STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
APPEAL FROM MARLBORO COUNTY
Court of General Sessions
Honorable J. Michael Baxley, Circuit Court Judge

Opinion No. 5473 (S.C. Ct. App. Filed March 15, 2017)

Appellate Case No. 2013-001409

THE STATE, ... PETITIONER,

v.

ALEXANDER CARMICHAEL HUCKABEE, III, ...RESPONDENT.

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R. 478, ll. 9-18. On cross-examination, LaRosa conceded that Appellant's trial was the first time he had testified in a CSC trial as a criminal profiler. R. 499, ll. 20-24. LaRosa also freely admitted that he had no direct evidence that Appellant was the perpetrator, "I have no evidence of anybody, except to meet that profile that I just explained to you." R. 480, ll. 2-3. On recross, LaRosa, over the objection of defense counsel, testified that he had consulted on hundreds of CSC cases with all kinds of perpetrators, victims, and facts, but that in these cases his testimony was not requested. R. 480, ll. 17 – R. 481, ll. 21.

State's Closing Argument

LaRosa's testimony featured prominently in the State's closing argument; the expert that confirmed Appellant's guilt by linking the minor child's injuries to the Appellant:

> Paul Larosa testified, and I think Jones referred to it as whoie. **I mean it's – he trained with the Federal Bureau of Investigation, the chief law enforcement agency in the United States of America in this particular field.** And here is the more important thing. **Did he really tell you anything that didn't make sense.** You know before you say, oh, and dismiss it as whoie what he tell you? Well, it's a male. **Looking at it as a crime scene situation we would be looking for an adult male.**

R. 624, ll. 3-11. Having vouched for the credibility and skill of LaRosa, the State summarized LaRosa's testimony:

> **Agent LaRosa testified that based on that and based on his review of that and review of the record that would indicate an adult.** . . .
>
> You know, why do that[?] **That's sadistic. Well, that leads into the sexual gratification aspect** of this because it is centered around her genitalia. It's sick. It's sadistic, but there is a sexual basis for why someone would do that. Sick. I can't fathom it, but unfortunately, as we heard it happens, and it happened to [Minor Child].
>
> And then he also, Agent LaRosa, talked about the fact that **it would have been a male** because in the research and he outlined the research that had been done, the nature of what it is he does, and what not. These situations involve men. **Men are the perpetrators. . . . [LaRosa] [d]id not point and say the Defendant did it. This**

is where your common sense comes in. Who had the most access to that child during 16 that time? That was an adult male. The defendant.

R.. 624, ll. 17 – R. 625, ll. 16. The State then highlighted statements made by Appellant during his third interrogation by law enforcement, where Appellant conceded that he saw some indications of abuse and that he should have called DSS. R.. 53, ll. 8 – R.. 54, ll. 2.

The State also invited the jurors to compare their hypothetical actions to Appellant's actions: "[h]ow many of us would look and see that much going on with a three year old and not say or do something unless we had something to hide? Unless we were the perpetrators." *Id.* at 3-6. The State concluded with a slide show of pictures of the minor child from the autopsy interspersed with pictures of the minor child while she was alive. R. 57, ll. 10 – R.. 59, ll. 23.

Discussion

Criminal profiling testimony has the sole purpose of presenting expert opinion concerning the question of guilt or innocence; as such it usurps the jury's role as the sole judge of the facts and it does not aid the jury in objectively evaluating evidence put forward at trial. This Court should now take the opportunity to hold such testimony *per se* inadmissible.

South Carolina Courts have addressed the issue of criminal profiling testimony, but have not ruled on the admissibility of such evidence. *State v. Tapp*, 398 S.C. at 389, 728 S.E.2d at 475 (trial court's failure to make a determination on the underlying reliability of profiler's method was a harmless error)[2]. South Carolina courts have addressed the admissibility of a similar area of expert testimony in forensic interviewing of child abuse victims. *State v. Kromah*, 401 S.C. 340, 360, 737 S.E.2d 490, 500 (2013). In *Kromah*, the Court held that testimony by a forensic interviewer that she

[2]*See Id.* at 391, 728 S.E.2d at 476 (Pleicones, J., dissenting) (Prodan's testimony not harmless error as served to identify defendant as likely perpetrator in light of his statement to police that he had been in victim's apartment, as well as the testimony of the victim's roommate and another witness that the victim was familiar with respondent).

made a "compelling finding" of abuse based on her interview of the minor child was inadmissible as it bolstered the credibility of the victim. *Id.* at 356, 737 S.E.2d at 498.

As the Court noted, forensic interviewing may be a helpful investigative tool, but it is not an area of scientific study, it does not turn its practitioners into "human truth-detectors", and that court sanctioned expertise is improper because the interviewer's testimony must be limited to personal observations. *Id.* n. 4. Further, the Court concluded that the propriety of forensic interviewer testimony is questionable:

> An interviewer's statement that there is a "compelling finding" of physical abuse relies not just on objective evidence such as the presence of injuries, but on the statements of the victim and ***the interviewer's subjective belief as to the victim's believability***. However, an interviewer's expectations or bias, the suggestiveness of the interviewer's questions, and the interviewer's examination of possible alternative explanations for any concerns, are all factors that can influence the interviewer's conclusions in this regard. ***Such subjects, while undoubtedly important in the investigative process, are not appropriate in a court of law when they run afoul of evidentiary rules and a defendant's constitutional rights.***

Id. at 357, 737 S.E.2d at 499 n. 5 (*emphasis added*).

Criminal profile or offender behavior testimony has been held inadmissible in over twenty states. In the Fourth Circuit Court of Appeals as well as the Eighth, Ninth, Tenth, and Eleventh Circuits criminal profiling testimony is also inadmissible.

When courts address offender behavior or criminal profile testimony, it has been near universally excluded whether presented by the State or by the defense. *People v. Robbie*, 92 Cal.App.4th 1075, 112 Cal.Rptr.2d 479 (2001) (***testimony of criminal profiler was offered to establish a stereotype and then condemn defendant for fitting it***; testimony did not help the jury objectively evaluate evidence, but instead pushed them to conclude defendant was guilty because he fit the profile, not because of evidence presented at trial) (*emphasis added*).

In holding criminal profiling testimony inadmissible courts emphasize its irrelevance to the specific facts of the case before the jury, "evidence which only describes the characteristics of the typical offender has no relevance to whether the defendant committed the crime in question." *State v. Clements,* 770 P.2d 447, 454 (Kan. 1989); *see also: Sloan v. State,* 522 A.2d. 1364 (Md. Ct. App. 1987); *State v. Petrich,* 683 P.2d. 173 (Wash. 1984); *People v. Bradley,* 526 N.E.2d 916 (Ill. Ct. App. 3rd 1988); *Sanders v State,* 303 S.E.2d 13 (Ga. 1983); *Douglas v U. S.,* 386 A2d 289 (D.C. Ct. App. 1978); *U.S. v. Gillespie,* 852 F.2d 475 (9th Cir. 1988); *see, State v Hansen,* 743 P2d 157 (Ore. 1987); *see also, U.S. v Quigley,* 890 F.2d 1019 (8th Cir 1989), *cert denied* 493 US 1091 (1990); *U.S. v. Jones,* 913 F.2d 174 (4th Cir. 1990); *U.S. v. Miller,* 874 F.2d 1255 (9th Cir. 1989); *U.S. v Hernandez-Cuartas,* 717 F.2d 552 (11th Cir. 1983).

Second, courts stress that the inference drawn from criminal profiling evidence is an impermissible usurpation of the jury's role as sole fact finder, "the essence of the testimony would have been that **the expert had determined that the defendant was not a sex abuser and, therefore, was not guilty.** That question is for the jury." *State v. Gallup,* 779 P.2d 169, 172 (Ore. Ct. App. 1989)(*emphasis added*); *see, State v. Person,* 564 A.2d. 626 (Conn. Ct. App.1989); *State v. Fitzgerald,*382 N.W.2d 892 (Minn. Ct. App. 1986); *State v. Tucker,* 798 P.2d 1349 (Az. Ct. App. 1990); *People v. Watkins,* 440 N.W.2d 36 (Mich. Ct. App.1989); *Pendleton v. Commonwealth,* 685 S.W.2d 549 (Ky. 1985); *Williams v. State,* 649 S.W.2d 693 (Tex. Ct. App. 1983); *Kanaras v. State,* 460 A.2d 61 (Md. Ct. App. 1983); *U.S. v St. Pierre,* 812 F.2d 417 (8th Cir. 1987); *see also, State v. Cavallo,* 443 A.2d 1020 (NJ 1982).

As with forensic interviewing and polygraph examinations, criminal profiling may be an effective investigative tool. As expert testimony, it runs afoul of evidentiary rules and defendant's constitutional right to have a jury of his peers decide guilt or innocence by objectively weighing the

evidence properly before them. From a practical standpoint, it allows the party offering the expert to present highly prejudicial testimony, perhaps proper in a closing argument where the state is not presenting evidence and is allowed to make reasonable inferences from the record, during the case in chief with the weight and authority given by jurors to court sanctioned experts. *Watson v. Ford Motor Co.*, 389 S.C. 434, 449, 699 S.E.2d 169, 176 (2010)(courts should be cautious in conferring an expert label upon a witness as juries may accord excessive, undue weight to "expert" testimony).

LaRosa's testimony is exactly the kind of criminal profile testimony that has been ruled inadmissible in so many other jurisdictions. His testimony was put forward by the state to establish the profile of a child molester and then to condemn the Appellant because he fit their tailor-made profile. The court's ruling also illustrates the powerful, human appeal of profile testimony, as it alleges to answer, "How could anyone do this to a child . . . . the jury has to be wondering how could such a thing occur." R. 455, ll. 8-21.

How something could happen is not the proper focus of the jury's deliberations; the jury must objectively decide if the State proved beyond a reasonable doubt that the defendant did the crime. How someone could bring themselves to commit these acts is irrelevant to the determination of whether the State proved beyond a reasonable doubt that Appellant was the perpetrator. LaRosa's testimony did not help the jury objectively evaluate evidence, but instead demanded the jury conclude the defendant was guilty because he fit the profile.

Accordingly this Court should take the opportunity to definitively rule that expert "criminal profile" or "offender behavior" testimony is *per se* inadmissible in South Carolina courts.

II.

The trial court committed reversible error by allowing SLED "criminal profiler" Paul LaRosa to give expert testimony applying concepts on "offender behavior" in crafting a "criminal profile" when the State failed to establish that the methodology of "criminal profiling" was scientifically reliable under *State v. Jones*.

Discussion

All expert testimony must satisfy the Rule 702, SCRE, criteria. *State v. White*, 382, S.C. 265, 270, 676 S.E.2d 684, 686 (2009). Under this rule, the trial court exercises gatekeeping function to insure the proposed expert testimony meets a reliability threshold for the jury's consideration. *Id.* This inquiry requires that the proposed expert testimony meets a threshold level of reliability, regardless of whether it is scientific or unscientific. *Id.* Accordingly, trial courts are required to establish whether: (1) the expert has the requisite qualifications, experience, and/or credentials; (2) the methodology by which the evidence is obtained is reliable; and (3) the evidence will assist the trier of fact. *Id.* Evaluating the reliability of the proposed expert testimony is the central concern of Rule 702 admissibility. *State v. Jones,* 343 S.C. 562, 572, 541 S.E.2d 813, 818 (2001); *Kumho Tire Co., Ltd. v. Carmichael,* 526 U.S. 137, 147, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999).

With respect to reliability of scientific expert testimony and evidence, the trial court must examine the following factors: (1) publications and peer reviews of the technique used by the expert; (2) prior application of the method to the type of evidence involved in the case; (3) quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures. *State v. Jones,* 273 S.C.723, 731-732, 259 S.E.2d 120, 124-125 (1979). When admitting scientific evidence under Rule 702, SCRE, the trial judge must find the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable. *State v. Council*, 335 S.C. 1, 21, 515 S.E.2d 508, 518 (1999). On appeal, the trial judge's

decision to admit or exclude evidence is reviewed under an abuse of discretion standard. *Id.* at 20, 515 S.E.2d at 518.

Whether criminal profiling is a proper field for scientific expert testimony is an open question in South Carolina. *Tapp*, 398 S.C. at 389 728 S.E.2d at 475. However, the South Carolina Supreme Court's decisions regarding "barefoot sole impressions" in *State v. Jones*, and mitochondrial DNA (mtDNA) analysis in *State v. Council* are instructive and, at a minimum, provide guideposts for determining the level of scientific reliability required by courts when evaluating the admissibility of testimony from an obscure or relatively new field of study.

In *Jones*, the State sought to introduce "barefoot insole impression evidence," which theorizes that the regular wearer of a pair of shoes imparts the impression of his foot into the insole of the shoes. 343 S.C. 562, 572, 541 S.E.2d 813, 819. Barefoot insole impression evidence consists of "inked impressions of the suspected wearer's feet, photos of the suspected wearer's known insoles, and a standing cast of the suspected wearer's foot [which] are compared to the impressions in the boots, both visually and by using calipers to compare distances between toes and other features among the various exhibits." *Id.* The State's expert testified that there were several methods used in making "barefoot insole impression" comparisons and that his work was published and subject to peer review. The expert specifically named three texts that he relied on, and several professional discussions he had with named experts as the basis for reaching his conclusion in the present case. *Id.*

The Supreme Court held that "barefoot insole impression" evidence is not scientifically reliable under the *Jones* test and thus inadmissible. *Id.* at 573, 541 S.E.2d at 819. The Court noted that while the expert was peer reviewed, much of his earlier work was discredited. *Id.* Moreover, SLED had no experience conducting this kind of work and had no written protocol to insure

accuracy and repeatability. *Id.* at 574, 541 S.E.2d at 819. Further, the Court concluded that there was no existing recognized scientific laws or proceedings regarding the field of "barefoot insole impression." *Id.*

By comparison, in *State v. Council* the Court affirmed the trial court's determination that mtDNA analysis evidence was admissible. 335 S.C. 1, 515 S.E.2d. 508 (1999). At trial, the State's expert testified on proffer that he conducted the analysis using a widely recognized and accepted methodology within the scientific community. *Id.* at 17, 515 S.E.2d at 517. Further the expert testified that he confirmed the mtDNA evidence "based on a scientific objective standard" that was capable of repetition and replication by any qualified scientist. *Id.* at 18, 515 S.E.2d. at 516-517.

Looking to the *Jones* test, the Court concluded: "[mtDNA] analysis has been subjected to peer review and many articles have been published about this technology. The F.B.I. validated the process and determined its [statistical] rate of error. Its underlying science has been generally accepted in the scientific community. Further, while forensic application of mtDNA analysis is fairly new, the technology has been used in other contexts for several years." *Id.* On appeal, the trial court's ruling was upheld, mtDNA analysis evidence was admissible under *Jones* and Rule 702 SCRE. *Id.* at 21, 515 S.E.2d at 518.

In the present case the trial court abused its discretion in holding that the science and methodology utilized in the field of "criminal profiling" was sufficiently reliable under the *Jones* standard. R. 453, ll. 9-24. First, LaRosa's never named an authoritative "criminal profiling" text that he relied on in making his determination and never named other criminal profilers that he sent his profile to for peer review. Instead, LaRosa vaguely references an F.B.I. run database of past offenders and that he sent his profile to other anonymous behaviorists for review. R. 438, ll. 5 – R. 439, ll. 25. As LaRosa never submitted a written report, the trial court had no other way of knowing

what information LaRosa used or supplied to his peer reviewers when generating and seeking confirmation of his offender profile.

Second, LaRosa's testimony regarding prior application of his methods in past criminal cases was vague and provided no guidance to the trial court regarding the reliability of his testimony. LaRosa admitted that he had never testified as a profiler in a criminal sexual conduct case before and had only testified once before as a criminal profiler. R. 479, ll. 20-25. Third, as to error rate and quality control, LaRosa testified that he had a zero rate of error in making predictions. R. 444, ll. 7 – R. 445, ll. 10. This astonishing accuracy was reached by creating vague profiles. *Id.* However, LaRosa never testified as to specific quality control measures taken to insure reliability, beyond simply crafting a broad profile capable of encapsulating at least one of the incarcerated suspects.

Fourth, unlike the method for analyzing mtDNA sanctioned in *Council*, there is no consistent scientific method or procedure in criminal profiling. As LaRosa explained, the methodology of "criminal profilers" consists of looking at all of the evidence law enforcement has in a particular case and trying to extrapolate a sketch of the characteristics a possible perpetrator based on past cases. Thus, there is no minimum amount of evidence necessary before a criminal profile can be created. Moreover, the importance of any particular piece of evidence is left completely to the subjective determination of the individual profiler. LaRosa's methods cannot be tested for consistency and there are no scientific laws applicable to "criminal profiling."

Ultimately, creating a known potential error rate to insure the accuracy of criminal profiling is impossible because there are too many variables in technique: there are no standards for evaluating the weight and relevance of certain evidence; no set standards for how specific a profile must be before it can be declared a success; and no defined method of crafting a profiling that

capable of replication by others to insure accuracy. Additionally, the trial court erred in applying a *Daubert* analysis, which the Supreme Court had expressly rejected in *Jones*; which along with the trial court's stated reasoning revealed a deeply flawed exercise of discretion. 383 S.C. at 538, 681 S.E.2d at 581.

Any assertion of harmless error by the State would be untenable; LaRosa's offender profile testimony could not be harmless because it was the only evidence the State presented linking the injuries of the minor child and the resulting criminal sexual conduct charge to the Appellant. During all three of Appellant's interrogations, including the final interrogation spanning three hours, and at trial Appellant adamantly denied any knowledge of the cigarette burns to the minor child's genitals. Nor was there DNA evidence indicating Appellant's involvement or eye witnesses to the alleged conduct.

Testimony by his co-defendant, Hunt, was entirely self-serving and uncreditable. She had taken a plea deal which resulted in her changing her story and "remembering" incidents involving Appellant and minor child. R. 399, ll. 15 – R. 400, ll. 25. Even then none the incidents remembered explained the pattern of cigarette burns. R. 392, ll. 19-25. The pornography found on Hunt's computer, but attributed to Appellant, consisted almost exclusively of visits to a single website with videos involving older women.[3] R. 503, ll. 11-23. Finally, prior to taking the plea deal she wrote a letter to Appellant's mother assuring her of Appellant's innocence and her love for him; while simultaneously carrying on an affair with a correctional officer.[4] R. 353, ll. 8 – R. 355, ll. 22.

[3] The computer and computer crime report were entered into the record as State's Ex. No. 85 and 99, respectively. R. 654.

[4] The letters from Hunt to Appellant's mother and to the correctional officer were entered into the record as Defense Exhibit No. 1 and 2, respectively. R.917.

Therefore, the trial court's error in admitting LaRosa's testimony was not harmless because it was critical to the Appellant being found guilty of criminal sexual conduct with a minor in the first degree. *State v. Mitchell,* 378 S.C. 305, 316, 662 S.E.2d 493, 499 (2008). Accordingly the trial court committed reversible error in holding that criminal profiling was a proper field for expert testimony as the State failed to establish that the methodology of "criminal profiling" was scientifically reliable under *State v. Jones.*

III.

Whether the trial court committed reversible error by allowing SLED "criminal profiler" Paul LaRosa to give expert testimony applying concepts on "offender behavior" in crafting a "criminal profile" when the State failed to demonstrate that LaRosa had the necessary education, expertise, and experience to give opinion testimony?

Discussion

Trial courts have a gatekeeping role with respect to all evidence sought to be admitted under Rule 702, SCRE, whether the evidence is scientific or nonscientific. *White*, 382 S.C. at 274, 676 S.E.2d at 688. In the discharge of its gatekeeping role, a trial court must assess an expert's qualifications before determining if the expert's proposed testimony is sufficiently reliable. *Tapp*, 398 S.C. at 389, 728 S.E.2d at 475 (trial court committed reversible error in permitting testimony from criminal profiler without first assessing his qualifications as an expert).[5] Rule 702, SCRE, imposes on the trial courts an affirmative and meaningful gatekeeping duty. *White*, 382 S.C. at 270, 676 S.E.2d at 686. However, a trial court's decision to admit or to exclude expert testimony will not be reversed absent a prejudicial abuse of discretion. *State v. Price*, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006).

