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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Williamsburg County
The Honorable R. Ferrell Cothran, Circuit Court Judge

THE STATE,

Respondent,

v.

MARQUISE D. FRANKLIN,

Appellant.

Appellate Case No. 2024-001277

FINAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

1. Whether the court erred by failing to direct verdicts of acquittal where the State's circumstantial case merely raised a suspicion of guilt, since there was not substantial circumstantial evidence of guilt?
2. Whether the court erred by permitting a lay witness to testify that Appellant left the scene traveling at speeds up to 105 miles per hour according to a GPS tracker, where the witness did not know how the tracker determined speed,
 - a. Since the witness lacked personal knowledge of what speed Appellant was driving?
 - b. Since the evidence was improper lay opinion testimony when the circumstances required expert testimony?
 - c. Since Appellant was denied the opportunity for confrontation and cross-examination of this evidence?
3. Whether the court erred by admitting jail phone call recordings from Ohio, where the State failed to comply with Section 19-5-520 and failed to call the custodian of records, since the recordings were not authenticated?

STATEMENT OF THE CASE

On October 3, 2020, appellant Marquise D. Franklin murdered Quadree Wilson in Williamsburg County. Tysie Wilson, Quadree's sister, was also killed at the same time. Franklin was arrested several weeks later in Cuyahoga County, Ohio and returned to South Carolina to face prosecution. On July 18, 2024, the Williamsburg County Grand Jury indicted Franklin for 2 counts of murder, possession of a weapon during a violent crime, and possession of a firearm by a person convicted of a violent felony. (Ind. # 2024-GS-45-00047). On July 26, 2024, the State served notice of intent to seek life without parole (LWOP) pursuant to S.C. Code Ann. Section 17-25-45, the recidivist statute, due to Franklin having 2 prior convictions for kidnapping and 2 prior convictions for burglary 2nd violent. Franklin proceeded to a jury trial on all charges before the Honorable R. Ferrell Cothran, Circuit Court Judge from July 22-25, 2024. Debbie Butcher, Esquire, represented Franklin. Assistant Solicitors Ella Alston and Chip Benny prosecuted the case. On July 25, 2024, Franklin was found guilty of the murder of Quadree Wilson and possession of a weapon during a violent crime. Franklin was found not guilty of the murder of Tysie Wilson. The charge of possession of a firearm by a person convicted of a violent felony was not submitted to the jury. Franklin was sentenced to LWOP for the murder of Quadree Wilson and 5 years concurrent for possession of a weapon during a violent crime. Franklin directly appeals to this Court raising 3 issues. (IBOA). This is the Final Brief of Respondent. (R. 282-283; 1; 236-237; 280-281; 282-283).

RESPONDENT'S STATEMENT OF FACTS

Raneisha Conyers ("Conyers") was Quadree Wilson's girlfriend. They had been dating for several years. Conyers testified that even back in high school and since then, appellant Marquise Franklin ("Franklin") and her boyfriend Quadree Wilson ("the victim") had been "beefing." This had been going on for about 3 years. Conyers testified that on September 19, 2020, she was outside a nightclub in Salters, S.C. and Franklin walked up to her and slapped her. Franklin then stated: "Quadree [the victim] is next." Conyers testified that after she was slapped by Franklin, she left the nightclub and went home to Greeleyville, S.C., a drive of approximately 15 minutes. Franklin followed her home. When Conyers got inside her home, she heard a noise and looked outside, and Franklin was in her yard jumping up and down and telling the victim to come outside and face him. The victim ignored Franklin, and Franklin eventually left Conyers' yard. Conyers notified police, and Franklin was arrested for slapping Conyers. (R. 186-191; see also 177-83 [proffer]).

Just 2 weeks later, on October 3, 2020, appellant Franklin was at the apartment complex of a young woman he had been seeing by the name of Tykia Carson ("Carson"). Franklin was driving Carson's car. Franklin's own car was left parked at Franklin's residence on Bloody Bucket Road. Franklin drove Carson by a friend's home so Carson and the friend could go to a concert. According to Carson, the friend was still getting dressed and not ready, so Franklin drove Carson to the apartment complex where the victim's murder occurred, Lanue Floyd Village Apartments in Kingstree, S.C. (R. 38-47; State's Ex. 84; State's Ex. 1; R. 27-31; State's Ex. 76-80; R. 224-29).

On that date, October 3, 2020, a "setting up" for a memorial service [a wake] was being held in the parking lot and common area of Lanue Floyd Village Apartments. People were gathered there for the "setting up" of the memorial service. It was packed. There were adults, children, babies, and senior citizens there to comfort the family of an individual "auntie, Meg," who had

died recently. Among the people gathered for the memorial service was Quadree Wilson (“the victim”) and his 16-year-old sister Tysie Wilson (“Tysie”). The victim and his sister were standing with a group of people gathered in an area near the parking lot but in a common area of the apartment complex. (R. 42-46; 48-56: State’s Ex. 1; R. 27-31).

Carson testified that appellant Franklin drove her to the “setting up” in Carson’s car and parked in the parking lot near the group of people which included the victim and his sister. Franklin parked the vehicle so it was facing the apartment building, and as a result Carson could not see what was going on behind her. Franklin got out of the driver’s seat and walked to the group of people that included the victim and his sister which was behind Carson. Franklin left Carson’s car running with the lights on. Carson did not turn the car off. Carson remained in the car in the passenger seat on her phone. Carson then heard several gunshots and ducked. Franklin came back to the car and got back in the driver’s seat. Franklin backed out of the parking space, and Franklin then fled from the parking lot at a high-speed driving Carson’s vehicle. Carson saw blood on Franklin’s neck, and Franklin told her he had been grazed by one of the gunshots. Carson claimed Franklin did not say anything about the shooting and she did not see a gun. Carson testified Franklin then drove himself to Greeleyville, S.C. in Carson’s car and got out of the car. Carson then drove herself to the concert in her own car. The next day, Carson went to the police station and identified her car for the police on a surveillance video of the apartment complex at the time of the crime. (R. 39-46; 48-56; State’s Ex. 1 [surveillance video]; R. 27-31).

There was a surveillance camera which captured part of the incident. (State’s Ex. 1; R. 150-52). The surveillance video shows Franklin and Carson parking in Lanue Floyd Village Apartments in Carson’s car. Franklin parked the car pointed toward the apartment complex building as Carson testified. The surveillance video also captures Franklin getting out of the driver’s side of Carson’s

car, standing next to the driver's side for a few seconds, and then walking toward the group of individuals congregated in the upper left-hand corner of the surveillance video but just out of camera range. Franklin approaches the group from the backside of the group. Franklin left Carson's car running and its taillights are on. Several seconds go by after Franklin approaches the group, which included the victim and his sister, and gunshots are fired, and people begin to run, and the victim falls to the ground and into view on the surveillance video. According to the testimony before the jury describing the video, Franklin runs around a building and then returns to Carson's car and gets back into the driver's seat. Carson identified this man on the video as Franklin when interviewed by police and identified her vehicle in the video. Franklin then backs out of the parking space and is the first car to leave the apartment complex parking lot. As he is passing people who have fled from the shooting, a female who fled from the group where the shooting took place ducks down until the headlights of the Franklin's vehicle passes by; then the same female gets back up and goes back where the shooting took place. No other people in the area duck down when any other vehicle passes by when leaving the complex. (State's Ex. 1 [surveillance video]; R. 27-58; 150-52).

The autopsy determined that the victim was shot 8 times and died from several of those gunshot wounds. A pistol was found at the crime scene approximately 3 feet from the victim's hand on the ground which contained the victim's DNA on the trigger. A SLED firearms examiner testified in comparing a bullet from the victim's body to the gun found near the victim, that the victim was not shot with the firearm near the victim's hand but another firearm that was not found at the scene, i.e. a gun that was taken from the scene by the shooter. Numerous fired shell casings were found at the crime scene, 9, which were consistent with being fired by a firearm that was not the firearm recovered near the victim's hand, i.e. the shell casings were fired by the gun taken from

the scene. Another fired shell casing was found at the scene that was not fired by the gun that fired the other 9 shell casings but was inconclusive whether it was fired from the gun found near the victim. Victim's sister was killed by a bullet fragment that was so badly damaged that it could have come from the gun that was taken from the scene by the shooter or by the gun found near the victim's hand. It was inconclusive. However, it was clear from the evidence the victim was the target of the attack as he was shot 8 different times. (R. 31-38; 191-212; 169-76; 112-26; 242-48).

Zya Rose, who was also at the "setting up," was in the group of people that included the victim and his sister. Zya testified that the people in the group were making music and enjoying each other's company in a common area of the apartment complex. Zya testified she saw Franklin there at the setting up earlier in the day, but she could not be more specific. Zya testified that later, right before the victim was murdered, several of the men in the group she was standing in were making music or "a beat" with their hands when suddenly there were several seconds of silence. This would have been at the approximate time that Franklin walked up to the group after he returned to the apartment complex in Carson's car with Carson. After this moment of silence, Zya heard several gunshots go off, and she ran. She saw the victim's body on the ground. Zya testified she did not notice any "bad vibe" when Franklin returned to the complex in Carson's vehicle. But Zya did testify there were a few seconds of silence just before the victim was murdered. Zya testified that immediately after the shooting, the vehicle Franklin was driving then backed out of the parking space it was in and as it fled from the parking lot it almost hit Zya, and she had to dodge Franklin's vehicle [actually Carson's vehicle] to avoid getting hurt. Zya testified the vehicle was driving faster than it should have in the apartment complex. Later, other cars left the apartment complex before police arrived. (R. 48-58; 38-47; State's Ex. 1).

Franklin fled the area at a high rate of speed not only according to Zya but also according to Carson. Franklin was also wearing an ankle monitor with “GPS” tracking, which tracked Franklin’s path of flight from the crime scene immediately after the shooting and the speed at which he fled the crime scene. The GPS monitor showed Franklin was at the crime scene at the time of the murder, approximately 7:45 p.m., and then left the area traveling on Highway 37, M.L.K. Jr. Blvd., and Highway 521. According to the GPS report, on M.L.K. Jr. Blvd. Franklin was fleeing at 72, 73, and 76 m.p.h. And then on Highway 521, Franklin was fleeing at 95, 96, 98, and 105 m.p.h. Franklin drove at these high rates of speed to Greeleyville where he cut the ankle monitor off of his leg and fled to Cleveland, Ohio where he was later arrested by United States Marshalls. (R. 38-58; 216-17; 224, 227-29; 131; State’s Ex. 1; 76; 78; 79).

Franklin phoned his former girlfriend and his sister from the detention center in Cuyahoga County, Ohio, and from the Williamsburg County Detention Center after his return to South Carolina. In those phone calls, Franklin made incriminating statements to the person on the other end of the line. (State’s Ex. #76; 77; 78; 79; 80). In one call to Carson, Franklin stated:

I don’t, I don’t want you like, I ...don’t know man. I feel like it’s my fault if people hate you, well, I know it is, [unintelligible (it hurts?)], every time I think about it really wasn’t gonna be no way around this shit bruh. It was not gonna be no way around the shit cause if I woulda dropped you off at Quadesha’ house, I was really going to see my brother then I was going out there anyway, you feel what I’m saying, so this shit would have happened regardless girl, but it was meant for this shit to happen because there wasn’t no way around this shit bruh.

