

RECEIVED

NOV 16 2015

THE STATE OF SOUTH CAROLINA
In The Supreme Court

S.C. Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Case No. 11-GS-40-897 and 11-GS-40-898

The State of South Carolina, ... Respondent,

v.

Leslie Todd Parvin, ... Petitioner.

APPENDIX VOLUME V

Dwight F. Drake
Michael J. Anzelmo
NELSON MULLINS RILEY &
SCARBOROUGH LLP
P.O. Box 11549
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, South Carolina 29201
803.799.2000

Attorneys for Petitioner

Brendan McDonald
S.C. Attorney General's
Office
Columbia, SC 29212
803.734.3188

Attorney for Respondents

APPENDIX INDEX

RECORD ON APPEAL – Volume I

Orders and Judgments

Order denying Motion for New Trial March 19, 2012	1
---	---

Transcripts

Trial Transcript December 12, 2011 through December 21, 2011	2
Testimony	182
Alredo Zunija Vidal	182
Direct by Campbell	182
Cross by Shealey	188
Jose Monroy	193
Direct by Campbell	193
Cross by Davis	198
ReDirect by Campbell	202
Investigator Brien Gwyn	204
Direct by Campbell	204
Cross by Shealey	211
Investigator Willie Gonzalez	216
Direct by Campbell	216
Cross by Shealey	220
ReDirect by Campbell	223
Opening Statements	239
Officer Chauncey Smith	267
Direct by Walker	267
Cross by Pringle	272
ReDirect by Walker	278
Jose L. Monroy	281
Direct by Campbell	281
Cross by Davis	293
Adan Soto	303
Direct by Walker	303
Cross by Shealey	307
Marlin Avila	312
Direct by Walker	312
Cross by Davis	314
Alredo Zunija Vidal	319
Direct by Simpson	319
Cross by Shealey	331

Dimas Fernandez	342
Direct by Walker	342
Cross by Shealey	353
Roberto Gonzales Merrin.	360
Direct by Campbell	360
Cross by Davis	365
Dimas Fernandez	377
Direct by Walker	377
Cross by Shealey	378
ReDirect by Walker	382
Roberto Gonzales Merrin	384
Direct by Campbell	384
Cross by Davis	394
John Belleisle	458
Direct by Simpson	458
Cross by Shealey	464

RECORD ON APPEAL - VOLUME TWO

Testimony cont.	
Dr. Clay Nichols	465
Direct by Campbell	465
Cross by Pringle	498
ReDirect by Campbell.....	501
Sled Agent Deborah Goff	502
Direct by Walker	502
Cross by Shealey	506
Andrea Thompson	508
Direct by Simpson	508
Cross by Pringle.....	511
Investigator Yvonne Woods	512
Direct by Campbell	512
Cross by Shealey	546
ReDirect by Campbell.....	556
Investigator Michael Beeler	557
Direct by Campbell	557
Cross by Pringle	598
ReDirect by Campbell.....	614
Investigator Kristen Polis.....	618
Direct by Simpson	618
Investigator Trish Odom.....	633
Direct by Campbell	633
Cross by Shealey	651
Investigator Bernadette Atencio	658
Direct by Walker	658
Officer Patricia Weed	661

Direct by Simpson	661
Jill Jarreau	665
Direct by Walker	665
Cross by Pringle	668
Sled Agent John Roberts	669
Direct by Campbell	669
Cross by Shealey	679
ReDirect by Campbell.....	682
ReCross by Shealey	683
Cheryl Taylor.....	684
Direct by Walker	684
Cross by Davis	686
Officer eina Goff.....	687
Direct by Simpson	687
Officer William Gonzalez	696
Direct by Campbell	696
Cross by Davis	713
Investigator Stan Richards.....	723
Direct by Campbell	723
Seargant Matthew Ellis	728
Direct by Campbell	728
Seargant Kevin Isenhoward	732
Direct by Simpson	732
Cross by Davis	738
Officer Audra Linfert	740
Direct by Walker	740
Cross by Pringle	742
ReDirect by Walker	746
Investigator Robert Oates	746
Direct by Campbell	746
Cross by Shealey	752
Lt Ben Moore.....	788
Direct by Walker	788
Officer Christine Barrackman	790
Direct by Walker	790
Officer John Barron	795
Direct by Campbell	795
Cross by Pringle	823
ReDirect by Campbell.....	829
ReCross by Pringle	830
Chief Roland Hill	831
Direct by Simpson	831
Cross by Pringle	833
ReDirect by Simpson.....	836
ReCross by Pringle	
Officer Terri Gleason	840

Direct by Campbell	840
Cross by Shealey	858
ReDirect by Campbell.....	864
ReCross by Shealey.....	865
Investigator Kerry Johnson	866
Direct by Campbell	866
Cross by Shealey	895
Investigator Brian Gwyn	896
Direct by Campbell	896
Cross by Davis	919
ReDirect by Campbell.....	953
ReCross by Davis	957

RECORD ON APPEAL- VOLUME THREE

Testimony cont.	
Major James Smith.....	959
Direct by Campbell	959
Cross by Shealey	992
Leslie Todd Pavin	1060
Direct by David	1060
Cross by Campbell.....	1139
Shelby Ingram.....	1210
Direct by Pringle	1210
Lee Jarman.....	1226
Direct by Shealey	1226
Cross by Campbell.....	1229
Robert Tressell.....	1230
Direct by Shealey	1230
Cross by Campbell.....	1259
ReDirect by Shealey	1276
ReCross by Campbell	1279
Chaplain Mike Dugal	1280
Direct by Pringle.....	1280
James Parvin	1289
Direct by Pringle	1289
Chaplain Charles Bailey	1346
Direct by Davis.....	1346
Chaplain Phillip Wright	1351
Direct by Davis.....	1351
Cross by Campbell.....	1355
Chaplain Terry Marrero Catagena.....	1358
Direct by Shealey	1358
Cross by Campbell.....	1361
Chaplain Edwin Ahl.....	1362
Direct by Shealey	1362

Chaplain Eugene Lovelace, Jr	1367
Direct by Shealey	1367
Chaplain Terry Austin	1371
Direct by Shealey	1371
Chaplain James R. White	1374
Direct by Pringle	1374
Cross by Campbell.....	1378
ReDirect by Pringle	1379
Chaplain Carleton Birch.....	1380
Direct by Pringle	1380
Master Sergeant Eric Kamer	1388
Direct by Shealey	1388
Cross by Campbell.....	1391
ReDirect by Shealey	1393
Charles Hire	1393
Direct by Pringle	1393
Chaplain Eugene Zehner	1397
Direct by Pringle	1397
Cross by Campbell.....	1400
ReDirect by Pringle	1400
Chaplain Timothy Walls.....	1401
Direct by Shealey	1401
Officer David Collins (Rebuttal)	1425
Direct by Campbell	1425
Cross by Shealey	1435
Chief Roland Hill (Rebuttal).....	1445
Direct by Simpson	1445
Cross by Pringle	1447

RECORD ON APPEAL - VOLUME IV

Testimony cont.	
Dr. John Taylor (Rebuttal).....	1448
Direct by Campbell	1448
Cross by Pringle	1451
ReDirect by Campbell.....	1457
Captain James Smith (Rebuttal)	1457
Direct by Campbell	1457
Cross by Shealey	1475
Leslie Todd Pavin (Surrebuttal).....	1488
Direct by Davis.....	1488
Cross by Campbell.....	1493
Closings	1603
Jury Instructions	1687

Miscellaneous and Other Motions

Pavin's Motion for New Trial dated January 6, 2011	1755
State's Response to Defense Motion for New Trial dated January 12, 2012	1768
Indictments Nos. 2011-GS-40-0897 and 2011-GS-40-0898	1773
Certificate of Counsel	

APPENDIX - VOLUME V

(Record on Appeal numbering continued as "App")

Final Brief of Appellant.....	1775
Final Brief of Respondent	1799
Final Reply Brief of Appellant.....	1825
Court of Appeals Opinion, July 30, 2014	1844
Respondent's Petition for Rehearing <i>En Banc</i> August 13, 2014.....	1854
Appellant Leslie Todd Parvin Petition for Rehearing and Rehearing August 18, 2014.....	1856
Appellant's Return to The State's Petition for Rehearing August 19, 2014	1873
Respondent The State's Return to Petition for Rehearing September 29, 2014	1897
Appellant Parvin's Reply to Respondent's Return to Appellant's Petition for Rehearing October 13, 2014	1910
Court of Appeals Order granting Parvin's Petition for Rehearing in part, ordering Additional oral argument and denying The State's Petition for Rehearing December 11, 2014	1916
Court of Appeals Opinion, Withdrawn, and Refiled June 10, 2015	1918
Appellant Parvin's Petition for Rehearing and Suggestion for Rehearing <i>En Banc</i> June 25, 2015	1928
Court of Appeals Order denying Appellant Parvin's Petition for Rehearing and Suggestion for Rehearing <i>En Banc</i> October 8, 2015.....	1942

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Case No. 11-GS-40-897 and 11-GS-40-898

The State of South Carolina, ... Respondent,
v.
Leslie Todd Parvin, ... Appellant.

Final Brief of Appellant

Dwight F. Drake
Michael J. Anzelmo
NELSON MULLINS RILEY & SCARBOROUGH LLP
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, South Carolina 29201
803.799.2000

Attorneys for Appellant Leslie Todd Parvin

RECEIVED

AUG 09 2013

SC Court of Appeals

Table of Contents

	<u>PAGE</u>
Table of Authorities	ii
Statement of Issue on Appeal	1
I. The trial court committed reversible error in admitting the hearsay statement of Lopez, which hearsay constituted the heart of the State's case to the jury.....	1
Statement of the Case	2
Statement of Relevant Facts	3
Argument	11
Conclusion	22

Table of Authorities

PAGE

CASES

<u>Dalon v. Golden Lanes, Inc.</u> , 320 S.C. 534, 466 S.E.2d 368 (Ct. App. 1996).....	12
<u>Estate of Gee v. Bloomington Hosp.</u> , 2012 U.S. Dist. LEXIS 24639 (S.D. Ind. 2012).....	20
<u>Hilyer v. Howat</u> , 578 F.2d 422 (D.C. Cir. 1978)	19
<u>Hughes v. Indianapolis Radio License, Co.</u> , 2009 U.S. Dist. LEXIS 6957 (S.D. Ind. 2009).....	19
<u>Miller v. Keating</u> , 754 F.2d 507 (3rd Cir. 1985)	14, 19
<u>State v. Burroughs</u> , 328 S.C. 489, 492 S.E.2d 408 (Ct. App. 1997).....	12, 15
<u>State v. Gilmore</u> , 396 S.C. 72, 719 S.E.2d 688 (Ct. App. 2011)	11
<u>State v. Griffin</u> , 339 S.C. 74, 528 S.E.2d 668 (2000)	14
<u>U.S. v. Blakey</u> , 607 F.2d 779 (7th Cir. 1979)	13
<u>U.S. v. Green</u> , 556 F.3d 151 (3rd Cir. 2009).....	14
<u>U.S. v. Manfre</u> , 368 F.3d 832 (8th Cir. 2004).....	14
<u>U.S. v. Mitchell</u> , 145 F.3d 572 (3rd Cir. 1998)	13
<u>U.S. v. Parker</u> , 936 F.2d 950, 954 (7th Cir. 1991)	14
<u>U.S. v. Portsmouth Paving Corp.</u> , 694 F.2d 312 (4th Cir. 1982).....	13
<u>U.S. v. Ruiz</u> , 249 F.3d 643 (7th Cir. 2001).....	13, 14

OTHER AUTHORITIES

28 Fla. St. U.L. Rev. 907, 918-19.....	13
4 Christopher B. Mueller and Laird C. Kirkpatrick, <u>Federal Evidence</u> § 8:67, 559, 562 (3rd ed. 2007)	14
<u>McCormick on Evidence</u> , John William Strong ed., 5th ed. 1999, § 271	13

RULES

Fed. R. Evid. 803(1)	13
SCRE Rule 404(b)	10
SCRE Rule 801(c)	11
SCRE Rule 802.....	11
SCRE Rule 803.....	passim
SCRE Rule 803(1)	passim

Ultimately, the jury convicted Parvin on two counts of murder on December 21, 2011. {Trans. p. 1742; R. 1744}. The trial court sentenced Parvin to thirty-five years on December 28, 2011. {Motion for New Trial dated January 6, 2011; R. 1755}. Thereafter, Parvin timely moved for a new trial. {Motion for New Trial dated January 6, 2011; R. 1755}. The trial court denied that motion. {Order denying Motion for New Trial dated March 19, 2012; R. 1}. This appeal timely followed. {Notice of Appeal}.

Statement of Relevant Facts

On Friday, July 30, 2010, Parvin set out in his van in pursuit of his hobby of collecting scrap metal for recycling and some small profit. {Trans. p. 1087-88; R. 1089-90}. As was his custom and habit formed from twenty years of military² service, Parvin had his forty-five caliber pistol with him in the van. {Trans. p. 1103-05; R. 1105-07}. On the way home from an unsuccessful scrap metal search, Parvin picked up a twelve-pack of Modelo beer to replace some of the beer he and his wife had consumed the previous evening with dinner. {Trans. p. 1092-93; R. 1094-95}. After he picked up the Modelo beer, Parvin passed the home where Lopez and Gutierrez were in the yard drinking beer.³ {Trans. p. 1093-94; R. 1095-96}. Parvin assumed that, given the attire of the men, perhaps Lopez and Gutierrez worked in the construction industry and could have leads or contacts for him on some scrap metal. {Trans. p. 259-260; 1094; R. 260-61; 1096}. Parvin stopped to talk to the men to see

² Parvin had served a distinguished 20-year military career, including five tours of duty, and the Bronze Star. {Trans. p. 1063-65; 1066; 1070-71; 1076; 1187; R. 1065-67; 1068; 1072-73; 1078; 1189}.

³ Lopez and Gutierrez were not the only two men present in the yard that evening. Other men came and went throughout the evening with some drinking beer, including the beer Parvin provided. {Trans. p. 282; 344-46; 1109-10; 1111; 1168; R. 283; 345-47; 1111-12; 1113; 1170}.

if his hunch would pan out. {Trans. p. 1095; 1156; R. ____}. Parvin told Lopez and Gutierrez his name, offered some Modelo beer to the men, spent some time drinking with the men, told the men he lived⁴ nearby, and otherwise tried to ingratiate himself with the men prior to asking about the scrap metal. {Trans. p. 1096; 1097; 1110; 1111; 1158-59; R. 1098; 1099; 1112; 1113; 1160-61}. Parvin also showed off his distinctive and very personal tattoos because one the men present also "had some ink." {Trans. p. 1111-13; 1182; R. 1113-15; 1184}. In short, Parvin did not want to pull up to the yard and immediately ask for connections and leads on the scrap metal; rather, he thought a better tactic to produce better leads or contacts would be to develop a rapport with Lopez and Gutierrez before asking about the scrap metal. {Trans. p. 1111; R. 1113}.

At some point in the evening, the Modelo beer provided by Parvin ran out, and Lopez asked Parvin to take him to a gas station to purchase more. {Trans. p. 1102; 1106; R. 1104; 1108}. Parvin agreed to do so. {Trans. p. 1103; R. 1105}. After arriving at the gas station, Lopez stated that he had no money for beer and told Parvin to give him money to buy the beer. {Trans. p. 260; 1106-07; R. 261; 1108-09}. Parvin again agreed to do so. {Trans. p. 1107; R. 1109}. When Lopez entered Parvin's van to head to the gas station, Parvin decided to move his gun from between the front seats and place it in the waistband of his shorts. {Trans. p. 1103; R. 1105}. Lopez observed Parvin do so. {Trans. p. 1105; R. 1107}.

⁴ Parvin testified his neighborhood was adjacent or "butt[ed]-up" to the location where he encountered Lopez and Gutierrez. {Trans. p. 1091; R. ____}.

Lopez entered the store and purchased a twenty-four pack of Budweiser beer with the money provided by Parvin.⁵ {Trans. p. 1108; R. 1110}. Parvin remained in the van and did not enter the gas station. {Trans. p. 1107-08; R. 1109-10}. While at the gas station, Lopez engaged in conversation with two acquaintances, Adan Soto (hereinafter "Soto") and Marlin Avila (hereinafter "Avila"). {Trans. p. 303; 311-12; R. 304; 312-13}. The substance of that conversation ultimately formed the sole basis for the State's motive theory of the case.

Parvin and Lopez returned to the house. {Trans. p. 1108; 1172; R. 1110; 1174}. Parvin's gun remained in the waistband of his shorts. {Trans. p. 1122; 1181; R. 1124; 1183}. Throughout the remainder of the evening, Lopez, who had been translating for Parvin, Gutierrez, and the other people present begin to cut Parvin from the conversations. {Trans. p. 1111; 1115; 1182-83; R. 1113; 1117; 1184-85}. Eventually, only Parvin, Lopez, and Gutierrez remained at the house. {Trans. p. 1117; 1118; R. 1119; 1120}. Parvin decided to leave at that point. {Trans. p. 1115; R. 1117}. When he tried to leave, Lopez stated Parvin could not do so and requested more money from Parvin. {Trans. p. 1117; 1169; R. 1119; 1171}. Parvin refused to give him money and, in fact, asked that Lopez return Parvin's change from the case of Budweiser. {Trans. p. 1120; 1172; 1184-85; R. 1122; 1174; 1186-87}. Lopez refused and became visibly upset, including threatening Parvin and his family. {Trans. p. 1120; 1121-22; R. 1122; 1123-24}. Parvin again tried to leave but Gutierrez blocked the exit from the yard. {Trans. p. 1118; 1121; 1185; 1186; R. 1120; 1123; 1187; 1188}. Further, Gutierrez made physical contact with Parvin and tried to obtain

⁵ At the time of his death, Lopez had a blood alcohol level of .379, nearly five times the legal limit. {Trans. p. 104; R. 105}.

control of Parvin's gun. {Trans. p. 1122; 1188; R. 1124; 1190}. Parvin retained control of the gun and saw Lopez reach for something in the shed in the yard. {Trans. p. 1118; 1122; 1186; 1187; R. 1120; 1124; 1188; 1189}. At that time Parvin became fearful for his life and shot both Lopez and Guttierrez in self-defense. {Trans. p. 1122; 1136; 1188; R. 1124; 1138; 1190}. Lopez and Guttierrez died as a result of the shooting. {Trans. p. 1123-24; R. 1125-26}.

Ultimately, Parvin was arrested at his home without incident. {Trans. p. 1132-33; R. 1134-35}. The Grand Jury of Richland County indicted Parvin on two counts of murder related to the deaths of Lopez and Guttierrez.. {Indictments No. 2011-GS-40-0897 and 2011-GS-40-0898; Trans. p. 32; R. 33}. The matter proceeded to trial on December 12, 2011.

The State tried the case under a central theory as to Parvin's potential motive. The State propounded a theory that Parvin solicited Lopez to have sex with him for two hundred dollars (\$200), and, when Lopez refused to do so, Parvin killed both Lopez and Guttierrez in retaliation. {Trans. p. 240; 242-43; 244; 246-47; 257-58; 261; 302-06; 311-13; R. 241; 243-44; 245; 247-48; 258-59; 262; 303-07; 312-14; }. The sole support for this theory was the conversation at the gas station between Lopez, Soto, and Avila (sometime referred to as "the Lopez statements").⁶

⁶ Parvin does not concede or admit and in fact denies that he made any such solicitation statements. Any discussion in this brief of the statements as alleged by the State should not be construed as an admission of such. The discussions herein are in assuming *arguendo* approach and should only be construed in that manner.

At the gas station, Lopez engaged in conversation with Soto and Avila. {Trans.

p. 303; 311-12; R. 304; 312-13}.⁷ Soto testified that:

Q: And did you have a chance to speak to [Lopez] on that day?

A: Yeah, I spoke to him the day that I saw him at the gas station at that time.

Q: And while you were talking to [Lopez], did he mention what he was doing at the gas station?

A: Yeah, he told me he was going to buy a case of beer, that he was with an American.

Q: Okay. Did he say anything else about the American and the beer?

A: Yes, he said the American had given him \$200 to buy beer because he wanted to have sex with him.

{Trans. p. 303-04; R. 304-05}. Avila also testified as to her conversation with Lopez:

Q: What did [Lopez] tell you about what he was doing with that American?

A: He said that the American had given him money to buy beer and he said the American had given him \$200 to have sex.

{Trans. p. 312; R. 313}. Parvin moved to exclude this evidence as inadmissible hearsay and because the statement did not constitute a present sense impression under Rule 803(1), SCRE. {Trans. p. 110; 303; 312; R. 111; 304; 313}. The trial court overruled that objection. {Trans. p. 179; 303; 312; R. 180; 304; 313}.

The trial court's failure to exclude the Lopez statements allowed the State to frame the trial with its central theory as to Parvin's alleged motive to kill Lopez and Gutierrez. Based on the Lopez conversation with Soto and Avila, the State extrapolated that Parvin lived a secret double life. {Trans. p. 239; R. 240}. The State

⁷ Prior to trial, Parvin moved in limine to exclude this testimony on the basis that the statement from Lopez to Soto and Avila constituted inadmissible hearsay and did not qualify as a present sense impression under Rule 803(1), SCRE. {Trans. p. 101-110; R. 102-111}. The trial court denied that motion. {Trans. p. 179; R. 180}.

alleged that in one life Parvin was a military hero, a veteran, and a devoted family man. {Trans. p. 239-40; R. 240-41}. The State argued that in Parvin's other life he solicited strange and unknown men for sexual relations for money. {Trans. p. 240; R. 241}. In opening, the State framed this theory to the jury, again based solely on the conversation at the gas station between Lopez, Soto, and Avila.

The State argued that in this secret life Parvin:

[P]ropositioned [Lopez] for sex . . . gave him money for sex, and even bought him beer and continued to drink; the Leslie Parvin, though, who, after they drank a few, but denied him the sex that he thought he was going to get; the Leslie Parvin who perhaps felt he had been played for a fool, pulled a gun from his waistband and shot two unarmed men.

{Trans. p. 240; R. 241}. The State continued, stating "[a]nd so [Parvin], most of his interactions were with [Lopez], the man he had solicited for sex at some point during this time period." {Trans. p. 242; R. 243}. The State continued to frame the case under its central theory by previewing the forthcoming testimony from Soto and Avila in the opening. The State alleged that:

So [Parvin, Lopez, Gutierrez, and Jose Monroy] are drinking, sitting around, conversations. And there's a conversation in which Edgar began speaking in Spanish and he starts calling [Parvin] a homosexual. [Gutierrez] tells him to be quiet, though, because he doesn't know that. And they continue talking about other things. [Lopez] has mentioned that [Gutierrez] will have to sleep outside because the defendant will be staying in his room. And [Parvin] actually asked [Lopez] "what are y'all saying?" And [Lopez] told him exactly what he said, but [Parvin] doesn't get upset. They continued drinking and at some point Alfredo arrives, because Jose called him. And then [Parvin] and [Lopez] leave and go to the gas station to get more beer, because they ran out.

under Rule 803(1), SCRE.¹⁰ {Motion for New Trial dated January 6, 2011; R. 1755}. The trial court denied that motion. {Order denying Motion for New Trial dated March 19, 2012; R. 1}. This appeal timely followed. {Notice of Appeal}.

Argument

The trial court committed reversible error by allowing Soto and Avila to testify to the Lopez statements for three reasons. First, the Lopez statements constituted hearsay. Second, the statements did not qualify as a present sense impression under Rule 803(1), SCRE. Third, Parvin suffered prejudice from the admission of the Lopez statements because the statements related to the central issues in the case and allowed the State to shape its entire presentation to the jury. As a result, the trial court committed reversible error in admitting the Lopez statements. This Court should remand for a new trial.

First, Lopez's statements to Soto and Avila constitute hearsay. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. The State introduced the Lopez statements to prove the truth of the matter asserted—specifically that Parvin offered Lopez money to have sex with him. The Lopez

¹⁰ At trial, Parvin also argued the statement was inadmissible as hearsay or under Rule 404(b), SCRE. {Trans. p. 103-12; R. 104-13}. In response to that argument, the State conceded it was not seeking admission under Rule 404(b), SCRE. {Trans. p. 107; R. 108}. In the motion for a new trial, Parvin again argued the statement did not qualify under Rule 803(1), SCRE, and that it was inadmissible under Rule 404(b), SCRE. {Motion for New Trial dated January 6, 2011; R. 1755}. The State did not argue any Rule 404(b), SCRE, grounds in its return to the motion for new trial. {Response Motion for New Trial dated January 17, 2011; R. 1768}. Thus, the State has abandoned this ground. This issue cannot formulate the basis for admission of the statement or constitute an additional sustaining ground. Moreover, any *res gestae* argument advanced by the State also is improper and cannot be used to support the admission of the statement. *Res gestae* only applies in a Rule 404, SCRE, analysis. See *State v. Gilmore*, 396 S.C. 72, 83 n.9, 719, S.E.2d 688, 694 n.9 (Ct. App. 2011). Because this ground was abandoned at trial, the State cannot argue such on appeal.

statements fit squarely within this definition and are classic hearsay. As hearsay, the Lopez statements were inadmissible "except as provided for by these rules" Rule 802, SCRE.

Importantly, the State conceded the Lopez statements constituted hearsay. The State failed to argue at trial that the statements did not constitute hearsay. Rather, the State argued admissibility under the present sense exception to hearsay contained in Rule 803(1), SCRE. {Transp. p. 108-09; 110; R. 109-10; 111}. The State also opposed Parvin's motion for new trial by exclusively arguing that the Lopez statements qualified for an exception to the hearsay rule. {Response to Motion for New Trial; R. 1768}. The State, therefore, effectively conceded the Lopez statements were hearsay.

Second, the trial court decided to admit the Lopez statements under the present sense impression exception to the hearsay rule. {Transp. p. 179; Motion for New Trial p. 1; R. 180; 1755}. That was error. The Lopez statements cannot establish the prerequisites for admissibility under Rule 803(1), SCRE. The Lopez statements failed as a present sense impression because Lopez was not describing something contemporaneously perceived. Instead, the Lopez statements constituted a recollection of a past event. The trial court committed error in holding otherwise and admitting the Lopez statements.

Our rules of evidence render admissible a hearsay "statement describing or explaining an event or condition made while the declarant was perceiving the event or

condition, or immediately thereafter.” Rule 803(1), SCRE.¹¹ This exception is commonly referred to as the present sense impression exception to hearsay.

Over time courts developed three requirements before this hearsay exception can be applied. First, the statement must describe an event or condition without narration. See, e.g., U.S. v. Ruiz, 249 F.3d 643, 646 (7th Cir. 2001); U.S. v. Mitchell, 145 F.3d 572, 576 (3rd Cir. 1998); U.S. v. Portsmouth Paving Corp., 694 F.2d 312, 323 (4th Cir. 1982). Second, the declarant must have personally perceived the event or condition. Id. Third, there is a requirement of temporal immediacy that requires the statement to be made while the declarant was perceiving the event or immediately thereafter.¹² Id.

While there “is no per se rule indicating what time interval is too long under Rule 803(1),” the drafters of this rule intended the exception to require contemporaneity. See Fed. R. Evid. 803(1), advisory committee note; U.S. v. Blakey, 607 F.2d 779, 785 (7th Cir. 1979). The phrase “or immediately thereafter” was added to recognize only the slight lapse of time the brain requires to convert thought to words. Fed. R. Evid. 803(1), advisory committee note. Most commentators and courts have interpreted the rule to mean that “the time lapse requirement should be enforced with rigor . . . the time lapse allowable is only that

¹¹ The South Carolina present sense impression exception is identical to that contained in the Federal Rules of Evidence. Rule 803, SCRE, Reporter’s Note (“Except for modifications to subsections (4), (6), (8), (18), and (22) . . . this rule is identical to the federal rule”); State v. Burroughs, 328 S.C. 489, 498, 492 S.E.2d 408, 412 (Ct. App. 1997). Thus, our courts turn to cases interpreting the identical federal for guidance in interpreting the state rule. See, e.g., Dalon v. Golden Lanes, Inc., 320 S.C. 534, 466 S.E.2d 368 (Ct. App. 1996).

¹² Some courts construe this third requirement to mean that declaration is made “essentially contemporaneous” to witnessing the event. See, e.g., U.S. v. Mitchell, 145 F.3d 572, 576 (3rd Cir. 1998).

‘slight lapse’ before reflective thought intervenes.” 28 Fla. St. U.L. Rev. 907, 918-19; McCormick on Evidence, John William Strong ed., 5th ed. 1999, § 271 at 475 (“The phrase ‘immediately thereafter’ accommodates the human realities that the condition or event may happen so fast that the words do not quite keep pace, and proving a true match of words and events may be impossible for ordinary witnesses, so it would be foolish to require a statement to be truly simultaneous with the event or condition. The exception allows enough flexibility to reach statements made a moment after the fact, where a small delay or ‘slight lapse’ is not enough to allow reflection, which would raise doubts about trustworthiness.”).

A statement that meets this third requirement “is generally regarded as trustworthy because the substantial contemporaneity of event and statement minimizes unreliability due to defective recollection or conscious fabrication.” Ruiz, 249 F.3d at 646-47; U.S. v. Manfre, 368 F.3d 832, 840 (8th Cir. 2004); U.S. v. Parker, 936 F.2d 950, 954 (7th Cir. 1991); Miller v. Keating, 754 F.2d 507, 512 (3rd Cir. 1985) (holding that the lack of time from event to statement is key). “The idea of immediacy lies at the heart of the exception; thus, the time requirement underlying the exception is strict because it is *the* factor that assures trustworthiness.” U.S. v. Green, 556 F.3d 151, 156 (3rd Cir. 2009) (emphasis in original); 4 Christopher B. Mueller and Laird C. Kirkpatrick, Federal Evidence § 8:67, 559, 562 (3rd ed. 2007). “[T]he temporality requirement must be rigorous because the passage of time—or the lack thereof—is the effective proxy for the reliability of the substance of the declaration; hence the greater the passage of time” from the event to the statement

“the less trustworthy the statement is presumed to be, and the more the scales should tip toward inadmissibility.” Manfre, 368 F.3d at 840.

South Carolina courts are in accord. In State v. Griffin, the Supreme Court addressed this exception in the context of this temporal element. 339 S.C. 74, 78 n.3, 528 S.E.2d 668, 670 n.3 (2000). In that matter, the State sought to admit testimony from a witness relaying a statement from the victim that established the defendant was present at the murder. Griffin, 339 S.C. at 77, 528 S.E.2d at 669. The trial court admitted the testimony under the present sense impression exception to hearsay. Id. On appeal, the Supreme Court held the statement was not admissible “under Rule 803(1) as a present sense impression.” Id. at 78 n.3, 528 S.E.2d at 670. The court reasoned that:

This rule allows for the admission of “a statement describing or explaining an event or condition made while the declarant was *perceiving* the event or condition, or immediately thereafter.”

Id. (emphasis in original). The court concluded that the statement was inadmissible hearsay because it was not a statement made while the declarant was perceiving the event. Id. Rather, it was a statement “regarding a *future* event and not a statement regarding something contemporaneously perceived.” Id. (emphasis in original).

