

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ORIGINAL

THE STATE,

RESPONDENT,

V.

BRENDA L. ROBERTS,

APPELLANT

APPELLATE CASE NO 2017-001103

Appeal from Laurens County

Honorable Frank R. Addy, Circuit Court Judge

Opinion No. 2020-UP-072

PETITION FOR REHEARING

RECEIVED

APR 03 2020

SC Court of Appeals

Pursuant to Rule 221(a), SCACR, counsel for Brenda L. Roberts petitions the Court for rehearing and respectfully submits that this Court overlooked the fact that the instruction to the jury failed to cure the error in admitting the three written hearsay statements by the principal and Petitioner, charged as an accessory, was prejudiced by the error. Additionally, counsel respectfully submits that this Court overlooked the fact that Petitioner was not required to contemporaneously object to the trial judge's instruction to the jury in regard to the hearsay statements because the trial judge overruled Petitioner's objection to the admission of the statements and immediately prior to the instruction, the trial judge noted the objection and advised counsel that he was protected and did

not need to renew the objection. Counsel respectfully seeks rehearing and a reversal of the conviction.

Appellant was indicted and convicted for being an accessory after the fact to the murder of James "Jim" Bolt committed by A.J. Bowers. (R. p. 364- 365). The indictment alleges, "That Brenda L. Roberts did, on or about September 26, 2003, in Laurens County, did feloniously, willfully and unlawfully harbor and/or assist Arthur Jason Bowers, et al., with knowledge that the said Arthur Jason Bowers had completed the acts of Murder and Armed Robbery, in violation of the Laws of South Carolina and Section 16-1-55 of the South Carolina Code of Laws, 1976, as amended." (R. p. 365). Bowers gave his first statement to police on September 27, 2003, the day after Mr. Holt's was found dead at the VFW Hall in Laurens. (R. p. 355). The jury learned that after giving his first statement Bowers was taken into custody because the statement contained information about the murder that was not public knowledge. (R. p. 135, line 12 – p. 136, lines 1-2). In his first statement to police Bowers stated:

I was in a car with Wanda, Wanda is a he/she, and another guy who I don't know. They drove behind the VFW. I got out of the car and took a piss. Wanda and the guy left in the car. I buzzed the door and went inside. Ray-Ray and the old man were the only ones there. I do not -- I did not sign the sign in sheet. I talked to Ray-Ray and asked him what's up. I saw the old man walk in the bathroom and Ray-Ray followed him in. He had his hand in front of him as he walked into the bathroom. I heard a noise and I walked in the bathroom to see what it was. I saw the old man in the floor and blood everywhere. I ran out of the front door. I didn't see where Ray-Ray went. I went to Randy's house when I left. I didn't get any money and haven't talked to Ray-Ray since it happened. I can't remember what time it was, but it was starting to get dark outside. I had been taking pills all day and was messed up.

(State's Exhibit #38, R. p. 355).

Bowers did not testify at Appellant's trial. Instead, three of his written statements to police, including the first statement above, State's Exhibit #38, were admitted, over objection, in evidence at Appellant's trial. Appellant argued that the statements were hearsay and more

prejudicial than probative. (R. p. 45, line 12 – p. 46, lines 1-9). The judge initially ruled that the statements were admissible. (R. p. 47, lines 22-23). When the State first sought to introduce the advice of rights from for the first statement, Appellant again objected on hearsay grounds as well as the confrontation clause. (R. p. 114, lines 2-3; 15-18). The judge also discussed the statement and overruled the objection stating, “I appreciate your objection. I don’t believe it’s hearsay. Crawford or Bruton are not implicated either.” (R. p. 116, lines 23-25). Appellant again objected as a violation of the confrontation clause. (R. p. 117, lines 1-2). The judge again ruled, “I don’t think Crawford is implicated and I don’t see where it’s hearsay since the State’s purpose in offering this statement is not for the truth of the matter asserted in the statement, but Mr. Bowers was merely present at the scene.” (R. p. 117, lines 17-21).

