

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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MAY 02 2014

Appeal from Pickens County  
Letitia H. Verdin, Circuit Court Judge

SC Court of Appeals

THE STATE,

Respondent,

vs.

MATTHEW RYAN HENDRICKS,

Appellant.

PETITION FOR REHEARING

Pursuant to SCACR Rules 221 and 224, the State of South Carolina respectfully asks for rehearing on the following points that this Court may have overlooked or misapprehended in its decision.<sup>1</sup>

This Court rendered its opinion<sup>2</sup> that found a recording of a 911 call by Victim's mother, Gilstrap, constituted inadmissible hearsay, but found that the error was harmless. The State agrees the conviction should be affirmed and any possible error was harmless. However, the State is concerned with the analysis of the challenged 911 recording, which appears to base the determination of hearsay on weighing the probative value of the 911 recording's non-hearsay purpose. The State would respectfully submit such weighing is

<sup>1</sup> The State agrees with this Court's analysis in determining any error from admitting the recording of the 911 call from Gilstrap was harmless, especially in light of the fact that the substance of the 911 call was elicited during Gilstrap's direct examination without objection.

<sup>2</sup> State v. Matthew Hendricks, Op. No. 5225 (S.C. Ct. App., filed April 23, 2014).

more appropriate under a Rule 403, SCRE, analysis, rather than the determination of the hearsay character of the challenged evidence.

The opinion correctly notes that the State suggested at oral argument that the statement was admissible not for the truth of the matter asserted, but rather to explain how the police investigation began. This Court acknowledged in its opinion that “there may have been some minimal probative value in admitting the statement for that purpose.” However, this Court concluded that “the reason the police arrived at the hospital was not a significant issue at trial.” Based on this analysis, this Court concluded the statement was admitted for the truth of the matter asserted and was therefore hearsay. The State is concerned that the opinion suggests an added step of analysis in determining whether an out-of-court statement is hearsay – a balancing test based on the probative value of the evidence.

“Evidence is not hearsay unless it is an out of court statement offered to prove the truth of the matter asserted.” State v. Thompson, 352 S.C. 552, 558, 575 S.E.2d 77, 81 (Ct. App. 2003). “An out of court statement is not hearsay if it is offered for the limited purpose of explaining why a government investigation was undertaken.” Caprood v. State, 338 S.C. 103, 111, 525 S.E.2d 514, 518 (2000).

For instance, in State v. Brown, 317 S.C. 55, 63, 451 S.E.2d 888, 894 (1994), the Supreme Court found that law enforcement’s testimony about receiving information and complaints about the neighborhood before setting up surveillance was not hearsay because the out-of-court statements were not entered for their truth but to explain why officers began their surveillance.

In Thompson, a trial for carjacking, kidnapping, and first degree criminal sexual conduct charges, law enforcement’s investigation led them to the victim’s stolen Camaro.

Over counsel's objection, the police officer was allowed to testify that a bystander indicated the driver lived in a house 200 yards away from the Camaro. It was the Thompson family home, owned by Thompson's father. This Court found no error because the statement was not for the truth of the matter asserted but "to explain and outline" law enforcement's investigation and why law enforcement went to Thompson's home. Id. at 559, 686 S.E.2d at 81.

Demonstrative is State v. Vick, 384 S.C. 189, 682 S.E.2d 275 (2009). In that case, Vick complained that testimony by a State witness, Reeves, was impermissible hearsay. The testimony related a phone conversation between Vick's mother and the deceased victim that Reeves heard while the victim, a hairdresser, was cutting Reeves' hair. It also included conversation between the victim and Reeves about the phone call. Essentially, the phone call was a request to cut Vick's hair and the victim's response that she did not have time to cut Vick's hair. Id. at 197-98, 682 S.E.2d at 279. The Supreme Court found the testimony was not for the truth of the matter asserted, concluding as follows:

If the evidence was elicited, as Vick contends, to show that Victim's past dealings with Vick were unpleasant, she was unhappy with Vick and his mother, and that she was not looking forward to dealing with Vick again, it was not then elicited to show the truth of the matter asserted, that Victim did not have time to fix Vick's hair on that particular day.

Id., at 200, 682 S.E.2d at 280-81. As noted in the opinion, the State indicated that the purpose of the testimony was to establish Vick was a customer. The opinion further noted other evidence established Vick was a customer and determined any error was harmless because the challenged testimony was cumulative to the other evidence. Id.

Likewise, in the instant case, if the evidence is admissible for some purpose other than the truth of the matter asserted, then the evidence is not hearsay. In the instant

case, the 911 phone call is not hearsay as it merely provides an explanation of how law enforcement became involved in the case. The weighing of the 911 call's probative value against any danger of unfair prejudice is an analysis that should be carried out under Rule 403, SCRE, and is not determinative of the question of whether the recording of the phone call constitutes impermissible hearsay.

Of course, the content of the 911 call was already testified to by Gilstrap, without objection, rendering admission of the recording harmless as it was cumulative to direct examination testimony. Further, any error would be harmless beyond a reasonable doubt in light of the evidence presented at trial.

#### **CONCLUSION**

For all of the foregoing reasons, the State would respectfully request this Court to grant this petition for rehearing and vacate the portion of the opinion finding that the 911 recording was improper hearsay, find it was not admitted for the truth of the matter asserted, and affirm Appellant's conviction and sentence.

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Respectfully submitted,

ALAN WILSON  
Attorney General

DAVID SPENCER  
Senior Assistant Attorney General

BY: 

\_\_\_\_\_  
DAVID SPENCER

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ATTORNEYS FOR RESPONDENT

May 2, 2014

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal From Pickens County  
Honorable Letitia H. Verdin, Circuit Court Judge

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THE STATE,

RESPONDENT,

vs.

MATTHEW RYAN HENDRICKS,

APPELLANT.

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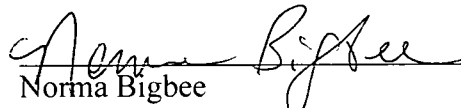
**PROOF OF SERVICE**

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I, Norma Bigbee, certify that I have served the State's Petition for Rehearing on Appellant's Attorney by depositing a copy of the same in the United States mail, postage prepaid, addressed to Carmen V. Ganjehsani, Esquire, Appellate Defender, SC Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia, SC 29211.

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

This 2<sup>nd</sup> day of May, 2014.

  
Norma Bigbee  
Administrative Assistant  
Office of Attorney General  
Post Office Box 11549  
Columbia, SC 29211  
(803) 734-3727



ALAN WILSON  
ATTORNEY GENERAL

May 2, 2014

**VIA HAND DELIVERY**

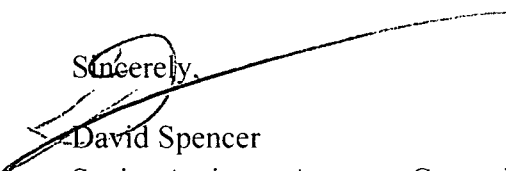
The Honorable Jenny A. Kitchings  
Clerk, South Carolina Court of Appeals  
Post Office Box 11629  
Columbia, SC 29211

RE: **State of South Carolina v. Matthew Ryan Hendricks**  
**Appellate Case No: 2011-203730**

Dear Ms. Kitchings:

Enclosed please find the Original and one (1) copy of the State's Petition for Rehearing in the above case.

Sincerely,

  
David Spencer  
Senior Assistant Attorney General  
Bar No: 68571

DS/nb

Enclosures

cc: Carmen Ganjehsani, Esquire  
Trisha Allen

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MAY 02 2014

**SC Court of Appeals**