STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Greenville County

Honorable Letitia H. Verdin, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

MALETTE DENISE KIMBROUGH,

APPELLANT

APPELLATE CASE NO. 2019-001013

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FINAL BRIEF OF APPELLANT

———————

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3.

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

STATEMENT OF THE CASE

Appellant was indicted at the August 28, 2018 term of the Greenville County grand jury for the offenses of murder and possession of a weapon during the commission of a violent crime. R. 326-327. Her case came on for trial on June 10, 2019 before the Honorable Letitia H. Verdin, and a jury. O. W. Bannister and Alex Stalvey represented appellant. W. Jeffry Weston and Anthony J. McCollum were the assistant solicitors. R. 1.

On June 12, 2019, the jury found appellant guilty on both counts. R. 319, ll. 14-19. Judge Verdin sentenced appellant to thirty-seven years' imprisonment. R. 330, ll. 8-9.

This appeal follows.

STANDARD OF REVIEW

Jury instructions: "In criminal cases an appellate court sits to review errors of law only." State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion." Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." Id

Admission of evidence - hearsay: The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice." 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." Id. at 429–30, 632 S.E.2d at 848.

ARGUMENT

1.

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

Relevant Facts

Ruby Smith was the decedent's live-in sixty-two-year-old daughter. She was on disability, so she was not working at the time of the incident in this case. R. 13, l. 12 – 14, l. 9. Smith was living with her seventy-five-year-old decedent mother on Colonial Avenue in Greenville at the time of her death. The decedent had numerous medical problems and she was mostly confined to a wheelchair. R. 14, l. 18 – 15, l. 22.

Smith said the decedent used a "sleep machine" or an "oxygen machine" to help her sleep at night. "I put water in it every night." R. 17, l. 20 – 18, l. 7. Her mother also wore a plastic mask "that went over her nose and her mouth." R. 18, ll. 20-23. Smith testified that her seventy-five-year-old decedent mother smoked crack. Smith admitted she smoked crack also but maintained, "[I] didn't do none that night." R. 19, ll. 3-22.

Smith knew Appellant Malette Denise Kimbrough as her mother's friend, and her friend also. Smith and her mother had known appellant for about a year. "She just kept coming over there hanging around and would get high." Smith said appellant also used crack, and she considered appellant and her mother to be "get-high buddies." R. 21, ll. 3-17. Smith testified that appellant liked her mother and she had never heard them argue or even disagree. R. 21, l. 18 – 22, l. 3.

Smith said on the night the decedent died she was in the house with the decedent, appellant, her nephew, Lorenzo Pardlow, and her niece, Portia Rogers. R. 24, l. 22 – 26 l. 4. Portia's boyfriend, Leroy, was also present, but Smith offered, "They left around about 12:00," midnight. R. 26, ll. 3-10.

Smith recalled that prior to Portia leaving, "She got into an argument with me. Me and her got into it because I told her to leave out of my house." R. 27, ll. 12-15. Smith claimed to the solicitor that when Portia and her boyfriend left, neither one of them came back to the house again that evening. Smith said that Portia was not mad at her mother, and that her beef was with Smith. She maintained that Portia had no motive to kill her mother, and even that Portia could not have killed her mother. R. 30, ll. 1-21.

Smith noted that for about a week, appellant had slept in a lounge chair in the decedent's room. The decedent slept in a king or queen-size hospital bed in "a nice size bedroom." R. 31, l. 3 – 32, l. 15. Smith admitted that appellant was nice to her mother, did her hair, cooked for her, and that they smoked crack cocaine together. R. 32, l. 19 – 33, l. 12. Smith said appellant had an overnight bag, "a tote bag with clothes and stuff" and "[s]he washed up and changed clothes" at their house. She did not live there or have a key to the house. R. 33, l. 8 – 34, l. 14.