Competency to testify as an expert requires a witness to "have acquired by reason of study or experience or both such knowledge and skill in a profession or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony." *Gooding v. St. Francis Xavier Hosp.*, 326 S.C. 248, 252-53, 487 S.E.2d 596, 598 (1997). An expert's testimony may not exceed the scope of his expertise. *State v. Ellis*, 345 S.C. 175, 547 S.E.2d 490 (2001) (finding police officer, qualified as an expert in crime scene processing and fingerprint identification,

[5] The South Carolina Supreme Court has declined to make a determination as to the reliability and expertise of criminal profiler, Adam Prodan. *Tapp*, 398 S.C. at 388, 767 S.E.2d at 474 n. 11; *State v. Sessions*, 2013–UP–063 (S.C. Ct. App. Filed January 30, 20130; and *State v. Stephens*, 2013–UP–062 (S.C. Ct. App. Filed January 30, 2013).

exceeded the scope of his expertise when he testified to conclusions drawn from the location and position of the victim's body at the time of the shooting).

In order to testify as to an accused's state of mind, a prospective expert must state what training or experience enabled the expert to comment as to the accused's state of mind at the time of the incident. *State v. Harris*, 318 S.C. 178, 181, 456 S.E.2d 433, 435 (Ct. App. 1995) (licensed clinical psychologist with ***four years of mental health experience and six months of counseling with defendant was not qualified*** to render an opinion as to defendant's state of mind at the time of the incident) (*emphasis added*). While an expert witness is not necessary to testify to the existence of prior injuries; only a properly qualified expert may offer a conclusion that a child has been a victim of abuse. *State v. Lopez*, 306 S.C. 362, 366, 412 S.E.2d 390, 393 (1991) (diagnosis of a victim's injuries and determination of the cause of those injuries based on the symptoms is beyond the ability of the average trier of fact and a qualified expert opinion is essential for the trier of fact to connect those injuries to a physical cause). Therefore, qualifications for expert witnesses in child abuse cases focus on whether the proffered expert possessed the requisite skill, training, experience, learning, and knowledge to render a psychiatric or psychological diagnosis of the victim and the abuser.

Moreover, since the Appellant and Hunt were already incarcerated when LaRosa became involved in the case, LaRosa's testimony was focused on explaining why someone would abuse the minor child and which of the two defendants was most likely responsible. R. 473, ll. 15-24. His formal psychological training and education consisted of an eight week F.B.I. course and a one month internship with the department of mental health. His profiling experience consisted of assisting in investigations in an advisory capacity with an undisclosed rate of success and profiling

accuracy. R. 480, ll. 25 – R. 481, ll. 7. He had never testified as a criminal profiler in a criminal sexual conduct with a minor case. R. 479, ll. 20-24.

While not identifying the Appellant by name, LaRosa, considering he was brought in when the suspects were limited to two people, strongly inferred Appellant was the perpetrator. R. 478, ll. 3-25. He speculated to the jury in graphic detail that the perpetrator, whoever he might be, was "a situational abuser.... from sex sadistic qualities like this," and was almost certainly "an adult male, approximately the age of twenty five to forty, who would have . . . direct access over this child where they were able to have complete control over a period of time." R. 478, ll. 13 – R. 481; ll. 7. Further, LaRosa speculated that Hunt was too self-absorbed to have sexually abused the minor child. R. 442, ll. 6-20. He also claimed that Hunt's journal was likely an accurate and true reflection of her feelings since it was "an open ended flowing document."[6] R. 441, ll. 9-21.

LaRosa pontificated on the Appellant's state of mind at the time of incident and hypothesized that he was a sadistic pedophile. R. 478, ll. 13 – R. 481; ll. 7. He also speculated on the co-defendant's state of mind and speculated on her possible psychological condition. R. 441, ll. 9-21. Further, he diagnosed the minor child's injuries, determined of the cause of those injuries, and connected the physical findings to a cause with an alleged perpetrator. *Lopez*, 306 S.C. at 366, 412 S.E.2d at 393. Nothing in LaRosa's experience, training, and education suggests he has the necessary mental health background or professional qualifications to reliably make these assessments and testify as an expert at trial.

[6] In addition to his profiling expertise, LaRosa also apparently is credentialed as a human truth detector. *Kromah*, 401 S.C. at 357, 737 S.E.2d at 499 n. 4.

IV.

The trial court committed reversible error by allowing SLED "criminal profiler" Paul LaRosa to give expert testimony applying concepts on "offender behavior" in crafting a "criminal profile" when the probative value of the expert "offender behavior" evidence, offered as definitive proof of Appellant's guilt, was substantially outweighed by the danger of unfair prejudice as the evidence is not probative of whether the Appellant committed the specific acts he for which he was standing trial and provided no information helpful to the jury's understanding of the evidence properly before it.

Discussion

Rule 403, SCRE, states that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." A trial court has wide discretion in ruling on Rule 403 objections. *See State v. Adams,* 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003). ("A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances. We ... are obligated to give great deference to the trial court's judgment [regarding Rule 403]." (internal citation omitted)). However, evidence "calculated to arouse the sympathy or prejudice of the jury should be excluded if they are ... not necessary to substantiate material facts or conditions." *State v. Torres,* 390 S.C. 618, 623, 703 S.E.2d 226, 228 (2010). "[A] court analyzing probative value considers the importance of the evidence and the significance of the issues to which the evidence relates." *State v. Collins*, 398 S.C. 197, 203, 727 S.E.2d 751, 754 (Ct. App. 2012).

"Prejudice that is 'unfair' is distinguished from the legitimate impact all evidence has on the outcome of a case." *Id.* " 'Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest [a] decision on an improper basis.' " *Id.* (quoting *State v. Gilchrist*, 329 S.C.

621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998)). " 'All evidence is meant to be prejudicial; it is only unfair prejudice which must be [scrutinized under Rule 403].' " *Id.* (quoting *Gilchrist*, 329 S.C. at 630, 496 S.E.2d at 429). Like probative value, unfair prejudice should be evaluated in the practical context of the issues at stake in the trial of the case." *Id.*; *See State v. Wilson*, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001) ("The determination of prejudice must be based on the entire record and the result will generally turn on the facts of each case.").

In the present case, LaRosa's testimony had no relevance to whether the Appellant committed the specific acts he on which he was indicted. However, his testimony was extremely prejudicial. LaRosa's testimony should have been excluded under Rule 403, SCRE because it served only to introduce to the jury an unfavorable comparison between the hypothetical profile of someone who might have sexually abused the minor child and Appellant. It did not make any specific factual issue of guilt or innocence of the Appellant any more or less probable.

Moreover, for LaRosa's testimony to have any value to the State it necessarily exceeded the limitations placed on it by the trial court. R. 456, ll. 10-16. LaRosa was instructed to avoid eliminating Hunt as a suspect. *Id.* Nevertheless his testimony immediately eliminated Hunt as a suspect: "**you would be looking for an adult male.**" R. 478, ll. 9-18 (*emphasis added*). Therefore, even under the trial court's unworkable standard, LaRosa's testimony should have been disallowed. In all respects his testimony was both highly prejudicial and of almost no relevance.

Accordingly, the trial court committed a reversible error and abused its discretion in permitting SLED "criminal profiler" Paul LaRosa to testify about the characteristics of "offender behavior" where the probative value of such expert "offender behavior" testimony, which was offered as definitive proof of Appellant's guilt, was substantially outweighed by the danger of

unfair prejudice as the evidence has no relevance to whether the Appellant committed the specific acts for which he was being tried and provided no information helpful to the jury's understanding of the evidence properly before it.

V.

The trial court committed reversible error by admitting Appellant's videotaped interrogation after law enforcement testified that they failed to fully re-*Mirandize* Appellant, including failing to advise him of his right to have an attorney present and his right to have an attorney appointed if he could not afford one, when three days had elapsed since his previous custodial interrogation and the interrogation was given under coercive conditions which overcame Appellant's will.

Relevant Facts

Appellant never admitted to maliciously harming the minor child and adamantly denied molesting the minor child. As detailed below, Appellant was interrogated three times by law enforcement. R. 745, ll. 9-22. Of those three interrogations, only the third interrogation, done without fully re-*Mirandizing* Appellant, yielded any incriminating statements. R. 566, ll. 11-24. The statements Appellant made during his third interrogation are incriminatory only in the sense that Appellant reflected introspectively on how he failed to seek medical attention for the minor child and that he may have too roughly disciplined minor child. *Id.*

First Interrogation of Appellant

Appellant was first questioned by law enforcement at his residence on the night of minor child's death. R. 4, ll. 9-14. That night, Appellant was transported by law enforcement to the Bennettsville Police Department for further questioning. R. 5, ll. 13-20. Appellant was not interrogated immediately, but held at the station while police spoke with medical personnel and neighbors. R. 25, ll. 8-11. Appellant's son was taken into SCDSS custody at this time. *Id.* at ll. 21-23. This interrogation lasted about forty-five minutes and Appellant appeared to law enforcement to be alert, sober, and to understand the questions. R. 15, ll. 24 – R. 16, ll. 14. Appellant did not request breaks or drinks during the interview. *Id.* at ll. 12-17. Further, Appellant was not made any

promises, shackled, threatened, and was not under arrest. R. 16, ll. 18 – R. 17, ll. 8. Appellant was apparently free to leave during this interview if he wanted to. *Id.*

Appellant signed the law enforcement provided form acknowledging his *Miranda*[7] rights at 12:45 A.M. on October 7, 2011. R. 19, ll. 4-16. During the interrogation, Appellant admitted to being at home with the minor child on the night of her death and that he believed she had a seizure. R. 21, ll. 21-24. Appellant denied involvement in the child's death and was allowed to return home. R. 22, ll. 4. Later that night Atelia Hunt was *Mirandized* and interviewed, starting at 1:47 A.M. The following morning, October 8, 2011, Appellant was arrested. R. 23, ll. 15-20.

Second Interrogation of Appellant

Three days later, on October 10, 2011, Appellant was interrogated for a second time. R. 31, ll. 22-25. This interrogation took place at the Bennettsville Detention Center and was conducted by Lt. Kathy Bass of SLED and Lt. Larry Turner of the Bennettsville Police Department. R. 28, ll. 1 - 13. Appellant remained under arrest, incarcerated, likely shackled, but not handcuffed. Appellant was *Mirandized.* He initialed and signed a second *Miranda* waiver. [8] R. 29, ll. 4-21. This interrogation was not videotaped. R. 34, ll. 2-6. At the end of the interrogation and at the behest of law enforcement, Appellant started to write a statement. R. 34, ll. 10- 17. Shortly after beginning his statement, Bass stopped Appellant and recalled:

> [Appellant] attempted to write a statement. He wrote about three or four sentences. He told me he was not a good writer or speller. He requested I write it for him, and I told him I couldn't do that. So, he wrote what he felt like he could write at that point and just said, I can't — I'm not good with this.

Supp. R.. 1, ll. 4-10. Bass and Turner terminated the interrogation after learning that Appellant was only semiliterate. *Id.* at ll. 11-24.

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

Third Interrogation of Appellant

On October 13, 2011, Appellant was transported back to the Bennettsville Police Station in order to be videotaped for a third interrogation by Bass and Turner. R. 34, ll. 2-9. Unlike his prior interrogations, Appellant was not provided with a *Miranda* waiver form and was not fully *Mirandized*. R. 34, ll. 19 – R. 35, ll. 19. Bass would explain at the *Denno* hearing:

> ***I abbreviated [the Miranda warnings]. But, I virtually told him that he was still under arrest.*** I had read him his rights when I was at the jail, and that everything was still intact from his Miranda warnings, so I went over it in my terms. I don't think I actually read a form to him.

Id. at ll. 6-11 (emphasis added). **Bass did not advise Appellant he had the right to have an attorney present or that one would be appointed if he could not afford an attorney.** R. 718, ll. 1-7. Before starting the interview, Bass told Appellant:

> You know me and my house keeping rules. I got to make sure you understand that. I read you your rights the last time we were here, so you understand that you have the right to remain silent.

Appellant: on everything.

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

R. 715, ll. 13-23. At the pre-trial *Denno* hearing, Bass stated that avoiding the full *Miranda* warnings in later interrogations was her "standard practice." R. 34, ll. 12-14. Bass would also later testify that while she did not threaten or make promises to Appellant, she did tell him that she, "wanted to help him . . . . That he needed to tell me that he needed help. If there was something going on at home with Minor child or at home, that this was the time for him to tell me." R. 35, ll.

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[8] The *Miranda* rights waiver form signed and initialed by Appellant on October 10, 2011 was entered into the record as State's Exhibit No. 78. R. 650.

20 – Supp R. 3, ll. 4. Bass also implied to Appellant that she would help Appellant find out about his upcoming bond hearing and told Appellant was not a flight risk. Supp. R. 3, ll. 18-25.

Over the course of the interrogation Appellant conceded that he occasionally hit the minor child when disciplining her. He consistently denied ever molesting the child or inflicting burns on her. R. 745, ll. 9-22. Appellant catalogued for law enforcement his significant health problems: hyperactivity, epilepsy, narcolepsy, and a learning disability resulting in near illiteracy. R. 722, ll. 4 – R. 725, ll. 24. When interrogating Appellant, Bass regularly told Petitioner that if he did not cooperate he would be blamed for the minor child's death and that the only way to avoid this was by giving more information. R. 825, ll. 18-23. At the end of the interrogation, Lt. Turner asked Appellant if he believed in God and informed Appellant that "Christ is going to deal with you .... Well I can promise you, as long you been sitting across that table, you've not been truthful with us. God will deal with you." R. 913, ll. 1-17.

Jackson v. Denno Hearing

On October 5, 2012, the trial court conducted a *Jackson v. Denno* hearing. R. 1. After reviewing the evidence and testimony summarized above, the trial court concluded that all of Appellant and co-defendant's statements, written or oral, were admissible. This included the videotaped statements made by Applicant during the October 13, 2011 interrogation. R. 41, ll. 9 – R. 42, ll. 24. The trial court reasoned that while Applicant was under custodial interrogation and was not advised of his *Miranda* rights on October 13, 2011:

> The third statement [Appellant] gave was ***really set in a way as a courtesy to him, because he just was in no condition for whatever reason to write a statement on the second interview, and thus it was carried over.*** And the Court finds that by the time he sat down for his third interview, he had clearly been advised of his rights, and he had clearly waived those rights, each and every one. Now when Agent Bass sat down and ***did not mention among the numerous rights that she did mention on the tape of the third statement, failed to mention the right, the specific right to counsel right then or the right to stop and talk to counsel.*** The Court does not find

> that that somehow were coercive, that there had been a failure to advise Mr. Huckabee of that specific right because he had heard that right at least twice, and initialed the form so that he was aware of the right. And he expressed clearly an intention to go forward in the statement on the third occasion without reservation.

R. 41, ll. 12 – R. 42, ll. 4 (*emphasis added*). The trial court concluded, "all of the statements are in compliance with the Fifth and Sixth Amendment rights of the defendants as well as under the safeguards of *Miranda* ... these statements were knowing and intelligently given." R. 42, ll. 24 – R. 43, ll. 2. The trial court concluded that the statements were without coercion, undue influence, and that the Appellant and co-defendant gave them free of duress and without any promise reward or threat of punishment. R. 43, ll. 3-7.

Trial: Testimony of Investigator Turner

On May 14, 2013, Appellant proceeded to trial. After presenting testimony from the nurse who treated minor child upon admittance to the hospital and the forensic pathologist who conducted the autopsy; the State started to call the law enforcement officers involved in the investigation. R. 140, ll. 7-15. The State first called Turner to testify about the October 7, 2011 and October 10, 2011 interrogations. R. 145, ll. 3-25. The State also used Turner to enter the video footage of the October 7, 2011 interrogation and Appellant's partial written statement made following the October 10, 2011 interrogation. R. 146, ll. 15 – R. 147, ll. 16. Defense counsel renewed his objections to the statements and the trial judge overruled it. R. 147, ll. 12-16.

After Turner laid the foundation, the video footage and written statement were entered into evidence. R. 152, ll. 12 – R. 153, ll. 12; R. 651 (Appellant's Statement). Turner then read Appellant's written statement:

> I came home about 7:30 from the shop, and I was laying on the chair watching t.v. Then I hear Minor child scream out, and she hit the front — she hit the floor. Then I pick her up, and she was breathing. I ran to the kitchen, and I'm not sure exactly what he's trying –saying so far. I can't understand that. Then I look out the window and saw Tia at the neighbor backdoor. Then they came to the back door. That when I put her in the back of the car.

R. 153, ll. 13-21. Turner also testified about the October 13, 2011 interrogation. R. 154, ll. 11-13. As Appellant had not confessed any responsibility for the death, he and Bass "played good cop, bad cop. I wanted him to feel as comfortable as possible . . . . I wanted him to think he had a friend in me while we were there in the interview and that he could tell me whatever." R. 155, ll. 16-25. Turner stated that it was during the third interview that Appellant started to make incriminating statements. R. 157, ll. 5-7. For example, Appellant stated that minor child had ran into his cigarette on one occasion which may have caused the burn marks. *Id.*

Turner testified that he told Appellant that he and co-defendant had both denied harming the minor child and "I basically told him them, well, that only left a third person, and would be [Appellant's] son."

Trial: Testimony of Lt. Bass

The State called Bass as its next witness. R. 160, ll. 14. Bass' testimony laid the foundation for the three-hours of video footage from Appellant's third interview. R. 206, ll. 12 – R. 207, ll. 6. Defense counsel renewed his previous objection, was overruled, and the video was published to the jury. R. 207, ll. 12-17. In addition to playing the video, the jury was given transcripts of the video interrogation. Supp. R. 4, ll. 13-23. After finishing the video, Bass testified that she "suspected that the [Appellant] was not being truthful." Supp. R. 7, ll. 20-24.

On cross-examination Bass admitted that she deliberately misled Appellant as to what Hunt was telling law enforcement in an effort to illicit information from him. R. 220, ll. 18-25. Bass also admitted that Hunt's statements had inconsistencies as she shifted from ignorance to claiming Appellant was solely responsibility for minor child's death and was responsible for the burn marks on minor child. R. 233, ll. 4-21. Bass then reluctantly detailed a series of love letters between Hunt and a correctional officer which began shortly after Hunt wrote a plaintive letter to Appellant's

mother expressing her love and loyalty to Appellant. R. 218, ll. 14-20. Bass also testified to journal entries kept by Hunt revealing obsessive behavior calculated to maintain her relationship with Appellant.[9] R. 224, ll. 16-21.

Trial: Testimony of Appellant

Appellant testified at trial that co-defendant, Hunt, was a controlling and jealous person, who was dishonest and manipulative throughout their relationship. R. 574, ll. 6-19. Appellant recalled he and Hunt met over the internet while she was still married. R. 521, ll. 5-24. Hunt told Appellant that she was independently wealthy. R. 524, ll. 1-3. This was untrue and the parties relied solely on Appellant's income during the relationship. *Id.* Hunt pushed Appellant to let her and her minor child move into his house. R. 522, ll. 21-23. Once cohabitating, Hunt was the dominant force in the relationship and infiltrated every aspect of Appellant's life. R. 574, ll. 6-19. Appellant shaved minor child's head out of concern for lice and with Hunt's support. R. 528, ll. 15-21. He also testified that both he and Hunt removed two of minor child's teeth because Hunt thought they were loose. R. 527, ll. 17 – R. 528, ll. 14.

Hunt was responsible for the children's medical care and activities. R. 526, ll. 3-10. Hunt signed Appellant and the minor children up for Medicaid and food stamps. R. 303, ll. 1-2; R. 407, ll. 14-17. Appellant testified about his fear of SCDSS and that he avoided reporting Hunt's abuse out of fear that he would lose his son. R. 565, ll. 20 – R. 566, ll. 10. Appellant admitted he should have sought treatment for minor child and reported Hunt's abuse. R. 566, ll. 11-24. Appellant stated that, at the time of minor child's death, his relationship with Hunt was over and that he was going to ask her to leave his house. R. 567, ll. 3-23. Appellant also explained his learning

[9] Hunt's journal entries were entered into the record at trial as Defense's Ex. No. 1 and 2. R. 917 (Hunt Letters).

disabilities and the effect that he believed they had on his responses to law enforcement and to the minor child's medical conditions. R. 568, ll. 8-23.

