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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Fairfield County
The Honorable Brian M. Gibbons, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

TIMOTHY JAMES THOMPSON,

APPELLANT.

Appellate Case No. 2022-000397

INITIAL BRIEF OF RESPONDENT

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Whether the court erred by allowing state's witness Tommy Bell to testify remotely, where he was located in Fairfield County where appellant's trial was being held, since appellant was entitled to live confrontation with this key state's witness?

COUNTER STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in allowing witness Tommy Bell to testify live but remotely where there was a sufficient showing of necessity for allowing the witness to testify remotely, and appellant was able to confront, cross-examine, and impeach the witness live before the jury; and regardless, given all the record evidence, any error was harmless beyond a reasonable doubt?

STATEMENT OF THE CASE

On September 6, 2020, appellant Timothy James "Gus" Thompson ("Thompson") murdered Bruce Gibbs in Winnsboro, S.C. in Fairfield County. Thompson was arrested on September 9, 2020, in Richland County and returned to Fairfield County. (Tr. 279). Thompson was indicted at the December 8, 2020, term of the Fairfield County Grand Jury for the offenses of murder and hit-and-run involving death (Ind. #s 2020-GS-20-399 & 400). (Tr. 1-9, Indictments). Thompson proceeded to trial on March 21, 2022, before Circuit Court Judge Brian M. Gibbons and a jury. William Frick, Esquire represented Thompson. Assistant Solicitors Riley Maxwell and Henry McMaster, Jr. represented the State. (Tr. 1). At the conclusion of the trial, the jury found Thompson guilty of both offenses (Tr. 457-58). Judge Gibbons sentenced Thompson to life imprisonment for murder and 10 years concurrent for hit-and-run involving death. (Tr. 467).[1] This appeal followed raising 1 issue. This is the Brief of Respondent.

[1] At sentencing, Thompson's prior record was provided to court. Thompson had previously been convicted of ABHAN in 2010 and Lewd Act Upon a Minor in 2012. He also had previous convictions for Accessory After the Fact of a Felony, Attempted Burglary and Stolen Property in Florida in 2005 and Obstruction of Justice in North Carolina in 2016. (Tr. 459-61).

RESPONDENT'S STATEMENT OF FACTS

On the evening of September 5, 2020, there was a "fish fry" taking place at the home of Bruce Gibbs ("Victim") and his mother Felicia Johnson ("Felicia") located on Doty Road in Winnsboro in Fairfield County. Doty Road is not far from 11th Street in Winnsboro. Those in attendance at the fish fry were celebrating the birthday of a friend of Felicia and Victim. Victim was at the fish fry with the mother of his child, Nikki Thompson ("Nikki"), who is also the sister of the appellant, Timothy James Thompson ("Thompson"). Thompson, who is known by the nickname "Gus," was at the fish fry as well. (Tr. 143-72; 218-35).

At 8:00 p.m. to 9:00 p.m., Victim and Nikki got into a loud argument near the mailbox in Felicia's front yard. Felicia was in the house. Thompson was in the back yard but heard the argument and ran toward it because he did not like the fact Victim was arguing with his sister and called her a "bitch". When Thompson reached Victim and Nikki at the mailbox, he injected himself into the argument. Thompson stated he was tired of Victim arguing with his sister. Victim did not like Thompson interjecting himself into Victim's and Nikki's relationship and told Thompson to stay out of their business. Nikki did not want to hear any of it and walked away. Thompson then threatened Victim, and Victim stated they could "go one on one" right then. Thompson stated *he had something for Victim, **and** he was going to get him.* Two (2) different witnesses who saw the argument, Miranda Sawyer and Annie Roach, heard Thompson threaten Victim. Felicia came outside of her home and broke up the argument taking her son, Victim, inside the house. Thompson then left the party on foot leaving his car, a black 2004 Chevy Impala, parked at Felicia's home. Thompson came back later with his father, and Thompson and his father left the party together this time with Thompson driving his black 2004 Chevy Impala. Thompson's car was gone from Felicia's home by 10:00 p.m. (Tr. 143-72; 218-35; 205-16).

Nikki, the mother of Victim's child and the sister of Thompson, stayed at the party for a while longer but eventually left with her other children leaving her smallest child, Victim's child, with Felicia, the child's grandmother. At some point before leaving, Nikki gave Victim some money to go and buy her some marijuana. She later texted Victim about him coming over to her apartment and smoking marijuana. Later, Victim left Felicia's home on foot sometime around midnight or thereafter, now on September 6th, 2020, to get the marijuana and/or to take it to Nikki at her apartment. Victim ended up walking on the sidewalk on 11th Street in Winnsboro headed toward Nikki's apartment at approximately 1:00 a.m. (Tr. 143-72; 218-35; 205-16; 289-90).

About 1 ½ to 2 hours earlier, between 11:00 to 11:30 p.m. on September 5th, about an hour and ½ to 2 hours after Thompson left the fish fry at Felicia's home, Thompson drove his 2004 black Impala to the home of Victim's grandfather 74-year-old Tommy Bell.[2] Thompson was alone. According to Thompson, Mr. Bell was a close friend of Thompson. They had been next door neighbors at one time and would sit on the porch and talk. After Thompson arrived at Bell's home, Thompson made verbal threats against Victim to Mr. Bell and explicitly said he was going to kill Victim later that night. Bell tried to calm Thompson down and told Thompson to talk to Victim's mother, Felicia, instead, and she would straighten everything out with Victim. Thompson refused to talk to Felicia. Instead, Thompson asked Mr. Bell for a gun, which Bell stated he did not have. Mr. Bell testified Thompson spent a lot of the time at Bell's residence staring and Thompson was sweating a lot. As a result, Mr. Bell thought Thompson was high on something. Thompson told Bell that Victim had called Thompson's sister, Nikki, a bitch. Thompson left Mr. Bell's residence driving his black Chevy Impala around 12:00 to 12:30 a.m. now on September 6th. Mr. Bell and

[2] Respondent is approximating Mr. Bell's age at the time of the crime based on his stated age of 76 at the time of trial in March of 2022.

his fiancé eventually called Felicia, Victim's mother, and left a message on her voice mail notifying her of Thompson's threat to kill Victim. Unfortunately, Felicia did not receive the voice mail until after Victim had been killed. Mr. Bell was interviewed by police several days after the murder, on September 15th, and told police similar information as he testified to above in a video recorded statement, except Mr. Bell got wrong what night the threat occurred. A portion of this video recorded statement was played by the defense for the jury to impeach Mr. Bell's testimony. (Tr. 205-16; 287-89; 385-86; 412-13; 164-65; State's Ex. 18 [Defendant's recorded statement]).

After leaving Mr. Bell's home in his black Impala, Thompson went to the home of his friend Calvin Sampson ("Calvin"). Calvin testified Thompson came by his home between 12:00 a.m. and 1:00 a.m. in the early morning hours of September 6th driving the dark Impala. Thompson asked Calvin if he knew where Thompson could get a gun, and Thompson was willing to trade his car for a gun. Calvin told Thompson: "there ain't no gun around here," and Thompson left Calvin's residence without getting a gun and driving his black Impala. (Tr. 235-44).

Thompson then drove his black Impala to POPS convenience store. Surveillance footage there captured Thompson driving the dark early model Impala in the store parking lot shortly before 1:00 a.m. Surveillance footage also captured him entering POPS convenience store wearing distinctive black and white clothing that a Deputy Sheriff later saw him wearing shortly after Victim was murdered. (Tr. 277-82; 287; State's Ex. 8).

About 12:30 a.m., on September 6th, after Thompson left Calvin Sampson's home, Calvin also drove to POPS convenience store to buy some cigarettes. POPS is the only store in Winnsboro that is open at this late hour. While driving back to his home from POPS, Calvin saw a dark early model Chevy Impala, consistent with the one Thompson was driving earlier at Calvin's home, coming down 11th Street in the opposite direction of Calvin, driving "wide open." Calvin testified

the car came flying over the 11th Street bridge and was swerving all over the road and ran off that car's right side of the road, and Calvin believed the car hit a fence in a yard. Calvin did not see the car hit a person, but as he testified, he was headed in the opposite direction and was trying to avoid being hit by the car. Calvin testified the driver of the car was jerking the car back and forth trying to control the car after it came flying over the bridge and drove off the right side of the road where he thought it hit a fence. Calvin almost stopped his car to avoid being hit. Calvin said the car that ran off its' right side of the road and continued on and went onto Hwy 315 also known as Columbia Road, headed in the direction of POPS convenience store. Calvin continued home and when he arrived home told people at his residence that the person driving that car was going to kill someone. (Tr. 235-44).

