STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. Supreme Court

Appeal from Anderson County
J. Cordell Maddox, Circuit Court Judge

Case No. 07-GS-04-1218, 07-GS-04-1219

Appellate Case No. 2012-211998

STATE OF SOUTH CAROLINA,

Respondent,

v.

GARVIN DUVALL,

Petitioner

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S QUESTION PRESENTED

Whether the Court of Appeals erred by holding that the issue of allowing three witnesses, Kenneth Erwin, Nellie Erwin, and Rita Woods to testify that the decedent told them if he was ever found shot and his car caught on fire to have co-defendant Moore investigated was procedurally barred since the trial judge ruled immediately before the testimony was offered that it was admissible, over defense objection, and where in fact it was hearsay and its probative value was substantially outweighed by its unduly prejudicial effect even if it was admissible under State v. Weston and State v. Garcia or otherwise?

RESPONDENT'S COUNTER QUESTION PRESENTED

Whether the Court of Appeals correctly concluded that the issue concerning the admissibility of the fear evidence of the victim of the Co-defendant was procedurally barred where no timely or adequate objection was made by Duvall to the particular limiting instructions that the evidence was introduce only against the co-defendant, not the Appellant or concerning the sufficiency of its language which removed consideration of the "fear evidence" against Duvall and no motion for mistrial concerning the fear evidence and limiting instruction was timely made.

RESPONDENT'S STATEMENT OF THE CASE

Garvin Duvall was indicted by the Anderson County Court of General Sessions for murder and possession of a firearm (2007-GS-04-1218), and criminal conspiracy (2007-GS-04-1219). The charges arose from the 1999 murder of Paul Stephens.[1] On May 12, 2009, the matter was called to trial before the Honorable J. Cordell Maddox, presiding judge. The prosecution was handled by Assistant Solicitor Lauren S. Hogan and T. Matthew Bradley. Garvin Duvall was jointly tried with Frances Moore. DuVall was represented by Robert Gamble and Matthew Perkins of the Anderson County Public Defenders Office. Frances Moore was present and represented by J. Calhoun Pruitt of the Anderson County Bar. At the conclusion of the state's case against Duvall, counsel Gamble stated he would not be entitled to a directed verdict motion and that he introduced evidence in the state's case. R. 417, Tr.p. 531, l. 21-22.

On May 15, 2009, the jury returned guilty verdicts on all charges. Duvall was sentence to consecutive terms of thirty (30) years for murder, five (5) years consecutive for possession of a firearm during the commission of a violent crime and five (5) years for criminal conspiracy. R. 595, Tr. p. 715, ll. 5-11. This was for an aggregate forty (40) year sentence. R. 596, Tr. p. 716, l. 21.

The Appellant made a post-trial motion for new trial on June 16, 2009. R. 603-05, Tr. 723-725. The trial judge denied the motion. R. 605-06, Tr.p. 725-726.

A notice of appeal was served on May 22, 2009. A second notice was served on June 25, 2009.

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[1] Co-defendant, Frances Moore was indicted for murder, possession of a firearm during the commission of a violent crime and criminal conspiracy on Indictments 2007-GS-04-1342, 1343, 1344. Moore was sentence to consecutive terms of thirty (30) years for murder, five (5) years consecutive for possession of a firearm during the commission of a violent crime and five (5) years for criminal conspiracy. R. 596, Tr. p. 716, ll. 10-16. This was for an aggregate forty (40) year sentence. R. 596, Tr. p. 716, l. 21. The appeal was denied by the Court of Appeals. State v. Francis J. Moore, Unpublished Opinion No. 2012-UP-059 (S.C. Ct. App. February 1, 2012). A petition for writ of certiorari is currently pending before this Court.

The Court of Appeals affirmed petitioner's conviction on February 29, 2012. State v. Duvall, Unpublished Opinion No. 2012-UP-132 (S.C. Ct. App. February 29, 2012). App.p. 2. A petition for rehearing was denied by the Court of Appeals on March 29, 2012. A petition for writ of certiorari was made on June 29, 2012. This Return follows.

Respondent incorporates herein by reference its State's Version of the Facts, set forth in the Final Brief of Respondent, pages 2-9.

REASONS WHY CERTIORARI SHOULD BE DENIED

I. The trial judge properly admitted evidence from three witnesses that the victim had told them that he was in fear of being shot and having his car burned and was in fear of Frances Moore. The evidence was admissible under SCRE Rule 803(3) against the co-defendant Frances Moore.

A. The Court of Appeals Correctly Concluded that the Issue Concerning the Admissibility of the Fear Evidence Was Procedurally Barred Where No Timely or Adequate Objection Was Made By Duvall to the Particular Limiting Instructions and the Sufficiency of its Language Which Removed Consideration of the Evidence Against Duvall And No Motion For Mistrial Concerning the Evidence and Instruction Was Timely Made.

B. A limiting instruction that the evidence was only introduced against the co-defendant, not Duvall removed any prejudice to Appellant.

C. The evidence concerning the victim's fears was admissible under State v. Garcia and State v. Weston and Rule 803(3).

D. The probative value of the evidence of the fears was not substantially outweighed by danger of unfair prejudice where there was a limiting instruction against its use in Duvall's case, that their was independent evidence of Moore's hatred of Stephens and intent to kill him, independent evidence of Duvall's admissions that he was involved with Moore in a plot to kill Stephens, that he admitted killing Stephens with Moore.

E. Any admission of evidence of Stephens statement to others about his fear of being shot and having his car burned was

harmless error for similar reasons.

The three similar issues before the Court concern the admission of evidence concerning the victim's fear of death and of co-defendant Frances Moore. Relevant to the analysis are the decisions of the South Carolina Supreme Court in State v. Weston, 367 S.C. 279, 287-288, 625 S.E.2d 641, 645 - 646 (2006) and State v. Garcia, 334 S.C. 71, 512 S.E.2d 507 (1999). In Garcia, the Court held "the victim's state of mind-that she was scared of appellant-was relevant because it-tended to disprove appellant's contention the shooting was an accident; the victim's fear suggests appellant may have intended the shooting." *Id.* at 74, 512 S.E.2d 507, 512 S.E.2d at 608. The Court found **while the present state of the declarant's mind is admissible as an exception to hearsay, the reason for the declarant's state of mind is not , citing** *United States v. Cohen,* 631 F.2d 1223, 1225 (5th Cir.1980) ("But the state-of-mind exception does not permit the witness to relate any of the declarant's statements as to why he held the particular state of mind, or what he might have believed that would have induced the state of mind.). In Weston, the Court found that the evidence did not give a reason for the fear but the dear itself. The Court found admissible evidence if a victim's fear of a defendant, not just a victim's fear generally.

