RECEIVED
Aug 26 2025
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County

Honorable Kristi F. Curtis, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

FRANCISCO CORTES,

APPELLANT

APPELLATE CASE NO. 2024-002210

INITIAL BRIEF OF APPELLANT

KATHRINE H. HUDGINS
Senior Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS.......i

TABLE OF AUTHORITIES.......ii

STATEMENT OF ISSUES ON APPEAL.......1

STATEMENT OF THE CASE.......2

STATEMENT OF FACTS.......3

ARGUMENTS

1. **The trial judge erred in admitting four recorded jail calls and one jail video visit between Appellant and his girlfriend.......6**

   Standard of Review.......6
   Discussion.......6
   Fourth Amendment under State and Federal Law.......8
   First Amendment.......13
   Rules 402, 403.......14

2. **The trial judge erred in admitting videos, pursuant to Rule 613(b), SCRE, from an officer's body camera that recorded the interview of Appellant's girlfriend while she was in the hospital waiting to be treated for a gunshot wound when at trial the State failed to first advise the girlfriend of the substance of the statements she made during the interview.......23**

   Standard of Review.......23
   Discussion.......23

CONCLUSION.......29

TABLE OF AUTHORITIES

Federal Cases

Abraham v. County of Greenville, 237 F.3d 386 (4th Cir.2001) 11

Adams v. Carlson, 352 F.Supp. 882 (E.D.Ill.) 14

Benzel v. Grammer, 869 F.2d 1105 (8th Cir.), cert. denied, 493 U.S. 895, 110 S.Ct. 244, 107 L.Ed.2d 194 (1989) 13

Blount v. Rizzi, 400 U.S. 410, 91 S.Ct. 423, 27 L.Ed.2d 498 (1971) 13

Brady v. United States, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970) 12

Brown v. Hartness, 485 F.2d 238 (8th Cir. 1973) 14

Bumper v. North Carolina, 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968) 10

Coffin v. Reichard, 143 F.2d 443 (6th Cir. 1944) 9

Coolidge v. New Hampshire, 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971) 9

Gates v. Collier, 349 F.Supp. 881 (N.D.Miss.1972), aff'd, 501 F.2d 1291 (5th Cir. 1974) 14

Grosshuesch v. Cramer, 377 S.C. 12, 659 S.E.2d 112 (2008) 12

Horton v. California, 496 U.S. 128, 110 S. Ct. 2301, 110 L. Ed. 2d 112 (1990) 9

Johnson v. Galli, 596 F.Supp. 135 (D.Nev.1984) 13

Johnson v. State of Cal., 207 F.3d 650 (9th Cir. 2000) 14

Lopez v. Reyes, 692 F.2d 15 (5th Cir.1982) 13

Milwaukee Social Democratic Publishing Co. v. Burleson, 255 U.S. 407, 41 S.Ct. 352, 65 L.Ed. 704 (1921) 13

Morgan v. LaVallee, 526 F.2d 221 (2d Cir.1975) 13, 14

Pell v. Procunier, 417 U.S. 817, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1974) 14

People v. Henry, 65 Cal.2d 842, 56 Cal.Rptr. 485, 423 P.2d 557 (1967) 10

Price v. Johnston, 334 U.S. 266, 68 S.Ct. 1049, 92 L.Ed. 1356 (1948) 9

Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973) 10

Segura v. Texas, 826 S.W.2d 178 (Tex.App.1992) 8

State v. Miller, 197 N.C.App. 78, 676 S.E.2d 546 (2009) 22

Strandberg v. City of Helena, 791 F.2d 744 (9th Cir.1986) 13, 14

Thornburgh v. Abbott, 490 U.S. 401, 109 S.Ct. 1874, 104 L.Ed.2d 459 (1989) 13

Turner v. Safley, 482 U.S. 78, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987) 13

United States v. Amen, 831 F.2d 373 (2d Cir.1987) 11

United States v. Clark, 651 F. Supp. 76 (M.D. Pa. 1986) 9

United States v. Feekes, 879 F.2d 1562 (7th Cir.1989) 11

United States v. Footman, 215 F.3d 145 (1st Cir.2000) 11

United States v. Hammond, 286 F.3d 189 (4th Cir. 2002) 10, 11

United States v. Horr, 963 F.2d 1124 (8th Cir.1992) 11

United States v. Van Poyck, 77 F.3d 285 (9th Cir. 1996) 9, 11

United States v. Workman, 80 F.3d 688 (2d Cir.1996) 11

Washington v. Reno, 35 F.3d 1093 (6th Cir. 1994) 13

Wolff v. McDonnell, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974) 14

South Carolina Cases

State v. Austin, 306 S.C. 9, 409 S.E.2d 811 (Ct.App.1991) 8

State v. Barnes, 421 S.C. 47, 804 S.E.2d 301 (Ct. App. 2017) 27

State v. Bixby, 388 S.C. 528, 698 S.E.2d 572 (2010) 27

State v. Blalock, 357 S.C. 74, 591 S.E.2d 632 (Ct. App. 2003) 23, 26

State v. Brewer, 411 S.C. 401, 768 S.E.2d 656 (2015) 21, 22

State v. Brockmeyer, 406 S.C. 324, 751 S.E.2d 645 (2013) 6

State v. Carmack, 388 S.C. 190, 694 S.E.2d 224 (Ct. App. 2010) 26

State v. Collins, 409 S.C. 524, 763 S.E.2d 22 (2014) 17

State v. Easler, 327 S.C. 121, 489 S.E.2d 617 (1997) 8

State v. Edwards, 383 S.C. 66, 678 S.E.2d 405 (2009) 17

State v. Ellefson, 266 S.C. 494, 224 S.E.2d 666 (1976) .... *passim*

State v. Forrester, 343 S.C. 637, 541 S.E.2d 837 (2001) 8

State v. Hatcher, 392 S.C. 86, 708 S.E.2d 750 (2011) 6

State v. Lynn, 277 S.C. 222, 284 S.E.2d 786 (1981) 23

State v. McDowell, 266 S.C. 508, 224 S.E.2d 889 (1976) 17

State v. McLeod, 362 S.C. 73, 606 S.E.2d 215 (Ct. App. 2004) 26, 27

State v. Moses, 390 S.C. 502, 702 S.E.2d 395 (Ct. App. 2010) 27

State v. Pagan, 369 S.C. 201, 631 S.E.2d 262 (2006) 6

State v. Passio, 433 S.C. 666, 861 S.E.2d 785 (Ct. App. 2021), aff'd as modified, 440 S.C. 1, 889 S.E.2d 584 (2023) 16

