STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
The Honorable DeAndrea G. Benjamin, Circuit Court Judge

Appellate Case No. 2023-000234

THE STATE,

Respondent,

v.

NEVELLE JOSHUA EBERHART,

Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

In 2022, a Richland County grand jury indicted Appellant Nevelle Eberhart for armed robbery, possession of a weapon during a violent crime, and possession of a weapon by a person convicted of a violent crime. Appellant proceeded to jury trial before the Honorable DeAndrea G. Benjamin on February 6–8, 2023. The jury found Appellant guilty of armed robbery and possession of a weapon during a violent crime. The possession of a weapon by a person convicted of a violent crime charge was dismissed following the return of the first pair of verdicts since the charges were bifurcated. Appellant was sentenced to a concurrent term of 15 years imprisonment. This direct appeal follows.

STATEMENT OF FACTS

On January 1, 2022, James Stewart ("Victim"), a Vietnam veteran who underwent dialysis treatment three times a week at the VA, was walking to the ATM at First Palmetto Bank from his house nearby to get cash from his debit card. (Tr. 157–Tr. 158). When he got near the ATM, he was approached by a man riding up on a "black moped," later identified as the Appellant Nevelle Joshua Eberhart. When Victim turned to look, "[Appellant] stuck a gun in [his] face" and gestured with the gun towards the ATM and Victim's card. (Tr. 158, ll. 4–7). Victim gave him his debit card along with a "phony" pin number and then fled to the Scotchman just across the street.[1] (Tr. 158, ll. 8–16; Tr. 158, ll. 18-21). Victim hid at the Scotchman for a while, hoping that his assailant had left. However, when he came out of the Scotchman, Victim was approached by Appellant a second time on his moped and "did the same thing with the gun and wanted [Victim] to get on the back on the scooter" to return to the ATM. (Tr. 160, ll. 8–19). However, Victim refused and fled to his nearby home. (Tr. 176, ll. 14–24).

At home, Victim called law enforcement, who then came to his house to speak with him about the robbery. (Tr. 161, ll. 2–14; Tr. 145–Tr. 146; State's Exhibit #3). Law enforcement collected Victim's story and then called Victim later to conduct a photo lineup. (Tr. 226, ln. 12—Tr. 227). While Victim was unable to pick Appellant out of the lineup, Victim emphasized at trial that he recognized people better in person and that during the robbery, Victim was more focused on the gun. (Tr. 162, ll. 21-23; Tr. 165, ll. 1-8; Tr. 171—Tr. 174). Victim identified Appellant as the assailant at trial. (Tr. 162, ll. 2–5; Tr. 165, ll. 11–25).

[1] This same card would later be found on Appellant's person during the investigation and arrest. (Tr. 161, ll. 15–24; Tr. 233, ln. 12–Tr. 235, ln. 24).

Later that night, emergency dispatchers received a 911 call from a woman named Nicole Goodwin—who was apparently dating Appellant at the time—reporting a moped as stolen. (Tr. 201, ln. 12—Tr. 202, ln. 7). Investigator Emmett Gilliam viewed bank surveillance footage and identified the moped used by the assailant by its tag number "MP19444." (Tr. 206—Tr. 209). After running the tag through a database, the moped was found to belong to Goodwin. (Tr. 209, ln. 16—Tr. 210, ln. 8). On January 7, Gilliam went to Goodwin's address and found the same moped there. (Tr. 223, ll. 10–18). Appellant was also at the home at the time and spoke to law enforcement but was not arrested at that time. (Tr. 224, ll. 4–24).

Realizing that Appellant was out on bond with an ankle monitor at the time, Gilliam contacted Titus Curry from Bad Boyz Bail Bonding to retrieve GPS information regarding Appellant from the day of the robbery. (Tr. 225, ll. 3–17). Looking over the GPS data, Appellant was placed within "[a] little over a hundred" meters from the ATM at the bank at the time of the robbery and was also placed on King Street where Victim was confronted by Appellant the second time.[2] (Tr. 225, ln. 18—Tr. 226, ln. 11). Appellant was subsequently brought into headquarters for police questioning. After being advised of his rights and signing an advisement form, Appellant spoke with police. (Tr. 230—Tr. 233). After being confronted with evidence of his involvement, Appellant became hostile and combative and was subsequently arrested. (Tr. 48—Tr. 52; Tr. 232, ln. 13–Tr. 233, ln. 9). Among other items, Victim's debit card was discovered on Appellant's person. (Tr. 233, ln. 12–Tr. 235, ln. 24).