Smith admitted that she had never seen appellant with a gun. R. 34, ll. 20-21. Smith claimed appellant had told her on one occasion that "her gun got missing. Her son gave it to her. And it was missing. I asked her why she didn't call the police and report it." Smith claimed the report of the missing gun came the day before the decedent was shot. R. 34, l. 20 – 35, l. 19. Smith said appellant asked her, "you think Portia got her gun or somebody got her gun. I said, No." R. 35, l. 24 – 36, l. 22. Smith maintained appellant told her the gun was a thirty-eight or forty-five caliber, "one of the two." R. 37, ll. 13-16.

Smith said on the evening of her mother's death, she went to bed about 11:30 or 12:00 p.m., and she made sure the doors were locked. She remembered Lorenzo "was in the house" as were appellant and the decedent. R. 37, l. 19 – 39, l. 12.

Smith said her decedent mother called her in her room on the telephone from the decedent's bedroom at about 3:00 or 3:30 a.m, "wanting me to come put water in her machine." R. 39, l. 10 – 40, l. 21. Smith said when she went into the decedent's bedroom to put water in her "sleep machine," appellant was asleep, "[s]he was laying back in the chair with her eyes closed." R. 40, l. 23 – 41, l. 20. Smith said her mother, the decedent, was awake at the time, and she "fixed the machine" and left. Smith went back into her bedroom and got back in bed. R. 42, l. 23 – 43, l. 13.

Smith maintained that thirty-five minutes, to an hour or so later, "I heard some kind of noise like a banging door, a crazy noise—" "And I hollered out, I said, Momma, Lorenzo is going to call Uber to come and get him." R. 43, l. 24 – 44, l. 16. Smith said after she called out "Momma, is Lorenzo gone and did he call Uber for him?" that "[s]he never said nothing. And I got up." R. 44, ll. 11-22.

Smith testified, "I got up and opened the door. I looked in the back. Lorenzo was in the back room. Then I went to the front door—" Smith claimed, "Lorenzo was asleep—" and "Then I seen the front door was open." Smith continued, "And my momma's bedroom door was halfway open. I looked in. And I didn't see Denise [appellant] in the chair. I checked the front door. That's when I looked in there and went to my momma's room. And I seen her laying in the bed with a hole in her head." R. 45, ll. 12-20.

On questioning by the solicitor, Smith stated, "Ms. Kimbrough wasn't in the chair. She was gone . . . She was nowhere in the house." R. 46, ll. 9-13. Smith offered, "When I went

over to my mother, I seen my mother laying in the bed with a hole in her head. I kept hollering, Momma, momma, momma. She never did respond to me. And I got on the phone. I called 911." R. 46, ll. 16-19. "I told them that Denise must have killed—shot my momma in the head." R. 46, ll. 20-22. The 911 tape is on file with this Court. In that 911 call, Smith repeatedly told the 911 operator that she did not know who shot her mother.

Smith claimed, "I went and told Lorenzo she had shot my momma in the head. Momma was dead. And Lorenzo came in there and looked. And he got paranoid. He left out the door." "And I stayed on the phone until the police came." R. 46, l. 23 – 47, l. 25. Smith repeated that she found her mother dead, that appellant was no longer sleeping in the chair, and that appellant had left while Smith was apparently sleeping without telling Smith she was leaving. R. 48, ll. 13-24.

On cross-examination, Smith admitted that appellant cooked for her mother, did her hair, that she had never seen appellant with a gun, and that appellant and the decedent did drugs together. Smith acknowledged her decedent mother did not have any money and that appellant had money -- appellant "always had money." R. 50, l. 2 – 51, l. 20.

Smith also acknowledged on cross-examination that Portia, her niece, went outside and fired her pistol after she had gotten into an argument with Smith on the night the decedent was shot and killed. R. 51, l. 21 – 52, l. 13. Strangely, Smith said she did not hear Portia fire her gun that evening, but "they said she did." Smith said she meant that "Portia said she did . . . she told me that night. She called on the phone. And I told her my mother was dead." R. 52, ll. 9-24. Smith again admitted that appellant and her decedent mother had not argued and that there was no bad blood between them. R. 54, l. 1 – 55, l. 12.

