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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHESTER COUNTY
Court of General Sessions
The Honorable Brian M. Gibbons, Circuit Court Judge

Appellate Case No. 2019-001551

THE STATE,RESPONDENT,

v.

DARRYL QUAN DAMOND WILSON,APPELLANT.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The trial judge properly allowed the State to admit two recordings of Appellant's phone calls from jail because they were, along with other submitted evidence, were probative of Appellant's extreme indifference towards Victim.

STATEMENT OF THE CASE

On June 5, 2018, Appellant was indicted by the Chester County Grand Jury for homicide by child abuse. On September 6, 2019, the grand jury issued an amended indictment. On September 3–6, 2019, Appellant proceeded to a jury trial before the Honorable Brian M. Gibbons. Assistant Solicitors Candice Lively, Esquire, and Kaitlyn Easler, Esquire, represented the State; Jim Boyd, Esquire, represented Appellant. The jury found Appellant guilty as charged and the trial judge sentenced Appellant to forty years' incarceration.

Appellant timely filed a notice of appeal and brief. This brief of Respondent now follows.

STATEMENT OF FACTS

Pre-trial Hearing

Prior to trial, trial counsel moved to exclude recorded phone calls made by Appellant while he was incarcerated. The first call (Recording 1) involved Appellant talking about his pregnant sister and her desire to determine the paternity of her child. During the call, Appellant discussed taking the blood test which determined he fathered Victim and exclaimed “look where it got [him].” Trial counsel objected to the call’s admission, arguing that Appellant taking a blood test was not relevant to the State’s case. In response, the State argued that it showed a lack of remorse by the defendant; Appellant appeared unconcerned with the death of his child and focused on his incarceration. When asked by the trial judge the probative value of the recording, the State began to respond when the trial judge interrupted and suggested the evidence demonstrated extreme indifference. The State agreed, noting the recording “show[ed] the level of disconnection [Appellant] had with his child and how he could harm her the way he did and wake up the next morning and just keep going.” The trial judge denied the motion to suppress Recording 1. The State also sought to introduce another recording (Recording 2) in which Appellant stated: “Lord, forgive me, I hate I was the daddy.” The State and trial counsel repeated their arguments made for the introduction of the other recording; again, trial counsel merely claimed the recording should not be admitted because he “d[id]n’t see the relevance of [it].” After balancing the probative value of Recording 2 against its potential prejudicial effect, the trial judge denied the motion to suppress it. (R.p.12, line 4–R.p.15, line 8; State’s Exhibit 50)

Recordings 1 and 2 were only two of the exhibits offered by the State to establish a pattern of extreme indifference on the part of Appellant. The State also offered recordings of Appellant in which: (1) a few days after Victim died, he exclaimed he just wanted the investigation “over with” so he could get his phone back; (2) Appellant told his live-in girlfriend,

Ekeria Foote, to “whoop” her daughter; and (3) a phone conversation in which Appellant lied about Victim’s cause of death to a family member and blamed the situation on a burst appendix. (R.p.15, line 9–R.p.17, line 13; State’s Exhibit 50)

In addition to the recorded phone calls, the State also proffered a series of messages recovered from Appellant’s phone, including text conversations in which: (1) Appellant told Foote he should “whoop” her daughter’s butt; (2) a message to Victim’s mother in which Appellant claims Victim probably choked to death; and (3) a message in which Appellant lies about Victim having a mark on her nose when she arrived at his home on the Saturday before her death. (R.p.2, line 25–R.p.4, line 19; R.p.7, line 19–R.p.10, line 21)

The State also sought to admit photographs of Victim’s injuries on her body at the time of her death to further demonstrate the extreme indifference shown by Appellant. Photographs of Victim’s body showed abrasions to her head and nose which were not on her body when she went to bed on Halloween night. Other photographs showed the bruising showed substantial bruising on Victim’s torso which, again, demonstrated extreme indifference. The trial judge ruled the State could introduce these photographs at trial. (R.p.22, line 7–R.p.25, line 18)

Trial Evidence

Ward B. Lineberger, III, the Director of EMS and paramedic with Chester County EMS, had just arrived at work on November 1, 2017 when EMS received a call about a child in distress in the city of Chester. Within minutes, Lineberger was on the scene and administering treatment to Victim. Lineberger immediately noticed Victim was not breathing, did not have a pulse, and her extremities were cool. Additionally, Victim had vomit on her upper body. Lineberger believed Victim passed away awhile before paramedics arrived, but continued treatment on Victim while transporting her to the hospital. At that time, Lineberger also observed the skin on

Victim's upper body was grayish/yellowish, indicating a lack of oxygen within the body for an extended period of time. Tyanne Perry, another paramedic at the scene, also observed the vomit and that Victim never showed any signs of life while they attempted to resuscitate her. (R.p.39, line 6–R.p.52, line 3)

