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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Hampton County

Honorable Robert J. Bonds, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

WILLISTON L. OWENS,

APPELLANT

APPELLATE CASE NO. 2023-000593

INITIAL BRIEF OF APPELLANT

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II.

Whether the trial court erred by admitting two recordings of Appellant's calls from jail where Appellant was merely in pretrial detention and had a right to privacy pursuant to Article I section 10 of the South Carolina Constitution as well as the Fourth Amendment of the United States Constitution?

STATEMENT OF THE CASE

Appellant Williston L. Owens was indicted on October 22, 2021, by the Hampton County grand jury for murder, attempted murder, possession of a weapon during the commission of a violent offense, and two counts of discharging a firearm into an occupied dwelling. The charges stemmed from Appellant's alleged involvement in a shooting on the night of January 8, 2019, on Lightsey Street in Hampton, South Carolina. Tr. 6, ln. 3—Tr. 7, ln. 19; Tr.* (Indictments).

His case initially proceeded to trial in August 2022, but resulted in mistrial. Tr. 28, ln. 17; Tr. 35, ll. 6-10; Tr. 478, ln. 9; Tr. 480, ln. 9. His case again went to trial from April 3rd through 5th, 2023, before the Honorable Robert Bonds and a jury. Appellant was represented by Courtney Gibbes (Counsel), while the State was represented by Reed Evans. Tr. 1-2. The jury found Appellant guilty on all charges, and the trial court imposed the following sentences to be served concurrently: fifty-two (52) years for murder; thirty (30) years for attempted murder; 10 years for each of the two counts of discharging a firearm into an occupied dwelling; and five (5) years for possession of a weapon during the commission of a violent offense. Tr. 571, ll. 8-21; Tr. 579, ln. 16—Tr. 580, ln. 24; Tr.* (Verdict form); Tr.* (Sentence sheets).

STATEMENT OF THE FACTS

Appellant Williston Owens was with Treyvon Williams (Williams), Jeantaviene "Chabbi" Dobson (Chabbi), and Reivyn Ntori Delesine (Tori), on the night of January 8, 2019. The plan for the night was allegedly to hang out, smoke, and drink. The four left together from the home where Chabbi and Treyvon lived in Hampton, South Carolina, and rode in Treyvon's black Jeep to the Shell gas station. Tr. 286, ln. 2—Tr. 293, ln. 13; Tr. 306, ln. 16–Tr. 309, ln. 9; Tr. 316, ll. 7-9; Tr. 392, ln. 5—Tr. 393, ln. 20; Tr. 398, ll. 12-18; Tr. 415, ll. 11-16. After briefly shopping for snacks, they left Shell and took a different route back toward their house. On the way, they passed the trailer park down Lightsey Street where Mack Green (Green) lived. During the ride, Appellant apparently became agitated with Chabbi and Treyvon over conversation with them in the Jeep. He exited the back seat of the vehicle when it stopped at a stop sign near the trailer park, and began walking back towards his home by Hardee's instead. Tori got out as well and followed behind, and the Jeep drove off. Tr. 294, ln. 1—Tr. 296, ln. 23; Tr. 300, ln. 4—Tr. 301, ln. 3; Tr. 312, ln. 1–Tr. 315, ln. 4; Tr. 390, ll. 12-13; Tr. 394, ln. 16—Tr. 399, ln. 399, ln. 24.

As Appellant and Tori came upon the trailer park, Appellant purportedly crouched, stopped, and then continued walking again saying, "them boys." Tori testified that he took this to mean Donovan Riley (Riley) and thought it would not be a good situation due to a prior shooting incident.[1] Tori purportedly saw Appellant reach for his gun and shoot it for what he

[1] On the night of January 6, 2019, Appellant and his friend Ricky Fisk (Fisk) were outside the home of Appellant's mother in Hampton, South Carolina, when a person wearing all black was dropped off from a car and shot at them. Appellant and Fisk both returned fire in self-defense. Police responded to that incident, and collected fired shell casings from Appellant's gun, as well as several projectiles fired at the location. The assailant ran away but was believed to have been Blake Stokes (Stokes), the brother of Riley. Tr. 183, ln. 10—Tr. 184, ln. 9; Tr. 187, ll. 3-14; Tr.

thought was approximately five or six times. He further indicated Appellant said Riley was there. The two ran from the trailer park and went separate ways. Tr. 399, ln. 25—Tr. 408, ln. 17.

Green was outside of his trailer at 115 Lightsey Street with Riley. He was struck once in the back and ran into his trailer where he collapsed to the floor before his teenage son (Minor 1). Riley allegedly ran inside behind Green as well. Minor 1 called 911, and authorities arrived thereafter. Tr. 177, ll. 8-23; Tr. 221, ll. 8-25; Tr. 490, ln. 16—Tr. 497, ln. 11.

When processing the scene, Green was found deceased[2] inside his trailer. Further, at least two trailers were struck with bullets at some point:[3] 115 Lightsey Street; 117 Lightsey Street. Tr. 239, ln. 12—Tr. 241, ln. 20; Tr. 246, ln. 19—Tr. 250, ln. 24; Tr. 280, ln. 13—Tr. 281, ln. 25. Finally, multiple fired shell casings were located and collected from the roadway of Lightsey Street. Tr. 242, ln. 2—Tr. 245, ln. 25; Tr.* (State's Ex.# 47, sketch). No weapons were collected in the case. Tr. 266, ll. 13-15; Tr. 362, ll. 6-8.