In State v. Burroughs, the Court of Appeals applied a temporal restriction to reverse the trial court’s decision to admit a statement under the present sense impression exception. 328 S.C. 489, 498-99, 492 S.E.2d 408, 412-13 (Ct. App. 1997). In that case, the Court of Appeals excluded testimony that the State sought to introduce as a present sense impression because “[g]iven this lapse of time, it cannot be said that the victim made the statements while she was ‘perceiving the event or

condition, or immediately thereafter' as required by Rule 803(1)." Burroughs, 328 S.C. at 499, 492 S.E.2d at 413.

This matter is analogous. Here, the Lopez statements were not statements made while the declarant (Lopez) was perceiving the event (the alleged solicitation by Parvin). Id. Rather, it was a statement regarding a *past* event and not a statement regarding something contemporaneously perceived. Thus, the Lopez statements failed to satisfy temporal requirement for admissibility under Rule 803(1), SCRE.

The trial testimony and the State's position established that Parvin's alleged solicitation of Lopez occurred when Parvin and Lopez were at the house drinking, NOT when Parvin and Lopez went to buy beer at the gas station. Moreover, the alleged solicitation certainly was not contemporaneous with the conversations Lopez had with Avila and Soto because it was undisputed that Parvin remained in his van while Lopez purchased the beer and talked to Soto and Avila.

Here, the State's opening set forth the time frame for the jury to view the facts of this case. In that opening, the State presented the time frame as follows. First, Parvin met Lopez and Gutierrez. Second, Parvin drank beer with the men. Third, Parvin propositioned Lopez to have sex with him. Fourth, Parvin and Lopez left to buy beer at the gas station. Fifth, Lopez had conversations at the gas station with Soto and Avila. Sixth, Lopez backs out of the solicitation deal.

The State's opening stated that "Parvin spoke with them and drank with them; the Leslie Parvin who propositioned [Lopez] for sex . . . gave him money for beer and continued to drink" {Trans. p. 240; R. 241}. The State also argued that Parvin solicited Lopez prior to the arrival of Jose Monroy to the house. {Trans. p.

242; R. 243 ("most of [Parvin's] interactions were with [Lopez], the man he solicited for sex . . . And when Jose arrived, he hung out.")). The State further alleged that:

So [Parvin, Lopez, Guttierrez, and Jose Monroy] are drinking, sitting around, conversations. And there's a conversation in which Edgar began speaking in Spanish and he starts calling [Parvin] a homosexual. [Guttierrez] tells him to be quiet, though, because he doesn't know that. And they continue talking about other things. [Lopez] has mentioned that [Guttierrez] will have to sleep outside because the defendant will be staying in his room. And [Parvin] actually asked [Lopez] "what are y'all saying?" And [Lopez] told him exactly what he said, but [Parvin] doesn't get upset. They continued drinking and at some point Alfredo arrives, because Jose called him. And then [Parvin] and [Lopez] leave and go to the gas station to get more beer, because they ran out.

{Trans. p. 243; R. 244 (emphasis added)}.

Jose Monroy's testimony confirmed the time line set forth by the State. Monroy's testimony showed that Parvin and Lopez had the alleged solicitation discussion at the house and then the men left to go to the gas station to purchase more beer. Monroy testified that he arrived at the house while Parvin and Lopez were still drinking the Modelo beer that Parvin had brought with him:

Q: I want to turn your attention back to July the 30th of 2010. Did you see [Lopez] and [Guttierrez] that day?

A: Yes.

Q: And where were [Lopez] and [Guttierrez] when you saw them that day?

A: Where [Lopez] lived then.

Q: In the yard area?

A: Yes.

Q: And who was out there when you saw them that day?

A: There was a white gentleman.

Q: And [Lopez] and [Guttierrez]?

A: Yes.

Q: Tell the jury what happened when you went into the yard that day, what you saw.

A: What I saw was the three of them, they were drinking beer.

Q: Did you join them?

A: Yes, I had one beer. They invited me to have a Modelo beer. . . .

Q: Who actually offered you the beer that day?

A: The white gentlemen had it in his van.

{Trans. p. 281-82; R. 282-83}.¹³ Further, Monroy testified he was privy to Lopez's recap of the solicitation conversation and related sleeping arrangements:

Q: Do you remember telling the police about a conversation¹⁴ that day?

A: Yes, I do remember that conversation that I heard at that time and they were talking about where he would stay.

Q: Where who would stay that night?

A: [Lopez]¹⁵

Q: Do you remember him telling [Gutierrez] that the American was a homosexual?

A: No, not really. The only thing I remember is that at the end that he said that [Gutierrez] would be outside and those two would be inside.

Q: And that would be the American and [Lopez]?

A: And [Lopez].

{Trans. p. 285-86; R. 286-87}. This conversation about the solicitation occurred while Monroy was present in the yard. He testified as such. {Id.}. Monroy also admitted that he remained in the yard while Parvin and Lopez drove to the gas station.

{Trans. p. 283; R. 284}. As a result, his presence for that conversation established that the solicitation conversation could not have occurred at the gas station. {Trans.

¹³ Monroy was only present in the yard while the Modelo beer was being consumed and for a very brief time after Parvin and Lopez returned from the gas station.

¹⁴ This conversation is the conversation referred to in the State's opening and set forth above.

¹⁵ Lopez nickname was "Camagua," and Monroy refers to him as such.

p. 283; R. 284}. His testimony further established that the Modelo beer had not run out. {Trans. p. 281-82; R. 282-83}. Thus, because Monroy was present for Lopez's recap of the solicitation conversation, and that conversation occurred before Parvin and Lopez went to the gas station for more beer, then the solicitation conversation that framed the State's entire case to the jury had to have occurred prior to the gas station.

Accordingly, Monroy's testimony about the Modelo beer established that any alleged solicitation had occurred while Parvin and Lopez were still in the yard at the house. Also, Monroy's presence proved that the solicitation conversation referenced in the State's opening occurred before Parvin and Lopez went to the gas station. The men did not go to the gas station until the Modelo beer ran out. Thus, the fact that Monroy had a Modelo while engaged in the conversation with Lopez and Gutierrez about the solicitation (and related sleep arrangements) established that the solicitation had to have occurred prior to Parvin and Lopez going to the gas station and certainly before Lopez had the conversations with Soto and Avila.¹⁶ In short, the testimony proved that the solicitation conversation occurred before Parvin and Lopez went to the gas station to replenish the beer.

The above established that the Lopez statements cannot satisfy the temporal requirements of Rule 803(1), SCRE. The alleged solicitation occurred, Lopez and Gutierrez discussed the solicitation in front of Monroy, the men continued to consume the Modelo beer, then Parvin and Lopez drove to the gas station, and only

¹⁶ The State offered no evidence to establish that the solicitation took place at any other time or place. As the party seeking the introduction of the evidence, the burden of proving the elements of admissibility for a statement under the present sense impression exception is in the State. See, e.g., Miller v. Keating, 754 F.2d 507, 511 (3rd Cir. 1985). Therefore, the State failed to carry its burden that the solicitation conversation took place at a location other than the yard at the house.

upon arriving at the gas station did Lopez have conversations with Soto and Avila.¹⁷ The time lapse between the alleged solicitation of Parvin and the Lopez statements is too long for the statements to be admissible under that hearsay exception. This is especially true considering the fact that the event (the alleged solicitation) occurred at a location separate and distinct from where Lopez had the conversations with Soto and Avila.

Thus, the Lopez statements cannot be considered a present sense impression because the subject matter was not what Lopez was presently perceiving, but rather, Lopez conveyed something that had occurred at a previous time and a previous location. The passage of time renders the Lopez statements untrustworthy because temporally the event or condition was not connected to the Lopez's statements. In other words, the statements "w[ere] a commentary on a situation, not a description of an event or condition made while (or immediately after) the event or condition occurred." See Estate of Gee v. Bloomington Hosp., 2012 U.S. Dist. LEXIS 24639 (S.D. Ind. 2012). Therefore, the trial court erred in admitting the statements. This Court should remand for a new trial.

Third, the Lopez statements related to the seminal issues in the case and allowed the State to shape its entire presentation to the jury. Therefore, the trial court's admission of the Lopez statements prejudiced Parvin. Because the Lopez statements

¹⁷ The State will likely argue that this time was brief or short enough to satisfy the temporal requirement of Rule 803(1), SCRE. However, such a position has been rejected. See Hughes v. Indianapolis Radio License, Co., 2009 U.S. Dist. LEXIS 6957 (S.D. Ind. 2009). In that case, the court rejected an argument that because the statement was made "shortly after" the event, then the temporal limits of Rule 803(1) were satisfied. The court reasoned that "[s]hortly is not the same as 'immediately,' however. This is not mere parsing words; the hearsay exception applies when a statement is made during or immediately after an event, before the declarant had a chance to figure out how he wants to describe or explain the event." *Id.*; see also Hilyer v. Howat, 578 F.2d 422, 426 (D.C. Cir. 1978) (finding a delay of 15 minutes "hardly qualifies as immediate for purposes of Rule 803(1)").

related directly to the heart of the case, then the admission of the statements cannot constitute harmless error. The State framed its entire case to the jury on these statements. Without the theory extrapolated from the Lopez statements, the State had no motive theory to try Parvin. This Court should remand for a new trial.

Our Supreme Court very recently held that error related directly to the central issue of a case cannot constitute harmless error. In Sulton v. Health South, No. 27192 (S.C. Sup. Ct. filed November 21, 2012) (Shearouse Adv. Sh. No. 42 at 74), the Court addressed an erroneous jury charge that incorrectly elevated the duty of care owed by a hospital on the seminal issues of the case. The Supreme Court held that, despite the harmless error approach to review of jury instructions, the error could not be harmless because it went to the heart of the case. The court held remand was warranted because the error on the key issue caused the defendant to suffer prejudice. Sulton, No. 27192 at 77-78.

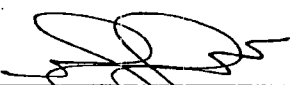
This matter is analogous to the court's logic and rationale in Sulton. Whether The State's motive theory—namely, Parvin solicited Lopez for sex and killed him and Gutierrez when Lopez backed out of the deal—was the seminal issue. The admission of the testimony of Soto and Avila was critical, and the only vehicle, to admit the Lopez statements that allowed the State to present and try this theory to the jury. Thus, it was critical that the trial court make the proper ruling on admissibility of those statements. The trial court's erroneous decision to admit the Lopez statements prejudiced Parvin's ability to defend on the basis of self-defense. This is especially true when the State premised the entire case on these Lopez statements. Therefore, Parvin

suffered prejudice from the erroneous admission of the Lopez statements. This Court should grant a new trial.

Conclusion

Based on the foregoing, this Court should find the trial court committed reversible error in admitting the hearsay statement of Lopez and remand this action to the trial court for a new trial.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

Dwight F. Drake

SC Bar No. 001745

E-Mail: dwight.drake@nelsonmullins.com

Michael J. Anzelmo

SC Bar No. 72933

E-Mail: michael.anzelmo@nelsonmullins.com

1320 Main Street / 17th Floor

Post Office Box 11070 (29211-1070)

Columbia, South Carolina 29201

803.799.2000

Attorneys for Appellant Leslie Todd Parvin

Columbia, South Carolina

August 9, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Case No. 11-GS-40-897 and 11-GS-40-898

RECEIVED

AUG 09 2013

SC Court of Appeals

The State of South Carolina, ... Respondent,

v.

Leslie Todd Parvin, ... Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

Dwight F. Drake

SC Bar No. 001745

E-Mail: dwight.drake@nelsonmullins.com

- Michael J. Anzelmo

SC Bar No. 72933

E-Mail: michael.anzelmo@nelsonmullins.com

1320 Main Street / 17th Floor

Post Office Box 11070 (29211-1070)

Columbia, South Carolina 29201

803.799.2000

RECEIVED

AUG 09 2013

SC COURT OF APPEALS

Attorneys for Appellant Leslie Todd Parvin

Columbia, South Carolina

August 9, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Case No. 11-GS-40-897 and 11-GS-40-898

The State of South Carolina, ... Respondent,

v.

Leslie Todd Parvin, ... Appellant.

PROOF OF SERVICE

I, the undersigned administrative assistant in the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Leslie Todd Parvin, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by hand delivery, to the following address(es):

Pleadings:

Counsel Served:

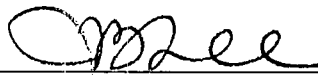
Final Reply Brief

Brendan McDonald
S.C. Attorney General's Office
Rembert C. Dennis Building
P. O. Box 11549
Columbia, SC 29211

RECEIVED

AUG 09 2013

SC Court of Appeals



Jennifer B. Lee

August 9, 2013

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County

Honorable Clifton Newman, Circuit Court Judge

Appellate Case No. 2012-205888

THE STATE

Respondent

v.

LESLIE TODD PARVIN

Appellant

FINAL BRIEF OF RESPONDENTS

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

BRENDAN J. McDONALD
Assistant Attorney General
S.C. Bar No. 77784

DAN E. JOHNSON
Solicitor, Fifth Judicial Circuit

P.O. Box 11549
Columbia, SC 29211-1549
(803) 734-3188

ATTORNEY(S) FOR RESPONDENTS

TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	ii-iii
QUESTIONS PRESENTED.....	iv
STATEMENT OF THE CASE.....	1
STATEMENT OF THE FACTS.....	1-11
A. The Murder of Edgar Lopez and Pablo Gutierrez	1-3
B. Defense Counsel's Motion <i>in Limine</i> Regarding Lopez's Statements	3-5
C. Opening Arguments and Lopez's Statements.....	5-6
D. Introduction of Evidence Supporting the State's Theory of the Case at Trial.....	6-8
E. Appellant's Defense.....	8-9
F. Closing Arguments.....	9-11
G. Appellant is Convicted of Murder	11
STANDARD OF REVIEW.....	11
ARGUMENTS.....	11-17
I. <u>Appellant's failure to appeal from all grounds supporting the trial court's evidentiary ruling makes the unappealed ruling law of the case meaning the judgment must be affirmed under the two-issue rule.</u>	11-14
II. <u>Lopez's statements to Soto and Avila that Appellant had solicited and paid him for sex shortly before Appellant shot and killed Lopez and Gutierrez were admissible even assuming the trial court erred in admitting the statements as a present sense impression, under Rule 803(1), SCRE, meaning the judgment should still be affirmed.</u>	14-17
CONCLUSION.....	17-18
CERTIFICATE OF COMPLIANCE.....	19-20
PROOF OF SERVICE.....	21

TABLE OF AUTHORITIES

Cases

<u>Anderson v. Short</u> , 323 S.C. 522, 476 S.E.2d 475 (1996).....	12
<u>Arnold v. State</u> , 309 S.C. 157, 420 S.E.2d 834 (1992).....	17
<u>Fields v. Reg'l Med. Ctr. Orangeburg</u> , 363 S.C. 19, 609 S.E.2d 506 (2005).....	11
<u>Jones v. Lott</u> , 387 S.C. 339, 692 S.E.2d 900 (2010).....	12
<u>ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche</u> , 327 S.C. 238, 489 S.E.2d 470 (1997)...	12
<u>Osterneck v. Osterneck</u> , 374 S.C. 573, 649 S.E.2d 127 (Ct. App. 2007).....	15
<u>Schneble v. Florida</u> , 405 U.S. 427 (1972).....	17
<u>State v. Adams</u> , 322 S.C. 114, 470 S.E.2d 366 (1996).....	3
<u>State v. Adams</u> , 354 S.C. 361, 580 S.E.2d 785 (Ct. App. 2003).....	11
<u>State v. Branham</u> , 392 S.C. 225, 708 S.E.2d 806 (Ct. App. 2011).....	12
<u>State v. Doctor</u> , 306 S.C. 527, 413 S.E.2d 36 (1992).....	16
<u>State v. Graham</u> , 314 S.C. 383, 444 S.E.2d 525 (1994).....	17
<u>State v. Hicks</u> , 387 S.C. 378, 692 S.E.2d 919 (2010).....	12
<u>State v. Pagan</u> , 369 S.C. 201, 631 S.E.2d 262 (2006).....	11
<u>State v. Prioleau</u> , 339 S.C. 605, 529 S.E.2d 561 (Ct. App. 2000).....	15
<u>State v. Simpson</u> , 325 S.C. 37, 479 S.E.2d 57 (1996).....	3
<u>U.S. v. Masters</u> , 622 F.2d 83 (4 th Cir. 1980).....	13
<u>Williamson v. U.S.</u> , 512 U.S. 594 (1994).....	15
<u>Wilder Corp. v. Wilke</u> , 330 S.C. 71, 497 S.E.2d 731 (1998).....	14

Rules

Rule 18(a), SCRCrimP.....	14
---------------------------	----

APPELLANT'S QUESTION PRESENTED

- I. Whether the trial court erred in admitting testimony regarding statements made by Edgar Lopez to others that appellant Leslie Todd Parvin had solicited and paid him for sex shortly before Parvin shot and killed Lopez and his friend, Pablo Guzman-Gutierrez.

RESPONDENT'S COUNTER-QUESTIONS PRESENTED

- I. Whether appellate counsel's failure to appeal from all grounds supporting the trial court's evidentiary ruling makes the unappealed ruling law of the case and therefore requires the judgment be affirmed under the two-issue rule.
- II. In the event appellate review is not procedurally barred under the doctrine of law of the case and the two-issue rule, whether Lopez's statements to others that Appellant Leslie Todd Parvin had solicited and paid him for sex shortly before Parvin shot and killed Lopez and his friend, Pablo Guzman Gutierrez were admissible under the Rules of Evidence.

STATEMENT OF THE CASE

Leslie Todd Parvin ("Appellant") was indicted by a Richland County grand jury for murdering Edgar Lopez ("Lopez") and Pablo Guzman-Gutierrez ("Gutierrez").¹ (R. 1773-74). Appellant was tried before the Honorable Clifton Newman and a jury on December 12, 2011 through December 21, 2011 where he was represented by Fielding Pringle, Jennifer Davis and Luke Shealy. (R. 2, 148, 408, 757, 1020, 1306, 1552, 1711). At the conclusion of trial, Appellant was found guilty as charged and on December 28, 2011, received concurrent thirty-five (35) year sentences. (R. 1744, 1755). Following his conviction, Appellant unsuccessfully sought a new trial. (R. 1755-62, 1769-72, 1). Thereafter, Appellant sought appellate review arguing only that the introduction of Lopez's statements to two acquaintances in the time leading up to his death was reversible error because the statements were purportedly inadmissible hearsay. (Br. of App. at 3).

STATEMENT OF THE FACTS

A. The Murder of Edgar Lopez and Pablo Gutierrez

On July 30, 2010, Appellant, a twenty year military veteran, shot and killed Lopez and Gutierrez in the front yard of Lopez's Richland County residence² with a .45 caliber semi-automatic handgun. (R. 1065-67, 1068, 1072-73, 1078, 1189, 1060-61, 789). According to forensic pathologist Dr. Clay Nichols, Lopez, who was 5'4 and 140 pounds, was shot once in the face at close range and once in the abdomen, while Gutierrez, who was 6'1 and 196 pounds, was shot three times in his back and once in the chest. (R. 497, 469-71, 474-75, 497, 485-86). Both Lopez and Gutierrez died on the scene. (R. 462-63). Describing the incident, eyewitness

¹ As noted by Appellant, Gutierrez is referenced throughout the record as Pablo Guzman or Guzman. Consistent with Appellant's brief, the State will refer to him solely as Gutierrez.

² The address where the incident occurred consisted of two separate buildings, a main residence, which was occupied by Dimas Fernandez, and a detached furnished garage which was Lopez's residence. (R. 343, 379).

Roberto Gonzalez-Merrin explained Appellant pulled a gun from his back and shot Lopez before turning the gun on Gutierrez, who was attempting to flee the scene, and shooting him in the back. (R. 386-87). Gonzalez-Merrin further testified Appellant was outside of the fence surrounding Lopez's front yard and was next to his vehicle, a two-tone green and grey Kia minivan, when he shot both Lopez and Gutierrez, both of whom were inside the fence. (R. 386-87, 388). Lopez and Gutierrez were unarmed when Appellant shot them. (R. 388-89).

Following the shooting, Appellant calmly walked to his minivan and fled the scene. (R. 387, 389, 391-92, 394, 1126, 1127). He then returned home, destroyed the gun used in the incident, put his family up in a motel for the evening, changed his appearance and drove his minivan to Louisiana where he "holed up" in a motel room. (R. 1126, 1130-31, 913, 1128, 1129-30, 991). Next, Appellant asked his father to drive down to Louisiana to join him and once he knew his father was coming, sold his minivan for scrap on August 5, 2010. (R. 1126, 1130, 1128, 1129-30, 666-68, 915). After selling his minivan for scrap, Appellant and his father stayed in Louisiana to "figure out what the heck to do." (R. 1131). They then continued to Texas where Appellant visited with his in-laws. (R. 915, 1131). On August 15, 2010, Appellant and his father returned to Columbia. (R. 1131-32). Despite knowing authorities were looking for him, Appellant admitted he never attempted to contact police about the shooting.³ (R. 1132). Likewise, Appellant's family never attempted to contact police about the shooting. (R. 987).

Four days after his return to Columbia, Appellant was apprehended at his residence when authorities attempted to execute a search warrant on the premises. (R. 910). Notably, in the time immediately before Appellant's apprehension, his wife, father and son all lied about his presence

³ A composite was generated on August 5, 2010 and was circulated thereafter. (R. 505). Additionally, once authorities determined the neighborhood in which Appellant resided, they issued a reverse 9-1-1 call warning citizens to be on the lookout for Appellant. (R. 916-17).

in the residence telling authorities Appellant was in Texas when police sought to execute the search warrant. (R. 735, 907, 909, 909-10).

B. Defense Counsel's Motion *in Limine* Regarding Lopez's Statements

Prior to trial, defense counsel made a motion *in limine* in an effort to, "exclude reference to other crimes, wrongs, acts; specifically any reference to the defendant being at the incident location for gay or homosexual sex." (R. 102). In particular, defense counsel explained the State would likely present evidence that: (1) Appellant encountered Lopez and Gutierrez at Lopez's residence, then gave Lopez a ride to a nearby Shell gas station and stayed in the car while Lopez told two acquaintances, Adan Soto and his wife, Marlin Avila that Appellant gave him \$200 in exchange for sex (R. 102-03); and (2) prior to going to the gas station, Jose Monroy, another acquaintance of Lopez, heard Lopez tell Gutierrez that Appellant was gay. (R. 103). As such, defense counsel argued evidence of Lopez's statements was improper character evidence citing to Rule 404(b), SCRE. (R. 104). Additionally, defense counsel acknowledged that while such evidence may be admissible as evidence of motive (i.e. that Appellant shot Lopez when their deal went awry after which he shot Gutierrez) neither of Lopez's statements were proven by clear and convincing evidence and therefore, the introduction of the statements would be unfairly prejudicial. (R. 106). Defense counsel also argued Lopez's statements were inadmissible hearsay. (R. 107).

In response, the State, citing to State v. Simpson, 325 S.C. 37, 479 S.E.2d 57 (1996) and State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996) argued Lopez's statements were admissible as, "*res gestae* or [the] present sense impression exception to the hearsay rule." (R. 107). The State went on to explain:

The parts he left out about the time line . . . is basically the defendant goes over to the victim[']s house. They are sitting out in the yard drinking beer. At some point

... there is a reference to how the defendant is going to spend the night with Edgar and is going to sleep in the room, so Pablo has to be outside. It's that reference[,] at that point[,] that [Parvin is] homosexual. . . [T]he victim and the defendant get into the defendant's car. They then go to the gas station where the second exchange occurs . . . [with] two different witnesses . . . who [are] somewhat clear and convincing, hear Mr. Lopez talking about his present sense impression that the American has given him \$200 in exchange for sex and whether or not he's going to go through with it. Then what happens is they immediately go back and start drinking beer again and within just a short time period, Your Honor, at that point there [are] loud voices heard. They can't hear exactly what's being said, but you then see, and it comes from the fact that Lopez says he's not going to have sex with him, he's just going to drink his beer. At that point[,] a different witness sees him pull into his—the victim pull into his pocket and hand what appears to be money to the defendant. At that point[,] there is some more arguing going on, at which point the defendant then pulls out a gun and shoots them.

(R. 108-09).

After giving its version of the timeline, the State maintained its purpose in introducing the homosexual aspect of the case was not to impugn Appellant's character, but to explain why Appellant "became enraged" and shot the victim "at close range." (R. 109). Continuing, the State argued that because the information essentially explained what happened on the day in question, it would come in under Adams as *res gestae*. (R. 109). The State then opined Lopez's statements were also admissible under Simpson as a present sense impression. (R. 109-10). Shifting back to its *res gestae* argument, the State highlighted, "[t]his is an ongoing chain of events that occur and lead up to the actual murder itself. We aren't talking about things that happened even hours before the murder, or even an hour before the murder, or days before the murder. We are talking about close in time." (R. 110).

Replying to the State's argument, defense counsel disputed the State's assertions regarding the application of *res gestae* and the present sense impression hearsay exception. (R. 111-12). The State then suggested Lopez's statements were also admissible under Rule 803(3), SCRE as evidence of the declarant's then existing state of mind. (R. 111-12).

After hearing argument on the issue, the trial court declined to rule immediately stating, “well you all have had the benefit of time to research and file motions and cite cases. . . and I’ll take the benefit of time to think about it before ruling.” (R. 112). The issue regarding the admissibility of the statements subsequently came up in additional argument on a collateral matter, but again, the trial court declined to rule. (R. 132-46). The following day, prior to opening statements, the trial court ruled Lopez’s statements at the Shell station were admissible under *res gestae* and as an exception to the hearsay rule, but failed to rule as to whether Lopez’s statement made at the scene of the shooting—that Appellant was gay—was admissible.⁴ (R. 180-81). Defense counsel renewed its’ objection to the introduction of the statements made by Lopez to Avila and Soto in the Shell station at trial. (R. 304, 313). The trial court, who merely overruled the objection without further argument clarified its ruling later in the day explaining, “the statements of the deceased at the gas station” were *res gestae* and further found the probative value of such evidence outweighed its prejudicial effect.⁵ (R. 395-96).

C. Opening Arguments and Lopez’s Statements

At trial, the State, consistent with the statements advanced in argument regarding its motive for the shooting, surmised in opening argument that Appellant shot Lopez and Gutierrez after Lopez refused to have sex with him. (R. 241). In particular, the State, summarizing Monroy, Soto and Avila’s expected testimony said:

So [Appellant, Lopez, Gutierrez, and Monroy] are drinking, sitting around, [having] conversations. And there’s a conversation in which [Lopez] began speaking in Spanish and he starts calling [Appellant] a homosexual. [Gutierrez] tells him to be quiet, though, because he doesn’t know that. And they continue talking about other things. [Lopez] has mentioned that [Gutierrez] will have to

⁴ Appellant only seeks review from the trial court’s ruling regarding the admission of the statements made to Soto and Avila at the Shell station. See Br. of App. at 11 (“The trial court committed reversible error by allowing Soto and Avila to testify to the Lopez statements for three reasons.”).

⁵ The admissibility of Lopez’s statements at the gas station was raised again in defense counsel’s motion for a new trial. (R. 1755-62).

sleep outside because [Appellant] will be staying in his room. And [Appellant] actually asked [Lopez] "what are y'all saying?" And [Lopez] told him exactly what he said, but [Appellant] doesn't get upset. They continued drinking and at some point Alfredo [Vidal] arrives, because [Monroy] called him. And then [Appellant] and [Lopez] leave and go to the gas station to get more beer, because they ran out.

(R. 244). Continuing, the State explained that once inside the Shell station, Lopez approached Soto and told him Appellant gave him \$200 for beer and sex, a claim that the State said he then reiterated to Avila. (R. 244-45).

Meanwhile, defense counsel, in its opening argument claimed Appellant was acting in self-defense when he shot Lopez and Gutierrez. (R. 263). Specifically, defense counsel alleged Lopez and Gutierrez "attacked" Appellant at which point he shot and killed them. (R. 263). Addressing the State's theory of the case, defense counsel attacked Lopez's credibility noting his blood alcohol level was later determined to be .379 and further argued the jury should, "[b]e insulted" with the money for sex theory since it asked them to believe Appellant would rather solicit homosexual sex than return home to his beloved wife. (R. 262).

D. Introduction of Evidence Supporting the State's Theory of the Case at Trial

At trial, the State, in support of its theory, presented testimony from Monroy, who was drinking beers with Appellant, Lopez and Gutierrez in the time leading up to the incident. (R. 286-87). Specifically, Monroy testified he joined Lopez, Gutierrez and Appellant for a Modelo beer outside of Lopez's residence when he overheard Lopez tell Gutierrez Appellant would be sleeping inside with him that evening. (R. 287). The State also presented testimony from Soto and Avila from the Shell station. (R. 302-17). In particular, Soto who is married to Avila, and was at the Shell station that evening with their six-year old son, said Lopez approached him outside the Shell station and was going to buy a case of beer when he said, "[Appellant] had given him \$200 to buy beer because he wanted to have sex with him." (R. 305, 306, 307).

According to Soto, Lopez then showed him the \$200 Appellant had given him.⁶ (R. 311). Avila's testimony largely corroborated Soto's recollection of the encounter with Lopez outside the Shell station explaining Lopez, who she met inside the Shell station, told her Appellant had taken him to buy beer and had given him \$200 to have sex. (R. 313). Notably, Avila added that Appellant had initially approached her because he was aware Avila sold perfume and wanted to see if she had any to sell because, "he needed some." (R. 313).

In addition to the testimony regarding the agreement between Lopez and Appellant the State also presented testimony from Gonzalez-Merrin and Dimas Fernandez which largely corroborated its theory that Appellant shot Lopez and Gutierrez after he became frustrated with Lopez. In particular, Gonzalez-Merrin, who was painting his porch across the street, testified that in the moments leading up to the shooting, he heard Appellant raise his voice and then point a gun at Lopez, who then extended his hand towards Appellant just before he was shot.⁷ (R. 387). Continuing, Gonzales-Merrin said Appellant then turned the gun on Gutierrez, who was attempting to flee the scene, and shot him in the back. (R. 386-87). Gonzalez-Merrin said Appellant was outside of the fence surrounding Lopez's front yard and was next to his vehicle, a two-tone green and grey Kia minivan, when he shot both Lopez and Gutierrez, both of whom were inside the fence. (R. 386-87, 388). Gonzalez-Merrin confirmed that neither Lopez nor Gutierrez were armed. (R. 388-389). Similarly, Fernandez, who lived in the main residence on the property, testified that while he did not see the actual shooting, he observed Appellant, who he saw was armed with a pistol, slam a chair, throw a beer and go outside of the fence. (R. 347). He then looked on as Lopez began to reach into his pocket and take out money extending it in

⁶ In his testimony, Appellant said Lopez did not have any money and further stated he only gave Lopez two twenty dollar bills to purchase beer. (R. 1109).

⁷ Gonzalez-Merrin, who does not speak English, further testified Appellant was yelling at Lopez just before the shooting. (R. 386-88).

Appellant's direction. (R. 347). Shortly thereafter, Fernandez said he heard gunshots and actually passed Appellant in his minivan as he was leaving the scene. (R. 349).

The State further attempted to support its theory by offering evidence showing Appellant fled the scene in the aftermath of the shooting, disposed of evidence and evaded capture leading up to his apprehension. (R. 387, 389, 391-92, 394). In particular, authorities explained they were never able to recover the gun used in the shootings, and further learned Appellant changed his appearance and fled to Louisiana where he sold his minivan for scrap. (R. 913, 991, 666-68, 915). They also learned Appellant continued to Texas where he visited with his in-laws before he returned to Columbia. (R. 915). Despite knowing authorities were looking for him, Appellant's family never attempted to contact police about the shooting and instead lied about his whereabouts even when his apprehension became imminent. (R. 505, 916-17, 987, 910, 735, 907, 909-10).

