STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM RICHLAND COUNTY
Court of General Sessions
The Honorable L. Casey Manning, Circuit Court Judge

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Appellate Case No. 2019-002072

THE STATE, .....RESPONDENT,

v.

KENNETH RAY GLEATON, .....APPELLANT.

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# FINAL BRIEF OF RESPONDENT

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## STATEMENT OF ISSUES ON APPEAL

I. The trial judge properly refused to bifurcate Appellant's trial because evidence of Appellant's prior criminal conviction was necessary for proving his guilt for the offense of unlawful possession of a firearm by a person convicted of a violent offense.

II. The trial judge properly exercised his broad discretion by admitting a limited number of photographs of Victim taken at the scene of the fire and during her autopsy because they were highly probative to establishing Appellant acted with malice aforethought when he killed Victim and Appellant was guilty of the destruction of human remains, and their immense probative value greatly outweighed any potential undue prejudice that could have resulted from their admission. (Appellant's Issues 2 & 3)

III. Any error in admitting the photograph of Victim prior to her death was harmless given the overwhelming evidence of Appellant's guilt. (Appellant's Issue 4)

IV. The trial judge properly allowed testimony in which Appellant adopted the statement of Victim when he admitted to pulling a gun on her a month before the murder. (Appellant's Issue 5)

V. The trial judge properly acted within his discretion by allowing the jury to decide whether they would like to move forward with closing arguments and deliberations on the last day of the first week of trial or continue the proceedings the following Monday. (Appellant's Issue 6)

VI. The trial judge did not abuse his discretion in refusing Appellant's request to defer sentencing because the reason for Appellant's request, the absence of a character witness, was due to his own failure to act with due diligence in securing the witness's attendance. Further, any purported error was harmless when the trial judge was later presented with an affidavit containing the witness's statements and, after consideration, refused to change Appellant's sentence. (Appellant's Issue 7)

VII. This Court should deny Appellant's request for a new trial based on the Cumulative Error Doctrine because said theory is not recognized under South Carolina law. Further, the issue is not preserved for appellate review because Appellant failed to present this ground for relief to the trial judge. (Appellant's Issue 8)

## STATEMENT OF THE CASE

The State agrees with Appellant's Statement of the Case.

## STATEMENT OF FACTS

### Pre-trial

Prior to trial, the State proffered the testimony of Jessica Gantt, Victim's roommate and coworker. The State sought to admit testimony from Gantt about a domestic violence incident which occurred between Appellant and Victim approximately one month before Victim's murder on September 8, 2017. Gantt testified about numerous aspects of the incident, including Appellant's threat to kill Victim in the future. Gantt also testified that the following day, Appellant returned the next day and confirmed claims made by Victim that Appellant had assaulted her with a gun. No objection to the testimony regarding the assault with the gun was made at that time. The following morning, before the trial began, trial counsel generally objected to Gantt's testimony regarding Appellant's September 9, 2017 statements, but did not state the basis of her objection. (R.p.43, line 2–R.p.63, line 14; R.p.70, line 11–R.p.72, line 23)

### Trial Evidence

Phillip Carlson testified about his interaction with Victim on September 8, 2017. At that time, he was a patrol deputy with the Richland County Sheriff's Office. That evening, he was dispatched to a Holiday Inn on Garners Ferry Road to respond to a domestic violence call. He met Victim at that location and, after interviewing her, helped her retrieve some belongings before escorting her to Sister Care, a shelter for victims of domestic abuse. (R.p.436, line 17–R.p.438, line 12)

Skylar Isenhower, Victim's adult daughter, spoke with Victim on the phone shortly before her death on October 9, 2017. Victim was excited that custody of her two young sons would be returned to her in the following weeks. Isenhower and Victim planned to visit the boys

a few days later and ended their phone call at approximately 8:55 p.m. (R.p.100, line 6–R.p.104, line 5)

Roderick "Mike" Dukes first met Victim in the summer of 2017 through her grandparents after they hired him to do yard work and odd jobs around the home. Before long, Dukes became friends with Victim, Appellant, and the grandparents and began hanging out at the house almost every day. Dukes became particularly close with Appellant and the two men would often drink together or go fishing. After knowing Victim, Appellant, and Victim's grandparents for approximately one to two months, Dukes observed the relationship between Appellant and Victim began to deteriorate. Dukes also noticed that Victim's parents and grandchildren moved out of the house but was never told why. (R.p.486, line 25–R.p.493, line 12)

On October 9, 2017, Dukes met up with Appellant and was hanging out with him when the latter suggested they go visit Victim at her home. Dukes could tell something was going on with them, but decided to accompany Appellant in the hopes of finding some odd job he could do for her in return for payment. Appellant wanted to get back in Victim's good graces, but Dukes advised him that he might ultimately need to give Victim some space. Still, the men went over to Victim's home around 6:00 or 7:00 p.m. However, the duo discovered that Victim had to take Gantt to work, so the men left and returned approximately an hour later. At that point, only Appellant, Dukes, and Victim were in the home. (R.p.493, line 13–R.p.499, line 1)

Initially, Appellant and Victim began a conversation at the kitchen table while Dukes grabbed a snack and went on the back porch. After eating, Dukes went into living room and began playing video games while Appellant and Victim went into a back bedroom to continue their conversation. Dukes ended up engrossed in the video game he was playing "Army of Two:

The Devil's Cartel,"[1] a shooting game, for several hours without Victim or Appellant exiting the room. Dukes quit playing after hearing a gunshot that did not come from the game; Dukes was wearing headphones linked to the PlayStation and the sound clearly originated outside the game. Dukes first went outside to investigate, but did not hear anything out there. Concerned that the noise was Appellant or Victim being shot, Dukes went to Victim's bedroom to investigate. (R.p.499, line 2–R.p.506, line 15)

Dukes was able to force the door open and was greeted with a disturbing scene: Victim appeared to be dead on the floor and Appellant was choking her with a belt while his foot was on her head. After Appellant exclaimed he had "fucked up," Dukes decided to take control of the situation by saying he was going to get some bags for Appellant so he could clean up the scene. Dukes used the distraction to escape and he took off running. As Dukes fled, he thought he could hear footsteps chasing after him, so he ran through nearby woods to a Circle K gas station he was familiar with. Dukes's purpose for running to the gas station was to use its WiFi to contact a friend; Dukes owned a cell phone but did not have a service plan, so he used an application on the phone to make calls and send messages using WiFi. Dukes messaged his friend Latoya Riley at 9:45 p.m. and asked her to pick him up because he was in a troubling situation and he was "so scared." (R.p.506, line 16–R.p.514, line 19)

After Riley picked up Dukes and he explained the situation to her, the two of them decided to drive to Waffle House and tell Gantt about what occurred and warn her against returning to Victim's home. After they informed Gantt about what transpired, Gantt tried to call Victim's cell phone but Appellant answered it instead. The three of them resolved to go back to

[1] During his testimony, Dukes called the game "Army Two" and "Devil's Cartel." The video game's website provided its full title as "Army of Two: The Devil's Cartel." Electronic Arts, https://www.ea.com/games.army-of-two/army-of-two-devils-cartel (last visited June 7, 2021)

Victim's home and tell law enforcement about the murder. When they returned, they saw the home was in flames and that numerous emergency personnel were on the scene. Dukes spoke with an officer and let him know he had been at the house earlier, so they performed a GSR (gunshot residue) test on his hands. Then, officers took Dukes to the police station and interviewed him about the night's events. (R.p.520, line 3–R.p.525, line 8)

Throughout October 10, 2017, Dukes continued to message Riley. He informed her that he found one of Victim's or Appellant's "bloody bags" in the woods near the pond where he and Appellant fished and that within the bag were several shirts. While informing Riley about this, he expressed remorse that he had not tried to take the gun from Appellant and "do something." Additionally, Appellant tried to call and message Dukes several times. (R.p.514, line 20–R.p.520, line 2; R.p.525, line 9–R.p.527, line 15)

Riley confirmed Dukes did not have an active phone number and relied on applications and WiFi to communicate with her. She recalled that on October 9, 2017, Dukes contacted her around 9:30 p.m. After becoming worried, she went and picked him up from a gas station and at that time was told that Appellant killed Victim. Dukes did not smell like smoke. After further conversation, they decided they had to tell Gantt about what occurred and decided to drive to her Waffle House. Throughout the car ride, Dukes was in shock and acted dazed. At the Waffle House, Riley called the police while Dukes spoke with Gantt. When they returned to Victim's home, they found it aflame. Riley found a law enforcement officer and told them that Dukes was a witness and that officers should speak with him about what occurred. (R.p.567, line 11–R.p.576, line 9)

