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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Richland County
The Honorable DeAndrea G. Benjamin, Circuit Court Judge
Appellate Case No. 2026-002120

THE STATE,

Respondent-Petitioner,

vs.

NEVELLE JOSHUA EBERHART,

Petitioner-Respondent.

APPENDIX

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Honorable DeAndrea G. Benjamin, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

NEVELLE JOSHUA EBERHART,

APPELLANT

APPELLATE CASE NO. 2023-000234

RECORD ON APPEAL

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**THE FOLLOWING EXHIBITS ARE ON FILE WITH THIS COURT:
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STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
2022-GS-40-03613; 2022-GS-40-03615

The State of South Carolina,)
)
 Plaintiff,)
)
)
 Nevelle Joshua Eberhart.)
 -----)

TRANSCRIPT OF DIGITALLY-
RECORDED HEARING

February 6-8, 2023
Columbia, South Carolina

B E F O R E:

The Honorable DeAndrea G. Benjamin, Judge Presiding

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P R O C E E D I N G S

* * * * *

THE COURT: This is Indictment Number 2022-GS-3613, 615 and 616, the State of South Carolina vs. Nevelle Eberhart; is that correct?

MS. EIGENBROT: Yes, Your Honor.

THE COURT: All right. And this is a -- I have three indictments, one for armed robbery; second one for possession of a weapon during a violent crime; and the third one, unlawful carrying of a pistol by a person convicted of a crime of violence. And I have Defense's proposed voir dire and witness list. I have the State's witness list, and you have an additional voir dire?

MR. NEELY: That's correct, Your Honor.

THE COURT: All right. And you have -- anything from the State before we get started? Any objection to the Defense's proposed voir dire?

MR. NEELY: No, Your Honor.

THE COURT: And any -- well, they don't have any. Any objections -- any -- I believe you have a motion regarding the indictments?

MS. EIGENBROT: Yes, Your Honor, I think we do need to address at least briefly before the jury panel comes in. I had requested in pretrial to

1 either severe or bifurcate the unlawful possession
2 -- well, possession of a pistol by a person
3 convicted of a crime of violence. I believe that
4 this indictment allows for the State to put into
5 evidence my client's prior criminal record. That
6 would not necessarily come in unless he were to
7 testify and make himself open to being crossed on
8 that. And for those reasons I don't know that it's
9 appropriate to move forward on this indictment
10 during the State's case-in-chief, simply because I
11 do believe it becomes prejudicial to my client. And
12 I believe he was previously convicted of a burglary
13 second, and then, of course, this, you know, the
14 indictment itself calls it person convicted of a
15 crime of violence. He is now being accused of a
16 crime of violence. And for those reasons I don't
17 think we should be able to move forward on that
18 particular indictment, at least in the initial case-
19 in-chief from the State.

20 And I did submit a memorandum in support of
21 either severing or bifurcating at trial, and I can
22 -- I do have some case law if Your Honor needs it.

23 THE COURT: All right. I'll be glad to
24 hear from the State.

25 MR. NEELY: Your Honor, I'm -- as we

1 discussed in Chambers, I'm fine with just reading
2 the first two indictments, and leaving the third one
3 off until Your Honor makes a ruling on the
4 bifurcation at the trial. And if Your Honor rules
5 in the State's favor, we could always read that
6 indictment to them tomorrow when they return.

7 THE COURT: All right. I think I was going
8 to go ahead and rule now ---

9 MR. NEELY: Okay.

10 THE COURT: -- because I have to read the
11 indictments to the jury. And so I -- my inclination
12 is to grant a motion to bifurcate. I think that's
13 how I normally do it with that charge. And so what
14 would happen is if he is -- well, if he --
15 regardless, once we do the first part of the trial,
16 jury deliberates, and then we'll come back and give
17 them the jury charge on the possession of a weapon
18 by a person convicted of a violent crime, and then
19 the jury will have to deliberate again.

20 MR. NEELY: Certainly, Your Honor, thank
21 you.

22 THE COURT: All right. So the Defendant's
23 motion to bifurcate is granted. Anything else we
24 need to take up before we bring the jury in?

25 MR. NEELY: Not from the State, Your Honor.

1 THE COURT: All right. Any objections or
2 exceptions? Anything we need to put on the record?
3 I just will put on the record I think she got it,
4 but we struck juror number 73 and juror number 359
5 for cause. All right. Are y'all ready to proceed
6 with motions?

7 MR. NEELY: Your Honor, if I could, could I
8 have a five-minute break to go gather some things
9 from my office?

10 THE COURT: You said what now?

11 MR. NEELY: Can I have a five-minute break
12 to go gather some things from my office?

13 THE COURT: Oh, sure. All right. We'll
14 take about five minutes.

15 MR. NEELY: Thank you.

16 (Whereupon, the Court takes a brief
17 recess.)

18 THE COURT: All right, we're ready. Sorry
19 for the delay. Motions, I'm assuming -- any from --
20 we'll get to yours in a second. You have a Denno;
21 is that correct?

22 MR. NEELY: Yes, ma'am.

23 Anything else?

24 MR. NEELY: Not from the State, Your Honor.

25 THE COURT: All right. The Defense, what

1 motions do you ---

2 MS. EIGENBROT: Your Honor, just standard
3 motions as far as really any Rule 5 and were riddled
4 any updated information. I think the only witness
5 they're calling that's not related to law
6 enforcement would be Mr. Stewart. If there's any
7 updated or different information you've provided
8 other staff, that that be turned over. Several of
9 the State witnesses, again, I think Mr. Stewart is
10 the only lay witness testifying. I don't believe
11 there's anything on his criminal record that I would
12 believe would be used during cross-examination.

13 THE COURT: All right. And so we're on
14 Rule 5, that's good, riddle return. 404(b)?

15 MS. EIGENBROT: Your Honor, obviously, Mr.
16 Eberhart does have some prior convictions. I
17 believe in his statement he did talk about some of
18 that record. I believe that was a portion we did
19 redact out of the interview video. But just -- I
20 don't know if the State actually intends to go into
21 any of those prior bad acts. But I just wanted to
22 put the Court on caution or on notice and the State
23 on notice that we would be objecting to any of that
24 testimony during direct.

25 THE COURT: All right. Yes, sir?

1 MR. NEELY: Yes, Your Honor, we're not --
2 we know that he has pending common law robbery with
3 our office that's prior to this event. We also --
4 the Lexington charges that are pending as well. We
5 are not planning on getting into any of the pending
6 charges or any of his criminal history unless he
7 testifies, in which case we would present that to
8 Your Honor as potential impeachment evidence.

9 THE COURT: All right.

10 MR. NEELY: And to address her, the first
11 part, we did speak with the victim James Stewart on
12 Friday, it was a very short conversation.
13 Investigator Gilliam and Paul Walton were also with
14 me. The conversation consisted of, "Do you still
15 remember this event? Do you remember how this
16 happened, and do you still wish to go forward and
17 prosecute," and he indicated that he did remember,
18 and that he did wish to prosecute. So nothing new.

19 THE COURT: All right. Anything else
20 regarding that? All right, and then motion to
21 exclude or limit testimony of GPS monitoring or
22 ankle monitor?

23 MR. FORNEY: Yes, Your Honor, I do have a
24 motion. I would move to exclude all mention of the
25 Defendant's location data as it's my position that

1 it's a warrantless search. It's a violation of Mr.
2 Eberhart's right to privacy, guaranteed under South
3 Carolina Constitution Article 1, Section 10.
4 Because it is a warrantless search, the burden is on
5 the State to show its reasonableness. And that is
6 pursuant to State v. Moore, 377-299, 309 Court of
7 Appeals 2008. Warrantless searches are unreasonable
8 absent a recognized exception to the warrant
9 requirement. Going through those, I don't see any
10 that would apply to this situation. And just so
11 Your Honor's aware, the GPS data in this case, and
12 I'm sure we'll hear more about it in a second, was
13 done by a simple request. I think it was an email
14 to his bondsman when we see where he was once he was
15 identified as a suspect. So no search warrant was
16 sought or granted. It's obviously somewhat of a
17 voluntary agreement when a person is fitted with a
18 GPS data -- or a GPS monitoring device. But when
19 the State attaches it to a person, the Supreme Court
20 of the United States has found that that is -- that
21 they are engaging in a search. My position here is
22 that he may have agreed to wear it to ensure
23 monitoring, that he was not violating any conditions
24 of his bond. But the moment that it was used as an
25 investigation tool, the State exceeded all scope of

1 any agreement he entered into with his bondsman.
2 And they would have had -- they were required to get
3 a warrant at that point. United States v. Jones,
4 is, of course, the case where the Supreme Court of
5 the United States found that law enforcement putting
6 a GPS monitoring device on a person or their
7 property is a search and does require a warrant. I
8 have those cases -- I have a couple of those cases
9 printed out if you'd like to review.

10 THE COURT: Yes, if you can ---

11 MR. FORNEY: So I'd move to exclude ---

12 THE COURT: -- pass them up.

13 MR. FORNEY: I didn't mention it, but Grady
14 vs. North Carolina is a -- is another one that I'm
15 going to be passing up. That one is about an
16 involuntary monitoring -- location monitoring
17 program, which I think is relevant here.

18 There you go, Your Honor, and I just
19 provided copies to the State.

20 THE COURT: All right. Thank you. All
21 right. Yes, sir, I'll be glad to hear from you.

22 MR. NEELY: Your Honor, just on cursory
23 review of the United States v. Jones, this is a
24 government installing a GPS device on a targeted
25 vehicle. That is certainly a different circumstance

1 than a voluntary agreement entered into with a
2 bonding company. GPS is to ensure his good behavior
3 on bond and to know his location so that they can
4 bring him to court when he's required to come to
5 court. That's nothing the State put on him. It's
6 something that the bonding company put on him.
7 That's -- this is not a warrantless search. This is
8 not -- this is not the federal government putting a
9 G -- a GPS on somebody's vehicle without them
10 knowing about it, which is certainly an invasion of
11 somebody's privacy; however, this is an entirely
12 different set of circumstances, where he's out on
13 bond, the bonding company wants a GPS monitor on him
14 to keep -- to keep his whereabouts unprivate, so
15 that they can know where he is, and so they can go
16 find him, so that if the State needs to find him,
17 they can. And in this case the request was for his
18 location data, and it puts him at the scene. The
19 probative value is extreme in that, as it uses good
20 technological data to prove the Defendant is where
21 the crime happened, when the crime happened. And I
22 think that the probative value of that shouldn't be
23 underweighed or misstated. And, again, the State
24 didn't attach this to him. This is not -- this is
25 not a warrantless search by the State, this is a

1 voluntary agreement for GPS monitoring. The State
2 is using that GPS monitor because it -- because it
3 locates him. But it's not a warrantless search by
4 the State. So I would say that U.S. v. Jones is
5 inapplicable, and ---

6 Beg the Court's indulgence for one second.

7 THE COURT: All right. I'll probably -- I
8 need to look at the case law regarding the issue. I
9 want to say there may be a case out there.

10 MR. FORNEY: Your Honor, would you like for
11 us to send you case law this afternoon?

12 THE COURT: If you -- you're more than
13 welcome to email it, and I'll get you-all a ruling
14 on that in the morning.

15 MR. FORNEY: Okay. Thank you, Your Honor.

16 MR. NEELY: Thank you, Your Honor.

17 THE COURT: All right. Thank you. All
18 right. And so now anything else from the Defense?

19 MS. EIGENBROT: Your Honor, in regards to
20 the ankle monitor, I think based upon your ruling we
21 may have an additional motion, but we can take it up
22 once you've made your ruling.

23 THE COURT: And as -- I assume that if I
24 let it -- if I let the information in regarding
25 location data ---

1 MS. EIGENBROT: I would prefer that it be
2 called location data, or GPS data, as opposed to an
3 ankle monitor. I think the ankle monitor being
4 affixed has an equal -- and testimony in regards to
5 that to a jury would be prejudicial in the fact that
6 you only put an ankle monitor on if you are on the
7 sex offender registry, or if you're being monitored
8 on bond, or by probation, suggesting a criminal
9 record, or suggesting other nefarious types of
10 things. Especially with the language that Sheriff
11 Lawson putting out in the media a lot recently, the
12 full caption release, my concern would be the jury
13 would make assumptions based on the continued
14 testimony about an ankle monitor against my client
15 isn't relevant to the case itself.

16 THE COURT: All right.

17 MR. NEELY: Your Honor, my only concern
18 here is -- is that it seems like they want to not
19 talk about how it got there, or why it's there,
20 which I understand. Like I said before, we're not
21 talking -- we're not planning on talking about this
22 pending charge that is inapplicable to this case.
23 However, if they're going to object to that
24 testimony, that foundation of what data it is, and
25 if it's real or not, then we're going to need to

1 explain more to lay a foundation for the GPS data,
2 and what it is, and that it is real, and that it is
3 accurate. And so that -- that's my only concern is,
4 if they're going to challenge that, then I need to
5 get into the details of it.

6 THE COURT: Yeah. How do you -- how are
7 you going to -- how do you suggest that they get it
8 in other than saying -- I mean because even if we
9 bring in the bail bondsman who has -- who has the --
10 I mean how -- how are we going to get in that he's
11 not on bail?

12 MS. EIGENBROT: And, Your Honor,
13 unfortunately, I haven't dealt with the bail
14 bondsman situation previously. I have been racking
15 my brain about how best to handle that if you were
16 to grant either of these motions. But I will tell
17 Your Honor I have had this issue come up in a
18 previous case. I believe what we did, the Judge
19 allowed the person to lay the appropriate
20 foundations by addressing the jury and telling them
21 that he had an ability to obtain data, location
22 data, based on GPS, they just did not talk about an
23 ankle monitor. They were not allowed to
24 specifically go into each single movement, but I
25 think that was some older information, and it was a

1 probation ankle monitor at the time.

2 THE COURT: I might have been the Judge on
3 that. I can't remember ---

4 MS. EIGENBROT: It's Judge Craig Reynolds,
5 the trial judge for that one.

6 THE COURT: Oh, I had one, it was a
7 probation case, and I mean I think we -- in that one
8 the facts was a little bit different because they --
9 they had -- there was a pursuit, and they were
10 trying to locate the Defendant in the woods. And
11 Probation -- the way they got him is that Probation
12 kept sending the signal, and it would say, "Call
13 your probation agent, call your probation agent,
14 call your probation -- or charge -- charge the
15 monitor," but it kept sending a signal, and that was
16 how law enforcement was able to find them is because
17 they could hear it ---

18 MS. EIGENBROT: Uh-huh.

19 THE COURT: -- by them sending it a signal.
20 And I'm trying to remember what we did. We didn't
21 -- we had -- in that case I did have to discuss that
22 he was on the -- because of the signal and the
23 monitor. And I'll try to see if I can find it. I'm
24 thinking the case was appealed, and -- but it was a
25 case of robbery down on the Dollar General, I think,

1 down on Bluff Road, or somewhere like that, and --

2 MS. EIGENBROT: Oh, Your Honor, that was
3 Elleby, that was Emmanuel Elleby.

4 THE COURT: And that was ---

5 MS. EIGENBROT: And it was (indiscernible
6 testimony) case, Emmanuel Elleby.

7 THE COURT: Yeah, I think that was in front
8 of him on that one.

9 MS. EIGENBROT: Yes.

10 THE COURT: Okay. Yeah, recently.

11 MS. EIGENBROT: That was -- that was the --
12 yeah, I was on that case, too ---

13 THE COURT: Yeah.

14 MS. EIGENBROT: -- but that was a separate
15 one.

16 THE COURT: Yeah. Yeah. So you -- and so
17 I can't remember what we did. We'll pull that case
18 up and figure it -- find out, but I'm sure that was
19 one of the issues on appeal, if they even -- I don't
20 know if it went to Supreme Court or Court of
21 Appeals, if they even addressed it, but ---

22 MS. EIGENBROT: And, Your Honor, on my --
23 in my previous case, it was an individual who was
24 located at a burglary crime scene. He'd been shot
25 by the homeowners, but was -- had an ankle monitor

1 affixed to his ankle, and Judge Brown allowed the
2 State to, obviously, reference the GPS and his
3 location, because he denied being there. But,
4 again, he limited the State's ability to call it an
5 ankle monitor, and referred to it in a way that
6 would suggest he had some kind of criminal
7 background. I just can't remember specifically.

8 THE COURT: Yeah. I just need the -- my
9 only concern is how will you -- him being able to
10 lay the foundation, if you are -- if you are
11 contesting the reliability of the monitor.

12 And in this case -- in this case you have
13 somebody from BadBoyz Bonding Company, not -- so
14 it's not even the monitoring company OMS, so
15 attached to it is the bonding company, which I
16 didn't think the bonding companies -- I thought OMS
17 did all of the monitoring.

18 MS. EIGENBROT: A few of the bonding
19 companies contract with outside agencies to also
20 allow that service. In fact, it's one of the -- or
21 used to be one of them. I don't think they do it
22 anymore.

23 THE COURT: Yeah. All right. Well, let me
24 think about it, let me look at the case. I mean
25 there's a way, but I don't know, I mean if it's --

1 if it's -- if it was the -- if it's just the officer
2 testifying that location -- that a location device
3 -- tracking device placed him at the scene, but if
4 y'all are going to challenge that, then that's when
5 the problem is going to come in. I don't know how
6 -- I'll -- we'll have to figure it out.

7 MS. EIGENBROT: Yes, ma'am.

8 THE COURT: But I -- and I need to look at
9 the warrantless search part of it, because I'm sure
10 there is some case law out there, maybe not in this
11 state, but federal of the state, so I will look at
12 that tonight, and then I'll try to figure out the --
13 the other part if I -- if I need to.

14 MS. EIGENBROT: Thank you, Your Honor.

15 MR. FORNEY: And, Your Honor, we're going
16 to do additional arguments, because I do want to
17 respond to a couple things Mr. Neely said, but I'm
18 happy to do it in the morning.

19 THE COURT: Yeah. Or you can do it now, it
20 doesn't ---

21 MR. FORNEY: Well, it's just that he, you
22 know, his statement about the bail bondsman not
23 being a state actor, not being law enforcement, if
24 you look at the North Carolina case that I handed
25 up, that was found to be -- there's some analysis in

1 there about a civil code enforcer comes in, though
2 he's not a police officer, he is the State, and he
3 is performing a search when he comes inside your
4 house without a warrant. So they've already -- the
5 Supreme Court of the United States has analyzed this
6 issue and has found that it extends beyond the
7 actions of law enforcement.

8 THE COURT: All right.

9 MR. FORNEY: And it does -- and that case
10 also extends the GPS monitoring analysis from a
11 vehicle to a person.

12 THE COURT: Okay. I'll take a look at it.

13 MR. FORNEY: Thank you.

14 THE COURT: All right. Are we ready for
15 the Denno?

16 MS. EIGENBROT: Yes, Your Honor.

17 MR. NEELY: Yes, Your Honor.

18 THE COURT: And is there some issue -- I
19 know something was redacted, something -- you --
20 what all have you redacted, just for the record?

21 MR. NEELY: Your Honor, I -- I believe, and
22 I've given Ms. Eigenbrot a copy, as well as your law
23 clerk. I'm pretty sure everything has been redacted
24 except for the profanity that is near the end of the
25 interview that leads into the confrontation whenever

1 he was being detained, which is what we spoke about
2 in Chambers, that if she wants that part in, then
3 she needs to have the initial part that led to the
4 confrontation in there as well. However, I believe
5 there was 15 -- I think it was 15 line items, and
6 the last two of which were just profanity used by
7 the Defendant. And so this version has profanity in
8 it, but all the other requests that she made to have
9 redacted out, we have redacted out. And I have not
10 had time, since I got that done this morning, to go
11 back through and watch it all again, but I will do
12 so again. And we were planning on playing just the
13 initial ---

14 THE COURT: Okay.

15 MR. NEELY: -- first part, where he gives
16 the Miranda warnings, and the Defendant signs the
17 Miranda warnings just to establish the voluntariness
18 of the statement.

19 THE COURT: Okay. All right.

20 MR. NEELY: Thank you, Your Honor.

21 THE COURT: Call your witness.

22 MR. NEELY: The State would call
23 Investigator Gilliam.

24 * * * * *

25 Emmett Gilliam,

1 having been duly sworn,
2 testifies as follows:

3 * * * * *

4 THE COURT: All right. Yes, sir.

5 MR. NEELY: Thank you, Your Honor.

6 DIRECT EXAMINATION

7 BY MR. NEELY:

8 Q. Investigator Gilliam, where do you
9 work?

10 A. Columbia Police Department.

11 Q. And how long have you worked there?

12 A. I've been in the Columbia Police
13 Department for almost 16 years.

14 Q. And in what capacity do you work?

15 A. Investigation Major Crimes.

16 Q. And what kind of crimes do you
17 investigate?

18 A. Everything from assaults to murder.

19 Q. Did you have a cause -- or did you
20 interview Nevelle Eberhart?

21 A. Yes.

22 Q. What was that interview in regards to?

23 A. Armed robbery.

24 Q. And was that interview audio and video
25 recorded?

1 A. Yes.

2 Q. And did you read him his Miranda
3 rights?

4 A. Yes.

5 Q. Did he seem to understand them?

6 A. Yes.

7 Q. Do you have a paper -- that form that
8 you read from?

9 A. Yes.

10 MR. NEELY: Will you mark this for ID
11 purposes for the Court for Exhibit Number 1?

12 (Court's Exhibit Number 1, Advisement of
13 Rights, is marked for the record.)

14 BY MR. NEELY:

15 Q. Mr. Gilliam, I'm showing you what's
16 been marked as Court's Exhibit Number 1. Do you
17 recognize what that is?

18 A. Yes, Advisement of Rights.

19 Q. And does that go over all the Miranda
20 rights?

21 A. Yes.

22 Q. If you would, would you just read that
23 into the record?

24 A. "Before we ask you a question, you must
25 understand your rights. You have the right to

1 remain silent. Anything you say can be used against
2 you in court. You have the right to talk to a
3 lawyer for advice before we ask you -- we ask you
4 any questions, or to have him with you during the
5 questioning. If you cannot afford to hire a lawyer,
6 one will be appointed to you before we ask you
7 questions, if you wish. If you still want to answer
8 questions without a lawyer present, you still have
9 the right to stop answering questions at any time.
10 You also have the right to stop answering questions
11 until you talk to a lawyer. (Indiscernible
12 testimony) waive your rights?" "I have written a
13 statement of my rights, and understand what my
14 rights are. I am willing to make a statement and
15 answer questions. I do not want a lawyer at this
16 time. I understand and know what I'm doing. No
17 pressure," excuse me, "no promise or threats have
18 been made to me, nor pressure or coercion of any
19 kind have been used against me."

20 Q. Thank you. And is that the form that
21 you read to Nevelle Eberhart in the interview?

22 A. Yes.

23 Q. And how do you know that?

24 A. Because it's my signature down at the
25 bottom.

1 Q. And before the interview took place,
2 did you do any questioning of Nevelle Eberhart?

3 A. No.

4 Q. Were any threats or promises made off
5 camera?

6 A. No.

7 Q. How long was the interview?

8 A. Between me and him, probably -- well,
9 the whole time, he was there probably about four --
10 three or four hours, but I think the interview
11 between me and him probably around 30, 35 minutes, I
12 believe.

13 Q. And during the three or four hours, did
14 he have occasion to ask to go to the bathroom or
15 require any refreshments?

16 A. Did he ask a question?

17 Q. Did he ask to go to the bathroom,
18 or ---

19 A. No.

20 Q. -- did he ask for any refreshments
21 like ---

22 A. No.

23 Q. -- water?

24 A. No.

25 Q. If he did, would it have been provided?

1 A. Yes.

2 Q. Okay. And you said that you recognize
3 that because you signed it?

4 A. Yes, sir.

5 Q. Okay.

6 A. And also Mr. Nevelle signed it -- I
7 mean Mr. Eberhart.

8 Q. Okay. So he did as well? And that's
9 all captioned on audio and video?

10 A. Yes.

11 Q. I'm going to show you this DVD. Do you
12 recognize this DVD?

13 A. Yes, sir.

14 Q. And what is it?

15 A. This is a copy of the interview of
16 myself and Mr. Nevelle Eberhart on January the 11th.

17 Q. And how do you know that's what that
18 is?

19 A. Because I -- initially, because I went
20 back and reviewed it again, and I also initialed
21 today.

22 Q. Okay. Thank you.

23 MR. NEELY: I want to enter this as Court's
24 Exhibit Number 2, DVD of Interview, is marked for
25 the record.)

1 BY MR. NEELY:

2 Q. And during the interview of Mr.
3 Eberhart, when did that -- when did that interview
4 stop?

5 A. When he started getting a little irate
6 about the questions and where he was, and he didn't
7 do something.

8 Q. Okay. So at that point you cease
9 asking questions?

10 A. That's correct.

11 Q. And what -- what did you do after that?

12 A. Excuse me?

13 Q. After you stopped asking questions,
14 what happened?

15 A. He started getting irate, called me
16 names, used profanity towards me, as I go to exit
17 the room.

18 Q. But at that time the interview is over?

19 A. Yes.

20 MR. NEELY: Your Honor, I'd like to just
21 publish the first few minutes of this, where we can
22 hear Investigator Gilliam asking Defendant -- or
23 advising the Defendant of his Miranda rights, and
24 the Defendant signing his Miranda form.

25 THE COURT: Yes, sir.

1 (Video is being published for the Court.)

2 BY MR. NEELY:

3 Q. Investigator Gilliam, was that an
4 accurate reflection of what happened in the
5 interview?

6 A. Yes.

7 Q. And did you advise him of his Miranda
8 rights?

9 A. Yes.

10 Q. Did he try to interrupt you while you
11 were doing that?

12 A. Yes, sir. He did.

13 Q. But you still continued with him?

14 A. Yes.

15 MR. NEELY: No further questions, Your
16 Honor.

17 THE COURT: All right. Yes, ma'am?

18 MS. EIGENBROT: Defense has no questions.

19 THE COURT: All right, you can step down.

20 All right, I'll be glad to hear from any other
21 witnesses, I'm sorry.

22 MR. NEELY: No other witnesses, Your Honor.

23 THE COURT: Yes, sir, I'll be glad to hear
24 from you.

25 MR. NEELY: Your Honor, I think it's pretty

1 clear the statements that he gave after that were
2 voluntary, that he was appropriately and adequately
3 informed -- informed of his Miranda rights, and
4 advised of the potential dangers of talking to law
5 enforcement with the fact that he had a warrant that
6 was served on him. And he was advised of that as
7 well.

8 THE COURT: All right. Yes, ma'am?

9 MS. EIGENBROT: Your Honor, I don't
10 actually have any objections so long as the
11 appropriate redactions have been made. I believe I
12 need to review the redacted video myself, but as --
13 as of this moment I don't have any objections.

14 THE COURT: All right. Thank you.

15 I do find that the statement was given
16 voluntarily. In considering the totality of the
17 circumstances, that he was given his Miranda rights,
18 it is on video. There's no coercion from -- the
19 police officer actually stops him before he talks to
20 give him the Miranda rights, and he voluntarily
21 agreed to speak with law enforcement, obviously. So
22 based on what -- the preponderance of the evidence
23 before the Court, I do find that the statement was
24 voluntarily given by the Defendant. All right.

25 MR. FORNEY: Thank you, Your Honor. That's

1 the only motion -- motion we have.

2 THE COURT: And on the redaction, do we
3 need to address the issues regarding -- there was
4 some curse words or something?

5 MS. EIGENBROT: Your Honor, if you go a
6 little bit further into the video after Investigator
7 Gilliam has spoken to Nevelle for some time -- not
8 some time, not a very long time, but enough, Mr.
9 Eberhart does get angry about the conversation. As
10 Investigator Gilliam is getting up to leave, Mr.
11 Eberhart does use some profanity, I don't
12 necessarily think it is relevant. It can be
13 slightly prejudicial. He uses the N word pretty
14 significantly. There's a point where he stops, and
15 he's -- he's addressing all of this at Investigator
16 Gilliam. He is -- even after he's walked out of the
17 room. I believe you can kind of hear Investigator
18 Gilliam on the other side of the door kind of laugh
19 -- laughing, like kind of making noises in reference
20 to what he is saying. I'd ask that that portion be
21 cut out, if -- and I can give Your Honor the
22 timeframe. I don't know what it would be on the
23 redacted video, but I'm happy to email it to you.
24 On the original video it was from 19:28 minutes into
25 the video from -- to 19:56, it was about 30 seconds,

1 where he's literally just yelling and being -- using
2 profanity.

3 THE COURT: Is this before or after they
4 come in?

5 MS. EIGENBROT: This is before they come
6 in. He then -- and, Your Honor, it continues. I
7 mean he -- at that time I believe -- I can't -- I
8 don't have the time in front of me, but he slams a
9 wall and is still yelling, and at that time is when
10 the other officers come into the room.

11 THE COURT: Can you all find it on there
12 pretty quickly?

13 MR. NEELY: I believe so, Your Honor.

14 (Video is published for the Court.)

15 MR. NEELY: There's about eight more
16 minutes if you want to continue and watch the rest
17 of it, Your Honor, but that was like the -- that was
18 the main confrontation part right there.

19 THE COURT: All right. So I'm assuming,
20 are you asking for the other eight minutes to be
21 shown? I know you -- you -- I think you -- he --
22 you said you were going to redact it.

23 MR. NEELY: I think it's relevant because
24 after the -- in the initial -- in the initial
25 cussing, my position would be that while he's in

1 custody, he's also making allegations of innocence,
2 and I think that being able to view that and his
3 body language and his demeanor is appropriate for
4 the jury, as the finder of fact, and they're
5 supposed to be weighing his credibility. And during
6 that cussing episode he claims he's innocent a few
7 times. I think that it's important for a jury to be
8 able to weigh credibility appropriately, and so I
9 think it is appropriate.

10 THE COURT: I think she wants that part in,
11 right?

12 MS. EIGENBROT: Your Honor, it is literally
13 the section where Investigator Gilliam is like out
14 the door, and my client just keeps -- like up until
15 the point. There is a point he stops addressing him
16 and gets more -- just -- there's just more yelling.
17 That -- I don't know, it's just ---

18 THE COURT: Yeah, I don't know, I mean I --
19 we can stop it here, unless there's something that
20 you -- something ---

21 MS. EIGENBROT: No, I mean the rest of it I
22 don't have any objections to. I mean it's ---

23 THE COURT: But I think ---

24 MS. EIGENBROT: In fact, I think
25 Investigator Gilliam walks in and helps him with the

1 handcuffs.

2 THE COURT: I think -- I thought earlier
3 that there was some discussion about the State was
4 going to redact it all?

5 MR. NEELY: I was going to redact from the
6 moment that he -- what I proposed redacting before
7 they came in and detained him, but Megan said that
8 she wanted that part in there, and I said that was
9 fine, I don't mind that part being in there, but if
10 that part was in there, then really I have a strong
11 objection to not including the cussing and banging
12 on the wall that led up to that.

13 THE COURT: Well, I mean I think you have
14 to put both of them in. You're going to have to, if
15 it's what led to under, you know, the doctrine of
16 completeness, and everything else, you -- you would
17 have to be able to show what led to -- so if I put
18 the second part of them coming in, I have to be able
19 to show why they came in.

20 MS. EIGENBROT: Yes, Your Honor.

21 THE COURT: All right. Including, I guess,
22 him from the beginning becoming agitated with the
23 investigator. All right?

24 MS. EIGENBROT: Thank you.

25 THE COURT: All right. So I think that

1 resolves the issues that -- regarding the -- the
2 video. Anything else regarding that video?

3 MR. NEELY: Your Honor, the only thing I
4 would ask is that if we're able to review the video,
5 if there's anything in there that should be taken
6 out that wasn't taken out, that we -- that was sent
7 in the original -- initial email that you let us
8 know as soon as possible, so we can get that done.

9 THE COURT: Yes. All right. Anything
10 else?

11 MS. EIGENBROT: Nothing from the Defense,
12 Your Honor.

13 THE COURT: All right, and so I'll get
14 y'all a ruling on the GPS issue and the ankle
15 monitor.

16 MR. NEELY: Thank you, Your Honor.

17 MR. FORNEY: Thank you, Your Honor.

18 THE COURT: All right, and we'll see you --
19 let's say about 9:15, I'm going to try. Yeah. So I
20 can rule and -- and then -- because the jury --
21 well, the jury gets here at 9:30, so I mean I'll --
22 I'll hear you all -- if there's additional
23 arguments, we'll hear it, but we're -- we're going
24 to -- we'll do some research tonight on the issue
25 and see what we find. All right, all right, thanks.

1 MS. EIGENBROT: Thank you, Your Honor.

2 (Whereupon, the trial is adjourned for the
3 day and will begin at 9:30 a.m. on February 7,
4 2023.)

5 * * * * *

6 (Beginning of second day, February 7, 2023.)

7 * * * * *

8 THE COURT: The jury is still coming in,
9 but just as a housekeeping note, we had -- good
10 morning, I should say. We had a couple of the
11 jurors that have to pick their kids up, or
12 something. One lady said 3:30, Tuesday, Wednesday,
13 Thursday, Friday. But I will explain to her that
14 she will not be able to -- she will need to make
15 alternative arrangements. I'm not sure why they
16 didn't tell Judge Hood that on yesterday, but
17 there's no way in the world I can stop at 3:30 for
18 her to go pick her child up. So I'll have that
19 discussion with them once we finish the motions.
20 And then one of the other ones said she needs to
21 pick her child up, I think, by 5:30. And so I mean
22 that may be a little more workable, just depending
23 on where we end today, but 3:30 is definitely --
24 definitely not going to work.

25 All right. Actually, Janie, if you can go

1 tell the one that's at 3:30, if she can go ahead and
2 start trying to make some arrangements, but just
3 tell her we -- we -- I can't -- we can't just stop
4 the trial at 3:30.

5 MADAM CLERK: Okay.

6 THE COURT: I'm not sure why she didn't
7 discuss that with Judge Hood yesterday, but I
8 assumed when they all came and sat in here that they
9 were ---

10 MADAM CLERK: Okay, so I'm going to go tell
11 her to get somebody to pick her child up.

12 THE COURT: And the one at 5:30, we'll try
13 our best to get her out of here by 5:30, but ---

14 MADAM CLERK: Okay.

15 THE COURT: -- you know, 5:00 or 5:30,
16 that's a little more reasonable, but I -- I can't
17 promise that.

18 MADAM CLERK: Okay.

19 THE COURT: All right. I'll be glad to
20 hear from you all if there's anything additional
21 you'd like to put on the record regarding the motion
22 to exclude testimony regarding the GPS monitor and
23 ankle monitor, pursuant to 403.

24 MR. NEELY: Thank you, Your Honor.

25 And I -- I emailed and handed in a paper

1 copy of what is the State's brief, it's State v.
2 Kitt, that declines the rule on the issue. And in
3 the second, the number two note, I think that the
4 State's brief in that case is correctly on point
5 with all the things that I would argue, which is,
6 first, is that the Defense has the burden of showing
7 a legitimate expectation of privacy in the area he
8 was searched. And that includes the subjective
9 expectation of not being discovered, and the
10 expectation is one that society recognizes as
11 reasonable. And that's in KATZ, and also in KATZ,
12 when a person knowingly exposes to the public, even
13 his home -- home or office, is not subject to Fourth
14 Amendment protection. In this case we have a
15 Defendant who was out on bond, who voluntarily
16 submitted to GPS monitoring. As a condition of that
17 bond, and in doing so voluntarily gave up his
18 expectation of privacy and his location. That is a
19 condition of his bond. And that's why we had the
20 GPS monitoring, because the GPS monitoring is to
21 ensure they're good behavior, and -- and know where
22 they're at, so they don't -- so the State can use
23 that, and that's what we have in this case.
24 Further, I think that it's applicable to note that I
25 know that there are some cases out there that have

1 ruled on cell phones with Verizon, that the third
2 party exception -- the State can't get around the
3 warrantless search by going to Verizon and getting
4 somebody's personal data from their cell phone;
5 however, cell phone is a -- is an entirely different
6 beast than GPS monitoring, and I think that's been
7 -- that's been noted in courts as well. Basically,
8 every -- every bit of personal information you have
9 is contained in the cell phone, whereas, a GPS
10 monitoring system only monitors the location that
11 you are at, which is on -- is inherently no
12 expectation of privacy. If you're out in public,
13 people can see you, there's no expectation of
14 privacy there. If you're driving around on a moped,
15 on the street, there's no expectation of privacy,
16 people can see you there. People can note that
17 you're there with their own eyes. So I don't think
18 that the Defendant has an expectation of privacy in
19 this location. Further, I don't think that --
20 sorry. All right. So there's no expectation of
21 privacy, and further, Defendant consented to the
22 acquisition of his movements to the GPS monitoring
23 as part of his released on bond. So not only is
24 there no expectation of privacy, but the Defendant
25 consented to that -- to that happening, and that

1 being part of it. So I think that -- that this is
2 an exception to the warrantless search requirement.
3 I -- I would -- would note that from my research on
4 this, that it does not appear to be an issue that
5 South Carolina has ruled on.

6 THE COURT: All right. Yes, sir?

7 MR. FORNEY: Thank you, Your Honor, may it
8 please the Court?

9 I want to just address the -- the claims
10 made in -- in sequence. The State claims that the
11 burden is on us to show that there was an
12 expectation of privacy, when I argued yesterday that
13 under State v. Moore the burden is always on the
14 State to show that a search was reasonable when it
15 is done without a warrant, as this one was. I think
16 maybe the first thing to do is decide -- I mean just
17 an order of operations may be to decide whether this
18 was a search. If it was a search, then it is on the
19 -- incumbent on the State to show it was -- it was
20 reasonable or falls within a -- a recognized
21 exception to the warrant requirement. I don't -- I
22 don't -- I haven't heard, the only warrant exception
23 I've heard is possibly consent, and they have
24 pointed to the State v. Kitt case, which I think
25 shows a clear consent in that case. In that case

1 the Defendant says to law enforcement, "Check my
2 GPS, I was in Savannah that night." Giving clear
3 consent for law enforcement to check his location.
4 Completely distinguishable from this situation,
5 where Mr. Eberhart is never consulted, never asked,
6 and certainly never provides his consent. The
7 consent -- furthermore, I think we're conflating
8 consent to be monitored on bond, with consent to be
9 investigated for a new crime, those are not the
10 same. A consenting to have your movements monitored
11 for adherence to bond conditions is not the same
12 thing, as -- as consenting to give up a
13 constitutional right to have your home and persons
14 secure from government intrusion, which Mr. Eberhart
15 never gave up. The Supreme Court of the United
16 States has been very clear about the distinction
17 between the use of technology in discerning a
18 person's location versus using the naked eye. Mr.
19 Neely's correct that, if the -- if the police were
20 just following Mr. Eberhart around watching what
21 businesses he went to, he very likely wouldn't have
22 an expectation of privacy. But that's not the
23 situation we have here. We have here them using
24 very sophisticated technology to monitor his
25 location 24 hours a day for the purposes of a

1 criminal investigation. And it falls clearly within
2 recognized law that they cannot use such
3 technological devices without a search warrant. So
4 I don't believe that the State has produced --
5 furthermore, Kitt -- doesn't have any precedential
6 value. It's very clear about that. It's
7 distinguishable on the facts, and there really is no
8 Fourth Amendment analysis to be found in -- in that
9 case. So I don't think it helps Mr. Neely's
10 position to cite that case. The other case he
11 mentions, State v. Robinson, I think that's just
12 mentioned as an example of a case where GPS data
13 comes in. Again, no Fourth Amendment analysis
14 whatsoever. So I have not heard anything that
15 persuades -- that I find persuasive. I believe the
16 burden is still on the State to show why they didn't
17 get a warrant in this case. I believe they had
18 ample opportunity to. They -- they chose not to,
19 and the burden is on them to show that it falls
20 within a reasonable exception, and they haven't done
21 so.

22 THE COURT: Any response?

23 MR. NEELY: Just briefly, Your Honor. And
24 from what I'm hearing from Mr. Forney, he's stating
25 that the Defendant has an expectation of privacy in

1 his location while he's riding around on a moped on
2 the street. And I -- first off, I think that that
3 is -- that's incorrect. And as a matter of
4 standing, it's -- it's -- he doesn't have a standing
5 to bring this, because it's not -- there's no
6 expectation of privacy there. Further, I think that
7 -- well, not I think. In the brief that I emailed
8 Your Honor about one of the cases that mentions the
9 Colorado case where they address this issue on
10 point. It's -- in the Colorado case it was a
11 suspect and a burglary wearing a GPS ankle monitor
12 at the request of a private bail bondsman when he
13 was arrested. Officer requested data from the
14 monitoring company without requesting a warrant, and
15 in -- in that case, the court found even if the
16 Defendant had a -- an expectation of privacy,
17 personally, a subjective expectation of privacy of
18 not being discovered, that the court in Colorado
19 found that is not a expectation of privacy, that
20 society was willing to find this reasonable for
21 somebody that was on GPS monitoring. And I think
22 that that is the second part of the argument as
23 well, that he is on GPS monitoring, he is on notice
24 that the State has his location data and would use
25 that against him.

1 THE COURT: All right. Thank you.

2 All right. In considering the Fourth
3 Amendment, it prohibits against unreasonable search
4 and seizures, it -- the Fourth Amendment protects
5 the people from unreasonable searches and seizures.
6 I disagree, I think the burden is on the -- anytime
7 you have a motion to suppress a -- suppress evidence
8 based on an alleged -- an alleged unreasonable
9 search, the Defendant has the burden of showing that
10 he had a legitimate expectation of privacy in the
11 area that is searched. And here I have not heard
12 anything or did not find that the Defendant has a
13 legitimate expectation of privacy when he
14 voluntarily submits to GPS monitoring. The sole
15 purpose of GPS monitoring is to determine a
16 Defendant's location while out on bond. The
17 Defendant entered into the agreement with the
18 bonding company, knowing that the bonding company
19 could share the information with law enforcement.
20 One of the conditions of bond is good behavior, and
21 to be able to -- the purpose of the GPS is to be
22 able to locate the Defendant, that it could be
23 shared with law enforcement, and it could be shared
24 with the Court. And so, therefore, I do not find
25 that the -- the Defendant had a legitimate or

1 reasonable expectation of privacy as it relates to a
2 GPS monitor that he has voluntarily entered into a
3 contract with the bonding company. And so,
4 therefore, I am going to deny motion to suppress the
5 GPS monitoring location data. So next we need to
6 discuss how it gets in, what gets in. I have
7 concerns about -- in looking at 403 and 404 about
8 any information coming in about him being out on
9 bond. I don't even know what he was out on bond
10 for. What was he out on bond for?

11 MR. NEELY: For common law robbery, Your
12 Honor.

13 THE COURT: Okay. Well, that's definitely
14 not coming in, but I think the State has that it is
15 some probative value there for the State, to be able
16 to identify or use the location data to put him in
17 the location. The question is, how do we get it in
18 -- how do we get that in without prejudicing the
19 jury -- prejudicing the Defendant in the eyes of the
20 jury? So I'll be glad to listen to any suggestions.
21 I know Ms. Eigenbrot had some suggestions yesterday.
22 I'm thinking if -- if there was a way to get any in
23 through the law enforcement, but then, of course, if
24 you're going to challenge the reliability of it,
25 that's where it becomes problematic, because then I

1 have to -- they have to bring in the bonding
2 company, and the bondsman is going to have to
3 testify that he works for the bonding company. He
4 may not have to say he works for Bad Boy Bonding,
5 but ---

6 MS. EIGENBROT: So, Your Honor, I did go
7 back last night and contact Mr. Ruffin when you
8 referenced the State v. Elleby case ---

9 THE COURT: Uh-huh.

10 MS. EIGENBROT: -- where we discussed an
11 ankle monitor. He was able to send me some pages
12 from the transcript if Your Honor is inclined to
13 view them. I think what we ended up ultimately
14 doing in that case was allowing them to refer to it
15 as a GPS device. I guess suggesting another device
16 could be used.

17 THE COURT: Uh-huh.

18 MS. EIGENBROT: And I think what we as the
19 Defense ultimately did was conceded that the
20 information being provided did belong to the client.
21 But in considering and thinking about this
22 additionally, I do have some concerns about them
23 being able to lay the appropriate foundation for
24 accuracy. They have a bonding agent who's, I
25 recall, being called as a witness to testify to this

1 report that was provided in discovery. Your Honor,
2 what I have not received though is any information
3 from this particular individual that would suggest
4 that he has any knowledge of the complex nature of
5 how GPS devices actually work or how the data is
6 monitored and/or stored and handled. He is not --
7 I've not been provided any type of CD that would
8 suggest he has any expertise, and that, other than
9 the fact that he affixes the monitor on individuals,
10 and he pulls these reports from a third party that
11 actually -- that actually stores the data and
12 interprets it and uses -- I guess fixes to use the
13 devices themselves. And so I do think ultimately
14 we're going to end up in a situation where there's
15 some foundational issues. I don't even know that
16 law enforcement can testify to that. I think we all
17 know, generally, that GPS allows some accuracy, but
18 for how -- how they -- I think there needs to be
19 something more than just a bonding agent that comes
20 in, and can testify and explain why that is
21 accurate. Not simply that, you know, it's a GPS
22 monitor, we know it works.

23 THE COURT: Well, I -- I would think that
24 the bonding -- whoever is doing the monitoring would
25 have to come in, testify to the serial number on the

1 monitor, is this the one that was assigned to him,
2 and how -- and how they get the report from the
3 serial -- but we would probably need to proffer that
4 testimony from the bonding agent to ---

5 MS. EIGENBROT: Okay.

6 THE COURT: -- to find out if he -- if he's
7 able to testify to that. But that still doesn't
8 help me on that other issue. I mean we can proffer
9 the testimony. I was trying to figure out if
10 there's a way to proffer the testimony, and then
11 proffer it for the record outside the presence --
12 outside the presence of the jury to establish if he
13 can -- is able to lay the foundation, but yet not
14 get all of that in in front of the jury. I just --
15 I mean I think if you're going to question the
16 reliability, I don't know how you do that without
17 getting -- and then in the case, remember, that was
18 -- the Elleby case was a probation case.

19 MS. EIGENBROT: Yes, Your Honor, it was.

20 THE COURT: And what we were trying to keep
21 out was just that he was on probation. And so that
22 one was a little bit different because we just had
23 someone come in -- was it a probation? I can't
24 remember if it was ---

25 MS. EIGENBROT: I believe it was a

1 probation agent, and I believe Ms. Sampson kind of
2 led them through the particular language that was
3 allowed by the Court. And, Your Honor, I actually
4 think Mr. Ruffin and I messed up by not objecting to
5 that agent's ability to -- I don't even know if they
6 actually testified about any accuracy of it. I
7 think we ended up conceding that. But looking at it
8 now and recognizing this technology continues to
9 grow and become more complex, I don't know that it's
10 appropriate to do that anymore. I think
11 individuals that actually understand the technology,
12 I know I don't. I know I've been doing this and
13 having to fight for ankle monitors for nine years
14 now, I don't really understand how it works. And I
15 can look at a report, and I can think that I
16 understand what it's saying, but it might not
17 necessarily be the case. And so I think there has
18 to be something more and, again, this data is not
19 stored by BadBoyz Bonding Company. It is stored by
20 a third party. I think that was the ghost that
21 would know their systems. All the bonding agent
22 does is affix him with the monitor, and I think he
23 has access to the system. He doesn't have any
24 knowledge about how the system works, how the data's
25 actually stored. I know he can retrieve a report,

1 but I think that's the extent of what his testimony
2 would be in this situation.

