STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Jasper County
Carmen T. Mullen, Circuit Court Judge

THE STATE,

Respondent,

v.

RICHARD PASSIO, JR.,

Appellant

Appellate Case No. 2018-001488.

INITIAL BRIEF OF RESPONDENT

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II. Whether the trial court judge erred when she allowed the State to present a Facebook profile picture allegedly posted by Passio because it was irrelevant and unduly prejudicial?

RESPONDENT'S COUNTERSTATEMENT OF THE ISSUES ON APPEAL

I. Did the trial court properly deny Appellant's directed verdict motion where the State circumstantially established motive, means, and opportunity for Appellant to have killed his wife prior to calling 911 and reporting she committed suicide but also reporting that she shot multiple times?

II. Did the trial court properly admit a screenshot of Appellant's Facebook profile page through the testimony of Appellant's father, who testified he was Facebook friends with Appellant and identified the photographs as being of Appellant and two of his children, where the profile page tended to show Appellant's father's bias, prejudice, or motive to misrepresent?

STATEMENT OF THE CASE

In August 2016, the Jasper County Grand Jury indicted Appellant Richard Passio, Jr. for the June 3, 2016 murder of his wife Michelle Bennington Passio. (R. pp. *Indictment No. 2016-GS-27-00300). Christopher Geier, Esquire, represented Appellant on the charge. Assistant Fourteenth Circuit Solicitor Hunter Swanson prosecuted the case. (Tr. p. 2).

On July 20, 2018, Appellant proceeded to a jury trial before the Honorable Carmen T. Mullen. (Tr. p. 1). After a four-day trial, the jury convicted Appellant of murder. (Tr. p. 725, lines 11-15). Immediately following the trial, Judge Mullen sentenced Appellant to 30 years with credit for 27 days' time-served. (Tr. p. 735, lines 8-17).

This appeal follows with notice being served August 10, 2018. (R. p. *Notice of Appeal).

STATEMENT OF FACTS

Appellant Richard Passio Jr. and his wife Michelle lived on East Main Street in Ridgeland, South Carolina, just blocks away from their family-run restaurant Jasper's Porch and other local eateries and watering holes. With eight children ranging from the ages of seven weeks to pre-teen and a dog, the Passio family equaled ten. Appellant's brother and father also lived in town and worked at Jasper's Porch.

Just before 6 AM on June 3, 3016, Appellant called 911. He asked for help because his wife had committed suicide. He also told the 911 operator that she fired the gun three times. (State's Ex. 1; Tr. p. 97, lines 3-4; Tr. p. 421, lines 16-19). "She shot in the air twice, and then she put it under her neck." (State's Ex. 1 at 1:39 to 1:45). Appellant also told the 911 operator that he could not see because "she got [his] contacts out," that his hand was injured because he had it on the bottom of the gun, and that "she was really drunk," they were fighting, "she attacked [him] a few times," and that "she does this a lot." (State's Ex. 1, at 2:10 to 3:42).

When Lt. Ginn of the Ridgeland Police Department arrived seven minutes later, Appellant came down from his front porch, waving. He said his wife shot herself while they struggled over a weapon. He had some blood on his right hand and he had a lot of blood on the right side of his pants. But the blood appeared dry. He also said he had lost his contact lenses and could not find his glasses, which were later located in a bathroom inside. (Tr. p. 98, line 4 – p. 101, line 3). Appellant's hand appeared crusted with dried blood, so the paramedic handed Appellant a bandage for him to self-administer. (Tr. p. 212, lines 5-20). Appellant may have been cut by the slide on the pistol. (Tr. p. 165, line 6 – p. 167, line 7).

Appellant's house was dark and quiet, despite being occupied by eight children and a dog. A baby slept in a basinet in the same room as the victim, Michelle Passio. First responders

found her lying on the sofa, deceased, with a pistol lying on the floor right beside her. (Tr. p. 101, line 4 – p. 104, line 4; Tr. p. 211, lines 11-16; State's Ex. 3). They "entered the scene to find the patient lying on the sofa, with her head back, with obvious bullet hole to the bottom of her chin. There was a pool of blood on the chest that had already started to coagulate. [The] patient had blood coming from their nose and mouth." (Tr. p. 221, lines 16-21).

Soot and an imprint from the muzzle of the gun appeared underneath her chin, indicating the gun was held in contact with her skin at the time of the shot. (Tr. p. 242, lines 6-10). Her skin appeared ashen. (Tr. p. 221, line 25 – p. 222, line 1). Her body was cold to the touch. Blood in her right ear did not drip, but "had coagulated, ballooned up." Likewise, no blood came from the exit wound on the top of her head. The wound appeared dry. (Tr. p. 133, lines 3-15; Tr. p. 211, lines 17-21). A blanket lay on top of her. (Tr. p. 107, lines 12-15). Though EMS's cardiac monitor showed a workable cardiac rhythm, the brain matter and blood in her hair and the injury caused EMS to opine that the victim could not be revived. (Tr. p. 223, lines 19-25).

Inside, it smelled odd to Ginn. He described the smell as something other than trash; it may have been decomposition. (Tr. p. 112, line 9 – p. 113, line 6, Tr. p. 133, lines 1-3). Ginn went back outside to tell Appellant that the victim was deceased. Appellant told him "that the two of them had fought over the weapon; that there was three rounds fired; that the fourth round that was fired" struck her. (Tr. p. 105, lines 15-22). Appellant seemed only a little emotional, never tearing up. (Tr. p. 105, line 25 – p. 106, line 1; Tr. p. 109, line 24 – p. 110, line 3).

Later DNA analysis showed that both Appellant and the victim left DNA on the trigger of the pistol. (Tr. p. 257, lines 14-18). The analyst also located Appellant's DNA on the pistol slide, (Tr. p. 258, lines 8-16), and further concluded that the underside of the victim's fingernails contained a complex mixture of two individuals' DNA. This conclusion applied to fingernail

scrapings collected from each of the victims' hands. (Tr. p. 251, lines 16-25).

Ginn recovered one empty shell casing from the chamber of the pistol. (Tr. p. 122, lines 1-23). Another Ridgeland Police Department officer, Cpl. Chris McIntosh, located three bullet strike areas inside the residence: one in the doorframe behind the victim's head; one to a windowpane in an adjacent room behind the victim's head, and another on the ceiling. McIntosh recovered two more shell casings from the residence. (Tr. p. 126, line 19 – p. 129, line 8). One was underneath the couch and another was in the room adjacent to the back of the victim's head. (Tr. p. 131, lines 4-17). "It appeared, from the way she was lying," that the gunshot wound underneath the victim's chin aligned with the bullet strike in the ceiling. (Tr. p. 159, lines 8-18).

When they removed the victim's body, they found that blood had traveled with the downward slope of the floor and pooled underneath the couch. (Tr. p. 131, line 21 – p. 132, line 8). "There was nothing dripping from the couch, the arm of the couch. Everything had already soaked in there." (Tr. p. 133, lines 8-10). The blood on the victim and on the floor was "very thick and very pliable." (Tr. p. 211, line 25 – p. 212, line 3). Blood led from the living room to the front door. (Tr. p. 170, lines 10-11). The Ridgeland officers did not locate blood in any other room or item in the house. (Tr. p. 170, line 18 – p. 171, line 10). McIntosh did find a hard-shell case, one that could be used to store a pistol, in the trunk of the car Appellant regularly drove. (Tr. p. 143, line 6 – p. 144, line 7; Tr. p. 254, lines 10-22). Only Appellant's DNA was located on the handle of that case. (Tr. p. 259, lines 11-23).

