STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Jasper County

Honorable Carmen T. Mullen, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JAVERIS TREMANE WILLIAMS,

APPELLANT

APPELLATE CASE NO. 2024-001362

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

STATEMENT OF ISSUES ON APPEAL

1. **Did the trial court err in admitting into evidence a jail house call that was not relevant to the crimes charged in which appellant used numerous expletives and inciting language in encouraging witnesses to tell the truth during trial?**

2. **Whether the trial court erred in admitting recorded statements from Frazier, over objection of counsel, as dying declarations when there was no evidence that Frazier was motivated by an extreme and powerful belief that his death was imminent?**

3. **Did the trial court err in allowing the state to recall its lead investigator to admit prior inconsistent statements of one of the state's witnesses when that witness was not provided the opportunity to admit, deny, or explain the alleged prior inconsistent statement?**

4. **Did the trial court err in sentencing appellant under S.C. Code § 16-23-490 (2010) in violation of the statutory prohibition on such a sentence following a life without parole sentence?**

STATEMENT OF THE CASE

Appellant was indicted on October 17, 2019, by a Jasper County grand jury for murder, armed robbery, and possession of a weapon during a violent crime connected to the death of Samquan Frazier. R. * Indictments. Appellant was tried before the Honorable Carmen T. Mullen and a jury from August 12 – 14, 2024. R. *. At trial, appellant was represented by Charlie Johnson with Trasi Campbell appearing on behalf of the state. R. *. The jury found appellant guilty on all charges. Tr. 586, ll. 11 – 25. The trial court sentenced appellant to a life sentence for murder, thirty years for armed robbery, and five years for the weapons offense. Tr. 598, l. 12 – 599, l. 2.

STATEMENT OF THE FACTS

Appellant, through the nickname of "Hustle Man"[1], was identified by Samquan "Chuck" Frazier as the individual who robbed and shot him. State's Ex. 13 03:40 – 04:00; State's Ex. 14.[2] Various witnesses testified that Frazier and appellant had been with several other people at a "yard party" during the evening hours of September 29, 2018. Tr. 287, l. 1 – 288, l. 9; 292, ll. 8 - 15. At some point in the evening, appellant drove two other individuals (Daveon Smith and Reginal Jenkins) from the yard party to an establishment on the South Carolina border with Georgia called Club Karma. Tr. 333, l. 14 – 334, l. 24. Frazier also traveled to Club Karma in a different vehicle. Tr. 288 ll. 4 – 25; 335, ll. 18 - 22. At the Club, people consumed alcohol, with Frazier becoming intoxicated and ill. Tr. 335, ll. 18 0 22; 352, ll. 7 - 16.

Club Karma stayed open all night with closing being in the early morning hours of September 30, 2018. Tr. 495, ll. 2 - 7. Appellant, Daveon Smith, Chuck Frazier, and Henry Williams left the Club close to closing time. Tr. 297, ll. 2 – 21; 316, ll. 1 – 21; 492, ll. 15 – 23; 495, ll. 2 – 7. They drove to the home of Robert Bright, known as PI. Tr. 245, ll. 12 – 18; 301 l. 19 – 302, l. 4. From there, appellant, Frazier, Reginal Jenkins and Daveon Smith drove to appellant's home and can be seen on a video played during trial. Tr. 303, l. 2 – 304, l. 25; 492, l. 24 – 493, l. 5; State's Ex. 16.[3] Jenkins then departed in his own vehicle, leaving appellant, Smith and Frazier behind. Tr. 303, l. 2 – 304, l. 25

The state's theory was that after the video was recorded and Jenkins left, appellant robbed and shot Frazier. Smith testified that he was asleep in the car when he heard a gunshot

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1 During trial, "Hustle Mane" and "hustle man" are used indiscriminately as connected to appellant. Tr. 125, ll. 18 – 24; 127, ll. 1 – 12; 186, ll. 5 – 14; 308, ll. 3 – 13; 497, ll. 19 – 25.

