RECEIVED

Dec 08 2022

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.

Op. No, 2022-UP-293 (S.C. Ct.App., July 13, 2022)
Appellate Case No. 2022-001624

RETURN TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

WILLIAM EDGAR SALTER III
Senior Assistant Attorney General

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

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

PETITIONER'S QUESTIONS PRESENTED

I. 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?

II. 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 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 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?

RESPONDENT'S COUNTERSTATEMENT OF QUESTIONS PRESENTED

I. Whether certiorari should be denied because the Court of Appeals correctly held that any error in the trial judge's jury instruction that malice could be inferred from the use of a deadly weapon was harmless beyond a reasonable doubt.

II. Whether certiorari should be denied because the Court of Appeals correctly found that Inv. Antonio Bailey's testimony about what he learned from the victim's daughter while at the scene informed the next steps in his investigation, the testimony was not offered for the truth of the matter asserted and was not inadmissible hearsay.

III. Whether certiorari should be denied because the Court of Appeals correctly found that the trial judge did not err by admitting Inv. Bailey's re-direct testimony that he cleared Portia Rogers as a suspect based on his investigation because it was not hearsay and because it was elicited in response to the details of that investigation interjected during Petitioner's cross-examination of him.

STATEMENT OF THE CASE

Following the November 19, 2016, homicide of Ruby Flamm, the Greenville County Grand Jury indicted Petitioner, Malette Denise Kimbrough, on 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 Petitioner at a jury trial before the Honorable Letitia H. Verdin. 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 Petitioner of both charges. ***R. p. 319, lines 14-19***. Judge Verdin sentenced her to concurrent sentences of thirty-seven years for murder and five years for possession of a weapon during the commission of a violent crime. R***. p. 323, lines 8-11***.

Petitioner timely served and filed a notice of appeal. Following briefing by the parties and oral argument, the Court of Appeals affirmed her convictions and sentence on July 13, 2022. *See State v. Kimbrough*, 2022-UP-293 (S.C. Ct.App., July 13, 2022). ***App. 57-60***. Petitioner's petition for rehearing (***App. 61-69***) was denied on October 20, 2022. ***App. 70***.

Petitioner served and filed her Petition for Writ of Certiorari on December 1, 2022. Respondent now files its Return to her Petition.

STATEMENT OF FACTS

Ruby Flamm, 75, lived with her daughter, Ruby Lynn Smith. ***R. p. 14, line 7 – p. 15, line 10***. Ruby needed the live-in assistance of her daughter because she had health problems and she was wheelchair-bound***. R. p. 15, line 11 – p. 16, line 13; p. 67, lines 9-11***. Ruby and Petitioner were friends. They would smoke crack together at Ruby's house. R***. p. 19, line 3 – p. 21, line 23***. One day in November 2016, someone dropped Petitioner off at Ruby's house with a sack of groceries and an overnight bag. She began staying at Ruby's and would occasionally help around the house. ***R. p. 32, line 14 – p. 34, line 14; p. 50, lines 2-15***. At night, she slept in a lounge chair beside Ruby's hospital bed. ***R. p. 31, line 3 – p. 32, line 15; p. 39, lines 10-12***.

On the evening of November 18, 2016, some of Ruby's grandchildren visited. ***R. p. 61, lines 3-18; p. 98, lines 8-10***. One granddaughter, Portia Rogers, came over with her boyfriend. ***R. p. 26, lines 3-8***. Portia eventually got in a fight with Ruby's daughter, Ruby Lynn Smith, and left the house sometime before midnight. Before she left, she fired a gun into the air in the front yard. Ruby's daughter did not hear or see this happen, but Ruby's grandson, Lorenzo Pardlow, did. ***R. p. 28, lines 9-20; p. 62 lines 11-21***. Portia did not have keys to Ruby's house, and she did not return to Ruby's house at all that night. ***R. p. 26, lines 9-16; p. 27, lines 10-24; p. 28, lines 21-23; p. 29, line 23 – p. 30, line 7***. Further, Portia never got into an argument with Ruby or exchanged any harsh words with her that evening; Portia only engaged in a dispute with Ruby's daughter. ***R. p. 30, lines 8-21***.