The first written statement, State’s Exhibit #38, was admitted, over objection, and read to the jury by the former officer who took the statement, Walter Bentley. (R. p. 132, lines 6-7). When he read the statement to the jury he referenced Wanda as Wanda Wayne. (R. p. 133, line 1). Wanda Wayne is a nickname name used by Appellant’s son, Doyle Wayne Roberts. (R. p. 190, lines 2-10). Randy Gambrell is Petitioner’s grandson. (R. p. 286, lines 10-19). When discussing the second statement the prosecutor told the judge that their understanding was that “Randy’s house” was the Appellant’s house. (R. p. 118, lines 22-23). Bowers’ advice of rights form was also admitted, over objection, as State’s Exhibit #37. (R. p. 128, lines 5-6; State’s Exhibit #37, R. p. 354).

The police learned that “Ray-Ray” referenced in Bowers’ first statement was Danny McDaniels who worked at the Fair with Bowers and was working on the night of September 26, 2003, when Mr. Bolt was killed. (R. p. 133, line 20 – p. 134, 135, lines 1-11). When the police

learned that “Ray-Ray” could not have been involved, they interviewed Bowers again and he provided a second written statement on September 29, 2003. (State’s Exhibit #40, R. p. 357).

Discussing the second statements, the judge asked the prosecution if there was anything in that statement that implicated the Appellant. (R. p. 118, lines 8-9). The prosecutor told the judge that in both the second and third statements Bowers told police he went to Appellant’s house after leaving the VFW Hall. (R. p. 118, line 11 – p. 119, 120, lines 1-17). “Randy’s house” is Appellant’s house. (R. p. 118, lines 22-23). Randy Gambrell is Petitioner’s grandson. (R. p. 286, lines 10-19). In the second statement Bowers told police that he went back to Randy’s house after leaving the VFW. (R. p. 118, lines 18-21). In the third statement Bowers told the police that after leaving the VFW Hall he was dropped off at Appellant’s house and provided the street address. (R. p. 120, lines 8-16). Appellant renewed the objection to the statements. (R. p. 120, lines 18-20).

The judge then stated:

Solicitor, my concern with the second and third statement is that the second statement references going to Defendant’s house. The third statement also references being dropped off at 114 Round Street. That is what connects the Defendant to this particular incident and has the potential to violate Bruton and Crawford.

(R. p. 120, line 21 – p. 121, line 1). The judge then ruled:

Here’s my ruling on these two statements then. You can admit them to demonstrate what Mr. Bowers said, but as far as any part of the statement that implicates Ms. Roberts, clearly that’s in violation, in my mind, of Bruton and Crawford, the confrontation clause. So those portions of the statement we won’t be able to refer to those portions through this witness. You’ll have to establish that Mr. Bowers went to Ms. Robert’s house through witnesses who can testify as eye witnesses, et cetera. But as far as these statements – and I understand you still object to my ruling. The statements can come in with that caveat.

(R. p. 121, line 16 – p. 122, lines 1-2). The reference to Randy’s house (Appellant’s house) in the second statement and the reference to the street address of Appellant’s house in the third

statement were then both redacted. (R. p. 122, lines 6-13; State's Exhibit #40, p. 4, R. p. 360; State's exhibit #42, p. 2, R. p. 363). The reference to Randy's house (Appellant's house) in the first statement, however, was not redacted. (R. p. 133, lines 12-13; State's Exhibit #38, R. p. 355).

Prior to the admission of the second and third written statements the judge told counsel for Petitioner, "Mr. Warder, as it relates to the second and third statements, you do not need to object at the time the State seeks to introduce those. You are protected. Your objections are noted. If there is a new objection or some other different type of objection, you need to give me a heads up though, okay." (R. p. 125, line 25 – p. 126, lines 1-5). The judge then instructed the jury:

Ladies and gentlemen, we are still proceeding with the testimony on direct of Mr. Bentley. Before we proceed further, I want to simply explain something to you just so that you are fully aware of why we are going into this testimony involving Mr. Bowers. Understand that one of the elements of the offense for which Ms. Roberts is charged is that Mr. Bowers did in fact commit either a murder or an armed robbery or both. The testimony that we have been receiving relates only to Mr. Bower's conduct in the underlying homicide involved here, okay? It doesn't impugn anything. You shouldn't take this testimony as impugning anything to Ms. Roberts who is on trial here today. This is simply offered to demonstrate that Mr. Bowers was, in fact, responsible. Was, in fact, guilty of the murder of the decedent in this case. That's the only purpose for this testimony coming in. I see several heads nodding, so I think you understand what I am received by you in any negative way as it relates to Ms. Roberts, okay? I think I've explained the situation.

