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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Berkeley County
The Honorable Kristie L. Harrington, Circuit Court Judge
Appellate Case No. 2018-000980

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SC Court of Appeals

THE STATE,

Respondent,

vs.

EDWARD ISAIAH NELSON,

Appellant.

FINAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

STATEMENT OF THE CASE

Respondent accepts Appellant's Statement of the Case for purposes of this appeal.

STATEMENT OF FACTS

Viewed in the light most favorable to the prosecution, the direct and circumstantial evidence presented at trial was that Shonda Davis, the victim, was a thirty-eight year old mother of a son who turned two on October 16, 2016: the day after Appellant, Edward Isaiah Nelson, brutally murdered Shonda with a knife in Moncks Corner, South Carolina. ***R. 24-27; 35-40; 235-247.***

Howard Morris testified that he had known Shonda since 2005 or 2006, and that she had been in a relationship with Appellant for roughly six months.[1] Mr. Morris last saw Shonda when they had dinner with a friend on Saturday night, October 15, 2016. They parted when Mr. Morris dropped her off at her car "[b]etween 8:20 and 8:30" that night. Shonda had a son whose second birthday was on October 16, 2016. Although her son was celebrating his birthday with her sister in Myrtle Beach, Shonda had to work. So, she had planned to celebrate his birthday when he returned on Sunday, the 16th. ***R. 24-28.***

Shonda had never told Mr. Morris that Appellant was abusive, but she did say that he was possessive and she told Mr. Morris at dinner on the 15th that she wanted to end their relationship. ***R. 30.*** Also, Shonda "seemed like she had a lot on her mind" that night. She told Mr. Morris that "she was going to take an insurance policy out to make sure that her son was secure in case something happened to her." Mr. Morris repeatedly asked her why she kept talking about the

[1] Mr. Morris' only contact with Appellant was Appellant's repeated attempts to have him confirm a friend request on Facebook. ***R. 25.***

policy. She only said, "[I]t's been on my mind and I want to make sure that everything is going to be okay." ***R. 31.***

Jessica Johnson testified that she lived immediately across the street from Shonda, in the same apartment complex. Ms. Johnson described Shonda as "quiet" and as "a sweet person." However, they did not interact because Shonda "stayed to herself." ***R. 32-35***. Ms. Johnson saw Appellant walking around the back and side of Shonda's residence before she returned home on the night of October 15th. ***R. 36-37.***

Later that night, Ms. Johnson heard Shonda screaming, "Help, he's killing me." Ms. Johnson called 911 and she then saw Shonda lying on the ground. There was a great deal of blood and Appellant was "[s]tabbing her" in the face. Ms. Johnson's two young sons and her boyfriend likewise saw Appellant attacking Shonda. ***R. 33; 37-39.***

By the time that Ms. Johnson could walk over to where Shonda was lying, Appellant had run into the Woods. Initially, Shonda was "breathing hard," but she soon stopped breathing. ***R. 40.*** Ms. Johnson thereafter gave a short statement to police. ***R. 44.***

Inv. Ashley Spurgeon was a patrol officer for the Moncks Corner Police Department at the time of the murder. She and her supervisor, Officer Robert Thomas, were dispatched to "an assault possibly in progress" at the scene shortly after 9:00 p.m. on October 15, 2016 and arrived in separate vehicles roughly four minutes later. They were the first responding officers. It was already dark but the weather was clear. Officer Spurgeon initially saw a group of individuals standing around the apartment complex's office, which is at the front of the complex. However, she and Officer Thomas went to the rear of the complex after she ascertained that there were no problems at the office. ***R. 45-49; 51-52; 80-84.***

They saw a much larger group of people when they reached Shonda's apartment. As soon as they exited their vehicles, Officer Spurgeon heard someone yell that "she needed EMS." They then saw Shonda lying on her back, in her front yard, at the corner of her driveway. Her head was closest to the road and her feet were closer to her residence. "She was profusely bleeding from many lacerations to her face," there was a "large pool of blood" around her, she had a purse on her right arm, and she could move her right arm but her wrist was limp. While Officer Thomas directed bystanders away from the area and notified Dets. Auclair and Thelma Lewis of what had occurred,[2] Officer Spurgeon unsuccessfully tried to speak with Shonda but Shonda could only moan and raise her arm. ***R. 52-53; 64; 84-86.***

Officer Spurgeon notified EMS to hurry because Shonda "needed immediate assistance." Officer Spurgeon stayed with Shonda until EMS personnel arrived and treated her. By this time, Officer Bailey, Officer Edens, and Sgt. Auclair had arrived. Officers Bailey and Edens secured the scene. ***R. 53-54; 86.***

Someone in the crowd told the officers that Shonda had a child. Because the officers did not know if either the child or a suspect was in the darkened residence and because the apartment doors were locked, Officer Bailey kicked in the door. However, no one was in the residence and it did not appear that anyone had been in it for hours. ***R. 54-56; 86-87.*** Officer Spurgeon followed the ambulance to Trident Medical Center, in North Charleston, at Officer Thomas' direction and she remained there until a doctor came out roughly twenty minutes later and advised her that Shonda was dead. ***R. 56-59.***

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[2] Officer Thomas notified the detectives because "they needed to be out for investigations, and there was a lot of forensics that needed to be done." ***R. 85.*** They told him that they were en route. ***R. 86.***

Officer Spurgeon saw Shonda's wounds. There were "numerous deep lacerations to her face, her head and her arms and her hands. It was exposing bone. ... [O]ne of the fingers was missing." Officer Spurgeon had never seen anyone injured so badly in her law enforcement experience. ***R. 59***.

Bradley Dorman is a paramedic employed by Berkeley County EMS. He and his partner, Emily Schlepenbock, were dispatched to the scene "for cuts and bruises related to an assault" at 9:14 p.m. on the 15th and arrived at 9:20 p.m. Shonda had "multiple wounds covering head, face, arms. She was breathing on her own in a shallow manner," but she was unable to answer questions and it was obvious that she would not be able to breathe much longer. Mr. Dorman called the Fire Department to drive the ambulance because they need assistance in getting Shonda into the ambulance and because her injuries were so severe they required both he and Ms. Schlepenbock to treat her. ***R. 65; 67-71***.

Mr. Dorman gave the following description of Shonda's injuries:

> Lacerations to the head and face too numerous to count and too overlapped to guess sizes, exposure of skull and possible brain matter found in opening above her right eye, smaller lacerations noted to the lips, a large laceration was noted under right eye approximately three inches ... [and] at the sternal notch, the chest had a laceration approximately two inches with fat exposure. ....
>
> .... No injuries noted to the lower extremities. Left arm had a large laceration to the wrist and partial amputation of the index finger, ring finger, and pinkie finger.
>
> Right arm was found – [a] large laceration to the right wrist about approximately three inches and right forearm approximately three inches.

R. 71-73. He reiterated that the wounds exposed both her skull and some brain matter. ***R. 73***.

Mr. Dorman's assessment was that she was "[p]eri-arrest. She was not in cardiac arrest, but she was close to it." ***R. 71***. They then loaded her into the ambulance and headed to the hospital. As they traveled, they did an EKG and unsuccessfully attempted to establish an IV. ***R. 74-75***.

Soon after they established an interosseous needle into her left tibia, she stopped breathing and she had to be ventilated. Her heart stopped shortly after that and they began CPR at 9:45 p.m. She remained in cardiac arrest until they reached the hospital at 10:00 p.m. and turned her over to the staff there. R. ***75-78***.