3 MR. NEELY: Your Honor, first I just want
4 to say that I think there's a case that sheds some
5 light on this issue. It's State v. Brown, the cite
6 is 424 S.C. 479. In that case they actually kept
7 the GPS monitoring data out because there was no
8 testimony elicited about its accuracy. And in that
9 case it says, "The State acknowledges that it is
10 required to authenticate the GPS records, but argues
11 the burden is not high." The Court agreed and also
12 the Court acknowledged that the reliability of
13 operation of GPS technology, in general, is not
14 generally disputed. You know, this is not 20 years
15 ago whenever people didn't know how GPS data worked.
16 Everybody carries around a phone these days,
17 everybody uses that GPS in their phone to go from
18 their house to even the store that's ten minutes
19 away. The reliability is -- is not really in
20 dispute. Certainly, a foundation needs to be laid,
21 but the -- the complexity doesn't need -- doesn't
22 need -- doesn't need to be -- doesn't need to be
23 delved into to really understand that it's reliable
24 technology. And going into the foundation part of
25 it, the State's concern is that if we knew through

1 the testimony of the bonding company agent too much,
2 the -- the jury's not going to believe him. We're
3 going to have what looks like a layperson come off
4 the street and say, "I know where he was," and
5 that's it, and ---

6 THE COURT: No, no, no, I mean if we -- if
7 there's an issue with the foundation, then I'm going
8 to have -- he's going to have to say he was a
9 bonding company. He's with a bonding company, and I
10 mean I just don't know any other way to get around
11 that.

12 MR. NEELY: I agree.

13 MS. EIGENBROT: And, Your Honor, I -- I
14 think -- I just want to reference what Mr. Neely
15 just suggested is that we all know how technology
16 works, but we don't know, and I don't know that in
17 Mr. Curry can actually articulate that he knows it
18 was working. Can he say that the ankle monitor was
19 on him at that time? Yes. It was coming back to
20 whatever systems were there. Yes, but can he say
21 that the system is accurately restoring that data, I
22 don't believe he can testify to that. And so I
23 think there's still a question of -- I mean just
24 assuming that GPS -- and that's what State v. Brown
25 is talking about. The probation agent gets up there

1 and testifies, "We just know it's accurate.
2 (Indiscernible testimony)." Well, that's not the
3 standard. Now, it is complex scientific technology
4 that I think has to be explained in better details
5 to warrant it to say why it's reliable in any court
6 of law.

7 THE COURT: Yeah. But in -- in looking at
8 State v. Brown, they -- the Court emphasizes that no
9 elaborate showing of the accuracy of the recorded
10 data -- data is required. Having a statement show
11 some -- must make some showing to authenticate the
12 records. Other jurisdictions have allowed GPS
13 records to be authenticated by someone who has
14 general knowledge and experience with the system
15 used, explains how the records are generated,
16 confirms the accuracy of the result.

17 MS. EIGENBROT: And, Your Honor, what I'm
18 mostly concerned about is where it says where --
19 there was allowed testimony in North Carolina, where
20 it says, "The sergeant testified about how the
21 device operates using a combination of GPS signals
22 and cell phone triangulation to track location of
23 the ankle monitoring device every four minutes."
24 Again, I think that is actually more than what Mr.
25 Curry can testify to.

1 THE COURT: Well, I mean I don't know if
2 Mr. Curry's going to testify today. I think Brown
3 is saying that he just needs to be able to
4 authenticate the records and discuss how he handles
5 them in the course of his business. But I mean in
6 this case it says the test is minimum when it comes
7 to GPS -- and this is a -- a 2018 case, so it's
8 relatively recent. But we can put him on the stand
9 and proffer his testimony. Before we do that, we
10 have a juror -- one of the jurors is sick,
11 apparently, and said they were sick all last night.
12 I don't know which one it is. I can bring the juror
13 in, and I'll probably end up having to dismiss. But
14 I pulled the juror from the room with the other
15 jurors, so if that person is, in fact, sick, we
16 don't want it to spread to the others in there. And
17 we have two alternates, so -- the Clerk's not down
18 there. Can we -- did -- can we bring in juror
19 number 252?

20 (Bailiff brings in juror number 252.)

21 THE COURT: All right, juror number 252, is
22 that correct?

23 JUROR 252: Yes, ma'am.

24 THE COURT: They said you're not feeling
25 well?

1 JUROR 252: Yeah. I was sick last night,
2 but I called per the call, came in 'cause I didn't
3 want -- I know it's ---

4 THE COURT: Yeah.

5 JUROR 252: -- (Indiscernible testimony)
6 people for this trial and --

7 THE COURT: Yeah. Well, I -- and I
8 appreciate you having your mask on ---

9 JUROR 252: Yeah, yeah.

10 THE COURT: -- around the other jurors.
11 So if you don't feel well, we're going to release
12 you. That's the reason we pick alternates.

13 JUROR 252: Yeah.

14 THE COURT: And so we will release you, and
15 I hope you feel better.

16 JUROR 252: All right.

17 THE COURT: All right. Thank you.

18 JUROR 252: Well, I apologize for it.

19 THE COURT: Oh, no, no problem, we --
20 there's some things we can't control.

21 JUROR 252: Yes.

22 THE COURT: All right. Thank you.

23 Juror number 252 will be excused. All
24 right, and then, apparently, I don't know why they
25 don't ask these questions and bring this up in the

1 qualifications. One of the jurors says she has to
2 leave at 5 o'clock. The one -- that 3:30 one has
3 made other arrangements, but the other one said she
4 has to leave at 5 o'clock to pick up her child by
5 5:30. So we will try our best, I don't know where
6 the child -- if this child is close by, or what, but
7 we'll try our best to -- to get her out of her by
8 5:00. I thought she said she needed to be out by
9 5:30, but I'll discuss that with them when they come
10 in. But let's put the bondsman -- is he your first
11 witness, or are we going to do him during the break,
12 or what?

13 MR. NEELY: He's here. He's not -- he's
14 not the first witness that we were planning on
15 calling, Your Honor.

16 THE COURT: Well, let's -- go ahead and
17 proffer his testimony.

18 MR. NEELY: Okay.

19 THE COURT: And then, Janie, I need you to
20 put the names in the cup, and then put -- we can
21 pull which one's going to be our alternate -- which
22 alternate I'm going to -- oh, so the one that has to
23 leave at 5:00 is one of the alternates, but I --
24 but, you know, the rules say we have to put their
25 name in the cup, and so we'll just -- I mean we'll

1 have to just -- I don't want to release her just yet
2 just because we already -- we just released one.
3 Well, we're going to go ahead and proffer this
4 testimony, and then we'll do that. So if you can go
5 ahead and call -- are you ready to call the witness?

6 MR. NEELY: Yes, Your Honor. The State
7 would call Mr. Curry to the stand, Titus Curry.

8 * * * * *

9 Titus Curry,
10 having been duly sworn,
11 testifies as follows:

12 * * * * *

13 MR. NEELY: Ready, Judge?

14 THE COURT: Yeah.

15 MR. NEELY: Thank you, Your Honor.

16 DIRECT EXAMINATION

17 BY MR. NEELY:

18 Q. How are you doing, Mr. Curry?

19 A. All right. How are you doing?

20 Q. I'm doing all right. Where do you --
21 where do you work at?

22 A. BadBoyz Bail Bonding.

23 Q. And what is your position at BadBoyz
24 Bail Bonding?

25 A. Office manager.

1 Q. And what is your responsibility as an
2 office manager?

3 A. Pretty much make sure everything works
4 right, doing reports, bonds, short-time recovery,
5 GPS, things of that nature.

6 Q. Okay. And when you say GPS, how many
7 clients do you all have on GPS in a given year?

8 A. Oh, hundreds.

9 Q. Yeah?

10 A. If it's Richland County, we usually do
11 them through OLMES [sic], in the other county we can
12 do them ourselves.

13 Q. And whenever you need to find out
14 somebody's location, how do you do that?

15 A. There's a database that we go on called
16 VeriTracks. We go on, access the actual serial
17 number, and it'll pull up all the track points.

18 Q. So if -- if -- whenever -- well, if law
19 enforcement requests that you pull the records of
20 Nevelle Eberhart ---

21 A. Uh-huh.

22 Q. -- and whenever you go to pull those
23 records, you go to VeriTracks; is that correct?

24 A. Correct.

25 Q. And what information does VeriTracks

1 give you?

2 A. Its track point for whatever date range
3 that we need.

4 Q. And VeriTracks is a software program
5 that you use?

6 A. Correct.

7 Q. And it keeps track of the GPS data
8 that's being recorded by each of the ankle monitors?

9 A. Correct.

10 Q. How is that data stored?

11 A. It stores the whole tenure of that
12 person's -- as long as they have the GPS on. If it
13 doesn't have a GPS, or have no location, or no
14 communication, it'll give us an alert and let us
15 know.

16 Q. And what circumstances would rise -- or
17 give rise to giving no location or something like
18 that?

19 A. We would have to make contact, tell
20 that person to come in, let us either fix that GPS,
21 or get one exchanged.

22 Q. And is this something that you depend
23 on for your business?

24 A. For the most part.

25 Q. And is it reliable?

1 A. It is.

2 Q. And do you -- do you know how the GPS
3 data is recorded?

4 A. Uh-huh.

5 Q. How is it recorded?

6 A. It -- it pings every about four to ten
7 minutes, and the only way it goes a little shorter,
8 if we put it on rapid mode, or pursuit mode, then
9 it'll be every couple seconds. And it pings off of
10 cell towers, so as long as they're not in the wild
11 jungle, you know, we can get them.

12 Q. And so the cell tower is what gives you
13 their location data?

14 A. Correct.

15 Q. And that is recorded by VeriTracks
16 automatically?

17 A. Uh-huh.

18 Q. And then VeriTracks keeps all the
19 location data for each Defendant automatically in
20 your system?

21 A. Correct.

22 Q. And then you can access that at any
23 time?

24 A. Correct.

25 Q. And that's something that you do as

1 part of your business?

2 A. Correct.

3 Q. And is that something that you rely on
4 whenever law enforcement asks you to find somebody?

5 A. Correct.

6 Q. And has it been reliable in your
7 experience?

8 A. Correct.

9 Q. I'm going to show you this movement
10 report. Do you recognize this?

11 A. I do.

12 Q. What is that?

13 A. This will be the track points for Mr.
14 Eberhart from -- in this date range.

15 Q. And how do you know that?

16 A. This is exactly how the report comes
17 up. And I'm familiar with a lot of these addresses,
18 so, yeah, this is how it comes up.

19 Q. Okay, so that's the -- that's the kind
20 of report that's automatically generated by
21 VeriTracks?

22 A. Correct.

23 Q. And what data is recorded in that
24 report?

25 A. What data is recorded for what?

1 Q. Well, generally, what data -- what kind
2 of -- what kind of data is recorded in that report?

3 A. All the track points, whenever he
4 moves, whenever he -- if he goes from one spot to
5 the next, it'll give us a ping telling us how long
6 he's been there, how fast he was moving, and his
7 ending address.

8 Q. Okay. So it -- the location data, it's
9 an address?

10 A. Uh-huh.

11 Q. And it also has the same time that he
12 was at that address for?

13 A. Correct.

14 Q. And then does it show you like the time
15 in between the pings?

16 A. Yeah.

17 Q. And so it's according to location, his
18 movement, and ---

19 A. Uh-huh.

20 Q. -- time in between?

21 A. Uh-huh.

22 Q. And that, again, is a report that's
23 automatically generated whenever you pull that
24 report?

25 A. Correct.

1 Q. And that's something you use as part of
2 your software for your business?

3 A. Uh-huh.

4 MR. NEELY: Beg the Court's indulgence.
5 Your Honor, that's all the questions I have.

6 THE COURT: All right. Yes -- yes, ma'am.
7 Yes, sir.

8 MR. NEELY: Oh ---

9 THE COURT: Do you have another question?

10 MR. NEELY: Well, I didn't -- I didn't ID
11 the -- what I handed him, the report.

12 THE COURT: We'll mark it for
13 identification purposes.

14 MR. FORNEY: I think we would object to
15 that being entered unredacted.

16 MR. NEELY: It's Court's ID.

17 THE COURT: For ID purposes.

18 MR. FORNEY: ID purposes. Okay.

19 THE COURT: Yeah. You can mark it as a
20 Court exhibit, or ID -- for ID purposes.

21 MR. NEELY: And ---

22 THE COURT: Let's mark it as a ---

23 MR. NEELY: Court's Number 3, please.

24 THE COURT: Let's mark it as a Court
25 exhibit, so for purposes of appeal it'll go on the

1 record and all that. So let's mark it as a Court
2 exhibit. So that would be Court Exhibit Number 1?

3 MR. NEELY: Three.

4 THE COURT: Three?

5 MR. NEELY: The number one is the advise of
6 rights, and number two was for the interview which
7 we, I guess ---

8 THE COURT: All right.

9 (Court's Exhibit Number 3, Location Data,
10 is marked for identification purposes only.)

11 MR. NEELY: Thank you, Your Honor.

12 THE COURT: All right. All right.

13 MR. FORNEY: Thank you, Your Honor, may it
14 please the Court?

15 THE COURT: Yes, sir.

16 **CROSS-EXAMINATION**

17 BY MR. FORNEY:

18 Q. Mr. Curry, you're a bondsman, right?

19 A. Correct.

20 Q. Correct. Do you mind if I ask, what's
21 your education background?

22 A. A college graduate.

23 Q. A college graduate?

24 A. Uh-huh.

25 Q. What's your degree in?

1 A. Community recreation, and I had a minor
2 in mass communication.

3 Q. In what kind of communication?

4 A. Mass communication.

5 Q. Mass communication. Okay. You don't
6 have a background in programing do you? Software?

7 A. No.

8 Q. Okay. Satellite technology?

9 A. Nope.

10 Q. Okay. Are you trained in the
11 translation of data from mathematical computer
12 expressions to physical location?

13 A. As opposed to GPS? Yes.

14 Q. You are trained in that?

15 A. Uh-huh.

16 Q. What's your training in that?

17 A. Everybody that manages it has to be
18 trained in it. We're trained by National Pretrial
19 Services.

20 Q. National Pretrial Services?

21 A. Correct.

22 Q. How long was your training?

23 A. Eight weeks.

24 Q. Eight weeks?

25 A. Uh-huh.

1 Q. Like an eight-hour day, 9:00 to 5:00?

2 A. They vary.

3 Q. Okay. Did you receive any kind of
4 certification or diploma for attending that?

5 A. They just allowed you to use it. They
6 wouldn't put you out there and be able to use it if
7 you couldn't use it.

8 Q. I see. Your -- have you ever
9 personally tested one of your devices that you use?

10 A. Troubleshoot it?

11 Q. Let me be specific. If you had to, for
12 example, put the ankle monitor on an associate, send
13 them to a location, and see if what shows on your
14 report is actually where they are?

15 A. I haven't personally sent them to an
16 address, but I've been able to pull up the reports,
17 and go and find that person there. So I mean if
18 that's the testing you're looking for, yes.

19 Q. All right. And you testified that this
20 was reliable in your experience. How long have you
21 been doing this?

22 A. GPS or a bondman?

23 Q. Both.

24 A. I've done bonding for about six years,
25 GPS for about three.

1 Q. GPS for about three. So is -- what --
2 I mean what -- you're an office manager. How much
3 of GPS -- how much of your daily -- how much of your
4 day is devoted to discerning GPS reports?

5 A. It gives you pings throughout the day,
6 so it's not necessarily -- you're not staring at it,
7 but it gives you pings all throughout the day for
8 every client.

9 Q. I see, but your -- your office doesn't
10 have a designated person whose only job is to manage
11 the GPS data?

12 A. In the office? No, VeriTracks has
13 that.

14 Q. And VeriTracks -- you don't work for
15 VeriTracks?

16 A. Uh-uh.

17 Q. That's a no?

18 A. I don't work for ---

19 Q. Okay.

20 A. -- VeriTracks.

21 Q. VeriTracks, where is their headquarters
22 located?

23 A. In Charleston, South Carolina.

24 Q. In Charleston?

25 A. Uh-huh.

1 Q. Is that where the data is stored, to
2 the best of your knowledge?

3 A. Yes.

4 Q. Okay. Can you explain to us where --
5 how the data travels from a person's device to where
6 it's stored in Charleston?

7 A. It's a cell phone tower. It's pretty
8 much a cell phone that walks in your pocket. It
9 gives a ping, the ping goes to that particular --
10 the particular home base, and it sends us a
11 notification saying that this person has either no
12 GPS, or instrument's on, or dead battery, or
13 anything.

14 Q. And can you be a little bit more
15 detailed in what a ping is?

16 A. If he gets in a certain area, a certain
17 -- let's say he's on Main Street, that ping will
18 tell us that, okay, this person has now entered Main
19 Street on this particular address.

20 Q. Okay. So ping is location then?

21 A. Correct.

22 Q. And so the -- the data travels from the
23 person's device to a cell tower to where it
24 eventually is ---

25 A. Uh-huh.

1 Q. GPS stands for Global Positioning
2 Satellite, right?

3 A. Uh-huh.

4 Q. Are there satellites involved in this
5 monitoring technology?

6 A. It's just like cell phone towers, yes,
7 sir.

8 Q. Okay.

9 MR. FORNEY: Beg the Court's indulgence.
10 I have nothing further, Your Honor.
11 Thank you, Mr. Curry.

12 THE COURT: Yes, sir. Any ---

13 MR. NEELY: Nothing from the State.

14 THE COURT: All right. You can step down,
15 Mr. Curry. All right, I'll be glad to hear from you
16 all.

17 MR. NEELY: Your Honor, as the -- as that
18 case states, the bar is low, and in this case I
19 think it's clear that Mr. Curry's qualified to pass
20 that bar and exceed that bar. He's trained in this
21 system, and training is required for this system.
22 He's testified that it's reliable, and that he's
23 used it reliably, and that not only is it reliable
24 and that he's used it, but hundreds of cases that
25 he's used it in, he found it to be reliable. It's

1 something that he relies on for his business, and
2 that it's kept as a business record, and can be
3 generated from a system any time he needs it. He
4 relies on that -- the accuracy, not just for his own
5 business, but also in law enforcement requested
6 data. So I think the reliability of the data and
7 his training in the data is also very clear.

8 THE COURT: Yes, sir.

9 MR. FORNEY: Yes, Your Honor. What's clear
10 to me from his testimony was that while -- and I
11 think what Ms. Eigenbrot was -- was arguing is that
12 we do rely on this technology, but very few of us
13 actually understand how it works. And when we rely
14 on technical data in a court of law, we have a
15 process for certifying an expert. The State is not
16 doing that in this case. They are putting forward a
17 man who deals with this -- with the derivative of
18 this technology, but doesn't -- isn't actually
19 trained in -- in how it works. And if the jury has
20 questions about that, he's not really able to answer
21 them. If this was a cell phone case where we were
22 looking through the data on a person's cell phone,
23 or their location data, we would have an expert to
24 testify what that data means. And, in fact, Mr.
25 Curry testified that this is very similar to a cell

1 phone. It pings off cell phone towers, and this
2 court is very accustomed to introducing experts when
3 it comes to cell phone location data, so I don't see
4 why we would treat him -- treat this situation any
5 differently. I think that the proper course would
6 be for the State to have an expert here, and without
7 that, I'm not sure that they have laid the
8 appropriate foundation.

9 THE COURT: All right. Thank you.

10 MR. NEELY: Your Honor, an expert's not
11 required to qualify a witness with -- with reliable
12 data is what's required, and that's certainly what
13 we have in this instance. I don't think that Mr.
14 Curry needs to be able to elucidate how the data
15 travels through the airways from cell tower to the
16 GPS monitor and back again, to qualify the -- the
17 reliability of his business record that he relies
18 on. And I think that's -- that's the short of it,
19 Your Honor.

20 THE COURT: All right. Based on the Brown
21 case, once again, it's 424 S.C. 479, the Supreme
22 Court has said that there is a minimal burdensome
23 test, that there is no elaborate showing of accuracy
24 of the recorded data. The only thing that the State
25 must be able to show in dealing with the GPS

1 tracking location is that the witness can testify
2 and can authenticate the records. General knowledge
3 of the GPS senate, I think in its analysis, what the
4 Court said in Brown is that there's a general
5 knowledge, and maybe 20, 30 years ago it was not,
6 but there is a general knowledge now with GPS
7 technology, and for purposes of the testimony of
8 this witness, the only thing that he needs to
9 testify is to -- is that the record is accurate as
10 to the person. And I believe he has testified that
11 regarding the -- actually, he testified more than --
12 than just about -- he -- he gave information about
13 the pings every four to ten minutes. I mean he gave
14 information -- more information, while not an
15 expert, as to how it works. He was very familiar
16 with how the GPS system works. He testified that he
17 had been trained in the system. I think he said he
18 used it for three years, and it was reliable. That
19 he is the one that is the custodian of the business
20 records at the bonding company. He was familiar
21 with VeriTracks, where VeriTracks is located. He
22 said there was an access serial number that is
23 assigned to the tracking, and -- and was able to lay
24 the foundation to authenticate the records. I am --
25 one of the things that I was sitting up here

1 thinking is how is this any different than the
2 custodian of records who comes in and testifies from
3 the bank as to bank records and ATM records that are
4 -- that show where money was withdrawn from the ATM?
5 The custodian of records would not be able to say
6 exactly how that record is transmitted to the bank,
7 but they can testify to the records being authentic,
8 and I think that is -- that is similar here. It is
9 a general knowledge, general information that does
10 not require expert testimony pursuant to Rule 701,
11 702 of the jury. The jury's familiar with GPS in
12 cars, on phones, on apps, and so I am going to allow
13 him to testify as a custodian of records as to the
14 records as held in the normal course of business of
15 the bonding company. And he's also testified, I
16 think, that he's -- that they have hundreds of
17 clients that are on the GPS electronic monitoring
18 tracking system that have ankle monitors. So we
19 will allow the testimony. Once again, I'm not sure
20 if we're going to -- if the question is the
21 reliability of it, the accuracy of it. I'm not sure
22 how to get around him saying he worked for the
23 bonding company, and that he had the monitor on his
24 leg. Did he -- I mean we can say he had a GPS
25 device if you don't want to say ankle monitor. I

1 mean I -- but I don't know how to get around where
2 he works, because he's the custodian of the records.
3 But if you're questioning the monitor, if you're
4 going to question him in front of the jury of the
5 monitor, I think -- I -- I just don't -- I'll be
6 glad to hear any suggestions, but I just don't know
7 how you get around it being a monitor. They are
8 monitoring his location. You may be able to call it
9 a location monitoring device. Obviously, we won't
10 get into any discussion about him being on bond, or
11 what the bond was for. I think that would -- I
12 don't even think -- I don't think that's relevant
13 here. The only information that is probative is how
14 law enforcement put him at the location using a
15 location device, which I think under 403 and 404,
16 the probative -- the probative value outweighs the
17 prejudicial effect. But if there's any suggestions
18 as to how we not get into -- other than not saying
19 that he was on bond, not saying what he was on bond
20 for, I mean I think he can testify that he works for
21 the bonding company.

22 MR. NEELY: Your Honor, I think maybe the
23 best that we can do is leave out the name of the
24 bonding company, which is BadBoyz Bail Bonding
25 Company. I don't have any problem redacting that

1 from the report, and we don't need to mention that
2 necessarily for him to enter the evidence in, but I
3 can't find a way -- I can't think of a way to get
4 around him being -- working for a bonding company
5 that has a device on the Defendant.

6 MR. FORNEY: Your Honor, I -- I would just
7 -- I would ask that if -- if Mr. Curry -- since Mr.
8 Curry looks like he is going to testify, he can
9 testify as being a custodian of records for GPS
10 data, but I don't think he needs to say he's a
11 bondsman. I don't understand -- I don't see any way
12 that that can come in that any reasonable juror is
13 not going to put two and two together there. I
14 think that would be highly prejudicial to our client
15 and not (Indiscernible). And there is a probative
16 way to get that information, if it is probative, in
17 without saying he's a bondsman. So I think -- I
18 think we can come up with a term that would not have
19 that connotation to it. A bondsman, I think, is
20 generally understood to be a person that handles
21 people who've been charged with crimes.

22 THE COURT: I understand, but the -- the
23 issue is -- and I'm -- and I'm not saying that
24 you're doing anything wrong, the issue is, I think
25 we can set it up where -- he has to be able to lay

1 the foundation. Where do you suggest we say he
2 works?

3 MR. FORNEY: Do we need to say where he
4 works?

5 MR. NEELY: I mean the problem, Your Honor,
6 is that I know -- I know they want to object to
7 preserve this record for appeal, and I -- and I also
8 know that we need to lay a foundation to preserve
9 for appeal for us, whenever it's -- and so that --
10 that is -- that is kind of the crux of the issue is,
11 that we need to lay a foundation, and I know they're
12 probably going to object to it.

13 THE COURT: Well, that's the issue -- I
14 mean that's what Brown says, and I don't know how
15 much of the proffered testimony -- obviously, you
16 object to it based on your motion. And I don't know
17 how much of the proffered testimony satisfies that
18 outside of the presence of the jury. Short of doing
19 something we did similar in Elleby is -- is just
20 having law enforcement testify that they received
21 it. That was my initial thought is to having law
22 enforcement testify that they had -- they received
23 location device information.

24 MS. EIGENBROT: Your Honor, I believe what
25 we -- we -- the conclusion we came to is to allow

1 the probation agent to testify and indicate that
2 that individual participated in -- in the
3 investigation and the location of the -- of the
4 suspect at the time.

5 THE COURT: But I think he testified that
6 he was a probation agent.

7 MS. EIGENBROT: Well, no, I think -- I
8 think you said here, and I can pass up a copy of the
9 transcript -- a few pages of the transcript that I
10 have, is she doesn't even have to mention probation
11 pardon for all services.

12 THE COURT: I thought in that case they --
13 the guy was in the woods, and they -- the reason
14 they were able to ---

15 MS. EIGENBROT: He was ---

16 THE COURT: -- catch him ---

17 MS. EIGENBROT: -- in his home. So,
18 initially, the way the investigation took place,
19 Your Honor, is this armed robbery occurs at the
20 Dollar General, I believe it was.

21 THE COURT: On Bluff Road.

22 MS. EIGENBROT: Right.

23 THE COURT: Uh-huh.

24 MS. EIGENBROT: The -- they -- law
25 enforcement received a tip about some information

1 that led to Mr. Elleby, and an address that he was
2 staying, or the address that he was staying at. Law
3 enforcement was informed that he also may have
4 served a substantial prison sentence, contacting
5 probation in the event they were monitoring anybody
6 at that address. Probation responded with an answer
7 yes. They gave his name, indicated that he was on
8 an ankle monitor. They told law enforcement he was.
9 Law enforcement then actually did some additional
10 follow-up investigation by going to the location of
11 securing video to make sure that Mr. Elleby just
12 wasn't in the store shopping at the time of this
13 incident. Because they were unable to locate him on
14 the video, other than during the time people were
15 robbing the store, they then, at that time, decided
16 he was a legitimate suspect and got a search warrant
17 for his residence -- no, I'm sorry, that they did
18 not get a search warrant. They had probation meet
19 them at the house to conduct the search. When he
20 would not answer the door, they asked them to ping
21 his location. He was at the house, and then that's
22 when probation started sending the alerts to the
23 ankle monitor. I think he actually slipped out the
24 back ---

25 THE COURT: Yeah. I was going to say I

1 think he went out the back door ---

2 MS. EIGENBROT: He's ---

3 THE COURT: -- and ---

4 MS. EIGENBROT: Yeah.

5 THE COURT: -- but -- but the -- I want to
6 say the -- they -- I remember him being in the
7 woods, and the reason they were able to track him
8 down is because they -- on the GPS you can send a
9 signal that says, "Call your probation agent, call
10 your probation agent." And so I believe that
11 testimony came in that he was on probation, we just
12 didn't get into what he was on probation for.

13 MS. EIGENBROT: Well, and, Your Honor, I --
14 actually, there's -- it's -- it's further discussed,
15 I actually objected to allowing them to say that it
16 was call your probation agent. I think what we --
17 the State agreed to do at that time was indicate
18 that -- that it was making a sound, a beeping sound
19 over in law enforcement to where he was. And I --
20 again, I can hand up a few pages of the transcript
21 that I have to Your Honor and to the State.

22 THE COURT: So how did the agent -- he just
23 said that he was a person -- a person participating
24 in the investigation?

25 MS. EIGENBROT: I believe that is what we

1 ultimately came to, but I don't believe there was --
2 I don't believe there was actually any testimony
3 that he was being supervised by probation, or any
4 suggestion of it at that time.

5 THE COURT: Uh-huh.

6 MS. EIGENBROT: From my memory, Your Honor.
7 And I -- I did pull the case. I don't believe the
8 ankle monitor was addressed during the appeal. I
9 think the appeal was more focused on his absence
10 during the (Indiscernible testimony) trial.

11 THE COURT: Let's do this. I hate to have
12 the jury back there for more than an hour. Let's go
13 ahead and get started. And then we'll just take a
14 break. When do you anticipate calling Mr. Curry?

15 MR. NEELY: I guess he would probably be
16 third, Your Honor.

17 THE COURT: Third? All right. We'll take
18 a break before -- are you going to call him before
19 law enforcement -- law enforcement last, right?

20 MR. NEELY: I was going to call law
21 enforcement first, Your Honor.

22 THE COURT: Oh, okay.

23 MR. NEELY: Well, actually ---

24 THE COURT: Can you let the jury know that
25 we're working on some matters, and that we will be

1 with them shortly, and I apologize for the delay?

2 MR. NEELY: Your Honor, may we take a quick
3 bathroom break?

4 THE COURT: Yeah, that's fine. I'm just
5 trying to -- I was still trying to figure out the
6 best way to get the testimony in. But go -- yeah,
7 go ahead and take a bathroom break.

8 MR. NEELY: Thank you.

9 THE COURT: And then when you come back we
10 also need to pick our new juror before I forget. If
11 anybody else needs to take a break, let's take five
12 minutes.

13 (Whereupon, a brief recess is taken.)

14 THE COURT: I think the State has to be
15 able to lay the foundation. I'm not sure how he can
16 get up and testify and not say where he works to
17 authenticate the records. I think in this situation
18 what we'll have to do is give a limiting instruction
19 during the charge, and I'll work on one, instructing
20 the jurors that they are not to consider it for more
21 than just location data. They are not to draw any
22 inferences from where Mr. Curry works, as it relates
23 to any issue or any Defendant in the case, and leave
24 it at that. I just -- I just don't know how -- I
25 thought about saying he could get up there and say

1 he works for a private company that does GPS
2 tracking of individuals, but I mean it still leaves
3 the question of -- I mean I think the jury would
4 probably still -- it still leaves the issues
5 regarding the foundation, and if there's going to be
6 questions regarding the reliability of the data
7 before the jury. But I think you can just say a GPS
8 -- that there's a -- a location device, or a GPS
9 device, does not -- we don't have to say ankle
10 monitor. And then I'll just -- I'll try to cure it
11 with a limited instruction regarding his -- where it
12 is, in fact, that he works. But if he can -- Mr.
13 Curry, if you can testify that you have location
14 data information on his location, and then without
15 getting into it being an ankle monitor. I think
16 that may be the -- the most appropriate way to do it
17 without -- I mean -- yeah, that -- that's probably
18 -- that's going to be the only way to do it and
19 still be able to lay a proper foundation before the
20 jury.

21 MR. FORNEY: And, Your Honor, we would, of
22 course, accept that cure of instruction. I just
23 want to note for the record that we would object to
24 it because I don't think it would cure the prejudice
25 that it causes. I think a reasonable juror could

1 still infer.

2 THE COURT: Yeah. But I think under 403
3 and 404 -- under 403 the probative value outweighs
4 the prejudicial effect as to placing him at the
5 scene of the crime would be highly probative. And
6 so I'll give the instruction to try to cure the
7 prejudicial. I mean, obviously, it's prejudicial,
8 but to try to cure it, and then also asking Mr.
9 Curry not to get into describing it -- describing it
10 as an ankle monitor, but a GPS device, or a location
11 device. And then I know you're going to object when
12 he tries to enter the report. We need to redact the
13 report. Are you all planning on asking him how ---

14 MS. EIGENBROT: And, Your Honor, my only
15 concern is I believe Investigator Gilliam wrote at
16 the top of this report ankle monitor BadBoyz, Bluff
17 Road.

18 THE COURT: I know we're going to --
19 they'll have to redact that.

20 MS. EIGENBROT: Yeah.

21 THE COURT: But ---

22 MS. EIGENBROT: I had asked them ---

23 THE COURT: -- how are we going to get
24 around the serial number, or are y'all -- are you
25 planning on -- I know we did it in proffer -- on the

1 proffer. Are you planning on cross-examining him
2 about -- because then I don't ---

3 MS. EIGENBROT: Your Honor, admittedly,
4 there is no serial number a part of this report. I
5 believe it just has my client's name. It does not
6 actually indicate the number that's associated with
7 the monitor.

8 THE COURT: But, no, I'm asking are you all
9 going to challenge the reliability of it in front of
10 the jury? Because if you are, then that ---

11 MS. EIGENBROT: Your Honor ---

12 THE COURT: -- puts me back in the ankle
13 monitor problem.

14 MS. EIGENBROT: I think my -- yeah, my
15 biggest concern is limiting the prejudice to my
16 client, at this point. I think there are other
17 ways to deal with the ankle monitor data that we can
18 address.

19 THE COURT: Well, I think that proffer ---

20 MS. EIGENBROT: We will, of course, we will
21 continue to object before he testifies, just to
22 renew our objection.

23 THE COURT: Well, I know you're going to
24 object, but no -- maybe not speaking objections, so
25 you won't -- we won't have to give ---

1 MS. EIGENBROT: I think what we'll do is
2 standard, indicate to the Court that we're renewing
3 our objections previously.

4 THE COURT: Based on previous rulings.

5 MS. EIGENBROT: Yes.

6 THE COURT: Yes. Okay. I guess my
7 question was though, are we going -- are you all
8 going to challenge the reliability? And I --
9 because if -- if you are, he's going to say, "I have
10 a serial number that is attached to him," and then
11 that -- I don't know how you would do that without
12 discussing the ankle monitor.

13 MS. EIGENBROT: And, Your Honor, I -- I --
14 I don't have any information that suggests this
15 information did not belong to my client at the time,
16 so I don't believe that we're going to cross that.

17 THE COURT: Okay. All right. All right.
18 Let's pick the alternate, and we'll bring the jury
19 in, we'll swear the jury, and then I'll give them
20 instructions. All right.

21 So juror number 40, which is the one that
22 needs to leave at five o'clock will be an alternate.
23 I will try to help her out as much as possible. If
24 we can get out of here at 5:00, I know that's going
25 to create problems for us if we do get all the

1 evidence in, and deliberations, that means we'll
2 have to come -- that means we'll have to come back
3 probably in the morning. All right, let's bring
4 them in.

5 (Jury enters the courtroom.)

6 BAILIFF: All jurors are seated, Your
7 Honor.

8 THE COURT: All right. Good morning,
9 ladies and gentlemen of the jury. I apologize for
10 the delay. We were -- I assure you that we were in
11 here working hard on some pretrial matters that I
12 had to take up outside of your presence. And we
13 worked until yesterday evening also, but there was
14 some additional things that I had to consider
15 outside your presence. So I do apologize for the
16 delay, but we are ready to start. And I just -- as
17 a housekeeping -- just for purposes of housekeeping,
18 juror number 252 was not feeling well, and so that's
19 why I pulled him out, so he wouldn't be back there
20 with you all, and excused him. And so we have drawn
21 the name of our first alternate, which is juror
22 number 40, who will -- juror number -- where's juror
23 number 40? All right. Juror number 40 will be in
24 our first -- in our 12 and will be one that is
25 seated as one of our jurors. And so juror number 26

1 will be our alternate. We'll have one alternate.

2 And where's juror 26? Oh, you're 26?

3 JUROR NUMBER 26: Yes.

4 THE COURT: Who's juror number 26? Oh, I'm
5 sorry, 152, I'm looking at the wrong number. Okay,
6 that's you. Okay. That's my mistake. All right.
7 All right. I'll ask the Clerk to swear the jurors.

8 CLERK: Would you all please stand? Please
9 raise your right hand to be sworn. Do you swear or
10 affirm that you shall well and truly try and true
11 deliverance make between the State of South Carolina
12 and the Defendant at bar, whom you shall have in
13 charge, and a true verdict give according to the law
14 and the evidence, so help you God?

15 JURORS: I do.

16 CLERK: Thank you, you can have a seat.

17 THE COURT: All right. Thank you, ladies
18 and gentlemen of the jury. What I will say now is
19 intended to serve as an introduction to the trial of
20 this case. These remarks are not a charge on the
21 law in this case. I will instruct you on the law
22 applicable to this case at the end of the trial
23 before you retire to consider your verdict. This is
24 merely an explanation of the procedure that we will
25 follow in the trial of this case so that you may

1 better understand what may be happening. I'm going
2 to ask that you not take any notes during the trial.
3 Ladies and gentlemen of the jury, the Defendant in
4 this case, Mr. Nevelle Eberhart, is charged, as I
5 told you yesterday, with the crime of armed robbery
6 and possession of a weapon during the commission of
7 a violent crime, the elements of which will be
8 explained to you later. As I told you all
9 yesterday, the indictments are simply the charge by
10 which the case is brought into court, and it is not
11 in any sense evidence of any of the allegations it
12 contains. The Defendant in this case has pled not
13 guilty to this indictment. Therefore, the State has
14 the burden of proving each of the elements of the
15 indictment beyond a reasonable doubt. And it will
16 be your duty, ladies and gentlemen, to decide
17 whether the State has met that burden. Your purpose
18 as jurors is to determine -- find and determine the
19 facts. You're the sole judges of the facts. If at
20 any time I make any comment regarding the facts, you
21 must disregard it. You are to determine the facts
22 from the testimony you hear and the other evidence
23 introduced in court. It is up to you to determine
24 the inferences which you feel may properly be drawn
25 from the evidence. It is especially important that

1 you perform your duty of determining the facts
2 diligently and conscientiously, because, ordinarily,
3 there is no way to correct an erroneous
4 determination of the facts by a jury. On the other
5 hand and with equal emphasis, the same law that
6 makes you the judges of the facts makes me the judge
7 of the law. The law, as given by the court, is the
8 only law you may consider. You must accept and
9 follow it even though you may disagree with it. I
10 cannot tell you what the facts are, and you cannot
11 disagree with me about what the law is or what the
12 law should be. Your job is to take the law as I
13 give it to you, and apply it to the facts as you
14 find them from the testimony of the witnesses, and
15 any other evidence that is introduced. After doing
16 that, you will render your verdict, a verdict under
17 the solemn oath that you just took as jurors. Until
18 I tell you that you may begin to deliberate, you
19 must not discuss this case with anyone, including
20 your fellow jurors, friends, family one -- family
21 members, or anyone involved in the case. The
22 attorneys and the parties in the case have been
23 advised that they are not to talk to you at all. So
24 if you see anyone involved in the case, and they do
25 not even say hello, they are not being unfriendly.

1 They are just following my instructions. You must
2 decide the case based solely on the evidence
3 presented here in the courtroom. This means that
4 during the trial you must not conduct any
5 independent research about the case, the facts of
6 the case, the evidence presented in the case, or the
7 people or organizations involved in any way in the
8 case. Please do not try to find out information
9 from any source outside of this courtroom. In other
10 words, you must not look at dictionaries or other
11 reference materials, search the Internet, website or
12 blogs, or use any other electronic tools to get
13 information about this case, or to help you decide
14 the case. You may not use computers, telephones,
15 cell phones, smart phones, tablets, the Internet, or
16 other tools of technology with communication
17 capabilities at any time while you're in the
18 courtroom or during your deliberations.

19 During your breaks for meals or overnight,
20 if necessary, you may use these devices; however,
21 you must not use these devices to communicate with
22 anyone about the case until the case is over. This
23 means you must not use phone calls, emails, text
24 message, instant message, instant messages, Twitter,
25 Facebook, Instagram, any of these social media

1 websites to send or receive information about this
2 case. This includes any information about a party,
3 a witness, an attorney, a court officer, news
4 accounts about the case, research on any topic
5 raised, any type as you may think would be helpful
6 in deciding the case, or any testimony presented by
7 a witness. Once again, during the trial do not
8 read, listen to, or watch any news reports about
9 this case. I don't know if there are any, but if
10 there are, please do not. This includes anything
11 that may be in the newspaper or on the Internet,
12 radio or television. You must not consider anything
13 you may have read or heard about the case outside
14 the courtroom, whether before or during the trial.
15 Information on TV, on the radio, and on the Internet
16 and from other sources might be wrong or incomplete.
17 In our judicial system it is important that you are
18 not influenced by anything or anyone outside of this
19 courtroom. If you become aware of another juror --
20 another juror's violations of these instructions,
21 please inform me immediately. Please inform the
22 bailiffs immediately. It is important that you keep
23 an open mind and not decide any issue in the case
24 until all of the evidence has been presented, the
25 parties have made their closing arguments, and I

1 have instructed you on the law in the case. It is
2 your solemn responsibility to determine the guilt or
3 innocence of the Defendant. And your verdict must
4 be based solely on the evidence as it is presented
5 to you in this trial, and on the law as I instruct
6 you during and at the close of the trial.

7 Now, in just a moment the Solicitor will
8 make what is called an opening statement, in which
9 the Solicitor will explain to you the issues in this
10 case, or at least what the Solicitor believes the
11 issues are in the case. The attorney for the
12 Defendant may also make an opening statement,
13 although they are not required to do so. What the
14 attorneys tell you during their opening statements
15 is not evidence in this case, it is only their
16 contention as to what the issues are. The evidence
17 in this case will be presented to you by the
18 testimony of sworn witnesses from the witness stand
19 and exhibits that may be introduced into evidence.
20 From time-to-time during the trial you may hear one
21 of the lawyers say something like, "Your Honor, I
22 believe we have a question of law, or a matter of
23 law to discuss with you," or, "Your Honor, may we
24 approach the bench?" Or sometimes I, myself, might
25 find it necessary to excuse you from the courtroom

1 for a short while so the attorneys and I can discuss
2 a matter of law. The reason for this is because
3 sometimes while discussing matters of law with the
4 attorneys, it may be necessary for me to make some
5 comment as to the facts in connection on whether a
6 particular law applies. I am not supposed to tell
7 you what I think the facts are, so I would will
8 excuse you from the courtroom, so you will not be
9 influenced by anything that I may say or do in
10 connection with ruling on a particular issue
11 regarding the facts. You must decide whether or not
12 the testimony of witnesses is believable. It will
13 be my responsibility to rule as a matter of law as
14 to whether certain testimony is admissible at all or
15 not, but once the testimony is admitted, whether or
16 not you believe it is solely for you to determine.
17 In deciding whether to believe a witness, you have
18 the right to consider the interest of any witness,
19 the bias of any witness, the prejudice of any
20 witness, the opportunity for the witness to have
21 seen the matters and things about which the witness
22 may testify, and the way the witness acts on the
23 witness stand. You have a right to consider
24 anything that is in the record that will help you
25 evaluate the testimony of the witnesses. That means

1 that it is your duty to pay close attention to these
2 witnesses, to observe the witnesses, to listen to
3 the witnesses, and to pay close attention to the
4 attorneys in the court. Please do not let your
5 thoughts wander, but give strict attention to the
6 testimony in this case, so that at the end of all of
7 the testimony, after the arguments of counsel and
8 the charge on the law by the Court, you will then be
9 able to apply the law to those facts, and thus
10 render a verdict. In order to preserve everyone's
11 rights, I will give the parties an opportunity to
12 object to anything that I've said.

13 Any objections or exceptions from the
14 State?

15 MR. NEELY: None from the State, Your
16 Honor.

17 THE COURT: Any from the Defendant?

18 MS. EIGENBROT: None from the Defense.

19 THE COURT: All right. Thank you.

20 At this time, ladies and gentlemen of the
21 jury, as I stated previously, we will have opening
22 statements. First you will hear from the State, and
23 then you will hear from the Defense.

24 Yes, sir.

25 MR. NEELY: May it please the Court?

1 THE COURT: Yes, sir.

2 * * * * *

3 OPENING STATEMENTS BY MR. NEELY

4 MR. NEELY: Good morning, ladies and
5 gentlemen of the jury. I introduced myself
6 yesterday, my name is Russton Neely. I'm the
7 Solicitor in this case, which means I will be
8 presenting the State's case to you. I'm just going
9 to skateboard around, because I know that everybody
10 learns differently, some people learn by hearing
11 things, people learn by seeing things, but I promise
12 you this is not going to be an intensive PowerPoint
13 presentation. We are here today because the victim
14 in this case, James Stewart, who is a 79-year-old
15 man, receives dialysis treatment three times a week,
16 was robbed at gunpoint at the First Palmetto Bank on
17 Devine Street, and that's just past Five Points. He
18 was robbed in broad daylight. It was 4:46 p.m. when
19 he was robbed. And we know that because the robbery
20 was captured on the ATM video. And you'll get to
21 see that, and I ask that you pay close attention to
22 that. And that will also be given to you, so that
23 you can watch it back in the jury room when you
24 deliberate and are able to talk about this case.
25 And I ask that you pay close attention to that.

