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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable Walton J. McLeod, IV, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MARK ANTHONY FESTUS SCHEIBLER,

APPELLANT

APPELLATE CASE NO. 2025-001268

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUE ON APPEAL.....	1
STATEMENT OF THE CASE.....	2
ARGUMENTS	
I. The trial court erred by admitting a recorded jail call between appellant and his niece because the calls were obtained in violation of appellant’s privacy rights.	3
Standard of Review.....	3
Relevant Facts.....	3
Discussion.....	11
II. The trial court abused its discretion by admitting texts messages extracted from appellant’s phone and sent on December 2, 2021, prior to his arrest, where the text messages were not admissible as evidence of flight to demonstrate evidence of appellant’s consciousness of guilt because there was no nexus between the alleged evasive conduct and the charged offenses and where the probative value of the text messages was substantially outweighed by the danger of unfair prejudice.	17
Relevant Facts.....	17
Discussion.....	24
III. The trial court erred in sentencing appellant to five years for possession of a weapon during the commission of a violent crime in violation of S.C. Code §16-23-490 when the judge sentenced appellant to life in prison for murder.....	28
Standard of Review.....	28
Relevant Facts.....	28
Discussion.....	29
CONCLUSION.....	31

TABLE OF AUTHORITIES

Cases

<i>Brady v. United States</i> , 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970).....	14
<i>Bumper v. North Carolina</i> , 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968).....	14
<i>Coffin v. Reichard</i> , 143 F.2d 443 (6th Cir. 1944).....	12
<i>Coolidge v. New Hampshire</i> , 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971)	13
<i>Ezell v. Ritholz</i> , 188 S.C. 39, 198 S.E. 419 (1938)	30
<i>Grosshuesch v. Cramer</i> , 377 S.C. 12, 659 S.E.2d 112 (2008)	14
<i>Horton v. California</i> , 496 U.S. 128, 110 S. Ct. 2301, 110 L. Ed. 2d 112 (1990).....	13
<i>People v. Diaz</i> , 33 N.Y.3d 92, 122 N.E.3d 61 (N.Y. 2019).....	15
<i>People v. Henry</i> , 65 Cal.2d 842, 56 Cal.Rptr. 485, 423 P.2d 557 (1967).....	14
<i>Price v. Johnston</i> , 334 U.S. 266, 68 S.Ct. 1049, 92 L.Ed. 1356 (1948).....	12
<i>Procunier v. Martinez</i> , 416 U.S. 396 (1974)	12
<i>Schneckloth v. Bustamonte</i> , 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973).....	14
<i>Segura v. Texas</i> , 826 S.W.2d 178 (Tex.App.1992)	11
<i>State ex rel. McLeod v. Holcomb</i> , 245 S.C. 63, 138 S.E.2d 707 (1964).....	30
<i>State v. Austin</i> , 306 S.C. 9, 409 S.E.2d 811 (Ct. App. 1991).....	11
<i>State v. Bonner</i> , 400 S.C. 561, 735 S.E.2d 525 (Ct. App. 2012)	29
<i>State v. Brantley</i> , 321 Ga. 370, 914 S.E.2d 807 (2025).....	14
<i>State v. Brockmeyer</i> , 406 S.C. 324, 751 S.E.2d 645 (2013)	3
<i>State v. Cartwright</i> , 425 S.C. 81, 810 S.E.2d 756 (2018).....	24, 25, 27
<i>State v. Crawford</i> , 362 S.C. 627, 608 S.E.2d 886 (Ct. App. 2005)	20
<i>State v. Easler</i> , 327 S.C. 121, 489 S.E.2d 617 (1997)	11

<i>State v. Ellefson</i> , 266 S.C. 494, 224 S.E.2d 666 (1976)	3, 4, 12, 13, 14, 15
<i>State v. Forrester</i> , 343 S.C. 637, 541 S.E.2d 837 (2001)	11
<i>State v. Gray</i> , 438 S.C. 130, 882 S.E.2d 469 (Ct. App. 2022).....	26
<i>State v. Gray</i> , 408 S.C. 601, 759 S.E.2d 160 (Ct. App. 2014).....	26
<i>State v. Hatcher</i> , 392 S.C. 86, 708 S.E.2d 750 (2011)	3
<i>State v. Johnston</i> , 333 S.C. 459, 510 S.E.2d 423 (1999)	29
<i>State v. King</i> , 424 S.C. 188, 818 S.E.2d 204 (2018).....	27
<i>State v. McDowell</i> , 266 S.C. 508, 224 S.E.2d 889 (1976).....	24
<i>State v. Middleton</i> , 441 S.C. 55, S.E.2d 279 (2023)	20, 24, 26
<i>State v. Pagan</i> , 369 S.C. 201, 631 S.E.2d 262 (2006)	3, 22, 24, 25
<i>State v. Plumer</i> , 439 S.C. 346, 887 S.E.2d 134 (2023).....	28, 29, 30
<i>State v. Vick</i> , 384 S.C. 189, 682 S.E.2d 275 (Ct. App. 2009).....	29
<i>United States v. Clark</i> , 651 F. Supp. 76 (M.D. Pa. 1986).....	12
<i>United States v. Stout</i> , 509 F.3d 796 (6th Cir. 2007).....	26
<i>United States v. Van Poyck</i> , 77 F.3d 285 (9th Cir. 1996).....	12

Statutes

S.C. Code Ann. §16-1-60.....	29
S.C. Code Ann. §16-23-490.....	1, 29, 30
S.C. Code Ann. §17-25-45.....	10, 28

Rules

Rule 401, SCORE.....	24
Rule 402, SCORE.....	22, 24
Rule 403, SCORE.....	22, 26, 27

Rule 404, SCRE	22
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Constitutional Provisions

S.C. Const. art. I, § 10	3, 11, 15, 16
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U.S. Const. amend. IV	3, 4, 11, 13, 15, 16
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STATEMENT OF ISSUES ON APPEAL

I.

Whether the trial court erred by admitting a recorded jail call between appellant and his niece because the calls were obtained in violation of appellant's privacy rights?

II.

Whether the trial court abused its discretion by admitting texts messages extracted from appellant's phone and sent on December 2, 2021, prior to his arrest, where the text messages were not admissible as evidence of flight to demonstrate evidence of appellant's consciousness of guilt because there was no nexus between the alleged evasive conduct and the charged offenses and where the probative value of the text messages was substantially outweighed by the danger of unfair prejudice?

III.

Whether the trial court erred in sentencing appellant to five years for possession of a weapon during the commission of a violent crime in violation of S.C. Code §16-23-490 when the judge sentenced appellant to life in prison for murder?