Though he had been dispatched to a suicide, Cpl. McIntosh investigated to determine whether a suicide or a homicide had occurred. (Tr. p. 181, line 13 – p. 182, line 6; Tr. p. 206, lines 3-5). He had never before responded to a suicide with multiple gunshot wounds or to a female suicide with a firearm. (Tr. p. 207, lines 3-21). Neither had the responding paramedic.

The paramedic had previously been dispatched to about 300 suicides, none of which involved multiple gunshots and only one of which concerned a female who had committed suicide with a firearm. (Tr. p. 219, line 13 – p. 220, line 19). Similarly, while the cause of death was undoubtedly a single gunshot wound to the underside of the victim's chin, the forensic pathologist could not rule out suicide or homicide as the victim's manner of death. She recorded it as undetermined. (Tr. p. 237, lines 1-8). The pathologist cursorily estimated that perhaps twenty percent of the female suicides she had seen occurred by gunshot. (Tr. p. 241, lines 10-19).

At trial, the State presented a series of local residents who could speak as eyewitnesses to tumult in the Passio's marriage and who could account for their whereabouts that night and into some of the early morning hours.

The victim's mother, Pam Bennington, did not support her daughter's relationship with Passio. She did, however, support her daughter, and had only moved out of the Passio's home and back to Ohio a short time before the victim's death. (Tr. p. 392, line 15 – p. 393, line 1; Tr. p. 399, line 25 – p. 400, line 14). She noted that her daughter and Appellant "fought constantly" and Appellant "wouldn't let her do anything." He would call them incessantly when they took too long at the grocery store. If Pam tried to intervene, Appellant would order her back upstairs. Pam did not want to make things worse by getting involved. Once she witnessed Appellant grab and shove the victim during a fight. The victim was pregnant at the time. The victim also showed her mother bruises when they lived in Ohio and when they lived in Ridgeland. (Tr. p. 394, line 1 – p. 395, line 21).

According to Pam, Appellant once flipped the kitchen table while holding a baby. One time he threw a cat against the wall because he was mad at it. He called the victim degrading names and "always put her down." He required things be done a certain way within the home.

For example, Pam recalled Appellant sending the victim back to the store if his lunch meat was not sliced by the grocery deli precisely the way he liked it. (Tr. p. 396, line 8 – p. 397, line 20). Pam described him as "a control freak." (Tr. p. 404, lines 18-19).

Pam testified that the victim wanted a divorce, "She just couldn't take it anymore." (Tr. p. 398, lines 12-19). Pam stated her daughter planned to keep working to save money for the divorce, and that at some point Pam would come back to Ridgeland to help her leave. (Tr. p. 398, line 21 – p. 399, line 20). The victim met with a local family law attorney a couple of months prior to the shooting. The attorney recalled that the victim was pregnant, concerned, and frightened. The attorney informed her about the services of a domestic abuse shelter in Beaufort. The attorney had also received expressions of concern for the victim from Ridgeland residents. She did not meet with the victim after referring her to the shelter. (Tr. p. 378, line 4 – p. 380, line 24).

A manager at Jasper's Porch testified that when Appellant and the victim were at work together, "he was always looking to find out what she was doing and where she was while she was working" and that "some days you could feel tension in the air." (Tr. p. 330, lines 5-25). Several times, the victim reported that Appellant had taken her shift money and placed it somewhere in the office. (Tr. p. 331, lines 2-7). The manager noted that the victim was happier when Appellant was not around, and more reserved in his presence. (Tr. p. 336, line 13 – p. 337, line 2).

A shift leader at the restaurant, Lisa, also testified about her relationship with the Passios. She explained that Appellant sang Lisa's praises and the victim stopped getting along with her at some point thereafter. Appellant told Lisa that he moved his family to Ridgeland to remove the victim from a bad lifestyle in Ohio. He told Lisa his wife's friends were trash and that he wished

she would hang out with Lisa instead. She testified that Appellant was controlling of the victim, watching her from the cameras in the office or staring at her from certain positions within the restaurant. One time, Appellant punched a wall, and he would kick trashcans. (Tr. p. 341, line 15 – p. 345, line 21).

Shelby, a co-worker at Jasper's Porch, was good friends with the victim. Their children would play together. She said you could tell that the victim and Appellant were having problems during the last six months of the victim's life. Shortly before her death, the Passio family threatened to fire Shelby if she kept spending time with the victim because "according to them, you know, she wasn't acting right; she was lashing out." The day before the shooting, the victim told Shelby about her plans for that weekend. (Tr. p. 382, line 1 – p. 385, line 24).

Another Jasper's Porch employee, Brandon, testified that he was very good friends with the victim and ended up having a brief affair with her. They maintained a friendship thereafter. He explained that she acted "100% different" when Appellant was around. The victim acted reserved around her husband, but when Appellant was not around, she was always laughing, vocal, and trying to have fun. Brandon testified that rumors flew about their affair and Appellant confronted him about it twice. The first time, Brandon adamantly denied it. Afterwards, Brandon noticed that cameras went up in the kitchen at work. Work was also "completely different" when Appellant and the victim were there at the same time. Appellant "was worried about what Michelle was doing all the time" and it made for a tense environment. (Tr. p. 306, line 9 – p. 310, line 1).

The victim would pick Brandon up for work at his mother's house. As a result, the victim befriended Brandon's mother Carla. The victim arranged regular playdates for her own children with Carla's grandchildren at Carla's house. After some time, the victim began hiding her van

around the block from Carla's house. Sometimes, Appellant would show up at Carla's when the victim was there "as if she was caught doing something wrong." When this happened, the Passios would argue and leave. But Appellant "was never angry" when they came over as a couple. Cathy described the victim and her children would act different when Appellant was around: they were passive, "little automatons, robots." Without Appellant, the children acted like normal toddlers. Cathy advised the victim that she did not have to live with the "degrading and abusive" way Appellant treated her and that she should talk to Cathy's divorce attorney. (Tr. p. 354, line 2 – p. 361 line 15).

Another employee at Jasper's Porch, Angel, testified that when Appellant and the victim were working at the same time "you could tell when there w[ere] problems." Each of them would speak about their relationship issues with co-workers and it caused everyone to walk "on eggshells." One time he made her change clothes during a waitressing shift. (Tr. p. 292, line 22 – p. 294, line 10).

The night of the shooting, Angel was traveling past Schooner's, a bar just a few blocks from the Passio's house, when the victim saw her through the window and invited her in for a drink. According to Angel, she seemed a little sad and mentioned she had to be home at 12 AM. Five minutes before midnight, the friends decided to have another beer. But at 12 AM, the phone rang and everyone could see from the caller ID that it was Appellant. On the second call, someone picked up the phone and handed it to the victim. A few minutes later, Appellant showed up and Angel could tell from his facial expressions that he was upset even though he was speaking to the victim in a quiet voice. The victim lit a cigarette and Appellant "kind of knocked it out of her hand." The victim announced that was her cue to leave. (Tr. p. 296, line 10 – p. 300, line 4).

The bartender at Schooner's also noticed the argument and Appellant's knocking of the victim's cigarette. She estimated they argued for twenty to thirty minutes. "And then, she left, and he left shortly there, after her." She estimated they were gone from Schooner's by 12:30 AM. (Tr. p. 286, line 10 – p. 287, line 2). The victim had befriended the bartender, who testified it was ordinary for the Passios to drop by Schooner's after Jasper's Porch closed up for the night. The night of the shooting, the victim came into Schooner's to visit the bartender. They made plans to meet up with their children the following day. They were cutting up around 11 PM. When the clock struck midnight, Appellant called the bar because the victim had not yet made it home. Appellant then came to Schooner's and that's when the argument started. (Tr. p. 282, line 2 – 286, line 8).