1 It's an important piece of evidence. In fact, Mr.
2 Stewart was actually essentially robbed twice. The
3 first robbery, as you will see, occurred at the ATM.
4 You'll see Mr. Stewart approached by Mr. Eberhart on
5 a moped. And he takes the ATM card out, there's
6 some conversation that happens. You can't really
7 hear anything because there's no audio on the ATM
8 camera. And then Mr. Stewart flees from the ATM
9 after being approached by Nevelle Eberhart. At that
10 point, the robber did not have the victim's ATM
11 card. The victim, Mr. Stewart, ran into a gas
12 station trying to flee, and he only lived about two
13 blocks away from the ATM, so he walked there. And
14 so after he leaves the gas station, he proceeded to
15 go back on his way home, and the same person on the
16 same moped came back around again, and this time
17 they did actually rob him. They did get his debit
18 card. And you'll hear from Mr. Stewart, and he'll
19 tell you that he gave them a funny PIN number to it,
20 and that is the essence of why we're here. That is
21 an armed robbery. You'll see the gun on the video.
22 You'll see -- the first part of that robbery
23 happened on that day. The second part of the
24 robbery is not captured on video, and you'll hear
25 about it from Mr. Stewart. There's no video

1 accompanying that part of the robbery. We are here
2 because the man at that table, Nevelle Eberhart, has
3 been charged with armed robbery and possession of a
4 weapon during the commission of a violent crime.
5 I'm going -- so armed robbery, what is armed
6 robbery? What do we have to prove to show that he
7 committed armed robbery? This is the SC Code, SC
8 Code 16-11-330, "A person who commits a robbery
9 while armed with a pistol," or by actual words, he
10 alleges he was armed (Indiscernible testimony) with
11 the representation of a deadly weapon, or any object
12 the person present during the commission of a
13 robbery reasonably believed to be a deadly weapon.
14 So I'm going to break that down like what does that
15 mean? What's a robbery? Well, in the Black's Legal
16 Dictionary a robbery is defined as a legal taking of
17 property from a person to another when the person's
18 present by violence or intimidation. This is not
19 theft by shoplifting doesn't require violence or
20 intimidation, it just requires that a theft took
21 place. This is different. This requires threat or
22 intimidation. While armed with a pistol, that's
23 pretty obvious. This is a little bit less obvious,
24 whereby actually with words he alleges he was armed
25 with a pistol or by using representation of a deadly

1 weapon. So that that means is it doesn't have to be
2 a real pistol is what it boils down to. And that
3 seems kind of strange or it can seem kind of
4 strange, there are several reasons why that is the
5 case. One of the reasons is that guns escalate
6 this, right? Nobody knows if it's a fake gun,
7 (indiscernible testimony) gun. And so law
8 enforcement doesn't know, the victim doesn't know,
9 and in South Carolina you have a right to defend
10 deadly force with deadly force. And so if somebody
11 brings a gun, even a fake gun, to a confrontation,
12 that can lead to escalation and people dying, and
13 that's why armed robbery doesn't require that the
14 gun be real. And in this case, the State never
15 found the gun, so you're not going to see a gun.
16 There's not going to be a gun that will be
17 introduced into evidence. The gun's gone. And so
18 we don't know whether it's a real gun or not. You
19 can see in the video, you can decide for yourself,
20 but armed robbery doesn't require that the gun be a
21 real gun, just that a reasonable approximation of
22 one, such that the person that was there would
23 reasonably believe it was a gun. And that's what we
24 have in this case. Although I believe the gun was
25 real, we can't show that, because we don't have the

1 gun to show it to you.

2 The second charge, possession of a weapon
3 during the commission of a violent crime. Similarly
4 to armed robbery, if the person is in possession of
5 a firearm or visibly displayed what appears to be a
6 firearm during the commission of a violent crime.
7 So again it doesn't have to be a real gun, it could
8 be a visibly displayed what appears to be a real
9 gun. Again, escalates things, and this is a violent
10 crime. So SC Code 16-1-60, define all violent
11 crimes. And in that statute, armed robbery is one
12 of the crimes that is described as a violent crime.
13 So you have to have a weapon or visibly display what
14 appears to be a firearm during the commission of a
15 violent crime. So if you believe that he's guilty
16 of armed robbery, then you'll also believe that he
17 is guilty of possession of a weapon during the
18 commission of a violent crime, because the firearm
19 wasn't visibly displayed.

20 And that's the end of the PowerPoint
21 presentation. So how do I prove that? What do the
22 next steps look like? Well, in court we often use
23 what I call magic words that mean a lot to lawyers
24 and judges and people that do this all the time, but
25 not so much to people that are here for the first

1 time maybe. You've never been on a jury -- never
2 been in a courtroom, maybe you've never been on a
3 jury before, and the magic words are for a person to
4 be guilty of a crime, each element, and broken down
5 elements, robbery and possession of a weapon during
6 -- during the commission of a violent crime, must be
7 proven beyond a reasonable doubt. And what is proof
8 beyond a reasonable doubt? So proof beyond a
9 reasonable doubt is not proof beyond any and all
10 doubt. There's very few things in this world that
11 are proof beyond any and all doubt. An example that
12 is often used is if you go into your house and
13 you're in there for two hours, when you went in your
14 house it's bright and sunny, you come back out
15 everything is drenched. The asphalt's black from --
16 from water, the trees are dripping, the grass is
17 dripping, but you didn't see anything happen because
18 you were in your house. Now, it rained. That's
19 what happened, you know. But proof beyond any
20 reasonable all doubt, did -- did ten fire trucks
21 come by and spray down your law, and spray down the
22 trees, and spray down everything with water? Could
23 that have happened? I guess, I mean it could have
24 happened, but is it reasonable? No, it's not
25 reasonable. You know -- you know that, right?

1 Another way that proof beyond a reasonable doubt is
2 explained is that it is proof that leaves you firmly
3 convinced. And while that might seem low, it's not.
4 And the reason that it's not is we have 12, 13
5 people right now, but when you go back to the jury
6 room and start deliberating, you're going to have 12
7 people back there, all of you have different
8 experiences, different backgrounds, different
9 knowledge, and all of you have given your oath to be
10 fair and impartial. If 12 people from all different
11 backgrounds and walks of life are firmly convinced,
12 that is proof beyond a reasonable doubt. It is hard
13 to convince 12 people of anything and get them to
14 agree on anything. And so if we have 12 people that
15 are firmly convinced that is proof beyond a
16 reasonable doubt, then you must find him guilty per
17 your oath. Similarly by your oath, if 12 people are
18 convinced that he's not guilty, then you must find
19 him not guilty if you are -- if all 12 of you are
20 not convinced. Another way that this is described,
21 and you'll hear the Judge talk about this at the end
22 of the trial, is that it is proof that would make
23 you not hesitate -- or proof beyond that will cause
24 you to hesitate to act in an important matter. And
25 that -- that is a little bit harder to understand

1 for -- for me, and I think for most people to firmly
2 convince, you know what firmly convinced is, but
3 proof beyond a -- proof that wouldn't cause you to
4 hesitate to act. The way that I think about it is,
5 when you look at a chair, like all of y'all came in
6 here and sat down on chairs, right? You were firmly
7 convinced that chair was going to hold you, right?
8 You had no -- there was no hesitation to act to sit
9 down in that chair. Now, if you'd come in here and
10 there was duct tape on that chair, or -- or it's got
11 one leg missing, okay, well, now we've got some
12 problems, and now we have to look at this chair a
13 little closer because you're not so sure about it.
14 But a solid case is proof that gives you the impetus
15 to firmly be convinced and to go forward and find
16 him guilty. Without you justice can't be done.
17 Like this is how we do things. When somebody pleads
18 not guilty there's a trial. And we depend on fair
19 and impartial jurors like you to decide cases when
20 somebody pleads not guilty. And we couldn't do it
21 without you. I know that none of y'all probably
22 signed up for this or asked to be on a jury, but it
23 is important. And a lot of people -- sometimes they
24 even talk about problems in the justice system, I
25 hear about it a lot. And this is part of it, right?

1 You're part of the justice system right now. Like
2 do justice, that's all we ask.

3 There are a few pieces of evidence in this
4 case that I'd like for you to pay especially close
5 attention to. One of which I've already mentioned
6 is the ATM video where you can see the gun, you can
7 see the Defendant, and we will have still-shots, but
8 you'll also have that video back in the jury room,
9 so you can look at it as closely as you want, and as
10 many times as you want. There's a moped, which
11 starts the investigative trail, and you'll see the
12 Defendant pull up on the moped at the ATM, and
13 you'll hear the victim talk about the moped, and
14 you'll hear the investigator talk about the moped.
15 So pay attention to that and how it leads to the
16 Defendant. You'll also hear an interview that was
17 conducted with the Defendant, Nevelle Eberhart, it's
18 conducted by Investigator Gilliam. And I ask you
19 pay close attention to the Defendant's demeanor, his
20 actions, what he says, why he says it. There's
21 another important piece of evidence. It's a photo
22 lineup. So in this case the victim was presented
23 with a photo lineup. He did not pick Nevelle
24 Eberhart. He picked somebody else in that photo
25 lineup. It's a randomly generated photo lineup by

1 SLED, but he did not pick him out. That being said,
2 you'll also hear the interview that was done by law
3 enforcement with the 79-year-old victim, that
4 happened about 30 minutes after the robbery took
5 place. In that interview you're going to hear him
6 say that he didn't really get a good look at him.
7 And, in fact, when you watch the ATM video, watch
8 the victim. He is focused on the ATM. And I've
9 never been robbed, but I -- I guarantee you that --
10 I've seen enough movies to know not to stare at the
11 person that's robbing you. They don't like that,
12 and that's not -- he doesn't look at him, he stares
13 at the ATM, and he runs away. So he didn't get a
14 very good look at him. He even picked the wrong guy
15 in the lineup, and that's not (indiscernible
16 testimony) pick the guy right guy, (indiscernible
17 testimony) for me, but it is what it is. And then
18 you'll also hear that GPS -- GPS data puts the
19 Defendant at the location at the time the robbery
20 occurred. Finally, the debit card that was stolen.
21 See when law enforcement arrests somebody, they do
22 an inventory, and this happened after the interview
23 of the Defendant. And they did an inventory of the
24 belongings when Nevelle Eberhart was arrested. In
25 Nevelle Eberhart's wallet, along with about 14 cards

1 that all had Nevelle Eberhart's name on them,
2 there's one card in particular that stands out. In
3 the Defendant's wallet was the stolen debit card of
4 the victim, James Stewart. You can see the debit
5 card in the ATM video, it's the same debit card.
6 The debit card that was stolen from the victim just
7 happened to be in the Defendant's wallet. I think
8 that's important. I don't think this is the crime
9 of the century. You'll see him on a camera on a
10 moped, the investigative trail leads directly to him
11 from the moped, and then they found the stolen debit
12 card on him, and that essentially is the State's
13 case. Thank you. And I ask your close attention.
14 This should not be a long trial. Hopefully, we'll
15 be done today. Thank you.

16 THE COURT: Yes, sir, Mr. Forney.

17 MR. FORNEY: Thank you, Your Honor.

18 **OPENING STATEMENTS BY MR. FORNEY**

19 MR. FORNEY: Odds are if any of you have
20 children or even grew up around them, you've seen a
21 toy like this before. I have a young daughter,
22 she's a toddler, and I used to love watching her
23 play with this. I still do. She doesn't know I
24 brought it here today, because I love encouraging
25 her to play with this toy. And for those of you who

1 don't know, the idea is to match the shape to the
2 corresponding hole, and if you do so, it goes in.
3 Teaching important fundamental shapes, fine motor
4 skills, that kind of thing. But what I notice when
5 I watch my daughter play, it was -- she very much
6 wanted to win the game. She wants to get that shape
7 in the box. And what she figured out pretty quickly
8 is, she can just take the lid off. I win. And
9 that's fascinated me since I saw her do that. And I
10 think sometimes as adults we're attempted to do the
11 same thing. And sometimes we get so focused on our
12 objective, on our task, on our goal, that we seek to
13 eliminate the obstacle in our way, even if there's a
14 good reason for it to be there. My name is Robert
15 Forney. I have the pleasure of representing Nevelle
16 Everhart -- Eberhart. And it is Nevelle, he
17 clarifies that on the video you'll watch. Beside me
18 is -- is my colleague Megan Eigenbrot. And we are
19 defending Mr. Eberhart on the charge of armed
20 robbery and possession of a weapon during a violent
21 crime. A man on a moped robbed James Stewart. I
22 don't debate that. He took the contents of his
23 wallet, including a Palmetto Union credit card and
24 some cash and a cell phone. You're going to hear
25 about all of that, and that happened. You're also

1 going to hear that Nevelle had that card. These
2 things aren't in dispute. What I'm here to tell you
3 is the State has to prove every element of the
4 offense. There are a lot of ways a person could get
5 possession of a card that doesn't belong to him, and
6 you're allowed to bring in your common sense as
7 jurors, and I think we all have common sense
8 (indiscernible testimony).

9 Nevelle was a suspect of convenience. And
10 really what this case boils down to is convenience
11 and contradiction. And that is not the way our
12 system is supposed to work. You're going to hear a
13 lot about your duties, your oaths, and I see it the
14 same way I see this box. You have certain ways
15 you're supposed to do things. You have to get the
16 square hole in the square hole -- the square peg in
17 the square hole. And we are not allowed to take the
18 lid off, we have -- there's a right way to do it.
19 And you're going to hear about all of that when
20 you're charged on the law. But that also applies to
21 the way law enforcement does things. There's a
22 certain way you go about an investigation. You
23 gather the evidence, then you decide who the suspect
24 is, not the other way around. You're going to hear,
25 and I think -- and I don't know if they'll even

1 dispute this, that Investigator Gilliam and those
2 working with him on the Columbia Police Department,
3 decided Nevelle Eberhart was guilty of this pretty
4 much as soon as they happened upon him. And that
5 decision, it doesn't make them bad people, it
6 doesn't mean they were sloppy or corrupt or
7 anything, no more than it makes my daughter a bad
8 person for wanting to take the lid off the box, it
9 just means they got focused on a task. Saw an
10 obstacle in the way, and they're going to disregard
11 it. That obstacle is the huge contradiction that
12 Mr. Neely already told you about. James Stewart had
13 ample opportunity to view his assailant, you heard
14 that from the State. More than just at the ATM,
15 which we do have footage of, and I would submit that
16 you can see him glance, looking directly at his
17 assailant a couple of times on that. You'll get to
18 see it yourself, but there were other opportunities
19 for him to observe him. We're going to get into all
20 of that. And after all those opportunities to
21 observe him, under ideal lighting conditions, late
22 afternoon sun, low in the sky, but as bright as can
23 be, he still couldn't pick him out of a lineup. Is
24 the man he picked from the lineup the man who robbed
25 him? I don't know. All I can tell you is that

1 whoever robbed Mr. Stewart might still be out there,
2 he's not in this courtroom. Because the State has
3 not -- is not going to be able to meet their burden
4 in this case. That burden's not meant to be
5 convenient. William Blackstone, a legal expert from
6 the 1700s, famously wrote, "It's better that ten
7 guilty people escape than that one innocent should
8 suffer." In the 1785 letter Benjamin Franklin took
9 it even further, he said, "It's better that 100
10 guilty people escape than one innocent person be
11 convicted." It's not supposed to be convenient.
12 It's not a box to check, it is a burden, a burden of
13 proof.

14 You and I as individuals have rights. The
15 State has burdens, specific ways they're supposed to
16 do things. Square holes, they've got to fit into
17 them just right. Make no mistake that the State is
18 trying to take away someone's (indiscernible
19 testimony), and our system rightly holds them to the
20 highest possible legal standard before they're
21 allowed to do that. Now, the robbery is on video,
22 parts of it. You heard Mr. Neely state that this
23 robbery actually happened twice. Therefore, we know
24 exactly what happened, when and how. And yet there
25 is this contradiction, James Stewart wasn't able to

1 pick his assailant out of a lineup. Or maybe he
2 was. Maybe James Stewart did see who robbed him and
3 he did pick the right person, and that person was
4 not Nevelle Eberhart. Nevelle Eberhart was a
5 convenient suspect. Through their investigation
6 they established he's in the area, you'll hear about
7 that in their GPS system, their GPS witness. I
8 submit to you that they decided his guilt
9 immediately, and that is not how we're supposed to
10 do this. This tunnel vision led them to disregard a
11 huge contradiction in their case, that their key
12 witness, the only witness they have picked the wrong
13 guy, in their opinion, the wrong guy. I'm not
14 asking you to set up and free guilty people today.
15 I'm asking you to set one innocent one free. The
16 man sitting before you, Nevelle Eberhart, I'm asking
17 that you find him not guilty of armed robbery and
18 possession of a weapon during a violent crime.
19 Thank you.

20 THE COURT: Thank you. Please call your
21 first witness.

22 MR. NEELY: Thank you, Your Honor. I spoke
23 with co-counsel, we're advised the first witness
24 being called is Tim Curry -- or is Titus Curry,
25 excuse me.

1 (Witness sworn.)

2 * * * * *

3 Titus Curry,

4 having been duly sworn,

5 testifies as follows:

6 * * * * *

7 MR. FORNEY: Your Honor, I'm not sure if
8 this is the right time or not, but I would like to
9 renew my previous objection brought up pretrial.

10 THE COURT: All right. Thank you.

11 MR. FORNEY: Thank you.

12 THE COURT: So noted for the record. Yes,
13 sir.

14 MR. NEELY: Thank you, Your Honor.

15 **DIRECT EXAMINATION**

16 BY MR. NEELY:

17 Q. How are you doing today, Mr. -- Mr.
18 Curry?

19 A. Fine. How's it going?

20 Q. Doing well. Let's get right off to it.
21 Where do you work?

22 A. I work for a company where we do
23 location finding with different Defendants.

24 Q. Okay. And what is your role in that
25 company?

1 A. Well, we pull reports for them,
2 different people we're trying to find with GPS.

3 Q. Okay. So you find people with GPS?

4 A. Yes.

5 MR. FORNEY: Object to the leading.

6 THE COURT: Sustained.

7 MR. NEELY: What was the objection?

8 THE COURT: Leading.

9 MR. NEELY: Leading?

10 THE COURT: Yes.

11 BY MR. NEELY:

12 Q. How do you do that?

13 A. We have a third-party data -- database.

14 Q. And what's that called?

15 A. VeriTracks.

16 Q. And what does VeriTracks do?

17 A. They collect pings and different
18 locations on people depending on where they're
19 going, (indiscernible testimony) zones, things of
20 that nature.

21 Q. And when you say collects pings, what's
22 a ping?

23 A. A ping is -- it goes off of a cell
24 phone tower, so if a person goes up the road or
25 whatever, it pings and let -- let us know that

1 they're there.

2 Q. And how does that track a particular
3 person?

4 A. With different devices. We have
5 different devices that we give a person.

6 Q. Okay. And so how do you -- how do you
7 find a particular person? Is that notated in your
8 VeriTracks?

9 A. Correct.

10 Q. And so how do you use that system to
11 pull up like a particular individual?

12 A. Let's say we're looking for a certain
13 individual, we'll put in a number, put in a device
14 number, and it'll pull up every report from that
15 person.

16 Q. Okay. So you can use the device number
17 to find a particular individual -- individual's GPS
18 location?

19 A. Correct.

20 Q. And how often with your company do you
21 do that in a given year?

22 A. Hundreds.

23 Q. And in your experience with that
24 company has that been reliable?

25 A. Correct.

1 Q. So you've used it to locate people?

2 A. Correct.

3 Q. And it's been accurate before?

4 A. Correct.

5 Q. Do you have any training in this area?

6 A. I do.

7 Q. What kind of training do you have in
8 this area?

9 A. We go and get certified -- well, it's
10 not necessarily a certification, you take classes,
11 eight weeks classes.

12 Q. You take eight weeks of classes for
13 this?

14 A. Correct.

15 Q. Could you do this without those
16 classes?

17 A. You possibly can, but it won't be
18 solidified.

19 Q. Okay. So you're not supposed to?

20 A. Correct.

21 Q. What kind of -- what's your education
22 background? Do you have any education in
23 communications?

24 A. Mass communications.

25 Q. Mass communications?

1 A. Uh-huh.

2 Q. And where did -- where did you get that
3 from?

4 A. Bennett College.

5 Q. Bennett College? Did you have an
6 occasion to produce a report on Nevelle Eberhart's
7 location, or develop Eberhart's location?

8 A. Can you repeat that?

9 Q. Did you have an opportunity, or was it
10 requested of you to pull Eberhart's location?

11 A. Yes.

12 Q. And did you do so?

13 A. I did.

14 Q. Let me show you a movement report; do
15 you -- do you recognize this?

16 A. (Reviews document.) I do.

17 Q. And what is that?

18 A. The movement report from Mr. Eberhart.

19 Q. And what -- what's the data that's
20 given on that report?

21 A. It's his movement -- his movements,
22 excuse me, his movements between these two date
23 ranges.

24 Q. Okay. So you said his movements?

25 A. Uh-huh.

1 Q. How -- how does that work?

2 A. Well, every time he move, if he's in a
3 certain zone or a certain cell phone tower, it pings
4 and let us know, hey, he's here, he's there, and it
5 gives us an address. It gives us the speed he was
6 moving. It gives us how long he was there.

7 Q. Okay. So -- and that's with the pings?

8 A. Correct.

9 Q. And how often do those pings go out?

10 A. If it's regular, it's about every four
11 to ten minutes. If we put it on pursuit mode, if we
12 put it on rapid mode, it can do every ten seconds.

13 Q. And for this report, which one was it?

14 A. This was a normal ping, so it was just
15 a regular pursuit -- not pursuit mode, sorry, it was
16 just a regular report.

17 Q. Okay, and so if you're going down
18 Harbison, it wouldn't ping every location of
19 Harbison, it would just have every four to ten
20 minutes it would hit; is that right?

21 A. Well, that depends on if he stops. If
22 he stops and then it'll give us a ping, but if he's
23 just driving, it'll give us he was moving forward 40
24 minutes, and it'll give us one ping, and then the
25 end -- the ending ping.

1 Q. Okay. And your company keeps these --
2 these datapoints to be generated as reports like
3 that?

4 A. Correct.

5 Q. And that's something you do in the
6 regular business for your company?

7 A. Correct.

8 Q. Where's that data stored?

9 A. In our main base in -- in VeriTracks.

10 Q. Okay. And you said before that you
11 used it before?

12 A. I have.

13 Q. Okay. And it was reliable?

14 A. Uh-huh.

15 Q. And how accurate is this GPS data?

16 A. It usually -- it's usually within a few
17 feet of the person.

18 Q. And ---

19 (State's Exhibit Number 1, Movement Report,
20 is marked and entered with objection by Defense.)

21 MR. NEELY: Well, Your Honor, at this time
22 I'd like to enter the move report as State's Exhibit
23 Number 1.

24 MR. FORNEY: Renew my prior objection.

25 THE COURT: All right, it'll be entered

1 over the objection of the Defense. And that's
2 State's 1.

3 BY MR. NEELY:

4 Q. And you said that you -- your office
5 generated this report?

6 A. Uh-huh.

7 Q. And to the best of your knowledge, it's
8 accurate?

9 A. Correct.

10 Q. On -- on this report there's -- there's
11 a datapoint with asterisks. Would you mind reading
12 those datapoints off?

13 A. The ones with the asterisks?

14 Q. Yes.

15 A. It is 2329 Devine Street, Columbia,
16 South Carolina, 29205.

17 Q. And what time is that?

18 A. There was one at 4:42 and it ends at
19 4:47.

20 Q. Is there also a King Street datapoint
21 on there?

22 A. Yes.

23 Q. And when was that?

24 A. There's multiple. There was one at
25 4:54, ends at 5:06. And then there's a couple more

1 from earlier that day, which would be 3:10 ending at
2 3:14, one at 2:09 ending at 2:10, and one at 2:04
3 ending at 2:07.

4 Q. So multiple datapoints for King Street,
5 and one datapoint for Devine Street?

6 A. Correct.

7 Q. Thank you.

8 MR. NEELY: That's all the questions I have
9 for this witness, Your Honor.

10 THE COURT: Thank you. Yes, sir?

11 MR. FORNEY: Thank you, Your Honor.

12 **CROSS-EXAMINATION**

13 BY MR. FORNEY:

14 Q. Good morning, Mr. Curry.

15 A. Good morning.

16 Q. Just a few questions for you. I'll
17 show you my copy of the report. Do you still have
18 yours in front of you?

19 A. I don't.

20 Q. I'll give it back to you.

21 MR. FORNEY: I'm showing the witness what's
22 been marked as State's Exhibit 1.

23 BY MR. FORNEY:

24 Q. Can you read the address you're showing
25 for Nevelle Eberhart at 4:46 p.m.?

1 A. At 4:46 p.m., let's see, 2329 Devine
2 Street.

3 Q. Okay. And just so I'm clear, you
4 testified that this is -- this is a period within
5 how many feet?

6 A. It can be a few feet. It depends on
7 what the record shows at the time, so it's usually
8 maybe five feet, sometimes up to 100 feet.

9 Q. Up to 100?

10 A. Uh-huh.

11 Q. Okay. Just on your knowledge --
12 general knowledge, is a city block more than a
13 hundred feet?

14 A. Could be.

15 Q. Would three city blocks be more than a
16 hundred feet?

17 A. Yeah.

18 Q. Okay. So this address that he's at,
19 2329 Devine Street, it's not 2530 Devine Street,
20 right?

21 A. Nope.

22 Q. Okay. And you show that at 4:46?

23 A. Correct.

24 Q. What does the asterisk mean?

25 A. He stopped there.

1 Q. That means he stopped?

2 A. Uh-huh.

3 Q. Okay. Just one last question, so this
4 device that you're testifying about, it only -- the
5 only data it shows is location, right?

6 A. Uh-huh.

7 Q. It doesn't show video, it doesn't show
8 who they're with?

9 A. Yeah.

10 Q. It doesn't show what they're doing?

11 A. No.

12 Q. Just location?

13 A. Correct.

14 Q. Thank you.

15 MR. FORNEY: I have nothing further.

16 THE COURT: Yes, sir?

17 MR. NEELY: Nothing on redirect, Your
18 Honor.

19 THE COURT: All right, you may step down,
20 thank you, sir. Any objection to this witness being
21 excused?

22 MR. NEELY: No objection, Your Honor.

23 THE COURT: All right. You're free to
24 leave. Thank you.

25 MR. NEELY: The State calls Officer Selph.

1 (Witness sworn.)

2 * * * * *

3 Javonte Selph,

4 Having been duly sworn,

5 testifies as follows:

6 * * * * *

7 THE COURT: Yes, sir.

8 MR. NEELY: Yes, Your Honor.

9 DIRECT EXAMINATION

10 BY MR. NEELY:

11 Q. Officer Selph, where do you work?

12 A. As an officer at the City of Columbia
13 Police Department.

14 Q. And how long have you been there?

15 A. Almost five years.

16 Q. And just what is the basic training
17 requirements to work at the Columbia Police
18 Department?

19 A. We have to attend the Police Academy on
20 Broad River Road for about three months now.

21 Q. Okay. And after that, what are your
22 duties -- what's -- what is your rank there?

23 A. My duties? I'm a patrolman, which
24 means I respond to various calls throughout the day.

25 Q. Okay. What are some of the calls?

1 A. Some of the calls could be as high as.
2 murder, robberies, it could be as low as a broken
3 down car, or somebody just wanting to talk.

4 Q. Okay. And as an officer are you
5 assigned to a particular region?

6 A. Yes, I am, South Region, which is
7 anywhere from the Five Points area, Devine Street,
8 all the way to Garners Ferry.

9 Q. And have you been in that region your
10 entire career?

11 A. Yes, I have.

12 Q. Okay. So -- so January of 2022 you
13 were in that region?

14 A. Yes, sir.

15 Q. And were you working on January 21st --
16 January 1st, 2022?

17 A. Yes, sir.

18 Q. Okay. And did you respond to a robbery
19 on that day?

20 A. Yes, I did.

21 Q. And can you tell the jury about what
22 you did when you responded to that call?

23 A. Okay. So the initial call came from
24 dispatcher, came as a subject who just had been
25 robbed at gunpoint. I arrived at the -- the

1 Plaintiff's house, who was sitting on the step. You
2 could tell he was kind of shaken up at the time.
3 He gave me a brief description of what happened, how
4 he was getting money out of a ATM machine, and a guy
5 came and ---

6 MR. FORNEY: Object -- Your Honor, I'd
7 object to the hearsay here.

8 MR. NEELY: Your Honor, this is
9 (indiscernible testimony) that the officer has
10 testified that the victim was under the stress of
11 the robbery and just explain to them what happened.

12 THE COURT: All right. Objection will be
13 overruled.

14 BY WITNESS:

15 A. Okay. As he told me, this guy, he's
16 getting money out of the ATM machine, and the guy,
17 came, pointed a black handgun at him.

18 Q. Okay. So after that then what did you
19 do?

20 A. I went to the convenience strip store
21 -- the convenience store to see if I could -- was
22 able to pull surveillance to try to prove at the
23 time of what the Plaintiff said, but I -- I was
24 unable to get the footage at the time.

25 Q. And then -- so after you try to get

1 that footage, did you do anything else in this case?

2 A. No, sir.

3 Q. Are you the primary investigator for
4 this case?

5 A. No, sir.

6 Q. And who is?

7 A. Investigator Gilliam.

8 Q. And so were you wearing a body camera
9 throughout ---

10 A. Yes, I was.

11 Q. And were you wearing a body camera when
12 you spoke to the victim, James Stewart?

13 A. Yes, I was.

14 MR. NEELY: Your Honor, may I approach?

15 THE COURT: Yes.

16 BY MR. NEELY:

17 Q. Officer Selph, do you recognize that?

18 A. (Reviews document.) Yes, I do.

19 Q. What is that?

20 A. The video of my DWC, which is body worn
21 camera.

22 Q. Okay. And have you had a chance to
23 review this?

24 A. Yes, I have.

25 Q. And how do you know that?

1 A. I initialed it and I dated it.

2 MR. NEELY: And, Your Honor, at this time
3 the State moves to have State's Exhibit 2 admitted
4 into evidence.

5 MR. FORNEY: I would object. I think it's
6 hearsay and hearsay within hearsay.

7 MR. NEELY: Your Honor, it's the same as
8 depicted in the statement, after we speak with the
9 officer about the robbery, (Indiscernible testimony)
10 and he testified that he's explained to them so they
11 could conduct the investigation. It placed -- when
12 it says 10 to 30 minutes after the robbery took
13 place, and the victim is going to testify, so with
14 regards to cooperation (Indiscernible testimony).

15 MR. FORNEY: The proper way I think would
16 then be for the victim to test -- to lay the
17 foundation, Your Honor.

18 THE COURT: Let me send -- ladies and
19 gentlemen of the jury, I'm going to send you all out
20 for a minute, and we'll go ahead and take -- I know
21 you all were back there for a second, but we
22 normally take a morning break, so we'll go ahead and
23 take a morning break. There's a matter of law I
24 need to take up outside of your presence. Please do
25 not discuss the case. Thank you.

1 (Jury exits the courtroom.)

2 THE COURT: All right, the objection again,
3 I need to -- I've not seen the video, so it's kind
4 of hard for me to rule on it, so I'll need to see
5 the video. Usually, I think the victim would need
6 to testify first, but I would think so under the
7 rules, because what if he doesn't testify?

8 (Video being played for the Court.)

9 THE COURT: All right. And what's the
10 objection?

11 MR. FORNEY: The objection is hearsay, Your
12 Honor. And I would argue that 803, subsection two
13 does not apply here. We know the time that the
14 robbery happened is 4:46 p.m. This is timestamped
15 5:17 p.m., almost an hour later. He does not appear
16 to my eyes to be under the effect of a startling
17 event, and so I -- I would argue that that exception
18 does not apply here, and that this is cumulative
19 evidence that -- that doesn't -- that -- that is
20 precluded by the rules.

21 MR. NEELY: Your Honor, I believe that
22 803(2) does -- 803(1) does apply, but also 803(1),
23 presence (Indiscernible testimony) says, "While
24 perceiving or immediately thereafter." You heard in
25 the video it says 15 to 20 minutes after the

1 robbery, he's explaining to the officer what took
2 place, so I believe the 803(1) applies, and I also
3 think while he may not be visibly shaken, he's
4 telling the officer, "I was just robbed," and at
5 some points his voice raises, while he's asking him
6 -- trying to relay the information. So because of
7 that I believe that hearsay exceptions do apply
8 here.

9 MR. FORNEY: I would simply add, Your
10 Honor, I believe Mr. Stewart's here. He's free to
11 testify to this out of his own mouth, and I think
12 that's what the rules are set up to do. Why is this
13 necessary?

14 THE COURT: All right. I'm going to
15 overrule the objection. 803(1), present sense
16 impression, I believe it's not over an hour, I think
17 it was a video, maybe it was like 20 or 30 minutes
18 immediately after the incident. Also 803(2), he
19 does -- and while I kind of agree with the Defense,
20 he's pretty calm, but there are some points in the
21 video where he becomes excited and raises his voice
22 when he's trying to explain. And he talks about the
23 gun, I believe he -- his -- he -- his voice elevates
24 at that point in time in the robbery. And so I do
25 find that under 803(1) and 803(2) that this is --

1 that it is -- that the motion is denied, and that
2 the exceptions to the hearsay rule are applicable
3 hear.

4 MR. FORNEY: Well, then, Your Honor, I'd
5 like to raise a separate objection under the
6 confrontation clause. We have a statement of a
7 victim who's not the one testifying. My right -- my
8 client has a right to confront him. I'm not sure if
9 the State's trying to avoid calling Mr. Stewart as a
10 witness or not, but we are -- the jury is going to
11 be hearing statements from Mr. Stewart without the
12 ability of me to question him.

13 MR. NEELY: That -- that's not the case at
14 all, Your Honor. It's just the matter of
15 efficiency. This is the officer with the body
16 camera admitting his body camera. And it -- also I
17 think it's relevant and probative, because it shows
18 Mr. Stewart's reactions at the time immediately
19 thereafter, hence why we're arguing the hearsay
20 exceptions. But there's no -- Mr. Stewart will be
21 called. He's probably the next witness or so.

22 THE COURT: All right. I think what needs
23 to happen, I'm going to sustain the objection. I
24 think the victim needs to testify first under
25 Crawford and the confrontation clause. And then you

1 can get it in -- try to get in after he testifies.
2 I think as the usual procedural way is to have the
3 victim testify, and then you will just have to
4 recall the officer. All right? All right. But you
5 can -- I don't know if you have any other questions
6 of this witness, but you can always recall the
7 witness. So what I'll do is, let's take a break
8 now, because they had a break, I need a restroom
9 break, I don't know about y'all, but we'll take
10 about a -- ten minutes, then we'll come back and
11 finish with this witness. You can step down, sir.
12 And then if you need to recall him you can. I think
13 you -- before there's any question about it, are you
14 going to try to show the video to the victim also?

15 MR. NEELY: No, Your Honor.

16 THE COURT: Okay. I didn't know if you
17 were going to try to show it and then enter it
18 through him. Okay. All right. All right. Thanks.

19 (Whereupon, a brief recess is taken.)

20 THE COURT: All right. All right, and
21 we'll bring the jury back in. So we won't show the
22 video until -- you'll have to recall him.

23 MR. NEELY: Yes.

24 (Jury enters the courtroom.)

25 BAILIFF: All jurors are seated, Your

1 Honor.

2 THE COURT: All right. Thank you. The
3 objection is sustained. Yes, sir, please continue.

4 BY MR. NEELY:

5 Q. So Officer Selph, after you spoke with
6 the victim, what did you do next?

7 A. I went to the convenience store to get
8 the surveillance to see did it catch the incident or
9 not, but I was unable to get the surveillance,
10 'cause the store manager wasn't in at the time.

11 Q. Okay. Didn't you turn the case over to
12 Investigator Gilliam?

13 A. Yes, sir.

14 Q. Okay. And earlier you said you
15 responded to the robbery. Where did this happen?

16 A. I met the -- the victim at his house,
17 but per his statements the incident occurred at the
18 bank, at the ATM machine.

19 Q. And was that in Columbia, South
20 Carolina?

21 A. Yes, sir.

22 Q. Is that in Richland County?

23 A. Yes, sir.

24 Q. All right. Thank you. Please answer
25 any questions the Defense has.

1 THE COURT: Yes, sir.

2 MR. FORNEY: Thank you, Your Honor, may it
3 please the Court?

4 THE COURT: Yes.

5 **CROSS-EXAMINATION**

6 BY MR. FORNEY:

7 Q. Officer Selph, I've just got a couple
8 questions for you. It's Officer, right?

9 A. Yes, sir.

10 Q. So you were the first law enforcement
11 to respond to this?

12 A. Yes, sir.

13 Q. You responded directly to Mr. Stewart's
14 house?

15 A. Yes, sir.

16 Q. All right. And you -- I'm not asking
17 you what anybody said to you, but you were able to,
18 through your investigation, determine certain
19 things?

20 A. Yes, sir.

21 Q. Okay. You were able to determine that
22 Mr. Stewart was the only witness to what happened,
23 correct?

24 A. At the time, yes, sir.

25 Q. At the time?

1 A. Yes, sir, on-scene.

2 Q. And you were able to determine that Mr.
3 Stewart and whoever robbed him had some kind of
4 interaction at the Scotchman gas station?

5 A. Yes, sir.

6 Q. And that's why you tried to obtain a
7 video of it?

8 A. Yes, sir.

9 Q. You tried to obtain that video because
10 that video would have been relevant to the
11 investigation?

12 A. Yes, sir.

13 Q. All right. And you weren't able to
14 obtain that video?

15 A. Yes, sir.

16 Q. Do you recall the street address where
17 the First Palmetto Bank is located?

18 A. No, sir.

19 Q. Would it help to review your report,
20 refresh your recollection?

21 A. Sure, yeah.

22 Q. I'm handing you Officer Selph his
23 report. You had a moment to refamiliarize yourself.
24 Would you mind just telling us the address of that?

25 A. 2530 Devine Street, Columbia, South

1 Carolina, 29205.

2 Q. Thank you very much. I have nothing
3 further.

4 THE COURT: Redirect?

5 MR. NEELY: No redirect, Your Honor.

6 THE COURT: You may step down. Call your
7 next witness.

8 MR. NEELY: The State calls James Stewart.
9 (Witness sworn.)

10 * * * * *

11 James Chester Stewart, Sr.,

12 having been duly sworn,

13 testifies as follows:

14 * * * * *

15 THE COURT: Yes, sir.

16 MR. NEELY: Thank you, Your Honor.

17 DIRECT EXAMINATION

18 BY MR. NEELY:

19 Q. Good morning, Mr. Stewart. How are you
20 doing today?

21 A. I'm doing pretty good these days.

22 Q. Good. And you remember me talking
23 about this in my opening, but do you have any health
24 issues?

25 A. What?

1 Q. Do you have any health issues that
2 you're dealing with?

3 A. Oh, yeah, yeah, I'm -- I'm -- I'm --
4 I'm on dialysis three days a week ---

5 Q. Three days a week?

6 A. -- at the -- at -- at V.A. Hospital,
7 yeah.

8 Q. V.A. Hospital?

9 A. Yeah.

10 Q. And what days are those?

11 A. Monday, Wednesdays and Friday.

12 Q. So today is one of your off days?

13 A. Huh?

14 Q. Today's one of your off days?

15 A. Yeah, Tuesday, yeah, yeah.

16 Q. Okay.

17 A. Tuesday.

18 Q. How are you feeling today?

19 A. I feel pretty good. I feel pretty good.
20 every day.

21 Q. Okay. Good. Obviously, you know what
22 we're here about. Do you recall an -- an incident
23 at the ATM on January 1st, 2022?

24 A. Yes, I do, very vividly, I -- I recall
25 it, yes.

1 Q. Okay. Would you mind telling us about
2 that?

3 A. Oh, yeah, I went up to -- I walked down
4 to get a few dollars off of my debit card. And just
5 as I was finishing, this gentleman rode up on a
6 black moped. Right? And when I turned, he stuck a
7 gun in my face, and then he snapped it back a couple
8 of times, letting me know it was real, right? And
9 he pointed to my ATM card and I gave it to him. I
10 mean I'm -- he's got fire power, so hey, I've got to
11 cooperate, so anyway I gave it to him, but I gave
12 him a phony number. And then anyway he -- he
13 negotiated a little longer about he wanted me to go
14 back -- he wanted me to go to the ATM, but I
15 wouldn't do that. I said, "No, no, you've got the
16 card, I'm leaving." And then I -- I ran ---

17 Q. And so how -- how did you get to the
18 ATM that day?

19 A. I walk, I walk. I -- I only live a
20 block and a half from the ATM.

21 Q. Okay. What -- what's your address?

22 A. 820 King Street.

23 Q. 820 King Street?

24 A. Uh-huh.

25 Q. And King Street is close to Devine

1 Street?

2 A. Yeah, King -- yeah, yeah, it's about a
3 block and a half away.

4 Q. Okay. And what bank -- what was the
5 bank that you went to?

6 A. Palmetto.

7 Q. Palmetto?

8 A. Palmetto Citizens.

9 Q. Is that the one that you use normally?

10 A. No, no, no, no, no, I've got -- I use
11 the Credit Union.

12 Q. Okay. But that day you had your card
13 taken?

14 A. What?

15 Q. But that day you had your card taken?

16 A. Yeah, yeah.

17 Q. And it was your debit card?

18 A. Yeah. But he -- he -- he -- I -- I --
19 I ran from him after I gave him the card. I ran
20 over to the Scotchman, right, and I stayed there
21 for ---

22 Q. And where -- where's the Scotchman
23 located?

24 A. Right across the street from -- just
25 right across the street from Palmetto Citizens Bank.

1 Q. Okay. That's on Devine Street as well?

2 A. It's on the corner of Devine and King
3 Street.

4 Q. Okay. Is there a BP over there too?

5 A. What?

6 Q. Is there a BP over there too?

7 A. No.

8 Q. No, you don't recall that? Okay. And
9 you said that he ended up getting your card. So you
10 ran to Scotchman after the ATM incident?

11 A. Yeah. Then --

12 Q. What --

13 A. Then he -- I came out of the Scotchman,
14 I waited there a while, I figured he was gone, then
15 he came back with his -- with his scooter, right?
16 He did the same thing with the gun and wanted me to
17 get on the back of the scooter, and he would take me
18 back to the machine. I wasn't doing that. I took
19 off.

20 Q. And so after this took place, did you
21 ever -- you spoke to law enforcement?

22 A. Yeah.

23 MR. FORNEY: Your Honor, I'd object to the
24 leading. It's been happening a bit here.

25 THE COURT: All right. Sustained.

1 BY MR. NEELY:

2 Q. Who did you speak to after the incident
3 took place?

4 A. I called the cops.

5 Q. And what happened after that?

6 A. Nothing.

7 Q. Did they come and speak with you?

8 A. Oh, they came to my house, yeah.

9 Q. Okay.

10 A. Yeah, yeah.

11 Q. And what did you say to him?

12 A. I told him the story I just told you.

13 Q. As simple as that?

14 A. Yeah.

15 Q. And do you -- Mr. Stewart, I'm going to
16 show you this card. Do you recognize this card?

17 A. Yeah, it's mine.

18 Q. That's your card?

19 A. It looks like it. At least -- I've got
20 to see if my name's on it, but it looks like it.
21 Yeah, that's my card.

22 Q. And was that the card that was taken
23 that day?

24 A. Yes. Yes, that's the card.

25 Q. And did you ever look at a lineup

1 that ---

2 A. Yeah, they all look the same to me.

3 Q. Okay. Is this that lineup?

4 A. Yeah, that's the lineup. They all look
5 the same, 'cause they've all got dreadlocks.

6 Q. Okay. And is that your signature right
7 there?

8 A. Yes.

9 Q. And is that the date?

10 A. Yeah.

11 Q. And what date is that?

12 A. I don't know, I can't see that.

13 1/10/2002.

14 Q. Okay. So that was --

15 A. Ten days afterwards.

16 Q. Okay. And did you tell law enforcement
17 that day that you thought you'd be able to tell who
18 it was?

19 A. No. I said I would look at the lineup,
20 but, no, I didn't tell them that.

21 Q. Okay. Did you get a really good look
22 at his face that day?

23 A. No, I'm looking at the gun.

24 MR. NEELY: I beg the Court's indulgence.

25 BY MR. NEELY:

1 Q. What -- what color was the gun; do you
2 recall?

3 A. I don't know, it looked like a .45 to
4 me. It was like -- it was almost black, it was sort
5 -- sort of a dark color, dark red or black or
6 whatever.

7 Q. Have you ---

8 A. It wasn't silver.

9 Q. Have you -- have you ever been robbed
10 before?

11 A. No.

12 Q. Was it scary?

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

21 Q. More upset than scared?

22 A. Huh?

23 Q. You were more upset than scared?

24 A. Yeah.

25 Q. That's great.

1 A. And there was a time I would attack him
2 with the gun, I would have done that, but I'm a
3 little older now.

4 Q. That's correct.

5 MR. NEELY: Your Honor, that's all the
6 questions I have for him.

7 THE COURT: Yes, sir.

8 MR. FORNEY: Thank you, Your Honor, may it
9 please the Court?

10 **CROSS-EXAMINATION**

11 BY MR. FORNEY:

12 Q. Good evening, Mr. Stewart.

13 A. Yes.

14 Q. You doing all right?

15 A. I'm doing okay.

16 Q. Good. I'll try to keep this brief.

17 You testified that you didn't see the man that
18 robbed you?

19 A. Huh?

20 Q. You testified that you didn't see the
21 man that robbed you?

22 A. No, I didn't -- I saw him.

23 Q. You did see him?

24 A. Yes, I saw him looking at me with the
25 gun.

1 Q. So you were looking at him?

2 A. I was looking at the gun and him with
3 the gun in his hand.

4 Q. Okay.

5 A. Yes.

6 Q. Did you look at his face?

7 A. I looked at the whole man, but I didn't
8 -- I was concentrating on the gun.

9 Q. But you had an opportunity to see his
10 face, right?

11 A. I'd seen him in here today. I saw his
12 face in here today up close.

13 Q. When you say in there, what do you
14 mean?

15 A. Huh?

16 Q. You said you saw him in there. What do
17 you mean by that?

18 A. In here, I saw him sitting over there
19 today.

20 Q. So you recognize him in the courtroom?

21 A. Yes.

22 Q. You can see him from where you're
23 sitting?

24 A. Yeah, I can see him. I was sitting
25 back there, I could see him. I recognize him today.

1 Q. And do you remember January 1st of last
2 year pretty well?

3 A. Yeah.

4 Q. Okay. Do you recall what time of day
5 it was when this all happened?

6 A. No, no, it was about midday.

7 Q. About midday?

8 A. Yeah, sometime in the after -- it was
9 afternoon, it was early afternoon.

10 Q. Afternoon?

11 A. Yeah.

12 Q. Okay. When you went to the ATM, was
13 the sun still up?

14 A. Huh?

15 Q. When you went to the ATM, the sun was
16 still up?

17 A. Yeah, yeah, yeah.

18 Q. Right.

19 A. Yeah.

20 Q. It was the afternoon?

21 A. Yeah.

22 Q. Right. So it's not like it was dark
23 out?

24 A. No.

25 Q. You could see clearly?

1 A. Yeah.

2 Q. In fact, the sun was behind you, wasn't
3 it?

4 A. I don't know where the sun was. I
5 don't know nothing about where the sun was.

6 Q. Okay.

7 A. Okay?

8 Q. Now, you're sitting here before us, you
9 don't have any glasses on, right?

10 A. No.

11 Q. And you -- Mr. Neely just handed you
12 your ID card and you read that ---

13 A. Yeah.

14 Q. -- without having to need glasses or
15 anything?

16 A. Yeah.

17 Q. So you don't need glasses to see, do
18 you?

19 A. No.

20 Q. You can see -- you can see my face
21 clearly from where you're sitting?

22 A. Yeah, I can.

23 Q. Okay. And you weren't wearing glasses
24 that day, were you?

25 A. No.

1 Q. All right. You testified, I think I
2 heard you say, you remember the day very vividly; do
3 you stand by that?

4 A. Yeah.

5 Q. Okay. You testified that when you're
6 at the ATM, the man on the moped pulled up ---

7 A. Uh-huh.

8 Q. -- right?

9 A. Yeah.

10 Q. And you turned?

11 A. Yeah.

12 Q. So you turned and looked at him?

13 A. Yeah.

14 Q. But you're saying you don't remember
15 his face?

16 A. I remember I saw him in the room today,
17 I remember that face, yeah. I saw him -- I saw him
18 sitting over there earlier.

