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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Florence County

Honorable R. Kirk Griffin, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

SATWAUN WALLACE HENRYHAND,

APPELLANT

APPELLATE CASE NO. 2022-000975

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial judge err in admitting the out of-court identification of Appellant by the motel clerk when the State failed to preserve the other photographs that were shown to the clerk by law enforcement, preventing Appellant from demonstrating that the procedure used was unnecessarily suggestive resulting in a substantial likelihood of misidentification?

2. Did the trial judge erred in admitting, pursuant to the excited utterance exception to the hearsay prohibition, the motel clerk's testimony that after viewing surveillance video of the robbery her co-workers said the person in the video was Appellant?

STATEMENT OF THE CASE

In November of 2021, the Florence County Grand Jury indicted Appellant, Satwaun Wallace Henryhand, for armed robbery, indictment #2021-GS-21- 02335. (R. pp. **). On June 27, 2022, Appellant proceeded to jury trial before the Honorable R. Kirk Griffin. Doward Harvin represented Appellant at trial. Ryan White prosecuted the case. The jury returned a verdict of guilty. After the verdict but prior to sentencing Appellant entered an Alford[1] plea to an unrelated voluntary manslaughter charge with the sentence to run concurrent to the sentence imposed for armed robbery. (Tr.. p. 251, lines 17-20). Judge Griffin sentenced Appellant to twenty-seven (27) years concurrent for each charge. (Tr. p. 269, lines 2-10). A timely notice of intent to appeal was served on July 11, 2022. This appeal follows.

[1] North Carolina v. Alford, 400 U.S. 25 (1970).

STANDARDS OF REVIEW

Identification

"[W]hether an eyewitness identification is sufficiently reliable is a mixed question of law and fact." State v. Moore, 343 S.C. 282, 288, 540 S.E.2d 445, 448 (2000) (finding show-up identification unreliable as a matter of law); see also State v. Traylor, 360 S.C. 74, 81-82, 600 S.E.2d 523, 526-27 (2004) (citing Moore and holding that photographic line-up procedure was "patently suggestive"). "Generally, the decision to admit an eyewitness identification is at the trial judge's discretion and will not be disturbed on appeal absent an abuse of such, or the commission of prejudicial legal error." Moore at 288, 540 S.E.2d at 448. "In reviewing mixed questions of law and fact, where the evidence supports but one reasonable inference, the question becomes a matter of law for the court." Id. Questions of law are reviewed *de novo*. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016).

Hearsay

The admission of evidence is left to the trial court's sound discretion, and its decision will not be reversed absent an abuse of discretion. State v. Byers, 392 S.C. 438, 444, 710 S.E.2d 55, 57-58 (2011). "An abuse of discretion occurs when the trial court's ruling is based on an error of law." *Id.* at 444, 710 S.E.2d at 58 (quoting State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000)). "To warrant reversal based on the wrongful admission of evidence, the complaining party must prove resulting prejudice." Id. "Prejudice occurs when there is a reasonable probability the wrongly admitted evidence influenced the jury's verdict." Id.

ARGUMENTS

1. **The trial judge erred in admitting the out of-court identification of Appellant by the motel clerk when the State failed to preserve the other photographs that were shown to the clerk by law enforcement, preventing Appellant from demonstrating that the procedure used was unnecessarily suggestive resulting in a substantial likelihood of misidentification.**

The jury found Appellant guilty of the armed robbery of the clerk at the Suburban Inn Motel on November 22, 2019. Surveillance cameras at the motel recorded the robbery but the video was lost by law enforcement. (Tr. p. 171, lines 4-12). Instead, the State, over objection, introduced a clip of the video, taken by the clerk on her phone, State's Exhibit #3. When law enforcement realized the original video was missing they asked the clerk if she had a copy. The clerk had taken a clip from the original video and sent it to a friend. The clerk no longer had the clip but reached out to the friend who provided the clip the clerk provided to law enforcement.