At trial, during a lengthy pre-trial motion phase, Defense Counsel moved to exclude all GPS tracking information from Appellant's ankle monitor, arguing that it was a warrantless

[2] Curry, from the bonding company, had previously testified during a proffer that the GPS tracking was accurate within "100 feet." Tr. 142, ll. 3–10.

search in violation of the Fourth Amendment. (Tr. 33–Tr. 34). The State responded by arguing that Appellant entered a voluntary agreement for GPS monitoring. (Tr. 36–Tr. 37). Citing the Katz standard, the State further argued that "the Defense has the burden of showing a legitimate expectation of privacy in the area he was searched. And that includes the subjective expectation of not being discovered, and the expectation that society recognizes as reasonable" and that therefore, pulling the GPS data from the bonding company was justified. (Tr. 61–Tr. 63). The Court agreed with the State's argument regarding the Katz framework and subsequently denied the motion to suppress.[3] (Tr. 67—Tr. 68).

Following testimony from Officer Selph, the responding officer to Victim's 911 call, the State attempted to show him the body camera footage of his interview with Victim but Defense Counsel objected, arguing it was hearsay. (Tr. 147, ln. 11–Tr. 148, ln. 6). Following some back and forth outside the presence of the jury, the Court denied the motion to suppress, stating that the recorded testimony of Victim fell under the present sense and excited utterances exceptions to the hearsay rule. (Tr. 150, ln. 14–Tr. 151, ln. 3). Defense Counsel then raised another motion to suppress the video testimony, this time under the Confrontation Clause. (Tr. 151, ll. 4–12). The Court then made a qualified ruling that sustained the objection as to playing the video *before* Victim had a chance to testify but would allow playing the video *after* Victim testified. (Tr. 151, ln. 22—Tr. 152, ln. 23). The video was then played for the Officer over the Defense's objections after Victim testified. (Tr. 178—Tr. 180).

After the State rested, Defense Counsel renewed their pretrial motion regarding the GPS evidence and made a motion for directed verdict. The Court then denied the motion for directed verdict and noted the objection regarding the GPS data for the record. (Tr. 259—Tr. 261).

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[3] Katz v. United States, 389 U.S. 347 (1967).

Following the conclusion of arguments, the jury convicted Appellant of armed robbery and possession of a weapon during a violent crime. (Tr. 310—Tr. 314).

STANDARD OF REVIEW

"In criminal cases an appellate court sits to review errors of law only." State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." State v. Saltz, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." State v. Jennings, 394 S.C. 473, 477–78, 716 S.E.2d 91, 93 (2011) (internal citation omitted). "To warrant reversal, an error must result in prejudice to the appealing party." State v. Black, 400 S.C. 10, 732 S.E.2d 880 (2012) (citing State v. Commander, 396 S.C. 254, 721 S.E.2d 413 (2011)). Further, "[e]rror 'is harmless where a defendant's guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached.'" State v. Collins, 409 S.C. 524, 538, 763 S.E.2d 22, 29-30 (2014) (quoting State v. Bryant, 369 S.C. 511, 518, 633 S.E.2d 152, 156 (2006)).

ARGUMENT

I. The trial judge properly admitted GPS location data placing Appellant at the scene of the crime obtained from a bondsman over the objection of Defense Counsel where Appellant could have no reasonable expectation of privacy in GPS data he voluntarily turned over to a bonding company as a condition for pre-trial release.

Appellant contends his right to a fair trial was infringed when the trial court admitted GPS location data taken from his ankle monitor tending to show he was near the crime when it occurred. He contends he had a legitimate expectation of privacy and taking the data was a warrantless search that did not fall under one of the exceptions to the warrant requirement. Appellant's arguments fail because he could not have held any legitimate expectation of privacy in data he knew was being collected and stored by a bonding company on behalf of the state for purposes of ensuring compliance with conditions of his pre-trial release. Even assuming that Appellant maintained a subjective expectation of privacy, this is not a privacy expectation that our society would accept as reasonable. Accordingly, the trial court properly denied Appellant's motion to suppress, and this Court should affirm.

