STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County
The Honorable R. Knox McMahon, Circuit Court Judge
Appellate Case No. 2011-190693

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

LEXIE DIAL, III,

APPELLANT.

FINAL BRIEF OF RESPONDENT

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II. **The trial judge properly denied Appellant's request to be permitted to cross-examine an investigator regarding his personal relationship with a prosecutor where the judge found that the personal relationship was not relevant as evidence of bias and that evidence thereof would serve only to mislead the jury; in any event, any error would have been harmless beyond a reasonable doubt.**

III. **The trial judge properly denied Appellant's motion for mistrial based upon the mother of victim carrying a small urn with her to the witness stand where the judge found no prejudice to Appellant and where he cured any possible prejudice with an instruction to the jury.**

IV. **The trial court did not err in admitting three autopsy photographs where the photographs were necessary to corroborate critical elements in the State's case, were necessary to rebut Appellant's defense of accident, and were limited in content and not unduly prejudicial to Appellant; in any event, any error would have been harmless beyond a reasonable doubt.**

V. **The trial judge did not commit reversible error in denying Appellant's request to admit the original and amended pathologist's reports where these reports did not support Appellant's defense in the manner suggested and where any error in failing to admit the reports was harmless beyond a reasonable doubt.**

VI. **The sentencing issue raised on appeal is not preserved for review; but, in any event, the trial judge properly exercised his discretion in sentencing Appellant to life imprisonment under S.C. Code § 16-3-85(D).**

STATEMENT OF THE CASE

Appellant was indicted in Lexington County in July 2010 for homicide by child abuse. On April 11-15, 2011, he proceeded to trial before the Honorable R. Knox McMahon and a jury. The jury found Appellant guilty as indicted, and, on April 19, 2011, Judge McMahon heard Appellant's post-trial motions. He denied the motions, and thereafter imposed a sentence of life without parole pursuant to S.C. Code Ann. § 16-3-85(D). A timely notice of appeal was served and filed.

ARGUMENT

Brief Statement of Facts

On the evening of January 19, 2010, Appellant was at his home in Lexington County alone with the victim, his five-month-old son. (R. p. 285-86; p. 855-59). At 8:14 pm, a 911 call was made by Appellant's father indicating that the victim was not breathing, and EMS, fire service, and law enforcement responded. (R. p. 226). At the scene, Appellant claimed that he fell while holding the victim and the victim hit his head on the coffee table. (R. p. 277-87; see State's Exhibit # 65). CPR was performed on the victim and he was ultimately transported to Lexington Medical Center. (R. p. 234-95). However, the emergency room doctor in Lexington determined that the victim needed services beyond the capabilities of the hospital, so he sent the victim to the children's hospital in Richland County. (R. p. 299-300). Early the next afternoon, the victim passed away. (R. p. 122).

The autopsy revealed that the victim had bilateral subdural hemorrhages and bilateral subarachnoid hemorrhages, very serious injuries not caused by a typical household fall. (R. p. 581-87; p. 753-54). The autopsy also revealed that the victim did not have a bruise on his head, proving that his injuries did not result from hitting his head as Appellant claimed. (R. p. 578-80). The pathologist listed the manner of death as homicide. (R. p. 586, lines 3-8). Retinal photographs revealed that the victim had hemorrhages "too numerous to count" in both eyes "in all quadrants to the back of the eyes," and that he had "retinoschisis," which is generally caused by back and forth acceleration, i.e., shaking. (R. p. 400-405). After Appellant was arrested, he confessed that he shook the victim in a fit of anger and frustration. (R. p. 115-16; p. 705-25; see State's Exhibit # 63). At trial, Dr. Webb-Wood, Dr. Cheeseman, Dr. Harper, and Dr. Luberoff all opined that the victim's injuries and death were the result of non-accidental trauma; specifically, shaken baby syndrome. (See R. p. 342, lines 15-17; p. 400-417; p. 455-466; p. 749-87).

I. **The trial judge properly concluded that the arrest of Appellant was lawful where Sgt. Dukes had jurisdiction to arrest Appellant in Richland County by virtue of his status as a Special Deputy of the U.S. Marshal's Service who was a member of a federally-authorized fugitive task force. In any event, the arrest of Appellant was proper as a citizen's arrest pursuant to S.C. Code § 17-13-10. Finally, even if the arrest was not lawful, suppression of Appellant's confession is not appropriate because the good-faith exception applies to preclude application of the exclusionary rule.**

Relevant Facts

Prior to trial, Appellant objected, pursuant to Jackson v. Denno, to the introduction of a statement he gave to Lt. Eric Russell of the Lexington County Sheriff's Office. (See R. p. 101). In a pre-trial Denno hearing, Lt. Russell testified that he became involved in the investigation of Appellant's case on January 20, 2010. (R. p. 103). He went to the hospital in Richland County after the victim was transferred there and spoke with the doctors regarding the nature of the victim's injuries. (R. p. 103; p. 106, line 2). While Lt. Russell was at the hospital conducting interviews, the victim passed away at 2:06 pm. (R. p. 104). Appellant was not in custody at that time. (R. p. 104). After Appellant went into the victim's room to say his final goodbyes, he was taken into custody in a private conference room down the hall. (See R. p. 104-105). This occurred a few minutes after the victim's death. (R. p. 122-23). Appellant was arrested for the offense of homicide by child abuse. (R. p. 123, lines 3-7). Sgt. Henry Dukes of the Lexington County Sheriff's Office made the actual physical arrest since he was a member of "the Sheriff's Department Task Force" and "had jurisdiction to make arrests in Richland County." (R. p. 105-106). At the time of Appellant's arrest, there had been a warrant issued for inflicting great bodily harm upon a child. (R. p. 123, lines 19-22). The police were in the process of having this warrant recalled and having a warrant for homicide by child abuse issued. (R. p. 123-24). At the time Appellant was arrested by Sgt. Dukes, the great bodily injury warrant was entered into NCIC, which meant that other jurisdictions could arrest Appellant based upon the outstanding warrant. (See R. p. 157, lines 12-18).

Following his arrest at the hospital, Appellant was escorted to Sgt. Dukes' vehicle and transported to the Lexington County Sheriff's Department complex. (See R. p. 106, lines 21-23). Lt. Russell rode along, and when they arrived at an interview room of the Sheriff's Department, Sgt. Dukes left and Lt. Russell removed the handcuffs from Appellant. (R. p. 107-108). Lt. Russell then provided Appellant with his Miranda rights, both orally and in writing, and Appellant waived his rights and agreed to speak with Lt. Russell. (R. p. 108-112; see State's Exhibit # 63). Thereafter, Appellant provided an oral statement that was largely consistent with prior statements he gave to people at the scene. (See R. p. 112; p. 127, lines 20-24). In this statement, Appellant claimed that the victim was injured when his head hit the coffee table after Appellant, who was holding the victim, tripped over something in the house and fell. (R. p. 112, lines 13-17). However, after Lt. Russell informed Appellant that the doctors had told him that the injuries to the victim could not have been caused by a single fall, Appellant provided a second statement, first orally and then in writing. (R. p. 112-115). In this second statement Appellant confessed that he shook the victim out of anger and frustration.[1] (R. p. 115-16). At the conclusion of the interview, Lt. Russell served the homicide by child abuse warrant on Appellant at approximately 4:10 pm. (R. p. 135-36; p. 137, lines 1-25).

At the conclusion of the pre-trial hearing, Appellant raised an issue about Sgt. Dukes' authority to arrest Appellant in Richland County. (See R. p. 162-63; p. 167-70). However, he admitted that he had no evidence to contest the undisputed, un-contradicted evidence in the record that "Sgt. Dukes had State-wide jurisdiction by virtue of being on the U.S. Marshal's Task Force." (R. p. 167, lines 16-20; p. 168-170). The trial judge concluded that, given the facts in the record, as I understand them at this point, Sgt. Dukes had the authority to make an arrest in Richland County." (R. p. 170, lines 14-16). Thereafter, both the State and the defense discussed Appellant's confession in opening statements. (See R. p. 205, line 23 – p. 206, line 4; p. 209, lines 6-10).

[1] This statement was later admitted at trial, over Appellant's objection, as State's Exhibit # 63. (See R. p. 705, lines 5-18).

Later in trial, Detective Grant testified that, after he and Lt. Russell talked with the doctors at the Richland County hospital, they believed that they had probable cause to obtain an arrest warrant for Appellant for inflicting great bodily injury upon a child. (See R. p. 135, line 1-3; p. 649). Therefore, they contacted another detective at headquarters, relayed to him the information constituting probable cause, and asked him to attempt to procure a warrant before a judge. (R. p. 649). After the warrant was obtained, because Appellant was in Richland County as opposed to Lexington County, the warrant was entered into NCIC, "the national police computer." (R. p. 649, lines 20-22). Detective Grant testified, over Appellant's "hearsay" objection, that the warrant was obtained by "another officer who works with the U.S. Marshal's task force, where he has jurisdiction to make a legal arrest." (R. p. 649, line 24 – p. 650, line 5). He stated it was standard procedure to contact such officers with "State-wide jurisdiction" when an arrest needs to be made in another county. (R. p. 650, lines 13-17). He testified without objection that, in this case, Sgt. Henry Dukes was the officer contacted to make the arrest of Appellant because he had state-wide jurisdiction. (R. p. 650, lines 18-21; p. 652, lines 7-12). Detective Grant also stated that, after the initial warrant had been entered into NCIC, the victim passed away, and they requested that the great bodily injury warrant be recalled and another warrant be obtained for homicide by child abuse. (R. p. 651, lines 8-16). After Appellant was allowed to see the victim for a few minutes, he was escorted to a separate room and "discreetly placed into handcuffs" by Sgt. Dukes, the officer with state-wide jurisdiction. (R. p. 652, lines 3-12).

Next, Detective Rivera testified and confirmed that he was the officer who actually procured both the arrest warrants for Appellant in this case. (See R. p. 661-63). He testified that the great bodily injury warrant was entered into NCIC around 2:00 pm. (R. p. 662, lines 18-23). He explained that when officers are trying to serve a warrant outside the county, they enter the warrant in NCIC and the NCIC entry authorizes the arrest of the person outside of Lexington County. (R. p. 667, lines 2-24). Detective Rivera then contacted the detectives at the hospital in Richland County

and advised them that the warrant had been entered into NCIC. (R. p. 663, lines 1-3). Shortly thereafter, Detective Rivera received a phone call from Lt. Russell and he then procured a second arrest warrant for homicide by child abuse, which was also subsequently entered into NCIC about fifteen minutes after he received the call from Lt. Russell. (R. p. 663-64; p. 668, lines 1-8). Later, when Lt. Russell arrived at the Sheriff's Department, the warrant was turned over to him. (R. p. 664, lines 17-19). Detective Rivera testified without objection that Sgt. Dukes, who effected the arrest of Appellant in this case, was one of several officers who have the ability to serve a warrant outside of Lexington County. (R. p. 669, lines 15 – p. 670, lines 1).