Brandon was also at Schooner's that night. Before he got to the bar, however, he visited with Appellant. Friends at the time, Appellant called him over and they shared a couple of drinks on Appellant's front porch. (Tr. p. 311, lines 5-25). Brandon left. He had to walk right by Schooner's on his way home and decided to stop in. He greeted Angel and the victim and went over to talk to another woman. Brandon remembered that Appellant came in and "you could tell he was displeased" as he talked to the victim. He "saw her go to light a cigarette and him knock it out of her hand." Appellant went out and got on the phone. The victim left, and Appellant left "shortly afterwards." (Tr. p. 313, lines 1-25). Brandon thought he heard Appellant mention he needed to go pick up some Jägermeister from the restaurant, which Brandon found odd because Jasper's Porch had lost its liquor license and he thought all of the liquor had already been removed. (Tr. p. 314, lines 6-11). Surveillance footage shows Appellant arriving at Jasper's Porch at 12:53 AM the night of the shooting and leaving with a black case in his left hand at 12:55 AM. (State's Ex. 6; Tr. p. 333, line 11 – p. 334, line 18).

Once, a few weeks before the victim's death, Appellant took Brandon and a couple of other cooks to a back room and showed him a gun in "a black case." (Tr. p. 310, line 12 – p. 311, line 4). Appellant had called other Jasper's Porch employees into his office where they could see the gun. Lisa testified that Appellant called her office and showed her a gun in an open, black case. (Tr. p. 345, lines 1-21). Lisa's husband Otto, who at one time consulted on operations at Jasper's Porch, also recalled seeing Appellant with a gun in a black, box-like case in his office at the restaurant. (Tr. p. 351, line 3 – p. 352, line 12).

Months after the shooting, Appellant met up with Otto at a gas station to pay back a debt. "[A]ll of the sudden," Appellant told him his hand was injured during the shooting because "he had the hand on the gun when the fatal shot was triggered." Appellant told Otto the victim shot twice towards him, missing him and hitting the wall. (Tr. p. 352, line 13 – p. 353, line 17).

Turning back to Brandon, he made it home from Schooner's around 2 AM. He received a Facebook message from Appellant asking for a baby bottle. Brandon had two children and Appellant had eight, so the request puzzled Brandon. (Tr. p. 314, lines 14-24). Appellant also contacted the victim's friend and co-worker Shelby around 1:45 AM that night "asking for a bottle." Shelby said she did not have one to spare and that was the end of their conversation. She heard the victim in the background of the phone call. (Tr. p. 386, line 2 – p. 387, line 5).

Buzzed, Brandon messaged Appellant back at 2:03 AM that he did have a baby bottle. Appellant came over "almost instantaneous[ly]." (Tr. p. 314, line 24 – p. 316, line 25). Appellant took a seat on Brandon's front porch and began unloading on Brandon about it being "bad" at his house. Appellant "mentioned Michelle killing herself," stating "I hope tonight's not the night that something happens." That made things "weird" according to Brandon, who assured Appellant things would be ok in time and that he needed to go to bed. Appellant took the baby

bottle and went back to his car. Brandon estimated the conversation lasted less than ten minutes and that it must have been about 2:10 or 2:15 AM. (Tr. p. 318, line 13 – p. 319, line 14). Brandon knew that the victim had recently spoken to a mental health therapist at Appellant's behest. (Tr. p. 323, lines 7-22; Tr. p. 328, line 21 – p. 329, line 4). He also testified that in the month prior to the victim's death, that Appellant "had hinted to" suicide in relation to the victim. Brandon recalled thinking Appellant had told him that was the reason he moved the gun to the restaurant. (Tr. p. 327, lines 13-25).

A teenager who lived two houses behind the Passios was sitting outside around a fire with her friends between 1:00 and 3:10 AM that night. She heard a male and a female arguing, a door slam, and then gunshots from the direction of the Passio's house. She recalling hearing two shots, a pause, and two more. She estimated that she heard these events take place sometime between 2:30 and 3:00 AM. (Tr. p. 263, line 5 – p. 264, line 25; Tr. p. 266, lines 3-24).

Another neighbor who had befriended the victim said that she did not hear any gunshots that morning when she woke up around 4:30 or 5 AM to get ready for work. Nor did she hear any between 5:30 and 6 AM when she was out walking her dog. When she returned to her cottage with her dog, she saw police at the Passio's house and she saw Appellant fully dressed in slacks and dark clothes rather than his normal pajamas. The neighbor had planned to meet the victim that day. Prior to this event, the victim had shown her neighbor bruises hidden underneath her clothing. The neighbor explained that she had advised the victim to leave Appellant. The neighbor would hold onto money and cigarettes for the victim so that Appellant would not take them from her. She never saw Appellant walk the Passio's dog and believed he kept a cabinet of food just for himself that his children and the victim were not allowed to access. (Tr. p. 270, line 7 – p. 275, line 13).

Appellant presented some contradictory testimony at trial. Appellant presented Pam's mother and the victim's grandmother, Linda Bennington, who testified that she told the Ridgeland investigator that Pam "was a pathological liar." At trial, Linda explained that she was referring to frequent lies about "inconsequential" things around young children. (Tr. p. 431, line 17 – p. 432, line 9). Linda was aware that the victim was not happy with her marriage and wanted out. (Tr. p. 434, lines 13-20; Tr. p. 436, lines 11-15). Another witness, an across-the-street neighbor to the Passios, testified that it appeared they had "a typical marriage." She could see them arguing at times but also saw them being "very loving." (Tr. p. 548, line 6 – p. 550, line 6). She believed the victim "was a very loving mother, [but was] kind of erratic." But then again, as she later acknowledged, they had eight children. She did not hear anything on the night of the shooting. She also testified that she witnessed Appellant walk the dog on a daily basis. (Tr. p. 551, line 3 – p. 553, line 25).

Appellant presented expert testimony from Dr. Sarah Stuchell, psychologist and licensed marriage and family therapist. (Tr. p. 458, lines 2-4). Just months prior to the shooting, Dr. Stuchell briefly treated the victim and Appellant both individually and as a couple. During her initial clinical assessment, the victim represented she met with Dr. Stuchell at the behest of her husband, who believed she had bipolar disorder. She was pregnant, stressed, and having marital issues. (Tr. p. 459, line 5 – p. 460, line 13). Appellant provided the psychologist "more collateral information on the symptoms of bipolar that he saw in her"—he had researched bipolar disorder on the internet and personally opined that she had bipolar 1, with rapid cycling. (Tr. p. 461, line 23 – p. 462, line 7).

During her assessment, the victim disclosed to Dr. Stuchell that she smoked cigarettes and drank alcohol during her pregnancy, and that her husband accused her of using marijuana.

He had her submit a drug test and it came up positive. She did not disclose, but Dr. Stuchell learned prior to trial, that the victim had previously sought treatment for depression. (Tr. p. 461, lines 2-17). The victim did report she was seeking assistance from a domestic abuse shelter and always denied thoughts of self-harm. (Tr. p. 478, line 13 – p. 479, line 13).

After completing her initial assessment, Dr. Stuchell diagnosed the victim with "unspecified anxiety disorder; unspecified trauma and stress or related disorder; relationship distress with spouse or intimate partner; religious or spiritual problem," and noted to "rule out bipolar disorder." (Tr. p. 462, lines 19-24). Dr. Stuchell later explained that the "religious or spiritual problems" derived from the victim's going along with Appellant's religion "even though it gave her internal struggles." The psychologist even made a written reference to "religious brainwashing." (Tr. p. 477, lines 2-18). Dr. Stuchell recalled the victim complaining that her husband was controlling. (Tr. p. 470, line 24 – p. 471, line 1).

