

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM JASPER COUNTY
Court of General Sessions

Appellate Case No. 2018-001488

The Honorable Carmen T. Mullen, Circuit Court Judge

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SC Court of Appeals

The State of South Carolina.....Respondent,

v.

Richard Passio, Jr.....Appellant.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. Whether the trial court judge erred when she denied trial counsel's motion for a directed verdict because the State did not offer substantial circumstantial evidence that Passio was responsible for the death of his wife?

- 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?

STATEMENT OF THE CASE

Richard Passio, Jr. was indicted by the Jasper County grand jury for murder. 2016-GS- 27- 00300. He was tried before the Honorable Carmen T. Mullen and a jury between July 30 and August 2, 2018 in Ridgeland, South Carolina. He was represented by Christopher Geier. The Fourteenth Circuit Solicitor's Office, who prosecuted the case, was represented by Hunter Swanson. Passio was convicted, and sentenced to 30 years in prison.

This appeal timely follows.

RELEVANT FACTS

Richard Passio Jr. was charged and convicted of the murder of his wife, Michelle, the mother of his eight children, and who also battled depression and significant drug and alcohol abuse. During an argument in their home in the early morning hours of June 3, 2016, and as their youngest child was sleeping just a few feet away, Michelle suffered a fatal gunshot wound to her head.

Richard, Michelle, and other family members owned, managed, and worked at Jasper's Porch, a small restaurant and bar in Ridgeville, South Carolina. In addition to first responders, law enforcement, and a forensic pathologist, a number of witnesses from this Jasper Porch ecosystem testified at trial.

The State offered the following pertinent testimony at trial: Lieutenant Joey Ginn with the Ridgeland Police Department testified that he responded to the Passio's residence at 7915 East Main Street before 6:00am on June 3, 2019. ROA 98. The first thing Ginn noticed when he arrived at the house in Ridgeland was a white male coming down the steps of the residence, waving his arms and trying to get his attention. ROA 99. It was "dimly lit" outside. ROA 100. When Ginn made contact with Passio, he noticed large amounts of blood on him. ROA 100. Richard told him that his wife had shot herself as they were struggling over a weapon. ROA 100. Beginning what would be a series of witnesses offering testimony to suggest that Richard Passio's story of his wife's death was a lie, Ginn said he thought the blood on Richard's pants "appeared dry." ROA 100. Richard also told Ginn that his contacts were out of his eyes, and he could not find his glasses. ROA 100.

As Ginn walked into the house, he noted that it was "completely dark." ROA 101. Ginn had to use his flashlight to see. Ginn noticed a basinet in the room with a young child who was sound asleep. ROA 101-102. A few feet from the baby he found Michelle on the couch. ROA 102. Ginn did not hear any other sounds in the house. ROA 102. Ginn collected the pistol, a .9 millimeter. ROA 103- 105.

EMS subsequently arrived on the scene. Ginn went inside the house with EMS after he placed the gun in his car. Once EMS determined there was no heartbeat and that Michelle was deceased, he went outside and told Richard. At that point, Richard told Ginn that the two of them had fought over the weapon, and that three rounds were fired. A fourth round killed Michelle. ROA 105. Sergeant McIntosh then arrived as an investigator to help process the scene. ROA 106. Ginn testified that roughly 20 people entered the investigation scene, including EMS and family. ROA 111. On cross-examination, Ginn confirmed that he did not tell anyone at the time that he smelled decomposition. ROA 112- 113. Lieutenant Ginn took two pictures at the scene. ROA 123.

Corporal Chris McIntosh also testified for the state. He was an investigator with the Ridgeland Police Department and arrived on the scene around 6:00am. ROA 125. Lieutenant Ginn was already there. McIntosh took photographs of the three bullet strikes he located in the house. ROA 126-27. One bullet strike was located in the doorframe, behind Michelle's head. Another was found in the ceiling of an adjacent room. The third strike was through a windowpane in the adjacent room. ROA 128. McIntosh recovered two shell casings from the scene. ROA 129. McIntosh testified that he smelled an odor that he believed was an early stage of decomposition. ROA 132. He testified that Michelle's body was cold to the touch and that some of the blood in her right ear had coagulated. ROA 133. The exit wound was at the side of her head. ROA 133. McIntosh testified that he did not see any bruising, scratches, or wounds on Richard, other than a wound to his right hand. ROA 133-34.

McIntosh recounted who he interviewed in connection with this incident. He interviewed Pam Bennington, Michelle's mother. He interviewed Shelby Simmons, a friend and co-worker. ROA 136. He interviewed Carla Ashcraft, the mother of Brandon Ashcraft. Carla was a friend of Michelle's. Brandon was also a close personal friend of Michelle's. ROA 137. He spoke to Cathy Badgett, a local attorney, and Angel Rose, an employee at Jasper's Porch Restaurant. ROA 138-39. He also spoke to Marian Mims, the manager on duty at Jasper's Porch. ROA 139. From Ms. Mims, he retrieved a copy of a surveillance tape from Jasper's Porch. ROA 140. McIntosh interviewed Ivy Bryan. ROA 141. On June 6, 2016, McIntosh interviewed Otto Helbig, Linda and Tom Bennington, Jordan Moser, and Richard Passio, Jr. ROA 141. In all, there were about 21 pictures of this death scene. ROA 156.

McIntosh's investigation at the scene was less-than-thorough. For example, McIntosh did not use any evidence markers at the scene. Nor did he generate a crime scene sketch to indicate where evidence was collected. ROA 158. He did not use any trajectory rods to determine where bullets were fired from. ROA 159. McIntosh testified that he did not "recall" telling Richard's father that he was 95% sure that this was a suicide. ROA 159-160. McIntosh did not have some of the blood on the couch tested to determine whether it belonged to Michelle or to Richard. ROA 161-62. He did not test for any gunshot residue on Richard's hands. ROA 163. Michelle's hands were checked for gunshot residue, but they were not bagged at the scene. It was his responsibility to do so. ROA 164. In State's Exhibit #3, one can see Lieutenant Ginn actually standing in a little bit of the blood that was pooled on the

floor. ROA 172. There were footprints in the blood, but McIntosh did not take any pictures of it. ROA 173. McIntosh admitted he did not have any training regarding the amount of time it takes a body to decompose. ROA 174. He also admitted he did not have any training in blood coagulation or blood spatter. ROA 175. Prior to this event, he had experience with only four prior homicides. ROA 175. McIntosh admitted that he did not call SLED to investigate, even though he could have. ROA 176-77. He did not interview any of the children who were present at the scene. ROA 177. Although he recorded some of his interviews, he did not recall if he recorded interviews with Shelby Simmons, Carla Ashcraft, Brandon Ashcraft, or Angel Rose. ROA 185. He also could not remember if he recorded interviews with Ivy Bryan, Otto Helbig, or Jordan Moser. ROA 185-86.

