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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Anderson County
Honorable J. Cordell Maddox, Circuit Court Judge

THE STATE,

Respondent,

vs.

STEPHEN GRANT PARTEN,

Appellant.

Appellate Case No. 2019-000326

INITIAL BRIEF OF RESPONDENT

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The photograph of the deceased, taken from the opposite side of the road from where the deceased lay, was probative and not unduly prejudicial. The body was not staged, but moved to the location shown in the photograph because officers moved the body to the road to have a hard stable surface to perform CPR in an attempt to save the deceased's life.

STATEMENT OF THE CASE

Appellant Parten was indicted for murder, attempted murder, kidnapping, grand larceny, first degree burglary, and possession of a weapon during a violent crime. At trial, the burglary indictment was amended to second degree burglary. The case was called to trial before the Honorable J. Cordell Maddox, Jr. At the conclusion of trial held February 11-15, 2019, the jury found Parten guilty of voluntary manslaughter, possession of a weapon during the commission of a crime, second degree assault and battery, grand larceny, and second degree burglary. Parten was acquitted of kidnapping. Judge Maddox sentenced Parten to thirty years' imprisonment suspended to twenty-five years' imprisonment and probation. The other sentences were concurrent except Judge Maddox sentenced Parten to five years' imprisonment consecutive to voluntary manslaughter.

STATEMENT OF FACTS

Thomas Francis, a driver with UPS, was making deliveries. As he drove down Hopewell Road in Anderson County, he saw a woman with blood in her hair in the backseat of a car with front end damage. Francis turned around to help the woman and called 911. Tr. pp. 123-24. Francis relayed questions from the 911 operator to the woman, Morgan Rhodes. Francis explained:

> I stayed on the phone with 911 and started talking to Ms. Rhodes, making sure she was okay and asking questions that the 911 dispatcher was prompting me to ask and kind of figure out what was going on.

Tr. p. 125, lines 3-6.

Francis testified he did not feel safe by the car because he heard something in the woods and based on what Rhodes told her, he thought it better to wait somewhere else, so he took Rhodes to Hopewell Baptist Church to wait for first responders. Tr. pp. 124-25. When asked if Rhodes was upset, Francis replied, "Yes, very much so." Tr. p. 129, lines 9-10.

Morgan Allie Rhodes was Parten's kidnapping victim. She knew Appellant Parten through her boyfriend, Ahmed Fallous, who was the homicide victim. Tr. pp. 130-31. She lived with Fallous. Parten came over to their house around 1 a.m. Fallous and Parten were friends. For some reason, she did not know why, they all left for Parten's house around 2:00 a.m. Parten drove. Rhodes was using cocaine that night, but did not know if Fallous used any. In the middle of an argument between Fallous and Parten, Parten slammed on the brakes. Parten then vomited outside the car. Fallous offered to drive, but then the fight continued outside the car and turned physical. When Parten pulled out a gun, Fallous ran. Parten discharged his gun and Rhodes heard Fallous fall down. Tr. pp. 130-38; p. 145; p. 147.

Parten grabbed Rhodes and the next thing she knew, she was in Parten's car as it sped away from the crime scene. Parten told Rhodes she was next. He drove erratically, and she described his behavior as psychotic and unhinged. The car struck a tree and he drove the vehicle a bit further before it became immobile. Parten then punched, kicked, slapped, strangled, and pistol-whipped Rhodes. At some point, Rhodes managed to get back in the car, lock the doors, jump in the back seat, and duck. She heard gunshots and smelled burning while she hid. Parten ran off and she was found about ten minutes later by a UPS driver. Tr. pp. 138-43. Rhodes came out of the episode with a broken finger and a large laceration in her scalp that needed staples. Tr. p. 144.

At 2:14 a.m., John Gibby reported in a 911 call that he was fishing off a dock near the bridge when he heard gunfire and a girl "hollering." He found Fallous in the woodline and asked who shot him. Fallous told him Stephen, either "Parten or Barten." State's Exhibit 1.

Anderson County Sheriff's Deputy Caleb Carroll was dispatched at 2:15 a.m. and found Fallous laying down on his side against a tree past where the guardrail ended at the Centerville Road bridge. Fallous was still alive at that point and held a gun in his right hand, which he dropped when ordered to do so by Deputy Carroll. Tr. pp. 172-77. In his dying declaration, Fallous said "Stephen," with a last name of "Parton or Barton," shot him. Tr. p. 179. Deputy Carroll admitted he moved Fallous in an attempt to save him, but Fallous died before EMS arrived. Tr. p. 181.

Dr. Brett Houghton Woodward, the pathologist, testified the entrance wound was in the left back and without stipling. In Dr. Woodward's opinion, Fallous would have died within a half hour of being shot. He noted a horseshoe shaped abrasion on Fallous' forehead. Tr. p. 190; pp. 195-96. In his opinion, the horseshoe abrasion was likely caused by the butt of a gun. Dr.

Woodward also found scrapes and abrasions on his back and defensive wounds on his hand. Tr. pp. 197-98.

