

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Clarendon County

Honorable William Jeffrey Young, Circuit Court Judge

THE STATE,

V.

JUSTIN JERMAINE JOHNSON,

RESPONDENT,

PETITIONER.

APPELLATE CASE NO. 2014-001219

APPENDIX

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**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Justin Jermaine Johnson, Appellant.

Appellate Case No. 2014-001219

Appeal From Clarendon County
W. Jeffrey Young, Circuit Court Judge

Opinion No. 5533
Submitted September 7, 2017 – Filed January 31, 2018

AFFIRMED

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KONDUROS, J.: Justin Jermaine Johnson appeals his convictions for two counts of murder, kidnapping, burglary in the first degree, and possession of a firearm during the commission of a violent crime. He maintains the circuit court erred in (1) admitting predeath photographs of the victims, (2) permitting a witness to testify via Skype, (3) admitting his confession to police when it was not voluntarily

given, (4) denying his motion for mistrial when he was brought shackled and guarded into a holding room adjacent to the jury pool's location, (5) denying his motion for mistrial when two witnesses involved in the case discussed the merits of the case in the hallway outside the courtroom and within earshot of prospective jurors, and (6) sentencing him to five years for possession of a weapon during the commission of a violent crime when a statute prohibits such punishment. We affirm.

FACTS

Johnson had two minor children with Kaisha Caraway, a nine-month-old son (Son) and a two-year-old daughter (Daughter). Kaisha and the children lived with her grandparents, John and Maxine Caraway. Son and Maxine Caraway were shot and killed on April 6, 2011. Johnson was arrested and indicted for the crimes.

At Johnson's trial, Kaisha testified that prior to the morning of the murders, she and Johnson had not been romantically involved for nine months. However, the two stayed in contact, and Johnson had his G.I. Bill check deposited into her bank account, on which he was a secondary cardholder, to help support the children. Kaisha and Johnson argued the night before the murders regarding Kaisha's having changed the personal identification number (PIN) on this account.

According to Kaisha, Johnson arrived at the Caraway residence on the morning of April 6, 2011, to take Son and Daughter to a doctor's appointment. Although he and Kaisha had discussed this, Kaisha was not expecting Johnson as he had last indicated he would not take the children. The two argued about the PIN over their cell phones for approximately twenty minutes until Johnson's phone battery died. He then left with Son and Daughter to go to the doctor. Kaisha testified that after Johnson had been gone about thirty minutes, she remembered something she needed to tell the doctor and phoned the doctor's office. According to the office, Johnson never arrived. Johnson returned to the Caraway residence with the children. He took Daughter out of her carseat and she walked into the house. Johnson brought Son onto the porch or into the house in his carseat. Kaisha and Johnson continued arguing. According to Kaisha, Johnson got in his car to leave but as she was shutting the door to the house, he got out of the car, ran back to the house, pushed through the front door, and began punching her. Son was sitting in his high chair at this point, and Daughter was sitting in a chair in the same room. Maxine came out to see what was going on, and Johnson attacked her. When

Kaisha went to get her phone, Johnson "came behind [her] and began dragging [her] out of the house."

According to Kaisha, Maxine had scratches and an injured nose and ran past Kaisha and Johnson who were now on the front porch. As she did, Johnson loosened his grip on Kaisha enough for her to slip out of her shirt and away from him into the house. Daughter was also outside the house.

Kaisha testified she located Maxine's cell phone and ran toward the hall when she realized Son was still in his high chair. Johnson entered the house with a shotgun in his hand and pointed it at her saying "you made me do this." She closed her eyes and heard a gunshot. She then realized Son had been shot. Kaisha ran down the hallway, locked herself in the bathroom, and pushed a cabinet in front of the door. She called 911 using the cell phone, and then Johnson shot through the door. Kaisha told Johnson emergency services were on the way.

Kaisha testified she left the bathroom and she and Johnson moved into the living room. When 911 called back, Johnson told Kaisha to tell the operator the call was a mistake, to pretend to be her grandmother, and to give them the name "Robert." After a few minutes, she heard Daughter crying and Johnson went to get her. As Kaisha went to the door, she saw that Maxine had been shot. Kaisha, Johnson, and Daughter got into his car to go to the police station. Though Johnson had the shotgun with him at first, he removed the remaining shells and left the gun in the yard at Kaisha's suggestion.

According to Kaisha, as they were driving to the police station, she and Johnson discussed the details of the story they would tell the police. Before they arrived, they encountered a police officer and led the officer back to the Caraway residence. Other police officers eventually arrived, and once Kaisha was separated from Johnson, she wrote "he did it" on a piece of paper, referring to Johnson.

Johnson's statement to police was initially in sharp contrast to Kaisha's testimony. After being read his *Miranda*¹ rights, he told police he arrived at the Caraway residence to find Kaisha and her boyfriend "Robert" arguing and the only shot he fired was at Robert in defense of himself and the others present at the house. However, after a lengthy interrogation, Johnson admitted Robert did not exist and he had fired the gun—although the gun "just went off" and it was an accident.

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

Prior to the selection of the jury, Johnson moved for a mistrial based on having been brought into the courthouse handcuffed and accompanied by jail personnel. He argued jurors may have seen him and been prejudiced by the indicia of guilt. The circuit court denied the motion.

Johnson made an additional mistrial motion based on his attorney having overheard two witnesses for the State discussing evidence in the case within proximity of potential jurors in the courthouse hallway. The circuit court asked the jury pool whether they had heard anything that would influence their ability to be impartial and followed that with the question whether they had heard anything "today." All jurors responded in the negative. The circuit court denied the mistrial motion.

Also prior to trial, the circuit court held a *Jackson v. Denno*² hearing to determine the voluntariness of Johnson's statement to police. Investigator Mason Moore, testifying via Skype,³ and Investigator Kippton Coker stated they advised Johnson of his *Miranda* rights and they did not threaten Johnson in order to coerce a confession from him. Investigator Moore further testified Johnson requested to speak with him again the following day and he was again read his *Miranda* rights. Moore stated Johnson did not recant his testimony or reassert his claim that the crimes were committed by a third party. After viewing the video recording that captured the majority of the interrogation, the circuit court found the statement was voluntary.

[T]he statement made by Mr. Johnson was given freely, voluntarily, knowingly, and intelligently. Although it was over an eleven-hour period, he was --he was Mirandized twice during that. He was very talkative.

He was offered ample times to take breaks. He was offered food. He was offered drink. He certainly did not appear to be under excessive I guess oppression in the giving of the confession, and I am going to allow the confession to come into evidence.

² *Jackson v. Denno*, 378 U.S. 368 (1964).

³ Skype is a telecommunications software that supports two-way video chat.

Although Johnson had not objected to Investigator Moore, who had moved to Montana, testifying via Skype for the *Jackson v. Denno* hearing, Johnson did object to the video testimony at trial.⁴ In anticipation of such an objection, the court made a preliminary ruling to admit the video testimony because the witness was 2,500 miles away, was an "ancillary" witness, "everything that was going on with him is available on videotape," and another officer was in the room for the majority of the interrogation.

Johnson argued the Skype testimony violated the Confrontation Clause of the Sixth Amendment and mere convenience of the witness should not trump the defendant's right to face-to-face confrontation. The State countered by reiterating the statements of the court and adding "a compelling or a substantial need exists to avoid costs, to avoid inconvenience to the witness, and to pretty much put on the record something that is not substantive but is a matter of tying the chain together." The circuit court concluded the Skype testimony was admissible.

The circuit court also held a preliminary hearing to address the admission of photographs at trial. Johnson objected to the admission of a predeath photograph of Maxine, arguing it was irrelevant and served only to arouse the sympathy of the jury. He further argued the photograph was more prejudicial than probative. Additionally, Johnson objected to the admission of a predeath picture of Son. The circuit court admitted the photographs saying, "I think who the person was is a part of this case." Johnson renewed his objections when the photographs were introduced, and the circuit court denied the objections.

The jury convicted Johnson for two counts of murder, kidnapping, burglary in the first degree, and possession of a firearm during the commission of a violent crime. The circuit court sentenced him to life in prison without parole plus five years for the possession of a weapon during the commission of a violent crime. This appeal followed.

LAW/ANALYSIS

I. Admission of Predeath Photographs

⁴ Tragically, Moore was shot and killed in the line of duty earlier this year in Montana.

Johnson argues the circuit court erred in admitting predeath photographs of Maxine and Son. We agree, but we conclude the admission of the photographs constitutes harmless error in this case.

"The relevancy, materiality, and admissibility of photographs as evidence are matters left to the sound discretion of the trial court." *State v. Johnson*, 338 S.C. 114, 122, 525 S.E.2d 519, 523 (2000). "However, photographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are irrelevant or unnecessary to the issues at trial." *Id.* "Yet, there is no abuse of discretion if the offered photograph serves to corroborate testimony." *Id.*

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. "Even if the evidence was not relevant and thus wrongly admitted by the trial judge, its admission may constitute harmless error if the irrelevant evidence did not affect the outcome of the trial." *State v. Langley*, 334 S.C. 643, 647, 515 S.E.2d 98, 100 (1999).

In *Langley*, our supreme court reversed the circuit court's admission of a photograph of the victim in his high school band uniform because it was not relevant to proving the guilt of the defendant. *Id.* at 648, 515 S.E.2d at 100. The court concluded the identity of the victim was not at issue and the only possible purpose of the photograph was to distance the victim from the drug dealing involved in the case. *Id.* at 648 n.3, 515 S.E.2d at 100 n.3.

As in *Langley*, the identification of the victims was not at issue in this case and nothing in the photographs served to make any fact in issue more or less likely. Neither the State nor the circuit court offered any rationale for how the predeath photographs were relevant to establishing Johnson's guilt. Consequently, we conclude admitting the photographs was error.

Nevertheless, we find the error was harmless based on the overwhelming evidence of guilt in the case and the nature of the error. Johnson's statement and Kaisha's testimony indicate Johnson was the shooter. The physical evidence in the case corroborated Kaisha's testimony. Additionally, the jury knew the victims were a nine-month-old child and his great-grandmother, so feelings of sympathy were already on the side of the victims based on their status. Overall, we conclude the introduction of the photographs could not have reasonably affected the outcome of

the trial. *See State v. Chavis*, 412 S.C. 101, 115, 771 S.E.2d 336, 343 (2015) ("Error is harmless when it could not reasonably have affected the result of the trial.").

II. Skype Testimony

Johnson next maintains the circuit court erred in permitting Investigator Moore to testify via Skype in violation of the Confrontation Clause of the Sixth Amendment. We agree. However, we again conclude this constituted harmless error under the facts of this case.

"A trial court's decision to allow videotaped or closed-circuit testimony is reversible 'only if it is shown that the trial judge abused his discretion in making such a decision. . . .'" *State v. Bray*, 342 S.C. 23, 27, 535 S.E.2d 636, 639 (2000) (quoting *State v. Murrell*, 302 S.C. 77, 82, 393 S.E.2d 919, 922 (1990)). "Where there is evidence to support a trial court's ruling, it will not be overturned for an abuse of discretion." *Bray*, 342 S.C. at 27, 535 S.E.2d at 639.

The majority of courts that have addressed two-way closed circuit testimony have adopted the same test set forth in *Maryland v. Craig*, 497 U.S. 836 (1990), which addressed the use of one-way video testimony in the context of a child sexual assault case.⁵ In *Craig*, the United States Supreme Court recognized the right to face-to-face confrontation under the Sixth Amendment is not absolute, but that it may only be modified "where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." *Id.* at 850.

⁵ See *United States v. Bordeaux*, 400 F.3d 548, 554 (8th Cir. 2005) ("'Confrontation' through a two-way closed-circuit television is not different enough from 'confrontation' via a one-way closed-circuit television to justify different treatment under *Craig*."); *Horn v. Quarterman*, 508 F.3d 306, 319-20 (5th Cir. 2007) (relying on *Craig* and its progeny in examining whether the admission of a terminally ill witness's testimony via two-way video was contrary to clearly established federal law); *United States v. Abu Ali*, 528 F.3d 210, 240 (4th Cir. 2008) (discussed *infra*); *United States v. Yates*, 438 F.3d 1307, 1312-14 (11th Cir. 2006) (*en banc*) (discussed *infra*).

The Second Circuit Court of Appeals has adopted a less stringent standard for permitting two-way closed circuit testimony. In *United States v. Gigante*, 166 F.3d 75, 78 (2d Cir. 1999), the Second Circuit affirmed the use of two-way video testimony when the witness was in the Federal Witness Protection Program and suffering from terminal cancer. *Id.* at 79. The court did not adopt the *Craig* test, emphasizing that in two-way testimony the witness must view the defendant—a closer approximation to face-to-face confrontation. *Id.* at 80-81. Instead, the court determined two-way video should be permitted in the same circumstances warranting a deposition under Rule 15 of the Federal Rules of Criminal Procedure. The court held that "[u]pon a finding of exceptional circumstances, . . . a trial court may allow a witness to testify via two-way closed-circuit television when this furthers the interest of justice." *Id.* at 81. The court concluded the witness's situation coupled with Gigante's own poor health, which limited his ability to travel for a deposition, constituted exceptional circumstances. *Id.* Even having adopted a less stringent test than that set forth in *Craig*, the court opined "[c]losed-circuit television should not be considered a commonplace substitute for in-court testimony by a witness." *Id.*⁶

In *United States v. Yates*, 438 F.3d 1307 (11th Cir. 2006), the Eleventh Circuit held witnesses' trial testimony via two-way video conference violated the defendant's Sixth Amendment rights. *Id.* at 1312. Two essential witnesses were in Australia beyond the subpoena power of the United States government but willing to testify remotely. *Id.* at 1310. On appeal, the State argued two-way video conferencing provided all the same Sixth Amendment protections as face-to-face confrontation, and two-way video conferencing was a better protection of rights than depositions when the witness was unavailable for trial. *Id.* at 1312. The appellate court determined *Craig* presented the proper test for its analysis, and the video conference testimony violated Yates' Sixth Amendment rights because it did not further an important public policy. *Id.* at 1313, 1316.

