STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Chester County
The Hon. Paul M. Burch, Circuit Court Judge
Appellate Case No. 2017-001500

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

V.

JERMAINE MARQUEL BELL,

PETITIONER.

INITIAL BRIEF OF RESPONDENT

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APPELLANT'S QUESTION PRESENTED

Whether the trial judge erred in allowing the decedent's husband and daughter to testify to the decedent's hearsay statements that she said she believed appellant was stealing her clothing, including her underwear, over appellant's objections, including Rule 404(b) and Rule 403, SCRE, and admitting the hearsay under the solicitor's claimed state-of-mind exception?

COUNTER STATEMENT OF QUESTIONS PRESENTED

I. Is Appellant's argument barred from appellate review, since he did not argue in the trial court that evidence the victim thought Appellant was stealing from her was inadmissible under Rule 803(3), SCRE?

II. Was the admission of evidence the victim thought Appellant was stealing from her harmless beyond a reasonable doubt in light of the overwhelming evidence of Appellant's guilt?

STATEMENT OF THE CASE

Appellant, Jermaine Marquel Bell, is currently incarcerated in the South Carolina Department of Corrections, as the result of his Chester County conviction and sentence for murdering Judy Lindsay. The Chester County Grand Jury indicted him on February 16, 2016 for murder (2016-GS-12-00173). ***R. pp.*** ___-__. Sixth Circuit Public Defender William P. Frick and Assistant Public Defender and Justin Jones represented Bell at trial, while Sixth Circuit Solicitor Randy E. Newman, Jr., and Assistant Solicitor Candice A. Lively prosecuted the case.

Bell received a jury trial before the Honorable Paul M. Burch on June 26-30, 2017. The jury convicted him of murder (***Tr. 623, lines 7-22***), and Judge Burch sentenced him to life imprisonment. ***Tr. 631, line 24- 632, line 2.*** Bell timely served and filed a notice of appeal.

STANDARD OF REVIEW

A party cannot argue one theory in support of his objection or motion at trial and raise a different theory on appeal. *E.g.*, *State v. Bailey*, 298 S.C. 1, 5-6, 377 S.E.2d 581, 584 (1989); *State v. Patterson*, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) ("Appellant is limited to the grounds raised at trial"). Also, in criminal cases, appellate courts sit to review errors of law only. *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). When reviewing an evidentiary ruling, the appellate court gives great deference to the trial judge because the reception or exclusion of evidence is a matter left largely to the sound discretion of a trial judge. *State v. Groome*, 274 S.C. 189, 190-191, 262 S.E.2d 31, 32 (1980); *see State v. Torres*, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010) ("The appellate court reviews a trial judge's ruling on admissibility of evidence pursuant to an abuse of discretion standard and gives great deference to the trial court."). Significantly, an appellate court will not reverse a trial judge's decision to admit or exclude evidence absent a clear prejudicial abuse of the trial judge's broad discretion in evidentiary matters. *State v. Gaster*, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); *State v. Kelley*, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995) ("A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice."). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *State v. McDonald*, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

Error that does not contribute to the verdict is harmless beyond a reasonable doubt. *State v. Fletcher*, 379 S.C. 17, 25, 664 S.E.2d 480, 484 (2008). The harmlessness of an error in the

admission of evidence generally depends on the materiality of the evidence in relation to the case as a whole. *State v. Haselden*, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003).

STATEMENT OF FACTS

Viewed in the light most favorable to the prosecution, the direct and circumstantial evidence presented at trial was that Judy Lindsay, the victim, was the common law wife of Mitchel Mayfield. They had been together for thirty-five or forty years and lived together for thirty. Mr. Mayfield testified they had three children: thirty-two year old Elton, thirty-one year old Teonia and Jessica, or "Jet" who was in her late twenties. In May 2015, Jessica and her two children lived with Judy and Mr. Mayfield in Chester, South Carolina. ***Tr. 110-11; 139***. He described the neighborhood as "quiet" and added that neither he nor Judy had any problems with their neighbors. ***Tr. 112***.

Judy and other family members often gathered on their front porch at night and socialized. Bell was friends with both her son and her youngest daughter, Jessica. Mr. Mayfield explained that "a lot of times [Bell] will come there, my wife will get mad at him for some reason or another and she'll run him off." Also, Bell had said some things to Teonia "about Judy that she didn't like and every time she came she would run him away." ***Tr. 112-13***. Teonia did not want him to come to their residence. ***Tr. 115-16***.

