ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County
The Honorable Victor C. Pyle, Jr., Circuit Court Judge
Appeal Case No. 2015-002541

THE STATE,

RESPONDENT,

V.

SYLVESTER KEEJAUN KING,

APPELLANT.

FINAL BRIEF OF RESPONDENT

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II. Whether the court erred by allowing Greenville Sheriffs Investigator Peeples to testify that she heard someone at appellant's place of business allegedly told someone else that appellant had had "called into work," and told someone at work that "he was a victim of a home invasion where he was injured," since this testimony was inadmissible prejudicial hearsay?

RESPONDENT'S COUNTERSTATEMENT OF ISSUE ON APPEAL

1. Whether the victim's son's comments to the first responding officer to arrive on the scene was properly admitted as excited utterances when the comments were made within minutes after the son discovered his mother's bloody dead body, the contents of the comments had already been introduced into evidence by the defense in a crime scene video, the admission of the comments were not otherwise prejudicial, and the comments would have been admissible for other purposes?

2. Whether a statement made by King's employer that indicated he was injured during a home invasion was properly admitted at trial when King did not object to the statement as improper hearsay as is argued on appeal, and the statement was admissible as non-hearsay evidence because it was not presented for the truth of the matter asserted, but instead to explain why Investigator Peeples contacted local hospitals?

STATEMENT OF THE CASE

On November 30 – December 2, 2015, Appellant Sylvester Keejuan King ("King") was tried by a jury for the murder of Janice Hackett and possession of a knife during the commission of a violent crime. King was tried in the Greenville County Court of General Sessions before the Honorable Victor C. Pyle, Jr., Circuit Court Judge. Alex Kornfeld represented King. The State was represented by Assistant Solicitors Judith M. Munson and Brittany Scott, both of the Thirteenth Judicial Circuit Solicitor's Office.

On December 2, 2015, King was convicted of murder and possession of a weapon during the commission of a violent crime. (R. p. 353). He was sentenced to life confinement for the murder conviction and five years confinement for the possession of a weapon during the commission of a violent crime conviction. (R. p. 357). Before this Court is King's direct appeal of his convictions and sentences. King requests this Court reverse his convictions and remand for a new trial. The State respectfully requests this Court deny King's appeal and affirm his convictions and sentences.

STATEMENT OF FACTS

On March 16, 2014, Appellant Sylvester Keejuan King ("King") stabbed his ex-girlfriend, Janice Hackett, to death in her home in Greenville. The victim suffered three separate incised wounds; one to the front portion of her right wrist, one to the front portion of her right shoulder, and one to the left upper shoulder in the back. (R. p. 274). She also had eight separate stab wounds. One was a superficial stab wound that went through the skin of her upper neck and stopped before it hit the bone of the skull. (R. p. 274). Another wound was to the midline of her upper back. This wound hit her seventh cervical vertebrae in the back. (R. pp. 274-75). The victim suffered two separate stab wounds right above the clavicle. (R. p. 275). She was also stabbed once on the left shoulder. (R. p. 275). On the right side of her head, she suffered another superficial stab wound that did not penetrate the skull. (R. p. 276). There were also two stab wounds to the right side of her neck. (R. p. 276). The pathologist testified that the two neck wounds were the two most potentially fatal wounds. (R. p. 277). The victim died as a result of multiple stab wounds of the head and neck. (R. p. 282).

A. King and the victim had previously dated.

King and the victim were, at one time, in a relationship. (R. p. 58). According to Raquan Lewers, the victim's son, King and the victim lived together for a year or two. (R. p. 61). At one point, the two broke up. (R. p. 61). They got back together, and moved in together again. (R. p. 62). While Lewers was held in a juvenile detention facility, King and the victim broke up again. (R. p. 64). The victim moved away, and according to Lewers, she did not want King to know where she lived. (See R. p. 65).

She did allow King's son, who would live with the couple along with Lewers when they were living together, to visit after the two ended their relationship. (R. p. 65).

During the defense case, King's sister, Sentoria Wilson, testified that she was aware that King and the victim were in a relationship at some point in time. (R. p. 288). She recalled seeing Hackett at family functions and events. (R. pp. 288-89). Wilson never saw King be violent towards the victim or any other woman, but she also recalled that sometimes her nephew, King's son, would say that King and the victim would "be into it" sometimes.[1] (R. p. 289).

B. On March 16, 2014, the victim returned home from a weekend trip with a new boyfriend.

Lewers recalled that his mother had been out of town that weekend, but she just returned to her Greenville home from vacation on the day she was killed.[2] (R. p. 67). She had just started dating someone new. (R. p. 67). Lewers testified that she arrived home around the time the sun started to go down. (R. pp. 67-8). He went with her to a Redbox, and to pick up some food from a seafood restaurant. When they returned home, the victim went to bed. (R. p. 68).

C. Lewers spends time with his girlfriend and her friend outside of the victim's home.

Lewers called his girlfriend, Quinna Fernandez, and told her to come over after his mother went to bed. (R. p. 68). Fernandez got a ride from her friend, Shakia Prease. (R. pp. 27, 45). Fernandez indicated that Prease picked her up around 10:20 pm. (R. p. 28). The two drove over to the victim's and Lewers' house. (R. pp. 27, 45).

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[1] Wilson stated that her nephew did explain what he meant when he was saying "into it," but she assumed he was talking about arguing. (R. pp. 289-90).