2 State's Exhibits 13 and 14 will be on file with this Court for review.

3 State's Exhibit 16 will be on file with this Court for review.

and saw appellant and Frazier "tussling" over a gun with Frazier being shot during the confrontation. Tr. 339, ll. 2 – 24. The location of the shooting, according to Smith, was unclear but on a road. Tr. 340, l. 24 – 342, l. 16. Smith admitted to changing his story, and acknowledged he was afraid of Frazier's family over threats they had made against him. Tr. 349, l. 14 – 350, l. 22.

Dontae Collins testified that he picked up appellant from appellant's home on the morning of September 30, 2018, and saw two persons sitting inside the vehicle located at the residence. Tr. 461, l. 6 – 462, l. 25. According to Collins, appellant was intoxicated and fell asleep during the drive to Blackville. Tr. 463, ll. 7 – 23. Donovan Riley testified that Frazier and Daveon Smith were arguing at appellant's residence early in the morning of September 30, 2018. Tr. 478, ll. 2 – 22. Riley saw Frazier stumbling with his hands in the air when Smith accused Frazier of robbing him and fired a gunshot. Tr. 478, l. 23 – 479, l. 19. Based upon the testimony of Collins and Riley, appellant was absent from the scene and Frazier was shot and killed by Daveon Smith, the state's eyewitness who changed his story, at appellant's residence and then transported by Smith to the rural road location.

The vehicle seen in State's Exhibit 16 and driven by appellant was never located. Officers found no shell casings, or a firearm, connected to the shooting. Tr. 229, ll. 10 - 22. There was some indication that Frazier had been moved from the location of the shooting, including marks on Frazier's body. Tr. 381, l. 16 – 382, l. 1; 388, ll. 14 – 22; 395, ll. 1 – 20. Appellant testified in his own defense. Appellant indicated Frazier was alive when he departed with Collins and that he had no connection to Frazier's death. Tr. 496, l. 20 – 497, l. 23; 498, ll. 9 - 19.

STANDARD OF REVIEW

As to Arguments 1, 2, and 3.

"The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." State v. Williams, 386 S.C. 503, 509, 690 S.E.2d 62, 65 (2010). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." State v. Black, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012). In evaluating the preliminary facts, the trial court should use a preponderance of the evidence standard. *See* State v. Brewer, 438 S.C. 37, 882 S.E.2d 156 (2022).

As to Argument 4.

"In criminal cases, the appellate court sits to review errors of law only." State v. Johnson, 413 S.C. 458, 466, 776 S.E.2d 367, 371 (2015). "A sentence will not be overturned absent an abuse of discretion when the ruling is based on an error of law or a factual conclusion without evidentiary support." In re M.B.H., 387 S.C. 323, 326, 692 S.E.2d 541, 542 (2010). "Generally, a challenge to sentencing must be raised at trial or the issue will not be preserved for appellate review." State v. Davis-Kocsis, 443 S.C. 127, 134, 903 S.E.2d 491, 495 (2024). However, this preservation requirement may be waived in "exceptional circumstances." Id.

ARGUMENT

1. The trial court erred in admitting into evidence a jail house call that was not relevant to the crimes charged in which appellant used numerous expletives and inciting language in encouraging witnesses to tell the truth during trial.

A. How the matter was addressed at trial.

During trial, the state recorded a phone conversation between appellant and an unnamed individual. State's Ex. 42.[4] In claiming the recorded call was relevant to the trial, the solicitor expressed her view that it involved witness tampering centered on her opening statement and speculation regarding the timing of Frazier being shot.

> However, and I confirmed with the court reporter who printed it out and is emailing it to me, in my opening, I set up a time line, and that time line began with my assertion that around 7:30 in the morning was when the killing occurred. And so he's clearly talking about evidence in the case. The facts, the State's time line, and what the witnesses need to do when they get in there tomorrow. And that sounds a little bit like collusion and manipulation of State witness testimony.

Tr. 369, ll. 5 – 14.

