STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Honorable Robert E. Hood, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

GENARI MCNEIL,

APPELLANT

APPELLATE CASE NO. 2023-000591

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Constitutional Provisions

STATEMENT OF ISSUES ON APPEAL

I. Whether the trial court erred in admitting statements of Appellant, a suspect, where Appellant was interrogated while in the hospital after being shot three times, where a police officer guarded his hospital room door, since the interrogation was custodial and the statements were tendered in violation of Appellant's *Miranda* rights, and since the statements were involuntarily made under the totality of the circumstances?

II. Whether the trial court erred in admitting surveillance footage from the hospital, where no one was present to lay the foundation for the footage, and instead the State offered only a vague "certification," since the State failed to authenticate the evidence?

III. Whether the trial court erred in refusing to instruct the jury on mere presence, given evidence Appellant was merely present in the parking lot when the decedents were killed, since a request to charge a correct statement of the law on an issue raised by the indictment and the evidence presented at trial should not be refused?

IV. Whether the trial court erred in admitting Sergeant Simpson's testimony that Simpson was told Appellant arrived at the hospital shortly after the shooting, since the statement was offered for the truth of the matter asserted, and since hearsay is generally inadmissible?

V. Whether the trial court erred by admitting graphic images of a decedent's blood and brain expelled onto the stairs, where the probative value of the evidence was substantially outweighed by the danger of unfair prejudice, since the evidence should have been excluded pursuant to Rule 403, SCRE?

STATEMENT OF THE CASE

On October 16, 2019, a Richland County grand Jury indicted Appellant, Genari McNeil, for two counts of murder, armed robbery, first-degree burglary, and possession of a weapon during the commission of a violent crime. R. *(indictments). Appellant was tried before the Honorable Robert Hood and a jury, from March 20 – 22, 2023. Tivis Sutherland represented Appellant. Dale Scott and Nick Fowler prosecuted the case. Tr. 1.

Appellant was convicted as indicted, and he was sentenced to serve consecutive terms of life without the possibility of parole for the two murder convictions. He was sentenced to serve concurrent terms of imprisonment of thirty years for first-degree burglary, thirty years for armed robbery, and five years for the weapons convictions. Tr. 457, l. 21 – 458, l. 21; Tr. 470, ll. 15-20; R. *(sentence sheets). On April 3, 2023, Appellant filed a motion for a new trial. R. *(motion for new trial). On April 4, 2023, the court issued an order denying the motion for a new trial. R. *(order denying motion for new trial).

This appeal follows.

STATEMENT OF FACTS

Shortly after ten p.m. on May 11, 2019, two black men wearing ski masks and armed with pistols accosted Jahquan Peterson when he walked up to his front door at an apartment complex off Greystone Boulevard in Columbia. A Ring doorbell security system captured the onset of the attack, and the footage reflected the following.[1] The masked gunman on the left of the footage instructed Peterson: open the door and do not speak. Peterson told the men, "Okay, here, get it. You can get it, you can get it, bro." The gunman on the left hit Peterson in the head with a pistol. The gunman on the right held a two-toned pistol to Peterson's head. It appeared the gunman on the right had a white stripe on his left pant leg. Peterson and the two gunmen entered the apartment; the Ring system's audio recording device captured someone inside saying, "It's right there, it's right there." Tr. 126, l.3 – 127, l. 1; Tr. 129, l. 20 – 131, l. 11; Tr. 133, l. 7 – 135, l. 6; State's Exhibit #92 (Ring footage).

Peterson and his next door neighbor, Velvet Dubose, both drove gray sedans. Shortly before Peterson was accosted at his door, Dubose was accosted at her front door. Dubose came home and put her key in her lock; she then heard a noise. Two masked men were behind her. The three looked at each other like "deer in the headlights." The men whispered something between themselves but "went on about their business." Dubose went into her home without further incident. Apparently, no one called the police. About ten minutes later Dubose heard Peterson pull up, and there were shuffling noises by his door. Then Dubose heard a "barrage of gunshots" coming from Peterson's apartment. Tr. 126, l. 2 – 131, l. 5.

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[1] Appellant has designated the Ring security footage, and it is on file with this Court. The court reporter's index reflected that the Ring footage was State's Exhibit #92, and that Officer Birochack's body-worn camera footage was State's Exhibit #93. Tr. 4, ll. 21-22. However, it appears these numbers may have been mixed up and State's Exhibit #93 may be the Ring footage while #92 may be Officer Birochack's body-camera footage. Regardless, Appellant has designated both exhibits: #92 and #93.

Officer Birochack was dispatched to the neighborhood in response to the gunshots. He found Peterson's brother frantically knocking on Peterson's apartment door. It looked like there was blood on the doorframe. Peterson's brother kicked the door open and Birochack entered. His body-worn camera was activated.[2] Birochack saw Peterson dead on the living room floor. There was a gun in the hallway, a second gun on the sofa, and a third gun on the kitchen floor. One of the guns looked like the two-toned gun from the Ring footage. Tr. 133, l. 3 – 140, l. 22; Tr. 193, l. 8 – 194, l. 24; Tr. 232, l. 9 – 233, l. 18; State's Exhibit #93 (Body-worn camera footage).

Peterson's girlfriend, Mary Carmichael, was dead on the stairs at the back of the apartment. Carmichael had been shot in the head, and her brain lay outside her head on the stairs in a pool of blood. There were bloodstains around the front door, including on the interior doorknob, the floor, the closet, and the walls. Cash was scattered around the apartment; some cash was on the ground outside. A total of $4,931 was found at the scene. Tr. 140, l. 2 – 143, l. 8; Tr. 162, l. 12 – 176, l. 18; Tr. 198, ll. 19-21; State's Exhibit #46; State's Exhibit #47; State's Exhibit #93 (Body-worn camera footage).

