STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY

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SC Court of Appeals

Court of General Sessions
Hon. John C. Hayes, III, Circuit Court Judge

Appellate Case No. 2018-000822

THE STATE,

Respondent,

v.

ANTOINE LAKIDA HIGHTOWER,

Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I.

Neither judge abused his discretion by declining to order a psychiatric evaluation to assess Appellant's criminal responsibility because Appellant failed to make a preliminary showing that such an evaluation was warranted.

II.

Neither judge abused his discretion by declining to order a competency evaluation because neither judge had reason to believe such an evaluation was warranted.

III.

This Court should affirm the trial court's admission of a body camera video containing out-of-court witness statements because the statements were admissible under the excited utterance exception to the hearsay rule. Alternatively, any error was harmless.

STATEMENT OF THE CASE

A York County grand jury indicted Appellant in December 2017 for kidnapping, first degree burglary, assault and battery of a high and aggravated nature, and possession of a weapon during the commission of a violent crime. R. (Indictments). Appellant proceeded to trial on April 23-25, 2018, before the Honorable John C. Hayes, III, and a jury. Appellant was convicted as charged on all counts and sentenced to incarceration for terms of 25, 25, 20 and 5 years respectively, with all sentences to run concurrently. April 25 Tr. 72. Appellant filed a notice of appeal on April 26, 2017.

STATEMENT OF FACTS

In the early morning hours of August 23, 2017, Maurice Taylor, Tymel McCullough, and two female acquaintances were spending time together in a room at the Hillside Motel in York County. Tr. 84. The four of them were watching TV when McCullough walked out to the parking lot to take a phone call. Tr. 112; 135. A man in a van asked McCullough to borrow a lighter. Tr. 112. Appellant was sitting in the back seat. Tr. 112. McCullough and Appellant knew each other prior to this incident. Tr. 113. According to McCullough, Appellant got out and approached McCullough face to face and asked whether McCullough was going to give them a light. Tr. 113. McCullough responded that he left his lighter in his room, and walked back to the room. Tr. 114. Appellant followed, but McCullough did not let him into the room because he thought Appellant was acting strange, and they weren't allowed to have company in the room. Tr. 114-15. Appellant knocked on the room door. Tr. 85-86. Taylor told Appellant he couldn't come in, but Appellant continued to knock. Tr. 115. When Taylor and McCullough refused to open the door, Appellant kicked it in. Tr. 87-88; 116. Appellant then demanded to know "Where is Gold?"[1] Tr. 88; 117. "Gold" is McCullough's nickname because he has gold teeth.[2] Tr. 88-89; 117. Appellant pointed a handgun at the group. Tr. 88; 117-18. McCullough and the women ran from the room. Tr. 87-89.

Appellant caught up to McCullough, slammed him to the ground, and beat him with the pistol. Tr. 118. McCullough attempted to defend himself with a brick that was laying on the ground. Tr. 118-19. McCullough, bleeding profusely, escaped back to the motel room. Tr. 91.

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[1] Taylor testified Appellant asked "Where is Gold?" but McCullough testified Appellant asked "Where is the guy with the gold?" Tr. 88; 117.

[2] Appellate omits this critical fact from his brief. Instead, he attempts to portray the reference to "gold" as evidence of the "odd nature of the factual allegations." Brief of Appellant at 15. Trial counsel agreed in his closing argument that McCullough's nickname is "Gold" and made no attempt to argue Appellant was searching for actual gold. April 25 Tr. 31-36.

Appellant threatened to shoot him as he ran away. Tr. 132. McCullough attempted to shut the door behind him, but Appellant pushed the door open and continued beating him over his head and body with the brick. Tr. 91. Appellant kept asking, "where is that?" Tr. 92. McCullough responded, "you're not going to get it this way." Tr. 92. Appellant beat McCullough unconscious. Tr. 120. Appellant then took something from the night stand and left. Tr. 92.

ARGUMENT

I.