Henry Dukes was the next witness called to testify. He testified that, in January 2010, he was a Sgt. with the Lexington County Sheriff's Department and was assigned to the U.S. Marshal's Service task force. (R. p. 670-71). After he stated that his involvement in the U.S. Marshal's fugitive task force gave him "particular abilities beyond just those of a regular Lexington County officer," Appellant's counsel stated, "Excuse me, Your Honor. "If he is going to testify that he had authority to arrest outside of Lexington County, that would be hearsay. We would require them to prove that with some documentation." (R. p. 671, lines 7-11). The jury was excused, and the judge asked Appellant to clarify his objection. (R. p. 671, lines 12-17). Appellant argued that in order for a Lexington County deputy to arrest someone outside of the jurisdiction of Lexington County, "there must be some governmental agreement to authorize the arrest, as you would have under certain statutes." (R. p. 671, lines 18-23). He asserted that the only way Sgt. Dukes could have authority to make an arrest outside of the county was with "some kind of governmental agreement that was approved by the Lexington County governing body." (R. p. 672, lines 3-11).

In response, the State argued that Sgt. Dukes, who had his U.S. Marshal credentials (Court's Exhibit # 2) present in the courtroom showing his membership in the U.S. Marshal's Task Force, is "certainly capable of testifying to his capabilities in that regard." (R. p. 672, lines 16-20). Further, the State pointed out that there was already un-objected-to evidence in the record regarding Sgt.

Dukes' state-wide jurisdiction and his ability to make the arrest of Appellant. (R. p. 672, lines 21-23). After Sgt. Dukes testified, outside the presence of the jury, that he was a "special deputy, a sworn special deputy with the United States Marshal's Service Task Force," at the time he made Appellant's arrest, the State argued that Sgt. Dukes "has federal jurisdiction, based on his membership in the Marshal's Service." (See R. p. 674-77). The State also argued that under S.C. Code § 23-1-212 "and under the powers he had as a deputy marshal that an arrest in Richland County would be valid." (R. p. 677, lines 8-19). Counsel noted that "it is accepted in the course of business of the State." (R. p. 677, lines 20-21).

Appellant then argued that S.C. Code § 23-1-212 did not apply in this case because it "applies to full-time federal law enforcement officers employed by a federal or state agency." (R. p. 678, lines 22-25). He also argued that "the only way a Lexington County officer can make an arrest outside of Lexington County is if they meet the requirements of 23-1-210 or -215 – if they are complied with." (R. p. 679, lines 6-9). Appellant argued that those statutes required "approval of a governing body" and there was no evidence of that in this case. (R. p. 679, lines 10-12). The State responded that the statutes referenced by Appellant did not apply because they dealt with local and county law enforcement; therefore, approval of the Lexington County Council was not necessary. (R. p. 680, lines 6-10).

The State then called Katherine Luvisi, custodian of records for the General Counsel of the Lexington County Sheriff's Department, as a witness to introduce the Memorandum of Understanding regarding the Fugitive Task Force currently on file in Lexington County. (See R. p. 681-83). This document was marked as Court's Exhibit # 3. (R. p. 682, line 24). The State then argued that, as stated in the Memorandum, the U.S. Marshal's Service has authority to investigate fugitive matters under federal law, specifically, under 28 U.S.C. § 566. (R. p. 684, lines 2-6; p. 688, lines 17-19; p. 689, lines 11-17). The State also pointed out that, as set forth in the Memorandum,

the U.S. Marshal's Service is authorized to offer assistance "in the apprehension of people who are wanted." (R. p. 688, lines 13-16).

Counsel for the State argued that the facts of Appellant's case were distinguishable from the facts of State v. Boswell, relied upon by Appellant's counsel, and again pointed out that there was both *in camera* testimony and testimony before the jury that Sgt. Dukes had state-wide jurisdiction to arrest based upon his deputization as a United States Marshal. (R. p. 671, line 24 – p. 672, line 2; p. 685, lines 1-10). Therefore, counsel argued, Dukes effected Appellant's arrest in accordance with his proper jurisdiction and the arrest was "the normal and usual practice in a case such as this." (R. p. 685, lines 11-13). Finally, the State argued that, even assuming Sgt. Dukes did not have proper authority to arrest Appellant in Richland County, Appellant's arrest was nevertheless proper as a citizen's arrest pursuant to S.C. Code § 17-13-10. (R. p. 685, lines 14-16).

Appellant responded by asserting that State had not met the requirements of S.C. Code § 23-1-220 (sic) or § 23-1-216 (sic) and that Lexington County is not authorized to enter into agreements "to extend jurisdiction." (R. p. 686, line 24 – p. 687, line 4). He stated that Appellant's arrest occurred in Richland County, but there was "no agreement with Richland County, and [the State] ha[s] not met the requirements as necessary." (R. p. 689, lines 3-7). He argued that S.C. Code § 23-1-212 "only applies to conduct of federal law enforcement agencies," but that Sgt. Dukes was an officer employed by Lexington County. (R. p. 688, line 23 – p. 689, line 2). He also argued that the Memorandum of Understanding regarding the Fugitive Task Force did not apply because "there is no dispute that Lexie Dial was not a fugitive, running from anybody"; in fact, he contended, the testimony supported that Appellant cooperated fully with law enforcement. (R. p. 687, lines 6-12). Finally, counsel asserted that "the citizen's arrest is not an issue that would apply, even if the requirements of the statute were met." (R. p. 687, lines 13-15).

The trial judge initially noted that Lt. Russell testified that Sgt. Dukes had state-wide jurisdiction to make arrests outside Lexington County. (See R. p. 689, lines 19-24). He also noted

that Sgt. Dukes subsequently testified and presented credentials establishing that he was a "special deputy U.S. Marshal" who was properly sworn-in by the appointed U.S. Marshal. (R. p. 690, lines 3-13). The credentials authorized Sgt. Dukes to "carry firearms, make arrests, serve warrants, and conduct other business as directed by the U.S. Marshal." (R. p. 690, lines 14-16). The Court then examined the Memorandum of Understanding regarding the agreement between the Sheriff of Lexington County and the United States Marshal, first noting that the document appeared to be properly signed. (R. p. 690, lines 17-22). The judge further stated that the Memorandum indicated that the primary mission of the task force is to "investigate and arrest as part of joint enforcement operations persons who have active state and federal warrants for their arrest." (R. p. 690, line 23 – p. 691, line 1). The judge quoted from the Memorandum that "[t]he intent of the joint effort is to investigate and apprehend local, state, and federal fugitives, thereby improving public safety and reducing violent crime," and that "task force personnel may be required to travel outside of the jurisdiction to which they are assigned to further task force operations." (R. p. 691, lines 2-9).

The court ruled that Appellant's case was clearly different from State v. Boswell, 391 S.C. 592, 707 S.E.2d 265 (2011), since in Boswell there was no arrest warrant and there was a 1999 "multi-jurisdictional agreement" between Calhoun and Lexington counties that had expired. (See R. p. 691, lines 10-19). See Boswell, 391 S.C. at 600-603; 707 S.E.2d at 269-71; see also S.C. Code § 23-1-210 (providing for multi-jurisdictional task forces between municipalities or counties).

The court stated that, looking at the evidence in the light most favorable to the defense, at the time of Appellant's arrest there was an arrest warrant issued for great bodily injury to a child, a felony, which was signed by a neutral and detached magistrate and was properly entered into the NCIC database. (R. p. 691, lines 12-24). The court found that the upgrade to the charge from great bodily injury to homicide by child abuse based upon the victim's subsequent death did not change

the analysis.[2] (R. p. 691, line 25 – p. 692, line 3). The court concluded that the arrest was valid since "it is a warrant arrest by an officer with the authority of Court's Exhibit Number 3."[3] (R. p. 692, lines 4-5).

Alternatively, the court ruled that the arrest was a valid citizen's arrest under S.C. Code § 17-13-10 and State v. Swilling, 249 S.C. 541, 155 S.E.2d 607 (1967). (R. p. 692-93). The judge pointed out that the arrest in Boswell was not a valid citizen's arrest because the charge was a misdemeanor, but in Appellant's case, the charge was clearly a felony, and officers had "certain information that a felony had been committed which caused great bodily injury and finally the homicide by child abuse." (R. p. 692-93). The judge pointed out that in State v. Swilling, part of the issue involved whether the officers making the citizen's arrest were required to take the defendant before a magistrate under S.C. Code § 17-13-10, and the Swilling court found the defendant would not have been released in any event because he was charged with a capital offense. (R. p. 693, lines 9-16). In conclusion, the trial judge ruled that "[t]here was a valid arrest warrant in this case, and the arrest is valid." (R. p. 693, lines 17-18). Appellant's confession was subsequently admitted at trial, over Appellant's objection, as State's Exhibit # 63. (See R. p. 705, lines 5-18).

Argument

The Memorandum of Understanding ("MOU") regarding the Fugitive Task Force (Court's Exhibit # 3), under which Sgt. Dukes was operating when he effected Appellant's arrest in Richland County, states, in pertinent part:

> This Memorandum of Understanding (MOU) is entered into by the Lexington County Sheriff's Dept. and the United States Marshals Service (USMS) pursuant to the

[2] Note that in the pre-trial hearing, the judge had already ruled that, pursuant to State v. Retford, 276 S.C. 657, 281 S.E.2d 471 (1981), the upgrade to the charge upon the victim's death did not serve as a basis to invalidate the arrest. (See R. p. 170, line 19 – p. 171, line 12).

[3] Contrary to Appellant's argument on appeal, although the parties made some arguments regarding the applicability of S.C. Code § 23-1-212, the trial judge never ruled that Sgt. Dukes had authority to arrest Appellant under this code section. (See Brief of Appellant, p. 10). (See R. p. 689-93; see also p. 161-75).

> Presidential Threat Protection Act of 2000 (Public L. 106-544, § 6 December 19, 2000, 114 Stat. 2718, 28 USC § 566 note.) As set forth in the Presidential Threat Protection Act of 2000 and directed by the Attorney General, the USMS has been granted authority to direct and coordinate permanent Regional Fugitive Task Forces consisting of Federal, state, and local law enforcement authorities for the purpose of locating and apprehending fugitives.
>
> The authority of the USMS to investigate fugitive matters as directed by the Attorney General is set forth in 28 USC § 566. The Director's authority to direct and supervise all activities of the USMS is set forth in 28 USC § 561(g) and 28 CFR 0.111. The authority of United States Marshals and Deputy U.S. Marshals to, "in executing the laws of the United States within a State . . . exercise the same powers which a sheriff of the State may exercise in executing the laws thereof" is set forth in 28 USC § 564. Additional authority is derived from 18 USC § 3053 and Office of Investigative Agency Policies Resolutions 2 & 15. See also "Memorandum for Howard M. Shapiro, General Counsel, Federal Bureau of Investigation" concerning the "Authority to Pursue Non-Federal Fugitives", issued by the U.S. Department of Justice, Office of Legal Counsel, dated February 21, 1995. See also: Memorandum concerning the Authority to Pursue Non-Federal Fugitives, issued by the USMS Office of General Counsel, dated May 1, 1995. See also: 42 USC § 19641(a) (the Attorney General shall use the resources of federal law enforcement, including the United States Marshals Service, to assist jurisdictions in locating and apprehending sex offenders who violate sex offender registration requirements.
>
> The primary mission of the task force is to investigate and arrest, as part of joint law enforcement operations, persons who have active state and federal warrants for their arrest. . . .
>
> . . . State or local fugitive cases will be entered into NCIC (and other applicable state or local lookout systems) as appropriate by the concerned state or local agency. . . .
>
> . . . Non-USMS law enforcement officers assigned to the task force will be deputized as Special Deputy U.S. Marshals. . . .
>
> Task force personnel may be required to travel outside of the jurisdiction to which they are normally assigned in furtherance of task force operations. . . .

