THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM BERKELEY COUNTY

Court of General Sessions

Honorable R. Markley Dennis, Circuit Court Judge

APPELLATE CASE NO. 2017-002104

THE STATE . . . . . RESPONDENT

v.

SAMUEL LEE BROADWAY. . . . . APPELLANT

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

The Appellant Samuel Broadway was indicted on October 11, 2016 for one count of Leaving the Scene of an Accident Which Resulted in Death, in violation of S.C. Code §56-5-1210. (R. p. 5). Broadway proceeded to a jury trial in Berkeley County on November 28, 2016. Broadway was convicted on the sole count of the indictment on November 30, 2016. (R. pp. 3-4). The trial court sentenced Broadway to twelve years' incarceration. (R. p. 4). On December 7, 2016, Broadway filed a motion under Rule 29(a) requesting a new trial, and also moved the court to reconsider the sentence imposed. (R. pp. 7-10, 11-57).[1] The trial court heard both post-trial motions on September 28, 2017. (R. p. 491). Broadway's motion for new trial was denied on September 28, 2017. (R. p. 1). Broadway's motion to reconsider his sentence was orally granted by the trial court on September 28, 2017, and a written order memorializing the court's modification of Broadway's sentence was filed on October 17, 2017. (R. pp. 2, 498-499).[2] Broadway timely filed a notice of appeal on October 4, 2017, appealing from his sentence, conviction, and the denial of his motion for new trial. (R. p. 58).

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[1] In Broadway's motion for new trial, he raised the same issues claimed as error in this appeal. (R. pp. 11-16). At the September 28, 2017 hearing on Broadway's motion for new trial, the trial court stood by its rulings regarding both issues, denying Broadway's motion for new trial. (R. pp. 498-499).

[2] The trial court amended Broadway's sentence as follows: Broadway is sentenced to "18 years, suspended upon the service of 8 years. The Defendant shall be given credit for all time served prior to this Order . . ." (R. p. 2).

FACTS

The present case arose out of a traffic accident that took place on the night of March 7, 2015, which resulted in the death of Jesse Feagin. Broadway was charged and convicted for violating S.C. Code §56-5-1210, Leaving the Scene of an Accident, based on the State's allegation that Broadway's vehicle struck Feagin's moped, and that Broadway subsequently left the scene of the accident without notifying the police that the accident took place. The State further alleged that Feagin's injuries from the collision resulted in his death.[3]

On the night of the incident, Feagin was repairing a moped for an acquaintance. (R. p. 169; Tr. 110). The moped's owner had contacted Feagin repeatedly asking for him to return the moped after completing the repairs. (R. p. 169; Tr. 110). Once Feagin completed the repairs at approximately 1:45 a.m. that night, Feagin decided to return the moped to its owner immediately, despite the late hour. (R. pp. 169-170; Tr. 110-111). Feagin then set out down a dark roadway in Berkeley County, riding on the moped. (R. p. 162; Tr. 103). Feagin was followed by his girlfriend Richley Campbell, who was driving in her car behind him. (R. p. 171; Tr. 112). As they approached a stop sign at the intersection of Domingo Road and 176, Feagin and Campbell both stopped. (R. p. 172; Tr. 113). Moments later, Feagin turned left onto 176. (R. p. 172; Tr. 113). Campbell, who was still behind Feagin in her vehicle, pulled up to the intersection and then looked both ways, and she noticed that Feagin was pulling out in front of an oncoming vehicle which was traveling down 176 in the same direction as Feagin was turning. (R. p. 172; Tr. 113). Campbell believed that the vehicle was going to rear-end Feagin's moped, so she quickly pulled her car out into the intersection and pulled up behind Feagin's moped with the expectation that the oncoming vehicle would instead strike the rear end of her car. (R. pp. 173, 183-184; Tr. 114, 124-125). The oncoming car, driven by Broadway, swerved off the road to avoid hitting Campbell's car, fishtailing into the grass on the right-hand side of the road, skidding around

[3] The M.U.S.C. trauma doctor who treated Feagin testified that Feagin passed away as a result of traumatic brain injury suffered during the collision. (R. pp. 329-331; Tr. 270-72).

Campbell's car. (R. p. 173; Tr. 114). As Broadway struggled to regain control of his car, he re-entered the roadway in front of Campbell's car, striking Feagin's moped. (R. p. 174; Tr. 115).[4] Campbell testified that after the collision took place, Broadway's car continued down the roadway, turning right at an intersection further down the road. (R. p. 174-175; Tr. 115-116). Campbell stopped her car and called 911. (R. pp. 176-177; Tr. 117-118). She remained on the scene of the collision until police and paramedics arrived. (R. pp. 178-179; Tr. 119-120). The first responders who arrived at the scene of the collision discovered Feagin at the side of the road, unconscious. (R. pp. 321-323; Tr. 262-264). Feagin was airlifted from the scene of the collision to M.U.S.C., where he was later pronounced dead. (R. pp. 325-326, 329-331; Tr. 266-267, 270-272).

