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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Honorable Milton Kimpson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOHN HENRY DIAL, JR.,

APPELLANT

APPELLATE CASE NO. 2025-001265

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I.

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

II.

Whether the trial court erred by allowing the state to elicit testimony concerning appellant's nickname where his nickname was irrelevant, unduly prejudicial, and used solely to impugn his character?

STATEMENT OF THE CASE

In January of 2025, the Richland County Grand Jury indicted appellant for Domestic Violence, first degree. R *(Indictment). On June 16, 2025, appellant's case was called to trial before the Honorable Milton Kimpson and a jury. Tr. 1.¹ Nicholas Fowler and Emily Burn represented the state. Tr. 1. Eric Fox represented appellant. Tr. 1. The jury ultimately found appellant guilty as indicted. Tr. 230, ll. 2-14; 279, ll. 4-17. Judge Kimpson imposed a total sentence of nine years, comprised of seven years active suspended on two years of probation. Tr. 300, ll. 20-22. Appellant filed a timely notice of appeal. R *(Notice of appeal).

This brief follows.

¹ For clarity, the trial court granted defense counsel's motion to bifurcate appellant's trial. Tr. 24, ll. 3-4; 50, l. 10-13.

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).

ARGUMENTS

I.

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

Relevant facts

Motion to suppress jail call

Prior to trial, defense counsel moved to suppress the jail call appellant made while he was incarcerated pursuant to *State v. Ellefson*, 266 S.C. 494, 224 S.E.2d 666 (1976). Tr. 40, ll. 5-19. He argued the only way appellant could communicate was through mail or phone calls as he had been incarcerated since his arrest. Tr. 40, ll. 10-13. Citing to *Ellefson*, counsel argued that incarcerated individuals are “a captive audience, that it’s not real consent,” because they do not have a choice. Tr. 41, ll. 14-15. He asserted that the only way an incarcerated individual can communicate is through the phone. Tr. 41, ll. 19-22. He argued that despite a posted sign and the warning, the consent is not meaningful because a different carrier could not be used and the only way to communicate is with the system the jail has in place. Tr. 42, ll. 1-13. Defense counsel argued that *Ellefson* addressed that jail security “is not a passport to wholesale abuse of the appellant’s constitutional rights.” Tr. 42, ll. 14-22. Counsel contended that appellant’s rights did not disappear when he was arrested. Tr. 42, ll. 23-25. He argued that the calls were obtained in violation of appellant’s constitutional rights, specifically, the First and Fourth Amendments. Tr. 43, ll. 2-8. He requested that the trial court exclude any jail calls. Tr. 43, ll. 10-13.

The state responded that *Ellefson* was “completely different than what we have here.” Tr. 43, ll. 20-24. The state pointed to the message delivered to inmates at the beginning of each call that the call would be recorded and monitored. Tr. 44, ll. 4-7. The state contended that by virtue

of hearing the message, every inmate consents to “having that call potentially used against him.” Tr. 44, ll. 8-11. The state cited an unpublished opinion² for the proposition that appellant would have neither a subjective nor objection legitimate expectation of privacy in calls made on prison telephones. Tr. 44, l. 12 – 45, l. 9. The state concluded that the calls were lawfully obtained and did not violate appellant’s rights to present them to the jury. Tr. 46, ll. 1-4. As to the First Amendment, the state contended that they did not limit appellant’s ability or opportunity to speak freely instead the state could “just hear everything.” Tr. 46, l. 22 – 47, l. 5.

The trial court stated that it “issued a brief order to the parties denying the defense’s motion to exclude the jail calls.” Tr. 50, ll. 4-9. The trial court further explained its reasoning for denying the motion on the second day of trial. The court explained that it did not believe that “the defendant had any reasonable expectation of privacy in those calls, given the warnings . . . that proceed every call that inmates make.” Tr. 90, ll. 18-22. The court stated that the lack of a reasonable expectation of privacy in the calls was the basis of the ruling. Tr. 90, ll. 22-24.