[2] Lewers also testified that his father, Keith Lewers, had stopped by the house earlier in the day because Lewers was sick. (R. p. 68). Lewers' father got Lewers some soup and other supplies. (R. p. 68).

When the two arrived, Lewers walked out of the house and got into Prease's car. (R. pp. 28, 45-6, 69). Prease was in the driver's seat, Fernandez sat in the front passenger seat, and Lewers got into the back seat. (R. p. 46). The three talked and played on their phones. (See R. pp. 29-30, 69). After about fifteen to twenty minutes, Lewers went back inside the house to connect Fernandez's phone to a charger. (R. pp. 29, 47, 69). Lewers informed his mother that he was about to have company, and he shut her bedroom door. (R. p. 69). He noted that she was asleep at that time. (R. p.p. 69-70). Lewers went back outside. (R. p. 70). Lewers did not lock the carport door when he left because he knew they would be right back. (R. pp. 75, 79).

When he returned to the car less than two minutes later, the three continued hanging out in the car for another fifteen to twenty minutes. (R. pp. 29, 39). During that time, both Lewers and Fernandez saw a car drive by slowly. (R. pp. 30, 72). Lewers saw the car as creeping along, and then it pulled off real fast. (R. p. 72). Both described the vehicle as being a black car that looked like a Crown Victoria. (R. pp. 30-31, 72, 79). Prease did not see the car, but she did recall Lewers and Fernandez talking about the car. (R. p. 47).

After hanging out in the car for a while, the three went to a nearby Citgo gas station to purchase some cigars.[3] (R. pp. 31, 38, 47, 70). Fernandez went inside, purchased some cigars and obtained an employment application, and returned to the car. (R. p. 31). Lewers then asked Fernandez and Prease to take him to the Greenville Arms, a nearby apartment complex, to make a marijuana sale. (R. pp. 32, 39, 47, 70). They drove to the complex. Id. While parked in the parking lot, Lewers got outside and

[3] They planned to use the cigars to smoke marijuana. (R. pp. 32, 39, 49, 71).

sold marijuana to someone he knew. (R. pp. 32, 40, 48). Lewers got out and walked behind the car. (R. pp. 48, 53). Lewers took two to three minutes to make the sale. (R. pp. 48-9, 53, 70). After the sale was completed, the three drove back to Lewers' home, the victim's residence. (R. pp. 32, 49, 71).

Prease, Fernandez and Lewers sat in the car in the driveway and talked for a while. (R. p. 32). Prease thought they were back for about five minutes before Lewers went inside to retrieve Fernandez's phone. (R. p. 49). Lewers recalled going into the house to get Fernandez's phone. (R. p. 71). Fernandez recalled Lewers stated he was going to go inside to check on his mother, the victim. (R. p. 32). He was also going to let her know that the three would be coming inside of the house. (R. p. 32). Prease noted that Lewers went through the garage/carport door to enter the house, and he came out the same door. (R. p. 50).

D. Lewers finds his mother's body in her bed.

When he went, he saw blood all over the door. (R. p. 71). As he walked in, he started calling his mother's name, and he got scared. (R. p. 71). He followed the blood, which he was hoping was juice, to her room. (R. p. 71; see R. p. 77). Lewers went into the victim's room, and he tried to wake her up. (R. p. 71). He noted that he touched her, and that he shook her, but she did not physically move her position in the bed. (R. pp. 71-2).

Lewers ran back outside and pulled on the door of the car, trying to get Prease and Fernandez out of the car. (R. pp. 32-3, 49, 50, 72). Prease and Fernandez both indicated this was within a minute of Lewers going inside the house. When he returned to the car, he pulled at the passenger side door. (R. pp. 32-3, 49, 50). Fernandez recalled Lewers "was like my mama gone, she dead." (R. p. 33, ll 3-4). Prease testified

that "[h]e was saying my mom is dead. My mom is dead." (R. p. 50, ll 15-6). Prease and Fernandez initially thought he was joking, but Lewers indicated he was not kidding. (R. p. 50). Fernandez then stated she wanted to go see Lewers' mother. (R. p. 34).

Prease and Fernandez then got out of the car, and the three then went inside the house. (R. p. 50). Lewers, Prease and Fernandez entered the house through the carport door. (R. p. 34). Lewers went in first, and Prease and Fernandez followed. (R. pp. 34, 50). Fernandez noted the door was wide open. They walked through the kitchen, and they went straight to the victim's bedroom. (R. p. 34). Prease recalled there was blood immediately when they walked in the carport door. (R. p. 50). She observed a trail of blood; there was blood all on the wall, and there was a bloody hand print on Lewers' bedroom door. (R. p. 51). The three walked into the victim's bedroom and saw her. (R. p. 51).

Fernandez testified that one of the victim's knees was up, and the other was down. (R. p. 34). They were in the room for two minutes. Fernandez recalled she kept saying call 911. (R. p. 35). Both Fernandez and Prease confirmed they did not touch the victim or take anything from the house. (R. pp. 35, 51).

Fernandez and Lewers both went to Lewers' bedroom. (R. p. 36). Lewers called the police first. (R. pp. 37, 41). After speaking with them, he called his grandmother. (R. pp. 37, 41). While Lewers was speaking with his grandmother, Fernandez called the police from her phone. (R. pp. 37, 41).