Appellant provided video recorded statements to the Hampton Police Department, including one on January 9, 2010, to Detective Qutique Manor (Det. Manor). Tr. 347, ln. 5—Tr. 348, ln. 13; Tr.* (State's exhibit #49, interview). During the interview, Det. Manor stated, *inter alia*, as a matter of fact to Appellant that "the .40 caliber bullet that you returned fire at your house is the same .40 caliber bullets out there." Tr.* (State's exhibit #49 @ 16:58 to 17:09).[4]

196, ln. 17—Tr. 198, ln. 19; Tr. 209, ln. 12—Tr. 213, ln. 12; Tr. 390, ll. 6-13. No suspects were interviewed, or arrests made in that case. Tr. 205, ll. 4-7; Tr. 217, ll. 22-24.

2 Cause of death was a gunshot wound to the back, causing damage to internal organs and internal bleeding. Tr. 437, ll. 20-23.

3 Minor 1 indicated it was not unusual to hear gunshots, and that they hear them all the time. Tr. 496, ll. 9-16.

4 No transcript was made of the interview. As such, the statements quoted are based upon Appellate Counsel's best efforts to relay what was said on the video. If there is any discrepancy,

Appellant did not admit to being involved in the incident. Tr. 356, ll. 2-9. Det. Manor again asserted the same near the end of the interview as well, saying, "So, only thing you know is you and your girlfriend Trinity rode by the house after [], before the shooting happened. That's it. You ain't got nothing else to do with nothing. And the .40 caliber that match yours, just so happens. . . . Just so happens to match your gun. Yes. . . . How is that possible, tell me about that. You have a shooting at your house and somebody is shooting at you, you return fire with a .40 caliber gun, you and your friend, a 9 millimeter and a .40, correct? . . . The same shell cases we recovered is on the scene of the murder. How is that possible? . . . Tell me, how is that possible?" Tr.* (State's exhibit #49 @ 25:09 to 25:58). Det. Manor then went on to discuss serrations, barrels, bullets, and the notion of fingerprints of a gun with Appellant. Tr.* (State's exhibit #49 @ 26:01 to 27:00). He then reminded Appellant he was free to go and that he would see him soon, and Appellant went to leave the interrogation room. Tr.* (State's exhibit #49 @ 27:08 to 27:24). Appellant was arrested the following day, as was Tori. Tr. 92, ll. 22-25, Tr. 352, ll. 8-10.

Appellant's case first proceeded to trial in August of 2022, but ended in mistrial. Tr. 28, ln. 17; Tr. 35, ll. 6-10; Tr. 478, ln. 9; Tr. 480, ln. 9. His case again proceeded to a jury trial on April 3, 2023. Tr. 1. During pretrial motions, Appellant moved to suppress two jail calls made to his mother, the first made on January 14th, and the second on January 19th. Tr. 60, ln. 23—Tr. 63, ln. 16. The State called Corporal Jeffery Maxwell (Cpl. Maxwell) from the Beaufort County Detention Center to testify. Cpl. Maxwell confirmed he listened-in "on certain phone calls that are being made by inmates at the Detention Center," including the two at issue in Appellant's case, ostensibly for the "safety and security of the inmates, staff and the public." Tr. 62, ln. 14—

Appellate Counsel respectfully defers to the video itself. Further, the times cited refer to the counter on the media player rather than the video's internal time-stamp.

Tr. 63, ln. 25. After listening to the Appellant's calls, he "noted that half the County investigators had no access, and there was some safety concerns." As a result, of "listening to the calls and hear[ing] some other stuff that were possible security issues," he contacted Det. Manor, who in turn subpoenaed the calls upon Cpl. Maxwell's instruction. Tr. 63, ll. 1-25; Tr. 64, ll. 6-8.

Counsel moved to suppress both jail tapes pursuant to Article 1, section 10 of the South Carolina Constitution, as well as the Fourth Amendment of the federal constitution. Specifically, Counsel argued that Appellant's status as a detainee did not completely disrobe him of his constitutional rights, including his right to privacy in his phone calls. Tr. 73, ll. 1-23. The State argued that Appellant had "much less of a reasonable expectation of privacy in jail than out of jail," and that Appellant "consented every time he put that PIN in [to make a call]." Tr. 75, ll. 5-17. The trial court held that the jail calls were admissible, and "did[] [not] know that they violate [Appellant's] constitutional rights under the United States Constitution, or the State Constitution." Tr. 75, ll. 22-25. The court further held as follows:

> As indicated, this was—these were statements that were obtained or reviewed initially by a law enforcement officer, detention officer, law enforcement officer, not a Solicitor or prosecutor, number one. Number two, I believe that the officer indicated that there was a verbal instruction.
>
> I thought he said it was contained in the handbook that was given at one point to every inmate, but then it seemed maybe he backed off of that, and he indicated that they were told orally; but, of course, also I think your client certainly had the ability to listen to each call, and each call indicated clearly that it would be monitored and subject to be recorded, and being monitored.
>
> So I just don't think that his constitutional rights have been violated, and I note your argument for the record. Now, I do have a lot of concern about the contents, because I just started making notes, and I ran out. There's just lots of hearsay, getting into what a lawyer was going to charge. I don't even think that's relevant.

