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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Honorable DeAndrea G. Benjamin, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

NEVELLE JOSHUA EBERHART,

APPELLANT

APPELLATE CASE NO. 2023-000234

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

1. Did the trial court commit reversible error by failing to suppress GPS data that was obtained by a warrantless search in violation of both the Fourth Amendment and South Carolina's constitutionally protected right of privacy and allowing its extensive use before the jury to place appellant at the location of the crime?
2. Did the trial court commit reversible error in allowing state to play a video recording of an interview with the adult victim of a crime that was testimonial in nature over appellant's objections based upon both hearsay and the Confrontation Clause?

STATEMENT OF THE CASE

Appellant was charged and formerly indicted by a Richland County grand jury with armed robbery, possession of a weapon during a violent crime, and possession of weapon by a person convicted of a violent crime. R. 1. Appellant was tried before the Honorable DeAndre Benjamin and a jury on February 6 – 8, 2023. Appellant was represented by Megan Eigenbrot and Robert Forney and Ruston Neely represented the state. R. 1. Appellant was found guilty of armed robbery and possession of a weapon during a violent crime.[1] R. 286, l. 24 - 287, l. 12; 295, ll. 5-12. This appeal follows.

[1] The possession of a weapon by a person convicted of a violent crime charge was bifurcated at trial and dismissed by the state following the jury's verdict. R. 6, ll. 10-19; 290, ll. 14-20.

STATEMENT OF FACTS

On January 1, 2022, James Stewart was confronted at an ATM machine in Columbia by an unknown assailant on a moped who pointed a gun at Stewart. Stewart gave the assailant his ATM card and a phony PIN number then ran away. R. 133, l. 21 - 134, l. 16. A second encounter followed a short time later, with assailant again confronting Stewart who fled a second time. R. 136, ll. 8-19. Stewart contacted the Columbia Police Department; and a body camera video of his initial interview with officer Javonte Self was made.[2] R. 144, l. 17 - R. 145, l. 15.

Investigator Emmett Gilliam with the Columbia Police Department obtained video of the incident from the ATM machine; and was able to observe the license tag number from the moped the unknown suspect was driving at the time of the incident. R. 183 ll. 5-18; 184 l. 20 - 185, l. 13. Gilliam ran the information and determined a report of a stolen moped had been made and interviewed the owner of the moped, Nicole Goodwin, at her home on January 7, 2022. R. 189, l. 22 - 190, l. 6; 198, l. 19 - 199, l. 21.

Appellant was at Goodwin's residence at the time of the interview, and Gilliam asked for and obtained appellant's ID and ran his information, discovering he was on bond and subject to GPS monitoring. R. 200, l. 4-201, l. 11. Gilliam immediately called BadBoyz Bail Bonding and obtained appellant's GPS data without securing a warrant. R. 200, l. 1 – 201, l. 20. After obtaining the GPS data, Gilliam created a photographic lineup that Stewart reviewed on January 10, 2022. R. 137, l. 25 - 138, l. 23; 202, ll. 12-23. From this photographic lineup, Stewart identified someone other than appellant as his assailant rather than indicating he could not properly identify the suspect.[3] R. 147, ll. 8-25; Defendant's Exhibit 1.

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[2] State's Exhibit 2, Body Cam video, is on file with this Court for review.

[3] Defendant's Exhibit 1, photographic lineup, is on file with this Court for review.

At trial, appellant moved to exclude any evidence related to his GPS location as a violation of his right to privacy under the South Carolina Constitution and the Fourth Amendment as this information was obtained by Gilliam without a warrant, as discussed *infra* in Argument 1. R. 9, l. 23 - 10, l. 6. In response, the state argued that appellant had consented to disclosure of his location data and had no expectation of privacy deserving protection regarding his physical location. R. 37, l. 3 - 39, l. 5. The court ruled the burden was on the appellant to establish a reasonable expectation of privacy existed in connection with the warrantless search, and that there was no legitimate expectation of privacy in connection with the GPS location of an individual wearing an ankle monitor as a condition of pre-trial release. R. 43, l. 2 - 44, l. 10. The jury was then presented with GPS data placing the appellant at the location of the armed robbery through the state's first witness, Titus Curry, the manager of BadBoyz Bail Bonding.[4] R. 113, ll. 14 - 23. The location reports Curry generated were entered into evidence over appellant's objection. R. 109, ll. 7 - 13; 115, l. 19 – 116, l. 2. Gilliam also testified from the same GPS data information during his testimony. R. 201, l. 16 – 202, l. 18. The state referenced the GPS data in closing argument. R. 252, ll. 3 - 17. The jury asked to obtain a "map of the GPS points" as part of their deliberations. R. 282, ll. 16 - 24.