After Portia and the other family members left, Ruby's daughter readied the house for everyone to go to bed. She checked all the exterior doors to the house and made sure they were deadbolted from the inside. R***. p. 38, lines 3- p. 39, line 9***. Lorenzo, the grandson, slept over that night. ***R. p. 60 lines 14-23***.

By bedtime, only Ruby, her daughter Ruby, Lorenzo, and Petitioner were in the house. ***R. p. 25, lines 19-24; p. 63, lines 12-18***. Lorenzo went to sleep in the third bedroom. ***R. p. 25, lines 9-18***. Ruby's daughter went to sleep in her bedroom, near the front of the house, while Ruby went to sleep in her bedroom, and Petitioner went to sleep in the chair in Ruby's room. ***R. p. 65, lines 17 – p. 66, line 11***.

In the middle of the night, Ruby 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***. Her daughter went back to bed, but Ruby later 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 Ruby's daughter went to tend to the machine, Petitioner appeared to be asleep in the chair next to Ruby's bed. ***R. p. 41, lines 1-7; p. 42, lines 19-24***.

After Ruby'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." She called out to Ruby, but Ruby did not respond. ***R. p. 44, lines 1-22***. 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 then checked the front door and found it open. She also saw that Ruby's bedroom door was "halfway open." ***R. p. 45, lines 15-16***. She looked in Ruby's bedroom and saw Ruby "in bed with a hole in her head." R***. p. 45, lines 16-20***. Petitioner, however, "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 a gunshot that came from the direction of Ruby's house. ***R. p. 84, line 13 – 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, he saw "a lady down at the stop sign running" away from the direction of Ruby's house. R***. p. 86, lines 24-25; p. 88, lines 1-5***. This black female was wearing dark pants and a light shirt. ***R. p. 87, lines 1-25***.

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

When Ruby's daughter discovered that Ruby 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. Further, he testified that Ruby's hands were down "by her side." (R. p. 70, lines 23-24).

First responders similarly noted that Ruby 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 also had blankets pulled up to her chest in a position consistent with her resting in the bed. ***R. p. 130, lines 19-20***. She had sustained a fatal "close-range gunshot wound to her forehead." ***R. p. 116, lines 4-9***. A ballistics analysis concluded that Ruby was struck by a bullet from "either a nine-millimeter handgun or a 38-caliber handgun."[1] ***R. p. 178 lines 2-5***.

[1] Because of 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***. Ruby's

When Ruby'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 Petitioner, who had been at Ruby's house.[2] ***R. p. 134, lines 7-17***. They did not find Petitioner at her own residence, but a subsequent conversation with her husband led officers to her daughter's house. ***R. p. 135, line 8 – p. 136, line 5***. There, officers found Petitioner's daughter, Malexes Dixon, and her boyfriend, Michael Argumenti. Dixon and Argumenti both went to the police department and gave statements. ***R. p. 136, line 13 – p. 138, line 6***.

They both explained that Petitioner arrived at their home between 4:30 and 5:00 a.m. on November 19, and banged on their door, waking the couple. It was cold. ***R. p. 185, line 10 – p. 186, line 6; p. 230, lines 2-4***. Argumenti described Petitioner as "tired" from "walking a long way" (R. p. 188, lines 17-18), and both Argumenti and Dixon said that she had removed her shirt and was wearing only "blue jeans and a bra" when they saw her at their door. ***R. p. 188, line 20 – p. 191, line 5; 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; p. 225, lines 7-11; p. 230, lines 5-20***.

