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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-561

Filed: 31 December 2020

Mecklenburg County, Nos. 17 CRS 212837-38, 17 CRS 212841

STATE OF NORTH CAROLINA

v.

LORENZA THOMAS INMAN, JR.

Appeal by defendant from judgment entered 22 February 2019 by Judge Jesse B. Caldwell, III in Superior Court, Mecklenburg County. Heard in the Court of Appeals 18 February 2020.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General Daniel Snipes Johnson, for the State.*

*The Epstein Law Firm PLLC, by Drew Nelson, for defendant-appellant.*

STROUD, Judge.

Defendant appeals from his conviction for attempted first degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, and possession of a firearm by a felon. Defendant argues the trial court erred by improperly admitting as substantive evidence an audio recording of the victim talking to police in the hospital and a written statement based upon the audio recording. We

hold the audio recording and statement were hearsay not subject to any exception and the trial court erred in overruling Defendant's objections to this evidence. Because the hearsay evidence was the only evidence clearly identifying Defendant as the person who shot the victim, we conclude the error was prejudicial, and Defendant is entitled to a new trial.

### I. Background

On 4 April 2017, Sharrieff Pope was shot in the parking lot in front of D-Town cell phone store in Charlotte at approximately 3:00 PM. Paramedics arrived and took Mr. Pope to the hospital. On 7 April 2017, detectives recorded an audio interview with Mr. Pope while he was still in the hospital ("Pope Interview").<sup>1</sup> In the Pope Interview, Mr. Pope described the incident when he was shot in detail and gave several details regarding the incident and identification of the person who shot him: He said the shooter drove a blue Ford Fusion with New York tags; the shooter was dark-skinned and had long dreads and tattoos on his face; he believed the gun was a 9 mm handgun; he knew the person who shot him by the nickname "Nuna," a tattoo artist who had done tattoos for some friends; he was older than Mr. Pope; and he believed the shooter's real name was "Lorenza something." Mr. Pope also stated he was "really like blind" and could not give any detail about the tattoos on the shooter's

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<sup>1</sup> The Pope Interview was admitted at trial both as the audio recording and as a written statement. Both included the same information, and Defendant objected to both for the same reasons. The trial court addressed both the recording and the written statement together, and this opinion will do the same.

face, but later noted he was wearing his contacts on the day of the shooting. He also identified a photograph of Defendant as the person who shot him.

Officer Ben Condron with the Charlotte Mecklenburg Police Department noticed a blue Ford Fusion with New York plates while working undercover on 4 April 2017. Later that day he received a “be on the lookout” email for a car matching the description of the car he saw earlier. Officer Condron went to the house where the car was located and arrested Defendant. Defendant was charged with attempted first degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, attempted robbery with a firearm, and possession of a firearm by a felon.

Defendant was tried before a jury at the 18 February 2019 Session of Superior Court, Mecklenburg County. The charge of attempted robbery with a firearm was dismissed at the close of the State’s evidence. The jury found Defendant guilty of attempted first degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, and possession of a firearm by a felon. Defendant was sentenced by the trial court, and he gave notice of appeal in open court.

## II. Substantive and Corroborating Evidence

Defendant argues, “the trial court improperly admitted the Pope [Interview] as substantive evidence.” We agree the evidence was improperly admitted but disagree that the trial court admitted the Pope Interview as substantive evidence.

### A. Preservation of Argument

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At trial, Defendant made a timely objection to the Pope Interview in the presence of the jury, but the reason for the objection was not apparent from the context.

MS. FERRIS: Thank you, Your Honor. At this time, the State would ask to publish State's Exhibit 4, the interview that was taken with the defendant right after this happened.

THE COURT: I can't remember. Did you make an objection yesterday about this?

MS. JEFFERS-NELSON: I didn't because they didn't make that statement, but I am making an objection, Your Honor.

(Bench conference.)

THE COURT: All right. The Court is going to overrule the objection. You may publish these.

The legal basis for the objection discussed during this bench conference is not in the record at this point in the transcript, but approximately two hours later, Defendant's counsel repeated the reason for her objection on the record, as noted by the trial court:

MS. JEFFERS-NELSON: Correct. The basis of the objection to the statement of Mr. Pope being admitted was hearsay, so I did want to add that to that. I don't think at any point did he say he needed his memory refreshed or anything like that, so I did want to add that to the record.

THE COURT: All right. Let the record so reflect.