Dr. Stuchell noted other problems:

> Client reports she and her daughters are not allowed to wear makeup, jewelry, or fancy clothing due to husband's controlling, which is influenced by religious ideas. Client also reports it is because of their religion that she is on her eighth pregnancy, and that she is to be sexually available for her husband whenever he wants, and with no birth control. Client reports she wants a divorce, and she is done with his controlling behavior.

(Tr. p. 477, line 24 – p. 478, line 9).

The psychologist never recorded a diagnosis of bipolar. (Tr. p. 484, lines 2-25; Tr. p. 488, lines 1-11). Yet she opined at trial that the victim displayed symptoms of bipolar disorder because "she would leave the house late at night" and "stay out all night." She did not "need a whole lot of sleep" and was texting "like, 30 guys" which she referred to as acting out sexually. There was also drug use and drinking. (Tr. p. 472, line 24 – p. 473, line 6).

Appellant underwent his own initial assessment by Dr. Stuchell wherein he complained that the victim caused him stress and anxiety. "His biggest complaint was anxiety over the stress that was going on in his marriage with Michelle." In his lone solo session, Dr. Stuchell assessed Appellant for "unspecified anxiety disorder; and then, history of obsessive compulsive disorder with good insight, which is in remission; and then relationship distress with spouse." (Tr. p. 471, line 17 – p. 472, line 14). Dr. Stuchell recalled Appellant complaining that his wife was the root of his own issues and that he hoped therapy would help them both. (Tr. p. 474, line 21 – p. 475, line 2).

Five days after the victim's assessment, the couple joined Dr. Stuchell for a marital counseling session. (Tr. p. 463, lines 8-9). During this session, Dr. Stuchell reviewed the criteria for bipolar with the couple but did not record a specific diagnosis for that condition. (Tr. p. 463, lines 14-25). She did refer the victim to a psychiatrist. Dr. Stuchell's second and final session with the couple occurred a week later. They discussed marital problems with the psychologist, who recorded "that both client and her spouse had appeared to develop insight to their relationship issues." (Tr. p. 465, lines 1-10). Each spoke about their own infidelity. (Tr. p. 479, line 14 – p. 480, line 3).

The victim next met with a psychiatrist, who noted that "the patient had one episode that lasted three to four weeks [which] meets the criteria for a manic episode. Patient states that she feels this was due to the fact that she had been pushed to her limit and wanted a divorce." The psychologist discussed the potential for bipolar disorder with the victim and encouraged her to call if she experienced extended period of decreased sleep or racing thoughts. (Tr. p. 465, line 24 – p. 466, line 12).

The victim then engaged in three therapy sessions with a mental health clinician. Notes

from these sessions make no mention of marital issues or bipolar disorder. (Tr. p. 466, line 20 – p. 467, line 21). Records also showed that the victim made an appointment for her oldest son, but "her husband became angry because she did not discuss with him first, and called to cancel the appointment." The victim stated "she is not allowed to do anything without his permission," including working at the family restaurant," which the therapist noted "contributes to depressive symptoms." (Tr. p. 485, line 13 – p. 486, line 3). But the victim's behavior was noted as "calm; her thought process was logical and goal-directed; that she did not have any suicidal ideation." (Tr. p. 482, line 23 – p. 483, line 7). The therapist recorded that the victim was engaged and making progress. At the conclusion of these sessions, the victim received a diagnosis of "unspecified anxiety disorder and unspecified depressive disorder." (Tr. p. 486, line 17 – p. 487, line 25).

Appellant also presented expert testimony in the area of crime scene investigation and bloodstain patterns. (Tr. p. 503, lines 7-19; Tr. p. 511, lines 14-16). Donald Girndt, a former SLED agent, testified that he reviewed photographs of the crime scene and opined that there were weaknesses in the manner in which Ridgeland Police Department processed the scene. They took few photographs and did not use evidence markers or trajectory rods. (Tr. p. 514, line 21 – p. 523, line 21). He testified that the investigation file he reviewed tended to support Appellant's version of events "based on the way it was documented," but he also testified that his examination "mainly focused on the physical evidence" and he "didn't pay much attention" to the videotaped portions of the investigative file which depicted Appellant's versions of events. He testified he considered Appellant's accounts—one being suicide and another being a struggle over the gun—"could be combined" for purposes of his second-hand analysis. (Tr. p. 523, line 22 – p. 526, line 9). His testimony also revealed that he did not consider evidence or testimonials

in the file which may cause him to question the veracity of Appellant's accounts. (Tr. p. 527, line 17 – p. 529, line 1).

Appellant also put forth testimony from a number of Appellant's closest relatives. Appellant's father, Richard Passio Sr., testified about Appellant and the victim's relationship. He said that as time went on, "Michelle seemed to be turning a certain way every time she got pregnant. Things would happen. Comments would be made," and Appellant started calling his father for advice. The victim would talk to her father-in-law about what was going on as well. He was close with both of them. He testified that once the victim hit her third trimester, "it would seem that these things would calm down." (Tr. p. 555, line 2 – p. 557, line 12). As things got worse for his son, Richard Sr. suggested that Appellant move his family from Ohio to South Carolina so they could "talk a lot easier" and so they could get the victim some help. (Tr. p. 558, line 11 – p. 559, line 2). When they moved to Ridgeland, Richard Sr. rented a house for them and gave Appellant and the victim jobs at Jasper's Porch. (Tr. p. 559, lines 10-22).

Richard Sr. said he thought the victim needed help because, for example, he heard her in the background on a phone call "re-writing the book" of bad language against her husband. Another time, during tropical storm Bonnie, Appellant called him in the early morning hours because the victim was not home. Richard Sr. went out looking and found her a few blocks away walking barefoot in the rain without a jacket. He said she refused to accept a ride home. (Tr. p. 559, line 23 – p. 563, line 1). He testified she was a good employee at the restaurant, and that she was outgoing and very personable to the point where you just could not help but like her. But he "had an issue" because "she just had a baby, you know. Somebody needs to be home." (Tr. p. 563, line 20 – p. 564, line 15). He described Appellant as "a know-it-all" and as someone who was opinionated and "hard to argue with." (Tr. p. 571, lines 2-5). He acknowledged that his son

followed in his own footsteps because father and son were devout Catholics and each had eight home-schooled children. (Tr. p. 572, lines 1-24). Richard Sr. knew that Appellant had confessed to emotional infidelity while living in Ohio. (Tr. p. 574, lines 16-25).

Appellant called Richard Sr. the morning that the victim died. He told his father that the victim shot herself. Richard Sr. jumped up and drove over to their home. He found Appellant on the porch, alongside a white stool or chair with "blood all over it." Contrary to the first responder's testimony, he described Appellant's hand as still bleeding. "He was trying to wrap it up, but you could see it, you know, . . . just shaken." (Tr. p. 564, line 16 – p. 565, line 9). The police were already at the house processing the crime scene when Richard Sr. arrived. Still on the front porch, he tried to comfort his son. (Tr. p. 565, lines 9-15). Richard Sr. recalled an officer telling him "he was about 95 percent sure that it was a suicide, because of the angle of the gun, and he [motioned]." (Tr. p. 566, line 23 – p. 567, line 5). After ten or twenty minutes, Richard. Sr. was allowed inside and he took care of the children and called the victim's mother. After taking the children to eat at Jasper's Porch, he told the eldest son what happened. (Tr. p. 565, line 17 – p. 566, line 11).