Deputy Al McCoy of the Fairfield County Sheriff's Office was patrolling on Columbia Road a few minutes after 1:00 a.m. on September 6th headed toward Calvin Sampson's home. Deputy McCoy saw a car he believed did not have its' headlights on, only its fog lights. The car was a Chevy Impala. The car was on 11th Street coming from the area of 11th Street's intersection with Chestnut Street headed toward its' intersection with Columbia Road. Deputy McCoy turned around and followed the dark Impala, and the Impala turned onto Columbia Road headed in the opposite direction from which Deputy McCoy had been coming. After turning around on the car, Deputy McCoy was now headed toward POPS convenience store just like the dark Chevy Impala. Deputy McCoy was going to pull the car over with the use of his blue lights until he pulled up beside the Impala on its' right at a red light, the intersection of Columbia Road and 321 By-Pass near the *BiLo* grocery store. Deputy McCoy then saw the dark Impala's headlights were on, but they were very dim. He noticed the car was an early model dark or black Chevy Impala with tinted windows and the tinting was "bubbling up" or coming off on the windows. He also noticed that

the rear passenger side tire on the car was flat. The car also had no hubcaps on the passenger side tires. The car turned left at the intersection onto Hwy. 321 South headed toward Columbia, and the Deputy did not stop the Impala because it looked like the driver was going to pull into POPS convenience store to put air in the car's flat tire. A few minutes later, the Deputy received a dispatch of a body in the road in the City of Winnsboro. He responded to the location of 11th Street and Chestnut Street where there was a dead body in the road. This is the same area he saw the dark Chevy Impala coming from just a few minutes earlier. Deputy McCoy arrived on scene at 1:14 a.m. Once the S.C. Highway Patrol arrived, Deputy McCoy shared with them what he had witnessed earlier regarding the dark early model Chevy Impala. (Tr. 80-97; 267-68).

A few minutes later, Deputy Jonathan Harris of the Fairfield County Sheriff's Office was patrolling and received a call of a stranded motorist in the area of Ridgeway. The Deputy responded, located the vehicle, and pulled over to the side of the road to see if the driver of the vehicle needed any assistance. The car was stranded on the side of Highway 34. The Deputy arrived at 1:26 a.m. The driver was a black male with dreadlocks. The car was pulled over on the right side of the road headed away from Winnsboro and toward I-77. The driver was changing a flat tire on the passenger side rear of the car. He was putting the spare tire on the vehicle and finishing up changing the tire. He told the Deputy he was fine and did not need any assistance. As a result, the Deputy got back in his car and did not look at the front of the vehicle. However, the Deputy had his car camera on the whole time of the encounter with the driver, and the driver was changing the tire on his older model black Chevy Impala. This was minutes after Deputy McCoy had seen the same car turning toward POPS convenience store with the flat rear passenger tire. (Tr. 292-303; State's Ex. 9).

Deputy Chris Childers arrived at the crime scene at the same time as Deputy McCoy. The dead body of Victim Bruce Gibbs was lying in the road on 11th Street at the intersection of 11th and Chestnut Street in Winnsboro. Victim was approximately 126 feet from where he had been struck by a car. The actual impact location was back up 11th Street and off the side of the roadway near 11th Street's intersection with Maple Street just past the 11th Street bridge. This is the exact area where Calvin Sampson saw the dark Chevy Impala go off the road and strike what Calvin thought was a fence. (Tr. 80-97; 101-10; 111-18; 120-30; 131-43; 235-44; 304-39; 339-51; 351-86).

The S.C. Highway Patrol MAIT team responded to the crime scene. Based on tire tracks, impact marks to the curb and sidewalk, scuff marks to the sidewalk and road, and the debris field, it was determined Victim had been struck in front of a home on 11th Street while on the sidewalk or in the grass of a yard. The MAIT team also determined the vehicle that struck Victim did not lose control before impact and was traveling at approximately 47 to 48 m.p.h. at the time of impact in a 35 m.p.h. zone, and the vehicle had gone off the road, first striking a curb, and going up onto a sidewalk and at least 1 wheel had gone into the grass either before or after striking Victim. All of the vehicle's tires, both driver's and passenger's side, had left the right lane of 11th street. The right tires had gone into the grass and the left front tires were outside of the white line at the edge of the road before the impact with Victim. At the point of impact, police found both of Victim's shoes and his cell phone, which is normal when a pedestrian is struck by a fast-moving vehicle. In the path of travel of the vehicle after Victim was struck, police found a front headlight clip that had broken off the vehicle that struck Victim. The vehicle that struck Victim was not at the scene. The autopsy determined Victim died from a fractured skull and a broken neck. Victim also had other broken bones and injuries to his body consistent with being struck by a car, including road rash. (Tr. 80-97; 101-10; 111-18; 120-30; 131-43; 304-39; 339-51; 351-86; 175-200).

Sometime after being notified of Victim's death at approximately 4:00 a.m. on September 6th, Felicia [Victim's mother] became aware of Thompson's threat against Victim made to her father, Mr. Bell, around midnight to 12:30 a.m. She notified investigators of the threat, and that Thompson may be involved in her son's death. Police then determined Thompson had access to a black early model Chevy Impala. The next day, Felicia contacted the police again, this time notifying them that a friend had seen Thompson walking on Hwy. 321, in the area of the *Flying J. Truckstop* near I-20 in Columbia, S.C., after Victim was killed. (Tr. 156-72; 266-68; 272-73).

That same day, police investigated this information and located Thompson's 2004 black Chevy Impala at the *Flying J Truckstop* next to I-20 near Columbia. The vehicle was abandoned. Police photographed the car and found impact damage to the front grill and hood of Thompson's car. Someone had also poured bleach on the hood of the car and on the windshield in an attempt to destroy evidence of the crime. Bleach was also running down the sides of the vehicle. A bottle of bleach was found in the back of Thompson's car. Police ran the tag and registration, and it came back registered to Thompson. The vehicle also had a spare tire on the back passenger side wheel rim that had visible yellow writing on it stating: "spare tire." This writing was not visible in an earlier surveillance video of Thompson driving the car at POPS convenience store a few minutes before Victim was struck. Police also noticed and photographed that the car also had bubbling to the window tinting just as Deputy McCoy had seen earlier at the red light in Winnsboro when Thompson turned left as if he was going to POPS convenience store to get air in the right rear passenger tire. The car also had no rims on the passenger side tires just as Deputy McCoy had seen the night before. Police obtained a search warrant from a Richland County Magistrate and towed the vehicle back to the Fairfield County Sheriff's Office for a more detailed search. There they found the front passenger side headlight was being held in place by a tie wrap. Someone had tied

the headlight in place with the tie wrap because the clip that holds the light in place was broken off. The broken clip found at the scene matched the clip on the driver's side which was still in place. (Tr. 245-60; 272-76; 304-86).

Surveillance video of the area of the vehicle impact with Victim was obtained by police from a local homeowner whose 2 security cameras were facing the area of the impact. The security footage captured the impact to Victim. Victim can be seen walking down 11th Street headed toward Nikki's apartment at approximately 1:00 a.m. A dark early model car with round brake lights [a Chevy Impala has round brake lights] can be seen going past Victim in the opposite direction at a normal rate of speed coming from the direction of POPS convenience store. The car then turns around and comes back at an accelerated speed and runs off the road and strikes Victim. The car does not stop and keeps going. At the time of the impact to Victim, another car, Calvin Sampson's car, can be seen coming by in the opposite direction [coming from the direction of POPS] and almost stopping, just as Calvin testified at trial. After Victim is struck by the car with the round brake lights, the car heads off toward the direction of POPS convenience store. The surveillance video from the 2 security cameras of the nearby homeowner was introduced at trial. (Tr. 339-51; State's Ex 13 [channels 1 and 2]).

Thompson turned himself in to Columbia police on Wednesday, 3 days after Victim's death, at the same *Flying J. Truck Stop* where he previously abandoned his vehicle. He told police there that he was wanted by police in Winnsboro. Thompson was arrested and returned to Winnsboro where he was questioned by police there. Thompson admitted everything but running over Victim. He admitted that he alone drove his 2004 black Chevy Impala the night of the murder. He admitted he was driving the car before the crime and after the crime. He admitted it was him who was broken down on the side of the road changing his right rear tire when Deputy Harris stopped and

asked if he needed any assistance. He admitted that there should be a flat tire somewhere on Highway 34 where he was seen changing the flat tire. He admitted he left his car at the *Flying J. Truck Stop* near I-20. He admitted it was he who was at POPS convenience store on the night of the crime before Victim was killed. He also admitted he was upset or agitated the night of the murder about something, and it took him about 3 hours to calm down. Finally, he stated on the tape that Mr. Bell was his best friend (Tr. 280-81; 377-79; 385-86; 412-13; State's Ex. 18 [Defendant's recorded statement]).

APPELLATE ISSUE

Did the trial court abuse its' discretion in allowing witness, Mr. Tommy Bell, to testify live via *My Virtual Courtroom* where there was a sufficient showing of necessity for allowing him to testify live but remotely; the witness was placed under oath; the jury and the appellant could see him, and appellant was able to confront, cross-examine, and impeach the witness live before the jury; and regardless, all the evidence rendered any error harmless beyond a reasonable doubt?

What occurred below relevant to this issue

Prior to trial, on March 11, 2022, there was a pre-trial hearing where the State moved before the trial court to allow the State to take the testimony of one (1) witness, Mr. Tommy Bell, live via *My Virtual Courtroom* **during the trial** because Mr. Bell was elderly, was out of town in Pennsylvania, and was ill and could not travel by plane or car. (March 11, 2022, Tr. 1-8). At that time, Mr. Bell was living with a son in Pennsylvania, and his doctor had told him not to travel because of his breathing and other health issues. (March 11, 2022, Tr. 3, 5). The trial judge held a hearing on the motion and spoke live with Mr. Bell while Bell was in Pennsylvania. (March 11, 2022, Tr. 1-7). Mr. Bell explained to the Court why he could not travel by plane or vehicle, that his breathing was bad and because of other health issues, and his doctor had ordered him not to travel. (March 11, 2022, Tr. 3 & 5). Thompson objected under the Confrontation Clause, stated there were some problems during this live video feed with the witness, and stated he would prefer live testimony even though he could cross-examine Mr. Bell over live video feed. (March 11, 2022, Tr. 5). The trial judge overruled the objection specifically finding the court was going to allow the live video feed testimony during the trial **based upon the risk to the witness's [Mr. Bell's], health and safety**. (March 11, 2022, Tr. **5, ln. 21 - 6, ln. 9**). The trial judge cautioned Mr. Bell that his testimony by *My Virtual Courtroom* would be just like he was in court when he testified. (March 11, 2022, Tr. 6).