After the departing from the scene of the collision, Broadway drove to BFE Bar, which is approximately two miles away. (R. pp. 200, 209; Tr. 141, 150). A bystander who was standing in the parking lot of BFE Bar when Broadway arrived testified for the State at trial. (R. pp. 195-215; Tr. 136-156). He stated that he observed Broadway drive up to the parking lot of the bar, and that he recognized Broadway; he stated that Broadway had been at the BFE Bar earlier that evening. (R. p. 200; Tr. 141). The bystander observed that Broadway appeared to be very upset. (R. p. 206; Tr. 147). Broadway said that he had just hit someone on 176, and that he needed to find his phone. (R. pp. 200, 205; Tr. 141, 146). Broadway then knocked on the door to the bar, telling bystanders that he had forgotten his phone inside. (R. p. 200; Tr. 141). However, by that time the bar had already closed for the night, and Broadway could not get inside. (R. p. 198; Tr. 139). Broadway asked several bystanders whether he could use their phones. (R. pp. 200-201;

[4] The State's witness from the Goose Creek Police Department's Traffic Unit, who reconstructed the accident scene, corroborated this account of the collision during his testimony. "The point of impact was the vehicle traveling southbound . . . The moped was struck by a vehicle traveling southbound on 176 and pushed southbound towards 17A." (R. pp. 259-260; Tr. 200-201). The witness further acknowledged that his photographs included skid marks in the grass where Broadway's vehicle left the roadway and then re-entered the roadway. (R. p. 299; Tr. 240). Lastly, the witness acknowledged that Richley Campbell had admitted to pulling out in front of Broadway's car in the moments before the collision took place. (R. p. 299; Tr. 240).

Tr. 141-142). The eyewitness who testified at trial stated that he declined Broadway's request to use his phone. (R. pp. 201, 211; Tr. 142, 152). The eyewitness testified that minutes later, Broadway appeared to find his phone on the floorboard of his car. (R. p. 206; Tr. 147). Broadway then left the area and proceeded to the home of Harvey and Marlene Burton, Broadway's in-laws. (R. pp. 334, 388; Tr. 275, 329). Their home is approximately three to five miles from the site of the collision. (R. p. 94; Tr. 35).

Broadway's Statements to the Burtons

Both Harvey Burton and Marlene Burton were at home when Broadway arrived at their house that night. (R. pp. 332-342, 387-398; Tr. 273-283, 328-339). Harvey Burton testified that when Broadway arrived at the Burton house, Broadway informed the Burtons that he had been in an accident, and that he had hit a moped. (R. p. 335; Tr. 276). After discussing whether they should call the police, Harvey stated that Broadway went to sleep. (R. p. 336; Tr. 277). Harvey Burton testified that he decided to call the police of his own accord. (R. p. 336; Tr. 277).

Marlene Burton attempted to contradict Harvey Burton's account of their interactions with Broadway. During her testimony, she attempted to state that Broadway asked the Burtons to call the police, but the State posed hearsay objections to this testimony, which the trial court sustained. (R. pp. 389-393; Tr. 330-334). Marlene Burton's testimony included the following:

> Q: Okay. Tell the jury what – how did [Broadway] arrive? What happened?
>
> A: Well, we were all in bed. I heard I think it was a knock at the door. I went to answer the door. I flipped the light on and it's Sam. And of course, I'm very outspoken. What in the are (sic) you doing here this time of day – night? And he said –
>
> MR. MCNEELY: Objection, Your Honor.
>
> THE COURT: Sustained. It's hearsay.
>
> THE WITNESS: When I asked him what he was doing there, he told me –
>
> MR. MCNEELY: Objection, Your Honor.
>
> THE COURT: Sustained.
>
> . . .

A: Okay. I saw Sam at my front door. I let him in. I asked him what he was doing there. In the conversation I found out that –

MR. MCNEELY: Objection, Your Honor.

THE COURT: Sustained. It would be hearsay.

. . .

Q: Did Broadway use your phone to call the police?

A: No.

Q: Did your husband [Harvey Burton] use the phone to call the police?

A: Yes.

Q: Why did Mr. Burton call the police?

A: Sam asked him to call.

MR. MCNEELY: Objection, Your Honor.

THE COURT: Sustained, hearsay. Jury disregard the last statement.

Q: At any point in your discussions, everyone at the house, did Mr. Broadway try to stop anyone from calling the police?

A: No, he did not.

Q: Okay. Based on your observations at the house, did [Broadway] want you to call the police?

MR. MCNEELY: Objection, Your Honor.

THE COURT: Sustained. That would call for speculation on the part of the witness. I will not allow it under 602.

. . .