Although neither he nor Judy drank alcohol or used drugs, other family members drank and Bell would wait until they wanted something to drink and return with alcohol. ***Tr. 113-14; 131***.[1] Also, Judy had told him that Bell was stealing "[h]er glasses, money, cigarettes, [and]

[1] Mr. Mayfield did not have any problems with Bell apart from his wife's issues with him. ***Tr. 114***.

clothes." However, they could not prove this and did not report it to the police. ***Tr. 114-15.***[2] *See* Argument. Also, Bell stayed at their residence on the night of May 11, 2015. ***Tr. 116-17.***[3]

On Saturday, May 12th, Mr. Mayfield went to work and did not see Judy the rest of the day, until he joined her and Jessica on the front porch that night. Jessica, her two children, and Teonia's child were there as well. He was tired and went to bed around 11:00 or 11:30 p.m., and his grandson was in the bed with him. He and Judy had an argument over what he should wear to a church event that he did not want to attend. He thereafter went to sleep and he did not know who was at his house after that. ***Tr. 118-20; 143-46.***

Mr. Mayfield awoke between 5:00 and 600 a.m. on Sunday, May 13, 2015 and he began his usual daily activities of having coffee, emptying his trash, and burning it in a burn barrel.[4] He had previously looked for Judy but did not see her and assumed she was in the Jessica's bedroom. ***Tr. 120-23; 150.*** At some point, he saw Judy's socks, shoes and scarf in the yard on the left side of his house. He also saw drag marks and tried to follow them. ***Tr. 136-37; 151-52.*** Assuming that the grandchildren had taken these articles outside, he went back into the house to have the children pick up the clothing. However, Jessica did not know where Judy was and she began calling people to try and locate her mother because Judy had never left the house without telling a family member where she was going. ***Tr. 121-24.***

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[2] Jessica Lindsay gave similar testimony. ***Tr. 176-77.***

[3] This was not unusual, and Bell would stay there when he and Elton got too drunk for Bell to go home. ***Tr. 125-26.*** However, Judy did not have a romantic relationship with Bell. Also, Mr. Mayfield often argued but he had never physically harmed her (***Tr. 127***), he had never put his hands around her neck to strangle her for any reason, and he was unaware of any threats of her. ***Tr. 132.***

[4] Mr. Mayfield guessed he was outside by 7:00 or 7:15 a.m. ***Tr. 152.***

Mr. Mayfield went back outside and he eventually saw both Judy's keys and her shirt in the yard. Upset, he called 911 and waited on police to arrive. ***Tr. 121-25; 128***. He did not learn that Judy's body had been located until later that day. The shed behind the abandoned house where she was found was not far from their house. ***Tr. 128-29***.

After law enforcement had processed the scene, he spoke to his sister, a former police officer, and she told him that he could go to the area where Judy was found. They then headed to that location and they found an ashtray and a bag with Judy's panties in it. So, he called the Sherrif's Office and officers retrieved these items from him. ***Tr. 129-30***. Mr. Mayfield fully cooperated with police, giving them a statement and a sample of his DNA. ***Tr. 130-31***.

Jessica "Jet" Lindsay testified that she has three children. In September 2015, she was living with her parents and had lived there three or four years. She had known Bell for some time. They were friends but neither she not anyone else in her family was ever romantically involved with him. ***Tr. 160-61***. Her mother did not want Bell coming to their house. However, she would let him come sometimes and, "if he'd been at work[,] he [would] come by and bring ... soda or something to try to win my mama over to let him sit and [drink] ...." ***Tr. 161-62***.

Although Jessica had previously seen Judy ask Bell to leave, Jessica admitted that she had invited him over and that he would return the next day on the occasions Judy asked him to leave. In fact, Bell stayed at their house on Friday, September 11th, and he slept in the living room. ***Tr. 162-64***.

When Judy returned from choir practice on Saturday night, September 12th, she changed clothes and joined Jessica on the front porch. She was wearing "a pair of pants and a T-shirt." Two of Jessica's children and her nephew were also sleeping in the house and her nephew slept

with her parents. Judy smoked a cigarette. Although Judy did not drink, Jessica was drinking both liquor and beer. ***Tr. 164-66.***

Jessica had Bell to come over. He eventually arrived and Jessica poured him a shot of liquor. ***Tr. 166-67; 180.*** At some point, Jessica's cousin drove her to Wendy's and she got something to eat. Judy and Bell were still on the porch and Bell was still drinking a beer when she returned, fifteen or twenty minutes later. ***Tr. 167-68; 179.***

Jessica promised her mother that she would go to church that morning. She then smoked a cigarette and went to bed because she was drunk. It was around 12:30 a.m. on September 13th. Bell was still with her mother at that time. Jessica did not awaken until later that morning. She was covered with a sheet when she awoke that morning but did not know how it got there. ***Tr. 169; 179181-82.*** She told police that she had then awakened her father. ***Tr. 183-84.***

Neither she nor her father could find Judy, which was unusual, since Judy would not leave home without telling anyone where she was going. Also, Jessica had seen Judy's socks and shoes and the drag marks. So, Jessica began calling people, including Bell, in an unsuccessful effort to find her. Bell only told her to ask "Mango," which is Mr. Mayfield. Jessica even had a friend drive her to the apartment of "Bo" Weldon, where Bell was supposed to be staying. No one came to the door. However, she saw the black Coogie shoes that Bell was wearing earlier that morning and they were muddy. ***Tr. 172-74; 184-86.*** She next saw Bell when he walked up to the yard after the police had arrived. ***Tr. 175-76.***

