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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Oconee County
Court of General Sessions
R. Lawton McIntosh, Circuit Court Judge

Case No. 2012-GS-37-597
Appellate Case No. 2013-001895

State of South Carolina,

Respondent,

v.

James Richard Bartee, Jr.,

Appellant

FINAL REPLY BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in allowing questioning concerning a suspension in appellant's employment history and in denying the defense motion for a mistrial based on the solicitor's questions concerning the suspension and the basis for the suspension?

2. Did the trial court err in allowing Nick Blackwell, a prosecution witness, to give his subjective, speculative interpretation of certain statements alleged to have been made by appellant during a recorded conversation?

3. Did the trial court err in admitting a disk containing an audio recording of certain conversations between Nick Blackwell and others, in admitting a purported transcript of that recording, and in limiting the defense's cross-examination of one of the state's witnesses with respect to that recording?

REPLY TO STATEMENT OF FACTS

The charge of solicitation of a felony is based on Nick Blackwell's claim that on May 27 appellant asked him to kidnap Judge Williams. The only evidence that such a conversation took place came from Blackwell's own statements. His claim, however, is squarely contradicted by another witness, who heard their entire conversation that night over an intercom in appellant's garage, and who testified that appellant did not plan a kidnapping in that conversation. R. pp. 541, 543, 546, 548-49.

The state's own witnesses and defense witnesses gave testimony painting a different picture of the events than that recited by the state in its statement of facts. Their accounts revealed that the person agitating to do something to Judge Williams was Blackwell himself.

Joseph Milbert, a prosecution witness, was emphatic in his testimony that it was Blackwell who was obsessed with doing something to Judge Williams; Milbert kept telling Blackwell to think of his family and not do anything, and he encouraged him to just go vote and get others to vote. R. pp. 280-83, 295; State's Exhibit 1. They exchanged 14 telephone calls, not just the two recorded by law enforcement on May 29. R. p. 253. Although Blackwell claimed Milbert told him to hold off on kidnapping the judge, R. p. 338, Milbert made no such statement in the recorded telephone calls. State's Exhibit 1.

Milbert asserted Blackwell was the *only* one who talked of doing something to Judge Williams. R. pp. 266, 275. Blackwell had been involved in a shooting incident the previous year and was unhappy with law enforcement because of their handling of that incident. R. pp. 278, 315. Within the last weeks, he had also had an altercation with Donnie Fricks, a former deputy and one of the candidates in the sheriff's race. R. pp. 148, 278-79, 320, 411. He was strained, frustrated, and angry, and he believed he and his family were being threatened by law enforcement and people involved with other candidates. R. pp. 264-67, 361. Milbert and other witnesses confirmed that Blackwell had a temper, behaved poorly, and was frequently upset and disruptive. R. pp. 266, 280, 493, 508-10, 574, 590, 603-04, 609-10, 688-90.

Various aspects of Blackwell's account were contradicted by other witnesses. Blackwell implied that appellant asked Stancil to provide information about Judge Williams. Stancil, however, testified that it was Blackwell, not appellant, who asked him to look up that information. R. pp. 569-70.

Blackwell claimed appellant gave him $200 to buy supplies when he supposedly asked Blackwell to kidnap Judge Williams, but appellant and other witnesses testified appellant loaned $180 to Blackwell days earlier. R. pp. 586, 590-92, 671, 699. It was a portion of this money that appellant thought Blackwell was returning on May 29. R. pp. 713-14.

Laurieanne Fletcher, the prosecution witness who testified Blackwell told her appellant asked him to kidnap a judge, also testified that she did not take Blackwell seriously, and she did not report his claim to law enforcement. R. pp. 301, 305-09. Her testimony contains an important omission. She did not testify that Blackwell also told her appellant gave him $200 for kidnapping supplies and did not testify that he showed her any money, something anyone would have done in the position Blackwell claimed to be in, having supposedly been asked to kidnap someone.

ARGUMENT IN REPLY

I. THE TRIAL COURT ERRED IN ALLOWING QUESTIONING CONCERNING A SUSPENSION IN APPELLANT'S EMPLOYMENT HISTORY AND FURTHER ERRED IN DENYING THE DEFENSE MISTRIAL MOTION BASED ON THIS QUESTIONING.