(State’s Ex. 80). In another call Franklin stated:

I ain’t knew this was gonna happen but now that I think bruh this junk happened, like it was meant for this junk, like, it wasn’t no way around this.

(State’s Ex. 77). In another call Franklin talked about hiding from police and the murder weapon:

If I woulda got up and went to McDonald’s like I was posed to that morning, bruh, I probably woulda met the bitches in the fucking parking lot or something like that. It wasn’t. If I woulda jumped out the window and tried to run they couldn’t shoot me though. And they ain’t have no, cause they ain’t even look for no gun, they ain’t found no gun, nothing like that boy. If I’d jump out that window; had it, I thought

they had it cause when dude put me in handcuffs, that little short white dude, he was walking in the house and he was meeting somebody who was coming out, he was like: "yeah, that right there seal the deal right there." So I don't, I thought he was talking about the gun but he musta been talking about me, cause like: "yep, that'll seal the deal right there." I swear to God, so I'm thinking he, they found the phone.

(State's Ex. 78). In talking about his escape from South Carolina, Franklin stated as follows:

Boy came through and ransack shit. They said they seen on my ankle monitor that I had been there for thirteen minutes. Cause like when I dropped myself off, I ain't even stay there long. Cause I went to go see my mama. And like I wasn't gonna do the shit bruh, I was not gonna cut my ankle monitor off bruh, but soon as I seen my mama bruh like she just starts . . . fuck's going on like them boys, them boys already knew what the fuck's going on before I even got to the [unintelligible.] Cause my sister Danielle was calling me when I was on the way, that's who I was on the phone... So that shit's really frustrating me out and God dammit I got to my mama and shit, she was spazzing on me all type of shit, crying and shit. I was just like, fuck it bruh, I got in my car and I left ... I left, I got on the four-wheeler and I left, I went to my mama and she started talking crazy so I went straight to my house, got in my car, and I just dipped, bruh like.

(State's Ex. 79). In talking about his arrest and hiding from police, Franklin stated as follows:

Cause I was with [unintelligible] like I was asleep but then when I heard you yell I was like, man, let me just go ahead and get up. You know, my plan was to goddamn whenever them boys come I was just gonna go on in one of them empty rooms. But shit, I couldn't even make it, boy. Bruh, I coulda beat them boys if I wasn't sleeping I coulda beat them boys, I coulda go right in one of them other apartments and just chill. I coulda really hid in one of them motherfucking cabinets or something cause they ain't really did shit, they just walked in that motherfucker. Saying shit, them boys ain't really did shit. I coulda got away, if I was up bruh I coulda got away, but ... And that's what I know they ain't got no evidence to go to trial, so they gonna try to get somebody to testify or whatever, bruh, you feel me so, that's most likely what they gonna try to do to you, get you to motherfucking come and tell something and if you don't tell nothing they gonna try to hit you with, oh, well you hiding a fugitive and this, that, and the third; this, that, and the third ... Man, I been telling y'all boy, ever since I first told y'all that girl said I was in Cleveland, bro, I been know they was looking for me, that's why they, bro they started setting up roadblocks and shit, remember you talking about said damn there's a ass of police and shit. I ain't wanted to say the shit to scare you up but I already knew what the fuck.

(State's Ex. 76).

ARGUMENT I.

Judge Cothran did not err in denying the motion for a directed verdict

What occurred below

At the conclusion of the case, Franklin moved for a directed verdict. (R. 230-231). Franklin argued there was no “substantial circumstantial evidence” to support the charge of murder or the weapon charge. (R. 234, ll. 8-10). The State responded there was substantial circumstantial evidence of murder and the gun charge and pointed out that evidence. (R. 231, ln. 21-234, ln. 7). Judge Cothran found that although there was no direct evidence, the State had presented substantial circumstantial evidence of Franklin’s guilt sufficient to overcome the motion for a directed verdict. (R. 234). Judge Cothran cited to evidence that Franklin was proven to be present at the scene of the crime, he left the scene “at a high rate of speed...He cut his ankle monitor off so he could not be tracked” by authorities. He made statements on the jail telephone conversations about – that the police didn’t find his gun, as well as it [the murder] was intended to happen. (R. 234, l. 23 – 235, l. 7). Furthermore, as will be discussed, there was additional substantial circumstantial evidence of Franklin’s guilt that supports the denial of the motion for a directed verdict.

Standard of Review

On appellate review, the denial of a directed verdict motion in a criminal case is reviewed under an any evidence standard. State v. Cain, 419 S.C. 24, 33, 795 S.E.2d 846, 851 (2017). “If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the Court must find the case was properly submitted to the jury.” State v. Harris, 413 S.C. 454, 457, 776 S.E.2d 365, 366 (2015)(emphasis added). “When reviewing a denial of a directed verdict, this [c]ourt views the *evidence and all reasonable inferences* in the light most favorable to the state.” Id. (emphasis added). “It is the trial court’s duty to submit the

case to the jury where the evidence is circumstantial, if there is any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced.” State v. Childs, 299 S.C. 471, 477, 385 S.E.2d 839, 843 (1989). In a circumstantial evidence case, the trial court is **not** required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis before denying a motion for directed verdict. State v. Cherry, 361 S.C. 588, 594, 606 S.E.2d 475, 478 (2004). "The appellate court may reverse the trial judge's denial of a motion for a directed verdict only if there is no evidence to support the judge's ruling." State v. Zeigler, 364 S.C. 94, 103, 610 S.E.2d 859, 863 (Ct. App. 2005)(citing State v. Gaster, 349 S.C. 545, 564 S.E.2d 87 (2002)). On appeal, the Court is limited to determining whether the trial judge abused his discretion. State v. Reed, 332 S.C. 35, 43, 503 S.E.2d 747, 751 (1998); State v. Douglas, 367 S.C. 498, 506, 626 S.E.2d 59, 63 (Ct. App. 2006)

Law/Analysis

Murder is the unlawful killing of another with malice aforethought. *S.C. Code Ann.* Section 16-3-10. Murder is a violent crime. The State produced substantial circumstantial evidence of Franklin’s guilt of the victim’s murder and of possession of a weapon during a violent crime.

First, the State produced evidence of Franklin’s malice toward the victim. Raneisha Conyers testified to the prior bad blood, animosity, and difficulties between Franklin and the victim. Conyers testified that Franklin and the victim had been “beefing” since high school, a period of about 3 years. Conyers also testified that just 2 weeks before the victim’s murder, she was at a nightclub in Salters, S.C. and Franklin approached her outside the club and slapped her. Franklin then told her that: “Quadree [the victim] is next.” Franklin then followed Conyers home, a drive of approximately 15 minutes, and stood outside her home and called out to the victim for

the victim to come outside and face Franklin. Conyers testified the victim did not go outside leaving the conflict unresolved and the threat from Franklin still outstanding. (R. 184-91).

As a result, the State proved there was prior bad blood and ill will between the parties, and Franklin had ill will toward the victim and had even threatened him and the threat remained outstanding. (R. 184-191). Blakely v. State, 360 S.C. 636, 602 S.E.2d 758 (2004)(testimony defendant had threatened the victim before the crimes is admissible to show malice toward the victim); State v. Cooley, 342 S.C. 63, 536, S.E.2d 666 (2000); State v. Beck, 343 S.C. 129, 536 S.E.2d 679 (2000)(A defendant's threats to injure or harm the victim are not necessarily prior bad acts that fall under Rule 404(b) but are independent evidence admissible to show malice, the defendant's criminal intent, and the defendant's state of mind under Rule 401 and 402, SCRE).

The State also proved the killing of the victim itself was malicious. (R. 191-212). The victim was shot 8 different times to his body resulting in his death. (R. 191-212). *See* State v. Smith, 337 S.C. 27, 522 S.E.2d 598 (Ct. App. 1999)(in murder and ABWIK prosecution, fact that defendant had previously been convicted for CDV against victim and made prior threats to kill the victim with a pistol, was admissible to refute defendant's claim the shooting was an accident); State v. Key, 277 S.C. 214, 284 S.E.2d 781 (1981)(that defendant had threatened victim with a pistol on 2 or 3 different occasions was admissible in prosecution for ABHAN to show absence of mistake or accident in shooting the victim). This was no accidental shooting. The victim was shot in the head, the back, the shoulder, and the legs showing a specific intent to kill the victim without just cause or excuse. State v. Fennell, 340 S.C. 266, 531 S.E.2d 512 (2000)(malice is hatred, ill-will, or hostility toward another person; a wrongful intent to injure another person indicating a wicked or depraved spirit intent on doing wrong; a formed purpose and design to do a wrongful act without legal justification or excuse). Further, the victim was shot 8 times while standing in the

middle of a large crowd gathered for a wake, which included women, children, and the elderly, showing a total disregard for the lives and safety of others. (R. 27-58). State v. Harvey, 220 S.C. 506, 68 S.E.2d 409 (1951) *overruled on other grounds by* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991)(malice does not necessarily import ill-will toward the individual injured, but signifies a general malignant recklessness toward the lives and safety of others, or a condition of the mind that “shows a heart regardless of social duty and fatally bent on mischief.”).

The State also proved the victim was killed and it was an unlawful killing. The pathologist testified the victim died from the multiple gunshots fired into his body. (R. 191-212). And the firearms examiner testified the victim was not killed by the gun found near the victim’s hand, i.e. he did not shoot himself, but was shot by another weapon that was taken from the crime scene after the killing by the shooter. (R. 112-26). That gun fired 9 of the casings found at the crime scene. (R. 112-26). No witness testified the victim did anything to provoke his shooting, in fact everyone was there at the “setting up” just enjoying themselves and comforting the family of Auntie Meg. (R. 38-58). No witness at the scene testified the shooting of the victim was in self-defense. (R. 38-58). The victim had not threatened Franklin in the past. Franklin did not testify and claim the shooting was in self-defense. In fact, it was Franklin who came to the shooting, armed with a firearm, a loaded firearm, and approached the victim on foot after threatening the victim just 2 weeks earlier, calling the victim out of his girlfriend’s apartment to face him 2 weeks earlier, and after “beefing” with the victim for about 3 years. (R. 38-58; 184-91; State’s Ex. 1). And, it was Franklin who drove a car to the crime scene that could not be traced to him, when he had his own car parked somewhere else, got out of the driver’s side of Carson’s car, walked directly to where the victim was standing, fired at least 9 shots with a semi-automatic pistol, 8 of which went in the victim’s body, and then returned to Carson’s car and re-entered the driver’s seat. (R.

38-58; State's Ex. 1[surveillance video]; R. 112-26; State's Ex. 79 [jail phone call where Franklin explains he later got in his own car and fled the State]).

