STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Florence County
The Honorable R. Knox McMahon, Circuit Court Judge

THE STATE,

Respondent,

v.

CORY NETTLES ALLEN,

Appellant.

Appellate Case No. 2016-000686

INITIAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

APPELLANT'S STATEMENT OF ISSUE ON APPEAL

I. Whether the court erred by refusing to redact the portion of the 911 call where Coe speculated about the motive for the shooting being a prior incident, since this speculation was no longer an excited utterance or present sense impression, and it should have been excluded given its tendency to confuse the jury, and its extremely prejudicial effect?

RESPONDENT'S COUNTERSTATEMENT OF ISSUE ON APPEAL

I. Because the prior death of Allen's brother was relevant to all theories of the case, the trial court properly admitted the entire 911 call as an excited utterance and present sense impression. Additionally, the statements about the prior death were cumulative to the testimony of numerous other witnesses, and any error in the admission of 911 call was harmless beyond a reasonable doubt.

STATEMENT OF THE CASE

In December of 2014, a Florence County Grand Jury indicted Appellant, Cory Nettles Allen, for murder. (Indictment.) Allen proceeded to a jury trial on March 21, 2016, before the Honorable R. Knox McMahon. Allen was represented by Rose Mary Parham, Esquire. (R. p.1.) Solicitor Edgar L. Clements, III, represented the State. (T. p.1.)

The jury found Allen guilty as charged on May 7, 2015. (T. p. 506, lines 16-22.) Judge McMahon sentenced Allen to forty years' imprisonment for murder. (T. p. 512, lines 5-9.)

This appeal follows.

THE SHOOTING WAS EITHER REVENGE OR SELF DEFENSE

The State's theory of the case was clear: Cory Allen waited years to seek revenge on Edward Windham, the man who killed Allen's brother. He finally succeeded one night in June, after he spotted Windham riding his moped through the neighborhood, on the same street where his brother was killed years before. (T. p. 108, line 21 – p. 110, line 10; p. 118, lines 18-21.) In contrast, Allen argued he was terrified of Windham after Windham killed his brother, so he obtained his concealed weapons permit to protect himself and his family from Windham in the future. (T. p. 115, lines 5-14.[1]) Allen argued his encounter with Windham that night was purely coincidental. (T. p. 110, lines 18-23.)

On June, 2014, officers responded to a 911 call about a shooting in a neighborhood known as Tara Village in Florence County. (T. p. 142, lines 2-14.) The victim, Edward Windham, was lying in the middle of the street near an overturned moped. Blood surrounded him on the pavement. The pathologist would find seven gunshot wounds on the victim's body. (T. p. 365, lines 5-7.) The wound to the back of the victim's neck was fatal. (T. p. 365, lines 12-20.) The pathologist believed the victim was shot from at least two to four feet away. (T. p. 367, lines 1-9.) A majority of the wounds showed the bullets entered the victim's from the left and traveling to the right side, or from his back to front. (T. pp. 367-378.) One wound to his arm could have been the result of being shot while driving the moped or raising his arm. (T. p. 383, line 10 – p. 384, line 19.)

Appellant, Cory Nettles Allen, and his brother were standing on the curb near the victim.

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[1] Defense counsel argued in her opening, "Yeah, he had a concealed weapons permit which you will see in evidence, but my client has no criminal history. He got the concealed weapons permit after the jury acquitted Mr. Windham of killing his brother, because he was terrified that Mr. Windham was going to kill him and his other brother." (T. p. 115, lines 5-10.)

(T. p. 142, lines 5-24.) The officer was advised from dispatch that the suspect was waiting with the victim for law enforcement to arrive. (T. p. 143, lines 10-16.) When he arrived on scene, he asked Allen and the other man, Allen's brother, to show him their hands and to get on their knees. (T. p. 143, lines 17-24.) Allen removed a pistol from his waistband, set it on the ground, and then complied with the officer's request. (T. p. 143, line 22 – p. 144, line 3.) The officer handcuffed Allen, read him his *Miranda* rights, and then escorted him to his patrol car. (T. p. 144, lines 10-23.)

Allen told the officer numerous times that he shot Windham in self-defense because the victim pulled a gun on him. Allen also told officers he attended a concealed weapons class. (T. p. 145, lines 18-24, p. 150, lines 11-17.) Multiple officers arrived on scene because some of the onlookers in the crowd became disorderly. (T. p. 151, lines 2-19.)