Appellant was arrested and charged with two counts of murder, armed robbery, first-degree burglary, and possession of a weapon during the commission of a violent crime. The State alleged Appellant was the gunman on the right of the Ring footage, the one with the two-toned pistol and the white stripe on his pants. The gunman on the left of the footage was never identified. It was uncontested that DNA analysis revealed Appellant's blood was inside the

[2] The footage from Officer Birochack's body-worn camera, State's Exhibit #93, is on file with this Court.

apartment's entryway, including on the walls, floor, and door.[3] The admissibility of other critical evidence, however, was contested. Tr. 232, l. 9 – 235, l. 5; Tr. 340, l. 3 – 354, l. 10.

After a pretrial *Jackson v. Denno* hearing,[4] defense counsel moved to suppress statements made by Appellant to Sergeant Simpson when Simpson interrogated Appellant at the hospital. Simpson testified as follows at the *Denno* hearing. Simpson first went to the crime scene and investigated the incident. Then he went to nearby Prisma Hospital where Appellant was being treated for gunshot wounds. As seen, Peterson and Carmichael were killed shortly after ten p.m. on May 11th. At approximately eleven a.m. on May 12th, Simpson questioned Appellant at the hospital. Simpson said it was typical for law enforcement to speak with gunshot victims whenever they went to a hospital. Simpson wanted to speak with Appellant regarding this case, since there were no other gunshots reported that night. "So when I first learned that he was shot, I already knew that there weren't any other shots fired calls . . . I wanted to talk to him and get his side of the story. And also kind of figure out what happened or basically try to see if he was involved. So that's why I asked officers to remain at the scene so I could get to him." Tr. 90, ll. 1-25; Tr. 80, l. 11 – 83, l. 6; Tr. 85, ll. 7-22; Tr. 89, ll. 4-12; Tr. 86, ll. 11-18.

Simpson claimed Appellant was not detained during the interrogation. However, Simpson admitted there were other police officers stationed outside Appellant's hospital room door. An officer was guarding the door when Simpson arrived. Simpson also admitted Appellant told him he had "blood on his brain," and "felt like he had been knocked out." Appellant was in his hospital bed during the interrogation. Appellant had been shot in the head, wrist, and leg.

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[3] Also admitted at trial was a photograph found on Appellant's telephone of a two-toned pistol that looked like the one seen on the Ring footage and recovered at the crime scene. Tr. 235, ll. 6-21; Tr. 261, l. 19 – 262, l. 22; Tr. 402, l. 22 – 403, l. 9.

[4] *Jackson v. Denno*, 378 U.S. 368 (1964).

Simpson questioned Appellant about how he got shot. According to Simpson, Appellant told him he was walking down the street near the Obama Gas Station over by the Colony Apartments when he heard a car approaching, and felt himself be hit by gunfire. Simpson claimed Appellant said he was walking to see a girl. According to Simpson, Appellant stated an unidentified person in another car picked Appellant up and took him to the hospital. No shots fired reports were made near the Obama Gas Station or Colony Apartments that night. It was undisputed that Simpson did not provide Appellant *Miranda* warnings[5] before interrogating him and obtaining the challenged statements. Appellant was arrested as soon as he was discharged from the hospital; he was handcuffed and taken in for more questioning. Tr. 82, ll. 4-12; Tr. 87, l. 1 – 89, l. 19; Tr. 83, l. 10 – 85, l. 6; Tr. 84, ll. 20-24; Tr. 88, ll. 21-23.

Defense counsel moved to suppress Appellant's statements to Simpson. Counsel argued that based on Simpson's testimony,

> it's clear that he was a suspect. It's my view that even though he's in the hospital, **he's in detention because they have officers guarding the door** and changing shifts. So it would be my motion to suppress what they intend to introduce on the basis that he was in custody. **He was interrogated. He was shot several times**. And he wouldn't know any medications that he was on . . . And **he had not been *Mirandized*** until right before they left the hospital.

Tr. 90, ll. 10-23 (emphasis added). Counsel continued, "He went to the hospital because that was the only shooting . . . he went there with the intention to interrogate, posting guards outside his room at the hospital. I don't believe he was free to leave. We didn't have any testimony to that effect." Tr. 92, ll. 7-14. The solicitor admitted Appellant was interrogated and had not yet received *Miranda* warnings, but argued he was not a suspect—merely a victim. Tr. 91, l. 2 – 93, l. 14.

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[5] *Miranda v. Arizona*, 384 U.S. 436 (1966).

The trial court found Appellant was not in custody and therefore *Miranda* warnings were not required:

> I'm going to find that he was not in custody for purposes of interrogation. He was in the hospital. . . . He didn't get to the hospital by police escort. And the fact that there were officers outside the room, I don't find makes a custodial interrogation to the point where he wasn't free to stop the interrogation or free to stop answering questions or invoking of his rights. There's also no medical evidence or testimony in the record as to that he was . . . not able to understand what was going on or was under the influence of some drug or illegal drug or any other drug or alcohol to the extent where his faculties were impaired and he didn't understand what was going on. Therefore**, I find that his *Miranda* warnings were not required because he was not in custodial interrogation based upon the totality of the circumstances** and the testimony that was present. I make the finding that that statement was admissible.