When reviewing a ruling on a constitutional search-and-seizure issue on appeal, the appellate court will "review the trial court's findings for any evidentiary support" and treat "the ultimate legal conclusion" as "a question of law subject to de novo review." State v. Frasier, 437 S.C. 625, 633, 879 S.E.2d 762, 766 (2022). The appellate court will not reverse a circuit court's findings of fact merely because it would have reached a different conclusion. State v. Cardwell 414 S.C. 416, 425, 778 S.E.2d 483, 488 (Ct. App. 2015) (citing State v. Moore, 404 S.C. 634, 640, 746 S.E.2d 352, 355 (Ct. App. 2013), *reversed on other grounds by* State v. Moore, 415 S.C. 245, 781 S.E.2d 897 (2016)).

Further, in order for a defendant to assert that the admitted evidence would be in violation of the Fourth Amendment as a warrantless search, "[t]hey must show that they have a legitimate

expectation of privacy in the place searched." Cardwell, 414 S.C. at 425, 778 S.E.2d at 488 (quoting State v. Missouri, 361 S.C. 107, 112, 603 S.E.2d 594, 596 (2004). "A legitimate expectation of privacy is both subjective and objective in nature: the defendant must show (1) he had a subjective expectation of not being discovered, and (2) the expectation is one that society recognizes as reasonable." Cardwell, 414 S.C. at 425–26, 778 S.E.2d at 488 (citation omitted). "'The proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure' by demonstrating he had an expectation of privacy in the area illegally searched." State v. Robinson, 410 S.C. 519, 528, 765 S.E.2d 564, 569 (2014) (quoting Rakas v. Illinois, 439 U.S. 128, 130 n. 1 (1978)). Even assuming a Fourth Amendment violation took place, a defendant must still have had a reasonable expectation of privacy in order to succeed on the motion to suppress. Robinson, 410 S.C. at 530–33, 765 S.E.2d at 570–71 (later concluding that Petitioner had not met that burden).

In People v. Campbell, 425 P.3d 1163 (Colo. Ct. App. 2018), as a matter of first impression, the Colorado Court of Appeals affirmed the conviction of the defendant, holding the trial court did not err in admitting GPS data obtained from an ankle monitor showing defendant was at the scene of the crime and that defendant did not have a reasonable expectation of privacy in the GPS data under either the United States or Colorado Constitutions. When Campbell was arrested, officers discovered that he was wearing an ankle monitor provided by a private bail bondsman. Campbell, 425 P3d at 1168. Thereafter, a detective contacted the GPS monitoring company and requested the data without a warrant, after which the company voluntarily provided the data. Id. Based on the data, police determined Campbell was at the scene of the crimes. Id. at 1169. The Court then discussed the lower court's decision and rationale regarding the data:

> In its bench ruling, the trial court concluded that Campbell lacked standing to challenge the allegedly unconstitutional search of the GPS data. In its findings of

> fact, the trial court noted that the ankle monitor had been imposed "as a condition of bond, whether it [was] court ordered or ordered by the bondsman." The trial court reasoned that Campbell was "not asserting his own rights" because, even if the bondsman might have an expectation of privacy in the records maintained by the monitoring company, Campbell did not.

Id. The Court then discussed the third-party doctrine, which states in part that a person has no reasonable expectation of privacy in information he or she voluntarily discloses to a third party. Id. (citing Smith v. Maryland, 442 U.S. 735, 742-43 (1979); United States v. Miller, 425 U.S. 435, 443 (1976) (explaining "the Fourth Amendment does not prohibit the obtaining of information revealed by a third party and conveyed by him to Government authorities."); Hoffa v. United States, 385 U.S. 293, 302 (1966).

