APPENDIX

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United States v. Spencer

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

Rulings by summary order do not have precedential effect. Citation to a summary order filed on or after January 1, 2007, is permitted and is governed by Federal Rule of Appellate Procedure 32.1 and this court's Local Rule 32.1.1. When citing a summary order in a document filed with this court, a party must cite either the Federal Appendix or an electronic database (with the notation "summary order"). A party citing a summary order must serve a copy of it on any party not represented by counsel.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 9th day of August, two thousand twenty-three.

PRESENT:

DENNY CHIN,
STEVEN J. MENASHI,
Circuit Judges,
ERIC R. KOMITEE,
District Judge.∗

UNITED STATES OF AMERICA,

Appellee,

v. 22-1464-cr

ERIC SPENCER, AKA Sealed Defendant 1,

Defendant-Appellant.

∗Judge Eric R. Komitee of the United States District Court for the Eastern District of New York, sitting by designation.

For Appellee: LAUREN RIDDELL (Anirudh Bansal, *on the brief*), Cahill Gordon & Reindel LLP, New York, NY.

For Defendant-Appellant: JANE Y. CHONG, Assistant United States Attorney (Matthew R. Shahabian and Hagan Scotten, Assistant United States Attorneys, *on the brief*), *for* Damian Williams, United States Attorney for the Southern District of New York, New York, NY.

Appeal from a judgment of the United States District Court for the Southern District of New York (Woods, J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

On February 2, 2021, Eric Spencer and his co-conspirators robbed a Chanel store in the SoHo neighborhood of Manhattan, stealing over $200,000 worth of merchandise. On February 20, 2021, Spencer was arrested in Florida and, one month later, was charged in a two-count indictment. Count One charged Spencer with conspiring to commit Hobbs Act robbery in violation of 18 U.S.C § 1951. Count Two charged Spencer with Hobbs Act robbery in violation of 18 U.S.C. §§ 1951 and 1952. The trial lasted from March 22 to 28, 2021, culminating in a conviction on both counts. On June 30, 2022, Spencer was sentenced by the district court to 87 months of imprisonment, followed by three years of supervised release, and restitution in the amount of $204,500. Spencer filed a timely notice of appeal on July 7, 2022, challenging the admission of two pieces of evidence. We assume the parties' familiarity with the underlying facts and procedural history.

Just before 2:00 PM on February 2, 2021, Spencer and his co-conspirators entered Chanel's SoHo location and began grabbing handbags and other merchandise. Four witnesses testified about the robbery: three Chanel security

guards—Vivian Harvey, Denzel Washington, and Suzy Murphy—and one Chanel employee—Julius Laroya. In addition to this testimony—as well as surveillance video, cellphone location analysis, social media activity, and internet search history—two out-of-court recorded statements were also admitted into evidence: (1) portions of video from the body camera of one of the police officers who interviewed Harvey immediately after the robbery and (2) the 911 call in which Washington reported the robbery. These two statements form the basis of Spencer's appeal.

We review the admission of evidence for abuse of discretion. *See United States v. Jones*, 299 F.3d 103, 112 (2d Cir. 2002). "A district court 'abuses' or 'exceeds' the discretion accorded to it when (1) its decision rests on an error of law (such as application of the wrong legal principle) or a clearly erroneous factual finding, or (2) its decision ... cannot be located within the range of permissible decisions." *Zervos v. Verizon New York, Inc.*, 252 F.3d 163, 169 (2d Cir. 2001) (footnote omitted). We conclude that the district court did not abuse its discretion and affirm the judgment.

I

In the body camera footage, Harvey tells the responding officer that when she reached for her weapon, the robber said, "Oh you wanna shoot me?," and then "he pulled his." Gov't Exhibit 117-A. Harvey clarifies to the officer that she never saw the gun, other than a "little bit" of a "brown" or "black" handle in the man's waistband. *Id*. In the video, Harvey can be seen waving her hands, touching her temples, and raising her voice when discussing the robbery. *Id*.

At trial, over a year later, the government played the admitted portion of the video. Harvey testified that she was "not sure" whether she in fact saw a gun handle. J. App'x 127. Harvey also admitted that she reported certain details incorrectly when speaking to the responding officer. For example, she stated that the man in the green sweatpants was wearing a black top instead of a grey top. *Id*. at 127-28. She explained that she was a "little shooken up" when interviewed immediately after the robbery. *Id*. at 128.

In admitting the video, the district court determined that the statements made by Harvey in the body camera footage were admissible as excited utterances. The district court noted that Harvey's statements were made "within minutes of the armed robbery" (six minutes to be exact), Sp. App. 79, and that, based on a review of the footage, the district court "interpret[ed] her body language and expressions to show her being under the stress of the incident," *id*. at 80. The district court concluded that the near-contemporaneous video of Harvey's reaction to the robbery provided "powerful direct evidence of those substantive legal elements of the charge," *id.* at 82, namely whether the defendant intended to put the victims in fear for their personal safety. The district court further determined that Harvey's statements were "intrinsically reliable" by nature of having been captured on video. *Id.* at 80.

Spencer contends on appeal that "the body camera footage permitted the Government to offer evidence that [Spencer] did have a gun, which clearly must have colored the jury's view of the Appellant, and suggested he was dangerous in a way the admissible evidence did not." Appellant's Br. 17. In challenging the admission of the body camera footage, Spencer argues (1) that the footage was insufficiently contemporaneous with the robbery, and (2) that Harvey's statements lacked sufficient reliability. *See id.* at 16. We disagree.

First, we agree with the district court on the issue of contemporaneity. "The rationale [of the excited utterance exception] … is that the excitement of the event limits the declarant's capacity to fabricate a statement and thereby offers some guarantee of its reliability." *United States v. Tocco*, 135 F.3d 116, 127 (2d Cir. 1998). "[W]hile the hearsay exception for present sense impressions focuses on *contemporaneity* as the guarantor of reliability, and requires that the hearsay statement 'describe or explain' the contemporaneous event or condition, the excited utterance exception is based on the *psychological impact* of the event itself, and permits admission of a broader range of hearsay statements—*i.e.* those that 'relate to' the event." *Jones*, 299 F.3d at 112 n.3 (citation omitted). Therefore, unlike a present sense impression, "[a]n excited utterance need not be contemporaneous with the startling event to be admissible under Rule 803(2)." *Tocco*, 135 F.3d at 127

(affirming the admission of an excited utterance that occurred three hours after startling information was shared); *see also United States v. Scarpa*, 913 F.2d 993, 1017 (2d. Cir. 1990) (affirming the admission of an excited utterance that occurred five or six hours after the startling event). We do not believe that the brief six-minute gap between the robbery and the interview prevented Harvey's statements from qualifying as excited utterances. Indeed, Harvey's body language in the video demonstrates that she remained under the stress of the event. *See Tocco*, 135 F.3d at 128 (observing that the declarant's "excitement obviously had not subsided").

Second, we reject the contention that Harvey's confusion over whether Spencer possessed a gun means that she engaged in "unreliable speculation." Appellant's Br. 17. Spencer implies that Harvey lacked sufficient personal knowledge of the circumstances of the robbery. *See* Fed. R. Evid. 602. Yet this is not a case in which the declarant did not witness the event.[1] Here, there is no question that Harvey saw the event because she was present for it, and the government correctly asserts that her inability to discern whether the robber actually had a gun—or was only pretending to have one—does not render her utterances unreliably speculative. Any inconsistencies between Harvey's testimony and her excited utterances in the video were, as the district court stated, "fair fodder on cross examination or closing argument but are no reason to exclude the evidence in its entirety." Sp. App'x 80-81.

II

Next, Spencer argues on appeal that Washington lacked the requisite personal knowledge for his statements from the 911 call to be admitted. According to Spencer, "[t]he 911 call itself and [Washington's] trial testimony make clear that his hearsay statements about the presence of a gun were not based on his own

[1] *See, e.g., United States v. Gonzalez*, 764 F.3d 159, 169 (2d Cir. 2014) (concluding the district court did not abuse its discretion in determining out-of-court statements by a child regarding a shooting to be inadmissible as either present sense impressions or excited utterances because the child was asleep in another room when the shooting occurred); *Browne v. Keane*, 355 F.3d 82, 88-89 (2d Cir. 2004) (concluding that a 911 caller's description of two shooters could not be admitted as a present sense impression because the caller may not have actually seen the shooting).

observations—as is essential for their admission under either exception—but rather on information relayed from others." Appellant's Br. 18.

During the 911 call, a person can be heard in the background saying several times, "he had a gun," J. App'x 124, to which Washington responded, "he had it," *id.* at 49. Once Washington spoke to the operator, the operator stated that he had heard "someone in the back saying that they saw a gun?" Gov. Exhibit 601-R. Washington confirmed that "yes, one of the men were armed … Three males." *Id*. Washington then clarified that "[o]ne male had a gun, but it was four suspects" and "[w]e all just backed up and let them." *Id*.

The district court reserved ruling on the admissibility of the call because it was not clear whether Washington's statements were based on his personal perception or relayed what other witnesses saw. *See* Sp. App'x 71-72. The district court, in rejecting a pretrial motion by the government for reconsideration on this question, reasoned that a foundation for admissibility could not be established until Washington testified.

At trial, Washington testified that he saw Harvey show the robber in green pants her holstered firearm, after which the robber "gestured his hands inside of his waistband and said, what the fuck are you going to do, shoot me?" *Id.* at 171. Washington stated that "once he did that, I was kind of sure he had something and he wasn't afraid to use it." *Id*. at 172. Washington clarified that the "something" was a "weapon." *Id*. He explained that he believed the robber had a weapon "[b]ecause of the gesture that he made, and, in my experience, you don't walk up to someone that has a firearm unless you have something, you know, to defend yourself." *Id*. at 172-73. Washington acknowledged that he did not actually see a gun, though he did see the robber "reach[] inside his waistband and actually tuck[] his hand in." *Id*. at 173. Washington reasoned, "So it's like, okay, he has something, and he will basically probably pull it out and use it." *Id*. Like Harvey, Washington also testified that he misreported a detail on the 911 call, stating that the robber was wearing a green "hoodie" instead of green sweatpants. J. App'x 50-51. Washington explained that he made the error because at the time of the call he

was "still pretty shaken up" and "still pretty distraught, still pretty scared." *Id.* at 50-51.

