STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED

Jun 29 2020

S.C. SUPREME COURT

Appeal from Laurens County

Honorable Frank R. Addy, Circuit Court Judge

Opinion No. 2020-UP-072 (S.C. Ct. App. Filed March 11, 2020)

2015-GS-3001477

THE STATE,

RESPONDENT,

V.

BRENDA L. ROBERTS,

PETITIONER

APPELLATE CASE NO 2017-001103

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

INDEX

CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on May 28, 2020.

QUESTION PRESENTED

1. In this trial for accessory after the fact to murder, did the Court of Appeals err in failing to find that the trial judge erred in admitting three written statements to police made by the non-testifying individual who the State asserted was one of the principals who committed the murder when the statements were prejudicial inadmissible hearsay and violated Petitioner's right to confront witnesses against her?

STATEMENT OF THE CASE

In October of 2015, the Laurens County Grand Jury indicted Petitioner, Brenda L. Roberts, for accessory after the fact to murder, indictment #2015-GS-30-1477. On April 24, 2017, Petitioner proceeded to jury trial before the Honorable Frank R. Addy, Jr. Richard H. Warder represented Petitioner at trial. Warren Mowry and Jim Todd prosecuted the case. The jury returned a verdict of guilty. Judge Addy sentenced Petitioner to fourteen (14) years in prison. A timely notice of intent to appeal was served on May 2, 2017, and the direct appeal perfected. The South Carolina Court of Appeals affirmed the conviction. State v. Brenda L. Roberts, 2020-UP-072 (S.C. Ct. App. filed March 11, 2020). A petition for rehearing was filed on April 2, 2020, and then denied on May 28, 2020. This petition for writ of certiorari follows.

STATEMENT OF FACTS

In the early evening on September 26, 2003, officers with the Laurens Police Department received a call that someone had been injured at the VFW Hall on Main Street in Laurens. (R. p. 64, lines 1-25). When they arrived at the VFW they found the body of James "Jim" Bolt in the bathroom. (R. p. 68, lines 10-11). It appeared that he had been beaten about the head and there did not appear to be signs of life. (R. p. 68, lines 13-16). An investigator opined, without objection, that based on the pattern of the strike marks, the weapon used was probably a claw hammer type object. (R. p. 96, lines 1-4). Mr. Bolt's pockets were pulled out and inside the bar area the cash register drawer was open and empty. (R. p. 96, line 22 – p. 97, line 1; p. 103, lines 1-23). Eugene Yeargin who cut the grass at the VFW Hall on September 26, 2003, testified that he saw Mr. Bolt alive at approximately 5:00 PM on September 26, 2003. (R. p. 81, lines 1-10). The coroner testified that the death was a homicide. (R. p. 78, line 2). The pathologist did not testify at trial but her report was admitted in evidence through the coroner.[1] (R. p. 77, lines 10-14).

Arthur James "A.J." Bowers quickly became a person of interest to the police during the investigation of the case. (R. p. 106, lines 16-24; p. 111, line 14 – p. 112, lines 1-11). The day after Mr. Bolt's body was found the police located Bowers at Petitioner's home. (R. p. 106, lines 16-24). The police obtained three written statements from Bowers. (R. p. 131, line 25 – p. 132, lines 1-2; p. 138, lines 20-22; p. 145, lines 1-8). Bowers was arrested after making the first statement, admitting to being at the VFW Hall when Mr. Bolt was killed but blaming the murder

[1] The only objection to the admission of the report was pursuant to Rule 403, SCRE. (R. p. 22, lines 3-19). The judge offered to allow trial counsel an opportunity to propose redactions to portions of the report that were more prejudicial than probative. (R. p. 23, lines 3-8). It does not appear that any redactions were made to the report before being admitted in evidence.

on an individual named Ray- Ray. (R. p. 135, line 12 – p. 136, lines 1-2; R. p. 132, line 25 – p. 133, lines 1-17). In his second statement to police Bowers claimed he went to the VFW with Buck but left before anything happened. (R. p. 143, line 3 – p. 144, lines 1-19). In his third statement to police he admitted going in the VFW Hall with Little Robin and Wayne Eubanks. (R. p. 160, line 20 – p. 161, lines 1-20).