The Court assumed for the sake of argument that defendant held a subjective expectation of privacy under the Katz framework but concluded that "any expectation of privacy in the GPS data was not 'one that society is prepared to recognize as reasonable.'"[4] Campbell, 425 P.3d at 1170 (quoting Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)). The Court's rationale was as follows:

> Campbell had no reasonable expectation of privacy in the GPS data because he voluntarily disclosed such data to a third party—his bondsman. Campbell was aware that his bondsman had access to the GPS location data to ensure that he did not leave the state while out on bond. In short, Campbell "t[ook] the risk, in revealing his affairs to another, that the information w[ould] be conveyed by that person to the government."

Id. (quoting Miller, 425 U.S. at 443).

[4] As will be discussed below, the Colorado Court also noted the factual differences between the Jones/Carpenter scenarios and the present GPS ankle monitor scenario. Campbell, 425 P.3d at 1170 ("the cases cited by Campbell do not address the precise issue here—whether a defendant has a reasonable expectation of privacy in GPS location data transmitted to and collected by a third party.")

In People v. Henderson, 174 N.Y.S.3d 182 (N.Y. Sup. Ct. 2022), in a pre-trial order, a New York trial court declined to suppress GPS data obtained from an ankle monitor, holding that defendant did not have a reasonable expectation of privacy and thus, the prosecution's procurement of that data was not a "search" under the Fourth Amendment. After being arraigned on unrelated charges, Henderson entered into an agreement with a bonding company which subsequently posted a $100,000 bond on his behalf. Henderson, 174 N.Y.S.3d at 184. As part of that arrangement, defendant signed an additional document, in which he "agreed and understood that, among other conditions, he would be required to wear a non-removable ankle bracelet for twenty-four hours each day, for seven days a week." Id. Said device would track his location using GPS and "Defendant was informed that he may refuse to wear the device, which would result in him being placed back into custody." Id. After being arrested for charges the subject of this case, prosecutors sought the GPS data through *subpoenas duces tecum* directed to the bonding company. Id. In response, defendant moved to suppress, arguing that he had a reasonable expectation of privacy similar to the defendant in Carpenter. Id. at 185. In response, the people argued that "defendant's reliance on Carpenter is misplaced because, unlike the incidental collection of CSLI in that case, here, defendant *explicitly* and *voluntarily* gave up the GPS data to a third party." Id. (emphasis added).

Citing both Katz and Smith, the trial court began its discussion by stating "[b]ut a search to which an individual consents meets Fourth Amendment requirements. [. . .] Moreover, 'a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.'" Id. (citations omitted). Citing these principles and others, the trial court concluded that "defendant has not established a reasonable expectation of privacy in the GPS data he voluntarily turned over to the bail bond company. Thus, there was no Fourth Amendment 'search,' and no

warrant was required for the prosecution to obtain the data." Id. at 186. As part of its rationale, the trial court emphasized that the defendant bears the burden of establishing a legitimate expectation of privacy before any Fourth Amendment warrant analysis is triggered:

> Defendant argues that he had an expectation of privacy to the extent that he believed that the GPS data would be turned over via a search warrant *only*. But defendant puts the cart before the horse. The requirement of a search warrant does not precede or create a reasonable expectation of privacy. Rather, it is an expectation of privacy that implicates the Fourth Amendment and thus, triggers the warrant requirement.

Id. (emphasis added). Regarding defendant's attempt to relate his case to Carpenter, the trial court further stated:

> Unlike the CSLI in Carpenter, which was collected incidentally by wireless carriers to enhance the service and experience for users' cell phones, collection of defendant's GPS data is entirely the point—it is deliberate. [. . .] While cell phone users sign contracts to receive cellular service from wireless carriers, they do not sign contracts for the *express purpose* of allowing carriers to monitor their location. In contrast, defendant signed the contract with [bonding company] *for the express purpose of* monitoring his location.

Id. at 187 (emphasis added). Accordingly, the court concluded that because defendant failed to show a subjective expectation of privacy, it did not need to consider whether it was an expectation that society would find reasonable and therefore denied the motion to suppress. Id.

As in these cases, Appellant cannot avail himself of Fourth Amendment protection because he has failed to demonstrate either a subjective expectation of privacy or an expectation of privacy that society is prepared to recognize as reasonable. The factual scenarios of Campbell and Henderson are nearly identical enough to this case to warrant serious consideration by this Court. For the same reasons that those courts discussed and the trial court in this case discussed, Appellant could not have a reasonable expectation of privacy, meaning that the GPS data could be obtained without a warrant.