Gantt testified about her interactions with Appellant and Victim leading up to the murder. Gantt moved into the home approximately a week before Victim's grandparents moved out of

the home. Gantt also remembered seeing Appellant with a gun on September 7th of that year. She saw him pull a silver pistol out of his pants and hide it in a boot. Gantt recalled that Victim asked the grandparents to leave because Victim believed they had called DSS and had her children removed from the home after the September 8, 2017 incident. Speaking about that incident, Gantt recalled getting ready for work while in her room in the basement and hearing loud voices and sounds. After getting ready, Victim drove Gantt to the Waffle House with Appellant tagging along for the ride. When they arrived, Victim jumped out of the car and hurriedly went inside. Victim never exited the building and Gantt was unable to locate her inside. After a while, police cars pulled into the parking lot. Appellant ran past her, chased by police, and told Gantt, "[T]ell [Victim] when you see her or talk to her again she's dead. I'll kill her." (R.p.586, line 3–R.p.592, line 19; R.p.599, lines 5–25)

The following day, Appellant showed up at Victim's house during the afternoon. He sat down at the kitchen table and informed Gantt he had a long night. He then asked Gantt whether Victim had told her about what occurred the previous night. Gantt revealed Victim had told her Appellant had pulled a gun on her, and Appellant acknowledged that such had happened by nodding his head "yes." Trial counsel objected to the admission of the statement, claiming the information provided by Victim was hearsay. The State disagreed, claiming it was admissible because Appellant adopted and acknowledged its truth. The trial judge agreed with the State and allowed its admission. (R.p.592, line 20–R.p.595, line 5)

Following that conversation, Appellant resumed living at Victim's house. However, he was kicked out of the home approximately one week before Victim's murder. On the day of the murder, Victim and Gantt ran errands through the morning and early afternoon. Around 4:30 p.m., Appellant showed up at the home. Victim and Gantt left the residence around 7:00 so that

Victim could take Gantt to the Waffle House for Gantt's shift that night. (R.p.595, line–R.p.596, line 13)

Around 11:45 p.m., Dukes and Riley showed up at the Waffle House and informed her about what had occurred that night. Gantt, like Riley, noticed Dukes appeared to be in shock and did not notice any strange smell on him. When Gantt tried calling Victim's phone, Appellant answered. Gantt demanded to speak with Victim, but Appellant claimed she had taken pills and fallen asleep. When Gantt pressed him and accused him of killing Victim, Appellant lost his composure and demanded to know who told her about Victim. Gantt hung up on Appellant and demanded Riley and Dukes take her to Victim's house. (R.p.596, line 14–R.p.599, line 4)

Cyril "Roy" Brasley, a Columbia hair dresser and Appellant's friend, recalled that in the late evening/early morning hours of October 9–10, 2017, Appellant went to his home looking for a place to lay down after, according to Appellant, he had an argument with Victim. Appellant asked Brasley for a pair of shorts and fell asleep on Brasley's couch; according to Appellant, the shorts he was wearing had blood on them. The following morning, Appellant brought up the idea of going to Texas for work, an idea which had been discussed between the men on previous occasions. Appellant claimed it was a good time for him to go due to issues between him and his girlfriend and he needed to "just get away." (R.p.663, line 7–R.p.668, line 24; R.p.677, line 6–R.p.678, line 18)

After Brasley gave Appellant some money to grab breakfast and then went to work, he got a phone call informing him that police were at his house and that some were on the way to his shop to see him. When they arrived, officers were vague about what was going on but did state they were investigating a death and a fire and they needed to speak with Appellant. Shortly after the officers left, Appellant showed up at Brasley's shop looking for money for a bus ticket

to Texas. Brasley confronted Appellant about what had occurred with Victim and recorded the conversation on his phone. During that conversation, Appellant admitted to hitting Victim and setting fire to her home. Brasley later gave that video to investigators. (R.p.668, line 25–R.p.676, line 18; State's Exhibit 111)

During the afternoon of October 10, 2017, Michael Shuler was with his girlfriend at the river teaching his dog to swim. When they arrived, they saw a man, whom he identified as Appellant, hanging out under the nearby bridge.[2] After approximately thirty minutes, Appellant approached Shuler and started a conversation. Before long, Appellant mentioned his girlfriend had "just died" and he wanted to get all of his pictures off of the old phone so that he could put them onto his new phone, both of which Shuler observed in Appellant's hands. Shuler told Appellant that he could take the SIM card out of the old phone and place it into a new one to keep the pictures. Appellant then removed the SIM card from one of the phones and tossed the phone into the river. Appellant returned to his initial spot under the bridge and began gathering his belongings when law enforcement arrived at the scene. One of the officers approached Shuler and asked if he had spoken with Appellant so Shuler informed the officer about his interactions with Appellant. (R.p.238, line 17–R.p.244, line 3)

Harry Coulter, Victim's grandfather, testified about several events which occurred during the last few months of her life. For most of 2016, Coulter and his wife lived with Victim and her children. Eventually, Appellant began dating Victim and also moved into the home. While living with Victim, Coulter owned a .25 caliber handgun which was silver with a brown wooden handle. However, in September of 2017 Coulter was forced to get rid of the weapon when

[2] This was established as the Gervais Street Bridge through another witness's testimony. (R.p.246, line 1–R.p.249, line 12)

Ashton, one of Victim's children, found the gun in the back of his vehicle. Victim, concerned about the weapon, took the gun and gave it to Appellant with instructions for him to get rid of the gun; Appellant was supposed to get rid of the gun by tossing it in the small pond behind the home. (R.p.294, line 8–R.p.300, line 7; R.p.304, line 24–R.p.309, line 3)

Ashton C., Victim's son, testified about the time period leading up to Victim's death. In September of 2017, he and his brother lived with Victim until he was called out of class and taken by DSS to live in foster care until the brothers were placed with their father. Before he was removed from the home, he met with his mother and she informed him about an incident between herself and Appellant. He noticed she was bruised and had the imprint of a gun barrel on the right side of her ribs. Throughout the conversation, Victim was frightened. (R.p.401, line 25–R.p.407, line 11)

Ashton also recalled the incident when he found his grandfather's gun and that Appellant was supposed to get rid of it. However, Ashton witnessed Appellant in possession of the gun several times after that day on at least five separate occasions. (R.p.407, line 12–R.p.411, line 3)

During Ashton's testimony, the State asked him about how often he saw his mother and what she looked like in October of 2017. The State presented a picture of Victim from when she was alive, and Ashton acknowledged she looked like she did in the photograph when he saw her last. Trial counsel objected to the picture. After a side bar, the trial judge overruled the objection. When trial counsel tried to put the basis of the objection on the record, the trial judge told trial counsel to do so later. (R.p.411, line 4–R.p.412, line 23; State's Exhibit 119)

John Bailey, a paramedic with Richland County Emergency Services, was dispatched to 109 Crestmore Street, Victim's Home, after emergency calls were made reporting a fire at that location. The fire department arrived shortly thereafter and searched the home and brought

Victim's body outside. Parts of Victim's corpse had been badly burned, particularly her hands. However, a pillow was over Victim's face which had prevented significant fire damage to her head. Bailey also observed that a belt had been wrapped tightly around Victim's neck. Immediately suspecting foul play, Bailey called for law enforcement. (R.p.113, line 6–R.p.122, line 17)

Following Bailey's testimony, trial counsel objected to the State's plan to introduce several photographs of Victim's body taken by the coroner who inspected it after it was removed from the burning home. The State proffered the photos; the trial judge noted the color photographs were "gruesome" and suggested the State use black and white versions of the photographs to avoid unnecessary prejudice. The State agreed to do so and, after a short break, presented the photos to the court. Trial counsel maintained her objection to the photos, noting they were still gruesome, overly prejudicial, and not probative to any issue in the case. In support of her argument, trial counsel cited to State v. Collins, 409 S.C. 524, 763 S.E.2d 22 (2014), in which the Supreme Court of South Carolina admission of pre-autopsy photographs of a child who had been mauled to death by dogs was not an abuse of discretion. Finding the photographs were not overly gruesome and that Collins actually supported his position, the trial judge allowed admission of the black and white photographs. (R.p.124, line 12–R.p.131, line 13; State's Exhibits 4, 7–11, 46–51)

Susan Acerra was the deputy coroner who inspected Victim's body after it was removed from the home. In addition to the belt around Victim's neck, she observed "petechial," or tiny hemorrhaging in Victim's eye caused by pressure or trauma which caused blood vessels to burst. She also found multiple injuries to the left side of Victim's head and a gunshot wound on her body. Due to the fire and the intense heat experienced by the body, Acerra could not estimate

Victim's time of death. Acerra photographed the various injuries she found and the room where the body was found and wrote a report about her findings. (R.p.151, line 1–R.p.155, line 6; R.p.161, line 1–R.p.173, line 24; R.p.178, line 12–R.p.179, line 6; State's Exhibits 46–51)

Investigator Jerry Nisky of the Richland County Fire Marshal's Office investigated the fire at Victim's home shortly after it was extinguished that night and again the following morning. The fire started in the bedroom in which Victim was found and had four separate points of origin within the house, including the bed upon which Victim was found. Each point of origin was created using an open flame ignition source, such as a lighter, but no flammable fluids were used to accelerate the fire; instead, the open flame was used to ignite readily combustible material in the home, including Victim's bedding. Unsurprisingly, Nisky also found a pink cigarette lighter in the room. (R.p.205, line 12–R.p.230, line 22)