The district court made no case-specific findings of fact that would support a conclusion that this case is different from any other criminal prosecution in which the

⁶ The Sixth Circuit appears to have approved of the *Gigante* rationale although it has not specifically adopted the *Gigante* test for analyzing this issue. See *United States v. Benson*, 79 F. App'x 813, 820-21 (6th Cir. 2003) (citing to *Gigante* and affirming the admission of testimony via two-way closed circuit television of an 85-year-old, out-of-state witness with numerous health issues).

Government would find it convenient to present testimony by two-way video conference. All criminal prosecutions include at least some evidence crucial to the Government's case, and there is no doubt that many criminal cases could be more expeditiously resolved were it unnecessary for witnesses to appear at trial. If we were to approve introduction of testimony in this manner, on this record, every prosecutor wishing to present testimony from a witness overseas would argue that providing crucial prosecution evidence and resolving the case expeditiously are important public policies that support the admission of testimony by two-way video conference.

Id. at 1316.

The Fourth Circuit has likewise acknowledged the *Craig* test is the measure for considering whether two-way closed circuit testimony is permissible under the Confrontation Clause. *United States v. Abu Ali*, 528 F.3d 210, 240 (4th Cir. 2008). In *Abu Ali*, the court affirmed the admission of testimony of Saudi Arabian officials beyond the reach of American courts in prosecution of a terrorism suspect. *Id.* at 240-41. The court found the interest of national security and protecting Americans from unprovoked terrorist attacks satisfied the first prong of *Craig*. *Id.* However, the court clarified:

This is not to suggest that a generalized interest in law enforcement is sufficient to satisfy the first prong of *Craig*. *Craig* plainly requires a public interest more substantial than convicting someone of a criminal offense. The prosecution of those bent on inflicting mass civilian casualties or assassinating high public officials is, however, just the kind of important public interest contemplated by the *Craig* decision.

Id. at 241.

The court further determined the trial court had taken steps necessary to ensure the reliability of the testimony so that no Sixth Amendment violation occurred. *Id.* at 241-42.

Additionally, in 2002, the United States Supreme Court declined to adopt a proposed Federal Rule of Evidence that mirrored the *Gigante* approach. The proposed amendment stated:

In the interest of justice, the court may authorize contemporaneous, two-way video presentation in open court of testimony from a witness who is at a different location if:

- (1) the requesting party establishes exceptional circumstances for such transmission;
- (2) appropriate safeguards for the transmission are used;
and
- (3) the witness is unavailable within the meaning of Federal Rule of Evidence 804(a)(4)-(5)

Hadley Perry, *Virtually Face-to-Face: The Confrontation Clause and the Use of Two-Way Video Testimony*, 13 Roger Williams U. L. Rev. 565, 566-67 (2008).

South Carolina has not specifically addressed the tension between two-way video testimony and a defendant's rights under the Confrontation Clause. However, South Carolina has recognized modifications to the traditional presentation of testimony may be appropriate in certain situations involving vulnerable witnesses. See S.C. Code Ann. § 16-3-1550(E) (2015) ("The circuit or family court must treat sensitively witnesses who are very young, elderly, handicapped, or who have special needs by using closed or taped sessions when appropriate."). Our state has adopted the *Craig* test in cases of one-way closed-circuit testimony and the testimony of children in sexual assault cases. See *State v. Lewis*, 324 S.C. 539, 544-45, 478 S.E.2d 861, 864 (Ct. App. 1996) (citing the *Craig* test for analyzing whether a witness's testimony via one-way closed circuit television violated the defendant's Sixth Amendment rights). While our courts have generally noted the protection of children is an important public policy concern, the appellate courts have not adopted a generalized policy of permitting child victims to present testimony via video recording. Rather, the courts require a specific case-by-case finding that a child witness will be traumatized by testifying in front of the defendant. See *Lewis*, 324 S.C. at 547-49, 478 S.E.2d at 865-67 (finding a Confrontation Clause violation when trial court permitted video testimony of a

particular child without specific evidentiary support the child would be traumatized by testifying in the defendant's presence); *State v. Murrell*, 302 S.C. 77, 80, 393 S.E.2d 919, 921 (1990) (holding a trial judge must make a case-specific determination of the need for videotaped testimony in a child sexual assault case). This approach underscores the reluctance of the court to use methods other than live testimony except under extreme circumstances.

After examining federal and state jurisprudence, we conclude the circuit court erred in permitting the State to present Investigator Moore's testimony via Skype. The Fourth Circuit has indicated the generalized conviction of criminal offenses is not sufficient to dispense with in-court confrontation and other courts have generally permitted such testimony only in cases in which the witness's health prevents him or her from traveling or possibly when a witness is beyond the subpoena power of the court. We recognize the advancements in technology permit two-way closed circuit testimony to more closely approximate face-to-face confrontation. However, in the absence of an important public policy or at least an exceptional circumstance, modifying a defendant's truest exercise of the Sixth Amendment right via in-person confrontation is inappropriate.⁷

Nevertheless, we find the circuit court's error in allowing the testimony was harmless. "[V]iolation of a defendant's Sixth Amendment right to confront the witness is not *per se* reversible error; instead, this Court must determine whether the error was harmless beyond a reasonable doubt." *State v. Davis*, 371 S.C. 170, 181, 638 S.E.2d 57, 63 (2006). "[W]hether an error is harmless depends on the particular circumstances of the case." *Id.* Error is harmless if it could not have reasonably affected the result of the trial. *Id.* at 181-82, 638 S.E.2d at 63.

We are cognizant that Johnson's confession was an important piece of evidence in this case. Likewise, we recognize the admission of his confession turned on a finding of voluntariness that must be proven by the State through its witnesses and evidence. In this case, Investigator Coker's testimony plus the recordings of Johnson's interrogation met this burden. Investigator Moore's testimony was only

⁷ We decline to adopt a specific test for the admission of two-way closed circuit testimony in this case, as convenience and expediency alone do not rise to the level of an exceptional circumstance, as set forth in *Gigante*, or implicate an important public policy consideration as required by *Craig*. Additionally, this ruling does not prohibit parties from consenting to use two-way video testimony.

relevant to events *not* presented by the videos or covered by Investigator Coker. Johnson does not allege wrongdoing by Investigator Moore other than through conduct contained in the videos.⁸ Consequently, Investigator Moore's testimony was largely cumulative to what was already before the jury. *See State v. Haselden*, 353 S.C. 190, 197, 577 S.E.2d 445, 448-49 (2003) (recognizing admission of improper evidence is harmless where the evidence is merely cumulative to other evidence). Accordingly, because the circuit court's erroneous decision to permit Investigator Moore to testify via Skype was harmless, we affirm the admission of that testimony.

III. Voluntariness of Confession

Next, Johnson argues the circuit court erred in finding his confession was voluntary because police misrepresented the evidence to him, threatened him with the death penalty, and repeatedly referenced Daughter and what she would think of her father's actions.⁹ We disagree.

"The trial judge determines the admissibility of a statement upon proof of its voluntariness by a preponderance of the evidence. If admitted, the jury must then determine whether the statement was given freely and voluntarily beyond a reasonable doubt." *State v. Parker*, 381 S.C. 68, 74, 671 S.E.2d 619, 622 (Ct. App. 2008) (citations omitted). "When reviewing a trial court's ruling concerning voluntariness, this [c]ourt does not reevaluate the facts based on its own view of the preponderance of the evidence, but simply determines whether the trial court's ruling is supported by any evidence." *State v. Saltz*, 346 S.C. 114, 136, 551 S.E.2d 240, 252 (2001). "The trial court's factual conclusions as to the voluntariness of a

⁸ Johnson's allegations as to the voluntariness of his confession are discussed more specifically in Section III of this opinion.

⁹ Johnson does not directly argue the length of his interrogation rendered his confession involuntary. Physical evidence was collected from Johnson for approximately three hours before an additional seven to eight hours of questioning by police. The interrogation began approximately mid-morning and continued through the afternoon and evening. Johnson does not appear to have been sleep deprived or otherwise physically distressed at the time of the interrogation. He was offered food, drink, and bathroom breaks and spoke with police only after having been read his *Miranda* rights twice.

statement will not be disturbed on appeal unless so manifestly erroneous as to show an abuse of discretion." *Id.*

"A criminal defendant is deprived of due process if his conviction is founded, in whole or in part, upon an involuntary confession." *State v. Pittman*, 373 S.C. 527, 565, 647 S.E.2d 144, 164 (2007). This due process analysis is evaluated based on examining the totality of the circumstances. *In re Tracy B.*, 391 S.C. 51, 66, 704 S.E.2d 71, 78-79 (Ct. App. 2010). Relevant circumstances for the trial judge to consider include the defendant's youth, the defendant's lack of education, the failure to Mirandize, the length of detention, the repeated and prolonged nature of the questioning, and the use of physical punishment such as the deprivation of food or sleep. *Pittman*, 373 S.C. at 566, 647 S.E.2d at 164. "If a suspect's will is overborne and his capacity for self-determination critically impaired, use of the resulting confession offends due process." *Saltz*, 346 S.C. at 136, 551 S.E.2d at 252.

A. Misrepresentation of Evidence

"Misrepresentations of evidence by police, although a relevant factor, do not render an otherwise voluntary confession inadmissible." *State v. Goodwin*, 384 S.C. 588, 601, 683 S.E.2d 500, 507 (Ct. App. 2009). "Both this [c]ourt and the United States Supreme Court have recognized that misrepresentations of evidence by police, although a relevant factor, do not render an otherwise voluntary confession inadmissible The pertinent inquiry is, as always, whether the defendant's will was 'overborne.'" *State v. Von Dohlen*, 322 S.C. 234, 243, 471 S.E.2d 689, 695 (1996). See also *State v. Myers*, 359 S.C. 40, 47, 596 S.E.2d 488, 492 (2004) (holding defendant's confession voluntary and admissible after police told him his hair was found clutched in victim's hand because "[e]ven if the information were untrue, it is not, alone, enough to render the confession involuntary"); *State v. Register*, 323 S.C. 471, 478, 476 S.E.2d 153, 158 (1996) (confession voluntary and admissible despite police misrepresentation that appellant had been seen with victim, tire and shoe impressions at the murder scene were a match, and DNA evidence established guilt); *Von Dohlen* at 242, 471 S.E.2d at 694 (holding defendant's will was not overborne and confession was voluntary when interrogators manufactured a composite sketch of suspect by looking at defendant through a one-way mirror and showed defendant shell casings not actually recovered from the crime scene).

Investigators Coker and Moore told Johnson the trunk of his car was analyzed and only his fingerprints were found, his shoe matched a footprint left from kicking in the door, his ring matched a wound left on Kaisha, and one could hear him in the background of the 911 calls. The primary evidence repeatedly referenced by the Investigators related to the 911 calls, which they claimed made Johnson's story impossible to believe. While this information was either unconfirmed or inaccurate, courts have routinely held the misrepresentation of evidence does not render a confession involuntary unless it is demonstrated the free will of the defendant was overborne.

B. Statements Regarding the Death Penalty

A "confession may not be 'extracted by any sort of threats or violence, [o]r obtained by any direct or implied promises, however slight, [o]r by the exertion of improper influence.'" *State v. Rochester*, 301 S.C. 196, 200, 391 S.E.2d 244, 246 (1990) (alterations in original) (quoting *Hutto v. Ross*, 429 U.S. 28, 30 (1979)). "Isolated incidents of police deception . . . and discussions of realistic penalties for cooperative and non-cooperative [defendants] . . . are normally insufficient to preclude free choice." *State v. Parker*, 381 S.C. 68, 91, 671 S.E.2d 619, 630-31 (Ct. App. 2008) (alterations in original) (quoting *United States v. Mendoza-Cecelia*, 963 F.2d 1467, 1475 (11th Cir. 1992)). In *State v. Childs*, 299 S.C. 471, 474, 385 S.E.2d 839, 841 (1989), the court found Childs's statement to police voluntary even though Childs argued his confession was coerced because investigating officers threatened him with the electric chair.

In this case, Johnson only cites to one instance of investigators mentioning the death penalty. However, this instance was not really a "discussion" of possible penalties but a statement that keeping up this "bullshit story" was going to land him in prison for life if not the death penalty. Nevertheless, this comment was isolated, and the death penalty was a possible sentence for the crimes at issue. Johnson did not recant his "Robert" story until well after the death penalty was mentioned, and it does not appear to have overborne his will.

C. Statements Regarding Daughter

In *State v. Corns*, 310 S.C. 546, 552, 426 S.E.2d 324, 327 (Ct. App. 1992), the court found an officer's statements that Corns's wife could be arrested because she could be "involved in the marijuana" and their children could be taken from them amounted to an exertion of improper influence rendering his confession

involuntary. Other cases in which statements were found to be involuntary involved the threat of specific tangible consequences to the defendant. *See State v. Osborne*, 301 S.C. 363, 366-67, 392 S.E.2d 178, 179-80 (1990) (holding defendant's statement inadmissible when over a period of months involving multiple interrogations, defendant was told she would be charged with the additional crime of withholding evidence if she remained silent); *State v. Hook*, 348 S.C. 401, 413-14, 559 S.E.2d 856, 862 (Ct. App. 2001) (holding defendant's statement to his probation officer was inadmissible because circumstances of interrogation indicated defendant's probation would be revoked if he did not cooperate).