State v. Sierra, 337 S.C. 368, 523 S.E.2d 187 (Ct.App.1999) 23, 26

State v. Sweat, 362 S.C. 117, 606 S.E.2d 508 (Ct. App. 2004) 17

State v. White, 437 S.C. 490, 879 S.E.2d 21 (Ct. App. 2022) 17

Statutes

18 U.S.C. § 2510 10

18 U.S.C. § 2511(1)(a) 11

18 U.S.C. §§ 2516, 2518 11

Rules

Rule 106, SCRE 5

Rule 401, SCRE 17

Rule 402, SCRE 6, 14, 15, 16

Rule 403, SCRE 6, 14, 15, 16

Rule 404, SCRE 6, 15

Rule 608, SCRE 17

Rule 613, SCRE 23, 25, 26, 27

Rule 801, SCRE 21, 25, 26

Constitutional Provisions

S.C. Const. art. I, § 10 .... 6, 7, 8

U.S. Const. amend. I 6, 7, 13, 14

U.S. Const. amend. IV 6, 7, 8, 9, 22

U.S. Const. amend. XIV 6, 13

STATEMENT OF ISSUES ON APPEAL

1. Did the trial judge err in admitting four recorded jail calls and one jail video chat between Appellant and his girlfriend?

2. Did the trial judge err in admitting videos, pursuant to Rule 613(b), SCRE, from an officer's body camera that recorded the interview of Appellant's girlfriend while she was in the hospital waiting to be treated for a gunshot wound when at trial the State failed to first advise the girlfriend of the substance of the statements she made during the interview?

STATEMENT OF THE CASE

In December of 2023, the Beaufort County Grand Jury indicted Appellant, Fracisco Cortes, for two counts of attempted murder, assault and battery of a high and aggravated nature [ABHAN], discharging a firearm into a dwelling, and possession of a weapon during the commission of a violent crime, indictments #2022-GS-07-00756 – 760, #2023-GS-07-01862. (Tr. p. **, indictments). On December 16, 2024, Appellant proceeded to jury trial before the Honorable Kristi F. Curtis. Courtney Gibbes and Taylor Diggs represented Appellant. Samantha Molina and Rachel DeAngelis prosecuted the case. The jury found Appellant guilty as charged. Judge Curtis sentenced Appellant to twenty-two (22) years for one count of attempted murder, twenty (20) years concurrent for the other count of attempted murder, ten (10) years concurrent for ABHAN, and five (5) years concurrent for each of the weapons charges. A timely notice of intent to appeal was served on December 20, 2024. This appeal follows.

STATEMENT OF FACTS

On July 5, 2021, the Beaufort County Sheriff's Office received 911 calls about shots fired at The Oaks Apartments on Hilton Head Island. The 911 calls were admitted in evidence without objection as State's exhibits #1, and #2. (Tr. p. 99, lines 3-11). One of the 911 calls was from a neighbor. The other 911 call was from Olivia Erskine who reported that Appellant accidentally shot her. When officers arrived at The Oaks they found Olivia had been shot in the wrist. The video from the officer's body cam was admitted in evidence without objection as State's exhibit #30. (Tr. p. 171, lines 1-17). Olivia again told officers that Appellant accidentally shot her.

Sergeant Scheemaker with the Beaufort County Sheriff's office testified that he went to apartment #4 at the Oaks where he saw a Hispanic man standing near the front door. (Tr. p. 121, line 23 – p. 122, lines 1-7). The Hispanic male was detained. The officer testified that a male and a female who only spoke Chinese also came out of the apartment. (Tr. p. 122, line 10 – p. 123, lines 1-3). Once inside the apartment the officer found another individual who had been shot in the leg. (Tr. p. 122, lines 13-17).

Olivia testified at trial that she did not remember much from the night she was shot. (Tr. p. 110, lines 10-22). She remembered that the other guy had a knife and locked the door so she could not get out. (Tr. p. 114, lines 4-10). Olivia agreed that she told the investigator who interviewed her at the hospital that the other guy had a knife. (Tr. p. 115, lines 3-6). She admitted that earlier she told a defense investigator that Appellant was trying to help her get out because they guy was being confrontational and had a knife. (Tr. p. 114, line 11 – p. 115, lines 1-25). Olivia agreed that she was in contact with Appellant wanting help to get out of the house because she was scared, and the man was threatening. (Tr .p. 115, line 16 – p. 116, lines 1-11).

She testified that the other man became aggressive, grabbed a knife, and would not let her leave. (Tr. p. 116, lines 19-24).

The Hispanic male who Sergeant Scheemaker detained, Faquin Hernandez Cruz, testified at trial with an interpreter. (Tr. p. 158, line 15 – p. 159, lines 1-2). Cruz testified that on July 5, 2021, he was living at The Oaks with an Asian couple and Mr. Jack. (Tr. p. 159, lines 6-15). According to Cruz he arranged with a person on Facebook to bring a female to the apartment to have sex. (Tr. p. 161, lines 1-25). Cruz testified that a workmate brought the female to the apartment. (Tr. p. 161. Lines 8-11). According to Cruz he and the female had a disagreement over money, she made a phone call, and then there was a knock on the front door. (Tr. p. 162, lines 4-10). Cruz testified that when he opened the door, he saw a man with a gun so he closed and locked the door. (Tr. p. 162, lines 10-12). Cruz claimed shots were fired at this point and he ran into another room. (Tr. p. 162, lines 13-15). Cruz did not remember picking up a knife. (Tr. p. 163, lines 14-16). According to Cruz the female left when the shots stopped but she was shot as she was leaving. (Tr. p. 162, lines 16-22).

The individual Sergeant Scheemaker found who had been shot in the leg, Yao Ming Zhang, testified at trial with an interpreter. (Tr. p. 153, lines 2-23). Zhang testified that his English name was Jack. (Tr. p. 153, lines 17-18). Zhang was asleep in his room when he heard a male and a female screaming and then he heard gunfire. (Tr. p. 155, lines 3-19). Zhang testified he was shot in the knee. (Tr. p. 155, lines 22-25).

Sergeant Zach Cushman, an investigator with the Beaufort County Sheriff's Office, testified he went to Savannah Memorial Health to interview Olivia and Zhang. (Tr. p. 182, line 8 – p. 183, lines 1-14). The bodycam video of two parts of his interview with Olivia were admitted over objection as State's exhibits #31, #32. (Tr. p. 184, lines 12-24). Counsel for

Appellant asked that the State be required to admit the third part of the interview pursuant to Rule 106, SCRE. (Tr. p. 177, line 20 – pp. 178 – 181, lines 1-3). The judge declined to require the State to admit the third part of the interview. (Tr. p. 181, lines 4-9). The Defense did not move to have it admitted. The admitted two parts of the interview were played for the jury. (Tr. p. 184, lines 3-24).