Finally, the State proved by substantial circumstantial evidence that Franklin was the shooter/the killer. First, the State proved Franklin had the motive to kill the victim. Franklin had "beefed" with the victim since high school. Just 2 weeks before the victim's murder, Franklin had slapped the victim's girlfriend and threatened the victim. State v. Sweat, 362 S.C. 117, 606 S.E.2d 508 (Ct. App. 2004)(prior bad acts are admissible under Rule 404(b) to prove identity of the perpetrator). Franklin stated to the victim's girlfriend after slapping her to tell the victim that he was next. Sweat. Franklin then followed the victim's girlfriend home from the night club to the victim's girlfriend's home, a drive of 15 minutes, and called the victim out of the girlfriend's home to face him. The victim refused to come outside leaving the threat still outstanding. (R. 184-91). Sweat, 362 S.C. 117, 606 S.E.2d 508 (prior difficulties between the parties are admissible to prove motive and identity); Cooley, 342 S.C. 63, 536 S.E.2d 666 (evidence that accused and decedent had previous difficulties are admissible); State v. Taylor, 333 S.C. 159, 168, 508 S.E.2d 870, 874 (1998)(prior difficulties between the parties are admissible to show animus between the parties, motive, state of mind, etc.); State v. Clinkscales, 231 S.C. 650, 99 S.E.2d 663 (1957).

Prior disputes between the victim and defendant may be relevant to establish the accused's motive for committing the crime **and motive may have bearing on the identity of the accused as the perpetrator of the crime.** State v. Atkins, 303 S.C. 214, 399 S.E.2d 760 (1990) (testimony regarding prior disputes between white defendant and family of black victim, one of which involved defendant's flying the Confederate flag on Independence Day, was relevant to motive and admissible); State v. Plyler, 275 S.C. 291, 270 S.E.2d 126 (1980) (testimony concerning a verbal altercation between victim and defendant prior to the murder was admissible as evidence of accused's motive **and** related to **defendant's identity as perpetrator**).

State v. Braxton, 343 S.C. 629, 636–37, 541 S.E.2d 833, 836–37 (2001)(emphasis added).

On October 3rd, just 2 weeks after threatening the victim and calling him out of his girlfriend's home, Franklin drove his girlfriend's car to a "setting up" where the victim was located. Franklin had already been there earlier in the day, left, and returned in Carson's car. Franklin parked his girlfriend's car facing the apartment complex but left the engine running and the lights still on. Franklin did not drive his own car which was parked at his residence. Instead, he drove a car that could not be traced to him. At the setting up, Franklin got out of driver's side of Carson's car and walked directly to where the victim was standing in a group of people there to pay their respects to Auntie Meg's family. Franklin's ankle GPS monitor established he was at the crime scene at the time of the murder. Carson stayed in the car.¹ At the approximate time Franklin reached the victim and the group of people congregating and having a good time, there was a brief moment of silence, and then multiple gunshots [at least 9] were fired at the victim, 8 of which were fired into the victim, whom Franklin had threatened previously just 2 weeks before. Several of the gunshots were fired into the victim's back and head. (R. 38-58). The circumstantial evidence showed the victim *may* have been carrying a gun as protection from Franklin, who previously threatened him, and may have gotten off 1 shot in self-defense. However, this evidence was inconclusive. After shooting the victim 8 times, Franklin then hurried back to Carson's car and re-entered the driver's seat. Franklin had blood on his neck and said he had been grazed by a gunshot. Franklin backed up and hurriedly fled the crime scene, almost striking 1 witness when he was leaving the apartment complex and causing another witness to duck down. (R. 38-58; State's Ex. 1: R. 184-91; 151-152).

¹ Carson testified that she and Franklin were at the setting up about 20 minutes before the shooting occurred. (R. p. 41, ln. 19). This is not correct. The surveillance video and the GPS monitor showed Franklin and Carson were only at the "setting up" for about 3 minutes. Long enough for Franklin to walk over to the victim, who he had beefed with and threatened, and shoot the victim multiple times and leave. (State's Ex. 1 & State's Ex. 84).

Franklin then fled from the crime scene on M.L.K. Jr. Blvd and then onto Highway 521 at a high rate of speed driving Carson's car. Franklin did not drive to a hospital or a police station even though he claimed he had been grazed by a bullet, and if believed could have been a victim. Instead, Franklin did not stop fleeing the crime scene in Carson's car until he reached his home and then his mother's home in Greeleyville, S.C. Franklin then switched vehicles. Franklin cut off his G.P.S. monitor so he could not be tracked **by authorities**, got in his own car which he did not drive to the murder, and fled the State of South Carolina not stopping until he reached Cleveland, Ohio. (R. 38-58; State's Ex. 1 [surveillance video]; R. 130-31; State's Ex. 79 [phone call in which Franklin admits the order of his flight and that he cut off his ankle monitor]).² Flight is evidence of guilt. State v. Grant, 275 S.C. 404, 407, 272 S.E.2d 169, 171 (1980); State v. Beckham, 334 S.C. 302, 310, 513 S.E.2d 606, 610 (1999)(evidence of flight has been held to constitute evidence of guilty knowledge and intent); State v. Crawford, 362 S.C. 627, 635, 608 S.E.2d 886, 890 (Ct. App. 2005). Franklin was arrested in Cleveland by United States Marshalls.

Franklin also made admissions in several jail phone calls that indicate he was the shooter in the victim's murder and why he fled South Carolina immediately after the shooting. (State's Ex. 76, 77, 78, 79, 80). Franklin told Carson that he was sorry that people hated her [presumably because he used her car and she was there], and he knew it was his [Franklin's] fault [because Franklin committed the crime], but Franklin admitted the murder of the victim was going to happen anyway. (State's Ex. 80). Franklin stated that even if he had dropped Carson off at Quadesha's house, he, Franklin, was going to see his brother and then eventually Franklin was going to go "out

² Friends of the victim who might want to shoot Franklin could not track him with the GPS system that only DPPPS and law enforcement had access to. Franklin cut the GPS monitor off so police could not locate him and arrest him for this murder.

there” [to the setting up/the crime scene] anyway, so “this shit” [the murder] “would have happened regardless girl.” (State’s Ex. 80). Franklin explained: so “this shit” [the murder] was going to happen because it was meant for it to happen because there was no way around it. (State’s Ex. 80).

Franklin admitted in yet another phone call that he was aware of the murder weapon and afraid the police had found the murder weapon:

If woulda jumped out the window and tried to run they couldn’t shoot me though. And they ain’t have no, cause they ain’t even look for no gun, they ain’t found no gun, nothing like that boy. If I’d jump out that window; had it, I thought they had it cause when the dude put me in handcuffs, that little short white dude, he was walking in the house and he was meeting somebody who was coming out, he was like: “yeah, that right there seal the deal right there.” So I don’t, I thought he was talking about *the gun* but he musta been talking about me, cause like: ‘yep, that’ll seal the deal right there.’ I swear to God, so I’m thinking he, they found the phone.

(State’s Ex. 78)(emphasis added).

Franklin admitted in yet another phone call that the police were on to him early because of the GPS monitor and knew exactly where he was and when, before he cut the ankle monitor off and fled the State:

Boy came through and ransack this shit. They said they seen on my ankle monitor that I been there for thirteen minutes. Cause when I dropped myself off, I ain’t even stay there long. Cause I went to go see my mama. And like I wasn’t gonna do the shit bruh, I was not gonna cut my ankle monitor off bruh, but soon as I seen my mama bruh like she just starts . . . fuck’s going on like them boys, them boys already knew what the fuck’s going on before I even got to the [unintelligible]. Cause my sister Danielle was calling me when I was on the way, that’s who I was on the phone . . . So that shit’s really frustrating me out and godammit I got to my mama and shit, she was spazzing on me all type of shit, crying and shit. I was just like, fuck it bruh, I got in my car and I left . . . I left, I got on the four-wheeler and I left, I went to my mama and she started talking crazy so I went straight to my house, got in my car, and I just dipped, bruh, like.

(State’s Ex. 79). Regarding the shooting and murder, Franklin also stated in another call:

I ain’t knew this was gonna happen but now that I think bruh this junk happened, like it was meant for this junk, like, it wasn’t no way around this.

(State’s Ex. 77). Regarding his arrest in Ohio, Franklin stated that he would have fled again if he had not been sleeping when U.S. Marshalls arrived, and he would have avoided arrest again if he

had been awake. (State's Ex. 76). And, Franklin told the person he was talking to that the State was going to try and intimidate that person into testifying against Franklin with harboring a fugitive charges, so the witness should be wary, and he, Franklin, knew police were looking for him in Cleveland, Ohio. (State's 76).

Based on all of the evidence presented, viewing that evidence and all inferences in the light most favorable to the State, there was more than substantial circumstantial evidence that Franklin committed the murder of the victim and possessed a weapon during the commission of a violent crime to submit the case to the jury. Cain; Harris. The State presented sufficient evidence of each of the elements of the crimes of murder and possession of a weapon during a violent crime, and Judge Cothran did not abuse his discretion. Therefore, there is no merit to this appellate ground, and Franklin's convictions and sentences must be affirmed. Cain; Harris.

ARGUMENT II.

The admission of the miles per hour Franklin was traveling early in his flight in South Carolina did not affect the outcome of the trial and was harmless beyond a reasonable doubt given the other evidence of Franklin's guilt presented and Franklin stipulated to the admissibility of his location at the crime scene at the time of the crime, to his locations and times at those locations during his flight inside South Carolina, and to his cutting off his ankle monitor and fleeing to the State of Ohio where he was later arrested by U.S. Marshalls; and there was other evidence he fled the scene at a high or excessive rate of speed.

What occurred below

At trial, the State intended to introduce the testimony of David Lake, formerly of the Department of Probation, Parole, and Pardon Services (DPPPS), regarding Franklin's location and movements at the time of the crime and his flight after the crime as determined by Franklin's Global Positioning System ("GPS") ankle monitor. Franklin was on parole for 2 counts of kidnapping and was wearing a GPS monitor on his ankle at the time of the crime and as he fled from the crime

scene.³ (R. 6-14; 282-83). Franklin moved for a proffer of Lake's testimony. (R. 212-13). Lake testified he was a former agent with DPPPS. His position was agent in charge of the Division of Intelligence Tracking and Communications. He monitored events occurring regarding those individuals wearing GPS monitors. Lake testified Franklin was wearing a GPS monitor on October 3, 2020, the date of the crime, and was being monitored by Lake. (R. 213-14).

Lake testified to his knowledge about the operation of the GPS technology utilized by DPPPS. He testified the GPS monitors are designed to try to get a GPS point every minute of the day, and the GPS points or coordinates were delivered to a server 4 times an hour. (R. 214). Lake admitted several things can affect the accuracy of the GPS data but that did not occur here given the number of satellites involved in tracking Franklin. (R. 218). Lake testified the GPS equipment used regarding Franklin has 12 satellites in orbit around the earth that can "see" or pick up the signal of the GPS ankle monitor, and you need only 3 satellites to obtain GPS points or coordinates to get a position that will be registered on the report that is generated. He testified Franklin's position at the crime scene at the time of the murder was generated by 8 different satellites that recognized the monitor Franklin was wearing and its location at that time. Lake testified the greater the number of satellites that see the device, the more accurate the device is. (R. 218-19).