E. Appellant's Defense

Following the close of the State's case, Appellant took the stand and consistent with defense counsel's assertions in its' opening argument, claimed he was acting in self-defense when he shot and killed Lopez and Gutierrez. (R. 1060-61). In his testimony, Appellant claimed he was "attacked" and "had to fight [his] way out of the yard." (R. 1061).

Elaborating, Appellant explained that after he and Lopez returned from the Shell station, he met "two guys" who he determined were Monroy and his friend, Alfredo Vidal.⁸ (R. 1111). Appellant said he then, "did the meet and greet" and shook hands with both individuals, after which, the group began to talk with Lopez serving as their translator. (R. 1111-12). Over the

⁸ This is actually at odds with Monroy's testimony. Specifically, Monroy testified he met Appellant when Appellant initially invited him to have a Modelo beer with Lopez and Gutierrez. (R. 283). Continuing, Monroy noted Appellant then offered him a second beer before Lopez and Appellant left Lopez's residence to get more beer. (R. 283-84).

course of the conversation, Appellant said Lopez, by failing to translate what Gutierrez, Monroy and Vidal were saying, excluded him from the conversation which made him feel, "mad" and "[l]ike an outsider." (R. 1117). As a result, Appellant claimed he attempted to leave and began walking towards his car when Lopez and Gutierrez followed him, kept him from leaving, asked for more money and purportedly told him, "no, you are not leaving."⁹ (R. 1119). Appellant further testified Gutierrez was guarding the gate to the fence at this time and claimed Lopez and Gutierrez told him they knew where his house and family were and "they would go there" which Appellant said, prompted him to ask Lopez for the change from their previous beer run. (R. 1120-21). After this exchange, Appellant testified he was "petrified" and claimed Lopez said "they had guns too" which led him to run towards the gate standing between Lopez's residence and his minivan, but when he did, Gutierrez fought him and attempted to take his weapon. (R. 1124). Appellant explained it was after this struggle that he pushed Gutierrez away and began firing. (R. 1124-25). Before he shot both Lopez and Gutierrez Appellant maintained he "was saying no, no, no, no, no." (R. 1126). After the shooting Appellant told the jury he walked to his minivan and "drove off." (R. 1126, 1127).

F. Closing Arguments

After the State opened on the law, defense counsel again criticized the State's theory of the case in its closing, reiterating its belief that Appellant was acting in self-defense when he shot and killed Lopez and Gutierrez. (R. 1624-25, 1626). In reviewing the testimony, defense counsel again attacked Lopez's credibility noting Lopez was drunk in the convenience store and therefore, was not to be believed implying Lopez's statements were simply drunken "ramblings."

⁹ While Appellant's testimony implies Monroy and Vidal remained at the residence during this altercation (R. 1118-19, 1120), both Monroy and Vidal said they left prior to the shooting. (R. 288-89, 327).

(R. 1627, 1633). Defense counsel further stated the State's theory of the case simply was devoid of common sense stating:

This is—I guess this is my version of common sense. If you are going to pay a man for sex, first of all, two hundred bucks, are you going to pay it up front and then hang out and court the guy, I guess, or—I don't know what their theory is. I don't get it. I don't understand it. I don't get what happens. He shows up and says "here, take it in advance and you pay me later, or I'll cash in later." That makes no sense. All right. Obviously I don't—obviously I have no idea how to even respond to that. It's ridiculous. And to use that as a basis of someone saying "oh, now you are not going to do it. I'm going to kill you and this guy for no reason?" That guy? That Todd Parvin would do that?

(R. 1634). Defense counsel then returned to Appellant's testimony regarding self-defense and engaged in a thorough self-defense analysis telling the jury Appellant's actions "met all of the elements required for self-defense." (R. 1643). As such, defense counsel concluded, "Todd Parvin is not guilty. Todd Parvin spent his life protecting others, and I'm going to ask you to protect him." (R. 1645).

Meanwhile, the State, in its closing, asked the jurors to consider the merits of Appellant's self-defense claim. (R. 1649). It then explained to the jury its burden of proof, noting it is not required to prove Appellant's sexual preference, but instead, is simply required to prove the elements of murder at which it explained was "a killing of another human being, in this case two, with malice aforethought." (R. 1652). Regarding malice, the State noted Gutierrez was likely shot because he served as a witness to Lopez's murder. (R. 1652). Addressing malice with respect to the killing of Lopez the State continued with its theory, pairing Monroy, Soto and Avila's testimony with Gonzalez-Merrin's eyewitness testimony of the shooting. (R. 1653-54, 1656-57). In particular, the State pointed out that Gonzalez-Merrin's testimony failed to corroborate Appellant's version of events noting Gonzalez-Merrin never saw Lopez attack Appellant and therefore Appellant's naked assertion of self-defense was not supported by the

evidence meaning Appellant was acting with implied malice when he fired his gun and shot and killed Lopez. (R. 1657). The State then asked the jury to scrutinize Appellant's testimony and highlighted various inconsistencies in Appellant's story before concluding Appellant should be found guilty of murder. (R. 1649, 1686).

G. Appellant is Convicted of Murder

Following the trial court's charge, the jury was sent back to begin deliberations. (R. 1687-1702, 1704). The next day, they found Appellant guilty as charged. (R. 1744-47).

STANDARD OF REVIEW

A trial judge's ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion or the commission of legal error which results in prejudice to the defendant. State v. Adams, 354 S.C. 361, 377, 580 S.E.2d 785, 793 (Ct. App. 2003). An abuse of discretion occurs where 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). To demonstrate prejudice, there must be a "reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof." Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005).

ARGUMENTS

- I. Appellant's failure to appeal from all grounds supporting the trial court's evidentiary ruling makes the unappealed ruling law of the case meaning the judgment must be affirmed under the two-issue rule

The State submits Appellant, by failing to appeal from all grounds supporting the trial court's evidentiary ruling, specifically the trial court's finding that evidence of Appellant's statements to Soto and Avila were independently admissible under a *res gestae* theory, results in the trial court's ruling on this issue becoming law of the case. See State v. Branham, 392 S.C.

225, 230-31, 708 S.E.2d 806, 809 (Ct. App. 2011) (concluding an appellant's failure to appeal from an alternative ground supporting the trial court's ruling renders the ruling law of the case). As a result, the State submits the judgment must be affirmed under the two-issue rule. See Jones v. Lott, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) ("Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become law of the case."); State v. Hicks, 387 S.C. 378, 379, 692 S.E.2d 919, 920 (2010) (affirming the ruling of the trial court where the appellant failed to appeal all grounds supporting the ruling); Anderson v. Short, 323 S.C. 522, 525, 476 S.E.2d 475, 477 (1996) (holding that when a trial court's decision is based upon more than one ground an appellate court must affirm unless the appellant appeals all grounds upon which the ruling was based).

It is well settled law that an unappealed ruling, right or wrong, becomes law of the case. ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997). Moreover, "[u]nder the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become law of the case." Jones, 387 S.C. at 346, 692 S.E.2d at 903. In fact, in Hicks our Supreme Court vacated an opinion by this Court when it ruled on the merits of an argument which was supported by additional unappealed rulings. 387 S.C. at 379, 692 S.E.2d at 920. In so finding, the Supreme Court reasoned that because the appellant failed to challenge the trial court's additional reasons for revoking probation, those additional rulings became law of the case, and thus the Court of Appeals' ruling had to be vacated. 387 S.C. at 346, 692 S.E.2d at 903. Thus, it seems clear that South Carolina law requires that a trial court's ruling be affirmed on appeal, regardless of whether the ruling is in error, when the party seeking appellate review

fails to appeal from all rulings supporting the trial court's decision. See e.g. Jones, 387 S.C. at 346, 692 S.E.2d at 903 ("Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become law of the case.").

Understanding this concept, the State submits the trial court's ruling must be affirmed under the two-issue rule since: (1) there were two grounds supporting the admission of Lopez's statements to Soto and Avila (R. 180-81, 395); and (2) Appellant only appealed from one of the two grounds. Br. of App. at 1 ("The trial court committed reversible error in admitting the hearsay statement of Lopez, which hearsay constituted the heart of the State's case to the jury.").

A. The Trial Court's Ruling was Based Upon Two Grounds

The record plainly reflects Lopez's statements to Soto and Avila were not simply admitted under Rule 803(1), SCRE's present sense impression exception, but were also determined to be admissible under a *res gestae* theory. (R. 180-81, 395; 1755-62; 1). This proposition is supported by a review of the extensive motion *in limine* wherein the State expressly argues Soto and Avila's statements were admissible under *res gestae* citing to Adams¹⁰ (R. 107, 109, 110), after which, the trial court agrees and denies defense counsel's motion *in limine* regarding Lopez's statements to Soto and Avila finding they are "admissible as part of the *res gestae* and as an exception to the hearsay rule[.]" (R. 180-81). This is even more apparent when the trial court issued its' on-the record ruling regarding the admission on the statements finding:

The first thing, just regarding the ruling earlier about the statements of the deceased at the gas station as being part of the *res gestae* . . . [t]he *res gestae* did

¹⁰ In Adams, the Supreme Court of South Carolina adopted the Fourth Circuit Court of Appeals reasoning in U.S. v. Masters, 622 F.2d 83, 86 (4th Cir. 1980) when it found that evidence of a defendant's cocaine use immediately prior to a robbery was admissible under a theory of *res gestae* because the use of cocaine "was inextricably intertwined with the robbery and murder." 322 S.C. at 122, 470 S.E.2d at 371.

not involve other crimes, but may have suggested some bad acts. . . I have considered the probative value versus the prejudicial effect of allowing the evidence, the *res gestae* evidence, and I find that the probative value outweighs any prejudicial effect. So that supplements my ruling on that issue.

(R. 395-96). Thus, it seems clear that when the trial court ruled on the issue and admitted the evidence regarding Lopez's statements to Soto and Avila it clearly admitted the statements *not* only under 803(1), SCRE, but also under a *res gestae* theory.¹¹

B. Appellant only Appealed from one of the Trial Court's Two Rulings

Likewise, a review of Appellant's statement of issues on appeal clearly reveals he is not challenging the admission of Lopez's statement to Soto and Avila on the grounds that the trial court erred in finding the evidence was admissible under a *res gestae* theory.¹² Instead, Appellant only claims the evidence now at issue constituted inadmissible hearsay. Br. of App. at 1 ("The trial court committed reversible error in admitting the hearsay statement of Lopez, which hearsay constituted the heart of the State's case to the jury."). Accordingly, the *res gestae* ruling is now law of the case and in light of these facts, the State submits this Court must affirm under the two-issue rule because, as was the case in Branham, Hicks and Jones, there are multiple grounds supporting the trial court's ruling.

II. Lopez's statements to Soto and Avila that Appellant had solicited and paid him for sex shortly before Appellant shot and killed Lopez and Gutierrez were admissible even assuming the trial court erred in admitting the

¹¹ Notably, even defense counsel, in its motion for a new trial, admitted the trial court ruled that evidence of Lopez's statements to Soto and Avila were admissible on multiple grounds. In particular, on the first page of its motion for a new trial, defense counsel wrote, "[t]his Court permitted the statement as an exception to the hearsay rule as a present sense impression under SCRE 803(1) and further found that the requirements of 404(b) were met to permit admission." (R. 1755).

¹² Furthermore, should Appellant argue the State allegedly abandoned its *res gestae* argument when it did not advance it in its return to defense counsel's motion for a new trial, the State notes this argument would not affect the trial court's admissibility ruling since it had already determined that issue at trial. See Wilder Corp. v. Wilke, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998) (holding the purpose of post-trial motions is to preserve issues that were raised to the trial court but not yet ruled upon); Rule 18(a), SCRCrIMP ("Counsel shall not attempt to further argue any matter after he has been heard and the ruling of the court has been pronounced."). In fact, the State's failure to address defense counsel's request for a new trial on the basis of the *res gestae* argument is of no consequence at all since this Court can "affirm any ruling, order or judgment for any ground appearing in the record on appeal" under Rule 220(c), SCACR.

statements as a present sense impression, under Rule 803(1), SCRE, meaning the judgment should still be affirmed

The State further submits that even assuming the trial court erred in finding Lopez's statements to Soto and Avila were present sense impressions under Rule 803(1), SCRE, the record still provides a basis for the admission of the statements and therefore, the judgment should still be affirmed on appeal. See Rule 220(c), SCACR (explaining the appellate court may affirm any ruling, order or judgment for any ground appearing in the record on appeal). This is so because Lopez's statements to Soto and Avila constitute admissible hearsay under Rule 804(b)(3), SCRE as a statement against penal interest.

Rules 804(a)(4) and 804(b)(3) of the South Carolina Rules of Evidence provide an exception to the hearsay rule if a declarant is unavailable due to death. Osterneck v. Osterneck, 374 S.C. 573, 579-80, 649 S.E.2d 127, 131 (Ct. App. 2007) (citing Rule 804(a), SCRE and Rule 804(b)(3), SCRE). Specifically, the exception permits the admission of the statement if the statement, "at the time of its making . . . tended to subject the declarant to civil or criminal liability . . . [such] that a reasonable person in the declarant's position would not have made the statement unless believing it to be true." Rule 804(b)(3), SCRE. The exception is "founded on the commonsense notion that reasonable people, even reasonable people who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true." State v. Prioleau, 339 S.C. 605, 611, 529 S.E.2d 561, 564 (Ct. App. 2000) (quoting Williamson v. U.S., 512 U.S. 594, 599 (1994)). Thus, in a situation such as this one, the lone question is simply whether a reasonable person in the declarant's position, in this case Lopez, would have made the statement if it was not in fact true. See Williamson, 512 U.S. at 603-04 ("The question under Rule 804(b)(3) is always whether the statement was sufficiently against the declarant's penal

interest that a reasonable person in the declarant's position would not have made the statement unless believing it to be true").

Here, the State submits Lopez's statements to both Soto and Avila—that Appellant gave him \$200 to buy beer and have sex with him—was sufficiently against Lopez's penal interest or pecuniary interest—in this case, being imprisonment or fined for prostitution—that a reasonable person in his position would not have made such a statement unless it was true.¹³ In particular, the statement, on its face is sufficiently inculpatory that anyone hearing the statement would clearly understand Lopez, by telling the hearer he just accepted money for sex, was admitting his involvement in prostitution—the world's oldest profession. Furthermore, while this case does not require corroboration under the rule, the surrounding circumstances further enhance the reliability of Lopez's statement. Specifically, the record reveals Lopez had previously discussed sleeping with Appellant earlier that evening back at his residence (R. 286-87); then made the statement while he was in the parking lot outside of the Shell station to Soto (R. 305-06); repeated the statement a second time to Avila inside the Shell station, saying almost the exact same thing (R. 313); made the statements while he was very intoxicated and in the company of others both inside and outside the Shell station (i.e. *in vinum est veritas*) (R. 305-07, 313); and continued to discuss his agreement with both Soto and Avila before eventually showing Avila

¹³ The portion of Rule 804(b)(3), SCRE stating "[a] statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement" does not apply in this case since the declarant's inculpatory statement obviously was not being used to exculpate the accused, but was instead being used to inculcate him. As such, the statement need not be corroborated. See also *State v. Doctor*, 306 S.C. 527, 529-30, 413 S.E.2d 36, 38 (1992) ("We now hold out-of-court statements made by an unavailable declarant are admissible in both civil and criminal trials. However, if offered to exculpate the accused in a criminal trial, it is admissible only if corroborating evidence clearly indicates the trustworthiness of the statement. We note this rule is in accord with the Federal Rules of Evidence Rule 804(b)(3).").

the \$200 Appellant had given him for sex. (R. 311). Thus, the State submits Lopez's statements to both Soto and Avila at the gas station, were admissible under Rule 804(b)(3), SCRE.¹⁴

CONCLUSION

For the aforementioned reasons, the State respectfully requests that this Court affirm appellant, Leslie Todd Parvin's convictions and sentences for the murders of Edgar Lopez and Pablo Guzman-Gutierrez.

Respectfully Submitted,

ALAN WILSON
Attorney General

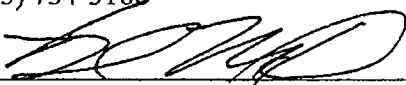
JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

BRENDAN J. McDONALD
Assistant Attorney General
S.C. Bar No. 77784

DAN E. JOHNSON
Solicitor, Fifth Judicial Circuit

South Carolina Office of Attorney General
P.O. Box 11549
Columbia, SC 29211-1549
(803) 734-3188


Brendan J. McDonald

¹⁴ Also, in the event this Court disagrees with the State's analysis on the additional sustaining ground, the trial court's error in admitting the evidence at issue is harmless beyond a reasonable doubt, since the jury clearly did not believe Appellant's self-defense claim, and was instructed that in order to convict, it must find the State proved the indictment unanimously and beyond a reasonable doubt. See *Schneble v. Florida*, 405 U.S. 427, 430 (1972) (stating "in some cases the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of the co-defendant's admission is so insignificant by comparison, it is clear beyond a reasonable doubt the improper use of the admission was harmless error"); *State v. Graham*, 314 S.C. 383, 444 S.E.2d 525, 527 (1994) (concluding a reviewing court must determine an error is harmless beyond a reasonable doubt); *Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834 (1992) (holding harmless beyond a reasonable doubt means the reviewing court can conclude the error did not contribute to the verdict beyond a reasonable doubt).

ATTORNEY(S) FOR RESPONDENTS

August 29, 2013.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Clifton Newman, Circuit Court Judge

Appellate Case No. 2012-205888

THE STATE,

RESPONDENT,

V.

LESLIE TODD PARVIN,

APPELLANT

CERTIFICATE OF COMPLIANCE

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

Respectfully Submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

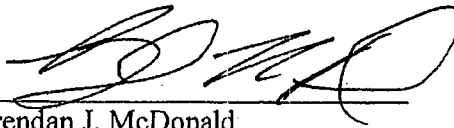
DONALD J. ZELENKA

Senior Assistant Deputy Attorney General

BRENDAN J. McDONALD
Assistant Attorney General
S.C. Bar No. 77784

DAN E. JOHNSON
Solicitor, Fifth Judicial Circuit

South Carolina Office of Attorney General
Capital and Collateral Litigation Unit
P.O. Box 11549
Columbia, SC 29211-1549
(803) 734-3188

A handwritten signature in black ink, appearing to read 'B. McDonald', is written over a horizontal line.

Brendan J. McDonald
ATTORNEY(S) FOR RESPONDENTS

August 29, 2013.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
Clifton Newman, Circuit Court Judge
Appellate Case No. 2012-205888

THE STATE,

RESPONDENT,

V.

LESLIE TODD PARVIN,

APPELLANT.

PROOF OF SERVICE

I, Brendan McDonald, counsel for the Respondent, certify that I have served the within Final Brief of Respondent and Certificate of Compliance on Appellant by depositing two (2) copies of the same in the United States mail, first class, postage prepaid, addressed to his attorney(s) of record, Dwight F. Drake and Michael J. Anzelmo at Nelson, Mullins, Riley and Scarborough, LLP at 1320 Main St. 17th Floor Columbia SC 29201.

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

This twenty-ninth day of August, 2013.


Brendan J. McDonald
Assistant Attorney General
Bar No. 77784
Office of Attorney General
P. O. Box 11549
Columbia, South Carolina 29211
(803) 734-3188
ATTORNEY FOR RESPONDENT

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County

Honorable Clifton Newman, Circuit Court Judge

Appellate Case No. 2012-105888

THE STATE,

Respondent,

LESLIE TODD PARVIN,

Appellant.

FINAL BRIEF OF RESPONDENTS

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

BRENDAN J. McDONALD
Assistant Attorney General
S.C. Bar No. 77784

DANE E. JOHNSON
Solicitor, Fifth Judicial Circuit

P.O. Box 11549
Columbia, SC 29211-1549
(803) 734-3188

ATTORNEY(S) FOR RESPONDENTS

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Case No. 11-GS-40-897 and 11-GS-40-898

The State of South Carolina, ... Respondent,

v.

Leslie Todd Parvin, ... Appellant.

Final Reply Brief of Appellant

Dwight F. Drake
Michael J. Anzelmo
NELSON MULLINS RILEY & SCARBOROUGH LLP
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, South Carolina 29201
803.799.2000

Attorneys for Appellant Leslie Todd Parvin

RECEIVED

AUG 09 2013

SC Court of Appeals

Table of Contents

Table of Authorities	iii
Argument	1
I. The two-issue rule is inapplicable to this action because the trial court's ruling was not, in fact or in law, a <i>res gestae</i> ruling and, further, the <i>res gestae</i> ruling does not support, or even relate, to the trial court's erroneous decision to admit the Lopez hearsay statements.	1
II. The State has conceded that the trial court erred in admitting the Lopez statements pursuant to Rule 803(1), SCRE	10
III. This Court should reject the additional sustaining ground advanced by the State because such grounds are not properly before the Court and do not apply to the Lopez hearsay statements	11
Conclusion	13

Table of Authorities

CASES

<u>I'On, LLC v. Town of Mt. Pleasant</u> , 338 S.C. 406, 526 S.E.2d 716 (2000)	12
<u>Pope v. Heritage Communities, Inc.</u> , 395 S.C. 404, 717 S.E.2d 765 (Ct. App. 2011)	9
<u>State v. Adams</u> , 322 S.C. 114, 470 S.E.2d 366 (1996).....	3
<u>State v. Burdette</u> , 335 S.C. 34, 515 S.E.2d 525 (1999)	6
<u>State v. Burroughs</u> , 328 S.C. 489, 492 S.E.2d 408 (Ct. App. 1997).....	6
<u>State v. Gagum</u> , 328 S.C. 560, 492 S.E.2d 822 (Ct. App. 1997).....	6, 7, 9
<u>State v. Gilmore</u> , 396 S.C. 72, 719 S.E.2d 688 (Ct. App. 2011).....	2, 3, 4, 6, 7, 9
<u>State v. Harrison</u> , 298 S.C. 333, 380 S.E.2d 818 (1989)	3
<u>State v. Smith</u>	4
<u>State v. Wiles</u> , 383 S.C. 151, 679 S.E.2d 172 (2009)	3
<u>Sulton v. Health South Corp.</u> , 400 S.C. 412, 734 S.E.2d 641 (2012).....	11
<u>Video Gaming Consultants, Inc. v. S.C. Dept. of Rev.</u> , 342 S.C. 34, 535 S.E.2d 642 (2000).....	10

RULES

S.C.A.C.R. 208(b)(2)	12
S.C.A.C.R. 220(c).....	12
S.C.R.E. 804(a)(4)	11
S.C.R.E. 804(b)(3)	11, 12
S.C.R.E. Rule 404(b)	3, 4, 5, 7, 8, 9
S.C.R.E. Rule 803	3
S.C.R.E. Rule 804(a)	11
S.C.R.E. Rule 804(b)(3).....	11
S.C.R.E. Rules 803(1)	6, 8, 9, 10

OTHER AUTHORITIES

3 Wigmore § 1767 3rd Edition (1940).....	2
<i>Black's Law Dictionary</i> 1173 (5th ed. 1979)	3

ARGUMENT

- I. The two-issue rule is inapplicable to this action because the trial court's ruling was not, in fact or in law, a *res gestae* ruling and, further, the *res gestae* ruling does not support, or even relate, to the trial court's erroneous decision to admit the Lopez hearsay statements.¹

The State, in its initial brief, relies on the two-issue rule in asking the Court to affirm the trial court. The State argues that the Lopez² hearsay statement in question was admitted by the trial court under a *res gestae* theory. The State's argument, however, is simply wrong for two primary reasons and is based on a complete misunderstanding of the application of the two-issue rule and *res gestae*. First, as detailed below, despite the trial judge's use of the term *res gestae* in describing his ruling, a review of all the language the judge employed establishes that his ruling was not based on *res gestae* at all. Accordingly, *res gestae* is not available as a "second" issue. Moreover, a *res gestae* ruling, even if made by the trial court, cannot be used to support a two-issue rule claim. A *res gestae* ruling and a hearsay ruling are wholly independent of each other. The *res gestae* determination does not independently allow admission of the evidence. Admission of a hearsay statement must still be determined under an exception to hearsay. In short, *res gestae* did not, and cannot, resolve the

¹ As in Parvin's initial brief, Parvin does not concede or admit that he made any such solicitation statements. Any discussion in this brief of the statements as alleged by the State should not be construed as an admission of such. The discussions herein are an assuming *arguendo* approach and should only be construed in that manner.

² As set forth fully in Parvin's initial brief, the statements at issue are statements by Lopez to two acquaintances, Soto and Avila, regarding Parvin's alleged solicitation statement to Lopez. Soto and Avila testified at trial to what Lopez told them that Parvin had said to Lopez previously on the day in question. These statements are referred to as the "Lopez statements" or "Lopez hearsay statements" in this brief.

question of the admissibility of the Lopez hearsay statement. Therefore, the two-issue rule does not apply, and this Court should reject this inapplicable argument.

First, the trial judge did not rule on the basis of *res gestae*. John Henry Wigmore, the acknowledged expert on the law of evidence, had this to say about *res gestae*:

The phrase *res gestae* is, in the present state of the law, not only useless, but even positively harmful—it ought therefore wholly to be repudiated as a vicious element in our legal phraseology. It should never be mentioned.

3 Wigmore § 1767 3rd Edition (1940). Wigmore died in 1943. Were he alive today, he would no doubt view this case as proof of the soundness and accuracy of his observation of more than seventy years ago.

While our courts have not determined that *res gestae* is “wholly to be repudiated,” this Court recently described the change in the law regarding *res gestae* in light of the adoption of the Rules of Evidence. As Chief Judge Few explained in State v. Gilmore, 396 S.C. 72, 719 S.E.2d 688 (Ct. App. 2011), the adoption of the Rules of Evidence in 1995 dramatically altered the doctrine of *res gestae* in South Carolina. No longer does *res gestae* relate to hearsay or admissibility of a hearsay statement. Chief Judge Few made clear in footnote 9 of that decision that all that remains of the doctrine of *res gestae* in South Carolina is evidence found to be “integral to the crime or event.” Here, Judge Newman did not rule that the evidence in question was admitted as something “integral to the crime or event.” As the State accurately notes in its initial brief, Judge Newman said:

The first thing, just regarding the ruling earlier about the statements of the deceased at the gas station as being part of the *res gestae* . . . the *res gestae* did not involve other

crimes, but may have suggested some bad acts I have considered the probative value versus the prejudicial effect of allowing the evidence, the *res gestae* evidence, and I find that the probative value outweighs any prejudicial effect. So that supplements my ruling on that issue.

{Trans. p. 394-95; R. 395-96}. This ruling of Judge Newman, while cloaked with the words “*res gestae*,” was not a ruling grounded in the current South Carolina law on the *res gestae* theory. The above-referenced footnote of Chief Judge Few in Gilmore reads in full:

Before the adoption of the South Carolina Rules of Evidence in 1995, the latin term “*res gestae*” meant two things. First, the term described an exception to the rule against hearsay, essentially a combination of the present sense impression and excited utterance exceptions now found in Rules 803(1) and (2). See Rule 803, SCRE, Note (citing *State v. Harrison*, 298 S.C. 333, 380 S.E.2d 818 (1989)). **The term is no longer used to describe a hearsay exception.** Second, *res gestae* meant the evidence was part of the body of the crime. See *Black’s Law Dictionary* 1173 (5th ed. 1979) (“‘*Res gestae*’ means literally things or things happened....”). **Under the Rules of Evidence, which do not use the term, arguing an event is part of the *res gestae* is equivalent to arguing the evidence is not an “other” act under Rule 404(b), but rather is integral to the crime or event.** Our courts have continued to use the term to describe details of a crime or event which are not to be excluded as “other crimes, wrongs, or acts” under Rule 404(b). See *State v. Wiles*, 383 S.C. 151, 158-59, 679 S.E.2d 172, 176 (2009) (stating “evidence of other crimes which supplies the context of the crime, or is intimately connected with and explanatory of the crime charged, is admissible as *res gestae* evidence”) (citing *State v. Adams*, 322 S.C. 114, 122, 470 S.E.2d 366, 370-71 (1996)).

Gilmore, 396 S.C. at 82 n.9, 719 S.E.2d at 694 (emphasis added).

A review of Judge Newman's ruling quoted above establishes that he did not rule the Lopez hearsay statement admissible consistent with the current law on *res gestae* as set forth by Judge Few. Judge Newman's ruling was not that the statement was "part of the body of the crime." Further, Judge Newman's ruling was not describing something that was "integral to the crime or event." Judge Newman's ruling was not that the hearsay statement was "intimately connected with and explanatory of the crime charged." Judge Newman's ruling was none of the things that this Court has said constitutes *res gestae* evidence since the adoption of the Rules of Evidence.

Judge Newman's ruling, by its very words, is in fact a description of an "other" act, which, as Chief Judge Few clearly states in Gilmore, no longer remains part of the doctrine of *res gestae* since the adoption of the Rules of Evidence. Should the question occur that the evidence in question may possibly be admitted under Rule 404(b), SCRE, it must be remembered that: first, the State does not argue admissibility under Rule 404(b), SCRE; second, Judge Newman did not purport to admit the evidence under Rule 404(b), SCRE; and third, the State unequivocally stated at trial that it was "not trying to admit anything under 404(b)." {Trans. p. 107; R. 108}.³ Therefore, the trial court did not admit the Lopez hearsay statement based on *res gestae* at all. Accordingly, the two-issue rule does not apply.

³ Additionally, the statement in question is not admissible under State v. Smith, 300 S.C. 216; 387 S.E.2d 245 (1989). Chief Justice Gregory, on behalf of the unanimous court and quoting a long line of cases, said that "[t]his Court has recognized the danger of prejudice where the prior bad acts are not subject to conviction and has limited the State's use of this evidence" and went further to recognize that in the absence of a conviction "[t]o be admissible, proof of prior bad acts must be clear and convincing." Smith, 300 S.C. at 218, 387 S.E.2d at 247. From Judge Newman's own description, that the statement "did not involve other crimes, but may have suggested some bad acts," it is clear that the evidence in question was far from "clear and convincing." {Trans. p. 394-95; R. 395-96 (emphasis added)}.

Even if the trial court had properly relied on the current version of *res gestae*, the State's two-issue rule argument lacks merit. A *res gestae* ruling cannot be used to support a two-issue rule claim because the *res gestae* ruling and a hearsay ruling are wholly independent of each other. The *res gestae* determination does not independently allow admission of the evidence. Admission of a hearsay statement is controlled solely by application of the exceptions to hearsay rules.

A decision that a statement qualifies as motive or *res gestae* evidence does not allow automatic admissibility of the statement because the hearsay problem with the statement still existed. Rather, the *res gestae* ruling resolves a wholly separate and distinct issue—whether the statement, which is evidence of a distinct crime or wrong, and in this case was the solicitation of prostitution, can be used to show something other than the bad character of Parvin. The statement of motive must still be independently evaluated for admissibility under an exception to hearsay. Because the *res gestae* ruling and the hearsay ruling are wholly independent of each other, the *res gestae* determination does not resolve the question of the admissibility of the statement as an exception to hearsay. Therefore, the two-issue rule does not apply, and this Court should reject this inapplicable argument.

