STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of General Sessions
Maite Murphy, Circuit Court Judge

Appellate Case No. 2015-002416

THE STATE, ...RESPONDENT,

v.

RODSHEEN AYER, ...APPELLANT.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

WILLIAM F. SCHUMACHER, IV
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3922

DAVID PASCOE
Solicitor, First Judicial Circuit

Post Office Box 1525
Orangeburg, SC 29116
(803) 533-6252

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STATEMENT OF ISSUES ON APPEAL

I. The trial court properly admitted a photograph of Appellant in his hospital room where the officers, who were collecting the destructible gunshot residue evidence at the hospital, took the photograph in conjunction with their investigation of Appellant's reported attack. Moreover, any alleged error in admitting the photograph was harmless as Appellant did not dispute at trial that he was the person in the hospital room and other photographs of Appellant's injury were submitted into evidence.

II. The trial court properly admitted testimonies of two officers which included statements regarding their conversations with persons and law enforcement agencies as the challenged statements were not submitted for the truth of the matter asserted but rather explained how law enforcement identified and located Appellant, as he had given the hospital a false name when seeking treatment for his gunshot wound.

STATEMENT OF THE CASE

On March 5, 2014, the Orangeburg County Grand Jury indicted Appellant for murder and two counts of attempted murder. Appellant's codefendant, Terrance Johnson, was indicted on identical charges. On November 16–19, 2015, Appellant proceeded to a jury trial before the Honorable Maite Murphy. Breen Stevens, Esquire, and Minh Lee Wyman, Esquire, represented Appellant; Scott Palmer, Esquire, represented Johnson; and Assistant Solicitors Don Sorenson, Esquire, and Ashley Cornwell, Esquire, represented the State. The jury found Appellant guilty of one count of attempted murder, but acquitted him of his other charges. The jury acquitted Johnson on all three charges. The trial judge sentenced Appellant to thirty years' incarceration.

Appellant filed a timely Notice of Appeal and subsequently submitted a Brief in support of his appeal. This Brief of Respondent follows.

STATEMENT OF FACTS

On September 10, 2012, Alvin Clark, Calvin Kennedy, and Greg Howell were victims of an attempted robbery at the home of Stephanie Barnwell. Kennedy and Howell were shot during the incident: Kennedy was shot numerous times in his body and face but survived; and Howell was shot twice and days later died from his wounds. The victims told officers the attack was perpetrated by Terrance Johnson and two unknown men later identified as Appellant and Taquan Morrison. The victims told investigators Kennedy was injured while wrestling with Appellant for a gun and that Kennedy eventually gained control of the gun and shot him in the arm. According to Clark and Kennedy, both groups of men promptly left the scene, with Clark, Kennedy, and Howell driving to the nearest hospital, Regional Medical Center, for medical attention. (R.p.38, line 4–R.p.48, line 17; R.p.81, line 13–R.p.100, line 6; R.p.146, line 9–R.p.168, line 12).

Later that night, Scarlet Coleman, an emergency room nurse, was working her shift at the Lexington Medical Center when Appellant arrived at the hospital at approximately 10:48 p.m., seeking treatment for a gunshot wound in his left forearm. Appellant, identifying himself as "Emmanuel Ayer," claimed he had been shot in a bungled robbery attempt at a club, but could not identify the location because he was only visiting the area. Pursuant to standard procedure and S.C. Code Ann. § 16-3-1072 (2015), hospital staff called the Lexington County Sheriff's Office and informed officers they were treating a gunshot wound victim.[1] (R.p.218, line 12–R.p.221, line 25).

Officer David Day responded to the call. When he arrived, Appellant was asleep. A road deputy whom had arrived prior to Officer Day, Officer Hanko, was in the room and provided

[1] S.C. Code Ann. § 16-3-1072 requires all physicians, nurses, and other medical services personnel to timely report the treatment of individuals suffering from gunshot wounds to the local sheriff's office.

Day with some of the information he received from Appellant. While he waited for Appellant to wake, he took a photograph (Photograph) of him and then began swabbing his hands for gunshot residue (GSR). As he swabbed Appellant's left hand, Appellant awoke. Officer Day questioned him about the reported attack, to which Appellant claimed he was shot during an attempted robbery outside a club, but did not know the location of the club because he was visiting from New York and unfamiliar with the area. (R.p.224, line 7–R.p.227, line 1; State's Exhibit 65).

Appellant was discharged from the hospital at approximately 3:35 a.m., less than five hours after he arrived. (R.p.221, lines 6–12).

Pretrial Hearing

During the pretrial hearing, trial counsel moved to suppress the Photograph. He argued that because Appellant was "half-naked," under the effects of pain medication, and sleeping in a private room, not the open-bay emergency area, Appellant had a reasonable expectation of privacy in the room under both the Fourth Amendment to the United States Constitution and the South Carolina Constitution. U.S. Const. amend. IV; S.C. const. art. I, § 10. Trial counsel did not provide law supporting his position, but generally argued individuals have recognized expectations of privacy in temporary housing such as hotel rooms. He further argued no exigent circumstances justified the intrusion as Appellant was unarmed and unconscious and an officer could have waited by the door and kept him in the room while other officers obtained a warrant for the Photograph. (R.p.2, line 23–R.p.5, line 3; R.p.8, lines 18–23).