Deputy James Christoper Wilson testified he responded to the scene of the shooting, the Centerville Road bridge. He was aware the body was moved before he arrived. Defense counsel objected to the hearsay that would have explained why the body was moved. Tr. p. 206. Deputy Wilson recovered casings at the scene – seven .45 casings and one 9mm casing, all collected by the bridge – and Fallous' gun, a Hi-Point .380 handgun. Tr. pp. 209-20; p. 225. The lever on Fallous' Hi-Point was pulled back with a live bullet in the chamber and a live cartridge in the magazine. Tr. p. 231.

Investigator Sean Proner also responded to the homicide on Centerville Road. He found the wrecked vehicle on the way and learned Rhodes was at a nearby church. He took photographs of Rhodes. She had blood on her hands and in her hair. She had a laceration under her hair. She was visibly shaken and upset while Investigator Proner spoke with her. Tr. pp. 234-38.

Investigator Proner observed the gas cap on the car was open and hanging down. The front of the car was smashed up. He found torn paper in the grass and a lighter. Tr. pp. 240-41. Inside the gas fill was a partially burned piece of paper. Tr. p. 258. Investigator Proner also found the tree impacted by the car and a trail of fluid leading away from it. Tr. pp. 246-47.

James Armstrong with the Greenville County Department of Public Safety's crime laboratory testified as an expert in firearms examination and identification. He examined the spent shell casings and the Hi-Point semiautomatic handgun. He determined the seven .45 casings were all fired by the same weapon. The 9mm casing was not shot by the same weapon.

He determined none of the .45 casings or the 9mm casing came from Fallous' Hi-Point semiautomatic handgun. Tr. pp. 268-73.

Investigator Nathan Mitchell was the lead investigator. He testified he determined Fallous' home was about three miles from the Centerville Road bridge. The .45 shell casings were found in a pattern on the bridge near the car. The 9mm casing has some oxidation as if it had been there a while. Tr. pp. 319-22. There were fresh tire tracks on the bridge. Tr. p. 323. He spoke with Rhodes. She looked like she was in some kind of assault – she was bloody. Tr. pp. 324-25. Investigator Mitchell described her demeanor as hysterical and emotional as if she just went through a traumatic experience. Tr. p. 325.

Investigator Mitchell explained Parten was caught five days later in Knoxville by the United States Marshall Service. Parten was covered with scratches and insect bites. The 2014 Ford F-150 Parten drove belonged to Daniel Ray. Tr. pp. 331-33. Investigator Mitchell testified Ray's home was roughly a mile through the woods from where Parten abandoned his own vehicle. Tr. p. 334.

Elizabeith McCarson testified she was outside her house sitting with Parten's friend, Ashley Moore, in Moore's truck, drinking a milkshake, when Parten drove up in a four-door truck and spoke to Moore. Parten looked disheveled. Parten said he ran naked through the woods after his clothes kept getting caught on briars that impeded his progress. Parten said he hid in a barn under hay to keep warm, and a woman came in the barn to feed the goats while he remained hidden in the hay. He lay on the front porch under a door mat trying to keep warm at another house. Eventually he found clothes and keys to the truck he was driving in yet another house. McCarson was well aware Parten was wanted. Meanwhile, Parten was surprised to find his case was all over the news. McCarson told Parten he needed to leave. Tr. pp. 365-69; p. 371.

Parten was surprised to learn someone died, but twice said, "The girl just needed to be taken care of." Tr. p. 369, lines 17-20. Parten asked them if they had any "money, food, water, or drugs." They gave him a milkshake. Tr. p. 377, lines 1-6.

Unbeknownst to Parten, they also threw a cell phone with a low charge in the back of Parten's truck. Tr. pp. 372-73. This allowed law enforcement to track the truck until the battery died. Law enforcement determined the truck went toward the North Carolina/Tennessee area. A Tennessee Highway Patrolman detained Parten and the truck. Lindsey ran the license plate tag after talking with the Tennessee authorities, and then called Daniel Ray, who Lindsey knew from church, and asked if Ray's truck was outside the house. It was not, because Parten stole it. Tr. pp. 351-53.

Daniel Ray was the last witness for the State. His truck was stolen on May 31. He did not know until Lindsey called and told him. Ray looked outside his window and saw Lindsey told the truth, his truck was gone. He also discovered his keys he kept inside the house by the garage door were missing. The keys were in the vehicle when it was returned to him. The checkbook and some other missing items were also returned to him. But a camera remained missing. Tr. pp. 379-81.

The defense called Christopher Robinson who was an expert in gunshot residue analysis. While the State's expert opined that the GSR analysis was inconclusive as to whether Fallous fired his gun (see tr. p. 298), Robinson concluded a great possibility existed that Fallous did discharge his weapon due to four particles found on the back of Fallous' hand. Tr. p. 410. On cross-examination, Robinson agreed a vast majority of the GSR community does not take a position on the certainty of GSR analysis, he was just basing his opinion on his experience. Tr. p. 419.

Anthony Dominguez testified Fallous was using cocaine the night he died. He told law enforcement that Fallous owns an AR-22 and a pistol. Tr. p. 434. However, on cross-examination, Dominguez admitted Fallous did cocaine a good while earlier, before midnight. Tr. p. 435.

