THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

APPEAL FROM BERKELEY COUNTY

Court of General Sessions

Honorable R. Markley Dennis, Circuit Court Judge

APPELLATE CASE NO. 2017-002104

THE STATE . . . . . RESPONDENT

v.

SAMUEL LEE BROADWAY. . . . . APPELLANT

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATION

Pursuant to Rule 242(d)(1), South Carolina Appellate Court Rules, I certify that a petition for rehearing was made and finally ruled on by the Court of Appeals.

s/ *Meredith McPhail*

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STATEMENT OF ISSUE ON APPEAL

DID THE TRIAL COURT ERR IN SUSTAINING THE STATE'S HEARSAY OBJECTIONS?

STATEMENT OF THE CASE

Appellant Samuel Broadway was indicted on October 11, 2016, for one count of Leaving the Scene of an Accident Which Resulted in Death, in violation of S.C. Code § 56-5-1210. (R. p. 5). A jury in Berkeley County heard the State's case against Broadway beginning on November 28, 2016. (R. p. 60). During trial, the defense attempted to introduce testimony that Broadway asked his in-laws to contact police as evidence that Broadway complied with the statute. (R. p. 389–93). However, the trial court excluded the testimony on hearsay grounds. (R. p. 389–93).

Broadway was convicted on the sole count of the indictment on November 30, 2016. (R. pp. 3–4). The trial court sentenced Broadway to twelve years' incarceration. (R. p. 4). On December 7, 2016, Broadway filed a motion under Rule 29(a) requesting a new trial and moved the court to reconsider his sentence. (R. pp. 7–10, 11–57). Broadway's motion for new trial, which included the issue raised here, was denied. (R. p. 1). Broadway's motion to reconsider his sentence was orally granted by the trial court, and Broadway was ultimately sentenced to eighteen years, suspended upon the service of eight years. (R. p. 2, 523). A written order memorializing the court's modification of Broadway's sentence was filed on October 17, 2017. (R. p. 2).

Broadway filed a timely notice of appeal on October 4, 2017. (R. p. 58). The Court of Appeals rejected Broadway's appeal on April 29, 2020, and his petition for rehearing was finally denied on September 8, 2020.

FACTS

The present case arose out of a traffic accident that took place on the night of March 7, 2015, and resulted in the death of Jesse Feagin. Broadway was charged and convicted for violating S.C. Code § 56-5-1210, Leaving the Scene of an Accident, based on the State's allegation that Broadway's vehicle struck Feagin's moped and that Broadway subsequently left the scene of the accident without notifying the police that the accident took place. The State further alleged that Feagin's injuries from the collision caused his death.[1]

On the night of the incident, Feagin was repairing a moped for an acquaintance. (R. p. 169; Tr. 110). The moped's owner had contacted Feagin repeatedly asking for him to return the moped after completing the repairs. (R. p. 169; Tr. 110). Once Feagin completed the repairs at approximately 1:45 a.m. that night, Feagin decided to return the moped to its owner immediately, despite the late hour. (R. pp. 169–70; Tr. 110–11). Feagin then set out down a dark roadway in Berkeley County, riding on the moped. (R. p. 162; Tr. 103). Feagin's girlfriend, Richley Campbell, followed behind him in her car. (R. p. 171; Tr. 112). As they approached a stop sign at the intersection of Domingo Road and 176, Feagin and Campbell both stopped. (R. p. 172; Tr. 113). Moments later, Feagin turned left onto 176. (R. p. 172; Tr. 113). Campbell, who was still behind Feagin in her vehicle, pulled up to the intersection and then looked both ways, and she noticed that Feagin was pulling out in front of an oncoming vehicle which was traveling down 176 in the same direction Feagin was turning. (R. p. 172; Tr. 113). Campbell believed that the vehicle was going to rear-end Feagin's moped, so she quickly pulled her car out into the intersection and pulled up behind Feagin's moped with the expectation that the oncoming vehicle

[1] The M.U.S.C. trauma doctor who treated Feagin testified that Feagin passed away as a result of traumatic brain injury suffered during the collision. (R. pp. 329–31; Tr. 270–72).