Tr. 94, ll. 2-21 (emphasis added). Simpson was permitted to testify about the statements before the jury. Tr. 220, l. 8 – 223, l. 9. In closing statements, the solicitor argued Appellant's statements to Simpson were evidence of guilt, since Appellant claimed he was shot near the Obama Gas Station, when his blood was instead inside the apartment. Tr. 399, l. 18 – 401, l. 25.

Defense counsel also objected to Sergeant Simpson's testimony that another officer told him Appellant showed up at nearby Prisma hospital "shortly after" Peterson and Carmichael were killed. The court overruled the objection, finding the statement was not offered for the truth of the matter asserted. Tr. 216, l. 20 – 217, l. 7.

Next, the State attempted to introduce surveillance footage of Appellant entering the hospital.[6] The defense objected based on a lack of authentication. Defense counsel cited Rule 901, SCRE and *Watts v. Chastain*, 438 S.C. 597, 885 S.E.2d 398 (Ct. App. 2022), and objected to "the admissibility of the hospital video through certificate rather than live testimony." "[T]hey

6 The hospital surveillance footage was State's Exhibit #91 and is on file with this Court.

have to have somebody come out here and testify about the system and the accuracy of the system." No custodian or other person from the hospital was present in court. Instead, the solicitor argued S.C. Code Ann. § 19-5-520 allowed him to enter the footage as a business record without the custodian. "What we have is a sworn affidavit by a representative of Prisma Health attesting to the accuracy of the video and that it is kept in the ordinary course of business to satisfy the business records exception." The court viewed the document, which was tiled a "certification," and it was made Court's Exhibit #1. *See* R. *(Court's Exhibit #1); Tr. 147, l. 14 – 150, l. 15.

The "certification" was signed by "Keith Kirchner," a "security manager" at "Prisma Health," with a length of employment of "5 years." Kirchner's signature was dated March 10, 2023, and the signature is notarized. The document was a form, with the following body: "I hereby attest to and certify that the attached records submitted to law enforcement and/or the 5th Circuit Solicitor's Office, identified as _____ (description of the records, recordings, etc.) were produced and are maintained in the regular course of business, and the copy of such records fairly and accurately depicts the original record from the date(s) and time(s) in question. I declare under penalty of perjury that the foregoing is true and correct." On the blank line, handwritten in were the words "*one disc containing 3 videos from Prisma Health surveillance cameras*." Nowhere in the document did it state which Prisma Health location the videos were from, or what dates and times the videos were recorded. The affidavit contained nothing about the maintenance, security, and operation of the recording equipment. R. *(Court's Exhibit #1).

The court found the footage admissible as offered: "I'll allow it. Under the 19-5-520, I'm not sure that *Watts v. Chastain* really has any bearing on the issue here. This is something kept in the normal course of business. There's an affidavit to that effect pursuant to the statute of the

security manager at Prisma Health." Tr. 150, ll. 16-21. The footage was admitted during Sergeant Simpson's testimony. Tr. 223, l. 10 – 226, l. 3. The footage showed a black man, who was visibly bloody, entering the hospital, and being wheeled into a hospital elevator by another black man who had a towel obscuring his face. The injured man's pants had a white stripe on them. State's Exhibit #91.

The defense also objected to the admission of grisly crime scene photographs and a portion of Officer Birochack's body-worn camera footage which reflected the same. Defense counsel objected to State's Exhibit #46 and State's Exhibit #47, as well as the portion of Birochack's footage that was recorded after the video's timestamp of 6:12 (State's Exhibit #92).[7] Appellant argued the "gruesome" body-camera footage should be "cut off at 6:12" and the photographs should be excluded because "there's no need to show brains and a bunch of blood and stuff like that." Defense counsel noted the State had other competent evidence it could use to establish the same facts without the gruesome depictions. Tr. 68, l. 8 – 79, l. 14. The images showed a large mass of brain laying in a pool of blood on the stairs above the remains of Mary Carmichael's head. Blood was shown splattered up the stairs. State's Exhibit #46; State's Exhibit #47; State's Exhibit #92. The State argued the images were necessary to orient the jury with the layout of the apartment and illustrate its theory that Carmichael was killed after she shot and hit Appellant and he returned fire. Tr. 70, l. 19 – 71, l. 17.

The court ruled,

> 46 and 47, assuming the proper foundation is laid, will be admissible. The Court is kind of balancing analysis in determining the prejudicial affect over weight against the probative value . . . 46 and 47 go directly to the State's theory of how the case or how the incident progressed. Further, while they do show the female

[7] State's Exhibit #46 and State's Exhibit #47 (the photographs) and State's Exhibit #92 (the body-camera footage) are on file with this Court.

> victim on the ground in where she appears to be deceased and there is some blood on the stairs, they're not overly gory or gruesome to the extent to where it would raise an overly emotional reaction to the photos.

Tr. 75, ll. 7-18.

Finally, during his testimony before the jury, Simpson stated Appellant told him during a later interrogation that Appellant was in the parking lot of the decedents' apartment complex but did not go inside. "So during my investigation with him, *I suggested, if he had just been in the parking lot and just didn't go inside. And he did acknowledge at that point that that was accurate*." Tr. 253, ll. 20-23 (emphasis added); Tr. 254, ll. 7-9. At the conclusion of the case, the defense requested a jury instruction on mere presence. Defense counsel argued Simpson's testimony that Appellant told him he was in the apartment complex parking lot but did not go inside the apartment was some evidence, and therefore the court should give the charge. "[H]e did say at one point he admitted that he was in the parking lot . . . I think it's some evidence that could be arguable." Tr. 382, ll. 2-3; Tr. 388, ll. 5-12; Tr. 382, l. 2 – 388, l. 23. The solicitor argued there was no evidence of mere presence. Tr. 382, ll. 7-12. The court ruled,

> **I just don't think there's any evidence in the record that he was merely—that he was just there and not participating in the crime**, It's either him on the video in the ski masks or it's not; right, period. It's . . . it really is in a category of cases of who done it. It's not a, this was justified or this was anything like that. It's either him and another guy participating in the crime or its not him at all.