In response, the State noted officers did not show up to the hospital with the intent of investigating Appellant specifically; rather, they were investigating reports of a gunshot victim made by the hospital. The first officer arrived at the hospital at approximately 1:15 a.m., at which time Appellant was awake and cooperative to the officer's questions regarding the

purported robbery. He continued cooperating with officers after he awoke. He provided officers with a false name. The officers at the hospital were not there to build a case against Appellant; rather, they were collecting evidence to prosecute the person responsible for the fabricated crime. Additionally, Appellant was not "half-naked" in the photograph, only a portion of his upper chest was visible. Moreover, Appellant had spoken with some officers a while before the photograph was taken and continued to provide officers with information until he left the hospital. (R.p.5, line 14–R.p.7, line 13; R.p.8, line 25–R.p.9, line 5).

The trial judge asked trial counsel how Appellant was prejudiced by the admission of the photograph, to which counsel responded, "Well, [trial judge], it's a question of whether they can take his picture when he's clothed or not." (R.p.8, lines 9–13).

After reviewing the hospital records and incident reports, the trial judge made several findings of fact on the record. He noted: (1) Appellant reported a crime to hospital employees as well as Deputy Hanko, the first officer on the scene; (2) Appellant "freely spoke" to officers before and after the Photograph was taken and at no point indicated he wished to exercise any kind of privacy rights; (3) he provided officers and hospital employees with a false name; (4) no evidence indicated Appellant was under the influence of substances that impacted his mental faculties at that time; and (5) Appellant checked out of the hospital within four hours of his arrival. The trial judge also stated he interpreted trial counsel's argument as one disputing Appellant's identity as "Emanuel Ayer," in which case he would not have standing to dispute the violation of that man's expectation of privacy. However, trial counsel clarified he was not disputing Appellant was "Emanuel," and thus no standing issue existed. (R.p.15, line 2–R.p.16, line 15).

Trial

Clark testified he met with officers after taking Kennedy and Howell to the hospital. He told the officers what happened that night and what he knew about Johnson. Later that day, he identified Johnson in a photographic lineup. During his testimony, Clark identified Appellant as the assailant shot by Kennedy. (R.p.86, line 19–R.p. 87, line 7; R.p. 89, line 7–R.p. 92, line 10; R.p. 96, line 18–R.p. 98, line 21).

Kennedy also testified regarding the events of the assault. He recalled his meeting with officers a few weeks after the shooting and identifying Morrison in a photographic lineup. During his testimony, he identified Appellant as the man who shot him. (R.p.152, line 21–R.p.153, line 23; R.p.165, line 12–R.p.168, line 12).

Tenaja Minick, Morrison's girlfriend at the time of the robbery, testified she met Johnson and Appellant, the latter of whom she knew as "Rah," through Morrison. She initially met Appellant a few weeks before the robbery, when he began staying in Minick and Morrison's shared home. At that time, she drove a 2010 White Chevrolet Impala. During the afternoon of September 10, Morrison dropped Minick off at work and borrowed her vehicle. He picked her up in the early morning hours of September 11, at which time she noticed a foul smell and a sheet in the backseat. Under the sheet, she found blood on the seats and floorboard. She found additional blood on the ceiling of the car. (R.p.197, line 6–R.p.204, line 9).

When she returned home, Appellant was not there. Later that morning, sometime around 3:00 a.m., Appellant returned home with his arm in a sling. He claimed his injury was from an accidental, self-inflicted gunshot wound. Sometime after Appellant's return, while he was still recovering from his injury, Minick took pictures of Appellant wearing his arm sling. Appellant was asleep at the time of the photographs. Those photographs were admitted into evidence

without objection. Minick recalled meeting with Officer Leonarde Cain approximately a week after the crime and telling him everything she knew about Morrison, Johnson, Appellant, and her car. She also identified Appellant as the man in the Photograph. (R.p.205, line 4–R.p.212, line 12; State's Exhibits 112–113).

Officer Day also testified at trial. In addition to recounting his interview with "Emanuel Ayer," he identified that man as Appellant. (R.p.227, lines 9–15).

Officer John Stokes of the Orangeburg County Sheriff's Office testified he was sent to the Regional Medical Center to investigate the victim's reports and met with Clark. After an off-the-record bench conference and over trial counsel's objection, Officer Stokes stated Clark informed him: (1) he believed Johnson's first name was Terrance, but was unaware of his surname; (2) the attackers escaped in a "white chevy," but was unsure of the make or model; (3) Johnson was a student at Denmark Technical College; and (4) Johnson was from the Bowman area. Officer Stokes used this information to develop photographic lineups through which Clark identified Johnson as one of the three attackers. Later, Officer Stokes showed both Clark and Kennedy photographic lineups for Morrison. He testified Clark was unable to make a positive identification, but Kennedy recognized Morrison as the driver of the car. (R.p.336, line 9–R.p.344, line 10; R.p.348, line 15–R.p.349, line 13).

Officer Stokes also discovered one of the perpetrators was shot by Kennedy, and put out a request to the regional hospitals for information regarding injured individuals treated around the time of the crime. (R.p.345, line 20–R.p.346, line 2).