The victim, Paul Stephens, had expressed that he was fearful of his ex-mother-in-law (co-defendant) Frances Moore when he stated on many occasions near the time of his murder to three people that "if I was ever found shot and his car caught fire to have his mother in law investigated." R. 199, Tr.p. 295, ll. 10-25. (Kenny Erwin). Also, R. 204, Tr. 300 (Nellie Erwin); R. 210, Tr. p. 306, ll. 9-14 (Rita Woods). [2] Frances Moore had a financial motive to kill Stephens (and a potential fund to pay to have it done) in addition to being upset that Stephens had gotten her daughter to commit a

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[2] It also aids this assessment that other evidence existed that Duvall had indicated that he was going to kill Stephens (in the same manner that Stephens had expressed to others that he feared his mother would kill him).

crime - she had a $100,000 life insurance policy on the victim through Liberty Life Insurance that she could and *eventually did recover* as a result of Stephen's death, *with interest.* R. 384-390, Tr.p. 498-504.

The Appellant in this appeal, Garvin Duvall - *not Frances Moore* - asserts that he is entitled to a new trial due to its admission because he claims it was hearsay and its probative value was substantially outweighed by prejudice. Any claimed entitlement to relief is in error because the particular "fear"evidence was limited to use against co-defendant Moore and not Duvall by a limiting instruction. Additionally, the fear evidence was admissible as a statement of the victim's state of mind and emotion and an exception to the hearsay rule. In addition, in light of independent evidence of the hatred and malice of Frances Moore against Stephens and the admissions by Duvall of his pre-killing involvement in a plan and his later admission in carrying out the murder, any error in the admission of was his fear of Francis Moore was harmless. His claim that the victim's fears later turned into reality as preventing its admission of his state of mind is defeated by the precedent in State v. Weston, 367 S.C. 279, 287-288, 625 S.E.2d 641, 645 - 646 (2006) which allows admission of fear, but not the **reason** for the fears. Since the reasons why Stephens possessed the fears of co-defendant Moore was never admitted (nor offered), certiorari must be dismissed and the appeal affirmed.

A. The Court of Appeals Correctly Concluded that the Issue Concerning the Admissibility of the Fear Evidence Was Procedurally Barred Where No Timely or Adequate Objection Was Made By Duvall to the Particular Limiting Instructions and the Sufficiency of its Language Which Removed Consideration of the Evidence Against Duvall And No Motion For Mistrial Concerning the Evidence and Instruction Was Timely Made.

In its summary opinion, the Court of Appeals cited to cases which concluded that a failure to object to the sufficiency of limiting instruction or move for a mistrial were a procedural bar to the appellate court's consideration of the claim. In particular, the Court of Appeals cited: State v. George, 323 S.C. 496, 510, 476 S.E.2d 903, 912 (1996) (holding that an issue is not preserved for review if the

objecting party accepts the judge's ruling and does not contemporaneously make an additional objection to the sufficiency of the curative instruction or move for a mistrial); State v. Wilson, 389 S.C. 579, 583, 698 S.E.2d 862, 864 (Ct. App. 2010) (holding that the law assumes a curative instruction will remedy an error and failure to object to the sufficiency of the charge renders the issue waived and unpreserved for appellate review); State v. White, 371 S.C. 439, 445, 639 S.E.2d 160, 163 (Ct. App. 2006) ("Because a trial court's curative instruction is considered to cure any error regarding improper testimony, a party must contemporaneously object to a curative instruction as insufficient or move for a mistrial to preserve an issue for review." (quoting State v. Patterson, 337 S.C. 215, 226, 522 S.E.2d 845, 850 (Ct. App. 1999))). The Petitioner asserts this conclusion was in error. Respondent submit that the bar applied due to his failure to timely challenge the sufficiency of the limiting instructions as given. See ROA 197-198, 202, 207, 213.

Judge Maddox then gave the following limiting instruction after the first witness Kenny Erwin testified concerning the victim's expressed fear of co-defendant Moore :

> ... I want to give you what is called a limiting instruction. The testimony that you just heard and the testimony that you're going to hear from the next two witnesses is **admitted in the State's case against Frances Moore but not in their case against Garvin Duvall**. Again, I'm going to tell you that after each witness.

R. 202, Tr. p. 298, ll. 15-22. No objection or additional request was made after the instruction. Similar instructions were made after Nellie Erwin and Rita Woods - again without objection to their sufficiency. ROA 207, 213.

In his certiorari petition, Duvall attacks these procedural conclusions by the Court of Appeals, initially asserting that he was not required to additionally object to the particular limiting instructions when given because the testimony of the witnesses concerning the Appellant's fear of his mother-in-law - not Garvin Duvall - occurred immediately after the *in limine* decision to admit the evidence. Contrary to the claim, the appellate court bar did not relate to admissibility of the evidence based upon

any failure to object to the evidence upon its admission, but the failure to object to the sufficiency of the limiting instruction that the fear evidence was admitted against Moore, not Duvall.

The Petitioner fails to see that the procedural bar by the appellate was not based upon the trial counsel's failure to renew an objection to the evidence when it was presented to the jury,[3] but the failure to object to the particular limiting instruction that was given in his case which addressed the point that none of the testimony should be considered against the defendant, but only against Frances Moore and the sufficiency of each of the particular instructions. At the time that each of the limiting instructions was given, no objection was made and no request for a revised instruction was given. ROA 202, 207, 213 Similarly, no motion for a mistrial was made at any time related to the "fear" evidence by Garvin Duvall. In fact, counsel Gamble, unlike counsel for Moore, did not even raise any issue concerning the admission of the fear evidence or the sufficiency of the limiting instruction in his motion for new trial and argument. ROA 601, 603-606. Because a trial court's curative instruction is considered to cure any error regarding improper testimony, a party must contemporaneously object to a curative instruction as insufficient or move for a mistrial to preserve an issue for review. State v. Johnson, 334 S.C. 78, 512 S.E.2d 795 (1999)(finding issue relating to admission of improper testimony was preserved where defendant renewed his request for mistrial following curative instructions); State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996); State v. Craig, 267 S.C. 262, 227 S.E.2d 306 (1979); State v. Walker, 366 S.C. 643, 623 S.E.2d 122 (Ct. App. 2005); State v. Jones, 325 S.C. 310, 479 S.E.2d 517 (Ct. App. 1996); State v Moyd, 321 S.C. 256, 468 S.E.2d 7 (Ct. App.