Tr. 388, ll. 15-23 (emphasis added).

As seen, Appellant was convicted as indicted, and he was sentenced, inter alia, to two consecutive life without parole sentences.

ARGUMENT

I. The trial court erred in admitting statements of Appellant, a suspect, where Appellant was interrogated while in the hospital after being shot three times, where a police officer guarded his hospital room door, since the interrogation was custodial and the statements were tendered in violation of Appellant's *Miranda* rights. and since the statements were involuntarily made under the totality of the circumstances.

Standard of review

The question of the voluntariness of a statement presents a mixed question of law and fact. The appellate court reviews the trial court's factual findings regarding voluntariness for any evidentiary support. However, the ultimate legal conclusion—whether, based on those facts, a statement was voluntarily made—is a question of law subject to de novo review. *State v. Miller*, 441 S.C. 106, 119, 893 S.E.2d 306, 313 (2023).

Discussion

"There are two constitutional bases requiring any confessions admitted into evidence to be voluntary: the Due Process Clause of the Fourteenth Amendment and the Fifth Amendment right against self-incrimination." *State v. Miller*, 441 S.C. 106, 120, 893 S.E.2d 306, 313 (2023) (citing *Dickerson v. United States*, 530 U.S. 428, 433 (2000)). It is "axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession." *Jackson v. Denno*, 378 U.S. at 385 (citing *Rogers v. Richmond*, 365 U.S. 534 (1961)). The standard for determining the voluntariness of a confession is whether, under the totality of the circumstances, the confession is the product of an essentially free and unconstrained choice by its maker or whether his free will has been overborne and his capacity for self-determination

critically impaired. *Schneckloth v. Bustamonte*, 412 U.S. 218, 225-26 (1973). "In analyzing whether a defendant's will was overborne and the resulting confession was offensive to due process, courts must consider the totality of the circumstances, including the details of the interrogation and the characteristics of the defendant. *Miller*, 441 S.C. at 120, 893 S.E.2d at 313–14 (citing *Schneckloth v. Bustamonte*, *supra*). A totality of the circumstances inquiry may include consideration of the physical condition of the accused and the location of the interrogation. *E.g.*, *State v. Miller*, 441 S.C. at 121, 893 S.E.2d at 314.

Coercive police activity is necessary predicate to finding confession is not voluntary within the meaning of the Due Process Clause. *Colorado v. Connelly*, 479 U.S. 157, 167 (1986). "Coercion is determined from the perspective of the suspect." *State v. Goodwin*, 384 S.C. 588, 601, 683 S.E.2d 500, 507 (Ct. App. 2009) (citation omitted).

"The State bears the burden of proving by a preponderance of the evidence that a statement allegedly given by an accused was voluntary and that the accused voluntarily, knowingly, and intelligently waived his rights to silence and to have counsel present during interrogation." *State v. Henderson*, 286 S.C. 465, 470, 334 S.E.2d 519, 522 (Ct. App. 1985) (citations omitted). A "waiver must be voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception, and made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Berghuis v. Thompkins*, 560 U.S. at 382–83 (cleaned up). "[W]aivers of counsel must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege, a matter which depends in each case upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." *Edwards v. Arizona*, 451 U.S. 477, 482 (1981) (cleaned up).

"In *Miranda v. Arizona*, the Court determined that the Fifth and Fourteenth Amendments' prohibition against compelled self-incrimination required that custodial interrogation be preceded by advice to the putative defendant that he has the right to remain silent and also the right to the presence of an attorney." *Edwards v. Arizona*, 451 U.S. at 481–82 (citing *Miranda*, *supra*). A suspect "must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation." *Miranda*, 384 U.S. at 479. "After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him." *Id.*

"In order to secure the admission of a defendant's statement, the State must affirmatively show the statement was voluntary *and* taken in compliance with *Miranda*." *State v. Middleton*, 288 S.C. 21, 25, 339 S.E.2d 692, 694 (1986) (citations omitted) (emphasis in original). "If the State establishes that a *Miranda* warning was given and the accused made an uncoerced statement, this showing, standing alone, is insufficient to demonstrate a valid waiver of *Miranda* rights. The prosecution must make the additional showing that the accused understood these rights." *Berghuis v. Thompkins*, 560 U.S. 370, 384 (2010) (cleaned up).

The trial court should have suppressed Appellant's statements to Simpson at the hospital. They were taken in violation of *Miranda*. It was undisputed Appellant had not been provided with *Miranda* warnings until after he made the statements. Tr. 88, ll. 12-23; Tr. 91, ll. 5-9. The

State conceded the statements were the product of an interrogation. The solicitor stated, "Clearly he's being interrogated[.]" Tr. 91, ll. 17-18.