would instead strike the back of her car. (R. pp. 173, 183–84; Tr. 114, 124–25). The oncoming car, driven by Broadway, swerved off the road to avoid Campbell's car, fishtailing into the grass on the right-hand side of the road and skidding around Campbell's car. (R. p. 173; Tr. 114). As Broadway struggled to regain control of his car, he re-entered the roadway in front of Campbell's car, striking Feagin's moped. (R. p. 174; Tr. 115).[2] Campbell testified that after the collision took place, Broadway's car continued down the roadway, turning right at an intersection further down the road. (R. p. 174–75; Tr. 115–16). Campbell stopped her car and called 911. (R. pp. 176–77; Tr. 117–18). She remained on the scene of the collision until police and paramedics arrived. (R. pp. 178–79; Tr. 119–20). The first responders who arrived at the scene of the collision discovered Feagin unconscious at the side of the road. (R. pp. 321–23; Tr. 262–64). Feagin was airlifted from the scene of the collision to M.U.S.C., where he was later pronounced dead. (R. pp. 325–26, 329–31; Tr. 266–67, 270–72).

After the departing from the scene of the collision, Broadway drove to BFE Bar, which is approximately two miles away. (R. pp. 200, 209; Tr. 141, 150). An individual who was standing in the parking lot of BFE Bar when Broadway arrived testified for the State at trial. (R. pp. 195–215; Tr. 136–56). He stated that he observed Broadway drive up to the parking lot of the bar and that he recognized Broadway; he stated that Broadway had been at the BFE Bar earlier that evening. (R. p. 200; Tr. 141). The man observed that Broadway appeared to be very upset. (R. p.

[2] The State's witness from the Goose Creek Police Department's Traffic Unit who reconstructed the accident scene corroborated this account of the collision during his testimony. "The point of impact was the vehicle traveling southbound . . . The moped was struck by a vehicle traveling southbound on 176 and pushed southbound towards 17A." (R. pp. 259–60; Tr. 200–01). The witness further acknowledged that his photographs included skid marks in the grass where Broadway's vehicle left the roadway and then re-entered the roadway. (R. p. 299; Tr. 240). Lastly, the witness acknowledged that Richley Campbell had admitted to pulling out in front of Broadway's car immediately before the collision took place. (R. p. 299; Tr. 240).

206; Tr. 147). Broadway said that he had just hit someone on 176 and that he needed to find his phone. (R. pp. 200, 205; Tr. 141, 146). Broadway then knocked on the door to the bar, telling bystanders that he had forgotten his phone inside. (R. p. 200; Tr. 141). However, by that time, the bar had already closed for the night, and Broadway could not get inside. (R. p. 198; Tr. 139). Broadway asked several bystanders if he could use their phones. (R. pp. 200–01; Tr. 141–42). The witness from the parking lot stated that he declined Broadway's request to use his phone. (R. pp. 201, 211; Tr. 142, 152). The eyewitness testified that minutes later, Broadway appeared to find his phone on the floorboard of his car. (R. p. 206; Tr. 147). Broadway then left the area and proceeded to the home of Harvey and Marlene Burton, Broadway's in-laws. (R. pp. 334, 388; Tr. 275, 329). Their home is approximately three to five miles from the site of the collision. (R. p. 94; Tr. 35).

Broadway's Statements to the Burtons

Both Harvey Burton and Marlene Burton were home when Broadway arrived at their house that night. (R. pp. 332-342, 387–98; Tr. 273–83, 328–39). Harvey Burton testified that when Broadway arrived at the Burton house, Broadway informed the Burtons that he had been in an accident and that he had hit a moped. (R. p. 335; Tr. 276). According to Harvey, Broadway went to sleep after discussing whether they should call the police. (R. p. 336; Tr. 277). Harvey Burton testified that he decided to call the police of his own accord. (R. p. 336; Tr. 277).

Marlene Burton attempted to contradict Harvey Burton's account of their interaction with Broadway. During her testimony, she attempted to state that Broadway asked the Burtons to call the police, but the State posed hearsay objections to this testimony, which the trial court sustained. (R. pp. 389–93; Tr. 330–34). Marlene Burton's testimony included the following:

> Q: Okay. Tell the jury what – how did [Broadway] arrive? What happened?

