STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Berkeley County
Honorable Deadra L. Jefferson, Circuit Court Judge
Appellate Case No. 2016-001519

THE STATE,

Respondent,

vs.

LEE DELL BRADLEY,

Appellant.

INITIAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

1.

In this murder case where appellant admitted his girlfriend died during an argument, did the trial court err in admitting evidence of appellant's nearly two-year-old conviction for domestic violence where this evidence was inadmissible as character evidence and it was more unfairly prejudicial than probative because of its remoteness?

2.

Whether the trial court erred in admitting the irrelevant, highly prejudicial testimony of an expert in "the impact of trauma, domestic violence" who testified that a woman's risk of being murdered increases if a woman prepares to leave her abuser?

COUNTER STATEMENT OF ISSUE ON APPEAL

I. Did the trial judge abuse her discretion by allowing the State to introduce evidence that Appellant had a 2012 criminal domestic violent conviction, where the conviction was not too remote; it constituted part of the *res gestae* of the murder by placing it in context; and it was highly probative of Appellant's intent and whether the victim's death was an accident - both of which were placed in issue by Appellant's custodial statement, his statement to the 911 operator and his telephone conversation with a friend after his arrest. Also, was the probative value of the conviction substantially outweighed by its prejudicial effect?

II. Did the trial judge abuse her discretion by allowing the State to introduce testimony from a qualified clinical psychologist, with expertise in "the impact of trauma, domestic violence" that a woman's risk of being murdered increases if she prepares to leave her abuser because (1) the expert testimony given in this case is nothing more than a description of Battered Spouse Syndrome, and the General Assembly has codified the admissibility of Battered Spouse Syndrome in criminal cases; (2) the testimony given is consistent with a number of post-*State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490 (2013), cases that have upheld the prosecution's introduction of analogous expert testimony in the field of child abuse dynamics; and (3) the probative value of this testimony was not substantially outweighed by its prejudicial effect under Rule 403, SCRE?

STATEMENT OF THE CASE

Appellant (Lee Dell Bradley) is currently serving a life sentence for murdering Frances Lawrence in Berkeley County, South Carolina, between May 20 and May 23, 2014. The Berkeley County Grand Jury indicted him for her murder on June 28, 2016. 2016-GS-08-1249, *R. pp.* ___-__. Assistant Public Defenders Debra K. Littlejohn and Keisha V. White represented him on this charge. Ninth Circuit Assistant Solicitors Anne M. Williams and Wilton H. McNeely prosecuted the case.

On July 11-15, 2016, Appellant received a jury trial before the Honorable Deadra L. Jefferson. The jury convicted him of murder and Judge Jefferson sentenced him to life imprisonment. Appellant timely served and filed a notice of appeal. With counsel's assistance, he filed an Initial Brief of Appellant on March 31, 2017.

STATEMENT OF FACTS

Karen Harrington, the Human Resources Manager for the Fruit of the Loom Distribution Center in Summerville, South Carolina, testified that Frances Lawrence (the victim) had worked as a quality control auditor at the Distribution Center since April of 2008. Frances worked the second shift, which was from 3:00 p.m. until 11:00 p.m. Every employee at the Distribution Center has an ID that must be used to clock-in to, or clock-out from, work; and it must be used to enter or leave the building. Frances worked her shift on Tuesday, May 20, 2014, and she last scanned to leave the building at 12:58 a.m. on Wednesday, May 21st. Although she had never previously failed to show for her scheduled shift, she did not return to work after the morning of the 21st. *Tr. pp. 134-38.*

Iona Gannt and Mary Jones testified that they were Frances' co-workers at the Distribution Center. Both women last saw Frances on Wednesday morning May 21st and she

never returned to work after that morning, even though she was scheduled to work. *Tr. pp. 141-44; 146 290-92; 294.* Ms. Gannt described Frances as "[b]eautiful, outgoing, always one way, and always encouraging others to do good." Also, Frances always drove to work in a blue SUV. The one time that Ms. Gannt saw Frances and Appellant, socially, Frances was the only one with money. *Tr. pp. 142-43; 148-49.*

Ms. Jones described Frances as "a very fun loving person" who got along with everyone. Also, Ms. Jones testified that it was unusual for Frances to miss work because she had a "very good work habit" and showed up when she was scheduled to work. Ms. Jones confirmed that Frances drove herself to work in her blue Blazer. *Tr. pp. 291-92.* When Frances did not come to work on Wednesday, May 23rd, and on Thursday, May 22nd, Ms. Jones called both her home and cell phones each evening. However, she did not get an answer. *Tr. pp. 290; 294-95.* Finally, Ms. Jones testified that the only time Frances ever visited her home, in Cross, South Carolina, was shortly after Ms. Jones' fiancée had died. *Tr. pp. 292-93.*

Brenda Bloom testified that Frances was her sister. Brenda testified that Frances would shower when she came home from work. After the murder, Brenda found a knife in a box that she removed from Frances' trailer. She gave this knife to their sister, Dorothy, so that Dorothy could give it to police. *Tr. pp. 202-07.*

Dorothy Rivers testified that she lived with her mother and her brother in May of 2014. Frances was her sister and lived immediately next door to her. Another sister, Darlene Drayton, lived on the other side of Frances. Dorothy is 4'11" tall and Frances was smaller than her.

Appellant was living with Francis "back and forth" at the time,[1] and Dorothy would occasionally visit with them. Lee only worked part-time. Also, he did not have a car when Frances was killed, and she only rarely lent her vehicle to anyone. *Tr. pp. 231-39.*

Dorothy went to Frances' residence on Tuesday morning, May 20th. Appellant was in the yard when she arrived and he prepared breakfast for her. Frances did not eat breakfast and Appellant went back outside after he had eaten. Dorothy described the mood inside the mobile home as "really, really thick." She felt awkward being there because Appellant was repeatedly in and out of the residence but Frances was not speaking to him. *Tr. pp. 239-42.*

Although Frances was a "very private" person who rarely spoke with others about her personal life, she told Dorothy on Tuesday morning that she was planning to move and she showed Dorothy some boxes containing some of her belongings. Also, Dorothy testified that Frances was "a very peaceful person" and did not fight. Rather, she would be sad if something upset her. *Tr. pp. 242-44.*

After Tuesday May 20th, Dorothy never saw Frances again. However, she saw Appellant going and coming back and forth in the [SUV] ...[a] couple times a day." Appellant came to Dorothy's residence on Thursday, May 22nd. When he said that he was going to North Carolina and was not going to return, Dorothy's mother asked him where Frances was. *Tr. pp. 242-45.*

Appellant told her that he and Frances had "a big argument." He claimed that Frances' friend, Mary, had picked her up as a result of this argument, and that Frances was staying with

[1] Frances' natural daughter died from cancer at age four. However, she was very close to a co-worker named Nickie, whom she treated as an "adopted daughter." Nickie lived with Frances for a long time. *Tr. pp. 236-37.*

Mary for several days.[2] He also claimed that he was going to leave Frances' vehicle at the bus station on Friday. Mary would then supposedly drive Frances there and she would get her vehicle. Dorothy did not speak to Appellant after that conversation. *Tr. pp. 245-47.*

Dorothy did not go over to Frances' home to check on her after the 20th because the residence was locked and Dorothy could not get into it. *Tr. p. 251.* Finally, Dorothy testified that

> ... I do remember when we didn't see [Frances], that her air conditioning was rolling like crazy. I mean, it was blaring. And Frances was very particular about her electric bill. [But] that air conditioning was going from day and night, and you could hear it going even if you [were] in the house.

Tr. p. 251. Because Appellant was coming and going from Frances' home, Dorothy thought that he was running the air conditioning. *Tr. p. 252.*

Darlene Walker, another of Frances' sisters, testified that she and her son, Harold Drayton, were living next door to Frances in May of 2014. Frances drove a blue "truck" that she would park in the front yard. Darlene last saw Frances on Monday May 19th. Later that week, she twice asked Appellant where her sister was. In his first response, he claimed that Frances was at work and that he had her vehicle in order to get the brakes fixed. In the second conversation, he said that he still had the vehicle because he had to change the oil. *Tr. pp. 254-57.*

One day that same week, Darlene saw Frances' vehicle parked behind a trailer belonging to Alma Reid, who is her cousin. Frances did not "hang around" Ms. Reid because alcohol and drugs are used at Ms. Reid's trailer. Darlene admitted that she has personally had her own struggles with drugs, and that Appellant smoked crack at her residence the week that Frances was missing. When Darlene asked him where Frances was, he said that she was staying with a co-worker, in Cross, because " 'she needed to get away for a while.' " Darlene thought that this

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[2] We know from Mary Jones' testimony that this was a lie.

was unusual for Frances, but she did not call police in light of his explanation. *Tr. pp. 257-60; 264; 267-68.*

On another occasion that same week, Darlene saw Appellant at Frances' trailer and heard his phone ring. When he finished his conversation, he told Darlene that Frances was the caller and that she had called to ask Appellant if he needed her help to get back to North Carolina. He told her no. Appellant then told Darlene that he was going to pick up Frances on Friday and that she would drop him off at the bus stop. *Tr. pp. 261-62.*

Additionally, Darlene saw Appellant giving away food and other items out of Frances' trailer, including a lawn mower. Again, Darlene thought that this was unusual. *Tr. pp. 262-64.*

Twenty-three year old Harold Drayton testified that he lived in with his mother, Darlene Walker, in Summerville, South Carolina, in May of 2014. Frances was his maternal aunt and lived less than 50' away from the Walkers. Harold confirmed that Frances owned a blue SUV, and he described Frances and Appellant as having an "off and on" relationship. Although she worked for Fruit of the Loom, Appellant only worked sporadically for the Charleston Auto Auction, in Moncks Corner. Harold last saw Frances a week before her murder. *Tr. pp. 220-24.*

Harold saw Appellant driving Frances' SUV and going in and out of her mobile home on Thursday and Friday of the week that Frances' body was found.[3] Appellant told Harold that she was visiting a friend in Cross, South Carolina. On Thursday night, Harold went with Appellant to a gas station on Highway, where Appellant unsuccessfully attempted to withdraw money from an ATM. He then went to another gas station that was across the street where he accessed the ATM. He had money when he returned to the vehicle. *Tr. pp. 224-26.*

[3] This was May 22nd and May 23rd.

