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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
The Honorable Thomas W. Cooper, Jr., Circuit Court Judge

STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

TASHONBY P. WILSON,

APPELLANT.

Appellate Case No. 2019-000749

FINAL BRIEF OF RESPONDENT

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1. Where a witness was testifying directly from a computer-aided dispatch report (CAD) but the CAD report was not introduced as evidence, whether the Court in ruling that hearsay statements from the CAD report were admissible under the business records exception to the rule against hearsay testimony.

2. Whether the court erred in allowing the state to publish an audio recording of a 911 call when the state offered no foundation to support that the hearsay statements contained in the call were admissible under one of the exceptions to the Hearsay Rule.

3. Whether the court erred in allowing the state to publish video recordings of three jail calls between the defendant and a third party which showed the appellant wearing a Lexington County Detention Center jumpsuit.

STATEMENT OF THE CASE

On September 26, 2016, appellant shot Ashley Jeffcoat and Brittany McCrae with a firearm in Lexington County. Appellant was arrested that night in Richland County, charged with 2 counts of attempted murder and possession of a weapon during a violent crime, and returned to Lexington County. On March 11, 2019, the Lexington County Grand Jury indicted appellant for 2 counts of attempted murder (Indictment #s 2019-GS-32-1182 & 1184) and possession of a weapon during a violent crime (Indictment # 2019-GS-32-1188). Josh Koger represented appellant. Appellant proceeded to a jury trial on April 23, 2019 before the Honorable G. Thomas Cooper. (R. 1). On April 26, 2019, the jury found appellant guilty of attempted murder (Ind. # 2019-GS-32-1182), guilty of assault and battery of a high aggravated nature (ABHAN) (Ind. # 2019-GS-32-1184), and guilty of the weapon charge (Ind. # 2019-GS-32-1188). (R. 513). A motion for a new trial was denied. (R. 512). Judge Cooper sentenced appellant to 27 years for attempted murder, 20 years for ABHAN, and 5 years on the weapon charge all to run concurrently. (R. 516). Appellant directly appeals raising 3 issues. (IBOA, p. 1). This is the Final Brief of Respondent.

FACTS

Brief Summary of the Crimes

On the evening of September 26, 2016, at the *Boardwalk Villas* condominiums on Lake Murray in Lexington County, appellant Tashonby P. (aka "Pep" or "Pep-Pep") Wilson, shot Ashley Jeffcoat ("Ashley") while inside Condominium #22 and then shot Brittany McCrae ("Brittany") in front of Condominium #48 with a .45 caliber semi-automatic pistol. The shootings were witnessed by multiple witnesses who all knew appellant and testified at trial. The shootings were in retaliation for Ashley and Brittany stealing appellant's drugs from his hotel room, Room 120 of *the Palmetto Inn*, in Richland County. After the 2 victims stole appellant's drugs from his

hotel room, appellant and another individual pursued the 2 women to the *Boardwalk Villas* where they damaged vehicles in the parking lot and then appellant shot the 2 women. Appellant was then driven away from the crime scene by the other unknown individual. (R. 42-106; 119-174; 183-206; 209-268; 274-311; 323-405; 513; State's Ex. 1; 138).

How the Crimes Occurred

Appellant was an admitted drug dealer who operated out of *the Palmetto Inn,* a drug den, in Richland County. He sold both heroin and crack cocaine. The victims Ashley and Brittany were romantically involved. Both were addicted to heroin and bought heroin from appellant at *the Palmetto Inn.* Before the day of the shootings, Ashley committed a sex act with appellant in exchange for the promise of money to pay for Ashley's and Brittany's rent. On the day of the shootings, Ashley demanded payment for the sex act; but appellant refused to give Ashley the money which she and Brittany needed or they were going to be evicted from their home. After appellant refused to pay Ashley the money, Ashley decided to take matters into her own hands. (R. 323-392; 415-20; 222-251).

On the evening of September 26th, Ashley, Brittany, and a friend Thomas Seehof ("Thomas") went together to appellant's motel room at *the Palmetto Inn.* Thomas was driving his truck, as the women had no transportation. Once there, Ashley confronted appellant, and appellant again refused to give Ashley the money he owed her. When appellant was not looking, Ashley stole appellant's heroin, contained in a cigarette box lying on the dresser, in lieu of the money he owed her. Ashley, Brittany, and Thomas then left the motel room and by the time they were in Thomas's truck and driving away, everyone in the vehicle knew what Ashley had done. Thomas, Ashley, and Brittany then drove to Thomas's condo in Lexington County on Lake Murray at *the Boardwalk Villas.* (R. 323-392; 222-251).

Almost immediately after the women and Thomas left appellant's motel room, appellant discovered his drugs had been taken. He began phoning both Ashley and Brittany, who shared a phone, **and** Thomas demanding the return of his drugs. Appellant also texted the women and Thomas for the women to return his drugs. These phone calls and texts occurred while Thomas, Ashley, and Brittany were driving to Thomas's condominium. Appellant was angry in each of the phone calls. In the phone calls and texts with appellant, Thomas and the women "played dumb," acting as if they did not know who took appellant's drugs. These phone calls and text messages from appellant's phone to Ashley and Brittany's shared phone and to Thomas's own phone were entered into evidence at appellant's trial. (R. 345-392; 222-251).

Upon arriving at *Boardwalk Villas* in Thomas's truck, Thomas, Ashley, and Brittany entered Thomas's condominium, Condo #22. There, Ashley and Brittany met Thomas's girlfriend Brandy Kaloplastos ("Brandy") and her 8 year-old son ("the 8 year-old boy").[1] These 5 people were eventually standing or seated in various locations in the den/dining room area of the condo. At that point, there was a knock at the front door of Condo #22. Thomas went and opened the front door. Appellant was standing just outside the doorway with a semi-automatic pistol in his hand, and appellant entered Thomas's condominium. Appellant brushed past Thomas and went through the kitchen to the den/living room area where everyone was seated. Appellant then pointed the gun at Ashley and Brittany, threatened them, and demanded the return of his drugs. Every person there knew appellant, including the 8-year-old boy, who knew appellant by his nickname "Pep." When Ashley refused to give appellant his drugs, appellant shot Ashley in the abdomen 1 time in front of everyone there in the condo while Ashley was seated on the couch. The bullet passed through Ashley's abdomen and exited her buttocks. Thomas begged appellant to stop and

[1] The son's name is omitted to protect his identity.

not hurt his family, and Ashley and Brittany fled from Condo #22 on foot toward the end of a cul-de-sac in the same complex where Condo #22 was located. Ashley hid between some vehicles in the parking lot of *Boardwalk Villas* near Condo #48. Appellant pursued Ashley and Brittany on foot with his .40 caliber semi-automatic pistol. (R. 222-251; 345-391; 392-405; 52-74).

Brittany continued running until she slammed into the front door of Condo #48. She then began banging on the door screaming for help and yelling: "he is going to kill us." The owners of Condo #48, James and Emily Ward, were just sitting down in their den with their dinner to watch T.V. when they heard Brittany crash into their front door and then heard her screaming for help. Mr. Ward got up and saw gunfire coming from outside his front door, through beveled glass, and both he and his wife heard gunshots outside their front door. Mr. Ward waited a few seconds and opened the front door and found Brittany curled up on the ground just outside his front door with multiple bullet wounds bleeding profusely. Mr. Ward told his wife to call 911, which she did. Ashley was sitting down nearby with the gunshot wound to her abdomen. Mr. Ward used his belt to apply a tourniquet to stop the bleeding from Brittany's leg. Both victims identified appellant to Mr. and Mrs. Ward, as the person who just shot them. Mrs. Ward relayed this information to the 911 operator. The 911 call was entered as evidence at trial, and Mrs. Ward who made the 911 call testified at trial along with her husband who found the 2 victims and relayed the name of the shooter to his wife while the 2 victims were lying on the ground screaming and moaning. (R. 52-74; 345-391; State's Ex. 1 & 2).

After appellant shot Brittany, but before Mr. Ward opened his front door, appellant was seen by a witness getting into a dark or grey small Honda vehicle on the passenger side, and an unknown person drove appellant away from the crime scene. Prior to getting into the Honda, appellant was seen cradling something in his hands. Witnesses testified the getaway vehicle had a

very loud distinctive muffler. At trial, the owner of that small Honda testified appellant borrowed his car, which had a blown out muffler, that day and evening and did not return it until that night, and the owner had to go pick the car up at a convenience store where appellant left it. The owner of the getaway car was a customer of appellant's drug business. (R. 52-74; 274-281; 290-311).

