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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Clarendon County
The Honorable William Jeffrey Young, Circuit Court Judge
Appellate Case No. 2014-001219

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SC Court of Appeals

THE STATE,

Respondent,

vs.

JUSTIN JERMAINE JOHNSON,

Appellant.

FINAL BRIEF OF RESPONDENT

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APPELLANT'S 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 or 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?

COUNTER STATEMENT OF ISSUES ON APPEAL

I. Whether the trial judge committed a prejudicial abuse of discretion by allowing the State to introduce a pre-death photograph of each murder victim where nothing about either photograph was prejudicial to Appellant, especially when compared to the overwhelming evidence of guilt, including crime scene photographs of these same innocent victims that showed the results of Appellant's malicious actions?

II. Whether the trial judge abused his discretion by allowing State's witness Mason Moore- a former member of the Clarendon County Sheriff's Department who was residing and working in Montana at the time of trial – to testify to his role in the custodial interrogation of Appellant via Skype because the trial judge's ruling comported with *Maryland v. Craig*. Also, whether it is unnecessary for this Court to address the merits of this novel issue because any error was harmless beyond a reasonable doubt?

III. Whether the trial judge abused his discretion by allowing the State to introduce Appellant's custodial statement because the record of the *Jackson v. Denno* hearing supports his findings that the statement was freely, knowingly, and voluntarily given after Appellant made a knowing and intelligent waiver of his *Miranda* rights?

IV. Whether the trial judge properly denied Appellant's motion or a mistrial based on the claim that jurors had seen him brought into the courthouse handcuffed and in the presence of armed guards before voir dire because there was no evidence that any juror saw him in this condition and because any error was non-prejudicial, since he was not seen in handcuffs or other visible restraints during the trial and jurors are quite aware that a defendant does not arrive by chance or happenstance?

V. Whether the trial judge abused his discretion by denying Appellant's motion for a mistrial where two prosecution witnesses may have discussed the case within close proximity to veniremen because there is no evidence that any juror overheard the conversation between these witnesses?

VI. Whether Appellant's argument that the trial judge erroneously sentenced him to five years imprisonment for possession of a weapon during the commission of a violent crime, in violation of S.C. Code Ann. § 16-23-490 (2003), is not properly before this Court because it was never presented to the trial judge and, instead, is being asserted for the first time on appeal?

STATEMENT OF THE CASE

Appellant, Justin Jermaine Johnson, is confined in the South Carolina Department of Corrections (SCDC), as the result of his Clarendon County convictions and sentence for two counts of murder, burglary in the first degree, kidnapping, and possession of a weapon during the commission of a violent crime. On July 7, 2011, the Clarendon County Grand Jury indicted him for two counts of murder, attempted murder, burglary in the first degree, kidnapping, and possession of a weapon during the commission of a violent crime. (2011-GS-14-0294). **R. pp. 971-72**. Scott L. Robinson, Esquire, represented him on these charges in the trial court, while Third Circuit Solicitor Ernest A. Finney, III, and Assistant Solicitor Christopher R. DuRant represented the State.

On March 6-7, 2014, the Honorable William Jeffrey Young held a pretrial *Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774 (1964), hearing. **3/6 Tr. pp. 1-68; R. pp. 1-69**. Then, on March 10-14 and 18-20, 2014, Appellant received a jury trial before Judge Young. Appellant, personally, waived jury charges on any lesser-included offenses. **Tr. pp. 870-73; R. pp. 852-55**. The jury convicted him of both murders, burglary in the first degree, kidnapping, and the weapon charge, but it found him not guilty of the attempted murder of Kaisha Caraway. **Tr. p. 959; R. p. 932**. Judge Young sentenced him to three consecutive terms of life imprisonment for the two murders and first degree burglary, imposed a consecutive thirty year sentence for kidnapping and a concurrent five years on the weapons charge. **Tr. pp. 975-76; R. pp. 948-49**.

On April 17, 2014, Judge Young conducted a hearing on Appellant's motions to set aside the verdict, for a new trial, to vacate the sentence and to reconsider the sentence. Counsel was present and represented Appellant at the hearing. **4/17 Tr. pp. 1-18; R. pp. 951-68**. Judge Young

later denied these motions in an Order filed on June 5, 2014. **R. pp. 969-70**. Appellant timely served and filed a notice of appeal.

ARGUMENTS

I. The trial judge did not commit a prejudicial abuse of discretion by allowing the State to introduce a pre-death photograph of each murder victim where nothing about either photograph was prejudicial to Appellant, especially when compared to the overwhelming evidence of guilt, including crime scene photographs of these same innocent victims that showed the results of Appellant's malicious actions.

Notwithstanding Appellant's argument to the contrary, Respondent submits that he cannot prove a prejudicial abuse of discretion resulting from the trial judge's ruling that allowed the State to introduce a pre-death photograph of each murder victim (**State's Exs. 38** and **54**), where nothing about either photograph was prejudicial to Appellant, especially when compared to crime scene photographs of these same victims that showed Appellant's malicious handiwork.

A. How the issue developed at trial.

Prior to trial, the trial judge addressed the admissibility of a number of photographs that the State planned to introduce. Appellant had no objection to many of these photographs, the trial judge excluded some photographs on objection, and others were admitted over objection. *See* **Tr. pp. 102-13; R. pp. 102-11**. Of relevance to the present issue, Appellant's trial counsel objected to a photograph of murder victim Mrs. Maxine Caraway that was taken while she was alive. (**State's Ex. 38**). Specifically, counsel argued that a pre-death photograph of Mrs. Caraway was irrelevant and "plays on the jury's sympathies and compassion[] and is certainly more prejudicial than it is probative." **Tr. p. 108; 119; R. p. 116, p. 117.**

The Solicitor argued that it was "within the jury's province to know ... something about Ms. Caraway while she was alive." The photograph was not being offered to arouse any passion

or prejudice," but merely "to substantiate what she looked like prior to her injuries on April 6th." **Tr. pp. 119; R. p. 117**. The trial judge overruled this objection. **Tr. p. 120; R. p. 118**.

When the trial judge asked whether counsel objected to the in-life photograph of Jayden C. (**State's Ex. 54**), counsel argued that neither Jayden's identity nor the cause of his death were in question. He also contended that showing "a child in a happy state prior to death" would be "very emotional to the jury." **Tr. pp. 121-22; R. pp. 119-20**. The trial judge, however, overruled his objection, stating, "I think who the person was is a part of this case." **Tr. p. 122; R. p. 120**.

John Caraway, Maxine Caraway's husband, subsequently testified that **State's Ex. 38** was a photograph of his wife, and Appellant renewed his objection. **Tr. pp. 165-66; R. pp. 162**. Appellant likewise renewed his objection when Kaisha Caraway identified **State's Ex. 54** as a photograph of Jayden C. that she had taken when he was approximately seven months old. **Tr. pp. 191-92; R. pp. 187-88**. He also unsuccessfully renewed all of his prior objections and motions at the conclusion of the State's case and at the conclusion of all evidence. **Tr. pp. 852; 889-90; R. pp. 834; 868-69**.

B. Discussion.

"The relevancy, materiality, and admissibility of photographs as evidence are matters left to the sound discretion of the trial court." *State v. Nance*, 320 S.C. 501, 508, 466 S.E.2d 349, 353 (1996); *State v. Todd*, 290 S.C. 212, 214, 349 S.E.2d 339, 340 (1986) (a defendant cannot dictate the manner in which the prosecution tries its case by stipulating to certain facts or by not challenging an element of the offense).[1] Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE; *State v. Shuler*, 353 S.C. 176, 184, 577 S.E.2d 438, 442 (2003); *State v. Alexander*, 303 S.C. 377,

[1] All relevant evidence is admissible. Rule 402, SCRE. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE.

401 S.E.2d 146 (1991). "To constitute unfair prejudice, the photographs must create a 'tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.'" *State v. Kelley*, 319 S.C. 173, 178, 460 S.E.2d 368, 370-71 (1995) (quoting *Alexander*, 303 S.C. at 377, 401 S.E.2d at 149). A trial judge's decision regarding the comparative probative value and prejudicial effect of relevant evidence should be reversed only in exceptional circumstances. *State v. Hamilton*, 344 S.C. 344, 357, 543 S.E.2d 586, 593 (Ct.App. 2001), overruled on other grounds, *State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005).

In the present case, both **State's Ex. 38** and **State's Ex. 54** were probative as to the identity of each of the victims. Obviously, identity is an element of the offense of murder. Also, the photograph of Mrs. Caraway (**State's Ex. 38**), demonstrating as it did how she looked before Appellant broke her nose by punching her in the face, was also relevant and probative of whether or not Appellant's actions were malicious, particularly when contrasted with the photograph showing her broken nose, **State's Ex. 37**. *See also* **Tr. pp. 165-66; 211-13; R. pp. 162-63; 207-09**. *Cf. State v. Gay*, 343 S.C. 543, 551, 541 S.E.2d 541, 545 (2001), abrogated on other grds., *Holmes v. South Carolina*, 547 U.S. 319, 126 S. Ct. 1727 (2006) (photograph of murder victim and boyfriend, in which she was wearing eyeglasses, was relevant to establish the broken eyeglasses which were found in the tunnel 20 feet away from her body were actually the victim's glasses).

The prosecution had the right to introduce these photographs to establish identity and malice even if Appellant was willing to stipulate to both matters because "[t]he State has the right to prove every element of the crime charged and is not obligated to rely upon a defendant's stipulation." *State v. Martucci*, 380 S.C. 232, 249, 669 S.E.2d 598, 607 (Ct. App. 2008) (citing

State v. Johnson, 338 S.C. 114, 122, 525 S.E.2d 519, 523 (2000)). *See also Estelle v. McGuire*, 502 U.S. 62, 69-70, 112 S.Ct. 475, 481 (1991).

Further, the trial judge did not abuse his discretion by rejecting the Rule 403 argument made by Appellant. Appellant failed to argue that either *State v. Livingston*, 327 S.C. 17, 488 S.E.2d 313 (1997), or *State v. Langley*, 334 S.C. 643, 648, 515 S.E.2d 98, 100 (1999), required the trial judge to sustain the objection to the photographs. Thus, his argument that these cases required exclusion of the photographs is not properly before this Court. *See State v. Watts*, 321 S.C. 158, 167, 467 S.E.2d 272, 278 (Ct.App. 1996) ("To be preserved for appellate review, an issue must be both presented to and passed upon by the trial court"); *State v. Bailey*, 298 S.C. 1, 5-6, 377 S.E.2d 581, 584 (1989) (a party cannot argue one theory at trial and a different theory on appeal). More importantly, neither case supports reversal of the trial judge's ruling in this case.

In *Livingston*, the defendant was prosecuted for felony DUI resulting in death. The Court found that the trial judge erroneously allowed the State to present testimony by the victim's husband, a sheriff's deputy, concerning their recent family history as well as a photograph of them together that was taken shortly before victim was involved in fatal collision. The Court found that this evidence was irrelevant to any disputed issue before the jury and that the husband's testimony and the photograph were highly inflammatory, particularly given the absence of overwhelming evidence of the defendant's guilt. *Livingston*, 327 S.C. at 19-20, 488 S.E.2d at 314. The Court reached a similar result in *Langley*, where the State introduced a photograph of the murder victim in his high school graduation cap and gown, as well as testimony by his sister as to how he acquired his nickname of "Bunny" and that he played drums in the high school band. *See Langley*, 334 S.C. at 648, 515 S.E.2d at 100. The Court

subsequently made clear in *State v. Bennett*, 369 S.C. 219, 229, 632 S.E.2d 281, 286-87 (2006), that it had deemed the photographs and testimony in *Livingston* and *Langley* "victim impact" evidence.

However, the State did not introduce any testimony that could even arguably be characterized as "victim impact evidence" in this case. To the contrary, each photograph was merely identified as representing a photograph of the respective victim. Thus, the prejudicial effect of these photographs did not substantially outweigh their probative value. *Accord State v. Adkins*, 353 S.C. 312, 326, 577 S.E.2d 460, 468 (2003) (trial judge did not abuse his discretion by allowing very brief testimony that the victim played sports and attended Northwestern High School, without providing details of victim's relationship with his family or how he acquired any family nicknames).

Finally, any error in the introduction of these photographs must be viewed as non-prejudicial and harmless beyond a reasonable doubt, since their introduction could not have reasonably affected the result of the trial. This is particularly true when these photographs are contrasted with the overwhelming evidence of guilt presented at trial, including crime scene photographs, which showed the malicious acts that Appellant perpetrated on the victims, a fifty-nine year old woman (**Tr. p. 166; R. p. 163**) and Appellant's own, defenseless nine month old son. *See State v. Sherard*, 303 S.C. 172, 175, 399 S.E.2d 595, 596 (1991) ("Error in a criminal prosecution is harmless when it could not reasonably have affected the result of the trial"); *Bailey*, 298 S.C. at 5, 377 S.E.2d at 584 ("When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result"). The State's evidence reasonably tended to demonstrate the following.