On Friday morning, Appellant called Harold and asked him to go check on Frances. Harold replied, " 'I thought she wasn't home.' He said, 'Yeah, she's home'. By the time ...I [hung] up the phone, and went to go [tell] my momma, the cops had the house surrounded." *Tr. p. 226.*

The records custodian for South State Bank, which had merged with First Federal Bank in Charleston, testified that Frances had a checking account with First Federal in May of 2014. The account was exclusively Frances' and only one ATM card was issued for it. The records for her account revealed that ATM inquiries and withdrawals were made at 2895 and 2908 West Fifth St., in Summerville, on May 22nd and May 23rd. *Tr. pp. 213-17; 219.*

Katrina Baxter, Darlene Walker's daughter, testified that she lived in another part of Summerville, and that she seldom visited her aunt Frances in May 2014. Katrina went to her mother's residence on Thursday of the week that Frances was missing (May 22nd). When she arrived, she saw her brother, Harold Drayton, and Appellant standing at the edge of the woods near her mother's house. Because Katrina and her husband owed Appellant money, he handed her the keys to Frances' SUV and asked her to go get the money that she owed him. However, she refused because she had just gotten there. *Tr. pp. 274-77.*

Katrina and the others sat outside and had "a couple of drinks." As they socialized, Katrina looked at Appellant and noticed that something was "not right." When she asked him whether he was okay, he told her that he was fine. *Tr. p. 277.*

During their conversation, Katrina said that she needed to get "shades," or sunglasses. Appellant said that he had some "shades" and he described them to her. Because she was interested in buying the sunglasses he described, he took her to Frances' trailer. Even though Katrina was reluctant to go inside because Frances did not like for anyone to go into her home

when she was not there, Katrina followed him into the den. *Tr. pp. 277-78; 283.* This was on the other side of the trailer from where Frances' body was later found.

Katrina testified that it was very cold in the trailer. Appellant handed her a pair of sunglasses and she went into the bathroom to try them on. She testified that the bathroom window was up and that an empty can of air freshener fell to the floor. She agreed to buy the sunglasses for the $4.00 that Appellant wanted but wound up not paying him anything. On her way out of the bathroom, the air freshener can fell to the floor again and Appellant picked it up off of the floor. *Tr. pp. 278-79; 286.*

From there, Appellant led Katrina to a bedroom because he allegedly had something that he wanted to show her. Because he rummaged through the room for several minutes without producing anything, she asked him what he wanted to show her. He said, "Nothing." Then, he took her into the kitchen and gave her food out of the refrigerator that he claimed he had purchased the food with food stamps. He told her that he did not want to leave any for Frances. Without explaining why he was selling it, he also sold her aunt's grill. However, she returned it to her grandmother on Friday, after learning that Frances was dead. *Tr. pp. 279-81.*

Cathy Hampton testified that Frances was her sister. She visited Frances whenever she could because she, Cathy, had a number of surgeries. Frances had always worked. Also, Appellant was living with her "[o]ff and on," in May of 2014, because they argued. And, Cathy had a conversation with Frances on May 11, 2011, in which Frances said that she was moving on. *Tr. pp. 300-02.*

Frances had acquired new telephone numbers for both her cell phone and her landline. She shared these numbers with her sisters but not with Appellant. Also, Frances "was a very peaceful person," told her family "to think of someone else first." Cathy had never seen Frances

get into a "physical fight" with anyone, she did not do drugs, and she did not party excessively. To Cathy's knowledge, the only medication that Frances took was for high blood pressure. Further, she had burned her hip as a child, which caused her to limp, and she had recently undergone surgery to remove fibroids. *Tr. pp. 302-05.*

Alma Reid testified that she was Frances' cousin and lived about a half-mile away from her. To Alma's knowledge, Frances did not drink. Appellant came to Alma's residence in Frances' SUV at some point during the week of Frances' murder, and they had a conversation. *Tr. pp. 194-95.*

Appellant told Alma that he and Frances had an altercation. Frances had retrieved a knife from the kitchen. Appellant pushed her on a chair and Frances cut her arm. When Alma asked Appellant if he called an ambulance, he said, " 'No, it wasn't that serious.' " Alma told Frances' niece, Katrina, about this conversation but she did not report it to police. *Tr. pp. 195-97; 199-200.*

Appellant finally called 911 at 8:52 a.m. on May 23, 2014. He told the 911 operator, April Carter, that his girlfriend had fallen on a knife and was dead. He also said that he was on Highway 78, but his cellphone was using a tower that was off of I-95. Appellant hung up before Ms. Carter could get a more precise location of his whereabouts.[4] The State published the 911 call (State's Ex. 69) to the jury. *Tr. pp. 109-10; 126-30.*

[4] She testified that when someone calls 911 from a cell phone, the call will "correlate ... our [GPS] system with our systems to give us a general location of where the cell phone is coming from. It will hit within ... a seven mile radius" of the tower closest to the caller." After a few minutes, the system will reassess and go to a two mile radius" of the caller's location. *See Tr. pp. 126-27.*

Deputy Stacey Cross, of the Berkeley County Sheriff's Department, is a uniform patrol officer. She was dispatched to the domestic disturbance at victim's Berkeley County mobile home on the morning of May 23, 2014. When she arrived at 9:04 a.m., the front door of the residence was locked, but Deputy Cross and two other deputies were able to enter through the unlocked back door. Although the residence was dark, the air conditioning was running. *Tr. pp. 321-24.*

After the officers conducted a safety search of the mobile home, Deputy Cross found Frances' body in the master bathroom. She was dead and she was lying on her back. Deputy Cross did not immediately see a wound and saw very little blood in her chest area. *Tr. pp. 321-25.*

Michelle Moritzky, a paramedic employed by Berkeley County, arrived at Frances' mobile home at 9:09 a.m. on May 23rd and confirmed that Frances was dead. Frances was wearing a nightgown. When Ms. Moritzky pulled up the nightgown, she saw a wound to Frances' left chest. There was "a little bit of ... dried blood" on the nightgown but there was no blood at the site of the wound. *Tr. pp. 369-73; 75-76.*

Crystal Spence and Sergeant Gene Alteri, with the forensic services unit of the Berkeley County Sheriff's Office, processed Frances' residence pursuant to a search warrant on the morning of May 23, 2014. Frances was lying face-up on the floor, with her feet towards a closet. Officer Spence did not initially notice any wounds. However, she saw a wound to the left side of Frances' chest when she closely examined Frances' body. The officers did not find any blood on any knives or anywhere else in the home, except for the blood on the victim's body, and the nightgown was the only bloody garment that they found. *Tr. pp. 378-85.* Likewise, the officers did not find any object in the residence that could have been the murder weapon. *Tr. p. 391.*

Det. Michael Cortte, with the Berkeley County Sheriff's Office, also responded to the scene on May 23rd. Other officers were present when he arrived, and he was directed to obtain statements from Frances' family members and Iona Gannt. In addition to obtaining statements, he assisted in a search of the property. However, nothing of evidentiary value was found. *Tr. pp. 150-54; 178-80; 184.*

Captain Bobby Shuler likewise responded to Frances' mobile home on May 23, 2014, and he was the lead investigator on the case. He explained that law enforcement developed Appellant as a suspect based upon the 911 call, in which Appellant claimed that there had been a struggle over a knife and that Frances fell on the knife. Several family members interviewed by officers that morning told the officers that Appellant had ties to both North Carolina and South Carolina. *Tr. pp. 453-57.*

Because officers received information that Appellant would sometimes take a bus to North Carolina, Captain Shuler sent officers to the bus station in Summerville. Officers also "started doing search warrants" for phone numbers that they had for him, and officers issued BOLOs for both Appellant and for Frances' SUV. When officers checked the victim's past criminal history, they discovered that "she had nothing in her criminal record of any kind of violence or any kind of record, period." *Tr. pp. 457-58.*

Appellant was eventually apprehended in North Carolina and was brought back to South Carolina.[5] Officers seized a pocket knife that he was carrying when he was arrested. This knife

[5] The jury could infer Appellant's guilty knowledge and his intent from the State's evidence that he fled the State and went to North Carolina. *See State v. Pagan*, 357 S.C. 132, 591 S.E.2d 646 (2003) (evidence of flight constitutes evidence of defendant's guilty knowledge and intent); *State v. Grant*, 275 S.C. 404, 407, 272 S.E.2d 169, 171 (1980) ("[A]ttempts to run away have always been regarded as some evidence of guilty knowledge and intent") (citation omitted); *State v. Crawford*, 362 S.C. 627, 634-36, 608 S.E.2d 886, 890-91 (Ct. App. 2005). "This common law

was seized and later sent to SLED, as was the knife that Brenda Bloom had found in Frances' home and gave to her sister Dorothy. *Tr. pp. 460-62. See also Tr. p. 175.*

On May 29, 2014, Capt. Shuler and Det. Cortte took a videotaped statement from Appellant. He was advised of his *Miranda* rights and waived them before speaking to the officers.[6] The statement was introduced as State's Ex. 71, and the State published it to the jury. *Tr. pp. 162-63; 166-67.* In it, he initially claimed - as he did in the 911 call - that Frances fell on the knife during a struggle.[7] However, he eventually changed his story and said that they both fell during a struggle and that he landed on top of her. *State's Ex. 71; Tr. p. 477; 493.*

He said that the knife that killed Frances had a black handle and a serrated edge he initially claimed that he had put it in the kitchen sink but later claimed that he put it in a drawer. *State's Ex. 71 at 9:51-16:44, 37:15-38:40.* However, the butcher block in the kitchen of her home had an empty slot, obviously indicating that one knife was missing. The murder weapon was never recovered. Appellant further claimed that he had left Frances' SUV at the bus stop. However, officers began searching for the SUV at the bus station immediately after family

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rule is based on ordinary human experience that echoes its often-quoted Biblical antecedent: 'The wicked flee where no man pursueth; but the righteous are bold as a lion.' Proverbs 28:1.' " *Ordway v. Com.*, 391 S.W.3d 762, 790 (Ky. 2013). *See also United States v. Kennard*, 472 F.3d 851, 855 (11th Cir. 2006) ("People, including jurors, realize that while "[t]he wicked flee when no man pursueth," Proverbs 28:1(KJV), they really flee when law enforcement is looking for them. That is why evidence of flight is admissible and probative").