George Becker is a deputy with the Richland County Sheriff's Department and part of the U.S. Marshal's fugitive task force. In 2017, Becker was part of the sheriff's office dive team who recovered evidence and bodies from aquatic environments. On October 10, 2017, Becker's dive team performed two dives: one in the small pond behind Victim's home and another in the river where Shuler claimed Appellant tossed a cell phone. Nothing was found in the pond. David Linfert, one of the team's divers, found the cell phone. (R.p.249, line 23–R.p.253, line 4; R.p.320, line 7–R.p.325, line 3)

Yvonne Woods, a crime scene investigator with the Richland County Sheriff's Department, responded to the scene of the fire and was there in the early morning hours of October 10. While there, she photographed the crime scene and Victim's body. Additionally, she performed a gunshot residue (GSR) kit on Dukes, who was "very cooperative" and

consented to the procedure. After collecting the samples from his hands, she sealed the kit and sent it off for testing. (R.p.259, line 17–R.p.269, line 1; R.p.334, line 19–R.p.336, line 18)

Harold Bouknight, a member of the Richland County Sheriff's Department's crime scene investigation unit, collected and photographed many of the items found at Victim's house. In addition to the pink lighter, he found a .25 caliber unfired cartridge. Later, he was dispatched to a wooded area off of Leesburg road and located a duffel bag. The bag was covered by a denim jacket and pine straw and within it officers found a PlayStation 3, PlayStation 3 games, a controller, a cell phone, a laptop computer, a Crown Royal bag filled with change, and a knife. (R.p.271, line 11–R.p.281, line 10)

Investigator Clay Short of the Richland County Sheriff's Department took Appellant into custody and searched his person. Appellant did not have any weapons on him, but did have a SIM card in his wallet. Short recalled that when Appellant was shown a recording in which he admitted to setting Victim's house on fire and asked to explain it, Appellant did not try to explain it and only commented he was "fucked either way." Additionally, Appellant smelled as if he had been near a camp fire. (R.p.325, line 20–R.p.329, line 8; R.p.692, line 19–R.p.694, line 12)

Sergeant John Carwell of the Richland County Sheriff's Department was one of the officers who interviewed Appellant following his arrest. Carwell immediately noticed that Appellant smelled like he had been around smoke and that he was unusually calm and apparently unbothered by the situation or his discussion with police. Appellant admitted to being at Victim's home the night of the fire and murder and said that around 1:00 a.m. he started walking to his friend's house, but ended up walking around town before he actually arrived at that location. Appellant told officers that he was wearing the same clothing he had on when he was at the home with the exception of his shorts, which he had changed out of when he reached his

friend's house. Additionally, Appellant admitted to taking several items from Victim's home including a PlayStation and a laptop computer which he stashed in a bag in the woods. He also informed the officers about its location. When asked about the details of what transpired within Victim's home, Appellant refused to give officers any information and told them they already had "everything they needed," and said he could not say anything to improve his situation. (R.p.339, line 1–R.p.351, line 22)

Lieutenant Ricky Johnson of the sheriff's office analyzed the recovered SIM card, the phone found in the river, and the phone found on Appellant's person when he was arrested. Notably, the SIM card could not fit in Appellant's phone, but did fit in the phone found in the river. Additionally, the phone number associated with the SIM card was Victim's. The phone found in the river, however, could not be accessed because it was password protected and encrypted. Appellant's phone appeared to still require setup, so either it had never been used or it had been wiped of all its data. Captain Scott McDonald, an expert in cell phone investigations, analyzed the cell phone records belonging to Victim's phone for the time between her last known call and Appellant's arrest. On the evening of October 9, Victim's phone began making several phone calls to Appellant's friend Roy Brasley. Additionally, Dukes and Gantt began calling Victim's phone, trying to make contact. Around the time of Victim's death, the phone started moving and interacting with several cell phone towers around Columbia, including the Five Points area, Gervais Street, and Earlewood. The final location of the phone was near the Gervais Street Bridge and the river, the same area where Appellant was arrested. (R.p.356, line 8–R.p.361, line 24; R.p.374, line 25–R.p.390, line 9)

Michael Beeler, another investigator with the sheriff's department, was also present when Appellant was brought in to speak with officers. Beeler photographed Appellant's clothing,

photographed and documented the injuries on Appellant's hands, and collected the clothing. Appellants hands and arms had bruises and cuts on them. When collecting Appellant's clothes, he noticed they smelled of smoke, like a barbecue. (R.p.414, line 10–R.p.415, line 18; R.p.421, line 7–R.p.426, line 9)

Prior to the testimony of Dr. Amy Durso, the pathologist who performed Victim's autopsy, the issue of the admissibility of Victim's autopsy was raised to the trial judge. Going through several color photographs from the autopsy, Dr. Durso explained why those photos, and not black and white substitutes, would help her explain her findings to the jury. For example, Dr. Durso explained one photograph showing the right side of Victim's head also showed the belt around her neck and showed soot on the neck around the belt but no soot was underneath it. Another photograph showing Victim's upper airway showed a lack of soot and demonstrated she did not inhale smoke, which itself supported the conclusion that Victim was dead before the fire was set. A third photo showed the petechial hemorrhages in Victim's eye which indicated she had been strangled while she was still alive. The fourth photograph presented showed Victim's left back gunshot wound along with charring and soot which made it difficult for Durso to determine whether the gun was shot point blank or at a distance. The State's fifth photograph showed the laceration on Victim's head but also contained some charring. The sixth and final photograph showed the hemorrhage underneath the skin of Victim's head, indicating the injury was inflicted while she was still alive. Dr. Durso explained that the black and white versions of those photographs made it difficult to distinguish among soot, hemorrhages, and normal tissue in the photographs. (R.p.441, line 6–R.p.448, line 22; State's Exhibits 136–141)

Trial counsel objected to the use of the photographs, claiming they were more prejudicial than probative because Victim's cause of death was not an issue in the case. Trial counsel also

argued the pictures were not admissible at all, but if they were they needed to be in black and white to minimize prejudice. The trial judge overruled the objection. (R.p.448, line 23–R.p.449, line 18)

During her testimony proper, Dr. Durso described her findings to the jury. Dr. Durso explained how the presence of the belt on Victim's body and the lack of soot underneath it indicated it was placed on her body before the fire started. Further, petechial and scleral hemorrhages found Victim's left eye along with hemorrhages found in her neck muscles confirmed Victim was strangled while she was alive. Additionally, Victim was shot twice and both bullets caused severe internal hemorrhaging, indicating both wounds occurred while she was alive. Describing Victim's head injury, Dr. Durso explained it was caused by blunt force trauma to the head which could have been caused by Victim's head hitting a wall or someone hitting her in the head with an object. Beneath the skin on Victim's head, a "large area of hemorrhage" could be seen which was as wide as six inches at parts. The hemorrhage indicated that, like with Victim's other injuries, the head wound was caused while she was alive. In addition to these severe injuries, bruising was found around Victim's left eye and abrasions were found all over her body, some of which occurred after her death. Dr. Durso also explained that Victim did not die as a result of the fire; the lack of soot in her airways and the absence of significant amounts of carbon monoxide in her blood indicated as much. Instead, it appeared Victim died as a result of the combination of strangulation, her gunshot wounds, and the severe blow to her head. Dr. Durso used the autopsy photographs to explain her findings to the jury. (R.p.459, line 14–R.p.477, line 22; State's Exhibits 136–43)

Megan Fletcher, a SLED forensics officer and an expert in GSR, reviewed the GSR evidence collected from Dukes. She found no particles characteristic of gunshot primer residue in the kit. (R.p.550, line 10–R.p.559, line 10)

Investigator Ronnie Hinson of the Richland County Sheriff's Department arrived at the scene of the fire while efforts to extinguish it were well underway. Hinson was notified that a man at the scene, Dukes, was an eyewitness to the murder. Dukes willingly allowed a GSR test be performed on his hands and willingly spoke with officers about what occurred. Dukes, still in shock, told Hinson he was scared Appellant might go after him because of what Dukes saw. Based on what Dukes told officers, a warrant was obtained for Appellant and a manhunt began. Around 9:47 a.m. on October 10, Dukes called Hinson and let him know that Appellant had tried to contact him. Hinson continued searching for Appellant until he was apprehended later that day. (R.p.610, line 10–R.p.618, line 17)

After Appellant's arrest, he was taken to the sheriff's office for interrogation. Hinson immediately noticed that Appellant had the distinct smell of smoke about him as if he had been near a camp fire. When asked about his clothing, Appellant admitted that he was wearing most of the clothes he wore the night before except for a pair of shorts he changed out of at his friend Roy Brasley's house because they had blood on them. Throughout the interview, Appellant had no remorse and was largely uncooperative with officers. Appellant did claim that he was at Victim's home that night but that she had asked him to leave so he packed up some belongings and left with her phone. Appellant admitted Dukes was at the home that night but never claimed Dukes had anything to do with Victim's death. At the end of the interview, Appellant told the officers they "had what [they] needed" and there was not anything he could say to improve the situation for him. Hinson also testified that Appellant had a prior conviction for a violent felony,

and the offense took place in Orangeburg in 1996 which was the reason for his charge of possession of a weapon by a person convicted of a violent felony. (R.p.618, line 18–R.p.627, line 13)

## 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 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."); also State v. Bixby, 388 S.C. 528, 556, 698 S.E.2d 572, 587 (2010) ("[D]eference is due to the trial court's admission of the evidence.").

