RECEIVED
Dec 01 2022
SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Greenville County
Letitia H. Verdin, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MALETTE DENISE KIMBROUGH,

PETITIONER

Opinion No. 2022-UP-293 (S.C. Ct. App. Filed July 13, 2022)

APPELLATE CASE NO. 2019-001013

APPENDIX

ROBERT M. DUDEK
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General
Rembert Dennis Building
1000 Assembly Street, Room 519
Columbia, SC 29201
(803) 734-3727

W. JEFFRY WESTON
Assistant Solicitor- Thirteenth Circuit
305 E. North St. #325
Greenville, SC 29601
(864) 467-8647

ATTORNEYS FOR RESPONDENT

INDEX

INDEX..i

FINAL BRIEF OF APPELLANT...1

FINAL BRIEF OF RESPONDENT..29

STATE V. KIMBROUGH, OP. NO. 2022-UP-293 (S.C. CT. APP. FILED JULY 13, 2022)......57

PETITION FOR REHEARING...61

ORDER DENYING PETITION FOR REHEARING...70

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable Letitia H. Verdin, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MALETTE DENISE KIMBROUGH,

APPELLANT

APPELLATE CASE NO. 2019-001013

FINAL BRIEF OF APPELLANT

ROBERT M. DUDEK
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE 2

STANDARD OF REVIEW 3

ARGUMENT

1.

The court erred by instructing the jury that malice may be inferred from the use of a deadly weapon since this instruction on inferred malice was error, and prejudiced appellant in this purely circumstantial evidence case where there was no evidence of any animus between appellant and the decedent. 4

Relevant Facts 4
The First Hearsay Objection 10
Request to Charge and Objections 13
Charge on the Law 14
Discussion 14

2.

The court erred by allowing Greenville investigator Antonio Bailey to testify the decedent's daughter, Ruby Smith, told him she checked on her mother around 4:00 a.m. while the decedent was in bed with appellant sleeping in a lounge chair in the decedent's bedroom, and that when she returned thirty to forty-five minutes later, appellant was gone and the decedent was shot in the head, since this was prejudicial hearsay 16

Relevant Facts 16

3.

The court erred by allowing Greenville County investigator Antonio Bailey to testify as a result of information he received Portia Rogers "was absolutely cleared" as a suspect in the

decedent's death since Bailey's opinion on Portia's innocence was based on inadmissible hearsay and it was prejudicial 19

Relevant Facts 19
Discussion 20

CONCLUSION 22

TABLE OF AUTHORITIES

Cases

Clark v. Cantrell, 339 S.C. 369, 529 S.E.2d 528 (2000)........ 3

Griffith v. Kentucky, 479 U.S. 314 (1987)........ 14

Jolly v. State, 314 S.C. 17, 443 S.E.2d 566 (1994)........ 17

State v. Baccus, 367 S.C. 41, 625 S.E.2d 216 (2006)........ 3

State v. Belcher, 285 S.C. 597, 685 S.E.2d 802 (2009)........ 14

State v. Brown, 317 S.C. 55, 451 S.E.2d 888 (1984)........ 16, 19

State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019)........ 13, 14, 15

State v. Douglas, 369 S.C. 424, 632 S.E.2d 845 (2006)........ 3

State v. King, 422 S.C. 47, 810 S.E.2d 18 (2017)........ 20

State v. Logan, 405 S.C. 83, 747 S.E.2d 444 (2013)........ 13

State v. Price, 368 S.C. 494, 629 S.E.2d 363 (2006)........ 16, 19

State v. Shuler, 344 S.C. 604, 545 S.E.2d 805 (2001)........ 19

State v. Washington, 379 S.C. 120, 665 S.E.2d 602 (2008)........ 17

Rules

Rule 801 (c), SCRE........16, 17, 19

Rule 802, SCRE........16, 19

STATEMENT OF ISSUES ON APPEAL

1.

Whether the court erred by instructing the jury that malice may be inferred from the use of a deadly weapon since this instruction on inferred malice was error, and prejudiced appellant in this purely circumstantial evidence case where there was no evidence of any animus between appellant and the decedent?

2.

Whether the court erred by allowing Greenville investigator Antonio Bailey to testify the decedent's daughter, Ruby Smith, told him she checked on her mother around 4:00 a.m. while the decedent was in bed with appellant sleeping in a lounge chair in the decedent's bedroom, and that when she returned thirty to forty-five minutes later, appellant was gone and the decedent was shot in the head, since this was prejudicial hearsay testimony?

3.

Whether the court erred by allowing Greenville County investigator Antonio Bailey to testify that as a result of information he received Portia Rogers "was absolutely cleared" as a suspect in the decedent's death since Bailey's opinion on Portia's innocence was based on inadmissible hearsay and it was prejudicial?

STATEMENT OF THE CASE

Appellant was indicted at the August 28, 2018 term of the Greenville County grand jury for the offenses of murder and possession of a weapon during the commission of a violent crime. R. 326-327. Her case came on for trial on June 10, 2019 before the Honorable Letitia H. Verdin, and a jury. O. W. Bannister and Alex Stalvey represented appellant. W. Jeffry Weston and Anthony J. McCollum were the assistant solicitors. R. 1.

On June 12, 2019, the jury found appellant guilty on both counts. R. 319, ll. 14-19. Judge Verdin sentenced appellant to thirty-seven years' imprisonment. R. 330, ll. 8-9.

This appeal follows.

STANDARD OF REVIEW

Jury instructions: "In criminal cases an appellate court sits to review errors of law only." State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion." Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." Id

Admission of evidence - hearsay: The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice." State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id. at 429–30, 632 S.E.2d at 848.

ARGUMENT

1.

The court erred by instructing the jury that malice may be inferred from the use of a deadly weapon since this instruction on inferred malice was error, and prejudiced appellant in this purely circumstantial evidence case where there was no evidence of any animus between appellant and the decedent.

Relevant Facts

Ruby Smith was the decedent's live-in sixty-two-year-old daughter. She was on disability, so she was not working at the time of the incident in this case. R. 13, l. 12 – 14, l. 9. Smith was living with her seventy-five-year-old decedent mother on Colonial Avenue in Greenville at the time of her death. The decedent had numerous medical problems and she was mostly confined to a wheelchair. R. 14, l. 18 – 15, l. 22.

Smith said the decedent used a "sleep machine" or an "oxygen machine" to help her sleep at night. "I put water in it every night." R. 17, l. 20 – 18, l. 7. Her mother also wore a plastic mask "that went over her nose and her mouth." R. 18, ll. 20-23. Smith testified that her seventy-five-year-old decedent mother smoked crack. Smith admitted she smoked crack also but maintained, "[I] didn't do none that night." R. 19, ll. 3-22.

Smith knew Appellant Malette Denise Kimbrough as her mother's friend, and her friend also. Smith and her mother had known appellant for about a year. "She just kept coming over there hanging around and would get high." Smith said appellant also used crack, and she considered appellant and her mother to be "get-high buddies." R. 21, ll. 3-17. Smith testified that appellant liked her mother and she had never heard them argue or even disagree. R. 21, l. 18 – 22, l. 3.

Smith said on the night the decedent died she was in the house with the decedent, appellant, her nephew, Lorenzo Pardlow, and her niece, Portia Rogers. R. 24, l. 22 – 26 l. 4. Portia's boyfriend, Leroy, was also present, but Smith offered, "They left around about 12:00," midnight. R. 26, ll. 3-10.

Smith recalled that prior to Portia leaving, "She got into an argument with me. Me and her got into it because I told her to leave out of my house." R. 27, ll. 12-15. Smith claimed to the solicitor that when Portia and her boyfriend left, neither one of them came back to the house again that evening. Smith said that Portia was not mad at her mother, and that her beef was with Smith. She maintained that Portia had no motive to kill her mother, and even that Portia could not have killed her mother. R. 30, ll. 1-21.

Smith noted that for about a week, appellant had slept in a lounge chair in the decedent's room. The decedent slept in a king or queen-size hospital bed in "a nice size bedroom." R. 31, l. 3 – 32, l. 15. Smith admitted that appellant was nice to her mother, did her hair, cooked for her, and that they smoked crack cocaine together. R. 32, l. 19 – 33, l. 12. Smith said appellant had an overnight bag, "a tote bag with clothes and stuff" and "[s]he washed up and changed clothes" at their house. She did not live there or have a key to the house. R. 33, l. 8 – 34, l. 14.

Smith admitted that she had never seen appellant with a gun. R. 34, ll. 20-21. Smith claimed appellant had told her on one occasion that "her gun got missing. Her son gave it to her. And it was missing. I asked her why she didn't call the police and report it." Smith claimed the report of the missing gun came the day before the decedent was shot. R. 34, l. 20 – 35, l. 19. Smith said appellant asked her, "you think Portia got her gun or somebody got her gun. I said, No." R. 35, l. 24 – 36, l. 22. Smith maintained appellant told her the gun was a thirty-eight or forty-five caliber, "one of the two." R. 37, ll. 13-16.

Smith said on the evening of her mother's death, she went to bed about 11:30 or 12:00 p.m., and she made sure the doors were locked. She remembered Lorenzo "was in the house" as were appellant and the decedent. R. 37, l. 19 – 39, l. 12.

Smith said her decedent mother called her in her room on the telephone from the decedent's bedroom at about 3:00 or 3:30 a.m, "wanting me to come put water in her machine." R. 39, l. 10 – 40, l. 21. Smith said when she went into the decedent's bedroom to put water in her "sleep machine," appellant was asleep, "[s]he was laying back in the chair with her eyes closed." R. 40, l. 23 – 41, l. 20. Smith said her mother, the decedent, was awake at the time, and she "fixed the machine" and left. Smith went back into her bedroom and got back in bed. R. 42, l. 23 – 43, l. 13.