Opening statements

During the state’s opening statement, the state contended that appellant made a call to the complainant while he was arrested and in jail. Tr. 69, ll. 14-16. The state submitted that appellant apologized to the complainant, said he loved her, and that appellant asked complainant to change her story about what happened. Tr. 69, ll. 18-25.

² See *State v. Martin*, 2017 WL 4641406 (Ct. App. 2017) (unpublished). The state also cited *State v. Crummey*, 443 S.C. 94, 902 S.E.2d 391 (Ct. App. 2024), see Tr. 45, ll. 10-15, however that case concerns Crummey’s argument that the clip from the recorded jail call was cumulative because the state had already admitted other evidence linking him to the Facebook account and that the evidence was unduly prejudicial because it was a jail call. In that case, this Court found the circuit court properly admitted the clip into evidence where the circuit court ruled that the portion of the call was admissible so long as the state laid the proper foundation. See *id.*, 443 S.C. at 106-07, 902 S.E.2d at 398.

Trial

The state presented testimony that on July 1, 2024, Corporal Ehrhart responded to Overbrook Drive where the complainant opened the door with a split lip, a discolored right eye, and what Ehrhart believed to be blood on complainant's upper thigh. Tr. 73, l.1 – 74, l. 8.

The complainant then testified that she and appellant were in a romantic relationship and they lived together at Overbrook Drive. Tr. 94, ll. 1-9. She testified that appellant was drinking mini bottles of Fireball and became angry with her when she told him she did not want to go into town with him. Tr. 94, l. 21 – 97, l. 9. She testified that appellant hit her, which surprised her, and she told appellant she would call the police. Tr. 97, ll. 16-23. She stated that she was hit in the face. Tr. 98, ll. 13-17. She testified that she had spoken with appellant twice since appellant was arrested. Tr. 101, ll. 14-17.

The state showed complainant State's Exhibit 5, which she identified as the phone calls she had with appellant four or five days after he was arrested. Tr. 101, l. 16 – 102, l. 1. She identified the voices on the calls as hers and appellants. Tr. 102, ll. 9-20. Defense counsel objected to the admission of the call into evidence. Tr. 102, l. 24. He argued that the call was initiated at a detention center in Richland County, and thus, someone from the detention center would need to describe how they store and preserve those calls and whether anything had been altered or changed in any way. Tr. 102, l. 24 – 103, l. 7. He argued that a foundation needed to be laid as to how the system worked, how they calls were recorded, and how the calls were preserved. Tr. 103, ll. 8-13.

The state responded that because complainant had listened to "this jail call *ad nauseum*," and testified under oath that it was a fair and accurate representation of the phone call with appellant, a foundation was properly laid. Tr. 103, l. 18 – 104, l. 4. The state then further

questioned the complainant at the court's direction. She testified that she remembered the phone call and recognized appellant's voice. Tr. 106, ll. 12-25. The state then argued that Rule 901(a), SCRE, was satisfied by evidence sufficient to support a finding that the matter in question is what the proponent claims Tr. 107, ll. 3-9. The state again moved State's Exhibit 5 into evidence, which defense counsel objected to based on his prior objection. Tr. 108, ll. 4-14. The state played the call for the jury. Tr. 109, l. 3. She described that on the call appellant asked her to call his attorney and tell her that there was an altercation between the dogs. Tr. 110, ll. 4-11.

State's Exhibit 5

The call begins by stating that the call was subject to monitoring and recording. R *(State's Exhibit 5; 2:05). Appellant stated that an accident happened and asked complainant to tell his attorney. R *(State's Exhibit 5; 7:02 – 7:06). Appellant told complainant that he was trying to separate the dogs and that she thought he hit her on purpose, but it was an accident. R *(State's Exhibit 5; 7:43 – 7:55). He apologized for what happened. R *(State's Exhibit 5; 10:24, 15:40). While discussing his bond, appellant reiterated that complainant should explain to his attorney that the dogs were in an altercation, he separated the dogs during a big panic, and complaint got hit by accident. R *(State's Exhibit 5; 11:07 – 11:28).

