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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Sumter County

Honorable Clifton Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TRAVON DERRELL RAGIN,

APPELLANT

APPELLATE CASE NO. 2025-000444

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Is *State v. Orr*, 128 S.C. 279, 122 S.E. 771 (1924), still good law such that a defendant need not object to an unconstitutional comment on the facts in order to challenge the jury charge on appeal?

2. Did the trial court err by allowing a detective to speculate about the movements of the victim and assailant at the time of the shooting?

3. Did the trial court err by allowing a detective to give his opinion about the location of the shooter and victim based on shell casings where he was not qualified as an expert in crime scene reconstruction?

4. Did the trial court err in allowing a detective to testify he arrested appellant "as a result of" interviewing two codefendants, thereby introducing hearsay by implication?

5. Did the trial court err by allowing a detective to testify about the nature of the victim's wounds expressly based on the hearsay findings of the forensic pathologist?

6. When considered together, did these errors prejudice appellant at trial and did the trial court err by denying his motion for a new trial based on the cumulative errors made during trial?

STATEMENT OF THE CASE

Appellant was indicted by the Sumter County grand jury on May 6, 2021, for murder, armed robbery, and possession of a weapon during the commission of a violent crime. R. p. 318. He proceeded to trial before Judge Clifton Newman and a jury on February 24–26, 2025. He was represented at trial by Elaine Cooke. R. 1. Ernest Finney, III, represented the state. R. 1.

After an *Allen* charge, the jury convicted him on all counts. R. 301:17-303:14, 306:5-22. The trial court issued a life sentence for the murder charge and a thirty-year sentence for the armed robbery. R. 314:14-20.

This appeal follows.

STATEMENT OF FACTS

Tenika Ragin[1] testified at trial that on April 3, 2020, she was outside her house with Sherrod Smith in his car. R. 38:2-39:10. She was in the passenger seat; Smith was in the driver's seat. R. 39:22-40:8. Smith had arrived shortly before midnight, and they spoke for several hours. R. 42:15-24. Around 3:00 a.m. someone opened the driver's door, Tenika saw a gun, and the intruder fired. R. 43:9-44:3. She fled the car, went inside, and called 911. R. 44:4-13, 47:4-16. Before she was inside, she heard a second shot. R. 48:4-12. Tenika could not identify the shooter—she saw only "a black silhouette of someone." R. 47:19-25.

Ultimately Justice Brock, Fre'Dron Spann, and appellant were arrested for this crime. R. 189:11-190:3, 215:18-216:1. Brock and Spann made a deal and testified against appellant in exchange for reduced and dismissed charges. R. 189:18-190:3, 194:25-195:21, 250:23-251:24. Their sentencing was delayed until after trial because the sentences depended on their testimony. R. 195:17-24, 251:9:12. Both testified that on April 3, 2020, they were out robbing cars. R. 173:7-174:22, 218:14-220:1. Both testified they did this multiple times with appellant, who was with them that night. R. 173:7-174:22, 218:14-25. Both testified that late in the night appellant went down a driveway, opened a car door, and then they heard a gunshot and ran away. R. 178:13-179:4, 222:3-224:4.

Officers arrived on scene and found Smith deceased outside the passenger side of the car. R. 82:17-84:22. Ellen Reimer, a forensic pathologist, testified he had been shot in the left elbow and back of the neck. R. 163:14-19, 164:18-20.

Further factual details will be addressed below as relevant to each issue on appeal.

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[1] Tenika Ragin is of no relation to appellant, although the solicitor forgot to ask this of her when she testified. R. 298:10-12.

STANDARD OF REVIEW

Jury Instruction

Whether a given jury charge is an unconstitutional comment on the facts should be reviewed de novo on appeal as a question of law. The question is whether the charge given violates Article V, section 21 of the South Carolina Constitution. That section is a limitation on the judicial authority of this state, and as such its application raises a question of law just the same as similar provisions limiting the authority of the General Assembly and Executive. *See, e.g., City of Rock Hill v. Harris*, 391 S.C. 149, 154, 705 S.E.2d 53, 55 (2011). This Court reviews questions of law de novo. *See State v. Frasier*, 437 S.C. 625, 633-34, 879 S.E.2d 762, 766 (2022) (holding constitutional criminal procedure issues are reviewed de novo).

Admission of Testimony

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." *State v. Odom*, 376 S.C. 330, 334, 656 S.E.2d 748, 750 (Ct. App. 2007) (citing *State v. Gaster*, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002)). "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) (citing *State v. McDonald*, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000)).

Motion for a New Trial

"Generally, the grant or refusal of a new trial is within the trial [court]'s discretion . . . ." *State v. Thompson*, 420 S.C. 386, 404, 803 S.E.2d 44, 53 (Ct. App. 2017) (alteration original) (citation omitted).

ARGUMENT

I. The implied malice charge was an unconstitutional comment on the facts that can be raised on appeal without objection below.

a. The charge given plainly violates *State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019), and was error.

When charging the jury the elements of murder, the trial court instructed: "Inferred malice may also arise when the deed was done with a deadly weapon, which is any article or instrument which is likely to cause death or great bodily injury." R. 292:12-15. In *State v. Burdette* the trial court charged the jury, "Inferred malice may also arise when the deed is done with a deadly weapon." 427 S.C. at 494, 832 S.E.2d at 577. The Supreme Court held the charge is never proper:

> A jury instruction that malice may be inferred from the use of a deadly weapon is an improper court-sponsored emphasis of a fact in evidence—that the deed was done with a deadly weapon—and it should no longer be permitted.

Burdette, 427 S.C. at 503, 832 S.E.2d at 582. *Burdette*'s holding has been applied and re-affirmed several times since. *State v. Campbell*, 443 S.C. 182, 190-91, 904 S.E.2d 441, 445 (2024); *State v. Brooks*, 428 S.C. 618, 626, 837 S.E.2d 236, 240 (Ct. App. 2019); *State v. Franks*, 432 S.C. 58, 79-80, 849 S.E.2d 580, 591-92 (Ct. App. 2020).

