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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA

IN THE 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

APPELLANT'S REPLY IN SUPPORT OF HIS PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Now before the Court is Sam Broadway's petition for a writ of certiorari. He seeks Supreme Court review of the Court of Appeals decision, which affirmed the trial court's exclusion of the testimony of Marlene Burton, a crucial defense witness. The testimony in dispute was Burton's statement that Broadway instructed her and her husband to call the police.

I. THE ISSUE WAS PRESERVED.

The issue currently before the court was properly preserved for appellate review. "It is axiomatic that an issue . . . must have been raised and ruled upon by the trial judge to be preserved for appellate review." *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1997). The purpose of the contemporaneous objection rule is to "enable[] trial judges to make reasoned decisions by appropriately developing issues by way of argument, both for or against any particular legal proposition. This, in turn, allows potential errors to be prevented or cured." *State v. Torrence*, 305 S.C. 45, 66–67, 406 S.E.2d 315, 327 (1991); *see also Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) ("Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review.") (quoting *Queens Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006)).

In many cases, a party fails to preserve an issue by failing to make an objection at trial. For example, when a party does not object to the admission of evidence, he may not later challenge the trial court's decision to admit the evidence on appeal. *See State v. Lynn*, 277 S.C. 222, 226, 284 S.E.2d 786, 789 (1981) (cited by the State at Resp. p. 8). But this is a different situation. Here, Broadway attempted to introduce the disputed evidence at trial, and he now challenges the trial court's decision to *exclude* that evidence. When an appellant seeks to

challenge the exclusion of testimony at trial, he may do so only if "the record on appeal shows fairly what the rejected testimony would have been." *State v. Roper*, 274 S.C. 14, 20, 260 S.E.2d 705, 708 (1979).

Both requirements for preservation are met here: (1) the trial court had "a fair opportunity to rule on the issue[]" and (2) "the record on appeal shows fairly what the rejected testimony would have been." First, the issue on appeal—whether Mrs. Burton's testimony about Broadway's request was inadmissible hearsay—was presented to the trial court. The defense was "not required to use the exact name of a legal doctrine in order to preserve the issue" as long as "the issue [was] sufficiently clear to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the judge." *Herron*, 395 S.C. at 466. The State objected to the disputed testimony on hearsay grounds, and the trial court ruled (multiple times) on the merits of that specific objection. (R. pp. 388–96). Second, the substance of Mrs. Burton's excluded testimony is clear from the record—so clear, in fact, that the trial judge had to instruct the jury to disregard it. (R. p. 392).

In support of its argument that the issue was not preserved, the State cites *State v. Webb*, 389 S.C. 174, 697 S.E.2d 662 (S.C. Ct. App. 2010), and *State v. Mitchell*, 330 S.C. 189, 498 S.E.2d 642 (1998). But neither governs this case. In both *Webb* and *Mitchell*, the unpreserved issues raised constitutional questions that were not apparent in the record. *Webb*, 389 S.C. at 667; *Mitchell*, 330 S.C. at 195. When the trial court placed limitations on the defense in *Webb* and *Mitchell*, the defense did not bring up a constitutional objection. The trial court could not rule on any constitutional issue because it did not know there was a constitutional issue in dispute.

Here, on the other hand, the issue was apparent from the context: it was an evidentiary dispute about whether or not testimony would be admitted. By barring the testimony in response

to the State's hearsay objections, the trial court necessarily ruled on the merits of the issue. The trial court's legal ruling appears clearly in the record. Broadway is entitled to have an appellate court meaningfully consider that question.

II. EXCLUSION OF MRS. BURTON'S TESTIMONY WAS REVERSIBLE ERROR.

The trial court erred in excluding the testimony because it was not hearsay.

Broadway's request was not a "statement" at all because it contained no assertion.

Hearsay is an out-of-court statement offered in court to prove the truth of the matter asserted in the statement. Rule 801, SCRE. A statement is "an oral or written assertion or [ ] nonverbal conduct of a person, if it is intended by the person as an assertion." *Id.* In other words, there is no hearsay without a statement, and there can be no statement without an assertion.