Initially, three Greenville County Sheriffs' Deputies arrived on the scene in response to the 911 call. (R. pp. 10-1; see R. pp. 252-53). The deputies knocked on the front door and announced they were with the sheriff's department. (R. pp. 12, 253-

54). In response, Lewers, Fernandez, and Prease came out of the front door of the house. (R. pp. 12, 254). Deputy Suber testified that Lewers indicated to him his mother was inside. (R. p. 255). The three teenagers were checked for weapons and were secured by the deputies. (R. pp. 12, 254-55). Suber testified that while Lewers was being secured, Lewers expressed that he believed King was the one who killed his mother, and he did not know how King knew where they lived. (R. pp. 255-56); Defense Exhibit 3).

After the teenagers were secured, the deputies went into the house and cleared the residence. (R. pp. 13-4, 256). Both Deputy Horne and Deputy Suber saw the victim lying in her bed, deceased, and covered in blood. (R. pp. 14, 256-57).

Investigator Michael Fortner with the Greenville County Sheriff's Office arrived at the crime scene just a little after midnight on March 17. (R. pp. 189-91). When he arrived, Lewers, Fernandez and Prease had already been transported to the Law Enforcement Center to be interviewed. (R. p. 192). The victim's body was still at the scene. (R. p. 192). Fortner, the forensics team, and Deputy Coroner Dill entered the house and did a walkthrough to identify potential evidence that needed to be collected. (R. pp. 193-94). He noted there were large amounts of blood on the floor and the walls, on the floor of the kitchen, on the door, on several appliances in the kitchen, and in the hallway leading to the victim's bedroom. (R. p. 194). Fortner also noted the victim's bed was saturated in blood. (R. p. 195).

After the walkthrough, the forensics team processed the house. (R. p. 195). Fortner contacted other investigators to check on the progress with the interviews with

Lewers, Fernandez, and Prease. (R. p. 195). Fortner also walked around the house looking for a possible weapon. (R. p. 195). No weapon was found.

Law enforcement did canvas the neighborhood to see if anyone heard or saw anything that night. (R. pp. 15, 197). No witness came forward. (R. pp. 15, 197). Fortner testified that he received information regarding Lewers' statements to law enforcement, and they initially thought he may be a suspect. (R. p. 197). Law enforcement was later able to rule him out as a suspect. (R. p. 198).

E. King tells one of his girlfriends that he was injured in a fight outside of a liquor house in Greenville.

Sheila Martin, one of King's girlfriends at the time of the stabbing, lived in Anderson at the time. (R. pp. 97-98). She owned a Mazda 626, and she allowed King to borrow her car while his car was in the shop.[4] (R. pp. 98-100). King and Martin spoke earlier in the day on March 16, 2014. King had indicated he was hanging out with his cousins, but he also advised Martin that he would come over to her residence later in the day. (R. p. 103).

King did not arrive at Martin's residence until almost 2 a.m. (R. p. 103). At that point, Martin was not expecting him, and King had not called to say he was still coming. (R. pp. 103-04). When she opened the door, King came and walked to Martin's bedroom. (R. p. 104). When Martin went into the bedroom, King was laying on the floor, face down. (R. p. 104). When she turned him over, he told her he had been in a fight. (R. p. 105). His hand was bandaged up in a shirt. Martin took the shirt off of the hand, and saw a really deep cut on King's wrist. (R. p. 105). The cut was still bleeding,

[4] King had told Martin that he was trying to prevent his baby mama from knowing where he lived, so he asked if he could borrow her car while his was in the shop. (R. p. 99). Martin drove King's rental car during that period. (R. pp. 98-100).

and there was a lot of blood. (R. p. 105). King's explanation was that he and his cousin got into a fight with four guys at a liquor house. (R. pp. 105-06). King also told her that he messed up her car, and there was blood all in the front seat.[5] (R. p. 108). Martin tried to get King to call the police, and she attempted to re-bandage the wound and apply pressure to stop the bleeding. (R. pp. 106-07).

F. King tells an Anderson City Police officer that he was injured during a robbery outside of a liquor house in Anderson.

Martin then took King to the emergency room at the Anderson County hospital. (R. pp. 107-08). At the hospital, King was re-bandaged twice. (R. p. 110). King also spoke with law enforcement about his injuries. Officer Daniel Stipe of the Anderson City Police Department was the officer who responded to the Anderson County Hospital. (R. pp. 140-41). Stipe testified that King indicated he was at a liquor house in Anderson. (R. p. 142). While there, he encountered some guys that were disrespectful to him and to his girlfriend, Ms. Martin. (R. pp. 142-43). They left, and while they were walking back to his car, four guys approached and told him that he needed to give up his jewelry. (R. p. 143). King claimed that a gold necklace and two gold rings valued at $1080 were taken from him. (R. p. 143). King could not give a written statement because of his injury. (R. p. 143).

According to Martin, King told the officer at the hospital that he claimed he was robbed, and he stated Martin was present when the robbery occurred. (R. pp. 111-12). Martin did note that when she asked King about the incident later, King maintained he and his

[5] Martin confirmed her Mazda was bloody. There was blood on the seat, the steering wheel, and base floorboard. (R. p. 116). Martin attempted to clean it, but she could not get the blood out. (R. p. 116). Martin also indicated King had left a pair of tennis shoes in the rental car. (R. pp. 118, 119).

cousin were jumped by four people because his cousin allegedly stepped on one of the guy's shoes. (R. pp. 111-13). Martin did not recall King telling her anything about a robbery. (R. p. 113).

