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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lancaster County
Honorable R. Lawton McIntosh, Circuit Court Judge
Appellate Case No. 2019-001417

THE STATE,

Respondent,

vs.

KAYLA MARIE COOK,

Appellant.

INITIAL BRIEF OF RESPONDENT

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II. The trial judge did not abuse his broad discretion by admitting evidence concerning an arm injury the minor victim sustained several weeks before she died because it constituted evidence of Appellant’s mental state and attitude towards the minor victim and, thus, it: (1) was relevant to the extreme indifference element of the charged crime; (2) was admissible pursuant to the intent exception of Rule 404(b) of the South Carolina Rules of Evidence; and (3) possessed a probative value that was not substantially outweighed by its potential for undue prejudice. However, even assuming the challenged evidence regarding the minor victim’s arm injury was somehow improperly admitted, any possible error in its admission was entirely harmless because it was cumulative to other substantially-similar evidence regarding the minor victim’s injured arm that was presented during trial *without objection*, including from Appellant herself.26

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STATEMENT OF ISSUES ON APPEAL

I.

“Did the trial judge err by failing to grant a mistrial when the lead detective informed the jurors that Appellant’s older child, who did not testify, provided evidence that ‘reinforced’ that Appellant caused the death of Minor?”

II.

“Did the trial judge err by allowing the state to introduce evidence that Minor suffered an injury to her arm two-to-four weeks prior to her death where (1) the evidence was irrelevant, (2) the evidence was inadmissible character evidence, and (3) the probative value of the evidence was substantially outweighed by its prejudicial effect?”

COUNTER-STATEMENT OF ISSUES ON APPEAL

I.

Did the trial judge abuse his broad discretion by declining to grant the extreme remedy of a mistrial after a witness for the prosecution made a brief remark improperly alluding to a purported out-of-court statement that—along with all the other evidence—allegedly “reinforced” the fact Appellant was responsible for the minor victim’s death when the occurrence of that isolated error was not sufficiently prejudicial to necessitate the grant of a mistrial in light of the facts the improper remark was vague and never repeated or referenced again at any point during the lengthy trial, no testimony or evidence was ever presented revealing the specific substance of the purported out-of-court statement alluded to by the remark, and the trial judge properly used alternative means to cure the error by swiftly striking the improper remark from the record and instructing the jurors on multiple occasions they could not consider it all during their deliberations?

II.

Did trial judge abuse his broad discretion by admitting evidence concerning an arm injury the minor victim sustained several weeks before she died when it constituted evidence of Appellant’s mental state and attitude towards the minor victim and, thus, it: (1) was relevant to the extreme indifference element of the charged crime; (2) was admissible pursuant to the intent exception of Rule 404(b) of the South Carolina Rules of Evidence; and (3) possessed a probative value that was not substantially outweighed by its potential for undue prejudice? Furthermore, even assuming the challenged evidence regarding the minor victim’s arm injury was somehow improperly admitted, was any possible error in its admission entirely harmless when it was cumulative to other substantially-similar evidence regarding the minor victim’s injured arm that was presented during trial *without objection*, including from Appellant herself?

STATEMENT OF THE CASE

In December of 2017, Appellant Kayla Marie Cook was arrested following an investigation into the death of a three-year-old child who died after sustaining fatal injuries caused by significant blunt force trauma. In June of 2019, the Lancaster County Grand Jury indicted Appellant for one count of homicide by child abuse. On August 12, 2019, a jury trial was commenced in the Lancaster County Court of General Sessions with the Honorable R. Lawton McIntosh, circuit court judge, presiding. At the conclusion of the six-day trial, the jury convicted Appellant as indicted. Following the verdict, the trial judge sentenced Appellant to life without parole. Appellant then timely filed a notice of appeal.

STATEMENT OF FACTS

In March of 2017, Timothy Scott Schroeder (“Father”) connected with Appellant through the internet, and the two quickly began dating. (Tr. p. 815; p. 817; pp. 1031-1032). Around a month or two later, they started living together. (Tr. p. 817; p. 1032). In the months that followed, they resided at a number of different homes along with Appellant’s two minor children, and, at some points, Father’s two-year-old daughter (“Victim”) also lived with them.¹ (Tr. pp. 817-821; pp. 1032-1034). However, at other times, Victim was in the custody of her biological mother, including for the majority of the summer. (Tr. p. 816; p. 818; p. 822). Furthermore, Father and Appellant’s relationship was not continuous during that span of time and, instead, was “on and off.” (Tr. p. 1032; State’s Ex. # 36 (Recording of Interview)).

Towards the middle or end of November of that year, Father and Appellant moved into a new residence located in Lancaster, South Carolina, along with Victim and Appellant’s children.² (Tr. p. 212; p. 635; p. 672; p. 826; p. 895; pp. 1036-1037). A short time later, Victim celebrated her third birthday. (Tr. p. 636; p. 830). Just over two weeks after that, Victim was dead. (Tr. p. 280; p. 295).

On the date of Victim’s death—December 18, 2017, Father headed to work in Fort Mill, South Carolina, at approximately 6:30 a.m. while leaving Victim, who was still asleep, in Appellant’s exclusive care. (Tr. pp. 864-865; p. 877; pp. 891-892; p. 1057). Around 11:00 a.m., one of Appellant’s neighbors went over to Appellant’s house to do laundry, and Appellant

¹ According to others, Victim’s relationship with Father was loving and “special,” and Father treated her very gently. (Tr. p. 217; p. 558; p. 900; p. 975). In fact, one witness who interacted with them in December of 2017 described Father as being Victim’s “world” and making her face “light up.” (Tr. p. 969; p. 980).

² At that time, Appellant’s son was approximately eighteen months old and Appellant’s daughter was roughly five years old. (Tr. p. 636).

greeted her at the door. (Tr. p. 366; p. 549; pp. 552-553; p. 557; State's Ex. # 36). However, instead of letting her in as planned, Appellant alerted her she would have to come get her later on because something had happened. (Tr. pp. 318-319; pp. 477-478; pp. 552-553; p. 1064).

Roughly an hour after that, Appellant ran out of her home while exclaiming Victim was not breathing, and several of her neighbors rushed over to assist. (Tr. p. 213; pp. 553-554; p. 557; pp. 638-639; p. 1067; p. 1118). At that time, Victim had no pulse, she was not breathing or moving, her body was "ice cold" to the touch, her eyes were set, her skin looked blue in color, and she appeared to be dead. (Tr. pp. 214-215; pp. 217-218; p. 554; p. 639). Upon finding Victim in that condition, one of the neighbors promptly—at 12:04 p.m.—called 911, and Appellant's other neighbors did their best to try to revive Victim while waiting for help to arrive. (Tr. pp. 214-215; p. 489; p. 554; p. 640; p. 1068).

In response to the 911 call, Sergeants Dale Johnson and Jodi Sims from the Lancaster Police Department hurried to Appellant's residence, and they found Victim on the floor inside limp and lifeless. (Tr. p. 215; pp. 230-231; p. 234; p. 237; pp. 357-358; p. 360). Due to Victim's unmistakably dire condition, the officers rapidly transported Victim to the hospital without delay, and, while on the way, they—along with another emergency responder who had arrived to help—did everything they could to resuscitate her. (Tr. pp. 222-228; pp. 233-234; p. 361; p. 363; p. 641). Sadly though, those measures were not effective. (Tr. pp. 222-228; p. 237).

At 12:14 p.m., Victim was delivered to the emergency room. (Tr. pp. 242-243; p. 313; p. 361; p. 489). When she arrived, Victim was not breathing, her heart was not beating, she had no pulse, her body temperature was "very cold," and her pupils were fixed and dilated.^{3 4} (Tr. pp.

³ Based on her body temperature and cold torso, Victim had been in cardiac arrest for thirty minutes *at a minimum* prior to arriving at the hospital. (Tr. pp. 294-295). However, one of the doctors who participated in the efforts to save Victim's life believed she had been in cardiac

246-247; p. 281; p. 283; pp. 292-293; p. 313). Beyond that, Victim, who was fully clothed at the time of her arrival, had bruises all over her body, including a striking one to her lower abdomen.⁵ (Tr. pp. 251-252; p. 283; p. 296; pp. 313-314; pp. 581-586; p. 908).

Not long after Victim was delivered to the hospital, Appellant arrived at that location and identified herself as Victim's mother. (Tr. p. 250; pp. 322-323). In an effort to find out what had occurred, some of the hospital staff spoke with Appellant, and Appellant advised them Victim had fallen in the bathtub while unattended at some point after breakfast and was found floating in six inches of lukewarm water with her face pointed upwards. (Tr. pp. 250-251; p. 318; pp. 365-368). In addition to that, Appellant reported Victim's abdominal bruise had been sustained two days earlier when she accidentally stepped on her after Victim was knocked down some stairs by a dog. (Tr. pp. 302-303; p. 318; p. 369).

Over the course of the next hour and a half, numerous doctors and medical specialists attempted to revive Victim. (Tr. pp. 242-243; p. 249; pp. 285-286; pp. 289-290; pp. 312-313). Tragically though, their efforts were in vain, and Victim's death was pronounced at 1:32 p.m. without her ever having shown any signs of life aside from a few possible flickers of pulseless electrical activity in her heart. (Tr. pp. 287-290; p. 295; p. 776).

Following Victim's death, law enforcement officers began an investigation into the matter. (Tr. pp. 370-371). As part of that investigation, Sergeant Sims—along with Agent Trista Baird from SLED's child fatality unit—conducted an interview of Appellant. (Tr. pp. 446-447;

arrest for "much more" than thirty minutes based on how frigid her body felt to the touch when she first arrived. (Tr. pp. 278-280; p. 310).

⁴ Significantly, Victim's fixed and dilated pupils were indicative of neurologic death. (Tr. p. 292). However, there were not yet any signs of rigor mortis, which typically manifest a few hours after death. (Tr. pp. 764-765).

⁵ At some point after she had been dressed, Victim defecated in her clothing. (Tr. p. 227).

p. 903; p. 907; State's Ex. # 36). During the course of the interview, Appellant provided a number of varying accounts of the events leading up to Victim's death. (Tr. p. 488; pp. 924-926; State's Ex. # 36). In one version of events, Victim was actively playing with Appellant's son on the morning of the incident before Appellant realized Victim had defecated on herself. (Tr. p. 483; State's Ex. # 36). After that, Appellant had Victim get into the bathtub to wash off, Appellant left Victim there, and Appellant returned after only "ten to fifteen minutes tops" to find Victim on her back in the water in a frog-like position. (Tr. p. 483; State's Ex. # 36). However, in other versions of events, Appellant left Victim unattended in the tub for varying periods of time that ranged from just "a few minutes" to as long as two entire hours. (Tr. p. 486; State's Ex. # 36). Similarly, at one point, Appellant alleged Victim ate and played before needing to be bathed that morning, and, at other points, she claimed the events that led to Victim getting into the tub occurred immediately after Victim awakened for the day.⁶ (Tr. pp. 484-485; State's Ex. # 36). Likewise, at different points in the interview, Appellant inconsistently claimed Victim both did and did not speak on the morning of her death, and she offered differing reports as to the number of times Victim defecated on herself that morning. (State's Ex. # 36). In addition to that information, Appellant claimed the striking bruise to Victim's abdomen had been inflicted when she accidentally stepped on Victim after the family's dog knocked Victim down the stairs a few days earlier. (State's Ex. # 36). In fact, Appellant went so far as to specifically identify the boots she had been wearing when she "landed on [Victim]" during that purported incident. (Tr. p. 1110; State's Ex. # 36). Additionally, when confronted about the fact Victim's entire body was covered in bruises, Appellant tried to explain those injuries by claiming her children "gang[ed] up" on Victim, alleging she had heard her daughter "smack [Victim] around,"

⁶ Later on during trial, testimony was presented establishing Victim had *no* stomach contents at the time of her death, which was pronounced in the afternoon. (Tr. p. 295; p. 764).

and insisting Victim was an “easy target” for the other children due to her small size. (Tr. pp. 928-929; State’s Ex. # 36). Furthermore, Appellant asserted she personally loved Victim very much and denied she would ever do anything to purposefully hurt Victim. (State’s Ex. # 36). However, Appellant also candidly acknowledged she “kn[e]w things look[ed] bad right [then].” (State’s Ex. # 36).

