STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Honorable Stephanie P. McDonald, Circuit Court Judge

THE STATE,

Respondent,

vs.

JAMES ROSE,

Appellant.

Appellate Case No. 2013-002750

FINAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF THE ISSUE ON APPEAL

The trial judge erred in admitting telephone calls purportedly made by Appellant while in pre-trial incarceration because Appellant made no "admissions" during the calls as required by the Rules of Evidence in order to be admissible.

RESPONDENT'S COUNTERSTATEMENT OF ISSUE ON APPEAL

Whether the trial judge erred in admitting the incarcerated Appellant's recorded phone call pursuant to South Carolina Rule of Evidence 801(d)(2)(A), where during the call Appellant inquires whether his cell phone is in the car associated with Appellant on the night of the murder.

STATEMENT OF THE CASE

Appellant James Rose was indicted by the Charleston County Grand Jury for murder in June 2012. (R. p. 514). Martha Kent Runey and Megan Ehrlich represented Rose at a jury trial which began December 9, 2013, before the Honorable Stephanie P. McDonald. (R. p. 1). Assistant Ninth Circuit Solicitors Jennifer Shealy and Jessica Baldwin prosecuted the case which lasted four days. (R. p. 1). Rose was convicted by a jury and Judge McDonald sentenced Rose to a term of life imprisonment. (R. p. 508, 509). This appeal follows. (R. p. 512-513).

STATEMENT OF FACTS

Appellant James Rose, a/k/a "Onyx," a/k/a "O," a/k/a "Black," visited the victim's mobile home three times on January 23, 2012, attempting to buy marijuana. (R. pp. 13-14, 41-42). Clarence Hush, a/k/a "Unk," drove Appellant and a third person to the victim's home for the second attempted buy. (R. p. 191). At the end of the second visit, the Appellant became heated and stated he would be back. (R. p. 13, line 18 – p. 164, line 1; R. p. 41, line 13 – p. 43, line 13; R. p. 213, line 14 – p. 214, line 4). Testimony shows that Appellant did return a third time that night in a gray, white or silver four-door sedan. (R. p. 45, lines 14-25). Upon the third visit, which Appellant denies,[1] the victim died as a result of in-home gunfire. (R. p. 53; R. p. 375, line 13 – p. 376 line 23; R. p. 427, lines 20-24). In addition to the victim, his daughter Joy Hill, cousin Antoine "Rick Ross" Aiken, girlfriend Tawana "Nikki" Alston, and neighbor Ishmal Weston were at the home throughout the evening to witness the course of events. (R. p. 41, line 16).

What Antoine Aiken Witnessed

When the Appellant arrived the third time, Aiken witnessed him stay for a quick visit and leave out the back door of the mobile home. (R. p. 47, line 16 – p. 48, line 10). The victim followed to lock the door behind the Appellant, at which point Aiken heard the first gunshot. (R. p. 48, lines 17-24). "For a brief second," Aiken saw a tall male dressed in black and wearing a ski mask meet with the victim at the time of the gunshot. (R. p. 49). Aiken reached for a rifle stored in a corner in the home, but it was not in its usual place. (R. p. 50, lines 1-9). He heard two more shots, saw the victim fall, and ran

[1] The Appellant testifies as to staying at his girlfriend Amber's trailer the remainder of that night. (R. p. 414, lines 3-8).

out the front door. (R. p. 50, lines 16-19). Outside, Aiken ran near the tree line and heard the Appellant state "go to the back room, everything in the back room" and "ya'll hurry up, come on, you're taking too long." (R. p. 52, lines 3-14; R. p. 53, lines 19-25). Finally, he saw the tall masked male exit from the back door and drive away in the car with the Appellant, who was in the driver's seat. (R. p. 54, line 13 – p. 55, line 11). On the 911 call Aiken made to report the victim's injuries, he identified the getaway car as gray with four doors. (State's exhibit 96).