The investigation had continued immediately after the ambulance left with the victim. A bystander had said that "someone dressed in black fled to the wood line," which has a walking trail that leads to the nearby Shannonwood Mobile Home Park. The Moncks Corner Police Department does not have a K9 unit. So, officers requested that Deputy Robert Dwyer, a K9 handler with the Berkeley County Sheriff's Department, respond with his tracking dog, Cero. He arrived around 10:30 p.m. and began tracking a scent into the woods. Officers Thomas and Bailey assisted him. ***R. 61-62; 87-91; 98-105***.[3]

Cero tracked the scent to Shannonwood Dr., where the officers encountered an African American man driving in the area. The man told Deputy Dwyer that he "was there looking for a friend [who] was in trouble and had called asking for assistance." Deputy Dwyer immediately called central dispatch and asked investigators to meet him because he thought that the man might have been looking for the murder suspect.[4] Det. Lewis responded. ***R. 91-92; 105-109***.

Deputy Dwyer and the other officers then followed Cero, who continued tracking the scent until he lost it at a viaduct that goes under Hwy. 52. Cero soon picked up another scent and tracked it until Deputy Dwyer mistakenly thought that he had lost it. ***R. 92-93; 109-11***.

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[3] They were eventually joined by Officer Spurgeon, who joined them after she left Trident Medical Center. ***R. 61-62***.

[4] Deputy Dwyer's hunch proved correct, as discussed, *infra*. This man, Duffy Skiner, had been called by Appellant and was looking for him.

The officers decided to head back to the crime scene in their vehicles. While they were en route, they received a call that an African American male was "banging on the back door" of the residence at 1130 Huger St. They then went to that location with Cero, which was "[e]xactly where [Deputy Dwyer] had abandoned the track." As Officers Thomas and Bailey were approaching the residence at 1130 Huger St., they heard someone "running in the wood line" and started chasing the person. ***R. 93-94; 111-13.***

Meanwhile, Cero had picked up a scent and began tracking it. The other officers stopped when Deputy Dwyer yelled, "Dog loose," so they would not get bitten. Cero went into the wood line for fifteen or twenty seconds before he came back to Deputy Dwyer because he "failed to engage." Cero did not thereafter successfully track the suspect. ***R. 94-95; 113-14.*** Det. Thomas and other officers thereafter returned to the apartment complex where the murder occurred and spoke to anyone who would talk about the murder. ***R. 95-96.***

"Several people said they heard screams" and heard the attack. Also, "a few people" admitted that they had seen "part of it." Even though officers extensively searched the area where the suspect had initially run, they never found the murder weapon. ***R. 96.***

Taronda Gilliard testified that Shonda was her baby sister. Shonda had a young son, whom Taronda was raising along with her twelve year old twin sons at the time of trial. Taronda testified that Roger Monte Brown was the father of Shonda's son, that he had been actively involved in their son's life, that they had shared custody of their son, and that he continued to see his son "every other weekend." Shonda had just begun working as an assistant manager at a "Check Into Cash" shortly before Appellant murdered her. Before that, she had worked at the library. ***R. 115-17.***

She met Appellant at the library in April of 2016, or approximately six months before he murdered her. Taronda only had very limited contact with Appellant in the months that he dated her sister. Shonda once brought him by Taronda's house, but he was only there briefly. Also, he had telephoned Taronda twice, when he was attempting to find out where Shonda's was. ***R. 117-18***.

Shonda's son turned two on October 16, 2016. He was with Taronda, in Myrtle Beach, on the night of the murder for a joint celebration of his and his cousins' birthdays. Shonda and Roger had planned to surprise other family members by going to Myrtle Beach on the 16th. However, Detective Lewis called Taronda at 10:46 p.m. on the 15th and told her about the murder. ***R. 119-20***.

Taronda thereafter called Appellant and asked, "[W]hat did you do to my sister?" When he claimed that he was in his bed, she accused him of lying. "And he said, what happened to Shonda? I said, you killed my sister." However, he persisted with the lie that he was in bed. ***R. 120***.

Forty-three year old Duffy Skiner testified that he lives in North Charleston and that he worked for a Summerville car dealership in October 2016. Mr. Skiner had a drug problem when he was younger and this led to run-ins with law enforcement. However, he got involved with Narcotics Anonymous and Alcoholics Anonymous following his stay in a drug treatment facility in 2009, and he has been clean and sober since then. ***R. 124-26***.

Mr. Skiner met Appellant through another associate in NA in July 2015, and he became Appellant's sponsor. He thought that Appellant was a "weird, cool young kid." Beginning in the fall of 2015 and continuing until the time of the murder, Mr. Skiner would try to take Appellant to meetings. However, Appellant "kind of distanced himself a little bit sometimes." ***R. 127-28***.

Appellant was living on Dorchester Rd. at the time. Mr. Skiner testified that he never met Shonda and that he never picked up Appellant from her residence. Mr. Skiner did not know much about Appellant's relationship with her, other than Appellant had met her at the library, and that he was happy when he talked about her because she would take him to and from work. ***R. 128-29.*** Although Mr. Skiner testified that "[t]he last I knew they [were] doing pretty [well]," he admitted that Appellant had an unpleasant conversation with him about the relationship with Shonda. ***R. 129-30.***

> [H]e just called me ... one night at one something in the morning, ... telling me that he was kind of all in his bad space, saying I feel like killing her and killing myself and I'm tired of all this and I'm stressed out. And I was like, whoa.

R. 130.

Apparently unaware that Appellant could be extremely violent, Mr. Skiner told him to calm down, relax, and to stop talking crazy because they would work out any problems. Mr. Skiner also suggested giving her space if necessary. Appellant was fine after this conversation. Mr. Skiner did not have any other conversations with him before the night of the murder. ***R. 130-131.*** *See also* ***R. 151-153.***

Mr. Skiner was working at the car dealership when Appellant called him around 9:00 p.m. on October 15, 2016. He did not answer the first call because he was waiting on customers. He also did not respond to a text message from Appellant. Mr. Skiner answered when Appellant called a second time, but said that he would have to call Appellant back. Appellant then called another time. ***R. 132.***

In this conversation, Appellant said that

> he was in a bad space. He was with some guys ... and they shot him up with some bad drugs ... and he was unable to walk. He was stuck beside a trailer someplace.