Here, the Lopez statements in this matter indisputably⁴ constituted hearsay and were not otherwise admissible. This means the State had to establish a hearsay exception applied before the statements could be admitted to prove motive. The State failed to do so.

⁴ The State failed to argue that the Lopez statements were not hearsay.

Formerly, South Carolina law recognized a *res gestae* exception to the hearsay rule. State v. Burdette, 335 S.C. 34, 41-42, 515 S.E.2d 525, 529-30 (1999) (“Prior to the adoption of the Rules of Evidence, South Carolina law provided for a *res gestae* exception to the hearsay rule”); State v. Burroughs, 328 S.C. 489, 498, 492 S.E.2d 408, 412 (Ct. App. 1997) (same). Prior to the adoption of the Rules of Evidence, the *res gestae* doctrine combined the current “present sense impression” and “excited utterance” exceptions to hearsay into one doctrine. See, e.g., Gilmore, 396 S.C. at 82 n.9, 719 S.E.2d at 694 (“Before the adoption of the South Carolina Rules of Evidence in 1995, the [L]atin term *res gestae* . . . described an exception to the rule against hearsay, essentially a combination of the present sense impression and excited utterance exceptions now found in Rules 803(1) and (2)”) (internal quotations omitted).

However, *res gestae* no longer constitutes an exception to the hearsay rule. Id., at 82 n.9, 719 S.E.2d at 694 (“The term is no longer used to describe a hearsay exception”). The adoption of the rules of evidence removed *res gestae* from the hearsay exceptions and split them into two independent and stand alone exceptions to the hearsay rule—present sense impression and excited utterance. Burdette, 335 S.C. at 41, 515 S.E.2d at 529 (“The hearsay exceptions of present sense impression and excited utterance have replaced the *res gestae* exception in South Carolina law”); see also Id. at 41 n.6, 515 S.E.2d at 529 (discussing same in detail); Gilmore, 396 S.C. at 82 n.9, 719 S.E.2d at 694.

Thus, *res gestae* no longer impacts or governs a trial court’s admissibility decision regarding a hearsay objection. State v. Gagum, 328 S.C. 560, 565 n.3, 492 S.E.2d 822, 824 (Ct. App. 1997) (holding “the *res gestae* exception to the hearsay rule

is not related to the *res gestae* question at issue in this case,” which was whether the evidence was proper as an other bad act). *Res gestae* still exists in South Carolina jurisprudence, but the trial court analyzes a *res gestae* argument in the context of motive or other bad act as part of a Rule 404(b) , SCRE, analysis. Gilmore, 396 S.C. at 83 n.2, 719 S.E.2d at 694 (“Under the Rules of Evidence, which do not use the term, arguing an event is part of the *res gestae* is equivalent to arguing the evidence is not an ‘other’ act under Rule 404(b)”); Gagum, 328 S.C. at 565 n.3, 492 S.E.2d at 824 (holding that “the *res gestae* exception to the hearsay rule is not related to the *res gestae* question at issue in this case,” which is whether the evidence qualified as an other bad act pursuant to Rule 404(b), SCRE).

Based on the above, a *res gestae* ruling no longer impacts a trial court’s hearsay determination. The ruling that a statement could be *res gestae* as motive evidence does not address the admissibility of that hearsay statement pursuant to a hearsay exception. If the statement is hearsay and not subject to an exception, then it is inadmissible, and the State cannot use it to prove the *res gestae* motive theory authorized by the trial court. Stated differently, *res gestae* allows certain types evidence to be admitted into evidence to prove motive. The evidence used, however, still must independently satisfy other rules of evidence, including any hearsay objection, to be properly admissible. *Res gestae*, a ruling under Rule 404(b), SCRE, does not obviate that requirement. The rulings on *res gestae* and hearsay are independent and do not implicate the two-issue rule.

The State’s argument fails to apprehend this distinction and incorrectly contends that the Lopez statements were admissible, despite being undisputed hearsay, merely

because the statement possibly qualified as motive evidence as part of the *res gestae*. This is simply incorrect. The trial court made two independent evaluations⁵ in regards to the Lopez statements. The first was that the Lopez statements, which set forth an alleged separate “bad act” by Parvin, could show evidence of the motive for the charge of murder under Rule 404(b), SCRE. However, the trial court’s analysis of this issue does not end the inquiry. The trial court then had to determine whether the type of evidence proposed by the State (here, the hearsay testimony of Soto and Avila as to what Lopez told them) was properly admissible under a hearsay exception to establish the *res gestae* motive.⁶ The admissibility ruling of these Lopez hearsay statements was based solely on Rule 803(1), SCRE. Those are two separate and independent rulings with separate and independent elements/tests to consider by the trial court. Both had to be satisfied for the evidence to be properly admitted. Therefore, the trial court’s *res gestae* ruling neither impacts nor affects the subsequent hearsay ruling on the admissibility of the Lopez statements. As a result, the hearsay ruling is the only operative ruling as to the admissibility of the Lopez statements. Parvin properly appealed the only ruling addressing the hearsay problem with the evidence. Therefore, the two-issue rule is inapplicable to the appeal of the admissibility of the Lopez statements. This Court should reject this argument.

⁵ As noted above, the trial court did not rule based on the current version of *res gestae*. This argument is also made in an assuming *arguendo* manner.

⁶ Parvin’s review of South Carolina jurisprudence on the admission of *res gestae* evidence indicates that the evidence introduced in those cases was properly admissible and non-hearsay evidence. Therefore, any reliance by the State at argument on cases allowing admission of *res gestae* evidence is misplaced. Those cases do not support an argument that a *res gestae* decision by the trial court would allow classic hearsay testimony to be admitted to establish motive.

As an additional reason the two-issue rule does not apply, the State is barred from making this argument. The State cannot reasonably assert that the trial court ruling on admissibility of the Lopez hearsay statements was based on a Rule 404(b), SCRE, or a *res gestae* ruling.⁷ The State admitted at trial that it was “not trying to admit anything under 404(b).” {Trans. p. 107; R. 108}. *Res gestae* has been subsumed as part of a Rule 404(b), SCRE, analysis after the adoption of the rules of evidence. Gilmore, 396 S.C. at 83, 719 S.E.2d at 694 (“Under the Rules of Evidence, which do not use the term, arguing an event is part of the *res gestae* is equivalent to arguing the evidence is not an ‘other’ act under Rule 404(b)”); Gagum, 328 S.C. at 565 n.3, 492 S.E.2d at 824 (holding that “the *res gestae* exception to the hearsay rule is not related to the *res gestae* question at issue in this case,” which is whether the evidence qualified as an other bad act pursuant to Rule 404(b), SCRE).

Thus, the State admitted the trial court did not admit the Lopez statements as part of their *res gestae* argument and that the admission was based solely on the Rule 803(1), SCRE, exception to hearsay. This admission precludes them from now arguing that the trial court admitted the Lopez statements as part of the *res gestae* as to Parvin’s motive. See, e.g., Pope v. Heritage Communities, Inc., 395 S.C. 404, 430-31, 717 S.E.2d 765, 779 (Ct. App. 2011) (holding that “[t]he parties to a suit are bound by admissions, made by their attorneys of record, in open court, or elsewhere, touching on matters looking to the progress of the trial”) (citations omitted). As a result, the two-issue rule is inapplicable.

⁷ As noted above, the trial court did not rule based on the current version of *res gestae*. The State, however, argues such a ruling was made by the trial court. The State is barred from such an argument as set forth herein.

II. The State has conceded that the trial court erred in admitting the Lopez statements pursuant to Rule 803(1), SCRE.

The State failed to refute, address, or even mention Parvin's argument that the Lopez statements constituted hearsay and that the trial court erred in admitting the statements as a present sense impression under Rule 803(1), SCRE. The State has, therefore, conceded this issue on appeal.

Our Supreme Court has established that the failure of a respondent to make any argument on an issue in its brief renders the issue abandoned. See, e.g., Video Gaming Consultants, Inc. v. S.C. Dept. of Rev., 342 S.C. 34, 42 n.7, 535 S.E.2d 642, 647 n.7 (2000) (holding that the failure of the respondent in the appeal to argue an issue in its brief established that the respondent abandoned the issue and, therefore, the court was precluded from considering it on appeal). The decision of the State to not address Parvin's argument in its Respondent's brief renders the issue abandoned and precludes this Court from considering a contrary position. Because the State abandoned its position from trial on this issue, the State effectively concedes that the trial court erred in admitting the Lopez statements pursuant to Rule 803(1), SCRE. This Court should adhere to precedent and treat Parvin's argument as conceded by the State.

Moreover, the Court should reject the State's conclusory argument that this error was harmless. See Respondent's Initial Brief p. 17, footnote 1. The State makes no attempt to refute the fact that the Lopez hearsay statements constituted prejudicial error because the statements related to the seminal issues in the case and allowed the State to shape its entire presentation to the jury. Without the theory extrapolated from

the Lopez statements, the State had no motive on which to try Parvin. Notably, the testimony from Soto and Avila was the only vehicle to admit the Lopez statements to present this theory to the jury.

It was vital that the trial court make the proper ruling on admissibility of those statements. See Sulton v. Health South Corp., 400 S.C. 412, 734 S.E.2d 641 (2012) (holding that errors relating to the seminal issue in a case cannot constitute harmless error and warrants reversal). Moreover, the erroneous decision to admit the Lopez statements prejudiced Parvin's ability to defend on the basis of self-defense as fully set forth in Parvin's initial brief to this Court. Therefore, Parvin suffered prejudice from the erroneous admission of the Lopez hearsay statements, and this Court should reverse.

III. This Court should reject the additional sustaining ground advanced by the State because such grounds are not properly before the Court and do not apply to the Lopez hearsay statements.

In its brief, the State alleges that this Court should affirm based on Rule 804(b)(3), SCRE.⁸ See Respondent's Initial Brief p. 15-17. This argument lacks merit for two reasons. First, the State did not present this argument to the trial, and as such, it cannot constitute an additional sustaining ground. Second, Rule 804(b)(3), SCRE, does not apply to the Lopez hearsay statements. This Court should reject this argument.

The State did not argue, or even mention, this Rule 804(b)(3), SCRE, argument at any time to the trial court, nor was this argument briefed or presented to the trial

⁸ The first part of a Rule 804(b)(3), SCRE, analysis is a finding that the declarant is unavailable per Rule 804(a), SCRE. Such a finding is proper here under Rule 804(a)(4), SCRE. Thus, the analysis of this issue is limited to the State's arguments pursuant to Rule 804(b)(3), SCRE.

court in response to Parvin's motion for a new trial. Thus, the argument is not properly before this Court; even as an additional sustaining ground. See Rules 208(b)(2) and 220(c), SCACR (limiting additional sustaining arguments to those "ground(s) appearing in the Record on Appeal"). The ground now advanced as an additional sustaining ground does not appear in the record on appeal. The ground did not "appear" until the State raised it for the first time in its brief to this Court. Additional sustaining grounds cannot be used to completely alter how a party presented the case to the trial court, nor can such grounds be used as a trap on appeal. Therefore, the State's argument is improper and should be ignored by this Court. I'On, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 421, 526 S.E.2d 716, 724 (2000) (holding that the appellate court is "likely to ignore" any additional sustaining grounds not presented to the trial court).

Even if this argument were properly before this Court, it should still be rejected because Rule 804(b)(3), SCRE, does not apply to the Lopez statement. The rule provides in part that:

Statement Against Interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true.

Rule 804(b)(3), SCRE (emphasis added).

The State cannot be serious in its assertion that the Lopez statements were admissible because he would be subjected to criminal liability for prostitution. See

Respondent's Initial Brief p. 16. The Lopez statement fails to establish the elements set forth in the rule. No "reasonable person" in the declarant's position (here Lopez) would think he would be charged with prostitution for simply referencing a statement made to him by another person, especially when the declarant (Lopez) qualified that statement with a rejection of the solicitation offer. In fact, the State's entire theory of the trial focused on Lopez's rejection of the purported solicitation advance from Parvin. Certainly a person who rejects a solicitation offer cannot reasonably expect to face criminal prostitution charges for acting lawfully in rejecting the offer. The State's position to the contrary borders on frivolous. This Court should reject this argument.

Conclusion

Based on the foregoing, this Court should find the trial court committed reversible error in admitting the hearsay statement of Lopez and reverse.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

Dwight P. Drake
SC Bar No. 001745
E-Mail: dwight.drake@nelsonmullins.com
- Michael J. Anzelmo
SC Bar No. 72933
E-Mail: michael.anzelmo@nelsonmullins.com
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, South Carolina 29201
803.799.2000

Attorneys for Appellant Leslie Todd Parvin

Columbia, South Carolina

August 9, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Case No. 11-GS-40-897 and 11-GS-40-898

The State of South Carolina, ... Respondent,

v.

Leslie Todd Parvin, ... Appellant.

RECEIVED
AUG 09 2013

SC Court of Appeals

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief complies with Rule 211(b), SCACR.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

Dwight F. Drake

SC Bar No. 001745

E-Mail: dwight.drake@nelsonmullins.com

Michael J. Anzelmo

SC Bar No. 72933

E-Mail: michael.anzelmo@nelsonmullins.com

1320 Main Street / 17th Floor

Post Office Box 11070 (29211-1070)

Columbia, South Carolina 29201

803.799.2000

Attorneys for Appellant Leslie Todd Parvin

Columbia, South Carolina

August 9, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Case No. 11-GS-40-897 and 11-GS-40-898

The State of South Carolina, ... Respondent,

v.

Leslie Todd Parvin, ... Appellant.

PROOF OF SERVICE

I, the undersigned administrative assistant in the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Leslie Todd Parvin, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by hand delivery, to the following address(es):

Pleadings:

Counsel Served:

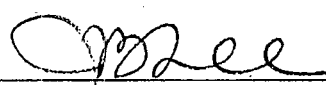
Final Reply Brief

Brendan McDonald
S.C. Attorney General's Office
Rembert C. Dennis Building
P. O. Box 11549
Columbia, SC 29211

RECEIVED

AUG 09 2013

SC Court of Appeals



Jennifer B. Lee

August 9, 2013



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

July 30, 2014

Mr. Dwight Franklin Drake, Esquire
PO Box 11070
Columbia SC 29211

Mr. Michael J. Anzelmo, Esquire
PO Box 11070
Columbia SC 29211

Re: The State v. Leslie Parvin
Appellate Case No. 2012-205888

Dear Counsel:

Enclosed is the decision of the Court. The remittitur will be sent as provided by Rule 221(b) of the South Carolina Appellate Court Rules.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Jenny Abbott Kitchings", with a stylized flourish at the end.

CLERK

cc: Brendan Jackson McDonald, Esquire
Donald J. Zelenka, Esquire
Daniel Edward Johnson, Esquire
The Honorable Clifton Newman

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Leslie Parvin, Appellant.

Appellate Case No. 2012-205888

Appeal From Richland County
Clifton Newman, Circuit Court Judge

Opinion No. 5254
Heard February 5, 2014 – Filed July 30, 2014

AFFIRMED

Dwight Franklin Drake and Michael J. Anzelmo, both of
Nelson Mullins Riley & Scarborough, LLP, of Columbia,
for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy
Attorney General John W. McIntosh, Senior Assistant
Deputy Attorney General Donald J. Zelenka, Assistant
Attorney General Brendan Jackson McDonald, and
Solicitor Daniel Edward Johnson, all of Columbia, for
Respondent.

LOCKEMY, J.: In this criminal appeal, Leslie Todd Parvin argues the trial court committed reversible error in allowing inadmissible hearsay statements from two witnesses. We affirm.

FACTS

Parvin was indicted on two counts of murder related to the deaths of Edgar Lopez and Pablo Guzman-Gutierrez. The State tried the case under the theory that Parvin solicited Lopez for sex and then killed Lopez and Gutierrez in retaliation when Lopez refused him later in the night. Parvin argued self-defense.

Motion In Limine

Immediately prior to trial, Parvin made a motion *in limine* to exclude any testimony referring to other crimes, wrongs, or bad acts. He contended that any statements alleging he was at Lopez's home for homosexual sex were inadmissible; specifically he objected to statements from three different witnesses—testimony from Adan Soto and Marlin Avila regarding statements made by Lopez at a gas station and testimony from Jose Monroy regarding statements Monroy overheard at Lopez's home. For purposes of appeal, we focus only on the contested testimony from Soto and Avila, which will be referred to as the Lopez statements. Parvin does not appeal any issue related to Monroy's testimony.

Parvin argued (1) the Lopez statements were inadmissible pursuant to Rule 404(b), SCRE, because the State could not prove by clear and convincing evidence that Parvin committed any bad acts, (2) the State was improperly introducing the Lopez statements to prove he was of bad character, and (3) the Lopez statements were more prejudicial than probative. Parvin also contended the Lopez statements would be inadmissible as hearsay.

The State argued the Lopez statements were admissible under the theory of res gestae or the present sense impression exception to the hearsay rule.¹ As to the issue of res gestae, the State asserted there was an ongoing chain of events, and the Lopez statements were an integral part of the crime. The State also contended the Lopez statements were admissible under Rule 803(3), SCRE, "then existing mental, emotional, or physical condition." Finally, the State emphasized that the Lopez statements also indicated Parvin's alleged motive and were not intended to show bad character. However, the State also asserted it was not attempting to enter the Lopez statements pursuant to Rule 404(b), SCRE.²

¹ The State cited *State v. Simpson*, 325 S.C. 37, 479 S.E.2d 57 (1996), and *State v. Adams*, 322 S.C. 114, 470 S.E.2d 366 (1996), to support its arguments.

² Rule 404(b), SCRE provides, "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity

The trial court ruled the Lopez statements (1) were admissible under the *res gestae* theory, (2) constituted an exception to the hearsay rule, and (3) were probative to the issue of Parvin's motive. During the trial, the trial court clarified its holding and stated that in admitting the testimonies under the *res gestae* theory, the testimonies "did not involve other crimes, but may have suggested some bad acts." It further stated the probative value of the evidence outweighed the prejudicial effect.

Parvin's Version of the Events

Parvin testified that on July 30, 2010, the day of the incident, he was driving his van and collecting scrap metal for recycling and profit. He carried a forty-five caliber pistol in his van as a result of his prior military service. On the way home from an unsuccessful search, Parvin picked up beer and passed Lopez's home, where Lopez and Gutierrez were drinking beer in the yard. Parvin stated he assumed the men were in the construction industry due to their attire and could possibly have leads regarding scrap metal. Parvin stopped in the yard and began speaking and drinking with Lopez and Gutierrez. Parvin claimed he did not want to immediately ask for connections or leads on scrap metal and first wanted to establish some sort of relationship with the men.

Parvin agreed to drive Lopez to the gas station for more beer and gave Lopez money for the beer. While at the gas station, Parvin claimed Lopez observed him move his gun from between the front seats and place it in the waistband of his shorts. Parvin remained in the van while Lopez entered the store and purchased the beer. Parvin and Lopez then returned to Lopez's home. Throughout the evening, several people came and left the home until only Parvin, Lopez, and Gutierrez remained. Parvin stated that when he tried to leave, Lopez would not let him and requested more money. Parvin refused and then asked for the change from the beer Lopez had purchased earlier in the night. Lopez became upset and threatened Parvin and Parvin's family. When Parvin attempted to leave again, Gutierrez blocked his exit. Gutierrez made physical contact with Parvin and tried to obtain control of Parvin's gun. Parvin kept control of his gun and saw Lopez reach for something in the shed located in the yard. Parvin stated he became fearful for his life at that time and shot both Lopez and Gutierrez in self-defense.

therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent."

The State's Case

In support of its version of events, the State offered testimony from Jose Monroy, who claimed he was drinking with Parvin, Lopez, and Gutierrez prior to the incident. Monroy stated he overheard Lopez tell Gutierrez that Parvin would be sleeping inside with him that evening. The beer was depleted at some point during the evening, and Lopez asked Parvin to drive him to a gas station to purchase more. The State presented testimony from Soto and Avila, who spoke with Lopez at the gas station.³ Soto and Lopez were both from Guatemala, and Soto knew Lopez through Soto's sister-in-law. Soto stated Lopez approached him and began talking with him. Lopez mentioned he was at the gas station with an American to purchase a case of beer and further explained that Parvin had offered two hundred dollars to buy the beer and have sex. Lopez then showed Soto the two hundred dollars but told Soto he was going to tell Parvin to go home. Avila corroborated Soto's testimony. After returning to Lopez's home, the State opined that Parvin became angry because Lopez refused to have sex with him. The State presented Roberto Gonzalez-Merrin as an eyewitness to the shooting. Merrin explained that Parvin pulled a gun from his back and shot Lopez before turning the gun on Gutierrez, who was attempting to flee the scene, and shooting him in the back. Merrin testified that when the shooting occurred, Parvin was outside of the fence that surrounded Lopez's front yard while Lopez and Gutierrez were both inside the fence. Following the shooting, Parvin fled the scene in his minivan. Parvin then returned to his home, destroyed the guns used in the shooting, checked his family in to a motel for the evening, changed his appearance, and drove his minivan to Louisiana. While in Louisiana, Parvin sold his minivan for scrap and continued to Texas. Parvin returned to Columbia on August 15, 2010, and despite knowing that the authorities were looking for him, he never attempted to contact police.

Verdict

The jury convicted Parvin of two counts of murder, and the trial court sentenced Parvin to thirty-five years' imprisonment. Parvin moved for a new trial based upon three grounds, and the trial court denied his motion. Thereafter, Parvin filed this appeal, in which he focuses only on the first ground contained within his motion for a new trial.

STANDARD OF REVIEW

³ Parvin objected to the testimony immediately prior to Soto's and Avila's answers, but the trial court overruled the objection.

"In criminal cases, the appellate court sits to review errors of law only." *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001) (citing *State v. Cutter*, 261 S.C. 140, 147, 199 S.E.2d 61, 65 (1973)). "We are bound by the trial court's factual findings unless they are clearly erroneous." *Id.* at 6, 545 S.E.2d at 829 (citing *State v. Quattlebaum*, 338 S.C. 441, 452, 527 S.E.2d 105, 111 (2000)). "This same standard of review applies to preliminary factual findings in determining the admissibility of certain evidence in criminal cases." *Id.* "On review, we are limited to determining whether the trial judge abused his discretion." *Id.* "This [c]ourt does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial judge's ruling is supported by any evidence." *Id.*

LAW/ANALYSIS

Parvin argues the trial court committed reversible error by allowing Soto and Avila to testify about the Lopez statements.⁴ Specifically, he argues the Lopez statements were hearsay and did not qualify as a present sense impression under Rule 803(1), SCRE. He also argues the Lopez statements were unduly prejudicial because they related to the central issues in the case and allowed the State "to shape its entire presentation to the jury." We agree.

"The admission or exclusion of evidence is a matter within the trial court's sound discretion, and an appellate court may disturb a ruling admitting or excluding evidence only upon a showing of 'a manifest abuse of discretion accompanied by probable prejudice.'" *State v. Dennis*, 402 S.C. 627, 635, 742 S.E.2d 21, 25 (Ct. App. 2013) (quoting *State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 845, 847-48 (2006)).

"Hearsay is an out of court statement, offered in court to prove the truth of the matter asserted." *State v. Townsend*, 321 S.C. 55, 59, 467 S.E.2d 138, 141 (Ct. App. 1996). "Hearsay is inadmissible as evidence unless an exception applies." *Id.* Rule 803(1), SCRE, provides for the "present sense impression" exception, which allows for the admission of "a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." Our courts have not delineated a time frame that would

⁴ At trial, Parvin also objected to any reference by Monroy regarding homosexual sex. However, he does not raise that argument on appeal. Thus, we only address the Lopez statements.

constitute "immediately thereafter"; however, this court has held that a statement given nearly ten hours after the perceived incident cannot be admitted under Rule 803(1), SCRE. *State v. Burroughs*, 328 S.C. 489, 499; 492 S.E.2d 408, 413 (Ct. App. 1997).

Parvin contests the admission of the following testimony from Soto:

Q: And did you have a chance to speak to [Lopez] on that day?

A: Yeah, I spoke to him the day that I saw him at the gas station at that time.

.....

Q: And while you were talking to [Lopez], did he mention what he was doing at the gas station?

A: Yeah, he told me he was going to buy a case of beer, that he was with an American.

Q: Okay. Did he say anything else about the American and the beer?

A: Yes, he said the American had given him \$200 to buy beer because he wanted to have sex with him.

Parvin also contests the admission of the following testimony from Avila:

Q: What did [Lopez] tell you about what he was doing with that American?

A: He said that the American had given him money to buy beer and he said the American had given him \$200 to have sex.

The witnesses gave no indication as to the amount of time between when Parvin allegedly solicited sex and when Lopez spoke with them. The State simply explained it was an "ongoing chain of events." We find the trial court erred in ruling the Lopez statements were admissible because the timing of the declarant's statement is a critical component of the present sense impression exception.

Despite finding error in the trial court's ruling, we must also find that it prejudiced Parvin before we can reverse. See *State v. Garner*, 389 S.C. 61, 67-68, 697 S.E.2d 615, 618 (Ct. App. 2010) ("[I]mproper admission of hearsay testimony constitutes

reversible error only when the admission causes prejudice. Such error is deemed harmless when it could not have reasonably affected the result of the trial, and an appellate court will not set aside a conviction for such insubstantial errors." (alteration by court) (internal quotation marks and citation omitted)).

Further in the trial, the State presented Detective William Gonzalez as a witness. Detective Gonzalez recorded statements from both Avila and Soto regarding the night of the incident. Detective Gonzalez testified that Avila stated Lopez said Parvin gave him two hundred dollars to have sex. There was no objection at the time of this testimony. Because the improperly admitted Lopez statements were cumulative to Detective Gonzalez's testimony, their admission did not prejudice Parvin. *See State v. Townsend*, 321 S.C. 55, 59, 467 S.E.2d 138, 141 (Ct. App. 1996) ("Where the hearsay is merely cumulative to other evidence, its admission is harmless.").

CONCLUSION

For the forgoing reasons, we find the trial court's error in allowing hearsay testimony was harmless because it was cumulative to other evidence received without objection. Thus, the trial court is

AFFIRMED.

WILLIAMS and KONDUROS, JJ., concur.



ALAN WILSON
ATTORNEY GENERAL

August 13, 2014

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

Re: The State v. Leslie Parvin
Appeal from Richland County
Appellate Case No.: 2012-205888

Dear Ms. Kitchings:

Enclosed please find the original and six (6) copies of the Petition for Rehearing dated August 13, 2014, along with proof of service, in the above-referenced case.

Thank you for your cooperation in this matter.

Sincerely,

Brendan J. McDonald
Assistant Attorney General

BJM/mv
Enclosures

cc: ✓ Michael J. Anzelmo, Esq.
Dwight F. Drake, Esq.
The Honorable Daniel E. Johnson, Solicitor, 5th Judicial Circuit
Trisha Allen, Victim Services

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County

Honorable Clifton Newman, Circuit Court Judge

Appellate Case No. 2012-205888

THE STATE,

RESPONDENT,

V.

LESLIE TODD PARVIN,

APPELLANT.

PETITION FOR REHEARING *EN BANC*

Comes now Respondent, above named, by and through the Attorney General of South Carolina, and pursuant to Rule 221(a), SCACR, hereby respectfully petitions this Court for rehearing.

STATEMENT OF THE CASE

Leslie Todd Parvin was indicted by a Richland County grand jury for murdering Edgar Lopez ("Lopez") and Pablo Guzman-Gutierrez ("Gutierrez").¹ (R. 1773-74). Parvin was tried before the Honorable Clifton Newman and a jury on December 12, 2011 through December 21, 2011 where he was represented by Fielding Pringle, Jennifer Davis and Luke Shealy. (R. 2, 148, 408, 757, 1020, 1306, 1552, 1711). At the conclusion of trial, Parvin was found guilty as charged and on December 28, 2011, received concurrent thirty-five (35) year sentences. (R.

¹ As noted in Parvin's brief, Gutierrez is referenced throughout the record as Pablo Guzman or Guzman. In an effort to be consistent with Parvin's brief, the State will refer to him solely as Gutierrez.

1744, 1755). Following his conviction, Parvin unsuccessfully sought a new trial. (R. 1755-62, 1769-72, 1).

Parvin subsequently sought appellate review arguing only that the introduction of Lopez's statements to two acquaintances in the time leading up to his death was reversible error because the statements were purportedly inadmissible hearsay. (Br. of App. at 3). In response, the State argued that: (1) Parvin's failure to appeal from all grounds supporting the trial court's evidentiary ruling resulted in the unappealed ruling becoming law of the case meaning the judgment must be affirmed under the two-issue rule; (2) Lopez's statements to Soto and Avila indicating Parvin had solicited and paid him for sex prior to Parvin shooting and killing both Lopez and Gutierrez were admissible under Rule 804(B)(3), SCRE as a statement against interest; and (3) even assuming the trial court erred in admitting Soto and Avila's statements, any error was harmless.

On July 30, 2014, this Court issued a published opinion affirming Parvin's conviction and sentence and finding the admission of Soto's and Avila statements was harmless error. State v. Parvin, 2014 WL 3734369 (July 30, 2014). While the State agrees with the Court's conclusion concerning the question of harmless error, it respectfully requests rehearing to address: (1) whether merits review is appropriate where Parvin failed to appeal from all grounds supporting the trial court's evidentiary ruling; and (2) whether Soto and Avila's statements were in fact admissible as statements against interest.

STANDARD OF REVIEW

"[A] petition for rehearing must 'state with particularity the points supposed to have been overlooked or misapprehended by the court.' " Herron v. Century BMW, 395 S.C. 461, 466, 719 S.E.2d 640, 643 (2011) (quoting Rule 221(a), SCACR). Similarly, "[t]he purpose of a petition

for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time.” Kennedy v. S.C. Retirement Sys., 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001) (quoting Jean H. Toal, Appellate Practice in South Carolina 309 (1999)).

ARGUMENTS

- I. The appellate panel overlooked or misapprehended the effect of Parvin’s failure to appeal from all grounds supporting the trial court’s evidentiary ruling and therefore erred in addressing the merits of Parvin’s argument since an unappealed ruling is law of the case and therefore the judgment must be affirmed under the two-issue rule

The appellate panel, by failing to address the legal effect of Parvin’s failure to seek appellate review of all grounds supporting the trial court’s evidentiary ruling, appears to have overlooked the legal effect of the law of the case doctrine. Indeed, it is well settled law that an unappealed ruling, right or wrong, becomes law of the case. ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997). Moreover, “[u]nder the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become law of the case.” Jones v. Lott, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010). In fact, in State v. Hicks, 387 S.C. 378, 692 S.E.2d 919 (2010) our Supreme Court vacated an opinion by this Court when it ruled on the merits of an argument which was supported by additional unappealed rulings. 387 S.C. at 379, 692 S.E.2d at 920. In so finding, the Supreme Court reasoned that because the appellant failed to challenge the trial court’s additional reasons for revoking probation, those additional rulings became law of the case, and therefore the Court of Appeals’ ruling had to be vacated. 387 S.C. at 346, 692 S.E.2d at 903. Thus, it seems clear that South Carolina law requires that a trial court’s ruling be affirmed on appeal, regardless of whether the trial court’s

ruling is correct, when the party seeking appellate review fails to appeal from all rulings supporting the trial court's decision. See e.g. Jones, 387 S.C. at 346, 692 S.E.2d at 903 ("Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become law of the case.").