[3]A ruling *in limine* is not final; unless an objection is made at the time the evidence is offered and a final ruling procured, the issue is not preserved for review. See State v. Wannamaker, 346 S.C. 495, 499, 552 S.E.2d 284, 286 (2001). An exception to this rule is when the motion in limine is made "immediately prior to the introduction of the evidence in question." State v. Forrester, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001); State v. Wiles, 383 S.C. 151, 157, 679 S.E.2d 172, 175 (2009) (if the trial court clearly indicates its ruling is final, rather than preliminary, the issue is preserved for appellate review).

1996)(if the objecting party accepts the ruling of the trial judge and does not contemporaneously object to the sufficiency of the curative instruction or move for a mistrial, error deemed cured and issue not preserved for appellate review).

Alternately, the Petitioner now claims that at the conclusion of the motion *in limine* proceeding, he made an adequate objection to any potential limiting instruction when counsel Gamble jokingly commented after the trial court stated that he would give a curative instruction : " [Y]ou're trying to strain buttermilk after there's something happened to it[4]" and the trial court responded : "I agree with you. I think I'm the strainer, too." ROA 197, l. 3-10. However, the Petitioner fails to note that his ambiguous comment at the *in limine* hearing was not related to any particular language not that counsel thought it could not be done. Respondent submits that the appellate court was correct in concluding these ambiguous comments at the *in limine* hearing were inadequate to act as either an objection to the sufficiency of the latter instructions as given or a motion for a mistrial. See State v. Bennett, 328 S.C. 251, 493 S.E2d 845 (S.C. App. 2005) (appellant's objection was too vague to preserve any issue for review).

Plainly these premature and ambiguous comments were insufficient to explain a legal theory as to why the particular instructions were insufficient as opposed to a comment as to what the trial judge was actually doing in having a limiting instruction. At no time did counsel Gamble ever suggest that the given curative instructions were inadequate or needed additional ameliorating language. At no time did he request a mistrial as to the instruction. South Carolina procedure reasonably requires such predicates to insure that basis of the limiting instructions are adequate and could be corrected

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[4]For some inexplicable reason, Petitioner's counsel in his Petition for rehearing and his Petition for Writ of Certiorari refers to these comments as revised as " defense counsel told the judge that an attempt to cure prejudice to petitioner through a curative instruction were akin to trying to *strain urine out of milk*, and that the judge agreed but nonetheless stated that he was going to give the instructions." App.p. 4; Petition , p. 13.

when given. Since no objection was given to the language in the instructions, the trial judge as well as the Court of Appeals, properly assumed that the defense was satisfied with the language and its ability to insure the evidence was directed only at Moore and not Petitioner. Certiorari was properly denied.

HOW THE ISSUE WAS RAISED BELOW

Respondent incorporates by reference procedural history set for in the *Final Brief of Respondent*, p. 13-24.

This appeal concerns the introduction of testimony from three witnesses; Kenneth Erwin, Nellie Erwin, and Rita Woods. Initially, the prosecution through Assistant Solicitor Bradley, advised the trial judge that the State had a motion to allow the introduction under State v. Garcia, 334 S.C. 71, 512 S.E.2d 507 (1999) of evidence about the victim's fear of co-defendant Moore. R. 24-25, Tr.p. 96, l. 18-p. 97, l. 7. He contended that Garcia allowed for evidence of the victim's fear to be introduced, but not the "why" the victim had fear. Id. The prosecutor asserted that three different witnesses were going to testify that they heard the same thing from the victim on different occasions that he was afraid of the victim and if he ever was found shot in the head and his car burned to have Frances Moore investigated. R. 183-84, Tr. p. 279, l. 20 - p. 280, l. 3. The State contended under State v. Garcia and S.C.R.E. Rule 803(3) that as hearsay exception they would be allowed to testify to the then existing mental state and condition of Paul Stephens. Id. Specifically, the State was proffering testimony as to what the fear was - fear of being found shot in the head and car burned and not why he was afraid.

The State asserted that under Garcia, a witness can testify to the "fear", but not the circumstances as to why they were afraid of the person, such as a prior act of being assaulted by another. R. 184, Tr. p. 280, ll. 13-17. He asserted the evidence in this case would only go into the fact of what the fear was and that he was afraid. R. 184, Tr. 280. Defense counsel Pruitt *for co-defendant*

Moore disagreed with the State's interpretation of Garcia. He noted that Garcia held that the witness could not testify why he was afraid which he contends is what the State is seeking to show. Counsel contended the testimony should be limited to Stephens was "afraid", contending that anything more would be against Garcia's holding because it is "why" and it is "hearsay within hearsay." He further asserted that it is so bad that prejudice outweighs probative value. R. 185, Tr. p. 281, ll. 13-23.

In response, the prosecutor stated the "why" of the victim's fear was that the witnesses had been told by the victim that Moore had gotten away with similar crimes in the past. However, the State was not going to present that portion of the evidence through the witnesses. Solicitor Bradley declared they would only offer "the actual fear was that he was going to be shot in the head and car burned and that she would be responsible." R. 186, Tr. p. 282, ll. 7-10. This would be the fear - not the "why." R. 186, Tr. 282. The prosecution pointed out a similar case from North Carolina, State v. Gray, 347 N.C. 143, 172-176, 491 S.E.2d 538, 550-552 (1997) which involved the victim (wife) had told several witnesses on multiple occasions that she was afraid of her husband and if ever found dead he would have been the one to have done it. the North Carolina court admitted the evidence under the "state of mind" exception to the hearsay rule. Similar to the instant case, the North Carolina jury was allowed to hear the fact that if she was found dead and police don't know who did it to have the husband investigated. R. 187, Tr. p. 283, ll. 3-8.