Over appellant's objection, the jury was allowed to watch the body-cam video of the victim's initial police interview, despite the fact that victim had already testified at trial, as discussed *infra* in Argument 2. R. 151 ll. 8-24.

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[4] The court did restrict reference to appellant's status on bond from pending charges, and a generic reference to GPS data was used instead of testimony regarding the ankle monitor. R. 80, ll. 7-20. The name of the business, BadBoyz Bail Bonding, was also not disclosed to the jury during trial.

ARGUMENT

1. The trial court improperly admitted GPS location data obtained without a warrant by the state for investigative purposes.

A. Standard of Review.

"Each party has the burden to prove separate things during the motion to suppress. The state bears the burden to demonstrate that it was entitled to conduct the search or seizure under an exception to the Fourth Amendment's warrant requirement." State v. Robinson, 410 S.C. 519, 530, 765 S.E.2d 564, 570 (2014). "[T]the criminal defendant retains the burden to establish that he is asserting his own Fourth Amendment rights, rather than vicariously asserting the rights of others; therefore, the defendant bears the burden to demonstrate that he had an actual and reasonable expectation of privacy in the place illegally searched." Id. Once a privacy right is held to exist, the court may not

> sponsor the notion of requiring a defendant to prove that this right—a right she already possesses—exists in any given case. We must therefore part company with the Mitchell Court, as we will not impose upon a defendant the burden of establishing the absence of exigent circumstances. We have consistently held the prosecution has the sole burden of proving the existence of an exception to the warrant requirement.

State v. Key, 431 S.C. 336, 348, 848 S.E.2d 315, 320–21 (2020) (referencing and declining to follow Mitchell v. Wisconsin, 139 S. Ct. 2525, 2531 (2019)).

"[A]ppellate review of a motion to suppress based on the Fourth Amendment involves a two-step analysis. This dual inquiry means we review the trial court's factual findings for any evidentiary support, but the ultimate legal conclusion ... is a question of law subject to de novo review." State v. Frasier, 437 S.C. 625, 633-34, 879 S.E.2d 762, 766 (2022).

B. Citizens, including those on pre-trial release, have a reasonable expectation of privacy regarding their GPS location that prevents the government from obtaining such information without the requirement of obtaining a warrant and establishing probable cause.

In Carpenter v. United States, 585 U.S. ___, 138 S. Ct. 2206 (2018), the United States Supreme Court reviewed the need for a warrant before obtaining GPS data from a cell phone carrier. The Court ruled that "[a]s with GPS information, the time-stamped data provides an intimate window into a person's life, revealing not only his particular movements, but through them his 'familial, political, professional, religious, and sexual associations.'" Id., 201 L. Ed. 2d 507, 138 S. Ct. 2206, 2217 (2018) (quoting United States v. Jones, 565 U.S. 400 (2012) (concurring opinion of Sotomayor)). As such, the Supreme Court ruled that "when the Government accessed CSLI from the wireless carriers, it invaded Carpenter's reasonable expectation of privacy in the whole of his physical movements." Carpenter, 138 S. Ct at 2219. A contrary holding would create a situation in which "[w]hoever the suspect turns out to be, he has effectively been tailed every moment of every day for five years, and the police may—in the Government's view—call upon the results of that surveillance without regard to the constraints of the Fourth Amendment." Id., 138 S. Ct. at 2218.

Even if location data was not an area protected under the United States Constitution, it would find protection under the South Carolina Constitution. Under Article I, section 10, South Carolinians are protected "from two distinct actions by the government: first are 'unreasonable searches and seizures[,]' largely mirroring our federal constitution's Fourth Amendment, and second is a protection not found in the United States Constitution, to be secure from 'unreasonable invasions of privacy.'" Planned Parenthood S. Atl. v. State, 438 S.C. 188, 199, 882 S.E.2d 770, 776 (2023). This heightened protection distinguishes the rights afforded South Carolina citizens from the general Fourth Amendment rights enjoyed by all. *Compare* State v.

Counts, 413 S.C. 153, 172, 776 S.E.2d 59, 70 (2015) (holding that "law enforcement must have reasonable suspicion of illegal activity at a targeted residence prior to approaching the residence and knocking on the door."), *with* Kentucky v. King, 563 U.S. 452, 469 (2011) (holding "law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do."). The idea that the government would have access to the whole of your movements, from the public streets to your own bedroom, is an invasion of privacy that "shall not be violated" absent a warrant based upon probable cause. S.C. Const. art. I, §10.

