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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Appeal from Richland County
The Honorable Clifton Newman, Circuit Court Judge

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THE STATE,

RESPONDENT,

v.

CHARLES JASON CARMICHAEL,

APPELLANT.

Appellate Case No. 2022-001717

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**CORRECTED**
**SUPPLEMENTAL RECORD ON APPEAL**

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1 A Correct.
2 Q So we're dealing with March 13th of 2021 at 4:43 and
3 here it says 30 seconds in the morning, correct?
4 A Yes, sir.
5 Q Okay.
6 (The video was played for the jury.)
7 BY MR. HILL:
8 Q So I see two vehicles coming down Two Notch, one
9 taking a right and then another taking a right onto
10 Albritton; is that right?
11 A Yes.
12 Q I'm just going to show you two quick photos. Again,
13 these are stills from the video we just saw, correct?
14 A Yes.
15 Q Now, this still states 585. That's just zoomed in,
16 correct?
17 A Yes, sir.
18 Q I have another video for you. Is this the same
19 intersection that we just looked at?
20 A Yes, sir.
21 Q All right. And the time on this one, we're at the
22 same date, March 13th of 2021. The time on this one is
23 4:45 and right now, it's at 51 seconds, right?
24 A Yes, sir.
25 Q So just several minutes after the last video we

1 He says, It's time you can take a break again.
2 You're clearly not thinking right at this time. Take a
3 break. That stuff is -- none of that goes to the victim's
4 state of mind. I wish you well may go to the victim's
5 state of mind.
6 THE COURT: Are you in the process of handing me
7 something?
8 MS. CAVANAUGH: Oh, yes, sir. State v. Griffin, the
9 first headnote refers to --
10 THE COURT: Well, I can tell what it refers to if you
11 let me read it.
12 MS. CAVANAUGH: Thank you, Your Honor.
13 (Pause.)
14 I have some other arguments, Your Honor, once you're
15 ready, as well. And, Your Honor, some other arguments
16 that I have as to why it should come in. I also think it
17 should come in under Rule 803(2) excited utterance, and I
18 will tell you why. Miko Dreher yesterday testified
19 yesterday that there was a very heated conversation in the
20 afternoon of March 12th, 2021.
21 She was sitting in the car right. Before that text
22 message, line number six and line number five, you'll see
23 there's a four minute 57 second conversation between the
24 two, line number five, as well as line number six, there's
25 a two second -- they didn't actually communicate, but

there's a five-minute conversation right before that text is sent.

So I think because of Miko Dreher's conversation -- excuse me, testimony, it also qualifies under the exception under hearsay under 803(1) -- excuse me, 803(2) excited utterance. They just had a very heated conversation and that is the victim, R.C. 's response to his brother after that heated conversation. It's immediately after that conversation. It's only separated by six minutes.

In addition, I know the case I handed up talked about the victim's plan. Rule 803(3) also refers to an exemption under the hearsay as the then existing mental, emotional or physical condition. He is describing his feelings towards his brother at the time. So those are my arguments as to why that message should come in.

THE COURT: Mr. O'Neil.

MR. O'NEIL: Thank you, Your Honor. I don't think it falls under either one of those. It's clearly hearsay. The question is does it fall under excited utterance? No. Because excited utterance has to relate to a startling event or describe the startling event. Excited utterance has to relate or describe a startling event. None of those two relate to or describe a startling event. Therefore, it's not an excited utterance.

