STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Florence County
The Honorable D. Craig Brown, Circuit Court Judge

Appellate Case No. 2013-000227

THE STATE,

Respondent,

v.

TROY HUNTER,

Appellant.

INITIAL BRIEF OF RESPONDENT

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The trial court properly admitted a statement made by the victim to his mother identifying Appellant as the person who assaulted him because it was not hearsay, but even if it was, the statement fell under the excited utterance exception to the hearsay rule.

STATEMENT OF THE CASE

A Florence County Grand Jury indicted Appellant for armed robbery, attempted murder, possession of a firearm, and second-degree assault and battery. (R.* Indictments.) On January 14-16, 2013, Appellant proceeded to trial before a jury and the Honorable D. Craig Brown on the armed robbery and second-degree assault and battery charges. The State *nolle prossed* the other two charges. (Tr. 306, lines 1-5.) Steven Deberry, Esquire, represented Appellant, and Matthew Ozment, Esquire, represented the State. The jury found Appellant guilty of both charges. (Tr. 303.) Judge Brown sentenced him to three years' imprisonment for the second-degree assault and battery charge and thirty years' imprisonment for the armed robbery charge, to be served concurrently. (Tr. 311-12.)

On January 25, 2013, Appellant filed a Notice of Appeal.

STATEMENT OF FACTS

At approximately 2:00 p.m. on November 30, 2011, Demetrius Holloman (Victim) and Roderick Titus returned to Titus's home after attending a funeral. (Tr. 64, lines 4-17; Tr. 130, lines 15-23.) When he arrived at the home, Victim walked to the side of the house, where he had his cell phone charger plugged in, and kneeled down to unplug it. (Tr. 131, lines 5-25.) While Victim was kneeling down, Appellant came up behind him and hit him in the mouth with a .357 Magnum. (Tr. 131, line 25-Tr. 132, line 22; Tr. 133, lines 23-25.) Victim fell to the ground, and Appellant hit him on the top of the head with the gun, stood over him, and asked where "it" was. (Tr. 132, line 24-Tr. 133, line 3.) Appellant shot the gun right by Victim's head and then reached into Victim's pants pocket, taking $1,000. (Tr. 133, lines 3-14; Tr. 134, lines 9-12.) Appellant threatened to kill Victim if he said anything, and then Appellant left the scene. (Tr. 133, lines 14-22.)

Immediately after he saw Appellant drive away, Victim got up and walked straight to his mother's house and told her what happened and who did it. (Tr. 135, line 17-Tr. 136, line 10; Tr. 139, lines 13-15.) Initially, Victim told police he did not know who did it, but he eventually gave Appellant's name. (Tr. 139, 16-23.) About two weeks later, a tip led to the arrest of Appellant for armed robbery, attempted murder, possession of a firearm, and second-degree assault and battery. (Tr. 95, line 13-Tr. 97, line 2; R.* Indictments.) Appellant proceeded to trial before a jury and the Honorable D. Craig Brown on the armed robbery and second-degree assault and battery charges after the State *nolle prossed* the other two charges. (Tr. 7, lines 12-24; Tr. 306, lines 1-5.)

At trial, Roderick Titus testified that he, Victim, and Appellant were all friends. (Tr. 60, line 6-Tr. 61, line 11.) He testified that on November 30, 2011, he and Victim

attended a funeral together and then returned to his residence. (Tr. 64, lines 4-13.) Titus went inside the home to change clothes, while Victim walked to the side of the house. (Tr. 65, lines 1-10.) Titus testified he heard a "loud bang noise" that could have been gunshots, at which time his sisters ran inside screaming and upset. (Tr. 65, lines 10-24; Tr. 66, lines 3-16; Tr. 69, lines 19-25.)