Jacob Quarles (aka "Q"), who also sold drugs out of *the Palmetto Inn*, also testified at trial that appellant bought the .40 caliber pistol he used in the shootings from Quarles that evening. Appellant then returned it to Quarles after the shooting and asked Quarles to get rid of the gun, which Quarles did. (R. 323-44).

When appellant shot Brittany outside the Ward's home, 2 bullets traveled through the Ward's front door and went through their home. Fired projectiles from a .40 caliber weapon were recovered inside the Ward's condo after the shootings. Outside the Ward's home, police recovered multiple fired .40 caliber shell casings. Police also discovered in the parking lot of the condominium complex that all of the tires on Thomas's truck had been flattened and 3 of Thomas's father's car tires had been flattened as well. Police also discovered blood drops and smears between vehicles in the parking lot where Ashley had hidden after fleeing from appellant. (R. 52-74; 74-80; 120-174).

When police and EMS arrived at the crime scene, both Ashley and Brittany identified appellant as the shooter. At the hospital, they also identified appellant as the shooter. When interviewed at the scene, the 8-year-old boy also identified appellant as the shooter. The 8-year-old-boy stated "Pep-Pep" was the person who shot Ashley. (R. 42-52, 184-92; 208-11; 52-77; 1State's Ex. 1).

At trial, Ashley, Brittany, Thomas, and Brandy all identified appellant as the shooter. The Ward's also testified to the excited utterances of both Ashley and Brandy identifying appellant.

One of the first responding deputy sheriffs also testified to the excited utterances of Ashley and Brandy identifying appellant as the shooter. The detective who interviewed Ashley and Brandy at the hospital testified without objection that both victims identified appellant as the shooter. A detective who interviewed the 8-year-old boy also testified without objection that the 8-year-old boy identified appellant as the shooter of Ashley. (R. 74-77; 184-197; 222-251; 345-391; 392-405; 42-74).

After appellant was arrested, he was video recorded talking to his brother about the case from jail and those recordings contained admissions by appellant. (State's Ex. 138; R. 198-203). Appellant tells his brother to tell "Q" that Thomas ["Tattoo"] was the snitch. Appellant asked his brother to track down the 2 victims who had been shot and told his brother the 2 victims were at Lexington County Hospital. Appellant also told his brother to get "Q" to write a statement that Brandy was a drug user, to set her up. Appellant also told his brother, the reason he went crazy the day of the crime was over $1,800. Appellant also told his brother to warn a certain person that police were looking for the driver. (State's Ex. 138). Appellant also contacted Thomas and his girlfriend Brandy by phone before trial attempting to get them to not testify in the trial. (State's 168). Appellant also instructed them not to identify his picture if police came and showed them a photo line-up. Appellant also indicated in the call that his brother had already contacted Thomas and Brandy, and he asked them to contact the 2 victims for him. In this call, appellant apologizes to Thomas for the damage he and the driver did to Thomas's and his father's vehicles the day of the crime. Unknown to appellant, this call was recorded by Thomas and Brandy. (State's 168). All of these recordings were played for the jury at appellant's trial. (R. 198-203; 397-98).

APPELLATE ISSUE I.

Appellant first alleges that where the custodian of records was testifying directly from a computer-aided dispatch (CAD) report but the CAD report was not introduced as evidence, the Court erred in ruling that hearsay statements from the CAD report were admissible under the business records exception to the rule against hearsay testimony.

What occurred below

The State called as its first witness at trial the custodian of records for Lexington County 911 Communications Center, Nikki Rodgers. Ms. Rodgers testified to the purpose of Lexington County Communications Center and how Computer Assisted Dispatch (CAD) Reports are generated in the ordinary course of business. Ms. Rodgers was handed the CAD Report generated on the night of September 26, 2016 for the crimes committed by appellant at the Villas. Ms. Rodgers identified the report and testified without objection to numerous things in the report including the nature of the call, a 911 call; the date and time of the 911 call, September 26, at 8:21 p.m.; the location of the call, 48 Boardwalk Lane at the end of the subdivision; the identity of the caller, Emily Ward ("Mrs. Ward) and her phone number (803) 808-8071; the nature or type of event, gunshot wound; who responded to the call, law enforcement, EMS, and fire, the number of victims, multiple; what emergency efforts had taken place at the scene, a tourniquet had been applied to a female who was shot, and, damage to property; a gunshot went through the door. (R. 45-47). Ms. Rodgers testified that anything a caller says to the 911 center is taken down by the computer and entered in the CAD report as notes as described above. When asked if there was any information on the CAD report regarding the parties involved, the following occurred:

Q: What, if any, other information on there relates to the parties involved?

A. There was - - I'm trying to find it. There's a lot of notes on this call, so you have to go through them line by line, but the caller did indicate that the victims

knew this person, and that the shooter was - -

MR. KOGER: Objection, Your Honor.

THE COURT: What's the nature of the objection?

MR. KOGER: Excuse me?

THE COURT: Yes, sir. The grounds for the objection. She's reading from the Report, as I understand it; is that right??

THE WITNESS: Yes, sir.

THE COURT: All aright.

MR. KOGER: Improper foundation in that she was about to state the supposed name, and the proper foundation has not been laid.

THE COURT: I'm sorry; I didn't understand exactly what the objection was. She's reading from the report. Can you help me with that? I couldn't hear all of the objection, Mr. Koger. I apologize.

MR. KOGER: Your Honor, improper - - she was - - she was about to name the person named in the report, and the proper foundation had not been allowed for her to have done that. I'm just objecting to it, Your Honor.

THE COURT: Mr. Pincelli, do you want to offer this record into evidence?

MR. PINCELLI: Your Honor, I would.

THE COURT: All right. You're offering it under the Business Records Act?

MR. PINCELLI: Yes, Your Honor. I believe that the witness has demonstrated that she has - - keeps this in the ordinary course of business. She has care and custody of such records.

THE COURT: All right. Mr. Koger, it does appear that the requirements of the rules of evidence, which allows for this type of document to come into evidence, have been complied with based on the foundation that has been set under Rule 803(6). I'll allow it into evidence.

There is, however, a portion of that evidence that does not allow subjective opinions or judgments to be admissible, so I don't' know what's going to come out of this. We might transgress that particular part of the rule. As long as we're not talking about subjective opinions and judgments, then she's entitled to read from the record in its entirety.

MR. KOGER: Your Honor, I just want you to note my objection.

THE COURT: Yes, sir, I will.

MR. PINCELLI: Your Honor, to stay away from any subjective information, I'd like to ask the witness just the assailant's name that would be in the report to - - just what she was going to say prior to the objection.

THE COURT: All right, sir. You can do that.

THE WITNESS: Just read it straight from the paper; correct?

MR. PINCELLI: That's correct.

THE WITNESS: Okay.

A. So, "Caller is at the very end of the subdivision. Shooter is Wilson, Tashiby (verbatim). Left in small, black, Toyota.

Q: Thank you.

MR. PINCELLI: I believe those are all my questions based on the CAD report.

(R. 47, ln. 25-50, ln. 12). While the record had been offered and admitted in evidence before the witness read the last portion which was objected to, the State forgot to mark the exhibit when it entered it into evidence. Appellant now appeals arguing Judge Cooper should not have allowed the custodian of records to read the last portion of the CAD report because the exhibit was not marked with an identification or exhibit number when it was admitted in evidence. Appellant is wrong.

Standard of Review

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Hatcher, 392 S.C. 86, 91, 7 - 8 S.E.2d 750, 753 (2011)(quoting State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (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.; *see also* State v. Brookmeyer, 406 S.C. 324, 340, 751 S.E.2d 645, 653 (2013).

ARGUMENT I.

Judge Cooper did not err in allowing the custodian to read from the last objected to portion of the CAD report because the proper foundation had been laid; the report was offered into evidence as a business record, and Judge Cooper found the proper foundation had been laid for the report as a business record and admitted the same in evidence as a business record; further even if any error, it was harmless as the evidence objected to was cumulative to other evidence properly admitted including the testimony of the person who called 911 and gave the objected to information to 911.