R. 131.

Mr. Skiner told Appellant to "hang tight" because he was leaving work shortly and would come get him and get him to someplace where he could get help, if necessary. ***R. 131-32.*** Consistent with NA policy for persons on "a drug mission," Mr. Skiner picked up his fiancé in North Charleston, so that she would be present to offer support when he met with Appellant. While Mr. Skiner and his fiancé were headed to Rivers Ave., Appellant called again and told Mr. Skiner the same story. However, he said he was then on the side of the Moncks Corner Big Lots but that Mr. Skiner should still pick him up by the trailer. Because he also said that his phone was dying, Mr. Skiner agreed to call when they were near and asked him where he was.[5] ***R. 131-33.***

When he gave his location, Mr. Skiner asked why he did not call his girlfriend because she lived nearby. Appellant said that he had not spoken to her "in a few months." ***R. 134.*** The men spoke again several minutes later and Appellant gave Mr. Skiner directions to the mobile home park where he was. "As soon as we pulled in, … [we saw] two officers right at the beginning of the entrance with dogs out." Mr. Skiner asked the officers for help, telling them "I've got a friend that just called me and said he was in trouble and needed some help to get out of there." The officers immediately asked him where his friend was and what his friend looked like. ***R. 134-35.***

At this point, Appellant called Mr. Skiner and asked where he was. Mr. Skiner, still unaware of the murder, told Appellant that the police were out there and could help him. Appellant's tone immediately changed and he asked if Mr. Skiner had "brought the cops with you." Mr. Skiner called Appellant. Appellant answered but apparently hung up and then returned the call. ***R. 135-36.***

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[5] Mr. Skiner's fiancé overheard this conversation because he had his phone on speakerphone. ***R. 133.***

Once again, he asked if Mr. Skiner had brought the police. Mr. Skiner told him no and that they were already out there. Appellant's phone then died. When Mr. Skiner reached the trailer where Appellant had claimed to be, Det. Lewis pulled up in her vehicle. ***R. 136.***

She asked Mr. Skiner, "[D]o you know where he is? Do you know what he did?" He said no and asked what had happened. She said, "He just murdered his girlfriend." Mr. Skiner then followed her to Shonda's apartment and started calling Appellant, at her request. ***R. 136-37.*** He had several more conversations with Appellant, but he never saw Appellant and eventually went home at 1:30 a.m. on the 16th. ***R. 137-38.*** With Mr. Skiner's continued cooperation and assistance, Appellant was arrested at the Moncks Corner Waffle House later that morning. ***R. 138-45; 186-88.***

Det. Michael Auclair, who supervised the forensic unit of the Moncks Corner Police Department, went to the crime scene on the night of October 15, 2016. He seized a blue bag, a black bag, Shonda's cell phone, Shonda's glasses, one of Shonda's shoes, a child's shoe, "a couple of pieces of hair," and other personal items. He also swabbed what appeared to be a bloody footprint. ***R. 174-78; 181-85.***

Following Appellant's arrest on October 16th, Det. Auclair collected Appellant's shirt, pants, boots, belt, his cell phone, a charger for the phone, and a box cutter. Det. Auclair likewise obtained a buccal swab from Appellant and he swabbed Appellant's ears, as well as the palms of Appellant's hands. Appellant "had a cut on his hand, [and] he had a mark on his ear that ... looked like blood." He did not have any other visible injuries. ***R. 189-91.***

Det. Auclair examined Shonda's phone and discovered a series of text messages between her and Appellant on the night of October 16th, as well as eight missed video chats from Appellant to her. Four of these text messages were sent after 7:33 p.m. There was also a phone call from

Monte Brown to Shonda. This call began at 8:06 p.m. and lasted slightly over fifty-seven minutes. A reasonable inference is that she was talking to him when attacked by Appellant. ***R. 194-95***.

The State introduced photographs of and published a series of text messages between Appellant and Shonda that were found on her phone (State's Exs. 34-56) through Moncks Corner Chief of Police Rick Ollic. The messages begin on Friday, October 14, 2016, and the last one is at 8:28 p.m. on the 16th. In Shonda's first text to him on Saturday, she told him that she was crying on her way to work, that she was tired of "hurting," and that she would longer let him hurt her. She also told him that he was on his own after that week. ***R. 217-22***.

Appellant was apologetic and contrite in his response. Also, he told that he loved her, that he would give her space, and that wanted her to be his "life partner." ***R. 223-24***. Shonda, however told him not to call her because she was at work and she asked him if he read her message. Appellant apologized for bothering her at work but asked if she could drive him to Lowe's to purchase a tool that he needed for work. They then exchange emails about whether she would take him to Lowe's and the bank. ***R. 224-25***.

In the last text message sent by Appellant at 8:28 p.m., Appellant seemed disparate for Shonda to contact him:

> Lowe's don't close until after they have it. They close at nine. Can you take me to the bank? Can you take me to the bank? Can I get the TV from you? Why you block me? Can we please talk, please? Please call me. It's very important, please!!!

R. 225.

The State also introduced and published a composite of Appellant's statements at his bond hearing as State's Ex. 71. ***R. 226-27***. When he is first brought into the courtroom, he is crying and says "Oh, God! What have I ...!" Among other matters, he thereafter freely and voluntarily stated that his motive was jealousy that was fueled by her failure to talk to him about their relationship:

> Shonda didn't deserve it. But you know, I let my anger get to me. I let jealousy get to me. I let certain things get to me that shouldn't have. And if I could have just heard from her, if she would have just answered the phone when I was .... I just wanted to talk to her about the situation that happened prior to that. She wouldn't answer. Instead, she wanted to go out with her friends.

State's Ex. 71.

Courtney Thompson, a forensic serologist at SLED, examined the box cutter, Appellant's t-shirt, and his boots for the possible presence of blood. ***R. 198-201***. Because the box cutter tested negative for the presence of blood, she swabbed it only for the presence of touch DNA. She forwarded the following items for DNA testing because they tested positive for the presumptive test for blood: a cutting from the exterior right sleeve of the t-shirt, a cutting from the collar of the t-shirt, a swab from the outward facing heel area of the left boot, and a swab from the outward facing ankle area of the right boot. ***R. 202-04***.

Stephanie Stanley is a forensic DNA analyst assigned to the DNA casework department at SLED. ***R. 209***. She received a buccal swab from Shonda and buccal swabs from Appellant, which she used as known standards. She received swabs from Appellant's left ear, his right palm, his left palm, and his right ear. She also received swabs from the bloody shoe print on the sidewalk at the scene, the two cuttings from his t-shirt, and the swabs taken from his boots. She did not analyze the box cutter. ***R. 210-11***.

Because presumptive testing of the swabs of Appellant's left ear and his right ear were positive for blood, she performed DNA analysis on them. The DNA profile developed from those swabs matched Appellant. Thus, they were his blood. ***R. 211-12***.

DNA analysis of the swabs of Appellant's boots matched Shonda Davis' DNA profile, as did the cutting from the exterior sleeve of Appellant's t-shirt. "The probability of randomly

selecting an unrelated individual having the DNA profile that matched those items is 1 in 5.16 trillion." ***R 212-15***; State's Ex. 68 (chart of DNA testing results).

On October 17, 2016, forensic pathologist Dr. Ellen Riemer performed the autopsy on Shonda Davis at the Medical University of South Carolina. Other than being obese, Shonda was a healthy woman. Also, the toxicology report on Shonda showed only the presence of caffeine, nicotine and cotinine, which is metabolite of nicotine. ***R. 237-38***. Dr. Riemer determined that the cause of death was "[m]ultiple sharp-force injuries" that were so severe that they caused injury to the brain. Dr. Riemer opined that the "manner of death [was] homicide." She documented the various injuries that she observed. ***R. 232-33; 235-37; 244-45***.

Although Dr. Riemer's report did not differentiate between stabbing and chopping or cutting injuries, she elaborated on the number and types of injuries that were present:

> ... [W]e're talking about dozens of sharp-force injuries overlapping on each other. There was actually one stab wound in there, but most of them were incised or chopping-type wounds. .... Stabbing means deeper than wide. So these ... actually -- covered [a] large area on the skin and they were deep enough to kill her, but ... they weren't deeper than wide.