The need for this protection grows as the use of GPS expands from the tracking devices at issue in United States v. Jones, 565 U.S. 400 (2012) to cell phone based GPS data at issue in Carpenter v. United States, 585 U.S. ___, 138 S. Ct. 2206 (2018) to the consumer GPS tracking devices like smart watches and tracking tags. Citizens are now tracked by modern devices and their location logged twenty-four hours a day, seven days a week, for an indefinite time period. Allowing government intrusion into such a vast area of life, without the requirement of a warrant, exposes the intimate and private movements and actions of every moment of a normal citizen's life to government scrutiny. Courts are already having to deal with "geofence" warrants, which obtain user GPS data for *all GPS devices* within a certain geographic location at a specific time to help law enforcement identify a suspect. *See* United States v. Chatrie, 590 F. Supp. 3d 901, 905 (E.D. Va. 2022) ("Law enforcement has seized upon the opportunity presented by this informational stockpile, crafting 'geofence' warrants that seek location data for every user within a particular area over a particular span of time.").

C. The burden is on the state to justify the warrantless search when it invades an area protected by an expectation of privacy.

At trial, the parties disagreed as to who had the initial burden before the court. Appellant contended a warrantless search was a *per se* violation of the Fourth Amendment and the burden fell on the state to establish an exception applied to excuse the violation. R. 39, ll. 10-15. The state asserted the burden was on the appellant to establish a reasonable expectation of privacy existed. R. 37, ll. 6-11. The court ultimately ruled the burden was on the appellant to establish a reasonable expectation of privacy existed in connection with the warrantless search, and that there was no legitimate expectation of privacy in connection with the GPS location of an individual wearing an ankle monitor as a condition of bond. R. 43, l. 2 - 44, l. 10.

Assuming that appellant did have the burden of establishing an expectation of privacy, such expectation is established under both the Fourth Amendment and S.C. Const. art. 1, §10 as discussed above. Having established that a citizen's location obtained via GPS is a matter of privacy, the burden would shift to the state to justify its warrantless search for that information. The South Carolina Supreme Court has stated:

> [T]he "general presumption that a warrant is required may be overcome in certain situations. Consent and exigent circumstances are two of the recognized exceptions to the general warrant requirement. Most important to the issue before us is the settled principle that 'the burden is upon the State to justify a warrantless search.' At no time has this Court placed the burden on a defendant to establish that an exception to the warrant requirement does not exist."

State v. Key, 431 S.C. 336, 344, 848 S.E.2d 315, 319 (2020) (internal citations omitted). Since the government may not obtain GPS location data without an invasion of a protected right of privacy, the burden here is on the state, not appellant, to justify this intrusion. The court erroneously shifted the burden on consent in this case, ruling that the existence of the ankle monitor as a condition of bond eliminated the right of privacy, rather than holding the state to the

burden of establishing appellant's consent to this warrantless search that invaded an area of life to which all enjoy a reasonable expectation of privacy. R. 43, l. 24 - 44, l. 3. Thus, without requiring a presentation of the bond terms and conditions, what was expressed to appellant about who could access the GPS data, what appellant was told about the use of such data, or any other disclosure that would establish the state's burden on this issue, the court simply ruled appellant consented and waived any right to privacy over such data. R. 43, ll. 14-24. The facts referenced by the lower court and the state, the sharing of the information by the bonding company with law enforcement and the extent of appellant's understanding of that potential sharing, were not produced as would be required had the lower court properly placed the burden on the state. The bond agreement was not produced. Titus Curry's testimony, the office manager for BadBoyz Bail Bonding, was proffered outside the presence of the jury, but the state did not ask about the specific terms of the bond agreement, did not introduce any signed documentation from appellant concerning the ankle monitoring and the use of the GPS data, or take any other steps to meet a burden of showing consent. The mere existence of the ankle monitor itself, as a condition of bond by a private bonding company, was deemed enough to meet the state's burden of justifying a warrantless search of GPS location data.

D. Appellant's GPS monitor, as a condition by his private bonding company for agreement to obtain his pretrial release, was not a blanket consent for criminal investigatory searches nor a waiver his expectation of privacy regarding his location from warrantless intrusion by the state.