Likewise, decisions regarding the conduct of a criminal trial are left largely to the sound discretion of trial judges, and a trial judge's ruling on the conduct of a trial will not be reversed absent a prejudicial abuse of discretion. State v. Bryant, 372 S.C. 305, 312, 642 S.E.2d 582, 586 (2007); see State v. Heath, 232 S.C. 384, 391, 102 S.E.2d 268, 272 (1958) ("Necessarily the conduct of a trial is largely within the discretion of the presiding judge, to the end that a fair and impartial trial may be had."). "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).

## I.

**The trial judge properly refused to bifurcate Appellant's trial because evidence of Appellant's prior criminal conviction was necessary for proving his guilt for the offense of unlawful possession of a firearm by a person convicted of a violent offense.**

Appellant argues the trial judge erred in denying his motion to bifurcate his trial. The State disagrees with this allegation of error because a bifurcated trial is inappropriate in situations, such as Appellant's, in which evidence of a prior conviction is inextricably tied to the State's burden of proving each and every element of a charged offense.

"[A] bifurcated proceeding is not required in a non-capital case." Chubb v. State, 303 S.C. 395, 397, 401 S.E.2d 159, 161 (1991). "[A bifurcated trial] is not required by either the common law, the statutory law, or the constitution of this State." State v. Bennett, 256 S.C. 234, 242, 182 S.E.2d 291, 295 (1971). Similarly, the United States Supreme Court has explained, "Two-part jury trials are rare in our jurisprudence; they have never been compelled by this Court as a matter of constitutional law, or even as a matter of federal procedure." Spencer v. Texas, 385 U.S. 554, 568 (1967).

Appellant's argument on appeal relies upon the Supreme Court of South Carolina's opinion in State v. Cross, 427 S.C. 465, 832 S.E.2d 281 (2019), in which the court found the trial judge erred in refusing to bifurcate a defendant's trial for the offenses of first-degree criminal sexual conduct (CSC) with a minor and committing a lewd act on a minor. In that case, the defendant requested his lewd act charge and the sexual battery element of the CSC charge be presented to the jury first and, if the jury concluded a sexual battery occurred, then evidence of his prior first-degree CSC with a minor conviction from 1992 would be presented to the jury. Id.

at 470–71, 832 S.E.2d at 283–84. Importantly, Cross was charged with first-degree CSC with a minor pursuant to S.C. Code Ann. Section 16-3-655(A), which provides:

> (A) A person is guilty of criminal sexual conduct with a minor in the first degree if:
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> ....
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> (2) the actor engages in sexual battery with a victim who is less than sixteen years of age and the actor has previously been convicted of, pled guilty or nolo contendere to, or adjudicated delinquent for an offense listed in Section 23-3-430(C) or has been ordered to be included in the sex offender registry pursuant to Section 23-3-430(D).

Distinguishing Cross's case from prior South Carolina cases[3], the Supreme Court found the trial court erred in refusing to bifurcate Cross's trial. Id. at 477–78, 832 S.E.2d at 287–88. The court emphasized Cross's 1992 conviction for first-degree CSC with a minor "had insurmountable probative value in proving the prior conviction element of first–degree CSC with a minor," but found the failure to bifurcate was reversible error in Cross's situation because: (1) the prior conviction was not probative of "the threshold issue of whether Cross committed the [charged] sexual battery . . . ."; (2) prior sex-related offenses carry an "inherently prejudicial stigma"; (3) the evidence of Cross's guilt was based entirely on the jury's evaluation of the witnesses' credibility which the prior conviction, given its inherent prejudice, possessed an "overwhelming danger" of improperly influencing. Id. at 477–79, 482–84, 832 S.E.2d at 287–88, 290–91.

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[3] See, e.g., State v. Benton, 338 S.C. 151, 526 S.E.2d 228 (2000), in which the Supreme Court found a defendant's two prior burglary convictions were admissible during his trial for first-degree burglary where the prior convictions formed the basis for the upgraded charge. Id. at 153, 526 S.E.2d at 229. Notably, Benton offered to stipulate to the two prior burglary convictions in camera to avoid their introduction to the jury. The court found the State was not forced to accept the stipulation and was permitted to introduce evidence of the prior convictions at trial because the convictions were used "to establish a material fact or element of the crime charged . . . ." Id. at 155–56, 526 S.E.2d at 230.

Notably, Appellant's case lacked any of the factors upon which the Cross court based its decision. Appellant was not on trial for a sex-related offense nor was the prior conviction related to a sex crime. Further, witness credibility was not a critical issue with Appellant's trial: Appellant did not testify and the State's witnesses had their testimony supported by the other evidence submitted at trial, including the recording in which Appellant admitted he attacked Victim and set fire to the home.

Still, the most important reason why bifurcation was improper for Appellant's case is because Appellant's prior conviction was **required** to prove whether he was guilty of unlawful possession of a firearm by a person convicted of a violent offense as defined by S.C. Code Ann. § 16-23-30. Notably, in delineating the elements of the offense, the legislature chose to make the defendant's prior conviction an element of the offense. Thus, in order to prove Appellant's guilt for the charged offense, the solicitor was required to submit evidence that Appellant was previously convicted of a violent crime. 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."); also 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.").

For that reason, the evidence of Appellant's prior conviction had immense probative value in Appellant's case as it established an element of the offense that necessarily had to be proven, and, since that evidence was essential to prove the charged offense, the probative value of the evidence was not – and could not be – substantially outweighed by a danger of unfair prejudice. See United States v. Gaudin, 515 U.S. 506, 510 (1995) ("[The Fifth Amendment and

Sixth Amendment to the United States Constitution] require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt."); also 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." (citations omitted)); 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."); State v. Queen, 264 S.C. 515, 521, 216 S.E.2d 182, 185 (1975) ("It is the duty of jurors to take the law from the court in the particular case on trial. It must be presumed that they do so.").

As a result, the trial judge did not abuse his discretion in admitting the evidence of Appellant's prior conviction for the limited purpose of proving an element of the indicted offense after appropriately evaluating the comparative value of that evidence. See State v. Cheatham, 349 S.C. 101, 109-110, 561 S.E.2d 618, 623 (Ct. App. 2002) ("It is well settled the admission of prior burglary or housebreaking convictions for limited consideration as an element of first degree burglary does not constitute undue prejudice. Thus, the admission of Cheatham's prior burglary and housebreaking convictions as an element of first degree burglary does not constitute unfair prejudice in this case. Further, the trial judge specifically instructed the jury not to consider Cheatham's prior convictions as evidence of the Patel burglary and to limit their consideration of the prior convictions to whether an element of first degree burglary was proven. We find no error in the admission of the convictions because the trial court took every precaution to prevent the improper consideration of Cheatham's convictions and to guard against undue prejudice.")

## II.

**The trial judge properly exercised his broad discretion by admitting a limited number of photographs of Victim taken at the scene of the fire and during her autopsy because they were highly probative to establishing Appellant acted with malice aforethought when he killed Victim and Appellant was guilty of the destruction of human remains, and their immense probative value greatly outweighed any potential undue prejudice that could have resulted from their admission. (Appellant's Issues 2 & 3)**

Appellant argues the trial judge erred in admitting various photographs of Victim's corpse taken after she was removed from the fire and during her autopsy. The State disagrees with this allegation of error. The photographs of Victim's body were critical to establishing Appellant acted with malice aforethought when he murdered her. Moreover, the photographs were used to prove Appellant was guilty of the destruction of human remains by setting the house fire after Victim's death. Although undeniably graphic and disturbing, those photographs were not so gruesome, gory, or extreme that their potential for undue prejudice substantially outweighed their exceedingly high probative value under the circumstances of Appellant's case. As a result, the trial judge did not abuse his broad discretion by admitting the photographic evidence during trial. Appellant's conviction should be affirmed.

When reviewing an evidentiary ruling, the appellate court must give great deference to the trial judge because the reception or exclusion of evidence is a matter left largely to the sound discretion of a trial judge. State v. Groome, 274 S.C. 189, 190-191, 262 S.E.2d 31, 32 (1980); 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 admissibility of evidence pursuant to an abuse of discretion standard and gives great deference to the trial court."). Significantly, an appellate court will not reverse a trial judge's decision to admit or exclude evidence absent a clear prejudicial abuse of the trial judge's

broad discretion in evidentiary matters. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); see State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995) ("A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice."). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000); see also United States v. Summers, 666 F.3d 192, 197 (4th Cir. 2011) (instructing an appellate court will not find a trial judge's evidentiary ruling constituted an abuse of discretion unless it was arbitrary and irrational).

