ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Beaufort County
William Henry Seals, Jr., Circuit Court Judge
2009-GS-07-1279; 1293; & 1296
Appellate Case No. 2012- 208487

THE STATE OF SOUTH CAROLINA,

Respondent,

v.

JAQUWN BREWER,

Appellant.

FINAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF ISSUE ON APPEAL

Did the circuit court improperly admit hearsay statements, contained on an audio recording of an interrogation interview, identifying Appellant as the perpetrator?

RESPONDENT'S COUNTER STATEMENT OF THE ISSUE

Did the court err in admitting the audio recording of the interrogation of the Appellant which included the Appellant being confronted with evidence gathered by the law enforcement which was not introduced for the truth of the matters asserted but for the Appellant's reaction and failure to respond to the inquiries other than to respond to his mother and the investigators that he did not do any shooting rather than reveal the location of the weapon he was photographed with at the crime scene?

RESPONDENT'S STATEMENT OF THE CASE

The Appellant, Jaquwn Brewer, was indicted at the 2009 term of the Court of General Sessions for murder, attempted murder, and possession of a weapon during the commission of a violent crime. 2009-GS 07-1279, 2009-GS-07-1293, and 2009-GS-07-1296. ROA 4-13 . The charges arise from an incident in Beaufort County at the Semper Fi Club during a Memorial Day party on May 23-24, 2009. During the incident, Donald Parker was shot in the right calf after the Appellant was directed to take his gun outside of the ongoing event at the club. Further shots were fired inside and then outside the club. During the final shots, Henry Jones was shot in the head while he was attempting to call 911. He died shortly thereafter as a result of the single gunshot wound.

On August 22, 2011, the Appellant went to trial before the Honorable William H. Seals, Jr. The Appellant was represented by retained counsel, Jared S. Newman. The prosecution was handled by Assistant Solicitors Meredith A. Bannon and James J. Bannon of the Fourteenth Circuit Solicitor's Office. On August 26, 2011, the jury returned a guilty verdict on each charge. Judge Seals sentenced the Appellant to life imprisonment on murder, twenty (20) years concurrent on attempted murder, and five (5) years on the charge of possession of a weapon during commission of a violent crime. ROA _ (Sentencing Sheet). R. p. 6-12.

The Appellant made a timely notice of appeal on August 26, 2011.

This briefing follows.

RESPONDENT'S STATEMENT OF THE FACTS

Respondent will set forth pertinent facts to the appeal within the argument.

ARGUMENT

I. The trial court did not abuse its discretion in admitting the audio recording of the interrogation of the Appellant which included the Appellant being confronted with purported statements of witnesses who had identified Appellant as the shooter. The portions were not introduced for the truth of the matters asserted but for the Appellant's reaction and failure to respond to the inquiries other than to state to his mother and the investigators that he did not do any shooting rather than reveal the requested location of the weapon he was photographed with at the crime scene?

Any alleged error in the failure to redact does not require reversal where the witnesses, including Deon Stevenson, Sheena Gardner, and Gary Bright testified consistent with the unidentified maker of the purported statement and was subject to examination and impeachment.

In the new era of the preferred admission of audio and video recordings of interrogations, the true nature of the manner of such interrogations is being revealed, rather than a digested format or reliance solely upon a written statement. In the present case, the admission of an hour long interrogation of Jaquwn Brewer was presented which reveal appropriate interview techniques by competent and cautious investigators seeking the truth and assistance from the defendant about the circumstances of the crime. Not unique to this case, the defendant was confronted with information - or alleged information - in order to seek further information from the Appellant - either exculpatory or inculpatory - as a reaction to the information. The Appellant does not challenge that the statements he made throughout the interrogation were involuntary or in violation of his Miranda rights or the constitution. Instead, he suggests that he has a right to exclude the comments of the investigators in their inquiry to the defendant because they make reference to alleged statements and information. Under the Appellant's apparent theory, his hour long interview should have been dissected down to a single mere statement - I did not do the shooting - rather than to reveal the true nature of the interrogation and the Appellant's evasive

denial and refusal to answer the direct questions. The trial court did not abuse its discretion in admitting the audio tape and not requiring redaction of a number of the investigators comments which placed Appellant's comments and refusals in context. While waiving his rights and discussing the matter with law enforcement, he failed to respond to the questions about the gun's location after he admitted that he was in the club with and photographed with it to the investigators and his mother. The admission of the comments were not intended to be for the truth of the matters asserted before the jury, but to Appellant during the interrogation. The state did not use the comments in lieu of actual evidence of the witnesses to prove the case against Appellant. A new trial is not warranted.

In his brief before this Court, Brewer claims that selected portions of the taped interview were improperly played to the jury which suggested that the police had statements from witnesses (unidentified during the interview) who had given statements that they had either seen the Appellant with a gun or that he was the shooter when he was confronted with it. This arises from the May 24, 2009 interview with Beaufort County Sheriff Department investigators Jeremiah Fraser and Brian Chapman. *Initial Brief of Appellant*, p. 5, 11-12. Brewer claims that the declarative statements and interrogatives by the investigators during the interview were hearsay and therefore inadmissible under SCRE Rule 801 (c), (d). Also, Rule 803, 804. He contends, contrary to the assertions of the prosecution at trial, that the purpose of the comments was not to show the denial of culpability , but to implicate the Appellant, He contends that since some of the comments were not questions but statements by Investigator Fraser. However, he admits that they were intended to be uttered to elicit a response and an affirmation by Appellant

that the representations were true (or false) - the nature and purpose of an interrogation. See Initial Brief of Appellant, p. 12.

