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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Kristi F. Curtis, Circuit Court Judge

Appellate Case No. 2024-002210

The State, ...Respondent,

v.

Francisco Cortes,.....Appellant.

INITIAL BRIEF OF RESPONDENT

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RESPONDENT'S STATEMENT OF ISSUES ON APPEAL

1. Whether the trial court properly admitted four audio-recorded jail calls and one video-recorded jail call between Appellant and victim Olivia Erskine where: (1) the recordings did not constitute an unreasonable search under the Fourth Amendment to the United States Constitution; (2) the recordings did not constitute an unreasonable invasion of privacy under section 10 of article I of the South Carolina Constitution; (3) the recordings did not abridge Appellant's freedom of speech under the First Amendment to the United States Constitution; and (4) the recordings were not subject to exclusion because: (a) they did not constitute hearsay under Rules 801 & 802, SCRE, (b) they were relevant under Rule 402, SCRE, and (c) their probative value was not substantially outweighed by the danger of unfair prejudice under rule 403, SCRE. Furthermore, whether any possible error in admitting the five recorded items was harmless in this case where, beyond a reasonable doubt, it did not contribute to the jury's verdict given the overwhelming evidence of guilt.

2. Whether trial court properly admitted a video recording of Sergeant Cushman's body-worn camera interview of victim Olivia Erskine at the hospital as extrinsic evidence of her prior inconsistent statement under Rule 613(b), SCRE, where Erskine effectively denied making the prior inconsistent statement after being advised of the substance of the statement, the time and place it was allegedly made, and the person to whom it was made. Furthermore, whether any possible error in admitting the statement was harmless where, beyond a reasonable doubt, it did not contribute to the jury's verdict given the overwhelming evidence of guilt.

STATEMENT OF THE CASE

Francisco Cortes (Appellant) was indicted at the December, 2023 term of the grand jury for Beaufort County for two counts of attempted murder (2022-GS-07-00756 & 2023-GS-07-01862); one count of assault and battery of a high and aggravated nature (ABHAN) (2022-GS-07-00757); two counts of discharging a firearm at or into a dwelling (2022-GS-07-00758 & -00759); and one count of possession of a weapon during a violent crime (2022-GS-07-00760). He was represented by Assistant Public Defenders Courtney Gibbs and Taylor Diggs of the Fourteenth Circuit Public Defender's Office. Respondent (the State) was represented by Assistant Solicitors Samantha Molina and Rachel DeAngelis of the Fourteenth Circuit Solicitor's Office. On December 16-18, 2024, the case proceeded to trial before the Honorable Kristi F. Curtis and a jury. At the conclusion of trial, the jury found Appellant guilty as indicted, and he was sentenced to concurrent terms of twenty-two (22) years' imprisonment for one count of attempted murder; twenty (20) years' imprisonment for the second count of attempted murder, ten (10) years' imprisonment for ABHAN, five (5) years' imprisonment for each count of discharging a firearm into a dwelling, and five (5) years' imprisonment for possession of a weapon during a violent crime. (Tr.p.1; p.340-p.345; Indictments & Sentencing Sheets).

Appellant timely filed a notice of intent to appeal and a brief in support of his appeal was filed by Senior Appellate Defender Kathrine H. Hudgins of the South Carolina Commission on Indigent Defense. This Brief of Respondent now follows.

STATEMENT OF FACTS

As briefly summarized by the State in its opening statement, this case stemmed from a shooting that occurred at The Oaks apartment complex on Hilton Head Island during the early-morning hours of July 5, 2021. The incident started with an arranged sexual encounter between two of the victims—Olivia Erskine (Victim 1) and Faquin Cruz (Victim 3)—and ended with Appellant firing six shots into apartment 4, two of which went through a wall and into apartment 6. Two people were ultimately hit: Erskine, who was trying to leave apartment 4, and Yao Ming Zhang (Victim 2), who was asleep, in bed, in a separate bedroom in apartment 4. After the shooting, Appellant fled the scene. (Tr.p.94-p.95). In his opening statement, Appellant asked the jurors to listen closely to the witnesses when deciding what to believe. Appellant acknowledged it was an extremely serious situation and did not deny firing the shots; however, he argued law enforcement had made a rush to judgment and asked the jurors to consider justification and reasonable doubt, and to ultimately find him not guilty. (Tr.p.95-p.97).

Pretrial Motions

On December 16, 2024, prior to the jury being sworn, the trial court convened a hearing to address Appellant's pretrial motions. These included a written motion to suppress/exclude any and all of Appellant's recorded jail calls the State might seek to introduce at trial, in which Appellant claimed the recordings violated: (1) his First Amendment right "to be free to communicate without the uninvited ears and eyes of the government" and (2) his South Carolina Article I, Section 10 right and his United States Fourth Amendment right "to be free from unreasonable searches and seizures." ("Defendant's Notice of Motion and Motion to Suppress Jail Calls" dated December 16, 2024). During the hearing, Appellant proceeded to argue motions to: (1) sequester each victim during the testimony of the other victims; (2) renew discovery and Rule 5 requests; (3) exclude any prior bad acts evidence under Rule 404(b) and

Lyle; (4) hold a *Neil v. Biggers* hearing; (5) reveal any deals offered by the State to Victim 1 regarding her pending charges in Jasper County and, as set out in his written motion, (6) exclude the five jail calls the State sought to introduce (four audio and one video) (See Argument I below). (Tr.p.55-p.86). Most of the motions were addressed as they were raised, but the trial judge deferred ruling on the admissibility of the jail calls until she had an opportunity to review them as well as the relevant case law argued by the parties. (Tr.p.85, lines 5-8; p.134-p.135).

Motion to Exclude Jail Calls – Part 1

Initially, as to Rule 404(b), Appellant explained he primarily sought to exclude any evidence suggesting he was involved in prostitution or acting as a pimp; however, he also noted he would have some related 404 arguments challenging portions of the recorded jail calls which would be raised in a separate discussion. After hearing arguments, the trial court ruled that, with the exception of prohibiting the solicitor from calling Appellant a pimp in her opening statements, any allegedly "bad acts" evidence would be admitted as part of the *res gestae* because the acts in question all related to the narrow time frame leading up to the shooting. (Tr.p.57-p.63). Despite this ruling, the trial court later ordered redaction of other portions of the recordings to remove prejudicial information.

Later, specifically in regard to the jail calls, Appellant referenced his written motion, handed up a copy of *State v. Ellefson*, 266 S.C. 494, 224 S.E.2d 666 (1976)—the primary case upon which the motion was based—and argued the calls should be suppressed/excluded on Fourth Amendment grounds.[1] He claimed the recordings violated the Fourth Amendment

[1] Although Appellant referenced the First Amendment as well as the South Carolina Constitution in his written pretrial motion, he failed to mention either provision to the trial judge, did not articulate or expound upon these allegations, or argue that the South Carolina Constitution offers privacy protections beyond that which is offered by the Fourth Amendment. As a result, the trial judge did not specifically address either the First Amendment or the South Carolina Constitution in denying the motion to suppress/exclude the jail calls. Consequently, these specific aspects of Appellant's argument are arguably not preserved for appellate review. *State v. Rogers*, 361 S.C. 178, 183, 603 S.E.2d 910, 912-13 (Ct. App. 2004) (In order for an issue to be preserved for appellate review, the issue must

because they were effectively a warrantless search with no valid exception to the warrant requirement. Appellant complained there was no legitimate security purpose for getting the recordings and instead the State was simply trying to circumvent the warrant requirement, his constitutional rights, and the discovery process. He argued there were no exigent circumstances to justify the search and no valid, voluntary consent to the search. In regard to the substance of the calls, Appellant said he would have additional objections related to hearsay, Rule 404 character evidence, and other issues. (Tr.p.74-p.79). In making his Fourth Amendment challenge, Appellant acknowledged he was given a form advising him that the jail calls would be recorded as well as the existence of audio recordings at the start of each of his calls saying they were being recorded for security purposes. (Tr.p.78, lines 17-22). Nevertheless, Appellant argued he did not give voluntary consent to the recordings.