(R. p. 126, line 9 – p. 127, lines 1-3). Earlier, however, the judge ruled, "I don't think Crawford is implicated and I don't see where it's hearsay since the State's purpose in offering this statement is not for the truth of the matter asserted in the statement, but Mr. Bowers was merely present at the scene." (R. p. 117, lines 17-21). As reflected in the instruction to the jury, the statements were offered to prove more than that Bowers was merely present at the scene. Prior to the ruling and the instruction counsel for Petitioner argued, "I would just respond that if it's an

element of the crime and they're offering to prove it, it's against my client." (R. p. 117, lines 7-9). The instruction to the jury indicates that the hearsay statements by Bowers were offered to prove an element of the crime charged, accessory before the fact to murder.

In his second statement Bowers told police:

On Sunday night I came to Laurens with the fair. We went -- we came to Laurens from Lenore, North Carolina where we'd been set up working. I think that it had been around 5:01 p.m. when we pulled into the fairground gates, because the first thing I did was went to the bathroom. I rode to Laurens with Larry in an red old Pontiac car. Larry works with the fair too. A short time later I walked to the Exxon station and bought a pack of cigarettes and a Mountain Dew. I walked over to the Family Dollar and bought some things, like shampoo, towels, et cetera. I walked back to the fair and after a while, I was with Frost this time, and we walked back to the Exxon store and back to the Family Dollar and Frost bought some things. When we were done there we went back to the fair and after we got dressed we all went to the VFW. There was me, Frosty, Boo, Ray-Ray, Darby, Bones, and Larry. While we were there a guy came inside and bought a six-pack. This guy may have been Buck. A guy I met later at the fair. We stayed there that Saturday night until 10:00 p.m. and we all left after we bought some Crown Royal. We left and went to Walmart and bought some drinks and Frost bought a DVD player. I bought another pack of cigs. We then went back to the fairgrounds and drink Crown Royal and played cards and listed to music and had fun playing dice. Then stayed up that night, but I got sick and went to my bunk and went to bed.

I got up around 12:00 p.m. that Monday and set up the fair with everyone. I think it was around Wednesday afternoon when I met Stan who started working for Bones, and I met Buck. Later on Wednesday Buck had been working for Terry but got fired for coming to work drunk. Buck kept hanging around Wednesday night and left around 9:00 p.m. I also met Randy who was Angela's son. We closed around 10:00 p.m. Wednesday night and Bunk and Randy's grandfather came to pick up Angela -- and Angela's daughter. They were in a minivan. When they left a man named Courtney was with them and I walked -- I walked with Randy to his house. Randy and I stopped by Chelsie's house at some apartments. Chelsie came outside and we walked over to the playground at the apartments. Randy told me to walk away and when I got back they were finishing what they were doing. Randy and I started walking and when he got to the church and the gas station some Mexicans pulled up and wanted to buy marijuana. They pulled a gun on us and we both ran. We went over to Randy's house and slept there until 12:00 p.m. that Thursday.

We hung out with Amanda, Courtney, Buck, Angela, and her mother and father until around 4:00 p.m. Then me, Angela, Courtney, Randy -- excuse me -- then me, Amanda, Courtney, Randy, Angela, the blonde haired girl with the eight-

year-old son with Angie's dad who was driving the white minivan went to the fair. This was around 5:00 p.m. I went to work around 6:00 p.m. that day after they left that Thursday night. After I got off work, Amanda, Courtney, Randy, and me went over to Randy's house with a guy named James or John who works with the fair in his brown Ford F-150 truck. I stayed with them that night, and when I got up around 11:00 p.m. Friday morning I decided that I was not going to work because they didn't pay me enough. We all hung out together at the house that afternoon and I rode a dirt bike and fell off and hurt my arm. I think that was around 5:00 p.m. Friday afternoon.