Smith maintained that thirty-five minutes, to an hour or so later, "I heard some kind of noise like a banging door, a crazy noise—" "And I hollered out, I said, Momma, Lorenzo is going to call Uber to come and get him." R. 43, l. 24 – 44, l. 16. Smith said after she called out "Momma, is Lorenzo gone and did he call Uber for him?" that "[s]he never said nothing. And I got up." R. 44, ll. 11-22.

Smith testified, "I got up and opened the door. I looked in the back. Lorenzo was in the back room. Then I went to the front door—" Smith claimed, "Lorenzo was asleep—" and "Then I seen the front door was open." Smith continued, "And my momma's bedroom door was halfway open. I looked in. And I didn't see Denise [appellant] in the chair. I checked the front door. That's when I looked in there and went to my momma's room. And I seen her laying in the bed with a hole in her head." R. 45, ll. 12-20.

On questioning by the solicitor, Smith stated, "Ms. Kimbrough wasn't in the chair. She was gone . . . She was nowhere in the house." R. 46, ll. 9-13. Smith offered, "When I went

over to my mother, I seen my mother laying in the bed with a hole in her head. I kept hollering, Momma, momma, momma. She never did respond to me. And I got on the phone. I called 911." R. 46, ll. 16-19. "I told them that Denise must have killed—shot my momma in the head." R. 46, ll. 20-22. The 911 tape is on file with this Court. In that 911 call, Smith repeatedly told the 911 operator that she did not know who shot her mother.

Smith claimed, "I went and told Lorenzo she had shot my momma in the head. Momma was dead. And Lorenzo came in there and looked. And he got paranoid. He left out the door." "And I stayed on the phone until the police came." R. 46, l. 23 – 47, l. 25. Smith repeated that she found her mother dead, that appellant was no longer sleeping in the chair, and that appellant had left while Smith was apparently sleeping without telling Smith she was leaving. R. 48, ll. 13-24.

On cross-examination, Smith admitted that appellant cooked for her mother, did her hair, that she had never seen appellant with a gun, and that appellant and the decedent did drugs together. Smith acknowledged her decedent mother did not have any money and that appellant had money -- appellant "always had money." R. 50, l. 2 – 51, l. 20.

Smith also acknowledged on cross-examination that Portia, her niece, went outside and fired her pistol after she had gotten into an argument with Smith on the night the decedent was shot and killed. R. 51, l. 21 – 52, l. 13. Strangely, Smith said she did not hear Portia fire her gun that evening, but "they said she did." Smith said she meant that "Portia said she did . . . she told me that night. She called on the phone. And I told her my mother was dead." R. 52, ll. 9-24. Smith again admitted that appellant and her decedent mother had not argued and that there was no bad blood between them. R. 54, l. 1 – 55, l. 12.

Lorenzo Pardlow was thirty years old on the day of appellant's trial. The decedent was his grandmother, and Ruby Smith was his aunt. Lorenzo remembered on November 19, 2016, he was staying at his decedent grandmother's house. He had been there "for a couple of nights." R. 59, l. 12 – 60, l. 23.

Lorenzo recalled an argument between Portia and Ruby Smith that evening, and he said Portia left "around 11:00, no later than 11:30." R. 61, l. 6 – 62, l. 18. Lorenzo remembered that Portia went in the front yard, and "She shot in the air." R. 62, ll. 19-21. Lorenzo said as far as he knew, neither Portia nor her boyfriend came back into the house that night after they left around 11:00 p.m. Lorenzo said this left him, Ruby Smith, the decedent, and appellant in the house. R. 63, ll. 4-15.

Lorenzo testified that appellant was very close to the decedent, and that she did not have anything against her. "[S]he was friends with my grandma. They did drugs together." R. 63, l. 4 – 64, l. 25. Lorenzo said appellant helped clean up and fixed food for them to eat. Lorenzo also recalled that appellant slept in a chair in the decedent's room. R. 65, l. 1 – 66, l. 14. Lorenzo offered that the decedent "had real bad arthritis. She had bronchitis, asthma. She wasn't able to walk. She was in a wheelchair. She, also, slept with a breathing machine on." R. 67, ll. 7-11.

Lorenzo said he went to bed at midnight or 1:00 in the morning at the latest that fatal night. Lorenzo recalled he woke up at 3:30 or 4:00 in the morning to hear his aunt, Ruby Smith, "calling my grandma's name and she wasn't responding. That's when I woke up." Lorenzo said Smith was calling out, "Oh, they killed momma. They killed momma." Lorenzo went in to check on the decedent, "And she was laying in there in her bed dead, blood dripping from her head." R. 70, ll. 1-20. Lorenzo said there did not appear to be any sign of a struggle as the

decedent's hands were at her side. Lorenzo remembered that the appellant was no longer in the house when they found the decedent dead in her bed. R. 70, l. 1 – 72, l. 2. Lorenzo noted that the doors had "deadbolts" on them, and he reasoned the only way to open the door would have been from the inside. R. 71, l. 25 – 72, l. 8.

Lorenzo offered that after Ruby Smith called the police, "I stepped outside to take a walk for a minute to get myself together. And I took a stroll around the block and came right back." Lorenzo estimated that he was gone for five or ten minutes and "The cops was there. They was putting tape around the house, and all of that. And the rest of the family had done got there." Lorenzo gave the police a statement which said he had no idea why he did not hear a gunshot that night, offering: "Maybe because I was intoxicated." R. 73, l. 3 – 74, l. 3.

On cross-examination, Lorenzo admitted he had criminal convictions for grand larceny, selling drugs, failure to stop for a blue light, and driving under suspension. R. 77, l. 9 – 78, l. 4.

Keith Ramsey lived two houses away from the decedent's house on Colonial Avenue in Greenville. He was sixty-one years old, and he had retired from BMW by the time of the trial. R. 80, l. 14 – 81, l. 17. Ramsey worked one of the late shifts at BMW at the time the decedent was killed. Ramsey said he was "very good friends" with the decedent, but he did not socialize with her because of "some activity in the house I did not agree with." R. 82, l. 22 – 83, l. 15.

Ramsey remembered on November 19, 2016 at about four a.m. he was getting ready "to go to bed." "I had cut off the TV. And I was getting ready to go to bed, turning the lights off. And I came out of the bathroom going towards the bed, and I heard a gunshot." R. 84, ll. 11-21. Ramsey recalled, "I reached toward the head of the bed and grabbed my gun and headed towards the front door, looked at the—I always look at the cable box. I don't know, habit I guess. I

always look at the cable box because it's always on, has the time on it . . . about 4:10." R. 85, ll. 13-20.

Ramsey recalled that he turned the porch light off, went out on the front porch and "I looked to the left and I seen a lady down at the stop sign running." R. 86, ll. 15-25. Ramsey said this woman was black, but he did not recognize her and he could not give any further description of her. R. 87, l. 4 – 88, l. 21.

The First Hearsay Objection

Greenville investigator Antonio Bailey was the lead investigator in the homicide case involving the decedent. R. 121, l. 14 – 122, l. 17. Bailey went to the crime scene at about five a.m., and he said there was no sign of a struggle in the decedent's death. Bailey recalled that the victim was lying in a hospital bed on her back. "The room was somewhat cluttered. There was a chair, along with a little night stand, you know. And, of course, with trauma to the head, there was a substantial amount of blood." R. 130, ll. 5-24. The following occurred on direct examination of investigator Bailey:

> Q: All right. Did she [Ruby Smith] indicate what had happened to this Denise -- or what'd -- what did she tell you about the circumstances with regard to Denise?
>
> MR. BANNISTER: Your Honor, I believe that's hearsay. And we would object to that.
>
> MR. WESTON: Your Honor, it's not offered for the truth of the matter asserted. It's offered to explain what he did next, which is what I'm getting ready to ask him about.
>
> THE COURT: All right. I'll allow that question.
>
> BY MR. WESTON:
>
> Q: What did she tell you with regard to the circumstances with regard to this Denise and her deceased mother?

> A: She 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. 11 – 133, l. 11.

Bailey also maintained that he thoroughly investigated this case, and he made a broad claim that he eliminated other suspects in the case. R. 140, ll. 4-11. As will be seen infra, when Bailey testified specifically about him specifically eliminating Portia Rogers as a suspect, and his belief that Portia did not have anything to do with the decedent's death based on information he had received, defense counsel objected to this hearsay testimony. R. 161, ll. 1-17.

On cross-examination, Bailey acknowledged he knew that Portia Rogers had engaged in an argument with the decedent's daughter on the night the decedent was killed. He also knew Portia had fired her weapon twice in the air at the house on the night of the murder. R. 149, l. 15 – 150, l. 25.

Bailey admitted that Portia refused to come in for an interview because she had outstanding arrest warrants against her. When she finally came in, she failed to tell Bailey that she was in possession of a weapon and had fired it on the night of the murder. R. 151, l. 4 – 152, l. 4.

Bailey acknowledged that Portia had been taken into custody days before his interview with her and that she was in possession of a twenty-two-caliber pistol at the time of her arrest. R. 152, l. 21 – 156, l. 20. Bailey admitted that the twenty-two-caliber pistol in Portia's

possession was never compared to the "bullet jacket recovered from Ruby Flamm." R. 157, ll. 3-13.