Appellant contends the court erred in its ruling that appellant opened the door to questioning of a prosecution witness, Joe Milbert, concerning a disciplinary matter during appellant's Secret Service employment and further erred in denying a motion for mistrial based on the solicitor's questions about that matter that injected race into the proceedings. The state mischaracterizes the evidence and appellant's argument of this issue, as addressed below in the discussion of the merits.

The state contends this issue is not preserved, stating appellant never challenged the ruling that he opened the door and thereby conceded the holding. This assertion is incorrect. The defense did challenge the ruling that it had opened the door to this questioning, and it did not concede that the court's holding was correct. In argument of the mistrial motion after the jury was out of the courtroom, the defense asserted that its questions did not open the door. R. p. 312, lines 1-14. The court adhered to its ruling, finding the witness had opened the door. R. p. 312, line 16 – p. 313, line 2; p. 313, lines 19-21. The authorities cited for the assertion that the defense conceded the court's holding as to door-opening are not applicable. Those cases did not address the situation presented here or the question whether a defendant opened the door to an inadmissible line of questioning.

The state also contends the mistrial motion was untimely and therefore unpreserved for appellate review. To the contrary, the defense made the mistrial motion at the first opportunity out of the presence of the jury, immediately after the court excused the jury from the courtroom. R. p. 311, lines 17-18, 22-24.

The state further contends the mistrial issue is waived because appellant did not accept the court's offer of a curative charge. The reason counsel did not accept a curative charge was that any attempt at a cure would instead call attention to the prejudicial comments and thereby enhance the prejudicial effect. R. p. 314 Even the court recognized the prejudice that would result from such a charge, noting that calling attention to the comments would be "like rubbing the scab." R. p. 314, lines 2-3. Under certain circumstances, the prejudicial effect of improper comments cannot be removed in any other way, including by a curative charge, and a mistrial is the proper remedy. *Cf.*

State v. Jones, 343 S.C. 562, 575, 541 S.E.2d 813, 820 (2001) (declining to hold that a limiting instruction always cures an evidentiary error); *State v. Smith*, 290 S.C. 393, 395, 350 S.E.2d 923, 924 (1986) (recognizing that, under the facts of a particular case, a curative charge may not be capable of alleviating the prejudicial effect of an improper question). Appellant did not waive this issue by declining a curative charge that would have exacerbated the prejudice.

In the opening paragraph of its argument of this issue, the state mischaracterizes the issue raised by appellant and the testimony that gave rise to the improper examination in response. The state asserts the prosecutor's questioning was in response to the witness's testimony as to appellant's "good character and 'honorable' service." This assertion is incorrect. The witness gave no such testimony. The prosecutor's questions were in direct response to the witness's testimony that appellant "had exemplary training." R. p. 276, line 1.

Addressing the merits of appellant's arguments, the state ignores two fundamental problems with the court's ruling that appellant opened the door to the prosecutor's inappropriate line of questioning. First, the defense did not ask any question to elicit testimony about appellant's employment record. Rather, the witness used the word "exemplary" in response to a question about appellant's training. The solicitor mischaracterized the witness's testimony as being about appellant's "exemplary record" in his employment. The defense's questions posed to this prosecution witness did not open the door to this line of questioning by the state. It was the state, not the defense, that first addressed appellant's employment record.

Second, the court's ruling that this prosecution *witness*, rather than the *defendant*, opened the door is contrary to the principle that allows otherwise improper questioning by one *party* in response to testimony elicited by the other *party*. *See State v. Foster*, 354 S.C. 614, 623, 582 S.E.2d 426, 431 (2003); *State v. Stroman*, 281 S.C. 508, 513, 316 S.E.2d 395, 399 (1984); *State v. Beam*, 336 S.C. 45, 52, 518 S.E.2d 297, 301 (Ct. App. 1999).

The state latches onto other testimony of this witness to argue that the questioning was in response to the witness's placing appellant's character in issue, even though the prosecutor's questions were clearly in response to the witness's use of the term "exemplary" when asked about appellant's training. The defense did not elicit any character evidence. Contrary to the state's assertion, the witness's testimony that appellant was able to get the witness a job and that appellant was very smart did not place character in issue. An ability to get someone a job and intellect are not traits of character. This testimony did not open the door to the state's improper questions. Nor did the witness's description of appellant as honorable open the door to introduction of evidence of a disciplinary matter almost three decades earlier. The disciplinary matter did not involve dishonorable conduct, but if it had, such conduct would have no relevance to appellant's character some thirty years later. The defense did not, by its examination of this prosecution witness, invite the response the state engaged in and the court allowed.

