ORIGINAL

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Kershaw County
Deandrea G. Benjamin, Circuit Court Judge

THE STATE,

Respondent,

v.

WILLIE THOMAS STARNES,

Appellant.

Appellate Case No. 2014-002652

FINAL BRIEF OF RESPONDENT

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SC Court of Appeals

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

I. Did the trial court err in admitting hearsay statements of the victim pursuant to the excited utterance exception to the hearsay rule?

II. Did the trial court err in admitting hearsay statements of the victim pursuant to the dying declaration exception to the hearsay rule?

RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON APPEAL

I. The trial court did not abuse its discretion in admitting statements made by the victim to William Pate pursuant to the excited utterance exception to the hearsay rule where the statements were made following the startling event of being run over by a vehicle, while the victim was under the stress of excitement caused by the event, and the court examined the totality of the circumstances prior to admitting the statements; regardless, any alleged error is harmless as the record demonstrates the admission could not have affected the jury's guilty verdict.

II. The trial court did not abuse its discretion in admitting statements made by the victim to Martha Pate pursuant to both the excited utterance and dying declaration exceptions to the hearsay rule where the statements were made while the victim was under the stress of being run over by a vehicle, and where the victim's belief in the imminence of death could be inferred from the facts and circumstances surrounding the declaration; regardless, any alleged error is harmless beyond a reasonable doubt as the record demonstrates the admission could not have affected the jury's guilty verdict.

STATEMENT OF THE CASE

A Kershaw County Grand Jury indicted appellant, Willie T. Starnes, for murder and armed robbery. (R.pp.246-49). Appellant proceeded to a jury trial on August 25, 2014 and was represented by Jason D. Kirincich, Esquire. (R.p.1). Brett A. Perry, Esquire, Curtis A. Pauling, III, Esquire, and Curtis R. Hutchinson, Esquire, of the Fifth Circuit Solicitor's Office represented the State. (R.p.1).

The jury found appellant guilty of both charges on August 28, 2014. (R.p.244, lines 5-13). The Honorable Deandrea G. Benjamin sentenced appellant to two concurrent terms of life without the possibility of parole, one for murder and one for armed robbery. (R.p.245, lines 18-24).

This appeal follows.

STATEMENT OF FACTS

A dying man lying on the side of the road, struggling to speak over the pain, tells family members that someone meant to harm him. (R.p.36, line 24-p.37, line 4). A driver hit him and knocked him off his moped. (R.p.36, lines 10-13). But it was the driver's final act that killed Alan Robinson. The driver turned around, drove back, and ran over Robinson, crushing him. (R.p.36, lines 16-23; p.170, lines 16-19; p.184, lines 4-13; p.185, lines 2-5; p.186, lines 10-12).

At trial, the State presented evidence that appellant intentionally hit Alan Robinson with his SUV, stole Robinson's moped, and ran over him. Robinson died in the hospital from his injuries. (R.p.177, lines 9-14). William Pate, Robinson's nephew, testified he and his wife were leaving their home in Bethune on the evening of August 24, 2013 when they saw something lying on the side of Freeman Road but could not determine what it was.[1] (R.p.30, line 25-p.31, line 13). As they drove closer, Pate realized it was his uncle and they stopped and jumped out of the car. (R.p.31, lines 14-15). Robinson was lying with his head on an embankment and his feet facing the middle of the street. (R.p.33, lines 12-23). Pate testified his uncle was upset and agitated, was moaning and crying and saying, "God help me." (R.p.36, line 24-p.37, line 1). Pate stated Robinson was "screaming in pain," incapable of much movement, and could not stand up. (R.p.37, lines 2-6). Robinson told Pate someone bumped his moped, got out of their vehicle, hit him in the face, and knocked him off the moped. (R.p.36, lines 14-18). The person then stole the moped and loaded it into the vehicle. (R.p.38, lines 6-8). Robinson told Pate the person got back in the vehicle, drove down the street, turned around, and drove back to run Robinson over. (R.p.36, lines 18-23, p.37, line 25-p.38, line 2). Robinson described the vehicle as similar to a neighbor's dark blue Chevrolet Tahoe. (R.p.50, lines 2-8; p.50, lines 16-17). Pate

[1] The victim lived on the Pates' property. (R.p.30, lines 19-22).

noted it was Robinson's habit, while riding his moped, to pull over to the side of the road if a vehicle came up behind him and let the other vehicle pass by.[2] (R.p.38, lines 9-21).

