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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Cherokee County

Honorable R. Keith Kelly, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

DIONICIO NAVA ABARCA,

APPELLANT

APPELLATE CASE NO. 2024-000180

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# FINAL BRIEF OF APPELLANT

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**United States Cases**



**South Carolina Cases**



**Rules**

**Constitutional Provisions**

## STATEMENT OF ISSUE ON APPEAL

Whether the court erred by admitting the 911 call in this case since it contained highly prejudicial, inadmissible prior consistent statements about appellant allegedly being angry with his decedent wife the night before they disappeared for cheating on him where the 911 call was also needlessly cumulative under Rule 403, SCRE, it violated appellant's right to confrontation, and it did not qualify as an excited utterance or under any other hearsay exception which would have made the 911 call admissible since there was no ongoing emergency involved?

## STATEMENT OF THE CASE

Appellant was indicted at the March 25, 2021 term of the Cherokee County grand jury for the offenses of murder and possession of a weapon during the commission of a violent crime. R. 380-381. His case was called to trial on January 22, 2024, before the Honorable R. Keith Kelly and a jury. James Farr represented appellant. Adrienne Elizabeth Barry and Evan Haney were the assistant solicitors. R. 1.

On January 26, 2024, the jury found appellant guilty of both counts. R. 373, ll. 7-14. Judge Kelly sentenced appellant to life imprisonment for murder, and he imposed a five-year concurrent term for possession of a weapon during the commission of a violent crime. R. 377, ll. 19-23.

This appeal follows.

## STANDARD OF REVIEW

**Admission of evidence:** "The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice." State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (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. at 429–30, 632 S.E.2d at 848.

**Confrontation grounds:** The Sixth Amendment to the United States Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." This procedural protection applies in both federal and state prosecutions by virtue of the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400, 406, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965).

## ARGUMENT

The court erred by admitting the 911 call in this case since it contained highly prejudicial, inadmissible prior consistent statements about appellant allegedly being angry with his decedent wife the night before they disappeared for cheating on him where the 911 call was also needlessly cumulative under Rule 403, SCRE, it violated appellant's right to confrontation, and it did not qualify as an excited utterance or under any other hearsay exception which would have made the 911 call admissible since there was no ongoing emergency involved.

**Relevant facts**

Prior to trial, defense counsel Farr objected to the state playing a tape of the 911 call since appellant's children would be testifying, and statements on the 911 call constituted inadmissible prior consistent statements from those children who would testify at trial. The 911 call was also inadmissible as needlessly cumulative evidence under Rule 403, SCRE. R. 13, ll. 9-23.

The solicitor argued, admitting "[i]t's going to be the same children that are on the 911 call that will be played for the children. They're going to testify and will be subject to cross-examination and all of that ... it is cumulative evidence. This is not as cumulative. This is different, distinct evidence and that should -- and the indictment shows time and location of the report. This happened three-and-a-half years ago. The kids' memory may be a little fuzzy. So, the 911 call is an exact record, business record, of what took place that day. So, it is different. It's not cumulative." R. 14, l. 12 – 15, l. 6.

Defense counsel continued to argue that the 911 tape constituted inadmissible prior consistent statements that were cumulative to the testimony of the witnesses and that if the witnesses' memories needed to be refreshed "then there's a proper way to do that, is to play the

911 call to refresh their [memory]." R. 15, ll. 6-16. The judge ruled the 911 call was admissible over the defense objection. R. 15, ll. 17-21.

When Dennis Gardner, the director of 911 communications, was called as a witness, defense counsel objected on the basis of a confrontation clause denial, citing Crawford v. Washington, 541 U.S. 36 (2004), Davis v. Washington, 547 U.S. 813, 821 (2006) and Michigan v. Bryant, 562 U.S. 344, 354-60 (2011), since "this is not the person who actually took the call, and I'm objecting to this individual at this time." The judge also overruled this objection. R. 32, l. 14 – 33, l. 3. Defense counsel renewed his objection when the 911 tape was played for the jury. Tr. 67, ll. 3-13.

In the 911 tape, then sixteen-year-old Dulce Abarca tells the 911 operator that she was twelve-years-old at the time of the 911 call and that her father, appellant, had fought with her mother, the decedent, the prior day because appellant thought the decedent was cheating on him. R. 55, l. 1 – 57, l. 5; 61, l. 16-24; 65, ll. 5-9. Dulce's older brother, Juan Daniel Abarca, also testified consistently with the 911 call that his parents left the day before the 911 call, and he thought they were going to Walmart at the time they left. Juan also testified at trial that they were fighting the night before they left. R. 43, l. 16 – 44, l. 9. The 911 call, State's Exhibit 2, is on file for this Court to review.