McIntosh did, however, record an interview he conducted with two of Richard and Michelle's neighbors, Devan and Kayla. In the recorded interview, they told him they left the Passio house at a particular time on the night of Michelle's death. McIntosh did not put that information into his written report. He testified his failure to do so was a "typo" or "mistake." ROA 187- 189. Also Devan and Kayla told McIntosh that Michelle was "definitely drunk that night" but he failed to include that in his report either. ROA 190.

McIntosh did not interview Aaron and Latisha Horry, neighbors who lived across the street from Richard and Michelle. ROA 192.

McIntosh admitted that he took notes as he conducted his interviews, but that he destroyed them prior to trial. ROA 195.

In another interview McIntosh conducted, he spoke with Michelle's first child's grandparents (Tom and Linda Bennington). In that interview, Tom and Linda told McIntosh that they believe Michelle's mother is a "pathological liar." ROA 200. That, too, did not make it into McIntosh's written report. They also told McIntosh that "Pam is probably going to blame Richard for this" and McIntosh did not put that in his report either. In yet another interview, this time with one of the children in the house, McIntosh left out a critical fact related by the child and important to Passio's defense—that "it was almost day" when she heard her parents arguing. ROA 203-204.

Ryan Altman, a firefighter and EMT also testified for the state. ROA 210. When he arrived at the scene, Michelle was deceased. He testified that she was cold to the touch. ROA 211. He noticed that the blood on her and on the floor was thick and very pliable. ROA 212. He testified that Richard's hand wound was dry. ROA 212. Altman admitted that he is not a hematologist, biologist, or bloodstain expert. He admitted that he could not, with any degree of certainty, say how long it takes the average person's blood to clot outside of the body. ROA 216.

Michael Singleton, a paramedic and firefighter for Jasper County Fire and Rescue also testified. He testified that he arrived at the scene 8 minutes after he was dispatched. ROA 221. He claimed that by the time he arrived, Michelle was cool and ashen, and that her blood appeared to have coagulated. ROA 221-22. He also testified that he applied a cardiac monitor to her, and that she "showed asystole, which is a — a workable cardiac rhythm." ROA 223, ll. 20-21. They did not attempt to revive her

because, with the head injury, in his opinion her condition was inconsistent with life. ROA 223. Singleton also provided testimony that it was “very uncommon” for women to use firearms to commit suicide, but that claim is demonstrably false.¹

Dr. Erin Presnell is a forensic pathologist from the Medical University of South Carolina. ROA 234. Despite her credentials and being the only witness qualified to opine as to such things, the solicitor did not ask Dr. Presnell about the likelihood of smelling human decomposition when arriving at a scene, or whether blood coagulation is a reliable indicator of when a person dies. Dr. Presnell noted that, in her system, Michelle had some marijuana metabolite, significant nicotine, caffeine, and a blood alcohol level of 0.07. ROA 236.

The state also presented the testimonies of two DNA experts. Andrew Garinger, an expert in DNA analysis, testified that he swabbed two parts of the gun:

¹ Singleton admitted he did not have any authority for this claim other than that was what he was taught during his EMT training, but it is belied by widely published and available scientific studies. *See* MS Kaplan, H McFarland, N Huguet, Characteristics of adult male and female firearm suicide decedents: findings from the National Violent Death Reporting System, Injury Prevention, Volume 15, Issue 5, *available at:* <https://injuryprevention.bmj.com/content/15/5/322> (*last visited* 6/27/19) (Firearms used in 31.2% of female suicides according to data from the restricted National Violent Death Reporting System (2003-06) for 25,491 male and female suicides decedents aged 18 and older). *And see* Violence Policy Center, *Who Dies? A Look at Firearms Death and Injury in America*, Revised Edition, *available at:* <http://www.vpc.org/studies/whofem.htm> (*last visited* 6/27/19) (The National Center for Health Statistics reports that for all female victims of suicide, the percentage using firearms to kill themselves went from 30 percent in 1970 to 40 percent in 1996). *And see* Monaco, Kristen, *Suicide Rate in Women Jumps by 50%*, *Medpage Today*, June 14, 2018), *available at:* <https://www.medpagetoday.com/psychiatry/depression/73485> (*last visited* 6/27/19) (For women aged 25-44 years old, the most common method of suicide is the use of firearms at 32%, as reported by a study conducted by the National Center for Health Statistics based on data collected from 2000 to 2016).

the rear slide of the gun and the trigger. ROA 250-51. On the trigger, he found a mixture of DNA, but was unable to separate it into individual profiles. ROA 251. John Donahue was the second DNA expert who testified. He is trained in a computer program called TrueAllele. Using that program, he was able to determine that the DNA profiles on the gun trigger were from both Richard and Michelle Passio. ROA 257.

The state then called a number of lay witnesses to testify. Ivy Bryan was a senior in high school at the time of trial; she was 16 when these events occurred. ROA 261. She was a neighbor of the Passio's. ROA 262. She and her friends were hanging outside by a fire on the night Michelle died. ROA 263. She heard arguing, a door slam, and then gunshots. ROA 264. She heard a man and a woman, and she testified she thought the sounds were around 2:30 or 3:00am. She thought she heard 4 gunshots in all. ROA 264. The next day she told her father, and then she spoke to Investigator McIntosh. ROA 265. On cross-examination, she admitted that she may have told the Investigator it occurred between 1:00-3:00am. ROA 266.

Juanita Patrum, another neighbor of the Passio's also testified. ROA 268- 70. Earlier that night, she and Michelle hung out on her porch and drank beer. Michelle had made a Low Country broil and wanted Ms. Patrum to taste it. She testified that she and Michelle made plans for the next day to again sit on her porch and drink more beer. ROA 271. Ms. Patrum testified that the next morning she woke up around 4:30 or 5:00am. She took her dog for a walk between 5:30 and 6:00am. She did not hear any gunshots. ROA 271-72. She testified she heard fighting between the

Passio's "all the time." ROA 273. Ms. Patrum testified that sometimes she bought Ramen noodles for the children. She claimed that Richard Passio had a cabinet of food that was just for him, and that the kids and Michelle were not allowed to get into it. ROA 274-75. This testimony was later contradicted by one of Richard and Michelle's children.

Michelle would leave her cigarettes at Ms. Patrum's house. Otherwise, Richard would throw them away. ROA 275. Ms. Patrum claimed the only time she saw Richard walk the dog was after Michelle died. ROA 276. She admitted she did not sit on her porch watching who was letting dogs out at night. ROA 279. She knew Michelle for about 11 months prior to her death. ROA 279.