G. King runs away from a potential encounter with law enforcement.

After Martin and King left the hospital, they went back to Martin's home. (R. p. 112). She left King at her home, and she to get King a cell phone from a Family Dollar. (R. p. 113). While there, Martin received a call from law enforcement. (R. p. 114). When she returned home, Martin told King about the phone call she received. (R. p. 114). In response, King said he had to go. (R. p. 114). The two then drove around to different places. (R. pp. 114-15). When they were heading back to Martin's residence later that day, officers were on Martin's street. (R. p. 116). King asked Martin to go around and to not return to her residence, but Martin refused because her daughter was home. (R. p. 116). In response, King jumped out of the moving car. (R. pp. 116, 117). Martin did not know what he did after he jumped out of the car. (R. p. 117).

Craig Hawkins, who was with the Greenville County Sheriff's Office Warrants Division, found King at a residence in Spartanburg on March 26, 2014. (R. pp. 152-3). The apartment belonged to Kumiko Mitchell, another of King's girlfriends. (R. pp. 153). King was arrested that morning and transported to the Greenville County Law Enforcement Center. (R. pp. 155-57).

H. Law enforcement investigation continues.

Investigators sought to speak to several other potential suspects, including Lewers' father, the victim's current boyfriend, and King. (R. pp. 198-99). Fortner eventually spoke with King by phone, and the two made arrangements for King to speak with investigators. (R. pp. 199-200, 201). King did not show up at the arranged time.

(See R. p. 200). Fortner testified that law enforcement searched King's house in Greenville, and they found keys to the Mazda he borrowed from Sheila Martin. (R. p. 213). Nothing else of evidentiary value was found at the house. (R. pp. 214-219).

The victim's DNA was found in a swab from the kitchen closet doorknob, swab from son's bedroom doorknob, a swab from victim's bedroom doorknob, swab of suspected blood from top steps to rear kitchen door, suspected swabs from Samsung cell phone on the stool in the victim's bedroom, swabs from buttons of Samsung cell phone on the stool in victim's bedroom, suspected blood swabs from Samsung Verizon phone, swab from touchscreen of Samsung Verizon phone, suspected blood swabs from the charger of Samsung Verizon phone, and fingernail clippings from the victim's hands. (R. pp. 177-78). King's DNA was found on the exterior side knob of the rear kitchen door; on the rear passenger door handle of the vehicle that was located in the carport; on the ground near the rear passenger door by the car under the car port; on a swab on the exterior carport window; from the interior of the rear door on the driver's side of a car; on the rear door frame on the driver's side of the car; on the floor mat from the front passenger side of the car; from the interior of the front windshield of the car; from the top of the steering column, from the front of the steering wheel; on the turn signal shifter; on the vehicle's carpet. (R. pp. 178-79). King's DNA, the victim's DNA, and a third individual's DNA was found on the sole of King's tennis shoes that were recovered from the vehicle at Martin's residence. (R. p. 187).

I. King claims he is also a victim in his statement to law enforcement.

King gave a statement to law enforcement. In his statement, he admitted he knew the victim and that they had broken up. (R. p. 211). He claimed that on the night of the stabbing, she had picked him up at his house in Greenville and took him to her

house. (R. p. 211). The two laid down to go to bed. According to King, he noticed the bedroom door come open, and an individual was standing there. (R. p. 211). That individual said something to the effect of "oh, hell no;" and at that time, the individual produced a knife and started attacking King and the victim with the knife. (R. p. 211). That was how King explained his hand was cut. (R. p. 211). King described the assailant as a black male who was kind of muscular. (R. p. 211). King asserted the assailant was larger than King. (R. p. 212).

King further told law enforcement that he tried to defend himself and the victim. (R. p. 212). He jumped up and ran out of the house thinking the victim was following him. (R. p. 212). King then ran down the street, where he claimed to flag down a man in a white pickup truck. (R. p. 212). King claimed he paid the man $20 for a ride to his house in Greenville. (R. p. 212).

ARGUMENT

I. The trial court did not abuse its discretion in allowing the State to present the victim's son's declaration that he believed King was the one who killed the victim because they were hiding from him as an excited utterance. King's arguments that the statement was not an excited utterance are not supported by the record; the statement was admissible; and any error in admitting the statement as an excited utterance was not prejudicial.

What occurred at trial

Ronald Suber, the first road deputy to respond to the scene, testified that he arrived at the victim's home at approximately 11 p.m. (R. pp. 252-53). He noted that he arrived before emergency personnel. (R. p. 253). Suber and several other deputies approached the house. He initially knocked on the front door and announced they were sheriff's deputies. (R. pp. 253-54). There was no initial response. After a second knock, Suber heard some movement, and a male voice said wait a minute. (R. p. 254). Relatively quickly after, a male came to the door. (R. p. 254). He was secured, and he advised the deputies that two females were also in the residence. (R. p. 254). They were also brought out. (R. p. 254). Suber then testified that the male stated his mom was inside. Suber noted the male was jittery, and Suber could tell that something was wrong. (R. p. 255).

Suber also noted that it only took him a minute or two to respond to the scene, and there was only another minute before he spoke with the male, identified as Lewers. (R. p. 255). Then, the following exchange occurred.

> MS. MUNSON: Your Honor, at this time, I want to ask him about what this subject said as an excited utterance exception to hearsay rule.
>
> THE COURT: Proceed.
>
> MS. MUNSON: All right.

THE COURT: You object?

MR. KORNFELD: Yeah, I would object. I don't think that is a correct -- I don't think that is a correct exception. He testified earlier.

THE COURT: I will allow it. Go ahead.