Prior to trial the judge conducted an identification hearing pursuant to Neil v. Biggers, 409 U.S. 188 (1972). (Tr. pp. 50-86). The only witness to testify at the hearing was the motel clerk, Felecia Benjamin. The clerk testified that law enforcement developed a suspect after viewing the surveillance video and then showed the clerk a group of photos. (Tr. p. 57, lines 5-25). When asked if the photos were equal sizes the clerk answered, "No. they wasn't like – it wasn't one paper with six different people if that's what you're asking." (Tr. p. 65, lines 10-11). The clerk testified that the individuals in the photos were wearing different clothing. (Tr. p. 65, lines 12-18). The clerk identified a photograph of Appellant that was shown to her by law enforcement and the photo was marked for identification as State's Exhibit #5. (Tr. p. 59, lines 21-24). No other photographs were marked for identification.

There was no testimony from the clerk about the physical characteristics of the individuals in the other photos.

At the end of the identification hearing the prosecutor conceded that the "lineup" was a little "unorthodox" but argued that it met the requirements of Neil v. Biggers. (Tr. p. 79, line 24 – p. 80, lines 1-3). Counsel for Appellant noted that the State failed to produce the other photos that were shown to the clerk. (Tr. p. 80, lines 22-24). The judge ruled, " So based on the totality of the circumstances I don't think the procedure was unduly suggestive, but even if it was considering these five factors enumerated in Neil v. Biggers, the analysis that I have just gone through, I an going to allow the out of court identification. (Tr. p. 85, line 21 – p. 86, line 1). The trial judge erred.

At trial when the State moved to admit State's Exhibit #5, the photo of Appellant, counsel first stated, "No objection, Your Honor." (Tr. p. 114, line 3). Trial counsel immediately stated, "And Judge, just to make sure that the record is clear, I do want to preserve my objections that we stated earlier off the record." (Tr. p. 114, lines 8-10). The judge asked, "So you want to preserve objections made during the pretrial hearing?" (Tr. p. 114, lines 11-12). Trial counsel answered, "Yes." (Tr. p. 114, line 13. The judge then stated, "For the record this is admitted over defense's objection." (Tr. p. 114, lines 14-15). The clerk then identified State's Exhibit #5 as the photograph of Appellant she identified at the time of the robbery. (Tr. p. 114, lines 17-24). The trial judge erred in admitting the out of court identification.

In State v. Liverman, 398 S.C. 130, 138, 727 S.E.2d 422, 426 (2012), the South Carolina Supreme Court wrote:

> In Neil v. Biggers, the United States Supreme Court set forth a two-pronged inquiry to determine whether due process requires suppression of an eyewitness

> identification. Due process requires courts to assess, on a case-by-case basis, whether the identification resulted from unnecessary and unduly suggestive police procedures, and if so, whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. Biggers, 409 U.S. at 198, 93 S.Ct. 375. Under the totality of the circumstances, the factors to be considered in assessing the reliability of an otherwise unduly suggestive identification procedure are: (1) the witness's opportunity to view the perpetrator at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the perpetrator, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation. Manson v. Brathwaite, 432 U.S. 98, 114, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977) (citing Biggers, 409 U.S. at 199–200, 93 S.Ct. 375).

In the present case the State's failure to preserve the other photos presented to the clerk by law enforcement prevented a determination under the first prong of the Neil v. Biggers due process assessment of whether the out of court identification was the result of an unnecessary and unduly suggestive police procedure. Without the other photos the identification procedure in the present case is analogous to the inherently suggestive one on one show up identification procedure that this Court has, under certain circumstances, found proper. In State v. Mansfield, 343 S.C. 66, 78, 538 S.E.2d 257, 263 (Ct. App. 2000), this Court wrote:

> "[A] showup may be proper where it occurs shortly after the alleged crime, near the scene of the crime, as the witness' memory is still fresh, and the suspect has not had time to alter his looks or dispose of evidence, and the showup may expedite the release of innocent suspects, and enable the police to determine whether to continue searching." 22A C.J.S. *Criminal Law* § 803 (footnotes omitted). "The closer in time and place to the scene of the crime, the less objectionable is a showup." Id. "A showup may be proper even though the police refer to the suspect as a suspect, and even though the suspect is handcuffed or is in the presence of the police...." *Id.* (footnotes omitted). "While show-ups have been upheld by the Court, these situations usually involve either extenuating circumstances or are very close in time to the crime." State v. Hoyte, 306 S.C. 561, 562–63, 413 S.E.2d 806, 807 (1992).

