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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEE COUNTY
R. Ferrell Cothran, Circuit Court Judge

Appellate Case No. 2023-001893

The State, ... Respondent,

v.

Michael Juan Smith, ... Appellant.

FINAL BRIEF OF RESPONDENT

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RESPONDENT'S STATEMENT OF ISSUE ON APPEAL

1. Whether Appellant's argument that the trial court erred in excluding Mr. Lyles's prior statement to law enforcement is not preserved for appellate review where Appellant abandoned the issue by failing to articulate any argument in support of admission under Rule 803(5), SCRE. In any event, whether the trial court properly excluded the statement as inadmissible hearsay under Rule 802, SCRE, because it did not qualify for an exception as a "recorded recollection" under Rule 803(5), SCRE, where Appellant failed to establish the necessary foundation for admission. Finally, whether any possible error in excluding Mr. Lyles's statement was harmless in this case where, beyond a reasonable doubt, it did not contribute to the jury's verdict.

STATEMENT OF THE CASE

Michael Juan Smith (Appellant) was indicted at the May 20, 2021 term of the State Grand Jury for conspiracy (Superseding Indictment No. 2020-GS-47-20 – Count One); assault and battery by mob - first degree (death results) (Superseding Indictment No. 2020-GS-47-20 – Count Eight); and prisoner carrying or concealing a weapon (Superseding Indictment No. 2020-GS-47-20 – Count Nine). On December 4-8, 2023, Appellant proceeded to a trial by jury before the Honorable R. Ferrell Cothran. He was represented by Aimee Zmroczek, Esquire. Respondent (the State) was represented by Assistant Attorneys General Barney Giese, Margaret Scott, Stephen Lunsford, and John Conrad of the South Carolina Attorney General's Office. (R.p.1). At the conclusion of trial, the jury found Appellant guilty as indicted. He was sentenced by Judge Cothran to thirty (30) years' imprisonment for first-degree assault and battery by mob; ten (10) years' consecutive imprisonment for possession of a weapon by prisoner; and five (5) years' concurrent imprisonment for criminal conspiracy; for an aggregate sentence of forty (40) years' imprisonment. (R.p.1, p.568-p.579; p.581-p.637). Appellant timely filed a notice of intent to appeal his convictions and sentence, and a brief was submitted in support of his appeal by Appellate Defender Sarah E. Shipe of the South Carolina Commission on Indigent Defense. This Brief of Respondent follows.

STATEMENT OF FACTS

As briefly summarized by the State during its opening statement, the charges against Appellant stemmed from a prison riot that occurred on April 15, 2018, at the South Carolina Department of Corrections' (SCDC's) Lee Correctional Institution (LCI) which resulted in seven

inmates being killed, including the victim in this case, Cornelius McClary, who was stabbed 97 times by a mob—a mob which included Appellant. (R.p.65-p.71).

Pretrial Motions

On December 4, 2023, when the case was called for trial, the trial court conducted a pretrial hearing to address a variety of motions raised by the parties. During the motion hearing, Appellant noted the discovery provided by the State listed sixteen confidential informants (CIs) whose names and unredacted statements, by and large, had not been provided by the State. He acknowledged, however, that the State subsequently notified the defense it intended to call "CI number five" at which time they provided his entire file, including his name and unredacted statements. (R.p.41-p.42).

Trial – Opening Statements

The following day, the jury was sworn and the trial court gave preliminary instructions to the jurors. (R.p.60-p.65). The parties then gave brief opening statements. The State explained the charges against Appellant stemmed from a prison riot that occurred on April 15, 2018, at LCI. The prosecutor described it as "the most horrendous riot in State history" which resulted in seven inmates being killed, including the victim in this case, Cornelius McClary. The State explained how the incident started in the F-3 dorm in LCI with a single gang-related stabbing and robbery, which led to retaliatory attacks in F-5, and eventually F-1, where McClary was stabbed 97 times[1] by a mob which included Appellant. The prosecutor noted the jury would see videotape recordings from LCI showing Appellant's actions during the attack on McClary, including Appellant chasing McClary and repeatedly stabbing him before McClary bled to death. (R.p.65-p.71). In response, Appellant argued the entire riot occurred because LCI had "opened

[1] Subsequent testimony was elicited from the pathologist which identified 101 sharp force injuries to McClary's head and body. (R.p.360).

killing season on [Appellant] and his friends." He claimed circumstances in LCI were permitted by corrupt officers who brought in cell phones and drugs and allowed inmates to carve weapons, creating an environment where no inmate was safe. Appellant argued he acted in self-defense and was simply trying to neutralize the threat of McClary killing him rather than trying to kill McClary, and that McClary only died because the correctional officers left him on the ground bleeding after he had been stabbed instead of rendering aid. (R.p.72-p.79).

