STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County
Honorable Steven H. John, Circuit Court Judge

THE STATE OF SOUTH CAROLINA,

Respondent,

vs.

ALYSSA ANNE DAYVAULT,

Appellant.

Appellate Case No. 2020-001515

FINAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF ISSUE ON APPEAL

Whether the trial judge erred in allowing the state to join two separate homicide by child abuse charges against Appellant at the same jury trial where the alleged acts took place thirteen months apart from one another and the joinder of the indictments resulted in extreme unfair prejudice to appellant by allowing the state to argue that she killed two of her newborn children on separate occasions?

RESPONDENT'S STATEMENT OF ISSUE ON APPEAL

The trial court did not err by allowing both homicide charges to be tried together because both births and deaths were discovered at the same time through the same investigation, arose out of a single chain of circumstances, were proved by substantially the same evidence, and were part of the same common scheme or plan, carried out the same way and united by the same motive.

STATEMENT OF THE CASE

Dayvault was convicted by a jury of two counts of homicide by child abuse following trial on October 12-15, 2020. Dayvault was present for a motion hearing on October 6, but despite Judge John's admonishment to be present, Dayvualt did not appear at trial. R. pp. 26-27; pp. 48-49. On November 5, 2020, Judge John unsealed Dayvault's sentence of forty years' imprisonment for both counts.

STATEMENT OF FACTS

In defense counsel's words, "In November 2017 and in December of 2018, my client, Alyssa Dayvault, **unexpectedly** gave birth in her own home." R. p. 133, lines 16-17. The birth of each child was hardly unexpected for Dayvault, but their births and deaths were unexpected and unknown to the rest of the world. Both children were never seen alive, even by Dayvault's live-in boyfriend and presumptive biological father. The child born in December 2018 was found dead in Dayvault's trash can. The child born in November 2017 was never found.

The cases were referred to the North Myrtle Beach Police Department by the Myrtle Beach Police Department after Dayvault visited Grand Strand Hospital in December 2018. Dayvault lived in North Myrtle Beach where both filicides occurred, although she lived at different residences for each filicide. R. pp. 135-37.

Dr. Jessica Brown, an OBGYN, testified Dayvault presented to the North Strand ER with heavy vaginal bleeding and dangerously low hemoglobin in December 2018. Dayvault was brought to the Grand Strand Hospital for treatment and needed a blood transfusion because of the low hemoglobin level. R. p. 141. Her hormone level of 31,000 beta, an elevated level, meant Dayvault should be pregnant in utero, yet Dayvault claimed she did not know of any pregnancy. R. p. 143. During surgery, Dr. Brown found a full-term placenta, and given Dayvault denied being pregnant, Dr. Brown was quite confused. R. p. 145. It had the weight and feel of a full-term developed placenta. However, the placenta carried a foul odor not ordinarily emitted. R. pp. 146-47. The placenta weighed 570 grams and normal weight for a full-term placenta is 400 to 600 grams. R. p. 149. Dr. Brown explained, "So in my mind, that's a full-term healthy placenta. Her being young and healthy, I'd presume it was a healthy pregnancy, but I don't know; I wasn't there." R. p. 149,

lines 13-15.

Dr. Brown explained in the United States, the risk of a third trimester stillbirth is less than one percent, and for more than 37 weeks, full-term birth, the risk decreases to less than .2 percent. R. p. 154, lines 19-25. Dr. Brown testified no circumstance exists in which a full-term placenta develops without a baby. There was a baby somewhere. R. p. 154, lines 4-10.

SLED Agent Erin Gott Beasley investigates child fatalities in South Carolina. She interviewed Dayvault along with two other law enforcement officials in December 2018. R. pp. 163-65. Dayvault initially denied being pregnant,[1] but ultimately admitted to birthing two times – in December 2018 and also in November 2017. The admissions to both births and deaths came simultaneously, as follows:

> Dayvault: I gave that baby up. I gave the baby up. [Referencing the November 2017 child].
>
> Agent: Where did you give birth?
>
> Dayvault: Where did I give birth?
>
> Agent: Yes?
>
> Dayvault: I gave birth at home.
>
> Detective: Where is home when you said you gave birth?
>
> Dayvault: At the apartment, at my apartment whenever I lived on David Street.

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[1] Specifically, Dayvault initially claimed, "I'm not pregnant. Like I hadn't been pregnant. . . . . Like my family would know, my boyfriend would know, like I would be ecstatic." State's Exhibit 16 (1:25-1:50). She was asked about the last time prior to December 2018 that she was at the hospital, and she claimed it was Halloween in 2016, omitting her November 2017 visit to the ER. State's Exhibit 16 (5:30 – 6:30). She initially claimed she gave the November 2017 baby up for adoption. State's Exhibit 16 (circa 6:30).

Agent: So where's the baby this time? What happened to that baby?

Dayvault: I don't . . .

Agent: Okay. Well listen to me, listen, look at me. You're going to have to look at me. Okay. Look at me. You've got to tell us where they are.

Dayvault: **They're** was, **they're** was . . . It's dead.

Agent: Okay. Where, where did it . . . Was it a boy? Was it a girl?

Dayvault: (Crying – inaudible).

Agent: I mean, he or she was a big baby. You had to see him.

Dayvault: (Crying – inaudible).

Agent: I know.

Dayvault: (Crying – inaudible).

Agent: Because you were scared, right?

Dayvault: (Crying – inaudible).

Agent: That's fine. And that's fine. Everybody freaks out, okay. Where did you put the baby? Where's he at?

Dayvault: . . . trash.

Agent: Alright. What day was that? Was it Wednesday?

Dayvault: Wednesday.

Agent: So the trash is picked up on Wednesday?

Detective: What time was that?

Dayvault: 'Cause it was about 6 o'clock.

Detective: And you put it in. Okay.

Agent: Okay, was that the same thing that happened last year? Is that one dead too?

Dayvault: Yes.

Agent: Do you remember what month, what, what month was it?

Dayvault: It was in November.

State's Exhibit 16 (6:30 – 8:35).

Dayvault admitted she concealed both her pregnancies from both her boyfriend and her mother. R. pp. 168-69. Dayvault claimed she took the child born in December 2018 to the nearby dump. However, surveillance cameras at the dump failed to show Dayvault appearing there. R. pp. 169-70; p. 181. So the officers interviewed Dayvault again later the same day. R. p. 171.

On cross-examination, defense counsel explored the explanations Dayvault provided Agent Gott for what happened. She claimed when the baby was born in December 2018, she passed out and woke up to find the baby was blue. R. pp. 174-75. She claimed the first baby born in November 2017 was born with the umbilical cord wrapped around his neck and died immediately after birth. R. p. 176.

Detective Will Lynch was asked to investigate "suspicious activity" regarding Dayvault's visit to the hospitals. He received medical records from Dayvault's recent December 5-7, 2018 visit and from a visit on November 4, 2017. R. pp. 184-88. Following the second interview, officers found the baby born in December 2018 in the trashcan at Dayvault's house (not the dump). The baby was inside a trashbag in the trashcan. R. p. 196. **Detective Lynch explained but for the discovery of the December 2018 pregnancy, law enforcement would never have known about the child born in November 2017.** R. p. 196. Dayvault's final version of events was the child

found in the trashcan was born gasping for air. Likewise, Dayvault claimed the child born in November 2017 was also born gasping for air. R. p. 198; State's Exhibit 17 (28:05-28:20).

