ORIGINAL

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BAMBERG COUNTY
The Honorable Doyet A. Early, III., Circuit Court Judge

Appellate Case No. 2018-001212

THE STATE, ... RESPONDENT

v.

KWAMAINE JARELLE ROSS, ...APPELLANT.

FINAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Other Authorities

APPELLANT'S STATEMENT OF ISSUE ON APPEAL

Whether the court erred by allowing Agent David Owen to testify that Lenell Ross allegedly told him that appellant was wearing a yellow shirt on the night of the murder, and that appellant changed his shirt later that night, since this was highly prejudicial hearsay testimony where the state was urging that the evidence showed the murderer was wearing a yellow shirt?

STATEMENT OF THE CASE

On October 24, 2015, in Bamberg County, Appellant Kwamaine Jarelle Ross and another perpetrator, and possibly a third perpetrator, murdered Travis Anderson by means of shooting him with a gun. On November 5, 2015, Appellant was arrested for the murder. The Bamberg County grand jury subsequently indicted Appellant for the murder (Ind. # 2017-GS-05-00028). Appellant was represented by Ola Johnson, Esquire. On June 19, 2018, Appellant proceeded to a jury trial before Circuit Court Judge Doyet A. Early, III. The case was prosecuted by Deputy Solicitor David Miller and Assistant Solicitor R. Jackson Cooper. At the conclusion of the trial on June 21, 2018, the jury found Appellant guilty of murder. Judge Early sentenced Appellant the same day to thirty (30) years' incarceration for murder. (R. 229, Supp. R. 238-39, 244-45, Arrest Warrant, Indictment, Sentencing Sheet).

RESPONDENT'S STATEMENT OF FACTS

On October 24, 2015, Appellant Kwamaine J. Ross (hereinafter "Appellant") and one (1) associate, and possibly another associate, unlawfully entered the home of Travis Anderson ("the victim") in Bamberg County and murdered Anderson by shooting him with a handgun. After an investigation by the Bamberg County Sheriff's Office and the State Law Enforcement Division ("S.L.E.D."), Appellant was arrested for the murder. (R. June 19-20, 2018, pp. 6-60, 62-103; 104-164; 165-180; R. June 21, 2018, pp. 229, 230, 237-41, 242-43, 244-45).

Relevant Facts

Travis "Bird" Anderson (hereinafter "the victim") and his common law wife and high school sweetheart Octavia Bannister (hereinafter "Ms. Bannister") lived in a two (2) story house at 253 Sanders Street located directly behind Betty's Quick Stop, a convenience store, located on Highway 301 in Bamberg, S.C. Directly across Highway 301 from Betty's Quick Stop is a Dollar Tree store. Residing with the victim and Ms. Bannister in their two (2) story home were their two (2) small children, ages two (2) and three (3) years old. The victim sold marijuana to make money. Ms. Bannister worked at the Piggly Wiggly grocery store in Denmark, S.C. She drove back and forth to work each day. (R. June 19-20, 2018, pp. 151-164).

On October 24, 2015, Appellant, who was from Orangeburg, S.C., and two (2) associates drove from Orangeburg to Appellant's uncle Alonza Ross's house, located at 33 Hill Street in Bamberg. Appellant's uncle Alonza Ross (hereinafter "Alonza" or "Appellant's uncle") is also known as "Duck" or "Uncle Duck." Appellant's uncle's home is located approximately one quarter (1/4) of a mile from the victim's residence. Appellant and his two (2) associates arrived at Alonza's house on October 24th sometime after dark. (R. June 19-20, 2018, 10-32).

Appellant and his two (2) associates were in a dark in color SUV when they arrived at Alonza's house. When the three (3) men arrived, there at Appellant's uncle's house was Alonza and a cousin of Appellant and another nephew of Alonza, Lenell Ross (hereinafter "Lenell" or "Appellant's cousin") who basically lived with Alonza. Lenell is also known by the nickname "Black-O." (R. June 19-20, 2018, 10-32; 137-141).

Appellant and his two (2) associates stayed at Alonza's residence for a period of time and then left and went to a store and purchased beer and returned to Alonza's house. The three (3) men then drank beer with Alonza and Appellant's cousin Lenell. Appellant and his two (2) associates then eventually left Alonza's home again. (R. June 19, 2018, 10-32; 137-141).

While they were gone from Alonza's house this time, Appellant and at least one (1) of his two (2) associates, and possibly both, entered the home of the victim armed with handguns with the intent to rob the victim. While in the victim's home, there was a struggle in the kitchen, and shots were fired. The victim either ran upstairs or was forced upstairs by Appellant or one (1) of his associates or both. Once upstairs, one (1) of the three (3) men murdered the victim by shooting him in the neck in his upstairs bedroom. The victim's small children were in the bedroom and witnessed their father's murder. (R. June 19-20, 2018, pp. 6-9; 10-32; 117-129; 137-141; 146-151; 151-164; 112-117; 33-41; 77-86; 89).

The victim's wife, Ms. Bannister, arrived home from work between nine (9) and ten (10) p.m. as the murder was occurring. When she pulled in her driveway, she noticed all the lights were on in her house and the back sliding glass door was open. Both of these facts were unusual because all of the lights were normally not on at one (1) time and her husband never left the back door open and complained if anyone did leave the back door open. Because things appeared suspicious, Ms. Bannister circled the outside of her home on foot calling the victim's name. She

received no response. As she entered the home she and her children shared with the victim, she noticed items in the kitchen had been knocked off the table and were on the floor. It looked as if the victim had finished feeding his children when someone had entered the kitchen and a struggle ensued. Bowls were on the kitchen floor and the kitchen table was turned over. Ms. Bannister then heard a gunshot upstairs in her house. She also heard one (1) of her children scream. (R. June 19-20, 2018, pp. 151-164; 129-135; 52-56).

As a result of hearing the gunshot and hearing her child scream, Ms. Bannister screamed and turned and saw Appellant standing nearby with a pistol in his hand. Ms. Bannister then turned and ran from her house. As she was fleeing the house, she looked back and saw Appellant again, this time standing in the sliding glass door with a gun in his hand. She later positively identified Appellant from a photographic line up. (R. June 19-20, 2018, pp. 151-164; 129-135; 52-56).

Ms. Bannister fled to the Dollar Tree store located across Highway 301 from Betty's Quick Stop. She fled there because there were people in the parking lot. She was frantic and yelled to an eyewitness, who was closing the Dollar Tree store, that there was a man in her house with a gun and her children were still inside the house. The eyewitness then saw a tall slender man with dreadlocks and wearing a white t-shirt [not Appellant] exit a door of the victim's home and turn to his right and run around the back of the victim's home. (R. June 19-20, 2018, pp. 151-64; 6-9).