Lieutenant Edwin Aiken from the Beaufort County Detention Center testified that all calls and video chats from the detention center were recorded unless privileged. (Tr. p. 263, lines 1-18). Four phone calls and one video visit between Appellant and Olivia were admitted in evidence as State's exhibits #92-#96. (Tr. p. 263, line 22 – p. 264, lines 1-14). The calls and video visit were played for the jury. (Tr. p. 265, line 1 – p. 266, lines 1-11).

ARGUMENTS

1. **The trial judge erred in admitting four recorded jail calls and one jail video visit between Appellant and his girlfriend.**

Standard of Review

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).

Discussion

Prior to trial counsel for Appellant moved to exclude the four recorded jail phone calls and one recorded video visit between Appellant and his girlfriend, Olivia Erskine. (Tr. pp. 74 – 85). In support counsel submitted a written motion with attachments. (R. p. ** motion with attachments). In the motion counsel cited to the South Carolina Constitution Article 1, section 10, as well as the First, Fourth and Fourteenth Amendments to the United States Constitution. Counsel additionally cited State v. Ellefson, 266 S.C. 494, 224 S.E.2d 666 (1976). Counsel argued that the calls were accessed by the Solicitor's Office the week before trial. (Tr. p. 75, lines 15-24). The judge withheld her ruling until she had the opportunity to review the calls and review the Ellefson case. (Tr. p. 85. Lines 5-8).

Later in trial, after the judge reviewed the jail calls, she ruled the jail calls admissible with redactions. (Tr. p. 142, lines 9-18). Counsel argued the redacted calls should be excluded because any probative value was outweighed by the prejudice, noting Rules 402, 403, 404, SCRE. (Tr. p. 144, line 15 – p. 145, lines 1-19). Counsel attempted to limit the portions of the

jail calls admitted to those calls that were related to the case. (Tr. p. 145, lines 12-19; p. 147, line 12 – p. 148, lines 1-21). Counsel argued, "You know, I don't think I have an argument against with what he's telling her to say, her testimony or anything to do with the case. But I think everything else is extremely prejudicial and outweighs any probative value. I think it gets into character evidence." (Tr. p. 145, lines 3-7). Counsel specifically argued that nothing in the video visit should be admitted. (Tr. p. 145, lines 7-19). Counsel additionally argued ". . . there are some hearsay implications. . ." (Tr. p. 147, line 24).

The judge ruled stating, "I think where he talks about 'don't talk about it on here, I'll call you in a few minutes on a different account,' that is admissible. The stuff about how he is going to impregnate her when he gets out, that is admissible. The stuff about the tattoo. I'm excluding the stuff about allowing her to hook up with other guys to get money. I think that's highly prejudicial and has very little probative value in this case." (Tr. p. 150, lines 4-12). Counsel renewed the objection to the jail calls when the State moved to admit all five redacted phone calls. (Tr. p. 264, lines 8-10). The objection was noted and the phone calls, marked State's exhibits #92-96, were published for the jury. (Tr. p. 264, line 11 – p. 265, 266, lines 1-11). State's #94 is the video visit. (Tr. p. 265, lines 14-15).

The trial judge erred in admitting the jail phone calls and video visit. The jail calls and video visit should have been excluded as violative of Appellant's constitutional protections against unreasonable search and seizure and invasion of privacy. U.S. Const. amend. IV.; S.C. Const. art. 1 § 10. The monitoring of the calls additionally infringed on Appellant's First Amendment rights. Alternatively, the calls and video visit should have been further redacted to exclude hearsay and those portions where the probative value was substantially outweighed by the danger unfair prejudice pursuant to Rule 403, SCRE.

Fourth Amendment under State and Federal Law

The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, ..." U.S. Const. amend. IV. The South Carolina Constitution also prohibits unreasonable searches and seizures and additionally includes an express protection of the right to 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 (emphasis added).

In State v. Forrester, 343 S.C. 637, 643–44, 541 S.E.2d 837, 840 (2001), the South Carolina Supreme Court wrote:

> 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. Easler, 327 S.C. 121, 131 n. 13, 489 S.E.2d 617, 625 n. 13 (1997); see also State v. Austin, 306 S.C. 9, 409 S.E.2d 811 (Ct.App.1991). Therefore, state courts can develop state law to provide their citizens with a second layer of constitutional rights. Id. This relationship is often described as a recognition that the federal Constitution sets the floor for individual rights while the state constitution establishes the ceiling. See Segura v. Texas, 826 S.W.2d 178, 182 (Tex.App.1992). Thus, this Court can interpret the state protection against unreasonable searches and seizures in such a way as to provide greater protection than the federal Constitution.

In State v. Ellefson, 266 S.C. 494, 224 S.E.2d 666, (1976), the South Carolina Supreme Court reversed the conviction finding the admission of incriminating letters written by a pre-trial detainee and obtained by a detective not affiliated with the jail should have been excluded as a product of an illegal search and seizure. In Ellefson, the Court wrote:

> 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.' Price v. Johnston, 334 U.S. 266, 285, 68 S.Ct. 1049, 1060, 92 L.Ed. 1356 (1948). 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.' Coffin v. Reichard, 143 F.2d 443, 445 (6th Cir. 1944), Procunier v. Martinez, supra, Marshall concurring page 1816.

266 S.C. at 500, 224 S.E.2d at 669.

The jail calls and video visit in the present case are analogous to the letters in Ellefson. While federal courts have found no expectation of privacy in jail calls,[1] this Court should find that Appellant had, at least, a diminished but reasonable expectation of privacy in the jail calls and video visit at issue based on the heightened protection of privacy found in the South Carolina Constitution and the holding in Ellefson. Detention centers can have a legitimate interest in monitoring detainee phone calls for security purposes. This interest, however, should not extend to prosecutors conducting a fishing expedition of a defendant's phone calls, a week prior to trial, in the hopes of finding incriminating evidence. The search of the calls by the prosecutor in this case, without prior approval by a judge, was per se unreasonable. See Coolidge v. New Hampshire, 403 U.S. 443, 454–55, 91 S. Ct. 2022, 2032, 29 L. Ed. 2d 564 (1971), holding modified by Horton v. California, 496 U.S. 128, 110 S. Ct. 2301, 110 L. Ed. 2d 112 (1990) ("Thus 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

---

[1] United States v. Van Poyck, 77 F.3d 285, 290–91 (9th Cir. 1996); United States v. Clark, 651 F. Supp. 76, 81 (M.D. Pa. 1986)

exceptions.' The exceptions are 'jealously and carefully drawn,' and there must be 'a showing by those who seek exemption * * * that the exigencies of the situation made that course imperative.' '(T)he burden is on those seeking the exemption to show the need for it."). The State failed to show any exception to the warrant requirement, failed to show exigent circumstances, and failed to attempt to show the existence of probable cause to justify the search.