Tr. 76, ll. 1-22. After redactions were made, the jail tapes were admitted and published to the jury over Counsel's contemporaneous objection. Tr. 505, ln. 11—Tr. 506, ln. 22; Tr.* (State's exhibit #52, containing both jail tapes).

Counsel also objected to portions of the January 9th video interview of Appellant with Det. Manor. Specifically, she argued *inter alia* that Det. Manor's statements during the interview were "becoming a commentary" where "he almost sounded like a gun expert." Tr. 329, ll. 20-25. While acknowledging a firearms expert was going to testify in the case as well, Det. Manor's comments to the same in the video also amount to bolstering of the expert. Tr. 331, ll. 4-6; Tr. 334, ll. 3-5; Tr. 335, ll. 2-5. The State acknowledged Counsel's concern that Det. Manor was not an expert in firearms analysis, and that Det. Manor did not know whether the casings matched at the time he asserted they did in Appellant's interview on January 9th, but nonetheless sought admission of the comments on the basis that it was an investigative technique to "bluff" or fib. Tr. 325, ln. 9—Tr. 326, ln. 20. The trial court ruled as follows:

> What I'm gonna do is, I'm going to allow the investigative technique, as it relates to saying that the shell casings match, or whatever he was saying, as it relates to that. When he gets into start talking about striations, when he says striations, I think that should be excluded.
>
> . . . . .
>
> I think the striations, and because I think that does get into bolstering. I think that could confuse the jury. It gets into some areas of expertise, again, so I think that's not appropriate, and—
>
> . . . . .
>
> I'm not saying that the entire rest of it needs to be out, but I also don't think it's appropriate to show him terminating the interview. If she doesn't want that, I agree.

Tr. 336, ln. 18—Tr. 337, ln. 13. Over Counsel's contemporaneous objection, the video was admitted and published to the jury. Tr. 347, ln. 16—Tr. 348, ln. 9; Tr.* (State's #49, DVD of interview).

The jury found Appellant guilty as charged on all counts. The trial court imposed concurrent sentences as follows: fifty-two (52) years for murder; thirty (30) years for attempted murder; 10 years for each of the two counts of discharging a firearm into an occupied dwelling; and five (5) years for possession of a weapon during the commission of a violent offense. Tr. 571, ll. 8-21; Tr. 579, ln. 16—Tr. 580, ln. 24; Tr.* (Verdict form); Tr.* (Sentence sheets).

This appeal follows.

ARGUMENT

I. The trial court erred by admitting the video recording of Appellant's interrogation without requiring the State to redact commentary and accusations by the interrogating detective where they were burden shifting and tantamount to expert opinion statements that the fired shell casings from Appellant's gun in an incident two days prior matched those found at the scene in the present shooting incident.

The trial court erred by admitting the video of Appellant's interview on January 9, 2019, with Det. Manor where Det. Manor gave commentary and statements of opinion without being qualified as an expert. While video statements of defendants may be admissible at trial, statements of officers during interrogation that are inadmissible under the rules of evidence must be redacted. Unqualified expert opinion testimony from a lay witness is forbidden, regardless of whether it was a "technique" used by police in interrogations. See Rule 701, SCRE; State v. Ellis, 345 S.C. 175, 178, 547 S.E.2d 490, 491 (2001). Further, Appellant was prejudiced because Det. Manor's accusations served to bolster other testimony at trial, and his insistence that Appellant explain "how is that possible" amounted to burden shifting. Accordingly, the trial court erred by admitting the video without requiring the State to first redact the inadmissible portions.

The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Hatcher, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) (quoting State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id.; see also State v. Brockmeyer, 406 S.C. 324, 340, 751 S.E.2d 645, 653 (2013).

In State v. Brewer, 411 S.C. 401, 768 S.E.2d 656 (2015), the South Carolina Supreme Court addressed the admissibility of a audiotaped interrogation wherein police utilized various tactics, including "hearsay-laden questions and comments." They also repeatedly indicated the

defendant should prove himself innocent. Id. 411 S.C. at 405, 768 S.E.2d at 658. While acknowledging "the propriety of law enforcement interrogation techniques, including misrepresenting the existence and strength of the evidence against an accused, as well as asking the accused to produce evidence voluntarily" during interrogations, the Court went on to explain that "[s]uch matters are typically examined *in camera* when the trial court is making a preliminary determination as to the admission of a confession." Id. 411 S.C. at 406, 768 S.E.2d at 658. However, the Court then cautioned that "such evidence will rarely be proper for a jury's consideration." Id. 411 S.C. at 406, 768 S.E.2d at 659.

