STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. Supreme Court

Appeal from Horry County
The Honorable Steven H. John, Circuit Court Judge
Appellate Case No. 2013-000793

THE STATE,

RESPONDENT,

V.

CHRISTOPHER M. STEPHENS,

PETITIONER.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUES ON APPEAL

1. Whether the Court of Appeals erred by holding that the error of the trial court in admitting the testimony of SLED "victimologist expert" Mike Prodan was harmless error, since his speculative, irrelevant, and inadmissible testimony under State v. Tapp, 398 S.C. 376, 728 S.E.2d 468 (2012) impermissibly led the jury to believe the relationship between petitioner and the decedent was consistent with the motive for and the circumstances of the murder?

2. Whether the Court of Appeals erred by holding the hearsay testimony of James Pearl that decedent Jamilla Hightower was screaming at petitioner in anger about the money he owed her for drugs was admissible as an "adoptive admission" since petitioner was present and did not deny it since some accusations or assertions, including this one, are not w01ih of a response and the legal principle of an "adoptive admission" was therefore inapplicable?

COUNTER STATEMENT OF ISSUES ON APPEAL

I. Whether the Court of Appeals correctly found that any error in the introduction of the State's expert testimony on crime scene analysis and victimology was harmless beyond a reasonable doubt?

II. Whether the trial judge properly allowed the State to introduce James Pearl's testimony about a conversation between Stephens and the victim because any statements by Stephens were admissible as admissions and as statements by a co-conspirator in furtherance of a conspiracy to rob and murder Jamilla. Further, his silence in the face of her statements were adoptive admissions by him of the debt that he owed her for drugs. Whether the conversation was likewise admissible to show bad blood between Stephens and Jamilla? Alternatively, whether any error was harmless beyond a reasonable doubt?

ADDITIONAL SUSTAINING GROUND

III. Whether Stephens' challenge to the State's expert testimony on crime scene analysis and victimology, given by SLED Agent Michael Prodan, is procedurally barred because he failed to raise the same argument in the trial court? [Argued in Argument I].

STATEMENT OF THE CASE

The Horry County Grand Jury indicted Petitioner, Christopher M. Stephens (Stephens) in July 2007 for two counts of accessory before the fact of the two murders and armed robbery. (07-GS-26-2974 through -2976). His co-defendant, Jimmy Lee Sessions, (Sessions) in July 2007 for two counts of murder (07-GS-26-2962), burglary in the first degree (07-GS-26-2968) and armed robbery (07-GS-26-2961). Bobby G. Frederick and Laura L. Hiller, Esquires represented Stephens. Johnny Gardner, Esquire, represented Sessions.[1]

Sessions and Stephens were jointly tried on these charges before the Honorable Stephen H. John on February 2-6, 2009. tried with him. The jury found Stephens and Sessions guilty of all of the indicted charges. Stephens received current sentences of forty years imprisonment for the accessory convictions. A timely Notice of Appeal was served and filed by each defendant. The Court of Appeals affirmed in a January 30, 2013, unpublished Opinion. *State v. Stevens*, 2013-UP-062 (S.C. Ct.App., Jan. 30, 2013), **App. 1-4**. A timely rehearing petition (**App. 5-9**) was denied on March 20, 2013. **App. 10**. The Petition for Writ of Certiorari was filed on June 19, 2013.[2]

ARGUMENTS

II. Stephens' challenge to the State's expert testimony on crime scene analysis and victimology, given by SLED Agent Michael Prodan, is procedurally barred because he failed to raise the same argument in the trial court. Alternatively, Respondent submits that the Court of Appeals correctly found that any error in the introduction of the State's expert testimony on crime scene analysis and victimology was harmless beyond a reasonable doubt. [Respondent's Issue I and Additional sustaining Ground].

Relying upon this Court's decision in *State v. Tapp*, 398 S.C. 376, 728 S.E.2d 468(2012)

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[1] Assistant Solicitors Bradley Coy Richardson and Donna Elder, of the Fifteenth Circuit Solicitor's Office, prosecuted the case. A November 2008 trial on the charges ended in a mistrial. Charges against Marshal Stephens were dismissed for lack of evidence.

[2] Sessions currently has a pending certiorari petition, which was filed on the same date as well.

(*Tapp II*), Stephens maintains that the trial judge abused his discretion by allowing the State to present expert testimony on crime scene analysis and victimology through SLED Agent Michael Prodan. Respondent submits that his challenge to Agent Prodan's testimony is procedurally barred because he failed to raise the same argument in the trial court. Alternatively, Respondent submits that the trial judge did not abuse his discretion by allowing the State to introduce the evidence. Respondent further submits that, if there was error, any error was harmless beyond a reasonable doubt.

A. How issue developed at trial.

Agent Prodan testified that he has been employed at SLED for ten years and that he was the Supervisor of the Behavioral Sciences Unit. Prior to that time, he was "the lead agent and the supervisor of the Violent Crime Analysis Unit" of the California Attorney General's Office. Both at SLED and with the California Attorney General's Office, his job responsibilities involved "crime scene analyses, consultation on violent crime, investigative techniques and strategies, threat assessment, interviews and interrogation, and what is generally referred to in the media as psychological profiling." **R. pp. 568-69**.[3] Agent Prodan described his educational training as

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[3] As he had in *Tapp II*, Agent Prodan also listed the extensive nature of his prior employment and his educational and other experience in the field:

> [I f]irst started in violent crime training, of course, with the Las Angeles County Sheriff's Department and Police Academy in Violent Crime Investigation, but as a agent for the California Department of Justice, Bureau of Investigation, was a specialized six months program, with the advanced training center in the California Criminalistic Institute, involving crime scene analyses and criminalistic, if you would, that include courses in firearms trajectory, blood spatter interpretation, and forensic pathology.
>
> During that time I was selected and spent a one-year Fellowship at the F.B.I. Academy in Quantico, Virginia, at the National Center for the Analyses of Violent Crime. That one year Fellowship also included courses at the Armed Forces Institute of Pathology on basic and advanced Forensic Pathology courses in Psychiatry in the Law, in the University of Virginia at Charlottesville. There were also courses at the Clark Institute of the

"ongoing" and he explained that, "more often than not," it involved in-service training ... with the International Criminal Investigative Analyst Fellowship, certain training programs with the Federal Bureau of Investigation, yearly training and updates with the Association of the Threat Assessment Professionals."He likewise engages in "self-initiated education," by "keeping abreast of the literature involving homicide and sexual assault, and violent crime in general, and involving the literature and the texts that are available" to law enforcement and the general public. **R. pp. 570-71.**[4]

Both defendants objected when the State offered him as an expert in "Crime Scene Interpretation and Analyses" (**R. pp. 571-72**) and the trial judge heard their arguments *in camera*. Once the trial judge had ascertained that Agent Prodan's notes had been provided to the defense,[5] he asked the State to briefly summarize to the proffered testimony. **R. pp. 581-82.**

The Assistant Solicitor explained that:

> Psychology of Aggression in Ottawa, Ontario, Canada.
>
> There has been training over a varied of time involving the California Homicide Investigators Association, California Sexual Assault Investigators' Association, the Association of Threat Assessment Professionals.

See **R. pp. 569-70.**

[4] Agent Prodan is a "member of the International Criminal Investigative Analyst Fellowship, which is ... a worldwide organization that standardizes and provides training on criminal investigative analyses profiling." He is also "a member of the Association of Threat Assessment Professionals," and he had previously been a member of the "California Homicide Investigators Association, and California Sexual Assault Investigators' Association."**R. p. 570.** Agent Prodan has "been brought in on cases by law enforcement ... many times" and he has been qualified as a crime scene analyst in a number of courts. **R. p. 571.**

[5] Both defendants initially complained because the State had not disclosed that Agent Prodan would be giving the testimony at issue and because there was no report. The State, however, responded by pointing to items where the testimony was disclosed. **R. pp. 572-75.** Prodan then testified that the Assistant Solicitor had met with him about two weeks earlier, and she provided him with copies of the crime scene photographs and the autopsy report; and she asked him to testify "[t]o the materials pertaining to how the crime occurred." However, he had not kept notes, and he had not issued a report to law enforcement or the Solicitor's Office. He also had not generated any report, except for his "case notes" that were merely bullet points "to keep my thoughts on track." Even these were only generated a week before his testimony. **R. pp. 575-81.**

> the process of my direct-examination of Agent Prodan is going to be, show him some of the State's exhibits, . . . ask him if he has had an opportunity to review them, based on his expert opinion, what do these crime scene photos tell us in reference to victimology, method of operation, motive, things like that, Your Honor. It has nothing to do specifically with the Defendants. He has not reviewed the Defendants, he has not talked with the Defendants, he has not got the Defendants' statements.

R. p. 582. The defendants stated their objections to the proffered testimony. Sessions' sole objection was relevance, **R. p. 582, l. 18**, while Stephens asked that he be allowed to view the notes to prepare for cross-examination and again claimed that there had been a discovery violation. **R. p. 582, l. 21-p. 583, l. 3**. However, the trial judge found that there had not been a *Brady v. Maryland*, 373 U.S. 83 (1963) violation. He further noted that he had the notes that Agent Prodan had made provided to the defendants, and he noted that the examination would proceed after a break. **R. p. 583. ll. 12-25**. *See also* **R. pp. 584-85**.

When the jury returned, the trial judge explained that he was "going to allow the witness to -- and is going to qualify the witness to give his opinion in the areas of Behavioral Science, Violent Crime, Methodology, Motive Behavior." **R. p. 585, l. 23-p. 586, l. 1**. In front of the jury, Agent Prodan explained that, upon receiving a request for assistance from a law enforcement agency, he first asks for background information about the victim or victims. "It is referred to in certain literatures ... as a Victimology, the study of the victim." The initial question he tries to answer is why the victim was selected to be a victim of a violent crime. This requires him to assess the degree of risk the person had to be a victim - whether it is a low, moderate or high risk of being a victim. In making this assessment, "we insist that the agency does not give us any information about any suspects that they may have developed. . . because we don't want to have any contamination ... on suspect information as to what actually happened during the commission of the violent crime." **R.**

pp. 586-87.

Agent Prodan explained that an individual's risk level is based upon the individual's circumstances. So, high risk victims are persons whose lifestyles put them "at a high risk of becoming a violent crime victim.[6] Low risk victims are those persons who are not involved in sexual affairs or prostitution, and who are not involved in criminal enterprises or drug selling. Experience and research reflect that "the lower the risk of a victim, the more likely it is that a person[ ] - - is a victim because of a person[al] cause." **R. pp. 586-88**. In between low and high risk victims are the "moderate risk victims." Those persons do not live a very risky lifestyle, but certain circumstances in their lives increases their risk of being a victim. He included convenience store clerks and cab drivers in this category, as well as persons who are "dabbling in criminal enterprises." **R. p. 588**.