Here, the trial court erroneously gave the implied malice charge.

b. Pursuant to *State v. Orr*, 128 S.C. 279, 122 S.E. 771 (1924), an unconstitutional comment on the facts can be raised on appeal for the first time because it is a limitation on the judicial power itself.

Appellant's counsel did not object to the charge. However, article V, section 21 of the South Carolina Constitution is clear: "Judges shall not charge juries in respect to matters of fact, but shall declare the law." This provision "prohibit[s] courts from commenting to the jury on the facts of a case." *State v. Stukes*, 416 S.C. 493, 499, 787 S.E.2d 480, 483 (2016). "Accordingly, it is not within the province of the court to express an opinion to the jury on its view of the facts."

Id.; *see generally Norris v. Clinkscales*, 47 S.C. 488, 25 S.E. 797 (1896) (providing a detailed analysis and history of the then-newly adopted strict prohibition on charging the facts in any way and explaining the effect of its amendment from a prior version in which trial courts could "state the testimony").

In *State v. Orr*, 128 S.C. 279, 122 S.E. 771 (1924), the Supreme Court recognized the importance of this rule and its place in the constitution of our state. 128 S.C. at 280, 122 S.E. at 771. Thus, the Court held a challenge concerning the "constitutional prohibition as to a charge on the facts" need not be raised below to be challenged on appeal. 128 S.C. at 280, 122 S.E. at 771. In *Orr* the Court considered an appeal challenging the trial court's instruction on the facts without objection. *Id.* It reversed, holding:

> It is said, however, that, if his honor misstated the issues, it was the duty of the defendant to call the attention of the court to it, and, not having done so, he cannot now complain. That is a rule of court and must give way to the constitutional prohibition as to a charge on the facts. This assignment of error must be sustained.

Id. Therefore, objections to a charge on the facts need not be raised below to be argued on appeal because the constitutional rule outweighs the general issue preservation requirement.

Appellant recognizes this rule has not been used since *Orr*. However, in virtually all recent comment-on-the-facts cases the jury instruction issue was preserved so the *Orr* rule was unnecessary to consider. *See State v. Brown*, 443 S.C. 196, 198, 904 S.E.2d 448, 449 (2024); *Campbell*, 443 S.C. at 191, 904 S.E.2d at 445; *State v. Stewart*, 433 S.C. 382, 386, 858 S.E.2d 808, 810 (2021); *State v. Smith*, 430 S.C. 226, 229, 845 S.E.2d 495, 496 (2020); *Burdette*, 427 S.C. at 493, 832 S.E.2d at 577; *Pantovich v. State*, 427 S.C. 555, 832 S.E.2d 596 (2019); *Stukes*, 416 S.C. at 497, 787 S.E.2d at 482; *State v. Witherspoon*, 418 S.C. 641, 642, 795 S.E.2d 685, 686 (2016); *State v. Cheeks*, 401 S.C. 322, 327, 737 S.E.2d 480, 483 (2013); *State v. Belcher*, 385 S.C. 597, 601, 685 S.E.2d 802, 804 (2009); *State v. Hughey*, 339 S.C. 439, 452, 529 S.E.2d 721, 728 (2000),

overruled in unrelated part by Rosemond v. Catoe, 383 S.C. 320, 680 S.E.2d 5 (2009); *State v. Roof*, 298 S.C. 351, 353, 380 S.E.2d 828, 829 (1989); *State v. Grant*, 275 S.C. 404, 406, 272 S.E.2d 169, 170 (1980); *Franks*, 432 S.C. at 80, 849 S.E.2d at 592; *Brooks*, 428 S.C. at 626, 837 S.E.2d at 240; *State v. Owens*, 427 S.C. 325, 329, 831 S.E.2d 126, 128 (Ct. App. 2019), *aff'd*, 433 S.C. 482, 860 S.E.2d 357 (2021); *State v. Huckabee*, 388 S.C. 232, 244, 694 S.E.2d 781, 787 (Ct. App. 2010). Appellant is unable to find any case where our appellate courts have found the issue unpreserved.

Although not expressly used in modern times, the *Orr* rule is a logical exception to the typical preservation requirements because it is a constitutional restriction directly on the judicial power of the trial courts. Article V establishes the judicial branch, and it empowers and limits the courts in specific ways, such as the prohibition in section 21 on factual commentary by the court. As a restriction on the actual judicial power itself, this constitutional rule must be more closely guarded than any other. *See Orr*, 128 S.C. at 280, 122 S.E. at 771. This is for good reason: "the real object of this clause of the constitution is to leave the decision of all questions of fact to the jury exclusively, uninfluenced by any expressions of opinion by the judge, whose position would very naturally add great weight to any opinion he might express upon any question of fact arising in a case." *State v. White*, 15 S.C. 381, 392 (1881). The separation of roles between judge and jury is the foundation of our justice system. *Sumter Tr. Co. v. Holman*, 134 S.C. 412, 132 S.E. 811, 817 (1926) ("The people of South Carolina have said that it is the province of the courts to state the law and of juries to determine the facts."); *see also* 64 Corpus Juris, *Trial* § 313, at 299 (1933) ("[I]t is the office of the judge to instruct the jury in points of law and of the jury to decide matters of fact."). Therefore, "the strict prohibition of the constitution" must be enforced because it is that important. *Norris*, 47 S.C. 488, 25 S.E. at 810; *see State v. Kennedy*, 272 S.C. 231, 234,

250 S.E.2d 338, 339 (1978) (applying this provision and stating, "A fundamental concept of our system of justice is that every person charged with a crime has an absolute right to a fair and impartial trial").