Few criminals feel impelled to confess to the police purely of their own accord without any questioning at all. . . . Thus, it can almost always be said that the interrogation caused the confession. . . . It is generally recognized that the police may use some psychological tactics in eliciting a statement from a suspect. . . .

These ploys may play a part in the suspect's decision to confess, but so long as that decision is a product of the suspect's own balancing of competing considerations, the confession is voluntary.

Von Dohlen, 322 S.C. at 244, 471 S.E.2d at 695 (quoting *Miller v. Fenton*, 796 F.2d 598, 604-05 (3d Cir. 1986)).

Johnson argues statements that Daughter would think he was a cold-blooded killer who only survived because her father ran out of bullets was unduly coercive. However, these statements are not the type of tangible threat related to children or family members generally considered to render a confession involuntary. Such statements are more akin to a psychological tactic than actual coercion.

Overall, we conclude the circuit court did not abuse its discretion in admitting Johnson's statement as the evidence supports a finding his will was not overborne by the various tactics employed during his interrogation.

IV. Remaining Arguments

A. Shackles

The circuit court did not err in denying Johnson's motion for mistrial based on his being brought into the courthouse in handcuffs and surrounded by police personnel as the record fails to demonstrate any juror observed this activity or that any juror was prejudiced. *See State v. Wiley*, 387 S.C. 490, 495, 692 S.E.2d 560, 563 (Ct. App. 2010) ("The decision to grant or deny a mistrial is within the sound discretion of the trial court."); *id.* ("The trial court's decision will not be overturned on appeal absent an abuse of discretion amounting to an error of law."); *State v. Moore*, 257 S.C. 147, 152-53, 184 S.E.2d 546, 549 (1971) ("We think that when a jury or members thereof see an accused outside the courtroom in chains or handcuffs the situation is psychologically different and less likely to create prejudice in the minds of the jurors." (quoting *State v. Cassel*, 180 N.W.2d 607, 611 (1970))); *id.* at 153, 184 S.E.2d at 549 (affirming the denial of defendant's motion for mistrial noting defendant presented no proof the incident prejudiced the minds of the jurors—only the allegation that it did).

B. Witness Discussion/Comments

Likewise, the circuit court did not err in denying Johnson's motion for mistrial based on his attorney having overheard two witnesses discussing the weight of the evidence when the record fails to demonstrate a juror overheard the comments or was prejudiced by them. *See State v. Rowlands*, 343 S.C. 454, 457-58, 539 S.E.2d 717, 719 (Ct. App. 2000) ("Whether a mistrial is manifestly necessary is a fact specific inquiry."); *id.* ("It is not a mechanically applied standard, but rather is a determination that must be made in the context of the specific difficulty facing the trial judge." (quoting *Gilliam v. Foster*, 75 F.3d 881, 895 (4th Cir. 1996))); *State v. Bantan*, 387 S.C. 412, 417, 692 S.E.2d 201, 203-04 (Ct. App. 2010) ("The trial court should exhaust other methods to cure possible prejudice before aborting a trial.").

C. Sentencing

Finally, we find Johnson's argument as to any error in his sentencing is unpreserved for appellate review. *See State v. Bonner*, 400 S.C. 561, 564, 735 S.E.2d 525, 526 (Ct. App. 2012) ("It is well settled that issues not raised and ruled on in the trial court will not be considered on appeal."); *id.* ("Thus, 'a challenge to sentencing must be raised at trial, or the issue will not be preserved for appellate review.'" (quoting *State v. Johnston*, 333 S.C. 459, 462, 510 S.E.2d 423, 425 (1999))). While preservation concerns may be superseded by the interest of

judicial economy under certain circumstances, we do not believe such circumstances are implicated in this case as the State does not concede the circuit court erred in sentencing Johnson to five years for possession of a weapon during the commission of a violent crime. *See Johnston*, 333 S.C. at 463, 510 S.E.2d at 425 (vacating defendant's sentence in case which "present[ed] the exceptional circumstance in which the State has conceded in its briefs and oral argument that the trial court committed error by imposing an excessive sentence"); *Bonner*, 400 S.C. at 567, 735 S.C. at 528 (vacating defendant's sentence when both parties fully briefed the issue, acknowledged defendant could raise the issue in an application for post-conviction relief, and because the State "concede[d] in its brief that the trial court committed error by imposing an improper sentence.").

CONCLUSION

We find the circuit court erred in admitting predeath photographs of the victims and in permitting Investigator Moore to testify via Skype at trial over Johnson's objection. However, we conclude both of these errors were harmless under the facts of this case. Furthermore, we conclude the circuit court did not abuse its discretion in admitting Johnson's confession or in denying his motions for mistrial. Last, the sentencing issue is not preserved for our review. Therefore, Johnson's conviction is

AFFIRMED.¹⁰

GEATHERS, J., concurs.

SHORT, J., concurring in a separate opinion.

I agree with the majority's opinion with the exception of the last issue. Johnson argues the trial judge erred in sentencing him for possession of a firearm in the commission of a violent crime because section 16-23-490(A) (2015) of the South Carolina Code of Laws prohibits such a sentence where life imprisonment without parole is imposed. I agree.

Section 16-23-490(A) states:

¹⁰ We decide this case without oral argument pursuant to Rule 215, SCACR.

If a person is in possession of a firearm or visibly displays what appears to be a firearm or visibly displays a knife during the commission of a violent crime and is convicted of committing or attempting to commit a violent crime as defined in Section 16-1-60, he must be imprisoned five years, in addition to the punishment provided for the principal crime. This five-year sentence does not apply in cases where the death penalty or a life sentence without parole is imposed for the violent crime.

Section 16-23-490(A) expressly provides the mandatory five-year sentence for possession of a firearm during the commission of a violent crime shall not be imposed when the defendant is sentenced to death or to life without parole for the violent crime. Appellant was sentenced to life without parole. Although this argument was not raised to or ruled upon by the trial court, I would address the issue in the interest of judicial economy. *See State v. Bonner*, 400 S.C. 561, 565-67, 735 S.E.2d 525, 527-28 (Ct. App. 2012) (addressing an unpreserved sentencing issue in the interest of judicial economy); *State v. Vick*, 384 S.C. 189, 202, 682 S.E.2d 275, 282 (Ct. App. 2009) (noting the appellate courts have "summarily vacated" sentences for kidnapping when the defendant received a concurrent sentence under the murder statute and addressing the unpreserved sentencing issue in the interest of judicial economy). Accordingly, I would vacate Johnson's five-year sentence for possession of a firearm during the commission of a violent crime.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Justin Jermaine Johnson, Appellant.

Appellate Case No. 2014-001219

Appeal From Clarendon County
W. Jeffrey Young, Circuit Court Judge

Opinion No. 5533
Submitted September 7, 2017 – Filed January 30, 2018
Withdrawn, Substituted and Refiled March 28, 2018

AFFIRMED

Appellate Defender Laura Ruth Baer, of Columbia, for
Appellant.

Attorney General Alan McCrory Wilson, Deputy
Attorney General Donald J. Zelenka, Senior Assistant
Attorney General W. Edgar Salter, III, all of Columbia;
and Solicitor Ernest Adolphus Finney, III, of Sumter, for
Respondent.

KONDUROS, J.: Justin Jermaine Johnson appeals his convictions for two counts of murder, kidnapping, burglary in the first degree, and possession of a firearm during the commission of a violent crime. He maintains the circuit court erred in (1) admitting predeath photographs of the victims, (2) permitting a witness to testify via Skype, (3) admitting his confession to police when it was not voluntarily

given, (4) denying his motion for mistrial when he was brought shackled and guarded into a holding room adjacent to the jury pool's location, (5) denying his motion for mistrial when two witnesses involved in the case discussed the merits of the case in the hallway outside the courtroom and within earshot of prospective jurors, and (6) sentencing him to five years for possession of a weapon during the commission of a violent crime when a statute prohibits such punishment. We affirm.

FACTS

Johnson had two minor children with Kaisha Caraway, a nine-month-old son (Son) and a two-year-old daughter (Daughter). Kaisha and the children lived with her grandparents, John and Maxine Caraway. Son and Maxine Caraway were shot and killed on April 6, 2011. Johnson was arrested and indicted for the crimes.

At Johnson's trial, Kaisha testified that prior to the morning of the murders, she and Johnson had not been romantically involved for nine months. However, the two stayed in contact, and Johnson had his G.I. Bill check deposited into her bank account, on which he was a secondary cardholder, to help support the children. Kaisha and Johnson argued the night before the murders regarding Kaisha's having changed the personal identification number (PIN) on this account.

According to Kaisha, Johnson arrived at the Caraway residence on the morning of April 6, 2011, to take Son and Daughter to a doctor's appointment. Although he and Kaisha had discussed this, Kaisha was not expecting Johnson as he had last indicated he would not take the children. The two argued about the PIN over their cell phones for approximately twenty minutes until Johnson's phone battery died. He then left with Son and Daughter to go to the doctor. Kaisha testified that after Johnson had been gone about thirty minutes, she remembered something she needed to tell the doctor and phoned the doctor's office. According to the office, Johnson never arrived. Johnson returned to the Caraway residence with the children. He took Daughter out of her carseat and she walked into the house. Johnson brought Son onto the porch or into the house in his carseat. Kaisha and Johnson continued arguing. According to Kaisha, Johnson got in his car to leave but as she was shutting the door to the house, he got out of the car, ran back to the house, pushed through the front door, and began punching her. Son was sitting in his high chair at this point, and Daughter was sitting in a chair in the same room. Maxine came out to see what was going on, and Johnson attacked her. When Kaisha went to get her phone, Johnson "came behind [her] and began dragging [her] out of the house."

According to Kaisha, Maxine had scratches and an injured nose and ran past Kaisha and Johnson who were now on the front porch. As she did, Johnson loosened his grip on Kaisha enough for her to slip out of her shirt and away from him into the house. Daughter was also outside the house.

Kaisha testified she located Maxine's cell phone and ran toward the hall when she realized Son was still in his high chair. Johnson entered the house with a shotgun in his hand and pointed it at her saying "you made me do this." She closed her eyes and heard a gunshot. She then realized Son had been shot. Kaisha ran down the hallway, locked herself in the bathroom, and pushed a cabinet in front of the door. She called 911 using the cell phone, and then Johnson shot through the door. Kaisha told Johnson emergency services were on the way.

Kaisha testified she left the bathroom and she and Johnson moved into the living room. When 911 called back, Johnson told Kaisha to tell the operator the call was a mistake, to pretend to be her grandmother, and to give them the name "Robert." After a few minutes, she heard Daughter crying and Johnson went to get her. As Kaisha went to the door, she saw that Maxine had been shot. Kaisha, Johnson, and Daughter got into his car to go to the police station. Though Johnson had the shotgun with him at first, he removed the remaining shells and left the gun in the yard at Kaisha's suggestion.

According to Kaisha, as they were driving to the police station, she and Johnson discussed the details of the story they would tell the police. Before they arrived, they encountered a police officer and led the officer back to the Caraway residence. Other police officers eventually arrived, and once Kaisha was separated from Johnson, she wrote "he did it" on a piece of paper, referring to Johnson.

Johnson's statement to police was initially in sharp contrast to Kaisha's testimony. After being read his *Miranda*¹ rights, he told police he arrived at the Caraway residence to find Kaisha and her boyfriend "Robert" arguing and the only shot he fired was at Robert in defense of himself and the others present at the house. However, after a lengthy interrogation, Johnson admitted Robert did not exist and he had fired the gun—although the gun "just went off" and it was an accident.

Prior to the selection of the jury, Johnson moved for a mistrial based on having been brought into the courthouse handcuffed and accompanied by jail personnel.

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

He argued jurors may have seen him and been prejudiced by the indicia of guilt. The circuit court denied the motion.

Johnson made an additional mistrial motion based on his attorney having overheard two witnesses for the State discussing evidence in the case within proximity of potential jurors in the courthouse hallway. The circuit court asked the jury pool whether they had heard anything that would influence their ability to be impartial and followed that with the question whether they had heard anything "today." All jurors responded in the negative. The circuit court denied the mistrial motion.

Also prior to trial, the circuit court held a *Jackson v. Denno*² hearing to determine the voluntariness of Johnson's statement to police. Investigator Mason Moore, testifying via Skype,³ and Investigator Kippton Coker stated they advised Johnson of his *Miranda* rights and they did not threaten Johnson in order to coerce a confession from him. Investigator Moore further testified Johnson requested to speak with him again the following day and he was again read his *Miranda* rights. Moore stated Johnson did not recant his testimony or reassert his claim that the crimes were committed by a third party. After viewing the video recording that captured the majority of the interrogation, the circuit court found the statement was voluntary.

[T]he statement made by Mr. Johnson was given freely, voluntarily, knowingly, and intelligently. Although it was over an eleven-hour period, he was --he was Mirandized twice during that. He was very talkative.

He was offered ample times to take breaks. He was offered food. He was offered drink. He certainly did not appear to be under excessive I guess oppression in the giving of the confession, and I am going to allow the confession to come into evidence.