Here, Parvin, by failing to appeal from all grounds supporting the trial court's evidentiary ruling, specifically the trial court's finding that evidence of his statements to Soto and Avila were independently admissible under a *res gestae* theory, results in the trial court's ruling on this issue becoming law of the case. See State v. Branham, 392 S.C. 225, 230-31, 708 S.E.2d 806, 809 (Ct. App. 2011) (concluding an appellant's failure to appeal from an alternative ground supporting the trial court's ruling renders the ruling law of the case). As a result, the State submits the judgment must be affirmed under the two-issue rule. See Jones, 387 S.C. at 346, 692 S.E.2d at 903 ("Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become law of the case."); Hicks, 387 S.C. at 379, 692 S.E.2d 919, 920 (affirming the ruling of the trial court where the appellant failed to appeal all grounds supporting the ruling); Anderson v. Short, 323 S.C. 522, 525, 476 S.E.2d 475, 477 (1996) (holding that when a trial court's decision is based upon more than one ground an appellate court must affirm unless the appellant appeals all grounds upon which the ruling was based).

Specifically, the record plainly reflects Lopez's statements to Soto and Avila were not simply admitted under Rule 803(1), SCRE's present sense impression exception, but were also determined to be admissible under a *res gestae* theory. (R. 180-81, 395; 1755-62; 1). This proposition is supported by a review of the extensive motion *in limine* wherein the State

expressly argues Soto and Avila's statements were admissible under *res gestae* citing to Adams² (R. 107, 109, 110), after which, the trial court agrees and denies defense counsel's motion *in limine* regarding Lopez's statements to Soto and Avila finding they are "admissible as part of the *res gestae* and as an exception to the hearsay rule[.]" (R. 180-81). This is even more apparent when the trial court issued its' on-the record ruling regarding the admission on the statements finding:

The first thing, just regarding the ruling earlier about the statements of the deceased at the gas station as being part of the *res gestae* . . . [t]he *res gestae* did not involve other crimes, but may have suggested some bad acts. . . I have considered the probative value versus the prejudicial effect of allowing the evidence, the *res gestae* evidence, and I find that the probative value outweighs any prejudicial effect. So that supplements my ruling on that issue.

(R. 395-96). Thus, it seems clear that when the trial court ruled on the issue and admitted the evidence regarding Lopez's statements to Soto and Avila it clearly admitted the statements *not only* under 803(1), SCRE, *but also* under a *res gestae* theory.³

Likewise, a review of Parvin's statement of issues on appeal clearly reveals he is not challenging the admission of Lopez's statement to Soto and Avila on the grounds that the trial court erred in finding the evidence was admissible under a *res gestae* theory.⁴ Instead, Parvin

² In Adams, the Supreme Court of South Carolina adopted the Fourth Circuit Court of Appeals reasoning in U.S. v. Masters, 622 F.2d 83, 86 (4th Cir. 1980) when it found that evidence of a defendant's cocaine use immediately prior to a robbery was admissible under a theory of *res gestae* because the use of cocaine "was inextricably intertwined with the robbery and murder." 322 S.C. at 122, 470 S.E.2d at 371.

³ Notably, even defense counsel, in its motion for a new trial, admitted the trial court ruled that evidence of Lopez's statements to Soto and Avila were admissible on multiple grounds. In particular, on the first page of its motion for a new trial, defense counsel wrote, "[t]his Court permitted the statement as an exception to the hearsay rule as a present sense impression under SCRE 803(1) and further found that the requirements of 404(b) were met to permit admission." (R. 1755).

⁴ Furthermore, should Parvin argue the State allegedly abandoned its *res gestae* argument when it did not advance it in its return to defense counsel's motion for a new trial, the State notes this argument would not affect the trial court's admissibility ruling since it had already determined that issue at trial. See Wilder Corp. v. Wilke, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998) (holding the purpose of post-trial motions is to preserve issues that were raised to the trial court but not yet ruled upon); Rule 18(a), SCRCrimP ("Counsel shall not attempt to further argue any matter after he has been heard and the ruling of the court has been pronounced."). In fact, the State's failure to address defense counsel's request for a new trial on the basis of the *res gestae* argument is of no consequence at all

only claims the evidence now at issue constituted inadmissible hearsay. Br. of App. at 1 (“The trial court committed reversible error in admitting the hearsay statement of Lopez, which hearsay constituted the heart of the State’s case to the jury.”). Accordingly, the *res gestae* ruling is now law of the case and in light of these facts, the State submits this Court must affirm under the two-issue rule because, as was the case in Branham, Hicks and Jones, there are multiple grounds supporting the trial court’s ruling.

II. The appellate panel overlooked or misapprehended that Lopez’s statements to Soto and Avila explaining Parvin solicited and paid him for sex shortly before Parvin shot and killed both Lopez and Gutierrez were admissible as statements against interest

The State further submits that the appellate panel, while not required to address the State’s additional sustaining ground in light of its conclusions on harmless error, overlooked the fact that both Soto and Avila’s testimony was admissible pursuant to Rule 804(b)(3), SCRE.⁵ This is so because Lopez’s statements to Soto and Avila constitute admissible hearsay under Rule 804(b)(3), SCRE.

Rules 804(a)(4) and 804(b)(3) of the South Carolina Rules of Evidence provide an exception to the hearsay rule if a declarant is unavailable due to death. Osterneck v. Osterneck, 374 S.C. 573, 579-80, 649 S.E.2d 127, 131 (Ct. App. 2007) (citing Rule 804(a), SCRE and Rule 804(b)(3), SCRE). Specifically, the exception permits the admission of the statement if the statement, “at the time of its making . . . tended to subject the declarant to civil or criminal liability . . . [such] that a reasonable person in the declarant’s position would not have made the statement unless believing it to be true.” Rule 804(b)(3), SCRE. The exception is “founded on

since this Court can “affirm any ruling, order or judgment for any ground appearing in the record on appeal” under Rule 220(c), SCACR.

⁵ The State, as noted in its brief and reiterated in oral argument, submits the record provides a basis for the admission of the statements. See Rule 220(c), SCACR (explaining the appellate court may affirm any ruling, order or judgment for any ground appearing in the record on appeal).

the commonsense notion that reasonable people, even reasonable people who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true.” State v. Prioleau, 339 S.C. 605, 611, 529 S.E.2d 561, 564 (Ct. App. 2000) (quoting Williamson v. U.S., 512 U.S. 594, 599 (1994); Fed. R. Evid. R. 804(b)(3) Advisory Comm. Notes (citing Hileman v. Northwest Engineering Co., 346 F.2d 668, 670 (6th Cir.) (explaining the rationale behind the statement against interest doctrine is that people typically do not make statements which are damaging to themselves unless satisfied for good reason that they are true). Thus, in a situation such as this one, the lone question is simply whether a reasonable person in the declarant’s position, in this case Lopez, would have made the statement if it was not in fact true. See Williamson, 512 U.S. at 603-04 (“The question under Rule 804(b)(3) is always whether the statement was sufficiently against the declarant’s penal interest that a reasonable person in the declarant’s position would not have made the statement unless believing it to be true”).

Here, the State submits the appellate panel overlooked the fact Lopez’s statements to both Soto and Avila—that Appellant gave him \$200 to buy beer and have sex with him—was sufficiently against Lopez’s penal interest or pecuniary interest—that a reasonable person in his position would not have made such a statement unless it was true.⁶

In particular, the statement on its face is sufficiently inculpatory that anyone hearing the statement would clearly understand Lopez, by telling the hearer he just accepted money for sex, was admitting his involvement in prostitution—the world’s oldest profession. Further, while this

⁶ The portion of Rule 804(b)(3), SCRE stating “[a] statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement” does not apply in this case since the declarant’s inculpatory statement obviously was not being used to exculpate the accused, but was instead being used to inculcate him. As such, the statement need not be corroborated. See also State v. Doctor, 306 S.C. 527, 529-30, 413 S.E.2d 36, 38 (1992) (“We now hold out-of-court statements made by an unavailable declarant are admissible in both civil and criminal trials. However, if offered to exculpate the accused in a criminal trial, it is admissible only if corroborating evidence clearly indicates the trustworthiness of the statement. We note this rule is in accord with the Federal Rules of Evidence Rule 804(b)(3).”).

case does not require corroboration under the rule, the surrounding circumstances in which the disclosure occurred further enhance the reliability of Lopez's statement. Specifically, the record reveals:

- Lopez had previously discussed sleeping with Parvin earlier that evening back at his residence to an acquaintance (R. 286-87);
- Lopez subsequently volunteered the details of his arrangement while he was in the parking lot outside of the Shell station to Soto, another acquaintance (R. 305-06);
- Lopez, without being questioned, repeated the details of he and Parvin's arrangement a third time to Avila, another acquaintance, inside the Shell station, saying almost the exact same thing (R. 313);
- Lopez volunteered the statements to each of the aforementioned acquaintances while he was very intoxicated (i.e. *in vinum est veritas*) (R. 305-07, 313);
- When Lopez made the statements, he was in the company of others (R. 305-07, 313); and
- Lopez continued to discuss his agreement with both Soto and Avila, which was caught on video, before eventually showing Avila the \$200 Parvin had given him for sex. (R. 311).

Moreover, it should be noted that the circumstances under which Lopez's revelations occurred only enhance his credibility on this issue. For example, while the advisory committee notes regarding the federal version of Rule 804(b)(3) explain that an exculpatory statement given in custodial interrogation may not be credible enough to meet the requirements of the rule, an inculpatory statement given to an acquaintance "would have no difficulty in qualifying." See Fed. R. Evid. R. 804(b)(3), Advisory Comm. Notes. Indeed, this rationale was recently reiterated by a California Appellate Court in People v. Arceo, 195 Cal. App. 4th 556, 577 (2011) when the Court explained "the most reliable circumstance . . . is one in which the conversation occurs between friends in a noncoercive setting that fosters uninhibited disclosures." As a result,

the State submits Lopez's statements to Soto and Avila at the gas station, statements volunteered to Soto and Avila likely because they were acquaintances of his and he was seeking advice, are admissible pursuant to Rule 804(b)(3), SCRE.

CONCLUSION

For the aforementioned reasons, the State respectfully requests this Court grant rehearing or, in the alternative, substitute an opinion addressing the concerns advanced by the State in this petition and affirm the judgment imposed by the trial court.

Respectfully Submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

BRENDAN J. McDONALD
Assistant Attorney General
S.C. Bar No. 77784

DANIEL E. JOHNSON
Solicitor, Fifth Judicial Circuit

South Carolina Office of Attorney General
P.O. Box 11549
Columbia, SC 29211-1549
(803) 734-3188



Brendan J. McDonald
ATTORNEY(S) FOR RESPONDENTS

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County

Clifton Newman, Circuit Court Judge

Appellate Case No. 2012-205888

THE STATE,

RESPONDENT,

V.

LESLIE TODD PARVIN,

APPELLANT.

PROOF OF SERVICE

I, Brendan McDonald, counsel for the Respondent, certify that I have served the within Petition for Rehearing on Appellant by depositing two (2) copies of the same in the United States mail, first class, postage prepaid, addressed to his attorney(s) of record, Dwight F. Drake and Michael J. Anzelmo at Nelson, Mullins, Riley and Scarborough, LLP at 1320 Main St. 17th Floor Columbia SC 29201.

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

This thirteenth day of August, 2014.



Brendan J. McDonald
Assistant Attorney General
Bar No. 77784
Office of Attorney General
P. O. Box 11549
Columbia, South Carolina 29211
(803) 734-3188

ATTORNEY FOR RESPONDENT

Nelson Mullins

Nelson Mullins Riley & Scarborough LLP
Attorneys and Counselors at Law
1320 Main Street / 17th Floor / Columbia, SC 29201
Tel: 803.799.2000 Fax: 803.255.9024
www.nelsonmullins.com

Michael J. Anzelmo
Tel: 803.255.9312
Fax: 803.255.9024
michael.anzelmo@nelsonmullins.com

August 18, 2014

Hand Delivered

The Honorable Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
1015 Sumter Street - 5th Floor
Columbia, SC 29201

RECEIVED

AUG 18 2014

SC Court of Appeals

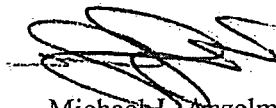
RE: The State v. Leslie Parvin
Civil Action Nos. 2011-GS-40-00897 and 2011-GS-40-00898
Our file no.: 33999/00708

Dear Ms. Kitchings:

Enclosed please find an original and seven copies of a Petition for Rehearing in the above-referenced matter. Should you have any questions, please do not hesitate to contact me.

By copy of this letter, I am hereby serving opposing parties.

Very truly yours,



Michael J. Anzelmo

MJA:jlee
Enclosures

cc: Brendan McDonald

With offices in the District of Columbia, Florida, Georgia, Massachusetts, North Carolina, South Carolina, Tennessee and West Virginia

The Honorable Jenny Abbott Kitchings
August 18, 2014
Page 2

bbc: Michael Anzelmo
Meredith Keane

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

AUG 18 2014

SC Court of Appeals

Clifton Newman, Circuit Court Judge

Case No. 11-GS-40-897 and 11-GS-40-898
Appellate Case No. 2012-205888

The State of South Carolina, ... Respondent,

v.

Leslie Todd Parvin, ... Appellant.

Petition for Rehearing

Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, Appellant Leslie Todd Parvin petitions the Panel to grant rehearing in State v. Parvin, Op. No. 5254 (S.C. Ct. App. filed July 30, 2014) (Shearouse Adv. Sh. No. 30 at 85), and reverse the trial court. This matter necessitates rehearing for two reasons. First, the Panel misapprehended or overlooked the well-settled error preservation rules in finding the Lopez hearsay statement constituted harmless error. Second, the Panel's harmless error holding overlooked the fact that our Supreme Court has held that error related directly to the central issue of a case cannot constitute harmless error. The Panel should grant rehearing to correct these errors and reverse.

Rehearing is required because the Panel misapprehended or overlooked the well-settled rules of error preservation in finding the Lopez hearsay statement constituted harmless error. The Panel affirmed Parvin's conviction because Detective William Gonzalez "testified that Avila stated Lopez said Parvin gave him two hundred dollars to

have sex. There was no objection at the time of this testimony.” Op. No. 5254 at 91.¹ The Panel then held the erroneous admission of the Lopez hearsay statements was harmless because “the improperly admitted Lopez statements were cumulative to Detective Gonzalez’s testimony” Id. Such a finding misapprehends and overlooks Parvin’s obligations to object to cumulative testimony.²

Our well-settled rules of error preservation did not require Parvin to object to Detective Gonzalez’s testimony, as required by the Panel in this opinion. Our rules only required Parvin to object to the inadmissible Lopez hearsay statements once and obtain a ruling once as to the admissibility of those statements. Parvin did so. Of that there is no question.

Our rules did not require Parvin to object each time the State introduced the improper statements, in whatever form, after the trial court ruled on the issue. See, e.g., State v. McDaniel, 320 S.C. 33, 37, 462 S.E.2d 882, 884 (Ct. App. 1995) (recognizing the well-settled rule that “[s]o long as the judge had an opportunity to rule on an issue, and did so, it was not incumbent upon defense counsel to harass the judge by parading the issue before him again”) (international quotations omitted); Bennett v. State, 383 S.C. 303, 308, 680 S.E.2d 273, 275 (2009) (finding trial counsel was not ineffective for failing to renew his objection to testimony as inadmissible hearsay because the trial court overruled trial counsel’s previous objection to the testimony);

¹ The testimony of Detective Gonzalez was substantively identical to the Lopez hearsay statements (to which Parvin had previously properly objected) in a different form. The Lopez hearsay statements were statements by Edgar Lopez to Adan Soto and Marlin Avila on the night at issue. The substance of those statements was that Lopez told Avila that Parvin offered Lopez money to have sex with him. That is exactly what Detective Gonzalez testified to as well. See Trial Transcript p. 714.

² Again, Detective Gonzalez’s testimony was the same as the Lopez hearsay statements. Detective Gonzalez did not add any new evidence or statements. He only reiterated the Lopez hearsay statements.

State v. Liberte, 336 S.C. 648, 652 n.1, 521 S.E.2d 744, 746 n.1 (Ct. App. 1999) (holding that once a trial judge has overruled an objection, there is no need to renew objections to preserve the issue for appeal); State v. Nelson, 331 S.C. 1, 6 n.6, 501 S.E.2d 716, 718 n.6 (1998) (holding that once the trial judge has ruled on an objection, it is not necessary for counsel to object every time the point is raised thereafter); State v. Ross, 272 S.C. 56, 60-61, 249 S.E.2d 159, 161-62 (1978) (same). Moreover, such a rule would contradict Rule 17 of the South Carolina Rules of Criminal Procedure, which establishes that “[i]f an objection has once been made at any stage to the admission of evidence, it shall not be necessary thereafter to reserve rights concerning the objectionable evidence.” Rule 17, SCRCrimP (emphasis added).

As written, the opinion alters that established common law and procedural practice and requires—for the first time—that a party must object to the same evidence repeatedly in order to avoid losing on appeal based on a “harmless error” analysis.³ The Panel misapprehended or overlooked the fact that this is not the rule in South Carolina. Rehearing is warranted to correct this error.

Second, the Panel’s holding of harmless error overlooked the fact that our Supreme Court very recently held that error related directly to the central issue of a case cannot constitute harmless error. Rehearing should be granted on this basis as well. The Panel held that admission of the Lopez hearsay statements “related to the central issue of the case and allowed the State ‘to shape its entire presentation to the

³ Moreover, had the trial court properly excluded the Lopez hearsay statements (as this Panel has held), then such evidence would never have been admitted, would not have been before the trial court or this Panel, and could not be used to find harmless error. Likewise, if the trial judge had properly excluded the Lopez hearsay statements at the outset of the trial, then Detective Gonzalez does not present his report summarizing the Lopez statements.

jury.” Op. No. 5254 at 89. That holding was correct. The State framed and presented its entire case on a theory that Parvin offered Lopez money in exchange for sex and killed him in retaliation when Lopez backed out of the deal. See Trans. p. 107-08; 240; 242-43; 244; 246-47; 257-58; 261; 302-06; 311-313. Once the trial judge admitted the Lopez hearsay statement over the objection of Parvin at the outset of the trial, the State was off and running with its case and repeatedly hammered its theory throughout trial, including with Detective Gonzalez.

Error related directly to the central issue of a case cannot constitute harmless error. Sulton v. Health South, 400 S.C. 412, 418, 734 S.E.2d 641, 644 (2012). In Sulton, the Supreme Court addressed an erroneous jury charge that incorrectly elevated the duty of care owed by a hospital on the seminal issues of the case. Id. The court held that, despite the harmless error approach to review of jury instructions, the error could not be harmless because it went to the heart of the case. Id. The court held such errors are per se reversible, even in light of the traditional harmless error analysis. Id.

This matter is analogous to the court’s logic and rationale in Sulton. The State’s motive theory was the seminal issue. Without the Lopez hearsay statements, the State had nothing to present to the jury on that issue. Thus, it was critical that the trial court make the proper ruling on admissibility of those statements. The trial court’s erroneous decision to admit the Lopez statements prejudiced Parvin’s ability to defend on the basis of self-defense. This is especially true when the State premised the entire case on these Lopez statements. Therefore, the error cannot be harmless.

Even if an error on the seminal issue of a case could be subject to a harmless error analysis, this error cannot be harmless. This is quite evident in this matter. The

Lopez hearsay statements allowed the State to shape its entire presentation to the jury. Without the theory extrapolated from the Lopez statements, the State had no motive for the crime. The State framed its entire case to the jury on these statements. The jury likewise weighed the evidence against that framework based on the Lopez hearsay statements. Therefore, the trial court's admission of the Lopez statements prejudiced Parvin and cannot constitute harmless error.

Lastly, the State conceded the admission of the Lopez hearsay statement under Rule 803, SCRE, was error. The State did not attempt to defend that ruling before this Court, and instead, sought affirmance under a Rule 220, SCACR, argument. The Panel cannot allow a party to acknowledge error on the seminal issue in a criminal case and then prevail when the party later compounds that error at trial. That error tainted the entire trial. The State cannot be permitted to gain from its own error. The Panel should grant rehearing on this basis and reverse.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

Dwight F. Drake
SC Bar No. 001745
E-Mail: dwight.drake@nelsonmullins.com
Michael J. Anzelmo
SC Bar No. 72933
E-Mail: michael.anzelmo@nelsonmullins.com
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, South Carolina 29201
803.799.2000

Attorneys for Leslie Todd Parvin

Columbia, South Carolina

August 18, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

AUG 18 2014

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

SC Court of Appeals

Clifton Newman, Circuit Court Judge

Case No. 11-GS-40-897 and 11-GS-40-898

The State of South Carolina, ... Respondent,

v.

Leslie Todd Parvin, ... Appellant.

PROOF OF SERVICE

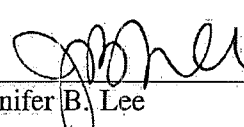
I, the undersigned administrative assistant in the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Leslie Todd Parvin, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by hand delivery, to the following address(es):

Pleadings:

Petition for Rehearing

Counsel Served:

Brendan McDonald
S.C. Attorney General's Office
Rembert C. Dennis Building
P. O. Box 11549
Columbia, SC 29211


Jennifer B. Lee

August 18, 2014

Nelson Mullins

Nelson Mullins Riley & Scarborough LLP
Attorneys and Counselors at Law
1320 Main Street / 17th Floor / Columbia, SC 29201
Tel: 803.799.2000 Fax: 803.255.9024
www.nelsonmullins.com

Michael J. Anzelmo
Tel: 803.255.9312
Fax: 803.255.9024
michael.anzelmo@nelsonmullins.com

August 19, 2014

Hand Delivered

The Honorable Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
1015 Sumter Street - 5th Floor
Columbia, SC 29201

RE: The State v. Leslie Parvin
Civil Action Nos. 2011-GS-40-00897 and 2011-GS-40-00898
Our file no.: 33999/00708

Dear Ms. Kitchings:

Enclosed please find an original and seven copies of a Return to the State's Petition for Rehearing in the above-referenced matter. Please file the original and return a clocked-in copy to me via our courier. Should you have any questions, please do not hesitate to contact me.

By copy of this letter, I am hereby serving opposing counsel.

Very truly yours,



Michael J. Anzelmo

MJA:jlee
Enclosures

cc: Brendan McDonald

RECEIVED

AUG 19 2014

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Case No. 11-GS-40-897 and 11-GS-40-898
Appellate Case No. 2012-205888

RECEIVED

AUG 19 2014

SC Court of Appeals

The State of South Carolina, ... Respondent,

v.

Leslie Todd Parvin, ... Appellant.

Return to the State's Petition for Rehearing

Pursuant to Rules 221(a) and Rule 240(e) of the South Carolina Appellate Court Rules, Appellant Leslie Todd Parvin files this return to the State's petition for rehearing¹ in State v. Parvin, Op. No. 5254 (S.C. Ct. App. filed July 30, 2014) (Shearouse Adv. Sh. No. 30 at 85). The Panel should deny the State's petition, grant Parvin's petition for rehearing, and reverse the trial court.

First, the Panel should deny the State's petition because the State improperly asks the Panel to reconsider the State's failed arguments on the admissibility of the Lopez hearsay statement. See Kennedy v. S.C. Retirements Sys., 349 S.C. 531, 552, 564 S.E.2d 322, 322 (2001) (holding that a party cannot use a "petition for rehearing to have the case tried in the appellate court a second time"). This is precisely what the

¹ The State's petition is made pursuant to Rule 221(a), SCACR, the rule for petitions for rehearing. However, the State captioned the petition as a "Petition for Rehearing En Banc." However, the State does not suggest rehearing *en banc* under Rule 219(b), SCACR. Thus, Parvin construes the petition as one for rehearing under Rule 221(a), SCACR, only.

State seeks. The State re-raises the same arguments regarding the admissibility of the Lopez hearsay statement. This Court considered those arguments and rejected them by the issuance of the opinion that held the Lopez hearsay statement was improperly admitted.

Second, the State's arguments still lack any merit. Rather than rehash why those arguments lack merit, Parvin incorporates his Reply Brief as if set forth fully herein to respond to the State's meritless arguments. Parvin's Reply Brief is attached hereto as Exhibit A for ease of reference. In short, the State's arguments fail because:

(1) *Res gestae* does not provide an independent basis for admission of evidence, and *res gestae* no longer constitutes an exception to the hearsay rule. State v. Gilmore, 396 S.C. 72, 82 n.9, 719 S.E.2d 688, 694 (Ct. App. 2011) ("The term is no longer used to describe a hearsay exception"); State v. Burdette, 335 S.C. 34, 41-42, 515 S.E.2d 525, 529-30 (1999) (holding that the adoption of the rules of evidence removed *res gestae* from the hearsay exceptions and split them into two independent and stand alone exceptions to the hearsay rule—present sense impression and excited utterance). The evidence still must be admissible under the Rules of Evidence. Here, the only basis for admission under the Rules of Evidence was the trial court's Rule 803, SCRE, ruling. The State simply fails to understand this distinction. Thus, the State's two-issue rule argument fails.

(2) The State's additional sustain ground argument under Rule 804(a)(4) and 804(b)(3), SCRE, are wholly without merit. No "reasonable person" in the declarant's position (here Lopez) would think he would be charged with

prostitution for simply referencing a statement made to him by another person, especially when the declarant (Lopez) qualified that statement with a rejection of the solicitation offer. In fact, the State's entire theory of the trial focused on Lopez's rejection of the purported solicitation advance from Parvin. Certainly a person who rejects a solicitation offer cannot reasonably expect to face criminal prostitution charges for acting lawfully in rejecting the offer.

The Panel should deny the State's petition for rehearing, and, if the State's petition can be construed as a suggestion for rehearing *en banc*, the Court should deny that request as well.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

Dwight P. Drake

SC Bar No. 001745

E-Mail: dwight.drake@nelsonmullins.com

Michael J. Anzelmo

SC Bar No. 72933

E-Mail: michael.anzelmo@nelsonmullins.com

1320 Main Street / 17th Floor

Post Office Box 11070 (29211-1070)

Columbia, South Carolina 29201

803.799.2000

Attorneys for Leslie Todd Parvin

Columbia, South Carolina

August 19, 2014

EXHIBIT

A

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Case No. 11-GS-40-897 and 11-GS-40-898

The State of South Carolina, ... Respondent,

v.

Leslie Todd Parvin, ... Appellant.

Final Reply Brief of Appellant

Dwight F. Drake
Michael J. Anzelmo
NELSON MULLINS RILEY & SCARBOROUGH LLP
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, South Carolina 29201
803.799.2000

Attorneys for Appellant Leslie Todd Parvin

RECEIVED

AUG 19 2014

SC Court of Appeals

RECEIVED

AUG 09 2013

SC Court of Appeals

Table of Contents

Table of Authorities	iii
Argument.....	1
I. The two-issue rule is inapplicable to this action because the trial court's ruling was not, in fact or in law, a <i>res gestae</i> ruling and, further, the <i>res gestae</i> ruling does not support, or even relate, to the trial court's erroneous decision to admit the Lopez hearsay statements.	1
II. The State has conceded that the trial court erred in admitting the Lopez statements pursuant to Rule 803(1), SCRE.....	10
III. This Court should reject the additional sustaining ground advanced by the State because such grounds are not properly before the Court and do not apply to the Lopez hearsay statements.....	11
Conclusion	13

Table of Authorities

CASES

<u>I'On, LLC v. Town of Mt. Pleasant</u> , 338 S.C. 406, 526 S.E.2d 716 (2000)	12
<u>Pope v. Heritage Communities, Inc.</u> , 395 S.C. 404, 717 S.E.2d 765 (Ct. App. 2011)	9
<u>State v. Adams</u> , 322 S.C. 114, 470 S.E.2d 366 (1996)	3
<u>State v. Burdette</u> , 335 S.C. 34, 515 S.E.2d 525 (1999)	6
<u>State v. Burroughs</u> , 328 S.C. 489, 492 S.E.2d 408 (Ct. App. 1997)	6
<u>State v. Gagum</u> , 328 S.C. 560, 492 S.E.2d 822 (Ct. App. 1997)	6, 7, 9
<u>State v. Gilmore</u> , 396 S.C. 72, 719 S.E.2d 688 (Ct. App. 2011)	2, 3, 4, 6, 7, 9
<u>State v. Harrison</u> , 298 S.C. 333, 380 S.E.2d 818 (1989)	3
<u>State v. Smith</u>	4
<u>State v. Wiles</u> , 383 S.C. 151, 679 S.E.2d 172 (2009)	3
<u>Sulton v. Health South Corp.</u> , 400 S.C. 412, 734 S.E.2d 641 (2012)	11
<u>Video Gaming Consultants, Inc. v. S.C. Dept. of Rev.</u> , 342 S.C. 34, 535 S.E.2d 642 (2000)	10

RULES

S.C.A.C.R. 208(b)(2)	12
S.C.A.C.R. 220(c)	12
S.C.R.E. 804(a)(4)	11
S.C.R.E. 804(b)(3)	11, 12
S.C.R.E. Rule 404(b)	3, 4, 5, 7, 8, 9
S.C.R.E. Rule 803	3
S.C.R.E. Rule 804(a)	11
S.C.R.E. Rule 804(b)(3)	11
S.C.R.E. Rules 803(1)	6, 8, 9, 10

OTHER AUTHORITIES

3 Wigmore § 1767 3rd Edition (1940)	2
<i>Black's Law Dictionary</i> 1173 (5th ed. 1979)	3

ARGUMENT

- I. The two-issue rule is inapplicable to this action because the trial court's ruling was not, in fact or in law, a *res gestae* ruling and, further, the *res gestae* ruling does not support, or even relate, to the trial court's erroneous decision to admit the Lopez hearsay statements.¹

The State, in its initial brief, relies on the two-issue rule in asking the Court to affirm the trial court. The State argues that the Lopez² hearsay statement in question was admitted by the trial court under a *res gestae* theory. The State's argument, however, is simply wrong for two primary reasons and is based on a complete misunderstanding of the application of the two-issue rule and *res gestae*. First, as detailed below, despite the trial judge's use of the term *res gestae* in describing his ruling, a review of all the language the judge employed establishes that his ruling was not based on *res gestae* at all. Accordingly, *res gestae* is not available as a "second" issue. Moreover, a *res gestae* ruling, even if made by the trial court, cannot be used to support a two-issue rule claim. A *res gestae* ruling and a hearsay ruling are wholly independent of each other. The *res gestae* determination does not independently allow admission of the evidence. Admission of a hearsay statement must still be determined under an exception to hearsay. In short, *res gestae* did not, and cannot, resolve the

¹ As in Parvin's initial brief, Parvin does not concede or admit that he made any such solicitation statements. Any discussion in this brief of the statements as alleged by the State should not be construed as an admission of such. The discussions herein are an assuming *arguendo* approach and should only be construed in that manner.

² As set forth fully in Parvin's initial brief, the statements at issue are statements by Lopez to two acquaintances, Soto and Avila, regarding Parvin's alleged solicitation statement to Lopez. Soto and Avila testified at trial to what Lopez told them that Parvin had said to Lopez previously on the day in question. These statements are referred to as the "Lopez statements" or "Lopez hearsay statements" in this brief.

question of the admissibility of the Lopez hearsay statement. Therefore, the two-issue rule does not apply, and this Court should reject this inapplicable argument.