A: Well, we were all in bed. I heard I think it was a knock at the door. I went to answer the door. I flipped the light on and it's Sam. And of course, I'm very outspoken. What in the are (sic) you doing here this time of day – night? And he said –

MR. MCNEELY: Objection, Your Honor.

THE COURT: Sustained. It's hearsay.

THE WITNESS: When I asked him what he was doing there, he told me –

MR. MCNEELY: Objection, Your Honor.

THE COURT: Sustained.

. . .

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

MR. MCNEELY: Objection, Your Honor.

THE COURT: Sustained. It would be hearsay.

. . .

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

A: No.

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

A: Yes.

Q: Why did Mr. Burton call the police?

A: Sam asked him to call.

MR. MCNEELY: Objection, Your Honor.

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

Q: At any point in your discussions, everyone at the house, did Mr.

> Broadway try to stop anyone from calling the police?
>
> A: No, he did not.
>
> Q: Okay. Based on your observations at the house, did [Broadway] want you to call the police?
>
> MR. MCNEELY: Objection, Your Honor.
>
> THE COURT: Sustained. That would call for speculation on the part of the witness. I will not allow it under 602.
>
> . . .
>
> Q: Did he direct you to call the police?
>
> MR. MCNEELY: Objection, Your Honor.
>
> THE COURT: Sustained. It's hearsay.

(R. pp. 389–93; Tr. 330–34). The trial court then instructed the jury to disregard Marlene Burton's description of Broadway's statement. (R. p. 392; Tr. 333).

Broadway's Statements to Police

It is undisputed that Harvey Burton did, in fact, call the police after speaking with Broadway. (R. p. 341; Tr. 282). When police responded to the Burton home, they questioned Broadway about his involvement with the collision on 176 earlier that evening. (R. p. 356; Tr. 297). One of the officers spoke with Broadway for approximately five to ten minutes. (R. p. 96; Tr. 37). The State presented a copy of the video captured by Davis's in-car recording equipment. (R. pp. 98–100; Tr. 39–41).[3]

The video was played during the State's case-in-chief over trial counsel's objection.[4] (R.

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

[4] Prior to trial, Broadway moved the court under *Jackson v. Denno*, 378 U.S. 368 (1964), to exclude the video recording of the statement that he made to police at the Burton home. (R. pp. 93, 110–11; Tr. 34, 51–52).

pp. 358–59; Tr. 299–300). Broadway informed the officers that he had been at BFE Bar earlier that evening. (State's Ex. 3, 06:11:36).[5] Broadway stated that at some point after he got home, he realized he had lost his phone. (State's Ex. 3, 06:11:50). Broadway decided to go back to BFE Bar to find his phone. (State's Ex. 3, 06:11:55). Broadway said that as he was driving there, a car pulled out in front of him. (State's Ex. 3, 06:12:05). Broadway told the officers that as he swerved to avoid the car, he noticed another vehicle in front of that car, and that he heard something hit his car. (State's Ex. 3, 06:12:20). Broadway said that he left the scene of the collision and came to the Burtons' home. (State's Ex. 3, 06:13:30). After Broadway gave his account of the events earlier that evening, Officer Davis said that he was concerned that Broadway may be impaired. (State's Ex. 3, 06:15:00). The officer then asked Broadway whether he would be willing to provide a blood sample for testing. (State's Ex. 3, 06:15:00). Broadway declined. (State's Ex. 3, 06:16:00). Broadway was then asked to give a written statement, which he agreed to do. (State's Ex. 3, 06:16:55). That handwritten statement was also tendered and admitted subject to counsel's pre-trial objection. (R. pp. 362–63; State's Ex. 37; Tr. 303–04).

At the conclusion of the trial, the jury convicted Broadway on the sole count of the indictment. (R. p. 471; Tr. 412). Broadway now appeals.

