

**ORIGINAL**

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Horry County  
Honorable Larry B. Hyman, Circuit Court Judge  
Appellate Case Tracking No. 2017-000135

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The State,

Respondent,

vs.

Jamal Marquis Daniels,

Appellant.

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**BRIEF OF RESPONDENT**

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ATTORNEYS FOR RESPONDENT

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## STATEMENT OF ISSUES ON APPEAL

- I. The trial court properly admitted the 911 call and the dispatch notes as neither was inadmissible hearsay.

## **STATEMENT OF THE CASE**

The State agrees with Appellant's procedural Statement of the Case.

## STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001); State v. Butler, 353 S.C. 383, 388, 577 S.E.2d 498, 500 (Ct. App. 2003). “The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion.” State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). “An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.” Id.

## ARGUMENT

### **I. The trial court properly admitted the 911 call and the dispatch notes as neither was inadmissible hearsay.**

Appellant contends the trial court erred in admitting the 911 call and the dispatch notes. However, neither the 911 call nor the dispatch notes were inadmissible hearsay. The dispatch notes were a clear business record under Rule 803(6), SCRE. Further, the 911 call was properly admitted as excited utterance and present sense impression exceptions to the hearsay rules under Rules 803(1) and (2), SCRE. Finally, it is highly questionable whether the issue as presented in Appellant's brief is preserved for review on appeal.

#### **Preservation**

Initially, the arguments raised in Appellant's brief are significantly different from the arguments raised at trial, and are therefore not properly preserved for review on appeal. At trial, Appellant initially objected to the 911 recording on the basis of hearsay, but maintained it was hearsay solely because "[w]e need to know whose voice is on the 911 tape before it is submitted into evidence." (R.69).<sup>1</sup> After identifying the parties on the 911 call, the trial court allowed both into evidence. The trial court then raised an initial concern regarding the dispatch notes, believing them to contain subjective impressions of the dispatcher. (R.70-71). Appellant never raised an objection to the notes on this basis.

Prior to playing the 911 recording, Appellant renewed his objection, indicating the statements by the neighbor are hearsay. He explained: "His statements are hearsay at this point, whether or not they come under the business records or not. If he is preparing to testifying [sic],

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<sup>1</sup> Appellant did not appear to object to the dispatch notes, but only raised an objection to the 911 recording. As a result, any issue regarding the dispatch notes is not preserved for review on appeal. See State v. Johnson, 363 S.C. 53, 609 S.E.2d 520 (2005) (to preserve an issue for review there must be a contemporaneous objection that is ruled upon by the trial court).

after he's testified, then it is not hearsay . . . ." (R.72). The trial court indicated the recording could contain present sense impressions and would not be hearsay, and Appellant's counsel agreed. (R.73). Finally, he then asserts the caller is relaying information from the victim and that portion is hearsay. (R.74). This prompts the trial court to review the recording. After review, the trial court concludes the statements by the caller are based on the caller's own observations and are present sense impressions. Appellant fails to offer any argument to the contrary and instead argues:

[T]he reason we challenge, contest, this is that medical staff reported that the head injury may, be consistent with a grazing bullet wound. I don't think we have medical testimony to testify that, yes, there was a bullet wound to the head. Him, making those statements, hearsay statements, on a 911 tape are prejudicial to our later position concerning what the extent of the injuries were.

(R.75). The trial court repeats his decision that he is allowing the recording in under present sense impression and excited utterance. (R.75-76).

For the first time on appeal, Appellant challenges the trial court's ruling that the recording came under the present sense impression or excited utterance exceptions of Rule 803, SCRE. This argument was never presented to the trial court and, as a result, should not be considered on appeal. See e.g., State v. Stahlnecker, 386 S.C. 609, 617, 690 S.E.2d 565, 570 (2010) ("For an issue to be properly preserved it has to be raised to and ruled on by the trial court."); State v. Freiburger, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005) (holding an issue not preserved when one ground is raised to the trial court and another ground is raised on appeal); State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003) (holding a defendant may not argue one ground at trial and another on appeal).