Furthermore, the Brewer Court rebuked the State's argument that statements by the interrogators "were admissible for purposes of context or for the effect the statements had on" the defendant. Id. 411 S.C. at 407, 768 S.E.2d at 659 (citing United States v. Silva, 380 F.3d 1018, 1020 (7th Cir.2004) ("So to what issue other than truth might the testimony have been relevant? ... Allowing agents to narrate the course of their investigations, and thus spread before juries damning information that is not subject to cross-examination, would go far toward abrogating the defendant's rights under the [S]ixth [A]mendment and the hearsay rule."). Rather, the Court determined that "[t]he only effect these statements had on Brewer was to make him repeatedly deny shooting anyone. The meaning of these repeated denials is obvious and requires no explanatory context." Id. While acknowledging it was not creating a categorical rule barring all statements made by police during interrogation, the Brewer Court issued the following admonition:

> To that end, "we would like to remind trial courts that the questions police pose during suspect interviews may contain false accusations, inherently unreliable, unconfirmed or false statements, and inflammatory remarks that constitute legitimate points of inquiry during a police investigation, *but that would otherwise be inadmissible in open court.*"

Id. 411 S.C. at 408, 768 S.E.2d at 659 (emphasis added) (quoting State v. Miller, 197 N.C.App. 78, 676 S.E.2d 546, 556 (2009). Along with that, the Court likewise cautioned about "the grave constitutional error in the admission of the challenged evidence in this case. Law enforcement's ad nauseam insistence that Brewer prove his innocence has no place before the jury. It is chilling that we have to remind the State that an accused is presumed innocent and that the State has the burden to prove guilt beyond a reasonable doubt." Id. 411 S.C. at 408, 768 S.E.2d at 659-60 (citing U.S. Const. amend. V ("No person ... shall be compelled in any criminal case to be a witness against himself...."); and Sandstrom v. Montana, 442 U.S. 510, 512, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979) (noting that the Fourteenth Amendment requires that "the State prove every element of a criminal offense beyond a reasonable doubt")). In other words, while techniques of accusations and admonitions by investigators are permissible during interrogation, they amount to burden shifting if placed before the jury.

The South Carolina Court of Appeals dealt with the issue of an audiotaped interrogation that likewise included the detective's use of hearsay statements and repeated requests that the defendant explain why he was not guilty. State v. Washington, 431 S.C. 619, 621-23, 848 S.E.2d 794, 795-96 (Ct. App. 2020). Relying upon Brewer, the Washington Court confirmed that, while the detective's interrogation methods may have been "proper investigative technique," "every word he uttered during the out of court interview" was inadmissible. Id. 431 S.C. 622-23, 848 S.E.2d 796. The Court further found, as in Brewer, that the detective's "repeated requests that [the defendant] explain why he was not guilty amounted to a grave constitutional error." Id. (internal quotations omitted).

Like hearsay statements, the admissibility of opinion statements before a jury is also strictly governed by rules of evidence. Rule 701 of the South Carolina Rules of Evidence governs opinion testimony by lay witnesses, and provides as follows:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, *and* (c) *do not require special knowledge, skill, experience or training.*

Rule 701, SCRE (emphasis added). Therefore, if a person is not qualified as an expert witness, his testimony regarding opinions or inferences is sharply limited: such lay witness testimony must meet the three conjunctive requirements established by the Rule, or it is beyond the scope of lay witness testimony.

Generally speaking, if the State desires to enter opinion evidence based on the specialized knowledge of witnesses, then it is required to qualify them as expert witnesses. See Rule 702, SCRE ("If scientific, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, *a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.*") (emphasis added). Additionally, expert testimony specifically "receives additional scrutiny relative to other evidentiary decisions." As such, the trial court, in its role as gatekeeper, "must make three key preliminary findings which are fundamental to Rule 702 before the jury may consider expert testimony." Watson v. Ford, 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010) (listing the three mandatory preliminary findings a court must make prior to permitting expert opinion testimony). This is critical, as "[a]n officer's improper opinion testimony which goes to the heart of the case is not harmless." Ellis, 345 S.C. at 178, 547 S.E.2d 491.

In the case at bar, Det. Manor's statements on the video of Appellant's interview amounted to inadmissible opinion testimony. First, Det. Manor insisted to Appellant that "the .40 caliber bullet that you returned fire at your house is the same .40 caliber bullets out there." Tr.* (State's exhibit #49 @ 16:58 to 17:09). Despite Appellant's refusal to admit involvement in the incident, Det. Manor again asserted the same, saying, "So, only thing you know is you and your girlfriend Trinity rode by the house after[], before the shooting happened. That's it. You ain't got nothing else to do with nothing. And the .40 caliber that match yours, just so happens. . . . Just so happens to match your gun. Yes. . . . How is that possible, tell me about that. You have a shooting at your house and somebody is shooting at you, you return fire with a .40 caliber gun, you and your friend, a 9 millimeter and a .40, correct? . . . The same shell cases we recovered is on the scene of the murder. How is that possible? . . . Tell me, how is that possible?" Tr. 356, ll. 2-9; Tr.* (State's exhibit #49 @ 25:09 to 25:58). Such accusations amount to statements of opinion permissible as evidence before a jury only through witnesses qualified as an expert in the given field by the court. See Rules 701 & 702, SCRE.

It is undisputed that Det. Manor was never qualified as an expert in the field of firearms identification, tool marks, or any other pertinent field required to render an opinion as to whether shell casings or bullets match. In fact, the fired shell casings had not even been tested by an actual expert at that point in time. The State admitted as much when it acknowledged Det. Manor was "bluffing" or "fibbing" about the shell cases matching, and tried to justify the inclusion of his accusations on the video before the jury as an allowable interrogation "technique." The trial court allowed the statements and commentary as "investigative technique." Tr. 336, ln. 18—Tr. 337, ln. 13. However, there is no interrogation technique exception to the rules of evidence allowing such plainly inadmissible statements in court simply

because it was from the video of an interrogation. Indeed, the Brewer Court cautioned against as much. Id. 411 S.C. at 408, 768 S.E.2d at 659. This was error.