On the mistrial issue, the state contends no prejudice resulted from the questions because the witness did not provide any evidence in response to the questions. The fact that no evidence may have been admitted as the result of the answer is not dispositive. Rather, the issue is the prejudice that results from the information conveyed by the

question itself. In *State v. Smith*, 290 S.C. 393, 350 S.E.2d 923 (1986), the solicitor asked a defense witness whether he was aware the defendant refused to make a statement to police officers. Because an objection was interposed, the witness never answered the question. *Id.*, 290 S.C. at 394, 350 S.E.2d at 924. The Supreme Court found the prejudicial effect of the question, an improper comment on the defendant's right to remain silent, required reversal. *See id.*, 290 S.C. at 395, 350 S.E.2d at 924.

Similarly, in this case, although the answers to the solicitor's questions did not confirm the information contained in the questions, the questions themselves had an extremely prejudicial effect. The state was allowed to inject an issue of race, the effect of which was to inflame the jury and taint its ability to render a fair and impartial verdict, based solely on the evidence pertaining to appellant's guilt or innocence. The report of the incident stated the "allegations of profanity and/or racial remarks cannot be confirmed or denied." R. p. 631. The state did not introduce any evidence establishing the basis for the suspension.

For the solicitor to ask questions accusing appellant of using racial slurs and to specifically state those alleged slurs – "you're a damned black cow" and "a black bitch" – could only inflame the passions and prejudices of the jurors, black and white alike. R. p. 740, lines 11-12, 22. The fact that the questions did not elicit any evidence that appellant actually made such pejorative racial comments does not negate the extreme prejudice that resulted from the asking of the questions. Under these circumstances, appellant was denied a fair trial, and this Court should reverse.

II. THE TRIAL COURT ERRED IN ALLOWING NICK BLACKWELL TO GIVE HIS SUBJECTIVE, SPECULATIVE INTERPRETATION OF CERTAIN STATEMENTS ALLEGED TO HAVE BEEN MADE BY APPELLANT ON THE RECORDING.

Appellant contends the court committed reversible error in allowing Nick Blackwell to testify concerning what he believed appellant meant during the recorded conversation the night of May 29-30. The state contends every objection to this testimony other than its prejudicial effect was waived when counsel responded to questions posed by the court. Counsel's responses, in the context of the entire objection, did not waive any of the grounds of the objections articulated by counsel.

The context is revealed by the following excerpt from the transcript, not merely by the isolated passage quoted by the state:

> Q. What did he mean by that?
>
> MR. BRANNON: Object.
>
> THE COURT: Sustained.
>
> By Mr.Wagner:
>
> Q. What else did he say?
>
> A. Uh, you know, he told me the judge was a weasel. He said a lot.
>
> Q. Did he tell you not to do it or did he just tell you to wait?
>
> A. It seems as if he was saying, Let's don't kidnap the judge, let's wait till the dust settles and we're gonna do some other action. It was implied. You know, he never was very specific.
>
> MR BRANNON: Objection.
>
> THE COURT: He's giving his impression. I overrule that.
>
> THE WITNESS: He never was very specific. But it implied to me, my perception of it was when he said I didn't need a mask because they were talking about having a mask before because he couldn't identify

me, he said I don't need a mask when I sneak up on them because if they were dead, it wouldn't matter if they saw me anyway.

MR. BRANNON: Objection. Move to strike.

R. p. 345, line 8 – p. 346, line 6. The jury was excused and the argument of the objection continued:

MR BRANNON: Your honor, in his earlier testimony he said that Mr. Bartee specifically said don't kill him. Now he's talking about the judge being dead. It's not - - I've got three different statements made by this man and nowhere does he say, My impression was I thought this.

He is embellishing beyond credibility at this point, Your Honor, and to allow him to taint the jury by using the words "dead" and "murdered" and stuff like that, it's not - - he's now giving an impression that he never had before.

R. p. 346, lines 12-22. The court and witness had a brief exchange when the witness interjected a comment, then the colloquy between the court and counsel continued:

THE COURT: . . .

What evidentiary rule are you using other than it's just not right?

MR. BRANNON: Well, Your Honor, how does he know what Mr. Bartee was implying, if anything?