Appellant cites Deep Keel, LLC v. Atlantic Private Equity Group, LLC, 413 S.C. 58 (2015) in support of his argument. However, what occurred in Deep Keel, LLC is clearly distinguishable from what occurred in this case. In Deep Keel LLC, the sole member of *Deep Keel, LLC,* Scott Bynum, the plaintiff, testified to the valuation of a debt owed on a defaulted loan by reviewing documents he received from the bank. The documents were not at trial and not presented to Bynum. They were not offered in evidence or admitted by a trial judge. Id. at 70. The Court held Bynum's testimony as to what was in the bank documents, and his ultimate determination of what was owed on the mortgage from those documents, was hearsay where the documents were not offered or admitted in evidence and his testimony did not fit under the business records exception of the S.C.R.E. where "[t]here were numerous elements to the foundation for a business record to which Bynum did not testify in this case." Id. That simply did not occur here. (R. 42-50).

In the present case, *the CAD report* was present at trial and shown to *the custodian of records of CAD reports for Lexington County Communications.* She identified the CAD report and testified to each of the required elements for the admission of the record under the business records exception. (R. 40-52). Appellant "concedes" in his brief that "the physical copy of the CAD report from which Chief [of Emergency Services] Rodgers [the custodian of records] read

into evidence may have met the requirements of the business records exception." (IBOA), p. 10, ll. 3-4 [last page of Argument I.]).[2] The Solicitor offered the CAD report into evidence. (R. 48, ln. 25 – 49, ln. 2). The Solicitor offered the CAD report under the Business Records Act or exception. (R. 49, ll. 3-8). After hearing Ms. Rodgers' foundational testimony and the State's basis for admitting the CAD report, Judge Cooper found the record [the CAD report] qualified as a Business Record under the S.C.R.E. (R. 49, ll. 9-13). Judge Cooper specifically found the proper foundation had been laid by the witness to admit the record as a business record under the S.C.R.E. (R. 49, ll. 9-13). Judge Cooper asked the Solicitor if he was offering the document or record into evidence as a business record: "Are you offering it under the Business Records Act." (R. 49, ll. 3-4). The Solicitor responded: "Yes, your honor." (R. 49, l. 5). Judge Cooper then admitted the CAD report in evidence under the business records exception:

> THE COURT: All right. Mr. Koger, it does appear that the requirements of the rules of evidence, which allows for admission of this type of document to come into evidence, have been complied with based on the foundation that has been set under Rule 803(6). I'll allow it into evidence.

(R. 49, ll. 9-13). Judge Cooper also noted on the record:

> THE COURT: There is, however, a portion of that evidence that does not allow subjective opinions or judgments to be admissible, so I don't know what's going to come out of this. We might transgress that particular part of the rule. As long as we're not talking about subjective opinions and judgments, then she's entitled to read from the record in its entirety.

(R. 49, ll. 14-20). The witness then read a short portion of the CAD report: "Caller is at the very end of the subdivision. Shooter is Wilson, Tashiby (verbatim). Left in small black Toyota." (R. 49, ln. 23 – 50, ln. 10). This was put out over the radio to responding officers.

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[2] Appellant's Initial Brief pages are not numbered. Respondent counted from the Questions Presented to the cited quotation from appellant's brief above.

As discussed above, what occurred in Deep Keel, LLC did not occur here. The custodian of records actually testified here, had the record in question in her hands while testifying before the jury, laid the proper foundation for the admission of the evidence under 803(6), SCRE, as a business record, and Judge Cooper found the record in question met the foundation requirements of a business record and admitted the record into evidence before the witness was permitted by the Court to read from the admitted record. The Solicitor's or the Court Reporter's failure to put an exhibit number on the record does not obviate that the proper foundation was laid, **and** the record was admitted before the custodian read from the admitted document. (R. 42-50). Deep Keel, *supra*. *See* Rule 803(6), SCRE (providing the business records exception to the rule against hearsay: "A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness; *provided, however*, that subjective opinions and judgments found in business records are not admissible. The term 'business' as used in this subsection includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.").

Lack of Prejudice

Further, even if the Court somehow erred in admitting this testimony from the CAD report, its' admission was harmless because it was cumulative *and* the same to other evidence properly admitted including the same evidence admitted without objection through other witnesses.

See State v. Vick, 384 S.C. 189, 199, 682 S.E.2d 275, 280 (Ct. App. 2009) ("Error is harmless when it could not reasonably have affected the result of the trial."); *Id.* ("Appellate courts will not set aside convictions due to insubstantial errors not affecting the result."); State v. Blackburn, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978) ("[T]he admission of improper evidence is harmless whe[n] it is merely cumulative to other evidence.").

The State introduced the 911 call [State' s Ex. 1, CD/911 call] from which the CAD report was generated. In that call, the 911 caller [Mrs. Ward] stated the shooter was Tishoby [sic] Wilson. (State's Ex. 1).[3] Mrs. Ward **also testified at trial.** (R. 52-68). She identified her voice as the person on the 911 call and that she was the person who called 911 and said the shooter was Tashonby Wilson. (R. 52-68). She related she got this information from the 2 victims who were wounded, excited, upset, and still under the influence of the event. (R. 52-68). **Mr. Ward** also testified at trial to the fact the victims immediately identified "T. Wilson" as the shooter and the first name of the shooter was one that Mr. Ward had not heard before, *when he heard his wife state Tishonby Wilson to the 911 operator.* (R. 68-74). The first responding deputy also testified that he responded to a shooting and the shooter was identified as Tishonby Wilson. (R. 77). Another investigator testified *without objection* he spoke to the 8 year-old boy shortly after the shooting, at the scene, and the 8 year-old boy identified appellant, "Pep-Pep", as the shooter. (R. 209-12). An investigating detective also interviewed both Ashley and Brittany at the hospital and each

[3] Respondent's attorney has reviewed the 911 call multiple times both at the Clerk's Office [the original] and at the Attorney General's Office [in a copy provided by the Solicitor's Office]. Respondent cannot hear the 8-year-old boy state anything in the background of the 911 call. In the 911 call of Mrs. Ward, Respondent's attorney can hear the victims screaming and as Mrs. Ward is asking the victims who shot them they speak and someone states Toshoby Wilson, which Mrs. Ward relates to the 911 operator. Respondent believes this is **Mr.** Ward who is relaying what the victims are saying to Mrs. Ward based on multiple reviews of the 911 tape. There was testimony of a separate incident where the 8-year-old boy relates to someone else that "Pep-Pep" shot Ashley.

separately identified appellant as the person who shot them. (R. 189-92). The State also introduced appellant's incriminating jail phone calls with his brother. (State's 138). And, the State introduced appellant's incriminating phone call with Thomas and Brandy where appellant admits to the crime and asks Thomas and Brandy not to identify him. (State's 168). As a result, any error in allowing the limited objected to testimony from the CAD report was cumulative to other evidence properly admitted and was harmless beyond a reasonable doubt. Blackburn, 271 S.C. at 329, 247 S.E.2d at 337 ("[T]he admission of improper evidence is harmless whe[n] it is merely cumulative to other evidence."); State v. Evans, 378 S.C. 296, 662 S.E.2d 489 (Ct. App. 2008)(hearsay testimony was merely cumulative to 2 other witnesses testimony which was not hearsay and there was no prejudice where there was an abundance of competent evidence from which defendant's guilt was properly established). The same is true in this case. Numerous witnesses testified to exactly what was in the CAD Report that was objected to, including the person who made the 911 call which generated the information in the report.

Finally, the evidence of appellant's guilt was overwhelming. Numerous witnesses who knew appellant, 4 in all, identified appellant at trial as the shooter. The victims' excited utterances at the scene seconds after the shootings, identifying appellant, were also admitted in evidence. The owner of the car used in the crimes testified appellant borrowed the car the night of the crimes but did not return it until late. Q also testified appellant purchased the gun used in the crimes from him and asked Q to get rid of the gun after the crimes, which he did. And, appellant's jail calls to his brother and the 1 call to the 8 year old boy's parents were admitted in evidence. In the phone call to his brother, appellant makes an admission to why he committed the crime and attempts to get his brother to enlist Q in discrediting a witness, Brandy. Appellant also asks his brother to track down the 2 victims and asks his brother to warn a certain individual that police are looking

for the driver. (State's Ex. 138). In the call to Thomas and Brandy, appellant apologizes for the damage he and his driver did to Thomas's and Thomas's father's vehicles the day of the shooting, i.e. confesses to his participation in the crimes. Appellant also asks Thomas and Brandy not to identify him if shown a photo line-up or at trial. (State's Ex. 168). The reading of the CAD report was harmless. This appellate ground has no merit.

APPELLATE ISSUE II.

Appellant next argues the trial court erred when it allowed the state to publish an audio of a 911 call when the state offered no foundation to support that the hearsay statements contained in the call were admissible under one of the exceptions to the hearsay rule. Again, appellant is wrong.