Judge Maddox initially found that he thought Garcia result was confusing because he did not understand why the admission should only be limited to the fear, but not telling the jury why. R. 187, Tr. p. 283, ll. 9-12. However, he opined that Garcia allows the admissibility of the fears. Id. The court then allowed, in camera, for the proffered witness to testify. Ken Erwin testified when asked if Paul had told him anything about Moore prior to his death stated:

> He told me if he was ever found shot and his car caught on fire to have his mother in law investigated.

R. 191, Tr. p. 287, ll. 16-19. Accord, R. 194, Tr. p. 290, ll. 7-14. Erwin stated that Paul had told him this "more than 12 times" and a month prior to the death. R. 191-92, Tr. p. 287, l. 16 - p. 288, l. 1. He clarified that Paul was "scared of her." R. 193, Tr. p. 289, l. 14.

The Appellant's counsel, Robert Gamble, cross-examined Erwin during the proffer. Counsel Gamble developed that the victim had told Erwin about a man that was found shot and his van set on fire who was missing a gold watch and $10,000. R. 194, Tr. p. 290, ll. 19-23.

Appellant Duvall's Objections Through Counsel Robert Gamble

Counsel Gamble (for Appellant) entered a general objection to hearsay as to Garvin Duvall because none of it involved him and it was out of his presence. R. 195, Tr. p. 291, ll. 19-22. The prosecutor (Bradley) stated that under "joinder" rules, evidence could be admitted in a joint trial and does not have to be admitted to the other one. He asserted that the court could give an instruction limiting it to one defendant (Moore) and not the other. R. 196, Tr. 292. Defense counsel Gamble argued that the mere prejudicial effect outweighs probative value. R. 196, Tr. p. 292, ll. 5-6. Judge Maddox noted that decision in State v. Weston, 367 S.C. 279, 625 S.E.2d 641 (2006) allowed more evidence than just "I'm afraid." R. 196, Tr. p. 292, ll. 16-19. Judge Maddox stated that he would allow the testimony and let them testify as to "the fear and the fear of being shot and burned - nothing further." He stated that he was basing this on State v. Weston. R. 196-97, Tr. p. 292, l. 20 - p. 293, l. 2. Judge Maddox also stated to Gamble that he would give a curative [limiting] instruction. R. 197, Tr. p. 293, ll. 7-8.

B. THE EVIDENCE AND INSTRUCTIONS THE JURY HEARD

Kenny Erwin testified that the victim, like a brother to him, had known him for twenty years and that he came to live with him for five months prior to his death. Stephens had broken up with his wife Debra. He testified, without objection, that his relationship with his mother-in-law "wasn't too

good." R. 199, Tr. p. 295, ll. 13-14. When asked what the victim had told him about Frances Moore prior to his death, Erwin stated:

> A. If he was ever found shot and his car caught on fire to have his mother-in-law investigated.
>
> Q. And how would he act when he would say this to you?
>
> A. He was afraid. Like he was afraid.

R. 199, Tr. p. 295, ll. 17-22. He stated the victim told him this "probably 12 or more times." R. 199, Tr. p. 295, l. 24. This occurred "up to about a month" before he was killed. R. 200, Tr. p. 296, ll. 1-3. He stated that the victim went back home to his wife about a month before he died. R. 200, Tr. p. 296, l. 8.

On cross-examination from counsel Pruitt for Moore, Erwin testified that Debra lived about 20 feet away right next to her mother, Frances Moore. R. 201, Tr. p. 297, ll. 9-18. He developed that they would use a common driveway. R. 201, Tr. 297. He emphasized that the victim had returned to live 20 feet from his mother-in-law a month before he died. R. 201-02, Tr. p. 297, l. 22 - p. 298, l. 3.

Counsel Gamble on behalf of Appellant Duvall had no questions.[5]

LIMITING INSTRUCTION AS TO KENNY ERWIN

Judge Maddox then gave the following limiting instruction:

> ... I want to give you what is called a limiting instruction. The testimony that you just heard and the testimony that you're going to hear from the next two witnesses is admitted in the State's case against Frances Moore but not in their case against Garvin Duvall. Again, I'm going to tell you that after each witness.

R. 202, Tr. p. 298, ll. 15-22. No objection or additional request was made after the instruction.

Nellie Erwin testified similar to Kenny Erwin. She testified that she did not think the victim got along with Moore and that "he was kind of afraid of her." Concerning what the victim had told

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[5] It is noted that no objection was made during the testimony of Kenny Erwin.

her about Moore, she stated:

> A. He told me and my husband if he was ever found been shot or his car been caught on fire to have her investigated, Frances.

R. 204, Tr. p. 300, ll. 8-10. Mrs. Erwin stated the victim said this several times up until his death. She stated he moved back because he wanted to be with his son whom he loved more than anything. R. 204-05, Tr. 300-01.

On cross-examination by Moore's counsel, among other things, she confirmed that the victim lived in close proximity to his mother-in-law. R. 206-07. Tr. 302-03.

Counsel Gamble had no questions of Mrs. Erwin. R. 207, Tr. 303.

LIMITING INSTRUCTION AS TO NELLIE ERWIN

Judge Maddox gave a similar limiting instruction concerning Mrs. Erwin:

> As I told you, ladies and gentlemen, that witness' testimony was introduced in the State's case against Frances Moore, but not Garvin Duvall.

R. 207, Tr. p. 303, ll. 12-14. No objection or request was made by any counsel. R. 207, Tr. 303.

Rita Woods testified that she met Paul Stephens at a club with the Erwins about three months before he died. R. 208, Tr. 304. She stated that she knew the victim's wife through Paul and found that they argued and had hostility in their relationship. R. 209, Tr. 305. She also knew Frances Moore through Paul. She met her around four times when they went to pick up Paul's son Skylar. R. 209, Tr. p. 305, ll. 8-12. Woods testified that in describing Paul's relationship with Frances Moore that it was not good wand that she upset him, dominated him and had more control over them. She said he wanted to get his son away from her and the situation. She described an occasion when she stayed over with the victim and they woke up and Moore was standing over them and the victim jumped and asked her what she was doing there: ". . . She said you know how easy it would have been for me to kill both of you." Pruitt (Moore): "Objection" Court: "... Sustained." R. 210, Tr. p. 306, ll. 1-6. [No

request for mistrial]. When asked what if anything he told her regarding Moore:

A. He told me he was scared of her, always afraid of her. You know, just anything could happen. she was capable of anything, and that if he was ever - - he was ever found dead, shot, shot in the head and his car was burned that she had something - - that she did it, she had something to do with it.