During the pre-trial hearing the prosecutor argued, "It's not under the law enforcement exception, it's under a consent exception. He consents to the recording and monitoring when he makes the phone call." (Tr. p. 80, lines 1-3). Consent was addressed in Ellefson where the pre-trial detainee signed a card when he was processed into the jail authorizing jail officials to read his mail. The Court wrote:

> If the State relies upon the consent to search, it has the burden of proving the voluntariness of the consent. Bumper v. North Carolina, 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968). The court thus cannot assume there was consent. People v. Henry, 65 Cal.2d 842, 56 Cal.Rptr. 485, 423 P.2d 557 (1967). For noncustodial searches, the current test is whether or not the consent was voluntary under the totality of the circumstances. Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). 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.

Ellefson, 266 S.C. at 502–03, 224 S.E.2d at 670. (n. 4 omitted).

In each of the four phone calls in the present case, State's exhibits #92, #93, #95, and #96, a recording can be heard stating, "This call will be recorded and is subject to monitoring at any time." The recording can not be heard on State's #94, the video visit, but the State redacted the beginning of that exhibit. (Tr. p. 143, lines 20 – 25). In United States v. Hammond, 286 F.3d 189 (4th Cir. 2002), the Fourth Circuit addressed a challenge to recordings of telephone calls the FBI obtained from the Bureau of Prison [BOP] by a subpoena as a violation of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 *et seq.* [Title III].

"Specifically, Hammond argued that in order to listen to the tapes, the FBI was required to obtain a judicial interception order pursuant to 18 U.S.C. §§ 2516 and 2518, which set out procedural requirements and safeguards greater than those involved in obtaining a standard subpoena." Hammond, 286 F.3d at 191.

The Fourth Circuit disagreed and wrote:

> Title III generally prohibits the unauthorized interception of "any wire, oral, or electronic communication." 18 U.S.C. § 2511(1)(a). It "protects an individual from all forms of wiretapping except when the statute specifically provides otherwise." Abraham v. County of Greenville, 237 F.3d 386, 389 (4th Cir.2001). Although the argument has been made that Title III was not intended by Congress to apply to prisons, it is well accepted that its protections do apply to that context. See, *e.g.*, United States v. Van Poyck, 77 F.3d 285, 291 (9th Cir.1996); United States v. Feekes, 879 F.2d 1562, 1565 (7th Cir.1989); United States v. Amen, 831 F.2d 373, 378 (2d Cir.1987). Therefore, the tapes were properly used by the FBI only if (1) the initial interception by the BOP was lawful pursuant to an exception to the general injunction prohibiting use of wiretaps, and (2) the FBI's subsequent acquisition/use of the tapes was lawful.

Hammond, 286 F.3d at 192.

In determining if the initial interception by the BOP was lawful, the Hammond court found that both the "law enforcement" exception and the "consent" exception rendered the recording by the BOP lawful. As to consent, the court wrote, "We conclude that the 'consent' exception applies to prison inmates, such as Hammond, required to permit monitoring as a condition of using prison telephones, joining other circuits which have found the exception to apply under very similar circumstances. See United States v. Footman, 215 F.3d 145, 154–56 (1st Cir.2000); Van Poyck, 77 F.3d at 292; United States v. Workman, 80 F.3d 688, 693 (2d Cir.1996); United States v. Horr, 963 F.2d 1124, 1126 (8th Cir.1992)." Hammond, 286 F.3d at 192.

The present case is distinguished from Hammond. The challenge in Hammond was based on Title III requiring a judicial interception order pursuant to 18 U.S.C. §§ 2516 and 2518

rather than a subpoena. The consent exception is specifically noted in Title III. "It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception." 18 U.S.C. § 2511(2)(c). The challenge in the present case was not based on Tile III. Instead, the challenge in the present case was based, in part, on the Fourth Amendment of the State and Federal Constitutions with the heightened protection of privacy found in the South Carolina Constitution. While consent found in Hammond and other federal cases may be an exception under Title III, consent should not be sufficient to waive Fourth Amendments protections against unreasonable searches and seizures and unreasonable invasions of privacy under the South Carolina Constitution. See Ellefson.

Waiver of the South Carolina constitutional right against unreasonable invasions of privacy requires more than the consent exception contained in Title III. The recording prior to the jail calls in the present case is not sufficient for consent under the South Carolina Constitution. The recording is not sufficient as a waiver of constitutional rights. "Courts employ a high bar when judging the waiver of constitutional rights. See Brady v. United States, 397 U.S. 742, 748, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970) (noting that "[w]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.")." Grosshuesch v. Cramer, 377 S.C. 12, 24, 659 S.E.2d 112, 118 (2008).

First Amendment

In the written motion to suppress the jail calls Appellant cites Ellefson and argues that the jail phone calls should be suppressed because they were obtained in violation of Appellant's First Amendment rights. (R. p. **Motion). In State v. Ellefson, 266 S.C. 494, 501, 224 S.E.2d 666, 670 (1976), the South Carolina Supreme Court wrote:

> Additionally, the search impinged upon the appellant's First Amendment right, as incorporated by the Fourteenth Amendment, to be able to communicate without the uninvited ears and eyes of the government. As Mr. Justice Holmes observed over a half century ago, 'the use of the mails is almost as much a part of free speech as the right to use our tongues . . .' Milwaukee Social Democratic Publishing Co. v. Burleson, 255 U.S. 407, 437, 41 S.Ct. 352, 363, 65 L.Ed. 704 (1921) dissenting opinion quoted with approval in Blount v. Rizzi, 400 U.S. 410, 416, 91 S.Ct. 423, 428, 27 L.Ed.2d 498 (1971).