Respondent submits that the circuit court did not err or abuse its discretion in allowing the admission of the brief portions of the tools of persuasion used by the investigators which occurred within the hour long interview in State Exhibit 2.[1]

THE CHALLENGED STATEMENTS

The Appellant sets out, with specificity, for the first time before this Court, the particular excerpted comments from the investigators made during the interview that they claim should have been redacted:

Outline of Recording

0:00-4:00	Waiver of Rights, etc.
4:00-4:30	"Word is you have been identified as somebody who did some shooting yesterday." .... "There's a bunch of people identified you..." ....
5:25-5:39	"When we was at the Shriner's club on May 24, I [*and I'm not going to say her name*] and my boyfriend [*not going to say his name*] was about to take a picture and he *[Jaquwn Brewer*] was already taking his picture with his gun up and we asked him what he was doing with it in there and he pointed it at us and he pointed it and *as we backed off* he just started shooting everywhere." (Investigator Fraser purportedly reading a statement provided by an unnamed witness) (*corrections made by Respondent's counsel after reviewing tape*).
6:06-6:10	"There's a lot people that saw you do it."
7:11-7:21	"Well there's too many people that saw you shoot it. .... Everybody's saying the same thing. They

[1]This audiotape exhibit is in the possession of the Clerk of Court in a "wav" format. State Exhibit 2. There is no official transcription of the tape.

	confronted you about having the gun in that picture and you started shooting."
9:58-10:13	"I've got statements from people that identify you as the shooter by name. ... They called your name... They wrote it in the statements, straight up."
12:04-12:08	"But people saw you. They know you. They called your name."
18:30	Questioning stops at Appellant's request
28:21	Questioning resumes *with mother present*
49:29	"All I have to go on is what the witnesses there said. That's it. I've got you with the gun. I've got them saying you are the one that shot."
53:10-55:18	"They're saying you came out of the club shooting. They're saying you were shooting in the air. That's what they are saying. That's exactly what they are saying you did. ... They're saying they confronted you. They are like 'What are you doing with the gun.' That's when you pulled out the gun and started shooting. ... That's exactly what they are saying. That's what they are saying. ... You're thinking that there's only one person saying you did it. There's a bunch of people; they were there, they saw you and they called your name. ... They saw you with the gun."
1:03:51	Recording Ends

State's Exhibit 2, Initial Brief of Appellant, p. 11-12 (with corrections by Respondent's counsel).

STANDARD OF REVIEW

The issue before this Court raises a claim that evidence was improperly admitted at trial. Although the Appellant purports to raise the claim as the admission of hearsay, the State's purported bases of admission was not to prove the truth of the matters asserted to Appellant during his interrogation, but simply to show the context of the interrogation. This is a distinction

with a difference. Further, the Appellant is not claiming in this Court or the trial court a confrontation clause claim under the federal constitution.[2]

ERROR OF LAW

In criminal cases, the appellate court sits to review errors of law only and is bound by the factual findings of the circuit court unless clearly erroneous. State v. Wilson, 345 S.C. 1, 5–6, 545 S.E.2d 827, 829 (2001). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006).

ADMISSION OF EVIDENCE

"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. Black, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." State v. Jennings, 394 S.C. 473, 477–78, 716 S.E.2d 91, 93 (2011).

HEARSAY

The rule against hearsay prohibits the admission of evidence of an out-of-court statement to prove the truth of the matter asserted unless an exception to the rule applies.' " Watson v. State, 370 S.C. 68, 71, 634 S.E.2d 642, 644 (2006); Vail v. State, 738 S.E.2d 503, 507 (S.C.App. 2013).

STATEMENT NOT OFFERED FOR THE TRUTH OF THE MATTER ASSERTED IS NOT HEARSAY

[2] It is apparent that this assertion would not be made because of the maker of the unidentified statement at portion 5:25 was Sheena Gardner and she testified concerning the event and when her boyfriend was confronting Appellant. R.p. 240-247. As noted within, others also identified Appellant with a weapon that night.

Importantly, a statement that is not offered to prove the truth of the matter asserted should not be excluded as hearsay. See State v. Blackburn, 271 S.C. 324, 247 S.E.2d 334 (1978) (statement implicating defendant in alleged prior crimes, which was not offered to prove the truth of the matter asserted, that is, that defendant in fact committed the prior crimes, but to establish motive, was not "hearsay" and its admission was not error); Hawkins v. Pathology Assocs. of Greenville, P.A., 330 S.C. 92, 498 S.E.2d 395 (Ct.App.1998) (allowing admission of letters, an anniversary card, and video to show close familial bond between the decedent, her husband, and her children in a malpractice action). Evidence of an out of court statement offered to prove the effect on a person hearing the statement is outside of the definition of hearsay because the statements are not offered to prove their truth. Watson v. Wall, 239 S.C. 109, 121 S.E.2d 427 (1961).

Further, non-assertive statements or conduct is not hearsay. See Danny R. Collins, *South Carolina Evidence*, Section 16.6, pp. 487-488, (2nd ed., S.C. Bar 2000) Several categories of statements as non-assertive include questions and exclamation. Id. A questions is not hearsay because it is not assertive. State v. Johnson, 324 S.C. 38, 476 S.E.2d 681 (1996). "An inquiry is not an 'assertion,' and accordingly is not and cannot be a hearsay statement." Inc. Pub. Corp. v. Manhattan Magazine, Inc., 616 F.Supp. 370, 388 (S.D.N.Y.1985), aff'd, 788 F.2d 3 (2d Cir.1986). Because a question cannot be used to show the truth of the matter asserted, the dangers necessitating the hearsay rule are not present. See United States v. Detrich, 865 F.2d 17, 20–21 (2d Cir.1988). Where, as here, the comments are offered as circumstantial evidence of Brewer's state of mind in response to the comment, it does not fall within the definition given by Rule 801©; because it was not offered to prove the truth of the matter asserted. See United States

v. Kohan, 806 F.2d 18, 22 (2d Cir.1986); United States v. Southland Corp., 760 F.2d 1366, 1376 (2d Cir.), cert. denied, 474 U.S. 825, 106 S.Ct. 82, 88 L.Ed.2d 67 (1985); United States v. Harris, 733 F.2d 994, 1004 (2d Cir.1984).