Neither judge abused his discretion by declining to order a psychiatric evaluation to assess Appellant's criminal responsibility because Appellant failed to make a preliminary showing that such an evaluation was warranted.

Standard of Review

A trial court's decision whether to order a psychiatric examination to assess a defendant's criminal responsibility is reviewed under an abuse of discretion standard. State v. Holland, 261 S.C. 488, 496, 201 S.E.2d 118, 122 (1973); Monahan v. State, 365 S.C. 130, 134, 616 S.E.2d 422, 424 (2005). An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support. State v. Pittman, 373 S.C. 527, 570, 647 S.E.2d 144, 166 (2007).

Relevant Facts

The case was set for trial for the first April 2018 term. March 27 Tr. 4. A hearing was held on March 27 before the Honorable Daniel D. Hall, at which Appellant requested that the court appoint a different lawyer to represent him. Appellant expressed dissatisfaction with his attorney's failure to obtain a better plea offer, explaining "All I did was get into a fight and the situation got out of hand." March 27 Tr. 10. Judge Hall declined to appoint a different lawyer to represent Appellant. Upon examination by the court, Appellant stated he was "kind of diagnosed" in 2000 with paranoid schizophrenia. March 27 Tr. 6. Appellant explained he was currently taking medication. When asked if he understood what he was doing, he responded "I know exactly what I'm doing." March 27 Tr. 7. Neither Appellant nor his lawyer asked the court to order a psychiatric evaluation.

Judge Hall convened another hearing on April 4, 2018, the week before the case was scheduled for trial. April 4 Tr. 3. Defense counsel moved for a court-ordered mental evaluation based on Appellant's previous assertion that he had a history of schizophrenia. April 4 Tr. 5. Defense counsel did not claim Appellant was unable to understand what he was doing at the time of the crime, but explained that "**if** he was going through a schizophrenic episode... I don't believe it's in my discretion to not ask your honor to allow him to go through the process of at least being evaluated...." April 4 Tr. 5 (emphasis added). Counsel further explained that Appellant wanted to "make sure that he has every opportunity afforded to him to... prepare his defense in the best way we possibly can for this case." April 4 Tr. 6. The Court then inquired into Appellant's mental health history. Appellant told the court he last saw a doctor in relation to his mental condition in late 2016. April 4 Tr. 7. Appellant explained he received a disability check and that he was the payee. April 4 Tr. 7-8.[3] Appellant further explained he last worked at Ruby Tuesday, but claimed he was let go "because of my mental situation." April 4 Tr. 8. The court accepted defense counsel's representation that Appellant was not taking medication at the time of the incident. April 4 Tr. 10. Appellant did not give the names of any doctors he saw or places where he was treated, nor did he provide any medical records to substantiate his claims. Counsel told the court Appellant claimed to have a list of places where he had been treated, and that he was working to ascertain that information. April 4 Tr. 5. The court declined to order a mental evaluation but continued the trial until the April 23rd term of court because defense counsel had another case on the trial docket. April 4 Tr. 13.

Appellant's case was called for trial on April 23, 2018, before the Honorable John C. Hayes, III. Defense counsel renewed his motion for a court-ordered mental evaluation. Tr. 42.

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[3] Defense counsel explained Appellant's mental condition was "part of what he's on disability for...." April 4. Tr. 5.

When defense counsel told the court he made the same motion before Judge Hall at the previous hearing, the court asked whether counsel had any new information to present. Defense counsel replied that he did not. Tr. 42. Judge Hayes ruled that Judge Hall's ruling was the law of the case and declined to order an evaluation because "there's nothing additional or new or supplemental being offered." Tr. 42.

Discussion

"It is an affirmative defense to a prosecution for a crime that, at the time of the commission of the act constituting the offense, the defendant, as a result of mental disease or defect, lacked the capacity to distinguish moral or legal right from moral or legal wrong or to recognize the particular act charged as morally or legally wrong." S.C. Code Ann. § 17-24-10(A) (2014). By comparison, "A defendant is guilty but mentally ill if, at the time of the commission of the act constituting the offense, he had the capacity to distinguish right from wrong or to recognize his act as being wrong as defined in Section 17-24-10(A), but because of mental disease or defect he lacked sufficient capacity to conform his conduct to the requirements of the law." S.C. Code Ann. § 17-24-20(A) (2014).