STATEMENT OF THE CASE

In June of 2025, the Lexington County Grand Jury indicted appellant for murder and possession of a weapon during commission of a crime. R. *(Indictments). On June 16, 2025, appellant's case was called to trial before the Honorable Walton J. McLeod, IV, and a jury. Tr. I, p. 1.¹ Suzanne Mayes and Kelly Oppenheimer represented the state. Tr. I, p. 1. Jean M. Popowski, Stephen Russel Story, Jr., and Gabriel L. Mangold represented appellant. Tr. I, p. 1. The jury found appellant guilty as indicted. Tr. II, p. 458, ll. 16-25. Judge McLeod imposed a life sentence as to murder and a concurrent five-year sentence as to the possession of a weapon during commission of a violent crime offense. Tr. II, p. 468, ll. 15-24. Appellant filed a timely notice of appeal. R. *(Notice of appeal).

This brief follows.

¹ On November 27, 2023, appellant proceeded to trial on the above charges as well as the charge of arson. Ultimately, the 2023 jury rendered a not guilty verdict as to arson and the trial court declared a mistrial as to the remaining charges because the jury could not come to a decision.

ARGUMENTS

I.

The trial court erred by admitting a recorded jail call between appellant and his niece because the calls were obtained in violation of appellant's privacy rights.

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).

Relevant facts

Motion to suppress jail calls

Prior to trial, appellant moved to suppress jail calls recorded while appellant was being detained. Tr. I, p. 120, ll. 10-13.² Defense counsel argued that admission of the calls would violate the Fourth Amendment of the United States Constitution as well as the right to privacy in Article 1 Section 10 of the South Carolina Constitution. Tr. I, p. 120, ll. 10-19. Counsel pointed to his written motion which cited to *State v. Ellefson*, 266 S.C. 494, 224 S.E.2d 666 (1976) where our Supreme Court held that a defendant's letters obtained by law enforcement from the jail were admitted in violation of the South Carolina and United States Constitutions. Tr. I, p. 120, l. 19 – 121, l. 2. Counsel argued that in *Ellefson*, our Supreme Court looked to 1) whether the regulation or practice in question furthered an important substantial governmental interest, and

² For ease of reference, “Transcript I” refers to the transcript of the proceedings on June 16-17, 2025, while “Transcript II” refers to the transcript of the proceedings on June 18-20, 2025.

2) the limitation of the First Amendment must be no greater than necessary and essential to the protection of the government interest. Tr. I, p. 121, ll. 6-17. Counsel noted that in *Ellefson*, there was a signed and written waiver that the letters would be read, however, the *Ellefson* Court found that fact was not dispositive to establish a voluntary waiver for purposes of their right to privacy and right against searches and seizures under the Fourth Amendment. Tr. I, p. 122, ll. 4-9. Counsel argued that the act of signing a waiver was more assertive than the statement in many of the recorded jail calls that the calls would be recorded. Tr. I, p. 122, ll. 9-12.

In addition, defense counsel contended that there was “no substantial governmental interest except for investigation.” Tr. I, p. 122, ll. 12-13. He argued that while law enforcement and the solicitors often cite safety issues, *Ellefson* and other cases provide that “general safety” cannot satisfy as a governmental interest. Tr. I, p. 122, ll. 14-16. He argued that pretrial detainees, like appellant, have to talk to people on the outside to marshal a defense and communicate with their family members, friends, and other close persons. Tr. I, p. 122, l. 24 – 123, ll. 4. He asserted that there was no interest present in appellants case but instead the jail and the solicitor gather the jail calls “simply for the purpose of investigation.” Tr. I, p. 123, ll. 16-25. He concluded by asking the trial court to suppress the recorded jail calls as they were obtained merely for investigative purposes and there was no evidence that appellant was “bringing contraband into jail or anything like that.” Tr. I, p. 124, ll. 1-6.

The state responded that the Fourth Amendment focused on reasonable expectations of privacy. Tr. I, p. 124, ll. 8-15. The state contended that there was no reasonable expectation of privacy in calls made while in jail and there was “certainly a waiver by continuing to make phone calls in jail.” Tr. I, p. 124, ll. 16-18. The state distinguished from the cited cases because appellant’s case concerned calls while the cases concerned mail. Tr. I, p. 124, ll. 19-22. The

state argued that jail calls allowed “any other person working the jail, any other inmate in the booking area where [appellant] made the call, could overhear what he was saying.” Tr. I, p. 124, ll. 22-24. The state thus concluded that there was no “reasonable expectation of privacy, and the Fourth Amendment would not protect his calls.” Tr. I, p. 125, ll. 7-9. Further, the state argued that there was an “implicit waiver,” even if there were a reasonable expectation of privacy as appellant continued to make calls. Tr. I, p. 125, ll. 9-11.

The trial court determined that “[b]ased on the record we’ve made here today I’ll deny the motion to suppress the jail calls at this time.” Tr. I, p. 125, ll. 21-23.

Trial

On November 27, 2021, several 911 calls were placed concerning gunshots that were heard at Mac Circle. Tr. I, p. 166, ll. 17-21; p. 173, ll. 9-20; p. 187, ll. 1-9. Officers arrived at the scene and located an individual, later identified as Jimmy Johnson, with multiple gunshot wounds.³ Tr. I, p. 207, l. 21 – 209, l. 7. Diedre Smith, Johnson’s girlfriend, testified that she and Johnson both had campers located on the Mac Circle property. Tr. I, p. 226, ll. 6-13; 229, ll. 16-22. She testified that on November 27, 2021, she was woken up by Johnson saying that his camper was on fire. Tr. I, p. 230, ll. 10-12. She explained that Johnson left the camper to figure out what was going on. Tr. I, p. 231, ll. 7-10. As she was starting to head out of the camper, she heard pops. Tr. I, p. 233, ll. 16-24. Initially, she did not realize the multiple pops were gunshots. Tr. I, p. 234, ll. 2-6. When she got to the porch she saw Johnson face down on the porch. Tr. I, p. 234, ll. 22-25. She tried to move him, but he was unresponsive. Tr. I, p. 235, ll. 1-9. A neighbor came to help her, and they moved Johnson from the front porch onto a golf cart top. Tr. I, p. 235, ll. 11-16. When they moved Johnson, she realized that he had been shot. Tr.

³ During trial, a forensic pathologist testified that Johnson’s cause of death was gunshot wounds to the torso. Tr. II, p. 103, ll. 16-18.

I, p. 235, ll. 16-18. Smith testified that she never saw a shooter in the yard or a vehicle that the shooter was in. Tr. I, p. 239, ll. 17-20.

Smith then testified that she had seen appellant a few nights prior on November 23, 2021. Tr. I, p. 244, l. 22 – 245, l. 7. Appellant asked for a ride into town and Johnson and appellant left with Smith's car. Tr. I, p. 245, l. 11 – 247, ll. 11. Johnson came back thirty minutes later alone. Tr. I, p. 247, ll. 17-24. Finally, Smith testified that on the day of the incident the front passenger and rear tires of her car were slashed. Tr. I, p. 251, ll. 18-24.

