STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to the Court of Appeals
Appeal from Charleston County
Honorable Roger L. Couch, Circuit Court Judge
S.C. Ct. App. Appellate Case No. 2017-001111

THE STATE, Petitioner,

vs.

MACK SEAL WASHINGTON, Respondent.

Opinion No. 5773 (S.C. Ct. App. refiled October 7, 2020)

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATION OF COUNSEL

Counsel for Petitioner hereby certifies that a Petition for Rehearing was filed in the South Carolina Court of Appeals on September 24, 2020. The Petition for Rehearing was granted by Order filed October 7, 2020. The Court of Appeals dispensed with further briefing and substituted a new opinion on October 7, 2020.

STATEMENT OF ISSUE ON CERTIORARI

Did the Court of Appeals err by holding the trial judge erroneously admitted hearsay evidence which improperly shifted the burden of proof to Washington when the issues of hearsay and burden shifting were not properly preserved for appellate review and, even if they were, none of the statements made by Detective McCauley during his interview of Washington were actually hearsay or shifted the burden of proof to Washington? Furthermore, even assuming McCauley's statements during the interview were hearsay or shifted the burden of proof to Washington, did the Court of Appeals nonetheless err by reversing Washington's convictions when any possible error in the admission of the statements was harmless beyond a reasonable doubt since the statements were cumulative to other evidence presented and the evidence of Washington's guilt was overwhelming?

STATEMENT OF THE CASE

Procedural History

In September 2016, a Charleston County Grand Jury indicted Washington for one count of first-degree burglary, one count of malicious injury to a house under the enhancement provision of S.C. Code Section 16-1-57, and one count of obtaining goods by false pretenses under the enhancement provision of Section 16-1-57. On April 17-18, 2017, a jury trial was held in the Charleston County Court of General Sessions with the Honorable Roger L. Couch, circuit court judge, presiding. At the conclusion of trial, the jury convicted Washington of all three counts. Following the verdict, the trial judge sentenced Washington to two concurrent terms of ten years' imprisonment, as well as an additional concurrent term of fifteen years' imprisonment for Washington's first-degree burglary conviction, resulting in an aggregate sentence of fifteen years' imprisonment. Washington then timely filed a notice of appeal and an initial brief.

On appeal, Washington alleged the trial judge erred by admitting statements made by Detective McCauley during his interrogation of Washington because the statements "concerned improper opinion evidence and shifted the burden of proof to [Washington]". (App. 231). In a divided, published opinion, the Court of Appeals reversed Washington's convictions and found McCauley's statements were hearsay and improperly shifted the burden of proof to Washington. State v. Washington, Op. No. 5773 (S.C. Ct. App. filed September 16, 2020) (Shearhouse Adv. Sh. No. 36) (App. 264). Thereafter, the State filed a petition for rehearing with the Court of Appeals on September 24, 2020. (App. 272). The Court of Appeals granted the State's petition for rehearing, dispensed with further briefing, and substituted a new opinion on October 7, 2020. State v. Washington, Op. No. 5773 (S.C. Ct. App. filed October 7, 2020) (Shearhouse Adv. Sh. No. 39) (App. 286, App. 287).

Factual Background

On August 21, 2015, Deputy Jacob Hill of the Charleston County Sheriff's Office responded to a report of burglary at the home of Lawrence Collins on Johns Island. (App. 77). Hill observed signs of a forced entry on an outside door leading to the garage. (App. 78). Hill dusted for potential fingerprints on a stackable washer-dryer that appeared to have been moved during entry into the home and lifted a latent print from the washer-dryer. (App. 78-80). Collins testified a number of items were missing from his home, including a rifle, a pistol, and a Husqvarna weed eater. (App. 52, 55).

