STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of General Sessions

Clifton Newman, Circuit Court Judge

Appellate Case No. 2015-002285

THE STATE,

RESPONDENT,

V.

LESLIE PARVIN,

PETITIONER.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S COUNTER-QUESTIONS PRESENTED

I. Whether the Court of Appeals erred in its harmless error analysis when the testimony at issue—victim Edgar Lopez's statements to Adan Soto and Marlin Avila that he had received $200 from Petitioner Leslie Parvin in exchange for sex—was cumulative when viewed within the context of the entire record, particularly the unchallenged testimony of Investigator William Gonzalez, Investigator Brien Gwyn and Jose Monroy.

II. Whether the Court of Appeals, in applying its harmless error analysis, erred when it relied on established case law concerning harmless error and considered the testimony of Investigators William Gonzalez and Brien Gwyn where trial counsel, despite objecting to the admission of Soto and Avila's hearsay testimony concerning Lopez's statements, failed to contemporaneously object to the admission of similar testimony through Investigators Gonzalez and Gwyn.

III. Whether the Court of Appeals erred in rejecting Parvin's claims that its harmless error analysis: (a) treated opening statements and statements made in voir dire as evidence; and (b) erroneously relied on evidence from defense counsel's cross-examination of Gonzalez to conclude the admission of Soto and Avilla's testimony was harmless.

INTRODUCTION AND STATEMENT OF THE CASE

Leslie Todd Parvin ("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 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. 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 ("Soto") and Marlin Avila ("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 *inter alia*[2] that the evidence at issue was admissible pursuant to Rule 804(b)(3), SCRE and further maintained any error was harmless. (App. 1799-1823).

On July 30, 2014, the Court of Appeals 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. (App. 1846-52). Both parties sought rehearing. (App. 1854-64, 1865-72). The State's petition for rehearing was denied while Parvin's petition was

[1] As noted in Parvin's final brief before the Court of Appeals, 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.

[2] The State reiterated each of its arguments for affirming Parvin's conviction and sentence in its petition for rehearing and in the event certiorari is granted, reserves the right to raise these arguments in support of affirmance pursuant to Rule 220(c), SCACR. See Rule 220(c), SCACR (2015) ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal); Sims v. AMISUB of South Carolina, Inc., 408 S.C. 202, 214-15, 758 S.E.2d 187, 194 (Ct. App. 2014) (quoting I'On L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000) ("A respondent 'may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court.'")).

granted in part. (App. 1916-17). The sole issue on rehearing was: "[w]hether the Court misapprehended or overlooked rules of error preservation in finding the admission of the victim's hearsay statement constituted harmless error." (App. 1916-17). Following oral argument, the Court issued a substituted opinion again affirming Parvin's conviction and sentence. (App. 1918-27). Thereafter, Parvin unsuccessfully sought rehearing (App. 1928-41, 1942-43) and has now sought certiorari in this Court. The State asks that certiorari be denied.

WHY THE PETITION SHOULD BE DENIED

In summary, the State submits Parvin's petition, which merely disagrees with the Court of Appeals' harmless error analysis, fails to meet any of this Court's "Considerations Governing Review" as explained in Rule 242(b)(1-5), SCACR.[3] For instance, a review of Parvin's petition reflects that none of the considerations present in subsections (b)(2), (b)(4) or (b)(5) are even alleged to exist in this case.[4] Instead, Parvin only suggests the Court of Appeals' harmless error ruling creates "new" so-called rules concerning error preservation and statements made in *voir dire*. See Pet. for Writ Cert. at 11. It does not and it cannot—this is not a case about error preservation, nor is it a case questioning whether statements made in *voir dire* are evidence—indeed the hearsay issue related to Parvin's Rule 803(1), SCRE objection to Soto and Avila's testimony is admittedly preserved and no one suggests that statements made in *voir dire* are

[3] As this Court is well aware, Rule 242(b), SCACR's "Considerations Governing Review," while admittedly non-exclusive, provide examples of the type of issues amounting to the "special and important reasons" supporting a grant of certiorari and include: (1) "[w]here there are novel questions of law[;]" (2) "[w]here there is a dissent in the decision of the Court of Appeals[;]" (3) "[w]here the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court[;]" (4) "[w]here substantial constitutional issues are directly involved[;]" and (5) "[w]here a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court." Rule 242(b)(1-5), SCACR (2015).