We agree with the district court's determination that Washington's testimony provided an adequate foundation for admitting the 911 call excerpts as both present sense impressions and excited utterances. As the district court noted, "[t]he witness has testified that he did not see the gun, but, based on the observations of the motions of the person, he was, as he said, 100 percent sure that the man was armed." Sp. App'x 197. In later testimony, after the jury heard the 911 call, Washington testified that he had thought the robber was armed because of Harvey's statements and "[b]ecause of the actions and the body language of the individual." J. App'x 49. Because Washington, like Harvey, reacted to what he witnessed as the robbery unfolded, we cannot conclude that Harvey lacked the requisite personal knowledge.

III

Even if the district court had erroneously admitted these two pieces of evidence, we would still need to "evaluate the erroneous admission of hearsay evidence for harmless error." *United States v. Dukagjini*, 326 F.3d 45, 59-60 (2d Cir. 2003). According to Spencer, the error of admitting both pieces of evidence was not harmless because it "prevented the jury from fairly judging the case based on the admissible evidence," thereby "depriving the Appellant of a fair trial." Appellant's Br. 17. By "suggesting that the Appellant possessed a gun during the offense," this evidence "clearly prejudiced his defense, particularly since the testimony and other admissible trial evidence did nothing to establish that a gun was present during the offense." *Id*. at 19-20. We disagree and conclude that any possible error would be harmless.

"Error is harmless if it is highly probable that it did not contribute to the verdict." *United States v. Gomez*, 617 F.3d 88, 95 (2d Cir. 2010) (quoting *United States v. Kaiser*, 609 F.3d 556, 573 (2d Cir. 2010)). In reviewing for harmless error, we consider "(1) the overall strength of the prosecutor's case; (2) the prosecutor's conduct with respect to the improperly admitted evidence; (3) the importance of

the wrongly admitted testimony; and (4) whether such evidence was cumulative of other properly admitted evidence." *United States v. Kaplan*, 490 F.3d 110, 123 (2d Cir. 2007). This court has "repeatedly held that the strength of the government's case is the most critical factor in assessing whether error was harmless." *United States v. McCallum*, 584 F.3d 471, 478 (2d Cir. 2009).

Here, the government's case against Spencer was strong. Spencer bragged about possessing numerous Chanel bags on his Facebook account, writing "So much double C RN [right now]. I could open a small boutique FRFR [for real, for real]." J. App'x 672. "Double C" is slang for the interlocking C-logo for the brand Chanel. *Id.* at 513. Photos of four of the stolen bags were found on Spencer's phone with metadata indicating that the pictures had been taken either the day of or the day after the robbery. *Id*. at 502-05. Spencer's private Facebook messages show him discussing the sale of the bags. Spencer wrote, for example, "They [$]5,000. I was selling them for [$]2,000," *id*. at 394, and "I had Chanel bags. They all gone thou," *id*. at 393. These messages were also found on Spencer's cellphone. Additionally, video surveillance from an apartment complex in Brooklyn showed Spencer and one of the other robbers shortly before the robbery dressed in the same clothing they wore during the robbery. *Id.* at 353-66. Surveillance footage also shows a black Audi arriving to pick up Spencer and his co-conspirator before the robbery in Brooklyn, *id.* at 367-69, with a similar car appearing in surveillance video from around the Chanel store at the time of the robbery, *id.* at 196-201. Testimony from a cellphone location analyst identified Spencer's phone as being in the vicinity of the Brooklyn apartment complex both before and after the robbery. *Id*. at 272-78.

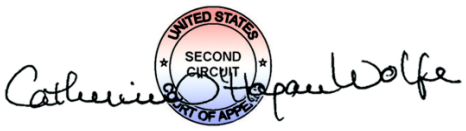
Furthermore, we agree with the government that the recorded statements regarding the presence of a weapon were largely cumulative of testimony provided by three of the four witnesses, who believed that the robber in the green sweatpants was armed. Such testimony makes the additional recorded statements "less likely to have injuriously influenced the jury's verdict." *Wray v. Johnson*, 202 F.3d 515, 526 (2000).

Spencer's conviction on Count Two did not depend on whether he had a gun but on whether he threatened force. *See* 18 U.S.C. § 1951(b)(1). The district court instructed the jury that the government needed to prove only that Spencer "threatened force, violence or fear of injury," that such a threat of force or violence "may be made verbally or by physical gesture," and that fear of injury means that a victim reasonably feared or expected personal harm. J. App'x 825-26. Therefore, the government argued to the jury that Spencer sought to make the victims believe he had a gun, not that he actually had one. *Id.* at 782. The government stated in summation that "it doesn't matter if [Spencer] had a gun …. What matters is, … when he was in the store, he wanted his victims to think he had a gun. What matters is that he wanted to scare them into submission. What matters is that he succeeded into [their] not putting up a fight." *Id.* Accordingly, "the prosecutor's conduct" with respect to the evidence does not suggest prejudice. *Gomez*, 617 F.3d at 95.

* * *

We have considered Spencer's remaining arguments, which we conclude are without merit. We affirm the judgment of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

v. 21 CR 193 (GHW)

ERIC SPENCER,

Defendant.

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New York, N.Y.
March 8, 2022
10:15 a.m.

Before:

HON. GREGORY H. WOODS,

District Judge

APPEARANCES

DAMIAN WILLIAMS
United States Attorney for the
Southern District of New York
BY: MATTHEW R. SHAHABIAN
ABIGAIL KURLAND
JANE CHONG
Assistant United States Attorneys

CAHILL GORDON & REINDEL LLP
Attorney for Defendant
BY: ANIRUDH BANSAL
LAUREN RIDELL
SAMUEL J. WEINER

ALSO PRESENT:
BRIAN SMITH, Special Agent
PHOENIX BUCKNOV, Special Agent
COLLEEN GEIER, Paralegal Specialist

testify about their personal observations, but also it is a requirement of this rule and very sensibly a requirement of this rule.

Also, it very much fits within the 403 analysis in the sense that it is probative of almost nothing if he didn't actually see it and has walked it back, and it is highly prejudicial for obvious reasons.

THE COURT: Thank you.

Good. Anything else, counsel for defendant?

MR. BANSAL: Not at this time, Judge. I'm happy to answer questions.

THE COURT: Good. Thank you.

Counsel, first, thank you very much for your arguments. What I would like to do is to take a short recess for me to consider your arguments. I will do that now. My hope is that I'll be able to come back and rule, at least in part, on the issues presented in the motions or in the motion in limine. It's about 11:50 now. I'm going to propose that we just turn this into a lunch break and that we return at 12:30.

Counsel, I'll see you back here then. Thank you all very much.

(Luncheon recess)

Thank you. We're back on the record after a longer recess than I anticipated, about 45 minutes.

Thank you for your patience. I will now deliver my

decision on the government's motion in limine. I'll do so orally.

By way of background, the United States filed a motion in limine seeking the admission of three recordings, each containing several out-of-court statements, on February 8, 2022. Docket number 60 ("Government Mot"). The government provided the court with excerpted copies of the three recordings. The defendant opposed the government's motion on February 15, 2022, and provided the court with a longer excerpt of one of the videos included in the government's motion. Docket number 65 ("Opposition"). The government filed a reply in further support of its motion on February 22, 2022. Docket number 66 ("Reply").

The parties are familiar with the underlying facts. Therefore, I will not recite those in detail. To the extent that any facts in this case are particularly pertinent to my decision, those facts are embedded in my analysis.

2. Legal standard.

I begin with an overview of some guiding legal principles that inform my evaluation of the government's motion in limine. "The purpose of an in limine motion is to aid the trial process by enabling the court to rule in advance of trial on the relevance of certain forecasted evidence, as to issues that are definitely set for trial, without lengthy argument at, or interruption of, the trial." Hart V. RCI Hospital Holdings,

Inc., 9 F. Supp. 3d 250, 257 (S.D.N.Y. 2015)(quoting Highland Cap. Management LP v. Schneider, 551 F.Supp.2d 173, 176 (S.D.N.Y. 2008)("Evidence should not be excluded on a motion in limine unless such evidence is clearly inadmissible on all potential grounds.") *Id.* (Quoting National Union Fire Insurance Co of Pittsburgh, Pa v. L.E. Myers Co. Group, 937 F.Supp. 276, 287 (S.D.N.Y. 1996)). Courts considering a motion in limine may reserve judgment until trial, so that the motion is placed in the "appropriate factual context." See National Union Fire Insurance Co., 937 F.Supp. at 287. Further, "[a] ruling [on a motion in limine] the subject to change when the case unfolds, particularly if the actual testimony differs from what was contained in the [party's] proffer." Luce v. United States, 469 U.S. 38, 41 (1984). The Federal Rules of Evidence govern the admissibility of evidence at trial. Under Rule 402, evidence must be relevant to be admissible. Federal Rule of Evidence 402. The "standard of relevance established by the Federal Rules of Evidence is not high." United States v. Southland Corp., 760 F.2d 1366, 1375 (2d Cir. 1985)(quoting Carter v. Hewitt, 617 F.2d 961, 966 (3d Cir. 1980). If the evidence has "any tendency to make a fact more or less probable than it would be without the evidence" and remember "the fact of consequence in determining the action" it is relevant. Federal Rule of Evidence 401. Nonetheless, under Rule 403, relevant evidence may be excluded if "its probative value is

substantially outweighed by a danger of one or more of the following: Unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Federal Rule of Evidence 403.

The Second Circuit has instructed that "district courts have broad discretion to balance probative value against possible prejudice" under Rule 403. United States v. Bermudez, 529 F.3d 158, 161 (2d Cir. 2008). Because "virtually all evidence is prejudicial to one party or another," "to justify exclusion under Rule 403, the prejudice must be unfair." Weinstein's Federal Evidence Section 403.04[1][A](2019)(citing cases). "The unfairness contemplated involves some adverse effect beyond tending to prove a factor issue that justifies admission." Costantino v. David M. Herzog, M.D., P.C., 203 F.3d 164, 174 to 75 (2d Cir. 2000). Further, as the advisory committee notes to Federal Rule of Evidence 403 explain, the unfair prejudice "within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Federal Rule of Evidence 403 advisory committee notes.