What occurred below relevant to this issue.

After the CAD Report was admitted, the State marked the 911 call made to Emergency Services. The 911 call was then shown to the custodian of records of the Department of Emergency Services who received the 911 call. She authenticated the call, and it was marked for identification and received into evidence. (R. 50-51; State's Ex. 1).

Mrs. Ward then testified before the jury that she was the person who made the 911 call, she had listened to the 911 call [State's Ex. 1] and identified her voice on the 911 call as person who reported the shooting and who the shooter was. (R. 52-54). The State again offered State's Ex. 1 into evidence and Judge Cooper stated it was admitted because it had already been admitted. (R. 54). Mrs. Ward testified she was present in her home with her husband when the victim Brittany ran into their front door. She then heard Brittany screaming for help and stating "help me, help me, he's going to kill me." (R. 52-59). She then heard gunshots right outside her front door and bullets came through her front door and went through her house. (R. 59). Her husband got up and seconds later opened the front door and told her to call 911, which she did. Mrs. Ward went outside

her home. The victims were on the ground and suffering from gunshot wounds and immediately identified Toshiby or Tishiby Wilson as the shooter. Mrs. Ward testified she immediately related this to the 911 operator. (State's Ex. 1; R. 52-68).

Mr. Ward testified similarly. On the evening of the crimes, he and Mrs. Ward were about to eat dinner when someone ran into their front door and began screaming for help. He got up and saw gunshots through his front glass door and heard gunshots. He waited a few seconds and opened the front door and the victims were on the ground bleeding from gunshot wounds. Both identified "T. Wilson" as the shooter. He was speaking with the wounded victims seconds after the crimes and he relayed to his wife what the victims were saying immediately upon them stating it. He heard his wife tell the 911 operator it was "Toshiby" [sic] Wilson who was the shooter. Mr. Ward stated he had never heard that first name before in his life. (R. 68-74).

The 911 tape was admitted by Judge Cooper. (R. 50-51; 54).

The 8-year-old boy is not on the 911 tape. The victims [Ashley & Brittany], Mr. Ward, and Mrs. Ward are on the 911 tape. Both of the 8-year-old boy's parents testified to the child witnessing appellant shoot Ashley in the abdomen in their condominium, Condo #22. (R. 222-251; 392-405). The child witnessed appellant enter the apartment and shoot Ashley, and witnessed his father begging appellant not to kill his father, mother, or the child. (R. 222-251, 392-405). Another witness, an officer, testified without objection to being present shortly after the crime when the child identified appellant ["Pep-Pep"] as the shooter of Ashley. (R. 208-11). This witness's testimony was not objected to. (R. 208-11).

ARGUMENT II.

Judge Cooper did not err in admitting the 911 tape because it contained firmly rooted hearsay exceptions; further, Mr. Ward & Mrs. Ward, the 911 caller, testified at trial to the exact same information as in the 911 call, that both victims, still under the stress and influence of an exciting event, identified appellant as the

shooter, and these statements were admitted without objection, and the 8 year-old boy's parents and an officer testified without objection to the information about and statement of the 8-year-old boy [not on the 911 call] and as a result there was no error and even if there was error it was harmless.

Appellant argues Judge Cooper erred in admitting the 911 call. (State's Ex. 1). Appellant argues the State did not lay a proper foundation for the admissibility of the 911 call. Specifically, appellant objects to the admission of the 8-year-old boy in the background of the 911 call stating "Pep" shot Ashley. (IBOA). Appellant has misread the record. The 8-year-old boy is not on the 911 call. His exited utterance came in through an entirely different witness. (R. 208-11).

First, the 911 call was properly authenticated by the Custodian of the 911 calls and Mrs. Ward, who had made the call, and Mr. and Mrs. Ward, who can be heard on the call, were under the influence of an exciting or startling event and were describing or relating an event which they witnessed while it was occurring. Mrs. Ward was physically present with her husband sitting down about to eat dinner when victim Brittany crashed into her front door. She and her husband both heard Brittany screaming and begging for someone to help her or "[h]e [appellant] was going to kill them." Mrs. Ward and her husband both then heard multiple gunshots being fired outside their front door **and** bullets passed through their front door and into their house. Mr. Ward actually saw gunfire through the beveled glass of his front door. Their house was actually shot into by appellant. Mr. Ward opened the front door and found the 2 victims with gunshot wounds, 1 to the abdomen, and 1 to her leg which was bleeding profusely. Mrs. Ward also stepped outside and saw the same thing. Mr. Ward tied off 1 victim's leg with a tourniquet and told Mrs. Ward to call 911 immediately and come back outside, which she did. Still under the excitement of the startling event, Mrs. Ward related to the 911 operator that a shooting had just occurred outside her front door while she and her husband were at home and which they heard and there were 2 gunshot victims on the ground. While she did not see the shooting, her husband was an eyewitness to the

shooting and she was an eyewitness or at least an "ear" witness to the actual shooting and perceived it as it was occurring. (R. 52-74). State v. Hendricks, 408 S.C. 525, 759 S.E.2d 434, 438 (Ct. App. 2014) (where 911 caller did not perceive the event or call immediately after the event, her statement on the 911 call was hearsay). Mrs. Ward was standing next to her husband, who was next to the just wounded victims Ashley and Brittany. Mr. Ward was treating Brittany. The 911 operator asked Mrs. Ward to ask the victims if they knew who shot them. She asked the victims and her husband if the victims knew who shot them. Her husband then asks the victims if they knew who shot them. They responded yes and her husband repeated to Mrs. Ward the victims stated yes. She also asked who the shooter was. Mr. Ward asks who the shooter was. The victims state who the shooter was to Mr. Ward and he immediately repeats to his wife it was Toshoby Wilson, which Mrs. Ward immediately relates to the 911 operator. Mrs. Ward's statement to the 911 operator and Mr. Ward's statements to the victims and his wife were excited utterances, State v. Sims, 348 S.C. 16, 558 S.E.2d 518 (2002); Rule 803(3), SCRE; **and,** present sense impressions as to what was occurring in front of them during the 911 call itself. Rule 803(1), SCRE (defining a present sense impression as "a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or *immediately thereafter*." (emphasis added); State v. Prather, 429 S.C. 583, 611, 840 S.E.2d 551, 565 (2020)(to qualify as present sense impression, (1) statement must describe or explain an event or condition; (2) the statement must be contemporaneous with the event; and (3) the declarant must have perceived the event), (quoting Hendricks, 408 S.C. at 533, 759 S.E.2d at 438).

"Hearsay within hearsay is admissible if each level of hearsay satisfies an exception to the hearsay rule." Hendricks, 408 S.C. at 530, 759 S.E.2d 434; Rule 805, SCRE. As to **the statements of the 2 victims** identifying appellant as the shooter to Mr. and Mrs. Ward, these were admissible

as well. They were **statements of identification,** which is non-hearsay. **SCRE, 801(d)(1)(C).** Both victims testified at trial (R. 345-391) and were subject to cross-examination about their statement of identification to Mrs. Ward and her husband immediately after the shooting. SCRE, Rule 801(d)(1). And, their statements to Mrs. Ward were "one of identification of a person made after perceiving the person." **Rule 801(d)(1)(C), SCRE.** As a result, the victims' statements to Mrs. Ward identifying their shooter were admissible as **non-hearsay** under our Rules of Evidence.

Additionally, both victims' statements to Mr. and Mrs. Ward were excited utterances and present sense impressions. Both Ashley and Brittany had just witnessed appellant shoot Ashley in the abdomen in Condo #22, both had fled from appellant on foot, and both witnessed appellant shoot Brittany multiple times in front of Condo #48, and both witnesses were wounded and still under the influence of the exciting or startling event when they made the statement of identification of appellant to Mr. and Mrs. Ward. *See* Rule 802, SCRE ("Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court of this State or by statute."); Rule 803(2), SCRE (providing the excited utterance exception to the rule against hearsay: "A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."); State v. Hendricks, 408 S.C. 525, 532, 759 S.E.2d 434, 438 (Ct. App. 2014)(finding the excited utterance exception applied to a victim's statement reporting the crime soon after the crime was committed); **and,** present sense impressions as to what was occurring in front of them during the 911 call itself. Rule 803(1), SCRE (defining a present sense impression as "a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or *immediately thereafter.*" (emphasis added); State v. Prather, 429 S.C. 583, 611, 840 S.E.2d 551, 565 (2020)(to qualify as present sense impression, (1) statement must describe or explain an event or condition; (2) the statement must

be contemporaneous with the event; and (3) the declarant must have perceived the event), (quoting Hendricks, 408 S.C. at 533, 759 S.E.2d at 438). "Hearsay within hearsay is admissible if each level of hearsay satisfies an exception to the hearsay rule." Hendricks, 408 S.C. at 530, 759 S.E.2d 434; Rule 805, SCRE. In the 911 call, while Mrs. Ward is talking to the 911 operator both victims can be heard in the background screaming and moaning in pain, and making anxious statements about when is the ambulance going to arrive. (State's Ex. 1). Mrs. Ward also anxiously relates to the 911 operator that both victims are terrified the shooter is going to return and kill them. (State's Ex. 1). Both Mrs. Ward and others can be heard trying to calm both victims down and assuring them that help is on the way. (State's Ex. 1). The 911 tape was admissible.