[4] Indeed, there is no assertion, nor could there be, that there was a dissent in the Court of Appeals. Likewise, Parvin does not suggest the panel's analysis conflicts with a decision by the Supreme Court of the United States, nor does it "directly involve[]" a substantial constitutional issue.

evidence.[5] Instead, the issue in this case, as well as in every criminal case applying a harmless error analysis, is simply whether the defendant was prejudiced by the admission of the allegedly erroneous evidence.[6]

Here, as demonstrated below, a review of the Court of Appeal's decision shows that it applied clearly-established precedent regarding harmless error and the admission of allegedly inadmissible hearsay testimony to conclude such evidence was cumulative to other evidence in the record.[7] Particularly, the Court correctly found the "unobjected-to testimonies" of Investigators William Gonzalez and Brien Gwyn, both of whom testified two witnesses had told them Lopez accepted money from Parvin in exchange for sex, was cumulative to the objected-to testimony of Soto and Avila and was therefore harmless. (App. 1925-27). Moreover, and as noted above, because the Court of Appeals correctly concluded preservation rules do "not alter the rule requiring a contemporaneous objection *when evidence is presented to preserve the issue of its admissibility on appeal*" there was no error when the Court relied on Gonzalez and Gwyn's testimony to conclude the alleged error regarding the admission of Soto and Avila's testimony was cumulative. (App. 1925) (emphasis added). Additionally, since the Court of Appeals' opinion merely relied on Parvin's *voir dire* request as well as an unobjected-to portion of the State's opening argument to reflect that such information, "while . . . not evidence" had already been relayed to the jury prior to the admission of Soto and Avila's respective testimony, it cannot be said that the Court of Appeals erred in merely mentioning these historical facts when

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[5] In fact, this was noted by the Court of Appeals in its opinion stating, "the trial court's comments during voir dire . . . are not evidence[.]" (App. 1926).

[6] See e.g., 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."); State v. Kirton, 381 S.C. 7, 37, 671 S.E.2d 107, 122 (Ct. App. 2008) ("[A]ppellate courts will not set aside convictions due to insubstantial errors not affecting the result.").

[7] See Parvin, 413 S.C. at 505, 777 S.E.2d at – (citing State v. Townsend, 321 S.C. 55, 59, 467 S.E.2d 138, 141 (Ct. App. 1996)); Parvin, 413 S.C. at 505, 777 S.E.2d at – (citing State v. Kirby, 325 S.C. 390, 396-97, 481 S.E.2d 150, 153 (Ct. App. 1996)).

analyzing whether Parvin was prejudiced by the admission of such evidence. Finally, the fact that the Court of Appeals relied, in part, on Gonzalez's testimony on cross-examination is irrelevant as there is simply nothing to reflect that a harmless error analysis can only be based upon evidence (i.e. testimony) elicited by the prosecution. To the contrary, and as noted above, an appellate court performing a harmless error analysis must do so within the "context of the entire record" rather than against only one portion of the record as Parvin now suggests.[8] Accordingly, the State respectfully asks certiorari be denied.

RESPONDENT'S STATEMENT OF THE FACTS

A. The Murder of Edgar Lopez and Pablo Gutierrez

On July 30, 2010, Parvin, a twenty year military veteran, shot and killed Lopez and Gutierrez in the front yard of Lopez's Richland County residence[9] 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 the 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 Roberto Gonzalez-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. (R. 386-87). Gonzalez-Merrin further testified Parvin 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

[8] See State v. Holder, 382, S.C. 278, 289, 676 S.E.2d 690, 696-97 (2009) (citing State v. Brown, 344 S.C. 70, 75, 543 S.E.2d 552, 554-55 (2001)) (holding the erroneous admission of evidence is harmless beyond a reasonable doubt where it is minimal in the context of the entire record and cumulative to other testimony admitted without objection.).

[9] 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).

shot both Lopez and Gutierrrez, both of whom were inside the fence. (R. 386-87, 388). Lopez and Gutierrez were unarmed when Parvin shot them. (R. 388-89).

Following the shooting, Parvin 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, Parvin 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, Parvin and his father stayed in Louisiana to "figure out what the heck to do." (R. 1131). They then continued to Texas where Parvin visited with his in-laws. (R. 915, 1131). On August 15, 2010, Parvin and his father returned to Columbia. (R. 1131-32). Despite knowing authorities were looking for him, Parvin admitted he never attempted to contact police about the shooting.[10] (R. 1132). Likewise, Parvin's family never attempted to contact police about the shooting. (R. 987).

Four days after his return to Columbia, Parvin was apprehended at his residence when authorities attempted to execute a search warrant on the premises. (R. 910). Notably, in the time immediately before Parvin's apprehension, his wife, father and son all lied about his presence in the residence telling authorities Parvin was in Texas when police sought to execute the search warrant. (R. 735, 907, 909, 909-10).