Also, for the same reasons discussed in Campbell and Henderson, Appellant's reliance on Jones and Carpenter is misplaced. In United States v. Jones, 565 U.S. 400 (2012), the United States Supreme Court held that attaching a GPS tracking device to the underside of a suspect's vehicle and using such device to track suspect's movements for nearly a month without a warrant was a "search" under the Fourth Amendment. In her concurrence, Justice Sotomayor summarized the Court's reasoning:

> In this case, the Government installed a [GPS device] on [Jones'] Jeep without a valid warrant *and without* Jones' consent, then used that device to monitor the Jeep's movements over the course of four weeks. The Government *usurped* Jones' *property* for the purpose of conducting surveillance on him, thereby invading privacy interests long afforded, and undoubtedly entitled to, Fourth Amendment protection.

Jones, 565 U.S. at 413 (Sotomayor, J., concurring) (emphasis added).

In Carpenter v. United States, 585 U.S. ___, 138 S. Ct. 2206 (2018), the United States Supreme Court held that denying a motion to suppress cell site location information ("CSLI") was error and that individuals have a reasonable expectation of privacy in location data obtained from CSLI. Specifically, it held that obtaining over 120 days of CSLI allowing the Government to look into every physical movement of the defendant without a search warrant was an unreasonable invasion of privacy. Carpenter, 138 S. Ct. at 2217-19. However, the Court there implicitly recognized the clear differences between the CSLI and ankle monitor contexts: "Accordingly, when the Government tracks the location of a cell phone it achieves near perfect surveillance, *as if* it had attached an ankle monitor to the phone's user." Id., 138 S. Ct. at 2218 (emphasis added).

As both the Colorado and the New York courts made clear, Jones and Carpenter are clearly distinguishable from the present scenario. Appellant was not someone who was simply

being tracked without their knowledge or without their consent as part of some broader criminal investigation. As State Counsel summarized during the second day of pre-trial proceedings:

> In this case we have a Defendant who was out on bond, who *voluntarily* submitted to GPS monitoring. As a *condition* of that bond, and in doing so *voluntarily* gave up his expectation of privacy and his location. That is a condition of his bond. And that's why we had the GPS monitoring, because the GPS monitoring is to ensure they're good behavior [sic] and – and know where they're at [. . .] it's applicable to note that I know that there are some cases out there that have ruled on cell phones with Verizon, that [. . .] the State can't get around the warrantless search by going to Verizon and getting someone's personal data from their cell phone; however, cell phone is a – is an entirely different beast than GPS monitoring [. . .] every bit of personal information you have is contained in the cell phone, whereas, a GPS monitoring system only monitors the location where you are at

(Tr. 61, ln. 14—Tr. 62, ln. 11) (emphasis added).[5] In its ruling denying the motion to suppress, the trial court agreed:

> [H]ere I have not heard anything or did not find that the Defendant has a legitimate expectation of privacy when he *voluntarily* submits to GPS monitoring. The *sole* purpose of GPS monitoring is to determine a Defendant's location while out on bond. The Defendant entered into the agreement with the bonding company, knowing that the bonding company could share the information with law enforcement. [. . .] [T]herefore, I do not find that [. . .] the Defendant had a legitimate *or* reasonable expectation of privacy as it relates to a GPS monitor that he has *voluntarily* entered into a contract with the bonding company.

(Tr. 67, ln. 11—Tr. 68, ln. 3) (emphasis added).

Even during the initial motion, Defense Counsel conceded that normally, "[i]t's obviously somewhat of a voluntary agreement when a person is fitted with a GPS data – or a GPS monitoring device" but immediately tried to qualify the concession by stating "[b]ut when the State attaches it to a person, [SCOTUS] has found that that is – that they are engaging in a search." (Tr. 34, ll. 15-21). However, it is unclear what precedent Defense Counsel was citing.

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[5] State Counsel would go on to cite the "Colorado" Campbell case in support of their argument but did not explicitly cite the case by name. The facts of the case cited are identical to Campbell. Tr. 66, ll. 7-21.