The couple asked Petitioner what was going on but she refused to answer, saying only that "she couldn't tell" them. ***R. p. 191, lines 6-12; p. 194, line 25 – p. 195, line 13; p. 222, lines 15-21***. Petitioner did not respond at all when Dixon asked what was going on,[3] and she thought

---

granddaughter Portia, 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 Petitioner until about five months after the shooting. ***R. p. 138, lines 13-19***.

[3] Dixon testified law enforcement threatened to take her to jail; however, she also asserted she

her mother acted nervous. ***R. p. 222, lines 1-14***.

Petitioner asked to take a shower. ***R. p. 191, line 15; 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***. Dixon provided her with fresh clothes because the shirt Petitioner had previously worn had "bed bugs on it." ***R. p. 197, lines 2-6; p. 226, lines 9-21***.

Next, Petitioner asked the couple to call her friend Johnny Marshall to give her a ride. ***R. p. 197, lines 12-22; p. 226, line 25 – p. 227, line 23***. Argumenti knew Marshall and called him for Petitioner between 5:00 and 5:30 a.m. ***R. p. 198, lines 10-25***. He handed the phone to Petitioner who spoke to Marshall. She rested on her daughter's sofa while waiting for Marshall. Marshall picked her up about half an hour later. ***R. p. 200, lines 2-21***. Neither Argumenti nor Dixon saw Petitioner with a gun that morning. R***. p. 203, lines 14-25; p. 232, lines 1-7***. However, Argumenti told law enforcement he saw two guns in her house about a year earlier. ***R. p. 205, lines 9-19; p. 206, lines 1-12***.

STANDARD OF REVIEW FOR ISSUE I

In criminal cases, appellate courts only review errors of law. *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). "The burden is upon the appellant to satisfy this court that there has been prejudicial error." *State v. Smith*, 230 S.C. 164, 168, 94 S.E.2d 886, 887 (1956). "

---

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

'Errors, including erroneous jury instructions, are subject to harmless error analysis.' …. 'When considering whether an error with respect to a jury instruction was harmless, we must 'determine beyond a reasonable doubt that the error complained of did not contribute to the verdict.' …. 'In making a harmless error analysis, our inquiry is not what the verdict would have been had the jury been given the correct charge, but whether the erroneous charge contributed to the verdict rendered.' " *State v. Burdette*, 427 S.C. 490, 496, 832 S.E.2d 575, 578-79 (2019) (citations omitted). Applying this standard of review requires denial of certiorari.

I. Certiorari should be denied because the Court of Appeals correctly held that any error in the trial judge's jury instruction that malice could be inferred from the use of a deadly weapon was harmless beyond a reasonable doubt.

Over Petitioner's objection, (***R. p. 251, lines 1-18; p. 252, lines 18-21***), the trial judge 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;*** *see also* ***R. p. 258, lines 3-11*** (trial judge's ruling). The trial judge correctly observed that the record before her and the case law in effect at that time allowed for this instruction on implied malice. ***R. p. 253, lines 1-10 and 17-20***. At the time of Petitioner's June 2019 trial, *State v. Belcher*, 385 S.C. 597, 612, 685 S.E.2d 802, 810 (2009), *overruled*, *State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019), 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." *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 the trial, this Court"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." *Burdette*, 427 S.C. at 502, 832 S.E.2d at 582 (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 in *Burdette* applied this 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 Court of Appeals correctly held that although the trial judge erred by giving the instruction,

> 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

[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, Petitioner objected to the State's request to charge implied malice, and the trial judge ruled without delay. ***R. p. 251, lines 16-18; p. 253, lines 17-20***.

> 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)[, *cert. denied*, Sept. 21, 2021] (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).

Kimbrough, at 2, ***App. 58***.