Another hearing was conducted on the day of trial, pre-trial, regarding the logistics of Mr. Bell testifying via *My Virtual Courtroom.* (Tr. 9-12). At that time, the parties still understood Mr. Bell to be in Pennsylvania. (Tr. 9-10). The trial judge reiterated his holding and that Thompson's objection to Mr. Bell testifying via live feed was protected. (Tr. 9-12). At that time, the Solicitor informed the trial judge that Mr. Bell was 76 years old and would still be testifying on Wednesday by live video feed on a large screen so the jury could see the witness, and the witness would be the only person on the screen at the witness' end of the transmission. (Tr. 9-12). The trial judge instructed the Solicitor to make sure there were no video feed glitches, if at all possible, and the court would do a test run of the technology during a bond hearing with another witness before Mr. Bell testified. (Tr. 9-12). The attorneys informed the trial judge where they would be located during Mr. Bell's live video feed testimony and cross-examination. (Tr. 9-12).

On Tuesday, immediately after the jury was selected, the Solicitor then informed the trial judge that there had been a change of circumstances. (Tr. 63, ln. 21-24). The Solicitor informed the trial judge that it looked like Mr. Bell would be present to testify in the courtroom. (Tr. 63, ln. 21-24). Mr. Bell had moved back to South Carolina before the trial. (Tr. 205-06). When informed of this new information, the trial judge responded: "That's just –that's wonderful. That is great. That's great news." The jury was then brought into the courtroom, and the trial judge gave the jury his general trial preliminary instructions and the trial commenced. (Tr. 64).

On the Wednesday of the trial, after the pathologist testified, the trial court excused the jury to hold another *in camera* hearing regarding Mr. Bell's testimony. (Tr. 200). The trial court was informed that even though the witness, Mr. Bell, was now in Fairfield County, he could not make it to the courthouse to testify because of a physical illness. (Tr. 200-202). Thompson renewed his objection to the live video feed testimony of Mr. Bell by way of *My Virtual Courtroom.* (Tr. 200,

ll. 15-24). Thompson argued that since Mr. Bell was now in Fairfield County and he was down the road from the Courthouse, he could be transported to the courtroom to give live testimony. (Tr. 200, ll. 15-24). Thompson stated through counsel:

> My chief concern is, if I need to ask him about his previous [video recorded] statement, I think this is going to be problematic and very difficult. I'm not exactly sure how were going to execute that. I've got him cued up and ready to go to attempt it though.

(Tr. 200, ll. 19-24). At that time, the trial judge had the witness, Mr. Bell, live on *My Virtual Courtroom* and placed Mr. Bell under oath. (Tr. 201, ll. 3-9). Mr. Bell then testified under oath that he could not come to court. Mr. Bell explained to the trial judge that a lower lumbar disc in his back was ruptured, and his back was all upset [he was in pain], and he could not come to court. (Tr. 201, ll. 10-15). The trial judge then asked who was sitting with Mr. Bell at the location where Mr. Bell was. There were three (3) individuals with Mr. Bell, presumably to transport Mr. Bell to the courthouse *if* he was physically well enough to do so. (Tr. 201, ll. 16-21). Those individuals with Mr. Bell were Keith Lewis, Julie Hall, and Bill Dove. (Tr. 201, ll. 19-21). Bill Dove was with the Fairfield County Sheriff's Office. (Tr. 201, ll. 20-21). The trial judge inquired of the witnesses there with Mr. Bell if they had attempted to transport Mr. Bell to the courthouse by car and bring him to the courtroom. (Tr. 201, ll. 22-23). Keith Lewis informed the trial court that they had attempted to get Mr. Bell up out of his chair, but he was in so much pain that they did not move him further. Mr. Lewis stated exactly as follows:

> THE COURT: Did y'all attempt to try to get him in the car and bring him up to the courthouse[?]
>
> MR. LEWIS: Yes, sir. We tried to get him up out of his chair but he's in a lot of pain when he tries to move. And he says he's been sitting here at this table for a good while this morning.
>
> THE COURT: Thank you.

(Tr. 201, ln. 22-202, ln. 3). The trial judge then held, "**[b]ased upon my prior ruling,** I'm going to allow this witness to testify remotely via *my virtual courtroom.* We'll just deal with the sound issues, the acoustics issues, the best we can. But you're protected in the record Mr. Frick." (Tr. 202, ll. 4-9)(italics added, emphasis added). After dealing briefly with technical and acoustics issues with the attorneys, the trial judge then brought the jury in and explained to the jury that the next witness was going to be testifying live via *My Virtual Courtroom,* but the jury should treat and consider his testimony just like a witness who is present in the courtroom and give it the weight and credibility the jury determined it should receive. The trial judge explained there may be some audio problems, but they would work through that and get through the witness' testimony. The trial judge then explained he was going to swear the witness in, and the witness would be asked questions just like if he was in the courtroom. (Tr. 203, ln. 16 – 204, ln. 17). The trial judge then placed Mr. Bell under oath again, this time before the jury [Tr. 204, ll. 18 - 205, ln. 2], and Mr. Bell's testimony was taken live via *My Virtual Courtroom* with the State asking questions on direct, the defense asking questions on cross-examination, and the State asking questions on re-direct. (Tr. 205-217). The defense did not want to ask any questions in re-cross. While there were some audio disruptions, those were handled by the trial court and the attorneys, and defense counsel was not prohibited from re-asking any question or re-stating any question to obtain the answers to the questions defense counsel wanted to ask. (Tr. 205-18). Specifically, defense counsel was able to cross-examine Mr. Bell on his prior recorded statement to police, and Mr. Bell denied he told police that Mr. Thompson came to his house on Thursday night instead of Saturday night. (Tr. 205-218). Defense counsel could have played the statement at that time, but he chose not to. (Tr. 200, ln. 24; 217 [in camera conference]). Later, through the police officer who took the recorded statement, defense counsel played a portion of the video statement of Mr. Bell to the jury impeaching him as

defense counsel wanted to do. (Tr. 200-16; **287-89**). Based on the record, in that recorded statement taken on September 15th, Mr. Bell told law enforcement about the threats Thompson made at his home, he simply confused what night the incident took place. (Tr. **200**; **213-14**; 287-89). Mr. Bell was not interviewed until September 15th, several days after his grandson's murder occurred on September 6th. (Tr. 213). Regardless, the jury saw the portion of the statement of Bell defense counsel wanted *and* saw and heard live the direct, cross-examination, and redirect of Bell and could judge Mr. Bell's credibility and testimony accordingly. Further, Thompson admitted in his statement to police that Mr. Bell was his best friend. (Tr. 412-13; State's Ex. 18 [Defendant's statement]). Mr. Bell also testified at trial that he and Thompson were close at the time Thompson lived next door to him. Defense counsel also impeached Mr. Bell with his prior statement which was slightly inconsistent with his direct testimony regarding what time Thompson told Mr. Bell he was going to kill Victim. (**Tr. 205-16**). Defense counsel also impeached Mr. Bell with the fact that initially he did not believe the threats Thompson made. (**Tr. 214**). And, defense counsel impeached Mr. Bell with his claim that Thompson and his sister came back to his home a second time at 1:00 a.m., which Nikki testified under oath did not happen. (**Tr. 214-15**; **230-31**).

ARGUMENT

Thompson's Confrontation Clause rights were not violated by Mr. Bell testifying live via *My Virtual Courtroom*; and, even if a confrontation clause violation occurred, it was harmless given the evidence of Thompson's guilt and the cumulative evidence of Thompson's threats and malice against Victim.

Standard of Review

"A trial court's decision to allow videotaped or closed-circuit testimony is reversible 'only if it is shown that the trial judge abused his discretion in making such a decision. ...' " State v. Bray, 342 S.C. 23, 27, 535 S.E.2d 636, 639 (2000) (quoting State v. Murrell, 302 S.C. 77, 82, 393 S.E.2d 919, 922 (1990)). "Where there is evidence to support a trial court's ruling, it will not be overturned for an abuse of discretion." Bray, 342 S.C. at 27, 535 S.E.2d at 639.

Analysis

The great majority of courts that have addressed whether there is a Confrontation Clause violation due to the use of live two-way video testimony, including South Carolina, have adopted the same test set forth in Maryland v. Craig, 497 U.S. 836 (1990), which addressed the use of one-way video testimony in the context of a child sexual assault case. *See* State v. Johnson, 422 S.C. 439, 453–54, 812 S.E.2d 739, 746–47 (Ct. App. 2018); State v. Tate, 969 N.W.2d 378 (Minn. Ct. App. 2022); United States v. Yates, 438 F.2d 1307, 1313 (11th Cir. 2006); United States v. Bordeaux, 400 F.2d 548, 554 (8th Cir. 2005); State v. Rogerson, 855 N.W. 495, 502-03, 506 (Iowa, 2014)(applying Craig standard, requiring a showing of necessity and reliability, and noting courts in Florida, Texas, Wyoming, North Carolina, Virginia, New York, Montana, and Pennsylvania had done the same); *cf.* United States v. Weekley, 130 F.3d 747, 753 (6th Cir. 1997) (applying Craig's standard without analyzing one-way versus two-way video); United States v. Farley, 992 F.2d 1122, 1124-25 (10th Cir. 1993)(same); State v. Stock, 256 P.3d 899 (Mont. 2011)(applying Craig to determine the admissibility of two-way video testimony after holding that Crawford did not

overrule Craig); State v. Thomas, 376 P.3d 184, 193-94 (N.M. 2016)(applying Craig's two-prong test).

