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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS
Appeal from Jasper County
Court of General Sessions
Carmen T. Mullen, Circuit Court Judge

Appellate Case No. 2021-001007

THE STATE, ...RESPONDENT,

v.

RICHARD PASSIO, JR.,..... PETITIONER.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

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II. The Court of Appeals properly affirmed the trial judge's admission of a screenshot of Petitioner's Facebook profile because it was used to impeach Petitioner's father's testimony and show his bias.

STATEMENT OF THE CASE

In August 2016, the Jasper County Grand Jury indicted Petitioner Richard Passio, Jr. for the June 3, 2016 murder of his wife Michelle Bennington Passio. (Indictment No. 2016-GS-27-00300). Christopher Geier, Esquire, represented Petitioner on the charge. Assistant Fourteenth Circuit Solicitor Hunter Swanson prosecuted the case. (R. p. 2). On July 20, 2018, Petitioner proceeded to a jury trial before the Honorable Carmen T. Mullen. (R. p. 1). After a four-day trial, the jury convicted Petitioner of murder. (R. p. 725, lines 11-15). Immediately following the trial, Judge Mullen sentenced Petitioner to 30 years with credit for 27 days' time-served. (R. p. 735, lines 8-17).

Petitioner appealed his conviction and sentence. On August 4, 2021, the South Carolina Court of Appeals affirmed Petitioner's conviction in a published opinion. State v. Passio, 861 S.E.2d (filed August 4, 2021). Thereafter, Petitioner filed a petition for rehearing on August 11, 2021 which was denied on August 18, 2021. On October 4, 2021, Petitioner submitted a Petition for a Writ of Certiorari to this Court. This Return, filed on behalf of the State, follows.

STATEMENT OF FACTS

Petitioner Richard Passio Jr. and his wife Michelle lived on East Main Street in Ridgeland, South Carolina, just blocks away from their family-run restaurant Jasper's Porch. Just before 6 AM on June 3, 3016, Petitioner called 911. He asked for help because his wife had

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

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

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

Soot and an imprint from the muzzle of the gun appeared underneath her chin, indicating the gun was held in contact with her skin at the time of the shot. (R. p. 242, lines 6-10). Her skin appeared ashen. (R. p. 221, line 25 – p. 222, line 1). Her body was cold to the touch. Blood in her

right ear did not drip, but "had coagulated, ballooned up." Likewise, no blood came from the exit wound on the top of her head. The wound appeared dry. (R. p. 133, lines 3-15; R. p. 211, lines 17-21). A blanket lay on top of her. (R. p. 107, lines 12-15). Though EMS's cardiac monitor showed a workable cardiac rhythm, the brain matter and blood in her hair and the injury caused EMS to opine that the victim could not be revived. (R. p. 223, lines 19-25).

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

Later DNA analysis showed that both Petitioner and the victim left DNA on the trigger of the pistol. (R. p. 257, lines 14-18). The analyst also located Petitioner's DNA on the pistol slide, (R. p. 258, lines 8-16), and further concluded that the underside of the victim's fingernails contained a complex mixture of two individuals' DNA. This conclusion applied to fingernail scrapings collected from each of the victims' hands. (R. p. 251, lines 16-25).

Ginn recovered one empty shell casing from the chamber of the pistol. (R. p. 122, lines 1-23). Another Ridgeland Police Department officer, Cpl. Chris McIntosh, located three bullet strike areas inside the residence: one in the doorframe behind the victim's head; one to a windowpane in an adjacent room behind the victim's head; and another on the ceiling. McIntosh recovered two more shell casings from the residence. (R. p. 126, line 19 – p. 129, line 8). One was underneath the couch and another was in the room adjacent to the back of the victim's head.

(R. p. 131, lines 4-17). "It appeared, from the way she was lying," that the gunshot wound underneath the victim's chin aligned with the bullet strike in the ceiling. (R. p. 159, lines 8-18).