The state argued below, and the court found, that appellant had "consented" to the search or had waived any expectation of privacy as to the data when appellant agreed to the monitor provided by a third-party bonding company as a condition for the posting of his bond on unrelated criminal charges. R. 38, ll. 21-25; 43, l. 24-44, l. 3. No court order requiring such GPS

monitoring was provided to the court, and no other records or forms used in connection with the terms of his pre-trial release were relied upon in making these arguments.

Appellant was, at the time of his arrest, under pretrial release on unrelated charges and wearing a GPS device issued by his bond company, BadBoyz Bail Bonding. R. 55, ll. 20-25; 113, ll. 9-25. It is important to distinguish the status of appellant as being monitored pre-trial under conditions of an agreement with a private company, rather than as a function of probation or parole.

Courts have long recognized the lowered constitutional protections of citizens subject to conditions of probationary releases.

> Probation is considered 'an act of grace' given to a person who is still serving the sentence of the court, and 'the revocation of this privilege of probation is more in the nature of an extension of the original proceedings.' In addition, section 24-21-410 of the South Carolina Code (Supp. 2017) provides . . . [before] a defendant may be placed on probation, he must agree in writing to be subject to a search or seizure, without a search warrant, based on reasonable suspicions, of the defendant's person.

State v. Ross, 423 S.C. 504, 511, 815 S.E.2d 754, 757 (2018) (internal citations omitted). While the privacy interest of someone on probation is lower, it is not non-existent.

> Although the Fourth Amendment ordinarily requires the degree of probability embodied in the term 'probable cause,' a lesser degree satisfies the Constitution when the balance of governmental and private interests makes such a standard reasonable. Those interests warrant a lesser than probable-cause standard here. When an officer has reasonable suspicion that a probationer subject to a search condition is engaged in criminal activity, there is enough likelihood that criminal conduct is occurring that an intrusion on the probationer's significantly diminished privacy interests is reasonable.

United States v. Knights, 534 U.S. 112, 121, (2001) (internal citations omitted). Knights was followed by Samson v. California, 547 U.S. 843, 857 (2006), which held that "the Fourth Amendment does not prohibit a police officer from conducting a suspicionless search of a parolee." Id. at 857. This blanket denial of any expectation of privacy for those on probation has

been rejected under by other states on state constitutional grounds. *See* State v. Short, 851 N.W.2d 474, 506 (Iowa 2014) ("The United States Supreme Court in Griffin, Knights, and Samson has engaged in innovations that significantly reduce the protections of the Warrant Clause of the Fourth Amendment. We decline to join the retreat under the Iowa Constitution. We hold that under article I, section 8, the warrant requirement has full applicability to home searches of both probationers and parolees by law enforcement. As a result, because evidence seized in this case was obtained unlawfully, the motion to suppress should have been granted."). As South Carolina's Constitution provides even more explicit protection against invasions of privacy than Iowa's Constitution, which mirrors the Fourth Amendment, the reasoning in State v. Short is compelling, but need not be addressed here as appellant was not subject to probation or parole restrictions.

Contrast the present case to the use of GPS in State v. Brown, 424 S.C. 479, 818 S.E.2d 735 (2018), who was being monitored by GPS under terms of probationary release and enjoyed a lower expectation of privacy. This is reinforced by the plain language of S.C. Code Ann. § 24-21-410 (1976 as amended) that specifically mandates a probationer must agree in "writing to be subject to a search or seizure, without a search warrant, based on reasonable suspicion . . ." Since appellant here was on pre-trial release, his expectation of privacy in his movements, absent a contrary showing by the state of affirmative consent to disclosure of such information through the terms of pre-trial release from a court order or terms of the bond agreement (as S.C. Code Ann. § 24-21-410 dictates for those on probation), was protected by both the Fourth Amendment and S.C. Const. art. I, section 10, from warrantless searches by the state.

In the present case, appellant's privacy rights were clearly greater than those addressed in State v. Ross and Samson v. California. Appellant was on pre-trial release, the GPS monitor was

supplied by a private bonding company, was not required as a condition of bond by a court, and there was not showing of any kind that appellant was ever informed that the government would have access to his GPS data for investigatory purposes unrelated to his bond.