Appellant's counsel objected, arguing that the call in question was both unduly prejudicial and not relevant to the trial:

> MR. JOHNSON: Your Honor, it's very simple: 7:30 came from the prosecution's opening statement. Her statement is not evidence. My client -- I'm sure you heard the tape. He did use some cuss words, but there's one word in there that she left out. He said that, They need to tell the truth. That's not coercion. That's all he said. He didn't threaten anybody. He didn't say anything. And it's our position it is irrelevant. How is that relevant to anything that went on in this case? And it is our position the State have to show

[4] State's Exhibit 42 will be on file with this Court for review.

> relevance to that. Other than that, it's extremely prejudicial and accumulative [sic].

Tr. 369, l. 17 – 370, l. 7.

The trial court admitted the recorded call, citing State v. White, 437 S.C. 490, 879 S.E.2d 21 (Ct. App. 2022) and State v. Martin as support for the call being admissible.[5] The trial court based this finding on the contents of the call being an admission by a party opponent. Tr. 370, l. 22 – 371, l. 1.

B. How the trial court erred.

"Evidence is relevant if it tends to make more or less probable a fact in issue." State v. Huggins, 336 S.C. 200, 205, 519 S.E.2d 574, 576 (1999). "[A] court analyzing probative value considers the importance of the evidence and the significance of the issues to which the evidence relates." State v. Gray, 408 S.C. 601, 610, 759 S.E.2d 160, 165 (Ct. App. 2014). The recorded call does not contain relevant information to the charges before the Court. As noted by the solicitor, the content of the call (absent the expletives) concerned the need for the witnesses to tell the truth about the timeline of events. State's Ex. 42. At no point in the call does appellant admit to a role in shooting or robbing Frazier. At no point in the call does appellant add factual details not already before the trial court. The state's alleged relevance (witness tampering) is simply factually not present. Tr. 369, ll. 5 – 14. The state read between the lines, no doubt using the context of the harsh language, to find witness tampering that simply did not exist. The

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5 While counsel for appellant is confident on the citation for State v. White referenced by the trial court, counsel assumes the other reference is to State v. Martin, 403 S.C. 19, 742 S.E.2d 42 (Ct. App. 2013) (holding the test for determining the admissibility of evidence concerning flight also applies to other evidence of evasive conduct).

purported "change" in the testimony of one witness, Reginal Jenkins, is discussed in detail in Argument x, *supra.*

Moreover, any limited probative value of the recording was outweighed by the unfair prejudice to Appellant. The jury was reminded of appellant's status as an inmate at the time. The language used has numerous curse words and language that can be viewed as violent in nature ("bust those [expletive] heads"). See State v. Cheeseboro, 346 S.C. 526, 547, 552 S.E.2d 300, 311 (2001) ("Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one."). In State v. King, 422 S.C. 47, 810 S.E.2d 18 (2017), our Supreme Court noted that calls of this nature should be excluded when they are of "limited probative value" that is outweighed by the unfair prejudice to the accused. In King, the call in question was laced with profanity and provided limited probative value to the issues before the trial court since the alleged relevant information could be obtained from other sources:

> Third, the limited probative value of the recording was outweighed by the unfair prejudice to King. The fifteen-minute recording is riddled with profanity, racial slurs, and impermissible references to King's prior bad acts.

King, 422 S.C. at 69, 810 S.E.2d at 29–30.

By contrast, this Court in State v. White, 437 S.C. 490, 879 S.E.2d 21 (Ct. App. 2022) emphasized the importance of the recorded call on the ultimate issues before the trial court, finding the call relevant since it established that "White knew he shot Victim, that he was being detained for Victim's murder, and that he was excited to learn (even though based on false information) that Victim's gunshot wounds were not the ultimate cause of his death." Id., 437 S.C. at 495, 879 S.E.2d at 24.

The state's closing argument placed the negative inferences from the language used in full context for the jury:

> And you heard part of the jail phone call that he made Monday night after he heard that I -- and he testified to it, that I might have a time line because I mentioned that 7:30 might be important. So he's listening and he's getting his people out there working on that. You heard the call. You better tell them boys, you know, go in there, meaning tomorrow, and bust those mother f'ers, bust them up.

Tr. 542, ll. 11 – 19. The use of the negative language and connotations associated with the violent imagery demonstrates the true motive behind the state's admission of the phone call before the jury. It had noting to do with the minor discrepancy between the testimony Jenkins provided and the various statements he made to investigators.