Neither circuit court judge abused his discretion by declining to order a psychiatric evaluation to assess Appellant's criminal responsibility because Appellant failed to produce any evidence to warrant such an order. Counsel based his request for an evaluation on Appellant's representation that he was "kind of diagnosed" as schizophrenic seventeen years before the incident date. Appellant produced no documentation of his treatment history, or even the names of any doctors he saw. Counsel told Judge Hall he was going to try to obtain documentation, but failed to produce any when the case was called for trial nineteen days later. Nor did counsel give the court any reason to believe that such documentation existed and could be obtained with

assistance of the court. Based on this total lack of evidence, neither judge abused his discretion by declining to order an evaluation. See State v. Sharpe, 239 S.C. 258, 266, 122 S.E.2d 622, 626 (1961) (no abuse of discretion in trial court's refusal to order criminal responsibility examination where there was "failure on the part of the appellant to produce any evidence that would warrant the granting of such motion"); State v. Anderson, 181 S.C. 527, 188 S.E. 186, 190 (1936) (trial court did not abuse its discretion by refusing to order mental examination pursuant to relevant former statute where "no facts were shown from which it could be said that [defendants] did not know the difference between right and wrong"); State v. Holland, 261 S.C. 488, 496, 201 S.E.2d 118, 122 (1973) (trial court did not abuse its discretion by refusing to order mental examination pursuant to former statute where there was "no showing by [defendant] that would warrant the granting of his motion"); United States v. Hoffman, 612 F. App'x 162, 169 (4th Cir. 2015), as amended (June 2, 2015) (holding trial judge did not abuse its discretion when defense counsel offered only "scant facts" supporting motion for criminal responsibility evaluation).

Appellant relies primarily on United States v. Taylor, 437 F.2d 371 (4th Cir. 1971), to support his argument. In that case, Taylor was tried for an assault he committed while serving a prison sentence for armed robbery. At the armed robbery trial, Taylor presented an unsuccessful insanity defense. Prior to his assault trial, Taylor moved for a court-ordered psychiatric evaluation to determine competency, but his motion alleged facts suggesting an evaluation for criminal responsibility was more appropriate. Id. at 373–74. He presented "uncontested" evidence showing his "extensive history of mental disturbance," including "previous expert medical opinion to the effect that he was 'psychotic' and lacked sufficient internal controls over his conduct." Id. at 373–377. Taylor provided the court with documentation of the dates and locations where he was treated. Id. at 373. The court ordered a competency evaluation, but the

evaluation was terminated after less than ten minutes because Taylor threatened violence against the examiner. Id. at 374. Taylor proceeded to trial, which ended in mistrial when he "picked up one of the large chairs in the courtroom, turned over several of the large tables and proceeded towards the guard who was then in the witness chair with the obvious intention of then and there striking him with the chair." Id. at 374 n.3. Prior to retrial, Taylor again filed a motion "replete with factual allegations casting serious doubt on Taylor's responsibility for his conduct." Id. at 377. The trial court denied the motion. Taylor presented an insanity defense, but was found guilty. The Fourth Circuit Court of Appeals held the trial court should have ordered a criminal responsibility evaluation pursuant to 18 U.S.C. § 3006A(e), the federal statute providing for government-funded "expert services" when necessary for an indigent defendant to present an adequate defense. Id. at 377. The court did not decide the case on constitutional grounds.

If anything, the Taylor case illustrates what Appellant failed to do in this case. Taylor provided documentation of his history of mental illness, including the names of the doctors who treated him, the locations where he received treatment, the dates of treatment, and an "expert medical opinion" showing his inability to control his actions. He clearly stated his intention to present an insanity defense, and actually presented such a defense at trial. Those circumstances are not present here.