In April 2011, Kaisha Caraway was taking online courses to become a Ford automobile technician. She and her two children, two year old "Keya" C. and nine month old Jayden C. lived in the Clarendon County residence of her grandparents, Maxine and John Caraway. Appellant was the father of both of her children but he did little to help with them or support them financially.[2] However, his pay from the National Guard was directly deposited into Kaisha's bank account, for which Appellant had an ATM card. On April 5th, Kaisha and Appellant argued, after she learned that he was seeing another woman. During this argument, Appellant told her that he would not bring either money or goods for the children on the 6th, as he had originally promised to do. Kaisha told him that she was tired of his going "back and forth," and that she was going to change the PIN number on her account. She thereafter changed the PIN number, which prevented him for accessing the account to withdraw any money, including his National Guard check that was to be deposited on the 6th. **Tr. pp. 165-68; 183-86; 189-93; 255-56; 258-64; 281; R. pp. 162-65; 179-82; 185-89; 251-52; 254-60; 277.**

Because Appellant had told Kaisha that he would not take her children to a previously scheduled doctor's appointment,[3] she was surprised when he telephoned her on the morning of April 6th and told her that he was outside of the residence. Contrary to their previous conversation, he said that he would take the children. (Mr. and Mrs. Caraway were at home at this time). While still on the phone with Appellant, Kaisha dressed Jayden and took him out to the car in his car seat. Then, she dressed Keya, took Keya out to the car, and put her in the rear seat with the car seat. Appellant wanted Kaisha to go with them to the appointment, but she declined because she did not feel comfortable doing so. Instead, she told him where the children

[2] Kaisha and Appellant had not been in a romantic relationship for at least nine months before the crimes in this case, and their only dealings related to their two children. **Tr. pp. 198-99; 263-64; R. pp. 194-95; 259-60.** Mr. Caraway also testified that Appellant did ask around the house very often. **Tr. pp. 169-70; R. pp. 166-67.**

[3] Kaisha did not have a car and was dependent upon her grandmother for transportation. **Tr. p. 194; R. p. 190.**

were going and what was wrong with them, so he could tell the doctor. Kaisha then went back inside the house. Appellant called her again and, for approximately twenty minutes, unsuccessfully tried to persuade her to accompany them. He became angry and threatening when she refused. **Tr. pp. 167-69; 194-201; 256; 267-70; R. pp. 164-66; 190-97; 252; 263-66.**

"He threatened to break into the house. ... [A]t that time, I told him my grandparents were in there. He said he didn't care." Mr. Caraway apparently left for work during the course of this conversation, but Mrs. Caraway was still inside the residence. Eventually, Appellant left for roughly thirty minutes. Rather than take the children to see the doctors, Appellant attempted to use an ATM at a gas station near the Walmart in Manning. A surveillance video from the store that morning (**State's Exhibit 71**) shows him trying to use the ATM at 9:01 a.m. **Tr. pp. 171; 779-84; R. pp. 168; 761-66; State's Exhibit 71.**

Kaisha discovered that he had not taken the children to the doctors when she called the doctor's office to tell him something that she had forgotten. She then unsuccessfully tried to reach him both directly and through his mother. He finally called her approximately twenty or thirty minutes after he originally left the house and asked about the PIN number. She did not answer his question and he did not answer her question about why he had not taken the children to see the doctor. Unable to withdraw any money, he went to residence of his girlfriend, Danisha Brogdon, where he was living, along with her sister, Lativia Brogdon, and Korianda Walker. Appellant kept the murder weapon, a Mossberg model 88 12 gauge pump-action shotgun (**State's Ex. 74**), in Lativia's bedroom. It was in her bedroom when she went to bed on April 5, 2011. When she got home from school on April 6th, however, it was missing. **Tr. pp. 756-57; 785-89; 831-33; R. pp. 738-39; 767-71; 813-15.** Walker testified that Appellant had knocked on her door on the morning of the April 6 and asked where his gun was. **Tr. pp. 832-33; R. pp.**

814-15. On May 11, 2011, Walker told SLED Agent Tina Carter that Appellant had awakened her around 9:15 or 9:30 a.m. on the 6th and asked where "the bullets were." She told him there were on a closet shelf and she saw him retrieve them. **Tr. pp. 838-39; R. pp. 820-21**.

Appellant thereafter drove back to the Caraways' residence. Kaisha was there with her grandmother. He took Keya out of her car seat, and she walked in the house. He carried Jayden in the house in his car seat. When Kaisha asked why they never made it to the doctor, he claimed that they were not taking walk-ins. Asked about the items that he was supposed to have brought for the kids, he admitted that he did not have the items. He went to the trunk of his gray car and brought in a baby cup. Although he was not armed at the time, he was angry and asked if she had changed the PIN number on her account. Again, he asked Kaisha to go with him and, again, she refused. Appellant got into his car and acted like he was going to leave. However, he started running towards the door as Kaisha was in the process of closing and locking it. **Tr. pp. 203-05; 277-78; 332-33; R. pp. 199-01; 273-74; 321-22**.

Appellant forced his way into the house, damaging the door in the process. *See* **State's Exs. 23-24**. He immediately began pushing and punching Kaisha and she tried to fight back. Jayden was in his highchair and Keya was sitting on a chair, looking around the corner. Soon, Maxine came into that portion of the house and asked what was happening.[4] As soon as Maxine walked down the steps and entered the room, Appellant "jumped onto her and began fighting her." They soon fell to the floor as they struggled, and Appellant refused Kaisha's pleas to stop beating her grandmother. Kaisha immediately walked up the steps and tried to find a telephone that was in the adjacent room, but Appellant pulled her back and the wig that she had been

[4] At some point in his assault on Maxine Caraway, he told her that the fight was about the PIN number. **Tr. pp. 284-85**.

wearing came off of her head and fell to the floor. **Tr. pp. 172; 205-13; 311-12; R. pp. 169; 201-09; 300-01; State's Ex. 43.**

In the course of Appellant's assault on Maxine, he broke her nose by punching her in the face. She also had scratches on her. As Appellant was dragging Kaisha back into the room, Maxine ran up the steps, retrieved her keys and indicated that she was going to the hospital. Appellant attempted to stop her. In doing so, he loosened his grip on Kaisha's shirt and she managed to slip her shirt off over her head. Appellant then threw the shirt down and ran after her grandmother. When Kaisha went back into the house to call for help, she saw Appellant and her grandmother standing by her grandmother's car. Maxine was fumbling for her keys, Keya was behind Maxine, and Appellant was stepping back from them. **Tr. pp. 214-18; R. pp. 210-14.**

Kaisha could not find the cordless phone, but she found her grandmother's cell phone lying on the counter. (*See* **State's Ex. 53**). She started to run down the hall but stopped when she realized that Jayden was still sitting in his highchair. When she stopped to look at Jayden, Appellant "walked back into the room ... in a rush." Kaisha did not see either Maxine or Keya. Appellant was carrying the shotgun in his hands and it was pointed at her. Appellant told her, "[Y]ou made me do this." Kaisha immediately closed her eyes because she thought that he was going to kill her. After she heard a gunshot and realized that she had not been shot, she opened her eyes and saw that Appellant had done something even more tragic: he had shot his own son, Jayden. **Tr. pp. 218-21; 249-50; R. pp. 214-17; 245-46.**

Kaisha quickly ran down the hallway and she locked herself in the bathroom. She also pushed a cabinet in front of the door. She then called 911 using Maxine's cell phone and asked for help because Appellant had shot Jayden.[5] She ended the call when Appellant shot open the

[5] She did not know were either Maxine or Keya were. **Tr. pp. 222-23; R. pp. 218-19.** She was thus unaware that Appellant had already shot Maxine.

bathroom door.[6] She fell over the cabinet in an effort to get further away from him. While she was unaware of it at the time, she had been shot in the shoulder by this shot. Appellant entered the room, and he did not say anything. Kaisha told him that she had called 911 and that "they were on the way." The 911 dispatcher called back twice as Kaisha lay on the floor and over the cabinet. Appellant was standing over her and pointing the shotgun at her. Kaisha did not answer the first call, but she explained to Appellant that 911 would send someone out if she did not answer. So, she answered the second call. **Tr. pp. 221-25; 231-32; 250-51; R. pp. 217-21; 227-28; 246-47.**

> He told me, "Tell them that the call was a mistake." And at that time, the 9-1-1 operator said, no, it wasn't because she could hear what was going on. That's when he told them to tell them that that I was my grandmother and that my granddaughter and her boyfriend [were] arguing. She asked for the address, and he gave me the address to give them and told me to tell them that the boyfriend's name was Robert.

Tr. p. 225; R. p. 221.

Kaisha followed his instructions because he still had the shotgun pointed at her during the call. She explained that she had gotten the name of "Robert" from Appellant, that there was no "Robert," and that Appellant's voice could not be heard on the 911 call that was later published to the jury (**State's Ex. 55**) because he was whispering. They eventually left the bathroom and walked into the room where Jayden's body was. About five minutes later, Kaisha heard Keya crying and asked Appellant why he left her alone. Appellant said that Keya was not by herself. So, Kaisha walked to the front door and saw her grandmother lying "on the ground beside her car." At that point, she realized that her grandmother had also been shot. She exclaimed, "Oh,

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[6] A number of pellets from the blast had gone into the paneling in the wall above the bathroom sink. **Tr. pp. 227-28; R. pp. 223-24.**

my God" and ended the call with 911. **Tr. pp. 225-26; 233-34; 282-84; 319-20; R. pp. 221-22; 229-30; 278-80; 308-09.**[7]

Still following Appellant's orders, Kaisha got a shirt and put it on. Next, she and Keya left the house with Appellant, who was driving his car. At Kaisha's request, Appellant left the shotgun in the front yard before they left. He also took the remaining shells from the gun and put them in his pocket. Kaisha still had her grandmother's cell phone but did not use it because she was afraid. They drove until they found Officer Eaddy, of the Clarendon City Police Department. They asked him to follow them to the Caraway residence and he did so. Along the way, Appellant instructed her on the details of the story that he wanted her to tell and she told him that she would stick with that story. Officer Eaddy remained at the residence until other officers arrived minutes later. When Eaddy asked who was responsible, he was told that "Robert" was. **Tr. pp 150-58; 234-39; 254-55; R. pp. 147-55; 230-35; 250-51.**

It was not until Inv. Ricky Richards, of the Clarendon County Sheriff's Department, separated Kaisha from Appellant that she was able to write on a piece of paper that Appellant had committed the murders. She was thereafter taken to the hospital, where her gunshot wound was treated. **Tr. pp. 239-40; 289-90; 336-39; R. pp. 235-36; 285-86; 325-28.** Her account of the struggle and shootings that day was circumstantially corroborated by photographs of the damaged door (**State's Exs. 23-24**), photographs of blood in the dining room (**State's Ex. 13**) and outside of the house (**State's Ex. 32**), photos of the pellets in the bathroom wall (**State's Exs. 18-20**), photographs of Jayden (**State's Exhibit 15**) and Maxine (**State's Ex. 37**) at the crime scene, forensic DNA analysis matching blood found on Appellant's shoes and clothing to DNA of Maxine and Kaisha, photographs of the shotgun wound to Kaisha's left shoulder

[7] On cross-examination, she testified that she had only heard two shots, even though she was aware by the time of trial that there were four shots fired. **Tr. pp. 286-87; R. pp. 282-83.**

(**State's Exs. 5-6**), the recovery of other items from the scene that she had described, photographs depicting the damage to the hallway and bathroom as well as shells present (**State's Exs. 16-18; 20-21; 48-51** and **76-80**), seizure of four shotgun shells from the glove compartment of Appellant's vehicle, and the recovery of the four spent shotgun shells. One shell was on the porch outside of the house, one was in the dining room where Appellant had shot Jayden, another shell was in the dining room close to the entrance to the hallway, and one was in the doorway of the bathroom. **Tr. pp. 246-47; 339-56; 582-84; 612-38; 648-50; 717-33; R. pp. 242-43; 328-451; 564-66; 594-620; 630-32; 699-715.**

Additionally, SLED Agent Dan DeFreese, a forensic firearms examiner, opined that Appellant's shotgun (**State's Ex. 74**) fired all four of the spent shotgun shells found at the scene. Agent DeFreese likewise explained that the shot pattern for any 12 gauge shotgun begins to spread and the wad drops away from the shot after traveling a distance away from the muzzle of the gun. The shot starts to "expand slightly" between three and five feet after exiting the muzzle and continues to do so as distance increases. However, "[a]t very, very close range is like ranges [of] one, two, three feet, they generally have not started to diverge to any great extent." With respect to Appellant's shotgun, it would not be unusual for the wad to stay with the shot and enter the target if it was fired at a close range. **Tr. pp. 752-71; R. pp. 734-53.**

The State presented evidence that Appellant had purchased **State's Ex. 74** at the local Walmart on May 7, 2010. **Tr. pp. 846-49; R. pp. 828-31**. Also, Appellant freely and voluntarily gave a statement to law enforcement, in which he admitted some of the matters to which Kaisha testified, including that there was no Robert, that he had the shotgun when it "went off" and killed Jayden, and that he was responsible whether it was an accident or not. *See* **State's Ex. 64, beginning at 40:40.**

Finally, the forensic pathologist who performed the autopsies on Maxine and Jayden, Dr. Cynthia Schandl, testified that Maxine had "two major injuries. She had an injury to her left hand, and she had an injury to her head." After reviewing x-rays taken of Maxine's body, it was clear to Dr. Schandl that both wounds were caused by a shotgun wound with birdshot. The shotgun wound to her head fractured her skull and "you could see the dispersion of all of the different small bird shot pellets into her brain." This injury was to the right side of Maxine's head. It went to "through the right front parietal scalp [,] … [t]hen through the skull underneath, the right front parietal skull, same area." The injury continued through the dura, which covers the brain, and into the brain. Dr. Schandl did not find evidence of an exit wound. She found further casing in this wound. Maxine also had a scrape over her right eye, a bruise over her right collarbone, and a displaced fracture of her nose. **Tr. pp. 547-53; R. pp. 529-35; State's Exs. 36, 37, 39.**

Dr. Schandl opined that Jayden had died from a gunshot wound to the head. The wound entered his right eye, went through the skull, through the dura and into the brain. The wound "shredded" the brain on that side of his head. There was also an exit wound. Again, Dr. Schandl found pellets, casing and wadding. She listed his cause of death as laceration of the brain caused by gunshot wound to the head. She described the shotgun wound to Maxine as a "close-range penetrating shotgun wound to the head," and she opined that both injuries were caused by close-ranged shotgun wounds. **Tr. pp. 553-63; R. pp. 535-45.**

Appellant did not testify and there were no other eyewitnesses. In light of this overwhelming evince of guilt, Appellant was not prejudiced by the introduction of **State's Exs. 38** and **54**. *See Sherard*, 303 S.C. 172, 175, 399 S.E.2d 595, 596.

II. The trial judge did not abuse his discretion by allowing State's witness Mason Moore - a former member of the Clarendon County Sheriff's Department who was residing and

working in Montana at the time of trial - to testify to his role in the custodial interrogation of Appellant via Skype because the trial judge's ruling comported with *Maryland v. Craig*. However, it is unnecessary for this Court to address the merits of this novel issue because any error was harmless beyond a reasonable doubt.

Likewise, the trial judge did not abuse his discretion by allowing State's witness Mason Moore - a former member of the Clarendon County Sheriff's Department who was residing and working in Montana at the time of trial - to testify to his role in the custodial interrogation of Appellant via Skype because this ruling did not violate Appellant's Sixth Amendment right of confrontation, since the trial judge's ruling comported with *Maryland v. Craig*, 497 U.S. 836, 110 S.Ct. 3157 (1990). Also, many of Appellant's arguments in support of his claim of error are not preserved for appellate review because he did not raise them in the trial court. However, it is unnecessary for this Court to address the merits of this novel issue because any error was harmless beyond a reasonable doubt: Moore's testimony was not necessary for introduction of Appellant's statement or evidence that was gathered from Appellant before the statement was given, it was largely cumulative to trial testimony by another officer who was present during the interrogation of Appellant and the video recordings of the interrogation process, and there was overwhelming evidence of guilt.