Although Johnson had not objected to Investigator Moore, who had moved to Montana, testifying via Skype for the *Jackson v. Denno* hearing, Johnson did object to the video testimony at trial. In anticipation of such an objection, the court made a preliminary ruling to admit the video testimony because the witness was

² *Jackson v. Denno*, 378 U.S. 368 (1964).

³ Skype is a telecommunications software that supports two-way video chat.

2,500 miles away, was an "ancillary" witness, "everything that was going on with him is available on videotape," and another officer was in the room for the majority of the interrogation.

Johnson argued the Skype testimony violated the Confrontation Clause of the Sixth Amendment and mere convenience of the witness should not trump the defendant's right to face-to-face confrontation. The State countered by reiterating the statements of the court and adding "a compelling or a substantial need exists to avoid costs, to avoid inconvenience to the witness, and to pretty much put on the record something that is not substantive but is a matter of tying the chain together." The circuit court concluded the Skype testimony was admissible.

The circuit court also held a preliminary hearing to address the admission of photographs at trial. Johnson objected to the admission of a predeath photograph of Maxine, arguing it was irrelevant and served only to arouse the sympathy of the jury. He further argued the photograph was more prejudicial than probative. Additionally, Johnson objected to the admission of a predeath picture of Son. The circuit court admitted the photographs saying, "I think who the person was is a part of this case." Johnson renewed his objections when the photographs were introduced, and the circuit court denied the objections.

The jury convicted Johnson for two counts of murder, kidnapping, burglary in the first degree, and possession of a firearm during the commission of a violent crime. The circuit court sentenced him to life in prison without parole plus five years for the possession of a weapon during the commission of a violent crime. This appeal followed.

LAW/ANALYSIS

I. Admission of Predeath Photographs

Johnson argues the circuit court erred in admitting predeath photographs of Maxine and Son. We agree, but we conclude the admission of the photographs constitutes harmless error in this case.

"The relevancy, materiality, and admissibility of photographs as evidence are matters left to the sound discretion of the trial court." *State v. Johnson*, 338 S.C. 114, 122, 525 S.E.2d 519, 523 (2000). "However, photographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are irrelevant or unnecessary to the issues at trial." *Id.* "Yet, there is no abuse of discretion if the offered photograph serves to corroborate testimony." *Id.*

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. "Even if the evidence was not relevant and thus wrongly admitted by the trial judge, its admission may constitute harmless error if the irrelevant evidence did not affect the outcome of the trial." *State v. Langley*, 334 S.C. 643, 647, 515 S.E.2d 98, 100 (1999).

In *Langley*, our supreme court reversed the circuit court's admission of a photograph of the victim in his high school band uniform because it was not relevant to proving the guilt of the defendant. *Id.* at 648, 515 S.E.2d at 100. The court concluded the identity of the victim was not at issue and the only possible purpose of the photograph was to distance the victim from the drug dealing involved in the case. *Id.* at 648 n.3, 515 S.E.2d at 100 n.3.

As in *Langley*, the identification of the victims was not at issue in this case and nothing in the photographs served to make any fact in issue more or less likely. Neither the State nor the circuit court offered any rationale for how the predeath photographs were relevant to establishing Johnson's guilt. Consequently, we conclude admitting the photographs was error.

Nevertheless, we find the error was harmless based on the overwhelming evidence of guilt in the case and the nature of the error. Johnson's statement and Kaisha's testimony indicate Johnson was the shooter. The physical evidence in the case corroborated Kaisha's testimony. Additionally, the jury knew the victims were a nine-month-old child and his great-grandmother, so feelings of sympathy were already on the side of the victims based on their status. Overall, we conclude the introduction of the photographs could not have reasonably affected the outcome of the trial. *See State v. Chavis*, 412 S.C. 101, 115, 771 S.E.2d 336, 343 (2015) ("Error is harmless when it could not reasonably have affected the result of the trial.").

II. Skype Testimony

Johnson next maintains the circuit court erred in permitting Investigator Moore to testify via Skype in violation of the Confrontation Clause of the Sixth Amendment. We agree. However, we again conclude this constituted harmless error under the facts of this case.

"A trial court's decision to allow videotaped or closed-circuit testimony is reversible 'only if it is shown that the trial judge abused his discretion in making such a decision. . . .'" *State v. Bray*, 342 S.C. 23, 27, 535 S.E.2d 636, 639 (2000) (quoting *State v. Murrell*, 302 S.C. 77, 82, 393 S.E.2d 919, 922 (1990)). "Where there is evidence to support a trial court's ruling, it will not be overturned for an abuse of discretion." *Bray*, 342 S.C. at 27, 535 S.E.2d at 639.

The majority of courts that have addressed two-way closed circuit testimony have adopted the same test set forth in *Maryland v. Craig*, 497 U.S. 836 (1990), which addressed the use of one-way video testimony in the context of a child sexual assault case.⁴ In *Craig*, the United States Supreme Court recognized the right to face-to-face confrontation under the Sixth Amendment is not absolute, but that it may only be modified "where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." *Id.* at 850.

The Second Circuit Court of Appeals has adopted a less stringent standard for permitting two-way closed circuit testimony. In *United States v. Gigante*, 166 F.3d 75, 78 (2d Cir. 1999), the Second Circuit affirmed the use of two-way video testimony when the witness was in the Federal Witness Protection Program and suffering from terminal cancer. *Id.* at 79. The court did not adopt the *Craig* test, emphasizing that in two-way testimony the witness must view the defendant—a closer approximation to face-to-face confrontation. *Id.* at 80-81. Instead, the court determined two-way video should be permitted in the same circumstances warranting a deposition under Rule 15 of the Federal Rules of Criminal Procedure. The court held that "[u]pon a finding of exceptional circumstances, . . . a trial court may allow a witness to testify via two-way closed-circuit television when this furthers the interest of justice." *Id.* at 81. The court concluded the witness's situation coupled with Gigante's own poor health, which limited his ability to travel

⁴ See *United States v. Bordeaux*, 400 F.3d 548, 554 (8th Cir. 2005) ("'Confrontation' through a two-way closed-circuit television is not different enough from 'confrontation' via a one-way closed-circuit television to justify different treatment under *Craig*."); *Horn v. Quarterman*, 508 F.3d 306, 319-20 (5th Cir. 2007) (relying on *Craig* and its progeny in examining whether the admission of a terminally ill witness's testimony via two-way video was contrary to clearly established federal law); *United States v. Abu Ali*, 528 F.3d 210, 240 (4th Cir. 2008) (discussed *infra*); *United States v. Yates*, 438 F.3d 1307, 1312-14 (11th Cir. 2006) (*en banc*) (discussed *infra*).

for a deposition, constituted exceptional circumstances. *Id.* Even having adopted a less stringent test than that set forth in *Craig*, the court opined "[c]losed-circuit television should not be considered a commonplace substitute for in-court testimony by a witness." *Id.*⁵

In *United States v. Yates*, 438 F.3d 1307 (11th Cir. 2006), the Eleventh Circuit held witnesses' trial testimony via two-way video conference violated the defendant's Sixth Amendment rights. *Id.* at 1312. Two essential witnesses were in Australia beyond the subpoena power of the United States government but willing to testify remotely. *Id.* at 1310. On appeal, the State argued two-way video conferencing provided all the same Sixth Amendment protections as face-to-face confrontation and two-way video conferencing was a better protection of rights than depositions when the witness was unavailable for trial. *Id.* at 1312. The appellate court determined *Craig* presented the proper test for its analysis, and the video conference testimony violated Yates' Sixth Amendment rights because it did not further an important public policy. *Id.* at 1313, 1316.

The district court made no case-specific findings of fact that would support a conclusion that this case is different from any other criminal prosecution in which the Government would find it convenient to present testimony by two-way video conference. All criminal prosecutions include at least some evidence crucial to the Government's case, and there is no doubt that many criminal cases could be more expeditiously resolved were it unnecessary for witnesses to appear at trial. If we were to approve introduction of testimony in this manner, on this record, every prosecutor wishing to present testimony from a witness overseas would argue that providing crucial prosecution evidence and resolving the case expeditiously are important public policies that support the admission of testimony by two-way video conference.

⁵ The Sixth Circuit appears to have approved of the *Gigante* rationale although it has not specifically adopted the *Gigante* test for analyzing this issue. See *United States v. Benson*, 79 F. App'x 813, 820-21 (6th Cir. 2003) (citing to *Gigante* and affirming the admission of testimony via two-way closed circuit television of an 85-year-old, out-of-state witness with numerous health issues).

Id. at 1316.

The Fourth Circuit has likewise acknowledged the *Craig* test is the measure for considering whether two-way closed circuit testimony is permissible under the Confrontation Clause. *United States v. Abu Ali*, 528 F.3d 210, 240 (4th Cir. 2008). In *Abu Ali*, the court affirmed the admission of testimony of Saudi Arabian officials beyond the reach of American courts in prosecution of a terrorism suspect. *Id.* at 240-41. The court found the interest of national security and protecting Americans from unprovoked terrorist attacks satisfied the first prong of *Craig*. *Id.* However, the court clarified:

This is not to suggest that a generalized interest in law enforcement is sufficient to satisfy the first prong of *Craig*. *Craig* plainly requires a public interest more substantial than convicting someone of a criminal offense. The prosecution of those bent on inflicting mass civilian casualties or assassinating high public officials is, however, just the kind of important public interest contemplated by the *Craig* decision.

Id. at 241.

The court further determined the trial court had taken steps necessary to ensure the reliability of the testimony so that no Sixth Amendment violation occurred. *Id.* at 241-42.

Additionally, in 2002, the United States Supreme Court declined to adopt a proposed Federal Rule of Evidence that mirrored the *Gigante* approach. The proposed amendment stated:

In the interest of justice, the court may authorize contemporaneous, two-way video presentation in open court of testimony from a witness who is at a different location if:

- (1) the requesting party establishes exceptional circumstances for such transmission;
- (2) appropriate safeguards for the transmission are used;
- and

(3) the witness is unavailable within the meaning of
Federal Rule of Evidence 804(a)(4)-(5)

Hadley Perry, *Virtually Face-to-Face: The Confrontation Clause and the Use of Two-Way Video Testimony*, 13 Roger Williams U. L. Rev. 565, 566-67 (2008).

South Carolina has not specifically addressed the tension between two-way video testimony and a defendant's rights under the Confrontation Clause. However, South Carolina has recognized modifications to the traditional presentation of testimony may be appropriate in certain situations involving vulnerable witnesses. See S.C. Code Ann. § 16-3-1550(E) (2015) ("The circuit or family court must treat sensitively witnesses who are very young, elderly, handicapped, or who have special needs by using closed or taped sessions when appropriate."). Our state has adopted the *Craig* test in cases of one-way closed-circuit testimony and the testimony of children in sexual assault cases. See *State v. Lewis*, 324 S.C. 539, 544-45, 478 S.E.2d 861, 864 (Ct. App. 1996) (citing the *Craig* test for analyzing whether a witness's testimony via one-way closed circuit television violated the defendant's Sixth Amendment rights). While our courts have generally noted the protection of children is an important public policy concern, the appellate courts have not adopted a generalized policy of permitting child victims to present testimony via video recording. Rather, the courts require a specific case-by-case finding that a child witness will be traumatized by testifying in front of the defendant. See *Lewis*, 324 S.C. at 547-49, 478 S.E.2d at 865-67 (finding a Confrontation Clause violation when trial court permitted video testimony of a particular child without specific evidentiary support the child would be traumatized by testifying in the defendant's presence); *State v. Murrell*, 302 S.C. 77, 80, 393 S.E.2d 919, 921 (1990) (holding a trial judge must make a case-specific determination of the need for videotaped testimony in a child sexual assault case). This approach underscores the reluctance of the court to use methods other than live testimony except under extreme circumstances.

After examining federal and state jurisprudence, we conclude the circuit court erred in permitting the State to present Investigator Moore's testimony via Skype. The Fourth Circuit has indicated the generalized conviction of criminal offenses is not sufficient to dispense with in-court confrontation and other courts have generally permitted such testimony only in cases in which the witness's health prevents him or her from traveling or possibly when a witness is beyond the subpoena power of the court. We recognize the advancements in technology permit two-way closed circuit testimony to more closely approximate face-to-face confrontation. However, in the absence of an important public policy or at least an

exceptional circumstance, modifying a defendant's truest exercise of the Sixth Amendment right via in-person confrontation is inappropriate.⁶

Nevertheless, we find the circuit court's error in allowing the testimony was harmless. "[V]iolation of a defendant's Sixth Amendment right to confront the witness is not *per se* reversible error; instead, this Court must determine whether the error was harmless beyond a reasonable doubt." *State v. Davis*, 371 S.C. 170, 181, 638 S.E.2d 57, 63 (2006). "[W]hether an error is harmless depends on the particular circumstances of the case." *Id.* Error is harmless if it could not have reasonably affected the result of the trial. *Id.* at 181-82, 638 S.E.2d at 63.

We are cognizant that Johnson's confession was an important piece of evidence in this case. Likewise, we recognize the admission of his confession turned on a finding of voluntariness that must be proven by the State through its witnesses and evidence. In this case, Investigator Coker's testimony plus the recordings of Johnson's interrogation met this burden. Investigator Moore's testimony was only relevant to events *not* presented by the videos or covered by Investigator Coker. Johnson does not allege wrongdoing by Investigator Moore other than through conduct contained in the videos.⁷ Consequently, Investigator Moore's testimony was largely cumulative to what was already before the jury. *See State v. Haselden*, 353 S.C. 190, 197, 577 S.E.2d 445, 448-49 (2003) (recognizing admission of improper evidence is harmless where the evidence is merely cumulative to other evidence). Accordingly, because the circuit court's erroneous decision to permit Investigator Moore to testify via Skype was harmless, we affirm the admission of that testimony.