Bailey also acknowledged that he learned appellant had gotten a loan for $850 on November 17, 2019, two days before the murder from "a cash loan business that was on Pleasantburg Drive." R. 158, ll. 14-24. This was significant because of evidence from appellant's daughter and her boyfriend that appellant had money in her possession following the murder.[1]

Michael Argumenti was living with the appellant's daughter in an apartment on the night the decedent was killed. R. 182, l. 14 – 185, l. 13. Michael remembered that at about 4:30 in the morning on November 19, 2016, appellant knocked on their door. R. 185, ll. 10-25. The testimony of both Michael and the appellant's daughter were inconsistent and vacillating. Michael said his girlfriend, the appellant's daughter, asked her mother if there was a problem, and "She [the decedent] said she couldn't tell us" and that "She said she was walking a long way and she wanted to take a shower because she was tired and sweaty." R. 191, ll. 6-21.

Michael said he told an investigator in the case that appellant had "a stack of money, 20s, and hundreds, and a Visa card" in her possession. When Michael said he could not remember exactly what he told the investigator, the solicitor again accused him of lying. R. 193, ll. 5-20. Michael testified that he did not see appellant with any gun that night and that the police searched their apartment, and did not find one either. "I had some marijuana on my stool that they took." R. 203, l. 14 – 204, l. 3.

[1] Firearm expert James Armstrong testified that the fatal bullet could not have been fired by a twenty-two-caliber handgun. "It's definitely the wrong caliber. A 22 is much smaller than the nine millimeter." R. 178, ll. 2-15.

Appellant's daughter, twenty-eight-year-old Malexes Dixon, testified she was threatened by the police into giving a statement against her mother. R. 208, l. 10 – 213, l. 21. Dixon admitted she told an investigator when appellant came to their apartment that early morning, she asked her, "What the hell is going on, momma." She told the investigator that appellant told her, "I can't tell you anything." R. 222, ll. 15-21. Dixon said she had lied to the police because she was scared. She told the investigator her mother said, "I think I hurt somebody tonight." R. 223, ll. 6-23. Dixon said appellant had cigarettes, candy, and some change in her pocketbook, but she did not have a gun in her possession. R. 231, l. 20 – 232, l. 7.

Request to Charge and Objections

At a charge conference held on the morning of Wednesday, June 12, 2019, defense counsel requested an instruction on circumstantial evidence pursuant to State v. Logan, 405 S.C. 83, 747 S.E.2d 444 (2013). R. 249, l. 6 – 250, l. 14. The solicitor then told the judge the state wanted the court to instruct that malice could be inferred from the use of a deadly weapon. A miscellaneous, State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019), had been argued on February 21, 2019 before the Supreme Court. This was almost four months before the charge conference in this case. State v. Burdette was filed on July 31, 2019.

Regardless, when the judge asked the defense for its position on charging "malice can be inferred from the use of a deadly weapon," defense counsel objected to that instruction. R. 251, ll. 14-20. Defense counsel also added that there was case law on the malice charge, and that he could further argue after closing arguments, which did not occur, but nonetheless defense counsel's objection to the inferred malice instruction remained. R. 251, l. 14 – 254, l. 6.

The judge also told defense counsel she did not need "a lot of argument" on the malice instruction, but she would allow it if the defense desired to argue it. R. 253, l. 17 – 254, l. 6.

Defense counsel later told the judge he did not have any further arguments on the jury instructions. R. 258, ll. 3-12.

Charge on the Law

The judge charged the jury that malice could 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 bodily 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. 23 – 305, l. 5.

Discussion

In State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019), the 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."

The Court held the state and the defense were free to argue what they wished regarding malice, but that the trial court could not charge that malice could be inferred from the use of a deadly weapon. State v. Burdette, 427 S.C. 490, 501, 832 S.E.2d 575, 582 (2019). The Court in Burdette stated based upon Griffith v. Kentucky, 479 U.S. 314 (1987), that its holding was effective in cases pending on direct review, such as this case, where the issue was preserved. State v. Burdette, 427 S.C. 490, 505, 832 S.E.2d 575, 583 (2019).

There was no doubt that the decedent was shot with a deadly weapon. The error also was not harmless. 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. This was a purely circumstantial evidence case where the state's case only raised a suspicion that appellant was guilty. The error was not harmless. Appellant is respectfully entitled to a new trial.

2.

The court erred by allowing Greenville investigator Antonio Bailey to testify the decedent's daughter, Ruby Smith, told him she checked on her mother around 4:00 a.m. while the decedent was in bed with appellant sleeping in a lounge chair in the decedent's bedroom, and that when she returned thirty to forty-five minutes later, appellant was gone and the decedent was shot in the head, since this was prejudicial hearsay testimony.

Relevant Facts

Investigator Antonio Bailey's testimony as seen above 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. The solicitor's assertion otherwise was incorrect. As this Court will recall, 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.

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).

Investigator Bailey's testimony that the decedent's daughter told him that she checked on her mother and added water to the "breathing machine" that early morning, and that appellant was sleeping in the lounge chair in the bedroom, but that when she returned thirty to forty-five minutes later, her mother was shot in the head and that appellant was gone was very damning, concise, hearsay testimony about the murder. The fact that it concisely put before the jury the state's theory of why appellant was the prime suspect underscores its prejudicial effect.

As in Jolly v. State, 314 S.C. 17, 443 S.E.2d 566 (1994), it was the repetition of Ruby Smith's testimony here – and in such a concise fashion by Investigator Bailey -- which enhanced its prejudice as our Supreme Court explained in Jolly. In Jolly, the state had a social worker testify that the child made a prior statement that Jolly had abused her. The judge overruled the hearsay objection of defense counsel.

This Court found the social worker's testimony was cumulative to the testimony of the child's uncle and the child. The Supreme Court in Jolly held that improper corroboration testimony cannot be harmless, because it is precisely this cumulative effect which enhances the devastating impact of improper corroboration. Jolly was only overruled as to the never harmless error portion of it.

Appellant obviously recognizes this is not a child sex case, and not a corroboration case, but Jolly v. State makes the point that hearsay repetition of a witness's testimony has the spurious effect of making the testimony of that earlier witness more believable, and it enhances by repetition that testimony. The testimony of Investigator Bailey as to what Ruby Smith told him happened on the night of the murder was offered for the truth of the matter as asserted, and therefore, it was inadmissible hearsay. See Rule 801 (c), SCRE; State v. Washington, 379 S.C. 120, 665 S.E.2d 602 (2008). As explained in issue one, this was a purely circumstantial

evidence case, where appellant had no motive to harm the decedent, there was not any animus between them, and the concise hearsay testimony regarding the alleged critical facts of the murder as allegedly told by Smith to Investigator Bailey was not harmless.

3.

<u>The court erred by allowing Greenville investigator Antonio Bailey to testify that as a result of information he received, Portia Rogers "was absolutely cleared" as a suspect since Bailey's opinion was based on inadmissible hearsay, and it should not have been allowed.</u>

Relevant Facts

As seen, Smith's niece, Portia Rogers, seemed a prime suspect in this case. She had an argument with the decedent's daughter on the night the decedent was shot and killed. Portia also discharged her weapon once or twice outside the house that night after being ordered to leave. Portia appeared to be avoiding the police after the shooting as seen <u>supra</u>, because of prior warrants and whatever other reasons. Portia apparently only talked to the police after she was in custody on another charge. Regardless, she failed to disclose the important fact she was in possession of gun, and had discharged it on the night of the murder.

Conversely, there was no evidence of any disagreement between appellant and the decedent -- or appellant and anyone in the household. Further, appellant did kind acts for the decedent by doing her hair and cooking for her and others in the household. There was absolutely no evidence of any animosity between appellant and the decedent or anyone else in the household as seen above.

Against this backdrop, the solicitor questioned investigator Bailey about his investigation of Portia Rogers. The following occurred between the solicitor and investigator Bailey:

> Q: Was she anywhere near this house at the time of the shooting?
>
> A: Not based on the information, no.
>
> Q: Was she, in fact, <u>cleared totally as a suspect</u> *as a result of information and alibi* –
>
> MR. STALVEY: Judge, I'm going to object. It's hearsay.

> THE COURT: I'm going to allow him to answer that question, whether or not she was cleared as a suspect.
>
> BY MR. WESTON:
>
> Q: *Did -- did you, in fact, clear her absolutely as a suspect as a result of that information about phones, as well as alibi witnesses?*
>
> *A: She was automatic -- she was absolutely cleared.*
>
> *Q: Do you believe today that Portia Rogers had anything to do with killing her grandmother?*
>
> *A: None whatsoever.*

R. 161, ll. 1-17. (emphasis added).

Discussion

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. See 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).

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 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).

CONCLUSION

By reason of the foregoing arguments, appellant's conviction should be reversed, and this case remanded to the Greenville County Court of General Sessions for a new trial.

s/ Robert M. Dudek
Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 4th day of November, 2020.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant 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."

November 4, 2020.

s/ Robert M. Dudek
Robert M. Dudek
Chief Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable Letitia H. Verdin, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MALETTE DENISE KIMBROUGH,

APPELLANT

CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Final Brief of Appellant in the above-referenced case has been served upon Caroline Scrantom, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 4th day of November, 2020.

s/ Robert M. Dudek
Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

THE STATE,

Respondent,

v.