Appellant and at least one (1) co-perpetrator fled the victim's home, this included the one (1) co-perpetrator who had dreadlocks and was wearing a white t-shirt. Appellant was wearing a

yellow or light green shirt. (R. June 19-20, 2018, pp. 6-9; 20-27; 77-80; 89, 10-32; 137-141; 151-64).[1]

A close friend of the victim, Jeffrey Porter, lived nearby. At the time of the murder, he heard what sounded like someone beating something with a hammer several times, an echoing type noise, but his sister who Mr. Porter was sitting with at the time stated out loud that the noise was gunshots. Mr. Porter and his sister then heard and saw Ms. Bannister screaming and running across the road to the Dollar Tree. Ms. Bannister was screaming that her children were still in the house. Mr. Porter ran to the victim's home and entered the victim's home and immediately saw the disarray in the kitchen. He climbed the stairs where he found the victim dead in the bedroom upstairs. The victim's two (2) small children were seated nearby on a bed in the same bedroom where the victim was killed. Mr. Porter picked up the children and carried them from the house to their mother across Highway 301 at the Dollar Tree. Mr. Porter informed Ms. Bannister that the victim was dead. Mr. Porter also testified that around the time of the murder he saw a dark SUV drive by the area. (R. June 19-20, 2018, pp. 33-41).

After committing the crime, Appellant eventually fled back to his uncle Alonza's home. Appellant's two (2) associates left the area in the dark SUV. By the time Appellant had gotten back to his uncle's home, Appellant's uncle Alonza had already learned of the murder and spoken with another individual, Harriet Washington, by phone and she had communicated to him

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[1] S.L.E.D. Agent David Owen testified the investigation revealed one (1) perpetrator was wearing a white t-shirt and the other a light green or yellow shirt. (R. June 19-20, 2019, pp. 77-78). Ms. Bannister testified at trial, three (3) years after the crime, that Appellant was wearing a green shirt. (R. June 20, 2018, pp. 151-64). However, police had also received information over the CAD (911) that a witness had described one (1) of the perpetrators as wearing a yellow or light green shirt and fleeing the scene. (R. June 20, 2018, pp. 77-80). Ms. Harriet Washington, who was listening to her police scanner at the time, almost immediately informed Appellant's uncle Alonza Ross, by phone, that one (1) of the perpetrators was wearing a yellow shirt. Alonza testified Appellant was wearing a yellow shirt or one similar to yellow. (R. June 19-20, 2019, pp. 20-27).

that one (1) of the perpetrators of the murder was wearing a yellow shirt. Upon seeing Appellant enter his home for the second (2nd) time that evening, Alonza immediately asked Appellant what he had done, because Appellant was wearing a yellow or similar colored shirt. Appellant stated he had not done anything, but Appellant immediately changed from his yellow shirt into another different colored shirt. Appellant's cousin, Lenell Ross, was also there with Alonza and witnessed Appellant remove the yellow shirt and change into a different color of shirt. Alonza and Lenell both later gave statements to law enforcement that Appellant changed from his yellow shirt into another color of shirt after returning to Alonza's house the last time and after being informed that the perpetrator of the murder at the nearby victim's house had been seen and was wearing a yellow shirt. (R. June 19-20, 2018, pp. 10-32; 137-140).

However, when Appellant's cousin Lenell Ross was called to testify at trial, he testified Appellant was wearing a dark or blue colored shirt the night of the crime, not yellow, and he denied Appellant changed out of a yellow shirt when informed by Alonza the perpetrator was wearing a yellow shirt. When asked, Appellant's cousin Lenell denied that he told S.L.E.D. Agent David Owen on November 2, 2015 in Bamberg, shortly after the crime, that Appellant was wearing a yellow shirt when he returned to the victim's home after the murder occurred and that Appellant changed his yellow shirt into a different shirt. (R. June 19-20, 2018, pp. 92-98; 100-103; 69-70). Lenell Ross was then impeached with his prior inconsistent statement introduced through the S.L.E.D. agent who had previously interviewed him, Agent David Owen. (R. June 19-20, 2018, pp. 137-140). Appellant's uncle, Alonza Ross, did testify at trial that Appellant did change his shirt from a yellow or similar colored shirt to a different color shirt after Alonza questioned Appellant about what he had done and informed Appellant that the murderer had been described as wearing *a yellow shirt*. (R. June 19-20, 2018, pp. 10-32).

S.L.E.D assisted local law enforcement in investigating the murder. Police discovered while processing the crime scene that the victim had been shot at or shot three (3) times while in the kitchen of his home. Three (3) fired 9mm shell casings were found on the kitchen floor where the initial struggle had taken place. The victim was then shot or shot at four (4) more times in the upstairs bedroom of the house. Four (4) more fired shell casings were found in the upstairs bedroom where the victim's body was found and the victim's children were recovered. The victim suffered a total of six (6) gunshot wounds. The fatal shot was one (1) to the neck which severed the spinal column. S.LE.D.'s firearms laboratory determined all seven (7) recovered fired shell casings were fired by the same gun. (R. June 19-20, 2018, pp. 104-111 146-151; 112-117; State's Ex. # 3).

Also testifying in Appellant's trial were two (2) individuals who had been in jail with Appellant at the Bamberg County Detention Center while Appellant was awaiting trial. Each testified Appellant made admissions to them of his participation in the murder of the victim. Appellant told Keon Kimble that the murder of the victim was the result of a robbery that went bad or didn't go as he and the others he was with had planned. Appellant stated to Kimble that "they" intended to rob the victim, who was a drug dealer, but the robbery did not go as planned and they ended up shooting the victim and they did not get anything. Kimble testified without any promises from the State and at the time of trial was up for parole in two (2) months and would max out his sentence in 2019. (R. June 19-20, 2018, pp. 117-123). Appellant told Charles Lott that he was in the house in Bamberg directly behind "Betty's Quick Stop" [the victim's home] going to "hit a lick." Lott understood this to mean robbing the victim, Travis "Bird" Anderson. Appellant stated that while in the house behind Betty's Quick Stop, about to hit a lick, he heard a car pull up. Appellant stated he spotted the driver of the car, it was the victim's

"baby mama" and she ran to the Dollar Tree across from Betty's Quick Stop. (R. pp. June 19-20, 2018, pp. 123-127). This is consistent with the testimony of the victim's common law wife who testified after she saw Appellant standing in her house with a gun in his hand, she ran out the front door and across the street to the Dollar Tree which was closing **and** the testimony of an eyewitness who was outside the Dollar Tree across the road from the convenience store who spoke to Ms. Bannister. (R. June 19-20, 2018, pp. 151-64; 6-9).