19 Q. But you had seen him before that point,
20 right?

21 A. I saw him the day he robbed me.

22 Q. But before the ATM, you'd seen him at
23 the gas station, right?

24 A. No, I -- I -- yeah, I -- on my way to
25 the ATM he was parked at the gas station. He was

1 parked at -- at the pump.

2 Q. Did you recognize him from the gas
3 station?

4 A. Yes, I did. Of course, I did.

5 Q. Okay. So that's two different places
6 you'd seen him that day?

7 A. Yeah.

8 Q. Two opportunities you had to view him?

9 A. Yeah, yes, yes.

10 Q. Okay.

11 A. Yes.

12 Q. And at the ATM that wasn't the last
13 time you saw him, was it?

14 A. No, I -- I -- I -- I ran from him at
15 the ATM over to the Scotchman, and I waited there
16 about a half hour or so, and then I started to walk
17 home, and he came back.

18 Q. He came back?

19 A. Yeah.

20 Q. And that part isn't on video as far you
21 know, right?

22 A. No, no, there was no video, it was on
23 the -- it was on King Street.

24 Q. Okay. Where was he in relation to you
25 for that encounter?

1 A. Huh?

2 Q. Was he -- did you get a good look at
3 him during that time?

4 A. Yeah, yeah, I got a pretty good look at
5 him.

6 Q. You got a good look at him?

7 A. Yeah.

8 Q. Okay. So that's three different
9 opportunities you had to see him?

10 A. Yeah.

11 Q. And then sun was still out at that
12 point?

13 A. Yeah, the sun was still out.

14 Q. Your vision was still good?

15 A. Uh-huh.

16 Q. You remember the day vividly? Okay.
17 Now, on -- you already testified about calling the
18 police, and then coming, them coming to talk to you,
19 but that wasn't where -- you -- you gave some
20 additional information to the police, correct?

21 A. I gave them this information at -- on
22 the -- at my house. They came to my house.

23 Q. Right. After they came to your
24 house ---

25 A. Uh-huh.

1 Q. Let me ask you more specifically.

2 A. Uh-huh.

3 Q. Did you talk to the police at -- at
4 their headquarters on January 10th?

5 A. Yeah.

6 Q. You did?

7 A. Uh-huh.

8 Q. And on that day, did you look -- you
9 looked at a photo lineup, right?

10 A. Yeah, but -- yeah, I thought it was
11 gonna be a physical lineup, not ---

12 Q. I see.

13 A. -- a bunch of photos. I thought I
14 was gonna actually get to see him physically, and
15 that way I can be better with my judgment. Okay?

16 Q. And you looked at that photo lineup ---

17 A. And they all look the same to me.

18 Q. And you picked one.

19 A. I know, but I'm saying they all looked
20 the same to me, the -- I could have picked either
21 one, 'cause they all look -- all them -- that lineup
22 on that photo look -- all looked the same.

23 Q. You agree with me that you could have
24 just chosen not to pick anybody, right?

25 A. Yeah.

1 Q. But you chose to pick somebody.

2 A. Yeah, I chose to pick somebody, yeah.

3 I was under the impression I was going to physically
4 see the person.

5 Q. Right, right.

6 A. But the -- the photos --

7 Q. Mr. Stewart, I'd like to show you the
8 lineup that you saw that day, if that's all right, a
9 copy of it anyways.

10 A. Yeah, I don't want to see it. It -- it
11 wouldn't make any difference.

12 Q. Oh, I understand, but it's part of
13 the ---

14 A. But I -- I actually saw the gentleman
15 that robbed me in the court today.

16 Q. I heard you say so.

17 A. Okay.

18 Q. Would it be all right if I showed it to
19 you just so you can make sure it's the same one you
20 saw?

21 A. I don't -- I -- I -- the -- the photos
22 don't mean anything to me, they all look -- they all
23 blend together.

24 Q. I understand, but ---

25 A. I need to see the physical person, and

1 I saw him today.

2 Q. So you're -- you say you don't want
3 to ---

4 A. I don't look -- no, I don't need to do
5 that. I don't need to see no photos.

6 Q. Would you mind doing me a favor and
7 just looking at it making sure it's the same one?

8 A. No, I don't want to look at it.

9 Q. Okay.

10 THE COURT: All right, so Mr. Stewart, he's
11 going to show you the photo, and then ask you
12 questions, and you just answer the question, okay?
13 Just -- he's going to show it to you ---

14 WITNESS: Yeah.

15 THE COURT: -- he can ask you a question,
16 answer the question, and then we'll just move on
17 after that. Okay?

18 MR. FORNEY: May I approach, Your Honor?

19 THE COURT: Go ahead.

20 BY MR. FORNEY:

21 Q. Is this the lineup you saw on January
22 10th of last year?

23 A. (Reviews photograph.) Yeah. Yeah.

24 Q. It is? I'll take that back.

25 A. And they all look the same.

1 Q. I understand.

2 A. I need to see them in person.

3 MR. FORNEY: Your Honor, at this point I'd
4 move to introduce what will be Defense Exhibit 1,
5 which I've already shown to opposing counsel.

6 THE COURT: Any objection?

7 MR. NEELY: No objection.

8 THE COURT: All right, it'll be entered
9 without objection.

10 (Defendant's Exhibit Number 1, Photo
11 Lineup, is marked and entered into the record
12 without objection.)

13 BY MR. FORNEY:

14 Q. Just to return to the final interaction
15 you had with the man that robbed you, you said you
16 negotiated with him a bit, right?

17 A. Maybe, yeah.

18 Q. You talked? You guys talked?

19 A. Yeah, I talked to him, yeah.

20 Q. He gave you your card back?

21 A. He didn't give me my ATM card.

22 Q. Right, but one of your cards he did?

23 A. Yeah.

24 Q. How long did that interaction --

25 A. He gave me -- he -- he gave me my VA

1 card back.

2 Q. Right.

3 A. My -- my Veterans card.

4 Q. And that interaction, how long did that
5 last?

6 A. I don't know. I've got a gun in my
7 face, I don't -- I'm not gonna compute time, it
8 wasn't very long, maybe ten, 15 minutes, but I don't
9 know.

10 Q. All right. But you saw him at three
11 different points, at three different locations?

12 A. Yeah.

13 Q. And you're telling us that you don't
14 remember what he looked like?

15 A. Look, I saw -- I just told you I saw
16 him sitting in the courtroom today.

17 Q. But you didn't remember what he looked
18 like on January ---

19 A. No, no, no, I -- the photos don't mean
20 much to me. I don't -- I -- I can't tell much from
21 a photo. I can tell from -- if they're the actual
22 person. I need to see the physical person, then I
23 can tell you who it was, and I saw him sitting in
24 the courtroom today.

25 MR. FORNEY: Beg the Court's indulgence.

1 BY MR. FORNEY:

2 Q. And I just want to clarify a couple
3 timeline things, and then I'll let you go, sir. It
4 was afternoon when you first went to the ATM?

5 A. Huh?

6 Q. You said it was the afternoon when you
7 first went to the ATM?

8 A. Yeah, it was afternoon -- early
9 afternoon.

10 Q. You don't remember exactly what time?

11 A. No.

12 Q. But after that you went to the
13 Scotchman?

14 A. Yeah. No, I ran from him -- I gave him
15 the card, and I ran from him at the bank over to the
16 Scotchman. And I waited there for about 15, 20
17 minutes, I figured he was gone, and then I tried to
18 go home and then he came back. He stopped me the
19 second time.

20 Q. And how long after that did you call
21 the police?

22 A. As soon as I got home. I don't -- I
23 don't live but about a block and half from
24 Scotchman.

25 Q. Understood. Thank you very much for

1 your testimony today, sir.

2 A. Okay.

3 THE COURT: All right. Thank you.

4 Redirect?

5 MR. NEELY: Just briefly, Your Honor.

6 **REDIRECT EXAMINATION**

7 BY MR. NEELY:

8 Q. Mr. Stewart, ---

9 A. Yes.

10 Q. -- had -- had you ever seen that man
11 before that day?

12 A. No.

13 Q. You didn't know him?

14 A. No.

15 Q. Is there any reason that he should have
16 your debit card?

17 A. He took it at the -- he took my debit
18 card at the ATM machine.

19 Q. Okay.

20 A. That's how he -- how he ended up with
21 it, he took it.

22 Q. Thank you.

23 A. And ---

24 Q. That's all the questions I have.

25 A. Yeah, okay.

1 THE COURT: All right, you can step down --
2 step down, sir.

3 WITNESS: Okay. Thank you.

4 THE COURT: Okay.

5 All right. Call your next witness.

6 MR. NEELY: The State recalls Officer
7 Selph.

8 MADAM CLERK: Is he still under oath?

9 THE COURT: Yes, he is.

10 * * * * *

11 Recall of Javonte Selph,
12 remaining under oath,
13 testifies as follows:

14 * * * * *

15 REDIRECT EXAMINATION

16 BY MR. NEELY:

17 Q. Officer Selph, you went and spoke to
18 Mr. Stewart on January 1st, 2022, right?

19 A. Yes, sir.

20 Q. And you said earlier that you had on a
21 body camera?

22 A. Yes, sir.

23 Q. Do you recognize that?

24 A. Yes, sir.

25 Q. What is that?

1 A. My body-worn camera.

2 Q. Is it from January 1st, 2022?

3 A. Yes, sir, it is.

4 Q. And have you reviewed this video?

5 A. Yes, I have.

6 Q. And how do you know that?

7 A. I signed and dated it.

8 MR. NEELY: Your Honor, at this time the

9 State moves to have State's Exhibit 6 --

10 COURT REPORTER: Two.

11 MR. NEELY: -- 2 into evidence.

12 THE COURT: It's State's 2 or 6?

13 COURT REPORTER: Two.

14 MR. NEELY: Two.

15 THE COURT: Two. Any objection?

16 MR. FORNEY: Yes, Your Honor, I would
17 object, because it's -- it's still the same issues
18 that we raised outside of the jury's presence. At
19 this point it's just cumulative and -- and
20 unnecessary.

21 THE COURT: Objection is overruled.

22 (State's Exhibit Number 2, Video from Body-
23 worn Camera is marked and entered into the record
24 with objection from Defense.)

25 MR. NEELY: Permission to publish to the

1 jury, please?

2 THE COURT: Yes. And that's State's 2 is
3 entered over the objection of the Defense.

4 (Video being played for the jury.)

5 BY MR. NEELY:

6 Q. Thank you, Officer, I have no further
7 questions.

8 THE COURT: Cross?

9 MR. FORNEY: Nothing further, Your Honor.

10 THE COURT: All right, you may step down.
11 Any objection to this witness being excused?

12 MR. NEELY: No objection.

13 THE COURT: All right. You're free to
14 leave. Let me see you one second. See you all,
15 both of you.

16 (Bench conference is held.)

17 THE COURT: Call your next witness.

18 MR. NEELY: The State calls Jackie
19 Richburg.

20 (Witness sworn.)

21 * * * * *

22 **Jacqueline Richburg,**
23 **having been duly sworn,**
24 **testifies as follows:**

25 * * * * *

25 A. The information is stored on a -- one

1 of our data servers. And then we input the
2 information into our CAD system. And then we
3 dispatch it out to the officers' responding units.

4 Q. Okay. So there's a record kept of each
5 911 call?

6 A. Yes.

7 Q. Okay. And you said it's stored in your
8 data servers?

9 A. Yes.

10 Q. And can you access those data servers
11 and find reports?

12 A. Yes.

13 (State's Exhibit Number 3, CAD Close
14 Incident Report, is premarked for the record.)

15 BY MR. NEELY:

16 Q. I'm going to show you what's been pre-
17 marked as State's Exhibit 3. What -- what is that?

18 A. It's a Close incident report, CAD Close
19 incident report.

20 Q. And what is a CAD Close Incident
21 Report?

22 A. It's the report that when we receive a
23 call, we input the information from the caller. And
24 if it's called in on 911, it stamps either the tower
25 address, or either the address that the caller

1 called from.

2 Q. And does the -- does the 911 operator
3 that receives the call input any information as
4 well?

5 A. Yes.

6 Q. What kind of information do they input?

7 A. They'll put the caller's name, what
8 type of call it is, their callback number, and what
9 the issue is, or what's -- what they're calling
10 about.

11 Q. Okay. And that is stored in the data
12 server as well?

13 A. Yes.

14 Q. And is that report that you're looking
15 at the result of one of those data inputs?

16 A. Yes.

17 Q. And, specifically, what date and time
18 was this report taken?

19 A. This was January the 2nd, 2022 at 01:46
20 in the morning.

21 Q. This -- these records are kept in the
22 normal course of your business?

23 A. Yes.

24 Q. Okay. You said 24/7 every day, every
25 night, ---

1 A. Yes.

2 Q. -- correct?

3 A. Yes.

4 Q. How many reports like that do you think
5 you get in about an average day?

6 A. About 3,500.

7 Q. And those are all kind of kept in the
8 same order of business?

9 A. Yes.

10 Q. Automatically?

11 A. Yes.

12 MR. NEELY: Your Honor, at this time, the
13 State would like to introduce the CAD Incident
14 Report as State's Exhibit Number 3.

15 THE COURT: Any objection?

16 MS. EIGENBROT: Yes, Your Honor. I would
17 object to hearsay, and if I may approach, we can
18 briefly explain why, or send the jury out.

19 (Bench conference is held.)

20 THE COURT: All right, ladies and gentlemen
21 of the jury, I'm going to have to send you all out
22 for a brief moment, and then we'll bring you all
23 back very shortly.

24 (Jury exits the courtroom.)

25 THE COURT: All right. The objection?

1 MS. EIGENBROT: Thank you, Your Honor, may
2 it please the Court? Your Honor, I'm objecting to
3 this piece of evidence as hearsay evidence. I
4 recognize the State is attempting to introduce this
5 as a business record, which would be considered an
6 exception to hearsay on a normal basis. However,
7 I'm objecting to the hearsay within the report. The
8 report is made by a young lady by the name of Nicole
9 Goodwin, who was dating Mr. Eberhart at the time of
10 this incident. She called to report her moped
11 stolen the next -- that night at 1:46 in the
12 morning. And what that report contains is her
13 description of that individual, I guess, that --
14 that she believes took the moped. And what they're
15 trying to do is use that description to match the
16 description in the video of the individual that
17 robbed Mr. Stewart. But my problem here is, Ms.
18 Goodwin is not here for me to confront her on that
19 description. And so I believe the information
20 contained in the report is still hearsay, as she was
21 the only person that witnessed that. And I don't
22 believe the introducing a business record alleviates
23 the fact that I cannot confront her about her
24 description at the time by putting in this report.
25 So I guess it's actually hearsay and confrontation

1 clause, Your Honor.

2 THE COURT: All right. Yes, sir?

3 MR. NEELY: Your Honor, if it's a business
4 record exception, the purpose of the business record
5 is that it is highly suspicious when law enforcement
6 pulls the tag number of somebody who was involved in
7 an armed robbery on a moped, and they go to the
8 location, and she had called it in at 2:00 a.m. as
9 stolen that same night. And they show up at the
10 house and guess who's there? Nevelle Eberhart.

11 THE COURT: Uh-huh.

12 MR. NEELY: And I think that that is --
13 that's pertinent information. He's -- his name is
14 never mentioned. In fact, when they ask who stole
15 it, she declined to say, which, again, is
16 suspicious, but that's not -- it -- this is --
17 business records exception is what it boils down to.
18 It's not a confrontation clause issue. It's non-
19 testimonial in nature, it's a 911 call of the
20 girlfriend who reported the moped stolen that was
21 used in the robbery.

22 THE COURT: Do you have the call, or are
23 you going to play the call ---

24 MR. NEELY: We ---

25 THE COURT: -- or are you just trying to

1 get the record in?

2 MR. NEELY: We do not have the call, Your
3 Honor.

4 THE COURT: Okay. So that's a note from
5 one of the jurors who says that he is a driver for
6 the Bay A Medical Center, and he thinks he took Mr.
7 Stewart home before. So that'll be Court Exhibit
8 Number 4?

9 COURT REPORTER: Four.

10 (Court's Exhibit Number 4, Note from Juror,
11 is marked for identification purposes.)

12 THE COURT: Let's pull him out. I need to
13 do that first. Pull him out. I think it's juror
14 272.

15 Just pull him out and leave him outside for
16 a second. Close the door. You have to close the
17 door when you walk out so the jurors can't hear
18 anything. So I will need to -- I'll get back to
19 that issue, but I need to -- I'll bring him in a
20 second and ask him the questions. Obviously, Mr.
21 Stewart wasn't here yesterday because he was at the
22 doctor, and then we'll go from there. I'll find out
23 when it was he took him to the VA and make sure he
24 hasn't discussed that with anyone in the jury room,
25 and see if he says he can be fair and impartial, and

1 then I'll bring him back. As to this issue, I need
2 to see -- we need to mark the document, and I need
3 to see it. So let's mark it as an -- as a -- for
4 identification purposes.

5 So you all are saying -- all right, just so
6 I'm clear, the State is introducing -- what you --
7 she's testifying to a 911 call reporting the
8 motorcycle was stolen, by who it was -- and who it
9 was reported stolen. What do you -- I guess what
10 I'm trying to figure out, are you trying to get into
11 specific statements of the girlfriend, beyond
12 reporting it stolen?

13 MR. NEELY: She does say that she knows the
14 guy, but if -- if we want to redact that, then I --
15 I mean it's a business record exception, it's non-
16 testimonial. I think it should come in under
17 Crawford, but if -- if you want to redact that out
18 of an abundance of caution, then I -- I think that's
19 fine. I think -- I still think it goes to the fact
20 that, primarily, it is suspicious when a moped is
21 used in a -- in a armed robbery, and then reported
22 stolen that night at 2:00 a.m., and then when law
23 enforcement shows up the moped is there and so is
24 the Defendant.

25 THE COURT: Well, I assume law enforcement

1 will be able to testify to what they saw when they
2 got there.

3 MR. NEELY: That is true, but not the
4 reporting of it stolen.

5 THE COURT: But I think 911 can testify
6 that they got a call, who they got the call from,
7 what time they got the call, and what was the nature
8 of the call under the business records. But I think
9 to get into her testifying to what the girlfriend
10 said he was wearing and all of that, that's -- I
11 think the document comes in under business records
12 -- under the business record exception, but once you
13 start getting into her statements, which are
14 testimonial in -- in nature as to what he had on,
15 and I think that's when you -- the confrontation
16 clause issues arise. So she can testify about the
17 motorcycle being stolen. It's definitely probative,
18 because it is a -- it's been testified that somebody
19 on a motorcycle is -- pulled up, robbed him. She
20 can testify to the time the report came in, which
21 would be business records, she's 911 Interim
22 Director, who the report came from. What did I say?
23 She can testify to the who, the when, and what was
24 -- and the why, I guess, of why -- what was the call
25 related to, but I think any testimony beyond that as

1 to what he had on, who she thinks -- is she saying
2 -- is the -- Goodwin -- is Goodwin saying that he
3 stole the motorcycle?

4 MR. NEELY: She actually refuses to say.
5 She said she doesn't -- in the report there's a
6 note, it says, "Caller did not wish to name person,
7 but said she knows who it is."

8 THE COURT: And that's what you're saying
9 is testimony?

10 MS. EIGENBROT: Well, that part and the
11 description she provides to the 911 operator. And
12 so I -- I -- and, Your Honor, I -- I would object to
13 the report itself coming in. I think that this
14 witness is more than capable of providing the
15 information you just said that she would be allowed
16 to testify to, without the entire report coming in.
17 Because, basically, we'd have to redact -- I mean
18 almost pages of this report.

19 THE COURT: But how is that any different
20 than -- on a 911 call somebody robbing the gas
21 station, and they call 911 with the description of
22 what they had on, the person that was robbing --
23 robbing the gas station?

24 MS. EIGENBROT: And, Your Honor, generally,
25 when those 911 calls in or somebody's able to

1 provide a description, they are a witness called to
2 testify, so they can provide that information, they
3 provided the 911 call and lay the appropriate
4 foundation to do so, and I also have an opportunity
5 to cross-examine that person. By just inserting a
6 report with that information, that I need to talk to
7 Ms. Goodwin about what she told police at that point
8 in time, or why she reported it, or what she was
9 doing.

10 THE COURT: And are you all calling her as
11 a witness, Ms. Goodwin?

12 MR. NEELY: No, Your Honor.

13 THE COURT: Yeah. So I think ordinarily
14 you would have Ms. Goodwin testify, and then she
15 could come back on the 911, too, afterwards. But if
16 she's not testifying, I'm not sure how we can get
17 into the descriptions, which would be testimonial.
18 So I'm going to allow her to testify to the call,
19 the nature of the call, when, who, what ---

20 MR. NEELY: Your Honor, I think it might be
21 testimonial to a stolen vehicle charge. I don't
22 think it's testimonial to an armed robbery charge
23 that she's not indicating in any way it's related to
24 this.

25 MS. EIGENBROT: But, Your Honor, he then is

1 arguing that this is completely probative of his --
2 the investigation in this case, and so I don't
3 understand why it would not be testimonial in that
4 situation. They're offering it to prove the truth
5 of the matter asserted in that report, so they can
6 talk about why Investigator Gilliam believed that he
7 was the individual that night -- that day.

8 THE COURT: But I'm assuming Investigator
9 Gilliam is going to still testify that he went
10 there, the moped was there, the same one that was
11 reported stolen?

12 MS. EIGENBROT: And, Your Honor, if he want
13 -- and if he can testify to it, if that's the case,
14 and he had this report, but I don't believe they can
15 go into the details of that report without Ms.
16 Goodwin being here.

17 MR. NEELY: I think we can, now, that --
18 that's the crux.

19 THE COURT: All right, well, I am going to
20 -- I think you -- I think under business records she
21 can, like I said, testify to what I just stated, the
22 who, the when, the why and the nature of the call.
23 And -- but if you get into the statements and you're
24 not calling her as a witness, I think that's where
25 you're going -- where you're running into trouble

1 with a confrontation clause. So that's what I will
2 allow her to testify to. You will have an
3 opportunity to cross-examine her regarding the
4 business record. I don't even know -- I mean I --
5 and the record -- you will have to redact -- I mean
6 is there any comment in here about -- anything about
7 what she said would need to be redacted?

8 MS. EIGENBROT: Let me -- that's the whole
9 paragraph on here. I mean I would cut out a
10 significant portion of the report.

11 THE COURT: Where?

12 MR. NEELY: I think it's only the paragraph
13 -- there's, what, four or five lines where ---

14 MS. EIGENBROT: Page ---

15 MR. NEELY: -- the description's given.

16 MS. EIGENBROT: Page two and three, that
17 whole top part of that. I mean -- I'm sorry, I'm
18 looking at the wrong one, Your Honor.

19 THE COURT: Yeah, page two just says en
20 route.

21 MS. EIGENBROT: It's page three, Your
22 Honor.

23 THE COURT: Is that where she said black
24 gray checkerboard color?

25 MS. EIGENBROT: Yes, Your Honor.

1 THE COURT: Is that what she's describing
2 as what he had on?

3 MR. NEELY: The moped.

4 THE COURT: Oh, that's the moped, but I
5 think where it says, Four, (Indiscernible testimony)
6 who took the vehicle, male, does not want to give
7 the name, you can -- we'd have to take that out.
8 Five, black male, dressed hoody, blue jeans, red and
9 white shoes. And then those would be the only two I
10 see so far that would need to be redacted.

11 MS. EIGENBROT: Your Honor, I would ask,
12 you know, ask that lines six and seven also be
13 redacted. Seven advises breach of trust, we wait
14 for subject to return, suggesting she knows the
15 individual. And, again, I'm not here to confront
16 her on that part of her knowledge, and I don't
17 believe that should come in together.

18 THE COURT: Well, six says, "Corporal Wells
19 advancing, call holding." I don't think that ---

20 MS. EIGENBROT: I guess my concern is if we
21 just eliminate certain lines, it's going to look
22 suspicious to a degree, which is where I don't
23 believe the report should come in at all, and that
24 this witness should be able to testify to the nature
25 of the call at the time, and leave it at that.

1 THE COURT: Are you trying to enter the
2 report? And I don't know if he, or if he isn't,
3 he ---

4 MR. NEELY: I was planning on entering the
5 report into evidence, Your Honor.

6 THE COURT: You are?

7 MR. NEELY: I was ---

8 THE COURT: Well, I think if you redact
9 those lines four through seven on page three, that
10 -- that resolves it -- resolves the issue.

11 MR. NEELY: Thank you, Your Honor. Would
12 you prefer for us to do that over lunch, or do it
13 right now?

14 THE COURT: You're not going to publish it
15 to them right now, are you?

16 MR. NEELY: No.

17 THE COURT: Okay. Well, you can do it over
18 lunch.

19 MR. NEELY: All right.

20 THE COURT: All right, so -- but the
21 objection is noted for the record. Let's bring
22 the jury in. So you we -- you under -- Ms.
23 Richburg, ---

24 MS. EIGENBROT: Yes, ma'am.

25 THE COURT: -- you testify all the time.

1 So if we can just limit our questions of her to --
2 we're not going to get into any statements given by
3 Ms. Goodwin regarding what he had on, or her
4 possibly knowing ---

5 MS. EIGENBROT: Yes, ma'am.

6 THE COURT: -- but just what the call is --
7 the nature of the call, who, when, yeah.

8 And hold on, I need to bring that juror
9 back in here.

10 All right. Yes, sir, your -- is it 270 --
11 270? Yes, juror 272.

12 JUROR 272: Yes, ma'am.

13 THE COURT: I just received a note, which
14 I've marked as Court Exhibit Number 4, and it says
15 that you do transportation for the VA, and that ---

16 JUROR 272: Yes, ma'am.

17 THE COURT: -- you think you've driven ---

18 JUROR 272: Uh-huh.

19 THE COURT: -- Mr. --

20 JUROR 272: Stewart --

21 THE COURT: -- Stewart.

22 JUROR 272: James Stewart, yes, I did,
23 ma'am.

24 THE COURT: And when -- do you recall when
25 that was?

1 JUROR 272: I think a couple months ago,
2 because I saw the yellow house, and I actually buy
3 cars out there. Yeah, I definitely know Mr.
4 Stewart.

5 THE COURT: Okay.

6 JUROR 272: I know him.

7 THE COURT: And a couple months ago, and
8 during that time was there any discussion about
9 anything involved in this case?

10 JUROR 272: No, ma'am.

11 THE COURT: And you basically pick him up
12 from the VA and take him home?

13 JUROR 272: Yes, ma'am, I do.

14 THE COURT: All right. And you've done
15 that one time or more than one?

16 JUROR 272: I think maybe about two. I
17 know once for sure.

18 THE COURT: All right.

19 JUROR 272: Yes, ma'am.

20 THE COURT: And, sir, you said it's been a
21 couple months ago?

22 JUROR 272: Yes, ma'am.

23 THE COURT: And would that affect your
24 ability to be fair and impartial in this trial?

25 JUROR 272: Yes, ma'am, I will, because I

1 am a Veteran too.

2 THE COURT: Okay.

3 JUROR 272: Yes, ma'am.

4 THE COURT: All right. All right, have a
5 -- just have a seat right outside.

6 JUROR 272: Okay. Thank you.

7 THE COURT: All right, yes, ma'am?

8 MS. EIGENBROT: Your Honor, the only other
9 question or concern I would have is what information
10 that he relayed to the rest of the jury.

11 THE COURT: Oh, yeah, yeah, I meant to ask
12 that. I'll bring him back in, but I'm going to
13 release him since he's saying he can't be fair and
14 impartial. So let's bring him back in, and we will
15 sit -- and then I'll seat the last alternate.

16 BAILIFF: Bring all the jurors or just him?

17 THE COURT: Uh-huh.

18 BAILIFF: Bring all the jurors back?

19 THE COURT: Just him.

20 BAILIFF: Yes, ma'am. Okay.

21 THE COURT: All right, Mr. Scott, my last
22 question, did you discuss anything regarding knowing
23 Mr. Stewart with any of the other jurors? I know
24 you told ---

25 JUROR 272: No.

1 THE COURT: -- the Bailiff, but you have
2 not had any discussions with them?

3 JUROR 272: No, ma'am.

4 THE COURT: All right. We are going to --
5 I think that's going -- based on my comments with
6 you, we're going to disqualify you, so we're ---

7 JUROR 272: Okay.

8 THE COURT: -- going to release you, but I
9 do appreciate you being honest.

10 JUROR 272: Thank you.

11 THE COURT: And I understand Mr. Stewart
12 was not here yesterday, so you didn't get an
13 opportunity to see him.

14 JUROR 272: Yes, ma'am.

15 THE COURT: But I am going to release you
16 from your -- your service, and you'll need to just
17 go back downstairs for further instruction.

18 JUROR 272: Okay. Thank you.

19 THE COURT: All right. Thank you, sir.
20 All right. We will bring the jury back in and
21 finish this witness, and then we'll take a break for
22 lunch.

23 And we need to -- and I'll seat juror
24 number 152 as -- alternate number two is that, so
25 hopefully no one else -- we still have an issue of

1 the jurors that need to -- say they need to leave
2 early.

3 MR. NEELY: Yeah, Investigator Gilliam is
4 probably going to take a while. I don't know what
5 Your Honor wants to do about that, but ---

6 THE COURT: I'll just ask, is it -- I think
7 it's just one juror. One of them said they were
8 able to work it out, but we'll just ask if the
9 jurors have -- if the juror has a spouse or someone
10 that can possibly pick the kids -- the child up.

11 MR. NEELY: I think we can probably be
12 closing by 5:00, but the issue would be closing and
13 then immediately sending them out back home.

14 THE COURT: Well, I don't know what they're
15 going to do ---

16 MR. NEELY: Yeah.

17 THE COURT: -- so, yeah. All right.

18 (Jury enters the courtroom.)

19 BAILIFF: All the jurors are seated.

20 THE COURT: All right. Thank you.

21 Ladies and gentlemen of the jury, juror
22 number 272 I ended up having to excuse, and so juror
23 152, which is our second alternate, you will be
24 seated as a -- a juror in this trial. All right,
25 the objection is sustained. Please rephrase the

1 question.

2 MR. NEELY: Your Honor, at this -- this
3 point I'd like to enter the incident detail CAD
4 report into evidence.

5 THE COURT: All right. Same objection?

6 MS. EIGENBROT: Same objection, Your Honor.

7 THE COURT: All right, objection is
8 overruled. Yes, sir. And that will be ---

9 MR. NEELY: State's Exhibit Number 3, Your
10 Honor.

11 THE COURT: State's 3.

12 (State's Exhibit Number 3, Incident Detail
13 CAD Report, is marked and entered into the record
14 with objection of Defense.)

15 BY MR. NEELY:

16 Q. And, Ms. Richburg, if you would, what
17 -- what time and day was that report made?

18 A. It was January the 2nd at 01:46.

19 Q. Is that 1:46 a.m.?

20 A. Yes.

21 Q. And who called in and made that report?

22 A. Nicole Goodwin.

23 Q. And what was that report concerning?

24 A. A stolen vehicle report.

25 Q. Does it say what kind of stolen vehicle

1 it was?

2 A. A moped.

3 MR. NEELY: Thank you. That's all the
4 questions I have.

5 THE COURT: Yes, ma'am?

6 MS. EIGENBROT: I don't -- I don't have any
7 questions for Ms. Richburg -- Ms. Richburg.

8 THE COURT: All right. You may step down,
9 Ms. Richburg. Any objection to this witness being
10 excused?

11 THE COURT: Not from the State.

12 MS. EIGENBROT: Not from the Defense.

13 THE COURT: All right. Thank you, you're
14 free to leave.

15 WITNESS: Thank you.

16 THE COURT: All right. Ladies and
17 gentlemen of the jury, it is about 1:20, and so this
18 is a good time for us to take a lunch break. We
19 will start back at 2:30. Please do not discuss the
20 case with anyone. It is also improper for you to
21 form any opinion or make any decisions yourself
22 until you've received all the evidence, the
23 arguments of the party, and the charge on the law.
24 All right? Have a good lunch, we'll see you back at
25 2:30.

1 (Jury exits the courtroom.)

2 THE COURT: Let me see the lawyers for one
3 second.

4 (Bench conference is held.)

5 THE COURT: All right, we'll start back at
6 2:30. And so then you just have -- you just have
7 Investigator Gilliam? All right, and then we'll
8 break. We'll try, I don't know -- I don't want them
9 to start -- I'm not going to give it to them after 4
10 o'clock, so we may just have to argue and charge,
11 and, of course, I've got to wait and see what
12 they're going to -- if they, you know, decide to do
13 anything.

14 MR. NEELY: Certainly.

15 THE COURT: All right.

16 MR. NEELY: And for the redaction of the --
17 those Court's 7 --

18 THE COURT: Yes.

19 MR. NEELY: -- the marker, or are we going
20 to redact the marker on both sides?

21 THE OCURT: Or white it out or ---

22 MR. NEELY: White out?

23 THE COURT: And then just copy it maybe.

24 MR. NEELY: Yeah, okay.

25 THE COURT: And mark it -- maybe a marker

1 or white it out, and then just copy it.

2 MR. NEELY: We could do a whiteout and then
3 do a copy of it.

4 THE COURT: Yeah, that might be the easiest
5 way to do it. Just let them see it first.

6 MR. NEELY: Will do.

7 THE COURT: All right?

8 MS. EIGENBROT: Thank you, Judge.

9 THE COURT: All right, hold tight, because
10 before you all take them out, well, you know ---

11 BAILIFF: Oh, I'll check.

12 THE COURT: Yeah, because they -- they are
13 moving a little slow getting in and out. All right.

14 (Whereupon, a lunch recess is given.)

15 THE COURT: We're ready for them when that
16 juror's here.

17 (Jury enters the courtroom.)

18 BAILIFF: All jurors are seated, Your
19 Honor.

20 THE COURT: All right. Thank you. All
21 right. Thank you, ladies and gentlemen of the jury.
22 At this time -- I hope you had a good lunch. At
23 this time we are ready to continue with the State's
24 case. I'll ask the State to call their next
25 witness.

1 MR. NEELY: The State calls Emmett Gilliam.
2 (Witness sworn.)

3 * * * * *

4 Emmett Gilliam,
5 having been duly sworn,
6 testifies as follows:

7 * * * * *

8 THE COURT: Yes, sir.

9 MR. NEELY: Thank you, Your Honor.

10 **DIRECT EXAMINATION**

11 BY MR. NEELY:

12 Q. Investigator Gilliam, where are you
13 currently employed?

14 A. Columbia Police Department.

15 Q. And how long have you been employed
16 there?

17 A. I've been with the Columbia Police
18 Department about 16 years.

19 Q. And what -- what role do you serve in
20 the Columbia Police Department?

21 A. I'm a Major Crime Investigator.

22 Q. I'm sorry, say it again?

23 A. I am a Major Crime Investigator.

24 Q. Major Crime Investigator. And what
25 sort of crimes does a Major Crime Investigator --

1 A. From assaults to murders, carjacking,
2 robbery, a little bit of everything.

3 Q. And did you have occasion to initiate
4 an investigation of an armed robbery on January 1st,
5 2022?

6 A. Yes.

7 Q. And when did you get put on that case?

8 A. I got it June -- I mean January 4th.

9 Q. January 4th? And just kind of start
10 from the beginning, and what happened in that
11 investigation?

12 A. I received a report about a robbery
13 that happened at 26 -- correction, 2530 Devine
14 Street. Mr. Stewart, an elder man, 79-years-old,
15 robbed at the teller machine. I thought of looking
16 at the body cam video, I went to the bank itself,
17 First -- I think First Palmetto. Talked to one of
18 the managers there, and we reviewed the video, where
19 it's clear you can see the individual coming up on a
20 moped, no mask on, and pulls up while the victim's
21 at the teller machine. Pulls out his gun, and you
22 can see him point it at him and rack it. At that
23 time the victim did a little something, you could
24 see his hand -- like trying to snatch it out of his
25 hand, and then the victim takes off running towards

1 Scotchman's. That's what you can see on video,
2 plus, then you can also see this black moped right
3 there and also be able to look at the tag number on
4 the moped.

5 Q. I'm going to stop you right there.
6 What is this?

7 A. This is the video surveillance of the
8 ATM machine during the robbery.

9 MR. NEELY: Your Honor, at this time the
10 first stipulation I'd like to enter State's 4, the
11 ATM video into evidence.

12 (State's Exhibit 4, Video, is marked and
13 entered into the record without objection.)

14 THE COURT: And you said no objection?

15 MS. EIGENBROT: There's no objection to
16 this video.

17 THE COURT: All right, thank you. Publish
18 it to the jury now?

19 MR. NEELY: Yes, Your Honor.

20 THE COURT: Okay.

21 (Video being played for the jury.)

22 BY MR. NEELY:

23 Q. Is there audio on this video,
24 Investigator?

25 A. No, no audio. That's the victim going

1 to the teller machine. That's the (indiscernible
2 testimony) pulling up.

3 MR. NEELY: Pause right there at 1:25.

4 BY MR. NEELY:

5 Q. What did you see in -- in the robber's
6 hand?

7 A. A firearm -- some type of firearm --
8 what appears to be a firearm.

9 Q. What color is it?

10 A. Black. Right there he's acting like
11 he's trying to snatch it out of his hand, and the
12 victim ran.

13 Q. And was that the end of the evidentiary
14 value of the video?

15 A. Yes.

16 Q. And that's State's Exhibit 4. And so
17 after you pulled the video, what did you do?

18 A. Got the video, the tag number on the
19 moped, ran it through our DMV.

20 Q. So you used that video for the tag
21 number?

22 A. Yes, I enhanced it a little bit, so I
23 could get the tag number off of it.

24 Q. And were you able to get the tag
25 number?

1 A. Yes.

2 Q. And what was the tag number?

3 A. I can't say off the top of my head.

4 Q. All right. And would your case notes
5 be ---

6 A. Yes.

7 Q. Will the request be reflected in your
8 case notes?

9 A. Yes.

10 Q. And does it have the tag number on
11 there?

12 A. Yes, it has the tag number. Okay, the
13 tag number on the moped is -- is MP19444.

14 Q. And when -- what did you do with that
15 tag number?

16 A. When I ran that tag number, it came
17 back to a Ms. McCor -- I can't pronounce her last
18 name. She lives at 2205 Stark Street, which is in
19 that -- close to that Five Points area as well.

20 Q. And so when you pulled that tag number,
21 it gives you an address, and at that point in time
22 had you ever had any involvement with the ---

23 A. No.

24 Q. (Indiscernible testimony.)

25 A. No.

1 Q. When you headed to that address, who
2 did you (Indiscernible testimony)?

3 A. The owner, Ms. -- Ms. McCoy -- I forgot
4 her last name. Is it Starks?

5 Q. It's Goodwin.

6 A. What?

7 Q. Goodwin?

8 A. Goodwin, I'm sorry, yes.

9 Q. And so what did you do then?

10 A. I -- I asked -- asked her a question --
11 can -- before we go -- can we excuse the jury for
12 one second, 'cause I've got one question before I
13 say that.

14 THE COURT: Hold on one second.

15 BY WITNESS:

16 A. I'm not questioning ---

17 THE COURT: Hold on -- hold on one second,
18 hold on one second. All right. Ladies and
19 gentlemen of the jury, I'm going to send you out for
20 one second, and I'll bring you back in shortly.

21 (Jury exits the courtroom.)

22 THE COURT: All right. I'm sorry, yes,
23 sir?

24 WITNESS: Yes, ma'am.

25 THE COURT: I appreciate before when you

1 were saying instead of ---

2 WITNESS: Right.

3 THE COURT: -- having to -- what's the --
4 what's the question?

5 WITNESS: It's the answer -- the answer I
6 often give, it's dealing with the dispatch stuff,
7 because I did contact Dispatch with that address,
8 and they gave me information about her making the --
9 Goodwin making a phone call, so that's why before I
10 said anything, I want to make sure.

11 MS. EIGENBROT: I -- I think that's
12 appropriate, so long as he doesn't go beyond that
13 whole reason he was at the house.

14 WITNESS: I can't talk about the
15 description of what they gave me?

16 MS. EIGENBROT: And, Your Honor, I would
17 object to the description as hearsay, since she's
18 not here.

19 THE COURT: The description of him, or the
20 description of the moped?

21 WITNESS: The description of the person who
22 had her moped. It doesn't say a name, that's the
23 reason why I wanted to ---

24 THE COURT: But I think I previously ruled
25 that the description wasn't coming in, because ---

1 WITNESS: Okay.

2 THE COURT: -- she's not testifying here to
3 give the description, pursuant to the confrontation
4 clause in Crawford. So he can't -- so he -- I think
5 he would be limited to what the 911 operator
6 testified to earlier. It was a call, when, who and
7 the -- and the subject of the -- the motor -- the
8 moped was stolen I think for a -- yeah.

9 WITNESS: Last thing, can I at least say
10 she said she knew who it was? I can't -- no, I'm
11 sorry, I can't say none of that.

12 THE COURT: No, I excluded that ---

13 WITNESS: Yeah, okay.

14 THE COURT: -- in my previous ---

15 WITNESS: Yeah, you're right.

16 THE COURT: -- ruling.

17 WITNESS: I forgot, thank you.

18 THE COURT: Okay, yeah. So in the previous
19 ruling I excluded that. She said she knew who it
20 was and a description that she gave of the person
21 who stole the moped. I did not exclude the
22 description of the moped, and where it was located,
23 so he can -- he -- my understanding is, he's going
24 to testify that -- y'all just want to proffer the
25 testimony, so we can make sure we're all on the same

1 page?

2 MR. NEELY: Sure.

3 THE COURT: Okay.

4 MS. EIGENBROT: Thank you, Your Honor.

5 BY MR. NEELY:

6 Q. So when you -- when you went to that
7 location -- or I guess before you went to that
8 location, did you -- did you run that address
9 through Dispatch?

10 A. Yes.

11 Q. And what came out from that dispatch?

12 A. From them they stated that her -- she
13 reported her moped taken by somebody, with a
14 description, and also did she know who it was.

15 Q. I'm going to show you what's been
16 entered into evidence as State's Exhibit Number 3,
17 is this an incident detail of that -- of that call?

18 A. Yes, sir. Yes, sir.

19 Q. And that was received January 2nd,
20 right?

21 A. That's correct.

22 Q. And when was this home visit occurring?

23 A. I think it was January the 7th, I
24 believe. It's on my notes.

25 SOLICITOR: I beg the Court's indulgence.

1 BY WITNESS:

2 A. It's on my case notes. If I may get my
3 binder, I -- it's in there.

4 Q. You need your binder?

5 A. Yeah, it's on the -- (retrieves binder)
6 correction, yeah, it was January 7th.

7 Q. And when you went to that location, who
8 was there?

9 A. Ms. Goodwin, and at that time an
10 unknown suspect that matched the same description as
11 the person in -- on the moped during the armed
12 robbery.

13 Q. And did you know that the suspect was
14 there whenever you arrived?

15 A. No.

16 Q. How did you figure out that he was
17 there?

18 A. When I was talking to her she kind of
19 rambled a little bit about who, you know, about who
20 -- she got her moped back, so I figured something
21 must be wrong. I asked her to step out in the yard
22 with me. She stepped out in the yard. We was
23 talking a little bit more, then all of a sudden the
24 front door closed. And I asked, "Who's inside?"
25 She said, "Anthony." A couple minutes later he

1 comes out -- the Defendant comes out of there, and I
2 looks at him, and I said, "I need -- can I talk to
3 you for a minute?" He said, "I've got to use the
4 bathroom." He walked around the house, came back, I
5 said, "What's your name?" And, you know, I said,
6 "Nothing's wrong, I just want to know who you are."
7 So he pulls out his ID, I took a picture of it.

8 Q. And that was Nevelle -- Nevelle
9 Eberhart?

10 A. Yes.

11 Q. And was the moped at the location?

12 A. Yes.

13 Q. And where was the moped?

14 A. It was next to the house.

15 Q. And it was the same moped in the video
16 from what ---

17 A. That's --

18 Q. -- you saw?

19 A. That is correct.

20 Q. And it was the same license plate as
21 the moped on the video?

22 A. Yes.

23 Q. And so after -- after you discovered
24 Mr. Eberhart, what happened next?

25 A. I went back to the police headquarters,

1 checked his criminal history, and it showed that he
2 was out on bond -- I'm sorry, I -- I forgot -- I
3 forgot we can't say that. That I checked his
4 criminal history, and I talked to people for the
5 GPS.

6 MR. NEELY: So, Your Honor, I don't know
7 how you want to handle this, we can -- let me say
8 this ---

9 BY MR. NEELY:

10 Q. So you -- you ran -- you ran the call --
11 you ran the address through Dispatch, right?

12 A. That's correct.

13 Q. And that -- and that turned up the 911
14 call?

15 A. Yes.

16 Q. Did you run Mr. Eberhart's information
17 when you got back to the police department?

18 A. I ran it after I talked to her and saw
19 him at that -- that address, yes.

20 Q. Okay. But you ran his information?

21 A. Yes.

22 Q. And were you able to find any GPS
23 monitoring?

24 A. Yes.

25 Q. And what did this data tell you?

1 A. That puts him in the location of where
2 the victim got robbed at.

3 Q. And is -- I'll show you what's been
4 marked as State's Exhibit Number 1; is this the
5 report that you received?

6 A. (Reviews document.) Yes.

7 Q. And did you receive that from the
8 company of Titus Curry?

9 A. Yes.

10 Q. Okay. And that placed Mr. Eberhart at
11 the location?

12 A. Yes.

13 Q. And so what happened after you were
14 able to place Mr. Eberhart at the location with the
15 GPS data?

16 A. I then -- I did contact the victim and
17 let him know I want you to come -- I'll get him and
18 show him -- do a -- do an interview with him at --
19 at headquarters. Also I contacted SLED for a photo
20 lineup with Mr. Eberhart's picture.

21 Q. Okay, and which one of those happened
22 first? Like ---

23 A. Contact SLED first.

24 Q. Okay, and did you do the photo lineup
25 first, or did you do the interview first?

1 A. I did the interview first, and I let
2 another investigator show him the lineup.

3 Q. Okay. 'Cause after that was he
4 interviewed? Mr. Nevelle Eberhart?

5 A. Excuse me, sir?

6 Q. After -- after that, the next thing was
7 the interview with Nevelle Eberhart?

8 A. Yes, sir.

9 MR. NEELY: Your Honor, maybe -- do you
10 want me to proffer the interview as well, or stop at
11 this point ---

12 THE COURT: All right. So the first thing
13 is, I think the ruling was that we couldn't -- that
14 -- that -- that pursuant to Crawford in a
15 confrontation clause he can't say that -- what's the
16 lady's name?

17 MS. EIGENBROT: Nicole Goodwin, Your Honor.

18 THE COURT: That Ms. Goodwin said she knew
19 the person that stole the motorcycle.

20 MR. NEELY: I don't think -- did he say it?

21 WITNESS: We didn't talk about it.

22 THE COURT: Yeah, he said it.

23 WITNESS: I didn't say that.

24 MR. NEELY: Oh, okay.

25 THE COURT: No, I think you said -- you

1 said she said it was stolen and she knew who stole
2 it, I think is what he testified to. I didn't stop
3 y'all.