Martha Pate (Martha), William Pate's wife, testified when they first spotted Robinson on the side of the road, he was holding his stomach and kept yelling, "Help me!" and "I'm in pain!" (R.p.58, lines 2-10; p.58, line 25-p.59, line 8). Martha testified Robinson was normally a calm man, who did not "say a lot," so she knew he was in a lot of pain by the way he was yelling and holding himself. (R.p.59, lines 14-18). Similar to her husband's testimony, Martha stated Robinson told them someone took his moped and then ran him over. (R.p.60, lines 1-6; p.62, lines 13-19). Specifically, Robinson believed two people took the moped, and put it in the back of a vehicle the same dark color as a neighbor's. (R.p.61, line 14-p.62, line 4). Martha called 911 and testified when law enforcement arrived, she and her husband told them what Robinson said had happened to him. (R.p.64, lines 8-24; p.66, line 21). Martha noted that she and her husband were the only people to talk to Robinson before the ambulance and paramedics arrived. (R.p.67, lines 5-7).

Paramedic Michelle Marble testified Robinson was conscious when they arrived, and told them he had been hit by a vehicle. (R.p.79, lines 4-9; p.80, line 21-p.81, line 3; p.82, lines 13-15). Robinson was showing signs of shock, including "very, very low" blood pressure and Marble rechecked it to make sure her data was correct. (R.p.83, lines 8-14; p.84, lines 7-12). Marble explained, "[W]henever you get something that is that extreme off the norms, you always do a doublecheck." (R.p.84, lines 13-14). Further, Robinson was "panicky" and exhibited a cold, clammy sweat which demonstrated his body "wasn't compensating as it had been before." (R.p.84, lines 15-25). Marble testified they got Robinson in the ambulance and headed toward

[2] Pate's wife confirmed Robinson was "very, very careful" on the moped. (R.p.63, lines 2-7; p.68, line 23-p.69, line 7).

Kershaw Health, the closest hospital. (R.p.86, lines 8-16). However, Robinson's blood pressure continued to drop and his symptoms deteriorated, so Marble received permission to fly Robinson to the closest major trauma center, which was in Richland County. (R.p.86, line 17-p.87, line 5). Marble testified she suspected a possible hip or pelvic fracture "which can bleed intensely." (R.p.87, lines 13-25).

An orthopedic physician examined Robinson and testified he had a shattered pelvis—the bone was broken in the front, back, and both sides. (R.p.155, lines 14-15; p.161, lines 4-10; p.166, line 18-p.168, line 4). The doctor stated the injury indicated Robinson endured "trauma to both sides of the pelvis or some sort of a crush injury." (R.p.170, lines 14-19). Robinson also had a broken ankle, fractured collarbone, multiple tears in his small and large bowel, as well as "significant areas of blood vessels that were bleeding." (R.p.166, lines 1-5; p.171, lines 2-5; p.172, lines 22-25). The autopsy revealed multiple rib fractures, a hemorrhage in Robinson's abdominal cavity, and injuries to some of the major arteries near his pelvis. (R.p.184, lines 4-24). The pathologist who performed the autopsy testified she could "feel the shards of broken bone" in the pelvis area and stated Robinson suffered "very severe traumatic injuries." (R.p.185, lines 2-8). The doctor determined Robinson's cause of death to be "blunt force injuries" consistent with being hit by a vehicle, and categorized the manner of death as homicide. (R.p.186, lines 4-16).

Investigators with both the highway patrol and Kershaw County Sheriff's Office worked the case at first, because they were not sure if the incident was an accident or an intentional act. (R.p.97, line 18-p.98, line 3). However, once investigators observed the scene, spoke with the family members and with appellant's wife, they determined someone intended to harm Alan Robinson and steal his moped. (R.p.92, line 13-p.93, line 1; p.98, lines 4-14). At the scene,

investigators "could clearly see where something had been disturbed, the dirt was kicked up."[3] (R.p.93, lines 2-6). Moreover, by following the tire tracks, they could see where a vehicle drove up the road, executed a three or four-point turn, and drove back down the road. (R.p.94, lines 15-24; p.100, line 21-p.101, line 14). Investigators testified their observations of the scene matched what Robinson told family members had happened. (R.p.95, line 17-p.96, line 17).

On August 26, 2013, investigators received a tip that someone who worked at a poultry processing plant in Bethune had information about the deadly incident. (R.p.138, lines 1-8; p.149, line 21-p.150, line 2). When they arrived at the plant, they spoke with Patricia Starnes (Patricia), appellant's wife. (R.p.113, lines 9-15). Patricia told investigators appellant was involved in the crash and showed them her black Chevrolet Tahoe, which was parked outside the plant. (R.p.138, line 16-p.139, line 9). Investigators found damage to the Tahoe's front bumper and the defense stipulated at trial that paint found on the bumper was consistent with paint from the victim's moped. (R.p.124, lines 1-22; p.138, lines 23-25). Patricia testified her husband "was doing drugs" and "acting crazy" around the time of the incident. (R.p.114, lines 17-23). Appellant took off in Patricia's Tahoe the day before the incident and, when he returned, he kept mumbling, "What are you going to do?" and told Patricia that "he had done something bad." (R.p.115, lines 4-25). Patricia told investigators appellant admitted he hit someone on a moped. (R.p.117, lines 2-16). She also gave investigators an identification card that belonged to appellant, which had his picture on it. (R.p.139, line 25-p.140, line 4).