On the following day, Dr. Janice Ross, an expert forensic pathologist with more than three decades of experience, conducted Victim’s autopsy. (Tr. pp. 389-392). During that autopsy, Dr. Ross found bruises all over Victim’s body, including on Victim’s head, ears, eye, eyeball, chest, arms, hand, back, legs, abdomen, groin, and liver. (Tr. pp. 393-394; pp. 399-405; p. 411; p. 415; p. 432). Significantly, some of those bruises extended deep into Victim’s body, and they appeared to be recent. (Tr. pp. 408-409). Dr. Ross also discovered a several-week-old fracture to Victim’s right arm that was in the process of healing. (Tr. pp. 402-403). Additionally, she found swelling in Victim’s brain and a large amount of blood-tinged fluid inside Victim’s chest and abdominal cavity that resulted from blunt-force-trauma-induced internal hemorrhaging, which constituted Victim’s most serious injuries. (Tr. pp. 411-412; pp. 416-417; pp. 420-421; pp. 432-435). Based on her findings, Dr. Ross concluded Victim died as a result of the blunt force trauma and opined Victim’s death would have occurred within thirty minutes to two hours of the onset of the brain swelling. (Tr. pp. 420-421; pp. 432-434).

Ultimately, at the conclusion of the investigation into Victim’s death, Appellant was arrested and indicted for homicide by child abuse, and she proceeded forward to trial. (Tr. p. 47; p. 907; pp. 921-922; Indictment). During the course of trial, the officers, medical personnel, neighbors, and other individuals involved in Appellant’s case testified about Victim’s death and the results of the ensuing investigation into that tragic occurrence. (Tr. pp. 212-228; pp. 230-

237; pp. 240-253; pp. 276-310; pp. 312-334; pp. 534-559; pp. 561-632; pp. 634-645; p. 724; pp. 781-789; pp. 885-900). Likewise, Father testified about the events leading up to Victim's death, he noted Victim was asleep when he left for work early on the date she died, and he confirmed he had not seen any abdominal bruising on her body when he bathed her on the preceding night.⁷ (Tr. p. 813; pp. 860-861; pp. 863-865). Additionally, Sergeant Sims and Agent Baird discussed their roles in the investigation along with the varying accounts provided to them by Appellant, and a recording of Appellant's law enforcement interview was played for the jury. (Tr. pp. 357-373; pp. 446-450; pp. 474-499; pp. 511-526; pp. 903-916; pp. 921-930; State's Ex. # 36). Furthermore, Dr. Ross testified about the results of Victim's autopsy and provided her opinion about the cause of Victim's death. (Tr. pp. 389-434).

In addition to that testimony and evidence, Dr. Susan Lamb, a child abuse pediatrician and expert in child abuse pediatrics, testified about her involvement in the state-mandated review of Victim's death. (Tr. p. 736; p. 739; p. 741; p. 746). Through that review, Dr. Lamb indicated she noticed "very apparent" bruises all over Victim's body, including "pattern injuries" to Victim's legs, that were consistent with inflicted—as opposed to accidental—wounds. (Tr. p.

⁷ During his testimony, Father also stated he got into an argument with Appellant early on the day before Victim died, the argument briefly became physical, Appellant punched and scratched his face, and he grabbed and pushed her away in response. (Tr. pp. 850-852). Father further acknowledged he initially lied to law enforcement about that altercation, and he explained he did so because he was afraid it would lead to him being arrested before Victim's funeral due to the physical nature of the argument. (Tr. pp. 870-872; p. 874; p. 882).

⁸ Father's mother, who had entered into a "kinship agreement" with the Department of Social Services to be Victim's caretaker a few weeks prior to Victim's death, also testified as part of the State's case, and she stated she last saw Victim around Victim's birthday. (Tr. pp. 668; p. 670; p. 673-674; p. 715). During her testimony, she confirmed she had been criminally charged in connection to Victim's death because she was supposed to be living with Victim at the time Victim died but was not actually doing so. (Tr. p. 676; pp. 688-690; p. 716). Furthermore, she admitted she initially lied to law enforcement in an effort to cover up the fact she was not complying with the terms of the "kinship agreement." (Tr. pp. 688-689; p. 712).

747; pp. 757-760). Additionally, she stated she found signs of *fresh* internal bleeding in Victim's abdominal cavity that resulted from a retro-peritoneal hemorrhage caused by significant blunt force trauma to Victim's abdomen along with swelling in Victim's brain, which she opined were the two major causes of Victim's death. (Tr. pp. 750-752; pp. 761-763; p. 766; p. 772; p. 777). As to how those particular injuries were caused, Dr. Lamb indicated both would have required a degree of force consistent with the force involved in a significant or high-speed car accident, and she affirmed the abdominal injury, which was Victim's primary cause of death, had to have been caused by a direct blow. (Tr. pp. 752-753; p. 761; p. 766). Likewise, as to how long Victim could have survived after receiving those injuries, Dr. Lamb explained Victim's fatal injuries would have led to her death within minutes to at most two hours. (Tr. p. 762; p. 766; pp. 778-779). Based on that, Dr. Lamb opined the injuries were sustained no earlier than 8:00 a.m. on the morning of Victim's death, they could not have been inflicted on the preceding night, and the hemorrhaging was likely caused around 10:15 a.m. (Tr. pp. 765-766). Moreover, Dr. Lamb explained Victim's injuries would have been agonizing, would have led to obvious symptoms, and would have prevented Victim from behaving normally. (Tr. pp. 751-752; p. 763; p. 768).

Following the presentation of the State's case, Dr. Nicholas Batalis, a forensic pathologist from the Medical University of South Carolina with eleven years of practicing experience, was presented as a defense expert on the subject of forensic pathology.⁹ (Tr. pp. 983-983; p. 986). During his testimony, Dr. Batalis explained he reviewed a variety of materials provided to him by defense counsel in connection to Appellant's case, including Dr. Ross's autopsy report, photographs from Victim's autopsy, and some tissue samples collected during the autopsy. (Tr.

⁹ Interestingly, despite his experience as a forensic pathologist, Dr. Batalis had never served on a child fatality review board and did not even appear to be aware there was a statutorily-mandated review process that must be followed whenever a child in South Carolina dies in a suspicious or unexplained manner. (Tr. pp. 1019-1020).

pp. 987-988). Based on that review, Dr. Batalis opined Victim—whom he noted had numerous bruises all over her body—died as the result of a “traumatic injury” to her abdomen.¹⁰ (Tr. p. 990; p. 997; p. p. 999; p. 1002; p. 1004). Beyond that, Dr. Batalis described Dr. Ross’s autopsy report as “fairly complete and mostly well-documented,” but he indicated he believed a few more procedures should have been performed. (Tr. p. 990). Specifically, he asserted Victim’s broken right arm should have been removed to allow for a potential determination of when she sustained the fracture to it, her eyes should have been removed for more extensive examination, and her brain should have been saved for “a week or two” to allow for further analysis. (Tr. pp. 991-993). Additionally, as to Victim’s fatal injury, Dr. Batalis indicated it extended *more than halfway* through Victim’s body, resulted in a striking bruise, and caused fatal internal bleeding.¹¹ (Tr. pp. 998-999; pp. 1004-1005). Moreover, based on the perceived varied coloration of the bruise he detected by viewing photographs of the injury, Dr. Batalis asserted it was “unlikely” the injury could have been inflicted on the date in which Victim died, and he opined it was likely sustained at least a day before Victim’s death up to as many as “a couple days” before that time. (Tr. pp. 998-1001). He further asserted it would “at least take several hours” for the bruise to have developed after the injury due to the fact “[b]ruises take time to develop.” (Tr. p. 1014). However, despite relying upon—or primarily upon—the coloration of the bruise to opine when the fatal injury both was and was not likely sustained, Dr. Batalis admitted he and the scientific

¹⁰ Apart from his review of the provided materials, Dr. Batalis did not take any other actions—such as consulting with other doctors or experts—before rendering his opinion in Appellant’s case. (Tr. p. 1019).

¹¹ Despite the “traumatic” nature of Victim’s injury, Dr. Batalis refused to acknowledge the three-year-old child’s pain level would have been significant on the basis he could not “place [him]self in her mind set,” but he conceded she would have been expected to be “in some sort of pain.” (Tr. pp. 1004-1007). Similarly, although Dr. Batalis described the bruise as “striking,” he later indicated he could not state “whether it would [have been] obvious for somebody else observing the child.” (Tr. pp. 998-999; p. 1014).

community as a whole were “not that great” at dating bruises, claimed he personally “never place[d] a specific time with bruises,” and candidly conceded he had written a published article cautioning the medical community to be careful about trying to date bruises from their appearance.¹² (Tr. p. 998; p. 1000; p. 1002; p. 1008; p. 1010; p. 1022). Furthermore, as to how it was caused, Dr. Batalis asserted he could not state whether the injury was inflicted or accidental, but he noted the force required to cause it would had to have been “very significant” as it was consistent with one that could result from a high-speed car crash.¹³ (Tr. p. 1005). He further noted the injury was not consistent with Victim having simply tripped over onto the ground or slipped in the bathtub and, instead, was consistent with her having been stomped, punched, or kicked or her having fallen from “some height” or onto something firm. (Tr. p. 1005; p. 1012).

Subsequent to Dr. Batalis’s testimony, Appellant elected to testify on her own behalf, discussed the details of her “on and off” nine-month-long relationship with Father, confirmed she was living in the same home as Victim in December of 2017, and provided yet another account of the events leading up to Victim’s death. (Tr. pp. 1031-1037; pp. 1047-1084; p. 1112). In that latest version of events, Appellant caught Father whipping Victim with a belt for defecating on herself on the night before Victim died, she rescued Victim and put her to bed, she then left

¹² Initially, on direct examination, Dr. Batalis indicated the “main factor” for his belief regarding when Victim’s fatal injury was incurred was the color of the bruise. (Tr. p. 1000). Shortly after that, Dr. Batalis admitted on cross-examination it was accurate to state he was dating Victim’s internal injury and bruise from the bruise’s color. (Tr. p. 1002). However, after further cross-examination led him to admit he had expressly cautioned other medical professionals against trying to date bruises from their appearance and to acknowledge the progression of a bruise would vary to some degree from person to person, Dr. Batalis altered his position and stated his opinion was based “on the totality of everything [he] reviewed.” (Tr. p. 1010; p. 1014; p. 1022).

¹³ Although Dr. Batalis was unwilling to opine whether the fatal abdominal injury was inflicted or the result of an accident, he did state he did *not* believe all the many bruises on Victim’s body were caused by accidental falls or bumps. (Tr. p. 997).