Patrick Ward, an expert in crime scene investigations, testified that he observed blood on the porch, deck, and front door area. Tr. I, p. 266, ll. 12-22. He located two fired cartridge cases in the front yard area and five fired cartridge cases on the front porch, all of which were nine millimeter caliber. Tr. I, p. 270, ll. 12-24. An expert in crime scene investigations, including firearms examination and crime scene reconstruction, also opined that the seven 9mm fired shell casings were fired from the same firearm. Tr. II, p. 361, ll. 16-21.

Several officers testified that appellant was ultimately detained on December 2, 2021, on Thrush Street. Tr. II, p. 11, ll. 14-17; p. 15, ll. 17-21; p. 16, ll. 10-14. A cellphone was collected when appellant was detained. Tr. II, p. 16, ll. 15-18. Appellant provided consent to search his phone. Tr. II, p. 17, l. 23 – 18, l. 1. An extraction was completed on appellant's phone. Tr. II, p. 43, ll. 11-19. Three factory resets were associated with appellant's phone on November 27, 2021, at 9:45 a.m. and 9:39 p.m., and a third factory reset was completed at 11:40 p.m. on December 1, 2021. Tr. II, p. 149, ll. 11-24.

Stacie Fidler then testified that on November 27, 2021, she lived on Harbison Boulevard with Jeffrey Davidock. Tr. II, p. 197, l. 16 – 198, l. 13. Earlier in November she got a rental car. Tr. II, p. 200, ll. 7-11. She recalled that the same day she got the rental car, Davidock's work

colleague was at their residence when she returned home. Tr. II, p. 201, l. 19 – 202, l. 3. The work colleague was appellant, whom she had never seen prior to that night, November 24, 2021. Tr. II, p. 202, ll. 12-20. She described that appellant was mad that someone had taken his girlfriend's belongings and Fidler further testified that appellant "said that he was going to kill him" Tr. II, p. 203, ll. 8-13. She testified she heard appellant say he would "go to his house and shoot him when he came out." Tr. II, p. ll. 14-15. She testified that the person appellant was angry with was Johnson. Tr. II, p. 204, ll. 17-20. Fidler also explained that on Friday November 26, 2021, her rental car was gone. Tr. II, p. 211, ll. 17-20. She testified that she called appellant several times trying to get the car back. Tr. II, p. 212, ll. 9-13. She testified that at 9:29 a.m. on Saturday appellant told her she did not want the car back. Tr. II, p. 214, ll. 11-22. On Sunday she learned that Johnson was dead, and she never heard from appellant again or had her rental car returned to her. Tr. II, p. 215, ll. 22-24; p. 218, ll. 20-25.

Jeffrey Davidock then testified that on November 24, 2021, appellant called him and said he needed a place to sleep. Tr. II, p. 235, ll. 10-19. Davidock described appellant as paranoid and agitated. Tr. II, p. 236, ll. 1-3. He testified that appellant said someone stole his girlfriend's belongings and he wanted them back. Tr. II, p. 236, ll. 5-12. Davidock testified that appellant said he was going to go to Johnson's place, and when Johnson came out he was going to shoot him. Tr. II, p. 237, ll. 3-21. He testified that they all went to sleep, and when he woke up the next morning the rental car was gone.⁴ Tr. II, p. 238, ll. 2-17.

Jail calls entered at trial

Paula Hare, a lieutenant with the Lexington County Sheriff's Office at the detention center testified that records were kept of visitors to inmates. Tr. II, p. 167, l. 22 – 168, l. 22. She

⁴ During trial, the state presented evidence that the rental car was later discovered from a report to the Aiken County Sheriff's Department for an abandoned vehicle. See Tr. II, p. 255-264.

testified that appellant's visitor log listed Doshia Folden, his niece. Tr. II, p. 170, ll. 15-23. The phone number associated with Folden ended in -5606. Tr. II, p. 171, ll. 9-11. Michael Layland, the president of AmTel, testified that AmTel provided communication for residents inside the facility and records those jail calls. Tr. II, p. 173, ll. 1-12. He testified that an audio warning is heard when a call is placed and there was a placard on the telephone itself with a warning. Tr. II, p. 173, ll. 13-17. He explained that calls are retained in the ordinary course of business for five years. Tr. II, p. 173, ll. 18-22. AmTel can pull calls from a database if requested. Tr. II, p. 173, ll. 23-25. He explained, however, that the warden determines who has access to that process. Tr. II, p. 174, ll. 2-5. He testified that he was asked to pull a jail call assigned to appellant. Tr. II, p. 174, ll. 6-8. He testified that the date of the call was December 3, 2021, and appellant's unique pin number was associated with the call. Tr. II, p. 174, ll. 18-25. The call was made at 3:39 p.m. with appellant's unique pin to a number ending in -5606. Tr. II, p. 177, l. 17 – 178, l. 10. The call was 900 seconds. Tr. II, p. 178, l. 23 – 179, l. 1. Kennedy Conatser, an expert in audio/visual enhancements, testified that he performed several audio enhancements on the jail call. Tr. II, p. 180, l. 8 – 182, l. 20. He was requested to get rid of the background noise on the call. Tr. II, p. 186, l. 21 – 187, l. 1.

Kevin McCullough, a lieutenant employed at Alvin S. Glenn Detention Center, testified that he had access to recorded jail calls. Tr. II, p. 188, ll. 1-11. He reviewed and listened to the jail call related to appellant from December 3, 2021. Tr. II, p. 188, ll. 22-25; p. 189, ll. 14-15. He testified that he was the custodian of records for Alvin S. Glenn and did not have the ability to alter the content of the jail calls. Tr. II, p. 189, ll. 19-22. The state moved exhibits 171-173 into evidence over defense counsel prior objection. Tr. II, p. 190, ll. 2-9.

State's Exhibits 171-173

The first clip, State's Exhibit 171, provides an automated message that all phone calls are subject to monitoring and recording. R *(State's Exhibit 171). In State's Exhibit 172, appellant can be heard stating someone needs to give him his sock back. R *(State's Exhibit 172). Finally, in the third clip, State's Exhibit 173, appellant can be heard saying that someone stole something from him, he told him that he had four hours to give it back, and he did not want to give it back, so he unloaded on him. R *(State's Exhibit 173).