The extenuating circumstances discussed in Mansfield are not applicable in the present case because the police had not apprehended a suspect. The procedure used in this case by law enforcement was not necessary. See State v. Wyatt, 421 S.C. 306, 310, 806 S.E.2d 708, 710 (2017) ("The Supreme Court of the United States has repeatedly emphasized 'that due process concerns arise only when law enforcement officers use an identification procedure that is both suggestive and unnecessary.' Perry v. New Hampshire, 565 U.S. 228, 238-39, 132 S.Ct. 716, 724, 181 L.Ed. 2d 694, 707 (2012) (citing Manson v. Brathwaite, 432 U.S. 98, 107, 109, 97 S.Ct. 2243, 2249, 2250, 53 L.Ed. 2d 140, 149, 151 (1977), and Biggers, 409 U.S. at 198, 93 S.Ct. at 382, 34 L.Ed. 2d at 411); see also Liverman, 398 S.C. at 138, 727 S.E.2d at 426 (describing the trial court's task under the first prong as determining 'whether the identification resulted from unnecessary and unduly suggestive police procedures').")

In the present case there was no reason that a non-suggestive photo line-up could have been compiled, presented to the clerk, and preserved for review by the courts. Although the judge ruled that even if the procedure was suggestive, the identification was admissible considering the five Neil v. Biggers reliability factors, the reliability determination should not take place without a finding under the first prong that the procedure was unnecessary and unduly suggestive. Law enforcement's failure to preserve the photos prevented that determination. The judge's ruling constitutes an error of law.

In State v. Moore, 343 S.C. 282, 288, 540 S.E.2d 445, 448 (2000), this Court wrote:

> As noted in Chief Judge Howell's dissent in this case, whether an eyewitness identification is sufficiently reliable is a mixed question of law and fact. State v. Moore, 334 S.C. at 418, 513 S.E.2d at 629. In reviewing mixed questions of law and fact, where the evidence supports but one reasonable inference, the question becomes a matter of law for the court. Clyburn v. Sumter County Sch. Dist., 317 S.C. 50, 53, 451 S.E.2d 885, 887-88 (1994). Generally, the decision to admit an eyewitness identification is at the trial judge's discretion and will not be disturbed on appeal absent

> an abuse of such, or the commission of prejudicial legal error. State v. Johnson, 311 S.C. 132, 427 S.E.2d 718 (Ct.App.1993). However, an eyewitness identification which is unreliable because of suggestive line-up procedures is constitutionally inadmissible as a matter of law. Caver v. Alabama, 537 F.2d 1333, 1335 (5th Cir.1976), cert. denied, 430 U.S. 910, 97 S.Ct. 1183, 51 L.Ed.2d 587 (1977), citing Foster v. California, 394 U.S. 440, 442-43, n. 2, 89 S.Ct. 1127, 22 L.Ed.2d 402 (1969).

The admission of the out of court identification by the clerk is inadmissible as a matter of law.

As to burden of proof, the trial judge stated, "The burden is on the defendant to show by a preponderance of the evidence that the identification procedure was impermissibly suggestive, and that under the totality of the circumstances there's a very substantial likelihood of irreparable misidentification, and to make that analysis obviously we've got to go on what the witness testified." (Tr. p. 83, line 21 – p. 84, lines 1-2). In State v. Dukes, 404 S.C. 553, 561–62, 745 S.E.2d 137, 141–42 (Ct. App. 2013), the South Carolina Court of Appeals wrote:

> We decline to resolve this issue in terms of whether the trial court properly applied the burden of proof. First, our supreme court has never placed the burden of disproving suggestiveness on the State. The Fourth Circuit, whose decisions regarding federal constitutional law are binding on us,[3] has held the defendant bears the burden of proving the identification procedure was impermissibly suggestive. See United States v. Saunders, 501 F.3d 384, 389 (4th Cir.2007) ("[T]he defendant must show that the photo identification procedure was impermissibly suggestive.").[4] Second, it appears the trial court did place the burden of proof on the State. At the beginning of the hearing, Dukes' counsel stated, "The State can't prove its burden and it's suggestive." The State then put up its evidence. Under these circumstances, the question of whether the burden of proof was properly applied makes no difference because the trial court applied it in the manner most beneficial to Dukes.