The court must decide preliminary or predicate questions of fact regarding the admissibility of evidence. Under Rule 104(a) of the Federal Rules of Evidence, the court "must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible.

In so deciding, the court is not bound by evidence rules, except those on privilege." Federal Rule of Evidence 104(a). When preliminary facts related to the admissibility of evidence are disputed, the party offering the evidence must prove its admissibility by a preponderance of the evidence. Bourjaily v. United States, 483 U.S. 171, 175 (1987) Rule 104(b) provides that "when the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later." Federal Rule Of evidence 104(b). This rule permits the introduction of evidence at trial "subject to connection" when other evidence is proffered to be offered later in the trial.

A. Hearsay Generally.

"Hearsay evidence is any statement made by an out-of-court declarant and introduced to prove the truth of the matter asserted." United States v. Cardascia, 951 F.2d 474, 486 (2d Cir. 1991)(citing Federal Rule of evidence 802). "Of course, every out-of-court statement is not hearsay, and all hearsay is not automatically inadmissible at trial. Instead, the purpose for which the statement is being introduced must be examined and the trial judge must determine whether -- if that purpose is to prove the truth of its assertion -- the proffered statement fits within any of the categories excepted from the rule's prohibition." *Id.*

Under Federal Rule of Evidence 805, "hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule." Federal Rule of Evidence 805. Where a witness's testimony involves two out-of-court statements, a court must "review each statement to determine whether it is admissible, either because it not hearsay or because it is hearsay subject to an enumerated exception." United States v. Cummings, 858 F.3d 763, 773 (2d Cir. 2017).

B. Present sense impressions.

Under Rule 803(1) a statement is admissible as a present sense impression if it describes a state or condition and is made "while or immediately after" the declarant perceived that event or condition. United States v. Pizzaro, 2018 WL 2089346, at *1 (S.D.N.Y. May 4, 2018)(quoting Federal Rule of Evidence 803(1)). This requires that the declarant "express knowledge based on direct sensory perception." Schering Corp. v. Pfizer, Inc., 189 F.3d 2018, 233 (2d Cir. 1999), as amended on rehearing (September 29, 1999); see also United States v. Mejia-Valez, 855 F.Supp. 607, 613 (E.D.N.Y. 1994) ("Application of Rule 803(1) has three distinct requirements: I): the statement must describe or explain the event perceived; ii) the declarant must have in fact perceived the event described; and iii) the description must be 'substantially contemporaneous' with the event in question.").

A statement offered as a present sense impression is only admissible if it was made contemporaneous with or immediately after the declarant experienced the relevant event. United States v. Jones, 299 F.3d 103, 112 (2d Cir. 2002)(citing Federal Rule of Evidence 803(1) and 803(2). "Such statements are considered to be trustworthy because the contemporaneity of the event and its description limits the possibility for intentional deception or failure of memory." *Id.* While "precise contemporaneity is not required," no more than a "slight lapse is allowable." United States v. Steele, 216 F. Supp. 3d 317, 321 to 322 (S.D.N.Y. 2016)(quoting Federal Rule of Evidence 803 advisory committee's notes). "Where a longer time has passed between the events and the statement describing them, admission under Rule 803(1) can be 'buttressed by the intrinsic reliability of the statements.'"*Id.* at 322 (quoting United States v. Parker, 936 F.2d 950, 954 (7th Cir. 1991)).

C. Excited Utterances

Under Federal Rule of Evidence 803(2), "a statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused" is admissible. Statements made under the stress of excitement are reliable because "the excitement of the event limits the declarant's capacity to fabricate a statement." United States v. Tocco, 135 F.3d 116, 127 (2d Cir. 1998).

To be admissible as an excited utterance, proponent of the hearsay statement must establish (1) that a startling event occurred, (2) that the out-of-court statement relates to that startling event, and (3) that the statement was made "while the declarant was under the stress of excitement caused by the startling event." Pizzaro, 2018 WL 2089346, at *1; see also Mejia-Valez, 855 F.Supp. at 614 ("The two conditions for the application of this exception are that there has been a startling event and that the offered statements were made during the period of excitement, and in reaction to that event.").

Although the "excited utterance need not be contemporaneous with the startling event to be admissible" the time elapsed between the startling event and the statement is "one factor to be taken into account in determining whether the declarant was, within the meaning of rule 803(2), under the stress of excitement caused by the event or condition." Jones, 299 F.3d at 112 (internal citations and quotation marks omitted). The Advisory Committee Notes to the Federal Rules state that, "under [the excited utterance exception] the standard of the measurement is the duration of the sate of excitement. 'How long can excitement prevail? Obviously there are no pat answers and the character of the transaction or event will largely determine the significance of the time factor.'" Federal Rule of Evidence 803, Advisory Committee's

Note (1972)(quoting Slough, Spontaneous Statements and State of Mind, 46 Iowa L.Rev. 224, 243 (1961); McCormick Section 272, page 580).

"Other relevant factors include: The characteristics of the event; the subject matter of the statement; whether the statement was made in response to an inquiry; and the declarant's age, motive to lie and physical and mental condition." United States v. Delvi, 275 F.Supp. 2d 412, 415 (S.D.N.Y. 2003)(citing United States v. Marrowbone; 211 F.3d 452, 454 to 55 (8th Cir. 2000)); see also United States v. Alexander, 331 F.3d 116, 123 (D.C. Cir. 2003)(listing the same factors and adding the "declarant's tone and tenor of voice." (internal quotation marks omitted); United States v. Magnan, 863 F.3d 1284, 1292 (10th Cir. 2017) (identifying a "range of factors" to be considered when determining if a declarant is under the stress of excitement including "(a) the amount of time between the event and the statement, (b) the nature of the event, (c) the subject matter of the statement, (d) the age and condition of the declarant, (e) the presence or absence of self-interest, and (f) whether the statement was volunteered or in response to questioning." (internal quotation marks omitted)).

3. Discussion.

A. The 911 call.

I can conclude now that much of the 911 call is

admissible as either a present sense impression or an excited utterance. However, the government must exclude the portions of the call during which Security Guard-2 makes statements that are not based on his personal knowledge. And there are portions of the call as to which the Government has not made a sufficient showing regarding the requirement that the speaker be describing events personally perceived by him. I will provide more detail regarding those summary statements in a moment. But first, the Court will summarize the 911 call.

Security Guard-2 placed the call to 911. After the 911 operator picks up the call, a short period elapses before Security Guard-2 speaks directly to the operator. During that time, Security Guard-1 can be heard in the background saying, "he had a gun" and "it was sticking out." Approximately 20 seconds into the call, Security Guard-2 tells the 911 operator that "we just had a robbery at the Chanel store soho." The operator asks for the address and Security Guard-1 can be heard in the background saying "139 Spring Street." The Operator said he heard "someone in the back saying that they saw a gun?" to which Security Guard-2 responds, "yes, one of the men were armed... Three males." He then describes what the robbers took from the store. Security Guard-1 can be heard in the background saying "four." Security Guard-2 asks, "there was one in the car?" He then clarifies for the operator that "one male had a gun, but it was four suspects." When asked what

kind of gun he had seen, Security Guard-2 said "handgun." When asked if he could describe the color, Security Guard 2 said "he didn't pull it all the way out, I just saw the imprint of it because when one of my other guards reached for hers, he reached for his, so he didn't pull it all the way out, but I seen the imprint of the handgun and only one of them had it." He then says "he didn't pull it out because my guard then pulled hers out. We all just backed up and let them ..." Security Guard-2 then describes what he recalls the suspects wearing. He said they were all wearing "hoodies" and that one individual had on a tie-dyed face mask. When asked what direction the suspects went, Security Guard-2 asked people in the background about the street layout around the store to provide a response. He then answers the 911 operator. When asked if there's anything else, Security Guard-2 says, "I remember the one with the all black had on black pants as well." He then added, "they have a whole lot of handbags." When asked which suspect had the gun, and "was it the one with the tie-dye mask," Security Guard-2 said, "yes the one with the dark green hoodie."

Again, those are approximations of the text on the recording, just for context.

i. Present Sense Impressions

To be admissible as a present sense impression, the government must show three things: "i) the statement must

describe or explain the event perceived; ii) the declarant must have in fact perceived the event described; and iii) the description must be 'substantially contemporaneous' with the event in question." Mejia-Valez, 855 F. Supp. at 613 (quoting Federal Rule of Evidence 803(1)); see also Jones, 299 F.3d at 112 ("a present sense impression is a statement 'describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.'" (quoting Federal Rule of Evidence 803(1))). "For statements to qualify as present sense impressions, precise contemporaneity is not required." United States v. Ibanez, 328 F. App'x 673, 675 (2d Cir. 2009)(summary order).

I do not believe that the government has shown all of these things with respect to the entirety of the 911 call. Based on the evidence that I have before me now, and the proffers by counsel regarding the anticipated testimony of the witnesses at trial, I cannot conclude that it is more likely than not that all of the statements made were based on the personal knowledge of the speaker. In particular, the statements by SG2 with respect to whether or not he saw a gun, which are outlined in approximately seconds 44-51 and 1:30 to 2:44 of the tape have not yet been proven to me to be based on the personal perception of the witness. Based on what the witness said on the tape, I could have made that conclusion-- he says in the recording that he saw a gun and the imprint of a

gun. I now understand that those statements may have been the witness transmitting information transmitted to him by others, rather than being based on his personal perception. I am not granting the government's motion to admit those portions of the tape as a result. But neither am I excluding them. I am happy to reconsider the question after hearing the testimony of the witnesses at trial. The remaining comments regarding the admissibility of the statements in the 911 tapes, therefore, relate to the portions of the recordings that the Government has demonstrated sufficiently to be based on the personal knowledge of the speaker. As you will hear, I believe that they satisfy the other requirements for admissibility.