State's Closing Argument

The State extensively referenced statements from Petitioner's third interrogation in its closing argument. As the only interrogation that contained incriminating statements, the third interrogation provided the State with evidence that Appellant was aware of the abuse and that, in retrospect, Appellant believed he should have taken action. R. 634, ll. 6-14.

The State emphasized: "if you will remember in [Appellant's] statement that we listened to . . . he said in response to a question by either Lieutenant Bass or one of the Bennettsville Police Department questioners. Didn't you see those burns? You were around that child. Doesn't you see those burns. He said, 'Yes.'" R. 604, ll. 2-8. The State then assured the jurors of Lt. Bass' credibility, averring that "having worked with them for years I can say this; that they take every case seriously, but I think as we are all sitting here this is an especially poignant case because you've got a child" R. 619, ll. 7-15.

Finally, the State pointed to the gradual admission of knowledge from Appellant that was extracted from him during the three hour interrogation: "well, 'I didn't see anything.' Then gradually, 'Well, yeah, I saw some bruises. A couple.' Then it goes to, 'Well, yeah, I saw bruises. I should have said something.'"

Discussion

In *Jackson v. Denno*, 378 U.S. 368, 376 (1964), the United States Supreme Court held that "a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession." In order to introduce a statement produced during custodial interrogation, the prosecution must prove by a preponderance of the evidence that the statement was made freely and voluntarily, and taken in compliance with *Miranda v. Arizona*, 384 U.S. 436 (1966); *see also State v. Moses*, 390 S.C. 502, 512, 702 S.E.2d 395, 400 (Ct. App. 2010); *State v. Goodwin*, 384 S.C. 588, 601, 683 S.E.2d 500, 507 (Ct. App. 2009); *State v. Miller*, 375 S.C. 370, 378, 652 S.E.2d 444, 448 (Ct. App. 2007).

"*Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent." *Rhode Island v. Innis*, 446 U.S. 291, 300-01 (1980); *State v. Howard*, 296 S.C. 481, 488, 374 S.E.2d 284, 288 (1988). While there is no requirement as to specific words or phrases, the warnings given to a suspect must be the "fully effective equivalent" of the *Miranda* warnings. *California v. Prysock*, 453 U.S. 355, 359-60 (1981); *State v. Singleton*, 284 S.C. 388, 391, 326 S.E.2d 153 (1985), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991). Strict compliance with *Miranda* is not required but, the warnings must meaningfully convey the substance of the suspect's rights. *Duckworth v. Eagan*, 492 U.S. 195, 203 (1989); *State v. Easier*, 322 S.C. 333, 338, 471 S.E.2d 745, 749 (Ct. App. 1996).

The trial court committed a reversible error in finding that the earlier *Miranda* warnings, given three days before on October 10, 2011, were sufficient to advise Appellant of his rights during the October 13, 2011 interrogation. R. 41, ll. 3-12 (10/15). **Lt. Bass admitted that she**

did not comply with the requirements of *Miranda* when advising the Appellant of his rights prior to the October 13, 2011 videotaped statement. R. 34, ll. 19 – R. 35, ll. 19; *State v. Ridgely*, 251 S.C. 556, 567, 164 S.E.2d 439, 444 (1968) (officer's warning that the court would appoint a lawyer for the defendant "should he be charged with anything" did not comply with the requirements of *Miranda*). Crucially, **Bass did not inform Appellant that he had the right to an attorney, to consult with an attorney, or to have an attorney appointed if he could not afford one.** Unlike in Appellant's two prior interrogations, law enforcement did not have him sign and initial a waiver; instead Appellant was orally given an "abbreviated" warning.[10]

The trial court erroneously determined that the October 13, 2011 interrogation was "set in a way as a courtesy to him, because he was really in no condition for whatever reason to write a statement on the second interview, and thus [the *Miranda* warnings] was carried over." R. 41, ll. 12-15 (10/15). The statement referenced by the trial court as justification for law enforcement's courteous extension of a third interrogation, is an incomplete and short introductory paragraph, consistent with Appellant's testimony from the October 7, 2011. Of the three interrogations, only the October 13, 2011 interrogation yields admissions from the Appellant that he should have reported Hunt's abuse.

There was no evidence supporting the trial court's conclusion that the October 13, 2011 interrogation was simply an extension of the prior written statement; particularly in light of law enforcement's prolonged and aggressive questioning during the interrogation and Appellant's wide ranging answers. Appellant was incarcerated during the three day gap between

[10] *Miranda* waivers from October 6, 2011 and October 10, 2011, were entered into the record as State's Exhibit No. 77 and 78. R. 649; R. 650.

interrogations and law enforcement knew that Appellant was only semiliterate with serious medical problems when they began the October 13, 2011 interrogation.

Furthermore, Lt. Bass traded on Appellant's upcoming bond hearing and concern for his son to encourage Appellant to let Bass "help him." R. 35, ll. 20 – Supp. R. 3, ll. 4. The third interrogation was nearly three hours long and the only one where Appellant made any incriminatory answers; such as reflecting that he should not have disciplined minor child and that he should have pushed Hunt to seek medical care for minor child instead of following her instructions. R. 566, ll. 11-24. Appellant never admitted to molesting minor child and denied any knowledge of minor child's fatal urinary tract infection. R. 526, ll. 3-10; R. 745, ll. 9-22.

This interrogation came a week after his arrest and was Appellant's third interrogation. All of these pressures were deliberately exploited by law enforcement when interrogating Appellant and overcame the Appellant's free will. As such, the trial court erred in determining that the video footage and transcript of Appellant's third interrogation was admissible as freely and voluntarily given.

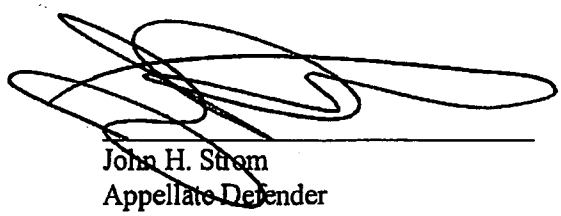
Bass should have fully *re-Mirandized* Appellant on October 13, 2011, as the three day break in interrogation combined with the coercive pressure of law enforcement and Appellant's continued incarceration created circumstances where Appellant's capacity for self-determination and the voluntariness of his statements were in doubt. There was simply no justifiable reason for law enforcement to not *re-Mirandize* Appellant as they had in the prior two interrogations.

Accordingly, the trial court committed reversible error by in admitting Appellant's videotaped interrogation after law enforcement testified that they failed to fully re-*Mirandize* Appellant, including failing to advise him of his right to an attorney and his right to terminate the interview, when three days had elapsed since his previous custodial interrogation.

CONCLUSION

By reason of the foregoing arguments, Appellant's conviction should be reversed and this case remanded to the Marlboro County Court of General Sessions for a new trial.

Respectfully submitted,



John H. Strom
Appellate Defender

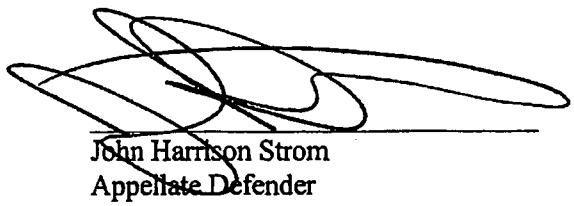
ATTORNEY FOR APPELLANT

This 13th day of August, 2015.

CERTIFICATE OF COUNSEL FOR APPELLANT

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

August 13th, 2015



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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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

THE STATE,

RESPONDENT,

V.

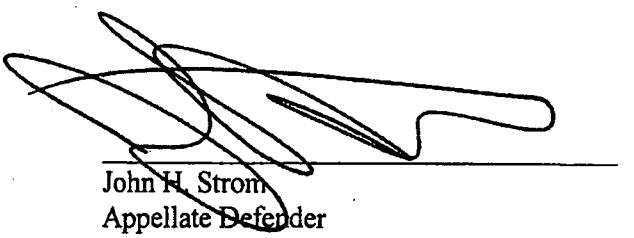
ALEXANDER CARMICHAEL HUCKABEE, III,

APPELLANT.

APPELLATE CASE NO. 2013-001409

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Susannah Cole, Esquire, Office of the Attorney General, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 13th day of August, 2015.



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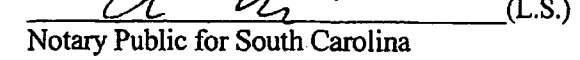
SUBSCRIBED AND SWORN TO before me
this 13th day of August, 2015.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Notary Public for South Carolina
My Commission Expires: May 12, 2025.

STATE OF SOUTH CAROLINA

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

Appellate Case No. 2013-001409

THE STATE,

Respondent,

v.

ALEXANDER CARMICHAEL HUCKABEE, III,

Appellant.

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STATEMENT OF ISSUES ON APPEAL

I.

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

STATEMENT OF THE CASE

Alexander Carmichael Huckabee, III, (Appellant) was indicted for Homicide by Child Abuse, Inflicting Great Bodily Injury upon a Child, Unlawful Conduct toward a Child, and Criminal Sexual Conduct with a Minor (First Degree). (R. pp. 641-48.) There were multiple pre-trial hearings in 2012, and a jury trial commenced on June 17, 2013, before the Honorable J. Michael Baxley.[1] Appellant was found guilty of all counts. Judge Baxley pronounced life sentences for Homicide by Child Abuse and Criminal Sexual Conduct with a Minor (First Degree), twenty years for Inflicting Great Bodily Injury upon a Child, and ten years for Unlawful Conduct toward a Child. All sentences were to be served concurrently. (R. p. 640.)

STATEMENT OF FACTS

Appellant met Atelia Hunt ("Hunt") in an online chatroom in 2009, and after Hunt separated from her husband in 2011, the two arranged to meet. (R. pp. 183-84, pp. 268-71, p. 521.) A relationship ensued, and Hunt moved from North Carolina to Bennettsville, South Carolina, to live with Appellant in the summer of 2011. (R. p. 264, pp. 272-74, p. 522, p. 524.) Appellant's seven-year-old (Son), and Hunt's daughters, six-year-old Sister and three-year-old Victim, also lived in the home. (R. p. 143, p. 243, p. 274.) Victim went to stay with Hunt's parents in August 2011 as a result of a Department of Social Services ("DSS") investigation, and Victim remained there for about four weeks. (R. pp. 187-88, pp. 243-45, pp. 278-81.) In mid-September 2011, Victim returned to the home Hunt shared with Appellant and the other children in Bennettsville. (R. pp. 284-85.)

On October 6, 2011, just before 10:00 p.m., Hunt brought Victim to the hospital. (R. pp. 67-68.) Victim's head was shaven. (R. pp. 68-69.) The nurse who treated her in

[1] The prosecution was initially going to try jointly Appellant and co-defendant Atelia Hunt. Hunt pled guilty prior to trial. (R. p. 350.)

the emergency room noted bruises all over Victim's body – the top of her head, the bottoms of her feet, and her legs. (R. pp. 70-71, pp. 75-76.) Victim had cigarette burn marks to her private area and buttocks. (R. p. 71, p. 333.) The nurse who first encountered Victim had difficulty talking about the Victim's extensive visible injuries at trial, saying she had "never seen anything like it, and [she hoped she never would] again." (R. p. 71.) Despite efforts to resuscitate Victim for approximately twenty-five minutes, Victim died. (R. p. 70, p. 76.) She was about one month shy of her fourth birthday. (R. p. 91.)

Law enforcement officers and two DSS employees were sent to the home that night. (R. p. 143.) When the foster care supervisor for DSS, Rebecca Jorgensen ("Jorgensen"), arrived, Appellant was standing on the porch smoking a cigarette. (R. p. 136.) Appellant claimed Victim had been acting normally then started shaking and fell to the floor. (R. pp. 137-38.) He showed Jorgensen the sofa and said, "Look, that's where [Victim] peed, and she peed on me." (R. p. 137.) Appellant also stated that when Victim started shaking and fell to the floor, "he picked [Victim] up and took her to the kitchen, and put her on the table in the kitchen to do CPR." (R. p. 137.) He demonstrated picking the child up and carrying her into the kitchen as he talked. (R. pp. 137-38.) Jorgensen observed stains on the sofa, two pairs of girls' underwear on the floor in the living room, a hammer on the floor next to the bed where Sister slept, and a cigarette butt in the bathroom sink. (R. p. 138.) Jorgensen and a co-worker woke Son and Sister and removed them from the home. (R. p. 139.)

Autopsy Findings

An autopsy was conducted on October 8, 2011, by Dr. Cynthia Schandl ("Dr. Schandl"). (R. p. 89.) Dr. Schandl began with an external examination, noting numerous injuries consistent with abuse. (R. p. 115, p. 120.) She noted Victim's head was shaven. (R. p. 101.) Dr. Schandl also detailed extensive external injuries – numerous bruises (seven or eight to Victim's face and head, several to the inner thighs, and on her vagina), round ulcerations which appeared to be burns in various stages of healing, and subdural hemorrhage indicating trauma to the head. (R. pp. 94-95, pp. 101-02.) Victim had obvious bruises to the left and right sides of her head, her face, her chin, her neck, and "the angle of her mandible." (R. p. 101, pp. 116-17.) The bruises to her head went into the scalp. (R. p. 101.) There were hemorrhages around the optic nerves, further suggesting significant trauma to the head. (R. p. 102.) The bruises about the head suggested blunt trauma. (R. p. 103.) Dr. Schandl was very suspicious of abuse based on the head injuries. (R. p. 104.)

Victim suffered several other injuries. Notably, hemorrhaging inside Victim's vagina indicated a blunt trauma within two to three days of her death, an injury suspicious for some sort of sexual assault. (R. pp. 107-08.) There were other more superficial bruises on the child's body. There was a long, narrow bruise on Victim's abdomen, and there were two bruises on her inner thighs. (R. pp. 102-03, pp. 118-19.) There were scrapes and bruising further down her legs, particularly around the ankles. (R. p. 103.)

There were at least five burn marks on Victim's body. (R. p. 105.) Dr. Schandl described five places on the Victim's buttocks where "the skin is basically, simply absent." (R. p. 105, p. 118.) Those burns occurred within forty-eight hours of death. (R.

p. 108.) The injuries were consistent in size with a cigarette burn. (R. p. 105.) Dr. Schandl noted several other similar round areas that had healed and scarred. (R. p. 105.) There were two healing areas in Victim's vaginal area very consistent with the fresher burn injuries to her buttocks. (R. pp. 105-06, p. 119.)

Victim was also missing two front teeth. (R. pp. 109-10, p. 117.) Dr. Schandl noted this was unusual for a child of Victim's age because normally children begin to lose teeth around age six or seven, and normally the bottom incisors are lost before the top. (R. p. 109.) The area where the teeth were missing had healed, so they had not come to be missing very recently. (R. p. 110.)

The extensive injuries did not cause Victim's death, however. Victim was found to have suffered a "massive infection that started as a urinary tract infection." (R. p. 92.) The infection spread to Victim's bladder and kidneys. (R. p. 92.) From there, it became a blood infection. (R. pp. 92-93.) The blood infection affected the way the blood clotted. (R. p. 93.) Victim began having blood clots which "went to her brain, and she had basically small strokes in her brain from those clots caused by the infection." (R. p. 93.) The blood clots would cause small areas of the brain to die.[2] (R. p. 96.) Dr. Schandl found evidence that Victim was suffering brain damage during the 5-7 days before her demise. (R. p. 96.)

Dr. Schandl opined Victim would have first displayed symptoms of the urinary tract infection (UTI) – burning with urination, frequent urge to urinate, leakage, and bloody or foul-smelling urine. (R. p. 97.) As the infection progressed to her kidneys, in addition to the symptoms of the UTI, she would have experienced back pain. (R. p. 97, p. 123.) As the infection progressed, Victim would have suffered the effects of extremely

[2] While extensive bruising could also cause blood clots, Dr. Schandl believed the infection "was enough to kill her." (R. p. 128.)

high fever. (R. p. 97.) As the blood infection raged, brain damage could cause symptoms such as tiredness, not wanting to eat, difficulty waking, coma, and seizures during Victim's final days. (R. pp. 96-97.) During the final week of her life, Victim would have been wobbly, lethargic, slow, and non-reactive when people spoke to her. (R. p. 98, p. 123.) It would have been obvious that the child was very sick. (R. pp. 98-99.)

Background

Suspicion was first aroused about Victim's treatment in mid-August 2011. Prior to Victim going to live with Hunt's parents, Victim had odd markings behind her ears. Appellant told Hunt he would rub Victim's ears and Victim liked it. (R. p. 278-79.) Victim developed raw marks behind her ears, and her hair would stick to the wounds. (R. p. 278.) Hunt also noticed bruises on Victim, but testified when she questioned Appellant, "he always came up with an excuse that she fell or she ran into a table." (R. p. 279.) Specifically, when Victim left to stay with Hunt's parents, Hunt told her father that Victim's ears were raw and a bruise on Victim's back was, according to Appellant, the result of a seizure "where she had been caught between the foot of the bed and the mattress."[3] (R. pp. 279-80.) Upon seeing Victim, Hunt's mother reported the matter to DSS. (R. pp. 280-81.) DSS visited the home Appellant and Hunt shared, and Victim would be placed with Hunt's parents for a time. (R. pp. 187-88, pp. 243-45, pp. 278-81, p. 283; R. pp. 748-51.) When Hunt brought Victim back to South Carolina in mid-September 2011, around two weeks before her death, she had no bruises, had hair down to her neck, and had all her teeth. (R. pp. 284-85.) Within a week of returning to Bennettsville on September 16, bruises began appearing on Victim. (R. p. 287.) By October 6, she would be battered from head to toe and dead from an infection.

[3] Hunt never saw Victim suffer seizures. She only witnessed two "episodes" where Victim would "go into a mold," not a violent seizure, and both of these occurred in the weeks before Victim died. (R. pp. 289-90.)

During the investigation, Hunt and Appellant were each interviewed several times, and both Hunt and Appellant testified at trial. From their various statements, certain facts were consistent. Hunt would generally get up in the morning with Son and Sister, ensure Son took his ADHD medicine, and take them to the bus stop. (R. p. 194, p. 302, p. 525.) Hunt ran errands and cared for Appellant's ill mother. During these times, Victim stayed home with Appellant. (R. p. 194, pp. 295-97.) They both noticed Victim had a grayish pallor the week of her death. (R. p. 149, pp. 252-53, p. 325, p. 328, p. 758.)

Hunt's Testimony

Prior to Appellant's trial, Hunt pled guilty to homicide by child abuse under the aiding and abetting provisions and to unlawful neglect or conduct toward a child. (R. p. 350.)

Hunt attempted to explain the bruises around Victim's ankles, describing Appellant grabbing Victim by the ankles and trying to make her do splits. (R. pp. 287-88.) According to Hunt, Appellant pulled one of Victim's teeth, claiming it was loose, but when he showed her the tooth he pulled "the root [was] still connected to it." (R. p. 288.) Hunt testified that the second missing tooth was pulled, but it was loose. (R. pp. 288-89.) Again, Hunt noted the pulled tooth still had root attached to it. (R. p. 289.) Appellant bathed Victim. (R. pp. 290-91.) Where Victim had usually worn clothing around the house, usually shorts and a tank top, when Victim came home after September 16, she would usually be in only panties. On several occasions Hunt returned home to find Victim completely naked. (R. p. 291.) Hunt also described incidents in the bathroom where Victim was naked against the wall while Appellant was on the toilet. (R. pp. 291-92.) Hunt recounted that Appellant shaved Victim's hair. (R. p. 292, pp. 421-22.) According to Hunt, Appellant explained he had done so because Victim had "sores in her

head, and he wanted to see how deep the sores was and the bruises." (R. p. 292.) Hunt said Appellant demonstrated how he would sometimes hit Victim on top of her head with his knuckles. (R. p. 293.)