Detective Timothy McCauley of the Charleston County Sheriff's Office searched a pawnshop database and determined Washington pawned a rifle and a weed eater the same day as the burglary at two separate pawn shops. (App. 151). Ronald Wood of Money Man Pawn Shop identified the pawn ticket showing a rifle matching the description given by Collins was sold in his store. (App. 145-47). The pawn ticket bore the Washington's name, signature, address, and date of birth. (App. 146-47). Robert Delatte, an employee of a different Money Man Pawn Shop, identified another pawn ticket showing a Husqvarna weed eater was sold in his store. (App. 140-41). The second pawn ticket also bore Washington's name, signature, address, and date of birth. (App. 140-41). Wood testified that normally pawn shops require a customer to show photo identification before pawning an item. (App. 144).

The State also presented testimony regarding fingerprint analysis from two agents with the State Law Enforcement Division. Stephen Curtis was tendered as an expert in the field of latent print examination. (App. 109). Seraphim Haftoglou was tendered as an expert in ten-print fingerprint examination. (App. 100). Curtis testified he was one hundred percent certain the fingerprint lifted from the washer-dryer belonged to Washington. (App. 125, 135).

After the State presented evidence that Washington's fingerprint was found inside Collins' home and that Washington's identifying information was listed on pawn tickets, McCauley testified about his interrogation of Washington. The State and Washington agreed to redact certain portions of the interrogation. However, Washington objected to other portions of the interrogation on the grounds that McCauley's statements were hearsay, his statements improperly bolstered the State's expert testimony, and the statements were improper opinions by a lay witness. (App. 17-19). The trial judge redacted portions of the interview that mentioned SLED or the credibility of SLED. (App. 20-22). However, the trial judge denied Washington's motion with respect to approximately eleven questions and/or statements made by McCauley. The trial judge allowed the jury to hear the following exchanges over Washington's objection:

> McCauley: you threw it in the back of your truck and it stayed there for a while?
> Washington: yeah it stayed there for maybe about 2 or 3 weeks.
> McCauley: That's not possible because you pawned it the same day you broke into that house.
>
> . . . .
>
> McCauley: Can you explain why your fingerprint would have been inside the house?
> Washington: my fingerprints inside the house? I don't believe that. No way. I really don't believe that. My fingerprints inside the house?
>
> . . . .
>
> Washington: I'll tell you what. Get in contact with my boss man and see what I been at that day this happened.
> McCauley: I'll call him, but how do you explain your fingerprints inside this man's house?
>
> . . . .
>
> Washington: John's Island. I don't even go over there. There's no way it could be my fingerprints man
> McCauley: There's no if, and, or buts about it.

Washington: They got to say I'm there because that's where I work at. I work everyday.
McCauley: But you can't be at work and your fingerprint be inside the house at the same time.

. . . .

Washington: I'm going to be honest with you but I know I was working that day, you can't tell me I wasn't working. I work seven days a week.
McCauley: Then how'd your finger print end up there?
Washington: That's what I like to know too, how my fingerprints end up at the house. What time that supposed to be there?

. . . .

Washington: Okay yeah so that this, if I go working that day then what?
McCauley: You still have to explain why your fingerprints is in that man's house.
Washington: How can I?
McCauley: And why you pawned his stolen property.

. . . .

McCauley: I think you're giving me part of the story.
Washington: No
Washington: You still saying I break into the house
McCauley: Mhm your fingerprint was inside.

. . . .

Washington: I call breaking the man, what did I break I? How did I break into his house? What is this?
McCauley: That's your fingerprint.
Washington: All that's my fingerprint?
McCauley: No it's in there
Washington: My fingerprints in there?
McCauley: Mhm. That's inside the man's garage okay
Washington: First you say I been inside the house and now you say garage
McCauley: Yeah that's part of a house, that's considered part of a dwelling. An attached garage. And you got in the house from there.

. . . .

Washington: I can't help you because I ain't break into a house man. I ain't gonna say I break into a damn house if I ain't break in a house.
McCauley: Well then it still doesn't explain why you're fingerprints are there and why you had a stolen gun, a stolen rifle. There was a second gun stolen, it was a

pistol, which is why I think you're trying to put the story together of a person you ran into on Bees Ferry in the parking lot of Walmart. You're trying to put some story together to justify why you had access to those.
Washington: I ain't have access to it. Not me.
McCauley: you also pawned a weed eater.