HARMLESS ERROR

"Improper admission of hearsay testimony constitutes reversible error only when the admission causes prejudice." State v. Garner, 389 S.C. 61, 67, 697 S.E.2d 615, 618 (Ct.App.2010). Such error is deemed harmless when it could not have reasonably affected the result of trial, and an appellate court will not set aside a conviction for such insubstantial errors. Id. Improperly admitted hearsay which is merely cumulative to other evidence may be viewed as harmless. State v. Blackburn, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978). See State v. Price, 368 S.C. 494, 499, 629 S.E.2d 363, 366 (2006) (noting the admission of improper hearsay evidence is harmless where the evidence is merely cumulative to other evidence).

HOW THE ISSUE WAS RAISED IN THE TRIAL COURT

This issue concerns the failure to redact certain questions/statements made by investigators during the May 24, 2009 interrogation of Jacquwn Brewer.

The Jackson v. Denno Hearing

On August 22, 2011 a Jackson v. Denno, 378 U.S. 368 (1964) hearing was held concerning the voluntariness of statements made by the Appellant during the hour long interview held on May 24, 2009. Tr. 53-72. Testimony was received from Beaufort County Sheriff Investigators Brian Chapman and Jeremiah Fraser.[3]

[3] During the hearing, the prosecution noted that Brewer admitted that he was wearing the same pants he was wearing the night before (May 23). Counsel Newman confirmed that the defense was not contesting the voluntariness of the statement or that it was made pursuant to Miranda up to when Appellant stated he did not want to talk anymore. From that point, Newman contended it was a violation of Edwards v. Arizona, 451 U.S. 477 (1980). Tr. 65-66.

After the hearing, counsel Newman was arguing reasons why the statement was not admissible. Tr. 72-77. Pertinent to this appeal, Newman argued that within the interrogation the investigators made hearsay statements. R. p. 13, ll. 22-25. Newman complained that the investigators were saying to Appellant that they had witnesses saying that he did the shooting and that the witnesses had called his name out. R. 14. Newman argued that if the investigator testified at trial, he would not be able to state it. The defense argued that they should not be able to get the hearsay statements in under the guise of the interrogation. R. p. 14, ll. 14-17. Defense counsel Newman stated that those should be redacted and deleted from the recording. R. p. 14, ll. 17-19.

Newman asserted that it also infected the interview when the investigator declared that he could prove himself innocent if he provided them with the gun and to help prove his innocence. R. p. 14, ll. 20-25. Newman was concerned that these comments were contrary to the burden of proof instruction. Newman was concerned that these comments by law enforcement (and his mother) infected the audio. R. p. 15, ll. 10-17.

The prosecution on the "hearsay" issue, the prosecution stated:

> MR. BANNON: Oh the hearsay arguments. Well, Your Honor, as I stated up at the bench, it would be the State's position that the statements that the mother make we're not offering for the truth of the matter asserted and that therefore they aren't hearsay. They're obviously out-of-court statements, but we just - - we're offering they're not of the truth of the matter asserted, and clearly we think they're extremely reliable as there's a, you know, word-for-word recording of it and so we're just relying on the fact that we're not offering them for the truth of the matter asserted, which would make them not hearsay.

THE COURT: How about the other hearsay statements. Such as, so and so said he saw him shoot or whatever.

MR. BRANNON: Well, Your Honor, I think that - - that's very similar to, you know, the police officers are permitted to use tactics even if they aren't true. I mean, it would be - - Investigator Fraser would have been within his rights to say to the defendant, we have the gun and we found a print on it, even though that was not true. I mean, the mere fact that there were a number of witnesses who saw the defendant and that these people did - - you know, identify Mr. Brewer as the shooter, that doesn't in and of itself make Mr. - - or the investigator's tactics inadmissible. He could've used completely false statements to try to get Mr. brewer to admit to his involvement and I don't see what would preclude him from using things that are true and that will be testified in the trial during the course of this interrogation.

R. p. 18, l. 12 - p. 19, l. 23.

Counsel Newman asserted that the problem was that the investigator through the audio recording is allowed to testify that a witness said they saw the Appellant which they could not testify about in the court. R. 20.

The prosecution responded that it was not Investigator Fraser's intent to try to backdoor the statements in. R. p. 20, ll. 20-21. The prosecutor declared that the investigator was trying to state to Appellant the facts as he knew them in order to get him to admit his involvement where there was a club full of people, many who knew the Appellant and saw him with a gun. Further, he revealed to Appellant there was a picture of him holding a gun and that Appellant produced it and began firing into the crowded room. The prosecutor stated that Investigator Fraser was

confronting Appellant with evidence, not making an attempt to bring in hearsay at a later trial, through the backdoor. R. 20-21.

The prosecutor stated that a number of the witnesses are going to be testifying. Solicitor Bannon noted that the witnesses were not named during the interview, so it would not suggest a missing witness that did not testify had seen Appellant with a gun. R. p. 21, ll. 11-18.

In response, the defense asserted the additional problem he had with the police comments was that the declarants were not identified. R. 21-22.[4] The defense feared that while the State would call a number, it would leave in the jury's mind other witnesses that were not called. R. 22. Counsel stated that if the investigator is called to testify about witnesses seeing the Appellant with a gun and did this, the defense could object and the objection would be sustained. R. 22.

The prosecution responded that the investigator's comments were not testimony, but being offered only to show the tactic to try to get the defendant to admit his guilt, which was unsuccessful. "That's not evidence that's being admitted [to show the truth of the matter asserted], this is information being used to confront the [Appellant]." R. p. 23, ll. 11-17.

Judge Seals then admitted the statement, finding Appellant was properly Mirandized and that they were freely and voluntarily given. R. p. 23, ll. 18-22.