4 MR. NEELY: I didn't -- I didn't hear that.
5 I'm sorry.

6 THE COURT: They didn't say anything
7 either, but I -- let's just make sure we're clear
8 about that. So don't -- don't say that -- what she
9 said about knowing who stole it or any description
10 of who stole it.

11 WITNESS: Yes, ma'am.

12 THE COURT: On the issue of the bonding,
13 any objection to the proffered testimony regarding
14 that?

15 MS. EIGENBROT: Absolutely, Your Honor. I
16 believe referencing the bond, that he's out on bond,
17 running his rap sheet and learning he was a violent
18 criminal is absolutely prejudicial under Rule 403.

19 THE COURT: I think they rephrased that.
20 But he -- but we -- we're not going to -- he can say
21 -- he did, I think he went back and kind of
22 redirected him or rephrased it after he said it, and
23 he corrected himself, and said, "Oh, I can't say
24 that."

25 WITNESS: Yeah.

1 THE COURT: So we can't testify about him
2 being on bond. I -- I think what you probably can
3 ask him, or -- not that I can tell a witness what to
4 state, but based on his investigation he learned
5 that this company may have some information
6 regarding his location, or something like that. I
7 think that's the best ---

8 MR. NEELY: Okay.

9 THE COURT: -- way to do it, without
10 getting into the bond company, him doing a criminal
11 record search, or anything like that. I think -- I
12 think based on his investigation, which we all know
13 is him doing a criminal record search, the -- he --
14 he received information that this company may have
15 some location data on the Defendant. And -- and
16 after speaking with him -- and then you can get into
17 kind of like what you said Mr. -- what was his name?
18 Mr. Titus Curry's company may have located him,
19 yeah. I think that's probably the best way. Any
20 objection to ---

21 MS. EIGENBROT: To what Your Honor just
22 suggested? Absolutely not.

23 THE COURT: Okay. All right. We're all on
24 the same page.

25 WITNESS: Yes, ma'am.

1 THE COURT: Okay, now, the video, what was
2 the issue regarding the video?

3 MR. NEELY: No issue regarding the video, I
4 just wasn't trying to play the whole video to
5 proffer ---

6 THE COURT: You ---

7 MR. NEELY: Unless -- unless they want me
8 to.

9 MR. EIGENBROT: Yeah.

10 THE COURT: You've seen the redacted video?

11 MS. EIGENBROT: Yes, Your Honor, we
12 reviewed that last night. I did not provide any
13 objections to the State at this time.

14 THE COURT: Okay. All right. So that
15 takes care of the bonding and GPS and the -- the 911
16 call. Anything else we ---

17 MS. EIGENBROT: And I -- just, again, Your
18 Honor, we caution anyone -- anyone's testimony about
19 anything Ms. Goodwin said about the situation.

20 THE COURT: Other than she reported a
21 stolen ---

22 MS. EIGENBROT: Correct.

23 THE COURT: -- moped. She reported it
24 stolen. When she reported it, where she reported
25 it, and then he -- I mean then he said he came to

1 her house at this location, and I think all of that
2 is admissible. All right. Are we ready?

3 WITNESS: Yes, ma'am.

4 THE COURT: All right. Thank you. Let's
5 bring them in. Now, if we need to send them back
6 out, if something comes up, just stop and we'll ---

7 MR. NEELY: And slow is better than fast.

8 THE COURT: Yes.

9 MR. NEELY: So if you need to slow things
10 down and think about it for a second, that's totally
11 fine.

12 WITNESS: Cool.

13 (Jury enters the courtroom.)

14 BAILIFF: All jurors are seated, Your
15 Honor.

16 THE COURT: All right. Yes, sir?

17 MR. NEELY: Thank you, Your Honor.

18 BY MR. NEELY:

19 Q. Let me just backtrack a little bit to
20 make sure we've covered everything. So you ran the
21 tag number on the moped?

22 A. That's correct.

23 Q. And then you -- you got the location
24 for the tag number of the owner?

25 A. Yes.

1 Q. And that came back Nicole Goodman?

2 A. Yes.

3 Q. And did you run that address through
4 your system?

5 A. Yes.

6 Q. And what did that produce?

7 A. A report that was filed by -- by her.

8 Q. A report of what?

9 A. A stolen vehicle -- a stolen moped.

10 Q. And then did you have occasion to go to
11 the address yourself?

12 A. Yes.

13 Q. And was Ms. Goodwin there?

14 A. Yes, she was there.

15 Q. Was her moped there?

16 A. Yes.

17 Q. And this was what day again?

18 A. January 7th.

19 Q. And when did she report it stolen?

20 A. January, I think, 2nd, in the early
21 morning hours.

22 Q. And while you're speaking of Ms.
23 Goodwin, was there anybody else at the house?

24 A. Yes. I started talking to her. I
25 asked her to come down into the yard, and we started

1 talking a little bit more. The door shut. And then
2 after that the Defendant walked out the door on the
3 front porch.

4 Q. So the door shut to the house when Ms.
5 Goodwin's outside the house?

6 A. Yes, we was on -- in -- in the yard.

7 Q. So that you knew somebody else was in
8 the house?

9 A. That is correct.

10 Q. And so did you end up speaking with the
11 other person in the house?

12 A. Yes, I asked him can I speak to him for
13 a minute. He said he had to use the bathroom. Went
14 around the house, came back, and talked to him for a
15 second. I asked him for his ID or what's his name,
16 he handed me his ID and I took a picture of it.

17 Q. Okay. And who was that?

18 A. Mr. Eberhart.

19 Q. So he was at the location with the
20 moped?

21 A. Yes.

22 Q. And after you got his information, did
23 you run that through your system?

24 A. Yes.

25 Q. And what did that information run and

1 your system turn up?

2 A. That I needed to talk to Mr. Curry.

3 Q. Okay. And so you spoke with Mr.

4 Curry's company?

5 A. That's correct.

6 Q. And did they have GPS data on the

7 Defendant?

8 A. Yes.

9 Q. And were you able to get a report from
10 that GPS data?

11 A. Yes.

12 Q. I'm going to show you what's been
13 marked as State's Exhibit Number 1. Do you
14 recognize this?

15 A. (Reviews document.)

16 Q. And what is that?

17 A. That is tracking of Mr. Eberhart.

18 Q. And so you've got the tracking of Mr.
19 Eberhart. Where did the GPS data place him at the
20 time of the robbery?

21 A. Around the 2400 -- 24 or 2500 -- excuse
22 me, 2400 block of Devine Street.

23 Q. And about how far away is that from the
24 incident location of 2530 Devine Street?

25 A. A little over a hundred -- 130 meters,

1 or whatever.

2 Q. Not that far?

3 A. Not ---

4 Q. Not ---

5 A. -- far at all.

6 Q. And I'm going to hand you this again,
7 what -- what time did it place him there?

8 A. 4:46 p.m.

9 Q. And is there also GPS for that location
10 from him being on King Street?

11 A. Yes.

12 Q. So after you received the report
13 placing Mr. Eberhart at the scene, or around the
14 scene at the time of the crime, what did you do?

15 A. By that time I had the victim brought
16 back to -- set up another interview -- interview
17 with the victim. Interviewed him first, and then
18 another investigator showed him a photo lineup.

19 Q. And he did not pick Mr. Eberhart out of
20 the lineup, correct?

21 A. That's correct. He said he ---

22 Q. He did not pick him out of the lineup?

23 A. No, he did not.

24 Q. And so how -- how's a photo lineup
25 generated? How's that done?

1 A. We send our pictures -- an individual
2 who we're looking for, I mean we possibly have got a
3 suspect, we send it to SLED, so they can do a photo
4 lineup for us. They keep it -- they've got a whole
5 state person they can put in the lineup instead of
6 we're doing somebody local.

7 Q. So you don't create the photo lineup,
8 you send that to SLED?

9 A. Yes.

10 Q. And then they -- do you send one
11 picture to SLED?

12 A. I sent the info- -- yeah, the
13 information of Mr. Eberhart over there, they created
14 the lineups.

15 Q. Okay. So the other five people on
16 there are SLED generated?

17 A. That's correct.

18 Q. And were there any other suspects in
19 that lineup?

20 A. No.

21 Q. Did you recognize any of the people in
22 that lineup?

23 A. No.

24 Q. And after you presented the lineup to
25 the victim, and -- what did you do next?

1 A. After he couldn't pick him out of the
2 lineup, I then -- of course, I reviewed the video,
3 and I enhanced it a little bit as well. I can
4 enhance the video a little bit better, and I could
5 clearly see that Mr. Eberhart and the unknown
6 suspect that did this robbery is the same person.

7 Q. And backtrack a little bit. Was there
8 another angle of the Palmetto First Bank?

9 A. Yes, yes.

10 Q. That showed the street?

11 A. Yes.

12 MR. NEELY: Your -- Your Honor, oh, I'm
13 sorry.

14 BY MR. NEELY:

15 Q. Do you recognize this; is that the
16 video?

17 A. Yes.

18 MR. NEELY: And this is also stipulated to
19 the State would enter the roadside view of the gas
20 station video as a composite.

21 THE COURT: It's all one, State's 5?

22 MR. NEELY: State's 5.

23 THE COURT: Any objection?

24 MS. EIGENBROT: No objection.

25 THE COURT: All right, thank you.

1 (State's Exhibit Number 5, Video, is marked
2 and entered into evidence without objection.)

3 BY MR. NEELY:

4 Q. It's a very short video. So this is
5 Palmetto First Bank -- First Palmetto Bank, excuse
6 me, what street is that it's driving down?

7 A. Devine.

8 Q. Devine? The moped?

9 A. Yes.

10 Q. With the same person that robbed Mr.
11 Stewart?

12 A. Yes, same stretch.

13 Q. And was there any other evidence you
14 derived from that angle?

15 A. No.

16 Q. Okay. So after you met the victim, you
17 had the interview with the Defendant?

18 A. Yes.

19 Q. And where was that interview?

20 A. Police headquarters.

21 Q. I'm sorry?

22 A. Columbia Police Headquarters.

23 Q. Okay. And was that interview audio and
24 video recorded?

25 A. Yes.

1 Q. Do you recognize this?

2 A. Yes. That's the interview of me and
3 Mr. Eberhart.

4 Q. Does it accurately depict the -- the
5 questions and what was seen and heard that day in
6 that room?

7 A. Yes.

8 MR. NEELY: Your Honor, at this time the
9 State would seek to introduce the interview as
10 State's Exhibit Number 6.

11 THE COURT: Any objection?

12 MS. EIGENBROT: No objection.

13 THE COURT: It will be entered without
14 object -- without objection.

15 (State's Exhibit Number 6, Interview, is
16 marked and entered into evidence without objection.)

17 MR. NEELY: Permission to publish to the
18 jury, Your Honor?

19 THE COURT: Yes, sir.

20 (Video is published for the jury.)

21 BY MR. NEELY:

22 Q. I'm going to show you this piece of
23 paper; do you recognize this?

24 A. (Reviews document.) Yes, this is
25 advisement of rights.

1 Q. And did you sign this?

2 A. Yes.

3 Q. And has Mr. Eberhart also has signed
4 this?

5 A. Yes.

6 Q. And this is what you read him?

7 A. That is correct.

8 MR. NEELY: Your Honor, at this time the
9 State would seek to introduce the advisement of
10 rights as State's Number 7.

11 THE COURT: Any objection?

12 MS. EIGENBROT: No objection.

13 THE COURT: All right.

14 COURT REPORTER: Number nine.

15 MR. NEELY: Number 9, Your Honor, excuse
16 me, I'm sorry.

17 (State's Exhibit Number 9, Advisement of
18 Rights, is marked and entered into evidence without
19 objection.)

20 THE COURT: All right.

21 BY MR. NEELY:

22 Q. And did he seem to understand his
23 rights?

24 A. Yes.

25 Q. And he was willing to talk to you?

1 A. Yes.

2 (Video is published for the jury.)

3 BY MR. NEELY:

4 Q. So this interview continues on; isn't
5 that right?

6 A. That's correct.

7 Q. But the actual interview is done at
8 this point?

9 A. Yes. This -- the actual interview of
10 me and him was done.

11 Q. No more questions were asked?

12 A. None.

13 Q. Did this -- did this escalate?

14 A. Yes.

15 (Video is published for the jury.)

16 BY MR. NEELY:

17 Q. Does that kind of continue on in that
18 vain?

19 A. Yes.

20 Q. Anything else said about the case
21 itself from here on out?

22 A. No.

23 Q. But the rest of that's on this video?

24 A. Yes.

25 Q. That's in evidence?

1 A. Yes. Until the time they took him ---
2 got him out of there and took him onto
3 (Indiscernible testimony), 'cause I actually wanted
4 to move him quicker out of there because the way he
5 was getting all hostile, and we had one investigator
6 that had to go to the hospital.

7 Q. So after this took place, was the
8 Defendant put under arrest?

9 A. Yes.

10 Q. And was a search done of his person
11 incident to the arrest?

12 A. Yes. We emptied his pockets and stuff,
13 and got all his papers and stuff out of them.

14 Q. Is that standard procedure?

15 A. Yes.

16 Q. I'm showing you what's been pre-marked
17 as State's Exhibit Number 7. Could you look through
18 these? Do you recognize those?

19 A. ID, yes. Yes, I do.

20 Q. And what are those?

21 A. ID and credit cards with Mr. Nevelle's
22 name on it -- Mr. Eberhart -- Nevelle Eberhart's
23 name's on them.

24 Q. And did you personally witness those in
25 inventory?

1 A. Yes. I personally did it myself.

2 MR. NEELY: Your Honor, at this time the
3 State would like to introduce a rubber band with a
4 bundle of cards from ---

5 THE WITNESS: And his ID.

6 MR. NEELY: it's got his ID as well, as
7 State's Exhibit Number 7.

8 MS. EIGENBROT: Your Honor, I would object
9 to relevance.

10 THE COURT: Let me see.

11 MR. NEELY: And, Your Honor, the State's
12 argument is that they're ---

13 MS. EIGENBROT: Your Honor, may we
14 approach?

15 THE COURT: Hold on. Hold on one second.

16 (Bench conference is held.)

17 THE COURT: All right, the objection is
18 over -- overruled.

19 MR. NEELY: Thank you, Your Honor.

20 (State's Exhibit Number 7, Credit Cards
21 with ID, is marked and entered into evidence with
22 objection by Defense.)

23 BY MR. NEELY:

24 Q. And was this card also found?

25 A. Yes.

1 Q. And whose card is that?

2 A. This is Mr. -- Mr. Stewart's debit
3 card.

4 Q. And what bank is it for?

5 A. Palmetto Citizen.

6 Q. And was that the same bank that he was
7 robbed at?

8 A. That's not Palmetto, that's First
9 Palmetto.

10 Q. Okay. So it's a different card?

11 A. Yes. But you can use it at any ATM
12 machine.

13 Q. Gotcha. And this was also found on Mr.
14 Eberhart's person?

15 A. That is correct.

16 Q. Along with the rest of the cards that
17 are his?

18 A. Yes.

19 MR. NEELY: Your Honor, at this time the
20 State will introduce -- seek to introduce State's
21 Number 8, which is the Palmetto Citizens card which
22 is James Stewart's.

23 THE COURT: Any objection?

24 MS. EIGENBROT: No objection.

25 THE COURT: All right, that will be entered

1 without objection, and 7 was entered with the
2 objection of the Defendant.

3 (State's Exhibit Number 8, Palmetto
4 Citizen's Debit Card, is marked and entered into
5 evidence without objection.)

6 BY MR. NEELY:

7 Q. When you did this interview, had you
8 recovered those cards from him?

9 A. No.

10 Q. So when you were doing this interview,
11 you didn't know that he had that card on him?

12 A. No.

13 Q. But he knew?

14 A. Yes.

15 MS. EIGENBROT: Objection, speculation.

16 THE COURT: What was the question?

17 MR. NEELY: I'm sorry, that was -- I'll
18 withdraw it.

19 THE COURT: All right.

20 BY MR. NEELY:

21 Q. So after you did an inventory, was
22 there any other investigation that was done after
23 the arrest?

24 A. Not really. We just kind of like
25 checked on -- checked on the victim. We did talk to

1 another person, a Ms. Goodwin after that as well.

2 Q. Let's not go into that.

3 A. That's correct.

4 Q. And I know the -- James Stewart already
5 said this, but you had occasion to interact with Mr.
6 Eberhart?

7 A. That's the first time.

8 Q. That's the first -- that was the first
9 day that you met him?

10 A. Yes.

11 Q. And is he in the room today?

12 A. Yes.

13 Q. And could you point him out?

14 A. Sitting at the corner with the black
15 jacket on, braided hair, blue shirt, tie.

16 MR. NEELY: That's all the questions I have
17 for him.

18 THE COURT: All right. Please answer any
19 questions from the Defense.

20 **CROSS-EXAMINATION**

21 BY MS. EIGENBROT:

22 Q. All right. All right, good afternoon,
23 Investigator.

24 A. Good afternoon.

25 Q. Thank you for being here with us today.

1 A. Sure.

2 Q. Obviously, I have some questions for
3 you.

4 A. Sure.

5 Q. Let's start with the photo lineup ---

6 A. Uh-huh.

7 Q. -- okay? So we've heard testimony that
8 Mr. Stewart was shown a photo lineup, right?

9 A. That is correct.

10 Q. And I believe you testified previously
11 that SLED generated that photo lineup, right?

12 A. That's correct.

13 Q. And that is standard procedure?

14 A. Yes.

15 Q. You obtain a suspect and send that
16 information to SLED?

17 A. That's correct.

18 Q. And their job is to find similar
19 pictures to the suspect that you have, right?

20 A. That's correct.

21 Q. And that's because the idea of looking
22 at a photo lineup is to make sure and guarantee that
23 somebody is identifying the correct person?

24 A. That is correct.

25 Q. And I believe you testified, too, that

1 you did not, in fact, show Mr. Stewart the lineup;
2 isn't that correct?

3 A. That is correct.

4 Q. And that's actually also a standard or
5 a good procedure in photo lineups; isn't that right?

6 A. It's a good procedure.

7 Q. You use somebody else that doesn't know
8 as much about the case to show the lineup to the
9 victim?

10 A. That is correct.

11 Q. And that's what you did here, right?

12 A. Yes.

13 Q. Now, I know you didn't show this
14 lineup, but I know with your experience you've done
15 this before. When you show somebody a lineup you
16 give them instructions; isn't that correct?

17 A. That's correct.

18 Q. One of those instructions is the
19 suspect may or may not be in this lineup?

20 A. Yes.

21 Q. Because you don't want to bias the
22 individual, correct?

23 A. That's correct.

24 Q. And you basically do your best not to
25 make any comment on the photo lineup itself, and

1 just simply show them the lineup, right?

2 A. That is correct.

3 Q. And then they are also instructed that
4 they don't actually have to pick anybody. If they
5 don't see the person, they don't need to pick one,
6 right?

7 MR. NEELY: Objection, Your Honor. She's
8 asking about -- she's asking him specifically, not
9 generally here. She -- she asked him what was said
10 for the photo lineup, and he did not give this photo
11 lineup.

12 MS. EIGENBROT: I don't believe I asked
13 that, but I can rephrase the question.

14 THE COURT: All right. Rephrase the
15 question.

16 BY MS. EIGENBROT:

17 Q. Investigator, typically, when you show
18 an individual a photo lineup, they're also told they
19 do not have to pick an individual in that lineup?

20 A. That's correct.

21 Q. And to the best of your knowledge,
22 those procedures were followed here?

23 A. Yes.

24 Q. Okay. The next thing I want to briefly
25 talk about is this interview that you had.

1 A. Okay.

2 Q. This interview.

3 A. Uh-huh.

4 Q. Right? You questioned Mr. Eberhart on
5 January 11th; is that right?

6 A. Yes.

7 Q. And at that time he was brought to
8 headquarters by another officer; ---

9 A. Yes.

10 Q. -- is that correct? So he was taken
11 into custody by somebody?

12 A. Yes.

13 Q. And notified that he was under arrest
14 for these charges?

15 A. Yes.

16 Q. So when he's in this room with you, he
17 is aware that he is under arrest at that time?

18 A. Yes, but the arrest warrant wasn't
19 signed -- I mean served -- served on him.

20 Q. Okay. Now I do want to talk a little
21 bit about the bank video. And I -- Investigator, we
22 saw two different clips from the Bank; isn't that
23 right?

24 A. Two different sections, yes.

25 Q. And the one clip is at the -- I guess

1 it's kind of the split clip is at the ATM, right?

2 A. I guess, I can't tell you off the top
3 of my head.

4 Q. Okay. But you would -- you would
5 acknowledge though that that's over the ATM, like it
6 shows in the video?

7 A. Yes, it's showing that.

8 Q. And that second one is like at the
9 front of the bank, and catches kind of across the
10 street; is that right?

11 A. Yes.

12 Q. Now, I know we showed you a brief clip,
13 but I'm going to show you on my disk, I think I've
14 got the clip. I'm going to show you what's been
15 marked as State -- or Defendant's Exhibit Number 2.
16 I just want you to verify this is the same video.

17 (Video is published for the Court.)

18 BY MS. EIGENBROT:

19 Q. Is that the same video we saw earlier?

20 A. Yeah. That's the wrong one. That's
21 the second time he was riding by on the moped.

22 Q. Okay. But that's the -- that's the
23 view from the front of the Bank?

24 A. Yes.

25 Q. And it starts at military time 16:46;

1 is that correct?

2 A. Yes.

3 MS. EIGENBROT: Your Honor, at this time I
4 would move to enter into evidence Defendant's
5 Exhibit 2, and publish to the jury.

6 THE COURT: Any objection?

7 MR. NEELY: I'm not sure that I still have
8 it. What is it? Hold on one second. No objection,
9 Your Honor.

10 THE COURT: All right, no objection.

11 (Defendant's Exhibit Number 2, Video, is
12 marked and entered into evidence without objection.)

13 MS. EIGENBROT: Your Honor, may I publish,
14 please?

15 THE COURT: Yes.

16 (Video is published for the jury.)

17 BY MS. EIGENBROT:

18 Q. Investigator, can you see this?

19 A. Yes.

20 Q. Okay. All right. So again, this is at
21 the front part of the Bank, correct?

22 A. That is correct.

23 Q. And that's -- it's facing this gas
24 station or convenience store we've been talking
25 about, the Scotchman.

1 A. If you -- if you look at the roadway,
2 then Scotchman's right across the street.

3 Q. Okay. So right in this little corner
4 right here ---

5 A. Yes.

6 Q. -- is the Scotchman's is what we're
7 talking about, correct?

8 A. Yes.

9 Q. And I think I mentioned before, this
10 video itself starts at 16:46, ---

11 A. Uh-huh.

12 Q. -- is that right?

13 A. That's correct.

14 Q. And for those that don't understand
15 military time that is 4:46 p.m., correct?

16 A. That is correct.

17 Q. Okay.

18 (Video is being published for the jury.)

19 BY MS. EIGENBROT:

20 Q. When I hit play you would agree there's
21 an individual kind of walking up here in this
22 corner?

23 A. Yes.

24 Q. I think you can see it. Okay. And
25 that is at -- and, I'm sorry, you're kind of far

1 away, but 16:46:19 seconds.

2 A. If you say so, yes.

3 Q. All right. All right. And now you'd
4 agree that you can see the moped up here in the
5 corner, correct?

6 A. Yes.

7 Q. Okay. And we believe this is the
8 suspect, ---

9 A. Yes.

10 Q. -- right? Okay. And this timestamp
11 down here now reads 16:46:51.

12 A. Okay.

13 Q. Do you ---

14 A. Yes.

15 Q. And then he leaves the frame seconds
16 later. And this video itself, this particular clip
17 stops after that single minute, right?

18 A. Yes.

19 Q. All right. Okay. And you could see
20 sort of in that corner up there maybe that --
21 whoever that person was walking in the corner, you
22 kind of see their feet up there for a piece of it;
23 would you agree?

24 A. Yes.

25 Q. Okay. Now, I want to show you what is

1 marked and has been admitted as State's Exhibit
2 Number 1, which I believe is the movement report
3 from Mr. Eberhart. And, Investigator, if I could
4 get you turn to the second page?

5 A. Okay.

6 Q. We heard previously some testimony that
7 at some point Mr. Eberhart was at 2329 Devine
8 Street, correct?

9 A. Yes.

10 Q. Okay. And that if you look at the
11 times by that address, his start time at that
12 address was 4:46:22 p.m.

13 A. Oh, yes.

14 Q. Okay. And the end time at that address
15 was 4:47:20 p.m.

16 A. Yes.

17 Q. And then after that, he is located at
18 2527 U.S. 21 Connector; isn't that correct?

19 A. Yes.

20 Q. Okay. And he's at that location,
21 according to this report, starting at 4:54:22,
22 right?

23 A. That's correct.

24 Q. And then until 4:57:19, right?

25 A. That's correct.

1 Q. And now have you looked -- you looked
2 up this address the 2527 U.S. 21 Connector?

3 A. No, I didn't.

4 Q. Okay. All right, now I want to go back
5 to the other bank video. Okay. All right.

6 (Video is published for the jury.)

7 So Investigator, again, let me get this
8 video to pause for a moment. This video at the ATM
9 starts at the same time, the 4:46 p.m., correct?

10 A. I hope they're on the same timeframe.

11 Q. That was what you requested at least,
12 correct?

13 A. Yes.

14 Q. Okay. All right. And so Mr. Stewart
15 shows up in the frame at about 4:46:33, right?

16 A. Yes.

17 Q. All right. And then we see the
18 suspect's moped here in the frame at -- it's now
19 4:47:12.

20 A. Correct.

21 Q. All right. And then he gets snatched
22 at at about 4:47:59?

23 A. Correct.

24 Q. All right. And then he takes off
25 running out of the frame at 4:48?

1 A. Uh-huh, correct.

2 Q. All right. And (Indiscernible
3 testimony), right?

4 A. Yes.

5 Q. Now -- all right, and, Investigator,
6 I'm going to show you what has been marked as
7 Defense's Exhibit 3 through 9 and let me know if you
8 recognize what those would be.

9 A. (Reviews exhibits.) Yes, I recognize
10 them.

11 Q. And those would be -- would those be
12 fair and accurate depictions of the videos you just
13 saw?

14 A. Yes.

15 MS. EIGENBROT: Your Honor, at this time
16 the Defense would move into evidence Defendant's
17 Exhibits 3 through 9.

18 THE COURT: Any objection?

19 MR. NEELY: Without objection, Your Honor.

20 MS. EIGENBROT: Thank you.

21 (Defendant's Exhibit Number 3, Depictions
22 of Video, is marked and entered into evidence
23 without objection.)

24 (Defendant's Exhibit Number 4, Depiction of
25 Video, is marked and entered into evidence without

1 objection.)

2 (Defendant's Exhibit Number 5, Depiction of
3 Video, is marked and entered into evidence without
4 objection.)

5 (Defendant's Exhibit Number 6, Depiction of
6 Video, is marked and entered into evidence without
7 objection.)

8 (Defendant's Exhibit Number 7, Depiction of
9 Video, is marked and entered into evidence without
10 objection.)

11 (Defendant's Exhibit Number 8, Depiction of
12 Video, is marked and entered into evidence without
13 objection.)

14 (Defendant's Exhibit Number 9, Depiction of
15 Video, is marked and entered into evidence without
16 objection.)

17 BY MS. EIGENBROT:

18 Q. All right. So -- all right. So once
19 you received this case, Investigator, you did
20 several things, which you've given us testimony
21 about. Now, I do want to ask you, and we've heard
22 testimony previously from the responding officer,
23 Officer Selph, that he responded and went to the
24 convenience store, the Scotchman; is that right?

25 A. That is correct.

1 Q. And he went to determine if there was
2 video surveillance, correct?

3 A. That's correct.

4 Q. And that was based on Mr. Stewart's
5 statement to him, initially, right?

6 A. Yes.

7 Q. But was unable to obtain the video, I
8 believe he testified, because the manager was not
9 present; is that right?

10 A. That is correct.

11 Q. Now, you never went back and asked for
12 that video with the manager?

13 A. Yes, I did.

14 Q. Okay. That was never turned over as
15 part of evidence?

16 A. There was nothing there. You couldn't
17 even tell him walking from -- coming from the bank
18 to the -- to the store. So that's why I'd seen
19 nothing there, unless they gave me the wrong
20 timeframe. So I didn't put it in the evidence.

21 Q. But you did go and request, but you
22 think maybe they gave you the wrong timeframe?

23 A. Yes. And also, if you look, I had one
24 say 4:28:22. I don't know where that even come
25 from.

1 Q. Okay. And that was part of this case
2 jacket when you were working ---

3 A. Yes, and that's why I didn't put that
4 part with it, 'cause there was nothing I can ---

5 Q. But needless to say, we don't have that
6 video, correct?

7 A. That's correct.

8 Q. And I believe Mr. Stewart testified
9 that's where he would have spent ---

10 A. A good part ---

11 Q. -- at least ten minutes after this part
12 of the robbery, correct?

13 A. That is correct.

14 Q. Okay. Now, Investigator, I also want
15 to ask, downtown Columbia has lots of cameras, isn't
16 that right?

17 A. They do.

18 Q. But not everywhere, right?

19 A. No.

20 Q. But there are -- there are cameras
21 available ---

22 A. Yes.

23 Q. -- is that right? And you would agree
24 with me that there was no straight -- straight on
25 view of Mr. Eberhart or ---

1 A. No.

2 Q. -- the suspect in this -- this video?

3 A. No.

4 Q. And you had that report where it showed
5 some of his locations, right?

6 A. Yes.

7 Q. You did not go to any of those
8 locations to determine if there was any better video
9 available?

10 A. There is not. The closest cameras are
11 right down towards the other side of South Region
12 Headquarters, when you start getting back into the
13 -- the Five Points area, which is almost, what,
14 three-quarters of a mile.

15 Q. Investigator, did you look at any other
16 addresses on that report?

17 A. No, other than what I got there, and
18 two addresses this incident occurred at.

19 Q. So you do not follow-up after -- his
20 movements after?

21 A. The two addresses that I -- I come
22 straight on, was the one right at Devine Street and
23 the one on King Street. At that time you can look
24 at it, it does show him from like where at Stark
25 Street. If I'm correct, it does show him at Stark

1 Street.

2 Q. Okay.

3 A. Okay.

4 Q. I guess my -- afterwards he travels to
5 several addresses on Millwood Avenue, right?

6 A. That's correct.

7 Q. And then additionally at several
8 addresses on Forest Drive?

9 A. Yes.

10 Q. But we did not look at those addresses
11 to see what those were?

12 A. No, no, ma'am.

13 Q. Investigator, I just want to ask, you
14 are the one that transported Mr. Stewart here today;
15 is that correct?

16 A. Yes.

17 MS. EIGENBROT: Beg the Court's indulgence.

18 BY MS. EIGENBROT:

19 Q. Back to the investigation, so it sounds
20 like you spoke to a young lady by the name of Nicole
21 Goodwin, right?

22 A. Yes.

23 Q. Okay. And that's where you actually
24 were first introduced to Mr. Eberhart?

25 A. That's correct.

1 Q. Okay. And at that time he was leaving
2 her residence when you met with him?

3 A. No. He'd just come out the door and
4 looking.

5 Q. Okay. Came out the door and exited the
6 house, right?

7 A. Yes.

8 Q. Now, after his arrest -- or before his
9 arrest, you did not obtain any search warrants for
10 her residence?

11 A. No. The reason when he's arrested, she
12 was evicted. Everything she had was outside.

13 Q. Okay. You did not search this victim's
14 house that day?

15 A. No, because they just placed all her
16 stuff out the door.

17 Q. I guess my point here though is you
18 never found a gun in any of Mr. Eberhart's
19 belongings; is that right?

20 A. When they arrested him, no, we did not,
21 but everything she had and he had was placed outside
22 the resident, because she's been -- she was evicted
23 -- I'm sorry, she was a evicted. That's the reason
24 why a search warrant wasn't done.

25 MS. EIGENBROT: Beg the Court's ---

1 BY MS. EIGENBROT:

2 Q. Actually, let me ask you, you swore
3 this warrant out on January 8th maybe?

4 A. No, ma'am.

5 Q. I apologize, Investigator, the 11th.

6 A. Okay, thank you.

7 Q. Actually, I'm sorry, again, I'm --
8 correct me if I'm wrong. Let me show you -- this is
9 going to be marked as Defendant's Exhibit 10.

10 (Defendant's Exhibit Number 10, Warrant, is
11 marked and entered without objection.)

12 BY THE WITNESS:

13 A. Number 10? Okay, yeah.

14 Q. And I'm going to show you what's been
15 marked as Defendant's Exhibit 10, Investigator ---

16 MR. NEELY: I mean can I see that?

17 BY MS. EIGENBROT:

18 Q. I just want to point you to the date
19 when the warrant was sworn out.

20 A. Okay.

21 MR. NEELY: What is that number?

22 BY MS. EIGENBROT:

23 Q. This one's January 10th; is that right?

24 A. Yes.

25 Q. So the day before he was interviewed?

1 A. Yes.

2 Q. And that's because you were still
3 investigating, right?

4 A. I was still investigating, yes, but --
5 but that was after I interviewed the victim. I'm --
6 because I positive ID him from my photo -- from --
7 from the photos -- from the video there as well as
8 seeing him personally.

9 Q. I believe you testified you interviewed
10 Mr. Stewart -- was it on the 8th?

11 A. I believe it was on the 10th, because
12 we showed the lineup.

13 Q. Okay.

14 A. Hold on, I can tell you in one second,
15 hold on. Seven -- I believe it was the 10th. For
16 some reason ---

17 Q. Okay.

18 A. I believe it's the 10th.

19 Q. All right.

20 A. For some reason I don't see a date on
21 it for that, but I know it's -- it was after we
22 interviewed him.

23 Q. I trust your judgment on that.

24 MS. EIGENBROT: Beg the Court's indulgence.

25 BY MS. EIGENBROT:

1 Q. Investigator, out of abundance of
2 caution, did you ever request the individual's
3 information in the lineup that Mr. Stewart did
4 circle?

5 A. No, 'cause they couldn't give it to
6 you, because it's a random thing they -- they run
7 through their system, but they don't -- I -- I can't
8 -- from my point of view, they don't even know,
9 'cause I have done that before.

10 Q. Okay.

11 MS. EIGENBROT: Thank you, I have no
12 further questions.

13 THE COURT: All right. Yes, sir?

14 MR. NEELY: Just briefly, Your Honor.

15 BY MR. NEELY:

16 Q. When Nicole Goodwin introduced you to
17 Nevelle Eberhart, who did she introduce him as?

18 A. Anthony.

19 Q. Anthony?

20 A. Yes.

21 MS. EIGENBROT: Objection, hearsay.

22 MR. NEELY: Your Honor, she opened the
23 door.

24 THE COURT: Let me see you all one second.

25 (Bench conference is held.)

1 THE COURT: Objection's overruled.

2 BY MR. NEELY:

3 Q. So what did Nicole Goodwin introduce
4 him as?

5 A. Anthony.

6 MR. NEELY: Thank you, that's all the
7 questions I have.

8 THE COURT: Anything else?

9 All right. You may step down.

10 All right. Call your next witness.

11 MR. NEELY: Your Honor, that's the State's
12 case.

13 THE COURT: All right. Thank you.

14 Ladies and gentlemen of the jury, there is
15 a matter of law that I need to take up outside of
16 your presence, and so I'm going to send you all back
17 into the jury room for a short moment, and then
18 we'll receive you back shortly.

19 (Jury exits the courtroom.)

20 THE COURT: All right. I'll be glad to
21 hear from you all regarding any motions. Any from
22 the State?

23 MR. NEELY: Not from the State, Your Honor?

24 THE COURT: Defense?

25 MS. EIGENBROT: I beg the Court's

1 indulgence, Your Honor.

2 THE COURT: Yes, ma'am.

3 MR. FORNEY: I would renew my pretrial
4 motion to -- about the admission of the GPS data
5 through previous -- citing my previous citations of
6 law.

7 THE COURT: All right. Thank you.

8 MS. EIGENBROT: And, Your Honor, of course,
9 at this time the Defense would move for a directed
10 verdict. At this time, taking the light -- taking
11 the evidence in the light most favorable to the
12 State, the State has failed to present evidence
13 beyond a reasonable doubt sufficient to convince a
14 jury that Mr. Eberhart is, in fact, this individual
15 that committed this armed robbery.

16 First and foremost, Your Honor, I think
17 identity is obviously a big part of this case. I
18 don't think they have sufficiently produced evidence
19 that Mr. Eberhart was the individual on this video.
20 As Your Honor may have seen from the video, or, if
21 not, having to present some of the exhibits that
22 were entered, there's not any direct shot of the
23 individual's face in these bank videos. The victim
24 in this case was unable to identify him in a photo
25 lineup. And I think identity here is the big piece

1 of this case, and, again, so for those reasons I
2 don't believe they've sufficiently met their burden
3 as far as the element of identification and/or why
4 Mr. Eberhart is the accused in this case. So, Your
5 Honor, for those reasons I would move for a directed
6 verdict.

7 THE COURT: Yes, sir.

8 MR. NEELY: Your Honor, a directed verdict
9 is no -- is a very low standard. I think that
10 standard is met by just a couple pieces of the
11 evidence that's been introduced. The -- the victim
12 got up on the stand, and said he didn't recognize
13 from photographs, and that he's not good at
14 recognizing photographs, but he recognizes him
15 today, and that's the person that stole from him.
16 There's a video that corroborates the fact that the
17 victim was stolen from by a black male on a moped,
18 and he identified him in court, and then he was
19 found with the stolen property. I think that alone
20 satisfies the burden of a directed verdict.

21 THE COURT: All right. I do find that
22 there is sufficient evidence in the light most
23 favorable to -- favorable to the non-moving party
24 that there's sufficient evidence for this matter to
25 go to a jury. So the jury -- there is to the

1 identity issues, that the victim in this case
2 identified the -- in court identified the Defendant
3 as the person that robbed him. The Investigator
4 also, I believe, testified as to identifying him at
5 the home, finding the victim's card, debit card or
6 credit card on this Defendant, thus, giving issues
7 of fact for the jury to decide. And I will
8 respectfully deny the motion for a directed verdict.
9 I do find that there is more than a scintilla of
10 evidence that has been introduced for the jury.

11 All right. And your other motions are
12 preserved for the record.

13 All right. If we can have Mr. Eberhart
14 stand and raise his right hand.

15 MADAM CLERK: Mr. Eberhart, do you solemnly
16 swear the answers you give to questions provided by
17 the Court will be the truth, the whole truth and
18 nothing but the truth, so help you God?

19 MR. EBERHART: Yes.

20 MADAM CLERK: Thank you.

21 BY THE COURT:

22 Q. All right. Thank you. Mr. -- you are
23 Mr. Nevelle Eberhart; is that correct?

24 A. Yes, I am.

25 Q. All right. And at this time I am going

1 to explain to you certain right -- of your rights.
2 If you do not understand anything I say, please let
3 me know. If you want me to explain anything in more
4 detail, please let me know. Do you understand?

5 A. Yes.

6 Q. We have now reached the stage of the
7 trial where you may present your Defense. You have
8 the right to claim the protections given to you by
9 the Fifth Amendment to the Constitution of the
10 United States. This amendment states, in part, no
11 person shall be compelled in any criminal case to be
12 a witness against themselves. This means that you
13 cannot be required to testify in this case. You
14 have the right to testify on your own behalf,
15 however, no one can make you testify. This is a
16 personal right, and no one can waive this right
17 except you. If you decide to testify, you will be
18 subject to the same rules that govern other
19 witnesses, and you may be examined and cross-
20 examined on any relevant issue in this case. In
21 addition, if you have any convictions involving
22 dishonesty or false statement, or for crimes
23 punishable by imprisonment for more than one year,
24 and this Court determines that the probative value
25 of admitting this evidence outweighs its prejudicial

1 effect to you, the Solicitor will be able to
2 introduce your record to attack your credibility.
3 If you decide to testify, this decision on your part
4 must be freely, voluntarily and intelligently made
5 with knowledge of the protections given to you by
6 the Fifth Amendment, and the consequences of your
7 decision to testify. If you decide not to testify,
8 I will instruct the jurors that they cannot give the
9 fact that you did not testify any consideration
10 whatsoever, and that there is to be absolutely no
11 prejudice to you because you did not testify. It is
12 left entirely up to you whether or not you testify.
13 You may talk with your attorney, your family and
14 friends or anyone else, but the final decision will
15 be left entirely up to you. Do you understand what
16 I've explained to you?

17 A. Yes, I do.

18 Q. And do you have any questions about
19 what I have explained to you?

20 A. No, ma'am.

21 Q. And would you -- do you need additional
22 time to speak with your attorneys as to whether you
23 should or should not testify?

24 A. No, ma'am.

25 Q. All right. And do you wish to talk to

1 your lawyer at this time?

2 A. No, I'm fine.

3 Q. All right. And do you wish to testify?

4 A. No.

5 Q. All right. Thank you.

6 THE COURT: All right, any other witnesses
7 that you all ---

8 MS. EIGENBROT: No, Your Honor.

9 THE COURT: All right. So for procedural
10 purposes I am going to bring the jury back in. It's
11 4:30, I'm not going to argue and charge right now.
12 I'll bring the jury back in, and I'll let -- I'll
13 ask if the Defense has any witnesses to call, and
14 then let you all put, and then I'll go ahead and let
15 them know that we're going to release them, and to
16 be back in the morning -- I'll probably say -- 9:15,
17 at 9:15. I'll just tell them to be here at 9:45,
18 and, hopefully, we can get started with closing
19 arguments and the charge on the law by 10 o'clock,
20 and I believe that's it. Anything ---

21 MR. NEELY: Just a brief question. And so
22 the Defense is resting and not calling witnesses?

23 THE COURT: Yeah. That's what I think they
24 said.

25 MR. NEELY: Okay. Just making sure.

1 MS. EIGENBROT: Right.

2 THE COURT: All right. All right. Are we
3 ready to bring them in? Bring them on in. I guess
4 we'll need to order lunch tomorrow, Janie. We'll do
5 that in the morning.

6 (Jury enters the courtroom.)

7 BAILIFF: All jurors are seated, Your
8 Honor.

9 THE COURT: All right. Thank you. The
10 State has rested at this time. Does the Defense
11 have any witnesses to call?

12 MS. EIGENBROT: No, Your Honor, the Defense
13 would rest.

14 THE COURT: All right. Thank you.

15 All right. Ladies and gentlemen of the
16 jury, the State has rested, and the Defense,
17 although they are not required, has stated that they
18 do not have any witnesses to present, and so,
19 therefore, we are at the point of the trial where
20 we're ready for closing arguments and the charge on
21 the law. But it is 4:35, and that is going to take
22 -- that would take us well into the evening, and I
23 do understand that some of you have some obligations
24 and responsibilities, and I don't want to keep you
25 here late tonight, because once we argue -- once

1 they do closing arguments and the charge, then you
2 normally would deliberate following that. And that
3 -- I'm not sure how long that will take. So that
4 being said, we're going to handle some matters
5 before you get here, so if you can be here at 9:45
6 in the morning, we'll see you at 9:45. Please do
7 not discuss the case, although you do have all of
8 the evidence, you have not received the arguments of
9 the parties and the charge on the law from the
10 Court, so I would ask that you not -- continue to --
11 to not do any research, any -- speak to anyone
12 regarding the case. And we will see you tomorrow
13 morning at 9:45. The Court will have order forms
14 for lunch. We'll order lunch tomorrow. So I hate
15 to say it, because my time -- if time works out,
16 you'll be able to deliberate and eat lunch at the
17 same time, so we'll plan to have lunch brought in
18 around the time that I estimate. I always estimate,
19 and then my estimation is wrong, but I estimate, you
20 know, we -- we should be able to possibly deliberate
21 around the time -- eat lunch around the time you are
22 deliberating, but nonetheless we'll order lunch
23 tomorrow. Have a wonderful evening, and we'll see
24 you tomorrow at 9:45. All right. Thank you.

25 (Jury exits the courtroom.)

1 THE COURT: All right. Anything else we
2 need to take up regarding -- the jury will be here
3 at 9:45, she'll get their lunch, and then the -- the
4 goal is to, hopefully, to start at 10:00. I have
5 the jury charge. Are there any special requests? I
6 can go -- did you email it to them already? She'll
7 send you what we have. Take a look at it, and I'll
8 go over it real quick since we have some time,
9 unless you want to go ahead and send it to them now.
10 She's going to send you the jury charge. Everybody
11 has a computer, if y'all want to take a look at it?
12 That way we can use this last couple of minutes.
13 And I did that -- we -- we did a -- I guess a
14 limited instruction regarding the bonding guy, but
15 he actually did not even get into where he worked.
16 I mean y'all take a look at it, and see if you want
17 me to give that instruction, or we just leave well
18 enough alone. I don't think he gave any indication,
19 but it's going to be up to the Defense. I'll give
20 it if you'd like, but I'd hate to bring -- to bring
21 it up and start talking about you can't consider any
22 criminal, you know, record, or anything like that,
23 when he didn't say anything about it. That's my
24 only concern. All right. Yes, who wants to start?
25 The State?

1 MR. NEELY: The only thing that I would
2 like to add is in the armed robbery portion, it does
3 not have representation of a deadly weapon, or the
4 belief -- or the reasonable belief by a person that
5 was at the robbery that it was a deadly weapon, and
6 that is something I mentioned in closing -- or
7 opening, and is also part of the statutory language.
8 So we would ask that that be included in the
9 representation of a deadly weapon, not just a deadly
10 weapon. And also the ---

11 THE COURT: Any objection that that's in
12 the statute?

13 MS. EIGENBROT: Your Honor, actually, what
14 I think -- there's been no testimony or any evidence
15 to suggest a real -- real weapon was not used, that
16 it was a fake gun. I don't know that you
17 necessarily -- so I don't know that that's actually
18 applicable in this case. I believe the allegations
19 -- and I believe the victim testified that he racked
20 it to show him it was a real gun. So for those
21 reasons I don't necessarily think the portion of
22 that statute requiring the pretend weapon, or acted
23 as though he had a weapon would be applicable in
24 this case, and I don't know if there's any evidence
25 presented that it would be.

1 THE COURT: Yeah. I mean usually that is
2 when there's some testimony.

3 MR. NEELY: Your Honor, I think -- I think
4 the only actual evidence -- I mean other than the
5 victim's testimony, the evidence is representation
6 of a deadly weapon, and we don't know -- we don't
7 know if that was a toy gun, a BB-gun, we have no
8 idea. We don't have the gun with us, and so we're
9 unable to show that it was a real gun, even though
10 the victim did say that he racked it, there's a
11 number of toy guns that do that, and I -- I think
12 that the jury should be able to consider the whole
13 statute because that is the best evidence.

14 THE COURT: All right, I'll -- I mean I'll
15 -- I'll -- I'll need to look at the statute, but if
16 it's in there under, I'll put it in -- I'll add that
17 information, because it's statutory and it is the
18 law. All right. Anything else on that issue?

19 MS. EIGENBROT: And, Your Honor, I actually
20 don't believe the Curative instruction is necessary,
21 as the testimony that we were concerned about was
22 his position at the bonding company ---

23 THE COURT: Yeah.

24 MS. EIGENBROT: -- suggesting my client's
25 potential of being -- of being out on bond. I

1 believe he testified to things that we objected to
2 pretrial for other reasons, not necessarily that the
3 Curative instruction addresses, so I don't think
4 that it's necessary in the instructions.