Nate Orgbon testified he was also at Titus's house on November 30, 2011, and saw Appellant there later in the day, after lunch. (Tr. 84, line 25-Tr. 85, line 19.) He testified Appellant was looking for Victim and someone told Appellant where to find Victim. (Tr. 86, lined 14-24.) Orgbon explained Appellant walked up to Victim and "clean clock"ed him with his fist. (Tr. 87, lines 11-12.) Orgbon testified, "He just punched the man, you know what I mean, so they fighting." (Tr. 87, lines 12-13.) He stated he left after he saw Victim "go back" after Appellant hit him. (Tr. 87, lines 14-15.)

The State called Idena Titus Simmons (Roderick Titus's mother), who lived at the address where the incident happened on November 30, 2011. (Tr. 108, line 12-Tr. 109, line 13.) She testified that after she returned from a funeral, she heard a boom. (Tr. 112, lines 6-15.) She recalled telling her husband it sounded like a truck hitting a transmitter and that her husband said it sounded like a gun. (Tr. 112, lines 15-17.)

Deloris Titus Johnson, Simmons' sister, testified she was at Simmons' residence on November 30, 2011, and was parked in the yard talking on her cell phone when she saw Appellant arrive with a man she did not know and walk by her car. (Tr. 118, line 15-Tr. 121, line 3.) Next, she recalled hearing gunshots. (Tr. 121, lines 7-17.) She testified she saw Appellant and the man walk back to their car and leave. (Tr. 122, lines 2-19.)

Victim testified regarding the details of being assaulted and robbed by Appellant. (Tr. 130-33.) Victim testified that as soon as he saw Appellant drive away, he got up and

walked straight to his mother's house and told her what happened and who did it. (Tr. 135, line 17-Tr. 136, line 10; Tr. 139, lines 13-15.) He went to the hospital and spoke to police there, but he did not tell them who did it because he was afraid. (Tr. 136, line 13-Tr. 138, line 13.) Victim testified that a couple of days later he told the police what really happened. (Tr. 139, lines 16-23.) He testified he was so scared after telling police Appellant did it that he stayed inside for two weeks, fearing for his life. (Tr. 139, line 24-Tr. 140, line 7.)

On cross-examination, defense counsel questioned Victim regarding when he told police who assaulted and robbed him. (Tr. 154, line 25-Tr. 155, line 4.) Defense counsel asked several times whether Victim realized he could not get his mouth fixed unless he gave a statement. (Tr. 154, line 25-Tr. 155, line 4; Tr. 155, lines 16-18; Tr. 155, line 25-156, line 2.) Specifically, defense counsel asked, "Because of your recorded statement, you said to Sergeant Davis that it was only when you realize[d] that you couldn't get your mouth fix[ed] without giving a statement, that you decided to tell that it **might** have been Troy Hunter?" (Tr. 154, line 25-Tr. 155, line 4.) (emphasis added.)

Victim's mother, Debra Singleton, also testified. (Tr. 160, line17-Tr. 161, line 4.) As soon as Singleton began to tell how Victim ran into her house, defense counsel objected and the trial court excused the jury. (Tr. 162, lines 2-16.) At that time, Appellant objected to Singleton's testimony, arguing it was hearsay and an attempt to bolster Victim's credibility. (Tr. 162, line 21-Tr. 163, line 12.) The State argued defense counsel already put Victim's credibility at issue when defense counsel discussed Victim's criminal record and pending charges; counsel further challenged Victim's credibility when he tried to point out disparities in Victim's story and the various times he talked to the police. (Tr. 163, lines 14-20.) Additionally, the State argued Singleton's answers

regarding what Victim said happened were not being submitted for truthfulness and would fall outside hearsay. (Tr. 163, lines 20-25.) The State argued the testimony instead would be submitted to rebut defense counsel's attack on Victim's credibility by showing that Victim did indeed tell his mother about the crime and who committed it. (Tr. 164, lines 10-17.)

