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S.C. SUPREME COURT

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

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on October 20, 2022. App. 70.

QUESTIONS PRESENTED

1.

Whether the Court of Appeals erred by holding it was harmless error for the trial court to instruct the jury that malice may be inferred from the use of a deadly weapon since this instruction significantly prejudiced petitioner in this purely circumstantial evidence case where there was no evidence of any animus between petitioner and the decedent, and this improper jury instruction allowed the jury to infer malice against petitioner because the decedent was killed with a deadly weapon where there was no actual evidence of malice regarding petitioner and the decedent?

2.

Whether the Court of Appeals erred by holding the trial court did not abuse its discretion 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 petitioner sleeping in a lounge chair in the decedent's bedroom, and that when she returned thirty to forty-five minutes later that petitioner was gone, and that the decedent was shot in the head, since this was prejudicial hearsay testimony, and not simply testimony as to what Bailey did next in his investigation?

3.

Whether the Court of Appeals erred by holding the trial court did not abuse its discretion 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 FACTS

Procedural history

Petitioner 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 petitioner. W. Jeffry Weston and Anthony J. McCollum were the assistant solicitors. R. 1.

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

The Court of Appeals affirmed petitioner's convictions in State v. Malette Denise Kimbrough, Op. No. 2022-UP-293 (filed July 13, 2022). App. 57-60. Petitioner filed for rehearing. App. 61-69. Rehearing was denied in the order of the Court of Appeals dated October 20, 2022. App. 70.

This petition for a writ of certiorari follows.

Relevant facts

Ruby Smith was the decedent's live-in, sixty-two-year-old daughter. She was receiving disability, and she was not working. R. 13, l. 12 – 14, l. 9. Smith lived 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 Petitioner Malette Denise Kimbrough as her mother's friend. Petitioner was also Smith's friend. Her mother had known petitioner for about a year. "She just kept coming over there hanging around and would get high." Smith said petitioner also used crack, and she considered petitioner and her mother to be "get-high buddies." R. 21, ll. 3-17. Smith said that petitioner liked her mother. Smith had never heard them argue or even disagree. R. 21, l. 18 – 22, l. 3.

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

Smith recalled that prior to Portia leaving, "She [Portia] 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 that after Portia and her boyfriend left, neither one of them came back. Smith said that Portia was not mad at her mother, and that her problem was with Smith. Smith maintained that Portia had no motive to kill her mother. Smith opined even further that Portia could not have killed her mother. R. 30, ll. 1-21.

Smith remembered that for about a week, petitioner 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 confirmed that petitioner was nice to her mother, petitioner did her hair, petitioner cooked for her, and that they smoked crack cocaine together. R. 32, l. 19 – 33, l. 12. Smith recalled that petitioner had an overnight bag, "a tote bag with

clothes and stuff" and "[s]he washed up and changed clothes" at their house. However, petitioner did not live there, and she did not have a key to the house. R. 33, l. 8 – 34, l. 14.

Smith had never seen petitioner with a gun. R. 34, ll. 20-21. However, Smith claimed petitioner 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 gun was reported missing the day before the decedent was shot. R. 34, l. 20 – 35, l. 19. Smith remembered petitioner asking her: "You think Portia got her gun or somebody got her gun. I said, No." R. 35, l. 24 – 36, l. 22. Smith maintained petitioner told her the gun was a thirty-eight or forty-five caliber, "one of the two." R. 37, ll. 13-16.

On the evening of her mother's death, Smith said she went to bed about 11:30 or 12:00 p.m. She maintained that ensured that the doors were locked. She remembered Lorenzo "was in the house" as were petitioner 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. She was "wanting me to come put water in her machine." R. 39, l. 10 – 40, l. 21.

When Smith went into the decedent's bedroom to put water in her "sleep machine," petitioner was asleep. "[S]he was laying back in the chair with her eyes closed." R. 40, l. 23 – 41, l. 20. Smith recalled that her decedent mother was awake at the time, and Smith "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 [petitioner] 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 added, "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 petitioner was no longer sleeping in the chair, and that petitioner had left while Smith was apparently sleeping without telling Smith she was leaving. R. 48, ll. 13-24.

On cross-examination, Smith admitted that petitioner cooked for her mother, petitioner did her mother's hair, and that Smith had never seen petitioner with a gun. Further, petitioner

and the decedent did drugs together. Smith acknowledged her decedent mother did not have any money and that petitioner had money. In fact, petitioner "always had money." R. 50, l. 2 – 51, l. 20.