Lorenzo Pardlow was thirty years old on the day of appellant's trial. The decedent was his grandmother, and Ruby Smith was his aunt. Lorenzo remembered on November 19, 2016, he was staying at his decedent grandmother's house. He had been there "for a couple of nights." R. 59, l. 12 – 60, l. 23.

Lorenzo recalled an argument between Portia and Ruby Smith that evening, and he said Portia left "around 11:00, no later than 11:30." R. 61, l. 6 – 62, l. 18. Lorenzo remembered that Portia went in the front yard, and "She shot in the air." R. 62, ll. 19-21. Lorenzo said as far as he knew, neither Portia nor her boyfriend came back into the house that night after they left around 11:00 p.m. Lorenzo said this left him, Ruby Smith, the decedent, and appellant in the house. R. 63, ll. 4-15.

Lorenzo testified that appellant was very close to the decedent, and that she did not have anything against her. "[S]he was friends with my grandma. They did drugs together." R. 63, l. 4 – 64, l. 25. Lorenzo said appellant helped clean up and fixed food for them to eat. Lorenzo also recalled that appellant slept in a chair in the decedent's room. R. 65, l. 1 – 66, l. 14. Lorenzo offered that the decedent "had real bad arthritis. She had bronchitis, asthma. She wasn't able to walk. She was in a wheelchair. She, also, slept with a breathing machine on." R. 67, ll. 7-11.

Lorenzo said he went to bed at midnight or 1:00 in the morning at the latest that fatal night. Lorenzo recalled he woke up at 3:30 or 4:00 in the morning to hear his aunt, Ruby Smith, "calling my grandma's name and she wasn't responding. That's when I woke up." Lorenzo said Smith was calling out, "Oh, they killed momma. They killed momma." Lorenzo went in to check on the decedent, "And she was laying in there in her bed dead, blood dripping from her head." R. 70, ll. 1-20. Lorenzo said there did not appear to be any sign of a struggle as the

decedent's hands were at her side. Lorenzo remembered that the appellant was no longer in the house when they found the decedent dead in her bed. R. 70, l. 1 – 72, l. 2. Lorenzo noted that the doors had "deadbolts" on them, and he reasoned the only way to open the door would have been from the inside. R. 71, l. 25 – 72, l. 8.

Lorenzo offered that after Ruby Smith called the police, "I stepped outside to take a walk for a minute to get myself together. And I took a stroll around the block and came right back." Lorenzo estimated that he was gone for five or ten minutes and "The cops was there. They was putting tape around the house, and all of that. And the rest of the family had done got there." Lorenzo gave the police a statement which said he had no idea why he did not hear a gunshot that night, offering: "Maybe because I was intoxicated." R. 73, l. 3 – 74, l. 3.

On cross-examination, Lorenzo admitted he had criminal convictions for grand larceny, selling drugs, failure to stop for a blue light, and driving under suspension. R. 77, l. 9 – 78, l. 4.

Keith Ramsey lived two houses away from the decedent's house on Colonial Avenue in Greenville. He was sixty-one years old, and he had retired from BMW by the time of the trial. R. 80, l. 14 – 81, l. 17. Ramsey worked one of the late shifts at BMW at the time the decedent was killed. Ramsey said he was "very good friends" with the decedent, but he did not socialize with her because of "some activity in the house I did not agree with." R. 82, l. 22 – 83, l. 15.

Ramsey remembered on November 19, 2016 at about four a.m. he was getting ready "to go to bed." "I had cut off the TV. And I was getting ready to go to bed, turning the lights off. And I came out of the bathroom going towards the bed, and I heard a gunshot." R. 84, ll. 11-21. Ramsey recalled, "I reached toward the head of the bed and grabbed my gun and headed towards the front door, looked at the—I always look at the cable box. I don't know, habit I guess. I

always look at the cable box because it's always on, has the time on it . . . about 4:10." R. 85, ll. 13-20.

Ramsey recalled that he turned the porch light off, went out on the front porch and "I looked to the left and I seen a lady down at the stop sign running." R. 86, ll. 15-25. Ramsey said this woman was black, but he did not recognize her and he could not give any further description of her. R. 87, l. 4 – 88, l. 21.