Appellant was also in custody, and the trial court's determination that Appellant was not in custody was error. The custody inquiry asks: "whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (cleaned up). "Whether a suspect is in custody is determined by an examination of the totality of the circumstances, such as the location, purpose, and length of interrogation, and whether the suspect was free to leave the place of questioning. It is an objective determination, that is, would a reasonable person have believed he was in custody." *State v. Navy*, 386 S.C. 294, 301, 688 S.E.2d 838, 841 (2010) (citing *State v. Evans*, 354 S.C. 579, 583, 582 S.E.2d 407, 410 (2003)). "Other factors include the use or absence of physical restraints, the statements made by the police, and whether the defendant was released at the end of the encounter." *State v. Hill*, 425 S.C. 374, 381, 822 S.E.2d 344, 348 (Ct. App. 2018) (citing *Howes v. Fields*, 565 U.S. 499, 509 (2012)). "On appeal, the trial court's findings as to custody must be upheld where they are supported by the record." *State v. Navy*, 386 S.C. at 301, 688 S.E.2d at 841 (2010).

Simpson testified there were police officers at Appellant's hospital room door because Simpson wanted to interrogate Appellant about the shooting. "Q. And do you know why the officers were outside the room? A. So when I first initially heard that he was shot, I already knew there weren't any other shots fired calls . . . I wanted to talk to him and get his side of the story. And also kind of figure out what happened or basically try to see if he was involved. So that's why I asked officers to remain at the scene [sic] so I could get to him." Tr. 86, ll. 5-21. Appellant was in his hospital bed being treated for gunshot wounds. He had law enforcement guarding his

door: that was a restraint on freedom of movement of the degree associated with a formal arrest. A reasonable person would have believed he was not free to leave. *Beheler*, 463 U.S. at 1125. This was not a routine inquiry—when Simpson did not like Appellant's story, he charged him, arresting Appellant shortly after the interrogation (as soon as he was discharged). *See State v. Evans*, 354 S.C. at 584, 582 S.E.2d at 410 (totality of circumstances supported finding defendant was in custody particularly given officer's purpose: "her story was challenged and once that was challenged, that changes from just a routine inquiry"). This was custodial interrogation, and the court should have suppressed the statements based on the *Miranda* violation.

The statements were also inadmissible as involuntary. The totality of the circumstances in this case included the *Miranda* violation, the officers guarding the hospital room door, the interrogation occurring while Appellant was in his hospital bed, after being shot three times, including once in the face, while he had blood on his brain, and felt like he had been "knocked out." These circumstances were also coercive, because the totality of these circumstances would have interfered with Appellant's ability to make a fully informed decision of whether to engage in the interview. *Cf. State v. Collins*, Op. No. 28197 (S.C. Sup. Ct. filed Apr. 3, 2024) (Howard Adv. Sh. No. 13 at 11) (false assurance of confidentiality from law enforcement is inherently coercive because it interferes with layperson's ability to make fully informed decision whether to engage in interview under such circumstances). The statements were not the product of a "free and unconstrained choice." *Schneckloth v. Bustamonte*, 412 U.S. at 225-26; *Berghuis v. Thompkins*, 560 U.S. at 382. Appellant should have been advised of his *Miranda* rights. The State did not show Appellant "voluntarily, knowingly, and intelligently waived his right[] . . . to have counsel present during interrogation." *State v. Henderson*, 286 S.C. at 470, 334 S.E.2d at 522. The statements were involuntary under the totality of the circumstances and should have

been excluded. *Miranda*, 384 U.S. at 479; *Jackson v. Denno*, 378 U.S. at 385; *Edwards v. Arizona*, 451 U.S. at 482; *State v. Miller*, 441 S.C. at 120, 893 S.E.2d at 313–14; U.S. Const. amend. V; US. Const. amend. XIV.

II. The trial court erred in admitting surveillance footage from the hospital, where no one was present to lay the foundation for the footage, and instead the State offered only a vague "certification," since the State failed to authenticate the evidence.

Standard of review

"The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice." *State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *Id.* at 429–30, 632 S.E.2d at 848.

Discussion

"It is black letter law that evidence must be authenticated or identified in order to be admissible." *State v. Brown*, 424 S.C. 479, 488, 818 S.E.2d 735, 740 (2018) (citing *State v. Rich*, 293 S.C. 172, 173, 359 S.E.2d 281, 281 (1987)). "Upon adoption of the South Carolina Rules of Evidence, this common law rule was codified at Rule 901, SCRE." *Brown*, 424 S.C. at 488, 818 S.E.2d at 740. "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Rule 901(a), SCRE.

Rule 901(b) contains examples of "authentication or identification conforming with the requirements of this rule." Rule 901(b), SCRE. One way evidence may be authenticated is by testimony of a witness with knowledge: "Testimony that a matter is what it is claimed to be." Rule 901(b)(1), SCRE. Rule 902, SCRE provides that "[e]xtrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following," and then lists ten categories of documents inapplicable here. However, S.C. Code Ann. § 19-5-520 (2015)

provides, “In addition to those matters provided by Rule 902, South Carolina Rules of Evidence, extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:”

> **(A) The original or a copy of a domestic record that meets the requirements of Rule 803(6), South Carolina Rules of Evidence, as shown by a certification of the custodian or another qualified person that complies with a state statute or a court rule**. Before the trial or hearing, the proponent shall give an adverse party reasonable written notice of the intent to offer the record and shall make the record and certification available for inspection so that the party has a fair opportunity to challenge the record.

Rule 803(6), SCRE provides that the following is not excluded by the hearsay rule, even though the declarant is available as a witness:

> Records of Regularly Conducted Activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness; provided, however, that subjective opinions and judgments found in business records are not admissible. The term "business" as used in this subsection includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

In this case, Appellant objected because no one was present to authenticate the evidence by testifying the footage was what it was purported to be—video footage from the Prisma Hospital located off Harden Street in Columbia taken on May 11, 2019, that had not been tampered with. Appellant cited Rule 901 and *Watts v. Chastain*, 438 S.C. 597, 607, 885 S.E.2d 398, 403 (Ct. App. 2023), which held a trooper’s copy of a business’s video surveillance footage was properly authenticated by testimony of the business’s owner that the system was reliable, the

date and time stamp were accurate, the video had not been altered; and the trooper's testimony the video was an accurate representation of what he recorded with his camcorder from the business's surveillance system.