Captain John Kelly was a patrol lieutenant with the Chester County Sheriff's Office on September 13, 2015. He was the first officer on the scene, and Mr. Mayfield showed him the drag marks and Judy's belongings that were on the ground. Officer Kelly immediately called an

investigator and secured the crime scene because it was apparent that "something bad had taken place out there." ***Tr. 188; 190-91***. Officer Kelly was present when Bell arrived. Bell was willing to speak to authorities about being the last person known to have seen the victim alive. So, Officer Kelly placed Bell, un-handcuffed, in his patrol car, and another officer later transported him to the law enforcement center. ***Tr. 192-93***.

Randy Clinton, who supervises the K-9 division of the York County Sheriff's Office, was called to assist in this case around 10:55 a.m. on September 13th. Officer Kelly briefed him when he arrived. Using a bloodhound, he "scent[ed]" his dog off of a pair of socks. ***Tr. 202-04***. As the dog tracked the scent from the left side of Judy's house, Officer Clinton placed markers whenever he saw something of potential relevance. The trail eventually led to the discovery of Judy's body behind a shed in the yard of the abandoned house next door. In all, it only took the dog two or three minutes to locate her. Officer Clinton immediately backed out and neither he nor the dog touched her body. ***Tr. 204-09; 212-13***.

At the request of the Chester County Sheriff's Office, SLED Agent Haley Nelson, as well as Special Agents Melinda Worley and Terrance Matthews responded to the crime scene and processed it on September 13, 2015. The scene as secured when they arrived, and they spoke to other members of law enforcement who were present. These officers informed Agent Nelson's team that fifteen markers had been placed at the location of potentially relevant evidence. ***Tr. 428-31***.

Following a walk-through of the path the bloodhound had taken, Agent Nelson and her team processed the scene, photographing and/or seizing potentially relevant evidence. Of particular importance to the case, they seized a black left shoe; a black and red shoe; a multi-

colored doo rag; Judy's orange T-shirt, which had a red hair binder and a key ring containing two keys on it; a black sash; and a black lanyard. They also photographed drag marks at markers five-eight and eleven-thirteen, footwear impressions, and the back yard of the abandoned house and the shed where Judy's body was found. Likewise, they photographed fecal matter that they found near the doo rag. ***Tr. 431-34; 446-47; 449.***

Judy's body was found 243 feet from where the first marker had been placed. **Tr. 450.** The officers had been told that Judy kept her keys on the black lanyard. ***Tr. 456.*** After Agent Nelson's team had responded to another location, they received information that Mr. Mayfield had found the ashtray and a plastic bag with his wife's panties in it. So, they returned to his residence and seized those items. ***Tr. 459-60.***

Det. Wade Young, with the Chester County Sheriff's Office, was the investigating officer called to the scene on the morning of September 13, 2015. When Det. Young was advised that Bell was willing to speak to officers about being the last person seen with Judy, he spoke to Bell. Before they spoke, Det. Young advised Bell and obtained a waiver of his *Miranda* rights.[5] ***Tr. 487-91.*** In this statement, Bell claimed that he, Judy and Jessica were on the porch on the night of September 12th, and that Jessica went to bed around 11:00 p.m. ***Tr. 491.***

Bell added that:

> So [Bell] advised me that himself and Judy stayed on the porch around 12:30 or 1:00, he said Judy said she was getting sleepy so decided to go into the house, Jermaine Bell was still on the porch at that time. He stated that Judy come back out of the house, said it was too hot. He advised me that Mr. Mayfield cuts on the air condition, puts the window up, then he said he decided to leave and he said it was still 12:30 or 1:00. He said Ms. Judy went in the house and he proceeded to go to his mom's house, which is [on] Foote Street. So he walks up Saluda going to his mom's house, when he gets to his mom's house he can't get in, so he turns around and comes back down Saluda Street to ... Mr. Herman Weldon's and says

[5] See *Miranda v. Arizona*, 384 U.S. 436 (1966).

> he sleeps on the porch. He said he is there until about 8:00 in the morning when Mr. Herman Weldon comes out of the house, he wakes up and asks Mr. Weldon for a cigarette.

Tr. 491, line 25- 492, line 16.

