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Jul 27 2022
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

MALETTE DENISE KIMBROUGH,

APPELLANT.

APPELLATE CASE NO. 2019-001013

Appeal from Greenville County
Honorable Letitia H. Verdin, Circuit Court Judge

Opinion No. 2022-UP-293 (Ct. App. filed July 13, 2022)

PETITION FOR REHEARING

Appellant seeks rehearing pursuant to Rule 221(a), SCACR, because this Court may have overlooked the fact that the jury instruction that malice may be inferred from the use of a deadly weapon had to be prejudicial in this case since all of the evidence was that appellant and the decedent were friends, and there was no evidence of any disagreement, argument, or any bad blood between them. It is hard to fathom where the jury could have found malice in this case if it was not, at least in part, from the jury instruction which allowed it to infer malice from the fact a deadly weapon killed the victim.

Further, this Court may also have overlooked the fact that a police officer repeating what an eyewitness -- the decedent's daughter -- told her about the alleged critical moments of the

aftermath of the victim's death was hearsay, and it was, most respectfully to this Court, a stretch to hold that this critical statement to the police was admissible only to show what the police did not next. It was not even needed to explain that.

Finally, this Court also misapprehended the key and long-time respected tradition in this stat that law enforcement witnesses are fact witnesses and that they should not give their opinions about who "was cleared" during a police investigation anymore than they should testify about whether they think the defendant on trial is guilty. The extent of the law enforcement investigation or the lack of it can be a key consideration for the jury in determining reasonable doubt. Opinions on the veracity or criminal culpabilities of various players during a criminal trial is not a proper role for law enforcement witnesses. In this case, Investigator Bailey testified that Portia Rogers, who was angry and shot a gun on the night of the homicide, was "absolutely cleared" as a suspect as "a result of information he received during his investigation" . . .so "he personally eliminated Rogers as a suspect . . ." This testimony should have been excluded.

I. Erroneous malice instruction found harmless.

This Court correctly found the malice may be inferred from the use of a deadly weapon instruction was error. In State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019), our Supreme Court held that the judge erred by instructing the jury that malice could be inferred from the use of a deadly weapon. In the particular facts of Burdette, the Supreme Court noted there was evidence which would reduce, mitigate, excuse, or justify the homicide as previously held in State v. Belcher, 285 S.C. 597, 685 S.E.2d 802 (2009), to make the inferred malice instruction improper. However, the Supreme Court in State v. Burdette held that, regardless of the evidence presented at trial, "a trial court shall not instruct a jury that it may infer the existence of malice when the deed was done with a deadly weapon."

There was no doubt that the decedent in this case was shot with a deadly weapon. This was a purely circumstantial evidence case where the only evidence was that appellant and the decedent were friends. There was no evidence they ever argued or even disagreed.

As to the suspicion evidence, appellant left the decedent's house on the night of the murder. Appellant also had money in her possession when she arrived at her daughter's apartment in the time period after the murder. The only evidence in this case was that the decedent did not have money. Appellant, conversely, had obtained a loan of over $800 from a loan company two days before the shooting. Thus, while appellant having money in her possession when she went to her daughter's apartment in the early morning hours may look suspicious, there was no evidence in the record this money came from the decedent. Appellant's dress that morning may have been suspicious but drugs may have been involved --- this evidence regarding appellant at her daughter's home was not evidence she killed the decedent with malice aforethought. This was a purely circumstantial evidence case where the state's case only raised a suspicion that appellant was guilty.