Appellant also gave police a statement after he was arrested. While he denied involvement in the murder, Appellant admitted he was from Orangeburg, S.C., and he was at his uncle Alonza's house in Bamberg on the night of October 24, 2015, the night of the murder. Alonza's house is located one-quarter (1/4) of a mile from the victim's home. Appellant admitted he was driven to his uncle's house from Orangeburg by a gentleman named "Q." Appellant stated he had met "Q" approximately two (2) years earlier in Orangeburg. When interviewed by police, Appellant could not remember anything else about "Q" including his real name or his telephone number. Appellant stated he could not remember the exact time it was when he arrived at his uncle's house in Bamberg, but it was dark. Appellant stated his cousin Lenell was there at his uncle's house. He stated "Q" then left after dropping him off. Appellant stated while he was there at his uncle's house, his uncle mentioned something about *a shooting and someone wearing a yellow shirt.* Appellant stated he arrived at his uncle Alonza's house once and left only once. Appellant also stated while he was at his uncle Alonza's house, his uncle Alonza asked him "if he was good." Appellant told his uncle Alonza: "Yeah, I had nothing to do with it." Appellant stated to police he wasn't concerned about it because he didn't have on a yellow shirt, he had on a blue shirt and blue jeans. Later that evening, he decided to return to Orangeburg so he called his friend "Q" to come pick him up. He called "Q" on Lenell's

cell phone because Appellant's cell phone could not get service. (R. June 19-20, 2015, pp. 63-64).

Appellant also testified at trial. He again admitted he was in Bamberg on the night of the victim's murder at his uncle Alonza's house one-quarter (1/4) mile from the victim's house. Appellant testified he was brought there by "Q." Contrary to the testimony of his own uncle and cousin, Appellant denied he arrived at his uncle Alonza's house with two (2) men. Appellant testified contrary to his uncle Alonza's testimony that he did not leave his uncle's house two (2) times with the two (2) men he came with prior to the murder of the victim and then return to his uncle's house by himself the last time. He again claimed he was wearing a blue shirt, *not a yellow shirt* as testified to by his uncle Alonza. Appellant also informed the jury that he had voluntarily reported to law enforcement for questioning about the murder. (R. June 19-20, 2018, pp. 165-73). However, in reply the State proved Appellant was arrested for the murder and questioned only after his probation and parole officer contacted him about a probation violation, a traffic offense, and asked him to report to his probation or parole officer. (R. June 19-20, 2018, pp. 178-79).

The Issue Raised on Appeal

Appellant raises the following issue on appeal:

> Whether the court [Judge Early] erred by allowing Agent David Owen to testify that Lenell Ross allegedly told him that appellant was wearing a yellow shirt on the night of the murder, and that appellant changed his shirt later that night, since this was highly prejudicial hearsay testimony where the state was urging that the evidence showed the murderer was wearing a yellow shirt?

(Initial Brief of Appellant, p. 1).

What Occurred Below

During the trial of the case, the State called as a witness Appellant's cousin, Lenell Ross, who was present at Appellant's uncle Alonza's residence when Appellant returned from the commission of the murder of the victim. Contrary to what Lenell had told a S.L.E.D. Agent shortly after the crime and contrary to what Lenell had told the Solicitor and the same S.L.E.D. Agent shortly before trial, Appellant's cousin Lenell testified Appellant was not wearing a yellow shirt and did not change out of a yellow shirt after returning to his uncle's residence shortly after the murder and shortly after being informed by his uncle that the perpetrator of the murder was wearing a yellow shirt. The Solicitor then asked Lenell if he had ever told the S.L.E.D. Agent, Agent David Owen, when he was interviewed by him shortly after the crime, November 2, 2015, that Appellant was wearing a yellow shirt that night and Appellant had changed his yellow shirt into another different colored shirt after being informed by his uncle that the perpetrator of the crime had been seen wearing a yellow shirt. The witness, Lenell Ross, while admitting he had given a statement to the S.L.E.D. Agent on the date alleged, in Bamberg, S.C., denied making these prior statements to the S.L.E.D. Agent. As a result, the State re-called S.L.E.D. Agent David Owen who testified he had interviewed Appellant's cousin Lenell shortly after the crimes, November 2, 2015, and Lenell had provided a statement in which Lenell had

informed Agent Owen that Appellant was wearing a yellow shirt on the night of the murder and had changed his yellow shirt when he returned to his uncle's residence shortly after the commission of the murder and shortly after his uncle had stated to Appellant the perpetrator was wearing a yellow shirt. (R. June 19-20, 2018, pp. 92-98; 100-103; 137-140). Appellant objected to Agent Owen's testimony in this regard only on the grounds of hearsay. (R. June 19-20, 2018, pp 137-140).

The following is the relevant testimony with regard to witness Lenell Ross:

Q: Good afternoon, Mr. Ross, how you doing?

A: All right.

Q: Mr. Ross, how do you know the defendant, Kwamaine Ross [Appellant]?

A: My first cousin.

Q: He's your first cousin? I need you to speak up.

A: He's my first cousin.

Q: Do you recall the night of October 24, 2015?

A: Yeah. I remember seeing him. He came and got a couple of beers. I remember it. About three years ago, I remember.

Q: When he arrived at your Uncle Duck's [Alonzo's] house, who was he with?

A: One fellow I definitely never seen before. The other dude was supposed to be Queeny's son.

THE COURT: Who?

THE WITNESS: Queeny's son.

THE COURT: Queeny's son.

THE WITNESS: Queeny's son. I don't know the other dude.

BY MR. MILLER:

Q. And you don't know who Queeny's son is, you just know him as Queeny's son?

A. I see two or three times before in my life, but I don't know him personally. I seen him before.

Q. Okay. You don't know his actual government name?

A. No. no.

Q. Okay. So when the defendant and Queeny's son and the third guy show up at Uncle Duck's [Alonzo's] house, how long did they stay there?

A. I'm not exactly sure, sir.

Q. Just ballpark.

A. I don't know, honestly. I would guess 30 minutes be good.

Q. And when they left, did they leave together or did they leave separately?

A. Well, they left together. They were supposed to go back to Orangeburg, but my cousin decided to stay. He came and decided to stay.

