STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Greenville County
Letitia H. Verdin, Circuit Court Judge

THE STATE,

Respondent,

v.

MALETTE DENISE KIMBROUGH,

Appellant

Appellate Case No. 2019-001013.

INITIAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF THE ISSUES ON APPEAL

I. Whether the court erred by instructing the jury that malice may be inferred from the use of a deadly weapon since this instruction on inferred malice was error, and prejudiced appellant in this purely circumstantial evidence case where there was no evidence of any animus between appellant and the decedent?

II. Whether the court erred by allowing Greenville investigator Antonio Bailey to testify the decedent's daughter, Ruby Smith, told him she checked on her mother around 4:00 a.m. while the decedent was in bed with appellant sleeping in a lounge chair in the decedent's bedroom, and that when she returned thirty to forty-five minutes later, appellant was gone and the decedent was shot in the head, since this was prejudicial hearsay testimony?

III. Whether the court erred by allowing Greenville County investigator Antonio Bailey to testify that as a result of information he received Portia Rogers "was absolutely cleared" as a suspect in the decedent's death since Bailey's opinion on Portia's innocence was based on inadmissible hearsay and it was prejudicial?

RESPONDENT'S COUNTERSTATEMENT OF THE ISSUES ON APPEAL

I. Whether the trial court prejudicially instructed the jury that malice could be inferred from the use of a deadly weapon where neither party presented any evidence which would reduce, mitigate, excuse, or justify the shooting, and where the State presented overwhelming evidence of malice apart from the use of a gun, rendering the instruction harmless beyond a reasonable doubt.

II. Whether the trial court erred in admitting an investigator's testimony about what he learned at the scene that informed the next steps in his investigation, where the testimony was not offered for the truth of the matter asserted.

III. Whether the trial court erred in admitting an investigator's re-direct testimony that he cleared the victim's granddaughter as a suspect, where his testimony related to his own investigation so that it was not hearsay, and this testimony was elicited in response to details interjected during Appellant's cross-examination of that investigator.

STATEMENT OF THE CASE

Following the November 19, 2016, homicide of Ruby Flamm, the Greenville County Grand Jury indicted Appellant Malette Denise Kimbrough for the charges of murder and possession of a weapon during the commission of a violent crime. (R. pp. *Indictment).

Attorneys O. W. Bannister and Alex R. Stalvey represented Kimbrough at a jury trial before the Honorable Letitia H. Verdin. (Tr. p. 1). Assistant Thirteenth Circuit Solicitors W. Jeffry Weston and Anthony J. McCollum prosecuted the case. Trial began on June 10, 2019. (Tr. p. 1).

On June 12, 2019, a jury convicted Kimbrough of both charges. (Tr. p. 400, lines 14-19). Judge Verdin sentenced Appellant to 37 years for murder and a concurrent five years for possession of a weapon during the commission of a violent crime. (Tr. p. 408, lines 8-11).

This appeal follows. (R. p. *Notice of Appeal).

STATEMENT OF FACTS

Ruby Flamm, 75, lived with her daughter, Ruby Lynn Smith. (Tr. p. 69, line 7 – p. 70, line 10). Flamm needed the live-in assistance of her daughter due to a number of ailments. Flamm was also wheelchair-bound. (Tr. p. 70, line 11 – p. 71, line 13; Tr. p. 124, lines 9-11).

Flamm and Appellant, Malette Denise Kimbrough were friends. They would smoke crack together at Flamm's house. (Tr. p. 74, line 3 – p. 76, line 23). One day in November 2016, someone dropped Kimbrough off at Flamm's with a sack of groceries and an overnight bag. Kimbrough began staying at Flamm's, helping some around the house. (Tr. p. 87, line 14 – p. 89, line 14; Tr. p. 105, lines 2-15). At night, she slept in a lounge chair beside Flamm's hospital bed. (Tr. p. 86, line 3 – p. 87, line 15; Tr. p. 94, lines 10-12).

One evening, some of Flamm's grandchildren visited. (Tr. p. 118, lines 3-18). One of her granddaughters, Portia, came over with her boyfriend. (Tr. p. 81, lines 3-8). Portia got in a fight with Flamm's daughter and left the house sometime before midnight. Portia didn't have keys to Flamm's house. (Tr. p. 81, lines 9-16; Tr. p. 82, lines 10-24). Before Portia left, she fired a gun into the air in Flamm's front yard. Flamm's daughter did not hear or see this happen, but Flamm's grandson, Lorenzo Pardlow, did. (Tr. p. 83, lines 9-20; Tr. p. 119 lines 11-21). Portia did not return to Flamm's house at all that night. (Tr. p. 83, lines 21-23; Tr. p. 84, line 23 – p. 85, line 7). Moreover, Portia never got into an argument with Flamm or exchanged any harsh words with her that evening; Portia only engaged in a dispute with Flamm's daughter. (Tr. p. 85, lines 8-21).