BY MS. MUNSON:

Q What did he tell you?

A As we were getting him secured, he immediately began saying that, uh -- I believe I wrote it in this report, if you will excuse me one second. (Pause.). He kept saying that he believed his mother's boyfriend had done it because he kept saying they were hiding from him.

Q Okay.

A And when asked who the boyfriend was, he stated the name Sylvester King.

(R. p. 255, l 21 – R. p. 256, l 18).

The defense later renewed the objection after the State rested its case. (R. p. 301). The objection was again denied. (R. p. 354). The defense also renewed the objection after the jury's verdict. (R. pp. 354-55). The trial court again denied the objection. (R. p. 355).

Standard of Review

"In reviewing a trial court's ruling on the admissibility of evidence, appellate courts recognize that the trial judge has considerable latitude in this regard and will not disturb such rulings absent a prejudicial abuse of discretion." State v. Scott, 405 S.C. 489, 497, 748 S.E.2d 236, 241 (Ct. App. 2013) (citing State v. Whitner, 399 S.C. 547, 557, 732 S.E.2d 861, 866 (2012); State v. Clasby, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009). "An abuse of discretion occurs when the trial court's ruling is based on an

error of law or, when grounded in factual conclusions, is without evidentiary support." Whitner, 399 S.C. at 557, 732 S.E.2d at 866 (citation omitted).

Discussion

A. Raquan Lewers' comments to Deputy Suber, the first responder to arrive at the residence within a couple of minutes of the 911 call that was made after Lewers' discovered his mother's body, was an excited utterance.

Lewers' comments to Deputy Suber were excited utterances. The record supports findings that the statements related to the murder of the victim and Lewers' discovery of the body, which were the startling events. Suber's testimony reflected that Lewers was under the stress of excitement caused by his discovery of his mother's body. This was supported by the testimony of other witnesses. Thus, King fails to establish the trial court erred in allowing Suber to testify about the comments.

"'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. "Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court of this State or by statute." Rule 802, SCRE. "A statement that is admissible because it falls within an exception in Rule 803, SCRE, such as the excited utterance exception, may be used substantively, that is, to prove the truth of the matter asserted." State v. Sims, 348 S.C. 16, 20, 558 S.E.2d 518, 520–21 (2002) (citation omitted). An excited utterance is a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Rule 803(2), SCRE.

> The rationale behind the excited utterance exception is that the startling event suspends the declarant's process of reflective thought, reducing the likelihood of fabrication. State v. Dennis, supra. In determining whether a statement falls within the excited utterance exception, a court must consider the totality of the circumstances. State v.

> McHoney, 344 S.C. 85, 544 S.E.2d 30 (2001). Additionally, such a determination is left to the sound discretion of the trial court. State v. Burdette, 335 S.C. 34, 515 S.E.2d 525 (1999).

Sims, 348 S.C. at 20–21, 558 S.E.2d at 521.

> Three elements must be met for a statement to be an excited utterance: (1) the statement must relate to a startling event or condition; (2) the statement must have been made while the declarant was under the stress of excitement; and (3) the stress of excitement must be caused by the startling event or condition.

State v. Stahlnecker, 386 S.C. 609, 623, 690 S.E.2d 565, 573 (2010) (citing Sims, 348 S.C. at 21, 558 S.E.2d at 521. A court must consider the totality of the circumstances in determining whether a statement falls within the excited utterance exception. Stahlnecker, 386 S.C. at 623, 690 S.E.2d at 573; McHoney, 344 S.C. at 94, 544 S.E.2d at 34. The passage of time between the startling event and the statement is one factor to consider, but it is not the dispositive factor. Stahlnecker, 386 S.C. at 623, 690 S.E.2d at 573; Sims, 348 S.C. at 21, 558 S.E.2d at 521. "Other factors useful in determining whether a statement qualifies as an excited utterance include the declarant's demeanor, the declarant's age, and the severity of the startling event." Stahlnecker, 386 S.C. at 623, 690 S.E.2d at 573 (quoting Sims, 348 S.C. at 22, 558 S.E.2d at 521).

Lewers' comments to Deputy Suber meet all of the requirements of an excited utterance. The startling events or conditions in this case were the murder and Lewers discovery of his mother's body in her bedroom. The comments Lewers made to Deputy Suber related to those events. In his comments, Lewers identified as the person he thought killed his mother, and he stated he did not know how King knew where they lived.

These comments were made while Lewers was under the stress of excitement. Suber testified that Lewers was very jittery when he first saw him, and "you could tell something was going on, something was wrong." (R. p. 255, ll 10-11). As noted by Investigator Fortner during cross-examination, it would have been a traumatic situation for a teenager to come home and find his mother dead and blood everywhere. (R. p. 231, see R. p. 232). Other testimony presented during the trial supported this conclusion and a conclusion that Lewers' stress was caused by his discovery of his mother's dead body.

Lewers' testimony indicated he was traumatized by finding his mother's body.

> From what I remember, I remember pulling back up -- I believe I was going to get her [Fernandez's] phone -- seeing blood all over the door. I started calling my mom's name. I got scared. I thought it might've just been some juice or something. I followed it to her room. I didn't know what to do. From there, I really don't remember half of the stuff that happened.

(R. p. 71, ll 10-17). He then ran back outside and grabbed the door trying to get his girlfriend and her friend out of the car. (R. p. 72). Both Fernandez and Prease indicated that Lewers was acting abnormally when he returned to the car outside. Both noted that Lewers was pulling on the door when he came back outside. (R. pp. 33, 50). While they initially thought he was kidding when he said his mother was dead, it quickly became apparent to them that he was not kidding.