The First Hearsay Objection

Greenville investigator Antonio Bailey was the lead investigator in the homicide case involving the decedent. R. 121, l. 14 – 122, l. 17. Bailey went to the crime scene at about five a.m., and he said there was no sign of a struggle in the decedent's death. Bailey recalled that the victim was lying in a hospital bed on her back. "The room was somewhat cluttered. There was a chair, along with a little night stand, you know. And, of course, with trauma to the head, there was a substantial amount of blood." R. 130, ll. 5-24. The following occurred on direct examination of investigator Bailey:

> Q: All right. Did she [Ruby Smith] indicate what had happened to this Denise -- or what'd -- what did she tell you about the circumstances with regard to Denise?
>
> MR. BANNISTER: Your Honor, I believe that's hearsay. And we would object to that.
>
> MR. WESTON: Your Honor, it's not offered for the truth of the matter asserted. It's offered to explain what he did next, which is what I'm getting ready to ask him about.
>
> THE COURT: All right. I'll allow that question.
>
> BY MR. WESTON:
>
> Q: What did she tell you with regard to the circumstances with regard to this Denise and her deceased mother?

> A: She indicated that -- she talked about her mother being on a breathing machine and that she had to get up to put water in her mother's breathing machine. I think she indicated that she got up maybe around 4:00 to put – to go in her mother's room to put water in this machine. After she -- she said when she walked in the room, her mom was there in the bed. She put water in the machine. And there was -- Denise was sitting in a chair in her bedroom. She said, you know, she left and came back about maybe 30 or 45 minutes later. And she noticed that Denise was gone and her mother was laying there with – bleeding from the head.

R. 132, l. 11 – 133, l. 11.

Bailey also maintained that he thoroughly investigated this case, and he made a broad claim that he eliminated other suspects in the case. R. 140, ll. 4-11. As will be seen infra, when Bailey testified specifically about him specifically eliminating Portia Rogers as a suspect, and his belief that Portia did not have anything to do with the decedent's death based on information he had received, defense counsel objected to this hearsay testimony. R. 161, ll. 1-17.

On cross-examination, Bailey acknowledged he knew that Portia Rogers had engaged in an argument with the decedent's daughter on the night the decedent was killed. He also knew Portia had fired her weapon twice in the air at the house on the night of the murder. R. 149, l. 15 – 150, l. 25.

Bailey admitted that Portia refused to come in for an interview because she had outstanding arrest warrants against her. When she finally came in, she failed to tell Bailey that she was in possession of a weapon and had fired it on the night of the murder. R. 151, l. 4 – 152, l. 4.

Bailey acknowledged that Portia had been taken into custody days before his interview with her and that she was in possession of a twenty-two-caliber pistol at the time of her arrest. R. 152, l. 21 – 156, l. 20. Bailey admitted that the twenty-two-caliber pistol in Portia's

possession was never compared to the "bullet jacket recovered from Ruby Flamm." R. 157, ll. 3-13.

Bailey also acknowledged that he learned appellant had gotten a loan for $850 on November 17, 2019, two days before the murder from "a cash loan business that was on Pleasantburg Drive." R. 158, ll. 14-24. This was significant because of evidence from appellant's daughter and her boyfriend that appellant had money in her possession following the murder.[1]

Michael Argumenti was living with the appellant's daughter in an apartment on the night the decedent was killed. R. 182, l. 14 – 185, l. 13. Michael remembered that at about 4:30 in the morning on November 19, 2016, appellant knocked on their door. R. 185, ll. 10-25. The testimony of both Michael and the appellant's daughter were inconsistent and vacillating. Michael said his girlfriend, the appellant's daughter, asked her mother if there was a problem, and "She [the decedent] said she couldn't tell us" and that "She said she was walking a long way and she wanted to take a shower because she was tired and sweaty." R. 191, ll. 6-21.

Michael said he told an investigator in the case that appellant had "a stack of money, 20s, and hundreds, and a Visa card" in her possession. When Michael said he could not remember exactly what he told the investigator, the solicitor again accused him of lying. R. 193, ll. 5-20. Michael testified that he did not see appellant with any gun that night and that the police searched their apartment, and did not find one either. "I had some marijuana on my stool that they took." R. 203, l. 14 – 204, l. 3.