Trial – State's Case

After opening statements, the State began presenting its case-in-chief. First, the State called Associate Warden Edward Tisdale to the stand. He testified he was not working on April 15, 2018, but received a call from a deputy warden at LCI that night, Captain McCullough, saying there was an incident inside F-3 where an inmate had been stabbed and other inmates were refusing to "go in" to their cells, which prevented staff from getting the injured inmate to medical. A satellite image of LCI, State's Exhibit 1, was admitted into evidence. Tisdale reported to LCI to assist and as he was in the control room assessing how to retrieve the injured inmate from F-3 he described receiving a report of a "fence breech" in F-5. He went to the roof with a shotgun where he looked down and saw groups of inmates stabbing other groups of inmates in F-5 and other inmates in the yard with serious injuries from having climbed through razor wire to get out of F-5—a chaotic scene resulting in multiple inmates leaving in ambulances. Tisdale then heard over the radio that F-1 had also erupted. (R.p.79-p.97). On redirect examination, Tisdale described "throw overs" as incidents where contraband is thrown over the fence from outside the institution. He also explained the rapid response team (RRT) and confirmed that Captain McCullough had told LCI staff to have all the inmates return to their cells when the riot started. (R.p.127-p.135).

Next, the State called SCDC's John Douglas. Douglas explained he runs the "camera shop" for SCCD, which was responsible for maintaining the surveillance cameras in all prisons, including LCI, as well as for maintaining the recorders that store footage from those cameras. State's Exhibit 2, a floor plan of F-1 was admitted into evidence. Douglas then described the Viconet video management system and how recordings from the incident had been archived. He verified two particular recordings from the cameras in F-1 which were admitted as State's Exibits 3 and 4. (R.p.136-p.148). On cross-examination, Douglas acknowledged the video from F-1 was incomplete but explained this was because inmates broke a window and threw water on the equipment, which shorted it out. (R.p.148-p. 152). On redirect, Douglas identified multiple views of the dorm from multiple cameras, and on recross he agreed that even with all the cameras at LCI there were still some blind spots. (R.p.152-p.156).

The State then called Captain Annie McCullough to the stand. McCullough explained she worked her way up through the ranks to become captain at LCI in 2016 and that as captain, she was in charge of the general correctional officers assigned to each dorm at LCI. She said she was the on-call duty warden on the day of the incident and gave the call for an institutional lockdown and although the order went institution-wide, inmates in F-1, F-3, and F-5 did not report to their cells. McCullough said she witnessed the riot and she identified Appellant on State's Exhibit 3 as well as identifying him in the courtroom. Several photographic still shots from the video were introduced as State's Exhibits 5 through 12 and McCullough identified Appellant holding a sharp object in one of the photos. (R.p.157-p.173).

Next, the State called Cody Wilson, the Assistant Chief over the Public Corruption Unit within SCDC's Inspector General's Office. Wilson recounted getting a call about the incident and responding to the scene. He described all the agencies involved in the response, where he

was stationed during the incident itself, and how he later became the special agent with SCDC assigned to the case pursuant to which he conducted over 100 interviews. Wilson noted the case was ultimately handled by the State Grand Jury. (R.p.197-p.212). The State then called Lieutenant William Burley to the stand. Burley testified he was currently a shift supervisor at Broad River Correctional Institution but at the time of the incident he was in the contraband unit at LCI where he worked on both contraband and security threat group (STG) issues. Burley explained how he was familiar with most of the inmates at LCI at the time of the riot and he identified Appellant in a number of frames from State's Exhibit 3. Burley noted Appellant's nickname was "Flame" and that he was a member of the Bloods. He also identified McClary and noted in at least one of the still shots Appellant was holding a metal weapon. He then identified Appellant in the courtroom. (R.p.224-p.243). On cross-examination the defense introduced two photos and questioned Burley about those photos. Burley described how contraband is often thrown over the fence. (R.p.243-p.258).

Next, the State called SLED agent Jamie Shaw to the stand. Shaw was assigned as the chief investigating officer on the McClary stabbing case. She described her investigation of the incident and how she was able to identify individual inmates and track their movements before and during the attack on McClary. She then described what was depicted in the videotapes of the incident, wherein she identified a group of Bloods, including Appellant, attempting to kick down a door where a group of Crips was hiding, just before McClary was attacked. Shaw identified McClary being stabbed and one point in the video where Appellant is seen with a weapon in his hand. She watched multiple segments from different cameras while describing what each showed. (R.p.259-p.294).

At the conclusion of Shaw's testimony, the State advised the trial court that the parties had reached an agreement about Appellant's request for information on the unidentified CIs. The prosecutor said that based on their discussions, the request had been significantly narrowed and that the State had now provided the names and the unredacted statements from two of those individuals who had not been previously disclosed: CI number seven and CI number eleven. Counsel for Appellant agreed and advised the trial court she would review the information and let the judge know if Appellant intended to call either as a witness. Counsel noted she believed one of the CIs was represented by William Hodge, Esquire, and the other was unrepresented. (R.p.303-p.305).