State's Exhibit 42 falls more under the King spectrum than under White. The trial court erred in finding it relevant evidence and should have excluded it as unduly prejudicial under Rule 403, SCRE.

C. Prejudice.[6]

The state's case hinged on the credibility of Smith and the impact of Frazier's statements to law enforcement after he was shot, addressed in Argument 2 *infra*. By contrast, appellant presented evidence that he was absent from the area when the shooting occurred through his own testimony and the testimony of Dontae Collins. In addition, Donovan Riley testified that he saw Smith and Frazier involved in an altercation when he heard a gunshot and fled.

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6 The prejudice analysis for the improper admission of evidence is the same for each argument. This portion of appellant's brief is incorporated in Arguments 2 and 3 regarding the prejudicial impact of the trial court's error.

A case that depends on the credibility of the witnesses does not lend itself to a finding of harmless error. *See* State v. Gracely, 399 S.C. 363, 731 S.E.2d 880 (2012) (holding the state's reliance on circumstantial evidence and credibility of witnesses negated a finding of harmless error). As in Gracely, the credibility of many of the witnesses called during this trial could raise a concern with the jury. As in Gracely, the state relied extensively on circumstantial evidence. The declarations by Frazier identifying his assailant are also of suspect value in a harmless error analysis.[7] Frazier had been intoxicated and "passed out" for many of the events that occurred during the early morning hours after he left Club Karma with appellant. The vehicle stopped at several locations and passengers changed. Frazier was observed during this time as either asleep or passed out. A jury could reasonably believe that Frazier was confused about the identity of his assailant and simply latched onto the one clear person in his head: appellant as the driver of the car.

The jury was faced with the question of accepting the credibility of Collins, Riley, and appellant or the credibility of Smith supported by the statements of Frazier, discussed in Argument 2, *infra*. In judging prejudice, for the evidence of guilty to be

> "overwhelming" such that it categorically precludes a finding of prejudice—as we found it did in *Rosemond* and *Harris*—the evidence must include something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the *Strickland* standard of "a reasonable probability ... the factfinder would have had a reasonable doubt" cannot possibly be met.

Smalls v. State, 422 S.C. 174, 191, 810 S.E.2d 836, 845 (2018). Here, there is no conclusive physical evidence, and guilt depends on the jury's judgment on the credibility of the two competing versions of Frazier's death: either appellant robbed and shot him, or Smith did.

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[7] Should this Court determine Frazier's statements were inadmissible, they would play no role in the harmless error analysis. *See* Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018).

The prejudicial admission of State's Exhibit 42 in this context was erroneous and warrants reversal and remanding of this matter to the Court of General Sessions for a new trial.

2. The trial court erred in admitting recorded statements from Frazier, over objection of counsel, as dying declarations when there was no evidence that Frazier was motivated by an extreme and powerful belief that his death was imminent.

A. How the matter was raised at trial.

Counsel for appellant objected to the introduction of body camera videos that recorded statements by Frazier that he had been robbed, shot, and that "hustle man" was the perpetrator. Tr. 116, ll. 1 – 24; State's Ex. 13 & 14. The basis for the objection was based upon a lack of knowledge that death was imminent and the added impact of marijuana and alcohol in Frazier's system. Tr. 116, ll. 1 – 24; 119, ll. 1 – 21. The solicitor indicated the medical examiner would explain the lack of impact of the alcohol and marijuana during trial. Tr. 119, l. 22 – 120, l. l. 3.[8]

The trial court ruled that Frazier's statements to police were admissible dying declarations. Initially, the trial court ruled the matter was for the jury to decide.

> THE COURT: Well, I'm going to let the jury determine from the evidence in the case what inferences can be made. I think it's proper for me to give it to the jury or allow them to use it.
> And if the jury believes it or not, that's up to them to believe.
> But I think you can infer the decedent's state of mind from the facts and circumstances surrounding the case. And the fact he was shot, the fact that he couldn't breath, I think it admissible.

Tr. 118, 13 – 23.