## Merits

Even assuming Appellant's contentions the 911 recording and the dispatch notes are inadmissible hearsay are preserved for review on appeal, both fall under clear exceptions to the hearsay rules. The contents of the dispatch notes were business records and the 911 recording contained permissible present sense impressions or excited utterances such that they were properly admitted and not inadmissible hearsay.

## Dispatch Notes

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. Generally, hearsay is inadmissible. Rule 802, SCRE. One exception to the hearsay rule is for admission of business records. Rule 803(6), SCRE provides:

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness; provided, however, that subjective opinions and judgments found in business records are not admissible.

Id. The dispatch log in this case clearly meets the requirements of a business record and its admission was properly supported by the custodian of the log. The dispatch log was a report made as the events it records were unfolding and was kept in the regular course of business for the Support Services Division of the Myrtle Beach Police Department. (R.67; State's Exhibit 3, 388-391).

Further, the log is not hearsay because it was not admitted for the truth of the matters asserted within the log, but instead was admitted to demonstrate the progression of the investigation including arrival times of the officers and steps they undertook in the investigation. As a result, the report does not constitute hearsay under Rule 801(c). Whether admitted as not constituting hearsay or pursuant to the business record exception, the trial court properly admitted the dispatch log.

### **911 Call**

The 911 call also falls under exceptions to the hearsay rule. Two such exceptions are for present sense impression and excited utterance. Pursuant to Rule 803(1), SCRE, a present sense impression is excluded from hearsay and is defined as: "A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." *Id.* Further, Rule 803(2), SCRE, indicates an excited utterance is excluded from the hearsay rule and defines it as: "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." *Id.*

The 911 call contains the phone call made by the victims' next door neighbor. Much of the recording qualifies as a present sense impression being given by the neighbor. "There are three elements to the foundation for the admission of a hearsay statement as a present sense impression: (1) the statement must describe or explain an event or condition; (2) the statement must be contemporaneous with the event; and (3) the declarant must have personally perceived the event." *State v. Hendricks*, 408 S.C. 525, 533, 759 S.E.2d 434, 438 (Ct. App. 2014). In the call, he is reporting events as he witnesses them based on his own personal observations. He describes seeing his neighbor with blood coming from her head. He tells the dispatcher what is

occurring around him. The vast majority of the 911 call recording is of the neighbor's present sense impressions and was admissible under the exception to hearsay found in Rule 803(1).

Additionally, on the 911 call recording you can periodically hear statements being made by the victims. These statements are clearly excited utterances detailing the recent traumatic experience of a robbery and assault and battery that occurred. "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).

The statements on the 911 call recording all relate to the robbery and assault and battery, which certainly qualify as a startling event. As explained in testimony, the victims fled the scene as the robbery occurred and immediately went to their neighbor's. (R.93-94). It was then the neighbor called 911 and the victim's cries, pleas, and explanations can be heard. These statements, which occurred right after fleeing the assailants, met the requirement that they were made while still under the stress of the event. Finally, the 911 call and the comments by the victims were clearly caused and directly related to the startling event. As a result, any statements being made by the victims in the background of the 911 call recording were properly admitted as excited utterances pursuant to Rule 803(2).

Finally, the neighbor is asked several questions by the dispatcher. The neighbor talks to the victim, but only his questions are heard. Ultimately, the neighbor relayed information he received from the victims that the robber was wearing a mask. He does not provide any further information on the 911 call recording regarding the robber's identity or description. The information clearly comes from the victim.

While the information about the mask is arguably hearsay, it's admission entirely harmless. The harmlessness of an error in the admission of evidence generally depends on the materiality of the evidence in relation to the case as a whole. State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003); see State v. Wiley, 387 S.C. 490, 497, 692 S.E.2d 560, 564 (Ct. App. 2010) ("No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case."). Where a review of the entire record establishes the error is harmless beyond a reasonable doubt, the conviction should not be reversed. State v. Pickens, 320 S.C. 528, 531, 466 S.E.2d 364, 366 (1996).