The week before Victim died, Hunt's father picked Sister up from school and brought her home. Appellant told Hunt's father that Victim was at a friend's house. Once Hunt's father left, he admitted to Hunt that Victim was inside the house, but he did not want Hunt's father to see her because she was so bruised. (R. pp. 329-30.)

Hunt also recalled another incident in the days before Victim's death. Appellant told Hunt Victim climbed a chair and hit her "nusie," the word she used for vagina. He used a burgundy towel to clean up blood in the kitchen. (R. pp. 318-19, pp. 321-22, pp. 401-03.)

Hunt admitted that by October 4-5, Victim had assumed a grayish pallor and had difficulty walking. (R. pp. 326-28.) Hunt described Victim trying to stand up but falling to one side, and Appellant would "jerk her up...where she'd be standing straight back up." (R. p. 326.) October 5 was Appellant's birthday. Hunt and Appellant both testified they went to Pizza Time restaurant to pick up carry-out for lunch. At the restaurant, Hunt got spaghetti for Victim, but she did not see her eat it. (R. p. 327, p. 535.) Later that night Appellant, Hunt, Sister, and Son went to the home of their neighbors, the Malachis, for a cookout for Appellant's birthday. (R. p. 331, p. 536.) They left Victim at home. (R. pp. 331-32.) Even though Appellant, Hunt, Son, and Sister interacted with the Malachis fairly regularly, the Malachis never met Victim. (R. p. 332, pp. 495-96.)

On the morning of October 6, Hunt walked Sister and Son to the bus stop. (R. p. 305.) She left Appellant and Victim at the home and took Appellant's mother for cataract surgery in Laurinburg, North Carolina. (R. p. 305.) After tending to Appellant's mother,

she picked up vitamins for Victim on her way home. (R. p. 306.) She dropped off the vitamins then went to pick Sister and Son from bus stop just after 3:00 pm. (R. p. 306.) Upon returning to the house, she checked on Appellant and Victim in the bedroom, and Victim was laying on the floor. (R. pp. 306-07.) Hunt then did some household chores. (R. p. 307.)

She left the house to take Son to Cub Scouts. (R. p. 307.) She was at the meeting for about two hours. (R. p. 307.) Other parents at the Cub Scout meeting testified and affirmed that Hunt was with Son at the Cub Scout meeting. The sign-in sheet also reflected Hunt and Son were present. Hunt was already present when the meeting began at 5:30 pm, and the meeting was long that night, until around 7:00 pm, because they were planning a camping trip. Hunt stayed particularly late to talk to the group leaders about financial assistance in purchasing a shirt for Son. (R. pp. 486-88, 489-94.)

When Hunt got home, Sister was alone in the front room watching television. When Hunt asked why Sister was alone, Sister stated that Appellant did not want her in the bedroom with him and Victim. Hunt went in the bedroom, and Victim was laying in the bed wearing only panties with a blanket up to her waist. Appellant was in the chair. They argued briefly about why he had not helped with chores. (R. p. 307.) Hunt started to make hot dogs for Sister and Son and told them to shower while she made dinner. She checked on Appellant and Victim again and found Victim laying on cushions on the floor in front of the air conditioner, turned as if watching her favorite cartoon, Spongebob. (R. p. 308.) Assuming everything was alright, Hunt went back to the kitchen and plated the hot dogs for the children. She returned to the bedroom and saw Victim still laying on the floor but now staring up at the ceiling. Hunt turned her head back, and she asked Appellant to have Victim eat. (R. p. 309.)

After Sister and Son ate, Hunt again went to the bedroom. Again, Victim lay with eyes fixed on the ceiling. Appellant denied moving Victim. Victim was now having difficulty breathing. Hunt felt something wasn't right and decided to take Victim to the hospital. She recalled that Appellant touched Victim's stomach and she grunted. Hunt ran next door and asked the neighbor to watch the children so she could take Victim to the hospital. (R. p. 310.) Sister and Son collected some stuffed animals, and Hunt took them to the neighbor's house. Appellant directed Hunt to run some hot water in the bathtub. She insisted on taking Victim to the hospital and wanted him to come with her. (R. p. 311.) He refused to come to the hospital, and told her to get the children back from the neighbor's house. (R. pp. 311-12.)

When Hunt came back with the children, Appellant was on the couch with Victim wrapped in a burgundy towel. Hunt grabbed some clothing to put on Victim. She came back in the room. Victim fell off the loveseat onto her right side. She lay there a few seconds, and Appellant picked her up by the waist. As he laid her on his lap, she urinated. (R. p. 312.) Appellant wiped his leg "and said that she didn't make it to the 25th."[4] (R. pp. 312-13.) He took her into the kitchen to do CPR. (R. p. 313.) Hunt ran next door and begged Denea Malachi to come to the hospital with her. They got in the car, and Appellant put Victim in the back seat. During the trip, Hunt had Denea take over driving so she could perform CPR on the child. (R. p. 313.) Hunt testified she ran into the hospital with Victim, and the staff took Victim to a room.

Hunt was taken to a waiting room. Denea came in with Hunt's purse. A few minutes later, Appellant's father arrived. (R. p. 314.) Appellant's father assisted Hunt in calling her parents. Appellant called, and Hunt informed Appellant that Victim was dead.

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

In response to this news, Appellant specifically asked her if she had talked to anyone from DSS or law enforcement. He told Hunt "that he'll take care of all this, that he'd let them know what had happened." (R. p. 316, p. 335.)

Hunt denied causing any of the injuries. (R. p. 334, pp. 349-50.) Hunt also testified Appellant watched pornography on her computer with Son. (R. p. 349.) She believed Appellant sexually assaulted Victim. (R. p. 349.) Hunt testified that she did not take Victim to the doctor because Appellant would tell her to wait until the bruises healed up as a doctor would see them and then DSS would get involved. (R. p. 356, pp. 412-13.)

Appellant's Statements and Testimony

Appellant conceded several times that if he was guilty of anything it was not getting medical attention for Victim. (R. p. 191, p. 248, p. 262, p. 563, p. 752, p. 797, p. 813, pp. 815-16, p. 864.[5])

When asked about the burn marks on Victim's vagina, Appellant said Hunt told him Victim "just blistered up." (R. p. 188, p. 197, p. 234.) In response to questioning about the marks on Victim's legs, Appellant reported Victim fell in the bathroom once and on another occasion he popped Victim because she was about to touch a wall socket. (R. p. 189, p. 526.) He also remarked Victim had fleas from the rabbit where she slept on the floor, so he shaved her head with Hunt's approval. (R. pp. 189-90, pp. 198-99, p. 529.) However, there was no evidence of flea bites on Victim. (R. p. 190.) He reported Hunt would yell at the girls and make them stand in the corner. (R. p. 191.) Notably, during interviews, Appellant did not refer to Victim by her name but as "that girl." (R. p. 191.)

[5] Ct. Ex. 2 (R. pp. 713-916) is a transcript of a videotaped statement which was played for the jury as State's Exhibits 81, 82, and 83.

Appellant was also asked about caring for the child. He claimed he bathed Victim, but Sister would wash Victim's bottom area. (R. p. 192.) He discussed having issues potty training her. (R. pp. 193-94.) As for Victim's missing teeth, Appellant only said that she had a loose tooth, and he pulled it. (R. pp. 199-200.) He claimed Hunt pulled the second tooth on the morning of October 6. (R. p. 200, p. 528.) This claim was contrary to the autopsy findings that the area around the missing teeth had healed.

Appellant testified that Victim sustained two accidental injuries on October 3. Victim ran into one of his cigarettes and burned her arm. (R. p. 530.) She also slipped and fell in the bathroom. (R. p. 531.)

Appellant also stated he feared DSS would become involved, and he did not want to lose his son Alex. (R. p. 201, p. 263, p. 564, p. 565, p. 827.) Contrary to his asserted fear of DSS, he also defended his failure to notify authorities about Victim's condition, stating, "DSS done been called before and they ain't did nothing. I mean, what's the point." (R. p. 566.)

Appellant, like Hunt, testified that he stayed home with Victim when Hunt took his mother to the doctor's appointment. Appellant claimed Victim watched cartoons and colored that morning. (R. pp. 194-95, p. 537, p. 753, p. 755, p. 764.) He then went to his shop for a short time. When he got home, Son and Sister were home from school. (R. p. 538.) Hunt took Son to a Cub Scout meeting around 5:30 pm.[6] (R. pp. 538-39.) While Son and Hunt were at Cub Scouts, Appellant testified that he, Victim, and Sister watched TV in the living room. Victim went into the other room and laid down, so only Appellant and Sister were in the living room when Hunt got home. (R. pp. 539-40.)

[6] Appellant initially told police that Hunt never left the house again that day, (R. p. 774.)

Appellant testified that after Hunt got home, she told him Victim was having "one of her little episode. Little episode is when she's got her fist clenched up ... [Hunt] come got me and showed [Appellant] [Victim] was having a little episode, and it lasted like three minutes and she went back to normal." (R. pp. 540-41.) Victim was warm, so they put her in front of the air conditioner. Appellant laid down in the same room while Hunt went to make dinner. He heard a grunting noise but wasn't sure if it was Victim or the dog. (R. pp. 541-42.) Hunt came back in the room. Appellant touched Victim's stomach and she made the grunting noise. She felt cold so they ran warm water in the bath. (R. pp. 543-44.) He put her in the bath, stating "it ain't my child. If the parent tell me how to do something, I did it." (R. p. 545.) He then wrapped her in a burgundy towel and sat her on the love seat while Hunt collected clothes for Victim. At that point, Victim made a "squealing noise" and rolled off the love seat and onto the floor. Victim was not breathing, and Appellant carried her to the kitchen table to attempt CPR. (R. p. 546.) He later put Victim in the back seat of the car when Hunt and Denea Malachi left for the hospital. (R. p. 547.)

Computer

Appellant stated the computer belonged to Hunt, and she had limited his access to it. (R. pp. 570-71, p. 766) An analysis of the computer revealed that there were two usernames being used on the laptop, Atelia and Guess. Guess is a default. (R. p. 512.) Between 3:08 pm and 3:56 pm on October 6, 2011, the day Victim died, several searches were made ranging from what to do when a child is unconscious to how to treat "sores on the butt" which look like cigarette burns. (R. pp. 505-08.) At 6:26 pm, while Hunt was with Son at Cub Scouts, a search was made regarding what to do when a child is unconscious. (R. p. 507.) A web site called familydoctor.org was accessed at 6:35 pm,

again while Hunt was with Son at Cub Scouts. (R. p. 510.) There was also an extensive history of pornography on the computer.

Other Evidence

A pair of girls' panties, a hammer, a red towel, and a leather strap were collected from the house during execution of a search warrant on October 10. (R. pp. 81-83.) When officers arrived, a pet rabbit was running loose in the home, and there was rabbit's urine and feces in the house. (R. p. 82.) There were girls' clothes strewn in the living room. (R. pp. 85-86.) There were cigarette butts on the floor. (R. p. 85.) During that search, officers also noted a latch lock on the outside of the girls' bedroom. (R. pp. 83-84, p. 87.) A sheet covered the mirror in the girls' room. (R. p. 84, p. 88.) There was at least one cigarette butt underneath the bed in the girls' room. (R. p. 88.)

Agent Bass also collected a rod from the house which was inscribed with "Tommy Hammer," and DNA swabs were collected and tested. (R. pp. 171-172, pp. 177-78.) Hunt revealed that Appellant used the rod and the leather strap to hit her and the children. (R. pp. 321-24.) DNA testing found a mixture of DNA from at least three people on the rod. Hunt, Appellant, and Victim could not be excluded as contributors (probability of a randomly selected unrelated individual who could have contributed: 1 in 5). (R. p. 482.) Appellant and Victim could not be excluded from one DNA sample found on the belt (probability of an unrelated contributor: 1 in 1700). (R. pp. 483-84.) A second sample from the belt could not exclude Victim (probability of an unrelated contributor: 1 in 410,000). (R. pp. 484-85.)

The burgundy towel which Hunt claimed had been used to clean up Victim's blood and was later wrapped around her in the moments before her death contained

Victim's DNA, with a probability of a randomly selected unrelated person matching the profile 1 in 7.8 quadrillion. (2nd Supp R. p. 1.)

ARGUMENT

I.

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

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

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

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

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

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

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

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

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

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

LaRosa was tendered as an expert in crime scene reconstruction and crime scene analysis.[7] His testimony before the jury really went "back more to [his] crime reconstruction days."[8] (R. p. 475.) LaRosa reviewed evidence of the autopsy report and photos of Victim at the hospital. (R. p. 474.) He noted the cigarette burns to her vagina were "specific and direct." (R. p. 476.) He stated that typically, someone who is burned will move away from the burn, resulting in a "flashing" pattern. (R. p. 476.) Since Victim's burns were specific and direct, she must not have moved when they were inflicted. (R. p. 476.) If a child did not move when burned, it was likely that she was prevented from doing so. (R. p. 476.) LaRosa also testified that he believed that because

[7] LaRosa's qualification as a crime scene analyst is also variously referred to during trial as criminal profiler or criminal behaviorist. LaRosa testified "you can be a crime scene reconstructionist and not be a criminal profiler, or a crime analyst, or crime analytic, but you can't be a profiler without being a reconstructionist." (R. p. 465.)

[8] During *voir dire*, LaRosa did discuss certain profiles of offenders, e.g. the situational child molester with sadistic overtones. (R. p. 436.) LaRosa discussed different types of child molesters. (R. pp. 430-33.) He also stated that the sexual gratification aspect of the offender's behavior may not be immediate physical gratification, rather the offender may even save the memory of the behavior for later physical gratification. (R. pp. 432-33.) This type of testimony was not permitted or elicited before the jury.

the burns were inflicted to Victim's genital area, there was a sexual gratification element to the abuse. (R. p. 477.) Because of the sexual aspect of the crime, the perpetrator was likely a male. (R. p. 477.) LaRosa stated his experience, and the research he reviewed showed that most violent sexual crimes were perpetrated by men, and he had never come across such a case solely perpetrated by a female. (R. p. 477.) He also extrapolated that because the burns were in various stages of healing, they were inflicted over a course of time. This would tend to suggest that the person inflicting the burns had control over Victim for a course of time as opposed to a single violent episode. (R. p. 478.) In sum, LaRosa's testimony was that the Victim's wounds were most likely perpetrated over a period of time by a male who was physically larger than three-year-old Victim.

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

manifested a given psychology. Rather, LaRosa was asked to look at a crime scene and make deductions based on what he saw. The testimony set before the jury in this case was more Sherlock Holmes than Sigmund Freud.

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

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

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

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

"Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Rule 704, SCRE. LaRosa was careful to avoid testifying on the ultimate question of guilt or innocence in this case. He expressly emphasized that he could not say that Appellant was the perpetrator of the abuse in the case. (R. p. 436, p. 456, p. 480.) Nothing in LaRosa's assertion that he believed that law enforcement should focus on a male, larger than a three-year-old, who had access to the child on multiple occasions, usurped the jury's role in determining guilt. The testimony was helpful, however, in assessing how Victim's injuries could have occurred.

Finally, any error in admitting LaRosa's testimony is harmless beyond a reasonable doubt. LaRosa's testimony regarding the burn marks was largely cumulative to the testimony of the forensic pathologist, Dr. Schandl. Dr. Schandl opined that several of the burn marks were round, and those would indicate that Victim was "held, or asleep, or who knows what." (R. p. 106.) Dr. Schandl was even able to find that some of the burns, those to Victim's buttocks, occurred within 24-48 hours of Victim's death. (R. p. 105, p. 108, p. 118.) In that she placed the most damning injuries being inflicted within 48 hours of Victim's death, Dr. Schandl noted several other similar round areas that had healed and scarred which she opined could also have been similar burns which had healed over time. (R. p. 105.) This parallels LaRosa's observation that Victim suffered burn marks over a course of time, not as a result of a single encounter. (R. p. 478.) As such, LaRosa's testimony was largely cumulative to other testimony in the record. State v. Johnson, 298 S.C. 496, 381 S.E.2d 732 (1989) (admission of evidence is harmless where it is merely cumulative).

Moreover, the substantial evidence of guilt in this case, including Appellant's own admission that he should have done something to help "that girl," (he tended not to even use her name when questioned about her) renders the error harmless. In addition to Appellant's admission of neglect, it is unquestioned that Victim suffered countless injuries in the two weeks before her death, all inside the home shared by Appellant and Hunt. Her injuries were so visible that Appellant made sure she stayed inside when Hunt's father visited. Victim suffered cigarette burns throughout her last weeks, and Appellant admitted inflicting at least one of them, though he claimed it happened by accident. He is the only person mentioned smoking cigarettes in the trial transcript. In the last 24-48 hours of Victim's life, she suffered burn injuries to her vagina and buttocks. During that time frame, Appellant was admittedly home with her a great deal of the time. In light of all the evidence presented, it is unimaginable that LaRosa's testimony alone tipped the scale. As Appellant himself argued to the trial court, the "jury can draw their own conclusions from that without expert testimony." (R. p. 450.) LaRosa's testimony, as permitted by the trial court, essentially set forth fairly common sense conclusions from the evidence. Under the circumstances of this case, it is clear that LaRosa's testimony did not change the outcome of the trial. State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (holding whether an error is harmless depends on the circumstances of the case, but it is harmless where it could not reasonably have changed the outcome of the trial).

II. & III.

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

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

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

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

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

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

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

In the instant case, the trial court properly exercised its gatekeeper role to determine that the expert testimony was reliable, finding the testimony would assist the finder of fact and that LaRosa was qualified by his knowledge, skill, experience, and training.[9] The trial court also made a finding that the underlying science is reliable. Although application of Council was unnecessary, the trial court nonetheless applied the factors, noting that the procedures were recognized, that work is peer reviewed, and that the methodology is recognized and consistent with methods used throughout the country among criminal behaviorists, also called profilers. (R. pp. 453-54.) The trial court qualified LaRosa to "give some analysis of the crime scene, which actually is the body of the child."[10] (R. p. 454.) The Court's finding is supported by evidence in the record.

LaRosa has been employed by SLED since 1994. (R. p. 424, pp. 461-62.) He worked from 1994 to 2000 in the Latent Print Crime Scene Unit, the major statewide crime scene response unit for violent crime scenes. (R. p. 462.) He became certified in crime scene reconstruction. (R. p. 425.) In 2000, LaRosa went to the blood hound tracking team for five years. (R. p. 425, p. 462.) He was promoted to team leader on the SWAT team over the containment team. (R. p. 425.) In 2005, he moved to the midlands region where he was a general investigator, a training officer, and a team leader. (R. p. 425, p. 462.)

[9] It is interesting that Appellant objected, in part, to LaRosa's testimony on the basis that it was within the purview of laymen, stating the "jury can draw their own conclusions from that without expert testimony." (R. p. 450.) However, he now also argues that LaRosa's qualifications were not adequate to render such testimony.

[10] LaRosa was not permitted to say that Appellant was the only person with access to the child, and LaRosa was not permitted to discuss his analysis of Hunt's diary entries. (R. p. 456.)

In 2010, LaRosa was accepted as an understudy in the criminal behavioral science unit, a national fellowship program in which applicants become trained as criminal profilers or crime scene analysts. (R. p. 425, p. 462.) The program requires three to five years of training under another qualified analyst. Due to LaRosa's extensive previous experience in crime scene reconstruction, he was required to train for only two years. (R. p. 426.) The understudy program included training in cases of criminal sexual conduct. (R. p. 467.) He trained with various agencies throughout the southeast, including the US Marshal Service and the Naval Criminal Investigative Service (NCIS). (R. pp. 462-63.) He attended courses in topics such as blood spatter, deviant sexual behavior, and child sexual crimes. (R. p. 463.) As part of the program, he was expected to be able to teach and lecture at the level of a crime scene reconstruction expert. (R. pp. 426-27.) He teaches a class on offender behavior in criminal sexual conduct with a minor cases on a quarterly basis with twenty to thirty police officers in South Carolina, and he teaches at the American Academy of Forensic Sciences in Charlotte, North Carolina. (R. pp 447-48, pp. 467-68.) He also completed an eight week fellowship in criminal profiling and crime analysis under the tutelage of two supervisor agents who were qualified criminal profilers at FBI headquarters. He successfully completed the program, receiving certification as a criminal profiler in the FBI's Behavior Analysis Unit. (R. pp. 426-27, p. 463.)