The trial court then asked why the testimony would not fall under a hearsay exception, such as present sense impression or excited utterance. (Tr. 164, lines 18-21.) Defense counsel argued the amount of time between the crime and the statement to his mother prevented it from falling under either exception. (Tr. 164, line 22-Tr. 165, line 5.) Defense counsel then argued:

> Again, I don't think it's an excited utterance. I think, you know, he didn't want to tell anybody what happened. I mean, he[] certainly wasn't excited about it. You know, I don't think it was just a knee jerk reaction that he walked in and said that. I mean, there's certainly no evidence that it is. He's already testified to that fact he went there and he told his mother that. I don't understand how it's fair for them to be able now to put the mother up and say the same thing, that's clearly an out of court statement by another witness, that's hearsay. And I don't believe it falls within an exception.

(Tr. 165, lines 10-21.) The trial court ruled the testimony was not hearsay because it was not "offered for the truth of the matter asserted, but simply pursuant to the victim's credibility being attacked here." (Tr. 168, lines 16-21.) It further determined that even if the testimony were hearsay, the mere fact that it was made sometime after the incident occurred did not mean it could not qualify as an excited utterance provided the circumstances surrounding the statement indicated its reliability pursuant to State v.

Whisonant.[1] (Tr. 168, line 22-Tr. 169, line 3.) Thus, the trial court allowed Singleton to testify regarding Victim's statement to her about the crime and who committed it. (Tr. 169, lines 3-8.)

Singleton then testified Victim came into her house, calling out to her. (Tr. 170, lines 14-16.) She said she saw blood everywhere, "just pouring," and asked him what happened. (Tr. 170, lines 16-21.) She testified, "He say momma that boy hit me. I say what boy. He say [Appellant] hit me in my mouth with a gun." (Tr. 170, lines 18-19.) Singleton went with Victim to the emergency room and told Victim he needed to tell what happened. (Tr. 172, lines 5-19.) She recalled he was kind of scared to say anything because he knew Appellant carried a gun and was afraid Appellant could kill him. (Tr. 173, lines 6-14.) She testified she sensed he might still have been scared even after he told police because he stayed at her house for about two weeks. (Tr. 173, lines 19-24.)

Investigator Lee Davis of the Florence Police Department testified he got involved in the case when Victim called Victim Services and was told he had to cooperate to receive services. (Tr. 181, lines 14-25.) Davis testified Victim reported Appellant assaulted him. (Tr. 181, line 25-Tr. 182, line 2.) Davis took a recorded statement from Victim, and Victim Services took photographs of his injuries. (Tr. 182, lines 14-20.) The photographs were admitted without objection. (Tr. 183, lines 5-25.)

Next, the State called Dr. James M. Lawhan, an oral and maxillofacial surgeon, to testify regarding Victim's injuries. (Tr. 220, lines 4-23.) The trial court qualified him as an expert in the field of dentistry and facial trauma without objection. (Tr. 222, line 22-Tr. 223, line 15.) Dr. Lawhan testified he saw Victim on December 1, 2011, for an evaluation of trauma to his face. (Tr. 224, lines 1-2.) He found one bottom tooth that

[1] 335 S.C. 148, 515 S.E.2d 768 (Ct. App. 1999).

was fractured, two adjacent missing teeth to the right of that, and two fractured teeth on the top. (Tr. 231, 14-24.) He also noted swelling of the upper and lower lips. (Tr. 233, lines 13-16.) Dr. Lawhan testified that between the swelling, the fresh blood clots he observed where the teeth had been knocked out, and the clean edges of the fractured teeth, he could tell the injuries were recent. (Tr. 233, lines 3-20.) When asked whether the injuries were consistent with a closed fist punch, Dr. Lawhan testified he believed it when Victim told him he was hit with a gun, due to the mechanism of the injury. (Tr. 235, lines 15-19.) He testified the injuries would be consistent with a gun butt. (Tr. 236, lines 8-10.)

Ultimately, the jury found Appellant guilty of both charges, and Judge Brown sentenced him to three years' imprisonment for the second-degree assault and battery charge and thirty years' imprisonment for the armed robbery charge, to be served concurrently. (Tr. 303, 311-12.)