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); see also, State v. Pagan, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006) ("Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result. Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained."). "Error without prejudice does not warrant reversal." State v. McWee, 322 S.C. 387, 393, 472 S.E.2d 235, 239 (1996); see also, State v. Hariott, 210 S.C. 290, 298, 42 S.E.2d 385, 388 (1947) ("It is a rule of practically universal application in appellate procedure that an accused cannot avail himself of error as a ground for reversal where the error has not been prejudicial to him.").

The statement is clearly cumulative. The statement on the 911 call recording is clearly just a relay of information from the victim. The jury understood it was information being relayed by the neighbor from the victim to dispatch. As such, the statement is cumulative to the victims' later testimony that the robber wore a mask. (R.90-91; 115; 125; 143). Further, it is cumulative to evidence presented regarding what was contained in the officer's report. (R.288).

The statement could not have impacted the outcome of the trial as it was immaterial to establishing an identification of the robber and it was merely cumulative to other evidence in the record. See State v. Haselden, 353 S.C. 190, 577 S.E.2d 445 (2003) (admission of improper evidence is harmless where the evidence is merely cumulative to other evidence.); State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993) (any error in admission of evidence cumulative to other unobjected-to evidence is harmless).<sup>2</sup>

Appellant contends this case is similar to State v. Hendricks, 408 S.C. 525, 533, 759 S.E.2d 434, 438 (Ct. App. 2014), in which this Court found a 911 call recording inadmissible hearsay and not subject to the present sense impression or excited utterance exceptions. This case is clearly distinguishable from Hendricks. In Hendricks, the victim's mother calls the police some time after learning of her daughter's rape—specifically, the caller waited for the victim to arrive at her house and then put the children to bed before calling 911 after leaving the house to take the daughter to the hospital—and provided information she obtained from the daughter. Id. at 534, 759 S.E.2d at 439.

This Court correctly noted the mother was not providing the 911 dispatch information about an event or condition she perceived, but instead was relaying information regarding the daughter's rape which she did not witness. Id. at 533, 759 S.E.2d at 438. In the instant case, the majority of the 911 call recording is the neighbor explaining what he perceives and understands about the current situation he is witnessing—his neighbor arriving on his balcony seeking help.

Additionally, this Court noted in Hendricks that the mother was no longer under the stress of an emotional situation. She had time to calmly reflect and even assisted in putting

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<sup>2</sup> It is also important to note that Appellant never moved to redact any portions of the 911 call recording. He sought exclusion of the recording in its entirety. Clearly, the overwhelming majority of the recording fell under an exception to the hearsay rule and it was incumbent on Appellant to seek redaction of any portion not in compliance with Rules 803(1) and (2), SCRE.

children to bed before calling. The call was calm and did not provide the necessary assurance of spontaneity required. In this case, however, the call the neighbor and the statements by the victims in the background of the call clearly exhibit the kind of distress and emotion expected of an excited utterance. A robbery and shooting had just occurred and the victims were in the process of seeking help. The 911 call recording is a classic example of a distressed caller, a chaotic scene, and an intense emotion reaction of which the declarants were still under the resulting stress. The phone call in Hendricks is clearly distinguishable from the call in this case.

The 911 call recording and the statements by the neighbor and the victims included on the recording are clear present sense impressions and excited utterances. As a result, the trial court properly admitted the recording into evidence as it was not inadmissible hearsay. Accordingly, this Court should affirm the decision of the trial court and affirm Appellant's convictions and sentences.

CONCLUSION

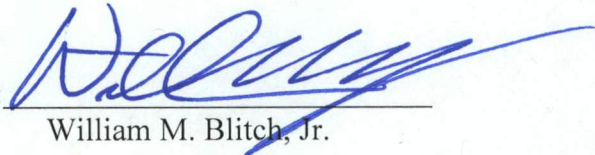
For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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**CERTIFICATE OF COUNSEL**

The undersigned certifies that this Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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