The State then called Clive Lopez, a correctional officer working inside LCI on the night of the incident. Lopez described his response to the initial incident in F-3 and how, following the stabbing in F-3, some inmates refused to go to their cells when a lockdown was ordered. He said there was no institutional control and that inmates were walking around with weapons in their hands. Lopez noted how at the time he did not feel safe because, while some inmates had weapons, all he had was a can of pepper spray, and there were approximately 200 inmates to one officer. As a result of this situation, he called the control room for help and advised he was not okay. At that point, the inmates wanted him to unlock the door. He initially refused and reached for his gas canister, but after speaking with inmate Henry Dukes, he got the impression Dukes was given the okay to "come after me." Lopez testified he had no backup and pointed out on the video where an inmate was coming towards him with a bladed weapon, at which point he threw his keys on the ground. He testified he was afraid for his life so he gave up his keys and put his hands up. Lopez admitted he did not render aid to McClary after the assault, but again explained he was afraid and was not actually there when McClary was attacked. (R.p.312-p.338). On

redirect Lopez clarified he could not simply run from the dorm to the yard because he was locked in, with a bunch of angry, armed inmates. (R.p.354).

Finally, the State called forensic pathologist Janice Ross to the stand. Dr. Ross performed the autopsy on McClary. She prepared a diagram made during the autopsy, an enlarged copy of which was admitted as State's Exhibit 20. Dr. Ross testified she discovered 101 sharp force injury wounds on McClary's body and offered her expert opinion that his cause of death was hypovolemic shock—a slower bleed than exsanguination, where a person could possibly walk around a little until they became weak and eventually lost enough blood to become unconscious. She further testified McClary's manner of death was homicide. Several autopsy photos were then admitted into evidence as State's Exhibits 15 through 19. Dr. Ross testified the defensive wounds on McClary's palm indicated he had no weapon in his hand when he was attacked. (R.p.355-p.367). On cross-examination Dr. Ross acknowledged the manner of death can be homicide even if it was done in self-defense. (R.p.367-p.369). The court then adjourned for the day. (R.p.372).

Trial – Right to Testify & Defense Case

The following morning, the State advised the trial court that it was ready to rest; however, it does not appear this was done on the record before the jury. Instead, the trial court proceeded to advise Appellant, outside the presence of the jury, regarding his right to testify or not testify, and the possibility of being impeached with his prior convictions. (R.p.376-p.378). Appellant then testified on his own behalf. He admitted prior convictions for burglary, firearms charges, and he acknowledged he had friends in gangs. Appellant described his prior connection to McClary and how they had both been inmates at Perry Correctional Institution before being transferred on the same van to LCI. He said he was a Blood and McClary was a Crip and said

McClary was known for keeping weapons, explaining McClary worked in the kitchen where he had access to weapons. Appellant testified he was scared living in LCI due to stabbings and guards letting things happen without intervention. He claimed that sometimes inmates were even put in charge of things like head-counts, and that there was often contraband including phones and drugs that inmates got from officers. Appellant testified that on the night of the incident, he got word that something was going on inside LCI. He said people had cell phones and that on those phones he saw videos of his friends getting their throats sliced. Appellant testified he was told the attackers would do the same to him. As things started happening in his dorm, Appellant claimed he tried to stop the fighting, but they claimed he was next. Appellant testified he heard his friend "Ray Ray" call for help and that when he got to him, blood was gushing from Ray Ray's throat and he was with McClary. He said McClary threatened to kill Appellant, so he borrowed a knife and defended himself. (R.p.378-p.442).

On cross-examination, Appellant claimed he was an inactive member of the Bloods and recounted feeling afraid for his life that night. He was asked how many minutes before the stabbing he armed himself, and Appellant replied he wasn't sure. He claimed he borrowed a knife when his friend was stabbed but denied dropping a knife after he stabbed McClary. Appellant testified there was no plan and they were not trying to break down the door, only that they were trying to get to their friends that were hurt. Appellant insisted he was scared of McClary even though McClary had been stabbed at least 90 times. He testified he does not carry weapons and said he is a peaceful man. (R.p.442-p.451).

At the end of Appellant's testimony, counsel advised the trial court she had forgotten to move for a directed verdict at the close of the State's case. The trial court allowed her to make

the motion and after hearing her argument and the State's response, denied the motion. (R.p.458-p.460).