ARGUMENT

The trial court properly admitted a statement made by the victim to his mother identifying Appellant as the person who assaulted him because it was not hearsay, but even if it was, the statement fell under the excited utterance exception to the hearsay rule.

Appellant argues the trial court erred in admitting a statement made by Victim to his mother identifying Appellant as the person who assaulted him. Specifically, he argues the statement was hearsay, did not meet any of the hearsay exceptions, and was unduly prejudicial and cumulative. To the contrary, the State submits the statement was not hearsay because it was not admitted to prove the truth of the matter asserted but rather was admitted to counter the attack on Victim's credibility the defense had launched. However, even if it was hearsay, it clearly fit into the excited utterance exception. Furthermore, it was not unduly prejudicial and cumulative. Thus, the trial court did not err in admitting the statement and should not be reversed.

"The general rule in this State is that the conduct of a criminal trial is left largely to the sound discretion of the presiding judge and this Court will not interfere unless it clearly appears that the rights of the complaining party were abused or prejudiced in some way." State v. Commander, 396 S.C. 254, 262, 721 S.E.2d 413, 417 (2011) (citation and quotation marks omitted). "Therefore, in criminal cases, this Court will only review errors of law." Id. "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. Stahlnecker, 386 S.C. 609, 617, 690 S.E.2d 565, 569 (2010) (citation and quotation marks omitted).

"'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. One of the "Statements Which Are Not Hearsay" pursuant to Rule 801(d), SCRE, is a "Prior Statement by Witness." Rule 801(d)(1), SCRE.

> A statement is not hearsay if—The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive; provided, however, the statement must have been made before the alleged fabrication, or before the alleged improper influence or motive arose . . . .

Rule 801(d)(1)(B), SCRE. For a prior consistent statement to be admissible pursuant to Rule 801(d)(1)(B), the following elements must be present:

> (1) the declarant must testify and be subject to cross-examination, (2) the opposing party must have explicitly or implicitly accused the declarant of recently fabricating the statement or of acting under an improper influence or motive, (3) the statement must be consistent with the declarant's testimony, and (4) the statement must have been made prior to the alleged fabrication, or prior to the existence of the alleged improper influence or motive.

State v. Winkler, 388 S.C. 574, 583, 698 S.E.2d 596, 601 (2010) (citation omitted).

"A court must consider the totality of the circumstances in determining whether a statement falls within the excited utterance exception." Stahlnecker, 386 S.C. at 623, 690 S.E.2d at 573. "The passage of time between the startling event and the statement is one factor to consider, but it is not the dispositive factor." Id. "Other factors useful in determining whether a statement qualifies as an excited utterance include the declarant's demeanor, the declarant's age, and the severity of the startling event." Id.

> Three elements must be met 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.

Hearsay

Appellant first argues Singleton's statement at trial was hearsay because it was being offered to prove the truth of the matter asserted. To the contrary, the statement was offered as a rebuttal to defense counsel's attack on Victim's credibility. Not only did defense counsel discuss Victim's pending charges and criminal record, he also pointed out disparities in Victim's story and the various times he talked to police. The State submitted the statement to corroborate Victim's own testimony that he said the statement.

Additionally, defense counsel implied a charge of fabrication when he questioned Victim about only telling police about Appellant after Victim realized he could not get his mouth fixed unless he gave a statement. (Tr. 154, line 25-Tr. 155, line 4; Tr. 155, lines 16-18; Tr. 155, line 25-156, line 2.) At that point, the State had the right to use Victim's statement to his mother to show he made the statement prior to any motive to fabricate. Rule 801(d)(1)(B), SCRE; State v. Winkler.

> The rationale for this rule is if the attacker has charged bias, interest, corrupt influence, contrivance to falsify, or want of capacity to observe or remember, the applicable principle is that the prior consistent statement has no relevancy to refute the charge unless the consistent statement was made *before* the source of the bias, interest, influence or incapacity originated.

