IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2019-KA-01467-COA

KOBE AUGUSTINE A/K/A KOBE JAQUAN AUGUSTINE A/K/A KOBE J. AUGUSTINE — **APPELLANT**

v.

STATE OF MISSISSIPPI — **APPELLEE**

DATE OF JUDGMENT:	09/16/2019
TRIAL JUDGE:	HON. LAWRENCE PAUL BOURGEOIS JR.
COURT FROM WHICH APPEALED:	HARRISON COUNTY CIRCUIT COURT, FIRST JUDICIAL DISTRICT
ATTORNEY FOR APPELLANT:	OFFICE OF STATE PUBLIC DEFENDER BY: MOLLIE MARIE McMILLIN
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: BARBARA WAKELAND BYRD
DISTRICT ATTORNEY:	JOEL SMITH
NATURE OF THE CASE:	CRIMINAL - FELONY
DISPOSITION:	REVERSED AND REMANDED - 12/15/2020
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

BARNES, C.J., FOR THE COURT:

¶1. A Harrison County grand jury indicted Kobe Augustine for first-degree murder. After a jury trial, Augustine was acquitted of first-degree murder but convicted of second-degree murder. The trial court sentenced Augustine to serve thirty-five years in the custody of the Mississippi Department of Corrections (MDOC). After the court denied his posttrial motion, Augustine appealed, claiming that the trial court erred by (1) denying his motion to suppress his statement to law enforcement and (2) admitting hearsay evidence through Officer Nicholas Keyhoe's testimony. Finding the admission of Officer Keyhoe's hearsay testimony

constitutes error, we reverse and remand for a new trial.

FACTS AND PROCEDURAL HISTORY

¶2. On January 23, 2016, Sergeant Bradley Walker of the Gulfport Police Department responded to a shooting and found sixteen-year-old Nigel Poole lying in a grassy area with a gunshot wound to his head. Poole was unresponsive and later died at a hospital. Fifteen-year-old Augustine became a suspect and was arrested after police discovered him hiding under his bed. Augustine provided a statement to the police, claiming he and Poole had gotten into a confrontation. Augustine claimed that he wrestled his gun away from Poole and fired the gun into the air. Augustine was indicted for first-degree murder, and a jury trial was held on August 13, 2019.

¶3. Nilah Hands testified at trial that she was "hanging out" with Augustine, Poole, Clarence Clay, and Ladarious Thompson at her house on the day of the shooting. She had seen Augustine with a .38-caliber revolver earlier that day. According to Hands, Augustine left her house later that evening. Poole went with him but indicated to the others that he would be right back. Minutes later, Hands "heard two gunshots going off" and saw Augustine "running down the street by himself." When she asked where Poole was, Augustine hesitantly said that Poole had gone to "Cam's house." Hands asked about the gunshots, and Augustine said someone in a white car had shot at him and Poole three times and that he shot back once. Hands testified that this did not make sense to her because she only heard two gunshots and never saw a white car. Thompson also averred at trial that he

told law enforcement he knew Augustine was lying because Thompson only heard three gunshots. Thompson said that he saw Augustine give a gun to Clay, and Hands testified that she overheard Augustine tell Clay, "I shot him."

¶4. Hands, Thompson, and Clay went to Cam's house. No one answered when they knocked on the door, but they saw Andre Jefferson. Jefferson testified that while he was walking back from the store, he heard "[l]ike two" gunshots.[1] Jefferson kept walking and found Poole on the ground trying to breathe; so he went to Hands's house and called the police.

¶5. Sergeant Walker testified that he responded to the scene and discovered Poole lying in a grassy area. Poole appeared to have a gunshot wound to the head; he was still breathing but unresponsive. Sergeant Walker noticed one of Poole's pockets was inside out, and there were two cell phone chargers on the ground next to him.

¶6. Detective Christopher Werner with the Gulfport Police Department testified that Officer Keyhoe provided Augustine's name over the radio; so he and a crime scene technician went to Augustine's residence. Detective Werner found Augustine hiding under his bed and took him into custody. Augustine was advised of his *Miranda*[2] rights. He appeared to understand his rights, and he waived his rights and provided a statement. Over defense counsel's objections, the recording of the interview with police was played for the

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[1] Another witness, Jimmy Harrson, also testified that he heard two gunshots.