The solicitor responded that given Appellant's diminished expectation of privacy, the posted signs at the jail, and the audio warning given prior to each call being recorded, Appellant effectively *did* consent to the recordings. The State further noted the calls were made in a detention center with other individuals around who could hear the conversations, which further diminished any expectation of privacy. Finally, the State explained the myriad ways in which the recordings had evidentiary value at trial, including to help prove consciousness of guilt, malice and intent, and possibly bias from Erskine, who would be testifying at trial. The solicitor argued any prejudice was substantially outweighed by the probative value. (Tr.p.79-p.82). The trial judge opined this might be more of a waiver issue than one of consent and asked the parties to provide copies of the jail calls for her review. The parties agreed to provide redacted copies which included several substantive redactions they had already agreed upon. (Tr.p.82-p.86).

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have been: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity.).

Trial

Following the pretrial hearing, the trial court gave preliminary instructions, the jury was sworn, and the case proceeded to trial. (Tr.p.86-p.94). The State and Appellant each gave an opening statement before the State began calling witnesses, including the various law enforcement officers who responded to the scene or investigated the incident, and the three victims. (Tr.p.94-p.97). Lindsay Burns, Beaufort County Sheriff's Office (BCSO) records supervisor, identified and authenticated two audio recordings of the 911 calls following the incident and they were admitted without objection as State's Exhibits #1 & #2 and played for the jury. (Tr.p.97-p.99; State's Exhibit #2). Amanda Masskooni, Director of Business Development for Coastal Security Services, identified and authenticated two video recordings from the security cameras at The Oaks which were admitted without objection as State's Exhibits #3 and #4 and played for the jury. She testified she reviewed the videos and was able to identify Appellant in the recordings because she and Appellant had gone to high school together. Masskooni then identified Appellant in the courtroom. (Tr.p.99-p.106).

Testimony of Olivia Erskine (Victim 1)

Erskine identified Appellant in the courtroom and testified they were hanging out together on the night of the incident. Erskine testified she remembered that she and Appellant had planned to watch fireworks that night, but *she did not remember going to The Oaks apartments or anything else from that night besides waking up in the hospital* with a gunshot wound to her wrist and finger, and an abrasion on her chin. She then testified that she did not know which police officer was officer Cushman and therefore could not identify him but nevertheless *did not remember: (1) talking to Cushman or any other police officers, (2) about the incident, (3) while she was at the hospital that night for treatment*, claiming that she was in a

private area and that the police were not allowed to speak to patients. Erskine explained she was shot in the wrist and finger and said she had a metal rod put in her arm during surgery for her gunshot injury. (Tr.p.108-p.112) (emphasis added).

On cross-examination, Erskine testified she did not remember talking to any police officers on the scene before she went to the hospital, and she **confirmed** she *did not remember talking to Cushman at the hospital.* Then, despite having claimed she did not remember anything about the incident, Erskine answered a series of leading questions based on a telephone conversation she apparently had with an employee from the public defender's office the Friday before trial. She said she now remembered Cruz having a knife and locking the door so she couldn't get out of his apartment. Erskine claimed she was in communication with Appellant while this was going on and that Appellant was trying to help her get out. She said Cruz was being confrontational and holding a knife, which he pointed at Appellant before closing and locking the door. She claimed she was scared and felt like her life was in danger because Cruz had been drinking, became aggressive with her, and grabbed a knife. (Tr.p.113-p.116).

On redirect examination, Erskine **again confirmed** she *did not remember: (1) talking to law enforcement, (2) at the hospital, (3) about the incident*, and that *the first time she indicated she was not allowed to leave the apartment because of Cruz's aggressive threats* was the prior Friday, to the defense's investigator. (Tr.p.117, lines 2-15). On re-cross, Erskine, for the first time, claimed she "sort of" remembered an officer being at the hospital. She then claimed she was aware her statement to that officer was recorded on the officer's body camera and she agreed with the leading questions from defense counsel that: she told that officer the "other guy" had a big butcher knife, she and the other guy were arguing because he did not want her to leave but

Appellant wanted her out, and the other guy locked the door so she could not get out. (Tr.p.117-p.120).

Trial - Continued

BCSO Staff Sergeant Joshua Scheemaker was dispatched to The Oaks in response to the 911 calls. Upon arrival he saw a female (Victim 1) running towards some other officers and was directed to Apartment 4, where he encountered a Hispanic male (Victim 3) who he ordered to come out. Two additional people also exited, a male and female who only spoke Chinese. Scheemaker then entered the apartment building where he found a fourth person inside one of the bedrooms who had been shot in the leg (Victim 2). He identified a diagram of the scene as State's Exhibit #5 which was marked for identification and used for demonstrative purposes. Scheemaker then identified the layout of the apartment, where various people were located, and where bullet holes were found. He also described the demeanor of the people who were detained as part of the investigation. (Tr.,p.121-p.127). Natascia Drummond, a resident of apartment 6 at The Oaks on the night of the incident described being woken up in the middle of the night when she heard police knocking on her door. She identified bullet holes in the wall of her apartment but said she did not hear the actual shots when they were fired. (Tr.p.129-p.133).

Motion to Exclude Jail Calls – Part 2

When the trial broke for the day, the trial judge reminded the parties to provide the redacted jail call recordings for her review so she could make a ruling on admissibility the following morning. (Tr.p.134-p.135). The next morning the trial judge advised she had listened to the four audio recordings and had watched the one video recording at issue, which were marked collectively as Court's Exhibit #1. The trial court ruled:

> So my ruling with respect to the jail calls is that I do find that they're admissible subject to redactions. So I have not been through all the

> redactions. But, of course, anything pertaining to other offenses to being in jail, basically only the relevant portions coming in that pertain to her testimony or what she's gonna - - what he's instructing her to do as far as not testifying, going to the public defender, and telling her she wants to drop the charges, what she is to say, basically limited to that portion.

(Tr.p.142, lines 9-18). The trial court did not specifically articulate the basis of the denial of Appellant's Fourth Amendment challenge.

In response to the ruling, the solicitor explained that in addition to the portions the court specifically ruled admissible regarding Appellant's attempts to influence Erskine's cooperation with the State and her trial testimony, the State also intended to introduce the portions of the recordings which discussed their personal relationship, including talk of tattoos, her calling him "Kenny," them talking about "money and his sister "and other personal discussions, arguing it would serve both to rebut her claims that she did not really know Appellant and that it would more fully explain their relationship in the context of the case because it would "connect the dots." The solicitor noted the State had agreed to redact all references to drug use, Appellant being in jail, his previous periods of incarceration, his length of detention, his possible punishments, his court dates, and his efforts to seek a new attorney. She also noted she had provided the proposed redactions to the defense and did not get any response about additional segments Appellant wished to redact. (Tr.p.142, line19-p.144, line 5).

Appellant responded that he agreed with the court's original ruling admitting only the portions of the video where he attempted to direct or influence Erskine's testimony, but believed everything else was "not relevant," "prejudicial," and "confusing to the jury." He argued it was "extremely prejudicial and outweighs any probative value" and "gets into character evidence" and argued for exclusion of the entire video visit as "misleading to the jury." Appellant argued

admitting the additional portions of the recordings would run afoul of Rules 402, 403, and 404 of the Rules of Evidence. (Tr.p.144, line 15-p.145, line 19).

The solicitor continued to argue that the disputed parts of the recordings were relevant to rebut Erskine's denial of a relationship, for impeachment to show her bias in trying to protect Appellant, and to show Appellant's consciousness of guilt. In regard to Rule 404(b), the solicitor argued that to the extent anything touched upon Appellant's character, it was nevertheless admissible to prove intent and a common scheme or plan, particularly when they talked about putting "money on the books," which is "not more prejudicial than probative." (Tr.p.145, line 20-p.146, line 23). The solicitor further explained that where the recordings included discussions of money it showed the relationship was not merely romantic, but was also a business relationship, which helped show Appellant was manipulating Erskine, attempting to control her, and telling her what to do, all of which *explained the context of the charged crimes*. (Tr.p.147, lines 5-11) (emphasis added).