When Buck and the dude in the green car left Randy's house. When we were getting in the dude's car to go to the store Buck said let's go to the VFW. When we pulled up to the VFW me and Buck got out of the car. Buck went in first and I went in behind him. When we got to the second door, the red door, it was shut and Bunk buzzed the door and the old man let us inside. When we got inside Buck walked to the right and sat down near the phone. The phone is at the end of the bar. It is a regular phone that sits on the bar, but you have to put a quarter in it to use it. When I came in I walked to the right just behind the red door and asked the old man for a six-pack of Bud Light. The old man asked for my ID. I told him I didn't have one when we first got there -- when we first got there I saw two to three more people in there. There was no one sitting at the bar but Buck. I think that there were some tables set up and some that were not. The old man would not sell me beer, so I walked outside and left Buck -- I walked outside and left. Buck stayed inside. Buck was still sitting near the phone when I walked out of the VFW and left in the green car with the dude. When the dude I left the VFW I think that it was around 6:00 p.m. I went to -- I went with Angie, her father, Wanda Wayne, the baby, and we went to pick up Angie's boyfriend John. It took us around one hour to go get him because it was around 8:30 or 9:00 when we got back to the house.

I walked down to Wanda Wayne's house. Angie, John -- Angie, John and there were Wanda Wayne, and started drinking. I didn't see Buck until 10:00 p.m. when he got beer, then he left when he went to the -- to the VFW that afternoon Buck was wearing blue jeans and a white shirt with some kind of design on it. When Buck came to Wanda Wayne's house he had shorts and kind of a tee shirt on. I didn't see Buck until 12:30 a.m. when he came back to Angie's house and showed me a piece of crack that he had in his mouth. It looked like about \$150 worth of crack. I asked Buck where he got that from and Buck told me that he had made some money and bought the crack. Buck told me at that time that he had whacked the old man, took his money. Buck told me that he had left the old man in a bathroom. Then Buck left with Randy and the dude driving the green car. I didn't see Buck until Saturday morning when the police were at Randy's house.

(R. p. 139, line 25 -- p. 140, 141, 142, 143, 144, lines 1-18). The second written statement was admitted, over objection, as State's Exhibit #40 and read to the jury by the former officer who

took the statement, Walter Bentley. (R. p. 139, lines 9-10). Bowers' advice of rights form was also admitted, over objection, as State's Exhibit #39. (R. p. 158, lines 20-21; State's Exhibit #39, R. p. 356). At trial the officer indicated that "Buck" referenced in the second statement is Buck Miller. (R. p. 144, lines 21-25). Billy "Buck" Miller is one of Petitioner's brothers. (R. p. 274, lines 13-14). "Angie" referenced in the statement is Appellant's daughter. (R. p. 272, lines 14-15). Wanda Wayne referenced in the statement is Petitioner's son. (R. p. 190, lines 2-10). Randy referenced in the statement is Petitioner's grandson. (R. p. 286, lines 10-19).

On October 9, 2003, Bowers provided a third statement to the police and stated:

That Friday night we were all talking. It was around 4:00 p.m that day -- that day or 4:30. I was talking to Little Robin, Wayne Eubanks, Buck Miller. Robin and Wayne was talking about making some money that night and they wanted to make some money and rob somebody. They called -- they called me over there to where they were standing near the old trailer. Robin and Wayne asked me if I wanted to make some money, and at first I said no and then they said that they would split the money with me. I asked them where we were going to make some money and Wayne said that we were going to the VFW. When we left there we were in an old brownish grey colored car, and Randy knows what car it was. We pulled up to the VFW and I went to take a leak, and I ran to go back up front and they were already inside. There was Wayne, Little Robin, and me. Me and Wayne was standing by the bar and I said what do you want me to do and they said just stand by the door. They pulled the man in the bathroom and three to four minutes later they said run, and we all three ran to the car. I sat in the car. Either Wayne or Little Robin went back inside and after three or four minutes we left. He got into the car and we left.