The rule also fairly represents modern practice in this area because on multiple occasions the Supreme Court has held a jury charge was or would be a comment on the facts despite the issue not being squarely presented on appeal. For example, in *State v. Cartwright*, 425 S.C. 81, 819 S.E.2d 756 (2018), the Court established a three-part test to determine when evidence of a defendant's attempted suicide is admissible as evidence of guilt, affirming the trial court's admission of the evidence in that case. 425 S.C. at 92-93, 819 S.E.2d at 762. It then went further and held that trial courts should not instruct the jury on evidence of a suicide, even though on appeal the defendant challenged solely the admission of the evidence. 425 S.C. at 90, 93, 819 S.E.2d at 760, 762. Similarly, in *Burdette* itself, the defendant had asserted only that his case fell within the narrower proscription established in *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009), "because there was evidence presented that could reduce, excuse, justify, or mitigate the homicide." *Burdette*, 427 S.C. at 493-94, 832 S.E.2d at 577. He did not challenge the wholesale impropriety of an inferred malice charge in every case; nonetheless the Court addressed the issue *after* holding there was evidence to reduce or mitigate the homicide and thus the charge was improper under *Belcher*. 427 S.C. at 495, 501-04, 832 S.E.2d at 578, 582-83.

Orr should also be upheld precisely because the issue preservation requirements are not new. The Court at the time of *Orr* regularly refused to address exceptions to jury charges on other issues which were not raised to the circuit court. *E.g.*, *Stanford v. Cudd*, 93 S.C. 367, 76 S.E. 986, 986 (1913) ("[W]e have frequently held that we can consider no question which was not presented to or decided by the circuit court."); *see also Morrison v. Mut. Benev. Ass'n of Chesterfield Cnty.*,

78 S.C. 398, 59 S.E. 27, 28 (1907) (citing *State v. Adams*, 68 S.C. 421, 47 S.E. 676 (1904)); *Adams*, 68 S.C. 421, 47 S.E. at 678-79 (citations omitted); *Smith v. S.C. & G.R.R.*, 62 S.C. 322, 40 S.E. 665, 665 (1902); *State v. Chiles*, 58 S.C. 47, 36 S.E. 496, 497 (1900) (citing *State v. Smith*, 57 S.C. 489, 35 S.E. 727, 728 (1900)); *Youngblood v. S.C. & Ga. R.R.*, 60 S.C. 9, 38 S.E. 232, 236 (1901). Nonetheless, the *Orr* Court recognized the general preservation requirement as "a rule of court"[2] that "must give way to the constitutional prohibition" in article V, section 21. 128 S.C. at 280, 122 S.E. at 771. That decision should not be easily discarded now. *State v. One Coin-Operated Video Game Mach.*, 321 S.C. 176, 181, 467 S.E.2d 443, 446 (1996) (citing the principle of stare decisis and stating, "we see no reason to revisit [the prior decision] today").

c. The implied malice charge is unconstitutional under article V, section 21.

Although the Court in *Burdette* expressly stated it was "decid[ing] this issue solely under the common law," 427 S.C. at 503, 832 S.E.2d at 582, the charge *is* an unconstitutional comment on the facts just as the charge was in *Stukes* because it "emphasizes the weight of [certain] evidence in the eyes of the jury," 416 S.C. at 499, 787 S.E.2d at 483. This charge violates article V, section 21 because "the force and effect, or weight and sufficiency, of testimony must be left exclusively to the jury, uninfluenced by any expression or intimation of opinion thereof by the circuit judge . . . ." *State v. Sowell*, 85 S.C. 278, 67 S.E. 316, 318 (1910)). "The jury being the sole judges of the facts, it is for them, and not for the judge, to say whether any inferences, and if so what, shall be drawn from the testimony . . . ." *State v. James*, 31 S.C. 218, 9 S.E. 844, 852 (1889); *see also*

[2] It is most likely that "rule of court" refers to Rule 11 of the Circuit Court Rules (1922), which required parties to submit requests to charge prior to argument. That Rule eventually became Rule 20, SCRCrimP. If the constitutional prohibition prevailed over the old court rule, it prevails over the new one as well. The constitution must be the supreme law; it cannot be altered nor its protections weakened by mere amendment to the rules of court. *Cf. Cooper v. Poston*, 326 S.C. 46, 483 S.E.2d 750, 751 (1997).

State v. Cannon, 49 S.C. 550, 27 S.E. 526, 531 (1897) ("The jury are the sole judges as to what fact has been proven, *as well as the value to be attached to any proven fact.*" (emphasis added)).

That the Court in *Burdette* chose to restrain itself to its "policy-making role under the common law," 427 S.C. at 503, 832 S.E.2d at 582, does not mean the instruction is constitutionally sound. Rather, it was an exercise of the "Court's firm policy to decline to rule on constitutional issues unless such a ruling is required." *In re McCracken*, 346 S.C. 87, 92, 551 S.E.2d 235, 238 (2001) (citing *Fairway Ford, Inc. v. Cnty. of Greenville*, 324 S.C. 84, 86, 476 S.E.2d 490, 491 (1996)). Because the Court could effectively forbid the use of the implied malice charge solely under the common law, it was not necessary to decide if the charge also violated article V, section 21.[3] Nonetheless, the charge does violate the constitution because "the trial judge must refrain from all comment which tends to indicate his opinion as to the weight or sufficiency of evidence, the credibility of witnesses, the guilt of the accused, or as to the controverted facts." *Kennedy*, 272 S.C. at 234, 250 S.E.2d at 339 (first citing *State v. Pruitt*, 187 S.C. 58, 196 S.E. 371, 373 (1938), then citing S.C. Const. art. V, § 15 (a precursor to the current article V, section 21)). By instructing the jury that malice might be inferred from the use of a deadly weapon alone, the trial court "expresse[d] in his charge his own opinion upon the force and effect of the testimony, or of any part of it," and "intimate[d] his views of the sufficiency or insufficiency of the evidence in whole or in part." *Norris*, 47 S.C. 488, 25 S.E. 797, 806 (1896); *see also White*, 15 S.C. at 392 (reversing

[3] This narrow approach may also be the natural extension of the Court's decision in *Belcher* to take the same approach. In *Belcher*, the defendant argued the implied malice charge was improper under the common law and under article V, section 21. 385 S.C. at 602, 685 S.E.2d at 804. Nonetheless, the *Belcher* Court also decided the issue "solely under the common law." *Id.* Then, when the Court came to revisit the issue in *Burdette*, it took the same route either for the same reason or because Burdette did not argue the charge is unconstitutional.

because the jury instructions had the "inevitable tendency . . . to incline the jury to take the same view of the character of the homicide as that taken by the presiding judge").