Jordan Moser, a bartender at Schooner's Bar and Grill, testified. ROA 282. She got to know Richard and Michelle because they would come into the bar after Jasper's Porch closed at night. ROA 282. Michelle showed her a business card for a local divorce lawyer. ROA 283. Michelle was at the bar on the night of June 2, 2016. She and Michelle made plans for Jordan to meet her kids the next day, Friday. They also had lunch plans for that day. ROA 284. That night, Michelle came in around 11:00pm. ROA 284. Michelle was supposed to be home at midnight, but she remained at the bar. Richard called the bar. He showed up shortly afterwards. ROA 286. Richard and Michelle argued, and Moser saw Richard knock a cigarette out of Michelle's hand or mouth. ROA 286. Michelle then left, and Richard left shortly afterwards. ROA 286. They were probably at the bar for about 30 minutes. ROA 287. Jordan smoked marijuana with Michelle a couple of times. ROA 289.

Angel Rose, an employee of Jasper's Porch, testified. ROA 291. Rose was friends with both Richard and Michelle. She recalled one time when Michelle changed clothes at Richard's request when she started waitressing. ROA 293- 294. She saw Michelle briefly at Schooner's at 11:30pm on the night of June 2, 2016. ROA 296. Rose testified that Michelle "had a lot of issues" and that "she was a little sad." ROA 297. She testified that Michelle said she was supposed to be home at midnight. Around 5 minutes until midnight, she ordered another beer. At midnight, Richard called but they did not answer at first. Then, after the second time he called, she "maybe...just clicked it right off." ROA 297. A few minutes later, Richard showed up. She told him she was going to finish her beer, and then she started to light her cigarette. Richard knocked it out of her hand. ROA 299. At one point, Rose suggested that Michelle seek counseling at Coastal Empire Mental Health. ROA 303.

The State then called Brandon Ashcraft to testify. ROA 305. He lived close to Jasper's Porch and had previously been an employee. He stopped working there a week or two prior to these events. ROA 306. He and Michelle had an affair. ROA 307. When it was over, they remained friends. ROA 308. There were rumors about the two of them, and Richard confronted him about it. Ashcraft adamantly denied it to Richard. ROA 308. Ashcraft said he knew there was a gun in a case at the restaurant. ROA 310. On the night Michelle died, Ashcraft was not working. He walked down the street and saw Richard sitting on his porch. They had a margarita or Long Island iced tea together. ROA 311. He had one or two drinks there. There was a kid named Devan at Richard's house, too. ROA 311. Afterward, he walked to Schooner's Bar.

He was there when Richard arrived later. ROA 313. He observed Richard knock the cigarette out of Michelle's hand. ROA 313. Ashcraft stayed at the bar talking to a girl until it closed. Then he went home. Once home, Richard sent him a text message asking if he had a baby bottle. ROA 314. He did, because he had two kids himself, but he testified he thought the request was odd because Richard had 8 kids. ROA 314.

When Richard arrived at Ashcraft's place, he wanted to know why Ashcraft did not come and speak to him earlier when he was at Schooner's bar. Ashcraft told Richard that, ever since those rumors of his affair with Michelle, he wanted to stay "on opposite sides" of Richard. And also, he was interested in talking to a young woman named Tori. After that, Richard's demeanor changed, and he had a seat on Ashcraft's swing. ROA 318. Then Richard said that he hoped "tonight's not the night" and mentioned Michelle killing herself. ROA 318. He took the baby bottle and then headed back to his car. ROA 319. Ashcraft confirmed on cross-examination that Michelle was getting help at a mental health center and was speaking to a therapist. ROA 323. Ashcraft had his affair with Michelle when she was about 6 or 7 months pregnant. ROA 325. He knew she was drinking, smoking marijuana, and smoking cigarettes during her pregnancy. ROA 326.

Marian Mims, a former manager at Jasper's Porch, testified. ROA 330. According to her, sometimes Richard would take Michelle's tip money and put it in the office. ROA 331. Mims showed Investigator McIntosh where the surveillance cameras were located. ROA 331. A video was introduced into evidence that showed

Richard Passio removing a plastic case from Jasper's Porch before 1:00am. Mims testified that sometimes Michelle was depressed. ROA 336.

Lisa Helbig, a shift leader at Jasper's Porch worked with Michelle, was called to testify. ROA 341.² Lisa and Michelle talked to one another in the beginning, but then Michelle stopped talking to her. Helbig testified that Michelle told her that Richard would come home and talk about Lisa and ask her why she could not be more like Lisa. ROA 341. Richard told Lisa he thought Michelle's friends were trash and that he wished Michelle would hang out with Lisa more. ROA 342. Helbig testified that Richard was controlling. ROA 343. Helbig testified that Richard told her they moved from Ohio down to South Carolina so he could get Michelle away from the bad people who were there, and to get her away from the drugs and the kind of lifestyle she was leading there. ROA 344.

Otto Helbig, Lisa's husband, testified. ROA 350. He was hired as a restaurant consultant by Richard Passio, Sr. ROA 351. He and Richard Passio, Jr. spoke after Michelle's death. During that conversation, Richard told Helbig that his hand was injured when it was on the gun as the fatal gunshot was triggered. ROA 353. Richard told Helbig that Michelle shot twice at him, but that she missed and hit the wall. ROA 353. On cross-examination, Helbig admitted that his relationship with Richard

² Mrs. And Mr. Helbig were arrested for abuse of a vulnerable adult around September 2015 for events allegedly occurring in Nebraska. The victim was Ms. Helbig's mother. See <https://www.wowt.com/home/headlines/Husband-and-Wife-Accused-of-Abuse-of-Vulnerable-Adult-328591061.html> (last visited July 11, 2019).

was “rocky.” Helbig had the impression that Richard did not care much for his opinions. ROA 343.

Carla Ashcraft, Brandon Ashcraft’s mother, testified. ROA 355. She confirmed that her son worked at Jasper’s Porch, and that she and Michelle developed a friendship. Ashcraft had custody of her grandchildren, so she and Michelle bonded over an interest in their children. ROA 357. She saw Richard and Michelle have disagreements at her house. ROA 358. Ashcraft suggested to Michelle that she speak with Cathy Badgett, the lawyer she used when she got divorced and had custody issues with her grandchildren. ROA 361.

Cathy Badgett, an attorney in Jasper County, testified. ROA 377. She testified that she and Michelle Passio spoke for about an hour on March 2, 2016. According to Badgett, Michelle appeared “very concerned, frightened.” ROA 379. She was pregnant at the time. Ms. Badgett referred Michelle to Legal Services and to Citizens Opposed to Domestic Abuse. ROA 379.

Shelby Simmons, a friend of Michelle’s, was called to testify. They hung out every day and worked together at Jasper’s Porch. Shelby knew Michelle for about a year. ROA 382. She testified that she thought Michelle and Richard were having problems for the last six months prior to her death. ROA 383. Simmons testified that the Passios did not like Michelle’s relationship with Shelby, and they threatened to fire Shelby if she continued to hang out with Michelle. ROA 384. She was fired three days after Michelle died. ROA 384. Simmons testified that Michelle seemed “fine” the day before her death and had plans to help a friend move. ROA 385.