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[8] THE COURT: I appreciate knowing that. I'm assuming Dr. Batalis will testify that he wasn't in a drunken stupor, and whether or not he could make this statement and could understand the significance of it. Tr. 120, ll. 9 – 13.

After a request for clarification, the trial court ruled specifically as the gatekeeper regarding the admission of the evidence.

> MR. JOHNSON: Just one clarification. Your Honor, it's my understanding that that determination is a determination made by the Court, not by the jury.
>
> THE COURT: Well, I think there are facts and circumstances from which I could determine as a fact finder that he believed his death was impending.

Tr. 123, ll. 17 – 24.

B. How the trial court erred.

While not directly cited during the discussion, this matter is governed by Rule 804(b)(2), SCRE. "In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death." Under South Carolina law, a "declarant does not have to express, in direct terms, his awareness of his condition for his statement to be admissible as a dying declaration. The necessary state of mind can be inferred from the facts and circumstances surrounding the declaration." State v. McHoney, 344 S.C. 85, 93, 544 S.E.2d 30, 33 (2001). "A belief in imminent death is an extreme and powerful belief" and carries with it a level of trustworthiness that is the basis for the hearsay exception. State v. Brown, 421 S.C. 337, 344, 806 S.E.2d 724, 728 (Ct. App. 2017).

Contrasting the present matter with McHoney and Brown provides guidance on the trial court's error. In McHoney, the victim was stabbed seven times in her abdomen and had a four inch long incised wound across her neck and shook her head in the negative when told she would be alright. Our Supreme Court noted "the length of time the declarant lives after making the

dying declaration is immaterial. The focus is on the declarant's state of mind when the statement is made, not on the eventual outcome of the declarant's injuries." McHoney, 344 S.C. at, 93, 544 S.E.2d at 34. Our Supreme Court emphasized that the declarant shook her head when told she would be fine as supporting the declarant's state of mind.

By contrast, in State v. Brown, 421 S.C. 337, 806 S.E.2d 724, 729 (Ct. App. 2017) neither the medical records nor the other evidence demonstrated that the victim was aware of his imminent death. This Court noted the contrast with McHoney, particularly related to the indications from the declarant that they did not expect to survive.

> The case at bar is also in contrast to the facts in McHoney wherein the victim sustained a severe cut across her neck and seven stab wounds to her abdomen. 344 S.C. at 89-90, 544 S.E.2d at 32. After the attack, the victim was conscious but could not speak, and identified her attacker by nodding to indicate letters of her attacker's name as a nurse recited the alphabet. Id. at 90, 544 S.E.2d at 32. Even though the nurse sought to reassure the victim she would be alright, the victim 'shook her head no.'

Brown, 421 S.C. at 346, 806 S.E.2d at 729.

The facts before the trial court were more closely aligned with Brown than McHoney. Frazier gave no indication during the recorded interviews that he felt death was imminent. While he did complain about difficulty in breathing and thirst, he made no comment or indication that he believed he was facing imminent death. When combined with his intoxication during the prior evening during which he was ill, and still had alcohol in his system at his death (along with marijuana), the lower court erred in finding the declarations by Frazier were made under a "belief in imminent death" that was "an extreme and powerful belief" as required for the admission of the statements. Brown, 421 S.C. at 344, 806 S.E.2d at 728.

The impact of marijuana and alcohol would be an additional factor weighing against a determination that Frazier was under a powerful belief of his imminent death. While the solicitor

indicated the pathologist would explain the impact of these substances on Frazier, and the trial court relied upon that explanation regarding Frazier's ability understand the significance of his physical state (Tr. 120, ll. 9 – 13), the pathologist provided no such guidance:

> In short, I can't predict exactly how much this would have affected him. You know, .06 is a relatively low amount of alcohol. You know, for reference, to drive, you have to be beneath a .08, so it was a relatively low amount of alcohol. With that being said, I don't know exactly what affect, if any, that would have had on his behavior.

Tr. 385, l. 21 – 386, l. 3.