Bell was thereafter transported to the Sheriff's Office. Based upon information that he provided to officers questioning him, officers searched both his mother's residence and Mr. Weldon's apartment. (Det. Brian Sanders assisted in the searches). Officers seized a pair of wet black tennis shoes from Mr. Weldon's apartment because Jessica had indicated that these were the shoes Bell wore on the night of the murder. ***Tr. 309-11; 492-94;*** *see also* ***Tr. 528.*** Det. Young testified that Mr. Weldon's apartment is only .35 miles from Judy's house. ***Tr. 499.***

SLED Agent Kristen Grant assisted in interviewing Bell. She spoke to him on both the 13th and the 15th. He was not under arrest and he had waived his *Miranda* rights on both occasions. The purpose of the September 15th interview was to clarify inconsistencies in his statements on the 13th. ***Tr. 520-25.*** Agent Grant explained that:

> The focus was when we first talked with him he told us that he had gone home that night and he told us one address of home being Center Street. Again, one of the times I step out I contact the investigators on the scene and tell them hey, this is where he says he was all night. The next time he says, "No, I didn't go there, I went to Foote Street which is my mom's address," and he said nobody was there all night, he stayed there all night by himself. And then he said no, he was there, then his brother was there, and then he said, no, he spent the night at Herman Weldon's house. So we had several stories about where he went the night after he left Ms. Judy's house. ....
>
> He [also] told us that when he left the home that night, that he left the house, walked straight out in the front yard, walked onto Fifth Street, walked around the curve and that was it. He said he never went anywhere other than from the road to the porch, the porch to the road. And then at one point he tells, "No, actually I was on the side of the house," which is where the drag marks were eventually found. He said he went over there to urinate, and when we questioned him about that he said he just forgot. We asked him what clothing he had on the night of the incident, he told us initially he had on a black shirt, jeans and Coogee shoes, but the morning when we interviewed him he said he -- the last story was he'd been at

> Mr. Weldon's house that night and slept. He said that when he got up that morning, that when Jessica called him that he got straight up, he didn't shower, he didn't change clothes or anything, he had slept in the clothes, he walked straight back up to ... Fifth Street and had on the same thing he had on the night before. Well, when we interviewed him that day that is not what he had on. And then he eventually said, "No, I changed clothes and this is what I had on," that I had on a solid black shirt, that I did shower and I changed shoes.

Tr. 526, line 7 – 527, line 22. Another inconsistency was that the black Coogie tennis shoes, which were muddy when Jessica saw them, appeared to have been washed by the time officers seized them from Mr. Weldon's apartment. ***Tr. 528.***[6]

Det. Brian Sanders, of the Chester County Sheriff's Office, testified that a witness that he spoken to, Brianna Lowery, gave officers a timeline of the 13th. Without objection, Det. Sanders testified that Ms. Lowery told them that she had driven to Judy's residence around 12:30 a.m. because she and Jessica were supposed to go out. The lights were off, the front door was open and the T.V. was on. Yet, no one came outside when she blew her horn. She saw Bell come from a house across the street. She asked where Judy and Jessica were, and he claimed that he did not know. ***Tr. 303-04.***

Herman Weldon testified that he lives in an apartment on Saluda St. in Chester. He had gone to school with Judy and he met Bell through her family. He does not know Bell well, but he has allowed Bell to stay at his apartment on more than one occasion. Bell was on his front porch when he awoke around 7:00 a.m., on September 13, 2015. He asked Bell for a cigarette, but Bell did not have any. So, Mr. Weldon walked to the store and purchased some. ***Tr. 277-81.*** When he got home, he and Bell smoked a cigarette. They did not talk. However, Bell kept walking back and forth to the road. He did not tell Mr. Weldon why he did this. ***Tr. 281-82.***

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[6] The State introduced CDs containing audio and video recordings of Bell's statements on September 13 as State's Ex.s 110-15 and the September 15th recordings as State's Ex.s 129-30. *See* ***Tr. 314; 536-39.*** Bell never admitted his guilt, but the statements are telling because of the various lies that he told in an effort to avoid capture.

Darkarious Woods is Mitchell "Mango" Mayfield's nephew. Mr. Woods was driving down Fifth St. between roughly 1:00 and 1:30 a.m. on September 13th. When he passed Judy's home, he looked to see if anyone was on the porch.[7] No one was on the porch and he parked his car nearby. After he had parked, he saw Bell "come from the side of" the abandoned home next to Judy's residence. ***Tr. 285-86.***

Bell approached him and asked if his car was new. While Mr. Woods said that it was new, he thought that Bell's question was strange because Bell had washed his car before and knew he had the car. Both men went their separate ways after this conversation. At the time, Mr. Woods did not think anything about Bell's "real jittery" demeanor. ***Tr. 286-87; 290-91.***

Twenty-seven year old Ervin Chalkin testified that he had known Bell for "a year or two" and that they were "cool." In September 2015, Bell was staying in an abandoned house across the street from Mr. Chakin's home on Saluda St., which was next door to Mr. Weldon's apartment. ***Tr. 317-19.*** Mr. Chalkin confirmed that although Bell never lived at Mr. Weldon's apartment, he had probably slept on his porch. ***Tr. 319-20.*** Bell did not have a car and would either walk or catch a ride to anywhere he wanted to go. ***Tr. 324.*** Mr. Chalkin knew Judy and he knew that Bell was friends with her son Elton. ***Tr. 321.***