The state then played the jail call for the jury. Tr. II, p. 320, l. 21. Joe Hart, a sergeant with the Lexington County Sheriff's Department, testified that the person on the other end of the call hears the warning. Tr. II, p. 320, l. 23 – 321, l. 1. The state played the jail call for the jury at 90 percent speed, over defense counsel's objection. Tr. II, p. 321, l. 21 – 322, l. 10. Hare testified that at the end of the phone call appellant referenced that something was stolen and appellant said, "I told him he got four hours to give it back, and he didn't want to give it back, so I sure for sure unloaded on him." Tr. II, p. 322, ll. 12-19. Hare testified that "[u]nloaded on him, in [his] experience, refers to unloading a firearm." Tr. 322, ll. 20-24. The state played the jail call for the jury at normal speed. Tr. II, p. 323, ll. 8-12. The state immediately played the call for the jury again at 90 percent speed. Tr. II, p. 323, ll. 16-18. On redirect examination, Hare testified that on the jail call the jury heard, appellant identified himself as the shooter. Tr. II, p. 345, ll. 19-25.

Renewed objections and motions

After the state rested, appellant moved for a directed verdict as to each offense, which the trial court denied. Tr. II, p. 394, l. 9 – 397, l. 4. Defense counsel then renewed all previous objections and motions. Tr. II, p. 397, ll. 7-8. Specifically, counsel renewed his objection to the

denial of the Fourth Amendment motion to keep out the jail call. Tr. II, p. 397, ll. 12-13. The trial court noted that the motions were renewed but determined that the prior rulings stood. Tr. II, p. 397, l. 25 – 398, l. 1. After the defense rested its case, Tr. II, p. 403, ll. 14-15, defense counsel again renewed all prior motions, Tr. II, p. 404, ll. 3-11.

Closing arguments

During its closing argument, the state argued that the jail call was direct evidence from appellant's mouth. Tr. II, p. 407, ll. 11-16. The state argued that the jury could "hear the utter malice still in [appellant's] voice when he talks about what he did," in reference to the jail call. Tr. II, p. 425, ll. 16-18. The state reiterated the statements from the call, specifically, that appellant said, "I unloaded on him." Tr. II, p. 425, ll. 19-21. The state argued that the jail call showed malice days later. Tr. II, p. 425, l. 23. The state pointed out that the jury could listen to the jail call as many times as they liked and emphasized that the call told "you exactly what he did and why he did it." Tr. II, p. 425, l. 24 – 426, l. 3. The state continued that "[t]he motive, the malice, and the means all in that jail call." Tr. II, p. 426, ll. 3-4. The state played the jail call for the jury. Tr. II, p. 427, l. 25.

Verdict and sentencing

The jury returned a verdict of guilty as to the charges of murder charge and possession of a weapon during commission of a violent crime. Tr. II, p. 458, ll. 16-25. During the sentencing hearing, the state noted that it served notice of mandatory imposition of a life sentence pursuant to S.C. Code Ann. § 17-25-45. Tr. II, p. 463, ll. 1-7. Judge McLeod thus imposed a life sentence as to the murder charge and a five-year concurrent sentence as to the possession of a weapon during the commission of a violent crime charge. Tr. II, p. 468, ll. 15-24.

Discussion

The trial court erred by refusing to exclude the recorded jail call between appellant and his niece because the call violated his privacy rights under the United States and South Carolina Constitutions as appellant had a reasonable expectation of privacy in using the jail telephones and making phone calls.

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 recorded jail call in the instant case is analogous to the letters in *Ellefson*. While federal courts have found no expectation of privacy in jail calls,⁵ this Court should find that appellant had, at least, a diminished but reasonable expectation of privacy in the jail call at issue based on the heightened protection of privacy found in the South Carolina Constitution and the holding in *Ellefson*. Surely detention centers can have a legitimate interest in monitoring detainee phone calls for security purposes. This interest, however, should not extend to the state conducting a fishing expedition of a defendant's phone calls prior to trial in the hopes of finding incriminating evidence.

⁵ *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).

In appellant's case, the jail call was recorded and stored by AmTel and the warden determined who had access to AmTel's database of retained jail calls. Tr. II, p. 173, ll. 1-12; p. 174, ll. 2-5. The president of AmTel testified that he was asked to pull a jail call assigned to appellant. Tr. II, p. 174, ll. 6-8. The result is that the search of the calls, 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 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.' 'The burden is on those seeking the exemption to show the need for it.'"). The state did not seek a warrant to obtain appellants' jail calls and likewise 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.

Although the state argued to the trial court that there was an "implicit waiver," by appellant, Tr. I, p. 125, ll. 9-11, and elicited testimony that an audio warning is heard when a call is placed and there was a placard on the telephone itself with a warning, Tr. II, p. 173, ll. 13-17, the audio warnings and appellant's action to continue to make calls despite the warnings does not create adequate consent. Specifically, 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 petitioner 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) (emphasis added). In the instant case, the recording prior to the jail calls that appellant heard is not sufficient for consent under the South Carolina Constitution. Tr. II, p. 173, ll. 13-17; *see also* R *(State’s Exhibit 171). The recording is thus not sufficient as a waiver of constitutional rights because “[c]ourts 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). It likewise cannot be said that appellant’s consent was voluntary as he had no viable alternative to the jail phones. Thus, the state’s argument to the trial court that appellant made an implicit waiver by continuing to make phone calls on the recorded line is nonsensical where, under the state’s logic, appellant would have to abstain from making any phone calls to avoid making an implicit waiver. Tr. I, p. 125, ll. 9-11.

In addition, while other courts have held that a pre-trial detainee lacks a reasonable expectation of privacy in jail calls, the justification is primarily jail safety as a “legitimate security measure.” *See, e.g., State v. Brantley*, 321 Ga. 370, 374, 914 S.E.2d 807, 810 (Ga. 2025). Although jail safety may be a legitimate concern, this ignores the fact that a pre-trial

detainee who wants to exercise one of several constitutional rights, including those so important as preparing his defense for trial,⁶ has no real choice but to use the recorded jail telephone. Nor can the broad-sweeping concern of “jail safety” justify indiscriminate eavesdropping on the phone calls of pre-trial detainees by various investigators. Tr. II, p. 173, ll. 23-25; p. 174, ll. 2-5; p. 188, ll. 22-25; p. 189, ll. 14-15; *See Ellefson*, 266 S.C. at 498, 224 S.E.2d at 668 (“The letters were obtained by...a detective who was not connected with the operation of the jail. His efforts were entirely investigatory and in pursuit of securing a conviction”); *see also People v. Diaz*, 33 N.Y.3d 92, 110, 122 N.E.3d 61, 73 (N.Y. 2019) (Wilson, J., dissenting (“It is simply implausible that the wholesale disclosure of phone call recordings to the District Attorney advances jail security”)). To that end, the state did not elicit testimony from any witness that appellant engaged in any behavior that suggested to law enforcement that there may be evidence of a crime to be found within his phone calls. The result is that these recordings were not made based on any particularized suspicion, and the search of the contents of appellants’ calls was unlawful. U.S. Const. amend. IV; S.C. Const. art. I, § 10.