First, the trial judge did not rule on the basis of *res gestae*. John Henry Wigmore, the acknowledged expert on the law of evidence, had this to say about *res gestae*:

The phrase *res gestae* is, in the present state of the law, not only useless, but even positively harmful—it ought therefore wholly to be repudiated as a vicious element in our legal phraseology. It should never be mentioned.

3 Wigmore § 1767 3rd Edition (1940). Wigmore died in 1943. Were he alive today, he would no doubt view this case as proof of the soundness and accuracy of his observation of more than seventy years ago.

While our courts have not determined that *res gestae* is “wholly to be repudiated,” this Court recently described the change in the law regarding *res gestae* in light of the adoption of the Rules of Evidence. As Chief Judge Few explained in State v. Gilmore, 396 S.C. 72, 719 S.E.2d 688 (Ct. App. 2011), the adoption of the Rules of Evidence in 1995 dramatically altered the doctrine of *res gestae* in South Carolina. No longer does *res gestae* relate to hearsay or admissibility of a hearsay statement. Chief Judge Few made clear in footnote 9 of that decision that all that remains of the doctrine of *res gestae* in South Carolina is evidence found to be “integral to the crime or event.” Here, Judge Newman did not rule that the evidence in question was admitted as something “integral to the crime or event.” As the State accurately notes in its initial brief, Judge Newman said:

The first thing, just regarding the ruling earlier about the statements of the deceased at the gas station as being part of the *res gestae* . . . the *res gestae* did not involve other

crimes, but may have suggested some bad acts I have considered the probative value versus the prejudicial effect of allowing the evidence, the *res gestae* evidence, and I find that the probative value outweighs any prejudicial effect. So that supplements my ruling on that issue.

{Trans. p. 394-95; R. 395-96}. This ruling of Judge Newman, while cloaked with the words "*res gestae*," was not a ruling grounded in the current South Carolina law on the *res gestae* theory. The above-referenced footnote of Chief Judge Few in Gilmore reads in full:

Before the adoption of the South Carolina Rules of Evidence in 1995, the latin term "*res gestae*" meant two things. First, the term described an exception to the rule against hearsay, essentially a combination of the present sense impression and excited utterance exceptions now found in Rules 803(1) and (2). See Rule 803, SCRE, Note (citing *State v. Harrison*, 298 S.C. 333, 380 S.E.2d 818 (1989)). **The term is no longer used to describe a hearsay exception.** Second, *res gestae* meant the evidence was part of the body of the crime. See *Black's Law Dictionary* 1173 (5th ed. 1979) ("*Res gestae* means literally things or things happened...."). Under the Rules of Evidence, which do not use the term, arguing an event is part of the *res gestae* is equivalent to arguing the evidence is not an "other" act under Rule 404(b), but rather is integral to the crime or event. Our courts have continued to use the term to describe details of a crime or event which are not to be excluded as "other crimes, wrongs, or acts" under Rule 404(b). See *State v. Wiles*, 383 S.C. 151, 158-59, 679 S.E.2d 172, 176 (2009) (stating "evidence of other crimes which supplies the context of the crime, or is intimately connected with and explanatory of the crime charged, is admissible as *res gestae* evidence") (citing *State v. Adams*, 322 S.C. 114, 122, 470 S.E.2d 366, 370-71 (1996)).

Gilmore, 396 S.C. at 82 n.9, 719 S.E.2d at 694 (emphasis added).

A review of Judge Newman's ruling quoted above establishes that he did not rule the Lopez hearsay statement admissible consistent with the current law on *res gestae* as set forth by Judge Few. Judge Newman's ruling was not that the statement was "part of the body of the crime." Further, Judge Newman's ruling was not describing something that was "integral to the crime or event." Judge Newman's ruling was not that the hearsay statement was "intimately connected with and explanatory of the crime charged." Judge Newman's ruling was none of the things that this Court has said constitutes *res gestae* evidence since the adoption of the Rules of Evidence.

Judge Newman's ruling, by its very words, is in fact a description of an "other" act, which, as Chief Judge Few clearly states in Gilmore, no longer remains part of the doctrine of *res gestae* since the adoption of the Rules of Evidence. Should the question occur that the evidence in question may possibly be admitted under Rule 404(b), SCRE, it must be remembered that: first, the State does not argue admissibility under Rule 404(b), SCRE; second, Judge Newman did not purport to admit the evidence under Rule 404(b), SCRE; and third, the State unequivocally stated at trial that it was "not trying to admit anything under 404(b)." {Trans. p. 107; R. 108}.³ Therefore, the trial court did not admit the Lopez hearsay statement based on *res gestae* at all. Accordingly, the two-issue rule does not apply.

³ Additionally, the statement in question is not admissible under State v. Smith, 300 S.C. 216; 387 S.E.2d 245 (1989). Chief Justice Gregory, on behalf of the unanimous court and quoting a long line of cases, said that "[t]his Court has recognized the danger of prejudice where the prior bad acts are not subject to conviction and has limited the State's use of this evidence" and went further to recognize that in the absence of a conviction "[t]o be admissible, proof of prior bad acts must be clear and convincing." Smith, 300 S.C. at 218, 387 S.E.2d at 247. From Judge Newman's own description, that the statement "did not involve other crimes, but may have suggested some bad acts," it is clear that the evidence in question was far from "clear and convincing." {Trans. p. 394-95; R. 395-96 (emphasis added)}.

Even if the trial court had properly relied on the current version of *res gestae*, the State's two-issue rule argument lacks merit. A *res gestae* ruling cannot be used to support a two-issue rule claim because the *res gestae* ruling and a hearsay ruling are wholly independent of each other. The *res gestae* determination does not independently allow admission of the evidence. Admission of a hearsay statement is controlled solely by application of the exceptions to hearsay rules.

A decision that a statement qualifies as motive or *res gestae* evidence does not allow automatic admissibility of the statement because the hearsay problem with the statement still existed. Rather, the *res gestae* ruling resolves a wholly separate and distinct issue—whether the statement, which is evidence of a distinct crime or wrong, and in this case was the solicitation of prostitution, can be used to show something other than the bad character of Parvin. The statement of motive must still be independently evaluated for admissibility under an exception to hearsay. Because the *res gestae* ruling and the hearsay ruling are wholly independent of each other, the *res gestae* determination does not resolve the question of the admissibility of the statement as an exception to hearsay. Therefore, the two-issue rule does not apply, and this Court should reject this inapplicable argument.

Here, the Lopez statements in this matter indisputably⁴ constituted hearsay and were not otherwise admissible. This means the State had to establish a hearsay exception applied before the statements could be admitted to prove motive. The State failed to do so.

⁴ The State failed to argue that the Lopez statements were not hearsay.

Formerly, South Carolina law recognized a *res gestae* exception to the hearsay rule. State v. Burdette, 335 S.C. 34, 41-42, 515 S.E.2d 525, 529-30 (1999) (“Prior to the adoption of the Rules of Evidence, South Carolina law provided for a *res gestae* exception to the hearsay rule”); State v. Burroughs, 328 S.C. 489, 498, 492 S.E.2d 408, 412 (Ct. App. 1997) (same). Prior to the adoption of the Rules of Evidence, the *res gestae* doctrine combined the current “present sense impression” and “excited utterance” exceptions to hearsay into one doctrine. See, e.g., Gilmore, 396 S.C. at 82 n.9, 719 S.E.2d at 694 (“Before the adoption of the South Carolina Rules of Evidence in 1995, the [L]atin term *res gestae* . . . described an exception to the rule against hearsay, essentially a combination of the present sense impression and excited utterance exceptions now found in Rules 803(1) and (2)”) (internal quotations omitted).

However, *res gestae* no longer constitutes an exception to the hearsay rule. Id., at 82 n.9, 719 S.E.2d at 694 (“The term is no longer used to describe a hearsay exception”). The adoption of the rules of evidence removed *res gestae* from the hearsay exceptions and split them into two independent and stand alone exceptions to the hearsay rule—present sense impression and excited utterance. Burdette, 335 S.C. at 41, 515 S.E.2d at 529 (“The hearsay exceptions of present sense impression and excited utterance have replaced the *res gestae* exception in South Carolina law”); see also Id. at 41 n.6, 515 S.E.2d at 529 (discussing same in detail); Gilmore, 396 S.C. at 82 n.9, 719 S.E.2d at 694.

Thus, *res gestae* no longer impacts or governs a trial court’s admissibility decision regarding a hearsay objection. State v. Gagum, 328 S.C. 560, 565 n.3, 492 S.E.2d 822, 824 (Ct. App. 1997) (holding “the *res gestae* exception to the hearsay rule

is not related to the *res gestae* question at issue in this case,” which was whether the evidence was proper as an other bad act). *Res gestae* still exists in South Carolina jurisprudence, but the trial court analyzes a *res gestae* argument in the context of motive or other bad act as part of a Rule 404(b) , SCRE, analysis. Gilmore, 396 S.C. at 83 n.2, 719 S.E.2d at 694 (“Under the Rules of Evidence, which do not use the term, arguing an event is part of the *res gestae* is equivalent to arguing the evidence is not an ‘other’ act under Rule 404(b)”); Gagum, 328 S.C. at 565 n.3, 492 S.E.2d at 824 (holding that “the *res gestae* exception to the hearsay rule is not related to the *res gestae* question at issue in this case,” which is whether the evidence qualified as an other bad act pursuant to Rule 404(b), SCRE).

Based on the above, a *res gestae* ruling no longer impacts a trial court’s hearsay determination. The ruling that a statement could be *res gestae* as motive evidence does not address the admissibility of that hearsay statement pursuant to a hearsay exception. If the statement is hearsay and not subject to an exception, then it is inadmissible, and the State cannot use it to prove the *res gestae* motive theory authorized by the trial court. Stated differently, *res gestae* allows certain types evidence to be admitted into evidence to prove motive. The evidence used, however, still must independently satisfy other rules of evidence, including any hearsay objection, to be properly admissible. *Res gestae*, a ruling under Rule 404(b), SCRE, does not obviate that requirement. The rulings on *res gestae* and hearsay are independent and do not implicate the two-issue rule.

The State’s argument fails to apprehend this distinction and incorrectly contends that the López statements were admissible, despite being undisputed hearsay, merely

because the statement possibly qualified as motive evidence as part of the *res gestae*. This is simply incorrect. The trial court made two independent evaluations⁵ in regards to the Lopez statements. The first was that the Lopez statements, which set forth an alleged separate "bad act" by Parvin, could show evidence of the motive for the charge of murder under Rule 404(b), SCRE. However, the trial court's analysis of this issue does not end the inquiry. The trial court then had to determine whether the type of evidence proposed by the State (here, the hearsay testimony of Soto and Avila as to what Lopez told them) was properly admissible under a hearsay exception to establish the *res gestae* motive.⁶ The admissibility ruling of these Lopez hearsay statements was based solely on Rule 803(1), SCRE. Those are two separate and independent rulings with separate and independent elements/tests to consider by the trial court. Both had to be satisfied for the evidence to be properly admitted. Therefore, the trial court's *res gestae* ruling neither impacts nor affects the subsequent hearsay ruling on the admissibility of the Lopez statements. As a result, the hearsay ruling is the only operative ruling as to the admissibility of the Lopez statements. Parvin properly appealed the only ruling addressing the hearsay problem with the evidence. Therefore, the two-issue rule is inapplicable to the appeal of the admissibility of the Lopez statements. This Court should reject this argument.

⁵ As noted above, the trial court did not rule based on the current version of *res gestae*. This argument is also made in an assuming *arguendo* manner.

⁶ Parvin's review of South Carolina jurisprudence on the admission of *res gestae* evidence indicates that the evidence introduced in those cases was properly admissible and non-hearsay evidence. Therefore, any reliance by the State at argument on cases allowing admission of *res gestae* evidence is misplaced. Those cases do not support an argument that a *res gestae* decision by the trial court would allow classic hearsay testimony to be admitted to establish motive.

As an additional reason the two-issue rule does not apply, the State is barred from making this argument. The State cannot reasonably assert that the trial court ruling on admissibility of the Lopez hearsay statements was based on a Rule 404(b), SCRE, or a *res gestae* ruling.⁷ The State admitted at trial that it was “not trying to admit anything under 404(b).” {Trans. p. 107; R. 108}. *Res gestae* has been subsumed as part of a Rule 404(b), SCRE, analysis after the adoption of the rules of evidence. Gilmore, 396 S.C. at 83, 719 S.E.2d at 694 (“Under the Rules of Evidence, which do not use the term, arguing an event is part of the *res gestae* is equivalent to arguing the evidence is not an ‘other’ act under Rule 404(b)”); Gagum, 328 S.C. at 565 n.3, 492 S.E.2d at 824 (holding that “the *res gestae* exception to the hearsay rule is not related to the *res gestae* question at issue in this case,” which is whether the evidence qualified as an other bad act pursuant to Rule 404(b), SCRE).

Thus, the State admitted the trial court did not admit the Lopez statements as part of their *res gestae* argument and that the admission was based solely on the Rule 803(1), SCRE, exception to hearsay. This admission precludes them from now arguing that the trial court admitted the Lopez statements as part of the *res gestae* as to Parvin’s motive. See, e.g., Pope v. Heritage Communities, Inc., 395 S.C. 404, 430-31, 717 S.E.2d 765, 779 (Ct. App. 2011) (holding that “[t]he parties to a suit are bound by admissions, made by their attorneys of record, in open court, or elsewhere, touching on matters looking to the progress of the trial”) (citations omitted). As a result, the two-issue rule is inapplicable.

⁷ As noted above, the trial court did not rule based on the current version of *res gestae*. The State, however, argues such a ruling was made by the trial court. The State is barred from such an argument as set forth herein.

II. The State has conceded that the trial court erred in admitting the Lopez statements pursuant to Rule 803(1), SCRE.

The State failed to refute, address, or even mention Parvin's argument that the Lopez statements constituted hearsay and that the trial court erred in admitting the statements as a present sense impression under Rule 803(1), SCRE. The State has, therefore, conceded this issue on appeal.

Our Supreme Court has established that the failure of a respondent to make any argument on an issue in its brief renders the issue abandoned. See, e.g., Video Gaming Consultants, Inc. v. S.C. Dept. of Rev., 342 S.C. 34, 42 n.7, 535 S.E.2d 642, 647 n.7 (2000) (holding that the failure of the respondent in the appeal to argue an issue in its brief established that the respondent abandoned the issue and, therefore, the court was precluded from considering it on appeal). The decision of the State to not address Parvin's argument in its Respondent's brief renders the issue abandoned and precludes this Court from considering a contrary position. Because the State abandoned its position from trial on this issue, the State effectively concedes that the trial court erred in admitting the Lopez statements pursuant to Rule 803(1), SCRE. This Court should adhere to precedent and treat Parvin's argument as conceded by the State.

Moreover, the Court should reject the State's conclusory argument that this error was harmless. See Respondent's Initial Brief p. 17, footnote 1. The State makes no attempt to refute the fact that the Lopez hearsay statements constituted prejudicial error because the statements related to the seminal issues in the case and allowed the State to shape its entire presentation to the jury. Without the theory extrapolated from

the Lopez statements, the State had no motive on which to try Parvin. Notably, the testimony from Soto and Avila was the only vehicle to admit the Lopez statements to present this theory to the jury.

It was vital that the trial court make the proper ruling on admissibility of those statements. See Sulton v. Health South Corp., 400 S.C. 412, 734 S.E.2d 641 (2012) (holding that errors relating to the seminal issue in a case cannot constitute harmless error and warrants reversal). Moreover, the erroneous decision to admit the Lopez statements prejudiced Parvin's ability to defend on the basis of self-defense as fully set forth in Parvin's initial brief to this Court. Therefore, Parvin suffered prejudice from the erroneous admission of the Lopez hearsay statements, and this Court should reverse.

III. This Court should reject the additional sustaining ground advanced by the State because such grounds are not properly before the Court and do not apply to the Lopez hearsay statements.

In its brief, the State alleges that this Court should affirm based on Rule 804(b)(3), SCRE.⁸ See Respondent's Initial Brief p. 15-17. This argument lacks merit for two reasons. First, the State did not present this argument to the trial, and as such, it cannot constitute an additional sustaining ground. Second, Rule 804(b)(3), SCRE, does not apply to the Lopez hearsay statements. This Court should reject this argument.

The State did not argue, or even mention, this Rule 804(b)(3), SCRE, argument at any time to the trial court, nor was this argument briefed or presented to the trial

⁸ The first part of a Rule 804(b)(3), SCRE, analysis is a finding that the declarant is unavailable per Rule 804(a), SCRE. Such a finding is proper here under Rule 804(a)(4), SCRE. Thus, the analysis of this issue is limited to the State's arguments pursuant to Rule 804(b)(3), SCRE.

court in response to Parvin's motion for a new trial. Thus, the argument is not properly before this Court, even as an additional sustaining ground. See Rules 208(b)(2) and 220(c), SCACR (limiting additional sustaining arguments to those "ground(s) appearing in the Record on Appeal"). The ground now advanced as an additional sustaining ground does not appear in the record on appeal. The ground did not "appear" until the State raised it for the first time in its brief to this Court. Additional sustaining grounds cannot be used to completely alter how a party presented the case to the trial court, nor can such grounds be used as a trap on appeal. Therefore, the State's argument is improper and should be ignored by this Court. On, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 421, 526 S.E.2d 716, 724 (2000) (holding that the appellate court is "likely to ignore" any additional sustaining grounds not presented to the trial court).

Even if this argument were properly before this Court, it should still be rejected because Rule 804(b)(3), SCRE, does not apply to the Lopez statement. The rule provides in part that:

Statement Against Interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true.

Rule 804(b)(3), SCRE (emphasis added).

The State cannot be serious in its assertion that the Lopez statements were admissible because he would be subjected to criminal liability for prostitution. See

Respondent's Initial Brief p. 16. The Lopez statement fails to establish the elements set forth in the rule. No "reasonable person" in the declarant's position (here Lopez) would think he would be charged with prostitution for simply referencing a statement made to him by another person, especially when the declarant (Lopez) qualified that statement with a rejection of the solicitation offer. In fact, the State's entire theory of the trial focused on Lopez's rejection of the purported solicitation advance from Parvin. Certainly a person who rejects a solicitation offer cannot reasonably expect to face criminal prostitution charges for acting lawfully in rejecting the offer. The State's position to the contrary borders on frivolous. This Court should reject this argument.

Conclusion

Based on the foregoing, this Court should find the trial court committed reversible error in admitting the hearsay statement of Lopez and reverse.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

Dwight P. Drake

SC Bar No. 001745

E-Mail: dwight.drake@nelsonmullins.com

- Michael J. Anzelmo

SC Bar No. 72933

E-Mail: michael.anzelmo@nelsonmullins.com

1320 Main Street / 17th Floor

Post Office Box 11070 (29211-1070)

Columbia, South Carolina 29201

803.799.2000

Attorneys for Appellant Leslie Todd Parvin

Columbia, South Carolina

August 9, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Case No. 11-GS-40-897 and 11-GS-40-898

The State of South Carolina, ... Respondent,

v.

Leslie Todd Parvin, ... Appellant.

RECEIVED

AUG 09 2013

SC Court of Appeal

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief complies with Rule 211(b), SCACR.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

Dwight F. Drake

SC Bar No. 001745

E-Mail: dwight.drake@nelsonmullins.com

Michael J. Anzelmo

SC Bar No. 72933

E-Mail: michael.anzelmo@nelsonmullins.com

1320 Main Street / 17th Floor

Post Office Box 11070 (29211-1070)

Columbia, South Carolina 29201

803.799.2000

Attorneys for Appellant Leslie Todd Parvin

Columbia, South Carolina

August 9, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Case No. 11-GS-40-897 and 11-GS-40-898

The State of South Carolina, ... Respondent,

v.

Leslie Todd Parvin, ... Appellant.

PROOF OF SERVICE

I, the undersigned administrative assistant in the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Leslie Todd Parvin, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by hand delivery, to the following address(es):

Pleadings:

Counsel Served:

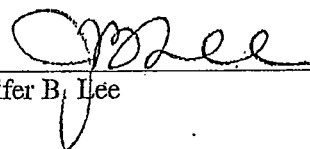
Final Reply Brief

Brendan McDonald
S.C. Attorney General's Office
Rembert C. Dennis Building
P. O. Box 11549
Columbia, SC 29211

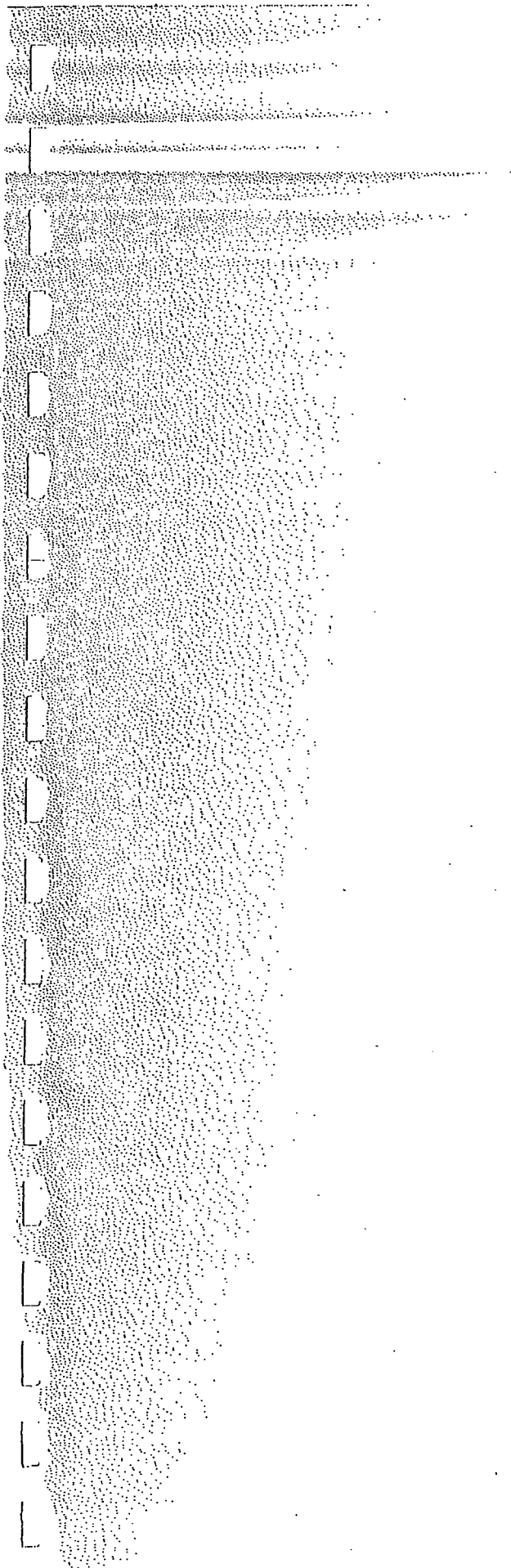
RECEIVED

AUG 09 2013

SC Court of Appeals


Jennifer B. Lee

August 9, 2013



THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Case No. 11-GS-40-897 and 11-GS-40-898

The State of South Carolina, ... Respondent,

v.

Leslie Todd Parvin, ... Appellant.

PROOF OF SERVICE

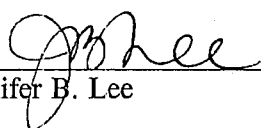
I, the undersigned administrative assistant in the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Leslie Todd Parvin, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by hand delivery, to the following address(es):

Pleadings:

Return to the State's Petition for Rehearing

Counsel Served:

Brendan McDonald
S.C. Attorney General's Office
Rembert C. Dennis Building
P. O. Box 11549
Columbia, SC 29211


Jennifer B. Lee

August 19, 2014

RECEIVED

AUG 19 2014

SC Court of Appeals



33999/00708
MJA, mws
Rec'd 9/30/14

ALAN WILSON
ATTORNEY GENERAL

September 29, 2014

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

Re: The State v. Leslie Parvin
Appeal from Richland County
Appellate Case No.: 2012-205888

Dear Ms. Kitchings:

Enclosed please find the original and six (6) copies of the Return to Petition for Rehearing dated September 29, 2014, along with proof of service, in the above-referenced case.

Thank you for your cooperation in this matter.

Sincerely,

Brendan J. McDonald
Assistant Attorney General

BJM/mv
Enclosures

cc: ✓ Michael J. Anzelmo, Esq.
Dwight F. Drake, Esq.
The Honorable Daniel E. Johnson, Solicitor, 5th Judicial Circuit
Trisha Allen, Victim Services

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County

Clifton Newman, Circuit Court Judge

Appellate Case No. 2012-205888

THE STATE,

RESPONDENT,

V.

LESLIE TODD PARVIN,

APPELLANT

RETURN TO PETITION FOR REHEARING

Comes now Respondent, above named, by and through the Attorney General of South Carolina, and hereby files a return to Appellant Leslie Todd Parvin's petition for rehearing pursuant to Rule 221(a), SCACR.

WHY PARVIN'S PETITION SHOULD BE DENIED

In short, Parvin's petition should be denied because:

- South Carolina's Error-Preservation rules do not prohibit an appellate court from considering evidence that is cumulative and came in without objection when analyzing the question of harmless error. See State v. Schumpert, 312 S.C. 502, 507, 435 S.E.2d 859, 862 (1993) (finding the admission of inadmissible hearsay was harmless error where the victim made similar statements to others which were not the subject of a contemporaneous objection); State v. Johnson, 298 S.C. 496, 498-99, 381 S.E.2d 732, 733 (1989) (concluding the erroneous admission of a family court restraining order was harmless error where a second family court restraining order was admitted into the record without objection);

- Well-settled law concerning the erroneous admission of inadmissible hearsay does not require reversal, but instead requires only that an appellate court determine whether the error is prejudicial in light of the entirety of the evidence in the record, an analysis which the panel performed in this case. See State v. Jennings, 394 S.C. 473, 478, 716 S.E.2d 91, 94-95 (2011) (analyzing improperly admitted hearsay evidence against other evidence in the record for purposes of determining whether the improperly admitted testimony is prejudicial); State v. Garner, 389 S.C. 61, 67-68, 697 S.E.2d 615, 618 (Ct. App. 2010) (explaining the trial court's erroneous admission of inadmissible hearsay is subject to a harmless error analysis comparing the relationship of the alleged error to other evidence in the record).
- It is beyond dispute that Soto and Avila's testimony concerning statements made by Lopez were cumulative to the unchallenged testimony from Detective Gonzalez on cross-examination and Detective Gwyn on direct, cross and re-direct examination (R. 716, 892, 951, 954-55);
- It is equally clear that even if defense counsel's objection to Soto and Avila's testimony had been sustained, the jury would have still known the case involved allegations of homosexual sex for money as defense counsel had informed the jury panel of this in its questioning in *voir dire* (R. 38, 49) and failed to object to Monroy's testimony concerning the sleeping arrangements on the night in question (R. 285-86);
- Contrary to Parvin's position, the central issue at trial was not Parvin's sexual preference, or whether he gave Lopez money in exchange for sex, but rather whether Parvin was acting with criminal intent when he shot and killed both Lopez and Guterrez.

As a result, the State respectfully asks this Court to deny Parvin's petition for rehearing.

STATEMENT OF THE CASE

Leslie Todd Parvin was indicted by a Richland County grand jury for murdering Edgar Lopez ("Lopez") and Pablo Guzman-Gutierrez ("Gutierrez").¹ (R. 1773-74). Parvin was tried before the Honorable Clifton Newman and a jury on December 12, 2011 through December 21, 2011 where he was represented by Fielding Pringle, Jennifer Davis and Luke Shealy. (R. 2, 148, 408, 757, 1020, 1306, 1552, 1711). At the conclusion of trial, Parvin was found guilty as charged and on December 28, 2011, received concurrent thirty-five (35) year sentences. (R.

¹ As noted in Parvin's brief, Gutierrez is referenced throughout the record as Pablo Guzman or Guzman. In an effort to be consistent with Parvin's brief, the State will refer to him solely as Gutierrez.

1744, 1755). Following his conviction, Parvin unsuccessfully sought a new trial. (R. 1755-62, 1769-72, 1).

Parvin subsequently sought appellate review arguing only that the introduction of Lopez's statements to two acquaintances, Adan Soto and Marlin Avila, in the time leading up to his death was reversible error because the statements were purportedly inadmissible hearsay. (Br. of App. at 3). In response, the State argued that: (1) Parvin's failure to appeal from all grounds supporting the trial court's evidentiary ruling resulted in the unappealed ruling becoming law of the case; (2) Lopez's statements to Soto and Avila indicating Parvin had solicited and paid him for sex prior to Parvin shooting and killing both Lopez and Gutierrez were admissible under Rule 804(B)(3), SCRE as a statement against interest; and (3) even assuming the trial court erred in admitting Soto and Avila's hearsay testimony, any error was harmless.

On July 30, 2014, this Court issued a published opinion affirming Parvin's conviction and sentence finding the admission of Soto's and Avila testimony concerning Lopez's statements constituted harmless error. State v. Parvin, 2014 WL 3734369 (July 30, 2014). Both parties sought rehearing in petitions filed on August 13th (the State) and 18th of 2014 (Parvin). The State now files a return to Parvin's petition for rehearing.

ARGUMENTS

- I. Rehearing must be denied because: (A) South Carolina's Error-Preservation Rules do not prohibit an appellate court from considering evidence that is cumulative and came in without objection when determining the question of harmless error; and (B) South Carolina law cannot be understood as requiring reversal just because an error is alleged to be "the central issue" of a case

Parvin seeks rehearing on two bases, first that the panel overlooked or misapprehended "well-settled error preservation rules" in determining the admission of Soto and Avila's hearsay testimony was harmless error; and second that the panel allegedly ignored case law holding that

“error related directly to the central issue of a case cannot constitute harmless error.” Parvin Pet. for Reh’g at 1. As seen below, because the requirements of error-preservation are inapposite to an appellate court’s ability to review the entirety of the evidence in the record for purposes of performing a harmless error analysis, an analysis which is not governed by any definite rule of law, but is instead determined from the relationship of the alleged error to the entire case, the State respectfully requests that Parvin’s petition for rehearing be denied.

A. South Carolina’s Error-Preservation Rules do not prohibit an appellate court from considering evidence that is cumulative and came in without objection when determining the question of harmless error

While it may be true that trial counsel need only present a contemporaneous objection and receive a ruling on such an objection in order to adequately preserve an issue for appellate review, the State submits these rules have no bearing on an appellate court’s ability to look to all evidence in the record, including cumulative evidence, when determining harmless error. Indeed, our Supreme Court, when discussing harmless error, recently noted “[n]o 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. Collins, 2014 WL 4087597 (August 20, 2014) (quoting State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (emphasis added)). Further, “in applying the harmless error rule, the court must be able to declare *the error had little, if any, likelihood of having changed the result of trial[.]*” Collins, 2014 WL 4087597 (August 20, 2014) (quoting State v. Watts, 321 S.C. 158, 165, 467 S.E.2d 272, 277 (Ct. App. 1996) “) (emphasis added)). In other words, the relevant question under a harmless error analysis is whether the alleged error, when compared to the entirety of the record, including the individual facts and circumstances of the case at hand, was “unimportant in relation to

everything else the jury considered on the issue in question.” Yates v. Evatt, 500 U.S. 391, 403 (1991).