In this case, Appellant never asserted he was insane on the night of the incident. Instead, based on Appellant's response to Judge Hall's inquiry into his mental health history, defense counsel merely requested an evaluation because he felt obligated to explore the possibility that Appellant may have had a mental health defense. He never asserted his intention to present a mental health defense, did not provide notice to the Solicitor's Office that he would pursue such

a defense (as required by the South Carolina Rules of Criminal Procedure),[4] and did not present a mental health defense at trial. Instead, he relied on the same theory he articulated in the pre-trial hearing— that he was involved in a fight that got out of hand. See Ake v. Oklahoma, 470 U.S. 68, 83, 105 S. Ct. 1087, 1096, 84 L. Ed. 2d 53 (1985) (holding that "**when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial**, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense") (emphasis added); Page v. Lee, 337 F.3d 411, 416 (4th Cir. 2003) (explaining "a defendant must show the trial court that there exists a reasonable probability both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial"); Campbell v. Polk, 447 F.3d 270, 285 (4th Cir. 2006) (explaining a defendant must produce "more than undeveloped assertions that the requested assistance would be beneficial"); Moore v. Kemp, 809 F.2d 702, 712 & n.8 (11th Cir. 1987) (explaining a defendant must make a "substantial showing," "something more than a mere possibility of assistance from a requested expert," in order to justify appointment of expert).

In summary, Appellant failed to make a preliminary showing that his sanity would be a significant factor in his defense, and did not present an insanity defense at trial. By his own admission, the incident was merely a fight that got out of hand, not the result of his mental illness. Even though Appellant claimed a history of mental illness, he did not produce any evidence to substantiate his claim or explain how it would factor into his defense. Appellant had multiple prior convictions, but there was no indication that he had ever been declared guilty but mentally ill. Apr 25 Tr. 68. Any contention that defense counsel wrongfully failed to procure

[4] See SCRCrimP 5(f). The State requested that Appellant comply with this rule in its discovery request, which Respondent has designated for inclusion in the record on appeal.

evidence substantiating Appellant's claim, if it exists, can be explored in a collateral proceeding. However, in the absence of such evidence, Appellant cannot show an abuse of discretion. This Court should affirm.

II.

Neither judge abused his discretion by declining to order a competency evaluation because neither judge had reason to believe such an evaluation was warranted.

Standard of Review

A trial court's decision whether to order a psychiatric examination to assess a defendant's competency to stand trial is reviewed under an abuse of discretion standard. State v. Locklair, 341 S.C. 352, 364, 535 S.E.2d 420, 426 (2000); State v. Bradshaw, 269 S.C. 642, 644, 239 S.E.2d 652, 653 (1977) (explaining the determination whether a defendant requires a competency exam "necessarily requires the exercise of discretion"). Great deference is given to trial judge because he sits in a better position to ascertain the defendant's faculties. State v. Colden, 372 S.C. 428, 441, 641 S.E.2d 912, 920 (Ct. App. 2007). An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support. State v. Pittman, 373 S.C. 527, 570, 647 S.E.2d 144, 166 (2007).

Discussion

S.C. Code Ann. § 44-23-410(A)(1) provides:

> Whenever a judge of the circuit court or family court **has reason to believe** that a person on trial before him, charged with the commission of a criminal offense or civil contempt, is not fit to stand trial because the person lacks the capacity to understand the proceedings against him or to assist in his own defense as a result of a lack of mental capacity, the judge shall order examination of the person by two examiners designated by the Department of Mental Health if the person is suspected of having a mental illness or designated by the Department of Disabilities and Special Needs if the person is suspected of having intellectual disability or having a related disability or by both sets of examiners if the person is suspected of having both mental illness and intellectual disability or a related disability.

(emphasis added). Judge Hall had the opportunity to observe and question Appellant at two pretrial hearings. At the March 27 hearing, Appellant petitioned the court to appoint a different lawyer to represent him. Appellant was able to articulate his dissatisfaction with his lawyer's representation, explained he did not want to represent himself, and implored the court to appoint different counsel. March 27 Tr. 6–10. Appellant explained he was taking medication for his mental health issues and understood the charges against him and their potential penalties. He explained his version of events: "All I did was get into a fight and the situation got out of hand." March 27 Tr. 10.