THE COURT: He is testifying it seems to me based on his, his impression of the conversation, which he is allowed to do. Do you disagree?

MR. BRANNON: No, I don't disagree. However, he's not - -

THE COURT: And I'll hear you. But wouldn't that be a matter of Cross-Examination just like the civil suit and other matters we brought up at pretrial?

MR. BRANNON: It would, Your Honor.

THE COURT: Okay.

MR. BRANNON: But there's also the possibility for prejudice here.

THE COURT: Sure. I mean, that's what trials are about.

MR. BRANNON: I understand that. But he's contradicting his own testimony. He said, Bartee said specifically, "Don't kill him." Now he's saying that's what he's talking about.

THE COURT: Okay. What evidentiary rule should I consider in considering your request? I mean, I'd be glad to. I just don't think it - - -

MR. BRANNON: Its prejudicial value far outweighs any probative value of this testimony.

THE COURT: 403?

MR. BRANNON: Yes, sir.

R. p. 347, line 4 – p. 348, line 9. The court overruled these objections, stating the witness has a right to testify to his impression of the conversation. R. p. 348, lines 10-14.

The isolated passage relied on by the state to argue the objection is not preserved on any ground other than Rule 403 was part of a lengthy and vigorous argument of a multi-faceted objection to the testimony. During that argument, the court posed a question to counsel, who responded, "No, I don't disagree. However, he's not - -" R. p. 347, lines 13-14. Cutting counsel off, the court stated, "And I'll hear you," but then posed an additional question without hearing what counsel was trying to argue when the court interrupted. R. p. 347, lines 13-17. After answering the second question posed, counsel continued, arguing prejudice but also reiterating his earlier objection based on the witness's contradiction of his own prior testimony in supplying a different impression of what appellant was talking about. R. p. 347, line 20 – p. 348, line 2. In the context of the entire argument, counsel did not waive any of the grounds asserted.

On the merits, this is not a case of a lay witness offering lay opinion testimony based on his own perceptions. This was the case of a witness contradicting multiple

statements previously given concerning what appellant actually said. It was the case of a witness supplying words that were never said by appellant, and that contradicted the words appellant actually did say, as sworn by the witness and as reflected on the recording. The so-called "perceptions" were pure speculation and had never before been asserted by the witness in any of the multiple written statements he had given. The court's ruling unduly prejudiced appellant by allowing the witness to fill the gaps in the state's evidence, putting words in appellant's mouth that appellant never uttered. It was uniquely the province of the jury to determine what appellant meant by the words he said in the recorded conversation. Allowing the witness to contradict appellant's words with the witness's purported "perception" that appellant meant something different than what he actually said was unduly prejudicial. The probative value of this testimony was far outweighed by its prejudicial effect. *See* Rule 403, SCRE.

Incongruously, the state argues the witness's "perception" of the conversation was evidence of other bad acts and somehow admissible as "res gestae." To the contrary, this testimony did not supply the context of the alleged crime. The actual words spoken by appellant, as evidenced by the recording itself, supplied the context. The witness's embellishment of that recording – attributing to it a meaning contradicted by appellant's own words, by the witness's testimony as to appellant's actual words, and by the witness's prior statements about the conversation – was absolutely improper and highly prejudicial. The court erred in allowing this testimony, and this Court should reverse.

III. THE TRIAL COURT ERRED IN ADMITTING A DISK CONTAINING THE PURPORTED AUDIO RECORDING OF TELEPHONE CALLS AND A CONVERSATION WITH APPELLANT, IN ADMITTING A PURPORTED TRANSCRIPT OF THAT RECORDING, AND IN LIMITING THE DEFENSE'S CROSS-EXAMINATION OF A WITNESS WITH RESPECT TO THAT RECORDING.

Appellant contends the court erred in admitting a disk containing a recording of the alleged conversation of May 29-30, because it was not the original, was not an authenticated duplicate, and had a defective chain of custody. Appellant also challenges the rulings allowing admission and use of a court reporter's transcript of the recording, which differed significantly from a transcript prepared by the solicitor's office and did not accurately reflect the recording's contents. Appellant also contends the court erred in limiting cross-examination about the SD card on which the original recording was made.

A. The recording was inadmissible because it was not the original or an accurate, authenticated duplicate of the original, and because of a defective chain of custody of the disk.