Unlike in Dukes, the trial judge in the present case placed the burden of proof on the Appellant. (Tr. p. 83, line 21 – p. 84, lines 1-2). Appellant, however, was prevented from meeting that burden of proof when the State failed to preserve the photos used in the identification. The burden was clearly on the State to preserve the photos that were presented

to the clerk, by law enforcement, as part of the identification procedure. The trial judge erred in admitting the out of-court identification of Appellant by the motel clerk when the State failed to preserve the other photographs that were shown to the clerk, preventing Appellant from demonstrating that the procedure used was unnecessarily suggestive resulting in a substantial likelihood of misidentification. The error requires reversal.

2. The trial judge erred in admitting, pursuant to the excited utterance exception to the hearsay prohibition, the motel clerk's testimony that after viewing the surveillance video of the robbery her co-workers said the person in the video was Appellant.

During the direct examination of the motel clerk the State asked if Appellant was identified from the surveillance video. (Tr. p. 119, line 14 – p. 111, lines 1-25). The clerk testified, "Well, after they watched it they said – called his name. I didn't know who he was, because I didn't know everybody who was there. Like my coworkers, they knew who he was and said something about he was staying in one of the rooms in the back –" (Tr. p. 111, lines 4-8). Appellant objected on hearsay grounds. (Tr. p. 111, line 9). The State argued that the testimony met the excited utterance exception to the hearsay rule. (Tr. p. 111, lines 10-15). The judge overruled the hearsay objection. (Tr. p. 111, line 16).

The State then asked, "So if you could repeat that one more time, your coworkers said what again?" (Tr. p. 111, lines 17-18). The clerk testified, "She said: That's Satwaun, he stayed in the back, him and his dad or somebody had a hotel 9sic0 in the back of the room, I don't know because I don't work first shift, and then most of the people I see, you know, I know them if they're checking in , so I never saw him before. Apparently they knew who he was as soon as they saw." (Tr. p. 111, lines 19-24). None of the coworkers testified at trial. The clerk's testimony about what her coworkers said in regard to identifying Appellant in the

surveillance video is hearsay. The testimony does not meet the excited utterance exception to the hearsay prohibition. The trial judge erred in admitting the testimony. The error was not harmless as it went to the identification of Appellant, a key element for determination by the jury.

In State v. Ladner, 373 S.C. 103, 116, 644 S.E.2d 684, 690–91 (2007), the South Carolina Supreme Court wrote:

> " 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. The general rule is that hearsay is not admissible. Rule 802, SCRE. There are, however, numerous exceptions to this rule, such as the excited utterance exception. The rules of evidence define excited utterance as 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." Rule 803(2), SCRE.

Importantly, " 'Statements which are not based on firsthand information, as where the declarant was not an actual witness to the event, are not admissible under the excited utterance or spontaneous declaration exception to the hearsay rule.' 23 C.J.S. *Crim.Law* § 876 (1989)." State v. Hill, 331 S.C. 94, 99, 501 S.E.2d 122, 125 (1998); see also State v. Davis, 371 S.C. 170, 179, 638 S.E.2d 57, 62 (2006) ("Finally, statements which are not based on firsthand information, such as where the declarant was not an actual witness to the event, are not admissible under the excited utterance exception to the hearsay rule.")

The statements by the coworkers were offered in evidence for the truth of the matter asserted – the identification of Appellant. The statements are hearsay and do not meet the excited utterance exception. The coworkers were not witnesses to the robbery and their statements were not based on firsthand information. Instead, their statements were made after viewing the surveillance video and possibly hearing law enforcement identify Appellant. The

statements by the coworkers were not admissible under the excited utterance exception to the hearsay rule. In State v. Hill, 331 S.C. 94, 100, 501 S.E.2d 122, 125 (1998), the South Carolina Supreme Court ruled that a statement by an unidentified person was not admissible under the excited utterance exception and wrote, "There is no evidence the unidentified declarant witnessed the shooting. Further, it is unknown whether the declarant was under the stress of excitement caused by the event. Therefore, the trial judge did not err in ruling this statement inadmissible." The trial judge in the present case erred in admitting the statement by the coworkers who did not witness the robbery.