In Craig, the United States Supreme Court recognized the right to face-to-face confrontation under the Sixth Amendment is not absolute, but that it may only be modified by use of one-way video testimony "where [1] denial of such confrontation is necessary to further an important public policy and [2] only where the reliability of the testimony is otherwise assured." Craig, 497 U.S. at 850. The Supreme Court found that the state had an important public policy interest in protecting child sexual abuse victims where there is a showing that there is a danger of harm to the child if the child testifies in the defendant's presence. The Court further found the child witness' testimony was reliable because the defense could cross examine the witness, the witness testified under oath, and the parties, including the jury, were able to assess the witness' demeanor over television. Id. at 851-53.

The Second Circuit Court of Appeals adopted a less stringent standard for permitting two-way closed-circuit testimony. In United States v. Gigante, 166 F.3d 75, 78 (2d Cir. 1999), the Second Circuit affirmed the use of two-way video testimony when the witness was in the Federal Witness Protection Program *and* suffering from terminal cancer. Id. at 79. The Court did not adopt the Craig test, emphasizing that in two-way testimony the witness must view the defendant—a closer approximation to face-to-face confrontation. Id. at 80-81. Instead, the Court determined two-way video should be permitted in the same circumstances warranting a deposition under Rule 15 of the Federal Rules of Criminal Procedure. The Court held that "[u]pon a finding of exceptional circumstances, ... a trial court may allow a witness to testify via two-way closed-circuit television when this furthers the interest of justice." Id. at 81. The Court concluded the witness's situation coupled with his own poor health, which limited his ability to travel for a deposition, constituted

exceptional circumstances. Id. Even having adopted a less stringent test than that set forth in Craig, the court opined "[c]losed-circuit television should not be considered a commonplace substitute for in-court testimony by a witness." Id.

Where there is no showing of necessity, simply an unwillingness to come to court or a complaint by the witness of excessive time or expense in appearing, appellate courts have uniformly rejected the use of live video testimony. For example, in United States v. Yates, 438 F.3d 1307 (11th Cir. 2006), the Eleventh Circuit held 2 witnesses' trial testimony via two-way video conference violated the defendant's Sixth Amendment rights. Id. at 1312. Two essential witnesses were in Australia beyond the subpoena power of the United States government but willing to testify remotely but refused to come to the trial. Id. at 1310. On appeal, the State argued two-way video conferencing provided all the same Sixth Amendment protections as face-to-face confrontation and two-way video conferencing was a better protection of rights than depositions when the witness was unavailable for trial. Id. at 1312. The court determined Craig presented the proper test for its' analysis, and the video conference testimony violated Yates' Sixth Amendment rights *because it did not further an important public policy*, the first element of the Craig test. Id. at 1313, 1316. In Yates, there was no necessity, such as an illness or medical condition.

> The district court made no case-specific findings of fact that would support a conclusion that this case is different from any other criminal prosecution in which the Government would find it convenient to present testimony by two-way video conference. All criminal prosecutions include at least some evidence crucial to the Government's case, and there is no doubt that many criminal cases could be more expeditiously resolved were it unnecessary for witnesses to appear at trial. If we were to approve introduction of testimony in this manner, on this record, every prosecutor wishing to present testimony from a witness overseas would argue that providing crucial prosecution evidence and resolving the case expeditiously are important public policies that support the admission of testimony by two-way video conference.

Id. at 1316. What occurred in Yates did not occur here.

The Fourth Circuit has likewise acknowledged the Craig test is the measure for considering whether two-way closed-circuit testimony is permissible under the Confrontation Clause. United States v. Abu Ali, 528 F.3d 210, 240 (4th Cir. 2008). In Abu Ali, the court affirmed the admission of testimony of Saudi Arabian officials beyond the reach of American courts in the prosecution of a terrorism suspect. Id. at 240-41. The Court found the interest of national security and protecting Americans from unprovoked terrorist attacks satisfied the first prong of Craig. Id. However, the court clarified:

> This is not to suggest that a generalized interest in law enforcement is sufficient to satisfy the first prong of Craig. Craig plainly requires a public interest more substantial than convicting someone of a criminal offense. The prosecution of those bent on inflicting mass civilian casualties or assassinating high public officials is, however, just the kind of important public interest contemplated by the Craig decision.

Id. at 241. The Court further determined the trial court had taken steps necessary to ensure the reliability of the testimony so that no Sixth Amendment violation occurred. Id. at 241-42.

South Carolina had not specifically addressed the tension between two-way video testimony and a defendant's rights under the Confrontation Clause until State v. Johnson, 422 S.C. 439, 453–54, 812 S.E.2d 739, 746–47 (Ct. App. 2018). However, South Carolina had recognized modifications to the traditional presentation of testimony may be appropriate in certain situations involving vulnerable witnesses. *See* S.C. Code Ann. § 16-3-1550(E) (2015) ("The circuit or family court must treat sensitively witnesses who are very young, elderly, handicapped, or who have special needs by using closed or taped sessions when appropriate."). Our state has adopted the Craig test in cases of one-way closed-circuit testimony and the testimony of children in sexual assault cases. *See* State v. Lewis, 324 S.C. 539, 544-45, 478 S.E.2d 861, 864 (Ct. App. 1996) (citing the Craig test for analyzing whether a witness's testimony via one-way closed-circuit television violated the defendant's Sixth Amendment rights). While our courts have generally noted the

protection of children is an important public policy concern, the appellate courts have not adopted a generalized policy of permitting child victims to present testimony via video recording. Rather, the courts require a specific case-by-case finding that a child witness will be traumatized by testifying in front of the defendant. *See* Lewis, 324 S.C. at 547-49, 478 S.E.2d at 865-67 (finding a Confrontation Clause violation when trial court permitted video testimony of a particular child without specific evidentiary support the child would be traumatized by testifying in the defendant's presence); State v. Murrell, 302 S.C. 77, 80, 393 S.E.2d 919, 921 (1990)(holding a trial judge must make a case-specific determination of the need for videotaped testimony in a child sexual assault case). This approach underscores the reluctance of the court to use methods other than live testimony except under necessity or extreme circumstances.

In Johnson, applying the Craig test, and after examining federal and state jurisprudence, this Court concluded the circuit court erred in permitting the State to present Investigator Moore's testimony via *Skype*. This Court noted that "[t]he Fourth Circuit had indicated the generalized conviction of criminal offenses is not sufficient to dispense with in-court confrontation and **other courts have generally permitted such testimony only in cases,"** such as this one, **"in which the witness's health prevents him or her from traveling** or possibly when a witness is beyond the subpoena power of the court." Johnson, 422 S.C. at 453–54, 812 S.E.2d at 746–47 (emphasis added). This Court also recognized the advancements in technology permitted two-way closed-circuit testimony to more closely approximate face-to-face confrontation. However, in the absence of an important public policy or at least an exceptional circumstance, modifying a defendant's truest exercise of the Sixth Amendment right via in-person confrontation is inappropriate. Johnson, *supra*. This is consistent with other case law that *convenience of the parties or witness* or *added*

expense are insufficient to satisfy the necessity prong of the Craig standard. Tate, 969 N.W.2d at 386; Yates, 438 F.2d at 1316.

However, here in the present case the witness, Mr. Bell, was medically ill and could not travel to court. (Tr. 200). The witness had previously notified the Court that he could not travel from Pennsylvania because of breathing and other medical health issues, and his doctor had ordered him not to travel. (Tr. March 11, 2000, 1-6). The witness was 76 years old at the time of trial. (Tr. 205). After moving back to South Carolina before trial, during an *in camera* hearing under oath, the witness testified to the trial court he had a ruptured disc in his back, **and** it was too painful to travel to court and testify there. (Tr. 200, ll. 8-16). He could testify from his home live. Deputy Sheriff's or court officials who were present at the witness' home with the witness verified live to the trial court that they tried to move the witness from a chair to a car to transport him to the courthouse, but the witness was in too much pain. (Tr. 200-01). The trial court made a specific finding *of necessity* of allowing live video testimony to protect the witness's health not once but three (3) times. (Tr. March 11, 2022, **p. 5, ln. 21- p. 6, ln. 9**; Trial Tr. 9-12 [reiterating prior ruling]; Trial Tr. 201, ll. 4-9 [same). The first time was when the witness was in Pennsylvania, the second time was at the beginning of the trial, and the third time was after hearing the witness's testimony under oath and from the court officials or witnesses there with the witness at his residence. (Tr. March 11, 2022, **p. 5, ln. 21- p. 6, ln. 9**; Trial **Tr. 9-12**; Trial **Tr. 201, ll. 4-9**).