Appellant argued that the mere fact he and Erskine were having conversations was enough to prove their relationship without getting into other information, which was simply "extra." He asked to exclude any mention of "putting money on the books" because there was no common scheme or plan. (Tr.p.147, line 12-p.148, line 1).

The trial court agreed to exclude any mention of how Erskine was expected to earn money but ruled it would admit the portions where Appellant said he wanted her to "put money on my books" or "give my sister money to put on my books." (Tr.p.148, lines 4-11). The trial court also excluded any mention of drug use or anything pertaining to people owing Appellant money. (Tr.p.148, line 8-p.149, line 8). The trial judge commented that she did not recall a

whole lot that was relevant to Erskine's testimony in the video recording; however, after further argument from the solicitor the trial court ruled as follows:

> Yeah. 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 going on a date, 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 the other guys to get money. I think that's highly prejudicial and has very little probative value.

(Tr.p.150, lines 4-12). After the ruling, the solicitor and Appellant's counsel agreed to work together to redact the recordings to comply with the parameters established by the trial judge prior to their admission. (Tr.p.150, lines 13-22).

Trial - Continued

Zhang (Victim 2), who was known as "Jack," was living in Apartment 4 on the night of the incident. He slept in one bedroom and had three roommates, a Chinese couple who lived in a second bedroom, and a single Mexican man (Victim 3) who lived in the third bedroom. Zhang was sound asleep in the early-morning hours of July 5, 2021, when he woke to hear a male and female screaming and a gunshot, which was immediately followed by a bullet striking him in the knee. Eventually two police officers came in and helped Zhang walk outside to an ambulance, which took him to the ER in Savannah for treatment. He had surgery a few days later to repair the damage to his knee and still had a scar at the time of trial. (Tr.p.153-p.158).

Faquin Hernandez Cruz (Victim #3) was also living in Apartment 4 the night of the incident and described sharing the apartment with Zhang and an Asian couple. On the day of the incident, after an eleven-hour workday, Cruz came home, took a shower, drank some beer, and began looking at things on his phone. He contacted a man he knew on Facebook, who he claimed "wasn't a friend," and made arrangements for the man to bring "a girl" to his apartment

to have sex with him in exchange for money. After Cruz and the woman talked for a while, the woman demanded more money. When Cruz would not agree, she picked up her phone and called the man who had brought her to the apartment. Cruz heard knocking on the door and when he started to open it, he saw a man standing there with a gun, so he pushed the door shut and locked it. Cruz then heard gunshots, so he ran to the bedroom where the couple was sleeping. When the gunshots stopped, the woman left. Cruz said she had been shot, but made it clear he did not shoot her. He said he locked the door to keep the man out because he saw the man holding a gun. Cruz testified he never threatened the woman or pulled a knife on her. (Tr.p.158-p.163).

BCSO Corporal Zachary Ray was on road patrol on Hilton Head Island the night of the incident. He received a call from dispatch at 3:59 a.m. to respond to "shots fired" at The Oaks apartment complex. Ray was one of the first two officers to arrive on scene, where he encountered Erskine. She was hysterical, screaming that she had been shot, and saying that it had happened in Unit 4. Ray applied a tourniquet to Erskine's right arm to stop the bleeding. He then identified a video recording from the body-worn camera he was wearing the night of the incident, which was admitted into evidence as State's Exhibit #30 without objection and played for the jury. Ray said Erskine named Appellant as a person who was involved in the incident but did not identify anyone in the apartment where she had been shot. Ray and the other officers briefly detained everyone in Apartment 4 while they tried to sort-out what happened and were able to identify Cruz using his ID. (Tr.p.167-p.173).

Motion to Exclude Erskine's Prior Inconsistent Statement

Prior to the State's next witness— BCSO Sergeant Zach Cushman—taking the stand, Appellant objected to the State's plan to introduce a video recording of Erskine's statement from

Cushman's body-worn camera when he interviewed her at the hospital following the incident. Appellant argued it should not be admissible as extrinsic evidence of a prior inconsistent statement because, while Erskine initially claimed she did not remember making the statement, she later admitted she had made it and was subject to both cross-examination and redirect examination about what she had said to Cushman. (Tr.p.174-p.175).

The solicitor disagreed, arguing the statement was admissible to impeach Erskine because it fell "squarely into Rule 613(b)" where she did not admit making the prior statement, and it was inconsistent with her trial testimony. The solicitor noted Erskine testified on direct that she did not remember anything about the incident, talking to officers at the scene, or speaking to officers at the hospital, and that the only thing she claimed to remember on cross-examination was telling the officers that Cruz was aggressive and threatened her, despite Erskine *never having made that claim to Cushman at the hospital.* The solicitor argued the proper foundation had been laid and that where Erskine kept saying she did not remember her statement at the hospital except for her claim that she said Cruz had been aggressive, the prior inconsistent statement could be used for impeachment, particularly where that particular claim was NOT made in the statement at the hospital. (Tr.p.175-p.177).

The trial court ruled:

> I do think that it's admissible under 613(b) also 801(d)(1)(a), which pretty much mirrors that rule. So under both of those rules it's not hearsay. I also think that it is admissible as an exception to the hearsay under Rule 803, subsection 5, Recorded Recollection: A memo or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately shown to have been made or adopted by the witness for the matter of suppression of the witness's memory to reflect that knowledge correctly.

(Tr.p.177, lines 9-19). Based on this ruling, Counsel for Appellant asked that, in addition to the two segments of the body-camera recordings the State sought to introduce, the State should also be required to introduce a third part of that recording pursuant the rule of completeness in Rule 106, SCRE. The trial court declined to require the State to introduce the third segment of the interview on direct, but ruled it would allow Appellant to introduce it during cross-examination of Cushman. (Tr.p.177-p.181).

Trial – Continued

Sergeant Cushman participated in the investigation of the incident at The Oaks on July 5, 2021. He was sent to Savannah Memorial Hospital to interview Erskine and Zhang. Cushman said Erskine was alert and seemed to be able to understand his questions and why he was there when she was interviewed. He identified and authenticated two segments of the video-recorded statements from his body-worn camera, which were marked as State's Exhibits 31 and 32. They were admitted into evidence, subject to Appellant's prior objections, and played for the jury. (Tr.p.182-p.184).

During the first of the two segments, Erskine said Appellant (her boyfriend) shot her by accident. She explained she was at The Oaks in an apartment with another guy (Cruz) when Appellant got jealous and told her to come out. Erskine said the other guy saw Appellant with a gun and he locked the door before she could leave. She noted the man she was with had a knife and was arguing with Appellant because he did not want her to leave, but she never said the man had threatened her with the knife. Instead, she insisted Appellant was simply jealous that she was with the other guy, wanted her to come out, and then shot through the door after it was locked. (State's Exhibit #31). During the second segment, which occurred *after* Cushman had been given Cruz's version of the events, Erskine acknowledged she was there to have sex with

Cruz in exchange for money, an arrangement that had been set up by Appellant. She said Cruz initially paid Appellant for a certain amount of time, but then wanted to pay her for more time together, which Appellant did not support. Erskine said Appellant started pounding on the door of the apartment because he was jealous and that Cruz, who was armed with a knife, cracked open the door, saw Appellant with a gun, then closed and locked the door. Again, she never said anything about Cruz threatening her, or that she was scared of him or his knife. (State's Exhibit #32).

Cushman then described collecting Erskine's cell phone, clothes, and shoes, which were admitted into evidence without objection. He also identified several photographs of those items and Erskine's injuries which were admitted into evidence without objection. Finally, Cushman described interviewing Zhang and identified photographs of his clothes and injuries which were admitted without objection. (Tr.p.184-p.191). Appellant's counsel did not seek to introduce the third part of the body-worn camera recording during cross. (Tr.p.191-p.192).