Mandy Williams, an Emergency Room Registered Nurse and also an ER coordinator for the MUSC Health Chester Medical Center. When Victim arrived at the hospital, she was and other immediately began advanced life-saving protocol. Williams noted Victim never showed any signs of life, and that she was eventually able to question Appellant about the events leading up to her condition. Appellant told her he believed Victim had been vomiting because she had been trick or treating the night before and had obtained some bad or tainted candy. Later, after Victim was pronounced dead, Williams noticed bruising on Victim's lower abdomen which resembled handprints. (R.p.52, line 11–R.p.58, line 6)

Dr. Isom Lowman, the ER doctor who treated Victim. Like the other medical professionals who tried to save her, Dr. Lowman noted Victim failed to show any signs of life throughout his attempts to save her. While attempting to save Victim, Dr. Lowman noted Victim had several visible injuries on her body: (1) an abrasion on her forehead; (2) a second abrasion on her nose, and (3) bruising on the "upper quadrant extending to the right lower quadrant" of her abdomen. Unfortunately, efforts to save Victim were ineffective and he declared Victim dead at 8:54 a.m. (R.p.58, line 11–R.p.64, line 9)

Stephanie Bishop, the deputy coroner for Chester County, documented Victim's injuries when she arrived at the hospital. Like Dr. Lowman, she observed injuries to Victim's nose and head, along with the noticeable bruising on her abdomen. She identified those injuries in photographs presented a trial. Additionally, Bishop recalled that she spoke with Appellant and

he claimed Victim's Halloween candy was what made her ill; he denied the possibility of any other sickness, injury, or accident contributing to her death. (R.p.65, line 1–R.p.73, line 11)

Lieutenant Lolita Fourney, who was at that time a police officer in Chester, was involved in the early investigation into Victim's death. Appellant told Lieutenant Fourney he last saw Victim alive when he made her go to bed the night before. When he woke up in the morning to get Foote's child ready for school, he discovered Victim unresponsive. When asked what happened to Victim, Appellant claimed she had thrown up the previous night and was not eating after she had consumed her Halloween candy. After obtaining Appellant's phone, she recovered pictures of Victim from Halloween in which her face was visible and which did not show the injuries to the nose and head observed by the medical professionals who attempted to save her life. (R.p.74, line 1–R.p.89, line 23)

Dr. Darren Monroe was the forensic pathologist who performed Victim's autopsy on November 2, 2017. Like the previous medical professionals who saw Victim the previous day, he observed the abrasions on Victim's forehead and nose. On Victim's torso, he observed numerous bruises which were not associated with the resuscitative measures used to try and save her life; the bruising on her lower chest had nothing to do with any efforts to save her life. After he began inspecting the interior of Victim's body, he noticed "free blood" in her abdomen, indicating extensive internal bleeding. After checking her appendix and finding no injury, Dr. Monroe excluded appendicitis as a potential cause of death. However, Dr. Monroe did find injuries to Victim's pancreas, small valve, small intestine, and an actual tear and damage to her mesentery. He explained the mesentery "is what supplies blood to your bowels and intestines and it kind of anchors them . . . to the back of your body, it holds them in place" Dr.

Monroe concluded the torn mesentery is the injury which ultimately killed Victim, and that it was caused by blunt force trauma to her abdomen. (R.p.94, line 7–R.p.111, line 15)

The exact timing and nature of the blunt force trauma which killed Victim was harder to determine. Dr. Monroe explained the injuries could have been caused by a single or multiple impacts with Victim’s abdomen, but that the force used would have been “extreme” and not caused by a minor accident, especially because the injuries occurred over a wide area of her body and impacted several organs. Additionally, the doctor could not determine the exact minute or hour in which Victim suffered the fatal injury, but was able to date the injury to within “two or three days” of her death. To reach this conclusion, Dr. Monroe used a microscope and samples from the mesentery to view the types of cells present in Victim’s injury. He explained neutrophils, the “first responders” of a body’s cells cause inflammation and are mostly gone by the third day of an injury. Macrophages, a second type of inflammatory cell, show up later in the healing process and consume the neutrophils. Thus, for both types of cells to exist in the large quantities found, the injury occurred likely two, but a maximum of three days prior to Victim’s death on October 29, 2017. Further, Victim’s reactions to such a severe injury would have been pain and vomiting soon after the injury occurred. (R.p.111, line 16–R.p.129, line 10; R.p.139, line 25–R.p.141, line 23)

Tornita Adams, Victim’s mother, testified about her own and Victim’s histories with Appellant. When Adams became pregnant with Victim, Appellant initially denied paternity. However, when Victim was almost a year old, a DNA test was conducted which proved Appellant’s paternity, leading Appellant to begin spending time with her. Eventually, Appellant moved in with his then-girlfriend Foote in Chester and Adams would allow Victim to stay with the couple and Foote’s daughter (Daughter) for several days at a time. By the time Adams

dropped Victim off with Appellant and Foote for the last time in October of 2017, Victim was over two years old and a healthy child. (R.p.142, line 19–R.p.153, line 8)