LaRosa also completed a one-month internship with the Department of Mental Health Forensic Behavioral Forensic Services Unit where he worked with a forensic psychiatrist covering a variety of criminal behaviors. (R. pp. 427-28.)

LaRosa has been qualified to testify as an expert in crime scene and crime scene reconstruction approximately thirty or forty times. (R. p. 425, p. 433, p. 464.) He testified in General Sessions court as an expert on crime analysis or criminal profiling in one

murder case approximately six months before Appellant's trial. (R. p. 433, p. 466.) He has also testified in Federal Court "on the dangerousness of an individual, as an expert of threat assessment and recognition of management." (R. pp. 433-34, p. 464.) Appellant's case was the first case in which he was qualified as an expert involving sexual misconduct. (R. p. 448.)

With regard to his role as a criminal behaviorist, LaRosa explained his role as looking at evidence left behind at a crime scene and using that evidence to "look at what type of offender would commit that crime." (R. p. 428.) The traditional role of behaviorists involves assisting law enforcement when they are trying to figure out who committed a crime – answering the question, "what kind of a [person] would have done this?" (R. p. 471.) The profiler then reviews the facts of the case and combines that information with statistical research to come up with "a general idea of who we're looking for." (R. p. 471.) LaRosa stated his analysis is based upon research of "thousands and thousands of violent offenders," databases containing case studies of past behaviors to predict future behaviors. (R. p. 430, pp. 440-41.) He also explained that profilers or analysts are often contacted by law enforcement for assistance in how to question a suspect. (R. p. 426, pp. 471-72.)

While criminal behaviorists are not a psychologists or psychiatrists themselves, they are "good seasoned police officers" trained "in a little bit of psychiatry" and working with psychiatrists to investigate crimes. (R. pp. 438-39, p. 472.) He consults with others in the profession, both other behaviorists and psychiatrists or psychologists. (R. p. 430, pp. 472-73.) LaRosa is one of three qualified criminal profilers or analysts in South Carolina, and he also consults with analysts at the FBI. (R. p. 439.)

Profiling is subject to a peer review system. (R. p. 434, pp. 438-39.) He has other analysts review his conclusions. In this case, after reviewing a basic investigative packet, LaRosa contacted other profilers and a forensic psychiatrist to seek out other cases with similar circumstances. (R. pp. 434-35, pp. 438-39, pp. 472-73.)

LaRosa was contacted in Victim's case before the autopsy results were received. (R. p. 429.) Based on the information provided, LaRosa opined that the perpetrator in Victim's case was likely a male due to the injury to the Victim's vaginal area as the injury would tend to indicate a sexual arousal element. (R. pp. 429-30, pp. 477-78.) LaRosa stated that in his review, 90%-99% of child sexual assaults were perpetrated by men, and there were no cases he could find similar to Victim's where the sole perpetrator was female. (R. pp. 477-78.) He believed the injuries to Victim were most consistent with someone with private access to the Victim over a period of time. He noted this conclusion was based on the fact that the burns were in various stages of healing. (R. pp. 478-79.)

Further looking at the burns, based on a review of prior cases, he noted that children often move when touched with something hot. (R. p. 436, p. 476.) In LaRosa's view, burns perpetrated by other children are often "flashing burns" because the victim moves away from the burning object. However, the burns in Victim's case were "direct and specific" which indicated that Victim was unable to move from the burning. It was therefore likely that someone older and stronger than Victim burned her. (R. p. 437, pp. 475-76.) He noted the common sense inherent in his statements regarding the burns:

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

(R. pp. 476-77.) [Emphasis supplied.] LaRosa stated his analysis in this case was reviewed by others in the field. (R. p. 440.)

LaRosa was clear that he could not determine whether Appellant inflicted the wounds to the child. (R. p. 436, p. 480.) He can only say that "it would've been somebody, a male, who would have had direct influence over this child. Would have the ability to be alone over a period of time, to inflict over a period of time these --- these burns and this abuse to this three year old's vagina." (R. p. 444.) Nothing in this description of the likely offender speaks to state of mind in psychological terms.

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

IV.

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

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

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

The trial court conducted an analysis under Rule 403, SCRE. (R. pp. 454-55.) The trial court found that the testimony would assist the jury in finding how the child's injuries occurred as they could not be self-inflicted. Judge Baxley did not permit LaRosa to testify regarding Hunt's diary entries.[11] Judge Baxley also found it would not be appropriate for LaRosa to testify "that the only male that had access to this child is the Defendant." (R. p. 456.) In sum, Judge Baxley limited LaRosa's testimony before the jury to "his analysis of [Victim's] body and the infliction of the wounds... ." (R. pp. 456-57.) As discussed in Section I, LaRosa's testimony before the jury was more in the vein of crime scene reconstruction than profile development.

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

[11] LaRosa was also provided with Hunt's diary entries from the computer and testified regarding his opinions on them during in camera testimony. (R. pp. 441-43.) Based on the diary entries, it appeared to LaRosa that Hunt was most concerned with herself, noting that of 81 lines of text, she never mentioned Victim until line 79. (R. p. 442.) When asked whether he believed the diary entries showed any indication that Hunt would be the person harming the child, LaRosa said, "she doesn't care enough about anybody but herself to even put [Victim] on the radar, that she wants to harm." (R. p. 442.) LaRosa opined the entries were free-flowing and bore no indicators that Hunt was dangerous. (R. p. 443.) None of this testimony was presented to the jury.

evidence is relevant. It was particularly relevant in light of the defense portrayal of Hunt as "wicked, evil woman" who controlled and manipulated the situation and "let her child die after inflicting God knows what kind of injury on the child." (R. pp. 587-606.)

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

V.

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

1. The issue is not preserved for review.

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

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

(R. p. 39.)[12] The use of the plural "statements" reveals just how general the objection was. "[A] specific objection to the admission of evidence must be made to preserve the issue for appeal." McKissick v. J.F. Cleckley & Co., 325 S.C. 327, 344, 479 S.E.2d 67, 75 (Ct. App. 1996). "The objection should be sufficiently specific to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the trial judge." Id. "The same ground argued on appeal must have been argued to the trial

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

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

However, the court did state:

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

(R. p. 40.) The trial court noted Appellant signed Miranda forms during his first two interviews, and he fully understood his rights at those times. (R. pp. 40-41.) The trial court noted that the third interview was conducted as a "courtesy" to Appellant, a carryover from the second interview where he was unable to completely write his statement. (R. p. 41.) The trial court found that the failure to specifically advise Appellant of the right to counsel or the right to stop and talk to counsel was not coercive in that, by the third interview, he had:

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

(R. p. 42.) The court found all three statements admissible. (R. pp. 42-43.)

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

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

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

Even if preserved for review, the issue would be without merit. Here, Appellant was properly advised of his Miranda rights on two occasions prior to his interview with Lt. Kathy Bass of SLED on October 13. Appellant was first interviewed in the early morning hours of October 7 by two officers, Lt. Larry Turner and Sgt. John Hepburn. He was given Miranda warnings before this interview. (R. p. 15, pp. 17-21, pp. 145-46, p. 649 (Miranda form); State's Exhibits 80 and 103.) Appellant was not arrested following the first interview. (R. p. 26, 157-58.)

On October 10, Appellant was interviewed again. This time the interview was conducted by Lt. Turner and Lt. Bass at the jail. He was again given Miranda warnings. (R. p. 27, p. 28, pp. 29-32, p. 650.) Appellant had difficulty providing a written statement. At the close of the October 10 interview, he expressly agreed to meet with Lt. Bass to give a video-recorded statement as he was not very good at writing. (R. pp. 165-66.)

The recorded statement took place on October 13 at the Bennettsville Police Department. (State's Exhibits 81, 82, and 83.) Agent Bass of SLED reminded Appellant of Miranda warnings verbally. (R. p. 61, pp. 71-72; State's Exhibits 81, 82, and 83.) In her interview with the Appellant, Lieutenant Kathy Bass states:

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

A: On everything.

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

A: I know.

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

A: I know

Q; So you're okay talking with me?

A: I'm fine –fine.

(R. pp. 715-16.)

Though she did not have Appellant initial a form, Lt. Bass' verbal reminder of covered the primary areas required by Miranda. "The precise wording of a Miranda warning is flexible; 'no talismanic incantation is required to satisfy Miranda.'" California v. Prysock, 453 U.S. 355, 359, 101 S.Ct. 2806, 69 L.Ed.2d 696 (1981)." Lt. Bass informed the Appellant that he did "have the right to remain silent." (R. p. 715.) She also explained to him that "anything you say can be held against you." (R. p 715.) The Appellant said he understood. (R. p. 715.) In this case, though a signed Miranda acknowledgement was not obtained a third time, Lt. Bass made every effort to make the Appellant aware of his Miranda rights before the interview began. She reminded him of rights read to him on the prior occasions, and she repeated those rights in language he could understand to ensure he was speaking with her voluntarily. (R. p. 715.) She thus incorporated the full Miranda warnings by reference to the prior acknowledgements. The trial court correctly concluded that the Appellant was properly advised of his rights, that he waived those rights, and that though Lt. Bass failed to mention his right to counsel again, Appellant was fully aware of that right. (R. p. 41.)

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

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

3. Any error in admitting the statement was harmless.

Any error in admitting the October 13 statement was harmless where Appellant testified before the jury in substantially the same way. "The admission of improper evidence is harmless where the evidence is merely cumulative to other evidence." State v. Kirton, 381 S.C. 7, 37, 671 S.E.2d 107, 122 (Ct.App. 2008). The most incriminating

portion of the October 13 statement was Appellant's admission that he should have sought help or done something for Victim. (R. p. 752, p. 797, p. 813, pp. 815-16, p. 864.) Appellant testified at trial, "just like I told Mrs. Bass [in the third interview], I wish --- I should have did something." (R. p. 556.) He later repeated his feeling that he "should have done something," but couched the statement with "If I knew something, I should have done something." (R. p. 564.) Assuming, *arguendo*, that admission of the statement was error, such error was harmless.

CONCLUSION

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

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

August 20, 2015

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IN THE COURT OF APPEALS

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The Honorable J. Michael Baxley, Circuit Court Judge

Appellate Case No. 2013-001409

THE STATE,

Respondent,

v.

ALEXANDER CARMICHAEL HUCKABEE, III,

Appellant.

CERTIFICATE OF COUNSEL

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

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PROOF OF SERVICE

I, Anne Mueller, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to John H. Strom, Esquire, S.C. Commission on Indigent Defense, Division of Appellate Defense, Post Office Box 11589, Columbia, SC 29211.

I further certify that all parties required by Rule to be served have been served. This 20th day of June, 2015.

Anne Mueller

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Marlboro County

J. Michael Baxley, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ALEXANDER CARMICHAEL HUCKABEE, III,

APPELLANT.

APPELLATE CASE NO. 2013-001409

FINAL REPLY BRIEF OF APPELLANT

JOHN H. STROM
Appellate Defender

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Division of Appellate Defense
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ARGUMENTS IN REPLY

I.

The State is attempting a *post hoc* redefinition of LaRosa's supposed expertise in an effort to recast his testimony as equivalent to that of a crime scene re-constructionist. LaRosa was admitted and testified as an expert "criminal profiler".

LaRosa's testimony consisted of conjectural deductions devised by applying the pseudoscientific concepts of "victimology" to information selected by law enforcement in order to create a profile of the "typical offender" who would commit the crime in question. The State argues that "LaRosa's testimony before the jury was limited to facts regarding the crime scene . . . and ***logical inferences*** that he, as an experienced investigator, was able to make." Resp't Br. p. 16. The State further surmises that LaRosa was simply "asked to look at a crime scene and ***make deductions*** based on what he saw." *Id.* p. 20. The State also contends that LaRosa:

> [E]xpressly emphasized that he could not say that Appellant was the perpetrator of the abuse in the case. ***Nothing in LaRosa's assertion that he believed that law enforcement should focus on a male, larger than a three year old, who had access to the child on multiple occasions,*** usurped the jury's role in determining guilt. The testimony was helpful, however, in assessing how the Victim's injuries could have occurred.

Id. at p. 21 (*emphasis added*).

What the State euphemistically describes as "logical inferences" and "deductions" is an "offender profile". Our Supreme Court has defined "criminal profiling" as, "a technique where a combination of forensics, behavior, victimology, crime scene assessment, crime scene reconstruction are put together to make an assessment of a violent crime to determine . . . possible characteristics and traits of the offender." *State v. Tapp*, 398 S.C. 376, 384 728 S.E.2d 468, 472 (2012). Left unsaid by the State in the above-quoted excerpt is that LaRosa's testimony went

beyond the mechanics of how the injuries occurred and speculated, under the guise of court-sanctioned expertise, on what kind of person would inflict those injuries. R. 455, ll. 8-21 .

Nor was LaRosa's testimony "largely cumulative" to the testimony of the forensic pathologist. Resp't. Br. p. 21. A forensic pathologist may render an opinion concerning the scientific bases of a victim's injuries or death in a criminal trial." *State v. Commander*, 396 S.C. 254, 265, 721 S.E.2d 413, 419 (2011). A properly qualified medical examiner may "opine that the victim's death was a homicide ***so long as the testimony does not speak to the defendant's 'state of mind at the time of the killing,'*** . . . such testimony "would cross the line between proper expert testimony and testimony in the form of a legal conclusion." *Id.* at 269, 721 S.E.2d at 421 (2011) (*citing State v. Young*, 662 A.2d. 904, 907 (Me. 1995)(*emphasis added*). Pathologists are prohibited from giving "expert testimony addressing the state of mind or guilt of the accused" because such a determination is exclusively the domain of the jury. *Id.* at 268, 721 S.E.2d at 420-421.

LaRosa's testimony before the jury is also readily distinguishable from that of an expert in crime scene reconstruction. An expert in crime scene reconstruction is qualified to give opinion testimony as to how a crime physically happened based on the evidence processed at the crime scene. *State v. Baccus*, 367 S.C. 41, 47, 625 S.E.2d 216, 219 (2006) (crime scene reconstruction testified she found the victim in the rear bedroom where a window had been broken, observed bloody footwear impressions from the bedroom to the side door of the residence and concluded that during the process of entering the window the suspect was cut); *Cf: State v. Ellis*, 345 S.C. 175, 547 S.E.2d 490 (2001) (police officer qualified in crime scene processing exceeded scope of expertise when he testified about his conclusion on how the crime occurred).

LaRosa, as a "criminal profiler", explicitly testified to the jury the on mental state of the type of person who would commit this crime:

> If this case came to us as a ***traditional profile*** and we had this victim on the side, say on the side of the road, we didn't know who she belonged to or what the history was. ***I would be telling the local authorities that you would be looking for an adult male, approximately the age of twenty five to forty . . . that this individual would have direct access over this child where they were able to have complete control over a period of time.*** . . . This is a repeated assault upon this child over a period of time where we're looking at burns that are in the healing process. It is directed specifically at the genital area of this child. ***And it gets into all kinds of offender behavior*** that is not pleasant to talk about or get into. But the categories that we would look at would be that this is a ***preferential or a situational,*** and then we would get into a subcategories and ***paint a picture for the authorities of what kind of guy we would be looking for.***[1]

R. 478, ll. 9 – R. 479, ll. 9 (*emphasis added*). The State's attempts to reclassify LaRosa as an expert in crime scene reconstruction or to portray his testimony as simply cumulative of testimony by the forensic pathologist are unavailing.

LaRosa's testimony is beyond a doubt criminal profile testimony. As will be explained in greater detail below this kind of "expert" testimony has been ruled inadmissible in the vast majority of other jurisdictions that have addressed it. Accordingly, this Court should now take the opportunity to hold such junk science testimony inadmissible.

[1] Curiously, the State avers that LaRosa did not testify to the jury about the different types of child molesters or about delayed sexual gratification. Resp't. Br. 18, n. 8. A simple review of the record reveals that the State elicited testimony from LaRosa about the characteristics of the typical violent child molester, "including both of a preferential child sex abuser and also a situational [abuser], ***which this case is a situational abuser.*** But yes, from ***sex [sadistic] qualities like this*** all the way to gentle family affair." R. 471, ll. 2 – R. 472, ll. 7 (*emphasis added*).

II.

While not identifying Appellant by name, the obvious implication from LaRosa's testimony was that Appellant was guilty because he fit LaRosa's "offender profile"; such testimony should be inadmissible as it usurps the jury's role, is offered only to advance "expert" opinion concerning the ultimate question of guilt or innocence, and amounts to impermissible, speculative propensity evidence.

The State posits that all twenty-one cases cited to in Appellant's brief as holding criminal profile testimony inadmissible are distinguishable from the present case. Resp't. Br. p. 17. In support of this sweeping statement, the State highlights two cases: *State v. Clements*, 770 P.2d. 447 (1989), and *People v. Robbie*, 92 Cal, App. 4th 1075 (2001). However, the threshold question answered by the cases cited in Appellant's brief and the question before this Court in the present case is the same, very simple evidentiary question: what is the evidence being offered to prove?

The only possible reason for LaRosa's testimony was to implant in the minds of the jurors a single thought: Appellant matches the State's profile of the kind of person who would commit the crime in question, thus Appellant is a pedophile and must be guilty. *Robbie*, at 1084 (a profile is a collection of conduct and characteristics commonly displayed by those that commit a certain crime).

This is impermissible in our adversarial system of justice, where "***[a] necessary corollary to the presumption of innocence is that a defendant must be tried for what he did, not for who he is.***" *State v. Nelson*, 331 S.C. 1, 15, 501 S.E.2d 716, 723 (1998) (*citing State v. Melcher*, 678 A.2d 146 ,151 (N.H. 1996) ("[u]nlike the era of the Star Chamber, when defendants could be found guilty merely because their character was suspect. . . [w]e presume a person innocent until the State proves guilt beyond a reasonable doubt")) (*emphasis added*).

In *Robbie* the State put forward an expert who answered a series of "hypothetical questions assuming certain behavior that had been attributed to the defendant and was allowed to opine that

[such behavior] was the most prevalent kind of sex offender conduct." *Id.* The issue in *Robbie* was whether or not the sexual encounter was consensual and the State sought to use the profile testimony to show that defendant's non-violent behavior was consistent with the behavior of a "certain kind of rapist." *Id.* at 1085. In holding such testimony inadmissible, the *Robbie* court noted that the expert was "never directly asked to opine on whether defendant was a sex offender," but "the jury was invited to conclude that if defendant engaged in the conduct described, he was indeed a sex offender." *Id.* at 1086.

In Appellant's case the "criminal profile" consists of the characteristics of a hypothetical person of interest had Minor been "found on the side of the road." R. 478, ll. 9-12. Appellant's characteristics – male, between the ages of 22-44, with access to the child, mirror the characteristics of LaRosa's profile – fit that of the hypothetical profile. In both cases the "jury is improperly invited to conclude that, because the defendant manifested some characteristics [of the profile], he committed the crime." *Robbie*, at 1085.

In *Clements*, the prosecution called an expert in the field of child abuse to testify on the "treatability and psychology" of pedophiles, specifically fixated sexual offenders. 770 P.2d. 447, 451-453. As in the present case and *Robbie*, the *Clements'* expert did not meet or interview the accused and did not explicitly testify that the accused was a fixated pedophile. *Id.*

Like in Appellant's case, the prosecutor's closing argument in *Clements* connected the expert's testimony on the characteristics of the typical fixated sexual offender to Appellant. *Id.*; *see* R. 624, ll. 3 – R. 625, ll. 16. The Kansas Supreme Court held "the only inference which the jury

could have drawn from [the closing] argument and [the expert's testimony] was that defendant fit the profile of the typical fixated child molester and was therefore guilty."[2] *Id.* at 454.