The statements made in the 911 call by Security Guard-1 and Security Guard-2 describe the robbery that had just happened. They reflect what the declarants, Security Guard-1 and Security Guard-2, perceived during the robbery, with the caveat that I described earlier. They were made immediately after the events described. Security Guard-2 made the call immediately after the robbery. On the phone, he tells the operator that "it just happened just now, about 30 seconds ago." 911 Call, at 1:20. According to the Government, the call was placed "less than two minutes after the defendant and his coconspirators ran out of the Store." Government Motion at 5. The defendant does not dispute this timeline. Opposition at 10 ("Security Guard-2 placed the 911 call approximately one

minute after the robbers left the store"). Therefore, the statements were made nearly contemporaneous with the events described. See Steele, 216 F. Supp. 3d at 322 (admitting a 911 call "made within minutes of the caller observing the events taking place"); Mejia-Valez, 855 F. Supp. at 613 (finding that a couple of minute lapse between the shooting and the statement met the "contemporaneity requirement" because "there was just a 'slight lapse' between the shooting and the placing of these two phone calls.").

The statements made during the 911 call are further supported by the "intrinsic reliability" of the statements. The statements were made on a recorded line to 911. There were multiple people on the other side of the line, who were able to hear what the speakers were saying and could correct mistakes. In addition, the Court understands that the Government intends to call [Security Guard-1 and Security Guard-2], as a result, the reliability of the testimony is supported or undermined by their live testimony and any issues regarding the accuracy of the statements can be examined through cross examination. See Reply, at 3; see also Steele, 216 F. Supp. 3d at 322-23 ("Even if several minutes had passed, the 911 call would be admissible because its reliability is supported by the live testimony of the 911 caller and by surveillance video."); Ibanez, 328 F. App'x at 675 (noting that admission of the statement was "harmless" because the declarant "was available for

cross-examination, so that his basis for the statement could be tested.").

Ii. Excited utterances.

The court concludes here that, as the court held in the Steele case, "Even if the 911 call were not admissible as a present sense impression, it would be admissible as an excited utterance." Steele, 216 F. Supp. 3d at 323. To be admissible as an excited utterance, the proponent of the hearsay must establish (1) that a startling event occurred, (2) that the out of court statement relates to that startling event, and (3) that the statement was made "while the declarant was under the stress of excitement caused by the startling event." Pizarro, 2018 WL 2089346, at *1.

First, both of the speakers during the 911 call had just experienced an armed robbery. An armed robbery qualifies as a startling event under Rule 803(2). See e.g., Pizarro, 2018 WL 2089346, at *3 (conditionally admitting statements made on a 911 call where the government expected an eyewitness to "testify that [the declarant] placed the call immediately after and while still significantly upset by the armed robbery."); United States v. Lloyd, 859 F. Supp. 2d 387, 395 (E.D.N.Y. 2012) ("the call is admissible as an excited utterance in that it was made by a participant while under the stress of the obvious excitement caused by the robbery by men with guns.").

Second, as described in more detail above, all the

declarants' statements pertain to the armed robbery.

Third, the government has proffered sufficient evidence to show that the declarants were still under the stress of excitement at the time they made these statements. Having made the call within minutes of the armed robbery, the declarant was likely still under the stress of excitement caused by the incident. See Jones, 299 F.3d at 112 (noting that "the length of time between the event and the utterance is only one factor to be taken into account in determining whether the declarant was, within the meaning of rule 803(2), 'under the stress of excitement caused by the event or condition.'") The other factors relevant to a finding of excitement also lead to the conclusion that the declarants were still under the stress of excitement at the time. In particular, the chaotic first 20 seconds of the call support the conclusion that the parties were still experiencing the stress of the robbery. It took six "hellos" before Security Guard-2 heard and processed that the operator had picked up the call.

Iii. Excludable Portions of the Call

While the court concludes that most of the call is admissible as either a present sense impression or excited utterance, the Court agrees with defendant that portions of the 911 call are not admissible, or at least have not been shown to be admissible, yet, because they do not reflect the declarant's personal knowledge.

First, I have already outlined the sections of the tape as to which it has not yet been demonstrated to my satisfaction that the statements are based on the personal perception of the speaker. I am not granting the government's motion in limine with respect to those statements, but I am not excluding them either -- if the Government can lay an appropriate foundation at trial, they may become admissible.

Second, and relatedly, Security Guard-2's statements relaying information from other witnesses cannot be admitted as a present sense impression or excited utterance. "'It is a condition precedent to admissibility of a statement under either [the present sense impression or excited utterance exceptions] that the declarant have personally observed the events described.'" Chen Kuo, 2011 WL 145471, at *4 (quoting United States v. Padilla, 1995 WL 261513, at *4 (S.D.N.Y. May 3, 1995)); see also United States v. Graham, 2015 WL 6161292, at *7 (S.D.N.Y. October 20, 2015) ("Excited utterances 'must rest on personal knowledge' to be admissible." (quoting Brown v. Keane, 355 F.3d 82, 90 (2d Cir. 2004))).

As the government appears to concede in their reply brief, the portion of the 911 call between 3:58 and 4:55 is therefore inadmissible because Security Guard-2 appears to be relaying information from other witnesses to the 911 operator. See Reply, at 3 n.1.

Third, Security Guard-2's statement that the armed

robber "didn't pull [the gun] out because my guard didn't pull hers out," 911 Call, at 2:35, is inadmissible for a different, but related reason: It is speculative and not based on Security Guard-2's personal knowledge.

To be very clear, if the statement had been the armed robber didn't pull out the gun after my guard didn't pull hers out, this would be a different conversation. It is the "because" that is the linchpin.

"The present sense impression exception applies only to reports of what the declarant has actually observed through the senses, not to what the declarant merely conjectures." Keane, 355 F.3d at 89. Further, under Rule 602, a witness may only testify if the witness "has personal knowledge of the matter." Federal Rule of Evidence 602; see also Keane, 355 F.3d at 90 ("It is one of the most basic requirements of the law of evidence that a witness's report may be admitted only where grounds exist for 'a finding that the witness has personal knowledge of the matter' to which the statement relates." Id. at 90 (quoting Federal Rule of Evidence 602)). "An assertion of fact based on conjecture and surmise, to which the declarant would not be allowed to testify if called to the witness box, does not become admissible under an exception to the hearsay rule merely because it was uttered out of court in a state of excitement." Id. at 90.

The government has not laid a foundation to support

Security Guard-2's conclusion that he knew why the armed robber did not draw his weapon. Security Guard-2's suggestion that he did not pull the gun because Security Guard-1 did not pull her weapon is merely conjecture. The government may be able to lay additional foundation to support Security Guard-2's inference when he testifies, but the Court cannot admit this statement on the present record.

Security Guard-2's statements about what happened, including that the suspect "didn't pull it all the way out," and that "when one of my other guards reached for hers he reached for his," are admissible. However, his statement suggesting the reason why the armed robber did not pull out his gun is inadmissible. Barring a further showing to the Court, that portion of the 911 call must be redacted.

B. Body camera footage clip 1.1.

Security Guard-1's statements to New York City Police Department ("NYPD") officers outside the SoHo store are admissible as excited utterances. The statements were made at approximately 1:51 p.m. when the NYPD officers arrived at the scene. See Government Exhibit, which I'll describe as video one. According to the government's proffer, the robbery took place at approximately 1:45 p.m. See Government Motion at 1. Therefore, Security-Guard-1's statements were made approximately six minutes after the robbery. Security Guard-1 can be heard saying that, "they had a gun, they had a gun" as

the NYPD officer approaches her. She then said, "they went this way" and points. When asked the color of the gun, Security Guard-1 said "I didn't see it, but a little bit of the handle was brown, a little bit of the handle ... no black. He had it in his pants." The NYPD officer can be heard relaying this information on his radio. Security Guard-1 then says, "when I pulled ... when I went to pull this out, he says, 'Oh you wanna shoot me?' and he pulled his." Security Guard-1, in response to the NYPD's questioning, describes the suspect as a "tall male black, dark skinned black ... " The NYPD asks what he was wearing, and Security Guard-1 says, "he had a mask on his face ..." She is then asked for the "color," and she responds, "green pants, the one with the gun had green sweatpants on." In response to a question about what color top he was wearing, she pauses and says, "what kind of top he had on ..." and then says, "he had a dark jacket on, a black jacket." She then says, "they were all about six feet tall."

The court concludes that Security Guard-1's statements outside the store, captured on the officer's body camera, are admissible as excited utterances. Security Guard-1's statements were made within minutes of the armed robbery. She is describing the incident and, based on her tone and demeanor as depicted on camera, she was still under the stress of the excitement caused by the robbery. Throughout the video she can be seen looking from side to side and her tone is elevated, as

though she is still experiencing, as the government put it, the "adrenaline she felt during the encounter." Motion at 7; see also, Tocco, 135 F.3d at 128 (affirming admission of a statement as an excited utterance after noting that the declarant's demeanor was "all hyped" and "nervous"). Having reviewed the video, I interpret her body language and expressions to show her as being under the stress of the incident.

The statements are also intrinsically reliable because they are captured on video. See Mejia-Valez, 855 F. Supp. at 614. Therefore, the Court finds that Security Guard-1's statements to the NYPD, made outside the Chanel store are admissible as excited utterances.

Defendant argues that "Security Guard-1's statements to police outside the store lack consistency" and are therefore "intrinsically unreliable" and more prejudicial than probative under Federal Rule of Evidence 403. Opposition at 9. This argument lacks merit. The statements are clearly probative -- they are nearly contemporaneous descriptions of the event by an eyewitness. The prejudice that defendant points to is that he believes that the witness's testimony is not credible. That is not the kind of prejudice that supports exclusion in this case. Arguments about asserted inconsistencies in her statements, or between her statements and the statements of other witnesses, are of course fair fodder on cross-examination or closing

argument but are no reason to exclude the evidence in its entirety.