Because Defendant presented a timely objection to the Pope Interview in the presence of the jury, and the trial court ruled on that objection, and the specific reason

for the objection was noted, we deem this issue was fully preserved for appellate review. *See* N.C. R. App. P. 10(a)(1) (“In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party’s request, objection, or motion. Any such issue that was properly preserved for review by action of counsel taken during the course of proceedings in the trial tribunal by objection noted or which by rule or law was deemed preserved or taken without any such action . . . may be made the basis of an issue presented on appeal.”).

B. Standard of Review

Defendant contends the Pope Interview was inadmissible as hearsay.

“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.” N.C. Gen. Stat. § 8C-1, Rule 801(c) (2018). “Hearsay is not admissible except as provided by statute or by these rules.” N.C. Gen. Stat. § 8C-1, Rule 802 (2018).

*State v. Roberts*, 268 N.C. App. 272, 276, 836 S.E.2d 287, 291 (2019), *review denied*, 374 N.C. 269, 839 S.E.2d 350 (2020). We review this issue *de novo*. *State v. Johnson*, 209 N.C. App. 682, 692, 706 S.E.2d 790, 797 (2011) (“When preserved by an objection, a trial court’s decision with regard to the admission of evidence alleged to be hearsay is reviewed *de novo*.” (citing *State v. Wilson*, 197 N.C. App. 154, 159, 676 S.E.2d 512,

515 (2009))).

C. Hearsay

The Pope Interview was admitted “to prove the truth of the matter asserted,” N.C. Gen. Stat. § 8C-1, Rule 801(c), specifically to identify Defendant as the person who shot Mr. Pope. The Pope Interview was a statement made by the declarant, Mr. Pope, at the hospital after the shooting. Thus, the Pope Interview was hearsay and could be admissible only under an exception to the hearsay rule. N.C. Gen. Stat. § 8C-1, Rule 802.

On appeal, the State does not dispute that the Pope Interview was hearsay or that Mr. Pope was available to testify, but the State contends the evidence was admitted only as corroborative evidence. The State also notes that “[t]he Rules of Evidence endorse the concept of adoption by a witness of the statement of another. N.C. Gen. Stat. §8C-1, Rule 803(5) allows recorded recollection to be shown by a memorandum made or adopted by the witness. N.C. Gen. Stat. §8C-1, Rule 803(5).” However, Rule 803(5) is simply not applicable to this case. Mr. Pope did not testify that he needed to use the Pope Interview to refresh his recollection because he had “insufficient recollection to enable him to testify fully and accurately,” N.C. Gen. Stat. §8C-1, Rule 803(5), and the Pope Interview was not used to refresh Mr. Pope’s recollection. In addition, if the Pope Interview had been admitted under Rule 803(5),

“the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.” *Id.*

Despite the State’s arguments on appeal, at trial the State sought to use the Pope Interview because Mr. Pope had stated he would refuse to testify, and the State attempted to treat him as unavailable. Defendant argues, “Mr. Pope was not ‘unavailable’ to testify during [Defendant’s] trial. Rule 804 of the North Carolina Rules of Evidence allows for the admission of certain out-of-court statements that would otherwise be inadmissible under our hearsay rules if the witness is ‘unavailable.’” As relevant to the issue in this case, Rule 804 of the North Carolina Rules of Evidence states:

(a) Definition of unavailability.--“Unavailability as a witness” includes situations in which the declarant:

...

- (2) Persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or
- (3) Testifies to a lack of memory of the subject matter of his statement[.]

N.C. Gen. Stat. § 8C-1, Rule 804.

Here, Mr. Pope initially told the court that he refused to testify but proceeded to answer questions by the State:

THE COURT: All right. Call your next witness please.

MS. FERRIS: Your Honor, the State calls Sharrieff Pope to the stand.

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THE COURT: All right. Very well.

SHARRIEFF POPE, HAVING BEEN FIRST DULY SWORN, TESTIFIED AS FOLLOWS ON, DIRECT EXAMINATION BY MS. FERRIS:

Q. Would you please state your name for the record, spelling your first and last name for the court reporter?

A. Um, only thing is, I refuse to testify. My name is Sharrieff Pope.

THE COURT: I think he said he refuses to testify, then he said his name was Sharrieff Pope. Is that what you said, sir?

WITNESS: I refuse to testify.

THE COURT: All right.