MALETTE DENISE KIMBROUGH,

Appellant

Appellate Case No. 2019-001013.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

CAROLINE SCRANTOM
Assistant Attorney General

Post Office Box 11549
Columbia, South Carolina, 29211
(803) 734-6305

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

APPELLANT'S STATEMENT OF THE ISSUES ON APPEAL iv

RESPONDENT'S COUNTERSTATEMENT OF THE ISSUES ON APPEAL iv

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 2

STANDARD OF REVIEW FOR ISSUE I 7

I. Because neither party presented any evidence which would reduce, mitigate, excuse, or justify the shooting, the trial court instructed the jury that malice could be inferred from the use of a deadly weapon; but the State presented overwhelming evidence of malice apart from the use of a gun, rendering the instruction harmless beyond a reasonable doubt. 7

STANDARD OF REVIEW FOR ISSUES II AND III 13

II. Because the State's investigator testified about what he learned at the scene that informed the next steps in his investigation, the testimony was not offered for the truth of the matter asserted and was not inadmissible hearsay. 13

III. Because Bailey's re-direct testimony that he cleared Portia as a suspect related to his own investigation, it was not hearsay and was further elicited in response to the details of that investigation interjected during Appellant's cross-examination of Bailey. 17

CONCLUSION 19

TABLE OF AUTHORITIES

Cases

Bowman v. State, 422 S.C. 19, 809 S.E.2d 232 (2018) 18

Hennes v. Shaw, 397 S.C. 391, 725 S.E.2d 501 (Ct. App. 2012) 7

In re Care & Treatment of Harvey, 355 S.C. 53, 584 S.E.2d 893 (2003) 14

State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009) 7, 8, 9

State v. Brown, 317 S.C. 55, 451 S.E.2d 888 (1994) 14, 16

State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019) 7, 8, 9

State v. Childers, 373 S.C. 367, 645 S.E.2d 233 (2007) 8

State v. Dunbar, 356 S.C. 138, 587 S.E.2d 691 (2003) 8

State v. Edwards, 127 S.C. 116, 120 S.E. 490 (1923) 11

State v. Franks, Op. No. 5758 (S.C. Sup. Ct. filed Aug. 12, 2020) 9

State v. Heyward, 426 S.C. 630, 828 S.E.2d 592 (2019) 18

State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011) 13

State v. Johnson, 333 S.C. 62, 508 S.E.2d 29 (1998) 8

State v. Jolly, 314 S.C. 17, 443 S.E.2d 566 (1994) 15

State v. Kerr, 330 S.C. 132, 498 S.E.2d 212 (Ct. App. 1998) 9

State v. Kirby, 325 S.C. 390, 481 S.E.2d 150 (Ct. App. 1996) 15

State v. Mattison, 388 S.C. 469, 697 S.E.2d 578 (2010) 9

State v. Middleton, 407 S.C. 312, 755 S.E.2d 432 (2014) 7, 9

State v. Mitchell, 286 S.C. 572, 336 S.E.2d 150 (1985) 13, 16

State v. Orozco, 392 S.C. 212, 708 S.E.2d 227 11

State v. Page, 378 S.C. 476, 663 S.E.2d 357 (Ct. App. 2008) 18

State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001) 13

State v. Sherard, 303 S.C. 172, 399 S.E.2d 595 (1991) 13

State v. Shuler, 344 S.C. 604, 545 S.E.2d 805 (2001) 18

State v. Sims, 304 S.C. 409, 405 S.E.2d 377 (1991) 15

State v. Smith, 307 S.C. 376, 415 S.E.2d 409 (Ct. App. 1992) 11

State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016) 10, 11

State v. Vick, 384 S.C. 189, 682 S.E.2d 275 (Ct. App. 2009) 14

State v. Weston, 367 S.C. 279, 625 S.E.2d 641 (2006) 13
United States v. Love, 767 F.2d 1052 (4th Cir. 1985) 14, 15

Rules

Rule 601, SCRE 17
Rule 701, SCRE 18
Rule 801, SCRE 14, 17
Rule 803, SCRE 14

APPELLANT'S STATEMENT OF THE ISSUES ON APPEAL

I. Whether the court erred by instructing the jury that malice may be inferred from the use of a deadly weapon since this instruction on inferred malice was error, and prejudiced appellant in this purely circumstantial evidence case where there was no evidence of any animus between appellant and the decedent?

II. Whether the court erred by allowing Greenville investigator Antonio Bailey to testify the decedent's daughter, Ruby Smith, told him she checked on her mother around 4:00 a.m. while the decedent was in bed with appellant sleeping in a lounge chair in the decedent's bedroom, and that when she returned thirty to forty-five minutes later, appellant was gone and the decedent was shot in the head, since this was prejudicial hearsay testimony?

III. Whether the court erred by allowing Greenville County investigator Antonio Bailey to testify that as a result of information he received Portia Rogers "was absolutely cleared" as a suspect in the decedent's death since Bailey's opinion on Portia's innocence was based on inadmissible hearsay and it was prejudicial?

RESPONDENT'S COUNTERSTATEMENT OF THE ISSUES ON APPEAL

I. Whether the trial court prejudicially instructed the jury that malice could be inferred from the use of a deadly weapon where neither party presented any evidence which would reduce, mitigate, excuse, or justify the shooting, and where the State presented overwhelming evidence of malice apart from the use of a gun, rendering the instruction harmless beyond a reasonable doubt.

II. Whether the trial court erred in admitting an investigator's testimony about what he learned at the scene that informed the next steps in his investigation, where the testimony was not offered for the truth of the matter asserted.

III. Whether the trial court erred in admitting an investigator's re-direct testimony that he cleared the victim's granddaughter as a suspect, where his testimony related to his own investigation so that it was not hearsay, and this testimony was elicited in response to details interjected during Appellant's cross-examination of that investigator.

STATEMENT OF THE CASE

Following the November 19, 2016, homicide of Ruby Flamm, the Greenville County Grand Jury indicted Appellant Malette Denise Kimbrough for the charges of murder and possession of a weapon during the commission of a violent crime. (R. pp. 326-27).

Attorneys O. W. Bannister and Alex R. Stalvey represented Kimbrough at a jury trial before the Honorable Letitia H. Verdin. (R. p. 1). Assistant Thirteenth Circuit Solicitors W. Jeffry Weston and Anthony J. McCollum prosecuted the case. Trial began on June 10, 2019. (R. p. 1).

On June 12, 2019, a jury convicted Kimbrough of both charges. (R. p. 319, lines 14-19). Judge Verdin sentenced Appellant to 37 years for murder and a concurrent five years for possession of a weapon during the commission of a violent crime. (R. p. 323, lines 8-11).

This appeal follows. (R. p. 324).

STATEMENT OF FACTS

Ruby Flamm, 75, lived with her daughter, Ruby Lynn Smith. (R. p. 14, line 7 – p. 15, line 10). Flamm needed the live-in assistance of her daughter due to a number of ailments. Flamm was also wheelchair-bound. (R. p. 15, line 11 – p. 16, line 13; R. p. 67, lines 9-11).

Flamm and Appellant, Malette Denise Kimbrough were friends. They would smoke crack together at Flamm's house. (R. p. 19, line 3 – p. 21, line 23). One day in November 2016, someone dropped Kimbrough off at Flamm's with a sack of groceries and an overnight bag. Kimbrough began staying at Flamm's, helping some around the house. (R. p. 32, line 14 – p. 34, line 14; R. p. 50, lines 2-15). At night, she slept in a lounge chair beside Flamm's hospital bed. (R. p. 31, line 3 – p. 32, line 15; R. p. 39, lines 10-12).

One evening, some of Flamm's grandchildren visited. (R. p. 61, lines 3-18). One of her granddaughters, Portia, came over with her boyfriend. (R. p. 26, lines 3-8). Portia got in a fight with Flamm's daughter and left the house sometime before midnight. Portia didn't have keys to Flamm's house. (R. p. 26, lines 9-16; R. p. 27, lines 10-24). Before Portia left, she fired a gun into the air in Flamm's front yard. Flamm's daughter did not hear or see this happen, but Flamm's grandson, Lorenzo Pardlow, did. (R. p. 28, lines 9-20; R. p. 62 lines 11-21). Portia did not return to Flamm's house at all that night. (R. p. 28, lines 21-23; R. p. 29, line 23 – p. 30, line 7). Moreover, Portia never got into an argument with Flamm or exchanged any harsh words with her that evening; Portia only engaged in a dispute with Flamm's daughter. (R. p. 30, lines 8-21).

After Portia and the other family members left, Flamm's daughter readied the house for everyone to go to bed. She checked all the exterior doors to the house to make sure they were locked. (R. p. 38, lines 3-25). Each door had to be deadbolted from the inside. (R. p. 39, lines 1-9). Flamm's grandson Lorenzo slept over that night. (R. p. 60 lines 14-23). By bedtime, only

Flamm, Flamm's daughter, Flamm's grandson Lorenzo, and Kimbrough occupied the house. (R. p. 25, lines 19-24; R. p. 63, lines 12-18). Lorenzo went to sleep in the third bedroom. (R. p. 25, lines 9-18). Flamm's daughter went to sleep in her bedroom near the front of the house. (R. p. 65, lines 17-25). Flamm went to sleep in her bedroom, and Kimbrough went to sleep in the chair in Flamm's room. (R. p. 66, lines 1-11).

In the middle of the night, Flamm needed water in her CPAP machine. (R. p. 18, lines 1-23). Around 3:00 a.m., she called out to her daughter, who got up and put water in the machine. This took about five minutes. (R. p. 39, line 15 – p. 42, line 11). Flamm's daughter went back to bed, but Flamm called down the hallway again because she could not get the machine to work. Her daughter responded, fixed the machine, and returned to bed. (R. p. 42, line 12 – p. 43, line 13). Both times that Flamm's daughter went to tend to Flamm's machine, Kimbrough appeared to be asleep in the chair next to Flamm's bed. (R. p. 41, lines 1-7; R. p. 42, lines 19-24).

When Flamm's daughter had been back in her own bedroom for what felt like thirty minutes to an hour, she heard "some kind of noise like a banging door, a crazy noise." (R. p. 44, lines 1-7). She called out to Flamm, but Flamm did not respond. (R. p. 44, lines 9-22). She got up and looked in the back bedroom and saw Lorenzo asleep in the bed. (R. p. 44, line 24 – p. 45, line 15). She checked the front door and found it open. She also saw that Flamm's bedroom door "halfway open." (R. p. 45, lines 15-16). She looked in Flamm's bedroom to find Flamm "in bed with a hole in her head." (R. p. 45, lines 16-20). Kimbrough was not there. "She was gone." (R. p. 46, lines 11-13).