After Portia and the other family members left, Flamm's daughter readied the house for everyone to go to bed. She checked all the exterior doors to the house to make sure they were locked. (Tr. p. 93, lines 3-25). Each door had to be deadbolted from the inside. (Tr. p. 94, lines 1-

9). Flamm's grandson Lorenzo slept over that night. (Tr. p. 117 lines 14-23). By bedtime, only Flamm, Flamm's daughter, Flamm's grandson Lorenzo, and Kimbrough occupied the house. (Tr. p. 80, lines 19-24; Tr. p. 120, lines 12-18). Lorenzo went to sleep in the third bedroom. (Tr. p. 80, lines 9-18). Flamm's daughter went to sleep in her bedroom near the front of the house. (Tr. p. 122, lines 17-25). Flamm went to sleep in her bedroom, and Kimbrough went to sleep in the chair in Flamm's room. (Tr. p. 123, lines 1-11).

In the middle of the night, Flamm needed water in her CPAP machine. (Tr. p. 73, lines 1-23). Around 3:00 a.m., she called out to her daughter, who got up and put water in the machine. This took about five minutes. (Tr. p. 94, line 15 – p. 97, line 11). Flamm's daughter went back to bed, but Flamm called down the hallway again because she could not get the machine to work. Her daughter responded, fixed the machine, and returned to bed. (Tr. p. 97, line 12 – p. 98, line 13). Both times that Flamm's daughter went to tend to Flamm's machine, Kimbrough appeared to be asleep in the chair next to Flamm's bed. (Tr. p. 96, lines 1-7; Tr. p. 97, lines 19-24).

When Flamm's daughter had been back in her own bedroom for what felt like thirty minutes to an hour, she heard "some kind of noise like a banging door, a crazy noise." (Tr. p. 99, lines 1-7). She called out to Flamm, but Flamm did not respond. (Tr. p. 99, lines 9-22). She got up and looked in the back bedroom and saw Lorenzo asleep in the bed. (Tr. p. 99, line 24 – p. 100, line 15). She checked the front door and found it open. She also saw that Flamm's bedroom door "halfway open." (Tr. p. 100, lines 15-16). She looked in Flamm's bedroom to find Flamm "in bed with a hole in her head." (Tr. p. 100, lines 16-20). Kimbrough was not there. "She was gone." (Tr. p. 101, lines 11-13).

Keith Ramsey lived two doors away. (Tr. p. 141, lines 14-17). He was getting ready for bed when the shooting occurred. As he cut the lights off in his bathroom, he heard one gunshot.

(Tr. p. 144, lines 13-21). It came from the direction of Flamm's house. (Tr. p. 144, line 2 – p. 144, line 2). Ramsey looked at his clock as he grabbed his gun, cut off his front porch lights, and stepped outside to see what was going on. It was 4:10 am. (Tr. p. 145, line 8 – p. 146, line 23). Looking to the left, Ramsey saw "a lady down at the stop sign running" away from the direction of Flamm's house. (Tr. p. 146, lines 24-25; Tr. p. 148, lines 1-5). The black female wore dark pants and a light shirt. (Tr. p. 147, lines 1-25).

Kimbrough had been staying at Flamm's for about a week at this point. (Tr. p. 87, lines 14-15). Flamm's daughter had not seen Kimbrough with a gun, but heard Kimbrough say she had either a .38 or a .45. The day before the shooting, Flamm's daughter heard Kimbrough say her gun was missing. Then, at some point, Kimbrough said she found it. (Tr. p. 89, line 17 – p. 91, line 22; Tr. p. 92, lines 7-18). Flamm's daughter had also never seen Flamm and Kimbrough get into any kind of argument and had no reason to believe they were mad at each other or had bad blood. (Tr. p. 76, lines 24-25; Tr. p. 109, lines 1-5; Tr. p. 110, lines 7-12).

When Flamm's daughter discovered Flamm had been shot, she woke Lorenzo. (Tr. p. 127, lines 17-20). As she called 911, Lorenzo "stepped outside to take a walk for a minute to get [him]self together." (Tr. p. 129, lines 14-20). He had not heard the gunshot. (Tr. p. 130, lines 23-24). He also did not notice any sign of a struggle. Flamm's hands were down "by her side." (Tr. p. 127, lines 23-24).

First responders similarly noted that Flamm was situated "underneath several blankets with a CPAP mask commonly used for sleep apnea still securely on her face." (Tr. p. 159, lines 22-15). She had blankets pulled up to her chest in a position consistent with her resting in the bed. (Tr. p. 207, lines 19-20). Flamm sustained a fatal "close-range gunshot wound to her forehead." (Tr. p. 193, lines 4-9). A ballistics analysis concluded that Flamm was struck by a

bullet from "either a nine-millimeter handgun or a 38-caliber handgun." [1] (Tr. p. 256, lines 2-5).