"Criminal profile" testimony is an insidious form of propensity evidence. Normally, character evidence is not admissible "for purposes of proving that the accused possesses a criminal character or has a propensity to commit the crime with which he is charged." *State v. Peake,* 302 S.C. 378, 380, 396 S.E.2d 362, 363 (1990). In this respect, "criminal profile" testimony is even more offensive than propensity evidence as all limitations on relevancy are substituted for any fact or circumstance that the "victimologist" deems relevant. *See Nelson,* 331 S.C. at 7, 501 S.E.2d at 719-720 (children's books and toys owned by defendant purporting to show 'context' of the crime were ***inadmissible when the assumption is made that defendant was acting in conformity with the character traits of a pedophile***) (*emphasis added*).

The question a jury has to answer in a criminal trial is: did the state prove the accused committed the crime charged? Testimony on the theoretical profile or on what type of person is statistically likely to have committed a crime is irrelevant to proving whether the accused committed the crime in question. *Clements,* 770 P.2d. at 454.

Due process protections and sound limitations on the admission of evidence are imperative in cases like Appellant's where there is often a mytilenian demand from society to punish those accused of committing crimes against children. *See Tapp* at 391, 728 S.E.2d at 476

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[2] The *Clements* opinion approvingly cites: *Hall v. State,* 692 S.W.2d 769 (Ark. Ct. App. 1985) (expert testimony that in child abuse cases 75-80% of abusers are known to the child, are a relative or friend, or have authority over the child was impermissible because it improperly focused the jury's attention upon whether the evidence against defendant matched evidence in the usual case involving sexual abuse of a young child. Such testimony is used solely to prove that the circumstances and details found in the present case matched the circumstances and details usually found in child abuse cases).

(Pleicones, J., dissenting) (criminal profiler's testimony not harmless error as it identified defendant as likely perpetrator in light of admission that he had been in victim's apartment, as well as testimony from witnesses that the victim was familiar with respondent).

LaRosa's testimony did not help the jury objectively evaluate evidence, but instead demanded the jury conclude the defendant was guilty because he fit the profile LaRosa created only after Appellant was arrested. Accordingly this Court should take the opportunity to definitively rule that expert "criminal profile" or "offender behavior" testimony is *per se* inadmissible in South Carolina courts.

III.

The State argues, as a pseudo-additional sustaining ground, that LaRosa's testimony was admissible non-scientific expert testimony; whether categorized as scientific or non-scientific expert testimony, the State failed to establish that "criminal profiling" is based on sufficiently reliable methodology.

Reliability is a central feature of Rule 702 admissibility. *State v. Jones*, 343 S.C. 562, 572, 541 S.E.2d 813, 818 (2001) (error for trial court's to admit "unreliable" expert evidence). While *Jones* provides the factors trial courts must use to determine the reliability of scientific expert testimony, the foundational requirement of reliability applies with equal force to non-scientific expert testimony:

> [T]he trial courts of this state have a gatekeeping role with respect to ***all evidence*** sought to be admitted under Rule 702, ***whether the evidence is scientific or nonscientific***. In the discharge of its gatekeeping role, a trial court must assess the threshold foundational requirements of qualifications and reliability and further find that the proposed evidence will assist the trier of fact. ***The familiar evidentiary mantra that a challenge to evidence goes to "weight, not admissibility" may be invoked only after the trial court has vetted the matters of qualifications and reliability and admitted the evidence.***

State v. White, 382 S.C. 265, 274, 676 S.E.2d 684, 89 (2009)[3]; *see also State v. Kromah*, 401 S.C. 340, 357, 737 S.E.2d 490, 499 (2013) ("it is "an inescapable fact that jurors can have a tendency to attach more significance to the testimony of experts").

The State argues for the first time that "criminal profiling" testimony is non-scientific expert testimony, therefore the *Jones* factors do not apply and all the State is required to prove is that LaRosa's testimony was reliable. Resp't. Br. p. 23 – p. 27. This contention seems odd given that, at trial and on appeal the State cited to LaRosa's claim that his work was peer reviewed and that he followed generally accepted methods of profiling. *Id.*; R. 439, ll. 11 – R. 440, ll. 7. Both of which are factors in the *Jones* analysis. 273 S.C. at 731-732, 259 S.E.2d at 124-125. From a practical standpoint, the State is attempting to define down the reliability requirements for non-scientific expert testimony.

Whether categorized as scientific or non-scientific expert testimony, the State failed to establish that the methodology of "criminal profiling" is sufficiently reliable to be admissible expert testimony. First, LaRosa lacked trial experience demonstrating the reliability of his methods. Second, his testimony was deeply compromised by the fact that he already knew Appellant was incarcerated for the crime in question when he generated his "offender profile". R. 429, ll. 16-21.

Before Appellant's case, LaRosa had never testified at trial as an expert "criminal profiler" in a sexual abuse case. R. 447, ll. 6-13. In fact, he had previously only testified once on "offender behavior". R. 434, ll. 7-9. Thus, the State could not establish LaRosa's reliability based on his past

[3] Dog tracking evidence was sufficiently reliable when: (1) the evidence shows the dog handler satisfies the qualifications of an expert under Rule 702; (2) the evidence shows the dog is of a breed characterized by an acute power of scent; (3) the dog has been trained to follow a trail by scent; (4) ***by experience the dog is found to be reliable***; (5) the dog was placed on the trail where the suspect was known to have been within a reasonable time; and (6) the trail was ***not otherwise contaminated***. *White*, 382 S.C. at 265, 676 S.E.2d at 687 (*emphasis added*).

experience. Nor did the State cite to cases in other jurisdictions supporting the reliability and admissibility of criminal profilers more generally. *White*, 382 S.C. at 272, 676 S.E.2d at 687 (relying in part on out-of-state authority approving the admissibility of dog tracking evidence).

Curiously, LaRosa summarily claimed that his method of "criminal profiling" could achieve a zero rate of error by crafting an intentionally vague profile. R. 444, ll. 7 – R. 445, ll. 10; R. 454, ll. 4-18. The incongruity in this assertion of infallibility should have raised serious doubts about the reliability of his methodology. Claiming to achieve an extremely high degree of accuracy by deliberately decreasing precision is disingenuous coming from a purported expert.

LaRosa attempted to augment the appearance of reliability by claiming that his work was peer reviewed. R. 472, ll. 23-25. He never identified who reviewed his work, preferring simply to aver that others had approved of his profile. R. 439, ll. 2-7; *see State v. Chavis*, 412 S.C. 101, 107-108, 771 S.E.2d. 336, 339 (2015) (training in RATAC protocol and peer review of expert's use of RATAC protocol was insufficient to prove accuracy and reliability of forensic interviewer's testimony). LaRosa claimed his "offender profile" was based on an FBI criminal profile database and on proven profiling methods. R. 435, ll. 13-21. He did not name the database or cite to any specific method. *Id.* LaRosa also never referenced any psychological or psychiatric treatises he relied on or offer any other documentation supporting his claim. R. 439, ll. 11 – R. 440, ll. 7.

LaRosa only became involved in the investigation after Appellant was arrested. R. 478, ll. 9-18. Nonetheless, he purported to craft his "offender profile" – and presented it to the jurors – under the erroneous premise that it was developed before law enforcement had a suspect in custody. *Id.* This would be as if the K-9 officer in *White* had already known the location of the defendant and simply walked the dog from the convenience store to the defendant's location. 382 S.C. at 268-269, 676 S.E.2d at 685-686; *Cf: State v. Brown*, 103 S.C. 437, 88 S.E. 21, 23 (1916)

(dog tracking evidence inadmissible where the dog tracking took place beyond the "period of efficiency" and the handlers interfered with the dogs' tracking).

The State presented LaRosa with a test where the correct answer was already known and where any piece of evidence or even the absence of evidence could be rationalized to the jury as an important factor contributing to the "offender profile". For example, the absence of Appellant's semen or any DNA on Minor was not indicative of the absence of sexual abuse. Instead, LaRosa imagined that it indicated the culprit likely reimagined the abuse for sexual gratification at a later time. R. 431, ll. 17 – R. 433, ll. 8.

As LaRosa's testimony makes clear that there are simply too many variables in technique and too few recognized standards to determine the reliability of criminal profiling. R. 428, ll. 12 – R. 438, ll. 9. There is no criterion for evaluating the weight and relevance of certain evidence; no floor for how specific a profile must be before it can be declared a "success"; and no defined method of crafting a profile that is capable of replication by others to insure accuracy. R. 554, ll. 14 – R. 555, ll. 8; *Cf. Chavis*, 412 S.C. at 107-108, 771 S.E.2d at 339-340 (procedural consistency does not ensure reliability without evidence demonstrating that expert is able to draw reliable results from the consistently applied procedures).

Accordingly, even if this Court determines that the State has presented an additional sustaining ground[4], the trial court still committed reversible error in holding that criminal profiling

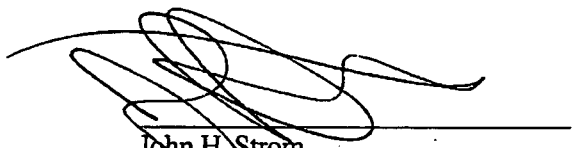
[4] LaRosa's vague, self-serving testimony does not provide a sufficient basis in the evidence to constitute an additional sustaining ground. The issue on appeal is whether the trial court exercised sound discretion in admitting the evidence on the predicate submitted to it. The State should be permitted not speculate on appeal with a novel theory of admissibility that was never advanced to the trial court. *See I'On, L.L.C. v. Town of Mt. Pleasant,* 338 S.C. 406, 421, 526 S.E.2d 716, 724 (2000) (it is "unfair to resolve a case on a ground never raised by respondent prior to appeal. . . respondent may raise additional sustaining ground not presented to the lower court, but the appellate court is likely to ignore it").

was a proper field for expert testimony as the State failed to establish that the methodology of "criminal profiling" was sufficiently reliable pursuant to Rule 702, SCRE.

CONCLUSION

By reason of the foregoing additional arguments, Appellant's conviction should be reversed and this case remanded to the Marlboro County Court of General Sessions for a new trial.

Respectfully submitted,



John H. Strom
Appellate Defender

ATTORNEY FOR APPELLANT.

This 13th day of August, 2015.

CERTIFICATE OF COUNSEL FOR APPELLANT

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

August 13th, 2015

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Marlboro County

J. Michael Baxley, Circuit Court Judge

THE STATE,

RESPONDENT,

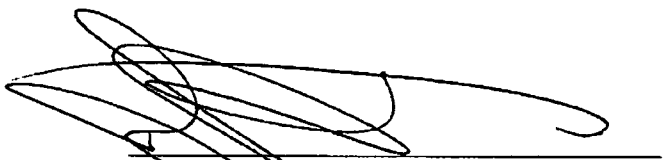
V.

ALEXANDER CARMICHAEL HUCKABEE, III,

APPELLANT.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Reply Brief of Appellant in the above referenced case has been served upon Susannah Cole, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 13th day of August, 2015.



John H. Strom
Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 13th day of August, 2015.


(L.S.)

Notary Public for South Carolina
My Commission Expires: May 12, 2025.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Alexander Carmichael Huckabee, III, Appellant.

Appellate Case No. 2013-001409

Appeal From Marlboro County
J. Michael Baxley, Circuit Court Judge

Opinion No. 5473
Heard October 12, 2016 – Filed March 15, 2017

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Appellate Defender John Harrison Strom, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Assistant Attorney General Mary Williams Leddon, and Assistant Attorney General William Frederick Schumacher, IV, all of Columbia; and Solicitor William Benjamin Rogers, Jr., of Bennettsville, for Respondent.

GEATHERS, J.: Appellant Alexander Huckabee, III seeks review of his convictions for homicide by child abuse (HCA), inflicting great bodily injury upon a child, unlawful conduct toward a child, and first-degree criminal sexual conduct (CSC) with a minor. Appellant assigns error to the trial court's admission of the testimony of a witness proffered as an expert in criminal behavioral analysis, arguing

the witness's criminal profiling testimony (1) was excludable under Rule 403, SCRE, (2) was based on an unreliable methodology, (3) was given by an unqualified witness, and (4) usurped the jury's role as sole fact finder. Appellant also challenges the admission of his third statement to police because (1) law enforcement did not "re-*Mirandize*"[1] him after a three-day lapse following his previous custodial interrogation and (2) the interrogation was given under additional coercive conditions. We affirm in part, reverse in part, and remand.

FACTS/PROCEDURAL HISTORY

Atelia Hunt was living with Appellant in Bennettsville on October 6, 2011, when Hunt took her three-year-old daughter (Victim) to the local hospital's emergency room at approximately 9:45 p.m., complaining that Victim was not breathing. Linda Hooper, one of the nurses on duty, called a "code team" to attempt to revive Victim, but tragically, the attempt was unsuccessful. Hooper noticed Victim had several bruises and burn marks all over her body and her head had been shaved. Dr. Cynthia Schandl performed Victim's autopsy and reported the cause of death as a "massive" blood infection that started as a urinary tract infection, traveled to Victim's bladder and kidneys, and ultimately entered into her blood.

Sergeant John Hepburn and Lieutenant Larry Turner of the Bennettsville Police Department conducted videotaped interviews of several witnesses, including Hunt and Appellant. Appellant's interview lasted approximately thirty to forty minutes, beginning on October 7, 2011, at 12:42 a.m. At that time, Appellant was not a suspect in Victim's death or injuries. Sergeant Hepburn, nonetheless, provided Appellant his *Miranda* rights in writing prior to questioning him, and Appellant signed the waiver of rights near the bottom of the form. Hunt and Appellant were later arrested in connection with Victim's death and injuries.

Lieutenant Turner also assisted Lieutenant Kathy Bass, an agent with the South Carolina Law Enforcement Division (SLED), in conducting a second interview of Appellant at the Bennettsville Detention Center on October 10, 2011, at approximately 10:45 a.m. Lieutenant Bass went over a *Miranda* form with Appellant, reading him his rights, and Appellant signed the waiver of rights near the bottom of the form. This interview, which was not recorded, lasted approximately one and one-half hours. Near the conclusion of the interview, Lieutenant Bass asked Appellant to submit a voluntary handwritten statement. Appellant began writing but stopped after two or three sentences. Lieutenant Bass then asked Appellant if he

[1] *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

would be willing to meet with her at a later date at the Bennettsville Police Department so that his statement could be videotaped in lieu of being handwritten. Appellant agreed and met with Lieutenant Bass again on October 13, 2011.

At the beginning of the October 13 interview, Lieutenant Bass reminded Appellant that she had given him written *Miranda* warnings at their previous meeting. She also gave verbal *Miranda* warnings but skipped over the right to counsel. According to the prosecutor, this third interview lasted approximately four hours.[2]

Appellant was indicted for HCA,[3] inflicting great bodily injury upon a child, unlawful conduct toward a child, and first-degree CSC with a minor. Prior to Appellant's trial, Hunt pled guilty to unlawful conduct toward a child and to HCA under the aiding and abetting provision of the HCA statute.

At Appellant's trial, Dr. Schandl testified that when she examined Victim, she discovered areas of Victim's brain in which blood clots had cut off the blood supply, ultimately causing brain death. Dr. Schandl explained that this process began approximately one week prior to Victim's death and would have caused Victim to feel fatigued. Victim also would have been difficult to arouse, she might have had a suppressed appetite, and she might not have walked as comfortably as she normally would have. Dr. Schandl stated it was highly unlikely that Victim would not have had those symptoms during her last week. Dr. Schandl also stated Victim might have experienced seizures and would have eventually fallen into a coma.

Dr. Schandl then described the symptoms Victim might have exhibited at the beginning of her urinary tract infection: burning upon urination, urinating more often, leakage, and blood in the urine. As the infection spread to Victim's kidneys, she might have experienced back pain, and as the infection went into Victim's blood, she would have experienced fever, chills, and sweating. Dr. Schandl stated that based on the progression of symptoms, it would have become obvious that Victim was very sick.

Dr. Schandl also found a hemorrhage approximately one centimeter inside Victim's vagina, which made her suspicious of a sexual encounter. She noticed

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[2] In his brief, Appellant estimates the third interview lasted "nearly three hours."

[3] Appellant was indicted under the principal provision of the HCA statute, section 16-3-85(A)(1) of the South Carolina Code (2015), rather than the aiding and abetting provision of the statute, section 16-3-85(A)(2).

cigarette burns and bruises on Victim as well. The burns were in varying stages of healing, and some of them were "more round" than others, indicating Victim was still when she experienced those burns. Dr. Schandl further testified Victim was missing two front teeth. She found this to be strange because Victim was three years old and children "don't start losing their teeth until they are six or seven."

The trial court admitted into evidence Appellant's third statement, in which he admitted that, on one occasion, he "popped" Victim for "messing with [a] wall socket" and the impact left a bruise. He also admitted he should have sought help for Victim and should have insisted that Hunt take Victim to the hospital earlier than she did. However, Appellant consistently denied inflicting the cigarette burns on Victim and instead implicated Hunt. He stated he asked Hunt about the burns and she told him they were blisters. He also stated Hunt performed an internet search on how to heal burns. When asked about the hemorrhage inside Victim's vagina, Appellant stated he did not know what caused the hemorrhage. Despite the lengthy questioning by Lieutenant Bass, Appellant remained strong-willed in his responses.

Hunt testified Victim's bruising was caused by Appellant grabbing Victim by her ankles, as she was standing in front of him, and trying to separate her legs to "make her do a split." She asserted Appellant explained Victim's bruises by stating he and Victim were "playing too hard" and "she ran up against the table or she had [fallen]." Hunt also stated whenever she would try to take Victim to a doctor during the last week of her life, Appellant would tell her to wait until Victim's bruises healed so they could avoid being reported to the Department of Social Services (DSS).

According to Hunt, when she noticed blood on a burgundy towel, Appellant explained it as an accident in which Victim had been climbing on a chair and hit her crotch on it. Hunt also claimed she asked Appellant about burn marks on Victim and Appellant told her to search the Internet to determine what to use on burns to heal them. Hunt further testified she lied to police during her interrogation because Appellant told her "to be quiet and that he'll take care of everything, and that he'll let them know what had happened."

When Appellant testified, he characterized Hunt as dishonest and controlling. He stated Hunt lied to him about her financial circumstances when they first met.[4] He admitted he should have done something to help Victim. However, he later stated he did not know Victim was as sick as she was. He also stated he was afraid DSS

[4] Hunt admitted that when she first met Appellant, she lied to him about owning her parents' residence.

would take his seven-year-old son away from him if he sought medical help for Victim. However, he denied ever touching the inside of Victim's vagina.

SLED agent Paul LaRosa gave expert testimony concerning the characteristics of individuals who sexually abuse children. He focused specifically on the infliction of cigarette burns near Victim's vagina and on her buttocks, characterizing this behavior as sexual. The State proffered Agent LaRosa as an expert in "Crime Analysis and Crime Scene Reconstruction." The State clarified that the area of Crime Analysis included profiling: "[J]ust to make sure the record is clear[, w]hen I say Crime Analysis, that would be slash Profiler."

The trial court qualified Agent LaRosa and admitted his testimony "in the area of Criminal Behavioral Analysis and Crime Scene Reconstruction." Agent LaRosa described his work as a criminal profiler at SLED in the following manner:

> The bulk of the work that we do when it comes to violent crimes or cases like this, where we get the agency who comes to us and says, we have had a crime, and the crime is [sic]. We know who the potential suspects are. And we need some help because of the nature of the crime, the violence of the crime, and the bazaar [sic] behavior in the crime. We need help. We need help from [the] interview stand point [sic]. Evidence collection. How to prosecute this case. What to charge them with.[5]

Agent LaRosa stated a person who inflicts well-defined cigarette burns on a three-year-old child would have to be someone who had complete control over the child over a long period of time. Notably, this specific testimony was based on Agent LaRosa's experience as a crime scene reconstructionist. He then gave his criminal profiling testimony, stating that the overwhelming majority of sexual offenders are male. His profile of an individual who would inflict cigarette burns near the victim's vagina was simply an adult male, approximately twenty-five to forty years of age. As of October 13, 2011, one week after Victim's death, Appellant was twenty-nine years of age.