Adams dropped off Victim with Appellant and Foote on October 28, 2017 at about 10:30 p.m. At that time, Adams was working on toilet training Victim and was using Pullups on her during the transition process; Adams told Appellant about the process and always left Pullups with him whenever Victim stayed. Adam also recalled Victim appeared fine that whole day, eating normally and singing in the car on the way to Chester. After dropping Victim off, Adams did not hear anything about Victim other than receiving a picture of her in her Halloween costume. On November 1, she received the news that Victim was not breathing and rushed to the hospital. There, she discovered Victim had passed away. (R.p.153, line 9–R.p.160, line 22)

Foote testified she came up with the idea of Victim staying with her and Appellant that weekend and through Halloween because it would allow Victim and Daughter to trick-or-treat together. Foote confirmed Adams and Victim arrived at her home at approximately 10:30 p.m. The following day, October 29, Victim appeared normal and possessed a normal appetite. (R.p.182, line 19–R.p.190, line 25)

Early the following morning, Foote woke up and prepared for work. Usually, workdays required Foote to wake up at 2:30 a.m. and she would leave by 3:00 a.m. Before leaving, Foote always flipped on the light to the children's room and checked on the kids. It was Appellant's responsibility to wake up Daughter before school and ensure she was ready to meet Foote's mother who would make sure Daughter got on the school bus. With Daughter at school, Appellant and Victim would be alone together until Daughter or Foote returned, both of whom usually arrived home in the afternoon. When she returned home, she found Victim acting normally and apparently healthy. For dinner, the children had hot dogs. That night, Foote gave

Daughter and Victim and bath. She did not see any bruising or injuries on Victim's torso.

(R.p.191, line 1–R.p.198, line 11)

The following morning—October 31—Foote again woke up at 2:30 a.m., checked on the children, and left for work. That day, however, Foote was sent home early from work because her employer—Shutterfly—did not have anything for her to do that day. She left work at 8:49 a.m. and was home less than an hour later. Both Victim and Appellant were still asleep, so she decided to nap until approximately 2:00 p.m. (R.p.198, line 12–R.p.199, line 22; R.p.200, line 8–R.p.205, line 12)

When Foote woke, she found Victim in the living room. She “wasn't normal,” sitting on Foote's leg, laying against her, and rubbing Foote's stomach. Foote told Appellant about Victim's behavior and remarking that Victim likely felt ill. To her knowledge, Appellant was the only person who had taken care of Victim that day and was the only person who would have fed her. Later, prior to trick-or-treating, Foote picked up Wendy's fast food and took Victim, Daughter, and her nephew to her sister's home. There, Victim vomited a green substance. Foote told Appellant about the incident, but he claimed the green coloration was from Kool-Aid she had drank earlier that day. Foote talked to Appellant about contacting Adams, but he declined to do so. (R.p.205, line 13–R.p.209, line 18)

Victim appeared ill in other ways as well. During both a trip to Wal-Mart and while trick-or-treating, Victim constantly sought to be held. Additionally, she appeared drowsy throughout the late afternoon and during trick-or-treating. After taking the kids around the neighborhood, Foote dropped Victim off with Appellant and took her daughter to Pizza Hut. Later, when she returned home with leftovers, Victim refused to eat. She also vomited several more times, and each time the vomit was green. Again, Foote asked Appellant to call Adams.

However, Appellant refused to do so and claimed Adams's car was inoperable. Foote desired to take Victim to the hospital, but Appellant refused to do so. When Foote got ready for bed, she saw Appellant and Victim in the living room of the home, with the latter asleep in a chair. Foote did not observe any injuries to Victim's nose or forehead. (R.p.209, line 19–R.p.221, line 6)

On November 1, Foote woke up around 2:30 a.m. as usual but when she checked on the children she discovered Victim was sitting up in the bed, which was strange behavior for her. When Foote asked her why she was still awake, she shrugged her shoulders. Foote then asked her to go back to bed, at which point Victim smiled and laid back down. Later, at work, Foote received a call from Appellant telling her that Victim was not breathing and that he had called 9-1-1. By the time she got to the hospital, Foote learned Victim had died. (R.p.221, line 7–R.p.225, line 17)

Erica Foote, Ekeria's sister, was at Ekeria's home when Adams dropped off Victim on October 28, at which point Victim was asleep. The next time she saw Victim was on Halloween, when Ekeria brought Victim, other children, and Wendy's fast food to Erica's home. Erica did not see any abrasions or marks on Victim's face, but noticed Victim was, uncharacteristically, not eating. When Victim final tried to eat some of the food, she started throwing up "green stuff" on the floor. Erica and Foote called Appellant and informed him about the incident, including the bizarre green color of the vomit. Appellant did not appear concerned and blamed the coloration of the vomit on Kool-Aid Victim drank earlier in the day. (R.p.176, line 20–R.p.179, line 23)

Dr. Susan Lamb, a child abuse pediatrician certified in both child abuse and neglect pediatrics, and testified about her investigation into Victim's death. Notably, Victim was a healthy child with no genetic disorders or other abnormalities which contributed to her death.