(See Court's Exhibit # 3, p. 1-2).[4]

It is undisputed that Sgt. Dukes was, at the time of Appellant's arrest, a properly sworn-in Special Deputy U.S. Marshal who was authorized to "carry firearms, make arrests, serve warrants, and conduct other business as directed by the U.S. Marshal." (R. p. 690, lines 14-16). It is also undisputed that the MOU between the Sheriff of Lexington County and the United States Marshal

[4] Respondent would note that numerous other jurisdictions also have United States Marshal's Service Fugitive Task Forces created pursuant to nearly identical MOUs.

was properly signed and was therefore in effect at the time of Appellant's arrest. (See Court's Exhibit # 3, p. 4). Finally, it is undisputed that the MOU creating the fugitive task force indicates that its primary mission is to investigate and arrest "persons who have active state and federal warrants for their arrest." (See Court's Exhibit # 3, p. 1). Thus, the MOU, consistent with federal law,[5] defines "fugitive" in a broad sense, referring to persons with active warrants for their arrest who are located outside the jurisdiction where the crime occurred.

The testimony established that the outstanding arrest warrant for great bodily injury to a child was properly entered into NCIC at the time of Appellant's arrest; therefore, Appellant could be properly arrested outside of Lexington County. (See R. p. 667, lines 2-24). As the trial judge concluded, the fact that the charge was later upgraded to homicide by child abuse based upon the victim's death did not affect the validity of Appellant's arrest. (See R. p. 170, line 19 – p. 171, line 12; p. 691, line 25 – p. 692, line 3). See State v. Retford, 276 S.C. 657, 660, 281 S.E.2d 471, 472 (1981) ("'An arrest is not rendered unlawful by the fact that an officer who has authority to make an arrest for a particular offense erroneously states that he making an arrest for some other offense or

[5] See Hogan v. O'Neill, 255 U.S. 52, 56 (1921) ("To be regarded as a fugitive from justice it is not necessary that one shall have left the state in which the crime is alleged to have been committed for the very purpose of avoiding prosecution, but simply that, having committed there an act which by the law of the state constitutes a crime, he afterwards has departed from its jurisdiction and when sought to be prosecuted is found within the territory of another state."); Strassheim v. Daily, 221 U.S. 280, 285 (1911) ("A]ll that is necessary to convert a criminal under the laws of a state into a fugitive from justice is that he should have left the state after having incurred guilt there."); see, e.g., Gee v. State of Kansas, 912 F.2d 414, 418 (10th Cir. 1990) ("A fugitive from justice is a person who is 1) suspected of or has been convicted of committing a crime, 2) sought by the jurisdiction so that the jurisdiction may subject the person to its criminal justice system, and 3) has left the jurisdiction and is found within the boundaries of another. Thus, "'all that is necessary to convert a criminal under the laws of a State into a fugitive from justice is that he should have left the State after having incurred guilt there.'") (citations omitted); White v. Armontrout, 29 F.3d 357, 359 (8th Cir. 1994) (rejecting defendant's contention that he was not a fugitive because he had no notice of the charges at the time he left the state, noting "[t]hat argument has long been rejected by the courts"); see also King v. Noe, 244 S.C. 344, 347, 137 S.E.2d 102, 103 (1964) (a fugitive from justice may be defined as "a person who, having committed or been charged with a crime in one state, has left its jurisdiction and is found within the territory of another when it is sought to subject him to the criminal process of the former state"); Ex parte Swearingen, 13 S.C. 74, 79-80 (1980) (defendant was a "fugitive from justice" where he committed an offense in another state and was subsequently found in South Carolina; the defendant needed not actually "flee," in the literal sense of the term, from the other state).

even for a cause which is not in fact an offense, or states the offense inaccurately.'") (citation omitted). Accordingly, as the un-objected-to testimony in the record established, Sgt. Dukes, based upon his status as a member of the federally-authorized fugitive task force created by the MOU, had proper jurisdiction to arrest Appellant, who had an active warrant in NCIC and was a "fugitive" as defined above, in Richland County.[6] See Presidential Threat Protection Act of 2000, Public L. 106-544, § 6 December 19, 2000, 114 Stat. 2718, 28 USC § 566 note; 28 USC § 561(g); 28 USC § 566(e)(1)(B); 28 CFR 0.111; 28 USC § 564; 18 USC § 3053; see also Authority of FBI Agents, Serving as Special Deputy United States Marshals, to Pursue Non-Federal Fugitives, 19 U.S. Op. Off. Legal Counsel 33 (1995).

Even assuming Sgt. Dukes did not have proper jurisdiction to make an official arrest of Appellant outside Lexington County, the judge correctly ruled that the arrest was nevertheless valid as a citizen's arrest pursuant to S.C. Code § 17-13-10. This code sections states as follows:

> Upon (a) view of a felony committed, (b) *certain information that a felony has been committed* or (c) view of a larceny committed, *any person* may arrest the felon or thief and take him to a judge or magistrate, to be dealt with according to law.

S.C. Code § 17-13-10 (emphasis added). In this case, Sgt. Dukes had "certain information" that a felony had been committed, since he received information regarding probable cause for Appellant's arrest from trusted fellow officers and was physically present when the victim passed away at the hospital. (See R. p. 695-96; see also p. 702-703). See State v. Swilling, 249 S.C. 541, 558, 155 S.E.2d 607, 617 (1967) (the term "certain information" in the citizen's arrest statute "means the existence of reasonable grounds to suspect the party arrested may be guilty of a felony," not the actual fact that a felony has been committed); see also State v. Cooney, 320 S.C. 107, 109-111, 463 S.E.2d 597, 598-99 (1995). In addition, contrary to Appellant's argument, whether or not Sgt. Dukes

[6] Indeed, the whole purpose of Sgt. Dukes' deputization as a U.S. Marshal was to provide him with the authority to locate and arrest defendants with outstanding arrest warrants who were outside of Lexington County. (See Court's Exhibit # 3).

was "acting under color of state and/or federal law" when he made the arrest is irrelevant, and he still qualifies as "any person" under S.C. Code § 17-13-10. See Swilling, 249 S.C. at 554-60, 155 S.E.2d at 615-18; State v. McAteer, 340 S.C. 644, 646-47, 532 S.E.2d 865, 865-66 (2000); State v. Boswell, 391 S.C. 592, 604, 707 S.E.2d 265, 271 (2011).

Finally, although Sgt. Dukes did not take Appellant *directly* "to a judge or magistrate," such a strict interpretation of the citizen's arrest statute has not been required by our Supreme Court. See State v. Swilling, 249 S.C. at 556, 155 S.E.2d at 616 ("We may assume that, under the [citizen's arrest] statute, upon arresting the defendant without a warrant, the officers were required to take him before a judge or magistrate *within a reasonable length of time thereafter.*") (emphasis added). Dukes did take Appellant to the Lexington County Sheriff's Department complex, of which the jail and the bond court is a part.[7] (R. p. 726, lines 2-8). Dukes' taking Appellant to a location where judges are in fact found and where Appellant would necessarily be taken before a judge within a reasonable time "to be dealt with according to law" clearly satisfied the statutory requirement of taking Appellant "to a judge or magistrate." See S.C. Code § 22-5-510(B); Rule 2(a), SCRCrimP. Therefore, since all of the statutory requirements were met, Appellant's arrest qualified as a proper citizen's arrest under S.C. Code § 17-13-10.

However, even if the trial judge erred in concluding that Appellant's arrest was valid, the exclusionary rule should not apply because the officers were acting in good faith when Appellant was arrested. Sgt. Dukes and his fellow officers acted under an objectively reasonable and good faith belief that Dukes had state-wide jurisdiction to arrest Appellant in Richland County by virtue of his status as a Special Deputy of the U.S. Marshal's Service who was a member of the federally-authorized fugitive task force created by the MOU. (See R. p. 106; p. 649-50; p. 662-69; p. 670-76;

[7] In fact, Appellant was served with the homicide by child abuse arrest warrant the same day around 4:10 pm, was thereafter taken to the county jail, and subsequently appeared before a judge for a bail proceeding. (See R. p. 106; p. 137; p. 724-26). The bond court, jail, and Sheriff's Department are all located at 521 Gibson Road in Lexington. This complex is known as the "James R. Metts Law Enforcement Complex."

p. 694-96; p. 702-703; see *supra*, p. 14-16). Therefore, the exclusionary rule does not apply and Appellant's confession must not be suppressed. See Davis v. U.S., 131 S.Ct. 2419, 2427 (2011) ("Exclusion exacts a heavy toll on both the judicial system and society at large. It almost always requires courts to ignore reliable, trustworthy evidence bearing on guilt or innocence. And its bottom-line effect, in many cases, is to suppress the truth and set the criminal loose in the community without punishment. Our cases hold that society must swallow this bitter pill when necessary, but only as a 'last resort.' For exclusion to be appropriate, the deterrence benefits of suppression must outweigh its heavy costs.") (citations omitted); Herring v. U.S., 555 U.S. 135 (2009) (good faith exception applied where an officer reasonably believed that the defendant had an outstanding arrest warrant but that belief was actually incorrect due to a negligent bookkeeping error by another police employee); see also Arizona v. Evans, 514 U.S. 1 (1995).

In conclusion, because Appellant's arrest was proper and lawful for all of the reasons discussed above, and because the good-faith exception applies even if the arrest was not lawful, suppression of Appellant's confession was not warranted and he is not entitled to a new trial.

II. The trial judge properly denied Appellant's request to be permitted to cross-examine an investigator regarding his personal relationship with a prosecutor where the judge found that the personal relationship was not relevant as evidence of bias and that evidence thereof would serve only to mislead the jury; in any event, any error would have been harmless beyond a reasonable doubt.