Appellant's testimony

Appellant testified in his own defense during trial. As relevant, appellant agreed that he was speaking on the jail call. Tr. 158, ll. 3-13. He agreed that he was frustrated. Tr. 158, ll. 23-24. He testified he was under stress and the call occurred a few days after his arrest. Tr. 164, ll. 2-5. He testified that it was not his intention to get complainant to lie for him but instead "[j]ust to tell them what happened." Tr. 165, ll. 6-11. He testified that he did not admit to hitting the complainant on the jail call. Tr. 192, ll. 2-18.

Closing arguments

During the state's closing argument, it highlighted appellant's "own words, not from this witness stand." Tr. 201, ll. 4-6. The state cited several portions of the jail call, his apologies during the call, and argued that appellant was "trying to her [complainant] to spin some sort of story to get him out of trouble." Tr. 201, ll. 7-14. The state argued that even in appellant's "fake version," he admitted that complainant got hit and that he was sorry. Tr. 201, ll. 15-20. It reiterated that these were appellant's words and reminded the jury it could "listen to it as many times as you want." Tr. 202, ll. 5-8.

Discussion

The trial court erred by refusing to exclude the recorded jail call between appellant and complainant 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. Moreover, the admission of the jail call violated appellant's rights under the First Amendment. Therefore, this Court should reverse.

a. The admission of appellant's call violated his right against unreasonable searches and seizures

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 *Ellefson*, 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,³ 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

³ *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).

conducting a fishing expedition of a defendant's phone calls prior to trial in the hopes of finding incriminating evidence.

In appellant's case, the record is silent as to how the jail calls were recorded and stored or how the calls were retained. The state noted, however, that it had a witness under subpoena from the jail who could have testified that the calls were kept in the ordinary course of business. Tr. 104, ll. 7-15. In any event, 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 contended that because inmates hear a message that their calls would be recorded and monitored every inmate thus consents to “having that call potentially used against him,” see Tr. 44, ll. 8-11, 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. 44, ll. 4-11; *see also* R *(State’s Exhibit 5). 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. *See* Tr. 41, ll. 19-22. Thus, the state’s argument to the trial court that appellant consented by virtue of hearing the message concerning recording and monitoring is inapposite where, under the state’s logic, appellant would have to abstain from making any phone calls to avoid “having that call potentially used against him.” Tr. 44, ll. 4-11.

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,⁴ 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. *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. As trial counsel argued below, jail security “is not a passport to wholesale abuse of the appellant’s constitutional rights,” and appellant’s rights did not evaporate when he was arrested. Tr. 42, ll. 14-25. 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. The state’s case began, in opening statements, by directing the jury’s attention to the call and its characterization of the contents of the call. Tr. 69, ll. 14-25. The state then elicited testimony from complainant concerning the call and played the call for the jury during her testimony. Tr.

⁴ *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.”).

101, l. 16 – 102, l. 20; 109, l. 3; 110, ll. 4-11. Specifically, complainant explained that on the call appellant asked her to call his attorney and tell his attorney that there was an altercation between the dogs. Tr. 110, ll. 4-11. The state also emphasized the contents of the jail call during its closing argument to argue that appellant was “trying to get [complainant] to spin some sort of story to get him out of trouble,” and pointed to appellant’s “own words,” in the call. Tr. 201, ll. 4-14. Moreover, during its closing argument, the state emphasized that the jail call was appellant’s words and reminded the jury it could “listen to it as many times as you want.” Tr. 202, ll. 5-8.

The trial court thus erred by refusing to suppress the recorded jail call because the calls were obtained in violation of appellant’s privacy rights.

b. The admission of appellant’s call violated the First Amendment

Even if Appellant had no reasonable expectation of privacy in the contents of his jail calls such that the Fourth Amendment and Article I, § 10 do not apply, the use of those calls against him at trial violated his rights under the First Amendment.