Courts who have faced this dilemma and necessity have found no Confrontation Clause violation and upheld the use of *Skype* or live video feed testimony as in this case because a valid public policy, protecting the health of the witness, or of the jury and court personnel, excuses in-person testimony where the defendant can still cross-examine the witness, the witness is under oath, and the jury can see the witness' testimony, insuring reliability. State v. Tate, 969 N.W.2d

378 (Minn. Ct. App. 2022)(investigator exposed to COVID and under quarantine could testify remotely); White v. State, 116 A.3d 520 (Md. Ct. App. 2015)(witness who had debilitating back condition and was out of state could testify remotely); State v. Camacho, 960 N.W.2d 739 754-56 (Neb. 2021)(remote testimony was necessary where witness tested positive for COVID); People v. Wrotten, 923 N.E.2d 1099, 1100 (Ct. App. N.Y. 2009)(allowing remote testimony where witness was 85 years old, in poor health, and could not travel); Bush v. State, 193 P.3d 203, 214 (Wyo. 2008)(witness could testify remotely where he had coronary failure); State v. Oliver, 112 N.E.3d 573, 580–82 (Ohio Ct. App. 2018)(husband who was extremely ill and wife his caretaker could testify remotely because of necessity but wife's sister could not because she was only inconvenienced by testifying at trial); *See, e.g.*, Horn v. Quarterman, 508 F.3d 306, 317 (5th Cir. 2007)(concluding on federal habeas review the state court did not unreasonably apply federal law when it permitted a terminally ill witness, whose doctor advised against travel, to testify via a two-way closed circuit television); Harrell v. Butterworth, 251 F.3d 926, 931 (11th Cir. 2001)(the state court's conclusion that an important public policy to excuse in-person confrontation was not contrary to federal law when "the witnesses lived beyond the subpoena power of the court;" that it was in the state's interest "to expeditiously and justly resolve criminal matters that are pending in the state court system"; that "one of the witnesses was in poor health and could not travel from Argentina to the United States; and that the two witnesses were 'absolutely essential' to the case"), *cert. denied*, 535 U.S. 958 (2002); State v. Sewell, 595 N.W.2d 207, 211–13 (Minn. Ct. App. 1999)(affirming authorization of live testimony via interactive television when the witness had undergone surgery and his physician informed the court the witness would risk paralysis if he traveled to Minnesota); Stevens v. State, 234 S.W.3d 748, 781–83 (Tex. Ct. App. 2007)(affirming two-way, closed-circuit testimony where the 75–year–old witness had a tenuous health situation

documented by letters from his treating cardiologist). *Cf.* United States v. Gigante, 166 F.3d 75, 79 (2d Cir.1999)(affirming a witness who was fatally ill with cancer and whose doctor advised against travel to testify via video conference by applying the "exceptional circumstances" standard encompassed by Rule 15 of the Federal Rules of Criminal Procedure (governing depositions) instead of the Craig test); Spinks v. State, 260 A.3d 726, 732–34 (Md. Ct. Spec. App. 2021)(permitting witness to testify by *Skype* or Video Conference where he had been at trial but had to leave on emergency due to terminal illness of witness' mother); Lipsitz v. State, 442 P.3d 138, 144 (Nev. 2019)("There is no dispute that the victim in this case was a patient at a residential drug treatment facility in Florida, and the victim's doctor opined that she "w[ould] not be available for a number of months." Admission into a treatment center for a prolonged period is a legitimate basis for the district court to find that a witness is medically unavailable to appear at trial[.]"; it was necessary to use two-way video technology for the witness who was medically unavailable due to being admitted to an out-of-state residential treatment center); Acevedo v. State, 2009 WL 3353625, at *23 (Tex. App.—Dallas Oct. 20, 2009, *pet. ref'd*)(*Not Designated for Publication*)(allowing a witness with a high-risk pregnancy to testify by way of a video conference system and noting that although a doctor had not confirmed the high-risk pregnancy, the trial court found the witness to be credible); Cervantes v. State, 594 S.W.3d 667, 671 (Tex. App. 2019)(applying Craig test and finding trial court did not err in allowing breast feeding mother with 4 other children to testify by video-conference where witness could see defendant and defendant could see her, witness was cross-examined just like in court, and jury could see witness); Montague v. State, 2016 WL 112378, at *5 (Tex. App.—Austin, Jan. 6, 2016, *pet. ref'd*) (*Mem. Op., Not Designated for Publication*)(allowing pregnant witness to testify by live video testimony); *See also* State v. Sweidan, 461 P.3d 378, 387–89 (Wash. App. 2020)(Outside the context of child witness

cases, courts have permitted the use of videoconference testimony in two other circumstances: when a witness is too ill to travel and when a witness resides outside the United States); Horn v. Quarterman, *supra*, 508 F.3d at 320 (The State has a legitimate interest in protecting a witness from physical danger and suffering).

More specifically, the Maryland Court of Appeals addressed this issue in White v. State, 116 A.3d 520. In its Opinion upholding the admission of *Skype* and *WebEx* testimony where a witness was not well, the Court stated as follows:

> By the time the two cold cases went to trial, Jeanne Hostetler was retired, living in Arizona, and unable to travel due to a debilitating back condition. Appellant challenges the State's contention that this witness, an important link in the chain of custody of Appellant's DNA, was subject to full cross-examination during her testimony via two-way video conference, and asserts that the admission of her testimony by the court violated Appellant's Sixth Amendment right to confrontation. Appellant contends that the absence of physical face-to-face confrontation is only permitted when necessary to further an important public policy and where the testimony is otherwise reliable, and he maintains neither circumstance was present here. The State responds that the admission of Ms. Hostetler's testimony via video conference did not violate Appellant's constitutional rights to confrontation because the testimony was a reliable, live two-way video that allowed Appellant to see Ms. Hostetler and Ms. Hostetler to see Appellant. Indeed, during the hearing before Judge McCormick and during the second trial, Appellant's counsel questioned and cross-examined Ms. Hostetler. Moreover, the State contends that permitting the two-way live video testimony in this case furthered the public policy of resolving cold cases and protecting the witness. We agree with the State.

White v. State, 116 A.3d at 540.

The Sixth Amendment to the United States Constitution, applicable to the States through the Fourteenth Amendment, establishes that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. CONST. amend. VI. The Confrontation Clause (1) insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the 'greatest legal

engine ever invented for the discovery of truth'; [and] (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility. California v. Green, 399 U.S. 149, 158 (1970) (footnote omitted). Together, these "elements of confrontation" serve to safeguard "that evidence admitted against an accused is reliable and subject to the rigorous adversarial testing that is the norm of Anglo–American criminal proceedings." Craig, 497 U.S. at 846 (citations omitted)(discussing the second element of the Craig test). To this end, United States Supreme Court precedent establishes that the Confrontation Clause reflects a "preference" for physical face-to-face confrontation, not an absolute guarantee. Id. at 849; *see also* Coy v. Iowa, 487 U.S. 1012, 1019 (1988) ("It is always more difficult to tell a lie about a person 'to his face' than 'behind his back.'").

As discussed, the seminal Supreme Court case on the use of a video medium in lieu of physical confrontation is Craig, 497 U.S. 836. In Craig, the Court addressed the constitutionality of a procedure permitted by a Maryland statute that allowed a child victim to testify via a one-way closed-circuit television instead of appearing in court. This mechanism allowed those in the courtroom to observe the child as he or she testified and was cross-examined in a separate room; the child, however, could not see the defendant. Id. at 841. The defendant was still able to communicate with his defense counsel during cross-examination. Id. at 842. After reviewing the history and purpose of the Confrontation Clause, the Court held that "a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." Id. at 850 (citations omitted).

Based on the facts before it, the Court first concluded that the testimony provided via the one-way circuit television was reliable, because it afforded elements of confrontation —oath,

cross-examination, and observation of the witness's demeanor—that "adequately ensure[d] that the testimony is both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony." Id. at 851. Next, the Court held that "if the State makes an adequate showing of necessity, the state interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure that permits a child witness in such cases to testify at trial against a defendant in the absence of face-to-face confrontation with the defendant." Id. at 855. The Court explained that the "requisite finding of necessity must ... be a case-specific one: The trial court must hear evidence and determine whether use of the one-way closed circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify[,]" such that the child would be traumatized by the presence of the defendant and that the emotional distress to be suffered is more than *de minimus*. Id. at 855–56.

In White, a case similar to this one, the Maryland Court of Appeals found:

> A. Reliability of Two–Way Video Conference Procedure
>
> At Appellant's first trial, the State presented Ms. Hostetler's testimony via Skype, and at his second trial, the State used WebEx. Both methods preserved hallmarks of the confrontation right aside from physical, in-court testimony: Ms. Hostetler was sworn under oath; Appellant, counsel, the court, and the jury could see Ms. Hostetler and observe her demeanor; and Ms. Hostetler was available for contemporaneous cross-examination. Moreover, unlike the one-way television in Craig, Ms. Hostetler was able to see Appellant. Both two-way mediums—absent any technological complications—therefore provided the traditional indicia of reliability under the Confrontation Clause. On that point, Appellant challenges the efficacy of Skype and WebEx at both trials. As to the first trial, Appellant highlights the difficulty the State experienced in establishing a two-way connection when it first called Ms. Hostetler to testify, prompting the State to move on to another witness. Although the State did, indeed, experience some troubleshooting issues, the testimony proceeded without issue once the connection was ultimately established when Ms. Hostetler was recalled. Appellant highlights on appeal the pixelated, dark picture during the Skype testimony. As found by Judge McCormick at the hearing, "the Court has had an opportunity to watch this feed live from this witness, and while the focus isn't as perfect as you would like for your wedding

pictures, you could still see this woman responding to every question. Sometimes here, the fine details were fuzzy, but you could see her lips moving in response to what was being said ... [and] [y]ou can see her face." Significantly, the record does not reflect that Appellant's counsel objected during the hearing or during the trial to the quality of the Skype image. Appellant's counsel cross-examined Ms. Hostetler during the hearing but chose not to cross-examine her during the trial. In fact, Appellant sought to call Ms. Hostetler as a defense witness to testify as to the substance of her analysis, but after a few questions on direct, defense counsel conferred with the State and her report was moved into evidence instead. Based on our review of the record, therefore, we do not find the court erred in finding that the Skype connection and image quality preserved the confrontation element of observing the witness's demeanor. With respect to the second trial, Appellant emphasizes Ms. Hostetler's initial difficulty—out of the jury's presence —hearing those in the courtroom and Judge Greenberg's corresponding concerns. Yet, once the audio problem was resolved, the testimony proceeded without issue. The State also took precaution to ensure that Ms. Hostetler could hear, advising her at the outset of direct examination to notify the court immediately if there ever came a time at which she was no longer able to hear. During Ms. Hostetler's testimony, Appellant's counsel did not object to the quality of the WebEx audio or image. Therefore, we are convinced that the WebEx connection preserved the confrontation element of observing the witness's demeanor.