In October of 2003, Petitioner told police that her grandson, Randy Gambrell, told her that A.J. Bowers told him that Bowers and Petitioner's half-brother, Billy Buck Miller killed the man at the VFW. (R. p. 287, line 21 – p. 288, lines 1-7). Petitioner admitted telling her grandson not to say anything about Bowers and Buck killing the man unless asked "point blank" about it. (R. p. 288, lines 8-10). She did, however, tell her grandson not to lie. (R. p. 288, lines 11-17). At trial Petitioner testified that Randy later told her that his statement was a lie. (R. p. 287, lines 7-8).

In 2011, the police received information about a well located on the property formally owned by Petitioner. (R. p. 146, lines 10-23). The new owners gave the police permission to search the well. (R. p. 146, line 25 – p. 147, line 1). Using a waterproof camera the police believe that they saw "an object in the well that could have resembled a hammer." (R. p. 147, lines 5-11). Nothing, however, was recovered from the well. Petitioner's nephew testified that Petitioner told him that the new property owner told her that Clorox had been poured in the well and clothes in a plastic bag were found in the well. (R. p. 184, line 22 – p. 185, 186, lines 1-12). Again, nothing was recovered from the well.

Petitioner's half-brother, James Fred Miller, claimed that on the evening of September 26, 2003, he was going to a little house on Petitioner's property to smoke crack when Bowers and Petitioner's grandson, Randy Gambrell, arrived at Petitioner's property in a van. (R. p. 171,

line 20 – p. 172, lines 1-25). According to Miller, Gambrell headed towards the little house so Miller hid because he did not want to share his crack. (R. p. 173, lines 1-7). Miller claimed that Petitioner came down toward the little house and told Gambrell to take the clothes off so that she could wash them. (R. p. 173, lines 8-14). Then, according to Miller, Gambrell said to Petitioner, "Nanny, you should have seen him. He had blood from here down to here." (R. p. 173, lines 19-20). Miller then claimed that Petitioner stated, "I know that. I'm going to wash his clothes too." (R. p. 173, lines 20-21). According to Miller the Petitioner stated, "What we said here today stays here." (R. p. 182, line 10). Miller testified that about fifteen minutes later he went in Petitioner's house where he claimed that Bowers was coming out of one shower and Gambrell was in the other shower. (R. p. 174, lines 1-6). Miller admitted smoking crack, drinking alcohol and taking a Xanax on the evening of September 26, 2003. (R. pp. 177-178). Miller admitted that he never saw any bloody clothes. (R. p. 180, lines 5-7). Miller admitted writing to law enforcement while he was in jail and offering to testify against Petitioner in exchange for being released on bond. (R. p. 176, lines 6-24).

Petitioner testified at trial that on the evening of September 26, 2003, she did not see her grandson, Randy Gambrell, did not say anything to him and denied taking any bloody clothes from him or Bowers. (R. p. 289, lines 1-14). Petitioner testified that her grandson was with his girlfriend in Laurens Villa that night. (R. p. 289, lines 12-14). Petitioner testified that on the evening of September 26, 2003, her husband, Doyle, her daughter, Angie, her son Wayne, her half -brother, Billy Buck Miller and A.J. Bowers drove to Ware Shoals between 6:30 and 7:00 to pick up Angie's boyfriend. (R. p. 274, lines 7-23). She testified that her husband returned about 8:30 and they went to bed. She testified that others may have gone to another trailer that was on the property. (R. p. 275, lines 11-16). She was not sure who was at the second trailer

that night. (R. p. 276, lines 7-9). She did not hear anyone come into her house and take a shower but testified that her husband had sleep apnea and used a CPAP machine that made a lot of noise. (R. p. 278, lines 11-18). The next morning the police came to the house looking for Bowers and found him by the barn. (R. p. 277, lines 15-24).