Victim alone in Father's care for a few hours while she dropped her daughter off with her parents for a trip, she subsequently came home to find Victim in bed where she had left her, and everyone went to sleep together in the same bed.¹⁴ (Tr. pp. 1052-1056; p. 1112). On the next morning, Father left for work, Appellant got up after he was gone, and Victim eventually awakened, too. (Tr. pp. 1057-1059). Once Victim was up, Victim—who supposedly was behaving normally at that time—went to the bathroom and smeared feces on the toilet, Appellant realized Victim had defecated on herself once again, Appellant gave Victim wipes and instructed her to clean the dirty toilet, Victim got into the bathtub to wash herself off after complying, and Appellant proceeded to leave her in the tub for an unknown span of time. (Tr. pp. 1059-1062; pp. 1112-1113; p. 1115). At some point later, Appellant heard a thud, went to check on Victim, found her in the tub on her back, and realized she had defecated in the tub. (Tr. pp. 1062-1063). Upon making that discovery, Appellant got Victim—who was purportedly breathing and looking at her—out of the tub and—after responding to a neighbor's knock at the door—dried Victim off, dressed her, and put her on the couch. (Tr. pp. 1063-1066). Appellant then resumed other activities until she heard Victim make a gurgling noise, and she went to check on Victim in response. (Tr. pp. 1066-1067). When she did, Appellant realized something was wrong, discovered Victim was not breathing, tried to resuscitate her unsuccessfully, and then ran to her neighbors for help. (Tr. pp. 1067-1068). Following that, the events at the hospital transpired, she was interviewed by law enforcement, she was taken to a hospital in North Carolina due to

¹⁴ Earlier, during her interview with law enforcement, Appellant claimed no one “whooped” or punished Victim when she defecated on herself the night before she died. (State's Ex. # 36). However, later on during that same interview, Appellant inconsistently stated Father “popped” Victim on the buttocks a few times that night as punishment. (Tr. p. 513; State's Ex. # 36).

suicidal thoughts, she was involuntarily committed for eleven days, and she was arrested upon subsequently returning home from the hospital.¹⁵ (Tr. pp. 1068-1080).

Beyond providing that most-recent narrative of events, Appellant denied causing a single one of the bruises on Victim's body and claimed she did not cause Victim's death. (Tr. pp. 1083-1084). Likewise, she insisted she never stepped on Victim after Victim fell down the stairs as she had earlier claimed, and she alleged she had no knowledge about the cause of Victim's striking abdominal bruise despite previously—on multiple occasions—identifying herself as the direct cause of that injury. (Tr. p. 1084; pp. 1107-1110; p. 1114; p. 1124). Furthermore, Appellant alleged her earlier lies were all uttered in an attempt to protect Father, and, despite her claim to the contrary during her interview with law enforcement, she insisted she had been protecting Father all along. (Tr. p. 1109; State's Ex. # 36).

At the conclusion of the defense's case, Dr. Amy Durso, an expert forensic pathologist with nine years of experience, testified for the State in rebuttal. (Tr. pp. 1139-1142). During her testimony, Dr. Durso indicated she consulted with Dr. Lamb and reviewed the autopsy report, the crime scene report, SLED's lab report, Agent Sims's report, Victim's death certificate, the coroner's case report, Victim's pediatric records, Victim's hospital records, the histologic slides, the post-mortem x-rays, and numerous photographs. (Tr. pp. 1142-1143). Ultimately, based on her consultation and review, Dr. Durso opined Victim died as the result of fatal internal bleeding that was caused by blunt force trauma injuries, and she concluded Victim had to have bled to death within an hour or less of receiving her fatal wounds. (Tr. p. 1149; p. 1151; pp. 1155-1156; p. 1158). As support for that particular conclusion, Dr. Durso explained there were no signs of

¹⁵ Although Appellant claimed her commitment was involuntary, the solicitor—on cross-examination—called Appellant's attention to the fact the form Appellant personally signed at the hospital upon admission had been a *voluntary* consent form. (Tr. pp. 1104-1105).

clotting in the large amount of blood found in Appellant's abdominal cavity, which was significant because such clotting could begin to appear within just twenty to thirty minutes. (Tr. p. 1146; p. 1151; pp. 1154-1156; p. 1158). Additionally, Dr. Durso opined Victim's injuries would have been "extremely painful" and resulted in obvious symptoms, and she explained significant force would have been required to cause them. (Tr. p. 1146; p. 1155; pp. 1159-1160). Furthermore, Dr. Durso confirmed there was no reliable way to determine the age of a bruise simply by looking at one, indicated it would not be scientific to try to do so, and noted photographs made it more difficult to attempt to date a bruise due to the fact lighting can affect how one's colors appear in a photograph. (Tr. pp. 1152-1154).

Following the presentation of the State's rebuttal testimony, the parties presented their closing arguments to the jury, and the trial judge instructed the jury on the applicable law. (Tr. pp. 1187-1258). Appellant's case was then submitted to the jury, and the jury ultimately convicted Appellant as indicted after a little over three hours of deliberations. (Tr. p. 1260; p. 1265).

ARGUMENT

I.

The trial judge did not abuse his broad discretion by declining to grant the extreme remedy of a mistrial after a witness for the prosecution made a brief remark improperly alluding to a purported out-of-court statement that—along with all the other evidence—allegedly “reinforced” the fact Appellant was responsible for the minor victim’s death because the occurrence of that isolated error was not sufficiently prejudicial to necessitate the grant of a mistrial in light of the facts the improper remark was vague and never repeated or referenced again at any point during the lengthy trial, no testimony or evidence was ever presented revealing the specific substance of the purported out-of-court statement alluded to by the remark, and the trial judge properly used alternative means to cure the error by swiftly striking the improper remark from the record and instructing the jurors on multiple occasions they could not consider it all during their deliberations.

Appellant contends the trial judge reversibly erred by refusing to grant a mistrial after Agent Baird testified “[t]he forensic interview [of Appellant’s daughter], along with all the other evidence in the case, reinforced the fact that [Appellant] did cause [Victim]’s death.” (Tr. p. 916). In support of that contention, Appellant maintains that “powerful” testimony was something the jurors would not have been able to ignore or disregard even though the trial judge explicitly instructed them they could not consider it. To the contrary, Agent Baird’s brief remark—although improper—was not sufficiently prejudicial to necessitate the grant of a mistrial because: (1) the remark was vague, isolated, and never repeated or referenced again throughout the remainder of the multi-day trial; (2) no testimony or evidence was ever presented revealing the specific substance of the purported out-of-court statement alluded to by the remark; and (3) the trial judge used alternative means to cure the error by quickly striking the remark from the record and by repeatedly instructing the jurors they could not give it any consideration at all when deciding Appellant’s case. Under such circumstances, the trial judge did not abuse his broad discretion by pursuing a less extreme remedy than the granting of a mistrial to address a vague and isolated trial error, and there are no proper grounds upon which to reverse that

discretionary decision on appeal, which is particularly true in light of the fact nothing that occurred during the course of trial suggested the jurors disregarded the trial judge's unambiguous curative instructions. Appellant's conviction should be affirmed.

Relevant Facts

On the third day of Appellant's lengthy trial, Sergeant Sims testified for the prosecution. (Tr. p. 474). While she was on the witness stand, defense counsel asked her on cross-examination if any of "the people that [she] interviewed" as part of her investigation into Victim's death saw Appellant strike or abuse Victim.¹⁶ (Tr. p. 501). Sergeant Sims responded: "Not intentionally, no." (Tr. p. 501). Defense counsel then began remarking upon Sergeant Sims's response to the question along with her understanding of her duty to serve and protect, and those remarks prompted Sergeant Sims to attempt to explain she responded in the manner she did based on what she was "trying not to reference." (Tr. p. 501).

At that point, the solicitor swiftly interjected, and the trial judge excused the jury from the courtroom. (Tr. p. 501). During the ensuing in camera hearing, the solicitor explained Appellant's five-year-old biological daughter was forensically interviewed subsequent to Victim's death and revealed during the interview she had observed Appellant hit Victim, leave marks on Victim's body, and treat Victim in a "mean" manner when Father was not present. (Tr. p. 501; p. 636; p. 1183). Based on that, the solicitor noted there had, in fact, been an eyewitness to some of Appellant's abuse of Victim, but she confirmed Sergeant Sims had been instructed she nonetheless could not testify about that particular matter despite being aware of it. (Tr. pp. 501-503). In response, the trial judge cautioned defense counsel to be careful with his

¹⁶ Earlier, Sergeant Sims had identified the people she personally interviewed as Appellant, Father, Father's mother, Appellant's sister, Appellant's sister's boyfriend, and one of Appellant's neighbors. (Tr. p. 372; p. 479).

questioning and expressly advised him he would not be permitted to create false impressions for the jury. (Tr. pp. 502-504). Following that discussion, the jury was brought back into the courtroom, and the trial continued forward. (Tr. p. 504).

On the next day of the proceedings, Agent Baird testified for the prosecution. (Tr. p. 903). As part of her testimony, Agent Baird explained she observed a forensic interview of Appellant's biological daughter on December 28, 2017, and the solicitor—while cautioning Agent Baird she could not state what was said during the interview—followed up by asking her if Appellant's daughter had been able to provide the interviewer with some information about the case. (Tr. p. 915). Immediately in response, defense counsel objected on the basis “[n]one of what [Appellant's daughter] said [was] admissible,” and the solicitor promptly agreed. (Tr. p. 915). At that point, the trial judge sustained the objection to the extent the witness intended to testify about what Appellant's daughter said but otherwise overruled it. (Tr. p. 915).

As the questioning continued, the following exchanged occurred:

[Solicitor]: Was she able -- you can't say what she said at all, okay? But was she able to give you information?

[Agent Baird]: Yes. The forensic interview, along with all the other evidence in the case, reinforced the fact that [Appellant] did cause [Victim]'s death.

(Tr. p. 916). Once again, defense counsel immediately lodged an objection, and the trial judge excused the jury from the courtroom so he could address the matter. (Tr. p. 916).

After doing so, the trial judge quickly explained Agent Baird's response constituted “back-dooring of what was said all day long” and was violative of the prohibition against hearsay. (Tr. pp. 916-917). Following that ruling, defense counsel asserted he believed the issue could not be overcome and moved for a mistrial. (Tr. p. 917). However, upon considering the matter, the trial judge stated he did not believe a mistrial was manifestly necessary at that point,

declined to grant one, indicated he would instead strike the response and present a curative instruction to the jury, and asked defense counsel if he had any specific suggestions for such an instruction. (Tr. pp. 917-919). In response, defense counsel affirmed he did not believe a curative instruction would be sufficient to cure the error but stated he would nevertheless accept one in an effort to protect the record. (Tr. pp. 917-919).

Thereafter, the jury returned to the courtroom, and the trial judge instructed the jurors as follows:¹⁷

All right. Mr. Foreman, ladies and gentlemen of the jury, the witness's last response to the question posed to her is stricken from the record. You may not and shall not consider it at all in your deliberations, when you're told to begin your deliberations. And that's your job to make sure that's not part of the jury's deliberations, okay, sir?

(Tr. p. 921). Once that curative instruction had been presented and the offending remark stricken, the trial was resumed, and no additional objections were raised as to the sufficiency of the curative measures that were actually implemented. (Tr. p. 921).

As the trial continued forward, Agent Baird confirmed she obtained a warrant for Appellant's arrest on December 19, 2017, which was more than a week before the agent observed Appellant's daughter's forensic interview. (Tr. p. 915; pp. 921-922). In addition to that testimony, Appellant testified on her own behalf and—consistent with earlier testimony that had been presented from other witnesses—confirmed her daughter was not present at the home on the date of Victim's death because she had been dropped off at her grandparents' house the night before for an out-of-state trip. (Tr. pp. 797-798; pp. 854-855; pp. 1053-1054).