Three of Appellant's children also testified on his behalf. Their eleven-year-old daughter testified that her parents argued. She thought that life with her dad was normal, but that her mom "was happy sometimes, and sad, and stuff like that." (Tr. p. 531, line 4 – p. 534, line 21). She testified that she was in the bedroom she shared with her two younger sisters when the shooting happened. She does not have a clock so she did not know what time it was, but she thought it was the middle of the night. She "heard two bangs; and [her] mom saying, do you want me to do it again; and then another bang." (Tr. p. 535, lines 3-11). She said her mom sounded "kind of angry" and her dad was crying. She stayed in her bedroom until later that morning when her

grandpa ushered her out of the house. On cross-examination, she testified she sort of remembered telling the investigator that she thought the bangs she heard sounded like her mom hitting something, like a hand smack on a table. (Tr. p. 535, line 14 – p. 538, line 5).

Their twelve year old son testified that his mother was his main caretaker and was softer and less frequent with punishment than his dad. But he recalled his mom being more violent at times and taking frequent naps. (Tr. p. 539, lines 10-11; Tr. p. 541, line 2 – p. 542, line 10). The morning of the shooting, he remembered waking up like normal but his dog was in his room frightened and acting as though she had heard a loud noise. (Tr. p. 542, line 11 – p. 543 line 3). He personally had not heard anything. (Tr. p. 547, lines 1-4). His room was nearly all the way to the back of the house. (Tr. p. 547, lines 19-25).

The eldest son, a fifteen-year-old, testified that his mom "was kind of secretive at times, but she was usually very happy." (Tr. p. 605, lines 11-12; Tr. p. 607, lines 24-25). He said that sometimes she would "just kind of leave" the house and it seemed like "she was always trying to hide something," like her smoking cigarettes and seeing friends she was not supposed to see. (Tr. p. 608, lines 1-21). This left him responsible for watching his younger siblings at times. (Tr. p. 609, lines 12-16). He said that there was only one cupboard in the house that "nobody went into" and it was used to store alcohol and mixers. (Tr. p. 611, lines 11-25). He stated that his dad did not like his mom to wear makeup "but he never forced her to not have it." (Tr. p. 623, lines 2-16). After they had lived in Ridgeland for a while, the son testified, his mom started to "go through these large fits where she would just sleep for hours," and he was easily annoyed by "little petty fights between the kids." (Tr. p. 612, lines 7-24). The fifteen-year-old later acknowledged that his mom was pregnant and waitressing the majority of the time she lived in South Carolina. (Tr. p. 627, lines 1-16). Additionally, he acknowledged that at the time of her

death, she was caring for a six week old baby which would have caused her to lose sleep at night, and that his dad was at work a lot and not helping out around the house. (Tr. p. 628, lines 1-13). The eldest son also recognized that he had previously told counselors that his mom felt trapped because only his dad could leave the house and that his did would become angry and question-ridden when his mom was late. (Tr. p. 624, line 20 – p. 625 line 7).

He assessed that his dad "was completely oblivious" to what he believed was going on with his mom and that when he found out he began acting in the manner other witnesses had described as controlling. (Tr. p. 615, line 22 – p. 616, line 7). He said he had never seen his dad hit or push his mom but he had seen his mom hit his dad and one time he had to get involved. (Tr. p. 620, line 18 – p. 621, line 13). He testified that one time he saw his grandma's boyfriend yelling at his dad and when the boyfriend punched his dad, he saw his father respond by grabbing and restraining him on the ground. (Tr. p. 618, line 15 – p. 619, line 10). He later testified that he had seen his dad try to physically restrain his mom and that sometimes she could get violent by throwing something. (Tr. p. 630, lines 1-19).

The son testified that as he began hearing more arguments between his parents, he "started getting up to see if [he] could do anything" because his presence seemed to calm his mother down. As he described it, when he "was around, she didn't act so erratic" and "a lot less would happen" between his parents. (Tr. p. 615, lines 1-12; Tr. p. 630, lines 14-17). He said he started getting up after his bedtime at night "and finding out what was going on" in his home. (Tr. p. 628, lines 14-21). He agreed that he was scared of what might happen between his parents and that he did not know what happened behind closed doors and when he was not around. (Tr. p. 632, lines 10-20).

As to the night of the shooting, he testified he was asleep and did not hear anything—his

room was in the back of the house and his door was shut. But he did recall his dog being under his bed when he woke up and took that as a sign that there had been a loud noise. (Tr. p. 621, line 16 – p. 622, line 3; Tr. p. 628, line 22 – p. 629, line 6).

Appellant's final witness was his brother, Stephen Passio, the general manager at Jasper's Porch. (Tr. p. 633, lines 14-25). He testified that the victim began as a good employee at the restaurant, but he "assumed, as her pregnancy went on, progressed, she either got tired. She started to slow down a little bit. And then, more towards the end of her employment there, she started [ ] to bring her home life into work. She wasn't always cheerful. . . ." So he began placing her on less-busy shifts. Eventually, he cut her from all work and told her she "needed her to step away, take care of whatever was going on at home." (Tr. p. 634, line 20 – p. 636, line 12). Stephen otherwise testified that business at the restaurant shut down after the shooting and that many of the witnesses at trial were all let go. (Tr. p. 641, line 20 – p. 642, line 8).

STANDARD OF REVIEW FOR ISSUE I

"On appeal from the denial of a directed verdict, this Court views the evidence and all reasonable inferences in the light most favorable to the State." *State v. Butler,* 407 S.C. 376, 381, 755 S.E.2d 457, 460 (2014). The trial court should deny a motion for directed verdict as to any charge when "there is 'any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced.'" *State v. Phillips*, 416 S.C. 184, 193, 785 S.E.2d 448, 452 (2016) (quoting *State v. Littlejohn*, 228 S.C. 324, 329, 89 S.E.2d 924, 926 (1955)). "In reviewing a motion for directed verdict, the trial court is concerned with the existence of evidence, not with its weight." *Id.* at 192, 785 S.E.2d at 452. While "the *jury* must consider alternative hypotheses, the *court* must concern itself solely with the existence or non-existence of evidence from which a jury could reasonably infer guilt." *State v. Bennett*, 415 S.C. 232, 237, 781 S.E.2d 352, 354 (2016) (emphasis in original).

I. Appellant should not have been directed a verdict of acquittal as to murder because the State presented substantial circumstantial evidence that Appellant had the motive, means, and opportunity to have killed his wife prior to him calling 911 and reporting that she committed suicide and also that she shot multiple times.

The trial court found that the State presented substantial circumstantial evidence pointing to Appellant's guilt. (Tr. p. 428, lines 16-20). "If there is any direct evidence, or if there is substantial circumstantial evidence, that reasonably tends to prove the defendant's guilt," then the court properly submits the case to the jury. *State v. Rogers*, 405 S.C. 554, 563, 748 S.E.2d 265, 270 (Ct. App. 2013). Substantial circumstantial evidence exists when the evidence submitted "reasonably tends to prove" that Appellant killed the victim. *Id.* at 555-57, 748 S.E.2d at 271-72. A directed verdict motion should be denied only "when the evidence merely raises a suspicion that the accused is guilty." *State v. Mitchell*, 341 S.C. 406, 409, 535 S.E.2d 126, 127

(2000).