As recognized in *Ellefson*, searching through the private communications of a pretrial detainee impinges upon the inmate’s First Amendment right “to be able to communicate without the uninvited ears and eyes of the government.” 266 S.C. at 501, 224 S.E.2d at 670. The First Amendment provides that the government shall not “abridg[e] the freedom of speech.” Within that freedom of speech is the right to “communicate without the uninvited ears and eyes of the government.” *Ellefson*, 266 S.C. at 501, 224 S.E.2d at 670; *see also* U.S. Const. Amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or *abridging the freedom of speech*, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances) (emphasis

added). The freedom of speech, while not unlimited, may not lightly be restricted; it is “susceptible of restriction only to prevent grave and *immediate* danger to interests which the state may lawfully protect.” *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943) (emphasis added).

When a jail or prison “impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.” *Turner v. Safley*, 482 U.S. 78, 89 (1987). In making this determination, there are four factors that the Court must consider. First is whether there is a “valid, rational connection” between the regulation and the interest put forth to justify it. *Id.* A regulation should not be sustained if the logical connection between it and the asserted goal is so remote as to render the policy arbitrary or irrational. *Id.* at 89-90. Second is whether there are other available avenues for the inmate to assert the right at issue. *Id.* at 90. Next is the impact that accommodation of the right will have on other inmates and guards. *Id.* Finally, the Court should look to whether there are ready alternatives. *Id.* The “existence of obvious, easy alternatives may be evidence that the regulation is not reasonable.” *Id.*

Appellant’s rights under the First Amendment were violated because he has a right to speak in private, and the overly broad policy of recording jail calls has a substantial chilling effect on speech. The recording of every single phone call going out of the jail, and sharing those calls with the Solicitor’s office and other unrelated law enforcement officers, is not rationally related to the stated goal of jail safety. In appellant’s case, the state presented no testimony as to the reasoning for law enforcement monitoring calls made in jail. Instead, when addressing the First Amendment, the state merely argued that they did not limit appellant’s ability or opportunity to speak freely instead the state could “just hear everything.” Tr. 46, l. 22 – 47, l. 5. The state failed to articulate any reason as to why they could “just hear everything.”

Thus, any danger that appellant poses on the jail telephones is not immediate. *Barnette*, 319 U.S. at 639. Because there is a disconnect between the goal, jail safety, and the process, allowing the state unfettered access to the calls, the policy of recording all calls is so remote that it is arbitrary and irrational. *Id.* at 89-90. Moreover, as discussed, there are no other adequate avenues for pretrial detainees such as appellant to exercise the rights at issue here, despite the state's argument to the contrary. *See id.* at 90. In that sense, the state *has* limited appellant's opportunity to speak freely as he must either entirely lose the ability to communicate with anyone outside of the jail or, if he exercises his only available avenue to communicate, must be subjected to monitoring and recording of every call he places. Tr. 40, ll. 10-13, 43, ll. 2-8, 46, l. 22 – 47, l. 5. Therefore, by nature of appellant being a pretrial detainee, there were no avenues through which he could communicate with anyone other than his attorney without surveillance by the state.

Accordingly, the trial court erred by admitting the recorded jail call between appellant and complainant 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. The trial court further erred because the call was also obtained in violation of appellant's rights under the First Amendment.

II.

The trial court erred by allowing the state to elicit testimony concerning appellant's nickname where his nickname was irrelevant, unduly prejudicial, and used solely to impugn his character.