This Court cited to its own opinion in State v. Franks, 432 S.C. 58, 849 S.E.2d 580 (Ct. App. 2020) in finding the error harmless. In Franks, this Court wrote:

> Aside from the instruction challenged on appeal, the trial court charged the jury that malice was the "intentional doing of a wrongful act without just cause or excuse [ ] and with an intent to inflict an injury" and that malice could be inferred from conduct showing a total disregard for human life. The trial court did not charge any lesser-included offenses and the record contains no evidence that would tend to reduce, mitigate, excuse, or justify the homicide. Therefore, notwithstanding this was a circumstantial evidence case, *no conflicting evidence concerning the shooter's intent was presented. Furthermore, the jury submitted three questions to the trial court during deliberations and none of these concerned malice.* Although we are mindful that the instruction is now improper regardless of the evidence presented at trial, as Franks points out, his defense focused on discrediting the State's

> theory that he was the shooter *and suggesting a third, unknown person may have committed the act. However, the trial court did not allow Franks to present evidence of third-party guilt at trial, and Franks did not appeal that ruling.* We acknowledge malice is an element of murder, meaning the State has the burden of proving that element beyond a reasonable doubt. Nevertheless, because the pivotal question before the jury in this case was whether Franks was the shooter and no evidence was presented tending to reduce, mitigate, excuse, or justify the homicide, the instruction was not misleading or confusing.

State v. Franks, 432 S.C. 58, 81-82, 849 S.E.2d 580, 593 (Ct. App. 2020).

This case is very different from Franks factually and legally. There was also evidence the defendant in Franks was being "hyper," "wild," and being loud on the night of the murder. State v. Franks, 432 S.C. 58, 65, 849 S.E.2d 580, 584 (Ct.App. 2020). Conversely, the only evidence in this case was that appellant was getting along well with the decedent, as she always did on the night the decedent was killed, and there was no motive or intent for the murder. Further, the jury here returned with questions about "the definition of reasonable doubt versus a hundred percent positively guilty," and "Can the Defendant be guilty of murder and not guilty of possession of a weapon," and "what is the definition of possession [of a weapon] in commission of a crime?" R. 309, l. 17 – 317, l. 3.

In answering the last question the judge told the jurors that a "firearm means any machine gun, automatic rifle, *revolver, pistol,* or any weapon which is designed to or may be readily converted to expel a projective." R. 316, ll. 7-10. (Emphasis added). The judge had very recently charged those jurors that *"malice may, also, be inferred from the use of a deadly weapon.* A deadly weapon is any article. Instrument, or substance which is likely to cause death or great body harm. Whether an instrument has been used as a deadly weapon depends on the facts and circumstances in each case. A gun may be a deadly weapon, even if it is not operating." R. 304, l. 25 – 305, l. 5. (Emphasis added). There was no doubt that the decedent in

this case was killed with a deadly weapon, and that the jury was erroneously allowed to infer malice from that fact. Finally, was no attempt by the defense to name a third-party murderer, as in Franks, that was denied by the trial court, and not appealed here. Appellant did challenge, and continues, to challenge the Investigator taking it up himself to "clear" Portia Rogers as a natural suspect in this case.

The evidence of malice in this case *was it being inferred* from the use of a deadly weapon. This Court should reconsider its harmless error holding and grant rehearing.

II. Investigator Bailey repeating what the victim's daughter told him she saw when she last viewed her mother in appellant's presence, and what she saw when she found her mother dead shortly afterwards with appellant gone was extremely prejudicial hearsay. The daughter's testimony being repeated by Bailey added to its prejudicial effect, and its repetition was not even needed to explain what law enforcement did next in the investigation.

Investigator Antonio Bailey's testimony regarding what decedent's daughter, Ruby Lynn Smith, told him about the murder was hearsay. It was offered for the truth of the matter asserted. Investigator Bailey testified over objection:

> She [Ruby Lynn Smith] indicated that -- she talked about her mother being on a breathing machine and that she had to get up to put water in her mother's breathing machine. I think she indicated that she got up maybe around 4:00 to put – to go in her mother's room to put water in this machine. After she -- she said when she walked in the room, her mom was there in the bed. She put water in the machine. And there was -- Denise was sitting in a chair in her bedroom. She said, you know, she left and came back about maybe *30 or 45 minutes later. And she noticed that Denise was gone and her mother was laying there with – bleeding from the head.*

R. 132, l. 25 – 133, l. 11. (emphasis added).

Hearsay is an out of court statement offered to prove the truth of the matter asserted therein. Rule 801 (c), SCRE; State v. Brown, 317 S.C. 55, 451 S.E.2d 888 (1984). The rule against hearsay prohibits the admission of evidence of an out of court statement to prove the truth of the matter asserted unless an exception to the rule applies. See Rule 802, SCRE; State v. Price, 368 S.C. 494, 629 S.E.2d 363 (2006).