As discussed above, the jail calls and video visit in the present case are analogous to the letters in Ellefson. Appellant had a First Amendment right to call and visit with friends without the uninvited ears and eyes of the prosecutor. In Washington v. Reno, 35 F.3d 1093, 1099–100 (6th Cir. 1994), the Sixth Circuit Court of Appeals wrote:

> The Supreme Court has recognized that " '[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution,' Turner v. Safley, 482 U.S. [78] at 84 [107 S.Ct. 2254, 96 L.Ed.2d 64 (1987)] ..., nor do they bar free citizens from exercising their own constitutional rights by reaching out to those on the 'inside,' id., at 94–99 [107 S.Ct. at 2265–67]...." Thornburgh v. Abbott, 490 U.S. 401, 407, 109 S.Ct. 1874, 1878, 104 L.Ed.2d 459 (1989). In fact, federal court opinions have previously held that persons incarcerated in penal institutions retain their First Amendment rights to communicate with family and friends, Morgan v. LaVallee, 526 F.2d 221, 225 (2d Cir.1975), and have recognized that "there is no legitimate governmental purpose to be attained by not allowing reasonable access to the telephone, and ... such use is protected by the First Amendment." Johnson v. Galli, 596 F.Supp. 135, 138 (D.Nev.1984).
>
> Nevertheless, an inmate "has no right to unlimited telephone use." Benzel v. Grammer, 869 F.2d 1105, 1108 (8th Cir.), cert. denied, 493 U.S. 895, 110 S.Ct. 244, 107 L.Ed.2d 194 (1989), citing Lopez v. Reyes, 692 F.2d 15, 17 (5th Cir.1982). Instead, a prisoner's right to telephone access is "subject to rational limitations in the face of legitimate security interests of the penal institution." Strandberg v. City of Helena, 791 F.2d 744, 747 (9th Cir.1986).

See also Johnson v. State of Cal., 207 F.3d 650, 656 (9th Cir. 2000) (Although prisoners have a First Amendment right to telephone access, this right is subject to reasonable limitations arising from the legitimate penological and administrative interests of the prison system. See Strandberg v. City of Helena, 791 F.2d 744, 747 (9th Cir.1986).)

In Morgan v. LaVallee, 526 F.2d 221, 225 (2d Cir. 1975), the Second Circuit Court of Appeals wrote:

> A prison inmate's rights to communicate with family and friends are essentially First Amendment rights subject to s 1983 protection, Corby v. Conboy, supra; see Procunier v. Martinez, supra, and may not be infringed without good cause. Collins v. Schoonfield, supra. See also Adams v. Carlson, 352 F.Supp. 882 (E.D.Ill.), rev'd in parts not here relevant, 488 F.2d 619 (7th Cir. 1973); Gates v. Collier, 349 F.Supp. 881, 896 (N.D.Miss.1972), aff'd, 501 F.2d 1291, 1313—14 (5th Cir. 1974); cf. Brown v. Hartness, 485 F.2d 238 (8th Cir. 1973) (restriction on mailing Christmas cards invalidated). Again, there must be a showing of a substantial governmental interest serving the legitimate and reasonable needs and exigencies of the institutional environment, Wolff v. McDonnell, 418 U.S. 539, 574—77, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974); Pell v. Procunier, 417 U.S. 817, 822, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1974), to warrant such limitations upon an individual inmate's rights to communicate.

Appellant's First Amendment rights were infringed by the prosecutor searching the jail calls in the hopes of finding incriminating evidence. The prosecutor's actions did not serve the legitimate and reasonable needs and exigencies of the jail. The State failed to show good cause for the violation.

Rules 402, 403

The jail calls and video visit with Appellant and Olivia Erskine should have been excluded in whole, as argued above. Alternatively, the jail calls and video visits should have been further redacted pursuant to Rules 402, 403, SCRE, and the rules against hearsay. After the judge ruled that the jail calls and video visit were admissible, with redactions, counsel for Appellant attempted to limit the portions of the jail calls. (Tr. p. 145, lines 12-19; p. 147, line 12

– p. 148, lines 1-21). Counsel argued, "You know, I don't think I have an argument against with what he's telling her to say, her testimony or anything to do with the case. But I think everything else is extremely prejudicial and outweighs any probative value. I think it gets into character evidence." (Tr. p. 145, lines 3-7). Counsel cited Rules 402, 403, 404, SCRE. (Tr. p. 145, lines 16-17.) Counsel specifically argued that nothing in the video visit, State's exhibit #94, should be admitted. (Tr. p. 145, lines 7-19).

The State argued the additional portions of the jail calls and video visit showed evidence of bias on the part of Olivia Erskine and was impeaching of her. (Tr. p. 145, line 20 – p. 146, lines 1-18). The State additionally argued that portions went to Appellant's malice and consciousness of guilt. (Tr. p. 146, lines 18-19). Counsel for Appellant noted:

> And then, Judge, just briefly. I do believe the fact that the jury is gonna hear that they are talking and having conversations is enough to show that they have a relationship. Because they're talking on jail phones to each other. And also, you know, the manipulation aspect that the Solicitor wants to get out can be accomplished by putting in the parts were he's talking about telling her what to say, not going to the Solicitor and stuff, that's relevant to this case. I think that accomplishes all of that. I think everything else is extra. Putting money on the books, that's not common scheme or plan. That's just, you know, put money on my books. I think -- and, you know, there are some hearsay implications I think that she says.

(Tr. p. 147, lines 12-2\43).

The judge ruled stating:

> I don't think anything pertaining to people owing him money would be relevant. Everything the State just talked about redacting as far as drug use, being in jail, getting a new attorney, bond reduction, previous incidents, how long he's been there, court dates, again, stuff about people owing him money or about her getting money for him by some illicit means, I do think – I'm gonna allow in some amount of general chatter between them because I do think what their relationship is relevant given her testimony that they have no relationship. In the video, I don't recall a whole lot that was relevant to her testimony except he does say something to the effect don't talk about this – if I' remembering correctly – don't talk about this here on the call, do it later on a separate account.

(Tr, p. 148, line 24 – p. 149, lines 1-13).

The prosecutor then discussed the video visit where Appellant and Olivia talk about "putting money on Appellant's books," Appellant instructing Olivia not to give his sister money, Olivia's new hair color and tattoo, going on a date, sex, the fact that the guy is bitter and if he is gone there should be no case. (Tr. p. 149, lines 14-25). The State additionally argued that some of the video visit was necessary to connect Appellant to the jail call made on somebody else's account.

The judge further ruled, "I think where he talks about 'don't talk about it on here, I'll call you in a few minutes on a different account,' that is admissible. The stuff about how he is going to impregnate her when he gets out, that is admissible. The stuff about the tattoo. I'm excluding the stuff about allowing her to hook up with other guys to get money. I think that's highly prejudicial and has very little probative value in this case." (Tr. p. 150, lines 4-12). The trial judge erred. The portions of the jail calls admitted in evidence should have been further limited, as requested, to those portions that met a hearsay exception and met the standards of Rule 402, 403, SCRE.

Rule 402, SCRE provides, "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina. Evidence which is not relevant is not admissible." In State v. Passio, 433 S.C. 666, 678, 861 S.E.2d 785, 791 (Ct. App. 2021), aff'd as modified, 440 S.C. 1, 889 S.E.2d 584 (2023), the South Carolina Court of Appeals wrote:

> For evidence to be admissible, it must be relevant. Rule 402, SCRE. " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less

> probable than it would be without the evidence." Rule 401, SCRE. "Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears, and it is not required that the inference sought should necessarily follow from the fact proved." State v. Sweat, 362 S.C. 117, 126-27, 606 S.E.2d 508, 513 (Ct. App. 2004). Evidence showing a witness's bias is relevant impeachment evidence. *See* Rule 608(c), SCRE ("Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced.").