Counsel Newman responded to move to suppress the audio and to limit the investigator's testimony to what the Appellant told him. He argued that the techniques and other information does not need to go before the jury. R. 24.

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[4] Defense counsel Newman stated that he was not questioning the motives for the interrogation or tactics used. R. p. 22, ll. 4-9.

The State responded that the completeness of the statements is relevant to show the number of occasions when he is confronted with where the pistol is and showing the "incredibly long pauses" before he responds "I didn't shoot anyone." R. 24-25.

The trial court then responded that he would allow the statement as it is. R p. 25, ll. 8-9.

The Trial Proceedings and Evidence Concerning the Identity of the Shooter and Possession of the Weapon

During the trial, various witnesses testified about the identity of the shooter. This information was presented through direct testimony.

Staff Sergeant Jason Wilson of the Beaufort County Sheriff's Department testified about his arrival at the Semper Fi Club. He stated that they had learned that there was a function there and that the roads were being patrolled because of the parking concerns and safety. R. 29-30. He had received reports that there was shooting inside and outside the club. R. 30. Upon arrival, he described "total chaos." R. 30. Fearing the shooter was still at the scene, they started to receive preliminary reports that the shooter had left. R. 31.

Sgt. Wilson found out talking with several people "that there was a single shooter that had been standing down the main part of the building and had shot up toward the door to the kitchen where they found the victim." R. 35.

Wilson stated he initially thought there was only one victim at that time and stated they stated to get information about the nickname of who the shooter may be. R. p. 35, ll. 9-13. [A sustained hearsay objection precluded the nickname disclosure at that time. R. p. 35, ll. 13-21].

Sgt. Wilson stated that he recovered photographs from the photographer from the event. R. 38, Tr. 142.

The photographer from the event, **Gary Bright**, testified while he was taking pictures at the event, one of the people pulled out a gun. R. 41, 44-45, 60. At that point, someone went to get a security guard. Id. Bright stated that he knew the person with the gun previously in passing and identified the Appellant. R. 41-42. Bright said the security initially came up to him and then went up to the defendant and told him that he could not be here with a gun. Then, Bright stated, the Appellant put the gun on the security guard's head and started walking backwards. The Appellant then pushed it off and then put the gun on promoted Deon Stevenson's head. Bright stated he turned away "because he did not want to see anything like that. R. 45. He stated Deon and the security guard did not have a gun. R. 45-46. At that point, he began hearing gunfire and people running. R. 46. Bright stated he did not see anyone else with a gun that night. He described the Appellant as being short, around five (5) feet tall. R. 47.

Bright stated he remained at the scene to collect his photography equipment. R. 47-48. He stated he heard a lot of gunshots outside the club. The Appellant was not in the club when he returned. R. 48.

Bright identified the gun in the picture with the Appellant. R. 56-57. Bright testified that he heard 3 to 5 shots inside the club and did not see who fired the shots. R. 67. He stated he then heard shots outside the club. Id. He stated he did not see the actual shooting because he turned away "because I didn't want to see anybody get shot." R. 69. He said that right before he saw the Appellant with the gun pointed at Deon. R. p. 69, ll. 7-13.

Houston Chaneyfield testified that he went to the party thrown by Deon Stevenson on May 23. He stated that he went to the party with Lawanda Ferguson (his girlfriend) and his cousin. R. 73. He stated he saw "Queezy" at the party. He stated that he saw Queezy (the

Appellant) with something bulging out of his pants that he assumed was a gun and told Deon. R. 74. Houston said he decided to leave when he saw the gun and went out the door after telling Deon. He was then outside when the shooting started. R. 76. He heard around 7 or 8 shots. R. 77.

Investigator Brian Chapman testified that he reviewed State Exhibit 54 (5-D). R. 87. He noted that the person wearing the Black T-shirt (Appellant) had a weapon located in the front waistband on his right-hand side. He stated the gun appears to be a 1911 .41 caliber handgun. R. 87-88.

Orthopedic surgeon Scott Strohmayer testified about his recovery of the bullet taken from surviving victim Donald Parker's right leg. R. 92-98. **Dr. Thomas Duff** testified about the gunshot wound to the head of the deceased victim, Henry Jones. R. 99-101.

Ivori Polite testified that her uncle Henry Jones was the bartender at the family reunion function. She stated that she knew Brewer from school and that he goes by the nickname "Quan" or "Queezy." R. 107-08. She stated she saw Appellant at the function. She described the shooting starting near the photo booth area. R. 109. She recalled hearing a bunch of shots. R. 110. When they started, she said she ran into the bathroom with her friends until it stopped. R. 110. At that point, Ivori stated she heard Shawnee tell Uncle Henry to call 9-1-1, but then there were 2 more shots and the last one hit him and he fell to the ground. R. 112. She said the bullet had to come through the door. R. 114. She identified Brewer in a photograph making a "Hill Posse" hand gesture. R. 118-21. Ivori confirmed that she never saw Brewer shoot. R. 123.

Donald Parker, the person who was shot in the leg at the function testified. R. 124. He stated he was in the middle of the room when the shooting started. R. 129. He was hit in the

right calf. R. 129. He stated he was just standing around socializing, heard a bunch of commotion and as soon as he turned his head he saw fire coming from the gun, "first shot, hit me in the back of the leg." R. 130, 132. All he saw was the pistol and he did not see who was holding it. R. 131, 135, 136.

Parker stated after he was shot, he heard more gunshots while he was inside the club. Parker recalled being carried to a truck once he got outside and still heard gunshots. R. 138. He stated they were taking him to the hospital when the police stopped them. R. 138-39.

Parker said he had seen the Appellant one time before, but did not recall seeing him that night at the club. R. 140.

Investigator Jeremiah Fraser testified before the jury. R. 144. Investigator Fraser testified that evening he went to the hospital because he knew there would be witnesses there with the two victims. R. 147. He stated Jones was unresponsive and he could not talk with him. R. 148.