Heather Cartee, a private investigator, claimed Rhodes told her both Parten and Fallous fired their weapons that day. Tr. p. 438. The defense also called the doctor who treated Rhodes for her injuries that morning. Her scalp was lacerated. She tested positive for benzodiazepines, cocaine, methamphetamine, and marijuana. Dr. Turner advised mixing the medications and other drugs could affect memory. He noted the medications were for anxiety and depression, and Rhodes was diagnosed with both conditions. Further, the positive results did not mean the illegal drugs were consumed that evening. Tr. pp. 453-55; p. 461. Dr. Turner also testified Victim told him she was pistol whipped and advised she never lost consciousness. Dr. Turner described her demeanor as quiet, upset, anxious, and crying. She also had a broken finger. Tr. pp. 459-60.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." State v. Jenkins, 412 S.C. 643, 650, 88 S.E.2d 906, 909 (2015). Parten's first issue is a challenge to the trial court's decision not to sever the charges. A motion for severance is addressed to the sound discretion of the trial court and will not be disturbed absence an abuse of that discretion. State v. Tucker, 324 S.C. 155, 164, 478 S.E.2d 260, 265 (1996). The remaining two issues, involving the admission of evidence, are also judged under an abuse of discretion standard. The admission or exclusion of evidence is a matter addressed to the trial court's sound discretion and will not be reversed absent a manifest abuse of the trial court's discretion and probable prejudice. State v. Wise, 359 S.C. 14, 21, 596 S.E.2d 475, 478 (2004).

ARGUMENT

I.

The trial court did not err in declining to sever the charges for burglary and larceny from the kidnapping, murder, and attempted murder charges because the burglary and larceny provided evidence of flight and identity for the other charges, and all the charges arose out of the same set of circumstances.

Appellant Parten claims the trial court erred in granting his motion for severance. However, the charges were clearly interconnected: Parten shot Fallous and immediately abducted the only eyewitness, Rhodes; he then crashed the car, assaulted Rhodes, ran from the car through the woods, and after hiding under hay in a goat barn, found a cabin and broke in, stole keys inside the cabin, and stole the Ford F-150 he was later captured in. The charges all arose out of the same set of circumstances, were similar in nature, and were proven by the same evidence. No right of Parten was violated by trying the charges together.

A motion for severance is addressed to the sound discretion of the trial court. State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996); McCrary v. State, 249 S.C. 14, 152 S.E.2d 235 (1967); State v. Carter, 324 S.C. 383, 478 S.E.2d 86 (Ct. App. 1996); State v. Anderson, 318 S.C. 395, 458 S.E.2d 56 (Ct. App. 1995). The court's ruling will not be disturbed on appeal absent an abuse of that discretion. Tucker, 324 S.C. at 164, 478 S.E.2d at 265; State v. Prince, 316 S.C. 57, 447 S.E.2d 177 (1993); State v. Deal, 319 S.C. 49, 459 S.E.2d 93 (Ct. App. 1995); see also State v. Harris, 351 S.C. 643, 572 S.E.2d 267 (2002) (stating a motion for severance is addressed to the trial court and should not be disturbed unless abuse of discretion is shown). An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law. State v. Walker, 366 S.C. 643, 623 S.E.2d 122 (Ct. App. 2005).

Criminal charges may be tried together where they (1) arise out of a single chain of circumstances, (2) are proved by the same evidence, (3) are of the same general nature, and (4)

no real right of the defendant has been prejudiced. State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996). Where the offenses charged in separate indictments are of the same general nature involving connected transactions closely related in kind, place and character, the trial judge has the discretionary power to order the indictments tried together if the defendant's substantive rights would not be prejudiced. State v. Cutro, 365 S.C. 366, 618 S.E.2d 890 (2005); State v. Sullivan, 277 S.C. 35, 43-44, 282 S.E.2d 838, 843 (1981) (where offenses charged in separate indictments are of same general nature, involving connected transactions closely related in kind, place and character, the trial judge has authority, in his discretion, to order indictments tried together over the objection of the defendant absent a showing that the defendant's substantive rights were violated); McCrary v. State, 249 S.C. 14, 36, 152 S.E.2d 235, 246 (1967) (stating "[t]he two offenses were of the same general nature, involving connected transactions closely related in time, place and character; and the trial judge had power, in his discretion, to order them tried together over objection by the defendant in the absence of a showing that the latter's substantive rights would have been thereby prejudiced.").

In Tucker, 324 S.C. at 164, 478 S.E.2d at 265, the Supreme Court found the charges of murder and two counts of burglary were interconnected because the reason Tucker burglarized a church and later a friend's house was to avoid capture for the murder charge. The Court found severance was not warranted because the crimes arose out of a single chain of circumstances, evidence of the break-ins were admissible as evidence of flight and identity for the murder charge, and the crimes were of the same general nature. The Supreme Court further concluded no right of Tucker was violated.

In State v Rice, 368 S.C. 610, 615-16, 629 S.E.2d 393, 396 (Ct. App. 2006), this Court concluded the trial court did not err in denying the motion to sever Rice's charges of murder and

trafficking cocaine. Law enforcement performed a traffic stop of Rice's vehicle because they suspected him of the murder. The State's theory of the case was Rice's motive for the murder was to recover cocaine and cash the victim stole from Rice. Law enforcement found what they suspected was the murder weapon and also large amounts of cocaine and cash in the car. This Court concluded without evidence of the cocaine trafficking, the "jury would not have received an accurate portrayal of the case."