What Tawana Alston Witnessed

Alston went out the back door of the trailer to smoke a cigarette as Appellant simultaneously exited from the same door. (R. p. 100, lines 18-23). She watched the Appellant get in the driver's side of the car. (R. p. 101, line 22 – p. 102, line 1). She turned around to a man dressed in a black ski mask pointing a shotgun to her face. (R. p. 101, lines 4-16). Alston watched a "short, chunky guy" run up the stairs and into the home, the man in the ski mask follow him, and then heard three gunshots as she ran away from the home. (R. p. 102, 103).

What Ishmal Weston Witnessed

Weston was in the living room when the Appellant exited through the back door. (R. p. 17, line 5 – p. 18, line 3). Weston heard Alston scream, heard and saw people coming inside the house, then heard "stomping and stuff." (R. p. 18, lines 4-14; R. p. 20, lines 14-20). Then Weston saw a black shadow resembling a shotgun pointed at the victim and heard a "fuss." (R. p. 18, line 16 – p. 19, line 8). He went to the back bathroom to hide, heard a gunshot, and closed the door. (R. p. 23, lines 1-11). Next, Weston heard people in the house "searching for stuff," "cabinets opening," "stuff being

flipped over;" then Weston heard those individuals move down the hallway towards Joy Hill's bedroom. (R. p. 23, lines 12-25). Weston heard muffled voices asking "where the money and stuff at." (R. p. 25, lines 6-16). Finally, he heard them "tearing up the back room," "run out the house," "speed off" and leave in a car. (R. p. 26, lines 12-23).

What Joy Hill Witnessed

Joy Hill, the victim's daughter, was in her bedroom on the phone when she heard scuffling, gunshots, and two people run past her room to the back of the trailer. (R. p. 217, line 9 – p. 218 line 10). She jumped into her bed and pretended to sleep. (R. p. 219, lines 16-25). They "[c]ame into [her] room with a double barrel shotgun and a single barrel shotgun, and had one to [her] chest and one to [her] head." (R. p. 220, lines 2-4). Hill testified as to hearing the Appellant's voice direct her to pull back her covers and tell her "where [it was] at." (R. p. 220, lines 5-9). She further identified the Appellant as wearing a red shirt, navy blue jacket, dark-colored jeans and a ski mask. (R. p. 220, lines 22-25). Then they left. (R. p. 221).

Later, Alston, Aiken and Hill made statements to law enforcement regarding the events and identified the Appellant to law enforcement. (R. pp. 60, 226, 228-234). Aiken and Alston identified the Appellant in a photo lineup. (R. p. 64, lines 9-18; R. p. 109, line 12 – p. 110 line 10). Alston identified the car parked outside the victim's home at the time of the crime as a gray or silver Dodge Neon. (R. p. 109, lines 1-3; R. p. 111, lines 13-22). Alston further branded the clothing worn by the Appellant that night as a "red T-shirt, blue jeans, [and] blue or black Nikes." (R. p. 106, line 11). Law enforcement set out looking for the Appellant and a gray Dodge Neon. (R. p. 252, lines 8-12).

The next morning, the Appellant met with Deanna Henderson at her home, nervously asking her to tell anyone who may inquire that he did not stay with her. (R. p. 152-153). Law enforcement arrived to apprehend him. (R. p. 154). From the backseat of the patrol car, the Appellant held down his head or nodded when Henderson asked him if she shot the victim. (R. p. 155, lines 5-15).[2] The Appellant testified that he went to Henderson's home because the news broadcast information regarding the shooting. (R. p. 420, lines 5-12). "So [he] told her [he] was going to turn [him]self in." (R. p. 425, lines 4-5).