There were two weapons at the crime scene: the first was the Ruger nine millimeter owned by Allen, and the second was a 25 caliber Lorscien handgun. (T. p. 288, lines 5-16; p. 298, lines 3-5.) Investigators discovered nine millimeter shell casings lying on the ground at the crime scene. (T. p. 170, lines 4-18, p. 190, lines 7-19.) Crime scene investigators also found three PMC 25 caliber unfired bullets in a magazine. (T. p. 191, lines 2-8.) The clip in the Ruger nine millimeter handgun was full, but a partial clip was lying nearby. (T. p. 193, lines 2-25.) The Loscien handgun was located close to the moped. There were unfired 25 caliber rounds on the ground, but no spent casings from the 25 millimeter. (T. p. 194, lines 5-23.) SLED analysts discovered during the firing of the Lorscien handgun that it would not engage another round into the chamber after firing. The analysist had to manually push the slide for the next round to enter the chamber. (T. p. 291, lines 10-21.)

Evidence of Allen's Motive to Kill Windham

Pete Farnum employed Allen at his automotive body repair business. (T. pp. 304-305.) Allen worked at the body shop for about six months, and Farnum described him as "very smart." (T. p. 306, lines 8-23.) One day Farnum realized Allen was carrying a handgun, and he confronted him about it. (T. p. 307, lines 1-3.) Allen told Farnum he had a concealed weapons permit because a man killed his brother. The man was in prison, but not for the murder of Allen's brother. (T. p. 307, lines 9-14.) Allen told Farnum he would kill the man eventually, and Farnum tried to talk him out of it. (T. p. 307, lines 15-23.) When Farnum later heard Allen killed Windham, he regretted not talking to police about Allen's plan. (T. p. 308, lines 6-9.) Farnum said Allen eventually stopped coming in to work. (T. p. 309, lines 7-11.)

Nettles made a motion in limine to exclude the testimony of Mr. Farnum as too remote in time to be relevant and as unfairly prejudicial. (T. p. 94, line 18 – p. 96, line 22.) The trial court denied the motion, finding the statements to Farnum met the threshold test of admissibility for relevance. (T. p. 97, lines 14-16.)

To corroborate and clarify the charges against Windham involving the death of Allen's brother, the Clerk of Court for Florence County testified about the indictment of Edward Windham for the murder of Robert Allen, Appellant's brother. The clerk told the jury Windham was acquitted of the murder charge and found guilty of the weapons charge. (T. p. 128, line 14 – p. 130, line 12.) The jury also learned Windham received five years' imprisonment for the weapons charge related to the brother's death. (T. p. 130, lines 2-4.)

Windham's wife, LaSheia Windham, testified her husband discussed the Allen brothers with her following his release from prison. (T. p. 132, line 13 – p. 133, line 13.) Ms. Windham described her husband's behavior in the months leading to his death as nervous and restless. (T.

p. 133, lines 20-25.)

Allen's Opportunity to Kill Windham

Vonquell Pittman lived with his brother on the street where the murder occurred. (T. p. 314, line 23 – p. 316, line 3.) His house was two houses away from where the victim was shot. (T. p. 318, lines 3-9.) On that night, Pittman arrived home from work and found Allen, who was friends with his brother, cooking out with some friends at his brother's house. (T. p. 318, line 13 – p. 319, line 23.) Another witness testified the victim visited the neighborhood on his moped almost every day. (T. p. 340, lines 8-22.) Windham had lived next door to Debra Coe with his grandmother years before. (T. p. 341, lines 3-20.) The same witnesses testified it was not usual to see Allen in the neighborhood. (T. p. 342, lines 10-22.) [2]

Allen's Version of Events

Allen told the jury his version of what happened that night. According to Allen, he had family and friends who lived in Tara Village. (T. p. 414, lines 2-24.) On the day of the shooting, Allen said he went with his brother to a cook out in Tara Village and to help a friend with his car. (T. p. 415, lines 15-18.) Allen brought his Ruger nine millimeter and an extra magazine clip with him. (T. p. 415, lines 19-22, p. 417, lines 3-7.) Allen said he obtained his concealed weapons permit after his brother's death because he and his family received threats. (T. p. 416, lines 12-24.) While at the cookout, a friend called Allen and asked him to walk down to his house and