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[1] Firearm expert James Armstrong testified that the fatal bullet could not have been fired by a twenty-two-caliber handgun. "It's definitely the wrong caliber. A 22 is much smaller than the nine millimeter." R. 178, ll. 2-15.

Appellant's daughter, twenty-eight-year-old Malexes Dixon, testified she was threatened by the police into giving a statement against her mother. R. 208, l. 10 – 213, l. 21. Dixon admitted she told an investigator when appellant came to their apartment that early morning, she asked her, "What the hell is going on, momma." She told the investigator that appellant told her, "I can't tell you anything." R. 222, ll. 15-21. Dixon said she had lied to the police because she was scared. She told the investigator her mother said, "I think I hurt somebody tonight." R. 223, ll. 6-23. Dixon said appellant had cigarettes, candy, and some change in her pocketbook, but she did not have a gun in her possession. R. 231, l. 20 – 232, l. 7.

Request to Charge and Objections

At a charge conference held on the morning of Wednesday, June 12, 2019, defense counsel requested an instruction on circumstantial evidence pursuant to State v. Logan, 405 S.C. 83, 747 S.E.2d 444 (2013). R. 249, l. 6 – 250, l. 14. The solicitor then told the judge the state wanted the court to instruct that malice could be inferred from the use of a deadly weapon. A miscellaneous, State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019), had been argued on February 21, 2019 before the Supreme Court. This was almost four months before the charge conference in this case. State v. Burdette was filed on July 31, 2019.

Regardless, when the judge asked the defense for its position on charging "malice can be inferred from the use of a deadly weapon," defense counsel objected to that instruction. R. 251, ll. 14-20. Defense counsel also added that there was case law on the malice charge, and that he could further argue after closing arguments, which did not occur, but nonetheless defense counsel's objection to the inferred malice instruction remained. R. 251, l. 14 – 254, l. 6.

The judge also told defense counsel she did not need "a lot of argument" on the malice instruction, but she would allow it if the defense desired to argue it. R. 253, l. 17 – 254, l. 6.

Defense counsel later told the judge he did not have any further arguments on the jury instructions. R. 258, ll. 3-12.

Charge on the Law

The judge charged the jury that malice could be inferred from the use of a deadly weapon. "A deadly weapon is any article, instrument, or substance which is likely to cause death or great bodily harm. Whether an instrument has been used as a deadly weapon depends on the facts and circumstances in each case. A gun may be a deadly weapon, even if it is not operating." R. 304, l. 23 – 305, l. 5.

Discussion

In State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019), the Supreme Court held that the judge erred by instructing the jury that malice could be inferred from the use of a deadly weapon. In the particular facts of Burdette, the Supreme Court noted there was evidence which would reduce, mitigate, excuse, or justify the homicide as previously held in State v. Belcher, 285 S.C. 597, 685 S.E.2d 802 (2009), to make the inferred malice instruction improper. However, the Supreme Court in State v. Burdette held that, regardless of the evidence presented at trial, "a trial court shall not instruct a jury that it may infer the existence of malice when the deed was done with a deadly weapon."

The Court held the state and the defense were free to argue what they wished regarding malice, but that the trial court could not charge that malice could be inferred from the use of a deadly weapon. State v. Burdette, 427 S.C. 490, 501, 832 S.E.2d 575, 582 (2019). The Court in Burdette stated based upon Griffith v. Kentucky, 479 U.S. 314 (1987), that its holding was effective in cases pending on direct review, such as this case, where the issue was preserved. State v. Burdette, 427 S.C. 490, 505, 832 S.E.2d 575, 583 (2019).

There was no doubt that the decedent was shot with a deadly weapon. The error also was not harmless. This was a purely circumstantial evidence case where the only evidence was that appellant and the decedent were friends. There was no evidence they ever argued or even disagreed.