PROCEDURAL HISTORY

The issue argued here was presented to the Court of Appeals along with an argument under *Jackson v. Denno*, 378 U.S. 368 (1964), that Broadway's statement to the police should be suppressed. The court denied both of Broadway's claims. Affirming the trial court's hearsay ruling, the Court of Appeals held that "[t]he trial court did not abuse its discretion in sustaining the State's hearsay objections because Broadway offered the statement for the truth of the matter

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

asserted." It offered only the following sentence, followed by a long and largely unsupportive string cite, to explain its ruling: "Broadway's various arguments as to why the statement was admissible do not apply to this case." *State v. Broadway*, 2020 S.C. App. Unpub. LEXIS 145, at *1–3 (S.C. Ct. App., April 29, 2020). Broadway's petition for rehearing was denied on September 8, 2020.

ARGUMENT

A. Standard of Review

"The admission or exclusion of evidence is a matter within the trial court's sound discretion, and an appellate court may only disturb a ruling admitting or excluding evidence upon a showing of a 'manifest abuse of discretion accompanied by probable prejudice.'" *State v. Commander*, 396 S.C. 254, 262–63, 721 S.E.2d 413, 417 (2011) (quoting *State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (2006)). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006).

B. The trial court erred in sustaining the government's hearsay objections.

Broadway's request that Mr. Burton call the police was not hearsay.

Hearsay is an out-of-court statement offered in court to prove the truth of matter asserted. S.C. R. Evid. 801. Thus, for an expression to constitute hearsay, four requirements must be met: (1) the expression occurred out of court, (2) the expression was a "statement," (3) the statement was offered in court, and (4) the statement was offered to prove the truth of the matter asserted. *Id*. Broadway's request was not a "statement" under 801 because it did not contain an assertion. Because requirement (2)—the requirement that the expression was a "statement"—is not met, Broadway's request was not hearsay. And even if Broadway's request was a "statement" under

Rule 801, requirement (4) remains unmet because Broadway's words were not offered to prove the truth of the matter asserted. Broadway's request to the Burtons was not hearsay, and therefore, the trial court committed legal error by excluding it. The error was highly prejudicial because it wholly undermined Broadway's defense that he complied with the statute by instructing the Burtons to notify proper authorities about the accident.

Broadway's request to Mr. Burton was not a "statement" under S.C. R. Evid. 801 because it contained no assertion; therefore, it was not hearsay.

"'Hearsay' is a *statement*, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." *Thomas v. Dootson*, 377 S.C. 293, 659 S.E.2d 253, 256 (2008) (emphasis added); S.C. R. Evid. 801(c). A statement is an "oral or written *assertion* or . . . nonverbal conduct of a person, if it is intended by the person as an *assertion*." S.C. R. Evid. 801(a) (emphasis added). By definition, hearsay must contain a statement, and by definition, a statement must contain an assertion. Therefore, if there is no assertion, there is no statement, and there is no hearsay.

To "assert" simply means "to say that something *is so*, e.g. that an event *happened* or that a condition *existed*." KENNETH S. BROUN, MCCORMICK ON EVIDENCE § 246 (6th ed. 2006) (emphasis added). It is, according to Black's Law Dictionary, "to state *positively*." (Emphasis added). An assertion, simply put, is the expression of a fact. It must be capable of being true. Otherwise, the concern of hearsay doctrine—that an out-of-court statement would be offered in court to prove the *truth* of the matter asserted—is not implicated. Necessarily, then, an assertion must also have the potential to be false. It must be falsifiable.

To determine whether a given statement contained an assertion, a court looks to the words themselves. Here, the utterance in question is Broadway's request that Harvey Burton call the police. Broadway's exact words are not in the record, but it is fair to assume that (according

to Mrs. Burton's proffered testimony) he said something along the lines of "Harvey, call the police." Broadway's request that Mr. Burton call the police conveys no factual substance; it cannot be proven or disproven; and it cannot be contradicted or shown to be false. Therefore, it was not an assertion. Consequently, it was not a statement and cannot be hearsay.

Broadway's request not offered to prove the matter asserted, but rather as conduct with legal significance.

Moving beyond this fundamental problem and assuming *arguendo* that the instruction to call police was an assertion, and therefore a statement, the defense had several valid non-hearsay purposes for offering Broadway's request to Mr. Burton. *See State v. Cox*, 274 S.C. 624, 628, 266 S.E.2d 784, 786 (1980).