After leaving the plant, investigators went back to the scene to examine it and to talk to the victim's family members, and saw appellant walking down the road. (R.p.141, lines 2-p.142, line 5). The lead investigator told appellant he was a person of interest in the case, read him his

[3] Freeman Road, where the incident occurred, was a dirt road. (R.p.69, lines 8-9).

rights, and appellant subsequently admitted he hit Alan Robinson.[4] (R.p.142, lines 18-21; p.202, lines 17-23; p.204, line 6-p.205, line 5). Appellant was taken into custody, and taken to the sheriff's office where he gave two additional statements to investigators in which he admitted his involvement in the incident.[5] (R.p.205, lines 6-10; p.207, lines 7-10; p.217, line 12-p.219, line 9; p.229, line 18-p.230, line 3).

After his arrest, appellant was placed in a holding cell with John Hunter. (R.p.129, line 22-p.130, line 8). Hunter testified appellant was "laughing and giggling." (R.p.130, lines 9-12). Appellant told Hunter, "Well, ain't you heard? I'm a celebrity inmate" and told Hunter he was charged with murder. (R.p.130, lines 12-18). Appellant told Hunter what happened on the night he killed Alan Robinson:

> [Appellant] told me how he was riding down the road. He was about half drunk, or whatever. He had been drinking a little bit. He was riding down the road. He seen the guy riding a moped and he thought it was a easy—a easy lick, or quick lick, or something the way he said it was like that.
>
> And he said he pulled up beside him, he bumped into—bumped him, run him off into the ditch. He said he didn't try to hit him too hard because he didn't want to mess up the moped.
>
> He said that when he seen the moped he knew it would be a quick

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[4] Appellant gave conflicting information at various times to investigators, at first claiming someone else was with him, but it was later determined that appellant acted alone. (R.p.219, line 22-p.220, line 1; p.242, lines 2-15).

[5] During one of the interviews, appellant told investigators where he sold the stolen moped, which was found to have damage consistent with that found on the Tahoe. (R.p.221, lines 2-13). Robert Danzy testified appellant tried to sell the moped to him for $100; however, he did not want it and a friend bought it instead. (R.p.103, lines 12-20). Danzy explained, "[I]t seemed like [the moped] was mighty hot," and appellant seemed "nervous about it" and wanted to "get rid of it fast." (R.p.104, lines 7-14; p.105, line 24-p.106, line 4). Jerry Crawford helped his nephew purchase the moped and testified, when he spoke to appellant, he told appellant the moped looked "mighty good" and asked him, "You sure it is not stolen?" (R.p.108, line 16-p.109, line 2). Appellant told Crawford the moped was not stolen and that he wanted to sell it because it did not "run" very well. (R.p.109, lines 3-10; p.111, lines 1-5).

> fix or a quick lick, or something like that. He said he stopped, he loaded up the moped.
>
> . . .
>
> And—but he just made it out like it was just all fun and games, like it was just a big joke, you know.

(R.p.131, lines 3-17; p.132, lines 8-10).

Investigators obtained warrants and charged appellant with murder after his first interview, in which he eventually confessed that he was the only one involved in the incident. (R.p.152, lines 18-25; p.238, line 9-p.239, line 12; p.240, lines 6-11). A Kershaw County Grand Jury subsequently indicted appellant for murder and armed robbery. (R.pp.246-49).

ARGUMENT

I.

> The trial court did not abuse its discretion in admitting statements made by the victim to William Pate pursuant to the excited utterance exception to the hearsay rule where the statements were made following the startling event of being run over by a vehicle, while the victim was under the stress of excitement caused by the event, and the court examined the totality of the circumstances prior to admitting the statements; regardless, any alleged error is harmless as the record demonstrates the admission could not have affected the jury's guilty verdict.

Relevant Facts:

As referenced above in the Statement of Facts, the charges stemmed from the death of Alan Robinson on August 24, 2013. The State maintained appellant bumped Robinson's moped, knocked him off, stole the moped, and then ran Robinson over, causing severe and traumatic injuries, including a crushed pelvis, multiple broken bones, and injuries to major organs and arteries. (R.p.155; p.161; pp.166-168; pp.171-72; pp.184-85). The State presented evidence, testimony, and appellant's confessions to connect him to the deadly incident.