Respondent submits that certiorari should be denied because there was no error. Although the implied malice instruction was valid at the time of trial,[5] it now constitutes harmless error under *Burdette* in light of the evidence presented. "When considering whether an error with respect to a jury instruction was harmless, [the Court] must 'determine beyond a reasonable doubt that the error complained of did not contribute to the verdict.' " *Middleton*, 407 S.C. at 317, 755 S.E.2d at 435 (quoting *Kerr*, 330 S.C. at 144-45, 498 S.E.2d at 218). And, the Court must consider the jury charge as a whole. *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." *Kerr*, 330 S.C. at 145, 498 S.E.2d at 218. "[The] inquiry is not 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.* "[W]hether or not the error was harmless is a fact-intensive inquiry." *Middleton*, 407 S.C. at 317, 755 S.E.2d at 435. *See also Franks*, 432 S.C. at 81, 849 S.E.2d at 592-93.

[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).

This Court has previously denied certiorari to review at least two similar cases in which the Court of Appeals held that giving an implied malice instruction was harmless in trials held before *Burdette* was decided. *See Franks*, *supra*; *State v. Brooks*, 428 S.C. 618, 627-33, 837 S.E.2d 236, 241-44 (Ct. App. 2019), *cert. denied*, Aug 10, 2020. Respondent likewise submits that the instruction was harmless in this case, since it did not contribute to the verdict in light of the evidence presented and the charge as a whole.

In addition to the challenged instruction, the trial judge instructed jurors that malice is "the intentional doing of a wrongful act without just cause or excuse, and with an intent to inflict an injury or under circumstances that the law will infer an evil intent." She also charged jurors that "malice may be inferred from conduct showing a total disregard for human life." ***R. p. 303, line 25 – p. 304, line 4; p. 304, lines 23-24***. Also, her 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 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. 304, line 25***.

The evidence presented was that Petitioner's actions fell within these definitions of malice and there was overwhelming evidence of guilt, such that this was not a who-done-it:

- The victim was 75 years old, wheelchair bound, and had health problems.
- She was shot in her forehead while she was asleep, and she could not have possibly defended herself;
- There was no evidence of a struggle;
- There were no prior difficulties or animosity between the victim and Petitioner;
- Rather, the victim and Petitioner were "get-high buddies," who smoked crack together;

- Neither the victim's daughter nor her nephew had ever seen Petitioner and the victim argue and neither witness could pinpoint any reason for the shooting to have occurred;

- The victim did not have money, and the killing was without any apparent motive;

- There was no evidence of self-defense, or any evidence presented that would reduce, mitigate, excuse, or justify the homicide, and the trial judge did not instruct on any lesser included offenses. See *Franks*, 432 S.C. at 81-82, 849 S.E.2d at 593;

- Petitioner suggested to jurors that the victim's grand-daughter, Portia Rogers, may have killed the victim.

- However, there was no evidence that Rogers was in the home at the time of the murder and third party guilt was not an issue;

- Before the murder occurred, the doors in the house were deadbolted from the inside, and it took a key to unlock the doors.

- Only the victim's daughter and the victim, in whose room Petitioner was staying, had keys;

- So, it was physically impossible for Rogers (or anyone else outside of the home) to gain entry after Ruby's daughter locked the deadbolts on the doors;

- The only persons in the home at that time were the victim, her daughter, her grandson, and Petitioner;

- Contrary to Petitioner's brief, she had either a .38 or a .45. **R. *p. 37, lines 7-18***;

- When the daughter got up to investigate a loud noise, the victim was dead, the grandson was still asleep, but Petitioner was missing, and the previously dead-bolted front door was open.

- A neighbor, who heard a gunshot coming from the direction of the victim's house, went out on his porch to investigate around 4:10 a.m.;

- He saw a black woman running away from the direction of the victim's home and wearing dark pants and a light shirt. ***R. p. 87***. *See State v. Orozco*, 392 S.C. 212, 220, 708 S.E.2d 227, 231 (2011) (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 grds*, *State v. Stukes*, 416 S.C. 493, 787 S.E.2d 480 (2016);

- Petitioner apparently fled to the residence of her daughter and the daughter's boyfriend, arriving between 4:30 and 5 a.m.;

- Although it was November and cold, she was only wearing a bra and jeans when she arrived;

- She wanted a shower and a change of clothes;

- She would not answer their questions about what was going on, stating only that she could not tell them; and

- While her daughter claimed at trial that she had lied to police, her daughter told police that Petitioner said that she thought she had hurt somebody.