. . . .

Washington: I got weed eaters to my house.
McCauley: I know I'm saying you pawned that the same day, the same day you pawned that rifle at a different pawn shop which is what people do when they're trying to spread out stuff that's stolen.
Washington: I pawned a weed eater to a different pawn shop. I stole a weed eater."
McCauley: mhm

(App. 208-12). Notably, during the interview Washington made approximately six other references to his fingerprints being found inside Collins' home that he did not object to or move to redact. (App. 208, 209, 211, State's Exhibit #41). Sarah Myers of Alternative Staffing testified Washington did not begin working for the company until over a month after the burglary. (App. 162). This contrasted with Washington's alibi that he was working on the day of the burglary. (App. 207).

When the trial judge instructed the jury before their deliberations, the judge clearly explained the burden of proof was entirely upon the State and the defendant was not required to prove himself innocent. (App. 181). The trial judge further instructed the jurors they were free to give the testimony of the two expert witnesses the weight they felt it deserved. (App. 188-89). Finally, the trial judge cautioned the jurors not to even consider the Washington's decision not to testify in their deliberations. (App. 189-90). The jury found Washington guilty on all three counts.

ARGUMENT

The Court of Appeals erred by holding the trial judge erroneously admitted hearsay evidence which improperly shifted the burden of proof to Washington when the issues of hearsay and burden shifting were not properly preserved for appellate review and, even if they were, none of the statements made by Detective McCauley during his interview of Washington were actually hearsay or shifted the burden of proof to Washington. Furthermore, even if McCauley's statements during the interview were hearsay or shifted the burden of proof to Washington, the Court of Appeals nonetheless erred by reversing Washington's convictions when any possible error in the admission of the statements was harmless beyond a reasonable doubt since the statements were cumulative to other evidence presented and the evidence of Washington's guilt was overwhelming.

In a divided opinion, a majority of the Court of Appeals reversed Washington's convictions after finding the trial judge erred by admitting some of the statements made by Detective McCauley during his interview with Washington. In doing so, the majority initially found Washington preserved issues concerning hearsay and burden shifting. In the light of that initial finding, the majority held the trial judge erred by admitting McCauley's statements because they were hearsay and improperly shifted the burden of proof to Washington. Furthermore, the majority held the trial judge's error was not harmless. Contrary to the majority's conclusions, the majority's decision to reverse Washington's convictions was wrong for three reasons: (1) the issues of hearsay and burden shifting were not properly preserved for appellate review, (2) even if the issues of hearsay and burden shifting were properly preserved, McCauley's statements are not hearsay and they did not shift the burden of proof to Washington, and (3) if McCauley's statements were admitted in error, any error is harmless because of the overwhelming evidence presented against Washington and because McCauley's statements were cumulative to evidence that was properly submitted to the jury. The State's petition for a writ of certiorari should be granted, and Washington's convictions should be affirmed.

Error Preservation

As an initial matter, the Court of Appeal's majority opinion incorrectly determined that Washington properly preserved either the issue of hearsay or burden shifting for appeal. To fully understand Washington's failure to preserve these issues, it is instructive to review the objections made by Washington at trial and the arguments made by Washington on appeal.

At trial, Washington objected to approximately eleven statements made by McCauley during his interrogation of Washington. Trial counsel for Washington offered the following argument in support of his objection to the selected statements:

> [Trial counsel for Washington]: Along that point, I would argue that the statements of Detective McCauley after—these statements coming in after an expert had testified regarding the fingerprints, certainly after the pawn tickets, is simply just bolstering. It's hearsay come from Detective McCauley and also, I would argue that his statements reaffirming the expert's conclusions are improper bolstering. Again, as I said, we are contesting the validity of the fingerprint comparison and, Your Honor, the same thing with the pawn tickets. Coming from Detective McCauley I would argue that it is hearsay. And, again, his statements are bolstering testimony of those pawnshop custodians. Essentially, his statements, Your Honor, are giving his opinion as to the ultimate question of fact in this case, which is whether or not [Washington] committed this burglary. I would ask that all—of the highlighted portions be redacted for those reasons. Thank you.