[2] *Miranda v. Arizona*, 384 U.S. 486 (1966).

jury. According to Detective Werner, Augustine initially stated that "he wasn't even there." Then Augustine said that someone in a car shot at them. Detective Werner testified there was no evidence to corroborate Augustine's statement. Then Augustine confessed to Detective Werner that he and Poole had a confrontation, and Poole hit him on the left side of the face. But Detective Werner did not find any indication of a struggle, and Augustine never said that Poole threatened to kill or hurt him.[3]

¶7. Jessica Kendziorek, a crime scene technician with the Gulfport Police Department, testified that during the search of Augustine's bedroom, they found a .380 shell casing and a .38-caliber bullet; however, a gun was not found at the crime scene or Augustine's residence. She also testified that when they discovered Augustine hiding under the bed, Augustine stated, "I don't have the gun, I don't have the gun." He then said, "[D]on't shoot, I don't have a gun, don't shoot, I don't have a gun."

¶8. Irby Jules testified that he had known Augustine "from the neighborhood." Yet he would not identify Augustine in the courtroom. Jules also could not recall giving a statement to law enforcement. The prosecutor attempted to impeach Jules with the specifics of a prior statement that he had given to Officer Keyhoe over defense counsel's objections, but the court did not let the prosecutor proceed; so the State tendered the witness.

¶9. Later, outside the jury's presence, the State indicated that it intended to call Officer

[3] Detective Werner noted a blemish on right side of Augustine's face but said that it did not appear to be an injury.

Keyhoe to impeach Jules with a prior statement. Defense counsel argued that this testimony was hearsay and "highly prejudicial." During a proffer, Officer Keyhoe testified that Jules had told him that "[he] heard [Augustine] in the neighborhood stating that he was going to get a teardrop tattoo . . . and also that he was going to catch a body," which meant that he was going to kill someone. Officer Keyhoe subsequently clarified that Jules had heard this information directly from Augustine. Jules also told the officer that he thought Augustine and Poole were having relations with the same girl. Jules said that Augustine attempted to sell him a black .38-caliber revolver for $150 approximately one week before the shooting. After the proffer, defense counsel stated that he had no problem with the State's asking Officer Keyhoe if Jules provided a statement, but he objected to the contents of Jules's statement being presented to the jury. Ultimately, the trial court held that the testimony about catching a body and selling a gun would be admissible for purposes of impeachment.

¶10. The State then called Officer Keyhoe to testify in front of the jury. He testified that Jules told him that he heard Augustine talking about catching a body, which meant to kill someone, and that Augustine and Poole had relations with the same girl. Finally, Officer Keyhoe stated that Jules said Augustine attempted to sell him a .38-caliber revolver one week prior to the shooting.

¶11. Dr. Mark LeVaughn, the Chief Medical Examiner with the State Medical Examiner's Office, testified that Poole died as a result of his injuries. Dr. LeVaughn testified Poole had sustained two gunshot wounds to the head, and he was able to determine the distance

between the barrel of the gun and Poole's head was beyond three to four feet. He did not know Poole's position when he was shot. According to Dr. LeVaughn, one of the shots would have rendered Poole "instantly incapacitated." Dr. LeVaughn did not observe any defensive wounds on Poole's body.

¶12. After the State rested its case-in-chief, Augustine's mother, Jackie Augustine, testified on behalf of the defense. Jackie said that she worked on January 23, 2016, and did not see Augustine until around 7:30 p.m. According to Jackie, he was acting normally at the time, and she never knew him to have a gun in the house. However, she admitted that she did not know if he had a gun earlier that day.