(R. p. 160, line 20 – p. 161, lines 1-20, State's Exhibit #42; R. p. 362-363). The written statement was admitted, over objection, as State's Exhibit #42 and read to the jury by the former officer who took the statement, Tony Lynch. (R. p. 160, lines 15-16). Bowers' advice of rights form was also admitted, over objection, as State's Exhibit #41. (R. p. 156, lines 1-6, State's Exhibit #41, R. p. 361). Although not read to the jury, the written statement admitted in

evidence for the jury to see during deliberations also included a final sentence that states, “Randy was with us but he stayed in the car and never got out.” (State’s Exhibit #42, p. 2, R. p. 363). The officer testified that “Little Robin” referenced in the statement was Robin Epting. (R. p. 160, line 25 – p. 161, lines 1-4). Interestingly, James Fred Miller, another of Petitioner’s brothers and the State’s main witness against Appellant, admitted that on September 26, 2003, he was with his nephew, Robin Epting, and Wayne Eubanks, two of the people Bowers told police he was with at the VFW. (R. p. 167, lines 8-13; pp. 168-171).

The trial judge erred in admitting the three written statements made by Bowers and the accompanying advice of rights forms. The statements constituted inadmissible prejudicial hearsay and violated Appellant’s right to confrontation. The statements were offered to establish that Bowers committed the murder and Appellant had knowledge that Bowers committed the murder by connecting Bowers to Appellant through various family members of the Appellant. The redactions as to Bowers going to Appellant’s house after he left the VFW contained in the second and third statements do not cure the error. The jury heard that Bowers went to Appellant’s house after leaving the VFW in the first statement that was not redacted.

“‘Hearsay is a statement, which may be written, other than one made by the declarant while testifying at trial, offered in evidence to prove the truth of the matter asserted.’ State v. Brockmeyer, 406 S.C. 324, 351, 751 S.E.2d 645, 659 (2013) (quoting In re Care & Treatment of Harvey, 355 S.C. 53, 61, 584 S.E.2d 893, 897 (2003)); Rule 801(c), SCRE. ‘Hearsay is not admissible unless there is an applicable exception.’ Brockmeyer, 406 S.C. at 351, 751 S.E.2d at 659; Rule 802, SCRE.” State v. King, 422 S.C. 47, 66, 810 S.E.2d 18, 28 (2017).

Bowers’ statements in the present case are hearsay. In State v. Collins, 329 S.C. 23, 25–26, 495 S.E.2d 202, 204 (1998), the South Carolina Supreme Court wrote, “Historically,

the elements of accessory after the fact of a crime have been: (1) the felony has been completed; (2) the accused must have knowledge that the principal committed the felony; and (3) the accused must harbor or assist the principal felon. State v. Hodge, 278 S.C. 110, 292 S.E.2d 600 (1982), cert. denied, 459 U.S. 910, 103 S.Ct. 217, 74 L.Ed.2d 172 (1982); State v. Nicholson, 221 S.C. 399, 70 S.E.2d 632 (1952). During the discussion about the statements the trial judge asked, “But, in a nut shell, the purpose that the [sic] seeks introduction of those statements is, in fact, to demonstrate that Mr. Bowers, the declarant in this case – Mr. Bowers is, in fact, the one who is guilty of the murder and therefore form the basis for the accessory after the fact that Ms. Rogers [Roberts] is charged with. Is that –” (R. p. 44, lines 13-18). The prosecutor answered, “Yes, sir.” (R. p. 44, line 19). The statements were offered in evidence to prove the truth of the matter asserted – that Bowers committed the murder, an element of accessory after the fact to murder in the present case. Proving an element of the crime is not an exception to the rule against hearsay. The State did not argue that the statements met an exception to the hearsay rule. The statements do not meet an exception to the rule against hearsay.

The statements are prejudicial. In closing argument the prosecutor told the jury:

Well consider who else is implicated in A.J. Bowers’ statement. In Freddie Miller’s testimony. Randy Gambrell. Randy Gambrell, the Defendant’s grandson. In other words, Brenda Roberts covered for A.J. Bowers because that was necessary to protect her grandson from scrutiny by the State. By the police. You’re going to have Bowers’ statements back there to review and you’ve heard from Freddie Miller.