A. How the issue arose at trial.

Mason Moore was the first State's witnesses at the March 6, 2014 pretrial *Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774 (1964), hearing. Mr. Moore was employed as an investigator with the Clarendon County Sheriff's Department when the crimes in this case occurred, but he was residing and working in Montana at the time of trial. Appellant's counsel did not object to Inv. Moore's sworn, *in camera* testimony being taken via Skype, but stated that he "may wish to be heard" on whether Skype could be used for testimony at trial. **3/6 Tr. pp. 2-4; R. pp. 2-5.**

On the day after the *Jackson v. Denno* hearing; the trial judge stated that he had researched the relevant law. He had also discussed the issue with other circuit court judges and discovered that "apparently[,] it's a pretty common practice, provided that there are certain situations." The trial judge found that the witness was "2500 miles away" from the court, that he was "not the main witness in this trial. He is an ancillary witness ... [and] everything that was going on with him is available on videotape." **3/6 Tr. pp. 62-63; R. pp. 63-64**. The trial judge further found that another officer was in the room with Moore and that this officer (Inv. Coker) was present for "95 percent of any testimony that [Moore] would give, it would be just cumulative to a large extent. And so I don't find that there would be any prejudice to the defendant to allow testimony of Officer Moore by use of Skype." **3/6 Tr. p. 63; R. p. 64**.

Appellant's counsel argued that taking the testimony via Skype violated the Sixth Amendment Confrontation Clause, and that face-to-face confrontation was required. He also contended that there may be "more of a propensity to lie" if the witness was "not literally facing" Appellant, and that the mere convenience to the witness was insufficient to dispense with the requirement of face-to-face confrontation. Rather, there had to a greater need for using Skype, such as serious illness, a physical inability to travel or absence from the country. To support his argument, he relied upon the late Justice Scalia's dissent in *Craig*, 497 U.S. at 860-70, 110 S.Ct. at 3171-76 (Scalia, J., dissenting) and *State v. Almanza*, 160 P.3d 932 (N.M. Ct.App. 2007) (allowing appearance by telephone of a chemist from the state crime lab violated Confrontation Clause and error was not harmless, since mere inconvenience to the witness was insufficient to dispense with face-to-face confrontation where witness was essential to establish the character of the substance defendant allegedly transferred). **3/6 Tr. pp. 63-66; R. pp. 64-67**.

The Solicitor argued that this case was a "special exception." He noted that the State was not asking to use Skype for any other witnesses; that Inv. Moore was not a "key witness; that he was a cumulative witness; that the other officer involved in the interrogation, Inv. Coker, would testify in court; that judicial economy supported the use of Skype; and that the "entire basis of [Inv. Moore's] testimony is on videotape for the jury to ascertain." While acknowledging that there was not much law on the issue, the law that the Solicitor found supported allowing Skype under the facts presented. **3/6 Tr. pp. 66-67; R. pp. 67-68**.

The trial judge found that his decision "would be much different if this was the sole eyewitness to a crime." However, Inv. Moore was "one of two men who were in that room virtually the whole time, and ... you see it on the video. So it's not anything hidden. ... [T]his [situation] is one that begs for the use of Skype in my opinion, and, therefore, I'm going to allow it." He also noted the improvement of Skype technology. However, he agreed to allow Appellant to supplement the motion. **3/6 Tr. pp. 67-68; R. pp. 68-69**.

Trial counsel renewed his earlier objection before Inv. Moore's trial testimony, but the trial judge overruled the objection. **Tr. p. 390; R. p. 379**. At a break following Inv. Moore's testimony (**Tr. pp. 391-413; R. pp. 380-402**), counsel renewed his objection, moved to strike Inv. Moore's testimony, and moved for a mistrial. He argued that "technical difficulties" had occurred and argued that the fact the picture "froze four or five times at least, ... certainly violates [the] confrontation clause" because "the ability to watch the facial expression throughout certainly was taken away. .... The jury did not get a continuous uninterrupted look at the witness like they would have had he been on the witness stand." **Tr. p. 414; R. p. 403**.

The Assistant Solicitor argued that "Mr. Moore was essentially an ancillary witness," and that his testimony was unnecessary for the introduction of Appellant's statement (**State's Ex.**

10), which was "on video. That video evidence is better evidence than what Mr. Moore could say happened." Also, the "next witness will be the second officer that was there present during the interview," Inv. Coker. Appellant could cross-examine him before the jury at length and thus was not prejudiced by allowing Inv. Moore's Skype testimony. Further, Appellant was aware of the breaks in Inv. Moore's testimony when they occurred. Those breaks were very brief and counsel "was able to repeat his question and get an answer from Mr. Moore live and [by] two-way interactive testimony." The Assistant Solicitor noted that other jurisdictions had allowed similar testimony and that Appellant was not prejudiced. **Tr. pp. 414-15; R. pp. 403-04**.

The trial judge denied Appellant's motions. He found that most of the breaks in testimony were during the State's direct examination and that "there was very few [episodes of] freezing" during cross-examination. "And so I don't see where the Defendant is prejudiced at all." **Tr. pp. 415-16; R. pp. 404-05**. Appellant unsuccessfully renewed all of his prior objections and motions at the conclusion of the State's case and at the conclusion of all evidence. **Tr. pp. 852; 889-90; R. pp. 834; 868-69**.

B. Discussion.

"The Confrontation Clause of the Sixth Amendment, made applicable to the States through the Fourteenth Amendment, provides: 'In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.' " *Craig*, 497 U.S. at 844, 110 S.Ct. at 3162. In *Coy v. Iowa*, 487 U.S. 1012, 1016, 108 S.Ct. 2798, 2801 (1988), the Court had stated that "the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." (citing *Kentucky v. Stincer,* 482 U.S. 730, 748, 749-50, 107 S.Ct. 2658, 2669, 2669, 2670 (1987) (MARSHALL, J., dissenting)). The Court explained in *Craig* that "[w]e have never held, however, that the Confrontation Clause

guarantees criminal defendants the *absolute* right to a face-to-face meeting with witnesses against them at trial." *Craig*, 497 U.S. at 844, 110 S.Ct. at 3162-63. Instead, "the Confrontation Clause reflects a *preference* for face-to-face confrontation at trial, a preference that must occasionally give way to considerations of public policy and the necessities of the case." *Id.* at 849, 110 S.Ct. at 3165 (internal quotations and citations omitted) (emphasis in original). The Court in *Craig* further explained that "[t]he central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." *Id.* at 845, 110 S.Ct. at 3163.

The Court added that:

> ... [T]he right guaranteed by the Confrontation Clause includes not only a "personal examination," [*Mattox v. United States*, 156 U.S. 237, 242, 15 S.Ct. 337, 339 (1895)] but also "(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, 1935 (footnote omitted).
>
> The *combined effect of these elements of confrontation*—physical presence, oath, cross-examination, and observation of demeanor by the trier of fact—serves the purposes of the Confrontation Clause by ensuring that evidence admitted against an accused is reliable and subject to the rigorous adversarial testing that is the norm of Anglo–American criminal proceedings.

Craig, 497 U.S. at 845-46, 110 S.Ct. at 3163 (emphasis added).

In *Craig,* the trial court utilized a Maryland procedure that permitted a child victim of sexual abuse to testify via a one-way, closed-circuit television system through which the defendant could see and hear the testimony, but the child could neither see nor hear the defendant. *Id.* at 840-42, 110 S.Ct. at 3160-61. The Court adopted a two-part test to determine

when face-to-face confrontation with a child victim of alleged sexual abuse may be excused and the one-way, closed-circuit television testimony used in its place. In such cases, the State must prove: (1) that the "denial of [face-to-face] confrontation is necessary to further an important public policy," and (2) that "the reliability of the testimony is otherwise assured." *Id.* at 850, 110 S.Ct. at 3166. Applying this test, the Court concluded that "a State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court. *Id.* at 853, 110 S.Ct. at 3167. Applying the second prong, the Court held that Maryland's closed-circuit video system assured the reliability of remote testimony because, even though it was not face-to-face confrontation, the witness testified under oath; the defendant was still able to fully cross-examine the witness; and the judge, jury, and defendant could see the witness's demeanor and body language as he or she testified. *Id.* at 857, 110 S.Ct. at 3170.

Last year, the Chief Justice of the Montana Supreme Court observed that:

"It's a great invention, but who would ever want to use it."

> ¶ 28 The world of telecommunications has come a long way since President Rutherford B. Hayes allegedly uttered these words about the telephone. Moreover, in the years since the adoption of the 1972 Montana Constitution, or even our 1994 decision in [*Bonamarte v. Bonamarte*, 866 P.2d 1132 (Mont. 1994) (holding that it was reversible error in divorce proceedings to allow wife to testify by telephone over objection of husband in lieu of personally appearing in court at hearing on merits of custody and child support issues)], advances in communications technology that have far outstripped the average person's ability to foresee or even imagine have occurred at an astonishing pace—technology that the Framers of our Constitution could not have anticipated.
>
> ¶ 29 Skype and similar services now allow real-time, face-to-face communication with another person virtually anywhere in the world. Usage of these communication tools has become commonplace in our society. Certainly modern juries will be comfortable with their use in the courtroom. As the Court notes, all of the hallmarks of confrontation clause concerns were satisfied with the use of Skype in this case.

City of Missoula v. Duane, 355 P.3d 729, 734-35 (Mont. 2015), reh'g denied (Sept. 15, 2015) (McGrath, C.J., concurring).

The United States Supreme Court has not decided what test should govern two-way video testimony. *See Wrotten v. New York*, 560 U.S. 959, 960, 130 S.Ct. 2520, 2520-21 (2010) (Sotomayor, J., commenting on denial of certiorari) (noting some differences between one- and two-way video systems and explaining that the Court has not yet decided the appropriate standard to govern two-way testimony).[8] Likewise, neither this Court nor the Supreme Court of South Carolina has addressed the present issue. Thus, Appellant's claim of error is based upon non-binding precedent from other jurisdictions.

Appellant relies heavily upon *State v. Rogerson*, 855 N.W.2d 495 (Iowa 2014), and *United States v. Yates*, 438 F.3d 1307 (11th Cir. 2006) (en banc). However, he did not present the trial judge with his argument predicated upon *Rogerson* or the other authorities cited in the FBOA. Thus, his argument based upon this precedent is procedurally barred. *See State v. Prioleau*, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001) (an objection should be addressed to the trial court in a sufficiently specific manner that brings attention to the exact error); *Watts*, 321 S.C. at 167, 467 S.E.2d at 278 ("To be preserved for appellate review, an issue must be both presented to and passed upon by the trial court"). Alternatively, this Court should not accept the reasoning of this non-binding precedent because, contrary to Appellant's argument and statements in some of the cases that he cites, the issue of whether the requirements of the

[8] Over a decade ago, the Supreme Court rejected a proposed change to Federal Rule of Criminal Procedure 26, which would have allowed unavailable witnesses to testify via two-way video. *Order of the Supreme Court*, 207 F.R.D. 89, 91 (2002). While the late Justice Scalia added a statement that "the Judicial Conference's proposed Fed. Rule Crim. Proc. 26(b) is of dubious validity under the Confrontation Clause of the Sixth Amendment to the United States Constitution," *id.* at 93, this does not represent the position of the Court. Instead, it was Justice Scalia's personal opinion that the Sixth Amendment Confrontation Clause mandates face-to-face confrontation of every witness in a criminal trial. *See Craig*, 497 U.S. at 860-65, 110 S.Ct. at 3171-74 (Scalia, J., dissenting); *id.* at 867, 110 S.Ct. at 3174-75(Scalia, J., dissenting). Justice Breyer, joined by Justice O'Connor, dissented from the Court's refusal to submit the proposed rule to Congress. *Id.* at 96 (dissenting statement of Breyer, J.).

Confrontation Clause are satisfied by witness testimony presented through the use of a two way video system - either by closed circuit transmission or over an internet service, such as Skype - is not so well-settled. It is true that a number of cases have held that the *Craig* test applies to the use of two-way video testimony by witnesses who are not child abuse victims. *See, e.g., United States v. Bordeaux*, 400 F.3d 548, 554 (8th Cir. 2005); *Yates*, 438 F.3d at 1315-16; *Rogerson*, 855 N.W.2d at 500-03; *White v. State*, 116 A.3d 520, 540-49 (Md. App. 2015); *State v. Schwartz*, 327 P.3d 1 108 (N.M. Ct. App. 2014), *cert. denied*, 328 P.3d 1188 (N.M. 2014), *cert. denied*, 135 S.Ct. 1397 (2015); *State v. Seelig*, 226 N.C.App. 147, 156-57, 738 S.E.2d 427, 434 (N.C.App. 2013). It is also true that at least some courts applying the *Craig* test to the use of such testimony have found that "mere convenience, efficiency, and cost-saving are not sufficiently important public necessities to justify depriving a defendant of face-to-face confrontation." *Rogerson*, 855 N.W.2d at 507. *See also Com. v. Atkinson*, 987 A.2d 743, 751 (Pa. Super. 2009) ("... convenience and cost-saving are not sufficient reasons to deny constitutional rights"); *State v. Smith*, 308 P.3d 135, 138 (N.M. Ct. App. 2013), *cert. denied*, 304 P.3d 425 (N.M. 2013). *Cf. White*, 116 A.3d at 545-46 ("Where considerations beyond mere convenience and expedience are involved, ... the factual setting of a case may support a finding of necessity to justify the absence of a witnesses physical presence at trial").

Yet, there are several readily apparent reasons not to adopt the reasoning of the cases relied upon by Appellant. For instance, much of what the Eleventh Circuit Court of Appeals stated in *Yates* was merely *dicta* because the majority reversed, at least in large measure, based on the Government's failure to seek a deposition of the witnesses under Rule 15, FRCrimP., and the district court's failure to make a case-specific finding as to whether a Rule 15 deposition

could not have been taken, a procedure that is not available in criminal trials in South Carolina. *See Yates*, 438 F.3d at 1316-18. Also, there was a strong dissenting opinion in *Yates*.