Officer Stokes asked Officer Cain to assist him in acquiring information about Terrance Johnson and the other attackers. Officer Cain spoke with Minick, and she provided him with

information pertinent to the investigation. Officer Stokes testified about this information in the following exchange:

> [State]: And to your knowledge, was Corporal Cain able to get any additional information that assist[ed] you with the investigation while looking for Terrance Johnson?
>
> [Officer Stokes]: Yes. Corporal Cain contacted me and advised me that he made contact with Ms. Minick, I think it's Tenaja Minick.
> . . .
>
> [State]: Corporal Cain met with the witness Tenaja Minick?
>
> [Officer Stokes]: Yes ma'am.
>
> [State]: And through that meeting, was there any information regarding Terrance Johnson or the incident that happened that assisted you in your investigation?
>
> [Officer Stokes]: Yes. She was able to give two additional names. One was [Taquan] Morrison. And also another subject that went by the name of Rah.
> . . .
>
> [State]: And was he also able to get information regarding any vehicle that was involved with those two suspects?
>
> [Officer Stokes]: He was.
>
> [State]: And what kind of vehicle was that?
>
> [Officer Stokes]: It was a white in color Chevy Impala.

(R.p.346, line 3–R.p.347, line 9).

Officer Stokes further testified the sheriff's office received information from Lexington Medical Center regarding their treatment of "Emanuel Ayer." After obtaining the hospital and Lexington County Sheriff's Office records, including the Photograph, Officer Cain sent the information up to New York Police Department (NYPD). According to Officer Stokes, the NYPD responded to Officer Cain and, using facial recognition software, identified the man in the Photograph as Appellant. Based on the evidence gathered by the officers, Officer Stokes

obtained arrest warrants for Johnson, Morrison, and Appellant. (R.p.347, line 10–R.p.350, line 13).

On cross-examination, Officer Stokes informed the trial court it is standard procedure for officers to perform GSR tests on individuals involved in shooting because it is an important evidentiary tool and such tests must be performed within approximately four hours of a gun being fired. After approximately four hours, the accuracy of such tests drops precipitously.[2] (R.p.356, line 22–R.p.359, line 15).

Officer Cain's testimony echoed that of Officer Stokes. He confirmed Officer Stokes asked him to help with this investigation and began his investigation at Denmark Technical College. He testified he contacted Minick, who "advised" him: (1) she did not know Johnson by his given name but was able to identify him and recall his nickname when shown his photograph; (2) Johnson and Morrison were friends; (3) "Rah" was staying at her house at the time of the crime; and (4) she owned a white Chevrolet Impala. The Lexington County Sheriff's Office informed him of "Emanuel Ayer's" treatment at the Lexington Medical Center and gave him a copy of the Photograph. The United States Marshall's Task Force in New York gave him a photograph of the real Emanuel Ayer from which Officer Cain determined the real Emanuel Ayer was not the man in the hospital. The task force then assisted in locating family members of the true Emanuel Ayer and, with their help, Officer Cain identified Appellant as the man in the Photograph. He also spoke with Sherrell Counts, Johnson's friend, whom "advised" him she, along with Johnson's mother and sister, took Johnson to Mississippi. Using the information he

[2] Nationwide, the consensus among forensics experts is that GSR tests must be performed within several hours of the crime. Summary of the FBI Laboratory's Gunshot Residue Symposium, 8 Forensic Science Communications 3 (July 2006), available at https://archives.fbi.gov/archives/about-us/lab/forensic-science-communications/fsc/july2006/research/2006_07_research01.htm#abstract (noting that GSR examiners vary in their opinions regarding the acceptable time range for collecting sample following a shooting, and that the majority agree that a four to six hour cut-off is appropriate).

collected, Officer Cain generated warrants which led to the arrest of Johnson in Mississippi as well as Morrison and Appellants' arrests in New York. (R.p.379, line 3–R.p.387, line 15).

Officer Gerald Carter testified he took several photographs of Appellant after his arrest. Those photographs were taken to document the scarring on his left arm from his bullet wound and were admitted into evidence. (R.p.329, line 11–R.p.332, line 9; State's Exhibits 67–70).

Samuel Stewart, a SLED agent employed in the DNA casework department of the agency, testified Appellant's DNA was located at several spots at the crime scene. Notably, Appellant's DNA was found on the .9 millimeter gun recovered at the trailer, the same gun which also held a large amount of Kennedy's DNA, and on the rear door of Minick's vehicle. (R.p.439, line 12–R.p.465, line 17).

After the State presented its case, Johnson testified. Johnson claimed he, Morrison, and Appellant went to Barnwell's home that night to purchase cocaine from the victims. While he and Howell were sitting and watching Clark "cook[] the dope," he heard gunfire. He and Howell immediately escaped out the front door. Minutes later, Appellant ran out the door and to the back of the house with Kennedy in pursuit. Then, Clark came outside the house and starting shooting, and Morrison returned fire so that Johnson and Appellant could make it to the car and escape. Appellant was shot, so they dropped him off at a hospital in the Columbia area. (R.p.486, line 4–R.p.513, line 18).

During his closing, trial counsel admitted Appellant's blood at the scene of the crime was an "indisputable fact." He alleged the victims attempted to rob Appellant that night and Appellant was likely shot inside the home. (R.p.604, line 25–R.p.605, line 10; R.p.611, lines 4–10; R.p.612, lines 10–20; R.p.614, lines 3–10).

ARGUMENT

I.