Relevant Facts

In a pre-trial Jackson v. Denno hearing, Lt. Russell testified that he was presently the Assistant Commander of the South Region of the Lexington County Sheriff's Office, although back in January 2010, when he questioned Appellant in relation to this crime, he was a detective/investigator in major crimes. (R. p. 102, lines 16-25). At the time of trial, Lt. Russell had a total of nineteen years of experience in law enforcement in Lexington County. (R. p. 699, lines 3-19). He became involved in the case on January 20, 2010, when he went to the hospital where the victim was being treated and talked to the doctors there. (R. p. 102, lines 6-19). Lt. Russell was

present when Appellant was arrested after the victim passed away, and he witnessed Sgt. Dukes arrest Appellant at the hospital. (R. p. 104-106). Lt. Russell testified that Appellant's arrest was "very peaceful" and that Appellant put up no resistance whatsoever. (R. p. 106, lines 14-19). Sgt. Dukes then drove Appellant to the Sheriff's Department while Lt. Russell sat with Appellant in the back seat of the car. (R. p. 107, lines 2-6). Upon arrival at the Sheriff's Department, Appellant was escorted to the interview room. (R. p. 107, lines 20-22). After being advised of his Miranda rights, Appellant waived those rights and agreed to talk to Lt. Russell. (R. p. 108-11). Appellant first gave an oral statement, similar to his prior statements to others, indicating that the victim hit his head on a coffee table after Appellant tripped over something in the house and fell while holding the victim. (R. p. 112, lines 13-17).

After Lt. Russell informed Appellant that the doctors had indicated that the victim's injuries could not have been caused by such a single fall, Appellant provided first an oral and then a written statement in his own handwriting admitting that he shook the victim in a sudden fit of anger and frustration. (See R. p. 112-16). This statement was later admitted over objection at trial. (See R. p. 704-24; see State's Exhibit # 63). When Appellant testified in his defense, he asserted that his written statement was not accurate and that Lt. Russell pressured him into making a statement to fit with his own belief about what happened to the victim. (See R. p. 868-88).

On cross-examination in the pre-trial hearing, Lt. Russell testified that, at the time he interviewed Appellant, he had been investigating child abuse cases for approximately seven-and-a-half years. (R. p. 129, lines 5-7). He stated he investigated another "shaken baby" case prior to Appellant's case. (R. p. 129, lines 8-13). Lt. Russell testified that Assistant Solicitor Moore had been the prosecutor in that previous child abuse case and that he had worked on other cases with Ms. Moore in the past. (R. p. 129-30). Lt. Russell acknowledged that he began a personal relationship with Ms. Moore in October 2010. (R. p. 131, lines 1-7). He stated that it was around that time that Appellant's case was initially scheduled to go to trial. (See R. p. 130-31).

Prior to October 2010, he and Ms. Moore had worked together for several years and had been friends. (R. p. 132; p. 136). Lt. Russell admitted that, after commencing the relationship with Ms. Moore in October 2010, he ended up separating from his then-wife. (R. p. 132, lines 5-14). When asked whether or not he wanted to put together a good case if Ms. Moore was the prosecutor, Lt. Russell responded that – as the lead investigator in the case – he wanted to "put together a good case, no matter who the prosecutor was." (R. p. 132, lines 15-18). He testified that his relationship with Ms. Moore had no effect whatsoever on his actions in taking the statement from Appellant in January 2010, particularly since the personal relationship did not begin until about ten months later and since he had no idea whether Ms. Moore would be assigned Appellant's case or not. (R. p. 136, lines 2-14).

Following the pre-trial hearing, Appellant's counsel argued that he "should certainly be allowed to explore" before the jury the issue of the relationship between Lt. Russell and Ms. Moore since he "should always be allowed to explore any evidence that may raise any possibility of bias." (R. p. 175, lines 19-22; p. 179, lines 12-15). He argued that admission of the evidence was not "foreclosed" by the fact that Lt. Russell stated that the relationship did not begin until some ten months after he took Appellant's statement. (See R. p. 176-79). He asserted that "the work of this officer on this case did not end with the taking of the statement," and that "the fact that [Ms. Moore] is no longer prosecuting the case doesn't remove the conflict that has been present on throughout the preparation of this case, or the investigation of this case." (R. p. 179, lines 16-23).

The State first argued that the personal relationship between Lt. Russell and Ms. Moore was not admissible under Rule 608(c), SCRE, and the case law interpreting that rule. (See R. p. 176-78). The State asserted that, because the undisputed evidence in the record demonstrated that the relationship began approximately ten months after the victim's death and after Lt. Russell took Appellant's statement, there was an insufficient temporal nexus between the two events such that any allegation of bias was simply too tenuous and speculative. (See R. p. 176-78). The State also argued

that an allegation of bias based upon the personal relationship between Lt. Russell and Ms. Moore was too tenuous regardless of the time period involved because both individuals had "long experience in doing things the right way" in their line of work and the relationship would not have biased Lt. Russell more toward the prosecution than he otherwise would have been. (See R. p. 177-78). Finally, the State argued that, even if evidence of the personal relationship was admissible under Rule 608(c), SCRE, it should nevertheless be excluded under Rules 401 and 403, SCRE, since it was simply not relevant and would lead to confusion of the issues. (R. p. 178-79).

The court ruled that evidence of a relationship that undisputedly began about ten months after Lt. Russell became involved in Appellant's case was not relevant. (R. p. 180, lines 3-7). The court found that "[t]here is no connection between the personal relationship of the Detective ten months after the event and the death of the child." (R. p. 180, lines 8-10). The court stated, "[i]t is just not relevant, as there is no way to connect those dots." (R. p. 180, lines 11-12). The court further found that, even if the evidence was somehow relevant under Rule 401, SCRE, it was not relevant as evidence of bias under Rule 608(c), SCRE, because "there is no relevancy of a relationship that developed thereafter that would in any way bias the testimony of this witness, Lt. Russell, in this case." (R. p. 180, lines 14-16). Moreover, the court concluded, even if the evidence was admissible under Rule 608(c), it was still not admissible under Rule 403, SCRE, since Rule 403 provides for exclusion of even relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. (R. p. 180, line 23 – p. 181, line 11). The court specifically found that if admitted, the evidence would have been "misleading to the jury" in violation of Rule 403. (R. p. 983, lines 15-16).

Argument

The admission or exclusion of evidence is within the sound discretion of the trial court and will not be reversed absent an abuse of discretion. State v. Orr, 389 S.C. 286, 291, 698 S.E.2d 633, 636 (Ct. App. 2010) (citation omitted). "An abuse of discretion occurs when the conclusions of the

trial court either lack evidentiary support or are controlled by an error of law." Id. (citation omitted). Rule 401, SCRE, provides that "[r]elevant 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 608(c), SCRE, provides as follows: "Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced." Rule 403, SCRE, provides, in pertinent part, that, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury."

In this case, the trial judge properly excluded evidence of the personal relationship between Lt. Russell and Ms. Moore.[8] After hearing all the testimony and arguments in the pre-trial hearing, the judge made findings of fact that the personal relationship began ten months after Appellant provided a statement to Lt. Russell and that the relationship would not have in any way biased the testimony of Lt. Russell.[9] (R. p. 180, lines 14-16; p. 180-82; p. 738, lines 7-10; p. 983, lines 8-19). See, e.g., State v. Asbury, 328 S.C. 187, 193, 493 S.E.2d 349, 352 n2 (1997) (noting that the trial judge is in a superior position to judge credibility and that great deference must be given the trial judge's determination); id. at 193, 493 S.E.2d at 352 ("In criminal cases, appellate courts are bound by fact findings in response to preliminary motions where there has been conflicting testimony or where the findings are supported by the evidence and not clearly wrong or controlled by an error of law."). In light of these findings of fact, the trial judge properly concluded that evidence of the

[8] Respondent would note that Appellant raised no constitutional challenge regarding this issue at trial, nor has Appellant raised a constitutional challenge in his brief. (See Brief of Appellant, p. 12-16). See, e.g., State v. Baker, 390 S.C. 56, 65, 700 S.E.2d 440, 444 (Ct. App. 2010) (no constitutional issue regarding cross-examination of a witness was preserved where the defendant failed to raise a constitutional issue to the trial judge below).

[9] Although the judge gave Appellant the opportunity to present his own evidence to show that personal relationship began sooner than October 2010, Appellant presented no such evidence. (See R. p. 182, lines 17-19). Thus, the evidence that the relationship began in October 2010 was undisputed.

personal relationship was simply not relevant to any issues in the case, was not relevant as evidence of bias under Rule 608(c), SCRE, and was impermissible under Rule 403 because such irrelevant evidence would have been misleading to the jurors.[10] Therefore, since the evidence was irrelevant, it was clearly improper and the trial judge correctly excluded it. See State v. Orr, 389 S.C. 286, 290-91, 698 S.E.2d 633, 636 (Ct. App. 2010) (trial court properly excluded defendant's proffered evidence of bias under Rule 608(c), SCRE, where the witness denied the allegations of bias in her proffered testimony and therefore the defendant was therefore unable to demonstrate any bias or motive existed; further, evidence was properly excluded where defendant failed to show that the event that caused the alleged bias occurred within a reasonable time prior to the time the witness made allegations against the defendant); State v. Baker, 390 S.C. 56, 66, 700 S.E.2d 440, 445 (Ct. App. 2010) (trial judge properly disallowed evidence of two incidents that the defendant contended would show bias or motive to misrepresent on the part of the victim under Rule 608(c) where, as to the first incident, it was "extremely unlikely that this simple incident would have a legitimate tendency to show [the purported bias]," and as to the second incident, "it could not have been used to demonstrate bias or a motive to misrepresent" because it occurred after the victim made her allegations against the defendant); State v. Burgess, 393 S.C. 396, 405, 712 S.E.2d 1, 5 (Ct. App. 2011) (trial judge did not err in excluding evidence proffered under Rule 608(c) where judge concluded that the proffered evidence was "irrelevant and highly prejudicial and I don't think it is

[10] Appellant asserts on appeal that the relationship with the prosecutor caused Lt. Russell to be "biased in favor of the prosecution." (Brief of Appellant, p. 14). The State submits that, inasmuch as Lt. Russell was the *lead investigator* in the prosecution against Appellant, he was already arguably one of the most "biased" witnesses in favor of the prosecution. Lt. Russell's romantic relationship with a co-worker having exactly the same interests - conviction of guilty parties - does not legitimately tend to show any *additional* "bias" on the part of the witness. Contrast State v. Starnes, 340 S.C. 312, 325, 531 S.E.2d 907, 915 (2000) ("A witness' romantic relationship **with a party** is a source of potential bias of which the jury should be aware in order to fully evaluate the witness' testimony.") (emphasis added and citations omitted). Appellant also points out on appeal that there was evidence that Ms. Moore was not truthful with her superiors regarding the nature of her relationship with Lt. Russell. (See Brief of Appellant, p. 16). While this may be true, there is no evidence Lt. Russell - the witness in question - was ever untruthful about the relationship; indeed, Court's Exhibit #4, proffered by Appellant at trial, indicated that Lt. Russell candidly admitted the relationship when questioned. (See Court's Exhibit #4). Notably, as the trial judge pointed out, Lt. Russell had been promoted since the commencement of the prosecution against Appellant, clearly suggesting he had committed no improprieties interfering with his job performance. (See R. p. 738, lines 7-10).

relevant to any of the issues in this case"); see also State v. Hamilton, 344 S.C. 344, 358, 543 S.E.2d 586, 594 (Ct. App. 2001) ("If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal."), *overruled on other grounds by* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005).