Q. So your testimony is that they all came, three people came. What kind of vehicle were they in?

A. It was an SUV.

Q. What color was it?

A. Dark, I don't know the exact color.

Q. Okay. Three people come in the dark SUV. The defendant, Queeny's son, and a guy you don't know?

A. Yeah.

Q. And when they left, your cousin stayed behind. That's your testimony.

A. Yeah, he - - well, he came and he stayed. They came back about an hour later.

Q. Do you recall giving a statement to the State Law Enforcement Division, Agent Owen, on November 2nd of 2015?

A. Yeah, I remember seeing him, he came.

Q. Do you admit or deny that on the day that you spoke to S.L.E.D., you told them that Kwamaine, Queeny's son, and an unknown person came to your Uncle Duck's house, that they arrived in a dark colored SUV and when they got there, they drank beer and talked about looking for girls. You remember saying that?

A. About the girl thing, I don't - - I just told you about the SUV they came in.

Q. Do you recall telling the agent - - do you admit or deny telling the agent that they left Uncle Duck's house and rode around looking for girls. They did not find any girls and returned to Uncle Duck's house and drank some more. Do you recall that?

A. I don't recall about the girls.

Q. Do you recall telling them after about 10 or 20 minutes, Kwamaine and the other two left and sometime later Kamaine returned by himself. Do you recall that?

A. I don't' remember from the time he got dropped back off. Yeah, I remember saying he got dropped back off.

Q. Okay. So they're all at your Uncle Duck's house, Kawamine, Queeny's Boy and the unknown guy. It's your testimony now that they all left and then a little while later they came back and dropped off Kwamaine?

A. Yeah, I was - - he was saying he go back to Orangeburg and then he came and said, I'm going to stay with you and they left him here. They made Duck walk to the store, yeah. But that was after all that. Way after, a good way after that.

Q. What color shirt was Kwamaine wearing that night?

A. I told y'all it was - - it was a dark color shirt, but I don't know the known color.

Q. Do you admit or deny you told Agent Owen that Kwamaine had on a yellow colored shirt?

A. I deny it because there are people came messing me with a bunch of stuff I never said. I never said he had on a yellow shirt.

Q. Do you recall telling Detective - - I'm sorry, do you recall telling Agent Owen that after Duck, Uncle Duck received a call about Kwamaine's possible involvement and a person with a yellow shirt, Kwamaine changed from the shirt he was wearing. Do you recall saying that?

A. Well, Duck changed the shirt, he attempted to change his shirt but he never truly did because he couldn't fit a shirt I wear because he's bigger than me. So he kept his shirt on, but he did thought about it.

Q. So are you saying that you never told the SLED agent that Kwamaine changed his shirt?

A. No, he tried to change the shirt but he couldn't fit it.

Q. No - -

A. He kept his shirt on, yeah.

Q. Are you saying you didn't tell the SLED agent - -

A. No. I didn't because he can't fit my shirt. I'm positive.

Q. Are you - - you remember sitting in my office yesterday?

A. Yes, sir.

Q. And yesterday in my office, do you recall telling this SLED agent - -

A. Said he attempted to change his shirt. I said he attempted.

Q. Do you admit or deny that yesterday sitting in my office, you said he changed his shirts, he put on one of your shirts?

A. He couldn't fit, that's what I'm saying. He didn't fit the shirt so - -

Q. You did not say that yesterday, did you?

A. I'm say - - I say he attempted.

Q. Okay.

A. Look at him and look at me. You think he fit the same shirt? Sure.

Q. Do you admit or deny saying that Kwamaine was at your Uncle Duck's house for about an hour before the two people returned [this was after the crime and after Appellant had returned to his uncle's house]?

A. I said - - I never said until they return. I couldn't say - - picked him up. I never said - - I never said two people was in the car because I didn't see it. Did I not tell you that too.

Q. Do you admit or deny that you were shown a photographic lineup that contained a picture of Queeny's Boy"

A. Yeah, I seen that picture. Yes, sir.

Q. And you picked him out?

A. Yes, sir.

Q. That's the first one you knew as Queeny's son?

A. Yea, yeah. I said I drunk beer with him.

Q. Now, immediately after this incident, you left Bamberg, didn't you?

Q. Yes, sir, I had death threats. So that's why I left.

Q. And you told - - do you admit or deny that you told the SLED agent when you talked to him that the reason you left is because your name was being called as being involved in this incident?

A. Yeah, I was saying death threats, yes, sir. Yeah my name was involved in it. That's why I left.

(R. 92, ln. 19 - 98, ln. 22)(emphasis added). On cross-examination, Lanell Ross further testified:

Q. Okay. And the fact of the matter is, that - - well some of the stuff that the solicitor's saying that you said, you don't agree with it.

A. Yeah, definitely. What I said yesterday, he said wasn't important. It's stuff I didn't say.

Q. So you're trying to tell the truth right now; that's what you're doing?

A. I'm on the stand, that's - -

Q. You're here to tell the truth?

A. Yeah.

(R. 100, ln. 19 – 101, ln. 3). On re-direct, Lanell Ross testified as follows:

Q. Mr. Ross, you left Bamberg because you heard your name was being put out there as being involved in this incident, correct?

A. Yes, sir. I did that.

Q. So if you got up and told the truth, told them the same thing, this jury the same thing you told SLED back two weeks after this happened and Kwamaine Ross got convicted of murder, what's Kwamaine to do at that point? Wouldn't he be inclined to tell who was involved with him?

A. That's between - - I don't know sir. That's kind of the question asking what he do, I don't' know what he do, sir.

Q. Well, you changed your story from the time you talked to SLED until you were in my office yesterday, until the time you got up here on the stand?

A. I told - -

Q. And each time that you changed your story, you story has gotten more and more convoluted, apparently trying to benefit Mr. Ross?

A. I'm saying, where I change my story at?

Q. Well, well get into where you changed your story at.

But you were the one that took off from Bamberg after the - -

MR. JOHNSON: Your Honor, I just - - at this point, I'm going to object to a leading question, but if Your Honor, if he's going to attempt, through cross-examination base on this being a hostile witness, if that's what he's trying to do. I just want to clarify that if Your Honor's going to allowing.

THE COURT: Well, obviously, he's changed his story and I'll allow him.

MR JOHSON: If he's doing cross, I'm objecting to the leading question, but if you're allowing cross, I just wanted to put that on the record.

BY MR. MILLER:

Q. I want to be very clear. When Kwamaine Ross arrived at your Uncle Duck's house, did he ever leave before he left and you didn't see him anymore?

A. Yeah, I said he came back, so I said that. I said - - he said we wasn't going to stay and they done turned around, so he came back. He came back and said I'm staying with you cousin. I just said it.