Trial Continued – Mr. Lyles's Statement

Following the denial of Appellant's motion for a directed verdict, the State notified the trial judge that a number of potential witnesses were subpoenaed but not called at trial, and that as a courtesy, the prosecutor would not release those individuals until Appellant's counsel determined whether she needed them as defense witnesses. Appellant's counsel noted one such witness was Mr. Lyles—CI number eleven—who she believed intended to assert his Fifth Amendment right against self-incrimination, but who she still wished to put on the stand. In the presence of Mr. Lyles's attorney, William Hodge, Appellant then attempted to question Mr. Lyles about a statement he allegedly gave to law enforcement during the investigation. (R.p.462-p.464). The following exchange then took place:

> THE COURT: Obviously there's not a jury present. Mr. Smith's lawyer needs to ask you questions if you could respond to whether you remember them or not. Okay.
>
> MR. LYLES: I don't want to talk. I want to [no] part of this.
>
> THE COURT: I understand but you've got to at least sit down. I've got to put some things on the record. Okay.
>
> MR. LYLES: Okay.
>
> MS. ZIMORCZEK: You can I mean . . .
>
> THE COURT: What's your name?
>
> MS. ZMROCZEK: It's Darius Rashaun Lyles.
>
> THE COURT: Okay. Mr. Lyles, do you swear the testimony you give will be the truth, the whole truth, and nothing but the truth so help you God?
>
> MR. LYLES: Yes sir.

THE COURT: Okay.

PROFFER TESTIMONY – Mr. Darius Rashaun Lyles – Examination by Ms. Aimee Zmroczek

Q: Mr. Lyles, my name is Aimee Zmroczek. We met briefly earlier. I understand you don't want to be here. I just need to ask you a few questions. Okay? Do you recall giving a statement to Agent Shaw, Special Agent Kevin Blake and John Hollingsworth from the South Carolina Attorney General's office on January 31st of 2020?

A: No ma'am.

Q: You don't recall? We just have to record it so I know you don't want to be here but if you can just speak up for me.

A: No ma'am.

Q: You don't recall?

A: No ma'am.

Q: Okay. Do you recall that they transported you to the Richland County Sheriff's --- Excuse me to the Richland County courthouse from the detention center and had you look at images, sign your name and identify certain individuals?

A: No ma'am.

Q: You don't recall that?

A: No ma'am.

Q: And do you recall in that statement telling Agent Shaw and the others I've mentioned that you provided some background conditions at Lee correctional that included you staying on the east yard for one week. Do you recall that?

A: No ma'am.

Q: Do you recall that when you were assigned to a cell on the west, and then you were assigned to a cell on the west yard, do you recall that?

A: No ma'am.

Q: Do you recall stating that all the doors at Lee Correctional stayed swinging and were never locked?

A: No ma'am.

Q: Do you recall stating that inmates conducted the count for the correctional officers?
A: No ma'am.

Q: Do you recall stating that on April 15 2018, that you were located in the A side dorm napped [sic] approximately two or 3pm until just before 9pm?

A: No ma'am.

Q: Do you recall stating that you woke and traveled to the B side of the F1 dorm?

A: No ma'am.

Q: Do you recall stating that you knew a Blood --- you observed a Blood gang member you knew as Ray Ray holding clothing to his neck because he had been stabbed?

A: No ma'am.

Q: Do you recall gangs conducting Blood calls?

A: No ma'am.

Q: Do you recall hearing people yelling on the ---Stating that you heard people yelling on the walk above the cell you were located in.

A: No ma'am.

Q: Do you recall saying that you observed a machete like shank dropped from the upstairs walkway?

A: No ma'am.

Q: Do you recall stating that you then saw a bloody individual you knew to be a Crip gang member fall down the left side stairs?

A: No ma'am.

Q: And do you recall them reading your Miranda warnings during that time or before this interview?

A: No ma'am.

Q: Okay. Do you recall identifying this individual in your handwriting as Ray Ray saying stabbed in neck?

A: No ma'am.

MS. ZMROCZEK: Your Honor, those would be the extent of the questions that I would ask Mr. Lyles.

THE COURT: Okay. Does the State have anything you want to add?

MR. CONRAD: In terms of questions? The only question I would ask is . . . .

Q: Sir, do you recall in that same interview that Ms. Zmroczek was referring to, do you recall stating that you heard a ...

MS. ZMROCZEK: I would object to hearsay.

MR. CONRAD: It's proffer.

THE COURT: Okay go ahead.

Q: Do you recall hearing an inmate named Rico who you identify as a Blood leader scream, if you Crips, you got 10 minutes to get out of the building or you die?

A: No sir.

MR. CONRAD: That would be the only direct questions the State makes.

(R.p.464, line 7-p.468, line 14).