Relevant facts

Appellant's testimony

Appellant testified that he and complainant were in a romantic couple which began four years prior. Tr. 145, ll. 2-10. He testified that complainant would move in and out of his residence. Tr. 146, l. 20 – 148, l. 19. He testified that his dog and complainant's dog would “play hard and they'd fight.” Tr. 150, ll. 7-11. He had to separate them sometimes. Tr. 150, ll. 12-16. He testified that on July 1, 2024, he was doing drugs with complainant's brother. Tr. 151, ll. 5-18. He explained that he had been arguing with complainant. Tr. 153, ll. 13-24. He testified that the two dogs were “going at it,” and he separated them. Tr. 154, ll. 3-8. He testified that he was holding complainant back. Tr. 154, ll. 9-12. He testified that they kept arguing and the dogs were barking. Tr. 154, ll. 13-20. He testified that he had called the police because complainant was sitting at his residence with her dog and he did not want to argue. Tr. 156, ll. 20-25. He was arrested. Tr. 158, ll. 2-6.

On cross-examination, the state inquired whether appellant had a nickname. Tr. 167, l. 11. Appellant replied that he did. Tr. 167, l. 12. Defense counsel objected that appellant's nickname was irrelevant. Tr. 167, ll. 15-17. The state responded that appellant testified he did not like arguing and contended that he stated “[h]e is a good Samaritan and sought only to help out [complainant] . . .” Tr. 167, ll. 18-23. A sidebar discussion was held off-the-record and the trial court overruled defense counsel's objection. Tr. 167, ll. 24-25.

The state resumed questioning and asked appellant what his nickname was. Tr. 168, ll. 4-5. Appellant responded it was, "Mayhem." Tr. 168, l. 6. The state then asked what mayhem meant. Tr. 168, l. 7. Appellant responded that it was from an insurance commercial and it went with his remodeling and demolition work. Tr. 168, ll. 8-15. The state asked what happened in those insurance commercials with the Mayhem character. Tr. 168, ll. 16-17. Appellant replied that it was "actually a funny thing," and that it was "not like you're trying to make it out to be." Tr. 168, ll. 18-21. The state responded, "A lot of damage and destruction in those commercials. It's an insurance company, right?" Tr. 168, ll. 22-23. Appellant reiterated they were funny commercials. Tr. 168, ll. 24-25. The state asked if appellant knew the definition of mayhem, and appellant replied that it was "derogatory." Tr. 169, ll. 3-5. The state asked again what the definition of mayhem was, and appellant stated "chaos." Tr. 169, ll. 7-8. Defense counsel objected to the line of questioning as asked and answered and the state responded it would withdraw. Tr. 169, ll. 9-14.

Discussion

The trial court erred by allowing the state to elicit testimony concerning appellant's nickname, "Mayhem," where his nickname was irrelevant to establish any matter at issue and his nickname was used only to impugn his character to insinuate to the jury appellant's propensity for "damage and destruction."

"For evidence to be admissible, it must be relevant." *State v. Daise*, 421 S.C. 442, 464, 807 S.E.2d 710, 721 (Ct. App. 2017); *see also* Rule 402, SCRE ("Evidence which is not relevant is not admissible."). Generally, relevant evidence "means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." Rule 401, SCRE.

In *State v. Day*, our Supreme Court considered a challenge to the judge's error in allowing the state to cross-examine about Day's "outlaw" tattoo and nickname because the testimony was used to impugn Day's character. 341 S.C. 410, 421, 535 S.E.2d 431, 437 (2000). There, during the state's cross-examination, defense counsel objected to any categorization of the word outlaw and explanation of what the phrase might have meant. *Id.* at 422, 535 S.E.2d at 437. Our Supreme Court determined that the solicitor's 23 references to the nickname was excessive and repetitious and was not used to prove any matter in controversy. *Id.* at 423, 535 S.E.2d at 438. The Court explained that the continuous use of the nickname "was extremely prejudicial because it was used to portray Day as a 'planner,' someone who was accustomed to deluding law enforcement, and someone who was proud of his notoriety as an outlaw." *Id.* Accordingly, our Supreme Court held that "the use of the term 'outlaw' permeates the solicitor's closing argument, infects the trial with unfairness, and deprives Day of due process of law." *Id.* at 424, 535 S.E.2d at 438.