Although equivocal on this point, Dayvault remembered she was home alone for the November 2017 birth.[2] State's Exhibit 17 (29:00-29:40). The family was home for the December 2018 birth, but she gave birth in the early morning hours. She admitted she tried to stay quiet because she did not want to wake anybody up because she did not want anyone to know she was having a baby. State's Exhibit 17 (11:30-12:30). She said the December 2018 child took "like two gasps" and died in her arms. State's Exhibit 17 (15:30-16:00). Asked if the same thing happened with the November 2017 child, Dayvault responded, "Yeah but it was, the umbilical was already around, like, the neck and I removed it, gasped and then that was it. 'Cause I could see where it was on the, on the neck." State's Exhibit 17 (16:45-17:10). During the first interview, Dayvault told the officers, while discussing the November 2017 baby, that **she would have to admit she was pregnant if the first baby was okay.** State's Exhibit 16 (16:10-16:30). She later admitted wearing baggy clothes because she was purposefully hiding the December 2018 pregnancy from everyone. She admitted she did not want any more children. State's Exhibit 16 (23:15 – 23:45).

Dr. Jorge Carreras testified he saw Dayvault in November 2017 and she complained of flu-like or cold symptoms. During his examination, he determined Dayvault was between 36 and 38 weeks pregnant. It was obvious, because during the course of examination, he discovered her uterus was enlarged. Listening to the baby's heart, he heard healthy fetal heart tones. To Dr. Carreras, it

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[2] At the time of the first birth, Dayvault lived at a different residence and her boyfriend stayed with her. State's Exhibit 16 (6:30-6:45) (gave birth at apartment); State's Exhibit 17 (5:45) ("We were kind of partially living together and starting like part of a relationship."); State's Exhibit 17 (circa 29:45) (Boyfriend not present because it was "during the day, so he would have been at work.").

appeared to be a healthy pregnancy. R. pp. 212-16; p. 220.

On cross-examination, Dr. Carreras explained, "[T]he pregnancy was discovered as an incidental finding." R. p. 223, lines 16-20. However, during Dayvault's second interview with law enforcement, Dayvault agreed with Detective Lynch – by nodding – **that she already knew she was pregnant**, and she shook her head in response to Detective Lynch's statement that it was not a surprise when told at the ER how far along she was in the pregnancy even though she had seen doctor before the visit. State's Exhibit 17 (circa 2:30).

Dr. Carreras determined Dayvault received no prenatal care and he referred her to the women's clinic on the Grand Strand. The clinic would have been able to see her that week if she went and would have accepted her as a patient regardless of her financial situation. Dayvault seemed to understand Dr. Carreras' instructions. R. pp. 218-20.

Dayvault claimed she wanted to give the November 2017 baby up for adoption. She claimed she looked up information for who to contact, but "before I [could] really come up with a plan, it was, it all just happened." State's Exhibit 17 (4:05 – 4:45). Dayvualt, during the first interview, claimed she was going to give the child (it is not clear which one) to someone, like an adoption agency, but then she "just couldn't do it." State's Exhibit 16 (14:15-14:45). Dayvault claimed she considered adoption for both the children. R. pp. 203-04.

Dayvault explained she was not financially able to take care of another child. State's Exhibit 17 (4:45-5:15). Even though her relationship became more serious with her boyfriend by the second pregnancy, "it was on and off" and they "had our issues," – she was not ready to have a child again. She said she did not want another child, did not know what to do, and she was scared. State's Exhibit 17 (8:30-9:05).

She also worried about her mother's opinion. Dayvault told the officers, "My mom terrifies me." She told them her mother threatened to take her children away before, and they got into arguments. So she was scared. She explained, "I let my mother's opinion get a little too much into my head and I was terrified for her to know that I had another child and the repercussions that I would have to deal with because I worked with her." State's Exhibit 17 (9:00-10:30). During the first interview, while being questioned about the pregnancy leading to the November 2017 baby's death, Dayvault explained, "I was just scared because there's a lot of problems when it comes to my personal life with my mom and a lot of, a lot of other things that I was scared 'cause I was, just got out of school and I was trying to get just start my career and it just, it was just hard." State's Exhibit 16 (9:35-10:00).

Dr. Brown described meconium, a green-tinted fluid a fetus or newborn will excrete, comparable to excrement from a bowel movement. Sometimes, this bowel movement of meconium occurs prior to birth. When the baby comes out of the womb, the baby's skin or fingernails may be stained with a greenish-tint from sitting in meconium fluid for a prolonged time prior to birth. R. pp. 149-51. Reviewing a photograph of the child as found in the trash can, Dr. Brown testified she did not see meconium staining on the child's skin or fingernails. R. p. 153, lines 1-16.

Dr. Nicholas Batalis, a pathologist, identified the yellowish, greenish fluid in the photograph introduced as State's Exhibit 14 as meconium. Meconium is a baby's first bowel movement. The concentration of meconium was located near the buttocks, indicating this bowel movement occurred during or after birth. R. pp. 236-37.

Dr. Batalis found no physiological or medical explanation for the child's death. R. p. 232. Dr. Batalis explained he found the absence of any physiological defect or disease causing death, and

found the examination was consistent with death caused by asphyxia or lack of oxygen. R. pp. 239-40. Dr. Batalis explained, "[G]oing through the process, we could rule out a number of things that could've possibly caused the death, but again, at the end of the day, we're essentially left with what had appeared to be a perfectly normal looking term fetus or infant." R. p. 239, lines 13-19. Dr. Batalis explained if a person was in an environment with little oxygen or their mouth and nose were covered, the person could suffocate with no detectable physical evidence in the autopsy. R. p. 240, lines 1-9.

Pre-trial testimony

Judge John heard various motions on October 6, 2020, including some argument on the State's motion for joinder. Detective Lynch testified in support of the admissibility of Dayvault's two statements to law enforcement, and explained the North Myrtle Beach police department received a report from the Grand Strand Hospital. The report advised a placenta was found inside a female patient and a baby should have been delivered. However, the patient denied having a baby or being pregnant. The doctors believed it was highly unlikely a placenta developed without a baby, and therefore, referred the matter to law enforcement. R. p. 7, lines 3-18.

By the time Detective Lynch received the report, Dayvault was released from the hospital. In the meantime, he subpoenaed and reviewed Dayvault's medical records. He further elaborated on what Dr. Brown reported:

> She had told us that when she delivered the placenta, it had an umbilical cord attached to it still. In her professional opinion, there was 100 percent a baby somewhere. And when she . . . questioned Dayvault about that and she got the response was, I was not pregnant and haven't been pregnant. I don't' have a baby anywhere. She looked into Dayvault's background and saw that she had been to North Strand ER, which is in North Myrtle Beach, North Stand ER,

> approximately 13 months earlier in November of 2017. And I think she had checked in for some type of – maybe a cold or flu-like symptoms. At that point in time, her hospital records showed that she was anywhere between 36 and, I think, 36 or 38 weeks pregnant. There was a fetal heartrate that was – the doctor had obviously noticed when he was doing the examination. So there was also medical records showing that a year prior she had been pregnant. And when she was at Grand Strand, I think Dr. Brown questioned her about that pregnancy and she denied at that point in time being pregnant back in 2017 as well.