All relevant evidence is admissible, and only relevant evidence should be admitted at trial. State v. Douglas, 369 S.C. 424, 430, 632 S.E.2d 845, 848 (2006); see Rule 402, SCRE ("All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina. Evidence which is not relevant is not admissible."). "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 (" 'Relevant evidence' means 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.' ").

However, even if relevant, evidence must be excluded from trial if its probative value is *substantially outweighed* by the danger of unfair prejudice. State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009); see Rule 403, SCRE ("Although 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."). The determination of the probative value of evidence relative to its potential prejudicial effect must be based on the entire record and the result generally hinges on the facts of each particular case. State v. Gillian, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007).

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. State v. Collins, 398 S.C. 197, 202, 727 S.E.2d 751, 754 (Ct. App. 2012), rev'd on other grounds, 409 S.C. 524, 763 S.E.2d 22 (2014). Meanwhile, unfair prejudice means an undue tendency to suggest a decision on an improper basis. State v. Dickerson, 341 S.C. 391, 400, 535 S.E.2d 119, 123 (2000); see Old Chief v. United States, 519 U.S. 172, 181 (1997) ("The term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged."). However, unfair prejudice does *not* mean damage to a defendant's case that results from the legitimate probative force of a piece of evidence. State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998). That is true because all evidence introduced by the State in a criminal trial is meant to be prejudicial to the defendant, and it is only unfair prejudice that must be avoided. Id.

When ruling on the comparative probative value and potential prejudicial effect of evidence, trial judges have "particularly wide discretion[.]" Collins, 398 S.C. at 209, 727 S.E.2d at 757. As a result, a trial judge's ruling on such a matter should be afforded great deference on appeal and should only be reversed in exceptional circumstances. State v. Lyles, 379 S.C. 328,

339-340, 665 S.E.2d 201, 207 (Ct. App. 2008). Importantly, "[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." State v. Hamilton, 344 S.C. 344, 358, 543 S.E.2d 586, 593-594 (Ct. App. 2001), overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). "If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal." Hamilton, 344 S.C. at 358, 543 S.E.2d at 594.

In Appellant's case, the trial judge did not abuse his broad discretion by admitting a limited number of photographs depicting Victim's injuries and condition after she was recovered from the house fire. That is true because, although somewhat graphic, the photographs of Victim's body and injuries taken at both the crime scene and during the autopsy were exceptionally probative. Notably, Appellant was charged not only with murder, but with desecration of human remains pursuant to S.C. Code Ann. § 16-17-600. Under § 16-17-600(A)(1), "[i]t is unlawful for a person willfully and knowingly, and without proper legal authority to . . . destroy or damage the remains of a deceased human being." In order to prove Appellant willfully and knowingly destroyed Victim's remains, it was essential to establish he killed her and, knowing she was dead, set fire to her and her house to destroy the evidence of his crime. Notably, the color photographs of Victim's autopsy were necessary because, as explained by Dr. Durso, the color photographs showed a lack of soot in Victim's airways which indicated she was dead before the fire was set. Thus, the photographs served to aid the jurors in understanding what had occurred and that Victim's murder and the destruction of her body were two separate criminal acts. See State v. Thompson, 420 S.C. 192, 215, 802 S.E.2d 623, 634-635

(Ct. App. 2017) ("These [autopsy] photographs, while graphic, were necessary to help the jury fully understand Dr. Durso's testimony regarding the nature of Victim's injuries resulting in his death. . . . Likewise, the photographs of Victim as he was found at the crime scene helped the jury to understand the nature and extent of Victim's injuries as well as his condition near death."); see also State v. Martucci, 380 S.C. 232, 250, 669 S.E.2d 598, 608 (Ct. App. 2008) ("[T]he photographs were introduced to corroborate the testimony of Dr. Ward, who testified regarding the various injuries inflicted on Child, including the discoloration of the bruises and the internal trauma which caused his death. . . . [T]he photographs were necessary to depict the severity of the bruises and the resulting trauma, which was inconsistent with accidental injury or play. The photographs were relevant and necessary, and they were not introduced with the intent to inflame, elicit the sympathy of, or prejudice the jury. The trial judge did not abuse his discretion in admitting the photographs."); cf. United States v. Kilbourne, 559 F.2d 1263, 1264 (4th Cir. 1977) ("Pictures taken at the scene showed the proximity of the body to certain items linked to Kilbourne, including a package of cigarettes and a gin bottle. Photographs taken at the morgue supported the prosecutor's theory that the nature of the victim's wounds indicated that the killer had acted deliberately and with premeditation.").

Additionally, the photographs of Victim's condition and injuries served to corroborate the testimony of the different witnesses who testified during trial, and they visually conveyed the severity of the injuries inflicted upon Victim while allowing the pathologist to explain the severity of the injuries inflicted by Appellant. See State v. Jarrell, 350 S.C. 90, 106-107, 564 S.E.2d 362, 371 (Ct. App. 2002) (finding the trial judge did not abuse his discretion by admitting autopsy photographs because, even though the photographs were "graphic," they corroborated testimony presented during trial by depicting the victim's injuries and by showing the victim's

condition); see also State v. Nance, 320 S.C. 501, 508, 466 S.E.2d 349, 353 (1996) ("The relevancy, materiality, and admissibility of photographs as evidence are matters left to the sound discretion of the trial court. If the offered photograph serves to corroborate testimony, it is not an abuse of discretion to admit it."); see generally State v. Allen, 839 P.2d 291, 302 (Utah 1992) ("Photographs of victims are always sobering and graphic, and indeed, they fit within the adage 'a picture speaks a thousand words.' ").

Moreover, the photographs—although inherently disturbing since they depicted a person who had been strangled, beaten, shot, and killed—accurately reflected what occurred to Victim and were not so extreme, unusually gruesome, or gory that they would have been inflammatory in a sense that went beyond the natural inflammation attendant to any post-mortem photographs of an individual who died of an unnatural and violent cause. See Torres, 390 S.C. at 624, 703 S.E.2d at 229 ("While the admitted photographs graphically depict the injuries of the victim, this was a particularly horrific crime, and the admission of the photographs did not unduly prejudice the jury."); State v. Holder, 382 S.C. 278, 291, 676 S.E.2d 690, 697 (2009) ("Although the photographs were graphic, the facts in the case were graphic, and there is no suggestion that their admission had an undue tendency to suggest a decision on an improper basis. We hold the trial court properly exercised its discretion in admitting the autopsy photographs in this case.").

Finally, the photographs were relevant and significant in regard to whether Appellant acted with malice aforethought at the time he killed Victim since they visually demonstrated the severity of Appellant's vicious assault; Appellant executed a calculated, multi-pronged attack on Victim. According to Dr. Durso, the gunshot wounds, strangulation, and head trauma were all done to Victim while she was alive and any one of those injuries could have been fatal. Yet, Appellant inflicted all of those grievous injuries to Victim while she was alive. See Nance, 320

S.C. at 508, 466 S.E.2d at 353 ("The photographs were . . . relevant to the issue of malice, an element of assault and battery with intent to kill."); State v. Gray, 408 S.C. 601, 614, 759 S.E.2d 160, 167 (Ct. App. 2014) ("[T]he photos were important to the State's ability to establish that Gray and Reese acted with malice."). Accordingly, even though the photographs were unpleasant and graphic, their potential for undue prejudice did not *substantially* outweigh their probative value, and the trial judge, who discretionarily ordered certain photographs be changed into a black and white format to minimize potential prejudice, committed no error by admitting into evidence a limited number of the photographs taken of Victim's body after her death. See State v. Todd, 290 S.C. 212, 214, 349 S.E.2d 339, 340 (1986) (recognizing determinations in regard to the relevancy and materiality of photographic evidence are generally left to the sound discretion of a trial judge); see also Jarrell, 350 S.C. at 106, 564 S.E.2d at 106 ("We find the trial court's exclusion of photographs demonstrates it exercised its discretion.").

In arguing to the contrary, Appellant contends the probative value of the photographs was greatly outweighed by their potential for undue prejudice because the pathologist's testimony alone was purportedly sufficient to establish the elements of the indicted offenses. However, the photographs of Victim's injuries visually demonstrated the manner in which Victim was killed in a way words simply could not while aiding the pathologist in explaining what caused Victim's death. See State v. Williams, 405 S.C. 263, 281, 747 S.E.2d 194, 204 (Ct. App. 2013) ("A trial court is not required to exclude relevant evidence simply because it is unpleasant or offensive."); see also Commonwealth v. Pestinikas, 617 A.2d 1339, 1346-1347 (Pa. Super. Ct. 1992) ("The photograph in question showed what happened to the decedent and, therefore, served as an aid to the jury in understanding the crime committed. . . . The availability of alternate evidence of a verbal nature does not obviate the admissibility of the photographs."). Accordingly, the

photographic evidence possessed enhanced probative value in light of the various claims made by both Appellant and defense counsel, and its high probative value was not substantially outweighed by its potential for undue prejudice due simply to the fact the photographs were somewhat graphic. See Martucci, 380 S.C. at 250, 669 S.E.2d at 607 ("A trial judge is not required to exclude relevant evidence merely because it is unpleasant or offensive."); see also Old Chief, 519 U.S. at 183, n. 7 ("On appellate review of a Rule 403 decision, a defendant must establish abuse of discretion, a standard that is not satisfied by a mere showing of some alternative means of proof that the prosecution in its broad discretion chose not to rely upon."); cf. United States v. Whitfield, 715 F.2d 145, 148 (4th Cir. 1983) ("While it is certainly possible that [Whitfield] could have been convicted in the absence of the photographs [depicting the wounds of the victim, who was bludgeoned to death with a blunt instrument]; and, while it may be true that [Whitfield] suffered prejudice by its admission, we do not find abuse of discretion by the trial court, and we find nothing in the admission of the photographic evidence to constitute reversible error.").