[6] *See Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966). He was also told that he was being charged with the murder of Frances Lawrence. *State's Ex. 71 at 1:46-4:06; State's Ex. 71, at 4:50-5:24.* Appellant was rational and coherent, and he did not appear to be under the influence of drugs or alcohol. Nor did he have any defensive wounds. *Tr. pp. 154-60; 458; 474-76.*

[7] He explained that the argument resulted from Frances' sister telling Frances that she had seen Appellant at another woman's house. He also claimed that this other woman was only a friend. *State's Ex. 71 at 12:03 thru 12:29.*

members said that Appellant would take a bus to North Carolina, and they continued searching for it after Appellant's statement. Officers likewise checked both NCIC and a national motor vehicle title database, but they never found the SUV. *State's Ex. 71 at 25:00 thru 25:48, 32:10 thru 32:35; Tr. pp. 463-69; 477-80; 483.*

Appellant likewise claimed that he had tried to call "Berkeley County" on the day after Frances was stabbed. *State's Ex. 71 at 17:02 thru 17:42, 18:28 thru 18:38.* However, a review of both his phone records and central dispatch revealed that this was yet another lie. The Sheriff's Office also did not discover anything that reflected that he had tried to call 911 back or that he called the police department. Nor were there any signs of a struggle in the residence, despite Appellant's claim that one had occurred. Also, he told officers that Frances had been drinking a lot, taking medication and acting crazy that night. *State's Ex. 71 at 01:05:01 thru 01:06:10, 01:14:33 thru 01:14:57; Tr. pp. 469-70; 472; 474; 493.* This is inconsistent both with testimony from others who knew her and with the toxicology results.

On June 4, 2014, then-Det. Ryan McDowell, with the Berkeley County Sheriff's Office, went to the Hess station on Highway 78, in Dorchester County because Appellant told law enforcement that he had made the 911 call from that store. *State's Ex. 71 at 35:48 thru 36:15.* Det. Ryan viewed the store's video surveillance for most of the day of May 21, 2014, but he did not see Appellant in the video. *Tr. pp. 313-14; 467.*

Jessica Stowe, a forensic serologist employed by SLED, examined several items of evidence submitted by the Berkeley County Sheriff's Office in this case, including Frances' nightgown; oral, rectal and vaginal swabs, as well as vaginal and rectal smears from a criminal sexual conduct kit; and two knives: the knife discovered by Frances' sister and Appellant's pocket knife. Ms. Stowe was asked to look for blood on the nightgown and she found blood on

it. She examined the knives for blood but the presumptive test for blood was negative on both knives; and no semen was present on any of the slides or smears. *Tr. pp. 399-406.*

Lily Gallman, a SLED forensic DNA analyst, examined fingernail clippings from Frances' hands. Using an STR test, she compared the DNA of two scrapes from the clippings to known DNA standards of Frances and Appellant. She found that both scrapes contained a mixture of DNA from at least two persons. Frances was the major contributor but the minor contributor was insufficient using this form of testing. She then performed a YSTR test on the scrapes, which only looks for the Y or male chromosome. The results matched Appellant. *Tr. pp. 410-13.*

Over Appellant's objection,[8] Deputy Cross was permitted to testify that she had previously responded to a domestic violence call at the victim's residence on September 19, 2012. When Deputy Cross arrived, at roughly 7:04 a.m., Frances was "visibly shaken." She was whispering and had been crying. The only other person at the residence was Appellant, and the call ended with Deputy Cross arresting him. *Tr. pp. 362-64.* The State was also permitted to introduce, over Appellant's objection, testimony from Berkeley County Deputy Clerk of Court Linda Hill that Appellant was convicted of criminal domestic violence in 2012. *Tr. pp. 365-67.*[9]

On May 23, 2014, forensic pathologist Dr. Lee Tormos[10] performed an autopsy on Frances. Dr. Tormos opined that Frances died from a single stab wound that penetrated 5" into her chest. The knife passed "through the muscles of the anterior chest[,] ... cut[] into the left

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[8] As discussed in Argument I, the objection was properly overruled.

[9] The State was not permitted to introduce either a certified copy of the conviction or the sentencing sheet. *See* State's Ex. 78 for identification.

[10] Dr. Tormos is employed at the Medical University of South Carolina, in Charleston, South Carolina. *Tr. p. 424.*

ventricle of the heart [before] ... go[ing] into the lower lobe of the left lung." Any knife with a blade at least 5" long could have been the murder weapon. Based upon Dr. Tormos' findings of rigor mortis and livor, she opined that Frances had been dead for at least thirty-six hours. *Tr. pp. 424; 431-32; 438.* Dr. Tormos concluded that "the cause of death [was] a stab wound to the chest and that the determination of the manner of death was "clear. It was a homicide." *Tr. pp. 426-28.*

Although it was possible for Frances too have fallen on the knife and killed herself, Dr. Tormos opined that it was "not very likely." She explained that people have a natural reflex to extend their arms and brace themselves when falling forward. Also, Dr. Tormos would have expected to find a wound with an upward trajectory, if she had fallen on the knife. Yet, the stab wound here went downward. This would have required Frances to hold the blade backwards, "toward the pinkie side" of her hand. *Tr. pp. 433-35.*

Dr. Tormos noted that Frances' nightgown (see State's Ex. 60) did not have a hole or defect in it. Therefore, either Frances was not wearing the nightgown or the nightgown was pulled completely above her breast at the time that she was stabbed. Also, Dr. Tormos found over a liter of blood in Frances' left chest cavity, and Dr. Tormos would have expected to find more blood on the nightgown if Frances had been wearing it when she was killed. Further, this amount of internal bleeding was consistent with Frances dying on her back. *Tr. pp. 436-38.*

The only other injuries that Dr. Tormos found were bruising to the "anterior aspects" of both shoulders, and "bruising to the bruising to the middle parts of both arms around the elbow." Based upon the symmetry of these injuries, Dr. Tormos explained that these injuries were consistent with "injuries that are brought upon when someone is struggling and they're being held down ... by the arms, and by the shoulders." *Tr. pp. 428-29.* Finally, toxicology testing of

Frances' blood revealed that she did not have any alcohol or drugs of abuse in her system.[11] *Tr. pp. 429-30.*

Additionally, the State introduced and published to the jury a recording of telephone call that Appellant made from the Hill-Finklea Detention Center (State's Ex. 72)[12] on July 5, 2016. *Tr. pp. 167-68; 296-99.* In this conversation, he twice told the other party to the conversation, a woman named Shirley, "It clearly was an accident." He later described the killing as a "freak accident. He also claimed that he did not kill Frances. Rather, she "bugged out" because one of her sisters told her that Appellant spent the night at another woman's house and her sister had seen his car parked there. However, he claimed that the house was a "gambling house" and that he was playing poker. *State's Ex. 72.*

This led to Frances rushing him with the knife, and they "tussled" over the knife. She "stuck herself" with the knife, as she tried to catch herself and avoid falling. She was still alive after she stuck herself with the knife. Appellant wanted to him to call an ambulance, but she told him, "No" and she asked him to hold her. He further claimed that Frances' demeanor was caused by new medications that she was taking. *State's Ex. 72.*

He also said, "It still bothers me though, it does." Yet, shortly after he expressed this "concern" for the victim, he asked Shirley, "But you know [what] she had the nerve to say before she died"? *State's Ex. 72.* Appellant then continued with his lies. For instance, he claimed that he and Frances had been planning to move to a new location, together, and that he had been sending her some of the $200.00-$250.00 a day from his job because they had to pay over

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[11] Other than caffeine, the only drugs in her system were for hypertension and angina, and she had prescriptions for these medications.

[12] The State has designated this recording as part of the record before this Court.

$1,200.00 before they could move into "their" new residence. She was putting this money into their joint bank account. He likewise claimed that he only took his money out of their joint account. *State's Ex. 72.*

ARGUMENTS

1. The trial judge did not abuse her discretion by allowing the State to introduce evidence that Appellant had a 2012 criminal domestic violent conviction, where the conviction was not too remote; it constituted part of the *res gestae* of the murder by placing it in context; and it was highly probative of Appellant's intent and whether the victim's death was an accident - both of which were placed in issue by Appellant's custodial statement, his statement to the 911 operator and his telephone conversation with a friend after his arrest. Also, the probative value of the conviction was not substantially outweighed by its prejudicial effect.

Notwithstanding Appellant's argument to the contrary, Respondent submits that the trial judge did not abuse her discretion by allowing the State to introduce that Appellant had a 2012 criminal domestic violent conviction (Court's Ex. 6), where the conviction was not too remote; it constituted part of the *res gestae* of the murder and placed it in context; and it was highly probative of Appellant's intent and whether the victim's death was an accident, both of which were placed in issue by Appellant's custodial statement (State's Ex. 71), his statement to the 911 operator (*Tr. pp. 109-10; 126-30*), his statement to the 911 operator and his telephone conversation with his friend Shirley (State's Ex. 72) following his arrest. Also, the probative value of the conviction was not substantially outweighed by its prejudicial effect.

A. How the issue arose at trial.

Appellant filed a pretrial motion to exclude evidence of his prior bad acts. Specifically, he moved to bar the introduction of evidence of prior criminal domestic violence calls to the victim's residence as irrelevant and inadmissible under Rule 404, SCRE. *R. pp.* __-__. The trial judge declined to rule on the motion pretrial because she wisely understood that a pretrial ruling

would be made in a vacuum, and that the evidence would have to be assessed in context, for her to accurately determine whether it was relevant. However, she ordered the State not to mention the evidence until she had ruled and the State agreed to do so. *Tr. pp. 29-32; 72-73.*

Before the State presented the testimony of Deputy Stacey Cross, of the Berkeley County Sheriff's Department, the Assistant Solicitor advised the trial judge that the State intended to introduce the prior criminal domestic violence (CDV) incidents during her testimony. The trial judge instructed the Assistant Solicitor to stop when that point arrived so that the issue could be addressed *in camera. Tr. p. 319.* After Deputy Cross had testified to her involvement in the investigation discussed in the "Statement of Facts," the Assistant Solicitor informed the trial judge that there was an issue of law. The trial judge excused the jury and heard the State's proffer *in camera. Tr. p. 326.*

Deputy Cross testified *in camera* that she had previously responded to the victim's residence on September 19, 2009 and on September 19, 2012. *Tr. pp. 327-28.* In the 2009 incident, she met the victim at another location. The victim said that she was being assaulted by her live-in boyfriend, Appellant. She was "very much afraid," and "[s]he was shaking." The right side of her face appeared to be swollen and she did not want to go back inside the residence. There was no suggestion that the victim was the aggressor, and Appellant was arrested for CDV. *Tr. pp. 327-29; 332-33.*

Deputy Cross further testified *in camera* that the 2012 incident occurred at the same address where the victim's body was discovered. On that occasion,

> [w]hen we approached the residence, [the victim] was outside. She didn't want to go back inside. She was fearful; that her live-in boyfriend was inside and he was sleeping; and she was afraid that he was going to assault her again. He had already previously assaulted her before our arrival. .... She was shaking -- visibly shaking and crying. She was also whispering because she was scared. .... The

> defendant was in the master bedroom sleeping. .... They had gotten into an argument over keys. She was refusing to give him the keys to their vehicle because he was intoxicated. And, again, he grabbed her and then slapped her, and took the keys from her.