Even further, the jail calls at issue in this case played a significant role in appellant’s trial. For instance, the state elicited extensive testimony about the calls, including playing the call for the jury several times at normal speed and slowed down. Tr. II, p. 320, l. 21; p. 321, l. 21 – 322, l. 10; p. 323, ll. 8-12; p. 323, ll. 16-18. Hart, an investigator assigned to appellant’s case, testified regarding the contents of the jail call. Specifically, he testified that appellant stated he “unloaded on him,” and explained that in his experience that meant unloading a firearm. Tr. II, p. 322, ll. 12-19; 322, ll. 20-24. In addition, Hare testified that he believed that the appellant

⁶ *Ellefson*, 266 S.C. at 501, 224 S.E.2d at 670 (“To allow an independent prosecution team the right to indiscriminately inspect letters written by the accused is to hack at the roots of any defense”).

identified himself as the shooter in the jail call. Tr. II, p. 345, ll. 19-25. The state also emphasized the contents of the jail call during its closing argument, to argue that malice could be heard in appellant's voice and that the call was direct evidence from appellant's mouth. Tr. II, p. 407, ll. 11-16; p. 425, ll. 16-18. Moreover, the state played the jail call during its closing argument and reminded the jury they could listen to the call as many times as they wanted emphasizing that the call "tells you exactly what he did and why he did it." Tr. II, p. 425, l. 24 – 426, l. 3; II, p. 427, l. 25.

Accordingly, the trial court erred by admitting the recorded jail call between appellant and his niece at trial because the calls were obtained in violation of appellant's privacy rights under the South Carolina Constitution and his guarantee against unreasonable searches and seizures under the Fourth Amendment of the United States Constitution.

II.

The trial court abused its discretion by admitting texts messages extracted from appellant's phone and sent on December 2, 2021, prior to his arrest, where the text messages were not admissible as evidence of flight to demonstrate evidence of appellant's consciousness of guilt because there was no nexus between the alleged evasive conduct and the charged offenses and where the probative value of the text messages was substantially outweighed by the danger of unfair prejudice.

Relevant facts

State's written motion

Prior to trial, on June 11, 2021, the state filed a written motion for admission of *res gestae* evidence. R *(*Res gestate* motion). In that motion, the state raised its intent to use evidence of flight as evidence of consciousness of guilt. R *(*Res gestate* motion). The state argued that it intended to present evidence that appellant fled the scene of the murder in Lexington County on November 27, 2021, and remained at large until he was apprehended in Richland County on December 2, 2021. R *(*Res gestate* motion). Specifically, the state contended that it intended to present evidence that appellant's phone did not interact with cell towers during the time of the murder, that he did not call 911 or remain at the scene, and that appellant sent a text message while officers were outside of the Richland County residence that read "phone got me." R *(*Res gestae* motion). The state argued that the "text is probative evidence of the [appellant's] knowledge and state of mind regarding law enforcement's ability to trace cellphone locations." R *(*Res gestate* motion). The state asserted that the text was proof of appellant's state of mind and intent to deactivate his phone during the time frame of the murder.

R *(*Res gestate* motion). As to the text, the state argued it was necessary and probative evidence of guilt and state of mind. R *(*Res gestate* motion).

Pretrial argument

During pretrial motions, defense counsel raised the final part of the state's *res gestae* motion which the trial court clarified concerned the "phone got me," text. Tr. I, p. 86, ll. 17-22. Counsel argued that evidence of flight requires both actual flight and nexus between the flight and the crime charged. Tr. I, p. 87, ll. 1-4. Counsel argued that there was no nexus because the Richland County arrest was regarding a Richland County shooting for which authorities were surrounding a trailer appellant was in because he was charged with the Richland County shooting. Tr. I, p. 87, l. 23 – 88, l. 3. Specifically, counsel argued that law enforcement did not "have probable cause for the Lexington County shooting . . . and so he was only on the run for the Richland County shooting." Tr. I, p. 88, ll. 4-8. Counsel continued that there was no actual flight as appellant surrendered to law enforcement and gave a full confession for both crimes. Tr. I, p. 88, ll. 9-11. Counsel argued that there was no flight and there was no nexus. Tr. I, p. 88, ll. 11-12. In addition, counsel contended that it was agreed the Richland County arrest was "off limits," and appellant had pled guilty to assault and battery of a high and aggravated nature as to the Richland County arrest. Tr. I, p. 88, ll. 11-18. Defense counsel argued that appellant did not flee, he was in the trailer, surrendered, and spoke with the police. Tr. I, p. 88, ll. 21-23. Therefore, counsel requested that the "particular text not be allowed in." Tr. I, p. 88, ll. 23-24.

The state responded that there was "no pre-trial discussion about the use of that text." Tr. I, p. 89, ll. 9-11. The state explained that testimony was offered that appellant's phone was deactivated during the time frame of the murder in Lexington County which was the same testimony that the expert would testify to in this trial. Tr. I, p. 89, ll. 11-17. The state contended

that it “knew” the defense would challenge evidence that appellant’s phone had been deactivated and argued the evidence was relevant and probative to the state’s case because it was evidence of premeditation or planning. Tr. I, p. 89, l. 24 – 90, l. 8. The state argued evidence that appellant factory reset his phone three times was relevant to appellant’s state of mind and knowledge that the phone could be traced. Tr. I, p. 90, ll. 9-13. The state continued that when appellant was surrounded by law enforcement on December 2, 2021, he stated, “The phone. They got me. The phone killed me,” which was a relevant admission by appellant that he knew his phone could be traced. Tr. I, p. 90, ll. 14-17. The state argued that the evidence of flight as to this crime had a strong nexus. Tr. I, p. 90, ll. 22-23. The state explained that on November 19, when his girlfriend was shot in Richland County, appellant had a completely different phone. Tr. I, p. 90, l. 24 – 91, l. 2. The state continued that the second phone was activated for the first time after the shooting of appellant’s girlfriend which was the phone appellant was caught with that sent the “phone got me,” text. Tr. I, p. 91, ll. 10-13. The state argued the phone was factory reset three times and that “we know that he fled the scene of this crime.” Tr. I, p. 91, ll. 18-21. The state contended that appellant fled because he left the scene in a car that he ultimately abandoned. Tr. I, p. 91, ll. 21-23.