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

[10] A composite was generated on August 5, 2010 and was circulated thereafter. (R. 505). Additionally, once authorities determined the neighborhood in which Parvin resided, they issued a reverse 9-1-1 call warning citizens to be on the lookout for Parvin. (R. 916-17). Authorities testified the reverse 9-1-1 warning was received by the Parvin household. (R. 917).

In *voir dire*, the trial court, at the request of defense counsel,[11] told the jury pool "an allegation may be made in this case regarding some allegation of homosexuality or sex for money – and/or sex for money." (R. 38, 48-49). Continuing, the trial court asked whether these allegations would adversely affect any potential juror's ability to be fair and impartial. (R. 48-49). No member of the jury pool indicated such an allegation would affect their duty to be fair and impartial. (R. 48-49).

Curiously, defense counsel also 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) Parvin 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 Parvin gave him $200 in exchange for sex (R. 102-04); and (2) prior to going to the gas station, Jose Monroy, another acquaintance of Lopez, heard Lopez tell Gutierrez that Parvin was gay. (R. 105). As such, defense counsel argued evidence of Lopez's statements was improper character evidence citing to Rule 404(b), SCRE. (R. 104-05). Additionally, defense counsel acknowledged that while such evidence may be admissible as evidence of motive (i.e. that Parvin 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).

[11] See (R. 103-04) ("Trial Judge: You filed a voir dire request and you asked to introduce [the homosexual sex for money aspect of the case] to the jury. And then you are arguing that what you asked me to inquire concerning the jury is that it should not be presented to them. Why would you ask – why would you submit a voir dire request of something that you are seeking to have excluded?").

In response, the State, citing 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 the statements were admissible as, "*res gestae* or [the] present sense impression exception to the hearsay rule." (R. 107). The State then explained its timeline for its present sense impression argument.[12] (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 Parvin's character, but to explain why Parvin "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).

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[12] Specifically, the State said:

> 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).

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 Parvin was gay—was admissible.[13] (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.[14] (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 Parvin shot Lopez and Gutierrez

[13] Parvin 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 (App. 1785) ("The trial court committed reversible error by allowing Soto and Avila to testify to the Lopez statements for three reasons.").

[14] 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).

after Lopez refused to have sex with him.[15] (R. 241). Meanwhile, defense counsel, in its opening argument claimed Parvin was acting in self-defense when he shot Lopez and Gutierrez. (R. 263). Specifically, defense counsel alleged Lopez and Gutierrez "attacked" Parvin at which point he shot and killed them. (R. 263). Addressing the sexual encounter gone wrong theory, 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 such a theory since it asked them to believe Parvin 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 sexual encounter gone-wrong theory, presented testimony from Monroy, who was drinking with Parvin, Lopez and Gutierrez in the time leading up to the incident. (R. 286-87). Specifically, Monroy testified he joined Lopez, Gutierrez and Parvin for a Modelo beer outside of Lopez's residence when he overheard Lopez tell Gutierrez that Parvin 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,

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[15] In particular, the State, summarizing Monroy, Soto and Avila's expected testimony said:

> So [Parvin, 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 [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 [Parvin] 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 [Vidal] arrives, because [Monroy] called him. And then [Parvin] and [Lopez] leave and go to the gas station to get more beer, because they ran out.

(R. 244).

"[Parvin] 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 Parvin had given him.[16] (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 Parvin had taken him to buy beer and had given him $200 to have sex. (R. 313). Notably, Avila added that Parvin 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).

Similarly, the State also elicited testimony from Investigator Brien Gwyn. On direct examination, Gwyn testified, without objection, that Soto and Avila advised him, both orally and in writing 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." (R. 892). Later, Gwyn, on two occasions during cross-examination, confirmed the store was "the place where [Lopez was] telling [Avila] about this sex for money." (R. 934-35).[17]

In addition to the testimony regarding the agreement between Lopez and Parvin, the State also presented testimony from Gonzalez-Merrin and Dimas Fernandez which largely corroborated its theory that Parvin 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 Parvin raise his voice and then point a gun at Lopez, who extended his hand towards Parvin just before he was shot.[18] (R. 387). Continuing, Gonzales-Merrin said Parvin next turned the gun on Gutierrez, who was attempting

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

[17] Notably, Detective William Gonzalez, like Detective Gwyn, testified to essentially the same thing. In particular, Gonzalez, in response to defense counsel's questioning during cross-examination, testified, again without objection, that Lopez told Avila and Soto that "the fucking American . . . gave me $200 to have sex with him." (R. 716).