Q. Did he stay with you?

A. Yes sir.

Q. Stayed overnight?

A. no, not overnight.

Q. Who's Q?

A. I have no idea, sir.

Q. But did you - - did Kwamaine use your phone to call Q that night?

A. I don't know who he called, sir. You asking me what he did. I don't know, you know. I don't know the same people he know.

Q. So you didn't know what Q's number be was?

A. I don't know a Q, sir, off the top of my head, sir.

MR MILLER: No further questions.

THE COURT: All right. You can step down, Mr. Ross. Thank you.

(R. 101, ln. 7 - 103, ln. 15).

Thereafter, the State recalled S.L.E.D. Agent David Owen who testified to the prior inconsistent statement of Lenell Ross. Not only did Agent Owen testify that Lenell Ross had previously informed Agent Owen that Appellant was wearing a yellow shirt shortly after the crime and changed into a different shirt after his uncle told him the murderer was seen wearing a yellow shirt, but also to other inconsistent statements Lenell Ross had made shortly after the crime which he had also denied on direct examination. (R. 137-140). Agent Owen's testimony on this issue was as follows:

Q. Agent Owen, you testified previously that you got statements during the course of your investigation from both Lenell Ross, the defendant's cousin; as well as Alonza Ross, who s referred to as Uncle Duck; is that correct?

A. Yes, sir, that's correct.

Q. And you heard both of them testify yesterday?

A. Yes, sir, I did.

Q. What timeline was provided for the comings and going of the defendant on the night of October 24th, by Lenell Ross when you talked to him shortly after the incident occurred?

A. On November 2nd, 2015 when I spoke with Lenell Ross, he did not give me any specific times such as 9 p.m. or 10 p.m., but he did state that on Saturday, October 24th, his cousin Kwamaine Ross, an individual he recognized as Queeny's Boy, and another third person - -

MR. JOHNSON: Your Honor, at this point I just have to object. Is this coming in from something that's in evidence? Or - -

THE COURT: He's testifying about what he learned when he interviewed this witness.

MR. JOHNSON: Well, if he's quoting somebody and it's hearsay, I object under hearsay, but if it's under some other exception, I'd ask the State to make that clear.

MR. MILLER: Your Honor, it's impeachment of Lenell Ross's prior testimony. There was - yesterday, Lenell Ross denied knowing or denied recalling ever telling the - - Agent Owens what he - - what the sequence of events was. And he repeatedly was stating or changing what his sequence of events was during his own testimony.

THE COURT: You can ask him what the sequence that he gave this witness was.

MR. JOHNSON: Yes, sir.

THE WITNESS: So Mr. Lenell Ross stated that his cousin, Kwamaine Ross, an individual he knows as, recognized as Queeny's Boy, and a third unknown person arrived at their uncle's house, uncle Duck, Alonza Ross. They were there for a period of time when Kwamaine and his two friends left, presumably to go buy some alcohol or beer; returned, consumed the alcohol at Uncle Duck's house, with Lenell Ross. And then Kwamaine, Queeny's Boy, and the third unknown, then left again.

A period of time later Kwamaine returned back to Uncle Duck's house by himself.

And then an unknown - - approximately an hour later, the two individuals that arrived with Kwamaine previously returned, stayed for a few minutes and then left with Kwamaine.

Q. Now, in his statement that he gave you back in November of 2015, did he tell you what color shirt the defendant was wearing when he arrived?

A. Yes, he stated he was wearing a yellow shirt, a yellow color shirt.

Q. And did he tell you that the defendant changed his shirt?

A. Yes, he did.

Q. Did he tell you at any point in time - -

MR. JOHNSON: Your Honor, I'd just object to leading questions and also hearsay. We're getting away from that original ruling, plus he's asking leading questions.

THE COURT: Overruled.

But don't ask leading questions

Overrule part of it, sustain as to leading questions.

MR. MILLER: Yes, sir.

BY MR. MILLER:

Q. Did he ever indicate to you that Mr. Ross tried to change his shirt but wasn't able to do so?

A. No, he did not. He stated he changed his shirt.

(R. 137, ln. 11 – 140, ln. 5).

Appellant now argues on appeal that Judge Early erred in admitting witness Lanell Ross' prior inconsistent statement. Appellant alleges the witness prior statement was inadmissible prejudicial hearsay and the State did not lay a proper foundation for the admission of a prior inconsistent statement pursuant to Rule 613, S.C.R.E. As the record shows, Appellant did not raise a Rule 403, SCRE objection to this testimony by Agent Owen and he did not object to the admission of the prior statement on the grounds the State had not laid a proper foundation for the admission of a prior inconsistent statement. Appellant only objected to the admission of Agent Owens' testimony on the grounds of hearsay. And, Appellant only objected after the testimony was elicited and the Solicitor had begun asking another question, so the objection appears untimely.

Further, as the record above shows, Judge Early did not err in admitting Agent Owen's testimony in this regard over the hearsay objection because the witness' prior inconsistent statement is **by definition not hearsay** under Rule 801(d)(1), SCRE, and **the State laid a proper foundation for the admission** of portions of the prior statement because they constituted prior inconsistent statements and were admissible to impeach the witness' trial testimony pursuant to Rule 613, SCRE. Furthermore, the admission of the prior inconsistent statement would be **harmless** on this record, and not prejudicial, where it was cumulative where there was other evidence from several different witnesses, including Appellant, and his own uncle about the yellow shirt and Appellant changing the yellow shirt.

Lack of preservation of Appellant's arguments on appeal

Appellant raises several arguments on appeal that were not raised below. Therefore, they are not preserved for appellate review.

First, Appellant argues the admission of the prior statement of Lanell Ross through Agent Owen was prejudicial hearsay, i.e. the admission of this evidence was more prejudicial than probative, a Rule 403, SCRE, argument. Appellant did not raise an objection below that the admission of the prior statement of Lenell Ross through Agent Owen was more prejudicial than probative, i.e. a Rule 403, SCRE, objection. As a result, this argument is not preserved for appellate review. State v. Patterson, 324 S.C. 5, 482 S.E.2d 760 (1997)(defendant may not argue one ground below and a different ground on appeal).

Appellant also now argues on appeal that if the State argues on appeal that the prior statement of Lenell Ross is a prior inconsistent statement, the State did not lay a proper foundation for the admission of a prior inconsistent statement. This argument was not raised below either. Appellant raised only a general hearsay objection below. As a result, this new

argument is not preserved for appellate review. Patterson, 324 S.C. 5, 482 S.E.2d 760 (defendant may not argue one ground below and a different ground on appeal).