On the night of her death, Simmons saw Richard and Michelle hanging out on the porch and they were fine. ROA 386. She got a call from Richard around 1:45 am asking her for a baby bottle. She told him she did not have one. ROA 386. She heard Michelle in the background. ROA 386-87. On cross-examination, Simmons admitted that when Michelle came over, she would drink Four Loko³. She would also drink beer and smoke cigarettes. ROA 390. She heard rumors that Michelle would smoke marijuana. ROA 390. Simmons also admitted that she did not hang out with Michelle once little Frankie was born. ROA 390-91.

Michelle's mother, Pam Bennington, testified. ROA 392. She has known Richard for 13-14 years. She was not supportive of Michelle and Richard's relationship. ROA 392. Bennington moved in with Michelle and Richard at the end of October 2015 to help them out with the children while they worked at the restaurant. Michelle was pregnant at the time. ROA 393. Bennington testified that Michelle and Richard fought often, and that Richard was controlling. ROA 394. She claimed she saw bruises on Michelle. ROA 395. She testified that once Richard flipped a kitchen table. ROA 395. Bennington testified that Richard would often put Michelle down. ROA 396. She said she never saw Richard walk the dog. ROA 397-98. Bennington

³ Four Loko markets itself as a premium malt beverage. *See* <https://fourloko.com/> (*last visited* June 24, 2019). According to GrubStreet, in November 2010, New York legislators including Chuck Shumer and Assemblyman Felix Ortiz increased pressure to ban sales of Four Loko after a series of high profile cases in which people were injured, including the death of an 18 year old girl on Long Island and an incident during which 16 Ramapo College students were hospitalized in New Jersey. *See* <http://www.grubstreet.com/2018/08/the-oral-history-of-four-loko.html> (*last visited* June 24, 2019).

testified that Michelle wanted a divorce. ROA 398. Michelle was going to save up some money working at the restaurant, and then apply for a divorce. ROA 399. Frankie was 5-6 weeks old when Bennington went back to Ohio. ROA 399. Bennington testified Michelle would never kill herself because she is a Catholic and believed she would go to hell. ROA 400. Bennington testified on cross-examination that she was not always able to care for Michelle while she was growing up. She had brain surgery and “then things fell apart.” ROA 403. She did not raise her other two sons either due to her struggles. ROA 403. Bennington testified that Michelle told her she was ingesting methamphetamine when she and Richard were living in Ohio. ROA 406.

Richard and Bennington’s boyfriend got into an altercation and the boyfriend was arrested. Bennington was not happy about that. The boyfriend ended up in jail for 10 days and he lost his job. ROA 406. After Michelle died, Bennington called the police and blamed Richard for Michelle’s death. She wanted custody of the 8 children but that was not allowed. ROA 407. Her request for the children was also opposed by Tom and Linda Bennington. ROA 408.

After Ms. Bennington’s testimony, the State rested its case. ROA 413.

During his motion for a directed verdict, trial counsel laid out a number of the shortcomings present in the State’s case:

MR. GEIER: Thank you, your Honor. Your Honor, this case is— as I’ve been sitting here the last day and a half, I don’t know that there’s any direct evidence at all in this case. It’s all circumstantial, which, obviously, it’s evidence that can be used to obtain a conviction. However, at the directed verdict stage, there has to be substantial circumstantial

evidence. And the circumstantial evidence that's out there has to do more than raise just a suspicion of guilt.

As I see it in this case, we have a couple things that have been put on by the state. Michelle was dead, and Richard was there. And we heard the 911 tape that was entered. And in that tape, he said she shot herself, with my gun. So, I think we have those things.

We've had, you know, that to the gun. Yeah, it was his gun. The state DNA expert said her DNA was on the trigger, as was his.

There was—most of the testimony that came in from any sort of fact witness was that Richard would lose control, which is not, in and of itself, evidence that he murdered Michelle.

There were claims of infidelity. And they had Brandon Ashcraft get up there and say, yes, I was having an affair. They never once presented any evidence that Richard knew. Absolutely none.

And it's the same thing with the claims of divorce. They had Ms. Badgett get up there; they had various family members say, yeah, she was talking about the divorce. Never was there any indication that Richard knew. Absolutely no evidence of either of those two things.

They put on some evidence suggesting that Richard didn't call 911 immediately after Michelle's death. They did that partially through the coagulation of blood. But again, their witness, the EMT, testified that, when they got there, that, yeah, the blood was goopy. But they found a working cardiac rhythm in Michelle, so her heart was still beating when they got there.

They put on Ivy Bryan, he said that it happened at—that she heard shots, four shots, at 1:00 am. There's a question there was only three. She couldn't identify exactly where they came from. She couldn't identify who was arguing that she heard, anything at all about that. No one else came on and said they heard shots around that time, including Juanita Patrum, who was next door.

Juanita said that she heard a shot—or didn't hear anything, including at 5:50 in the morning, when—about the time Richard called 911. But She also said that she wasn't outside the entire time; that she walked the dog; she went inside; fed the cats; got ready; and left. She started walking out as—then, again, pulled up.

Then got a case that they called a gun case, and they've asked all kinds of witnesses, did you see Richard with a gun at Jasper's Porch. Yeah. Did he have a case? Yeah. The case sitting right there, and it is entered into evidence, but not one of them testified that, that was the case. None of them identified that. They didn't ask them to. So, I guess that seems—they seem to be implying that Richard kept his gun at Jasper's Porch, in that case. And then, that morning, at one in the morning, I guess it was, with the timestamp being off, that he went there and retrieved this case. Well, again, nobody said that, that was the case that he ever kept any sort a firearm in.

That's all we got. I mean, we got him going to Jasper's Porch. There was some talk about how he was going to go to Jasper's Porch to get Jagermeister, and that was from Brandon Ashcraft. But there's nothing else about any of that.

We have, sounds like, one claim of some sort of prior difficulties, some sort of physical altercation, between Richard and Michelle. But they don't have anything else, and that evidence came from the decedents mother, who admitted she blamed Richard for it before she heard anything.

You know, I understand that these don't get granted very often, your Honor, but I just don't see that there is a causal connection between any of these things. If you're going to prove your case for circumstantial evidence, you've got to have a direct link. And nobody identified that box. That's a big kink in the chain. Nobody is saying that Richard said she was divorcing him; she's leaving me. Nobody is saying Richard new that Brandon was having an—an affair with his wife. Those are huge missing links in that chain, and to be honest, I don't think they got there.

ROA 416, l. 20- 420, l. 12.

After the State argued it did present substantial circumstantial evidence, counsel replied that the State never showed that the box that Richard retrieved from Jasper's Porch that night contained the gun that was used to kill Michelle. ROA 427. The trial court judge denied the motion. ROA 428.

The defense then put up its case.

Linda Bennington testified on behalf of Richard. ROA 429. She is Michelle's grandmother. She has known Pam Bennington for 36 years. ROA 431. Investigator McIntosh did not initially reach out to Linda Bennington, but she called him to let him know that Pam Bennington was a pathological liar. ROA 431. She told him that if Pam Bennington told her the grass were green, she would not believe it. ROA 432. Linda Bennington testified that she thought Michelle was very happy through her fifth child, but that it was harder for her after she had more children. ROA 436.

