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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Laurens County
Hon. Frank R. Addy, Jr., Circuit Court Judge
Appellate Case No. 2020-000931

The State, Respondent,

v.

Brenda L. Roberts, Petitioner.

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

RETURN TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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STATEMENT OF QUESTIONS PRESENTED

I. The Court of Appeals properly found the curative instruction given by the trial court cured any issue related to the admission of the statements and Petitioner never asserted the curative instruction was insufficient. Further, the statements were not hearsay or in violation of the Confrontation Clause because they were not admitted for the truth of the matter asserted.

STATEMENT OF THE CASE

Procedural History

The State agrees with Petitioner's Procedural Statement of the Case.

Factual Background

On September 26, 2003, Master Patrolman Dwight Craft responded to a call reporting an injury at the VFW Hall in Laurens.[1] R. p. 64. As he entered the VFW Hall, Master Patrolman Clark observed signs of forced entry. R. p. 68. Law enforcement officers subsequently entered the bathroom where they found the body of Jim Bolt. R. p. 68. The officers did not see any signs of life, but called EMS to the scene. R. p. 68. Master Patrolman Craft testified it appeared Bolt had been beaten about the head and there was a lot of blood in the bathroom. R. p. 68.

Walter Bentley was employed by the Laurens Police Department as an investigator in September of 2003. R. pp. 90-91. Investigator Bentley received a call around 6:30 p.m. to come to a homicide investigation at the VFW Hall. R. p. 92. Investigator Bentley testified when he arrived, Bolt was lying in a pool of, "[p]robably the most blood I've seen on crime scene in my career." R. p. 95. Investigator Bentley also observed blood spatter on the walls of the restroom. R. p. 95. Investigator Bentley referred to the blood splatter as, "high impact splatter" and stated it is indicative of a person being struck very hard with a blunt force object. R. p. 95. Investigator Bentley noticed defense wounds on Bolt's hands and that, due to the positioning and pattern of the strikes, believed a claw hammer type object was used in the assault. R. p. 95-96. Investigator Bentley noted Bolt's front and rear pockets were pulled out of his pants and that there was change on the floor. R. p. 96-97. Investigator Bentley testified there were signs of a struggle in

[1] The Veterans of Foreign Wars Hall is on East Main Street in Laurens and provides a place for veterans to congregate. R. p. 55, 92.

the bathroom and that it appeared someone was cleaning the bathrooms at the time of the assault. R. p. 100. The VFW's cash register had been pulled out and emptied. R. p. 103. Investigator Bentley stated that due to the facts and circumstances of the case, he believed law enforcement was dealing with an armed robbery and murder. R. p. 105.

The investigation eventually led law enforcement to an individual named A.J. Bowers[2], who was staying at Petitioner's residence. R. p. 106. Investigators were told they should speak to Bowers because he may be a person of interest. R. p. 106. After locating Bowers at Petitioner's residence, Bowers agreed to accompany officers to the Laurens Police Department to be interviewed. R. p. 107. Investigator Bentley noted Bowers was a not a suspect at the time and was, "just a person we wanted to talk to." R. p. 107. Investigator Bentley observed a fresh injury to Bowers' arm and hand. R. p. 108. Investigator Bentley thought this significant because there was a drop of blood left on a notepad at the crime scene that he believed was left by the assailant who suffered injuries during the murder. R. p. 108. Investigator Bentley noted the procedure at the VFW was that if you were not a member, you were supposed to sign in when you entered the premises. R. p. 111. Investigator Bentley testified that it appeared that a page had been torn out; however the imprint of the name "A. Bowers" was imprinted on the subsequent page. R. p. 112. Bowers voluntarily waived his rights and agreed to speak with law enforcement. R. p. 112. Bowers subsequently made a statement to Investigator Bentley on September 27, 2003. R. pp. 131-33. Law enforcement officers placed Bowers into custody because his statement included details that were not public knowledge at the time. R. p. 135. On September 29, 2003, Bowers provided Investigator Bentley with a second, lengthier statement. R. pp. 137-44. Investigator

2 According to the South Carolina Department of Corrections (SCDC) inmate locator, Bowers was admitted to SCDC on April 27, 2018, and is currently serving sentences for murder, armed robbery, and criminal conspiracy.

Tony Lynch subsequently re-interviewed Bowers because he was not satisfied with the second statement he made. R. p. 156. Bowers later provided Investigator Lynch with a third statement. R. pp. 160-61.