Sheila Erskine (Sheila), Erskine's mother, said she had never met Appellant in person but heard about him from Erskine, who called him "Kenny." After learning that her daughter had been shot, Sheila had a friend drive her to the hospital. While there, she called Appellant at a phone number provided by Erskine. Sheila told Appellant that her daughter had been shot, was badly hurt, and needed surgery, and Appellant said he was sorry. Sheila then identified photographs she had taken of Erskine's injuries, and they were admitted into evidence without objection. (Tr.p.196-p.204).

BCSO Sergeant Andrew Calore was the duty investigator assigned to the incident. He responded to the scene and was briefed by the patrol supervisor before sending an officer to the hospital to interview the two gunshot victims. Calore identified numerous photos from the scene

showing bullet holes in the walls of the apartments and several items recovered during the investigation, all of which were admitted into evidence without objection. (Tr.p.205-p.226).

Dr. Jason Norcross, an orthopedic surgeon at Hilton Head Hospital was admitted as an expert in orthopedic surgery without objection. He described the serious nature of the gunshot injury to Zhang's knee and how he performed surgery on that knee in a very delicate manner to avoid potential catastrophic injury and severe infection. Norcross opined that, for a variety of reasons, a gunshot could result in great bodily injury. (Tr.p.242-p.251).

On the third day of trial, BCSO evidence custodian Jacqueline Legree explained that although a kitchen knife had been recovered from the incident scene, it was destroyed by mistake prior to trial. (Tr.p.252-p.256). SLED firearms examiner Michelle Eichenmiller was admitted as an expert in firearm and toolmark identification without objection. She examined six fired 9-millimeter cartridge cases recovered from the incident scene and concluded they were all fired from one firearm. (Tr.p.256-p.262).

Testimony of Detention Center Officer Aiken

Finally, Lieutenant Edwin Aiken of the Beaufort County Detention Center identified and authenticated the recorded jail calls—four audio and one video—between Erskine and Appellant while Appellant was held in the detention center. Aiken explained he worked in the office of professional standards and that all jail calls and video visits are recorded, with the exception of privileged communications, and that the recordings are kept in the ordinary course of business. Subject to Appellant's prior objections, they were played for the jury. (Tr.p.262-p.266; State's Exhibits #92, #93, #94, #95, and #96).

Trial - Continued

At the conclusion of Aiken's testimony, the State rested. (Tr.p.266). Appellant renewed all previous motions and objections and also moved for a directed verdict. The trial court denied the motion for a directed verdict. (Tr.p.266-p.269). The trial court then questioned Appellant regarding his right to testify. Appellant elected not to testify, rested, and renewed his prior motions. Following a brief charge conference and the trial court's denial of the State's request to give the final argument, the parties proceeded to closing arguments. (Tr.p.269-p.303).

During its close, the State argued that this case was about control and ownership, which Appellant exercised over Erskine through violence and manipulation. The solicitor referenced Erskine's recorded statements to Cushman and the recorded jail calls with Appellant, arguing that: Appellant's flight from the scene, his telling Erskine what to do, and his telling Erskine not to come to court, all constituted consciousness of guilt. The State contended it was not a complicated case and that the evidence provided all of the puzzle pieces the jury needed to find Appellant guilty of the charged crimes beyond a reasonable doubt. (Tr.p.304-p.310). In response, Appellant argued Erskine had a right to act in self-defense because she was locked in a room with a man holding a knife who would not let her leave, and that Appellant consequently had the right to use deadly force to intervene and help Erskine. Counsel acknowledged the jail calls Appellant had made and how they did not make him look good, but provided various explanations for why he would have made the comments in those calls. Appellant attacked the State's theory that he was motivated by jealousy, Cruz's credibility, and several aspects of the police investigation of the incident before focusing on his theory of defense of Erskine and asking the jurors to find him not guilty even if they did not like him (Tr.p.310-p.322).

After hearing the trial court's charge on the law, which included a charge on prior inconsistent statements, the jury deliberated for approximately one hour and twenty-five minutes before finding Appellant guilty as indicted. (Tr.p.322-p.340). Appellant was sentenced by Judge Curtis to concurrent terms of: twenty-two (22) years' imprisonment for one count of attempted murder; twenty (20) years' imprisonment for the second count of attempted murder, ten (10) years' imprisonment for ABHAN, five (5) years' imprisonment for each count of discharging a firearm into a dwelling, and five (5) years' imprisonment for possession of a weapon during a violent crime. (Tr.p.340-p.345).

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. *State v. Black*, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012); *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). The appellate court does not re-evaluate the facts based on its own view of the preponderance of the evidence but, instead, simply determines whether the trial judge's ruling is supported by *any evidence*. *Wilson*, 345 S.C. at 6, 545 S.E.2d at 829 (emphasis added); *see also State v. Gracely*, 399 S.C. 363, 371, 731 S.E.2d 880, 885 (2012) ("The trial court will only be reversed when there is no evidence to support the ruling below."). Appellate review of a motion to suppress based on the Fourth Amendment involves a two-step analysis. *State v. Frasier*, 437 S.C. 625, 633, 879 S.E.2d 762, 766 (2022). This dual inquiry means the appellate court reviews the trial court's factual findings for any evidentiary support, but the ultimate legal conclusion is a question of law subject to de novo review. *Id.* at 633-34, 879 S.E.2d at 766.

ARGUMENT

I.

The trial court properly admitted four audio-recorded jail calls and one video-recorded jail call between Appellant and victim Olivia Erskine because: (1) the recordings did not constitute an unreasonable search under the Fourth Amendment to the United States Constitution; (2) the recordings did not constitute an unreasonable invasion of privacy under section 10 of article I of the South Carolina Constitution; (3) the recordings did not abridge Appellant's freedom of speech under the First Amendment to the United States Constitution; and (4) the recordings were not subject to exclusion where: (a) they did not constitute hearsay under Rules 801 & 802, SCRE, (b) they were relevant under Rule 402, SCRE, and (c) their probative value was not substantially outweighed by the danger of unfair prejudice under rule 403, SCRE. In any event, any possible error in admitting the five recorded items was harmless in this case because, beyond a reasonable doubt, it did not contribute to the jury's verdict given the overwhelming evidence of guilt.

Appellant argues the trial court erred in admitting the four recorded jail audio calls and one recorded jail video call between Appellant and Erskine. He contends they should have been excluded as violative of his constitutional protections against unreasonable search and seizure and invasion of privacy under U.S. Const. amend. IV and S.C. Const. art. I, § 10. Appellant argues the monitoring of the calls additionally infringed upon his First Amendment rights. Alternatively, he argues the calls and video visit should have been further redacted to exclude hearsay and the portions where the probative value was substantially outweighed by the danger of unfair prejudice pursuant to Rule 403, SCRE. (Brief of Appellant, p.6-p.7). However, these arguments are without merit and should be denied and dismissed for several reasons.

A. Not Preserved

As noted in footnote 1 above, key portions of this argument—specifically those that are based on the First Amendment and the right to privacy in art. I, § 10 of the South Carolina Constitution—are not preserved for appellate review because they were not sufficiently raised to

or ruled upon by the trial court. Not only was there **no** argument offered at the pretrial hearing in support of these two claims, the contention that there should be some level of expanded protection under the state constitution was not even set out in Appellant's written pretrial motion. Then, after Appellant effectively abandoned these arguments at trial, neither ground was specifically addressed by the trial court when it ruled to admit the redacted jail calls. Appellant did not ask the judge for a ruling on these grounds, instead choosing to focus exclusively on his Fourth Amendment challenge instead. Consequently, a large part of the current argument on appeal is not preserved for review and should be dismissed out-of-hand. *Rogers*, 361 S.C. at 183, 603 S.E.2d at 912-13.