At the time the state obtained the GPS data, the evidence it possessed against appellant was extremely limited. Appellant was at the home of the owner of the moped used in the robbery at the time of a police visit, and he was on pre-trial release for unrelated criminal charges. At this stage, the state could have attempted to obtain a warrant and asserted there was probable cause to obtain appellant's GPS data location from the bond company. Instead, the state requested the GPS data without considering the requirements for a search warrant and whether it had probable cause to invade appellant's right to privacy. R. 190, l. 16 – 193, l. 20. Obtaining appellant's GPS location data was not subject to the rigors of judicial review through the warrant process, and that data was essential to the state's case at trial as shown by the prosecutor's closing arguments and the jury questions regarding GPS mapping. R. 252, ll. 2-14; 282, l. 16 - 284, l. 11. The trial court committed reversible error in not suppressing the GPS data and allowing it to be used as a central element of the state's case against appellant. This court should reverse and suppress the GPS data.

2. The trial court erred in allowing the state to play the body camera recording of the initial police interview of the victim.

A. Standard of Review

"A ruling on the admissibility of evidence is within the sound discretion of the trial court and will not be reversed absent an abuse of discretion. An abuse of discretion occurs when the trial court's ruling is based on an error of law." State v. Washington, 379 S.C. 120, 123–24, 665 S.E.2d 602, 604 (2008) (citing State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

B. The use of video interviews of witnesses, even those called to trial, implicate the Confrontation Clause rights of the accused.

The state sought to introduce the body camera video of the victim, Stewart, into evidence during the testimony of officer Javonte Selph. R. 123, l. 17 - 124, l. 25. Following an objection based upon both hearsay and the confrontation clause, the court ruled that playing the resulting video of the interview of the victim of the crime would violate the confrontation clause, but the state could attempt to introduce it after the victim testified and was subject to cross-examination. R. 127, l. 4 - 128, l. 15. Following Stewart's testimony at trial, the state recalled Selph to introduce the body camera video of Stewart's initial police interview. R. 154, l. 1 - 155, l. 15. Appellant's counsel renewed the prior objections, and added the video was cumulative and unnecessary. R. 155, ll. 16-20. The objections were overruled, and the jury was allowed to watch Stewart discuss the crime with Selph through his recorded interview.

The use of such body camera testimony was error. The video contained testimonial material, including statements about the nature of the gun that was used, the interaction between

the victim and the suspect, a physical description of the suspect and his clothing.[5] The Supreme Court distinguishes between police encounters that enable officers to respond to ongoing emergencies and interrogations aimed at establishing past events:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Ohio v. Clark, 576 U.S. 237, 244 (2015). Testimonial statements, like those elicited from Stewart by Selph, are subject to confrontation clause objection, as well as historical hearsay objection. Crawford v. Washington, 541 U.S. 36, 59 (2004). The typical "ongoing emergency" exception to Confrontation Clause challenge would not apply, as there was approximately 30 minutes between the robbery and the interview based upon video time stamps, the interview was at Stewart's home and not the ATM location, and there was no active crime scene during the interview itself, and it was conducted by law enforcement investigating a reported crime. State's Exhibits 2. Rule 803(1) or (2), SCRE, exceptions may not serve to "rescue" testimonial statements from a confrontation clause challenge.

While Stewart was called to testify and thus subject to cross-examination, the playing of the video interview to bolster his testimony impermissibly reduced the impact of trial testimony, particularly cross examination, and was a violation of appellant's Constitutionally protected Confrontation Clause right. Since Stewart failed to identify appellant from a photographic lineup, his credibility and the accuracy of his memory of the events was properly before the jury. The admission of his recorded interview was not harmless, as it allowed the jury to base

[5] State's Exhibit 2, Body Cam video, is on file with this Court for review.

determinations on testimony provided outside of court, not subject to cross-examination, and in violation of a Constitutionally protected right in the form of the Confrontation Clause.

C. Even if Stewart's trial testimony "cured" any Confrontation Clause issue, it was still reversible error for the trial court to admit the material over hearsay objection and as cumulative and unnecessary evidence.

When ruling on the hearsay portion of appellant's objection to the recorded video, the trial judge held it was a "close call" on whether or not the recorded interview was an excited utterance under Rule 803(1), SCRE, and a present sense impression under Rule 803(2), SCRE. R. 126, l. 14 - 127, l. 3. Following Stewart's in court testimony, the trial judge also ruled the video was not cumulative to that testimony and allowed the state to play the interview. R. 155, ll. 15-21. The court improperly classified the recorded interview as non-testimonial, non-hearsay exited utterance and present sense impression.

i. The excited utterance exception does not apply to a recorded interview of an adult victim at his own home well away from the scene of the crime and not immediately following the criminal event.