Q. How would he act when he would tell you this?

A. He was very shaky, very nervous, and trying to make sure that what he was saying that I was believing him, that it was so, it was true. He said she was capable of doing that.

Q. Did he say this to you more than once?

A. Uh-huh.

Q. How many times?

A. A lot because they were getting in the arguments, you know, on the phone or whatever, and he would say, oh, my God. And he would, like look out the window, she might be out the window. It was just - - it was unnatural.

R. 210, Tr. p. 306, ll. 9-25. Like the Erwins, she stated that he told her this within the three months she knew him two or three times a week. R. 211, Tr. p. 307, ll. 1-5. She last spoke with him by telephone a week and ½ before his death. R. 211, Tr. p. 307, ll. 8-16.

On cross-examination by Moore's counsel, she described her own relationship with the victim as boyfriend-girlfriend, although both were separated and not divorced. R. 212, Tr. 308. She similarly noted that the victim had moved 20 feet from his mother-in-law. R. 212, Tr. p. 308, ll. 15-20.

LIMITING INSTRUCTION AS TO RITA WOODS

Judge Maddox gave the similar instruction concerning Ms. Woods' testimony:

> Ladies and Gentlemen, as I said, in keeping with the testimony of the previous two witnesses, that testimony was introduced in the State's case versus Frances Moore, not Mr. Duvall.

R. 213, Tr. p. 309, ll. 3-8. No objection or additional requests to the limiting instruction were made. R. 213, Tr. 309.

Subsequently, on behalf of Appellant Moore, counsel Pruitt stated that his objection to the three witnesses continued. Judge Maddox noted "for the record", that counsel Pruitt had objected to the three based upon his argument that Garcia would not have allowed it to other than "he was afraid of them." The court confirmed that he had overruled the objections. R. 214, Tr. p. 310, ll. 17-23.

The State's Closing Argument As To The Evidence

In the state's closing argument, Assistant Solicitor Bradley stated that:

> "Months and weeks leading up to the death of Paul Stephens he expressed to his family and friends his fear of the defendant, Frances Moore. He told them. He told Kenny Erwin, Nellie Erwin and Rita Woods , three different people on different occasions , multiple times that he was afraid of her. That if I'm ever found shot in the head, my car burned have her investigated. That was his fear..."

R. 543, Tr.p. 660, ll. 13-19.

The Motion for New Trial.

After the guilty verdict of May 15, 2009, motions for new trial were made by each counsel. At the June 16, 2009 hearing on the motions, on behalf of Appellant Moore, counsel Pruitt raised an issue, among others, concerning the admission of an out of court statement made by the victim to third parties concerning both his fear of the defendant and the reason for said fear. R. 597, Tr.p. 717, ll. 6-8. He re-argued that allowing evidence of the victim saying that he was afraid of Frances Moore has a prejudicial effect. He complained that admitting both the statement that he was afraid - which would be an exception to the hearsay rule as a present sense impression - and the reason he was afraid - which he objected to denied him his right to confront witnesses which he opined was inadmissible under State v. Garcia and State v. Holmes. R. 600-01, Tr.p. 720-21.

Judge Maddox then inquired that he assumed that he (Moore) was also incorporating a motion that his curative instruction was also insufficient. R. 601, Tr.p. 721, ll. 10-13. Counsel for Moore stated that he assumed it was part of it. R. 601, Tr.p. 721, l. 14. Counsel for the prosecution asserted

that there were no errors during the trial and the court gave a limiting instruction on the evidence that was admitted as to Mr. Moore versus Mr. Duvall. R. 601, Tr.p. 721, ll. 16-21. He addressed the "fear" evidence issue relying upon State v. Garcia. R. 602, Tr.p. 722, ll. 8-13. The prosecution stated that under Garcia, the Court had allowed evidence of fear to be admitted against the defendant and it was the state's position that the fact that he was going to be found shot in the head, his car set on fire was his "fear" and not the reason why he was afraid of the defendant. R. 602, Tr.p. 722, ll. 13-19.

Judge Maddox denied the motion of Moore. He stated that he was not concerned about the Garcia issue. R. 603, Tr.p. 723, ll. 7-12.

On behalf of the Appellant in this appeal, defense counsel Gamble made his new trial argument asserting the non-involvement of Duvall and alibi evidence. R. 603-04, Tr.p. 723-724. He questioned the validity of the testimony of the witness J.W. Stansell - who placed Duvall within the conspiracy based upon the delay in coming forward. **At no time did counsel Gamble mention the "fear" evidence issue as a basis for a new trial. R. 604, Tr.p. 724.**

Judge Maddox denied the motion for Mr. Duvall. R. 605-06, Tr.p. 725-726.

ANALYSIS

In his brief, Duvall raises three separate issues concerning the admission of the similar evidence that the decedent told the witnesses on numerous occasions months before the killing that if he was ever found shot and his car was burned that Frances Moore should be investigated. He contends that the testimony was hearsay and inadmissible under Garcia and Weston claiming it went beyond the fact that Stephens was afraid of Moore.[6] Further, he claims that it was unduly prejudicial under Rule

[6]This particular claim was not raised by Appellant at trial, it was only raised by Moore. As such it should be procedurally barred. Further, he only raised a general objection to hearsay and did not address any response on whether it was admissible under Rule 803(3) at trial. Finally, as to the limiting instruction, counsel Gamble never objected to the use of a limiting instruction. For each of these reasons, his exceptions are procedurally barred because they were not timely presented in the

403 because it allowed the decedent to speak through live witnesses about what he foresaw as the exact circumstances of his death. *Initial Brief of Appellant*, p. 9, 14, 15. Further, he claimed the evidence was not harmless. The issues with respect to each witness is without merit for appellate review.

B. The Limiting Instructions Removes Any Prejudice Against Duvall.

Judge Maddox in the joint trial gave a timely limiting instruction to the limited use of the evidence against Frances Moore and not against the Appellant Garvin Duvall:

> ... The testimony that you just heard and the testimony that you're going to hear from the next two witnesses is admitted in the State's case against Frances Moore ***but not in their case against Garvin Duvall***. Again, I'm going to tell you that after each witness.