The trial court properly admitted a photograph of Appellant in his hospital room where the officers, who were collecting the destructible gunshot residue evidence at the hospital, took the photograph in conjunction with their investigation of Appellant's reported attack. Moreover, any alleged error in admitting the photograph was harmless as Appellant did not dispute at trial that he was the person in the hospital room and other photographs of Appellant's injury were submitted into evidence.

Appellant argues the trial judge erred in admitting the Photograph as it was obtained in contravention of his rights under the Fourth Amendment and South Carolina Constitution. The State disagrees with Appellant's allegations of error. Initially, the State notes Appellant fails to demonstrate the admission of the Photograph created any prejudice, harmless or otherwise, for Appellant: (1) Appellant fails to argue the admission of the Photograph impacted his ultimate conviction; and (2) Appellant conceded at trial he was the man in the Photograph; and (3) similar photographs of Appellant were admitted during trial, without objection.

Moreover, the officers' actions did not violate the Fourth Amendment or S.C. Const. art. I, § 10, because they did not act unreasonably in obtaining the Photograph: (1) Appellant, based on the circumstances of the case, did not have a reasonable expectation of privacy in his hospital room; (2) even if Appellant had a reasonable expectation of privacy in the situation, the exigencies of the situation justified their presence in the room and once in the room, the plain view doctrine justified their observation and photographing of his injury.

Prejudice and Cumulative Evidence

Initially, the State notes Appellant's privacy violation claims are without merit as he, both at trial and in his brief, cannot state how he was prejudiced by the admission of the Photograph.

When the trial judge pressed trial counsel on the issue, the latter could only respond "it's a question of whether they can take [Appellant's] picture when he's clothed or not." Admittedly, Appellant is shirtless in the Photograph (although most of his chest is covered by his arm sling), but Appellant fails to even allege admission of the Photograph unfairly prejudiced his conviction. In fact, trial counsel conceded Appellant was the man in the Photograph. Moreover: (1) Officer Day testified Appellant was the man he interviewed and photographed; and (2) other photographs of Appellant's gunshot wound were admitted trial, including Minick's in which Appellant was, again, unconscious with his arm sling displayed prominently on his chest. Accordingly, any alleged error in admitting the Photograph was harmless as it was cumulative to the undisputed evidence presented at trial. See, e.g., State v. Schumpert, 312 S.C. 502, 507, 435 S.E.2d 859, 862 (1993) (any error in admission of evidence cumulative to other un-objected to evidence is harmless).

Fourth Amendment Privacy Rights

In criminal cases, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). In Fourth Amendment search and seizure cases, the appellate court reviews the circuit court judge's determinations under a clear error standard and will affirm the circuit court judge's determinations if they are supported by any evidence. State v. Provet, 405 S.C. 101, 107, 747 S.E.2d 453, 456 (2013); see State v. Brockman, 339 S.C. 57, 66, 528 S.E.2d 661, 666 (2000) ("[W]e will review the trial court's ruling like any other factual finding and reverse if there is clear error. We will affirm if there is any evidence to support the ruling."). However, the appellate court is **not** barred from conducting its own review of the record to determine whether the circuit court judge's decision in a search and seizure case is supported by the evidence. State v. Cheeks, 400 S.C. 329, 334, 733 S.E.2d 611, 614 (Ct. App.

2012); see Narcisco v. State, 397 S.C. 24, 28, 723 S.E.2d 369, 371 (2012) ("[T]his Court is not barred from conducting its own review of the record to determine whether the trial judge's decision is supported by the evidence.").

The Fourth Amendment prohibits unreasonable searches and seizures. U.S. Const. amend. IV. When an unreasonable search or seizure occurs, any evidence seized as the result of that unconstitutional action generally must be suppressed and excluded from trial pursuant to the exclusionary rule, a judicially-created remedy designed to serve as a deterrent sanction against unconstitutional conduct. State v. Weaver, 374 S.C. 313, 319, 649 S.E.2d 479, 482 (2007); see State v. Brown, 401 S.C. 82, 88, 736 S.E.2d 263, 266 (2012) ("The Fourth Amendment itself provides no remedy for a violation of the warrant requirement.") It is the burden of the party requesting the suppression of evidence to establish her own Fourth Amendment rights were violated by the challenged search or seizure by demonstrating she had an expectation of privacy in the area illegally searched. Rakas v. Illinois, 439 U.S. 128, 130 (1978).

The United States Supreme Court has fashioned a judicially-created remedy, the exclusionary rule, which is a deterrent sanction by which the prosecution is barred from introducing evidence obtained in violation of the Fourth Amendment." (citation omitted)). Importantly though, the exclusion of evidence following an unconstitutional search "is 'not a personal constitutional right,' nor is it designed to redress the injury occasioned by an unconstitutional search." Davis v. United States, 564 U.S. 229, 236 (2011) (citations omitted). Due to the heavy costs exacted by the exclusion of evidence on both the judicial system and society as a whole, application of the exclusionary rule is only appropriate where the deterrent benefits of the rule outweigh the heavy costs its application would exact. Brown, 401 S.C. at 88,

736 S.E.2d at 266. Recognizing the rule's harsh consequences, the United States Supreme Court stated:

> Suppression of evidence, however, has always been our last resort, not our first impulse. The exclusionary rule generates substantial social costs, which sometimes include setting the guilty free and the dangerous at large. We have therefore been cautious against expanding it, and have repeatedly emphasized that the rule's costly toll upon truth-seeking and law enforcement objectives presents a high obstacle for those urging its application. We have rejected indiscriminate application of the rule, and have held it to be applicable only where its remedial objectives are thought most efficaciously served. That is, where its deterrence benefits outweigh its substantial social costs.