In conclusion, the photographs depicting Victim's body and injuries after she was attacked by Appellant were highly probative of and relevant towards establishing Appellant's guilt for the unlawful killing and for the intentional act of destroying her corpse, and any potential for undue prejudice that could have resulted from the photographs based on their unpleasant nature did not substantially outweigh their high probative value. See State v. Brazell, 325 S.C. 65, 79, 480 S.E.2d 64, 72 (1997) (finding the trial judge did not abuse his discretion by admitting several crime scene photographs where the photographs "supported the testimony of several witnesses[,]" "were relevant to the nature of the crime[,]" and were used "to establish that the murder was a deliberate and calculated act"); see also McKee v. State, 44 So. 2d 781,

784 (Ala. 1949) ("Courts and juries cannot be too squeamish about looking at unpleasant things, objects or circumstances in proceedings to enforce the law and especially if truth is on trial. The mere fact that an item of evidence is gruesome or revolting, if it sheds light on, strengthens or gives character to other evidence sustaining the issues in the case, should not exclude it."). Under those circumstances, the trial judge did not abuse his broad discretion by admitting a limited number of those photographs during Appellant's trial, and no exceptional circumstances exist that would warrant a reversal of that discretionary decision on appeal.[4] See State v. Collins, 409 S.C. 524, 535, 763 S.E.2d 22, 28 (2014) ("Courts must often grapple with disturbing and unpleasant cases, but that does not justify preventing essential evidence from being considered by the jury, which is charged with the solemn duty of acting as the fact-finder."); see also Williams, 405 S.C. at 281, 747 S.E.2d at 203 (recognizing decisions regarding the comparative probative value and prejudicial effect of graphic photographs should only be reversed on appeal in "exceptional circumstances"); cf. State v. Dial, 405 S.C. 247, 259-260, 746 S.E.2d 495, 501 (Ct. App. 2013) (finding the trial judge did not abuse his discretion by admitting photographs

[4] Significantly, even assuming the trial judge somehow erred by admitted the crime scene and autopsy photographs during trial, any error resulting from the admission of those photographs was nonetheless entirely harmless because, even without consideration of the photographic evidence, the other evidence of Appellant's guilt presented during trial, which included Appellant's own admissions to attacking Victim and setting fire to her home, conclusively established Appellant's guilt such that no rational juror could have reached any other verdict aside from finding Appellant criminally responsible for Victim's death. See State v. Bryant, 369 S.C. 511, 518, 633 S.E.2d 152, 156 (2006) ("[A]ppellate courts will not set aside convictions due to insubstantial errors not affecting the result."); State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) ("When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result."); see also Collins, 409 S.C. at 538-539, 763 S.E.2d at 29-30 (concluding any error in the admission of the photographic evidence in Collins's case was entirely harmless in light of the fact the other evidence presented during trial was such that no jury could rationally conclude anything other than Collins was criminally negligent in his victim's death).

from the five-month-old victim's autopsy that depicted the victim's exposed brain and scalp in a homicide by child abuse case despite the fact the photographs were "shocking and gross"). Appellant's convictions should be affirmed.

## III.

**Any error in admitting the photograph of Victim prior to her death was harmless given the overwhelming evidence of Appellant's guilt. (Appellant's Issue 4)**

Appellant argues the trial judge erred in admitting a photograph of Victim prior to her death because any probative value of the photograph was substantially outweighed by the danger of unfair prejudice to Appellant's case. The State disagrees: admission of the photograph did not unfairly prejudice Appellant because the photograph, which merely showed Victim while she was alive, had no impact on Appellant's case due to the substantial and overwhelming evidence of his guilt.

"'The relevancy, materiality, and admissibility of photographs as evidence are matters left to the sound discretion of the trial court.'" State v. Hawes, 423 S.C. 118, 129, 813 S.E.2d 513, 519 (Ct. App. 2018), *reh'g denied* (May 24, 2018) (quoting State v. Johnson, 338 S.C. 114, 122, 525 S.E.2d 519, 523 (2000)). Even where a reviewing court finds an abuse of discretion, "reversal is not required unless appellant was prejudiced by the error." State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985). "Error is harmless when it 'could not reasonably have affected the result of the trial.'" Id., (quoting State v. Key, 256 S.C. 90, 180 S.E.2d 888 (1971)).

In State v. Owens, 427 S.C. 325, 831 S.E.2d 126 (2019), this Court found a trial court improperly admitted a photograph of a murder victim. The photograph in question depicted the victim "embracing his brother in a setting unrelated to the shooting. Id. at 334, 831 S.E.2d at

131. This Court found the photograph's little probative value was vastly outweighed by its danger of unfair prejudice because the victim's size, which did bear on the issue of how the crime unfolded, was also presented to the jury through his height and weight measurements included in the autopsy results and the photograph did not depict an objective measure of the victim's size; thus, the Court found the only thing the photograph could accomplish was "arouse sympathy for the Victim." Id. at 334, 831 S.E.2d at 130–31.

However, this Court found Owens was unable to demonstrate the error prejudiced him at trial because, "[v]iewing the record as a whole, it is unlikely the emotional pull of the photograph was enough to distract a rational juror from the main issues at trial or otherwise influence the verdict." Id. at 335, 831 S.E.2d at 131. The Court of Appeals found the photograph was harmless beyond a reasonable doubt for the same reason it should not have been admitted: it had "scant relevance to the jury's task of determining the germane facts" of the case. Notably, Owens had admitted to shooting the victim and photograph did not impact the issue before the jury: the defendant's credibility and intent. Id.

In the instant case, admission of the photograph of Victim was undoubtedly harmless. Similar to the photograph in Owens, it was inconsequential compared to the overwhelming evidence of Appellant's guilt presented by the State. The State's evidence included, but was not limited to: (1) a recording in which Appellant admits to attacking Victim and setting fire to her home; (2) an eyewitness to the crime seeing Appellant attacking Victim's lifeless body; (3) Appellant providing the location of electronics stolen from Victim's home; (4) Appellant's possession of Victim's cell phone after her murder; (5) confirmation by Appellant and Brasley that the former changed out of bloody shorts when he arrived at the latter's home that evening; and (6) multiple witnesses testifying that Appellant smelled like smoke the day after the fire

when he was wearing most of the same clothing he had worn the night before. Accordingly, admission of the photograph was harmless given the mountain of evidence proving Appellant's guilt of the offense.

## IV.

**The trial judge properly allowed testimony in which Appellant adopted the statement of Victim when he admitted to pulling a gun on her a month before the murder. (Appellant's Issue 5)**

Appellant argues the trial judge erred in allowing Gantt to testify that Victim told her, a month before the murder, that Appellant pulled a gun on Victim. The State disagrees with this allegation of error. In this situation, admission of the statement was entirely proper because Appellant adopted the truth of this statement in a conversation with Gantt and it was through testimony about that conversation the State introduced the statement in question into evidence.

Rule 801(c), SCRE defines "[h]earsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." However, pursuant to Rule 801(d)(2)(B), SCRE, a statement is not hearsay if it is "a statement of which the part has manifested an adoption or belief in its truth."

In State v. Knoten. 347 S.C. 296, 312, 555 S.E.2d 391, 399–400 (2001), the South Carolina Supreme Court found that a statement made by the defendant's mother to the defendant in the presence of an officer was not hearsay. It explained:

> The State argues, *inter alia*, that under Rule 801(d)(2)(B) SCRE, the statement was not hearsay. That rule provides "A statement is not hearsay if ... the statement is offered against a party and is ... a statement of which the party has manifested an adoption or belief in its truth." The comments to that section indicate that this rule is consistent with South Carolina law, citing State v. Sharpe, 239 S.C. 258, 122 S.E.2d 622 (1961), *rev'd on other grounds*, State v. Torrence. 305 S.C. 45, 406 S.E.2d 315 (1991).
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> The defendant in State v, Sharpe, *supra*, was on trial for assault with intent to ravish. The Court recounted that

> After the appellant had been arrested and placed in jail, his mother came to the jail and an officer explained to her why he was under arrest. The mother was then permitted to see the appellant in the presence of an officer and she said: 'Israel, as many colored women as it is in this town why in the world did you go and get messed up with a white woman and you will just have to pay your penalty.' The appellant made no reply to this statement.
>
> Upon the trial of the case, when this testimony was given by the officer, an objection was made to its admission only on the ground that the appellant was not present when the statement was made. The record shows otherwise. The objection was properly overruled. This Court has held that statements in the presence of the accused by a third person are admissible as evidence when such accused remains silent and does not deny such statements.... Under this rule, when appellant's mother made the foregoing statement to him and he remained silent and did not deny same, such statement was admissible.
>
> **We agree that [Knoten] adopted the statement when he later confessed to the crimes. "A party who has agreed with or concurred in an oral statement of another has adopted it."** 5 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 801.31[3][b] (Joseph M. McLaughlin, ed., Matthew Bender 2d ed. 2000).
>
> Because [Knoten] did not refuse his mother's statement, **and later admitted he was lying** when he denied involvement in or knowledge of the offenses charged, his mother's statement was not hearsay.