R. p. 9, line 10 – p. 10, line 3. There were no other medical records between the 2017 and 2018 visits. R. p. 10. The prosecution agreed with Judge John's assessment that the State was relying upon the evidence Judge John heard during the Jackson v. Denno[3] hearing, adding the State would also present autopsy results from examination of the second child. R. pp. 42-43. Judge John forestalled ruling on the motion until the next week in order to examine further information. R. pp. 46-47.

On the first day of trial, the issue of joinder was revisited, and the State presented testimony for authentication of Dayvault's medical records from November 2017 and December 2018. R. pp. 73-75. Dr. Karyn Markley, an OBGYN treating Dayvault after her December 2018 surgery, confirmed Dayvault denied being pregnant despite the discovery of the placenta. Dr. Markley also confirmed she became aware of the pregnancy in 2017 and agreed the medical records available to her reflected a report of Dayvault's pregnancy in 2017. R. p. 81; p. 91.

Court's ruling

Following Detective Lynch's testimony and arguments on joinder, Judge John ruled on the motion as follows:

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[3] Jackson v. Denno, 378 U.S. 368, 376 (1964).

> As to the issues of – or the issue of joinder, in looking at that, the Court has to decide whether or not the crimes involved are closely related in kind, place, and character; where the offenses are[,] or whether or not the offenses were[,] of the same general nature, arose from the same or similar conduct. The Supreme Court and Court of Appeals have cautioned the trial courts to avoid an inflexible application of the rule that charges must arise out of the same set of circumstances to warrant joinder.
>
> In this particular matter, even though these are two separate offenses charged by the State of South Carolina, two separate offenses, it is clear that there are glaring similarities to both of the crimes. When talking about her actions in 2017 and 2018, the fact that she was pregnant. She delivered both without seeking medical assistance of any kind at any point in time for those pregnancies. She delivered those children herself. She indicated that both of them were breathing at the time of the delivery. She thereafter disposed of both babies without telling anyone in a similar manner. Clearly, all evidence can be prejudicial but, in this particular matter, the evidence as set forth through the defendant's own statements, which the Court has allowed in evidence in this matter; the medical records; the testimony of the expert that the records indicate that the 2017 fetus was viable; and, in her terms that the fetus could survive outside the womb. She stated she did use the records in her treatment of the defendant, based on a question by the Court. Clearly, these crimes are of a nature that are closely related in kind, place, and character. I am going to allow the joinder of both indictments, allow the state to proceed to trial on both indictments as against the defendant.

R. p. 100, line 16 – p. 101, line 25.

Jury instructions

Immediately prior to opening arguments, the trial court made the following preliminary instructions to the jury:

> It will be your job and responsibility to listen to the facts and evidence in this case, and to determine whether or not the state has proven the defendant guilty of the crimes charged beyond a reasonable doubt.
>
> Now, let's talk about the two charges. While they are the same crime alleged by the state, homicide by child abuse, they are two separate incidents. The state has the responsibility. They've

> brought two charges; they must prove the charges to you beyond a reasonable doubt. At the end of it, it will be up to you to decide on what will be from the indictment 2019-844, regarding an incident that happened in December of 2018. And in indictment 2019-851, regarding an incident that happened on or between November 4, 2017 and November 23, '17, did the state prove that to you beyond a reasonable doubt. You will be making two separate decisions. Your decision on one does not have to be the same as the other. It could be but that's going to be your determination, because on each matter the state must prove that case to you beyond a reasonable doubt based on the facts and evidence presented.
>
> When the state brought these charges, levied these charges against the defendant, the burden of proof immediately came upon the State of South Carolina to prove the defendant guilty of those charges.

R. p. 125, line 8 – p. 126, line 7.

At the conclusion of the evidence and arguments, the trial court reminded the jury:

> To the indictments – and I'll talk about them being separate indictments in just a moment. But remember, there are two charges, two decisions. You must make a decision on each one of them. Your decision on one does not have to govern the decision on the other. It can be the same, or it may not be. That's based upon your evaluation of the facts and evidence of each case an your application of the law that I'm giving to you.
>
> But to those two charges, both charges, the defendant pled not guilty, and I told you that immediately put the burden of proof upon the State of South Carolina to prove the defendant guilty beyond a reasonable doubt.

R. p. 273, line 23 – p. 274, line 9. Immediately preceding the instructions on the elements of homicide by child abuse, the trial court reiterated, "Again, two charges, two decisions, two separate decisions, but the law is the same for both." R. p. 275, lines 13-15. After explaining the requirement of a unanimous verdict, the trial court commented:

> You understand – and I've said it a bunch of times, I just want to be clear. You are making two separate decisions. Your decision on one does not have to govern your decision on the other; it's an

> independent decision on each charge. You do an independent evaluation of the facts and evidence before you render your decision on each charge.

R. p. 277, line 25 – p. 278, line 5.

STANDARD OF REVIEW

The decision as to whether charges may be tried jointly or instead must be tried separately is addressed to the sound discretion of the trial court. State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996); McCrary v. State, 249 S.C. 14, 152 S.E.2d 235 (1967); State v. Anderson, 318 S.C. 395, 458 S.E.2d 56 (Ct. App. 1995). The court's ruling will not be disturbed on appeal absent an abuse of that discretion. Tucker, 324 S.C. at 164, 478 S.E.2d at 265; State v. Prince, 316 S.C. 57, 447 S.E.2d 177 (1993); State v. Deal, 319 S.C. 49, 459 S.E.2d 93 (Ct. App. 1995); see also State v. Harris, 351 S.C. 643, 572 S.E.2d 267 (2002) (stating a motion for severance is addressed to the trial court and should not be disturbed unless abuse of discretion is shown).

ARGUMENT

> **The trial court did not err by allowing both homicide charges to be tried together because both births and deaths were discovered at the same time through the same investigation, arose out of a single chain of circumstances, were proved by substantially the same evidence, and were part of the same common scheme or plan, carried out the same way and united by the same motive.**

Dayvault argues the trial court erred in allowing the joinder of both filicides, emphasizing the thirteen months' separation between the two deaths. Of course the passage of Dayvault's second pregnancy occupies nine months of that time frame. And uniting the two charges is the same motive to conceal the pregnancies. Further, Dayvault employed the same method of concealing her crimes each time and offered the same excuses. Note the first death would not have been discovered but for

Dayvault's hospital visit shortly after giving birth to the second child. Therefore, the charges arise out of the same set of circumstances. Further, the facts supporting each charge are probative of intent for the other, particularly to prove the extreme indifference the prosecution necessarily needed to prove as an element of homicide by child abuse.

As the trial court observed, criminal charges may be tried together where they (1) arise out of a single chain of circumstances, (2) are proved by the same evidence, (3) are of the same general nature, and (4) no real right of the defendant has been prejudiced. State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996). Where the offenses charged in separate indictments are of the same general nature involving connected transactions closely related in kind, place and character, the trial judge has the discretionary power to order the indictments tried together if the defendant's substantive rights would not be prejudiced. State v. Cutro, 365 S.C. 366, 618 S.E.2d 890 (2005); McCrary v. State, 249 S.C. 14, 36, 152 S.E.2d 235, 246 (1967) (stating "[t]he two offenses were of the same general nature, involving connected transactions closely related in time, place and character; and the trial judge had power, in his discretion, to order them tried together over objection by the defendant in the absence of a showing that the latter's substantive rights would have been thereby prejudiced.").