She concurred with Dr. Monroe's conclusion that Victim died as a result of blunt force trauma to her abdomen which damaged her mesentery. Further, she explained that once Victim suffered the injury, she would have "become quickly symptomatic," meaning that within an hour she would start showing severe symptoms. People with the types of injuries Victim possessed are in pain and will avoid any physical activity which jostles the abdomen. Additionally, they are "definitely not eating or drinking" and will start vomiting because their intestines are not processing their bodies' waste. Additionally, the internal bleeding will cause blood pressure to drop and lead to lethargy, drowsiness, and eventual unconsciousness. (R.p.241, line 15–R.p.248, line 15)

Dr. Lamb also explained that any attempt to eat or drink would "very quickly" lead to vomiting because the body would be unable to process any substance consumed. The green "vomit" from Victim was actually bile produced by Victim's liver or gall bladder; if nothing is moving through a body's intestines, bile sitting in the body is eventually vomited up as green liquid. By the time Victim started vomiting green bile, she would not have had any food or liquid in her stomach and would not have eaten for hours. Additionally, due to the severity of Appellant's injuries, she could not have had suffered them days before she began demonstrating symptoms; rather, she would have "immediately" began showing symptoms of illness and distress. (R.p.248, line 16–R.p.250, line 6; R.p.261, line 25–R.p.263, line 3; R.p.269, lines 3–22)

Reviewing Victim's autopsy report and its photographs, she noted the bruising on Victim's chest and abdomen were not from "normal accidental play" or other typical accidents experienced by children. Further, the round bruises found on Victim's upper chest demonstrated "a pattern injury that [experts] recognize in child abuse and neglect, that's caused by adult fingertips or knuckles." Dr. Lamb excluded the possibility that CPR or attempts to resuscitate

Victim caused the injury: CPR on a child victim's age require using the palm of a hand, not fingertips or knuckles. Further, in order to bruise a person, they have to have a blood pressure. Once a heart stops beating and no blood pressure is in a body, that body will not bruise at all. Other aspects of Victim's injuries also supported the allegations of abuse: the injuries to Victim's pancreas and its surrounding tissue are common in abuse situations and uncommon in accidental situations because the pancreas's location in the center of abdomen and over the spine. Due to its position in the body, it is difficult to damage the pancreas without a powerful, direct blow to the center of the abdomen. (R.p.250, line 7–R.p.261, line 24; R.p.267, line 4–R.p.268, line 8)

The State specifically questioned Dr. Lamb about her review of the autopsy information and when she believed, in her medical opinion, the “furthest out” Victim could have suffered her fatal injuries before her actual demise. Based on the information provided, including the testimony of witnesses who saw Victim in the days prior to her death, Victim was injured sometime after she ate the hot dogs on Monday, October 30 and when Foote tried to give Victim Wendy's fast food the following afternoon. This opinion was reinforced by Dr. Lamb's observation that Foote reported Victim did not have any visible injuries on her abdomen during her bath on that Monday night. (R.p.263, line 4–R.p.267, line 3)

Anissa Gordon, Appellant's mother, also saw Victim on the night of October 30. She observed Victim eating and apparently healthy and confirmed Foote gave Victim a bath that evening. When confronted with an audio recording of a conversation she had¹ with Appellant, she confirmed that Appellant stated that he regretted fathering Victim. (R.p.276, line 3–R.p.290, line 20)

¹ At trial, Gordon confirmed it was Appellant's voice on the recording but did not recognize her own voice. (R.p.290, lines 2–17)

SLED Agent Will Thrasher testified about his participation in the investigation into Victim's death, including his conversations with Appellant and Foote. Notably, Appellant denied ever hitting Victim or utilizing corporal punishment and denied Victim had any accident or injuries while she stayed with him that visit. However, Agent Thrasher discovered a cell phone conversation between Appellant and Foote from October 25, 2017, in which the former advocated the latter "whoop her [daughter's] ass and quit playing all the time." Additionally, Agent Thrasher listened to Appellant's jail recordings in which: (1) Appellant claimed the abrasion on Victim's nose was from a fall he witnessed; (2) Appellant told Gordon he wished he had not taken the paternity test because, "look what it got [him]"; (3) Appellant advocated for using corporal punishment on children; (4) Appellant, shortly after his arrest, was distressed not about Victim's death, but on the loss of his cell phone. (R.p.299, line 25–R.p.330, line 18; State's Exhibit 50)

SLED Agent Trista Baird observed similar inconsistencies between Appellant's statements to investigators and the evidence uncovered throughout the investigation into Victim's death. For example, despite assurances from Appellant that Victim was largely toilet trained, officers found a diaper, which she supposedly no longer wore, full of urine in the trash in her room at his home and another diaper on Victim herself when she arrived at the hospital on November 1. Additionally, despite his claims that Victim's initial vomiting was related to green Kool-Aid she drank, no green-colored Kool-Aid was found in his house. Finally, despite Appellant being told Victim died an unnatural death as a result of blunt force trauma to her abdomen he was recorded in one of his jail calls telling someone that Victim's death was a result not of blunt force trauma, but a burst appendix. (R.p.340, line 18–R.p.359, line 16)