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

to flee the scene, and shot him in the back. (R. 386-87). Gonzalez-Merrin said Parvin 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 Gutierrrez, 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 Parvin, 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 Parvin's direction. (R. 347). Shortly thereafter, Fernandez said he heard gunshots and actually passed Parvin in his minivan as he was leaving the scene. (R. 349).

The State further attempted to support its theory by offering evidence showing Parvin fled the scene in the aftermath of the shooting, disposed of evidence and evaded capture leading up to his apprehension.[19] (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 Parvin changed his appearance and fled to Louisiana where he sold his minivan for scrap. (R. 913, 991, 666-68, 915). They also learned Parvin continued to Texas where he visited with his in-laws before returning to Columbia. (R. 915). Despite knowing authorities were looking for him, Parvin's family never attempted to contact police about the shooting, instead lying about his whereabouts even when his apprehension became imminent. (R. 505, 916-17, 987, 910, 735, 907, 909-10).

[19] As this Court is well aware, evidence of flight is admissible as guilty knowledge and intent. See e.g., State v. Beckham, 334 S.C. 302, 315, 513 S.E.2d 606, 612-13 (1999) (holding evidence demonstrating a murder defendant left South Carolina for Florida and then, after learning he was wanted, drove overnight to Kentucky, was admissible as evidence of "guilty knowledge and intent" despite the fact the defendant later returned to South Carolina); State v. Pagan, 357 S.C. 132, 140-41, 591 S.E.2d 646, 650-51 (Ct. App. 2004) (explaining that a murder defendant's flight was admissible as evidence indicating consciousness of guilt).

E. Parvin's Defense

Following the close of the State's case, Parvin 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, Parvin claimed he was "attacked" and "had to fight [his] way out of the yard." (R. 1061).

Elaborating, Parvin 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.[20] (R. 1111). Parvin 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 course of the conversation, Parvin 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, Parvin 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, "you are not leaving."[21] (R. 1119). Parvin 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 Parvin said, prompted him to ask Lopez for the change from their previous beer run. (R. 1120-21). After this exchange, Parvin 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). Parvin explained it was after this struggle that he pushed Gutierrez away and began firing. (R. 1124-25). Before he

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

[21] While Parvin'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).

shot both Lopez and Gutierrez, Parvin maintained he "was saying no, no, no, no, no." (R. 1126). After the shooting, Parvin told the jury he walked to his minivan and "drove off." (R. 1126, 1127).

F. Closing Arguments and Parvin's Conviction

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 Parvin 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." (R. 1627, 1633). Defense counsel further criticized the sex for money aspect of the case arguing it was devoid of common sense.[22] Continuing, defense counsel returned to Parvin's testimony regarding self-defense and engaged in a thorough self-defense analysis telling the jury Parvin'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 Parvin's self-defense claim. (R. 1649). It then explained to the jury its burden of proof, noting it is not

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[22] Notably, defense counsel said:

> 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).

required to prove Parvin's sexual preference, but instead, is simply required to prove the elements of murder 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 sexual encounter gone wrong 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 Parvin's version of events noting Gonzalez-Merrin never saw Lopez attack Parvin and therefore Parvin's naked assertion of self-defense was not supported by the evidence meaning Parvin 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 Parvin's testimony and highlighted various inconsistencies in Parvin's story before concluding he should be found guilty of murder. (R. 1649, 1686). After being charged on the law, the jury was sent back for deliberations and ultimately agreed with the State finding Parvin guilty of murder. (R. 1687-1702, 1704, 1744-47).

ARGUMENT

I. The Court of Appeals correctly found the testimony at issue—Lopez's statements to Soto and Avila that he had received $200 from Parvin in exchange for sex—was cumulative when viewed within the context of the entire record, particularly the unchallenged testimony of Investigator William Gonzalez, Investigator Brien Gwyn and Jose Monroy

Parvin first maintains the Court of Appeals erred in its harmless error analysis because the evidence at issue—Soto and Avila's testimony that Lopez approached them and said Parvin had given him $200 in exchange for sex—was "the central issue of the case and allowed the State to frame its entire case to the jury." Pet. for Writ of Cert. at 13. In response, the State

submits that even assuming Parvin's characterization of Soto and Avila's testimony as "the central issue of the case" is correct, which it is not, because Soto and Avila's testimony was merely cumulative to the unobjected-to testimony of Investigators Gonzalez and Gwyn, as well as that of Jose Monroy, the Court of Appeals was correct in finding the admission of Soto and Avila's testimony was harmless.