R. 202, Tr. p. 298, ll. 15-22. (Emphasis added). See also, R. 207, 213, Tr.p. 303, ll. 12-14, p. 309, ll. 3-8. At the outset of the analysis, it must be noted that the evidence only went to Paul Stephens fear of Frances Moore - *not his fear of the Appellant Garvin Duvall.* Importantly, Judge Maddox recognized this distinction when he decided to give the limiting instructions. R. 196-97, Tr.p. 292-293.[7] Generally, "[w]hen evidence which is admissible ... for one purpose but not admissible ... for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and

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trial court. An objection should be sufficiently specific to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the trial judge. State v. Johnson, 363 S.C. 53, 609 S.E.2d 520 (2005)(objection should be addressed to trial court in sufficiently specific manner that brings attention to exact error); A trial judge commits no error in overruling a general objection. State v. Bailey, 253 S.C. 304, 170 S.E.2d 376 (1969)

[7]In State v. Haulcomb, 382 S.C. 432, 676 S.E.2d 149 (Ct. App. 2009), the Court of Appeals recognized that in a joint trial, limiting and cautionary instructions may be used to help protect the individual rights of the defendant and ensure that no prejudice will result from a joint trial. In State v. Stuckey, 347 S.C. 484, 556 S.E.2d 403 (Ct. App. 2001), the court held that defendants charged with murder, kidnapping, and other crimes were not entitled to separate trials based on possible prejudiced from the "spill-over effect" from evidence admitted against other co-defendants during joint trial. The defendants were all charged with criminal conspiracy and all of the evidence admitted in the joint trial would have been admissible against each defendant if they had been granted a separate trial.

instruct the jury accordingly." Rule 105, SCRE; *see* Brown v. Orndorff, 309 S.C. 320, 422 S.E.2d 151 (Ct.App.1992) (in an automobile accident case, the trial court's decision to admit evidence of party's driving record for limited purpose of evaluating future work opportunities held proper where jury instructed not to consider it on any issue pertaining to liability). As has been noted, if the evidence is admitted, the court should give a limiting instruction if the party opposing the evidence requests it. Here, the trial judge did so. See Richardson v. Marsh, 481 U.S. 200, 211, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987) (holding "the Confrontation Clause is not violated by the admission of a nontestifying co-defendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence."); State v. Page, 378 S.C. 476, 482, 663 S.E.2d 357, 359 - 360 (S.C.App.,2008). The law assumes that, except in extraordinary circumstances, jurors follow a court's instructions. Jones v. Polk, 401 F.3d 257, 264 (4th Cir. 2005); Richardson v. Marsh, supra.

Here, no timely objection was made by either defense counsel to the limiting instructions. R. 197, 202, 207, 213, Tr.p. 293, 298, 303, 309.[8] In fact, counsel for the Appellant failed to even mention the "fear" issue at the motion for new trial hearing. R. 603-04, Tr.p. 723-724.

Since a limiting instruction was given to the jury that the evidence of the victim was introduced only for the case of *State v. Frances Moore*, the exception raised by Appellant Duvall must be rejected. The jury would have reasonably followed the instructions and applied the evidence only as mandated. Further, the State in their closing argument limited the particular evidence to Moore. For this initial reason, the appeal must be dismissed.

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[8]Any issue concerning the instruction was raised for the first time in the motion for new trial hearing by counsel for Frances Moore after the trial judge prompted him. R. 601, Tr.p. 721. **However, no similar argument or motion was made by counsel for the Appellant, Robert Gamble. R. 603-06, Tr.p. 723-726.**

C. *Evidence of Decedent's Fear That He Would Be Shot And His Car Burned Was Admissible Under Garcia, Weston and SCRE Rule 803(3).*

The State asserted and the trial court concluded that the testimony of Paul Stephens fear that he would be shot and his car burned and fear of Frances Moore was admissible evidence under Rule 803(3). Rule 803(3) allows hearsay testimony if the testimony is in the form of a statement as to the declarant's then existing state of mind or emotions; the rule excludes the testimony, however, if it is purely a recitation of facts. SCRE 803(3). [9] The rationale for Rule 803(3) has been explained as follows:

> [T]here is a fair necessity, for lack of other better evidence, for resorting to a person's own contemporary statements of his mental or physical condition" and that such statements are more trustworthy than the declarant's in-court testimony. Mere statements of fact, however, are provable by other means and they are not inherently trustworthy.

State v. Hardy, 339 N.C. 207, 229, 451 S.E.2d 600, 612 (1994) (quoting 6 John H. Wigmore, Evidence § 1714 (1976)). Statements of emotion include, for example, "I'm frightened" or "I'm angry." Id. Courts have further clarified that testimony that recites *both emotions and facts* falls within the scope of the 803(3) exception. State v. Marecek, 130 N.C.App. 303, 306, 502 S.E.2d 634, 636, disc. review denied, 349 N.C. 532, 526 S.E.2d 473 (1998). This is because "factual circumstances surrounding [the declarant's] statements of emotion serve only to demonstrate the basis for the emotions." State v. Gray, 347 N.C. 143, 173, 491 S.E.2d 538, 550 (1997), cert. denied, 523 U.S. 1031, 118 S.Ct. 1323, 140 L.Ed.2d 486 (1998). Thus, to synthesize, courts have created a sort of trichotomy in applying Rule 803(3). Statements that recite only emotions are admissible under the exception; statements that recite

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[9]SCRE Rule 803 (3) does not exclude as hearsay the following:

> **(3) Then Existing Mental, Emotional, or Physical Condition.** A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

emotions and the facts underlying those emotions are likewise admissible; but statements that merely recite facts do not fall within the exception.