Also, both *Burdette* and footnote 9 in *Belcher* state that the State is free to argue the challenged inference. So, that closing argument is not prejudicial. Further, there was no suggestion that the jury was confused by the instruction. *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). And, the jury had four questions during nearly four hours of deliberations, but none of their questions concerned 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] *See Brooks*, 428 S.C. at 633, 837 S.E.2d at 244; *Franks*, 432 S.C. at 82, 849 S.E.2d at 593. Therefore, certiorari should be denied on this issue because any error was harmless beyond a reasonable doubt.

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

[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.

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. Certiorari should be denied because the Court of Appeals correctly found that Inv. Antonio Bailey's testimony about what he learned from the victim's daughter while at the scene 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***). Inv. Bailey began his investigation by asking "cursory questions" of people at the scene, which included Ruby Lynn Smith. He learned that she was the victim's daughter. ***R. p. 131, lines 3-7; p. 132, lines 6-10***. Inv. Bailey testified that "[s]he indicated that there was a female only known to her as Denise" at the house that evening. ***R. p. 131, lines 21-24***.

Over Petitioner's hearsay objection, the court permitted Inv. 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. Inv. 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***.

On appeal, the Court of Appeals rejected Petitioner's argument of error in admitting this testimony as follows:

> 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.").

Kimbrough, at 3, ***App. 59***.

Again, Respondent submits that certiorari should be denied because the Court of Appeals properly rejected Petitioner's argument. "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." *Brown*, 317 S.C. at 63, 451 S.E.2d at 894; *United States v. Love*, 767 F.2d 1052, 1063-64 (4th Cir. 1985), *cert. denied*, 474 U.S. 1081 (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, Inv. 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***. Instead, Inv. Bailey's testimony described how he began his investigation once he arrived on scene. At the time he spoke to the victim's daughter, Inv. Bailey and his team "were just beginning [their] investigation" (***R. p. 132, lines 6-7***), and he 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***.

His 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), the Court of Appeals similarly found an officer permissibly testified about a dispatcher's notification that he should be on the lookout for a particular vehicle. *Id*. at 393, 481 S.E.2d at 151. The Court found that 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 *Love*, *supra*, and *Brown*, *supra*).

As in *Kirby*, Inv. Bailey's interaction with the victim's daughter informed the next *logical* steps of his investigation. Furthermore, Inv. Bailey did not identify anyone, let alone Petitioner, as a perpetrator. *See also Brown*, 317 S.C. at 63, 451 S.E.2d at 893-94 (officer's testimony about "receiving [civilian] complaints" that led to the surveillance of the defendant's apartment was not hearsay). Also, Inv. Bailey testified that he continued to investigate the case for "probably five months" prior to making any arrest, and that he did not limit his investigation to Petitioner. Rather, he investigated "several" possible suspects. ***R. p. 138, lines 13-17; p. 139, lines 23-25***.

So, this is clearly distinguishable from cases where hearsay testimony was elicited in order to establish a perpetrator's identity. *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: *i.e.*, "Denise." 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 (1992) ("the officer's testimony was not hearsay as it was not offered to prove that Sims intended to kill the woman in question"); *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 Mitchell*, 286 S.C. at 573, 336 S.E.2d at 151. In addition to the points already advanced, Respondent submits that although the challenged statement did not address culpability, it was cumulative to the earlier testimony from the victim's daughter. *See* ***R. p. 46, lines 11-13***; *See Jennings*, 394 S.C. at 478, 716 S.E.2d at 93-94 ("Improperly admitted hearsay which is merely cumulative to other evidence may be viewed as harmless").