Fraser stated that when he located Parker at the hospital, he described to him how he was standing near the photo booth with friends, that there was a commotion behind him, he then turned and saw the gunshots. R. 149. He stated Parker gave him a brief description of the gunman as a black male. He told him that the shooter was the smallest man at the club, with a black shirt and close-cropped hair. R. 150-51. He said he knew the guy and seen him before. R. 151.

He talked with the victim's brother, Ronald Parker (who had recently been drafted by the Seahawks out of Illinois). R. 153-54.

Fraser testified that they interviewed between 40 to 50 people. Fraser stated that they had quickly identified "Queezy" or Jaquwn Brewer as the person who had done the shooting. R. 155.[5] He stated this was from quite a few eyewitnesses. R. p. 155, ll. 24-25.

Investigator Fraser described their request for Brewer to come to the Department and he came with his mother later that day. R. 157. He noted that during the interview his mother was not present at first, but was present after he asked to speak with her. R. 157-58.

Investigator Fraser stated that during the interview, the only thing he would state was that he did not shoot anyone, after he was confronted with the photograph showing he had a gun (that he originally denied). R. 158-59. Fraser noted that the focus on the gun was that if they could recover it, they could have taken it and matched it with the projectiles and shell casings that had been recovered. R. 159. However, they were unable to recover a gun and Brewer would never tell them where he took the gun. R. p. 159, ll. 5-21. Fraser described Appellant as very short, approximately five feet tall. R. 161.

Fraser stated during the investigation Donald Parker gave a different statement than he gave at the hospital. At the point after his release, he said the gunshot and the gun was all he remembered. R. 163.

At the conclusion of his direct testimony, the entire hour long interview of the Appellant on May 24, 2009 was published. R. 175-76. Counsel renewed in general his earlier objection.

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[5] There was no immediate objection to this testimony. R. p. 155, ll. 20-25. Subsequently, the record reveals an objection and a bench conference. R. p. 156, ll. 2-7. No action or motion to strike was made.

R. 175-76, 179. It should be noted that the referenced to the lie detector and polygraph were redacted in the presentation to the jury. [R. 142-143].[6]

A request to transcribe audio so that it could be redacted was denied. R. 179. Counsel stated that he was going to make a motion for a mistrial based upon everything that came out in the investigator's talking. R. 180.

Judge Seals responded that he was going to instruct the jury that the State has the burden of proof and that Brewer does not have any burden of proof. R. 181.

On cross-examination, Investigator Fraser was asked to disclose the name and number of witnesses he interviewed. R. 182. Fraser meticulously went through his notes and reports and identified the numerous contacts they made. R. 184-186.

Fraser stated that everybody they identified as witnesses identified Brewer, not Dominique Middleton, as the shooter. R. 200. He stated Middleton did shoot in the parking lot, but he was further out. R. 198, 200-01.

John Doctor testified that he was with Donald Parker and Ronald Parker at the club. He stated that he was standing by the photo booth and his partner told him "he got a gun?" and they decided to leave. He turns back and sees someone taking a picture. R. 206-07. He stated they then pay no attention and continue to party and then he hears a girl scream "he's got a gun" and then gunshots are heard. R. 207. At that point, everyone scatters. Doctor stated he went into the girls' bathroom. When he comes out, he sees a beam from a firearm in his face. R. p. 207, ll. 15-19. He sees Donald on the ground and Doctor picks him up and carries him to the nearest vehicle to get to the hospital. R. 207.

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[6] State's Exhibit 2 was played in portions from 0:00 to 5:36, 6:09 to 18:45, 27:03 to 38;23, 39:00 to 59:07, and 1:00:52 to 1:02:45. R. 177-78.

Doctor testified that he did not see anyone else there with a gun. R. 209.

Doctor testified he did not see the person who was shooting when it started. R. 211. However, Doctor confirmed that he identified the Appellant as a person he saw at the club that night with a gun. R. p. 212-214, l. 25. See also, R. 217-218. He said the only time he saw Appellant with the gun when the pictures were being taken. R. 218.

Doctor said when he exited the bathroom, he thought the beam landed on him from a gun. R. 220.

Doctor confirmed he only saw one gun that night and it was in the possession of the Appellant. R. 221-22.

Deon Stevenson testified that he was in Beaufort for a family reunion involving his girlfriend Sheena. R. 223. He stated they got to the party around 10:30. R. 225. He stated they did not allow guns at the party and were searching people. R. 226.

Deon stated that when he found out someone had a gun at the party, he approached them and told him to take the gun outside. R. 226. This occurred by the photo booth after Houston said to him that the guy (Brewer) had a gun in the club. R. 227.

Deon stated he approached Brewer nicely and told him to take the gun outside and that they did not want problems. R. 227-229. He said Brewer pulled out the gun, cocked it, and put it to his face telling him it was none of his business. Deon described slightly hitting the gun away and Brewer started shooting. R. p. 229, ll. 1-19. Deon said he started running back as Brewer was firing inside the club. R. 230. He stated he found his girlfriend outside. R. 231.

He recalled that there was 5 shots fired inside the club. He said he remembered it because the same gun had been in his face. R. 233. He stated that there was no laser beam on the gun when it was pointed at him. R. 234.

Sheena Gardener testified that she was in Beaufort at that family reunion. She stated that she knew Brewer as "Queezy." R. 240. She stated that someone came up to her at the party and told her Jaquwn had a gun. R. 243. She said she and Deon went over to him and told him to take the gun out of the club. R. 244.

Sheena stated Brewer was with Dominique (Dizzy) Middleton and Brian (Chocolate). R. 244-45. They were taking a picture at the time. When Deon told Brewer to take the gun outside, he responded mind your own business, pulled out the black gun from under his shirt and pointed it at Deon. R. 246. She said Deon swatted the gun from his face and Brewer started shooting. R. 247. She said Brewer was aiming at the ground. R. p. 247, ll. 19-25. However, she said he was aiming at people. R. 248. When he starts firing into the crowd, they run out the doors. R. 248-49.