As to the suspicion evidence, appellant left the decedent's house on the night of the murder. Appellant also had money in her possession when she arrived at her daughter's apartment in the time period after the murder. The only evidence in this case was that the decedent did not have money. Appellant, conversely, had obtained a loan of over $800 from a loan company two days before the shooting. Thus, while appellant having money in her possession when she went to her daughter's apartment in the early morning hours may look suspicious, there was no evidence in the record this money came from the decedent. This was a purely circumstantial evidence case where the state's case only raised a suspicion that appellant was guilty. The error was not harmless. Appellant is respectfully entitled to a new trial.

2.

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

Relevant Facts

Investigator Antonio Bailey's testimony as seen above regarding what decedent's daughter, Ruby Lynn Smith, told him about the murder was hearsay. It was offered for the truth of the matter asserted. The solicitor's assertion otherwise was incorrect. As this Court will recall, investigator Bailey testified over objection:

> She [Ruby Lynn Smith] indicated that -- she talked about her mother being on a breathing machine and that she had to get up to put water in her mother's breathing machine. I think she indicated that she got up maybe around 4:00 to put – to go in her mother's room to put water in this machine. After she -- she said when she walked in the room, her mom was there in the bed. She put water in the machine. And there was -- Denise was sitting in a chair in her bedroom. She said, you know, she left and came back about maybe 30 or 45 minutes later. And she noticed that Denise was gone and her mother was laying there with – bleeding from the head.

R. 132, l. 25 – 133, l. 11.

Hearsay is an out of court statement offered to prove the truth of the matter asserted therein. Rule 801 (c), SCRE; State v. Brown, 317 S.C. 55, 451 S.E.2d 888 (1984). The rule against hearsay prohibits the admission of evidence of an out of court statement to prove the truth of the matter asserted unless an exception to the rule applies. See Rule 802, SCRE; State v. Price, 368 S.C. 494, 629 S.E.2d 363 (2006).

Investigator Bailey's testimony that the decedent's daughter told him that she checked on her mother and added water to the "breathing machine" that early morning, and that appellant was sleeping in the lounge chair in the bedroom, but that when she returned thirty to forty-five minutes later, her mother was shot in the head and that appellant was gone was very damning, concise, hearsay testimony about the murder. The fact that it concisely put before the jury the state's theory of why appellant was the prime suspect underscores its prejudicial effect.

As in Jolly v. State, 314 S.C. 17, 443 S.E.2d 566 (1994), it was the repetition of Ruby Smith's testimony here – and in such a concise fashion by Investigator Bailey -- which enhanced its prejudice as our Supreme Court explained in Jolly. In Jolly, the state had a social worker testify that the child made a prior statement that Jolly had abused her. The judge overruled the hearsay objection of defense counsel.

This Court found the social worker's testimony was cumulative to the testimony of the child's uncle and the child. The Supreme Court in Jolly held that improper corroboration testimony cannot be harmless, because it is precisely this cumulative effect which enhances the devastating impact of improper corroboration. Jolly was only overruled as to the never harmless error portion of it.

Appellant obviously recognizes this is not a child sex case, and not a corroboration case, but Jolly v. State makes the point that hearsay repetition of a witness's testimony has the spurious effect of making the testimony of that earlier witness more believable, and it enhances by repetition that testimony. The testimony of Investigator Bailey as to what Ruby Smith told him happened on the night of the murder was offered for the truth of the matter as asserted, and therefore, it was inadmissible hearsay. See Rule 801 (c), SCRE; State v. Washington, 379 S.C. 120, 665 S.E.2d 602 (2008). As explained in issue one, this was a purely circumstantial

evidence case, where appellant had no motive to harm the decedent, there was not any animus between them, and the concise hearsay testimony regarding the alleged critical facts of the murder as allegedly told by Smith to Investigator Bailey was not harmless.

3.

The court erred by allowing Greenville investigator Antonio Bailey to testify that as a result of information he received, Portia Rogers "was absolutely cleared" as a suspect since Bailey's opinion was based on inadmissible hearsay, and it should not have been allowed.