Furthermore, the testimony at trial indicated the comments were made within minutes of Lewers' discovering his mother's body. The three teenagers went into the house very soon after Lewers' initial discovery. (R. pp. 34, 50). After they went back inside, Lewers called 911. (R. p. 36). Fernandez indicated law enforcement took approximately five minutes to get to the house after the calls to 911 were made. (R. p.

36). Deputy Suber indicated that it only took him a minute or two to respond to the scene after being dispatched, and it was only another minute between the time he arrived and his contact with Lewers. (R. p. 255).

Lewers' comments to Deputy Suber were clearly distinguishable from the statement deemed not to be an excited utterance in State v. Washington, 379 S.C. 120, 665 S.E.2d 602 (2008). In Washington, the statements at issue were made "in a formal interview with law enforcement at police headquarters almost ninety minutes after the events. These statements were made in response to the Officer's questions. None of the statements were independent assertions or exclamations regarding the events." Id. at 124, 665 S.E.2d at 604. In this case, Lewers' comments were made within minutes of Lewers' finding his mother's dead body. The statements were not made in a formal interview. To the contrary, Suber was the first law enforcement officer to arrive on the scene, and he was the first law enforcement officer that Lewers encountered that night. Suber's testimony reflected that Lewers was very jittery, and it was clear that something was wrong. (R. p. 255). Suber also noted that Lewers was making the comments about King killing his mother immediately as they were securing Lewers, which was as Lewers was coming out of the house. (R. p. 256). The comments were not in response to any question from Suber or anyone else. (R. p. 256).

That Lewers made these comments to a law enforcement officer did not disqualify them from being excited utterances. See Burdette, 335 S.C. at 42, 515 S.E.2d at 529 (finding victim's statement to responding officer made within one hour of attack qualified as excited utterance); Sims, 348 S.C. at 21-3, 558 S.E.2d at 521-22 (finding victim's child's statement to law enforcement was excited utterance). Lewers'

comments were "the off-the-cuff, volunteered responses to law enforcement that the Court has allowed under the excited utterance exception," which the Supreme Court noted was fundamentally different from the statement that was at issue in Washington. Washington, 379 S.C. at 125, 665 S.E.2d at 604 (citing State v. McHoney, 344 S.C. 85, 94, 544 S.E.2d 30, 34 (2001) (observing that an excited utterance expresses the real belief of the speaker because the utterance is made under the immediate and uncontrolled domination of the senses, rather than under reason and reflection)).

Finally, King's reliance upon the fact that law enforcement did not believe Lewers in the early phases of the investigation is misplaced. Law enforcement's opinion regarding the truthfulness of Lewers' comments is not determinative of whether the comments were excited utterances. King ignores the fact that when the comments were made, Lewers was not a suspect or a person of interest. Suber was one of the first deputies to arrive on the scene, and he was the first one who had contact with Lewers. (R. pp. 253, 256). The comments were made before law enforcement went inside the house. (R. p. 256). The comments were also made only minutes after Lewers' initial discovery of his mother's body, which was in a very bloody state. Also, the testimony at trial did not reflect that the skepticism regarding the comments was based upon Lewers' demeanor when the statement was made. Instead, it was based upon the lack of forced entry into the home, the short timeline in which the murder occurred based upon Lewers' later statements regarding the teenagers' short excursion, and the lack of immediate evidence indicating King was at the scene (i.e. no one saw him or his vehicle). (R. pp. 241, 243-44; Defense Exhibit 3).

Altogether, in looking at the totality of the circumstances, the comments were excited utterances. When Lewers made the comments, he was clearly stressed by his discovery of his mother's dead body. As noted above, the comments were made within minutes of his initial discovery of the body in a bloody house. There was testimony establishing that Lewers, who was a teenager, was jittery and acting abnormally, which was to be expected in light of the traumatic discovery he made. The trial court did not abuse its discretion in admitting the comments.

B. Any error in admitting Lewers' comments to Deputy Suber as excited utterances was not prejudicial.

King is not entitled to relief because he also cannot show he was prejudiced by the admission of the comments through Suber. The improper admission of hearsay is reversible error only when the admission causes prejudice. State v. Weston, 367 S.C. 279, 288, 625 S.E.2d 641, 646 (2006); State v. Hughes, 419 S.C. 149, 158, 796 S.E.2d 174, 179 (Ct. App. 2017); State v. Mizell, 332 S.C. 273, 504 S.E.2d 338 (Ct.App.1998) (in order to obtain new trial based upon erroneous admission of evidence, appellant must demonstrate both error and prejudice).

The content of the statements had already been introduced into evidence by the defense when King introduced the video from the crime scene as Defense Exhibit 3. In the video, which was introduced during the cross-examination of Investigator Fortner, officers discussed the fact that Lewers pointed to King as the one he believed killed his mother, and that Lewers indicated they had been trying from King.[6] (Defense Exhibit 3, file 3-17-2014_20852.m2ts, 11 sec. – 1 min. 11 sec.). Fortner testified immediately

[6] In listening to the discussion in the video and the testimony presented at trial, Respondent submits it appears that Suber may have been one of the officers involved in the conversation.

before Suber. Since the comments presented through Suber at trial were cumulative to evidence already presented at trial, the introduction of the comments through Suber was not prejudicial. State v. Parvin, 413 S.C. 497, 505, 777 S.E.2d 1, 5 (Ct.App.2015) (finding hearsay testimony that was improperly admitted was harmless because it was cumulative to other evidence presented); 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."); State v. Kirby, 325 S.C. 390, 396–97, 481 S.E.2d 150, 153 (Ct.App.1996).