Mr. Chalkin went to a birthday party for his young cousin around 6:00 p.m. on Saturday, September 12, 2015. He drank one or two beers while he was there. Bell later came to the party. Bell was wearing a blue and white striped shirt and he drank beer while there. Bell left the party at roughly 10:00 or 11:00 p.m. ***Tr. 326-30.***

Mr. Chalkin subsequently left the party and went to People's Choice, a club on Saluda St., and he stayed there until approximately 3:15 a.m. or so. As Mr. Chalkin was driving home at

[7] Mr. Woods would often stop and socialize if there was anyone on the porch. ***Tr. 286.***

3:25 or 3:30 a.m., he saw Bell walking. He assumed that Bell was headed to Weldon's apartment and did not stop. Bell was still wearing the blue and white shirt. ***Tr. 330-31.***

Dr. Kim Collins, a forensic pathologist, performed the autopsy on Judy's body. ***Tr. 242; 244.*** Judy was fifty-one years old, was 5'1 1/2" tall, and weighed roughly 150 pounds. ***Tr. 248.*** On external examination of the body, Dr. Collins found "multiple areas of abrasion" or scratches and "bruises to different parts of the body." ***Tr. 250.*** Specifically, there was a long, linear abrasion extending from Judy's left armpit area down to her waistline. This abrasion continued down her leg and there was a "large area of abrasion where the skin has been rubbed off on her left knee." ***Tr. 251.***

She also had abrasions on her left buttock. ***Tr. 251-52.*** Dr. Collins found a large contusion "on the inner aspect of ... her left arm ... near the elbow." She opined that "to cause a bruise you've got to have some amount of force, either a hitting, a pulling, a squeezing, something has to rupture the blood vessels underneath the skin to show up." Judy had similar bruising on her right upper arm and in the area of her armpit. ***Tr. 253-54.*** Dr. Collins opined that these injuries were consistent with someone dragging Judy across the ground with this person's hands under Judy's arms because these were unusual places to have been caused by an accident. ***Tr. 254-55.***

More importantly, Judy had "a red/purple discoloration" from her neck upwards, as well as an abrasion on her forehead. ***Tr. 255.*** She also had bruising in areas on the left and right side of her neck (***Tr. 257***); she had blood in her mouth, and she had bitten down on her tongue, "deep into the muscle;" she had tears and scratches on her lips, which "correspond[ed] with pressure from her lips onto her ... front[] teeth; and she had petechia, or pinpoint hemorrhages, on her

inner lip. Dr. Collins took swabs of the areas of bruising on the neck. Additionally, Dr. Collins found both petechia and "very maked ... hemorrhage in the tissues that's over the white of the eye[s]." All of these findings indicated that Judy was strangled. ***Tr. 258-60.***

All of the injuries that Dr. Collins observed appeared to have "occurred at or about the time of death." ***Tr. 255-56.*** Also, she opined that the strangulation took from "several seconds to several minutes." ***Tr. 262-63.*** Dr. Collins' internal examination of Judy's body confirmed that she had been strangled. There was bleeding in the strap muscles of her neck, which is only caused by strangulation, as well as "a massive amount of hemorrhage" in the tissues in the back of her throat along her back bone. Although it does not take a great deal of pressure to manually strangle someone, the findings in this case showed "a lot of squeezing" and a significant amount of force. ***Tr. 261-63.*** Dr. Collins opined that the manner of death was homicide, and that the cause of death was manual strangulation. ***Tr. 266.***[8]

Based upon the information provided to Agent Nelson and her team's processing of the scene,

> We thought that the initial struggle occurred over here and then that she was dragged along ... this route that we have seen through here and her body located here. One of the reasons why -- after talking to the pathologist, again why we notated that the rose bushes were of significance, she had a very long abrasion on the side, on the left side, and also there was abrasions on the front of her knees, her toes and feet had dirt and there was dirt kind of in her toenails. So we believed that she was drug face down to get that long scratch on her left side, as well as the shirt having -- being dirty and all the holes on the front of the shirt and the abrasions on the knees, so we thought that she was drug face down along that path.

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[8] Dr. Collins also performed a sexual assault examination. ***Tr. 257.*** She found an abrasion to Judy's pubic bone, tears and scrapes of the tissues outside her vagina on the left, and bleeding in the tissues around her rectum. The latter indicated force in that area. ***Tr. 264.*** Finally, there was no fecal matter on Judy's body, but Dr. Collins had been informed that feces was found at the scene and she explained that people often lose control of their bowels when strangled. ***Tr. 265-71.***

Tr. 466-67.

Jessica Stowe, a forensic serologist at SLED, looked at approximately thirty items that had been submitted for analysis in this case. No spermatozoa was identified on the vaginal swabs in the sexual assault kit. However, the vaginal, oral and rectal swabs all tested positive for the P30 enzyme, which is a component of semen. So, these items were forwarded for DNA analysis. ***Tr. 355-58***. Even though a swab of Judy's chin and mouth area was negative for spermatozoa and P30, she forwarded this swab for DNA analysis as requested. ***Tr. 360; 372***.