Additionally, as in Hill, the trial judge in the present case erred in admitting the statements by the coworkers because there was no evidence elicited by the State that the coworkers were under the stress of excitement from the armed robbery. In State v. Prather, 429 S.C. 583, 611, 840 S.E.2d 551, 565–66 (2020), the South Carolina Supreme Court wrote:

> For a statement to be an excited utterance: "(1) the statement must relate to a startling event or condition; (2) the statement must have been made while the declarant was under the stress of excitement; and (3) the stress of excitement must be caused by the startling event or condition." State v. Washington, 379 S.C. 120, 124, 665 S.E.2d 602, 604 (2008). "[T]he intrinsic reliability of an excited utterance derives from the statement's spontaneity which is determined by the totality of the circumstances surrounding the statement when it was uttered." Ladner, 373 S.C. at 119-20, 644 S.E.2d at 693.

While an armed robbery would qualify as a startling event, as discussed above, the coworkers did not witness the armed robbery. Viewing the armed robbery on surveillance video is not sufficiently startling. The coworkers did not make the statements under the stress of excitement from the armed robbery. The stress of excitement was not caused by the armed robbery.

In State v. Davis, 371 S.C. 170, 178–79, 638 S.E.2d 57, 62 (2006), the South Carolina Supreme Court wrote:

> A court must consider the totality of the circumstances when determining whether a statement falls within the excited utterance exception. Id. Nonetheless, "the burden of establishing the facts which qualify a statement as an excited utterance rests with the proponent of the evidence." 31A C.J.S.*Evidence* § 359 (1996); accord Mariano v. State, 933 So.2d 111, 118 (Fla.Dist.Ct.App.2006); Jarvis v. Commonwealth, 960 S.W.2d 466 (Ky.1998); State v. Kemp, 919 S.W.2d 278, 280 (Mo.Ct.App.1996) ("The party offering the statement as an exception to the rule against hearsay has the burden of making a sufficient showing of spontaneity to render the statement admissible.").

In the present case the State failed to meet its burden of establishing facts to establish that the statements by the coworkers qualified under the excited utterance exception. In Davis the Court found that testimony from a witness, Hicks, that another individual, Hill, told him not to buy a shotgun from the defendant because the victim had been shot with it did not qualify as an excited utterance. The Court wrote, "First, no evidence was elicited by the State that Hill was still under the stress or excitement of Paul's shooting. Therefore, the State did not meet its burden of establishing a foundation for the excited utterance. See Mariano v. State, supra; Jarvis v. Commonwealth, supra; State v. Kemp, supra; see also 31A C.J.S. *Evidence* § 359 (1996) ("the burden of establishing the facts which qualify a statement as an excited utterance rests with the proponent of the evidence")." Davis, 371 S.C. 180, 638 S.E.2d at 62–63. The Court, citing the Hill case, further wrote, "Second, the evidence in the record does not support the conclusion that Hill witnessed the shooting." Davis, 371 S.C. at 180, 638 S.E.2d at 63. As in Davis and Hill, the State did not meet its burden to establish that the statements by the coworkers qualified under the excited utterance exception to the hearsay prohibition. There was no evidence elicited by the State that the coworkers were under the stress of excitement from the armed robbery and the coworkers did not witness the armed robbery.

In State v. Heath, 433 S.C. 506, 515–16, 860 S.E.2d 673, 678 (Ct. App. 2021), this Court wrote, " 'The rationale for the [excited utterance] exception lies in the special reliability accorded to a statement uttered in spontaneous excitement which suspends the declarant's powers of reflection and fabrication.' State v. Burdette, 335 S.C. 34, 42, 515 S.E.2d 525, 529 (1999) (alteration in original) (quoting State v. Blackburn, 271 S.C. 324, 327, 247 S.E.2d 334, 336 (1978))." In the present case the State failed to show that the coworkers' statements were uttered in spontaneous excitement such that the statements could be considered reliable as an excited utterance. In State v. Hendricks, 408 S.C. 525, 759 S.E.2d 434 (Ct. App. 2014), this Court found that statements by Gilstrap, the mother, to the 911 operator about what the daughter said happened to her did not qualify under the excited utterance exception of the hearsay prohibition. This Court wrote:

> We recognize Gilstrap must have had an intense emotional reaction when she first heard her daughter had been raped. However, the State has not shown the nature of her reaction was such that it generated the spontaneity that gives an excited utterance its inherent reliability. See Ladner, 373 S.C. at 119–20, 644 S.E.2d at 693. Moreover, the State did not show Gilstrap was still under the required stress of excitement when she actually made her statement. See Davis, 371 S.C. at 180, 638 S.E.2d at 62 (finding the State elicited no evidence the declarant "was still under the stress or excitement of [the victim's] shooting," and "[t]herefore, the State did not meet its burden of establishing a foundation for the excited utterance").