A. Soto and Avila's Testimony was far from the "central issue" of the case

As an initial matter, Parvin's claim that Soto and Avila's testimony was the "central issue of the case" is simply incorrect. To the contrary, the central issue in this case was not whether Soto and Avila's money for sex testimony was credible, nor was it whether Parvin was a homosexual; instead, the sole question the jury was asked to resolve was whether the State met its burden of proving, beyond a reasonable doubt, that Parvin was acting with "malice aforethought" when he shot and killed Lopez and Gutierrez.[23] 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). Thus, the central issue in the case was not the credibility of Soto and Avila's testimony, but whether Parvin was acting with malice when he shot and killed Lopez and Gutierrez.

[23] Moreover, to the extent Parvin suggests the State could not have proven malice without Soto and Avila's testimony, this is also incorrect. In fact, as mentioned by the assistant solicitor in her closing, Gonzalez-Merrin's eyewitness testimony—that Parvin was not acting in self-defense when he shot and killed both Lopez and Gutierrez with a .45 handgun—can be construed as evidence of malice by itself. (R. 1655-56). See e.g., State v. Belcher, 385 S.C. 597, 612 n.9, 685 S.E.2d 802, 810 n.9 (2009) (explaining the State may argue "to the jury for a finding of malice from the use of a deadly weapon[.]"). In particular, the assistant solicitor argued Gonzalez-Merrin's testimony that Parvin was outside of the fence and by his van when he shot Lopez, who was inside the fence and, according to Gonzalez-Merrin, was not grabbing Parvin as Parvin testified, was evidence of malice. (R. 1655-56). Likewise, the assistant solicitor, again relying on Gonzalez-Merrin's testimony that Gutierrez was shot from a distance with his hands up, also argued that such testimony was indicative of malice and "proves the case beyond a reasonable doubt." (R. 1657). In other words, not only *could* the State argue malice without the admission of the evidence Parvin claims is "central" to the case, but it *did argue this*, meaning that contrary to Parvin's claim, the State *did not* premise its "entire case on a theory that Parvin offered Lopez money in exchange for sex[.]"

Parvin also argues Soto and Avila's testimony was central in supporting the State's motive theory. Again, this is incorrect as a factual matter since the record, as well as the Court of Appeals' opinion, clearly reflects Soto and Avila's testimony was cumulative to the testimony of Investigators Gonzalez and Gwyn, as well as that of Jose Monroy. Stated differently, because Soto and Avila's testimony was cumulative to the testimony of Gonzalez, Gwyn and Monroy, each of whom testified without objection, Soto and Avila's testimony could not be any more "central" than Gonzalez, Gwyn and Monroy's unchallenged testimony since they all established essentially the same thing—that Parvin solicited Lopez for sex. Therefore, while it might be correct to say that one of the State's theories of the case was the sex for money narrative, it is simply not true that Soto and Avila's testimony was any more central to presenting this narrative since, under the facts of the case, the State could have done so without their testimony.

Furthermore, even assuming no evidence was introduced concerning the sex for money aspect of the case, Monroy's unchallenged testimony concerning Parvin and Lopez's sleeping arrangements in conjunction with Gonzalez-Merrin's testimony—that he observed Parvin shouting at Lopez, who then tried to give money to Parvin before Parvin shot him—would still allow the State to, at a minimum, frame the case as a sexual encounter gone wrong. Indeed, the jury, who was informed of the nature of the case through defense counsel's *voir dire* request, could have inferred from both Monroy and Gonzalez-Merrin's testimony that Parvin and Lopez previously decided to sleep together; Lopez backed out; Parvin asked for his money back; got angry; shot Lopez; and then shot Gutierrez. Accordingly, not only is Parvin's "central issue" argument factually inaccurate, but even if one were to remove any mention of the sex for money motive, the State could have still presented, and the jury could have still inferred, that Parvin killed Lopez as a result of a sexual encounter gone wrong before then turning the gun on

Gutierrez who he believed was the only witness to the crime. As a result, Soto and Avila's testimony cannot be characterized as truly central to the State's case since, on these facts, it could have presented a nearly identical case to the jury without mentioning sex for money at all.