At the conclusion of the proffer, Appellant argued Lyles's prior statement should be admitted once non-relevant and hearsay portions were redacted. The trial judge asked what rule Appellant believed would make the statement admissible, commenting that Rule 804, SCRE,

deals with these exact circumstances—unavailability of a witness. The court asked what part of subsection (b) would allow admission of the hearsay. (R.p.468, line 20-p.469, line 9). Counsel responded: "Well, I don't think --- I believe that portions of what he said are not here or are excluded from hearsay because it was a statement given to law enforcement upon which they rely, but it also is a *recording recollection*. So 803(5) it's . . . ." (R.p.469, lines 13-23) (emphasis added). The trial court pointed out that Appellant fit the definition of "unavailable" in Rule 804(a)(3) because he testified as to a lack of memory of his prior statement. The court further noted Lyles did not appear to fit any exceptions in Rule 804(b) and requested further justification from Appellant. The trial court then took a lunch break to give Appellant "an hour to regroup." (R.p.469, line 24-p.472, line 16).

After the lunch break, counsel for Appellant made her final pitch in support of admitting Lyles's statement, arguing:

> Okay. So, Your Honor, so obviously, Mr. Smith was provided the name of the person who provided testimony which supported the facts of his case, when we previously before lunch, proffered the testimony of that witness he indicated that he couldn't remember anything and clearly just not willing to participate. And, Your Honor, so we made the argument that we would have liked to have gotten the statements in under Article One section 14, under the right to present a statement page under a right to present a full and fair or a full and complete defense, Your Honor, in this case. And we understand that as as the law stands now, with the hearsay exception, that finding him unavailable and him not qualifying under any of the available hearsay exceptions, what I would have liked to do is then call the agent and lay the foundation that she did take the statement on this day. And that it's a report that she kept in her regular course of business and that it was provided, along with all of the evidence that they use to build the indictment on this case. And we certainly understand the Court's ruling that as the hearsay exception stand now that that would not be proper testimony. But that we wanted to make sure that we preserved that objection.

(R.p.474, line 8-p.475, line 5). Despite previously referencing Rule 803(5) and claiming the statement was a "recording recollection," Appellant did not pursue this argument further and articulated no actual basis for how Rule 803(5) would allow for admission. Instead, counsel acknowledged the hearsay statement was not admissible under Rule 804 and argued for admission as a business record. (R.p.474, line 8-p.475, line 5). The trial court responded: "Okay. The record is so preserved." (R.p.475, lines 6-7). The defense then rested without offering any additional evidence. (R.p.478). Appellant renewed his motion for a directed verdict and the trial court again denied that motion. (R.p.479).

Closing Arguments, Jury Charge, Verdict & Sentencing

After the trial court denied Appellant's directed verdict motion and held a charge conference, the parties made closing arguments. (R.p.491-p.549). The trial judge then charged the jury on the roles of the judge and jury, the indictments, the State's burden of proof, the presumption of innocence, reasonable doubt, credibility of witnesses, expert witnesses, criminal intent, direct and circumstantial evidence, self-defense, the elements of each offense, the defendant's right to not testify, and the verdict forms. (R.p.553-p.568).

At the conclusion of trial, the jury found Appellant guilty as indicted. He was sentenced by Judge Cothran to thirty (30) years' imprisonment for first-degree assault and battery by mob; ten (10) years' consecutive imprisonment for possession of a weapon by prisoner; and five (5) years' concurrent imprisonment for criminal conspiracy; for an aggregate sentence of forty (40) years' imprisonment. (R.p.374, p.568-p.579; p.581-p.637).

STANDARD OF REVIEW

In criminal cases, an appellate court sits to review only errors of law, and it is bound by the trial court's factual findings unless they are clearly erroneous. *State v. Brown*, 401 S.C. 82, 87, 736 S.E.2d 263, 265 (2012), *cert. denied*, 569 U.S. 1023 (2013); *State v. Wilson*, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001). Our appellate courts give great deference when reviewing the evidentiary ruling of the trial court. *State v. Cross*, 427 S.C. 465, 473, 832 S.E.2d 281, 285 (2019); *State v. Davis*, 437 S.C. 93, 96, 876 S.E.2d 321, 322 (Ct. App. 2022). Indeed, the admission or exclusion of evidence is left to the sound discretion of the trial judge. *State v. Commander*, 396 S.C. 254, 262-63, 721 S.E.2d 413, 417 (2011); *State v. Edwards*, 373 S.C. 230, 234, 644 S.E.2d 66, 68 (Ct. App. 2007). The trial court's ruling on the admissibility of evidence will not be reversed on appeal absent abuse of discretion or the commission of legal error which results in prejudice to the defendant. *State v. McDonald*, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000); *State v. Adams,* 354 S.C. 361, 377, 580 S.E.2d 785, 793 (Ct. App. 2003). An abuse of discretion occurs when the ruling lacks evidentiary support or is controlled by an error of law. *Brown*, 401 S.C. at 87, 736 S.E.2d at 265; *State v. Jennings*, 394 S.C. 473, 477-78, 716 S.E.2d 91, 93 (2011); *State v. Morris*, 376 S.C. 189, 205-06, 656 S.E.2d 359, 368 (2008); *McDonald*, 343 S.C. at 325, 540 S.E.2d at 467.