Moreover, the Court has since cited *Belcher* and *Burdette* in holding a "felony attempted-murder charge" was an improper jury instruction, referring to that charge as a "constitutional error." *State v. Smith*, 430 S.C. 226, 233, 845 S.E.2d 495, 498 (2020). Even though the Court did not explain which provision of the constitution was violated, the only reasonable conclusion is that it violates article V, section 21. *Id.*

For all these reasons, the implied malice charge violates the Constitution of South Carolina, and under *Orr* the issue can be raised on appeal without prior objection.

d. The implied malice charge requires reversal because the use of a firearm was an integral part of the state's theory of malice.

When determining if an erroneous jury charge requires reversal, the question is whether the court can be confident "beyond a reasonable doubt that the error . . . did not contribute to the verdict." *State v. Otts*, 424 S.C. 150, 160, 817 S.E.2d 540, 546 (Ct. App. 2018) (quoting *State v. Middleton*, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014)). The question is *not* whether the jury would still have convicted the defendant without the erroneous charge. *Id.* (quoting *Middleton*, 407 S.C. at 317, 755 S.E.2d at 435); *see also State v. Kerr*, 330 S.C. 132, 145, 498 S.E.2d 212, 218 (Ct. App. 1998) (same) (citing *State v. Jefferies*, 316 S.C. 13, 22, 446 S.E.2d 427, 432 (1994)); *State v. Stewart*, 433 S.C. 382, 392, 858 S.E.2d 808, 813 (2021) (same) (citation omitted).

Appellate courts should be hesitant to find improper comments on the facts harmless beyond a reasonable doubt:

> It has long been recognized that even a slight remark, apparently innocent in its language, may, when uttered by the court, have a decided weight in shaping the opinion of the jury. Vested as the trial judge is, with superior authority, disinterested, and possessing experience not available to the ordinary layman, jurors,

> as a rule, are anxious to catch his view, upon which to found their conclusions.

State v. Pruitt, 187 S.C. 58, 196 S.E. 371, 372 (1938). Where the unconstitutional comment goes to an element of the offense, it should be the very rare case where the court can conclude with sufficient confidence that the error did not contribute to the jury's verdict. Since that analysis goes to the possibility of the effect on the jury, these errors will often not be harmless beyond a reasonable doubt because it will be "impossible to say just what effect this portion of the instruction, coming so late in the charge, had upon the jury, but it must be assumed that it was no[t] disregarded." *State v. Thorne*, 237 S.C. 248, 252, 116 S.E.2d 854, 856 (1960).

In *Belcher* the Court held the implied malice charge was prejudicial because it was "entirely conceivable that the only evidence of malice was Belcher's use of a handgun." 385 S.C. at 612, 685 S.E.2d at 810. In *Burdette*, the Court held the instruction was not harmless even though the defendant had been acquitted of murder and convicted of voluntary manslaughter where malice is not an element. 427 S.C. at 496, 832 S.E.2d at 579. This error is harmless beyond a reasonable doubt only if there is "overwhelming evidence of malice" *other than* the use of a deadly weapon. *State v. Campbell*, 443 S.C. 182, 192, 904 S.E.2d 441, 446 (2024). For example, in *Campbell* the error was harmless because there was evidence "indiscriminate firing of a rifle fourteen times into an apartment where a party was going on" and that the defendant stole a vehicle to "facilitate his attack." 443 S.C. at 192, 904 S.E.2d at 446. Of course that was a killing with malice, so the Court knew the jury's verdict had nothing to do with the instruction.

This case is far more similar to *Belcher* and *Burdette* than it is to *Campbell*. Here, essentially the only evidence of malice was the use of a firearm. To hold the error harmless would be to hold that although the inference of malice cannot be charged because of the risk of improper

influence on the jury, the inference itself is so apparent and strong that there is no way instructing that inference reasonably could have contributed to the verdict.

Further, in closing argument, the solicitor specifically pointed to the gun as evidence of appellant's guilt. He argued: "Only one man went to the car. Only one man had the gun. Only one man shot on the driver's side, and then . . . he went around the car and shot again a second shot. Ladies and gentlemen, that's when the line was crossed. That's when it became murder." R. 266:8-12. It almost would not be possible for a solicitor to more directly connect the use of a firearm to a finding of malice and murder. On this record, with that argument, there is a more than reasonable doubt the verdict was influenced by the trial court's erroneous instruction.

The error also cannot be considered harmless on a theory that appellant did not directly contest malice but instead argued he is entirely innocent. Long ago the Supreme Court explained:

> This court would probably hold it harmless error for a circuit judge, in his charge, to refer to or mention an admitted fact, since no one could be injured by a statement of what he conceded to be a verity. But a wide distinction exists between evidence admitted to be true and evidence as to which nothing is offered in contradiction. A defendant, by his plea of not guilty, disputes every fact relied on for his conviction. He has the right, if he chooses, to rely on the jury not to believe the testimony offered against him, or to draw from the evidence adduced against him inferences of fact consistent with his innocence, or inferences of fact insufficient to establish his guilt beyond a reasonable doubt. The jury are the sole judges as to what fact has been proven, as well as the value to be attached to any proven fact. A judge therefore invades the jury's province when he charges them in respect to matters of fact, *even though the facts or testimony be undisputed, in the sense that no evidence is offered to contradict the same*. Having reached this conclusion, nothing is left us but to enforce the constitutional mandate, and remand the case for a new trial. The judgment of the circuit court is reversed, and the case is remanded for a new trial.