The state further argued that appellant did not call 911, he got rid of the gun used in the crime, he got rid of the car used in the crime, and fled Lexington County. Tr. I, p. 92, ll. 3-12. The state asserted that appellant fled the crime and returned back to Richland County. Tr. I, p. 92, ll. 13-25. The state argued there was a strong nexus between the phone, the communication, his detention on December 2, 2021, and his statement that “my phone got me.” Tr. I, p. 93, ll. 2-4. The state argued at the same time appellant sent that text he was texting several other people asking for a ride. Tr. I, p. 93, ll. 2-10. The state maintained that these

communications showed his intent to flee and his state of mind. Tr. I, p. 93, ll. 10-12. Thus, the state argued that the evidence of flight is directly related to the murder of Johnson from the time appellant fled the crime scene onwards. Tr. I, p. 93, ll. 13-15. The state contended that the evidence was “all relevant and probative . . . to his state of mind and his knowledge of what law enforcement can and cannot trace, and his wanton ability, capabilities in this case, to conceal and destroy evidence.” Tr. I, p. 93, ll. 18-21.

Defense counsel responded that there was no flight in appellant’s case citing *Middleton*⁷ and *Crawford*,⁸ both of which the state relied on in their motion. Tr. I, p. 94, ll. 7-15. Counsel argued that the first time that law enforcement had contact with appellant he surrendered and spoke with the police, and thus, there was no flight. Tr. I, p. 94, ll. 16-25.

The trial court determined that, as to the flight evidence, it would deny the motion to suppress flight evidence but would address the specific incidents as they came up during trial on a case by case basis. Tr. I, p. 96, l. 25 – 97, l. 4.

Additional argument during trial

Before testimony from an expert in digital forensics and cellphone extractions, the trial court again heard argument concerning the admission of evidence related to appellant’s cellphone. Tr. II, p. 119, ll. 21-23. The state reiterated that the phone ending in -1170 was activated and began used after the Richland County crime had occurred. Tr. II, p. 120, ll. 7-11. The state argued when appellant was apprehended on December 2, 2021, he knew he was wanted because he abandoned his car and was using a different phone that was factory reset three times. Tr. II, p. 121, ll. 1-8. The state argued that appellant factory reset the phone to “eliminate, conceal, destroy evidence of all of these communications that are going on with others.” Tr. II,

⁷ *State v. Middleton*, 441 S.C. 55, 893 S.E.2d 279 (2023).

⁸ *State v. Crawford*, 362 S.C. 627, 608 S.E.2d 886 (Ct. App. 2005).

p. 121, ll. 22-24. The state noted that “flight may pertain to one of the proposed text messages, but the remaining text messages deal with the concealment and destruction of evidence, which is a completely separate issue than flight.” Tr. II, p. 122, ll. 1-4. As to the text sent on December 2, 2021, the state argued that it was sent one day after appellant had conducted three factory resets. Tr. II, p. 123, ll. 12-18. Concerning several texts with other individuals where appellant instructed those individuals to delete the messages, the state argued that “the fact that he’s communicating with others about the murder, then deleting evidence and instructing other people to delete evidence is directly relevant to show consciousness of guilt.” Tr. 124, ll. 8-19. The state continued that what was significant about State’s Exhibit 183, the “phone got me” text, was that it was “a direct admission of the [appellant] showing consciousness of guilt, that the phone he used to trace him.” Tr. II, p. 124, l. 24 – 125, l. 5. The state further argued that “the reason that is essential and probative” was because it was a circumstantial evidence case. Tr. II, p. 125, ll. 6-10. The state reiterated that the probative value was to establish knowledge in advance that by deactivating the phone it could not be traced and appellant admitted that on December 2, 2021, when he saw law enforcement outside and texted “phone got me.” Tr. II, p. 125, ll. 18-22. The state argues that “all three of these,” referring to State’s Exhibits 180, 181, and 183, were offered to show consciousness of guilt. Tr. II, p. 127, ll. 24-25.

Defense counsel responded that the problem with the statements was they were “coming off a cellphone.” Tr. II, p. 129, ll. 18-19. Specifically, counsel argued that it was not known what the texts were referring to and that “the State may believe that they refer to his flight of the murder of Jimmy Johnson on November 27, 2021, but that is mere speculation.” Tr. II, p. 129, ll. 18-22. Counsel continued that the text messages were taken completely out of context from appellant’s cellphone. Tr. II, p. 130, ll. 9-13. Counsel agreed that the texts were after the

Lexington County incident but pointed the court to *Pagan*⁹ to argue that there must be a nexus between the flight and the incident for which the accused is on trial. Tr. II, p. 130, ll. 16-25. Counsel objected under 402, SCRE, because the texts were irrelevant as they did not reference the shooting or anything testified to. Tr. II, p. 131, ll. 1-4. Counsel also objected under 404, SCRE. Tr. II, p. 131, ll. 5-8. Counsel then objected under 403, SCRE, because the prejudice of the evidence was not substantially outweighed by the probative value. Tr. II, p. 131, ll. 16-19. Counsel argued that the evidence had very little probative value noting that there were no witnesses to say that appellant was fleeing. Tr. II, p. 131, ll. 19-22. Counsel argued that the evidence would confuse the jury because we do not know what appellant is referring to. Tr. II, p. 131, ll. 22-23. Finally, defense counsel objected to the evidence as a violation of appellant's right to a fair trial under several constitutional provisions. Tr. II, p. 131, l. 24 – 132, l. 4.

The state responded by specifying that the text message instructing someone to delete the message had nothing to do with flight and had “everything to do with [appellant's] state of mind, guilty knowledge and intent when he has complete factory reset the phone.” Tr. II, p. 132, l. 23 – 133, l. 2. The state argued it had the burden to establish why information that has been deleted is not available, and thus, the statements “delete this” and “phone killed me” were not being offered for flight but connected to his knowledge that law enforcement can trace that phone and did trace the phone. Tr. II, p. 133, l. 18 – 134, l. 3. Defense counsel responded that the issue was the evidence is taken off the phone out of context and that the text messages were prejudicial and irrelevant without further context. Tr. II, p. 134, ll. 12-23.

The trial court noted that the objections came prior to testimony but was overruling the objections. Tr. II, p. 134, l. 25 – 135, l. 1. The trial court ruled,

⁹ *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006).

I intend to admit them over objection. I think they're relevant. I don't think they will confuse the jury. They may be prejudicial. I don't find they are unfairly prejudicial. I don't find they are substantially prejudicial in light of Rule 403.

I think you can certainly address it on cross, but I think there's certainly an argument that the – based off the time the text messages were sent, I think they can provide clarity to the jury instead of confusion. So as of now, I intend to admit them subject to objection.

Tr. II, p. 135, ll. 3-13.

Trial testimony

Michael Phipps, an expert in digital forensics and cellphone extractions, testified that appellant factory reset his phone on November 27, 2021, at 9:45 a.m. and 9:39 p.m., and factory reset his phone for a third time on December 1, 2021, at 11:40 p.m. Tr. II, p. 149, ll. 19-24. He explained that the only data that could be attributed to a user interacting with the phone was on December 2, 2021, due to the factory resets. Tr. II, p. 151, ll. 4-11. The state showed Phipps several text messages and moved State's Exhibits 180, 181, and 183 into evidence. Tr. II, p. 152, ll. 23-25. Defense counsel raised his prior objection to those exhibits, and the trial court admitted the exhibits over counsel's objection. Tr. II, p. 153, ll. 5-15.