ARGUMENT

I.

Appellant's argument that the trial court erred in excluding Mr. Lyles's prior statement to law enforcement is not preserved for appellate review because Appellant abandoned the issue by failing to articulate any argument in support of admission under Rule 803(5), SCRE. In any event, the trial court properly excluded the statement as inadmissible hearsay under Rule 802, SCRE, where it did not qualify for an exception as a "recorded recollection" under Rule 803(5), SCRE, because Appellant failed to establish the necessary foundation for admission. Finally, any possible error in excluding Mr. Lyles's statement was harmless in this case because, beyond a reasonable doubt, it did not contribute to the jury's verdict.

Appellant argues the trial judge erred in excluding Mr. Lyles's prior statement to law enforcement: (1) because the trial court incorrectly found Lyles was "unavailable as a witness" pursuant to Rule 804, SCRE, and that no exception applied for admitting the hearsay under that Rule; and (2) because Lyles's statement was admissible under the "recorded recollection" exception to hearsay under Rule 803(5), SCRE. (Brief of Appellant, p.4-p.12). The State disagrees and submits Appellant's arguments should be denied and dismissed for several reasons. First, Appellant's Rule 804 argument is a red herring. Regardless of whether the trial court correctly concluded Mr. Lyles was available or unavailable, his statement was inadmissible under Rule 804, SCRE. Second, Appellant's Rule 803(5) argument is not preserved for appellate review because Appellant failed to sufficiently articulate any argument on the record in support of admission under Rule 803(5). In any event, the argument is without merit because the hearsay statement did not qualify for admission as a "recorded recollection" under Rule 803(5), SCRE. Finally, any error in excluding the statement was harmless beyond a reasonable doubt given the overwhelming evidence of Appellant's guilt. Appellant's convictions and sentence should be affirmed.

Rule 804, SCRE

Hearsay is an out-of-court statement offered in court to prove the truth of the matter asserted. *State v. Price*, 368 S.C. 494, 499, 629 S.E.2d 363, 366 (2006); *State v. Lindsey*, 394 S.C. 354, 360, 714 S.E.2d 554, 557 (Ct. App. 2011). 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. *Price*, 368 S.C. at 499, 629 S.E.2d 363 at 366 (citing Rule 802, SCRE); *Lindsey*, 368 S.C. at 360, 714 S.E.2d at 557 (citing Rule 802, SCRE). The South Carolina Rules of Evidence recognize two general groups of hearsay exceptions: one set that applies where the availability of the declarant is immaterial (Rule 803, SCRE); and another set that applies only if the declarant is "unavailable" (Rule 804, SCRE). Rule 804 defines "unavailability as a witness" to include one of five specific situations regarding a declarant who: (1) is exempted on the ground of privilege; (2) persists in refusing to testify; (3) testified to a lack of memory; (4) is unable to testify due to death, illness or infirmity; or (5) is absent and the proponent has been unable to procure the declarant's attendance. Rule 804(a), SCRE. Here, if the trial court correctly concluded Appellant was "unavailable" as a witness, Mr. Lyles's statement was inadmissible because, as explained by the trial judge, it did not qualify for any exception in subsection (b), exceptions which include: (1) former testimony; (2) a statement under belief of impending death; (3) a statement against interest; or (4) a statement of personal or family history. Rule 804(b), SCRE. If instead, the trial court erred and Appellant was somehow "available" as a witness, Rule 804 does not apply at all because its exceptions only cover witnesses who are "unavailable." Under either scenario, Lyles's hearsay statement was not admissible under Rule 804, SCRE.

Rule 803(5), SCRE – Issue not Preserved for Review

Appellant's complaint about the trial court's failure to admit Lyles's statement under the "recorded recollection" exception to the rule against hearsay is not preserved for appellate review. In order for an issue to be preserved for appellate review, the issue must have been: (1) raised to and ruled upon by the trial court; (2) raised by the Petitioner; (3) raised in a timely manner; and (4) raised to the trial court *with sufficient specificity*. *State v. Rogers*, 361 S.C. 178, 183, 603 S.E.2d 910, 912-13 (Ct. App. 2004) (emphasis added). "If a party fails to properly object, the party is procedurally barred from raising the issue on appeal." *State v. Johnson*, 363 S.C. 53, 58-59, 609 S.E.2d 520, 523 (2005).