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

Though he had been dispatched to a suicide, Cpl. McIntosh investigated to determine whether a suicide or a homicide had occurred. (R. p. 181, line 13 – p. 182, line 6; R. p. 206, lines 3-5). He had never before responded to a suicide with multiple gunshot wounds or to a female suicide with a firearm. (R. p. 207, lines 3-21). Neither had the responding paramedic. The paramedic had previously been dispatched to about 300 suicides, none of which involved multiple gunshots and only one of which concerned a female who had committed suicide with a firearm. (R. p. 219, line 13 – p. 220, line 19). Similarly, while the cause of death was undoubtedly a single gunshot wound to the underside of the victim's chin, the forensic pathologist could not rule out suicide or homicide as the victim's manner of death. She recorded it as undetermined. (R. p. 237, lines 1-8). The pathologist cursorily estimated that perhaps twenty percent of the female suicides she had seen occurred by gunshot. (R. p. 241, lines 10-19).

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

According to Pam, Petitioner once flipped the kitchen table while holding a baby. One time he threw a cat against the wall because he was mad at it. He called the victim degrading names and "always put her down." He required things be done a certain way within the home. For example, Pam recalled Petitioner sending the victim back to the store if his lunch meat was not sliced by the grocery deli precisely the way he liked it. (R. p. 396, line 8 – p. 397, line 20). Pam described him as "a control freak." (R. p. 404, lines 18-19).

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

She did not meet with the victim after referring her to the shelter. (R. p. 378, line 4 – p. 380, line 24).

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

A shift leader at the restaurant, Lisa, also testified about her relationship with the Passios. She explained that Petitioner sang Lisa's praises and the victim stopped getting along with her at some point thereafter. Petitioner told Lisa that he moved his family to Ridgeland to remove the victim from a bad lifestyle in Ohio. He told Lisa his wife's friends were trash and that he wished she would hang out with Lisa instead. She testified that Petitioner was controlling of the victim, watching her from the cameras in the office or staring at her from certain positions within the restaurant. One time, Petitioner punched a wall, and he would kick trashcans. (R. p. 341, line 15 – p. 345, line 21).

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

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

The victim would pick Brandon up for work at his mother's house. As a result, the victim befriended Brandon's mother Carla. The victim arranged regular playdates for her own children with Carla's grandchildren at Carla's house. After some time, the victim began hiding her van around the block from Carla's house. Sometimes, Petitioner would show up at Carla's when the victim was there "as if she was caught doing something wrong." When this happened, the Passio's would argue and leave. But Petitioner "was never angry" when they came over as a couple. Cathy described the victim and her children would act different when Petitioner was around: they were passive, "little automatons, robots." Without Petitioner, the children acted like normal toddlers. Cathy advised the victim that she did not have to live with the "degrading and abusive" way Petitioner treated her and that she should talk to Cathy's divorce attorney. (R. p. 354, line 2 – p. 361 line 15).

Another employee at Jasper's Porch, Angel, testified that when Petitioner and the victim were working at the same time "you could tell when there w[ere] problems." Each of them

would speak about their relationship issues with co-workers and it caused everyone to walk "on eggshells." One time he made her change clothes during a waitressing shift. (R. p. 292, line 22 – p. 294, line 10).

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

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

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

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

Months after the shooting, Petitioner met up with Otto at a gas station to pay back a debt. "[A]ll of the sudden," Petitioner told him his hand was injured during the shooting because "he

had the hand on the gun when the fatal shot was triggered." Petitioner told Otto the victim shot twice towards him, missing him and hitting the wall. (R. p. 352, line 13 – p. 353, line 17).