The State argues for a broad definition of 'assertion,' arguing that an assertion is anything that is "communicative behavior." (Resp. p. 9–10). But such an expansive definition would be inconsistent with the Supreme Court's decision in *State v. Johnson*, 324 S.C. 38, 42, 476 S.E.2d 681, 683 (1996). In *Johnson*, the Court explained that the utterance "'you got a gun?' . . . was not even an assertion, but was a question asked to appellant." *Id.* at 683. The sentence "you got a gun?" is undeniably communicative behavior, so under the State's definition, it would constitute an assertion. But the Supreme Court noted unambiguously that it did not. Rather, an assertion is defined by its content: specifically, whether it can be shown to be true or false. 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.

It is also worth noting here that federal cases construing the identical federal rule[1]—which are "certainly persuasive if not controlling" under *S.C. Human Affairs Comm'n v. Zeyi*

[1] S.C. R. Evid. 801(c) is "identical to the federal rule," according to the Note to Rule 801.

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))—hold that a request like Broadway's does not constitute a "statement" for purposes of hearsay. *See, e.g.*, *Baines v. Walgreen Co.*, 863 F.3d 656, 662 (7th Cir. 2017) (noting that "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") (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.").

Broadway's request to the Burtons contains no information capable of being true or false. Therefore, it was not an assertion, and because it was not an assertion, Broadway's words were not a statement and could not constitute hearsay.

Broadway's request was not offered for the truth of the matter asserted.

Broadway's request was not offered for the truth of the matter asserted but rather as words with legal significance.

In some situations, the very fact that a statement was made, regardless of whether or not it was true, has legal significance. *Waites v. S.C. Windstorm & Hail Underwriting Ass'n*, 279 S.C. 362, 365, 307 S.E.2d 223, 225 (1983); *see also State v. Tabory*, 260 S.C. 355, 366, 196 S.E.2d 111, 114 (1973) (holding an out-of-court statement admissible because "such testimony was offered as evidence *of the utterance* and hearsay is not involved") (emphasis added).

In *Waites*, for example, the Supreme Court considered a dispute over whether the plaintiffs in a lawsuit had complied with a particular statute that required the plaintiffs to exhaust their administrative remedies prior to filing suit. 279 S.C. 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 and argued that the letter put the defendants on notice that the plaintiffs intended to pursue further legal action if their claim was denied. *Id*. at 365. The Supreme Court agreed, noting "that the letter was admissible as evidence of an attempt to comply with the statute." *Id.*

The State argues that this principle "does not apply so broadly as to apply to oral statements that may have some potential legal ramifications or carries a mitigating or exculpatory connotation." (Resp. p. 11) (citing *Deep Keel, LLC v. Atl. Private Eauitv Grp., LLC*, 413 S.C. 58, 69-70, 773 S.E.2d 607, 613 (Ct. App. 2015)). Broadway does not advocate for such a broad proposition—*i.e.*, that *anything* with *any* potential legal ramifications is not hearsay. Rather, the principle behind this argument is that some statements are relevant because they were said, regardless of whether or not they were true. That is the case here.

The State also cites to *Fields v. J. Havnes Waters Builders. Inc.*, 376 S.C. 545, 658 S.E.2d 80 (2008). (Resp. p. 11–12). Although the court in *Fields* does ultimately exclude the disputed statement in question as hearsay, in doing so, the court acknowledges that when a statement is offered "because the utterance is itself part of the issue litigated," that statement is not hearsay. *Id.* at 559. In *Fields*, "[t]he document is not offered as proof that Prime South simply offered to repair the Fields' home," which would be permissible, but rather "to show that Prime South offered to repair the home for a specific price and that the price offered was reasonable. This assertion is classic hearsay[.]" *Id.* at 560. Broadways request is analogous to the counterfactual example set forth by the Fields court: the statement would be offered as proof that Broadway did, in fact, make the statement, not for the truth of the statement's contents.