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

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

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

Turning to the present case, Broadway was convicted for violating S.C. Code § 56-5-1210, which states that an individual who has been involved in an accident resulting in injury or death "may temporarily leave the scene to report the accident to the proper authorities." Much like in *Waites*, the fact that Broadway notified the Burtons of the accident and then asked them to call the police was conduct with legal significance. Mrs. Burton's testimony should have been admitted as evidence that Broadway's complied with S.C. Code § 56-5-1210.

Broadway's request was not offered to prove the matter asserted, but rather to show the effect on the listeners—Harvey and Marlene Burton—and to explain the Burtons' subsequent conduct.

"Proof of a statement introduced for the purpose of showing a party . . . acted upon it is not objectionable on the ground of hearsay." *Webb v. Elrod*, 308 S.C. 445, 449, 418 S.E.2d 559 (S.C. Ct. App. 1992) (citing *Player v. Thompson*, 259 S.C. 600, 193 S.E.2d 531 (1972)); *see also Caprood v. State*, 338 S.C. 103, 111, 252 S.E.2d 514, 518 (2000) (holding that statements by police officers about other, unrelated offenses were not hearsay because the "officers were explaining their actions . . . and the statements were not offered for their truth"). *Webb* involved a dispute between two parties arising from the defendants' alleged interference with the plaintiffs' contractual relations with third parties. *Id*. at 446. The plaintiffs were prevented from introducing statements made by one of the defendants to those third parties, even though they

argued that these statements were admissible to show that the third parties acted upon the defendants' statements to the detriment of the plaintiffs. *Id*. at 448–49. The appellate court acknowledged that such statements are generally admissible and that when a statement is presented to prove that the listener relied upon the statement, a hearsay objection will not prevail. *Id*. at 449.[6]

Here, Broadway's statement to the Burtons that they should call the police was properly admissible to show that Harvey Burton's call to police was at Broadway's behest. Broadway's compliance with S.C. Code § 56-5-1210 was at issue in this case, so the fact that Broadway had, by Marlene Burton's account, instructed the Burtons to call the police was highly relevant. The admission of Broadway's statement to the Burtons would have permitted the jury to conclude that Harvey Burton called the police as a direct consequence of Broadway's statement. In this regard, Broadway's statement was not hearsay but rather evidence explaining the Burtons' subsequent conduct. Because the evidence was not offered for the truth of the matter asserted, the trial court erred by sustaining the State's hearsay objections.

Broadway's request was not offered to prove the matter asserted, but rather to show his state of mind.

In *State v Lewis*, 293 S.C. 107, 359 S.E.2d 66 (1987), the Supreme Court considered the appeal of a defendant who had been convicted for her involvement in a murder-for-hire plot. *Id*. at 108. After Lewis's cousin was murdered, the State alleged that Lewis had hired her co-defendant Lee Grant Bellamy to kill her cousin and that Bellamy had carried out the killing. *Id*. at 109–10. At their joint trial, Bellamy testified that he purchased the murder weapon not because he intended to kill Lewis's cousin with it, but actually because Bellamy had heard

[6] The lower court ruling was ultimately affirmed, however, because defendant could not show prejudice. *Id*. at 449.

rumors that Lewis had made threats on his life. *Id*. 110. Lewis objected to this testimony on hearsay grounds, but the court overruled her objection. *Id*. at 110–11. When Lewis raised this issue on appeal, the South Carolina Supreme Court held that Bellamy's testimony regarding alleged third-party statements was not hearsay because it was not offered for the truth of the matter asserted— *i.e*., "it was not offered to prove that Lewis intended to kill [Bellamy]." *Id*. at 110. "Rather," the Court continued, "it was offered to show Bellamy's state of mind, that is, the reason he bought the gun and had it with him on the night of the murder." *Id*. at 110–11.