The sole witness who testified in Appellant's defense was Dr. John D. Wren. Dr. Wren, a pathologist, was an "unofficial" medical examiner for Spartanburg County until shortly before trial. However, he was not board certified as a forensic pathologist. Because he was not a forensic pathologist, Dr. Wren failed to prepare a report evaluating the clinical autopsy findings along with investigative information gathered in Victim's case. (R.p.363, line 1–R.p.372, line 13)

After reviewing the coroner's autopsy report, autopsy photographs, and some of the tissue evidence collected during the autopsy, Dr. Wren concluded that Victim did die as a result of blunt force trauma which damaged her mesentery. However, he believed it was possible two "events" could have occurred to cause the damage, with the initial incident occurred between three and eight days prior to Victim's death and the second injury occurring within the time frame proposed by the State's experts. Dr. Wren could not reach a conclusion as to the cause of the bruising found on Victim's abdomen, claiming he was unsure whether, based on the information he was provided, the bruising was actually caused by blood pooling in Victim's body as a result of her corpse being face-down for a period of time before the autopsy. (R.p.372, line 15–R.p.390, line 17)

On cross-examination, Dr. Wren admitted he had not been paid by the defense as of the time of trial and that the defense had not asked him to prepare a report for trial. Further, he admitted that the information he reviewed was based on the limited request of information made by the defense. Further, Dr. Wren conceded that, less than a week before trial, he told trial counsel who in turn informed the State that the injury which caused Victim's death occurred between two and five days before her death, not the eight days he testified to at trial. Upon

further questioning, he admitted he was not presented with most of the autopsy photos, including ones showing Victim's organs intact and still within her body. (R.p.391, line 1–R.p.409, line 12)

Dr. Monroe was called back to the stand to rebut the claims made by Dr. Wren. He explained the injury to Victim's mesentery could not be a re-injury because no scar tissue was found in that section of Victim's body. Further, he explained that while Dr. Wren only reviewed a few autopsy photographs, several hundred were taken and available for review. Some of those photographs demonstrated Victim's blood pooled on her back, not her chest, because her body remained face up from death through the time of the autopsy. He also cut into the contusions to verify they were what Dr. Monroe believed them to be. In fact, Dr. Monroe identified photographs of dark spots he cut into on Victim's body which he discovered were not contusions. (R.p.413, line 6–R.p.423, line 18)

STANDARD OF REVIEW

“In criminal cases, an appellate court reviews errors of law only and is bound by the factual findings of the trial court unless clearly erroneous.” State v. Bryant, 372 S.C. 305, 312, 642 S.E.2d 582, 586 (2007). “The conduct of a criminal trial is left largely to the sound discretion of the trial judge, who will not be reversed in the absence of a prejudicial abuse of discretion. Id. “An abuse of discretion occurs when a trial court’s decision is unsupported by the evidence or controlled by an error of law.” Id.

“The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion.” State v. Black, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012). “An abuse of discretion occurs when the trial court’s ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support.” State v. Jennings, 394 S.C. 473, 477–78, 716 S.E.2d 91, 93 (2011).

“Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears.” State v. Alexander, 303 S.C. 377, 380, 401 S.E.2d 146, 148 (1991); see Rule 401, SCRE (defining relevant evidence as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence”). If a piece of evidence could assist the jury in arriving at the truth of an issue, it is relevant and should be admitted during trial. State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 403 (1986). However, even relevant evidence may be excluded “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Rule 403, SCRE.

ARGUMENT

The trial judge properly allowed the State to admit two recordings of Appellant’s phone calls from jail because they were, along with other submitted evidence, were probative of Appellant’s extreme indifference towards Victim.

Appellant argues the trial judge erred in admitting Recordings 1 and 2 because the State submitted the calls simply because the demonstrated his lack of remorse for Victim’s death. The State disagrees with this allegation of error. Notably, the issue as argued on appeal is not preserved for review because it was not raised to and ruled upon by the trial judge as Appellant argues it on appeal. Still, even if preserved, Appellant’s argument lacks merit. The Recordings were submitted, along with various other evidence, to demonstrate Appellant’s extreme indifference—a statutory element of the offense for which he was charged—towards Victim. Additionally, while the Recordings were properly admitted for this purpose, there were but two minor pieces of evidence demonstrating Appellant’s criminal behavior. Even if the admission of the Recordings was improper, the error in doing so was harmless given the remainder of the evidence presented by the State.