The State argued the video footage was a business record under the hearsay rules, Rule 803(6), SCRE, and therefore it could authenticate the footage by certificate rather than by testimony pursuant to Section 19-5-520. The State submitted a "certification." *See R*. *(Court's Exhibit #1). As of filing the initial brief, Appellant has found no case law addressing § 19-5-520.

The purported "certification" offered by the State was so vague it was insufficient to be admissible pursuant to § 19-5-520 and the evidence rules. The "certification" states "3 videos" were submitted but State's Exhibit #91 only contained two videos. The "certification" does not state the dates or times of the videos provided, and does not explain how the affiant (or anyone else) could tell the videos were from the night of May 11, 2019, and not some earlier date. The video footage itself does not contain dates or times. The "certification" does not state the videos were from Prisma Health Richland in Columbia, and instead states they were from "Prisma Health." Prisma Health has numerous hospitals, as well as other medical facilities. *E.g.*, *Nelson v. Harris*, 441 S.C. 379, 383, 893 S.E.2d 592, 594 (Ct. App. 2023) (patient "taken by ambulance to Prisma Health Baptist Parkridge Hospital"); *State v. Furtick*, 441 S.C. 626, 631, 896 S.E.2d 320, 322 (Ct. App. 2023) patient "transported to Prisma Health Richland"); *Matter of Perkins*, 438 S.C. 55, 56, 882 S.E.2d 166 (2022) (patient admitted to "Prisma Health Behavioral Care Day Treatment"). *See also State v. Gray*, 438 S.C. 130, 143, 882 S.E.2d 469, 476 (Ct. App. 2022) (video surveillance footage was authenticated by testimony of person who owned and operated the security system that recorded the video). No such person testified here. Notably, this was digital footage. *See,* e.g., *State v. Green*, 427 S.C. 223, 234, 830 S.E.2d 711, 716 (Ct. App.

2019), *aff'd as modified*, 432 S.C. 97, 851 S.E.2d 440 (2020) ("documents that once sat in dusty file cabinets crammed into office corners now float in the 'cloud,' making them susceptible to a wider range of mischief").

The "certification" did not comply with § 19-5-520 and did not comply with Rule 803(6)'s requirement that the record be made by a person with knowledge. The State failed to authenticate the evidence and its admission was error. Rule 901, SCRE.

III. The trial court erred in refusing to instruct the jury on mere presence, given evidence Appellant was merely present in the parking lot when the decedents were killed, since a request to charge a correct statement of the law on an issue raised by the indictment and the evidence presented at trial should not be refused.

Standard of review

"In criminal cases an appellate court sits to review errors of law only." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion." *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *Id.*

Discussion

The jury should have been instructed on mere presence. "The law to be charged to the jury is determined by the evidence presented at trial." *State v. Hill*, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993). When reviewing the trial court's refusal to deliver a requested jury instruction, appellate courts must consider the evidence in a light most favorable to the defendant. *State v. Williams*, 400 S.C. 308, 314, 733 S.E.2d 605, 608-09 (Ct. App. 2012) (citing *State v. Cole*, 338 S.C. 97, 101, 525 S.E.2d 511, 512-13 (2000)). "In reviewing jury charges for error, we must consider the court's jury charge as a whole in light of the evidence and issues presented at trial." *State v. Adkins*, 353 S.C. 312, 318, 577 S.E.2d 460, 463 (Ct. App. 2003).

"If there is any evidence to support a jury charge, the trial judge should grant the request." *State v. Brown*, 362 S.C 258, 262, 607 S.E.2d 93, 95 (Ct. App. 2004). "It is error for the trial court to refuse to give a requested instruction which states a sound principle of law when

that principle applies to the case at hand, and the principle is not otherwise included in the charge." *Clark v. Cantrell*, 339 S.C. 369, 390, 529 S.E.2d 528, 539 (2000). "A request to charge a correct statement of the law on an issue raised by the indictment and the evidence presented at trial should not be refused." *State v. Austin*, 299 S.C. 456, 458, 385 S.E.2d 830, 831 (1989). "However, if the trial judge refuses to give a specific charge, there is no error if the charge actually given sufficiently covers the substance of the request." *Id.*

"A defendant is entitled to a charge on mere presence if the evidence supports it." *State v. Franklin*, 299 S.C. 133, 141, 382 S.E.2d 911, 915 (1989) (citing *State v. Kimbrell*, 294 S.C. 51, 362 S.E.2d 630 (1987)). "[W]here there is some doubt over whether a person is guilty of a crime by virtue of accomplice liability, the trial court may be required to instruct the jury that a person must personally commit the crime or be present at the scene of the crime and intentionally, or through a common design, aid, abet, or assist in the commission of that crime through some overt act." *State v. Dennis*, 321 S.C. 413, 420, 468 S.E.2d 674, 678 (Ct. App. 1996) (cleaned up).