Smith 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. 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 petitioner and her decedent mother had not argued and that there was no bad blood or problem between them. R. 54, l. 1 – 55, l. 12.

Lorenzo Pardlow was thirty years old on the day of petitioner'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. He maintained that 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 offered that this left him, Ruby Smith, the decedent, and petitioner in the house. R. 63, ll. 4-15.

Lorenzo admitted that petitioner was very close to the decedent, and that petitioner 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 confirmed that petitioner helped clean the house, and she fixed

food for them to eat. Lorenzo also recalled that petitioner 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 seemed to recall that he went to bed at midnight or 1:00 in the morning at the latest that fatal night. Lorenzo said 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.

There did not appear to be any sign of a struggle as the decedent's hands were at her side. Lorenzo remembered that the petitioner 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 testified 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 but "The cops was [already] 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.

"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 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. He also could not give any further description of her. R. 87, l. 4 – 88, l. 21.

The First Hearsay Objection – Bailey and Ruby Smith

Greenville investigator Antonio Bailey was the lead investigator in this homicide case. 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 on Portia Rogers "being cleared"

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 he said he specifically eliminated Portia Rogers as a suspect. His belief that Portia did not have anything to do with the decedent's death was based "on information" he had received. Therefore, defense counsel objected to this hearsay testimony. R. 161, ll. 1-17.

On cross-examination, Bailey said he was aware that Portia Rogers was involved in an argument with the decedent's daughter on the night the decedent was killed. He also knew Portia had fired her weapon twice -- allegedly 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 Portia finally came in, she failed to tell Bailey that she had been in possession of a weapon and that she 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. Portia 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." [1] R. 157, ll. 3-13.

Other testimony

Bailey admitted he learned petitioner had gotten a loan of $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 petitioner's daughter and her boyfriend that petitioner had money in her possession following the murder.

Michael Argumenti was living with the petitioner's daughter 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, petitioner knocked on their apartment door. R. 185, ll. 10-25.

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[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.

The testimony of both Michael and the petitioner's daughter was inconsistent and vacillating. Michael said his girlfriend, the petitioner's daughter, asked her mother if there was a problem. "She [petitioner] said she couldn't tell us . . . 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 petitioner 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 accused him of lying. R. 193, ll. 5-20. Michael testified that he did not see petitioner with a gun. The police searched their apartment, and they did not find one either. "I had some marijuana on my stool that they took." R. 203, l. 14 – 204, l. 3.

Petitioner'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. Against this backdrop, Dixon admitted she told an investigator when petitioner came to their apartment that early morning, she asked her, "What the hell is going on, momma?" She told the investigator that petitioner 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 said she told the investigator her mother said, "I think I hurt somebody tonight." R. 223, ll. 6-23. Petitioner had cigarettes, candy, and some change in her pocketbook, but she did not have a gun. 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 earlier 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.

Court of Appeals

The Court of Appeals in its summary opinion found this jury instruction was error, but harmless error:

> "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).

App. 58.

ARGUMENT

1.

The Court of Appeals erred by holding it was harmless error for the trial court to instruct the jury that malice may be inferred from the use of a deadly weapon since this instruction significantly prejudiced petitioner in this purely circumstantial evidence case where there was no evidence of any animus between petitioner and the decedent, and this improper jury instruction allowed the jury to infer malice against petitioner because the decedent was killed with a deadly weapon where there was no actual evidence of malice regarding petitioner and the decedent.

The Court of Appeals properly held it was error for the trial court to instruct that malice could be inferred from the use of a deadly weapon. In State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019), this Court held that the judge erred by instructing the jury that malice could be inferred from the use of a deadly weapon. As to the particular facts of Burdette, this 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, this 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."

This 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 noted based upon Griffith v. Kentucky, 479 U.S. 314 (1987), that its holding was controlling 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). The Court of Appeals therefore correctly addressed the merits of this jury instruction issue.

There was no doubt in this case that the decedent was shot with a deadly weapon. The Court of Appeals erred in finding this charging error was harmless. The jury was allowed to infer malice against petitioner – the only person on trial – because the decedent was killed with a deadly weapon. This was a purely circumstantial evidence case where the only evidence was that petitioner and the decedent were friends. There was no evidence they ever argued or even disagreed. As seen above, there was simply absolutely no evidence of animus between petitioner and the decedent.