The background information he received in this case was that one victim, Jamilla, "was involved in some reasonably moderate illicit drug sales." Selling illegal drugs is risky by its very nature because people will often try to steal from the person. The crime scene photographs confirmed that Jamilla had considered herself to be at risk because she had "availed herself" of a shotgun to provide her with physical protection. **R. pp. 588-89**. Agent Prodan assessed Jamilla's risk level as moderate because of her drug trafficking. With the exception of living with Jamilla, he assessed Monica's risk level as low. **R. pp. 589-90**.

The next step in his process is "to look at how the crime occurred" and ascertain the motive for the murders.[7] Here, the murders occurred in Jamilla's residence, which is where law enforcement

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[6] He included persons who are "involved in criminal organizations and enterprises, criminal gangs," as well as persons who traffic in narcotics or are sexually promiscuous within this category because these persons "put themselves in a position" to be "more susceptible of becoming victims of violence than anyone else."

[7] It is his expert opinion, based upon experience and research, that there is always a motive for violent crimes, such as murder; and that any contrary belief misunderstands violent crimes. **R. p. 590**.

learned that she would primarily engage in her drug transactions. Also, the killer brought a weapon, which demonstrated some "pre-planning" by the perpetrator. Further, "[t]he victims were killed with what we typically see in a quote, unquote, drug related murder, a small to medium caliber handgun." Nor did the perpetrator make any effort to move or otherwise "interact with" the victims' bodies after killing them, and there was a minimal effort to destroy or conceal any physical evidence that was present, other than taking the murder weapon.[8] **R. pp. 590-92**. Based on these factors, Agent Prodan opined that this was "a primarily drug-related murder, and the motive for drug-related murders have to do with the discipline of the individual" perpetrator. **R. pp. 592-93; 600-01**.[9]

Next, Agent Prodan studied how the crimes occurred, both pre-offense and offense behavior. Before the crime, someone had to devise a plan: they had to select a particular place to rob and a particular time to rob it; they had to bring a weapon and ammunition; and they had to develop a plan to gain entry into the residence where the murder occurred. The manner in which the murders occurred shows that the plan for the murders originated outside of the residence. **R. pp. 593-95**.

Once inside the residence, the perpetrator has to gain control over the victim, which can be done by (1) the perpetrator's "mere presence"; (2) a verbal threat; (3) physical force or (4) a weapon. In this case, neither the autopsy reports nor the crime scene photographs suggested that either Jamilla or Monica was the victim of blunt force trauma, such as defensive injuries or facial injuries. There was also no evidence of a struggle in the house or that either victim was physically restrained or

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[8] For example, the crime scene reports did not reflect that the victims' bodies and had been washed or that any effort was made to wipe for prints. **R. p. 592**.

[9] Sometimes it is either to eliminate a competitor or to retaliate against a victim who owes the person money but cannot repay it. Also, drug dealers may be targeted for robbery of their drugs and money because drug dealers typically do not report robberies to the police. **R. pp. 592-93**. Agent Prodan opined that two other possible motives for drug-related murders were inapplicable in this case: the killing of an informant or a neighborhood anti-drug advocate. **R. p. 603**.

"bound." Moreover, based on photographs of Jamilla in her bedroom (**State's Exs. 2 and 5**), "it appears, ... most likely, that she was ordered to lie flat on the floor, the individual put a pillow over her head, and then fired one shot through the pillow at relatively close range into her head." **R. pp. 595-99.**[10] From his review of the crime scene photographs and autopsy reports, Agent Prodan did not see any evidence that either victim resisted. This suggested to Agent Prodan that the killer had gone into the residence with the belief that the victims would not cooperate and were potentially armed. This would explain why the perpetrator killed the victims - *i.e.*, the motive for the killings. **R. p. 600-02; 604-05.**

Over Stephens renewed objection to lack of relevancy, Agent Prodan was permitted to opine as to the manner in which Monica was murdered. He explained that, based on **State's Exs. 10** and **49**, she had been killed in a manner similar to Jamilla. Because there was some feces in Monica's bedroom, it appeared that she had been moved from her bedroom to the bathroom. She was moved there to kill her because she was a potential witness. **R. pp. 602-04.**

B. Discussion.

1. Stephens' belated relevancy objection does not preserve any issue for appellate review concerning testimony that was only objected to on the basis that the State had committed a discovery violation. [Additional Sustaining Ground].

The Court of Appeals erroneosly found the matter properly preserved for appellate review. As shown, Stephens' only initial objection was that the State had committed a discovery violation. He also later claimed that one brief portion of Agent Prodan's testimony was not relevant and that

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[10] There were two possible reasons for using a pillow case in this fashion. First, it is easier, emotionally, to depersonalize the victim and shoot a pillow rather a person's head. Second, it would reduce the amount of recoil and prevent "any blow-back of blood" onto the perpetrator or his weapon. Again, this suggestion pre-planning.**R. pp. 599-600.**

it was speculative. **R. pp. 573; 582-83; 602.**[11] In arguing the trial court, Sessions did not advance anything close to the argument that he now raises on appeal.

On appeal, he relies upon this Court's opinion in *Tapp II*. In *State v. Tapp*, 387 S.C. 159, 691 S.E.2d 165 (2010) (*Tapp I*), reversed, 398 S.C. 376, 728 S.E.2d 468 (2012), the Court of Appeals had agreed with the defendant's challenge to the qualification of Agent Prodan as an expert witness and it reversed Tapp's convictions and sentence based upon this Court's decision in *State v. White*, 382 S.C. 265, 676 S.E.2d 684 (2009), and its finding that the record was insufficient "for this court to determine whether Prodan should have been qualified [to testify] under *White*." *Tapp I*, 387 S.C. at 164-69, 691 S.E.2d at 167, 169 -170.[12] This Court granted certiorari and reversed in *Tapp II*. See 398 S.C. at 379, 728 S.E.2d at 470.