Error preservation rules do not require a party to use the exact name of a legal doctrine in order to preserve an issue for appellate review. *State v. Brannon*, 388 S.C. 498, 502, 697 S.E.2d 593, 595 (2010); *State v. Dunbar,* 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003). Instead, a litigant is only required to fairly raise the issue to the trial court, thereby giving it an opportunity to rule on the issue. *Brannon*, 388 S.C. at 502, 697 S.E.2d at 595-96; *Hubbard v. Rowe,* 192 S.C. 12, 19, 5 S.E.2d 187, 189 (1939). Conversely, a litigant fails to fairly raise an issue to the trial court if he or she does not argue it with sufficient specificity to give the trial court the opportunity to make a ruling on that particular issue. Here, although Appellant mentioned Rule 803(5) in passing and used the similar sounding but incorrect term "recording recollection," he then quickly abandoned any effort to explain to the judge how or why this hearsay exception would apply. Instead, Appellant focused on Rule 804, SCRE, and whether Lyles was "unavailable" as a witness. Even after an hour-long lunch break, Appellant continued his argument with absolutely no mention of Rule 803(5), SCRE. Consequently, Appellant's Rule 803(5) argument is not preserved for appellate review and his convictions should be affirmed.

Rule 803(5), SCRE - Law / Analysis

As explained above, 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. *Price*, 368 S.C. at 499, 629 S.E.2d 363 at 366 (citing Rule 802, SCRE); *Lindsey*, 368 S.C. at 360, 714 S.E.2d at 557 (citing Rule 802, SCRE). Also as explained above, the South Carolina Rules of Evidence recognize a general group of hearsay exceptions that applies where the availability of the declarant is immaterial. Rule 803, SCRE. Except for modifications to subsections (4), (6), (8), (18), and (22), and the deletion of subsection (24) which contained a "catchall" or residual hearsay exception, Rule 803 of the South Carolina Rules of Evidence is identical to the federal rule. Rule 803, SCRE cmt. background (2025). Under Rule 803, one of the twenty-three enumerated hearsay exceptions where the availability of the declarant is *immaterial* is the "recorded recollection." Rule 803(5), SCRE.[2]

As explained in American Jurisprudence, a "past recollection recorded" occurs where a memorandum records a past recollection of the witness who, even after consulting the memorandum, cannot presently testify from independent memory as to the event in question *but is able to state that he or she once knew the facts and correctly recorded them in the memorandum.* 29A AM. JUR. 2D EVIDENCE § 1196 (2025) (emphasis added). Under such circumstances, the memorandum is admissible in evidence once it has been verified by the witness, notwithstanding its nature as hearsay and notwithstanding that the witness cannot effectively be cross-examined as to the matters stated in the memorandum. *Id.* However,

[2] Appellant argues in part that: "The trial court erred in finding Mr. Lyles was 'unavailable' pursuant to Rule 804(a)(3), SCRE." (Brief of Appellant, p.11). As argued above, the State submits this argument is irrelevant to the substantive issue raised by Appellant to this Court—his contention that the trial court erred in failing to admit Mr. Lyles's prior statement under the "recorded recollection" exception to the rule against hearsay in Rule 803(5), SCRE. Where the availability of the declarant is *immaterial* to the admissibility of a "recorded recollection," any ruling by the trial court regarding the availability of the declarant is of no moment, and the State submits it should play no part in this Court's appellate review.

admission of a past recollection recorded exception to the hearsay rule is proper only if: (1) the witness has no revivable recollection of the subject; (2) the witness has firsthand knowledge of the facts recorded; (3) *the witness can testify that the statement was truthful when made*; and (4) the recording was made when the events were fresh in the witness's memory. *Id.* (emphasis added). Similarly, under the Federal and Uniform Rules of Evidence, a record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him or her to testify fully and accurately, *which is shown* to have been made or adopted by the witness when the matter was fresh in his or her memory and *to reflect that knowledge accurately*, is not excluded by the hearsay rule even though the declarant is available as a witness. 29A AM. JUR. 2D EVIDENCE § 1196 (2025) (emphasis added).

As noted above, in South Carolina the federal rule is essentially repeated in our rules of evidence, and specifically defines an admissible "recorded recollection" as:

> A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, *shown* to have been made or adopted by the witness when the matter was fresh in the witness' memory and *to reflect the knowledge correctly*. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

Rule 803(5), SCRE (emphasis added). This Court has emphasized that the party seeking to admit a recorded recollection under Rule 803(5) must first establish the proper foundation. *Lindsey*, 394 S.C. at 360, 714 S.E.2d at 557. While the rule does not require a memorandum to have been prepared by the witness for it to be admissible as a recorded recollection, 29A AM. JUR. 2D EVIDENCE § 1199 (2025), the guarantee of trustworthiness for a recorded recollection is found in the reliability inherent in a record made while events were still fresh in mind *and* accurately reflecting them—both of which are foundational requirements. 93 A.L.R. FED. 2D 79

(2025). In regard to whether a recorded recollection correctly reflects the prior knowledge of the witness, this requirement is *only* satisfied where the witness has a present recollection of making a memorandum *and* can testify from present memory that he or she took care to ensure that the memorandum correctly reflected what he or she then knew. 29A AM. JUR. 2D EVIDENCE § 1197 (2025). "A statement which the witness fails to endorse as accurate generally cannot be admitted under this rule." *Id.* Indeed, a statement cannot be said to correctly reflect the prior knowledge where the witness has expressly repudiated it on the stand. *Id.*