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

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

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

And like in *Sims*, Broadway's request that the Burtons call the police explained Broadway's conduct in the minutes and hours that followed his arrival at the Burtons' home. Harvey Burton testified that Broadway simply went to sleep after informing the Burtons that the collision had taken place. (Tr. 276–77). Marlene Burton corroborated that portion of Harvey Burton's testimony, stating that after she spoke with Broadway, he went into the bedroom where his daughters were sleeping and laid across the foot of the bed. (Tr. 337). Based on the Burtons' account of events, it would seem that Broadway's actions after his arrival demonstrated at best total indifference towards whether the police were notified of the collision and perhaps even an affirmative attempt to avoid detection. However, if the jury had also learned that Broadway had directed the Burtons call the police before lying down, his subsequent conduct appears far more reasonable. In fact, this additional information completely undermines the inference that

Broadway intended to avoid police detection. On the contrary, Broadway's subsequent conduct could more easily be understood as manifesting his belief that the police would be on their way and that he had fulfilled his duty to notify law enforcement of the collision that had taken place.

The trial court's error prejudiced Broadway.

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

In the present case, there is more than a "reasonable probability" that the jury's verdict was influenced by the exclusion of Broadway's out-of-court statement. Indeed, Broadway's entire defense was predicated on the notion that he complied with the statute and that he made good-faith efforts to notify the police of the collision. The fact that Broadway allegedly directed the Burtons to call the police was the most critical piece of evidence to the defense. But the jury was left only with evidence that Broadway left the scene of the accident, attempted to locate his phone at BFE Bar, proceeded to the Burtons' home, informed them that he had been in a collision, and then rather than making attempts to notify the police, simply went to sleep. The prosecution latched onto these facts, making repeated references throughout closing argument to the fact that there was no evidence before the jury that Broadway had attempted to notify the police of the collision.[7] In fact, the State was permitted to offer affirmative testimony that

[7] "Mr. Broadway didn't ask people to call the police." (Tr. 374). "There is no testimony that [Broadway] tried to call 911." (Tr. 374). "Richley Campbell, which you've heard, and Harvey Burton who he told you about his 911 call. Those are the only two [911 calls]." (Tr. 377).

Broadway did *not* tell the Burtons to call police and that it was actually Harvey Burton who told Broadway to call the police. (Tr. 276, 283). Due to the exclusion of Marlene Burton's account of these events, Broadway was completely unable to contradict these arguments.

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

C. The trial court's error warrants review by the South Carolina Supreme Court.

This question is appropriate for Supreme Court review under Rule 242(b) because the decision of the Court of Appeals conflicts with multiple prior decisions of the South Carolina Supreme Court.

Each of the South Carolina Supreme Court decisions cited by the lower court, ostensibly in support of its reasoning actually points in Broadway's favor. As outlined above, both *Lewis* and *Sims* stand for the proposition that statements offered for reasons other than to prove the truth of the matter asserted are not objectionable on hearsay grounds. *Lewis*, 293 S.C. at 110–11;

"Well, if Mr. Broadway was intending to call the police, he never did it . . . He didn't call the police." (Tr. 378). "Mr. Broadway, by all accounts, didn't call the police at that time and Marlene [Burton] didn't call the police at that time." (Tr. 379). "Besides Richley Campbell, Harvey Burton is the only one that called 911 that morning." (Tr. 379). "Broadway never called the police or returned to the scene, which is required by the statute." (Tr. 379). "All [Broadway] had to do was stop, go get help, come back and we wouldn't be here today." (Tr. 380).

Sims, 304 S.C. at 420. Even the passages quoted by the lower court bolster that conclusion. (quoting the court in *Lewis* that "[The co-defendant's] testimony regarding what third parties told him as to Lewis's alleged threats to kill him was not hearsay as it was not offered to prove that Lewis intended to kill him. Rather it was offered to show [co-defendant's] state of mind, that is, the reason he bought a gun and had it with him on the night of the murder." and quoting the court's conclusion in *Sims* that the statement offered was not hearsay but rather was admissible to prove state of mind). In both cases, the Supreme Court ruled that the testimony was, in fact, admissible. The appellate court in this case made no attempt to distinguish *Lewis* or *Sims* and disregarded the Supreme Court's guidance in denying Broadway's claim.