B. Even assuming Soto and Avila's testimony was the "central issue" in this case, because their testimony was cumulative to Investigators Gwyn and Gonzalez as well as that of Jose Monroy, the Court of Appeals did not err in its' harmless error analysis

The State further submits that even if one were to assume Parvin is correct in factually characterizing Soto and Avila's testimony as central to the State's case, he is incorrect in his conclusion that this somehow mandates reversal. In particular, Parvin claims that an "[e]rror related directly to the central issue of a case cannot constitute harmless error" citing to Sulton v. Health South, 400 S.C. 412, 418, 734 S.E.2d 641, 644 (2012). See Pet. for Writ of Cert. at 14. However, because South Carolina law, including Sulton, explains a determination of harmless error is necessarily based on the individual facts and circumstances of a particular case, this statement, without more, is largely incorrect.[24] In light of this, the State submits the Court of Appeals did not err in its harmless error determination, but instead correctly found the admission of Soto and Avila's testimony was cumulative to other evidence in the record and was therefore harmless.

In Sulton, this 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 charge was an incorrect statement of law, considered adopting the rule from a North Carolina case which mandated reversal. 400 S.C. at 418, 734 S.E.2d at 644

[24] Notably, Parvin essentially concedes this in his petition where he acknowledges, at page 13, that the issue of "[w]hether an error is harmless depends on the circumstances of the particular case" adding that "the materiality and prejudicial character of the error must be determined from its relationship to the entire case." See Pet. for Writ of Cert. at 13 (citing State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985)).

(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 suggested by Parvin, but it further confirms an erroneous jury instruction, like the allegedly erroneous admission of hearsay testimony in this case, is subject to a prejudice analysis.[25]

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 that such an error, and whether it is prejudicial, would still be based on the entirety of the record. In Garner, a case cited by the Court of Appeals in its opinion, the 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.

When assessing prejudice as part of a harmless error analysis, South Carolina law requires an appellate court to determine whether the alleged error is prejudicial in light of the entirety of the record, an analysis which the Court of Appeals performed in this case.[26] As this Court recently explained, "in applying the harmless error rule, the court must be able to declare

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[25] See Sulton, 400 S.C. at 418, 734 S.E.2d at 644 (analyzing erroneous jury instruction as a whole and utilizing a prejudice analysis); State v. Garner, 389 S.C. 61, 67-68, 697 S.E.2d 615, 618 (Ct. App. 2010) (stating the improper admission of hearsay evidence constitutes reversible error only when the admission cause prejudice).

[26] 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); Garner, 389 S.C. at 67-68, 697 S.E.2d at 618 (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).

the error had little, if any, likelihood of having changed the result of trial[.]" State v. Collins, 409 S.C. 524, 538, 763 S.E.2d 22, 29 (2014) (quoting State v. Watts, 321 S.C. 158, 165, 467 S.E.2d 272, 277 (Ct. App. 1996)). In the words of the Supreme Court of the United States, 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 this Court explained in Collins that harmless error has not set formula, 409 S.C. at 538, 763 S.E.2d at 29, there are certain situations in which an error may be more likely to be found harmless. Notably, 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).

For example, this Court in State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993) 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 Schumpert Court, this 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. The same was true in State v. Ladner, 373 S.C. 103, 644 S.E.2d 684 (2007) where this Court, affirming the admission of a child's hearsay statement in a criminal sexual assault case, found not only that the statement at issue was admissible as an excited utterance, but added that since a doctor who examined the victim later testified the victim had told him the same thing, any error caused by the admission of the allegedly inadmissible hearsay was rendered harmless when defense counsel failed to object to the doctor's testimony. Id. at 113 n.8, 644 S.E.2d at 689 n.8

Understanding this, the State submits the Court of Appeals was correct when it found Soto and Avila's testimony concerning their conversation with Lopez was cumulative to the unobjected-to testimony of Detectives Gonzalez and Gwyn.[27] In particular, since the only alleged error identified by Parvin's trial and appellate counsel was the purportedly inadmissible hearsay testimony of Soto and Avila, the Court of Appeals was correct in analyzing the alleged error against testimony from Detectives Gonzalez and Gwyn consistent with that of Soto and Avila—that Lopez received $200 from Parvin in exchange for sex.[28] (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" of the proceeding.[29] Thus, the Court of Appeals was necessarily correct in

[27] Notably, Detective Gonzalez's testimony concerning the sex for money theory was elicited during *cross-examination* on this issue. (R. 716). Additionally, Detective Gwyn's testimony, which came in on direct (R. 892), *cross-examination* (R. 951) and re-direct (R. 954-55) was also elicited without objection on this matter. Also, while not exactly the same, Monroy's unchallenged testimony reflected that Lopez and Parvin planned on sleeping together that night. (R. 285, 286).