This Court found that the Court of Appeals had

> misstated that White created the requirement that "the foundational reliability of nonscientific testimony must be tested prior to the qualification of an expert." *Tapp*[I], 387 S.C. at 166, 691 S.E.2d at 169 (emphasis added). The court additionally stated, "this court is left with no guidance on what test or elements must be satisfied to establish the foundational reliability necessary to qualify an expert in the fields of crime scene analysis and victimology." *Id.* at 166–67, 691 S.E.2d at 169. To be clear, the reliability of a witness's testimony is not a pre-requisite to determining whether or not the witness is an expert. The expertise, reliability, and the ability of the testimony to assist the trier of fact are all threshold determinations to be made prior

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[11] On appeal and despite a claim that he was not given notice of Prodan's testimony, he has not challenged, either before the Court of Appeals or this Court, the trial judge's ruling that there was no *Brady* violation. Therefore, that argument has been abandoned. *State v. Sullivan*, 277 S.C. 35, 282 S.E.2d 838 (1981) (an issue not argued in the appellant's brief is deemed abandoned); Rule 242(d)(2), SCACR ("Only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari ... ."); *Camp v. Springs Mortgage Corp.*, 310 S.C. 514, 516, 426 S.E.2d 304, 305 (1993) (declining to address issue not addressed by the court of appeals and not raised in petition for rehearing). .

[12] Specifically, the Court of Appeals in *Tapp I* was concerned about the absence of findings by the trial judge of the foundational requirements under *White* that "(1) the expert has the requisite qualifications, experience, and/or credentials; (2) the methodology by which the evidence is obtained is reliable; and (3) the evidence will assist the trier of fact." *Tapp I*, 387 S.C. at 164-69, 691 S.E.2d at 167-70.

> to the admission of expert testimony, and generally, a witness's expert status will be determined prior to determining the reliability of the testimony.

Tapp II, 398 S.C. at 388, 728 S.E.2d at 474-75.

Contrary to Stephens' construction of this Court's decision, the Court did not find that the trial court had erred in qualifying Prodan as an expert. *Id* at 387-89, 728 S.E.2d at 474-75. Rather, the Court found that " [u]nder *White*, after qualifying Prodan as an expert, the circuit judge should have then evaluated the substance of Prodan's testimony to determine if it was reliable, as required by Rule 702, SCRE." This Court did not express any view on the reliability of his opinions. *Id* at 387 n. 11, 728 S.E.2d at 474 n. 11. While the trial court had erred, this Court found that any error was harmless beyond a reasonable doubt because it "did not contribute to the guilty verdict." *Id* at 389-90, 728 S.E.2d at 475.

However, Sessions did not raise any type of challenge to the foundational requirements for this testimony or to Agent Prodan's expertise in the trial court. His only objection was that a small portion of Agent Prodan's testimony would not assist the jury any was speculative. This did not preserve any objection to the portions of Prodan's previously-admitted testimony to which no objection was taken and it did not preserve the current argument. Thus, his argument on appeal is procedurally barred. *See State v. Bailey*, 298 S.C. 1, 5-6, 377 S.E.2d 581, 584 (1989) (a party cannot argue one theory in support of his objection or motion at trial and raise a different theory on appeal); *State v. Watts*, 321 S.C. 158, 167, 467 S.E.2d 272, 278 (Ct.App. 1996) ("To be preserved for appellate review, an issue must be both presented to and passed upon by the trial court").[13]

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[13] *See also State v. Vanderbilt*, 287 S.C. 597, 340 S.E.2d 543 (1986) ("Issues not properly preserved at trial may not be raised for the first time on appeal. To the extent that *State v. Griffin*, [129 S.C. 200, 124 S.E. 81 (1924)], may be inconsistent with this result it is overruled").

Also, his suggestion that this Court found that it was improper to qualify Prodan as an expert ignores that why this Court reversed the Court of Appeals, and his argument must be rejected in light of both the current record and this Court's decision in *Tapp II*. *See also* Rule 702, SCRE ("If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise"); *White*, 382 S.C. at 269, 676 S.E.2d at 686 ("A trial court's decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion. State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006)"); *Mizell v. Glover*, 351 S.C. 392, 406, 570 S.E.2d 176, 183 (2002) ("A trial court's ruling to exclude or admit expert testimony will not be disturbed on appeal absent a clear abuse of discretion"). As the California Supreme Court in *People v. Prince*, 40 Cal.4th 1179, 1222, 156 P.3d 1015, 1047, 57 Cal.Rptr.3d 543, 580 (2007), "experts may testify even when jurors are not 'wholly ignorant' about the subject of the testimony.... 'If that [total ignorance] were the test, little expert opinion testimony would ever be heard.'" (Citations omitted).

2. Alternatively, the Court of Appeals properly found that any error in admitting Prodan's testimony was harmless beyond a reasonable doubt.