Id. at 271, 122 S.E.2d at 628–29 (citations omitted) (emphasis added).

Similarly, in United States v. Robinson, 275 F.3d 371 (4th Cir. 2001), the Fourth Circuit Court of Appeals found a witness was allowed to testify about statements she overheard from two codefendants in which they described the crime because each codefendant adopted the statements of the other making the witness's testimony not hearsay, but an adopted admission pursuant to Rule 801(d)(2)(B), FRE. Id. at 382–83. Notably, Rule 801(d)(2)(B), FRE uses nearly identical language to South Carolina's version of the rule.

In the instant case, Victim's statement to Gantt was not hearsay because Appellant adopted it when he nodded "yes." Appellant's only argument as to why the statement was inadmissible hearsay is based upon an incorrect application of Knoten which contradicts the plain language of the rule: Appellant argues that for Rule 801(d)(2)(B) to apply, the person who initially made the comments adopted by a defendant must have done so in the presence of a party opponent. Notably, no such requirement exists within the rule. See Rule 801(d)(2)(B), SCRE. Additionally, Knoten itself actually rejects this proposition[5]: the Supreme Court found Appellant adopted his mother's statement to him when he **later** confessed to the crimes outside her presence. See Knoten, 347 S.C. at 312–13, 555 S.E.2d at 400.

Finally, Appellant's interpretation of the rule is nonsensical because regardless of whether Victim was present when Appellant adopted the statement, her statement would, by definition, be hearsay without his adoption of its veracity. Appellant could, regardless of the Victim's presence when the statement was adopted, argue that Appellant "heard, understood and acquiesced to pulling a gun during the prior incident." Simply put, Victim's presence when the statement was adopted did not, in any way, impact his ability to challenge its admission at trial. Accordingly, the trial judge did not err in admitting the statement pursuant to Rule 801(d)(2)(B), SCRE.

[5] Appellant misquotes Knoten in his brief. Notably, Appellant's brief quotes nearly the same section of Knoten cited in this brief but omits the sentence immediately following his quoted passage in which the Supreme Court acknowledged that Knoten's later confession, made outside the presence of his mother, functioned as an adoption of his mother's statements to him. Compare (Br. of Appellant, pp.24–25) with (Br. of Respondent, pp.35)

## V.

**The trial judge properly acted within his discretion by allowing the jury to decide whether they would like to move forward with closing arguments and deliberations on the last day of the first week of trial or continue the proceedings the following Monday. (Appellant's Issue 6)**

Appellant argues the trial judge erred in refusing to recess for the day on Friday at 5:00 p.m. and instead moving forward with closing arguments, jury instructions, and jury deliberations. The State disagree with this allegation of error. The trial judge acted in his discretion in denying the request for the recess given it was the jurors themselves who elected to move forward.

At 4:00 p.m. on Friday, November 1, a break was held so that trial counsel could speak with a potential final witness. After a short break, trial counsel announced that no further witnesses would be called and that the defense rested its case. At that point, the trial judge observed that, with jury instructions and closing arguments, the jury would likely not begin deliberations until approximately 6:00 p.m. Given that likely timetable, the trial judge announced he planned to ask the jury whether they preferred to stay the rest of the day and begin deliberations or delay the remainder of the proceedings to the following Monday. (R.p.822, line 13–R.p.824, line 19)

After a short break, the trial judge went back on the record to inform the parties that he had discussed the matter with the jurors and they were considering the matter. After another short break, the trial judge informed the parties that the jurors had sent a note expressing their desire to continue with the matter that day after a short break. The trial judge noted that dinner needed to be ordered for the jurors as a result. Trial counsel objected to continuing that day, arguing "[p]ursuant to the Fifth, Sixth, and Fourteenth Amendments and in violation of due

process, [because] it ha[d] been a long week" and the jurors were tired. The trial judge overruled the objection, explaining the jurors themselves elected to continue with the trial. Closing arguments began at approximately 5:00 p.m., jury instructions began around 6:25 p.m., deliberations began at 7:00 p.m., and the jury reached its verdict on all charges around 8:30 p.m. (R.p.824, line 20–R.p.826, line 8).

"As with requests for a trial continuance, requests for a recess during trial are within the trial judge's discretion, and will be reversed on appeal only upon a showing of an abuse of that discretion." State v. Mitchell, 330 S.C. 189, 192, 498 S.E.2d 642, 644 (1998) (citing State v. Durden, 264 S.C. 86, 212 S.E.2d 587 (1975) and State v. Meyers, 262 S.C. 222, 203 S.E.2d 678 (1974)). To demonstrate reversible error in a trial court's denial of a motion to recess, a defendant must show prejudice stemming from the trial court's denial of the motion. State v. Brannon, 341 S.C. 271, 276, 533 S.E.2d 345, 347 (Ct. App. 2000) (citing Mitchell, 330 S.C. at 194, 498 S.E.2d at 644–45).

In the instant case, Appellant has failed to provide any evidence that he was prejudiced by the trial judge's refusal to delay the proceedings which, alone, merits denial of his request for reversal of his convictions. See id.

Notably, Appellant's only argument is that by refusing to recess on November 1, the trial judge "forced" the jury into deliberations which resulted in a "coerced" verdict. Bizarrely, Appellant equates his situation with that of a coercive Allen[6] charge compelling a verdict. Appellant's argument is fundamentally flawed: the instant case is the opposite of one involving a coercive Allen instruction because the trial judge did not force the jury to deliberate; instead, the jurors made the decision themselves to continue with the trial instead of recessing until the

[6] Allen v. United States, 164 U.S. 492 (1896)

following week. Thus, it was impossible for the trial judge to "force" deliberations or "coerce" a verdict.

Accordingly, the trial judge did not err in refusing trial counsel's request to recess the trial.

## VI.

**The trial judge did not abuse his discretion in refusing Appellant's request to defer sentencing because the reason for Appellant's request, the absence of a character witness, was due to his own failure to act with due diligence in securing the witness's attendance. Further, any purported error was harmless when the trial judge was later presented with an affidavit containing the witness's statements and, after consideration, refused to change Appellant's sentence. (Appellant's Issue 7)**

Appellant argues the trial judge erred in refusing to defer his sentencing hearing until the following Monday to give him the weekend to secure the attendance of family members. Initially, the State would note that Appellant stated that his mother was the sole witness he planned to have testify and the attendance of other witnesses was not mentioned to the trial judge. As to the merits of Appellant's claim, the State asseverates the trial judge acted within his discretion in denying the request because Appellant failed to act with due diligence in obtaining the attendance of Appellant's mother and other family members, especially when they had attended the trial throughout the week and trial counsel failed to explain why Appellant's mother was unavailable at that time. Regardless, any alleged error is harmless given that the defense presented this same information to the trial judge in affidavits submitted with its post-trial motions and the trial judge, after reviewing this information, refused to modify Appellant's sentences.

The Witnesses' Unavailability is Appellant's Fault

"The trial court's denial of a motion for a continuance will not be disturbed on appeal absent a clear abuse of discretion." State v. Morris, 376 S.C. 189, 208, 656 S.E.2d 359, 369 (2008) (citing State v. McMillian, 349 S.C. 17, 21, 561 S.E.2d 602, 604 (2002)). "An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support." State v. Meggett, 398 S.C. 516, 523, 728 S.E.2d 492, 496 (Ct. App. 2012). "Reversals of refusal of a continuance are about as rare as the proverbial hens' teeth." State v. McMillian, 349 S.C. 17, 21, 561 S.E.2d 602, 604 (2002) (citing State v. Lytchfield, 230 S.C. 405, 95 S.E.2d 857 (1957)).

Rule 7 of the Criminal Rules of Procedure states:

> No motion for continuance of trial shall be granted on account of the absence of a witness without the oath of the party, his counsel, or agent to the following effect: the testimony of the witness is material to the support of the action or defense of the party moving; the motion is not intended for delay, but is made solely because he cannot go safely to trial without such testimony; and **has made use of due diligence to procure the testimony of the witness** or of such other circumstances as will satisfy the court that his motion is not intended for delay.
>
> (1) When a subpoena has been issued, the original shall be produced with proof of service or the reason why not served endorsed thereon or attached thereto; or if lost the same proof shall be offered with additional proof of the loss of the original subpoena.
>
> (2) A party applying for such postponement on account of the absence of a witness shall set forth under oath in addition to the foregoing matter what fact or facts he believes the witness if present would testify to and the grounds for such belief.