R. 237.

Dr. Riemer testified that the photographs taken at autopsy and which are at issue on appeal – State's Exs. 61-63 and 88-90 – would assist her in explaining the injuries that she found. ***R. 238-39***. State's Ex. 61 depicts "multiple cuts from a sharp force instrument on her [right] arm." These cuts go "through the skin and the subcutaneous tissue or the fatty tissue on her arm." State's Exs. 62 and 63, which are of Shonda's left hand, depict amputation of the second through fifth fingers of her left hand, by "very forceful sharp-force injuries." She likewise had similar injuries to the

right hand.[6] Based on these findings, Dr. Riemer opined that these injuries were defensive wounds and that "when she was aware that the sharp force object, this knife, was coming at her, it's most likely that she held the hand up to her head to try to protect herself from the impact." ***R. 240-41; 244***.

Dr. Riemer likewise opined that the injuries to Shonda's right arm "may have been sustained in a similar manner while she had her arm up." ***R. 241***. Using State's Ex. 88 and 89 to illustrate her findings, Dr. Riemer testified that Shonda's face was "almost unrecognizable as a face because there are so many intersecting cuts ... all over her face." These cuts were on Shonda's forehead, nose, and cheeks, and her "right eye was also collapsed." The cut on her cheek "went through into the sinus of the face. So they were very deep and damaged structures of the face." ***R. 241-43***.

Also, Shonda's hair was "disrupt[ed]" by the deep cuts that she suffered. The cuts to her head "went through the scalp and skull in order to cause brain matter to be exposed." The photograph of the top of her head showed "a bunch of intersecting sharp-force injuries" that were "all over the top of the head, ... on the face and a little bit more on the right side." ***R. 243***. Dr. Riemer utilized two diagrams that were admitted without objection (State's Exs. 92 and 93) and explained the cause of death, as follows:

> What we're looking at is the outer layer, the skull. You can see the skull. And then beneath the skull, you don't have the brain immediately right away.
>
> There's a periosteal layer and [meningeal] layer, and there -- there's areas of space between the dura and ... the dura matter is like an envelope that covers the brain, and then the arachnoid membrane is like a little piece of tissue that also covers the brain.

[6] Dr. Riemer initially testified that the amputation was to the fingers of the right hand but corrected herself after reading her report stating the amputated fingers were on the left hand. ***R. 240-41; 244***.

> So we have many layers between that -- the anatomy of the brain and the skull is made up of. And she had bleeding into the subdural space and the subarachnoid space, and disruption of the brain tissue itself.
>
> So, you know, there was exposure of the -- normally, you don't see the brain. Right? The skull is there to protect it. But the skull was basically chipped and cut with exposure of the underlying brain, as hard as that is to believe, with abundant bleeding on the surface of the brain.
>
> .... Okay. [State's Ex. 93] is just more of the same kind of diagram that shows the different layers of the head. This one is starting with the scalp. So the pink layer is the skin of scalp, and then we have [the] bone of skull.
>
> So the scalp was more cut through and the bone of the [skull] was actually cut through as well, and pieces of it were just, like, breaking off.
>
> ... I can't describe it any more than just it was multiple fractures of the skull with exposure of the brain tissue beneath the skull and damage and bleeding to the actual brain tissue.

R. 244-47.

In Dr. Riemer's opinion, Shonda had suffered "fatal, non-survivable injuries" and she could not have survived her injuries, even if she had been closer to a hospital. ***R. 247.***

The jury also heard that Appellant had confronted Shonda with a butcher knife roughly six months before October 16, 2016. April Jenkins testified she lived next door to Shonda on July 17, 2016. They did not interact much because Shonda "stayed to herself." However, April was sitting on her porch with her sister and her neighbor's boyfriend on the night of July 17th when they saw. Shonda and Appellant outside of her apartment. ***R. 154-157.***

April testified that Appellant "had a butcher knife after her" and that Shonda was "backing away" while holding her hands up. Appellant dropped the knife to his side after April said something to him, but he also told her that she "needed to mind [her] mother F'ing business." At that point, April and the man on her porch briefly argued with Appellant before he and Shonda left in Shonda's white Camry. ***R. 157.***

April called the police and reported what she had seen when they responded. She also provided a license tag number. Later, April spoke to Shonda and asked if she was okay. Shonda said that "she was fine." ***R. 157-59***.

Officer Gray Mason, of the Moncks Corner Police Department, testified that he responded to April's call on July 17, 2016. April said that "a black female had come running out of the apartment and a man had come out of the apartment. And they were yelling at each other back and forth, and the man had ... a butcher knife." Neither Appellant nor Shonda were there when Officer Mason arrived, and the license tag number that April gave him (KJA 600) was for a different vehicle than Shonda's Camry.[7] Officers did not find her Camry, although they searched the rest of the day for it. When Officer Mason went to Shonda's apartment the next day, she would not even tell him her name. ***R. 164-67***.[8]

STANDARD OF REVIEW

Appellate courts sit to review errors of law only in criminal cases, *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001), and an appellate court is bound by a trial judge's factual findings unless they are clearly erroneous. *Id.* at 6, 545 S.E.2d at 829. The conduct of a criminal trial is left largely to the sound discretion of the trial judge, who will not be reversed in the absence of a prejudicial abuse of discretion. *State v. Bridges,* 278 S.C. 447, 448, 298 S.E.2d 212, 212 (1982). *See also State v. Bryant*, 372 S.C. 305, 312, 642 S.E.2d 582, 586 (2007). *State v. Gaster*, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002) (an appellate court will not reverse a trial judge's decision to

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[7] Unfortunately, April had inverted two letters on the tag. Taronda testified that the tag was "KAJ 600." ***R. 172***.

[8] The trial judge's instructions limited the jury's consideration of this evidence to "the question of intent, motive, and common scheme or plan." They could not consider this evidence as proof of Appellant's guilt or for any other purpose. ***R. 281-82***.

admit or exclude evidence absent a clear prejudicial abuse of the trial judge's broad discretion in evidentiary matters); *State v. Kelley*, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995) ("A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice"). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *State v. McDonald*, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

ARGUMENT

The trial judge did not abuse her discretion by allowing the State to introduce six autopsy photographs that accurately depicted the victim's injuries (State's Exs. 61-63 and 88-90) through the pathologist who conducted the autopsy because these photographs corroborated and illustrated the pathologist's findings; they corroborated the testimony of the paramedic who transported the victim to the hospital and the first responding officer, who saw the injuries at autopsy; they were extremely probative on whether Appellant acted with malice aforethought, which was the only question before the jury; and their probative value was not substantially outweighed by the danger of unfair prejudice.

Notwithstanding Appellant's argument to the contrary, Respondent submits that the trial judge did not abuse her discretion by allowing the State to introduce six autopsy photographs that accurately depicted the victim's injuries (State's Exs. 61-63 and 88-90) through the pathologist who conducted the autopsy because the photographs corroborated and illustrated the pathologist's findings; they corroborated the testimony of the paramedic who transported the victim to the hospital and the first responding officer, who saw the injuries at autopsy; they were extremely probative on whether Appellant acted with malice aforethought, which was the only question before the jury; and their probative value was not substantially outweighed by the danger of unfair prejudice.

A. Events in the trial court.

The trial judge addressed the admissibility of the autopsy photographs in a pretrial hearing. The State noted that it intended to introduce three color photographs (Court's Exs. 1-3) marked for

identification as State's Exs. 61-63 and three black and white photographs (Court's Exs. 10-12) marked for identification as State's Exhibits 88-90. The State also made the other photographs Court's Exhibits 2-9 and 13-55, part of the record in order to show the trial judge "the breadth of the photos and that we were selecting just very specific photos to show each injury so that the pathologist could describe that." The latter photographs were marked as Court's Exhibits. ***R. 4-5***.