In State v. Beekman, 415 S.C. 632, 636-37, 785 S.E.2d 202, 204 (2016), the Supreme Court rejected a "restrictive interpretation" of "a single chain of circumstances" for separate charges for sexual assaults on Beekman's stepson and stepdaughter, finding that the charges "arose from, in substance, a single course of conduct or connected transactions."

The charges in the instant case arose out of the same set of circumstances. A reasonable juror could believe Parten, after attempting (and perhaps unknown to Parten, succeeding) to kill Fallous, kidnapped Rhodes to "take care" of her (as he told Moore and McCarson) presumably because she was a witness to the shooting. A reasonable juror would believe Parten's fear of being apprehended by law enforcement for these crimes motivated him to run through the forest naked, hide under hay in a barn full of goats, and burglarize a house, then steal a vehicle. Therefore, as in Tucker and Rice, the charges arose from, "in substance," the same set of circumstances. Tucker, Beekman, Rice.

Further, all the charges were proven by the same evidence. Parten's abduction occurred at the scene of the homicide and belied Parten's claim of self-defense. As in Tucker, the burglary of Ray's cabin and larceny of his truck was evidence proving identity and flight for the murder and kidnapping charges.

Moreover, the charges stemming from the killing of Fallous, the abduction and attempted murder of Rhodes, and the burglary of Rays' dwelling, are all of the same kind and nature. Parten argues that while murder, attempted murder, and kidnapping are crimes against the person, burglary is a crime against property. This ignores the policy behind burglary statutes. "[O]ur burglary laws protect an interest separate and apart from ownership: the right to be safe and secure in one's home." State v. Singley, 392 S.C. 270, 276, 709 S.E.2d 603, 606 (2011).

Additionally, this restrictive view of what constitutes charges of the "same kind and nature" is at odds with precedent in other cases. In Rice, the charges were murder and trafficking cocaine. And in State v. Davis, 422 S.C. 472, 482, 812 S.E.2d 423, 429 (Ct. App. 2018), this Court found severance was not warranted even though the charges were first degree burglary and possession with intent to distribute methamphetamine. In that case, Davis left her car parked in the driveway of the house she was burglarizing. She was found inside the house with the owner's belongings piled on the floor, and law enforcement found methamphetamine and her identification in a purse in her car. Given the incongruent nature between charges found in both Rice and Davis, the charges in the present case are sufficiently of the "same kind and nature."

Moreover, in the instant case, the charges would be proven by the same evidence as in Tucker because the burglary of Ray's dwelling and larceny of Ray's truck were part of the res gestae of the crime. Evidence of other bad acts is admissible when it furnishes part of the context of the crime or is necessary to a full presentation of the case. State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996) *overruled on other grounds by* State v. Giles, 407 S.C. 14, 754 S.E.2d 261 (2014). Under the res gestae theory, evidence of other bad acts may be an integral part of the crime with which the defendant is charged or may be needed to aid the fact finder in

understanding the context in which the crime occurred. State v. Owens, 346 S.C. 637, 552 S.E.2d 745 (2001) *overruled on other grounds by* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005); State v. Wood, 362 S.C. 520, 608 S.E.2d 435 (Ct. App. 2004).

This evidence of other crimes is admissible:

> when such evidence "furnishes part of the context of the crime" or is necessary to a "full presentation" of the case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its "environment" that its proof is appropriate in order "to complete the story of the crime on trial by proving its immediate context or the 'res gestae' " or the "uncharged offense is 'so linked together in point of time and circumstances with the crime charged that one cannot be fully shown without proving the other ... '[and is thus] part of the res gestae of the crime charged.' And where evidence is admissible to provide this 'full presentation' of the offense," [t]here is no reason to fragmentize the event under inquiry" by suppressing parts of the "res gestae."

Adams, 322 S.C. at 122, 470 S.E.2d at 370-71 (quoting United States v. Masters, 622 F.2d 83, 86 (4th Cir.1980) (citations omitted)).

In the instant case, the burglary of Ray's dwelling enabled Parten to commit the larceny of Rays' truck, the vehicle Parten drove when found by the Tennessee patrolman after multiple law enforcement agencies tried to apprehend Parten for the murder of Fallous and the kidnapping of Rhodes. See State v. Benjamin, 345 S.C. 470, 549 S.E.2d 258 (2001) (finding, in prosecution of armed robbery and murder at a Citgo, evidence of subsequent robbery at a Dodger's store, where defendant dropped his gun, was admissible under *res gestae* theory, as it was necessary to a full presentation of State's case); State v. Gagum, 328 S.C. 560, 492 S.E.2d 822 (Ct. App. 1997) (in strong arm robbery prosecution, evidence that defendant offered his civilian captors dope to let him go was admissible as *res gestae* of crime); State v. Crim, 327 S.C. 254, 489 S.E.2d 478 (1997) (Evidence of defendant's larceny of the car defendant drove when the

accident leading to the felony DUI charge occurred was admissible as *res gestae* in prosecution for felony DUI).

Much like Tucker, the same evidence is used to prove all the crimes because the burglary of Ray's dwelling and the larceny of his truck constituted evidence of flight and identity. Parten ran naked through woods to make it to Ray's dwelling, and Ray's dwelling was only a mile from his abandoned, smashed vehicle. Hiding in the hay, makes it clear Parten was fleeing. Finally, no right of Parten was violated by trying the charges together. Accordingly, the trial court did not err in denying Parten's motion to sever the charges.