When Flamm's daughter called 911, she told the operator that she did not know what happened other than someone shot her mother in the head and killed her. (Tr. p. 155, lines 9-25; State's Ex. 3). Investigators began looking to identify Kimbrough, who had been at Flamm's house.[2] (Tr. p. 211, lines 7-17). They did not find Kimbrough at her own residence. A subsequent conversation with Kimbrough's husband led officers to Kimbrough's daughter's house. (Tr. p. 212, line 8 – p. 213, line 5). There, officers found Kimbrough's daughter, Malexes Dixon, and her boyfriend, Michael Argumenti. They both went to the police department and provided statements. (Tr. p. 213, line 13 – p. 215, line 6).

Dixon and Argumenti each explained that Kimbrough arrived at their home between 4:30 and 5:00 a.m. on November 19. It was cold. (Tr. p. 263, lines 10-22). Kimbrough banged on their door, waking the couple. (Tr. p. 263, line 20 – p. 264, line 6; Tr. p. 308, lines 2-4). Argumenti described Kimbrough as "tired" from "walking a long way." (Tr. p. 266, lines 17-18). According to both Argumenti and Dixon, Kimbrough had removed her shirt and wore only "blue jeans and a bra" when they saw her at their door. (Tr. p. 266, line 20 – p. 269, line 5; Tr. p. 298, lines 22-25). She also had a small black purse, and a sizeable amount of money. Argumenti recalled a black grocery bag as well. (Tr. p. 270, line 21 – p. 272, line 9; Tr. p. 303, lines 7-11; Tr. p. 308, lines 5-20).

The couple asked Kimbrough what was going on but she refused to answer, stating only

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[1] Due to the size of the recovered fragments, the same analysis concluded it would have been "impossible" for a 22-caliber handgun to have fired the bullet. (Tr. p. 256, lines 6-15). Flamm's granddaughter Portia, the one who fired a gun into the air earlier in the evening, had recently been found in possession of a 22-caliber pistol. (Tr. p. 232, lines 1-5).

[2] Investigators explored other suspects and did not arrest Kimbrough until about five months after the shooting. (Tr. p. 215, lines 13-19).

that "she couldn't tell" them. (Tr. p. 269, lines 6-12; Tr. p. 272, line 25 – p. 273, line 13; Tr. p. 300, lines 15-21). According to Dixon, Kimbrough did not respond at all when she asked what was going on.[3] (Tr. p. 300, lines 1-5). Dixon thought her mother acted nervous. (Tr. p. 300, lines 11-14).

Kimbrough asked to take a shower. (Tr. p. 269, line 15; Tr. p. 303, lines 19-25). "She said she was walking a long way and she wanted to take a shower because she was tired and sweaty." (Tr. p. 269, lines 19-21). After she showered, she placed her clothes in a black grocery bag. (Tr. p. 272, lines 7-15). Her daughter provided her with fresh clothes, stating the shirt Kimbrough previously wore had "bed bugs on it." (Tr. p. 275, lines 2-6; Tr. p. 304, lines 9-21).

Next, Kimbrough asked the couple to call her friend Johnny Marshall to give her a ride. (Tr. p. 275, lines 12-22; Tr. p. 304, line 25 – p. 305, line 23). Argumenti knew Marshall, and called him on Kimbrough's behalf between 5:00 and 5:30 a.m. (Tr. p. 276, lines 10-25). He handed the phone to Kimbrough who spoke to Marshall. (Tr. p. 278, lines 2-4). While Kimbrough waited for Marshall, she rested on her daughter's sofa. (Tr. p. 278, lines 16-21). Marshall picked Kimbrough up about half an hour later. (Tr. p. 278, lines 5-15).

Neither Argumenti nor Dixon saw Kimbrough with a gun that morning. (Tr. p. 281, lines 14-25; Tr. p. 310, lines 1-7). Argumenti informed law enforcement he saw two guns in Kimbrough's house about a year earlier. (Tr. p. 283, lines 9-19; Tr. p. 284, lines 1-12).

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[3] Dixon testified law enforcement threatened to take her to jail; however, she also asserted she and Argumenti voluntarily arrived at the law enforcement center to speak to investigators. (T. p. 290, line 10 – p. 291, line 24). Ultimately, Kimbrough testified she was high on marijuana during her interactions with the investigator, and alleged the investigator threatened to take her to jail if she was not truthful. (Tr. p. 292, line 15 – p. 296, line 10). Dixon said the investigator thought she "was lying because [she] did not look him in the eyes." (Tr. p. 292, lines 15-21). Dixon testified she told law enforcement "whatever they needed to know." (Tr. p. 311, line 21 – p. 312, line 15). However, Dixon denied that Kimbrough told her she thought she hurt somebody that night. (Tr. p. 300, line 22 – p. 302, line 25).