III. Voluntariness of Confession

Next, Johnson argues the circuit court erred in finding his confession was voluntary because police misrepresented the evidence to him, threatened him with

⁶ We decline to adopt a specific test for the admission of two-way closed circuit testimony in this case, as convenience and expediency alone do not rise to the level of an exceptional circumstance, as set forth in *Gigante*, or implicate an important public policy consideration as required by *Craig*. Additionally, this ruling does not prohibit parties from consenting to use two-way video testimony.

⁷ Johnson's allegations as to the voluntariness of his confession are discussed more specifically in Section III of this opinion.

the death penalty, and repeatedly referenced Daughter and what she would think of her father's actions.⁸ We disagree.

"The trial judge determines the admissibility of a statement upon proof of its voluntariness by a preponderance of the evidence. If admitted, the jury must then determine whether the statement was given freely and voluntarily beyond a reasonable doubt." *State v. Parker*, 381 S.C. 68, 74, 671 S.E.2d 619, 622 (Ct. App. 2008) (citations omitted). "When reviewing a trial court's ruling concerning voluntariness, this [c]ourt does not reevaluate the facts based on its own view of the preponderance of the evidence, but simply determines whether the trial court's ruling is supported by any evidence." *State v. Saltz*, 346 S.C. 114, 136, 551 S.E.2d 240, 252 (2001). "The trial court's factual conclusions as to the voluntariness of a statement will not be disturbed on appeal unless so manifestly erroneous as to show an abuse of discretion." *Id.*

"A criminal defendant is deprived of due process if his conviction is founded, in whole or in part, upon an involuntary confession." *State v. Pittman*, 373 S.C. 527, 565, 647 S.E.2d 144, 164 (2007). This due process analysis is evaluated based on examining the totality of the circumstances. *In re Tracy B.*, 391 S.C. 51, 66, 704 S.E.2d 71, 78-79 (Ct. App. 2010). Relevant circumstances for the trial judge to consider include the defendant's youth, the defendant's lack of education, the failure to Mirandize, the length of detention, the repeated and prolonged nature of the questioning, and the use of physical punishment such as the deprivation of food or sleep. *Pittman*, 373 S.C. at 566, 647 S.E.2d at 164. "If a suspect's will is overborne and his capacity for self-determination critically impaired, use of the resulting confession offends due process." *Saltz*, 346 S.C. at 136, 551 S.E.2d at 252.

A. Misrepresentation of Evidence

⁸ Johnson does not directly argue the length of his interrogation rendered his confession involuntary. Physical evidence was collected from Johnson for approximately three hours before an additional seven to eight hours of questioning by police. The interrogation began approximately mid-morning and continued through the afternoon and evening. Johnson does not appear to have been sleep deprived or otherwise physically distressed at the time of the interrogation. He was offered food, drink, and bathroom breaks and spoke with police only after having been read his *Miranda* rights twice.

"Misrepresentations of evidence by police, although a relevant factor, do not render an otherwise voluntary confession inadmissible." *State v. Goodwin*, 384 S.C. 588, 601, 683 S.E.2d 500, 507 (Ct. App. 2009). "Both this [c]ourt and the United States Supreme Court have recognized that misrepresentations of evidence by police, although a relevant factor, do not render an otherwise voluntary confession inadmissible The pertinent inquiry is, as always, whether the defendant's will was 'overborne.'" *State v. Von Dohlen*, 322 S.C. 234, 243, 471 S.E.2d 689, 695 (1996). *See also State v. Myers*, 359 S.C. 40, 47, 596 S.E.2d 488, 492 (2004) (holding defendant's confession voluntary and admissible after police told him his hair was found clutched in victim's hand because "[e]ven if the information were untrue, it is not, alone, enough to render the confession involuntary"); *State v. Register*, 323 S.C. 471, 478, 476 S.E.2d 153, 158 (1996) (confession voluntary and admissible despite police misrepresentation that appellant had been seen with victim, tire and shoe impressions at the murder scene were a match, and DNA evidence established guilt); *Von Dohlen* at 242, 471 S.E.2d at 694 (holding defendant's will was not overborne and confession was voluntary when interrogators manufactured a composite sketch of suspect by looking at defendant through a one-way mirror and showed defendant shell casings not actually recovered from the crime scene).

Investigators Coker and Moore told Johnson the trunk of his car was analyzed and only his fingerprints were found, his shoe matched a footprint left from kicking in the door, his ring matched a wound left on Kaisha, and one could hear him in the background of the 911 calls. The primary evidence repeatedly referenced by the Investigators related to the 911 calls, which they claimed made Johnson's story impossible to believe. While this information was either unconfirmed or inaccurate, courts have routinely held the misrepresentation of evidence does not render a confession involuntary unless it is demonstrated the free will of the defendant was overborne.

B. Statements Regarding the Death Penalty

A "confession may not be 'extracted by any sort of threats or violence, [o]r obtained by any direct or implied promises, however slight, [o]r by the exertion of improper influence.'" *State v. Rochester*, 301 S.C. 196, 200, 391 S.E.2d 244, 246 (1990) (alterations in original) (quoting *Hutto v. Ross*, 429 U.S. 28, 30 (1979)). "Isolated incidents of police deception . . . and discussions of realistic penalties for cooperative and non-cooperative [defendants] . . . are normally insufficient to preclude free choice." *State v. Parker*, 381 S.C. 68, 91, 671 S.E.2d 619, 630-31 (Ct. App. 2008) (alterations in original) (quoting *United States v. Mendoza-*

Cecelia, 963 F.2d 1467, 1475 (11th Cir. 1992)). In *State v. Childs*, 299 S.C. 471, 474, 385 S.E.2d 839, 841 (1989), the court found Childs's statement to police voluntary even though Childs argued his confession was coerced because investigating officers threatened him with the electric chair.

In this case, Johnson only cites to one instance of investigators mentioning the death penalty. However, this instance was not really a "discussion" of possible penalties but a statement that keeping up this "bullshit story" was going to land him in prison for life if not the death penalty. Nevertheless, this comment was isolated, and the death penalty was a possible sentence for the crimes at issue. Johnson did not recant his "Robert" story until well after the death penalty was mentioned, and it does not appear to have overborne his will.

C. Statements Regarding Daughter

In *State v. Corns*, 310 S.C. 546, 552, 426 S.E.2d 324, 327 (Ct. App. 1992), the court found an officer's statements that Corns's wife could be arrested because she could be "involved in the marijuana" and their children could be taken from them amounted to an exertion of improper influence rendering his confession involuntary. Other cases in which statements were found to be involuntary involved the threat of specific tangible consequences to the defendant. See *State v. Osborne*, 301 S.C. 363, 366-67, 392 S.E.2d 178, 179-80 (1990) (holding defendant's statement inadmissible when over a period of months involving multiple interrogations, defendant was told she would be charged with the additional crime of withholding evidence if she remained silent); *State v. Hook*, 348 S.C. 401, 413-14, 559 S.E.2d 856, 862 (Ct. App. 2001) (holding defendant's statement to his probation officer was inadmissible because circumstances of interrogation indicated defendant's probation would be revoked if he did not cooperate).

Few criminals feel impelled to confess to the police purely of their own accord without any questioning at all. . . . Thus, it can almost always be said that the interrogation caused the confession. . . . It is generally recognized that the police may use some psychological tactics in eliciting a statement from a suspect. . . .

These plays may play a part in the suspect's decision to confess, but so long as that decision is a product of the

suspect's own balancing of competing considerations, the confession is voluntary.

Von Dohlen, 322 S.C. at 244, 471 S.E.2d at 695 (quoting *Miller v. Fenton*, 796 F.2d 598, 604-05 (3d Cir. 1986)).

Johnson argues statements that Daughter would think he was a cold-blooded killer who only survived because her father ran out of bullets was unduly coercive. However, these statements are not the type of tangible threat related to children or family members generally considered to render a confession involuntary. Such statements are more akin to a psychological tactic than actual coercion.

Overall, we conclude the circuit court did not abuse its discretion in admitting Johnson's statement as the evidence supports a finding his will was not overborne by the various tactics employed during his interrogation.

IV. Remaining Arguments

A. Shackles

The circuit court did not err in denying Johnson's motion for mistrial based on his being brought into the courthouse in handcuffs and surrounded by police personnel as the record fails to demonstrate any juror observed this activity or that any juror was prejudiced. *See State v. Wiley*, 387 S.C. 490, 495, 692 S.E.2d 560, 563 (Ct. App. 2010) ("The decision to grant or deny a mistrial is within the sound discretion of the trial court."); *id.* ("The trial court's decision will not be overturned on appeal absent an abuse of discretion amounting to an error of law."); *State v. Moore*, 257 S.C. 147, 152-53, 184 S.E.2d 546, 549 (1971) ("We think that when a jury or members thereof see an accused outside the courtroom in chains or handcuffs the situation is psychologically different and less likely to create prejudice in the minds of the jurors." (quoting *State v. Cassel*, 180 N.W.2d 607, 611 (1970))); *id.* at 153, 184 S.E.2d at 549 (affirming the denial of defendant's motion for mistrial noting defendant presented no proof the incident prejudiced the minds of the jurors—only the allegation that it did).

B. Witness Discussion/Comments

Likewise, the circuit court did not err in denying Johnson's motion for mistrial based on his attorney having overheard two witnesses discussing the weight of the evidence when the record fails to demonstrate a juror overheard the comments or

was prejudiced by them. *See State v. Rowlands*, 343 S.C. 454, 457-58, 539 S.E.2d 717, 719 (Ct. App. 2000) ("Whether a mistrial is manifestly necessary is a fact specific inquiry."); *id.* ("It is not a mechanically applied standard, but rather is a determination that must be made in the context of the specific difficulty facing the trial judge." (quoting *Gilliam v. Foster*, 75 F.3d 881, 895 (4th Cir. 1996))); *State v. Bantan*, 387 S.C. 412, 417, 692 S.E.2d 201, 203-04 (Ct. App. 2010) ("The trial court should exhaust other methods to cure possible prejudice before aborting a trial.").

C. Sentencing

Finally, we find Johnson's argument as to any error in his sentencing is unpreserved for appellate review. *See State v. Bonner*, 400 S.C. 561, 564, 735 S.E.2d 525, 526 (Ct. App. 2012) ("It is well settled that issues not raised and ruled on in the trial court will not be considered on appeal."); *id.* ("Thus, 'a challenge to sentencing must be raised at trial, or the issue will not be preserved for appellate review.'" (quoting *State v. Johnston*, 333 S.C. 459, 462, 510 S.E.2d 423, 425 (1999))). While preservation concerns may be superseded by the interest of judicial economy under certain circumstances, we do not believe such circumstances are implicated in this case as the State does not concede the circuit court erred in sentencing Johnson to five years for possession of a weapon during the commission of a violent crime. *See Johnston*, 333 S.C. at 463, 510 S.E.2d at 425 (vacating defendant's sentence in case which "present[ed] the exceptional circumstance in which the State has conceded in its briefs and oral argument that the trial court committed error by imposing an excessive sentence"); *Bonner*, 400 S.C. at 567, 735 S.C. at 528 (vacating defendant's sentence when both parties fully briefed the issue, acknowledged defendant could raise the issue in an application for post-conviction relief, and because the State "concede[d] in its brief that the trial court committed error by imposing an improper sentence.").

CONCLUSION

We find the circuit court erred in admitting predeath photographs of the victims and in permitting Investigator Moore to testify via Skype at trial over Johnson's objection. However, we conclude both of these errors were harmless under the facts of this case. Furthermore, we conclude the circuit court did not abuse its discretion in admitting Johnson's confession or in denying his motions for mistrial. Last, the sentencing issue is not preserved for our review. Therefore, Johnson's conviction is

AFFIRMED.⁹

GEATHERS, J., concurs.

SHORT, J., concurring in a separate opinion.

I agree with the majority's opinion with the exception of the last issue. Johnson argues the trial judge erred in sentencing him for possession of a firearm in the commission of a violent crime because section 16-23-490(A) (2015) of the South Carolina Code of Laws prohibits such a sentence where life imprisonment without parole is imposed. I agree.

Section 16-23-490(A) states:

If a person is in possession of a firearm or visibly displays what appears to be a firearm or visibly displays a knife during the commission of a violent crime and is convicted of committing or attempting to commit a violent crime as defined in Section 16-1-60, he must be imprisoned five years, in addition to the punishment provided for the principal crime. This five-year sentence does not apply in cases where the death penalty or a life sentence without parole is imposed for the violent crime.

Section 16-23-490(A) expressly provides the mandatory five-year sentence for possession of a firearm during the commission of a violent crime shall not be imposed when the defendant is sentenced to death or to life without parole for the violent crime. Appellant was sentenced to life without parole. Although this argument was not raised to or ruled upon by the trial court, I would address the issue in the interest of judicial economy. See *State v. Bonner*, 400 S.C. 561, 565-67, 735 S.E.2d 525, 527-28 (Ct. App. 2012) (addressing an unpreserved sentencing issue in the interest of judicial economy); *State v. Vick*, 384 S.C. 189, 202, 682 S.E.2d 275, 282 (Ct. App. 2009) (noting the appellate courts have "summarily vacated" sentences for kidnapping when the defendant received a concurrent sentence under the murder statute and addressing the unpreserved sentencing issue in the interest of judicial economy). Accordingly, I would vacate Johnson's five-year sentence for possession of a firearm during the commission of a violent crime.