William Pate, the victim's nephew, testified to finding Robinson lying on the side of the road, upset and agitated. (R.p.30, line 25-p.31, line 15). The State asked:

> THE STATE: When you found [Robinson] laying there, what sort of condition was he in as far as, you know, how he appeared to you? Did he appear to be excited and, you know, in a state of agitation? Or tell me how he appeared in that sense. Not what he said, but just what he was doing. Was he screaming anything out?
>
> PATE: He was hollering, I'm hurting! God, help me!

(R.p.34, lines 2-9). Defense counsel objected to Pate's testimony as hearsay. (R.p.34, lines 10-11). The trial court sustained the objection and ordered the State to rephrase the question. (R.p.34, lines 16-18). The State then established Robinson's apparent state of mind:

> THE STATE: Did he appear to be excited and agitated?

PATE: Yes, sir.

THE STATE: All right. Did he tell you why he was excited and agitated?

PATE: He was crying.

THE STATE: Did he tell you, yes or no, did he tell you why he was agitated?

PATE: Yes, sir.

THE STATE: Okay. All right. Was he alone or was his moped there with him?

PATE: No, his moped wasn't there.

THE STATE: Okay. All right.

(R.p.34, line 20-p.35, line 6). The State told the court: "I think I've established that [Robinson] was in an agitated state, that his moped wasn't there, and that he was injured. I would offer it under the excited utterance. And I have established that, you know, he was saying, Oh, God! Dying declaration." (R.p.35, lines 7-12). Defense counsel argued the State failed to establish the statements qualified under the dying declaration exception to the hearsay rule, and renewed his objection to the admission of the statements under the excited utterance exception, asserting the State failed to establish Robinson was upset, excited, or in an agitated state. (R.p.35, lines 14-20). The court allowed the statements in under the excited utterance exception, but sustained defense counsel's objection as to the dying declaration exception. (R.p.36, lines 1-8).

As referenced in further detail above in the Statement of Facts, Pate continued to testify that his uncle was moaning and crying, screaming in pain, and saying "God help me." (R.pp.36-37). Robinson told Pate someone hit his moped, knocked him off, hit him in the face, and stole his moped. (R.p.36; p.38). Pate further testified that Robinson told him the person got back in the vehicle, drove down the street, turned around, and drove back to run Robinson over.

(R.pp.36-38).

Discussion:

Hearsay is defined as "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. Generally, hearsay is not admissible unless it falls within an exception. Rule 802, SCRE. Hearsay is admissible if it falls within the excited utterance exception, which allows statements "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.

There are three elements that must be met to find a statement qualifies as 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 or excitement; and, (3) the stress or excitement must be caused by the startling event. *State v. Ladner*, 373 S.C. 103, 116, 644 S.E.2d 684, 691 (2007). "[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." *Id.* at 119-20, 644 S.E.2d at 693; *see also State v. Sims*, 348 S.C. 16, 20, 558 S.E.2d 518, 521 (2002) (explaining 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").

The examination of the totality of the circumstances and determination of whether a statement falls within the excited utterance exception is left to the sound discretion of the trial court. *Ladner*, 373 S.C. at 116, 644 S.E.2d at 691. While the passage of time between the startling event and the statement is one factor to consider, it is not the dispositive factor. Even statements made after extended periods of time can be considered an excited utterance as long as

they were made under continuing stress. *Sims*, 348 S.C. at 21-22, 558 S.E.2d at 521. 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.* at 22, 558 S.E.2d at 521.

The improper admission of hearsay evidence is not necessarily reversible error, but is subject to a harmless error analysis. *State v. Graham*, 314 S.C. 383, 386, 444 S.E.2d 525, 527 (1994). Appellate courts must determine whether the error was harmless beyond a reasonable doubt. *Id.* Moreover, whether an error is harmless depends on the particular circumstances of the case. *Id.* The circumstances include, but are not limited to, the importance of the witness' testimony in the State's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination, and the overall strength of the State's case. *Id.* Error is only harmless "when it 'could not have reasonably affected the result at trial.'" *State v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (citation omitted).