After Bowers provided law enforcement with these statements, an arrest was made, however the Solicitor at the time dismissed the case with leave to re-indict. R. p. 145. The case remained open and officers continued to investigate. R. p. 146. In October of 2011, law enforcement received a tip and searched a well on Petitioner's address for evidence relating to the murder. R. p. 146. Despite using a diver and attempting to pump water out of the well, officers were unsuccessful in finding evidence due to the depth and character of the well. R. pp. 147-49. Curiously, Petitioner drove by the residence very slowly in a minivan while the investigators were attempting to search the well.[3] Following the search of the well, law enforcement continued to investigate. R. p. 151. Investigator Bentley eventually left to work for the Eighth Circuit Solicitor's Office and he selected Jared Hunnicutt as his successor at the Laurens Police Department. R. p. 151.

At trial, Officer Hunnicutt explained he was involved in the re-investigation of the VFW murder. R. pp. 188-89. On September 10, 2012, Officer Hunnicutt responded to a call about a stolen vehicle. R. p. 189. The complainant on the call was Petitioner, and the driver of the stolen car was her son, Doyle Wayne Roberts.[4] R. p. 189. Upon arriving at the scene, Officer Hunnicutt put Mr. Roberts under arrest for driving under suspension. R. p. 190. Pursuant to standard procedure, Officer Hunnicutt informed Petitioner and she came to the scene. R. pp. 190-91. At the scene, Mr. Roberts shouted, "I'm telling everything," to Petitioner. R. pp. 229-30. Mr.

[3] By 2011, Petitioner had moved to Clinton and lived five or six miles away from her previous address where she resided at the time of the murder. R. p. 150.

[4] Mr. Roberts is also known by the alias, "Wanda Wayne." R. p. 190.

Roberts also shouted, "You're going to jail bitch." R. p. 231. Mr. Roberts further yelled, "You know you washed them clothes." R. p. 231. Mr. Roberts told the officers, "You finally got to arrest Wanda Wayne, but you're going to be arresting [Petitioner] for murder." R. p. 231.[5]

Law enforcement subsequently approached Freddie Miller, Petitioner's brother, in July of 2015. On the evening of September 26, 2003, Miller went to Petitioner's home to smoke crack cocaine he obtained earlier in the evening. R. p. 172. As he approached Petitioner's home, Mr. Roberts, A.J. Bowers, and Randy Gambrell[6] pulled up in a van. R. p. 172. When the group approached, Miller hid because he did not want to share his crack cocaine with them. R. p. 173. Miller observed Petitioner approach Gambrell and tell him to take his clothes off so she could wash them. R. p. 173. Miller testified Gambrell stated, "Nanny, you should have seen him. He had blood from here down to here." R. p. 173. Petitioner replied, "I know that. I'm going to wash his clothes too." R. p. 173. Gambrell then handed his clothes to Petitioner and she took them into the house. R. p. 173. Miller waited fifteen to twenty minutes and entered the house. R. p. 174. When Miller arrived at the home, Bowers was coming out of the shower and Doyle Wayne asked Miller if he had any clothes Bowers could wear. R. p. 174. Miller testified that Petitioner's washing machine was working on the night of the murder and that Petitioner got rid of it sometime in the next couple of days.[7] R. p. 175.

Jonathan Epting, Petitioner's nephew, was aware that the well at Petitioner's former residence was searched by law enforcement. R. p. 183. Following this event, Epting and Petitioner were both at Self Memorial Hospital in Greenwood because Epting's grandfather,

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[5] Mr. Roberts testified he was drunk and on drugs at the time of his statement; however, he Officer Hunnicutt testified he did not appear to be intoxicated and that, had he been intoxicated, Mr. Roberts would have been charged thus. R. pp. 259-60.

[6] Gambrell is Petitioner's grandson. R. p. 181.

[7] After the murder, Investigator Lynch noticed a washing machine sitting on Petitioner's front porch and that it looked like Petitioner was getting ready to throw it away. R. p. 162.

Petitioner's father, was having surgery. R. p. 184. Epting told Petitioner something was found in her well. R. p. 184. Petitioner replied that clothes were in a plastic bag and that Clorox had been poured down the well. R. p. 184-85. Petitioner told Epting her husband poured Clorox down the well every year to purify the well. R. p. 186.

Lieutenant Joey Pittman of the Laurens Police Department began looking at the VFW murder case in 2015 with "fresh eyes" with other detectives to see what they could come up with. R. p. 252. Lieutenant Pittman testified Doyle Wayne Roberts' arrest shined a "spotlight" on Petitioner as a suspect in the case. R. p. 253. Lieutenant Pittman spoke with James Miller and Jonathan Epting about the case. R. pp. 253-54. On July 7, 2015, Petitioner was picked up by law enforcement to discuss her potential involvement in the VFW murder. R. p. 254. Lieutenant Pittman stated that Petitioner was upset and crying. R. p. 256. When Petitioner was told law enforcement had a video of Doyle Wayne Roberts implicating her in a murder, she did not believe them. R. p. 258. Lieutenant Pittman noted, "she didn't believe that Wayne would say anything like that about her." R. p. 258. After being shown the video, Petitioner cried hysterically. R. p. 258. Petitioner stated, "I can't believe Wayne would say anything like that about me." R. p. 258. Petitioner then stated, "Well, I guess I'll just have to take it to my grave." R. p. 258.