(Ms. Ferris replays State's Exhibit 1.)<sup>[2]</sup>

. . . .

Q. Is that you, Mr. Pope?

A. Yes.

Q. Did you meet with me a few weeks ago?

A. Yes.

MS. FERRIS: May I approach, Your Honor?

THE COURT: You may.

Q. Mr. Pope, do you remember meeting with a detective in the hospital after this happened?

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<sup>2</sup> State's exhibit 1 is the security camera footage of the shooting from the D-Town cell phone store.



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A. Yes.

Q. And do you remember giving him a statement while you were laying in your hospital bed?

A. Yes.

Q. And do you remember reviewing that audio recording with me?

A. Yes.

Q. Can you tell me what this is? (holds up statement)<sup>[3]</sup>

MS. JEFFERS-NELSON: May I approach, Your Honor?

THE COURT: Yes, ma'am.

Q. Do you remember initialing and dating it after we listened to it?

A. Yes.

Q. And are those your initials and the date that you wrote on there?

A. Yes.

Q. Was that the interview that, in fact, you gave to the detective?

A. Yes, at the time I was shot, when I was on drugs (inaudible)

THE COURT: Sir, can you speak up? The court reporter and defense counsel and I are not able to hear you, and

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<sup>3</sup> These questions are addressing the Pope Interview, both the "audio recording" and the written statement.

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maybe some of the jury. Would you mind speaking up, please?

MS. FERRIS: Your Honor, I would just ask if he answers the questions that I --

THE COURT: I couldn't hear what he said. I didn't know if -- what -- if he could speak up to what you said sir, please?

A. I said the day I was interviewed I was heavily, like, on drugs, on pain drugs, and just showed a video and pictures.

Q. And is that the audio recording of the interview?

A. Yes.

MS. FERRIS: Your Honor, at this time the State would tender State's Exhibit 4 into evidence; the audio recording of Mr. Pope's interview right after this happened.

THE COURT: The State's Exhibit Number 4 will be received into evidence.

The court then took a recess for the evening. The next day, counsel for the State told the court that Mr. Pope was "refusing to come to court." The trial court ordered Mr. Pope to appear, and the direct examination continued:

Q. Mr. Pope, there was some coughing during that interview. Was that you?

A. Yes.

Q. Can you tell me why you were coughing?

A. Because I had a breathing tube in me.

Q. And do you, as a result of this, have any permanent damage? When you exercise, say, is there a difference?

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A. Well, I get fatigued.

Q. Can you explain that to us?

A. My left lung is like collapsed, so it's like I don't breathe like normal.

Q. And did you hear the detective say that it was the 7<sup>th</sup> of April in that interview?

A. Yes.

Q. Does that sound about right?

A. Yes.

Q. And you were still in the hospital?

A. Yes.

Q. Did you post a photo on social media of a pile of cash and a gun the day of the shooting?

A. Yes.

Q. Do you know about how soon before the shooting you did that?

A. Like probably about an hour or two hours since it happened.

Q. And are you friends with, or followed by, anybody the defendant knows?

A. Probably.

Q. Does his girlfriend follow you?

MS. JEFFERS-NELSON: Objection, Your Honor.

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THE COURT: Overruled, if he knows.

A. Probably.

Q. Mr. Pope, I know this is a lot, but would you mind showing us the scars from the shooting?

(Witness lifts his shirt to reveal scars.)

Q. And what is that?

A. I think that'll show when like the bullet went in.

Q. And did the bullet stay in, or did it go through?

A. It went through, like almost to the tip of my back, like into my spine.

Q. Can you show us that, too?

A. I don't know if they're going to be able to see it.

Q. Thank you.

This was the entirety of Mr. Pope's testimony on direct examination.

Defendant argues that Mr. Pope was not unavailable to testify since he did not "persist[] in refusing to testify concerning the subject matter of his statement despite an order of the court to do so," N.C. Gen. Stat. § 8C-1, Rule 804(a)(2), and "Mr. Pope was not ordered to testify. While the trial court did issue an oral order to bring Mr. Pope to court, the trial court never issued an order compelling Mr. Pope to answer questions." Defendant is correct, as Mr. Pope at first said he would not testify, but he then proceeded to answer all the State's questions. The trial court never had to

order him to testify because the State did not ask him any questions he actually refused to answer. Pursuant to Rule 804, Mr. Pope, despite his objections, did not *persist* in refusing to testify. *See* N.C. Gen. Stat. § 8C-1, Rule 804(a)(2).