Again, the State disregarded entirely federal case law construing the identical federal rule, which is "certainly persuasive if not controlling" under *S.C. Human Affairs Comm'n*, 2020

S.C. LEXIS 116, at *14–15 (quoting *Orr*, 277 S.C. at 540), and which holds that a request like Broadway's may be offered as words or 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"); *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).

Broadway's request was not offered for the truth of the matter asserted but rather to show the effect on the Burtons and to explain their 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").

On this point, the State misunderstands Broadway's argument. It is not, as the State writes, that "the testimony was not hearsay because it was admitted to show notice." (Resp. p. 12). Nowhere in his petition does Broadway argue that his request is relevant, much less admissible, to show notice. Rather, Broadway's argument is that the request was admissible to explain Harvey Burton's actions in calling the police, along the lines of the Court's reasoning in

State v. Sims, 304 S.C. 409, 405 S.E.2d 377 (1990) (noting that non-hearsay statement "was offered to explain the officer's actions").

Yet again, federal cases—"certainly persuasive if not controlling" under *S.C. Human Affairs Comm'n*, 2020 S.C. LEXIS 116, at *14–15 (S.C. 2020) (quoting *Orr*, 277 S.C. at 540)—support Broadway's argument that his request was offered not for the truth of the matter asserted but to show its effect on the Burtons and explain their subsequent conduct. *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).

Broadway's request was not offered for the truth of the matter asserted but rather as evidence of his own state of mind.

When a statement is offered in court to prove the declarant's state of mind, it is not hearsay. *State v. Lewis*, 293 S.C. 107, 110–11, 359 S.E.2d 66, 68 (1987). The State rebuts Broadway's reliance on *Lewis*, 293 S.C. 107, and *Sims*, 304 S.C. 409, with the conclusory statement, meant to distinguish this case from those, that "Broadway seeks to admit the statement for the truth of the matter asserted." (Resp. p. 13). But the State provides no reasoning to back up that claim. In fact, Broadway's case is analogous to both *Lewis* and *Sims*, and the Court's decision in both cases to admit the disputed evidence as non-hearsay supports Broadway's contentions here. (*See* Pet. p. 12–14).

One of the cases summarized by the State, *Wright v. Bi-Lo*, 314 S.C. 152, 159, 442 S.E.2d 186, 190-91 (S.C. Ct. App. 1994), addresses an argument that a particular statement was offered to prove the declarant's state of mind. *Wright* was a worker's compensation case resulting from the death of a Bi-Lo grocery store employee, who pursued a shoplifter and died of a heart attack during the pursuit. *Id.* at 153. At issue in the case was whether Wright was acting within the course and scope of his employment by chasing the shoplifter. *Id*. at 154–55. "Wright's widow and daughter sought to testify regarding Wright's statements" that he had "participated in apprehending shoplifters and had been commended by the employer for his actions," arguing that the "testimony was relevant to Wright's state of mind, that is, his understanding of the employer's policy on shoplifters." *Id*. at 159. The court excluded the widow's and daughter's testimony because Wright's out-of-court statement was being offered for the truth of the matter asserted—*i.e.*, that he had, in fact, "participated in apprehending shoplifters and had been commended by the employer for his actions." *Id.* The court so

concluded because otherwise, "there is no merit to the widow's 'understanding' argument." *Id.* In other words, for her argument to be effective, what he said had to be *true*. That is not the case here.

The appellate court in *Wright* rejected the argument that Wright's statement was probative of his "state of mind" as an "impermissible bootstrap argument"; but the court did not rule that *any* evidence showing a person's state of mind relies on an "impermissible bootstrap argument." In fact, the *Wright* court later admitted statements under that very premise: "Wright's responses, as related by the employer's witnesses, were not offered to prove the truth of the matter asserted. . . . The important truths at issue were that the managers told the employee about the store's shoplifter rules and that he responded in a manner *that indicated he heard them*. Neither of these matters is hearsay." *Id.* at 160. Whether or not Wright heard the store's shoplifter rules was a question of his state of mind, and therefore, his statements introduced to that effect were not hearsay. Broadway's request is analogous to the statement properly admitted in *Wright* because it showed his state of mind—more specifically, Broadway's intent to comply with § 56-5-1210.