Harmless Error

Finally, even if the trial judge had erred in refusing to admit evidence regarding the personal relationship between Lt. Russell and the former prosecutor, the error was harmless beyond a reasonable doubt. As the trial judge concluded, this evidence was simply not relevant and was too speculative and tenuous to constitute evidence of bias. (R. p. 180, lines 14-16; p. 180-82; p. 738, lines 7-10; p. 983, lines 8-19). For the same reasons the evidence was not admissible, its omission from the record could not have affected the jury's evaluation of Lt. Russell's credibility and therefore did not prejudice Appellant. See, e.g., State v. Ferguson, 300 S.C. 408, 411, 388 S.E.2d 642, 644 (1990) (refusal to allow certain impeachment evidence is not reversible error when the particular evidence would not have had a meaningful impact on the witness's credibility). Accordingly, the judge's refusal to admit this evidence was harmless beyond a reasonable doubt. See State v. Reeves, 301 S.C. 191, 194, 391 S.E.2d 241, 243 (1990) (an error is harmless if it could not reasonably have affected the result of the trial).

III. The trial judge properly denied Appellant's motion for mistrial based upon the mother of victim carrying a small urn with her to the witness stand where the judge found no prejudice to Appellant and where he cured any possible prejudice with an instruction to the jury.

Relevant Facts

The victim's mother, Misti Richard, was called as the fourteenth witness at Appellant's trial. (See R. p. 5). As Ms. Richard proceeded to the witness stand, the trial judge - from his unique vantage point on the bench - noticed that Ms. Richard had a small object in her hand and asked the jurors to step out for a moment. (See R. p. 498, lines 10-19). After Ms. Richard explained that the

object in her hand was an urn containing the victim's ashes, the judge ruled that Ms. Richard would not be allowed to sit on the witness stand with the urn in her hand. (R. p. 498, lines 14-19). The judge also did not permit Ms. Richard to hold a picture of the victim in her hand when she testified. (R. p. 498, lines 20-25). The judge then stated that he was not "fussing at" Ms. Richard and that since she "approached the witness stand in a very low-grade manner" he did not believe "any members of the jury would have seen [the urn] or know[n] what it was." (R. p. 499, lines 1-5). Notably, the urn was not readily identifiable as such since it was a small, heart-shaped box. (See R. p. 500-502).

At that point, Appellant's counsel moved for dismissal of the case on the ground of prosecutorial misconduct. (R. p. 499, lines 16-17). Counsel argued that Ms. Richard's walking to the stand with the urn was an "obvious ploy to gain the sympathy of the jury." (R. p. 499, lines 17-19). Defense counsel "guessed" that the jurors figured out what the object was. (R. p. 499, lines 20-22). Counsel argued that there was "no way that the defendant can get a fair trial when the child's ashes were in place in the courtroom." (R. p. 499, lines 23-25).

The State's attorney responded that, although she had been aware that Ms. Richard had the object in her pocket, she had not ever been aware of what the object was. (R. p. 500, lines 3-7). Counsel indicated that she had not known what it was and did not believe there was any way the jury could have known what it was either. (R. p. 500, lines 8-11). She argued that Appellant suffered no prejudice at all merely from Ms. Richard walking up to the witness stand with the urn. (R. p. 500, lines 12-13).

The trial judge then requested that the clerk of court measure the urn with a ruler. (R. p. 500-501). The object measured just shy of three inches in width, two-and-a-half inches in length, and one inch in depth. (R. p. 501, lines 4-7). The urn was bronze in color. (R. p. 501, lines 8-9).

In making his ruling, the trial judge first pointed out "small size" of the object, "the manner in which the witness approached the clerk to be sworn in" - that is, with "her left side and left

posterior" toward the jury, cupping the object in both hands - and the fact that the judge himself "wasn't sure and I had a much better view of [Ms. Richard] than any member of the jury panel - I wasn't sure that was what it was but out of an abundance of caution I directed the jurors outside the courtroom to take the matter up." (R. p. 501, lines 11-25). The judge then stated that he found credible the statement of the prosecutor that she had no knowledge that Ms. Richard had approached the witness stand with the urn in her hands. (R. p. 502, lines 1-6). Therefore, the judge denied Appellant's motion to dismiss based upon prosecutorial misconduct. (R. p. 502, lines 7-8).

Appellant's counsel then moved for a mistrial, although he noted that he did not necessarily want to move for a mistrial but felt that he was forced to do so. (R. p. 502, lines 10-15; see also p. 503, lines 1-3). He stated that "we've already had one episode of crying in front of the jury in the courtroom, and now [Ms. Richard] has been holding it in her hands as she walked in front of the jury with it, placed it on the table." (R. p. 502, lines 16-19). Counsel stated that the urn is "shaped like a heart" and that "obviously some of the jurors were likely to figure out what it was." (R. p. 502, lines 19-21). Counsel indicated that, based upon these things, he felt that Appellant's "chances of having a fair trial has been severely prejudiced." (R. p. 502, lines 22-23).

The trial judge again stated that he did not believe there was any intentional misconduct "or any misconduct whatsoever" on behalf of the State's attorneys. (R. p. 503, lines 10-12). He also noted that it was his observation that "the State was as surprised as perhaps everyone else in the courtroom that Ms. Richard had that item." (R. p. 503, lines 13-15). The judge stated that he did not agree with Appellant's assessment that the jury knew what the object was; in fact, the judge did not necessarily agree "that the jury even saw the item." (R. p. 504, lines 3-7). The judge indicated that he would be happy to give whatever curative instructions Appellant wished to be given, and pointed out that he had previously instructed the jurors that their verdict could not be based upon passion, prejudice, sympathy, or any other arbitrary factors, but only upon the evidence produced in the courtroom. (R. p. 504, lines 1-2 & lines 11-15; see also p. 233, lines 10-24). The judge stated that he

would be happy to reiterate that same instruction or say nothing at all, upon Appellant's request, but stated that he was denying the motion for mistrial. (R. p. 504, lines 16-21). Appellant's counsel requested that the judge instruct the jurors that "the actions of a witness in trying to take the urn to the witness stand was a blatant attempt to gain the sympathy of the jury, and that they are to specifically disregard that and those efforts by the witness." (R. p. 505, lines 18-22). The State objected to the curative instruction requested by the defense. (R. p. 506, lines 10-11).

The judge found that the curative instruction requested by the defense would be inappropriate inasmuch as the judge had not questioned Ms. Richard and had no evidence that her bringing the urn with her was in fact an attempt to gain sympathy from the jury panel. (R. p. 506, line 19 – p. 507, line 9). The judge declined to give the requested instruction but offered to give a general curative instruction if the defense wished him to do so. (R. p. 507, lines 7-9). Appellant's counsel indicated that although he would have preferred the requested charge, he would accept a general curative instruction in light of the court's ruling. (R. p. 507, lines 10-21). Before the jury returned to the courtroom, the judge admonished all the witnesses regarding controlling their emotions in light of the defendant's right to a fair and impartial jury. (R. p. 509, lines 4-23). When the jurors returned, the judge instructed them that they could not allow themselves to be swayed by sympathy, prejudice, passion, public opinion, emotion, or any other arbitrary factors, since the defendant was entitled to a fair and impartial trial. (R. p. 510, lines 5-22). He also instructed the jurors that they were required to carefully and impartially consider all of the evidence in the case and follow the law as the judge instructs it to them. (R. p. 510, lines 9-12). Subsequently, at the post-trial motions hearing, the judge reaffirmed his ruling regarding the denial of Appellant's mistrial motion and specifically concluded that the urn incident "did not inflame the passions of the jurors" even if they did see Ms. Richard holding an item. (R. p. 982, lines 11-19).

Argument

Appellant now argues that the trial judge erred in denying his motion for mistrial based upon the urn incident, arguing that the incident was extremely prejudicial to Appellant.[11] "A mistrial should only be granted in cases of manifest necessity and with the greatest caution for very plain and obvious reasons." State v. White, 371 S.C. 439, 444, 639 S.E.2d 160, 162 (Ct. App. 2006) (citations omitted). The granting of a motion for mistrial is an extreme measure that should be taken only where an incident is so harmful that the prejudicial effect can be removed in no other way. State v. Stanley, 365 S.C. 24, 33, 615 S.E.2d 455, 460 (Ct. App. 2005). In order to receive a mistrial, the party must show both error and resulting prejudice. See id. (citations omitted). In determining whether to grant a mistrial, the court should determine whether or not the mistrial is dictated by manifest necessity or the ends of public justice. State v. Simmons, 352 S.C. 342, 354, 573 S.E.2d 856, 862 (Ct. App. 2002). "The granting or refusing of a motion for a mistrial lies within the sound discretion of the trial court and its ruling will not be disturbed on appeal absent an abuse of discretion amounting to an error of law." State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 627-28 (2000).

In this case, the trial judge acted within his discretion when he denied Appellant's mistrial motion. The judge, who personally witnessed the incident and was therefore in the best position to determine any potential prejudice from it, concluded that the jurors either did not see the object in Ms. Richard's hands or were not able to tell what the object was. He pointed out that the small urn measured three inches by two-and-a-half inches and was one inch deep and that the urn would not

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[11] Arguably, this issue is not preserved for appellate review, since Appellant did not object to the sufficiency of the curative instruction given. (See R. p. 506-510). See State v. Brown, 389 S.C. 84, 95, 697 S.E.2d 622, 628 (Ct. App. 2010) ("If a trial court issues a curative instruction, a party must make a contemporaneous objection to the sufficiency of the curative instruction to preserve an alleged error for review."); State v. McEachern, 399 S.C. 125, 146-47, 731 S.E.2d 604, 615 (Ct. App. 2012) ("Because Hollie failed to object to the curative instruction, and additionally failed to move for a mistrial after the trial court gave its curative instruction, we find the mistrial issue is not preserved for review."); compare State v. Johnson, 334 S.C. 78, 89, 512 S.E.2d 795, 801 (1999) (mistrial issue was preserved for review where defendant renewed his mistrial motion following the curative instruction).

have been obvious to the jurors because of the way Ms. Richard approached the witness stand and held the object cupped in her hands. In that vein, there is absolutely no evidence in the record showing that any jurors saw the urn, knew what it was, or were prejudiced against Appellant because of it. Compare State v. Paige, 375 S.C. 643, 649, 654 S.E.2d 300, 303-304 (Ct. App. 2007) (no actual or inherent prejudice to defendant based upon spectators wearing buttons containing the victim's picture where the was "absolutely no evidence of record that the jurors in this matter were ever exposed to these button photos, and, if they were, whether they could perceive that they depicted the victim"); see also State v. Bradford, 254 Kan. 133, 142, 864 P.2d 680, 687 (1993) (defendant failed to show he was prejudiced such that he was entitled to a mistrial by audience members wearing buttons containing the victim's picture where he "failed to provide evidence that any of the jurors saw or were influenced by the buttons"). Contrary to Appellant's suggestion, the incident with the urn in this case was a far cry from the deliberate, staged display of a shrouded baby carriage during closing argument in State v. Northcutt, which the jurors obviously all observed. (See Brief of Appellant, p. 17). See State v. Northcutt, 372 S.C. 207, 222-23, 641 S.E.2d 873, 881-82 (2007).