Mr. Pope also did not testify “to a lack of memory of the subject matter of his statement.” N.C. Gen. Stat. § 8C-1, Rule 804(a)(3). Instead, he testified that he remembered the interview and giving the statement. He also testified that he remembered posting pictures online prior to the shooting and other related events, but the State did not ask him any details regarding the shooting. Instead, the State relied solely on the Pope Interview to provide these crucial facts. Thus, Mr. Pope was not “unavailable” to testify as defined by Rule 804(a) and the Pope Interview did not fall under an exception to the hearsay rule and was not eligible to be admitted as substantive evidence.

D. Corroborating Evidence

The State contends that the trial court did not admit the Pope Interview as substantive evidence but only to corroborate “[t]he security camera videotape of the attack on Mr. Pope” which was “published to the jury during both [the testimony of the cell phone store’s manager] and Mr. Pope’s testimony.”

The prior consistent statements of a witness may be offered at trial for corroborative, nonhearsay purposes. “Corroborative testimony is testimony which tends to strengthen, confirm, or make more certain the testimony of another witness.” “In order to be corroborative and therefore properly admissible, the prior statement of the

witness need not merely relate to specific facts brought out in the witness's testimony at trial, so long as the prior statement in fact tends to add weight or credibility to such testimony." The trial court "has wide latitude in deciding when a prior consistent statement can be admitted for corroborative, nonhearsay purposes."

*State v. Duffie*, 241 N.C. App. 88, 93, 772 S.E.2d 100, 104 (2015) (citations omitted).

The State points out that the trial court *did not* admit the Pope Interview as substantive evidence based on trial court's ruling during the charge conference. Defendant noted his prior objection to the admission of the Pope Interview, and the trial court clarified that it was admitted only as corroborative evidence.

THE COURT: All right. So what [do] you contend would be substantive evidence? Although it seems to me that the body cam tapes or discs --

MS. FERRIS: I have the surveillance video, Your Honor.

THE COURT: Surveillance video.

MS. FERRIS: The audio interview with Mr. Pope.

THE COURT: I will note that that is substantive evidence.

MS. JEFFERS-NELSON: Well, you know I'd agree -- disagree with it because I objected to that as hearsay, so --

THE COURT: I'm going to deny your motion on that. *I don't believe that's substantive evidence.* All right, so -- I mean that the statement on impeachment or corroboration by a prior statement says that you must -- evidence has been received tending to show that at an earlier time a witness made a statement which may conflict or be consistent with testimony of the witness in this trial. You must not consider such earlier statement as evidence of the truth, as

what was said in that earlier time was not made under oath in this trial. If you believe the earlier statement was made, and that it conflicts, or is consistent with the testimony of a witness at this trial, you may consider this and all other facts and circumstances bearing upon the witness's truthfulness in deciding whether or not you will believe or disbelieve witness testimony.

*So anyway, I'm going to deny the request for the for that to be substantive evidence.*

(Emphasis added.)

The trial court instructed the jury accordingly. The trial court first instructed the jury that "the two body cam videos, the surveillance video and the 911 telephone calls . . . may be considered by you as a substantive evidence of facts which they illustrate or show." The trial court then instructed the jury that the Pope Interview could only be considered as impeachment or corroboration evidence:

Now, what we call in the law, impeachment, or corroboration by prior statement -- impeachment means to attack a statement. Corroboration means to support or bolster the statement. *Members of the jury, evidence has been received tending to show that, at an earlier time, a witness made a statement which may conflict with, or be consistent with, the testimony of the witness at this trial. You must not consider such earlier statement as evidence of the truth of what was said at that earlier time, because it was not made under oath at this trial.* If you believe the earlier statement was made, and that it does conflict with or is consistent with the testimony of the witness at this trial, you may consider this and all other facts and circumstances bearing upon the witness's truthfulness, in deciding whether you will believe or disbelieve the witness's testimony.

(Emphasis added.)