Even if this Court finds that the issue was not procedurally barred, Respondent alternatively submits that reversal still is not required because the Court of Appeals correctly found, as this Court had in *Tapp II*, that any error in admitting the substance of his testimony - without first vetting it for reliability - was harmless beyond a reasonable doubt because it did not contribute to the verdict. The Court of Appeals observed that this Court's decision in *White* "was issued several months after the trial in the present case took place." It further found that Sessions' gatekeeper argument was

preserved for appellate review based upon this Court's decision in *Tapp II. Sessions*, at 3, **App. 3**. It then found that any error was harmless, as follows:

we hold that "beyond a reasonable doubt the trial error did not contribute to the guilty verdict[s]" against Stephens. *Id.* at 390, 728 S.E.2d at 475. Here, Prodan's testimony concerned only the victims and the crime scene. He never identified Stephens, the co-defendant, or anyone else as a perpetrator and testified that at his insistence, he was not given any information about any suspects developed in the case. As was the case in *Tapp* [*II*], the jury made numerous factual determinations in arriving at its verdict, including (1) whether Pearl testified truthfully about the victim's accusations against Stephens and the defendants' attempt to enlist his help in committing the crimes, (2) the credibility of witnesses who allegedly heard Stephens's co-defendant admit to committing a crime, (3) whether shoe prints found at the crime scene matched the shoes taken from the property bag of Stephens's co-defendant, and (4) the credibility of testimony that certain individuals knew about the deaths of the victims before the police found their bodies.

See Sessions, at 3-4, **App. 3-4**.

Additionally, Respondent would point to the other, overwhelming evidence that conclusively proved Stephens' guilt. The prosecution's case was that the killings occurred close to midnight on Thursday June 9, 2006. This was when Jamilla and Monica's neighbor, Teresa Greene, heard several "pops" that sounded like fire crackers. **R. pp. 298-301**.[14]

Apart from Agent Prodan's testimony, the State's other evidence showed that:

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[14] Monica was a drug dealer who sold cocaine and marijuana. **R. p. 131; 182-84**. Anyone wishing to buy drugs from her had to telephone a request first and then go to her residence to get the drugs. She kept some marijuana and cocaine that had already been bagged in the kitchen, and she kept larger amounts of drugs in her bedroom She did not allow anyone into the bedroom. **R. pp. 131-37**.

- Sessions and Stephens came by the residence of James Pearl, who also knew both victims and purchased drugs regularly from Jamilla, on Wednesday June 8th. They were in a blue Jeep Grand Cherokee that Sessions was driving. All three men were broke and, after Pearl got into the vehicle, his friends began talking about committing some robberies. While they were talking, Jamilla came up to the vehicle and got into a verbal argument with Stephens over drug money that he owed her. She was angry when she left. **R. pp. 119-22**.

- Sessions and Stephens then discussed robbing Jamilla. Stephens said that "[h]e He couldn't rob her because she knew him, but Jimmy Lee was like, I can rob her though, . . . she don't know me." Because they knew that Jamilla would not voluntarily give them drugs or money, they said that they were "[g]oing to have to lay her down" or kill her. They asked Pearl to be the "door man," but he refused to get involved and he got out of the vehicle. Pearl did not think that his friends knew that Monica was there. **R. pp. 122-24; 142**.

- Pearl, who learned about the murders on Friday June 10th, testified that Sessions called him later that night and invited Pearl to "come chill" with Sessions. When Pearl reached Sessions' location, he and Sessions "had a little fling" with a girl who was there named "Poo." He and Sessions then went into the bathroom. Sessions had a "dinner plat[e] full" of cocaine and he allowed Pearl to snort some, using a drinking straw. Pearl surmised that the cocaine was Jamilla's based on its unique smell. While they used the drugs, Sessions told Pearl that he had killed Jamilla and Monica. Sessions also had some high-quality marijuana and the two friends smoked a "cigar of it. At some point, Sessions also showed Pearl a black semi-automatic weapon. However, Pearl was unsure whether it was a 9 mm. or a .40 caliber. **R. pp. 125-28**.

- When describing what he had done, Sessions told Pearl that "when he was in the house, and he was leaving out, he heard the shower go off, and . . . and the bathroom door opened up and [Monica] was standing there looking him in his face, so he said he rushed in the bathroom, put it - and shot her, and left her in the tub. **R. p. 129**.

- Sessions called Pearl on Saturday and he asked Pearl to send him a $100.00 moneygram. While Pearl said that he would do so, he never sent it. **R. p. 130**.

- Pearl later had a telephone conversation with Stephens, in which Stephens accused him of sending the police to Connecticut after Sessions. Pearl denied doing this. **R. pp. 130-31**. Pearl did not initially come forward because he was afraid of Sessions and Stephens. **R. pp. 141-42**.

- Jamilla's first cousin, Rodney Turner, Jr., was at the house on Wednesday, June 8th. The house was neat at that time, **R. pp. 185-86**, but it was messy and articles were disturbed when police arrived on Friday the 10th.

- While Turner was there, Stephens came to the house between 9:30 an 10:00 p.m. on Wednesday. Stephens had come in a truck or SUV. "He had on all black when he came to the house. He was in the living room area." Also, he was "nervous, looking around." Stephens and Jamilla went outside briefly. When Jamilla returned, she was alone and she was mad. **R. pp. 186-87.**

- Shortly, thereafter, Turner drove Jamilla to another residence where she "re-up[ped]" her supply of cocaine. Afterwards, Turner drove her home. **R. pp. 187-88.**

- Turner had never seen Sessions at Jamilla's residence, but she had spoken about him. Apparently, the friendship between Sessions and Jamilla soured because of drug business disputes. **R. pp. 188-89.**

- Sometime between 9:00 and 10:30 p. pm. on Thursday June 9th, Matthew Junior Campbell saw Sessions outside of the apartment complex where Campbell lives. Sessions was dressed in black clothing and he had on a black hoodie. Also, he had a gun "[o]n his side." Sessions told Campbell that "he's got to get him a lick, a robbery . . . because he's got to get out of town because he's hot." Sessions then left the complex with another person on foot. The apartment complex is within walking distance of the crime scene. **R. pp. 238-41.**