Rule 403, SCRE provides, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." In State v. White, 437 S.C. 490, 496, 879 S.E.2d 21, 24 (Ct. App. 2022), the South Carolina Court of Appeals wrote:

> Although evidence may be relevant, the trial court, as the gatekeeper of evidence, must exercise discretion and exclude such evidence if its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE; State v. Edwards, 383 S.C. 66, 73, 678 S.E.2d 405, 408–09 (2009) ("[T]rial [courts] serve[ ] a critical gatekeeping role, under Rule 403, SCRE, and otherwise, in determining the admissibility of evidence."). "[T]he standard is not simply whether the evidence is prejudicial; rather, the standard under Rule 403, SCRE is whether there is a danger of *unfair* prejudice that *substantially* outweighs the probative value of the evidence." State v. Collins, 409 S.C. 524, 536, 763 S.E.2d 22, 28 (2014). "As a general rule, any guilty act, conduct, or statements on the part of the accused are admissible as some evidence of consciousness of guilt." State v. McDowell, 266 S.C. 508, 515, 224 S.E.2d 889, 892 (1976).

Only two of the four jail phone calls should have been admitted, State's exhibits #93 and #95. As to State's #93, trial counsel told the judge, "You know, I don't think I have an argument against with what he's telling her to say, her testimony or anything to do with the case." (Tr. p. 145, lines 3-5). State's #95 is a phone call using another inmate's name, Gene Simmons, and account. The other two jail phone calls and the video visit, State's exhibits #92, #94, and #96,

however, should have been excluded because any possible probative value was substantially outweighed by the danger of unfair prejudice.

The conversation between Appellant and Olivia in the jail call admitted as State's exhibit #92 is irrelevant, contained inadmissible hearsay and contained nothing probative. In the call Olivia told Appellant she gave his sister twenty-five dollars to "put on his books." Appellant said that he had been trying to call but she was not picking up the phone. Olivia apologized. Olivia talked about living in Beaufort. Appellant told Olivia he was "going to put a baby inside her" when he gets out. Olivia told Appellant that her mom told her that the Chinese man left the State and then they discussed how the State probably picked up the case. Appellant told Olivia if he calls her on someone else's account, she should pick it up.

The conversation is irrelevant because it fails to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Any possible probative value in the hearsay conversation is substantially outweighed by the danger of unfair prejudice. Any possible bias the State seeks to show on the part of Olivia is demonstrated in the two jail phone calls that are not challenged, State's exhibits #93, #95. The State failed to lay the proper foundation for use as impeachment. The State shows Appellant calls Olivia using another account with the admission of State's exhibit #95, the jail call using another inmate's account. "Putting money on the books" is included in State's exhibit #93. As correctly noted by counsel, "You know, some of these conversations don't put him [Appellant] in a good light and it has nothing to do with her testimony in this case. (Tr. p. 145, lines 7-9). The conversation shows Appellant in a prejudicial light in front of the jury, especially the comment that he was going to put a baby inside of her. The conversation lacks probative value. State's exhibit #92 should have been excluded.

State's #94 is the video visit. Appellant and Olivia discussed her blonde hair color, she showed him her tattoo, they continued to discuss "putting money on his books," Appellant instructed Olivia not to give his sister money, Olivia talked about getting her license and a car, and they talked about her nails. Olivia talked about the man involved being bitter and leaving the State. Appellant told Olivia not to talk about his case. Appellant stated. "If he's gone there should be no case." They talked about going on a date. They talked about a threesome. They talked about sex. Olivia talked about her public defender. The two talked about Olivia's mother. Appellant talked about impregnating Olivia. They talked about the solicitor. Appellant told Olivia he will talk to her on somebody else's account.

Like State's exhibit #92, the conversation between Appellant and Olivia in the video visit admitted as State's exhibit #94 is irrelevant, contains inadmissible hearsay and contains nothing probative. None of the conversation makes the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Any possible probative value in the hearsay conversation is substantially outweighed by the danger of unfair prejudice. While the judge excluded portions, the judge specifically admitted the conversation about going on a date, the tattoo and Appellant impregnating Olivia. (Tr. p. 150, lines 6-9). The trial judge erred. Any possible probative value about the date, the tattoo, and impregnating, (having sex), is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE. The video visit portrays Appellant in a prejudicial way in front of the jury, especially the conversation about sex and a threesome, without serving any probative purpose.

Again, as argued with regard to State's #92, any possible bias the State seeks to show on the part of Olivia is demonstrated in the two jail phone calls that are not challenged, State's exhibits #93, #95. The State failed to lay the proper foundation for use as impeachment. The

State shows Appellant calls Olivia using another account with the admission of State's exhibit #95, the jail call using another inmate's account. Any possible malice or consciousness of guilt is demonstrated in the two jail phone calls that are not challenged, State's exhibits #93, #95, where Appellant is telling Olivia what to say and to not appear in court. "Putting money on the books" is included in State's exhibit #93. State's exhibit #94 should have been excluded.

The conversation between Appellant and Olivia in the jail call admitted as State's exhibit #96 contains inadmissible prejudicial hearsay. Specifically, the jury hears Olivia tell Appellant he was jealous of the "dude" he shot. The remainder of the conversation is irrelevant. None of the remaining conversation makes the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Any possible probative value in the hearsay conversation is substantially outweighed by the danger of unfair prejudice.

In the call Olivia talked about her hair and nails. Appellant asked who she is looking pretty for. They talked about her "needs." Olivia told Appellant she hopes that when he gets out he does not get crazy and possessive. Appellant told her he is not the jealous type. Olivia disagreed. Olivia told Appellant he was jealous of the "dude" he shot. Appellant told her not to talk about it on the phone. Olivia asked when Appellant gets out of jail if he will rub her feet at night. Appellant answered that as long as she does not act crazy with all that arguing. Appellant stated that he does not need drama in his life. Olivia said that she is not drama. Appellant disagreed. Olivia said that she was only twenty-one, drinking and not working. They talked about what Appellant ate that day and the soups he ordered. Olivia told Appellant not to get fat in jail. Appellant told her he does not want her to mess up what she has going on and told her she is doing good. Appellant told Olivia not to block this number again.