¹⁷ Before the jury returned to the courtroom, the solicitor candidly accepted responsibility for the "mess-up." (Tr. p. 920).

Subsequently, just before the case was submitted to the jury, the trial judge instructed the jury on the applicable law. (Tr. pp. 1242-1258). In doing so, the trial judge explicitly instructed the jurors they “must” follow the law as instructed to them. (Tr. p. 1244). Furthermore, the trial judge reminded the jurors some evidence had been stricken from the record during the trial, and he again reiterated to them such evidence could not be considered as part of their deliberations and must be treated as if it had not been presented. (Tr. p. 1247). More specifically, the trial judge instructed: “[L]adies and gentlemen, any evidence that has been stricken from the record, and there is some stricken from the record, may not be considered by you in this case. You must treat it as if it was not presented at all.”¹⁸ (Tr. p. 1247).

Standard of Review

In criminal cases, appellate courts sit to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). When reviewing a decision regarding a mistrial, an appellate court will not disturb a trial judge’s discretionary ruling on such a matter absent a prejudicial abuse of discretion. State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 627-628 (2000); see State v. Kelly, 331 S.C. 132, 142, 502 S.E.2d 99, 104 (1998) (“In order to receive a mistrial, the defendant must show error and resulting prejudice.”). “An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.” State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

Analysis

During the course of every criminal trial, the trial judge will almost certainly be confronted with an error or irregularity at some point during the proceedings. See Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986) (recognizing the occurrence of an error during the course

¹⁸ Once again, defense counsel raised no objections to that particular curative instruction. (Tr. pp. 1258-1261).

of a criminal trial is “virtually inevitable”). When an error occurs, one potential course of action available to a trial judge is to grant a mistrial. State v. Council, 335 S.C. 1, 13, 515 S.E.2d 508, 514 (1999). However, a mistrial is an *extreme* remedy that involves completely abandoning the trial. State v. Beckham, 334 S.C. 302, 310, 513 S.E.2d 606, 610 (1999); see State v. Woods, 382 S.C. 153, 158, 676 S.E.2d 128, 131 (2009) (“A mistrial is the equivalent of no trial and leaves the cause pending in the circuit court.”). As a result, a mistrial should only be granted when one is manifestly necessary *and* no other legitimate courses of action remain available. State v. Simmons, 352 S.C. 342, 354, 573 S.E.2d 856, 862 (Ct. App. 2002); see State v. Wiley, 387 S.C. 490, 495, 692 S.E.2d 560, 563 (Ct. App. 2010) (“The power of the trial court to declare a mistrial should be used *with the greatest caution* under urgent circumstances and for very plain and obvious reasons stated on the record by the trial court.” (emphasis added)).

As an alternative to the grant of a mistrial, one potential course of action available to a trial judge confronted with the erroneous presentation of inadmissible testimony or evidence is to strike the improper testimony or evidence and instruct the jury to disregard it. State v. White, 371 S.C. 439, 445, 639 S.E.2d 160, 163 (Ct. App. 2006); see State v. Kelsey, 331 S.C. 50, 70, 502 S.E.2d 63, 73 (1998) (“[A]ny prejudice to Kelsey could have been removed by the trial court striking the testimony and giving a curative instruction to the jury.”). Generally, if the trial judge does just that, “the error is deemed cured” since jurors are presumed to follow the instructions presented to them. State v. George, 323 S.C. 496, 510, 476 S.E.2d 903, 911-912 (1996); see State v. Grovenstein, 335 S.C. 347, 353, 517 S.E.2d 216, 219 (1999) (“[J]urors are presumed to follow the law as instructed to them.”). Accordingly, absent some showing the jurors prejudicially failed to follow a curative instruction, a party ordinarily cannot complain after the trial judge strikes objectionable testimony or evidence and properly instructs the jury not to give

it any consideration at all. See State v. Crim, 327 S.C. 254, 257, 489 S.E.2d 478, 480 (1997) (“An instruction to disregard objectionable evidence usually is deemed to have cured the error in its admission unless on the facts of the particular case it is probable that notwithstanding such instruction the accused was prejudiced.”); State v. Campbell, 259 S.C. 339, 345, 191 S.E.2d 770, 773-774 (1972) (“When the record shows that objectionable testimony was either disallowed or stricken out on motion and the jury instructed to disregard it, the defendant cannot complain.”).

In the case sub judice, the trial judge correctly sustained the objection to Agent Baird’s improper remark stating “[t]he forensic interview, along with all the other evidence in the case, reinforced the fact” Appellant caused Victim’s death because that remark appeared to indirectly allude to the nature of an out-of-court statement made by someone other than the agent in a manner violative of the general hearsay prohibition. See State v. King, 422 S.C. 47, 68, 810 S.E.2d 18, 29 (2017) (“While [investigative information] may be couched in terms of explaining an officer’s conduct during an investigation, it may not be used to offer the substance of an out-of-court statement that would otherwise violate our state’s rules against hearsay.”). Importantly though, the brief presentation of that vague remark to the jury was not alone sufficient to create a manifest necessity that warranted a grant of a mistrial in Appellant’s case for several different reasons. See White, 371 S.C. at 444, 639 S.E.2d at 162 (“[A] mistrial should not be ordered in every case in which incompetent evidence is improperly admitted[.]”); see also State v. Greene, 255 S.C. 548, 558, 180 S.E.2d 179, 184 (1971) (“[The appellant] was not entitled to a perfect trial, only a fair one.”).

Turning to those reasons, the remark itself was exceedingly vague and only constituted a single fleeting—and indirect—comment on an out-of-court statement purportedly made by a five-year-old child who was not present in the home on the date of Victim’s death, the actual

substance of that statement was never revealed, no further details of any kind were ever provided to the jury about the statement at any other point during the course of the six-day trial, and the remark was never again referenced or repeated by any of the parties. See Council, 335 S.C. at 13, 515 S.E.2d at 514 (recognizing the vague nature of improperly-admitted testimony minimized the testimony’s potential for prejudice even *without* any curative instruction being presented); State v. Chisholm, 395 S.C. 259, 274, 717 S.E.2d 614, 622 (Ct. App. 2011) (considering the fleeting nature of a hearsay statement in concluding the statement was harmless); Wiley, 387 S.C. at 496, 692 S.E.2d at 563 (concluding the solicitor making a “vague reference” to Wiley’s outstanding criminal charge did not warrant the grant of a mistrial due to the fact the vagueness of the reference ensured the jurors would not have been aware of the precise nature of the other criminal activity); cf. State v. Ferguson, 376 S.C. 615, 621, 658 S.E.2d 101, 104 (Ct. App. 2008) (“[T]he trial judge’s curative instruction was simple, and the court refrained from reiterating or emphasizing the unresponsive answer. Accordingly, we find the instruction cured any prejudice, and we hold the trial court properly exercised its discretion in denying Ferguson’s motion for a mistrial.”). Similarly, based on the substance of Agent Baird’s improper remark, it was clear Agent Baird not only was not the declarant of the alleged statement but also was not even the person *to whom* the statement was made, and, thus, the jurors would have clearly understood Agent Baird’s remark concerned hearsay as opposed to something about which Agent Baird actually possessed first-hand knowledge, which helped to minimize the remark’s potential to cause any undue prejudice. See State v. Price, 368 S.C. 494, 499, 629 S.E.2d 363, 366 (2006) (finding the improper admission of hearsay evidence to be harmless where the hearsay evidence was impeached by the jury’s exposure to the fact the evidence was not based on any first-hand knowledge). Furthermore, the improper remark was

quickly followed by both an objection and a thorough curative instruction, and the curative instruction—which was later reiterated—specifically instructed: (1) Agent Baird’s improper remark was stricken from the record; (2) the jurors could not consider it “at all” when deciding Appellant’s case; and (3) the jury foreman had a duty to ensure the remark was not a part of the deliberations. See State v. Smith, 290 S.C. 393, 395, 350 S.E.2d 923, 924 (1986) (stating a curative instruction should specifically instruct the jurors to disregard improperly-presented evidence and not consider it for any purpose during deliberations in order to be good and effective); cf. State v. Brown, 389 S.C. 84, 95-96, 697 S.E.2d 622, 628 (Ct. App. 2010) (concluding any error in the presentation of testimony characterized as “untrue and highly prejudicial” was cured by the trial judge instructing the jurors to completely disregard the testimony and asking the foreman to monitor deliberations to ensure it was not discussed in any way). Based on that, the jurors clearly understood both the remark had been stricken almost immediately after it was uttered and they could not consider it in any manner whatsoever, which meant the error was effectively cured before it could cause any actual prejudice. See State v. Dial, 405 S.C. 247, 258, 746 S.E.2d 495, 501 (Ct. App. 2013) (“A curative instruction is generally deemed to have cured any alleged error.”); cf. State v. Craig, 267 S.C. 262, 268-269, 227 S.E.2d 306, 309-310 (1976) (concluding the improper admission of bad character evidence portraying Craig “as a sick and mean person, capable of committing a dreadful act” was not sufficiently prejudicial to warrant a grant of a mistrial *even though the trial judge had initially ruled the evidence was admissible* because the trial judge later changed his mind and instructed the jury to “disregard [it] in its entirety”). Finally, nothing that occurred throughout the remainder of the trial even remotely suggested any of the jurors disregarded the trial judge’s easily-understood and unmistakable curative instructions, and defense counsel never identified—

or attempted to identify—anything that could have supported such a conclusion. See Foye v. State, 335 S.C. 586, 590, n. 1, 518 S.E.2d 265, 267 (1999) (“The jury was instructed to determine petitioner’s guilt based only on the evidence presented in the trial. A jury is presumed to follow instructions. Therefore, *without some showing the jurors disregarded these instructions*, this Court declines to presume prejudice.” (emphasis added and citations omitted)); State v. Patterson, 337 S.C. 215, 227, 522 S.E.2d 845, 851 (Ct. App. 1999) (“The burden is on the movant to show not only error, but resulting prejudice in order to justify a mistrial.”); see also United States v. Hager, 721 F.3d 167, 189 (4th Cir. 2013) (“Without any evidence to the contrary, we must assume that the jury followed the instructions given to it by the court.”).

Under such circumstances, the trial judge—who was in the best position to evaluate the vague but nonetheless improper remark’s impact on the jurors seated in his courtroom—did exactly what he was supposed to do by attempting to remedy a trial error in an appropriate manner that was far less extreme than aborting a lengthy trial in which other substantial and compelling evidence of Appellant’s guilt had been properly introduced. See State v. Stanley, 365 S.C. 24, 34, 615 S.E.2d 455, 460 (Ct. App. 2005) (“The granting of a motion for a mistrial is an extreme measure which should be taken only where an incident is so grievous that prejudicial effect can be removed in no other way.”); see also State v. Anderson, 322 S.C. 89, 93, 470 S.E.2d 103, 105-106 (1996) (recognizing the trial judge holds the best position to assess the potential impact of a trial occurrence upon the jury); cf. Brown, 389 S.C. at 96, 697 S.E.2d at 628 (“The trial court’s curative instruction cured any error presented by Gordon’s testimony because the jury was told to disregard that testimony completely.”). Moreover, the remedial measures employed by the trial judge were wholly adequate to deal with the unextraordinary trial error with which he was confronted, and, in light of those measures, Appellant could only have

been prejudiced by the error if the jurors all explicitly defied the instructions presented to them in contravention of the well-established presumption they would not. See State v. Blackwell, 220 S.C. 342, 356, 67 S.E.2d 684, 691 (1951) (finding no prejudice resulted from the presentation of inadmissible testimony in front of the jury because “the jury were clearly instructed that they should not consider the testimony”); cf. State v. Dawkins, 297 S.C. 386, 393-394, 377 S.E.2d 298, 302 (1989) (concluding the trial judge did not abuse his discretion by refusing to grant a mistrial in a criminal sexual conduct with a minor case even though the solicitor elicited testimony from a psychiatrist expressing a personal belief the victim’s symptoms were “genuine” because the trial judge presented a curative instruction to the jurors advising them to disregard the testimony and the testimony—although improper—“was not of such magnitude to effect the outcome of the trial”). Accordingly, the trial judge did not abuse his broad discretion by denying defense counsel’s request for a mistrial after taking sufficient steps to cure the error that had occurred, and Appellant wholly failed to identify anything that could legitimately justify a reversal of that discretionary decision on appeal pursuant to the standard by which it must be judged. See Harris, 340 S.C. at 63, 530 S.E.2d at 628 (instructing a trial judge’s ruling on a mistrial motion “will not be disturbed on appeal absent an abuse of discretion amounting to an error of law”); see also State v. Robinson, 426 S.C. 579, 607, 828 S.E.2d 203, 217 (2019) (recognizing it is conceivable the discretionary rulings of two different trial judges who reached opposite conclusions from the same set of circumstances will both be affirmed on appeal due to the deferential nature of the abuse of discretion standard of review). Appellant’s conviction should be affirmed.