Both charges arose out of a single chain of circumstances

Both charges arose out of a single chain of circumstance: Dayvault became pregnant, hid the pregnancy, hid the child; she became pregnant again approximately four months later, hid the second pregnancy, hid the second child. Both births and deaths were discovered at the same time from the same investigation that ensued when Dayvault was treated at the hospital and a fully formed placenta was found inside her, but the child that went with the placenta was missing. This led to review of Dayvault's medical records showing yet another child from approximately a year earlier was also

missing. Accordingly, both charges arose out of the same investigation, an investigation of two missing persons, but one mother who should know.

The Supreme Court rejected a "restrictive reading of the phrase 'a single chain of circumstances.'" State v. Beekman, 415 S.C. 632, 637, 785 S.E.2d 202, 205 (2016) (citing City of Greenville v. Chapman, 210 S.C. 157, 161-62, 41 S.E.2d 865, 867 (1947) (explaining courts should avoid the "inflexible application" of the rule that charges must arise out of the same set of circumstances to allow joinder and if "it does not appear that any real right of the defendant has been jeopardized, it would be a refinement not demanded by the law or by justice to require in all instances a separate trial")).

The Supreme Court found, "[W]e agree with the court of appeals that 'the two charges against Beekman arose from in substance, a single course of conduct or connected transactions.'" Id. (citation omitted). "In other cases, even though the charges did not arise out of a single, isolated incident, this court and the court of appeals have allowed joinder when the crimes 'involv[ed] connected transactions closely related in kind, place, and character.'" Id. at 637, 785 S.E.2d at 205 (citations and internal quotation marks omitted). "Of course they are distinct crimes, but that in no manner diminishes the glaring similarities in Beekman molesting both of his stepchildren in the same place, over the same time period, and in a similar manner." Id. at 638, 785 S.E.2d at 205. The Supreme Court noted, "For joinder of related offenses, our appellate courts have recognized that there may be evidence that is relevant to one or more, but not all, of the charges." Id. The Supreme Court referenced Tucker – in which joinder of burglary and murder was proper because the defendant broke into a church and mobile home while a fugitive for murder – and noted Beekman ignored "the fact that the evidence needed to prove Tucker committed the murder was necessarily

different than the evidence needed to prove Tucker broke into the church and mobile home." Id. at 639, 785 S.E.2d at 206.

In the present case, the prosecution needed two doctors to prove two pregnancies, but the rest of the evidence consisted of law enforcement and their interviews simultaneously investigating both deaths, plus evidence relating to the second child's remains. Even if the evidence was different to prove the corpus delecti of both crimes, both deaths are connected in kind, place, and character. The deaths occurred in Dayvault's residence, when Dayvault birthed in isolation and concealed both pregnancies from the same boyfriend. Both children, allegedly dying of respiratory difficulties, were disposed of in the trash without medical care and without Dayvault calling 911. Both died for the same reasons satisfactory to Dayvault, not only to avoid the financial and work implications of unwanted children but also to avoid discovery of the pregnancy by her mother whom she feared.

Dayvault relies on City of Greenville v. Chapman, 210 S.C. 157, 41 S.E.2d 865 (1947). In that case, the defendant was charged with twenty-three counts of adulterating milk. The evidence showed the defendant added water to the milk which was provided under contract to a single customer that was the victim of all the charges. The first crime was alleged to occur on February 10, 1944, and the last on September 20, 1945. So it was not "everyday" as Dayvault recites in the parenthetical to her citation of the case. Five counts were abandoned, so Chapman was tried on 18 counts across a 19-month time span. Without much explanation of the facts in the case, the Supreme Court observed the charges were supported by evidence provided by the same witnesses. The Supreme Court rejected a restrictive reading of "the same transaction" argued by Chapman "where the warrant was founded upon what was in substance a single criminal course of conduct." Id. at 161, 41 S.E.2d at 867.

Likewise, across only a thirteen-month timespan, the charges in the instant case, in substance, arose from a single course of conduct. The conduct behind both charges was identical: Dayvault became pregnant twice, both times while dating and living with her boyfriend, the presumptive biological father. Both times she hid her pregnancy from him and her mother. She avoided prenatal care even though, in both cases, she sought treatment for herself. Both times she gave birth in secret and disposed of the child, in secret. She provided the motive for both of the crimes in her statements to the police: She hid the pregnancies for financial reasons, to avoid disruption of her career, and to avoid judgment by her mother. The two homicides represent manifestations of the same course of conduct fueled by the same motive.

Dayvault complains the deaths in the instant case were separated by thirteen months. In State v. Cutro, 365 S.C. 366, 618 S.E.2d 890 (2005) (hereinafter Cutro 2), the deaths of two children were separated by nine months' time. Further, the common scheme or plan in the instant case necessarily took the length of a pregnancy to unfold, unlike Cutro 2. Therefore, Dayvault's primary argument does not posit a circumstance outside the boundaries of discretion entrusted to the trial court. Dayvault cites Cutro 2 for the basic law on joinder, but neglects to distinguish Cutro 2 despite its factually similar scenario in which two homicide abuse charges were united under a common scheme or plan and the same motive.

Cutro 2 involved, as in the instant case, the joinder of two homicide by child abuse charges for two different children. A third charge was for assault and battery of a third child, and Cutro was acquitted of that charge. The first child, Parker, ceased breathing and perished while in Cutro's daycare on January 4, 1993. Another child, Asher, suffered permanent brain damage while in daycare in June 1993. Ashlan, the third child, became the second fatality when he died at Cutro's

daycare in September 1993.

The Supreme Court already reversed the conviction for the killing of Ashlan in a prior opinion based on improper admission of the other incidents as prior bad acts because the Court found the prosecution failed to establish clear and convincing evidence of those acts. State v. Cutro, 332 S.C. 100, 504 S.E.2d 324 (1998) (Cutro 1). Cutro argued in Cutro 2 that her convictions upon retrial should have been reversed because the trial court erred in joining the three charges. The Supreme Court noted prior bad acts not the subject of conviction could only be admitted if established by clear and convincing evidence. However, when joining charges for joint trial, "procedural safeguards are already in place that eliminate the need for preliminary fact-finding by the trial judge . . . [because the charges are] subject to judicial procedures such as indictment and preliminary hearing." In Cutro 2, the prosecution's theory of the case was the acts were committed with the same motive, characterized as Munchausen Syndrome by Proxy (MSBP), a form of child abuse committed by the perpetrator to garner sympathy and attention for the perpetrator. Id. at 370, 618 S.E.2d at 892. The abuse in all three cases was inflicted by the same method, Shaken Baby Syndrome, in the same place, the daycare. The Supreme Court found joinder was proper, concluding: "These offenses clearly fit within the Lyle categories for common scheme or plan and motive." Id. at 375, 618 S.E.2d at 895.

Unlike the scheme in Cutro 2, individual manifestations of Dayvault's scheme took the length of a pregnancy to execute, and therefore, after the November 2017 death of the first baby, Dayvault executed the common scheme when she became pregnant the second time and, like the first pregnancy, concealed the second pregnancy. Both pregnancies were discovered by authorities at the same time, and Dayvault admitted both children's deaths to law enforcement at the same time. As in Cutro 2, the charges arose out of the same set of circumstances as part of the same common scheme

or plan and committed with the same motive.