Judge Marcus (who was joined by Judges Tjoflat and Birch) found that "the use of the video testimony procedure employed in this case fully comported with the text, historical purpose, and modern understanding of the Confrontation Clause." *Id.* at 1327 (Marcus, J. dissenting). He found that *Craig* did not apply because contrary to the children witnesses in *Craig* "who could have been ordered to testify in court in the usual fashion, but for compelling public policy reasons were permitted to testify out of the defendant's presence," the witnesses in *Yates* were "genuinely were unavailable to appear in court to give their testimony and could not be either persuaded or compelled to appear" because they were in Australia and refused to return to the United States out of fear of being prosecuted. He also observed that the decision in *Craig* had addressed the "very particular predicament ... [of] an abused child who, if forced to take the witness stand to confront her abuser, would suffer emotional trauma that would compound the harm she had already suffered and also impair her ability to give reliable testimony." *Id. See also id.* at 1328-29 (Marcus, J., dissenting).

Judge Marcus would have held that

> the contemporaneous, real-time, twoway video procedure used in this case was wholly different in nature from the one-way video procedure employed in *Craig*. A two-way videoconference used contemporaneously during trial, unlike a one-way videoconference, allows the witness to see the jury and the defendant, thus achieving the Confrontation Clause's important goal of bringing the accuser face to face with the accused and the factfinder, albeit through the medium of a television screen.

Id.[9]

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[9] He also observed that "even if *Craig* could be adapted to govern the facts of this case," the majority's analysis was flawed because

Similarly, Judge Hecht, of the Iowa Supreme Court concurred specially in the majority decision in *Rogerson*. He explained that:

> I agree the State made no attempt to show necessity, and I agree the district court's order should be reversed for that reason. I write separately, however, because I do not share my colleagues' conclusion that current two-way video technology is inadequate and cannot accomplish the constitutional objectives of confrontation.

Rogerson, 855 N.W.2d at 508 (Hecht, J., concurring specially). He added that:

> As my colleagues recognize, two-way video technology allows the witness and the defendant to see one another. Accordingly, the form of transmission the State proposed to use in this case is "very different from th[e closed-circuit system] used in ... *Craig*." See *Order of the Supreme Court*, 207 F.R.D. 89, 101 (2002) (advisory committee's note to proposed Fed.R.Crim.P. 26(b), reprinted as an appendix to the statement of Breyer, J.).
>
> Whether a defendant's right of confrontation is adequately protected when witnesses testify via two-way video technology turns largely, in my view, on fact determinations. I believe that in this case, the question whether the sufficiency of the technology could have been shown should be left completely open. The answer to this question in a future case should be informed in part by the latest social science addressing the extent, if any, to which the actual physical presence of a witness in a courtroom produces a sufficiently enhanced opportunity for confrontation when compared to presence achieved through two-way video technology. Indeed, the answer to this fact question is essential, in my view, to a determination of whether the difference between actual and virtual presence supports the continued maintenance of a strict constitutional distinction.

> [i]n finding that the possibility of a Rule 15 deposition somehow made remote testimony improper under *Craig,* the majority has misapprehended both Rule 15 and the Confrontation Clause. Indeed, it has inexplicably accorded Rule 15 quasiconstitutional status as the exclusive means of obtaining overseas testimony. The *Craig* test, properly applied, would find that the two-way video procedure used here satisfied the Confrontation Clause in light of the necessity of obtaining the overseas witnesses' testimony and the extensive measures the district court took to preserve the essential elements of effective confrontation. All in all, the procedure the district court followed in this case fully complied with the demands of the Confrontation Clause. Yates and Pusztai had every opportunity to cross-examine the witnesses against them, and those witnesses testified under oath and under the gaze of the defendants, the judge, and the jury.

Yates, 438 F.3d at 1327-28 (Marcus, J. dissenting). *See also id.* at 1332-35 (Marcus, J., dissenting).Judge Marcus would have applied the Court's decision *in Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004), to the Confrontation Clause question and he would have held that *Crawford* was satisfied because the witnesses were unavailable and their testimony was subject to cross-examination in a manner that satisfied the requirements of the Sixth Amendment *Yates*, 438 F.3d at 1328-33 (Marcus, J. dissenting).

> I, of course, concede my colleagues' observation that virtual presence is not "the same" as physical presence. However, I believe social science should inform our answer to the question whether existing state-of-the-art technology can achieve the goal of confrontation through an accuser's virtual presence. If technology has evolved to the point where real-time video testimony neither significantly diminishes the fact finders' ability to assess credibility nor lessens accusers' motivation to tell the truth, courts should not cling to old forms for consistency's sake.

Id. at 509 (Hecht, J., concurring specially). Also, the Court in *Atkinson* found that the Confrontation Clause violation in that case was harmless. *See Atkinson*, 987 A.2d at 751-53.

More importantly, there is authority supporting the trial judge's ruling in this case. In *United States v. Gigante,* 166 F.3d 75 (2nd Cir. 1999), the Government sought to allow a witness in the Federal Witness Protection Program to testify via closed circuit television from a remote location because of "his illness and ... infirmity." *Id.* at 79. The district court granted this motion and the witness ultimately testified via two-way, closed-circuit television. As the witness testified, he was visible on video screens in the courtroom to the judge, the jury, defense counsel, and the defendant. The witness "could see and hear defense counsel and other courtroom participants on a video screen at his remote location." *Id.* at 80. On appeal, the defendant argued that this procedure violated his Sixth Amendment right to confront the witness face-to-face in the courtroom. *Id.*

The Second Circuit Court of Appeals disagreed. It concluded that the defendant's confrontation rights had been adequately protected because "[t]he closed-circuit television procedure utilized for Savino's testimony preserved all of the[] characteristics of in-court testimony: Savino was sworn; he was subject to full cross-examination; he testified in full view of the jury, court, and defense counsel; and Savino gave this testimony under the eye of Gigante himself." *Id.* The Court rejected the defendant's argument that *Craig* was controlling and required reversal because the Government had failed "to articulate the important public policy

that was furthered by Savino's testimony." *Id.* at 81. The Court observed that the Supreme Court in *Craig* had "crafted this standard to constrain the use of one-way closed-circuit television, whereby the witness could not possibly view the defendant." *Id.* Because the district court had utilized a two-way system, it found that *Craig* was inapposite. *Id.*

Instead of applying *Craig*, the Court found that it was more appropriate to analogize the use of the two-way video testimony to a deposition under Rule 15, FRCrimP, which can be used in the district court's discretion if the witness is "unavailable" under Rule 804(a), FRE, and that "exceptional circumstances" exist for taking the deposition.[10] The Court found that it would not have been an abuse of discretion to have ordered a deposition. It also found that "the closed-circuit presentation of Savino's testimony afforded greater protection of Gigante's confrontation rights than would have been provided by a Rule 15 deposition," *Id.* It concluded that "[t]he facts of Savino's fatal illness and participation in the Federal Witness Protection Program, coupled with Gigante's own inability to participate in a distant deposition, satisfy this exceptional circumstances requirement," and that the district judge "did not abuse his discretion by allowing Savino to testify in this manner. Savino's testimony did not deprive Gigante of his right to confront his accuser under the Sixth Amendment." *Id.* at 81-82.

Likewise, several cases that have applied the *Craig* standard also support the trial judge's ruling in this case. The trial judge found that it was appropriate to allow Inv. Moore to testify via Skype because Moore's testimony was not necessary for introduction of Appellant's statement, his testimony was largely cumulative to testimony by the other officer who was present during the interrogation of Appellant and the video recordings of the interrogation process. It is also

[10] The district court had considered the using a Rule 15 deposition and "noted that the government was 'able to make the threshold showing entitling it to a [Rule 15] deposition' " *Id.*

clear that he found that Skype was a reliable method of presenting this testimony and he specifically noted the recent improvement of Skype technology. **3/6 Tr. pp. 62-63; 67-68.**[11]

The first relevant case is *Com. v. Leahy*, 2003 WL 1270525, at *1 (Ky. Ct. App. Feb. 7, 2003), where, over the defendant's Sixth Amendment objection, the Commonwealth was permitted to admit the testimony of a crime lab employee "via a closed circuit television system and telephone" at a bench trial for DUI, first offense.[12] On appeal, the Kentucky Court of Appeals rejected the defendant's argument that this procedure violated the Confrontation Clause. The Court first found that the Kentucky Supreme Court's decision in *Bolen v. Com.*, 31 S.W.3d

[11] For the first time on appeal, Appellant argues that "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.' [*Craig*, 497 U.S. at 850, 110 S.Ct. at 3166]." **FBOA p. 26**. He did not make this argument in the trial court. Instead, he argued that the money saved and the convenience of using Skype were not sufficient reasons to use it, and he disputed the reliability of Skype based upon internet-related glitches that occurred during Moore's testimony. Because he did not make the present arguments below, this Court is barred from considering them on appeal. *See Prioleau*, 345 S.C. at 411, 548 S.E.2d at 216 (an objection should be addressed to the trial court in a sufficiently specific manner that brings attention to the exact error); *Watts*, 321 S.C. at 167, 467 S.E.2d at 278 ("To be preserved for appellate review, an issue must be both presented to and passed upon by the trial court"); *Bailey*, 298 S.C. at 5-6, 377 S.E.2d at 584 (a party cannot argue one theory at trial and a different theory on appeal).

Moreover, even though the trial judge did not specifically refer to the necessity for Inv. Moore's testimony to be received via Skype, Respondent submits that his findings were sufficient under *Craig*. Even if his findings were insufficient under *Craig*, reversal is not required because the record supports his ruling and this Court can make any requisite finding(s). "No principle in the disposition of appeals is more firmly established than that a right decision upon a wrong ground will be affirmed." *Foster v. Taylor*, 210 S.C. 324, 329, 42 S.E.2d 531, 534 (1947). Also, this Court may affirm based upon any ground appearing in the record. Rule 220(c), SCACR. "The reasoning adopted by the court below is not binding upon [this Court] if the record discloses a correct result." *Potomac Leasing Co. v. Otts Mkt., Inc.*, 292 S.C. 603, 606, 358 S.E.2d 154, 156 (Ct. App. 1987).

[12] The Court of Appeals explained that:

> The video-conferencing system at issue in this case allows expert witnesses to testify via a closed circuit television system from another location in the state. Through a set of cameras set up at the remote location, at each counsel's table and at the bench, all of the trial participants are able to see and hear each other simultaneously. In this particular case, there was a problem with the audio system in that the remote witness was not able to hear the judge or the attorneys in the courtroom. Therefore, a telephone line was used to correct the audio problem. The trial judge used a speaker phone that allowed the courtroom participants to hear the remote witness clearly and also allowed them to conduct both direct and cross-examination. We have reviewed the videotaped record of the bench trial, and have determined that the testimony of the remote witness was easily understandable.

Id. at *2.

907, 910 (Ky. 2000), was controlling because the Court in *Bolen* "clearly reviewed the issue and determined the argument that the use of the closed circuit television to admit expert testimony violated the Confrontation Clause to be without merit." *Id.* at *2. The Court of Appeals further held that the use of the closed circuit television system did not violate either the Sixth Amendment Confrontation Clause or a similar provision of the Kentucky Constitution because "[t]he video-conferencing system afforded Leahy the right to confront the witnesses against him face-to-face. Leahy was able to see and hear [the witness] as he testified remotely ... and [the witness] was able to see and hear Leahy, as well as the attorneys and the trial judge, throughout his testimony." *Id.* Finally, the Court found that "[a]llowing expert witnesses ... to testify remotely from their places of employment serves the purpose of eliminating unjustifiable expense and delay in requiring them to travel throughout the Commonwealth in order to testify." *Id.*

In *City of Missoula*, the defendant on trial for misdemeanor cruelty to animals claimed that the municipal court violated his right to confront the witnesses against him, in violation of Mont. Const. art. II, 24,[13] by allowing the veterinarian who performed the necropsy on the dog to testify via Skype. Prior to trial, the City had requested either that the veterinarian's supervisor be allowed to testify to her report or, alternatively, to allow the witness to testify via Skype because the witness had moved her practice to California. The City asserted that requiring the witness "to travel to and testify in person at three separate trials would impose an extraordinary expense on

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[13] Mont. Const. art. II, 24 reads as follows:

> In all criminal prosecutions the accused shall have the right to appear and defend in person and by counsel; to demand the nature and cause of the accusation; *to meet the witnesses against him face to face;* to have process to compel the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, subject to the right of the state to have a change of venue for any of the causes for which the defendant may obtain the same.

(Emphasis added.)

the City and a significant burden on [her]." 355 P.3d at 731. "The City argued that with the advancements of two-way video/audio technology, the face-to-face confrontation clause would be satisfied." *Id.*

On appeal, the Montana Supreme Court observed that "[i]n the last two decades, with the advancement of video conferencing technology, courts across the country have been called upon to address how the use of this technology may affect a criminal defendant's constitutional right to confront his or her accuser." *Id.* at 732. The Court further noted that the Supreme Court in *Craig* "observed that the primary purpose of the Confrontation Clause is to 'ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding,' " *id.* (citing *Craig*, 497 U.S. at 845, 110 S.Ct. at 3163); and that " '[t]he elements of confrontation include physical presence of the witness, testimony under oath, cross-examination of the witness, and observation of the witness's demeanor by the trier of fact.' " *City of Missoula*, 355 P.3d at 732 (citing *State v. Stock*, 256 P.3d 899, 903 (Mont. 2011), citing *Craig*, 497 U.S. at 845-46, 110 S.Ct. at 3163).

The Court in *City of Missoula* further noted that *Craig* had explained that the Confrontation Clause did not guarantee criminal defendants an absolute right to a face-to-face confrontation of the witnesses against them, 355 P.3d at 732, and it explained that although it had construed Mont. Const. art. II, 24 to provide greater protection to an accused than the Sixth Amendment Confrontation Clause, "in *Stock*, we observed that 'we have never interpreted that greater protection to entitle a criminal defendant to *literal* face-to-face confrontation with all witnesses.' " *Id.* at 732-33 (emphasis in original citation).