The Court of Appeals cases cited by the lower court support Broadway's argument as well. The Court of Appeals here cited *Deep Keel* for the proposition that statements with "independent legal significance . . . are non[-]hearsay." *Broadway*, 2020 S.C. App. Unpub. LEXIS 145, at *2 (S.C. Ct. App. 2020) (alterations in original). In *Deep Keel*, the court actually affirmed the trial court's decision to admit the statement in question because it proved the existence of an agreement, which was legally significant.[8] *Deep Keel, LLC v. Atl. Private Equity Grp., LLC*, 413 S.C. 58, 69–71, 773 S.E.2d 607, 613 (S.C. Ct. App. 2015). The Court of Appeals did not distinguish Broadway's case from *Deep Keel* or explain why *Deep Keel* should not govern.

The court below did, however, attempt to distinguish *Webb*, 308 S.C. 445. *Broadway*, 2020 S.C. App. Unpub. LEXIS 145, at *3. The court quoted the passage in *Webb* that "[p]roof of a statement introduced for the purpose of showing a *party* relied and acted upon it is not

[8] Testimony based on the documents in question was ruled inadmissible on hearsay grounds, but the document itself—here, the statement in question—was admitted. *Id*. at 74.

objectionable on the ground of hearsay," adding emphasis to the word 'party.' *Id*. This emphasis signals that the appellate court distinguished *Webb* from Broadway's case on the basis that the statement offered by Broadway was offered to show reliance by a *non*-party. But this distinction is wholly irrelevant. In *Webb*, the reason the statement was admissible was because it was offered for a reason *other* than to prove the truth of the matter asserted (there, to show its impact on the listener)—not because its alleged impact was on a party specifically. *See Webb*, 308 S.C. at 449. In making such a distinction, the lower court revealed a serious misunderstanding of evidence law that requires correction.

The Court of Appeals also ignored entirely several Supreme Court cases cited by Broadway in his briefing, including *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 559, 658 S.E.2d 80, 87 (2008) ("[I]n some scenarios, words or utterances themselves from an out of court declarant may, regardless of their truth, accompany an ambiguous act and give the act legal significance, be used circumstantially, such as to show a state of mind, or form part of an issue in a case."); *Waites*, 279 S.C. at 365 ("Where, regardless of the truth or the falsity of a statement, the fact that it has been made is relevant, the hearsay rule does not apply, but the statement may be shown."); *Cox*, 274 S.C. at 628 (holding that the statement "Honey, please open the door" "was obviously not offered for the truth of the matter asserted and therefore, by definition, is not hearsay"); and *Player*, 259 S.C. at 610 ("Inasmuch as the testimony was not offered to prove the truth of the matter stated, but solely to prove notice, which is a state of mind, the hearsay rule does not apply.").

Moreover, the lower court defied the South Carolina Supreme Court's command that "where state law is based on a substantially similar federal counterpart, cases interpreting those federal provisions or procedures 'are certainly persuasive if not controlling' in construing the

state provisions." *S.C. Human Affairs Comm'n v. Zeyi Chen*, ___ S.C. ___, ___, 846 S.E.2d 861, ___, 2020 S.C. LEXIS 116, at *14–15 (S.C. 2020) (quoting *Orr v. Clyburn*, 277 S.C. 536, 540, 290 S.E.2d 804, 806 (1982)). Because S.C. R. Evid. 801(c) is "identical to the federal rule," according to the Note to Rule 801, this is one of those situations.

Under law interpreting the identical federal rule, a command generally does not constitute a statement and therefore cannot constitute hearsay. Rather, "statements assert propositions that may be true or false. They are distinct from other forms of communication, such as questions or commands. A command is not hearsay because it is not an assertion of fact." *Baines v. Walgreen Co.*, 863 F.3d 656, 662 (7th Cir. 2017) (internal quotation marks, alterations, and citations omitted); *United States v. Thomas*, 451 F.3d 543, 548 (8th Cir. 2006) ("[C]ommands generally are not intended as assertions, and therefore cannot constitute hearsay.").