In this case, there was evidence Appellant was merely present in the parking lot when the crimes were committed: Sergeant Simpson testified Appellant told him so during a subsequent interrogation. It was therefore a jury question whether or not Appellant was in the parking lot rather than the apartment. If the jury concluded Appellant was merely in the parking lot, then it was a jury question whether that was because he was an accomplice or because he just happened to be there. *See State v. Dennis*, 321 S.C. 413, 420, 468 S.E.2d 674, 678 (Ct. App. 1996) (mere presence inapplicable where defendant denied even being at scene of crime, "hence, there was never any issue of whether he was an accomplice, aider or abetter, or not liable at all because he was merely present without knowledge of the criminal conduct of another"). Appellant should have received the instruction.

"A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." *State v. Adkins*, 353 S.C. 312, 318, 577 S.E.2d 460, 464 (Ct. App. 2003). "The substance of the law is what must be instructed to the jury, not any particular verbiage." *State v. Smith*, 315 S.C. 547, 554, 446 S.E.2d 411, 415 (1994). The failure to charge "mere presence" may constitute reversible error. *State v. Lee*, 298 S.C. at 364, 380 S.E.2d at 835. "[T]o warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." *State v. Burkhart*, 350 S.C. 252, 263, 565 S.E.2d 298, 304 (2002). "Failure to give requested jury instructions is not prejudicial error where the instructions given afford the proper test for determining the issues." *Id*. at 263, 565 S.E.2d at 304.

The following instructions have been found to be adequate charges on mere presence. *State v. Zeigler*, 364 S.C. 94, 107, 610 S.E.2d 859, 866 (Ct. App. 2005) ("The mere knowledge that another person is going to commit a crime, even if the defendant is present when the crime is committed is not sufficient to convict the defendant as a principal."); *State v. Kelsey*, 331 S.C. 50, 76, 502 S.E.2d 63, 76 (1998) ("mere presence at the scene is insufficient to prove someone guilty of a crime . . . If you find after reviewing all of the evidence that the state has proven that the defendant was only present at the scene of the crime and they have not proven beyond a reasonable doubt any other participation in the crime, then you must find a defendant not guilty. The law says that proof of mere presence at the scene of the crime is not sufficient to find someone guilty."). In this case, read as a whole, the jury charges did not adequately cover the law regarding mere presence. The jury was not apprised of the proper test for determining the issues. *Burkhart*, 350 S.C. at 263, 565 S.E.2d at 304; *Kelsey*, 331 S.C. at 76, 502 S.E.2d at 76.

IV. The trial court erred in admitting Sergeant Simpson's testimony that Simpson was told Appellant arrived at the hospital shortly after the shooting, since the statement was offered for the truth of the matter asserted, and since hearsay is generally inadmissible.

Standard of review

"The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice." *State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *Id.* at 429–30, 632 S.E.2d at 848.

Discussion

The statement should have been excluded pursuant to Rule 802, SCRE. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE; *see State v. Brockmeyer*, 406 S.C. 324, 351, 751 S.E.2d 645, 659 (2013) (same). "Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court of this State or by statute." Rule 802, SCRE.

The trial court incorrectly ruled the testimony was not offered for the truth of the matter asserted. Simpson's testimony about what time Appellant got to the hospital testimony was offered to prove the truth of the matter asserted—that Appellant got to the hospital shortly after the decedents were killed. *State v. Williams*, 285 S.C. 544, 550–51, 331 S.E.2d 354, 358 (Ct. App. 1985) (police officers' testimony "amounted to their saying what they had been told outside of court and, even though they did not testify as to exactly what had been said, their testimony had no purpose other than to prove the truth of the matters asserted").

That Simpson heard the information during his investigation did not exempt the statement from the hearsay rules. In *State v. King*, 422 S.C. 47, 52, 810 S.E.2d 18, 20-21 (2017), the prosecution elicited over objection that Officer Butler talked to neighbors who said they heard multiple gunshots. On appeal, the State argued Officer Butler's testimony was not inadmissible hearsay since she merely relayed what she learned during her investigation. *Id.*, 422 S.C. at 64-65, 810 S.E.2d at 27. The Supreme Court found the admission of the testimony, which should be analyzed under traditional hearsay rules, was error. "We find the disposition of this issue involves a straightforward hearsay analysis." *Id.*, 422 S.C. at 66, 810 S.E.2d at 28. "Officer Butler's testimony was hearsay as it was based exclusively on what the witnesses told her during the neighborhood canvas and was offered to prove that King fired more than one gunshot. Further, we do not discern, nor has the State cited, any exception to the hearsay rule that would provide for the admissibility of the testimony." *Id.* "Nonetheless, even with this straightforward analysis, we believe it is necessary to caution prosecutors against using 'investigative information' as it appears this is an attempt to circumvent the rules against hearsay." *Id.*, 422 S.C. at 66-67, 810 S.E.2d at 28. "[W]e caution against the use and admission of 'investigative information.' While it may be couched in terms of explaining an officer's conduct during an investigation, it may not be used to offer the substance of an out-of-court statement that would otherwise violate our state's rules against hearsay." *Id.*, 422 S.C. at 68, 810 S.E.2d at 29.

The objection should have been sustained. *See, e.g.*, *State v. Thompson*, 352 S.C. 552, 559, 575 S.E.2d 77, 81 (Ct. App. 2003) (officers' testimony regarding statements made by bystander were not entered for truth but to explain and outline officers' investigation and reasons for going to defendant's home. Thus, the evidence was not hearsay.); *State v. Brown*, 317 S.C. 55, 63, 451 S.E.2d 888, 894 (1994) (statements were not entered for their truth but rather to

explain why the officers began their surveillance). The statement was admitted for the purpose of showing that Appellant actually did show up at the hospital shortly after the decedents were killed—it was offered for the truth of the matter asserted. The testimony "violate[d] our state's rules against hearsay." *King*, 422 S.C. at 68, 810 S.E.2d at 29; Rule 801, SCRE; Rule 802, SCRE.