The Court then rejected Duane's argument as follows:

> The record reveals that during the Municipal Court trial, the electronic connection was made without difficulty. The court administered the oath and confirmed that

> Sjolin was alone in the room from which she was testifying, and that she could hear and see the court and the jury could hear and see her. Subsequently, counsel for the City and Duane conducted direct and cross-examination of the doctor in real time without complication or technical difficulty. Based upon the in-person testimony of other witnesses and Sjolin's Skype testimony, the jury found Duane guilty.
>
> We conclude that the Municipal Court did not abuse its discretion in allowing Sjolin to testify via Skype, and the District Court did not err in upholding that decision. The concerns underlying our decision in *Bonamarte* with respect to cross-examination by telephone simply do not exist in this case and with this technology. While telephone testimony presents the listener with a disembodied voice and no clue as to the demeanor of the witness, Skype allows the court and jury to observe and hear the testimony of the witness firsthand. We conclude that our confrontation analysis in *Bonamarte* supports rather than precludes the use of Skype for witness testimony at trial.
>
> While the physical presence of a witness in the courtroom is preferred, the City made a compelling showing that requiring Sjolin to travel to Missoula from California to testify live at three separate trials would impose a prohibitive expense on the City and a significant burden on Sjolin. Allowing Skype testimony under these circumstances was not error because all of the hallmarks of confrontation addressed in *Craig* and *Stock* were fully met: the proceeding was adversary, the witness was present in real time and under oath, and the jury was able to observe her demeanor and hear her testimony as she was subject to direct and cross-examination. Duane's constitutional right to confrontation was not violated.

City of Missoula, 355 P.3d at 733-34.[14]

Likewise, in *People v. Novak*, 41 Misc. 3d 733, 733, 971 N.Y.S.2d 197, 198 (N.Y. Co.Ct. 2013), the defendant filed a motion to allow a necessary defense witness, who resided in Florida and would not be available to testify in New York, "to testify via live, two-way video conference through Skype." The People did not oppose the motion but argued that a finding of necessity must be made. *Id.* Relying upon the holding in *People v. Wrotten*, 14 N.Y.3d 33, 36, 38-39, 896 N.Y.S.2d 711, 714, 923 N.E.2d 1099, 1100, 1102 (N.Y. Ct.App. 2009), *cert. denied*, 560 U.S.

[14] Thus, Appellant's reliance upon *Stock*, as well as the Court's reliance upon *Stock* in *Rogerson* is misplaced.

959, 960, 130 S.Ct. 2520, 2520-21 (2010),[15] the trial judge granted the motion. He found that "[t]here is a necessity to have Deputy Wiggins testify via Skype: Due to the length and time constrains of this trial, the hardship Deputy Wiggins would experience in having to lose time from work to travel from Florida to New York, the delay in the trial if the witness had to arrange to travel to New York to testify, and the unexpected use of this witness by the defense. In addition, with the use of live, two-way video via Skype, the witness will be subject to cross-examination before the jury, making the testimony reliable." *Novak*, 41 Misc. 3d at 735, 971 N.Y.S.2d at 199 (footnote omitted). The trial court also observed that the defendant, who has the constitutional right to confrontation, did not object, and that "Internet Skype communication is reliable, accurate and widely used in society and commerce." *Id.* at 735-36, 971 N.Y.S.2d at 199.

Nor is there merit to Appellant's argument that Skype was not sufficiently reliable because "there were multiple interruptions in the video testimony." While he cites to eleven instances in which there were internet glitches, all but four of those instances occurred during the State's direct examination. **Tr. p. 403, ll. 19-21; p. 405, ll. 22-24; p. 409, l. 2; p. 409, l. 25; R. p. 392, ll. 19-21; p. 394, ll. 22-24; p. 398, l. 2; p. 398, l. 25.** He admits that "the connection was ultimately restored" in each of the four interruptions that occurred on cross-examination. Also, either counsel was able to restate a question that was not heard or the witness was able to restate the answer that was interrupted on each occasion, both on direct and cross-examination. Respondent submits that these few interruptions did not establish the unreliability of Skype and did not deprive him of his Sixth Amendment right to confront the witness. *See Harrell v. Butterworth*, 251 F.3d 926, 928, 930-31 (11th Cir. 2001) (state court determination that technical

[15] In *Wrotten*, the Court of Appeals held that the trial judge's decision to allow a prosecution witness, who was found to be elderly, infirm, and physically incapable of traveling interstate to appear in court, to testify via live, two-way television, subject to cross-examination "following a finding of necessity was permissible under the Confrontation Clauses of both the Federal and State Constitutions," since public policy of protecting witness's well-being could justify ruling. *Id.*

difficulties occurring during testimony offered via satellite was neither contrary to, nor an unreasonable application of, clearly established Federal law as determined by the United States Supreme where the jurors were able to evaluate the witnesses' credibility and demeanor, despite technical difficulties during the testimony); *Leahy*, 2003 WL 1270525 at *3 ("we believe that the trial court did not abuse its discretion in overruling Leahy's objections to the admission of expert testimony via the video-conferencing system. Although the system was not functioning properly, an appropriate remedy corrected the problem with the audio portion of the testimony"). Notwithstanding Appellant's contrary complaints, Respondent submits that the use of Skype provided him with all of the hallmarks of confrontation addressed in *Craig* and even provided greater protection of the confrontation right than in *Craig*: (1) the proceeding was adversary; (2) the witness was presented in real time and testified under oath, having been sworn by the Clarendon County Clerk of Court; (3) the witness was subject to cross-examination by defense counsel, which is "the 'greatest legal engine ever invented for the discovery of truth';" (4) the witness could see the defendant, as well as the other courtroom participants, and the defendant could see the witness; and (5) the jurors were able to evaluate the witnesses' credibility and demeanor. *See Craig*, 497 U.S. at 485-86, 110 S.Ct. at 3163; *City of Missoula*, 355 P.3d at 733-34; *Leahy*, 2003 WL 1270525 at *3; *Gigante,* 166 F.3d at 80; *Montague v. State*, 2016 WL 112378, at *3-5 (Tex. App. Jan. 6, 2016); *Yates*, 438 F.3d at1328-29 (Marcus, J., dissenting). The presence of these factors "ensur[ed] that [the] evidence admitted against [Appellant was] reliable and subject to the rigorous adversarial testing that is the norm of Anglo–American criminal proceedings." *Craig*, 497 U.S. at 486, 110 S.Ct. at 3163.

Although Respondent submits that this Court should follow the well-reasoned decisions in *Missoula*, *Leahy* and *Novak*, and reject the contrary authority cited by Appellant, the Court

does not need to address this novel issue because any supposed error was harmless beyond a reasonable doubt. *Accord State v. Drayton*, 415 S.C. 43, 45, 780 S.E.2d 902, 903 (2015) ("We find the Court of Appeals erred in reaching the novel issue of whether petitioner had an expectation of privacy in his HCSLD because, in view of the totality of the circumstances, the affidavits in support of the warrants established probable cause for the search"). A violation of the confrontation clause is not *per se* reversible but is subject to a harmless error analysis. *Delaware v. Van Arsdall*, 475 U.S. 673, 680, 106 S.Ct. 1431, 1436 (1986). *See also Coy v. Iowa*, 487 U.S. 1012, 1021-22, 108 S.Ct. 2798, 2803 (1988).

> Whether such an error is harmless in a particular case depends upon a host of factors.... The factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

Van Arsdall, 475 U.S. at 684, 106 S.Ct. at 1438.[16]

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[16] At trial, Appellant did not argue 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." **FBOA p. 37**. Thus, his argument is barred on appeal. *See Bailey, supra*. Worse, he does not even bother to cite any authority for this bald proposition; and, more importantly, his counsel either knows or reasonably should know that there is no precedent from either the United States Supreme Court or the appellate courts of this State that would provide support ffor the claim that a violation of either S.C. Const. art. I, § 14 or § 17-23-60 is not subject to a harmless error analysis. *See, e.g., State v. Holder*, 382 S.C. 278, 285, 676 S.E.2d 690, 694 (2009) ("Violations of the Confrontation Clause are subject to a harmless error analysis"). An even more fundamental problem is that his claim that a violation of state law can constitute structural error misunderstands that the phrase "structural error" is a term of art developed by the Supreme Court and has nothing to do, whatsoever, with violations of state law, whether constitutional or otherwise.

"[M]ost constitutional errors can be harmless." *Arizona v. Fulminante*, 499 U.S. 279, 306, 111 S.Ct. 1246, 1263 (1991). Also, "if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other [constitutional] errors that may have occurred are subject to harmless-error analysis. The thrust of the many constitutional rules governing the conduct of criminal trials is to ensure that those trials lead to fair and correct judgments. Where a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed. " *Rose v. Clark*, 478 U.S. 570, 579, 106 S. Ct. 3101, 3106 (1986).

As the Supreme Court has more recently emphasized, the few errors that have been classified as structural defects have been so categorized because the nature of the right at issue is such that "the effect of the violation cannot be ascertained" on review under traditional "harmless-error standards." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 n. 4, 126 S.Ct. 2557, 2564 n. 4 (quoting *Vasquez v. Hillery*, 474 U.S. 254, 263, 106 S.Ct. 617 (1986)). Hence, *Gonzalez-Lopez* explains that the violation of the Sixth Amendment's public-trial guarantee is considered a structural defect "because 'the benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance,' " *id.*

Here, there cannot be any conceivable prejudice from allowing Inv. Moore's testimony via Skype, even if this did violate Appellant's right to confrontation. First, there was overwhelming evidence of guilt. Second, Moore's testimony was not necessary for introduction of Appellant's statement or evidence that was gathered from him before the statement was given. To the contrary, Inv. Coker's testimony independently authenticated and provided a sufficient foundation for the introduction of the custodial statement, and the evidence gathered prior to it. Third, Inv. Moore's testimony was largely cumulative to and was corroborated on all key points by the testimony by Inv. Coker, who was present during the interrogation of Appellant. It was also corroborated by the video recordings of the interrogation process. *See* **State's Exs. 56-65.**[17]

III. The trial judge did not abuse his discretion by allowing the State to introduce Appellant's custodial statement because the record of the *Jackson v. Denno* hearing supports his findings that the statement was freely, knowingly, and voluntarily given after Appellant made a knowing and intelligent waiver of his *Miranda* rights.

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at 149 n. 4 (quoting *Waller v. Georgia*, 467 U.S. 39, 49, n. 9, 104 S.Ct. 2210 (1984)); discriminatory practices in jury selection are structural "because the effect of the violation cannot be ascertained," *id.* (quoting *Vasquez*, 474 U.S. at 263, 106 S.Ct. 617); and the deprivation of a defendant's right to counsel of his or her choosing, the consequences of which "are necessarily unquantifiable and indeterminate," constitutes a structural defect, *id.* at 149-50, 126 S.Ct. at 2564 (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 282 (1993)); *see also McKaskle v. Wiggins*, 465 U.S. 168, 177 n. 8, 104 S.Ct. 944, 951 n. 8 (1984) ("Since the right of self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant, its denial is not amenable to 'harmless error' analysis"). Thus, the alleged error before this Court is not and could never be a "structural error." Indeed, Appellant's discussion of *Schwartz* at **FBOA p. 37-38** guts his claim that a Sixth Amendment Confrontation Clause violation is structural error and it supports the State's harmless error analysis.

[17] Appellant did not assert in the trial court that Inv. Moore's testimony via Skype violated either S.C. Const. art. I, § 14, or S.C. Code Ann. § 17-23-60 (2003). **FBOA p. 27**. Thus, his arguments before this Court are procedurally barred under *Watts* and *Bailey*, *supra*. More importantly, he has not cited any authority for the proposition that art. I, § 14 affords greater protection to an accused than that afforded by the Sixth Amendment, and the Court explained in *State v. Cooper*, 291 S.C. 351, 356, 353 S.E.2d 451, 454 (1987), that:

> This Court commented in [*State v. Smith*, 230 S.C. 164, 94 S.E.2d 886 (1956)], that § 17–23–60 is a restatement of an accused's constitutional rights. Here, we hold it does not enlarge them. The "face to face" provision does not require, in all cases, a direct physical confrontation between defendant and witness. When a balancing of competing interests demands it, the "face to face" requirement may be served by the appearance of the witness before counsel for cross-examination outside the defendant's presence.

See also State v. Anderson, 413 S.C. 212, 215-18, 776 S.E.2d 76, 77-79 (2015), *reh'g denied* (Sept. 3, 2015) (§ 17–23–175 (2003) did not violate the Sixth Amendment's Confrontation Clause).

Notwithstanding Appellant's argument to the contrary, Respondent submits that the trial judge did not abuse his discretion by allowing the State to introduce Appellant's custodial statement because the record of the *Jackson v. Denno* hearing supports his findings that the statement was freely, knowingly, and voluntarily given after Appellant made a knowing and intelligent waiver of his *Miranda*[18] rights.

A. The *Jackson v. Denno* hearing and the trial judge's ruling.

On March 6, 2014, the trial judge held a *Jackson v. Denno* hearing. Inv. Moore (testifying, without objection, via Skype) and Inv. Coker were the only witnesses. Inv. Moore testified that he was an investigator in the Clarendon County Sheriff's Department on April 6, 2011, and that he participated in an the interview of Appellant. **3/6 Tr. pp. 4-5; R. pp. 5-6**. He also testified that the Sheriff's Department had received a 911 call "about someone being shot," and that Appellant was brought to the Sheriff's Department "for further interview." Invs. Moore and Coker were the only officers present during the interview, which took place in one of the interview rooms. Appellant did not appear to be under the influence of either drugs or alcohol, and he did not appear to have any physical or mental disability that would have impaired his ability to understand the officers' questioning of him. Rather, he appeared to be aware of the nature of the investigation. **3/6 Tr. pp. 5-6; R. pp. 6-7**.

Inv. Moore advised Appellant of his *Miranda* rights from a printed card at least twice before the officers spoke with him. He was first advised of his rights before the officers collected evidence from him, and he was not questioned while they were doing so. Appellant indicated his willingness to waive his rights and speak with the officers. Inv. Moore re-advised him of his rights immediately before the questioning began and Appellant again waived his rights. Appellant never invoked either his right to remain silent or his right to counsel. While Appellant

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

was emotional at times during the interview, his answers were rational and responsive, and he was never so emotional that Inv. Moore ever had any concerns about his ability to understand his rights. **3/6 Tr. pp. 6-8; 12-13; R. pp. 7-9; 13-14**.

Inv. Moore explained that the reason that the process took so long was because it took the officers a long time to collect evidence from Appellant. Also, once the interview began, "it took us time just to talk to him, and then ... as we got more information about what was at the scene and the inconsistencies between his stories and what was actually at the same and [the] evidence, ... we would go back and talk to him about those inconsistencies." **3/6 Tr. pp. 18-19; 23-24; 27-28; R. pp. 19-20; 24-25; 28-29**. Inv. Moore characterized the interview as "in-depth," with the actual interview portion beginning around 2:00 p.m. or so, and he estimated that it lasted at least four or five hours. However, there were a number breaks during the process. ... [W]e made sure that ... he was able to take a break if he needed it, if he needed to get some water or something to drink or use the bathroom. We asked him ... in excess of ... four or five times because ... over that length of time there were several times where ... [w]e would leave the interview room and that sort of thing, and when we left ... almost every time we asked him, 'Hey, you know, do you need anything? Are you doing okay? Do you need to go to the bathroom? You need anything to drink?' " **3/6 Tr. pp. 9; 12; 16; R. pp. 10; 13; 17**.