Hudson, 514 U.S. at 591 (internal quotations omitted). As a result, judicially-created exceptions to the exclusionary rule have been established, including the good faith exception. Brown, 401 S.C. at 88–89, 736 S.E.2d at 266; see also State v. McKnight, 291 S.C. 110, 113, 352 S.E.2d 471, 473 (1987) ("Exclusion of evidence is not the only means available to insure that warrants are properly issued.").

"However, a warrantless search may nonetheless be proper under the Fourth Amendment if it falls within one of the well-established exceptions to the warrant requirement." Id.; see State v. Brown, 401 S.C. 82, 89, 736 S.E.2d 263, 266 (2012) (recognizing the following exceptions to the warrant requirement: (1) search incident to a lawful arrest, (2) hot pursuit, (3) stop and frisk, (4) automobile exception, (5) the plain view doctrine, (6) consent, and (7) abandonment). "The exigent circumstances doctrine provides an exception to the Fourth Amendment[']s protection against warrantless searches, but only where, from an objective standard, a compelling need for official action and no time to secure a warrant exists." State v. Abdullah, 357 S.C. 344, 351, 592 S.E.2d 344, 348 (Ct.App.2004); see State v. Brown, 289 S.C. 581, 587, 347 S.E.2d 882, 886 (1986) (acknowledging the exigent circumstances doctrine as an exception to the warrant requirement).

Another exigent circumstance is the imminent destruction of evidence. In Schmerber v. California, 384 U.S. 757 (1966), the United States Supreme Court found the exigency created by the dissipation of alcohol in a defendant's blood stream combined with the necessity of securing the scene of an accident justified an officer's decision to obtain a blood draw from a defendant without obtaining a warrant. Noting the test was a common, minimally invasive procedure which was performed in a reasonable manner, the Court found the Constitution "does not forbid the States minor intrusions into an individual's body under stringently limited conditions."

To determine whether a law enforcement officer faced an emergency that justified acting without a warrant, a court must look to the totality of the circumstances. See Brigham City v. Stuart, 47 U.S. 398, 406 (2006). The fact-specific nature of such an inquiry demands a court evaluate each case of alleged exigency based on its own facts. Missouri v. McNeely, 133 S.Ct. 1552, 1559 (2013).

"The relevancy, materiality, and admissibility of photographs as evidence are matters left to the sound discretion of the trial court." State v. Holder, 382 S.C. 278, 290, 676 S.E.2d 690, 697 (2009) (quoting State v. Nance, 320 S.C. 501, 508, 466 S.E.2d 349, 353 (1996)). "A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice." State v. Kelley, 319 S.C. 173, 177, 460 S.E.2d 368, 370 (1995) (emphasis added). Admitting photographs which serve to corroborate testimony is not an abuse of discretion. State v. Martucci, 380 S.C. 232, 250, 669 S.E.2d 598, 607 (Ct. App. 2008).

Appellant argues he had a reasonable expectation of privacy in his hospital room under the Fourth Amendment. Admitting that South Carolina courts have not ruled on such arguments, he relies on cases from other jurisdictions to support his assertions. In each of the three cited

opinions, however, the ruling courts found the defendants had only a limited expectation of privacy in this setting. In State v. Stott, 794 A.2d 120 (N.J. 2002), the Supreme Court of New Jersey found a patient involved in an extended stay at a psychiatric hospital did have some degree of privacy rights in his room. However, it cautioned that the determination of such rights should be determined by "the facts and circumstances of a given case," particularly the length of a patient's stay because "a patient admitted for long-term care may enjoy a greater expectation of privacy than one rushed to an emergency room and released that same day."[3] Id. at 127–28. In Jones v. State, 648 So.2d 669 (Fla. 1994), the Florida Supreme Court similarly found the defendant had some privacy rights in his room as it was not a "public place," but he "did not have the heightened expectation of privacy in his hospital room that he would have had in his home." Id. at 676–77. In Morris v. Commonwealth, 157 S.E.2d 191 (Va. 1967), the Supreme Court of Virginia found officers violated a defendant's privacy rights when they requested, and obtained, his clothes from hospital personnel without first obtaining a search warrant and without any exigencies justifying their request. Said clothes were located in the wardrobe in the defendant's hospital room. Id. at 333–34.

Notably, these three cases do not support Appellant's sweeping assertion that patients have the same expectation of privacy in their hospital rooms as their homes. Stott and Jones both involved the propriety of officers seizing defendants' clothes from their hospital rooms; neither court found the officers' presence in those hospital rooms violated privacy protections. In Morris, the court did not discuss such issue because officers were not in the defendant's room at

[3] In his brief, Appellant contends the Supreme Court of New Jersey stated "the patient may at least restrict the access of visitors or non-medical personnel" so as to "control the degree of privacy within the room." However, the quoted language was not a finding of the court; rather, the cited language came from a block quote cited only to support the general proposition that hospital patients do have some privacy interests in their private rooms. See Stott, 794 A.2d at 127 (quoting Michael T. Flannery, *First, Do No Harm: The Use of Covert Video Surveillance to Detect Munchausen Syndrome by Proxy An Unethical—Means of "Preventing" Child Abuse,* 32 *U. Mich. J.L. Reform* 105, 155–56 (1998)).

the time of the seizure, nor was there any discussion whether officers could have visited his room and interviewed him without a warrant.