Ms. Stowe also received State's Ex. 143, which was the victim's shirt and keys. She forwarded cuttings of those areas of the shirt that tested positive for acid phosphatase, an enzyme found in high concentrations seminal fluid. Further, she submitted the swabs taken at autopsy for potential presence of touch DNA. ***Tr. 362-64***.

Lily Gallman is the forensic DNA analyst at SLED who processed the evidence submitted for DNA analysis in this case. ***Tr. 391-92***. She had a known blood standard from the victim and buccal swabs from Mr. Mayfield and Bell.[9] She also received swabs from the sexual assault kit along, swabs from fingernail scrapings, swabs from the victim's neck area, and swabs from the chain linked fence. She was asked to see if she could develop a DNA profile from the unknown items and to determine whether the DNA profile of the item(s) matched any of the known standards. ***Tr. 393-95***.

Short repeat DNA analysis (STR) of the swab from the victim's neck taken at autopsy reflected that it was a mixture of DNA and neither the victim nor Bell could be excluded. With respect to Bell's DNA, the statistical probability of selecting an unrelated individual who could have contributed to the mixture was "one in ten." Because so much of the DNA present in this

[9] Bell voluntarily gave a buccal swab for DNA testing on September 13th. ***Tr. 221-22***.

mixture was the victim's, Ms. Gallman performed a YSTR analysis, which only develops a profile based on the Y or male chromosome. YSTR testing reflected that the DNA matched Bell, and that the statistical probability "of randomly selecting an unrelated male individual having a YSTR DNA profile matching this item is approximately one and 8600." Mr. Mayfield was excluded from this mixture on both tests. ***Tr. 398-405***.

The STR testing of the swabs from under the victim's arms and adjacent areas of her shirt revealed a mixture of at least two persons and neither Bell nor the victim could be excluded. The statistical probability of selecting an unrelated individual other than Bell who could have contributed to the mixture was "one in 960." The YSTR DNA profile of Bell matched the unknown DNA and, again, the statistical probability "of randomly selecting an unrelated male individual having a YSTR DNA profile matching this item was one in 8600. Again, Mr. Mayfield was excluded from the mixture on both tests. ***Tr. 406-08***.

Ms. Gallman explained that since YSTR testing only focuses on the Y chromosome, anyone sharing Bell's paternal lineage could have left the DNA. ***Tr. 403-04***. However, the State and the defense stipulated that "Tyjuan Bell, who is the biological brother of the defendant, was working on the night of September the 12th of 2015, and that he was not at the home of the victim, Judy Lindsay." See ***Tr. 535-36***.

ARGUMENT

Bell's argument that evidence the victim thought he was stealing from her was inadmissible under Rule 803(3), SCRE, is not preserved for appellate review because he failed to present the same argument to the trial judge. Alternatively, this Court does not need to address the propriety of the trial judge's ruling because any supposed error was harmless beyond a resonable doubt.

Bell argues for the first time before this Court that evidence the victim thought he was stealing from her was inadmissible under Rule 803(3), SCRE. Respondent submits that his

argument is not preserved for appellate review because he did not present the trial judge with *any* argument that the challenged evidence was inadmissible under Rule 803(3), SCRE. Alternatively, Respondent submits that it is unnecessary for this Court to address whether the trial judge properly permitted this evidence because, at worst, introduction of the challenged testimony was harmless beyond a reasonable doubt.

A. Events in the trial court.

Judy Lindsay's husband, Mitchell Mayfield, was the prosecution's first witness. The following exchange occurred on direct examination of Mr. Mayfield:

> Q Now, getting closer to the time of September 2015, had any other problems [arisen] regarding the defendant, Jermaine Bell, between you and your wife, Judy?
>
> A No. Now, at a point in time ... Judy had told me Jermaine was stealing.
>
> Q Someone was stealing?
>
> MR. FRICK: Objection, Your Honor.
>
> MS. LIVELY: Goes to the state of mind, Your Honor.
>
> MR. FRICK: 404-B.
>
> THE COURT: I'm going to give her a little leeway on it, I will overrule the objection. Go ahead.
>
> MS. LIVELY: Thank you, Your Honor.
>
> Q So she believed that the defendant was stealing.
>
> A Yes.
>
> Q Stealing what?
>
> A Her glasses, money, cigarettes, clothes.
>
> Q But you didn't have any proof of this; is that correct?

A Not then.

Q Did you call the police?

A Well, no.

Q All right. But this was something that Ms. Judy had mentioned to you.

A Yeah.

Tr. 114, line 18- 115, line 16.

A similar exchange occurred on direct examination of Jessica Lindsay, Judy's daughter:

Q Now Jessica, did your mom have a problem -- you've mentioned -- I asked about him coming over to the house, did she have a problem with him just in general?

A I don't know.