Further, Respondent submits the hearsay objection was not timely, but came after the testimony challenged on appeal was elicited not once, but twice, and the Solicitor had started asking another question of Agent Owen regarding what the same witness, Lenell Ross, told him. *Compare* State v. Byers, 392 S.C. 438, 710 S.E.2d 55 (2011)(where motion to strike came immediately after hearsay testimony the objection was timely and preserved for review). Therefore, Respondent submits the issue raised on appeal is not preserved for this reason.

Regardless of the lack of issue preservation, there is no merit to Appellant's hearsay objection on appeal.

ARGUMENT

Judge Early did not abuse his discretion in admitting the prior inconsistent statement of witness Lenell Ross because: it was not hearsay by definition; the witness testified inconsistent with his prior statement to S.L.E.D.; a proper foundation was laid for admitting the statement; the witness was asked about the prior inconsistent statement and denied making the statement; further, the admission of this testimony was harmless where it was cumulative to other evidence that Appellant was wearing a yellow shirt and changed his yellow shirt after the crime when informed by his uncle that the perpetrator was described wearing a yellow shirt, including the testimony of Appellant's own uncle.

Standard of Review

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Hatcher, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011)(*quoting* State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id.; *see also* State v. Brockmeyer, 406 S.C. 324, 340, 751 S.E.2d 645, 653 (2013).

Lanell Ross' prior inconsistent statement was not hearsay

Appellant argues that Judge Early erred in admitting witness Lenell Ross' prior statement to S.L.E.D. Agent David Owen because it was prejudicial hearsay. However, Appellant is wrong. Rule 801(a), SCRE, defines hearsay as 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. Id. However, the Rule 801(d)(1)(A), SCRE, specifically provides a statement is **not hearsay** if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is inconsistent with the declarant's testimony.

As shown in the record quoted above, the declarant, Lanell Ross, testified at trial and was subject to cross-examination regarding his prior statement to S.L.E.D. and his prior statement to S.L.E.D. was inconsistent with his trial testimony. (R. June 19-20, 2018, pp. 92-98; 100-103; 137, ln. 11 – 140, ln. 5). Lanell Ross testified at trial that Appellant was wearing a dark shirt when he returned to his uncle's house shortly after the murder and Appellant attempted to or considered changing his shirt but did not do so. (R. June 19-20, 2018, pp. 92-98; 100-103). In contrast, Appellant told S.L.E.D. Agent David Owen on November 2, 2015, shortly after the crime, that Appellant was wearing a yellow shirt when he returned to his uncle's residence shortly after the murder and Appellant changed his yellow shirt after his uncle told Appellant the murderer had been seen by a witness wearing a yellow shirt. (R. 137, ln. 11 – 140, ln. 5). As a result, Appellant is simply wrong that Lanell Ross's prior inconsistent statement is hearsay. It is by definition not hearsay. Rule 801(d)(1)(A), SCRE; Sheppard v. State, 357 S.C. 646, 661, 594 S.E.2d 462, 471 (2004)("Rule 801(d)(1)(A) provides a statement is not hearsay if the declarant testifies at the trial and is subject to cross-examination concerning the statement, and the statement is inconsistent with the declarant's testimony."), *overruled in part on other grounds by*

State v. Burdette, 427 S.C. 490, 832 S.E.2d 535 (2019)(inference of malice from a deadly weapon shall no longer be charged). Appellant's argument fails for this reason. State v. Stahlnecker, 386 S.C. 609, 622-23, 690 S.E.2d 565, 572-73 (2010)(A statement that is "not hearsay" under Rule 801(d), SCRE, may be used substantively to prove the truth of the matter asserted.); State v. Dennis, 337 S.C. 275, 284, 523 S.E.2d 173, 177 (1999)(same).

Further, the admission of this non-hearsay was relevant and not unfairly prejudicial or even prejudicial. S.L.E.D. Agent Owen testified the investigation of the murder revealed that one (1) of the perpetrators was wearing a yellow or light green shirt and the other perpetrator was wearing a white shirt. Because of what had been communicated to Appellant's uncle Alonza about what the perpetrator was wearing, and because Appellant was wearing a similar shirt just moments after the crime in close proximity to the crime, Alonza asked Appellant what he had done. Appellant denied being involved in the crime, but when informed a witness had seen the perpetrator in a yellow shirt, Appellant immediately changed his yellow shirt. Appellant's attempt to change his appearance was circumstantial evidence of guilt. Although he could not remember it at trial, testimony also established Alonza told police shortly after the crime that Appellant took the yellow shirt with him when he left Alonza's house the night of the crime. Attempts to destroy or hide evidence are also circumstantial evidence of guilt. Therefore, it was certainly relevant whether Lanell Ross, who was also present when Appellant returned to Alonza's residence shortly after the crime, told S.L.E.D. Agent Owen shortly after the crime that Appellant was wearing a yellow shirt and changed the shirt when his uncle Alonza told Appellant the person who committed the crime was wearing a yellow shirt. Especially since Lenell Ross testified under oath at trial that Appellant was wearing a dark shirt, not a yellow shirt, when he returned to his uncle's residence shortly after the crime, and did not change his

shirt. Not only was the evidence admissible to impeach Lenell Ross' inconsistent trial testimony but as substantive evidence for the jury to give whatever weight they chose to give the evidence. State v. Stahlnecker, 386 S.C. 609, 622-23, 690 S.E.2d 565, 572-73 (2010)(A statement that is "not hearsay" under Rule 801(d), SCRE, may be used substantively to prove the truth of the matter asserted.); State v. Dennis, 337 S.C. 275, 284, 523 S.E.2d 173, 177 (1999)(same); State v. Copeland, 278 S.C. 572, 300 S.E.2d 63 (1982)(a prior inconsistent statement may also be considered as substantive evidence by the jury); State v Crawford, 362 S.C. 627, 608 S.E.2d 886 (Ct. App. 2005).

The State laid a proper foundation for the prior inconsistent statement

Rule 607, SCRE provides "[t]he credibility of a witness may be attacked by any party **including the party calling the witness**." Id. (emphasis added). Rule 607, SCRE, substantially changed the law as it existed prior to its adoption. Prior to its adoption, a party could not impeach its own witness, unless the witness was declared a hostile witness by the court. Now, a party may call and impeach its own witness without showing the witness is hostile or that the party is surprised by the witness' testimony. The party may impeach a witness through various methods including a prior inconsistent statement.