Judge Hall had an additional opportunity to observe and speak with Appellant at a separate hearing on April 4, when defense counsel moved for an evaluation to assess his criminal responsibility. Judge Hall performed a lengthy colloquy and heard that Appellant had been dealing with mental health issues since his teenage years but was taking medication provided by the jail. April 4 Tr. 6-7. Appellant explained that he had his GED, had worked in the past, and was the father of three children. April 4 Tr. 9. The court explicitly found Appellant was able to assist in his defense and understand what he was doing. April 4Tr. 9. This finding is supported by Appellant's coherent answers to the court's questions and his statement at the March 27 hearing where he told the court: "I know exactly what I'm doing." March 27 Tr. 7.

The record supports Judge Hall's finding that Appellant was competent and that a mental evaluation was not necessary. See State v. Bradshaw, 269 S.C. 642, 644, 239 S.E.2d 652, 653 (1977) (holding trial court did not abuse its discretion by denying motion for a mental examination to determine competency where defendant failed to show an examination was warranted). Appellant did not broach the topic of competency in front of Judge Hayes at trial, or otherwise give him reason to believe he was not competent. He summarily renewed his motion

for "a mental health evaluation" and did not make an argument why an evaluation was warranted. Tr. 42. Considering trial courts are entitled to especially broad discretion in this area, State v. Colden, 372 S.C. 428, 441, 641 S.E.2d 912, 920 (Ct. App. 2007), this Court should affirm.

III.

This Court should affirm the trial court's admission of a body camera video containing out-of-court witness statements because the statements were admissible under the excited utterance exception to the hearsay rule. Alternatively, any error was harmless.

Appellant alleges the trial court committed reversible error by admitting a police body camera video. The footage shows the scene of the crime in the aftermath of the incident and includes the officer's interaction with Taylor and McCullough, wherein they summarize the incident for the officer. The witness statements contained within the video, to the extent they were admitted for their truth, were hearsay. The trial court seemed to engage in a Confrontation Clause analysis focusing on the declarants' availability for cross-examination, rather than a rules-based hearsay analysis. Tr. 40-41. Respondent concedes this to be incorrect. However, this Court should affirm for two reasons. First, despite the mistaken premise of the trial court's ruling, the statements were admissible under the excited utterance exception to the hearsay rule. An appellate court may affirm on any ground appearing in the record. SCACR 220(c). Second, the admission of the video was harmless because it was not important to State's case and its exclusion would not have changed the result of the trial. This Court should affirm.

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. Byers, 392 S.C. 438, 444, 710 S.E.2d 55, 57–58 (2011). "An abuse of discretion occurs when the trial court's ruling is based on an error of law." Id.

Contents of the Video

The video in question was recorded by the body camera of a police officer who responded to the incident location. State's Exhibit 3. The officer did not testify, and the video is

heavily redacted to remove all of the officer's statements. The video runs approximately 7 ½ minutes. It contains statements by both McCullough and Taylor. Taylor explains that he rented the hotel room and the others were his guests. He describes Appellant knocking on the room door and subsequently forcing it open. He describes Appellant chasing McCullough from the room with the gun. McCullough explains that he had seen Appellant before, that Appellant worked at Ruby Tuesday, and Appellant was with a white male.

Excited Utterance

Despite being hearsay, a statement may be admitted if it "relat[es] to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." SCRE 803. In determining whether a particular statement falls within the excited utterance exception, the statement must be viewed under the totality of the circumstances. State v. Brock, 335 S.C. 267, 272, 516 S.E.2d 212, 215 (Ct. App. 1999). Three elements must be met to find 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. Ladner, 373 S.C. 103, 116, 644 S.E.2d 684, 691 (2007). All three elements are present in this case.