Additionally, Det. Manor's commentary and insistence that Appellant explain to him *how it is possible* that fired shell casings from Appellant's gun at the January 6th incident matched those found at the murder crime scene on January 8th was likewise inadmissible. This was inherently part and parcel of the comments complained of by Counsel as it was inseparable from Det. Manor's insistence that the fired shell casings matched from both incidents, and it was inadmissible as a burden shift. See, e.g., Brewer, 411 S.C. at 408, 768 S.E.2d at 659-60; See also, Washington, 431 S.C. 622-23, 848 S.E.2d 796. Yet the trial court nonetheless permitted the State to admit the video without redacting Det. Manor's statements and commentary as part of the "investigative technique." Tr. 336, ln. 18—Tr. 337, ln. 13. As such, the trial court erred.

Appellant was also prejudiced by the trial court's erroneous admission of the video. First, as asserted by Counsel, although the shell casings eventually were tested by an expert who found they matched and testified to the same, Det. Manor's own out-of-court "expert" opinion assertions played to the jury on video served to impermissibly bolster credibility of the real expert's testimony. Second, as indicated above, Det. Manor's commentary insisted that Appellant explain to him how it is possible that fired shell casings from Appellant's gun at the January 6th incident matched those found at the murder crime scene on January 8th. This too was an inadmissible burden shift. See, e.g., Brewer, 411 S.C. at 408, 768 S.E.2d at 659-60; See also, Washington, 431 S.C. 622-23, 848 S.E.2d 796. Accordingly, Appellant was prejudiced.

II. The trial court erred by admitting two recordings of Appellant's calls from jail where Appellant was merely in pretrial detention and had a right to privacy pursuant to Article I section 10 of the South Carolina Constitution as well as the Fourth Amendment of the United States Constitution.

The trial court reversibly erred by admitting two jail calls into evidence in violation of Appellant's federal and state constitutional rights. Appellant was merely a pretrial detainee, and not a convicted prisoner. As such, Appellant maintained a degree of his constitutional rights, including the right to a reasonable expectation of privacy in his phone calls. Although the State has an interest in maintaining safety of its local jails, the content of Appellant's calls to his mother in no way jeopardized the safety and security of the facility; rather, Cpl. Maxwell acted as an agent of the State using his position to assist in the investigation of Appellant's case. Further, Appellant did not personally consent to recording of his telephone conversations by entering a PIN or hearing a recording on his calls that they were recorded, as the State failed to provide a copy of Appellant's knowing, willful, and voluntary waiver of his rights. Accordingly, the jail tapes should have been suppressed as being obtained in violation of Appellant's state and federal constitutional rights.

In criminal cases, an appellate court sits to review errors of law only. Therefore, an appellate court is bound by the trial court's factual findings unless they are clearly erroneous. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). The same standard of review applies to preliminary factual findings in determining the admissibility of certain evidence in criminal cases. State v. Wilson, 345 S.C. 1, 5–6, 545 S.E.2d 827, 829 (2001). Appellate review in Fourth Amendment search and seizure cases is limited to determining whether any evidence supports the trial court's finding. State v. Butler, 353 S.C. 383, 388, 577 S.E.2d 498, 500–01 (Ct.App.2003).

"The Fourth Amendment to the Constitution of the United States grants citizens the right to be secure against unreasonable search and seizure." State v. Tindall, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010); see U.S. Const. amend. IV. The Fourth Amendment is applicable to the States through the Due Process Clause of the Fourteenth Amendment. Mapp v. Ohio, 367 U.S. 643, 655, 81 S.Ct. 1684, 1691 (1961). It is important to note that it is not the place that is constitutionally protected by the Fourth Amendment. As succinctly explained by the United States Supreme Court, "this effort to decide whether or not a given 'area,' viewed in the abstract, is 'constitutionally protected' deflects attention from the problem presented by this case. For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." Katz v. United States, 389 U.S. 347, 351, 88 S.Ct. 507, 511, 19 L.Ed.2d 576 (1967). "'Generally, the Fourth Amendment requires the police to have a warrant in order to conduct a search.'" State v. Counts, 413 S.C. 153, 163, 776 S.E.2d 59, 65 (2015) (quoting Robinson v. State, 407 S.C. 169, 185, 754 S.E.2d 862, 870 (2014)). "Evidence seized in violation of the warrant requirement must be excluded from trial." Id.

Further, Article I, section 10 of the South Carolina Constitution likewise protects citizens against unreasonable searches and seizures, and more: it also protects against unreasonable invasions of privacy:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, the person or thing to be seized, and the information to be obtained.

S.C. Const. art. I, § 10. "The relationship between the two constitutions is significant because '[s]tate courts may afford more expansive rights under state constitutional provisions than the rights which are conferred by the Federal Constitution.'" State v. Forrester, 343 S.C. 637, 643, 541 S.E.2d 837, 840 (2001) (quoting State v. Easler, 327 S.C. 121, 131 n. 13, 489 S.E.2d 617, 625 n. 13 (1997)). Thus, "the South Carolina Constitution, with an express right to privacy provision included in the article prohibiting unreasonable searches and seizures, favors an interpretation offering a higher level of privacy protection than the Fourth Amendment." Id. 343 S.C. at 645, 541 S.E.2d at 841.