Keith Ramsey lived two doors away. (R. p. 81, lines 14-17). He was getting ready for bed when the shooting occurred. As he cut the lights off in his bathroom, he heard one gunshot. (R. p. 84, lines 13-21). It came from the direction of Flamm's house. (R. p. 84, line 22 – p. 85, line

2). Ramsey looked at his clock as he grabbed his gun, cut off his front porch lights, and stepped outside to see what was going on. It was 4:10 am. (R. p. 85, line 8 – p. 86, line 23). Looking to the left, Ramsey saw "a lady down at the stop sign running" away from the direction of Flamm's house. (R. p. 86, lines 24-25; R. p. 88, lines 1-5). The black female wore dark pants and a light shirt. (R. p. 87, lines 1-25).

Kimbrough had been staying at Flamm's for about a week at this point. (R. p. 32, lines 14-15). Flamm's daughter had not seen Kimbrough with a gun, but heard Kimbrough say she had either a .38 or a .45. The day before the shooting, Flamm's daughter heard Kimbrough say her gun was missing. Then, at some point, Kimbrough said she found it. (R. p. 34, line 17 – p. 36, line 22; R. p. 37, lines 7-18). Flamm's daughter had also never seen Flamm and Kimbrough get into any kind of argument and had no reason to believe they were mad at each other or had bad blood. (R. p. 21, lines 24-25; R. p. 54, lines 1-5; R. p. 55, lines 7-12).

When Flamm's daughter discovered Flamm had been shot, she woke Lorenzo. (R. p. 70, lines 17-20). As she called 911, Lorenzo "stepped outside to take a walk for a minute to get [him]self together." (R. p. 72, lines 14-20). He had not heard the gunshot. (R. p. 73, lines 23-24). He also did not notice any sign of a struggle. Flamm's hands were down "by her side." (R. p. 70, lines 23-24).

First responders similarly noted that Flamm was situated "underneath several blankets with a CPAP mask commonly used for sleep apnea still securely on her face." (R. p. 99, lines 22-25). She had blankets pulled up to her chest in a position consistent with her resting in the bed. (R. p. 130, lines 19-20). Flamm sustained a fatal "close-range gunshot wound to her forehead." (R. p. 116, lines 4-9). A ballistics analysis concluded that Flamm was struck by a bullet from

"either a nine-millimeter handgun or a 38-caliber handgun."[1] (R. p. 178 lines 2-5).

When Flamm's daughter called 911, she told the operator that she did not know what happened other than someone shot her mother in the head and killed her. (R. p. 95, lines 9-25; State's Ex. 2). Investigators began looking to identify Kimbrough, who had been at Flamm's house.[2] (R. p. 134, lines 7-17). They did not find Kimbrough at her own residence. A subsequent conversation with Kimbrough's husband led officers to Kimbrough's daughter's house. (R. p. 135, line 8 – p. 136, line 5). There, officers found Kimbrough's daughter, Malexes Dixon, and her boyfriend, Michael Argumenti. They both went to the police department and provided statements. (R. p. 136, line 13 – p. 138, line 6).

Dixon and Argumenti each explained that Kimbrough arrived at their home between 4:30 and 5:00 a.m. on November 19. It was cold. (R. p. 185, lines 10-22). Kimbrough banged on their door, waking the couple. (R. p. 185, line 20 – p. 186, line 6; R p. 230, lines 2-4). Argumenti described Kimbrough as "tired" from "walking a long way." (R. p. 188, lines 17-18). According to both Argumenti and Dixon, Kimbrough had removed her shirt and wore only "blue jeans and a bra" when they saw her at their door. (R. p. 188, line 20 – p. 191, line 5; R. p. 220, lines 22-25). She also had a small black purse, and a sizeable amount of money. Argumenti recalled a black grocery bag as well. (R. p. 192, line 21 – p. 194, line 9; R. p. 225, lines 7-11; R. p. 230, lines 5-20).

The couple asked Kimbrough what was going on but she refused to answer, stating only

[1] Due to the size of the recovered fragments, the same analysis concluded it would have been "impossible" for a 22-caliber handgun to have fired the bullet. (R. p. 178, lines 6-15). Flamm's granddaughter Portia, the one who fired a gun into the air earlier in the evening, had recently been found in possession of a 22-caliber pistol. (R. p. 155, lines 1-5).

[2] Investigators explored other suspects and did not arrest Kimbrough until about five months after the shooting. (R. p. 138, lines 13-19).

that "she couldn't tell" them. (R. p. 191, lines 6-12; R. p. 194, line 25 – p. 195, line 13; R. p. 222, lines 15-21). According to Dixon, Kimbrough did not respond at all when she asked what was going on.[3] (R. p. 222, lines 1-5). Dixon thought her mother acted nervous. (Tr. p. 222, lines 11-14).

Kimbrough asked to take a shower. (R. p. 191, line 15; R. p. 225, lines 19-25). "She said she was walking a long way and she wanted to take a shower because she was tired and sweaty." (R. p. 191, lines 19-21). After she showered, she placed her clothes in a black grocery bag. (R. p. 194, lines 7-15). Her daughter provided her with fresh clothes, stating the shirt Kimbrough previously wore had "bed bugs on it." (R. p. 197, lines 2-6; R. p. 226, lines 9-21).

Next, Kimbrough asked the couple to call her friend Johnny Marshall to give her a ride. (R. p. 197, lines 12-22; R. p. 226, line 25 – p. 227, line 23). Argumenti knew Marshall and called him on Kimbrough's behalf between 5:00 and 5:30 a.m. (R. p. 198, lines 10-25). He handed the phone to Kimbrough who spoke to Marshall. (R. p. 200, lines 2-4). While Kimbrough waited for Marshall, she rested on her daughter's sofa. (R. p. 200, lines 16-21). Marshall picked Kimbrough up about half an hour later. (R. p. 200, lines 5-15).

Neither Argumenti nor Dixon saw Kimbrough with a gun that morning. (R. p. 203, lines 14-25; R. p. 232, lines 1-7). Argumenti informed law enforcement he saw two guns in Kimbrough's house about a year earlier. (R. p. 205, lines 9-19; R. p. 206, lines 1-12).

---

[3] Dixon testified law enforcement threatened to take her to jail; however, she also asserted she and Argumenti voluntarily arrived at the law enforcement center to speak to investigators. (R. p. 212, line 10 – p. 213, line 24). Ultimately, Kimbrough testified she was high on marijuana during her interactions with the investigator, and alleged the investigator threatened to take her to jail if she was not truthful. (R. p. 214, line 15 – p. 218, line 10). Dixon said the investigator thought she "was lying because [she] did not look him in the eyes." (R. p. 214, lines 15-21). Dixon testified she told law enforcement "whatever they needed to know." (R. p. 233, line 21 – p. 234, line 15). However, Dixon denied that Kimbrough told her she thought she hurt somebody that night. (R. p. 222, line 22 – p. 224, line 25).

STANDARD OF REVIEW FOR ISSUE I

This Court reviews alleged error in jury instructions for an abuse of discretion. *Hennes v. Shaw*, 397 S.C. 391, 402, 725 S.E.2d 501, 507 (Ct. App. 2012). "In reviewing jury charges for error, the appellate court must consider the circuit court's jury charge as a whole in light of the evidence and issues presented at trial." *Id.* "An erroneous instruction alone is insufficient to warrant this Court's reversal." *State v. Burdette*, 427 S.C. 490, 496, 832 S.E.2d 575, 578 (2019), *reh'g denied* (Sept. 27, 2019). "Errors, including erroneous jury instructions, are subject to harmless error analysis." *State v. Belcher*, 385 S.C. 597, 611, 685 S.E.2d 802, 809 (2009). Harmless error applies when, beyond a reasonable doubt, "the error complained of did not contribute to the verdict." *State v. Middleton*, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014) (internal quotation omitted). This inquiry does not pertain to "what the verdict would have been had the jury been given the correct charge, but whether the erroneous charge contributed to the verdict rendered." *Id.*

I. Because neither party presented any evidence which would reduce, mitigate, excuse, or justify the shooting, the trial court instructed the jury that malice could be inferred from the use of a deadly weapon; but the State presented overwhelming evidence of malice apart from the use of a gun, rendering the instruction harmless beyond a reasonable doubt.

Over Appellant's objection, (R. p. 251, lines 1-18; R. p. 252, lines 18-21), the trial court instructed the jury that "[m]alice may be inferred from conduct showing a total disregard for human life. Malice may, also, be inferred from the use of a deadly weapon." (R. p. 304, lines 23-25; R. p. 258, lines 3-11). The trial court noted that the record before it and the case law in effect at that time allowed for this instruction on implied malice. (Rr. p. 253, lines 1-10 and 17-20). At the time of Appellant's June 2019 trial, *State v. Belcher* provided "that where evidence is

presented that would reduce, mitigate, excuse or justify a homicide (or assault and battery with intent to kill) caused by the use of a deadly weapon, juries shall not be charged that malice may be inferred from the use of a deadly weapon." 385 S.C. 597, 612, 685 S.E.2d 802, 810 (2009). *Belcher* did not address the propriety of the implied malice charge where *no* evidence adduced at trial would reduce, mitigate, excuse or justify the killing.