Even if this Court disagrees and finds *all* current claims in Argument 1 are preserved, the trial court properly admitted the four audio-recorded jail calls and one video-recorded jail call between Appellant and Erskine because: (1) the recordings did not constitute an unreasonable search under the Fourth Amendment to the United States Constitution; (2) the recordings did not constitute an unreasonable invasion of privacy under section 10 of article I of the South Carolina Constitution; (3) the recordings did not abridge Appellant's freedom of speech under the First Amendment to the United States Constitution; and (4) the recordings were not subject to exclusion where: (a) they did not constitute hearsay under Rules 801 & 802, SCRE, (b) they were relevant under Rule 402, SCRE, and (c) their probative value was not substantially outweighed by the danger of unfair prejudice under rule 403, SCRE. Finally, any possible error in admitting the five recorded items was harmless in this case because, beyond a reasonable doubt, it did not contribute to the jury's verdict given the overwhelming evidence of guilt. For all of these reasons, Appellant's argument 1 and all of its subparts should be rejected, and Appellant's convictions and sentences should be affirmed.

B. Fourth Amendment

The Fourth Amendment to the United States Constitution protects people from unreasonable searches and seizures and provides that no warrants shall be issued except upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized. U.S. Const. amend. IV. The South Carolina Constitution provides similar protection against unreasonable searches and seizures and unreasonable invasions of privacy. S.C. Const. art. I, § 10. A search compromises the individual's interest in privacy; a seizure deprives the individual of dominion over his or her person or property. *State v. Brown*, 401 S.C. 82, 88, 736 S.E.2d 262, 266 (2012); *State v. Wright,* 391 S.C. 436, 442, 706 S.E.2d 324, 327 (2011) (quoting *Horton v. California,* 496 U.S. 128, 133 (1990)). For constitutional purposes, a search occurs when "an expectation of privacy that society is prepared to consider reasonable is infringed." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

Warrantless searches and seizures are unreasonable absent a recognized exception to the warrant requirement. *Brown*, 401 S.C. at 89, 736 S.E.2d at 266; *Wright,* 391 S.C. at 442, 706 S.E.2d at 327. *See Kentucky v. King*, 563 U.S. 452, 462 (2011) ("[W]arrantless searches are allowed when the circumstances make it reasonable . . . to dispense with the warrant requirement."). These exceptions include the following: (1) search incident to a lawful arrest, (2) hot pursuit, (3) stop and frisk, (4) automobile exception, (5) the plain view doctrine, (6) consent, and (7) abandonment. *Brown*, 401 S.C. at 89, 736 S.E.2d at 266; *State v. Dupree,* 319 S.C. 454, 456, 462 S.E.2d 279, 287 (1995); *State v. Moore,* 377 S.C. 299, 309, 659 S.E.2d 256, 261 (Ct. App. 2008). Since a prisoner has no expectation of privacy in a cell, the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell.

Hudson v. Palmer, 468 U.S. 517, 526 (1984); *State v. Matthews*, 296 S.C. 379, 389, 373 S.E.2d 587, 593 (1988).

1. The Exclusionary Rule

The Fourth Amendment itself provides no remedy for a violation of the warrant requirement. *Davis v. United States,* 564 U.S. 229, 230-31 (2011). However, the United States Supreme Court has fashioned a judicially created remedy, the exclusionary rule, which is a deterrent sanction by which the prosecution is barred from introducing evidence obtained in violation of the Fourth Amendment. *Id.* at 231-32; *Brown*, 401 S.C. at 88, 736 S.E.2d at 266. Generally speaking, any evidence seized as the result of an unreasonable search and seizure must be excluded from trial. *State v. Weaver*, 374 S.C. 313, 319, 649 S.E.2d 479, 482 (2007).

2. Consent

Whether consent to search was voluntary or the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of the circumstances. *State v. Wallace,* 269 S.C. 547, 550, 238 S.E.2d 675, 676 (1977); *State v. Mattison*, 352 S.C. 577, 584, 575 S.E.2d 852, 855 (Ct. App. 2003). The State bears the burden of establishing the voluntariness of the consent. *Schneckloth v. Bustamonte,* 412 U.S. 218 (1973); *Mattison*, 352 S.C. at 584, 575 S.E.2d at 855. The "totality of the circumstances" test applies whether the consent was given in a non-custodial or custodial situation. *Wallace,* 269 S.C. at 550, 238 S.E.2d at 676; *Mattison*, 352 S.C. at 584, 575 S.E.2d at 855. In a custodial situation, the custodial setting is a factor to be considered in determining whether consent was voluntarily given. *Wallace,* 269 S.C. at 552, 238 S.E.2d at 677; *Mattison*, 352 S.C. at 584, 575 S.E.2d at 855. Custody alone, however, is not enough in itself to demonstrate a coerced consent to search.

Mattison, 352 S.C. at 584, 575 S.E.2d at 855; *State v. Brannon,* 347 S.C. 85, 90, 552 S.E.2d 773, 775 (Ct. App. 2001).

The issue of voluntary consent, when contested by contradicting testimony, is an issue of credibility to be determined by the trial judge. *Mattison*, 352 S.C. at 584-85, 575 S.E.2d at 856; *State v. Dorce,* 320 S.C. 480, 482, 465 S.E.2d 772, 773 (Ct. App. 1995). A trial judge's conclusions on issues of fact regarding voluntariness will not be disturbed on appeal unless so manifestly erroneous as to be an abuse of discretion. *Mattison*, 352 S.C. at 585, 575 S.E.2d at 856; *State v. Rochester,* 301 S.C. 196, 200, 391 S.E.2d 244, 247 (1990) (dealing with voluntariness of a statement); *State v. Greene,* 330 S.C. 551, 557, 499 S.E.2d 817, 820 (Ct. App. 1997).

3. No Expectation of Privacy

The recording of Appellant's jail calls did not violate the Fourth Amendment's protections against unreasonable searches and seizures because he had no reasonable expectation of privacy and consented to the search. "A government agent's search is unreasonable when it infringes on 'an expectation of privacy that society is prepared to consider reasonable.'" *United States v. Castellanos*, 716 F.3d 828, 832 (4th Cir. 2013) (quoting *United States v. Jacobsen*, 466 U.S. 109, 113 (1984)). In order to have a legitimate expectation of privacy, one must have (1) a subjective expectation of privacy that (2) is objectively reasonable, i.e., one that society is willing to recognize as reasonable. *Id.* Prisoners have neither a subjective nor an objective expectation of privacy in phone calls made on prison telephones. *United States v. Van Poyck*, 77 F.3d 285, 290–91 (9th Cir. 1996). A prisoner does not have a subjective expectation of privacy when the prisoner is notified that his calls are being monitored. *Id.* at 290. Further, no prisoner should reasonably expect privacy in outbound telephone calls due to the severe curtailing of

other privacy rights by virtue of being imprisoned. *See id.* at 290–91; *see also United States v. Clark*, 651 F. Supp. 76, 81 (M.D. Pa. 1986) (finding prisoners do not have a legitimate expectation of privacy in prison telephone conversations because prisons routinely monitor and record phone conversations to enhance security).

Appellant had neither a subjective nor objective expectation of privacy in his prison telephone calls with Erskine. Appellant did not have a subjective expectation of privacy because he was notified that his calls were being monitored for security purposes. (Tr.p.78, lines 17-22). By electing to make the calls anyway, Appellant gave consent to the search. Unlike in *Ellefson*, where there was testimony refuting the idea that the search was for any legitimate jail purpose, 266 S.C. at 500 fn2, 224 S.E.2d at 669 fn2, here Appellant conceded the recording was made for legitimate security reasons. Additionally, even if Appellant had a subjective expectation of privacy, any such expectation was not objectively reasonable. To hold otherwise would be inconsistent with the recognition that prisoners have severely curtailed privacy rights and would frustrate the detention center's ability to preserve security in its facility. *See Bell v. Wolfish*, 441 U.S. 520 (1979) (holding a requirement that pretrial detainees remain outside their rooms during "shakedowns by prison officials and practice of conducting body-cavity searches following contact visits did not violate Fourth Amendment); *Hudson v. Palmer*, 468 U.S. at 526 (holding "society is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell and that, accordingly, the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell. The recognition of privacy rights for prisoners in their individual cells simply cannot be reconciled with the concept of incarceration and the needs and objectives of penal institutions").