State v. Fulton, 333 S.C. 359, 374, 509 S.E.2d 819, 826-27 (Ct. App. 1998) (citation and internal quotation marks omitted).

Here, the prior statement (which in this case was Victim's statement to his mother naming Appellant as his attacker) is consistent with Victim's testimony at trial and was made prior to the alleged improper motive (which in this case was defense counsel's theory that Victim only reported his attacker to police so that he could receive monetary

assistance from Victim Services); thus, the prior statement was used to rebut the charge of fabrication. If the statement is made prior to any motive to fabricate, and is consistent with testimony at trial, then it can be admitted under these limitations. Thus, the statement Victim made to his mother prior to finding out he had to cooperate in order to receive assistance meets the requirements of Rule 801(d)(1)(B), SCRE, and falls outside the definition of hearsay. Therefore, it was properly admitted.

Excited Utterance

If this Court determines the statement was hearsay, it was nonetheless properly admitted under the excited utterance exception to the hearsay rule.

> Rule 803(2), SCRE, provides for an "excited utterance" exception to the hearsay rule. The exception provides "[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" is not excluded by the hearsay rule even though the declarant is available as a witness. The rationale behind the excited utterance exception to the hearsay rule is that the startling event suspends the declarant's process of reflective thought and, consequently, reduces the likelihood of fabrication. The mere fact that a statement was made some time after the incident occurred does not mean the statement cannot qualify as an excited utterance, provided the circumstances surrounding the statement indicate its reliability.

State v. Whisonant, 335 S.C. 148, 155, 515 S.E.2d 768, 772 (Ct. App. 1999) (citations omitted).

Appellant's arguments as to why this statement does not fit the excited utterance exception are as follows: (1) there was no evidence Victim was excited when he made the statement; (2) the statement was not spontaneous; (3) the evidence showed Victim was extremely hesitant about revealing the attacker's identity; and (4) a considerable

amount of time had passed between the event and the statement. The State will address each argument in turn.

(1) Evidence Victim was Excited

As the Supreme Court pointed out in State v. Sims, being "excited" in the context of the excited utterance exception does not mean acting "animated." 348 S.C. 16, 558 S.E.2d 518 (2002).

> Regarding the son's demeanor, when the neighbor found the son, he could not be consoled and continued to cry. Police arrived soon thereafter. When Officer Thomas interacted with the son, his behavior was withdrawn and automatic, and he answered her questions in a vague manner. Officer Thomas also testified the son held his head down while answering questions. **While the son was not crying or acting "excited" in the sense of being animated when he made the statement, we believe his demeanor can also be characteristic of someone who is under the "stress of excitement."**

Id. at 22, 558 S.E.2d at 521-22 (emphasis added). Evidence existed in the form of Singleton's testimony, prior to defense counsel's objection to what she was going to say, that Victim came running into her house calling out for her. Running into his mother's house, calling out for her, can reasonably be seen to indicate excitement. But even if there were no evidence of "excitement" on the part of Victim, the requirement is that when the statement was made, the declarant was "under the stress of excitement caused by the event or condition." Victim testified as soon as he saw Appellant leave the scene, he went straight to his mother's house form the location where he was beaten and robbed. Clearly he was still under the stress caused by the event.

(2) Spontaneity of Statement

In State v. Ladner, the victim's caretaker noticed blood on some toilet paper and asked her what happened, at which time the victim named the person who sexually

assaulted her. 373 S.C. 103, 109, 644 S.E.2d 684, 687 (2007). In State v. Kromah, 401 S.C. 340, 356, 737 S.E.2d 490, 498 (2013), the statement was made in response to an investigative interview. And in Sims, 348 S.C. at 22-23, 558 S.E.2d at 522, the Supreme Court made clear that "even statements in response to an officer's questioning can be an excited utterance because the statements still have spontaneity . . . ."

> The statement, to be admissible, must be spontaneous and not the product of thought and consideration. Nevertheless, it can be argued that a statement made in response to a question does not necessarily lack spontaneity, especially where the declarant is a child, or where the questioner merely asked open–ended questions, such as "what happened?"