5 THE COURT: Yeah, I was just wondering if
6 it was -- if -- because then -- because the jury
7 charge brings up other crimes, and that witness did
8 not -- he actually -- I guess he sat back there and
9 listened to us go on and on, and -- and had a better
10 idea as to what should be said then all the rest of
11 us. So he, you know, he didn't -- he did not get
12 into anything about the bonding company, or where he
13 worked, and so we'll take that out.

14 MS. EIGENBROT: Thank you, Your Honor.

15 THE COURT: I -- I would not want to insert
16 that into -- into the -- before the jury, if it is
17 not being brought up, so ---

18 MS. EIGENBROT: Thank you, Your Honor.

19 THE COURT: -- we'll take that out.
20 Anything else that you all see? And what we'll do
21 is, because I send -- I do send this back. We'll
22 let them deliberate. When they come back, depending
23 on what verdict, I guess, the State either way, if
24 it's -- I don't know, it'll be up to State to decide
25 if they want to do the bifurcated portion on the

1 weapon in possession of a violent felon. The State
2 can decide that. We'll go ahead and draft, I guess,
3 another jury verdict form and a charge on that --
4 just on that one charge -- the jury charge based on
5 that one indictment. All right? Anything else?

6 MS. EIGENBROT: Not from the Defense, Your
7 Honor.

8 MR. NEELY: Not from the State, Your Honor.

9 THE COURT: All right. So I have a status
10 conference at 9:15. I should be ready around --
11 I'll come check -- we'll come check in with you all
12 at 9:30. She'll send you the final jury charge. If
13 something else comes up, just email it -- email us
14 tonight, so we have a heads-up. And, yeah, I'll
15 check in with you all about 9:30 before the jury
16 gets here to see if we need to make any changes. If
17 not, we'll be ready to start with closing arguments,
18 close in full -- the State will close in full. You
19 all will respond, and then you'll be able to only
20 respond to anything that they have brought up --
21 anything they say in their -- in their response.
22 Got it?

23 MS. EIGENBROT: Thank you, Your Honor.

24 MR. NEELY: Yes, Your Honor.

25 THE COURT: All right. You all have a good

1 evening.

2 (Whereupon, the trial is adjourned until
3 tomorrow at 9:30 a.m. on February 8, 2023.)

4 * * * * *

5 (Beginning of Third Day, February 8, 2023.)

6 * * * * *

7 THE COURT: All right, I tried, but I had a status
8 conference and SLED and, yeah, it's always, yeah,
9 but anything before we get started? Y'all ready?

10 MS. EIGENBROT: Just waiting on my client.

11 THE COURT: He's on the way in, I just saw
12 him, he's on the way in. Foreperson? Are we ready
13 to bring them in? Are we ready to bring them in?

14 MS. EIGENBROT: Defense is ready.

15 MR. NEELY: State's ready.

16 THE COURT: And you can -- juror 40 is
17 going to be the foreperson, so just, you know,
18 she'll ---

19 BAILIFF: Quiet, please.

20 (Jury enters the courtroom.)

21 BAILIFF: All jurors are seated, Your
22 Honor.

23 THE COURT: All right. Good morning,
24 ladies and gentlemen of the jury, I hope you had a
25 restful evening. As I told you on yesterday, we are

1 ready to begin with closing arguments and the charge
2 on the law. Juror number 40, I'm going to ask that
3 you be our Forelady. I will give you instructions
4 as to your duties and responsibilities during my
5 jury charge. Okay? All right. Thank you. Please
6 pay close attention to the attorneys. You'll first
7 hear from Mr. Neely on behalf of the State, and then
8 you'll hear from Ms. Eigenbrot on behalf of the
9 Defendant. And the State has an opportunity to a
10 reply to -- if they choose to Ms. Eigenbrot. All
11 right? So please pay close attention to the
12 attorneys.

13 MR. NEELY: Thank you, Your Honor, may it
14 please the Court?

15 THE COURT: Yes, sir.

16 **CLOSING STATEMENTS BY MR. NEELY**

17 MR. NEELY: Ladies and gentlemen of the
18 jury, first off I want to thank you for paying close
19 attention, I appreciate that. I've had jurors that
20 do not do that, they often fall asleep, and I
21 noticed that you've been paying close attention, and
22 I appreciate that. This is not a square peg in a
23 round hole. This is not a conspiracy against
24 Nevelle Eberhart. The investigator did not know
25 that man. The victim did not know that man. The

1 reason he was charged and the reason that we are
2 here is because all the evidence points to one man,
3 Nevelle Eberhart. And you're going to have all the
4 evidence in front of you, and I ask you take -- take
5 -- take time and look at it, pay close attention to
6 it, and you'll find that all the evidence points to
7 one man, Nevelle Eberhart. What I'm saying is not
8 evidence. What she's gonna say is not evidence.
9 That's the evidence, and that's what you need to pay
10 the most close attention to. Nevelle Eberhart
11 pointed a gun and attempted to rob a 79-year-old
12 man, who was just trying to get cash from the ATM
13 down the street. After James Stewart, the victim,
14 ran away from Nevelle Eberhart and escaped to the
15 gas station across the street, he was just trying to
16 get home from the gas station a block away from his
17 house. And Nevelle Eberhart tracked him down,
18 finished the robbery that he started, and stole
19 James Stewart's debit car, phone and \$20. Do not be
20 deceived, all the evidence points to him. How do we
21 know about these things? Well, first, there's a
22 video of him doing it in broad daylight at the
23 Devine Street ATM, and you'll have that video, and
24 you can watch it as many times as you need to. You
25 can see the gun in the video. You can see the

1 victim in the video. You can see Nevelle Eberhart
2 in the video, points at him, and if that alone isn't
3 enough, there's plenty of evidence that backs that
4 up. What's the other evidence? Well, what vehicle
5 was the robber on whenever he robbed James Stewart?
6 The license plate came back with the address where
7 Nevelle Eberhart was at, where he was staying. It's
8 his girlfriend's moped that he was on, and he admits
9 in the interview that he was on it. Nicole Goodwin
10 called it in as stolen, that moped, at 2:00 a.m. the
11 night of the robbery. I bet she hoped they wouldn't
12 come looking for it at her house. Is that a
13 coincidence? No, it's not a coincidence, it's
14 proof. And when Investigator Gilliam saw Nevelle
15 Eberhart and asked her who he was, her answer,
16 "Anthony." His middle name is Jonathan, it's not
17 Anthony. She's trying to hide it, trying to protect
18 him, because she knew he was using that moped, and
19 she knew what he did.

20 MS. EIGENBROT: Objection, Your Honor,
21 that's not in evidence.

22 MR. NEELY: Your Honor ---

23 THE COURT: Hold on. Let me see y'all one
24 second, just come up.

25 (Bench conference is held.)

1 THE COURT: The objection is sustained.

2 MR. NEELY: The person there was Nevelle
3 Eberhart. The investigator ran his information.
4 And when he ran his information, he had a GPS device
5 attached to his person, and where did it show that
6 he was? His answer to law enforcement in the
7 interview, when they asked him where he was at the
8 time of the robbery, the day of the robbery, his
9 answer was, "Everywhere." He was not everywhere, he
10 was on Devine Street and King Street where the
11 robbery happened. That's where the GPS puts him.
12 That's not everywhere, that's specific. Is that a
13 coincidence? It's not a coincidence. These are all
14 not coincidences. This is proof. And, finally,
15 they found the victim's stolen debit card on him
16 when he was arrested. Is that a coincidence? No,
17 it's not a coincidence. It's proof. And the
18 Defense would have you believe that all these things
19 just happened to him. They didn't happen to him, he
20 happened to -- he happened to James Stewart. James
21 Stewart is minding his own business. This is proof
22 that should firmly convince you that Eberhart was,
23 in fact, the man in the video. You don't have to
24 rely on just the video, we have things surrounding
25 the video that point to him, that prove that he was

1 the man in the video. The ATM video, the victim's
2 testimony, and he picked the wrong guy out of the
3 lineup, sure, but all of us -- or most of us have
4 social media, and sometimes pictures don't match up
5 when you see somebody. I -- I've seen somebody on
6 social media, and I've met them, and did not realize
7 it was the same person until you actually see them,
8 and you're like, oh, you know what? Okay, now I get
9 it. And that's what happened here, he pointed him
10 out. He knows who robbed him, the man right there,
11 Nevelle Eberhart. In Nevelle Eberhart's interview,
12 when does he get upset? When does the interview get
13 -- go from him giving non-answers and answering
14 questions with questions, to him cussing and
15 slamming on the wall, it starts when Investigator
16 Gilliam asks him where the victim's stolen debit
17 card is. At that point in time the Investigator
18 didn't know where it was, but guess who did know
19 where it was? Nevelle Eberhart, and that's when he
20 started showing out, because he knew the gig was up.
21 He knew that he was in trouble. He knew that he was
22 going to be charged with armed robbery that he
23 committed.

24 Do not be distracted, do not let Nevelle
25 Eberhart get away with mugging a 79-year-old man in

1 broad daylight. All the evidence points to him.
2 Folks, like I said -- I said in my opening
3 statement, this was not the crime of the century,
4 he's on video robbing him. He's on video on Nicole
5 Goodwin's moped, which was not stolen, it was at
6 that house with him. There's no reason for the
7 victim's stolen debit card to be in his possession,
8 except for the fact -- except for what James Stewart
9 himself said when I asked him, "Why would he have
10 that on him?" The reason that he said, "The reason
11 it was in his pocket when he was arrested is because
12 he's the one who stole it." All the evidence points
13 to one person, Nevelle Eberhart. He committed armed
14 robbery, and he had a -- he had a weapon, or a
15 representation of a weapon, and you can see it
16 clearly on the video. He did this crime. Do not
17 let him get away with it. Find him guilty of armed
18 robbery. Find him guilty of possession of a weapon
19 during the commission of a violent crime. Thank
20 you.

21 THE COURT: Yes, ma'am?

22 MS. EIGENBROT: Thank you, Your Honor, may
23 it please the Court?

24 CLOSING STATEMENTS BY MS. EIGENBROT

25 Good morning, everyone. My client, Nevelle

1 Eberhart, is not guilty. He did not commit this
2 armed robbery. And this was a fairly short trial.
3 There was not a lot of complicated evidence, not a
4 lot going on, very few witnesses. So I'm going to
5 jump kind of right into things and -- why he is not
6 guilty. So first the State talked a little bit
7 about this moped. Again, on the video it is very
8 clearly being used in the robbery. There's no
9 question about that, I'm not denying that. I'm also
10 not denying that his girlfriend reported the moped
11 stolen at some point. Also not denying that
12 Investigator Gilliam saw the tag number on the
13 video. What we don't have here, guys, is actually
14 definitive proof that that moped is the same moped
15 that was used in this crime. Mr. Gilliam testified
16 that he saw there was a moped at her house many days
17 later. There was's a stretch of time that we don't
18 know what happened with that. And we also don't
19 know if it was the same one because the one person
20 that would know, the one person that owned the
21 moped, the one person whose house it was at, Ms.
22 Goodwin, was not here to tell us any of those
23 things. She was not here to express her opinions,
24 to tell you what she saw and things that she
25 witnessed during the course of that week. Ask

1 yourselves why that is? There's no definitive proof
2 that that moped was the one used in this armed
3 robbery. And, of course, I know the State is also
4 making roads a lot safer. So I would like to point
5 something out to you all. The testimony has been
6 that this bank card was snatched from Mr. Stewart at
7 the ATM, at that first part of the robbery. And you
8 all will have this photo and the other photos I
9 presented in evidence back there with you while
10 you're deliberating. This is a photo of Mr. Stewart
11 running from the scene. If you look very closely,
12 his debit card is still in his hand. Here's the
13 definitive proof of this man walking away -- ran
14 away from the ATM with that card in his hand. Now,
15 I know the allegations are he was robbed a second
16 time, but keep in mind he is somewhat startled, he
17 just had a gun pointed at him. He's going to run
18 into the Scotchman. He then -- as he's walking home
19 is robbed again. And I enter there -- and during
20 that interaction the allegations are he's fumbling
21 with his stuff, he's handing cards back to him, he
22 handed back his VA card. Folks, I mean there's
23 always an innocent explanation for lots of things,
24 maybe he dropped the card. Never denying that my
25 client was not in that location at any point in

1 time, I think he even said in his interview his mama
2 lives in that area. He told them he was at
3 Scotchman the night before he was arrested. There's
4 a completely plausible explanation. The card was
5 dropped, and he picked it up at some other time.
6 And also keep in mind and think about this, if you
7 are arm robbing somebody, and the intent is to steal
8 a bank card, a bank card you could take somewhere
9 and use, why is there no evidence that Mr. Eberhart
10 took that card somewhere and tried to use it? He
11 went through all that for -- he robbed an individual
12 two times, and he didn't try to use that card at any
13 point in time? In fact, nobody did. There's no
14 evidence that anybody did. Could that mean there's
15 an innocent explanation that why -- why he had it in
16 his possession? I think so, and I think you all
17 think so too. Now, the State is obviously making a
18 big deal about the GPS evidence, and, again, you're
19 going to have this report back here with you. I
20 don't think the GPS is exactly what the State thinks
21 it is. Folks, what the testimony was, and this is
22 -- unfortunately, why I slowly bumbled through
23 trying to get some timestamps and timeframes on that
24 bank video, which you will have. You'll also have
25 this report to look for yourself. But at the time

1 that bank video starts across the street, where Mr.
2 Gilliam points out that suspect and that moped on
3 that little, tiny corner at the top, my client is
4 down the street at a different address. It's here
5 in the report. Mind you, Mr. Stewart also said he
6 had an original opportunity to view the suspect at
7 the Scotchman before he walked to the bank. My
8 client's not there. Is he in the area? I can't
9 deny that, yeah, he's there, but is he at the
10 locations the State is saying he's at? Absolutely
11 not. The GPS does not put him at the bank. The
12 address for the bank is not in here. The address
13 for the bank is 2530 Devine Street. By all means,
14 scan through this and look through it, go through it
15 with a fine-tooth comb. That address is not in this
16 report. You know, the State says my client says he
17 was everywhere, that is -- he wasn't sitting still.
18 Look at the timeframes. I mean this is from 2:00
19 p.m. to 7:00 p.m. These are his movements. He was
20 everywhere. And then, obviously, we heard from Mr.
21 Stewart this week, a very likeable individual. An
22 armed robbery should never happen to anyone, let
23 along with a nice man like Mr. Stewart. I'm not
24 denying that. But his likeability, his age, his
25 ailment, who he is as a person does not mean we

1 convict somebody, not that we believe everything he
2 says. In fact, the Judge is going to instruct you
3 about credibility. Part of your job is to determine
4 whether or not you believe some of these witnesses,
5 and that could be the whole statement that he made,
6 it could be parts of his statement, it could be all
7 of it, or none of it. And while he was up here able
8 to testify that he was, in fact, robbed, the devil's
9 in the details, folks, and let's talk about the
10 details. The man contradicts himself on the stand,
11 did it here yesterday, he did it during the
12 investigation when he was giving statements to
13 people. I think -- I think you have to consider his
14 credibility in that scenario, and I -- I don't think
15 he's up here trying to lie, but simply that he just
16 may be wrong. He talks about, "I didn't get a good
17 look at him, I was focused on the gun." And then he
18 tells Mr. Forney on cross, "Yeah, I had
19 opportunities to see him, I did look at him. I
20 didn't have a chance to get a good look at him, but,
21 yeah, that's him over here in the courtroom. He
22 said he was focused on the gun, but then had a hard
23 time remembering what the gun looks -- he's kind of
24 back and, you know, back and forth, "Black, gray, I
25 don't remember." He said he didn't need glasses,

1 but he seemed to have hard time reading the photo
2 lineup that Mr. Neely showed him, or at least his
3 signature, and then can look over there and say
4 that's my client, or that's the suspect, that's the
5 person who did it. Lots of contradictions, folks.
6 And the lineup up is a big part of this. I know the
7 State wants to downplay that situation, but we do
8 lineups the way they do lineups for a reason, I'll
9 testify to that. There are procedures and policies
10 in place in order to protect the process of doing
11 these photo lineups. It is not supposed to be easy.
12 You are supposed to be looking at a lineup of like
13 appear -- people that look alike. So it's not just,
14 oh, it's that person. The idea is, you have to be
15 able to focus and actually pick the correct person.
16 And all of these guys, yes, they look similar, but
17 if you look closely there are different facial
18 features. And had they -- and had Mr. Stewart
19 picked Mr. Eberhart, they would be waving this all
20 in your face. This is it, he definitely got him, he
21 identified him, period, but he didn't. And that's a
22 big deal, guys, and I'm going tell you, too, when
23 you look at these still shots from this video, look
24 at the video, this person could be this guy that he
25 identified, very easily, and you'll have these back

1 here, and you can look at them more closely. It is
2 easy to look over at that Defense table and see my
3 client singled out by himself, sitting with two
4 attorneys that don't look a single thing like him,
5 and say, "Yeah, that's him, I know it's him." It's
6 also coming from a man that rode here with the lead
7 investigator on this case, just keep that in mind,
8 and why that identification is important and a
9 problem for the State. And I do kind of want to go
10 back, I was asking Investigator Gilliam about the
11 video from the Scotchman and not obtaining it. I
12 think I got a little confused when I was questioning
13 him, and maybe you guys did too. It sounds like he
14 did request it, it's what he should have done. He
15 acknowledged it was an important piece of evidence.
16 It's important, because it corroborates what Mr.
17 Stewart would say, and -- or it could not. It could
18 be a piece of evidence that actually shows the real
19 suspect, we don't know. But he did try to request
20 it. But then he said there was nothing of value on
21 it. It was the wrong date. But why wouldn't you
22 check that when you got the video? Why wouldn't you
23 have taken a look at it to see if it had any
24 evidentiary value when you collected it. It's so
25 important, why wouldn't you have? And so now we're

1 here without the benefit of that video, or the
2 benefit of that evidence. And like I said, Mr.
3 Eberhart was running all over the place that day.
4 He didn't go check to see if those places could
5 provide a straight-on shot. And I'm going to tell
6 you, folks, none of these are straight-on, none of
7 these are clear shots of the suspect. And I know
8 they want you to believe that Mr. Gilliam could
9 easily identify this person in these shots, but that
10 is not straight-on, that is not definitive of who
11 somebody is or what somebody looks like. There's
12 general characteristics you can see in this, but
13 that's about it. And now, obviously, I need to talk
14 a little bit about Mr. Eberhart's statement with law
15 enforcement. I think what's most important to note
16 in that statement is the multiple times my client
17 denied committing this robbery, he denied it. And
18 Mr. Neely's right, my client wasn't answering
19 questions, he was asking questions, two questions.
20 The individual that's giving the information, the
21 details in that interview is Investigator Gilliam.
22 My client doesn't corroborate any of it. He said
23 something about a moped, said something about being
24 -- being everywhere, and possibly being at
25 Scotchman, that is the extent of what my client said

1 in that statement. And I know he blew up a little
2 bit, but he's sitting there listening to this man
3 accuse him. Mind you, he knows he's charged, he
4 knows he's going to be given a warrant at some point
5 for something he's saying he didn't do, knows he
6 didn't do. And he's sitting there listening to
7 Investigator Gilliam in his face, "You did this.
8 This is it. This is the evidence. You did this."
9 And, finally, yes, it boiled over. I know he used
10 some colorful language, but what that is, is
11 frustration. Frustration with being falsely accused
12 for a crime. And I also want you guys to see,
13 although he does get irate, he slams the wall. When
14 those investigators come in there to confront him,
15 the last thing out of his mouth, before they slam
16 him into the wall by his neck is, "Get out, I will
17 calm down, please." You can listen to it. You can
18 listen to his voice crack that last time. He was
19 going to calm down, he was just frustrated.

20 You all have a very heavy task. The burden
21 the State has in this case is beyond a reasonable
22 doubt. It is the absolute highest burden we have in
23 our criminal justice system, and it is like that for
24 a reason, because it is better that you consider all
25 the facts and circumstances of these charges, and

1 deliberate, and have to feel certain about your
2 deliberations because no innocent man should ever go
3 to prison for something he did not do. And I submit
4 to you and tell you here today that Mr. Eberhart is
5 not guilty of this crime. This case is riddled with
6 what we call reasonable doubt. All of the things
7 I've been up here talking to you about are
8 considered reasonable doubt, that should give you
9 pause, that should make you hesitate about this
10 decision. Find Mr. Eberhart not guilty. Thank you.

11 THE COURT: Yes, sir.

12 MR. NEELY: Just briefly, Your Honor.

13 **REBUTTAL CLOSING STATEMENTS BY MR. NEELY**

14 MR. NEELY: Just a coincidence. Maybe he
15 picked a card up off the ground. They want you to
16 believe that some random person that's generated on
17 the photo lineup, and not the guy whose card is in
18 his pocket, the GPS puts him there, the video puts
19 him there, the victim puts him there. This is good
20 evidence, not all cases have evidence like this,
21 this is a good case. This is proof beyond a
22 reasonable doubt. Why didn't he use the number? I
23 don't know. The victim said he gave him a funny PIN
24 number. Maybe that's why he couldn't use it. That
25 doesn't matter. That's just a distraction from the

1 -- of whether he did this or not. Nevelle Eberhart
2 did this. He is guilty of this crime. The evidence
3 points solely to him. It's not some random person.
4 He didn't just pick this card up off the ground. He
5 was there and he took it from him. He stole it from
6 James Stewart. He's guilty of armed robbery. Thank
7 you.

8 THE COURT: All right.

9 JURY CHARGE

10 THE COURT: Ladies and gentlemen of the
11 jury, Madam Forelady, you have heard all of the
12 evidence, the arguments of the parties, and it's now
13 my responsibility to charge you as to the law. I
14 remind you that during this trial you and I have
15 certain duties to perform. As the trial judge it
16 may -- it is my responsibility to preside over the
17 trial of this case, and I also have the duty to rule
18 on the admissibility of evidence offered during this
19 trial. You are to consider only the competent
20 evidence before you. If there was any evidence
21 ordered -- or testimonies ordered stricken from the
22 record in this case during this trial, you must
23 disregard that testimony. You are to consider only
24 the testimony which has been presented from the
25 witness stand, any exhibits which have been made a

1 part of the record in this case, and any
2 stipulations of counsel. I have the additional duty
3 to charge you the law applicable to this case. As
4 the presiding judge, I am the sole judge of the law
5 of this case, and it is your duty, as jurors, to
6 accept and apply the law as I now state it to you.
7 If you already have any idea as to what the law is,
8 or what the law ought to be, and it does not agree
9 with what I now tell you the law is, you must
10 abandon this idea, because you are sworn to accept
11 and apply the law exactly as I state it to you. In
12 every case tried in this court before a jury, the
13 jury becomes the sole and exclusive judge of the
14 facts in the case. A trial judge cannot -- cannot
15 state, comment on, or make any statement to a trial
16 jury about the facts in a case. Since you are the
17 -- you, the jury, are the sole judges of the facts
18 in this case, you are not to infer from what I have
19 said during the progress of this trial in ruling
20 upon the admissibility of evidence, or otherwise, or
21 anything that I say now during the course of these
22 instructions to you, that I have any opinion about
23 the facts in this case. The law does not allow me
24 to have an opinion about the facts in this case.
25 This is a matter solely for you, the jury, to

1 determine. As jurors, it is your duty to determine
2 the effect, value, weight and the truth of the
3 evidence presented during this trial. You must not
4 consider as evidence any statement of counsel made
5 during the trial. Statements of counsel do not
6 constitute evidence. Rather, counsel is
7 articulating the position in contention of their
8 client. This rule applies to the opening statement
9 of counsel and the closing arguments of counsel.

10 Ladies and gentlemen of the jury, there are
11 two types of evidence which are generally presented
12 during a trial, and that is direct evidence and
13 circumstantial evidence. Direct evidence directly
14 proves the existence of a fact and does not require
15 deduction. Circumstantial evidence is proof of a
16 chain of facts and circumstances, indicating the
17 existence of a fact. Crimes may be proven by
18 circumstantial evidence. The law makes no
19 distinction between the weight or value to be given
20 to either direct or circumstantial evidence.
21 However, to the extent the state relies on
22 circumstantial evidence, the circumstances must be
23 consistent with each other, and when taken together
24 point conclusively to the guilt of the accused
25 beyond a reasonable doubt. If these circumstances

1 merely portray the Defendant's behavior as
2 suspicious, the proof has failed. The State has the
3 burden of proving the Defendant guilty beyond a
4 reasonable doubt. The burden rests with the State
5 regardless of whether the State relies on direct
6 evidence, circumstantial evidence, or some
7 combination of the two.

8 Necessarily, you must determine the
9 credibility of witnesses who have testified in this
10 case. Credibility simply means believability. It
11 becomes your duty as jurors, to analyze and evaluate
12 the evidence to determine which evidence convinces
13 you if it's true. In determining the believability
14 of witnesses who have testified in this case, you
15 may believe one witness over several witnesses, or
16 several witnesses over one witness. You may believe
17 a part of the testimony of a witness and reject the
18 remaining part of the testimony of that same
19 witness. You may believe the testimony of a witness
20 in its entirety or reject the testimony of the
21 witness in its entirety. You may consider whether
22 any witness has exhibited to you any interest, bias,
23 prejudice or other motive in this case. You may
24 also consider the appearance and the manner of a
25 witness while on the witness stand, and whether the

1 testimony of the witness was corroborated and made
2 stronger by other testimony in evidence or was it
3 made weaker and impeached by other testimony and
4 evidence presented?

5 The indictments in this case allege several
6 different offenses against the Defendant. The two
7 indictments, the charges are count one, armed --
8 count number one is armed robbery, and count number
9 two is possession of a weapon during the commission
10 of a violent crime. The indictments charge two
11 separate and distinct offenses. You must decide
12 each charge separately on the evidence and the law
13 applicable to it uninfluenced by your decision as to
14 any other charge. The Defendant may be convicted or
15 acquitted on any or all of the offenses charged.
16 You will be asked to write a separate verdict of
17 guilty or not guilty for each charge. The
18 indictments charge the Defendant with one count of
19 armed robbery, and one count of possession of a
20 weapon during the commission of a violent crime. I
21 remind you that the fact that the Defendant was
22 arrested, charged and indicted in this case is not
23 evidence in this case and cannot be considered by
24 you as evidence of guilt in this case. Nor does it
25 create any presumption or inference of guilt. The

1 document is simply the formal written interest --
2 instrument which contains the charge made against
3 the Defendant -- the charges made against the
4 Defendant, and it is the formal document or
5 documents by which the case is brought into court.
6 The Defendant in this case has pled not guilty to
7 these indictments, and that puts the burden on the
8 State to prove the Defendant guilty. A person
9 charged with committing a criminal offense in South
10 Carolina is never required to prove himself
11 innocent. I charge you that it is an important rule
12 of the law, that the Defendant in a criminal trial,
13 no matter what the seriousness of the charge may be,
14 will always be presumed to be innocent of the crime
15 for which the indictment was issued unless guilt has
16 been proven by evidence satisfying you of that guilt
17 beyond a reasonable doubt. This presumption of
18 innocence does not end when you begin your
19 deliberation -- deliberations, but it accompanies
20 the Defendant throughout the trial until or unless
21 you reach a verdict of guilt based on evidence
22 satisfying you of that guilt beyond a reasonable
23 doubt. The presumption of innocence is like a robe
24 of righteousness placed about the shoulders of the
25 Defendant, which remains with the Defendant until it

1 has been stripped by evidence satisfying you of the
2 Defendant's guilt beyond a reasonable doubt. The
3 presumption of innocence is not a mere legal theory.
4 It is not a legal phrase. It is a substantial right
5 to which every Defendant is entitled unless you, the
6 jury, are satisfied from the evidence of the
7 Defendant's guilt beyond a reasonable doubt. What
8 is reasonable doubt in the law? A reasonable doubt
9 is the kind of doubt that would cause a reasonable
10 person to hesitate to act. The State has the burden
11 of proving the Defendant guilty beyond a reasonable
12 doubt. Some of you may have served as jurors in
13 civil cases where you were told that it is only
14 necessary to prove that a fact is more likely true
15 than not true, such as the greater weight or
16 preponderance of the evidence. In criminal cases
17 the State's proof must be more powerful than that,
18 it must be beyond a reasonable doubt. Proof beyond
19 a reasonable doubt is proof that leaves you firmly
20 convinced of the Defendant's guilt. There are very
21 few things in this world that we know with absolute
22 certainty, and in criminal cases the law does not
23 require proof that overcomes every possible doubt.
24 If convinced that the Defendant is guilty of the
25 crime charged, you must find the Defendant guilty.

1 If on the other hand, you think there's a real
2 possibility that the Defendant is not guilty, you
3 must give the Defendant the benefit of the doubt and
4 find him not guilty. In order to establish criminal
5 liability, criminal intent is required. For
6 example, the mental state required to be proven by
7 the State for a particular crime might be purpose,
8 intent, knowledge, recklessness or criminal
9 negligence. Criminal intent must be proven by the
10 State beyond a reasonable doubt. Criminal intent is
11 always a matter that must be determined by the jury
12 from the circumstances surrounding the situation.
13 There's no way to prove intent to a mathematical
14 certainty. There's no way medical science can
15 dissect a person's brain and determine what the
16 person had in mind, so the law says that criminal
17 intent may be inferred from the circumstances shown
18 to have existed. This is how you make a
19 determination of whether or not the elements
20 requiring intent was present. It is not necessary
21 to establish intent by direct and positive evidence,
22 but intent may be established by inference in the
23 same way as any other fact, by taking into
24 consideration the acts of the parties and all the
25 facts and circumstances of the case. Criminal

1 intent is a mental state, a conscious wrongdoing.
2 It is up to you to determine what the Defendant
3 intended to do based on the circumstances shown to
4 have existed. Criminal intent can arise from action
5 or failure to act. It may arise from negligence,
6 recklessness or an indifference to the duty of the
7 consequences that is considered by the law to be
8 equivalent of criminal intent.

9 Ladies and gentlemen of the jury, the
10 Defendant, as I told you, is charged with armed
11 robbery. In order to prove this offense, the State
12 must first prove beyond a reasonable doubt that the
13 Defendant took personal property from the person or
14 presence of another person. Property in the
15 presence of a person, if it is within -- is in the
16 presence of a person, if it is in the person's
17 reach, inspection, observation or control, so that
18 the person could, if not overcome with violence or
19 prevented by fear, keep possession of the property.
20 The State must also prove beyond a reasonable doubt
21 that the Defendant carried the property away,
22 intending to permanently deprive the owner of the
23 property and to keep the property for the
24 Defendant's own use. The slightest removal of the
25 property or the complete possession of the property,

1 even for an instant, by the Defendant is sufficient
2 to show a taking and carrying away of the property.
3 The taking and carrying away of the property must
4 have been done with violence or by putting the owner
5 of the property in fear of violence.

6 Finally, the State must prove beyond a
7 reasonable doubt that the Defendant was armed with a
8 deadly weapon during the robbery or that the
9 Defendant while alleging either by actions or words
10 was armed while using a representation of a deadly
11 weapon. or any object which a person present during
12 the commission of the robbery, reasonable --
13 reasonable believed to be a deadly weapon. A deadly
14 weapon is any article, instrument or substance which
15 is likely to cause death or great bodily harm.
16 Whether an instrument has been used as a deadly
17 weapon depends on the facts and circumstances of
18 each case. The following are examples of
19 instruments which may be deadly weapons, a pistol, a
20 shotgun, a rifle, a dirk, a dagger, a knife, a
21 slingshot, metal knuckles, a razor, gasoline, a fire
22 bomb or Molotov cocktail and lighter fluid. A gun
23 may be a deadly weapon even if it is not operating.

24 The Defendant is also charged with
25 possession of a weapon during the commission of a

1 violent crime. The Defendant is charged with
2 possession of a weapon during the commission of or
3 attempt to commit a violent crime. The State must
4 prove beyond a reasonable doubt that the Defendant
5 was in possession of a firearm or visibly displayed
6 what appeared to be a firearm during the commission
7 of a violent crime. A firearm means any machine
8 gun, automatic rifle, revolver -- revolver, pistol
9 or any weapon which will, is designed to, or may be
10 readily converted to expel a projectile. In order
11 to find the Defendant guilty of possession of a
12 weapon during the commission of a violent crime, you
13 must first find the Defendant guilty of either
14 committing a violent crime or attempting to commit a
15 violent crime. Ladies and gentlemen of the jury, an
16 armed robbery is a violent crime. The State must
17 prove beyond a reasonable doubt that the weapon
18 further advanced or helped in the commission of the
19 crime. I instruct you and emphasize that the fact
20 that the Defendant did not testify is not a factor
21 to be considered by you in any way in your
22 deliberation and in your consideration on the
23 question of the guilt or the innocence of the
24 Defendant. It must not be considered by you in any
25 manner whatsoever. A Defendant has a constitutional

1 right to remain silent. And the assertion of this
2 right must not be considered by you in your
3 deliberations. I repeat, under your oath you are to
4 draw no conclusion whatsoever from the fact that the
5 Defendant in this case did not testify. The fact
6 that the Defendant did not testify should not even
7 be discussed in the jury room. The burden of proof,
8 as I have stated to you, is on the State. The
9 Defendant is not required to prove himself innocent.
10 The burden of proof remains on the State to prove
11 guilt beyond a reasonable doubt. The State and the
12 Defendant are entitled to the individual opinion of
13 each juror on the issues of fact in this case. It
14 is the duty of each of you to consider and weigh all
15 the evidence in the case, and from such evidence to
16 determine, if you can, the question of the guilt or
17 innocence of the Defendant. There's nothing
18 peculiarly different in the way a jury should
19 consider the evidence in a criminal case from that
20 in which all reasonable persons treat any question
21 depending upon evidence presented to them. You are
22 expected to use your good sense, consider the
23 evidence in the case for only the purposes for which
24 it has been admitted, and give it a reasonable and
25 fair construction in the light of your common

1 knowledge of the natural tendencies and inclinations
2 of human beings. Your verdict in this case will be
3 one of two forms. If from the evidence and the law
4 you find that the Defendant is not guilty of the
5 crime charged, you will circle not guilty on the
6 verdict form that I will give you, and the
7 Foreperson will sign her name. If on the other
8 hand, you find that the Defendant is guilty based
9 upon the evidence and the law which you have heard,
10 you will circle guilty on the verdict form and the
11 Forelady will sign her name. Your verdict must be
12 unanimous, it must be guilty or not guilty. The law
13 requires that a jury verdict be unanimous, which
14 means that all jurors must agree. The only two
15 forms of the verdict are guilty or not guilty. Once
16 the jury reaches a verdict of not guilty or guilty,
17 circle the verdict on the face of the verdict form
18 and sign your name, Madam Forelady, at the bottom of
19 the verdict form. Then you will notify us that you
20 have reached a verdict by knocking on the door and
21 informing the bailiffs. I will give you a copy of
22 these instructions in written form. During your
23 deliberations, you may refer to the instructions to
24 guide your decision-making. You must consider the
25 instructions as a whole and not follow some and

1 ignore others. Please return the instructions to
2 the Court at the time your verdict is rendered.

3 All right, do we have a copy for the
4 Forelady, if we can hand that to her. Madam
5 Forelady, I'm going to hand you a copy of the
6 verdict form so you'll have it, and we'll go over it
7 together. This needs to be marked as Court's
8 Exhibit 10.

9 (Court's Exhibit Number 10, Verdict Form,
10 is marked for the record.)

11 THE COURT: All right, so the verdict form
12 that you have says State of South Carolina, County
13 of Richland, State of South Carolina vs. Nevelle
14 Eberhart, Indictment Numbers 2022-GS-43-3613 and
15 3615, in the Court of General Sessions of the Fifth
16 Judicial Circuit. Verdict form, please circle the
17 appropriate verdict below as to each indictment and
18 follow the accompanying instructions carefully.
19 Number one, as to the indictment alleging armed
20 robbery, we, the jury, unanimously find the
21 Defendant guilty or not guilty, and you'll circle
22 whichever one you all decide. If you circle guilty
23 for question one, please proceed to question two.
24 If you circle not guilty for question one, stop, and
25 end your deliberations. Madam Forelady, you will

1 sign where it says Foreperson at the bottom and you
2 will date the verdict form. You will knock on door
3 and let the bailiffs know that you have reached a
4 verdict, and then we will receive you back in the
5 courtroom for your verdict. I am going to send you
6 back into the jury room. We're going to grab that
7 back from you. Please do not begin deliberations
8 until you've received all of the evidence from the
9 bailiffs, the instruction on the law -- the
10 instruction on the law, the jury charge and
11 instructions from the bailiffs to begin. When they
12 say you can begin deliberations, you can go ahead
13 and start. I believe that lunch will be here around
14 12:00ish, and so you can -- they'll knock on the
15 door and stop, and give you your lunch. You -- it's
16 up to you all if you want to continue to deliberate
17 while you eat, or you can stop, eat and start back
18 deliberating. Everyone must be in the room while
19 you're deliberating, so just keep that in mind. All
20 right? We'll send you back. Please don't start
21 deliberating until you receive everything. Once you
22 receive the evidence and the -- and the jury charge,
23 you can start.

24 (Jury exits the courtroom.)

25 THE COURT: Any objections or exceptions?

1 MR. NEELY: None from the State, Your
2 Honor.

3 MS. EIGENBROT: None from the Defense.

4 THE COURT: All right. You all take a look
5 at the evidence, send it -- and once you send it
6 back they'll begin deliberations. If you can give
7 -- do you have everyone's phone number? If you can
8 give my -- give Chandler your phone numbers, she'll
9 call you if they have a question or anything. All
10 right, thanks. This will be Court Exhibit Number 8.

11 (Court's Exhibit Number 8, Question by
12 Jurors, is marked for the record.)

13 THE COURT: "Can we consider evidence that
14 wasn't addressed in court if it is on pictures?" So
15 my guess is that they have some pictures back there,
16 and it may be something that you all didn't bring
17 up, but they want to, and my answer is, if it's --
18 if you have the pictures in evidence, you can
19 consider anything on the pictures that you need to.

20 MR. NEELY: Yeah, evidence ---

21 THE COURT: Okay.

22 MR. NEELY: -- is evidence.

23 THE COURT: Yeah. All right. We'll bring
24 them in I guess.

25 (Jury enters the courtroom.)

1 BAILIFF: All jurors are seated, Your
2 Honor.

3 THE COURT: All right. Thank you. Madam
4 Forelady, I received your question, and I think I
5 understand what you're asking. It says, "Can we
6 consider evidence that wasn't addressed in court if
7 it is in or on the pictures?" And you mean the
8 pictures that you have back there that are in
9 evidence?

10 MADAM FORELADY: Yes, ma'am.

11 THE COURT: So anything that you have back
12 there in evidence, you can consider. If you have
13 any -- because it's in evidence, even if the lawyers
14 or no one said anything about something, if you --
15 if you have it, it is for you to consider.

16 MADAM FORELADY: Okay.

17 THE COURT: All right? All right, thank
18 you.

19 (Jury exits the courtroom to continue
20 deliberations.)

21 THE COURT: Who put in pictures? Y'all?

22 LAW CLERK: Defense, I think.

23 THE COURT: Okay. I didn't see the
24 pictures. What are the pictures?

25 MS. EIGENBROT: They're still-shots from

1 the video.

2 MR. FORNEY: The bank video.

3 THE COURT: From the bank video?

4 MR. NEELY: And they have the video too, so

5 I ---

6 THE COURT: Huh?

7 MR. NEELY: They have the video too, so

8 it's -- I don't know.

9 THE COURT: Yeah. Yeah, well, yeah, okay,
10 I don't know what that meant, but -- I -- I don't
11 try to get ---

12 MS. EIGENBROT: Thank you, Judge.

13 THE COURT: Uh-huh.

14 MR. NEELY: Thank you.

15 (Recess while Jury is in deliberations.)

16 THE COURT: All right, we have another
17 question, I'm sorry. Juror number -- the juror
18 would like -- one of the jurors would like to know
19 if we can have a map of the GPS points. He is not
20 convinced that they have all of the evidence. I can
21 bring them back out here and tell them, "You have
22 all of the evidence. That is what you have is what
23 you can consider," or I can go knock on the door and
24 tell them, "What you have is what you can consider."

25 MR. NEELY: I don't care if you knock on

1 the door.

2 MS. EIGENBROT: I think Mr. Eberhart would
3 like you to bring them in the courtroom, Your Honor.

4 THE COURT: All right. Let's bring them
5 in.

6 MS. EIGEBROT: Thank you.

7 THE COURT: We'll mark this as Court
8 Exhibit --

9 COURT MONITOR: Nine.

10 THE COURT: Court Exhibit 5?

11 COURT MONITOR: Nine.

12 THE COURT: Nine she said.

13 (Court's Exhibit 9, Note from Jurors, is
14 marked for the record.)

15 (Jury enters the courtroom.)

16 BAILIFF: The jury's been seated, Your
17 Honor.

18 THE COURT: All right. Thank you. Madam
19 Forelady, I received your question regarding a map
20 of the GPS points, and that one of the jurors is --
21 isn't convinced this is all of the evidence. You
22 have all of the evidence that you will get in this
23 case. If -- I cannot -- if it's not been entered
24 into evidence, we cannot give you any additional
25 information, so you have to consider what you have

1 back there in the jury room as evidence. There's --
2 obviously, the testimony is evidence. I would have
3 to figure out how to -- I mean I think the court
4 reporter can play back a portion if you need
5 testimony or something like that, but in terms of
6 the physical evidence, you have everything that you
7 need in the jury room and that is what you are to
8 consider, and you can only consider what has been
9 entered into evidence in this case. So that would
10 be the exhibits, the testimony and everything that
11 you have back there. All right?

12 JUROR: I've got a question, Your Honor.

13 THE COURT: Hold on -- hold on one second.
14 You have to write a question down.

15 JUROR: Do I have to write it down?

16 THE COURT: Yes, sir, and you -- and the --
17 and she needs to write the question down. all
18 right? And I may not be able to -- I may not be
19 able to answer the question, because remember I had
20 told you at the beginning of the trial, I cannot
21 make any comments regarding any of the facts in the
22 case. The only thing that I can do is give you the
23 law. You are the triers of the facts. I am the
24 trier of the law. And so I -- the only thing I can
25 instruct you to is as to the law. But I do -- will

1 tell you is that you have everything that has been
2 admitted into evidence. Okay? Now, if you have a
3 question, you have to write it down -- well, the
4 Forelady -- the questions need to come from her.
5 All right? And you don't need to -- and don't --
6 you don't have to identify whose question it is, you
7 can just say a juror. Okay? All right. We're
8 going to send you all back to continue your
9 deliberations.

10 (Whereupon, the Jurors exit to continue
11 deliberations.)

12 THE COURT: All right. Any objections or
13 exceptions to my comments?

14 MR. NEELY: None from the State.

15 MS. EIGENBROT: Not from the Defense, Your
16 Honor.

17 THE COURT: All right. I don't know, once
18 again, what it is they're asking for, but we'll see.
19 I'm sure they'll have more questions.

20 (OFF RECORD)

21 THE COURT: All right, I'll mark this as
22 Court Exhibit 9.

23 (Whereupon, Court is in recess while Jury
24 deliberates.)

25 THE COURT: I understand that they have a

1 verdict. All right. Are we ready to bring them in?

2 BAILIFF: Yes, Your Honor.

3 THE COURT: All right. Bring them on in.
4 I'll send them back to the jury room because you
5 haven't told me -- you guys -- you have to let me
6 know about the bifurcation part. Did y'all forget
7 about that?

8 MR. NEELY: Oh.

9 THE COURT: Yeah. So you don't have to
10 decide now, but I will need to send them back to the
11 jury room. And then I'll have to bring them back.

12 (Jury enters the courtroom.)

13 BAILIFF: All jurors are seated, Your
14 Honor.

15 THE COURT: All right. Thank you. Madam
16 Forelady, it's my understanding that you all have
17 reached a verdict; is that correct?

18 MADAM FORELADY: We have.

19 THE COURT: And is that verdict unanimous?

20 MADAM FORELADY: It is.

21 THE COURT: All right. And if you can hand
22 it to the Bailiff, and she'll hand it to the Clerk
23 of Court. Thank you. Yes, ma'am.

24 **THE VERDICT**

25 MADAM CLERK: Indictment numbers 2022-GS-

1 40-3613 and 2022-GS-43-3616, the State of South
2 Carolina vs. Nevelle Eberhart, question number one,
3 as to the indictment alleging armed robbery, we, the
4 jury, unanimously find the Defendant guilty.
5 Question number two, as to the indictment alleging
6 possession of a weapon during the commission of a
7 violent crime, we, the jury, unanimously find the
8 Defendant guilty. This is signed Foreperson, Juror
9 number 40, February 8th, 2023. Madam Foreperson, is
10 this your verdict -- are these your verdicts and the
11 verdicts of the entire jury?

12 MADAM FORELADY: Yes, ma'am.

13 THE COURT: All right. Anything else from
14 the jury?

15 MS. EIGENBROT: Your Honor, the Defense
16 would ask the jury be polled.

17 THE COURT: All right. Thank you. Madam
18 Clerk, if you'll poll by number, please?

19 MADAM CLERK: Yes, Your Honor. Ladies and
20 gentlemen of the jury, I'm going to ask you two
21 questions regarding your verdict, if you'll answer
22 yes or no to both questions. Juror number 40, were
23 these your verdicts?

24 JUROR 40: Yes.

25 MADAM CLERK: Are they still your verdicts?

1 JUROR 40: Yes, ma'am.

2 MADAM CLERK: Juror number 353, were these
3 your verdicts?

4 JUROR 353: Yes.

5 MADAM CLERK: Are they still your verdict?

6 JUROR 353: Yes.

7 MADAM CLERK: Juror number 299, were these
8 your verdicts?

9 JUROR 299: Yes.

10 MADAM CLERK: Are they still your verdicts?

11 JUROR 299: Yes.

12 MADAM CLERK: Juror number 202, were these
13 your verdicts?

14 JUROR 202: Yes.

15 MADAM CLERK: Are they still your verdicts?

16 JUROR 202: Yes.

17 MADAM CLERK: Juror number 347, were these
18 your verdicts?

19 JUROR 347: Yes.

20 MADAM CLERK: Are they still your verdicts?

21 JUROR 347: Yes.

22 MADAM CLERK: Juror number 135, were these
23 your verdicts?

24 JUROR 135: Yes.

25 MADAM CLERK: Are they still your verdicts?

1 JUROR 135: Yes.

2 MADAM CLERK: Juror number 81, were these
3 your verdicts?

4 JUROR 81: Yes.

5 MADAM CLERK: Juror number 50, were these
6 your verdicts?

7 JUROR 50: Yes.

8 MADAM CLERK: Are they still your verdicts?

9 JUROR 50: Yes.

10 MADAM CLERK: Juror number 210, were these
11 your verdicts?

12 JUROR 210: Yes.

13 MADAM CLERK: Are they still your verdicts?

14 JUROR 210: Yes.

15 MADAM CLERK: Juror number 267, were these
16 your verdicts?

17 JUROR 267: Yes, ma'am.

18 MADAM CLERK: Are they still your verdicts?

19 JUROR 267: Yes, ma'am.

20 MADAM CLERK: Juror 190, were these your
21 verdicts? 190?

22 JUROR 190: Yes, ma'am.

23 MADAM CLERK: Are they still -- are they
24 still your verdicts?

25 JUROR 190: Yes, ma'am.

1 MADAM CLERK: Juror number 152, were these
2 your verdicts?

3 JUROR 152: Yes.

4 MADAM CLERK: Are they still your verdicts?

5 JUROR 152: Yes.

6 MADAM CLERK: The jurors have been polled,
7 Your Honor.

8 THE COURT: All right. Thank you. Ladies
9 and gentlemen of the jury, I am going to send you
10 back into the jury room for just one second, and
11 then I have further instructions for you. All
12 right? Thank you.