One month after Appellant's trial, the Supreme Court of South Carolina "consider[ed] whether the permissive inference charge may be given in *any setting*, even those in which no evidence is presented that would reduce, mitigate, excuse, or justify the commission of an offense containing the element of malice." *State v. Burdette*, 427 S.C. 490, 502, 832 S.E.2d 575, 582 (2019) (filed July 31, 2019) (emphasis in original). *Burdette* held that "regardless of the evidence presented at trial, a trial court shall not instruct the jury that it may infer the existence of malice when the deed was done with a deadly weapon." *Id.* at 503, 832 S.E.2d at 582. The court found the charge "an improper court-sponsored emphasis of a fact in evidence," but noted the parties remained free to argue implied malice "based on the evidence in the record." *Id.* Like *Belcher*, the court applied the holding to cases "pending on direct review or [ ] not yet final, so long as the issue is preserved."[4] *Id.* at 505, 832 S.E.2d at 583.

"The law to be charged must be determined from the evidence presented at trial." *State v. Childers*, 373 S.C. 367, 373, 645 S.E.2d 233, 236 (2007). The implied malice instruction, while

[4] "In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. . . .[and] it must be clear that the argument has been presented on that ground." *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) (internal citations omitted). "[W]here a party requests a jury charge and, after opportunity for discussion, the trial judge declines the charge, it is unnecessary, to preserve the point on appeal, to renew the request at conclusion of the court's instructions." *State v. Johnson*, 333 S.C. 62, 64, 508 S.E.2d 29, 30 (1998). Here, Appellant objected to the State's request to charge implied malice, and the court ruled without delay. (R. p. 251, lines 16-18; R. p. 253, lines 17-20).

valid at the time of trial,[5] now constitutes harmless error due to the nature of the evidence presented. Harmless error review requires consideration of the jury instruction as a whole. *State v. Burdette*, 427 S.C. at 498, 832 S.E.2d at 580. The Court "must review the facts the jury heard and weigh those facts against the erroneous jury charge to determine what effect, if any, it had on the verdict." *State v. Kerr*, 330 S.C. 132, 145, 498 S.E.2d 212, 218 (Ct. App. 1998).

Beyond a reasonable doubt, the implied malice instruction did not contribute to the verdict obtained. *Id.*; *State v. Middleton*, 407 S.C. at 317, 755 S.E.2d at 435 ("whether or not the error was harmless is a fact-intensive inquiry"). Our appellate courts have not yet reversed a case pursuant to *Belcher* or *Burdette* when the State's case is proven by circumstantial evidence and without evidence in the record that would reduce, mitigate, excuse or justify the shooting. Most recently, this Court decided a similar case where the State relied upon circumstantial evidence and did not present evidence of any motive for the shooting, and where neither party was permitted to introduce evidence which would reduce, mitigate, excuse or justify the homicide. *State v. Franks*, Op. No. 5758 (S.C. Sup. Ct. filed Aug. 12, 2020) (Shearouse Adv. Sh. No. 31 at 65), *pet. for rhrng pending, response requested* (Aug. 31, 2020). Though *Franks* is not final as of the submission of Respondent's initial brief, this Court therein found the implied malice instruction harmless on those facts, finding the charge not confusing given the record, and that "there was overwhelming evidence of malice apart from the mere use of a deadly weapon." *Id.* at 82-83.

Here, the court's complete malice charge included language defining malice as "hatred, ill will, or hostility towards another person," as "the intentional doing of a wrongful act without

[5] "The trial court is required to charge only the current and correct law of South Carolina." *State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 583 (2010).

just cause or excuse, and with an intent to inflict injury or under circumstances that the law will infer an evil intent," and that it "may be inferred from conduct showing a total disregard for human life." (R. p.303, line 22 – p. 3045, line 25). Given the totality of the malice instruction, the challenged portion could not have acted to confuse or mislead the jury. *See State v Stukes*, 416 S.C. 493, 787 S.E.2d 480 (2016) (jury instructions should "enlighten the jury and aid it in arriving at a correct verdict," and may not be confusing or misleading). Neither party presented evidence which would reduce, mitigate, excuse or justify the shooting. Neither party presented evidence of "just cause or excuse" for the killing. Instead, the State's fact witnesses indicated they did not know of any reason for Appellant to have acted with malice. The victim's daughter and nephew each testified they had never seen Appellant and the victim argue and they had never seen Appellant with a gun. Neither witness could pinpoint any reason for the shooting to have occurred. (R. p. 21, line 21 – p. 22, line 3; R. p. 34, lines 20-21; R. p. 54, lines 1-5; R. p. 55, lines 1-12; R. p. 74, lines 12-14; R. p. 75, lines 18-24).

However, the State presented overwhelming evidence of malice apart from the use of a gun: the victim was killed under the cover of darkness while in a peaceful slumber, without time or occasion to react in her own defense. There was no evidence of a struggle. Save for a close-range gunshot wound to the forehead, family and first responders found the victim in an otherwise undisturbed state with her CPAP machine in place and the blankets pulled up to her chest. (R. p. 70, lines 17-24). The victim did not have any money which might have induced Appellant to rob her. (R. p. 51, lines 7-14). More, no one other than the persons inside the home had access to the victim at the time. The doors had been dead bolted from the inside, no one else had a key to the home, and the other two occupants were asleep. (R. p. 27, lines 1-9; R. p. 44,

line 1 – p. 45, line 20; R. p. 72, lines 3-8; R. p. 75, lines 10-17). Appellant, previously asleep in the chair in the victim's bedroom, was gone. (R. p. 42, lines 18-24; R. p. 46, lines 11-13).

Other evidence showed Appellant acted in a manner consistent with consciousness of guilt immediately after the shooting. *See State v. Orozco*, 392 S.C. 212, 220, 708 S.E.2d 227, 231 (noting evidence of "unexplained" flight "is admissible as indicating consciousness of guilt, for it is not to be supposed that one who is innocent and conscious of that fact would flee"), *overruled on other grnds by State v. Stukes, supra*. Right after hearing a gunshot, a neighbor rushed to his porch and saw a black woman hurrying away from the direction of the victim's home. (R. p. 85, line 13 – p. 87, line 8). Appellant showed up at her daughter's in the early morning hours wearing nothing but a bra and a pair of jeans and acting nervous. (R. p. 220, lines 22-25; R. p. 222, lies 11-12; R. p. 233, line 21 – p. 234, line 15). It was November and it was cold. (R. p. 185, line 10-27). Appearing tired and sweaty, Appellant refused to tell her daughter and her boyfriend what was going on and asked to take a shower. (R. p. 191, lines 1-21). Later that day, her daughter told investigators Appellant told her she may have hurt someone. Though she disavowed the veracity of that statement at trial, the jury was free to consider her credibility. (R. p. 223, lines 6-16).

Therefore, upon circumstantial evidence alone, Appellant's jury was left to conclude whether Appellant did or did not shoot the victim. Not only was there no evidence to support any lesser offense, but there was no conflicting evidence of intent for the jury to consider. Notably, the State was not required to present evidence of any clear motive in order to establish malice, as "motive is not an element of murder." *State v. Smith*, 307 S.C. 376, 385, 415 S.E.2d 409, 414 (Ct. App. 1992), *cert. dismissed as improvidently granted* (Nov. 10, 1993). The jury was free to consider the absence of motive in its deliberations. *See State v. Edwards*, 127 S.C. 116, 120 S.E.

490 (1923). Further, Appellant's jury did not appear confused by the malice instruction. The jury returned four questions during nearly four hours of deliberations, none of them concerning malice or the elements of murder. (R. p. 308, lines 11-13; R. p. 309, lines 21-24; R. p. 314, lines 3-10).[6] The error should be found harmless as, beyond a reasonable doubt, it did not contribute to the verdict.

---

[6] The jury submitted questions about the verdict form, about the charge on reasonable doubt and on circumstantial evidence, and about the possession of a weapon during the commission of a violent crime.

STANDARD OF REVIEW FOR ISSUES II AND III

"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). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *State v. Jennings*, 394 S.C. 473, 477-78, 716 S.E.2d 91, 93 (2011). "The improper admission of hearsay is reversible error only when the admission causes prejudice." *State v. Weston*, 367 S.C. 279, 288, 625 S.E.2d 641, 646 (2006); *State v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150, 150-51 (1985). Appellate courts "will not set aside convictions due to insubstantial errors not affecting the result." *State v. Sherard*, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991).

II. Because the State's investigator testified about what he learned at the scene that informed the next steps in his investigation, the testimony was not offered for the truth of the matter asserted and was not inadmissible hearsay.

The State called homicide investigator Antonio Bailey of the Greenville County Sheriff's Office. (R. p. 121, lines 23-24). He had been dispatched to work the scene. (R. p. 128, lines 1-4). Bailey testified he began his investigation by asking "cursory questions" of people at the scene, which included Ruby Lynn Smith. (R. p. 131, lines 3-7; R. p. 132, lines 6-10). He learned she was the victim's daughter. (R. p. 131, line 4). "She indicated that there was a female only known to her as Denise" at the house that evening. (R. p. 131, lines 21-24).

Over Appellant's hearsay objection, the court permitted Bailey to testify the victim's daughter "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 . . . maybe around 4:00[.]" (R. p. 132, line 11 – p. 133,

line 4). "[S]he 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." (R. p. 133, lines 5-7). "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. p. 133, lines 8-11). Bailey next testified that he wanted to investigate the identity of Denise, (R. p. 133, lines 12-14), so he "tasked" others on his team "with the responsibility of finding out as much as they could about this person we knew only as Denise." (R. p. 134, lines 7-11).