Q: Did he direct you to call the police?

MR. MCNEELY: Objection, Your Honor.

THE COURT: Sustained. It's hearsay.

(R. pp. 389-393; Tr. 330-334). Thus, Marlene Burton intended to testify that when Broadway arrived at the house, he told the Burtons to call the police. (R. p. 392; Tr. 333). However, when Marlene Burton repeatedly attempted to testify to this fact, and the State posed hearsay objections, which the trial court sustained. (R. p. 392; Tr. 333). Further, the trial court instructed the jury to disregard Marlene Burton's description of Broadway's statement. (R. p. 392; Tr. 333).

Broadway's Statements to Police

It is undisputed that Harvey Burton did in fact call the police after speaking with Broadway. (R. p. 341; Tr. 282). When police responded to the Burton home, they questioned Broadway about his involvement with the collision on 176 earlier that evening. (R. p. 356; Tr. 297). Prior to trial, Broadway moved the court under *Jackson v. Denno*[5] to exclude the video recording of the statement that he made to police at the Burton home. (R. pp. 93, 110-111; Tr. 34, 51-52). The recording in question was made by the in-car camera of Officer Ted Davis, who responded to the Burton home after Harvey Burton called 911. (R. pp. 273, 354-357; Tr. 214, 295-298). The trial court held a hearing prior to trial, at which the State presented Davis' testimony. (R. pp. 93-94; Tr. 34-55). Davis testified that when he arrived at the Burton residence, he made contact with Broadway in the driveway. (R. p. 95; Tr. 36). Davis stated that he spoke with Broadway for approximately five to ten minutes. (R. p. 96; Tr. 37). The State presented a copy of the video captured by Davis' in-car recording equipment. (R. pp. 98-100; Tr. 39-41).[6]

The trial court denied Broadway's *Jackson v. Denno* motion, and ruled that the video was admissible at trial. (R. pp. 113-114; Tr. 54-55).[7] The video was later played during the State's case-in-chief, over trial counsel's objection. (R. pp. 358-359; Tr. 299-300). The in-car camera video commences at approximately 6:05 a.m. on March 7, 2015. (State's Ex. 3). The video shows five police vehicles parked at the foot of the Burtons' driveway. (R. p. 107; Tr. 48; State's Ex. 3, 06:05:15).[8] Broadway can be seen standing near the foot of the driveway, with several

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[5] 378 U.S. 368 (1964).

[6] The video disc was tendered and admitted without objection at the hearing as State's Exhibit 3. (R. p. 99; Tr. 40).

[7] The court found by a preponderance of the evidence that the statement was voluntary. (R. p. 113; Tr. 54). In articulating its ruling, the trial court stated that *Miranda* warnings "may or may not have been necessary." (R. p. 113; Tr. 54).

[8] In order to facilitate this Court's review of the video exhibit, this brief will make reference to the portions of the video with the following timestamp format: HH:MM:SS. The timestamp reference point can be located in the video player in the bottom-left corner under "Current Time." (State's Ex. 3).

uniformed officers standing around him. (State's Ex. 3, 06:10:20). The officers advised Broadway of his *Miranda*[9] rights. (State's Ex. 3, 06:10:10). During the officer's recitation of Broadway's *Miranda* rights, the following exchange took place:

> Officer: You have the right to talk to an attorney and have him or her present before any questioning, if you wish. Ok? If you can't afford to hire an attorney one will be appointed to represent you before any questioning, if you wish. Now if you decide to start answering questions, or start making statements without an attorney present, you may decide at any time to stop answering questions and stop making statements until you retain legal counsel. Ok?
>
> Broadway: Can you call Chase Payne?[10] Did someone get hurt more majorly than I know?
>
> Officer: Well, before we get into all that, why don't you tell me what happened?

(State's Ex. 3, 06:10:30). Broadway then proceeded to inform the officers that he had been at BFE Bar earlier that evening. (State's Ex. 3, 06:11:36).[11] Broadway stated that at some point after he got home, he realized he had lost his phone. (State's Ex. 3, 06:11:50). Broadway decided to go back to BFE Bar to find his phone. (State's Ex. 3, 06:11:55). Broadway said that as he was driving there, a car pulled out in front of him. (State's Ex. 3, 06:12:05). Broadway told the officers that as he swerved to avoid the car, he noticed another vehicle in front of that car, and that he heard something hit his car. (State's Ex. 3, 06:12:20). Broadway said that he left the scene of the collision and came to the Burtons' home. (State's Ex. 3, 06:13:30). After Broadway gave his account of the events earlier that evening, Officer Davis said that he was concerned that Broadway may be impaired. (State's Ex. 3, 06:15:00). The officer then asked Broadway whether he would be willing to provide a blood sample for testing. (State's Ex. 3, 06:15:00). Broadway declined. (State's Ex. 3, 06:16:00). Broadway was then asked to give a written statement, which

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[9] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[10] Michael Chase Payne is an attorney licensed to practice in South Carolina since 2011.