The pathologist gave a similar response as to the impact of the other substances found in Frazier's blood:

> So, in this case, alcohol was detected, in addition to caffeine, cotinine, which is a nicotine metabolite. And then the last thing that was detected was Delta 9 THC, which is the active drug in marijuana, and then a metabolite of that Delta 9 carboxy THC.
> Again, in this case, the concentrations were relatively low. But, again, it's very tough to say.
>
> What we can say is that he did have the active component compound of marijuana in his system when he died. We know it's a relatively low concentration, but I can't say what affect it would have had, if any, on his behavior.

Tr. 386, l. 18 – 387, l. 5.

3. The trial court erred in allowing the state to recall its lead investigator to admit prior inconsistent statements of one of the state's witnesses when that witness was not provided the opportunity to admit, deny, or explain the alleged prior inconsistent statement.

A. How the matter was addressed at trial.

The state sought to recall detective Ethan Rogers to impeach Reginald Jenkins on a prior inconsistent statement:

> Your Honor, so, the State has decided after we play the jail call to recall the lead detective Ethan Rogers since Reggie's testimony yesterday here in court was substantially different from the testimony that he gave him during the course of the investigation; particularly one section that he changed dramatically, which was, originally, he reported that he had gotten to the house, he got in his car, was getting ready to leave, he called over to the defendant and Smith and the victim, said, *Where you-all going*? And the defendant said, *We're going to his mama's house*, and he left.
> So he left all three individuals in the car –

Tr. 397, l. 16 398, l. 3 (emphasis in original).

Trial counsel noted an objection.

> MR. JOHNSON: Your Honor, I would object to that. The State had their witness on. He testified. He has been released. That was the State's own witness they put up. So they're putting another detective, the same detective that's already testifies, to then impeach their own witness. And once again --[9]

Tr. 398, ll. 10 - 16.

At this point, the trial court interjected and the propriety of introducing a prior inconsistent statement was addressed.

> THE COURT: Well, it came out that he had given two inconsistent statements originally. Because it came out this is talking about Reginald, right?
>
> MS. CAMPBELL: That's correct.
>
> THE COURT: Yeah, he had originally testified, the first one he gave, he knew nothing about nothing, right? And then it changed. I think she can recall him. I think she can recall him.

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9 While the beginning of counsel for appellant's argument centered on impeaching one's own witness, the remaining discussion centered on the propriety of extrinsic evidence of the alleged prior inconsistent statement.

> MR. JOHNSON: Just for clarification, but is she -- is he then allowed to bring up new evidence that he didn't originally testify to before?
>
> MS. CAMPBELL: No, that is up and down. That is zero focused. When I bring him back, that's the only reason I'm putting him back up, is to counter that testimony that was given here yesterday. Again, based upon the jail phone call, that I learned about last night.
>
> THE COURT: And Rodgers correct me if I'm wrong, Rodgers testified before Reginald, correct?
>
> MS. CAMPBELL: Absolutely.
>
> THE COURT: Okay, I just wanted to make sure.
>
> MS. CAMPBELL: Yeah.
>
> THE COURT: Okay. Yeah, he can go ahead and testify. That's fine.

Tr. 398, l. 17 – 399, l. 20.

The state then had Rogers relate the "inconsistent" version of events in which appellant, Smith, and Frazier were together in the vehicle and heading to another location close in time to the shooting.

> So while I was interviewing Reginald Jenkins, the information that he provided to me after being read Miranda was that, once they returned to the defendant's house, he exits the vehicle, went with the defendant, and then asked him, Hey, where are you guys going? The defendant replied to him, We're going to Daevon's mother's house, and they left. He never indicated, whatsoever, the defendant exited the vehicle along with him.

Tr. 405, ll. 12 – 20.

B. How the trial court erred.

The trial court erred in allowing extrinsic evidence of the prior inconsistent statement when the state failed to lay the proper foundation while their witness, Jenkins, was on the stand. As counsel for appellant noted, Jenkins had fully testified and been released. At no point during his testimony did the state lay a foundation for this inconsistent statement.[10]

> It is mandatory that a witness be permitted to admit, deny, or explain a prior inconsistent statement. Under Rule 613(b), extrinsic evidence of the statement is not admissible unless the witness is advised of the substance of the statement, the time and place it was allegedly made, and the person to whom it was made. Rule 613(b) explicates the procedure for impeachment by a prior inconsistent statement and requires laying the foundation.