- Christy Regina Peal, James Pearl's cousin, testified that on Thursday the 9th, she was at the residence that she shared with Mildred Brown and her sister-in-law "partying and playing cards" all day. James Pearl and Phonetia Hightower (Jamilla's cousin) were also present. She had smoked a cigar full of marijuana that day. Mildred, James Pearl and Phonetia were using cocaine, while James and Mildred were drinking. At some point, Christy, Mildred and Phonetia left the residence and, at Jamilla's prior request, went to Jamilla's residence. Christy then drove Jamilla to a local Super 8 motel. When Jamilla came out of the motel, Christy drove her home. Jamilla paid her $ 40.00 for the ride. After that, Christy and the other women went home. **R. pp. 265-76; 280.**

- At some point, Sessions came to the residence . He was dressed in black clothing, including a black hoodie, and he was wearing gloves. Phonetia left with him. **R. pp. 276-82.**

- Christy saw Phonetia later that morning and Phonetia told her that Jamilla and Monica were dead. She did not take Phonetia seriously because Phonetia often lies. However, Christy went to Jamilla's house around 1:00 p.m. or so; and Jamilla did not respond to either a telephone call or the door bell. **R. pp. 282-85; 287.**

- Antwann Higgins was another first cousin of Jamilla and they had briefly lived

together at the residence where the murders occurred, along with Higgins' girlfriend, Melissa Gomez. Higgins and Melissa moved to another location when he and Jamilla argued over the fact he "had raised my hand at Melissa. Yet, they were not having any difficulties at the time of the murders. **R. pp. 303-08**. Higgins and Melissa discovered the bodies at roughly 6 p.m. on Friday, June 10th. They went next door and had a neighbor call -911. **R. pp. 309-10; 313-20; 358-64**.

- Higgins denied ever stepping into Monica's bathroom and he voluntarily submitted to gunshot residue testing. The police searched his residence, and the took the four pairs of shoes. Police also found two weapons: a .32 caliber handgun and a .25 caliber handgun. **R. pp. 324-25; 327-31**. None of the items seized connected him to the murders.

- Craig Burris, who was incarcerated while awaiting trial for an unrelated murder, was in the Jet Age "social club" one night shortly after the murders. He saw Sessions there, and Sessions invited him to get high with him at the residence of an individual named "LeeLee," in Myrtle Beach area. When Burris arrived at the residence, "LeeLee was there with his girlfriend, and Stephens was present. **R. pp. 531-35**.

- While there, Burris snorted cocaine and smoked marijuana that Sessions provided. Sessions also gave him "about a gram or two" of cocaine. Sessions and he had often shared drugs with one another, but this was the most cocaine that Session had ever given to him. Sessions acted as if he was celebrating and he told Burris that he "just . . . hit a lick, just like a robbery or something." Burris saw Sessions and Stephens talk, but their conversations were private. **R. pp. 535-39**.

- Expert testimony established that cartridge casings found at the scene (**State's Exs. 55-56**) were fired by the same firearm. The two projectiles - one recovered from the floor of the shower in the bathroom and the other removed from Jamilla's head at autopsy - were also fired by a single firearm. The projectiles "were most consistent with bullets that are loaded into some [.40 caliber] Smith and Weston . . . cartridges." **R. pp. 616-19**.

Thus, the State had established overwhelming evidence of guilt, separate and apart from Agent Prodan's testimony. *See Bailey*, 298 S.C. at 5, 377 S.E.2d at 584.

II. The trial judge properly allowed the State to introduce James Pearl's testimony about a conversation between Stephens and the victim because any statements by Stephens were admissible as admissions and as statements by a co-conspirator in furtherance of a conspiracy to rob and murder Jamilla. Further, his silence in the face of her statements were adoptive admissions by him of the debt that he owed her for drugs. *See* Rule 801(d)(2)(B), SCRE. Likewise, the conversation was also admissible to show bad

blood between Stephens and Jamilla. Alternatively, any error was harmless beyond a reasonable doubt.

Stevens maintains that the trial judge erroneously allowed the State to introduce the testimony of James Pearl of a conversation between Jamilla Hightower and Stephens, in which "decedent Jamilla Hightower was screaming in anger about the money he owed her for drugs because this testimony was highly prejudicial hearsay." Respondent submits that his argument lacks merit and that the trial judge properly allowed the State to introduce Mr. Pearl's testimony because any statements by Stephens were admissible as admissions by him and as statements by a co-conspirator in furtherance of a conspiracy to rob and murder Jamilla. Further and as the Court of Appeals correctly reasoned, *Stephens*, at 2, **App. 2**, his silence in the face of her statements were adoptive admissions by him of the debt that he owed her for drugs. *See* Rule 801(d)(2)(B), SCRE. Also, "because the deceased victim was an unavailable declarant and her accusation against Stephens included a declaration on her part that she sold illegal drugs to him, the statement was admissible under Rule 804(b)(3), SCRE, as a statement against her interest." *Stephens*, at 2, **App. 2**.[15] Alternatively, any error was harmless beyond a reasonable doubt.

A. How the issue arose at trial.

James Pearl testified that he knew both victims and purchased drugs regularly from Jamilla. Sessions and Stephens came by Mr. Pearl's residence on Wednesday June 8th. It was still light. They were in a blue Jeep Grand Cherokee that Sessions was driving. All three men were broke and, after Pearl got into the vehicle, his friends began talking about committing some robberies. While they were talking, Jamilla came up to the vehicle and got into a verbal argument with Stephens over drug

[15] Likewise, their conversation was also admissible to show bad blood between Stephens and Jamilla.

money that he owed her. She was angry when she left. **R. pp. 119-22.**

Stephens' argument on appeal centers around the following exchange:

Q. Did Jamilla ever come up to that car?

A. Yes Ma'am.

Q. Were you present?

A. Yes Ma'am.

MR. FREDERICK: And Judge, we are going to object to any hearsay, as far as testimony from him about what Jamilla Hightower said.