II.

The trial court did not err in admitting the 911 call because the kidnapping victim's statements heard in the recording were all within the excited utterance exception and statements by the good-Samaritan caller were substantively cumulative to the victim's own statements during the call. Appellant was not prejudiced by the alleged error because the caller's statements were cumulative to abundant evidence properly before the jury and the alleged error is unlikely to affect the outcome of trial.

Parten argues the 911 call should not have been admitted because it constitutes double hearsay. In his brief, Parten argues Rhodes' statements during the call were not excited utterance, although defense counsel did not contest this in his objection at trial; and Parten further argues the 911 call constitutes double hearsay. Parten fails to indicate which parts of the call were supposedly prejudicial. Although the 911caller, Francis, relayed answers to the 911 operator's questions that are arguably hearsay, his statements are merely cumulative to Rhodes' statements heard in the same call, which are unequivocally excited utterance. Any hearsay is cumulative to other evidence before the jury and is not reasonably likely to have affected the outcome of trial.

The 911 call begins with Francis telling the operator a lady is hurt and asking for assistance. He expounds on this by saying the lady said she was beaten by someone and was in a car that hit a tree. (to 1:30) He describes the car as messed up and describes her as covered in blood. (1:30-45). As Francis explains where he is located and tries to explain what happened, he tells the operator she said something about a shooting. (2:00-30). He relays that three people were involved and the lady said her boyfriend was shot. Francis further relates that the lady said she was shot at after the car hit a tree and someone tried to kill her. At this point, Rhodes' part of the conversation becomes more discernable in the recording as she spells out Fallous' name and

said the suspect tried to kill her. (to 4:30). Rhodes is crying and talks about what happened to her (5:00). Francis relates that the shooter's name is Stephen Parten. (5:45-6:15). Francis related the lady was worried about her boyfriend "being shot or something." (6:00-6:15). Rhodes is heard saying her boyfriend might be dead. (6:45). Francis relates that he took Rhodes to the church because it sounded like someone was in the woods. (7:30-40). Rhodes is heard saying "he" strangled me and Rhodes is clearly distraught. She is later is heard giving the suspect's physical description. She is heard crying again. (8:00-45). When asked how long she was in the car, Rhodes replied "it seemed like forever" (9:30). Rhodes is heard saying she heard gunshots before Francis relates that she heard gunshots once he ran into the woods. (10:00). When Francis has difficulty relating what Rhodes is telling him, Francis admits to the operator, "wish I had something more for you." (10:15). Rhodes is heard clearly explaining that Parten hit a tree, tried to keep driving, and the car just died, and that she locked herself in the back seat of the car. (10:45-11:10). The rest of the call chiefly concerns whether or not Francis and Rhodes should go back to the car where the officer is or stay at the church.

Trial counsel objected based on double hearsay, arguing that despite Rhodes' statements to Francis potentially being excited utterance, Francis' statements to the 911 operator were inadmissible hearsay. The trial court after listening to the call, expressed his opinion as follows:

> Francis, to be honest with you. I think I could hear what she was saying, quite frankly, better than what I could hear what he was saying. It sounded to me like he was just literally repeating what she was saying, almost unintelligible, than she was, and I think she does fall under the excited utterance because it is her.

Tr. p. 92, line 22 – p. 93, line 9.

Rhodes' statements during the call are clearly excited utterance. Much of Francis' statements constituted present sense impression because he is relating events he personally

perceived: the damaged car, the bloody lady, and the sounds of someone in the forest. Further, statements by Francis that might be considered hearsay are not prejudicial because they are merely cumulative to Rhodes' own statements in the 911 call, as well as other evidence 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, SCRE. Hearsay is inadmissible except as provided by statute, the Rules of Evidence, or other court rules. Rule 802, SCRE; State v. LaCoste, 347 S.C. 153, 553 S.E.2d 464 (Ct. App. 2001), *cert. dismissed* 353 S.C. 538, 579 S.E.2d 318.

The "rule against hearsay prohibits the admission of evidence of an out of court statement by someone other than the person testifying[,] which is used to prove the truth of the matter asserted." State v. Vick, 384 S.C. 189, 199, 682 S.E.2d 275, 280 (Ct. App. 2009). "[T]he improper admission of hearsay testimony constitutes reversible error only when the admission causes prejudice." Id. at 199, 682 S.E.2d at 280. "[T]he admission of improper hearsay evidence is harmless where the evidence is merely cumulative to other evidence." Id. at 199-200, 682 S.E.2d at 280.

Some statements by Rhodes are audible in the 911 call, others are relayed or summarized by Francis. Francis also makes statements about things close in time to when he perceives them, such as describing the front end damage to Parten's car or that he heard noise coming from the woods near the car. Statements by Rhodes that are not audible, but are relayed or summarized by Francis could be considered double hearsay. See State v. Hendricks, 408 S.C. 525, 532-33, 759 S.E.2d 434, 438 (Ct. App. 2014). However, "[h]earsay within hearsay is admissible if each level of hearsay satisfies an exception to the hearsay rule." Id. at 530, 759 S.E.2d at 437 (citing Rule 805, SCRE).