State v. Cannon, 49 S.C. 550, 27 S.E. 526, 531 (1897) (emphasis added). At trial appellant largely challenged the credibility of Brock and Spann, urging the jury to disbelieve them and emphasizing the inconsistencies in their stories and the motive each had to protect himself by misrepresenting

appellant's involvement. R. 273:15-276:24. But appellant did not admit to malice by declining to directly attack the state's assertions. Thus, even though malice was not disputed in the sense that appellant did not offer evidence to contradict the state's theory, the clear violation of this provision and invasion of the jury's sole province requires reversal nonetheless. *See State v. Johnson*, 85 S.C. 265, 67 S.E. 453, 456 (1910) ("[B]ecause a party does not introduce evidence to disprove a fact which he denies, or to rebut the testimony introduced by the adverse party to prove the fact, it does not follow that it is an admitted or undisputed fact."). That appellant did not introduce evidence to dispute malice does not render the unconstitutional commentary harmless beyond a reasonable doubt. The fact that the jury was deadlocked and required an *Allen* charge before reaching its verdict also weighs heavily against finding the error harmless.

The error also cannot be harmless when considering, as the Court must, the jury charge as a whole. *See Burdette*, 427 S.C. at 498, 832 S.E.2d at 580 ("When considering whether an incorrect jury instruction constitutes harmless error, we are required to review the trial court's charge to the jury in its entirety."). In *Burdette* the Court noted, "Even telling the jury that it is to give evidence of the use of a deadly weapon only the weight the jury determines it should be given does not remove the taint of the trial court's injection of its commentary upon that evidence." 427 S.C. at 502-03, 832 S.E.2d at 582. Just the same, in *State v. White*, 15 S.C. 381 (1881), the Supreme Court specifically held that the prejudice of an unconstitutional comment on the facts of a case is not cured simply by also instructing the jury "that the law makes them the sole judges of the evidence, and that the judge can express no opinion on the facts, or if he does they are not bound by it." 15 S.C. at 393. There, such an instruction "was not . . . sufficient to do away with the effect of the previous expression of opinion as to the character of the homicide in question." *Id.* The same rationale holds here.

Finally, the Supreme Court has not always required a defendant prove prejudice from an improper comment on the facts. *See, e.g.*, *State v. Thorne*, 237 S.C. 248, 252, 116 S.E.2d 854, 856 (1960) (reversing even though the defendant "took the stand and asked that he be executed for his crime"); *State v. Addy*, 28 S.C. 4, 4 S.E. 814, 817 (1888) (stating that an improper comment on the facts "must always be reversed").

II. Detective Hansen's opinion about Smith's movement that night was not permissible under Rule 701, SCRE.

Detective Jeffery Hansen investigated the case, and he generally described the scene after he arrived. R. 111:8-18. Specifically, he testified in part:

> [Smith] had on white socks, and they were fairly bright white socks, and they were essentially clean, aside from the ball, or the area around his toes, where we believe he ran a short distance, but what we believe is that he went from the driver's seat where he was laying when the door was opened and --

R. 113:16-22. Appellant then objected to him testifying "as to what he believes," which the trial court sustained. R. 113:23-25. The solicitor persisted, however, and asked if Hansen "believed that [Smith] ran around the car to the passenger side" and "What do you believe he did?" R. 114:9-14. Appellant again objected for the same reason, and the trial court again sustained the objection. R. 114:15-17. Then the solicitor asked once more: "Why do you believe that he did not run around the car?" R. 114:19-20. For a third time appellant objected to the improper opinion testimony, yet this time the trial court overruled the objection without explanation. R. 114:22-23. Hansen then described his "theory" of how Smith left the vehicle. R. 115:3-7.

The trial court erred because Hansen's testimony was improper lay opinion, just as it had ruled twice previously. In general, the "function of a witness is merely to state facts within his personal knowledge, and under ordinary circumstances his opinion or conclusion with respect to matters in issue . . . cannot be received." 22 Corpus Juris, *Evidence* § 588, at 485 (1920). "If the

witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience or training." Rule 701, SCRE.

Hansen's testimony he "believed" Smith did not run around the car was an inference based on Smith's socks. That is clearly an opinion, and not one he was permitted to make. *See* D. Garrison Hill, *Lay Witness Opinions*, S.C. Law., September 2007, at 38 ("Lay opinion evidence that strays too far from the anchor of observed, concrete facts is nothing more than speculation."). Hansen did not watch Smith while the events of that night unfolded, and he did not see how Smith got to the passenger side of the car. Therefore, he should not have been permitted to share his guess—his "theory"—with the jury. *See Hamrick v. State*, 426 S.C. 638, 648, 828 S.E.2d 596, 601 (2019) (holding officer testimony about the location of a car crash was improper lay opinion because "he clearly did not perceive the location of the impact").

The trial court correctly sustained the objection the first two times the solicitor sought this testimony, but the solicitor persisted, and on the third try the state got in this improper guess about how the events of that night unfolded. That was error. *See State v. Pickrell*, 443 S.C. 497, 502-03, 905 S.E.2d 374, 376-77 (2024) (holding officer's testimony he could not understand the defendant's version of events was improper lay opinion testimony because it was not helpful to the jury).

III. Hansen provided an improper lay opinion about Smith's movement based on his speculative extrapolation from the location of shell casings.