[11] Broadway mistakenly refers to it as "BFF Bar."

he agreed to do. (State's Ex. 3, 06:16:55). That handwritten statement was also tendered and admitted subject to counsel's pre-trial objection. (R. pp. 362-363; State's Ex. 37; Tr. 303-304). At the conclusion of the trial, the jury convicted Broadway on the sole count of the indictment. (R. p. 471; Tr. 412). Broadway now appeals from his conviction, sentence, and the denial of his post-trial Rule 29[12] motion for new trial.

[12] Rule 29, SCRCrimP.

ARGUMENT

I. THE COURT ERRED IN SUSTAINING THE STATE'S HEARSAY OBJECTIONS AND STRIKING THE TESTIMONY OF MARLENE BURTON.

"The admission or exclusion of evidence is a matter within the trial court's sound discretion, and an appellate court may only disturb a ruling admitting or excluding evidence upon a showing of a 'manifest abuse of discretion accompanied by probable prejudice.'" *State v. Commander*, 396 S.C. 254, 262-63, 721 S.E.2d 413, 417 (2011)(quoting *State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 845, 847-48 (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." *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). Here, the trial court's ruling was controlled by an error of law – Broadway's statement to the Burtons was not hearsay, and consequently it was not properly excluded by the trial court. Furthermore, the trial court's error was highly prejudicial to Broadway's defense, depriving him of a valid defense to the charges, and by extension depriving him of his right to a fair trial.

A. Broadway's statement was not hearsay because it made no factual assertions.

"'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." *Thomas v. Dootson*, 377 S.C. 293, 659 S.E.2d 253, 256 (2008). By definition, hearsay is limited to those statements in which something is "asserted." Rule 801(c), SCRE. In the context of evaluating hearsay, the word "assert" simply means "to say that something is so, e.g. that an event happened or that a condition existed." KENNETH S. BROUN, MCCORMICK ON EVIDENCE § 246 (6th ed. 2006). In contrast, an out-of-court statement is not hearsay "if it is not an assertion." *Id.*

Turning to the present case, the testimony offered by the defense that Broadway asked the Burtons to call the police is, in essence, not an "assertion" of any kind, as contemplated by the hearsay rule. A request that the listener call the police is a statement that conveys no factual substance, it cannot be proven or disproven, it cannot be contradicted or shown to be false. In

other words, it is fundamentally devoid of any factual claims. For this reason, the statements by Broadway that were offered in this trial were improperly characterized by the trial court as hearsay, because the statements lacked any factual assertions, which is what gives rise to hearsay issues.

In *State v. Cox*, 274 S.C. 624, 266 S.E.2d 784 (1980), the supreme court considered an alleged hearsay statement that closely resembles Broadway's in the present case. *Cox* involved a sexual assault, in which the defendant abducted the victim and sexually assaulted her, and then the defendant forced the victim to accompany him on a search for someone who would sell him alcoholic beverages. *Id.* at 626. During the course of the evening, the defendant stopped at the home of a witness, who testified at trial that she heard the victim say, "Honey, please open the door." *Id.* at 628. On appeal, the defendant argued that the victim's out-of-court statement was hearsay, and that the trial judge erred by allowing the statement into evidence. *Id.* The supreme court rejected this claim of error, reasoning that the "statement was obviously not offered for the truth of the matter asserted and therefore, by definition, is not hearsay." *Id.* This case is illustrative of the principles that should have guided the trial court's analysis in the present case. The statement "Honey, please open the door" is a request; the speaker makes no factual claims, she is simply requesting that the listener open the door. Similarly, Broadway's request that the Burtons call the police made no factual claims, it was simply a request that the listener should contact the police. Like in *Cox*, Broadway's statements should have been admitted for this simple reason: his statement was not an assertion, and therefore it lacked the primary characteristic that classifies a statement as hearsay.

B. Broadway's statement was not hearsay because it was not offered for the truth of the matter asserted.

Moving beyond this fundamental problem with the trial court's ruling, there are numerous ways that Broadway's statement could be utilized for valid non-hearsay purposes, even assuming *arguendo* that the instruction to call police is an "assertion" for hearsay purposes. In other words, there are numerous bases to conclude that the statements were offered not for the

truth of the matter asserted, but for some other valid purpose. The Appellant respectfully sets forth the following non-hearsay applications of Broadway's statements for this Court's consideration.

i. Broadway's statement was admissible as conduct with legal significance.