B. Important Public Policy and Adequate Finding of Necessity

As noted supra, a defendant's right to confront his adversaries, absent physical appearance, may nevertheless be satisfied if the denial of physical confrontation due to unavailability furthers an important public policy. Craig, 497 U.S. at 850, 110 S.Ct. 3157. Appellant argues that convenience and efficiency are not sufficiently important public policies to warrant dispensing the right to physical face-to-face confrontation, and we agree. For instance, in United States v. Yates, 438 F.3d 1307 (11th Cir. 2006) (en banc), a case on which Appellant relies, two essential witnesses resided in Australia, thereby beyond the government's subpoena power, and were unwilling to travel to the United States for trial. Id. at 1310. The defendant objected to the use of two-way video conference broadcast. The district court applied the principles set forth in Craig and ultimately permitted both witnesses to testify. Id. at 1315. On appeal, the Eleventh Circuit vacated the defendants' convictions. According to this Circuit, the Government's policies of providing the fact-finder with crucial testimony and its need to expeditiously resolve that case were "not the type of public policies that are important enough to outweigh the Defendants' rights to confront their accusers face-to-face." Id. at 1316. Where considerations beyond mere convenience and expedience are involved, however, the factual setting of a case may support a finding of necessity to justify the absence of a witness's physical presence at trial. Other jurisdictions, for example, have found the need to protect the well-being of a medically infirm witness to be an important public policy under Craig.

White v. State, 116 A.3d 544-46. Again, in White the witness had a debilitating back condition. Id. More recently, the Maryland Court of Appeals reaffirmed its holding in White. Spinks v. State, 260 A.3d 726, 732–34 (Md. Ct. Spec. App. 2021).

In People v. Wrotten, the defendant was charged with first-degree assault and 2 counts of first-degree robbery. Id., 923 N.E.2d 1099, 1100 (2009), *cert. denied*, 560 U.S. 959 (2010). Soon after the incident, the elderly complainant moved to California. Id., 923 N.E.2d at 1101. Before trial, the State requested that the complainant be permitted to testify via two-way video conferencing, and at a hearing held thereafter, both the State and the defendant presented expert medical testimony regarding the complainant's condition. Id. Crediting the State's experts, the court found that the complainant was, at the time, a frail 85–year–old with a history of coronary disease and held that he could not travel to New York without endangering his health. Id. The court permitted the complainant to testify via a two-way video conference at trial, and the defendant was ultimately convicted of second-degree assault. Id. On appeal, the Court of Appeals of New York held that under Craig, the two-way video conference preserved "[all] traditional indicia of reliability" and that "the public policy of justly resolving criminal cases while at the same time protecting the well-being of a witness can require live two-way video testimony in the rare case where a key witness cannot physically travel to court in New York and where, as here, defendant's confrontation rights have been minimally impaired." Id., 923 N.E.2d at 1103.

In Bush v. State, 193 P.3d 203, 214 (Wyo. 2008), *cert. denied*, 556 U.S. 1185 (2009), a prosecution for first degree murder, the trial court allowed the prosecution to present testimony of an elderly couple who recognized David Bush's pickup truck as the truck that passed them at a high rate of speed shortly after the murder. The couple also saw two large plastic bags in the bed of the truck. The husband developed congestive heart failure and renal failure one week before

trial and could not travel from his home in Colorado to Wyoming. The wife did not wish to leave the husband alone. The decision does not disclose whether the wife helped to care for the husband. The court initially denied the request, but later revised its decision in light of its' subsequent review of the husband witness' medical records and the physician's advice not to travel to Wyoming. Id. at 215. The trial court found that the wife would suffer great stress if she left her husband of sixty years to travel to Wyoming. The Wyoming Supreme Court affirmed the trial court's ruling permitting the husband to testify by videoconference. The Court found that the trial court did not err in granting the request because the witness's "testimony via video conference was necessary to further the important public policy of preventing further harm to his already serious medical condition." Id. at 215–16. The Court found the trial court's ruling permitting the wife to testify remotely was error. The wife was not ill. The Court, however, held the error to be harmless. Id.

In State v. Oliver, 112 N.E.3d 573, 580–82 (Ohio Ct. App. 2018), the Ohio Court of Appeals found it was *not error* for the trial court to admit *Skype* or closed-circuit testimony of 2 victims where the male victim was very ill and his wife was his caretaker. However, *it was error* to permit *Skype* testimony of male victim's sister who made no showing of necessity only a wish not to have to travel. Id.

Many other decisions support the proposition that an illness of the witness suffices to permit a witness to testify by live video. State v. Sweidan, 461 P.3d 378, 388-90 (Wash. Ct. App. 2020). In Horn v. Quarterman, 508 F.3d at 313 (5th Cir. 2007), a Texas jury convicted Horn of capital murder and sentenced him to death. Horn filed a petition for habeas relief claiming in part that the trial court denied him the opportunity to confront a witness when the witness testified via two-way closed-circuit television. The appeals court denied relief because the state court correctly permitted a terminally ill witness, whose doctor advised against travel, to testify remotely.

In Harrell v. Butterworth, 251 F.3d at 931 (11th Cir. 2001), Harrell argued the trial court violated his right to confrontation when the court permitted two witnesses to testify via satellite from Argentina. On habeas review, the court reviewed the trial court's decision to excuse in-person confrontation of two witnesses essential to the State's case. The trial court had found the witnesses lived beyond the subpoena power of the court, there was no way to compel them to appear, **and** one of the witnesses was ill and could not travel.

In State v. Sewell, 595 N.W.2d 207 (Minn. Ct. App. 1999), Sewell challenged his conviction of second degree felony murder arguing the trial court improperly permitted the testimony of witness William Hurt through interactive television. The State alleged that Sewell admitted to the murder when speaking with fellow inmate Hurt. At the time of trial, Hurt suffered from medical problems, and he was under a medical restriction not to travel. The reviewing Court upheld the use of the video testimony. Id.

In Stevens v. State, 234 S.W.3d 748 (Tex. App. Fort Worth 2007), the Texas Court of Appeals held that video testimony of a 75-year-old witness suffering from medical problems did not violate the confrontation clause. The witness's cardiologist wrote a letter to the court explaining the witness had a well-documented medical history demonstrating a tenuous health status. The cardiologist wrote that testifying could have ramifications on his health.

The Court of Appeals of North Carolina held similarly in State v. Seelig, 738 S.E.2d 427 (N.C. App. 2013). In a prosecution for obtaining property by false pretenses, the trial court allowed a witness to testify by two-way, closed circuit Internet broadcast from Nebraska to North Carolina. The court indicated that, to decide the necessity question, the trial court must hold an evidentiary hearing and make case specific findings as to the necessity of allowing the witness to testify outside the defendant's physical presence in order to fulfill the important state interest. The trial court

conducted a hearing, after which the court found that the witness had a history of panic attacks, had suffered a severe panic attack on the day he planned to fly from Nebraska to North Carolina for trial, was hospitalized as a result, and was unable to travel to North Carolina because of his medical condition. The record showed that the defendant and the jury could see the witness while he testified. The Court held Seelig's confrontation rights were not violated. Id.

Texas courts have likewise held it was permissible to allow a witness to testify by video if the witness is ill or has a serious health condition. Paul v. State, 419 S.W.3d 446, 459 (Tex.App.—Tyler 2012, *pet. ref'd*) ("Jordan's serious health situation was an exceptional circumstance that warranted permitting her testimony by a computer video conferencing system."); Stevens v. State, 234 S.W.3d 748, 782 (Tex.App.—Fort Worth 2007) ("Ward's tenuous health situation—documented by letters from his treating cardiologist—was an exceptional circumstance that warranted permitting his testimony by two-way closed circuit television."); Cervantes v. State, 2019 WL 6607003, at *2-3 (Tex. App. Dec. 4, 2019)(*Unpublished*)(finding no violation of the confrontation clause in allowing a single mother of five who lived in Kansas to testify via Skype). At least one court has held that allowing a pregnant witness with a risk of miscarriage to testify by means of a two-way conferencing system did not violate the defendant's Sixth Amendment rights. *See* Acevedo v. State, 2009 WL 3353625, at *8 (Tex.App.—Dallas Oct. 20, 2009, pet. ref'd) (*Not Designated for Publication*).

As to the second element of Craig test, assuming the trial court allows videoconference testimony, courts assesses whether other components of the Confrontation Clause were left intact, including "oath, cross-examination, and observation of demeanor by the trier of fact" to determine if testimony is reliable. Craig, 497 U.S. at 837. These components ensure the reliability of

testimony in the absence of physical presence. State v. Sweidan, 461 P.3d 378, 390 (Wash. App. 2020).