Tr. pp. 330-31.

According to the victim, Appellant had threatened to kill her if she contacted law enforcement and had said that he was not afraid to go back to jail. Again, there was no indication that the victim was aggressive and Appellant was arrested for CDV. *Tr. pp. 331-32.* Deputy Cross admitted on cross-examination that her incident report reflected that she did not observe any injuries on the victim on that occasion. *Tr. p. 335.*

Following Deputy Cross' *in camera* testimony, Appellant argued that evidence of both incidents should be excluded under Rule 404(b), SCRE and *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923), because it was propensity evidence. He argued that the 2009 incident was not logically relevant to the murder. When he argued that this Court's decision in *State v. Sweat*, 362 S.C. 117, 606 S.E.2d 508 (Ct. App. 2004), required the prior bad conduct to have occurred closer in time to the crime charged than the 2009 incident, the trial judge informed him that she had already determined that the 2009 incident was too remote and that he only needed to address the admissibility of the 2012 crime. *Tr. pp. 338-40.*

Appellant then argued that the 2012 incident was not part of the *res gestae* of the murder, that there were no visible signs that the victim was injured on that occasion, and that the State was attempting to introduce the testimony "strictly for character evidence, and ... to prove a propensity." He further asserted the State could only prove the incident through hearsay by the victim (*Tr. pp. 340-42*); that the State was attempting to improperly impeach Appellant with prior, specific instances of bad conduct in violation of Rule 608, SCRE; that the 2012 incident

was factually different from the murder for which he was being tried; and that the 2012 incident was too remote. *Tr. pp. 342-43.*

In response, the Assistant Solicitor argued that the State was offering the challenged evidence to rebut Appellant's claim of accident. Also, Appellant had falsely claimed in his statement that there were never any fights and that he had only put his hands on the victim once. In response to the trial judge's question of whether the prior offenses were too remote, the State noted that the most recent conviction was in 2012. Appellant stated that the last conviction was on November 29, 2012. *Tr. pp. 343-44.* The trial judge observed that a certified copy of Appellant's convictions confirmed that he was convicted on November 29th of CDV in the second degree and that he received an eighty-one day time-served sentence. *Tr. pp. 344-45.*

The State argued that the 2012 conviction was not too remote, citing two cases from its Trial Brief on the issue that supported admission of the CDV conviction in this case: *State v Smith*, 337 S.C. 27, 522 S.E. 2d 598 (1999) (defendant's prior domestic violence conviction was admissible to show intent to kill and absence of mistake or accident in murder trial for killing daughter) and *State v. Key*, 277 S.C. 214, 215-16, 284 S.E. 2d 781, 782 (1981) (defendant's repeated threats to shoot victim spanning eight years before the day of the shooting "was properly admitted to show absence of mistake or accident as well as defendant's intent" in trial for aggravated assault and battery). *Tr. pp. 345-46;* Trial Brief for the State of South Carolina, p. 8, *R. p.* ___. The State again argued that the 2012 incident was relevant in light of Appellant's claim the victim was accidentally killed. *Tr.pp. 346-47.*

The trial judge stated that she would not permit the State to introduce what the victim said because she found that it was hearsay and not an excited utterance. *Tr.pp. 347-52.* Ultimately, she took a recess to further consider the question of whether the 2012 conviction was

too remote. *Tr.pp. 352-55*. When court resumed, she informed the parties that she would allow Deputy Cross to "testify in a limited fashion" to the 2012 incident. While the trial judge found that the 2009 incident was too remote and not proven by clear and convincing evidence, she found that

> [Deputy Cross] will be able to testify that she responded to the residence in 2012. She will be able to describe what ... she rationally perceived of the victim's ... demeanor. She will not be able to repeat anything that Mrs. Lawrence said to her, or what the nature of the incident was, as it would be hearsay not subject to cross examination.
>
> And I cannot establish that it was an excited utterance because there is no testimony available to the court as to the lapse in time between when the incident occurred and when the police were actually called. This officer would only be able to corroborate when she was called, and when she was dispatched, and when she arrived. There will no references to the defendant being the primary aggressor, or any references to mutual combat.
>
> I find that the evidence is probative. That it is not more prejudicial than probative. Our court has not adopted any Bright Line tests regarding remoteness. And while this incident occurred in 2012 -- and I'm referring to the defendant's 2012 conviction, it would fall within the *Lyle* exception of absence of mistake and intent, as well as his defense of accident, which the State has the affirmative obligation to rebut by [proof] beyond a reasonable doubt.
>
> It is [relevant] to whether the defendant -- Mrs. Lawrence was combative is relevant to the issue of absence of mistake and intent. And it can be established by clear and convincing evidence, at least ... those portions of the evidence that ... I'm going to allow the witness to testify to as well as I anticipate the State seeking to introduce the certified conviction from the 2012 incident where he pled guilty on 11/29 of 2012.
>
> I would also find that the evidence is logically relevant to this incident, and for the jury to have a full picture of the nature of the relationship that existed between the defendant and the deceased, and in connection with the conviction ... and it rises above what would be considered just in the nature of character evidence.
>
> Our courts have found that the evidence of prior difficulties or ill feelings between an accused and victim, showing the cause of such difficulties or ill will is admissible when there is some connection or cause and effect between the evidence and the crime. Quoting CJS: I would find that it is relevant because it

> logically relates to the crime for which the defendant has been charged, and it will assist the jury in arriving at the truth of an issue that is relevant.
>
> And it is competent, that the evidence has a tendency to make the existence of a fact that is a consequence of the determination of the action more or less probable than it would be without the evidence. And it bears directly on the issue of accident. And it, likewise, supports a logical relevance between the prior acts and the crime, again, for which the defendant is accused.
>
> .... And, again, this rule is contingent on the State seeking to introduce the actual conviction, which when looked at together, rises to the level of clear and convincing evidence, as I find the officer's testimony credible that she was called to the scene. That could be corroborated by the incident report, which she has already used to refresh her memory.
>
> I find her testimony credible ... by clear and convincing evidence what she observed of Mrs. Lawrence when she arrived at the scene. And I've already found that the probative value is not substantially outweighed by the danger of any unfair prejudice to the defendant.

Tr. pp. 355-58 (emphasis added).

The trial judge noted that this was a slightly unusual case because the victim was dead. The trial judge also admonished the Assistant Solicitor that she was "strictly restricted to ... the confines of *Lyle* in dealing with that evidence," and that there would be no reference that this was a second offense CDV conviction. *Tr. pp. 358-60* (emphasis added). The trial judge later denied Appellant's new trial motion that was based upon this ruling. *Tr. pp. 631-32.*

Deputy Cross subsequently testified that she had previously responded to a domestic violence call at the victim's residence on September 19, 2012. When Deputy Cross arrived, at roughly 7:04 a.m., Frances was "visibly shaken." She was whispering and had been crying. The only other person at the residence was Appellant, and the call ended with Deputy Cross arresting him. *Tr. pp. 362-64.* The State ultimately presented testimony from Berkeley County Deputy Clerk of Court Linda Hill that a certified copy of a sentencing sheet reflected that Appellant was

convicted of criminal domestic violence in 2012. A redacted copy of the sentencing sheet (Court's Ex.6) was admitted. *Tr. pp. 365-67; 539-40.*

B. Discussion.

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." *State v. Cope*, 405 S.C. 317, 337, 748 S.E.2d 194, 204 (2013) (citing Rule 404(b), SCRE, and *Lyle,* 125 S.C. at 415-16, 118 S.E. at 807). However, such evidence may be admissible under Rule 404(b), SCRE, to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent. *See also State v. Taylor*, 333 S.C. 159, 168, 508 S.E.2d 870, 874 (1998) ("In homicide cases, evidence that the accused and the decedent had previous difficulty is admissible. The evidence is admissible to show the animus of the parties and to aid the jury in deciding who was the probable aggressor"). As a threshold matter, the trial court must determine whether the proffered evidence is relevant as required under Rule 401, SCRE." *Cope*, 405 S.C. at 337, 748 S.E.2d at 204. "Evidence is relevant when 'it tends to make more or less probable some matter in issue upon which it directly or indirectly bears.' " *State v. Brooks*, 341 S.C. 57, 61-62, 533 S.E.2d 325, 328 (2000) (citation omitted). If the trial judge finds the evidence is relevant, she must then determine whether the bad act evidence fits within an exception in Rule 404(b). *Cope*, 405 S.C. at 337, 748 S.E.2d at 204.

"Further, even though the evidence falls within a *Lyle* exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. The determination of the prejudicial effect of prior bad act evidence must be based on the entire record and the result will generally turn on the facts of each case. The erroneous admission of

prior bad act evidence, however, may be deemed harmless." *See State v. Fletcher*, 379 S.C. 17, 24, 664 S.E.2d 480, 483 (2008); *State v. Clasby*, 385 S.C. 148, 156, 682 S.E.2d 892, 896 (2009).

This Court is bound by the trial judge's factual findings unless they are clearly erroneous. *State v. Quattlebaum*, 338 S.C. 441, 527 S.E.2d 105 (2000). Accordingly, the trial judge's ruling will not be disturbed on appeal if there is any evidence to support the admission of bad act evidence. *State v. Wilson,* 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001). Applying this standard, the State submits that the trial judge did not abuse her discretion.

Appellant claimed that the killing was accidental in his statement to the 911 operator (*Tr. pp. 109-10; 126-30;* State's Ex. 69), in his custodial statement (State's Ex. 71), and in his telephone conversation with his friend Shirley (State's Ex. 72) following his arrest. He most fully explained his version of events in his statement to law enforcement, in which he claimed that the victim fell on the knife when she fell in the course of their struggle over a knife that she had supposedly brandished. Another version he gave at that time was that they both fell and that he landed on her. In both versions, he denied having any intent to kill her and he asserted that she was "accidentally" killed.