Jay M. Ziller, Annotation, *When is hearsay statement "excited utterance" admissible under Rule 803(2) of Federal Rules of Evidence*, 155 A.L.R. Fed. 583 (2011). According to Victim's testimony, he walked into his mother's house and told her what happened. According to Singleton, she saw blood "just pouring" and asked Victim what happened and he told her. Whether Victim spontaneously made the statement or made it after being asked what happened, it still fits the requirements of an excited utterance.

(3) Hesitancy to Reveal Attacker's Identity

Victim's testimony that he was hesitant to reveal the attacker's identity to police has no bearing on his statement to his mother, where he did immediately reveal Appellant as the attacker. Additionally, both Victim and Singleton explained the reason Victim was hesitant to name Appellant as the attacker was because he was afraid of retaliation. Appellant argues in his brief, "he didn't want to tell anybody what happened . . . he certainly wasn't excited about it." (App. Br. 13.) However, Victim's level of excitement when talking to the police is not relevant to his state at the time he told his mother who attacked him, and that time is the only one of concern in the trial court's evaluation of

whether the statement fits into the excited utterance exception. At the time he ran into his mother's home, calling for her, and told his mother what happened and who had done it, he had no time to reflect and decide what he would say. By the time he talked to the police, however, he had had time for reflective thought and consideration and decided not to tell what really happened because he was afraid of retaliation by Appellant. See Whisonant, 335 S.C. at 155, 515 S.E.2d at 772 ("The rationale behind the excited utterance exception to the hearsay rule is that the startling event suspends the declarant's process of reflective thought and, consequently, reduces the likelihood of fabrication. ").

(4) Time Between Event and Statement

In Kromah, our Supreme Court found testimony was admissible as an excited utterance despite the fact that the investigator did not speak to the child victim until after he was out of surgery. 401 S.C. at 356, 737 S.E.2d at 498. The Court found he was still under the influence of the traumatic events. In Sims, the Supreme Court found testimony admissible as an excited utterance despite the passage of twelve hours since the attack, pointing out that time is just one factor to consider, along with the declarant's demeanor and the severity of the startling event. 348 S.C. at 21-22, 558 S.E.2d at 521. In Ladner, the victim returned to her caretaker's house and sang some karaoke songs before her caretaker noticed blood on the victim's toilet paper and asked her what happened, at which time the victim named the person who sexually assaulted her. 373 S.C. at 109, 644 S.E.2d at 687.

Here, Victim testified he walked directly from the scene of the crime to his mother's house and told her what happened and who had done it. Victim testified the crime occurred shortly after 2:00 p.m., and Singleton testified Victim arrived at her home between 2:00 and 3:00 p.m. (Tr. 130, lines 19-23; Tr. 174, line 17-Tr. 175, line 3.) "The

rationale behind the excited utterance exception is that the startling event suspends the declarant's process of reflective thought, reducing the likelihood of fabrication." Sims, 348 S.C. at 20-21, 558 S.E.2d at 521. Nothing occurred between the time of the assault and the time of the statement that would have indicated Victim took time for reflective thought. This was a very different situation from the one in State v. Whisonant, 335 S.C. 148, 515 S.E.2d 768 (Ct. App. 1999), in which this Court found the statement inadmissible because there was a period of nine hours between the event and the statement; the victim had the opportunity to speak to a friend and the friend's mother but did not; and instead of going to her nearby father's house, she went to sleep and did not tell anyone until the next morning.

In State v. Burroughs, 328 S.C. 489, 492 S.E.2d 408 (Ct. App. 1997), this Court determined the statements made by the victim did not qualify under the excited utterance exception.

> The rationale for the [excited utterance] exception lies in the special reliability accorded to a statement uttered in spontaneous excitement which suspends the declarant's powers of reflection and fabrication. Thus, the mere fact that a statement was made some time after the incident occurred does not mean the statement cannot qualify as an excited utterance, provided that the circumstances surrounding the statement indicate its reliability.