As to the statement of the 8-year-old boy, it simply is not heard on the 911 tape. Appellant has misread the record. There is no merit to appellate ground 2.

The Solicitor was referring to a statement made by the 8-year-old boy to another witness, an officer. (See R. 208-11). That statement was not objected to when admitted. (R. 208-11). Any appellate challenge to that statement is not preserved for appellate review.

Even if it could be reviewed, that too was clearly an excited utterance. Hendricks, *supra*. The evidence establishes the 8-year-old boy was present in Condo #22 when appellant came into the condominium armed with a pistol. The 8-year-old boy was present when appellant pointed the gun at Ashley and Brandy and stated if they did not give him his drugs back he was going to kill them. The 8-year-old boy *witnessed* appellant shoot Ashley. The 8-year-old-boy stated "shortly" or "right after" the incident to an officer, while he was still under the influence of the startling event, that "Pep-Pep" [appellant] shot Ashley in the stomach. (R. 208-11). Hendricks.

As a result, what Mr. & Mrs. Ward stated in the 911 call was an excited utterance as to the shooting *and* a present sense impression, and both victims' statements on the 911 call were non-

hearsay, excited utterances, and present sense impressions. "Hearsay within hearsay is admissible if each level of hearsay satisfies an exception to the hearsay rule." Hendricks, 408 S.C. at 530, 759 S.E.2d 434; Rule 805, SCRE. The 911 tape was admissible. Finally, the 8-year-old-boy's statements were not on the 911 call but to an officer and were excited utterances. Hendrix, *supra.*

Harmless Error

Regardless, the admission of this objected to evidence was harmless. *See* State v. Vick, 384 S.C. 189, 199, 682 S.E.2d 275, 280 (Ct. App. 2009) ("Error is harmless when it could not reasonably have affected the result of the trial."); *id.* ("Appellate courts will not set aside convictions due to insubstantial errors not affecting the result."); State v. Blackburn, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978) ("[T]he admission of improper evidence is harmless whe[n] it is merely cumulative to other evidence."). Where the objected to evidence is merely cumulative to other evidence properly admitted, there is no prejudice. State v. Price, 368 S.C. 494, 629 S.E.2d 363 (2006); State v. Haselden, 353 S.C. 190, 577 S.E.2d 445 (2003).

Mrs. Ward, the 911 caller, testified at trial. (R. 52-67). She identified her voice as the person on the 911 call and that she was the person who called 911 and said the shooter was Tishoby Wilson. (R. 52-67). She readily admitted to the jury she heard the shooting but did not see the shooting and she got this identification information from the 2 victims who were wounded, bleeding, excited, upset, and still under the influence of the event. (R. 52-67). As a result, there could be no prejudice from what was in the 911 call. An unrelated witness related to the jury what the 8-year-old boy stated: that "Pep" "Pep" [appellant] shot Ashley. (R. 208-11). This was right after the incident and the record shows the boy witnessed appellant shoot Ashley in the stomach in his home *and* his father, begging appellant not to kill his father, his mother, and him. (R. 208-11; 228-34; 237; 392-405). Mrs. Ward had also witnessed the startling event as she heard the

victim Brandy screaming, heard the gunshots, and heard her husband Mr. Ward yell for her to call 911. (R. 52-67). **Mr. Ward** also testified at trial to the fact the victims immediately identified "T. Wilson" as the shooter and the first name of the shooter was one that Mr. Ward had not heard before, when he heard his wife state Tishoby Wilson to the 911 operator. (R. 68-74). A responding deputy also testified that he responded to a shooting and the shooter was identified as Tishonby Wilson. (R. 75-77). Another investigator testified without objection he spoke to the 8 year-old boy shortly after the shooting, at the scene, and the 8-year-old boy identified appellant, "Pep" "Pep", as the shooter. (R. 208-11). An investigating detective also interviewed both Ashley and Brittany at the hospital and each separately identified appellant as the person who shot them. (R. 184-93). The 8 year-old boy's parents also testified to the 8 year-old boy witnessing appellant shoot Ashley in Condo #22. (R. 228-34; 237; 392-405). As a result, any error in allowing the limited objected to testimony from the 911 call was cumulative to other evidence properly admitted and was harmless beyond a reasonable doubt. Blackburn, 271 S.C. at 329, 247 S.E.2d at 337 ("[T]he admission of improper evidence is harmless whe[n] it is merely cumulative to other evidence."); State v. Evans, 378 S.C. 296, 662 S.E.2d 489 (Ct. App. 2008)(hearsay testimony was merely cumulative to 2 other witnesses testimony which was not hearsay and there was no prejudice where there was an abundance of competent evidence from which defendant's guilt was properly established); Hendrix, *supra* (even though witness who did not perceive event and waited some time to call 911 statements on call were hearsay, their admission was harmless where the same witness testified to everything in the 911 tape as did the victims). The same is present in this case. As a result, this appellate ground has no merit.

Further, any error was harmless because of the overwhelming evidence of guilt admitted at trial independent of the 911 call. Four (4) different eyewitnesses identified appellant at trial as

the shooter, Ashley, Brittany, Thomas, and Brandy. All four (4) knew appellant. Mr. and Mrs. Ward testified to what they overheard moments after the shooting, i.e. the 2 victims immediately identified Tashonby Wilson as the shooter while under the influence of the event. The responding officer and the responding investigator testified the victims identified Tishonby Wilson as the shooter at the scene and at the hospital. Witnesses testified appellant got into a dark or black Honda with a loud muffler and was driven away from the crime scene. The owner of that car testified appellant borrowed his car that evening and did not return it until late that night. Jacob Quarles "Q" testified appellant bought the gun used in the shooting from him and after the crimes appellant asked Q to dispose of the weapon, which he did. Appellant's incriminating jail phone calls to his brother were admitted in evidence. In those calls, appellant tells his brother to tell someone that Thomas is definitely "the snitch." He also tells his brother to find the 2 victims. He also tells his brother to get Q to write a statement that Thomas's girlfriend Brandy, who witnessed the shooting of Ashley, is also a drug user, to set Brandy up or discredit her. Appellant tells his brother to warn someone that police are looking for the driver of the vehicle at the time of the crimes. Appellant tells his brother he lost his temper the day of the crimes because of $1,800. (State's Ex. 138). Appellant's phone call to Thomas and Brandy was also admitted before the jury. In that call, he apologizes to Thomas for the damage he and his driver did to Thomas' car and Thomas's father's car. Appellant also asks Brandy and Thomas not to identify him to police if shown a photo line-up or at trial. (State's Ex. 168). As a result, the admission of any portion of the 911 tape if error, was harmless.

APPELLATE ISSUE III.

Appellant next argues the court erred in allowing the state to publish video recordings of 3 jail calls between the defendant and a third party which showed appellant wearing a Lexington County Detention Center jumpsuit. (IBOA) Appellant is wrong.

What Occurred Below

At trial, the State offered three (3) video recorded jail phone calls between appellant and his brother. Appellant objected to admission of the video calls because they showed appellant in a Lexington County Detention Center orange jumpsuit during the calls. Appellant alleged the audio could be admitted but the video should not be shown because it was too prejudicial. Judge Cooper carefully considered the matter and admitted the video of the calls because after viewing the video's found that appellant's demeanor in the calls was relevant, and probative, and the probative value of those calls outweighed any prejudice from the jury seeing appellant in an orange jumpsuit. Further, Judge Cooper found the jury would be aware appellant was arrested for this crime and was wearing a jumpsuit for that reason at the time of the call, therefore, the jury would not attach any other improper significance to the clothing, such as a prior criminal record of that appellant had committed some other crime. Judge Cooper also directed the State to remove any date and time stamp so the jury would not know appellant had been in jail for a long period time to also reduce any prejudice. Appellant's contention Judge Cooper abused his discretion in admitting the phone calls is simply wrong.