Regarding State's Exhibit 180, Phipps testified that an outgoing text message to a number ended in -9460 on December 2, 2021, at 10:31 in the morning read "Well, I'm still hanging in there. Buying as much time as possible. Thank you for everything. You still going to give me a lift." Tr. II, p. 160, ll. 18-24; *see also* R *(State's Exhibit 180). As to State's Exhibit 181, Phipps testified that it was an outgoing message to a -9467 number on December 2, 2021, at 2:51 p.m. which read, "Well, here's my chance. I'm leaving now, headed to Myrtle Beach. Love y'all. Delete this." Tr. II, p. 161, ll. 3-8; *see also* R *(State's Exhibit 181). Finally, as to State's Exhibit 183, Phipps testified that it was an outgoing message to -9467 on December 2, 2021, at

3:30 p.m. which read, “They got me. Phone killed me.” Tr. II, p. 161, ll. 16-19; *see also* R *(State’s Exhibit 183).

Discussion

All relevant evidence is generally admissible. Rule 402, SCRE. To be relevant, the evidence must have a “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.

In *Middleton*, our Supreme Court reiterated that “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.” 441 S.C. at 60-61, 893 S.E.2d 279, 282 (quoting *State v. McDowell*, 266 S.C. 508, 224 S.E.2d 889 (1976)). Our Supreme Court clarified, however, that for an act to be relevant as consciousness of guilt under Rule 401, “there must be a nexus between the conduct and the offense charged.” *Id.* (quoting *Pagan*, 369 S.C. at 209, 631 S.E.2d at 266) (alterations omitted). Moreover, our Supreme Court explained that the rationale underlying the admissibility of flight evidence applies to other forms of evasive conduct as well. *Id.* at 61, 893 S.E.2d at 282. Specifically, our Supreme Court determined that in Middleton’s case it “must consider whether the State established a nexus between Middleton’s conduct and his charge for criminal sexual conduct in the third degree such that it had any tendency to make Middleton’s consciousness of guilt more probable that it would be without the evidence.” *Id.* at 62, 893 S.E.2d at 282 (internal quotations and alterations omitted).

This Court dealt with such a consciousness of guilt legal issue in *State v. Cartwright*, 425 S.C. 81, 810 S.E.2d 756 (2018), as it pertained to attempted suicide. There, the state argued that a suicide attempt while criminal charges were pending against the defendant awaiting trial

was admissible as “consciousness of guilt.” Our Supreme Court held that evidence of a defendant's attempted suicide may only be admitted if, following a hearing, it was shown that there was an unmistakable nexus linking the suicide attempt to a guilty conscience derivative of the offense. Our Supreme Court also noted it would be a rare case in the future given this rigorous standard that evidence of a suicide attempt would be admissible to show consciousness of guilt. *Id.* at 492-93, 810 S.E.2d at 762.

In appellant's case, the trial court abused its discretion by admitting several text messages extracted from appellant's cellphone. Both parties presented extensive argument to the trial court concerning the admissibility of these text messages and whether they were relevant, probative, unfairly prejudicial, or constituted evidence of flight or evasive conduct to demonstrate appellant's consciousness of guilt. *See* R *(*Res gestae* motion); *see generally* Tr. I, p. 86-96; Tr. II, p. 119-135. However, as defense counsel argued below, flight evidence is relevant when there is a nexus between the flight and the offense charged. Tr. I, p. 87, ll. 1-4; Tr. II, p. 130, ll. 16-25; *see Pagan*, 369 S.C. at 209, 631 S.E.2d at 266 (holding that the evidence of the defendant failing to stop for the blue light was inadmissible because there was no nexus between the flight and the murder for which the defendant was on trial). Such a connection is lacking between the messages from appellant's phone and the offenses for which he was eventually charged for in Lexington County. For one, the totality of the circumstances did not establish that appellant had knowledge that he was sought by law enforcement related to the Lexington County charges. *See Pagan*, 369 S.C. at 209, 631 S.E.2d at 266 (“The critical factor to the admissibility of flight evidence is whether the totality of the evidence creates an inference that the defendant had knowledge that he was being sought by the authorities.”). Although the state suggests that appellant engaged in concealment of evidence, appellant had not been

formally charged by way of indictment or warrant for his arrest relating to the offenses. Tr. I, p. 93, ll. 18-21; Tr. II, p. 121, ll. 22-24. In fact, when law enforcement arrived to detain appellant on December 2, 2021, he surrendered and made no effort to flee from arrest. Tr. I, p. 88, ll. 21-23; p. 94, ll. 16-25; *see also* Tr. II, p. 11, ll. 14-17; p. 15, ll. 17-21; p. 16, ll. 10-14. Moreover, to the extent that the state contended below that these text messages had nothing to do with flight, there must still be a nexus between the evasive conduct and the offenses charged for appellant's conduct to be relevant and admissible as evidence of consciousness of guilt. *See Middleton*, 441 S.C. at 60-61, 893 S.E.2d at 282; Tr. II, p. 122, ll. 1-4; p. 132, l. 23 – 124, l. 2. Importantly, these texts messages make no specific reference to the November 27, 2021, incident and any nexus to that incident is based on speculation as to what the text messages refer to or what their meaning may have been. Accordingly, the trial court abused its discretion by ruling that the contested text messages were relevant. Tr. II, p. 134, l. 25 – 135, l. 1.

In addition, Rule 403, SCRE provides that, “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. Gray*, 438 S.C. 130, 143-144, 882 S.E.2d 469, 476 (Ct. App. 2022), the South Carolina Court of Appeals wrote:

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 . . .” Rule 403, SCRE. “ ‘Probative value’ is the measure of the importance of that tendency to the outcome of a case. It is the weight that a piece of relevant evidence will carry in helping the trier of fact decide the issues.” *State v. Gray*, 408 S.C. 601, 610, 759 S.E.2d 160, 165 (Ct. App. 2014). “[T]he more essential the evidence, the greater its probative value.” *Id.* (alteration in original) (quoting *United States v. Stout*, 509 F.3d 796, 804 (6th Cir. 2007)). “Thus, a court analyzing probative value considers the importance of the evidence and the significance of the issues to which the evidence

relates.” *Id.* “[T]he burden [is] on the opponent of the evidence to establish [its] inadmissibility.” *State v. King*, 424 S.C. 188, 200 n.6, 818 S.E.2d 204, 210 n.6 (2018).