13 (Jury exits the courtroom.)

14 THE COURT: All right. Anything as to the
15 issue on the bifurcation?

16 MR. NEELY: Your Honor, we'll dismiss the
17 additional charge.

18 THE COURT: All right. Anything else
19 before I release them?

20 MR. NEELY: Not from the State, Your Honor.

21 MS. EIGENBROT: Nothing from the Defense,
22 Your Honor.

23 THE COURT: All right. I can bring them
24 back in, or I can go out there and release them
25 while you all -- you -- you said you're dismissing

1 the other charge? Okay. I will -- I will -- and I
2 -- and I usually invite them to come back in, if
3 they -- are we proceeding with sentencing tonight --
4 today? It's 3:30, it seems like it's later.

5 MR. NEELY: Certainly, Your Honor.

6 THE COURT: All right. Well, I need the
7 paperwork.

8 MR. NEELY: We'll get that.

9 THE COURT: All right. And I'll see if
10 they want to come back in. If not -- if not, I will
11 go ahead and release them. All right? So y'all
12 give me a second. While you're doing that, I'll get
13 the paperwork, and then we've still got motions,
14 don't ---

15 MS. EIGENBROT: Yes, Your Honor.

16 THE COURT: -- let me forget, okay.

17 (Judge exits the courtroom.)

18 THE COURT: All right. I think -- I
19 thought the jurors were coming in. Did y'all unlock
20 the door? No. They said they were coming in, so I
21 don't know where they are. Can you ---

22 BAILIFF: Yes.

23 MS. EIGENBROT: And, Your Honor, prior to
24 sentencing I would have a motion.

25 THE COURT: Uh-huh. Yeah. Let's go ahead

1 and put the motions on the record while they're
2 coming in.

3 MS. EIGENBROT: Your Honor, at this time
4 the Defense would renew the previous ---

5 THE COURT: Hold on one second, I can't --
6 you need to wait on your co-counsel?

7 MS. EIGENBROT: No, ma'am.

8 THE COURT: Okay. I would renew any
9 previous motions we made pretrial during the course
10 of the trial. And I at this time would also move
11 for a new trial. I still believe there are some
12 significant issues with the identification in this
13 case. I believe it was insufficient and did not
14 equate to beyond a reasonable doubt that my client
15 was the individual that committed this crime. But
16 most importantly, Your Honor, the -- during the
17 polling of the juror, there was one juror that had a
18 significant -- significant hesitation in whether or
19 not this was truly his verdict. I believe even the
20 last individual that was polled did not seem as firm
21 on his answers either. I believe that would lead me
22 to some question about what was happening in that
23 deliberation room. And for all the other previous
24 objections, I think based on all of those
25 circumstances, a new trial would be appropriate.

1 THE COURT: All right. Yes, sir?

2 MR. NEELY: Your Honor, the verdict was
3 rendered, they verified it. I don't have any
4 problem with somebody thinking it over and making
5 sure they wanted to say yes, after they said, "Is it
6 still your verdict?" I think he thought it over and
7 gave his answer, "Yes." I think that's appropriate.
8 I think the jury deliberations are sacred and
9 secret, and they should remain so. The evidence in
10 trial certainly showed that he was there, he was
11 identified by the victim in the video and the GPS
12 monitoring. Certainly, there was no other basis for
13 the jury verdict.

14 THE COURT: All right. I am going to
15 respectfully deny that motion for a new trial. And
16 also the -- I know you've renewed your motions on a
17 directed verdict, so I'm going to respectfully deny
18 your motions. I do find that there was sufficient
19 evidence to go before the jury regarding
20 identification to include the in court
21 identification by the victim of the Defendant a
22 number of times. I also find that the jury was
23 polled, and while the juror did pause, at no point
24 did anyone influence his decision, and he did, in
25 fact, come back and acknowledge that it -- it was

1 his verdict, and I think he had paused on the second
2 question, "Is it still your verdict," and his answer
3 was, "Yes." For that reason I am going to
4 respectfully deny the motion for a new trial. All
5 right. And we can proceed with sentencing. I --
6 I'll be glad to hear from the State and then from
7 the Defense. And all your other motions are
8 preserved for the record.

9 MS. EIGENBROT: Thank you, Your Honor.

10 THE COURT: And objections.

11 MS. EIGENBROT: Thanks.

12 MR. NEELY: Thank you, Your Honor. Your
13 Honor, his prior criminal history is a 2015 burglary
14 second degree. Mr. Eberhart also has a pending
15 common law robbery in Richland County, a pending
16 common law robbery in Lexington County with a
17 kidnapping and assault and battery in the first
18 degree. And those are the pending charges as well
19 as his felony record.

20 THE COURT: All right, and so he was on --
21 he was on a monitor for?

22 MR. NEELY: Common law robbery, Your Honor.

23 THE COURT: From Richland County?

24 MR. NEELY: Yes, Your Honor.

25 THE COURT: And then there's one in

1 record the -- the -- you need to put on the -- the
2 indictment that's dismissed, put all of that on the
3 record, so there won't be any issue about it later
4 on.

5 MR. NEELY: The State is dismissing the
6 possession of a weapon by a person convicted of a
7 crime of violence and is not going to force the jury
8 to deliberate on the bifurcated charge.

9 THE COURT: All right. And that's
10 Indictment Number 2022-GS-43-616 for the record.

11 MR. NEELY: That's correct, Your Honor.

12 THE COURT: All right. All right.

13 * * * * *

14 **SENTENCING**

15 * * * * *

16 THE COURT: On Indictment Number, the armed
17 robbery is 2022-GS-40-3613, sir, you'll be sentenced
18 to the State Department of Corrections for 15 years.
19 On Indictment Number 2022-GS-40-3615, you'll be
20 sentenced to the State Department of Corrections for
21 five years. The sentence will run concurrent. He
22 will be given credit for the 393 days that he has
23 served. I have put on here that addiction treatment
24 unit, obviously, that he has -- he struggles with
25 some drug-related issues, which are highly probable

1 related to the incident that is here before the
2 Court today. So I do find that a recommendation to
3 the addiction treatment unit is appropriate in this
4 case.

5 All right. Anything else?

6 MR. NEELY: Not from the State. Thank you,
7 Your Honor.

8 MR. FORNEY: Thank you, Your Honor.

9 THE COURT: All right. Thank you.

10 (Whereupon, the trial is concluded.)

11 -- END OF TRANSCRIPT --

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WITNESSES

(S) Emmitt D Gilliam
- Columbia Police Department

DOCKET NO. 2022GS4003613

The State of South Carolina

County of

Richland

ARREST WARRANT NUMBER

2022A4021600083

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury JUN 15 2022
Date:

VERDICT

Foreperson of Petit Jury
Date:

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

COURT OF GENERAL SESSIONS

JUNE TERM 2022

131

THE STATE
vs.

Nevelle Joshua Eberhart

Indictment for
ARMED ROBBERY

SC Code: 16-11-0330(A)
CDR Code: 0139

STATE OF SOUTH CAROLINA)
)
 COUNTY OF RICHLAND)

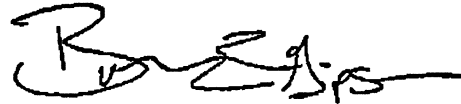
INDICTMENT

At a Court of General Sessions, convened on June 14, 2022, the
 Grand Jurors of Richland County present upon their oath:

ARMED ROBBERY

That Nevelle Joshua Eberhart did, in Richland County, on or about January 1, 2022, commit robbery by unlawfully taking from James Stewart, by means of force or intimidation, goods or monies of James Stewart, such goods or monies being described as: a financial transaction card, with the intent to deprive the owner permanently of such property, while armed with a pistol, or while alleging, either by actions or words, that he was armed, while using a representation of a deadly weapon or any object, which a person present during the commission of the robbery reasonably believed to be a deadly weapon. All in violation of §16-11-330(A), SC Code of Laws (1976, as amended).

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



BYRON E. GIPSON, SOLICITOR

WITNESSES

(S) Emmitt D Gilliam
- Columbia Police Department

DOCKET NO. 2022GS4003615

The State of South Carolina

County of

Richland

ARREST WARRANT NUMBER

2022A4021600084

ACTION OF GRAND JURY

TRUE BILL

Christina Jellard
Foreperson of Grand Jury JUN 15 2022
Date:

VERDICT

App'x 299

Foreperson of Petit Jury
Date:

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

COURT OF GENERAL SESSIONS

JUNE TERM 2022

131

THE STATE
vs.

Nevelle Joshua Eberhart

Indictment for
POSSESSION OF A WEAPON DURING
VIOLENT CRIME

SC Code: 16-23-0490
CDR Code: 0549

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

INDICTMENT

At a Court of General Sessions, convened on June 14, 2022, the
Grand Jurors of Richland County present upon their oath:

POSSESSION OF A WEAPON DURING THE COMMISSION
OF A VIOLENT CRIME

That Nevelle Joshua Eberhart did, in Richland County, on or about
January 1, 2022, possess a firearm, or visibly display what appeared to be
a firearm during the commission of a violent crime, namely: Armed Robbery,
in violation of Section 16-23-0490, S. C. Code of Laws, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute
in such case made and provided.



BYRON E. GIPSON, SOLICITOR

Movement Report

Name	Start Address	Start Time	Stop Time	Travel Duration	Travel Distance (miles)	Max Speed (mph)	End Address	Stop Duration
Eberhart, Nevelle	1220 King St Columbia, SC 29205	01/01/2022 02:04:22 PM	01/01/2022 02:07:20 PM	3 Mins.	0.48	23	1133 King St Columbia, SC 29205	3 Mins.
Eberhart, Nevelle	1133 King St Columbia, SC 29205	01/01/2022 02:08:18 PM	01/01/2022 02:10:54 PM	2 Mins.	0.01	1	2559 Millwood Ave Columbia, SC 29205	6 Mins.
Eberhart, Nevelle	2559 Millwood Ave Columbia, SC 29205	01/01/2022 02:15:17 PM	01/01/2022 02:16:20 PM	1 Min.	0.05	0	2490 Millwood Ave Columbia, SC 29205	2 Mins.
Eberhart, Nevelle	2490 Millwood Ave Columbia, SC 29205	01/01/2022 02:17:22 PM	01/01/2022 02:18:21 PM	59 Secs	0	0	2436 Greene St Columbia, SC 29205	10 Mins.
Eberhart, Nevelle	2436 Greene St Columbia, SC 29205	01/01/2022 02:27:20 PM	01/01/2022 02:28:22 PM	1 Min.	0.02	11	2413 Greene St Columbia, SC 29205	24 Mins.
Eberhart, Nevelle	2413 Greene St Columbia, SC 29205	01/01/2022 02:51:19 PM	01/01/2022 02:52:20 PM	1 Min.	0.03	19	2435 Greene St Columbia, SC 29205	9 Mins.
Eberhart, Nevelle	2435 Greene St Columbia, SC 29205	01/01/2022 03:00:17 PM	01/01/2022 03:03:29 PM	3 Mins.	0.29	30	1221 King St Columbia, SC 29205	8 Mins.
Eberhart, Nevelle	1221 King St Columbia, SC 29205	01/01/2022 03:10:20 PM	01/01/2022 03:14:20 PM	4 Mins.	0.27	32	2410 Stark St Columbia, SC 29205	12 Mins.
Eberhart, Nevelle	2410 Stark St Columbia, SC 29205	01/01/2022 03:25:17 PM	01/01/2022 03:27:20 PM	2 Mins.	0.13	0	2539 Cherry St Columbia, SC 29205	10 Mins.
Eberhart, Nevelle	2539 Cherry St Columbia, SC 29205	01/01/2022 03:36:17 PM	01/01/2022 03:38:19 PM	2 Mins.	0.09	10	926 Short St Columbia, SC 29205	2 Mins.

Eberhart, Nevelle	926 Short St Columbia, SC 29205	01/01/2022 03:39:20 PM	01/01/2022 03:40:20 PM	1 Min.	0	4 2403 Stark St Columbia, SC 29205	32 Mins.
Eberhart, Nevelle	2403 Stark St Columbia, SC 29205	01/01/2022 04:11:22 PM	01/01/2022 04:14:22 PM	3 Mins.	0.29	23 2585 Cherry St Columbia, SC 29205	29 Mins.
Eberhart, Nevelle	2585 Cherry St Columbia, SC 29205	01/01/2022 04:42:18 PM	01/01/2022 04:45:18 PM	3 Mins.	0.32	11 * 2329 Devine St Columbia, SC 29205	2 Mins.
Eberhart, Nevelle	* 2329 Devine St Columbia, SC 29205	01/01/2022 04:46:22 PM	01/01/2022 04:47:20 PM	58 Secs	0	0 2527 US-21 Connector Columbia, SC 29205	8 Mins.
Eberhart, Nevelle	2527 US-21 Connector Columbia, SC 29205	01/01/2022 04:54:22 PM	01/01/2022 04:57:19 PM	3 Mins.	0.23	19 719 King St Columbia, SC 29205	7 Mins.
Eberhart, Nevelle	719 King St Columbia, SC 29205	01/01/2022 05:03:17 PM	01/01/2022 05:06:18 PM	3 Mins.	0.31	28 2433 Greene St Columbia, SC 29205	9 Mins.
Eberhart, Nevelle	2433 Greene St Columbia, SC 29205	01/01/2022 05:14:16 PM	01/01/2022 05:15:23 PM	1 Min.	0.02	13 2481 Millwood Ave Columbia, SC 29205	7 Mins.
Eberhart, Nevelle	2481 Millwood Ave Columbia, SC 29205	01/01/2022 05:21:19 PM	01/01/2022 05:22:18 PM	59 Secs	0.05	5 2550 Millwood Ave Columbia, SC 29205	2 Mins.
Eberhart, Nevelle	2550 Millwood Ave Columbia, SC 29205	01/01/2022 05:23:16 PM	01/01/2022 05:27:17 PM	4 Mins.	1.15	23 3430 Forest Dr Columbia, SC 29204	17 Mins.
Eberhart, Nevelle	3430 Forest Dr Columbia, SC 29204	01/01/2022 05:43:43 PM	01/01/2022 05:44:27 PM	44 Secs	0	0 3501 Forest Dr Columbia, SC 29204	10 Mins.
Eberhart, Nevelle	3501 Forest Dr Columbia, SC 29204	01/01/2022 05:53:20 PM	01/01/2022 05:58:24 PM	5 Mins.	2.04	37 5321 Forest Dr Columbia, SC 29206	54 Mins.
Eberhart, Nevelle	5321 Forest Dr Columbia, SC 29206	01/01/2022 06:51:17 PM	01/01/2022 06:59:18 PM	8 Mins.	2.47	34 (in Motion) 4735 Fort Jackson Columbia, SC 29209	0 Secs

Incident Detail Report

Incident Status Closed
 Incident Number 002CPD01077
 Incident Date 1/2/2022 01:46:07

Incident Information

Incident Type: 1 Unit Response
 Priority: P4
 Determinant:
 Base Response #:
 Confirmation #:
 Taken By: Bryant, Quimlirrah
 Response Area: CPD 355 464
 Disposition: Clear No Report Taken (C8)
 Cancel Reason: CPD Call Completed (CC)
 Incident Status: Closed
 Certification: No
 Longitude: 81015612
 MGRS: 17SMT9855862478

Alarm Level:
 Problem: Stolen Vehicle Report
 Agency: CPD
 Jurisdiction: CPD
 Division: South
 Battalion: South
 Response Plan: South 1PD
 Command Ch:
 Primary TAC:
 Alternate TAC:
 Delay Reason:
 Latitude: 34002912
 UTM: 175 498558 3762479

Incident Location

Location Name:
 Address: 2205 Stark St
 Apartment:
 Building:
 City, State, Zip: COLUMBIA, SC 29205

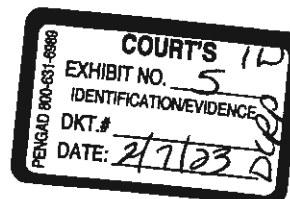
County: RICHLAND
 Location Type:
 Cross Street: PINE ST/Dead End
 Tow Provider Area:
 Map Reference: 26E5

Call Receipt

Caller Name: NICOLE GOODWIN
 Method Received: YES
 Caller Type: 911 Line
 Caller Address:
 Caller City, State, Zip: ,

Call Back Phone: 803-239-9510
 Caller Location: 1829 SENATE ST. SE SECTOR
 Caller Apt/Bldg: /
 Caller County:

Report Generated: 1/20/2022 18:58:11



Page 1 of 7

Time Stamps

Description	Date	Time	User
Phone Pickup	1/2/2022	01:46:07	
1st Key Stroke	1/2/2022	01:46:07	
In Pending Queue	1/2/2022	01:48:02	
Call Taking Complete	1/2/2022	01:50:45	Bryant, Quimirrah
1st Unit Assigned	1/2/2022	02:28:30	
1st Unit Enroute	1/2/2022	02:29:08	
1st Unit Arrived	1/2/2022	02:53:13	
Incident Under Control			
Time Sent to Other CAD			
Incident Closed	1/2/2022	03:06:45	Gaynor, Zaire I.

Elapsed Times

Description	Time
Received to In Queue	00:01:55
Call Taking	00:04:38
In Queue To 1st Assign	00:40:28
Call Received to 1st Assign	00:42:23
Assigned to 1st Enroute	00:00:38
Enroute to 1st Arrived	00:24:05
Incident Duration	01:20:38

ANI/ALI Calls

Time Received	Phone Number	Address	City
1/2/2022 1:46 AM	803-239-9510	1829 SENATE ST - SE SECTOR	COLUMBIA

Units Assigned

Unit	Assigned	Disposition	Enroute	Staged	Arrived	At Patient	Delay Avail	Complete	Odm. Enroute	Odm. Arrived	Cancel Reason
C375	1/2/2022 02:28:30	Clear No Report Taken (CB)	1/2/2022 02:29:08					1/2/2022 02:40:26			Reassigned (CR)
C376	1/2/2022 02:46:28	Clear No Report Taken (CB)	1/2/2022 02:46:42		1/2/2022 02:53:13			1/2/2022 03:06:45			CPD Call Completed (CC)

Personnel Assigned

Unit	Name
C375	Boyd, Justin (24227)

Pre-Scheduled Information

No Pre-Scheduled Information

Special Equipment

No Special Equipment

Transports

No Transports

Transport Legs

No Transport Legs

Comments

Date	Time	User	Type	Confidential	Comment
------	------	------	------	--------------	---------

Report Generated: 1/20/2022 18:58:11

Page 2 of 7

1/2/2022	01:46:46	QB	Response	[1] HOUSE
1/2/2022	01:47:06	QB	Response	[2] TIMELAPSE 3HRS
1/2/2022	01:48:55	QB	Response	[3] MOPED // BLCK/ GREY CHECKER BOARD COLDR
1/2/2022	01:49:37	QB	Response	
1/2/2022	01:50:22	QB	Response	
1/2/2022	01:50:37	ZIG	Response	
1/2/2022	03:06:45	ZIG	Response	

Address Changes

No Address Changes

Priority Changes

No Priority Changes

Transport Changes

No Transport Changes

Transport Priority Changes

No Transport Priority Changes

Alarm Level Changes

No Alarm Level Changes

Activity Log

Date	Time	Unit	Activity	Location	Log Entry	User
1/2/2022	01:48:02		Incident in Waiting Queue			
1/2/2022	01:48:02		Read Comment		Comment for Incident 659 was Marked as Read.	QB
1/2/2022	01:48:02		ANI/ALI Statistics		INT Insert:Jan 02 2022 01:46:07 / INT SendNP:Jan 02 2022 01:46:07 / WS RecvNP:Jan 02 2022 01:46:07 / WS Process:Jan 02 2022 01:48:02	QB
1/2/2022	01:48:02		Incident in Waiting Queue			
1/2/2022	01:48:02		Waiting Pending Incident Time Warning		Waiting Pending Incident Time Warning timer expired	
1/2/2022	01:48:07		Remove Waiting Pending Incident Warning		Removing Waiting Pending Incident Time Warning timer expired	
1/2/2022	01:48:08		Incident in Waiting Queue Timer Clear			
1/2/2022	01:48:40		Read Incident		Incident 659 was Marked as Read.	ZIG
1/2/2022	01:50:02		Pending Incident Time		Pending Incident Time Warning	

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			Warning		timer expired	
1/2/2022	01:50:02		Incident Late			
1/2/2022	01:50:40		UserAction		User clicked Exit/Save	ZIG
1/2/2022	01:50:45		UserAction		User clicked Exit/Save	QB
1/2/2022	01:50:51		Read Comment		Comment for Incident 659 was Marked as Read.	QB
1/2/2022	01:51:31		UserAction		User clicked Exit/Save	QB
1/2/2022	02:01:51		UserAction		User clicked Exit/Save	ZIG
1/2/2022	02:01:59		UserAction		User clicked Exit/Save	ZIG
1/2/2022	02:25:43		UserAction		User clicked Exit/Save	ZIG
1/2/2022	02:28:30	C375	DSP	2205 Stark St		ZIG
1/2/2022	02:28:30		Incident Timer Clear		Incident Timer Cleared	
1/2/2022	02:29:08	C375	Enroute	2205 Stark St	Responding From = 2020-2160 S BELTLINE BLVD	ZIG
1/2/2022	02:29:09		UserAction		User clicked Exit/Save	ZIG
1/2/2022	02:40:26		ReAssign Response	2205 Stark St	ReAssign Reason: Reassigned (CR)	ZIG
1/2/2022	02:40:26		ReAssign Response	2205 Stark St	Clearing Primary Vehicle Flag	ZIG
1/2/2022	02:40:26	C375	ReAssign Vehicle	2205 Stark St	ReAssign Reason: Reassigned (CR)	ZIG
1/2/2022	02:40:27		Waiting Pending Incident Time Warning		Waiting Pending Incident Time Warning timer expired	
1/2/2022	02:40:28		Incident Late			
1/2/2022	02:40:32		Remove Waiting Pending Incident Warning		Removing Waiting Pending Incident Time Warning timer expired	
1/2/2022	02:43:03		UserAction		User clicked Exit/Save	ZIG
1/2/2022	02:46:28	C376	DSP	2205 Stark St		ZIG
1/2/2022	02:46:29		Incident Timer Clear		Incident Timer Cleared	
1/2/2022	02:46:42	C376	Enroute	2205 Stark St	Responding From = 4301-4305 BLOSSOM ST	ZIG
1/2/2022	02:46:43		UserAction		User clicked Exit/Save	ZIG
1/2/2022	02:53:13	C376	Arrived	2205 Stark St		ZIG
1/2/2022	03:06:45		Cancel Response	2205 Stark St	Cancellation Reason: CPD Call Completed (CC), Response Disposition: Clear No Report Taken (C8)	ZIG
1/2/2022	03:06:45	C376	Avail	2205 Stark St	Unit Cleared From Incident 002CPD01077	ZIG
1/2/2022	05:31:16		Read Comment		Comment for Incident 659 was Marked as Read.	ZIG
1/2/2022	05:31:21		UserAction		User clicked Exit/Save	ZIG

1/2/2022	05:31:35	UserAction	User clicked Exit/Save	ZIG
1/4/2022	18:30:05	UserAction	User clicked Exit/Save	KSW
1/4/2022	18:32:27	UserAction	User clicked Exit/Save	KSW

Edit Log

Date	Time	Field	Changed From	Changed To	Reason	Table	Workstation	User
1/2/2022	01:46:07	Call_Back_Phone		803-239-9510	(Response Viewer)	Response_Master_Incident	911CAD16	QB
1/2/2022	01:46:07	Address	(Blank)	1829 SENATE ST - SE SECTOR	New Entry	Response_Master_Incident	911CAD16	QB
1/2/2022	01:46:08	Jurisdiction		CPD	(Response Viewer)	Response_Master_Incident	911CAD16	QB
1/2/2022	01:46:08	Division		South	(Response Viewer)	Response_Master_Incident	911CAD16	QB
1/2/2022	01:46:08	Battalion		South	(Response Viewer)	Response_Master_Incident	911CAD16	QB
1/2/2022	01:46:08	Response_Area		CPD 355 464	(Response Viewer)	Response_Master_Incident	911CAD16	QB
1/2/2022	01:46:08	ResponsePlanType	0	0	(Response Viewer)	Response_Master_Incident	911CAD16	QB
1/2/2022	01:46:08	Address	1829 SENATE ST - SE SECTOR	2200-2212 STARK ST	Entry Selected/Returned from GeoLocator	Response_Master_Incident	911CAD16	QB
1/2/2022	01:46:08	City		COLUMBIA	Updated City	Response_Master_Incident	911CAD16	QB
1/2/2022	01:46:08	Latitude	0	34003023	Entry Selected/Returned from GeoLocator	Response_Master_Incident	911CAD16	QB
1/2/2022	01:46:08	Longitude	0	81015248	Entry Selected/Returned from GeoLocator	Response_Master_Incident	911CAD16	QB
1/2/2022	01:46:34	Address	(Blank)	2205 STARK ST	New Entry	Response_Master_Incident	911CAD16	QB
1/2/2022	01:46:34	Jurisdiction		CPD	(Response Viewer)	Response_Master_Incident	911CAD16	QB
1/2/2022	01:46:34	Division		South	(Response Viewer)	Response_Master_Incident	911CAD16	QB
1/2/2022	01:46:34	Battalion		South	(Response Viewer)	Response_Master_Incident	911CAD16	QB
1/2/2022	01:46:34	Response_Area		CPD 355 464	(Response Viewer)	Response_Master_Incident	911CAD16	QB

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1/2/2022	01:46:34	ResponsePlanType	0	0	(Response Viewer)	Response_Master_Incident	911CAD16	QB
1/2/2022	01:46:34	Address	2205 STARK ST	2205 STARK ST	Entry Selected/Returned from GeoLocator	Response_Master_Incident	911CAD16	QB
1/2/2022	01:46:34	City		COLUMBIA	Updated City	Response_Master_Incident	911CAD16	QB
1/2/2022	01:46:34	Latitude	34003023	34002912	Entry Selected/Returned from GeoLocator	Response_Master_Incident	911CAD16	QB
1/2/2022	01:46:34	Longitude	81015248	81015612	Entry Selected/Returned from GeoLocator	Response_Master_Incident	911CAD16	QB
1/2/2022	01:48:02	Read Comment	False	True	(Response Viewer)	Response_Master_Incident	911CAD16	QB
1/2/2022	01:48:02	Problem		Stolen Vehicle Report	(Response Viewer)	Response_Master_Incident	911CAD16	QB
1/2/2022	01:48:02	Priority_Description		P4		Response_Master_Incident	911CAD16	QB
1/2/2022	01:48:02	Priority_Number	0	4		Response_Master_Incident	911CAD16	QB
1/2/2022	01:48:03	Pickup_Map_Info		26E5		Response_Transports	911CAD16	QB
1/2/2022	01:48:03	Map_Info		26ES		Response_Master_Incident	911CAD16	QB
1/2/2022	01:48:03	Subdivision			Polygon Lookup	Response_User_Data_Fields	911CAD16	QB
1/2/2022	01:48:40	Read Call	False	True	(Response Viewer)	Response_Master_Incident	911CAD02	ZIG
1/2/2022	01:50:26	Caller_Type		911 Line	(Response Viewer)	Response_Master_Incident	911CAD16	QB
1/2/2022	01:50:41	Caller_Name	T-MOBILE USA	NICOLE GOODWIN	(Response Viewer)	Response_Master_Incident	911CAD16	QB
1/2/2022	01:50:42	MethodOfCallRcvd		YES	(Response Viewer)	Response_Master_Incident	911CAD16	QB
1/2/2022	01:50:45	Certification_Level		No	(Response Viewer)	Response_Master_Incident	911CAD16	QB
1/2/2022	01:50:51	Read Comment	False	True	(Response Viewer)	Response_Master_Incident	911CAD16	QB
1/2/2022	02:01:59	Certification_Level		No	(Response Viewer)	Response_Master_Incident	911CAD02	ZIG
1/2/2022	05:31:16	Read Comment	False	True	(Response Viewer)	Response_Master_Incident	911CAD02	ZIG

Custom Time Stamps

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No Custom Time Stamps**Custom Data Fields****Description****Data****User**

Subdivision

Case Number**No Case Numbers****Attachments****No Attachments****Dispositions**

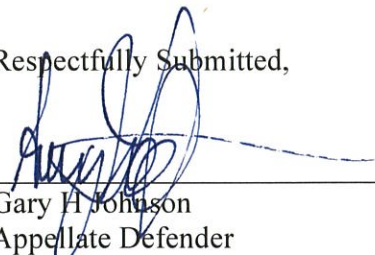
Date	Time	Unit	Disposition	User
1/2/2022	02:40:26		Clear No Report Taken (C8)	Gaynor, Zaire I.
1/2/2022	03:06:45		Clear No Report Taken (C8)	Gaynor, Zaire I.

Supplemental Person**No Supplemental Persons****Supplemental Property****No Supplemental Property****Supplement Vehicle****No Supplemental Vehicles****Supplemental Weapon****No Supplemental Weapons**

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability with the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

Respectfully Submitted,



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ATTORNEY FOR APPELLANT

This 28th day of November, 2023.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Honorable DeAndrea G. Benjamin, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

NEVELLE JOSHUA EBERHART,

APPELLANT

APPELLATE CASE NO. 2023-000234

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Record on Appeal in the above-referenced case has been served upon Joshua A. Edwards, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 28th day of November, 2023.



Gary H. Johnson
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ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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THE STATE,

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V.

NEVELLE JOSHUA EBERHART,

APPELLANT

APPELLATE CASE NO. 2023-000234

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

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

STATEMENT OF THE CASE

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

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

STATEMENT OF FACTS

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

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

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

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

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

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

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

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

ARGUMENT

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

A. Standard of Review.

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

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

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

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

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

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

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

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

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

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

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

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

The South Carolina Supreme Court has stated:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. Standard of Review

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

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

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

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

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

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

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

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

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

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

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

When ruling on the hearsay portion of appellant's objection to the recorded video, the trial judge held it was a "close call" on whether or not the recorded interview was an excited utterance under Rule 803(1), SCRE, and a present sense impression under Rule 803(2), SCRE.

R. 126, l. 14 - 127, l. 3. Following Stewart's in court testimony, the trial judge also ruled the video was not cumulative to that testimony and allowed the state to play the interview. R. 155, ll. 15-21. The court improperly classified the recorded interview as non-testimonial, non-hearsay excited utterance and present sense impression.

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

"A court must consider the totality of the circumstances when determining whether a statement falls within the excited utterance exception. Nonetheless, 'the burden of establishing the facts which qualify a statement as an excited utterance rests with the proponent of the evidence.'" State v. Davis, 371 S.C. 170, 178-79, 638 S.E.2d 57, 62 (2006) (internal citations omitted). "For a statement to be an excited utterance: '(1) the statement must relate to a startling event or condition; (2) the statement must have been made while the declarant was under the stress of excitement; and (3) the stress of excitement must be caused by the startling event or condition.'" State v. Prather, 429 S.C. 583, 611, 840 S.E.2d 551, 565-66 (2020) (quoting State v. Washington, 379 S.C. 120, 124, 665 S.E.2d 602, 604 (2008)). "[T]he intrinsic reliability of an excited utterance derives from the statement's spontaneity which is determined by the totality of

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

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

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

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

ii. Present sense impression would also not be applicable.

“There are three elements to the foundation for the admission of a hearsay statement as a present sense impression: (1) the statement must describe or explain an event or condition; (2) the statement must be contemporaneous with the event; and (3) the declarant must have personally perceived the event.” State v. Parvin, 413 S.C. 497, 503, 777 S.E.2d 1, 4 (Ct. App. 2015) (quoting State v. Hendricks, 408 S.C. 525, 533, 759 S.E.2d 434, 438 (Ct. App. 2014)).

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

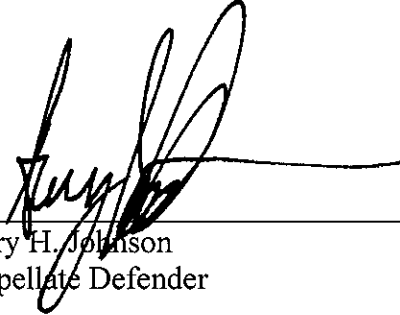
at an earlier time, it does not fit within this exception and will not be admitted as a present sense impression. The basis of the present sense impression exception is that closeness in time between the event and the declarant's statement reduces the likelihood of deliberate or conscious misrepresentation.” State v. Washington, 424 S.C. 374, 399–400, 818 S.E.2d 459, 472 (Ct. App. 2018), *aff'd in part, vacated in part, rev'd in part*, 431 S.C. 394, 848 S.E.2d 779 (2020).

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

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

CONCLUSION

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



Gary H. Johnson
Appellate Defender

ATTORNEY FOR APPELLANT

This 18th day of December, 2023.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Honorable DeAndrea G. Benjamin, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

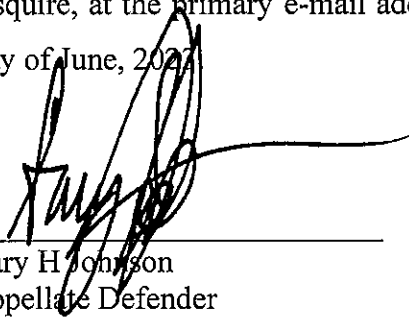
NEVELLE JOSHUA EBERHART,

APPELLANT

APPELLATE CASE NO. 2023-000234

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Final Brief of Appellant and Designation of Matter in the above-referenced case has been served upon Joshua A. Edwards., Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 27th day of June, 2027.



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STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Appellate Case No. 2023-000234

THE STATE,

Respondent,

v.

NEVELLE JOSHUA EBERHART,

Appellant.

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STATEMENT OF ISSUES ON APPEAL

- I. Whether the trial judge properly admitted GPS location data placing Appellant at the scene of the crime obtained from a bondsman where Appellant could have no reasonable expectation of privacy?
- II. Whether the trial judge erred in allowing the State to play body camera footage of the initial police interview with the victim after victim had the chance to testify?

STATEMENT OF THE CASE

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

STATEMENT OF FACTS

On January 1, 2022, James Stewart (“Victim”), a Vietnam veteran who underwent dialysis treatment three times a week at the VA, was walking to the ATM at First Palmetto Bank from his house nearby to get cash from his debit card. (R. pp.133–34). When he got near the ATM, he was approached by a man riding up on a “black moped,” later identified as the Appellant Nevelle Joshua Eberhart. When Victim turned to look, “[Appellant] stuck a gun in [his] face” and gestured with the gun towards the ATM and Victim’s card. (R. p. 134, ll. 4–7). Victim gave him his debit card along with a “phony” pin number and then fled to the Scotchman just across the street.¹ (R. p. 134). Victim hid at the Scotchman for a while, hoping that his assailant had left. However, when he came out of the Scotchman, Victim was approached by Appellant a second time on his moped and “did the same thing with the gun and wanted [Victim] to get on the back on the scooter” to return to the ATM. (R. p. 136, ll. 8–19). However, Victim refused and fled to his nearby home. (R. p. 152, ll. 14–24).

At home, Victim called law enforcement, who then came to his house to speak with him about the robbery. (R. pp. 121–22; p. 137, ll. 2–14; pp. 303–09). Law enforcement collected Victim’s story and then called Victim later to conduct a photo lineup. (R. pp. 202, ln. 12—203). While Victim was unable to pick Appellant out of the lineup, Victim emphasized at trial that he recognized people better in person and that during the robbery, Victim was more focused on the gun. (R. p. 138, ll. 21–23; p. 141, ll. 1–8; pp. 147—50). Victim identified Appellant as the assailant at trial. (R. p. 117, ll. 11–25; p. 138, ll. 2–5;).

¹ This same card would later be found on Appellant’s person during the investigation and arrest. (R. p. 137, ll. 15–24; pp. 209, ln. 12 – 211, ln. 24).

Later that night, emergency dispatchers received a 911 call from a woman named Nicole Goodwin—who was apparently dating Appellant at the time—reporting a moped as stolen. (R. pp. 177, ln. 12—178, ln. 7). Investigator Emmett Gilliam viewed bank surveillance footage and identified the moped used by the assailant by its tag number “MP19444.” (R. pp. 182—185). After running the tag through a database, the moped was found to belong to Goodwin. (R. pp. 185, ln. 16 — 186, ln. 8). On January 7, Gilliam went to Goodwin’s address and found the same moped there. (R. p. 199, ll. 10–18). Appellant was also at the home at the time and spoke to law enforcement but was not arrested at that time. (R. p. 200, ll. 4–24).

Realizing that Appellant was out on bond with an ankle monitor at the time, Gilliam contacted Titus Curry from Bad Boyz Bail Bonding to retrieve GPS information regarding Appellant from the day of the robbery. (R. p. 201, ll. 3–17). Looking over the GPS data, Appellant was placed within “[a] little over a hundred” meters from the ATM at the bank at the time of the robbery and was also placed on King Street where Victim was confronted by Appellant the second time.² (R. pp. 201, ln. 18 — 202, ln. 11). Appellant was subsequently brought into headquarters for police questioning. After being advised of his rights and signing an advisement form, Appellant spoke with police. (R. pp. 206-09). After being confronted with evidence of his involvement, Appellant became hostile and combative and was subsequently arrested. (R. pp. 24-28; pp. 184, ln. 13–185, ln. 9). Among other items, Victim’s debit card was discovered on Appellant’s person. (R. pp. 209, ln. 12–211, ln. 24).

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

² Curry, from the bonding company, had previously testified during a proffer that the GPS tracking was accurate within “100 feet.” R. p. 118, ll. 3–10.

search in violation of the Fourth Amendment. (R. pp. 9–10). The State responded by arguing that Appellant entered a voluntary agreement for GPS monitoring. (R. pp. 12-13). Citing the Katz standard, the State further argued that “the Defense has the burden of showing a legitimate expectation of privacy in the area he was searched. And that includes the subjective expectation of not being discovered, and the expectation that society recognizes as reasonable” and that therefore, pulling the GPS data from the bonding company was justified. (R. pp. 37–38). The Court agreed with the State’s argument regarding the Katz framework and subsequently denied the motion to suppress.³ (R. pp. 43-44).

Following testimony from Officer Selph, the responding officer to Victim’s 911 call, the State attempted to show him the body camera footage of his interview with Victim but Defense Counsel objected, arguing it was hearsay. (R. pp. 123, ln. 11–124, ln. 6). Following some back and forth outside the presence of the jury, the Court denied the motion to suppress, stating that the recorded testimony of Victim fell under the present sense and excited utterances exceptions to the hearsay rule. (R. pp. 126, ln. 14–127, ln. 3). Defense Counsel then raised another motion to suppress the video testimony, this time under the Confrontation Clause. (R. p. 127, ll. 4–12). The Court then made a qualified ruling that sustained the objection as to playing the video *before* Victim had a chance to testify but would allow playing the video *after* Victim testified. (R. pp. 127, ln. 22-128, ln. 23). The video was then played for the Officer over the Defense’s objections after Victim testified. (R. pp. 154-156).

After the State rested, Defense Counsel renewed their pretrial motion regarding the GPS evidence and made a motion for directed verdict. The Court then denied the motion for directed verdict and noted the objection regarding the GPS data for the record. (R. pp. 235-37). Following

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

the conclusion of arguments, the jury convicted Appellant of armed robbery and possession of a weapon during a violent crime. (R. pp. 286-90).

STANDARD OF REVIEW

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

ARGUMENT

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

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

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

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

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

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

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

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

Id. The Court then discussed the third-party doctrine, which states in part that a person has no reasonable expectation of privacy in information he or she voluntarily discloses to a third party.

Id. (citing Smith v. Maryland, 442 U.S. 735, 742-43 (1979); United States v. Miller, 425 U.S. 435, 443 (1976) (explaining “the Fourth Amendment does not prohibit the obtaining of information revealed by a third party and conveyed by him to Government authorities.”); Hoffa v. United States, 385 U.S. 293, 302 (1966)).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(R. p. 37, ln. 14–p. 38, ln. 11) (emphasis added).⁵ In its ruling denying the motion to suppress, the trial court agreed:

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

(R. p. 43, ln. 11—p. 44, ln. 3) (emphasis added).

Even during the initial motion, Defense Counsel conceded that normally, “[i]t’s obviously somewhat of a voluntary agreement when a person is fitted with a GPS data – or a GPS monitoring device” but immediately tried to qualify the concession by stating “[b]ut when the State attaches it to a person, [SCOTUS] has found that that is – that they are engaging in a search.” (R. p. 10, ll. 15-21). However, it is unclear what precedent Defense Counsel was citing.

⁵ State Counsel would go on to cite the “Colorado” Campbell case in support of their argument but did not explicitly cite the case by name. The facts of the case cited are identical to Campbell. R. p. 42, ll. 7-21.

Jones involved the surreptitious placement of a tracking device on the underbody of a jeep.⁶

Similarly, Carpenter involved CSLI from a person's phone taken without their knowledge or consent. Defense Counsel further attempted to pivot by stating:

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

(R. p.10, ln. 21—p.11, ln. 1) (emphasis added). This argument, which Appellant Counsel essentially replicates in their brief, ignores the purpose of the bonding agreement.

Appellant further argues the trial court erroneously shifted the burden of showing consent to Appellant and further contended that such consent (to the bonding company or the state) was not effectively demonstrated at the trial court because (1) there was no presentation of bond terms and conditions; (2) no discussion of what Appellant was told about GPS monitoring; and (3) no production of the bond agreement—thereby implying the trial court made its conclusion only because of the existence of the ankle monitor. (Initial Brief of Appellant at 8-10). However, the trial court did not rely on the consent exception in admitting the records. Rather, the court found no reasonable expectation of privacy, and by extension no search, meaning consent was not required. (R.p.43–44). For all the foregoing reasons, the trial court correctly denied Appellant's motion to suppress. This Court should affirm.

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

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

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

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

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

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

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

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

Here, there are two applicable exceptions: excited utterance and present sense impression. First, an excited utterance is “[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.” Rule 803(2), SCRE. “For a statement to be an excited utterance: ‘(1) the statement must relate to a startling event or condition; the statement must have been made while the declarant was under the stress of excitement; and (3) the stress or excitement must be caused by the startling event or condition.’” State v. Praher, 429 S.C. 583, 611, 840 S.E.2d 551, 565-66 (2020) (quoting State v. Washington, 379 S.C. 120, 124, 665 S.E.2d 602, 604 (2008)). “Whether a statement is admissible under the excited utterance exception to the hearsay rule depends on the circumstances of each case and the determination is generally left to the sound discretion of the trial court.” State v. Burdette, 335 S.C. 34, 43-44, 515 S.E.2d 525, 530 (1999) (citation omitted). Further, an excited utterance need only be “substantially contemporaneous with the transaction.” State v. Blackburn, 271 S.C. 324, 328, 247 S.E.2d 334, 336 (1978) (later concluding that a victim statement given an hour after the event “would qualify as excited utterance and be admissible under [that] exception”).

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

block away from where he lives and, when asked about the bank, he raises his voice and becomes agitated. (R. pp. 303-09). Similarly, at two minutes, 37 seconds and seven minutes, 20 to 35 seconds into the video, Victim can be heard raising his voice describing the altercation. Third, the video clearly demonstrates that this excitement was directly related to the armed robbery that had occurred only thirty minutes prior.

Accordingly, the trial court correctly characterized the testimony as an excited utterance in its ruling denying the motion to suppress. (R. p.126, ll. 18–24). Appellant’s emphasis on the time between the robbery and the actual testimony is overstated. Following the proposition from Blackburn that suggests that an excited utterance can still occur up to an hour after a startling event, the record here demonstrates that Victim’s interview with police, roughly thirty minutes after the robbery, was well within the reasonable and acceptable window for an excited utterance. Therefore, it was well within the sound discretion of the trial court, based on the video evidence, to classify Victim’s testimony as an excited utterance under Rule 803(2), SCRE.

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

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

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

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

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

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

Parvin, 413 S.C. 497, 777 S.E.2d 1 (finding erroneous admission of testimony as present sense impression harmless). Generally, “[e]rror is harmless when it could not reasonably have affected the result of the trial.” State v. Golson, 349 S.C. 421, 429, 562 S.E.2d 663, 667 (Ct. App. 2002). However, there are several factors to assess in considering whether evidence admitted in error was harmless: “the importance of the challenged evidence to the State’s case, whether the evidence was cumulative, whether the evidence was materially corroborated or contradicted by other evidence, [. . .] the extent of cross-examination otherwise permitted, and the overall strength of the State’s case.” Dinkins, 339 S.C. at 603, 529 S.E.2d at 560 (citing Jenkins, 322 S.C. at 364-65, 474 S.E.2d at 815.⁷ Applying these factors to the present case, admitting the body cam footage was harmless.

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

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

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

CONCLUSION

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

Respectfully submitted,

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December 18, 2023

STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Appellate Case No. 2023-000234

THE STATE,

Respondent,

v.

NEVELLE JOSHUA EBERHART,

Appellant.

CERTIFICATE OF COUNSEL

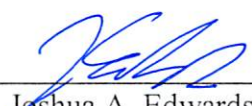
The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled “Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings.”

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Appellant.

PROOF OF SERVICE

I, Anne Mueller, certify that I have served the within Initial Brief of Respondent on Gary Howard Johnson II, Esquire, counsel of record for the Appellant, by electronic mail to the address listed for counsel in AIS.

I further certify that all parties required by Rule to be served have been served.

This 18th day of December, 2023.



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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County

Honorable DeAndrea G. Benjamin, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

NEVELLE JOSHUA EBERHART,

APPELLANT

APPELLATE CASE NO. 2023-000234

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ARGUMENT IN REPLY

1. The mechanical application of the third-party doctrine advanced by Respondent does not protect the reasonable expectation of privacy over a person's movements from a warrantless intrusion by the government.

Respondent argues that there is no constitutional concern, either under the Fourth Amendment or the S.C. Const. art. I, §10, when the government obtains location data of a criminal suspect when such data is maintained by a third party under a private bond agreement because appellant lacked a reasonable expectation of privacy that society is prepared to acknowledge in such data. Resp. Br. p. 12. This mechanical approach to GPS type data is misguided. As location data becomes more and more pervasive, this assertion opens the door to the clear danger foreseen by the United States Supreme Court that we now live in a world in which “[w]hoever the suspect turns out to be, he has effectively been tailed every moment of every day for five years, and the police may—in the Government's view—call upon the results of that surveillance without regard to the constraints of the Fourth Amendment.” Carpenter v. United States, 585 U.S. ___, 138 S. Ct. 2206, 2218 (2018).