(App. 19, lines 5-21). The Court of Appeals' majority opinion acknowledges that at trial Washington objected to McCauley's statements "on three grounds: hearsay, improper bolstering of the State's fingerprint expert's testimony, and that it contained improper opinion evidence." (App. 288).

On appeal, Washington posed the following question in the statement of issue on appeal in his brief:

> Did the trial judge err in failing to suppress statements by law enforcement during the audio-recorded interrogation of [Washington] where the statements concerned improper opinion evidence and shifted the burden of proof to [Washington]?

(App. 231). Washington's statement of issue on appeal did not allege that McCauley's statements were hearsay nor did it allege the statements constituted improper bolstering[1]. Thus, Washington abandoned his objections to McCauley's statements on the grounds of hearsay and improper bolstering and added the additional claim of burden shifting. Not only did Washington abandon his objection to hearsay in his brief, but he did not raise it at oral argument either. In fact, at oral argument, counsel for Washington specifically articulated the issues she was presenting to the court. Counsel for Washington noted she was concerned with "specifically instances where the police both shifted the burden and provided improper lay opinion testimony." (Oral argument at 9:00-9:16). The only time counsel for Washington ever mentioned the word "hearsay" at oral argument was when she clarified that this Court addressed hearsay in State v. Brewer, 411 S.C. 401, 768 S.E.2d 656 (2015) and how the hearsay statements in Brewer applied to a harmless error analysis. (Oral Argument at 15:50-16:20).

Because Washington never raised the issue of hearsay in his brief or at oral argument, it was not properly before the appellate court. Similarly, because the issue of burden shifting was not raised to and ruled upon by the trial court, that issue is unpreserved for appeal. "In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal." State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003). A party may not argue one ground at trial and an alternate ground on appeal. State v. Prioleau, 345 S.C. 404, 548 S.E.2d 213 (2001). "The rule is well established that if asserted errors are not presented to the lower Court,

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[1] See Rule 208(b)(1)(B)("Statement of Issues on Appeal. A statement of each of the issues presented for review. The statement shall be concise and direct as to each issue, and may be stated in question form. Broad general statements may be disregarded by the appellate court. Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal.").

the question cannot be raised for the first time on appeal." State v. Freiburger, 366 S.C. 125, 135, 620 S.E. 2d 737, 742 (2005). "An issue that is not argued in the brief is deemed abandoned and precludes consideration on appeal." Jones v. Leagan, 384 S.C. 1, 17, 681 S.E.2d 6, 15 (Ct. App. 2001). "It is axiomatic that oral argument may not be used as a vehicle to argue issues not argued in the appellate brief." State v. Nelson, 336 S.C. 186, 193, 519 S.E.2d 786, 789 (1999).

The Court of Appeal's dissenting opinion correctly noted that Washington's objection at trial to McCauley's statements "did not concern an alleged burden shifting nor mention a Brewer violation." (App. 292). Therefore, as the dissent properly concluded, the issue of burden shifting was not preserved for appeal.

As to hearsay, the Court of Appeals dissenting opinion correctly recognized Washington's "*sole* issue on appeal is the inclusion of the statements shifted the burden of proof and constituted improper opinion evidence." (App. 292). The dissent further recognized that Washington's only reference to hearsay in his brief comes in the form of a quote from Brewer about how statements in that case were hearsay. However, Washington never argued in his brief or at oral argument that McCauley's statements were hearsay. Therefore, the dissent correctly concluded the issue of hearsay was not properly preserved for appeal.