In the present case, Petitioner "was merely in pretrial confinement. The only legitimate purpose for confining him was to insure his presence at trial." State v. Ellefson, 266 S.C. 494, 500, 224 S.E.2d 666, 669 (1976). As such, he is not stripped of all his rights. As our Supreme Court explained in Ellefson:

> When a pretrial detainee remains in custody, *he is not disrobed of his constitutional rights and laid bare for the zealous investigation of his case. He is cloaked with the presumption of innocence. His rights are curtailed only to the extent justified by the considerations underlying our penal system.* Even a convicted prisoner does not shed basic constitutional rights at the prison gate. Rather, he retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law.

Id. (emphasis added) (internal quotations and citations omitted); see also State v. Gaskins, 284 S.C. 105, 116, 326 S.E.2d 132, 139 (1985).

In Ellefson, the defendant was held in pretrial incarceration awaiting trial for breach of trust. Id. 266 S.C. at 496-98, 500, 224 S.E.2d at 667-68. While in the Greenville County Jail, he sent three letters, which were obtained by a detective investigating the case and not affiliated with the jail. Id. 266 S.C. at 498, 500, 224 S.E.2d at 668. The letters were then used against the defendant at trial. The Supreme Court reversed, citing Procunier v. Martinez, 416 U.S. 396, 94

S.Ct. 1800, 40 L.Ed.2d 224 (1974) to cast "grave doubt upon the continued vitality" of prior state case law allowing "indiscriminate censorship of prison mail." Id. 266 S.C. at 499, 500, 224 S.E.2d at 669. Rather, the Court looked to two prongs to determine whether it was justified: (1) "the regulation or practice in question must further an important or substantial governmental interest unrelated to the suppression of expression;" and (2) "the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved." Id. 266 S.C. at 499-500, 500, 224 S.E.2d at 669.

There, the Court determined no effort was made to show probable cause existed, no exigent circumstances were present, and the detective had no legitimate purpose to search the defendant's mail. The Ellefson Court continued to warn that the disturbing aspect of the search was the context in which it occurred:

> What is particularly disturbing here is the context in which this search took place. When an accused is not bailable, he is somewhat disadvantaged in preparing for trial. If he is to marshall facts in support of his defense, he necessarily must rely on persons outside the jail. Perhaps an accused may have to run the risk of exposing his communications to a jailor, if jail security justifies opening and reading all incoming and outgoing mail. But see Mr. Justice Marshall's concurring opinion in Procunier v. Martinez, supra. Nonetheless, to allow an independent prosecution team the right to indiscriminately inspect letters written by the accused is to hack at the roots of any defense.
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> To paraphrase Justice Black, freedom to communicate privately with associates to develop a possible defense is as important to a fair trial as is the heart to the human body. In fact, this right is the heart of any defense. If that heart be weakened, the result is debilitation; if it be stilled, the result is death.

Id. 266 S.C. at 501–02, 224 S.E.2d at 670 (citing Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc., 312 U.S. 287, 61 S.Ct. 552, 85 L.Ed. 836 (1941)).

Another South Carolina case touching upon the privacy rights of incarcerated citizens is State v. Gaskins, 284 S.C. 105, 326 S.E.2d 132 (1985). There, Donald "Pee Wee" Gaskins was already a convicted prisoner in the department of correction serving life sentences for committing eight murders. Id. 284 S.C. at 110, 326 S.E.2d at 136. He used his position as a maintenance man at the prison to disguise explosives in the form of a makeshift radio, arranged for the device to be smuggled into a death row inmate's cell, and killed him. Id. 284 S.C. at 110-11, 326 S.E.2d at 136. Now a suspect, Gaskins' belongings were taken to the contraband office and inventoried, whereupon incriminating evidence was discovered.

The Gaskins Court acknowledged "that a *prisoner* does not lose all of his constitutional rights by reason of being incarcerated, at the same time a *prisoner* by reason of his very status does not retain all of the rights available to free persons in our society." Id. 284 S.C. at 116, 326 S.E.2d at 139. The Court further explained the requirement to balance in each case "the need of the particular search against the invasion of personal rights. The courts must consider the scope of the particular intrusion and the manner in which it is conducted as well as the justification for initiating it." Id. In Gaskins' case, the need was both pressing and obvious: "prison authorities were aware of the fact that a contraband explosive had been brought into the cell block. It became their duty in the interest of prison security to protect the rights of other inmates by solving the crime and to do everything reasonably possible to find the culprit and remove other explosives if any there be." Id.