Circumstantial evidence "gains its strength from its combination with other evidence, and all the circumstantial evidence presented in a case must be considered together to determine whether it is sufficient to submit to the jury." *State v. Rogers*, 405 S.C. at 567, 748 S.E.2d at 272. Parsing some of the facts presented, as Appellant has done, may appear to establish a "speculative inference" of guilt. (Br. of App. at 27). But the State did not present scarce, singular instances of conduct sufficient to raise only a mere suspicion of guilt. *Cf. State v. Bostick*, 392 S.C. 134, 141-42, 708 S.E.2d 774, 778 (2011) ("No direct evidence linked Bostick to the crime scene or the items found in the burn pile."); *State v. Arnold*, 361 S.C. 386, 390, 605 S.E.2d 529, 531 (2004) (fingerprint on cup lid in victim's borrowed car, later found short distance from defendant's father's home, raised mere suspicion of guilt when victim's body was found in separate location); *State v. Buckmon*, 347 S.C. 316, 555 S.E.2d 402 (2001) (while evidence established that defendant walked in the direction where victim was found, no evidence placed defendant at the scene of the crime and defendant's house was in the same direction); *State v. Mitchell*, 341 S.C. at 409, 535 S.E.2d at 127 (2000) ("The only evidence linking respondent to the burglary is the fingerprint."); *State v. Schrock*, 283 S.C. 129, 132, 322 S.E.2d 450, 452 (1984) ("Nothing in evidence places Schrock at the scene of the crime."). Here, the State established an operative chain of facts from which the jury could reasonably conclude guilt beyond a reasonable doubt, and the trial court did not error in submitting the case to the jury.

The evidence the State presented established motive, means, and opportunity reasonably tending to prove that Appellant was criminally responsible for the murder of his wife. (Tr. p. 416, line 17 – p. 428, line 15). Appellant called 911 and placed himself with the victim and with his hands on the gun contemporaneous to the shooting. He told the 911 operator that his wife

shot herself, and also that they were arguing. He made it known that their argument got physical, stating that his wife attacked him a few times, knocked his contacts from his eyes, and that he hurt his hand on the bottom of the gun when it went off. (State's Ex. 1). He relayed this information to responding law enforcement and stated that he and his wife struggled over the weapon. (Tr. p. 98, line 4 – p. 101, line 3; Tr. p. 105, lines 15-22; Tr. p. 165, line 6 – p. 167, line 7). Forensic evidence corroborated a physical struggle, as both Appellant and the victim left DNA on the trigger of the pistol. (Tr. p. 257, lines 14-18). And, fingernail scrapings from each of the victim's hands contained a complex mixture of two persons' DNA. (Tr. p. 251, lines 16-25). Moreover, the victim had plans for the days following her death, contrasting Appellant's assertion that she committed suicide. (Tr. p. 385, line 22 – p. 386, line 1; Tr. p. 284, lines 3-6).

Further contrary to Appellant's report of a suicide were the multiple bullet strikes located in the home. A bullet struck a door frame behind the victim's head, and another struck a windowpane in the same direction. Yet the victim was located lying on the sofa with her head back. (Tr. p. 128, lines 5-25; Tr. p. 221, lines 16-18). Appellant reported she fired into the air. (State's Ex. 1 at 1:39 to 1:45). Months later, Appellant, unprovoked, told another acquaintance from Jasper's Porch that the victim shot twice towards him, missing him and hitting the wall. (Tr. p. 352, line 13 – p. 353, line 17). From the evidence of a physical struggle and the stray bullet marks behind the victim's head, the jury could reasonably conclude the killing occurred at the hands of Appellant rather than as a result of victim's personal volition, even in the heat of passion. The jury was instructed they may find Appellant guilty of voluntary manslaughter if they did not find him guilty of murder beyond a reasonable doubt. (Tr. p. 713, lines 1-25).

Temporally, it can be fairly and logically deduced from the evidence that Appellant and the victim were at home arguing and that the argument culminated with Appellant killing the

victim. *See State v. Logan*, 405 S.C. 83, 97, 747 S.E.2d 444, 451 (2013) ("evaluation of circumstantial evidence requires jurors to find that the proponent of the evidence has connected collateral facts in order to prove the proposition propounded"). The video from Jasper's Porch places Appellant at the restaurant after the Passio's public argument at Schooner's bar. Their argument at the bar began shortly after midnight and witnesses saw Appellant and the victim leave separately. (Tr. p. 282, line 2 – 286, line 8; Tr. p. 296, line 10 – p. 300, line 4; Tr. p. 313, lines 1-25). The bartender testified that she estimated that Appellant and the victim left Schooner's by 12:30 AM. (Tr. p. 286, line 10 – p. 287, line 2). Appellant made a quick stop at Jasper's Porch minutes before 1 AM. (State's Ex. 6; Tr. p. 333, line 11 – p. 334, line 18). A neighbor who had been sitting outside most of the night heard arguing and gunshots between 1 AM and 3:10 AM—she estimated she actually heard the shots between 2:30 and 3:00 AM. (Tr. p. Tr. p. 263, line 5 – p. 264, line 25; Tr. p. 266, lines 3-24). Around 2 AM, Appellant briefly visited a co-worker to pick up a baby bottle. Appellant told his co-worker that things were bad at home. Appellant mentioned suicide, stating that he hoped it was "not the night that something happens" to the victim. He left by 2:15 AM. (Tr. p. 316, line 16 – p. 319, line 14). Appellant called 911 at 5:53 AM to report the shooting. (Tr. p. 221, lines 1-8). However, another neighbor who regularly heard fighting at the Passio's house and who ordinarily woke up between 4:30 and 5 AM testified she did not hear gunshots at any point after she woke up that morning. (Tr. p. 270, line 19 – p. 273, line 20). Therefore, since it undisputed the Appellant was present at the time of the shooting, the evidence reasonably tends to prove that the shooting occurred after 2:15 AM when Appellant arrived home with a borrowed baby bottle and before the neighbor woke up around 4:30 or 5 AM.

The State also submitted substantial circumstantial evidence that Appellant introduced

the murder weapon into the home on the night of the shooting, reasonably indicating malice aforethought. Video surveillance shows Appellant entering Jasper's Porch just before 1 AM on the same night as the murder and leaving moments later with a black case in his left hand. (State's Ex. 6; Tr. p. 333, line 11 – p. 334, line 18). Witnesses who worked at Jasper's Porch also testified that Appellant had previously taken them into the restaurant office and showed them a gun in a black case. The case they described was similar to the black object Appellant can be seen carrying out of the restaurant. (State's Ex. 6; Tr. p. 310, line 12 – p. 311, line 4; Tr. p. 345, lines 1-21; Tr. p. 351, line 3 – p. 352, line 12). Further, one witness who saw Appellant leave Schooner's said he believed Appellant said he was going to Jasper's Porch to retrieve bottles of liquor. (State's Ex. 6; Tr. p. 314, lines 6-11). Yet the black case in the video is not a box or other ordinary receptacle. Finally on this point, when law enforcement arrived at the Passio's at 6 AM in response to Appellant's 911 call, they found the gun on the floor next to the victim and an empty hard-shell case in the back of Appellant's car. Analysis located his DNA on the handle. (Tr. p. 103, lines 13-17; Tr. p. 143, line 6 – p. 144, line 7; Tr. p. 220, line 22 – p. 221, line 5; Tr. p. 254, lines 10-22; Tr. p. 259, lines 11-23).

Moreover, the State presented more than a mere suspicion that Appellant waited to call 911 and report the shooting, indicating consciousness of guilt. *See State v. McDowell*, 266 S.C. 508, 515, 224 S.E.2d 889, 892 (1976) (as a general rule, any guilty act or conduct by the accused is admissible as some evidence of consciousness of guilt). First responders arrived at the Passio's house to find all eight children and the dog quietly asleep. (Tr. p. 102, lines 2-24). The injury to Appellant's hand appeared crusted and dry rather than fresh. (Tr. p. 212, lines 5-20). The victim's blood was not dripping from any wound, but rather had soaked into the sofa and had coagulated on her person and on the floor and was thick like Jell-O. (Tr. p. 133, lines 3-15; Tr. p.