In the instant case, all Rhodes' statements during the 911 call, both heard and unheard during the call, constitutes excited utterance. In order for a statement to constitute an excited utterance, the statement must 1) relate to a startling event or condition; 2) be made while the declarant is still under the stress or the excitement; and 3) be caused by the startling event. Rule 803(2), SCRE; see State v. Sims, 348 S.C. 16, 21, 558 S.E.2d 518, 521 (2002) (defining excited utterance). Determining if a statement is an excited utterance is within the trial court's discretion after the trial court considers the totality of circumstances. Id. at 20-21, 558 S.E.2d at 521.

Parten claims the passage of time from when he fled the car to when Rhodes was found and brought to the church defeats application of the excited utterance exception. "While the passage of time between the startling and the statement is one factor to consider, it is not the dispositive factor. Even statements after extended periods of time can be considered an excited utterance as long as they were made under continuing stress." Sims, 348 S.C. at 21-22, 558 S.E.2d at 521. Other factors to consider may include the declarant's demeanor, declarant's age, and the severity of the startling event. State v. Stahlnecker, 386 S.C. 609, 623, 690 S.E.2d 565, 573 (2010). In the instant case, by Rhodes estimation, she was discovered by Francis roughly ten minutes after Parten left. Therefore, the intervening time that passed until the 911 call seems minimal in light of the ordeal Rhodes encountered.

One can detect from the 911 call itself that Rhodes was under the stress of the startling event. She is heard crying a couple of times and she sounds distraught, emotional about her experience, and panicked about Fallous' fate. When asked if Rhodes was upset, Francis replied, "Yes, very much so." Tr. p. 129, lines 9-10. Investigator Proner, who responded to the church after the 911 call, observed Rhodes with blood on her hands and in her hair, and described her as visibly shaken and upset while he spoke with her. Tr. pp. 237-38. Investigator Nathan Mitchell

also spoke with Rhodes and described her as emotional and hysterical as if she had been through traumatic event. Tr. p. 325.

The facts in the instant case therefore correspond with the facts supporting this Court's holding in Hendricks that the rape victim's statements constituted excited utterance. In Hendricks, this Court noted the victim was shaking, crying, and distraught, which showed the victim was under the stress of excitement from being kidnapped, beaten, and raped by the appellant. The victim's out of court statements related to those crimes. Therefore, the victim's statements constituted excited utterance. Hendricks, 408 S.C. at 532, 759 S.E.2d at 438.

As in Hendricks, the trial record in the instant case supports a finding that Rhodes' statements heard during the 911 call and her statements to Francis constitute an excited utterance. Rhodes experienced a series of startling events: she witnessed Parten and her boyfriend engage in an argument, then a physical fight, and witnessed Parten shoot Fallous. She was kidnapped, beaten, in a car wreck, and held under siege once she locked Parten out of his own car. Rhodes estimated Francis found her about ten minutes after Parten ran away. Tr. p. 143. Therefore, the experience was still fresh when she spoke to Francis and is heard on the 911 call. Even later, when speaking with law enforcement officers, she remained hysterical and emotional. Tr. pp. 237-38; p. 325. See State v. Sledge, 428 S.C. 40, 54, 832 S.E.2d 633, 641 (Ct. App. 2019) (finding 911 caller whose mother was shot, was under the duress of the startling event even though the caller attempted to remain calm while relating information, the caller could be heard crying at times and expressed shock, disbelief, and fear during the call). Finally, Rhodes' statements were about the startling events: the kidnapping, the shooting, and Parten's assaults inflicted on her. The portions of the 911 call where she is heard, and her statements to Francis, constituted excited utterance.

Further, at least some of Francis' statements in the 911 call do not constitute hearsay because the statements constitute present sense impression. Under Rule 803(1), SCRE, testimony is admissible under present sense impression if it is a "statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." "The idea of immediacy lies at the heart of the exception; thus, the time requirement underlying the exception is strict because it is the factor that assures trustworthiness." United States v. Green, 556 F.3d 151, 156 (3d Cir. 2009). "The basis of the present sense impression exception is that closeness in time between the event and the declarant's statement reduces the likelihood of deliberate or conscious misrepresentation." State v. Washington, 424 S.C. 374, 400, 818 S.E.2d 472 (Ct. App. 2018) (quoting State v. Pickens, 488 S.E.2d 162, 171 (N.C. 1997)).

The present sense impression exception is modeled after the Federal Rules of Evidence. See Rule 803 cmt., SCRE. The Note provided by the Advisory Committee to the 1972 proposed rules explains the inclusion of the present sense impression exception: "The underlying theory of Exception [paragraph] (1) is that substantial contemporaneity of event and statement negates the likelihood of deliberate or conscious misrepresentation." Rule 803 cmt., FRE.