The charges were proved by substantially the same evidence. The treating doctor from the prior pregnancy was the only significant witness testifying solely to the first charge. The same investigation determined both children were missing. More importantly, evidence of one charge is admissible as to the other charge even if Dayvault was tried separately for both charges.

In State v. McGaha, 404 S.C. 289, 297, 744 S.E.2d 602, 606 (Ct. App. 2013), this Court found, "Thus a substantial portion of the testimony the State presented at trial to prove the crimes against one child was the same evidence it would have used to prove the crimes against the other. Even though some of the evidence related only to one child, we find the evidence described above supports the trial court's determination that the separate charges would be proven by the same evidence."

Likewise, in the instant case, some evidence also related to only one infant, but important witnesses and evidence would be used to prove the crime against the other infant. One doctor (Dr. Brown) testified about treating Dayvault after the second pregnancy, while another doctor treated Dayvault during the first pregnancy. However, both charges were uncovered at the same time because it was only when Dayvault was found with a full term placenta and no child that law enforcement became aware of two missing children from two different pregnancies. Detective Lynch investigated both missing child cases simultaneously, it was the same investigation. Dayvault was interviewed at the same time for both charges and concomitantly discussed both pregnancies.

Even if tried separately, each homicide would be admissible as an extrinsic act for the prosecution of the other homicide.

Each crime is admissible evidence probative of proving the other crime. Prior bad acts may

be admissible when they establish (1) motive; (2) intent; (3) absence of mistake or accident; (4) a common scheme or plan; or (5) identity of the person charged. State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." Rule 404(b), SCRE.

Intent

Each crime was admissible to prove intent in the other crime. State v. Adams, 322 S.C. 114, 118, 470 S.E.2d 366, 369 (1996) (holding defendant's involvement in armed robbery a half hour before charged armed robbery was admissible to prove defendant's intent to rob second store) *overruled on other grounds by* State v. Giles, 407 S.C. 14, 754 S.E.2d 261 (2014); State v. Simmons, 310 S.C. 439, 427 S.E.2d 175 (1993) ("The evidence of appellant's violence against elderly women, each of whom was alone in her home at the time of the attack, makes more probable appellant's criminal intent when he entered [victim's] house since he already knew her to be an elderly woman.") *reversed on other grounds by* Simmons v. South Carolina, 512 U.S. 154 (1994).

In the instant case, Dayvault's intent was the chief focus of the case. A person is guilty of homicide by child abuse if (1) the person causes the death of a child while committing child abuse or neglect; and (2) the death occurs "under circumstances manifesting an extreme indifference to human life." S.C. Code Ann. §16-3-85(A)(1). "Child abuse or neglect" is defined under the homicide by child abuse statute as "an act or omission by any person which causes harm to the child's physical health or welfare[.]" S.C. Code Ann. § 16-3-85(B)(1).

"To prove a defendant guilty of homicide by child abuse, the State must demonstrate 'the

death occurr[ed] under circumstances manifesting an extreme indifference to human life.'" State v. Phillips, 411 S.C. 124, 767 S.E.2d 444 (Ct. App. 2014) (quoting section 16-3-85). "Extreme indifference is in the nature of a culpable mental state and therefore is akin to intent." State v. Jarrell, 350 S.C. 90, 98, 564 S.E.2d 362, 367 (Ct. App. 2002) (citation, ellipses, and internal quotation marks omitted). "In this state, indifference in the context of criminal statutes has been compared to the conscious act of disregarding a risk which a person's conduct has created, or a failure to exercise ordinary or due care." Id. The meaning of extreme indifference to human life in the context of a homicide by child abuse case is consistent with recklessness and indifference in reckless homicide cases. State v. McKnight, 352 S.C. 635, 645, 576 S.E.2d 168, 173 (2003). Thus, extreme indifference to human life can similarly be equated to "'a conscious failure to exercise due care or ordinary care or a conscious indifference to the rights and safety of others or a reckless disregard thereof.'" Id. (quoting State v. Tucker, 273 S.C. 736, 739, 259 S.E.2d 414, 415 (1979)). Each crime was probative evidence of the other because the requisite intent – extreme indifference – was the critical issue at trial.

In Simmons, the defendant was charged with murder and burglary in which the defendant broke into an elderly woman's house and crushed her skull by beating her with a toilet tank lid. During the guilt phase of the capital trial, the defense conceded murder but challenged the burglary charge which was the only statutory aggravating factor for the penalty phase. The defense alleged the prosecution could not prove the defendant entered the residence with an intent to commit a crime therein. The prosecution presented the defendant's confessions to three other burglaries in which the defendant physically and sexually assaulted elderly women. Simmons, 310 S.C. at 440-42, 427 S.E.2d at 176-77.

The Supreme Court rejected the defendant's claim the prior bad acts should not be admitted, finding the evidence of the other burglaries "logically relevant to the issue of intent." Id. at 442, 427 S.E.2d at 177. The Supreme Court explained:

> The evidence of appellant's violence against elderly women, each of whom was alone in her home at the time of the attack, makes more probable appellant's criminal intent when he entered Ms. Lamb's house since he already knew her to be an elderly woman. Although there was not sexual assault in Ms. Lamb's case, all of the previous sexual assaults were accompanied by terrific physical violence far beyond that needed to accomplish the sexual assault itself. Moreover, theft was not the overwhelming motivation in these prior cases. It is logical to conclude from the evidence that appellant was chiefly motivated in each case by an intent to violently injure an elderly woman. This evidence is therefore relevant to the issue of appellant's intent at the time he entered Ms. Lamb's home without her consent.

Id. at 442-43, 427 S.E.2d at 177-78. The Supreme Court also determined the probative value of the evidence outweighed the danger of unfair prejudice because intent was a contested issue. Id.

In Adams, Adams and his codefendant, Brown, robbed a convenience store at 5:30 a.m. and used the proceeds to buy and smoke crack cocaine. They ran out of crack and robbed a grocery store at 6:00 a.m. which resulted in the codefendant shooting the storeowner. Adams, 322 S.C. at 116-17, 470 S.E.2d at 368. The Supreme Court found evidence of the prior robbery of the convenience store was relevant to prove intent, explaining:

> The evidence that Adams participated with Brown in the robbery of the Circle K only half an hour before the robbery and murder at Johnny's Grocery is relevant to show Adams's intent. Adams was not the triggerman in the murder at Johnny's Grocery, but only an alleged accomplice. Therefore, to prove Adams was guilty of murder, the State had the burden of proving beyond a reasonable doubt that Adams combined with Brown to commit an unlawful act – armed robbery – and that homicide was a natural and probable consequence of the act planned. . . . Adam's mere presence with Brown at Johnny's Grocery cannot establish Adams's guilt; the prosecution must prove a

> combination. . . . Stated another way, Adams's intent to rob Johnny's Grocery with Brown was a prerequisite to his liability for murder.

Id. at 118, 470 S.E.2d at 369. The Court then concluded the first robbery tended to show that when Adams entered the second store with Brown, they both intended to rob the store, thus being probative of Adams's intent to combine with Brown, an essential element of proof for murder under the hand of one, hand of all doctrine. Id. at 119, 470 S.E.2d at 369.