Here, Alan Robinson's statement to his nephew satisfies the requirements for admission as an excited utterance. Robinson's statement related to the events leading up to a driver stealing his moped, turning around, and running him over. *See Ladner*, 373 S.C. at 116, 644 S.E.2d at 691 (discussing the three elements necessary to admit a statement as an excited utterance, including that the statement must relate to a startling event). Furthermore, the totality of the circumstances supports respondent's contention that Robinson was under the stress of the startling event of being run over. The State elicited testimony from William Pate to establish Robinson's stressed or agitated state. *See Ladner*, 373 S.C. at 116, 644 S.E.2d at 691 (noting the declarant must make the statement while under stress caused by the startling event). Pate

testified his uncle was upset and agitated, he was alone on the side of the road, and his moped was gone. (R.pp.34-35). Additionally, Pate's testimony about Robinson's inability to move, alternate moans and cries, screams of pain, and saying, "God help me," show Robinson was under the stress of excitement when he made his statements. (R.pp.36-37). Testimony from the first paramedic to treat Robinson further demonstrated his state of mind because he was showing significant signs of shock, including "very, very low" blood pressure, a cold, clammy sweat, and a panicked state. (R.pp.83-84). Evidence and testimony presented at trial supported the conclusion that the combination of the theft of his moped and being run over by a vehicle caused Robinson's stress. *See Sims*, 348 S.C. at 22, 558 S.E.2d at 521 (noting the declarant's demeanor and the severity of the startling event are factors a trial court should consider in determining whether a statement qualifies as an excited utterance). Accordingly, the record demonstrates the trial court carefully considered the totality of the circumstances and acted within its discretion to admit the victim's statement under the excited utterance exception.

Regardless, even if the Court were to find the trial court abused its broad scope of discretion, any alleged error is harmless beyond a reasonable doubt. *See Graham*, 314 S.C. at 386, 444 S.E.2d at 527 (holding admission of hearsay evidence is subject to harmless error analysis). William Pate's testimony was corroborated by and cumulative to that of multiple other witnesses and evidence. *See id.* (stating appellate courts will examine a host of factors to determine if the error was harmless, including the importance of the witness' testimony, whether the testimony was cumulative, and the presence of evidence corroborating the witness' testimony). Respondent submits it is unlikely admitting Robinson's statement to Pate unduly affected the jury's guilty verdict when an examination of the record shows the State also admitted and the jury considered: (1) multiple inculpatory statements from appellant in which he admitted

to participating in the deadly incident and gave details of the crime; (2) testimony from investigators who examined the scene, and interviewed appellant and family members; (3) testimony from appellant's wife who stated, without objection, that appellant told her he hit someone on a moped; (4) information about Robinson's severe and extensive injuries, which were consistent with being run over by a vehicle; (5) testimony from the men who talked to appellant about buying the victim's moped, who stated they thought it was stolen, in part, because appellant wanted to get rid of it fast and acted nervous; (6) testimony from a man who shared a cell with appellant who stated appellant told him what happened on the night Robinson died; and, (7) photographs of the damage to the Tahoe and the moped, as well as analysis of paint found on the Tahoe which was consistent with that on the moped. Accordingly, because admitting the victim's statement did not affect the verdict, any alleged error in admitting it was harmless beyond a reasonable doubt. *See Mitchell*, 286 S.C. at 573, 336 S.E.2d at 151 (holding an error admitting hearsay evidence is harmless when it could not have reasonably affected the result at trial).

II.

The trial court did not abuse its discretion in admitting statements made by the victim to Martha Pate pursuant to both the excited utterance and dying declaration exceptions to the hearsay rule where the statements were made while the victim was under the stress of being run over by a vehicle, and where the victim's belief in the imminence of death could be inferred from the facts and circumstances surrounding the declaration; regardless, any alleged error is harmless beyond a reasonable doubt as the record demonstrates the admission could not have affected the jury's guilty verdict.

Relevant Facts:

In his brief, appellant focuses the majority of this issue on the argument that the trial court erred in admitting Alan Robinson's statements to Martha Pate (Martha) as a dying declaration. As noted in appellant's brief, the court admitted the statements under both the excited utterance and dying declaration exceptions to the hearsay rule. Accordingly, respondent addresses both exceptions in turn, beginning with excited utterance.

Prior to trial, the State proffered the testimony of Martha, the wife of Robinson's nephew, in response to a pre-trial objection to her testimony as hearsay by defense counsel. (R.p.7, line 19-p.8, lines 2). The State wished to admit the statements as a dying declaration or excited utterance exception to the hearsay rule. (R.p.7, lines 21-25). Martha testified, after she and her husband stopped, she asked Robinson about his moped and he told her, "They took it." (R.p.9, line 11-p.10, line 4). Robinson could not get up off the ground, and he was screaming in pain, "Help me!" and "Oh, God, help me!" (R.p.10, lines 7-14). Robinson was holding his stomach and alternately grabbing both hips, stating they hurt. (R.p.10, lines 17-24). Martha testified she knew Robinson was in pain by the way he was yelling, because he was normally a quiet person. (R.p.11, lines 4-7). Robinson further told Martha someone stole his moped, drove down the road, turned around, and came back toward him. (R.p.11, lines 18-20). Robinson stated, as the driver got close to him, he sped up and ran him over. (R.p.11, lines 20-21; p.12, lines 4-6).