The defense then re-called Investigator McIntosh. ROA 438. This second time on the stand, trial counsel elicited additional facts about the night Michelle died. Ivy Bryan initially told McIntosh that she heard four shots at around 1:00am. ROA 439. Also, Ms. Bennington told McIntosh that Michelle loved being a mother until her fifth child, and then she began to feel overwhelmed. ROA 439. McIntosh also testified that Linda Bennington told him that Michelle told her, during a phone call in June 2015 that she did not care about the children anymore and she just wanted out of the marriage. ROA 444.

The defense called Dr. Sarah Stuchell. She is a licensed marriage and family therapist. ROA 453. She treated both Michelle and Richard at the Jasper Clinic of Coastal Empire. ROA 459. She first met with Michelle on February 29, 2016 for an initial clinical assessment. ROA 459. About a year before coming to South Carolina, Michelle was treated for depression. She was prescribed Zoloft. ROA 461. Michelle did not initially disclose that at the first meeting. ROA 461. She did disclose that she

drank alcohol, and smoked cigarettes during her pregnancy. Michelle said that a drug test came up positive for marijuana. ROA 461.

Dr. Stuchell next met with Michelle and Richard on March 3, 2016. ROA 461. At the end of this second session, Dr. Stuchell diagnosed Michelle with unspecified anxiety disorder, unspecified trauma and stress or related disorder, relationship distress with spouse or intimate partner, religious or spiritual problem, and to rule out bipolar disorder. ROA 462. She next saw them five days later for a marriage counseling session. At that session, Dr. Stuchell pulled out the Diagnostic Manual of Mental Disorders, and they went through the criteria of bipolar disorder. Michelle seemed to think that she fit the criteria for bipolar. ROA 463. Dr. Stuchell referred Michelle to a psychiatrist who would be the final authority for that diagnosis. ROA 463. Dr. Stuchell then met again with Michelle and Richard on March 14, 2016 for couples' therapy. She testified that Michelle cried for most of that session and that she acknowledged her behaviors were not okay or appropriate. ROA 464-65. That was her last session with Michelle; Dr. Stuchell left Coastal. ROA 465. The notes of the subsequent psychiatrist noted that Michelle had a manic episode that lasted for three to four weeks, that the patient attributed to the fact that she had been pushed to her limit and wanted a divorce. ROA 466. That psychiatrist discussed with Michelle the potential that she had bipolar disorder. ROA 466. Michelle also met with another mental health clinician for three sessions. ROA 466. That clinician noted unspecified anxiety disorder and unspecified depressive disorder. ROA 467. Dr. Stuchell described bipolar disorder:

A: So, bipolar is a mood disorder where you go from – swings from highs to lows. You're happy; you're sad. But the happys can be also aggressive or impulsive. So, there's lots—when you're in that high state, there's lots of racing thoughts; you can't control your impulses; you engage in risky behavior, like, you know, driving super-fast down the freeway, drug use, hyper-sexual-type stuff where you're sexting or acting out sexually. . .

The low points is severe depression where, you know, you can't get out of bed for days. You lose your appetite. You feel hopeless. That's where the traditional suicidality comes in, in those low depressive states.

Now, when you're in your manic state, and you're engaging in risky behavior, that's when people commit suicide on accident. You know, if you're speeding down the freeway, and you speed up, and you kill yourself because you roll your car.

ROA 469, ll. 3-22.

Dr. Stuchell explained that sometimes the spouses or parents of those with bipolar do not allow them to have access to their money because of this impulsiveness.

ROA 470. Dr. Stuchell testified that she diagnosed Michelle with bipolar disorder, even though it was not clearly listed in the medical records. ROA 489.

Don Girdnt, a crime scene investigation and blood pattern analysis expert, testified to problems he identified with the investigation. He reviewed the crime scene photographs, statements, body cam footage, the DNA report, the gunshot residue report, and the autopsy report. He testified it was not “a lot material, I mean, for a – you know, for a death investigation.” ROA 512, ll. 8-9. He testified that in an investigation like this one, someone should have bagged the decedent's hands. ROA 517. He said the investigator in this case did not follow standard procedure, as far as taking photographs. ROA 521. He criticized the investigator for not using trajectory, or dowel rods, to tell if the bullet hole in the ceiling, in fact, lined up with

the decedent's head. ROA 521. Girndt testified that the crime scene appeared consistent with Richard's version of events. ROA 523.

The couple's children also testified. The couple's 11-year old daughter, testified that her parents argued. ROA 534. Her mother "was happy sometimes, and sad . . ." ROA 534. She testified that, in the middle of the night, she heard two bangs. Then she heard her mother say, "do you want me to do it again" and then heard another bang. Her mother sounded kind of angry. After that, she heard her dad crying and then he called someone. ROA 535.

Their 12-year old son testified that his mother took a lot of naps, and that she was "more violent towards others." She would call people names. ROA 541, l. 8. His 11 year old sister told him what she heard that morning, and what she testified to. ROA 544. The couple's son also testified that his grandmother said to him that she was going to get his dad to hit his mother so they could call the police on him. ROA 545. That never happened, though, because his father never hit his mother. ROA 546.

Latesha Horry, a neighbor who lived across the street from the Passio's, testified that she saw Richard walk the dog every night. ROA 551.

Richard Passio, Sr. also testified. ROA 554. He said that during their marriage, his son would call him to ask for advice. ROA 556. He described how he, Passio, Sr., was very close with Michelle. ROA 556. He was also close with his son. ROA 556. At his suggestion, the couple and their children moved to South Carolina. ROA 557. He moved them down here. ROA 559. Passio Sr. believed that Michelle

needed help. ROA 559. He described how he heard Michelle saying “awful” things to his son. ROA 561, l. 9. He also described that, during Tropical Storm Bonnie, Michelle was not at home at 1:15 in the morning. His son called him and asked him to look for her, since he was at home with their 8 children. He found her, a few blocks from home, walking around in the pouring rain, barefoot. ROA 562. He tried to get her into the car, but she insisted on walking home in the rain. ROA 562.

Richard Passio Sr. described hearing about Michelle’s death. His son called him and told him that Michelle shot herself. He quickly travelled to their house and saw his son sitting on the porch. A white stool had blood all over it. His son was shaken. He tried to comfort him, to the best of his ability. ROA 564-65. After about ten to twenty minutes, he was allowed in the house. He checked on the children. The girls’ room door was cracked open. He shut it. ROA 565-66. He also shut the boys’ room. ROA 56. Then, he called his son’s mother, and then Michelle’s mother. ROA 566. Then he spoke to Investigator McIntosh and asked him what happened. McIntosh told him that “he was about 95 percent sure that it was a suicide, because of the angle of the gun...” ROA 567, ll. 1-3. McIntosh later told him to close the room off so the kids would not see Michelle’s body. McIntosh then told Passio Sr. to clean the room, which he did along with a friend. ROA 567.