Here, Lyles refused to endorse the statement he gave to the investigators as accurate. Indeed, he effectively repudiated the alleged recorded recollection when he testified, three times in succession, that he did not remember giving a statement in the first place, (R.p.465, lines 4-16), and twice testified he did not remember signing his name to any such statement. (R.p.465, lines 17-24). He never even acknowledged it was in fact his signature. Under these circumstances, the testimony was properly excluded because it simply did not qualify for admission as a recorded recollection under Rule 803(5), SCRE. Thus the trial court did not abuse its discretion. Instead, the trial judge's adherence to the limitations of the recorded recollection exception is evidenced by the decision to exclude the statement Appellant sought to introduce. There was no error in the trial judge's exclusion of Lyles's prior statement; therefore, that decision and Appellant's convictions should be affirmed.

Rule 803(5), SCRE - Harmless Error

Appellate courts will generally not set aside a judgment based on insubstantial errors not affecting the result. *State v. Sherard*, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991). Only errors so substantial that they result in a verdict which would not otherwise have been rendered require reversal. *State v. Jolly,* 304 S.C. 34, 39, 402 S.E.2d 895, 898 (Ct. App. 1991). "A

harmless error analysis is contextual and specific to the circumstances of the case." *State v. Byers*, 392 S.C. 438, 447, 447–48, 710 S.E.2d 55, 60 (2011). "No definite rule of law governs [a finding of harmless error]; rather the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless when it could not reasonably have affected the result of the trial." *Id.* at 447–48, 710 S.E.2d at 60 (quoting *State v. Reeves*, 301 S.C. 191, 193–94, 391 S.E.2d 241, 243 (1990)). A defendant seeking reversal based on error in admission or exclusion of evidence has the burden of showing that evidence or lack thereof was prejudicial. *State v. McElveen,* 280 S.C. 325, 327, 313 S.E.2d 298, 299 (1984).

The State submits any error in the exclusion of Lyles's statement was harmless because admitting the statement would have been insubstantial in view of the evidence presented of Appellant's guilt, such that it could not reasonably have affected the result of the trial. *See State v. Watts*, 321 S.C. 158, 467 S.E.2d 272 (Ct. App. 1996) (stating that error is harmless beyond a reasonable doubt if it does not contribute to the verdict). The State presented overwhelming evidence of Appellant's guilt including videotape recordings showing Appellant with a sharp weapon in his hand followed by Appellant stabbing and punching McClary during the mob assault that led to his death. Multiple witnesses identified Appellant in the video recordings as one of McClary's attackers. Given the overwhelming evidence of guilt, the State submits the absence of Lyles's statement could not reasonably have affected the result of the trial, and any error was harmless. *Byers*, 392 S.C. at 447-48, 710 S.E.2d at 243; *See State v. Watts*, 321 S.C. 158, 467 S.E.2d 272 (Ct. App. 1996) (stating that error is harmless beyond a reasonable doubt if it does not contribute to the verdict). Indeed, Appellant has not shown the requisite prejudice to support reversal of the convictions. *State v. Price*, 368 S.C. at 499, 629 S.E.2d at 366. In view of the very specific, detailed video recordings of the mob attack and identification evidence

adduced at trial, any possible errors arising from the exclusion of Lyles's statement was harmless, and did not have an impact on the verdict. Therefore, Appellant's convictions should be affirmed.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that Appellant's convictions and sentence be affirmed.

Respectfully submitted,

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Columbia, South Carolina
May 7, 2025

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May 07 2025
SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEE COUNTY
R. Ferrell Cothran, Circuit Court Judge

Appellate Case No. 2023-001893

The State, ...Respondent,

v.

Michael Juan Smith,...Appellant.

PROOF OF SERVICE

I, Susan Spencer, Legal Assistant, hereby certify that I have served the *Final Brief of Respondent*, dated May 7, 2025, on Appellant by sending an electronic copy via email to Sarah E. Shipe, counsel of record for Appellant, at the address listed for counsel in AIS.

I further certify that all parties required by Rule to be served have been served. This 7th day of May, 2025.

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Susan Spencer

From: Susan Spencer
Sent: Wednesday, May 7, 2025 10:00 AM
To: sshipe@sccid.sc.gov
Cc: Ben Aplin; Warren, Kaylynn
Subject: The State v. Michael Juan Smith (2023-001893)
Attachments: SMITH Michael - Final Brief of Respondent.pdf

Good Morning Ms. Shipe,

Attached please find the Final Brief of Respondent in The State v. Michael Juan Smith (2023-001893). This brief will be filed today with the Court of Appeals via the AIS OneDrive system. If you will, please confirm receipt.

Thank you.

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