THE COURT: I'll be glad to hear any objection as to any hearsay. I haven't heard anything yet.

Go ahead.

Ms. Elder: Thank you, Your Honor.

Q. Did she talk to anybody in the vehicle?

MR. FREDERICK: Judge, we object to the hearsay. [The] question elicits a hearsay response.

THE COURT: No sir, it does not. There is no hearsay at the present time. I'll be glad to hear from you if you wish to make an objection as to hearsay when any comes up.

Q. Did she talk to anybody in the vehicle?

A. Yes Ma'am.

Q. Did anybody in the vehicle talk to her?

A. Yes Ma'am.

Q. Who?

A. She was talking - - it was basically over money. It was - - she was screaming about money, and - - -

Q. Before we get to that, who was talking with her?

A. Well, she - - -

MR. FREDERICK: Judge, still objecting to the hearsay. Now he is testifying as to hearsay.

THE COURT: No sir.

You may proceed, Solicitor.

Ms. Elder:. Thank you, Your Honor.

Q. Who was talking with her?

A. Chris.

Q. Chris Stephens?

A. Yes Ma'am.

Q. And what was Chris Stephens saying to her?

A. Basically she was screaming on Chris about the money that he owed her.

Q. And what was he saying?

A. He ... told her at first, I'm going to pay you, and then he laughed it off, you know, and then he was like, I ain't going to pay the -- I ain't going to pay this girl, you know what I mean, so she was mad, and she told him, I want my money or - - -

MR. FREDERICK: Judge, I've got no problem with him saying what Christopher said, because those are statements that are admissible outside of the hearsay rule, but I'm asking the Court to not allow the witness to testify as to what other people said, including Jamilla Hightower.

THE COURT: No sir. I'm going to allow it. Thank you.

Q. Continue, Mr. Pearl.

A. It was about -- it was about drug money that was owed, so she was mad, very upset, and after that she left.

R. p. 120, l. 16-p. 122, l. 19.

Immediately after Jamilla left, Stephens and Sessions resumed their discussion about robbing her. Stephens said that he could not rob her because she knew him. However, Sessions indicated that he could rob her. Pearl did not want any part of their plan and he exited the car at that point in the conversation.[16] **R. pp. 122-24.**

B. Discussion.

"The admission or exclusion of evidence is a matter within the sound discretion of the trial court and absent clear abuse, will not be disturbed on appeal." *Gambell v. Int'l. Paper Realty Corp.*, 323 S.C. 367, 373, 474 S.E.2d 438, 441 (1996). To warrant reversal, an Appellant "must show both the error of the ruling and resulting prejudice." *Recco Paper & Label Co. v. Barfield*, 312 S.C. 214, 216, 439 S.E.2d 838, 840 (1994); *State v. Hamilton*, 344 S.C. 344, 353, 543 S.E.2d 586, 591 (Ct. App. 2001). "An error without prejudice does not warrant reversal." *State v. King*, 367 S.C. 131, 136, 623 S.E.2d 865, 867 (Ct.App.2005). *See also State v. Vick*, 384 S.C. 189, 199, 682 S.E.2d 275, 280 (Ct.App. 2009) ("The improper admission of hearsay testimony constitutes reversible error only when the admission causes prejudice").

Contrary to Sessions' argument, which seeks to obfuscate the issue before the Court by derisively referring to the victim and Mr. Pearl while simultaneously ignoring his own complicity in the murders of two individuals, the statements at issue are not hearsay. First, any statements by Stephens are admissible as admissions by him under Rule 801(d)(2), SCRE. His statements are also admissible as statements by a co-conspirator in furtherance of the conspiracy to rob and murder

[16] They had wanted him to act as a "doorman," to help them gain entry into Jamilla's residence.**R. pp. 123-24.**

Jamilla Hightower. *See* Rule 801(d)(2)(E), SCRE.[17]

Nor was Pearl's testimony that Jamilla was screaming at Stephens because he owed her money for drugs hearsay. Under Rule 801(d)(2)(B) SCRE, "[a] statement is not hearsay if ... the statement is offered against a party and is ... a statement of which the party has manifested an adoption or belief in its truth." This rule is consistent with prior South Carolina law.[18] In *State v. McIntosh*, 94 S.C. 439, ___, 78 S.E. 327, 329 (1913), this Court explained the rule as follows:

> Statements made in the presence of a party are generally admissible, if he remains silent, when they are made, and the circumstances are such that he can speak and naturally would or ought to respond to them. In such circumstances, his silence may afford ground for inferring that he acquiesces in the truth of the statements. But, where the situation is such that it would be improper for him to respond, statements made to him or in his presence are inadmissible. So, also, if he positively and unequivocally denies the truth of such statements, ... they are inadmissible.