She said people were running outside and that there was more shooting. R. 249. She stated she saw Brewer shooting outside the club. R. 250. She said Dominique was further back shooting and Jaquwn was up close to the building. R. 250. She said Dominique's gun had a laser. R. 251-52. She said Dominique was shooting up in the air, whereas Brewer was shooting toward the building. R. 252-53. She said she saw only one person, Jaquwn, shooting into the building. R. 254.

She stated Brewer was shooting from the grassy area right in front of the second door. R. 256. She denied that she saw the laser pointed into the club. R. 257-62, 273.

Octavia "Shawnee" Jones testified that the victim was her uncle. She got to the party at 10:30. She said she was in front of the ladies room when the shooting started. R. 278. She said she ran into the bathroom when it started with Ivori. R. 279.

She described Sheena's boyfriend as Deon Stevenson. R. 279. She heard more gunshots and left the bathroom after 5 minutes when it was clear. R. 280. She described talking to her uncle on the ramp to call 9-1-1 and then there was a couple more gunshots and her uncle hit the floor. R. 281, 289-90. She saw "brains and blood" when he fell. R. 282. She said she did not see the man who was shooting. R. 283.

She said that she did not see a red laser sight come into the club. R. 284-86.

Charles Cox testified that he saw a gun in the club that night right before it went off. R. 296. He said he saw the gun while he was dancing and was about to tell his friends to leave and then it went off. He described the person as a dark-skinned shorter fellow. R. 297-98. He felt he saw the person aiming at people. R. 298-99.

Dr. Cynthia Shandi opined that Henry Jones died as a result of a distant gunshot wound. R. 315, 325-27. She recovered the bullet from the head of the victim. R. 316-20.

Tracey Thrower, a SLED forensic firearms examiner, testified that he analyzed the bullets recovered from the deceased and Donald Parker. R. 332. He opined that the bullet from the deceased was consistent with a .45 auto caliber weapon. R. 335. Concerning the bullet from Parker's leg, he opined that it also came from a .45 caliber automatic weapon. R. 335-37. However, his findings were inconclusive on whether they were fired from the same firearm. R. 337-38. He opined the bullets were too damaged or the firearm did not mark well. R. 337-38. However, he opined the bullets could have come from the same weapon. R. 339.

John Roberts of SLED testified that he analyzed the Appellant's pants and found the presence of gunshot residue. R. 345-350.

At the conclusion of the case, the defense renewed, in general terms, its prior motions. R. 351-52.

After the guilty verdict, the defense made a motion for a new trial based upon the playing of the audio taped statement. R. 376-377. He asserted it was burden shifting and hearsay. R. 376. The court denied the motion. R. p. 377, ll. 1-6.

ANALYSIS

1. The Comments Were Not Hearsay Because They Were Not Introduced to Prove The Truth Of The Matters Asserted.

The Appellant's pervasive complaint throughout his brief is that the investigators comments and inquiries were hearsay. However, as the prosecutor stated at the Jackson v. Denno hearing, this information was not being introduced to prove the truth of the matter asserted, but to show the effect of the comments on Appellant during the interrogation. R. p. 18-19. The foundation of his argument must fail.

The Appellant contends that the investigator's interview statements to Brewer referring to what they had learned in the investigation constituted inadmissible hearsay. Rule 801 of the Rules of Evidence defines "[h]earsay" as "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." S.C. R. Evid. 801©. Consequently, "[o]ut-of-court statements offered for purposes other than to prove the truth of the matter asserted are not considered hearsay." See for example State v. Call, 349 N.C. 382, 409, 508 S.E.2d 496, 513 (1998). In particular, statements of one person to another to explain subsequent actions taken by the person to whom the statements were

made are admissible as non-hearsay evidence. State v. Coffey, 326 N.C. 268, 282, 389 S.E.2d 48, 56 (1990). "The reason such statements are admissible is not that they fall under an exception to the [hearsay] rule, but that they simply are not hearsay—they do not come within the ... legal definition of the term." Long v. Paving Co., 47 N.C.App. 564, 569, 268 S.E.2d 1, 5 (1980).

In a recent North Carolina case, State v. Castaneda, 715 S.E.2d 290, 293 -294 (N.C.App.,2011), the court addressed a similar question. Therein, the North Carolina court concluded:

> Here, as noted by the trial court in denying defendant's motion, the detectives' references to statements by unidentified third parties are not hearsay because they were "not admitted for the purpose of conferring the truth of what [was] contained in [the] statements." **Instead, the detectives' statements were offered to provide context for defendants' answers and to explain the detectives' interviewing techniques**. See id. at 89, 676 S.E.2d at 553 ("Because defendant changed his story as a result of these out-of-court statements, it can be properly said that these questions were admitted to show their effect on defendant, not to prove the truth of the matter asserted."). As the detectives' statements were not offered to prove the truth of the matter asserted, they did not constitute hearsay, and the trial court properly admitted the evidence.

Id.