Appellant's principal brief provides a detailed recitation of the evidence concerning the making of the recording and the creation of the purported copy of the recording that was introduced as state's exhibit 1. That evidence established, through uncontradicted expert testimony, that the digital recording on the SD card, which the state had not preserved, was the true original. It also established that the proper methodology for forensically exporting the original and creating a duplicate original was not followed. Without the original, there was no way to determine that the copy on the disk offered into evidence by the state was an accurate copy, authenticated to the original. *See* Final Brief of Appellant, pp. 16-19. Based on this evidence, the disk was inadmissible. *See* Rules 1001(3), 1001(4), 1002, 1003, SCRE.

The state's brief does not address the testimony of the expert witness or proffer any argument to negate his professional expert conclusion that the offered exhibit contained neither the original recording nor an authenticated copy. Rather, the state merely argues that the copy of the disk was the original or an authentic copy because two officers said so. Those officers were not experts, trained and experienced in computer forensics. Neither those officers nor any other witness contradicted the testimony of the expert in computer forensics. Their assertions do not establish authenticity under Rule 901, SCRE, as the state asserts, in light of the expert testimony that the proffered copy could not be authenticated to the original. The court's finding that the disk was the original recording was contradicted by the only competent evidence on the issue, the expert testimony. The court abused its discretion in admitting this evidence based on factual findings not supported by the evidence.

The state continues to rely on *State v. Mitchell*, 399 S.C. 410, 731 S.E.2d 889 (Ct. App. 2012), on which the trial court also relied in admitting the disk. Although the state claims a similar sequence occurred in this case as in *Mitchell*, which addressed photographs removed from a digital camera, *Mitchell* is not controlling. There, the court held the offered photographs were the originals because the testimony established they were the same as the photographs contained in the camera. *See Mitchell*, 399 S.C. at 421-22, 731 S.E.2d at 896. Here, the evidence specifically established the opposite: based on the manner in which the officers handled the original on the SD card and created the purported copy before destroying the original, it could not be established that the original and the copy of the recording on the disk were identical.

The state also contends the copy on the disk was authenticated because Blackwell identified the speakers and appellant admitted he was one of the speakers. Identification of the speakers on a recording is not the equivalent of establishing that the recording is a true and accurate copy of the original, free of tampering or alteration due to the manner of handling and the conditions of storage. The state also suggests in footnote 3 of its brief that appellant waived his objection to the authenticity of the recording by acknowledging his voice and by failing to prove the recording was altered. This is simply not so. Appellant steadfastly adhered to his objection to the admissibility of the disk, offered expert testimony disputing its authenticity, and never abandoned or waived his position. A genuine issue existed as to the authenticity of this evidence, as established by the testimony of the expert witness, and it should not have been admitted. See Rule 1003, SCRE.

In addressing the chain of custody issue, the state asserts the item was non-fungible, readily identifiable, and not easily subjected to change. To the contrary, a recording on a disk is not readily identifiable and is susceptible to change either through human tampering or by virtue of its manner of handling and the conditions of its storage. Part of a recording can be easily erased, either intentionally or through inadvertence. Moreover, as the expert testified, the recording could be affected by heat or cold and possibly by humidity. R. p. 98. This recording was not like the uniquely identifiable, non-alterable, non-fungible items addressed in other cases, for which no chain of custody is required. *Cf. State v. Freiburger*, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005); *State v. Glenn*, 328 S.C. 300, 305, 492 S.E.2d 393, 395 (Ct. App. 1997). A complete chain of custody was absolutely necessary for admission of an item such as this recording.

Also contrary to the state's assertion, SLED agent Sloan did not identify all individuals who handled the disk and what was done with it prior to trial. In fact, Sloan acknowledged that the disk was removed from his truck's exterior tool box and handled by others from time to time. He made assumptions as to who had handled it and made copies from it. R. p. 68, lines 9-10. He could not say with certainty what he himself did with the disk while it was in his possession. R. p. 69, lines 11-16. He did not identify every "somebody" in the solicitor's office or elsewhere who had handled it. R. p. 68, lines 21-23; p. 69, line 22 – p. 70, line 1; p. 70, lines 9-14. The disk should not have been admitted under these circumstances.