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[2]SLED analyst Whitney Berry testified gunshot residue ("GSR") was found on Allen's hands, and no gunshot residue was found on the victim's hands. (T. pp. 346-356.) As Appellant noted, SLED determined Agent Berry reported inaccurate GSR results and initiated a corrective action investigation. *See* IBOA, n. 2. However, Respondent has confirmed the GSR test performed by Berry was outside the period requiring corrective active review. Respondent refers the Court to the letter from SLED to Solicitor Clements submitted simultaneously with the filing of the initial brief.

help him with an old car that needed work. (T. p. 418, lines 6-17.) Allen claimed as he was walking, he saw Edward Windham, who was riding on a moped, point a gun at him. (T. p. 419, lines 1-7.) Allen said once he saw Windham raise his gun, he fired until the victim "went down." (T. p. 419, lines 14-25.) Allen claimed he asked Ms. Coe to call 911 and then stayed at the scene, despite his brother's efforts to convince him to leave. (T. p. 420, line 9 – p. 421, line 12.) While he was waiting for the police, he reloaded his weapon because he feared repercussions from Windham's friends in the neighborhood. (T. p. 422, lines 3 – 20.)

On cross-examination, Allen denied telling his former employer he had the gun because he intended to kill Windham, but he acknowledged he may have mentioned "something connected with [his] brother." (T. p. 427, lines 6-21.) Allen denied knowing Windham was frequently in the neighborhood. (T. p. 433, lines 13-21.)

Allen's Objection to the Evidence of Motive

During the pre-trial motions, the solicitor asked the court to proffer the testimony of witness Debra Coe, who was under subpoena but refused to testify against Allen because she was afraid. (T. p. 47, lines 11-22.) Ms. Coe was an eye-witness to the murder, called 911, and gave a statement to police at the scene. (T. p. 48, lines 1-5.) Allen objected to the introduction of the 911 call, saying, "So I would object to the 911 conversation because it gets into a lot of extraneous stuff that is not actually accurate as to date and time." (T. p. 61, lines 22-24.) The solicitor acknowledged the shooting of Allen's brother happened approximately eight years before the instant case and not "last year" as Ms. Coe indicated in her call. (T. p. 62, lines 4-10.) Allen argued:

> We don't object to the earlier portion of the nine one one tape but toward the latter part she starts talking and telling the nine one one operator, no, I think this shooting must have been because his brother got shot last year and they really hate this guy.

Anyhow, I think the opinion she gave as to why this shooting happened is too prejudicial and not admissible.

(T. p. 62, lines 13-19.)

During the proffer, Coe said the victim was killed in the street in front of her house. (T. p. 51, lines 13-20.) Coe also testified the victim was the alleged shooter in a prior killing that also occurred in front of her house. (T. p. 51, line 21 – p. 52, line 2.) Coe testified she saw the victim riding past her house on a moped, and she spoke to him, and then she saw Allen approach. (T. p. 53, line 12 – p. 54, line 10.) Coe heard shots, ran to the front yard and saw the victim lying in the street, told Allen she was calling 911, and then placed the call. (T. p. 54, line 1 – p. 57, line 16.) Similarly, in the 911 call, Coe tells the operator she saw the victim ride down her street on the moped, and then saw Allen walk to the corner to wait for the victim to return and then shot him. (State's Exhibit 2.) In the call, Ms. Coe, who is distraught, tells the operator this incident is the second time a man has been killed in front of her house. (State's Exhibit 2.)

The solicitor informed the trial court he intended to call Ms. Coe as a witness and introduce her 911 call because she answered many of his questions during the in camera hearing. (T. p. 61, lines 4-14.) The solicitor argued the statements on the 911 call were made as excited utterances and present sense impressions. (T. p. 62, lines 2-5.) Allen objected to the introduction of the 911 call, through Ms. Coe, because portions of the call referred to the earlier shooting of Allen's brother. The solicitor urged the trial court to listen to the 911 call because Ms. Coe's excited tone is clear from the recording. (T. p. 63, lines 1-5.)

The trial court advised Ms. Coe she was under subpoena and informed her she would be held in contempt if she refused to testify. Judge McMahon asked an attorney with the Florence County Public Defender's Office to talk to Ms. Coe about the consequences of her refusal to testify. (T. p. 64, line 6 – p. 67, line 21.)