While South Carolina courts have not addressed the precise issue, Respondent find the controlling principle well articulated in Atkins v. Commonwealth, 13 Va.App. 365, 412 S.E.2d 194 (1991) to be persuasive:

> Whether statements which draw responses are inadmissible as hearsay depends upon the nature of the statements. Words which constitute a question or accusation that result in a party admission are not barred by the hearsay evidence rule. It is only when the prompting statements have the quality of evidence (offered for the truth of the matter asserted) that they become inadmissible hearsay

Id. at 368, 412 S.E.2d at 196 (citing Tellis v. Traynham, 195 Va. 447, 453, 78 S.E.2d 581, 584 (1953)); see also State v. Miller, 186 Ariz. 314, 921 P.2d 1151, 1159 (Ariz.1996) (declarant's

statement, made during course of interrogation, admitted to show effect on defendant during interrogation, not for its substantive content and therefore not hearsay); Williams v. State, 669 N.E.2d 956, 958 (Ind.1996) (declarant's statements largely designed to prompt defendant to speak held not to be hearsay; "it was the statements made by [defendant] that really constituted the evidentiary weight of the conversation"); Worden v. State, 603 So.2d 581, 583 (Fla.App.1992) (questions propounded and statements of detectives not offered for their truth, but to place defendant's answers in context).Like the statement in Atkins, the statements at issue in the present case were not offered for the truth of the matter asserted. Rather, they were offered to show the prompts to appellant's statements and the context of the interrogation, throughout which, appellant's version of events changed dramatically. As such, the statements were not objectionable as hearsay. See Atkins, 13 Va.App. at 368, 412 S.E.2d at 196.[7]

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[7]In State v. Miller, 197 N.C.App. 78, 86-94, 676 S.E.2d 546, 551 - 556 (N.C.App.,2009), the North Carolina court allowed the admission of similar comments from an interrogation. However, the court also gave a cautionary procedure for courts in the future addressing the matters:

> While we believe that publishing the recorded interview to the jury did not constitute error here, we nevertheless encourage trial courts to review the content of recorded interviews before publishing them to the jury to ensure that all out-of-court statements contained therein are either admissible for a valid nonhearsay purpose or as an exception to the hearsay rule in order to safeguard against an end-run around the evidentiary and constitutional proscriptions against the admission of hearsay. Further, we would like to remind trial courts that the questions police pose during suspect interviews may contain false accusations, inherently unreliable, unconfirmed or false statements, and inflammatory remarks that constitute legitimate points of inquiry during a police investigation, but that would otherwise be inadmissible in open court. As such, the wholesale publication of a recording of a police interview to the jury, especially law enforcement's investigatory questions, might very well violate the proscriptions against admitting hearsay or Rule 403. In such instances, trial courts would need to redact or exclude the problematic portions of law enforcement's investigatory questions/statements.

Other courts have addressed investigative comments as not hearsay when they are not presented for the truth of the matters asserted. See Kerr v. State , 167 S.W.3d 809, 813 (Mo.App. S.D.,2005) (the testimony of the officer explained the course he followed in his interrogation of movant. The testimony was not offered at the criminal trial for its truth; neither was it, as argued by movant, testimony that invited the inference of hearsay); People v. Isom, 140 P.3d 100, 103 (Colo.App.,2005) (the non-testifying interviewer's videotaped questions and statements were offered solely to place the victim's statements into context. The format of the interview was question-and-answer, and the interviewer offered no substantive comments of her own. The interviewer made no statement that could be considered "a statement offered to prove the truth of the matter asserted" under CRE 801(c)); State v. Johnson, 667 A.2d 523, 530 -531 (R.I.,1995) (questions the police officer asked of Shawn were not offered for the truth of any matter asserted therein but merely to provide a framework within which Shawn's answers could be understood); Towry v. State, 304 Ga.App. 139, 146, 695 S.E.2d 683 (2010) (distinguishing sworn testimony of a trial witness from comments on a video recording of the interrogation); Conwell v. State, 2011 Westlaw 1565909, 6 -7 (Ind.App.,2011) (Indiana Supreme Court has determined that police questions and comments during an interview designed to elicit a response from a defendant are not offered to prove the truth of the matter asserted, citing Smith v. State, 721 N.E.2d 213, 216 (Ind.,1999), but note, Smith, id.(error to admit the lack of an admonishment combined with the fact that the statements appear to be assertions of fact by the detective, not mere questions, renders their admission error). Likewise, courts in other jurisdictions have acknowledged the need for such interrogation techniques and under certain circumstances have allowed into evidence unredacted interview statements containing such techniques. Wurthmann v. Alaska, 27

P.3d 762, 768 (Alas.App.2001); Iowa v. Enderle, 745 N.W.2d 438, 442–443(III) (Iowa 2007); Lanham v. Kentucky, 171 S.W.3d 14, 34–36 (Ky.2005); South Dakota v. Zakaria, 730 N.W.2d 140, 147–148 (S.Dak.2007); Washington v. Demery, 144 Wash.2d 753, 30 P.3d 1278, 1282–1285 (2001). But see Kansas v. Elnicki, 279 Kan. 47, 105 P.3d 1222, 1227–1229 (2005) (interrogator comments that were not allowable as trial testimony could not be put before the jury through admission of unredacted pre-trial interview, even if their use was consistent with recommended interrogation technique); Pennsylvania v. Kitchen, 730 A.2d 513, 521 (Pa.Super.1999) (officer's interrogation statements regarding defendant's credibility must be redacted, because they are akin to prosecutor giving opinion at trial).

The Appellant's brief recognizes that in Georgia, their courts has dealt with interrogation comment issues. However, the court has allowed latitude given police interview question that are admitted into evidence. Windhom v. State, 315 Ga. App. 855, 859-860, 729 S.E.2d 25 (Ga. App. 2012), citing Axelburg v. State, 294 Ga. App. 612, 616, 669 S.E.2d 439 (2008). See DeYoung v. State, 268 Ga. 780, 789(8), 493 S.E.2d 157 (1997) (trial court did not err in denying motion to suppress statement obtained through police trickery or deceit); Carroll v. State, 261 Ga. 553, 554(2), 408 S.E.2d 412 (1991) (trial court, which redacted other portions of interview, did not abuse discretion in not redacting interrogator's argumentative comments).

The Appellant's reliance on South Carolina cases of Ezell v. State, 345 S.C. 312, 548 S.E.2d 260 (2001) is of little value in this case. There the prosecution played a tape of a drug transaction to the jury where the confidential informant identifies the defendant as the drug dealer on the tape, but does not testify at trial. Ezell is distinguishable at many levels, including the fact that it was introduced to prove the truth of the matter asserted and the CI did not testify.