Defendant also argues that admission of these statements would be "impermissible bolstering" of the witness. Opposition at 9. "Absent the introduction of impeaching facts, the witness's proponent ordinarily may not bolster the witness's credibility. The rationale is that we do not want to devote court time to the witness's credibility and run the risk of distracting the jury from the historical merits unless and until the opposing attorney attacks the witness's credibility." 1 McCormick On Evidence Section 47 (8th ed.); see also Federal Rule of Evidence 801 advisory committee's notes to 2014 amendment (referring to "the traditional and well-accepted limits on bringing prior consistent statements before the fact-finder for credibility purposes."); United States v. Arroyo-Angulo, 580 F.2d 1137, 1146 (2d Cir. 1978)(finding that introduction of a cooperation agreement under Rule 801 in anticipation of an attack on that witness's credibility during cross-examination "runs afoul of the well-established rules of evidence that absent an attack on the veracity of a witness, no evidence to bolster his credibility is admissible.")

At the outset, the defense argues that the prior statements are not consistent, but rather, inconsistent with the witnesses' anticipated trial testimony. The defense has asserted that they expect to cross-examine the witnesses

regarding those inconsistencies. To the extent that the statements are inconsistent, they are not consistent statements bolstering the witnesses' testimony. The concern simply does not apply.

Here, moreover, the Government proffers that the evidence of the 911 call and the video are not being introduced to bolster the credibility of the witnesses, but rather to prove a substantive element of the offense, namely whether the victim "'experienced anxiety, concern or worry over expected personal harm' and to determine if 'fear was part of the victim's state of mind.'" Reply, at 9-10. Playing and showing images and recordings of the people in the direct aftermath of the incident are powerful direct evidence of those substantive legal elements of the charge. So I accept the government's proffer that the evidence is provided for more than the mere purpose of bolstering the witnesses' in court testimony.

As the district court held in Steele, "admission of [an out-of-court statement] would not be unduly prejudicial simply because it bolsters the caller's credibility and supports his live testimony". 216 F. Supp. 3d at 323. The testimony is independently admissible for a different purpose. See also United States v. Nieves, 354 F. App'x 547, 551 (2d Cir. 2009)(finding no abuse of discretion where district court admitted taped telephone conversation involving a cooperating witnesses where "the recording was relevant" and

the statements in the recording were not hearsay).

As McCormick noted, the premise behind the anti-bolstering norm is to avoid misuse of the time of the participants in the litigation. Here that concern is very limited for a number of reasons. First, we know that the defense takes the position that the evidence is at least in part inconsistent with the trial testimony of these witnesses. We can anticipate impeachment based on these recordings; excluding it until impeachment is reached will not be an efficient presentation of the evidence to the jury. Moreover: Simply put, the recordings at issue here are very brief. Even expecting the possibility that they will be replayed on cross examination and at closing argument, they will not occupy an undue amount of time. Considered under the framework of Rule 403, the portions of this evidence that I have permitted to be introduced is highly probative. That probative value is not outweighed by a risk of wasting time or confusing the jury. The tapes are short. They are not unduly cumulative. Balancing all of the relevant factors, the probative value of these recordings outweighs their potential prejudice and the other risks described in Rule 403.

Therefore, the court will permit the government to introduce the statements made by Security Guard-1 outside the store.

C. Body Camera Footage 2.1.

The court agrees with defendant that Security Guard-1's statements, captured on the officer's body camera while Security Guard-1 sat in the patrol car, cannot be admitted on the present record because the Court cannot conclude that the declarant was still under the stress of excitement at that time and because of serious concerns under Rule 403. At approximately 1:54 p.m. -- just under ten minutes after the robbery -- Security Guard-1 said, unprompted, that the robbers "were very violent, they were really violent. They weren't amateur-like, they were violent." See Video 2.

First, these statements do not qualify as a present sense impression because Security Guard-1 appears to be reflecting on what happened rather than reciting, contemporaneous with an exciting event, what occurred. The government essentially concedes this when they note that she appeared to be "reliving the events of the robbery while in the squad car." Motion at 7.

Second, the government has not set forth sufficient evidence to permit me to conclude at this time that she was still under the stress of excitement when she made these statements in the car. Almost ten minutes had passed since the robbery. The Court also considers "other relevant factors" including "the characteristics of the event; the subject matter of the statement; whether the statement was made in response to an inquiry; and the declarant's age, motive to lie and physical

and mental condition." Delvi, 275 F. Supp. 2d at 415 (S.D.N.Y. 2003)(internal citation omitted). In particular, the Court considers Security Guard-1's tone and mental condition as reflected in the recording. In comparing her tone and demeanor between the earlier portion of the video and the later portion of the video, the court notes that she appears to have calmed down. Her tone is more relaxed, and her comments reflect that she is in the midst of processing what happened, rather than in the state of experiencing it. This makes sense given the series of events that took place. At the time of the first video, Security Guard-1 had just exited the store where the robbery took place. She was standing on the street where, just a few minutes earlier, an armed robber had fled. At the time of the second video, she was sitting down and inside a police car, accompanied by at least two armed officers. See e.g., United States v. Guevara, 277 F.3d 111, 127 (2d Cir. 2001), amended on rehearing, 298 F.3d 124 (2d Cir. 2002)(affirming exclusion of tape recordings that the district court determined "were conclusions based upon information [the declarant] had processed rather than contemporaneous or spontaneous statements that were inherently trustworthy;" United States v. Cooper, 2019 WL 5394622, at *5 (E.D.N.Y. October 22, 2019)(declining to admit a recorded statement where the declarant "may have been out of breath" but was "not 'all hyped,''nervous,' or conveying a state of 'sheer panic.'" (first quoting Tocco, 135 F.3d at

128, and then quoting Mejia-Valez, 855 F. Supp. at 614)).

Therefore, at this point, the Court cannot conclude that Security Guard-1 was still under a state of excitement while she was sitting in the police car.

Moreover, the court believes that this statement is substantially more prejudicial than it is probative and that it should be excluded on that basis. First, defendant properly argues that her testimony could be considered to be expert testimony for which she has no foundation. The security guard says that the robbers were not "amateur-like." There is not a basis for the Court to be able to conclude that this witness is able to opine regarding what types of crimes are committed by amateurs in what way as opposed to professionals. She cannot testify that she thinks that they were not amateurs lacking such a foundation for her surmise. Moreover, the statement is very prejudicial: by stating that the robbers were not amateurs, the guard is stating that they are professionals -- in other words that she thinks that they have committed this type of crime in the past. Speculation regarding the defendant's prior criminal conduct is very prejudicial and outweighs the probative value of her unfounded opinion that the robbers committed this offense in a way that is not typical of an amateur.

4. Conclusion.

For the reasons described, the 911 call is admitted

with the exceptions noted above. The first video will be admitted in its entirety. The court declines to admit, at this time, the second video.

Thank you for your patience, counsel, as I got through that. This summary is relatively straightforward. I hope that you caught it. I think that that concludes all that I wanted to say about it.

I'll issue a separate order on the docket which will refer to the transcript of today's proceedings to provide the basis for my determination that the motion in limine should be granted in part and denied in part.

Counsel, anything else that we should take up here before we adjourn, first counsel for the United States?

MR. SHAHABIAN: Yes, your Honor, two things.

First, with respect to the court's ruling on the motion in limine and understanding that the court is not prepared at this time to admit the second video as well as the excluded portions of the 911 call, for the truth of the matter asserted, that is as exceptions to the hearsay rule, the government is considering asking that those excluded portions, nevertheless, still be played for the jury because they are circumstantial evidence of those witnesses' fear and state of mind during the robbery. They are highly probative of that fear and state of mind given their contemporaneousness with the events, and the court could, of course, give the jury a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

v. 21 CR 193(GHW)

ERIC SPENCER

Defendants. Trial
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New York, N.Y.
March 22, 2022
9:00 a.m.

Before:

HON. GREGORY H. WOODS,

District Judge

- And A Jury -

APPEARANCES

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LAUREN RIDDELL
SAMUEL J. WEINER

THE COURT: Thank you.

I'm prepared to rule on this application now. There are really two parts of the motion, as I'll lay out now, beginning with:

1. Introduction:

I will now deliver my decision on the government's renewed motion in limine to admit certain out-of-court statements. For the reasons that follow, I will not reconsider my decision to admit, prior to trial, Security Guard 1's statement captured on the officer's body camera. However, the government may lay foundation during the trial to introduce the three statements made by Security Guard 2 during the 911 call.

The parties are familiar with the underlying facts; therefore, I will not recite those in detail. To the extent that any facts in this case are particularly pertinent to my decision, those facts are embedded in my analysis.

I'm also not going to restate the legal standard applicable to this application, which I recited in detail during our prior conference. I've considered the relevant legal standard as I laid it out there.

II. Discussion:

First off, just a couple of brief introductory notes.

I think it would have been helpful if the government had prepared a transcript of these calls for purposes of this motion. I had to listen to the calls in order to resolve this

motion. That is as it is. The lack of a transcript from the parties has also required that I functionally create a working transcript. That's not a burden that I'd expect that the multiple lawyers and paralegal from the government would impose on the Court and its clerk.

Second, I want to provide a brief reprice of what happened at the prior conference because the arguments presented by the government here and their focus on the 3500 materials suggest some disconnect.

The government says in its letter that I determined that "the government had not met the predicate threshold for establishing the admissibility of these statements because they lacked sufficient indicia of reliability." The motion at 2. That's not quite right. What I concluded was that the government had not established by a preponderance of the evidence that the statements that the government sought to introduce were based on the personal observations of the speaker. I do not think that there is a dispute regarding whether or not that is a necessary fact predicate for the introduction of this evidence. The only evidence before me was the tape itself. The defendant pointed to 3500 materials showing that some of the statements that the witness made on the tape were not based on the personal observations of the speaker. In argument, the government did not disagree that some of the statements — in particular, the statement about

whether or not the witness saw the imprint of the gun or saw the gun — were not based on the personal observations of the speaker.

Because I knew that some of the statements were not based on the witness' personal observation, I could not find that they were based on his personal observation, which is a necessary predicate to granting the government's motion in limine.