Kaleb Bennington, the couple’s eldest child, testified. ROA 604. He was 15 years old at the time of his testimony. ROA 605. He is not the biological son of Richard. Tr. 605. Kaleb testified Richard always treated him like he was his son. ROA 606. He testified he was around 12 years old when the family moved from Ohio to

South Carolina. ROA 607. He said his mother was “kind of secretive at times” but that she was usually very happy. ROA 607. He said his parents had an agreement that she would not smoke, but that she was constantly smoking, and trying to hide it. There were drugs and alcohol involved, and she would hang out with people who would give her drugs without telling his father. ROA 608. Sometimes Michelle would “go to the gas station” but not come home for hours. ROA 609. When Michelle left, Kaleb usually watched the children. ROA 609. He testified there was cupboard in the kitchen they were not allowed to go into—because it contained alcohol. It was the alcohol cabinet. ROA 611. There was no “hidden food at all.” ROA 611. The family had a pantry, and that is where all of the food was kept. ROA 612.

Initially Michelle was calm when they first moved to South Carolina. But she started to get aggravated more easily. Small petty fights between the children would get her “super-annoyed.” ROA 612, l. 15. She also became more secretive. She was constantly on her phone, and she slept often. ROA 612. She would go through large fits where she would sleep for hours during the middle of the day. ROA 612-13. When Michelle stopped working as Jasper’s Porch, she started disappearing more often. ROA 613. Michelle like to drink “Buzz Balls.” ROA 613. He knew his mother was using drugs because she mentioned it to Kaleb. ROA 614.

In the last months of her life, Michelle “wasn’t really acting like herself.” ROA 614, ll. 7-8. She was “overly-aggressive” and “she just didn’t want to deal with anything.” ROA 614, ll. 7-13. Kaleb remembers when Michelle left in the middle of the night during the storm, and that his grandfather brought her home. ROA 614.

Kaleb was used to being up late. He found that his presence would sometimes calm things down. Michelle did not act so erratic. ROA 615.

Kaleb also testified about his mother's mother, Pam Bennington. He said she was heavily into drugs and alcohol. She would drink "a lot of Buzz Balls."⁴ ROA 613. He saw her smoke marijuana. ROA 619. Kaleb testified that he never saw his father hit or push his mother. ROA 620. He has, however, seen his mother hit his father. Once he had to restrain his mother from beating his father. ROA 621. On the morning his mother died, he woke up and his dog was under his bed. The fact she was under his bed was an indication to him that there had been some kind of loud noise. ROA 622.

Sometimes when his mother would leave, Kaleb and his dad would try to keep her from leaving. She would not listen. ROA 631.

Stephen Passio, Richard's brother, also testified. ROA 633. He was the general manager at Jasper's Porch. ROA 633. He either fired or laid Michelle off. He thought she was moody. He said he needed her to step away from the job, and that they could talk again later. He admitted that it may have been her pregnancy that was affecting her. ROA 635-36.

After this testimony, the defense rested its case. ROA 643. Defense counsel renewed his motion for a directed verdict. ROA 644.

ARGUMENTS

⁴ "BuzzBallz" are ready-to-drink cocktails that contain 15-20% ABV depending on the state. *See* <https://www.buzzballz.com/> (*last visited* 6/27/19).

I. The trial court judge erred when she denied trial counsel's motion for a directed verdict because the State did not offer substantial circumstantial evidence that Passio was responsible for the death of his wife.

The State's case against Richard Passio did not meet the standard for allowing the case to go to the jury at the directed verdict stage. As is well-established under South Carolina law, a case should be submitted to the jury when the evidence is circumstantial "if 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. Mitchell*, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000). *See also State v. Williams*, 321 S.C.327, 332, 468 S.E.2d 626, 629 (1996). "The jury weighs the evidence but when there is an absence of evidence, it becomes the duty of the trial judge to direct a verdict..." *State v. Schrock*, 283 S.C. 129, 134, 322 S.E.2d 450, 452-53 (1984). Evidence must constitute positive proof of facts and circumstances which reasonably tends to prove guilt. *Id.* at 133, 322 S.E.2d at 452 (citing *State v. Manis*, 214 S.C. 99, 51 S.E.2d 370 (1949)).

In *State v. Bostick* 392-S.C. 134, 708 S.E.2d 774 (2011), the South Carolina Supreme Court, analyzing the evidence in the light most favorable to the State, found that the State's evidence only raised a suspicion of guilt that Bostick committed the crime. The State's case consisted of the following evidence: (1) the decedent's car keys, calculator, and other items from her home were found in the Bostick family's burn pile; (2) the fire in the burn pile was accelerated with either kerosene or diesel fuel, and Bostick's mother did not use those accelerants when she burned things in the pile; (3) Bostick had a pattern that matched gasoline on his shoes and gasoline

was the accelerant used for the house fire; and (4) while the DNA from the blood found on Bostick's jeans excluded about ninety-nine percent of the population, the blood could not be matched to the decedent's DNA. Also, the weapon used to kill the decedent was never introduced into evidence, and there was no evidence introduced to show that Bostick had knowledge the decedent may have had money in the briefcase or if any money was, in fact, in the briefcase on that date. *Id.* at 141-42, 708 S.E.2d 778.

In *State v. Odems*, 395 S.C. 582, 720 S.E.2d.48 (2011), the South Carolina Supreme Court reversed a conviction based on circumstantial evidence when the State established only the following facts: 1) that less than ninety minutes after the burglary, police located the defendant in the get-away car with the burglars and the stolen goods, 2) the defendant fled from law enforcement, and 3) the defendant asked an uninvolved person to lie to the authorities on his behalf. *Id.* at 588, 720 S.E.2d at 51.

In *Schrock, supra*, a double-homicide case, the South Carolina Supreme Court reversed a conviction where the State did not offer any evidence that the defendant was at the scene of the crime, could not definitely testify that the footprint found at the scene was made by shoes allegedly owned by the defendant, the State could not establish that cigarettes found at the scene had been smoked by the defendant, a hand print found at the scene was not the defendant's, and shoes presented in evidence were not identified by any witness who had seen the defendant actually wearing the shoes.

Also, in *State v. Arnold*, 361 S.C. 386, 605 S.E.2d 529 (2004), the South Carolina Supreme Court found evidence insufficient when the defendant's fingerprint on a coffee cup lid tab established that he was in the borrowed BMW on the same day the victim was last seen, and that the BMW was abandoned in Tennessee where the defendant stayed after his stay in Savannah, Georgia only raised a suspicion of guilt and was not sufficient to uphold the conviction. *Also see Mitchell, supra* at 409 ("The only evidence linking respondent to the burglary is the fingerprint").