In the instant case, the requisite intent was the disputed issue. The defense strategy was not to dispute that the newborn children died while in Dayvault's care, but to dispute she acted with extreme indifference, or committed child abuse at all. Dayvault's attorney argued in closing, "It's not child neglect not to seek prenatal care, **when there's no problems with the pregnancy**." R. p. 269, lines 9-10. He added, "It's not child neglect to have your baby at home." R. p. 269, lines 11-12. Dayvault's argument as to the December 2018 charge is refuted by the existence of a problem with the prior pregnancy, the November 2017 birth. The lack of any change in Dayvault's furtive and indifferent behavior during the second pregnancy belies any contention that she ever intended a different result – with either pregnancy.

Critically, the issue was whether Dayvault exhibited an intent to harm or allow harm to each child that amounted to extreme indifference. Dayvault's visit to the emergency room for flu or cold-like symptoms showed she did not reveal her pregnancy, but rather it was discovered by Dr. Carreras. Dayvault did not receive prenatal care before the appointment and no record appeared showing she sought prenatal care after the visit despite the physician's recommendation she seek such care. This child died, yet during Dayvault's second pregnancy, she again did not seek prenatal care even though she was on notice of a clinic that could provide care regardless of her financial situation, and

experience taught her the danger to her child if she did not seek care. This failure to seek care after the events of the first death display an indifference to the life and health of the second child, and therefore, evidence of the first charge is relevant to prove Dayvault's extreme indifference for the second charge.

Common scheme or plan

Both crimes are admissible under the common scheme or plan exception as both crimes are strikingly similar and each offense is proof that the common plan was being carried out in the other. "Whether such crime was committed as part of a common plan or system was wholly immaterial, unless proof of such system would serve to identify the defendant was the perpetrator of the particular crime charged or was necessary to establish the element of criminal intent. Proof of a common plan or system, therefore, in this connection is merely an evidential means to the end of proving identity or guilty intent." State v. Lyle, 125 S.C. 406, 118 S.E. 803, 811 (1923). In State v. Tutton, 354 S.C. 319, 328, 580 S.E.2d 186, 191 (Ct. App. 2003), this Court observed the common scheme or plan evidence is admissible when there is a pattern of continuous illicit conduct because the pattern "clearly supports the inference of the existence of a common scheme or plan, thus bolstering the probability that the charged act occurred in a similar fashion." In the instant case, proof of Appellant's system is probative to prove her guilty intent: her extreme indifference to the life of her newborn children. Her scheme was to hide any unwanted pregnancies – and births – to avoid disruption, financial burden, and her mother's reproach.

For example, this Court held evidence of prior bad acts admissible under the common scheme or plan where an attempted robbery and prior robbery were so similar to the incident for which the defendant was charged. State v. Ford, 334 S.C. 444, 452, 513 S.E.2d 385, 389 (Ct. App.

1999). In Ford, the victim of the robbery testified Ford and his accomplice robbed him once before at gunpoint, telling him they would shoot him if he did not give them $200 every time they saw him. They attempted to rob him again two months later. Id. at 451, 513 S.E.2d at 388. This Court found the prior robbery and attempted robbery provided "a necessary element in understanding their motive and intent when they accosted" the victim in the charged incident two months after the attempted robbery. Id. at 452, 513 S.E.2d at 389. This Court concluded, "The previous robbery and attempted robbery . . . were so similar to the incident for which Ford and [accomplice] were charged that they tend to establish both the existence of a common plan and the fact that the plan was being carried out." Id. Likewise, in the instant case, the similarities between each birth and death establish the existence of a common plan.

The Supreme Court recently reaffirmed the viability of the common scheme or plan exception in State v. Cotton, 430 S.C. 112, 844 S.E.2d 56 (2020). The Supreme Court found in a prosecution for kidnapping and sexual misconduct in the first degree of a young woman, the trial court did not err in admitting similar extrinsic acts against a second woman. The Supreme Court noted in both cases, Cotton picked up the women for a date, quickly became aggressive, and forced the women to perform oral sex on Cotton. He then drove them to a secluded location in the woods and raped the women outside the car before driving the women home. See also Morgan v. Foretich, 846 F.2d 941, 944 (4th Cir. 1988) (finding in a civil case brought by daughter against father and his parents, evidence of sexual abuse of the other daughter was admissible because "it tended to identify the defendants as the perpetrators of the crime against [plaintiff daughter] since only the defendants had access to both girls.").

In the instant case, the crimes were carried out the same way – Dayvault hid her pregnancy

from everyone, including her family. She avoided medical attention for her pregnancy. She gave birth in isolation in her own home, in her bathroom. She disposed of the baby by putting the baby in the trash. She did not call 911. Dayvault's crimes were committed in secret, but the evidence illuminated Dayvault's scheme and meets the acid test of relevancy for the common scheme or plan exception. Cutro, 332 S.C. at 103, 504 S.E.2d at 325 ("The acid test of admissibility is the logical relevancy of the other crimes."); State v. Perry, 430 S.C. 24, 44, 842 S.E.2d 654, 665 (2020) (finding a logical connection between the extrinsic act and the charged act must exist which reasonably proves a material fact in issue).

Motive

Both crimes are united by a common motive. Dayvault did not want the financial hardship of raising the children, did not want the interruption in her life and career, and did not want her mother to find out. This sentiment remained unchanged from one pregnancy to the next, so Dayvault's motive remained static during the course of both crimes.

"[T]he prosecution is permitted to prove the accused's motive to identify the accused as the perpetrator of the charged crime." Mitchell v. State, 865 P.2d 591, 596-97 (Wyo. 1993). "While intent accompanies the actus reus, the motive comes into play before the actus reus. The motive is a cause, and the actus reus is the effect." Id. at 597 (quoting Edward J. Imwinkelried, Uncharged Misconduct Evidence (1992 & Supp. 1993)). "That the defendant had a motive for that particular crime increases the inference of the defendant's identity. . . . It is ideal if the defendant is the only person with such a motive. . . . The courts assume that motive has strong probative value because a motive naturally leads to action." Id. (quoting Imwinkelried).

Mitchell took an in-depth look at the use of motive to prove a crime. The Wyoming court

observed:

> Uncharged misconduct evidence to prove motive is found in two forms. . . . In one form . . . the act of uncharged misconduct supplies the motive for the charged crime. . . . A concrete example of this form is the defendant committing murder to eliminate a witness to the defendant's uncharged misconduct. . . . The second form . . . . is described this way:
>
> > The act of uncharged misconduct evidences the motive; the motive again is the cause, the uncharged act is one effect, and the uncharged act tends to show the motive that produces the charge[d] act, the other effect. Both crimes are explainable as a result for the same motive.

Id. at 597 (citing and quoting Imwinkelried) (citations and internal quotation marks omitted).

Mitchell continued with another block quote from the Imwinkelried article, partly quoted below:

> The courts typically invoke this theory of relevance when the motive is in the nature of hostility, **antipathy**, hatred, or jealousy. When the evidence is offered to identify the defendant, the emotion must be directed at the victim or a defined class which included the victim. The prosecutor's case for admissibility is strongest when the sole object of the [emotion] is the victim. . . . However, **the courts have also admitted evidence of acts evidencing [emotion] against a class which included the victim. . . . There must be some relationship between all the victims.**

Id. (quoting Imwinkelried) (emphasis added).