Lake testified DPPPS monitored about 750 to 800 people statewide wearing GPS monitors. The individuals are monitored 24 hours a day. The staff monitors any and all events that occur regarding individuals wearing GPS monitors. (R. 213-14). Lake testified individuals wearing GPS monitoring are given a number of conditions regarding GPS monitors. They are not allowed to remove the GPS monitor. There are also other conditions. Some individuals may have a curfew;

³ The jury was not told of Franklin's prior criminal record only that he was being monitored with an ankle GPS monitor on the date of the crime. (R. 6-14)

others may not. An individual may be directed to be at a certain place at a certain time such as their home. An exclusion zone may also be drawn around certain areas in which the monitored individual is not allowed to go. The GPS monitor can be tailored to each individual being monitored. And the individual is required to charge the unit and keep it operable. (R. 214-15).

Lake testified he made specific findings in his report, State's Ex. 84. First, Lake found Franklin removed his GPS monitor on October 3, 2020, the date of the murder. Lake also found there were a number of GPS points/coordinates generated by the GPS monitor and satellites which monitored it that tracked Franklin's movements on October 3, 2020. Lake testified there was movement from location to location by Franklin along with the final location where the device was found by a DPPPS agent after Franklin removed the GPS monitor from his ankle. (R. 216).

Lake testified he monitored Franklin on the date of the murder and also generated a report regarding the GPS monitoring of Franklin. Lake testified a report is generated anytime there is a violation of the GPS monitor. Lake identified the report as State's Exhibit 84. Lake testified that the GPS monitoring showed Franklin was in the vicinity of the crime scene at 7:43 p.m., 7:44 p.m., and 7:45 p.m., which was the time of the murder. Lake testified Franklin stayed in the vicinity of the crime scene for 3 minutes. Lake also testified Franklin then left the crime scene on Highway 37, also known as M.L.K. Jr. Blvd., and then got onto Highway 521. (R. 216-17).

Lake also testified to and his report showed the GPS system recorded Franklin's speeds as he fled from the scene. On M.L.K Jr. Blvd, Franklin was driving 72, 73, and 76 m.p.h. And then on Highway 521, he was traveling at 96, 98, and 105 m.p.h. (R. 187).

Lake also testified that after Franklin drove the above routes, the GPS device showed Franklin traveled to a location off of Bloody Bucket Road. Franklin spent about 13 minutes there from 7:58 p.m. to 8:11 p.m. Franklin then traveled to a location in Greeleyville, S.C., where at

8:21 p.m. he cut the device off of his leg. A DPPPS agent recovered the device there later. (R. 217, ll. 18-24).

On cross-examination, Lake testified that many things can affect the accuracy of the GPS monitoring; however, in this case, as noted on the report that was generated, there are a number of satellites that are floating across the earth at any one time. The owner of the GPS equipment is Behavioral Interventions, and they have about 12 satellites that track the ankle monitor. Lake testified you need 3 satellite GPS points or coordinates to get a dot on the report showing where the device was located. When Franklin was at the crime-scene, there were 8 satellites picking up the GPS signal coordinate of the device. Franklin testified that the greater the amount of satellites, the more accurate the device is. And so, with 8 satellites picking up the GPS ankle monitor, if you go through the report, point-by-point-by point looking at the number of satellites that picked up its signal, 2 make it accurate but more than 3 make it even more accurate. (R. 218-19).

On cross-examination, Lake explained the screen shots in his report showing a specific location of Franklin's GPS monitor at a specific time were not generated by him but by the software DPPPS uses with the GPS monitor. The software with the GPS device generates the specific location [green dot] on the screen shot. (R. 219). Franklin then testified as follows:

Q: And I think what I am getting at is when you were stating how many miles per hour he was traveling, if the accuracy is off - - I'm assuming it measures this point to this point, and when he reaches this point how far he had to travel to there; is that correct?

A: You are asking me a technical question that I'm not exactly sure. I can't answer.

Q: Okay. So – okay. So you don't know how the machine generates the miles per hour?

A: No, I don't.

Q: What you do know is that he was at a certain address at a certain time?

A: Yes.

Q: At 7:43?

A: Yes, ma'am. At that general area that those points came on the report, yes.

Q: And you do know that his monitor stopped sending a signal at a certain time?

A: It didn't stop just because he cut it off. We get an alert call of a strap tamper. So when the agent gets the alert, we take a number of steps to try to contact the offender, usually by cell phone, if we have that. We can send signals to the device itself. But, usually, when a strap tamper occurs, in this case at 8:21 p.m., the device would still continue to get one point every single minute. That's how we found it in the first place. Does it make sense? So the device doesn't stop working because he cut it off.

Q. So you are able to say when the device stopped working?

A. When the strap was cut. There is a little fiberoptic light that goes around the strap. When that light was disturbed by cutting the device off, it sends the alert, and that was at 8:21 p.m. the device itself was still powered up and working and picking up points until the agent recovered it and cut it [turned it] off.

(R. 219, ln. 22 – R. 221, ln. 10).

After the conclusion of the proffer, Franklin did not object to Lake testifying about Franklin's location at different times based on the GPS ankle monitor he was wearing and at what time he was at a specific location. Franklin also did not object to Lake testifying to where Franklin was located when he cut the monitor off his leg and where the monitor was recovered by DPPPS. (R. 221-22; IBOA) Franklin moved that Lake be prohibited from testifying about speed. (R. 221-22). He argued Lake lacked the knowledge or failed to demonstrate any knowledge of how the GPS device was able to transmit what speed Franklin was traveling. Since he did not have knowledge of how that data was transmitted to generate a m.p.h. speed, that evidence should not come in, and Franklin could not cross-examine Lake on that issue. (R. 28-29). The trial court held:

The issue is whether he's an expert and qualified as an expert. Nobody tried to qualify him as an expert in this, but . . . he's testifying as to what his tracking device shows and what his speed shows. It is just like a patrolman testifying about his radar and how fast he's clocking somebody. Just because I can run a radar and clock a speed, he's not an expert in how the radar works and how it's put together. He's not testifying to that . . . so I think the evidence is admissible. You can argue to the jury the weight of the evidence, whether it is accurate or not. And so – he didn't testify it is accurate. He's just testifying as to what he is observing as he is tracking it, just like a patrolman running a radar . . . you can always argue that the

machine could be wrong, you know, not necessarily correct. I don't think he has to be an expert to testify. He's not trying to explain how it works. To explain how it works, he may need to be qualified as an expert, how the machine is put together.

He is testifying that he's tracking somebody. This is what the tracking showed, just like Google Maps of you tracking one of your family members. You don't have to be an expert on how Google works to do the tracking, and the jury can take it and give it whatever weight it is deemed, and you can argue that, but I think it is admissible.

(R. 222, ln. 12 - 223, l. 16 (emphasis added)).

The State then called Lake to testify before the jury. He testified he was formerly employed with DPPPS in charge of the Intelligence Tracking and Communications Center. He worked there for 5 years between 2017 and 2022. His primary responsibility was GPS monitoring of subjects. He testified there were 800 or so subjects that DPPPS monitored statewide, and those subjects are monitored 24 hours a day. Lake was employed on October 3, 2020, the date of the murder, and he tracked Franklin on that date who was wearing a GPS ankle monitor. (R. 224-25).

Lake explained to the jury that the GPS monitor is a device that is typically strapped around someone's ankle. The device itself "is like a cell phone" in that it can get a GPS point from satellites that float above the earth, and the GPS device also has an actual cell phone inside, so it has cellular coverage. Some of the devices have WiFi coverage as well. So those individuals that are placed on GPS monitoring usually have a standard set of rules they have to follow. Sometimes the court imposes additional rules. Some of the rules would be to charge the device, make sure it has power, and not to cut the device off. The GPS ankle monitor allows DPPPS to see where a person wearing a monitor is at all times. (R. 225-26). Lake testified the GPS monitor and the satellites that support it attempt to pick up 1 satellite point, GPS coordinate, or location on earth, every minute of the day, which is 1,440 minutes in a 24-hour period. (R. 226). Then 4 times an hour, every 15 minutes, the system makes a telephone call and delivers that minute by minute location data to the servers. (R. 226). Any DPPPS staff member across the State can pull up the

software and see where that GPS monitor is at all times. (R. 226). Lake testified there are dozens and dozens of alerts that GPS units will provide to the software. Some of those alerts are really nominal alerts that have to do with whether or not the system can pick up a GPS point, similar to when a cell phone drops a call. (R. 226). Other alerts are causes for concern, like if a subject being monitored were to go to an exclusion zone or not be home at curfew or cut a device off of their leg. Those alerts cause Lake's staff to contact the DPPPS staff in the field to address that alert. (R. 226-27). Lake testified reports are generated or associated with GPS alerts. Some of those alerts can be considered probation violations. Lake testified he prepared and generated a report in this case which was marked and identified as State's Ex. 84. (R. 227). He testified that at 7:43 p.m., 7:44 p.m., and 7:45 p.m. on the date of the murder, Franklin was in-the-area of the crime scene. (R. 227). Lake testified the location was determined by GPS software called BI, Behavioral Interventions, which uses about 12 satellites floating over the earth. To get a satellite point, the GPS device needs at least 3 satellites to be picking up the GPS monitor to get a point that is considered accurate. The more satellites between 3 and 12 that obtain a GPS point from the ankle monitor the more accurate the GPS point is. (R. 228). Lake testified that in this case there were 8 satellites which obtained GPS points from Franklin's ankle monitor so it is very accurate. (R. 228). Lake testified that after 7:45 p.m. on the night of the murder, Franklin traveled away from the area of the crime scene at a high rate of speed. He eventually went to an area called Bloody Bucket Road around 7:58 p.m. to 8:11 p.m., and stayed there about 13 minutes. After 8:11 p.m., Franklin traveled to a location on Gibson Road in the area of Greeleyville, S.C. At 8:21 p.m., while at that location, Franklin cut the GPS device off his ankle. (R. 228).

Lake also testified before the jury that the GPS device tracks speed as well. (R. 228). Lake testified that it is typical to have those speeds in the report generated when there is an alert. (R.

228). Lake testified that it is typical for every single satellite GPS point that the satellites pick up, the GPS software will show you a speed that the GPS device was traveling. The device will show zero (0) if someone wearing a monitor is sitting at home, and it will show the speed a person wearing the monitor is traveling if moving as fast as a car can go. (R. 228-29).

Lake testified that after Franklin left the crime scene area, the GPS device recorded 3 points on Highway 77, also known as M.L.K. Jr. Blvd. The device showed Franklin was traveling at 71, 73, and 76 m.p.h.. Lake testified the device showed that on Highway 521, Franklin was traveling at 95, 96, 98 and 105 m.p.h. (R. 229). The GPS monitor was discovered at the location the monitor was cut off. Franklin did not cross-examine Lake about any of his testimony. (R. 229).

The State also established through witness' testimony that Franklin fled the crime scene at a high rate of speed. (R. 58; 43). Zya Rose testified Franklin was driving at a speed he should not have been driving when he fled the apartment complex immediately after the shooting. (R. 58). Carson testified Franklin was driving "kinda fast" when fleeing to Greeleyville immediately after the murder. (R. 43).