Here, the evidence submitted by the State did not raise above a mere suspicion that Richard was guilty of the murder of his wife. At most it showed that Richard was present when his wife was shot, and that they had a disagreement earlier in the evening at the bar. Then, the State engaged in a number of speculative inferences calculated to have the jury draw the conclusion that Richard was guilty of her murder. For example, a number of State witnesses testified to the smell of "decomposition," and that her blood was "coagulated" suggesting that Richard's version of what happened was not to be believed. But as discussed below, there are serious problems with that testimony.

The State's Pseudo-Scientific Testimony Relating to Michelle's Time of Death

The State elicited a number of pieces of "evidence" that it purported showed that Richard Passio lied about how long his wife had been deceased prior to his calling 911.

During a pre-trial hearing, trial counsel objected to the anticipated testimony of one of the State's witnesses:

MR. GEIER: Yes, Your Honor. I believe he's [the EMT who was present at the scene] going to testify that, when he got there, based on the coagulation level of that blood, that, in his opinion, the scene had been there for awhile. In other words, it wasn't a fresh death.

THE COURT: Can he give any kind of time frame? Can you give any kind of idea as far as time?

MICHAEL SINGLETON: I can give a rough estimate, but I'm not—

THE COURT: What is your rough estimate?

MICHAEL SINGLETON: Probably at least 30 minutes for the coagulation to start setting in.

THE COURT: Okay.

MR. GEIER: Yeah, And—

SOLICITOR SWANSON: Just the fact that it didn't occur in the past ten minutes. The Dispatch time was 5:52. . . .

MR. GEIER: I mean, he can say, yeah, the blood was kind of gelatinous, or whatever it is he's going to say. And then, they can—the jury can draw their own conclusions. But there are people out there that are experts in this area that receive training and write papers on it, and go through lots and lots of classes specifically on this area, and I don't think that EMS is one.

ROA 68, l. 8- 70, l. 25.

Without exploring the EMT's training as to blood coagulation, the trial court judge found that he was qualified to offer this sort of opinion:

THE COURT: I'm supposing he's taking the totality of the circumstances when he testifies. And again, I think you can cross-examine him on all those questions...I think if he is comfortable and he wants to, and he says that, in my experience, you know, this didn't happen, you know, five, ten minutes ago; this happened at least a half hour ago; I think he can testify to that, if he's comfortable to and wants to, and feels like he can.

ROA 71, l. 19- 72, l. 5.

After Lieutenant Ginn's testimony, the trial court judge attempted to cabin this testimony to some extent:

THE COURT: ...We need to re-visit the paramedic's testimony. Just in thinking about it a little more in detail, I think, as long as he is comfortable, I think he can testify that, when he arrived there, he saw that the blood, potentially, was coagulating. I don't see anywhere in science that tells me that he can, or where he has been trained, or learned in any way to talk about timing, and that it has to be at least 30 minutes.

Ms. Swanson, unless you can point me to something, unless you can point to me he has some kind of specific training, and he can talk about coagulation patterns and bloodstain patterns, I'm real concerned about him going anywhere as far as timing is concerned, because I can't find where there is any scientific studies that will absolutely have experts say that. I think he can say, again, in his experience, he showed up, he saw blood coagulating, provided he knows what that is...I'm very leery of the leap factor that—to a time period, because I just don't see where the science allows him to put a time on it.

ROA 116, l. 11- 117, l. 10.

The court then told the Solicitor she did not need to qualify him as an expert.

ROA 118, ll. 23-25.

With the trial court's green light to this evidence, the State then presented a series of witnesses who then peppered their testimonies with pseudo-medical facts that would indicate Michelle's body was deceased for a longer period of time than alleged by Richard. For instance, Cpl. Chris McIntosh testified that he smelled "early states of decomposition" in the room. ROA 133, ll. 3-4. And that Michelle was "cold

to the touch.” ROA 133. He testified that the blood on the floor and in her right ear had coagulated. ROA 133.

Ryan Altman, a fireman and EMT also testified, upon questioning by the solicitor, that the blood on Michelle was “very thick and very pliable. It wasn’t liquid-like, it was more Jello.” ROA 212, l. 1-3. He also stated that Michelle was “very cold,” ROA 212, l. 25, and her blood was in a “gelatinous state.” ROA 213, l. 1.

Then the State called Michael Singleton. He noted that her blood “had already started to coagulate” when he arrived on the scene. ROA 221, l. 20. Her skin was “already cyanotic and ashen.” ROA 221, l. 22. He stated she was “already cool and ashen when he got to her.” ROA 221, l. 25- 222, l. 1. The solicitor reiterated,

Q: Her skin was ashen?

A: Yes, ma’am.

ROA 222, ll. 2-3.

Singleton then conceded that Michelle had a “workable cardiac rhythm” when he arrived on the scene. ROA 223, ll. 20-21. He testified there “was no active moving blood when [he] was on-scene.” ROA 224, ll. 23-24.

Importantly, when the State called its forensic pathologist to testify, the one witness who was actually qualified to testify to issues relating to the physiology of death, it did **not** question her about any of these “facts” the State elicited for purposes of showing that Richard lied about when his wife died. Had the State done so, the forensic pathologist may have testified to information readily available that undercuts these witness’s testimonies. For example, there is abundant literature that

confirms that blood coagulates very quickly. See Ross, Heather, and medically reviewed by Deborah Weatherspoon, PhD, RN, CRNA on May 4, 2017, *Prothrombin Time Test*, available at <https://www.healthline.com/health/prothrombin-time-pt#procedure> (last visited 6/27/19) (Finding that blood plasma begins to clot within 11 and 13.5 seconds if the patient is not taking blood-thinning medications); see also *What Is a Partial Thromboplastin Time Test?*, WebMD Available at <https://www.webmd.com/a-to-z-guides/partial-thromboplastin-time-test#1> (last visited 6/27/19) (The typical value for a PTT, or partial thromboplastin time, is 60-70 seconds). And see *Activated Coagulation Time*, University of Rochester Medical Center, available at <https://www.urmc.rochester.edu/encyclopedia/content.aspx?contenttypeid=167&contentid=act> (last visited 7/12/19) (Normally 70-120 seconds for blood to clot without heparin, a blood-thinner). And, just as the trial court judge recognized, there are no readily available studies that indicate that coagulated blood is used as a reliable measure to determine post-mortem interval. Michael Singleton's statement to the judge that it would be about 30 minutes for blood to coagulate is without any scientific basis at all, much like his false statistics as to the number of women who commit suicide by firearms.

Additionally, Singleton's testimony and the solicitor's pointed questioning about Michelle's looking "ashen" were misleading. Looking "ashen" is referred to in scientific literature as pallor mortis and has absolutely no value in determining time of death because it occurs almost instantaneously. See Schafter AT, *Color*

Measurements of pallor mortis, Int J Legal Med. 2000; 113(2):81-3, available at <https://www.ncbi.nlm.nih.gov/pubmed/10741481> (last visited 6/27/19) (Paleness develops so rapidly after death that it has no or little use in determining time of death).