Id. at 499, 492 S.E.2d at 413. In Burroughs, this Court based its decision on the fact that the statements were made ten hours after the incident, the victim talked to no one about the attack immediately after it occurred, and the victim's own testimony indicated she composed herself after the attack and determined exactly what she would tell her husband about what happened. Id. at 500-01, 492 S.E.2d at 413-14.

Here, not only was the statement made immediately after the crime occurred, but nothing in the record indicates Victim had an opportunity to tell anyone else, as he went directly to his mother's house. Also, nothing in Victim's testimony indicated he took any time to compose himself and decide what he would tell his mother when he arrived at her house. Thus, the factors that led this Court in Burroughs to determine that the victim's statements could not be considered spontaneous but rather were the product of reflective thought were not present in the instant case.

Appellant also points out that in Burroughs and Whisonant, this Court held the testimony of the statements by the victims improperly bolstered the victims' testimony. However, both cases are very different from the case at hand. Both were sexual assault cases, in which specific rules limit corroborative testimony to time and place of the assault. In Burroughs, the statement by one victim that the appellant had asked her for a hug corroborated two other victims' testimony that the assault began with a hug request. The circumstances of that case can be distinguished from the present case because here, there is only one victim instead of four victims whose stories are being compared to see if the manner of the assault was the same in each victim's case. Here, one victim testified to what he did following the assault, and his mother testified to his arrival at her house immediately following the incident to tell her who assaulted him. In Whisonant, the facts are more similar to the case at hand because the victim's stepmother testified to what the victim told her happened. However, this Court found error in Whisonant due to the fact that the stepmother's account of what victim told her went beyond time and place. Again, this limitation is specific to sexual assault and does not pertain to the present case where the crimes were armed robbery and assault and battery.

Finally, Appellant argues the statement Victim made to Singleton was unduly prejudicial and cumulative. Appellant cites Jolly v. State, 314 S.C. 17, 443 S.E.2d 566 (1994), for the proposition that improper corroboration testimony that is merely cumulative to the victim's testimony cannot be harmless.[2] Jolly was another case that involved criminal sexual conduct, in which the rules limit corroboration testimony to time and place. In Jolly, the statement did not fit under the excited utterance or any other hearsay exception, which is what made it improper corroboration testimony. Here, the testimony was not improper corroboration testimony; rather, the testimony from Singleton countered defense counsel's attack on Victim's credibility. The quoted portion of Jolly Appellant cites actually comes from State v. Barrett, 299 S.C. 485, 386 S.E.2d 242 (1989), another criminal sexual conduct case. Barrett makes clear that the devastating impact of the corroboration testimony was based on the witness's extensive details of the sexual abuse beyond time and place. Furthermore, the victim in Barrett had not even testified yet, so credibility was not an issue as it was here. Accordingly, Appellant's reliance on Jolly and Barrett is misplaced in a situation that does not involve criminal sexual conduct and where the testimony clearly fit into a hearsay exception.

Appellant argues the testimony was unduly prejudicial because it went to the very core of what the state was trying to prove. To the contrary, the testimony was made in response to defense counsel's attack on Victim's credibility and was not admitted for the truth of the matter asserted. Singleton's testimony was not used to prove Appellant was

[2] It is worth noting that the dissent and concurrences in State v. Jennings, 394 S.C. 473, 482, 716 S.E.2d 91, 95-96 (2011), called into question the "apparent categorical rule emanating from Jolly v. State and its progeny . . . ." The dissent pointed out Jolly's creation of "a rule of per se prejudice when testimony is cumulative to the victim's testimony . . . is contrary to the traditional analysis of improperly admitted hearsay testimony, which requires a finding of prejudice." Id. at 483, 716 S.E.2d at 96.