The key inquiry in these cases is whether the method of electronic testimony used by the State preserves the "salutary effects of face-to-face confrontation" relevant to a Sixth Amendment analysis. *See* Stevens, 234 S.W.3d at 782. These salutary effects include "(1) the giving of testimony under oath, (2) the opportunity for cross-examination, (3) the ability of the fact-finder to observe demeanor evidence, and (4) the reduced risk that a witness will wrongfully implicate an innocent defendant when testifying in his presence." Id. (citing Craig, 497 U.S. at 845–46); *see* Gonzales v. State, 818 S.W.2d 756, 764)(Tex. Crim. App. 1991)(*en banc*)(applying "Craig criteria" and concluding that witness "testified under oath, was subject to extensive cross-examination, and was observed by the judge, the jury and appellant"); Montague v. State, 2016 WL 112378, at *5 (Tex. App. Jan. 6, 2016) (*Unpublished*); *See* State v. Barber, 2019 WL 3231189, at *2 (Ariz. Ct. App. July 18, 2019)(*Unpublished*)(upholding the use of two-way conferencing when the witness was the sole caregiver for her 77-year-old husband, who had undergone multiple heart-related treatments and had since developed other complications). In Montague v. State, 2016 WL 112378, at *5 (Tex. App. Jan. 6, 2016) (*Unpublished*), the Court held as follows:

> Here, Ware's testimony preserved each of these effects. Ware testified under oath, she was cross-examined, the jury was able to observe her demeanor, and the defendant was able to observe Ware throughout her testimony. We conclude that Ware's at-risk pregnancy was an exceptional circumstance that justified her testifying remotely. Accordingly, we hold that the trial court did not abuse its discretion by allowing Ware to testify electronically, and we overrule Montague's second point of error.

Id.

As previously shown, the United States Supreme Court has held that although "the Confrontation Clause reflects a preference for face-to-face confrontation at trial," that "preference

must occasionally give way to considerations of public policy and the necessities of the case." Craig, 497 U.S. 836, 849 (1990). In holding that the right to confrontation is not absolute, the court detailed a number of important reasons for that right, including (1) the giving of testimony under oath, (2) the opportunity for cross-examination, (3) the ability of the fact finder to observe demeanor evidence, and (4) the reduced risk that a witness will wrongfully implicate an innocent defendant. State v. Marcinick, 2008 WL 2766174, (Ct. App. Ohio 2008)(*Slip Copy*) citing Craig 497 U.S. at 845-846. "The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." Craig at 845, 110 S.Ct. 3157. In Marcinick, *supra*, the court utilized the two-part analysis from Craig to determine whether the admission of testimony via teleconference at trial violated the defendant's right of confrontation. The court held:

> To qualify as an exception, the procedure must (1) be justified, on a case-specific finding, based on important state interests, public policies, or necessities of the case and (2) must satisfy the other three elements of confrontation — oath, cross-examination, and observation of the witness's demeanor.

Marcinick at 18, citing Harrell v. State, 709 So.2d 1364, 1369 (Fla. 1998), citing Craig at 849-851, 110 S.Ct. 3157. Applying the Craig analysis, the Court found in Marcinick that the teleconferencing testimony of the social worker witness who was out of the country, did not violate the defendant's right to confrontation because the state demonstrated that the witness was unavailable, established the admissibility of the testimony, and the two-way video link preserved the reliability elements of confrontation. Id.

Likewise, in Commonwealth v. Cuevas, 281 A.3d 1065 (Pa. Super. Ct. 2022)(*Unpublished Disposition*), the Court held as follows:

> We find no error in the trial court's reasoning. In Atkinson[3], we assessed whether receiving testimony by video violated a defendant's constitutional confrontation rights under Craig: "[A] defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." Atkinson, 987 A.2d at 748 (quoting Craig, 497 U.S. at 850). We surveyed cases holding that protection "from physical danger or suffering" is an important public policy that supports the use of video to receive live testimony from a witness who is ill. Id. at 748–50 (quoting Horn v. Quarterman, 508 F.3d 306, 319–20 (5th Cir. 2007)).
>
> Here, B.G. became ill during a pandemic the morning she was set to testify in court. Allowing B.G. to testify through video furthered the public policy of protecting the trial participants from exposure to disease. Cuevas and the jury could see and hear B.G., B.G. was subject to cross-examination, and the trial court instructed the jury to consider her testimony the same as if she were testifying in person. Based on the Craig test, we discern no constitutional violation.

Id.

Similarly, the witness in United States v. Benson was "elderly and infirm" and the Sixth Circuit allowed her to testify via videoconferencing technology. United States v. Benson, 79 Fed. Appx. 813, 820–21 (6th Cir. 2003). The Court cited to United States v. Gigante, 166 F.3d 75, 80 (2d. Cir. 1999) that live closed-circuit testimony preserved all of the characteristics of in-court testimony which made it reliable under Craig. Benson, 166 F.3d at 820-21. *See also* Spinks v. State, 260 A.3d 726 (2021).

Here in this present case, the State met the 2nd prong of the Craig test, reliability. Mr. Bell was placed under oath; the jury could see him and observe his demeanor; and, he was cross-examined by Thompson's counsel live and impeached. (Tr. 202-16; 287-89 [playing of Mr. Bell's prior statement to police to the jury]). While there were a few technological glitches, as the trial court warned the jury, each attorney was able to re-ask any questions that needed to be asked and

[3] Commonwealth v. Atkinson, 987 A.2d 743, 745 & n.2 (Pa. Super. 2009) (citation and footnote omitted).

answered by Mr. Bell. (Tr. 202-16). Mr. Bell was fully examined on direct, cross-examination, and re-direct. (Tr. 205-16). Defense counsel was not prohibited from asking any questions that needed to be asked or re-asked. (Tr. 205-16). Finally, defense counsel impeached the witness about the video recording of the witness' statement to police and played a portion of that video for the jury, which was defense counsel's main concern about the live video testimony. **(Tr. 200, ll. 19-24; 213-15; 287-89).** And, counsel impeached the witness about other matters, including using State's witness' Nikki to contradict Mr. Bell about part of his testimony. (Tr. 213-15; 230-31).

The trial court did not abuse its discretion in admitting the live video feed testimony of Mr. Tommy Bell where both elements of the Craig test were met, necessity and reliability. The witness, Mr. Bell, testified under oath to the necessity of his testifying via *My Virtual Courtroom*; the trial court held a hearing regarding whether there was proper necessity to allow live remote testimony including taking testimony under oath; the trial court made a specific finding of necessity supported by the witness' sworn testimony and verification by those present with the witness at the time; and, the live remote testimony before the jury preserved the hallmarks of reliability under Craig.

Harmless Error

In Johnson, even though this Court found the admission of the video testimony violated the Confrontation Clause without any necessity for the witness not being at trial, the error was still harmless. Johnson. This Court pointed out that: "[V]iolation of a defendant's Sixth Amendment right to confront the witness is not *per se* reversible error; instead, this Court must determine whether the error was harmless beyond a reasonable doubt." Id., quoting State v. Davis, 371 S.C. 170, 181, 638 S.E.2d 57, 63 (2006). And: "whether an error is harmless depends on the particular circumstances of the case." Johnson, *again quoting* Davis, *supra.* Error is harmless if it could not

have reasonably affected the result of the trial. Id. at 181-82, 638 S.E.2d at 63. This Court stated as follows in finding the confrontation clause violation in Johnson was harmless.

> We are cognizant that Johnson's confession was an important piece of evidence in this case. Likewise, we recognize the admission of his confession turned on a finding of voluntariness that must be proven by the State through its witnesses and evidence. In this case, Investigator Coker's testimony plus the recordings of Johnson's interrogation met this burden. Investigator Moore's testimony was only relevant to events *not* presented by the videos or covered by Investigator Coker. Johnson does not allege wrongdoing by Investigator Moore other than through conduct contained in the videos.[7] Consequently, Investigator Moore's testimony was largely cumulative to what was already before the jury. *See* State v. Haselden, 353 S.C. 190, 197, 577 S.E.2d 445, 448-49 (2003) (recognizing admission of improper evidence is harmless where the evidence is merely cumulative to other evidence). Accordingly, because the circuit court's erroneous decision to permit Investigator Moore to testify via Skype was harmless, we affirm the admission of that testimony.

Johnson, 422 S.C. at 453–54, 812 S.E.2d at 746–47. Likewise in State v. Oliver, 112 N.E.3d 573, 580–82 (Ohio Ct. App. 2018), the Court found it was error to allow the victim's sister to testify via *Skype* without any showing of necessity, but the error was harmless given the entire record and the cumulative nature of the evidence).

Here, even assuming *arguendo,* a Confrontation Clause violation, and removing from consideration Mr. Bell's testimony, considering all of the other evidence of Thompson's guilt, Bell's testimony was harmless beyond a reasonable doubt. Johnson. Several witnesses testified to the altercation between Thompson and Victim at Felicia's home just a few hours before Victim's death; 2 other witnesses testified to threats made by Thompson to Victim in those witnesses' presence; another witness testified to Thompson's attempt to obtain a gun to carry out the threats including Thompson was willing to trade his car for a gun and this was about an hour or less before Victim's murder, and a portion of the recorded interview of Mr. Bell with police was played before the jury; therefore, Bell's testimony was cumulative to other properly admitted evidence. Johnson.