In South Carolina, the Weston and Garcia opinions illustrate our courts approach. Particularly in *Weston*, the Court rejected the assertion that Rule 803 (3) and *Garcia* require a holding that a witness may testify to the fact that the decedent was afraid, but not that the decedent was afraid **of the defendant.** Instead, the decision in *Weston* held that "the victim's state of mind-that she was scared of appellant-was relevant ..." and evidence about the victim's state of mind to not touch anything because the victim was afraid of the defendant and was more nervous and anxious. State v. Weston. In Garcia, the Court found error in the admission of evidence beyond that the victim had fear which included evidence that the victim had told her grandmother that the defendant had kicked her causing a bruise and that the defendant had told the victim that if she ever left him that he would kill her. The Court held that the *reason* for the declarant's state of mind was not. [10]

The trial court relied upon a 5th Circuit decision in U.S. v. Cohen, 631 F.2d 1223, 1225 (5th Cir. 1980). In Cohen, the Court found that Rule 803 (3) state of mind exception allowed witnesses to relate out of court statements reflecting defendant's existing mental or emotional conditions that he was anxious, sad , or in any other state reflecting his then existing mental or emotional state. Cohen. The Cohen court held that the rule did not permit testimony concerning defendant's stated belief that the defendant was actually threatening him for a particular reason - to force him to cooperate in impersonating a federal official.

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[10]In Garcia, the Court explained that statements concerning the victim's state of mind under Rule 803(3)"are considered trustworthy because 'they are based on unique perception; that is, the declarant has a unique perspective into [her] own feelings and emotions.' . . . Statements may either directly or circumstantially show the declarant's state of mind, emotion, or physical condition." 334 S.C. at 75-76, 512 S.E.2d at 509 (citations omitted).

Here, no evidence of the "reason" was admitted. Instead, the only evidence presented was Paul Stephens fears - his fear of Frances Moore and his fear of being shot and having his car burned. The reasons for these fears and concerns was not admitted - just the fears themselves. The State did not introduce or seek to introduce the basis - reason - for the belief. The reason was that Stephens believed that Moore had gotten away with similar crimes before. R. 186, 188, Tr.p. 282, 284.

The admission of the evidence of Stephen's fear is readily distinguishable from the evidence deemed inadmissible in *Garcia* and *Cohen*. See Sheppard v. State, 357 S.C. 646, 662, 594 S.E.2d 462, 471 (S.C.,2004) (citing *"State v. Garcia,* 334 S.C. 71, 512 S.E.2d 507 (1999) (statement must relate to present or look to future, but cannot look back to past condition)."] There was no evidence presented about other acts of Frances Moore that caused the particular fears that he had. Instead, only the fears were presented through the three witnesses and the extended length of time he possessed the fears and persistent expression of the fears he made to the three witnesses. Under Rule 803(3), this evidence was properly admitted as "then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health)." His fear of being shot, his fear of having his car burned, and his fear of Frances Moore was admissible.

Further, the evidence from the three witnesses was not being offered to prove the events which caused the state of mind. To admit such evidence for that purpose would circumvent the hearsay rule. See U.S. v. Lui, 960 F.2d 449 (5th Cir. 1992). Statements by the victim of a crime are not admissible to prove the state of mind or actions of the accused; however, they are admissible to show how the victim's state of mind , such as fear of the accused would affect his subsequent behavior. See U.S. v. Tokars, 95 F.3d 1520 (11th Cir. 1996) (statements offered to show state of mind of murder victim and

to explain why she instructed documents be turned over to the police if anything happened to her). [11]

The co-defendant did not question that the fear of the Frances Moore could be introduced at trial - she only challenged whether the fear that he would be shot and a car burned could be introduced. However, the admitted testimony was not evidence of past conduct - or a past condition - and looked only to the future and his present emotion. The characterization that it was inadmissible as a "reason" was not supported by a reasonable reading of the record. Under Garcia and Weston, the evidence was admissible.

D. The Probative Value of the Evidence Was Not Substantially Outweighed By Danger of Unfair Prejudice.

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Rule 403, SCRE. The question then should be limited to whether the prejudicial value substantially outweighs the probative value. The evidence of Paul Stephens fears about Frances Moore was plainly relevant evidence under Rule 803. At trial, Frances Moore's counsel did not question the admission of that portion of the evidence - only the portion related to the fear that Stephens had that he would be shot and his car burned. This evidence was plainly relevant to show his state of mind about death and Frances Moore -buttressed by the fact that the victim - though separated from the daughter had moved back within 20 feet of defendant Moore (not Duvall) - to be near his son the love of his life.

The admission from the three witnesses did not meet the condition precedent for exclusion of

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[11]See also cases collected in Jay M. Zitter, Annotation, *Admissibility of evidence of declarant's then-existing mental, emotional, or physical condition, under Rule 803(3) of Uniform Rules of Evidence and similar formulations,* 57 A.L.R.5th 141 (1998), § 3[a] ("*Showing fear of defendant or accomplices harming victim or family—Statement held admissible under Rule 803(3)*").

"substantially outweigh the probative value" for a series of reasons.[12] The Appellant appears to complain that because Stephens was shot and his car burned, the evidence was overly prejudicial because it predicted the manner of his death. Since the fear of death itself was admittedly admissible by the defendants- the similarity with the actual manner of death was not as "prejudicial" as Appellant asserts. First, the comment of his fear was not to investigate Duvall, but to investigate Moore. Further, the limiting instruction directed the jury to use the evidence as the state intended only against Frances Moore. Further, the state's closing argument did not tie the challenged fear evidence to Duvall - only to Frances Moore.

As to Frances Moore, there was independent evidence of her hatred of Paul Stephens - so his mere and existing fear of her did not create substantial prejudice. First, Frances Moore got angry and declared the morning of the murder that "I'm going to kill that Son of a Bitch" after her daughter confessed to fraudulent checks and implicated her ex-husband - the victim - as making her do the crime. R. 218, Tr.p. 314, ll. 8-16. Moore was identified by Josh Anderson as being at Anderson Meats at a telephone near the scene of the murder near the time of the murders. R. 165-69, Tr.p. 261-265. A photograph of Duvall "popped out" or "jumped out" to him during the procedure, but he could not positively identify him as the other person at the telephone. R. 173-74, Tr.p. 269-270. Anderson only saw the lady on the telephone. R. 178, Tr.p. 274. The Anderson Meats telephone was used at that time to call the home three times where the victim lived during the same 2:54- 3 PM period (14:52, 14, 53, 14:57). Moore was seen with a male was at the location. R. 228, Tr.p. 343. Also R. 365-66, Tr.p. 479-

[12]In his *Initial Brief of Appellant and Petition*, Duvall claims the state's theory was based solely upon the mother being angry with the victim because her daughter had claimed to the police when she confessed her guilt to several forgeries that Stephens had made her do it. *Initial Brief of Appellant*, p. 3; Petition, p. 5. As evidenced by the testimony, the plan to kill Stephens had already been set days before the confession by Moore's daughter, according to Duvall's statement to Stansell, including a concern that he would rat them out to the authorities. R. 276-79. There were multiple motives at play leading to Stephen's death.