The officers did not threaten Appellant in exchange for his statement and, to the best of Inv. Moore's knowledge, Appellant freely and voluntarily gave his statement. Also, this statement was recorded on video, with audio. Additionally, Inv. Moore explained that Appellant was originally wearing street clothing when the process began but the officers seized his clothing because of blood on it, and he thereafter wore an orange jumpsuit from the jail. **3/6 Tr. pp. 9-10; R. pp. 10-11**.

Inv. Moore was at the crime scene very briefly on April 6th, and he did not know whether or not Appellant was examined for any physical injuries by EMS or anyone else. Also, Inv. Moore did not personally examine Appellant, apart from viewing him. Likewise, neither he nor Inv. Coker had specialized training in the area of posttraumatic stress disorder.[19] **3/6 Tr. pp. 14-16; R. pp. 15-17**. Further, the officers ended the questioning after Appellant gave what they believed was a "confession." While he could not remember how long the statement was, he agreed with the estimation there was approximately forty or forty-five minutes. Appellant gave differing accounts involving a third party before he gave that statement and the officers repeatedly told him that they knew he was lying. **3/6 Tr. pp. 20-21; R. pp. 21-22.**

Inv. Moore admitted telling Appellant that God would lift the weight of what had occurred if he gave a statement and that Inv. Moore put his hands on Appellant during this portion of questioning. He also admitted that Inv. Coker yelled at Appellant, at times, and called him a liar. Inv. Coker discussed telling Appellant's daughter that Appellant had told the truth, but Inv. Moore did not recall Appellant's demeanor changing after that discussion. **3/6 Tr. pp. 22-23; R. pp. 23-24**. Finally, Inv. Moore spoke with Appellant again on April 7th. This interview was at Appellant's request and, although Inv. Moore testified that Appellant did not recant to that time, he could not recall the details of the conversation. The April 7th interview was video recorded in the same manner as the April 6th interview. **3/6 Tr. pp. 26-29; R. pp. 27-30.**

Inv. Kippton Coker testified that he also participated in the April 6th interview of Appellant and he confirmed that he and Inv. Moore were the only officers present during the interview. Inv. Coker's recollection was that Appellant was taken into custody just as Inv. Coker arrived on the scene around 10:30 a.m. He was told that Appellant was being taken to the

[19] Similarly, they did not check his blood alcohol. **3/6 Tr. p. 25; R. p. 26**. However, Inv. Moore had eight or nine years of experience with law enforcement at the time of the interview and he would have recognized if Appellant was uncomfortable or needed medical assistance. **3/6/Tr. pp. 29-30; R. pp. 30-31.**

Sheriff's Department, and he was asked to interview Appellant. **3/6 Tr. pp. 31-33; R. pp. 32-34**. Appellant was taken into the interview room immediately upon arriving at the Sheriff's Department. Inv. Moore advised Appellant of his *Miranda* rights and Inv. Coker witnessed this. Appellant's *Miranda* rights were read to him again before the officers started questioning him because of the length of time that had passed since the original warnings were given, even though the officers had not asked him questions related to the crimes while they had gathered evidence from him. Coker's recollection was that the interview started around 2:00 p.m. **3/6 Tr. pp. 34-35; R. pp. 35-36**.

Inv. Coker confirmed that Appellant did not appear to be under the influence of either alcohol or drugs; that he did not have any apparent physical or mental disability that would have affected his ability to understand the proceedings; and that he "was actually helping [the officers] with the tests at some point." Also, he understood his *Miranda* rights as they were read to him, and he acknowledged that he had understood them. Inv. Coker had conducted "a lot" of interviews in the course of his fifteen year career and he stopped interviews immediately whenever someone had a problem. However, Appellant did not exhibit any symptoms that gave Inv. Coker any concern that his ability to understand what was happening had been impaired. To the contrary, he appeared to understand the proceedings. **3/6 Tr. pp. 35-37; R. pp. 36-38**.[20]

Inv. Coker also testified that he asked Appellant several times during the course of the interview if Appellant needed anything and whether or not Appellant was okay. Each time, Appellant indicated that he was fine. Also, Inv. Coker offered Appellant food and drink a number of times, and there were a number breaks during the interview. If Appellant asked for a

[20] He admitted on cross-examination that he did not have any specialized training in either recognizing or treating symptoms of shock, posttraumatic stress disorder, other mental illnesses or dietary deficiencies. Nor did any expert examine Appellant. Thus, his testimony based on his own observations of Appellant. **3/6 Tr. pp. 43-44; R. pp. 44-45**.

break, he received one, and the officers did not deny him a requested break. Also, Appellant used the bathroom a couple of times, and he was given something to drink. Appellant was also offered food but did not eat, saying that he was "fine." Inv. Coker confirmed that the interview was a lengthy one. However, he denied threatening Appellant or promising Appellant anything in exchange for his statement. To the best of Inv. Coker's knowledge, Appellant's statement was freely and voluntarily given. **3/6 Tr. pp. 37-39; 41-42; R. pp. 38-40; 42-43**. Inv. Coker had not been to the crime scene before he began questioning Appellant, but during the course of the interview, he received information from other officers on the scene. Initially, Appellant gave several versions of the story that a man named "Robert" was responsible. These stories were inconsistent with information provided to Inv. Coker by other officers and they were inconsistent with details provided by Appellant, himself. **3/6 Tr. pp. 39; 45-46; R. pp. 40; 46-47**.

Inv. Coker identified **State's Exs. 1-10** as DVDs of the interview conducted on April 6th. He explained that the digital recording system in the Sheriff's Department allows officers to record video and audio for approximately an hour and twenty minutes before it cuts off automatically. An officer would have to go to the other room and push a button to start "recording again. As a result, each of the DVDs did not record all of the interrogation, and there were gaps of a few minutes between the end of one disc and when the next one starts because neither of the officers in the interview room could see the machine. **3/6 Tr. pp. 39-41; 56; R. pp. 40-42; 57**. On cross-examination, Inv. Coker admitted that he had yelled at Appellant and called Appellant a liar because the stories that Appellant told did not fit the evidence of which Coker was aware; that they had discussed Appellant's daughter a lot and this had an impact on Appellant; that the officers had discussed how God might help him; and that the officers were playing on his emotions, at times. He also admitted that he was aware that Kaisha accused him of

the murders and that Appellant was a suspect before the interview began. Further, the video of the interrogation did not capture an incident when Appellant became angry, "hit the table and jumped up" out of his seat. **3/6 Tr. pp. 47-56; R. pp. 48-57.**

The trial judge indicated that he would take the matter under advisement and would notify the parties of his ruling the next morning. The State moved the DVDs into evidence as **State's Exs. 1-11. 3/6 Tr. p. 60; R. p. 61.**

The trial judge denied Appellant's motion the following morning, finding that:

> In State versus Johnson 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.

3/6 Tr. p. 62, lines 10-21; R. p. 63, lines 10-21. Appellant did not make any specific arguments in support of the motion to suppress. However, he renewed his objection prior to the DVDs introduction at trial. **Tr. pp. 417-18; R. pp. 406-07.**

B. Discussion.

There was no error " 'Questioning suspects is indispensable in law enforcement.'" *Culombe v. Connecticut*, 367 U.S. 568, 578, 81 S.Ct. 1860, 1865 (1961). The United States Supreme Court in *Culombe* also set forth the general test of voluntariness to be applied to the waiver of *Miranda* rights and any issue concerning the voluntariness of confessions generally.

> The ultimate test remains that which has been the only clearly established test in Anglo-American courts for 200 hundred years: The test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. *If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process. Rogers v. Richmond*, 365 U.S. 534, 81 S.Ct. 735, 5 L.Ed.2d 760. *The line of distinction is that at which*

governing self-direction is lost and compulsion, of whatever nature or however infused, propels or helps to propel the confession.

Id at 602, 81 S.Ct. at 1879 (emphasis added).

The United States Supreme Court has consistently adhered to *Columbe* in subsequent cases. *E.g.*, *Schneckloth v. Bustamonte*, 412 U.S.218, 93 S.Ct. 2041 (1973); *Colorado v. Spring,* 479 U.S. 564, 107 S.Ct. 851 (1987); and *Arizona v. Fulminante,* 499 U.S. 279, 111 S.Ct. 1246 (1991). *See also Dickerson v. United States*, 530 U.S. 428, 434, 120 S.Ct. 2326, 2331 (2000) ("We have never abandoned this due process jurisprudence, and thus continue to exclude confessions that were obtained involuntarily"). Likewise, the language describing the voluntariness test set forth in *Columbe* has been consistently followed by South Carolina appellate courts. *E.g.*, *State v. Rochester,* 301 S.C. 196, 199-202, 391 S.E.2d 244, 246-47 (1990); *State v. Franklin,* 299 S.C. 133, 135-39, 382 S.E.2d 911, 913-14 (1989).[21]

Applying this precedent to the present case requires this Court to affirm the trial judge's ruling. The DVD's of the April 6th interrogation (**State's Exs. 1-10** at the suppression hearing and **State's Exs. 56-64** at trial) support both the officers' testimony and the trial judge's findings. Appellant was twice advised of and waived his *Miranda* rights before he gave his statement. *See* **State's Ex. 56**, beginning at 3:37; **State's Ex. 59**, beginning at 2:00. Also, when Inv. Coker stopped the interview in order to collect buccal swabs from Appellant, Appellant assured him that he understood his *Miranda* rights. **State's Exhibit 61**, 1:04:11 through 1:06:24. Having

[21] In South Carolina, a two-fold determination of voluntariness must take place that is not constitutionally required by *Lego v. Twomey*, 404 U.S. 477, 489, 92 S.Ct. 619, 626-27 (1972). First, the trial judge must determine, from the context of an *in camera* hearing, whether or not appropriate *Miranda* warnings were given and freely and voluntarily waived. At the *in camera* hearing, it is the State's burden "to prove *by a preponderance of the evidence* that his rights were voluntarily waived" and that the confession or statement was freely and voluntarily given. *State v. Washington*, 266 S.C. 54, 55, 370 S.E.2d 611, 612 (1988) (emphasis in original). Once the trial judge makes a finding that the statement has been made freely and voluntarily, the matter must then be submitted to the jury, who cannot consider the statement on the issue of guilt or innocence until they have found that it was made freely and voluntarily beyond a reasonable doubt. *Id.*

twice waived his rights, he never invoked either his right to remain silent or his right to counsel.[22]

Appellant claims that his statement was involuntary because of the length of the interrogation; the fact he became emotional at times during questioning; the fact police officers lied to him about evidence implicating him in the crimes; evidence officers yelled at him and called him a liar; alleged intimidation and threats that he could go to prison or receive the death penalty; and a lengthy discussion on how his daughter would perceive him if he did not give a statement. However, Respondent submits that none of these factors show that the statement was involuntary under the totality of the circumstances because none of these factors show that his will was overborne.

Appellant asserts that the aggregate length of the **State's Ex. 59-65** is seven hours, 57 minutes, and 46 seconds. He also correctly notes that there were gaps in the video of the interrogation that resulted from the machine recording the interview stopping and the officers having to restart the recording.[23] Although the interview was a lengthy one, Appellant ignores that there were a number of breaks taken during the interview process and that he was left alone for over an hour and one half during these breaks.[24] Moreover, statements given after much

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[22] *Miranda* is a constitutionally based set of rules which police must follow in order to obtain an admissible. *Dickerson, supra*. The Supreme Court has explained that the question of whether a suspect has waived his right to remain silent has " 'has two distinct dimensions': [the] waiver must be 'voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception,' and [it must be] 'made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.' " *Berghuis v. Thompkins*, 560 U.S. 370, 382-83, 130 S.Ct. 2250, 2261 (2010) (quoting *Moran v. Burbine*, 475 U.S. 412, 421, 86 S.Ct. 1602 (1986)); *see also United States v. Turner*, 157 F.3d 552, 555 (8th Cir. 1998). "As a general proposition, the law can presume that an individual who, with a full understanding of his or her rights, acts in a manner inconsistent with their exercise has made a deliberate choice to relinquish the protection those rights afford." *Berghuis*, 560 U.S. at 385, 130 S.Ct. at 2262.

[23] Respondent submits **State's Ex. 65**, which is 4:03 in length, should not be included in this calculus because that video covers matters after Appellant had given his statement in **State's Ex. 64**. Nevertheless, the interrogation lasted almost eight hours.

[24] For instance, **State's Ex. 56** reflects that Appellant was alone for the first one minute and 56 seconds of the video and that he was alone on a break from 25:39 through 35:04 (or almost 9 1/2 minutes). **State's Ex. 58** reflects an

longer interviews have been found to be voluntary. *See People v. Collins*, 106 A.D.3d 1544, 1545, 964 N.Y.S.2d 393, 395 (N.Y.A.D., May 03, 2013) ("Contrary to defendant's contention, ... his statements made during the first 15 hours of interrogation were not involuntary due to police coercion"), leave to appeal denied, *People v. Collins*, 21 N.Y.3d 1072 (N.Y. Sep 12, 2013) (Table); *Torrence v. Ozmint*, 2008 WL 628604, 23 (D.S.C., Mar. 5, 2008); *State v. Neeley*, 271 S.C. 33, 244 S.E.2d 522 (1978); *State v. Chasteen*, 228 S.C. 88, 88 S.E.2d 880 (1955); *State v. Gilbert,* 273 S.C. 690, 258 S.E.2d 890 (1979).

Additionally, Appellant was repeatedly offered both food and drink or if he needed a bathroom break. Although he repeatedly declined the offer of food and declined most offers for something to drink or to go to the bathroom,[25] he twice received a Sprite when he asked for something to drink (**State's Ex. 58**, at 26:40 through 29:01; **State's Ex. 63**, beginning at 5:29), and there was at least one break - occurring less than twenty-five minutes before he gave his statement - where he asked to go to the bathroom and was allowed to do so. *See* **State's Ex. 64,** at 0:08 through 1:32.