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

[29] See State v. Kirton, 381 S.C. 7, 37, 671 S.E.2d 107, 122 (Ct. App. 2008) (citing State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991)); see also, Jennings, 394 S.C. at 478, 716 S.E.2d at 94-95 ("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

rejecting Parvin's Sulton argument and concluding the admission of Soto and Avila's testimony was harmless when viewed against the entirety of the record; particularly the testimony of Detectives Gonzalez and Gwyn as well as that of Jose Monroy.[30]

II. The Court of Appeals, in applying its harmless error analysis, correctly relied on established case law concerning harmless error when it considered the testimony of Investigators William Gonzalez and Brien Gwyn since trial counsel, while objecting to the admission of Soto and Avila's testimony concerning Lopez's hearsay statements, failed to contemporaneously object to the admission of similar testimony through Investigators Gonzalez and Gwyn.

Parvin also argues the Court of Appeals erred in considering the unchallenged testimony of Detectives Gonzalez and Gwyn in its harmless error analysis, claiming error preservation rules did not require him to contemporaneously object to the admission of either investigator's testimony. Specifically, Parvin claims his objection to the admission of Soto and Avila's testimony relieved him of his duty to contemporaneously object to the admission of "the same or substantially similar" testimony and, as a result, argues the Court of Appeals erred by relying on Gonalez and Gwyn's unchallenged testimony to conclude the admission of Soto and Avila's testimony was cumulative and therefore harmless. Because established law concerning preservation of error requires a litigant to contemporaneously object to the admission of evidence in order to later appeal its admissibility, the State submits the Court of Appeals was correct when it relied on established case law and considered Gonzalez and Gwyn's unchallenged testimony in its harmless error analysis.

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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.").

[30] 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).

It is well established that a party seeking to appeal a trial court's ruling concerning the admission of evidence must register a contemporaneous objection.[31] Here, the Court of Appeals simply applied this rule and correctly found Parvin, by failing to object to the admission of both Gonzalez and Gwyn's testimony, could not complain about the presence of such evidence in the record when it applied its harmless error analysis. Indeed, the Court of Appeals discussion on this matter correctly reflects that while Parvin certainly preserved the admissibility of Soto and Avila's testimony on appeal, his failure to object to the admission of Gonzalez and Gwyn's testimony waived his ability to argue such testimony was erroneously admitted. In fact, were Parvin now permitted to contest the Court of Appeals' harmless error ruling on the basis of preservation, doing so would actually turn the doctrine of preservation of error on its head by permitting Parvin to now argue, for the first time, that Gonzalez and Gwyn's testimony was also erroneously admitted.

Moreover, and as mentioned by the Court of Appeals, Parvin's argument is also at odds with South Carolina authority concerning the application of harmless error.[32] Indeed, a court performing a harmless error analysis must determine whether the admission of the erroneously

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[31] See State v. Johnson, 363 S.C. 53, 58–59, 609 S.E.2d 520, 523 (2005) (internal citations omitted) ("To preserve an issue for review there must be a contemporaneous objection that is ruled upon by the trial court. The objection should be addressed to the trial court in a sufficiently specific manner that brings attention to the exact error. If a party fails to properly object, the party is procedurally barred from raising the issue on appeal."); State v. Humphries, 325 S.C. 28, 35, 479 S.E.2d 52, 56 (1996) (concluding that capital defendant's failure to contemporaneously object to "the amount of victim impact evidence" as well as "the way in which it was used" was not preserved for review despite the fact defense counsel objected to the admission of such evidence on the basis that it had not received prior notice concerning the evidence at issue); State v. Southerland, 316 S.C. 377, 382-83, 447 S.E.2d 862, 866 (1994) (finding defense counsel's failure to contemporaneously object to the admission of testimony reflecting defendant stole murder weapon, killed victim and then sold murder weapon for drugs resulted in the admissibility of such testimony being waived on appeal); see also, 15 S.C. Jur. Appeal & Error § 79 (detailing that a "timely" objection is required in order to preserve the issue of the admissibility of evidence on appeal).