In State v. Cheeseboro, 346 S.C. 526, 552 S.E.2d 300 (2001), evidence of another murder committed by Cheeseboro was properly admitted under the common scheme or plan exception during the murder trial because forensic evidence showed the same gun was used in both shootings: "This fact establishes a substantial connection between the two crimes that supports the admission of evidence regarding the cab driver murder." The evidence was also admissible to show identity and

motive because both murders occurred during robberies and the appellant expressed a need for money in writing about the killings in his letters to a fellow inmate. Id. at 547, 552 S.E.2d at 311.

The opinion in State v. Bell, 302 S.C. 18, 393 S.E.2d 364 (1990) presents an unusually horrific fact pattern that nonetheless examines the common scheme or plan, intent, and motive exceptions under Lyle. Bell was tried, convicted, and sentenced to death for the murder of Debra Mae Helmick. From the start, the opinion noted, "The facts of the instant case must be considered together with the facts surrounding the abduction and murder of Shari Faye Smith . . . ." Id. at 21, 393 S.E.2d at 366. Shari was kidnapped and murdered two weeks before Helmick was kidnapped and murdered. Shari's family then was engaged in several phone conversations with Bell which were recorded. In the first recording, Bell described his abduction of Shari. In the second recording, Bell gave directions to the Smiths to the location of Shari's body. The third call, later supplemented by the fourth call, described in ghastly detail the sexual assault, torture, and murder of Shari. The fifth and final recording to the Smiths gave directions to locate Helmick. Id. at 26-27, 393 S.E.2d at 368-69.

The Supreme Court found the tapes that provided evidence of an abundance of bad acts including the murder of Shari were admissible:

> The evidence contained on the tapes was relevant here. It connected Bell to the commission of the murder of Debra by demonstrating the similarities between the Helmick and Smith murders. It was also relevant because the Smith and Helmick murders were so intertwined.

Id. at 28, 393 S.E.2d at 369.

Determining that the common scheme or plan exception was met, the Supreme Court noted:

> The state demonstrated that Bell devised a plan to kidnap and murder young, blonde girls and then utilize the Smith family as a platform to

> disclose the crimes. . . . the murders of Shari and Debra were joined together through Bell's own actions. The plan and commonality of the two crimes, such that the first crime tends to prove the second crime, is disclosed throughout the tapes.

Id. at 28-29, 393 S.E.2d at 370. Of importance to the Supreme Court was the probative value as to the cause of death for Helmick:

> In the third tape, Bell recounted how Shari Smith died. He told Dawn Smith that Shari died by suffocation. The manner of Shari Smith's death – suffocation by duct tape – was consistent with the way Debra died. A SLED analyst testified that residue found in Debra's hair was consistent with the type of adhesive found on duct tape. Thus, it could be concluded that Debra suffered death in a manner identical to that of Shari.

Id. at 29, 393 S.E.2d at 370. The Supreme Court held: "the circumstances surrounding the murder of Shari Smith were so blended with the murder of Debra that the proof of Shari's murder established the material fact that Bell murdered and kidnapped Debra." Id. Accordingly, the Supreme Court concluded, "By his own actions, Bell linked the two crimes together, and consequently, the evidence on the tapes was probative of his conduct." Id.

The Supreme Court also found the recorded conversations with the Smith family were admissible as evidence of Bell's motive and state of mind when he kidnapped and murdered Debra. Bell's recounting his sexual experiences with Shari demonstrated a possible sexual motive for kidnapping Helmick. Helmick was found with an extra pair of adult female silk bikini underwear on top of her children's underwear. The Supreme Court explained, "Although Debra's body was too decomposed to ascertain whether sexual intercourse of the like had occurred, the existence of the adult underwear on the child was evidence that Bell was impelled to kidnap her for bizarre sexual reasons." Id. at 29-30, 393 S.E.2d at 370-71. As in Bell, the circumstances of both births and deaths

were so blended that proof of each act was proof of the other. The circumstances of each birth and death likewise highlighted Dayvault's motive and state of mind in each filicide.

Absence of mistake or accident

As discussed in the statement of facts, defense counsel during opening argument claimed both pregnancies were "unexpected" – in other words, Dayvault did not know she was pregnant. In People v. Lisenba, 94 P.2d 569 (Cal. 1939), a bizarre case for sure, the defendant managed to entice a venomous snake to bite his wife's toe, but when that failed, he drowned her in a shallow pool in the yard. The motive was to collect life insurance from the wife's death. The California Supreme Court found no error for the introduction of the drowning death of his first wife in a bathtub in Colorado, which resulted in his collecting a life insurance settlement. In both cases, the defendant asked an agent if he could be a beneficiary for a life insurance policy when he was not married to the women, and each time married them shortly afterwards when told he could not be a beneficiary to the women unless he was married to them. Id. at 581-82.

The California Court found the evidence of the prior uncharged act admissible, quoting its own authority as follows:

> Upon principle and authority it is clear that where a felonious intent is an essential ingredient of the crime charged, and the act done is claimed to have been innocently or accidentally done, or by mistake, or when the result is claimed to have followed an act lawfully done for a legitimate purpose, or where there is room for such an inference, it is proper to characterize the act by proof of other like acts producing the same result as tending to show guilty knowledge, and the intent or purpose with which the particular act was done, and to rebut the presumption that might otherwise be obtained.

Id. at 582 (citations and quotation marks omitted).

Defense counsel's argument, if made during a trial solely on the 2018 filicide, would absolutely open the door to evidence of the 2017 filicide. State v. Dunlap, 353 S.C. 539, 541, 579 S.E.2d 318, 319 (2003) (finding defendant opened the door to distribution of an imitation substance when defense counsel, during opening argument said defendant was hooked on crack cocaine, but never sold it); see State v. Brown, 277 S.C. 203, 204, 284 S.E.2d 777, 778 (1981) ("An opening statement serves to inform the jury of the general nature of the action and defenses involved in a case so they will be better prepared to understand the evidence presented."). As previously noted, during the interview with law enforcement, Dayvault admitted she knew when she saw Dr. Carreras that she was pregnant. State's Exhibit 17 (circa 2:30). The 2017 child's home-birth was not unexpected, and is proof negating the claim she was unaware of her pregnancy during the 2018 home-birth. Accordingly, the 2017 pregnancy is probative to rebut counsel's assertion that Dayvault did not know she was pregnant in 2018.

The probative value of the 2018 filicide for proof of the 2017 filicide is enhanced because the child in the 2017 filicide was never found.

In the instant case, the probative value of the 2018 filicide to a prosecution for the 2017 filicide is enhanced by the fact that the child birthed in 2017 was never found. People v. Ruiz, 749 P.2d 854 (Cal. 1988) is illustrative on this point. The defendant married Tanya Ruiz in 1972, and Tanya disappeared in 1975. The defendant was not charged with her death until the discovery in 1979 of the bodies of the defendant's subsequent wife, Pauline, and her son. The defendant challenged joint trial for the three murders. In both cases, the defendant was elusive and unconcerned about the whereabouts of the missing wives. The defendant told Tanya's grandmother he did not want to start any trouble when she suggested he call the police, and all he told others

afterwards was Tanya left. In October 1978, Pauline and her son disappeared from the family ranch. Although Pauline and her son ceased communicating with relatives, the defendant claimed they left in a white car and only returned to retrieve some more belongings. However, their bodies were later found buried on the ranch. Id. at 857-59. On the other hand, Tanya's body was never discovered, although circumstantial evidence indicated the disappearance signaled her death. Id. at 860.