Federal cases interpreting the identical federal rule also weigh in Broadway's favor. *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). Because those cases are "certainly persuasive if not controlling" under *S.C. Human Affairs Comm'n*, 2020 S.C. LEXIS 116, at *14–

15 (S.C. 2020) (quoting *Orr*, 277 S.C. at 540), it was error to disregard them.

The State cites other cases dealing with hearsay issues but fails to explain how they apply in Broadway's case, much less undercut Broadway's argument.

The State parrots the facts and holdings of *State v. Galloway*, 305 S.C. 258, 407 S.E.2d 662 (Ct. App. 1991), and *State v. Brockmever*, 406 S.C. 324, 751 S.E.2d 645 (2013), but makes no attempt to explain their relevance or analogize them to the present case. Although both *Galloway* and *Brockmeyer* involve hearsay issues, neither governs here.

In *Galloway*, the defendant allegedly resisted arrest, causing a conflict that resulted in part of his earlobe being ripped off. 305 S.C. at 262. Galloway's "primary defense at trial was that the officers' testimony and the resisting arrest charge were fabricated in an attempt to persuade him not to pursue a civil action for the detached earlobe." *Id*. In support of that defense, Galloway wanted to "testify as to what was said to him in his conversation with Officer White, the deputy who allegedly tried to get him to sign a release." *Id.* The Court of Appeals affirmed the trial court's exclusion of that testimony, "as the record plainly reveals it was hearsay and Galloway failed to demonstrate it came within any exception to the hearsay rule." *Id.*

In *Brockmeyer*, the defendant was charged with murder. 406 S.C. at 355. On appeal, he claimed that it was error for the trial court to admit "a photograph recovered from the victim's cell phone depicting the murder weapon and the victim's pellet gun side by side with the caption, 'Wills gun on left my gun on righ[t].'" *Id*. The court agreed that the photograph's caption was offered for the truth of the matter asserted—that Brockmeyer did, in fact, own the gun pictured—but ultimately held the error was harmless because "Brockmeyer admitted owning and possessing the .380 pistol . . . on the night of the shooting." *Id.* at 355–56.

The mere citation of cases where a court happened to exclude evidence on hearsay grounds is insufficient to defend the Court of Appeals decision in this case. *Galloway* and

Brockmeyer do involve disputes regarding hearsay, but that is where their similarity with Broadway's appeal begins and ends. In *Galloway* and *Brockmeyer*, the testimony involved out-of-court statements offered in court to prove the truth of the matter asserted. Broadway's request, as reiterated by Marlene Burton, was not a statement and, even if it was, it was not offered to prove the truth of the matter asserted.

Ultimately, the principles underlying hearsay doctrine dictate that Marlene Burton's testimony was not hearsay.

"[T]he protection of cross-examination as the central accuracy-enhancing device of the trial is now understood to be the primary goal of the hearsay rule." Robert P. Burns, *Bright Lines & Hard Edges: Anatomy of a Criminal Evidence Decision*, 85 J. CRIM. L. & CRIMINOLOGY 843, 872–73 n.132 (1995) (discussing Federal Rule of Evidence 803(24)). Hearsay is disfavored in part because it "rests . . . on the veracity and competency of some other person." *Peurifoy v. Little*, 146 S.C. 1, 5–6, 143 S.E. 262, 264 (1928) (quotation marks and citation omitted). "A person who relates a hearsay is not obliged to enter into any particulars, to answer any questions, to solve any difficulties, to reconcile any contradictions, to explain any obscurities, to resolve any ambiguities; he entrenches himself in the simple assertion that he was told so, and leaves the burden entirely on his dead or absent author." *Id.* (adopting the reasoning of *Coleman v. Southwick*, 9 Johns. (N.Y.) 45, 50, 6 Am. Dec. 253 (1812)).