Law enforcement seized the Dodge Neon pursuant to a search warrant. (R. p. 269, lines 22-25; R. p. 293, lines 17-20). It was determined that Everlina "Lena" Bickman, the Appellant's girlfriend's cousin, owned the Neon. (R. p. 294, line 25 – p. 295, line 4; R. p. 415, lines 23-25). In the car, law enforcement recovered two cell phones: one phone was a Black Kyocera found in "front passenger interior drawer compartment" and the other a silver LG from the "front passenger interior door compartment." (R. p. 316, lines 18-23). Upon a search of that residence, law enforcement also collected a red shirt, black tennis shoes, and a red hooded sweatshirt. (R. p. 298, line 14 – p. 300, line 5). According to the Appellant, he did wear a red shirt, jeans and black athletic shoes the night the murder occurred. (R. p. 414, lines 9-12).

The Appellant also testified as to his pattern of cell phone use. When his food stamp phone ran out of minutes and shut off, he used his girlfriend Amber's phone. (R. p. 419, lines 14-21). Others contacted the Appellant by calling Amber's phone. (R. p. 419,

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[2] This testimony was not included in Ms. Henderson's statement to law enforcement. (R. p. 156, lines 3-5).

lines 14-18). When he needed to get in touch with Amber, he would call Everlina "Lena" Bickman's cell phone. (R. p. 420, lines 1-4). When he got arrested, he wanted to get in touch with Amber, but he "knew she didn't have a phone . . . ." (R. p. 424, lines 22-25). In jail, the Appellant called a friend, asking him to contact Amber in order to find out whether law enforcement recovered either DNA or a phone the Appellant used from the Dodge Neon. (R. p. 426, line 1 – p. 427, line 16). That call ends with the Appellant stating:

> I'm trying to get a hold of Amber . . . I wanna[sic] see what's, um[sic], what's going on with Amber so can you try to do that for me? 'Cause my phone – They took that girl's car. They tryin' to say I used that [sic] for the, um[sic], murder, they took her car, they tryin' to say I got some, um[sic], DNA in there I guess and my phone's inside that [car.] Well, it's not my phone, but them, um[sic], the phone I was usin' [sic] inside there. So see if you can get in touch with her and find out somethin' [sic].

(State's exhibit 99).[3]

[3] No formal transcript of the call has been made a part of the record, but Respondent presents this transcription to this Court, along with a copy of the call, which was made on January 25, 2012, at 7:27:42. (State's exhibit 99).

ARGUMENT

I. The trial court properly admitted the Appellant's recorded phone call under Rule 801(d)(2)(A), SCRE, because the Appellant's own out-of-court statements are being offered by the State against the Appellant, placing the call squarely within the definition of non-hearsay.

Proffer and Ruling

At trial, the State's case depended upon circumstantial evidence. The State sought to introduce the Appellant's jailhouse phone call because it tied the Appellant to the gray Neon, which is the same car witnesses testified to seeing outside of the victim's home during the incident, the same car witnesses testified to seeing the Appellant drive away after the murder, and the same car seized from his girlfriend's home, where the Appellant lived. (R. p. 167, lines 4-25). The call's context also tied the Appellant to a phone he used, and a phone was found inside the gray Neon upon its seizure. (R. p. 171, lines 1-9). Defense counsel postured the call should not be admitted because the Appellant's trying to find his girlfriend was irrelevant and because the call was unclear in regards to its context and as to whom the Appellant was speaking. (R. p. 165, lines 5-25).

The trial court took the matter under advisement. (R. p. 168). When it came time for the State to introduce the phone call at trial, Defense counsel renewed its objection pursuant to Rule 801(b)(3), SCRE, stating its position "that this is not an admission. He is in jail. He is trying to find his girlfriend. And he is having whoever he is talking to try to track her down." (R. p. 387, lines 7-11). The State proffered that the call goes towards evidence of guilt and is "an admission by a party opponent. He states not only is he concerned that DNA may be in the car that the police recovered, but he is also concerned about a phone that he was using, his phone. And then he backs off and says well the

phone I was using." (R. p. 387, line 13 – p. 388, line 2). The State expounded by connecting the phone call to its theory of the case by stating why the phone call constitutes evidence of the Appellant's guilt. A phone was found in the car seized by law enforcement. (R. p. 397, lines 19-22). That car's seizure resulted from witnesses identifying it as the car present at the scene on the night of the murder. (R. p. 387, line 23 – p. 388, line 2). The Court admitted the call into evidence under Rule 801(d)(2)(A), SCRE, defining the rule as applying to a party's "own statement in either an individual or represented capacity. Well, the statement about the phone and [']not my phone but the phone I was using that night[’] is the defendant's own statement." (R. p. 388, lines 3-12). "That is what the rule is. It isn't hearsay." (R. p. 235, lines 19-20).[4]