In *Waites v. S.C. Windstorm & Hail Underwriting Ass'n*, 279 S.C. 362, 307 S.E.2d 223 (1983), the supreme court considered a dispute over whether the plaintiffs in a lawsuit had complied with a particular statute, which required the plaintiffs to exhaust their administrative remedies prior to filing suit. *Id.* at 364. In order to show that they had complied with the statute in question, the plaintiffs introduced a letter from the Department of Insurance to the defendant, which the plaintiffs argued put the defendants on notice that the plaintiffs intended to pursue further legal action if their claim was denied. *Id.* at 365. In other words, the plaintiffs argued that the letter itself carried legal significance because it manifested their attempt to comply with the statute at issue. *Id.* Considering the admissibility of this letter, the supreme court stated as follows:

> While the contents of the letter were not admissible for the purpose of proving the facts therein stated, we think that the letter was *admissible as evidence of an attempt to comply with the statute.* "Where, regardless of the truth or the falsity of a statement, the fact that it has been made is relevant, the hearsay rule does not apply, but the statement may be shown."

Id. at 365 (quoting 31A C.J.S. *Evidence* § 239)(emphasis added). Put another way, the letter that the plaintiffs sought to introduce constituted legally significant conduct – it manifested their intent to comply with the statute, which was clearly admissible based on the defendants' argument that the plaintiffs had failed to comply with that very statute. As the supreme court recognized, it was not the substance of the letter itself that was significant (or admissible), it was the fact that the plaintiffs had undertaken steps to comply with the statute, and they were entitled to present evidence of same.

Turning to the present case, Broadway was convicted for violating S.C. Code §56-5-1210, which states that an individual who has been involved in an accident resulting in injury or

death "may temporarily leave the scene to the report the accident to the proper authorities." Much like in *Waites*, the fact that Broadway notified the Burtons of the accident and then asked them to call the police was conduct with legal significance. These facts created a jury question regarding whether Broadway's conduct complied with the requirements set forth in S.C. Code §56-5-1210. Like in *Waites*, Broadway's conduct carried legal significance, in that it constituted an attempt to comply with the statute, and squarely rebutted the State's position that Broadway had failed to do so. Consequently, Broadway's statement was not offered for the truth of the matter asserted, but rather to show Broadway's compliance with S.C. Code §56-5-1210, which was at issue in this case.

ii. Broadway's statement was admissible to show notice and/or knowledge.

"A statement that D made a statement to X is not subject to attack as hearsay when its purpose is to establish the state of mind thereby induced in X, such as receiving notice of having knowledge . . ." KENNETH S. BROUN, MCCORMICK ON EVIDENCE § 249 (6th ed. 2006). In *Player v. Thompson*, 259 S.C. 600, 193 S.E.2d 531 (1972), the supreme court considered a civil suit relating to a car accident. There, the plaintiff argued that the defendant's vehicle had bald tires, which rendered it dangerous to drive. *Id.* at 605. To that end, the plaintiff sought to introduce testimony that a vehicle inspector had informed the defendant approximately three weeks before the accident that she needed new tires on her car. *Id.* at 607-08. The supreme court held that this testimony was admissible, "not as a testimonial assertion by the attendant to prove the fact of slick tires, but as indicating that [the defendants] obtained knowledge of the slick tires, the fact of slick tires being proved by other evidence." *Id.* at 610. The supreme court further noted that this testimony was not offered for the truth of the matter asserted, "but solely to prove notice, which is a state of mind . . ." *Id.*

As discussed *supra*, the statute in question permits Broadway to temporarily leave the scene of the accident in order to alert the authorities that an accident had taken place. This duty gave rise to a jury question; the jurors were asked to consider whether Broadway complied with the statute in the hours that followed the accident. There is nothing in the text of the statute to

suggest that notifying authorities by way of a third party would fall short of one's statutory duty. Consequently, the jury was authorized to consider whether Broadway's actions placed the Burtons on notice that they should call the police. Having heard testimony about Broadway's statement to the Burtons, it would fall to the jury to decide whether the Burtons were in fact placed on notice of this desire by Broadway's statement, and further whether this notice adequately fulfilled Broadway's duties under the statute. However, the jury was never given an opportunity to consider these questions, because the trial court erred by disallowing this critical testimony.

iii. Broadway's statement was admissible to show the effect on the listeners – Harvey and Marlene Burton – and to explain the Burtons' subsequent conduct.

"Proof of a statement introduced for the purpose of showing a party relied and acted upon it is not objectionable on the ground of hearsay." *Webb v. Elrod*, 308 S.C. 445, 449, 418 S.E.2d 559 (1992)(citing *Player v. Thompson*, 259 S.C. 600, 193 S.E.2d 531 (1972)). In *Webb*, this Court considered a case involving a dispute between two parties arising from the defendants' alleged interference with the plaintiffs' contractual relations with third parties. *Id.* at 446. The plaintiffs were prevented from introducing statements made by one of the defendants to those third parties; the plaintiff argued that these statements were admissible to show that the third parties acted upon the defendants' statements, to the detriment of the plaintiffs. *Id.* at 448-49. This Court acknowledged that such statements are generally admissible, and that when a statement is presented to prove that the listener relied upon the statement, a hearsay objection will not prevail. *Id.* 449.[13]

Here, Broadway's statement to the Burtons that they should call the police was properly admissible to show that the Burtons perceived this request and relied upon it, and further that

[13] This Court ultimately affirmed the lower court, however, because it could not discern any harm from the defendants' statements being excluded, in light of the other evidence and testimony presented below. *Id.* at 449.