480. Importantly, a white Toyota RAV4 was seen by Josh Addis prior to 2:45-2:50 on Baugh Road where the crime happened. R. 131-33, Tr.p. 227-229. The RAV 4 followed him to Anderson Meats with a female driver and male passenger who got out by the telephone booth before 2:54. R. 134-38, Tr.p. 230-234. The woman and man were seen arguing and upset. R. 141-42, Tr.p. 237-238. Between 3:10 and 3:27, under the state theory at trial, Paul Stephens is murdered by 2 gunshots and his car is burned off Baugh Road. Josh Anderson sees Moore in Toyota around 3 PM with white male. Seventeen minutes after the victim could arrive at Baugh Road, 911 is called concerning the car fire at around 3:16. R. 29-33, 44, Tr. 121-125, 136. Car fire was determined to be between 10 minutes and could have been burning 45 minutes. R. 90-94, Tr.p. 182-186.

Further, the State presented evidence in its case against Duvall that he had attempted to solicit J.W. Stansell in the murder plan. As noted in the State's Version of the Case, J.W. Stansell he presented evidence that Duvall told him prior to the crime that there was a concern that the victim was a "rat" and was about to be arrested and turn on people he was involved with in criminal activity, including Frances Moore and that she along with some other people wanted Paul dead. And Garvin went on to tell me that she was going to pay him $2,000 to kill Paul. Duvall also showed Stansell a gun that he was given to use. R. 276-79, Tr.p. 390-393. Additionally, Stansell stated that the plan included the location and the intent to shot him in the car and then set the car on fire to make it appear like a drug deal gone bad. Id.

Stansell also testified that he later saw Duvall in a hospital after the murder and asked Duvall if he did it and Duvall declared that he had. R. 283, Tr.p. 397. In this conversation, Duvall made an admission that he had lured Stephens to the location, that Stephens had exited the vehicle and that Duvall then shot him in the head. Duvall confirmed that he next set the car on fire. R. 284, Tr.p. 398. He stated that he disposed of the murder weapon -as he had previously revealed in his plan - at his

work in a furnace. R. 284-85, Tr.p. 398-399.

In addition, independent evidence of Frances Moore's plan to kill, her express hatred and Duvall's involvement in the plan was presented to the jury. The defense presented a challenge to the credibility of the witnesses and Stansell's belated disclosure of Duvall's comments - as well as the reliability of the comments.

"Unfair prejudice means an undue tendency to suggest a decision on an improper basis." State v. Owens, 346 S.C. 637, 666, 552 S.E.2d 745, 760 (2001). Contrary to the bare assertions of the Appellant, "unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis." State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct.App.1998) (quoting United States v. Bonds, 12 F.3d 540, 567 (6th Cir.1993)). Here, the Appellant has only suggested that because it had probative value as to his fear, it must be prejudicial. However, the independent evidence of the plan and Duvall's admissions, as well as the limiting instructions minimize and potential for "unfair prejudice." These contrast with Frances Moore's attempts to show that there was no fear on his part because he had moved back to a location within steps of her home.

E. Any Error in the Admission Was Harmless Error.

Assuming the admission of the evidence was improperly admitted, any error in its admission was harmless. The challenged evidence only goes to the fear that he would be shot and his car burned. Whether an error is harmless depends on the circumstances of the particular case. "No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case." State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985). Error is harmless where it could not reasonably have affected the result of the trial. Generally, appellate courts will not set aside judgments due to insubstantial errors not affecting the

result. State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991).In considering whether error is harmless, a case's particular facts must be considered along with various factors including: the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and the overall strength of the prosecution's case. State v. Blackburn, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978).

As set out in the preceding section the evidence of fear of having his car burned and being shot was similar to other evidence admitted about the plan expressed by Duvall to Stansell about his plan and the carrying out of the plan. For the reasons set out therein, the admission of the evidence from the Erwins and Rita Woods would be harmless error as cumulative toward the testimony and admissions of Duvall to Stansell and the malice expressed on the day of the murder by Frances Moore to kill her son in law, in addition to the other ameliorating instructions and evidence set out in the prior section. The appeal should be dismissed.

CONCLUSION

For all the foregoing reasons, certiorari should be denied.

Respectfully submitted,

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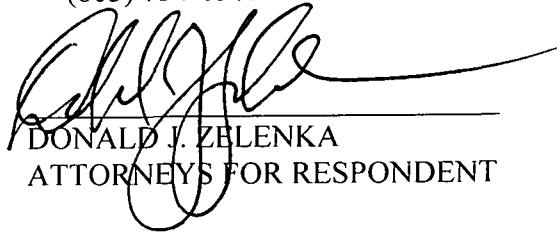
By: 
DONALD J. ZELENKA
ATTORNEYS FOR RESPONDENT

August 29, 2012.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Anderson County
J. Cordell Maddox, Circuit Court Judge

Case No. 07-GS-04-1218, 07-GS-04-1219

STATE OF SOUTH CAROLINA,

Respondent,

v.

GARVIN DUVALL,

Appellant

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, hereby certify that I have served Respondents ***Return to Petition for Writ of Certiorari*** on Robert M. Dudek, 1330 Lady Street, Suite 401, Columbia, South Carolina 29201 by depositing copies in the U.S> mail with first class postage prepaid this 29th day of August, 2012.

DONALD J. ZELENKA
Assistant Deputy Attorney General

ALAN WILSON
ATTORNEY GENERAL

Ph 8-29-12

August 29, 2012

Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
P. O. Box 11330
Columbia, SC 29211

Re: State v. Garvin Duvall
Appellate Case No. 2012-211998

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-referenced case for filing. By copy of this letter, I am serving opposing counsel with same.

Sincerely,

Lonetta B. Brawley
Legal Assistant to Donald J. Zelenka
Senior Assistant Deputy Attorney General

/lbb
Enclosures

cc: Robert M. Dudek, Esquire
Christina T. Adams, Solicitor
Sandi Wofford, Victims Assistance