Because Franklin cut the GPS monitor off on October 3rd in Greeleyville, S.C., the State proved Franklin's flight from South Carolina to Ohio by other evidence than the GPS monitor. (R. 130-33; State's Ex. 76-80). The case investigator testified to Franklin's flight from the State after removing the GPS monitor and to his arrest in Ohio by U.S. Marshalls. (R. 130-33). Franklin's jail calls also established his flight from South Carolina and arrest in Ohio. (State's Ex. 76-80).

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. Brown, 424 S.C. 479, 487, 818 S.E.2d 735, 739-40

(2018)(quoting State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (2006) (citations omitted). “An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.” Brown, 424 S.C. at 487, 818 S.E.2d at 739-40 (again quoting Douglas, at 429–30, 632 S.E.2d at 848 (citations omitted)).

Law/Analysis

First, Franklin alleges a Confrontation Clause violation in the admission of the GPS ankle monitor speeds. (IBOA). Franklin’s Confrontation Clause argument has no merit. *See State v. Brewer*, 438 S.C. 37, 48, 882 S.E.2d 156, 162 (2022); Crawford v. Washington, 541 U.S. 36, 61 (2004); Michigan v. Bryant, 562 U.S. 344, 359 (2011); Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009); Bullcoming v. New Mexico, 564 U.S. 647 (2011); State v. Brockmeyer, 406 S.C. 324, 751 S.E.2d 645 (2013); State v. English, 443 S.C. 49, 902 S.E.2d 385 (2024).

The GPS monitor and the information it generates is not hearsay because it is not an out-of-court statement of or by a person. Commonwealth v. Thissel, 910 N.E.2d 943, 946 (Mass. App. 2009)(GPS maps and logs are not hearsay because they are not an out of court statement of a person but generated by a device); *See also United States v. Washington*, 498 F.3d 225, 239 (4th Cir. 2007)(information generated by a machine is not hearsay because it is not a statement of a person); People v. Rodriguez, 224 Cal.Rptr.3rd 295, 314 (Cal. Ct. App. 2017)(the computer generated report of GPS data generated by the defendant’s ankle monitor were not statements of “a person” and therefore were not hearsay; the ankle monitor sent signals of the defendant’s location to the GPS; which automatically generated the computer data about the defendant’s location at the specific dates and times, so that there was no statement being made by a person regarding the data information so recorded); Carter v. State, 684 S.W.3d 311 (Ark. App. 2024)(GPS data pulled from defendant’s truck was not a statement at all, was not testimonial, and did not

violate Confrontation Clause). Since there was no hearsay, and defendant did not contend so at trial, there was no Confrontation Clause violation. Id.

Additionally, the GPS data and report fall under well-recognized hearsay exceptions so there is no Confrontation Clause violation even if this Court somehow considered the GPS data or report hearsay. The Thissel Court also found that even if the GPS evidence was considered hearsay, it was admissible as a business record. Thissel, 910 N.E.2d at 946 (It can be inferred that the GPS documents were made in good faith and in the ordinary course of business of the probation department, whose duty it was to supervise the defendant's probation, including the monitoring of his location by means of the GPS device). And, in State v. Jackson, 748 S.E.2d 50 (N.C. Ct. App. 2013), the Court found the data compilation of the GPS ankle monitor stored on a secure device which gained its information from satellites and cell phone triangulations was a data compilation and the exhibits used at trial were merely extractions of that data and the police sergeant's testimony at trial, similar to Lake's testimony in this trial, established a sufficient foundation of trustworthiness for the tracking evidence to be admitted as a business record. Id. at 55-56.

Further, Rule 901 (b), (7) SCRE provides as follows:

Public Records or Reports: Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

Rule 901(b)(7), SCRE. Under *S.C. Code Ann.* Section 23-3-540(P), which defines active electronic monitoring device, DPPPS is required to monitor offenders and the device utilized is required to actively monitor and "record a person's location at least once every minute twenty four hours a day..." Therefore the record of Franklin's movements by use of the GPS device report (State's Ex. 84) could be considered a public record authorized by law. *S.C. Code Ann.* Section

23-3-540(P) *c.f.* State v. Anderson, 386 S.C. 120, 130-131, 687 S.E.2d 35, 40 (2009)(noting the fingerprint records of every person arrested were submitted to SLED and maintained by SLED pursuant to the statute, and the fingerprints are stored in AFIS for every ten print card in South Carolina; therefore, Anderson’s fingerprint card was authenticated as a public record pursuant to Rule 901(b)(7), SCRE). Therefore, there is no Confrontation Clause violation.

Finally, on this issue, the GPS data recorded is not testimonial. United States v. Brooks, 715 F.3d 1069, 1079–80 (8th Cir. 2013). The crucial inquiry is whether the record was “created ... for the purpose of establishing or proving some fact *at trial*.” Melendez–Diaz, 557 U.S. at 324, 129 S.Ct. 2527 (emphasis added); *see also* Bullcoming, 131 S.Ct. at 2720 (Sotomayor, J., concurring) (“To determine if a statement is testimonial, we must decide whether it has ‘a primary purpose of creating an out-of-court substitute for trial testimony.’ ”) (quoting Michigan v. Bryant, 131 S.Ct. 1143, 1155 (2011)). Moreover, the Court has specifically held that certain statements obtained in the course of a law enforcement investigation may nonetheless be non-testimonial. *See* Bryant, 131 S.Ct. at 1166 (holding that shooting victim's statements to police regarding his shooting were non-testimonial statements because police “solicited the information necessary to enable them to meet an ongoing emergency” (citation and internal quotation marks omitted)); Davis v. Washington, 547 U.S. 813, 826–27, 126 S.Ct. 2266 (2006) (victim's statements to a 9–1–1 operator were non-testimonial as they “were necessary to be able to resolve the present emergency” (emphasis omitted)). In Brooks, the GPS tracking reports similarly were used to track Brooks in an ongoing pursuit. Although the reports ultimately were used to link him to the bank robbery, they were not *created* for this purpose as Brooks contended. In other words, unlike the chemical analysis report in Melendez–Diaz or the blood alcohol report in Bullcoming, the GPS reports were not created to establish some fact at trial. Instead, the GPS evidence was generated

by the credit union's security company for the purpose of locating a robber and recovering stolen money. Therefore, the Court in Brooks held the GPS reports were non-testimonial, and their admission did not violate Brooks's Confrontation Clause rights. *See also Carter v. State*, 684 S.W.3d 311 (Ark. App. 2024)(GPS data pulled from defendant's truck was not testimonial and therefore did not violate Confrontation Clause). As testified to by Lake, the primary purpose for generating this GPS monitoring data is to allow DPPPS to monitor those offenders on probation or parole subject or sentenced to electronic monitoring or to assist in their apprehension if they violate their probation or parole or the conditions of their electronic monitoring. Since the GPS data is not testimonial, there is no Confrontation Clause violation. Brewer; Crawford; Bryant; Melendez-Diaz; Bullcoming; Brockmeyer; English.

The issue before this Court is whether the speeds generated by Franklin's GPS ankle monitor were sufficiently authenticated. In Brown, 424 S.C. 479, 818 S.E.2d 735, the South Carolina Supreme Court noted that the main issue before that Court was whether Agent Powell's testimony that GPS records were used all the time in court was sufficient to authenticate the GPS records at issue in that case, which was location data. The Court held that the GPS records were not properly authenticated. The Court did not doubt that Agent Powell was a proper witness and likely able to lay the necessary foundation. But in terms of establishing the accuracy of the GPS records in that case, location data, Agent Powell simply observed the GPS records are accurate because "[w]e use it in court all the time." The Court held such a response provided no assistance in assessing the accuracy of the GPS records. Without this component of authentication satisfied, it was error to admit this evidence.

The Brown Court noted that it is black letter law that evidence must be authenticated or identified in order to be admissible. *See State v. Rich*, 293 S.C. 172, 173, 359 S.E.2d 281, 281

(1987)(noting prior to the adoption of the rules of evidence that an exception to the hearsay rule does not “absolve the offering party from the usual requirements of authentication”). The Brown Court noted that upon adoption of the SCRE, this common law rule was codified at Rule 901, SCRE. See State v. Anderson, 386 S.C. 120, 128–132, 687 S.E.2d 35, 39–41 (2009). This Rule specifically provides, “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. In addition, the Rule contains *examples* of “authentication or identification conforming with the requirements of this rule.” Rule 901(b), SCRE. The Brown Court noted the method at issue there was:

(9) *Process or System*. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

Rule 901(b)(9), SCRE.

The Brown Court noted the State acknowledged it was required to authenticate the GPS records but argued this burden was not high. The Supreme Court agreed and acknowledged the reliability or operation of GPS technology in general was not genuinely disputed. See, e.g., Commonwealth v. Thissell, 457 Mass. 191, 928 N.E.2d 932, 938 n.15 (2010)(reviewing the origins of GPS technology as a “U.S.-owned utility that provides users with positioning, navigation, and timing [PNT] services” and consists of three segments maintained by the United States Air Force). The Court held that the general acceptance of GPS technology does not, however, translate to the State getting a pass from making a minimum showing the GPS records it seeks to introduce into evidence are accurate. The Court found Agent Powell’s testimony failed to authenticate because it shed no light on the accuracy of the GPS records. The State’s argument that authentication was

fulfilled through other means failed to appreciate the nature of GPS records and that these records are generated and result from, at least in part, the process or system used by a machine. Brown.

As recognized by the Fourth Circuit Court of Appeals, “Any concerns about the reliability of such machine-generated information is addressed through the process of authentication” United States v. Washington, 498 F.3d 225, 231 (4th Cir. 2007). “When information provided by machines is mainly a product of ‘mechanical measurement or manipulation of data by well-accepted scientific or mathematical techniques,’” then “a foundation must be established for the information through authentication, which Federal Rule of Evidence 901(b)(9) allows such proof to be authenticated by evidence ‘describing [the] process or system used to produce [the] result’ and showing it ‘produces an accurate result.’ ” Id. (citation omitted); Brown, *supra* at 490.