In spite of Appellant's contrary argument, the State submits that the 2012 CDV conviction, involving the same parties in the same residence, was relevant to negating Appellant's statements that the killing resulted from an accident or mistake. It was equally relevant to proving his malicious intent. In other words, the 2012 conviction made it less probable that the killing was accidental, as Appellant claimed, and more probable that he acted intentionally and with malice. *See Sweat*, 362 S.C. at 124-25, 606 S.E.2d at 512 (in defendant's trial for burglary in the first degree, assault and battery with intent to kill (ABIK), and three counts of assault of a high and aggravated nature (ABHAN), trial judge did not err by allowing

defendant's girlfriend – who was also a victim in case on trial - to testify to a prior act of criminal domestic violence in prosecution occurring forty-five days before crimes for which he was being tried. The Court found that "both motive and intent can be inferred from the prior bad act"); *Smith*, 337 S.C. at 33, 522 S.E.2d at 601 (in trial for murder and ABIK, the Supreme Court alternatively found that "[t]he solicitor properly offered appellant's July 1996 criminal domestic violence conviction to establish appellant's intent to kill and the absence of mistake or accident. The prior conviction was logically relevant to appellant's intent and absence of mistake or accident at the time of the shooting" roughly three months later); *State v. Simmons*, 310 S.C. 439, 442-43, 427 S.E.2d 175, 177-78 (1993) (evidence of prior attacks on elderly women admissible to show defendant's intent in entering home of an elderly murder victim's home without her consent in trial for murder and burglary; also, finding that the probative value of this evidence was not substantially outweighed by prejudicial effect), *sentence rev'd on other grds.*, *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187 (1994); *State v. Ford*, 334 S.C. 444, 452, 513 S.E.2d 385, 389 (Ct. App. 1999) (evidence appellant and co-defendant had previously robbed or attempted to rob victim of common law robbery "was a necessary element in understanding their motive and intent when they accosted" victim on date of crime). *See also United States v. Contreras*, 816 F.3d 502 (8th Cir. 2016) (evidence defendant had previously spanked his daughter hard enough to leave a mark, and had apologized to daughter's mother, was admissible in his trial for the second degree murder of his daughter; such evidence was relevant to prove absence of mistake and lack of accident, and was similar in kind and close in time to the crime charged, and probative value of the evidence outweighed potential prejudice"); *State v. Boe*, 847 N.W.2d 315, 321 (S.D. 2014) (trial court did not abuse its discretion by admitting evidence of defendant's 2002 conviction for aggravated assault as other act evidence in his trial for 2012

aggravated assault, where both the past and current incidents involved a female victim in a relationship with defendant who was not complying with defendant's wishes, and defendant used a firearm in both incidents; this other act evidence was relevant to negate defendant's claim that the shotgun fired accidentally, that he did not intend to harm victim with the shotgun, and that he had no motive to harm her); *State v. Grubb*, 111 Ohio App.3d 277, 282, 675 N.E.2d 1353 (Ohio App 1996).

The State further submits that the trial judge properly found that the 2012 conviction constituted part of the *res gestae* of the murder. "The *res gestae* theory recognizes evidence of other bad acts may be an integral part of the crime with which the defendant is charged, or may be needed to aid the fact finder in understanding the context in which the crime occurred.' .... 'The evidence admitted must logically relate to the crime with which the defendant has been charged.' " *State v. McGee*, 408 S.C. 278, 287, 758 S.E.2d 730, 735 (Ct. App. 2014) (citation omitted). In other words, evidence of another crime constitutes part of the *res gestae* if that evidence "furnishes part of the context of the crime or is necessary to a full presentation of the case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its environment that its proof is appropriate in order to complete the story of the crime on trial by proving its immediate context ...." *State v. Adams*, 322 S.C. 114, 122, 470 S.E.2d 366, 370-71 (1996), *overruled on other grds.*, *State v. Giles*, 407 S.C. 14, 754 S.E.2d 261 (2014). The 2012 CDV constituted part of the *res gestae* in this case because it helped place the prosecution's other evidence in context and it provided jurors with what the trial judge accurately described as a "full picture of the nature of the relationship that existed between the defendant and the deceased." *Id. See also Anderson v. State*, 354 S.C. 431, 435, 581 S.E.2d 834, 836 (2003) ("Evidence of other crimes is admissible

under the *res gestae* theory when the other actions are so intimately connected with the crime charged that their admission is necessary for a full presentation of the case").

Moreover, the probative value of the 2012 conviction, involving the same two parties, was not substantially outweighed by its prejudicial effect under Rule 403 SCRE. First, it was extremely probative of disproving Appellant's claim that the killing was the result of some bizarre accident. It was equally probative of the State's theory that Appellant killed the victim with malice. The resolution of these matters was critical to the outcome of the case because, obviously, the State had to prove malice as an element of murder. The conviction thus completed the State's theory of the case. *See Sweat*, 362 S.C. at 129, 606 S.E.2d at 515 ("Testimony of the October incident was highly probative. It tended to show motive and intent, and it completed the State's theory of the case"). While the prior CDV conviction may have had some prejudicial effect, the State submits that the danger of unfair prejudice was slight compared to its relevancy. *Id. See also State v. Green*, 412 S.C. 65, 79, 770 S.E.2d 424, 432 (Ct. App. 2015), *reh'g denied* (Apr. 21, 2015) ("If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal"), *cert. denied* (Sept. 3, 2015).

Further, Appellant's assertion that the 2012 conviction was too remote temporally lacks merit. The November 29, 2012 conviction occurred almost a year and one-half before the day on which Frances was last seen alive and presumably was murdered (May 21, 2013) or slightly more than three years and seven months before the July 11, 2016 trial. The fact the 2012 conviction was more remote than the prior bad act in *Sweat* or the three month difference in *Smith* is not dispositive. "... [While] courts have considered temporal remoteness in determining whether admission is proper, ... there exists no set time limit beyond which a prior bad act is simply, *per se*, too remote." *State v. Scott*, 405 S.C. 489, 504, 748 S.E.2d 236, 245 (Ct.App.

2013); *see also State v. Tutton*, 354 S.C. 319, 332, n. 5, 580 S.E.2d 186, 193 n. 5 (Ct.App.2003) ("Remoteness in time, however, is not dispositive"); 29 Am.Jur.2d *Evidence* § 420 ("Temporal remoteness goes to the weight, not the admissibility, of evidence of prior bad acts ....").

A number of other cases have found that prior bad acts occurring more remotely than the year and one-half at issue were not too remote. In *Key*, the defendant was convicted of aggravated assault and battery for shooting the victim in the leg. Over the defendant's objections that the earlier incidents were irrelevant and lacked similarity to the crime for which he was on trial, the trial judge allowed the State to introduce evidence of the defendant's repeated threats to shoot victim spanning eight before the day of shooting. *Key*, 277 S.C. at 215, 284 S.E. 2d at 782. On appeal, the Supreme Court found that the evidence was "properly admitted to show absence of mistake or accident as well as defendant's intent." *Id.* at 215-16, 284 S.E. 2d at 782. In *State v. Blanton*, 316 S.C. 31, 33, 446 S.E.2d 438, 440 (Ct. App. 1994), *as amended* (June 23, 1994), the Court concluded "that the alleged acts perpetrated against the two witnesses occurred some seven to eight years prior to the alleged molestation of J., is not alone dispositive."[13] And, the Court concluded in *Scott* that the prior bad acts were not too remote and that the evidence's probative value was not substantially outweighed by the danger of unfair prejudice, even though the prior bad acts occurred "some eleven to twenty years prior to the crimes charged." *Scott*, 405 S.C. at 509, 748 S.E.2d at 247.

Moreover, the trial judge gave the following limiting instruction in her jury charge:

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[13] In *State v. Hubner*, 362 S.C. 572, 608 S.E.2d 572, 608 S.E.2d 463 (Ct. App. 2005), fourteen years passed between the prior bad act in Maine with a different victim and the charged conduct. The Court of Appeals reversed the convictions and sentence based on dissimilarities in conduct, but the Supreme Court reversed the Court of Appeals opinion, despite the fourteen year gap. *State v. Hubner*, 384 S.C. 436, 683 S.E.2d 279 (2009).

> I ... instruct you that *you have heard evidence that the defendant was convicted of a crime*, and/or committed a bad act, not the subject of a conviction, other than the one for which the defendant is now on trial. *This testimony, if you conclude it is true, may only be considered by you on the question of intent and absence of mistake, and for no other reason, and for no other purpose.*
>
> You may give this evidence the weight, value, and effect you decide, if any, which you decide it should have *on the sole issue of intent and absence of mistake. You must not consider evidence of the commission of another offense and/or a bad act, not the subject of a conviction, as proof of the defendant's guilt of the charge we are trying today.*

Tr. p. 599, lines 8-22 (emphasis added).

Because "[It is] the almost invariable assumption of the law that jurors follow their instructions," *United States v. Olano*, 507 U.S. 725, 740, 113 S.Ct. 1770, 1781 (1993) (citing *Richardson v. Marsh*, 481 U.S. 200, 206, 107 S.Ct. 1702, 1707 (1987)); *see also Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068 ("a court should presume ... that the judge or jury acted according to law"), the State submits that jurors would have only considered this conviction, to the extent they gave it any weight at all, "on the sole issue of intent and absence of mistake" Under these circumstances, Appellant cannot prove that the prejudicial effect of the 2012 CDV conviction substantially outweighed its prejudicial effect.

Finally, the State submits that even if the trial judge abused her discretion by admitting the 2012 conviction, any error was clearly harmless beyond a reasonable doubt. An insubstantial error not affecting the result of the trial is harmless where "guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached." *State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989). *See also State v. Gillian*, 373 S.C. 601, 611, 646 S.E.2d 872, 877 (2007). And, again, the trial judge's limiting instruction precluded jurors from considering the conviction on the question of whether or not he murdered Frances Lawrence. Rather, jurors could only consider it, "on the sole issue of intent and absence of mistake." Also,

the State did not expressly reference existence of the CDV conviction in closing argument. *See Tr. pp. 543-75.*[14] Moreover, even though this was a circumstantial evidence case, the prosecution's evidence conclusively proved Appellant's guilt beyond any reasonable doubt.