⁹ We decide this case without oral argument pursuant to Rule 215, SCACR.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

JUSTIN JERMAINE JOHNSON,

APPELLANT

APPELLATE CASE NO. 2014-001219

Appeal from Clarendon County

Honorable William Jeffrey Young, Circuit Court Judge

Opinion No. 5533

PETITION FOR REHEARING

On January 31, 2018, this Court affirmed Appellant Justin Johnson's convictions for two counts of murder, kidnapping, first degree burglary, and possession of a firearm during the commission of a violent crime, in a published opinion. State v. Johnson, Opinion No. 5533 (S.C. Ct. App. filed Jan. 31, 2018) (Shearouse Adv. Sh. No. 5 at 26). The issues that Johnson continues to pursue on appeal relate to: (1) the improper admission of the pre-death photographs of the victims; (2) the improper use of remote video testimony for State's witness Mason Moore; (3) the improper admission of Johnson's involuntary statement to police; and (4) the improper sentencing of Johnson to five-years incarceration for the weapons offense where he was sentenced to life

imprisonment. Pursuant to Rule 221(a), SCACR, Johnson respectfully petitions this Court for a rehearing of its opinion based upon the following points overlooked or misapprehended by the Court:

1. The trial court's error in admitting the irrelevant pre-death photographs of each of the victims was not harmless.

In accordance with State v. Livingston, 327 S.C. 17, 488 S.E.2d 313 (1997), and State v. Langley, 334 S.C. 643, 515 S.E.2d 98 (1999), this Court properly ruled that the trial court erred in admitting the pre-death photographs of Son and Maxine, because they were not relevant to establishing Johnson's guilt. However, this Court erred in finding that the trial court's error was "harmless based on the overwhelming evidence of guilt in the case and the nature of the error."

This Court reasoned:

Johnson's statement and Kaisha's testimony indicate Johnson was the shooter. The physical evidence in the case corroborated Kaisha's testimony. Additionally, the jury knew the victims were a nine-month-old child and his great-grandmother, so feelings of sympathy were already on the side of the victims based on their status. Overall, we conclude the introduction of the photographs could not have reasonably affected the outcome of the trial.

Respectfully, the evidence in this case was not overwhelming and sympathy is not a proper basis for the jury to render a verdict under any circumstance.

Whether an error is harmless depends on the circumstances of the particular case. State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985). No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Id. "[P]hotographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are irrelevant or not necessary to substantiate material facts or conditions." State v. Martucci, 380 S.C. 232, 250, 669 S.E.2d 598, 607 (Ct. App. 2008). "To constitute unfair prejudice, the photographs must create a tendency to suggest a

decision on an improper basis, commonly, though not necessarily, an emotional one.” Id. (internal citations and quotations omitted).

Beginning with the prejudicial impact of the pre-death photographs themselves, it is notable that the Livingston Court found that though the testimony that accompanied the introduction of the pre-death photograph was “not extensive,” “it create[d] a poignant image.” 327 S.C. at 19, 488 S.E.2d at 314. Here, the pre-death photographs were admitted in conjunction with the testimony of Maxine Caraway’s husband, John Caraway, Jr., and the testimony of the minor victim’s mother, Kaisha Caraway. R. 162, l. 20 – 163, l. 20; R. 186, l. 13 – 189, l. 5. Mr. Caraway was conveniently called to testify on what would have been Maxine’s sixty-second birthday, a fact the prosecution elicited on direct examination. He also testified that he and Maxine were married for thirty-seven years. R. 162, l. 20 – 163, l. 20. The minor child’s picture was admitted while Kaisha Caraway testified about the child’s birth and the purported lack of support that she received from Johnson in caring for their children. R. 186, l. 13 – 189, l. 5.

Notably, the pre-death photograph of Maxine was immediately preceded and followed by photographs of her injuries in the numerical order of the State’s exhibits. See State’s Exhibits 36, 37, 38, and 39 (Photographs). As such, the pre-death photograph appeared between the other photographs of the victim’s injuries when presented to the jury during deliberations. In a case such as this, where the jury was also shown postmortem photographs of the victims, both of whom were shot in the face or head with a shotgun, the juxtaposition of the pre-death photographs is even more impactful upon the jury. Compare State’s Exhibits 38 and 54 (Pre-death Photographs of Victims) (on file with this Court) with State’s Exhibits 15 and 36 (Postmortem Photographs of Victims) (on file with this Court).

As this Court found, the pre-death photographs in this case were not relevant to establishing Johnson's guilt. Rather, their sole and improper purpose was to pull on the heart strings of the jury and encourage them to view the case through a lens of emotion and prejudice. See U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed"). This Court's determination that the prejudice to Johnson was somehow lessened because "the jury knew the victims were a nine-month-old child and his great-grandmother, so feelings of sympathy were already on the side of the victims based on their status" is contrary to the fundamental precept of our justice system that a jury's verdict will be rendered based upon the evidence and not emotion. If anything, the fact that there was an intrinsically emotional element to the case increased the prejudice to Johnson from the admission of the pre-death photographs.

This Court further erred in finding that there was overwhelming evidence of Johnson's guilt. This Court seems to have adopted Respondent's harmless error argument, which was premised only upon the evidence that supported the solicitor's theory of the case. See Brief of Resp., pp. 6-14. However, a harmless error analysis cannot be based solely upon the State's perceived strength of its case alone. See Holmes v. South Carolina, 547 U.S. 319, 331, 126 S.Ct. 1727, 1735 (2006) ("[B]y evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt"). While that evidence may have been sufficient to present the case to a jury, it fails to establish overwhelming evidence of Johnson's guilt. See Langley, 334 S.C. at 101, 515 S.E.2d at 649.

Both Respondent and this Court omitted that there was an unknown third parties' DNA and footprint found at the crime scene and never identified. R. 701, ll. 16-24; R. 702, ll. 7-13; R. 663, l. 10 – 666, l. 6; R. 674, ll. 1-8. Though Kaisha Caraway later changed her story, both she and Johnson originally told law enforcement that Kaisha's boyfriend, Robert, shot the victims. State's Ex. 55 (Recording of 911 calls) (on file with this Court); State's Ex. 59-63 (DVDs of Apr. 6, 2011 Interrogation). Johnson maintained that Robert was the responsible party throughout the majority of his interrogation. Johnson continues to challenge the admissibility of his statements to police. However, to the extent that the interrogation was admissible, the defense's position was that Johnson eventually provided an account consistent with the information fed to him by the officers.

Regarding the physical evidence, the discovery of Maxine Caraway's blood on Johnson's shoe and gunshot residue on Johnson's hand were explained by Johnson's admission that that he was there when the incident occurred and fired one shot at Robert as he fled. Thus, the only evidence that actually placed Johnson as the triggerman when the deadly shots were fired was the testimony of Kaisha Caraway, who was angry with Johnson due to what she perceived as his deficient support for their children and his possible infidelity. In light of the gaps and flaws in the State's evidence, there is a reasonable probability that the improper admission of the pre-death photographs affected the outcome of the trial. See State v. Adkins, 353 S.C. 312, 577 S.E.2d 460 (Ct. App. 2003) ("A defendant is not required to present a defense and can instead rely entirely on the weakness of the State's case since the State has the burden of proving guilt beyond a reasonable doubt."). Johnson is accordingly entitled to reversal of his convictions and a new trial.

2. The trial court's error in allowing State's witnesses, Mason Moore, to testify via video was not harmless.

This Court properly ruled that the trial court erred in admitting the testimony of investigator Mason Moore. As an initial matter, Johnson must respectfully request that this Court reconsider the inclusion of footnote 4 in the opinion, which states: "Tragically, Moore was shot and killed in the line of duty earlier this year in Montana." This information was not contained in the Amended Record on Appeal, which was filed with this Court on May 11, 2016, and is not the proper subject for judicial notice. See Rule 201, SCRE. The implication of including this type of information in the Court's opinion is either that this Court reviewed media reports in conjunction with its review of this case or has some other personal knowledge upon which it relied for the information. Neither is proper. Moreover, to the extent that this Court's harmless error analysis was impacted in any manner by the unavailability of Moore for a future retrial, such is not a proper consideration. Any reference to Moore's death following Johnson's trial should be removed from this Court's opinion.

Further, this Court erred in ruling that the circuit court's erroneous decision to permit Investigator Moore to testify via Skype was harmless. The reasoning for the finding of harmlessness set forth in this Court's opinion was:

We are cognizant that Johnson's confession was an important piece of evidence in this case. Likewise, we recognize the admission of his confession turned on a finding of voluntariness that must be proven by the State through its witnesses and evidence. In this case, Investigator Coker's testimony plus the recordings of Johnson's interrogation met this burden. Investigator Moore's testimony was only relevant to events *not* presented by the videos or covered by Investigator Coker. Johnson does not allege wrongdoing by Investigator Moore other than through conduct contained in the videos. Consequently, Investigator Moore's testimony was largely cumulative to what was already before the jury.

This ruling essentially condones the approach taken by the trial court in this case, which required the defense to prove prejudice at the trial level rather requiring the prosecution to meet its burden

of showing that the video testimony was reliable and, most importantly, that denial of the right to confrontation was necessary to further an important public policy. R. 63, l. 2 – 69, l. 11; Maryland v. Craig, 497 U.S. 836, 850 (1990); State v. Bruce, 412 S.C. 504, 772 S.E.2d 753, 755-56 (2015) (“[I]t is clearly improper for the trial court to perform a harmless error analysis on its own evidentiary ruling. Trial courts cannot sit in judgment of their own rulings and proceedings.”).

As more fully discussed in the brief and reply brief of appellant, the right to confrontation attaches to every witness and the proper inquiry for determining harmlessness is the impact on the jury’s verdict. “The United States Supreme Court has dispensed with the notion that some witnesses for the prosecution are exempt from the Confrontation Clause.” State v. Rogerson, 855 N.W.2d 495 (Iowa 2014) (citing Melendez-Diaz v. Massachusetts, 557 U.S. 305, 313-14 (2009) (“Contrary to respondent’s assertion, there is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation.”)). In State v. Schwartz, 327 P.3d 1108, 1116 (N.M. App. 2014), the court found that “even if the video testimony was cumulative, improperly admitted evidence that is cumulative is not ipso facto harmless beyond a reasonable doubt. Rather, even cumulative evidence may be harmful if it had an impact on the jury’s verdict.” Id. (internal citation and quotations omitted). Thus, the court held that, despite the State’s efforts to minimize the role of witness Labance’s video testimony, “there is no reasonable possibility that this evidence did not contribute to Defendant’s conviction.” 327 P.3d at 1117. The Schwartz court likewise rejected the State’s argument that the video testimony was harmless because the documents admitted through the witness “could have been authenticated another way.” The court ruled that “the State chose to rely on Labance to get the documents admitted. Having made that choice, the State cannot now argue, simply because there was another method for admission of the documents, that the jury did not rely on Labance’s testimony to convict

Defendant.” Id. Accordingly, the court reversed Schwartz’s convictions and remanded for a new trial. Id. at 1119.

Here, the State chose to call Investigator Moore as a witness and he was not merely cumulative. Their purpose was obvious, as a review of the entirety of Johnson’s interrogation made clear that Coker was the “bad cop” and Moore was the “good cop.” In fact, one of the DVDs mysteriously cut off just as Coker was yelling at Johnson. See State’s Ex. 59 (DVD of Apr. 6, 2011 Interrogation) (on file with this Court). Given that ultimately the jury would determine the voluntariness of Johnson’s statements and the breaks in the video recording, the State did not want to rely solely on Coker’s testimony regarding the interrogation. See State v. Davis, 309 S.C. 326, 422 S.E.2d 133 (1992) (stating that after the trial judge makes an initial determination allowing a confession into evidence, “[i]t then is for the jury ultimately to decide whether the confession was voluntary.”), *overruled on other grounds by Brightman v. State*, 336 S.C. 348, 520 S.E.2d 614 (1999). In addition to Coker’s lies and threats to Johnson shown on the videos of the interrogation, his credibility was further damaged on cross-examination, where he made bold, unsupported accusations against Johnson and minimized his conduct during the interrogation as interview “techniques.” R. 461, l. 4 – 501, l. 15. Thus, the State relied upon Moore’s testimony to convince the jury of the voluntariness of Johnson’s confession. As a result, it cannot be said that Moore’s testimony did not impact the verdict and that its improper admission was harmless beyond a reasonable doubt. Johnson is accordingly entitled to reversal of his convictions and a new trial.

3. The trial court erred in admitting Appellant's statement where, under the totality of the circumstances, it was not involuntarily given.

This Court ruled that Johnson's statement to law enforcement was voluntary despite law enforcement's misrepresentations of evidence, threat of the death penalty, and emotional appeals and threats related to Johnson's two-year old daughter. Finding that none of these factors alone rendered Johnson's statement involuntary, this Court concluded that "the circuit court did not abuse its discretion in admitting Johnson's statement as the evidence supports a finding his will was not overcome by the various tactics employed during his interrogation." As discussed more fully in the brief of appellant, the threats and coercion utilized by the officers in this case to extract Johnson's alleged confession rendered his statements involuntary and inadmissible. Brief of Appellant, pp. 3-7 and 41-45.