And, Thompson's guilt was firmly established through eyewitness' testimony, Thompson's statement, surveillance video, and evidence found at the scene and on and in his car.

Multiple witnesses who were friends of Thompson, including his sister [Victim's girlfriend], testified to being present at the "fish fry" when Victim and Nikki got into an argument and Thompson injected himself into that argument. Two (2) independent witnesses testified they heard Thompson threaten Victim in the front yard of Victim's mother's home. Other witnesses confirmed there was an altercation between Thompson and Victim in the front yard of Victim's mother's home and Victim's mother had to separate the 2 men. Thompson then walked home but returned shortly and retrieved his car, the 2004, black, Chevy Impala, the murder weapon. Thompson drove away from the "fish fry" in the dark early model Impala. (Tr. 143-72; 218-35; 205-16; 289-90).

While Mr. Bell's testimony may not be considered in the harmless error analysis, a portion of his taped video-recorded statement to police was played at trial for the jury. (Tr. 287-89). Based on a review of the record, in that tape recording, Bell tells the investigator about a week after the murder, that Thompson was at his house on Thursday [sic] night and threatened to kill Bell's grandson. (Tr. 205-16; 287-89). Bell and his fiancé then called his daughter, Felicia [Victim's mother] and left a message on her answering machine about the threat. (Tr. 205-16; 287-89). Felicia testified at trial about finding out there was contact between Thompson and her father around midnight. Felicia either listened to her answering machine or talked to Mr. Bell or his fiancé in the early morning hours of September 6th after notification of Victim's death and contacted police sometime after 4:00 a.m. with the information she had received [the threats against her son] and that police needed to look at Thompson as a suspect or person of interest in Victim's death and Thompson was driving a 2004 Impala. (Tr. 156-72; 266-68; 287-89).

The officer who received this information from Felicia also testified at trial and corroborated Felicia's testimony about providing police the information she received from her father about Thompson being involved in her son's death. (Tr. 266-68; 156-72; 287-89).

Thompson next appeared at Calvin Sampson's home between 12:00 a.m. and 1:00 a.m. trying to purchase a gun. This was just a few hours after Thompson threatened Victim at the "fish fry." At this time, at Mr. Sampson's home, Thompson was willing to trade his car to get a gun, but Calvin Sampson did not have a gun and told Thompson so. Thompson then drove away from Mr. Sampson's residence in his 2004 black Chevy Impala without a gun to harm Victim and only his car to use as a weapon. This was shortly before Victim was killed by being run over with Thompson's car. (Tr. 235-44).

Thompson left Mr. Sampson's home and drove to POPS convenience store. At this time, he was captured on surveillance video at the store wearing a distinctive shirt and driving the dark 2004 Chevy Impala without the spare tire on the right rear. You cannot see a flat tire either at this time. Thompson then left POPS convenience store driving his Impala headed back the direction he came at approximately 12:45 to 12:50 a.m. on September 6th. This was in the direction of where Victim was walking from. (Tr. 277-82; 287; State's Ex. 8).

Video surveillance in the area where Victim was struck and landed, combined with other evidence, shows Thompson's car went up 11th Street slowly coming from the direction of POPS convenience store. Video surveillance also shows Victim was walking on the opposite side of the road from Thompson's car headed in the direction of his girlfriend Nikki's apartment. Video surveillance also shows Thompson's vehicle turned around and came back the way Victim was walking. Additionally, Calvin Sampson had gone to POPS to get some cigarettes and on his way back from POPS he also witnessed Thompson's vehicle coming back on 11th street now headed

the same way Victim was walking. At this time, Calvin Sampson noticed Thompson's car was running "wide open" and jumped the bridge and ran off its' right side of the road. Mr. Sampson did not see Thompson hit Victim with his car because Sampson and Thompson were going in opposite directions, but Sampson believed Thompson hit a fence when he drove off the road at a high rate of speed. Video surveillance also captured Thompson driving off the road and striking Victim in this same area. The physical evidence also showed Thompson drove all the way off the marked portion of the roadway and the right wheels were in the grass when Thompson struck Victim with his 2004 black Chevy Impala. The curb and sidewalk contained marks consistent with the vehicle striking each before coming into contact with Victim; and, Thompson' car striking the curb or sidewalk or coming back onto the road was consistent with Thompson having damaged or flattened Thompson's right rear tire. Also, debris in the road and Victim's injuries showed he was struck by the Impala and landed 126 feet from where he was struck. The speed of the Impala when it struck Victim was approximately 47 m.p.h. The speed limit was 35 m.p.h. In the debris field was a broken clip to an automobile headlight. Mr. Sampson saw the driver of the Impala trying to control the vehicle after driving off the road and saw it headed toward or turning on Columbia Road headed toward POPS convenience store. When Calvin Sampson reached home, he told others that the driver of that dark vehicle was going to kill someone. ((Tr. 80-97; 101-10; 111-18; 120-30; 131-43; 235-44; 304-39; 339-51; 351-86; 175-200; State's Ex 13 [channels 1 and 2])).

Deputy McCoy saw Thompson's vehicle on 11th Street just after it struck Victim and McCoy passed Thompson's vehicle going in the opposite direction and saw the Impala with what looked like only its' fog lights on. The Deputy turned around and was going to stop the vehicle until he was able to pull up beside it at a traffic light and saw the headlights were on but dim. The Deputy noticed the Impala had tinted windows in which the tint was bubbling up on the windows

and the right rear passenger side tire was flat. The Deputy also noticed that both right wheels did not have rims on them. He then saw the car turn left and looked to be going to POPS convenience store to put air in the right rear passenger tire. Almost immediately, the Deputy was called to the crime scene on 11th Street and informed other officers about the dark Impala he had seen. (Tr. 80-97; 267-68).

Approximately 15 to 20 minutes later another Deputy Sheriff saw Thompson's vehicle pulled over on the side of the road headed away from Winnsboro, and Thompson was changing the back rear passenger tire by replacing it with a spare tire. Thompson told the Deputy he was finishing up changing the tire and was putting the tools away. The Deputy was able to see the car and his in-car video captured the car. That Deputy was unaware of what Thompson had done but was able to testify at trial to seeing Thompson working on the car shortly after Victim's murder, shortly after Thompson struck the sidewalk and damaged his car, and shortly after Deputy McCoy saw the car at the traffic light with a flat back rear passenger side tire. (Tr. 292-303).

The following day, police found Thompson's 2004 black Chevy Impala abandoned at the Flying J. Truckstop next to I-20. The registration came back to Thompson. The vehicle had impact damage to the front grille and the front hood. Someone had also poured bleach on the hood and front windshield to remove evidence from the vehicle; bleach was running down the sides of the vehicle as well, and a bottle of bleach was later found in the back passenger compartment of the vehicle. The windows of the vehicle also had tint that was bubbling up on the passenger side and no rims on the passenger side just as Deputy McCoy had seen around 1:00 a.m. There was also a spare tire on the passenger side rear that contained the wording "spare tire" in yellow. The car was towed to Winnsboro for a further search where police found the passenger side headlight was being held in place under the hood by a tie wrap and the clip that normally held up this headlight was

missing. Police were also able to match the broken clip found at the crime scene in the debris field to the clip on the driver's side headlight of Thompson's Impala. Police also took photographs of Thompson's vehicle showing the jury where the broken clip would have gone instead of the tie wrap. (Tr. 245-60; 272-76; 304-86).

Thompson did not turn himself in for at least 3 days. He then turned himself in only to Columbia police at the *Flying J. Truckstop.* The same *Flying J. Truckstop* where he had abandoned the car 3 days earlier after killing Victim. He told police he was wanted for a crime by the Winnsboro authorities. (Tr. 280-81; 245-60; 377-79; 385-86; 412-13; State's Ex. 18 [Defendant's recorded statement]).

Thompson was also interviewed by the police in Winnsboro. (State's Ex. 18; Tr. 377-79). He admitted to pretty much everything but running over Victim. He admitted he was driving his 2004 black Impala the night of the crime. He admitted no one else drove his car the night of the crime. He admitted he was alone. He admitted he was the person on the surveillance video at POPS convenience store and that was him driving the Impala on the video. He also admitted it was he who was changing his tire when the Deputy stopped to help him, and he was the person who turned left at the traffic light next to POPS when the right rear tire was flat. He also admitted there should be a flat tire somewhere on Hwy. 34. Further, he admitted he was extremely upset the night of the crime about something, and it took him approximately 3 hours to calm down. (State's Ex. 18; Tr. 377-79).

As stated, Thompson was proven guilty of the crimes and other witnesses heard and testified to Thompson and Victim arguing, Thompson threatening Victim or wanting to trade his car for a gun right before Victim was killed; Felcia and a police officer testified to Felicia making police aware of Thompson's probable involvement in her son's murder, and a portion of Bell's

interview with police was played to the jury making Bell's testimony cumulative in any event. Finally, Thompson in his statement admitted he was the only person who drove his car the night of the murder and he was angry about something the night of the murder and it took him several hours to calm down. As a result, even if there was some Confrontation Clause violation it was harmless beyond a reasonable doubt. Johnson, *supra* (finding confrontation clause violation harmless); Stevenson v. State, 357 So. 3d 1141, 1154–57 (Miss. Ct. App. 2023)(similar); Molina v. State, 2018 WL 3150419, at *3–6 (Tex. App. June 28, 2018)(*Unpublished*)(similar).

CONCLUSION

For all of the above stated reasons, Thompson's convictions and sentences must be affirmed and this appeal denied and dismissed.

Respectfully Submitted,

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