(R. p. 315, lines 5-12). The inadmissible hearsay statements were used by the State to establish motive. Miller testified about an alleged conversation between Appellant and her grandson, Randy Gambrell. Bowers’ third statement places Gambrell at the VFW Hut outside in the car at

the time of the murder. The statements were not merely cumulative to Miller's testimony and the error in admitting the statements was not harmless.

Additionally, the statements violated Appellant's constitutional right to confront witness Bowers. In State v. Brockmeyer, 406 S.C. 324, 340, 751 S.E.2d 645, 653–54 (2013), the South Carolina Supreme Court wrote:

The Sixth Amendment to the United States Constitution guarantees that “[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.” This procedural protection applies in both federal and state prosecutions by virtue of the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400, 406, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965).

In Crawford v. Washington, the Supreme Court unanimously found the criminal defendant's Confrontation Clause rights had been violated by the admission into evidence a tape recording of a nontestifying person's “testimonial” statement to police. 541 U.S. 36, 68–69, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). Crawford changed the law to prohibit the admission of testimonial, out-of-court statements unless two conditions are met: the witness is unavailable at trial and the defendant had a prior opportunity to cross-examine the witness. Id. at 68. Although Crawford applies whenever “testimonial evidence is at issue,” the Supreme Court emphasized that “nontestimonial” evidence is exempted from Confrontation Clause scrutiny altogether. Id.

Bowers' three statements to police were testimonial. There is nothing in the record to indicate that Bowers was unavailable. Appellant did not have a prior opportunity to cross-examine Bowers. The error in admitting the statements, as discussed above, was not harmless. In Bowers' first statement, that was not redacted, Bowers told police he went to Randy's house (the Appellant's house) after leaving the VFW Hut. In his third statement Bowers placed Appellant's grandson at the VFW Hut, outside in the car, at the time of the murder. The State argued that Appellant's motive to assist Bowers was to protect her grandson. Appellant's Confrontation Clause rights were violated by the admission of Bowers' statements to police.

In affirming the conviction this Court wrote:

We affirm pursuant to Rule 220(b), SCACR, and the following authorities: *State v. Young*, 420 S.C. 608, 624, 803 S.E.2d 888, 896 (Ct. App. 2017) ("Limiting instructions are deemed to cure error unless 'it is probable that, notwithstanding the instruction, the accused was prejudiced.'" (quoting *State v. Smith*, 290 S.C. 393, 395, 350 S.E.2d 923, 924 (1986))); *State v. Patterson*, 337 S.C. 215, 226, 522 S.E.2d 845, 850 (Ct. App. 1999) ("Because a trial court's curative instruction is considered to cure any error regarding improper testimony, a party must contemporaneously object to a curative instruction as insufficient or move for a mistrial to preserve an issue for review.").

State v. Roberts, Op. No. 2020-UP-072 (S.C. Ct.App. filed March 11, 2020).

Counsel respectfully submits that this Court overlooked the fact that the instruction given failed to cure the error in admitting the three written hearsay statements by the principal and Petitioner, charged as an accessory, was prejudiced by the error. It is probable that, notwithstanding the instruction, Petitioner was prejudiced. In the present case, instead of curing the error, the instruction compounded the error by instructing the jury that the second and third hearsay statements were offered to demonstrate that Bowers was guilty of murder, an element of accessory after the fact to murder.

The judge instructed the jury:

Ladies and gentlemen, we are still proceeding with the testimony on direct of Mr. Bentley. Before we proceed further, I want to simply explain something to you just so that you are fully aware of why we are going into this testimony involving Mr. Bowers. Understand that one of the elements of the offense for which Ms. Roberts is charged is that Mr. Bowers did in fact commit either a murder or an armed robbery or both. The testimony that we have been receiving relates only to Mr. Bower's conduct in the underlying homicide involved here, okay? It doesn't impugn anything. You shouldn't take this testimony as impugning anything to Ms. Roberts who is on trial here today. This is simply offered to demonstrate that Mr. Bowers was, in fact, responsible. Was, in fact, guilty of the murder of the decedent in this case. That's the only purpose for this testimony coming in. I see several heads nodding, so I think you understand what I am received by you in any negative way as it relates to Ms. Roberts, okay? I think I've explained the situation.

(R. p. 126, line 9 – p. 127, lines 1-3).