Here, the testimony was meant to prove that when the decedent was last seen alive appellant was with here. When she was next seen thirty to forty-five minutes later she was dead and appellant was gone. This was inadmissible hearsay, and it was totally unnecessary to explain why law enforcement investigated appellant as a suspect. Appellant was one of the last, if not the last person, seen with the decedent on the night of her death. She was naturally a

suspect for that reason, and that was all law enforcement had to say about why they came to interview her. Repeating of what the decedent's daughter told Investigator Bailey was gratuitous, and it was not necessary to impart this investigatory fact to the jury.

Further, repetition of inadmissible only makes it all the more prejudicial. See Jolly v. State, 314 S.C. 17, 443 S.E.2d 566 (1994). (Although such repetition can no longer *never be harmless error*, its holding on such repetition of hearsay enhancing its prejudicial effect remains good law).[1] This Court should grant rehearing.

III. Law enforcement witnesses are supposed to be fact witnesses, and should not give opinions on which persons they think are innocent or guilty.

Portia Rogers was a natural suspect in the murder for the reasons above. While third-party guilt was never formally discussed in this case, it was apparent that the solicitor chose to take it head on as to the prospect of Portia Rogers being considered the murderer or a very likely suspect in the murder.

In context, it is apparent that Investigator Bailey told the jury that based upon information that he was privy to, but that was not available to the jury, that Portia Rogers was cleared as a suspect, and that she did not have "anything to do with killing her" in Bailey's opinion based on the "information" he had received. See State v. Shuler, 344 S.C. 604, 630, 545 S.E.2d 805, 818 (2001) (Improper [bolstering] occurs when the prosecution places the government's prestige behind a witness . . . or where a prosecutor implicitly vouches for a witness' veracity by indicating information not presented to the jury supports the testimony." (citation omitted)); Id. at 631, 545 S.E.2d at 819. *Conceptually*, while the solicitor was not vouching for witnesses the jury never heard from, Investigator Bailey was doing exactly that when he boldly asserted that Portia Rogers had been cleared as a suspect, and that he was confident Portia had nothing to do

[1] Overruled in Thompson v. State, 423 S.C. 235, 814 S.E.2d 487 (2018).

with the murder. In short, the jury should take the word of government agent Bailey that suspect Portia had been "cleared as a suspect" based on information Bailey had allegedly received from others that he found credible. This inadmissible hearsay evidence was prejudicial to appellant as it impermissibly sought to remove the reasonable doubt of appellant's guilt by impermissibly absolving Portia Rogers through hearsay evidence where third party guilt had been legitimately raised by the trial evidence, and the solicitor chose to fight it. R. 161, ll. 1-17. Cf. State v. King, 422 S.C. 47, 810 S.E.2d 18 (2017) (holding the officer's testimony that she allegedly learned from neighbors that they had heard multiple shots, where King's defense was that his gun discharged one time accidentally during the robbery attempt, was inadmissible hearsay).

A similar law enforcement opinion issue has recently been argued in our Supreme Court following the grant of certiorari from this Court's in State v. Middleton, 2020-UP-271, Shearouse's Adv. Sh. #38 (filed September 30, 2020). This Court should respectfully grant rehearing, and withhold ruling pending the Supreme Court's opinion in Middleton.

Respectfully Submitted,

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This 27th day of July, 2022.

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APPELLANT.

APPELLATE CASE NO. 2019-001013

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the petition for rehearing in the above-referenced case has been served upon William Edgar Salter III, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 27th day of July, 2022.

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Subject: 2019-001013 The State v. Malette Denise Kimbrough
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Attachments: 2019-001013 The State v. Malette Denise Kimbrough - Petition for Rehearing.pdf

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Attached is a petition for rehearing which will be filed with the Court of Appeals today in the above-referenced case.

Thank you.

Sincerely,
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