Rule 801(c) SCRE provides, " 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Olivia's statement in the jail phone call that Appellant was jealous of the dude he shot was inadmissible hearsay because it was offered for the truth of the matter asserted. The statement is highly prejudicial. Appellant was charged with the attempted murder of Cruz. In closing counsel argued Appellant was defending Olivia who was being held at knife point by Cruz. (Tr. p. 311, line 1 – p. 312, lines 1-2). The inadmissible statement of Olivia that Appellant shot in jealousy undermines the defense of others claim. The conversation between Appellant and Olivia in the jail call admitted as State's exhibit #96 is inadmissible prejudicial hearsay that should have been excluded. Again, as argued with State #94, any possible malice or consciousness of guilt is demonstrated in the two jail phone calls that are not challenged, State's exhibits #93, #95, where Appellant is telling Olivia what to say and to not appear in court.

The remainder of the jail call is irrelevant because it fails to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Any possible probative value in the hearsay conversation is substantially outweighed by the danger of unfair prejudice. Again, as argued with regard to State's #92, and #94, any possible bias the State seeks to show on the part of Olivia is demonstrated in the two jail phone calls that are not challenged, State's exhibits #93, #95. The State failed to lay the proper foundation for use as impeachment. State's #96 should have been excluded.

In State v. Brewer, 411 S.C. 401, 407–08, 768 S.E.2d 656, 659 (2015), the South Carolina Supreme Court wrote:

> We emphasize that today's decision is not a categorical rule that any statement by an investigator during an interrogation is inadmissible at trial. As recognized by

> the North Carolina Court of Appeals, however, caution must be exercised in the admission of such evidence to ensure that all out-of-court statements are either "admissible for a valid nonhearsay purpose or as an exception to the hearsay rule in order to safeguard against an end-run around the evidentiary and constitutional proscriptions against the admission of hearsay." State v. Miller, 197 N.C.App. 78, 676 S.E.2d 546, 556 (2009).

The Brewer case involved a police interrogation and not a jail phone call at issue in the present case. The importance of exercising caution in the admission of statements of an investigator during an interrogation, however, is equally applicable to jail calls to ensure that all out-of court statements are either admissible for a valid nonhearsay purpose or as an exception to the hearsay rule in order to safeguard against an end-run around the evidentiary and constitutional proscriptions against the admission of hearsay.

The trial judge abused her discretion in admitting the four jail calls and video visit. The error in admitting the calls and video visit is controlled by an error of law as violative of Appellant's constitutional Fourth Amendment protections against unreasonable search and seizure and invasion of privacy under both the federal and state constitution. Additionally, the prosecutor's use of the phone calls and video visit impinged on Appellant's first Amendment rights. Finally, the admission of all four jail calls and video visit constituted as abuse of discretion when the probative value of two of the calls and the video was substantially outweighed by the danger of unfair prejudice. The error requires reversal.

2. The trial judge erred in admitting videos, pursuant to Rule 613(b), SCRE, from an officer's body camera that recorded the interview of Appellant's girlfriend while she was in the hospital waiting to be treated for a gunshot wound when at trial the State failed to first advise the girlfriend of the substance of the statements she made during the interview.

Standard of Review

"Our courts have consistently held that a trial court's decision to admit evidence of a witness's prior inconsistent statement will not be reversed absent a manifest abuse of discretion. State v. Lynn, 277 S.C. 222, 225, 284 S.E.2d 786, 788 (1981); State v. Sierra, 337 S.C. 368, 373, 523 S.E.2d 187, 189 (Ct.App.1999) (finding appellant must show both abuse of discretion and resulting prejudice)." State v. Blalock, 357 S.C. 74, 78, 591 S.E.2d 632, 635 (Ct. App. 2003).

Discussion

The State called Olivia Erskine as a witness at trial. (Tr. pp. 108-120). Olivia described her relationship with Appellant as unfamiliar. (Tr. p. 109, lines 5-9). She denied knowing him as Kenny. (Tr. p. 109, lines 12-13). Olivia admitted going to see the fireworks with Appellant on July 4, 2021, but denied going anywhere else. (Tr. p. 110, lines 10-13). When asked about the Oaks apartment she testified, "I do not remember much that night." (Tr. p. 110, lines 14-16). The prosecutor asked Olivia, "Do you remember speaking to Officer Cushman in the hospital?" (Tr. p. 110, line 25 – p. 111, line 1). Olivia answered, "No, ma'am." (Tr. p. 111, line 2). When asked if she remembered speaking with any officers in the hospital, she testified that there were no officers at the hospital, she was in a private area, and "they" were not allowed to talk to patients. (Tr. p. 111, lines 5-18). The prosecutor, however, did not advise Olivia of the substance of any specific statements she made to Officer Cushman.

On cross-examination Olivia remembered the other guy in the house had a knife. (Tr. p. 114, lines 4-7). She also remembered that the other guy locked the door so she could not get out.

(Tr. p. 114, lines 8-10). Olivia admitted that she sometimes called Appellant Kenny. (Tr. p. 114, lines 19-21). She testified about statement she made to the defense investigator the past Friday. (Tr. p. 114, line 11 – p. 115, 116, lines 1-24). On re-direct examination the prosecutor asked, "So do you remember talking to law enforcement on scene or at the hospital? You testified you don't." (Tr. p. 117, lines 4-5). Olivia answered, "Yes, ma'am." (Tr. p. 117, line 6). Olivia agreed that the first time she indicated the aggressive and threatening behavior by the other guy was to the defense investigator. (Tr. p. 117, lines 7-10). She agreed that the first time she indicated that she was not allowed to leave was this past Friday to the defense investigator. (Tr. p. 117, lines 11-14).

On re-cross examination Olivia testified that she "sort of" remembered talking to an officer at the hospital. (Tr. p. 117, lines 20-25). Defense counsel asked if she remembered telling the officer at the hospital that the other guy had a knife and describing the knife to the officer. (Tr. p. 118, lines 1-4). Olivia answered, "Yeah. It's been a long time." (Tr. p. 118, line 5). The prosector objected stating, "She said she doesn't remember." (Tr. p. 118, lines 6-7). The judge allowed the question. (Tr. p. 118, line 8). After an additional objection by the State defense counsel asked, "You remember being at the hospital and an officer taking your statement? You might . . ." (Tr. p. 119, lines 6-7). Olivia answered, "Just barely." (Tr. p. 119, line 8). She remembered describing the knife as a big butcher knife. (Tr. p. 119, lines 13-15). She remembered she said she was arguing with this man because he didn't want her to leave and her boyfriend wanted her out. (Tr. p. 119, lines 16-19). She agreed that the man locked the door and held up a knife so she could not get out. (Tr. p. 119, lines 20-22). She remembered she told the officer twice that she did not want to press charges. (Tr. p. 119, lines 23-25).