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

Buzzed, Brandon messaged Petitioner back at 2:03 AM that he did have a baby bottle. Petitioner came over "almost instantaneous[ly]." (R. p. 314, line 24 – p. 316, line 25). Petitioner took a seat on Brandon's front porch and began unloading on Brandon about it being "bad" at his house. Petitioner "mentioned Michelle killing herself," stating "I hope tonight's not the night that something happens." That made things "weird" according to Brandon, who assured Petitioner things would be ok in time and that he needed to go to bed. Petitioner took the baby bottle and went back to his car. Brandon estimated the conversation lasted less than ten minutes and that it must have been about 2:10 or 2:15 AM. (R. p. 318, line 13 – p. 319, line 14). Brandon knew that the victim had recently spoken to a mental health therapist at Petitioner's behest. (R. p. 323, lines 7-22; R. p. 328, line 21 – p. 329, line 4). He also testified that in the month prior to the victim's death, that Petitioner "had hinted to" suicide in relation to the victim. Brandon recalled thinking Petitioner had told him that was the reason he moved the gun to the restaurant. (R. p. 327, lines 13-25).

A teenager who lived two houses behind the Passio's was sitting outside around a fire with her friends between 1:00 and 3:10 AM that night. She heard a male and a female arguing, a

door slam, and then gunshots from the direction of the Passio's house. She recalling hearing two shots, a pause, and two more. She estimated that she heard these events take place sometime between 2:30 and 3:00 AM. (R. p. 263, line 5 – p. 264, line 25; R. p. 266, lines 3-24).

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

Petitioner's eldest son, a fifteen-year-old, testified that his mom "was kind of secretive at times, but she was usually very happy." (R. p. 605, lines 11-12; R. p. 607, lines 24-25). He stated that his dad did not like his mom to wear makeup "but he never forced her to not have it." (R. p. 623, lines 2-16). Additionally, he acknowledged that at the time of her death, Victim was caring for a six week old baby which would have caused her to lose sleep at night, and that his dad was at work a lot and not helping out around the house. (R. p. 628, lines 1-13). The eldest son also recognized that he had previously told counselors that his mom felt trapped because only his dad could leave the house and that his dad would become angry and question-ridden when his mom was late. (R. p. 624, line 20 – p. 625 line 7).

He assessed that his dad "was completely oblivious" to what he believed was going on with his mom and that when he found out he began acting in the manner other witnesses had described as controlling. (R. p. 615, line 22 – p. 616, line 7). He testified that one time he saw his grandma's boyfriend yelling at his dad and when the boyfriend punched his dad, he saw his father respond by grabbing and restraining him on the ground. (R. p. 618, line 15 – p. 619, line 10). He later testified that he had seen his dad try to physically restrain his mom and that sometimes she could get violent by throwing something. (R. p. 630, lines 1-19). He agreed that he was scared of what might happen between his parents and that he did not know what happened behind closed doors and when he was not around. (R. p. 632, lines 10-20).

CERTIORARI

Petitioner argues this Court should grant certiorari, but fails to articulate any "special and important" reasons for the Court to do so. Rule 242(b), SCACR states that a writ of certiorari is not a "matter of right," but should be granted only where special and important reasons merit this Court's review. In the instant case, Petitioner fails to articulate any "special and important reasons" for this Court to exercise its discretion to grant review of the decision of the Court of Appeals. Indeed, the Court of Appeals' decision was a straightforward exercise of reviewing and affirming the trial court's application of established precedent, logic, and practical consideration of the particular facts and circumstances of Petitioner's case. Thus, the State respectfully requests that Petitioner's petition for a writ of certiorari be denied and dismissed.

STANDARD OF REVIEW

"On appeal from the denial of a directed verdict, this Court views the evidence and all reasonable inferences in the light most favorable to the State." *State v. Butler,* 407 S.C. 376, 381, 755 S.E.2d 457, 460 (2014). The trial court should deny a motion for directed verdict as to any

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

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

ARGUMENT

I.

The Court of Appeals properly affirmed the trial judge's denial of Petitioner's motion for a directed verdict of acquittal as to murder because the State presented substantial circumstantial evidence that Petitioner had the motive, means, and opportunity to have killed his wife prior to him calling 911 and reporting that she committed suicide and also that she shot multiple times.