212, lines 1-3). Something about the scene smelled off. (Tr. p. 112, lines 8-19, Tr. p. 133, lines 1-3). The victim's arm was cold to the paramedic's touch. (Tr. p. 211, lines 17-21). And the neighbor who regularly awoke between 4:30 and 5 AM to get ready for her 6 AM work shift did not hear any gunshots that morning, which would have been fairly contemporaneous to Passio's 5:53 AM call to 911. She also saw Appellant in slacks rather than his usual pajamas and was home to see the police arrive. (Tr. p. 221, lines 1-8; Tr. p. 270, line 16 – p. 273, line 15).

Additional evidence reasonably tended to prove malice aforethought. Testimony established a number of possible motives, including the victim's plans to divorce Appellant, the victim's prior infidelity, and Appellant's expression to others that he believed the victim "wasn't acting right; she was lashing out." (Tr. p. 382, line 1 – p. 385, line 24). A number of State's witnesses testified that they had witnessed Appellant act in an argumentative, controlling, or violent fashion with the victim. (Tr. p. 341, line 15 – p. 345, line 21; Tr. p. 396, line 8 – p. 397, line 20). Their dual presence at Jasper's Porch caused tension. (Tr. p. 292, line 22 – p. 294, line 10; Tr. p. 309, line 1 – p. 310, line 1; Tr. p. 330, lines 5-25). Outside of work, by at least one witness account, the victim acted to conceal her whereabouts from Appellant, who was "degrading and abusive" of her. (Tr. p. 354, line 2 – p. 361 line 15). The victim had recently met with a family court attorney who testified that she planned to divorce Appellant. The attorney described the victim as pregnant, concerned, and frightened, and she referred the victim to a local shelter for victims of domestic abuse. (Tr. p. 378, line 4 – p. 380, line 24). The victim's mother corroborated the late wife's plans to leave Appellant once she set aside enough money. (Tr. p. 398, line 12 – p. 399, line 20). The State also presented direct testimony that the victim had an affair with another restaurant employee and that Appellant was at least aware of the rumors, if

not the actual affair, as he confronted that employee about it and thereafter put surveillance cameras around their workplace. (Tr. p. 307, line 1 – p. 309, line 8).

Respondent submits this issue's fact-driven inquiry requires affirmance of the trial court. Unlike other cases where our appellate courts have corrected the trial court's failure to direct a verdict, Appellant places himself at the scene, in a physical struggle with the victim, with his hands on the murder weapon, and witness to the shooting. There was additional evidence that Appellant brought the gun into the home that night and waited some time after the shooting to call 911. *State v. Lynch*, 412 S.C. 156, 173-74, 771 S.E.2d 346, 355-56 (Ct. App. 2015) (case properly submitted to jury on substantial circumstantial evidence where defendant was the last person seen with victim at location of murder and State presented substantial evidence of flight); *State v. Bratschi*, 413 S.C. 97, 112-14, 775 S.E.2d 39, 47-48 (Ct. App. 2015) (substantial circumstantial evidence established by prior violent confrontation between victim and defendant; defendant getting a ride from a location near where the victim's vehicle was found with victim's dated blood on the steering wheel; and by grave-like hole on defendant's family land). In *State v. Frazier*, 386 S.C. 526, 689 S.E.2d 610 (2010), the Court ruled that the State presented substantial circumstantial evidence of guilt by with evidence of the following: an affair between the victim's wife and the defendant, defendant's knowledge of victim's whereabouts, defendant's confrontation with the victim shortly before the murder, defendant's actions taken in preparation for the murder, and eyewitness testimony placing defendant near the murder scene at the time of the murder. *Frazier*, 386 S.C. at 531-32, 689 S.E.2d 610, 613. Respondent submits that the State presented substantial circumstantial evidence of the same caliber as the evidence presented in *Frazier*, and Respondent asks the Court to likewise find that "[t]his evidence, when viewed collectively, presented a jury question. . ." as to Appellant's guilt. *Id.* at 532, 689 S.E.2d at 613.

STANDARD OF REVIEW FOR ISSUE II

"The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." *State v. Saltz,* 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001). To warrant reversal, an appellant must show not only an alleged error, but also resulting prejudice. *State v. Thompson,* 305 S.C. 496, 502, 409 S.E.2d 420, 424 (Ct. App. 1991). Additionally, "[t]he appellate court 'will not disturb a trial court's ruling concerning the scope of cross-examination of a witness to test his or her credibility, or to show possible bias or self-interest in testifying, absent a manifest abuse of discretion.'" *State v. Fuller*, 425 S.C. 468, 476, 822 S.E.2d 910, 914 (Ct. App. 2019) (quoting *State v. Gracely*, 399 S.C. 363, 371, 731 S.E.2d 880, 884 (2012)).

II. It was appropriate to admit a screenshot of Appellant's Facebook profile page through Appellant's father, who was friends with Appellant on Facebook and could identify the screenshot, because the profile page tended to reveal Appellant's father's bias, prejudice, or a motive to misrepresent.

During cross-examination and over Appellant's objection, the trial court admitted a screenshot of Appellant's Facebook profile page. The screenshot showed a selfie by Appellant and another photograph of Appellant with two of his sons. Appellant's name, Rock Passio, appears underneath these photographs, and then the following: "I know who I am. I'm a dude, playing a dude, disguised as another dude." (Tr. p. 577, lines 16-25; State's Ex. 32). Appellant objected on the basis of relevance, further stating that the witness, Appellant's father Richard Passio, Sr., did not authenticate the Facebook page because he only recognized the photographs. (Tr. p. 577, lines 16-20).

Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. "Evidence which assists the jury in

arriving at the truth of an issue is relevant and admissible unless otherwise incompetent." *State v. Sweat*, 362 S.C. 117, 126, 606 S.E.2d 508, 513 (Ct. App. 2004); *see* Rule 403, SCRE (relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice). "Evidence is admissible if 'logically relevant' to establish a material fact or element of the crime; it need not be 'necessary' to the State's case in order to be admitted." *State v. Sweat*, 362 S.C. at 127, 606 S.E.2d at 513.

Additionally, "[b]ias, 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 608(c), SCRE. "Our courts have followed the 'general rule' that 'anything having a legitimate tendency to throw light on the accuracy, truthfulness, and sincerity of a witness may be shown and considered in determining the credit to be accorded his testimony,' so that 'on cross-examination, any fact may be elicited which tends to show interest, bias, or partiality' of the witness.'" *Smalls v. State*, 422 S.C. 174, 182–83, 810 S.E.2d 836, 840 (2018), *reh'g denied* (Mar. 29, 2018) (quoting *State v. Brewington*, 267 S.C. 97, 100–01, 226 S.E.2d 249, 250 (1976) (citing 98 C.J.S. Witnesses §§ 460 and 560a)).

Richard Sr. asserted during direct examination that he was very close with Appellant. (Tr. p. 556, lines 16-17). The screenshot therefore became relevant to the question of how well Richard Sr. actually knew his son. Its admission during the State's cross-examination of Richard Sr. constituted competent impeachment evidence tending to establish bias, prejudice, or a motive to misrepresent. Rule 608(c), SCRE.

Over the course of his direct examination, Richard Sr. delivered accounts of personal interactions with Appellant which painted the victim in a derogatory light. Richard Sr. testified that the victim regularly and wrongfully accused Appellant of "wild things" that were not

believable and which Appellant denied; that the Passio's marital issues spawned from the victim's unpleasant behavior; and that Richard Sr. himself had an issue with the victim working shifts at Jasper's Porch after giving birth. He attributed these wrongful accusations and unsavory attitudes to the victim's pregnancies and elevated his son as the morally upright individual in the marriage. (Tr. p. 555, line 25 – p. 564, line 7; Tr. p. 569, line 10 – p. 571, line 5). But he also testified that one could not help but like the victim because she was "outgoing, very personable," and had "a magnetism about her." (Tr. p. 564, lines 8-13).