On September 10, 2012, nine years after the death of Mr. Bolt, Petitioner reported her car stolen. (R. p. 189, lines 1-25). When officers located and stopped the car, Petitioner's son, Doyle Wayne Roberts was the driver. (R. p. 189, line 21 – p. 190, lines 1-6). Petitioner was notified and came to the scene of the stop where her son was arrested. (R. p. 190, line 18 – p. 191, lines 1-9). Wayne Roberts admitted at his mother's trial that on the day that he was stopped in his mother's car he was angry at her for having him arrested, was under the influence and made some false accusations against his mother. (R. p. 231, line 23 – p. 232, lines 1-20). Wayne Roberts admitted shouting when he was arrested, "I'm telling everything." (R. p. 229, line 25 – p. 230, lines 1-24). Wayne Roberts admitted shouting, "You're going to jail, bitch." (R. p. 231, lines 1-2). Wayne Roberts also admitted to shouting, "You know you washed them clothes." (R. p. 231, lines 3-5). Finally, Wayne Roberts admitted telling the officer, "But you're going to be arresting her for murder." (R. p. 231, lines 16-18). Wayne Roberts explained that when he made those statements he was angry, drunk and on drugs and simply repeating rumors he heard on the street. (R. p. 231, line 23 – p. 232, lines 1-20). The trial judge reviewed a dash-cam video of Wayne Roberts' arrest and noted, " . . . it shows alcohol being pulled out. The witness is clearly animated. It looked like he was on drugs, to put it politely." (R. p. 211, lines 12-14). The State recalled the arresting officer who testified that he did not arrest Wayne Roberts for DUI because, in his opinion, Roberts did not appear intoxicated. (R. p. 259, lines 11-22).

Almost three years later in July of 2015, police officers showed the dash-cam video of Wayne Roberts' arrest to Petitioner. (R. p. 254, line 3 – 255, 256, 257, 258, lines 1-23). At trial the officer testified that after seeing the video, "She [Petitioner] cried hysterically. She couldn't believe that Wayne said that. She even said that. She said, 'I can't believe Wayne would say anything like that about me." And then she – she got a Kleenex, so she was sobbing. And she sat back and said, 'Well, I guess I'll just have to take it to my grave,' and that was it." (R. p. 258, lines 16-21). At trial Petitioner explained that she meant that she could stand by God and take this to her grave that she did not wash anybody's clothes. (R. p. 282, lines 8-23).

ARGUMENT

In this trial for accessory after the fact to murder, the Court of Appeals erred in failing to find that the trial judge erred in admitting three written statements to police made by the non-testifying individual who the State asserted was one of the principals who committed the murder when the statements were prejudicial inadmissible hearsay and violated Petitioner's right to confront witnesses against her.

Petitioner 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 Petitioner'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 Petitioner's trial. Petitioner 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, Petitioner 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). Petitioner 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 Petitioner'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 Petitioner'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 Petitioner. (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 Petitioner's house after leaving the VFW Hall. (R. p. 118, line 11 – p. 119, 120, lines 1-17). "Randy's house" is Petitioner'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 Petitioner's house and provided the street address. (R. p. 120, lines 8-16). Petitioner 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 (Petitioner's house) in the second statement and the reference to the street address of Petitioner'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 (Petitioner'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 10:0 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 [sic] 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 Petitioner'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 Petitioner, 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 Petitioner's right to confrontation. The statements were offered to establish that Bowers committed the murder and Petitioner had knowledge that Bowers committed the murder by connecting Bowers to Petitioner through various family members of the Petitioner. The redactions as to Bowers going to Petitioner'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 Petitioner'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 was present at the VFW with Randy Gambrell, Petitioner's grandson, and afterward returned to Petitioner's house. The State offered the hearsay statements to prove 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 important because the statements were used by the State to establish an element of the offense as well as motive. The hearsay statements were not cumulative to other testimony. Miller testified about an alleged conversation between Petitioner 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 hearsay statements were not merely cumulative to Miller's testimony and the error in admitting the statements was not harmless.

Additionally, the statements violated Petitioner'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. Petitioner 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 Petitioner's house) after leaving the VFW Hut. In his third statement Bowers placed Petitioner's grandson at the VFW Hut, outside in the car, at the time of the murder. The State argued that Petitioner's motive to assist Bowers was to protect her grandson. Petitioner's Confrontation Clause rights were violated by the admission of Bowers' hearsay statements to police. The error in admitting the statements was not harmless.

In affirming the conviction the Court of Appeals 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).

The Court of Appeals 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 Bruton[2] 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

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

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, the Court of Appeals 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 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.

CONCLUSION

Based on the above argument, this Court should grant the petition for writ of certiorari to allow further briefing on the issue.

Respectfully Submitted,

s/ Kathrine H. Hudgins

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 29th day of June, 2020.