STANDARD OF REVIEW FOR ISSUE I

This Court reviews alleged error in jury instructions for an abuse of discretion. *Hennes v. Shaw*, 397 S.C. 391, 402, 725 S.E.2d 501, 507 (Ct. App. 2012). "In reviewing jury charges for error, the appellate court must consider the circuit court's jury charge as a whole in light of the evidence and issues presented at trial." *Id.* "An erroneous instruction alone is insufficient to warrant this Court's reversal." *State v. Burdette*, 427 S.C. 490, 496, 832 S.E.2d 575, 578 (2019), *reh'g denied* (Sept. 27, 2019). "Errors, including erroneous jury instructions, are subject to harmless error analysis." *State v. Belcher*, 385 S.C. 597, 611, 685 S.E.2d 802, 809 (2009). Harmless error applies when, beyond a reasonable doubt, "the error complained of did not contribute to the verdict." *State v. Middleton*, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014) (internal quotation omitted). This inquiry does not pertain to "what the verdict would have been had the jury been given the correct charge, but whether the erroneous charge contributed to the verdict rendered." *Id.*

I. Because neither party presented any evidence which would reduce, mitigate, excuse, or justify the shooting, the trial court instructed the jury that malice could be inferred from the use of a deadly weapon; but the State presented overwhelming evidence of malice apart from the use of a gun, rendering the instruction harmless beyond a reasonable doubt.

Over Appellant's objection, (Tr. p. 330, lines 1-18; Tr. p. 331, lines 18-21), the trial court instructed the jury that "[m]alice may be inferred from conduct showing a total disregard for human life. Malice may, also, be inferred from the use of a deadly weapon." (Tr. p. 385, lines 23-5; Tr. p. 339, lines 3-11). The trial court noted that the record before it and the case law in effect at that time allowed for this instruction on implied malice. (Tr. p. 332, lines 1-10 and 17-20). At the time of Appellant's June 2019 trial, *State v. Belcher* provided "that where evidence is

presented that would reduce, mitigate, excuse or justify a homicide (or assault and battery with intent to kill) caused by the use of a deadly weapon, juries shall not be charged that malice may be inferred from the use of a deadly weapon." 385 S.C. 597, 612, 685 S.E.2d 802, 810 (2009). *Belcher* did not address the propriety of the implied malice charge where *no* evidence adduced at trial would reduce, mitigate, excuse or justify the killing.

One month after Appellant's trial, the Supreme Court of South Carolina "consider[ed] whether the permissive inference charge may be given in *any setting*, even those in which no evidence is presented that would reduce, mitigate, excuse, or justify the commission of an offense containing the element of malice." *State v. Burdette*, 427 S.C. 490, 502832 S.E.2d 575, 582 (2019) (filed July 31, 2019) (emphasis in original). *Burdette* held that "regardless of the evidence presented at trial, a trial court shall not instruct the jury that it may infer the existence of malice when the deed was done with a deadly weapon." *Id.* at 503, 832 S.E.2d at 582. The court found the charge "an improper court-sponsored emphasis of a fact in evidence," but noted the parties remained free to argue implied malice "based on the evidence in the record." *Id.* Like *Belcher*, the court applied the holding to cases "pending on direct review or [ ] not yet final, so long as the issue is preserved."[4] *Id.* at 505, 832 S.E.2d at 583.

"The law to be charged must be determined from the evidence presented at trial." *State v. Childers*, 373 S.C. 367, 373, 645 S.E.2d 233, 236 (2007). The implied malice instruction, while

[4] "In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. . . .[and] it must be clear that the argument has been presented on that ground." *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) (internal citations omitted). "[W]here a party requests a jury charge and, after opportunity for discussion, the trial judge declines the charge, it is unnecessary, to preserve the point on appeal, to renew the request at conclusion of the court's instructions." *State v. Johnson*, 333 S.C. 62, 64, 508 S.E.2d 29, 30 (1998). Here, Appellant objected to the State's request to charge implied malice, and the court ruled without delay. (Tr. p. 330, lines 16-18; Tr. p. 332, lines 17-20).

valid at the time of trial,[5] now constitutes harmless error due to the nature of the evidence presented. Harmless error review requires consideration of the jury instruction as a whole. *State v. Burdette*, 427 S.C. at 498, 832 S.E.2d at 580. The Court "must review the facts the jury heard and weigh those facts against the erroneous jury charge to determine what effect, if any, it had on the verdict." *State v. Kerr*, 330 S.C. 132, 145, 498 S.E.2d 212, 218 (Ct. App. 1998).