Therefore, I deny the motion. I was not finding that Security Guard 2 was an unreliable witness or that he had not seen the gun. I was saying that I couldn't find, based on the evidence before me, that the relevant statements on the tape were based on his personal observations. The consequences of that decision were that the government would have to introduce evidence to show the Court that any statements that the government wants to introduce were based on the witness' personal observations.

The government argues in its motion that "based on the evidence available now, all three of these statements are admissible now under Rule 803." Docket No. 74. The government supports its motion with pages of its 3500 materials with respect to the witness. I've reviewed those materials, but I want to highlight that I do not view the 3500 materials as evidence. The government did not even present 3500 materials to the Court under cover of a sworn affidavit. I'm not going

to find what the witness thought, saw, or believed based on unsworn notes made by lawyers. The 3500 materials are not evidence, so the government cannot meet its burden using them alone. I'm going to make a decision about whether or not an adequate foundation has been laid based on the evidence, which, here, I would expect would be the witness' testimony.

I fear that the government misapprehends what happened with the 3500 materials at our prior conference. I did not find, based on the 3500 materials read to me by the defendant's counsel, that the witness did not believe that the robber was armed. As the government observed in its letter, I did not even look at the 3500 materials. Instead, the argument presented by the defendant based on the 3500 materials — and the government's subsequent concession that the witness would say that he had never actually seen the gun or the imprint of the gun despite his statements to that effect in the recording — indicated to me that some of the statements made by the declarant were not based on his personal observations, requiring me to hear evidence to find out which facts were and were not founded on his personal observations.

So just for the sake of clarity, I did not decide that this witness was unreliable or that he did not believe that one of the robbers wearing Mr. Spencer' snazzy track suit was armed based on his observations. Instead, I concluded — again, based in part on the concession by the United States — that I could

not trust that everything that the declarant said on the tape was based on his personal observations. As a result, I denied the government's motion in limine. I did not exclude the evidence. Instead, I denied a motion that asked me to determine that the evidence was admissible prior to trial.

The result was to require that the government lay a proper foundation at trial before I could determine its admissibility.

(a). The 911 Call:

The government is not asking me to revisit most of the decision. They asked that I determine in advance that only three selected statements are admissible. They are detailed in the government's letter.

The first was: "The operator said he heard 'someone in the back saying that they saw a gun," to which Security Guard 2 responds, "Yes, one of the men were armed — or...three males.'" Transcript (3/8/22) at 61:18-21. As to this, I will just say that it's challenging for me to say whether or not this is a statement based on his personal observations. The operator says that he, the operator, heard someone say that someone had a gun. The declarant responded, yes, one of the men were armed. So the declarant may simply have been stating back what he heard the person in the background saying she had seen. The phrasing of the question and answer — someone in the back said X, yes, X — suggests that may be the case. The

government will have the opportunity to show me at trial that the declarant was not merely responding to the operator's question about what someone else had just said she had seen. I highlight again that as phrased, the declarant is responding to a question about whether someone else had said she saw a gun.

The second and third statements at 1:30 to 1:40 and 2:37 to 2:40 do not have the same issue with respect to the structures of the question and answer, but here, too, the government will be charged to show that these statements were based on his personal observations.

I think that the defendant is correct to say that if these statements are not based on the declarant's personal observations, the argument that they can be introduced to show the witness' state of mind is poor. If the statement reflects things that he is reporting on from others, they say little about his personal state of mind at the time of the robbery. If he thought that the robber was armed only based on a conversation that he had with a colleague after the robbery ended, it does not say much about his state of mind at the time of the robbery. So here, too, I'd expect that the foundation that the statements reflect the declarant's personal observations and feelings would be laid.

The government is not asking the Court to reexamine other portions of the call. Therefore, I understand that the government is not planning to attempt to introduce Security

Guard 2's statement that he saw the "imprint" of a gun, which the government conceded was not based on the witness' personal observation or the portion of the call from 3:58 to 4:55.

II. Body Camera Footage 2.1:

The Court will not admit Security Guard 1's statement captured in video 2.

The government is now offering this statement — "They were very violent, they were really violent...they were violent" — not for its truth, but rather as evidence of Security Guard 1's state of mind. See Docket No. 74, at 4. "The Federal Rules of Evidence define hearsay as a declarant's out-of-court statement 'offered in evidence to prove the truth of the matter asserted in the statement.'" *United States v. Dupree*, 706 F.3d 131, 136 (2d Cir. 2013)(quoting Federal Rule of Evidence 801(c)). "Every out-of-court statement is not hearsay" and because the government is not offering this statement to prove the truth asserted in it, i.e., that the robbers were in fact violent, it's not hearsay if offered for that purpose. See *United States v. Cardascia*, 951 F.2d 474, 486 (2d Cir. 1991).

However, as with all other evidence, the Court must evaluate whether this nonhearsay evidence is relevant and, if so, whether it should be precluded under Rule 403.

The Court finds that this statement has minimal probative value. The government argues that the evidence is

relevant because from it, "the jury can infer the witness' state of mind, i.e., [that] the witness was concerned for [her] safety." Docket No. 88, at 2. What is relevant, however, is not her state of mind while she was sitting in the patrol car surrounded by the police officers, but, rather, her state of mind during the robbery. The government's own proposed jury instructions make this clear that what matters is "the victim's state of mind at the time of the defendant's actions." Docket No. 58, at page 15.

Security Guard 1's statement that they were "violent" made approximately ten minutes after the robbery is minimally probative of that issue. As the Court noted in its decision on the government's first motion in limine, by this time, Security Guard 1 appears to have calmed down. Her tone is more relaxed, and her comments reflect that she's in the midst of processing what happened, rather than in the state of experiencing it. Given that she is no longer in the state of experiencing what happened during the robbery, the Court is not clear how her statement to say "were violent" reflects her state of mind at the time of the robbery. In a way, that is distinct from what I expect we will hear from her at trial.

The case the government cites, *Smith v. Duncan*, is inapposite. There, the Second Circuit, in dicta, was considering statements that would have been offered for the nonhearsay purpose of showing the declarant's state of mind at

the time he made the statements. See *Smith v. Duncan*, 411 F.3d 340, 347 n.4 (2d Cir. 2005). Here, the government is offering these statements as evidence of her state of mind ten minutes earlier.

However, assuming that admission of the statement could aid the jury in inferring that she was in fear at the time of the robbery, the Court finds that its probative value is substantially outweighed by a danger of unfair prejudice, confusing the issues, and misleading the jury. See Federal Rule of evidence 403.

The Court is concerned that admitting that statement will confuse the jurors as to the relevant issue, namely, whether the individuals who experienced the robbery were in fear at the time of the robbery, rather than ten minutes later. In addition, the statement is cumulative of other evidence the government intends to offer at trial. Security Guard 1 will be testifying. Her description of the robbery, including how she felt at the time, will be offered live to the jury. To admit her live testimony along with this video is unnecessarily cumulative. It could also, as the defense noted in its original opposition brief, constitute impermissible bolstering. Assuming Security Guard 1 will testify live that she thought the robbers were "violent," admission of the video will serve only one purpose: To bolster that live testimony. Such use is plainly inadmissible.

"Absent the introduction of impeaching facts, the witness' proponent ordinarily may not bolster the witness' credibility. The rationale is that we do not want to devote court time to the witness' credibility and run the risk of distracting the jury from the historical merits unless and until the opposing attorney attacks the witness' credibility." 1 McCormick On Evidence, Section 47 (8th edition).

Romanette iii: Therefore, for the reasons described, the Court denies the government's renewed motion in limine to admit prior to trial three statements from the 911 call identified by the government in their supplemental letter, and the Court excludes Security Guard 1's statement in the back of the patrol car. Note that I am not excluding the evidence with respect to the 911 calls. I'm just telling the government that it has to lay a proper foundation for the introduction of the evidence at trial.

Thank you, counsel, for your patience. I think that concludes my agenda. I'm going to hear, I think, in a moment where our jury is.

Counsel, I understand that the jurors will be ready for us in ten minutes. So what I would propose to do is that we begin to move downstairs so that we can go in there as soon as the jurors are ready for us.

Anything else that any party would like to raise with me before we step downstairs?

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

v. 21 CR 193(GHW)

ERIC SPENCER

Defendants. Trial
----------x

New York, N.Y.
March 23, 2022
9:15 a.m.

Before:

HON. GREGORY H. WOODS,

District Judge

APPEARANCES

DAMIAN WILLIAMS
United States Attorney for the
Southern District of New York
BY: JANE CHONG
MATTHEW RAFFI SHAHABIAN
ABIGAIL S. KURLAND
Assistant United States Attorneys

CAHILL GORDON & REINDEL LLP
Attorneys for Defendant
BY: ANIRUDH BANSAL
LAUREN RIDDELL
SAMUEL J. WEINER

(At the sidebar)

THE COURT: Thank you.

Go ahead, counsel.

MR. SHAHABIAN: Your Honor, at this time, I want to take up what we left off from the in limine briefing, which is the scope of what's playable from Government Exhibit 601, which is the 911 call.

THE COURT: Thank you.

MR. SHAHABIAN: I think at this time, we've laid an adequate foundation to play the portions of the audio where the witness says that a man was armed.

THE COURT: Thank you.

You're referring to the three selections that were identified in the supplemental briefing; is that right?

MR. SHAHABIAN: That is correct, your Honor.

THE COURT: Thank you.

Counsel, any argument?

MR. BANSAL: I disagree, your Honor. I think the record stands exactly where it was during the in limine motion argument, which is that Mr. Washington has testified that he didn't see anything and that he drew an inference from gestures that were made by the defendant. So anything he could say on the 911 call about the robbers having a gun would be based only on other people or speculation.

THE COURT: Thank you.

I believe that there has been an adequate foundation laid. I'm not going to take up the other requirements of the hearsay exceptions at issue here. I spoke about them when I ruled on the motion in limine in the first instance.

The question that remained to be resolved was whether, and to what extent, information shared by the declarant in the recording regarding whether or not the man was armed were based on his personal observations. The witness has testified that he did not see the gun, but, based on the observations of the motions of the person, he was, as he said, 100 percent sure that the man was armed.