Nor was this statement rendered involuntary simply because Inv. Coker yelled at him and called him a liar or because he became emotional at times during questioning. Again, these factors are simply part of the totality of the circumstances. The officers did not threaten

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almost 5 minute break that occurred when Appellant changed his clothes and the officers seized his clothing. *See* **State's Ex. 58**, 16:32-21:25. On **State's Ex. 59**, Appellant is alone until 1:18 of the video, and then again from 14:24 through 58:34. This break lasted over 44 minutes. On **State's Exhibit 61**, there is a break where Appellant is alone from 11:27 through 31:16 (or 19 minutes and 49 seconds), and he is taken out and fingerprinted from 1:15:17 through 1:16:32. Likewise, **State's Ex. 62** reflects a break from 32:42 through 43:14 (or approximately 10 1/2 minutes). Also, **State's Exhibit 63** reflects a break from 5:48 through 25:46 (or almost 20 minutes), which was only interrupted when Inv. Moore provided him with a Sprite when he requested something to drink. **State's Exhibit 63** further reflects a break of over 141/2 minutes, from 1:04:56 through 1:19:30.

[25] *See* **State's Ex. 58**, 26:40-29:01; **State's Ex. 59**, beginning at 43:17; **State's Ex. 61**, 4:05-9:48 (twice declining the offer for seven to drink or to go to the bathroom and Inv. Coker informing him to knock on the door if he needed to go to the bathroom); **State's Ex. 61**, 1:06:25 through 1:06:44; **State's Ex. 62**, at 43:17; **State's Ex. 63**, beginning at 5:29; and **State's Ex. 64**, 0:08 through 1:32. In fact, **State's Ex. 64** reflects that from 2:46 through 4:05, Appellant repeatedly refused offer for food. Also, at 6:34, he admits that he is comfortable and declines the offer to stretch his legs.

Appellant and they did not physically assault him. His argument ignores that neither of these factors overbore his will, and that he did not give a statement even after he was called a liar and was yelled at by the officer. Instead, Appellant was able to calmly draw a floor plan of the Caraway residence in detail shortly after being yelled at and called a liar. *See* **State's Ex. 62,** beginning at 52:23. "... [W]hile [Inv. Coker's] raised voice may have unsettled [Appellant], [Coker] never threatened or used physical violence. Merely yelling once or twice, or 'getting in the face' of the defendant, does not reach the degree of physical coercion or trickery by authorities sufficient to render a statement involuntary. *United States v. Wylie*, 2006 WL 1431656, at *4 (W.D.N.C. May 19, 2006), *aff'd*, 328 F. App'x 888 (4th Cir. 2009). *See also Jenner v. Smith,* 982 F.2d 329, 334 (8th Cir. 1993) ("Numerous cases have held that questioning tactics such as a raised voice, deception, or a sympathetic attitude on the part of the interrogator will not render a confession involuntary unless the overall impact of the interrogation caused the defendant's will to be overborne"). "Similarly, neither expressing disbelief in the statements of the defendant in this case, nor continuing to question on specific matters constitute coercion. Such tactics often are necessary to achieve the truth." *Wylie*, 2006 WL 1431656, at *4. *See also Schneckloth v. Bustamonte*, 412 U.S. at 224, 93 S.Ct. at 2046 ("very few people give incriminating statements in the absence of official action of some kind").

Likewise Appellant's statement was not the product of police intimidation or threats, as he suggests. In support of his contention, he points out that he was told that he could potentially go to prison or face the death penalty if he did not take the opportunity to give a statement. His argument ignores that he had murdered two people and had shot yet a third person. He certainly was facing prison for these offenses, and the death penalty was both a factual and legal possibility because of the presence of at least two statutory aggravating circumstances, "[t]wo or

more persons were murdered by the defendant by one act or pursuant to one scheme or course of conduct" and murder of a child eleven years of age or under." See S.C. Code Ann. § 16-3-20(C)(a)(9)-(10). Again, however, providing this information to him did not over bear his will.

Additionally, " '[b]oth this Court and the United States Supreme Court have recognized that misrepresentations of evidence by police, although a relevant factor, do not render an otherwise voluntary confession admissible ... The pertinent inquiry is, as always, whether the defendant's will was 'overborne.' " *State v. Von Dohlen*, 322 S.C. 234, 243, 471 S.E.2d 689, 695 (1996). *See also State v. Parker*, 381 S.C. 68, 90, 671 S.E.2d 619, 630 (Ct. App. 2008); *Frazier v. Cupp*, 394 U.S. 731, 89 S.Ct. 1420 (1969) (confession voluntary despite police misrepresentation that associate had confessed); *State v. Rabon*, 275 S.C. 459, 272 S.E.2d 634 (1980) (confession voluntary despite police misrepresenting the evidence that had been accumulated). Here, any deception by the officers as to what evidence the State could marshal against him was not such that it rendered his statement involuntary.

Finally, the lengthy discussion on how his daughter would or should perceive him if he did not give a statement did not render his statement involuntary. Unlike *State v. Corns*, 310 S.C. 546, 526 S.E.2d 324 (Ct. App. 1992) and *Lynumn v. Illinois*, 372 U.S. 528, 534, 83 S.Ct. 917, 921 (1963), neither Inv. Coker nor Inv. Moore threatened either Appellant's daughter or any other family member with arrest or otherwise. Thus, the conversation about how she should or would perceive him did not constitute a "veiled threat[] against his family." Therefore, based on the current record, the trial judge's ruling must be affirmed.

IV. The trial judge properly denied Appellant's motion for a mistrial based on the claim that jurors had seen him brought into the courthouse handcuffed and in the presence of armed guards before voir dire because there was no evidence any juror saw him in this condition and because any error was non-prejudicial, since he was not seen in handcuffs or other visible restraints during the trial and jurors are quite aware that a defendant does not arrive by chance or happenstance.

Respondent further submits that the trial judge properly denied Appellant's motion for a mistrial based on the claim that jurors had briefly seen him brought into the courthouse handcuffed and in the presence of armed guards before voir dire because any error was non-prejudicial, since he was not seen in handcuffs or other visible restraints during the trial and jurors are quite aware that a defendant does not arrive by chance or happenstance.

Following voir dire of the jury venire, Appellant's counsel moved for a mistrial. He noted that Appellant had been brought to the courthouse in street clothes but "with his hands cuffed in front of him in a pair of orange handcuffs and escorted by at least three and perhaps four jail personnel." He was then led to the holding cell, which was "immediately adjacent and within full view of where the jurors were assembling this morning." Although counsel conceded that this was inadvertent, he argued that Appellant had been prejudiced and that "the entire jury pool was tainted" because "at that point in time the jury saw him come through there with all indicia of being incarcerated and under heavy guard." He offered to substantiate his motion with testimony from one of the guards and moved for a mistrial. **Tr. p. 94; R. p. 92.**

The State argued that Appellant was in street clothes when he entered the courthouse, and that there could not be any prejudice because jurors would expect that someone charged with committing two murders "would have to be in custody or potentially could be in custody." The State further noted that the trial judge had questioned the venire during jury selection as to whether anyone on the jury panel knew of any other reason why they could not give Appellant a fair trial, other than those reasons specified in the trial judge's questioning, and no juror responded affirmatively. The State also argued that the trial judge had carefully conducted jury selection; that only those jurors indicating that they could be fair and impartial had been qualified; and that none of the jurors had mentioned the incident, which reflected that no juror

thought that this was something that should be brought to the trial judge's attention. **Tr. pp. 94-95; R. pp. 92-93.**

Trial counsel contended that jurors did not have the right to assume that Appellant would be brought into the courtroom under guard and in handcuffs because he is presumed innocent. Also, counsel contended that jurors' perspective of the presumption of innocence had changed as a result of having seen him brought into the courthouse this way. Counsel contended that "there was no way … [for] me to ask that in voir dire, because I would have re-rung the bell." In response to the trial judge's observation that the jurors' "last view" of Appellant before jury selection was as a free man because Appellant had entered the courtroom with counsel and without handcuffs, counsel suggested that it would be dangerous to try and quantify or qualify when and how jurors' observation of him affected jurors. However, counsel admitted that he did not know whether or not any juror actually observed Appellant handcuffed, but he asked the trial judge to "err on the side of caution to protect [Appellant's] rights" and to grant his motion. **Tr. pp. 96-97; R. pp. 94-95.**

The trial judge denied the mistrial motion. He noted that he had asked jurors "many times, was there any bias? Was there anything that they needed to tell me? Was there any reason they didn't think they can go forward. And although you make a compelling and sincere argument, I don't think it's the law of this state, so I'm going to deny your motion." **Tr. p. 97; R. p. 95.**[26]

There was no error. The granting or refusing of a motion for a mistrial lies within the sound discretion of the trial court and its ruling will not be disturbed on appeal absent an abuse of discretion amounting to an error of law. *State v. Council*, 335 S.C. 1, 12, 515 S.E.2d 508, 514

[26] As noted, Appellant unsuccessfully renewed all of his prior objections and motions at the conclusion of the State's case and at the conclusion of all evidence. **Tr. pp. 852; 889-90; R. pp. 834; 868-69.**

(1999). A mistrial should only be granted when absolutely necessary. *Id.* In order to receive a mistrial, the defendant must show error and resulting prejudice. *Id.* The United States Supreme Court has found that **visible restraints** may be used **during a jury trial only** if "justified by an essential state interest" such as security because "... the Fifth and Fourteenth Amendments prohibit the use of physical restraints visible to the jury absent a trial judge's determination, in the exercise of his discretion, that they are justified by a state interest specific to a particular trial" including "potential security problems and the risk of escape at trial." *Deck v. Missouri*, 544 U.S. 622, 624, 629, 125 S.Ct. 2007, 2009, 2012 (2005),

However, "it is within the sound discretion of an officer charged with the custody of a prisoner to place handcuffs or shackles on him while being taken back and forth between the court house and the jail." *State v. Moore*, 257 S.C. 147, 152, 184 S.E.2d 546, 548 (1971). Prejudice is not inherent in shackling outside the courtroom because " '[i]t is a normal and regular as well as a highly desirable and necessary practice to handcuff prisoners when they are being taken from one place to another, and the jury is aware of this .' " *United States v. Halliburton*, 870 F.2d at 561 (9th Cir. 1989) (quoting *United States v. Leach*, 429 F.2d 956, 962 (8th Cir. 1970)). *See also Moore*, 257 S.C. at 152-53, 184 S.E.2d at 549. Indeed, the United States Supreme Court has explained that "[r]ecognizing that jurors are quite aware that the defendant appearing before them did not arrive there by choice or happenstance, we have never tried, and could never hope, to eliminate from trial procedures every reminder that the State has chosen to marshal its resources against a defendant to punish him for allegedly criminal conduct." *Holbrook v. Flynn*, 475 U.S. 560, 567, 106 S. Ct. 1340, 1345 (1986).

Thus, those courts that have considered the present issue after the Supreme Court's opinion in *Deck* have concluded that that there is no prejudicial error from brief and accidental

viewing of the defendant in restraints outside of the courtroom. *Mendoza v. Berghuis*, 544 F.3d 650, 655-56 (6th Cir. 2008) (observing that no United States Supreme Court case holds that seeing the defendant in shackles during transport violates the Constitution); *United States v. Lattner,* 385 F.3d 947 (6th Cir. 2004); *United States v. Olano,* 62 F.3d 1180, 1190 (9th Cir.1995); *Pantusco v. Lagana,* No. 11–680, 2013 WL 4446965, at * 6 (D.N.J. Aug.16, 2013). *See also Shiro v. Clark*, 963 F.2d 962 (7th Cir. 1992) (fleeting and inadvertent observation); *Ghent v. Woodford*, 279 F.3d 1121, 1132-33 (9th Cir. 2002); *Rhoden v. Rowland*, 172 F.3d 633, 636 (9th Cir. 1999); *Castillo v. Stainer,* 983 F.2d 145, 148 (9th Cir. 1992); *United States v. Rushton*, 963 F.2d 272, 274 (9th Cir. 1992) (inadvertent view of handcuffed defendant during fire drill).[27] The Fifth Circuit Court of Appeals has recognized that "brief and inadvertent exposure to jurors of defendants in handcuffs is not so inherently prejudicial as to require a mistrial, and defendants bear the burden of affirmatively demonstrating prejudice." *United States v. Diecidue*, 603 F.2d 535, 549–50 (5th Cir.1979). As the Fifth Circuit has explained, the potential for prejudice is much less in this context because "[t]he possible awareness that a defendant in a violent-crime case awaits trial in jail is not the same type of prejudice faced by a defendant who sits in shackles or leg irons in front of the jury that will decide his fate." *United States v. Turner*, 674 F.3d 420, 2012 WL 716885, *8 (5th Cir. March 7, 2012).

Appellant cannot show any prejudice in this case because counsel candidly admitted that he did not know whether or not any juror had, in fact, seen Appellant while handcuffed. Nor did Appellant ask the trial judge to admonish the jury to disregard a possible view of him in handcuffs and to draw no inferences from fact that he was in custody and had been handcuffed

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[27] *See also State v. Payne*, 233 Ariz. 484, 505, 314 P.3d 1239, 1260 (Ariz. 2013); *State v. Apelt*, 176 Ariz. 349, 361, 861 P.2d 634, 646 (Ariz.1993) (affirming denial of new trial where four jurors saw defendant in shackles and handcuffs being escorted from courthouse); *United States v. Jackson*, 423 Fed.Appx. 329, 331, 2011 WL 1376793, 2 (4th Cir. 2011) (unpublished); *United States v. Lattner*, 385 F.3d 947, 959–60 (6th Cir. 2004); *Halliburton*, 870 F.2d at 560-61.

on his trip to the courthouse. See *Moore*, 257 S.C. at 152-53, 184 S.E.2d at 549. Also, no juror stood in response to the trial judge's questions on voir dire as to whether any member of the jury panel (1) had "formed or expressed an opinion about any issue or matter as involved in this case," (2) which tended to favor the State or might result in a close case in favor of the State because Appellant was charged with murder, (3) would "tend to give credit to the testimony of a witness who is a law enforcement official or police officer over that of a person simply because the witness is a law enforcement official or police officer," or (4) had read anything about the case in the Sumter Daily Item, the Planning Citizen, or the Manning Times, or heard "any television, radio or any news account revolving around this case that would make it so that you can't be fair and impartial to the State or the Defense in this case." Those jurors who responded affirmatively to the question of whether he or she "[knew] of any reason whatsoever why he or she should not serve as a juror in this case with particular emphasis being placed on your ability to be fair and impartial to both the State and the Defendant," was not seated until the trial judge was assured that the juror could be fair and impartial to both the State and Appellant. **Tr. pp. 24-33; R. pp. 77-86**.