Rule 613 (a) & (b), SCRE provides:

> In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown or its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.
>
> Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is advised of the substance of the statement, the time and place it was allegedly made, and the person to whom it was made, and the person to whom it was made, and is given the opportunity to explain or deny the statement. If a witness does not admit that he has made the prior inconsistent statement, extrinsic evidence of such statement is admissible. However, if the witness admits making the prior statement,

extrinsic evidence that the prior statement was made is inadmissible.

Id. Rule 613, SCRE, is consistent with prior case law.

Any oral or written inconsistent statement made by a witness to another person may be used to impeach the witness who is said to have made the statement. State v. Galloway, 263 S.C. 585, 211 S.E.2d885 (1975); State v. Miller, 262 S.C. 369, 204 S.E.2d 738 (1974); State v. Scott, 269 S.C. 438, 237 S.E.2d 886 (1977). That a statement has not been reduced to writing does not affect its admissibility, but may put into issue the credibility of such testimony as to whether or not such statement was ever made by the witness, which is a matter to be ultimately resolved by the jury. State v. Williams, 222 S.C. 354, 72 S.E.2d 830 (1952). For a prior inconsistent statement to be admissible, the witness alleged to have made the statement must first testify. State v. Anders, 326 S.C. 392, 483 S.E.2d 780 (Ct. App. 1997), *reversed*, 331 S.C. 474, 503 S.E.2d 443 (1998).

When an attorney desires to impeach a witness with a prior inconsistent statement, a foundation must be laid by: (1) advising the witness of the substance of the statement; (2) when the statement was made; and (3) to whom the statement was made. Rule 613(b), SCRE; State v. Roper, 274 S.C. 14, 260 S.E.2d 705 (1979); State v. Galloway, 263 S.C. 585, 211 S.E.2d 885 (1975); State v. Washington, 424 S.C. 374, 398, 818 S.E.2d 459, 471-72 (Ct. App. 2018). It does not follow that the formula of "when-where-to whom" must be blindly adhered to in all cases, because the purpose of the preliminary questioning of the witness is to adequately appraise the witness of the particular circumstances and the occasion in which it is claimed that the witness made the former statement, so that he may be prepared to disprove it or explain it away. State v. Hampton, 79 S.C. 179, 60 S.E. 669 (1908). While it is usual and important, whenever practicable, to give the exact terms of the proposed contradictory statement, it is not a fatal

objection to the testimony if the variance between the statement as set forth in the question and as given in the answer is not such as to make the two statements substantially different. State v. Hampton, 79 S.C. 179, 60 S.E. 669.

Whether or not a witness has been adequately advised and informed of the alleged prior statement [i.e. whether a proper foundation has been laid for admission of a prior inconsistent statement] is addressed to the sound discretion of the trial judge. State v. McFadden, 259 S.C. 616, 193 S.E.2d 536 (1972). Similarly, once advised of the statement, whether or not a witness has admitted or denied the making of the statement, is also left to the discretion of the trial judge. State v. Blalock, 357 S.C. 74, 591 S.E.2d 632 (Ct. App. 2003).

If a witness admits that the prior inconsistent statement was made, then the witness has impeached himself, and no further evidence is admissible on the prior inconsistent statement. State v. Lynn, 277 S.C. 222, 284 S.E.2d 786 (1981); State v. Roper, 274 S.C. 14, 260 S.E.2d 705 (1979). However, should the witness deny making the prior statement, then testimony regarding the prior statement is admissible to impeach the witness **and** as substantive evidence to be given what weight the jury determines is appropriate. State v. Stokes, 381 S.C. 390, 673 S.E.2d 434 (2009); State v. Copeland, 278 S.C. 572, 300 S.E.2d 63 (1982); State v Crawford, 362 S.C. 627, 608 S.E.2d 886 (Ct. App. 2005).[2]

[2] Prior to the South Carolina Supreme Court's Opinion in State v. Copeland, 278 S.C. 572, 300 S.E.2d 63, a prior inconsistent statement was admissible only for the limited purpose of impeaching a witness. Typically, a trial judge would give a limiting instruction at the time the witness was impeached or in the final instructions that the statement was only admissible on the issue of the witness' credibility. *See* State v. Warren, 277 S.C. 167, 284 S.E.2d 355 (1981). After State v. Copeland, *supra*, a prior inconsistent statement is admissible not only as evidence impeaching a witness' testimony but also as substantive evidence which the jury may give what weight it deems appropriate. Copeland, 278 at 581-82, 300 S.E.2d at 69; Stokes, 381 S.C. 390, 673 S.E.2d 434; Crawford, 362 S.C. 627, 608 S.E.2d 886. A limiting instruction is no longer necessary.

Generally, where the witness has responded with anything less than an unequivocal admission, trial courts have been granted wide latitude to allow extrinsic evidence proving the statement. State v. Blalock, 357 S.C. 74, 591 S.E.2d 632 (Ct. App. 2003); State v. Brown, 296 S.C. 191, 193, 371 S.E.2d 523 (1988); State v. Miller, 262 S.C. 369, 204 S.E.2d 738 (1974); 81 Am. Jur. 2d *Witnesses* Section 948 (2003); State v. Kelly, 46 S.C. 55, 62, 24 S.E. 60, 63 (1896). *See also* State v. Suber, 82 S.C. 159, 63 S.E. 684 (1909)(in murder prosecution, where witness denied that he ever identified the defendant as the shooter, solicitor was allowed to impeach the witness with a statement made by the witness to the sheriff that, "You have the right man". Whether such statement was to be regarded as an expression of opinion or a statement of fact, depends on the circumstances. If used by one not present at the commission of a homicide with respect to the arrest of another, it would necessarily be only the expression of an opinion derived from the observation of others; and a contradiction as to the expression of such opinion would not be admissible. This was the principle applied in State v. Bodie, 33 S.C. 117, 11 S.E. 624 (1890). But, when one who was present at the killing says to an officer after the arrest, "you have the right man," the natural inference is that the witness means to say: "As I was present, I know from my own observation that the person you have arrested committed the homicide."); State v. Galloway, 263 S.C. 585, 211 S.E.2d 885 (1975)(witness [defendant's aunt] testified the victim was the aggressor in an altercation that resulted in the victim's death. On cross-examination the Solicitor asked the witness whether it was true, that upon learning of the victim's death, but before learning that her nephew was involved in the altercation, that she made a statement to three co-workers, "Why did they do away with capital punishment? He was a good man." The Court held it was proper for the prosecution to call the three co-workers to testify as to the prior inconsistent statements of the witness).