In the initial phase of review by the trial judge, if a defendant was advised of his Miranda rights, but chose to make a statement anyway, the "burden is on the State to prove by a *preponderance of the evidence* that his rights were voluntarily waived." State v. Washington, 296 S.C. 54, 55, 370 S.E.2d 611, 612 (1988) (emphasis in original). The State bears this burden of proof even where a defendant has signed a waiver of rights form. State v. Goolsby, 275 S.C. 110, 268 S.E.2d 31 (1980), *cert. denied*, 449 U.S. 1037, 101 S.Ct. 616 (1980). The trial judge's determination of the voluntariness of a statement must be made on the basis of the totality of the circumstances, including the background, experience, and conduct of the accused. State v. Linnen, 278 S.C. 175, 293 S.E.2d 851 (1982). When considering the voluntariness of a statement, the court and jury should consider "not only the crucial element of police coercion; the length of the interrogation; its location; its continuity; the defendant's maturity; education; physical condition; and mental health." Withrow v. Williams, 507 U.S. 680, 693, 113 S.Ct. 1745 (1993) (omitting internal citations). "Coercion is determined from the

perspective of the suspect.” State v. Miller, 375 S.C. 370, 386, 652 S.E.2d 444, 452 (Ct. App. 2007). Statements given pursuant to threats or under inherently coercive circumstances are not admissible. See Mincey v. Arizona, 437 U.S. 385, 398-99, 98 S.Ct. 2408 (1978); Minnesota v. Murphy 465 U.S. 420, 427, 104 S.Ct. 1136 (1984).

Here, the trial judge’s assessment fell far below the required consideration of the totality of the circumstances. While Johnson was read his Miranda rights and offered breaks, food, and bathroom facilities, Judge Young failed to consider the false, coercive, and threatening statements made by the officers throughout the lengthy interrogation or Johnson’s lack of experience with the criminal justice system. See R. 63, ll. 10-21. The investigators in this case continuously lied about the evidence in an effort to “wear on his [Johnson’s] psyche” and “break him [Johnson] down.” They told Johnson that the trunk of his car was analyzed and only his fingerprints were found, that his shoe matched a footprint left from kicking in the door, that his ring matched a wound left on Kaisha, and that you could hear him in the background of the 9-1-1 calls made by Maxine and Kaisha. None of that was true. R. 463, l. 2 – 484, l. 16; R. 487, l. 13 – 488, l. 2; State’s Ex. 55 (Recording of 911 calls) (on file with this Court).

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

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

What this Court misses in its analysis is that the officers increased the coercive nature of their "tactics" throughout the lengthy interrogation because they were continually unsuccessful in extracting a confession. They finally found either the right combination of coercive techniques or the most effective one – the threats related to Johnson's daughter – to overbear Johnson's will. Thus, while no one factor may have rendered Johnson's statement involuntary on its own, the totality of the circumstances in this case necessitated exclusion of his statement to police. Johnson is accordingly entitled to reversal of his convictions and a new trial.

4. The trial court erred in sentencing Appellant to five years incarceration for possession of a weapon during the commission of a violent crime.

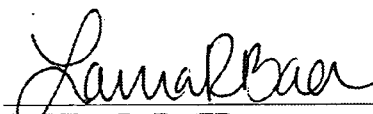
Though the error in imposing a sentence for the weapons offense was not preserved for appeal, Johnson asked the Court to vacate the sentence in the interest of judicial economy. The majority refused to do so because "the State does not concede the circuit court erred in sentencing Johnson to five years for possession of a weapon during the commission of a violent crime." In the concurring opinion authored by the Honorable Paul E. Short, Jr., he agreed that the trial judge erred in sentencing Johnson for possession of a firearm in the commission of a violent crime because S.C. Code Ann. § 16-23-490(A) prohibits such a sentence where life imprisonment without parole is imposed and would vacate the sentence in the interest of judicial economy.

The State's refusal to concede the issue is based upon their contention that "sentencing on the weapons charge was mandatory under § 16-23-490 because the weapon was used to effectuate the kidnapping, he was convicted of kidnapping, and he could not and did not receive a life sentence for that offense." Brief of Resp., p. 57 n.31. As discussed more fully in Appellant's brief, the trial judge made no finding of a nexus between the actual or constructive possession of the firearm and the furtherance of the crime of kidnapping. See State v. Whitesides, 397 S.C. 313, 725 S.E.2d 487 (2012) (holding that "[a] nexus between possession of the firearm and the underlying violent crime must be established in order for a defendant to be convicted of possession of a firearm during the commission of a violent crime"). Kaisha's testimony at trial made clear that the shotgun was left at the house and was not in the vehicle with them after they left. R. 230, l. 23 – 232, l. 8; R. 249, l. 25 – 251, l. 8. As such, the evidence would not have supported a conviction for possession of a firearm during the commission of the kidnapping. Johnson's sentence for the weapons offense should accordingly be vacated, or at the very least remanded for a finding regarding the nexus requirement.

CONCLUSION

For the reasons set forth herein, Appellant Justin Johnson respectfully requests that the Opinion of the Court of Appeals be withdrawn, that his convictions and sentences be reversed or vacated, and that his case be remanded for a new trial.

Respectfully Submitted,



LAURA R. BAER
Appellate Defender

This 15th day of February, 2018.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Clarendon County

Honorable William Jeffrey Young, Circuit Court Judge

THE STATE,

RESPONDENT,

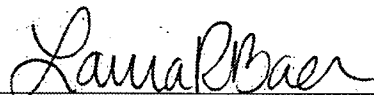
V.

JUSTIN JERMAINE JOHNSON,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon William Edgar Salter, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Justin Jermaine Johnson, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 15th day of February, 2018.


Laura R. Baer
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE
ME this 15th day of February, 2018.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: May 12, 2027

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

JUSTIN JERMAINE JOHNSON,

APPELLANT

APPELLATE CASE NO. 2014-001219

Appeal from Clarendon County

Honorable William Jeffrey Young, Circuit Court Judge

Opinion No. 5533

SECOND PETITION FOR REHEARING

On March 28, 2018, this Court withdrew its prior opinion and substituted and refiled an opinion affirming Appellant Justin Johnson's convictions for two counts of murder, kidnapping, first degree burglary, and possession of a firearm during the commission of a violent crime, in a published opinion. State v. Johnson, Opinion No. 5533 (S.C. Ct. App. filed Mar. 28, 2018) (Shearouse Adv. Sh. No. 13 at 25). The issues that Johnson continues to pursue on appeal relate to: (1) the improper admission of the pre-death photographs of the victims; (2) the improper use of remote video testimony for State's witness Mason Moore; (3) the improper admission of Johnson's involuntary statement to police; and (4) the improper sentencing of Johnson to five-years

incarceration for the weapons offense where he was sentenced to life imprisonment. Pursuant to Rule 221(a), SCACR, Johnson respectfully petitions this Court for a rehearing of its opinion based upon the following points overlooked or misapprehended by the Court:

1. The trial court's error in admitting the irrelevant pre-death photographs of each of the victims was not harmless.

In accordance with State v. Livingston, 327 S.C. 17, 488 S.E.2d 313 (1997), and State v. Langley, 334 S.C. 643, 515 S.E.2d 98 (1999), this Court properly ruled that the trial court erred in admitting the pre-death photographs of Son and Maxine, because they were not relevant to establishing Johnson's guilt. However, this Court erred in finding that the trial court's error was "harmless based on the overwhelming evidence of guilt in the case and the nature of the error."

This Court reasoned:

Johnson's statement and Kaisha's testimony indicate Johnson was the shooter. The physical evidence in the case corroborated Kaisha's testimony. Additionally, the jury knew the victims were a nine-month-old child and his great-grandmother, so feelings of sympathy were already on the side of the victims based on their status. Overall, we conclude the introduction of the photographs could not have reasonably affected the outcome of the trial.

Respectfully, the evidence in this case was not overwhelming and sympathy is not a proper basis for the jury to render a verdict under any circumstance.

Whether an error is harmless depends on the circumstances of the particular case. State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985). No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Id. "[P]hotographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are irrelevant or not necessary to substantiate material facts or conditions." State v. Martucci, 380 S.C. 232, 250, 669 S.E.2d 598, 607 (Ct. App. 2008). "To constitute unfair prejudice, the photographs must create a tendency to suggest a

decision on an improper basis, commonly, though not necessarily, an emotional one.” Id. (internal citations and quotations omitted).

Beginning with the prejudicial impact of the pre-death photographs themselves, it is notable that the Livingston Court found that though the testimony that accompanied the introduction of the pre-death photograph was “not extensive,” “it create[d] a poignant image.” 327 S.C. at 19, 488 S.E.2d at 314. Here, the pre-death photographs were admitted in conjunction with the testimony of Maxine Caraway’s husband, John Caraway, Jr., and the testimony of the minor victim’s mother, Kaisha Caraway. R. 162, l. 20 – 163, l. 20; R. 186, l. 13 – 189, l. 5. Mr. Caraway was conveniently called to testify on what would have been Maxine’s sixty-second birthday, a fact the prosecution elicited on direct examination. He also testified that he and Maxine were married for thirty-seven years. R. 162, l. 20 – 163, l. 20. The minor child’s picture was admitted while Kaisha Caraway testified about the child’s birth and the purported lack of support that she received from Johnson in caring for their children. R. 186, l. 13 – 189, l. 5.

Notably, the pre-death photograph of Maxine was immediately preceded and followed by photographs of her injuries in the numerical order of the State’s exhibits. See State’s Exhibits 36, 37, 38, and 39 (Photographs). As such, the pre-death photograph appeared between the other photographs of the victim’s injuries when presented to the jury during deliberations. In a case such as this, where the jury was also shown postmortem photographs of the victims, both of whom were shot in the face or head with a shotgun, the juxtaposition of the pre-death photographs is even more impactful upon the jury. Compare State’s Exhibits 38 and 54 (Pre-death Photographs of Victims) (on file with this Court) with State’s Exhibits 15 and 36 (Postmortem Photographs of Victims) (on file with this Court).

As this Court found, the pre-death photographs in this case were not relevant to establishing Johnson's guilt. Rather, their sole and improper purpose was to pull on the heart strings of the jury and encourage them to view the case through a lens of emotion and prejudice. See U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed"). This Court's determination that the prejudice to Johnson was somehow lessened because "the jury knew the victims were a nine-month-old child and his great-grandmother, so feelings of sympathy were already on the side of the victims based on their status" is contrary to the fundamental precept of our justice system that a jury's verdict will be rendered based upon the evidence and not emotion. If anything, the fact that there was an intrinsically emotional element to the case increased the prejudice to Johnson from the admission of the pre-death photographs.

This Court further erred in finding that there was overwhelming evidence of Johnson's guilt. This Court seems to have adopted Respondent's harmless error argument, which was premised only upon the evidence that supported the solicitor's theory of the case. See Brief of Resp., pp. 6-14. However, a harmless error analysis cannot be based solely upon the State's perceived strength of its case alone. See Holmes v. South Carolina, 547 U.S. 319, 331, 126 S.Ct. 1727, 1735 (2006) ("[B]y evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt"). While that evidence may have been sufficient to present the case to a jury, it failed to establish overwhelming evidence of Johnson's guilt. See Langley, 334 S.C. at 101, 515 S.E.2d at 649.

Both Respondent and this Court omitted that there was an unknown third parties' DNA and footprint found at the crime scene and never identified. R. 701, ll. 16-24; R. 702, ll. 7-13; R. 663, l. 10 - 666, l. 6; R. 674, ll. 1-8. Though Kaisha Caraway later changed her story, both she and Johnson originally told law enforcement that Kaisha's boyfriend, Robert, shot the victims. State's Ex. 55 (Recording of 911 calls) (on file with this Court); State's Ex. 59-63 (DVDs of Apr. 6, 2011 Interrogation) (on file with this Court). Johnson maintained that Robert was the responsible party throughout the majority of his interrogation. Johnson continues to challenge the admissibility of his statements to police. However, to the extent that the interrogation was admissible, the defense's position was that Johnson eventually provided an account consistent with the information fed to him by the officers.

Regarding the physical evidence, the discovery of Maxine Caraway's blood on Johnson's shoe and gunshot residue on Johnson's hand were explained by Johnson's admission that that he was there when the incident occurred and fired one shot at Robert as he fled. Thus, the only evidence that actually placed Johnson as the triggerman when the deadly shots were fired was the testimony of Kaisha Caraway, who was angry with Johnson due to what she perceived as his deficient support for their children and his possible infidelity. In light of the gaps and flaws in the State's evidence, there is a reasonable probability that the improper admission of the pre-death photographs affected the outcome of the trial. See State v. Adkins, 353 S.C. 312, 577 S.E.2d 460 (Ct. App. 2003) ("A defendant is not required to present a defense and can instead rely entirely on the weakness of the State's case since the State has the burden of proving guilt beyond a reasonable doubt."). Johnson is accordingly entitled to reversal of his convictions and a new trial.

2. The trial court's error in allowing State's witnesses, Mason Moore, to testify via video was not harmless.

This Court properly ruled that the trial court erred in permitting Investigator Moore to testify via Skype in violation of the Confrontation Clause of the Sixth Amendment. However, this Court erred in ruling that the circuit court's error was harmless. The reasoning for the finding of harmlessness set forth in this Court's opinion was:

We are cognizant that Johnson's confession was an important piece of evidence in this case. Likewise, we recognize the admission of his confession turned on a finding of voluntariness that must be proven by the State through its witnesses and evidence. In this case, Investigator Coker's testimony plus the recordings of Johnson's interrogation met this burden. Investigator Moore's testimony was only relevant to events *not* presented by the videos or covered by Investigator Coker. Johnson does not allege wrongdoing by Investigator Moore other than through conduct contained in the videos. Consequently, Investigator Moore's testimony was largely cumulative to what was already before the jury.