Certainly, the circumstances in the present case negate the likelihood of deliberate or conscious misrepresentation. Francis was relaying answers to questions concomitantly with Rhodes' excited utterances – the likelihood of a deliberate or conscious misrepresentation was negated by the circumstances. In United States v. Ibiesevic, 675 F.3d 342 (4th Cir. 2012), Ibiesevic, a Bosnian citizen working in the United States with a limited level of proficiency in English, was charged with multiple offenses for failing to report, and concealing possession of, more than $10,000 in currency when leaving the country. When questioned by the customs

agent, he told the agent he only carried $5,000 in cash and equivalents, but under further questioning, Ibiesevic admitted carrying $40,000 stored in three different belongings. Ibiesevic's mother testified for the government. She was present while the customs agent questioned Ibiesevic. She did not speak English and testified at trial through an interpreter. Defense counsel attempted to elicit testimony from her on cross-examination that Ibiesevic told her in Serbian that the agent was asking him how much the luggage was worth if it had to be replaced. Id. at 347. The Fourth Circuit held that Ibiesevic's statement to his mother was not for the truth of the matter asserted, but to show his failure to understand the agent's questions. Further, the Fourth Circuit found the statement was present sense impression because Ibiesevic made the statement to his mother immediately after listening and answering the agent's questions. Id. at 349.

In the present case, some of Francis' out of court statements were about events or conditions he perceived, and he related them close in time to when he perceived them. Francis saw the front end damage to the car, the blood on Rhodes, and her injuries. He also heard something or someone in the woods, which was not for the truth of the matter asserted, but to explain why he took Rhodes to the church. Other statements were merely relaying Rhodes' statements to the 911 operator, without opportunity for conscious misrepresentation of the relayed statement's content, and even if they constitute hearsay, the statements are generally cumulative to Rhodes' own statements that are audible during the call.

The cumulative nature of Francis' out of court statements render any error harmless. Improperly admitted hearsay which is merely cumulative to other evidence may be viewed as harmless. State v. Blackburn, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978). The identity of Fallous' shooter was not in question. Deputy Carroll and the caller in State's Exhibit 1 both

related Fallous' dying declaration that Parten was the shooter. Parten admitted he felt he needed to take care of Rhodes and admitted fleeing through the woods when he visited Moore and McCarson. Rhodes testimony that she was assaulted was supported by testimony by the treating physician, the two law enforcement officers whom she spoke with, and the photographs of her admitted into evidence. Investigators found the tree Parten hit, with a trail of fluid leading away, and the car itself with its front end damage to corroborate that Rhodes was involved in the car wreck. Parten's dramatic flight is further evidence of Parten's guilt.

Errors are considered to be harmless when they could not reasonably have affected the result of the trial. State v. Adams, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (Ct. App. 2003). "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." State v. Hariott, 210 S.C. 290, 298, 42 S.E.2d 385, 388 (1947). When a review of the entire record establishes an error is harmless beyond a reasonable doubt, an appellate court should not reverse a conviction. State v. Thompson, 352 S.C. 552, 562, 575 S.E.2d 77, 83 (Ct. App. 2003). "Harmless error rules . . . 'serve a very useful purpose insofar as they block setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial.'" State v. White, 410 S.C. 56, 59, 762 S.E.2d 726, 728 (Ct. App. 2014) (quoting Chapman v. California, 386 U.S. 18, 22 (1967)); see also State v. Tapp, 398 S.C. 376, 389, 728 S.E.2d 468, 475 (2012) ("Engaging in this harmless error analysis, we note that our jurisprudence requires us not to question whether the State proved its case beyond a reasonable doubt, but whether beyond a reasonable doubt the trial error did not contribute to the guilty verdict.").

III.

The photograph of the deceased, taken from the opposite side of the road from where the deceased lay, was probative and not unduly prejudicial. The body was not staged, but moved to the location shown in the photograph because officers moved the body to the road to have a hard stable surface to perform CPR in an attempt to save the deceased's life.

Parten claims a single picture of the deceased, taken from the opposite side of the road, was unfairly prejudicial because, to paraphrase, it showed a dead person with some blood and a torn shirt. The photograph was probative and not unduly prejudicial. Other than the fact it shows a deceased individual, the photograph is hardly graphic for a murder trial and was probative to corroborate law enforcement's testimony, to establish the corpus delicti, and to show steps law enforcement took to preserve evidence.

Parten objected to the photograph and asked to "approach briefly to put an objection on the record." Tr. p. 176, lines 15-19. The trial court advised, "It won't be on the record if you go over there." Tr. p. 176, lines 20-21. Counsel's objection was based "on 403 grounds and also it's gruesome and intended to inflame the passion of the jury." Tr. p. 176, line 25 – p. 177, line 6. Counsel did not offer any further elaboration. The trial court advised, "We have had some discussion off the record. I think that its probative value outweighs its probability of inflaming the passions of the jury." Tr. p. 177, lines 7-10. Any further description of the ruling was not placed on the record, including the reasons why counsel thought the picture might be unduly gruesome or would inflame the jury. Further, the trial court's comments show, despite the perfunctory objection, that the trial court conducted a proper Rule 403, SCRE, analysis.

For evidence to be admissible, it must be relevant. Rule 402, SCRE. 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. "Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears, and it is not required that the inference sought should necessarily follow from the fact proved." State v. Sweat, 362 S.C. 117, 126-27, 606 S.E.2d 508, 513 (Ct. App.2004). Relevant evidence may be excluded where its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE; State v. Pagan, 369 S.C. 201, 210, 631 S.E.2d 262, 266 (2006).

A trial court's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances. State v. McLeod, 362 S.C. 73, 81, 606 S.E.2d 215, 219 (Ct. App.2004). The relevance, materiality and admissibility of photographic evidence, like other evidence, is within the sound discretion of the trial court. State v. Kelly, 319 S.C. 173, 177, 460 S.E.2d 368, 370 (1995). The trial court does not abuse its discretion if the photographs serve to corroborate testimony. State v. Nichols, 325 S.C. 111, 481 S.E.2d 118 (1997).