Jones involved the surreptitious placement of a tracking device on the underbody of a jeep.[6] Similarly, Carpenter involved CSLI from a person's phone taken without their knowledge or consent. Defense Counsel further attempted to pivot by stating:

> My position here is that he *may have agreed* to wear it to ensure *monitoring*, that he was not violating any conditions of his bond. But the moment that it was used as an investigation tool, the State exceeded all scope of any agreement he entered into with his bondsman.

(Tr. 34, ln. 21—Tr. 35, ln. 1) (emphasis added). This argument, which Appellant Counsel essentially replicates in their brief, ignores the purpose of the bonding agreement.

Appellant further argues the trial court erroneously shifted the burden of showing consent to Appellant and further contended that such consent (to the bonding company or the state) was not effectively demonstrated at the trial court because (1) there was no presentation of bond terms and conditions; (2) no discussion of what Appellant was told about GPS monitoring; and (3) no production of the bond agreement—thereby implying the trial court made its conclusion only because of the existence of the ankle monitor. (Initial Brief of Appellant at 8-10). However, the trial court did not rely on the consent exception in admitting the records. Rather, the court found no reasonable expectation of privacy, and by extension no search, meaning consent was not required. (Tr.p.67–68). For all the foregoing reasons, the trial court correctly denied Appellant's motion to suppress. This Court should affirm.

II. The trial judge did not err in allowing the State to play body camera footage of the initial police interview with the victim after victim had the chance to testify.

[6] The Supreme Court specifically indicated that it would not go any farther than calling that scenario a "search," stating that it would not evaluate the reasonableness of Jones' expectation of privacy since the Government had "forfeited" that argument. Jones, 565 U.S. at 404, 413.

Appellant argues, on both Confrontation Clause grounds and hearsay grounds, that the trial court committed reversible error by allowing the State to introduce body cam footage of an interview with Victim describing the attack and the assailant. Appellant contends that admitting the video testimony even after Victim had testified did not cure a Confrontation Clause deficiency and that, even if the Confrontation Clause issue was cured, the trial court still improperly classified the video as an excited utterance or present sense impression exception to the general prohibition on hearsay. Appellant contends that playing the video before the jury negatively impacted its ability to assess Victim's credibility and trial testimony and that, as a result, Appellant was prejudiced. For the foregoing reasons, these arguments are without merit.

Under the Sixth Amendment of United States Constitution, among other protections, "[i]n all criminal prosecutions, the accused shall enjoy the right [. . .] to be confronted with the witnesses against him." U.S. Const. amend. VI. As the United States Supreme Court noted in Crawford v. Washington,

> [T]he principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused. It was these practices that the [English] Crown deployed in notorious treason cases. [. . .] The Sixth Amendment must be interpreted with this focus in mind.

541 U.S. 36, 50 (2004). The Confrontation Clause gives a defendant the right to cross-examine witnesses presented against them. Id. at 61–62; State v. Gracely, 399 S.C. 363, 372, 731 S.E.2d 880, 885 (2012) (right to cross examine witnesses about bias); State v. Stokes, 381 S.C. 390, 402, 673 S.E.2d 434, 439 (2009). Where a witness testifies and is subjected to cross-examination, there is no Confrontation Clause violation when video testimony of the witness is introduced after the witness testified, especially when the testimony in the video directly correlates to the scope of testimony elicited under direct and cross-examination. See State v.

Anderson, 413 S.C. 212, 217-18, 776 S.E.2d 76, 78-79 (2015) (finding in CSC case where minor's testimony regarding abuser appellant was admitted through a recorded interview, there was no Confrontation Clause violation when minor had the chance to testify and was subjected to cross-examination). Accordingly, although there may have been a Confrontation Clause issue in admitting the video testimony before Victim had the chance to testify—as the trial court noted—this issue immediately became moot as soon as Victim testified and was subjected to cross-examination.