The issue in Ezell was one of whether there was prejudice over the erroneous admission because the so-called corroborating testimony was not overwhelming. The only common factor is a tape. The difference is that in Brewer, the state was not using the tape to prove others had identified Brewer, only the manner that Brewer reacted to the accusations.

Dawkins v. State, 346 S.C. 151, 551 S.E.2d 260 (2001) is also distinguishable. Unlike in Brewer's case, the comments of the testimony by the investigator and counselor were to prove that the victim had named Dawkins as the perpetrator. Here, to the contrary, the interview comments were not to show the jury that others had identified Appellant with a gun or as the shooter. As noted above, the witnesses actually at trial testified about that. It was to show the effect of the comments and Brewer's steadfast unwillingness to respond to the inquiries that followed to his mother and the investigators. In Dawkins, the inadmissible evidence was the improper corroboration. Similarly, his reliance on Sanchez v. State, 351 S.C. 270, 569 S.E>2d 363 (2002) is without merit. In Sanchez, like Dawkins, the victim's parents testimony about what their daughter told her the defendant did to her to add and corroborate her testimony was determined to be inadmissible hearsay for the truth of the matter asserted and improper corroboration. The investigator's comments here were not to prove that he had done the shooting nor that others had said so, but to place in context the effect upon Appellant during the interrogation.

At no time in the arguments before the jury did the prosecution rely upon those interrogation comments to prove the witness identification. R. p. 353-375. Instead, the prosecutor asserts that they had witnesses. R. p. 360. The comments about the statement are brief noting that Brewer revised his denial that he did not have a gun at the party to his having a gun after being

confronted with the photograph with the gun. R. p. 362- 363. The prosecution is then contrasting the Appellant's statement comments with the actual witnesses who testified at trial. R. p. 363-364. There is actually no reference to the investigator interrogation comments in the state closing argument.

Respondent respectfully submits that where the interrogation comments were not used to prove the truth of the matter asserted by the prosecution, they were not hearsay. The Appellant's protestations to the contrary are without merit.

HARMLESS ERROR

Alternately, even if this Court opines that the comments should have been redacted, any error was harmless error. The comments concerned whether witnesses had seen the Appellant either with a gun or shooting. There was non-hearsay evidence in the record from the eyewitnesses that show the information was cumulative.

As to the "comment" when the investigator was reading from a statement from a female about seeing the gun pointed at her boyfriend (Exhibit 2, 5:25), Sheena Gardner, Deon Stevenson's boyfriend testified about seeing the defendant with a gun and having her boyfriend Deon confront him and asked him to remove the gun from the area and points it at him and begins shooting. R. p. 244-249. She also testified about seeing him shooting inside and outside. R. p. 257-262.

In addition, Deon Stevenson declared similarly that he learned about Brewer having a weapon and confronted him with the gun being placed to his head and then seeing the Appellant shooting. R. p. 227-229.

Others testified about seeing Appellant with a gun. These included Gary Bright who photographed Appellant with the gun and saw him put the gun to Stevenson head immediately prior to gunfire. R.p. 41-42, 45-46, 56-57. Houston Chaneyfield saw Appellant with the gun and reported it to Stevenson immediately prior to the shooting. R.p. 74-76. John Doctor saw the Appellant with the gun in his possession. R.p. 221-222. Charles Cox saw the gun with a shorter fellow aiming it at people. R.p. 297-299. However, Donald Parker was unable to identify his shooter, only the fact that he saw the gun fire. R.p. 130, 132, 149.

Simply put, there was no reliance by the prosecution upon the investigator interrogation comments to prove that witnesses had seen Appellant shooting that night. Instead, the witnesses themselves testified - although some were confronted with their prior statements - and were subjected to cross-examination. Any error in the admission was harmless. A new trial is not warranted.

CONCLUSION

For all the foregoing reasons, the appeal should be dismissed and judgment of conviction affirmed.

Respectfully submitted,

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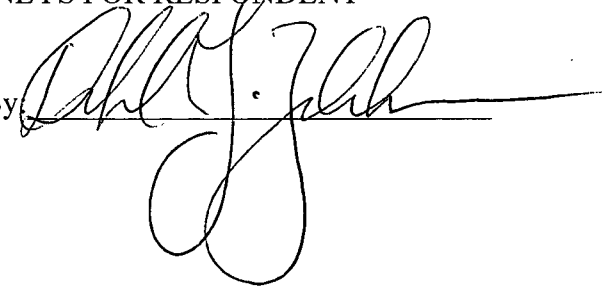
By: 

Columbia, South Carolina
July 9, 2013

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Beaufort County
William Henry Seals, Jr., Circuit Court Judge
2009-GS-07-1279; 1293; & 1296
Appellate Case No. 2012- 208487

THE STATE OF SOUTH CAROLINA,

Respondent,

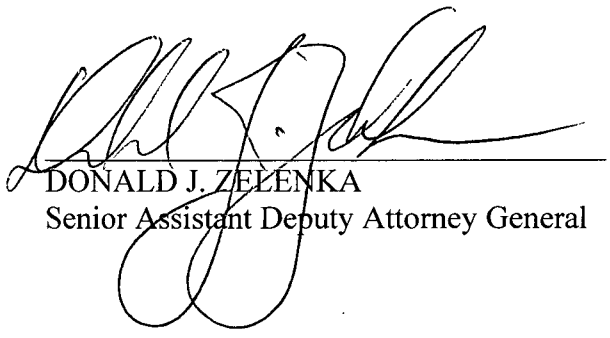
v.

JAQUWN BREWER,

Appellant.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211 (b), SCACR, and the August 13, 2007 Order of the South Carolina Supreme Court entitled "Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."



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July 9, 2013

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, herby certify that I have served the ***Final Brief of Respondent*** in the foregoing action by depositing copies in the United States Mail, postage prepaid to:

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