Further, the judge properly concluded that even if the jurors did see that Ms. Richard had an object in her hands when she approached the witness stand, the incident was not so prejudicial as to inflame the passions of the jurors. Assuming the jurors somehow figured out that the small object Ms. Richard carried to the stand was an urn containing the victim's ashes, it was obviously no surprise to the jurors that the victim was deceased, and the fact that his mother carried his ashes with her in an urn did not in any way suggest that Appellant was the one who killed the victim. Instead, a reasonable juror would perceive the carrying of the victim's urn to be a normal sign of the grief occasioned by the loss of a loved one.

In short, Appellant has failed to meet his burden to show that he suffered any tangible prejudice from the urn incident. See State v. Wasson, 299 S.C. 508, 510, 386 S.E.2d 255, 256 (1989) ("The burden on motion for mistrial because of anything occurring during trial is upon movant to

show not only error, but resulting prejudice.") (citation omitted); State v. Paige, 375 S.C. at 648, 654 S.E.2d at 303 ("Ideal conditions, it is true, are not to be expected, and verdicts should not be set aside by an appellate court for misconduct in a trial, unless the evidence is clear and convincing that extraneous influences so interfered with the conduct of the trial, or so pressed upon the jury, as to become factors in the result.") (citation omitted); see also State v. Smith, 230 S.C. 164, 168, 94 S.E.2d 886, 887 (1956) ("The burden is upon the appellant to satisfy this court that there has been prejudicial error.") (citations omitted); State v. Bonneau, 276 S.C. 122, 125, 276 S.E.2d 300, 301 (1981) ("It is, of course, incumbent upon an appellant in this court to prove that he was denied a fair trial."); State v. Crocker, 366 S.C. 394, 408, 621 S.E.2d 890, 897-98 (Ct. App. 2005) ("To warrant reversal, an appellant must show both error and resulting prejudice.") (citations omitted).

In any event, even assuming Appellant was somehow prejudiced, the trial judge cured any such prejudice when he promptly delivered an instruction advising the jurors that they could not allow the verdict to be influenced by passion, sympathy, or prejudice. (See R. p. 510, lines 5-22). Notably, this instruction had been given once previously and was again repeated during the final jury instructions. (See R. p. 233, lines 10-24; p. 956, lines 2-13). See, e.g., State v. Brown, 389 S.C. 84, 95, 697 S.E.2d 622, 628 (Ct. App. 2010) ("A curative instruction is usually deemed to cure an alleged error."); State v. Queen, 264 S.C. 515, 521, 216 S.E.2d 182, 185 (1975) (it is the duty of the jury to take the law from the court in the case on trial and "[i]t must be presumed that they do so."); State v. Ard, 332 S.C. 370, 386, 505 S.E.2d 328, 336 (1998) (citation omitted) (we are to presume that juries follow their instructions and that proper instruction of the jury by the court cures most errors), *overruled on other grounds by* State v. Shafer, 340 S.C. 291, 304, 531 S.E.2d 524, 531 n. 12 (2000). For all of the above reasons, the trial judge did not commit reversible error by denying Appellant's motion for mistrial.

IV. The trial court did not err in admitting three autopsy photographs where the photographs were necessary to corroborate critical elements in the State's case, were necessary to rebut Appellant's defense of accident, and were limited in content and not unduly prejudicial to Appellant; in any event, any error would have been harmless beyond a reasonable doubt.

Relevant Facts

Prior to the testimony of Dr. Janice Ross, the forensic pathologist, Appellant objected to admission of certain autopsy photographs of the victim, arguing that they were gruesome, would be "shocking" to the jury, and that the prejudicial effect of the photographs outweighed any probative value. (See R. p. 75; p. 552; p. 554). The State argued that the photographs were relevant and necessary to explain the critical issue in the case regarding whether or not the victim's injuries and death could have resulted from a fall, as Appellant was contending. (See R. p. 72-73). The State argued that the photographs were also "very necessary" to demonstrate the extent of the bilateral hemorrhaging in the victim's head, which was illustrative of a violent, intentional injury rather than an accident. (R. p. 74). Later in trial, after the State pared down the photographs, Appellant clarified that he was objecting to State's Exhibits # 7, # 8, and # 86. (R. p. 552-54). The State noted that # 7 depicted a subdural hematoma, # 8 depicted subarachnoid hemorrhaging, and # 86 depicted the back of the victim's head with the scalp reflected back to show that there was no bruising at the back of the head. (See R. p. 552-53).

Thereafter, Dr. Ross testified outside the presence of the jury to explain the relevance of the photographs. (See R. p. 556-64). She first testified that it was common practice to take photographs during autopsies to document any injuries discovered, and she stated that she took photographs during the autopsy of the victim. (See R. p. 556-57). She stated that State's Exhibit # 1 (to which there was no objection) showed the back of the victim's head before any incisions had been made. (R. p. 558). This photograph illustrated that it appeared that there were no signs of a bruise at the back of the victim's head. (R. p. 558). Dr. Ross testified that State's Exhibit # 13 (to which there was no objection) reflected a bruise on the victim's chin. (R. p. 559).

The doctor testified that State's Exhibit # 86 depicted the victim's head with the scalp reflected back. (R. p. 559). This photograph definitively showed that there was no bruising to the back of the victim's head. (R. p. 559-60). Meanwhile, State's Exhibit # 8 depicted the top of the victim's brain showing subarachnoid hemorrhaging on both sides. (R. p. 560). This bleeding was below the arachnoid membrane but on top of the brain's surface. (R. p. 560-62). This photo illustrated that the subarachnoid hemorrhaging was a separate bleed from the bleeding on top of the arachnoid membrane (the subdural hematoma depicted in State's Exhibit # 7). (See R. p. 560-63). State's Exhibit # 8 also illustrated that there was enough accumulated blood to cause swelling in the brain. (R. p. 561-62). Dr. Ross testified that this subarachnoid hemorrhage was caused by the original trauma to the victim. (R. p. 562, lines 7-15). Regarding State's Exhibit # 7, the doctor explained that it showed the victim's brain after it was removed, illustrating the subdural bleeding on both sides of the head. (R. p. 562). She stated that this bleeding was caused by the brain being "jostled around" and pulling on the veins in that area, causing them to break open. (See R. p. 563). She testified that this bleeding on both sides of the brain was also caused by the original trauma to the victim. (R. p. 563).

Following this testimony, Appellant's counsel argued that the photographs were intended to arouse the sympathies and passions of the jury and that the prejudicial nature of the photographs far outweighed the probative value. (R. p. 564). He also argued that Dr. Ross could convey her points in words without showing the jury the "inflammatory" photographs. (R. p. 564). The State responded that the primary issue in this case was whether or not the injuries could have come from an accidental fall, as Appellant was claiming. (See R. p. 565-66). Counsel argued that, under State v. Jarrell, 350 S.C. 90, 564 S.E.2d 362 (Ct. App. 2002), and State v. Martucci, 380 S.C. 232, 669 S.E.2d 598 (Ct. App. 2008), the photographs were admissible to corroborate the pathologist's testimony regarding the nature and severity of the victim's injuries, which would support that the injuries were inflicted intentionally rather than accidentally. (See R. p. 565-66; see also p. 578-88).

The State also noted that the number of photographs being proffered had been pared down to only five photographs, two of which were not being objected to by the defense. (R. p. 566, lines 7-12). Counsel stated that the State was "doing [its] best to reduce the number down to the bare minimum so as to avoid having any undue pressure or effect to the jury." (R. p. 566, lines 10-12). Counsel also argued that, in light of the fact that this was, unfortunately, a homicide case, "it just comes with the facts in this kind of case, and graphic images sometimes have to be displayed" so long as it is done in a proper manner and for the proper reasons. (See R. p. 566, lines 13-21).

The trial judge first noted that he had carefully reviewed State v. Jarrell, 350 S.C. 90, 564 S.E.2d 362 (Ct. App. 2002), State v. Martucci, 380 S.C. 232, 669 S.E.2d 598 (Ct. App. 2008), and State v. Holder, 382 S.C. 278, 676 S.E.2d 690 (2009). The court also noted that although the State had initially offered fourteen photographs, it had withdrawn all except for # 1, # 7, # 8, # 13, and # 86, and there was no objection to # 1 and # 13. (R. p. 567, lines 7-17). The judge stated that Dr. Ross testified that photographs would assist her in explaining the "various injuries and harm to the child." (R. p. 567, lines 21-25). He stated that the photographs corroborated Dr. Ross's autopsy findings and the extent of the injuries; particularly, that the bleeding was bilateral and that there was in fact no bruising at the back of the victim's head. (R. p. 568, lines 1-8). The judge stated, "[i]t appears that that would be of assistance to the jury." (R. p. 568, lines 9-10).

The judge pointed out that "[t]he State has a responsibility for proving its case beyond a reasonable doubt and proving the elements of the case, which is proving the child was abused and the abuse was the cause of the death, and that the abuse manifests and extreme indifference to human life." (R. p. 568, lines 11-15). He indicated that the photographs in question would be necessary to depict the severity of the victim's injuries and the trauma, which the State was contending was inconsistent with the accidental injury that Appellant was claiming. (R. p. 568, lines 16-20). Thus, the judge found that the photographs "are relevant and necessary, and they are not introduced to inflame the jury or to elicit sympathy of or prejudice the jury, or to cause a decision based on

emotion. (R. p. 568, lines 21-24). He pointed out that in these types of cases, the issues frequently involved graphic facts. (R. p. 569, lines 4-5). The judge stated that he recognized that the photographs were "graphic," which was defined as "vivid or realistic," and noted that there was no objection to the graphic testimony in the case. (R. p. 568, line 25 – p. 569, line 3). However, he pointed out that graphic photographs do not necessarily indicate the perpetrator of the injuries, although they may indicate the force of the violence which was used or the manner in which the injury was inflicted. (R. p. 569, lines 5-10). The judge concluded that, in light of Holder, Martucci, and Jarrell, "in my discretion, and realizing that the State has withdrawn nine of fourteen" photographs, State's Exhibits # 7, # 8, and # 86 were admissible subject to Appellant's objections. (R. p 569, lines 13-17). Appellant raised no further arguments. (R. p. 569, lines 18-21). Notably, when the photographs were later admitted into evidence, the State made a deliberate election not to publish the photos to the jury via the overhead projector. (R. p. 600, lines 6-17).