Beyond a reasonable doubt, the implied malice instruction did not contribute to the verdict obtained. *Id.*; *State v. Middleton*, 407 S.C. at 317, 755 S.E.2d at 435 ("whether or not the error was harmless is a fact-intensive inquiry"). Our appellate courts have not yet reversed a case pursuant to *Belcher* or *Burdette* when the State's case is proven by circumstantial evidence and without evidence in the record that would reduce, mitigate, excuse or justify the shooting. Most recently, this Court decided a similar case where the State relied upon circumstantial evidence and did not present evidence of any motive for the shooting, and where neither party was permitted to introduce evidence which would reduce, mitigate, excuse or justify the homicide. *State v. Franks*, Op. No. 5758 (S.C. Sup. Ct. filed Aug. 12, 2020) (Shearouse Adv. Sh. No. 31 at 65), *pet. for rhrng pending, response requested* (Aug. 31, 2020). Though *Franks* is not final as of the submission of Respondent's initial brief, this Court therein found the implied malice instruction harmless on those facts, finding the charge not confusing given the record, and that "there was overwhelming evidence of malice apart from the mere use of a deadly weapon." *Id.* at 82-83.

Here, the court's complete malice charge included language defining malice as "hatred, ill will, or hostility towards another person," as "the intentional doing of a wrongful act without

[5] "The trial court is required to charge only the current and correct law of South Carolina." *State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 583 (2010).

just cause or excuse, and with an intent to inflict injury or under circumstances that the law will infer an evil intent," and that it "may be inferred from conduct showing a total disregard for human life." (Tr. p.384, line 22 – p. 385, line 25). Given the totality of the malice instruction, the challenged portion could not have acted to confuse or mislead the jury. *See State v Stukes*, 416 S.C. 493, 787 S.E.2d 480 (2016) (jury instructions should "enlighten the jury and aid it in arriving at a correct verdict," and may not be confusing or misleading). Neither party presented evidence which would reduce, mitigate, excuse or justify the shooting. Neither party presented evidence of "just cause or excuse" for the killing. Instead, the State's fact witnesses indicated they did not know of any reason for Appellant to have acted with malice. The victim's daughter and nephew each testified they had never seen Appellant and the victim argue and they had never seen Appellant with a gun. Neither witness could pinpoint any reason for the shooting to have occurred. (Tr. p. 76, line 21 – p. 77, line 3; Tr. p. 89, lines 20-21; Tr. p. 109, lines 1-5; Tr. p. 110, lines 1-12; Tr. p. 131, lines 12-14; Tr. p. 132, lines 18-24).

However, the State presented overwhelming evidence of malice apart from the use of a gun: the victim was killed under the cover of darkness while in a peaceful slumber, without time or occasion to react in her own defense. There was no evidence of a struggle. Save for a close-range gunshot wound to the forehead, family and first responders found the victim in an otherwise undisturbed state with her CPAP machine in place and the blankets pulled up to her chest. (Tr. p. 127, lines 17-24). The victim did not have any money which might have induced Appellant to rob her. (Tr. p. 106, lines 7-14). More, no one other than the persons inside the home had access to the victim at the time. The doors had been dead bolted from the inside, no one else had a key to the home, and the other two occupants were asleep. (Tr. p. 82, lines 1-9; Tr. p. 99, line 1 – p. 100, line 20; Tr. p. 129, lines 3-8; Tr. p. 132, lines 10-17). Appellant, previously

asleep in the chair in the victim's bedroom, was gone. (Tr. p. 97, lines 18-24; Tr. p. 101, lines 11-13).

Other evidence showed Appellant acted in a manner consistent with consciousness of guilt immediately after the shooting. *See State v. Orozco*, 392 S.C. 212, 220, 708 S.E.2d 227, 231 (noting evidence of "unexplained" flight "is admissible as indicating consciousness of guilt, for it is not to be supposed that one who is innocent and conscious of that fact would flee"), *overruled on other grnds by State v. Stukes*, *supra*. Right after hearing a gunshot, a neighbor rushed to his porch and saw a black woman hurrying away from the direction of the victim's home. (Tr. p. 145, line 13 – p. 147, line 8). Appellant showed up at her daughter's in the early morning hours wearing nothing but a bra and a pair of jeans and acting nervous. (Tr. p. 298, lines 22-25; Tr. p. 300, lies 11-12; Tr. p. 311, line 21 – p. 312, line 15). It was November and it was cold. (Tr. p. 263, line 10-27). Appearing tired and sweaty, Appellant refused to tell her daughter and her boyfriend what was going on and asked to take a shower. (Tr. p. 269, lines 1-21). Later that day, her daughter told investigators Appellant told her she may have hurt someone. Though she disavowed the veracity of that statement at trial, the jury was free to consider her credibility. (Tr. p. 301, lines 6-16).

Therefore, upon circumstantial evidence alone, Appellant's jury was left to conclude whether Appellant did or did not shoot the victim. Not only was there no evidence to support any lesser offense, but there was no conflicting evidence of intent for the jury to consider. Notably, the State was not required to present evidence of any clear motive in order to establish malice, as "motive is not an element of murder." *State v. Smith*, 307 S.C. 376, 385, 415 S.E.2d 409, 414 (Ct. App. 1992), *cert. dismissed as improvidently granted* (Nov. 10, 1993). The jury was free to consider the absence of motive in its deliberations. *See State v. Edwards*, 127 S.C. 116, 120 S.E.