"A court must consider the totality of the circumstances when determining whether a statement falls within the excited utterance exception. Nonetheless, 'the burden of establishing the facts which qualify a statement as an excited utterance rests with the proponent of the evidence.'" State v. Davis, 371 S.C. 170, 178–79, 638 S.E.2d 57, 62 (2006) (internal citations omitted). "For a statement to be an excited utterance: '(1) the statement must relate to a startling event or condition; (2) the statement must have been made while the declarant was under the stress of excitement; and (3) the stress of excitement must be caused by the startling event or condition.'" State v. Prather, 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). "[T]he intrinsic reliability of an excited utterance derives from the statement's spontaneity which is determined by the totality of

the circumstances surrounding the statement when it was uttered." Prather, 429 S.C. at 611, 840 S.E.2d at 566 (quoting State v. Ladner, 373 S.C. 103, 120, 644 S.E.2d 684, 693 (2007)).

As noted, there was no "ongoing emergency" facing Selph when he interviewed Stewart. The crime had occurred at a different location. Stewart was at his own home, approximately half an hour had elapsed, and all parties to the video (the responding officers and Stewart) were calm in their demeanor with no sense of urgency or stress. Stewart himself denied he was afraid or under stress from the event:

> A. I wasn't scared of no gun. I just didn't -- I didn't like the idea of being robbed, but I wasn't afraid. I'm a Vietnam Veteran, I've been shot at and slept on the rivers and everything else. The most thing was I was insulted by -- about being robbed walking down the street. I was more upset -- upset about being robbed than I was about being scared.

R. 139, ll. 13-20. These factors remove the interview from being non-testimonial, excited utterances, and confirm it to be a formal police interview about a past criminal act that was testimonial in nature.

ii. Present sense impression would also not be applicable.

"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)).

"The theory supporting the present sense impression exception is that substantial contemporaneity of the event and the statement negates the likelihood of memory deficiencies or deliberate misstatements. Its use is limited to statements made while the witness is perceiving an event or condition or immediately thereafter. If the statement describes something that happened

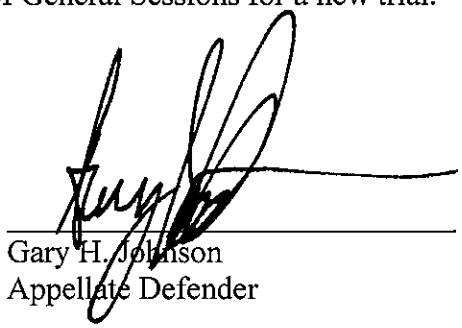
at an earlier time, it does not fit within this exception and will not be admitted as a present sense impression. The basis of the present sense impression exception is that closeness in time between the event and the declarant's statement reduces the likelihood of deliberate or conscious misrepresentation." State v. Washington, 424 S.C. 374, 399–400, 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).

Like the "excited utterance" analysis, the passage of time (half an hour), the change in location (scene of crime to victim's own home), the calm demeanor of all involved, and the testimonial nature of the interaction, remove the video from the "present sense impression" exception.

The sole purpose of entering the video was to influence the jury and bolster the impact of Stewart's testimony. As Stewart's identification of his assailant was a central factor in the case, as was his inability to identify appellant from a photographic lineup within days of the event, playing this interview for the jury was error and prejudicial. As appellant made no allegations of fabrication or improper motive, there was no basis for allowing the video to be played and influence the jury. *See* State v. Russell, 383 S.C. 447, 450, 679 S.E.2d 542, 543–44 (Ct. App. 2009) (holding "a prior consistent statement is not admissible unless the witness is charged with recent fabrication or improper motive or influence.").

CONCLUSION

By reasons of the foregoing arguments, appellant's convictions should be reversed, and the case remanded to the Richland County Court of General Sessions for a new trial.



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This 18th day of December, 2023.

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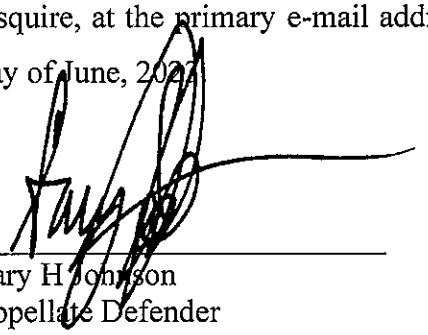
NEVELLE JOSHUA EBERHART,

APPELLANT

APPELLATE CASE NO. 2023-000234

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Final Brief of Appellant and Designation of Matter in the above-referenced case has been served upon Joshua A. Edwards., Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 27th day of June, 2023.



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