Hansen testified he found two shell casings at the scene. R. 116:13-117:8. State's exhibits 5, 7, 8, and 13 are photographs on file with this Court which show the locations of the casings. The following exchange then took place:

> Q: Could you -- can you -- can you decipher from the injury where the shooter was and where the victim was?
>
> A: Based on shell casings, the first shot would have been on the driver's side. The second shot would have been on the passenger's side as Mr. Smith was fleeing, running from the car.
>
> MS. COOKE: Your honor, I'm going to object on the basis that he hasn't been qualified as an expert in crime scene reconstruction.
>
> THE COURT: Well, he's answered the question already. You're objecting after he answered the question. Next question.

R. 119:13-24. Hansen's testimony then continued.

The trial court erred for two reasons. First, this testimony was inadmissible lay opinion because it was not "helpful" to the jury under Rule 701(b). Hansen's testimony about where the shell casings and Smith's body were located was "easily understood" and demonstrated with pictures, and therefore his opinion "was not helpful to a clear understanding" of his testimony. *Pickrell*, 443 S.C. at 503, 905 S.E.2d at 376. It also was not helpful to the determination of a "fact in issue," Rule 701(b), SCRE, because his speculative opinion about Smith's movement "added nothing to th[e] determination." *Pickrell*, 443 S.C. at 503, 905 S.E.2d at 376-77.

Second, the court's theory that appellant's objection came too late is unfounded in law. Of course, "objections to testimony must be made when the testimony is offered." *McGahan v. Crawford*, 47 S.C. 566, 25 S.E. 123, 127 (1896). But while a witness is testifying is "when" the testimony is offered. Our law requires contemporaneous objections, not pre-emptive ones. The solicitor asked a question that did not on its face demand an objection: "Can you decipher from an injury where the shooter was and where the victim was?" Hansen may have responded, "No, I

cannot. That is not within my ability as a detective, but we do have crime scene experts that could." Such testimony would not have warranted an objection at all. Appellant was not required to object before Hansen answered the question in speculative anticipation the response would run afoul of the rules. The trial court erred by strictly requiring such a prospective, predictive objection. The objection should have been sustained and the jury instructed to disregard the improper opinion testimony.

IV. The trial court erred by allowing Hansen to imply the codefendants implicated appellant, over appellant's hearsay objection.

Hansen testified officers received information that led them to interrogate Brock and Spann in November of 2020. R. 120:24-121:8. Hansen then attempted to repeat what Brock and Spann stated in their interrogations, namely that they were with appellant and all were involved in these crimes. R. 120:9-122:18. Appellant objected because those statements are hearsay and Hansen was not even at those interrogations. R. 123:17-124:13. The solicitor argued he was "going into the fact that as a result of the interviews, information was gathered, and based on that information, warrants were served on all three individuals, and that brought us here today." R. 125:20-23. The trial court sustained the objection in part. R. 126:22-24. It ruled Hansen could describe that process leading to the arrests in this case but not the statements from their interrogations. R. 126:22-24. Hansen then testified that in November of 2020, "as a result of" interrogating Brock and Spann, he arrested all three young men. R. 133:1-24.

The trial court erred because hearsay implied by conduct is still hearsay: "Where conversations are properly excluded because they are hearsay, every material act done by the witness which had its sole origin in the hearsay statements made to him should also be rejected." 22 Corpus Juris, *Evidence* § 175, at 215 (1920); *see also* 29 Am. Jur. 2d *Evidence* § 656 (West 2025) ("Oral or written statements that directly *or impliedly* state the matter to be proved are

assertive statements excludible as hearsay."). "[N]o direct quotation of the words is necessary." *State v. Williams*, 285 S.C. 544, 548, 331 S.E.2d 354, 356 (Ct. App. 1985) (citing J. Dreher, *A Guide to Evidence Law in South Carolina* 63 (1967)). "An out-of-court statement offered in evidence to prove the truth of the matter asserted is hearsay whether the statement is quoted verbatim or conveyed only in substance; *whether it is relayed explicitly or merely implied* . . . ." *Young v. United States*, 63 A.3d 1033, 1044 (D.C. 2013) (footnote omitted) (emphasis added).

Had Hansen testified, "Spann and Brock told me the defendant killed Smith," that would clearly be hearsay. The state is not permitted to reach the same result merely by implying what they said without expressly stating it. Jurisdictions across the country have recognized this rule. *See United States v. Gomez*, 617 F.3d 88, 91-92 (2d Cir. 2010) (citing *Ryan v. Miller*, 303 F.3d 231, 252-53 (2d Cir. 2002)); *Flores v. United States*, 551 F.2d 1169, 1173 (9th Cir. 1977) (quoting 6 J. Wigmore, Evidence § 1788 at 234 (3d ed. 1940)); *State v. Burton*, 216 A.3d 734, 749 (Conn. App. 2019); *Cedillo v. State*, 949 So. 2d 339, 341 (Fla. Dist. Ct. App. 2007) (citing *Stokes v. State*, 914 So. 2d 514, 517 (Fla. Dist. Ct. App. 2005)); *Stevenson v. Commonwealth*, 237 S.E.2d 779, 781-82 (Va. 1977).

The solicitor asked, "*as a result of*" talking to Brock and Spann, "what happened?" R. 133:14-17. Hansen's reply—"a warrant . . . was drawn and served on each of the three people"—served one purpose: to inform the jury that Brock and Spann confessed and implicated appellant. The state introduced this testimony so the jury would itself assume what the codefendant's out-of-court statements were and then infer appellant's guilt. It is hearsay whether Hansen used the words "and they told me he is guilty" or not. That inference of guilt is what the state wanted when it introduced this evidence, and the hearsay-by-implication purpose makes the testimony inadmissible. The "rigid approach to hearsay [as excluding *only* "he said"-type testimony] has

long been rejected in favor of one that recognizes statements often contain implied assertions of fact and are hearsay *when admitted for those implications*." *Grimes v. United States*, 252 A.3d 901, 916 (D.C. 2021) (emphasis added).