Statements Made by A.J. Bowers

During Investigator Bentley's testimony, when the solicitor moved to admit A.J. Bowers' first statement into evidence, Defense Counsel objected to the admission of the evidence on hearsay and Confrontation Clause grounds. R. p. 114. The trial judge initially ruled that Crawford[8] was not implicated and that Bowers' statements were not hearsay, stating, "I don't

[8] Crawford v. Washington, 541 U.S. 36 (2004).

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. 114. After further argument about the statements, the trial judge stated:

> Solicitor, my concern with the second and the third statement is that the second statement references going to the Defendant's house. The third statement also references being dropped off at [Petitioner's address] That is what connects the Defendant to this particular incident and has the potential, I think, to violate Bruton and Crawford.

R. pp. 120-21. The solicitor replied, "I would submit, Your Honor, that the witness has already testified that they located Bowers at the Defendant's house." R. p. 121. The trial judge replied:

> The witness can testify as to what he personally observed and that he located Mr. Bowers at [Petitioner's] house. It's a different matter entirely when we have a non-testifying witness saying that, okay, Mr. Bowers told me that he went to [Petitioner's] house after the fact. In our meeting in chambers I think you indicated that the State has additional witnesses that would be willing to testify or that you anticipate will testify that Mr. Bowers did, in fact, go to [Petitioner's] house, that they are first-party witnesses.

R. p. 121. The solicitor replied, "Yes, sir. Right. Yes, sir." R. p. 121. The trial 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 [Petitioner], clearly that's in violation, in my mind, of Bruton and Crawford, the confrontation clause. So these 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 [Petitioner's] house through witnesses who can testify as eye witnesses, et cetera. But as far as these statements - - I understand you still object to my ruling. The statements can come in with that caveat.

R. p. 121-22. Defense Counsel then told the trial judge, "sometime I would have a limiting instruction, but I'd like to think about that." The trial judge replied:

> Certainly. I think that touches on what we were discussing yesterday, that this evidence only relates to the question of whether Mr. Bowers was involved in the homicide, armed robbery, what have you. I was thinking about that last night, but I still haven't put together or formulated something in my own mind. Perhaps we can continues to work on that.

R. p. 122. The trial judge subsequently instructed the jury:

> We're back on the record. 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 [Petitioner] 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 [Petitioner] 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 getting at. **Obviously this testimony should not be received by you in any negative way as it relates to [Petitioner], okay?** I think I've explained the situation. Solicitor, you may continue with your examination.

R. pp. 126-27 (emphasis added). The State subsequently presented Bowers' three statements to law enforcement. As to Bowers' first statement, Investigator Bentley read the statement into the record. R. p. 133. Investigator Bentley also read Bowers' second statement, which was four pages long. R. p. 139-144. Bowers' third statement, made to Investigator Lynch, was also read into the record. R. pp. 160-61.

ARGUMENT

I. The Court of Appeals properly found the curative instruction given by the trial court cured any issue related to the admission of the statements and Petitioner never asserted the curative instruction was insufficient. Further, the statements were not hearsay or in violation of the Confrontation Clause because they were not admitted for the truth of the matter asserted.

The Court of Appeals correctly found the trial court's limiting instruction cured any error regarding the possibility of admitting improper evidence in the statements by a non-testifying individual. Petitioner requested the curative instruction, never objected to its sufficiency, and did not move for a mistrial after the instruction was given. Further, the statements were properly admitted and were not inadmissible hearsay or in violation of the Confrontation Clause because they were admitted not for the truth of the matter asserted, but instead, for context and to demonstrate the inconsistencies of the author's statements.

Standard of Review

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001); State v. Butler, 353 S.C. 383, 388, 577 S.E.2d 498, 500 (Ct. App. 2003). "The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006); State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Pagan, 369 S.C. at 208, 631 S.E.2d at 265; State v. McDonald, 343 S.C. 319, 540 S.E.2d 464 (2000). "A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice." State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995). "Prejudice occurs when there is

reasonable probability the wrongly admitted evidence influenced the jury's verdict." State v. Byers, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011).