Appellant objected to the introduction of the proffered photographs because they were "more prejudicial than they are probative." He argued that "[t]he only issue that is going to be before this jury is the intent behind the crime, the manner in which the victim died, and the perpetrator of the crimes are not in question; therefore, the photographs are solely going to be introduced to inflame the emotions of the jury." He also claimed that introduction of the photographs would deprive him of a fair trial, in violation of the Fifth and Fourteenth Amendments of the United States Constitution and article I, section 3 of the South Carolina Constitution. Because the manner of death was not in question, he argued that the photographs "would likely mislead" jurors and "confuse the issues that are before them." However, the photographs would not assist jurors in determining Appellant's s intent, since they only highlight the manner of death. ***R. 5-6***.

He further contended that the photographs "would be a waste of time" and prejudicial under Rule 403, SCRE, since "medical examiner, the emergency medical technicians, and the responding law enforcement will be testifying to the manner of death and extent of the injuries that the victim received." Also, they were irrelevant because the manner of death was not at issue. ***R. 7***.

In response, the State argued that Appellant claimed that this was a case of voluntary manslaughter. So, the State had the burden to prove "an intentional killing with malice," and "these photographs illustrate malice very, very vividly." The State also observed that the materiality and

admissibility of photographs is in the sound discretion of the trial court under *State v. Collins*, 409 S.C. 524, 530, 763 S.E.2d 22, 25 (2014), and argued that the Court in *Collins* approved of photographs showing the extent of the victim's injuries. The State likewise submitted that these types of injuries are beyond "the knowledge of an ordinary juror." ***R. 8-9***.

The State noted that "a knife was never found," and it argued that the photographs demonstrate both the manner of death and how Appellant killed Shonda. The State further argued that it had the right to present evidence showing the jury "exactly what happened so that [the jury] can consider all of the issues and weigh all of the evidence." While it conceded that the proffered photographs were "horrific," it pointed out that "this crime was horrific." Accordingly, it sought to introduce the photographs so that it could meet its burden of proof. ***R. 9***.

Appellant replied by reiterating that the manner of death was not in question, and the fact the injuries were "so gruesome, [did] not show malice which would be the intent in my client's head at the time." Instead, the photographs showed "the gruesome nature of the injuries and we're not disputing that fact." ***R. 9***.

The trial judge ruled that the photographs were admissible as follows:

> In chambers the State presented the entire photo array. Based upon the presentation here today, the State has selected six photographs -- three color, three black and white -- to show the extent of the injuries. Based on the State's argument and my review of the case law, I find that the photographs are necessary to substantiate material facts regarding the nature of the crime and show evidence of malice.
>
> I do find the photos contained information that make them more probative than prejudicial. I do not find that the photographs will inflame the emotions of the jury to draw sympathy of the jury, to draw sympathy for the victim's manner of death.
>
> State's 61, 62, 63, 88, 89, and 90 will be admitted noting your exception.

R. 10, lines 2-18. The photographs were then introduced into evidence. ***R. 10, lines 19-20***.

The photographs were formally introduced during the testimony of Dr. Ellen Riemer, the forensic pathologist who performed the autopsy. Before she testified, the State and the trial judge took precautions to minimize any prejudice to Appellant that could arise from introduction of the photographs. First, the State assured the trial judge that the individuals observing this testimony were "okay to remain" because they had "an understanding of what is about to take place and that they cannot have an emotional reaction." The trial judge then directed the State to "give the instructions to the witness" and the State responded affirmatively. ***R. 229***.

The State noted that it had asked Dr. Riemer "if she would be comfortable at the appropriate time, when we're showing the pictures, if she could leave the witness chair and stand in front of the jury and just show the individual pictures rather than us projecting them onto the large screen behind her." The State had discussed this proposed procedure with counsel for Appellant and was told that counsel did not object to it. ***R. 229-30***. Appellant's counsel confirmed that while Appellant objected to the photographs being admitted, he did not object to this procedure. ***R. 230***.

The trial judge instructed Appellant to object to any photograph he found objectionable and she explained to Dr. Riemer that an objection was not personal but was merely a requirement for Appellant "to protect the record." Finally, the trial judge provided a "[l]ast chance for any member of the victim's family to leave the courtroom" before Dr. Riemer testified, and the State placed on the record that it was only offering State's Exs. 61-6 and 88-90. ***R. 231***. Appellant thereafter twice renewed his objection in front of the jury before Dr. Riemer's testified about what the photographs depicted and before they were introduced. ***R. 238-39***.

B. Discussion.

The conduct of a criminal trial is left largely to the sound discretion of the trial judge, who will not be reversed in the absence of a prejudicial abuse of discretion. *Bridges,* 278 S.C. at 448,

298 S.E.2d at 212. *See also Bryant*, 372 S.C. at 312, 642 S.E.2d at 586; *Gaster*, 349 S.C. at 557, 564 S.E.2d at 93 (an appellate court will not reverse a trial judge's decision to admit or exclude evidence absent a clear prejudicial abuse of the trial judge's broad discretion in evidentiary matters); *Kelley*, 319 S.C. at 176, 460 S.E.2d at 370 ("A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice"). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law" *McDonald*, 343 S.C. at 325, 540 S.E.2d at 467. *See also Collins*, 409 S.C. at 530, 763 S.E.2d at 25 (same); *State v. Stephens*, 398 S.C. 314, 319, 728 S.E.2d 68, 71 (Ct.App. 2012). Generally, all relevant evidence is admissible. Rule 402, SCRE.

"The relevancy, materiality, and admissibility of photographs as evidence are matters left to the sound discretion of the trial court." *Collins*, 409 S.C. at 534, 763 S.E.2d at 27 (quoting *State v. Nance*, 320 S.C. 501, 508, 466 S.E.2d 349, 353 (1996)); *State v. Todd*, 290 S.C. 212, 214, 349 S.E.2d 339, 340 (1986). Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE; *State v. Shuler*, 353 S.C. 176, 184, 577 S.E.2d 438, 442 (2003); *State v. Alexander*, 303 S.C. 377, 401 S.E.2d 146 (1991). "To constitute unfair prejudice, the photographs must create a 'tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.'" *Kelley*, 319 S.C. at 178, 460 S.E.2d at 370-71 (quoting *Alexander*, 303 S.C. at 377, 401 S.E.2d at 149). "'If the offered photograph serves to corroborate testimony, it is not an abuse of discretion to admit it.'" *State v. Torres*, 390 S.C. 618, 623, 703 S.E.2d 226, 229 (2010) (quoting *Nance*, 320 S.C. at 508, 466 S.E.2d at 353).

Notwithstanding Appellant's complaints to the contrary, the trial judge did not abuse her discretion by allowing the State to introduce these autopsy photographs. First, State's Exs. 61-63 and 88-90 were relevant because they corroborated Dr. Riemer's testimony about the multitude of injuries that she found when she performed the autopsy on the victim. *See Torres*, 390 S.C. at 623, 703 S.E.2d at 229; *Nance*, 320 S.C. at 508, 466 S.E.2d at 353. Despite Appellant's hyperbole as to what is depicted in the photographs,[9] the photographs were presented in the course of the Dr. Riemer's clinically scientific and almost educational discussion of her findings. For most of the photographs, she explained precisely what was depicted, how the photograph supported her finding(s), and why the matter depicted in the photograph was significant. *Id. See also State v. Gray*, 408 S.C. 601, 612-16, 759 S.E.2d 160, 166-68 (Ct. App. 2014) (Court finding that three autopsy photographs that showed the victim's exposed skull and brain were probative because they corroborated the pathologist's findings concerning the extent and location of the victim's head injuries and the cause of death, and they were important to the State's ability to prove malice).