In State v. Young, 420 S.C. 608, 803 S.E.2d 888 (Ct. App. 2017), this Court found that a limiting instruction cannot cure a Bruton¹ like problem. While the present case does not involve a joint trial, this Court should find, as the Court found in Young, that the instruction did not cure the error. In Young this Court wrote:

Relying on this same language, our supreme court recently reaffirmed that a limiting instruction cannot fix a Bruton violation. State v. McDonald, 412 S.C. 133, 142, 771 S.E.2d 840, 844 (2015). We perceive no practical difference between Bruton, McDonald, and the wrongful admission of Barnes' letter against Young that would justify a different result. We do not believe the limiting instruction given here in a joint trial magically gains potency by labeling the error it was designed to target as inadmissible hearsay rather than lack of confrontation. The concepts are close cousins. Dutton v. Evans, 400 U.S. 74, 86, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970) (“[T]he Sixth Amendment's Confrontation Clause and the evidentiary hearsay rule stem from the same roots.”). Nor can we sensibly say the magnitude of prejudice varies with whether the tainted confession was testimonial or not. It was an out-of-court statement that came in as evidence against the accused without the benefit of cross-examination, and the limiting instruction could not take it out.

420 S.C.at 625, 803 S.E.2d at 897. Bowers' statements in the present case are out-of-court statements that came in as evidence against Petitioner without the benefit of cross-examination. The instruction did not cure the error and in fact diluted the State's burden of proof by telling the jury, “Understand that one of the elements of the offense for which Ms. Roberts is charged is that Mr. Bowers did in fact commit either a murder or an armed robbery or both. . . . This is simply offered to demonstrate that Mr. Bowers was, in fact, responsible. Was, in fact, guilty of the murder of the decedent in this case.” (R. p. 126, lines 14-16; lines 21-23). Unlike the error in Young, the error in the present case was not harmless.

As to issue preservation, counsel respectfully submits that this Court overlooked the fact that the trial judge overruled the objection to the admission of the hearsay statements and immediately prior to the instruction to the jury told trial counsel, “Mr. Warder, as it relates to the

¹ Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968).

second and third statements, you do not need to object at the time the State seeks to introduce those. You are protected. Your objections are noted. If there is a new objection or some other different type of objection, you need to give me a heads up though, okay.” (R. p. 125, line 25 – p. 126, lines 1-5). Trial counsel was not required to contemporaneously object to the instruction after the judge overruled the objection and advised trial counsel that he did not need to renew the objection. The issue as to the admission of the statements is preserved for appellate review.

In State v. George, 323 S.C. 496, 510, 476 S.E.2d 903, 911–12 (1996), the South Carolina Supreme Court wrote:

If the trial judge sustains a timely objection to testimony and gives the jury a curative instruction to disregard the testimony, the error is deemed to be cured. State v. Craig, 267 S.C. 262, 227 S.E.2d 306 (1976); State v. Morris, 307 S.C. 480, 415 S.E.2d 819 (Ct.App.1991). No issue is preserved for appellate review if the objecting party accepts the judge's ruling and does not contemporaneously make an additional objection to the sufficiency of the curative charge or move for a mistrial. Id.

In contrast, in the present case the judge did not sustain the objection to the admission of the hearsay statements. Instead, the judge overruled the objection and then elected to instruct the jury with regard to the statements in a manner that diluted the State's burden of proof. While there was no objection to the instruction, the objection to the admission of the hearsay statements is preserved for appellate review. Counsel respectfully seeks rehearing and reversal of the conviction.

Respectfully Submitted,

s/ Kathrine H. Hudgins

KATHRINE H. HUDGINS
Appellate Defender

This 2nd day of April, 2020.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Laurens County

Honorable Frank R. Addy, Circuit Court Judge

RECEIVED

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THE STATE,

RESPONDENT,

V.

BRENDA L. ROBERTS,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon Mark R. Farthing, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Brenda L. Roberts, #372316, at Leath Correctional Institution, 2809 Airport Road, Greenwood, SC 29649, this 2nd day of April, 2020.

s/ Kathrine H. Hudgins

Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE
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The Honorable Jenny Abbott Kitchings
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