¶13. Finally, Augustine testified. He said he had purchased a gun from Clay a day or two before the shooting. Augustine did not know how Clay got the gun or if he stole it, but he knew the gun had previously belonged to Poole. Augustine never discussed the fact that he had the gun while he was with Poole because he "knew it was going to be problems." He said on January 23, 2016, he left to go to a girlfriend's house, and Poole followed him. Acknowledging that Augustine had the gun, Poole asked to shoot it. Augustine said that when he pulled out the gun, Poole "hit [him] in the face," and the gun fell to the ground. Wrestling over the gun, Augustine "pushed off, . . . grab[bed] the gun, and . . . fired a warning." Augustine testified that Poole was bigger than he was and would shoot him if he got the gun. According to Augustine, Poole was still coming toward him after the first shot; so he shot again. However, Augustine admitted that he had previously told Detective Werner

that Poole fell after the first shot. Augustine went back to Hands's house and gave the gun to Clay because he did not "want nothing to do with the gun." Augustine admitted to lying to his friends about what happened because he was "scared" and did not "want to go to jail." He also admitted to lying to Detective Werner because Augustine "felt like [the detective] was going to feel like I'm a criminal when that's not me." Finally, Augustine admitted that he had lied about what happened during a phone call to his brother the Thursday before trial.

¶14. The jury found Augustine guilty of second-degree murder, and he was sentenced to serve thirty-five years in the custody of the MDOC. Augustine appeals, contending that the trial court erred by denying his motion to suppress his statement to law enforcement and by admitting hearsay evidence through Officer Nicholas Keyhoe's testimony.

DISCUSSION

I. Whether the trial court erred in denying Augustine's motion to suppress his statement.

¶15. Prior to trial, Augustine filed a motion to suppress his statement to law enforcement, arguing that he was not adequately warned of his rights, he did not understand his rights, his statement was made without counsel present, and his statement was a product of coercion, duress, and promises of leniency. At a hearing on the motion to suppress, Detective Werner testified that Augustine was advised of his *Miranda* rights. According to Detective Werner, Augustine had a question, but he explained the form to Augustine, who acknowledged—both orally and in writing—that he understood his rights and indicated that he was willing to make a statement. Detective Werner said that Augustine did not request an attorney. He

acknowledged that Augustine did ask where his mother was and gave Detective Werner her phone number.[4] Detective Werner testified that he told Augustine that he did not know where his mother was but he would find her.[5] According to Detective Werner, Augustine was not coerced to give a statement, and he did not condition Augustine's seeing his mother upon providing a statement. Augustine told Detective Werner that he had been threatened by individuals in the neighborhood, but not law enforcement. Finally, Detective Werner testified that Augustine had several prior arrests and that Augustine had waived his rights and gave a statement in September 2015. Augustine's mother, Jackie Augustine, testified that she asked to go back to the interview room, but the lady at the front desk said that "they [would] come get [her]." Ultimately, the trial court denied Augustine's motion to suppress his statement.

¶16. Augustine argues that because he did not knowingly, intelligently, or voluntarily waive his rights to remain silent and to counsel, the trial court erred by denying his motion to suppress. It is well established that "a defendant must be advised of his right to remain

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[4] Defense counsel also suggested that Augustine's statement should have been suppressed because he was illegally arrested and his statement was taken in violation of the Youth Court Act. Augustine appears to have abandoned these arguments on appeal. However, to the extent that Augustine is arguing that his mother should have been present for the interview, we note that the provisions of the Youth Court Act are inapplicable in this case. *See* Miss. Code Ann. § 43-21-151(1)(b) (Rev. 2015); *Moody v. State*, 838 So. 2d 324, 333 (¶33) (Miss. Ct. App. 2002) (noting that crimes "within the exclusive jurisdiction of the circuit court from their inception[] render[] the provisions of the Youth Court Act inapplicable").

[5] The transcript of the interview indicates that Augustine stated, "I thought I was going to talk to her." Detective Werner responded, "You will, I'll will make sure of it."