The Court of Appeals' majority opinion attempted to address the dissent's error preservation concerns in its revised opinion by noting: "The State did not raise issue preservation in its brief. Although the issue was raised by the panel at oral argument, the State spent considerable time there and at oral argument claiming the recording is not hearsay. While we may invoke preservation rules on our own, we should not be quick to disturb the parties' silence." (App. 290-91). While the State did not raise the issue of error preservation as to burden shifting in its brief, there was no need to raise an error preservation argument regarding hearsay

in the State's brief because Washington did not argue hearsay in his brief. The first time hearsay was raised in Washington's appeal was by the Court of Appeals at oral argument. When asked at oral argument if Washington had preserved the issue of burden shifting for appeal, the State argued the issue was not preserved. (Oral argument at 30:15-30:40). Furthermore, the State argued that Washington had never raised the issue of hearsay in his brief. (Oral Argument at 25:27-26:00). Therefore, it is inaccurate to suggest, as the majority opinion does, that the State was silent on the issue of error preservation.

The majority opinion also faults the State for spending time in its brief and at oral argument claiming McCauley's statements were not hearsay and seems to suggest the State conceded the issue of hearsay was preserved for appeal by doing so. Indeed, the State addressed the issue of hearsay in its brief to distinguish the facts of Brewer with the facts and the arguments being made in Washington's case. The only reference made by the State to hearsay in its brief was to argue that Washington's case was different from Brewer. (App. 253-54). In fact, the State explicitly argued that Washington failed to argue hearsay in the following sentence in its brief: "Furthermore, unlike Brewer where Brewer specifically alleged that the State used a back door to admit hearsay evidence, Washington does not even allege that the statements at issue here are hearsay." (App. 254). Furthermore, the State was compelled to address the issue of hearsay at oral argument to distinguish the facts in Washington's case from those of Brewer and to directly answer a question posed by the Court of Appeals. (Oral Argument at 25:10-26:55). As the State attempted to distinguish Brewer from Washington's case, the panel asked "how is the reference to fingerprints not hearsay?" (Oral Argument at 26:00-26:10). Naturally, the State answered the panel's question regarding hearsay. However, the State did not concede the issue of hearsay was

preserved merely by answering the Court of Appeals' question at oral argument. For the foregoing reasons, the State's petition for a writ of certiorari should be granted.

Hearsay

If this Court determines the issue of hearsay was properly preserved for appeal, the State submits the Court of Appeals erred in finding McCauley's statements were hearsay. McCauley's statements were not hearsay because they were not offered for the truth of the matter asserted. In addressing the issue of hearsay, the Court of Appeal's majority opinion states:

> At trial, the assistant solicitor contended McCauley's statements were not hearsay because they were not offered for their truth but to give Washington's answers 'context'. There is no 'context' exception to the hearsay rule. Brewer rejected this same argument as 'patently without merit', finding it had 'no support in the law.' Undeterred, the State recycles the argument before us, still unaccompanied by any authority to support it.

(App. 290). Respectfully, the Court of Appeal's majority opinion misunderstood the State's argument. The State did not argue there was a context exception to the hearsay rule. The State argued McCauley's statements were not hearsay to begin with because they were not offered for the truth of the matter asserted and thus did not require an exception to the hearsay rule. See Rule 801(c) SCRE ("'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."). At trial, the solicitor responded to Washington's objection with the following argument:

> [Solicitor]: I don't believe any (sic) Detective McCauley's questions are, in fact, hearsay. We are not offering Detective McCauley's questions for the truth of the matter. We intend to prove the truth of the fingerprint and the proof of the pawn tickets through SLED and pawnshop witnesses. His questioning simply goes to the statements made in furtherance of his investigation, Judge. And I think the responses by the defendant are certainly not hearsay. But for those to make any sense, the jury has to hear the questions made to the defendant, Judge. So I don't believe those assertions are hearsay.

(App. 19, lines 23-35 – App. 20, lines 1-8). Likewise, at oral argument, the State argued that McCauley's statements were not hearsay because they were not offered for the truth of the matter asserted. (Oral argument at 26:30-26:50).