II.

The trial judge did not abuse his broad discretion by admitting evidence concerning an arm injury the minor victim sustained several weeks before she died because it constituted evidence of Appellant's mental state and attitude towards the minor victim and, thus, it: (1) was relevant to the extreme indifference element of the charged crime; (2) was admissible pursuant to the intent exception of Rule 404(b) of the South Carolina Rules of Evidence; and (3) possessed a probative value that was not substantially outweighed by its potential for undue prejudice. However, even assuming the challenged evidence regarding the minor victim's arm injury was somehow improperly admitted, any possible error in its admission was entirely harmless because it was cumulative to other substantially-similar evidence regarding the minor victim's injured arm that was presented during trial *without objection*, including from Appellant herself.

Appellant contends the trial judge committed reversible error by permitting the introduction of evidence establishing Victim suffered an injury to her arm several weeks before she died. As support for that contention, Appellant maintains the evidence was irrelevant, constituted inadmissible character evidence, and had a probative value that was substantially outweighed by its prejudicial effect. To the contrary, the evidence regarding Victim's arm injury and Appellant's response to it in the days and weeks leading up to Victim's death was relevant, probative, and admissible as evidence of Appellant's mental state and attitude towards Victim, which was a critical issue due to the fact extreme indifference was an element of the charged crime. Likewise, the probative value of that evidence was not substantially outweighed by its potential for undue prejudice under the circumstances involved. As a result, the trial judge did not abuse his broad discretion by admitting the evidence for the limited purpose of establishing Appellant's intent. However, even assuming the evidence's admission was somehow improper, any conceivable error was entirely harmless under the circumstances involved because the challenged portion of the evidence regarding Victim's arm injury was merely cumulative to other unobjected-to evidence presented during trial, including to virtually-identical testimony offered by Appellant and her own defense witnesses. Appellant's conviction should be affirmed.

Relevant Facts

Amongst the many injuries to Victim's body at the time of her death, the upper bone in Victim's right arm was fractured. (Tr. p. 402; p. 763; p. 991). However, unlike the fatal blunt force trauma injuries, that particular injury had occurred several weeks earlier and did not cause Victim's death. (Tr. pp. 402-403; p. 433; pp. 763-764; p. 766; pp. 778-779; pp. 1149-1150).

Just before Appellant's trial began, defense counsel submitted a written motion seeking suppression of any evidence of Victim's arm fracture *unless* the prosecution produced evidence "directly connect[ing]" Appellant to it. (Tr. p. 111; Motion to Suppress Healing Fracture of Arm). In response, the trial judge preliminarily addressed the matter towards the outset of trial. (Tr. pp. 141-144). During the ensuing discussion, the solicitor indicated she believed evidence of the fracture was relevant to show Appellant did not obtain medical care for that injury despite claiming to have done so and *not* as proof Appellant was the one who actually broke Victim's arm. (Tr. pp. 141-143). After hearing the solicitor's explanation, the trial judge indicated he would consider the matter and instructed the solicitor to proffer any testimony related to Victim's broken arm before it was introduced. (Tr. p. 144). Following that, defense counsel simply replied, "Fair enough, your Honor." (Tr. p. 144).

Thereafter, during the evidentiary phase of trial, Earlene Cochran, one of Appellant's neighbors, testified for the prosecution about the events surrounding Victim's death. (Tr. pp. 212-221). During her testimony, she noted—without objection—she had observed Victim a few days before her death, noticed her arm was swollen at that time, and was advised she had fallen.¹⁹ (Tr. pp. 216-217). Furthermore, on cross-examination, she indicated—again without

¹⁹ On appeal, Appellant claims at multiple points in her brief the solicitor violated the trial judge's request for a proffer by eliciting that—and other—testimony related to Victim's arm. (App. Br. pp. 19-20). Notably though, defense counsel did *not* raise such a contention at trial,

objection—Victim’s injured arm was swollen to twice its normal size, she asked Appellant about the swelling, and Appellant responded by claiming Victim had fallen. (Tr. p. 220).

As the trial proceeded forward, Dr. Alexander Vinuya, an emergency room doctor who treated Victim after she was brought to the hospital, indicated he observed bruising, including to Victim’s arm. (Tr. p. 296). At that point, defense counsel objected and—while referring back to a pre-trial motion he had filed seeking the exclusion of any testimony regarding *bruises*—asserted any evidence related to Victim’s bruises was irrelevant, highly prejudicial, and not probative unless the prosecution could show the bruises had been caused by Appellant.^{20 21} (Tr. p. 297). However, the trial judge overruled that objection, and Dr. Vinuya was permitted to testify he observed bruising to Victim’s right bicep over defense counsel’s objection. (Tr. p. 300). Following that testimony, one of the nurses who unsuccessfully tried to save Victim testified—without objection—she observed swelling and bruising to Victim’s right arm along with a bruise on Victim’s left arm. (Tr. pp. 320-321).

and the trial judge himself did not appear to view his request for a proffer concerning evidence of the fracture to explicitly extend to testimony concerning the swollen visual appearance of Victim’s arm in light of his own inaction when such testimony was elicited. (Tr. p. 216; p. 220). In fact, the trial judge explicitly indicated he considered the evidence related to the swollen nature of Victim’s arm to be different from the evidence of the fracture. (Tr. p. 299).

²⁰ Prior to Dr. Vinuya’s testimony, several law enforcement officers and other medical professionals who were involved in the futile attempt to save Victim’s life testified about their experiences and observations on the date of the incident, and many of those witnesses recounted—without objection—they saw bruising all over Victim’s body. (Tr. pp. 222-228; pp. 230-237; pp. 240-253).

²¹ Earlier, defense counsel had filed a motion for any evidence of Victim’s bruising to be suppressed unless the prosecution could prove beyond a reasonable doubt Appellant caused it. (Tr. p. 148). However, when confronted about the basis for that motion, defense counsel conceded proof beyond a reasonable doubt was *not* the standard that had to be met for such evidence to be admissible. (Tr. p. 148).

Thereafter, the solicitor advised the trial judge she wished to proffer the testimony of Miriam Myers, another of Appellant's neighbors, because it related to Victim's arm injury. (Tr. pp. 334-335). During the ensuing proffer, Myers asserted she observed Victim with an apparent arm injury a few weeks before Victim died, she asked Appellant about the injury, Appellant advised her Victim had hurt her arm by falling off a bed, and Appellant stated Victim said her mother did it while pointing to her. (Tr. pp. 336-337). Following the proffer, the trial judge asked defense counsel for his position on the matter. (Tr. p. 337). In response, defense counsel acknowledged Victim's arm was broken. (Tr. p. 337). However, he contended it was not clear Appellant had anything to do with that fracture, and he further asserted the testimony was "not fair" because Victim had accused her mother of inflicting the injury as opposed to Appellant, who was not Victim's mother. (Tr. p. 337). The trial judge then expressed concern to the solicitor about the hearsay nature of the specific testimony proffered and questioned how that evidence would be admissible, including pursuant to Rule 403 of the South Carolina Rules of Evidence. (Tr. pp. 337-338). In reply, the solicitor asserted the evidence was relevant and significant to Appellant's ongoing failure to obtain medical care for Victim while citing to Rule 404(b); State v. Holder, 382 S.C. 278, 676 S.E.2d 690 (2009); and State v. Martucci, 380 S.C. 232, 669 S.E.2d 598 (Ct. App. 2008), as support.²² (Tr. pp. 338-341). The trial judge then took the matter under advisement so he could review the authorities cited. (Tr. pp. 341-342).

Ultimately, after completing his review, the trial judge ruled the testimony concerning the arm fracture would be admissible for the limited purpose of proving the extreme indifference element of the charged crime based on Appellant's failure to obtain care for that injury, and he

²² Despite the fact the decisions in Holder and Martucci were expressly presented to the trial judge to guide his evidentiary decision, Appellant—perhaps tellingly—has *not* referenced them at any point in her appellate brief. (App. Br. pp. 1-43).

further noted he would present an appropriate limiting instruction about it to the jury. (Tr. pp. 378-379). In response to that ruling, defense counsel replied: “As long as it’s clear that it’s failure to . . . pursue medical care.”²³ (Tr. p. 379).

Following that, Dr. Ross testified about the things she discovered during her autopsy of Victim, including about the several-week-old fracture to Victim’s right arm. (Tr. pp. 402-403). Significantly, defense counsel did *not* raise any objections to that testimony when it was presented. (Tr. pp. 402-403).

In addition to that, Sergeant Sims testified about her interview of Appellant, and a recording of the interview was admitted into evidence and played for the jury. (Tr. p. 448; pp. 474-476). Through that recording, the jury heard Appellant personally make a number of statements about Victim’s arm injury. (State’s Ex. # 36). More specifically, Appellant claimed Victim injured her arm falling off a bed a few weeks prior to her death and the fall caused a bruise on Victim’s right elbow. (State’s Ex. # 36). Appellant further alleged Victim complained about her arm hurting at some points and always whined whenever she slept on it, including *on the morning of the death*. (State’s Ex. # 36). Nonetheless, Appellant insisted she personally believed Appellant’s arm was fine. (State’s Ex. # 36). Beyond that, at other points in the interview, Appellant claimed she had cried and begged Father and his mother to let her take Victim to the hospital. (State’s Ex. # 36). Critically though, Appellant alleged that had occurred “months ago,” and the reasons she identified for wanting to take Victim to the hospital related not to the arm injury but to various things she claimed to have noticed after Victim returned from periods spent staying with her biological mother. (State’s Ex. # 36).

²³ Interestingly, Appellant has *not* acknowledged that particular statement from defense counsel in her lengthy appellate brief. (App. Br. pp. 1-43).

Subsequently, Myers began her testimony in front of the jury, and, during her testimony, she indicated she saw Victim a week before her death. (Tr. pp. 641-642). The solicitor then alerted the trial judge her next questions would relate to Victim's broken arm, and the following exchange occurred:

[Trial Judge]: Ladies and gentlemen, the evidence you're about to hear, with regard to -- It's the right humerus; is that correct?

[Solicitor]: Correct, sir.

[Trial Judge]: Is to be received by you for the limited purpose, and the only purpose towards whether the State has met what the elements, the statute requiring extreme indifference. I'll charge you about that later, but any consideration of this testimony following in just a moment must be limited to that purpose and that purpose only. Okay.