State v. McLeod, 362 S.C. 73, 81, 606 S.E.2d 215, 219 (Ct. App. 2004).

Here, Jenkins was never confronted about any inconsistent statements by the state related to the trial testimony the state elicited. In fact, the solicitor was content with the testimony Jenkins provided:

> Q Okay. Well, all right. Thank you for that, but I'm going to move on. So you got out up in Estill of Tyree's car and you hopped in the defendant's car, right?
>
> A Correct.
>
> Q Why are you hopping in his car at that point?
>
> A I lost the keys in the club.
>
> Q Okay. And the victim, Samquan, is in the back seat with you; is that right?
>
> A Yes, ma'am.

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10 The state's implication that the jail phone call played some role in counsel's failure to lay the proper foundation is without merit. The alleged inconsistent statement was well known to counsel for the state prior to the start of trial and a lengthy transcript of the Jenkins interview had been provided by the state during discovery. Tr. 350, l. 16 – 351, l. 10.

Q And do you remember where you got out of the defendant's car those early morning hours?

A I believe it right around the corner from his house actually at PI's.

Q At PI's house?

A Yeah.

Q All right. Did you get a call later on September 30th asking you to come pick somebody up?

A No, ma'am.

Q You don't recall that?

A Huh-uh.

Tr. 298, ll. 4 – 24.

The trial court erred in admitting the prior inconsistent statement as the state failed to properly lay the foundation. This error was compounded by the improper admission of the recorded jail call, discussed in Argument 1, *supra*, as the predicate for the admission of the prior inconsistent statement.

4. The trial court erred in sentencing appellant under S.C. Code § 16-23-490 (2010) in violation of the statutory prohibition on such a sentence following a life without parole sentence.

A. Discussion.

The trial court sentenced appellant to an additional five year sentence under S.C. Code § 16-23-490 (2010) despite the statute's clear limitation that the "five-year sentence does not apply in cases where the death penalty or a life sentence without parole is imposed for the violent

crime." Appellant acknowledges that trial counsel did not object to the improper sentence. While this omission by trial counsel raises an issue preservation concern for this Court's review, appellant would argue that, with the consent of the state, this matter may be addressed on direct appeal. *See* State v. Plumer, 439 S.C. 346, 351, 887 S.E.2d 134, 137 (2023) (holding that an illegal sentence may be addressed on direct even in absence of an objection at sentencing).

The sentence here mirrors the South Carolina Supreme Court's decision in Plumer. As the Supreme Court noted in Plumer:

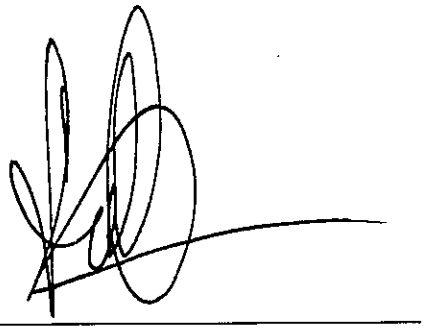
> In such cases, it is inefficient and a waste of judicial resources to delay the inevitable by requiring the appellant to file a post-conviction relief action or petition for a writ of habeas corpus. Therefore, we modify Johnston and hold that when a trial court imposes what the State concedes is an illegal sentence, the appellate court may correct that sentence on direct appeal or remand the issue to the trial court even if the defendant did not object to the sentence at trial and even if there is no real threat of incarceration beyond the limits of a legal sentence.

Id, 439 S.C. at 351, 887 S.E.2d at 137.

This Court should vacate appellant's sentence under S.C. Code § 16-23-490 (2010).

CONCLUSION

Based upon the foregoing arguments, this Court should reverse appellant's convictions and remand this matter to the Court of General Sessions for Jasper County for a new trial.



Gary H Johnson
Appellate Defender

ATTORNEY FOR APPELLANT

This 11th day of July, 2025.