McCauley's statements regarding Washington's fingerprint being found inside Collins' home were not offered to prove that Washington's fingerprint was actually found inside Collins' home. The State had already proven that Washington's fingerprint was found inside Collins' home via testimony from two SLED witnesses. (App. 104, 125, 135). McCauley's statements were offered to show the jury how Washington reacted when he was confronted with evidence that did not fit his alibi. Indeed, McCauley's statements provided context to Washington's responses. See United States v. Tolliver, 454 F.3d 660, 666 (7th Cir. 2006) ("Statements providing context for other admissible statements are not hearsay because they are not offered for their truth."). Otherwise, the jury would have only heard Washington provide answers to unknown questions and the interview would not have made any sense. McCauley's questions do provide context to Washington's answers but the State did not argue there was a context exception to the hearsay rule. Rather, the State argued McCauley's statements were not hearsay to begin with.

The State also respectfully submits the Court of Appeals' majority opinion misunderstands this Court's holding in State v. Brewer. Brewer does not establish a categorical rule against playing statements made by an investigator during an interrogation for a jury. This Court wrote: "We emphasize that today's decision is not a categorical rule that any statement by an investigator during an interrogation is inadmissible at trial." Brewer 411 at 407, 768 S.E.2d at 659. Rather, this Court sought to ensure that "all out-of-court statements are either 'admissible for a valid non-hearsay purpose or as an exception to the hearsay rule in order to safeguard

against an end-run around the evidentiary and constitutional proscriptions against the admission of hearsay.'" Brewer 411 S.C. at 407-08, 768 S.E.2d at 659 (quoting State v. Miller, 197 N.C. App. 78, 93-94, 676 S.E.2d 546, 556 (2009)).

The statements at issue in Brewer were not admissible for a non-hearsay purpose or as an exception to the hearsay rule. In Brewer, investigators quoted purported eyewitnesses who claimed that Brewer shot two of the victims in that case. The purported eyewitnesses did not testify at trial. Their testimony was offered for the sole purpose of proving that Brewer shot the victims in question. Indeed, this Court noted, Brewer repeatedly denied shooting anyone and "The meaning of these repeated denials is obvious and requires no explanatory context." Brewer 411 S.C. at 407, 768 S.E.2d at 659. Meanwhile, the statements in Washington's case were not offered to prove Washington's fingerprint was actually inside Collins' residence. The SLED witnesses—unlike the purported eyewitnesses in Brewer—testified before the statements were presented to the jury and had already proven through their testimony that Washington's fingerprints were inside Collins' home. McCauley's statements were offered to help the jury understand Washington's answers. For example, Washington claimed he bought the rifle that was stolen from Collins' house from a drug addict and then pawned it two to three weeks later. (App. 207-08). McCauley then confronted Washington with the pawn ticket that disproved his claim about the rifle. Without McCauley's statements, the following exchange played for the jury would not make sense:

> McCauley: You're telling me you got the rifle from somebody
> Washington: Yeah I bought it from somebody
> McCauley: You threw it in the back of your truck and it stayed there for a while?
> Washington: Yeah it stayed there for maybe 2 or 3 weeks
> McCauley: That's not possible because you pawned it the same day you broke into that house
> Washington: I pawned it the same day?

(App. 208). The State did not offer the preceding statements to prove that Washington actually pawned the stolen rifle. The State proved that through the testimony of the pawnshop owner. The statement was played because it directly contradicted Washington's alibi. McCauley's questions give context to Washington's answers. Without McCauley's questions, Washington's answers do not make sense[2]. See United States v. McDowell, 918 F.2d 1004, 1007 (1st Cir. 1990) ("McDowell's own statements could, of course, be used against him; his part of the conversations was plainly not hearsay. Nor can a defendant, having made admissions, keep from the jury other segments of the discussion reasonably required to place those admissions in context."). Similarly, when Washington claimed he was at work on the day of the burglary, McCauley confronted Washington with the logical impossibility of his alibi in the following exchange:

> Washington: I'm going to be honest with you but I know I was working that day, you can't tell me I wasn't working. I work seven days a week.
> McCauley: Then how'd your finger print end up there?
> Washington: That's what I like to know too, how my fingerprints end up at the house. What time that supposed to be there?