Marlene Burton's testimony is not what the hearsay rules were designed to prevent. The question was what *Marlene* heard. Whether or not Marlene actually heard it is a question of Marlene's credibility, not of Broadway's. And the State was able to test Marlene's credibility because she testified under oath. Therefore, the evil that the hearsay rules attempt to prevent—statements immune to testing under cross-examination—is not present here.

The error prejudiced Broadway.

"If a review of the entire record does not establish that the error was harmless beyond a reasonable doubt, then the conviction shall be reversed. *State v. Simmons*, 423 S.C. 552, 566, 816 S.E.2d 566, 574 (2018). At various times, the United States Supreme Court has described "beyond a reasonable doubt" as a "subjective state of certitude," *In re Winship*, 397 U.S. 358, 364 (1970); "utmost certainty," *id.*; a "subjective state of near certitude," *Jackson v. Virginia*, 443 U.S. 307, 315 (1979); and "evidentiary certainty," *Cage v. Louisiana*, 498 U.S. 39, 41 (1990).

With the inclusion of Marlene Burton's testimony, Broadway would have raised a question appropriate only for a jury to resolve: whether Broadway complied with S.C. Code Ann. § 56-5-1210, which permits an individual to "temporarily leave the scene to report the accident to the proper authorities" before "return[ing] to and . . . remain[ing] at the scene of the accident until he has fulfilled the requirements of Section 56-5-1230." The jury could have found that Broadway complied with the statute by determining one of two things: (1) that Broadway was in the process of fulfilling his duty when he was at the Burton's house or (2) that Broadway had, by summoning the authorities, discharged his duty to return to the scene.

First, a jury could find that Broadway was in the process of fulfilling his statutory duty by remaining at his in-laws' home after reporting the accident to the police. It was reasonable for Broadway to think that after the police had been notified of his location, leaving that location would cause confusion or appear evasive. But a jury could find that if Broadway had been so instructed, he would have returned to the scene after informing the police of the accident or after speaking with law enforcement at the Burtons' home.

Second, it is true that S.C. Code Ann. § 56-5-1210 requires the driver to "return to and [ ]

in every event remain at the scene." But what the State did not include in its response is the rest of that sentence. Section 56-5-1210 requires the driver to "return to and [ ] in every event remain at the scene of the accident *until he has fulfilled the requirements of § 56-5-1230*." Section 56-5-1230 dictates that the driver has a "duty to give information and render aid." Essentially, the law does not require a driver to return to the scene indefinitely; rather, it requires him to return to the scene only until certain conditions are satisfied. Theoretically, then, if the conditions were satisfied before the driver's return to the scene, the driver would have no duty to return at all.

A reasonable jury could find that Broadway's duty to give his information and render aid (or, as permitted under the statute, "ma[ke] arrangements" therefor) was fulfilled when he—or another person under his direction, as asserted here—notified the police that there had been an accident with likely injuries and told them his personal information. Then, having fulfilled his duty, Broadway was released from his obligation to return to the scene. The State cannot now show with the "utmost certainty" that no reasonable jury could so find. The core of Broadway's defense was that he complied with the requirements of § 56-5-1210, but the jury was never permitted to decide that question.

III. THE STATE IGNORED BROADWAY'S ARGUMENTS UNDER THE SUPREME COURT'S DECISION IN *S.C. HUMAN AFFAIRS COMMISSION*.

The State does not refute the contention that the Court of Appeals was bound by the South Carolina Supreme Court's mandate 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*, 2020 S.C. LEXIS 116, at *14–15 (quoting *Orr*, 277 S.C. at 540). Nor does the State refute that Rule 801, SCRE, is "identical to the federal rule." Because the Court of Appeals entirely ignored the Supreme Court's guidance on this point, review by the Supreme Court is

both appropriate and necessary.

CONCLUSION

The trial court committed reversible error by excluding Mrs. Burton's testimony about Broadway's request that the Burtons call the police. The testimony should not have been excluded because it was not hearsay, and its exclusion prejudiced Broadway by virtually eliminating his entire defense. The Court of Appeals decision warrants review because it disregarded South Carolina Supreme Court precedent.

Respectfully submitted,

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