The California Court noted the similarities between the two sets of murders. First both cases involved a wife abruptly disappearing under suspicious circumstances. In both cases, the defendant was undisturbed and uncooperative with efforts to find the missing wives. The California Court observed:

> It is true that the prosecution's case against the defendant for Tanya's murder was relatively weak, supported only by circumstantial evidence and inferences one might draw therefrom. . . . [W]ith the discovery of Pauline and [son]'s bodies, the Tanya murder case suddenly became much stronger. **But that circumstance is one favoring, rather than disfavoring, joinder of these offenses.** The fact that defendant had killed Pauline was quite relevant to the question whether he had killed Tanya; indeed, Pauline's death was relevant to the critical issue whether Tanya too had died of some criminal agency.

Id. at 606 (emphasis added).

Our Supreme Court recognized "the inherent difficulties" in prosecuting homicide by child abuse cases, and favorably quoted Chief Justice Toal as follows:

> Child abuse differs from other types of crimes in several respects. Specifically, the crime of child abuse often occurs in secret, typically in the privacy of one's home. The abusive conduct is not usually confined to a single instance, but rather is a systematic pattern of violence progressively escalating and worsening over time. Child victims are often completely dependent upon the abuser, unable to defend themselves, and often too young to alert anyone to their horrendous plight or ask for help.

State v. Smith, 406 S.C. 215, 220, 750 S.E.2d 612, 613 n.7 (2013) (quoting State v. Fletcher, 379 S.C. 17, 27, 664 S.E.2d 480, 484-85 (2008) (Toal, C.J. dissenting)). In the instant case, only Dayvault witnessed each child's brief lifespan, no other knew of either child's existence until the child passed from this world. Accordingly, each act carries enhanced probative value in proof of the other. In particular, like Ruiz, the 2018 filicide is probative because the child born in 2017 is missing.

In the instant case, as discussed above, Dayvault committed both crimes in the same fashion, in the same location, for the same reasons. This met the common scheme or plan exception. Intent was very much an issue as the only defense to the charges was the absence of the requisite criminal intent. Her actions with the second child, including lying about the location of the body, was relevant to proving her extreme indifference to both children. Her intentional evasion of prenatal care for both children, after even being presented with the opportunity for free prenatal care through a clinic at the time of her first pregnancy is likewise probative of her extreme indifference. Defense counsel would have opened the door to the 2017 pregnancy because he claimed during opening argument the births were unexpected. Suddenly, the 2017 birth, not a surprise to Dayvault, becomes relevant to prove absence of mistake or accident. Finally, as discussed in Bell and Mitchell, each crime was committed with the same motive, a resolve to not be saddled with the burdens and apparent shame of unwanted pregnancy or birth. It is important to note that the first homicide case is a missing body homicide. Therefore, like Ruiz, the second homicide becomes relevant to prove both the actus rea and the corpus delecti for the first homicide.

Res Gestae

Dayvault spent eighteen months of a twenty-two month span in her life hiding pregnancy, birth, and death (all during the two-year relationship with her live-in boyfriend). For this reason, evidence of each filicide is the res gestae of the other, notwithstanding the requirements of temporal proximity.[4] The 2017 filicide was only discovered because of the 2018 filicide. The 2018 filicide was a continuation of the same sentiment that Dayvault did not want to raise another child or have the existence of her pregnancy exposed to those around her. Both charges were simultaneously discovered and investigated.

In Mackbee v. State, 575 So.2d 16 (Miss. 1990), while investigating a vehicle that burned on the highway, and after the defendant was seen beside the parked vehicle, an officer found two charred bodies, one on top of the other. The prosecution tried each murder separately and the opinion is an appeal for the murder of Montgomery, the owner of the vehicle. The defendant complained about evidence and testimony presented concerning the other victim. The Mississippi Court rejected this argument, explaining: "Simply put, the investigators did not know that Mackbee would be charged in separate indictments for the murders. They did not know that they would have to fix their cameras in such an angle which would do the impossible – photograph only one body in the trunk. The only way they could do this was to remove one body from the top of the other. Of course this would leave them open to an accusation of tampering with the evidence." Id. at 28.

This Court noted the following:

> One of the accepted bases for the admissibility of evidence of other crimes arises when such evidence "furnishes part of the context of the

[4] State v. Sweat, 362 S.C. 117, 606 S.E.2d 508 (Ct. App. 2004) (finding temporal proximity of other acts to the charged crime is important in determining admissibility).

> crime" or is necessary to a "full presentation" of the case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its "environment" that its proof is appropriate in order "to complete the story of the crime on trial by proving its immediate context or the 'res gestae'" or the "uncharged offense is 'so linked together in point of time and circumstances with the crime charged that one cannot be fully shown without proving the other' [and is thus] part of the res gestae of the crime charged."

State v. Preslar, 364 S.C. 466, 474, 613 S.E.2d 381, 385 (Ct. App. 2005) (citations omitted).

In the instant case, during her interview with law enforcement, both missing children were discussed simultaneously. It becomes difficult at times to even know which child Dayvault is discussing or if she is talking about one of the children, or both of them. However, a lot of the time, she is talking about both of them: when she said she "just couldn't" put the child up for adoption, she means both of them; when she says she just panicked, she means both of them; when she admits she has no excuse, she means both of them. The fear of facing her mother is constant, so her statement she was afraid of her mother is an explanation for both filicides. The interview, integral to each charge, is difficult, if not impossible to present to the jury without allusion to the other charge.

The charges are, of course, of the same general nature and no substantial right of the appellant is violated by trying the charges together.

The charges are identical charges, each filicide occurred under nearly identical circumstances, so naturally the charges are of the same general nature. See Cutro 2.

Finally, because each charge would be admissible in the trial for the other charge, Dayvault suffered no deprivation of a substantial right. Importantly, the trial court reminded the jury it was required to make two separate decisions and the State bore the burden of proving each charge beyond a reasonable doubt. The trial court's persistent instructions demanding the jurors consider each

instruction separately limited any danger of prejudice from the joint trial. Moreover, Dayvault does not challenge Judge John's denial of directed verdict. Here, Cutro 2 is once more implicated. Regarding the danger of unfair prejudice from joinder, the Supreme Court held:

> [I]n the joinder context, the defendant may argue unfair prejudice if, after the State's case, the trial judge determines that a directed verdict should be granted. . . . If the trial judge finds there is no substantial evidence to submit any one of the joined charges to the jury, the defendant may move for a mistrial on the basis of unfair prejudice resulting from joinder.

Cutro 2, 365 S.C. at 375, 618 S.E.2d at 894. In the present case, because evidence was sufficient to allow the jury to render a verdict, Dayvault was not exposed to the danger of unfair prejudice and no substantial right of hers was violated. Accordingly, the trial court did not abuse its discretion.

CONCLUSION

For all of the foregoing reasons, the judgment and convictions of the lower court should be affirmed.

Respectfully submitted,

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December 13, 2021

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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County
Honorable Steven H. John, Circuit Court Judge

THE STATE OF SOUTH CAROLINA,

Respondent,

vs.

ALYSSA ANNE DAYVAULT,

Appellant.

Appellate Case No. 2020-001515

CERTIFICATE OF COUNSEL

The undersigned certifies that 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."

Respectfully submitted,

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