Martha confirmed Robinson was in great pain, could not get up, and was crying out for help. (R.p.12, lines 7-13). Martha testified she called 911, and while they waited for paramedics to arrive, Robinson continued to yell, "Help me!" and they told him the ambulance was on the way and that he could not get up. (R.p.13, lines 2-12).

At that time, the State indicated the circumstances surrounding the statements made by Robinson were such that it could be inferred he believed his death was imminent and fell within the dying declaration exception to the hearsay rule. (R.p.16, lines 13-23). Relying on case law, the State argued Robinson did not have to express in direct terms his awareness of his condition, and the nature of his injury and his critical condition supported the inference that Robinson was aware he was dying. (R.p.16, line 24-p.17, line 6). The State asserted it was common sense to think that someone who said he was run over by a vehicle and was lying on the ground crying out in "excruciating pain" would believe that death was or could be imminent. (R.p.17, lines 7-13). Moreover, the State emphasized the focus should be on Robinson's state of mind at the time he made the statements, as the declarant, and not that of the person who heard it. (R.p.17, lines 14-21). The State also argued the statements could be admitted under the excited utterance exception to the hearsay rule because the totality of the circumstances, including Robinson's demeanor, the severity of the startling event, and his injuries, indicated the statements were made while Robinson was in an excited and agitated state. (R.p.18, line 20-p.22, line 9).

Defense counsel argued the State failed its burden of proving the statements were "in any way" a dying declaration. (R.p.23, lines 15-17). Counsel asserted Martha Pate (Martha) had no idea what Robinson's thoughts were regarding his condition, she only knew that he was in pain and did not know details about his medical condition. (R.p.23, lines 18-25). Counsel maintained the State failed to show Robinson believed he was dying and his statements were, therefore,

unreliable. (R.p.24, lines 6-17). Defense counsel also argued the statements should not be admitted under the excited utterance exception because the timeline had not been established to determine how long Robinson had been lying in the road before he made his statements. (R.p.25, lines 20-24). Counsel maintained the statements were inadmissible hearsay, the State should not be allowed to use the information from Martha in its opening, and the State was required to build a better foundation at trial before using Martha's testimony about Robinson's statements. (R.p.26, lines 5-11).

The trial court found, after reviewing case law and the rules of evidence, that the statements could be admitted under both the dying declaration and excited utterance exceptions to the hearsay rule. (R.p.26, line 14-p.28, line 21).

At trial, the State laid the proper foundation to admit the statements during its direct examination of Martha Pate (Martha):

> MARTHA: [We questioned Robinson when w]e didn't see the moped. And we asked him, Where is your moped, Al? All this stuff is on the ground.
>
> And he said, They took it.
>
> THE STATE: Let's don't say what he told you just yet.
>
> MARTHA: Okay.
>
> THE STATE: I'm trying to sort of lay the groundwork for that. But at some point did he tell you about what had him so excited and upset and in pain?
>
> MARTHA: Yes, sir.
>
> THE STATE: He wasn't able to get up and walk around?
>
> MARTHA: No, sir.
>
> THE STATE: Ultimately did EMS come and transport him?

MARTHA: Yes, sir.

THE STATE: And ultimately did you find that Al had in fact died?

MARTHA: Yes, sir.

THE STATE: And during the time that you were there with him until EMS came to get him, did he remain in sort of an excited sort of agitated state during that time?

MARTHA: Yes, sir.

THE STATE: Your Honor, I'd offer the statements he made to them or to her under both the excited utterance and the dying declaration.

(R.p.60, line 1-p.61, line 4). The trial court admitted the statements. (R.p.61, lines 5-6). Defense counsel subsequently renewed his objection to the testimony as inadmissible hearsay, which the court overruled under both the dying declaration and excited utterance exceptions. (R.p.61, lines 8-12).

Martha continued to testify to substantially the same information she gave during the pre-trial proffer. Martha stated Robinson was holding his stomach and yelling, "Help me!" and "I'm in pain!" when she and her husband found him on the side of the road. (R.pp.58-59). Martha testified Robinson's demeanor was normally calm and he was usually a quiet man, so she knew he was in a lot of pain by the way he was yelling and holding himself. (R.p.59). Martha stated Robinson told them someone took his moped and then ran him over. (R.p.60; p.62). Specifically, Robinson believed two people took the moped and put it in the back of a vehicle the same dark color as a neighbor's. (R.pp.61-62).