Specifically, the State's evidence showed that:

- Analysis of the victim's fingernail clippings revealed the presence of Appellant's DNA. *Tr. pp. 410-13*;
- The victim was only about 4'11" tall and she had a variety of health problems in her life. *Tr. pp. 239; Tr. pp. 302-05*;
- The victim told her sister, Dorothy Rivers, on Tuesday morning May 22nd, that she was planning to move and she showed Dorothy some boxes containing some of her belongings, *Tr. pp. 242-44*;
- The victim likewise told her sister, Cathy Hampton, that she was ready to "move on." *Tr. pp. 300-01*;
- Dorothy was at the victim's residence on Tuesday, May 20th and described the mood inside the mobile home as "really, really thick." She felt awkward being there, and indicated that the victim was not speaking to Appellant. *Tr. pp. 239-42*;
- Appellant was smoking crack in the days before the victim's body was found. *Tr. p. 260*;

[14] The only remarks that even remotely approach a comment on the existence of the conviction are "There's only two people there when he murdered her; this is true. But what can you tell about the way he behaved toward her during the murder. Look at the way he treated her when she was alive. Look at the way he treated her and talks about her after she is dead." *Tr. p. 545, line 24 – p. 546, line 3*. However, these remarks can also be fairly viewed as referencing testimony from family members who explained the "on again and off again" relationship that the victim had with Appellant. *See Donnelly v. DeChristoforo*, 416 U.S. 637, 647, 94 S.Ct. 1868, 1873 (1974) (a reviewing court "should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations"). Mysteriously, Appellant seems to suggest that the absence of any express comment referring to the CDV conviction was somehow prejudicial, even though he surely would have argued that any express reference was prejudicial.

- The victim had acquired new telephone numbers for both her cell phone and her landline. She shared these numbers with her sisters but not with Appellant. *Tr. p. 302*;

- Although the victim had never previously failed to show for her scheduled shift and it was very unusual for her to miss work, she did not return to work after the morning of Wednesday, May 21st. *Tr. pp. 134-38; 141-44; 146 290-92; 294*;

- Because the victim did not show for work, her friend, Mary Jones, called both her home and cell phones on the evenings of Wednesday, May 23rd, and on Thursday, May 22nd, but did not get an answer. *Tr. pp. 290; 294-95*;

- Following the victim's disappearance, Appellant told the victim's sister, Darlene Walker, that Frances was at work and that he had her vehicle in order to get the brakes fixed. In the second conversation, he said that he still had the vehicle because he had to change the oil;

- Following the victim's disappearance, Appellant told her sisters, Dorothy and Darlene, as well as her nephew, Harold Drayton, that the victim's friend Mary had picked her up and that the victim was staying with Mary for several days;

- He also told Dorothy that he was going to leave her vehicle at the bus station on Friday. Mary would then supposedly drive Frances there and she would get her vehicle;

- However, Ms. Jones testified that the only time the victim had ever visited Ms. Jones' home, in Cross, South Carolina, was shortly after Ms. Jones' fiancée had died. *Tr. pp. 292-93*;

- Appellant, who did not have a car, was seen by several witnesses driving the victim's blue SUV after her disappearance but at a time when he told her family members that she was alive. *Tr. pp. 224-26; 254-57*;

- After the victim's disappearance, the air conditioning was constantly running, which was something that the victim did not do. *Tr. p. 251; 279-81; 321-24*;

- Also, an air freshener can was in the residence, and at least one bathroom window was left open. *Tr. pp. 278-79; 286*;

- He told Alma Reid that he and the victim had an altercation, in which the victim had retrieved a knife from the kitchen, Appellant pushed her on a chair, and the victim cut her arm;

- When Reid asked Appellant if he called an ambulance, he said, " 'No, it wasn't that serious.' " *Tr. pp. 195-97; 199-200*;

- In his call from jail (State's Ex. 72), he falsely claimed that he and Frances had been planning to move to a new location, together, and that he had been sending her some of the $200.00-$250.00 a day from his job because they had to pay over $1,200.00 before they could move into "their" new residence;

- The prosecution's evidence was that he was not employed full-time;

- On Thursday night, May 2nd, Appellant went to a gas station on Highway, where he unsuccessfully attempted to withdraw money from an ATM;

- He then went to another gas station that was across the street where he accessed the ATM, and he had money when he returned to the vehicle. This was witnessed by the victim's nephew, Harold Drayton. *Tr. pp. 224-26*;

- In his call from the jail, he claimed that he and the victim had a joint bank account, and that he only took his money out of their joint account;

- Yet, the bank records where the victim had an account reflected that she had a checking account that was exclusively in her name, and that only one ATM card was issued for it;

- On May 22nd and 23rd, there were ATM inquiries and withdrawals made at 2895 and 2908 West Fifth St., in Summerville. *Tr. pp. 213-17; 219*;

- Appellant pretended to have telephone conversation with the victim after her disappearance and, inferably, at a time when she was dead. *Tr. pp. 261-62*;

- In the days following the victim's disappearance, Appellant gave away food, a grill, a lawn mower, and other items that had belonged to the victim. *E.g., Tr. pp. 251; 279-81*;

- He did not place a 911 call until Friday morning, even though she had been dead since early Wednesday, May 21st. *State's Ex. 69*;

- He lied to the 911 operator and claimed that she had died on Thursday, the 22nd. *State's Ex. 69*;

- He also lied to the 911 operator about his location when he made the call. He claimed that he was on Highway 78, but his cellphone was using a tower that was off of I-95. *Tr. pp. 109-10; 126-30; State's Ex. 69*;

- Appellant hung up before the operator could get a more precise location of his whereabouts, and he never called back;

- He never tried to call an ambulance for the victim;

- The State published the 911 call (State's Ex. 69) to the jury;

- The victim's gown did not have any hole or defect that corresponded to the knife wound. So, either she was not wearing the gown or it was pushed up when she was stabbed. *Tr. pp. 391; 436-38*;

- In his custodial statement (State's Ex. 71), Appellant admitted that he had changed the gown that she was wearing at the time she was killed but no other bloody gown was recovered. *Tr. p. 391*;

- In his statement to law enforcement (State's Ex. 71), Appellant lied about calling Berkeley County the night after the stabbing;

- He also changed his account of what she said after being stabbed in his statement. He initially claimed that she had simply groaned, but later said that she asked him to hold her and to not call 911;

- In his statement, he also gave two different accounts of how the victim aggressively came at him with a knife and, following a struggle, fell and accidently died from a self-inflicted wound (State's Ex. 71);

- He likewise claimed in the recorded telephone conversation from the jail (State's Ex. 72) that the killing was the result of a "freak accident" after a struggle the victim started, but he gave a different account to the person with whom he was speaking;

- When the forensic pathologist was asked a hypothetical question encompassing the accidental killing he had described, the pathologist opined that this was "not very likely" to have occurred; she described the unusual manner in which the victim would have had to have been holding the knife in order to match the downward trajectory of the knife wound; and she explained that the natural reflex for someone falling forward is to use the arms to brace for impact. *Tr. pp. 433-35*;

- His story was inconsistent with the manner she was found, lying on her back. *Tr. pp. 378-85*;

- His story was also inconsistent with testimony from family members, who described the victim as a peaceful person who would not fight. *Tr. pp. 242-44; 303-04*;

- Additionally, there were no signs of a struggle in the residence, despite Appellant's claim that one had occurred. *Tr. pp. 469-70; 472; 474; 493*;

- In fact, nothing of evidentiary value was found at the scene. *Tr. pp. 150-54; 178-80; 184*;

- In his statement, he also asserted that the victim had been drinking a lot, taking medication and acting crazy that night;

- Yet, a toxicology analysis of the victim's blood revealed that she did not have any alcohol or drugs of abuse in her system (*Tr. pp. 429-30*) and his claims were inconsistent with testimony from those who knew her that the victim did not use drugs and that she did not drink to excess;

- Although one would have expected to find a great deal of blood at the crime scene, in light of the stab wound, very little was found. This suggests that he cleaned the scene, in an effort to cover up the crime;

- The pathologist found symmetrical bruising on the victim's shoulders and arms that were consistent with someone holding her down. *Tr. pp. 428-29*;

- He lied to law enforcement about what he had done with the murder weapon and it has never been recovered;

- Although he claimed that he left the victim's SUV at the bus stop, it was not there and, despite exhaustive efforts to locate it, the Sheriff's Office has never been able to locate it;

- Appellant had a part-time job at a car auction;

- A very reasonable inference from this evidence is that he disposed of both the knife and the vehicle because they were incriminating of him;

- He fled the State before he could be arrested, see *Grant*, 275 S.C. at 407, 272 S.E.2d at 171; and,

- He lied in his custodial statement about where he was when he placed the 911 call. *Tr. pp. 313-14; 467.*

In light of this evidence, any error in introducing evidence of the CDV conviction was harmless beyond a reasonable doubt. *See Bailey,* 298 S.C. at 5, 377 S.E.2d at 584.

II. The trial judge did not abuse her discretion by allowing the State to introduce expert testimony from a qualified clinical psychologist that there is an increased risk of homicide for victims "in domestic violence relationships" when the victim has left in the past or is "in the process of attempting to leave" because (1) the expert testimony given in this case is

nothing more than a description of Battered Spouse Syndrome, and the General Assembly has codified the admissibility of Battered Spouse Syndrome in criminal cases, *see* § 17-23-170(A); (2) the testimony given is consistent with a number of post-*State v. Kromah* cases that have upheld the prosecution's introduction of analogous expert testimony in the field of child abuse dynamics; and (3) the probative value of this testimony was not substantially outweighed by its prejudicial effect under Rule 403, SCRE.

Appellant's remaining argument is that the trial judge erroneously allowed the State to introduce the expert testimony of Dr. Alyssa Rheingold, a clinical psychologist with expertise in "the field of impact of trauma, domestic violence," that there is an increased risk of homicide for victims "in domestic violence relationships" when the victim has left in the past or is "in the process of attempting to leave." His contention is that "[t]he expert's testimony in this case is no more admissible than the profiling testimony in the recent case of [*State v. Huckabee*, 419 S.C. 414, 798 S.E.2d 584 (Ct. App. 2017), *cert. pending*]" because it is irrelevant and prejudicial. The State submits that the trial judge did not abuse her discretion because (1) the expert testimony given in this case is nothing more than a description of Battered Spouse Syndrome, and the General Assembly has codified the admissibility of evidence concerning Battered Spouse Syndrome in criminal cases in S.C. Code Ann. § 17-23-170(A) (2003); (2) the testimony given is consistent with a number of post-*State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490 (2013), cases that have upheld the prosecution's introduction of analogous expert testimony in the field of child abuse dynamics because the expert did not interview any witness, she never commented on the credibility of any prosecution witness, she did not comment on Appellant's culpability or attribute any criminal conduct to him, she was unaware of the facts of the case, and she did not make any statements that the Court in *Kromah* found were improper; and (3) the probative value of this testimony was not substantially outweighed by its prejudicial effect under Rule 403,

SCRE. Finally, to the extent that the Court finds that it was error to admit this testimony, the State submits that any error was harmless beyond a reasonable doubt.