(App. 209). The State did not offer the preceding statement to prove Washington's fingerprint was actually inside Collins' home. The State had already proven that Washington's fingerprint was inside Collins' home through SLED witnesses. The State offered this statement to contradict Washington's alibi. Unlike Brewer, where no context was needed to understand Brewer's repeated denials, the context of McCauley's questions is necessary to understand the strength of

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[2] The North Carolina Court of Appeals recognized need to put a defendant's answers in context in a case cited by this Court in Brewer. In State v. Miller, the North Carolina Court of Appeals affirmed the decision of the trial court to allow the statements of officers made during Miller's interview to be played for the jury when the trial court determined "that redacting the detectives' questions from the DVD would serve to confuse the jury." The Court also noted the trial judge provided a curative instruction which informed the jury the statements of officers were not being offered for the truth of the matter asserted. Miller, 197 N.C. App. at 92-93, 676 S.E.2d at 555.

Washington's alibi and for the jury to see Washington's reactions when he is confronted with assertions inconsistent with his alibi. McCauley's statements are not a violation of State v. Brewer. For the foregoing reasons, the State's petition for a writ of certiorari should be granted.

Burden Shifting

If this Court determines the issue of burden shifting was properly preserved for appeal, the State submits the Court of Appeals erred in finding McCauley's statements shifted the burden of proof to Washington. The Court of Appeals' majority opinion only addresses the issue of burden shifting by again comparing Washington's case to Brewer. The majority offers the conclusory statement that McCauley's "repeated requests that Washington explain why he was not guilty amounted to a 'grave constitutional error.'" (App. 290). However, McCauley's statements did not ask Washington to explain why he was not guilty, nor did McCauley tell Washington he had to "prove his innocence" as was the case in Brewer. Notably, this Court's majority opinion in Brewer reversed one of Brewer's convictions based on impermissible hearsay; not based on burden shifting[3].

However, even if this Court had reversed Brewer's murder conviction based on burden shifting, the statements at issue in Brewer differ considerably from the statements made by McCauley in Washington's case. In Brewer, officers continually shifted the burden of proof to Brewer by making statements such as "This is it. Prove it. You can prove your innocence", "proving yourself innocent should be, you know, that would be my first priority", and "help me prove you innocent." Brewer 411 S.C. at 405 n.4, 768 S.E.2d at 659 n.4. The aforementioned statements are clear examples of burden shifting. McCauley's statements, by contrast, never

[3] Chief Justice Beatty noted in his concurring opinion that the solicitor in Brewer shifted the burden on numerous occasions via the interrogation tape. Brewer 411 S.C. at 412, 768 S.E.2d at 662. (Beatty J. concurring in part).

asked or demanded that Washington prove his innocence. McCauley asked Washington to explain how his fingerprint could be located in a house he claimed to have never been in. Furthermore, McCauley asked Washington to explain how he obtained Collins' property to later sell at a pawn shop. Surely, these are legitimate avenues of inquiry for law enforcement to explore when interviewing a criminal defendant who is giving a voluntary Mirandized interview. Such statements will not always be proper to play in front of a jury, as was the case in Brewer. However, when the statements are used to show a jury how a defendant reacts when confronted with facts that contradict his alibi, as was the case with Washington, such statements can and should be played before a jury. For the foregoing reasons, the State respectfully requests this Court to grant the State's petition for a writ of certiorari to review the decision of the Court of Appeals.

Harmless Error

The Court of Appeals' majority opinion held the admission of McCauley's statements was not harmless error because the statements ultimately contributed to the jury's verdict[4]. However, as the dissent correctly noted, any error in the admission of McCauley's statements was harmless "in light of the other overwhelming evidence of Washington's guilt including the fingerprint evidence showing he had been inside the dwelling, the pawn tickets showing he was in possession of the stolen items on the day of the burglary, and his assertion of a spurious alibi." (App. 294). In addition to the overwhelming evidence against Washington, McCauley's statements were merely cumulative to other evidence that was properly presented to the jury.