silent and his right to an attorney before any police questioning can take place during custodial interrogation." *Taylor v. State*, 291 So. 3d 14, 21-22 (¶24) (Miss. Ct. App. 2019) (citing *Miranda*, 384 U.S. at 444). "Once informed of these rights, an accused may waive them if he so desires and respond to questioning." *Id*. (citing *Jordan v. State*, 995 So. 2d 94, 106 (¶30) (Miss. 2008)). However, "[w]aiver of the constitutional rights to remain silent and to counsel must be knowing, intelligent, and voluntary." *Id*. (quoting *Moore v. State*, 287 So. 3d 905, 921 (¶21) (Miss. 2019)). The Mississippi Supreme Court has held that a waiver is considered to be knowing and intelligent if it is "made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it." *Benjamin v. State*, 116 So. 3d 115, 123 (¶19) (Miss. 2013) (quoting *Moran v. Burbine*, 475 U.S. 412, 421 (1986)). "A voluntary waiver of one's *Miranda* rights is one made with 'free and deliberate choice rather than intimidation, coercion, or deception.'" *Singleton v. State*, 151 So. 3d 1046, 1053 (¶35) (Miss. Ct. App. 2014) (quoting *Chim v. State*, 972 So. 2d 601, 603 (¶8) (Miss. 2008)).

¶17. "[W]hether a defendant knowingly, intelligently, and voluntarily waives his rights is a factual question to be determined by the trial judge under the totality of the circumstances." *Taylor*, 291 So. 3d at 23 (¶30) (quoting *McGowan v. State*, 706 So. 2d 231, 235 (¶12) (Miss. 1997)). "Because the trial judge sits as the finder of fact in these matters, we give great deference to the court's decision to admit such incriminating statements." *Id*. (citing *Gillett v. State*, 56 So. 3d 469, 484-85 (¶29) (Miss. 2010)). This Court "will not disturb a [trial]

court's denial of a motion to suppress unless the incorrect legal principle was applied; if there was no substantial evidence to support a knowing, intelligent, and voluntary waiver of *Miranda* rights; and if the denial was a result of manifest error." *Id*. at 22 (¶25) (quoting *Tard v. State*, 132 So. 3d 550, 552 (¶9) (Miss. 2014)).

¶18. We find nothing in the record to indicate that Augustine did not understand his rights or the consequences of waiving them. Detective Werner had fully advised Augustine of his rights, Augustine indicated that he understood these rights, and he waived his rights without promises of leniency, coercion, or duress. The record also shows that although Augustine was fifteen years old, he was familiar with the criminal justice system, and he had waived his rights in another investigation. In addition, Augustine did not request an attorney any time prior to or during his interview. For these reasons, this issue is without merit.

II. Whether the trial court erred in admitting Officer Keyhoe's testimony.

¶19. Augustine further claims that the trial court erred by admitting hearsay evidence through Officer Keyhoe. Specifically, Augustine takes issue with the admission of Officer Keyhoe's testimony regarding Jules's prior statement. We find that the officer's testimony that Jules provided a statement to police was admissible for impeachment purposes. However, his additional testimony regarding the content of Jules's statement was inadmissible hearsay and prejudicial to Augustine's defense, as it provided the only evidence of a motive for the shooting. Further, we find such prejudice caused by the officer's hearsay testimony was not cured by the trial court's limiting instruction.

¶20. After Jules testified that he did not recall making any statement, the State proffered Officer Keyhoe as a witness to impeach Jules's testimony. The Mississippi Supreme Court "has held that where a witness claims not to recall making a statement, the witness's lack of recognition is essentially a denial," and the State may introduce evidence in rebuttal "*that he did in fact make the statement being asked about*." *Harrison v. State*, 534 So. 2d 175, 180 (Miss. 1988) (emphasis added) (citation omitted). "This prevents an unwilling witness from seeking refuge in a lack of recollection." *Bush v. State*, 667 So. 2d 26, 28 (Miss. 1996) (citing *Harrison*, 534 So. 2d at 180).

¶21. In this case, the trial court not only allowed the officer to testify that Jules made a statement but also to the content of that statement—specifically, that Augustine told Jules about "catching a body," which meant Augustine intended to kill someone, that Augustine and Poole had relations with the same woman, and that Augustine tried to sell Jules a gun. In ruling that this testimony was "material" and admissible, the trial judge cited *Johnson v. State*, 655 So. 2d 37, 41 (Miss. 1995), in which the supreme court held that "a party has the right to contradict a witness and impeach [him] if in so doing he was attempting to show bias, motive, or intent as affecting the credibility of the testimony of the witness." (Quoting *Cranmer v. Baylis*, 493 So. 2d 977, 977 (Miss. 1986)).