Hudson v. Palmer was referred to in Gaskins as discussing the rights of *prisoners*. Gaskins, 284 S.C. at 116, 326 S.E.2d at 139. In Palmer, the United States Supreme Court addressed privacy claims of a convict serving his time in a Virginia corrections facility. Specifically, Palmer claimed the "shakedown" search of his prison cell violated "his Fourth

Amendment right not to be deprived of his property without due process of law." Palmer, 468 U.S. at 519-29, 104 S.Ct. at 3196-7, 82 L.Ed.2d 393 (1984). In its discussion regarding the constitutional rights of *prisoners*, the Palmer Court reasoned as follows:

> We have repeatedly held that prisons are not beyond the reach of the Constitution. No "iron curtain" separates one from the other. Indeed, we have insisted that prisoners be accorded those rights not fundamentally inconsistent with imprisonment itself or incompatible with the objectives of incarceration. For example, we have held that invidious racial discrimination is as intolerable within a prison as outside, except as may be essential to "prison security and discipline." Like others, prisoners have the constitutional right to petition the Government for redress of their grievances, which includes a reasonable right of access to the courts.
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> Prisoners must be provided "reasonable opportunities" to exercise their religious freedom guaranteed under the First Amendment. Similarly, they retain those First Amendment rights of speech "not inconsistent with [their] status as ... prisoner[s] or with the legitimate penological objectives of the corrections system." They enjoy the protection of due process. And the Eighth Amendment ensures that they will not be subject to "cruel and unusual punishments." The continuing guarantee of these substantial rights to prison inmates is testimony to a belief that the way a society treats those who have transgressed against it is evidence of the essential character of that society.

Palmer, 468 U.S. at 523–24, 104 S.Ct. at 3198–99, 82 L.Ed.2d 393 (internal citations omitted). The Palmer Court further explained that "while persons imprisoned for crime enjoy many protections of the Constitution, it is also clear that imprisonment carries with it the circumspection or loss of many significant rights." Id. 468 U.S. at 524, 104 S.Ct. at 3199, 82 L.Ed.2d 393. Regarding whether the Fourth Amendment afforded protections to Palmer's privacy in his prison cell, the Court looked to whether such a claim was reasonable and determined it was not, based upon "a balancing of interests" between "society in the security of

its penological institutions and the interest of the prisoner in privacy within his cell." Palmer, 468 U.S. at 525-28, 104 S.Ct. at 3200-01, 82 L.Ed.2d 393.

The case at bar is more akin to Ellefson than Gaskins or Palmer. First and foremost, Appellant was not a convicted prisoner serving time in the department of corrections; rather, he was merely in pretrial custody at the local jail. By definition, he was merely a defendant accused of an offense, and not in the category of convicted inmates discussed in Palmer.[5] As such, the justifications for denying Appellant his constitutional rights while being held against his will are not the same, especially as it pertains to his right to privacy in his communications: the accused should have a greater expectation of privacy in his communications to those outside the jail.

Furthermore, even if the Fourth Amendment is more limited in its protections offered to Appellant, Article I, section 10 of the South Carolina Constitution affords him with heightened protections of privacy. In other words, in the context of a pretrial detainee house at a local jail, the balance needed to be struck between the needs of security and the privacy interests of the accused in his outgoing communications is inherently different than that posed by a convicted prisoner serving his sentence in the department of corrections. See, e.g., Ellefson, 266 S.C. at 501–02, 224 S.E.2d at 670 ("What is particularly disturbing here is the context in which this

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[5] The Palmer Court provided the following rationale:

> Prisons, by definition, are places of involuntary confinement of persons who have a demonstrated proclivity for antisocial criminal, and often violent, conduct. Inmates have necessarily shown a lapse in ability to control and conform their behavior to the legitimate standards of society by the normal impulses of self-restraint; they have shown an inability to regulate their conduct in a way that reflects either a respect for law or an appreciation of the rights of others.

Id. 468 U.S. at 526, 104 S.Ct. at 3200, 82 L.Ed.2d 393.

search took place. When an accused is not bailable, he is somewhat disadvantaged in preparing for trial. If he is to marshall facts in support of his defense, he necessarily must rely on persons outside the jail.").

Second, similar Ellefson to sending letters to those outside the jail pertaining to his case, Appellant's telephone calls were to his mother about his case. Cpl. Maxwell's conduct in the present case belies his statements that he only listens to calls "for safety and security of the inmates, the staff, and the public." As "the Intelligence Officer" at the jail, Cpl. Maxwell reviewed the calls of Appellant's simply because they "received [Appellant] at Beaufort County on an in-state hold."[6] Tr. 62, ll. 23-25. Further, after listening to Appellant's phone calls he "noted that half the County investigators had no access," so he "contacted the Sheriff's Office, and [Det. Manor] was the person that [he] was put in contact with," ostensibly to relay "some safety and security concerns." Tr. 63, ll. 1-5. He again did the same when listening to Appellant's later phone call to his mother because he "was still listening to the calls and heard some other stuff that were possibly security issues, so [he] contacted Manor." Tr. 63, ll. 18-20. Finally, he personally "notified" investigators regarding the "procedures to have to happen to obtain the phone calls," and as a result "got subpoenas for those calls." Tr. 64, ll. 1-8; Tr. 68, ln. 16-Tr. 69, ln. 7.

To sum up, Cpl. Maxwell purposefully listened to the telephone communications of Appellant for the simple reason that he was being held at the jail pretrial "on an in-state hold" for "purposes of safety and security." After noting County investigators did not have access to Appellant's jail calls, he zealously reached out to the Sheriff's Office and relayed "some safety and security concerns" to Det. Manor—the lead investigator on Appellant's case. However,

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[6] On cross examination, Cpl. Maxwell also indicated he determines which calls to listen to randomly "for the most part" based "pretty much" on the severity of charges. Tr. 66, ll. 15-23.

examination of the jail tapes reveals that Appellant's conversation had nothing to do with the security of the jail or the safety of those in it; rather, the value of the jail tapes lay in the incriminating words Appellant spoke to the ear of his own mother. This reveals the disturbing reality that Cpl. Maxwell's desire to relay "some safety and security concerns" was in actuality his desire to be the conduit to relay Appellant's personal and private communications about facts and details directly related to his case that Det. Manor would otherwise never have known, and the State would never have been able to use against him in his trial.