the attacker; rather, her testimony supported Victim's account of what he did immediately following the attack. The argument Appellant makes that Singleton's statement tipped the jury in favor of a conviction while it was "on the fence" between whether to acquit or convict is without merit. The trial judge has a duty to urge the jury to reach a verdict, so long as he does not coerce them. "The typical judicial mechanism for encouraging an indecisive jury is the Allen charge, in which jurors are instructed on, among other things, their duties to approach the evidence with an open mind and consider the opinions of their fellow jurors." State v. Robinson, 360 S.C. 187, 193, 600 S.E.2d 100, 103 (Ct. App. 2004). Giving an Allen charge is an acceptable way to encourage the jury to make its decision and in no way indicates unfair prejudice of the evidence.

In sum, Singleton's testimony regarding Victim's running into her house immediately following the incident and telling her what happened and who did it is not hearsay because it was not offered to prove the truth of the matter asserted. Rather, it was offered to rebut defense counsel's attack on Victim's credibility and to rebut defense counsel's implied charge of fabrication pursuant to Rule 801(d)(1)(B). However, if this Court finds it is hearsay, the evidence still is admissible because it fits firmly under the excited utterance exception as it meets all the elements: (1) the statement related to the startling event or condition of being assaulted and battered with a gun and being robbed at gunpoint; (2) the statement was made while Victim was under the stress of excitement because he went straight to his mother's house following the incident, ran into the house, and was still bleeding profusely and carrying his teeth (Tr. 176, lines 10-11); and (3) the stress of excitement was caused by the startling event or condition, which was the act of being hit in the mouth with a gun hard enough to knock Victim's teeth out and having shots fired right past his head while being robbed. State v. Stahlnecker, 386 S.C. 609,

623, 690 S.E.2d 565, 573 (2010). The trial court properly admitted the testimony and this Court should affirm its ruling.

CONCLUSION

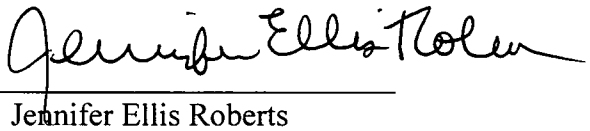
For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

JENNIFER ELLIS ROBERTS
Assistant Attorney General

E.L. Clements, III
Solicitor, Twelfth Judicial Circuit

BY: 
Jennifer Ellis Roberts
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ATTORNEYS FOR RESPONDENT

March 27, 2014

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Florence County
The Honorable D. Craig Brown, Circuit Court Judge

Appellate Case No. 2013-000227

THE STATE,

Respondent,

v.

TROY HUNTER,

Appellant.

DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL

In addition to the matter designated by Appellant, Respondent proposes the following to be included in the Record on Appeal:

Tr. p. 7.

To facilitate the preparation of the Final Brief, Respondent requests that counsel for Appellant retain the page numbers of the trial transcript in the Record on Appeal, in addition to the new page numbers.

The undersigned hereby certifies this Designation contains no matter which is irrelevant to this appeal.

ALAN WILSON
Attorney General

JENNIFER ELLIS ROBERTS
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E.L. Clements, III
Solicitor, Twelfth Judicial Circuit

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ATTORNEYS FOR RESPONDENT

March 27, 2014

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Florence County
The Honorable D. Craig Brown, Circuit Court Judge

Appellate Case No. 2013-000227

THE STATE,

Respondent,

v.

TROY HUNTER,

Appellant.

PROOF OF SERVICE

I, Angela Bennett, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Lara M. Caudy, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served. This 27th day of March, 2014.

ANGELA BENNETT
Legal Assistant

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Columbia, SC 29211
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ALAN WILSON
ATTORNEY GENERAL

March 27, 2014

Lara M. Caudy, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

RE: State v. Troy Hunter
Appellate Case No. 2013-000227

Dear Ms. Caudy:

I am enclosing two (2) copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

Jennifer Ellis Roberts
Assistant Attorney General
Bar # 79818

JER/ab
Enclosures

cc: Honorable Jenny A. Kitchings
(original enclosed)
Victim Services