¶22. We find that the officer's testimony exceeded the permissible bounds of impeachment testimony and constituted inadmissible hearsay. "In general, statements made outside the court submitted to prove the truth of the matter asserted are inadmissible hearsay." *Blake v.*

State, 256 So. 3d 1161, 1168 (¶32) (Miss. 2018) (citing M.R.E. 801, 802). Jules was a hostile witness, refusing to identify Augustine in the courtroom, and Jules never testified as to any conversation between himself and the officer.[6]

¶23. Officer Keyhoe's testimony that Jules had provided a statement to police was, on its own, sufficient to question Jules's credibility. But as argued by Augustine's trial attorney, James Lloyd Davis:

> First, credibility for what? He never said anything. So why do they want to impeach him anyway? He never said anything.
>
> . . . .
>
> The guy didn't say anything to impeach. What was his value? Nothing. What are they impeaching? Nothing. I think they are just trying to get a backdoor way to get in those same statements they didn't get in with the witness.

Had Jules testified, for example, that Augustine never indicated a desire to kill anyone or that Augustine and Poole never dated the same woman, the content of his prior statement to the officer could be used to impeach him. Here, however, there was no substantive testimony to be impeached and no reason to introduce Officer Keyhoe's testimony regarding the content of the conversation between Jules and the officer except to prove the truth of the matter asserted (i.e., that Augustine said he meant to kill someone and that Augustine and

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[6] The only remotely substantive testimony by Jules was an acknowledgment of what he told the prosecutors before trial—that he thought Augustine "was just influenced by rap music[,] . . . singing rap songs . . . with crazy lyrics" and that Augustine never told him "anything like confronting toward one another." But the impeachment evidence brought in with Officer Keyhoe's testimony did not attempt to question that statement.

Poole had a relationship with the same female) and to provide a possible motive for the murder. The trial court erred in allowing this testimony under the guise of impeachment.

¶24. "Errors in the admission of evidence are subject to a harmless error analysis because, as is often said, a defendant is entitled to a fair trial, not a perfect one." *James v. State*, 124 So. 3d 693, 699 (¶18) (Miss. Ct. App. 2013) (citing *Conners v. State*, 92 So. 3d 676, 688 (¶33) (Miss. 2012)). The supreme court has deemed the admission of hearsay testimony to be "harmless if 'the same result would have been reached had [it] not existed.'" *White v. State*, 48 So. 3d 454, 458 (¶17) (Miss. 2010) (quoting *Tate v. State*, 912 So. 2d 919, 926 (¶18) (Miss. 2005)). Augustine admitted that he had a gun in his possession that day and shot Poole, but he insisted that Poole hit him, they fought over the gun, and he shot Poole in self-defense. Officer's Keyhoe's hearsay testimony was the only testimony that established Augustine had a motive for shooting Poole, negating his self-defense argument. Therefore, we cannot find that this testimony was harmless error.

¶25. Finally, the trial court's limiting instruction to the jury regarding Officer Keyhoe's testimony failed to cure any error in this instance. As we noted in *Jenkins v. State*, 101 So. 3d 161, 169 (¶25) (Miss. Ct. App. 2012), "There is a presumption that a circuit court's limiting instruction to a jury, to disregard testimony or evidence that might be prejudicial, cures any error." (Citing *Burnside v. State*, 912 So. 2d 1018, 1024 (¶10) (Miss. Ct. App. 2005)). But as defense counsel asserted during his objection to the admission of this testimony:

> The contents of this hearsay is not supposed to be considered as evidence when [the jury] reach[es a] verdict. In this particular case[,] the content of the hearsay statements are that [Augustine] told Mr. Jules that he wanted to catch a body. . . . That is inflammatory. It's prejudicial. It's horrible.
>
> And how [are] you going to take that out of a jury's mind. It's impossible. That's why it's so bad in this case, and in this case, it is unbelievably bad. Even though we'll give them an instruction that says you're [not] supposed to consider the contents of those statements, they aren't going to be able to wipe those babies out. That's horrible.