Harvey Burton's call to police was at Broadway's behest. Broadway's compliance with S.C. Code §56-5-1210 was at issue in this case, and therefore the fact that Broadway had, by Marlene Burton's account, instructed the Burtons to call the police was highly relevant to the jury's consideration of the evidence. The admission of Broadway's statement to the Burtons would have authorized the jury to conclude that Harvey Burton called the police as a direct consequence of Broadway's statement. In this regard, Broadway's statement was not hearsay, and was instead evidence that explained the Burtons' state of mind and their subsequent conduct. Because the evidence was not offered for the truth of the matter asserted, but rather to explain the Burtons' state of mind and subsequent conduct, the trial court erred by sustaining the State's hearsay objections.

iv. Broadway's statement was admissible to show the state of mind of the declarant.

In *State v Lewis*, 293 S.C. 107, 359 S.E.2d 66 (1987), the supreme court considered the appeal of a defendant who had been convicted for her involvement in a murder-for-hire plot. *Id.* at 108. After Lewis' cousin was murdered, the State alleged that Lewis had hired her co-defendant Lee Grant Bellamy to kill her cousin, and that Bellamy had carried out the killing. *Id.* at 109-10. At their joint trial, Bellamy testified that he purchased the murder weapon not because he intended to kill Lewis' cousin with it, but rather because he had heard rumors that Lewis had made threats on his (Bellamy's) life. *Id.* 110. Lewis posed a hearsay objection to this testimony and was overruled at trial, and Lewis enumerated this ruling as error on appeal. *Id.* at 110-11. The supreme court held that Bellamy's testimony regarding alleged third-party statements was not hearsay because it was not offered for the truth of the matter asserted, i.e. "it was not offered to prove that Lewis intended to kill [Bellamy]." *Id.* at 110. "Rather," the supreme court continued, "it was offered to show Bellamy's state of mind, that is, the reason he bought the gun and had it with him on the night of the murder." *Id.* at 110-11.

Like in *Lewis*, Broadway's statement to the Burtons was properly admissible in this case to show his state of mind when he arrived at the Burtons' home. Due to the fact that Broadway

departed from the scene of the collision and ended up driving to the Burtons' home in the middle of the night, the defense was tasked with explaining *why* Broadway chose to go to the Burtons house, rather than returning to the scene of the collision. The fact that Broadway departed from the scene of the collision creates a difficult inference that he did so in order to *avoid* the police, rather than to make contact with them. Testimony from Marlene Burton that Broadway told them to call the police squarely rebuts this inference by supplying proof that Broadway went to the Burton home with the intention of asking them to contact the police. In other words, it provides the jury with concrete evidence that Broadway's intent was to substantially comply with his duties under S.C. Code §56-5-1210. Without hearing what Broadway told the Burtons, the jury was left with an incomplete portrait of Broadway's mental state on the night of the incident, and left only with the inference that he intended to avoid detection by driving away from the scene of the collision and going to the Burtons' home.

v. Broadway's statement was admissible to show the reasonableness and/or good faith of Broadway's subsequent conduct.

In *State v. Sims*, 304 S.C. 409, 405 S.E.2d 377 (1990), the supreme court considered the admissibility of certain out-of-court statements made to the arresting officer. The defendant in that case was charged with murder, and fled to Florida, California, and then Nevada to avoid apprehension. *Id.* at 413-14. The State presented the testimony of the officer who ultimately located and arrested Sims. *Id.* at 419. The officer testified that when he arrived at the scene, a woman met him and said to him, regarding Sims, "He has a gun," and "He's going to kill my sister." *Id.* The officer further testified that as he approached Sims, Sims reached toward his pocket, and the officer had to forcibly restrain Sims' hand while he retrieved a gun from Sims' pocket. *Id.* On appeal, Sims claimed that the officer's testimony concerning the statements made to him by the woman should have been excluded as hearsay. *Id.* The supreme court disagreed, holding that "the officer's testimony was not hearsay as it was not offered to prove that Sims intended to kill the woman in question." *Id.* at 420. The court noted that, "the evidence was

offered to explain the officer's actions in restraining Sims when he reached towards his pocket." *Id.*