The trial court found that the State presented substantial circumstantial evidence pointing to Petitioner's guilt. (R. p. 428, lines 16-20). "If there is any direct evidence, or if there is substantial circumstantial evidence, that reasonably tends to prove the defendant's guilt," then the court properly submits the case to the jury. *State v. Rogers*, 405 S.C. 554, 563, 748 S.E.2d 265, 270 (Ct. App. 2013). Substantial circumstantial evidence exists when the evidence submitted "reasonably tends to prove" that Petitioner killed the victim. *Id.* at 555-57, 748 S.E.2d at 271-72. A directed verdict motion should be denied only "when the evidence merely raises a suspicion that the accused is guilty." *State v. Mitchell*, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000).

Circumstantial evidence "gains its strength from its combination with other evidence, and all the circumstantial evidence presented in a case must be considered together to determine whether it is sufficient to submit to the jury." *State v. Rogers*, 405 S.C. at 567, 748 S.E.2d at 272. Parsing some of the facts presented, as Petitioner has done, may appear to establish a "speculative inference" of guilt. (Br. of App. at 27). But the State did not present scarce, singular instances of conduct sufficient to raise only a mere suspicion of guilt. *Cf. State v. Bostick*, 392 S.C. 134, 141-42, 708 S.E.2d 774, 778 (2011) ("No direct evidence linked Bostick to the crime scene or the items found in the burn pile."); *State v. Arnold*, 361 S.C. 386, 390, 605 S.E.2d 529, 531 (2004) (fingerprint on cup lid in victim's borrowed car, later found short distance from defendant's father's home, raised mere suspicion of guilt when victim's body was found in separate location); *State v. Buckmon*, 347 S.C. 316, 555 S.E.2d 402 (2001) (while evidence established that defendant walked in the direction where victim was found, no evidence placed defendant at the scene of the crime and defendant's house was in the same direction); *State v. Mitchell*, 341 S.C. at 409, 535 S.E.2d at 127 (2000) ("The only evidence linking respondent to

the burglary is the fingerprint."); *State v. Schrock*, 283 S.C. 129, 132, 322 S.E.2d 450, 452 (1984) ("Nothing in evidence places Schrock at the scene of the crime."). Here, the State established an operative chain of facts from which the jury could reasonably conclude guilt beyond a reasonable doubt, and the trial court did not error in submitting the case to the jury.

The evidence the State presented established motive, means, and opportunity reasonably tending to prove that Petitioner was criminally responsible for the murder of his wife. (R. p. 416, line 17 – p. 428, line 15). Petitioner called 911 and placed himself with the victim and with his hands on the gun contemporaneous to the shooting. He told the 911 operator that his wife shot herself, and also that they were arguing. He made it known that their argument got physical, stating that his wife attacked him a few times, knocked his contacts from his eyes, and that he hurt his hand on the bottom of the gun when it went off. (State's Ex. 1). He relayed this information to responding law enforcement and stated that he and his wife struggled over the weapon. (R. p. 98, line 4 – p. 101, line 3; R. p. 105, lines 15-22; R. p. 165, line 6 – p. 167, line 7). Forensic evidence corroborated a physical struggle, as both Petitioner and the victim left DNA on the trigger of the pistol. (R. p. 257, lines 14-18). And, fingernail scrapings from each of the victim's hands contained a complex mixture of two persons' DNA. (R. p. 251, lines 16-25). Moreover, the victim had plans for the days following her death, contrasting Petitioner's assertion that she committed suicide. (R. p. 385, line 22 – p. 386, line 1; R. p. 284, lines 3-6).

Further contrary to Petitioner's report of a suicide were the multiple bullet strikes located in the home. A bullet struck a door frame behind the victim's head, and another struck a windowpane in the same direction. Yet the victim was located lying on the sofa with her head back. (R. p. 128, lines 5-25; R. p. 221, lines 16-18). Petitioner reported she fired into the air. (State's Ex. 1 at 1:39 to 1:45). Months later, Petitioner, unprovoked, told another acquaintance

from Jasper's Porch that the victim shot twice towards him, missing him and hitting the wall. (R. p. 352, line 13 – p. 353, line 17). From the evidence of a physical struggle and the stray bullet marks behind the victim's head, the jury could reasonably conclude the killing occurred at the hands of Petitioner rather than as a result of victim's personal volition, even in the heat of passion. The jury was instructed they may find Petitioner guilty of voluntary manslaughter if they did not find him guilty of murder beyond a reasonable doubt. (R. p. 713, lines 1-25).