The Brown Court pointed out other persuasive authority supports this approach. *See, e.g.*, Subdivision (b)(9)—Process or System, 31 Fed. Prac. & Proc. Evid. § 7114 (1st ed. Apr. 2018) (stating “Rule 901(b)(9) governs the authentication of data produced by a machine purporting to measure or detect something, such as a radar gun, a breathalyzer, *a global positioning system device*, and the like” (emphasis added)); *see also* Rule 902(13), FRE (allowing “[a] record generated by an electronic process or system that produces an accurate result” to be certified). The Court held the State needed to present “[e]vidence describing [the] process or system used to produce” the GPS records and “showing that the process or system produces an accurate result” in accordance with Rule 901(b)(9), SCRE, to authenticate the GPS records in that case. Brown. The Court also held as follows:

We emphasize that “[n]o elaborate showing of the accuracy of the recorded data is required”; however, the State must make *some* showing to authenticate the records. People v. Rodriguez, 16 Cal.App.5th 355, 224 Cal.Rptr.3d 295, 309 (2017). Other jurisdictions have allowed GPS records to be authenticated by someone who has general knowledge and experience with the

system used, explains how the records are generated, and confirms the accuracy of the result. *See, e.g., United States v. Brooks*, 715 F.3d 1069, 1077–79 (8th Cir. 2013) (affirming, as to the specific device's accuracy, that the GPS records were authenticated because the Government's witness “had been trained by the company, he knew how the device worked, ... he had demonstrated the device for customers dozens of times,” other testimony confirmed the device's accuracy, and any brief lapse in the device's transmission was explained); *United States v. Espinal-Almeida*, 699 F.3d 588, 612–13 (1st Cir. 2012) (stating “[t]he issues surrounding the processes employed by the GPS and software, and their accuracy, were not so scientifically or technologically grounded that expert testimony was required to authenticate the evidence, and thus the testimony of ... someone knowledgeable, trained, and experienced in analyzing GPS devices, was sufficient to authenticate the GPS data and software generated evidence” given the “testimony about the processes employed by both the GPS and the software”); *Rodriguez*, 224 Cal.Rptr.3d at 309–10 (holding the GPS data was properly authenticated through the sergeant's testimony as he “testified about his familiarity and knowledge of how the ankle monitor transmitted defendant's location through GPS data, the computer software used to track the ankle monitor and the GPS data, and how the GPS report was generated” as well as “testified about the accuracy and reliability of the GPS report generated from the ankle monitor's signals”); *State v. Kandutsch*, 336 Wis.2d 478, 799 N.W.2d 865, 875–76 (2011) *superseded by statute on different grounds*, Wis. Stat. § 907.02, *as recognized in In re Commitment of Jones*, 381 Wis.2d 284, 911 N.W.2d 97 (2018) (finding “the State was permitted to authenticate and lay a foundation for the EMD report by providing testimony describing the electronic monitoring system and the process by which the daily summary reports are generated and showing that this process produces an accurate result” through the department of correction's agents, who were familiar with its operation and testified regarding the installation of the specific device and its accuracy).

One jurisdiction, North Carolina, appears to use the same or similar vendor as the one used in this case—Omni Link—and has found an officer's testimony sufficient to authenticate GPS records. In *State v. Jackson*, 229 N.C.App. 644, 748 S.E.2d 50 (2013), an individual, wearing an electronic monitoring device, was accused of sexually assaulting a victim. At trial, the State introduced evidence from the defendant's electronic monitoring device in order to place the defendant at the scene of the assault. *Id.* at 53. On appeal, the court evaluated whether the GPS tracking evidence was properly authenticated. 748 S.E.2d 50. The court stated, “Regarding the

specific electronic monitoring device worn by defendant, [a trained sergeant] identified the device as the Omni-Link 210.” Id. at 54. The sergeant “described the different components of the device” and “testified about how the device operates using a combination of GPS signals and cell phone triangulations to track the location of the electronic monitoring device at least every four minutes.” Id. In addition, he explained how the “tracking data is then uploaded from the device to a secured server where it is stored” and “that the device primarily uses GPS signals, which are very accurate, usually within four to ten meters.” Id. He also testified that he “never had any issue with the accuracy of the data.” Id. at 54. Moreover, the court noted that the sergeant “described how he retrieved the data for defendant’s electronic monitoring device for [the specific dates at issue] and produced the event log entered into evidence.” Id. The court held that the evidence was properly authenticated and admitted. Id. at 55.

Brown, at 491-92. After reviewing various authorities, the Court required that a witness should have experience with the electronic monitoring system used and provide testimony describing the monitoring system, the process of generating or obtaining the records, and how this process has produced accurate results for the particular device or data at issue. The witness need not be an expert. However, even under the minimally burdensome test the Court set forth, Agent Powell failed to properly authenticate the accuracy of the GPS records when he said the records were accurate because we use them all the time in court. Thus, it was error for the trial court to admit the evidence in that case because the GPS records were not properly authenticated. Brown, *supra*.

In the present case, how the GPS satellite system computed speed or m.p.h. was not properly authenticated. Lake had no knowledge of how the GPS system accomplished that. However, here Franklin does not contest the GPS records and testimony as to his location at the crime scene at the time of the murder or the GPS records of his location at each location as he fled the crime-scene at a specific time until he reached Greeleyville, or his location and the specific time where he cut off his GPS monitor. (IBOA). Further, 2 different witnesses testified Franklin fled from the crime scene at an excessive speed. And, the Williamsburg County jurors who

decided this case would have been familiar with the crime scene location and how long it normally takes to travel from Kingstree to Greeleyville and thus from the unobjected to GPS evidence of location and time could determine Franklin fled at an excessive rate of speed. Furthermore, the fact that Franklin fled from South Carolina the day of the murder in his own car and fled to Cleveland, Ohio, where he was arrested by U.S. Marshalls hiding out weeks later was proven by other evidence including his jail phone calls and the testimony of an investigator, not the GPS system. (R. 130-131; State's Ex. 76-80). The fact that Franklin was at the crime scene, fled from the crimes, and then fled South Carolina was thoroughly proven. The miles per hour he drove on specific roads before he cut off his ankle monitor did not affect the result as will be discussed in more detail below.

Unlike Brown, there was much more evidence about and supporting authentication in the present case. That is why Franklin concedes the GPS data of locations and specific times is admissible. Here there was testimony the DPPPS agent routinely used the information from the GPS system in tracking monitored subjects such as Franklin and was tracking Franklin using the GPS data, including approximate speed, the day of the crime as Judge Cothran found. There was testimony from the agent how the GPS information of locations and times was gathered and how he knew it was accurate. Notably, as Brown suggests, the testimony demonstrated accuracy as the information led DPPPS to the location Franklin first fled to and then the exact spot the monitor was cut off, corroborated by 1 of Franklin's jail phone calls. This Court need not determine if further information about accuracy would have been sufficient to admit the specific evidence of m.p.h. as any potential error could only be harmless.

Harmless Error

Despite the error in admitting the GPS records in Brown, that Court held the error was harmless beyond a reasonable doubt due to the evidence of guilt presented against him. Id. Here, the specific speeds Franklin drove on certain roads did not affect the result. “Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result.” State v. Pagan, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006). “Where ‘guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached,’ an insubstantial error that does not affect the result of the trial is considered harmless.” State v. Byers, 392 S.C. 438, 447, 710 S.E.2d 55, 60 (2011) (citing Pagan, 369 S.C. at 212, 631 S.E.2d at 267). “A harmless error analysis is contextual and specific to the circumstances of the case.” Id. at 447–48, 710 S.E.2d at 60. “Where a review of the entire record establishes the error is harmless beyond a reasonable doubt, the conviction should not be reversed.” State v. Price, 368 S.C. 494, 499, 629 S.E.2d 363, 366 (2006). Where the evidence is cumulative to other evidence, it is harmless. State v. Haselden, 353 S.C. 190, 577 S.E.2d 445 (2003) (recognizing admission of improper evidence is harmless where the evidence is merely cumulative to other evidence) State v. Kirton, 381 S.C. 7, 38, 671 S.E.2d 107, 122–23 (Ct. App. 2008); State v. Johnson, 298 S.C. 496, 498, 381 S.E.2d 732, 733 (1989) (instructing admission of improper evidence is harmless where it is merely cumulative to other evidence); State v. Richardson, 358 S.C. 586, 596–97, 595 S.E.2d 858, 863 (Ct.App.2004); State v. Brown, 344 S.C. 70, 75, 543 S.E.2d 552, 555 (Ct.App. 2001).

In the present case, as previously stated, and admitted in Franklin’s brief (IBOA), Franklin does not object to the GPS evidence placing Franklin at the crime scene at the time of the crime, leaving the crime scene immediately after the murder, and the evidence plotting his locations as he fled from the crime scene and the times he was at a certain locations, including when he went

to his home and stayed approximately 13 minutes and then went to another location where he cut off his GPS ankle monitor. Further, Franklin does not object to the admission of the fact he cut off his ankle monitor and cannot object to the evidence of his flight from the State after cutting off his ankle monitor and capture several weeks later by U.S. Marshalls hiding out in Cleveland, Ohio, introduced by the State through completely different evidence. (R. 130-31; State's Ex. 76-80). Franklin only objects to the admission of the specific speeds testified to by Lake on certain roads, not his actual flight from apprehension and prosecution.⁴ Additionally, Franklin does not object to the testimony of specific witnesses that Franklin fled from the crime scene at an accelerated and unsafe speed. (IBOA). As a result, the speeds recorded by the GPS device did not affect the result of the trial. Pagan, 369 S.C. at 212, 631 S.E.2d 267; Haselden, 353 S.C. 190, 577 S.E.2d 445.

Even removing the specific speeds Franklin was traveling on certain roads as he admittedly fled the crime scene, that leaves all of the other evidence of Franklin's guilt introduced at trial. This includes Franklin's assault on the victim's girlfriend 2 weeks before the murder and his threat to the victim that the victim was next. This includes the testimony that Franklin followed the victim's girlfriend home from the nightclub in Salters, S.C., and stood outside her home challenging the victim to come outside and face him. This also includes the GPS data and the testimony of Franklin's former girlfriend Carson, both placing Franklin at the crime scene at the time of the crime. Additionally, the surveillance video at the crime scene shows Franklin at the crime scene just moments before the murder; Franklin getting out of the driver's side of Carson's vehicle; Franklin walking directly to where the victim was located; whereupon several gunshots

⁴ Franklin's speed fleeing the crime scene was so unimportant to Franklin that he did not even cross-examine Lake before the jury about any possible inaccuracy of this specific data. (R. 229). Franklin argued to the jury he fled at such a speed because he had been shot at and grazed by a bullet.

were fired; and, Franklin immediately returning to Carson's vehicle and getting back in the driver's seat of Carson's vehicle and then leaving the crime-scene in a hurried and unsafe fashion. This evidence includes the GPS data not objected to tracking Franklin minute by minute fleeing the crime scene on M.L.K. Jr. Blvd and then onto Highway 521 and not stopping until he reached Bloody Bucket Road where he stayed for approximately 13 minutes. The unobjected to GPS data then tracked Franklin minute by minute to Greeleyville where he cut off his GPS monitor *so authorities could not track him*.⁵ The Williamsburg County jurors who decided this case would have been familiar with the crime scene location, which was near the courthouse, and how long it takes to travel from Kingstree to Greeleyville and thus from the unobjected to GPS evidence of location and time could determine Franklin fled at an excessive rate of speed. The evidence also includes unrelated evidence that Franklin then fled South Carolina to Cleveland, Ohio where he was arrested by U.S. Marshalls several weeks later. (R. 130-36). The evidence also includes Franklin's jail phone call where he apologizes to Carson that everyone [in the community] hates her [because he used her car in the murder], but explains to Carson the murder was going to happen anyway because he, Franklin, was going to the crime scene ["the setting up"] that night even if Carson had not been with him. The evidence also includes Franklin's phone call where he admits knowledge of the murder weapon and his fear and belief upon his arrest that police had found the murder weapon. This evidence also includes Franklin's phone call where he admits if he had not been asleep when Marshalls arrived to arrest him, he would have continued to flee from arrest, but police caught him before he could flee again. Under the circumstances presented in this case and

⁵ Friends of the victim who might want to shoot Franklin could not track him with the GPS system that only DPPPS and law enforcement had access to.

based on the evidence described in the first section of this brief and immediately above, the m.p.h. did not affect the verdict and was harmless. Pagan; Haselden.

ARGUMENT III.