On cross-examination, Richard Sr. again represented that he knew Appellant "as well as any father can know his son." (Tr. p. 573, lines 7-8). The State established Appellant in some ways emulated the life led by Richard Sr. They both had eight home-schooled children. (Tr. p. 572, lines 1-24). However, as cross-examination wore on, the State pointed out facets of Appellant's personal life Richard Sr. either did not know about or did not divulge in his prior testimony. Richard Sr. testified he "would imagine" Appellant did not tell him everything. (Tr. p. 574, lines 13-15). Appellant did not tell Richard Sr. that he posted a craigslist ad less than a month after the victim's death asking, "can we have two true loves in our lifetime?" (Tr. p. 574, lines 5-12). Richard Sr. was not aware that Appellant began texting another female after the victim's death and misrepresented to her that he was a law enforcement officer specializing in bank robberies. (Tr. p. 575, line 9 – p. 576, line 2). Then the State presented State's Exhibit 32. (Tr. p. 576, lines1-25).

The Rules of Evidence provided the State with leeway to probe Richard Sr. for truthfulness, bias, or a motive to misrepresent the facts and circumstances of Appellant's relationship with his wife. Rule 608(c), SCRE. The text on the profile page, which Richard Sr.

could identify as belonging to his son,[1] casts doubt upon the veracity of Richard Sr.'s self-professed closeness with Appellant. The exhibit bore relevance to Richard Sr.'s credibility, including whether he had reliable knowledge about what went inside his son's home. Rule 608(c), SCRE; *Smalls v. State*, *supra*; *see also State v. Sims*, 348 S.C. 16, 25, 558 S.E.2d 518, 523 (2002) (noting 608(c) preserves well-established South Carolina precedent). For these same reasons, the screenshot's probative value was not substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE.

Assuming error *arguendo*, our courts "decline to set aside a conviction due to insubstantial errors not affecting the result." *State v. Black*, 400 S.C. 10, 27, 732 S.E.2d 880, 890 (2012). "In determining harmless error regarding any issue of witness credibility," relevant factors include, but are not limited to, "the importance of the witness's testimony to the prosecution's case, whether the witness's testimony was cumulative, whether other evidence corroborates or contradicts the witness's testimony, the extent of cross-examination otherwise permitted, and the overall strength of the State's case." *State v. Fossick*, 333 S.C. 66, 70, 508 S.E.2d 32, 34 (1998); *State v. Holmes*, 320 S.C. 259, 265, 464 S.E.2d 334, 337 (1995) (adopting *Delware v. VanArsdall*, 475 U.S. 673, 684, 106 S.Ct. 1431, 1438 (1986) factors for any error concerning witness credibility). "No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless when it could not reasonably have affected the result of the

[1] Richard Sr. testified prior to the introduction of the screenshotted profile page that he was Facebook friends with Appellant. (Tr. p. 576, lines 12-24). He testified that he was familiar with Appellant's Facebook profile page. (Tr. p. 577, lines 1-2). Richard Sr. identified the screenshotted profile page as Appellant's by the photographs it contained. (Tr. p. 577, lines 3-13). The State published the screenshot and asked Richard Sr. to read aloud the text that followed Appellant's name. (Tr. p. 578, lines 6-10).

trial." *State v. Mitchell*, 378 S.C. 305, 316, 662 S.E.2d 493, 499 (2008) (internal quotation omitted).

State's Exhibit 36 could not reasonably have affected the result of the trial. Appellant's re-examination of Richard Sr. cures any prejudice. Immediately after the State published the text on the screenshot, Richard Sr. responded during re-direct examination that he had seen the photograph of Appellant and two of his sons but had never seen the text underneath and had "no idea what" it was. (Tr. p. 578, lines 13-25). Richard Sr. thus disavowed knowledge of its context, origin, or applicability to Appellant.

Moreover, when considering the totality of the evidence adduced, witnesses presented by both parties gave testimony tending to establish that Appellant and the victim engaged in volatile behavior behind closed doors, thus corroborating the text that Appellant "was playing another dude." (*See* State's Ex. 36). Appellant's eldest son testified after Richard Sr., establishing that things escalated with Appellant and the victim in private. (Tr. p. 615, lines 1-12; Tr. p. 628, lines 14-21; Tr. p. 630, lines 14-17; Tr. p. 632, lines 10-20). The attorney with whom the victim consulted about a divorce referred her to a women's shelter and had been approached by other people in the community who were concerned for the victim. (Tr. p. 378, line 4 – p. 380, line 24). The victim concealed bruises under her clothing. (Tr. p. 274, lines 6-13; Tr. p. 395, lines 11-21). When Appellant came to the bar to argue with her the night of the shooting, he addressed the victim in a quiet tone but bystanders could tell he was angry and watched him knock a cigarette from her hand. (*E.g.*, Tr. p. 296, line 10 – p. 300, line 4). Witness testimony shows that the victim felt a need to conceal her individual activities from Appellant so as to avoid his disapproval and backlash, that Appellant was degrading and controlling of the victim, and that Appellant had displayed violent behavior inside his home. (*E.g.*, Tr. p. 341, line 15 – p. 345, line

21; Tr. p. 354, line 2 – p. 361 line 15; Tr. p. 382, line 1 – p. 385, line 24; Tr. p. 394, line 1 – p. 395, line 21; Tr. p. 396, line 8 – p. 397, line 20; Tr. p. 477, line 24 – p. 478, line 9; Tr. p. 485, line 13 – p. 486, line 3).

CONCLUSION

For all of the foregoing reasons, Respondent submits that this Court affirm Appellant's convictions and sentence for murder.

Respectfully submitted,

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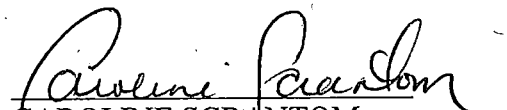

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ATTORNEYS FOR RESPONDENT

September 9, 2019
Columbia, South Carolina

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Jasper County
Carmen T. Mullen, Circuit Court Judge

THE STATE,

Respondent,

v.

RICHARD PASSIO, JR.,

Appellant

Appellate Case No. 2018-001488.

PROOF OF SERVICE

I, Caroline Scrantom, counsel for the Respondent, certify that I have served the within *Initial Brief of Respondent* and *Designation of Matter to be Included in the Record on Appeal* by depositing two (2) copies of the same in the United States mail, addressed to his attorney of record at:

Elizabeth Franklin-Best
Elizabeth Franklin-Best, P.C.
2725 Devine Street
Columbia, SC 29205

I further certify that all parties required by Rule to be served have been served this 9th day of September, 2019.

Caroline Scrantom
CAROLINE SCRANTOM
Assistant Attorney General

ALAN WILSON
ATTORNEY GENERAL

October 9, 2019

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

Re: *The State v. Richard Passio, Jr.*
Appeal from Jasper County
Appellate Case No. 2018-001488

Dear Ms. Kitchings:

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

Sincerely,

Caroline Scrantom
Assistant Attorney General

CS:dmd
Enclosures
cc: Elizabeth Franklin-Best, Esq. (w/two copies of encls.)
The Honorable Isaac McDuffie Stone, Solicitor 14th Judicial Circuit (w/copy of encls.)
Trisha Allen, Victim Advocacy Division (w/copy of encl.)