490 (1923). Further, Appellant's jury did not appear confused by the malice instruction. The jury returned four questions during nearly four hours of deliberations, none of them concerning malice or the elements of murder. (Tr. p. 389, lines 11-13; Tr. p. 390, lines 21-24; Tr. p. 395, lines 3-10).[6] The error should be found harmless as, beyond a reasonable doubt, it did not contribute to the verdict.

[6] The jury submitted questions about the verdict form, about the charge on reasonable doubt and on circumstantial evidence, and about the possession of a weapon during the commission of a violent crime.

STANDARD FOR REVIEW FOR ISSUES II AND III

"The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." *State v. Saltz,* 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *State v. Jennings*, 394 S.C. 473, 477-78, 716 S.E.2d 91, 93 (2011). "The improper admission of hearsay is reversible error only when the admission causes prejudice." *State v. Weston*, 367 S.C. 279, 288, 625 S.E.2d 641, 646 (2006); *State v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150, 150-51 (1985). Appellate courts "will not set aside convictions due to insubstantial errors not affecting the result." *State v. Sherard,* 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991).

II. Because the State's investigator testified about what he learned at the scene that informed the next steps in his investigation, the testimony was not offered for the truth of the matter asserted and was not inadmissible hearsay.

The State called homicide investigator Antonio Bailey of the Greenville County Sheriff's Office. (Tr. p. 198, lines 23-24). He had been dispatched to work the scene. (Tr. p. 205, lines 1-4). Bailey testified he began his investigation by asking "cursory questions" of people at the scene, which included Ruby Lynn Smith. (Tr. p. 208, lines 3-7; Tr. p. 209, lines 6-10). He learned she was the victim's daughter. (Tr. p. 208, line 4). "She indicated that there was a female only known to her as Denise" at the house that evening. (Tr. p. 208, lines 21-24).

Over Appellant's hearsay objection, the court permitted Bailey to testify the victim's daughter "talked about her mother being on a breathing machine and that she had to get up to put water in her mother's breathing machine . . . maybe around 4:00[.]" (Tr. p. 209, line 11 – p. 210,

line 4). "[S]he said when she walked in the room, her mom was there in the bed. She put water in the machine. And there was – Denise was sitting in a chair in her bedroom." (Tr. p. 210, lines 5-7). "She said, you know, she left and came back about maybe 30 or 45 minutes later. And she noticed that Denise was gone and her mother was laying there with – bleeding from the head." (Tr. p. 210, lines 8-11). Bailey next testified that he wanted to investigate the identity of Denise, (Tr. p. 210, lines 12-14), so he "tasked" others on his team "with the responsibility of finding out as much as they could about this person we knew only as Denise." (Tr. p. 211, lines 7-11).

"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." *In re Care & Treatment of Harvey*, 355 S.C. 53, 61, 584 S.E.2d 893, 897 (2003) (citing Rule 801, SCRE). "Hearsay is not admissible unless there is an applicable exception." *Id.* at 61-62, 584 S.E.2d at 897 (citing Rule 803, SCRE). But not all out-of-court statements constitute hearsay. Rule 801, SCRE. "It is well settled that evidence is not hearsay unless offered to prove the truth of the matter asserted." *State v. Vick*, 384 S.C. 189, 199, 682 S.E.2d 275, 280 (Ct. App. 2009). "Additionally, an out of court statement is not hearsay if it is offered for the limited purpose of explaining why a government investigation was undertaken." *State v. Brown*, 317 S.C. 55, 63, 451 S.E.2d 888, 894 (1994); *United States v. Love*, 767 F.2d 1052, 1063-64 (4th Cir. 1985), *cert. denied*, 474 U.S. 1081, 106 S.Ct. 848 (1986) (statement by officer not hearsay when "not offered for its truth but only to explain why the officers and agents made the preparations that they did in anticipation of the appellants' arrest").

As the State argued in this case, Bailey did not recite the information he gleaned from the victim's daughter at the scene in order to prove its truth. (Tr. p. 209, lines 16-19). Bailey's testimony described how he began his investigation once he arrived on scene. At the time he

spoke to the victim's daughter, Bailey and his team "were just beginning [their] investigation." (Tr. p. 209, lines 6-7). Bailey was orienting himself to the scene rather than conducting any "in depth" interview for the purpose of establishing a suspect. (Tr. p. 29, lines 8-10). Bailey's testimony, including the challenged statement, showed only that he responded to the call and initially acted to gain a general understanding of what had occurred prior to his arrival. In *State v. Kirby*, 325 S.C. 390, 481 S.E.2d 150 (Ct. App. 1996), this Court similarly found an officer permissibly testified about a dispatcher's notification that he should be on the lookout for a particular vehicle. 325 S.C. at 393, 481 S.E.2d at 151. This Court found the testimony about the dispatcher not hearsay because it "was not offered for the truth of the matter asserted, but rather, served only to explain the reason for the initiation of police surveillance of the vehicle in question." 325 S.C. at 396, 481 S.E.2d at 153 (citing *United States v. Love, supra*).