The Court's Ruling on the 911 Call

The trial court did not rule on the admissibility of the tape prior to trial, but instead heard arguments from the State and the defense when the State attempted to introduce the tape during the testimony of the 911 dispatcher. (T. pp. 119-123.)

The court found any discrepancies between what Coe said she saw on the 911 call and what she testified to was a matter for the jury to decide in weighing the credibility of the testimony. (T. p. 125, lines 2-9.) The trial court also found the testimony was relevant and not unfairly prejudicial to Allen, as long as the jury heard the correct information about when the prior shooting actually took place. (T. p. 124, lines 14-23, p. 125, lines 2-16.) Allen objected preliminarily to the admissibility of the 911 call because the witness was potentially unavailable to testify and Allen would not be able to cross examine her on the statements she made in the call. (T. p. 125, line 17 – p. 126, line 1.) The court told Allen he could only rule on the issue before him. (T. p. 126, lines 7-20.) The recording, marked as State's Exhibit #2, was published to the jury. (T. p. 127, lines 1-2.)

The State rested its case without calling Ms. Coe. (T. p. 389, line 14.) Allen moved for a mistrial on the grounds the 911 call should not have been admitted because the recording contained inadmissible hearsay and because he did not have the opportunity confront Ms. Coe. (T. p. 391, lines 1-23.) The solicitor informed the court Ms. Coe was still available for the defense to call, but he declined to call her because he was unsure if she would tell the truth. (T. p. 393, lines 16-25.)

The court found there was no gap in the tape where it could be easily redacted. (T. p. 394, lines 11-20.) The trial court then went on to make an extensive analysis of the Confrontation Clause and the applicability of Supreme Court case law:

In this case, the statements were made to a nine one one emergency operator by Ms. Debra Coe who called in to report an emergency, that an individual had been shot; that he was dead in the road in a particular location in Florence County.

That the shooter was still in the area, and the nine one one operator was not interrogating Ms. Coe for purposes of future presentation in Court or at trial, but was responding to a citizen emergency complaint.

Obviously, in the excited state and stress of the moment, the operator knowing no history whatsoever, Ms. Coe relates that history to the operator and the operator then properly and correctly and professionally follows up on it because law enforcement officers were responding to the scene of a shooting.

Now, whether the individual was responsible for the shooting or not, he was still at the scene.

So I would find that it is non-testimonial, that Ms. Coe is available, number one, although not presented by the State, and, number two, the Defendant has had the opportunity to cross-examine Ms. Coe during the in-camera hearing.

So with those two prongs, the clause would not apply. Therefore, it then goes to State evidentiary law, and that evidentiary law, as I ruled previously, under 803 one, a hearsay exception. The availability of declarant – the following is not excluded by the hearsay rule even though the declarant is available to be a witness.

One, present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter. Two, excited utterance – a statement relating to a startling event or condition, and I emphasize a statement relating to a startling event or condition, made while the declarant was under the stress of the excitement following the crime, the event or the matter at issue.

(T. p. 397, line 21 – p. 399, line 5.) Finding no constitutional prohibition against the earlier admission of the call, as well as no state evidentiary considerations, the court denied the motion for mistrial. (T. p. 399, lines 6-7.)

ARGUMENT

Because the prior death of Allen's brother was relevant to all theories of the case, the trial court properly admitted the entire 911 call as an excited utterance and present sense impression. Additionally, the statements about the prior death were cumulative to the testimony of numerous other witnesses, and any error in the admission of 911 call was harmless beyond a reasonable doubt.

Allen never disputed he shot Windham. The only question of fact for the jury was whether 1) Allen, fearing for his life, reasonably shot his brother's killer after that killer

threatened him with a gun; or 2) Allen, seeking revenge, gunned down Windham on the street that evening when he finally saw the opportunity. The death of Allen's brother was critical to both the State's theory and the defense's theory of the case. Ms. Coe's reference in the 911 call to the earlier shooting, which was the portion to which Allen objected, was relevant and even consistent with the arguments presented to the jury. In ruling on its admissibility, the trial court found the 911 call constituted a continuous statement that could not easily be redacted. The court further found the references to the prior shooting of Allen's brother were made as a present sense impression and an excited utterance. Regardless of whether the statements qualified as either, Allen cannot show prejudice from the jury's knowledge of the earlier shooting when he argued that history with Windham was why he feared for his life.