The trial court also abused its discretion in admitting the contested text messages because any probative value of the messages was substantially outweighed by the danger of unfair prejudice. As discussed, the text messages carried little weight in assisting the factfinder to decide appellant’s case because the content of the messages were not sufficiently related to the charges appellant faced at trial. While the state argued below that the messages were probative to appellant’s state of mind and acted as an admission that he knew deactivating his phone meant it could not be traced, *see* Tr. II, p. 125, ll. 18-22, the state presented evidence that appellant’s phone had been factory reset three times during the timeframe of the murder without objection, Tr. II, p. 149, ll. 19-24; Tr. II, p. 151, ll. 4-11; *see Cartwright*, 425 S.C. at 91-93, 819 S.E.2d at 761-62 (finding a defendant’s attempted suicide may be admitted to prove consciousness of guilt if the evidence survives a Rule 403 analysis and establishes a nexus between the suicide attempt and a guilty conscience derivative of the offense for which the defendant is on trial). Thus, the text messages added no additional probative value to the state’s theory as to appellant’s state of mind. Further, any probative value the text messages may have had was outweighed by the prejudicial effect because the messages, without any context, served only to confuse the issues and mislead the jury as to appellant’s state of mind or consciousness of guilt based on the state’s speculative theory. *Gray*, 438 S.C. at 143-144, 882 S.E.2d at 476; Rule 403, SCRE. Therefore, the trial court abused its discretion by finding that the messages were not unfairly prejudicial in light of Rule 403. Tr. II, p. 134, l. 25 – 135, l. 1.

III.

The trial court erred in sentencing appellant to five years for possession of a weapon during the commission of a violent crime in violation of S.C. Code §16-23-490 when the judge sentenced appellant to life in prison for murder.

Standard of Review

“[W]hen a trial court imposes what the State concedes is an illegal sentence, the appellate court may correct that sentence on direct appeal or remand the issue to the trial court even if the defendant did not object to the sentence at trial and even if there is no real threat of incarceration beyond the limits of a legal sentence.” *State v. Plumer*, 439 S.C. 346, 351, 887 S.E.2d 134, 137 (2023).

Relevant facts

During appellant’s sentencing hearing, the state noted that it served notice of mandatory imposition of a life sentence pursuant to S.C. Code Ann. § 17-25-45. Tr. II, p. 463, ll. 1-7. Judge McLeod thus imposed a life sentence as to the murder charge and a five-year concurrent sentence as to the possession of a weapon during the commission of a violent crime charge. Tr. II, p. 468, ll. 15-24. Appellant’s sentencing sheets also reflect that the trial court imposed a life sentence as to murder and a concurrent five-year sentence as to the weapons charge. R *(Sentencing sheets). The notice of mandatory imposition of sentence pursuant to S.C. Code § 17-24-45 was attached to the sentencing sheets and provided that a life without parole sentence was required and mandatory based on appellant’s two prior convictions for serious and/or most serious offenses. R *(Notice).

Discussion

The trial judge sentenced appellant to life in prison for murder and five years concurrent for possession of a weapon during the commission of a violent crime. Tr. II, p. 486, ll. 15-22. The trial court thus imposed an illegal sentence when he sentenced appellant to life in prison for murder and five years in prison for possession of a weapon during the commission of a violent crime. Specifically, S.C. Code §16-23-490(A) provides, “If a person is in possession of a firearm or visibly displays what appears to be a firearm . . . during the commission of a violent crime and is convicted of committing or attempting to commit a violent crime as defined in Section 16-1-60, he must be imprisoned five years, in addition to the punishment provided for the principal crime. *This five-year sentence does not apply in cases where the death penalty or a life sentence without parole is imposed for the violent crime.*” (emphasis added). Importantly, S.C. Code §16-1-60 defines murder as a violent crime.

In *State v. Plumer*, 433 S.C. 300, 308, 857 S.E.2d 796, 800 (Ct. App. 2021), *aff’d as modified*, 439 S.C. 346, 887 S.E.2d 134 (2023), a case decided several years before the trial in this case, the South Carolina Court of Appeals, relying on S.C. Code §16-23-490(A), vacated the five-year sentence imposed for possession of a weapon during the commission of a violent crime when the judge also sentenced Plumer to life for attempted murder. In *Plumer*, as in the present case, there was no objection to the illegal sentence. *See id.* (citing *State v. Johnston*, 333 S.C. 459, 510 S.E.2d 423 (1999); *see also State v. Vick*, 384 S.C. 189, 682 S.E.2d 275 (Ct. App. 2009); *State v. Bonner*, 400 S.C. 561, 567, 735 S.E.2d 525, 528 (Ct. App. 2012)). In any event, all cases decided before the trial in this case, the Court of Appeals found that under the circumstances of the case and as a matter of criminal equity the illegal five-year sentence should be vacated although there was no objection made to the sentence.

The South Carolina Supreme Court affirmed as modified the decision by the Court of Appeals to vacate the illegal sentence writing:

On occasion, we encounter illegal sentences to which no objection was taken in the trial court. In such cases, it is inefficient and a waste of judicial resources to delay the inevitable by requiring the appellant to file a post-conviction relief action or petition for a writ of habeas corpus. Therefore, we modify *Johnston* and hold that when a trial court imposes what the State concedes is an illegal sentence, the appellate court may correct that sentence on direct appeal or remand the issue to the trial court even if the defendant did not object to the sentence at trial and even if there is no real threat of incarceration beyond the limits of a legal sentence. However, we do not agree with the court of appeals' conclusion that the correction of the sentence is a function of "criminal equity." *Plumer*, 433 S.C. at 315, 857 S.E.2d at 803. "The general rule is well settled that equity has no criminal jurisdiction" *State ex rel. McLeod v. Holcomb*, 245 S.C. 63, 67, 138 S.E.2d 707, 708 (1964); see *Ezell v. Ritholz*, 188 S.C. 39, 46-47, 198 S.E. 419, 422 (1938). With that modification, we affirm the court of appeals on this issue.

State v. Plumer, 439 S.C. 346, 351, 887 S.E.2d 134, 137 (2023).

Pursuant to S.C. Code §16-23-490(A), the five-year sentence imposed for possession of a weapon during the commission of a violent crime is an illegal sentence when the judge also sentenced appellant to life in prison for murder. Although there was no objection made to the illegal sentence, this Court, based on *Plumer*, should nonetheless vacate the illegal sentence.

CONCLUSION

Based on the arguments presented in issues one and two, appellant respectfully requests that this Court reverse his convictions and sentence and remand to the Court of General Sessions of Lexington County for a new trial. Based on the argument presented in issue three, appellant respectfully requests that this Court vacate the illegal five-year sentence for possession of a weapon during commission of a violent crime.


Molly M. Keegan
Appellate Defender

ATTORNEY FOR APPELLANT

This 11th day of June, 2026.

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