Rule 7(b), SCRCrimP (emphasis added). A continuance is not automatically given because a witness is unavailable. The court has discretion to determine whether due diligence was used to try and secure the witness's testimony. In the instant case, the trial court clearly found due

diligence was not used by Appellant's counsel because he did not seek the continuance prior to trial and, instead, waited until the fourth day of trial.

This Court has made it abundantly clear: "It is paramount that the party asking for the continuance **show 'due diligence' was used** in trying to procure the absent witness." State v. Colden, 372 S.C. 428, 439, 641 S.E.2d 912, 918-19 (Ct. App. 2007) (emphasis added). This Court has also explained the primary requirements for obtaining a continuance based on an absent witness—even one that is unexpectedly absent: "The party asking for the continuance **must show due diligence was used** in trying to procure the testimony of an absent witness as well as set forth what the party believes the absent witness will testify to and the grounds for that belief." State v. Yarborough, 363 S.C. 260, 266, 609 S.E.2d 592, 595 (Ct. App. 2005) (emphasis added).

In the instant case, trial counsel, for some unknown reason, did not have Appellant's family members waiting for the jury verdict and sentencing. The trial judge offered to wait for Appellant's family members to arrive at the court, but trial counsel, without explanation, claimed she did not have a phone number for Appellant's mother. However, trial counsel failed to explain why she failed to obtain her attendance for the reading of the jury's verdict or for the sentencing hearing despite the mother's attendance at Appellant's trial throughout the week. Trial counsel also apparently planned on having Appellant's grandmother testify on his behalf during sentencing given trial counsel's inclusion of her affidavit with the post-trial motion, yet she was in no way referenced at sentencing and trial counsel has failed to provide any explanation why she was also absent at that time. The only reasonable conclusion that can be drawn from the record was these character witnesses were unavailable at sentencing due solely to trial counsel's negligence.

Accordingly, as a result of counsel's complete lack of due diligence in seeking to secure the testimony of Appellant's family members, the trial court properly denied his motion for a continuance. Appellant cannot claim error when it was trial counsel's duty to ensure Appellant's family members remained close by and available to testify at Appellant's sentencing hearing. Appellant's counsel failed to exercise the "paramount" responsibility prior to seeking a continuance; the party asking for the continuance must "show 'due diligence' was used in trying to procure the absent witness." Colden, 372 S.C. at 439, 641 S.E.2d at 918-19. As a result, this Court should affirm the trial court's decision and affirm Appellant's convictions and sentences.

Harmless Error

Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result. State v. Bryant, 369 S.C. 511, 518, 633 S.E.2d 152, 156 (2006); State v. Heller, 399 S.C. 157, 171, 731 S.E.2d 312, 320 (Ct. App. 2012). Thus, an insubstantial error not affecting the result of the trial is harmless where a defendant's guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached. Bryant at 518, 633 S.E.2d at 156. "A harmless error analysis is contextual and specific to the circumstances of the case: No definite rule of law governs a finding of harmless error; rather the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Further, it is well settled that the admission of improper evidence is harmless where it is merely cumulative to other evidence." Heller, 399 S.C. at 171, 731 S.E.2d at 320.

Any alleged error in failing to defer sentencing was harmless. Notably, trial counsel made a post-trial motion for a new trial and sentencing hearing and submitted affidavits from Appellant's mother and grandmother in which they set forth the reasons they believed the trial judge should have considered when sentencing Appellant; the trial judge reviewed those

affidavits before issuing his ordering denying a new trial and sentencing hearing. (Mot. For New Trial and Sentencing Hearing, pp.14–16; Affidavit of Lillie Marie Stevenson; Affidavit of Hazel Gleaton; Order Denying Motion for New Trial and Sentencing Hearing). Thus, the trial judge was ultimately presented with the information and found it did not impact his original sentences.

This result was not unexpected: the assertions in the affidavits, which alleged Appellant grew up in a challenging environment, were unable to justify or mitigate his criminal acts. As proven by the State, Appellant assaulted Victim on multiple occasions and during the last incident murdered her after a violent assault which included strangulation and multiple gunshot wounds. After committing his murder, Appellant did not express remorse; he instead set fire to Victim's corpse and home after looting the latter's expensive electronics and stashing the items in the woods. Appellant then attempted to escape town and run away to Texas to avoid prosecution for his acts. Even worse, Appellant's trial strategy was to pin his crimes on Dukes and have him take the fall for his cold and calculated actions. The State asseverates that the information contained in the affidavits could not have had any meaningful impact on the trial judge's sentencing decisions.

Accordingly, Appellant is unable to demonstrate that presentation of this evidence at trial would have had any impact on his sentencing. See Bryant at 518, 633 S.E.2d at 156.

The Appropriate Remedy for the Alleged Error

Finally, should this Court find the trial judge committed reversible error in failing to continue the trial to allow Appellant's mother to testify, the only appropriate remedy or Appellant is a new sentencing proceeding. Notably, the alleged error in sentencing had no impact on the events of Appellant's trial.

## VII.

**This Court should deny Appellant's request for a new trial based on the Cumulative Error Doctrine because said theory is not recognized under South Carolina law. Further, the issue is not preserved for appellate review because Appellant failed to present this ground for relief to the trial judge. (Appellant's Issue 8)**

Appellant argues the cumulative effect of the errors argued above create reversible error in his case. The State disagrees with this allegation. This ground was not raised at trial and is therefore not preserved for review. Further, the trial judge's decisions were not error and do not justify the grant of a new trial.

The exact name of the legal doctrine employed does not need to be used to preserve an argument, but it must be clear that the argument has been presented on that ground. State v. Russell, 345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001).

The cumulative error doctrine provides relief to a party when a combination of errors, insignificant by themselves, has the effect of preventing the party from receiving a fair trial, and the cumulative effect of the errors affects the outcome of the trial. State v. Beekman, 405 S.C. 225, 237, 746 S.E.2d 483, 490 (Ct. App. 2013) (citing State v. Johnson, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999)). An appellant must demonstrate more than error in order to qualify for reversal pursuant to the cumulative error doctrine; rather, he must show the errors adversely affected his right to a fair trial to qualify for reversal on this ground. Id.; see also State v. McEachern, 399 S.C. 125, 150, 731 S.E. 2d 604, 617 (Ct. App. 2012) (stating, "even if the court did commit any errors, we believe those errors to be harmless such that Hollie can show neither prejudice, nor that the errors affected her right to a fair trial"). The Constitution entitles a criminal defendant to a fair trial, not a perfect one. State v. Mitchell, 330 S.C. 189, 199-200, 498 S.E.2d 642, 647-48 (1998) (finding reversal on cumulative error doctrine not warranted).

Despite the numerous issues presented on appeal, the record reflects the trial court exercised its discretion soundly at each instance. The trial judge acted within his discretion in admitting the photos of Victim's body and Appellant's prior conviction into evidence because they were extremely probative to proving the elements of the offenses with which Appellant was charged. The trial judge also acted in his discretion in admitting Appellant's admission, through adopted statement, that Appellant had previously pulled a gun on Victim shortly before the murder. Moreover, the trial judge acted within his discretion when he allowed the jury to choose whether they wanted to begin deliberations on the last day of the first week of trial or continue the case to the following week and in refusing to continue Appellant's sentencing hearing until the Monday after the trial.

Appellant's attempt to stack the deck does not change the equation: the sum of all zeros is still zero. Moreover, the cumulative effect of any errors this Court might find fails to undermine the fact that Appellant did receive a fair trial. This case does not warrant reversal on grounds of cumulative error. "As we have stressed on more than one occasion, the Constitution entitles a criminal defendant to a fair trial, not a perfect one." Mitchell, 330 S.C. at 199-200, 498 S.E.2d at 647-48 (finding reversal on cumulative error doctrine not warranted). In the case at hand, Appellant received a fair trial.

Here, Appellant failed to raise any issue based on the cumulative error doctrine during his trial. Appellant raised the issue for the first time in a post-trial motion. (Appellant's post trial motion). Even if this Court determines that Appellant properly preserved this issue for appeal, Appellant abandoned the issue by addressing it in a conclusory and unsupported manner in his brief. Appellant cites appellate authority to establish that there is, in fact, a doctrine in South Carolina known as the cumulative error doctrine; however, Appellant does not explain how the

cumulative error doctrine applies to his case, other than to say the "combination of errors in this case . . . adversely affected Appellant's right to a fair trial." (Br. of Appellant p.31). Appellant's single sentence, conclusory argument and analysis are insufficient to preserve this issue for appeal. Even if this Court determines that Appellant properly preserved this issue for appeal, Appellant has failed to identify any errors, cumulative or otherwise that entitle him to a new trial. Appellant's convictions and sentences should be affirmed.

## CONCLUSION

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

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August 16, 2021

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STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM RICHLAND COUNTY
Court of General Sessions
The Honorable L. Casey Manning, Circuit Court Judge

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Appellate Case No. 2019-002072

THE STATE, .....RESPONDENT,

v.

KENNETH RAY GLEATON, .....APPELLANT.

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**CERTIFICATE OF COUNSEL**

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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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