In fact, the Supreme Court of Virginia explicitly recognized the limits of Morris in Craft v. Commonwealth, 269 S.E.2d 797 (Va. 1980). In Craft, officers were investigating an attempted robbery in which witnesses reported the perpetrator was shot and went to the hospital in search of information, not to search the defendant or seize his belongings. After arriving at the hospital and asking the staff whether anyone with such an injury was admitted, the emergency room doctor provided officers with the defendant's clothing, including a flowered shirt with two bullet holes, along with the bullet removed from the defendant. The Craft court found the clothing and bullet removed from the defendant were properly admitted, because: (1) a witness told officers he shot the assailant twice in the stomach and the latter's shirt was "flowered," and defendant's shirt matched the description; (2) the hospital had lawful custody of defendant's clothes and the bullet because the medical treatment of the defendant necessitated the removal of his clothes and the bullet by hospital personnel; thus, it was not an impermissible search and seizure by law enforcement, but rather "good medical practice" by the attending staff; and (3) the officers' presence at the hospital was not an improper search because they went to the hospital to investigate a reported crime. Id. at 797–801.

Appellant also fails to note the Fourth Circuit United States Court of Appeals has examined this issue in U.S. v. Davis, 690 F.3d 226 (4th Cir. 2012). In Davis, officers were able to identify one of the two suspects in a murder, the named defendant, after submitting DNA found on crime scene items to a local DNA database which led to a "cold hit." Id. at 229. The DNA profile was in the database Davis had gone to the hospital after receiving a gunshot wound to his leg approximately four years prior to the murder. After providing employees with a false

name and false driver's license, he informed hospital personnel he had been shot by a purported robber. Hospital personnel called the police, as required by Maryland law, and officers went to the hospital to meet with Davis and investigate the reported crime. Before leaving, Officer King grabbed Davis's pants and boxer short, which had been removed and placed in a plastic bag by hospital employees. Notably, the officers observed Davis's gunshot wound and secured the clothing as evidence to be used in the prosecution of the purported robber. Id. at 230.

During the course of their investigation, officers discovered marijuana in the vehicle in which Davis had arrived at the hospital along with several other potentially incriminating items which led to his arrest on drug charges upon his release from the hospital. No one was ever charged in the shooting of Davis, and he was never informed that officers were no longer pursuing the robbery investigation. Officers retained the pants and boxer shorts, and later used them to generate the DNA profile for Davis which officers found on the DNA database. Id. at 230–31.

The court found the officer did not violate Davis's Fourth Amendment rights by seizing the clothing. Specifically, the court found the seizure was justified by the plain view doctrine because: (1) Davis conceded Officer King was lawfully in his hospital room investigating the crime he reported; (2) Officer King viewed the bag of clothing while lawfully present in the hospital room; (3) the officer knew defendant's clothes were in the seized bag due to his direct observations and knowledge of hospital policy regarding the storage of patients' personal effects; and (4) the "incriminating character" of the clothes was apparent to officers because it was "clear evidence" the shooting occurred that also had a reasonable probability of providing officers with scientific evidence regarding the details of the attack. When explaining this last point, the court

noted there was no authority requiring that evidence seized pursuant to the plain view doctrine be "incriminating against the person from whom it is seized." Id. at 233–38.

Additionally, while the court found law enforcement did violate Davis's Fourth Amendment rights by obtaining his DNA from the clothing and submitting his DNA profile into its database, the mistake was a "good faith" exception to the exclusionary rule because: (1) the clothing was lawfully seized; (2) it was unclear whether the analysts who tested the clothing knew anything other than the evidence came from a "suspect in a shooting"; (3) the analysts' lack of awareness regarding Davis's dual status was "flagrant," or "intentional . . . patently unconstitutional" conduct warranting exclusion; (4) the analysts were never told to destroy the DNA profile; and (5) Davis's dual status as the victim of the crime he reported and later as a suspect in a different crime was a unique factual scenario unlikely to reoccur and thus the exclusion of the evidence would not have a deterrent effect on future investigations. Id. at 251–56.

The State recognizes that individuals, under the correct circumstances, can have a reasonable expectation of privacy in a hospital room. However, as explained by the Stott court, the nature and scope of such privacy interest is determined by the facts of the situation. See id. at 127. Here, Appellant failed to provide facts supporting such an expectation. Appellant was in the hospital for only a few hours, with only a portion of that time spent in his hospital room recovering from his emergency treatment. He cooperated with the officers who interviewed him, and gave no indication that he wished for them to leave his room. No information was provided about the location or size of his room, its maximum patient capacity, how many other patients and other individuals entered the room during Appellant's brief stay, or whether he had any right to exclude individuals. Appellant was discharged from the hospital the very same night, shortly

after he was interviewed by Officer Day. Accordingly, Appellant did not have a reasonable expectation of privacy in his hospital room. See Rakas, 439 U.S. at 130 (stating it is the burden of the party claiming a Fourth Amendment violation to prove he had a reasonable expectation of privacy in the area searched).