Standard of Review

"Decisions regarding the admissibility of evidence are within the trial court's sound discretion and will not be reversed on appeal absent a prejudicial abuse of that discretion." *State v. Blurton,* 342 S.C. 500, 507, 537 S.E.2d 291, 295 (Ct. App. 2000) (rev'd on other grounds, 352 S.C. 203, 573 S.E.2d 802 (2002)).

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[4] The Court also admits the call into evidence under Rule 803(6), SCRE, as the jail recorded was conducted as a business activity, and under Rule 403, SCRE, as relevant to the Defendant's presence in the Dodge Neon. The Court went further in its ruling, *sua sponte* admitting the call based upon its context:

> there are arguments that have been made regarding using jail phone calls and the context of the call. Ms. Runey did mention the context. And I understand it that's that full telephone call, correct? I mean the jail calls are usually limited to 15 minutes. But that one hung up a little over three. So I'm not sure that there was any other conversation which could context it. And quite frankly, I'm not sure that the folks talking wanted anybody to be able to figure out the context. So I'm going to allow it.

(R. p. 388, line 13 – p. 389, line 7; R. p. 393, lines 2-4).

A. The context of the phone call constitutes circumstantial evidence placing the Appellant at the scene of the crime and, therefore, is a statement against his own interest meeting the non-hearsay definition of an admission by party-opponent.

An out of court statement by a party is not hearsay when that statement is offered at trial against that party. Rule 801(d)(2)(A), SCRE.[5] An admission by a party-opponent is a statement by a party "'of the existence of a fact which is relevant to the cause of his adversary.'" *City of Easley v. Portman,* 327 S.C. 593, 607, 490 S.E.2d 613, 621 (Ct. App. 1997) (quoting *Black's Law Dictionary* 296 (1990)). An admission by a party need not be a confession in order to be admissible. *See Id.; Pressley v. State,* 201 Ga. 267, 39 S.E.2d 478 (1946). An admission is merely a party's own incriminating statement. Any such statement from which the jury may reasonably infer any fact tending towards the defendant's guilt or innocence is relevant, is admissible, and is not hearsay. *See* Rules 403, 801(d)(2), SCRE.

Rule 801(d)(2) has been consistently applied. A defendant's incriminating statement is admissible at trial through the witness to whom that statement was related. *See State v. Gilchrist,* 342 S.C. 369, 372-73 n.3, 536 S.E.2d 868, 870 n.3 (2000); *State v. Good,* 308 S.C. 313, 315, 417 S.E.2d 643, 644 (Ct. App. 1992) (co-defendants' statements admissible "under the well-recognized exception to the hearsay rule that permits an out-of-court admission of a criminal defendant to be related by a witness to whom the admission was made") (citing *State v. Shorter,* 85 S.C. 170, 171, 67 S.E. 131,

[5] The rule: "Rule 801(d) Statements Which are Not Hearsay. A statement is not hearsay if – (2) Admission by Party-Opponent. The statement is offered against a party and is (A) the party's own statement in either an individual or representative capacity . . . ."