Appellant's hearsay claim is likewise without merit. Hearsay is defined as a "statement, other than one made by the defendant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE; State v. King, 422 S.C. 47, 66, 810 S.E.2d 18, 28 (2017). "A 'statement' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." Rule 801(a), SCRE. "Hearsay is not admissible unless there is an applicable exception." King, 422 S.C. at 66, 810 S.E.2d at 28 (quoting State v. Brockmeyer, 406 S.C. 324, 351, 751 S.E.2d 645, 659 (2013)). However, even if hearsay is improperly admitted during the scope of a trial, an appellant still has the burden of demonstrating prejudice. See State v. Vick, 384 S.C. 189, 200, 682 S.E.2d 275, 281 (Ct. App. 2009) (finding that defendant failed to demonstrate reversible error in admitting hearsay evidence since hearsay testimony was "merely cumulative to other unobjected to testimony" and that jury verdict was supported by "an abundance of [other] competent evidence"); United States v. Palow, 777 F.2d 52 (1st Cir. 1985) (finding that codefendants' post-arrest statements were hearsay as to defendant and were inadmissible to him but admission was harmless since statements were "merely cumulative of the mass of similar evidence").

Here, there are two applicable exceptions: excited utterance and present sense impression. First, an excited utterance is "[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. "For a statement to be an excited utterance: '(1) the statement must relate to a startling event or condition; the statement must have been made while the declarant was under the stress of excitement; and (3) the stress or excitement must be caused by the startling event or condition.'" State v. Praher, 429 S.C. 583, 611, 840 S.E.2d 551, 565-66 (2020) (quoting State v. Washington, 379 S.C. 120, 124, 665 S.E.2d 602, 604 (2008)). "Whether a statement is admissible under the excited utterance exception to the hearsay rule depends on the circumstances of each case and the determination is generally left to the sound discretion of the trial court." State v. Burdette, 335 S.C. 34, 43-44, 515 S.E.2d 525, 530 (1999) (citation omitted). Further, an excited utterance need only be "substantially contemporaneous with the transaction." State v. Blackburn, 271 S.C. 324, 328, 247 S.E.2d 334, 336 (1978) (later concluding that a victim statement given an hour after the event "would qualify as excited utterance and be admissible under [that] exception").

Here, it was proper for the trial court to classify Victim's video statement as an excited utterance. First, the statement was clearly related to a startling event or condition, the double armed robbery that Victim was subjected to only thirty minutes prior to police arrival. Second, there is enough evidence from which the court could conclude that Victim, the declarant, was under the stress of excitement while giving the statement. There are multiple moments where Victim raises his voice and gets agitated when describing what happened. For example, one minute and 45 seconds into the video to two minutes and 30 seconds into the video, when describing where he was robbed, Victim can be seen gesturing towards the scene just over a

block away from where he lives and, when asked about the bank, he raises his voice and becomes agitated. (State's Exhibit #3). Similarly, at two minutes, 37 seconds and seven minutes, 20 to 35 seconds into the video, Victim can be heard raising his voice describing the altercation. Third, the video clearly demonstrates that this excitement was directly related to the armed robbery that had occurred only thirty minutes prior.

Accordingly, the trial court correctly characterized the testimony as an excited utterance in its ruling denying the motion to suppress. (Tr. 150, ll. 18–24). Appellant's emphasis on the time between the robbery and the actual testimony is overstated. Following the proposition from Blackburn that suggests that an excited utterance can still occur up to an hour after a startling event, the record here demonstrates that Victim's interview with police, roughly thirty minutes after the robbery, was well within the reasonable and acceptable window for an excited utterance. Therefore, it was well within the sound discretion of the trial court, based on the video evidence, to classify Victim's testimony as an excited utterance under Rule 803(2), SCRE.

A present sense impression, on the other hand, is "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." Rule 803(1), SCRE. "There are three elements to the foundation for the admission of a hearsay statement as a present sense impression: (1) the statement must describe or explain an event or condition; (2) the statement must be contemporaneous with the event; and (3) the declarant must have personally perceived the event." State v. Parvin, 413 S.C. 497, 503, 777 S.E.2d 1, 4 (Ct. App. 2015) (quoting State v. Hendricks, 408 S.C. 525, 533, 759 S.E.2d 434, 438 (Ct. App. 2014)). Below, the South Carolina Court of Appeals in State v. Washington describes the differences between present sense impressions and excited utterances:

> Present sense impression evidence differs from the excited utterance exception, since the excited utterance exception requires that the shock or excitement of an

> incident or event trigger the outburst, while the present sense impression exception does not require that the declarant be excited. [. . .] The present sense impression exception requires a closer time proximity than the excited utterance one.