Additionally, while Appellant compares his expectation of privacy in a hospital room to that of a hotel guest, he ignores the fundamental part of the hotel–guest relationship: payment. A hotel guest has an expectation of privacy in her rented room because she has lawfully acquired such access through a bargained for exchange. Appellant provided the hospital with false identification and failed to supply the trial court with any evidence he paid or had the intention of paying his hospital bill. Accordingly, it was unreasonable for Appellant to expect privacy protections in his hospital room when said room was obtained through fraud. Cf. U.S. v. Hargrove, 647 F.2d 411, 412 (4th Cir. 1981) (finding defendant did not have a reasonable expectation of privacy in the stolen vehicle because he could not establish a legitimate claim to the vehicle he was driving because he failed to demonstrate he obtained the car legitimately or without knowledge it was stolen).

Further, unlike in Stott, Jones, Morris, Craft, and even Davis, officers did not seize Appellant's clothing and possessions. Officer Day photographed Appellant to memorialize his injury, and did not manipulate Appellant or the room to obtain the Photograph. Anyone entering the room during that period, including hospital staff, readily observed Appellant's injury and could testify to such. Thus, even if Appellant did have some quantum of privacy interest in the physical possessions in his hospital room, such interest did not extend to his physical appearance while present in said room.

The State also notes that even if this Court determines Appellant had a reasonable expectation of privacy in the hospital room, the exigency of investigating Appellant's reported crime justified Officers Hanko's and Day's actions that night. At that time, they believed Appellant had been shot in a robbery. In his brief, Appellant concedes "the police were bound to investigate the report of Appellant suffering a gunshot wound . . . ." (Br. of Appellant, p.13). Similar to the officers in Davis, Officers Hanko and Day responded to Appellant's false report and went to the hospital in the hopes of gathering information about that crime to help them locate the purported shooter. Officer Day followed police procedure to gather GSR evidence to be used in the attacker's future prosecution. As noted by the officers, GSR only remains on the hands for several hours after exposure, and could be destroyed by even the simple act of washing one's hands. Officer Day had to perform the GSR test at that point, or risk losing that evidence. The importance of such prompt action is only highlighted by the fact Appellant was discharged from the hospital approximately thirty minutes after the Photograph was taken. At that time, Appellant was not a criminal suspect and officers would have been unable to take him into custody or keep him at the hospital. If Officer Day had waited any longer, he would not have obtained the Photograph or GSR samples.

The instant case is also similar to Davis because once the officers were lawfully in Appellant's hospital room, the plain view exception justified Officer Day taking the Photograph. Appellant himself was direct evidence of the purported crime and proof of his injury was important for later prosecution of the shooter. Thus, the "incriminating character" of his injury was obvious to the officers.

For all these reasons, the admission of the Photograph was proper under the Fourth Amendment.

South Carolina Privacy Rights

"In parallel with the protection of the Fourth Amendment, the South Carolina Constitution also provides a safeguard against unlawful searches and seizures." State v. Forrester, 343 S.C. 637, 643, 541 S.E.2d 837, 840 (2001); S.C. Const. art. I, § 10. "The relationship between the two constitutions is significant because '[s]tate courts may afford more expansive rights under state constitutional provisions than the rights which are conferred by the Federal Constitution.'" Forrester, 343 S.C. at 643, 541 S.E.2d at 840 (quoting State v. Easler, 327 S.C. 121, 131 n. 13, 489 S.E.2d 617, 625 n. 13 (1997)). "Therefore, state courts can develop state law to provide their citizens with a second layer of constitutional rights." Id. "This relationship is often described as a recognition that the federal Constitution sets the floor for individual rights while the state constitution establishes the ceiling." Id. "Thus, this Court can interpret the state protection against unreasonable searches and seizures in such a way as to provide greater protection than the federal Constitution." Id. at 644, 541 S.E.2d at 840.

Appellant argues that even if this Court finds the Fourth Amendment does not provide him his asserted reasonable expectation of privacy, South Carolina's heightened privacy protections under S.C. Const. art. I, § 10 should be interpreted as granting privacy protections in an individual's hospital room. However, he provides no specific justification for interpreting such protections under the South Carolina Constitution. Additionally, as mentioned previously: (1) Appellant did not have a reasonable expectation of privacy in the hospital room, as he was a short-term patient receiving emergency medical attention; (2) Appellant did not have a reasonable expectation of privacy in his physical appearance in the room; (3) Appellant fully cooperated with officers before and after the Photograph was taken and failed to give any indication they were not welcome in the room; (4) Officer Day's photographing of Appellant was

a minimal intrusion on his privacy, one which pales to cases involving seizures of clothing cited in his brief; (5) regardless of any reasonable expectation of privacy he had in his room, the exigency of investigating the attack **Appellant** reported and collecting evidence associated with that crime justified the officers' presence; and (6) once the officers were in the room, Appellant's injuries were in their "plain view" and were appropriately photographed for future prosecution of his purported attacker. Accordingly, admission of the Photograph did not violate Appellant's privacy rights under the South Carolina Constitution.

II.