Further, no juror responded when asked the following question: "Has any member of the jury panel heard anything about this case in any way whatsoever while you're here today in the courtroom or in and out of the courtroom?" **Tr. p. 34; R. p. 87**. Finally, the trial judge instructed jurors, in his opening comments to the jury, that their purpose was to determine the facts in the case from the testimony presented from the witness stand and any other exhibits introduced in the trial, and that their verdict "must be based solely on the evidence as it is presented during this trial and on the law as I instructed to you during and at the close of the trial." **Tr. pp. 127-29; R. pp. 124-26;** *see also* **Tr. p. 934; R. p. 913**. As a result, his argument lacks merit. *Id.*

V. The trial judge did not abuse his discretion by denying Appellant's motion for mistrial because two prosecution witnesses may have discussed the case within close proximity to veniremen because there is no evidence that any juror overheard the conversation between these witnesses.

The trial judge also properly denied Appellant's motion for mistrial because two prosecution witnesses may have discussed the case within close proximity to veniremen because there is no evidence that any juror overheard the conversation between these witnesses.

As the second part of trial counsel's mistrial motion after voir dire of the jury venire, counsel noted that, after the jury had been qualified but before voir dire, counsel had overheard two of the State's witnesses - Inv. Richards and Robert Brogdon - discussing the case outside of the courtroom. The men were within "arm's length" of potential jurors. "I can't tell you what was said in front of me. But I can tell you that there was a conversation between Investigator Richards and Mr. Robert Brogdon because I walked up on the conversation." Counsel asked both men not to discuss the case because "[j]urors are in here." Counsel then walked away from the men. **Tr. pp. 97-98; R. pp. 95-96**.

Mr. Brogdon later found counsel and counsel was prepared to present Mr. Brogdon to testify about the conversation. Counsel added that "there was [a] substantive conversation about .... the existence of evidence in this case, the weight of that evidence and the Defendant's guilt in the hallway to him in front of jurors standing around." Counsel noted that this was after the trial judge had asked if there was any reason anyone could not serve as a juror in the case. However, he conceded that there had been "some specific voir dire" after this occurred. **Tr. pp. 98-99; R. pp. 96-97**.

The trial judge noted that "I asked the jurors specifically did they know anything about this case that did not come from within the four walls of this courtroom, and they said, 'No.' " **Tr. p. 99; R. p. 97**. Counsel contended that "the problem is that he may not have known at that

time that it was about this case," and he contended that jurors may not realize that the conversation was about this case until either of the officers testified. **Tr. p. 99; R. p. 97**. The trial judge observed that the State would say in its opening statement that Appellant committed the murders, and he indicated that he was going to instruct jurors, "as I always do, that the only evidence of this case comes from this witness stand and from any other exhibits." **Tr. pp. 99-100; R. pp. 97-98**.

The State briefly responded by noting that the trial judge's last question during voir dire "was whether or not any member the jury panel had heard anything today." Again, the trial judge noted that he specifically asked jurors the question and none responded. Quite correctly, he reasoned that "I have to take them at their word …." **Tr. p. 100; R. p. 98**. In response to counsel's query as to whether counsel should call Mr. Brogdon, the trial judge stated that he assumed that what counsel alleged had, in fact, been said. However, "whether they heard it or not" was a different matter. He therefore denied counsel's motion. **Tr. pp. 100-01; R. pp. 98-99**.[28]

"[A] criminal defendant has no right to a trial by any particular jury, but only a right to a trial by a competent and impartial jury." *Palacio v. State*, 333 S.C. 506, 517, 511 S.E.2d 62, 68 (1999). " '[I]n order to fully safeguard this protection, it is required that the jury render its verdict free from outside influences of whatever kind and nature.' " *State v. Bryant*, 354 S.C. 390, 395, 581 S.E.2d 157, 160 (2003) (quoting *State v. Cameron*, 311 S.C. 204, 207, 428 S.E.2d 10, 12 (Ct.App.1993)). Again, the granting or refusing of a motion for a mistrial lies within the sound discretion of the trial court and its ruling will not be disturbed on appeal absent an abuse of discretion amounting to an error of law. *Council*, 335 S.C. at 12, 515 S.E.2d at 514. A mistrial

[28] As noted, Appellant unsuccessfully renewed all of his prior objections and motions at the conclusion of the State's case and at the conclusion of all evidence. **Tr. pp. 852; 889-90; R. pp. 834; 868-69**.

should only be granted when absolutely necessary. *Id.* In order to receive a mistrial, the defendant must show error and resulting prejudice. *Id.*

This Court must affirm because the trial judge did not abuse his discretion in denying the mistrial motion. First, Mr. Brogdon's relationship to the case is not entirely clear based upon the current record. Although he was named as a potential State's witness, he did not testify. Accordingly, there is no indication as to what knowledge, if any, Mr. Brogdon may have had concerning the facts of the crimes for which Appellant was being tried.[29]

Second and more importantly, there is **no** evidence that any juror overheard the conversation between Inv. Richards and Mr. Brogdon. Appellant makes an offensive assertion that the trial judge was "blasé" in his handling of the mistrial motion. However, the trial judge was not nonchalant or unconcerned about whether the witnesses had spoken about the case in the presence of jurors. Instead, he correctly focused on the fact that there was no evidence that jurors, in fact, overheard the conversation, even if they were in close proximity to it.

Specifically, the record reflects that no juror stood in response to the trial judge's questions on voir dire as to whether any member of the jury panel (1) had "formed or expressed an opinion about any issue or matter as involved in this case," (2) which tend to favor the State or might result in a close case in favor of the State because Appellant was charged with murder, (3) would "tend to give credit to the testimony of a witness who is a law enforcement official or police officer over that of a person simply because the witness is a law enforcement official or police officer," or (4) had read anything about the case in the Sumter Daily Item, the Planning

[29] It appears that Mr. Brogdon is related to prosecution witness Lativia Brogdon, whose testimony begins on **Tr. p. 785; R. p. 767**. She was not a witness to the murders and kidnapping. Rather, Appellant was dating Lativia's sister and living in their house on April 6, 2011. Appellant kept the murder weapon in Lativia's bedroom, and it was in her bedroom when she went to bed on April 5, 2011. Because the shotgun had been in a crib, Lativia moved it out of the crib and placed it underneath the bed. When she got home from school on April 6, however, it was missing. **Tr. pp. 786-89; 768-71.**

Citizen or the Manning Times, or heard "any television, radio or any news account revolving around this case that would make it so that you can't be fair and impartial to the State or the Defense in this case." Those jurors who responded affirmatively to the question of whether he or she "[knew] of any reason whatsoever why he or she should not serve as a juror in this case ... [and] be fair and impartial to both the State and the Defendant," were not seated until the trial judge was assured that the juror could be fair and impartial to both the State and Appellant. **Tr. pp. 24-33; R. pp. 25-34.**

Further, no juror responded when asked the following question: "Has any member of the jury panel heard anything about this case in any way whatsoever while you're here today in the courtroom or in an out of the courtroom?" **Tr. p. 34; R. p. 35**. Finally, the trial judge instructed jurors, in his opening comments to the jury, that their purpose was to determine the facts in the case from the testimony presented from the witness stand and any other exhibits introduced in the trial, and that their verdict "must be based solely on the evidence as it is presented during this trial and on the law as I instructed to you during and at the close of the trial." **Tr. pp. 127-29; R. pp. 124-26;** *see also* **Tr. p. 934; R. p. 913**. *Id.*

Further, the trial judge correctly found that he had to accept the jurors' representations in response to his questioning. "The Court presumes that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them." *Francis v. Franklin*, 471 U.S. 307, 324 n.9, 105 S.Ct. 1965, 1976 n.9 (1985). "Were this not so, it would be pointless for a trial court to instruct a jury, and even more pointless for an appellate court to reverse a criminal conviction because the jury was improperly instructed." *Id.* This rule "is a pragmatic one, rooted less in the absolute certitude that the presumption is true than in the belief that it

represents a reasonable practical accommodation of the interests of the state and the defendant in the criminal justice process." *Richardson v. Marsh*, 481 U.S. 200, 211, 107 S.Ct. 1702, 1709 (1987). *See also United States v. Olano*, 507 U.S. 725, 740, 113 S.Ct. 1770, 1781 (1993) ("[It is] the almost invariable assumption of the law that jurors follow their instructions") (citing *Richardson*, 481 U.S. at 206, 107 S.Ct. at 1707); *Gray v. Maryland*, 523 U.S. 185, 200, 118 S.Ct. 1151, 1159 (1998) (Scalia, J., dissenting) ("The almost invariable assumption of the law is that jurors follow their instructions") (citing *Francis, supra*); *Old Chief v. United States*, 519 U.S. 172, 196 (1997); *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068 (1984) ("a court should presume ... that the judge or jury acted according to law").

Further, Appellant did not present any evidence that any juror, in fact, heard this conversation. Also, he did not argue below and does not assert on appeal that any juror(s), in fact, intentionally concealed information inquired into during *voir dire*, *i.e.*, knowledge about the case "while you're here today in the courtroom or in and out of the courtroom." **Tr. p. 34; R. p. 87**. *See Smith v. State*, 375 S.C. 507, 518-20, 654 S.E.2d 523, 529-30 (2007) (explaining the law relating to jurors' concealment of information on voir dire and holding that "[w]hen a juror conceals information inquired into during *voir dire*, a new trial is required only when the court finds the juror intentionally concealed the information, and that the information concealed would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenges"). *See also State v. Elmore*, 279 S.C. 417, 420, 308 S.E.2d 781, 784 (1983); *State v. Gulledge*, 277 S.C. 368, 287 S.E.2d 488 (1982).

Finally, Appellant's reliance upon *State v. Cameron*, 311 S.C. 204, 208, 428 S.E.2d 10, 12 (1993) is misplaced. He did not argue in the trial court that a private communication had occurred between a court official and a member of the jury. *See Bailey*, 298 S.C. at 5-6, 377

S.E.2d at 584 (a party cannot argue one theory at trial and a different theory on appeal). More importantly, the record does not reflect that any such conversation occurred. Thus, the trial judge did not abuse his discretion by denying Appellant's motion.

VI. Appellant's argument that the trial judge erroneously sentenced him to five years imprisonment for possession of a weapon during the commission of a violent crime, in violation of S.C. Code Ann. § 16-23-490 (2003), is not properly before this Court because it was never presented to the trial judge and, instead, is being asserted for the first time on appeal.

Appellant's remaining argument is that the trial judge erroneously sentenced him to five years imprisonment for possession of a weapon during the commission of a violent crime, in violation of S.C. Code Ann. § 16-23-490 (2003). However, he did not raise this argument either at the time of sentencing (**Tr. pp. 960-72; R. pp. 933-45**) or at the hearing held on his motions to set aside the verdict, for a new trial, to vacate the sentence and to reconsider the sentence. **4/17 Tr. pp. 1-18; R. pp. 951-68**. Rather, he raises it for the first time on direct appeal.[30]

As repeatedly discussed, a party cannot argue one theory at trial and a different theory on appeal). *See Bailey*, 298 S.C. at 5-6, 377 S.E.2d at 584; *Johnson*, 363 S.C. 53, 58-59, 609 S.E.2d 520 523 (2005) ("If a party fails to properly object, the party is procedurally barred from raising the issue on appeal"). *Watts*, 321 S.C. at 167, 467 S.E.2d at 278 ("To be preserved for appellate review, an issue must be both presented to and passed upon by the trial court"). This well-settled procedural rule also extends to sentencing issues. *See State v. Johnston*, 333 S.C. 459, 462, 510 S.E.2d 423, 425 (1999) ("[A] challenge to sentencing must be raised at trial, or the issue will not be preserved for appellate review."); *State v. Winestock*, 271 S.C. 473, 475, 248 S.E.2d 307, 308

[30] Before sentence was imposed, he merely asked the trial judge to impose the minimum sentence permitted by law. **Tr. pp. 970-72; R. pp. 943-45**. At the hearing on his post-trial motions, he argued that the trial judge improperly sentenced him to thirty years for kidnapping because he had received a life sentence for each murder, relying upon of S.C. Code Ann. § 16-3-910 (2003), and ignoring that the kidnapping victim was a different person from either murder victim. **4/17 Tr. pp. 10-12; R. pp. 960-62**.

(1978) ("[An] appellant's failure to timely object to or seek modification of his sentence in the [circuit] court precludes him from presenting the question to [the appellate c]ourt for the first time on appeal").[31]

CONCLUSION

For all of the foregoing reasons, this Court should affirm the judgment, convictions and sentence.

Respectfully submitted,

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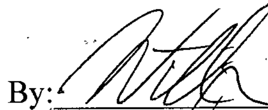

By: ______________________
WILLIAM EDGAR SALTER, III
ATTORNEYS FOR RESPONDENT

May 23, 2016.

[31] Moreover, the Court should not address this issue for the sake of "judicial economy" because the State does not concede that it was error for the trial judge to sentence on the weapons charge. *Contra State v. Bonner*, 400 S.C. 561, 565, 735 S.E.2d 525, 527 (Ct. App. 2012). Rather, sentencing on the weapons charge was mandatory under § 16-23-490 because the weapon was used to effectuate the kidnapping, he was convicted of kidnapping, and he could not and did not receive a life sentence for that offense. See S.C. Code Ann. § 16-3-910. However, his claim should not be addressed because it is not preserved for appellate review and he has an available remedy, since he can seek relief under the Uniform Post–Conviction Procedure Act, S.C. Code Ann. §§ 17-27-10 to -160 (2003), a remedy that he will undoubtedly pursue if unsuccessful on direct appeal.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Clarendon County
The Honorable William Jeffrey Young, Circuit Court Judge
Appellate Case No. 2014-001219

RECEIVED
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SC Court of Appeals

THE STATE,

Respondent,

vs.

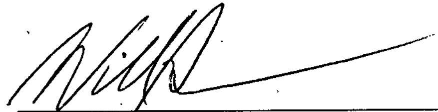
JUSTIN JERMAINE JOHNSON,

Appellant.

CERTIFICATE OF COMPLIANCE

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

This 23rd day of May, 2016.



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STATE OF SOUTH CAROLINA
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CERTIFICATE OF SERVICE

I, William Edgar Salter, III, counsel for the Respondent, certify that I have served the within Final Brief of Respondent and Certificate of Compliance on Appellant by depositing three (3) copies of the same via U.S. mail, first class, postage prepaid to his attorney of record,

Laura R. Baer, Esq.
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I further certify that all parties required by Rule to be served have been served.

This 23rd day of May, 2016.

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