The jail phone calls between appellant and his brother are not damaging because appellant is wearing an orange jumpsuit; they are damaging because of what appellant says and his demeanor in the video jail recordings. (State's Ex. 138). Viewing the video calls, as Judge Cooper did, one can see appellant is serious and is instructing, giving orders to, his brother to do certain things.

First, he tells his brother to tell someone that Thomas was "the snitch." Appellant then asks his brother to locate the 2 victims and states they were last in the Lexington County hospital. Appellant then tells his brother to tell Q to write a statement against Brandy that Brandy is a drug user to set her up or discredit her. Appellant tells his brother to warn a certain person that police are looking for the person who drove the car the night of the crime. Appellant then explains he lost his temper the day of the crime because of $1,800. He tells his brother to connect the dots or put things together for himself. His brother responds that appellant was ripped off, and appellant states say no more. (State's Ex. 138). The video recordings show not only that appellant was serious and not joking, but that he was urgently requesting his brother's help, and also that his brother took the directions seriously. (State's Ex. 138). The video also shows appellant is attempting to discuss things in a coded fashion but he is frustrated at times trying to get his brother to understand what he is talking about. (State's Ex. 138). As a result, Judge Cooper did not abuse its discretion in admitting the video jail calls. Their probative value was not substantially outweighed by the danger of their prejudicial effect. Rule 403, SCRE.

In appellant's brief here, he relies on cases holding that a criminal defendant's constitutional rights may be violated when he is shackled or compelled to wear prison clothing *during his trial. See, e.g.*, Deck v. Missouri, 544 U.S. 622, 626-633 (2005) (holding that visibly shackling a defendant in leg irons, handcuffs, and a belly chain in the courtroom during the guilt or penalty phase of his trial, absent any justified state interest, was unconstitutional because it undermined the presumption of innocence, interfered with the defendant's ability to communicate with counsel, and decreased the formal dignity of the courtroom); Estelle v. Williams, 425 U.S. 501, 504-505 (1976) (holding that a defendant's right to a fair trial was violated when he was compelled to wear identifiable prison clothing during his trial, which was a "constant reminder of the accused's

condition" affecting the jury's judgment). But those cases are distinguishable. Appellant does not contend (and the record does not indicate) that he was shackled or forced to wear jail garb at any time during his trial.

Courts across the United States have repeatedly rejected the challenge made to the evidence in this case under both Rules 401 and 403, SCRE, for the same reasons Judge Cooper did. Bannister v. State, 306 Ga. 289, 300, 830 S.E.2d 79 (2019) (explaining that evidence that appellant said during a recorded jail call, " 'I know I f**ked up. It's all messed up,' " was not unfairly prejudicial and was probative "because it indicated that after the shooting [of the victim, the appellant] believed he had done something wrong"); Early v. State, 313 Ga. 667, 671, 872 S.E.2d 705, 710 (2022)(finding jail tape was admissible for the same reasons and "Moreover, the video allowed the jurors to assess Appellant's credibility directly, as they could see and hear him make the statement.") Burton v. State, 237 So. 3d 1138, 1141–44 (Fla. Dist. Ct. App. 2018); Singleton v. State, 783 So.2d 970, 976 (Fla. 2001), Alston v. State, 723 So.2d 148 (Fla. 1998), Black v. State, 120 So.3d 654, 655 (Fla. 1st DCA 2013) ("[W]e are persuaded that the trial court's decision allowing the state to present to the jury both the audio and visual portions of appellant's brief, videotaped police interview, in which appellant could be seen wearing a jail uniform, handcuffs, and leg chains, was not an abuse of the trial court's discretion."); *See e.g.* United States v. Arayatanon, 980 F.3d 4803(1)44, 449-451 (5th Cir. 2020) (holding that the trial court did not abuse its discretion in admitting recorded jail calls because "the fact that [the defendant] had been in custody before trial was not unfairly prejudicial under [the] circumstances"); United States v. Johnson, 624 F.3d 815, 820-822 (7th Cir. 2010) (holding that recordings of the defendant's phone calls from jail while he was awaiting trial were admissible under Federal Rule of Evidence 403 and rejecting his argument that the evidence placed him in a position similar to a defendant forced

to wear prison attire at trial); Reid v. Long, Case No. 21-1109, 2021 WL 4786631, at *6-7 (10th Cir. Oct. 14, 2021)(Unpublished)(upholding the district court's denial of the defendant's petition for habeas corpus claiming his constitutional rights were violated by admission of a video recording of his jail interview with an investigator, which showed him in jail attire and handcuffs, because the 82-minute video did not implicate the concerns discussed in Estelle); Anderson v. Secretary for the Dept. of Corrections, 462 F.3d 1319, 1328-1329 (11th Cir. 2006) (upholding the district court's denial of the defendant's habeas petition and concluding the admission of a one-and-a-half-minute video of a news broadcast showing him in prison garb and in the custody of prison authorities did not violate his due process rights or the holdings in cases like Estelle); Gates v. Zant, 863 F.2d 1492, 1501-1502 (11th Cir. 1989) (holding the admission of a 15-minute videotaped confession showing the defendant in handcuffs was not unduly prejudicial and distinguishing cases concluding that shackling a defendant at trial negates the presumption of innocence); People v. Mims, Case No. 348311, 2020 WL 7636262, at *5-8 (Mich. Ct. App. Dec. 22, 2020)(Unpublished)(holding the admission of a 15-minute video depicting the defendant in handcuffs and a belly chain was minimally prejudicial and "not of significant duration or importance in the whole of the trial to negate the presumption of innocence"); People v. Thames, 467 P.3d 1181, 1191-1192 (Colo. Ct. App. 2019) (the admission of a video of the defendant in a prison uniform did not violate the presumption of innocence because, unlike the impact of seeing a defendant in prison attire throughout the trial, the video was only one hour and 14 minutes long and therefore was not a constant reminder that would create a continuing prejudicial influence in the minds of the jurors); Bramlett v. State, 422 P.3d 788, 794 (Okla. Crim. App. 2018)(the admission of a videotaped interview of the defendant in an orange jumpsuit and handcuffs did not dilute the presumption of innocence in the same way as viewing

the defendant in such attire throughout trial); Smith v. State, 246 So.3d 1086, 1105-1107 (Ala. Crim. App. 2017) (rejecting defendant's argument that the admission of photographs and a recorded statement to law enforcement officers depicting him in handcuffs and leg irons violated the presumption of innocence and explaining " '[t]his [c]ourt has recognized that there is a distinction between the jury's observing a defendant wearing handcuffs in the courtroom for his or her trial and the jury's observing the defendant wearing handcuffs in a videotape that is shown to the jury during trial' " (citation omitted)); State v. Clarke, Case No. CA2015-11-189, 2016 WL 5874478, at *5-6 (Ohio Ct. App. Oct. 3, 2016)(Unpublished)(holding that allowing the jury to view a videotaped polygraph examination showing the defendant in jail clothing and leg restraints did not violate the presumption of innocence); Ritchie v. State, 875 N.E.2d 706, 718 (Ind. 2007) (concluding trial counsel did not provide ineffective assistance by failing to object to recorded interviews of the defendant, which showed him shackled and in jail clothing, because the recordings were admissible and did not implicate the concerns discussed in Deck); Taylor, 240 S.W.3d at 796 (permitting the jury to see a video that was less than 10 minutes long depicting the defendant in a cell and wearing an inmate jumpsuit did not violate the defendant's due process rights or the presumption of innocence).