Discussion:

Hearsay is defined as "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 it falls within an exception. Rule 802, SCRE. In addition to the excited utterance exception where the availability of a witness is immaterial, exceptions exist when a declarant is unavailable, such as when a person cannot testify because of death. Rule 803, SCRE; Rule 804(a)(4), SCRE. An exception to the hearsay rule exists in a prosecution for homicide, where "a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death," commonly known as a dying declaration. Rule 804(b)(2), SCRE.

A declarant is not required to express, in direct terms, his awareness of his condition for his statement to be admissible as a dying declaration. *State v. McHoney*, 344 S.C. 85, 93, 544 S.E.2d 30, 33 (2001). "The necessary state of mind can be inferred from the facts and circumstances surrounding the declaration." *Id.* The belief in imminent death may be demonstrated by the declarant's own statement or from circumstantial evidence, such as the nature of the wounds, the declarant's critical condition, or statements made in the declarant's presence. *Id.* at 93, 544 S.E.2d at 33-34 (citations omitted). Moreover, the length of time the declarant lives after making the dying declaration is immaterial. The focus is on the person's state of mind when the statement is made, not on the outcome of the injuries. *State v. Hall*, 134 S.C. 361, 361, 133 S.E. 24, 26 (1926). In *Hall*, the Supreme Court held it was up to the jury to pass on the credibility of the dying declaration, and the length of time between the declaration and death is only one factor to be considered. *Id.*

Here, Alan Robinson's statements to Martha Pate (Martha) satisfy the requirements for admission both as an excited utterance and a dying declaration. As argued by the State at trial and allowed by the trial court, Robinson's statements to Martha were admissible under the

excited utterance exception. As noted in Argument I, the statement related to the startling event of a driver stealing Robinson's moped and running him over. *See Ladner*, 373 S.C. at 116, 644 S.E.2d at 691 (discussing the elements necessary to admit a statement as an excited utterance, including that the statement must relate to a startling event). The totality of the circumstances demonstrates Robinson was under the stress of the startling event when Martha repeatedly testified Robinson was in an upset and agitated state, he was yelling in pain and asking for help, and kept holding his hips and stomach stating they hurt. (R.p.10, pp.12-13; pp.58-61); *see also Ladner*, 373 S.C. at 116, 644 S.E.2d at 691 (noting the declarant must make the statement while under stress caused by the startling event). Additionally, to establish Robinson's stressed and agitated state, Martha testified his usual demeanor had changed—he was normally calm and a quiet man, so Martha knew he was in a lot of pain by the way he was yelling—and a paramedic testified that Robinson's body was no longer compensating as it used to, as evidenced by signs of shock such as very low blood pressure and a cold, clammy sweat. (R.p.11; p.59; pp.83-84); *see also Sims*, 348 S.C. at 22, 558 S.E.2d at 521 (noting the declarant's demeanor and the severity of the startling event are factors a trial court should consider in determining whether a statement qualifies as an excited utterance). Accordingly, the record demonstrates the trial court carefully considered the totality of the circumstances and acted within its discretion to admit the victim's statement under the excited utterance exception.

While respondent submits Robinson's statements also satisfy the requirements for admission as a dying declaration, respondent also acknowledges it is a closer question. The statement concerned the cause of his impending death, as Robinson told Martha someone ran over him with a vehicle. (R.pp.11-12; p.60; p.62); *see also* Rule 804(b)(2), SCRE (an exception to the hearsay rule exists where a declarant makes a statement while believing death is imminent,

concerning the cause of the impending death). Robinson never directly stated he thought he would die; however, a declarant is not required to expressly state, "I'm dying," for a statement to be admissible as a dying declaration. *See McHoney*, 344 S.C. at 93, 544 S.E.2d at 33 (holding a declarant is not required to express, in direct terms, his awareness of his condition for his statement to be admissible, but it can be inferred from the surrounding circumstances and facts). It could be inferred from the surrounding circumstances that Robinson believed death was imminent because he: (1) was screaming in pain; (2) could not get up from the ground; (3) continually yelled for help; (4) was holding his hips and stomach; and, (5) his family members told him not to move and to wait for the ambulance to arrive. (R.p.10; pp.12-13; pp.58-59); *see also McHoney*, 344 S.C. at 93, 544 S.E.2d at 33-34 (addressing the factors to be considered when establishing a declarant's necessary state of mind, which include the nature of the wounds and statements made in the declarant's presence). Moreover, Robinson was undoubtedly in critical condition. *See McHoney*, 344 S.C. at 93, 544 S.E.2d at 33-34 (noting the declarant's critical condition is also a factor to be considered when establishing the declarant's state of mind). A paramedic testified Robinson was showing signs of shock, his condition deteriorated in the ambulance to the point that the decision was made to fly him to a major trauma center, and the paramedic suspected a possible pelvic fracture. (R.pp.83-84; pp.86-87). Additionally, once Robinson arrived at the hospital it was determined his severe injuries included a shattered pelvis, additional broken bones, multiple injuries to major organs, and internal bleeding. (R.p.155; p.161; pp.166-168; pp.171-172). Accordingly, the facts and circumstances surrounding Robinson's statements supported the inference he was aware death was or could be imminent, and the trial court acted within its discretion to admit his statement under the dying declaration exception.