Our Supreme Court has held that when a witness does not testify, evidence to corroborate their testimony may not be admitted. *See State v. Jackson*, 340 N.C. 301, 319, 457 S.E.2d 862, 873 (1995) (“The statement was a self-serving declaration, not part of the *res gestae*, and it was not available for corroborative purposes since defendant did not testify.”); *State v. Taylor*, 280 N.C. 273, 281, 185 S.E.2d 677, 683 (1972) (“Defendant did not take the witness stand and offered no evidence whatever. The proposed cross-examination was therefore not competent to corroborate the defendant or, for that matter, any other witness. It was properly excluded as a self-serving declaration.”). Mr. Pope did testify but the State did not ask him questions about the shooting or identification of the person who shot him. Instead, the State attempted to rely solely on the Pope Interview to provide the details of the shooting and identification of the shooter. The State argues that Mr. Pope gave testimony regarding the shooting when he agreed that he was the person shown in the *surveillance video* of the shooting.<sup>4</sup> The State argues,

When Mr. Pope answered “Yes” to the question “Is that you, Mr. Pope?” during the playback of the security camera video, *the State submits that he in effect adopted*

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<sup>4</sup> The quality of the surveillance video is low. This video shows Mr. Pope’s red car stop in a parking lot. He opens the car door but remains inside. The assailant walks up to the car; he has dreadlocks and is wearing a baseball cap, a dark shirt, and red pants. Mr. Pope stands as he gets out of the car and the assailant puts a pistol to his chest and fires. Mr. Pope fell back into the car and then to the ground outside the car, hiding behind the car door. The assailant then shot Mr. Pope again; Mr. Pope then shoots in the direction of the assailant, and he retreats across the parking lot. Mr. Pope then runs from his car to the nearby closed shop door, staggers, pulls the door open, squats behind the door, and then collapses backwards into the shop.



*and restated, under oath, all the information that can be gathered from watching the security camera video. The State submits that the adoption, under oath, of a video that speaks for itself as substantive evidence is the equivalent of court testimony by the witness reciting all that is shown by the video.*

(Emphasis added.) But without other testimony or evidence, the only information provided by Mr. Pope’s answer “Yes” is that he was the person who was shot, a fact that was not really in dispute. Mr. Pope did not “adopt and restate” everything the video showed, and the surveillance video did not provide any information at all about the transaction between Mr. Pope and the shooter or regarding the identity of the shooter other than showing the person’s dreadlocks, cap, dark shirt, and pants.

Videos often provide compelling evidence, but a video rarely “speaks for itself” in a manner “equivalent of court testimony.” Viewers may not all agree on what a video actually means. One famous example of this sort of disagreement regarding interpretation of a video is presented in *Scott v. Harris*, 550 U.S. 372, 127 S. Ct. 1769 (2007). In *Scott*, Justice Scalia, writing for the majority, considered the meaning of a video of the high-speed car chase to be entirely obvious and reversed the trial court on this basis. *Id.* at 386, 127 S. Ct. at 1779. Justice Stevens disagreed and dissented based in large part upon his own different interpretation of the video. *Id.* at 389, 127 S. Ct. at 1781 (Stevens, J. dissenting). Justice Scalia noted

Justice STEVENS suggests that our reaction to the videotape is somehow idiosyncratic, and seems to believe we are misrepresenting its contents. See *post*, at 1783

(dissenting opinion) (“In sum, the factual statements by the Court of Appeals quoted by the Court . . . were entirely accurate”). We are happy to allow the videotape to speak for itself. See Record 36, Exh. A, available at [http://www.supremecourtus.gov/opinions/video/scott\\_v\\_harris.html](http://www.supremecourtus.gov/opinions/video/scott_v_harris.html) and in Clerk of Court’s case file.

*Id.* at 378 n.5, 127 S. Ct. at 1775 n.5. Justice Breyer concurred in the majority opinion, noting his own interpretation of the video:

I join the Court’s opinion with one suggestion and two qualifications. Because watching the video footage of the car chase made a difference to my own view of the case, I suggest that the interested reader take advantage of the link in the Court’s opinion, *ante*, at 1775, n. 5, and watch it.

*Id.* at 387, 127 S. Ct. at 1780 (Breyer J., concurring).

Without testimony from a witness about what he believes “all the information that can be gathered from watching the security camera video” is, there is no way to know what facts that witness “in effect adopted and restated, under oath.” In addition, the Pope Interview was not about the security camera video; it was a hospital interview about the incident in general. We reject the State’s argument and hold that Mr. Pope’s testimony only served to identify himself as the person who was shot in the surveillance video. The Pope Interview cannot corroborate anything in the surveillance video other than the fact that Mr. Pope was the victim of the shooting.