Victim McCullough made his statements to police shortly after he was brutally beaten by Appellant, and while he was still under the stress of excitement caused by the attack.[5] Our Supreme Court "has generally allowed as excited utterances statements made by the victim to the police immediately following a physical attack." State v. Burdette, 335 S.C. 34, 43, 515 S.E.2d 525, 530 (1999) (holding statements made to police within one hour of physical attack were

[5] It is unclear from the record exactly how many minutes passed before the officer arrived, but it is apparent that officers responded swiftly in response to a 911 call. Tr. 75-76; 109.

admissible as excited utterances), citing State v. Sims, 304 S.C. 409, 405 S.E.2d 377 (1991) (allowing statements made to police under former res gestae exception where the officer had proceeded directly to the scene attack upon it being reported); State v. Harrison, 298 S.C. 333, 380 S.E.2d 818 (1989) (allowing as res gestae the statements of an alleged rape victim to an officer at the hospital upon first opportunity to tell what happened to her); State v. Blackburn, 271 S.C. 324, 247 S.E.2d 334 (1978) (noting that a time interval of over one hour, and up to eleven hours, did not necessarily eliminate a statement as part of the res gestae); State v. Quillien, 263 S.C. 87, 207 S.E.2d 814 (1974) (concluding a rape victim's statements to police when she arrived at the emergency room were admissible under the res gestae exception); State v. Dennis, 321 S.C. 413, 468 S.E.2d 674 (Ct.App.1996) (allowing statements made to the police and nurse where the record indicated there was no appreciable time lapse between the attack and the statements).

McCullough was still untreated and bleeding from the attack. See State v. Ladner, 373 S.C. 103, 117, 644 S.E.2d 684, 691 (2007) (statement qualified as excited utterance where "victim was complaining of pain and was bleeding when the statements were made, and thus, the victim made the declaration while under the stress of her attack"); Blackburn, 271 S.C. at 328, 247 S.E.2d at 336 (victim's statement to police at hospital one hour after incident was admissible as excited utterance where victim "was still under the stress and pain of the assault at the time she made the statement"). Having been beaten over the head with a brick, McCullough was not capable of reflective thought. Tr. 101.[6] Thus, the rationale for the excited utterance rule is present. See State v. Whisonant, 335 S.C. 148, 155, 515 S.E.2d 768, 772 (Ct. App. 1999) ("The rationale behind the excited utterance exception to the hearsay rule is that the startling event

[6] When McCullough gave his statement to responding officers, he "was not in his right mind. I don't even think he knew where he was at." Tr. 101 (testimony of Maurice Taylor).

suspends the declarant's process of reflective thought and, consequently, reduces the likelihood of fabrication.").

Likewise, Taylor had witnessed the beating, fled from the hotel room after Appellant kicked the door in, and at one point attempted to defend himself with a coat rack. Tr. 89-91. His statements to the responding police officer were made at the first opportunity. See State v. Cox, 274 S.C. 624, 266 S.E.2d 784 (1980) (statement made an unspecified time after the incident admissible as part of the res gestae where the victim made the statement at the first opportunity). Because the statements in question were made while the declarants were still under the stress of excitement caused by these events, the statements were admissible under SCRE 803(2). This Court should affirm on this independent ground.

Prejudice

Even if the video contained inadmissible hearsay, its admission was harmless. Error is harmless when it could not reasonably have affected the result of the trial. State v. Reeves, 301 S.C. 191, 194, 391 S.E.2d 241, 243 (1990). "In order to obtain a new trial based upon the erroneous admission of evidence, the appellant must demonstrate both error and prejudice." State v. Mizell, 332 S.C. 273, 285, 504 S.E.2d 338, 345 (Ct. App. 1998). The burden is on the appellant to show that the testimony in question was prejudicial. State v. McElveen, 280 S.C. 325, 327, 313 S.E.2d 298, 299 (1984).