Q Had she ever explained to you about anything that he had done?

A Yeah, stealing stuff from her.

MR. FRICK: Objection, Your Honor, same as before, 403.

MS. LIVELY: Goes to the state of mind, Your Honor.

THE COURT: Overruled.

Q What kind of items had she said -- and I understand -- did she ever call the police on him for stealing stuff in her house?

A No, ma'am.

Q But she -- did she tell you that he'd taken stuff or she believed him to have?

A Yes, ma'am.

Q What were those items, do you remember?

A Her glasses, underclothes, by underclothes I mean underwear.

Q All right. Did you ever confront him about that?

A No, ma'am.

Q Do you know if your mom had?

A I'm not for sure.

Tr. 176, line 6 – 177, line 5.

Bell did not further address his objections that the witnesses' testimony was inadmissible under Rule 404(b), SCRE, and, critically, he never made any argument at trial that their testimony was inadmissible as evidence of the victim's then-existing state of mind under Rule 803(3), SCRE.

B. Discussion.

Initially, Respondent submits that his argument is not preserved for appellate review because, while he did object to the evidence under Rule 404(b), SCRE, he did not present the trial judge with *any* argument that the challenged evidence was inadmissible under Rule 803(3), SCRE. It is axiomatic that a party cannot argue one theory in support of his objection or motion at trial and raise a different theory on appeal. *E.g.*, *State v. Bailey*, 298 S.C. 1, 5-6, 377 S.E.2d 581, 584 (1989); *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground"); *State v. Patterson*, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) ("Appellant is limited to the grounds raised at trial"); *State v. Thomason*, 355 S.C. 278, 288, 584 S.E.2d 143, 148 (Ct. App. 2003) ("[A] party cannot argue one theory at trial and a different theory on appeal"). "Error preservation requirements are intended 'to enable the [trial] court to rule properly after it has considered all relevant facts, law, and arguments.' " (quoting *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000)).

Because Bell did not present the trial judge with the argument he advances on appeal, his argument is not preserved for appellate review.

Alternatively, Respondent notes that this Court explained in *State v. Hughes*, 419 S.C. 149, 155-56, 796 S.E.2d 174, 177-78 (Ct. App. 2017), that:

> " 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801, SCRE. Rule 803(3), SCRE, provides that a statement "of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed" is not excluded by the hearsay rule. Our supreme court has held that "while the present state of the declarant's mind is admissible as an exception to hearsay, the reason for the declarant's state of mind is not." *State v. Garcia*, 334 S.C. 71, 76, 512 S.E.2d 507, 509 (1999). The court cautioned that "[i]f the reservation in the text of the rule is to have any effect, it must be understood to narrowly limit those admissible statements to declarations of condition—'I'm scared'—and not belief—'I'm scared because [someone] threatened me.' " *Id.* (quoting *United States v. Cohen*, 631 F.2d 1223, 1225 (5th Cir. 1980)).

See also *State v. Tennant*, 394 S.C. 5, 15-16, 714 S.E.2d 297, 302-03 (2011).

However, this Court need not address whether the trial judge properly allowed the State to introduce the challenged testimony as evidence of the victim's then-existing state of mind because assuming without conceding its inadmissibility, at worst, introduction of the challenged testimony was harmless beyond a reasonable doubt, as were the inadmissible statements in *Hughes*.[10]

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[10] In *Hughes*, the Court observed that "[t]he improper admission of hearsay is reversible error only when the admission causes prejudice." *Hughes*, 419 S.C. at, 155, 796 S.E.2d at 177 (citing *State v. Weston*, 367 S.C. 279, 288, 625 S.E.2d 641, 646 (2006)). The Court found that statements such as " '[Victim] was not comfortable around [Hughes]. She had some concerns about his ... drug use and his lifestyle. And ... I do know for a fact that she talked about getting into some verbal altercations with him,' " were inadmissible "because they not only revealed Victim's state of mind, they described the reasons for her state of mind." *Hughes*, 419 S.C. at 157, 796 S.E.2d at 178. However, the Court found that admission of the statements was harmless beyond a reasonable doubt because the challenged testimony was cumulative to other testimony

Appellate courts will generally not set aside a judgment based on insubstantial errors not affecting the result. *State v. Sherard*, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991). When an error is found, the appellate court must then review the other evidence considered at trial besides the erroneously admitted evidence. *State v. Baccus*, 367 S.C. 41, 55, 625 S.E.2d 216, 223 (2006). Error that does not contribute to the verdict is harmless beyond a reasonable doubt. *State v. Fletcher*, 379 S.C. 17, 25, 664 S.E.2d 480, 484 (2008). The harmlessness of an error in the admission of evidence generally depends on the materiality of the evidence in relation to the case as a whole. *State v. Haselden*, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003); *State v. Wiley*, 387 S.C. 490, 497, 692 S.E.2d 560, 564 (Ct. App. 2010) ("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."). "When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result." *Bailey*, 298 S.C. at 5, 377 S.E.2d at 584.