In support of the state's position, respondent focuses on the source of the location data, an ankle monitor, rather than the nature of the information itself, the detailed history of appellant's movements, twenty-four hours a day, seven days a week. GPS data, from your phone, your smart watch, your vehicle, and your fitness tracker provides an “intimate window into a person's life, revealing not only his particular movements, but through them his ‘familial, political, professional, religious, and sexual associations.’” Id. at ___, 138 S. Ct. at 2217. By simply discounting the nature of the information obtained without a warrant (the location data) and focusing instead on its source

(an ankle monitor supplied by a private bond company), respondent is attempting to carve out an exception to the expectation of privacy recognized in Carpenter.

By contrast, this Court, and the lower court before it, should begin the analysis with the nature of the information to determine whether it is an area deserving of protection under both the Fourth Amendment and S.C. Const. art. I, §10. If the nature of the information is deemed protected (do we as citizens have reasonable expectation of privacy that society recognizes), a warrant would be required before the government may access it absent exigent circumstances (such as ongoing emergency). This approach places the burden of invading the protected area on the state to either obtain a warrant or be prepared to justify the warrantless search and seizure.

In this case, respondent asserts that appellant waived an expectation of privacy due to the nature of the device used to collect the data. Resp. Br. p. 12. The lower court agreed with this argument, specifically finding that “I have not heard anything or did not find that the Defendant has a legitimate expectation of privacy when he *voluntarily* submits to GPS monitoring.” R. 43, ll. 11 - 14. One would assume this same argument would apply to all data stored on your behalf by a third-party that you voluntarily agree to use, such as your health information on a fitness tracker. This position was rejected in Carpenter which focused, not on the third-party source of the stored data, but on the nature of the data itself.

The Government's position fails to contend with the seismic shifts in digital technology that made possible the tracking of not only Carpenter's location but also everyone else's, not for a short period but for years and years. Sprint Corporation and its competitors are not your typical witnesses. Unlike the nosy neighbor who keeps an eye on comings and goings, they are ever alert, and their memory is nearly infallible. There is a world of difference between the limited types of personal information addressed in *Smith* and *Miller* and the exhaustive chronicle of location information casually collected by wireless carriers today. The Government thus is not asking for a straightforward application of the third-party doctrine, but instead a significant extension of it to a distinct category of information.

Carpenter, 585 at ___, 138 S. Ct. at 2219.

The logical extension of Carpenter is to focus on the nature of the data (the detailed location data), not its source (an ankle monitor). Here, the data is of the same nature as that addressed in Carpenter. Location data, regardless of its source, is protected by both the Fourth Amendment and S.C. Const. art. I, §10. This does not prohibit government access through proper warrant applications or exigent circumstances, or even waiver of those protections by the citizen through consent in the appropriate settings and with the appropriate showing.

When a warrantless invasion of a protected area occurs, the burden is on the state to demonstrate an appropriate exception. *See State v. Key*, 431 S.C. 336, 348, 848 S.E.2d 315, 320–21 (2020) (“Once a privacy right is held to exist, the court may not sponsor the notion of requiring a defendant to prove that this right—a right she already possesses—exists in any given case.”). It was the respondent’s burden below to demonstrate a warrant exception applies. That would require the state to have produced some evidence that went to consent or waiver by appellant, rather than the mere existence of the device being connected to a bonding company. Respondent could have attempted to show this through the bond agreement or a court order indicating appellant was aware of the invasion of his legitimate expectation of privacy from government intrusion for investigative purposes unrelated to the reason for the ankle monitor. Such evidence, either in the form of a court order related to appellant’s release on bond or the written bond agreement itself, may have demonstrated appellant’s expectation in the privacy of his movements from government intrusion was waived.

By way of example, in People v. Henderson, 76 Misc. 3d 1100, 174 N.Y.S.3d 182 (N.Y. Sup. Ct. 2022), a case cited by respondent as authority that petitioner lacked an expectation of privacy, the court was provided evidence of Henderson’s agreement with the bond company. The

Henderson court noted that “[c]lause one of the contract states, ‘I understand that my location will be monitored by this Device and if necessary and/or required by law, may be shared with other law enforcement agencies.’” Id. at 1105, 174 N.Y.S.3d at 186. The state in Henderson made the effort to provide the court with evidence of the underlying agreement demonstrating Henderson’s understanding and consent to release of the GPS data. No such showing or effort was made by the state in the present case.

The state’s reliance on People v. Campbell, 425 P.3d 1163 (Colo. App. 2018) is also misplaced. Campbell was decided months before the Supreme Court decided Carpenter. The superficial third-party approach adopted in Campbell was specifically rejected by Carpenter. The Colorado Court of Appeals held that “the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities.” Campbell, 425 P.3d at 1169 (citing United States v. Miller, 425 U.S. 435, 443 (1976)). While not abandoning the third-party doctrine, the Supreme Court curtailed the automatic waiver concept when it deals with information as pervasive as location data that reveals so much of a person’s day to day life to scrutiny.

The third-party doctrine partly stems from the notion that an individual has a reduced expectation of privacy in information knowingly shared with another. Smith and Miller, however, did not rely solely on the act of sharing. They also considered “the nature of the particular documents sought” and limitations on any “legitimate ‘expectation of privacy’ concerning their contents.” Miller, 425 U.S., at 442, 96 S. Ct. 1619. *In mechanically applying the third-party doctrine to this case* the Government fails to appreciate the lack of comparable limitations on the revealing nature of CSLI.

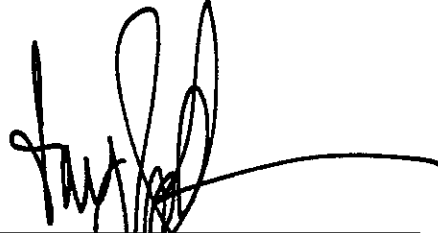
Carpenter, 585 at ___, 138 S. Ct. at 2210 (*emphasis added*).

The lower court, and respondent in its brief to this court, has fallen into the same mechanical approach to the third-party doctrine. Much like the court in Campbell, the

respondent's superficial application of the third-party doctrine fails to appreciate the nature of the invasion of privacy involved – intimate knowledge of the movement of a citizen around the clock. Securing a warrant before obtaining that information, or at least the requirement of producing affirmative evidence of consent or exigent circumstance, is required to comply with the protections of both the Fourth Amendment and S.C. Const. art. I, §10. The lower court committed reversible error in its mechanical application of the law and this court should hold that appellant's location data is protected from a warrantless search by the government and that when such data is obtained without a warrant, the government bears the burden to justify the warrantless search.

CONCLUSION

For the reasons outlined herein and in appellant's Initial Brief, appellant's convictions should be reversed, and the case remanded to the Richland County Court of General Sessions for a new trial.

A handwritten signature in black ink, appearing to read 'Gary H. Johnson', written over a horizontal line.

Gary H Johnson
Appellate Defender

ATTORNEY FOR APPELLANT

This 18th day of December, 2023.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County

Honorable DeAndrea G. Benjamin, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

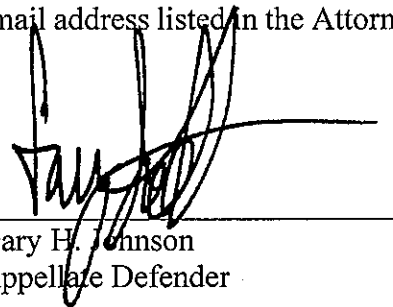
NEVELLE JOSHUA EBERHART,

APPELLANT

APPELLATE CASE NO. 2023-000234

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies true copies of the Final Reply Brief of Appellant in the above-referenced case has been served upon Joshua A. Edwards, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 18th day of December, 2023.



Gary H. Johnson
Appellate Defender

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ATTORNEY FOR APPELLANT

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Nevelle Joshua Eberhart, Appellant.

Appellate Case No. 2023-000234

Appeal From Richland County
DeAndrea G. Benjamin, Circuit Court Judge

Opinion No. 6150
Heard April 8, 2026 – Filed July 1, 2026

AFFIRMED

Appellate Defender Gary Howard Johnson, II, of
Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Assistant
Attorney General Joshua A. Edwards, Assistant Attorney
General Paul Sanders Linker, Jr. and Solicitor Byron E.
Gipson, all of Columbia, for Respondent.

THOMAS, J.: Nevelle Joshua Eberhart appeals his convictions of armed robbery and possession of a weapon during a violent crime, arguing the trial court erred in admitting (1) GPS data from his bond company obtained without a warrant, and (2) a video recording. We affirm, finding no error in the admission of the video and finding that although the court erred in admitting the GPS data, the error was harmless.

FACTS

This case involves the robbery of James Stewart (Victim) at an ATM at Palmetto Citizens Bank located near the intersection of King and Devine Streets in Columbia. As Victim was finalizing his transaction, a black moped pulled up and the rider pointed a finger toward Victim's ATM card and a gun toward Victim. After giving the perpetrator a false password, Victim ran to the Scotchman gas station directly across the street. When Victim left the Scotchman, he again saw the perpetrator, "took off," and called the police. Victim identified Eberhart at trial as the perpetrator.

Prior to trial, Eberhart moved to exclude GPS evidence obtained from the ankle monitor he was wearing as a requirement imposed by his bond company. Although the agreement between Eberhart and the bond company was not provided in the record on appeal, the court found the following:

[H]ere I have not heard anything or did not find that the Defendant has a legitimate expectation of privacy when he voluntarily submits to GPS monitoring. The sole purpose of GPS monitoring is to determine a Defendant's location while out on bond. The Defendant entered into the agreement with the bond[] company, knowing that the bond[] company could share the information with law enforcement. One of the conditions of bond is good behavior, and to be able to -- the purpose of the GPS is to be able to locate the Defendant, that it could be shared with law enforcement, and it could be shared with the Court. And so, therefore, I do not find that the -- the Defendant had a legitimate or reasonable expectation of privacy as it relates to a GPS monitor that he has voluntarily entered into a contract with the bond[] company. And so, therefore, I am going to deny [the] motion to suppress the GPS monitoring location data.

Titus Curry, the office manager of BadBoyz Bail Bonding, testified that he worked for a company that "did location finding with different defendants." He explained how he used a third-party database, VeriTracks, that tracked location by "collect[ing] pings [from cell phone towers] and different locations on people depending on where they're going, . . . zones, things of that nature." As to

Eberhart, he explained the VeriTracks report for the times requested by law enforcement indicated Eberhart was at or near the location during the time of the robbery on January 1, 2022.

Officer Javonte Selph, of the Columbia Police Department (CPD), testified that he responded to a report of a robbery on the day in question. He met Victim at his house, where Victim reported he had been robbed at gunpoint at the ATM machine. Selph was wearing a body camera at the time. Eberhart objected to admission of a video of Victim's interview, and outside of the presence of the jury, the video was admitted with the caveat that it would be introduced after Victim testified. Selph testified the ATM machine was located at 2530 Devine Street. Selph was recalled after Victim testified, and the video recording was published to the jury over Eberhart's objection.

Jacqueline Richburg, of Columbia Richland 911 Communications, testified that a 911 call was received on January 2, 2022, the day following the ATM robbery, from Nicole Goodwin, who reported a stolen moped.

Investigator Emmett Gilliam of the CPD testified he investigated the robbery by first retrieving video from the bank, which showed the perpetrator arriving at the ATM on the moped while Victim was at the teller machine. In addition, the video showed the perpetrator pulling out a gun and appearing to grab Victim's ATM card from him and then Victim running away. The video also showed the moped's tag number. Gilliam investigated the tag number, which was registered to Goodwin at 2205 Stark Street, which was near the same area of Columbia. Gilliam went to Goodwin's address on January 7 and met Goodwin. The moped was at the home. While speaking to Goodwin outside, Eberhart came out of the house. Gilliam photographed Eberhart's identification card.

Without obtaining a warrant, Gilliam approached BadBoyz to obtain GPS data on Eberhart. Based on the GPS report, Gilliam opined Eberhart was on the 2400 block of Devine Street at the time of the robbery. After Victim could not identify Eberhart from a photo lineup, Gilliam compared the bank video to Eberhart and concluded it was "the same person." Gilliam then interviewed and arrested Eberhart. Victim's debit card was found during a search of Eberhart.

Eberhart moved for a directed verdict and a new trial, which were denied. The court sentenced Eberhart to fifteen years' imprisonment for armed robbery and a concurrent term of imprisonment of five years for possession of a weapon during the commission of a violent crime. This appeal followed.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only. This court is bound by the trial court's factual findings unless they are clearly erroneous." *State v. Parker*, 381 S.C. 68, 74, 671 S.E.2d 619, 621 (Ct. App. 2008) (internal citations omitted).

LAW/ANALYSIS

A. ADMISSIBILITY OF GPS DATA

Eberhart argues the trial court erred in admitting the GPS location data because it was obtained without a warrant in violation of his Fourth Amendment rights under the United States Constitution. Eberhart also argues the trial court erred in admitting the evidence because he had a reasonable expectation of privacy under the greater protection afforded under the South Carolina Constitution.

We begin our analysis mindful of our supreme court's language in *State v. Moore*, 429 S.C. 465, 477, 839 S.E.2d 882, 888 (2020): "Of course, we recognize the adage 'get a warrant' will always be at play in these Fourth Amendment challenges. We join that chorus as well, as it is always preferable to 'get a warrant.'" Further, we note that "appellate review of a motion to suppress based on the Fourth Amendment involves a two-step analysis. This dual inquiry means we review the trial court's factual findings for any evidentiary support, but the ultimate legal conclusion . . . is a question of law subject to de novo review." *State v. Frasier*, 437 S.C. 625, 633–34, 879 S.E.2d 762, 766 (2022).

We also note that our analysis in this case would be different if this case concerned court-ordered monitoring or if the agreement was included in the record and indicated BadBoyz could or would share information with law enforcement. Eberhart argues he consented to giving the GPS data only to the bond company. The State argues Eberhart could not have held any legitimate expectation of privacy in data he knew was being collected and stored by a bond company *on behalf of the State*. However, as previously noted, the bond agreement was not in the record on appeal; thus, this court is unable to determine whether the agreement was "on behalf of the state" or merely an agreement between Eberhart and BadBoyz. Under the particular circumstances before us, we find Eberhart had a reasonable expectation of privacy in his GPS data and the trial court erred in

admitting the data because it was obtained without a warrant in violation of Eberhart's Fourth Amendment rights.

"The Fourth Amendment . . . protects the people's right to be free from unreasonable searches and seizures." *State v. Robinson*, 410 S.C. 519, 526, 765 S.E.2d 564, 568 (2014) (citing U.S. Const. amend. IV; S.C. Const. art. I, § 10). "The proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure' by demonstrating he had an expectation of privacy in the area illegally searched." *Id.* at 528, 765 S.E.2d at 569 (quoting *Rakas v. Illinois*, 439 U.S. 128, 130 n.1 (1978)).

"A legitimate expectation of privacy is both subjective and objective in nature: the defendant must show (1) he had a subjective expectation of not being discovered, and (2) the expectation is one that society recognizes as reasonable." *State v. Brown*, 423 S.C. 519, 526, 815 S.E.2d 761, 765 (2018) (quoting *State v. Missouri*, 361 S.C. 107, 112, 603 S.E.2d 594, 596 (2004)). "[This] test, articulated in *Katz v. United States*, 389 U.S. 347 (1967), holds that government conduct is a search if it interferes with a reasonable expectation of privacy." Richard Seamon, *New Technology Brings Up Old Question: The Fourth Amendment and the Issue of Search*, 13 S.C. Law. 23, 25 (2001). "*Katz* posits a two-part inquiry: first, has the individual manifested a subjective expectation of privacy in the object of the challenged search? Second, is society willing to recognize that expectation as reasonable?" *Moore*, 429 S.C. at 486, 839 S.E.2d at 893 (Beatty, C.J., dissenting) (quoting *California v. Ciraolo*, 476 U.S. 207, 211 (1986)).

In addition to the protection provided by the United States Constitution, the South Carolina Constitution provides the following: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated" S.C. Const. art. 1, § 10. "By articulating a specific prohibition against 'unreasonable invasions of privacy,' the people of South Carolina have indicated that searches and seizures that do not offend the federal Constitution may still offend the South Carolina Constitution." *State v. Weaver*, 374 S.C. 313, 322, 649 S.E.2d 479, 483 (2007).

In considering Eberhart's motion to suppress the GPS data, the trial court found that he did not have a legitimate expectation of privacy because he voluntarily submitted to GPS monitoring. The court found that Eberhart "entered into the agreement with the bond[] company, knowing that the bond[] company could share the information with law enforcement."

We find Eberhart had a subjective expectation in the privacy of his GPS data. He argues he was on bond for an unrelated charge, the GPS monitor was supplied by a private bond company for purposes of ensuring he appeared for that charge, there is no evidence in the record that the monitor was required as a condition of bond by a court, and the State failed to present any evidence that he was informed the government could have access to the data for investigatory purposes unrelated to his bond. *See Moore*, 429 S.C. at 486, 839 S.E.2d at 893 (Beatty, C.J., dissenting) (describing the first part of the two-part inquiry to determine a reasonable expectation of privacy as whether the individual had a subjective expectation of privacy in the object of the challenged search).

Having found Eberhart had a subjective expectation of privacy in his GPS data, the harder issue is whether Eberhart's expectation was reasonable.¹ In determining if an individual has a reasonable expectation of privacy, the Supreme Court of the United States "consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." *Smith v.*

¹ We acknowledge Eberhart's argument that the trial court erred in shifting the burden of proof from the State to prove an exception to a warrantless search. *See Robinson*, 410 S.C. at 530, 765 S.E.2d at 570 ("Each party has the burden to prove separate things during the motion to suppress. The State bears the burden to demonstrate that it was entitled to conduct the search or seizure under an exception to the Fourth Amendment's warrant requirement. . . . [T]he criminal defendant . . . bears the burden to demonstrate that he had an actual and reasonable expectation of privacy in the place illegally searched." (internal citations omitted)); *State v. Wright*, 391 S.C. 436, 442, 706 S.E.2d 324, 327 (2011) ("Warrantless searches and seizures are unreasonable absent a recognized exception to the warrant requirement."); *State v. Brown*, 401 S.C. 82, 89, 736 S.E.2d 263, 266 (2012) ("These exceptions include the following: . . . (5) the plain view doctrine, (6) consent, and (7) abandonment."). We also understand the State's argument that it does not have a burden of proving an exception until after a defendant shows a reasonable expectation of privacy. *See State v. Flowers*, 360 S.C. 1, 5, 598 S.E.2d 725, 728 (Ct. App. 2004) ("When a defendant has a reasonable expectation of privacy in the property being searched, Fourth Amendment rights apply to the search."). Here, the trial court analyzed both the exception of consent with the finding of a reasonable expectation of privacy, which is necessary when determining whether Eberhart's consent to the bond company equated to consent to a governmental search. We find the trial court did not erroneously shift the burden.

Maryland, 442 U.S. 735, 743–44 (1979). The Fourth Amendment prohibition against a warrantless entry does not apply "to situations in which voluntary consent has been obtained, either from the individual whose property is searched . . . or from a third party who possesses common authority over the premises." *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990) (internal citation omitted). Also, an individual does not possess an actual, constitutionally protected expectation of privacy in something the individual "knowingly exposes to the public." *Katz*, 389 U.S. at 351. *See State v. Herring*, 387 S.C. 201, 209 n.4, 692 S.E.2d 490, 494 n.4 (2009) (applying the plain view doctrine and stating "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection"); *see also Rawlings v. Kentucky*, 448 U.S. 98, 104–05 (1980) (a legitimate expectation of privacy is necessary to trigger Fourth Amendment protections).²

Here, the bail agreement with the bond company is not in the record; thus, there is no evidence that Eberhart consented to giving anyone other than the bond company access to his GPS data. There is also no evidence that the bond company had authority to give consent on his behalf. We accordingly find Eberhart did not knowingly expose the GPS information to the public by contracting with the bond company and because the agreement with the bond company is not in the record, we cannot say the bond company was a third-party with authority to share his data. Thus, Eberhart was protected under the Fourth Amendment.

² We note a concern that many courts are struggling with in determining how far this third-party doctrine exception to the warrant requirement extends. *See Nicole Mo, If Wheels Could Talk: Fourth Amendment Protections Against Police Access to Automobile Data*, 98 N.Y.U. L. Rev. 2232, 2234 (2023) (explaining that automobiles collect data on car owners via services such as OnStar, which is retained in the automobiles and accessible to third parties, who can share it with police). "Courts are divided on whether the third-party doctrine applies to law enforcement's indirect access to auto data." *Id.* at 2257. As we stressed above, "get a warrant." "[A] warrant requirement for auto data access will do real work in ensuring that cartapping is one [less] shortcut that police can take to access some of our most personal information." *Id.* at 2272.

We find support for our analysis in the recent United States Supreme Court and South Carolina Supreme Court cases that more stringently view electronic surveillance vis-à-vis the right to privacy. For instance, "[i]n *Carpenter v. United States*, the United States Supreme Court found 'an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through [cell site location information (CSLI)]." *State v. Carter*, 438 S.C. 463, 470–71, 884 S.E.2d 195, 199 (Ct. App. 2022), *aff'd*, 445 S.C. 157, 912 S.E.2d 264 (2025) (quoting *Carpenter*, 585 U.S. 296, 310 (2018)). South Carolina has also recognized that the "police must get a warrant when collecting CSLI to assist in the mine-run criminal investigation" absent an exception such as exigent circumstances. *Id.* at 471, 884 S.E.2d at 199 (quoting *Carpenter*, 585 U.S. at 320). Although our supreme court affirmed *Carter* based on the emergency provision of the "federal Stored Communications Act[, which] specifically allows cell-service providers to release customer records" in an "emergency involving danger of death or serious physical injury to any person[.]" we find the general rule in South Carolina governing CSLI requires law enforcement to obtain a warrant absent certain exceptions not at issue in this case. *Carter*, 445 S.C. at 163, 912 S.E.2d at 268 (quoting 18 U.S.C. § 2702(c)(4)); *see id.* at 162, 912 S.E.2d at 267 ("Ordinarily, we would begin our analysis of a question of this type by considering whether a search occurred, and if we found it did, we would then consider whether an exception to the warrant requirement applied.")).

Thus, as Eberhart argues, there is a need to carefully examine whether people have a reasonable expectation of privacy in their digital data.

[T]he oft-divided Supreme Court [of the United States] has taken unanimous stands against warrantless electronic surveillance and cell phone searches of arrestees The Court has likewise recognized that the concept of a "reasonable expectation of privacy" for Fourth Amendment purposes must reflect the "seismic shifts in digital technology" that now allow for "near perfect surveillance" of digital records that "hold for many Americans the "privacies of life." These efforts reflect a bipartisan consensus that, when it comes to government surveillance of private citizens, "digital is different."

Kate Weisburd, *Sentenced to Surveillance: Fourth Amendment Limits on Electronic Monitoring*, 98 N.C. L. Rev. 717, 720–21 (2020) (internal footnotes and citations omitted).

After consideration of the lack of proof of Eberhart's consent to share his GPS data with the government and the heightened considerations surrounding electronic surveillance—in addition to our mindfulness of our *de novo* standard of review regarding whether Eberhart had a reasonable expectation of privacy—we find the trial court erred in finding that he "entered into the agreement with the bond company, knowing that the bond[] company could share the information with law enforcement" and erred in finding Eberhart had no reasonable expectation of privacy in his data. *See Frasier*, 437 S.C. at 633–34, 879 S.E.2d at 766 (stating the ultimate legal conclusion regarding the reasonable expectation of privacy is a question of law subject to *de novo* review).

We find no exceptions to the requirement of a warrant in this case, and absent evidence of an agreement permitting BadBoyz to share Eberhart's data or court-ordered monitoring, we also find Eberhart had a reasonable expectation of privacy in the data and the circuit court erred in admitting it. However, we find the circuit court's error was harmless. *See State v. Rivera*, 402 S.C. 225, 246, 741 S.E.2d 694, 705 (2013) ("Most trial errors, even those which violate a defendant's constitutional rights, are subject to harmless-error analysis."); *State v. Warner*, 436 S.C. 395, 409, 872 S.E.2d 638, 644 (2022) (Hearn, J., dissenting) (applying a harmless error analysis to a Fourth Amendment violation). Here, Victim identified Eberhart in court as the perpetrator and video from the bank showed the moped's tag number. The moped had been reported stolen, yet was found at the owner's home where Eberhart was also found. After Victim could not identify Eberhart from the photo lineup, Investigator Gilliam compared the bank video to Eberhart and concluded it was the same person; Gilliam then interviewed and arrested Eberhart—finding Victim's debit card in the process.³ Because we find the trial court's error in admitting the GPS data was harmless, we affirm on this issue. *See*

³ Gilliam testified he spoke to BadBoyz to obtain GPS data on Eberhart before arresting Eberhart. To the extent the evidence would be inadmissible under the exclusionary rule, we find it would have been discovered by lawful means based on the evidence leading to Eberhart derived from the bank video and moped tag. *See State v. Hardin*, 425 S.C. 1, 18, 819 S.E.2d 177, 186 (Ct. App. 2018) ("The exclusionary rule is a deterrent sanction by which the prosecution is barred from introducing evidence obtained in violation of the Fourth Amendment.").

State v. Collins, 409 S.C. 524, 537, 763 S.E.2d 22, 29 (2014) ("The harmless error rule generally provides that an error is harmless beyond a reasonable doubt if it did not contribute to the verdict obtained."); *State v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) ("Error is harmless when it 'could not reasonably have affected the result of the trial.'" (quoting *State v. Key*, 256 S.C. 90, 93, 180 S.E.2d 888, 890 (1971))).

B. VIDEO RECORDING

Eberhart argues the trial court erred in admitting the body camera recording of the initial police interview with Victim, raising a violation of Eberhart's rights under the Confrontation Clause and a hearsay violation. We disagree.

"The appellate court reviews a trial [court's] ruling on admissibility of evidence pursuant to an abuse of discretion standard and gives great deference to the trial court." *State v. Torres*, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *State v. Cross*, 427 S.C. 465, 473, 832 S.E.2d 281, 285 (2019) (quoting *State v. Douglas*, 369 S.C. 424, 429–30, 632 S.E.2d 845, 848 (2006)).

Confrontation Clause

"The Confrontation Clause of the Sixth Amendment to the United States Constitution provides that '[i]n all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him . . .'" *State v. Henson*, 407 S.C. 154, 161, 754 S.E.2d 508, 512 (2014) (quoting U.S. Const. amend. VI) (alteration and omissions in original). The constitutional right provided by the Confrontation Clause "applies to the states through the Fourteenth Amendment [and] guarantees a defendant in a criminal trial the right to cross-examine the witnesses against him." *Id.* "[I]t is the *opportunity* to cross-examine that is constitutionally protected." *State v. Stokes*, 381 S.C. 390, 402, 673 S.E.2d 434, 440 (2009) (emphasis in original); *see id.* at 401, 673 S.E.2d at 439 (concluding there was no Confrontation Clause violation where the witness was available at trial and subject to cross-examination).

Here, the trial court determined the Victim was available to testify before ruling the video was admissible and did not allow the State to publish the video to the jury until Victim testified. We find no Confrontation Clause violation.

Hearsay

The trial court found Victim's statements recorded on the video produced by Officer Selph's body camera were admissible as either present sense impressions or excited utterances, two exceptions to the rule against the admission of hearsay. We find no error.

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. "Hearsay is not admissible unless there is an applicable exception." *State v. Brockmeyer*, 406 S.C. 324, 351, 751 S.E.2d 645, 659 (2013) (quoting *In re Care & Treatment of Harvey*, 355 S.C. 53, 61–62, 584 S.E.2d 893, 897 (2003)). Present sense impressions and excited utterances are exceptions to hearsay. Rule 803, SCRE. A present sense impression is "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." Rule 803(1), SCRE. "To qualify as a present sense impression: '(1) the statement must describe or explain an event or condition; (2) the statement must be contemporaneous with the event; and (3) the declarant must have personally perceived the event.'" *State v. Prather*, 429 S.C. 583, 611, 840 S.E.2d 551, 565 (2020) (quoting *State v. Hendricks*, 408 S.C. 525, 533, 759 S.E.2d 434, 438 (Ct. App. 2014)). "For a statement to be an excited utterance: '(1) the statement must relate to a startling event or condition; (2) the statement must have been made while the declarant was under the stress of excitement; and (3) the stress of excitement must be caused by the startling event or condition.'" *Id.* at 611, 840 S.E.2d at 565–66 (quoting *State v. Washington*, 379 S.C. 120, 124, 665 S.E.2d 602, 604 (2008)).

Here, Victim's statements on the video recording described the robbery, were made within thirty minutes of the event, and were perceived by Victim. We find the statements were present sense impressions and met the exception to the rule prohibiting the admission of hearsay. The statements also met the requirements of an excited utterance. They were made after a double armed robbery at gunpoint, which is a startling event; made within thirty minutes of the robbery, which is well within the time generally accepted as considering a victim as still under the stress of the robberies; and that stress was caused by the robbery. Accordingly, we find no error by the trial court in admitting the statements as exceptions to the rule against the admission of hearsay.

We find neither a violation of Eberhart's rights under the Confrontation Clause nor a hearsay violation in the admission of the body camera recording of the initial

police interview with Victim. *See State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006) ("The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion.").

CONCLUSION

Based on the foregoing, Eberhart's convictions and sentences are

AFFIRMED.

TURNER, J., concurs.

MCDONALD, J., concurring in result only:

While I respectfully concur in the result reached by my colleagues in the majority, I write separately because I agree with the circuit court that a criminal defendant has no "legitimate expectation of privacy when he voluntarily submits to GPS monitoring" while out on bond.

In addition to the circuit court's cogent ruling, I find persuasive the analysis of the Colorado Court of Appeals in *People v. Campbell*, 425 P.3d 1163, 1170 (Colo. App. 2018). In this appeal from his convictions for second-degree burglary and criminal mischief, Campbell challenged the trial court's denial of his motion to suppress GPS location data obtained through the ankle monitor he wore at the request of a private bondsman. *Id.* at 1168. Rejecting Campbell's claims under both the Fourth Amendment and the more protective provision of Colorado's Constitution, the Colorado court explained:

Under the Supreme Court precedent, Campbell had no reasonable expectation of privacy in the GPS data because he voluntarily disclosed such data to a third party—his bondsman. Campbell was aware that his bondsman had access to the GPS location data to ensure that he did not leave the state while out on bond. In short, Campbell "t[ook] the risk, in revealing his affairs to another, that the information w[ould] be conveyed by that person to the Government." Thus, even if we assume he subjectively believed his GPS data would remain private, that expectation was not one society would be prepared

to call reasonable.

Campbell, 425 P.3d at 1170 (alteration in original) (quoting *United States v. Miller*, 425 U.S. 435, 443 (1976)).

In my view, when a defendant submits to an ankle monitor as a condition of his bond—whether the condition is imposed by a court or by a private bondsman—he has neither a subjective expectation of privacy in the monitoring data nor an expectation of privacy that society would deem reasonable. Under bond conditions like those imposed here, this location data differs from that obtained when the Government surreptitiously installs a GPS device on a vehicle or obtains cell site location data without a warrant.

Here, the circuit court properly recognized that one "of the conditions of bond is good behavior" and "the purpose of the GPS is to be able to locate the Defendant." The circuit court further found the defendant knew the location data "could be shared with law enforcement, and it could be shared with the Court." Finally, section 17-15-20(A) of the South Carolina Code (2014) provides:

An appearance recognizance or appearance bond must be conditioned on the person charged personally appearing before the court specified to answer the charge or indictment and to do and receive what is enjoined by the court, and not to leave the State, and be of good behavior toward all the citizens of the State, or especially toward a person or persons specified by the court.

For these reasons, I would find the circuit court correctly determined Eberhart had no reasonable expectation of privacy in the ankle monitor data and properly declined to suppress the GPS location information obtained from his bond company.

STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Appellate Case No. 2023-000234

THE STATE,

Respondent,

v.

NEVELLE JOSHUA EBERHART

Appellant.

Opinion No. 6150 (filed July 1, 2026)

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

On July 1, 2026, this Court issued a published opinion affirming Appellant Nevelle Eberhart's convictions for armed robbery and possession of a weapon during the commission of a violent crime. State v. Eberhart, Op. No. 6150, (S.C. Ct. App. filed July 1, 2026) (Howard Adv. Sheet no. 25 at 11). The majority found the circuit court erred by admitting GPS location data created by an ankle monitor worn by Eberhart while out on bond for unrelated charges. The majority held police violated Eberhart's Fourth Amendment rights because they did not obtain a search warrant before requesting the data from Eberhart's bondsman. The Court affirmed Eberhart's convictions on harmless error grounds. Judge McDonald, concurring in result only, found Eberhart failed to demonstrate a reasonable expectation of privacy in the data and thus no

search occurred. Pursuant to Rule 219 and Rule 221 of the South Carolina Appellate Court Rules, the State respectfully petitions for rehearing and suggests rehearing en banc.

This is a question of exceptional importance.

Rehearing en banc may be granted when the court has “overlooked or misapprehended” an issue and “the proceeding involves a question of exceptional importance.” Rules 219 and 211, SCACR. This published opinion effectively creates a new constitutional privacy interest where none should rightly exist. More importantly, the opinion endangers the citizens of this state by severely limiting the ability of law enforcement to monitor the most dangerous criminal defendants who are released pending trial. Rehearing en banc is warranted.

Pretrial GPS monitoring protects victims of violent crime—and the public at large—from dangerous criminals who are released on bond. The majority opinion undermines the efficacy of this important public safety tool by requiring a judicial probable cause determination as a prerequisite to viewing a bonding company’s GPS data to ensure a defendant is abiding by the terms of their bond. By requiring probable cause to seek a bondsman’s GPS data, the opinion strips GPS monitoring of much of its utility.

This opinion will, at best, result in delays and obstacles to the detection of bond violations by requiring police to seek unnecessary warrants. At worst, it will prevent the government from enforcing bond orders for the most dangerous criminal defendants, placing the State at the severe disadvantage of relying on bondsman to enforce the orders of the court. See State v. Mitchell, 421 S.C. 365, 807 S.E.2d 193 (2017) (affirming estreatment of bond where bondsman failed to take any steps to enforce good behavior provision). This result is contrary to the legislative intent to allow rigorous supervision via GPS monitoring. See S.C. Code Ann. § 17-15-37 (establishing regulations which, inter alia, “allow any law enforcement agency,

including the prosecutor's office, to have access to real-time monitoring" of court-ordered GPS monitoring). This decision has the real potential to make the people of South Carolina less safe.

Further, the opinion establishes an unworkable rule that raises more questions than it answers. What if a circuit court judge wants to know if a defendant is abiding by the conditions of the bond it set? Is the court required to issue a warrant sua sponte? And on suspicion of what crime? A bond violation may not be a criminal offense. The opinion does not even clearly set out when warrants are required, limiting its holding to the "particular circumstances before [the court]." Eberhart, Howard Adv. Sheet no. 25 at 15. Law enforcement needs clear guidance from courts to know when warrants are required. This opinion does not provide that important guidance. Rehearing en banc is warranted to address these important questions.

The majority misapprehended important points of constitutional law.

The majority opinion is wrong on the merits. No warrant was required because no search occurred.

Eberhart failed to demonstrate a reasonable expectation of privacy in the data collected by his GPS monitor. Eberhart did not testify or proffer any evidence in support of his motion. The Court acknowledges this was Eberhart's burden to meet. See Rakas v. Illinois, 439 U.S. 128, 132 n.1 (1978) ("The proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure. . . . The prosecutor's argument gave petitioners notice that they were to be put to their proof on any issue as to which they had the burden, and because of their failure to assert ownership, we must assume, for purposes of our review, that petitioners do not own the rifle or the shells." (emphasis added)); State v. Robinson, 410 S.C. 519, 530, 765 S.E.2d 564, 570 (2014) (explaining "the defendant bears the burden to demonstrate that he had an actual and reasonable expectation of

privacy in the place illegally searched” (citing Rakas)); United States v. Bellina, 665 F.2d 1335, 1340 (4th Cir. 1981) (“The burden rests on one who seeks to suppress to prove that his legitimate expectation of privacy has been violated by the challenged search.”). But rather than holding Eberhart to his burden, the majority indulged in every presumption in his favor, faulting the State for failing to present evidence to disprove his objectively unreasonable and unsupported privacy claim.

At oral argument, the Court asked the parties whether GPS monitoring was a court-ordered condition of bond. Based on a review of the clerk of court’s file, the State represented that this was indeed a court-ordered condition, and the State makes the same representation now. However, neither the bond order nor the GPS monitoring agreement between Eberhart and the bonding company are in the record. The majority opinion places the blame with the State, noting “the agreement between Eberhart and the bond company was not provided in the record on appeal” and explaining the “analysis in this case would be different if this case concerned court-ordered monitoring or if the agreement was included in the record and indicated [the bonding company] could or would share information with law enforcement.” The Court explained it was “unable to determine whether the agreement was ‘on behalf of the state’ or merely an agreement between Eberhart and [the bonding company].” Eberhart, Howard Adv. Sheet no. 25 at 15.

This should have been the end of the analysis. Absent proof of this hypothetical, extraordinarily unusual “agreement” between Eberhart and the bonding company to keep the GPS data confidential, Eberhart failed to show even a subjective expectation of privacy in the data.¹ Nor did Eberhart proffer any testimony about the existence of such an agreement.

¹ Eberhart, as a party to the agreement, was in the best position to produce the bond agreement. See Wayne LaFave et al, Search & Seizure § 11.2(b) “Burden of proof” (6th ed.) (explaining

Instead, the Court analyzed the case as if the GPS monitoring was not court-ordered, finding “Eberhart had a subjective expectation in the privacy of his GPS data” because “there is no evidence in the record that the monitor was required as a condition of bond by a court, and the State failed to present any evidence that he was informed the government could have access to the data for investigatory purposes unrelated to his bond.”² Eberhart, Howard Adv. Sheet no. 25 at 16. This analysis turns the Rakas burden on its head, effectively requiring the State to disprove the existence of a privacy interest that has not been proved by the movant and has never been recognized by an appellate court in this State. This was an error of law.

In a footnote, the Court acknowledged the “State’s argument that it does not have a burden of proving an exception [to the warrant requirement] until after a defendant shows a reasonable expectation of privacy.” But while the Court acknowledged the State’s argument, it did not really address it. The Court noted the trial court analyzed the expectation of privacy along with the consent exception to the warrant requirement and held “the trial court did not erroneously shift the burden” to Eberhart to show consent. This analysis confuses the issues. No exception to the warrant requirement need be shown until the defendant establishes that a search occurred by proving he had a reasonable expectation of privacy in the things that were searched. Eberhart’s “consent to the bond company” as a condition of his release is relevant to whether he had a reasonable expectation of privacy, but it should not be conflated with consent to search

“the matter of standing usually concerns the defendant’s interest in an expectation of privacy concerning the place searched or the objects seized, about which the defendant will be most knowledgeable”).

² A “good behavior” provision is a standard provision of bond, and the commission of a subsequent crime is a violation of that provision. See Mitchell, 421 S.C. at 368, 807 S.E.2d at 194 n.1. Bondsmen may be held responsible for violations of good behavior provisions. Id. at 373, 807 S.E.2d at 197. Thus the commission of a robbery while on bond could not be “unrelated to [Eberhart’s] bond.” Eberhart, Howard Adv. Sheet no. 25 at 16.

because if there was no reasonable expectation of privacy, a search did not occur. Because Eberhart did not produce any evidence of an agreement with the bond company not to share his location data with police (which the Court deemed determinative of whether he possessed a reasonable expectation of privacy), Eberhart failed to meet his burden to show a reasonable expectation of privacy and, by extension, a search.

Not only did Eberhart fail to show a subjective expectation of privacy, such an expectation would not be objectively reasonable. The sole purpose of GPS monitoring is to monitor a person's movements. Eberhart knew his movements were being tracked, and this tracking was directly linked to his ability to be released on bond. No reasonable person would think a bondsman could not share his location with the State, and society would not honor that expectation as reasonable.

The Court relied on Carpenter v. United States, 585 U.S. 296 (2018), to support its holding. But unlike the cell phone which produced the location data in Carpenter, the ankle bracelet was not Eberhart's property. It belonged to the bonding company, which had exclusive control over the monitor and the data it produced. This data was created for the bonding company's benefit, and the State's. It was not Eberhart's to keep private because he had no "substantial possessory interest" in it. Rakas, 439 U.S. at 136; see also Byrd v. United States, 584 U.S. 395, 407 (2018) (discussing "the expectation of privacy that comes from lawful possession and control" of a rental car). This is not the type of data a person "reasonably understands as his own." Chatrie v. United States, 609 U.S. ___, slip op. at 25 (June 29, 2026). The data simply was not private in nature.

The majority opinion is unsupported by the text, history, or logic of the Fourth Amendment or the Privacy Clause of the South Carolina Constitution. It must be corrected.

CONCLUSION

This Court should grant rehearing en banc to correct this serious constitutional error.

Respectfully submitted,

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Attorney General

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ATTORNEYS FOR RESPONDENT

July 15, 2026

STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Appellate Case No. 2023-000234

THE STATE,

Respondent,

v.

NEVELLE JOSHUA EBERHART,

Appellant.

PROOF OF SERVICE

I, Grace Sommer, certify that I have served the within Petition for Rehearing on Appellant by sending an electronic copy to Gary Johnson, II, Esquire, to the address listed for counsel in AIS.

I further certify that all parties required by Rule to be served have been served.
This 15th day of July, 2026.



Grace Sommer
Legal Assistant
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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

NEVELLE JOSHUA EBERHART,

APPELLANT

APPELLATE CASE NO. 2023-000234

Appeal from Richland County

Honorable DeAndrea G. Benjamin, Circuit Court Judge

Opinion No. 6150

PETITION FOR REHEARING

On July 1, 2026, this Court issued a decision in connection with the above referenced matter, finding error in the lower court's decision not to suppress the warrantless search of petitioner's location data but finding the admission of such evidence harmless. Pursuant to Rule 221(a), SCACR, petitioner requests that this Court grant rehearing regarding the alleged "harmless" error of admitting improperly obtained location data.

"An error is harmless when it could not have reasonably affected the result of the trial."

Matter of Hyman, 447 S.C. 573, 597, 930 S.E.2d 1, 13 (2026). Here, the victim in the armed robbery not only failed to pick petitioner out of a photographic lineup shortly after the crime occurred, but he also actively selected someone other than petitioner. R. 147, ll. 8-25. While some of victim's personal items were found on petitioner during his arrest and petitioner was connected to the moped shown in the armed robbery as noted by this Court's opinion, those connections were circumstantial evidence of petitioner's guilt. The only evidence that placed petitioner at the scene of the armed robbery, other than the improperly admitted GPS data, was the in court identification of the victim, an identification hopelessly tainted by his earlier failure to select petitioner during a photographic lineup.

"We do not doubt either the importance or the fallibility of eyewitness identifications. Indeed, in recognizing that defendants have a constitutional right to counsel at postindictment police lineups, we observed that 'the annals of criminal law are rife with instances of mistaken identification.'" Perry v. New Hampshire, 565 U.S. 228, 245 (2012).

An eyewitness identification in Court with all eyes solely on the accused, tainted by an earlier failure of that witness to select the accused from a photographic lineup, would not support a finding of harmless error. The other pieces of circumstantial evidence supporting guilt noted by this Court would not remove the impact on the jury of placing petitioner in physical proximity to the crime scene when the armed robbery occurred.

As the state argued in closing, the GPS data was proof of petitioner's guilt.

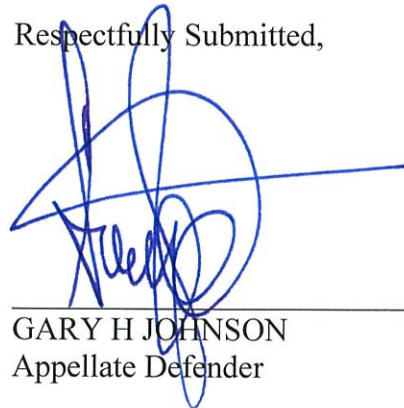
The person there was Nevelle Eberhart. The investigator ran his information. And when he ran his information, he had a GPS device attached to his person, and where did it show that he was? His answer to law enforcement in the interview, when they asked him where he was at the time of the robbery, the day of the robbery, his answer was, "Everywhere." He was not everywhere, he was on Devine Street and King Street where the robbery happened. That's where the GPS puts him. That's not everywhere,

that's specific. Is that a coincidence? It's not a coincidence. These are all not coincidences. This is proof.

R. 276, ll. 2 – 14.

This Court should not hold "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." State v. Liverman, 398 S.C. 130, 144, 727 S.E.2d 422, 429 (2012). Petitioner respectfully requests that this Court reconsider its harmless error analysis and, in light of this Court's proper finding of error in the admission of the GPS data, remand this matter for a new trial.

Respectfully Submitted,



GARY H JOHNSON
Appellate Defender

This 16th day of July, 2026.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Honorable DeAndrea G. Benjamin, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

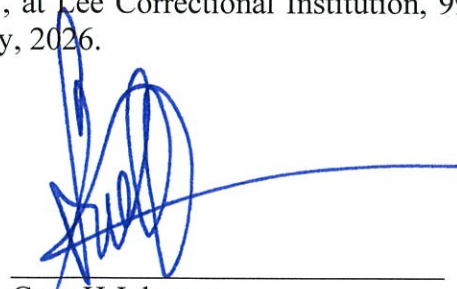
NEVELLE JOSHUA EBERHART,

APPELLANT

APPELLATE CASE NO. 2023-000234

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above-entitled case has been served upon Joshua A. Edwards, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Nevelle Joshua Eberhart, #363531, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 16th day of July, 2026.



Gary H Johnson
Appellate Defender

ATTORNEY FOR APPELLANT

The South Carolina Court of Appeals

The State, Respondent,

v.

Nevelle Joshua Eberhart, Appellant.

Appellate Case No. 2023-000234

ORDER

After careful consideration of the petitions for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petitions for rehearing are denied.



J.



J.



J.

Columbia, South Carolina

cc:

Alan McCrory Wilson, Esquire

Joshua Abraham Edwards, Esquire

Byron E. Gipson, Esquire

Gary Howard Johnson, II, Esquire

Paul Sanders Linker, Jr., Esquire

The Honorable DeAndrea G. Benjamin

FILED
Aug 26 2026



The South Carolina Court of Appeals

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CATHERINE S. HARRISON
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August 26, 2026

Mr. Joshua Abraham Edwards, Esquire
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Mr. Gary Howard Johnson, II, Esquire
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Re: The State v. Nevelle J. Eberhart
Appellate Case No. 2023-000234

Dear Counsel:

Enclosed is a copy of an order of the panel denying your petitions for rehearing. Respondent's petition for rehearing en banc was distributed to the judges, but it has been rejected. *See* Rule 219, SCACR.

Very truly yours,

Jasmine D. Smith, Deputy
CLERK

cc: Alan McCrory Wilson, Esquire
Byron E. Gipson, Esquire
Paul Sanders Linker, Jr., Esquire
The Honorable DeAndrea G. Benjamin