Issue Preservation

Pursuant to our issue preservation requirements in South Carolina, an issue must also be raised in a sufficiently specific manner to call attention to the exact error to the trial court. State v. Johnson, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005); see State v. Prioleau, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001) (“[A]n objection should be sufficiently specific to bring into focus the precise nature of the alleged error so it can be reasonably understood by the trial judge.” (emphasis added)). Importantly, “[a] party need not use the exact name of a legal doctrine in order to preserve it[.]” State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003). However, in order for an issue to be preserved for review, “it must be clear that the

argument has been presented on that ground.” Id. Significantly, “[w]here an objection and the ground therefore is not stated in the record, there is no basis for appellate review.” State v. Morris, 307 S.C. 480, 485, 415 S.E.2d 819, 823 (Ct. App. 1991); see State v. Fleming, 254 S.C. 415, 421, 175 S.E.2d 624, 627 (1970) (“It is well settled that an issue which has not been presented to or passed upon by the trial judge will not be considered on appeal.”). “

As an initial matter, the State notes Appellant’s issue on appeal is rife with preservation problems. At trial, trial counsel’s sole objection to either recording were that he, in general, did not see how either one was relevant to Appellant’s case. These arguments, although obviously referencing Rule 401, SCRE, were not supported with citation to any authority or specific argument. Without a specific objection, the trial judge was not provided a sufficient reason to rule in Appellant’s favor. See Fleming, 254 S.C. at 421, 175 S.E.2d at 627. Even worse for Appellant, trial counsel made no reference to the probative value or prejudicial effect of the recordings at trial, rendering present discussion of them improper. See id.; see also State v. Patterson, 324 S.C. 5, 17, 482 S.E.2d 760, 765–66 (1997) (stating a general objection which does not specify the particular ground on which it is based is insufficient to preserve an issue for appellate review). Accordingly, this Court should reject Appellant’s arguments on preservation grounds.

Analysis

A person is guilty of homicide by child abuse if (1) the person causes the death of a child while committing child abuse or neglect; and (2) the death occurs “under circumstances manifesting an extreme indifference to human life.” S.C. Code Ann. §16-3-85(A)(1). “Child abuse or neglect” is defined under the homicide by child abuse statute as “an act or omission by

any person which causes harm to the child’s physical health or welfare[.]” S.C. Code Ann. § 16-3-85(B)(1).

“To prove a defendant guilty of homicide by child abuse, the State must demonstrate ‘the death occur[red] under circumstances manifesting an extreme indifference to human life.’” State v. Phillips, 411 S.C. 124, 767 S.E.2d 444 (Ct. App. 2014) (quoting section 16-3-85). “Extreme indifference is in the nature of a culpable mental state and therefore is akin to intent.” State v. Jarrell, 350 S.C. 90, 98, 564 S.E.2d 362, 367 (Ct. App. 2002) (citation, ellipses, and internal quotation marks omitted). “In this state, indifference in the context of criminal statutes has been compared to the conscious act of disregarding a risk which a person’s conduct has created, or a failure to exercise ordinary or due care.” Id. The meaning of extreme indifference to human life in the context of a homicide by child abuse case is consistent with recklessness and indifference in reckless homicide cases. State v. McKnight, 352 S.C. 635, 645, 576 S.E.2d 168, 173 (2003). Thus, extreme indifference to human life can similarly be equated to “‘a conscious failure to exercise due care or ordinary care or a conscious indifference to the rights and safety of others or a reckless disregard thereof.’” Id. (quoting State v. Tucker, 273 S.C. 736, 739, 259 S.E.2d 414, 415 (1979)). “As a general rule, any guilty act, conduct, or statements on the part of the accused are admissible as some evidence of consciousness of guilt.” State v. McDowell, 266 S.C. 508, 515, 224 S.E.2d 889, 892 (1976).

The State believes Appellant’s failure to raise the arguments mentioned in his brief to the trial judge was not due to any deficiency, but because he—at the trial stage—recognized admission of the recordings was entirely proper. As explained supra, Appellant was charged with the crime of homicide by child abuse, which requires the State to prove he acted “under circumstances manifesting an extreme indifference to human life.” See S.C. Code Ann. §16-3-

85(A)(1). South Carolina courts have regularly permitted evidence of a defendant's attitude towards a victim of homicide by child abuse because such information is relevant to the determination of whether a defendant acted with extreme indifference.

In State v. Holder, 382 S.C. 278, 676 S.E.2d 690 (2009), the named defendant sought reversal for her conviction for homicide by child abuse for the death of her son after her coworker testified at trial that defendant "began dressing differently and talked less about her child once her relationship began with [her codefendant]." Id. at 287, 676 S.E.2d at 695. Notably, the witness had known Holder for years, well before the latter began dating codefendant. Id. When the witness noticed bruises along the side of Holder's son's face, the witness confronted Holder about the markings but Holder claimed the son had been pushed into a swimming pool by a dog. Id. During this visit, the son seemed more upset than usual, and at one point Holder told the son, "You better behave or I'm going to take you home to [codefendant]." Id. The child responded by falling to the floor and screaming. Id. When asked to generally describe Holder during that period, the witness stated:

When she first started working there, she talked more about [her son] and—it's hard to explain. She was a little more soft-spoken. She dressed a little more conservatively. And over a period of weeks, it started to change. Especially now looking back at the change of her dress. She started dressing a little different.