The trial court properly admitted testimonies of two officers which included statements regarding their conversations with persons and law enforcement agencies as the challenged statements were not submitted for the truth of the matter asserted but rather explained how law enforcement identified and located Appellant, as he had given the hospital a false name when seeking treatment for his gunshot wound.

Appellant argues the trial judge erred in admitting Officers Stokes's and Cain's testimonies regarding the statements made by several witnesses during the course of the criminal investigation. The State disagrees with Appellant's allegations of error. The statements referenced by the two officers were not hearsay because they were not offered for the truth of the matter asserted, but to explain how Appellant, Johnson, and Morrison were identified as the three suspects for which the officers were searching. Additionally, even if the trial judge erred in admitting the disputed statements, such error was harmless because the witnesses who provided the officers with the information testified at trial and provided those same facts to the jury.

In South Carolina, hearsay is inadmissible "except as provided by these rules or by other rules prescribed by the Supreme Court of this State or by statute." Rule 802, SCRE. Our rules of evidence define hearsay 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. Accordingly, an out of court statement is not hearsay if it is offered for the limited purpose of explaining why a government investigation was undertaken. State v. Brown, 317 S.C. 55, 63, 451 S.E.2d 888, 894 (1994).

Even if improper hearsay evidence is admitted, any error in the admission of the hearsay evidence is subject to a harmless error analysis and only warrants reversal if it results in actual prejudice. State v. Weston, 367 S.C. 279, 288, 625 S.E.2d 641, 646 (2006). Appellate courts

will generally not set aside a judgment based on insubstantial errors not affecting the result. State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991). After an error is found, the appellate court must then review the other evidence considered at trial besides the erroneously admitted evidence. Baccus, 367 S.C. at 55, 625 S.E.2d at 223. Error is harmless beyond a reasonable doubt if it does not contribute to the verdict. State v. Fletcher, 379 S.C. 17, 25, 664 S.E.2d 480, 484 (2008).

In the instant case, the challenged testimonies of Officers Stokes and Cain were not admitted for the truth of the matter asserted, which in this situation is the determination of the defendants' guilt in the underlying offenses: rather, their testimonies outlined the process they followed to identify Johnson and Appellant as suspects in the case.

Notably, the statements Appellant argues are hearsay do not reference any evidence regarding the crime or the evidence supporting it. The "hearsay" statements describe the official investigation into the crime, beginning with Officer Stokes testifying Clark only recognized one of the shooters, and such identification was limited to the person's first name (Terrance), the person's nickname, two possibilities for the person's surname (Johnson or Bowman), the area the person might be from, and the person's status as a student at Denmark Technical College. Ascertaining Appellant's identity was even more daunting for officers, as the only helpful information they obtained from Clark and Kennedy was that he was shot while attempting to flee the scene. While investigating this lead, officers discovered Appellant had given a false name to the Lexington County Medical Center and Lexington County Sheriff's Office, along with a fabricated story about the source of his injury. The officers' testimonies were mere summaries of their investigation, including the conversations they had with witnesses, which provided them with the information used to identify and arrest Johnson, Morrison, and Appellant. South

Carolina courts have routinely found testimony of this variety does not violate Rule 801. See Rhodes v. State, 349 S.C. 25, 31, 561 S.E.2d 606, 609 (2002) (finding a witness's testimony she heard a "rumor" the defendant was responsible for the attack on the victim was not hearsay because it was not offered to prove defendant was guilty of the crime but to explain how the victim found out defendant's name and identified him in his high school yearbook, which led to defendant's apprehension and subsequent identification by both victims); State v. Thompson, 352 S.C. 552, 557–59, 575 S.E.2d 77, 80–81 (Ct. App. 2003) (finding officers' testimonies regarding a bystander informing officers that person driving victim's car, defendant, lived in a particular home was not hearsay; the officers' testimonies regarding the bystander's statement "were not entered for their truth but rather to explain and outline the officer's investigation and their reasons for going to the [defendant's] home").

Moreover, even if the trial judge erred in admitting the officers' statements, such error was harmless. Clark, Kennedy, and Minick, the witnesses whose statements were referenced in the officers' testimonies, all testified at trial to the information they provided the officers. Accordingly, Appellant was not prejudiced by Officers Stokes's and Cain's testimonies. See e.g., Schumpert, 312 S.C. at 507, 435 S.E.2d at 862 (1993) (any error in admission of evidence cumulative to other un-objected to evidence is harmless).

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

WILLIAM F. SCHUMACHER, IV
Assistant Attorney General

DAVID PASCOE
Solicitor, First Judicial Circuit

BY: _____

William F. Schumacher, IV
Bar # 100231
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3922

ATTORNEYS FOR RESPONDENT

April 24, 2017

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of General Sessions
Maite Murphy, Circuit Court Judge

Appellate Case No. 2015-002416

THE STATE, ...RESPONDENT,

v.

RODSHEEN AYER, ...APPELLANT.

CERTIFICATE OF COUNSEL

The undersigned certifies this Final Brief of Appellant 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."

ALAN WILSON
Attorney General

WILLIAM F. SCHUMACHER, IV
Assistant Attorney General

DAVID PASCOE
Solicitor, First Judicial Circuit

BY: _____

William F. Schumacher, IV
Bar # 100231
Office of the Attorney General
Post Office Box 11549

Columbia, SC 29211
(803) 734-3922

ATTORNEYS FOR RESPONDENT

April 24, 2017