(Tr. p. 642). Following the presentation of that limiting instruction, defense counsel renewed his earlier objection to the testimony.²⁴ (Tr. p. 642). Myers then resumed her testimony and stated she noticed something was wrong with Victim's arm a few weeks before Victim died. (Tr. p. 643). She further indicated Victim cried out in pain when she accidentally bumped Victim's arm while helping her in the bathroom. (Tr. p. 643). Based on that, Myers confirmed she asked Appellant about the matter and Appellant responded by claiming Victim hurt her arm when she fell off a bed. (Tr. pp. 642-643). However, Myers indicated Appellant also stated Victim said her "Mommy did it" while pointing to her. (Tr. p. 644).

Thereafter, Father's mother, Tracy Schroeder ("Grandmother"), testified about the events leading up to Victim's death, and, during her testimony, she stated—without objection—she

²⁴ In total, defense counsel's earlier objection to Myers's testimony had been: "Well, you Honor, I think there's no doubt that -- that [Victim]'s arm was broken. It's just a matter of we really don't know when, and we really don't know how, or at least we don't know that [Appellant] had anything to do with the broken arm. Plus, [Appellant] saying [Victim] said Mommy did it, Mommy -- the solicitor has made a great point that Mommy is really Michelle Bigham and not [Appellant]. I just don't think that that is fair testimony." (Tr. p. 337).

learned Victim injured her arm around Thanksgiving. (Tr. p. 679). Upon learning of that injury, Grandmother asserted she asked Appellant and Father about it and they advised her it was only a sprain that was being kept wrapped. (Tr. pp. 679-680). At that point, defense counsel stated: “Your Honor, I think we’re in dangerous territory here about the arm.” (Tr. p. 680). In response, the trial judge presented the following limiting instruction to the jury:

All right. Mr. Foreman, ladies and gentlemen of the jury, let me remind you, *any* testimony with regard to the right humerus, or the right arm, is being received solely for the purpose of whether or not the State presented any evidence with regard to the intent required under the statute for extremely indifference.

I’ll charge you further that you may not consider it as being -- this arm being caused by the defendant. That is not in the evidence towards that regard, and that -- and there’s no evidence that that arm had anything to do with this child’s ultimate death.

(Tr. p. 680) (emphasis added). Following that, text messages Grandmother exchanged with Appellant were admitted into evidence over defense counsel’s objection, and, in those messages, Appellant stated Victim’s arm had already been checked out, was badly sprained but not broken, and should not be “messed with.” (Tr. pp. 863-865; State’s Ex. # 224 (Text Messages)). However, Grandmother further stated both Appellant and Father used Appellant’s phone, and, therefore, she conceded Father possibly could have sent the text messages. (Tr. p. 713).

As the trial continued on, several other witnesses for the State referenced Victim’s arm injury as part of their testimony. (Tr. p. 736; p. 790). More specifically, Dr. Lamb—without objection—testified: (1) Victim’s arm was fractured; (2) the injury did *not* contribute to Victim’s death; (3) the injury had occurred at least two weeks earlier; (4) the injury was in the process of healing; and (5) the injury potentially could have been caused by an accidental fall. (Tr. pp 763-764). Additionally, Appellant’s sister, Kerrin Cook, asserted—without objection—she visited with Appellant and Victim on the day preceding Victim’s death, Appellant showed

her Victim's arm during the visit for reasons not articulated, and what she saw did not "really" cause her any alarm. (Tr. pp. 790-792). Likewise, Father stated—without objection—Victim's arm was swollen around Thanksgiving, Victim complained about the injury some, and Appellant told him Victim sprained it by falling off a bed. (Tr. pp. 828-830; p. 877). Furthermore, Jennifer Cochran, another of Appellant's neighbors, testified—without objection—she remembered Victim having a swollen arm at some point, but she noted she was not present when that injury was sustained. (Tr. pp. 897-898). Lastly, Agent Baird confirmed—without objection—Appellant told her Victim hurt her arm a few weeks earlier by falling off a bed. (Tr. p. 929).

After that evidence and testimony was presented, the State rested, and defense counsel called several witnesses in Appellant's defense, including Appellant herself. (Tr. p. 968; p. 982; p. 1029). Notably, each of those defense witnesses presented testimony directly related to Victim's arm injury. (Tr. p. 971; p. 978; pp. 990-991; pp. 1081-1082; p. 1107). More specifically, Jennifer Adams, a case worker from the Department of Social Services, testified—without objection—she hugged Victim during a home visit conducted in December of 2017, Victim "shied away" when she touched Victim's arm, and Appellant advised her Victim had injured her arm by falling off a bed. (Tr. pp. 968-969; p. 971; p. 978). Likewise, Dr. Batalis confirmed—without objection—Victim's arm was fractured, and he used that fracture to undermine Dr. Ross by faulting her for not doing more during the autopsy to determine its age. (Tr. pp. 990-991). Furthermore, Appellant—in addition to claiming she loved Victim "with all of [her] heart" and "would never physically harm" her or any of her children—personally admitted she was present when Victim hurt her arm, confirmed she unequivocally was *aware of the injury*, and acknowledged Victim complained about her arm hurting on some occasions after it was injured. (Tr. pp. 1038-1039; pp. 1081-1082; p. 1084; p. 1107).

Following that, Dr. Durso offered some rebuttal testimony and briefly discussed Victim's arm injury. (Tr. p. 1149). In doing so, Dr. Durso explained—without objection—Victim's right arm had been fractured, that “more remote” injury had been sustained two to four weeks earlier, and it did *not* cause Victim's death. (Tr. pp. 1149-1151). Beyond that, Dr. Durso noted—without objection—the injury would have been “extremely” painful. (Tr. p. 1050).

Once all that evidence and testimony had been presented and before the case was submitted to the jury, the trial judge instructed the jury on the applicable law. (Tr. pp. 1187-1258). As part of those instructions, the trial judge properly defined and explained the elements of homicide by child abuse, including the extreme indifference element.²⁵ (Tr. pp. 1255-1256).

Following the presentation of those instructions, the jurors began their deliberations. (Tr. p. 1260). Just under three hours later, the jurors asked to be re-instructed on homicide by child abuse and extreme indifference, and the trial judge presented the requested instructions without objection. (Tr. pp. 1262-1264; Court's Ex. # 14 (Jury Note)). A short time after that, the jury convicted Appellant as charged. (Tr. p. 1265).

Standard of Review

In criminal cases, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Trial judges have considerable discretion in ruling on the admission or exclusion of evidence, and an appellate court will not reverse a trial judge's ruling on evidentiary matters absent a clear abuse of that discretion resulting in prejudice to the defendant. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); see State v. Torres, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010) (“The appellate court reviews a trial judge's ruling on

²⁵ Regarding extreme indifference, the trial judge instructed: “The State must also prove beyond a reasonable doubt that the death occurred under circumstances showing a[n] extreme indifference to human life. Extreme indifference is a mental state akin to intent, characterized by a deliberate act culminating in death.” (Tr. p. 1256).

admissibility of evidence pursuant to an abuse of discretion standard and gives great deference to the trial court.”); State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995) (“A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice.”). Significantly, “[a]n abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.” McDonald, 343 S.C. at 325, 540 S.E.2d at 467.

Analysis

A. Propriety of the Trial Judge’s Decision to Admit Evidence Regarding Victim’s Non-Fatal Arm Injury

In South Carolina, the offense of homicide by child abuse occurs when a person “causes the death of a child under the age of eleven while committing child abuse or neglect, and the death occurs under circumstances manifesting an *extreme indifference to human life*[.]” S.C. Code Ann. § 16-3-85(A)(1) (emphasis added). For purposes of the offense, extreme indifference constitutes “a mental state *akin to intent* characterized by a deliberate act culminating in death.” State v. Phillips, 416 S.C. 184, 196, 785 S.E.2d 448, 454 (2016) (emphasis added and citations and internal quotations omitted); see State v. Jarrell, 350 S.C. 90, 98, 564 S.E.2d 362, 367 (Ct. App. 2002) (explaining extreme indifference is a culpable mental state akin to intent while citing to State v. Vowell, 634 S.W.2d 118 (Ark. 1982), as support). Thus, in order to establish all the required elements of homicide by child abuse, the State necessarily must prove beyond a reasonable doubt the defendant manifested a mental state of extreme indifference to the minor victim’s well-being. State v. Holder, 382 S.C. 278, 294, 676 S.E.2d 690, 699 (2009).

Generally speaking, homicide by child abuse is inherently difficult to prove because it is a secretive crime by nature that typically occurs behind closed doors. See State v. Smith, 406 S.C. 215, 220, n. 7, 750 S.E.2d 612, 614 (2013) (“Child abuse differs from other types of crimes

in several respects. Specifically, the crime of child abuse often occurs in secret, typically in the privacy of one's home. The abusive conduct is not usually confined to a single instance, but rather is a systematic pattern of violence progressively escalating and worsening over time. Child victims are often completely dependent upon the abuser, unable to defend themselves, and often too young to alert anyone to their horrendous plight or ask for help." (quoting State v. Fletcher, 379 S.C. 17, 27, 664 S.E.2d 480, 484-485 (2008) (Toal, C.J. dissenting))). Moreover, because it requires proof the defendant possessed a specific mental state, circumstantial evidence is ordinarily needed to establish the offense absent a candid confession. See State v. Tuckness, 257 S.C. 295, 299, 185 S.E.2d 607, 608 (1971) ("The intent with which an act is done denotes a state of mind, and can be proved only by expressions or conduct, considered in the light of the given circumstances. Intent is seldom susceptible to proof by direct evidence and must ordinarily be proven by circumstantial evidence, that is, by facts and circumstances from which intent may be inferred." (citation omitted)). As a result, evidence of anything tending to shed light on the defendant's attitude or mental state towards the minor victim is *crucial* in a homicide by child abuse case. See generally Holmes v. Goldsmith, 147 U.S. 150, 164 (1893) ("[G]reat latitude is allowed in the reception of circumstantial evidence, the aid of which is constantly required; and therefore, where direct evidence of the fact is wanting, the more the jury can see of the surrounding facts and circumstances the more correct their judgment is likely to be.").

Pursuant to our evidentiary rules, evidence of other crimes, wrongs, or acts is one type of circumstantial evidence that—while “not admissible to prove the character of a person in order to show action in conformity therewith”—may be admissible for the purpose of showing “motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or *intent*.” Rule 404(b), SCRE (emphasis added); see State v. Lyle, 125 S.C. 406, 416, 118 S.E.

803, 807 (1923) (recognizing evidence of other crimes is competent to prove a charged offense if it tends to establish: (1) motive; (2) intent; (3) the absence of mistake or accident; (4) common scheme or plan; or (5) identity). Based on that, appellate courts in South Carolina—and elsewhere—have traditionally found evidence of earlier acts bearing on a defendant’s mental state towards a victim of child abuse to be relevant and admissible as evidence of intent. See Holder, 382 S.C. at 294, 676 S.E.2d at 699 (finding evidence of past child abuse inflicted by another person to be admissible to demonstrate the required element of extreme indifference in a homicide by child abuse case); State v. Martucci, 380 S.C. 232, 252, 669 S.E.2d 598, 609 (Ct. App. 2008) (concluding evidence of “prior abuse or neglect” was admissible to prove—amongst other things—the required intent in a homicide by child abuse case because the earlier episodes of abuse or neglect that occurred in the weeks leading up to the minor victim’s death were “relevant to the material issue of Martucci’s state of mind” and showed Martucci’s hostility and cruelty towards the minor victim); see, e.g., Estelle v. McGuire, 502 U.S. 62, 69 (1991) (recognizing evidence of a child’s prior injuries, including evidence of some several-week-old bone fractures, was probative of intent in a case in which the child was killed as the result of child abuse); Labbe v. Berman, 621 F.2d 26, 30 (1st Cir. 1980) (concluding evidence about injuries visible on the minor victim’s body in the months leading up to his death was properly admitted to show Labbe’s attitude toward the victim).