1 Secondly, the State put forth maybe this is a state
2 of victim's intent. Nothing -- or emotional state.
3 Nothing in the substance of what was said described the
4 victim's intent or emotional state. The statements are
5 declaratory statements that the victim makes as to what he
6 thinks his brother, my client, should do.
7 The statements are, It's time for you to take a
8 break. Please, Jason. Take a break. That's all I have
9 to say. Jail is not an illusion. There's nothing that
10 describes the victim's emotions or the victim's feelings.
11 It's, basically, advice that the victim is giving my
12 client to do. It doesn't fall under any exception under
13 hearsay, so I think it's not admissible.
14 MS. CAVANAUGH: One quick response, Your Honor.
15 THE COURT: Hold up. It's not a debate. I'm trying
16 to make a decision, so give me -- this is indicated as an
17 instant message, so is that a text?
18 MR. O'NEIL: That is in a text, Your Honor.
19 THE COURT: A text from --
20 MS. CAVANAUGH: From the victim --
21 THE COURT: -- the victim to his brother?
22 MS. CAVANAUGH: Right.
23 THE COURT: So his brother is texting the defendant
24 these many times on 3/12?
25 MS. CAVANAUGH: No, just twice, Your Honor, line

1 number seven and then line number 18. The rest are from
2 the defendant to his brother.
3 THE COURT: The brainwash has stopped. I see clearly
4 now. You be safe. We fight different. I already F'd up.
5 He was acting -- he chose a sneak attack.
6 MR. O'NEIL: And, Your Honor, just to be clear --
7 THE COURT: My little brother is -- who's the little
8 brother?
9 MR. O'NEIL: Your Honor, if you look at --
10 THE COURT: Who is the little brother?
11 MS. CAVANAUGH: The defendant.
12 THE COURT: All right. So be quiet. I just asked
13 the question.
14 Go ahead.
15 MS. CAVANAUGH: Your Honor, the startling event that
16 Mr. O'Neil said didn't happen, you remember from
17 Ms. Dreher's testimony yesterday, she said that she
18 overheard -- a five-minute conversation, she heard the
19 defendant say, I'm going to kill you. I'm going to bury
20 you. Your Honor, I think threats against the victim's
21 wife would certainly qualify as a startling event.
22 THE COURT: Where is that recorded statement by --
23 the witness who said that she heard all of this through
24 the blue tooth, why isn't that part of what you're
25 offering?

1 MS. CAVANAUGH: Well, because that was a telephone
2 conversation that she was overhearing. That is line
3 number -- that is line number five. That phone call
4 wasn't recorded, it's just documented in the phone log.
5 THE COURT: I got you.
6 MS. CAVANAUGH: One more thing along those lines, as
7 far as how we --
8 THE COURT: You give me everything this time and then
9 I'll hear from him.
10 MS. CAVANAUGH: How we know that that's the
11 conversation -- again, it goes towards the credibility --
12 excuse me, it's the weight, not the admissibility, but the
13 entire -- the entire download from March 9th through
14 March -- the entire download on March 12th, there is no
15 prolonged conversation between the two.
16 So as far as how we know that is the conversation
17 that Miko overheard, which would be the startling event
18 the victim responded to, there is no other lengthy
19 conversation the day before in that phone download, Your
20 Honor. So I think I've said everything --
21 THE COURT: All right. Tell me when you're through
22 with everything.
23 MS. CAVANAUGH: My argument on why that statement
24 should come in is under --
25 THE COURT: You don't have to repeat it. I'm saying

1 once you're through, tell me you're through.
2 MS. CAVANAUGH: Thank you, Your Honor.
3 THE COURT: Okay. Now, you go.
4 MR. O'NEIL: My argument would be if you don't have
5 evidence that this notation number five, the incoming call
6 is the event that the witness just stated -- referred to.
7 Secondly, we don't have any testimony from the
8 victim, R.C. 's perspective that this was a
9 startling event to him. Because you're talking about
10 excited utterance, the person who makes the utterance has
11 to be upset about the event in order to make it an excited
12 utterance. There's no testimony as it relates to how this
13 alleged conversation affected the victim to make it a
14 startling event.
15 And thirdly to that point, Your Honor, even if it was
16 a startling event, the substance of the text message does
17 not describe the startling event, which is required of an
18 excited utterance. The substance of the text message goes
19 on other things like declaratory statements --
20 THE COURT: What can be more startling than talking
21 with your brother, who's threatening to kill you?
22 MR. O'NEIL: It may startle me, but the question is
23 did it startle -- if the conversation occurred, did it
24 startle --
25 THE COURT: Well, the witness said it occurred. We