Argument

Appellant asserts that the trial court erred in admitting photographs # 7, # 8, and # 86 because the photographs were "gory and shocking" and that under Rule 403, they were much more prejudicial than they were probative. To the contrary, the photographs were highly probative and necessary to prove a critical issue at trial - the nature and extent of the victim's injuries - which refuted Appellant's defense that the victim was injured as a result of an accident. The photographs corroborated the testimony of the forensic pathologist in this regard and allowed her to fully explain her findings and conclusions. Finally, the photographs, while obviously graphic, were not of the type to cause an intense emotional reaction from the jurors such as would inflame their sympathies or prejudices; therefore, the photographs were not unduly prejudicial to Appellant.

"The relevancy, materiality, and admissibility of photographs as evidence are matters left to the sound discretion of the trial court." State v. Holder, 382 S.C. 278, 290, 676 S.E.2d 690, 697 (2009) (quoting State v. Nance, 320 S.C. 501, 508, 466 S.E.2d 349, 353 (1996)). "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." State v. Kelley, 319 S.C. 173, 177, 460 S.E.2d 368, 370 (1995). Admitting photographs which serve to corroborate testimony is generally not an abuse of discretion. State v. Martucci, 380 S.C. 232, 250, 669 S.E.2d 598, 607 (Ct. App. 2008). Photographs 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. Brazell, 325 S.C. 65, 78, 480 S.E.2d 64, 72 (1997). "To constitute unfair prejudice, the photographs must create 'an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.'" State v. Jackson, 364 S.C. 329, 334, 613 S.E.2d 374, 376 (2005) (quoting State v. Alexander, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991)).

Here, Appellant argues that the trial court committed reversible error in admitting the "gory and shocking" photographs of the victim's "unsheathed brain." (Brief of Appellant, p. 19). Unfortunately, due to the manner in which the injuries were inflicted, the victim's "unsheathed brain" held all the answers to determining what caused his untimely demise. (See R. p. 581, lines 2-12). State's Exhibit # 86 conclusively showed the lack of a contusion or bruising on the back of the victim's head. (R. p. 559-60; p. 580). The absence of a bruise on the back of the victim's head as reflected in State's Exhibit # 86 refuted Appellant's story that the victim was injured when he fell and hit his head. State's Exhibit # 8 illustrated the extent of the victim's injuries in that it revealed that the subarachnoid hemorrhaging was a separate bleed from the bleeding on top of the arachnoid membrane, and that there was enough accumulated blood to cause swelling in the brain. (See R. p. 560-63; p. 581-85). State's Exhibit # 7 also revealed the nature and extent of the victim's injuries in that it illustrated that the victim suffered subdural bleeding on both sides of the head as opposed to just one side, which was caused by the victim's brain being "jostled around" inside the head. (See R. p. 562-63; p. 582-87). The global extent of the victim's head injuries as depicted in State's Exhibits 7 and 8 served to refute Appellant's defense of accident because they corroborated the medical

testimony indicating that those types of injuries could not have been caused by a mere fall but had to have been the result of intentional, non-accidental trauma caused by violent shaking of the victim. (See R. p. 322; p. 327-28; p. 332; p. 339; p. 342; p. 400; p. 404-405; p. 413; p. 415-17; p. 424-31; p. 455-58; p. 464-66; p. 485-86; p. 587-88; p. 750-61; p. 768-69; p. 776-786). Since the photographs in question illustrated key points regarding the nature and extent of the victim's injuries, it was critical that the jury actually view the photographs so that they could determine whether the doctors' findings were corroborated by the actual physical evidence on these most important points.

In State v. Torres, 390 S.C. 618, 623, 703 S.E.2d 226, 228 (2010), the South Carolina Supreme Court stated that "[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." Here, the photographs were highly relevant because they were necessary to substantiate material facts – specifically, to show the nature of Appellant's conduct toward the victim which ultimately caused the victim's death. Further, as the trial judge pointed out, these material facts were necessary for the State to prove the elements of homicide by child abuse. (See R. p. 568, lines 11-20).

Appellant contends that his case is "strikingly similar" to the case of State v. Collins, 398 S.C. 197, 727 S.E.2d 751 (Ct. App. 2012), in which this Court recently held that seven autopsy photographs of a ten-year-old boy who was partially eaten by dogs was inadmissible in the defendant's trial for involuntary manslaughter and owning dangerous animals. This Court found that, although the photographs had "some probative value," the photographs "added little" to the testimony of the witnesses; were not material to the State's case because they were "far removed" from depicting the criminal conduct of the defendant since the photographs illustrated only the conduct of the dogs; and because the seven photographs were "disturbing," "chilling," and the danger of unfair prejudice was "extreme" because "seeing the photos draws an intense emotional response and a level of sympathy for the dead child that does not come from the testimony." Collins, 398 S.C. at 204-209, 727 S.E.2d 751, 755-57.

In Appellant's case, the three photographs of the victim's head were not of the same caliber as the seven photographs in Collins depicting the victim's partially eaten body. They were admittedly "graphic," meaning "vivid or realistic" (R. p. 569, line 3), but they were not "chilling" or "disturbing" so as to cause an intense emotional reaction as were the photographs in Collins. The three photographs did not depict the victim's whole body or face and they show only what is necessary - the interior of the head - to illustrate the pathologist's testimony. More importantly, contrary to Appellant's assertions, the photos were not admitted for the same reasons advanced in Collins. Here, the photographs were **not** "far removed" since they were in fact necessary to show the nature and extent of *the defendant's own conduct* toward the victim, which was critical to establishing the elements of homicide by child abuse. Compare State v. Kornahrens, 290 S.C. 281, 289, 350 S.E.2d 180, 186 (1986) ("While not pleasant to look at, [the photographs] show what the defendant himself did to the bodies and nothing more.").

As in State v. Martucci, "[t]he photographs were relevant to prove Child was abused, that the abuse was the cause of his death, and that the abuse manifested an extreme indifference to human life, all of which support the charge of homicide by child abuse. . . The photographs were relevant and necessary, and they were not introduced with the intent to inflame, elicit the sympathy of, or prejudice the jury. The trial judge did not abuse his discretion in admitting the photographs." Martucci, 380 S.C. at 250, 669 S.E.2d at 608; see also State v. Nichols, 325 S.C. 111, 124, 481 S.E.2d 118, 121 (1997) ("The photographs are not unduly gruesome nor prejudicial considering the insignificant amount of blood and the material purpose for their introduction."); State v. Ward, 374 S.C. 606, 613, 649 S.E.2d 145, 149 (Ct. App. 2007) (where photographs were necessary to rebut the defense's arguments, the probative value outweighed the prejudicial effect). Appellant's case is much more akin to cases such as Martucci, Nichols, and Ward, as well as State v. Jarrell, 350 S.C. 90, 564 S.E.2d 362 (Ct. App. 2002), State v. Holder, 382 S.C. 278, 290, 676 S.E.2d 690, 697 (2009),

State v. Torres, 390 S.C. 618, 703 S.E.2d 226 (2010), and State v. Kelley, 319 S.C. 173, 460 S.E.2d 368 (1995), and the photos were properly admitted for the same reasons advanced in those cases.

Appellant now argues on appeal that the trial judge "did not conduct the required analysis under Rule 403." (Brief of Appellant, p. 20). Notably, there was no objection on this basis below; therefore the issue is not preserved. (See R. p. 569, lines 13-20). See State v. Smith, 391 S.C. 353, 365, 705 S.E.2d 491, 497 (Ct. App. 2011) (defendant's argument on appeal that the trial judge conducted an improper Rule 403 analysis was not preserved for appellate review where defendant did not present that argument to the trial judge). In any event, it is clear from the record that the trial judge did consider Rule 403, SCRE, in making his ruling on the photographs. The trial judge's analysis clearly indicated that he weighed the probative value against the prejudicial impact and concluded that the probative value was not substantially outweighed by the danger of unfair prejudice. (See R. p. 566-69). He specifically found that the photographs were "relevant and necessary" for the State to prove its case and to refute the defense of accident, and that the photos "are not introduced to inflame the jury or to elicit sympathy of or prejudice the jury, or to cause a decision based on emotion." (R. p. 568). The judge also specifically mentioned that although the photos were "graphic," the photos did not suggest the perpetrator of the injuries. (R. p. 568, line 25 – p. 569, line 10). Finally, the judge twice noted that he was taking into account the fact that the State had withdrawn numerous other photographs to which the defendant had objected, and he also specifically stated that he was exercising his "discretion." (See R. p. 567, lines 7-17; p. 569, lines 13-17; p. 569, line 14).

Accordingly, since it is clear from the record that the trial judge considered the prejudicial versus probative value when he ruled on the photographs, there is no reversible error, and this Court should defer to the trial court's ruling admitting the photographs. See State v. King, 349 S.C. 142, 561 S.E.2d 640 (Ct. App. 2002) ("this Court will not reverse the conviction if the trial judge's comments concerning the matter indicate he was cognizant of the evidentiary rule when admitting

the evidence"); State v. Rosemond, 335 S.C. 593, 596, 518 S.E.2d 588, 589-90 (1999) ("The relevance, materiality, and admissibility of photographs are matters within the sound discretion of the trial court and a ruling will be disturbed only upon a showing of abuse of discretion."); State v. Kelley, 319 S.C. 173, 177, 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.").

Harmless Error

Finally, even if the trial judge had erred in admitting the three photographs, the error was harmless beyond a reasonable doubt. "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, 647-48, 515 S.E.2d 98, 100 (1999) (citations omitted). In Appellant's case, as discussed previously, the three limited-in-content photographs were not so gory and shocking as to elicit a visceral emotional response. Further, the overwhelming medical evidence established that the victim suffered non-accidental trauma in his brain and ultimately died as a result of being violently shaken, and - in addition to the fact that Appellant was admittedly the only person with the child at the time the injury occurred - Appellant subsequently confessed to shaking the victim on the night in question. (See R. p. 322; p. 327-28; p. 332; p. 339; p. 342; p. 400; p. 404-405; p. 413; p. 415-17; p. 424-31; p. 455-58; p. 464-66; p. 485-86; p. 587-88; p. 717-19; p. 750-61; p. 768-69; p. 776-786; State's Exhibit # 63, Confession). Accordingly, admission of the three photographs was harmless beyond a reasonable doubt. See State v. Myers, 359 S.C. 40, 48, 596 S.E.2d 488, 492 (2004) (finding that the trial court's Rule 403 error "was harmless in light of Appellant's confession"); State v. Reeves, 301 S.C. 191, 194, 391 S.E.2d 241, 243 (1990) (an error is harmless if it could not reasonably have affected the result of the trial).

V. **The trial judge did not commit reversible error in denying Appellant's request to admit the original and amended pathologist's reports where these reports did not support Appellant's defense in the manner suggested and where any error in failing to admit the reports was harmless beyond a reasonable doubt.**

Appellant argues that the trial judge erred in denying his request to admit the original and amended reports regarding the cause of death because these reports were generated by the forensic pathologist and "documented her about-face as to cause of death *after she spoke with the Coroner.*" (Brief of Appellant, p. 20). Appellant's argument misconstrues the testimony of the forensic pathologist. On cross-examination in front of the jury, Dr. Janice Ross identified the original report (Defense Exhibit # 2 for ID) and the amended report (Defense Exhibit # 3 for ID). (R. p. 588-591). She indicated that the original report was created following the autopsy and was thereafter transmitted to the Coroner's Office "to give the coroner an idea of how to word the death certificate." (See R. p. 588, lines 15-19). She prepared the original report to state that the cause of death was "head hit object." (R. p. 588-589). When she returned to the office and reviewed her notes, she decided to change the report because she realized that "the head could have been hit by something or could have hit an object," so she removed the language about the cause of death "in order to open up the possibilities because the investigation was still going on." (R. p. 589, lines 19-24; p. 590, lines 13-23).