"Hearsay is a statement, which may be written, other than one made by the declarant while testifying at trial, offered in evidence to prove the truth of the matter asserted." *In re Care & Treatment of Harvey*, 355 S.C. 53, 61, 584 S.E.2d 893, 897 (2003) (citing Rule 801, SCRE). "Hearsay is not admissible unless there is an applicable exception." *Id.* at 61-62, 584 S.E.2d at 897 (citing Rule 803, SCRE). But not all out-of-court statements constitute hearsay. Rule 801, SCRE. "It is well settled that evidence is not hearsay unless offered to prove the truth of the matter asserted." *State v. Vick*, 384 S.C. 189, 199, 682 S.E.2d 275, 280 (Ct. App. 2009). "Additionally, an out of court statement is not hearsay if it is offered for the limited purpose of explaining why a government investigation was undertaken." *State v. Brown*, 317 S.C. 55, 63, 451 S.E.2d 888, 894 (1994); *United States v. Love*, 767 F.2d 1052, 1063-64 (4th Cir. 1985), *cert. denied*, 474 U.S. 1081, 106 S.Ct. 848 (1986) (statement by officer not hearsay when "not offered for its truth but only to explain why the officers and agents made the preparations that they did in anticipation of the appellants' arrest").

As the State argued in this case, Bailey did not recite the information he gleaned from the victim's daughter at the scene in order to prove its truth. (R. p. 132, lines 16-19). Bailey's testimony described how he began his investigation once he arrived on scene. At the time he

spoke to the victim's daughter, Bailey and his team "were just beginning [their] investigation." (R. p. 132, lines 6-7). Bailey was orienting himself to the scene rather than conducting any "in depth" interview for the purpose of establishing a suspect. (R. p. 132, lines 8-10). Bailey's testimony, including the challenged statement, showed only that he responded to the call and initially acted to gain a general understanding of what had occurred prior to his arrival. In *State v. Kirby*, 325 S.C. 390, 481 S.E.2d 150 (Ct. App. 1996), this Court similarly found an officer permissibly testified about a dispatcher's notification that he should be on the lookout for a particular vehicle. 325 S.C. at 393, 481 S.E.2d at 151. This Court found the testimony about the dispatcher not hearsay because it "was not offered for the truth of the matter asserted, but rather, served only to explain the reason for the initiation of police surveillance of the vehicle in question." 325 S.C. at 396, 481 S.E.2d at 153 (citing *United States v. Love*, *supra*).

As in *Kirby*, Bailey's interaction with the victim's daughter informed the next *logical* steps of his investigation. Furthermore, Bailey did not identify anyone, let alone Appellant, as a perpetrator. This is discernable from eliciting hearsay testimony for the purpose of establishing who was responsible for the crime that had occurred. *Compare State v. Jolly*, 314 S.C. 17, 20, 443 S.E.2d 566, 568 (1994) ("testimony regarding the [child victim's] prior statement that identified Jolly as the perpetrator clearly does not fall into any of the hearsay exceptions"). Here, the alleged hearsay statement did not address or imply culpability—only that there was, or had been, some other person at the victim's home that investigators should better identify. As a result, the challenged statement was not offered for the truth of the matter asserted, but as an explanation for what steps the Greenville Sheriff's Department took to continue the investigation in this case. *State v. Sims*, 304 S.C. 409, 420, 405 S.E.2d 377, 383 (1991), *cert. denied*, 502 U.S. 1103, 112 S.Ct. 1193 (1992) ("the officer's testimony was not hearsay as it was not offered to

prove that Sims intended to kill the woman in question"); *State v. Brown*, 317 S.C. at 63, 451 S.E.2d at 894.

Moreover, for much of the same reason, any error in the admission of this testimony is harmless, as it could not reasonably have affected the result of the trial. *See State v. Mitchell*, 286 S.C. at 573, 336 S.E.2d at 151. Because the alleged statement did not address culpability, it was not prejudicially corroborative of the earlier testimony from the victim's daughter. (*See* R. p. 46, lines 11-13). The challenged statement is further innocuous to the outcome of the trial because Bailey also testified that he continued to investigate the case for "probably five months" prior to making any arrest, (R. p. 138, lines 13-15), and that he did not limit his investigation to Appellant, but rather investigated "several" possible suspects. (R. p. 138, lines 16-17; R. p. 139, lines 23-25).

Any error is also harmless where guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached. *See State v. Mitchell, supra.* As discussed in regards to Issue I above, Appellant exhibited consciousness of guilt when she arrived at her daughter's house in the early morning hours wearing no shirt, acting nervous, and requesting a shower and a change of clothes. (R. p. 220, lines 22-25; R. p. 222, lines 11-12; R. p. 233, line 21 – p. 234, line 15). Appellant refused to explain herself. (R. p. 191, lines 1-21). Moreover, hearing a gunshot, the victim's neighbor rushed outside to see a black woman hurrying away from the direction of the victim's home. (R. p. 85, line 13 – p. 87, line 8).

III. Because Bailey's re-direct testimony that he cleared Portia as a suspect related to his own investigation, it was not hearsay and was further elicited in response to the details of that investigation interjected during Appellant's cross-examination of Bailey.

On cross-examination, Bailey testified that law enforcement investigated Portia, the victim's granddaughter, who fired a pistol into the air in the victim's yard the evening before the victim was killed. (R. p. 149, line 15 – p. 150, line 25). He asked Portia, among others, to come in for an interview, "but she indicated that she had outstanding warrants" and refused. (R. p. 151, lines 1-13). Later, Portia "was being held on unrelated charges" and was at that time found in possession of a 22-caliber pistol. (R. p.153, line 7 – p. 154, line 25). Bailey submitted that pistol for comparison to the bullet fragments and jacket recovered from the victim. (R. p. 155, lines 1-19). Portia had also been found in possession of a different pistol in 2019, (R. p. 156, line 5-20), which was not compared to the ballistics recovered in the victim's case. (R. p. 157, lines 9-13).

On re-direct, Bailey testified that he also sought to obtain Portia's phone records, "trying to substantiate all the information" he had received, but was able to validate where Portia was at the time of the shooting without them. (R. p. 160, lines 12-25). He concluded Portia was nowhere near the victim's at the time of the shooting. (R. p. 161, lines 1-3). Over Appellant's objection, Bailey testified Portia "was absolutely cleared" as a suspect. (R. p. 161, lines 11-14). Without objection, Bailey next testified that he did not believe Portia had anything to do with the victim's death. (R. p. 161, lines 15-17).

Bailey's testimony that he personally eliminated Portia as a suspect in this case does not constitute an out-of-court statement, made by anyone other than the person testifying at trial, and is not hearsay. Rule 801, SCRE. Bailey's testimony that he cleared Portia as a suspect permissibly addressed his own conduct during the investigation of this case. Rule 601, SCRE;

see also Rule 701, SCRE. And, while "[a] prosecutor cannot vouch for the credibility of a witness by expressing or implying his personal opinion concerning a witness' truthfulness," Bailey's testimony on this point could not vouch for or bolster Portia's veracity, because Portia was not called as a witness in this case. *State v. Shuler*, 344 S.C. 604, 630, 545 S.E.2d 805, 818 (2001).

Moreover, the State did not delve into the outcome of that investigation until after the defense attacked its credibility on cross-examination. *See id.* at 631, 545 S .E.2d at 819. "A party may introduce otherwise inadmissible evidence in rebuttal when an opponent introduces evidence as to a particular fact or transaction" so long as the responsive testimony is "'proportional and confined to the topics to which counsel had opened the door.'" *State v. Heyward*, 426 S.C. 630, 636-37, 828 S.E.2d 592, 595 (2019), *reh'g denied* (June 28, 2019) (quoting *Bowman v. State*, 422 S.C. 19, 42, 809 S.E.2d 232, 244 (2018)); *State v. Page*, 378 S.C. 476, 482, 663 S.E.2d 357, 360 (Ct. App. 2008) (collecting cases). Appellant interjected the specifics of Bailey's investigation of Portia as evidence during his cross-examination of Bailey. The State thereafter elicited a proportional response regarding the outcome of that investigation, which Bailey himself lead. The jury remained free to consider whether Portia's firing of a pistol and argument with the victim's daughter on the evening of the shooting created reasonable doubt as to Appellant's culpability. (*See* R. p. 27, line 10 – p. 30, line 21).

Finally, Bailey's testimony that he cleared Portia as a suspect was cumulative to that of James Armstrong, the State's expert in firearms examination and identification, such that any error in its introduction "could not reasonably have affected the trial's outcome." *State v. Page*, 378 S.C. at 483, 663 S.E.2d at 360 (error in finding that defense counsel opened the door to the admission of unredacted statement of non-testifying co-defendant was harmless, as the

unredacted statement was cumulative of other testimony presented at trial). Armstrong testified that he examined a "caliber 38 – or nine-millimeter fired bullet jacket" and "a caliber 38-nine millimeter fired bullet core" collected in association with this case. (R. p. 175, line 14 – p. 177, line 14). He testified it was "[i]mpossible" for these evidentiary items to have been fired by a 22-caliber handgun because a 22-caliber "is much smaller than the nine millimeter." (R. p. 178, lines 2-15). Thus, not only did Portia not have any dispute with the victim, (R. p. 27, line 10 – p. 30, line 21), but the 22-caliber Portia had in her possession upon her later, unrelated, arrest could not have been responsible for the victim's death. (R. p. 153 line 7 – p. 154, line 25).

CONCLUSION

For all of the foregoing reasons, Respondent respectfully submits that this Court should affirm Appellant's convictions and sentence for murder and possession of a weapon during the commission of a violent crime.

Respectfully submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

CAROLINE SCRANTOM
Assistant Attorney General

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

CAROLINE SCRANTOM
ATTORNEY FOR RESPONDENT

October 28, 2020
Columbia, South Carolina

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

THE STATE,

Respondent,

v.