Standard of Review

"The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." *State v. Saltz*, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001). An abuse of discretion occurs when the conclusions of the trial court are based on an error of law. *State v. McDonald*, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000). 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). The standard of review is limited to determining whether the trial court's ruling is supported by any evidence. *State v. Breeze*, 379 S.C. 538, 543, 665 S.E.2d 247, 250 (Ct. App. 2008) (emphasis added). Here, the court correctly found Ms. Coe's statements to the 911 operator were relevant, not unduly prejudicial, and reliable as present sense impression and excited utterance exceptions to the prohibition against hearsay.

The Prior Death Was Relevant As Motive Evidence

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. The trial court has broad discretion in determining the relevancy of evidence and its decision to admit or exclude evidence will not be reversed on appeal absent an abuse of that discretion and a showing of prejudice. *State v. Holder*, 382 S.C. 278, 288, 676 S.E.2d 690, 696 (2009); *State v. Gaster*, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002).

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Rule 403, SCRE; *see also State v. Cooley*, 342 S.C. 63, 69, 536 S.E.2d 666, 669 (2000). "Unfair prejudice means an undue tendency to suggest decision on an improper basis." *State v. Tynes*, 402 S.C.211 740 S.E.2d 512 (Ct. App. 2013); *State v. Wiles*, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009). "All evidence is meant to be prejudicial; it is only **unfair** prejudice which must be [scrutinized under Rule 403]." *State v. Lee*, 399 S.C. 521, at 529, 732 S.E.2d 225, at 229 (Ct. App. 2012) (quotation marks and citations omitted)(emphasis added).

At trial, Allen argued Ms. Coe's reference to the earlier shooting of Allen's brother was inaccurate and confusing to the jury, and thereby prejudicial to Allen. (T. p. 123, lines 4-7.) Allen conceded the first portions of the 911 call were admissible as excited utterances, but said the later portions "about what happened last year" became inadmissible hearsay. (T. p. 123, lines 1-3.) Allen's argument against admissibility had two components: the prejudice argument and the hearsay argument. Perhaps realizing he could not argue the death of Allen's brother was irrelevant, given his opening argument in which claimed fear of his brother's killer, he appears

to suggest the inaccuracy of Coe's statement was prejudicial, not the content. The court, however, correctly noted that mistake of fact could be corrected for the jury, and the jury could consider the inaccuracy of her statement in weighing her credibility. (T. p. 63, line 25 – p. 64, line 5; p. 125, lines 2-10.) The trial court further ordered a remedy to any confusion over the date of the brother's shooting by directing the State to provide accurate information to the jury of when the shooting took place. The State did, in fact, offer the clerk of court from Florence County to substantiate those dates. (T. p. 128, line 18 – p. 130, line 20.)

Ms. Coe's reference to earlier the shooting in the 911 call communicated to the jury information they already knew from the State's opening argument, as well as that of the defense: the death of Edward Windham was entirely related to the death of Allen's brother years before. The objectionable statements were cumulative and were in no way unfairly prejudicial to Allen. *See State v. Blackburn*, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978) ("improperly admitted hearsay which is merely cumulative to other evidence may be viewed as harmless").

The 911 Call Was Inherently Reliable

Allen next argues the later portions of the 911 call were inadmissible hearsay because the call contained inadmissible hearsay statements from Ms. Coe. However, Ms. Coe, who had just heard gun shots and saw a man lying dead in the street, immediately called 911 to report what she witnessed. Her statements, made over the course of an approximately seven minute long telephone call, fall within two exceptions to the prohibition against hearsay, and were thereby properly admitted at trial.

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c),

SCRE. "Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court of this State or by statute." Rule 802, SCRE.