At trial, Juan Abarca testified that appellant and his mother left that afternoon in appellant's brown pickup truck. R. 44, ll. 14-17. Juan said he thought his parents were going to the field, then to their rental home and then to the Walmart. R. 43, ll. 18-24. Juan described the field as "my dad's garden, and we would usually work on it or whatever we needed to do for the plants growing there." R. 45, ll. 14-18. Juan also testified that he drove to their rental property

the next day, and he found his father's brown truck there. That is when he called 911. R. 46, l. 24 - 48, l. 22.

Dulce Abarca testified that she mentioned the State of Alabama in the 911 call because her father, appellant, had talked about moving there in the past. R. 56, ll. 16-25. She said when her parents did not return home the day before the 911 call, she thought they were going to the field, the store, and then to their rental property. They went in appellant's small brown pickup truck. R. 57, ll. 3-17.

Dulce said she asked to go with her parents, but appellant told her she could not come. She began to worry by about six o'clock that night, and she phoned her mother and got no answer from her mother or from appellant on his separate cellphone. R. 58, l. 21 – 59, l. 3. As stated, Dulce repeated that her parents argued the night before the 911 call when they left about her mother cheating on appellant. R. 61, ll. 16-24.

This was very significant, and it was the only evidence of appellant having a motive to harm his wife – anger because of cheating.

Mark Hutchens of the Cherokee County Sheriff's Office testified that on July 19, 2020, he went to the field or garden spot owned by appellant to search it. Hutchens remembered Deputy Singleton hollering to him that he had found the decedent's body "in a shallow grave" in the field. R. 68, l. 14 – 71, l. 12.

Luis Abarca testified that appellant was his uncle. At the time of the trial, Luis was twenty-years-old, and he was working at UPS. R. 192, l. 5 – 193, l. 8. Luis testified that he was not extremely close with appellant. He remembered on July 18, 2020, he was dropping off the rent money to appellant at one of his rental homes. R. 193, l. 2 – 194, l. 5.

In the past, Luis had worked with appellant on a farm. Luis was seventeen-years-old on this July day in 2020, and he remembered appellant asked him for a ride. Luis agreed to give appellant a ride. Appellant got in the back passenger seat of his car. R. 194, l. 2 – 195, l. 21.

Luis remembered that appellant told him to get on I-85, and he remembered driving through Spartanburg and then Greenville counties. R. 196, ll. 4-16. Luis continued to drive on I-85 with appellant into Georgia, but it started getting dark. R. 197, l. 15 – 198 l. 1.

Luis testified he told appellant he needed to go home because it was getting dark, but "he asked me to continue to drive." R. 198, ll. 4-8. Luis recalled going through Atlanta and continuing on I-85 into the state of Alabama. R. 199, ll. 2-15. Luis thought at one point appellant mentioned Houston, Texas as a destination. R. 199, ll. 22-25.

Luis remembered he stopped at a vacant gas station in what he thought was Mobile, Alabama. "I could not drive any further." R. 200, l. 8 – 201, l. 13. Luis went to sleep inside the car at the abandoned gas station until he awoke to his shoulder being shaken and appellant telling him to drive. R. 200, l. 8 – 201, l. 25.

He also saw police officers next to the car at the time he was awakened by appellant. R. 202, ll. 1-20. Luis testified: "I believe at that point, I told them [the police] that I was worried for my safety—and that something was wrong." R. 203, ll. 13-21. Luis offered that he originally had thought appellant simply wanted a short ride from him when he asked for a ride. R. 205, ll. 9-13.

Pate Cardwell was a deputy with the Baldwin County Sheriff's Department in Baldwin County, Alabama. R. 218, ll. 4-18. Cardwell remembered driving by the closed gas station at about three o'clock in the morning and spotting the vehicle Luis was driving with appellant in

the back seat. He remembered that when his headlights shone on the car "two heads pop up, like one in the driver's seat and one in the back passenger seat." R. 219, ll. 3-25.

Cardwell testified that Luis told him he was driving his uncle "to see his aunt in New Orleans at a hospital, that she has COVID." Tr. 251, ll. 3-5. Cardwell said he thought it was suspicious that someone would be going to a hospital to see someone with COVID at that time. Cardwell continued to talk to Luis, and Luis admitted he was actually going to Houston. "And he said he was scared, and asked if I could walk away from the vehicle and talk to him." Luis told Caldwell he thought appellant "had done something bad. And I asked him what. He said he didn't know." R. 221, l. 19 – 222, l. 20.

Cardwell recalled that appellant had a COVID mask on, and he was staring straight ahead. Cardwell said Luis gave him consent to search the car, and he found appellant's passport and about one thousand dollars inside the car. R. 223, ll. 7-22; 224, l. 1 – 225, l. 10.