Furthermore, consent is consent regardless of whether a challenge is raised under the Omnibus Crime Control and Safe Streets Act of 1968, or the Fourth Amendment. Despite Appellant's attempt to distinguish the Fourth Circuit's determination in *United States v. Hammond*, 286 F.3d 189, 191 (4th Cir. 2002), that the consent exception applies to prison inmates required to permit monitoring as a condition of using prison telephones, there is no reason for disparate treatment or analysis. Appellant had no reasonable expectation of privacy in his jail calls and the consent exception to the warrant requirement applies.

B. Art. I, § 10 - Right to Privacy

Appellant further maintains that even if the Fourth Amendment does not apply, the State violated his right to be protected against unreasonable invasions of privacy. Yet for the same reasons described above, where Appellant had no reasonable expectation of privacy, any heightened protection would necessarily be muted, and the reasonableness of any invasion of such privacy could more easily be shown.

The South Carolina Constitution provides as follows:

> 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). Our supreme court has interpreted South Carolina's express right against unreasonable invasions of privacy provision to provide greater—or, a more "heightened"—protection than that provided by the United States Constitution. *State v. Weaver*, 374 S.C. 313, 321, 649 S.E.2d 479, 483 (2007) (holding ultimately the search in question met the automobile exception to the warrant requirement and did not violate the more expansive right to privacy). "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." *State v. Forrester*, 343 S.C. 637, 643, 541 S.E.2d 837, 840 (2001). Our supreme court explained in *Weaver*:

> The focus in the state constitution is on whether the invasion of privacy is reasonable, regardless of the person's expectation of privacy to be searched. Once the officers have probable cause to search a vehicle, the state constitution's requirement that the invasion of one's privacy be reasonable will be met.

374 S.C. at 322, 649 S.E.2d at 483. A similar analysis holds here. Once the consent exception to the Fourth Amendment is met, the state's constitutional requirement that an invasion of privacy be reasonable will also be met.

In a more recent article I, section 10 case, *State v. German*, 439 S.C. 449, 469–74, 887 S.E.2d 912, 922–25 (2023), our supreme court concluded that: "A mandatory and forced blood draw is patently distinct from other modes of DUI investigation and, consequently, violates the South Carolina Constitution when administered without a warrant." *Id.* At 473-74, 887 S.E.2d at 924-25. This was because German clearly refused her consent, but the blood was drawn anyway. Here, Appellant *never* refused consent and was *not forced* to make phone calls to Erskine. There was simply no violation of Article I, Section 10.

C. Good faith

If this Court determines, for the first time, that routine recordings of jail calls for security purposes somehow violates either the Fourth Amendment or the South Carolina Constitution's right to privacy, the exclusionary rule should nevertheless not apply because, in this case, State officials all acted in good faith. The exclusionary rule operates as "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *United States v. Leon*, 468 U.S. 897

(1984) (quoting *United States v. Calandra*, 414 U.S. 338, 348 (1974)). "[T]he sole purpose of the exclusionary rule is to deter misconduct by law enforcement." *Davis v. United States*, 564 U.S. 229, 246 (2011). The rule does not apply "when the police act with an objectively 'reasonable good-faith belief' that their conduct is lawful." *Id.* at 238, 131 S.Ct. 2419. In *Davis*, the United States Supreme Court concluded the officers who conducted the search did not violate Davis's Fourth Amendment rights "deliberately, recklessly, or with gross negligence." *Id.* at 240, 131 S.Ct. 2419. "Where there is no misconduct and no deterrent purpose to be served, suppression of the evidence is an unduly harsh sanction." *State v. Adams*, 409 S.C. 641, 653, 763 S.E.2d 341, 348 (2014).

Here, the recording of jail calls for security purposes has not been seriously called into question in this state until now. When Appellant's jail calls were recorded, the State actors reasonably relied on well-established procedures and precedent, and did not violate Appellant's rights deliberately, recklessly, or with gross negligence. Thus, even if the officials violated Appellant's rights under both the Fourth Amendment and South Carolina's Constitution, exclusion was not warranted. *German*, 439 S.C. at 474–75, 887 S.E.2d at 925.

D. First Amendment

Appellant argues the jail calls in his case are analogous to the letters in *Ellefson*, where our supreme court found the opening and reading of letters as impinging on the First Amendment right to be able to communicate without the uninvited ears and eyes of the government. He recognizes a prisoner's right to telephone access is subject to rational limitations in the face of legitimate security interests; however, he argues those security interests somehow evaporated in his case because the recorded calls ended up in the hands of prosecutors. This distinction cannot

possibly render a jail recording inadmissible as a First Amendment violation, or else it would swallow the rule and jail recordings would never be allowed for prosecution.

Furthermore, the United States Supreme Court case the *Ellefson* court relied upon for its entire First Amendment analysis, *Procunier v. Martinez*, 416 U.S. 396 (1974), was later reversed by the United States Supreme Court in *Thornburgh v. Abbott*, 490 U.S. 401 (1989). In *Thornburg*, the court approved an approach more deferential to the judgment of prison authorities than the one set forth in *Procunier*. Where, as here, the detention center's actions in recording all jail calls in the regular course of business was reasonably related to legitimate penological interests, there was no First Amendment violation. *Thornburg* effectively overrules *Ellefson* for purposes of the First Amendment analysis contained therein.

E. Rules of Evidence

Appellant argues that to the extent the jail calls were admissible at all (which he seemed to concede at trial), they nevertheless should have been further redacted pursuant to Rules 402 and 403, SCRE, and the rules against hearsay. The State disagrees and submits that under this Court's standard of review, the trial court must be affirmed because it thoughtfully applied the correct law to the information and evidence before it.

1. Standard of Review

Our appellate courts give great deference when reviewing the evidentiary ruling of the trial court. *State v. Cross*, 427 S.C. 465, 473, 832 S.E.2d 281, 285 (2019); *State v. Davis*, 437 S.C. 93, 96, 876 S.E.2d 321, 322 (Ct. App. 2022). Indeed, the admission or exclusion of evidence is left to the sound discretion of the trial judge. *State v. Wallace*, 440 S.C. 537, 541, 892 S.E.2d 310, 312 (2023); *State v. Phillips*, 430 S.C. 319, 340, 844 S.E.2d 651, 662 (2020); *State v. Swaringen*, 446 S.C. 16, 26, 916 S.E.2d 343, 349 (Ct. App. 2025); *State v. Edwards*, 373 S.C.

230, 234, 644 S.E.2d 66, 68 (Ct. App. 2007). The trial court's ruling on the admissibility of evidence will not be reversed on appeal absent abuse of discretion or the commission of legal error which results in prejudice to the defendant. *State v. McDonald*, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000); *State v. Adams,* 354 S.C. 361, 377, 580 S.E.2d 785, 793 (Ct. App. 2003). An abuse of discretion occurs when the ruling lacks evidentiary support or is controlled by an error of law. *State v. Brown*, 401 S.C. 82, 87, 736 S.E.2d 263, 265 (2012); *State v. Jennings*, 394 S.C. 473, 477-78, 716 S.E.2d 91, 93 (2011); *McDonald*, 343 S.C. at 325, 540 S.E.2d at 467. 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).

The trial court—when ruling on the admission or exclusion of evidence—must think through the objection that has been made, the arguments of the attorneys, and the law—particularly the applicable evidentiary rules—and must thoughtfully apply the correct law to the information and evidence before it. *Wallace*, 440 S.C. at 541-43, 892 S.E.2d at 312-13; *Morris v. BB&T Corp.*, 438 S.C. 582, 587, 885 S.E.2d 394, 397 (2023). If the record reflects the trial court "exercise[ed] its discretion according to law," the appellate court will almost always affirm the ruling. *Wallace*, 440 S.C. at 543, 892 S.E.2d at 313; *Morris*, 438 S.C. at 585-86, 885 S.E.2d at 396; *see also State v. Gibbs*, 438 S.C. 542, 551-53, 885 S.E.2d 378, 383-84 (2023) (discussing in detail a trial court's exercise of discretion in ruling on the admissibility of evidence).