In the case at bar, the trial judge—recognizing one of the elements of homicide by child abuse was extreme indifference—allowed the State to introduce evidence related to Victim’s several-week-old arm injury *solely* for the purpose of proving the mental state necessary to

establish a required element of the charged offense.²⁶ Through that evidence, the jury heard Victim hurt her arm several weeks before she died, Appellant was fully aware of that injury, and Appellant was present when it was sustained. Likewise, the jury heard Victim repeatedly complained about arm pain in the weeks that followed, including on the morning of her death. Furthermore, the jury heard Appellant did not obtain professional medical care for the injury despite Victim’s complaints, Appellant dissuaded others from obtaining such care for Victim by falsely claiming the injury was just a sprain, and Victim’s arm was actually broken. Meanwhile, through the trial judge’s limiting instructions, the jury heard *any* of the evidence presented concerning Victim’s arm injury was solely being admitted for the purpose of establishing the intent required by the homicide by child abuse statute, it could not be considered as—and was not—proof Appellant caused the arm injury, and there was nothing establishing the arm injury itself had anything to do with Victim’s death.²⁷

²⁶ During trial, the trial judge explicitly ruled the evidence related to Victim’s arm injury was being admitted for the sole purpose of establishing extreme indifference, which was an element related to Appellant’s *intent*. (Tr. pp. 378-379; p. 642; p. 680). Contrastingly, on appeal, Appellant now—while referring to unobjected-to remarks made by the solicitor during her closing argument—suggests the evidence was or might have been admitted for purposes of identity and common scheme or plan before proceeding to thoroughly attack the applicability of those two Rule 404(b) exceptions to her case. (Tr. p. 1226; p. 1238; App. Br. pp. 32-36). Notwithstanding the fact the evidence was *not* admitted on the grounds Appellant has now set up for herself to assail on appeal, Appellant cannot validly raise any appellate issues related to the referenced closing argument remarks because defense counsel did not raise any objections to those remarks during trial. See State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) (“Appellant is limited to the grounds raised at trial.”); cf. State v. Smith, 391 S.C. 353, 365, 705 S.E.2d 491, 497 (Ct. App. 2011) (“To the extent this and other comments by the trial judge have been argued to indicate an improper Rule 404(b) analysis or Rule 403 analysis, it was Smith’s duty to raise those arguments before the trial judge. Because the arguments were never presented to the trial judge, they are not preserved for our review.”), rev’d on other grounds, 406 S.C. 215, 750 S.E.2d 612 (2013).

²⁷ In her appellate brief, Appellant heavily criticizes the trial judge in regard to both how and when he presented his limiting instructions to the jury. (App. Br. pp. 22-23; pp. 25-27; pp. 41-42). However, at trial, defense counsel—despite being provided with opportunities to provide

Initially, the evidence related to Victim’s arm injury was relevant to Appellant’s case because it helped to prove one of the required elements of the charged offense. Specifically, the State was required to establish Appellant caused Victim’s death under circumstances manifesting an extreme indifference to human life, and extreme indifference has been identified as a mental state akin to intent. Jarrell, 350 S.C. at 98, 564 S.E.2d at 367. Because the extreme indifference element was one directly related to Appellant’s mental state, evidence bearing on her attitude towards Victim, including in the days and weeks leading up to Victim’s death, could and would shed light on whether Appellant was indifferent to Victim’s well-being, which unquestionably was a material issue during the trial. See Holder, 382 S.C. at 288-289, 676 S.E.2d at 695-696 (concluding evidence of Holder’s shift in focus from her child to her new boyfriend in the *weeks* leading up to the child’s death was relevant and admissible for purposes of establishing the extreme indifference element of homicide by child abuse); see also State v. Plunkett, 149 P.2d 101, 109 (Nev. 1944) (concluding evidence of Plunkett’s prior acts of indifference towards a minor victim, such as his act of leaving the infant alone for hours at a time, that preceded the victim’s violent death demonstrated the “feeling of the defendant for the child” and, thus, was relevant and admissible for purposes of establishing malice during Plunkett’s murder trial). Therefore, the evidence related to Victim’s arm injury and Appellant’s response to it was—just as the trial judge recognized—relevant evidence. See Rule 401, SCRE (defining relevant evidence as “evidence having any tendency to make the existence of any fact that is of

input regarding how and when the limiting instructions would be presented—did not offer any objections to the manner in which they were actually presented and, instead, simply renewed his objection to the evidence the first time a limiting instruction was given and expressly indicated he had no objections the second time such an instruction was given. (Tr. pp. 454-455; p. 642; pp. 680-681). As a result, Appellant cannot properly raise any issues on appeal with respect to the trial judge’s limiting instructions. See State v. Senter, 396 S.C. 547, 555, 722 S.E.2d 233, 237 (Ct. App. 2011) (“Because Senter failed to raise this argument to the trial court, it is not preserved for our review.”).

consequence to the determination of the action more probable or less probable than it would be without the evidence”); State v. Green, 261 S.C. 366, 371, 200 S.E.2d 74, 77 (1973) (“[E]vidence logically relevant to establish a material element of the offense charged is not to be excluded merely because it incidentally reveals the accused’s guilt of another crime.”).

Additionally, the evidence related to Victim’s arm injury was established by clear and convincing evidence as to the allegations sought to be established. See Fletcher, 379 S.C. at 24-25, 664 S.E.2d at 483 (“[E]vidence of the prior bad act must be clear and convincing. . . . Clear and convincing evidence is that degree of proof which will produce in the mind of the trier of facts a firm belief *as to the allegations sought to be established*. Such proof is intermediate, more than a mere preponderance but less than is required for proof beyond a reasonable doubt; it does not mean clear and unequivocal.” (emphasis added)). Specifically, the *limited* allegations the trial judge ruled could be established concerning Victim’s fractured arm were Appellant was aware of the arm injury, did not obtain care for it, and dissuaded others from obtaining such care by falsely claiming it was just a sprain.²⁸ Based on the medical evidence presented at trial, it was indisputable Victim’s arm had been fractured in the weeks preceding her death, and that fact was readily acknowledged by defense counsel. Similarly, based on Appellant’s own testimony and earlier admissions, Appellant was present when Victim’s arm injury was sustained, was fully aware of it, and heard Victim complain about ongoing pain resulting from it, including on the

²⁸ Since the trial judge did *not* admit the evidence regarding Victim’s arm injury to establish Appellant was the one who inflicted that injury and, instead, expressly cautioned the jury it could not be considered for that particular purpose, the circumstances of Appellant’s case were very different from the circumstances of ones in which evidence of prior injuries admitted to establish the existence of a common scheme or plan was found to be inadmissible absent clear and convincing proof the defendant actually inflicted the injuries. Cf. State v. Pierce, 326 S.C. 176, 178, 485 S.E.2d 913, 914 (1997) (concluding testimony concerning a minor victim’s prior injuries that was admitted “to prove a common scheme or plan” was inadmissible “absent a conviction or clear and convincing proof that [Pierce] inflicted the injuries”).

morning of her death. Likewise, based on the express testimony presented from Father, Appellant led Father to believe nothing needed to be done to address Victim’s arm injury because it was simply a sprain, and Grandmother also confirmed she had been alerted the injury was just a sprain. Thus, since the limited allegations sought to be established were either entirely undisputed or established by direct testimony, the trial judge’s decision to admit the evidence concerning Victim’s arm injury was fully supported by the evidence and testimony presented. See Wilson, 345 S.C. at 6, 545 S.E.2d at 829 (“[W]e do not review a trial judge’s ruling on the admissibility of other bad acts by determining de novo whether the evidence rises to the level of clear and convincing. If there is any evidence to support the admission of the bad act evidence, the trial judge’s ruling will not be disturbed on appeal.”).

Furthermore, the evidence fell directly within Rule 404(b)’s intent exception because it was introduced to establish—and was probative of—the extreme indifference element of the indicted offense. Specifically, by failing to obtain medical care for an injured child who repeatedly complained about the pain she was experiencing and by falsely claiming to others the injury was a sprain in an apparent effort to discourage them from obtaining professional treatment for Victim, Appellant demonstrated she was—at best—indifferent to Victim’s well-being in the days and weeks leading up to Victim’s death. Based on that, the evidence of Appellant’s past indifference towards Victim leading up to Victim’s death was logically relevant in regard to the mental state and attitude Appellant held towards *the exact same child* at the time of the child’s death just a few weeks after the arm injury was sustained. See id. at 7, 545 S.E.2d at 829 (recognizing evidence of intent can be demonstrated through past actions); see also Vowell, 634 S.W.2d at 119 (instructing “evidence of other offenses is admissible under Rule 404(b)” to prove extreme indifference because it is a culpable mental state akin to intent); Wall

v. State, 500 S.E.2d 904, 907 (Ga. 1998) (“[E]vidence of the defendant’s prior acts toward the victim, be it a prior assault, a quarrel, or a threat, is admissible when the defendant is accused of a criminal act against the victim, as the prior acts are evidence of the relationship between the victim and the defendant and may show the defendant’s motive, intent, and bent of mind in committing the act against the victim which results in the charges for which the defendant is being prosecuted.”). Meanwhile, the evidence of Appellant’s behavior towards Victim concerning the arm injury could *not* logically support a conclusion Appellant had a propensity to inflict the type of significant blunt force trauma injury that caused Victim’s death. See State v. Perry, 430 S.C. 24, 30, 842 S.E.2d 654, 657 (2020) (recognizing the inherent risk created by evidence of other similar criminal acts perpetrated by a defendant is the jury will view it as propensity evidence because “[p]roof that a defendant has been guilty of another crime *equally heinous* prompts to a ready acceptance of and belief in the prosecution’s theory that he is guilty” (emphasis added and citation and internal quotations omitted)); cf. State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003) (finding evidence Haselden tended to golf, fish, or go to his mother’s house presented during a murder trial was not evidence tending to prove Haselden had a tendency towards abusing and murdering his son). Therefore, the evidence of Victim’s arm injury and Appellant’s response to it was properly admitted as evidence of intent pursuant to Rule 404(b) of our state’s evidentiary rules and *not* as improper propensity evidence. Cf. Holder, 382 S.C. at 289, 676 S.E.2d at 969 (“The State’s purpose for offering the testimony [regarding Holder’s behavioral changes in the weeks preceding her child’s death] was not to show Holder had a propensity to abuse her child in conformance with a character trait. Rather, it was to show Holder’s strong desire to please Martucci instead of protecting the welfare of her child and to establish an element of the offense, that she manifested an extreme indifference to the well-being

of her son.”); State v. Sweat, 362 S.C. 117, 126, 606 S.E.2d 508, 513 (Ct. App. 2004) (finding prior bad act evidence of a domestic violence incident between Sweat and his purported wife was admissible to establish intent in a subsequent prosecution arising from an incident where Sweat attempted to attack his wife and her boyfriend).