Hendricks, 408 S.C. at 533–34, 759 S.E.2d at 438. In the present case, as in Hendricks, the State failed to show that the nature of the coworkers' reaction was such that it generated the spontaneity that gives an excited utterance its inherent reliability and the State failed to show that the coworkers were under the required stress of excitement when they made the statements.

The present case is distinguished from State v. Sledge, 428 S.C. 40, 832 S.E.2d 633 (Ct. App. 2019), and State v. Sims, 348 S.C. 16, 20, 558 S.E.2d 518, 521 (2002). In Sledge this Court found that the ten-year old's statements to the 911 operator about who shot his mother qualified under the excited utterance exception to the hearsay prohibition. This Court wrote:

> We acknowledge that Davis clearly provides that in situations in which the declarant does not have firsthand knowledge because he did not witness an event, statements made by the declarant concerning the event are not admissible under the excited utterance exception to the rule against hearsay. Nonetheless, we find this situation is distinguishable from Davis because, while the evidence suggests M.W. did not visually observe Sledge shoot Victim, he perceived Sledge shot her based upon his witnessing of the argument and physical altercation between Sledge and Victim prior to the shooting, his auditory and sensory perception of the shooting, and his discovery of Victim's body in a pool of blood and the fact that Sledge had left the house. Under the totality of the circumstances, in particular the sequence of events here, we find the startling event was such as to suspend M.W.'s process of reflective thought, thereby reducing the likelihood he fabricated the statements in issue. See Ladner, 373 S.C. at 116, 644 S.E.2d at 691 ("The excited utterance exception is based on the rationale that 'the startling event suspends the declarant's process of reflective thought, reducing the likelihood of fabrication.' " (quoting Dennis, 337 S.C. at 284, 523 S.E.2d at 177)).

Sledge, 428 S.C. at 54–55, 832 S.E.2d at 641. Unlike the circumstances present in Sledge, there is no evidence in the record that the coworkers perceived the armed robbery such as to suspend their process of reflective thought, reducing the likelihood of fabrication.

In Sims a five-year old saw his mother after and possibly while she was being attacked. The Court found that statements the child made to law enforcement about who was in the house at the time of the attack qualified under the excited utterance exception to the hearsay prohibition. The Court wrote, "Given the totality of the circumstances, we find the son was under the continuing stress of excitement when he told Officer Thomas appellant was in the home the night of the attack". Sims, 348 S.C. at 23, 558 S.E.2d at 522. In contrast, given the

totality of the circumstances in the present case, the State failed to present any evidence that the coworkers were under the continuing stress of excitement when they made the statement identifying Appellant from a surveillance video.

The trial judge erred in admitting, pursuant to the excited utterance exception to the hearsay prohibition, the motel clerk's testimony that after viewing the surveillance video of the robbery her co-workers said the person in the video was Appellant. The error was not harmless. The identification of the robber was highly contested and the improper hearsay went to identity. The error was compounded by the challenged out of court identification discussed in issue one. The State emphasized the hearsay statements in closing argument telling the jury, "So they start asking coworkers, and the coworkers come on and they view the video and the say; yeah, we know him, I think he's living in the back. The coworkers recognize the man on the video as Henryhand because he's living there in the hotel." (Tr. p. 219, lines 2-6). The State did not present overwhelming evidence of guilt. There was no forensic testimony linking Appellant to the robbery. The judge's finding that the statements by the coworkers qualify under the excited utterance exception to the hearsay prohibition constitutes an abuse of discretion. The admission of the improper hearsay testimony identifying Appellant requires reversal.

CONCLUSION

Based on the above arguments, this Court should reverse the conviction and remand for a new trial.

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ATTORNEY FOR APPELLANT

This 10th day of July, 2023.