Further, any error is also harmless where guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, as was the case here. *See Mitchell*, 286 S.C. at 573, 336 S.E.2d at 151. As discussed in Argument I, Petitioner 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. Also, she refused to explain herself when questioned by her daughter and Argumenti. 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. Further, given that the doors to the residence had been deadbolted from the inside before the crime, only someone in the residence could have murdered the victim and all of the State's evidence, discussed in Argument I and in the "Statement of Facts", pointed to Petitioner as the murderer. So, any error was harmless beyond a reasonable doubt.

III. Certiorari should be denied because the Court of Appeals correctly found that the trial judge did not err by admitting Inv. Bailey's re-direct testimony that he cleared Portia Rogers as a suspect based on his investigation because it was not hearsay and because it was elicited in response to the details of that investigation interjected during Petitioner's cross-examination of him.

On cross-examination, Inv. Bailey testified that law enforcement investigated Rogers, 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 Rogers, among other people, to come in for an interview, "but she indicated that she had outstanding warrants" and refused. ***R. p. 151, lines 1-13***. Later, when Rogers "was being held on unrelated charges," she was found in possession of a 22-caliber pistol. ***R. p.153, line 7 – p. 154, line 25***. Inv. Bailey submitted this pistol for comparison to the bullet fragments and jacket recovered from the victim. ***R. p. 155, lines 1-19***. Rogers 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, Inv. Bailey testified that he also sought to obtain Rogers' phone records, "trying to substantiate all the information" he had received. However, he was able to validate where she was at the time of the shooting without them. ***R. p. 160, lines 12-25***. He concluded that Rogers was nowhere near the victim's residence at the time of the shooting. ***R. p. 161, lines 1-3***). Over Petitioner's objection, he testified that Rogers "was absolutely cleared" as a suspect. ***R. p. 161, lines 11-14***. Without objection, he next testified that he did not believe Rogers had anything to do with the victim's death. ***R. p. 161, lines 15-17***.

On appeal, the Court of Appeals found that there was no error in permitted the testimony on redirect:

> 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.").

Kimbrough, at 3-4, ***App. 59-60***.

Once again, Respondent submits that certiorari should be denied because the Court of Appeals properly rejected Petitioner's argument. Inv. Bailey's testimony that he personally eliminated Rogers as a suspect in this case does not constitute an out-of-court statement, made by anyone other than the person testifying at trial. So, by definition, his testimony is not hearsay. *See* Rule 801(c), SCRE. Rather, his testimony that he cleared Rogers as a suspect permissibly addressed *his own conclusion* as to the results of *his investigation* in the case. See Rule 601, SCRE; *see also Weaver*, 361 S.C. at 86, 602 S.E.2d at 792 (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") Also, while "[a] prosecutor cannot vouch for the credibility of a witness by expressing or implying his personal opinion concerning a witness' truthfulness," Inv. Bailey's testimony on this point could not have possibly vouched for or bolstered Rogers' veracity because she 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, Petitioner "opened the door" to the introduction of this testimony. The State did not delve into the outcome of Inv. Bailey's 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). Petitioner interjected the specifics of Inv. Bailey's investigation of Rogers as evidence on his cross-examination of Inv. Bailey. The State thereafter elicited a proportional response regarding the outcome of that investigation, which Inv. Bailey himself lead. The jury remained free to consider whether Rogers' firing of a pistol and argument with the victim's daughter on the evening of the shooting created reasonable doubt as to Petitioner's culpability. *See* **R. *p. 27, line 10 – p. 30, line 21***.

Finally, Inv. Bailey's testimony that he cleared Rogers 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." *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 Rogers not have any dispute with the victim, **R. p. 27, line 10 – p. 30,**

line 21, but the 22-caliber she 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

This Court should deny certiorari for the foregoing reasons.

Respectfully submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General
S.C. Bar # 4806
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

By: *s/William Edgar Salter, III*
WILLIAM EDGAR SALTER, III
ATTORNEY FOR RESPONDENT

December 8, 2022.