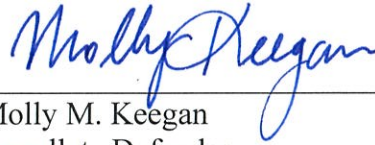
In appellant's case, his nickname did not tend to establish any fact of consequence, namely, whether appellant committed the offense he was charged with. *See State v. Passio*, 433 S.C. 666, 678, 861 S.E.2d 785, 791 (Ct. App. 2021) ("Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears, and it is not required that the inference sought should necessarily follow from the fact proved") (citing *State v. Sweat*, 362 S.C. 117, 126-27, 606 S.E.2d 508, 513 (Ct. App. 2004)); *see also* S.C. Code Ann. § 16-25-20(A) ("It is unlawful to: (1) cause physical harm or injury to a person's own household member; or (2) or attempt to cause physical harm or injury to a person's own household member with apparent present ability under circumstances reasonably creating fear of imminent peril); *id.* § 16-25-20(B)(3) (A person commits the offense of domestic violence in the first degree when the individual has two or more prior convictions of domestic violence within 10 years of the current offense). Instead, the state sought to suggest to the jury that appellant's nickname, which it repeatedly questioned appellant about, was indicative of his character. *See State v. Lyles*, 379 S.C. 328, 337, 665 S.E.2d 201, 206 (Ct. App. 2008) (citing *State v. Schmidt*, 288 S.C. 301, 303, 342 S.E.2d 401, 403 (1986); *Toole v. Salter*, 249 S.C. 354, 361, 154 S.E.2d 434, 437 (1967); *State v. Pipkin*, 359 S.C. 322, 326, 597 S.E.2d 831, 833 (Ct. App. 2004)) ("Evidence which assists a jury in arriving at the truth of an issue is relevant and admissible unless otherwise incompetent. Evidence is incompetent if it could create dangers such as prejudice, undue delay, confusion of the issues, tendency to mislead the jury, waste of time, or cumulative presentation."). The state continually asked appellant to define "Mayhem," which appellant testified was "derogatory," and meant "chaos." Tr. 168, l. 7, 169, ll. 3-8. The result is that the state was allowed to elicit highly irrelevant testimony.

To that end, the only purpose the state had for eliciting appellant's irrelevant nickname was to allow the state to characterize appellant as someone who causes "damage and destruction." Tr. 168, ll. 22-23. That is improper. The mere fact that appellant had a particular nickname did not assist the jury in its consideration of any matter in controversy. *See United States v. Nsahlai*, 121 F.4th 1052, 1060 (4th Cir. 2024) (explaining that "the threshold for relevance is a low bar, but it nonetheless requires that the evidence be 'worth consideration by the jury' or have a 'plus value' on the question before that body."). Nor was appellant's nickname relevant to aid the jury in establishing appellant's identity. *See Day*, 341 S.C. at 423, 535 S.E.2d at 437 (citing *Stevenson v. Texas*, 963 S.W.2d 801 (Tex. App. 1998) ("Evidence concerning a defendant's tattoo or nickname is not prejudicial when used to prove something at issue in a trial, such as the identification of the defendant."); *see also United States v. Clark*, 541 F.2d 1016, 1018 (4th Cir. 1976) (explaining that evidence of an alias is relevant and permissible when the alias is necessary to identify the defendant in connection with the acts charged in the indictment). Even further, as in *Day*, appellant's nickname was instead used to portray appellant in a negative light and as someone who was destructive. *See Day*, 341 S.C. at 423, 535 S.E.2d at 438; Tr. 168, ll. 22-23, 169, ll. 3-8.

Therefore, the trial court abused its discretion by allowing the state to elicit testimony concerning appellant's nickname and the origin or definition of his nickname as it was wholly irrelevant and merely an attempt by the state to comment on appellant's character.

CONCLUSION

Based on the foregoing arguments, appellant respectfully requests that this Court reverse his conviction and sentence and remand to the Court of General Sessions of Richland County for a new trial.



Molly M. Keegan
Appellate Defender

ATTORNEY FOR APPELLANT

This 30th day of July, 2026.