As in *Kirby*, Bailey's interaction with the victim's daughter informed the next *logical* steps of his investigation. Furthermore, Bailey did not identify anyone, let alone Appellant, as a perpetrator. This is discernable from eliciting hearsay testimony for the purpose of establishing who was responsible for the crime that had occurred. *Compare State v. Jolly*, 314 S.C. 17, 20, 443 S.E.2d 566, 568 (1994) ("testimony regarding the [child victim's] prior statement that identified Jolly as the perpetrator clearly does not fall into any of the hearsay exceptions"). Here, the alleged hearsay statement did not address or imply culpability—only that there was, or had been, some other person at the victim's home that investigators should better identify. As a result, the challenged statement was not offered for the truth of the matter asserted, but as an explanation for what steps the Greenville Sheriff's Department took to continue the investigation in this case. *State v. Sims*, 304 S.C. 409, 420, 405 S.E.2d 377, 383 (1991), *cert. denied,* 502 U.S. 1103, 112 S.Ct. 1193 (1992) ("the officer's testimony was not hearsay as it was not offered to

prove that Sims intended to kill the woman in question"); *State v. Brown*, 317 S.C. at 63, 451 S.E.2d at 894.

Moreover, for much of the same reason, any error in the admission of this testimony is harmless, as it could not reasonably have affected the result of the trial. *See State v. Mitchell*, 286 S.C. at 573, 336 S.E.2d at 151. Because the alleged statement did not address culpability, it was not prejudicially corroborative of the earlier testimony from the victim's daughter. (*See* Tr. p. 101, lines 11-13). The challenged statement is further innocuous to the outcome of the trial because Bailey also testified that he continued to investigate the case for "probably five months" prior to making any arrest, (Tr. p. 215, lines 13-15), and that he did not limit his investigation to Appellant, but rather investigated "several" possible suspects. (Tr. p. 215, lines 16-17; Tr. p. 216, lines 23-25).

Any error is also harmless where guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached. *See State v. Mitchell*, *supra.* As discussed in regards to Issue I above, Appellant exhibited consciousness of guilt when she arrived at her daughter's house in the early morning hours wearing no shirt, acting nervous, and requesting a shower and a change of clothes. (Tr. p. 298, lines 22-25; Tr. p. 300, lies 11-12; Tr. p. 311, line 21 – p. 312, line 15). Appellant refused to explain herself. (Tr. p. 269, lines 1-21). Moreover, hearing a gunshot, the victim's neighbor rushed outside to see a black woman hurrying away from the direction of the victim's home. (Tr. p. 145, line 13 – p. 147, line 8).

III. Because Bailey's re-direct testimony that he cleared Portia as a suspect related to his own investigation, it was not hearsay and was further elicited in response to the details of that investigation interjected during Appellant's cross-examination of Bailey.

On cross-examination, Bailey testified that law enforcement investigated Portia, the victim's granddaughter, who fired a pistol into the air in the victim's yard the evening before the victim was killed. (Tr. p. 226, line 15 – p. 227, line 25). He asked Portia, among others, to come in for an interview, "but she indicated that she had outstanding warrants" and refused. (Tr. p. 228, lines 1-13). Later, Portia "was being held on unrelated charges" and was at that time found in possession of a 22-caliber pistol. (Tr. p. 230, line 7 – p. 231, line 25). Bailey submitted that pistol for comparison to the bullet fragments and jacket recovered from the victim. (Tr. p. 232, lines 1-19). Portia had also been found in possession of a different pistol in 2019, (Tr. p. 233, line 5-20), which was not compared to the ballistics recovered in the victim's case. (Tr. p. 234, lines 9-13).

On re-direct, Bailey testified that he also sought to obtain Portia's phone records, "trying to substantiate all the information" he had received, but was able to validate where Portia was at the time of the shooting without them. (Tr. p. 237, lines 12-25). He concluded Portia was nowhere near the victim's at the time of the shooting. (Tr. p. 238, lines 1-3). Over Appellant's objection, Bailey testified Portia "was absolutely cleared" as a suspect. (Tr. p. 238, lines 11-14). Without objection, Bailey next testified that he did not believe Portia had anything to do with the victim's death. (Tr. p. 238, lines 15-17).