MALLETTE DENISE KIMBROUGH,

Appellant

Appellate Case No. 2019-001013.

CERTIFICATE OF COMPLIANCE

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

This 28th day of October, 2020.

Respectfully submitted,

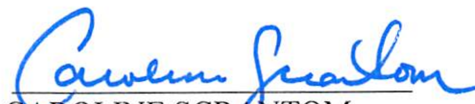
ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

CAROLINE SCRANTOM
Assistant Attorney General

Office of Attorney General
P.O. Box 11549
Columbia, SC 29211
(803) 734-6305



CAROLINE SCRANTOM
ATTORNEYS FOR RESPONDENT

October 28, 2020
Columbia, South Carolina

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

Appellate Case No. 2019-001013

THE STATE,

Respondent,

vs.

MALETTE DENISE KIMBROUGH,

Appellant.

CERTIFICATE OF SERVICE

I, Brandy Rankin, as an employee of the Respondent, hereby certify that as per the March 20, 2020 Order of the Chief Justice, the Initial Brief of Respondent and Designation of Matter, and Certificate of Service have been forwarded to Appellant's counsel, Robert M. Dudek, Esq., via email today, October 28, 2020 to RDudek@sccid.sc.gov and to Mr. Dudek's assistant, Haley Kellner, Hkellner@sccid.sc.gov.

I further certify that all parties required by Rule to be served have been served.

This 28th day of October, 2020.

Brandy Rankin
Legal Assistant to Caroline Scrantom
Assistant Attorney General

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE 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
Letitia H. Verdin, Circuit Court Judge

Unpublished Opinion No. 2022-UP-293
Heard June 7, 2022 – Filed July 13, 2022

AFFIRMED

Chief Appellate Defender Robert Michael Dudek, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Deputy Attorney General Donald J. Zelenka, Senior Assistant Deputy Attorney General Melody Jane Brown, Senior Assistant Attorney General W. Edgar Salter, III, and Assistant Attorney General Caroline Scrantom, all of Columbia, for Respondent.

PER CURIAM: Malette Denise Kimbrough appeals her convictions for murder and possession of a weapon during the commission of a violent crime, arguing the trial court erred in: (1) instructing the jury that malice may be inferred from the use of a deadly weapon; (2) allowing an investigator to testify about what the decedent's daughter told him because it was prejudicial hearsay testimony; and (3) allowing an investigator to testify that a person "was absolutely cleared" as a suspect as a result of information he received because the investigator's opinion was based on inadmissible hearsay. We affirm pursuant to Rule 220(b), SCACR.

1. We find the trial court erred in instructing the jury that malice may be inferred from the use of a deadly weapon; however, the erroneous instruction did not contribute to the verdict and does not require reversal. *See State v. Burdette*, 427 S.C. 490, 496, 832 S.E.2d 575, 578 (2019) ("An erroneous instruction alone is insufficient to warrant . . . reversal."); *State v. Smith*, 430 S.C. 226, 233, 845 S.E.2d 495, 498 (2020) ("[E]rroneous jury instructions are subject to a harmless error analysis."); *State v. Middleton*, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014) (holding an erroneous jury instruction is harmless if the court "determine[s] beyond a reasonable doubt that the error complained of did not contribute to the verdict" (quoting *State v. Kerr*, 330 S.C. 132, 144-45, 498 S.E.2d 212, 218 (Ct. App. 1998))); *Kerr*, 330 S.C. at 144, 498 S.E.2d at 218 ("Jury instructions must be considered as a whole, and if, as a whole, they are reasonably free from error, isolated portions which might be misleading do not constitute reversible error."); *id.* ("When reviewing a trial judge's instruction for error, this court must consider the instructions in their entirety."); *State v. Stanko*, 402 S.C. 252, 260, 741 S.E.2d 708, 712 (2013) (holding "[a] jury charge instructing that malice may be inferred from the use of a deadly weapon is no longer good law in South Carolina where evidence is presented that would reduce, mitigate, excuse, or justify the homicide"), *overruled on other grounds by Burdette*, 427 S.C. 490, 496, 832 S.E.2d 575, 578 (2019); *Burdette*, 427 S.C. at 502-05, 832 S.E.2d at 582-83 (holding that regardless of the evidence presented at trial, it is no longer appropriate to instruct the jury that malice may be inferred through the use of a deadly weapon, and making the court's ruling effective for all cases currently pending on direct review or that were not yet final, so long as the issue was preserved); *State v. Franks*, 432 S.C. 58, 81, 849 S.E.2d 580, 593 (Ct. App. 2020) (finding that despite the lack of evidence of a motive and that the evidence against Franks was circumstantial, the evidence of malice was overwhelming such that the erroneous inference of malice instruction was harmless beyond a reasonable doubt).

2. We find the trial court did not err in allowing Greenville County Sheriff's Office Investigator Antonio Bailey to testify about what decedent's daughter told him because it was offered to explain what he did next in his investigation, which was to determine who Kimbrough was and where she was; thus, it was not hearsay testimony. *See* Rule 801(c), SCRE ("'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."); *State v. King*, 422 S.C. 47, 67, 810 S.E.2d 18, 28 (2017) ("An out-of-court statement made to a police officer is judged by the same rules of evidence that govern any out-of-court statement by any out-of-court declarant. . . . [I]f the out-of-court statement made to a police officer has relevance and probative value that is not dependent upon its truthfulness, and it is not offered into evidence as proof of the matter asserted, then by definition the evidence is not hearsay." (quoting *Ruiz v. Commonwealth*, 471 S.W.3d 675, 681 (Ky. 2015))); *State v. Brown*, 317 S.C. 55, 63, 451 S.E.2d 888, 894 (1994) ("[A]n out of court statement is not hearsay if it is offered for the limited purpose of explaining why a government investigation was undertaken."); *State v. Rice*, 375 S.C. 302, 325, 652 S.E.2d 409, 421 (Ct. App. 2007) ("The hearsay rule does not require exclusion of testimony about what an investigating officer learns from his investigation."), *overruled on other grounds by State v. Byers*, 392 S.C. 438, 445, 710 S.E.2d 55, 58 (2011); *State v. Thompson*, 352 S.C. 552, 559, 575 S.E.2d 77, 81 (Ct. App. 2003) ("[T]he officers' testimony regarding statements made by the bystander were not entered for their truth but rather to explain and outline the officers' investigation and their reasons for going to the Thompsons' home.").

3. We find the trial court did not err in allowing Investigator Bailey to testify on redirect examination that Portia Rogers "was absolutely cleared" as a suspect as a result of information he received during his investigation because it was his testimony that he personally eliminated Rogers as a suspect in this case, which does not constitute an out-of-court statement made by someone other than the person testifying at trial and was not hearsay testimony. *See* Rule 801(c), SCRE ("'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."); *State v. Weaver*, 361 S.C. 73, 86, 602 S.E.2d 786, 792 (Ct. App. 2004) (finding an officer's testimony was not hearsay because he testified only to the conclusions he made based on what his investigation had thus far revealed); *Rice*, 375 S.C. at 325, 652 S.E.2d at 421 ("The hearsay rule does not require exclusion of testimony about what an investigating officer learns from his investigation."), *overruled on other grounds by Byers*, 392 S.C. at 445, 710 S.E.2d at 58; *see also State v. Page*, 378 S.C. 476, 482, 663 S.E.2d 357, 360 (Ct. App. 2008) (finding Page opened the door to testimony due to his questions on the detective's investigative techniques and the

sufficiency of evidence linked to Page because otherwise inadmissible evidence may be properly admitted when opposing counsel opens the door to that evidence); *id.* at 483, 663 S.E.2d at 360 ("Whether a person opens the door to the admission of otherwise inadmissible evidence during the course of a trial is addressed to the sound discretion of the trial judge.").

AFFIRMED.

THOMAS, MCDONALD, and HEWITT, JJ., concur.

RECEIVED
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.

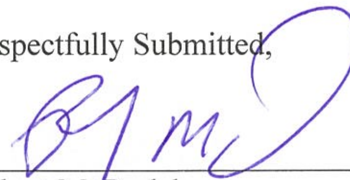
In context, it is apparent that Investigator Bailey told the jury that based upon information that he was privy to, but that was not available to the jury, that Portia Rogers was cleared as a suspect, and that she did not have "anything to do with killing her" in Bailey's opinion based on the "information" 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,



Robert M. Dudek
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

This 27th day of July, 2022.

RECEIVED
Jul 27 2022
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable Letitia H. Verdin, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

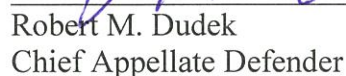
MALETTE DENISE KIMBROUGH,

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.



Robert M. Dudek
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

The South Carolina Court of Appeals

The State, Respondent,

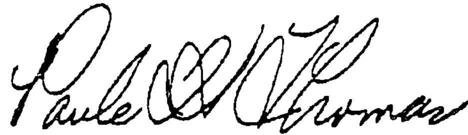
v.

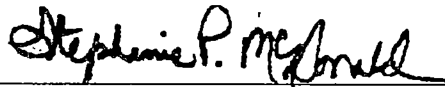
Malette Denise Kimbrough, Appellant.

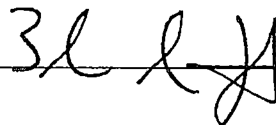
Appellate Case No. 2019-001013

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.


J.


J.


J.

Columbia, South Carolina

cc:
Alan McCrory Wilson, Esquire
Robert Michael Dudek, Esquire
Melody Jane Brown, Esquire
Caroline Scrantom, Esquire

FILED
Oct 20 2022

Donald J. Zelenka, Esquire
W. Edgar Salter, III, Esquire
The Honorable Letitia H. Verdin