2. Not Hearsay – Not Offered for the Truth of the Matter Asserted

Hearsay is a statement, which may be written, other than one made by the declarant while testifying at trial, offered in evidence to prove the truth of the matter asserted. *State v. King*, 422

S.C. 47, 66, 810 S.E.2d 18, 28 (2017); *State v. Brockmeyer*, 406 S.C. 324, 351, 751 S.E.2d 645, 659 (2013); Rule 801(c), SCRE. "Hearsay is not admissible unless there is an applicable exception." *King*, 422 S.C. at 66, 810 S.E.2d at 28; *Brockmeyer*, 406 S.C. at 351, 751 S.E.2d at 659; Rule 802, SCRE. If a statement is relevant and probative *only* to prove the truth of the matter asserted by the out-of-court declarant, then the statement is hearsay, and its admission into evidence is governed by the traditional hearsay rule. *King*, 422 S.C. at 67, 810 S.E.2d at 28 (relying on *Ruiz v. Commonwealth*, 471 S.W.3d 675 (Ky. 2015)). But, as with any other statement, if the out-of-court statement has relevance and probative value that is *not* dependent upon its truthfulness, and it is *not* offered into evidence as proof of the matter asserted, then by definition the evidence is *not* hearsay. *Id.*

In the instant case, evidence regarding the statements Appellant made on his jail calls to Erskine were not entered for their truth, but rather to show their effect on Erskine—that effect being her decision to talk to the public defender's office on the Friday before trial to claim, for the first time, that she had felt threatened by Cruz, and then to avoid testifying about the incident by claiming she did not remember anything about that night. Thus, as determined by the trial court, the evidence was not hearsay, was relevant and probative, and was properly admitted. *See* 29 Am. Jur. 2d *Evidence* § 660 (2026) ("[A]n out-of-court statement is not hearsay when offered to prove its effect *on a listener's mind* or to show why the listener subsequently acted as the listener did." (emphasis added)); *see State v. White*, 446 S.C. 276, 290–91, 919 S.E.2d 37, 45 (Ct. App. 2025) (holding text messages on defendant's cell phone revealing drug transactions conducted years before defendant was convicted were not out-of-court statements that were offered for the truth of the matter asserted, and thus did not constitute inadmissible hearsay evidence; as to statements of third parties within texts, the State did not offer them for the truth

of the matter asserted but rather for effect that statements had on defendant, giving context to his responsive texts); *State v. White*, 425 S.C. 304, 310, 821 S.E.2d 523, 527 (Ct. App. 2018) ("We find the statement was not introduced to prove the truth of the matter asserted, i.e.[,] ... [the victim] actually had a gun and knife on his moped. Instead, [the defendant] offered the statement to show *he believed* [the victim] had weapons on his moped."); *id.* at 310 n.2, 821 S.E.2d at 527 n.2 (noting that other jurisdictions "have similarly held statements were not hearsay when they were offered to show the effect of the statement *on the listener's state of mind* when the listener's state of mind was relevant to the case" (emphasis added)); *Caprood v. State,* 338 S.C. 103, 111, 525 S.E.2d 514, 518 (2000) (finding statements made regarding unrelated crimes not hearsay where "officers were explaining their actions in pursuing the defendants and the statements were not offered for their truth"); *State v. Johnson,* 318 S.C. 194, 197, 456 S.E.2d 442, 444 (Ct. App. 1995) (ruling testimony that defendant was in a "high drug traffic area" was not hearsay because it was introduced as "background information" about the investigation).

3. Not Hearsay – Admissions of a Party-Opponent

Even if this Court concludes the statements were offered for the truth of the matter asserted, they still were not hearsay and were properly admitted under the rules. Indeed, all parts of Appellant's statements were admissible as admissions of a party-opponent under Rule 801(d)(2)(A), SCRE; *State v. Beck*, 342 S.C. 129, 134, 536 S.E.2d 679, 682 (2000) ("'As a general rule, statements or declarations made by one accused of a crime are admissible against him.'"). These admissions are the very statements he now complains were improperly admitted because they "portray Appellant in a prejudicial way in front of the jury." (Brief of Appellant, p.19). This was a portrayal of Appellant's own making; therefore, his admissions were properly admitted in the discretion of the trial court.

4. Relevant and Probative – Rules 402 & 403

A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances. *State v. Adams*, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003). The appellate courts review a trial court's decision regarding Rule 403, SCRE, pursuant to the abuse of discretion standard and are obligated to give great deference to the trial court's judgment. *State v. Aleksey,* 343 S.C. 20, 35, 538 S.E.2d 248, 256 (2000); *State v. Hamilton*, 344 S.C. 344, 358, 543 S.E.2d 586, 598 (Ct. App. 2001) *overruled on other grounds by State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005).

Generally, all relevant evidence is admissible. Rule 402, SCRE; *State v. Saltz*, 346 S.C. 114, 127, 551 S.E.2d 240, 247 (2001). Relevant evidence is 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; *State v. King,* 349 S.C. 142, 561 S.E.2d 640 (Ct. App. 2002). Relevant evidence may be excluded where its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE; *Saltz* 346 S.C. at 127, 551 S.E.2d at 247; *State v. Cooley,* 342 S.C. 63, 536 S.E.2d 666 (2000). "To show prejudice, there must be a reasonable probability that the jury's verdict was influenced by the challenged evidence." *State v. Lee*, 399 S.C. 521, 527, 732 S.E.2d 225, 228 (Ct. App. 2012). "Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest a decision on an improper basis." *Id.* at 529, 732 S.E.2d at 229. "If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal." *State v. Hamilton*, 344 S.C. 344, 358, 543 S.E.2d 586, 598 (Ct. App. 2001), *overruled on other grounds by State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005). Our supreme court has

explained that when balancing the danger of unfair prejudice against the probative value of evidence, the determination must be based on the entire record and will turn on the facts of each case. *State v. Collins*, 409 S.C. 524, 534, 763 S.E.2d 22, 27-28 (2014).

Considering the record in this case, the trial court did not err in determining the probative value of admitting the jail calls was *not* substantially outweighed by the prejudicial effect of admitting the evidence. As explained by the solicitor at trial, the statements Appellant made in the jail calls were probative of his consciousness of guilt, his intent, malice, and Erskine's bias—which became critically important where she suddenly claimed a lack of memory about the incident. Appellant also advanced the theory that he was acting in defense of Erskine, thus further challenging his criminal intent and rendering the jail calls even more probative. Undoubtedly, the challenged evidence was prejudicial, as most evidence introduced by the prosecution in an attempted murder case rightfully would be. "Unfair prejudice, however, does not include damage that occurs to a defendant's case because of the 'legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis.'" *United States v. Guerrero-Cortez*, 110 F.3d 647, 652 (8th Cir. 1997); see also *Lee*, 399 S.C. at 527, 732 S.E.2d at 228. Here, the trial court aptly recognized these issues were all central in the case. Consequently, the trial court did not err in finding the probative value of the jail calls was not substantially outweighed by the danger of unfair prejudice. Whatever prejudicial effect the evidence may have had was outweighed by its probative value, since it helped to prove intent, motive, consciousness of guilt, and possible witness bias.