Judge Cothran properly admitted the jail phone recordings from Ohio and Williamsburg County as the jail phone calls were properly authenticated and they were admissions against interest; and, regardless, the State complied with the requirements of S.C. Code Ann. Section 19-5-520 in presenting a certification from the custodian of records in Cuyahoga County, Ohio that the jail phone calls were business records and were authentic.

What occurred below

At trial, the State sought to introduce jail phone call recordings between Franklin and Carson and Franklin and his sister. Argument and proffers were made *in limine* on the admissibility of jail phone recordings from Ohio and also from Williamsburg County between Franklin and Carson and Franklin and his sister. (R. 59-111). The State moved to admit the recordings as admissions of Franklin against his interest. Rule 804(b)(3), SCRE. The State also argued the recordings were admissible pursuant to *S.C. Code Ann.* Section 19-5-520, the Uniform Business Records as Evidence Act. On the second day of trial, the State gave to Franklin and provided to the Court a certification from the custodian of records of the Cuyahoga County Jail in Ohio certifying that the jail phone calls it provided to the detective here, investigator Jade Brown, were business records kept in the ordinary course of business, and they were authentic and had not been tampered with in any way. (Certification; R. 59-81; 109). Defense counsel argued the certification was not turned over in advance of trial so that she could confirm its authenticity, and thus counsel argued the jail calls were not authenticated. Counsel also noted the date the records were turned over to the investigator was also left blank. Defense counsel also noted that she had no way to know if the “certification” was that of a “custodian or other qualified person.” (R. 17; 59-66; 71; 76).

The State responded that the jail phone calls had been turned over to defense long in advance of trial, years in fact, and the State went through hours of the jail phone calls and even narrowed down for Franklin and his counsel what portions of the phone calls they intended to introduce, so Franklin's claim of surprise was simply false. The State informed the court that the phone calls were pulled by the custodian of records in Ohio and were emailed to the investigator here in South Carolina. (R. 69). The State asserted the phone calls were not hearsay because they were statements made by the defendant himself and they were statements against interest. (R. 69). The State informed the court it intended to authenticate the calls several ways. First, the person on the call states: "this is Marquise," and the South Carolina officer had listened to the calls, and she knew Marquise Franklin's voice and was going to identify the voice on the phone calls as that of Marquise Franklin. (R. 71). Defense counsel argued the State could not authenticate the calls by simply authenticating Franklin's voice. There was no affidavit; and, there was no one at trial to authenticate them. Counsel claimed the calls could have been manipulated. (R. 77). Counsel argued the State could not say how these phone calls were kept or made or when or anything. (R. 80). Counsel argued just because Franklin's voice was on the recording, it was important to know when the recordings were made by the person that made a record of the recording itself. (R. 81). Defense counsel referred to Rule 803(6), SCRE. (R. 79-80).

Judge Cothran held that if the calls were sufficiently authenticated, they would be admissible as statements against interest of the defendant under Rule 804(b)(3), not as business records under Rule 803(6), SCRE. (R. 80-81). Judge Cothran pointed out the State was not offering them as business records as Franklin argued but as statements against interest by a party opponent. Judge Cothran ruled he would have to hear testimony before he could authenticate the recordings or not. The State then presented the testimony of 2 witnesses outside the presence of

the jury. Both of those witnesses identified the person's voice on the jail recordings as appellant Franklin's voice. Investigator Jalisa Brown (Brown) identified Franklin's voice after first having spoken to Franklin when he was brought into Williamsburg County after his arrest in Ohio. Brown stated that she also gave SLED the phone number Franklin had been calling from jail and SLED provided her with information about the person Franklin had been calling. Brown testified Franklin also made calls from the Williamsburg County Detention Center, and Brown listened to those phone calls and the voice on those phone calls was the same voice as that on the jail phone calls from Ohio to Williamsburg County and to the voice of Franklin when she spoke with him when he was returned from Ohio to Williamsburg County. Brown also testified Franklin also identified himself as "Marquise", Franklin's first name, in the jail phone calls. (R. 82-99).

The State also called *in camera*, Carson, Franklin's former girlfriend. Carson testified she had known Franklin for about a month before the murder **and** subsequently talked to him while he was in jail in Ohio and in Williamsburg County. She knew Franklin's voice. She testified Franklin would initiate the calls from jail to her. Carson identified Franklin's voice as being the voice in each of the jail phone calls played for her including State's Ex. 70, 71, 72, 73 and 74.⁶ Carson testified she spoke to Franklin 6 to 7 times while he was in jail. Carson also testified before Judge Cothran she believed 2 of the calls were from Franklin to her. (R. 100-03; State's Ex. 70). She was unsure if the voice in 1 call was hers, but it was just that her voice sounded different on the recording. She testified it was definitely Franklin's voice in the phone call. Carson testified Franklin would always identify himself in the calls made to her. (R. 100-08; State's 70-74).

At the conclusion of the proffer, the State moved to admit the jail phone call recordings as statements against interest by Franklin. Rule 804(b)(3), SCRE. Franklin again argued the State

⁶ These were State's Ex. 76-80, redacted of the women's voices, before the jury.

needed to authenticate the calls as business records by showing when the calls were recorded. (R. 108).

Judge Cothran ruled the recordings were properly authenticated under Rule 901(b)(5) or 901(b)(6), SCRE. He held: “[I]t is authenticated that the voice on that recording is the defendant’s voice.” Judge Cothran ruled that the recordings did not have to be authenticated as business records. Judge Cothran found that the voice identifications made by the witnesses during the proffer were sufficient to authenticate the recordings under at least Rule 901(5). (R. 109-11). As to the hearsay objection, Judge Cothran found the recordings were admissible as statements against interest. Rule 804(b)(3), SCRE. “So the parts of these tapes that are against his interest are admissible under the hearsay rule.” (R. 109, ln. 24 -110, ln. 8). Judge Cothran noted the certification from the custodian in Ohio was before him, but he was not admitting the records under the business records act but as admissions against interest authenticated by 2 different witnesses who knew Franklin’s voice. (R. 109-10).

The State initially offered unredacted versions of the recordings for the *in camera* hearing (State’s Ex. 70-74). But when Franklin objected, Judge Cothran directed the State to remove the women’s voices on the calls, and the State did so, leaving only Franklin’s voice for the jury to hear. And the State only entered the portions of the calls that were statements against interest. (State’s Ex. 76-80; R. 82; 136-38; 143-49).

Thereafter, the State re-called Investigator Brown before the jury who identified Franklin’s voice on each of the phone calls and testified to the authenticity of the phone calls and how she authenticated them. (R. 131-49). Brown also testified to the circumstances of how she requested and received the jail phone calls from Cuyahoga County, Ohio from the custodian of records there and in listening to all of the jail calls she listened to, including those from Williamsburg County, it

was clearly Franklin's voice in the jail calls speaking, and she heard no evidence of any tampering of the phone calls before she received them. (R. 131-36; 137-38; 141-49; State's Ex. 70-74; 76-80 [redacted]). She testified that in the jail phone calls she received during her investigation, Franklin identified himself on those calls. (R. 142). She testified that is normal protocol for an individual calling someone from a jail facility awaiting trial. (R. 142). She testified there were other identifying characteristics of the person that is calling such as at the Williamsburg County Detention Center in order for an inmate to make a phone call, they have a certain pin number. Every inmate has his own pin number. They have to put the pin number in to make a phone call on their account. Investigator Brown testified she specifically listened to each of the jail phone calls and identified Franklin's voice on the jail phone calls identified as States' Ex. 76 through 80 before the jury, which were redacted versions of State's Ex. 70 though 74.

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." Douglas, 369 S.C. at 429, 632 S.E.2d at 847-48 (citations omitted). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Douglas, at 429-30, 632 S.E.2d at 848.

Law/Analysis

The burden of authenticating evidence is not high, and a party need not rule out any possibility the evidence is not authentic. State v. Gray, 438 S.C. 130, 882 S.E.2d 469 (Ct. App. 2022); *see also* State v. Green, 427 S.C. 223, 230, 830 S.E.2d 711, 714 (Ct. App. 2019) (citation omitted), *aff'd as modified*, 432 S.C. 97, 851 S.E.2d 440 (2020). "The trial judge acts as the authentication gatekeeper, and a party may open the gate by laying a foundation from which a

reasonable juror could find the evidence is what the party claims.” Gray, 438 S.C. 130, 882 S.E.2d 469. A witness with knowledge may authenticate evidence by testifying that “a matter is what it is claimed to be.” Gray, 438 S.C. 130, 882 S.E.2d 469; *See* Rule 901(b)(1), SCRE. Or circumstantial evidence or the circumstances of the writing or recording and the circumstances surrounding the writing or recording may be sufficient to authenticate a document or recording. State v. Benton, 435 S.C. 250, 865 S.E.2d 919 (Ct. App. 2021) *aff’d as modified*, 443 S.C. 1, 901 S.E.2d 701 (2024); Green, 427 S.C. 223, 830 S.E.2d 711; State v. Hall, 437 S.C. 107, 876 S.E.2d 328 (Ct. App. 2022). “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; Benton, 435 S.C. at 261–65, 865 S.E.2d at 925–27, *aff’d as modified*, 443 S.C. 1, 901 S.E.2d 701. Rule 901, SCRE, provides:

By way of illustration only, and not by way of limitation, the following are *examples of* authentication or identification conforming with the requirements of this rule:

(1) Testimony of Witness With Knowledge. Testimony that a matter is what it is claimed to be.

....

(4) Distinctive Characteristics and the Like. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) Voice Identification. Identification of a voice, whether heard first hand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) Telephone Conversations. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

Rule 901(b), SCRE (emphasis added). Again, “‘The burden to authenticate ... is not high’ and requires only that the proponent ‘offer[] a satisfactory foundation from which the jury could reasonably find that the evidence is authentic.’” Deep Keel, LLC v. Atl. Private Equity Grp., LLC, 413 S.C. 58, 64, 773 S.E.2d 607, 610 (Ct. App. 2015)(alterations in original)(quoting United States v. Hassan, 742 F.3d 104, 133 (4th Cir. 2014)). The court decides whether a reasonable jury could find the evidence authentic; therefore, the proponent need only make “a prima facie showing that the ‘true author’ is who the proponent claims it to be.” Once the trial court determines the prima facie showing has been met, the evidence is admitted, and the jury decides whether to accept the evidence as genuine and, if so, what weight it carries. Green, 427 S.C. at 230, 830 S.E.2d at 714 (quoting United States v. Davis, 918 F.3d 397, 402 (4th Cir. 2019)), *aff’d as modified*, 432 S.C. 97, 99, 851 S.E.2d 440, 441 (2020).

Text messages sent between cell phone users are treated the same as emails for purposes of authentication. Typically, such messages are admitted on the basis of identifying the author who texted the proffered message. Ownership of the phone that originated the message is not sufficient. Like email, authorship can be determined by the circumstances surrounding the exchange of messages; their contents; who had the background knowledge to send the message; and whether the parties conventionally communicated by text message.

Benton, 435 S.C. at 262-63; 865 S.E.2d at 925, *quoting* 2 Kenneth S. Broun et al., *McCormick On Evid.* § 227 (8th ed. 2020) (footnotes omitted).