Here, the testimony of Mr. Mayfield and Jessica Lindsay did not constitute evidence of a prior bad act by Bell under Rule 404(b), SCRE. To the contrary, the testimony merely articulated the victim's *suspicion* that he had sttolen items from her. Both witnessses candidly admitted that Judy never called the police and complained of him stealing the items, and Jessica did not know whether Judy had confronted him about her suspicions. *See* ***Tr. 115, lines 5-13; 176, line 17 – 177, line 5.***

More importantly, the State presented evidence that Bell's DNA matched the YSTR DNA from the swabs of the bruises on the victim's neck where she had been strangled, as well as

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presented at trial without objection and because of overwhelming evidence of guilt. *Id.* at 158-59, 796 S.E.2d at 179-80.

the DNA from swabs from under the victim's arms and adjacent areas of her shirt. Also, while any other male with the same parental lineage could have left this DNA, the parties stipulated that "Tyjuan Bell, who is the biological brother of the defendant, was working on the night of September the 12th of 2015, and that he was not at the home of the victim, Judy Lindsay." See ***Tr. 535-36.***

The State also presented evidence that (1) the victim did not like Bell coming to her house, yet, he would always return; (2) Jessica testified that he was with the victim when she went to bed and, accordingly, was the last person known to have seen her alive; (3) a plastic bag with several pairs of the victim's panties and an ashtray that belonged to her were found in the same secluded area as her body and near her body; (4) when Jessica saw the black tennis shoes he had worn on the night of the murder at Mr. Weldon's apartment, they were muddy, as were the drag marks found at the scene; (5) when police seized these same shoes in a search of Mr. Weldon's apartment, the shoes were wet and appeared to have been washed; (6) Bell told shifting lies to law enforcing about where he had stayed and what he had worn on the night of the murder; (7) his lies were not only refuted by what the officers found or were unable to find, they were inconsistent with the testimony of Ervin Chalkin and Darkarious Woods, who had seen him on the 12th and/or the 13th; (8) when Mr. Woods saw Bell between roughly 1:00 and 1:30 a.m. on September 13th, Bell came "from the side of" the abandoned home next to Judy's residence (***Tr. 285-86***); (9) Bell was "real jittery" when they spoke and asked Mr. Woods about his car, even though Bell was aware the car belonged to Woods; and (10) his claim in his statement to Det. Wade Young that he left the victim's house when Judy went to bed around 12:30 or 1:00 a.m. was contradicted by the timeline provided to police by Brianna Lowery of

September 13th. Ms. Lowery said that she had driven to Judy's residence around 12:30 a.m. because she and Jessica were supposed to go out. The lights were off, the front door was open and the T.V. was on. Yet, no one came outside when she blew her horn. She saw Bell come from a house across the street. She asked where Judy and Jessica were, and he claimed that he did not know. ***Tr. 303-04.***

Thus, viewing the challenged evidence in the proper context and in relation to the other evidence presented during trial, any error in the admission of the hearsay statements was harmless and did not warrant a reversal of Bell's conviction. *Id.*

CONCLUSION

For the above-stated reasons, Respondent submits that this Court should affirm Bell's conviction and sentence.

Respectfully submitted,

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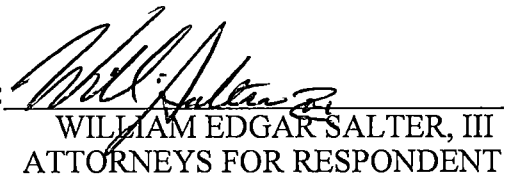
December 13, 2018.

By: 

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ATTORNEYS FOR RESPONDENT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Chester County
The Hon. Paul M. Burch, Circuit Court Judge
Appellate Case No. 2017-001500

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

V.

JERMAINE MARQUEL BELL,

PETITIONER.

CERTIFICATE OF SERVICE

I, William Edgar Salter, III, counsel for the Respondent, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two (2) copies of the same in the United States mail, addressed to his attorney of record: David Alexander, Esq. , SCCID/Division of Appellate Defense, 1330 Lady Street, Suite #401, Columbia, South Carolina 29201.

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

This 13th day of December, 2018.

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December 13, 2018

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

Re: *The State v. Jermaine Marquel Bell*
Appeal from Chester County
Appellate Case No. 2017-001500

Dear Ms. Kitchings:

Enclosed for filing please find the original Initial Brief of Respondent and Designation of Matter, together with Proof of Service in the above-referenced case. If you should have any questions, please feel free to contact me.

Sincerely,

William Edgar Salter, III
Senior Assistant Attorney General

WES:dmd
Enclosures
cc: David Alexander, Esq. (w/two copies of encls.)
The Honorable Randy E. Newman, Jr., Solicitor 6th Judicial Circuit (w/copy of encls.)
Trisha Allen, Victim Advocacy Division (w/copy of encls.)