131 (1910)).[6] In the Fourth Circuit, Rule 801(d)(2)(A) applies to allow the admission of recorded telephone conversations.[7] The Rule has been interpreted to allow the two-way conversation into evidence, because both speakers' statements are "reasonably required to place [the defendant's] responses into context." *United States v. Wills,* 346 F.3d 476, 490 (4th Cir. 2003). "[S]o far as they constituted incriminating admissions," the entire call is admissible under Rule 801(d)(2)(A) to make the statements "'intelligible to the jury and recognizable as admissions.'" *Id.* (citing *United States v. Lemonakis,* 485 F.2d 941, 948 (D.C. Cir. 1973)).

Other jurisdictions have similarly applied Rule 801(d)(2)(A): "[s]tatements of a party opponent are admissible as substantive evidence if offered against that party." *State v. Tyler,* 196 Ohio App.3d 443, 452, 964 N.E.2d 12, 19 (Ohio 4th Dist. Ct. App. 2011). The phone call in *State v. Tyler* consisted of the defendant ascertaining whether the victim intended to testify against him at trial and apologizing, but not explicitly admitting to robbing the victim. *Id.* at 448, 964 N.E.2d at 16. That court pertly held the call admissible under Rule 801(d)(2)(A) because the defendant's "statements in the recording are admissions and are, by definition, not hearsay." *Id.* at 452, 964 N.E.2d at 19. Further, a defendant's statement amounts to relevant non-hearsay evidence where the statement is reasonably susceptible to multiple inferences. In *State v. Barone,* the trial court properly

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[6] The fact that the statement was not admitted into evidence through the witness to whom the statement was related, but instead through a recorded jailhouse phone call does not affect its admissibility under the rule. *See, e.g. State v. Tucker,* 334 S.C. 1, 12-13, 512 S.E.2d 99, 105 (1999) (a defendant's prior statements from the guilt phase of his own trial have been deemed admissible during later courtroom proceedings pursuant to the rule at issue). The trial court admitted the phone call through its custodian pursuant to Rule 803(6), SCRE, the hearsay exception for records of regularly conducted activity.

[7] Federal Rule of Evidence 801(d)(2)(A) is identical to the South Carolina Rule.

admitted an inmate's intercepted letter. 239 Or. 210, 237, 986 P.2d 5, 23 (Or. 1999). Even where defense counsel argued that the vagueness of the letter precluded its relevance, admissibility resulted from the possible "interpretation of the letter as a veiled request by defendant for another inmate to take steps to stop [a jailhouse informant] from testifying." *Id.* at 238, 986 P.2d at 24. Both the jailhouse letter in *Barone* and the present Appellant's jailhouse phone call to a friend constitute relevant non-hearsay evidence due to both defendants' statements' susceptibility to "an 'inference of consciousness of guilt' on the defendant's part." *Id.* (quoting the trial court's ruling). During the present call, the Appellant seeks information regarding whether law enforcement located a phone he used and searched for his DNA in the seized car. One may draw the reasonable inference from the call that the Appellant admitted his involvement in the crime to a friend, and sought help in determining whether law enforcement found direct evidence of the Appellant's presence at the scene of the crime. Therefore, the trial court properly admitted the Appellant's recorded phone call as a statement against a party-opponent because the call goes towards the issue of guilt.

Appellant cites *State v. Needs,* wherein a circumstantially incriminating statement was admissible under Rule 801(d)(2) as evidence of motive. 333 S.C. 134, 508 S.E.2d 857 (1998). In that case, the defendant killed his stepfather, which allowed his mother to collect on the victim's life insurance policies and loan the defendant start-up funds for his business. *Id.* The court admitted testimony "about the insurance policies and the potential loan from his mother as admissions by a party-opponent" under Rule 801(d)(2)(A). *Id.* at 150, 508 S.E.2d at 865. The court disagreed with defense counsel's contention that the circumstantially relevant and incriminating statement "created the illusion of a nexus"

between that appellant and the insurance policies he sought to collect as a result of the murder. *Id.* at 150-51, 508 S.E.2d at 865. Thus, the evidence properly bolstered the State's case. *Id.* Similar to *Needs,* the introduction of this jailhouse call is admissible because, from its context, the jury could reasonably infer that in light of all of the other evidence, the Appellant took part in the murder. Thus, the Appellant's opponent offers the statements made during the call against the Appellant and they are admissible as non-hearsay.