This Court faced a very similar issue in *State v. Davis*, 420 S.C. 50, 800 S.E.2d 138 (Ct. App. 2017). There, an officer sent a confidential informant to the defendant's house with money in order to buy drugs. 420 S.C. at 65-66, 800 S.E.2d at 146. At trial, the agent testified the informant went to the house, "spent some time there, received a phone call, and returned to him with approximately 3.5 grams of methamphetamine." 420 S.C. at 65, 800 S.E.2d at 146. The agent "also said the CI paid for the drugs with government funds" and that "this was the only controlled purchase attempted." 420 S.C. at 65-66, 800 S.E.2d at 146. This Court held the admission of that testimony was error "because it was inadmissible hearsay without an exception under our rules of evidence." 420 S.C. at 66, 800 S.E.2d at 146. The agent had no personal knowledge of the informant's activities in the house, yet he "was allowed to relay to the jury the CI's multiple implied statements to him upon return for debriefing that he had, in fact, gone to Davis's residence and purchased methamphetamine." *Id.* This Court expressly rejected the state's contention that it was not hearsay because the agent "never repeated any statements from the CI to the jury." 420 S.C. at 66 n.8, 800 S.E.2d at 146 n.8. It was unavailing that the agent did not testify to direct, express statements because "the jury could only infer from Agent Asbill's testimony that the CI communicated to him, in some form, that he successfully purchased methamphetamine at Davis's residence." *Id.*

This case presents the same situation as in *Davis*. The jury could only infer from Hansen's testimony that Brock and Spann confessed and implicated appellant. There was no other purpose to the testimony because the simple fact of his arrest is not evidence of guilt. More importantly

here, Hansen testified the arrest was made "as a result of" speaking with Brock and Spann, plainly implying they implicated appellant. The trial court erred by overruling appellant's objection because "assertions that are relevant only as implying a statement or opinion of the absent declarant on the matter at issue constitute hearsay in the same way the actual statement or opinion of the absent declarant would be inadmissible hearsay." *State v. Dullard*, 668 N.W.2d 585, 591 (Iowa 2003).

The Supreme Court held similarly in *State v. Corn*, 215 S.C. 166, 54 S.E.2d 559 (1949), where an officer was permitted to testify that after several shots were fired, "he could find no one in the neighborhood who had heard any shots." 215 S.C. at 171-72, 54 S.E.2d at 560-61. That testimony too was hearsay because it "was tantamount to permitting the witness to testify that the people residing and working in the neighborhood had told him they did not hear the shots." 215 S.C. at 172, 54 S.E.2d at 561. Just the same, Hansen's testimony that "as a result of" speaking with Brock and Spann he arrested appellant was tantamount to telling the jury that Brock and Spann had told him appellant was guilty. The testimony was equivalent to "saying what [he] had been told outside of court," and even though he "did not testify as to exactly what had been said," the "testimony had no purpose other than to prove the truth of the matters asserted." *Williams*, 285 S.C. at 551, 331 S.E.2d at 358.

There is an important nuance here. Some jurisdictions have held that "implied assertions" *in out-of-court statements* may not render the statements hearsay as admitted for the truth of the implication. *See, e.g., Garner v. State*, 414 Md. 372, 388, 995 A.2d 694, 704 (2010). *But see United States v. Hernandez*, 176 F.3d 719, 727 (3d Cir. 1999) (affirming exclusion of out-of-court statement because it "was only relevant because of the implied assertion"); *Grimes*, 252 A.3d at 916 ("If the 'declarant intends . . . to communicate an implied assertion and the proponent offers it

for this intended message,' the statement 'falls within the hearsay definition.'" (omission in original) (quoting *United States v. Torres*, 794 F.3d 1053, 1056 (9th Cir. 2015))). Hansen's testimony was hearsay for a different reason. His testimony was clearly not an out-of-court statement when he testified in court as to why he arrested appellant. The reason it should still have been excluded as hearsay, however, is that the only purpose for the testimony was to imply out-of-court statements for the truth of the matter asserted in those implied statements.

Testimony that an officer arrested a defendant *because of* information that itself would be hearsay is still hearsay. Perhaps Hansen could have testified *that* he arrested appellant—although the relevance of such testimony is essentially nonexistent—but he did more. He directly connected the arrest to statements Brock and Spann made in their interrogations, thereby implying the hearsay statements each made implicating appellant. Because the arrest depended on hearsay and his testimony implied statements that would be hearsay, his testimony should have been excluded.

V. The trial court erred by allowing Hansen to testify about the pathologist's conclusions because her out-of-court findings were hearsay.

At trial the solicitor asked Hansen, "Based on the information you received from the autopsy, did you learn about injuries that Mr. Smith received . . . and what were those injuries?" R. 118:11-14. Appellant objected that the question called for hearsay, and the trial court overruled the objection without explanation. R. 118:2-15.

The trial court erred by allowing this testimony. "Hearsay is a statement, which may be written, other than one made by the declarant while testifying at trial, offered in evidence to prove the truth of the matter asserted." *State v. Blackwell*, 420 S.C. 127, 158, 801 S.E.2d 713, 729 (2017) (first quoting *State v. Brockmeyer*, 406 S.C. 324, 351, 751 S.E.2d 645, 659 (2013), then citing Rule 801(c), SCRE)). Anything the pathologist previously told Hansen about Smith's injuries was hearsay. Had Hansen testified instead that he observed wounds in the given locations, there would

be no problem. But the solicitor expressly connected the testimony to the pathologist's reports or statements made to Smith outside of court. The impermissible hearsay bolstered Hansen's attempt to explain the scene and his theory of events. The trial court erred by overruling the hearsay objection.

VI. These errors were not harmless because they went directly to an element of the offense and improperly corroborated the only evidence of appellant's involvement in these crimes.