On further re-direct Olivia denied that Appellant coached her or told her what to say about the case. (Tr. p. 129, lines 15-17). Although defense counsel questioned Olivia about some of her statements to the officer, the prosecutor did not question her about any specific statements. The prosector still failed to advise Olivia of the substance of any statement she made to Officer Cushman, as required by Rule 613(b).

Prior to the testimony of Officer Cushman Appellant objected to the admission of the videos of Olivia's interview at the hospital captured on Officer Cushman's body camera. (Tr. p. 174, line 13 – p. 175, lines 1-20; p. 176, line 24 – p. 177, lines 1-8). The State argued that the video was admissible pursuant to Rule 613(b). (Tr. p. 175, line 22 – p. 176, lines 1-23). The judge ruled the video admissible pursuant to Rule 613(b) and 801(d)(1)(a). (Tr. p. 177, lines 9-19). The trial judge erred. The State failed to advise the witness of the substance of the prior statements during direct examination as required by Rule 613(b), SCRE.

During the testimony of Officer Cushman, the State moved to admit two portions of the body camera video, marked State's exhibits #31, #32. (Tr. p. 183, line 1 – p. 184, lines 1-13). The judge admitted the exhibits subject to the prior objection and the videos were published to the jury. (Tr. p. 184, lines 14-24). The videos of the interview were not admissible as extrinsic evidence of a prior inconsistent statement pursuant to Rule 613(b) because the State failed to lay the proper foundation by not advising the witness of the substance of the prior statements to Officer Cushman.

Rule 613(b), SCRE provides:

> Extrinsic evidence of a prior inconsistent statement by a witness 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, and is given the opportunity to explain or deny the statement. If a witness does not admit that he has made the prior inconsistent statement, extrinsic evidence of such statement is

> admissible. However, if a witness admits making the prior statement, extrinsic evidence that the prior statement was made is inadmissible. This provision does not apply to admissions of a party-opponent as defined in Rule 801(d)(2).

The clear reading of the rule required the State to advise Olivia of the substance of the prior statements she made to Officer Cushman so that she had a chance to admit, deny, or explain the statements. The general denial or failure to remember talking to officers is not sufficient. In State v. McLeod, 362 S.C. 73, 81, 606 S.E.2d 215, 219 (Ct. App. 2004), the South Carolina Court of Appeals wrote:

> The South Carolina rule differs from the federal rule in that a proper foundation must be laid before admitting a prior inconsistent statement. 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. See State v. Sierra, 337 S.C. 368, 523 S.E.2d 187 (Ct.App.1999).

The State should have asked Olivia specific questions about the prior statement to Officer Cushman. The extrinsic evidence of the prior statement in the form of the body camera videos was only admissible if Olivia was given the opportunity to unequivocally admit to making the statement. If she did not admit making the statement and instead denied making the prior statement or failed to recall making the specific statement, the State could have sought to impeach with the videos. The witness was not given the opportunity to admit. "When the issue is whether the witness admitted making the prior inconsistent statement, the admission must be unequivocal. Blalock, 357 S.C. at 80, 591 S.E.2d at 635. 'Generally, where the witness has responded with anything less than an unequivocal admission, trial court's have been granted wide latitude to allow extrinsic evidence proving the statement.' Id. at 80, 591 S.E.2d at 636." State v. Carmack, 388 S.C. 190, 201, 694 S.E.2d 224, 229–30 (Ct. App. 2010). "This wide latitude extends to a witness indicating an inability to recall or to remember a previous statement: If the

witness neither directly admit[s] nor den[ies] the act or declaration, as when he merely says that he does not recollect, or, as it seems, gives any other indirect answer not amounting to an admission, it is competent for the adversary to prove the affirmative, for otherwise the witness might in every such case exclude evidence of what he had done or said by answering that he did not remember." State v. Moses, 390 S.C. 502, 522–23, 702 S.E.2d 395, 406 (Ct. App. 2010) (internal citations omitted).

The witness in the present case, Olivia, was not given the opportunity to unequivocally admit, or deny or testify that she did not recall a specific statement because the State failed to lay the foundation by failing to advise her of the substance of the prior specific statement as required by Rule 613(b), SCRE. In State v. Barnes, 421 S.C. 47, 57–58, 804 S.E.2d 301, 307 (Ct. App. 2017), the Court of Appeals wrote:

> Once the State confronted Ms. Barnes with the substance of her previous statement, the time and place it was made, and the person to whom it was made, and she denied making it, the foundation required by Rule 613(b) was complete. See State v. Bixby, 388 S.C. 528, 551–52, 698 S.E.2d 572, 584–85 (2010) (finding State laid proper foundation under Rule 613(b) for introduction of recorded conversation after witness was excused because witness admitted having conversation at issue but denied making the statements); State v. McLeod, 362 S.C. 73, 81, 606 S.E.2d 215, 219 (Ct. App. 2004) (stating that under Rule 613(b), extrinsic evidence of the statement is not admissible unless 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).

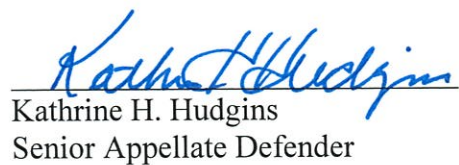
In contrast to the finding in Barnes and Bixby, the State in the present case failed to lay the proper foundation under Rule 613(b) for admission of the prior statements captured on the officer's body camera. The prosecutor asked Olivia about going to the Oaks apartments and Olivia testified that she did not remember. (Tr. p. 110, lines 10-19). The prosecutor, however, did not ask Olivia if she remembered telling the officer she went to the Oaks apartments. While Olivia denied knowing Appellant as Kenny on direct, she admitted on cross that she sometimes

called him Kenny. (Tr. p. 114, lines 18-21). The prosecutor failed to lay the foundation by failing to ask the witness about specific statements she made to the officer.

The error in admitting the videos constitutes an error of law. The error was not harmless because the statements made by Olivia were highly prejudicial. In State's #31, she told the officer that Appellant was pounding on the door because "he wanted me." She said he gets jealous. She talked about Appellant shooting her and discussed a sex for money scheme involving Appellant. In State's #32, Olivia told the officer that her boyfriend shot her by accident and he had a 9 mm gun. She is seen on the video in a hospital gurney, in pain, as the officer administered a GSR kit. She told the officer they call him Kenny and he has a jealousy problem. Olivia talked about "hanging out" with the other guy who she met through Appellant. She told the officer that Appellant said, "Come out Come out." The State failed to lay the foundation to admit the highly prejudicial statements. The error requires reversal.

CONCLUSION

Based on the above arguments this Court should reverse the convictions and remand for a new trial.



Kathrine H. Hudgins
Senior Appellate Defender

ATTORNEY FOR APPELLANT

This 26th day of August, 2025.