The State also argues that Mr. Pope gave “significant testimony” and cites to the trial transcript which includes his direct examination, cross examination, re-direct examination, and re-cross examination. But the entirety of Mr. Pope’s direct examination is quoted above, and it does not form a basis for which the alleged corroborative evidence should have been admitted. On cross examination, Defendant’s counsel asked Mr. Pope about the specifics of when he gave the Pope Interview and whether he was competent to do so, but because Defendant’s counsel objected to the evidence being admitted during direct examination and that objection was overruled, her questioning on cross does not preclude appellate review. *See State v. Anthony*, 354 N.C. 372, 408, 555 S.E.2d 557, 582 (2001) (“An objecting party does not waive its objection to evidence the party contends is inadmissible when that party seeks to explain, impeach, or destroy its value on cross-examination[.] (citing *State v. Adams*, 331 N.C. 317, 328, 416 S.E.2d 380, 386 (1992))). Because the witness did not provide any substantive testimony which could be supported by the Pope Interview, in either its audio recording or written format, we hold it was not eligible to be admitted into evidence for corroborative purposes as a prior consistent statement. .

E. Prejudice

“[E]ven if the trial court admits hearsay in error, ‘[t]he erroneous admission of hearsay testimony is not always so prejudicial as to require a new trial, and the

burden is on the defendant to show prejudice.” *State v. Cromartie*, 257 N.C. App. 790, 792, 810 S.E.2d 766, 769 (2018) (second alteration in original) (quoting *State v. Allen*, 127 N.C. App. 182, 186, 488 S.E.2d 294, 297 (1997)). “Evidentiary errors are harmless unless a defendant proves that absent the error a different result would have been reached at trial.” *Id.* (quoting *State v. Ferguson*, 145 N.C. App. 302, 307, 549 S.E.2d 889, 893 (2001)).

Defendant argues there was a reasonable possibility that he would not have been convicted without the admission of the recorded Pope Interview, which described “the person who shot him, noting in particular his assailant’s long dreadlocked hair and face tattoos;” “informed the police that he believed his assailant’s first name is ‘Lorenza’ or a similar name;” “provided his assailant’s nickname; and” “described the assailant’s car as a blue Ford fusion with a New York license plate.” In addition, during its deliberations, the jury asked to hear the Pope Interview and to see other evidence. The trial court discussed with both parties’ counsel what evidence to send to the jury. Defendant’s counsel repeated her objection to the Pope Interview, but the trial court allowed the jury to hear it again.

The most crucial fact the jury had to determine was the identity of the person who shot Mr. Pope. There was no question he was shot; the question was who did it. Mr. Pope did not provide testimony in court identifying defendant as the person who shot him; the only identification evidence at trial was contained in the Pope

Interview.<sup>5</sup> The trial court admitted the Pope Interview only as corroborative evidence, but this was also error as there was no substantive evidence to corroborate—Mr. Pope gave no testimony describing the shooting or about the shooter’s identity. We conclude that the trial court erred by admitting the Pope interview as corroborating evidence and based on the specific facts of this case, the admission of the Pope Interview was prejudicial and warrants a new trial for Defendant. Since we have concluded that Defendant is entitled to a new trial based upon the erroneous admission of the Pope Interview, we need not address Defendant’s remaining argument regarding the admission of the jail phone calls, as this alleged error may not recur in the new trial.

### III. Conclusion

The trial court erred by admitting an out-of-court statement by the victim when the victim was available to testify and did in fact testify. Even if the Pope Interview was admitted only as corroborative evidence, it did not corroborate the surveillance video since Mr. Pope’s acknowledgement that he was the person shot in that video is not “the equivalent of court testimony by the witness reciting all that is

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<sup>5</sup> An employee of the cell phone store saw the shooting. She described the shooter as tall and said he was wearing red pants and a black shirt with “a number or something” on it; his hair was “braided down” and pulled back. She did not identify Defendant as the person who shot Mr. Pope. The officers who arrested Defendant testified about the clothes he was wearing when he was arrested, the same day of the shooting. They testified he was wearing maroon pants with a bunch of zippers on them, a black short sleeved hoodie with white writing on the front. The Pope Interview contained no evidence corroborating the employee’s description of the shooter.

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shown by the video.” The Pope Interview was the only evidence, substantive or corroborative, which identified defendant as the person who shot Mr. Pope, so admission of the evidence was prejudicial. Defendant is entitled to a new trial.

NEW TRIAL.

Judges INMAN and YOUNG concur.

Report per Rule 30(e).