See also State v. Sharpe, 239 S.C. at 271, 122 S.E.2d at 629 ("This Court has held that statements in the presence of the accused by a third person are admissible as evidence when such accused remains silent and does not deny such statements"); *State v. Nolan*, 318 S.C. 253, 257-58, 456 S.E.2d 926, 928-29 (Ct.App. 1999) (statement made by police officer, who died before the trial, that he had stopped vehicle being driven by drug defendant because it was weaving, was admissible over hearsay objection to establish probable cause for stop of vehicle where there were independent *indicia* of reliability since testifying officer had seen vehicle weave as it approached him after it had been

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[17] "While hearsay testimony generally is not admissible, an exception is allowed when a statement is offered against a party and is "a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.' Rule 801(d)(2)(E), SCRE. When a statement meets these requirements, it is considered non-hearsay."*State v. Sims*, 387 S.C. 557, 564, 694 S.E.2d 9, 13 (2010). Unlike the factual scenario in *Sims*, Stephens cannot seriously contend that his statements to Jamilla, in which he feigned an agreement to pay her money that he owed her and thereby provided him and Sessions with a possible manner for entry into her residence that would not otherwise exist, were not in furtherance of the conspiracy to rob and murder her.

[18] *See* Comments to Rule 801(d)(2)(B) (citing *Sharpe, supra*; *State v. Knoten*, 347 S.C. 296, 312, 555 S.E.2d 391, 399 (2001).

initially stopped, and officer making initial stop had told testifying officer in presence of defendant that defendant had been stopped for weaving and defendant did not contradict statement).

In the present case, Jamilla accused Stephens of owing her money for drugs. This was the reason that she was mad at him. He did not deny this accusation, even though the circumstances surrounding the conversation demonstrated that he could speak and naturally would or should have denied it if it was untrue. Rather than deny her accusation, Stephens admitted that he owed her money and he ostensibly agreed to repay it. He only revealed his actual intent when she left his presence and he resumed the conspiratorial conversation with Stephens about their plan to rob and murder her. Additionally, Stephens' conversation with Jamilla reflected that she had sold drugs to him. Her statement to this effect was admissible under Rule 804(b)(3), SCRE, since it was "[a] statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true."

Further, the statements by her were admissible because, "[i]n homicide cases, evidence that the accused and the decedent had previous difficulty is admissible. The evidence is admissible to show the animus of the parties and to aid the jury in deciding who was the probable aggressor." *State v. Cooley*, 342 S.C. 63, 68-69, 536 S.E.2d 666, 669 (2000) (quoting *State v. Taylor*, 333 S.C. 159, 168, 508 S.E.2d 870, 874 (1998)). As in *Cooley*, there is no contention that Jamilla was the aggressor. However, this evidence was still "relevant to proving the 'animus of the parties.'" *Cooley*, 342 S.C. at 69, 536 S.E.2d at 669. It may also be properly viewed as providing the motive for selecting her to rob and murder, as opposed to some other drug dealer. *See State v. Sweat*, 362 S.C.

117, 606 S.E.2d 508 (Ct.App. 2004).

Further, Stephens various statements to Jamilla were admissible. Thus, the jury properly heard him tell Jamilla, a drug dealer, that he would pay the money that he owed her. Her statements, by and large, simply gave context to Stephens' statements and were admissible for this purpose. *See United States v. Wills*, 346 F.3d 476, 490 (4th Cir. 2003) (witness statements made in conversation with defendant properly admitted to show context of incriminating admissions); *United States v. McDowell*, 918 F.2d 1004, 1007 (1st Cir. 1990) ("McDowell's own statements could, of course, be used against him; his part of the conversations was plainly not hearsay. Nor can a defendant, having made admissions, keep from the jury other segments of the discussion reasonably required to place those admissions into context.").

More importantly and even if the Court does not find that her declarations were properly admissible on this theory, any error in admitting this evidence was harmless and non-prejudicial beyond a reasonable doubt, since it could not reasonably have affected the result of the trial. *See State v. Sherard*, 303 S.C. 172, 175, 399 S.E.2d 595, 596 (1991) ("Error in a criminal prosecution is harmless when it could not reasonably have affected the result of the trial"); *State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) ("When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result"). Again, the jury properly heard him tell Jamilla, a drug dealer, that he would pay the money that he owed her, and any statements by her were thus cumulative and not prejudicial.

Also, the State had established overwhelming evidence of guilt, separate and apart from either the evidence of which he now complains or Agent Prodan's testimony. In light of this

evidence, discussed in **Argument I**, *supra*, any error was non-prejudicial and harmless beyond a reasonable doubt. *See Bailey*, 298 S.C. at 5, 377 S.E.2d at 584. As a result, any error "could not reasonably have affected the result of the trial." *See Sherard*, 303 S.C. at 175, 399 S.E.2d at 596.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should deny certiorari.

Respectfully submitted,

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July 19, 2013.

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S.C. Supreme Court

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Horry County
The Honorable Steven H. John, Circuit Court Judge
Appellate Case No. 2013-000793

THE STATE,

RESPONDENT,

V.

CHRISTOPHER M. STEPHENS,

PETITIONER.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Return to Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and does not include, or partially redacts, personal data identifiers, Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings, 375 S.C. 56, 650 S.E.2d 462 (2007)(requiring redaction of social security numbers, names of minor children, financial account numbers, and home addresses).

This 19th day of July, 2013.

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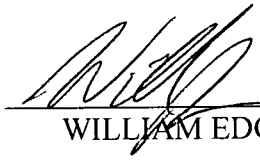
CERTIFICATE OF SERVICE

I, William Edgar Salter, III, counsel for the Respondent, certify that I have served the within Return to Petition for Writ of Certiorari and Certificate of Compliance on Appellant by depositing three (3) copies of the same in the United States mail, first class, postage prepaid, addressed to his attorney of record, Robert M. Dudek, Esq., SCCID/Division of Appellate Defense, 1330 Lady St., Ste. #401, Columbia, South Carolina 29201.

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

This 19th day of July, 2013.



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