Furthermore, State v. Weston, 367 S.C. 279, 625 S.E.2d 641 (2006), does not support a finding of prejudice in this case. In Weston, the Supreme Court found the admission of testimony of two witnesses who indicated the victim was afraid of the defendant was admissible to show the victim's state of mind concerning the defendant. Relying upon its opinion in State v. Garcia, 334 S.C. 71, 512 S.E.2d 507 (1999), the Supreme Court found the testimony was admissible because it did not give a reason for the victim's fear. Weston, 367 S.C. at 287, 625 S.E.2d at 646. Lewers comments here were similar. His comments ultimately reflected that his mother was afraid of King. He noted that they were hiding from him, but he never discussed why the victim was afraid of King.

Finally, King cannot establish he was prejudiced in light of the other evidence of guilt presented at trial. King's blood was found at the scene. Despite the significant injury he suffered to his wrist, King did not seek medical attention until hours later, and not at any of the local hospitals. King gave three different stories as to how he was injured. He told Martin that he was injured after he and his cousin got into a fight with

some guys outside of a liquor house in Greenville. (R. pp. 105-06, 112-13). King told the Anderson City Police officer that he was injured as he was robbed outside of a liquor house in Anderson and Martin was there with him. (R. pp. 142-43). He later admitted to the Greenville County investigators that he was at the scene, but he claimed that he was attacked and that he ran away and caught a ride to his Greenville home from a stranger. (R.pp. 211-13). This assertion was not supported by any physical evidence as there was no indication at his Greenville residence that he had been at the house after the victim was killed. (See R. pp. 214-20). Further, King actively avoided any contact with law enforcement after talking with the officer at the emergency room. He asked to leave Martin's home after she told him about the call from law enforcement she received, and he jumped out of a moving car when Martin refused to avoid going home because law enforcement officers were on her street. (R. pp. 114-18). He misled investigators into thinking he was going to come in to talk with them, and he avoided apprehension for nine days. (R. pp. 152-55, 200-02). "Flight from prosecution is admissible as guilt." State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 266 (2006) (citing State v. Thompson, 278 S.C. 1, 292 S.E.2d 581 (1982), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) (evidence of flight admissible to show guilty knowledge, intent, and that defendant sought to avoid apprehension)). Altogether, in light of the evidence presented, King cannot show that he was prejudiced by any error in admitting Lewers' comments to Suber.

C. Lewers' comments were also admissible under other theories.

As additional sustaining grounds, Respondent submits Lewers' comments were also admissible under other theories. First, as already discussed above, Lewers' comment regarding the fact that he and the victim were hiding from King, reflecting she

was afraid of King, was admissible to show her existing state of mind. Rule 803(3), SCRE; see Weston, supra; Garcia, supra. Also, the comments were admissible to explain why law enforcement conducted the investigation it did. Lewers' comments arguably provided law enforcement with a basis for seeking to speak with him about his whereabouts that evening. Evidence explaining why law enforcement is in a particular area has been held to be relevant information for the jury to consider. State v. Johnson, 318 S.C. 194, 197, 456 S.E.2d 442, 444 (Ct. App. 1995) (citing State v. Davis, 309 S.C. 56, 419 S.E.2d 820 (Ct.App.1992)).

II. The statement from King's employer reflecting he had called in to say he was injured during a home invasion was properly admitted at trial. King failed to preserve a hearsay objection to the statement, and the statement was admissible because it was not hearsay.

King's second contention on appeal is without merit. Contrary to his assertions, the trial court did not err in admitting testimony through Investigator Shawnee Peeples that reflected law enforcement was advised that King had called his employer and informed his employer that he was injured during a home invasion. King did not present a hearsay objection at trial, and the argument raised on appeal is not preserved for appellate review. Further, the statement was not hearsay. It was not introduced for the truth of the matter asserted, and was only presented to explain the actions taken by Peeples during the investigation.

How the issue arose at trial

The State presented testimony from Investigator Shawnee Peeples of the Greenville County Sheriff's Office. (R. pp. 157-58). Investigator Peeples became involved in the case on March 17, 2014. (R. p. 158). She was assisting with the case, which occurred the night before. (R. p. 158). Peeples, at the time an investigator in family violence cases, was listening as the investigators in this case were talking about the case as she was trying to determine how she could assist. (R. p. 158). During the discussion, King's name came up. Peeples testified, "I was advised that that day he called in to work and he told his job that he was a victim of a home invasion where he was injured." (R. p. 159, ll 2-5). Defense counsel objected, stating, "I object unless the foundation is laid, Your Honor." (R. p. 159, ll 6-7). The trial court overruled the objection. Peeples went on to testify that based upon that information, she started calling area hospitals to see if King sought medical attention for his injuries. (R. p. 159).

She called the two hospitals in Greenville and learned he had not been treated at either hospital. (R. p. 159). After reviewing the address on his driver's license, Peeples called the hospital in Anderson County, and the hospital in Anderson confirmed King had been seen. (R. p. 159).