Finally, the probative value of the evidence concerning Victim’s arm injury was high because it shed light on Appellant’s mental state and attitude towards the minor victim, which was a disputed issue at trial, while the evidence’s potential for prejudice was comparatively low under the circumstances involved. Looking to the evidence’s probative value, the State was *required* to prove Appellant’s mental state towards Victim was one of extreme indifference, and the evidence regarding Appellant’s indifferent response to Victim’s arm injury in the weeks leading up to her death constituted compelling circumstantial proof she possessed just such a mental state. See In re Winship, 397 U.S. 358, 364 (1970) (“[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”); cf. Wilson, 345 S.C. at 8, 545 S.E.2d at 829 (recognizing evidence of Wilson’s prior acts was “especially probative” because the State had to circumstantially prove Wilson’s intent). Likewise, Appellant strongly disputed she possessed a mental state of extreme indifference towards Victim by both claiming to have loved her and asserting she would “never” have hurt her.²⁹ See Martucci, 380 S.C. at 253, 669 S.E.2d at 609 (“Because Martucci disputed the motive and intent to commit homicide by child

²⁹ By claiming during her testimony she would “never” hurt her children, Appellant arguably offered evidence of her character, and, once she did, the State was entitled to rebut it had it sought to do so. See Rule 404(a)(1), SCRE (permitting the defense to introduce evidence of an accused’s character for the purpose of establishing action in conformity therewith and *also* permitting the State to attempt to rebut such evidence with evidence of its own once character evidence has been offered by the defense); cf. Council v. State, 976 So. 2d 889, 902 (Miss. Ct. App. 2007) (“Council, by testifying that she ‘never fought’ or ‘bothered nobody,’ put at issue her self-acclaimed trait of peacefulness.”).

abuse, evidence of the prior abuse or neglect was highly probative of his guilt on the homicide charge. The evidence was necessary to establish a material fact or element of the crime charged.”). Based on those factors, the evidence of Victim’s arm injury was exceedingly probative. See State v. Collins, 398 S.C. 197, 202, 727 S.E.2d 751, 754 (Ct. App. 2012) (explaining probative value is the measure of the importance of a piece of evidence’s tendency to prove or disprove some fact or issue relevant to the outcome of a case), rev’d on other grounds, 409 S.C. 524, 763 S.E.2d 22 (2014). Meanwhile, looking to the evidence’s potential for undue prejudice, the trial judge took proper steps to prevent the arm injury evidence from causing any undue prejudice by specifically instructing the jury on the purposes for which that evidence could and *could not* be considered. See Rule 105, SCRE (“When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.”). Moreover, the evidence itself was not particularly graphic or detailed, which helped to ensure it would not have been used by the jury in an improper manner. Cf. State v. Roberson, 988 S.W.2d 690, 696 (Tenn. Crim. App. 1998) (“The evidence of the non-fatal injuries was not gruesome; the injuries were not remote in time from the fatal trauma; they were not life-threatening; and there was no direct proof that [Roberson] had caused them. The dangers and considerations with which Rule 403 is concerned were simply minor when weighed against the probative value of this proof.”). Under such circumstances, the evidence’s high probative value was not “substantially outweighed” by its potential for undue prejudice, and the trial judge did not abuse his broad discretion by choosing to admit it. Rule 403, SCRE; cf. Dial, 405 S.C. at 261, 746 S.E.2d at 502 (“We find the photographs were highly probative to the issues of whether Victim was abused and whether the abuse was the cause of his death, which are integral elements

to the charge of homicide by child abuse. Thus, we find the danger of unfair prejudice did not outweigh the photographs' probative value, and the trial court did not abuse its discretion by admitting them." (citation omitted)).

Accordingly, for all those reasons, the evidence related to Victim's arm injury was properly admitted during trial as proof of the extreme indifference element of the charged crime, and the trial judge's decision to admit the evidence for that limited purpose was fully supported by the evidence and testimony presented during trial. See Martucci, 380 S.C. at 253, 669 S.E.2d at 609 ("If there is any evidence to support the admission of bad act evidence, the trial judge's ruling cannot be disturbed on appeal."); see also State v. Hamilton, 344 S.C. 344, 358, 543 S.E.2d 586, 594 (Ct. App. 2001) ("A trial judge's balancing decision under Rule 403 should not be reversed simply because an appellate court believes it would have decided the matter otherwise because of a differing view of the highly subjective factors of the probative value or the prejudice presented by the evidence. If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal." (citations omitted)), overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). Appellant's conviction should be affirmed.

B. Harmlessness of Any Error in the Admission of the Objected-To Evidence Regarding Victim's Arm Injury

Even if a trial judge improperly admitted inadmissible evidence during the course of a trial, reversal is not automatically warranted on appeal as such an error may have been harmless under the circumstances involved. See State v. Northcutt, 372 S.C. 207, 217, 641 S.E.2d 873, 878 (2007) ("Determining the trial judge committed error is the first step of our analysis. Next we must determine whether the error was harmless."). When conducting a harmless error analysis, an appellate court must ordinarily review the record as a whole to ascertain the impact

of an error. Baccus, 367 S.C. at 55, 625 S.E.2d at 223; see United States v. Hasting, 461 U.S. 499, 509 (1983) (“[I]t is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations.”). The harmlessness of an error generally depends on its materiality in relation to the case as a whole. Haselden, 353 S.C. at 196, 577 S.E.2d at 448. Significantly, after reviewing the entire record, the appellate court will typically not set aside a judgment based on insubstantial errors not affecting the result, and errors are generally deemed harmless when they do not contribute to the verdict. State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991).

In Appellant’s case, defense counsel—at several different points during trial—raised contemporaneous objections when evidence was presented concerning Victim’s arm injury. Through that objected-to evidence, the jury heard: (1) Victim’s arm was bruised at the time of her death; (2) Victim was showing signs of an arm injury a few weeks earlier; (3) Appellant was aware of that particular injury; (4) the injury was causing Victim pain; (5) Appellant claimed it was sustained when Victim fell off a bed and further stated Victim said her mother did it while pointing to her; and (6) Appellant asserted the injury was only a sprain. Meanwhile, at other points during trial, evidence about Victim’s arm injury was introduced *without* contemporaneous objection. Through that *unobjected-to* evidence, the jury similarly heard: (1) Victim’s arm was bruised and swollen at the time of her death; (2) Victim was showing signs of an arm injury a few weeks earlier; (3) Appellant was aware of that injury; (4) the injury was painful for Victim; (5) Appellant claimed—on multiple different occasions—it was sustained when Victim fell off a bed; (6) Appellant alleged the injury was only a sprain; and (7) Victim’s arm had actually been fractured. Beyond that, Appellant offered several witnesses in her own defense, and, through their highly-similar testimony, the jury heard Victim’s arm was injured a few weeks before she

died, the injury was painful, Appellant claimed it occurred from a fall off a bed, and Victim's arm was, in fact, broken. Moreover, Appellant personally testified about Victim's arm injury, and, in doing so, she confirmed she was aware of it, was present when it was sustained, and had heard Victim complain about it on multiple occasions prior to her death.

Under such circumstances, the objected-to evidence regarding Victim's arm injury was cumulative to other virtually-identical evidence admitted without objection. See State v. Blackburn, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978) ("Under settled principles, the admission of improper evidence is harmless where it is merely cumulative to other evidence."); cf. State v. Holley, 136 S.C. 68, ___, 134 S.E. 213, 215 (1926) (instructing an appellate challenge to the trial judge's admission of objected-to testimony could not be sustained because "another witness for the state . . . testified, without objection, to substantially the same facts"). Likewise, it was also cumulative to other virtually-identical testimony provided by defense witnesses, including *Appellant herself*. See State v. Washington, 315 S.C. 108, 110, 432 S.E.2d 448, 449 (1993) ("Appellant may not now be heard to complain of the admission of evidence elicited by his own counsel."); see also Ohler v. United States, 529 U.S. 753, 756 (2000) (recognizing the "well-established commonsense principle" that "a party introducing evidence cannot complain on appeal that the evidence was erroneously admitted" and citing approvingly to the proposition an objection is waived "[i]f a party who has objected to evidence of a certain fact himself produces evidence from his own witness of the same fact" (citations and internal quotations omitted)); cf. State v. Richardson, 358 S.C. 586, 596-597, 595 S.E.2d 858, 863 (Ct. App. 2004) (finding any error in the admission of purported improper character evidence to be harmless because "the testimony was cumulative to other similar testimony that was admitted without objection[,]” including to Richardson's *own* unobjected-to testimony).

Critically, because the objected-to evidence about Victim’s arm injury was merely cumulative to similar unobjected-to evidence about the very same subject, any possible error in the admission of the challenged evidence during trial could not have prejudiced Appellant or had any impact on the outcome of her case. See State v. Oglesby, 384 S.C. 289, 293, 681 S.E.2d 620, 622 (Ct. App. 2009) (“[T]he admission of improper evidence is deemed harmless if it is merely cumulative to other evidence.”); cf. State v. Braxton, 343 S.C. 629, 635, 541 S.E.2d 833, 836 (2001) (concluding the trial judge’s erroneous admission of “inadmissible character evidence” was harmless because the improperly-admitted evidence was cumulative to other evidence presented); State v. Barron, 268 S.C. 318, 319, 233 S.E.2d 110, 110 (1977) (“We agree that it was error to allow the State to introduce evidence of appellant’s character when he had not first tendered that issue. This was, however, harmless error due to the later admission of identical reputation testimony without objection.” (citations omitted)). Accordingly, even assuming the trial judge somehow erred by admitting the challenged evidence, any conceivable error in that regard was harmless beyond a reasonable doubt, and that was particularly true given the compelling nature of the other substantial evidence of Appellant’s guilt presented during trial, which—aside from the opinion of a lone defense expert who testified in a manner that conflicted with and was undermined by his own past scholarly work—established Victim’s fatal blunt force trauma injuries were inflicted at a time when Victim was in Appellant’s exclusive care. See Fletcher, 379 S.C. at 25, 664 S.E.2d at 484 (“Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained.”); see also State v. Tench, 353 S.C. 531, 537, 579 S.E.2d 314, 317 (2003) (“Given the abundant evidence of Tench’s guilt, we find any error in admission of the seized items clearly harmless beyond a reasonable doubt.”). Appellant’s conviction should be affirmed.

CONCLUSION

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

Respectfully submitted,

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May 5, 2021

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

May 05 2021

SC Court of Appeals

Appeal from Lancaster County
Honorable R. Lawton McIntosh, Circuit Court Judge
Appellate Case No. 2019-001417

THE STATE,

Respondent,

vs.

KAYLA MARIE COOK,

Appellant.

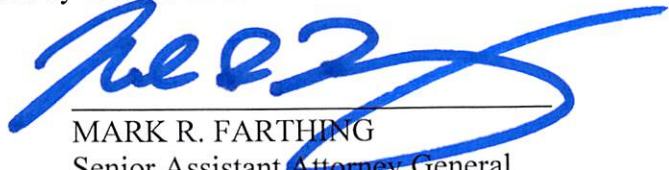
PROOF OF SERVICE

I, Mark R. Farthing, certify I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by sending electronic copies via email to the addressed listed in AIS for the following individuals:

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I further certify all parties required by Rule to be served have been served.
This 5th day of May, 2021.



MARK R. FARTHING
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Subject: State v. Kayla Marie Cook -- Initial Brief of Respondent and Designation of Matter
Date: Wednesday, May 5, 2021 8:34:00 PM
Attachments: [Cook.IBOR \(02562796xD2C78\).pdf](#)

Ms. Hackett, Ms. Hendrick, and Mr. Westbrook,

Attached are copies of the State's initial brief and designation of matter in the State v. Kayla Marie Cook appeal. These documents will be filed electronically with the Court of Appeals shortly through the AIS One Drive System. If anyone would also like a physical copy of these documents, please let me know and I will get one out through the mail. Thanks, and please let me know if you need anything else.

Sincerely,
Mark



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