Relevant Facts

As seen, Smith's niece, Portia Rogers, seemed a prime suspect in this case. She had an argument with the decedent's daughter on the night the decedent was shot and killed. Portia also discharged her weapon once or twice outside the house that night after being ordered to leave. Portia appeared to be avoiding the police after the shooting as seen supra, because of prior warrants and whatever other reasons. Portia apparently only talked to the police after she was in custody on another charge. Regardless, she failed to disclose the important fact she was in possession of gun, and had discharged it on the night of the murder.

Conversely, there was no evidence of any disagreement between appellant and the decedent -- or appellant and anyone in the household. Further, appellant did kind acts for the decedent by doing her hair and cooking for her and others in the household. There was absolutely no evidence of any animosity between appellant and the decedent or anyone else in the household as seen above.

Against this backdrop, the solicitor questioned investigator Bailey about his investigation of Portia Rogers. The following occurred between the solicitor and investigator Bailey:

> Q: Was she anywhere near this house at the time of the shooting?
>
> A: Not based on the information, no.
>
> Q: Was she, in fact, cleared totally as a suspect *as a result of information and alibi –*
>
> MR. STALVEY: Judge, I'm going to object. It's hearsay.

> THE COURT: I'm going to allow him to answer that question, whether or not she was cleared as a suspect.
>
> BY MR. WESTON:
>
> Q: *Did -- did you, in fact, clear her absolutely as a suspect as a result of that information about phones, as well as alibi witnesses?*
>
> *A: She was automatic -- she was absolutely cleared.*
>
> *Q: Do you believe today that Portia Rogers had anything to do with killing her grandmother?*
>
> *A: None whatsoever.*

R. 161, ll. 1-17. (emphasis added).

Discussion

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. See Rule 801 (c), SCRE; State v. Brown, 317 S.C. 55, 451 S.E.2d 888 (1984). The rule against hearsay prohibits the admission of evidence of an out-of-court statement to prove the truth of the matter asserted, unless an exception to the rule applies. See Rule 802, SCRE; State v. Price, 368 S.C. 494, 629 S.E.2d 363 (2006).

Portia Rogers was a natural suspect in the murder for the reasons above. While third-party guilt was never formally discussed in this case, it was apparent that the solicitor chose to take it head on as to the prospect of Portia Rogers being considered the murderer or a very likely suspect in the murder.

In context, it is apparent that investigator Bailey told the jury that based upon information that he was privy to, but that was not available to the jury, that Portia Rogers was cleared as a suspect, and that she did not have "anything to do with killing her" in Bailey's opinion based on the "information" he had received. See State v. Shuler, 344 S.C. 604, 630, 545 S.E.2d 805, 818

(2001) (Improper [bolstering] occurs when the prosecution places the government's prestige behind a witness . . . or where a prosecutor implicitly vouches for a witness' veracity by indicating information not presented to the jury supports the testimony." (citation omitted)); Id. at 631, 545 S.E.2d at 819. *Conceptually*, while the solicitor was not vouching for witnesses the jury never heard from, Investigator Bailey was doing exactly that when he boldly asserted that Portia Rogers had been cleared as a suspect, and that he was confident Portia had nothing to do with the murder. In short, the jury should take the word of government agent Bailey that suspect Portia had been "cleared as a suspect" based on information Bailey had allegedly received from others that he found credible. This inadmissible hearsay evidence was prejudicial to appellant as it impermissibly sought to remove the reasonable doubt of appellant's guilt by impermissibly absolving Portia Rogers through hearsay evidence where third party guilt had been legitimately raised by the trial evidence, and the solicitor chose to fight it. R. 161, ll. 1-17. Cf. State v. King, 422 S.C. 47, 810 S.E.2d 18 (2017) (holding the officer's testimony that she allegedly learned from neighbors that they had heard multiple shots, where King's defense was that his gun discharged one time accidentally during the robbery attempt, was inadmissible hearsay).

CONCLUSION

By reason of the foregoing arguments, appellant's conviction should be reversed, and this case remanded to the Greenville County Court of General Sessions for a new trial.

s/ Robert M. Dudek
Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 4th day of November, 2020.

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CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

November 4, 2020.

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