"An improper introduction of hearsay evidence constitutes reversible error only if its admission is prejudicial to the defendant." State v. Whisonant, 335 S.C. 148, 156, 515 S.E.2d 768, 772 (Ct. App. 1999). "Whether trial errors are harmless depends on the circumstances of each case. The materiality and prejudicial character of the error must be determined from its relationship to the entire case." Id. The introduction of inadmissible evidence is harmless when

the evidence is merely cumulative to other evidence. State v. Blackburn, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978).

Appellant claims the admission of the video containing the witnesses' prior consistent statements "cannot be harmless." Brief of Appellant at 23. Appellant cites Jolly v. State, 314 S.C. 17, 443 S.E.2d 566 (1994), a CSC case where the trial court erroneously admitted a child victim's prior consistent statement identifying Jolly, her step-grandfather, as the perpetrator. Jolly claimed the child's uncles had committed the sexual assaults. In response to the State's argument that the admission of this hearsay evidence was harmless, the court held: "Improper corroboration testimony that is *merely cumulative to the victim's testimony,* however, cannot be harmless, because it is precisely this cumulative effect which enhances the devastating impact of improper corroboration." Jolly, 314 S.C. at 21, 443 S.E.2d at 569. Appellant appears to argue that this portion of the court's opinion constitutes a bright line rule of law to be applied in every case involving a witness's prior consistent statement. However, Appellant fails to cite State v. Jennings, 394 S.C. 473, 482, 716 S.E.2d 91, 95–96 (2011), where our Supreme Court overruled the "apparent" bright line rule of Jolly and clarified that "a harmless error analysis should be employed when reviewing the admission of hearsay testimony that improperly corroborates the victim's testimony in a sexual assault case." See Thompson v. State, 423 S.C. 235, 246, 814 S.E.2d 487, 492 (2018), reh'g denied (June 12, 2018).[7] Jennings and Thompson unequivocally

[7] The Jennings opinion recognizes that Jolly, to the extent it established a bright-line rule, was wrongly decided. In support of its apparent bright line rule presuming prejudice in every improper corroboration case, the Jolly court cited as authority State v. Barrett, 299 S.C. 485, 386 S.E.2d 242 (1989), another case involving improper corroboration of a CSC victim's disclosure to a social worker. However, the Barrett court conducted a harmless error analysis, as did the court in every other case cited by Appellant in his brief. See State v. Whisonant, 335 S.C. 148, 154, 515 S.E.2d 768, 771 (Ct. App. 1999), State v. Foster, 354 S.C. 614, 624, 582 S.E.2d 426, 431 (2003), and State v. Saltz, 346 S.C. 114, 124, 551 S.E.2d 240, 246 (2001). The Whisonant court explicitly stated: "An improper introduction of hearsay evidence constitutes reversible

establish that the erroneous admission of a prior consistent statement is subject to a harmless error analysis.

In Jolly and the other cases cited by Appellant, the prior consistent statements bolstered an especially significant piece of testimony, the veracity of which was the crucial fact at issue. In Foster, the State acknowledged that a child witness's account of a shooting was the "crux" of its case and "the evidence of an intentional shooting was based almost exclusively on [her] testimony...." Foster, 354 S.C. at 624, 582 S.E.2d at 431. In Saltz, the declarant/ witness's testimony was "weak and not particularly credible," making the admission of her prior consistent statement prejudicial. Saltz, 346 S.C. at 124, 551 S.E.2d at 246. In Whisonant, prejudice existed because the case was "essentially a swearing contest" between victim and defendant. Whisonant, 335 S.C. at 156, 515 S.E.2d at 772. In Barrett, "the State relied solely upon Victim's testimony to establish the details of the crime and the identity of the perpetrator." Barrett, 299 S.C.at 487, 386 S.E.2d at 243 (1989). Notably, all of these cases involve a child or teen witness.