Temporally, it can be fairly and logically deduced from the evidence that Petitioner and the victim were at home arguing and that the argument culminated with Petitioner killing the victim. *See State v. Logan*, 405 S.C. 83, 97, 747 S.E.2d 444, 451 (2013) ("evaluation of circumstantial evidence requires jurors to find that the proponent of the evidence has connected collateral facts in order to prove the proposition propounded"). The video from Jasper's Porch places Petitioner at the restaurant after the Passios' public argument at Schooner's bar. Their argument at the bar began shortly after midnight and witnesses saw Petitioner and the victim leave separately. (R. p. 282, line 2 – 286, line 8; R. p. 296, line 10 – p. 300, line 4; R. p. 313, lines 1-25). The bartender testified that she estimated that Petitioner and the victim left Schooner's by 12:30 AM. (R. p. 286, line 10 – p. 287, line 2). Petitioner made a quick stop at Jasper's Porch minutes before 1 AM. (State's Ex. 6; R. p. 333, line 11 – p. 334, line 18). A neighbor who had been sitting outside most of the night heard arguing and gunshots between 1 AM and 3:10 AM—she estimated she actually heard the shots between 2:30 and 3:00 AM. (R. p. 263, line 5 – p. 264, line 25; R. p. 266, lines 3-24). Around 2 AM, Petitioner briefly visited a co-worker to pick up a baby bottle. Petitioner told his co-worker that things were bad at home. Petitioner mentioned suicide, stating that he hoped it was "not the night that something happens" to the victim. He left by 2:15 AM. (R. p. 316, line 16 – p. 319, line 14). Petitioner called 911 at

5:53 AM to report the shooting. (R. p. 221, lines 1-8). However, another neighbor who regularly heard fighting at the Passio's house and who ordinarily woke up between 4:30 and 5 AM testified she did not hear gunshots at any point after she woke up that morning. (R. p. 270, line 19 – p. 273, line 20). Therefore, because it undisputed the Petitioner was present at the time of the shooting, the evidence reasonably tends to prove that the shooting occurred after 2:15 AM when Petitioner arrived home with a borrowed baby bottle and before the neighbor woke up around 4:30 or 5 AM.

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

Moreover, the State presented more than a mere suspicion that Petitioner waited to call 911 and report the shooting, indicating consciousness of guilt. *See State v. McDowell*, 266 S.C. 508, 515, 224 S.E.2d 889, 892 (1976) (as a general rule, any guilty act or conduct by the accused is admissible as some evidence of consciousness of guilt). First responders arrived at the Passio's house to find all eight children and the dog quietly asleep. (R. p. 102, lines 2-24). The injury to Petitioner's hand appeared crusted and dry rather than fresh. (R. p. 212, lines 5-20). The victim's blood was not dripping from any wound, but rather had soaked into the sofa and had coagulated on her person and on the floor and was thick like Jell-O. (R. p. 133, lines 3-15; R. p. 212, lines 1-3). Something about the scene smelled off. (R. p. 112, lines 8-19, R. p. 133, lines 1-3). The victim's arm was cold to the paramedic's touch. (R. p. 211, lines 17-21). And the neighbor who regularly awoke between 4:30 and 5 AM to get ready for her 6 AM work shift did not hear any gunshots that morning, which would have been fairly contemporaneous to Passio's 5:53 AM call to 911. She also saw Petitioner in slacks rather than his usual pajamas and was home to see the police arrive. (R. p. 221, lines 1-8; R. p. 270, line 16 – p. 273, line 15).