Second, Dr. Riemer clearly testified that the selected photographs would assist her in explaining her findings to the jury and she noted that a "picture is worth a thousand words." ***R. 239-40.***[10] *Id.* Third, these photographs also corroborate the testimony of paramedic Bradley

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[9] His argument that the photographs should be excluded from evidence because they are "gruesome" and "horrific" ignores both that murder is a horrific crime, *see* S.C .Code Ann. § 17-25-45(C)(1) (Supp.2019) (classifying "murder" as a "most serious offense" under the "two strikes" law); *Furman v. Georgia*, 408 U.S. 238, 394 n. 18 (1972) ("There is no serious claim of disproportionality presented in these cases. Murder and forcible rape have always been regarded as among the most serious crimes. It cannot be said that the punishment of death is out of all proportion to the severity of these crimes"), and that he carried out the murder in this case in a very gruesome manner.

[10] This adage "refers to the notion that a complex idea can be conveyed with just a single still image." Also, "[i]t is believed by some that the modern use of the phrase stems from an article by Fred R. Barnard in the advertising trade journal *Printers' Ink*, promoting the use of images in advertisements that appeared on the sides of streetcars. The December 8, 1921 issue carries an ad

Dorman (***R. 71-73***) concerning the victim's injuries that he observed at the crime scene and Officer Spurgeon's testimony concerning the injuries that she saw at autopsy. ***R. 59***.

Fourth, there is no merit to Appellant's contention that State's Exs. 61-63 and 88-90 were not needed to prove the injuries that were found on autopsy, in light of the pathologist's testimony and her use of two charts (State's Exs. 92-93) in connection with her testimony. This is the wrong inquiry. The appropriate question for determining relevance was whether each of these photographs had "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. The photographs at issue pass this standard.

Fifth, Appellant's efforts to constitutionalize the issue before this Court conflicts with United States Supreme Court precedent. See *Estelle v. McGuire*, 502 U.S. 62, 67 (1991) ("In ruling that McGuire's due process rights were violated by the admission of the evidence, the Court of Appeals relied in part on its conclusion that the evidence was "incorrectly admitted ... pursuant to California law." Such an inquiry, however, is no part of a federal court's habeas review of a state conviction. We have stated many times that "federal habeas corpus relief does not lie for errors of state law") (citations omitted); *Strickland v. Washington*, 466 U.S. 668, 684-85 (1984) ("The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause"); *Spencer v. Texas*, 385 U.S. 554, 564 (1967) (the Constitution "has never been thought [to] establish this Court as a rule-making organ for the promulgation of state rules of

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entitled, 'One Look is Worth A Thousand Words.'" *See* http://en.wikipedia.org/wiki/A_picture_is_worth_a_thousand_words. (Footnote omitted).

criminal procedure"). Thus, the issue before the Court is one of whether the photographs were properly admitted as a matter of state evidentiary law.

Sixth and of greatest significance, the State indicted Appellant for murdering Shonda Davis. (*See* ***R.305-306***) This required the State to prove that he killed her "with malice aforethought, either express or implied." S.C. Code Ann. § 16-3-10 (2003). *See also State v. Blakely*, 402 S.C. 650, 742 S.E.2d 29 (Ct.App. 2013); *State v. Judge*, 208 S.C. 497, 38 S.E.2d 715, 719 (1946). "'Malice' is the wrongful intent to injure another and indicates a wicked or depraved spirit intent on doing wrong. *State v. Johnson*, 291 S.C. 127, 352 S.E.2d 480 (1987)." *State v. Kelsey*, 331 S.C. 50, 62, 502 S.E.2d 63, 69 (1998). It is the doing of a wrongful act intentionally and without just cause or excuse. *Tate v. State*, 351 S.C. 418, 570 S.E.2d 522 (2002). *See also State v. Fennell*, 340 S.C. 266, 275 n. 2, 531 S.E.2d 512, 517 n. 2 (2000) ("[m]alice is a legal term implying wickedness and excluding a just cause or excuse. The term malice indicates a formed purpose and design to do a wrongful act under the circumstances that exclude any legal right to do it"); *Arnold v. State*, 309 S.C. 157, 163, 420 S.E.2d 834, 837 (1992) (malice "is something which springs from wickedness, from depravity, from a heart devoid of social duty and fatally bent on mischief").

On the other hand, Appellant contented that he did not act with malice and that he asserted that he was only guilty of voluntary manslaughter. Voluntary manslaughter is an "unlawful killing of a human being in a sudden heat of passion upon sufficient legal provocation. S.C. Code Ann. § 16-3-50 (2003); *State v. Starnes*, 388 S.C. 590, 596, 698 S.E.2d 604, 608 (2011); *State v. Knoten*, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001); *State v. Walker*, 324 S.C. 257, 260, 478 S.E.2d 280, 281 (1996). The prosecution generally has the right to prove every element of the crime charged, even in cases where the defendant is willing to stipulate an element(s). *See Estelle*, 502

U.S. at 69; *Mathews v. United States*, 485 U.S. 58, 64 65 (1988); *State v. Johnson*, 338 S.C. 114, 122, 525 S.E.2d 519, 523 (2000).

Although Appellant stipulated to identity and the manner of death, he challenged the one element that is essential to any murder conviction: proof that he acted with malice aforethought.[11] Contrary to Appellant's objection, Respondent submits that a reasonable inference from the challenged photographs, as well as Dr. Riemer's testimony, is that he inflicted the various injuries when he killed the victim with malice aforethought. Accordingly, the photographs were relevant.

Further, the probative value of these photographs was not substantially outweighed by the danger of unfair prejudice under Rule 403, SCRE. "'A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances.'" *Collins*, 409 S.C. at 534, 763 S.E.2d at 28 (quoting *State v. Adams*, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct.App.2003)). Respondent submits that Appellant cannot show "exceptional circumstances" here.

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[11] Appellant cites to the United States Supreme Court's opinion in *Old Chief v. United States*, 519 U.S. 172 (1997), yet he conveniently ignores the following statement that is relevant to his claim of error:

> A syllogism is not a story, and a naked proposition in a courtroom may be no match for the robust evidence that would be used to prove it. People who hear a story interrupted by gaps of abstraction may be puzzled at the missing chapters, and jurors asked to rest a momentous decision on the story's truth can feel put upon at being asked to take responsibility knowing that more could be said than they have heard. A convincing tale can be told with economy, but when economy becomes a break in the natural sequence of narrative evidence, an assurance that the missing link is really there is never more than second best.

Id. at 189-190.

The photographs were extremely probative on whether he acted maliciously when he killed Shonda, vividly and accurately depicting as they did the brutally ferocious nature of his attack on her. Indeed, the force necessary to inflict these wounds, combined with the sheer number and severity of the wounds depicted by these photographs conclusively demonstrates that he acted with a malicious intent. The wounds to her face and head were so numerous and intersecting that a paramedic with eight years of experience testified that they were "too numerous to count and too overlapped to guess [their] sizes" (***R. 65; 71-72***), and a forensic pathologist who had performed over 4,000 autopsies (*see* ***R. 233; 235***) testified that Shonda's face was "almost unrecognizable as a face." ***R. 241***.