B. The court erred in admitting the transcript of the recording.

Appellant challenges the use of a court reporter's transcript of the recording, for multiple reasons. Chief among those reasons is the inaccuracy of that transcript with respect to one particular statement – an incorrect transcription of a statement attributed to appellant. The court reporter's transcript attributes to appellant the comment, "I just don't want to get in trouble." R. p. 885, lines 13-14. The recording itself and the other transcript prepared by the solicitor's office reveal that the actual comment of appellant to Blackwell was "You don't want to get in trouble." State's Exhibit 1; R. p. 928 (third passage attributed to "JB"). It was the incorrect version that the court allowed the jurors to hold and read along with throughout the playing of the recording and throughout the trial testimony about the recording. R. pp. 354-55.

The state dismisses the issue of the incorrect transcript with the assertion that the discrepancies were "minor." The discrepancy noted above is hardly minor. It goes to the core issue presented by the conflicting versions of the evidence. The state's theory was

that appellant put into place a scheme to kidnap Judge Williams, then called it off. The defense contended it was Blackwell who wanted to do something to the judge. The true comment attributable to appellant, as revealed by the recording itself, is that he was attempting to convince Blackwell not to do something, saying, "You don't want to get in trouble." The accurate version of the comment on the recording was consistent with the defense's case. It was extremely prejudicial for the jury to repeatedly be allowed to read an inaccurate transcription of this statement, while the recording was played and while the transcript was read and explained throughout Blackwell's testimony.

The state contends the defense waived this objection. The objection was made in limine. R. pp. 120-22. The court ruled the transcript would be admitted into evidence and used in the courtroom. R. p. 125, line 6; p. 130, line 15 – p. 131, line 11. Later, during the trial testimony of Blackwell, while the jury was out, the following exchange took place:

> MR. WAGNER: Your Honor, it may be time to bring the transcript. I think I'll go ahead and play the tape with Mr. Blackwell, the wire, which at that point we're gonna need to provide the jury the transcript.
>
> THE COURT: And I know there's an objection to the transcript. Any new objections other than previously stated?
>
> MR. BRANNON: I simply renew the previous objection.
>
> THE COURT: Right. And, as I previously ruled, that transcript will not actually go back to the jury, but it will be present in the courtroom if the jury requests to hear the audio again, and they can see it on a visual-aid basis.
>
> . . . .
>
> THE COURT: Any objection other than your previously stated objection?

MR. BRANNON: Nothing in addition.

R. p. 349, line 4 – p. 350, line 4. Counsel then briefly discussed the starting point of the recording with reference to the transcript, then the court took a five-minute break. After the break, there was a brief discussion of allowing a different witness to leave. R. pp. 350-53. When the jury returned to the courtroom, the first thing that took place was giving the witness a copy of the transcript and handing copies out to all the jurors. R. p. 353, lines 10-18. Here, the objection was made in limine and ruled upon. During trial, it was renewed and again ruled upon. It was not incumbent upon defense counsel to renew the objection to giving the jury the transcript, where nothing on this issue intervened to alter the court's ruling made immediately before the trial resumed in the presence of the jury. The court's ruling was final, and the issue is preserved. *Cf. State v. Forrester*, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001); *State v. Wood*, 362 S.C. 520, 526-27, 608 S.E.2d 435, 439 (Ct. App. 2004); *State v. Mueller*, 319 S.C. 266, 268-69, 460 S.E.2d 409, 410-11 (Ct. App. 1995).

The state also asserts the issue was waived because appellant "agreed" the first transcript would go to the jury. R. p. 835. The state takes this comment out of context. The second transcript was offered into evidence by the defense, and the state objected. R. pp. 618-21. When the court ruled the second transcript would be admitted, it changed its earlier ruling about the other transcript not going back to the jury room. R. p. 621, line 22 – p. 622, line 2. The statement of counsel made at the end of the trial, when the exhibit was remarked to go to the jury room, was merely a confirmation of the earlier ruling by the court that both transcripts would go to the jury room. However, if this statement can, in the context of the earlier ruling, be deemed an agreement by counsel, it