A. Proceedings at trial.

1. Appellant's *in camera* objection and the trial judge's ruling.

When the State indicated that it was calling Dr. Rheingold, Appellant objected. Following a bench conference, the trial judge excused the jury. *Tr. pp. 494-95.* Appellant argued *in camera* that Dr. Rheingold's testimony was inadmissible under Rules 402 and 403, SCRE, because it was irrelevant and highly prejudicial because it would confuse and mislead the jury. He further argued that only the 2012 CDV conviction had been admitted and that the State was attempting to bolster its "claim of murder" through her testimony. He also claimed that this would violate his right to due process under the Fifth and Fourteenth Amendments. *Tr. p. 495.*

In response, the Assistant Solicitor pointed out that evidence had been introduced that (1) even though the victim and Appellant had arguments, she "kept taking him back;" (2) she had gotten an extra phone number that she did not want Appellant to have and that she was preparing to move; (3) and they were "back together," despite a "domestic violence incident" in 2012. The Assistant Solicitor also noted that the defense had elicited evidence Appellant and the victim "were getting ready to get married," and she astutely observed that the defense was "presumably ... trying to paint a different picture of what was going on in this relationship." *Tr. p. 496.*

The Assistant Solicitor argued that expert testimony is permitted "if there is any issue that [she] can speak to, that is not within the ordinary understanding of the average juror." She explained that the State was presenting Dr. Rheingold's testimony to educate jurors about issues that are consistent in the studies of domestic violence, which is that there is a cycle of abuse where the victims typically ... go back to the defendant, even after episodes of domestic

violence." This cycle is "consistent to domestic violence relationships, and [is] supported by practice and literature." The State also wanted to introduce evidence "about periods of time when victims are getting ready to leave, and how violence often escalates in domestic violence relationships and what that means." *Tr. pp. 496-97.*

In response to the trial judge's inquiry, the Assistant Solicitor assured the trial judge that the State would not be asking questions about the victim, in light of *State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490 (2013), and stated that Dr. Rheingold did not know the specific facts of this case. Therefore, she would not be vouching for any witness' credibility. *Tr. p. 497.*

Appellant argued in reply that jurors had heard all of the witnesses testify that the victim and Appellant had a "rocky relationship" and that jurors could use "their common sense and draw from their own personal situations and understand dynamics of this relationship without having to have an expert testify about domestic violence." *Tr. pp. 497-98.* After some discussion with the trial judge about the CDV conviction that had been admitted, he again argued that the proposed testimony would confuse and misled the jury *Tr. p. 498.*

The trial judge, however, noted that the State was "well aware of the case law" and that Dr. Rheingold could not discuss "this specific incident." *Tr. p. 499.* After further discussion, *499-500*, she ruled that the testimony was admissible:

> ... I think there is enough evidence in the record to support having someone testify for the purpose of solely educating the jury. But, of course, the State would be precluded from arguing anything related to the defendant regarding consistency of behavior, or habit, or character, anything along those lines. And I think they are very clear regarding that. And I think the case law is very clear as well as to what the limitations are when admitting that type of testimony, and the scope of the State's subsequent arguments regarding that testimony.
>
> The Court overrules the objection pursuant to Rule 702, as well as finding that the evidence is relevant. It is probative. It is more probative than prejudicial. It will assist the trier of fact. Contrary to the defense's argument, it is not

> misleading. In fact, it will provide clarity and a bench mark for assisting the trier of fact in making its determination of the facts.
>
> I cannot discern any violation of any due process rights, as Mr. Bradley is represented and counsel has an adequate opportunity to thoroughly cross examine the witness regarding any issue or matter that she testifies to.
>
> And, of course, the State will still be bound by their requirement to establish pursuant to Rule 702 that the witness has sufficient training, education, technical, or other specialized knowledge that will assist the trier of fact to understand the evidence in establishing that foundation regarding the admissibility of her being admitted as an expert.
>
> I think it is routine now in cases where there are any allegations of difficulties in relationships, ... where we have these type of experts testify regarding certain principles to assist the trier of fact. And our Supreme Court has held that it is evidence appropriate. Again, the State is admonished to stick within the parameters of case law, and not have the witness make any in appropriate comments that directly bear on the facts and circumstances of this case.

Tr. pp. 500-01.

2. Dr. Rheingold's testimony.

Dr. Rheingold was the next prosecution witness. After she testified to her educational background and employment history, she was qualified, without objection, as an "in the field of psychology, and specifically in the field of impact of trauma[] [and] domestic violence." *Tr. pp. 507-08.*

She explained that domestic violence was "quite common, more common than most people think it is," and that approximately one out of every four women reports that she was a victim of domestic violence at some point in her life. Yet, research has shown that the majority of women will stay in a relationship even after being physically abused and that the relation lasts for over a year. Also, many return to the abusive partner, even after leaving the relationship for some time. Dr. Rheingold explained that the factors causing women to stay in a relationship even after they have been a victim of domestic violence include (1) love of the abusive partner, even

while not liking the abuse; (2) fear of the abuser; (3) belief that the abuser will get help, or not abuse her again in the future; (4) fear of harm to family members; (5) lack of alternative resources; and (6) "fear that they are going to be not believed, if they were to seek help." *Tr. pp. 508-09.*

Dr. Rheingold further explained that "more often than not" abused women do not disclose or report being a victim of domestic violence to others. Also, abusers often exert their power and control over their victims in other fashions, such as being psychologically and verbally abusive, economically abusing the victim, isolating the victim, and intimidating the victim. *Tr. p. 510.* Dr. Rheingold clearly testified that she did not know anything about Appellant's case and that she was testifying to what she had seen in her research and studies. *Tr. pp. 510-11.*

B. Discussion.

Appellant contends that the following exchange was improperly admitted:

> Q. What does the research say about the period of time when a woman is getting ready to leave her abuser?
>
> A. So in domestic violence relationships, when there -- there are risk factors for the potential -- for future escalation of harm, even homicide. And when there is a -- a relationship that is controlling, or there is this other kind of power of dynamics, when a woman is -- have left in the past, or in the process of attempting to leave, there is an increased risk of homicide.

Tr. 511, lines 4-13.

The State submits that the trial judge did not abuse her discretion by allowing the State to present Dr. Rheingold's expert testimony to the jury. "The decision to admit or exclude testimony from an expert witness rests within the trial court's sound discretion." *State v. Price*, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006). "Expert testimony may be used to help the jury

determine a fact in issue based on the expert's specialized knowledge, experience, or skill and is necessary in cases in which the subject matter falls outside the realm of ordinary lay knowledge." *State v. Brown*, 411 S.C. 332, 339, 768 S.E.2d 246, 251 (Ct. App. 2015) (cert. denied August 6, 2015). "A trial court's decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion." *State v. White*, 382 S.C. 265, 269, 676 S.E.2d 684, 686 (2009).

Appellant does not challenge either Dr. Rheingold's qualifications to provide expert testimony or that her testimony met the reliability threshold for the jury's ultimate consideration under Rule 702, SCRE. *See Id.* at 270, 676 S.E.2d at 686. Also, he has abandoned his claim that her testimony violated due process.[15] Instead, he asserts that her testimony was irrelevant and that it was overly prejudicial. Notwithstanding Appellant's complaints, the State submits that there was no error. In *Watson v. Ford Motor Co.*, 389 S.C. 434, 445, 699 S.E.2d 169, 175 (2010), the Court established a three prong test for a trial court to apply to determine if expert testimony is proper: (1) the trial judge must first determine if the subject matter is beyond the ordinary knowledge of the jury requiring the expert to explain the matter to the jury, (2) the trial judge must then determine if the expert has acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter, and (3) the trial judge must evaluate the testimony and determine if it is reliable. *Id.* at 446, 699 S.E.2d at 175.

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[15] The trial judge correctly recognized that his due process claim was not meritorious. *See Spencer v. Texas*, 385 U.S. 554, 563-64, 87 S.Ct. 648, 653-54 (1967) ("Cases in this Court have long proceeded on the premise that the Due Process Clause guarantees the fundamental elements of fairness in a criminal trial.... But it has never been thought that such cases establish this Court as a rulemaking organ for the promulgation of state rules of criminal procedure"). *See also Strickland v. Washington*, 466 U.S. 668, 684-85, 104 S.Ct. 2052, 2063 (1984) ("[t]he Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause") (citation omitted).

The trial judge correctly applied these criteria in allowing the evidence to be presented. Dr. Rheingold did not opine on the credibility of any prosecution witness; she never related her testimony to the facts of this case, *see Brown*; and she did not even know anything about the facts of this case. Rather, her research-based expert testimony simply provided general background testimony on the general behavioral characteristics of physically abused women. She thereby educated jurors on matters that are outside the realm of ordinary lay knowledge and helped the jury better understand the State's evidence. *Id.* The nature of her testimony falls under what a Texas court aptly described as "educator expert" evidence. *See Coble v. State*, 330 S.W.3d 253 (Tx. Crim.App. 2010) (finding expert testimony about the prison classification system and prison violence admissible despite not relating to appellant personally, but was "educator-expert" evidence).

The expert testimony in this case is nothing more than a description of Battered Spouse Syndrome. The South Carolina Supreme Court has held that a defendant may present expert testimony concerning this Syndrome to establish a claim of self-defense in a homicide case, *see State v. Hill*, 287 S.C. 398, 399-400, 339 S.E.2d 121, 122 (1986); *Robinson v. State*, 308 S.C. 74, 78-80, 417 S.E.2d 88, 90-91 (1992), and the General Assembly has the admissibility of Battered Spouse Syndrome in criminal cases "on the issue of whether the actor lawfully acted in self-defense, defense of another, defense of necessity, or defense of duress." *See* § 17-23-170(A). Of particular importance to this case, section 17-23-170(A) also provides that "[t]his section does not preclude the admission of testimony on battered spouse syndrome in other criminal actions."

Thus, the General Assembly has authorized testimony such as that challenged by Appellant. Nor does § 17-23-170(A) evince an intent to prevent the prosecution from introducing such testimony where, as here, it is relevant. Unlike the expert testimony approved of in *Hill* and

Robinson, however, Dr. Rheingold did not interview any witness; she never commented on the credibility of any prosecution witness; she did not comment on Appellant's culpability or attribute any criminal conduct to him; she was unaware of the facts of the case; and she did not make any statements that the Court in *Kromah* determined were improper. *See Brown*, 411 S.C. at 344, 768 S.E.2d at 252.