However, both the State and the trial judge took extensive measures to ensure that the photographs would not "create a 'tendency to suggest a decision on an improper basis, ... [such as] an emotional one.'" *Kelley*, 319 S.C. at 178, 460 S.E.2d at 370-71 (quoting *Alexander*, 303 S.C. at 377, 401 S.E.2d at 149). The State only selected six photographs out of the fifty-five photographs taken at autopsy. These six, although challenged at trial and on appeal, vividly and accurately depict the injuries that Appellant inflicted on the victim. Yet, they also were among the least (if not *the least*) offensive photographs that had been taken at autopsy. *Compare* Court's Exs. 1-55. Also, the only color photographs are State's Exs 61-63, which depict the defensive wounds to the victim's arm and her hand. The photographs depicting the injuries to her face and head, State's Exs. 88-90, were in black and white.

Each of these six photographs only depict the victim's injuries after those injuries were cleaned and, consequently, there is very little, if any blood present in them. The lone exception is State's Ex. 89, a black and white picture showing a wound to the head that was so forceful it penetrate the victim's skull and injured her brain. Further, none of the photographs were projected

onto the large screen, as were many other exhibits. Instead, Dr. Riemer left the stand, walked up to jurors and published each individual picture to jurors.

Moreover, both the trial judge and the State ensured that every member of Shonda's family who was present for Dr. Riemer's testimony was aware of the nature of her testimony and was admonished that any emotional outburst was prohibited. The record does not reflect that any such outburst occurred. Obviously, each of these steps helped to greatly minimize the chance that these photographs would inflame the emotions of jurors.

Appellant suggests that the challenged photographs exceed "the outer limits of what our law permits a jury to consider," *Torres*, 390 S.C. at 624, 703 S.E.2d at 229, and relies on *Torres* and *Collins* in support of this contention. His reliance is misplaced. *Torres* is readily distinguishable for several reasons. In *Torres*, the prosecution introduced sixteen autopsy photographs and a number of crime scene photographs of the victims in the **sentencing phase** of the appellant's capital trial. *Id.* at 622, 703 S.E.2d at 228. Also, these photographs are far more graphic than those presently at issue, with some depicting the male victim's skull crushed in completely and others showing the female victim's eye was missing, her face was unrecognizable, her mouth was where her cheek should be, and her dental bridge was essentially sticking out of her neck. As the Court in *Torres* acknowledged, however, the scope of the probative value is much broader in the sentencing phase of a capital murder trial, than in the guilt phase. *Id.* at 623, 703 S.E.2d at 229. Further, unlike the pre-autopsy photographs in *Collins*, State's Exhibits 61-63 and 88-90 depicted precisely what Appellant, personally, did to the victim and nothing more.[12]

[12] In *Collins*, the appellant was charged with involuntary manslaughter and three counts of owning a dangerous animal. At trial, the trial judge admitted into evidence seven pre-autopsy photographs of the child victim, who died of "extensive traumatic injury" after being severely mauled by dogs. *Collins*, 409 S.C. at 528-33, 763 S.E.2d at 25–27. This Court reversed, finding the circuit court erroneously admitted the photographs, and the error was not harmless. *Id.* at 533, 763 S.E.2d at

Given the manner in which the challenged photographs were presented and the pathologist's testimony about what they depict, Respondent submits that they simply did not create a "tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one." *Kelley*, 319 S.C. at 178, 460 S.E.2d at 370-71; *Alexander*, 303 S.C. at 377, 401 S.E.2d at 149. Particularly in this day and age, where forensic matters are graphically shown in various and sundry popular prime time television programs and documentaries - such as "Forensic Files" and "CSI" and its spin-offs - the jurors in this case simply would not be so shocked by these photographs that they would have rendered a verdict based on an emotional basis. Rather, they would have understood that the autopsy was a necessary and indispensable process to determine the cause of death.

In other words, the photographs were relevant and necessary, and they were not introduced with the intent to inflame, elicit the sympathy of, or prejudice the jury. *Id.* Respondent submits that these photographs were less prejudicial than autopsy photographs or graphic crime scene photographs that this Court or the South Carolina Supreme Court has previously found admissible in numerous other cases. *See, e.g., State v. Hawes*, 423 S.C. 118, 130-31, 813 S.E.2d 513, 520-21 (Ct. App. 2018), *reh'g denied* (May 24, 2018) (upholding admission of crime scene photographs of wounds to unclothed victim's right neck and breast where the photographs established the circumstances of the crime scene and corroborated the testimony of both the victim's next-door

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763 S.E.2d at 27. However, the Supreme Court reversed, with two members finding that the photographs were "highly probative, corroborative, and material in establishing the elements of the offenses charged; [their] probative value outweighed [their] potential prejudice; and the appellate court should not have invaded the trial court's discretion in admitting this crucial evidence based on its emotional reaction to the subject matter presented." *Id.* at 534–35, 763 S.E.2d at 28. Justice Kittredge, who was joined by Justice Hearn, concurred in the result. He found that the photographs were erroneously admitted but that any error was harmless and non-prejudicial. *Id.* at 539, 763 S.E. at 30 (Kittredge, J., concurring in result). Justice Pleicones dissented. *Id.* at 540. 763 S.E.2d at 30-31.

neighbor, who had heard the appellant attacking the victim on the morning of the murder, and the crime scene investigator); *Gray*, 408 S.C. at 612-16, 759 S.E.2d at 166-68 (finding that three autopsy photographs showing the victim's exposed skull and brain had probative value because they corroborated the pathologist's findings concerning the extent and location of the victim's head injuries and cause of death and were important to the State's ability to prove malice); *Kelsey*, 331 S.C. at 76, 502 S.E.2d at 76 (photographs of various bone and bomb fragments and clothing found at crime scene were admissible in murder prosecution, despite claim that, because victim's body was found in woods 46 days after crime was committed, weather or local fauna could have altered crime scene during that period; photographs corroborated other testimony concerning condition of victim's body as first discovered by police at crime scene, and location of bone and bomb fragments supported testimony that bomb had been detonated in victim's mouth); (upholding admitting autopsy photographs of child victim's internal organs and other injuries). *See also Todd*, 290 S.C. at 214, 349 S.E.2d at 340 (black and white photograph of the victim's right upper chest with the breast exposed showing the location of the bullet wound was admissible to corroborate pathologist's testimony regarding location of wound, and did not prejudice defendant, since there was explicit testimony that victim's blouse and brassiere had been removed by medical personnel when they arrived at scene in order to administer medical assistance); *State v. Jarrell*, 350 S.C. 90, 106, 564 S.E.2d 362, 371 (Ct. App. 2002) (upholding the admission of graphic autopsy photographs in homicide by child abuse case because they corroborated testimony and demonstrated the extent of the injuries); *State v. Ward*, 374 S.C. 606, 613, 649 S.E.2d 145, 149 (Ct. App. 2007) (upholding trial court's finding that probative value of two photographs illustrating graze wounds on the victim's back outweighed their prejudicial effect, since the jury's knowledge of the graze wound was necessary to rebut the defense's arguments about the angle of the shot);

State v Dial, 405 S.C. 247, 260-61, 746 S.E.2d 495, 501-02 (Ct.App. 2013) (probative value of three autopsy photographs of five-month-old victim's head injuries was not outweighed by danger of unfair prejudice in prosecution for homicide by child abuse; where photographs were introduced to corroborate testimony of forensic pathologist who performed autopsy that victim's various injuries were inconsistent with an accidental injury as defendant claimed had occurred, and they were highly probative of whether victim was abused and whether abuse was cause of his death, both integral elements of charged offense); *State v. Nichols*, 325 S.C. 111, 121, 481 S.E.2d 118, 124 (1997) (admitting a photograph of the victim's face because it demonstrated the angle and distance from which the victim was shot).