[32] See e.g., Jennings, 394 S.C. at 478, 716 S.E.2d at 94-95 (analyzing improperly admitted hearsay evidence against other evidence in the record for purposes of determining whether the improperly admitted testimony is prejudicial); Garner, 389 S.C. at 67-68, 697 S.E.2d at 618 (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); Yates, 500 U.S. at 403 (explaining 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.").

admitted evidence is prejudicial when viewed against the entirety of the record.[33] Here, were this Court to adopt Parvin's argument and rely on the doctrine of preservation of error as a means of mounting a backdoor challenge to the admission of Gonzalez and Gwyn's testimony, such a ruling would immediately call to question the viability of this Court's ruling in harmless error cases such as State v. Ladner, 373 S.C. 103, 644 S.E.2d 684 (2007), State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993), and State v. Johnson, 298 S.C. 496, 381 S.E.2d 732 (1989). Likewise, it would call into question the validity of the Court of Appeals' conclusions in cases like State v. Kirton, 381 S.C. 7, 671 S.E.2d 107 (Ct. App. 2008). Since the present case, like each of the cases mentioned above, establish the admission of improper hearsay testimony is harmless where it is cumulative to other evidence in the record, the State asks that certiorari be denied.[34]

III. The Court of Appeals correctly rejected Parvin's claims that it: (a) treated opening statements and statements made in *voir dire* as evidence; and (b) erroneously relied on evidence from defense counsel's cross-examination to conclude the admission of Soto and Avilla's testimony was harmless

In arguments three and four of his petition, Parvin suggests the Court of Appeals erred in: (a) "using statements made in voir dire and during the State's opening statement as evidence as support for its harmless error holding" and (b) "erred in relying on cross-examination to support its harmless error finding." Pet. for Writ of Cert. at i. The State disagrees.

With respect to Parvin's claim the Court of Appeals erroneously treated defense counsel's requested *voir dire* questions as well as the State's opening argument as evidence in its

[33] See n.32 supra.

[34] The State adds that revisiting the holding in these cases would be especially troubling based on the facts of this case. For instance: (1) the substance of Soto and Avila's testimony was initially mentioned to the jury through defense counsel's *voir dire* requests, requests which were given by the judge prior to defense counsel even presenting its motion *in limine*: (2) Detective Gonzalez's testimony regarding the sex for money aspect of the case was elicited during defense counsel's cross-examination; (3) defense counsel's "you should be insulted" defense was premised upon the admission of the evidence Parvin now contests; (4) the admission of Monroy's testimony—that Parvin would be sleeping with Lopez that evening—is, by all accounts, unchallenged; and (5) even without the sex for money evidence, there is a variety of other evidence establishing Parvin murdered Lopez and Gutierrez.

harmless error analysis, the State notes the Court's opinion expressly states otherwise. As even Parvin acknowledges, the Court of Appeals' opinion merely explains, "[w]hile 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." (App. 1926) (emphasis added). Quite simply, this is true—the Court's opinion confirms that while it did not consider either of these as evidence, a review of the record does in fact show that independent of the introduction of any evidence, the jury would have been aware of the sex for money aspect of the case. Indeed, defense counsel initially injected this information to the jury pool via defense counsel's *voir dire* request (as mentioned by the trial court). Moreover, the Court of Appeals was correct to point out that when defense counsel failed to object to the portions of State's opening statement summarizing the conversation that was later testified to by Monroy (without objection), the jury was obviously aware of the sex for money aspect of the case. Thus, because the Court's opinion did not premise its harmless error analysis on the existence of either of these historical facts, but instead merely highlighted that jury was aware of the sex for money component of the case, certiorari should be denied.

Likewise, the State submits the Court of Appeals did not err by relying on Gonzalez's testimony on cross-examination concerning the sex for money aspect of the case. Indeed, as established above, case law concerning harmless error uniformly reflects that such an analysis is based on the entirety of the record. Here, while Parvin complains this ruling somehow limits cross-examination, the fact is defense counsel—not the Court of Appeals—chose to elicit testimony on the sex for money aspect of the case. To the extent this amounts to any error at all, it would appear the question to consider is whether defense counsel, by asking the question

leading to Gonzalez's response, had an articulable strategy for doing so—a question that would be addressed in PCR as a potential ineffective assistance of counsel claim.

CONCLUSION

In conclusion, the State requests this Court deny certiorari. In particular, and for the reasons discussed above, the Court of Appeals was correct when it applied established case law concerning harmless error and, comparing the alleged error in this case against the entirety of the record, determined the trial court's allegedly erroneous admission of Soto and Avila's hearsay testimony did not affect the jury's verdict in this case.

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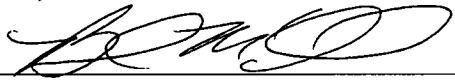

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CERTIFICATE OF SERVICE

I, Brendan J. McDonald, hereby certify that I have served the Return to Petition for Writ of Certiorari in the foregoing action by depositing two copies of same in the United States Mail to:

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This 16th day of December, 2015.

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