As the South Carolina Supreme Court found in State v. Bixby, 388 S.C. 528, 698 S.E.2d 572 (2010), in the present case, the State through its questions of Lanell Ross did lay a proper foundation for the admission of the prior inconsistent statement of Lanell Ross under Rule 613(b), SCRE. (R. 92-98; 101-103).[3]

As borne out by the record quoted above, and pursuant to Rule 613(b), SCRE, the series of questions asked of Lenell Ross from pages 173-179 and 182-184 of the trial transcript concerned (1) *the substance of the statement* given to S.L.E.D. Agent Owen on November 2, 2015, (2) *the time and place it was made*, November 2, 2015 in Bamberg, S.C., and (3) *the person to whom it was made*, S.L.E.D. Agent David Owen. (R. June 19-20, 2018, pp. 92-98; 100-103). Rule 613(b), SCRE; Bixby, 388 S.C. 528, **550-53**, 698 S.E.2d 572, **584-85** (emphasis added).

Also pursuant to Rule 613(b), SCRE, the witness Lenell Ross was also given the opportunity to admit or deny the statement in question. (R. June 19-20, 2018, pp. 92-98; 100-103). Rule 613(b), SCRE; Bixby, 388 S.C. at **550-53**, 698 S.E.2d at **584-85** (emphasis added). While Lenell Ross admitted that he had been interviewed by the S.L.E.D. Agent on November 2, 2015 in Bamberg, he specifically denied telling the S.L.E.D Agent that Appellant was wearing a yellow shirt shortly after the crime when Appellant returned to his uncle's house **and** denied telling the S.L.E.D. Agent that Appellant had changed the yellow shirt after his uncle Alonza confronted Appellant with the fact the perpetrator was wearing a yellow shirt. (R. June 19-20, 2018, pp. 92-98; 100-103). Rule 613(b), SCRE; Bixby, 388 S.C. at **550-53**, 698 S.E.2d at **584-85** (emphasis added).

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[3] Appellant wants to limit the laying of the foundation to one (1) or two (2) questions asked by the Solicitor; however, when the examination of the witness is viewed in its entirety, it is clear the State laid a proper foundation for the admission of the prior inconsistent statement of Lenell Ross. Bixby, *supra.*

Once Lenell Ross denied making the prior statement, the State had laid a proper foundation to recall and ask S.L.E.D. Agent David Owen about the prior inconsistent statement, which it did. (R. June 19-20, 2018, pp. 137-140). Bixby, 388 S.C. at **550-53**, 698 S.E.2d at **584-85** (emphasis added). Appellant's claim that the State did not lay a proper foundation for the admission of a prior inconsistent statement of the witness is simply not true or supported by the record. **(R. June 19-20, 2018, pp. 92-98; 100-103; 137-140).** The record shows a proper foundation for the admission of the statement was laid. Therefore, Judge Early, the learned trial judge, did not abuse his discretion in admitting the prior inconsistent statement. State v. McFadden, 259 S.C. 616, 193 S.E.2d 536; State v. Blalock, 357 S.C. 74, 591 S.E.2d 632. As a result, there is no merit to this appellate issue and this appeal should be denied and dismissed. Bixby, *supra*.

Harmless Error

Further, even assuming *arguendo* Judge Early erred, and the prior statement of the witness was somehow hearsay, the improper admission of hearsay evidence is reversible error only when the admission causes prejudice. State v. Brewer, 411 S.C. 401, 408-09, 768 S.E.2d 656, 660 (2015); State v. Price, 368 S.C. 494, 629 S.E.2d 363 (2006); State v. Mitchell, 286 S.C. 572, 336 S.E.2d 150 (1985). When the alleged inadmissible hearsay in question is merely cumulative to other admissible evidence, there is no prejudice. State v. Price, 368 S.C. 494, 629 S.E.2d 363 (2006)(Although the hearsay testimony was improperly admitted, defendant has not demonstrated reversible error, there being no prejudice, where other witnesses testified to same or similar facts); State v. Haselden, 353 S.C. 190, 577 S.E.2d 445 (2003); State v. Vick, 384 S.C. 189, 682 S.E.2d 275 (Ct. App.2009)(even if hearsay, there was no prejudice where other witnesses testified to the same or similar facts).

Multiple witnesses in this case testified without objection to Appellant wearing a yellow shirt and changing his shirt after being informed what Ms. Harriet Washington had heard on her police scanner. Appellant's uncle Alonza testified Appellant was wearing a yellow shirt when he arrived at Alonza's home the night of the murder. When Appellant returned to Alonza's home after the murder, Alonza testified he asked Appellant what he had done because Appellant was wearing a yellow shirt or one similar to the one described by Ms. Washington. Alonza then testified that Appellant changed out of the yellow shirt into a different color shirt. (R. June 19-20, 2018, pp. 10-32). In his own statement to police, admitted in evidence, Appellant stated his uncle, Alonza Ross had told him the perpetrator of the shooting was *wearing a yellow shirt* and asked him "if he was good." Appellant then stated that he told his uncle Alonza that he did not commit the crime. (R. June 19-20, 2015, pp. 63-64). Appellant also called his own private investigator Tony Taylor as a witness in his defense. Among other things, Taylor testified before the jury without objection that Appellant's uncle Alonza Ross informed Taylor when interviewed by Taylor prior to trial, that Appellant was wearing *a yellow shirt* when he arrived at his house the night of the murder and that Appellant changed his shirt because it was yellow. (R. June 19-20, 2019, p. 174; p. 176, ll. 6-12).

As a result, the yellow shirt evidence was before the jury through other witnesses and even Appellant himself. (R. June 19-20, 2019, pp. 10-32; 63-64; 174; 176). As a result, even if error, the admission of the challenged evidence was harmless. State v. Price, 368 S.C. 494, 629 S.E.2d 363 (Although the hearsay testimony was improperly admitted, defendant has not demonstrated reversible error, there being no prejudice, where other witnesses testified to same or similar facts); State v. Haselden, 353 S.C. 190, 577 S.E.2d 445; State v. Vick, 384 S.C. 189,

682 S.E.2d 275 (even if hearsay, there was no prejudice where other witnesses testified to the same or similar facts). Therefore, there is no merit to this appellate issue.

CONCLUSION

For the above stated reasons, Appellant's conviction and sentence for murder must be affirmed. This appeal should be denied and dismissed.

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January 28, 2020.

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Bamberg County
The Honorable Doyet A. Early, III, Circuit Court Judge

THE STATE,

Respondent,

v.

KWAMAINE JARELLE ROSS,

Appellant.

Appellate Case No. 2018-001212

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 28th day of January, 2020.

J. ANTHONY MABRY
Senior Assistant Attorney General

ATTORNEY FOR RESPONDENT