Merits

In determining the admissibility of the statements, the trial court specifically required some content to be redacted because it could violate Bruton v. United States, 391 U.S. 123, 135-36, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). With the redactions, the statements made no mention implicating Petitioner. At the same time, the trial court asked Petitioner's counsel: "Anything else?" Counsel responded: "Sometime I would have a limiting instruction, but I'd like to think about that." (R.122). The court then took a break and, when it returned, verified the redactions had been made and Petitioner's counsel was satisfied with the redactions. (R.125-126). The court then brought the jury back in and gave them a lengthy limiting instruction on the statements. In part the instruction read: "You shouldn't take this testimony as impugning anything to Ms. Roberts who is on trial here today." The court continued: "Obviously, this testimony should not be received by you in any negative way as it relates to Ms. Roberts, okay?" (R.126-167). After the instruction, Petitioner never maintained it was insufficient or seek a mistrial. As a result, any issue regarding the admission of the testimony is waived. See State v. McEachern, 399 S.C. 125, 146, 731 S.E.2d 604, 615 (Ct. App. 2012) (noting the law assumes a curative instruction will remedy an error; therefore, failure to object to the sufficiency of that charge renders the issue waived and unpreserved for appellate review); 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.").

Even if this Court overlooks the failure to object to the limiting instruction Petitioner specifically requested, there is no error in admitting the statements because they were not admitted for the truth of the matter asserted, and are therefore not hearsay or in violation of the confrontation clause. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. "Evidence is not hearsay unless it is an out of court statement offered to prove the truth of the matter asserted. An out of court statement is not hearsay if it is offered for the limited purpose of explaining why a government investigation was undertaken." Caprood v. State, 338 S.C. 103, 111, 525 S.E.2d 514, 518 (2000) (internal citation omitted).

In Petitioner's case, the three statements made by A.J. Bowers were not inadmissible hearsay because the statements were not offered for the truth of the matter asserted. All three of Bowers' self-serving statements made to investigators asserted that he was merely present in some capacity but did not participate in the murder or robbery. This varies significantly from the element the State was attempting to prove, that Bowers committed the murder. The information in Bowers' statements was simply introduced to discuss the evolution of the VFW investigation and the emergence of Bowers as a suspect. Bowers' statements contained various accounts of events containing non-public information, which made him a focal point of the investigation, as it signaled to law enforcement that he either was involved in the crime or had direct knowledge regarding who the perpetrators were. The State never contended at any point that Bowers was merely present at the scene and had no culpability in the murder, which was the fact propounded by the statements. The trial judge, therefore, properly found Bowers' statements were not hearsay because they were not offered for the truth of the matter asserted.

The admission of the statements also did not violate the Confrontation Clause. The United States Supreme Court has held the Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was available to testify, and the defendant had had a prior opportunity for cross-examination." Crawford v. Washington, 541 U.S. 36, 53–54 (2004). Critically, however, the Confrontation Clause is not implicated when statements are offered "for purposes other than establishing the truth of the matter asserted." Crawford, 541 U.S. at 59, n.9.

Bowers' statements provided important context to show how he became a person of interest in the investigation. In his statement, Bowers inadvertently provided critical, non-public information about the crime that alerted investigators to the fact that he was either present at the scene of the crime or, at a minimum, that he was somehow connected to the individuals that committed the crime. However, the State never asserted Bowers was telling the truth in any of his statements. Instead, the statements simply established that Bowers knew critical information about the crime, which made him a primary focus in the investigation into the murder. Bowers' statements were therefore not offered for the truth of the matter asserted. See e.g. Carter v. Douma, 796 F.3d 726 (7th Cir. 2015) (Confrontation Clause not violated when a statement is offered only to show the effect it had on the police, not for the truth of its contents); United States v. Rivera, 780 F.3d 1084, 1092 (11th Cir. 2015) (Out-of-court declarations that were either: 1) non-assertive statements incapable of being true or false or 2) statements that were indisputably false, did not constitute hearsay because they were introduced only to show their effect on the listener).

Finally, any possible error in admitting the testimony was entirely harmless. First, the limiting instruction discussed above greatly reduced any possible prejudice from the admission

of the statements because it prevented the jury from using the statements negatively against Petitioner. Further, Bowers' statements were not probative of Petitioner's guilt, and the only information that could be construed as incriminating towards Petitioner in Bowers' statements—the fact that Petitioner's child and grandson were involved and their home was visited by Bowers and the other various alleged perpetrators—also came in during the testimony of Freddie Miller. See State v. Haselden, 353 S.C. 190, 577 S.E.2d 445 (2003) (admission of improper evidence is harmless where the evidence is merely cumulative to other evidence); State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993) (any error in admission of evidence cumulative to other unobjected to evidence is harmless).

Accordingly, this Court should deny the Petition for Writ of Certiorari because the trial court did not err in admitting the statements, Petitioner asked for and received a limiting instruction to which he did not object, and any possible error was entirely harmless because the evidence was cumulative to other evidence in the record.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should deny the Petition for Writ of Certiorari to the Court of Appeals.

Respectfully submitted,

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