Pastor Michael Bridges of Concord Baptist Church in Gaffney, South Carolina identified the surveillance tape from outside his church that he turned over to the police in this case. R. 248, l. 9 – 251, l. 8. State's Exhibit 54, the surveillance tape, showed "a little brown-gold truck, small frame pickup truck, driving down Concord Road, passing the church, turning onto Concord Heights Road. Approximately thirty minutes after you see it make that turn onto Concord Heights, you see it leave Concord Heights turning left on Concord Road." Cherokee County Sheriff's Deputy Christopher Parnell testified that, in his opinion, this was important evidence because it was appellant's brown truck "located at the last place we knew him to be at." R. 270, l. 13 – 271, l. 22.

Parnell also testified that State's Exhibit 54 showed a brown truck that looked similar to appellant's truck on the surveillance video on July 18, 2020 at 2:57 in the afternoon. R. 271, l. 2 – 272, l. 13. That tape is before this Court for viewing.

The pathologist, Dr. Kelly Rose, performed the autopsy on decedent on July 21, 2020. She said the decedent's body showed sharp force wounds to the decedent's head and neck as if they were made by a machete. R. 302, l. 3 – 308, l. 11. Dr. Rose also testified the decedent's body had chemical type burns to the body which were consistent with gasoline or bleach. R. 312, l. 7 – 316, l. 25. Dr. Rose said the decedent in this case died from a loss of blood from a "brutal, vicious attack which was a homicide." R. 316, ll. 17-21.

**Discussion**

Defense counsel correctly argued that the 911 tape in this case contained impermissible prior consistent statements which made it inadmissible. Counsel also argued the 911 tape was needlessly cumulative, and inadmissible for that reason also.

The state reasoned that because the defense could cross-examine the witnesses on the 911 tape, Juan and Dulce Abarca, that solved the problem with the prior consistent statements and the cumulative nature of this testimony under Rule 403, SCRE. That was incorrect.

This was not a "traditional" 911 call, in that it did not constitute an excited utterance that was admissible pursuant to Rule 803(2) nor was it admissible as a present sense impression pursuant to Rule 803(1). The 911 call was made by appellant's sixteen-year-old and twelve-year-old minors the day after their parents left. It was a relatively calm narration of prior events that was highly prejudicial because the 911 operator was told that appellant and the decedent argued the *night before they left* about the decedent cheating on appellant. It was more than a day after that before 911 was called to report appellant and the decedent had not come home.

Importantly, this provided the only motive in this case for appellant to harm the decedent, and coupled with the flight evidence was the only evidence against appellant in this case.

In State v. Saltz, 346 S.C. 114, 121-122, 551 S.E.2d 240, 244 (2001), our Supreme Court noted:

> Prior consistent statements of a witness are not inadmissible hearsay if:
>
> The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is ... consistent with the declarant's testimony *and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive; provided, however, the statement must have been made before the alleged fabrication, or before the alleged improper influence or motive arose.*
>
> Rule 801(d)(1)(B), SCRE.
>
> Thus, in order for a prior consistent statement to be admissible pursuant to this rule, the following elements must be present:
>
> (1) the declarant must testify and be subject to cross-examination,
>
> (2) *the opposing party must have explicitly or implicitly accused the declarant of recently fabricating the statement or of acting under an improper influence or motive*,
>
> (3) the statement must be consistent with the declarant's testimony, and
>
> (4) *the statement must have been made prior to the alleged fabrication, or prior to the existence of the alleged improper influence or motive.*

(emphasis added).

The statements on the 911 call were not admissible pursuant to Rule 801(d)(1)(B), SCRE, because they were not offered to rebut an express or implied charge against either Juan or Dulce of recent fabrication or improper influence or motive. Therefore, the prior consistent statements impermissibly lent undue influence to the hearsay subject matter or "bolstered" the testimony of

Juan and Dulce about the alleged argument between appellant and the decedent about her cheating on him. See, also Vail v. State, 402 S.C. 77, 738 S.E.2d 503 (Ct. App. 2013); State v. Barrett, 299 S.C. 485, 386 S.E.2d 242 (1989).

Since the defense had not accused either Juan or Dulce of an expressed or implied charge of recent fabrication or improper influence or motive, the prior consistent statements were inadmissible, and they were highly prejudicial.

The 911 call in this case was a report, it was not an ongoing emergency. It was establishing the past fact that Juan and Dulce's parents had left and not returned. It was essentially a missing person's and neglect report. It was not an emergency call requiring police assistance in the normal sense as the report of an emergency would be to 911.

Consequently, pursuant to Crawford v. Washington and Davis v. Washington, the call involved testimonial statements. The 911 call is commonly distinguished from a formal investigation because at least the initial interrogation conducted in connection with a 911 call is ordinarily not designed primarily to "establish or prove" some past fact but to describe the current circumstances requiring police assistance. Davis v. Washington, 547 U.S. 813, 827 (2006). Like the Hammond v. Indiana, 547 U.S. 813 (2006) concurrent case in Davis v. Washington, the 911 call in this case involved an account of events in the past—the prior day.