The jury returned guilty verdicts against Appellant on the charged offenses. He was sentenced to life imprisonment for HCA and concurrent terms of (1) life

[5] Appellant and Hunt were known suspects when Agent LaRosa was engaged to work on the present case.

imprisonment for first-degree CSC with a minor, (2) twenty years for inflicting great bodily injury upon a child, and (3) ten years for unlawful conduct toward a child. This appeal followed.

LAW/ANALYSIS

Rule 403, SCRE

Appellant argues Agent LaRosa's criminal profiling testimony was excludable under Rule 403, SCRE, because the testimony suggested Appellant's guilt on an improper basis, and therefore, the danger of unfair prejudice outweighed any possible probative value. We agree.

"'Relevant evidence' means 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. Rule 403 states, in pertinent part, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." "Unfair prejudice means an undue tendency to suggest a decision on an improper basis." *State v. Lyles*, 379 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct. App. 2008) (quoting *State v. Gilchrist*, 329 S.C. 621, 627, 496 S.E.2d 424, 427 (Ct. App. 1998)). "When juxtaposing the prejudicial effect against the probative value, the determination must be based on the entire record and will turn on the facts of each case." *Id.* "A trial [court's] decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances. We review a trial court's decision regarding Rule 403 pursuant to the abuse of discretion standard and are obligated to give great deference to the trial court's judgment." *State v. Collins*, 409 S.C. 524, 534, 763 S.E.2d 22, 28 (2014) (citation omitted) (quoting *State v. Adams*, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003)).

We conclude the nature of the challenged testimony in the present case presents exceptional circumstances. Criminal profiling testimony is not probative of an individual defendant's guilt in a particular case. *See Commonwealth v. Day*, 569 N.E.2d 397, 399 (Mass. 1991) (holding that evidence of a "child battering profile" did not meet the test for relevance because the mere fact that a defendant fit the profile did not establish that a particular defendant physically abused the victim); *State v. Clements*, 770 P.2d 447, 454 (Kan. 1989) (examining and adopting case law from Arkansas, Washington, and Vermont and stating the thrust of these opinions "is that (1) evidence [that] only describes the characteristics of the typical offender

has *no relevance* to whether the defendant committed the crime in question; and (2) the only inference [that] can be drawn from such evidence, namely that a defendant who matches the profile must be guilty, is an impermissible one" (emphasis added)); *see also United States v. Jones*, 913 F.2d 174, 177 (4th Cir. 1990) (holding the trial court abused its discretion in admitting expert testimony of drug profiles as substantive evidence of the defendant's guilt); *id.* ("This is not a case in which evidence of the drug profile was used as purely background material to explain why the defendant was stopped . . . . Rather, it is a case in which the government attempted to establish the defendant's guilt by showing that he has the same characteristics as a drug courier. The use of the drug courier profile in this manner is clearly impermissible." (citations omitted)); *id.* ("[T]he use of expert testimony as substantive evidence showing that the defendant 'fits the profiles and, therefore, must have intended to distribute the cocaine in his possession' is error." (quoting *United States v. Quigley*, 890 F.2d 1019, 1023–24 (8th Cir. 1989))).

In *Commonwealth v. Day*, the Supreme Judicial Court of Massachusetts reversed the defendant's manslaughter conviction due to the superior court's admission of expert testimony regarding the profile of individuals who physically abuse children. 569 N.E.2d at 397. The testimony included the expert's opinion that a risk factor in child abuse cases was a repeated pattern of partners of single mothers who sometimes offend against children while the mothers are at work. *Id.* at 398–99. The court explained that the testimony "improperly suggested to the jury that the defendant physically abused the [victim] simply because he was the mother's partner[] and because he was left with the responsibility of caring for the child on the night [that] she died." *Id.* at 400. The court found the expert's forbearance from stating the defendant fit the profile was insignificant because "a reasonable jury" could have interpreted the testimony as a suggestion that the defendant "fit the 'child battering profile,'" and "was responsible for the child's fatal injuries." *Id.*

While criminal profiling may have a legitimate function in law enforcement investigations, such information constitutes propensity evidence and, therefore, has no place in a trial to determine the guilt of a specific individual. In other words, this type of testimony unduly tends "to suggest a decision on an improper basis." *Lyles*, 379 S.C. at 338, 665 S.E.2d at 206 (quoting *Gilchrist*, 329 S.C. at 627, 496 S.E.2d at 427); *cf.* Rule 404(a), SCRE ("Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion . . . ."); *State v. Nelson*, 331 S.C. 1, 4–5, 7, 501 S.E.2d 716, 717–19 (1998) (holding that the admission of children's toys, videos, and photographs depicting young girls, all seized from the defendant's bedroom, invited the jury to infer the defendant was acting in conformity with being a pedophile when

he allegedly committed the crimes with which he was charged and stating, "Because this is an improper basis upon which to determine guilt, the evidence should not have been admitted"); *State v. Peake*, 302 S.C. 378, 380, 396 S.E.2d 362, 363 (1990) ("Evidence of prior criminal acts [that] are independent and unconnected to the crime for which an accused is on trial is inadmissible *for purposes of proving that the accused* possesses a criminal character or *has a propensity to commit the crime with which he is charged.*" (emphases added)).

One neighboring jurisdiction has also condemned criminal profiling testimony as propensity evidence. In *Sanders v. State*, 303 S.E.2d 13, 18 (Ga. 1983), the Supreme Court of Georgia held,

> [U]nless a defendant has placed her character in issue or has raised some defense [that] the battering parent syndrome is relevant to rebut, the state may not introduce evidence of the syndrome, nor may the state introduce character evidence showing a defendant's personality traits and personal history as its foundation for demonstrating the defendant has the characteristics of a typical battering parent.

The court explained that, in the case before it, the expert's construction of a profile of the typical abusive parent, coupled with previous testimony showing the appellant possessed many characteristics within the profile, "could lead a reasonable juror to no other inference than . . . this parent . . . had in fact murdered her baby." *Id.* "It matters little that, as the state points out, [the expert] never expressly drew the conclusion that [the] appellant fit his profile of battering parents . . . ." *Id.* The court concluded the trial court erred in admitting the portion of the expert's testimony constructing a profile of the typical abusive parent. *Id.* While the court ultimately concluded the error was harmless in light of the overwhelming evidence against the appellant,[6] the present case is distinguishable as to the harmless error analysis. *See infra.*

We note our own supreme court indirectly addressed profiling testimony as potential propensity evidence in *Underwood v. State*, 309 S.C. 560, 563–64, 425 S.E.2d 20, 22–23 (1992).[7] In *Underwood*, the State's expert offered her "profile"

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[6] *Id.*

[7] Also, in *State v. Tapp*, the court held the trial court erred in admitting criminal profiling testimony without first determining whether it was reliable but declined to

testimony to explain why she found only a small tear in the hymen of one of the victims. 309 S.C. at 563, 425 S.E.2d at 22. This testimony merely explained the behavior of people who sexually abuse children and its effect on the victim's injuries—the expert stated,

> If you hurt a child very badly, that child is going—another adult is going to find out more likely. The child isn't going to come back, and you will be discovered. Therefore, many people who want to be sexually involved with children are careful of the children with whom they become sexually involved.

Id. Our supreme court held the defendant's trial counsel was not ineffective for failing to object to this testimony because it was not offered to identify the defendant as the offender. *Id.* at 564, 425 S.E.2d at 23.

In contrast, in the present case, the only testimony necessary to explain how Victim's cigarette burns were inflicted was the testimony based on Agent LaRosa's experience as a crime scene reconstructionist. Yet, Agent LaRosa's profiling testimony went further to specifically target an adult male between the ages of twenty-five and forty as the likely perpetrator of this type of abuse. While this testimony was not *expressly* offered to identify Appellant as the perpetrator, "[i]t matters little that . . . [Agent LaRosa] never expressly drew the conclusion that [A]ppellant fit his profile . . . ." *Sanders*, 303 S.E.2d at 18. Agent LaRosa's profiling testimony "could lead a reasonable juror to no other inference than" Appellant inflicted the burns and, therefore, had a propensity to commit the sexual battery resulting in Victim's hemorrhage.[8] *Id.*

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address the testimony's reliability. 398 S.C. 376, 387 & n.11, 728 S.E.2d 468, 474 & n.11 (2012).

[8] "A person is guilty of [CSC] with a minor in the first degree if the actor engages in sexual battery with a victim who is less than eleven years of age . . . ." S.C. Code Ann. § 16-3-655(A)(1) (2015). "Sexual battery" for purposes of first-degree CSC with a minor is defined as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, except when such intrusion is accomplished for medically recognized treatment or diagnostic purposes." S.C. Code Ann. § 16-3-651(h) (2015). In arguing against Appellant's directed verdict motion as to the CSC charge, the solicitor recounted what he believed to be the circumstantial evidence of Appellant's guilt:

The purported reason for the State seeking Agent LaRosa's expertise and presenting his testimony was to answer the question of "How could anyone do this to a child?" Yet, the only practical reason for the State to present the answer to this question would be to suggest that Appellant fit the profile of a person who would inflict this type of abuse and, therefore, he must have inflicted the burns and the sexual battery. This is evident in the trial court's Rule 403 analysis, Agent LaRosa's own testimony, and the questions posed by the State to Agent LaRosa. The trial court conducted the following Rule 403 analysis:

> [T]he [c]ourt finds that the jury here is confronted with basic questions. How could anyone do this to a child? Clearly if these wounds are not self-inflicted, these are cigarette burns, and that is the, I guess, the real evidence here, is the State's attempt to prove that [Appellant] did it. That's what brings us here. But the jury has to be wondering how could such a thing occur.

> I will start by highlighting Dr. Schandl's testimony as it relates to the injury inside . . . [Victim's] vagina, which she indicated was consistent with a sexual assault. She specifically said that on questioning by the State. Additionally, when you put that in the circumstances in [its] totality as to what is evidence, as to what was going on in that house, who had access to the child . . . that also adds a particular circumstance.
>
> And then finally . . . we had *[Agent LaRosa's] testimony as it relates to the Profiler.* Remind you, *not pointing out [Appellant], we understand that that was not the purpose of his testimony. But when you put that with the other circumstances, I think there is at least enough evidence for the jury to consider --- whether to consider it as it relates to the guilt of [Appellant] on the CSC charge.*

(emphases added).

> And the [c]ourt finds that this is a core concern. It's really something we haven't discussed yet. I'm sure it will come out in closing about how anyone could do this. How could this type of crime be committed? Clearly the crime was committed here. I'm not saying that [Appellant] did it, but someone did, because again these wounds cannot [be] self-inflicted.
>
> And so, the [c]ourt finds that this type of behavioral analysis to assist the jury in bringing an understanding to what really is a core issue, so I find it highly probative.
>
> I also find that it is not unfairly prejudicial *for the State to put up evidence that would show that [Appellant] would have attempted to have committed the crime*. That's what would be expected by the defense that the State would be putting in that type of evidence.
>
> And *thus, his comments that this would be done by a male* and that has a sexual component to it, the [c]ourt does not find that overly prejudicial.

(emphases added).

Further, in his explanation of how he became involved in the present case, Agent LaRosa stated,

> [W]e were not asked to say who was the individual [who] harmed [Victim], we were asked what is it, first of all. Because it was bazaar [sic] and very violent. And we were asked why would somebody do this. What are the most likely characteristic[s] of a person [who] would do this and harm [Victim] this way.

The State later specifically asked Agent LaRosa to relay his findings regarding the perpetrator's age and gender, to which Agent LaRosa responded that the "overwhelming percentage of the gender of a sexual assault on a child is going to be male" and that he "would be telling the local authorities that [they] would be looking for an adult male, approximately the age of [twenty-five] to forty."

Based on the foregoing, the present case is distinguishable from *Underwood*. Here, Agent LaRosa's profiling testimony had no probative value, and the danger of unfair prejudice to Appellant was high due to the testimony's tendency to suggest Appellant's guilt on an improper basis. Therefore, the testimony should have been excluded under Rule 403, SCRE.

Harmless Error

The State contends the admission of Agent LaRosa's testimony was harmless beyond a reasonable doubt because (1) his testimony regarding the burn marks was "largely cumulative" to Dr. Schandl's testimony and (2) there was "substantial evidence" of Appellant's guilt.

"Whether an error is harmless depends on the circumstances of the particular case. No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case." *State v. Chavis*, 412 S.C. 101, 109–10, 771 S.E.2d 336, 340 (2015) (citation omitted). For example, "[a police] officer's improper opinion [that] goes to the heart of the case is not harmless." *State v. Ellis*, 345 S.C. 175, 178, 547 S.E.2d 490, 491 (2001).[9] In *Ellis*, the supreme court reversed the trial court's ruling that allowed a police officer qualified as an expert in crime scene processing to exceed the scope of his expertise by imparting to the jury his conclusion, drawn from measurements taken at the scene, regarding the victim's location and body position. 345 S.C. at 177–78, 547 S.E.2d at 491. The court explained,

> In effect, [the police officer] was allowed to give his opinion on the ultimate issue: Whether [the] appellant was acting in self-defense when he shot and killed the victim. This was error. *See* Rule 704, SCRE; *State v. Wilkins*, 305 S.C. 272, 407 S.E.2d 670 (Ct. App. 1991) (opinion may be offered on ultimate issue only where witness is otherwise qualified).

Id. at 178, 547 S.E.2d at 491.

The court held the error could not be deemed harmless in light of the appellant's assertion that he was acting in self-defense. *Id.* The court further stated

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[9] *See also Tapp*, 398 S.C. at 393, 728 S.E.2d at 477 (Pleicones, J., dissenting) ("Improper 'expert' evidence [that] goes to the heart of the case is not harmless.").

the error was compounded by the solicitor's closing argument, in which he referenced the "'scientific' testimony of [the officer], 'an expert qualified by the judge.'" *Id.* "The trial court's imprimatur of [the officer] as an 'expert' was exploited by the solicitor to the prejudice of [the] appellant and his defense." *Id.*

In the instant case, the State conceded at trial that there was no direct evidence of Appellant's guilt as to the CSC charge and Agent LaRosa's testimony was part of the circumstantial evidence presented to support that charge. Further, there was no other evidence covering the most damning part of Agent LaRosa's testimony—targeting an adult male between the ages of twenty-five and forty as the likely perpetrator as to Victim's burns and his general statement that the overwhelming majority of sexual assaults on children are inflicted by males. Dr. Schandl's testimony concerning the burn marks merely alluded to the burns being inflicted (1) intentionally rather than accidentally and (2) over a sustained period of time due to the varying stages of healing among the several burns. Similarly, her testimony regarding the vaginal hemorrhage did not place limits on how the underlying trauma was inflicted other than that it was likely sexual in nature. This left open the possibility that Hunt, rather than Appellant, was the perpetrator.[10] In stark contrast, Agent LaRosa's testimony excluded Hunt as the likely perpetrator when it limited the class of possible suspects to adult males. This went to the heart of Appellant's defense that Hunt inflicted the abuse and that her testimony against him was not credible.

Moreover, the State presented Agent LaRosa's testimony immediately after presenting Hunt's testimony, during which Appellant's counsel significantly undermined Hunt's credibility on cross-examination. Agent LaRosa's profiling testimony made it easy for the jury to view Hunt as generally more credible than Appellant and, thus, to choose Hunt's account of the events preceding Victim's death over Appellant's conflicting account. In his closing argument, the prosecutor compounded the prejudice by following up his contrast of Appellant's credibility against Hunt's credibility with a glowing review of Agent LaRosa's profiling testimony, emphasizing his training "with the Federal Bureau of Investigation, the chief law enforcement agency in the United States of America in this particular field." In sum, the jury was prevented from conducting an uncontaminated assessment of the comparative credibility of Hunt and Appellant due to what

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[10] We are mindful of the State's reference to evidence showing Appellant was the only smoker in the household. However, this evidence does not exclude Hunt as the perpetrator in the absence of evidence demonstrating Hunt was prevented from accessing Appellant's cigarettes.

Appellant describes as Agent LaRosa's "speculat[ion], under the guise of court-sanctioned expertise, on what kind of person would inflict" the cigarette burns on Victim.

Other jurisdictions evaluating similar circumstances in the conduct of criminal trials have declined to hold that the admission of improper profile testimony was harmless. *See, e.g.*, *People v. Robbie*, 112 Cal. Rptr. 2d 479, 487–88 (Cal. Ct. App. 2001) (declining to characterize the admission of improper profile testimony concerning a particular type of sex offender as harmless and citing to the "starkly conflicting versions of events" given by the defendant and the victim and to the prosecutor's emphasis on the profiling testimony in his closing argument); *id.* at 488 (setting forth the circumstances rendering the admission of improper profile testimony reversible: "[T]he jury's verdict depended largely on whether it found [the victim] or the defendant more credible. [The victim's] credibility had been directly attacked but was significantly bolstered by the expert's testimony."); *Clements*, 770 P.2d at 454–55 (declining to hold the admission of improper profile testimony was harmless "[g]iven the highly prejudicial nature of the expert testimony and the prosecutor's comments in closing argument").

In *Commonwealth v. Day*, the Supreme Judicial Court of Massachusetts held the error in admitting evidence of a "child battering profile" was not harmless because the evidence of the defendant's guilt was not overwhelming. 569 N.E.2d at 400–01. The court noted both the defendant and the mother had access to the victim during the time period in which she died. *Id.* at 401. The court also noted that, although the defendant admitted to police he had hit the victim in the past, a babysitter testified to seeing the mother hit the children. *Id.* Therefore, the court concluded the profiling testimony may have contributed to the jury's conclusion that the defendant was responsible for the victim's injuries. *Id.*

Here, with the exception of unlawful conduct toward a child, the evidence of Appellant's guilt is not so overwhelming as to render the admission of Agent LaRosa's profiling testimony harmless, especially given the credibility problems with Hunt's testimony. On this basis, we reverse Appellant's convictions for first-degree CSC with a minor, inflicting great bodily injury upon a child, and HCA. Therefore, we need not reach the remaining challenges to the trial court's admission of Agent LaRosa's testimony. *See State v. Bostick*, 392 S.C. 134, 139 n.4, 708 S.E.2d 774, 776 n.4 (2011) (declining to address a remaining evidentiary issue when the court's decision on the first issue was dispositive); *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (providing that an

appellate court need not address remaining issues when resolution of a prior issue is dispositive).

As to Appellant's conviction for unlawful conduct toward a child, the admission of Agent LaRosa's profiling testimony was harmless in light of the other overwhelming evidence of guilt. *See Chavis*, 412 S.C. at 110 n.7, 771 S.E.2d at 340 n.7 (explaining that the trial court's error in admitting certain testimony was harmless "because there [was] other overwhelming evidence of guilt"). Section 63-5-70(A) of the South Carolina Code (2010) defines unlawful conduct toward a child in the following manner,

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

(emphasis added). "'Person responsible for a child's welfare' includes . . . an adult who has assumed the role or responsibility of a parent or guardian for the child, but who does not necessarily have legal custody of the child." S.C. Code Ann. § 63-7-20(16) (2010).

Appellant's own testimony showed he assisted in Victim's care during the two months she lived with him before she died. Dr. Schandl testified that as Victim's urinary tract infection eventually made its way into her blood, she would have experienced fever, chills, and sweating. Dr. Schandl explained that the process of blood clots cutting off the blood supply to Victim's brain began approximately one week prior to her death and this would have caused her to feel fatigued. Dr. Schandl also explained that Victim would have been wobbly and difficult to arouse and she might have had a suppressed appetite as well as difficulty reacting to people talking

to her. Dr. Schandl stated it was highly unlikely that Victim would not have had these symptoms during her last week.

Dr. Schandl also stated that based on the progression of symptoms, it would have become obvious that Victim was very sick. Appellant admitted on direct examination that he should have done something to help Victim, and his subsequent testimony that he did not know Victim was as sick as she was necessarily implied he knew Victim was sick to some degree. Moreover, Appellant admitted he was afraid DSS would take his son away if he sought medical help for Victim.

Because Dr. Schandl's testimony and Appellant's own admissions overwhelmingly support his conviction for unlawful conduct toward a child, we affirm this conviction.