In State v. Taylor, 240 S.W.3d 789 (Tenn. 2007), for example, the appellant appealed his judgment of sentence for first-degree murder, alleging that the trial court erred in allowing the prosecutor to play for the jury a seven-minute videotape of a conversation between the appellant and his cellmate when the appellant was incarcerated for an unrelated crime. On the videotape, the appellant, who was wearing prison clothing, admitted to the crime for which he was currently on trial. The appellant claimed that the admission of the videotape violated his constitutional right to the presumption of innocence and a fair trial, as recognized in Estelle. He further argued that the

videotape was unfairly prejudicial, and unnecessary, because the State had an audio-only version of the tape which defense counsel requested be played instead, but the trial court denied the request. The Tennessee Supreme Court first determined that, under its rules of evidence, which permit relevant evidence to be excluded if its probative value is substantially outweighed by, *inter alia*, "the danger of unfair prejudice, confusion of the issues, or misleading the jury," the probative value of the videotape in demonstrating the cellmate's credibility as a witness was not outweighed by the danger of unfair prejudice, as the jury did not see the videotape until after the witness testified that he and the appellant had been in jail together. Id. at 795, 798. The court also found that the videotaped images of the appellant in prison clothing were "countered by [his] appearance wearing street clothes during the three-day trial." Id. at 796. Regarding the appellant's claim that the admission of the videotape was improper under Estelle, the court reasoned that, under the circumstances of the case – including that the appellant was not tried in jail clothing; the jury saw the videotape after it heard the witness testify that the appellant confessed to him while they shared a jail cell; the videotape was less than ten minutes long; and the trial took place over three days – "the trial court did not violate the [appellant's] due process rights, nor impair the presumption of innocence, by allowing the jury to view the videotape." Id. Noting that "[o]ther courts have reached the same conclusion under similar circumstances," the court concluded that the videotape "did not serve as a 'constant reminder' to the jury that the [appellant] had been previously jailed and it did not corrupt the presumption of innocence on which the jury was properly instructed." Id. at 797.

In Ritchie v. State, 875 N.E.2d 706 (Ind. 2007), the appellant, following his conviction for murder and related offenses, asserted in a PCR action that counsel was ineffective by failing to move to suppress a videotape of his pretrial interviews with the news media during which the

appellant was shackled and dressed in prison clothing. He argued that the videotapes were inadmissible because they "violated his Fourteenth Amendment right not to be forced to appear in jail clothes or visibly shackled before the jury decided his fate." Id. at 716. In denying the appellant's ineffectiveness claim, the Indiana Supreme Court acknowledged that, under both state and federal law, "a criminal defendant cannot be forced to appear in either jail clothing or shackles during the guilt or penalty phase of trial without an individualized finding that the defendant presents a risk of escape, violence, or disruption of the trial." Id. at 718 (citing, *inter alia*, Deck, 544 U.S. at 624; Estelle, 425 U.S. at 512). The court explained that compelling an accused to appear before a jury in jail clothing or shackles threatens to "dilut[e] the presumption of innocence," and creates a risk that the jury "might find guilt based on these extraneous influential factors rather than probative evidence subject to the rigors of cross-examination." Id. The court also noted that shackles could hinder the accused's ability to participate with counsel. Id. The court concluded, however: Deck and its predecessors only discuss the use of jail clothing and visible shackles during *courtroom proceedings.* Ritchie was not forced to appear before the jury in jail clothing and shackles. Rather his claim is one step removed in that the jury viewed a videotape of Ritchie appearing in jail clothing and shackles while in police custody. The concerns with having a criminal defendant appear in jail clothing or shackles in a courtroom proceeding are not directly applicable to Ritchie's situation. Certainly, his right to participate with counsel is not implicated. Additionally, it appears to this Court that the risk of diluting the presumption of innocence or guilt being established by an extraneous influential factor is minuscule. Ritchie presents no evidence of how viewing him in jail clothing and shackles on the videotape had a bearing on his verdict. Any reasonable juror would have expected Ritchie to be dressed in jail clothing and shackled when meeting with members of the public outside the security

of a jail cell. *See generally* Davis v. State, 770 N.E.2d 319, 326 (Ind. 2002) (stating potential jurors would reasonably expect that anyone in police custody would be restrained). Id. (emphasis original). Thus, the court opined that, had counsel made an objection to the admission of the videotape, it "would not have been sustained," and, even assuming counsel should have made an objection, the appellant "still has failed to show that, but for counsel's error, the outcome of the trial would have been different." Id. at 718-19.

In Bramlett v. State, 422 P.3d 788 (Okla. Crim. App. 2018), the appellant was arrested on a material witness warrant in Illinois following the murder of his ex-girlfriend in Oklahoma. After being taken into custody, the appellant, who was clothed in an orange jumpsuit and handcuffs, was interviewed by detectives; the interview was videotaped. The appellant denied seeing the victim on the night she was killed, claiming he last saw her several days earlier. When the detectives advised the appellant they had evidence to the contrary, he terminated the interview. At the appellant's subsequent trial for first-degree murder, defense counsel objected to the admission of the videotaped interview on the basis that it was unnecessarily prejudicial because it depicted the appellant in custody and in prison clothing, and he requested that an audio version of the interview be played for the jury instead. The trial court denied the objection, holding the videotape was probative because it allowed the jury to "see Bramlett's demeanor during the interview" in order to determine whether his statement was voluntary. Id. at 794. On appeal, the Oklahoma Court of Criminal Appeals recognized the United States Supreme Court's holding that "routine use of visible shackling during the guilt phase of trial undermines the presumption of innocence, interferes with the accused's ability to communicate with his lawyer and participate in his own defense, and is an affront to the dignity of judicial proceedings," Id. (citing Deck, 544 U.S. at 631-32), but declined to extend Deck to the case before it:

> Clearly, [the appellant's] appearance in the video in handcuffs and jail clothing had no bearing on his ability to communicate with his lawyer nor was it an affront to the judicial proceedings. While it is easy to understand how viewing a defendant in handcuffs and jail clothing during trial might risk diluting the presumption of innocence, the same cannot be said about exposure to a video showing the defendant in jail clothing and handcuffs during an interview prior to trial. As the State argues, most jurors would not be surprised by the fact that a defendant was handcuffed and wearing jail clothing while in jail prior to trial. The concerns which arise when a criminal defendant appears at trial in jail clothing or shackles were not implicated under the circumstances of this case. The same degree of potential prejudice was simply not present.

Id. (citation omitted). Accordingly, the Bramlett court concluded that the "video of the interview was relevant and its probative value was not outweighed by the danger of unfair prejudice," and, therefore, that the trial court did not abuse its discretion in admitting the videotape. Id. at 795.

In People v. Thames, 467 P.3d 1181 (Colo. App. 2019), the appellant, who was convicted of first-degree murder and first-degree sexual assault, appealed on the basis the trial court erred in allowing the jury to view a videotape of his interrogation in which he was wearing prison clothing. The trial court had admitted the videotape for the purpose of showing the appellant's lack of surprise, anger, shock, and remorse to accusations that he beat, sexually assaulted, and fatally strangled the victim. In denying the appellant relief, the Colorado Court of Appeals first observed that, in reviewing the trial court's admission of the videotape, it was obliged, under the balancing test set forth in its rules of evidence, to "assign to the evidence the maximum probative value and the minimum unfair prejudice that a reasonable fact finder might attribute thereto." Id. at 1191. The court further rejected the appellant's claim that the admission of the videotape denied him his right to the presumption of innocence as recognized in Estelle, stating "[t]he presumption of innocence is undermined only 'when the defendant is required to *appear before the jury* in visible restraints or prison clothes.' " Id. at 1191 (emphasis original). The court opined that "[t]he risk of prejudicing the defendant due to his clothing is not present when the jury is shown

a video depicting the defendant in a prison uniform," Id. at 1191-92 (citing Ritchie, *supra*), and echoed the Bramlett court's finding that a jury's exposure to a video showing the defendant in handcuffs and a jail uniform prior to trial did not create a risk of diluting the defendant's presumption of innocence, because "[m]ost jurors would not be surprised by the fact that a defendant was handcuffed and wearing jail clothing while in jail prior to trial." Id. at 1192 (quoting Bramlett, 422 P.3d at 794) (alteration added)). Finally, the court in Thames concluded:

> Unlike the visual impact of a defendant's attire throughout a trial, the clothing shown in a video lasting one hour and fourteen minutes will not be a "constant reminder" of the defendant's condition or create a prejudicial, continuing influence in jurors' minds.
>
> [The appellant] does not contend that the trial court required him to appear in the courtroom in visible restraints or prison clothes. Rather, in the video, he is not restrained, is not handcuffed, and is depicted seated in what appears to be a conference room with pictures on the wall. Under these circumstances, [the appellant] was not deprived of his right to have the jury presume him innocent.

Id. (citation omitted).