[4] Specifically, the majority found "the hearsay figured so prominently in Washington's trial that its 'reverberating clang...would drown all weaker sounds' Shepard v. United States, 290 U.S. 96, 104 (1933)" (App. 291-92).

Therefore, any error on behalf of the trial judge in admitting McCauley's statements was harmless.

"The admission of improper evidence is harmless where the evidence is merely cumulative to other evidence." State v. Kirton, 381 S.C. 7, 37, 671 S.E.2d 107, 122 (Ct. App. 2008). "Under settled principles, the admission of improper evidence is harmless where it is merely cumulative to other evidence." State v. Blackburn, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978). "The admission of improper evidence is deemed harmless if it is merely cumulative to other evidence" State v. Oglesby, 384 S.C. 289, 293, 681 S.E.2d 620, 622 (Ct. App. 2009). "Where a review of the entire record establishes the error is harmless beyond a reasonable doubt, the conviction should not be reversed." State v. Thompson, 352 S.C. 552, 562, 575 S.E.2d 77, 83 (Ct. App. 2003). "Error is harmless when it could not reasonably have affected the result of the trial." State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (quoting State v. Key, 256 S.C. 90, 180 S.E.2d 888 (1971)).

At trial the State produced evidence from two expert witnesses from SLED regarding the presence of Washington's fingerprint inside Collins' house. (App. 104, 125, 135). Collins testified he did not know Washington and there was no reason for Washington to be in his house. (App. 63-64). Washington admitted that he did not know Collins and claimed he was never at Collins' home. (App. 208-09). The State presented testimony from employees of two different pawn shops testifying that items matching the description of items stolen were pawned by Washington on the day of the burglary. (App. 140-41, 146-47, 151). Additionally, Sarah Myers of Alternative Staffing testified Washington did not begin working for the company until over a month after the burglary. (App. 162). This contrasted with Washington's statement that he was working on the day of the burglary. (App. 207). For the foregoing reasons, the State respectfully

requests this Court to grant the State's petition for a writ of certiorari to review the decision of the Court of Appeals.

CONCLUSION

For all the foregoing reasons, the State respectfully requests this Court to grant this petition for a writ of certiorari.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

October 29, 2020

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Writ of Certiorari to the Court of Appeals
Appeal from Charleston County
Honorable Roger L. Couch, Circuit Court Judge
S.C. Ct. App. Appellate Case No. 2017-001111

THE STATE, Petitioner,

vs.

MACK SEAL WASHINGTON, Respondent.

PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Petition for Writ of Certiorari and Appendix on Respondent by email to the address listed in AIS and with a copy of the same to be deposited in the United States mail, postage prepaid, addressed to:

Susan B. Hackett, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This 29th day of October, 2020

Sally Ellison

SALLY ELLISON
Legal Assistant
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Sally Ellison

From: Sally Ellison
Sent: Thursday, October 29, 2020 10:34 AM
To: 'shackett@sccid.sc.gov'; Kasperski, Katriel
Cc: Scott Matthews; William Blitch; Sally Ellison
Subject: Emailing: 4 attachments
Attachments: Washington Mac Seal cover letter serving Petition Motion and Appendix Appelate Case No. 2017-001111 (02415131xD2C78).pdf; Washington Mack Seal Appellate Case # 2017-001111 Motion to Include Recording of Oral Argument PDF (02415106xD2C78).pdf; Washington Mack Seal Appellate Case # 2017-001111 PDF Petition for Cert (02415096xD2C78).pdf; WASHINGTON Mack - Appendix (02400952xD2C78).pdf

Good Morning:

Attached is a cover letter serving the attached copies of Petition for Writ of Certiorari, Motion to Include Recording of Oral Argument in Appendix, and Appendix. These court documents will be filed today with the Supreme Court through the AIS One Drive System.

Please confirm receipt of these documents.

Sally Ellison
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