Third Statement to Police

Finally, as to Appellant's challenge to the admissibility of his third statement, we affirm pursuant to Rule 220(b), SCACR, and the following authorities: *State v. Moses*, 390 S.C. 502, 513, 702 S.E.2d 395, 401 (Ct. App. 2010) ("[T]he test for determining whether a defendant's confession was given freely, knowingly, and voluntarily focuses upon whether the defendant's will was overborne by the totality of the circumstances surrounding the confession."); *State v. Goodwin*, 384 S.C. 588, 601, 683 S.E.2d 500, 507 (Ct. App. 2009) ("When reviewing a trial [court's] ruling concerning voluntariness, the appellate court does not re-evaluate the facts based on its own view of the preponderance of the evidence, but simply determines whether the trial [court's] ruling is supported by any evidence." (quoting *State v. Miller*, 375 S.C. 370, 378–79, 652 S.E.2d 444, 448 (Ct. App. 2007))).

CONCLUSION

Accordingly, we reverse Appellant's convictions for first-degree CSC with a minor, inflicting great bodily injury upon a child, and HCA and remand for a new trial on these charges. We affirm Appellant's conviction for unlawful conduct toward a child.

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

WILLIAMS and THOMAS, JJ., concur.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

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

Appellate Case No. 2013-001409

THE STATE,

Respondent,

v.

ALEXANDER CARMICHAEL HUCKABEE, III,

Appellant.

RESPONDENT'S PETITION FOR REHEARING

On March 15, 2017, this Court issued a published opinion in which it affirmed Appellant's conviction for unlawful conduct toward a child, but reversed his convictions for homicide by child abuse (HCA), inflicting great bodily injury upon a child, and first-degree criminal sexual conduct (CSC) with a minor. State v. Huckabee, Op. No. 5473 (S.C. Ct. App. filed March 15, 2017). In reversing the listed convictions, this Court concluded the trial court erred in allowing testimony from SLED Agent Paul LaRosa, a witness proffered as an expert in criminal profiling because the witness's testimony should have been excluded under Rule 403, SCRE. Specifically, the Court found the statements suggested guilt on an improper basis and as such the danger of unfair prejudice outweighed the possible probative value of his testimony because criminal profiling evidence is never probative of guilt. Furthermore, the Court

concluded the error in admitting the statements was not harmless because there was no direct evidence of Appellant's guilt and the most "damning" part of the expert's testimony—analysis that the perpetrator of the crimes was an adult male between the ages of twenty-five and forty—effectively excluded the possibility that Victim's mother, Atelia Hunt, committed the crimes. However, the Court rejected Appellant's contentions that Appellant's third statement to police was involuntary for alleged coercion or the three-day lapse between Miranda[1] warnings and a later custodial interrogation. Pursuant to Rule 221(a), SCACR, Respondent, the State, respectfully petitions for rehearing because the State believes: (1) this Court failed to apply the abuse of discretion standard in reviewing the trial judge's ruling and in neglecting to determine whether that discretion was abused in holding the probative value of Agent LaRosa's testimony was not **substantially** outweighed by the danger of unfair prejudice; (2) the Court misapprehended the facts by concluding Agent LaRosa's testimony suggested Appellant's guilt on an improper basis; and (3) the Court inconsistently applied the harmless error doctrine to Appellant's convictions. Accordingly, Respondent petitions for rehearing on the Rule 403, SCRE issues, and asks the Court to reinstate Appellant's convictions and sentences on HCA, inflicting great bodily injury upon a child, and first-degree CSC with a minor.

Abuse of Discretion Standard of Review

The State notes this Court failed to apply a deferential abuse of discretion standard when reviewing the trial judge's ruling on the admissibility of Agent LaRosa's testimony. The admission or exclusion of evidence is left to the sound discretion of the trial judge. State v. Gaster, 349 S.C. 545, 564 S.E.2d 87 (2002); State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001). A court's ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion or the commission of legal error that results in prejudice to the defendant. State v.

[1] Miranda v. Arizona, 384 U.S. 436 (1966).

Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847-48 (2006); State v. Rice, 375 S.C. 302, 314, 652 S.E.2d 409, 415 (Ct. App. 2007). An abuse of discretion occurs when the trial court's ruling is based on an error of law or a factual conclusion without evidentiary support. State v. Irick, 344 S.C. 460, 463, 545 S.E.2d 282, 284 (2001); State v. Mattison, 352 S.C. 577, 575 S.E.2d 852 (Ct. App. 2003).

In the instant case, the Court failed to give deference to the trial judge's ruling. Instead, it performed its own analysis of the probative value of Agent LaRosa's testimony. This Court has been emphatic in awarding a trial judge great deference in Rule 403 analyses. See State v. Lyles, 379 S.C. 328, 665 S.E.2d 201 (2008). The Court has specifically stated "[a] trial judge's balancing decision under Rule 403 should not be reversed simply because an appellate court believes it would have decided the matter otherwise because of a differing view of the highly subjective factors of the probative value or the prejudice presented by the evidence," and cautioned that "[i]f judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal." Id. at 339, 665 S.E.2d at 207.

In its opinion, the Court cites to the trial judge's Rule 403 analysis for its proposition that Agent LaRosa's testimony was a criminal profile submitted for the purpose of demonstrating Appellant possessed the characteristics of a "typical offender" and as such possessed no probative value. However, the Court failed to recognize this analysis was performed on Agent LaRosa's proffered testimony, and based on this same analysis the trial judge limited his statements to those he deemed relevant to the determination of Appellant's guilt. The trial judge imposed several limitations on Agent LaRosa's testimony: (1) he could not testify that Appellant was the only male with the degree of access required to inflict the injuries; and (2) he could only testify about his analysis of the victim's wounds and the infliction of the wounds, and to go

beyond that would exceed his "area of expertise" and unfairly prejudice Appellant. (R.p.456, line 8–R.p.457, line 12). These limitations were critical aspects of the trial judge's ruling designed to exclude non-probative evidence from the jury. Accordingly, the Court erred in failing to consider this in its analysis.

Moreover, the Court's opinion indicates it determined the "danger of unfair prejudice outweighed any possible probative value" instead of determining whether the danger of unfair prejudice substantially outweighed the possible probative value of Agent LaRosa's statements as required by Rule 403. In State v. Collins, 409 S.C. 524 763 S.E.2d 22 the South Carolina Supreme Court found this Court erred in overturning a trial judge's Rule 403 analysis regarding the admission of the victim's pre-autopsy photographs depicting his "gruesome" injuries inflicted by the defendant's dogs. Noting that appellate review of a trial judge's Rule 403 analysis is a "highly deferential standard of review," the South Carolina Supreme Court found this Court's analysis improper because: (1) the Court determined the evidence was prejudicial, rather than evaluating whether the danger of unfair prejudice substantially outweighed the probative value of the evidence; and (2) there were no witnesses, and therefore the pre-autopsy photographs were necessary in determining the defendant's guilt of the charged offenses. Here, similar to Collins, the Court failed to determine whether the danger of prejudice from Agent LaRosa's testimony **substantially** outweighed its probative value.

Accordingly, the Court erred in failing to consider whether the unfair prejudice of admitting Agent LaRosa's testimony substantially outweighed its probative value and in ignoring the deferential abuse of discretion standard applied by our appellate courts.

Admissibility of Criminal Profiling Evidence in South Carolina

On the merits, the Court misapprehended the scope and purpose of Agent LaRosa's testimony. In reaching its ruling, this Court concluded: (1) criminal profiling constitutes propensity evidence and never possesses any probative value; (2) other jurisdictions have condemned criminal profiling evidence as propensity evidence; (3) the South Carolina Supreme Court "indirectly addressed" profiling evidence in Underwood v. State, 309 S.C. 560, 563–64, 425 S.E.2d 20, 22–23 (1992), in which it found a defendant's trial counsel was not ineffective for failing to object to this testimony because it was not offered to identify the defendant as the offender; and (4) Underwood is distinguishable from the instant case because LaRosa's testimony "could lead a reasonable juror to no other inference than" Appellant inflicted the burns on Victim and therefore had a propensity to commit the sexual battery resulting in her death, a fact reflected in the trial judge's Rule 403 analysis.

The State notes the Court failed to consider standing South Carolina law when it found "criminal profiling . . . has no place in a trial to determine the guilt of a specific individual." The South Carolina Supreme Court has recognized the propriety of such evidence in some situations. In Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992), the court found trial counsel was not ineffective in failing to object to an expert witness's testimony about the "common profile" of people who sexually abuse children. The witness testified:

> A person who wants to have sex with or to accomplish penile-vagina penetration with a child may be one of two kinds of people. **He** may be a person who is so wound up in **his** own needs or so angry that **he** doesn't care how much it hurts the child at all. In that case, you can have a very violent rape. You can have significant damage to the child which requires a surgical repair.
>
> That is not - that is - a lot of people feel that that's the common kind of sexual abuse of children. That's not true.

> Very prominently, people who want to become sexually involved with children are people who want and need the children to like them, to trust them, and to come back for more.
>
> If you hurt a child very badly, that child is going-another adult is going to find out more likely. The child isn't going to come back, and you will be discovered. Therefore, many people who want to be sexually involved with children are careful of the children with whom they become sexually involved.

Id. at 563, 425 S.E.2d at 22 (emphasis added).

The court noted the witness "was testifying as to the common behavior of sexual abusers of children and how this behavior might manifest itself in the physical injuries of children" to explain why she found only a small tear in the hymen of one of the victims and such a small tear is compatible with partial penial penetration and "consistent with sexual abuse." Id. The court also noted such testimony was analogous to "battered or shaken child syndrome" prosecutions, as such cases involve testimony based upon "physical findings to support an inference that a child's injuries were not accidental" and emphasized the witness "did not offer the testimony to set out personality or character traits which [the defendant] possessed in order to identify him as the offender." Id. at 563–64, 425 S.E.2d at 22–23.

In State v. Spann, 334 S.C. 618, 513 S.E.2d 98 (1999), the South Carolina Supreme Court found a trial judge erred in failing to grant defendant's motion for a new trial based on after-discovered evidence. Around the time of the victim's death, two other murders had taken place involving victims of similar age and build killed in similar manners. Id. at 620–21, 513 S.E.2d at 99–100. Defendant learned about these other murders and their similarities after his trial, and sought to introduce evidence that the three murders were all perpetrated by the same person and such person could not have been him because the third murder occurred after he was in police custody. Id. At the motion hearing, the defendant presented the testimony of three expert

witnesses, including one qualified in "crime scene analysis and criminal personality profiling." The expert witness "profiled the killer of these three women as a white male in his mid-20's to mid-30's, with a history of mental illness, who was either single or had a dysfunctional marriage, a person with bizarre fantasies, a history of childhood abuse, and knowledge of the area." Notably, the defendant did not fit that profile. Id. The trial judge denied the motion, finding that information about the murders was available to the public at the time of trial. The court found the trial judge erred in failing to grant the new trial, noting the three experts, particularly the criminal profiler, provided testimony tending to exonerate that could not have been discovered by his attorneys because the similarities between the crimes were not apparent at the time of trial. Id. at 621–22, 513 S.E.2d at 100.

These two cases demonstrate South Carolina generally allows criminal profiling testimony to be used as evidence in a criminal trial. In Spann, the more recent of the two decisions, the South Carolina Supreme Court embraced the use of broad criminal profiling testimony and found it, along with testimonies from a forensic pathologist and forensic psychiatrist, justified granting the defendant a new trial. Notably, the profiling testimony focused on the characteristics of the alleged perpetrator, noting the killer was likely a "white male in his mid-20's to mid-30's," similar to Agent LaRosa's profile of the attacker, whom he believed was likely a male between the ages of twenty-five and forty. See id. at 621, 513 S.E.2d at 100.

In Underwood, similar to the instant case, the expert avoided broad personality characteristic comparisons between the defendant and "typical" abusers of children. Instead, both the Underwood expert and Agent LaRosa used the physical evidence found on the bodies of the victims to craft their profiles. Moreover, Agent LaRosa's testimony was more restrained

than the Underwood expert's: Agent LaRosa testified the person who assaulted Victim was **likely** male because an overwhelming percentage of sexual assaults are committed by men but admitted it was possible a female committed the crimes, whereas the Underwood expert omitted such cautionary language from her testimony and used male pronouns when describing her profile.

With the exception of Underwood, the Court cites to cases from other jurisdictions[2] where the ruling courts noted criminal profiles were used for the sole purpose of showing the defendants fit the profile of a typical offender of such crime. At best, those cases are merely persuasive authority from outside this jurisdiction. More importantly, however, those cases are wholly distinguishable from the instant case because they involved experts providing general criminal profiles unrelated to the actual evidence of the defendants' guilt. A prime example of this is the Court's reliance on Sanders v. State, 303 S.E.2d 13 (GA. 1983), in which the Supreme Court of Georgia condemned criminal profiling testimony. The expert in Sanders was a clinical psychologist with no background in crime scene analysis. Id. at 16. Further, he implicated the defendant's character by describing a profile of typical battering parents and openly compared the defendant's personality characteristics to that profile. Id. at 18. The court held that unless a defendant has placed her character in issue or has raised a defense involving battering parent syndrome, the prosecution could not introduce evidence of the syndrome or a defendant's personality traits **"as its foundation for demonstrating the defendant has the characteristics of a typical battering parent."** Id.

Agent LaRosa did not present a profile of the "typical" person who would abuse a child; quite the reverse, his profile described the specific person who committed the crimes and was

[2] In its opinion, the Court cites to United States v. Jones, 913 F.2d 174 (4th Cir. 1990); State v. Clements, 770 P.2d 447 (Kan. 1989); Commonwealth v. Day, 569 N.E.2d 397 (Mass. 1991). All three cases involve expert witnesses who provide criminal profiling testimony of the "types" of individuals whom generally commit the crimes charged.

founded upon his analysis of Victim's injuries. Notably, LaRosa testified before the jury that his deductions were based on his "crime reconstruction" experience, the photographs of Victim's body, and the autopsy report. (R.p.475, line 8–R.p.476, line 2).

In its opinion, this Court claims the State presented the profiling evidence to answer the question, "How could anyone do this to a child?" and the only practical reason for the State to present the answer to said question would be "to suggest that Appellant fit the profile of a person who would inflict this type of abuse" and, accordingly, must have been the person who committed the crimes against Victim. However, the Court ignores the numerous statements on the record which indicate the State did not submit this evidence to suggest Appellant fit the profile of a member of some class of people who **would** inflict this type of abuse, but rather Appellant matched the physical characteristics of the specific individual who **committed** this abuse.

In its opinion, the Court concedes Agent LaRosa's testimony was "necessary to explain how Victim's cigarette burns were inflicted" and that testimony was "based on Agent LaRosa's experience as a crime scene reconstructionist." Yet, the Court suggests the remainder of Agent LaRosa's testimony was rooted in vague, general profiling despite all evidence to the contrary. The State explained to the trial judge that Agent LaRosa's testimony was rooted in his role of "being a crime scene reconstructionist." (R.p.450, line 23, R.p.451, line 16). This is further evidenced in Agent LaRosa's stated explanations for how he reached his conclusions. Why did Agent LaRosa testify the perpetrator of the crime was between the ages of twenty-five and forty? Because the photographs and autopsy report indicated Victim was completely overpowered and unable to move while burning cigarettes were applied to her vagina and buttocks, and only an adult in their physical prime would be capable of performing such a task. Why did he indicate

the perpetrator was likely male? Because the cigarette burns indicated the assault was sexual in nature, and his research showed that somewhere between ninety and ninety-nine percent of sexual assaults are perpetrated by men, percentages based on statistical data collected on the subject. (R.p.475, line 8–R.p.478, line 8).

Accordingly, the Court erred in finding the trial judge erred in admitting Agent LaRosa's testimony. Agent LaRosa's testimony was based on the physical evidence in the case and highly probative of Appellant's guilt.

Harmless Error

The State also asserts the Court failed to consistently apply its harmless error analysis to Appellant's HCA conviction. Section 16-3-85(A) of the South Carolina Code (2015) states a person is guilty of homicide by child abuse if said person:

> (1) causes the death of a child under the age of eleven while committing child abuse or neglect, and the death occurs under circumstances manifesting an extreme indifference to human life; or
>
> (2) knowingly aids and abets another person to commit child abuse or neglect, and the child abuse or neglect results in the death of a child under the age of eleven.

(emphasis added). Section 16-3-85(B)(1) defines child abuse or neglect as "an act or omission by an person which causes harm to the child's physical health or welfare."

In its opinion, the Court found admission of Agent LaRosa's testimony was harmless error in Appellant's unlawful conduct toward a child conviction because: (1) Dr. Schandl explained Victim's deteriorating health would have been patently obvious to Appellant; (2) Appellant admitted on direct examination he should have done something to help victim and in his testimony admitted he did not know Victim was as sick as she was, which "necessarily implied" he knew Victim was sick to some extent; and (3) Appellant admitted he was afraid DSS

would take his son away if he sought medical help for Victim. Thus, the Court concluded the overwhelming evidence indicated he placed victim at unreasonable risk of harm pursuant to Section 63-5-70(A).

The Court failed to apply this same reasoning to Appellant's HCA conviction, as this same evidence shows Appellant was guilty of neglect amounting to an extreme indifference towards Victim's life. Appellant failed to obtain medical attention for Victim despite witnessing Victim's rapidly deteriorating health. In addition to the testimony cited by the Court, Appellant admitted during trial and during his police interviews he was "guilty of neglect" and to witnessing Victim's seizures—what he referred to as "little episodes" —leading up to Victim's death. (R.p.242, lines 4–13; R.p.253, lines 5–8).

Notably, he claimed one of Victim's seizures was so extreme he had to grab her mouth to prevent her from "swallow[ing] her tongue." (R.p.526, line 22–R.p.527, line 6). Moreover, he admitted: (1) he witnessed at least one of the seizures the day of her death and shortly thereafter heard Victim making "grunting" noises; and (2) he dissuaded Hunt from seeking medical care for Victim by telling her a doctor would call DSS and inform the agency of the "marks" on Victim. (R.p.540, line 12–R.p.544, line 6; R.p.564, line 7–R.p.565, line 3; R.p.569, lines 12–24). Dr. Schandl testified these seizures, and other ailments Appellant described witnessing including lethargy, loss of appetite, and difficulty walking were symptomatic of the infection that ultimately killed Victim. (R.p.97, line 1–R.p.98, line 24; R.p.252, line 15–R.p.253, line 20). Despite this plenitude of observed maladies, Appellant never sought medical care for Victim.

Accordingly, this Court erred in failing to find any perceived error in admitting Agent LaRosa's testimony was harmless as to Appellants HCA conviction.

Conclusion

For the reasons stated above, Respondent petitions for rehearing pursuant to Rule 221(a), SCACR, on the abuse of discretion, Rule 403, SCRE, and harmless error issues, and requests this Court reinstate Appellant's convictions and sentences for HCA, inflicting great bodily injury upon a child, and first-degree CSC with a minor.

Respectfully submitted,

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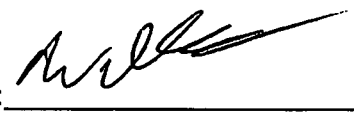
By: 
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April 4, 2017

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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

Appellate Case No. 2013-001409

THE STATE,

Respondent,

v.

ALEXANDER CARMICHAEL HUCKABEE, III,

Appellant.

PROOF OF SERVICE

I, Keely Carter, certify that I have served the within Respondent's Petition for Rehearing on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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

I further certify that all parties required by Rule to be served have been served.

This 4th day of April, 2017.

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The South Carolina Court of Appeals

The State, Respondent,

v.

Alexander Carmichael Huckabee III, Appellant.

Appellate Case No. 2013-001409

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover any material fact or principle of law that has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

_____ J.

_____ J.

_____ J.

Columbia, South Carolina

cc:
Alan McCrory Wilson, Esquire
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Mary Shannon Williams, Esquire
William Benjamin Rogers, Jr., Esquire

FILED
April 21, 2017

William Frederick Schumacher, IV, Esquire
The Honorable J. Michael Baxley