A cumulative error analysis comes in two forms. First, following the verdict, a defendant may make a motion for a new trial arguing the errors that occurred in the trial necessitate re-trial when considered together. *See, e.g.*, *State v. Gleaton*, 444 S.C. 394, 429, 906 S.E.2d 630, 648 (Ct. App. 2024); *State v. Thompson*, 420 S.C. 386, 404, 803 S.E.2d 44, 53 (Ct. App. 2017). Second, cumulative error can also arise on appeal as part of the prejudice analysis to defeat a harmless error argument. *See, e.g.*, *State v. Johnson*, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999) (citing *Tennant v. Marion Health Care Found., Inc.*, 459 S.E.2d 374, 394-95 (W. Va. 1995); *State v. Daise*, 421 S.C. 442, 467, 807 S.E.2d 710, 722 (Ct. App. 2017).

Appellant presented the first theory below in a motion for a new trial, which the trial court erred by denying. R. 310:20-22, 312:7-8. He presents the second theory now on appeal because this Court cannot be confident beyond a reasonable doubt that the result of the trial was uninfluenced by the above errors. Of course, as this Court has written, "every instance of trial error does not entitle an appellant to prevail on appeal." *State v. Freeman*, 319 S.C. 110, 123, 459 S.E.2d 867, 875 (Ct. App. 1995). "However, the aggregation of errors may produce a cumulative effect of prejudice, where individually, the prejudice is insufficient to justify reversal." *Id.*

Both cumulative error analyses necessarily require a consideration of the prejudice each error produced and the influence of those errors together. First, consider Hansen's lay opinions about the locations of the shooter and Smith. Twice the trial court allowed him to speculate about

where the shooter was, how Smith moved across the car, and which shot was fired first. As explained, the solicitor kept improperly pushing Hansen to testify that he believed Smith fled through the car and out the passenger side while appellant walked around to shoot him in the head. In closing argument the solicitor used this testimony to demonstrate malice: "Ladies and gentlemen, that's when the line was crossed. That's when it became murder." R. 266:8-12. But no witness saw these events occur. Tenika testified she ran inside and only heard the gunshots. No crime scene reconstruction expert testified giving a qualified opinion about the order of the shots or the locations of the people. Because this theory was part of the state's asserted evidence of malice, these errors severely compound the prejudice of the impermissible implied malice jury instruction, *supra*.

Second, consider Hansen's hearsay-by-implication corroboration of Brock and Spann. He was permitted to testify, albeit obliquely, that Brock and Spann previously told him appellant was guilty. But Brock and Spann had not yet testified. This is precisely the type of prior consistent statements that are not permitted under Rule 801(d)(1)(B), SCRE. *State v. Foster*, 354 S.C. 614, 621, 582 S.E.2d 426, 430 (2003) ("[E]vidence of a prior consistent statement is **only** permitted when the elements of Rule 801(d)(1)(B) are met." (emphasis original) (citing *State v. Saltz*, 346 S.C. 114, 124, 551 S.E.2d 240, 245 (2001)). Because they had not yet testified—Hansen had not even been cross-examined—their prior consistent statement was not admissible.[4] Because appellant's objection was overruled, Hansen was permitted to effectively bolster Brock and Spann

[4] Even if they had already testified, this evidence would not be admissible under Rule 801(d)(1)(B) because the statements were not "made before the alleged fabrication." The crime occurred on April 3, 2020, but Brock and Spann were not interviewed until that November. R. 133:4-10. At that time, they had the same incentives to fabricate or exaggerate appellant's involvement as they did when they testified.

in their prior consistent statements. *See State v. Geter*, 445 S.C. 139, 155, 912 S.E.2d 255, 263 (2025) (holding it was "inappropriate for Investigator Clarke to opine as to the consistency of Stone's testimony with his prior statement").

The improper corroboration cannot be harmless in this case. *Saltz*, 346 S.C. at 124, 551 S.E.2d at 246 ("Erroneously admitted corroboration testimony is not harmless merely because it is cumulative."). Brock and Spann were the only witnesses that connected appellant to this crime in any way. The Supreme Court has previously held that improper corroboration with prior consistent statements is not cumulative evidence but rather "it is precisely this cumulative effect which enhances the devastating impact of improper corroboration." *State v. Barrett*, 299 S.C. 485, 487, 386 S.E.2d 242, 243 (1989). Importantly, appellant did challenge Brock's and Spann's credibility when they testified and in closing. R. 193:13-196:1, 250:17-252:15, 276:12-24. These were two young men with bad memories facing up to a life sentence for murder and decades on other charges, and they had already been incarcerated for years. In exchange for their testimony, they had charges dismissed and were allowed to plead guilty as an accessory after the fact to murder rather than as a principle. They had every reason to blame someone else for this crime and to downplay their own involvement. Their testimony is the only evidence appellant was anywhere near the scene that night, the only evidence he may have had a gun, and the only evidence he shot Smith. Improper corroboration of that testimony is not harmless.

When that prejudice is considered in conjunction with the risk that the jury found malice because of Hansen's improper opinion and the trial court's unconstitutional implied malice charge, this Court cannot say beyond a reasonable doubt that the verdict was uninfluenced by these errors. This was a hung jury that deliberated for hours before reaching a verdict. R. 300:3-305:17. There

is a more than reasonable doubt that these errors, or a combination of them, contributed to the verdict.

CONCLUSION

For the foregoing reasons, appellant respectfully requests this Court reverse his convictions and remand for a new trial where the trial court does not place its thumb on the scale and the solicitor does not overinflate Hansen's knowledge and Brock's and Spann's credibility.

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Senior Appellate Defender

ATTORNEY FOR APPELLANT

This 28th day of May, 2026.

RECEIVED
May 28 2026
SC Court of Appeals

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this final brief of appellant complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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