So with respect to the three sections of the tape that were at issue in the motion, I believe that an adequate foundation has been laid. The weight accorded to it will now be determined by the jury. Thank you.

(Continued on next page)

22-1464-cr
United States v. Spencer

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

Rulings by summary order do not have precedential effect. Citation to a summary order filed on or after January 1, 2007, is permitted and is governed by Federal Rule of Appellate Procedure 32.1 and this court's Local Rule 32.1.1. When citing a summary order in a document filed with this court, a party must cite either the Federal Appendix or an electronic database (with the notation "summary order"). A party citing a summary order must serve a copy of it on any party not represented by counsel.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 9th day of August, two thousand twenty-three.

PRESENT:

DENNY CHIN,
STEVEN J. MENASHI,
Circuit Judges,
ERIC R. KOMITEE,
*District Judge.**

UNITED STATES OF AMERICA,

Appellee,

v. 22-1464-cr

ERIC SPENCER, AKA Sealed Defendant 1,

Defendant-Appellant.

---

*Judge Eric R. Komitee of the United States District Court for the Eastern District of New York, sitting by designation.

For Appellee: LAUREN RIDDELL (Anirudh Bansal, *on the brief*), Cahill Gordon & Reindel LLP, New York, NY.

For Defendant-Appellant: JANE Y. CHONG, Assistant United States Attorney (Matthew R. Shahabian and Hagan Scotten, Assistant United States Attorneys, *on the brief*), *for* Damian Williams, United States Attorney for the Southern District of New York, New York, NY.

Appeal from a judgment of the United States District Court for the Southern District of New York (Woods, J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

On February 2, 2021, Eric Spencer and his co-conspirators robbed a Chanel store in the SoHo neighborhood of Manhattan, stealing over $200,000 worth of merchandise. On February 20, 2021, Spencer was arrested in Florida and, one month later, was charged in a two-count indictment. Count One charged Spencer with conspiring to commit Hobbs Act robbery in violation of 18 U.S.C § 1951. Count Two charged Spencer with Hobbs Act robbery in violation of 18 U.S.C. §§ 1951 and 1952. The trial lasted from March 22 to 28, 2021, culminating in a conviction on both counts. On June 30, 2022, Spencer was sentenced by the district court to 87 months of imprisonment, followed by three years of supervised release, and restitution in the amount of $204,500. Spencer filed a timely notice of appeal on July 7, 2022, challenging the admission of two pieces of evidence. We assume the parties' familiarity with the underlying facts and procedural history.

Just before 2:00 PM on February 2, 2021, Spencer and his co-conspirators entered Chanel's SoHo location and began grabbing handbags and other merchandise. Four witnesses testified about the robbery: three Chanel security

guards—Vivian Harvey, Denzel Washington, and Suzy Murphy—and one Chanel employee—Julius Laroya. In addition to this testimony—as well as surveillance video, cellphone location analysis, social media activity, and internet search history—two out-of-court recorded statements were also admitted into evidence: (1) portions of video from the body camera of one of the police officers who interviewed Harvey immediately after the robbery and (2) the 911 call in which Washington reported the robbery. These two statements form the basis of Spencer's appeal.

We review the admission of evidence for abuse of discretion. *See United States v. Jones*, 299 F.3d 103, 112 (2d Cir. 2002). "A district court 'abuses' or 'exceeds' the discretion accorded to it when (1) its decision rests on an error of law (such as application of the wrong legal principle) or a clearly erroneous factual finding, or (2) its decision ... cannot be located within the range of permissible decisions." *Zervos v. Verizon New York, Inc.*, 252 F.3d 163, 169 (2d Cir. 2001) (footnote omitted). We conclude that the district court did not abuse its discretion and affirm the judgment.

I

In the body camera footage, Harvey tells the responding officer that when she reached for her weapon, the robber said, "Oh you wanna shoot me?," and then "he pulled his." Gov't Exhibit 117-A. Harvey clarifies to the officer that she never saw the gun, other than a "little bit" of a "brown" or "black" handle in the man's waistband. *Id*. In the video, Harvey can be seen waving her hands, touching her temples, and raising her voice when discussing the robbery. *Id*.

At trial, over a year later, the government played the admitted portion of the video. Harvey testified that she was "not sure" whether she in fact saw a gun handle. J. App'x 127. Harvey also admitted that she reported certain details incorrectly when speaking to the responding officer. For example, she stated that the man in the green sweatpants was wearing a black top instead of a grey top. *Id*. at 127-28. She explained that she was a "little shooken up" when interviewed immediately after the robbery. *Id*. at 128.

In admitting the video, the district court determined that the statements made by Harvey in the body camera footage were admissible as excited utterances. The district court noted that Harvey's statements were made "within minutes of the armed robbery" (six minutes to be exact), Sp. App. 79, and that, based on a review of the footage, the district court "interpret[ed] her body language and expressions to show her being under the stress of the incident," *id*. at 80. The district court concluded that the near-contemporaneous video of Harvey's reaction to the robbery provided "powerful direct evidence of those substantive legal elements of the charge," *id.* at 82, namely whether the defendant intended to put the victims in fear for their personal safety. The district court further determined that Harvey's statements were "intrinsically reliable" by nature of having been captured on video. *Id.* at 80.

Spencer contends on appeal that "the body camera footage permitted the Government to offer evidence that [Spencer] did have a gun, which clearly must have colored the jury's view of the Appellant, and suggested he was dangerous in a way the admissible evidence did not." Appellant's Br. 17. In challenging the admission of the body camera footage, Spencer argues (1) that the footage was insufficiently contemporaneous with the robbery, and (2) that Harvey's statements lacked sufficient reliability. *See id.* at 16. We disagree.

First, we agree with the district court on the issue of contemporaneity. "The rationale [of the excited utterance exception] … is that the excitement of the event limits the declarant's capacity to fabricate a statement and thereby offers some guarantee of its reliability." *United States v. Tocco*, 135 F.3d 116, 127 (2d Cir. 1998). "[W]hile the hearsay exception for present sense impressions focuses on *contemporaneity* as the guarantor of reliability, and requires that the hearsay statement 'describe or explain' the contemporaneous event or condition, the excited utterance exception is based on the *psychological impact* of the event itself, and permits admission of a broader range of hearsay statements—*i.e.* those that 'relate to' the event." *Jones*, 299 F.3d at 112 n.3 (citation omitted). Therefore, unlike a present sense impression, "[a]n excited utterance need not be contemporaneous with the startling event to be admissible under Rule 803(2)." *Tocco*, 135 F.3d at 127

(affirming the admission of an excited utterance that occurred three hours after startling information was shared); *see also United States v. Scarpa*, 913 F.2d 993, 1017 (2d. Cir. 1990) (affirming the admission of an excited utterance that occurred five or six hours after the startling event). We do not believe that the brief six-minute gap between the robbery and the interview prevented Harvey's statements from qualifying as excited utterances. Indeed, Harvey's body language in the video demonstrates that she remained under the stress of the event. *See Tocco*, 135 F.3d at 128 (observing that the declarant's "excitement obviously had not subsided").

Second, we reject the contention that Harvey's confusion over whether Spencer possessed a gun means that she engaged in "unreliable speculation." Appellant's Br. 17. Spencer implies that Harvey lacked sufficient personal knowledge of the circumstances of the robbery. *See* Fed. R. Evid. 602. Yet this is not a case in which the declarant did not witness the event.[1] Here, there is no question that Harvey saw the event because she was present for it, and the government correctly asserts that her inability to discern whether the robber actually had a gun—or was only pretending to have one—does not render her utterances unreliably speculative. Any inconsistencies between Harvey's testimony and her excited utterances in the video were, as the district court stated, "fair fodder on cross examination or closing argument but are no reason to exclude the evidence in its entirety." Sp. App'x 80-81.

II

Next, Spencer argues on appeal that Washington lacked the requisite personal knowledge for his statements from the 911 call to be admitted. According to Spencer, "[t]he 911 call itself and [Washington's] trial testimony make clear that his hearsay statements about the presence of a gun were not based on his own

[1] *See, e.g., United States v. Gonzalez*, 764 F.3d 159, 169 (2d Cir. 2014) (concluding the district court did not abuse its discretion in determining out-of-court statements by a child regarding a shooting to be inadmissible as either present sense impressions or excited utterances because the child was asleep in another room when the shooting occurred); *Browne v. Keane*, 355 F.3d 82, 88-89 (2d Cir. 2004) (concluding that a 911 caller's description of two shooters could not be admitted as a present sense impression because the caller may not have actually seen the shooting).

observations—as is essential for their admission under either exception—but rather on information relayed from others." Appellant's Br. 18.

During the 911 call, a person can be heard in the background saying several times, "he had a gun," J. App'x 124, to which Washington responded, "he had it," *id.* at 49. Once Washington spoke to the operator, the operator stated that he had heard "someone in the back saying that they saw a gun?" Gov. Exhibit 601-R. Washington confirmed that "yes, one of the men were armed … Three males." *Id*. Washington then clarified that "[o]ne male had a gun, but it was four suspects" and "[w]e all just backed up and let them." *Id*.

The district court reserved ruling on the admissibility of the call because it was not clear whether Washington's statements were based on his personal perception or relayed what other witnesses saw. *See* Sp. App'x 71-72. The district court, in rejecting a pretrial motion by the government for reconsideration on this question, reasoned that a foundation for admissibility could not be established until Washington testified.

At trial, Washington testified that he saw Harvey show the robber in green pants her holstered firearm, after which the robber "gestured his hands inside of his waistband and said, what the fuck are you going to do, shoot me?" *Id.* at 171. Washington stated that "once he did that, I was kind of sure he had something and he wasn't afraid to use it." *Id*. at 172. Washington clarified that the "something" was a "weapon." *Id*. He explained that he believed the robber had a weapon "[b]ecause of the gesture that he made, and, in my experience, you don't walk up to someone that has a firearm unless you have something, you know, to defend yourself." *Id*. at 172-73. Washington acknowledged that he did not actually see a gun, though he did see the robber "reach[] inside his waistband and actually tuck[] his hand in." *Id*. at 173. Washington reasoned, "So it's like, okay, he has something, and he will basically probably pull it out and use it." *Id*. Like Harvey, Washington also testified that he misreported a detail on the 911 call, stating that the robber was wearing a green "hoodie" instead of green sweatpants. J. App'x 50-51. Washington explained that he made the error because at the time of the call he

was "still pretty shaken up" and "still pretty distraught, still pretty scared." *Id.* at 50-51.