Moreover, while harmless error has no set formula, there are certain situations in which an error may be more likely to be found harmless. For instance, South Carolina’s appellate courts have long stated, specifically within the context of inadmissible hearsay that “the admission of improper evidence is harmless where it is merely cumulative to other evidence.” State v. Blackburn, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978). This is based on the “overriding rule” recognized by appellate courts that, “whatever doesn’t make any difference, doesn’t matter.” State v. Jolly, 304 S.C. 34, 39, 402 S.E.2d 895, 898 (1991) (“Appellate courts recognize an overriding rule which says: whatever doesn’t make any difference, doesn’t matter.”) (internal quotations omitted). The State submits the panel correctly recognized this principle in the present case when it found Soto and Avila’s testimony concerning their conversation with Lopez was cumulative to the unobjected-to testimony of Detective Gonzalez.²

Here, since the only alleged error identified by Parvin’s trial and appellate counsel was the purportedly inadmissible hearsay testimony of Soto and Avila, the panel was correct in analyzing the alleged error against the balance of the evidence; evidence which included testimony from Detectives Gonzalez and Gwyn consistent with that of Soto and Avila—that Lopez received \$200 from Parvin in exchange for sex.³ (R. 716, 892, 951, 954-55). As stated above, inadmissible hearsay evidence that is cumulative to other evidence may be harmless since “appellate courts will not set aside convictions due to insubstantial errors not affecting the result.” State v. Kirton, 381 S.C. 7, 37, 671 S.E.2d 107, 122 (Ct. App. 2008) (citing State v.

² The State further adds that in addition to Detective Gonzalez’s testimony on *cross-examination* on this issue (R. 716), Detective Gwyn, on direct (R. 892), *cross-examination* (R. 951) and re-direct (R. 954-55) also testified without objection on this matter.

³ Again, the State notes that Detective Gonzalez’s testimony came in response to defense counsel’s questioning on *cross-examination*. (R. 716).

Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991)); see also State v. Jennings, 394 S.C. 473, 478, 716 S.E.2d 91, 94-95 (2011) (“Improperly admitted hearsay evidence which is merely cumulative to other evidence may be viewed as harmless.”); State v. Price, 368 S.C. 494, 499, 629 S.E.2d 363, 366 (2006) (holding improper admission of an investigator’s hearsay testimony that was “solely based on information from informants” in a murder trial was “merely cumulative.”); State v. Townsend, 321 S.C. 55, 59, 467 S.E.2d 138, 141 (Ct. App. 1996) (“Where the hearsay is merely cumulative to other evidence, its admission is harmless.”); State v. Blackburn, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978) (“Under settled principles, the admission of improper evidence is harmless where it is merely cumulative to other evidence.”). As a result, Parvin’s claim that cumulative evidence cannot be reviewed in light of error-preservation rules is at odds with well-settled law which explains the admission of inadmissible hearsay may be cumulative where such evidence is admitted elsewhere in the record without objection. See Kirton, 381 S.C. at 37-38, 671 S.E.2d at 122 (explaining that while three individuals testified regarding allegedly improper evidence, defense counsel only registered a contemporaneous objection as to one of the individual’s testimony and as a result, any evidence which was allegedly improperly admitted, was harmless in light of the unobjected-to testimony); State v. Haselden, 353 S.C. 190, 196-97, 577 S.E.2d 445, 448-49 (2003) (acknowledging the admission of improper evidence is harmless where it is cumulative to other evidence that was not the subject of an objection).

For example, in State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993) our Supreme Court affirmed the admission of allegedly inadmissible hearsay evidence on the basis that the testimony at issue, hearsay testimony from a counselor repeating statements made by the victim, was “harmless” because “two other witnesses testified without objection” to similar hearsay

statements. 312 S.C. at 507, 435 S.E.2d at 862. Likewise, in State v. Johnson, 298 S.C. 496, 381 S.E.2d 732 (1989), a case cited by the Shumpert Court, our Supreme Court affirmed the trial court's erroneous admission of inadmissible hearsay concerning a family court restraining order because the order "was merely cumulative to the second order admitted without objection[.]" 298 S.C. at 498-99, 381 S.E.2d at 733.

With this in mind, the State submits the panel did not overlook or misapprehend anything when it found the admission of Soto and Avila's alleged hearsay testimony was cumulative to the testimony of Detective Gonzalez, and was therefore harmless.⁴ Rather, the panel, understanding that it may "disturb a ruling admitting or excluding evidence only upon a showing of 'manifest abuse of discretion accompanied by probable prejudice'" correctly applied its standard of review in conjunction with the doctrine of harmless error and reached the correct result. State v. Dennis, 402 S.C. 627, 635, 742 S.E.2d 21, 25 (Ct. App. 2013). Indeed, South Carolina law, as demonstrated in State v. Collins, clearly permits its' appellate courts to assess harmless error in light of the entirety of the record. This includes evidence, particularly hearsay evidence that is not the subject of a contemporaneous objection. Schumpert, 312 S.C. at 507, 435 S.E.2d at 862; Johnson, 298 S.C. at 498-99, 381 S.E.2d at 733. Accordingly, because the harmless error analysis performed by the panel in this case is completely consistent with the analysis performed by our Supreme Court in previous cases, most notably Schumpert and Johnson, the State respectfully requests Parvin's petition for rehearing be denied.

B. Contrary to Parvin's position, South Carolina law does not require reversal simply because an alleged error relates directly to the central issue in a case

⁴ In fact, Detective Gonzalez's testimony notwithstanding, there is a variety of other evidence in the record supporting the panel's determination that the so-called "Lopez Statements" were cumulative and therefore harmless. Specifically, the jury via *defense counsel's questions in voir dire*, was already aware that the case involved allegations of homosexual sex for money prior to opening arguments. (R. 38, 49). Furthermore, as noted in footnote two *supra*, Detective Gwyn, like Detective Gonzalez, also testified to the sexual arrangement between Lopez and Parvin. (R. 892, 951, 954-55). Likewise, defense counsel did not object to Monroy's testimony indicating Parvin and Lopez would be staying together that evening. (R. 286-87).

Parvin also contends the panel overlooked or misapprehended the effect of our Supreme Court's ruling in Sulton v. HealthSouth Corp., 400 S.C. 412, 418, 734 S.E.2d 641, 644 (2012), a ruling which he claims creates a *per se* rule of reversal where an issue is central to a case. Specifically, Parvin claims the question of whether he gave Lopez money in exchange for sex was central to the case⁵ and therefore, once the panel found the admission of Soto and Avila's testimony concerning Lopez's statements was erroneous, it was required to reverse under Sulton. The State disagrees because Sulton, a civil case involving an erroneous jury charge, did not adopt a *per se* rule of reversal, but instead expressly declined to adopt such a rule explaining that South Carolina law still requires a prejudice analysis on such issues. See Sulton, 400 S.C. at 418, 734 S.E.2d at 644 ("The North Carolina standard does not comport with South Carolina jurisprudence regarding jury instructions, which analyzes jury instructions as a whole and emphasizes prejudice analysis."). Moreover, and perhaps more to the point, because South Carolina's appellate courts have consistently explained "improper admission of hearsay testimony constitutes reversible error only when the admission causes prejudice," as noted in State v. Garner, 389 S.C. 61, 67-68, 697 S.E.2d 615, 618 (Ct. App. 2010), the State submits the panel was correct in declining to simply reverse Parvin's conviction and sentence.

In Sulton, our Supreme Court reversed a verdict in a survival action on the basis that the trial court's jury charge improperly instructed the jury that the defendant, HealthSouth, owed the plaintiff "a heightened duty of care." 400 S.C. at 416, 734 S.E.2d at 643. In so doing, the Court, after first explaining the jury charge was an incorrect statement of law, considered adopting the

⁵ Despite Parvin's claims, the central issue in this case was not whether Parvin offered Lopez money in exchange for sex, but whether the State met its burden of proving, beyond a reasonable doubt, that Parvin was acting with "malice aforethought" when he killed both Lopez and Gutierrez. In fact this was stressed by the State in closing when the assistant solicitor told the jury, "[w]hat we have to prove is . . . not whatever his sexual preferences are. What we must prove are the elements of murder; that there was a killing of another human being, in this case two, with malice aforethought." (R. 1652). E.g. S.C. Code Ann. § 16-3-10 (2003) ("Murder is the unlawful killing of another with malice aforethought, express or implied.").

rule from a North Carolina case which mandated reversal. 400 S.C. at 418, 734 S.E.2d at 644 (internal quotations omitted). The Court declined to do so, instead explaining the “North Carolina standard does not comport with South Carolina jurisprudence regarding jury instructions, which analyzes jury instructions as a whole and emphasizes prejudice analysis.” *Id.* Thus, even a cursory review of Sulton shows that not only is there no *per se* rule of reversal as argued by Parvin, but it further confirms that an erroneous jury instruction, like the erroneous admission of hearsay testimony in this case, is subject to a prejudice analysis. Sulton, 400 S.C. at 418, 734 S.E.2d at 644 (analyzing erroneous jury instruction as a whole and utilizing a prejudice analysis); Garner, 389 S.C. at 67-68, 697 S.E.2d at 618 (stating the improper admission of hearsay evidence constitutes reversible error only when the admission cause prejudice).

Furthermore, even if Sulton merely stands for the proposition that an appellate court, when performing a harmless error analysis, should look to whether the alleged error is the central issue in the case, the State submits the central issue in this case, as noted by the assistant solicitor in her closing argument, is not Parvin’s sexual preference, or whether he gave Lopez money in exchange for sex, but whether he possessed criminal intent when he shot and killed both Lopez and Gutierrez. Stated differently, the evidence relating to the “central issue” in this case would not be the testimony concerning the so-called Lopez Statements, but rather the disinterested eyewitness testimony describing Parvin’s actions when he shot and killed both Lopez and Gutierrez.

Additionally, even if one were to accept Parvin’s contention that the alleged error is “central” in this case, the State submits that such an error, and whether it is prejudicial, would still be based on the entirety of the evidence in this case. In Garner, a case cited by the panel in its opinion, this Court correctly described the relationship between error and prejudicial error in

the context of allegedly inadmissible hearsay testimony explaining, “improper admission of hearsay testimony constitutes reversible error only when the admission causes prejudice.” 389 S.C. at 67-68, 697 S.E.2d at 618. Continuing, the Court said, “such error is deemed harmless when it could not have reasonably affected the result of the trial, and an appellate court will not set aside a conviction for such insubstantial errors.” *Id.* Of course, “[n]o definite rule of law governs [harmless error]; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case.” *Collins*, (quoting *Mitchell*, 286 S.C. at 573, 336 S.E.2d at 151 (emphasis added)).

Here, as stated in Argument I(A), the State submits the panel correctly concluded that any error in admitting Soto and Avila’s testimony concerning Lopez’s statements was harmless when viewed against the entirety of the evidence, particularly the cumulative testimony of Detective Gonzalez on cross-examination. Specifically, the panel correctly applied well-settled law concerning the application of the harmless error doctrine when, rather than merely reversing under the rubric of *Sulton*, as suggested by Parvin, it instead looked to established precedent and, when reviewing the facts against the evidence correctly decided that any error was harmless, especially in light of the cumulative nature of the allegedly erroneous evidence. Indeed, it is beyond dispute that Soto and Avila’s testimony was cumulative to the unchallenged testimony of Detectives Gonzalez and Gwyn. (R. 716, 892, 951, 954-55). Moreover, it is equally clear the jury would have been aware of this component of the case even if the trial court had sustained defense counsel’s objection on this issue as defense counsel had already told the jury panel in *voir dire* that the case would involve allegations of homosexual sex for money. (R. 38, 49). Finally, and despite defense counsel’s assertions to the contrary, because the issue of Parvin’s sexuality was collateral to what was truly the main issue at trial—Parvin’s state of mind when he

shot and killed both Lopez and Gutierrez—the State submits that the jury’s verdict on this issue should not be set aside.

CONCLUSION

In conclusion, there is simply no argument that the jury, who is presumed to follow the law, and was instructed that its verdict could only be based on the evidence, would have convicted Parvin on the basis of the so-called Lopez Statements, especially when viewed against the entirety of the evidence in this case. As a result, the State requests the panel uphold both the jury’s verdict and its own harmless error analysis by denying Parvin’s petition for rehearing as it is clear the admission of Soto and Avila’s alleged hearsay testimony did not affect the jury’s verdict in this case.

Respectfully Submitted,

ALAN WILSON
Attorney General

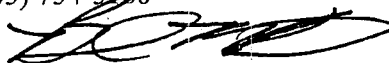
JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

BRENDAN J. McDONALD
Assistant Attorney General
S.C. Bar No. 77784

DANIEL E. JOHNSON
Solicitor, Fifth Judicial Circuit

South Carolina Office of Attorney General
P.O. Box 11549
Columbia, SC 29211-1549
(803) 734-3188



Brendan J. McDonald
ATTORNEY(S) FOR RESPONDENTS

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
Clifton Newman, Circuit Court Judge
Appellate Case No. 2012-205888

THE STATE,

RESPONDENT,

V.

LESLIE TODD PARVIN,

APPELLANT.

PROOF OF SERVICE

I, Brendan McDonald, counsel for the Respondent, certify that I have served the within Return to Petition for Rehearing on Appellant by depositing two (2) copies of the same in the United States mail, first class, postage prepaid, addressed to his attorney(s) of record, Dwight F. Drake and Michael J. Anzelmo at Nelson, Mullins, Riley and Scarborough, LLP at 1320 Main St. 17th Floor Columbia SC 29201.

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

This twenty-ninth day of September, 2014.


Brendan J. McDonald
Assistant Attorney General
Bar No. 77784
Office of Attorney General
P. O. Box 11549
Columbia, South Carolina 29211
(803) 734-3188

ATTORNEY FOR RESPONDENT

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Case No. 11-GS-40-897 and 11-GS-40-898
Appellate Case No. 2012-205888

RECEIVED

OCT 13 2014

The State of South Carolina, ...

Respondent

v.

Leslie Todd Parvin, ...

Appellant.

SC Court of Appeals

Appellant's Reply to the State's Return to the Petition for Rehearing

Pursuant to Rules 221(a) and 240(f) of the South Carolina Appellate Court Rules, Appellant Leslie Todd Parvin files this Reply to the State's Return to the Petition for Rehearing in State v. Parvin, Op. No. 5254 (S.C. Ct. App. filed July 30, 2014) (Shearouse Adv. Sh. No. 30 at 85). The Panel should grant the petition and reverse the trial court. The State's arguments ignore the fact that the opinion alters that established common law and procedural practice and requires—for the first time—that a party must object to the same evidence repeatedly in order to avoid losing on appeal based on a "harmless error" analysis. Moreover, the opinion encourages the State to continue to seek to admit improper¹ evidence at trial and hope that the defendant will fail to object

¹ The State has never argued that the trial-court properly admitted the Lopez hearsay statement under Rule 803, SCRE. The State did not attempt to defend that ruling before the Panel, and instead, sought affirmance under a Rule 220, SCACR, argument. The Panel cannot allow a party to acknowledge error on the seminal issue in a criminal case and then prevail when the party later compounds that error at trial. That error tainted the entire trial. The State cannot be permitted to gain from its own error. The Panel should grant rehearing on this basis and reverse.

one time and then lose on appeal based on a harmless error analysis. Each of the State's arguments fails as follows:

1. The State claims that "[e]rror-[p]reservation rules do not prohibit an appellate court from considering evidence that is cumulative . . . when analyzing the question under harmless error" and that "erroneous admission of inadmissible hearsay does not require reversal, but instead requires only that an appellate court determine whether the error is prejudicial" See Return p. 1 and 2, respectively. These positions misapprehend Parvin's argument and ignore the actual issue before the Panel on rehearing. Parvin did not argue that an appellate court cannot consider harmless error. Rather, Parvin argued that the opinion created a new error preservation rule to the traditional harmless error test. The new rule requires a defendant to object each time to the same objectionable evidence despite the fact that defendant had already properly preserved the objection or face affirmance on appeal. The State's return ignores the creation of this new rule and asks the Panel to do the same.

The State's position fails in light of the well-settled fact that our rules did not require Parvin to object each time the State introduced the improper statements, in whatever form, after the trial court ruled on the issue. See, e.g., Bennett v. State, 383 S.C. 303, 308, 680 S.E.2d 273, 275 (2009) (finding trial counsel was not ineffective for failing to renew his objection to testimony as inadmissible hearsay because the trial court overruled trial counsel's previous objection to the testimony); State v. Nelson, 331 S.C. 1, 6 n.6, 501 S.E.2d 716, 718 n.6 (1998) (holding that once the trial judge has ruled on an objection, it is not necessary for counsel to object every time the point is raised thereafter); State v. Ross, 272 S.C. 56, 60-61, 249 S.E.2d 159, 161-62 (1978)

(same); State v. Liberte, 336 S.C. 648, 652 n.1, 521 S.E.2d 744, 746 n.1 (Ct. App. 1999) (holding that once a trial judge has overruled an objection, there is no need to renew objections to preserve the issue for appeal); State v. McDaniel, 320 S.C. 33, 37, 462 S.E.2d 882, 884 (Ct. App. 1995) (recognizing the well-settled rule that “[s]o long as the judge had an opportunity to rule on an issue, and did so, it was not incumbent upon defense counsel to harass the judge by parading the issue before him again” (internal quotations omitted)). Moreover, such a rule would contradict Rule 17 of the South Carolina Rules of Criminal Procedure, which establishes that “[i]f an objection has once been made at any stage to the admission of evidence, it shall not be necessary thereafter to reserve rights concerning the objectionable evidence.” Rule 17, SCRCrIMP (emphasis added).

Moreover, this rule is logical in light of the fact that a defendant should not be required to object each time to the offending evidence for strategic trial reasons. Once a defendant objects to properly preserve an objection to the improper evidence and the trial court rules against the objection in front of the jury, the defendant should not have to continue to raise the same issue and continue to lose in front of the jury. Such a process would unfairly prejudice the defendant in the eyes of the jurors.

As written, the opinion alters that established common law and procedural practice and requires—for the first time—that a party must object to the same evidence repeatedly in order to avoid losing on appeal based on a “harmless error” analysis.²

² Moreover, had the trial court properly excluded the Lopez hearsay statements (as this Panel has held), then such evidence would never have been admitted, would not have been before the trial court or this Panel, and could not be used to find harmless error. Likewise, if the trial judge had properly excluded the Lopez hearsay statements at the outset of the trial, then Detective Gonzalez would not have presented his report summarizing the Lopez statements.

The State fails to provide any argument that supports leaving that new rule in place. Therefore, rehearing is warranted to correct this error.

2. The State next claims that “the central issue at trial was not Parvin’s sexual preference, or whether he gave Lopez money in exchange for sex, but rather whether Parvin was acting with criminal intent [at the time of the shooting]. See Return p. 2. This argument lacks merit for two reasons. First, the Panel has already held that admission of the Lopez hearsay statements “related to the central issue of the case and allowed the State ‘to shape its entire presentation to the jury.’” Op. No. 5254 at 89. That holding was correct.

Second, the State now, in a manner consistent with its ever-evolving positions on appeal, claims that the central issue is not Parvin’s motive. In so doing, the State asks the Panel to ignore the fact that the State framed and presented its entire case on a theory that Parvin offered Lopez money in exchange for sex and killed him in retaliation when Lopez backed out of the deal. See Trans. p. 107-08; 240; 242-43; 244; 246-47; 257-58; 261; 302-06; 311-313. That position provided the motive which allowed the State to argue Parvin possessed the requisite criminal intent for the crime—revenge.

The State also claims that the jury “would have still known the case involved allegations of homosexual sex for money” even if the Lopez statement was inadmissible. See Return p. 2. This is misrepresentation of this case to the Panel. Parvin’s sexual preference is immaterial. The State never argued that Parvin killed the victims because Parvin was a homosexual. The State consistently argued Parvin killed the victims because of revenge. That is a fundamental and critical distinction. The

State could not develop a motive/criminal intent theory for the jury on a baseless claim that Parvin was a homosexual. The State needed the revenge aspect of the Lopez statement to develop its motive/criminal intent theory. Once the State developed that narrative the entire case was tried on that theory. The jury likewise weighed the evidence against that framework based on the Lopez hearsay statements. Therefore, the trial court's admission of the Lopez statements prejudiced Parvin and cannot constitute harmless error.

It is again critical to note that the State has conceded the admission of the Lopez hearsay statement under Rule 803, SCRE, was error. The State did not attempt to defend that ruling before this Court. The Panel cannot allow a party to acknowledge error on the seminal issue in a criminal case and then prevail when the party later compounds that error at trial. That error tainted the entire trial. The State cannot be permitted to gain from its own error. The Panel should grant rehearing and reverse.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: Michael Anzelmo
Dwight F. Drake
SC Bar No. 001745
E-Mail: dwight.drake@nelsonmullins.com
Michael J. Anzelmo
SC Bar No. 72933
E-Mail: michael.anzelmo@nelsonmullins.com
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, South Carolina 29201
803.799.2000

W. Drake Anzelmo
is express permission

Attorneys for Leslie Todd Parvin

Columbia, South Carolina

October 10, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Case No. 11-GS-40-897 and 11-GS-40-898
Appellate Case No. 2012-205888

The State of South Carolina, ... Respondent,

v.

Leslie Todd Parvin, ... Appellant.

PROOF OF SERVICE

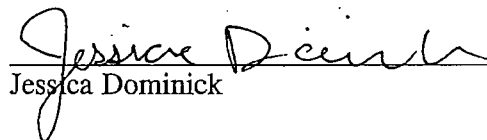
I, the undersigned administrative assistant in the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Leslie Todd Parvin, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by U.S. Mail, to the following address(es):

Pleadings:

**Appellant's Reply to the State's Return to the Petition
for Rehearing**

Counsel Served:

Brendan McDonald
S.C. Attorney General's Office
Rembert C. Dennis Building
P. O. Box 11549
Columbia, SC 29211



Jessica Dominick

October 10, 2014

The South Carolina Court of Appeals

The State, Respondent,

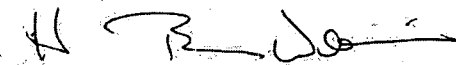
v.

Leslie Parvin, Appellant.

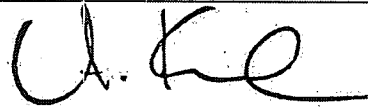
Appellate Case No. 2012-205888

ORDER

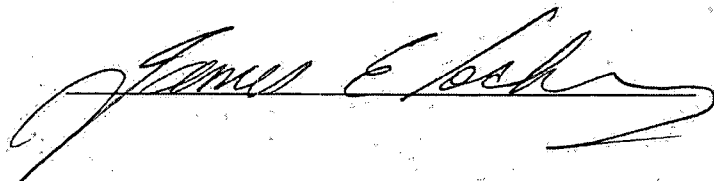
Parvin and the State both filed petitions for rehearing following this Court's opinion in *State v. Parvin*, Op. No. 5254 (S.C. Ct. App. filed July 30, 2014) (Shearouse Adv. Sh. No. 30 at 85-92). After careful consideration, we grant Parvin's petition in part and order additional oral argument on the following issue: "Whether the Court misapprehended or overlooked rules of error preservation in finding the admission of the victim's hearsay statement constituted harmless error." As to the State's petition, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the State's petition for rehearing is denied.



J.



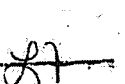
J.



J.

Columbia, South Carolina

FILED

12-11-14 

cc:

Dwight Franklin Drake, Esquire

Michael J. Anzelmo, Esquire

Brendan Jackson McDonald, Esquire

Donald J. Zelenka, Esquire

Daniel Edward Johnson, Esquire

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Leslie Parvin, Appellant.

Appellate Case No. 2012-205888

Appeal From Richland County
Clifton Newman, Circuit Court Judge

Opinion No. 5254
Heard February 5, 2014 - Filed July 30, 2014
Reheard January 13, 2015
Withdrawn, Substituted, and Refiled June 10, 2015

AFFIRMED

Dwight Franklin Drake and Michael J. Anzelmo, both of
Nelson Mullins Riley & Scarborough, LLP, of Columbia,
for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy
Attorney General John W. McIntosh, Senior Assistant
Deputy Attorney General Donald J. Zelenka, Assistant
Attorney General Brendan Jackson McDonald, and
Solicitor Daniel Edward Johnson, all of Columbia, for
Respondent.

LOCKEMY, J.: In this criminal appeal, Leslie Parvin argues the trial court erred in allowing inadmissible hearsay testimony from two witnesses. We affirm.

FACTS

Parvin was indicted on two counts of murder related to the deaths of Edgar Lopez and Pablo Guzman-Gutierrez. The State tried the case under the theory that Parvin solicited Lopez for sex and then killed Lopez and Gutierrez in retaliation when Lopez refused him later in the night. Parvin argued self-defense.

Motion In Limine

Immediately prior to trial, Parvin made a motion in limine to exclude any testimony referring to other crimes, wrongs, or bad acts. He contended any statements alleging he was at Lopez's home for homosexual sex were inadmissible. Specifically, he objected to statements from three different witnesses—testimony from Adan Soto and Marlin Avila regarding statements made by Lopez at a gas station and testimony from José Monroy regarding statements Monroy overheard at Lopez's home. For purposes of this appeal, we focus only on the contested testimony from Soto and Avila, which will be referred to as the Lopez statements. Parvin does not appeal any issue related to Monroy's testimony.

Parvin argued (1) the Lopez statements were inadmissible pursuant to Rule 404(b), SCRE, because the State could not prove by clear and convincing evidence Parvin committed any bad acts; (2) the State was improperly introducing the Lopez statements to prove he was of bad character; and (3) the Lopez statements were more prejudicial than probative. Parvin also contended the Lopez statements would be inadmissible as hearsay.

The State argued the Lopez statements were admissible under the theory of res gestae or the present sense impression exception to the hearsay rule.¹ As to the issue of res gestae, the State asserted there was an ongoing chain of events and the Lopez statements were an integral part of the crime. The State also contended the Lopez statements were admissible under Rule 803(3), SCRE, as statements of the declarant's "[t]hen existing mental, emotional, or physical condition." Finally, the State emphasized that the Lopez statements also indicated Parvin's alleged motive

¹ The State cited *State v. Simpson*, 325 S.C. 37, 479 S.E.2d 57 (1996), and *State v. Adams*, 322 S.C. 114, 470 S.E.2d 366 (1996), to support its arguments.

and were not intended to show bad character. The State, however, asserted it was not attempting to enter the Lopez statements pursuant to Rule 404(b), SCRE.²

The trial court ruled the Lopez statements (1) were admissible under the res gestae theory, (2) constituted an exception to the hearsay rule, and (3) were probative to the issue of Parvin's motive. During trial, the trial court clarified its decision and stated that in admitting the testimonies under the res gestae theory, the testimonies "did not involve other crimes, but may have suggested some bad acts." It further stated the probative value of the evidence outweighed the prejudicial effect.

Parvin's Version of the Events

Parvin testified that on July 30, 2010, the day of the incident, he was driving his van and collecting scrap metal for recycling and profit. He carried a forty-five caliber pistol in his van as a result of his prior military service. On the way home from an unsuccessful search, Parvin bought beer and passed Lopez's home, where Lopez and Gutierrez were drinking beer in the yard. Parvin stated he assumed the men were in the construction industry due to their attire and could possibly have leads regarding scrap metal. Parvin stopped in the yard and began speaking and drinking with Lopez and Gutierrez. Parvin claimed he did not want to immediately ask for connections or leads on scrap metal and first wanted to establish some sort of relationship with the men.

Parvin agreed to drive Lopez to the gas station for more beer and gave Lopez money for the beer. While at the gas station, Parvin claimed Lopez observed him move his gun from between the front seats and place it in the waistband of his shorts. Parvin remained in the van while Lopez entered the store and purchased the beer. Parvin and Lopez then returned to Lopez's home. Throughout the evening, several people came and left the home until only Parvin, Lopez, and Gutierrez remained. Parvin stated that when he tried to leave, Lopez would not let him and requested more money. Parvin refused and then asked for the change from the beer Lopez had purchased earlier in the night. Lopez became upset and threatened Parvin and Parvin's family. When Parvin attempted to leave again, Gutierrez blocked his exit. Gutierrez made physical contact with Parvin and tried

² Rule 404(b), SCRE, provides, "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent."

to obtain control of Parvin's gun. Parvin kept control of his gun and saw Lopez reach for something in the shed located in the yard. Parvin stated he became fearful for his life at that time and shot both Lopez and Gutierrez in self-defense.

The State's Case

In support of its version of events, the State offered testimony from Monroy, who claimed he was drinking with Parvin, Lopez, and Gutierrez prior to the incident. Monroy stated he overheard Lopez tell Gutierrez that Parvin would be sleeping inside with Lopez that evening. The beer was depleted at some point during the evening, and Lopez asked Parvin to drive him to a gas station to purchase more. The State presented testimony from Soto and Avila, who spoke with Lopez at the gas station.³ Soto and Lopez were both from Guatemala, and Soto knew Lopez through Soto's sister-in-law. Soto stated Lopez approached him and began talking with him. Lopez mentioned he was at the gas station with an American to purchase a case of beer and further explained Parvin had offered him \$200 to buy the beer and have sex. Lopez then showed Soto the \$200 but told Soto he was going to tell Parvin to go home. Avila testified Lopez made similar comments to her inside the store.

After returning to Lopez's home, the State opined Parvin became angry because Lopez refused to have sex with him. The State presented Roberto Gonzalez-Merrin as an eyewitness to the shooting. Merrin explained Parvin pulled a gun from his back and shot Lopez before turning the gun on Gutierrez, who was attempting to flee the scene, and shooting him in the back. Merrin testified that when the shooting occurred, Parvin was outside of the fence that surrounded Lopez's front yard while Lopez and Gutierrez were both inside the fence.

Following the shooting, Parvin fled the scene in his minivan. Parvin then returned to his home, destroyed the gun used in the shooting, checked his family into a motel for the evening, changed his appearance, and drove his minivan to Louisiana. While in Louisiana, Parvin sold his minivan for scrap and continued to Texas. Parvin returned to Columbia on August 15, 2010, and despite knowing the authorities were looking for him, he never attempted to contact police. Police obtained warrants for Parvin's arrest for murder after Monroy identified Parvin in a

³ Parvin objected to the testimony immediately prior to Soto's and Avila's answers, but the trial court overruled the objection.

photographic lineup. Police eventually arrested Parvin pursuant to search and arrest warrants executed at his home.

Verdict

The jury convicted Parvin of two counts of murder, and the trial court sentenced him to thirty-five years' imprisonment. Parvin moved for a new trial, which the trial court denied. This appeal followed.

LAW/ANALYSIS

Parvin argues the trial court erred in allowing Soto and Avila to testify about the Lopez statements. Specifically, he argues the Lopez statements were hearsay and did not qualify as present sense impressions under Rule 803(1), SCRE. We agree.

"The admission or exclusion of evidence is a matter within the trial court's sound discretion, and an appellate court may disturb a ruling admitting or excluding evidence only upon a showing of 'a manifest abuse of discretion accompanied by probable prejudice.'" *State v. Dennis*, 402 S.C. 627, 635, 742 S.E.2d 21, 25 (Ct. App. 2013) (quoting *State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 845, 847-48 (2006)).