Turning to the present case, Broadway's request that the Burtons call the police can similarly be understood as explaining Broadway's conduct in the minutes and hours that followed his arrival at the Burtons' home. Harvey Burton testified that Broadway simply went to sleep after informing the Burtons that the collision had taken place. (R. pp. 335-336; Tr. 276-77). Marlene Burton corroborated that portion of Harvey Burton's testimony, stating that after she spoke with Broadway, he went into the bedroom where his daughters were sleeping and laid across the foot of the bed. (R. p. 396; Tr. 337). Based on the Burtons' account of events, it would seem that Broadway's actions after his arrival demonstrate at best total indifference towards whether the police were notified of the collision, and perhaps even an affirmative attempt to avoid detection. However, if the jury had also learned that before lying down, Broadway had urged the Burtons call the police, his subsequent conduct appears far more reasonable. In fact, this additional information completely undermines the inference that Broadway intended to avoid police detection by going to the Burtons, or by lying down in one of the bedrooms after he arrived there. On the contrary, knowing that Broadway had requested that the Burtons call the police, Broadway's subsequent conduct could more easily be understood as manifesting his belief that the police would be on their way, and that he had fulfilled his duty to notify law enforcement of the collision that had taken place.

C. The trial court abused its discretion in excluding this non-hearsay testimony, and this error was prejudicial to Broadway.

As previously noted, the admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion. *State v. Gaster*, 349 S.C. 545, 557, 564 S.E.2d 87 (2002). An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. *State v. McDonald*, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000). Determining whether prejudice exists "depends on the circumstances" and "the materiality and prejudicial character of the error must be determined

from its relationship to the entire case." *State v. Taylor*, 333 S.C. 159, 172, 508 S.E.2d 870, 876 (1998)(quoting *State v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985)). Prejudice in this context means "there is a reasonable probability the jury's verdict was influenced by the wrongly admitted or excluded evidence." *Vaught v. A.O. Hardee & Sons, Inc.*, 366 S.C. 475, 480, 623 S.E.2d 373, 375 (2005).

In the present case, there is more than a "reasonable probability" that the jury's verdict was influenced by the exclusion of Broadway's out-of-court statement. Indeed, Broadway's entire defense was predicated on the notion that he complied with the statute, and that he made good-faith efforts to notify the police of the collision. The fact that Broadway allegedly directed the Burtons to call the police could rightly be characterized as the most critical piece of evidence in this case, from the defense's standpoint. And, in contrast, the State was permitted to offer affirmative testimony that Broadway *did not* tell the Burtons to call police, and in fact it was Harvey Burton who told Broadway to call the police. (R. p. 335, 342; Tr. 276, 283). The jury was left only with evidence that Broadway left the scene of the accident, attempted to locate his phone at BFE Bar, proceeded to the Burtons' home, informed them that he had been in a collision, and then rather than making attempts to notify the police, Broadway simply went to sleep. The prosecution latched onto these facts, making repeated references throughout closing argument to the fact that there was no evidence before the jury that Broadway had attempted to notify the police of the collision.[14] Due to the exclusion of Marlene Burton's account of these events, Broadway was completely unable to contradict these arguments.

[14] "Mr. Broadway didn't ask people to call the police." (R. p. 433; Tr. 374). "There is no testimony that [Broadway] tried to call 911." (R. p. 433; Tr. 374). "Richley Campbell, which you've heard, and Harvey Burton who he told you about his 911 call. Those are the only two [911 calls]." (R. p. 436; Tr. 377). "Well, if Mr. Broadway was intending to call the police, he never did it . . . He didn't call the police." (R. p. 437; Tr. 378). "Mr. Broadway, by all accounts, didn't call the police at that time and Marlene [Burton] didn't call the police at that time." (R. p. 438; Tr. 379). "Besides Richley Campbell, Harvey Burton is the only one that called 911 that morning." (R. p. 438; Tr. 379). "Broadway never called the police or returned to the scene, which is required by the statute." (R. p. 438; Tr. 379). "All [Broadway] had to do was stop, go get help, come back and we wouldn't be here today." (R. p. 439; Tr. 380).

Without knowing that Broadway intended for the Burtons to call the police, all of his conduct that followed the collision suggests that Broadway never intended to contact the police, and that he hoped he would not be discovered at the Burton home. Knowing that Broadway had in fact asked the Burtons to call the police casts Broadway's conduct in an entirely different light, and creates a very clear jury question regarding Broadway's compliance with the statute's requirements. Without Broadway's statement, no plausible argument could be made that Broadway meaningfully complied with the statute. In essence, Broadway had no defense without his statement to the Burtons.

In the end, the State was allowed to present evidence and testimony that Broadway had neglected to contact authorities, or perhaps even made efforts to avoid discovery. The trial court simultaneously prevented Broadway from presenting admissible evidence that squarely contradicted that critical fact. The trial court's ruling was based solely on its mischaracterization of Broadway's statement as hearsay. It was not hearsay. The trial court's erroneous ruling prejudiced Broadway's defense, and consequently Broadway is entitled to a new trial.