In the instant case, the photograph, exhibit 7e, constitutes evidence of the corpus delicti. Additionally, it corroborates testimony and evidence in several ways. First, the photograph adds context and corroborates Corporal Carroll's testimony, in tandem with the other pictures constituting exhibits 7a-d, to show to where Fallous was located when law enforcement arrived and how Fallous came to rest on the road. Deputy Carroll and another officer moved Fallous to perform CPR on a flat, hard surface in an attempt to save his life. Tr. pp. 178-82. Therefore, the accusation in Appellant's statement of the issue that law enforcement "staged" the photograph is simply false and is an unfair accusation against a law enforcement officer attempting to save the shooting victim's life.

Further, the picture shows Fallous' hands covered with paper bags. This is probative to show the efforts law enforcement took to preserve evidence for GSR analysis. This was particularly probative in the instant case as the defense presented its own expert to impeach testimony from forensic experts and to assert a sufficient amount of residue was found on Fallous' hands to establish, in the defense expert's opinion, a probability that Fallous fired his own weapon. Therefore, the single picture of Fallous provided sufficient probative value to be admissible.

The single photograph itself is not unfairly prejudicial. "To constitute unfair prejudice, the photographs must create a 'tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.'" Kelly, 319 S.C. at 178, 460 S.E.2d at 370-71 (citation omitted).

The photograph simply is unlikely to suggest a decision on an improper basis. It informs the jury of the existence of a deceased person which is unsurprising to a jury sitting in a murder trial. The photograph is somewhat distant from the body, taken from the opposite side of the road. The distance minimizes the graphicness of the body. Additionally, the photograph does not show the deceased's face. It does not show the entrance wound. One can see the shirt was cut open, which is corroborative of testimony, but not inflammatory. Blood is scarcely detectable on Fallous' right arm and perhaps, if straining one's eyes, some blood is detected on the paper bag on his left hand. The shirt may or may not be blood-soaked, but it is not obvious in the picture due to the angle and distance from which the picture was taken. In comparison to photographs in other homicide cases, this photograph could scarcely be considered gruesome. Nothing about the photograph should be surprising to a jury well aware it is sitting in a murder trial.

In comparison, in Kelly, the Supreme Court described the photographs it found admissible as follows:

> [T]wo photographs are of the victim's nude body lying on the living room floor with her face and body visible swollen from the beating. Additionally, the photographs show blood smeared on the walls and floor. The video shows the entire crime scene. These photographs and video were relevant to establish the crime scene.

Kelly, 319 S.C. at 178, 460 S.E.2d at 370 (citation omitted). In the instant case, the trial court simply did not abuse its discretion in admitting the photograph.

Errors are considered to be harmless when they could not reasonably have affected the result of the trial. State v. Adams, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (Ct. App. 2003). "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." State v. Hariott, 210 S.C. 290, 298, 42 S.E.2d 385, 388 (1947). When a review of the entire record establishes an error is harmless beyond a reasonable doubt, an appellate court should not reverse a conviction. State v. Thompson, 352 S.C. 552, 562, 575 S.E.2d 77, 83 (Ct. App. 2003).

The jury's verdict, including an acquittal for kidnapping and for lesser included offenses in lieu of murder and attempted murder, suggest that the jury's ability to objectively review the evidence was not undermined by the single picture. Further, any error was harmless in light of the substantial evidence presented at trial. It is just not likely the single picture improperly contributed to the verdict obtained.

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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ATTORNEYS FOR RESPONDENT

April 20, 2020

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Anderson County
The Honorable J. Cordell Maddox, Circuit Court Judge

Appellate Case No: 2019-000326

THE STATE,

Respondent,

v.

STEPHEN GRANT PARTEN,

Appellant.

PROOF OF SERVICE

I, Anne Mueller, certify that I have served the within Initial Brief of Respondent and Designation of Matter on counsel of record for the Appellant by electronic mail to the address listed for counsel in AIS, and by depositing one copy of the same in the United States mail, postage prepaid, addressed to Jessica M. Saxon, Esquire, South Carolina Commission on Indigent Defense, 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 20th day of April, 2020.

Anne Mueller

Anne A. Mueller
Legal Assistant

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From:	Saxon, Jessica
To:	Anne Mueller; Allgire, Mary
Cc:	David Spencer; William Blitch; Victim Services
Subject:	RE: [External] Parten Stephen - Initial Brief or Respondent and Designation of Matter - Appellate Case No. 2019-000326
Date:	Monday, April 20, 2020 2:09:12 PM
Attachments:	image001.jpg

Received – thank you!!

Jessica M. Saxon
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From: Anne Mueller <amueller@scag.gov>
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Subject: [External] Parten Stephen - Initial Brief or Respondent and Designation of Matter - Appellate Case No. 2019-000326

Dear Ms. Saxon,
Attached please find copies of the State's Initial Brief and Designation of Matter and our cover letter. The initial brief will be filed electronically today. Kindly acknowledge your receipt of this email and the attached documents by return email.
Sincerely,
Anne Mueller
Legal Assistant

Anne A. Mueller
Legal Assistant
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sender, or at 803-734-1343.