"Hearsay is an out of court statement, offered in court to prove the truth of the matter asserted." *State v. Townsend*, 321 S.C. 55, 59, 467 S.E.2d 138, 141 (Ct. App. 1996). "Hearsay is inadmissible as evidence unless an exception applies." *Id.* Rule 803(1), SCRE, provides for the "present sense impression" exception, which allows for the admission of "a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." "There are three elements to the foundation for the admission of a hearsay statement as a present sense impression: (1) the statement must describe or explain an event or condition; (2) the statement must be contemporaneous with the event; and (3) the declarant must have personally perceived the event." *State v. Hendricks*, 408 S.C. 525, 533, 759 S.E.2d 434, 438 (Ct. App. 2014). Our courts have not delineated a time frame that would constitute "immediately thereafter"; however, this court has held a statement given nearly ten hours after the perceived incident cannot be admitted under Rule 803(1). *See State v. Burroughs*, 328 S.C. 489, 499, 492 S.E.2d 408, 413 (Ct. App. 1997).

Parvin contests the admission of the following testimony from Soto:

Q: And did you have a chance to speak to [Lopez] on that day?

A: Yeah, I spoke to him the day that I saw him at the gas station at that time.

....

Q: And while you were talking to [Lopez], did he mention what he was doing at the gas station?

A: Yeah, he told me he was going to buy a case of beer, that he was with an American.

Q: Okay. Did he say anything else about the American and the beer?

A: Yes, he said the American had given him \$200 to buy beer because he wanted to have sex with him.

Parvin also contests the admission of the following testimony from Avila:

Q: What did [Lopez] tell you about what he was doing with that American?

A: He said that the American had given him money to buy beer and he said the American had given him \$200 to have sex.

The witnesses gave no indication as to the amount of time between when Parvin allegedly solicited sex and when Lopez spoke with them. The State simply explained it was an "ongoing chain of events." We find the trial court erred in ruling the Lopez statements were admissible because the timing of the declarant's statement is a critical component of the present sense impression exception.

Despite finding error in the trial court's ruling, we must also find the error prejudiced Parvin before we can reverse. *See State v. Garner*, 389 S.C. 61, 67-68, 697 S.E.2d 615, 618 (Ct. App. 2010) ("[I]mproper admission of hearsay testimony constitutes reversible error only when the admission causes prejudice. Such error is deemed harmless when it could not have reasonably affected the result of the trial, and an appellate court will not set aside a conviction for such insubstantial errors." (citation and internal quotation marks omitted)).

Later at trial, the State presented Investigator William Gonzalez as a witness. Investigator Gonzalez recorded statements from both Avila and Soto regarding the night of the incident. On cross-examination, Investigator Gonzalez testified, without objection, about a report he prepared following his interview of Avila and Soto.

Q: And in your report you noted that [Avila] told you that . . . [Lopez] referred to the American as "the fuc**** American," and you put that in your report?

A: That's correct. . . .

Q: And the next -- I'm sorry. You were also involved in, as the solicitor stated, the arrest of --

A: Well, it -- can I clarify one thing? It wasn't just "the fuc**** American." It was "the fuc**** American [who] gave me \$200 to have sex with him."

The State also presented Investigator Brien Gwyn as a witness to testify regarding his interview of Avila and Soto. On direct examination, he testified without objection, "Both in their statement advised us that according to [Lopez]'s conversation with [Soto and Avila] in the store or at the store, [Lopez] was solicited for sex by the individual he was at the store with." On cross-examination, Parvin asked Investigator Gwyn whether the store was "the place where [Lopez was] telling [Avila] about this sex for money," and Investigator Gwyn replied that it was. Later on cross-examination, Parvin asked the officer if "the only evidence that you have that there is a sex for money is the words of a man who [had a] .379 [blood alcohol content]," and Investigator Gwyn replied, "From two separate witnesses, yes."

We find the trial court's error in admitting Soto's and Avila's hearsay testimonies was rendered harmless because they subsequently became cumulative to Investigator Gonzalez's and Investigator Gwyn's unobjected-to testimonies. See *Townsend*, 321 S.C. at 59, 467 S.E.2d at 141 ("Where the hearsay is merely cumulative to other evidence, its admission is harmless."); *State v. Kirby*, 325 S.C. 390, 396-97, 481 S.E.2d 150, 153 (Ct. App. 1996) (finding even if an officer's testimony regarding information radioed by the police dispatcher was inadmissible hearsay, its admission was harmless because it was cumulative to similar testimony that was admitted without objection).

On rehearing, Parvin argues our finding of harmless error is contrary to the rule of appellate preservation that a party need only object once and obtain a ruling from the trial court to preserve an issue for appellate review. *See State v. McDaniel*, 320 S.C. 33, 37, 462 S.E.2d 882, 884 (Ct. App. 1995) ("So long as the judge had an opportunity to rule on an issue, and did so, it was not incumbent upon defense counsel to harass the judge by parading the issue before him again." (internal quotation marks omitted)). Parvin asserts that our holding requires for the first time "that a party must object to the same evidence repeatedly in order to avoid losing an appeal based on a 'harmless error' analysis." We disagree. Although Parvin objected to Soto's and Avila's hearsay testimonies, he did not object to Investigator Gonzalez's or Investigator Gwyn's testimonies, nor does he challenge the admission of the officers' testimonies on appeal. *See State v. Kirton*, 381 S.C. 7, 37-38, 671 S.E.2d 107, 122 (Ct. App. 2008) (finding any error in allowing the victim's testimony that the defendant sexually assaulted the victim six years earlier was harmless when, although the defendant objected to the victim's testimony, he "did not timely object" to testimony from two other witnesses regarding the defendant's touching of the victim prior to the sexual assault for which the defendant was charged).

Parvin further asserts our holding "contradict[s]" Rule 17 of the South Carolina Rules of Criminal Procedure, which states "[i]f an objection has once been made at any stage to the admission of evidence, it shall not be necessary thereafter to reserve rights concerning the objectionable evidence." We disagree. A review of the historical notes to Rule 17 indicates this language was "taken from Rule 43(c)(1), SCRCF." *Id.* In *Parr v. Gaines*, 309 S.C. 477, 424 S.E.2d 515 (Ct. App. 1992), this court rejected a similar argument in the context of Rule 43(c)(1). We explained Rule 43(c)(1), which uses the exact same language as Rule 17, "merely states that once a contemporaneous objection has been made, no further reservation of rights is needed to preserve the objection." *Id.* at 482, 424 S.E.2d at 519. Our court specifically noted, however, Rule 43(c)(1) "does not alter the rule requiring a contemporaneous objection" when evidence is presented to preserve the issue of its admissibility on appeal. *Id.* *Parr* therefore makes clear Rule 17, similar to Rule 43(c)(1), did not relieve Parvin of his requirement to object to Investigator Gonzalez's and Investigator Gwyn's testimonies to challenge the admissibility of their testimonies on appeal.

We find *State v. Ladner*, 373 S.C. 103, 644 S.E.2d 684 (2007), similar to the present case. *Ladner* involved a prosecution for criminal sexual conduct with a minor. *Id.* at 106, 644 S.E.2d at 686. At trial, the State moved to admit a witness's

testimony that after the sexual assault, the two-year-old victim told the witness her "tooch" hurt, and after the witness asked what happened, the victim responded by saying the defendant "did it" and then quickly stating he "didn't do nothing." *Id.* at 113, 644 S.E.2d at 689. Over the defendant's objection, the trial court allowed the witness's testimony, finding the victim's statement the defendant "did it" was admissible as an excited utterance. *Id.* at 115, 644 S.E.2d at 690. On appeal, our supreme court found no error in allowing this testimony because the victim's statement qualified as an excited utterance. *Id.* at 116-17, 644 S.E.2d at 690-91. In addition, the supreme court found "any arguable error regarding [the witness's] testimony would be deemed harmless" because "[o]ther hearsay statements by the victim identifying [the defendant] were also admitted during the State's case." *Id.* at 113 n.8, 644 S.E.2d at 689 n.8. Specifically, a doctor who examined the victim after the assault testified later at trial, without objection, the victim "indicated . . . she had been touched by her aunt's boyfriend [who] was previously identified at triage as someone named Bryan. And I asked her if the aunt's boyfriend was [the defendant] and she told me yes." *Id.*

Here, as in *Ladner*, the admission of Soto's and Avila's testimonies was rendered harmless in light of the other evidence that was later admitted at trial without objection. The investigators' unobjected-to testimonies was other evidence that tended to support the substance of Soto's and Avila's testimonies—that Parvin offered Lopez \$200 in exchange for sex. Because this other evidence became cumulative to Soto's and Avila's testimonies and was admitted without objection, we find the error in allowing Soto's and Avila's testimonies was rendered harmless.

We note that several other occurrences at trial further support our conclusion that the error in admitting Soto's and Avila's testimonies was harmless. For example, during voir dire and before Parvin's motion in limine to exclude any statements that Parvin was at Lopez's home for homosexual sex, the trial court informed the pool of potential jurors that the trial might involve "allegations of homosexuality . . . and/or sex for money." Moreover, during opening arguments, the State asserted, without objection, that Lopez told Avila and Soto "I'm here with the white American. I'm getting some beer and he offered to pay me money for sex." Likewise, Parvin's counsel told the jury Avila and Soto planned to testify that Lopez told them "[t]his fuc**** American gave me money for beer. This fuc**** American gave me \$200 to have sex with him, but I'm not going to do it." While the trial court's comments during voir dire and counsels' opening arguments are not evidence Parvin offered Lopez \$200 for sex, these instances show how this issue permeated the entire trial. Finally, as previously stated, Parvin does not challenge

Monroy's testimony that he overheard Lopez tell Gutierrez that Parvin would be sleeping inside with him that evening. Accordingly, when considering Soto's and Avila's hearsay testimonies in relation to the entire record, the trial court's error in allowing this testimony was harmless.

CONCLUSION

For the forgoing reasons, we find the trial court's error in allowing Soto's and Avila's testimonies was rendered harmless because it became cumulative to other evidence later admitted at trial without objection. Thus, the trial court is

AFFIRMED.

WILLIAMS and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Case No. 11-GS-40-897 and 11-GS-40-898
Appellate Case No. 2012-205888

The State of South Carolina, ... Respondent,

v.

Leslie Todd Parvin, ... Appellant.

Petition for Rehearing and Suggestion for Rehearing *En Banc*

Pursuant to Rules 219 and 221(a) of the South Carolina Appellate Court Rules, Appellant Leslie Todd Parvin petitions the Panel to grant rehearing in the only operative opinion in State v. Parvin, Op. No. 5254 (S.C. Ct. App. filed June 10, 2015) (Shearouse Adv. Sh. No. 22 at 50), and reverse the trial court. This matter necessitates rehearing and rehearing *en banc* for several reasons. First, in the substituted opinion, the Panel continued to misapprehend and overlook the well-settled error preservation rules in finding the Lopez hearsay statement constituted harmless error. Second, the Panel's holding of harmless error creates new procedure in South Carolina that contradicts our well-settled rules of error reservation and requires—for the first time—for a party to continue to object to the same evidence repeatedly despite the trial court already ruling on the admissibility of the evidence. Third, the opinion created a new rule limiting a criminal defendant's right to cross examine the State's witnesses on a witness statement after the State (1) already received an erroneous ruling to allow the

hearsay statements, (2) hammered the hearsay statement to the jury in opening, throughout fact witnesses, and in closing to the jury, and (3) in fact framed its entire case around this improperly admitted evidence.¹ Fourth, the Panel relied on statements in voir dire and the State's opening statement as facts to support its harmless error holding despite the Panel's admission that voir dire and opening statements "are not evidence." Fifth, the Panel's harmless error holding overlooked the fact that our Supreme Court has held that error related directly to the central issue of a case cannot constitute harmless error. The Panel should grant rehearing and/or rehearing *en banc* to correct these errors and reverse the trial court.

I.

As an initial matter, Parvin addresses the need for this petition for rehearing and suggestion for rehearing *en banc*.² Parvin avers that he is required to file this petition for rehearing and rehearing *en banc* because the Panel withdrew the initial opinion and issued a new, substituted opinion on June 10, 2015. By vacating the initial opinion and issuing a second opinion, the Panel voided the initial opinion and rendered the initial petition for rehearing immaterial. Thus, Parvin is required to file this petition for rehearing and rehearing *en banc* in order to address the valid and operative second opinion and as a precursor to a petition for writ of certiorari (should the Panel or *en banc* court not reverse the opinion). This petition for rehearing and suggestion for

¹ Evidence that the State never defended on the basis the State obtained admission in the trial court. The trial court ruled the Lopez hearsay statement was admissible as present sense impression under Rule 803(1), SCRE. The State did not attempt to defend that ruling on appeal, and instead, sought affirmance under a Rule 220, SCACR, argument. The Panel cannot allow a party to acknowledge error on the seminal issue in a criminal case and then prevail when the party later compounds that error at trial. That error tainted the entire trial. The State cannot be permitted to gain from its own error.

² Our Appellate Court Rules unfortunately do not address this issue or provide a procedure regarding rehearing after withdrawal of the initial opinion and upon issuance of a substituted opinion.

rehearing *en banc* properly address the only operative, controlling opinion issued by the Panel.

A brief re-cap of the procedural posture in this matter establishes why Parvin is required to file this petition for rehearing and rehearing *en banc*. On July 30, 2014, this Panel issued its first written opinion in this matter.³ Parvin Colleton timely filed a petition for rehearing as to the initial opinion. The State also filed a petition for rehearing. The Panel denied the State's petition but granted Parvin's petition in part and ordered oral argument on the issues raised by Parvin. After argument, the Panel withdrew the original opinion and substituted the new opinion in its place. Substituted Opinion No. 5254 was included in the June 10, 2015 Advance Sheets, indicating it replaced the original opinion. See State v. Parvin, Op. No. 5254 (S.C. Ct. App. Opinion Withdrawn, Substituted, and Re-filed June 10, 2015) (Shearouse Adv. Sh. No. 22 at 50).

South Carolina case law establishes that in such a situation the original opinion was vacated and treated as if it were never issued. As set forth in the Panel's substituted opinion, the original opinion was "withdrawn and substituted" with the new opinion. Such action vacated the original opinion and rendered it void. See, e.g., Sierra Club v. Kiawah Resort Assocs., 318 S.C. 119, 121, 456 S.E.2d 397, 399 (1995) (acknowledging that the issuance of a substituted opinion vacates a prior opinion, stating "[t]he prior opinion in Sierra Club v. Kiawah Resort Assocs., Op. No. 24121 (S.C. Sup. Ct. filed July 18, 1994) (Davis Adv. Sh. 17 at 7), is vacated and the following substituted in its place") (emphasis added); Benton v. Roger C. Peace Hosp.,

³ See State v. Parvin, Op. No. 5254 (S.C. Ct. App. filed July 30, 2014) (Shearouse Adv. Sh. No. 30 at 85).

313 S.C. 520, 521, 443 S.E.2d 537, 537 (1994) ("The prior opinion is vacated and the following substituted in its place") (emphasis added); State Workers' Comp. Fund v. S.C. Second Injury Fund, 313 S.C. 536, 537, 443 S.E.2d 546, 547 (1994) ("The prior opinion is vacated and the following substituted in its place").

In issuing the June 10th substituted opinion, the Panel denied the petition for rehearing, vacated the original opinion, and substituted a new opinion, wherein it added new findings/conclusions that were not present in the original opinion. As a result, this petition for rehearing and suggestion for rehearing *en banc* is needed to address the substituted opinion. Parvin has to do so in accordance with our appellate rules.

II.

Rehearing is required because the Panel misapprehended or overlooked the well-settled rules of error preservation in finding the Lopez hearsay statement⁴ constituted harmless error. Despite finding the trial court erred in admitting the Lopez hearsay statement, the Panel affirmed based on a harmless error analysis.⁵ Such a finding misapprehends, overlooks, and contradicts well-settled precedent from this Court and the Supreme Court as to error preservation and harmless error.

⁴ The Lopez hearsay statements were statements by Edgar Lopez to Adan Soto and Marlin Avila on the night at issue. The substance of those statements was that Lopez told Avila that Parvin offered Lopez money to have sex with him. The Panel recognized "the contested testimony from Soto and Avila, which will be referred to as the Lopez statements." See Substituted Opinion p. 51. The Lopez statements are comprised the Soto statement of "Yes, [Lopez] said the American had given him \$200 to buy beer because he wanted to have sex with him." See Substituted Opinion p. 55. Avila stated: "[Lopez] said that the American had given him money to buy beer and he said the American had given him \$200 to have sex." *Id.* Collectively, these statements are the Lopez statements. It is uncontested that Parvin objected to both.

⁵ The State framed its entire case to the jury on the Lopez statements. See Trans. p. 107-08; 240; 242-43; 244; 246-47; 257-58; 261; 302-06; 311-313.

a.

Rehearing and/or rehearing *en banc* is warranted because the Panel continued to misapprehend and overlook the well-settled error preservation rules in finding the Lopez hearsay statement constituted harmless error. The cases cited by the Panel illustrate this misapprehension. The holding of the Panel creates new procedure in South Carolina that contradicts our well-settled rules of error reservation and requires—for the first time—for a party to continue to object to the same evidence repeatedly despite the trial court already ruling on the admissibility of the evidence. Rehearing and/or rehearing *en banc* is warranted to correct these errors.

In the substituted opinion, the Panel affirmed on a harmless error basis because Investigator Brien Gwyn and Detective William Gonzalez both testified to the Lopez statements, and Parvin failed to object to each. See Substituted Opinion p. 56. Such a holding misapprehends the nature of the testimony from Gwyn and Gonzalez. Neither Gwyn nor Gonzalez introduced any new statements, evidence, or testimony. Rather, all that Gwyn and Gonzalez did was restate the Lopez statement from each officer's respective written report. Again, neither added anything new to the Lopez statement nor did either alter the Lopez statement in any meaningful manner. This is evident from the testimony of each. The testimony illustrates the Panel's misapprehension of the nature of the evidence and why Parvin did not have to object to Gwyn or Gonzalez simply reintroducing the same statement that had already been ruled admissible.

Investigator Gwyn testified—as recognized by the Panel—“regarding his interview of Avila and Soto.” See Substituted Opinion p. 56. Again as relied on by

the Panel, Gwyn merely stated that "[b]oth⁶ in their statement advised us that according to [Lopez]'s conversation with [Soto and Avila] in the store or at the store, [Lopez] was solicited for sex by the by the individual⁷ he was at the store with." Id. (alterations in original but footnotes added for clarification). This testimony was substantively identical to the Lopez statements. Investigator Gwyn offered no personal observations, statements, or other facts. He only reiterated the Lopez hearsay statements from his report as told to him by Soto and Avila.

The Panel further relied on Detective Gonzalez's testimony that Avila stated Lopez said Parvin gave him two hundred dollars to have sex. See Substituted Opinion p. 56.⁸ This again was substantively identical testimony to the Lopez hearsay statements to which Parvin had previously properly objected. See Trial Transcript p. 714. Detective Gonzalez did not add any new evidence, statements, or facts. He only reiterated the Lopez hearsay statements from his report as told to him by Soto and Avila.

The Panel reliance on the reiteration of the Lopez statements by Investigator Gwyn and Detective Gonzalez to find harmless error misapprehends and overlooks Parvin's obligations to object to cumulative testimony. Our rules are well-settled—the party only has to object once and receive a ruling as to a piece of evidence. The party is not required to continuously object to the same or substantively identical evidence. See, e.g., State v. McDaniel, 320 S.C. 33, 37, 462 S.E.2d 882, 884 (Ct. App. 1995)

⁶ "Both" refers to Soto and Avila's statements which are the Lopez statement at issue.

⁷ That individual was Parvin.

⁸ The Panel's improper reliance on Parvin's cross examination is addressed in section b, *infra*.

(recognizing the well-settled rule that “[s]o long as the judge had an opportunity to rule on an issue, and did so, it was not incumbent upon defense counsel to harass the judge by parading the issue before him again”) (international quotations omitted); Bennett v. State, 383 S.C. 303, 308, 680 S.E.2d 273, 275 (2009) (finding trial counsel was not ineffective for failing to renew his objection to testimony as inadmissible hearsay because the trial court overruled trial counsel’s previous objection to the testimony); State v. Liberte, 336 S.C. 648, 652 n.1, 521 S.E.2d 744, 746 n.1 (Ct. App. 1999) (holding that once a trial judge has overruled an objection, there is no need to renew objections to preserve the issue for appeal); State v. Nelson, 331 S.C. 1, 6 n.6, 501 S.E.2d 716, 718 n.6 (1998) (holding that once the trial judge has ruled on an objection, it is not necessary for counsel to object every time the point is raised thereafter); State v. Ross, 272 S.C. 56, 60-61, 249 S.E.2d 159, 161-62 (1978) (same).

The Panel overlooked or misapprehended the fact that the testimony of Investigator Gwyn and Detective Gonzalez was substantively identical to the Lopez statements. The above-cited rules establish that a party need not object every time the same evidence comes in at trial. Thus, the fact that Parvin did not object at the time of Investigator Gwyn and Detective Gonzalez’s testimonies is irrelevant for the analysis and cannot be used to support harmless error. The fact that Parvin objected to the Lopez statement at the earliest opportunity and obtained a ruling at that time⁹ is all that matters for preservation purposes.

The Panel’s also misapprehend Rule 43(c)(1), SCRCP, and Parr v. Gaines, 309 S.C. 477, 424 S.E.2d 515 (Ct. App. 1992), and the impact on Rule of the South

⁹ Parvin did object at the earliest opportunity and obtain a ruling. Of that there is no question.)

Carolina Rules of Criminal Procedure. Those citations do not require a party to continue to object to the same evidence each time it is introduced once the party obtained a ruling at the earliest opportunity. The Panel misapprehended that fact.

Rule 17 provides that "[i]f an objection has once been made at any stage to the admission of evidence, it shall not be necessary thereafter to reserve rights concerning the objectionable evidence." Rule 17, SCRCrimP (emphasis added). Parvin admits that Rule 17, SCRCrimP, Rule 43(c)(1), SCRCP, and Parr v. Gaines required him to make "a contemporaneous objection" to the admission of the Lopez statements. He did so. Those authorities required him to do no more. Because the testimony of Investigator Gwyn and Detective Gonzalez was substantively identical to the Lopez statements, no further objection was needed. Thus, when the Panel stated that Rule 43(c)(1), SCRCP, vis-à-vis Parr v. Gaines "merely states that once a contemporaneous objection has been made, no further reservation of rights is need to preserve the objection," that is correct and what Parvin did. See Substituted Opinion p. 57. In fact, that has been Parvin's argument throughout this appeal—he objected contemporaneously to the admission of the Lopez statement and received a ruling; thus, he was not required to continue to do so when Investigator Gwyn and Detective Gonzalez merely rehashed the Lopez statements. As a result, Rule 43(c)(1), SCRCP, and Parr v. Gaines actually support Parvin's arguments to the Panel. The Panel overlooked this fact and misapplied that rule.

In sum, the well-settled rules of error preservation did not require Parvin to object to Investigator Gwyn's testimony, Detective Gonzalez's reiteration of the Lopez statement, or withhold cross examination from Detective Gonzalez on the Lopez

statements, as required by the Panel in this opinion. Our rules only required Parvin to object to the inadmissible Lopez hearsay statements once and obtain a ruling once as to the admissibility of those statements.

As written, the substituted opinion alters that established common law and procedural practice and requires—for the first time—that a party must object to the same evidence repeatedly in order to avoid losing on appeal based on a “harmless error” analysis.¹⁰ The Panel misapprehended or overlooked the fact that this is not the rule in South Carolina. Rehearing and/or rehearing *en banc* is required to correct this error.

b.

The opinion also created a new rule limiting a criminal defendant’s right to cross examine the State’s witnesses. Harmless error cannot be found when a criminal defendant elects to cross examine a State witnesses on previously admitted evidence after the State (1) already received an erroneous ruling to allow the State to use the hearsay statements, (2) used that evidence throughout trial, hammered the hearsay statement to the jury in opening, throughout fact witnesses, and in closing to the jury, and (3) in fact framed its entire case around this improperly admitted evidence.

Even if an error on the seminal issue of a case could be subject to a harmless error analysis, this error cannot be harmless by relying on Parvin’s cross examination of Detective Gonzalez. This is quite evident in this matter. The Lopez hearsay

¹⁰ Moreover, had the trial court properly excluded the Lopez hearsay statements (as this Panel held), then such evidence would never have been admitted, would not have been before the trial court or this Panel, and could not be used to find harmless error. Likewise, if the trial judge had properly excluded the Lopez hearsay statements at the outset of the trial, then Investigator Gwyn and Detective Gonzalez do not present his report summarizing the Lopez statements, and there would have been nothing for Parvin to cross examine Detective Gonzalez about.

statements allowed the State to shape its entire presentation to the jury. See Trans. p. 107-08; 240; 242-43; 244; 246-47; 257-58; 261; 302-06; 311-313. Without the theory extrapolated from the Lopez statements, the State had no motive for the crime. The jury likewise weighed the evidence against that framework based on the Lopez hearsay statements.

Parvin should be allowed to cross examine witnesses on that statement in order to ameliorate or counter the damage incurred though the State's repeated use of the erroneously admitted evidence. A criminal defendant should not be punished by a harmless error analysis should the defendant elect to elicit cross on the evidence. A rule, such as the one created by the substituted opinion, would improperly limit (even unconstitutionally), if not foreclose, the criminal defendant's right to cross examine or challenge the State's witnesses and evidence in fear of having the sentence affirmed on appeal by harmless error. In essence, the substituted opinion tells a criminal defendant he should not defend himself at trial in the face of improper testimony in order to possibly prevail on appeal. That cannot be the law of South Carolina. The Panel misapprehended or overlooked this fact. Rehearing and/or rehearing *en banc* is required to correct this error.

c.

The substituted opinion also conflicts with well-established precedent from this Court and the Supreme Court regarding harmless error. Harmless error must be based on facts of each case based on the evidence presented to the trial court. See, e.g., State v. Chavis, 412 S.C. 101, 771 S.E.2d 336 (2015) (using evidence presented to the trial court to weigh whether the error was harmless); State v. McDonald, 412 S.C. 133, 771

S.E.2d 840 (2015) (same); State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (holding the admission of hearsay testimony was harmless error in light of the abundant evidence in the record from which the jury could find the defendant guilty); State v. Miller, 397 S.C. 630, 725 S.E.2d 724 (Ct. App. 2012) (refusing to apply harmless error where the State failed to present overwhelming evidence to the trial court to support such a ruling). No South Carolina court has held that an error can be harmless based on non-evidence. However, the substituted opinion creates such a rule and allows a finding of harmless error based on non-evidence.

The Panel relied on statements in voir dire and the State's opening statement as facts to support its harmless error holding despite the Panel's admission that voir dire and opening statements "are not evidence." The Panel misapprehended or overlooked the fact that reliance on such non-evidence cannot be used to support a harmless error finding. Rehearing and/or rehearing *en banc* is required to correct this error.

d.

The Panel's harmless error holding overlooked the fact that our Supreme Court has held that error related directly to the central issue of a case cannot constitute harmless error.¹¹ The State framed and presented its entire case on a theory that Parvin offered Lopez money in exchange for sex and killed him in retaliation when Lopez backed out of the deal. See Trans. p. 107-08; 240; 242-43; 244; 246-47; 257-58; 261; 302-06; 311-313. Once the trial judge admitted the Lopez hearsay statement over the objection of Parvin at the outset of the trial, the State was off and running with its case

¹¹ The initial opinion held that admission of the Lopez hearsay statements "related to the central issue of the case and allowed the State 'to shape its entire presentation to the jury.'" Initial Opinion No. 5254 at 89. That holding was correct.

and repeatedly hammered its theory throughout trial, including with Detective Gonzalez.

Error related directly to the central issue of a case cannot constitute harmless error. Sulton v. Health South, 400 S.C. 412, 418, 734 S.E.2d 641, 644 (2012). In Sulton, the Supreme Court addressed an erroneous jury charge that incorrectly elevated the duty of care owed by a hospital on the seminal issues of the case. Id. The court held that, despite the harmless error approach to review of jury instructions, the error could not be harmless because it went to the heart of the case. Id. The court held such errors are per se reversible, even in light of the traditional harmless error analysis. Id.

This matter is analogous to the court's logic and rationale in Sulton. The State's motive theory was the seminal issue. Without the Lopez hearsay statements, the State had nothing to present to the jury on that issue. Thus, it was critical that the trial court make the proper ruling on admissibility of those statements. The trial court's erroneous decision to admit the Lopez statements prejudiced Parvin's ability to defend on the basis of self-defense. This is especially true when the State premised the entire case on these Lopez statements. Therefore, the error cannot be harmless.

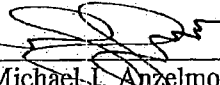
Even if an error on the seminal issue of a case could be subject to a harmless error analysis, this error cannot be harmless. This is quite evident in this matter. The Lopez hearsay statements allowed the State to shape its entire presentation to the jury. Without the theory extrapolated from the Lopez statements, the State had no motive for the crime. The jury likewise weighed the evidence against that framework based on the Lopez hearsay statements. Therefore, the trial court's admission of the Lopez statements prejudiced Parvin and cannot constitute harmless error. The Panel

overlooked or misapprehended this fact. Rehearing and/or rehearing *en banc* is required to correct this error.

e.

Lastly, the State conceded the admission of the Lopez hearsay statement under Rule 803, SCRE, was error. The State did not attempt to defend that ruling before this Court, and instead, sought affirmance under a Rule 220, SCACR, argument. The Panel cannot allow a party to acknowledge error on the seminal issue in a criminal case and then prevail when the party later compounds that error at trial. That error tainted the entire trial. The State cannot be permitted to gain from its own error. Rehearing and/or rehearing *en banc* is required to correct this error and reverse the trial court.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

Michael J. Anzelmo

SC Bar No. 72933

E-Mail: michael.anzelmo@nelsonmullins.com

Dwight F. Drake

SC Bar No. 001745

E-Mail: dwight.drake@nelsonmullins.com

1320 Main Street / 17th Floor

Post Office Box 11070 (29211-1070)

Columbia, South Carolina 29201

803.799.2000

Attorneys for Leslie Todd Parvin

Columbia, South Carolina

June 25, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

JUN 25 2015

SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Case No. 11-GS-40-897 and 11-GS-40-898
Appellate Case No. 2012-205888

The State of South Carolina, ... Respondent,

v.

Leslie Todd Parvin, ... Appellant.

PROOF OF SERVICE

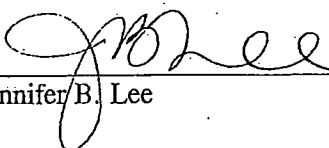
I, the undersigned administrative assistant in the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Leslie Todd Parvin, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by U.S. Mail, to the following address(es):

Pleadings:

Petition for Rehearing and Suggestion for Rehearing
En Banc

Counsel Served:

Brendan McDonald
S.C. Attorney General's Office
Rembert C. Dennis Building
P. O. Box 11549
Columbia, SC 29211


Jennifer B. Lee

June 25, 2015

The South Carolina Court of Appeals

The State, Respondent,

v.

Leslie Parvin, Appellant.

Appellate Case No. 2012-205888

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

H. Bruce Williams

J.

U. Ke

J.

James E. ...

J.

Columbia, South Carolina

cc:

Dwight Franklin Drake, Esquire
Michael J. Anzelmo, Esquire
Brendan Jackson McDonald, Esquire
Alan McCrory Wilson, Esquire
John W. McIntosh, Esquire

FILED
10/8/15

Donald J. Zelenka, Esquire
Daniel Edward Johnson, Esquire
The Honorable Clifton Newman