The 911 operator, who did not testify, was eliciting facts about the parents leaving the two minor children, Juan and Dulce, alone which looked to be neglect. Nonetheless, as the Court made clear in Davis v. Washington, even if the 911 call could be determined to be for some type of emergency assistance in the beginning, it evolved into testimonial statements once that "emergency" purpose had been achieved and where the 911 operator was gathering information about the argument over cheating after that. This part of the 911 call that elicited the critical

investigatory allegation that appellant and the decedent were fighting or arguing the afternoon they left about the decedent allegedly cheating on appellant was testimonial. The parents then left and did not return. Again, this cheating argument statement on the 911 tape provided the only evidence in this case of a motive – anger -- for appellant to kill the decedent.

Finally, the information contained in the 911 call about the parents fighting or arguing about an affair was needlessly cumulative to the live testimony in court pursuant to Rule 403, SCRE. It was just repetition of the live testimony recorded on tape during the 911 call which were inadmissible prior consistent statements. This repetition made the hearsay evidence have an impermissibly bogus persuasive effect. The prior consistent statement in this case violated the rule against hearsay which prohibits the admission of an out-of-court statement to prove the truth of the matter asserted, unless an exception to the rule applies. See Simpkins v. State, 303 S.C. 364, 401 S.E.2d 142 (1991).

This was not a criminal sexual conduct case, but none of the three exceptions recognized in Jolly v. State, 314 S.C. 17, 443 S.E.2d 566 (1994), would have qualified even if it was a CSC case. The prior inadmissible consistent statements here were cumulative to the trial testimony and impermissibly bolstered and improperly made more prominent the allegation that appellant was angry with the decedent because she had cheated on him, they left after this fight and did not return. See Jolly v. State.[1]

Here, defense counsel also correctly argued that the 911 call was needlessly cumulative to the live testimony in this case and therefore it involved the needless presentation of cumulative evidence under Rule 403, SCRE. See State v. Hess, 279 S.C. 14, 301 S.E.2d 547

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1 Jolly was overruled to the extent it imposed a categorical or *per se* rule precluding a finding of harmless error given the inadmissible hearsay testimony. See Thompson v. State, 423 S.C. 235, 245-246, 814 S.E.2d 487, 492 (2018).

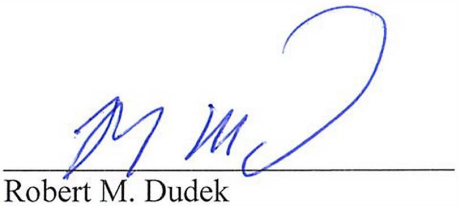
(1983). Again, that cumulative repetition gives the inadmissible evidence its impermissible spurious importance in the minds of the jurors. Jolly v. State, supra.

The errors were not harmless here because the inadmissible hearsay prior consistent statements were very prejudicial, they violated appellant's right to confrontation, they were needlessly cumulative under Rule 403, SCRE, and they were the only evidence of motive for the murder in this case. Coupled with the evidence of flight which was said to have occurred simultaneously with appellant and the decedent leaving the children the day after the affair argument was the state's case against appellant. "Error is only harmless `when it could not reasonably' have affected the result of the trial." See State v. Davis, 371 S.C. 170, 181, 638 S.E.2d 57, 63 (2006) *citing* State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150,151 (1985); State v. Mizzell, 349 S.C. 326, 335, 563 S.E.2d 315, 320 (2002) (confrontation clause error not harmless).

Appellant should be granted a new trial.

## CONCLUSION

By reason of the foregoing arguments, appellant's convictions should be reversed, and this case remanded to the Cherokee County Court of General Sessions for a new trial.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 2nd day of June, 2025.

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## CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

This 2nd day of June, 2025.

Robert M. Dudek
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ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Cherokee County

Honorable R. Keith Kelly, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

DIONICIO NAVA ABARCA,

APPELLANT

APPELLATE CASE NO. 2024-000180

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# CERTIFICATE OF SERVICE

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Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Final Brief of Appellant in the above-referenced case has been served upon J. Anthony Mabry, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 2nd day of June, 2025.

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## Warren, Kaylynn

**From:** Warren, Kaylynn
**Sent:** Monday, June 2, 2025 9:28 AM
**To:** Anthony Mabry
**Cc:** Dudek, Robert; Donna D'Alessio
**Subject:** 2024-000180 The State v. Dionicio Nava Abarca
**Attachments:** 2024-000180 The State v. Dionicio Nava Abarca Final Brief of Appellant.pdf

Good Morning,

Attached for service in the above-referenced case is the Final Brief of Appellant which will be filed today, June 2, 2025, with the Court of Appeals via email filing.

Respectfully,
Kaylynn

**Kaylynn Warren**
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