Most recently, in Early v. State, 313 Ga. 667, 872 S.E.2d 705 (2022), the Georgia Supreme Court rejected the appellant's claim therein that the trial court, in allowing the state to introduce body-camera footage showing the appellant in handcuffs and jail clothing, denied him his right to a fair trial and the presumption of innocence. In Early, the victim was fatally shot during an alleged drug purchase. Within an hour of the shooting, the appellant was arrested for the shooting. Later that evening, he was interviewed by a detective, and initially denied that he shot the victim. He then stated that he saw another man shoot the victim, but subsequently admitted to shooting the victim after a brief physical struggle. The appellant claimed he was afraid of the victim, and that he "blacked out" after the struggle and did not realize the gun was in his hand until he ran outside. Id. at 708. Approximately six months after his arrest, while he was incarcerated pending trial, the appellant was being disciplined for an unrelated matter and police body-camera footage

captured him stating "I'm a murderer." Id. at 709. The appellant's counsel filed a motion to exclude the body-camera footage at trial as unfairly prejudicial because it showed the appellant in handcuffs and jail clothing. The trial court denied the motion, holding that the probative value of the appellant's statement, as captured by the body-camera, was not substantially outweighed by the danger of unfair prejudice from the appellant's appearance in prison clothing. Before the state's high court, the appellant argued that the trial court abused its discretion in admitting the body-camera footage into evidence because it was highly prejudicial, and, under its rules of evidence, its probative value was substantially outweighed by undue prejudice. The appellant further argued, for the first time, that admission of the footage violated his constitutional right to the presumption of innocence and a fair trial under Estelle and Deck.

The Georgia Supreme Court first determined that the video was admissible under its rules of evidence, which provided that "[r]elevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Id. at 710. Specifically, the court held the appellant's statement "I'm a murderer" was highly probative because the appellant was charged with murder, and the statement contradicted his trial testimony that he shot the victim in self-defense. The court also found the video "was not overly prejudicial" because, *inter alia*, "the jury would not have been unfairly influenced by the fact that a defendant charged with murder was being detained while awaiting trial." Id. With regard to appellant's reliance on Estelle and Deck, the court determined those cases were distinguishable because the appellant did "not contend (and the record does not indicate) he was shackled or forced to wear jail garb at any time during his trial." Id. at 711. The court further observed it found no controlling authority from its own court, or the United States Supreme Court, "holding that the admission of a video at trial showing a defendant in jail wearing jail attire and handcuffs violated his constitutional rights. Indeed, many

other courts have reached the opposite conclusion." Id. (citing, *inter alia*, Ritchie; Thames; Bramlett; Taylor).[4] Thus, the court held that the appellant failed to demonstrate that the trial court's admission of the body-camera video was "plain error."(Citing numerous cases holding similarly and finding Deal v. Commonwealth, 607 S.W.3d 652 (Ky. 2020) was a lone outlier);[5] Commonwealth v. Gallaway, 283 A.3d 217, 228–36 (Pa. 2022)(admitting video of defendant in jail clothing was proper and did not violate Rule 403 and distinguishing Deal v. Commonwealth). *See also*; State v. Schaller, 199 Wis.2d 23, 544 N.W.2d 247 (WI App. 1995); State v. Taylor, 240 S.W.3d 789, 794–97 (Tenn. 2007); People v. Unger, 278 Mich.App. 210, 235, 749 N.W.2d 272 (2008); People v. Horton, No. 359012, 2022 WL 1193722, at *1-3, ___ N.W.2d ___ (Mich. Ct. App. Apr. 21, 2022)(trial court did not err in admitting jail video where jury briefly saw defendant wearing jail garb, but only saw him wearing civilian clothing when in person at trial. Further, jailhouse interrogation videos, in which defendants frequently appear in jail garb, are routinely admitted at trial and this is not a significantly different scenario. Because playing the video of the complaining witness's preliminary examination testimony—where defendant appears in jail garb—would not undermine the presumption of innocence, it does not violate his due-process rights; also admitting jail video because it enables jurors to observe factors such as demeanor and body language, and the jurors can obtain a better understanding of the witness's mood and nonverbal cues. Anything that can assist the jury in assessing the credibility of the complaining witness in a credibility contest has significant probative value. The risk of unfair prejudice, however, is less significant. For the entirety of the

[4] In a footnote, the Georgia Supreme Court listed numerous other cases that had also held similarly. Early, *supra* at n. 5.

[5] *See also* Glover v. Commonwealth, No. 2020-SC-0449-MR, 2022 WL 2252863, at *8–11 (Ky. June 16, 2022)(Unpublished)(distinguishing Deal and admitting jail video).

trial defendant will be dressed in civilian clothes, so the risk of an ongoing taint of the jury's perception of him would be diminished. Moreover, because defendant will be on trial for a serious crime, the jury will already be aware that defendant at some point was arrested and in police custody); Bramlett v. State, 422 P.3d at 794–95 (upholding admission of jail video because trial judge found it was important that the jurors see Bramlett's demeanor during the interview. The video of the interview was relevant and its probative value was not outweighed by the danger of unfair prejudice. State v. Green, 2018 WL 1004287, at *3–4 (Ariz. Ct. App. Feb. 22, 2018)(Unpublished); State v. Bankston, 2021-Ohio-4332, ¶ 34-37, appeal not allowed, 166 Ohio St. 3d 1467, 185 N.E.3d 107 (Unpublished); Stanley v. State, 2018 WL 359903, at *8–9 (Tex. App. Jan. 11, 2018)(Unpublished). Southern v. State, 878 N.E.2d 315, 320–21 (Ind. Ct. App. 2007); People v. Finch, 2020 WL 698280, at *3–4 (Mich. Ct. App. Feb. 11, 2020)(Unpublished); *See also* State v. Carpenter, 232 N.C. App. 637, 643–44, 754 S.E.2d 478, 483 (2014)("These photographs, at most, conveyed only the limited information that defendant had been arrested, taken to jail, and photographed. Therefore, we hold that the trial court did not abuse its discretion in overruling defendant's objection based on Rule 403 and did not err in admitting the photographs of defendant.") There simply is no merit to appellant's argument.

Harmless Error

Even if Judge Cooper somehow erred in admitting *the video portion* of the jail calls, the admission was harmless where the jury knew appellant was wearing a jumpsuit because he had been arrested for this crime; any date and time of the video had been removed, and the evidence of appellant's guilt was overwhelming including the audio portion of this call along with the other evidence of his guilt. State v. Lynch, 375 S.C. 628, 637, 654 S.E.2d 292, 297 (Ct. App. 2007)(where numerous correctional officers testified Lynch stabbed and threatened to kill Cotton.

The trial court did not commit reversible error in admitting videos after prison riot); State v. Wyatt, 317 S.C. 370, 372–73, 453 S.E.2d 890, 891 (1995). As previously stated, 4 different witnesses identified him as the shooter: Ashley; Brittany, Thomas, and Brandy. Witnesses identified the distinctive nature of the getaway vehicle, and the owner of that vehicle testified appellant borrowed his car that evening and did not return it until late that night. Jacob Quarles testified appellant bought the gun used in the shooting from him that evening and returned the gun to Quarles later that night and asked Quarles to get rid of the gun, which he did. Mr. and Mrs. Ward testified to the victims' identification of appellant seconds after the crime while they were suffering from their injuries. Several witnesses testified to the 8-year-old boy identifying appellant as the shooter by his nickname "Pep" "Pep." A first responding officer and the investigator testified the victims identified appellant immediately after the shooting and at the hospital. In the audio of the jail phone calls with his brother, appellant tells his brother that Thomas is "the snitch" and instructs his brother to tell a certain person this information. (State's Ex. 138). He tells his brother to find or locate the victims and tells him where they were last located, the hospital. He tells his brother that he lost his temper the day of the crime over $1,800 and acknowledges he got ripped off. He tells his brother to get Q to write a statement on Brandy [Thomas girlfriend] accusing her of being a drug user to set her up and/or discredit her. He tells his brother to warn someone that police are looking for the driver. (State's Ex. 138). In the recorded phone call to Thomas and Brandy (State's Ex. 168), appellant asks Thomas and Brandy not to identify him in a photo line-up or at trial. He also asks Thomas and Brandy to speak to the 2 shooting victims for him. He then admits to participating in the crimes when he apologizes for the damage he and his driver did to Thomas' vehicle and Thomas's father's vehicle in the parking lot at the time of the

shootings. (State's Ex. 168). Any error in the admission of the *video portion* of the jail call was harmless.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that this Court should affirm Appellant Wilson's convictions.

Respectfully Submitted,

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
The Honorable Thomas W. Cooper, Jr., Circuit Court Judge

STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

TASHONBY P. WILSON,

APPELLANT.

Appellate Case No. 2019-000749

CERTIFICATE OF COMPLIANCE

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

This 13th day of June, 2023.

s/ J. Anthony Mabry
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