This Court addressed the authentication of social media messages in Green, in which it explained that circumstantial evidence related to the content, tenor, and timing of such messages may serve as “sufficient authentication to meet the low bar Rule 901(b)(4), SCRE, sets.” 427 S.C. at 231–33, 830 S.E.2d at 714–16. Still, the Court noted social media messages are writings, and “evidence law has always viewed the authorship of writings with a skeptical eye.” Id. at 230, 830

S.E.2d at 714. Authentication of social media messages, like writings, requires more than “merely offering the writing on its own.” *Id.* at 231, 830 S.E.2d at 714.⁴ In Benton, this Court held:

We acknowledge the circuit court erred in stating that the fact the messages were sent from Benton's phone provided sufficient proof to establish Benton authored them—the authentication of text and social media messages requires more than proving mere ownership of the device from which messages originated. However, the timing and distinctive characteristics of the text messages here—in addition to Cheatham's identification of certain messages during his testimony—provided the circumstantial evidence necessary for authentication. *See* Rule 220(c), SCACR (“The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.”); Rule 901(b)(4), SCRE (providing evidence may be authenticated by “[a]pppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances”).

The contents of some of the late April messages demonstrate Benton had possession of his phone when the messages were sent; the timing of others provides additional circumstantial evidence that Benton sent them. During the time Benton concedes he was in possession of his phone, he frequently sent text messages to a phone number saved in his phone as “My Love.” He addressed these texts to Heather, identified at trial as his girlfriend. In these texts, Benton texted, “I love you”; he called her nicknames like “princess,” “beautiful,” and “baby”; and he talked to her about her children, their “perfect family,” and their engagement. In the days leading up to April 30, Benton frequently sent Heather text messages containing the same or substantially similar language.⁵ During these periods, he also texted Cheatham and others. The contents of the text messages to Heather provides circumstantial evidence from which a reasonable jury could find Benton was in possession of his phone and sent the text messages to others during this same period. *See Deep Keel*, 413 S.C. at 64, 773 S.E.2d at 610 (“‘[T]he burden to authenticate ... is not high’ and requires only that the proponent ‘offer[] a satisfactory foundation from which the jury could reasonably find that the evidence is authentic.’ ” (alterations in original) (quoting Hassan, 742 F.3d at 133)).

For example, on April 25, five minutes before texting Heather, Benton texted a number and asked if it was “Dougie.” Late that evening, the couple exchanged texts about baths for the children and the babies going to bed. Just after midnight on April 26, Heather texted Benton, “I’m headed to bed baby,” and three hours later, a

message was sent from Benton's phone instructing the recipient to "Meet us at 501," then referencing "CB's furniture outlet." Approximately two hours after that, Benton texted Heather again. Later on April 26, Heather asked what Benton was doing, and he responded, "Planning." Benton texted Heather he was talking to Cheatham about speakers and "to tell me that cb burnt his store down."

On April 27, Heather and Benton texted back and forth about Heather's children, and Benton stated, "If you do pick me up, we have to meet dougie down the road and head to fair bluff I think it is to get the truck." Then, in the late hours of April 28, Benton and Heather exchanged several text messages back and forth, in which Benton called Heather "baby" and "love." When Heather asked Benton what he was doing, he responded, "About to try to get \$100 g."

The authentication of the "Tommy Lee Kruspe" Facebook messages is more problematic. State's Exhibit 76 is a collection of Facebook messages, some of which Cheatham identified as an April 9 conversation he had with Benton about robbing Smith. Cheatham testified they had "just spoken on the phone about it," and he messaged Benton because he was unsure about the plan. Others include questions and accusations from Garland's wife, Katlin Rose, speculating as to Garland's involvement and location, with noncommittal responses from "Kruspe." The contents of the Facebook messages were obtained through a Cellebrite extraction of Benton's phone. Like Cheatham, Katlin Rose testified as to her belief that she was communicating with Benton through the Tommy Lee Kruspe account, but there is no other evidence to necessarily tie Benton to her messages or to the possession of his phone on April 9. To the extent the admission of the Facebook messages was erroneous, we find it harmless because the messages were cumulative to Cheatham's testimony that he began to plan the burglaries with Benton in late March and early April. *See State v. Martucci*, 380 S.C. 232, 261, 669 S.E.2d 598, 614 (Ct. App. 2008) ("The admission of improper evidence is harmless where the evidence is merely cumulative to other evidence.").

Benton, 435 S.C. at 263-265, 865 S.E.2d at 926-27. (footnotes omitted)

Here, the evidence at issue was phone call conversations from jail by Franklin to other individuals including Carson, not e-mails or text messages. Here Franklin's voice was identified by 2 different witnesses. *See State v. Aragon*, 354 S.C. 334, 579 S.E.2d 626 (Ct. App. 2003)(when

a tape recording has been properly authenticated, and the voices identified, such recording, if relevant may be introduced into evidence); State v. Nichols, 325 S.C. 111, 481 S.E.2d 118 (1997)(tape recorded statement was properly admitted in evidence where the witness, victim's son, identified the voice of the defendant in a conversation between defendant and another person); State v. Hambright, 310 S.C. 382, 426 S.E.2d 806 (Ct. App. 1992)(tape recorded statements of the defendant, that were tape recorded by an informant after the crime, were out of court declarations admissions by the defendant that were admissible at trial); State v. Stewart, 275 S.C. 447, 272 S.E.2d 628 (1980)(identification of defendant's voice was admissible in criminal prosecution where circumstances demonstrate reliability of evidence); State v. Plyler, 275 S.C. 291, 270 S.E.2d 126 (1980)(sufficient testimony as to recognition of the voice over the phone or in the background of a phone call warrants its admission); State v. Vice, 259 SC. 30, 190 S.E.2d 510 (1972)(voice identification of recorded phone call to police permissible further, jury can compare recorded telephone call and defendant's voice recorded prior to trial for purposes of comparison); State v. Porter, 251 S.C. 393, 162 SE.2d 843 (1968)(identification of party with whom witness talked need not be known at the time of conversation, but is sufficient if knowledge enabling witness to identify other party is later obtained); State v. Steadman, 216 S.C. 579, 59 S.E.2d 168 (1950)(voice identified over a phone call or in the background); State v. Smith, 307 S.C. 376, 415 S.E.2d 409 (Ct. App. 1992)(dispatcher allowed to identify voice of anonymous caller as that of defendant even with no prior voice identification training).

Franklin complains that Investigator Brown could not have identified his voice because she only spoke with him briefly when he returned from Ohio. However, this objection has no merit. State v. Heller, 399 S.C. 157, n. 8, 731 S.E.2d 312 (Ct. App. 2012). In Heller, the surviving victim only spoke with Heller a few minutes before she later identified his voice as that of the man who

returned and knocked on the door. The Court affirmed the admission of the witness' voice identification. Id. at n. 8. Brown listened to her initial interview with Franklin several times and listened to numerous other phone calls of Franklin from Ohio and from Williamsburg County.

After hearing the proffered sworn testimony of 2 different witnesses regarding the authentication of the jail phone calls, and the calls themselves (State's 70-74), Judge Cothran appropriately admitted the evidence and did not abuse his discretion. Beene v. State, 839 S.E.2d 23 (Ga. Ct. App. 2020). He appropriately removed any hearsay leaving only Franklin's voice. And, only admitted those statements of Franklin that were admissions against interest. Rule 804(b)(3).

The State presented sufficient evidence to meet the low bar of authentication that the phone calls were what the State proposed them to be, phone calls between Franklin and different women discussing different aspects of the case containing admissions against interest. Benton, 435 S.C. 250, 865 S.E.2d 919. Investigator Brown testified in detail how she obtained the jail phone recordings from both Ohio and South Carolina; she listened to hours and hours of the phone calls from both Ohio and South Carolina; she compared the jail phone recordings from Ohio to the jail phone recordings from Williamsburg County Jail from Franklin's jail account and the male voice on both was the same. The person making the phone calls identified himself as "Marquise" and he called a similar phone number in Ohio as he did in South Carolina. Further, she noticed no tampering or editing to the calls and also recognized the voice on each call as the same person she interviewed, Franklin, when he returned from Ohio to face the murder charges here. She testified it was Franklin's voice on all of the phone calls from South Carolina and Ohio. (R. 82-99; 130-49; 166-68). Beene v. State, 839 S.E.2d 23. The State only offered those portions of the phone calls that were admissions against interest, about the case, and helpful to the investigation. (State's Ex. 70-74; 76-80; R. 131-49). Rule 804(b)(3), SCRE; State v. Doctor, 306 S.C. 527, 413 S.E.2d 36

(1992). Not only were the jail phone calls sufficiently authenticated by Investigator Brown, but also by Ms. Carson. (R. 100-08). She was Franklin's former girlfriend and had known Franklin for a month before the murders and spoke to Franklin after the murders when he was incarcerated in Ohio and while incarcerated here in South Carolina. She positively identified Franklin's voice as that on each of the phone calls the State introduced including the phone call or calls she believed she was involved in. (R. 100-08; State's Ex. 70-74; 76-80). The State also supported the authentication of the phone calls with circumstantial evidence. In the phone calls themselves, Franklin is stating things only Franklin would know about this case, including where he fled to after the crimes and the cutting off of the GPS monitor and where he cut it off at. (State's Ex. 70-74; 76-80). Benton; Green. Further, listening to the jail phone call tapes one can tell it is Franklin talking based on the words and phrases he uses and his unique voice in each of the calls. (State's Ex. 70-74; 76-80). Benton; Green.

Finally, the certification before Judge Cothran shows Judge Cothran did not err in admitting the evidence because it was authentic. (Certification). *S.C. Code Ann.* Section 19-5-520 does not require the certification of the custodian of the records *be sworn or be an affidavit* as Franklin argues. Id. The statute only requires a certification, which in this case it was and signed by the custodian of records at the Cuyahoga County Jail, and was also notarized by a Notary Public in Ohio. The State met the requirements of Section 19-5-20 to authenticate and admit the records as business records. *S.C. Code Ann.* Section 19-5-20. See Taylor v. State, 353 So.3d 1114 (Miss. App. 2023)(certification sufficiently authenticated records for consideration at hearing).

Finally, Franklin's Confrontation Clause violation allegation has no merit. Franklin did not object to the jail recordings on the grounds of hearsay. He only objected on the grounds of authentication. The recorded phone calls are of Franklin himself talking during a phone call.

Franklin's voice was identified by 2 different witnesses. The other parties on the jail phone calls were deleted before the jury. Franklin's phone calls contain admissions against his interest. The phone calls are also not testimonial. Crawford. There is no Confrontation Clause violation here. Otherwise, no tape recording of the defendant making admissions against interest could be admitted where the defendant chooses not to testify or refuses to testify. Id.

Harmless error

Finally, even if this Court were to find the jail phone calls were improperly admitted, the error would be harmless given the other evidence of Franklin's guilt previously discussed in detail throughout this brief. State v. Pagan, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006).

CONCLUSION

For the above stated reasons, Franklin's convictions and sentences for the murder of Quadree Wilson and possession of a weapon during a violent crime must be affirmed.

Respectfully submitted,

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