Peeples further testified that she obtained an order for production of records for the medical records for the treatment. (R. p. 160). Also, Peeples contacted the Anderson City Police Department to obtain a copy of the police report that was generated from King's hospital visit. (R. p. 160). She also contacted the hospital's security department to obtain video footage of King's visit at the hospital. (R. p. 160).

Standard of Review

"In reviewing a trial court's ruling on the admissibility of evidence, appellate courts recognize that the trial judge has considerable latitude in this regard and will not disturb such rulings absent a prejudicial abuse of discretion." State v. Scott, 405 S.C. 489, 497, 748 S.E.2d 236, 241 (Ct. App. 2013) (citing State v. Whitner, 399 S.C. 547, 557, 732 S.E.2d 861, 866 (2012); State v. Clasby, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." Whitner, 399 S.C. at 557, 732 S.E.2d at 866 (citation omitted).

A. This argument is not preserved for appellate review because no hearsay objection was made to the introduction of the statement.

King contends that King's statement to his employer that was presented through Investigator Peeples' testimony was inadmissible hearsay. King did not raise that objection at trial. Instead, at trial, he asserted the State had not laid a proper foundation for the admission of the statement. Since King did not contend at trial the statement

was inadmissible hearsay, this argument presented on appeal is not preserved for appellate review. See State v. Johnson, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005) (stating an objection should be sufficiently specific to bring the exact error to the trial court's attention); State v. Adams, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (S.C. Ct. App. 2003); see State v. Perez, 334 S.C. 563, 565-66, 514 S.E.2d 754, 755 (1999) (issue not raised and ruled upon by trial court is procedurally barred and not preserved for appeal); see also State v. Tucker, 319 S.C. 425, 428, 462 S.E.2d 263, 265 (1995) (party cannot argue one ground below and then another on appeal); see generally Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) ("It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review."); I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (holding an appellant must present both his issues and arguments to the lower court and obtain a ruling before presenting the issues and arguments on appeal); State v. Williams, 303 S.C. 410, 411, 401 S.E.2d 168, 169 (1991) (concluding appellate courts will generally not address an argument unless it was first raised to and ruled upon by the trial court).

B. The statement was admissible because it was not hearsay.

The statement from King's employer was properly admitted through Investigator Peeples' testimony because it was not hearsay. The statement was not offered from the truth of the matter asserted. Instead, it was merely offered to show why Peeples proceeded to call local hospitals to see if King was treated for any alleged injuries. As such, the statement was properly admitted by the trial court.

Evidence is not hearsay unless it is an out of court statement offered to prove the truth of the matter asserted. State v. Brown, 317 S.C. 55, 63, 451 S.E.2d 888, 894 (1994) (internal citations omitted). "Additionally, an out of court statement is not hearsay if it is offered for the limited purpose of explaining why a government investigation was undertaken." Brown, 317 S.C. at 63, 451 S.E.2d at 894 (citing United States v. Love, 767 F.2d 1052 (1985), cert. denied, 474 U.S. 1081, 106 S.Ct. 848, 849, 88 L.Ed.2d 890 (1986). Evidence explaining why law enforcement is in a particular area has been held to be relevant information for the jury to consider. State v. Johnson, 318 S.C. 194, 197, 456 S.E.2d 442, 444 (Ct. App. 1995) (citing State v. Davis, 309 S.C. 56, 419 S.E.2d 820 (Ct.App.1992)).

Here, the King's statement to his employer that he was injured in a home invasion was not entered for the truth of the matter asserted. The testimony presented by Peeples after the reference to the statement shows the intent of introducing the statement was to explain why Peeples took certain actions in the investigation. Peeples testified that after hearing the statement, she called local hospitals to see if King sought treatment for the injuries he would have suffered in the home invasion. (R. p. 159). After learning that King also had an address in Anderson County, Peeples contacted the hospital in Anderson County to see if he was treated for injuries. (R. p. 159). After confirming he was treated, Peeples obtained an order for production of records for the medical records for the treatment and contacted the Anderson City Police Department to obtain a copy of the police report that was generated from King's hospital visit. (R. p. 160). She also contacted the hospital's security department to obtain video footage of King's visit at the hospital. (R. p. 160).

The State did not use the statement in any other manner during the trial. It was not utilized in closing argument, and no other witness referred to the statement. In light of the limited use of the statement only to explain why Peeples contacted local hospitals regarding King, the record supports a finding the statement was not hearsay and was properly admitted at trial. See Caprood v. State, 338 S.C. 103, 111, 525 S.E.2d 514, 518 (2000) (finding statements made regarding unrelated crimes did not constitute hearsay when "officers were explaining their actions in pursuing the defendants and the statements were not offered for their truth."); see also State v. Thompson, 352 S.C. 552, 559, 575 S.E.2d 77, 81 (Ct. App. 2003) (finding officer's testimony regarding statement by bystander was not hearsay because it was not entered for the truth of the matter asserted, but "rather to explain and outline the officers' investigation and their reasons for going to the Thompsons' home.").

CONCLUSION

For the foregoing reasons, the Respondent respectfully requests this Court deny King's appeal and affirm his convictions for murder and possession of a weapon during the commission of a violent crime.

Respectfully submitted,

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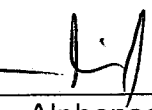
By: 
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June 16, 2017

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County
The Honorable Victor C. Pyle, Jr., Circuit Court Judge
Appeal Case No. 2015-002541

THE STATE,

RESPONDENT,

v.

SYLVESTER KEEJAUN KING,

APPELLANT.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, Order of the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

This 2nd day of August, 2017.

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