Id. at 287–88, 676 S.E.2d at 695–96. The defense objected, claiming the last statements were improper character evidence under Rule 404, SCRE. Id. at 288, 676 S.E.2d at 696. The trial court overruled the objection, and the witness concluded her testimony by noting that by that period of time, Holder did not talk as much about the son, and started talking about "[codefendant], [codefendant], [codefendant]" basically "all the time." Id. This stood out to witness because she, Holder, and their coworkers were all moms who traditionally focused their

conversations on their children. Id. The witness later testified, without objection, that Holder had cut off contact with her parents during this same time period. Id.

The Supreme Court of South Carolina found the statements were not inadmissible character evidence nor were they improper propensity evidence. Id. at 289, 676 S.E.2d at 696. Rather, they were submitted to demonstrate Holder's extreme indifference to her son by showing "Holder's strong desire to please [codefendant] 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." Id. Also of note, the court found the impact of the "brief evidence" was minimal given the record as a whole demonstrated Holder's guilt and the disputed evidence was cumulative to similar evidence admitted without objection Id.

Similarly, in State v. Palmer, 408 S.C. 218, 758 S.E.2d 195 (Ct. App. 2014) *aff'd in part, rev'd in part* 413 S.C. 410, 776 S.E.2d 558 (2015), Palmer and his codefendant, Gorman, were on trial for charges including homicide by child abuse for the death of the Gorman's seventeen-month old grandson. The Court of Appeals found evidence that Gorman "was often frustrated and annoyed with the [victim]'s behavior" and her comments that she disliked the child were appropriate for trial. Palmer, 408 S.C. 230–31, 758 S.E.2d at 202. This Court noted the evidence, by itself, was "insufficient" to prove guilt, but properly "considered in combination with all the evidence" to answer the question of "why" the child was killed. Id. The Supreme Court granted certiorari and reversed Palmer's conviction for homicide by child abuse, finding there was not sufficient evidence for the charge to survive the directed verdict motion at trial. Palmer, 413 S.C. at 420, 776 S.E.2d at 563. However, the court affirmed Gorman's, noting there was substantial circumstantial evidence of her guilt, including "numerous witnesses testified to her unusual affect and statements following the child's injury." Id.

In State v. Thompson, 420 S.C. 192, 802 S.E.2d 623 (Ct. App. 2017), the named defendant and her boyfriend, Guinyard, were convicted of homicide by child abuse and unlawful conduct toward a child for their roles in the death of their son. On appeal, they claimed the trial court erred in denying their respective motions for directed verdicts on their charges. Id. at 196, 802 S.E.2d at 625. The evidence against them largely fell into three categories: the substantial amount of external and internal injuries found on the son's corpse, including abrasions, scars, a subdural hemorrhage, two rib fractures, and a healing fracture to the son's upper left arm; physical abuse witnessed by family and friends in the fifteen-month period leading up his death; and various comments made by Thompson during that same time frame. Id. at 198–203, 802 S.E.2d at 625–28. Thompson's statements expressed a general disregard for the child and included: (1) Thompson, speaking about son, claiming she did not care "if the retarded bastard died" and if DSS did not take custody of the child, "she was going to kill him and bury him so DSS would not take her other baby"; (2) another occasion on which Thompson told her sister she wanted her son "to go back to DSS so they could give him a beating and a killing and a raping"; numerous complaints about the child such as his issues with wetting and soiling himself and that his speech "was not as good as his two-year-old sibling." Id. at 200–01, 802 S.E.2d at 626–27.

This Court found the trial court did not err in denying the defendants' directed verdict motion because the evidence, viewed in the light most favorable to the State, supported the charged offenses; the evidence showed the child had an "obvious" need for medical treatment in the last several weeks of his life, the defendants caused his death, and the death occurred under circumstances manifesting the defendants' extreme indifference to human life. Id. at 206–07, 802 S.E.2d at 630. The Court specifically noted that, "given the severity of [the child]'s symptoms and the history of [the defendant]s' animosity toward [him], a juror could reasonably

infer that [the defendant]s’ failure to seek medical treatment for [the child] was more than mere neglect but rather a deliberate choice” Id. at 207, 802 S.E.2d at 630. The Court noted the evidence **also** supported the charges based on the evidence that defendants allowed or inflicted the injuries on the child. Id. at 208, 802 S.E.2d at 631.

Appellant’s argument that the Recordings are not relevant to any issue in the case is incorrect. While the parties agreed Victim died as a result of blunt force trauma, the defense sought to persuade the jury that Victim’s injuries were either accidental or, if intentional, inflicted by someone prior to Victim being placed in Appellant’s care on October 28, 2017. It was the State’s burden to prove, beyond a reasonable doubt, that Appellant was the person responsible for Victim’s death. Pursuant to that burden, the State also had to prove Appellant acted with extreme indifference to Victim’s well-being. In general, “any guilty act, conduct, or statements on the part of the accused are admissible as some evidence of consciousness of guilt.” McDowell, 266 S.C. at 515, 224 S.E.2d at 892. Further, as demonstrated in Holder, Palmer, and Thompson, evidence of a defendant’s attitude towards a victim of homicide by child abuse may be relevant for determining why the defendant acted (or failed to act) in a particular way which ultimately led to a child’s death. See Holder, 382 S.C. at 289, 676 S.E.2d at 696; Thompson, 420 S.C. at 207, 802 S.E.2d at 630; and Palmer, 408 S.C. at 230–31, 758 S.E.2d at 202.