Additional evidence reasonably tended to prove malice aforethought. Testimony established a number of possible motives, including the victim's plans to divorce Petitioner, the victim's prior infidelity, and Petitioner's expression to others that he believed the victim "wasn't acting right; she was lashing out." (R. p. 382, line 1 – p. 385, line 24). A number of State's witnesses testified that they had witnessed Petitioner act in an argumentative, controlling, or violent fashion with the victim. (R. p. 341, line 15 – p. 345, line 21; R. p. 396, line 8 – p. 397, line 20). Their dual presence at Jasper's Porch caused tension. (R. p. 292, line 22 – p. 294, line 10; R. p. 309, line 1 – p. 310, line 1; R. p. 330, lines 5-25). Outside of work, by at least one witness account, the victim acted to conceal her whereabouts from Petitioner, who was

"degrading and abusive" of her. (R. p. 354, line 2 – p. 361 line 15). The victim had recently met with a family court attorney who testified that she planned to divorce Petitioner. The attorney described the victim as pregnant, concerned, and frightened, and she referred the victim to a local shelter for victims of domestic abuse. (R. p. 378, line 4 – p. 380, line 24). The victim's mother corroborated the late wife's plans to leave Petitioner once she set aside enough money. (R. p. 398, line 12 – p. 399, line 20). The State also presented direct testimony that the victim had an affair with another restaurant employee and that Petitioner was at least aware of the rumors, if not the actual affair, as he confronted that employee about it and thereafter put surveillance cameras around their workplace. (R. p. 307, line 1 – p. 309, line 8).

Respondent submits this issue's fact-driven inquiry requires affirmance of the trial court. Unlike other cases where our appellate courts have corrected the trial court's failure to direct a verdict, Petitioner places himself at the scene, in a physical struggle with the victim, with his hands on the murder weapon, and witness to the shooting. There was additional evidence that Petitioner brought the gun into the home that night and waited some time after the shooting to call 911. *State v. Lynch*, 412 S.C. 156, 173-74, 771 S.E.2d 346, 355-56 (Ct. App. 2015) (case properly submitted to jury on substantial circumstantial evidence where defendant was the last person seen with victim at location of murder and State presented substantial evidence of flight); *State v. Bratschi*, 413 S.C. 97, 112-14, 775 S.E.2d 39, 47-48 (Ct. App. 2015) (substantial circumstantial evidence established by prior violent confrontation between victim and defendant; defendant getting a ride from a location near where the victim's vehicle was found with victim's dated blood on the steering wheel; and by grave-like hole on defendant's family land). In *State v. Frazier*, 386 S.C. 526, 689 S.E.2d 610 (2010), the Court ruled that the State presented substantial circumstantial evidence of guilt with evidence of the following: an affair between the victim's

wife and the defendant, defendant's knowledge of victim's whereabouts, defendant's confrontation with the victim shortly before the murder, defendant's actions taken in preparation for the murder, and eyewitness testimony placing defendant near the murder scene at the time of the murder. *Frazier*, 386 S.C. at 531-32, 689 S.E.2d 610, 613. Respondent submits that the State presented substantial circumstantial evidence of the same caliber as the evidence presented in *Frazier*, and Respondent asks the Court to likewise find that "[t]his evidence, when viewed collectively, presented a jury question. . ." as to Petitioner's guilt. *Id.* at 532, 689 S.E.2d at 613.

II.

The Court of Appeals properly affirmed the trial judge's admission of a screenshot of Petitioner's Facebook profile because it was used to impeach Petitioner's father's testimony and show his bias.

During Richard Sr.'s cross-examination and over Petitioner's objection, the trial court admitted a screenshot of Petitioner's Facebook profile page. The screenshot showed a selfie by Petitioner and another photograph of Petitioner with two of his sons. Petitioner's name, Rock Passio, appears underneath these photographs, and then the following: "I know who I am. I'm a dude, playing a dude, disguised as another dude." (R. p. 577, lines 16-25; R. p. 737). Petitioner objected on the basis of relevance, further stating that the witness, Petitioner's father Richard Passio, Sr., did not authenticate the Facebook page because he only recognized the photographs. (R. p. 577, lines 16-20).

Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. "Evidence which assists the jury in arriving at the truth of an issue is relevant and admissible unless otherwise incompetent." *State v. Sweat*, 362 S.C. 117, 126, 606 S.E.2d 508, 513 (Ct. App. 2004); *see* Rule 403, SCRE (relevant

evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice). "Evidence is admissible if 'logically relevant' to establish a material fact or element of the crime; it need not be 'necessary' to the State's case in order to be admitted." *State v. Sweat*, 362 S.C. at 127, 606 S.E.2d at 513.

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

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

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

The Rules of Evidence provided the State with leeway to probe Richard Sr. for truthfulness, bias, or a motive to misrepresent the facts and circumstances of Petitioner's relationship with his wife. Rule 608(c), SCRE. The text on the profile page, which Richard Sr. could identify as belonging to his son,[1] casts doubt upon the veracity of Richard Sr.'s self-professed closeness with Petitioner. The exhibit bore relevance to Richard Sr.'s credibility, including whether he had reliable knowledge about what went inside his son's home. Rule 608(c), SCRE; *Smalls v. State*, *supra*; *see also State v. Sims*, 348 S.C. 16, 25, 558 S.E.2d 518,

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

523 (2002) (noting 608(c) preserves well-established South Carolina precedent). For these same reasons, the screenshot's probative value was not substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE.

Assuming error *arguendo*, our courts "decline to set aside a conviction due to insubstantial errors not affecting the result." *State v. Black*, 400 S.C. 10, 27, 732 S.E.2d 880, 890 (2012). State's Exhibit 36 could not reasonably have affected the result of the trial. Petitioner's re-examination of Richard Sr. cures any prejudice. Immediately after the State published the text on the screenshot, Richard Sr. responded during re-direct examination that he had seen the photograph of Petitioner and two of his sons but had never seen the text underneath and had "no idea what" it was. (R. p. 578, lines 13-25). Richard Sr. thus disavowed knowledge of its context, origin, or applicability to Petitioner. Moreover, when considering the totality of the evidence adduced, witnesses presented by both parties gave testimony tending to establish that Petitioner and the victim engaged in volatile behavior behind closed doors, thus corroborating the text that Petitioner "was playing another dude." (*See* R. p. 737). Petitioner's eldest son testified after Richard Sr., establishing that things escalated with Petitioner and the victim in private. (R. p. 615, lines 1-12; R. p. 628, lines 14-21; R. p. 630, lines 14-17; R. p. 632, lines 10-20). The attorney with whom the victim consulted about a divorce referred her to a women's shelter and had been approached by other people in the community who were concerned for the victim. (R. p. 378, line 4 – p. 380, line 24). The victim concealed bruises under her clothing. (R. p. 274, lines 6-13; R. p. 395, lines 11-21). When Petitioner came to the bar to argue with her the night of the shooting, he addressed the victim in a quiet tone but bystanders could tell he was angry and watched him knock a cigarette from her hand. (*E.g.*, R. p. 296, line 10 – p. 300, line 4). Witness testimony shows that the victim felt a need to conceal her individual activities from Petitioner so

as to avoid his disapproval and backlash, that Petitioner was degrading and controlling of the victim, and that Petitioner had displayed violent behavior inside his home. (*E.g.*, R. p. 341, line 15 – p. 345, line 21; R. p. 354, line 2 – p. 361 line 15; R. p. 382, line 1 – p. 385, line 24; R. p. 394, line 1 – p. 395, line 21; R. p. 396, line 8 – p. 397, line 20; R. p. 477, line 24 – p. 478, line 9; R. p. 485, line 13 – p. 486, line 3).

CONCLUSION

Based on the foregoing reasons, Respondent submits this Court should deny the petition for a writ of certiorari and let stand the decision of the Court of Appeals affirming the trial court. If the Court grants the petition for a writ of certiorari, Respondent would request permission under the rules to fully brief the issues contained herein.

Respectfully submitted,

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October 14, 2021