The trial judge's ruling is likewise supported by several post-*Kromah* cases that have upheld the prosecution's introduction of analogous expert testimony in the field of child abuse dynamics. For instance, in *State v. Anderson*, 413 S.C. 212, 218, 776 S.E.2d 76, 79 (2015), *reh'g denied* (Sept. 3, 2015), the Court found that the trial judge erred by failing to determine whether the State's proffered expert was qualified in the area of "child abuse assessment" because the Court "recognize[d] that there is such an expertise: this is the type of expert who can, for example, testify to the behavioral characteristics of sex abuse victims." The Court in *Anderson* explained that:

> The better practice ... is not to have the individual who examined the alleged victim testify, but rather to call an independent expert. To allow the person who examined the child to testify to the characteristics of victims runs the risk that the expert will vouch for the alleged victim's credibility.

Id. at 218-19, 776 S.E.2d at 79. The Court further found that the trial judge erred by qualifying this same witness as an expert in forensic interviewing because South Carolina does not recognize this as an area of expertise, and that this error required reversal. *Id.* at 219-221, 776 S.E.2d at 79-81.

And, in *Brown*, the State presented a witness who was qualified as an expert in child abuse dynamics. The expert, however, did not interview the victim and did not know the facts of the case. Nonetheless, Brown complained that her testimony bolstered the victims' testimony.

This Court distinguished *Brown* from the various cases like *Kromah* and *State v. McKerley*, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012), where a professional interviewing a victim indicated in her testimony she believed the victims' allegations of abuse. *Brown*, 411 S.C. at 344, 768 S.E.2d at 252.

The Court found those cases distinguishable because the expert in *Brown* never commented on the victims' allegations and testimony and the expert did not make any statements that the Court in *Kromah* found were improper. *Id.* The Court noted the expert merely testified to the general behavioral characteristics of child sex abuse victims and never related that testimony to the victims in Brown's case. *Id.* at 345, 768 S.E.2d at 253. The Court concluded that "the fact that her testimony corroborated some of the minor victims' reasons for delaying disclosure of the abuse does not mean her testimony improperly bolstered their accounts." *Id.*

This Court reached a similar result in *State v. Jones*, 417 S.C. 319790 S.E.2d 17 (Ct.App. 2016), *reh'g denied* (Aug. 18, 2016), where the appellant was convicted of one count of first-degree criminal sexual conduct (CSC) with a minor, one count of second-degree CSC with a minor, and two counts of lewd act upon a child. On appeal, he contended that the State's expert was erroneously permitted "to testify as an expert in child sex abuse dynamics because the subject matter of her testimony was not beyond the ordinary knowledge of the jury, the State failed to prove the reliability of the substance of her testimony, she improperly bolstered the victims' credibility, and her testimony was highly prejudicial." *Id.* at 323, 790 S.E.2d at 19.

In rejecting the claim that the expert's testimony was unnecessary and only offered to improperly bolster the credibility of the victims and their mother, this Court observed that it had distinguished improper bolstering in cases where the experts had themselves conducted the forensic interview "from cases involving independent mental health experts who addressed

general behavioral characteristics" in *Brown*. This Court distinguished the cases relied upon by Jones because the expert in his case "did not testify as a forensic interviewer, prepare a report for her testimony, or express an opinion or belief regarding the credibility of the Victims' allegations in this case. Importantly, [the expert] never interviewed Mother or the Victims, had no knowledge of the facts of the case beyond her discussions with the solicitor's office prior to trial, and did not make any of the statements our supreme court prohibited in *Kromah*." *Jones*, 417 S.C. at 335, 790 S.E.2d at 25-26. Applying the analysis set out in *Brown*, the Court found that the expert's testimony was admissible. *Id.* at 335-36, 790 S.E.2d at 26. *See also State v. Weaverling*, 337 S.C. 460, 474, 523 S.E.2d 787, 794 (Ct. App. 1999).

Additionally, Dr. Rheingold's testimony is consistent with expert testimony about the diagnosis of Munchausen Syndrome by Proxy (MSBP) that the Supreme Court found was admissible in S*tate v. Cutro*, 365 S.C. 366, 376-77, 618 S.E,2d 890, 895 (2005). And, courts in many other jurisdictions have approved the admissibility of similar expert testimony on the general behavioral characteristics of physically abused women. *See*, e.g., *Com. v. Morris*, 82 Mass. App. Ct. 427, 433-34, 974 N.E.2d 1152, 1159-60 (2012) (prosecution expert's testimony on domestic violence and the behavioral characteristics of victims did not constitute impermissible vouching, in prosecution for rape and assault by means of a dangerous weapon; expert stated only that teenagers look at controlling behaviors "as affection" showing "the person really loves them," and complainant did not testify that she saw defendant's abusive behavior as affection); *State v. Grecinger*, 569 N.W.2d 189, 194 (Minn.1997) ("the expert should not be permitted to testify on the ultimate fact of whether the particular [victim] actually suffers from battered woman syndrome"); *State v. Ibarra*, No. 41120, 2014 WL 4345833, at *2 (Idaho Ct. App. Sept. 2, 2014) ("Expert testimony, general to the characteristics of domestic violence and

the reaction of victims to such violence, is admissible") (citing *State v. Varie*, 135 Idaho 848, 855, 26 P.3d 31, 38 (2001)); *People v. Christel*, 449 Mich. 578, 537 N.W.2d 194, 202 n. 26 (1995) ("the majority of jurisdictions favor the admissibility of expert testimony regarding the battered woman syndrome") (citations and internal quotation marks omitted); *People v Kennedy*, 2013 WL 3834021, *1-*2 (Mich. Cir.Ct, Apr. 25, 2013) (permitting the prosecution to introduce expert testimony regarding the behavior of domestic violence victims in murder prosecution "to explain behavior such as 'prolonged endurance of physical abuse accompanied by attempts at hiding or minimizing the abuse, delays in reporting the abuse, or recanting allegations of abuse,' " but ruling that the expert could not "opine whether the victim is a domestic violence victim, may not testify that Defendant is guilty of the charge, and may not comment on the victim's truthfulness"). *See also* Annotation, *Admissibility of Expert Testimony Concerning Domestic-Violence Syndromes to Assist Jury in Evaluating Victim's Testimony or Behavior*, 57 A.L.R.5th 315 (1998).

Nor was the probative value of this evidence "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury" under Rule 403, SCRE. Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis. *State v. Spears*, 403 S.C. 247, 253, 742 S.E.2d 878, 881 (Ct. App. 2013). "The determination of the prejudicial effect of the evidence must be based on the entire record and the result will generally turn on the facts of each case." *State v. Fletcher*, 379 S.C. 17, 24, 664 S.E.2d 480, 483 (2008).

Notwithstanding Appellant's arguments, Dr. Rheingold's testimony educated the jury on matters that are beyond the knowledge of ordinary jurors. It was extremely probative of those matters and it helped the jury understand the State's other evidence. Yet, there could not be any

prejudice in the evidentiary sense of that word, since she did not interview any witness; she never commented on the credibility of any prosecution witness; she did not comment on Appellant's culpability or attribute any criminal conduct to him; she was unaware of the facts of the case; and she did not make any statements that the Court in *Kromah* found were improper. Thus, she did not draw any conclusions for the jury. *See Brown*, 411 S.C. at 344, 768 S.E.2d at 252. Moreover, Appellant has not shown (or even argued) that Ms. Rheingold's testimony was false, unreliable, or even inaccurate. *Contra State v. Chavis*, 412 S.C. 101, 108, 771 S.E.2d 336, 339 (2015), *reh'g denied* (May 6, 2015) ("We agree with Appellant that although Mrs. Elliott was sufficiently trained in RATAC protocol, and that she used RATAC protocol during her interviews, there is simply no evidence that her conclusions or impressions taken from these interviews were accurate"). Given the limited parameters of Dr. Rheingold's testimony and the absence of any proof that it was inaccurate, the trial judge properly found that the probative value of her proffered testimony was not substantially outweighed by its prejudicial effect. Accordingly, even assuming *arguendo* that *Huckabee* was correctly decided,[16] it is readily distinguishable.

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[16] As noted, *supra*, the State's petition for writ of certiorari is pending in *Huckabee*. The State submits that the Court's conclusion that behavioral profiling is not admissible in South Carolina is contrary to at least two decisions by the Supreme Court. In *State v. Spann*, 334 S.C. 618, 513 S.E.2d 98 (1999), the Court found that the trial had 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 who had been killed in similar manners. *Id.* at 620–21, 513 S.E.2d at 99–100. Spann learned about the 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, Spann presented the testimony of three expert witnesses, including one qualified in "crime scene analysis and criminal personality profiling." The expert witness testified that "that sexual sadistic killers are almost always psychiatrically disturbed white males" and he "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,

Finally, the State submits that the error, if any, in admitting Dr. Rheingold's testimony was harmless beyond a reasonable doubt for the reasons set forth in Argument I. *See Bailey,* 298 S.C. 1, 5, 377 S.E.2d 581, 584.

CONCLUSION

Therefore, it is respectfully submitted that his Court should affirm the judgment and conviction.

Respectfully submitted,

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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, Spann – an African American - 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. *See also Underwood v. State*, 309 S.C. 560, 563-64, 425 S.E.2d 20, 22-23 (1992) (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)

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August 14, 2017.

By: _____
WILLIAM EDGAR SALTER, III

ATTORNEYS FOR RESPONDENT

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Berkeley County
Honorable Deadra L. Jefferson, Circuit Court Judge
Appellate Case No. 2016-001519

THE STATE,

Respondent,

vs.

LEE DELL BRADLEY,

Appellant.

CERTIFICATE OF SERVICE

I, William Edgar Salter, III, counsel for Respondent, certify that I have served two (2) copies of the within Initial Brief of Respondent on counsel for the Appellant by depositing same in the United States mail, first class, postage prepaid, and addressed as follows:

David Alexander, Esq.
SCCID/Division of Appellate Defense
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This 14th day of August, 2017.

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ALAN WILSON
ATTORNEY GENERAL

August 14, 2017

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: *The State v. Lee Dell Bradley*
Appeal from Berkeley County
Appellate Case No. 2016-001519

Dear Ms. Kitchings:

Enclosed for filing in your office is the original Initial Brief of Respondent, Designation of Matter and Certificate of Service in the above-captioned matter.

Thank you for your assistance in this matter.

Sincerely,

William Edgar Salter, III
Senior Assistant Attorney General

WES/dmd
Enclosures
cc: David Alexander, Esq. (w/two copies of encls.)
The Honorable Scarlett Wilson, Solicitor, 9th Judicial Circuit (w/copy of encls.)
Trisha Allen, Victim Advocacy Division (w/copy of encls.)