And even if Broadway's words were an assertion, federal case law supports Broadway's contentions that Mrs. Burton's testimony about Broadway's request was not offered for the truth of the matter asserted but rather as conduct with legal significance, *see, e.g.*, *United States v. Iverson*, 818 F.3d 1015, 1020 (10th Cir. 2016) ("The promise [to do something] itself has independent legal significance so there is no hearsay issue."); *United States v. Moreno*, 233 F.3d 937, 940 (7th Cir. 2000) (noting that "statements that grant or withhold permission to the authorities to conduct a search carry legal significance" and thus "amount to verbal acts, and as such are not admissible hearsay"); *New Era Publs. Int'l ApS v. Henry Holt & Co.*, 873 F.2d 576, 592 (2d Cir. 1989) (noting that "words of independent legal significance, such as a contract or slander, are verbal acts and not hearsay"); *cf. United States v. Evans*, 572 F.2d 455, 489 (5th Cir. 1978) (noting that evidence admitted "for the purpose of showing that statements were made and not for their truth" is not hearsay); proof of the speaker's state of mind, *see, e.g.*, *Franchina v.*

City of Providence, 881 F.3d 32, 50 (1st Cir. 2018) (holding that evidence "was admissible as non-hearsay if . . . it was offered for the purpose of" knowledge or notice); *United States v. Lee*, 427 F.3d 881, 896 (11th Cir. 2005) (approving admission of a statement "for the non-hearsay purpose of showing notice"); *Ross v. St. Augustine's College*, 103 F.3d 338, 342 n.3 (4th Cir. 1996); *Phoenix Mut. Life Ins. Co. v. Adams*, 30 F.3d 554, 566 (4th Cir. 1994); *cf. United States v. Adams*, 722 F.3d 788, 830 (6th Cir. 2013); and evidence of the words' effect on the listener, *see, e.g.*, *United States v. Churn*, 800 F.3d 768, 776 (6th Cir. 2015) ("A statement that is not offered to prove the truth of the matter asserted but to show its effect on the listener is not hearsay. Such a statement may be admitted to show why the listener acted as she did.") (internal quotation marks and citation omitted); *United States v. Wright*, 739 F.3d 1160, 1171 (8th Cir. 2014) ("[T]estimony regarding what [one person] said to [another] was not hearsay because [the] statement was offered for its effect on [the listener]."); *United States v. Cone*, 714 F.3d 197, 219 (4th Cir. 2013) (affirming the admission of evidence "for the non-hearsay purpose of showing that [certain people] were on notice"); *United States v. Dupree*, 706 F.3d 131, 136 (2d Cir. 2013) ("[A] statement offered to show its effect on the listener is not hearsay."); *United States v. Boyd*, 640 F.3d 657, 664 (6th Cir. 2011) ("Because 'the proffered testimony was probative' to [the defendant]'s knowledge, the evidence is not hearsay."); *Stewart v. Warden of Lieber Corr. Inst.*, 701 F. Supp. 2d 785, 796 n.4 (D. S.C. 2010) (holding that a statement "would not constitute . . . hearsay because it was not offered to prove the truth of the matter asserted but was instead offered to show the effect on the listener"); *Biegas v. Quickway Carriers, Inc.*, 573 F.3d 365, 379 (6th Cir. 2009) ("A statement that is not offered to prove the truth of the matter asserted but to show its effect on the listener is not hearsay."); *United States v. Lambinus*, 747 F.2d 592, 597–98 (10th Cir. 1984) (ruling that a statement is not hearsay if it is offered to prove the effect on the

listener).

One of the factors considered when evaluating a petition for certiorari is the novelty of the question presented. S.C. R. App. P. 242(b). But there is nothing novel at all about this case. In fact, there is ample South Carolina Supreme Court case law providing guidance. It is for that very reason—because the lower court either willingly tossed aside or simply ignored Supreme Court precedent—that a writ of certiorari is appropriate. *Id*.

CONCLUSION

The lower court's decision represents a significant departure from South Carolina Supreme Court precedent. Worse, that departure deprived a criminal defendant of the ability to present a defense at trial. Because this case implicates the integrity of the South Carolina Supreme Court's precedent and the fundamental promise of South Carolina's criminal justice system, it merits consideration by the Supreme Court.