In *James*, after finding the trial court erred in admitting certain impeachment testimony,[7] we addressed this precise issue, reasoning:

> We are well aware that under most circumstances, the jury is presumed to follow the instructions of the trial court. *Sanders v. State*, 63 So. 3d 497, 504 (¶19) (Miss. 2011). However, as the United States Supreme Court has observed, "there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." *Bruton v. United States*, 391 U.S. 123, 135 . . . (1968). In *Wilkins* [*v. State*], our supreme court addressed this concern in the context of prior inconsistent statements . . . point[ing] out the inherent difficulty in following the cautionary instruction: if the jury believes the prior statement, . . . how can it then put that aside and adjudicate his guilt based only on the State's circumstantial case? [*Wilkins v. State*, 603 So. 2d 309, 319 (Miss. 1992), *overruled on other grounds by Carothers v. State*, 152 So. 3d 277 (Miss. 2014)]. The [*Wilkins*] court echoed a century-old observation that a jury attempting to comply with the instruction "might endeavor to do so, and believe they were doing so, and still be involuntarily and unconsciously influenced thereby." [*Id.*] (quoting *Williams v. State*, 73 Miss. 820, 826, 19

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[7] The finding of reversible error in *James* was predicated on the fact that the State failed to demonstrate it was surprised by the witness's testimony, which the supreme court subsequently held in *Carothers v. State* is no longer the required standard. *See Carothers v. State*, 152 So. 3d 277, 284 (¶21) (Miss. 2014) (citing M.R.E. 607). However, this distinction does not negate our Court's rationale for determining that the limiting instruction failed to cure the court's error in admitting the testimony.

> So. 826, 827 (1896)). The court further observed: "permitting a jury to hear such testimony and then instructing it not to consider it except for 'impeachment' has been called by one scholar 'a pious fraud.'" *Id*. (citing Edmund M. Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 Harv. L. Rev. 177, 193 (1948)).

James, 124 So. 3d at 700-01 (¶22). Here, Officer Keyhoe's hearsay testimony provided the only evidence of motive or plan on the part of Augustine to kill Poole and refuted his claim of self-defense. We find persuasive defense counsel's argument that it would be "impossible" to "take that out of a jury's mind."

¶26. Accordingly, we conclude that the trial court's admission of this testimony constituted reversible error, and we reverse and remand for a new trial.

¶27. **REVERSED AND REMANDED.**

WILSON, P.J., WESTBROOKS, McDONALD AND McCARTY, JJ., CONCUR. LAWRENCE, J., CONCURS IN PART AND DISSENTS IN PART WITHOUT SEPARATE WRITTEN OPINION. GREENLEE, J., CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE WRITTEN OPINION, JOINED BY CARLTON, P.J., AND LAWRENCE, J.

GREENLEE, J., CONCURRING IN PART AND DISSENTING IN PART:

¶28. I disagree with the majority that the admission of Officer Keyhoe's testimony constituted reversible error. Therefore, I dissent in part.

¶29. At trial, Jules testified that he had known Augustine "from the neighborhood." Yet he would not identify Augustine in the courtroom. Jules also denied giving a statement to law enforcement. The prosecutor attempted to ask Jules about the specifics of a statement that he had given to Officer Keyhoe, but defense counsel objected. The court did not allow

the prosecutor to proceed with impeachment, so the State tendered the witness for cross-examination.

¶30. Later, outside the jury's presence, the State indicated that it intended to call Officer Keyhoe to impeach Jules with a prior statement. Defense counsel argued that this testimony was hearsay. After a proffer, defense counsel stated that he had no problem with the State asking Officer Keyhoe if Jules provided a statement but objected to the contents of Jules's statement being presented to the jury. Ultimately, the court held that a portion of Officer Keyhoe's testimony was admissible for impeachment purposes.

¶31. The State then called Officer Keyhoe to testify. According to Officer Keyhoe, Jules told him that he heard Augustine talk about catching a body, which meant to kill someone, and that Augustine and Poole had relations with the same girl. Finally, Officer Keyhoe testified that Jules said Augustine attempted to sell him a .38-caliber revolver one week prior to the shooting.