This ruling essentially condones the approach taken by the trial court in this case, which required the defense to prove prejudice at the trial level rather than requiring the prosecution to meet its burden of showing that the video testimony was reliable and, most importantly, that denial of the right to confrontation was necessary to further an important public policy. R. 63, 1. 2 – 69, 1. 11; Maryland v. Craig, 497 U.S. 836, 850 (1990); State v. Bruce, 412 S.C. 504, 772 S.E.2d 753, 755-56 (2015) (“[I]t is clearly improper for the trial court to perform a harmless error analysis on its own evidentiary ruling. Trial courts cannot sit in judgment of their own rulings and proceedings.”).

As more fully discussed in the brief and reply brief of appellant, the right to confrontation attaches to every witness and the proper inquiry for determining harmlessness is the impact on the jury's verdict. “The United States Supreme Court has dispensed with the notion that some witnesses for the prosecution are exempt from the Confrontation Clause.” State v. Rogerson, 855 N.W.2d 495 (Iowa 2014) (citing Melendez-Diaz v. Massachusetts, 557 U.S. 305, 313-14

(2009) (“Contrary to respondent’s assertion, there is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation.”). In State v. Schwartz, 327 P.3d 1108, 1116 (N.M. App. 2014), the court found that “even if the video testimony was cumulative, improperly admitted evidence that is cumulative is not ipso facto harmless beyond a reasonable doubt. Rather, even cumulative evidence may be harmful if it had an impact on the jury’s verdict.” Id. (internal citation and quotations omitted). Thus, the court held that, despite the State’s efforts to minimize the role of witness Labance’s video testimony, “there is no reasonable possibility that this evidence did not contribute to Defendant’s conviction.” 327 P.3d at 1117. The Schwartz court likewise rejected the State’s argument that the video testimony was harmless because the documents admitted through the witness “could have been authenticated another way.” The court ruled that “the State chose to rely on Labance to get the documents admitted. Having made that choice, the State cannot now argue, simply because there was another method for admission of the documents, that the jury did not rely on Labance’s testimony to convict Defendant.” Id. Accordingly, the court reversed Schwartz’s convictions and remanded for a new trial. Id. at 1119.

Here, the State chose to call Investigator Moore as a witness and he was not merely cumulative. Their purpose was obvious, as a review of the entirety of Johnson’s interrogation made clear that Coker was the “bad cop” and Moore was the “good cop.” In fact, one of the DVDs mysteriously cut off just as Coker was yelling at Johnson. See State’s Ex. 59 (DVD of Apr. 6, 2011 Interrogation) (on file with this Court). Given that ultimately the jury would determine the voluntariness of Johnson’s statements and the disconcerting breaks in the video recording, the State did not want to rely solely upon Coker’s testimony regarding the interrogation. See State v. Davis, 309 S.C. 326, 422 S.E.2d 133 (1992) (stating that after the trial

judge makes an initial determination allowing a confession into evidence, “[i]t then is for the jury ultimately to decide whether the confession was voluntary.”), *overruled on other grounds by Brightman v. State*, 336 S.C. 348, 520 S.E.2d 614 (1999). In addition to Coker’s lies and threats to Johnson shown on the videos of the interrogation, Coker’s credibility was further damaged on cross-examination, where he made bold, unsupported accusations against Johnson and minimized his conduct during the interrogation as interview “techniques.” R. 461, l. 4 – 501, l. 15. Thus, the State relied upon Moore’s testimony to convince the jury of the voluntariness of Johnson’s confession. As a result, it cannot be said that Moore’s testimony did not impact the verdict and that its improper admission was harmless beyond a reasonable doubt. Johnson is accordingly entitled to reversal of his convictions and a new trial.

3. The trial court erred in admitting Appellant’s statement where, under the totality of the circumstances, it was not involuntarily given.

This Court ruled that Johnson’s statement to law enforcement was voluntary despite law enforcement’s misrepresentations of evidence, threat of the death penalty, and emotional appeals and threats related to Johnson’s two-year old daughter. Finding that none of these factors alone rendered Johnson’s statement involuntary, this Court concluded that “the circuit court did not abuse its discretion in admitting Johnson’s statement as the evidence supports a finding his will was not overborne by the various tactics employed during his interrogation.” As discussed more fully in the brief of appellant, the threats and coercion utilized by the officers in this case to extract Johnson’s alleged confession rendered his statements involuntary and inadmissible. Brief of Appellant, pp. 3-7 and 41-45.

In the initial phase of review by the trial judge, if a defendant was advised of his Miranda rights, but chose to make a statement anyway, the “burden is on the State to

prove by a *preponderance of the evidence* that his rights were voluntarily waived.” State v. Washington, 296 S.C. 54, 55, 370 S.E.2d 611, 612 (1988) (emphasis in original). The State bears this burden of proof even where a defendant has signed a waiver of rights form. State v. Goolsby, 275 S.C. 110, 268 S.E.2d 31 (1980), *cert. denied*, 449 U.S. 1037, 101 S.Ct. 616 (1980). The trial judge’s determination of the voluntariness of a statement must be made on the basis of the totality of the circumstances, including the background, experience, and conduct of the accused. State v. Linnen, 278 S.C. 175, 293 S.E.2d 851 (1982). When considering the voluntariness of a statement, the court and jury should consider “not only the crucial element of police coercion; the length of the interrogation; its location; its continuity; the defendant’s maturity; education; physical condition; and mental health.” Withrow v. Williams, 507 U.S. 680, 693, 113 S.Ct. 1745 (1993) (omitting internal citations). “Coercion is determined from the perspective of the suspect.” State v. Miller, 375 S.C. 370, 386, 652 S.E.2d 444, 452 (Ct. App. 2007). Statements given pursuant to threats or under inherently coercive circumstances are not admissible. See Mincey v. Arizona, 437 U.S. 385, 398-99, 98 S.Ct. 2408 (1978); Minnesota v. Murphy 465 U.S. 420, 427, 104 S.Ct. 1136 (1984).

Here, the trial judge’s assessment fell far below the required consideration of the totality of the circumstances. While Johnson was read his Miranda rights and offered breaks, food, and bathroom facilities, Judge Young failed to consider the false, coercive, and threatening statements made by the officers throughout the lengthy interrogation or Johnson’s lack of experience with the criminal justice system. See R. 63, ll. 10-21. The investigators in this case continuously lied about the evidence in an effort to “wear on his [Johnson’s] psyche” and “break him [Johnson] down.” They told Johnson that the trunk of his car was analyzed and only his fingerprints were found, that his shoe matched a footprint left from kicking in the door, that his

ring matched a wound left on Kaisha, and that you could hear him in the background of the 9-1-1 calls made by Maxine and Kaisha. None of that was true. R. 463, l. 2 – 484, l. 16; R. 487, l. 13 – 488, l. 2; State's Ex. 55 (Recording of 911 calls) (on file with this Court).

Further, investigators told Johnson that if he continued to tell them the same thing he was either going to go to prison or get the death penalty. Ex. 59 (DVD of Apr. 6, 2011 Interrogation, 1:17:33) (on file with this Court). Immediately prior to Johnson's alleged confession they spoke with him about what they would tell his daughter about him – threatening to tell her that he was a cold-blooded killer, that he did not “give a shit about her,” and that the only reason he did not kill her was because he ran out of shells. They also told him that he was not going to get the opportunity to see his daughter. Ex. 64 (DVD of Apr. 6, 2011 Interrogation, 0:20:21) (on file with this Court). Both investigators denied making any threats or coercive statements to Johnson, but agreed that it was only after the discussion of Johnson's daughter that Johnson changed his story. Coker also agreed that Johnson's original story matched the evidence at the scene and that it was countered only by Kaisha's statement and his alleged confession that followed seven hours of Johnson proclaiming his innocence. R. 387, ll. 8 – 402, l. 3; R. 461, l. 4 – 462, l. 20; R. 484, l. 17 – 485, l. 1; R. 496, l. 24 – 501, l. 15.

What this Court misses in its analysis is that the officers increased the coercive nature of their “tactics” throughout the lengthy interrogation because they were continually unsuccessful in extracting a confession. They finally found either the right combination of coercive techniques or the most effective one – the threats related to Johnson's daughter – to overbear Johnson's will. Thus, while no one factor may have rendered Johnson's statement involuntary on its own, the totality of the circumstances in this case necessitated exclusion of his statement to police. Johnson is accordingly entitled to reversal of his convictions and a new trial.

4. The trial court erred in sentencing Appellant to five years incarceration for possession of a weapon during the commission of a violent crime.

Though the error in imposing a sentence for the weapons offense was not preserved for appeal, Johnson asked the Court to vacate the sentence in the interest of judicial economy. The majority refused to do so because “the State does not concede the circuit court erred in sentencing Johnson to five years for possession of a weapon during the commission of a violent crime.” In the concurring opinion authored by the Honorable Paul E. Short, Jr., he agreed that the trial judge erred in sentencing Johnson for possession of a firearm in the commission of a violent crime because S.C. Code Ann. § 16-23-490(A) prohibits such a sentence where life imprisonment without parole is imposed and would vacate the sentence in the interest of judicial economy.

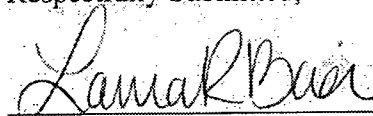
The State’s refusal to concede the issue is based upon their contention that “sentencing on the weapons charge was mandatory under § 16-23-490 because the weapon was used to effectuate the kidnapping, he was convicted of kidnapping, and he could not and did not receive a life sentence for that offense.” Brief of Resp., p. 57 n.31. As discussed more fully in Appellant’s brief, the trial judge made no finding of a nexus between the actual or constructive possession of the firearm and the furtherance of the crime of kidnapping. See State v. Whitesides, 397 S.C. 313, 725 S.E.2d 487 (2012) (holding that “[a] nexus between possession of the firearm and the underlying violent crime must be established in order for a defendant to be convicted of possession of a firearm during the commission of a violent crime”). Kaisha’s testimony at trial made clear that the shotgun was left at the house and was not in the vehicle with them after they left. R. 230, l. 23 – 232, l. 8; R. 249, l. 25 – 251, l. 8. As such, the evidence would not have supported a conviction for possession of a firearm during the commission of the

kidnapping. Johnson's sentence for the weapons offense should accordingly be vacated, or at the very least remanded for a finding regarding the nexus requirement.

CONCLUSION

For the reasons set forth herein, Appellant Justin Johnson respectfully requests that the Opinion of the Court of Appeals be withdrawn, that his convictions and sentences be reversed or vacated, and that his case be remanded for a new trial.

Respectfully Submitted,



LAURA R. BAER
Appellate Defender

ATTORNEY FOR APPELLANT

This 30th day of March, 2018.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Clarendon County

Honorable William Jeffrey Young, Circuit Court Judge

THE STATE,

RESPONDENT,

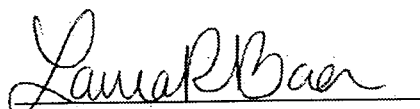
V.

JUSTIN JERMAINE JOHNSON,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Second Petition for Rehearing in the above-entitled case has been served upon William Edgar Salter, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Justin Jermaine Johnson, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 30th day of March, 2018.


Laura R. Baer
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE
ME this 30th day of March, 2018.

 (L.S)
Notary Public for South Carolina
My Commission Expires: July 3, 2023

The South Carolina Court of Appeals

The State, Respondent,

v.

Justin Jermaine Johnson, Appellant.

Appellate Case No. 2014-001219

ORDER

The petition for rehearing is granted. We dispense with further briefing and argument. The attached opinion is substituted for the previous opinion, which is withdrawn.

Paul G. Shert, Jr. J.

[Signature] J.

John D. [Signature] J.

Columbia, South Carolina

cc:

Alan McCrory Wilson, Esquire

Donald J. Zelenka, Esquire

Laura Ruth Baer, Esquire

W. Edgar Salter, III, Esquire

Ernest Adolphus Finney, III, Esquire

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MAR 28 2018

APPELLATE DEFENSE

FILED

March 28, 2018

The South Carolina Court of Appeals

The State, Respondent,

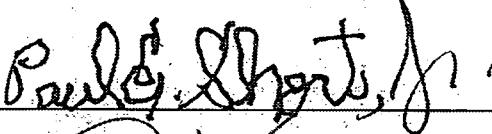
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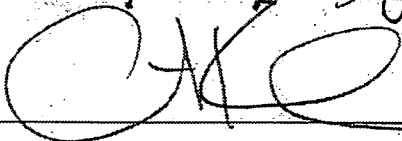
Justin Jermaine Johnson, Appellant.

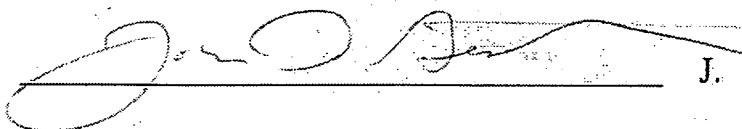
Appellate Case No. 2014-001219

ORDER

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


_____ J.


_____ J.


_____ J.

Columbia, South Carolina

cc:

Alan McCrory Wilson, Esquire

Donald J. Zelenka, Esquire

Laura Ruth Baer, Esquire

W. Edgar Salter, III, Esquire

Ernest Adolphus Finney, III, Esquire

FILED

April 26, 2018