We agree with the district court's determination that Washington's testimony provided an adequate foundation for admitting the 911 call excerpts as both present sense impressions and excited utterances. As the district court noted, "[t]he witness has testified that he did not see the gun, but, based on the observations of the motions of the person, he was, as he said, 100 percent sure that the man was armed." Sp. App'x 197. In later testimony, after the jury heard the 911 call, Washington testified that he had thought the robber was armed because of Harvey's statements and "[b]ecause of the actions and the body language of the individual." J. App'x 49. Because Washington, like Harvey, reacted to what he witnessed as the robbery unfolded, we cannot conclude that Harvey lacked the requisite personal knowledge.

III

Even if the district court had erroneously admitted these two pieces of evidence, we would still need to "evaluate the erroneous admission of hearsay evidence for harmless error." *United States v. Dukagjini*, 326 F.3d 45, 59-60 (2d Cir. 2003). According to Spencer, the error of admitting both pieces of evidence was not harmless because it "prevented the jury from fairly judging the case based on the admissible evidence," thereby "depriving the Appellant of a fair trial." Appellant's Br. 17. By "suggesting that the Appellant possessed a gun during the offense," this evidence "clearly prejudiced his defense, particularly since the testimony and other admissible trial evidence did nothing to establish that a gun was present during the offense." *Id*. at 19-20. We disagree and conclude that any possible error would be harmless.

"Error is harmless if it is highly probable that it did not contribute to the verdict." *United States v. Gomez*, 617 F.3d 88, 95 (2d Cir. 2010) (quoting *United States v. Kaiser*, 609 F.3d 556, 573 (2d Cir. 2010)). In reviewing for harmless error, we consider "(1) the overall strength of the prosecutor's case; (2) the prosecutor's conduct with respect to the improperly admitted evidence; (3) the importance of

the wrongly admitted testimony; and (4) whether such evidence was cumulative of other properly admitted evidence." *United States v. Kaplan*, 490 F.3d 110, 123 (2d Cir. 2007). This court has "repeatedly held that the strength of the government's case is the most critical factor in assessing whether error was harmless." *United States v. McCallum*, 584 F.3d 471, 478 (2d Cir. 2009).

Here, the government's case against Spencer was strong. Spencer bragged about possessing numerous Chanel bags on his Facebook account, writing "So much double C RN [right now]. I could open a small boutique FRFR [for real, for real]." J. App'x 672. "Double C" is slang for the interlocking C-logo for the brand Chanel. *Id.* at 513. Photos of four of the stolen bags were found on Spencer's phone with metadata indicating that the pictures had been taken either the day of or the day after the robbery. *Id*. at 502-05. Spencer's private Facebook messages show him discussing the sale of the bags. Spencer wrote, for example, "They [$]5,000. I was selling them for [$]2,000," *id*. at 394, and "I had Chanel bags. They all gone thou," *id*. at 393. These messages were also found on Spencer's cellphone. Additionally, video surveillance from an apartment complex in Brooklyn showed Spencer and one of the other robbers shortly before the robbery dressed in the same clothing they wore during the robbery. *Id.* at 353-66. Surveillance footage also shows a black Audi arriving to pick up Spencer and his co-conspirator before the robbery in Brooklyn, *id.* at 367-69, with a similar car appearing in surveillance video from around the Chanel store at the time of the robbery, *id.* at 196-201. Testimony from a cellphone location analyst identified Spencer's phone as being in the vicinity of the Brooklyn apartment complex both before and after the robbery. *Id*. at 272-78.

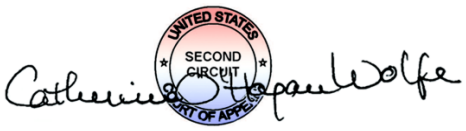
Furthermore, we agree with the government that the recorded statements regarding the presence of a weapon were largely cumulative of testimony provided by three of the four witnesses, who believed that the robber in the green sweatpants was armed. Such testimony makes the additional recorded statements "less likely to have injuriously influenced the jury's verdict." *Wray v. Johnson*, 202 F.3d 515, 526 (2000).

Spencer's conviction on Count Two did not depend on whether he had a gun but on whether he threatened force. *See* 18 U.S.C. § 1951(b)(1). The district court instructed the jury that the government needed to prove only that Spencer "threatened force, violence or fear of injury," that such a threat of force or violence "may be made verbally or by physical gesture," and that fear of injury means that a victim reasonably feared or expected personal harm. J. App'x 825-26. Therefore, the government argued to the jury that Spencer sought to make the victims believe he had a gun, not that he actually had one. *Id.* at 782. The government stated in summation that "it doesn't matter if [Spencer] had a gun …. What matters is, … when he was in the store, he wanted his victims to think he had a gun. What matters is that he wanted to scare them into submission. What matters is that he succeeded into [their] not putting up a fight." *Id.* Accordingly, "the prosecutor's conduct" with respect to the evidence does not suggest prejudice. *Gomez*, 617 F.3d at 95.

* * *

We have considered Spencer's remaining arguments, which we conclude are without merit. We affirm the judgment of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



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Catherine O'Hagan Wolfe, Clerk
United States Court of Appeals, Second Circuit

AO 245B (Rev. 09/19) Judgment in a Criminal Case Sheet 1 (form modified within District on Sept. 30, 2019)

UNITED STATES DISTRICT COURT

Southern District of New York

UNITED STATES OF AMERICA
v.
ERIC SPENCER

JUDGMENT IN A CRIMINAL CASE

Case Number: 1:21-cr-00193-GHW-1

USM Number: 30936-509

Anirudh Bansal
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s)

☐ pleaded nolo contendere to count(s) which was accepted by the court.

☑ was found guilty on counts after a plea of not guilty. 1 and 2 of the Indictment

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 1951	Conspiracy to Commit Hobbs Act Robbery	February 20, 2021	1
18 U.S.C. § 1951	Hobbs Act Robbery	February 20, 2021	2

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☐ Count(s) ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: 7/5/2022

June 30, 2022
Date of Imposition of Judgment

Signature of Judge

Hon. Gregory H. Woods, USDJ
Name and Title of Judge

July 5, 2022
Date

AO 245B (Rev. 09/19) Judgment in Criminal Case
Sheet 2 — Imprisonment

DEFENDANT: ERIC SPENCER
CASE NUMBER: 1:21-cr-00193-GHW-1

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:
87 months with respect to each of Counts 1 and 2, to be served concurrently.

☑ The court makes the following recommendations to the Bureau of Prisons:
The Court recommends that the defendant be placed in a BOP facility as close to New York City as possible, to the extent consistent with his security designation.

☑ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____ .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: ERIC SPENCER
CASE NUMBER: 1:21-cr-00193-GHW-1

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of:

3 years with respect to Counts 1 and 2, to be served concurrently.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☑ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq*.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: ERIC SPENCER
CASE NUMBER: 1:21-cr-00193-GHW-1

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: ERIC SPENCER
CASE NUMBER: 1:21-cr-00193-GHW-1

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall submit his person, and any property, residence, vehicle, papers, computer, other electronic communication, data storage devices, cloud storage or media, and effects to a search by any United States Probation Officer, and if needed, with the assistance of any law enforcement. The search is to be conducted when there is reasonable suspicion concerning violation of a condition of supervision or unlawful conduct by the person being supervised. Failure to submit to a search may be grounds for revocation of release. The defendant shall warn any other occupants that the premises may be subject to searches pursuant to this condition. Any search shall be conducted at a reasonable time and in a reasonable manner.

2. The defendant shall participate in an outpatient mental health treatment program approved by the United States Probation Office. The defendant shall continue to take any prescribed medications unless otherwise instructed by the health care provider. The defendant shall contribute to the cost of services rendered based on his ability to pay and the availability of third-party payments. The Court authorizes the release of available psychological and psychiatric evaluations and reports, including the presentence investigation report, to the health care provider

3. The defendant shall not incur new credit charges or open additional lines of credit without the approval of the probation officer unless he is in compliance with the installment payment schedule.

4. The defendant shall provide the probation officer with access to any requested financial information.

5. The defendant participate in a cognitive behavioral treatment program under the guidance and supervision of the probation officer, until such time as he is released from the program by the
probation officer.

6. The defendant shall be supervised in his district of residence.

DEFENDANT: ERIC SPENCER
CASE NUMBER: 1:21-cr-00193-GHW-1

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
TOTALS	$ 200.00	$ 204,500	$ 0.00	$	$

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☑ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss***	Restitution Ordered	Priority or Percentage
Payable To: Clerk of Court United States District Court Southern District of New York 500 Pearl Street, New York, NY 10007		$204,500.00	

TOTALS	$ 0.00	$ 204,500.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☑ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☑ the interest requirement is waived for the ☐ fine ☑ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.
** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: ERIC SPENCER
CASE NUMBER: 1:21-cr-00193-GHW-1

ADDITIONAL TERMS FOR CRIMINAL MONETARY PENALTIES

1. The defendant shall make installment payments toward his restitution obligation and may do so through the Bureau of Prisons' (BOP) Inmate Financial Responsibility Plan (IFRP). Pursuant to BOP policy, the BOP may establish a payment plan by evaluating his six-month deposit history and subtracting an amount determined by the BOP to be used to maintain contact with family and friends.

2. The defendant shall commence monthly installment payments of an amount equal to 10 percent of his gross income, payable on the first of each month, beginning 30 days after commencement of supervised release.

DEFENDANT: ERIC SPENCER
CASE NUMBER: 1:21-cr-00193-GHW-1

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☑ Lump sum payment of $ 200.00 due immediately, balance due

☐ not later than _____ , or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☑ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☑ Special instructions regarding the payment of criminal monetary penalties:
See Page 7.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Case Number Defendant and Co-Defendant Names *(including defendant number)*	Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.