Moreover, after "Intelligence Officer" Cpl. Maxwell zealously eavesdropped on Appellant's communications with his mother regarding his case, he likewise zealously explained to investigators on Appellant's case the procedures necessary for them to obtain the incriminating jail calls. In other words, Det. Maxwell's conduct reveals what his role truly was in Appellant's case: an agent of the State who purposefully used his position as "Intelligence Officer" to aid in the investigation and collection of evidence against Appellant—namely, Appellant's own communications about his case given in confidence to his own mother.

As the Ellefson Court warned, "[i]f jail security justified surveillance of his mail, then the Jail officials could open the letters in order to achieve that legitimate government purpose. *However, the shibboleth of jail security is not a passport to wholesale abuse of the appellant's constitutional rights.*" Id. 266 S.C. at 500, 224 S.E.2d at 669 (emphasis added). Yet that is precisely what occurred here: the State was permitted by the trial court to justify surveillance of communications (here, Appellant's phone calls) under the shibboleth of jail security, but without the hallmarks of necessity required to do so. There were no concerns Appellant was smuggling in materials or had committed any crimes within the jail, as in Gaskins; there were no exigent circumstances; and the notion that the warrantless listening of Appellant's jail calls was for

"safety and security concerns" as proclaimed by "Intelligence Officer" Cpl. Maxwell was belied by what was actually on the jail tapes, and Cpl. Maxwell's conduct of quickly relaying them to the lead investigator on Appellant's case. "Therefore, '—the most basic constitutional rule in this area is that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions. Id. 266 S.C. at 501, 224 S.E.2d at 669 (quoting Coolidge v. New Hampshire, 403 U.S. 443, 454, 455, 91 S.Ct. 2022, 2032, 29 L.Ed.2d 564 (1971)).

Additionally, Appellant did not knowingly or voluntarily expose his personal communications about his case with his mother to the public. See, e.g., Katz v. United States, 389 U.S. at 351, 88 S.Ct. at 511, 19 L.Ed.2d 576. Contrary to the State's position that Appellant was put on notice by being told his calls were recorded and that he entered a PIN in order to communicate with those outside the jail in support of his case, this type of "consent" was likewise addressed by the Ellefson Court and dismissed as ineffective. There, the defendant "signed a card authorizing jail officials to read his mail" during the reception process, and the State "attempt[ed] to elevate this into a waiver of constitutional rights." Ellefson, 266 S.C. at 502, 224 S.E.2d at 670. That was insufficient:

> If the State relies upon the consent to search, it has the burden of proving the voluntariness of the consent. The court thus cannot assume there was consent. For noncustodial searches, the current test is whether or not the consent was voluntary under the totality of the circumstances. The skeletal details of the so called 'consent' belie it. If we were to hold the appellant consented to waive his constitutional rights here, the doctrine of consent would be effectively emasculated.

Id. 266 S.C. at 502-03, 224 S.E.2d at 670 (internal citations omitted).

Here, the assertions of consent are similarly weak. Whether consent to a search is voluntary is a question of fact to be determined from the totality of the circumstances. State v. McKnight, 352 S.C. 635, 656, 576 S.E.2d 168, 179 (2003). First, as in Ellefson, pretrial detainees at the jail are processed: they are assigned a PIN for billing, and provide a voice identification. Tr. 66, ll. 3-14; Tr. 70, ll. 7-25. However, no forms providing consent for the government are provided or signed; rather, they are purportedly told "orally" when enrolled that calls are recorded, and a recording tells them when calls are made. Tr. 71, ln. 1—Tr. 72, ln. 20. What is not shown is they ever knowingly, willingly, and voluntarily accepted the limitations upon their constitutional right to privacy in their communications.

To the contrary, the facts instead show coercive conditions designed to force implied consent to governmental intrusion upon anyone who wishes to communicate privately with those outside the jail. Under such circumstances, "[i]f we were to hold the appellant consented to waive his constitutional rights here, the doctrine of consent would be effectively emasculated." Id. 266 S.C. at 503, 224 S.E.2d at 670. This is especially relevant in the context of communications of a pretrial detainee, where the "freedom to communicate privately with associates to develop a possible defense is as important to a fair trial as is the heart to the human body. In fact, this right is the heart of any defense. If that heart be weakened, the result is debilitation; if it be stilled, the result is death." Id. 266 S.C. at 502, 224 S.E.2d at 670.

Thus, the warrantless search and seizure of Appellant's jail calls was done in violation of his state and federal constitutional rights, and the State failed to meet its burden of proving Appellant willingly and voluntarily consented. Accordingly, the trial court erred in admitting the two jail tapes at Appellant's trial.

CONCLUSION

For the foregoing reasons, Appellant Williston L. Owens respectfully requests reversal of his convictions, and remand for a new trial.

Breen Richard Stevens
Appellate Defender

ATTORNEY FOR APPELLANT

This 3rd day of May, 2024.