Nor did the challenged photographs confuse the issues or mislead the jury. To the contrary, they merely demonstrated that Appellant's claim the homicide was voluntary manslaughter lacked plausibility. The bottom line on his argument in this regard is that any juror viewing the photographs would see that he was guilty of murder and not manslaughter. However, this is not the type of "unfair prejudice" against which Rule 403, SCRE, protects. "'Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest [a] decision on an improper basis.'" *State v. Gilchrist*, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998) (quoting *United States v. Bonds*, 12 F.3d 540, 567 (6th Cir. 1993)).

Finally, any error in the introduction of these photographs must be viewed as non-prejudicial and harmless beyond a reasonable doubt, since their introduction could not reasonably have affected the result of the trial. *See State v. Sherard*, 303 S.C. 172, 175, 399 S.E.2d 595, 596 (1991) ("Error in a criminal prosecution is harmless when it could not reasonably have affected the result of the trial"); *State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) ("When guilt

has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result"). "Whether an error is harmless depends on the circumstances of the particular case." *State v. Tapp*, 376, 389, 728 S.E.2d 468, 475 (2012).

Here, any error must be viewed as harmless and non-prejudicial because, at worst, these photographs were cumulative to the other expert testimony concerning the victim's injuries. The admission of improper evidence is harmless when the evidence is merely cumulative to other evidence. *See State v. Haselden*, 353 S.C. 190, 197, 577 S.E.2d 445, 448-49 (2003). *See also See State v. Brazell*, 325 S.C. 65, 79, 480 S.E.2d 64, 72 (1997) ("Even if the descriptive testimony of the prosecution's witnesses adequately conveyed the brutality and malice of the crime and these photographs were unnecessary, they were harmless surplusage") (citing *State v. Robinson*, 201 S.C. 230, 22 S.E.2d 587 (1942) (finding the photographs unnecessary but harmless because they were not prejudicial or inflammatory).

Additionally, there was overwhelming evidence of Appellant's guilt, such that the error complained of could not have affected the result of his trial. "Where 'guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached,' an insubstantial error that does not affect the result of the trial is considered harmless.'" *State v. Brown*, 424 S.C. 479, 493, 818 S.E.2d 735, 743 (2018) (quoting *State v. Byers*, 392 S.C. 438, 447, 710 S.E.2d 55, 60 (2011)).

Here, the State presented evidence that Shonda told Mr. Morris at dinner on the 15th that she wanted to end her relationship with Appellant. ***R. 30***. Ms. Jessica Johnson saw Appellant walking around the back and side of Shonda's residence before she returned home on the night of October 15th. ***R. 36-37***. More importantly, Ms. Johnson heard Shonda screaming, "Help, he's

killing me," and she saw Appellant stabbing Shonda in the face, as did her two young sons and her boyfriend. ***R. 33; 37-39.***

Additionally, Appellant fled the scene. In the process of fleeing, he attempted to get his unsuspecting friend, Mr. Skiner, assist him in his efforts, by lying to Mr. Skiner about why he was in trouble and needed to leave the trailer park and by telling his friend that he had not spoken to Shonda "in a few months." ***R. 134.*** *See State v. Pagan*, 357 S.C. 132, 591 S.E.2d 646 (2003) (evidence of flight constitutes evidence of defendant's guilty knowledge and intent); *State v. Grant*, 275 S.C. 404, 407, 272 S.E.2d 169, 171 (1980) ("[A]ttempts to run away have always been regarded as some evidence of guilty knowledge and intent") (citation omitted); *State v. Crawford*, 362 S.C. 627, 634-36, 608 S.E.2d 886, 890-91 (Ct. App. 2005).[13]

Likewise, he lied to Shonda's sister, Taronda Gilliard, when she called and asked him about what had happened to Shonda. He feigned ignorance and claimed that he had been in bed. ***R. 120.*** Further, the State presented the text messages exchanged between Shonda and Appellant on the day of the murder. These text messages reflect Shonda's effort to terminate their relationship and Appellant's effort to maintain it. Also, jurors heard that he sent eight missed video chats that night. ***R. 217-225.***

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[13] "This common law rule is based on ordinary human experience that echoes its often-quoted Biblical antecedent: 'The wicked flee where no man pursueth; but the righteous are bold as a lion.' Proverbs 28:1.' " *Ordway v. Com.*, 391 S.W.3d 762, 790 (Ky. 2013). *See also* 2 Wigmore, *Evidence* § 276 (Supp. 2007). Contrary to the evidence in *State v. Odems,* 395 S.C. 582, 585, 589-90, 720 S.E.2d 48, 49, 52 (2012), where a witness offered a plausible alternative reason for Odems fleeing the scene of his arrest in the State's case-in-chief – *i.e.*, he wished to avoid trouble because the driver told him that the driver did not have a license - there was no such plausible explanation for leaving the state here. Instead, viewing the evidence in the light most favorable to the State, the *only reasonable inference* is that Appellant fled because he knew that he would otherwise be arrested for the crimes he and his co-defendants had committed.

The jury likewise saw a video of excerpts of admissions that Appellant made at his bond hearing, including his statements that the victim did not deserve to be killed and that he let his jealousy and anger get the better of him when she went to dinner with her friends instead of responding to his efforts to talk to her about their relationship. State's Ex. 71; ***R. 226-227***. Further, he had a cut on his hand when arrested. Subsequent DNA testing showed that he had his blood on his right ear and left palm (***R. 211-12***), but he had her blood on his boots and his t-shirt. ***R. 212-215***.

Also, the jury heard that he had threatened Shonda with a butcher knife on July 17, 2016, or roughly six months before using a knife on her (***R. 154-59; 164-67***),[14] as well as evidence that he had previously called Mr. Skiner early one morning and said, "I feel like killing her and killing myself and I'm tired of all this and I'm stressed out." ***R. 130***.

CONCLUSION

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

Respectfully Submitted,

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[14] Again, the trial judge's instructions limited the jury's consideration of this evidence to "the question of intent, motive, and common scheme or plan." They could not consider this evidence as proof of Appellant's guilt or for any other purpose. ***R. 281-282***.

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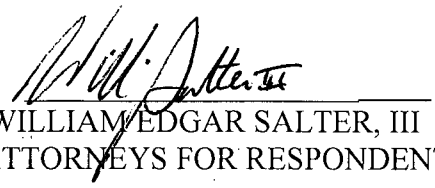
By: 
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October 1, 2019.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Berkeley County
The Honorable Kristie L. Harrington, Circuit Court Judge
Appellate Case No. 2018-000980

THE STATE,

Respondent,

vs.

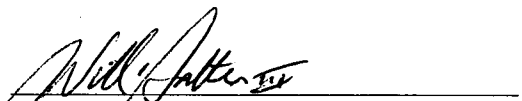
EDWARD ISAIAH NELSON,

Appellant.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and does not include, or partially redacts, personal data identifiers, Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings, 375 S.C. 56, 650 S.E.2d 462 (2007)(requiring redaction of social security numbers, names of minor children, financial account numbers, and home addresses).

This 1st day of October, 2019.



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