In the instant case, Recordings 1 and 2 were submitted in conjunction with other recordings, messages, and testimony which demonstrated Appellant’s extreme indifference towards Victim. Recordings 1 and 2 only contained the evidence that Appellant made statements expressing his regret at being Victim’s father which was combined with the remainder of the State’s evidence to show Appellant’s extreme indifference. Other recordings submitted the State included statements by Appellant that he just wanted the investigation over so he could get his

phone back; Appellant telling Foote, to “whoop” her daughter; and a phone conversation in which Appellant lies about Victim’s cause of death and blaming the situation on a burst appendix. The message submitted by the State involved Appellant, again, advocating for Foote to “whoop” her daughter; Appellant lying about Victim choking to death; and Appellant lying about the injury to Victim’s nose being present when she was dropped off with him. These various messages and recordings only supported the testimonies of the trial witnesses. Notably, Foote testified that Appellant blamed Victim’s green vomit on green-colored Kool-Aid, but SLED Agent Baird found no such thing in the home. Further, although Foote showed grave concern for Victim’s health on Halloween night, Appellant refused to seek medical attention for her. Combined, this is relevant, probative evidence of Appellant’s extreme indifference because it demonstrates Appellant’s “conscious failure to exercise due care or ordinary care or a conscious indifference to the rights and safety of others or a reckless disregard thereof.” See Tucker, 273 S.C. at 739, 259 S.E.2d at 415.

Appellant’s argument that references to his lack of remorse improperly violated his constitutional rights is misguided. None of the cases cited by Appellant in support of this position actually do so; the cases in question all involve the State or witnesses commenting on a defendant’s post-arrest silence or decision to plead “not guilty.” See, e.g., State v. Reid, 324 S.C. 74, 78, 476 S.E.2d 695, 696 (1996) (“It is a violation of due process for a State to permit comment on a defendant’s post-arrest silence since the giving of Miranda warnings might induce silence by implicitly assuring a defendant his silence will not be used against him.”); State v. Sloan, 278 S.C. 435, 440, 298 S.E.2d 92, 95 (1982) (“A defendant’s exercise of his right to plead not guilty is never a permissible basis upon which to impose the death penalty; this is particularly true in a capital case in this state, where a defendant *must* plead not guilty to have his sentence

determined by a jury). Further, the statements in Recordings 1 and 2 were willingly made by Appellant and he waived any constitutional complaints to the use of the recordings at the beginning of each call.

Near the conclusion of Appellant's brief, he impugns the character of the solicitor who prosecuted the case. Attacking her, he claims:

“The solicitor made her view of the evidence clear when arguing for admissibility. She wanted the evidence to appeal to the passions and prejudices of the jurors. She wanted the evidence to suggest the jurors convict Appellant, not based on the relevant and probative evidence presented, but on the highly emotional evidence that he wished he were not Minor's father. One can hardly imagine something more gut wrenching to hear than a father's disavowal of a child after the child's death.

(Br. of Appellant, p.15) Ironically, Appellant alleges the same impropriety in which his brief is based: appeals to the emotions of his audience rather than an analysis of the facts. While Appellant is correct the contested nature is damaging to the defendant, it is not improper; it was damaging to Appellant because it was directly probative for the crime for which he was on trial. As explained above, evidence of a defendant's attitude towards a victim of homicide by child abuse is extremely relevant to establishing whether that defendant acted with extreme indifference towards the victim. See Holder, 382 S.C. at 289, 676 S.E.2d at 696. Recordings 1 and 2 are the type of evidence South Carolina courts regularly allows in prosecutions for homicide by child abuse. The evidence may be shocking for its audience, but the State's burden of proving Appellant's actions constituted extreme indifference requires it present evidence that Appellant's actions (or lack thereof) were **extreme**. See State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998) (recognizing unfair prejudice does *not* mean damage to a defendant's case that results from the legitimate probative force of a piece of evidence).

Appellant provided substantial circumstantial evidence that Appellant was the person who injured Victim.

Accordingly, the trial judge did not abuse his broad discretion in allowing the State to introduce Recordings 1 and 2 into evidence.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgments and convictions of the lower court be affirmed.

Respectfully submitted,

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March 23, 2021

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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHESTER COUNTY
Court of General Sessions
The Honorable Brian M. Gibbons, Circuit Court Judge

Appellate Case No. 2019-001551

THE STATE,RESPONDENT,

v.

DARRYL QUAN DAMOND WILSON,APPELLANT.

CERTIFICATE OF COUNSEL

The undersigned certifies this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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