does not waive the issue presented here. The ruling on the admission of the court reporter's transcript was final, and that transcript had already been used in the trial when the second transcript was introduced and the court changed its ruling to allow both to go to the jury room. R. p. 349, 621-22. At the beginning of trial, the defense had objected to use of both transcripts. Had the trial court not admitted the first transcript, the defense would not have offered the second transcript to point out the inaccuracies in the first. R. p. 620, lines 7-10; p. 621, lines 3-15. Even if counsel agreed to allow both transcripts to go to the jury room, that agreement did not waive the initial objection that the first transcript should not have been admitted or used in any way during the trial, an objection that had been argued and finally ruled upon by the trial court and thus preserved for appellate review. *Cf. Mueller*, 319 S.C. at 268-69, 460 S.E.2d at 410-11 (issue of admissibility of witness's prior conviction was preserved, where counsel sought ruling immediately before witness testified and court ruled conviction could be used for impeachment; ruling was final, and issue was not waived by defense counsel's strategic decision to elicit the evidence during direct examination of the witness). Counsel did not waive the objection to the admission and use of the transcript.

C. The court improperly limited the defense's cross-examination with respect to the disk.

Appellant contends the court improperly limited cross-examination and improperly prevented a proffer of evidence, after SLED agent Sloan testified the disk was considered the original recording. The state contends the defense waived this issue by acquiescing in the court's ruling. This contention is not correct. After the court ruled the cross-examination would not be allowed because of the court's ruling that the disk was the original, defense counsel stated, "I understand your ruling." R. p. 473, lines 12-22.

This statement did not acquiesce in the court's ruling or waive the objection to it. Indeed, the court and counsel immediately began the proffer of the evidence the court would not allow. The court then interrupted the proffer and refused to allow the defense to continue with it. The court concluded its remarks, saying, "I'm not gonna let you go there. Okay?" and counsel replied, "Okay." R. p. 475, lines 13-14. Use of the word "okay" was not acquiescence in the court's ruling. Rather, the court was merely asking if counsel understood the ruling, and counsel was indicating that he did. Indeed, when the court followed up with further comment on its ruling, counsel indicated, "I understand." R. p. 475, lines 20-23. This exchange simply cannot be construed to be a waiver of the issue.

IV. THE ERRORS COMMITTED IN THIS TRIAL WERE NOT HARMLESS.

None of the errors raised in this appeal was harmless. The state's case was extremely weak, turning entirely on the claim of Nick Blackwell, whose account was discredited by both prosecution and defense witnesses. He was a frustrated, angry, and volatile individual who wanted to retaliate for prior brushes with law enforcement and wanted to do something to someone. The recording was not the original contained on the SD card, which had been destroyed. The copy could not be authenticated to the original, and it could not be confirmed that it had not been altered. The words of appellant in the recorded conversation did not implicate him in a plot to kidnap anyone. Blackwell embellished appellant's words and supplied an imagined meaning that was contrary to what appellant actually said, both in the May 27 conversation and in the recorded conversation of May 29. His testimony was also an embellishment not contained in any of his three prior statements concerning the conversation. Witnesses contradicted aspects

of Blackwell's story. Indeed, one witness heard the entire conversation of May 29 and flatly denied that what Blackwell claimed occurred. An improper racial element was injected, tainting the jury and creating a genuine likelihood that they could not render an impartial verdict, based solely on the evidence pertaining to appellant's guilt or innocence. The prejudicial effect of each error was great, not harmless. If this Court finds error with respect to any of the issues raised, it should reverse and grant appellant a new trial.

CONCLUSION

For the foregoing reasons and for all the additional reasons set forth in appellant's principal brief, this Court should reverse the decision of the circuit court and grant appellant a new trial.

Respectfully submitted,

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STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Oconee County
Court of General Sessions
R. Lawton McIntosh, Circuit Court Judge

Case No. 2012-GS-37-597
Appellate Case No. 2013-001895

State of South Carolina,

Respondent,

v.

James Richard Bartee,

Appellant

CERTIFICATE OF COUNSEL

Counsel hereby certifies that the final brief and final reply brief of appellant comply with Rule 211(b) of the South Carolina Appellate Court Rules.

Counsel further certifies that the final brief and final reply brief of appellant comply with the Order of the Supreme Court of South Carolina, *Re Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings*, 407 S.C. 607, 757 S.E.2d 421 (April 15, 2014).

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PROOF OF SERVICE

I certify that I have served the final brief of appellant, final reply brief of appellant, and certificate of counsel upon respondent, by mailing a copy of each, postage prepaid, to Assistant Attorney General William M. Blitch, Jr., P.O. Box 11549, Columbia, South Carolina 29211, on May 19, 2015.

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