II. THE COURT ERRED IN OVERRULING THE DEFENDANT'S PRETRIAL MOTION TO EXCLUDE VIDEO EVIDENCE UNDER JACKSON V. DENNO.

The Supreme Court has recognized "two constitutional bases for the requirement that a confession be voluntary to be admitted into evidence: the Fifth Amendment right against self-incrimination, and the Due Process Clause of the Fourteenth Amendment." *Dickerson v. United States*, 530 U.S. 428, 433 (2000)(citations omitted). Pursuant to *Jackson v. Denno*, 378 U.S. 368 (1964), the defendant is entitled to a "reliable determination as to the voluntariness of his confession by a tribunal other than the jury charged with deciding his guilt or innocence." *State v. Fortner*, 266 S.C. 223, 226, 222 S.E.2d 508, 510 (1976). At such a hearing, the State bears the burden of proving by a preponderance of the evidence that a defendant's confession is voluntary. *State v. Von Dohlen*, 322 S.C. 234, 243, 471 S.E.2d 689, 695 (1996).

Confessions given during custodial interrogation are further governed by the requirements of *Miranda v. Arizona*, 384 U.S. 436 (1966). If a confession was taken and obtained in the context of a custodial interrogation, the State must affirmatively show that the statement was not just voluntary, but also that it was taken in compliance with *Miranda*. *State v. Middleton*, 288 S.C. 21, 25, 339 S.E.2d 692, 694 (1986). A defendant may invoke his right to counsel under *Miranda* either prior to or during an interrogation, and after such an invocation, the police must immediately cease all questioning of the defendant. *Davis v. United States*, 512 U.S. 452, 458-59 (1994); *State v. Franklin*, 390 S.C. 535, 702 S.E.2d 568 (2010).

As a preliminary matter, Broadway was in custody for the purposes of *Miranda* during his questioning by officers, and the trial court erred by finding to the contrary. In determining whether an individual is "in custody" for *Miranda* purposes, "the ultimate inquiry is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with formal arrest." *California v. Beheler*, 463 U.S. 1121, 1125 (1983)(quoting *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977)). This requires a two-part inquiry: (1) what were the circumstances surrounding the interrogation, and (2) given those circumstances, "would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave." *Thompson v. Keohane*, 516 U.S. 99, 112 (1995). While he was being questioned by officers, Broadway stood alone at the foot of the driveway, surrounded by multiple uniformed officers. Their police vehicles were parked along the street at the foot of the driveway, blocking any exit path. Additionally, police seized and impounded Broadway's vehicle after questioning him. Thus, Broadway's only means of leaving from the scene of the interrogation was his vehicle, which was blocked in by police vehicles, and later seized by police. Furthermore, Broadway was told that questioning would cease if he needed to speak with an attorney. In response, Broadway requested an attorney, and the interrogating officer completely disregarded the request and commenced with the interrogation. Under these circumstances, a reasonable person in Broadway's position would not feel free to terminate the interrogation and leave. The

circumstances rendered the interrogation custodial for the purposes of this Court's analysis, triggering *Miranda* requirements.

At the commencement of the interrogation, Broadway invoked his right to counsel, and the trial court erred by finding to the contrary. To invoke the right to counsel, an individual must "articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." *Davis v. United States*, 512 U.S. 452, 459 (1994). Broadway explicitly and unequivocally asked the police to contact Chase Payne, a licensed attorney in this state. Rather than honoring that request for counsel, the investigating officer completely disregarded it, and then immediately commenced with soliciting Broadway's description of the night's events. Because the officer disregarded Broadway's request for counsel, Broadway's subsequent statement was obtained in violation of his rights under *Miranda*, and should not have been admitted at trial.

The erroneous admission of Broadway's statement was prejudicial to the defense in this case. In response to the officer's questioning, Broadway confessed to being involved in the collision, and to leaving the scene of the accident. Broadway admitted that the vehicle he struck was a moped, and his account of the collision directly corroborated the evidence from the scene. These admissions were critical to the State's case, and there is a reasonable probability that the exclusion of this evidence at trial – as is called for by *Miranda* – would have brought about a different result. For these reasons, the trial court's error was prejudicial to Broadway, calling for reversal of his conviction.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the trial court, vacate Broadway's conviction and sentence, and remand the case for a new trial.

Respectfully submitted,

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June 13, 2018.

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM BERKELEY COUNTY

Court of General Sessions

Honorable R. Markley Dennis, Circuit Court Judge

APPELLATE CASE NO. 2017-002104

THE STATE . . . . . RESPONDENT

v.

SAMUEL LEE BROADWAY. . . . . APPELLANT

CERTIFICATE OF COUNSEL

Pursuant to Rule 211(a), the Appellant hereby certifies that the Final Brief of Appellant complies with Rule 211(b).

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June 13, 2018.