Bailey's testimony that he personally eliminated Portia as a suspect in this case does not constitute an out-of-court statement, made by anyone other than the person testifying at trial, and is not hearsay. Rule 801, SCRE. Bailey's testimony that he cleared Portia as a suspect

permissibly addressed his own conduct during the investigation of this case. Rule 601, SCRE; *see also* Rule 701, SCRE. And, while "[a] prosecutor cannot vouch for the credibility of a witness by expressing or implying his personal opinion concerning a witness' truthfulness," Bailey's testimony on this point could not vouch for or bolster Portia's veracity, because Portia was not called as a witness in this case. *State v. Shuler*, 344 S.C. 604, 630, 545 S.E.2d 805, 818 (2001).

Moreover, the State did not delve into the outcome of that investigation until after the defense attacked its credibility on cross-examination. *See id.* at 631, 545 S .E.2d at 819. "A party may introduce otherwise inadmissible evidence in rebuttal when an opponent introduces evidence as to a particular fact or transaction" so long as the responsive testimony is "'proportional and confined to the topics to which counsel had opened the door.'" *State v. Heyward*, 426 S.C. 630, 636-37, 828 S.E.2d 592, 595 (2019), *reh'g denied* (June 28, 2019) (quoting *Bowman v. State*, 422 S.C. 19, 42, 809 S.E.2d 232, 244 (2018)); *State v. Page*, 378 S.C. 476, 482, 663 S.E.2d 357, 360 (Ct. App. 2008) (collecting cases). Appellant interjected the specifics of Bailey's investigation of Portia as evidence during his cross-examination of Bailey. The State thereafter elicited a proportional response regarding the outcome of that investigation, which Bailey himself lead. The jury remained free to consider whether Portia's firing of a pistol and argument with the victim's daughter on the evening of the shooting created reasonable doubt as to Appellant's culpability. (*See* Tr. p. 82, line 10 – p. 85, line 21).

Finally, Bailey's testimony that he cleared Portia as a suspect was cumulative to that of James Armstrong, the State's expert in firearms examination and identification, such that any error in its introduction "could not reasonably have affected the trial's outcome." *State v. Page*, 378 S.C. at 483, 663 S.E.2d at 360 (error in finding that defense counsel opened the door to the

admission of unredacted statement of non-testifying co-defendant was harmless, as the unredacted statement was cumulative of other testimony presented at trial). Armstrong testified that he examined a "caliber 38 – or nine-millimeter fired bullet jacket" and "a caliber 38-nine millimeter fired bullet core" collected in association with this case. (Tr. p. 253, line 14 – p. 255, line 14). He testified it was "[i]mpossible" for these evidentiary items to have been fired by a 22-caliber handgun because a 22-caliber "is much smaller than the nine millimeter." (Tr. p. 256, lines 2-15). Thus, not only did Portia not have any dispute with the victim, (Tr. p. 82, line 10 – p. 85, line 21), but the 22-caliber Portia had in her possession upon her later, unrelated, arrest could not have been responsible for the victim's death. (Tr. p. 230, line 7 – p. 231, line 25).

CONCLUSION

For all of the foregoing reasons, Respondent respectfully submits that this Court should affirm Appellant's convictions and sentence for murder and possession of a weapon during the commission of a violent crime.

Respectfully submitted,

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September 8, 2020
Columbia, South Carolina

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
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SC Court of Appeals

Appeal from Greenville County
Letitia H. Verdin, Circuit Court Judge

Appellate Case No. 2019-001013

THE STATE,

Respondent,

vs.

MALETTE DENISE KIMBROUGH,

Appellant.

CERTIFICATE OF SERVICE

I, Donna D'Alessio, as an employee of the Respondent, hereby certify that as per the March 20, 2020 Order of the Chief Justice, the Initial Brief of Respondent and Designation of Matter, and Certificate of Service have been forwarded to Appellant's counsel, Robert M. Dudek, Esq., via email today, August 25, 2020 to RDudek@sccid.sc.gov and to Mr. Dudek's assistant, Haley Kellner, Hkellner@sccid.sc.gov.

I further certify that all parties required by Rule to be served have been served.

This 8th day of September, 2020.

Donna D'Alessio

Donna D'Alessio
Legal Assistant to Caroline Scrantom
Assistant Attorney General

Donna D'Alessio

From: Donna D'Alessio
Sent: Tuesday, September 8, 2020 10:42 AM
To: 'rdudek@sccid.sc.gov'
Cc: Kellner, Haley (hkellner@sccid.sc.gov)
Subject: Kimbrough, Malette D. - Appellate Case No. 2019-001013 - Initial Brief of Respondent, Designation of Matter and Cert of Service 9-8-2020
Attachments: Kimbrough, Malette D. - Appellate Case No. 2019-001013 - Initial Brief of Respondent, DOM, & COS 9-8-2020 (02373043xD2C78).pdf

Dear Mr. Dudek:

Attached is a scanned copy of the Initial Brief of Respondent, Designation of Matter, and Certificate of Service regarding the above matter. A paper copy is being mailed to you this afternoon. The Initial Brief and supporting documents are being submitted to the South Carolina Court of Appeals through e-filing, along with a copy of this email.

Hope you are well, and thank you.

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