Regardless, even if the Court were to find the trial court abused its broad scope of discretion, any alleged error is harmless beyond a reasonable doubt. *See Graham*, 314 S.C. at 386, 444 S.E.2d at 527 (holding admission of hearsay evidence is subject to harmless error analysis). Similar to her husband's testimony, Martha Pate's (Martha) testimony was corroborated by and cumulative to that of multiple other witnesses and evidence. *See id.* (stating appellate courts will examine a host of factors to determine if the error was harmless, including the importance of the witness' testimony, whether the testimony was cumulative, and the presence of evidence corroborating the witness' testimony). As noted in Argument I, respondent submits it is unlikely admitting Robinson's statement to Martha unduly affected the jury's guilty verdict when an examination of the record shows the State also admitted and the jury considered: (1) multiple inculpatory statements from appellant in which he admitted to participating in the deadly incident and gave details of the crime; (2) testimony from investigators who examined the scene, and interviewed appellant and family members; (3) testimony from appellant's wife who stated, without objection, that appellant told her he hit someone on a moped; (4) information about Robinson's severe and extensive injuries, which were consistent with being run over by a vehicle; (5) testimony from the men who talked to appellant about buying the victim's moped, who stated they thought it was stolen, in part, because appellant wanted to get rid of it fast and acted nervous; (6) testimony from a man who shared a cell with appellant who stated appellant told him what happened on the night Robinson died; and, (7) photographs of the damage to the Tahoe and the moped, as well as analysis of paint found on the Tahoe which was consistent with that on the moped. Accordingly, because admitting the victim's statement did not affect the verdict, any alleged error in admitting it was harmless beyond a reasonable doubt. *See Mitchell*, 286 S.C. at 573, 336 S.E.2d at 151 (holding an error admitting hearsay evidence is harmless

when it could not have reasonably affected the result at trial).

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgments, convictions, and sentences of the trial court should be affirmed.

Respectfully submitted,

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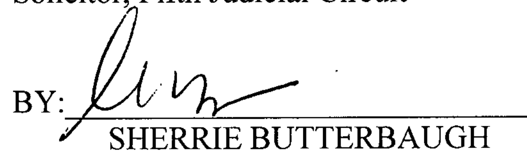
BY: 
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ATTORNEYS FOR RESPONDENT

April 18, 2016.

STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
APR 18 2016
SC Court of Appeals

Appeal from Kershaw County
Deandrea G. Benjamin, Circuit Court Judge

THE STATE,

Respondent,

v.

WILLIE THOMAS STARNES,

Appellant.

Appellate Case No. 2014-002652

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, Order of the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

This 18th day of April, 2016.

SHERRIE BUTTERBAUGH
Assistant Attorney General

ATTORNEY FOR RESPONDENT

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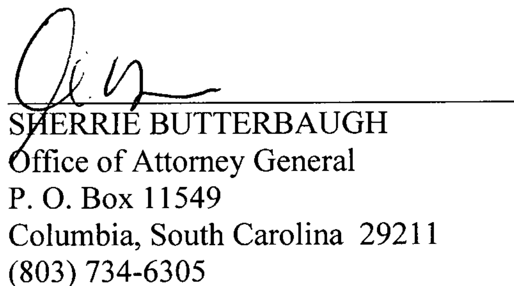
CERTIFICATE OF SERVICE

I, Sherrie Butterbaugh, counsel for the Respondent, certify that I have served the within Final Brief of Respondent and Certificate of Compliance on Appellant by depositing three (3) copies of the same via U.S. mail, first class, postage prepaid to his attorneys of record, Erick M. Barbare, Esq., The Barbare Law Firm, 120 Halton Road, Ste. #3, Greenville, South Carolina 29607; and Robert M. Dudek, Esq., SCCID/Division of Appellate Defense, 1330 Lady St., Ste. #401, Columbia, South Carolina 29201.

I further certify that all parties required by Rule to be served have been served.

This 18th day of April, 2016.



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