When asked if she had a conversation with the Sheriff's Department about amending the report, Dr. Ross responded: "I think I talked to the Coroner about it *after I went to change it.*" (R. p. 589, line 25 – p. 590, line 3). She explained that she changed the report herself on the same day, and "*then I called the Coroner* to ask them to submit the second death certificate and not the first." (R. p. 590, lines 6-12). Importantly, Dr. Ross specifically **denied** that she changed the report at the request of the Coroner. (R. p. 590, lines 4-5).

Appellant's argument that the two reports "document that Dr. Ross changed her opinion as to the cause of death determination on the amended report after she spoke with the Coroner" is clearly

incorrect. (Brief of Appellant, p. 20-21). In fact, the reports *themselves* document **only** that an amendment was made. Dr. Ross's *testimony* about the amendment of the reports explains why the change was made, but her testimony does not reflect what Appellant states it does, i.e., that she changed the report *after speaking with the Coroner*. Indeed, Appellant points to no testimony or evidence anywhere in the record supporting the proposition that Dr. Ross changed the report after speaking with the Coroner or anyone else. (See Brief of Appellant, p. 20-22). Therefore, since Appellant's argument for admission of the exhibits is simply not supported by the testimony or evidence, the trial judge's denial of Appellant's motion to admit these exhibits should be affirmed. (See R. p. 840-44).

Appellant contends that the issue in his case is a "mirror image" of the issue addressed in McKnight v. State, 378 S.C. 33, 661 S.E.2d 354 (2008). In McKnight, the Supreme Court found trial counsel ineffective after she "just forgot" to introduce the autopsy report into evidence in McKnight's second trial because the autopsy report was a "powerful piece of documentary evidence that was crucial to McKnight's defense" since the autopsy report would have served as hard evidence to undermine the conclusion of the only doctor who opined that cocaine alone caused the baby's death. McKnight at 54-55, 661 S.E.2d at 365. The Supreme Court pointed out that, since even McKnight's own expert could not rule out cocaine as a cause of death, the introduction of the autopsy report listing three causes of death was especially important. Id. at 55, 661 S.E.2d at 365.

The issue being raised in Appellant's case is not at all the same as the issue in McKnight. In Appellant's case, the change to the report regarding the cause of death – the *removal* of the cause of death "head hit object," leaving that section *blank* – did not necessarily either help or hurt Appellant's defense; instead, as Dr. Ross stated, it merely left open more possibilities since the investigation was still ongoing. In that vein, contrary to Appellant's argument, the original cause of death and amended cause of death were not "conflicting" in any way. (See Brief of Appellant, p. 22). Indeed, Dr. Ross testified at trial several times that it was still her opinion that the cause of

death was either "head hitting something or something hitting the head." (R. p. 590, line 25 – p. 591, line 1; see also R. p. 586-87; p. 588-92). Obviously, her trial testimony that the cause of death could have been "head hitting something" is consistent with and helpful to the defense.[12]

Second, as mentioned above, the *reports* do not show the reason for the amendment regarding the cause of death; only Dr. Ross's *testimony* explains the reason. Therefore, the jury's having copies of the original and amended reports would not have added anything to the defense case and certainly would not have been a "powerful piece of documentary evidence" as was the autopsy report in McKnight. Notably, as the trial judge pointed out, both certificates reflect that the manner of death was "homicide" (R. p. 843, lines 8-13), and both reports contain the same "Immediate Cause of Death," specifically, "Subdural Hemorrhage & Cerebral Edema; Closed Head Injury; Blunt Force Injury of Head." (See Defense Exhibits 2 & 3 for ID). Third, Appellant's argument about why Dr. Ross changed the report is not supported by any testimony or evidence; in other words, Dr. Ross **did not** amend the report after speaking to the Coroner. Therefore, his argument that "no two pieces of paper could better support the defense position than the certificates authored by Dr. Ross" is untenable. (Brief of Appellant, p. 22). In conclusion, the McKnight case does not support Appellant's position, and his argument that the trial judge committed reversible error by excluding the original and amended reports is without merit.

Harmless Error

Even assuming the trial judge committed error by disallowing the original and amended reports, such error was entirely harmless. See State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991) ("Appellate courts will generally not set aside a judgment based on insubstantial errors

[12] Appellant argues that the "newly minted cause of death for Joshua dovetailed perfectly with the state's theory of 'shaken baby' syndrome." (Brief of Appellant, p. 21). To the contrary, Dr. Ross's testimony that the victim's death was caused by his head hitting something or something hitting his head is *not* consistent with shaken baby syndrome. In fact, although several other doctors testified that the victim died as a result of being violently shaken, Dr. Ross never once testified about shaken baby syndrome. (See R. p. 342, lines 12-17; p. 416, line 20 – p. 417, line 5; p. 457-58; p. 465-66; p. 570-99).

not affecting the result."). First, as discussed at length above, the reports simply do not show what Appellant contends they show, that is, that Dr. Ross changed her cause of death after talking to the Coroner. Second, also for the reasons discussed above, the reports would not have helped the defense case in the manner suggested nor does Dr. Ross's amendment to the report help the prosecution's case in the manner suggested. (See *supra*, p. 44-47). Third, Dr. Ross's testimony in front of the jury fully explained the change to the report and her reason for the change. The reports themselves were therefore cumulative and were insignificant when considered in the context of the entire record. Accordingly, any error with respect to the judge's failure to admit the reports was harmless beyond a reasonable doubt. See, e.g., State v. Oglesby, 384 S.C. 289, 293, 681 S.E.2d 620, 622 (Ct. App. 2009) ("[T]he admission of improper evidence is deemed harmless if it is merely cumulative to other evidence."); State v. Reeves, 301 S.C. 191, 194, 391 S.E.2d 241, 243 (1990) (an error is harmless if it could not reasonably have affected the result of the trial).

VI. The sentencing issue raised on appeal is not preserved for review; but, in any event, the trial judge properly exercised his discretion in sentencing Appellant to life imprisonment under S.C. Code § 16-3-85(D).

Appellant now argues on appeal that the trial judge failed to properly consider the aggravating and mitigating circumstances when he imposed the sentence. However, Appellant never raised this objection below. (See R. p. 985-994). Therefore, the issue is not preserved for appellate review. See, e.g., State v. Johnston, 333 S.C. 459, 462, 510 S.E.2d 423, 425 (1999) ("[T]his Court has consistently held that a challenge to sentencing must be raised at trial, or the issue will not be preserved for appellate review.") (citations omitted); State v. Sheppard, 391 S.C. 415, 424, 706 S.E.2d 16, 20 (2011) (defendant's argument regarding an excessive sentence was not preserved for review where no objection was made on this ground below) (citation omitted).

In any event, it is clear from the record that the trial judge properly considered all of the relevant circumstances and properly exercised his discretion in sentencing Appellant to life imprisonment. After hearing from Appellant and his family members, the judge discussed his

reasoning regarding the sentence in great detail, specifically listing both mitigating and aggravating factors,[13] then imposed a sentence within the range set forth in S.C. Code § 16-3-85(D). (See R. p. 987-94). Appellant does not allege that the judge operated under "partiality, prejudice, oppression, or corrupt motive;" therefore, there is no basis for this Court to disturb the sentence imposed. See State v. Dozier, 263 S.C. 267, 271, 210 S.E.2d 225, 226 (1974) & Garrett v. State, 320 S.C. 353, 356, 465 S.E.2d 349, 350 (1995) (the length of a prison sentence rests in the sound discretion of the trial court; absent a showing of "partiality, prejudice, oppression or corrupt motive," an appellate court will not correct a sentence that is within the limits prescribed by statute); see also State v. Sidell, 262 S.C. 397, 398, 205 S.E.2d 2, 3 (1974); State v. Sanders, 251 S.C. 431, 444-45, 163 S.E.2d 220, 228 (1968); State v. Queen, 264 S.C. 515, 521-22, 216 S.E.2d 182, 185 (1975); State v. Patrick, 255 S.C. 130, 133-34, 177 S.E.2d 545, 547 (1970) (all finding no abuse of discretion even though the maximum sentence was imposed).

On August 13, 2012, Appellant's counsel provided this Court with a supplemental citation to Miller v. Alabama, 132 S.Ct. 2455 (2012), indicating that the citation was being provided due to Appellant's age at the time of the crime. However, Miller v. Alabama is simply not applicable to Appellant's case. In Miller v. Alabama, the United States Supreme Court held that mandatory life imprisonment without parole for those under the age of eighteen at the time of their crimes violates the Eighth Amendment's prohibition on cruel and unusual punishments. Miller, 132 S.Ct. at 2475. In Appellant's case, the statute at issue, S.C. Code § 16-3-85(D), does not require a mandatory sentence of life without parole. To the contrary, it provides a sentencing judge with discretion to sentence a person convicted of homicide by child abuse to anywhere from twenty years up to life

[13] The aggravating factors relied upon by the trial judge were the extent and severity of the traumatic injuries and the fact that the baby had to have been shaken violently, repetitively, and with velocity; testimony indicating "a lack of concern for the child's condition" after the injuries were inflicted; the judge's impression that Appellant was "trying to help [himself], not [his] child;" the fact that the judge did not find credible the version of events Appellant described at trial; and that the judge did not see "one ounce of remorse" from Appellant. (See R. p. 992, line 17 – p. 994, line 13).

imprisonment. See S.C. Code § 16-3-85(D). Miller is also inapplicable because, at the time of Appellant's crime, he was not under the age of eighteen.[14] (See R. p. 847, lines 3-4; p. 985, lines 22-23). Accordingly, Miller v. Alabama affords Appellant no relief, and the sentence must be upheld.

CONCLUSION

For the reasons discussed above, Respondent requests that this Court affirm Appellant's convictions and sentences.

Respectfully submitted,

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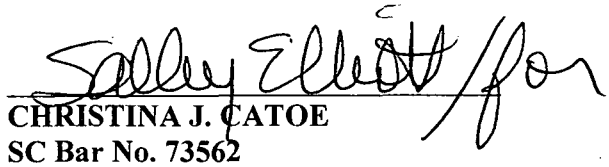

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January 28, 2013

[14] Appellant turned eighteen on January 11, 2010, and the crime occurred on January 19, 2010.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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R. Knox McMahon, Circuit Court Judge

THE STATE, Respondent,

vs.

LEXIE DIAL, III,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I, Norma Bigbee, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

H. Wayne Floyd, Esquire
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I further certify that all parties required by Rule to be served have been served.

This 28th day of January, 2013

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