Further, there was no evidence of malice involving petitioner in this case, other than the jury instruction allowing malice to be inferred from the use of a deadly weapon against her. This made this inferred malice jury instruction, at a minimum, very confusing to the jury. "The purpose of a jury instruction is `to enlighten the jury and to aid it in arriving at a correct verdict. It is error to give instructions which are calculated to confuse or mislead the jury.'" State v. Blurton, 352 S.C. 203, 207-08, 573 S.E.2d 802, 804 (2002) *citng* State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987). See, also, State v. Hewitt, 205 S.C. 207, 31 S.E.2d 257, 259 (1944).

As for the suspicion evidence in this case, petitioner left the decedent's house on the night of the murder. Petitioner 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. Petitioner, conversely, had obtained a loan of over $800 from a loan company two days before the shooting. Thus, while petitioner 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 petitioner was guilty.

The jury charge error was not harmless. Certiorari should be granted on this issue.

2.

The Court of Appeals erred by holding the trial court did not abuse its discretion 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 petitioner sleeping in a lounge chair in the decedent's bedroom, and that when she returned thirty to forty-five minutes later that petitioner was gone, and that the decedent was shot in the head, since this was prejudicial hearsay testimony, and not simply testimony as to what Bailey did next in his investigation

Relevant Facts

As seen above, 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. 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.

Court of Appeals

In its summary opinion on this issue, the Court of Appeals wrote:

> 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-courtdeclarant. . . . [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.")."

App. 59. (emphasis added).

Discussion

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 petitioner 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 petitioner was gone was very damning, concise hearsay testimony about the murder. It concisely, in Smith's alleged words to Bailey, which Bailey repeated, put before the jury the state's theory of why petitioner was the murderer, and that underscores its prejudicial effect. Bailey's testimony went far beyond explaining what he did next in his investigation vis-à-vis appellant or anyone else.

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 this 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.

The Court of Appeals found the social worker's testimony was cumulative to the testimony of the child's uncle and the child. This 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 can be harmless error portion of it.

Petitioner obviously recognizes this is not a child sex case, and not a corroboration case, but Jolly v. State makes the salient point that hearsay repetition of a witness's testimony has the spurious effect of making the testimony of that earlier witness seem more believable, and it

enhances by repetition that testimony. The testimony of Investigator Bailey, reducing Ruby Smith's statements into a concise or pithy prosecution theory of petitioner's guilt, was offered for the truth of the matter 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 petitioner had no motive to harm the decedent, there was not any animus between them, and simply no reason for petitioner to kill her friend. This pithy hearsay testimony regarding the alleged critical facts of the murder as allegedly told by Smith to Investigator Bailey was not harmless error.

3.

The Court of Appeals erred by holding the trial court did not abuse its discretion 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.

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 supra, because of prior warrants and whatever other reasons. Portia apparently only talked to the police after she was in custody on another charge. Regardless, Portia failed to disclose the important fact she was in possession of gun and that she had discharged it on the night of the murder.

Conversely, there was no evidence of any disagreement between petitioner and the decedent -- or petitioner and anyone else in the household. Further, petitioner 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 petitioner 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, cleared totally as a suspect *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).

Court of Appeals

In its summary opinion on this issue the Court wrote:

> 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.")."

App. 59-60.

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 third-party guilt head on as to the prospect of Portia Rogers being considered the murderer or a very likely suspect in the murder.

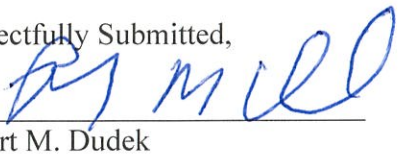
In context, it was apparent that what investigator Bailey told the jury was based upon "information" that he was allegedly privy to, but that was not available to the jury. He cleared Portia Rogers as a suspect, and he opined that she did not have "anything to do with killing her" in Bailey's opinion 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. Defense counsel's normal challenges to Bailey on cross-examination or the state's case did not "open to door" to this hearsay opinion testimony that Bailey "cleared" Portia as suspect either, as the Court of Appeals appears to have found in its summary opinion cited above citing State v. Page, 378 S.C. 476, 663 S.E.2d 357 (Ct.App. 2008). It remains unclear how petitioner's defense "opened the door" to Bailey's proclamation that he "cleared" Portia as the state alleged in the Court of Appeals. See State's Brief of Respondent at 17-18. App. 50-51. This inadmissible hearsay evidence was prejudicial to petitioner as it impermissibly sought to remove the reasonable doubt of petitioner's guilt by impermissibly absolving Portia Rogers -- through hearsay evidence where third party guilt had been legitimately raised by the trial evidence – and where 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 prejudicial hearsay).

CONCLUSION

By reason of the foregoing arguments, a writ of certiorari should be issued to allow full briefing on these three issues.

Respectfully Submitted,



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