And the State witnesses' testimonies about Michelle being cold to the touch also seems highly problematic. The cooling of the body is referred to in scientific literature as algor mortis, and it typically takes hours before it becomes noticeable. Cohut, Maria, *What happens to the body after death?*, Medical News Today, May 11, 2018) available at <https://www.medicalnewstoday.com/articles/321792.php> (noting it takes 18-20 hours before a body will reach ambient temperature); see also *Decomposition—Body Changes*, November 11, 2018, available at <https://australianmuseum.net.au/about/history/exhibitions/death-the-last-taboo/decomposition-body-changes/> (indicating that it take 12 hours for a body to be cool to the touch). Several formulas are used to estimate the rate of cooling after death, but as a general rule, the body loses an average of 1.5 to two degrees Fahrenheit per hour for the first 12 hours after a person's death. Samuel D. Hodge Jr. and Nicole M. Saitta, *Behind the Closed Doors of the Coroner's Office—the Medical/ Legal Secrets Involving an Autopsy*, 32 Temp. J. Sci. Tech. & Env'tl. L. 1 (2013). At the time Singleton first encountered Michelle, she still had a "workable cardiac rhythm." But also, what these witnesses failed to note was the presence of lividity or rigor mortis, or any other well-established methods for approximating time of death in a human being. The forensic pathologist could have testified to those

facts, had she been asked. If the State's theory was that Michelle was killed between 1:00 and 3:00am, as testified to by Ivy Bryan, then livor mortis should have been apparent. *See Helton v. Singletary*, 85 F. Supp.2d 1323 (S.D. Fla., 1999) (Livor mortis will usually appear within one or two hours following death and is visible to which side the body is lying). In its closing argument, the State appears to imply that is the time frame it is committed to. Tr. 680-81.

The State used all of this pseudo-scientific information to great effect during its closing argument. As the solicitor argued:

They all noted that there was no dripping blood. They all noted that the blood was coagulating, kind of getting to be that jelly-like substance. The blood on Michelle's chest and in her ear almost looks like a piece of wax, I mean, that is solidifying.

They also noted the smell of what they thought was decomposition. Both the EMT and the paramedic said that her body felt cold. Her extremities were cold to the touch. Her skin was turning an ashen color... The scene did not appear fresh. The shooting had not just happened, the way Richard said it did. He needed time to get things under control, get his story straight, tell whatever children were awake what he needed them to do.

ROA 682, l. 14- 683, l. 16.

The State introduced this pseudo-scientific evidence in its trial because it lacked substantial circumstantial evidence to show that Richard murdered Michelle.

The Gun

Additionally, the State introduced a video of Richard taking a box out of Jasper's Porch on the night of Michelle's death, and suggested—but never offered any evidence to prove—that the gun was in that box. Just as trial counsel argued during his motion for a directed verdict, the State failed to show that Passio retrieved his

gun on this particular night, as opposed to already having the gun on him or that it was located in his and Michelle's home. It was a completely speculative inference by the State that Richard procured the gun used to kill Michelle that very night from Jasper's Porch. Trial counsel brought this issue to the trial court's attention during the motion for directed verdict:

They've got a case that they called a gun case, and they've asked all kinds of witnesses, did you see Richard with a gun at Jasper's Porch? Yeah. Did he have a case? Yeah. The case sitting right there, and it's entered into evidence, but not one of them testified that, that was the case. None of them identified that. They didn't ask them to. So, I guess that seems—they seem to be implying that Richard kept the gun at Jasper's Porch, in that case. And then, that morning, at 1:00 in the morning, I guess it was, with the time stamp being off, that he went there and retrieved this case. Well, again, nobody said that, that was the case that he ever kept any sort of firearm in.⁵

ROA 419, ll. 1-14.

Just as the State introduced its pseudo-scientific medical testimony, it also relied on Richard's removing this case from the restaurant on that evening to imply that Richard retrieved the gun with the expectation he was going to murder his wife later that night. This inference is far too attenuated to support a murder conviction.

Respectfully, this Court should enter a judgement of acquittal because the evidence offered by the State to prove Richard murdered his wife was insufficient to support his conviction and sentence.

II. The trial judge erred when she allowed the State to present a Facebook post allegedly posted by Passio because it was irrelevant and unduly prejudicial.

⁵ The State introduced this case into evidence through the testimony of Investigator McIntosh, who testified he took it from the trunk of Richard Passio's car. ROA 144.

During her cross-examination of Richard Passio, Sr., the solicitor moved into evidence, over objection, a Facebook profile picture it took from the internet. State's Exhibit #32 shows a picture of Richard's head, with a caption below it that states: "I know who I am. I'm a dude, playing a dude, disguised as another dude." ROA 578. Richard Passio, Sr. testified he had no idea what it meant. ROA 578.⁶ Defense counsel objected on the basis of relevance and authentication. ROA 577. The State apparently used this post to suggest that Richard was somehow "disguised." The solicitor argued:

I'm going to leave you with his quote:

I know who I am, I'm a dude playing a dude, disguised as another dude.

Well, he does know who he is, and he does know what he did. He knows the monster inside that he has tried to disguise. Don't be fooled by that disguise. I'm asking you to return a verdict of guilty on murder and speak the truth that Michelle can no longer speak.

ROA 700, l. 22- 701, l. 5.

The trial court judge erred by allowing this exhibit into evidence because it lacked any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. *South Carolina Rules of Evidence*, Rule 401. This Facebook profile picture had absolutely no connection with any of the events of this case.

⁶ This is a popular quotation from the comedy *Tropic Thunder*, a 2008 film starring Ben Stiller, Jack Black, and Robert Downey, Jr.

Additionally, the solicitor's use of this evidence suggested something nefarious that was not based on any objective fact. The jury, having been admonished not to investigate the case, or discuss any of the evidence with others, likely had no idea this quotation was from a silly comedy movie about a group of actors making a Vietnam War film when their fed-up director abandons them in the middle of the jungle, forcing them to fight their way out (according to various on-line movie websites). Instead, the Solicitor argued to the jury it was relevant in determining whether Richard Passio was lying about whether he murdered his wife. Yet again, instead of relying on objective facts, the State used Passio's innocuous Facebook page to raise a suspicion that Richard Passio was devious, and lying about the death of his wife. This evidence was irrelevant, and put to the task the Solicitor assigned for it, unduly prejudicial. This Court should reverse Passio's conviction and sentence and remand for a new trial.

CONCLUSION

As to Argument I, this Court should direct a verdict of acquittal. As to Argument II, this Court should remand for a new trial.

Respectfully submitted,

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Dated this 21st day of January, 2020.

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM JASPER COUNTY
Court of General Sessions

Appellate Case No. 2018-001488

The Honorable Carmen T. Mullen, Circuit Court Judge

RECEIVED
JAN 30 2020
SC Court of Appeals

The State of South Carolina.....Respondent,

v.

Richard Passio, Jr.....Appellant.

CERTIFICATE OF COUNSEL

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



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January 24, 2020