Unlike those cases, the admission of the prior consistent statements in this case does not rise to the level of reversible error. The case against Appellant was not a swearing contest and did not turn inordinately on the credibility of the witnesses' account of the incident because the incident was captured on surveillance video. State's Exhibit 1. It was this video that effectively proved the State's case and on which the State relied in its closing argument, not the interviews captured on the body camera. April 25 Tr. 24. The surveillance video shows Appellant brutally beating the victim in the hotel parking lot. It provides much more potent corroboration for McCullough and Taylor's trial testimony than the few statements captured on the officer's body

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error only if its admission is prejudicial to the defendant." Whisonant, 335 S.C. at 156, 515 S.E.2d at 772.

cam.[8] Compare State v. Kromah, 401 S.C. 340, 358, 737 S.E.2d 490, 499 (2013) (finding improper bolstering by forensic interviewer to be harmless because of strong physical evidence providing independent corroboration), with State v. Jennings, 394 S.C. 473, 480, 716 S.E.2d 91, 94–95 (2011) ("There was no physical evidence presented in this case. The only evidence presented by the State was the children's accounts of what occurred and other hearsay evidence of the children's accounts. Because the children's credibility was the most critical determination of this case, we find the admission of the written reports was not harmless.").

Furthermore, Appellant conceded the incident took place. Appellant was arrested walking away from the scene of the crime. Tr. 109. Defense counsel used his closing argument to dispute the State's theorized motives for the assault, not to argue that it didn't happen. He conceded that Appellant "crashed" into the hotel room "to confront Gold." April 25 Tr. 32–33; 36. He downplayed the severity of the victim's injuries but did not deny that Appellant caused them. April 25 Tr. 35. He portrayed the incident as a mere fight and argued that Appellant was guilty of second degree assault and battery, but not ABHAN. April 25 Tr. 37–40. The general accuracy of the witnesses' account of the incident was never seriously in question. Introduction of inadmissible evidence is harmless where the facts are not seriously in dispute. Watts v. Bell Oil Co. of Ocean Drive, 266 S.C. 61, 64, 221 S.E.2d 529, 531 (1976) (erroneous admission of hearsay testimony was harmless where it was "simply corroborative" and there was "no conflict between the parties" regarding subject of hearsay testimony), citing Rouk v. Virginia-Carolina Chem. Co., 108 S.C. 397, 95 S.E. 79, 79 (1918) (admission of evidence was harmless where "appellant not seriously contending" underlying facts); Lamb v. S. Ry. Co., 86 S.C. 106, 67 S.E.

[8] See Tr. 141, lines 13-14.

958, 961 (1910) (admission of hearsay evidence was of "no consequence after the introduction of undisputed evidence" to the same facts).

Even if the trial court erred by admitting the video, its error was harmless. The cumulative hearsay testimony contained in the body cam video was not an important part of the State's case, its veracity was not disputed, and its admission did not affect the result of the trial. This Court should affirm.

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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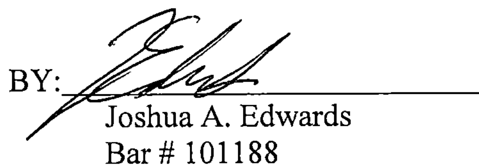

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March 27, 2019

STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM YORK COUNTY
Court of General Sessions
Hon. John C. Hayes, III. Circuit Court Judge

Appellate Case No. 2018-000822

THE STATE,

Respondent,

v.

ANTOINE LAKIDA HIGHTOWER,

Appellant.

PROOF OF SERVICE

I, Anne Mueller, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to Joanna K. Delany, Esquire, S.C. Commission on Indigent Defense, Division of Appellate Defense, Post Office Box 11589, Columbia, SC 29211.

I further certify that all parties required by Rule to be served have been served.
This 27th day of March, 2019.

Anne A. Mueller
Legal Assistant

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ALAN WILSON
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March 27, 2019

RECEIVED
MAR 27 2019
SC Court of Appeals

Joanna K. Delany, Esquire
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RE: State v. Antoine Lakida Hightower
Appellate Case No. **2018-000822**

Dear Ms. Delany:

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

Sincerely,

Joshua A. Edwards
Assistant Attorney General
Bar # 101188

JAE/aam
Enclosures

cc: ~~Honorable Jenny A. Kitchings (original and one enclosed)~~
Victim Advocacy Division