E. Harmless Error

Appellate courts will generally not set aside a judgment based on insubstantial errors not affecting the result. *State v. Sherard*, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991). Improper

admission of hearsay testimony constitutes reversible error only when the admission causes prejudice. *State v. Jennings*, 394 S.C. 473, 478–79, 716 S.E.2d 91, 93–94 (2011); *State v. Garner,* 389 S.C. 61, 67, 697 S.E.2d 615, 618 (Ct. App.2010). Only errors so substantial that they result in a verdict which would not otherwise have been rendered require reversal. *State v. Jolly,* 304 S.C. 34, 39, 402 S.E.2d 895, 898 (Ct. App. 1991). "A harmless error analysis is contextual and specific to the circumstances of the case." *State v. Byers*, 392 S.C. 438, 447-48, 710 S.E.2d 55, 60 (2011). "No definite rule of law governs [a finding of harmless error]; rather the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless when it could not reasonably have affected the result of the trial." *Id.* at 447-48, 710 S.E.2d at 60 (quoting *State v. Reeves*, 301 S.C. 191, 193-94, 391 S.E.2d 241, 243 (1990)). A defendant seeking reversal based on error in admission of evidence has the burden of showing that evidence was prejudicial. *State v. McElveen,* 280 S.C. 325, 327, 313 S.E.2d 298, 299 (1984).

Here, any error in the admission of the recorded jail calls with Erskine was harmless in view of the overwhelming evidence presented of guilt, such that it could not reasonably have affected the result of the trial. Considering: (1) Cruz's detailed testimony, which included an embarrassing admission that Erskine was at his apartment because he was paying her for sex, and his clear explanation that he only locked the door because Appellant was at the door with a gun; (2) Erskine's frantic 911 call asking for help because Appellant had shot her; (3) Masskooni identifying Appellant from the apartment security videos as being present at the time of the shooting; (4) Erskine generally corroborating Cruz's testimony while also trying to protect Appellant by claiming she did not remember the incident; (5) corroborating testimony from witness Drummond and victim Zhang; (6) Erskine's prior inconsistent statements on Cushman's

body-worn camera which further corroborated Cruz's testimony; (7) Appellant telling Erskine's mother Sheila on the phone that he was sorry he had shot Erskine; and (8) forensic evidence from the scene showing six shots had been fired from a single gun; the additional information conveyed in the jail calls was mere icing on the cake and did not reasonably affect the result at trial. Indeed, the remaining evidence is overwhelming where the jury found Cruz credible, as they clearly did. If the jurors did not believe Cruz, they would not have been able to convict under the law charged by the trial court, regardless of the connection to Erskine and the consciousness of guilt shown in the jail calls. Thus, the jail calls were inconsequential to the ultimate decision. For all of these reasons, the State submits this argument should be denied and dismissed, and Appellant's convictions and sentences should be affirmed.

II.

The trial court properly admitted a video recording of Sergeant Cushman's body-worn camera interview of victim Olivia Erskine at the hospital as extrinsic evidence of her prior inconsistent statement under Rule 613(b), SCRE, because Erskine effectively denied making the prior inconsistent statement after being advised of the substance of the statement, the time and place it was allegedly made, and the person to whom it was made. In any event, any possible error in admitting the statement was harmless because, beyond a reasonable doubt, it did not contribute to the jury's verdict given the overwhelming evidence of guilt.

Appellant argues the trial court erred in admitting Erskine's prior inconsistent statement under Rule 613(b), SCRE, because at trial, the State failed to first advise her of the substance of the statement. He contends the State failed to lay the proper foundation for admission by not advising Erskine about the *specific* substance of the prior statements she made to Cushman. Appellant argues the State should have asked Erskine specific questions about her prior statement so she would be given the opportunity to unequivocally admit to making the statement,

and *then* could have introduced the video if she did not admit and instead denied making it, or failed to recall making the specific statement about which she was questioned. (Brief of Appellant, p.23-p.28). The State disagrees and submits Appellant's argument is entirely without merit.

Law / Discussion

The trial court properly admitted the video-recording of Officer Cushman's body-worn camera interview of Erskine at the hospital as extrinsic evidence of her prior inconsistent statement under Rule 613(b), SCRE because Erskine effectively denied making the prior inconsistent statement after being repeatedly advised of the substance of the statement, the time and place it was allegedly made, and the person to whom it was made. The foundational requirements proposed by Appellant are overly technical, particularly where the s*pecific substance* of the inconsistency was an *omission* from the prior statement. Not only did the solicitor point out this omission on redirect, everyone in the courtroom was aware of the general substance of the prior statement—what happened during the incident. The argument should be rejected and Appellant's convictions and sentences should be affirmed.

On redirect examination, Erskine repeated her earlier claim that she *did not remember: (1) talking to law enforcement, (2) at the hospital, (3) about the incident.* She then seemingly admitted that *the first time she indicated she was not allowed to leave the apartment because of Cruz's aggressive threats* was the prior Friday, when talking to defense's investigator, but only after also agreeing she did not remember talking to law enforcement at the hospital. (Tr.p.117, lines 2-15). Thus, she was specifically given the opportunity to unequivocally admit this critical omission from the prior statement, but she waffled in her response. Under these circumstances,

the trial court acted well within its broad discretion in admitting Erskine's prior inconsistent statement under Rule 613(b), SCRE.

Even if this Court disagrees, any error in the admission of Erskine's prior inconsistent statement was harmless in view of the overwhelming evidence presented of guilt, such that it could not reasonably have affected the result of the trial. Considering: (1) Cruz's detailed testimony, which included an embarrassing admission that Erskine was at his apartment because he was paying her for sex, and his clear explanation that he only locked the door because Appellant was at the door with a gun; (2) Erskine's frantic 911 call asking for help because Appellant had shot her; (3) Masskooni identifying Appellant from the apartment security videos as being present at the time of the shooting; (4) Erskine generally corroborating Cruz's testimony while also trying to protect Appellant by claiming she did not remember the incident; (5) corroborating testimony from witness Drummond and victim Zhang; (6) the admitted jail calls between Appellant and Erskine which helped show consciousness of guilt, motive, intent, and possible witness bias; (7) Appellant telling Erskine's mother Sheila on the phone that he was sorry he had shot Erskine; and (8) forensic evidence from the scene showing six shots had been fired from a single gun; the additional information in the prior statement did not reasonably affect the result at trial. Indeed, the remaining evidence is overwhelming where the jury found Cruz credible, as they clearly did. If the jurors did not believe Cruz, they would not have been able to convict under the law charged by the trial court, regardless of the corroboration of his story that was shown through the prior inconsistent statement. Thus, Erskine's prior statement was inconsequential to the ultimate decision. For all of these reasons, the State submits this argument should be denied and dismissed, and Appellant's convictions and sentences should be affirmed.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that Appellant's convictions and sentences be affirmed.

Respectfully submitted,

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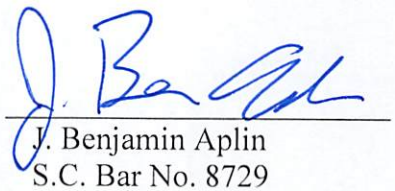
BY: 
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Columbia, South Carolina
January 9, 2026

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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Kristi F. Curtis, Circuit Court Judge

Appellate Case No. 2024-002210

The State, ...Respondent,

v.

Francisco Cortes,.....Appellant.

PROOF OF SERVICE

I, Susan Spencer, Legal Assistant, hereby certify that I have served the *Initial Brief of Respondent* and *Designation of Matter*, both dated January 9, 2026, on Appellant by sending an electronic copy via email to Kathrine H. Hudgins, counsel of record for Appellant, at the address listed for counsel in AIS.

I further certify that all parties required by Rule to be served have been served. This 9th day of January, 2026.

Susan Spencer

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Susan Spencer

From: Susan Spencer
Sent: Friday, January 9, 2026 4:11 PM
To: Hudgins, Kathrine
Cc: Ben Aplin; cstock@sccid.sc.gov
Subject: The State v. Francisco Cortes (2024-002210)
Attachments: CORTES Francisco - Initial Brief of Respondent.pdf

Good afternoon Ms. Hudgins,

Attached please find the Initial Brief of Respondent and Designation of Matter in The State v. Francisco Cortes (2024-002210). These documents will be filed today with the Court of Appeals via the AIS OneDrive system. If you will, please confirm receipt.

Thank you.

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