The 801(d)(2)(A) definition squarely fits the instant case. The case was prosecuted under the theory of the hand of one is the hand of all. It matters not whether Defendant was the triggerman, only that he was present at the scene participating in the commission of the murder. Circumstantial evidence places the Appellant as the instigator. Testimony shows that the Appellant heatedly left the victim's home earlier that evening regarding an insufficient drug deal, that he was at the scene immediately prior to the victim's shooting having arrived in a Dodge Neon, and that he exited through the trailer's back door immediately prior to the shooting. Testimony also shows that the shooting occurred in the vicinity of that back door. Further, the Appellant's voice was identified as directing others to search the mobile home for money and drugs. The Appellant was seen getting into the driver's seat of a Dodge Neon and speeding off with others after the murder occurred. The Appellant resided at the home where law enforcement found the Dodge Neon. All of the above facts reasonably lend to Appellant's participation in the murder. The jailhouse phone call between the Appellant and a friend bolsters the same vein of circumstantial evidence. During the call, the Appellant acknowledges fear that law enforcement may be searching the Dodge Neon for DNA or

his phone, or a phone he used. (State's exhibit 99). Even if the Appellant was "merely speculating" as to the Neon's seizure, the Appellant calls seeking information from a friend regarding the potential evidence which may be collected against him. *Id.;* (Final Br. of Appellant, p. 15). Though made out-of-court, these statements are clearly not hearsay because they are made by the Appellant and, when taken together in the context of the case, are offered against him by the State to support an inference of guilt. Thus, the trial court properly admitted the call as a non-hearsay admission by a party-opponent pursuant to Rule 801(d)(2)(A), SCRE.

B. Any error in the phone call's admission constitutes harmless error.

Even if not properly excluded, Appellant cannot show prejudice since the phone call was cumulative to the State's circumstantial evidence case. Improperly admitted testimony will be found harmless error where that testimony is "cumulative to the other, properly admitted evidence[.]" *State v. Williams*, 321 S.C. 455, 462, 469 S.E.2d 49, 53 (1996); *State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) ("When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result"). Factors to consider in determining harmless error are: "the importance of the witness's testimony to the prosecution's case, whether the witness's testimony was cumulative, whether other evidence corroborates or contradicts the witness's testimony, the extent of cross-examination otherwise permitted, and the overall strength of the State's case." *State v. McLeod*, 362 S.C. 73, 83, 606 S.E.2d 215, 220 (Ct. App. 2004).

The phone call at issue merely points out that the Appellant may have left the phone he was using in the same car that witnesses connected him to during the murder's commission. The phone call offers no direct, independent statement of guilt, but instead merely bolsters the inference the State sought the jury to draw from the totality of its case. Thus, the recorded phone call is cumulative and its admission into evidence is harmless because other evidence supports the State's theory of the case. *See State v. Beckham,* 334 S.C. 302, 320, 513 S.E.2d 606, 614 (1999) (exclusion of cumulative impeachment evidence held harmless error).

The absence of prejudice is underscored by the overwhelming proof of the Appellant's guilt based upon the foregoing strength of the State's circumstantial case. *State v. Bryant*, 369 S.C. 511, 518, 633 S.E.2d 152, 156 (2006) (error "is harmless where a defendant's guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached").

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should affirm the appellant's convictions.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent, complies with Rule 211(b), SCACR, and the August 13, 2007, Order of the South Carolina Supreme Court, "Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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PROOF OF SERVICE

I, Caroline M. Scrantom, counsel for the Respondent, certify that I have served the within Final Brief of Respondent and Certificate of Compliance by depositing two (2) copies of the same in the United States mail, addressed to his attorney of record at:

Susan B. Hackett
South Carolina Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
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I further certify that all parties required by Rule to be served have been served. This 30th day of December, 2014.

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