V. The trial court erred by admitting graphic images of a decedent's blood and brain expelled onto the stairs, where the probative value of the evidence was substantially outweighed by the danger of unfair prejudice, since the evidence should have been excluded pursuant to Rule 403, SCRE.

Standard of review

"The admission of evidence is within the circuit court's discretion and will not be reversed on appeal absent an abuse of that discretion." *State v. Dickerson,* 395 S.C. 101, 116, 716 S.E.2d 895, 903 (2011). "A trial court has particularly wide discretion in ruling on Rule 403 objections." *State v. Lee*, 399 S.C. 521, 527, 732 S.E.2d 225, 228 (Ct. App. 2012); *see also State v. Dial*, 405 S.C. 247, 260, 746 S.E.2d 495, 502 (Ct. App. 2013) ("A trial judge's decision regarding the comparative probative value and prejudicial effect of relevant evidence should be reversed only in exceptional circumstances.") (citation omitted). In exercising its discretion on a Rule 403 objection to the admissibility of autopsy photographs, the trial court "must balance the [unfair prejudice] of graphic photos against their probative value." *Dial*, 405 S.C. at 260, 746 S.E.2d at 502 (citation omitted).

Discussion

Under Rule 403, SCRE, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." "The trial judge must balance the prejudicial effect of graphic photographs against their probative value." *State v. Martucci*, 380 S.C. 232, 249, 669 S.E.2d 598, 607 (Ct. App. 2008).

"In the *guilt* phase of a trial, photographs of the murder victims should be excluded where the facts they are intended to show have been fully established by competent testimony." *State v. Kornahrens*, 290 S.C. 281, 288-289, 350 S.E.2d 180, 185 (1986) (emphasis in original). *See State v. Nelson*, 440 S.C. 413, 424-25, 891 S.E.2d 508, 513-14 (2023) (autopsy photographs have little, if any, evidentiary value where the information they depict is not in dispute; their scant evidentiary value is negated by the forensic examiner's testimony). "Photographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are irrelevant or not necessary to substantiate material facts or conditions." *State v. Torres*, 390 S.C. 618, 623, 703 S.E.2d 226, 228 (2010) (citing *State v. Brazell*, 325 S.C. 65, 78, 480 S.E.2d 64, 72 (1997)). "To constitute unfair prejudice, the photographs must create a 'tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.'" *Martucci*, 380 S.C. at 250, 669 S.E.2d at 607 (quoting *State v. Kelley*, 319 S.C. 173, 178, 460 S.E.2d 368, 370-71 (1995)).

The images of the decedent's brain sitting in a pool of blood on the stairs should have been excluded to Rule 403, SCRE. This was not a sentencing hearing, it was the trial on guilt or innocence. The images had no probative value since they were unnecessary to substantiate material facts. The State had the testimony of the forensic pathologist, the crime scene investigator, the lead investigator, and the responding officer. It had autopsy diagrams and a diagram of the apartment. It had physical evidence. *See* R. *(State's Exhibit #88; State's Exhibit #89); *see also* State's Exhibit #90. *See State v. Jones*, 440 S.C. 214, 263, 891 S.E.2d 347, 373 (2023) (during punishment phase, photographs of children's bodies in advanced stages of decomposition were inadmissible under Rule 403; they had "no probative value"). *Compare State v. Dial*, 405 S.C. at 261, 746 S.E.2d at 502 (Ct. App. 2013) (autopsy photographs of minor

victim's injuries "were highly probative to the issues of whether Victim was abused and whether the abuse was the cause of his death," where defendant claimed Victim's injuries were the result of accident); *State v. Holder*, 382 S.C. 278, 291, 676 S.E.2d 690, 697 (2009) (admission of autopsy photographs of two-year-old child's internal injuries was not error, where defendant claimed child was injured in ATV accident and pathologist used photographs to refute this explanation).

The likelihood of unfair prejudice was substantial as the images invited a decision on an improper basis. The evidence consisted of 8 x 10 color photographs and video footage of the decedent's blood and brain splattered up and down the stairs. The images were shocking and unnecessary. *See State v. Collins*, 409 S.C. 524, 539, 763 S.E.2d 22, 30 (2014) (Kittredge, J., concurring) (admission of autopsy photographs of child eaten by dogs was error since the primary purpose of the horrific photographs was to inflame the passions of the jury); *Torres*, 390 S.C. at 624, 703 S.E.2d at 229 (autopsy photographs were "at the outer limits of what our law permits a jury to consider"); *State v. Middleton*, 288 S.C. 21, 24, 339 S.E.2d 692, 693 (1986) (prejudice created by color autopsy photographs of victim's scalp pulled away from her skull and surgically opened vaginal cavity exposing seminal fluid clearly outweighed any evidentiary value); *State v. Haselden*, 353 S.C. 190, 201, 577 S.E.2d 445, 451 (2003) (autopsy photograph of child's dilated anus was simply irrelevant to any issues before the sentencing phase jury and served only to inflame the jury and leave them with impression that child may have been sexually abused). The admission of the unfairly prejudicial images was error. *Torre*s, 390 S.C. at 623, 703 S.E.2d at 228; Rule 403, SCRE.

CONCLUSION

Based on the foregoing argument, Appellant respectfully asks this Court to reverse his convictions and sentences and remand for a new trial.

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ATTORNEY FOR APPELLANT

This 2nd day of May, 2024.