The 911 Call Was Not Offered for the Truth of the Matter Asserted

As an initial matter, the 911 call was not offered for the truth of the matter asserted, so the statements made by Coe were not hearsay. *See Blackburn*, 271 S.C. 324, 247 S.E.2d 334 (1978) (statement implicating defendant in alleged prior crimes, which was not offered to prove the truth of the matter asserted, that is, that defendant in fact committed the prior crimes, but to establish motive, was not "hearsay" and its admission was not error). In particular, statements of one person to another to explain subsequent actions taken by the person to whom the statements were made are admissible as non-hearsay evidence. *State v. Coffey*, 326 N.C. 268, 282, 389 S.E.2d 48, 56 (1990). The 911 call explained why the officers were called to the scene and why they took investigative action to detain and question Allen upon their arrival. The State acknowledged the dates of the prior death referred to by Ms. Coe were not accurate and called the proper witnesses to clarify the correct timeline. Thus, Ms. Coe's reference to the prior death never rises to the level of hearsay because the State did not offer the 911 call to prove Allen's brother was killed the previous year.

Coe Was Startled and Under Stress When She Called 911 And the Recording Was Admissible as an Excited Utterance

Even assuming the 911 call did contain an out of court statement offered to prove the truth of the matter asserted, the statements at issue were still admissible. "A statement that is admissible because it falls within an exception in Rule 803, SCRE, such as the excited utterance exception, may be used substantively, that is, to prove the truth of the matter asserted." *State v. Sims*, 348 S.C. 16, 20, 558 S.E.2d 518, 520–21 (2002) (citation omitted). An excited utterance is

a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Rule 803(2), SCRE.

> Three elements must be met for a statement to be an excited utterance:
>
> (1) the statement must relate to a startling event or condition; (2) the statement must have been made while the declarant was under the stress of excitement; and (3) the stress of excitement must be caused by the startling event or condition.

State v. Stahlnecker, 386 S.C. 609, 623, 690 S.E.2d 565, 573 (2010) (*citing Sims*, 348 S.C. at 21, 558 S.E.2d at 521. A court must consider the totality of the circumstances in determining whether a statement falls within the excited utterance exception. *Stahlnecker,* 386 S.C. at 623, 690 S.E.2d at 573. The passage of time between the startling event and the statement is one factor to consider, but it is not the dispositive factor. *Stahlnecker*, 386 S.C. at 623, 690 S.E.2d at 573; *Sims*, 348 S.C. at 21, 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." *Stahlnecker*, 386 S.C. at 623, 690 S.E.2d at 573 (*quoting Sims*, 348 S.C. at 22, 558 S.E.2d at 521).

In the proffered testimony to the court, Coe testified she called 911immediately after she heard gun shots from in front of her house. (T. p. 52, lines 18-24.) In the 911 call, Coe was alarmed and in disbelief another shooting had happened in virtually the same location and involving the same men as a previous incident in the recent past, as best she could recall. (State's Ex. 2 at 1:50 ("Why in front of my damn house?"); State's Ex. 2 at 3:13 ("About a year ago, the same thing happened in front of my house.")) Coe is clearly upset, and she can be heard saying, "He's dead. He's laying in the street, dead. Come on!" (State's Ex. 2 at 0:35) In fact, the 911 operator tells Ms. Coe to "calm down." (State's Ex. 2 at 0:40.) Later, she is upset and angry

when she exclaims "I'm trying to finish cutting my grass and I got this bull crap in front of my house!" (State's Ex. 2 at 5:23.)

Applying the elements necessary for a statement to qualify as an excited utterance, Coe's statements to the 911 operator 1) related to the startling event of a man being shot in the street in front of her house; 2) were within minutes of the shots being fired while she was still under stress from the shooting; and 3) her emotional state was caused by the startling event of a man being shot, again, and lying dead so close to her home. The trial court did not abuse its discretion in finding the statements to the 911 operator admissible as an excited utterance exception to the prohibition against hearsay.

Coe's Description of the Shooting Was a Present Sense Impression

The court additionally found the statement was admissible as a present sense impression. There are three elements to the foundation for the admission of a hearsay statement as a present sense impression: (1) the statement must describe or explain an event or condition; (2) the statement must be contemporaneous with the event; and (3) the declarant must have personally perceived the event. *See* Rule 803(1), SCRE; *see also United States v. Mitchell*, 145 F.3d 572, 576 (3d Cir.1998) (listing the "three principal requirements" for a statement to be admissible as a present sense impression). *State v. Hendricks*, 408 S.C. 525, 533, 759 S.E.2d 434, 438 (Ct. App. 2014)

In the 911 call, Ms. Coe explains why she is calling 911, she describes the victim lying in the road, as well as Allen standing nearby, and she explains to the operator that the victim and Allen have a history of violent interactions. (State's Exhibit2.) Ms. Coe testified she called 911 immediately after hearing the gun shots and seeing the victim lying in the street. (T. p. 52, lines 18-21.) In fact, in the recording, Ms. Coe tells the operator the "moped is still running." (State's

Ex. 2 at 1:23.) Finally, Ms. Coe gives a detailed description of what she saw just before and after the shooting, in which she describes seeing Allen walk to the corner to follow Windham and waited for him to return back to the corner. (State's Ex. 2 at 4:45 – 5:08; 6:30.)