424 S.C. 374, 399, 818 S.E.2d 459, 472 (Ct. App. 2018), *aff'd in part, vacated in part, rev'd in part*, 431 S.C. 394, 848 S.E.2d 779 (2020) (citing 31A C.J.S. Evidence § 505 (2018)) (quotations omitted).

While not as clear-cut as the excited utterance analysis, it is still reasonable for Victim's statement to have been admitted as a present sense impression. First, as described above, Victim's statement clearly explained an event, the robbery. Second, the statement was substantially contemporaneous to the event. While the statement was given roughly thirty minutes after the robbery, there is still continuity between Victim leaving the Scotchman, being assailed for a second time, running away to his home only a block and a half away, calling police, and police arriving to Victim's house whereupon they immediately spoke with him. The only real gap in continuity likely comes from the time it took police to respond to Victim's house. Otherwise, to Victim, the event described had essentially only happened a few minutes before and there was no real break in circumstances for him other than getting away from where he was attacked. Third, Victim was present to the occasion as the person robbed. Accordingly, the trial court did not abuse its discretion in characterizing this testimony as a present sense impression.

Even assuming the trial court erred in allowing the body cam footage to be played before the jury in violation of either the Confrontation Clause or the prohibition on hearsay, this error was harmless and would not justify reversal. "A violation of the Confrontation Clause is not *per se* reversible error." State v. Dinkins, 339 S.C. 597, 603, 529 S.E.2d 557, 560 (Ct. App. 2000) (citing State v. Jenkins, 322 S.C. 360, 364, 474 S.E.2d 812, 815 (Ct. App. 1996)); see also

Parvin, 413 S.C. 497, 777 S.E.2d 1 (finding erroneous admission of testimony as present sense impression harmless). Generally, "[e]rror is harmless when it could not reasonably have affected the result of the trial." State v. Golson, 349 S.C. 421, 429, 562 S.E.2d 663, 667 (Ct. App. 2002). However, there are several factors to assess in considering whether evidence admitted in error was harmless: "the importance of the challenged evidence to the State's case, whether the evidence was cumulative, whether the evidence was materially corroborated or contradicted by other evidence, [. . .] the extent of cross-examination otherwise permitted, and the overall strength of the State's case." Dinkins, 339 S.C. at 603, 529 S.E.2d at 560 (citing Jenkins, 322 S.C. at 364-65, 474 S.E.2d at 815.[7] Applying these factors to the present case, admitting the body cam footage was harmless.

The video testimony was not overly important to the State's case. Victim had already testified to the same facts. Victim had the chance on the stand to physically identify his assailant, Appellant, in the court room. Furthermore, the other evidence of Appellant's guilt was overwhelming. The State had produced GPS data showing Appellant was at the scene of the crime, Victim's debit card which was found on Appellant when he was arrested, testimony regarding the moped used in the crime and its link to Goodwin/Appellant, video of Appellant's hostile reaction to being confronted with evidence of his guilt, and video evidence of the robbery corroborating Victim's account. The video evidence essentially supplemented Victim's in-court testimony. Finally, the Defense cross-examined Victim before the video was admitted before the

[7] Essentially, if the evidence admitted in error was inconsequential compared to other evidence, the error is harmless and does not require reversal. *See* State v. Henson, 407 S.C. 154, 166, 754 S.E.2d 508, 515 (2014) (finding for the context of co-defendant testimony admitted in error, "the harmless error standard has been formulated as: 'In some cases the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of the codefendant's admission is so insignificant by comparison, that it is clear beyond a reasonable doubt that that the improper use of the admission was harmless error.'") (quoting Schneble v. Florida, 405 U.S. 427, 430 (1972)).

jury. The jury would have easily convicted Appellant without the video. Admission of the video did not reasonably affect the result of trial. This Court should affirm.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgments and convictions of the lower court should be affirmed.

Respectfully submitted,

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