¶32. The standard of review for the admission of evidence is abuse of discretion. *Fontaine v. State*, 256 So. 3d 615, 621 (¶17) (Miss. Ct. App. 2018) (citing *Cooper v. State*, 200 So. 3d 1065, 1074 (¶32) (Miss. Ct. App. 2016)).

¶33. Mississippi Rule of Evidence 801(c) defines hearsay as "a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement." Officer Keyhoe's testimony was not "offered in evidence to prove the truth of the matter asserted." M.R.E.

801(c); *see Hall v. State*, 691 So. 2d 415, 420 (Miss. 1997). Rather, the evidence was offered as impeachment evidence from which the jury could infer that Jules's testimony was unreliable. *See* M.R.E. 613; *Hall*, 691 So. 2d at 420.

¶34. Furthermore, the jury was instructed as follows:

> You have heard evidence that Irby Jules made a statement prior to trial that may be inconsistent with the witness' testimony at this trial. If you believe that an inconsistent statement was made, you may consider the inconsistency in evaluating the believability of the witness' testimony. You may not, however, consider the prior statement as evidence of the truth of the matters contained in that prior statement.

And "it is presumed that jurors follow the instructions of the court." *Pitchford v. State*, 45 So. 3d 216, 240 (¶96) (Miss. 2010). The majority asserts that it was erroneous to admit Officer Keyhoe's testimony. But the testimony was not offered to prove the truth of the matter asserted. Rather, it was admitted for impeachment purposes, and the jury was instructed that it could not consider the testimony as substantive evidence. This ruling complies with long-standing Mississippi law. *See Baldwin v. State*, 784 So. 2d 148, 159 (¶40) (Miss. 2001) ("A statement that is not offered to prove the truth of the matter asserted is not hearsay and is, thus, admissible if it meets other evidentiary requirements."); *Hall v. State*, 691 So. 2d 415, 420 (Miss. 1997) (finding statement not hearsay when not offered to prove the truth of the matter asserted, but to impeach); *Harrison v. State*, 534 So. 2d 175, 179 (Miss. 1988) (finding prior statements were not offered as evidence to prove the truth of the matter asserted but rather as circumstantial evidence from which the jury could infer that the witness's testimony was unreliable). Because Officer Keyhoe's testimony was

offered for impeachment purposes and the jury was instructed that it could not consider it as substantive evidence, the trial court's decision to admit the evidence was not an abuse of discretion and was consistent with Mississippi law.

¶35. Furthermore, any error in admitting the testimony was harmless. Our supreme court has deemed the admission of hearsay testimony to be "harmless if 'the same result would have been reached had [it] not existed.'" *White v. State*, 48 So. 3d 454, 458 (¶17) (Miss. 2010) (quoting *Tate v. State*, 912 So. 2d 919, 926 (¶18) (Miss. 2005)). The majority asserts that the admission of Officer Keyhoe's testimony cannot be harmless error because it is "the only evidence of motive or plan on the part of Augustine to kill Poole." But to obtain a conviction for second-degree murder, the State had to prove beyond a reasonable doubt that Augustine killed Poole "without the authority of law by any means or in any manner when done in the commission of an act eminently dangerous to others and evincing a depraved heart, regardless of human life, although without any premeditated design to effect the death of any particular individual." *Jenkins v. State*, 284 So. 3d 862, 869 (¶11) (Miss. Ct. App. 2019) (quoting *Montgomery v. State*, 253 So. 3d 305, 316 (¶42) (Miss. 2018)). The State met its burden.[8] The majority also asserts that the admission of Officer Keyhoe's testimony cannot be harmless because "it was the only evidence . . . [that] refuted [Augustine's] claim of self-defense." However, Detective Werner testified that Augustine never stated that there was "a big blow up or a fight." And Detective Werner further testified that Augustine never

[8] Augustine does not challenge the sufficiency or weight of the evidence on appeal.

said that Poole threatened to kill him or threatened to hurt him.

¶36. Because I would affirm Augustine's conviction and sentence, I dissent in part.

CARLTON, P.J., AND LAWRENCE, J., JOIN THIS OPINION.