Ms. Coe's call to the 911 operator in which she describes what she is seeing in the street in front of her house, as well as her description of what she witnessed leading up to the shooting, was clearly her present sense impression at the time she made the call. The comments about the prior shooting, which were intertwined with her description of Windham's shooting, were an effort to make sense of what was happening before her eyes. Thus, as the trial court correctly found, the recording was admissible as a present sense impression, as well as an excited utterance.

The Evidence of Motive Was Cumulative

Lastly, improperly admitted hearsay which is merely cumulative to other evidence may be viewed as harmless. *See State v. Blackburn*, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978); *State v. Jennings*, 394 S.C. 473, 478, 716 S.E.2d 91, 93–94 (2011). Even if this Court were to find the trial court erred in admitting the unreacted portions of the 911 call, any error would be harmless beyond a reasonable doubt. Mrs. Windham, Mr. Farnum, and Allen, himself, all referred to the death of Allen's brother during their testimonies. Ms. Coe's innocuous reference on the 911 call to the previous shooting corroborated the other witness testimony. Moreover, the reference supported either theory of the case. Appellant cannot show he was prejudiced by the admission of the entire 911 call, and any error in its admission was entirely harmless.

THE TRIAL COURT COMMITTED NO ERROR

Under all theories of the case, the death of Allen's brother was relevant. Ms. Coe's reference to the death in the 911 call could not prejudice Allen's case when he claimed fear of

the victim because of his prior violence. In ruling on its admissibility of the recording, the court found the references to the prior shooting of Allen's brother were relevant, and made as part of a present sense impression and an excited utterance. The record before this Court support's the trial court's finding. The judgments, convictions, and sentences of the trial court should be affirmed.

Respectfully submitted,

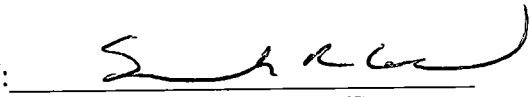
ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

SUSANNAH R. COLE
Assistant Attorney General

EDGAR L. CLEMENTS, III
Solicitor, Twelfth Judicial Circuit

BY: 
SUSANNAH R. COLE

Office of the Attorney General
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ATTORNEYS FOR RESPONDENT

July 24, 2017

STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
JUL 24 2017
SC Court of Appeals

Appeal from Florence County
The Honorable R. Knox McMahon, Circuit Court Judge

THE STATE,

Respondent,

v.

CORY NETTLES ALLEN,

Appellant.

Appellate Case No. 2016-000686

PROOF OF SERVICE

I, Susannah Cole, counsel for Respondent, certify that I have served the within Initial Brief of Respondent and Certificate of Compliance on Appellant by depositing two (2) copies of the same via inter-agency mail, addressed to his attorney of record at:

Robert Dudek
Chief Appellate Defender
SCCID/Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This 24th day of July, 2017.

Susannah R. Cole
Assistant Attorney General
SC Bar No. 68383

ALAN WILSON
ATTORNEY GENERAL

Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
P. O. Box 11629
Columbia, SC 29211

Re: The State v. Cory Nettle Allen
Appellate Case No. 2016-000686

Dear Ms. Kitchings,

Enclosed please find the original and one (1) copy of the ***Initial Brief of Respondent and Designation of Matter***, dated July 24, 2017, along with proof of service, in the above-referenced case.

By copy of this letter, I am serving opposing counsel with same. Thank you for your consideration in this matter.

Sincerely,

Susannah R. Cole
Assistant Attorney General

SRC/
Enclosures

cc: Robert Dudek, Esquire, Appellate Defender
The Honorable Edgar Clements, Solicitor, Twelfth Judicial Circuit
Trisha Allen, Victim Services