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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Oconee County
Honorable R. Lawton McIntosh, Circuit Court Judge
Appellate Case No. 2013-001895

The State — Respondent,

v.

James Richard Bartee Jr., — Appellant.

AMENDED FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

The State agrees with Appellant's procedural Statement of the Case.

STATEMENT OF FACTS

Appellant was a candidate for sheriff in Oconee County in the Republican Primary. His qualifications to be sheriff were in question because, according Brandy Duncan chief general counsel for the South Carolina Criminal Justice Academy, he did not have the requisite year of experience as a certified law enforcement officer in South Carolina. (T.251; 255; R.169; 172).

Judge Williams, concerned about the possibility of a sheriff being elected who could not be duly sworn for the position because he did not meet the statutory qualifications, raised the issue with Appellant and with the Republican Party. (T.222-224; R. 149-151). Eventually, Judge Williams brought a lawsuit seeking a determination of whether Appellant was qualified to be on the ballot. (T.225; R. 152). After an initial hearing on May 24, 2012, the case was continued to May 30, 2012. (T.225; R. 152).

On May 27, 2012, Laurieanne Fletcher gave Nick Blackwell and ride to Appellant's house. (T.534; R. 299). She and Blackewell went inside, another man presumably Joseph Milbert was already present, and the discussion turned to Appellant's campaign. Blackwell and Appellant stepped outside and were gone for thirty to forty-five minutes. (T.535; R. 300). According to Fletcher, Blackwell's demeanor changed after the conversation with Appellant and he became very flat. As they were driving away, Blackwell told Fletcher that Appellant asked him to kidnap a judge. (T.536; R. 301).

Blackwell was a campaign supporter for Appellant. (T.553-555; R.318-320). Blackwell ran into Appellant at the Seneca Fest event on May 26, 2012. During the event, conversation turned to the civil suit filed by Judge Williams. (T.558-559; R. 323-

324). As part of the conversation, Appellant asked Blackwell "I wonder what would happen if the judge didn't show up to the trial." (T.559; R. 324). Appellant left, but asked Blackwell to wait where he was standing. A short time later, Ryan Stancil approached Blackwell and handed him a card with the name, phone number, and address of Judge Williams on it. (T.559-560; R. 324-325).

Blackwell subsequently received a phone call from Joe Milbert indicating Appellant wanted to talk with Blackwell and he was to arrive on May 27 at Appellant's house after dark. (T.562; R. 327). Blackwell testified he had a friend named Laurieanne take him over there and she went inside Appellant's home with Blackwell.

At Appellant's house, Milbert and Appellant were discussing the civil suit. Blackwell and Appellant then went out on his back deck and explained they wanted Blackwell to kidnap the judge. (T.565; R. 330). Specifically, Appellant explained to Blackwell: "when I was in the Secret Service, and we would want somebody to miss something, we would just take them on a tour." Blackwell asked what he meant by a tour, and according to Blackwell, Appellant wanted him to kidnap the judge, take him to Asheville, North Carolina, and dump him to make sure Judge Williams did not make it back until the after the case was dismissed. (T.566-567; R. 331-332).

Blackwell, having concerns about committing the kidnapping, disclosed the plan to David Smith, an investigator he knew with the Oconee County Sheriff's Office. After telling Investigator Smith, the State Law Enforcement Division (SLED) was contacted and began an investigation. (T.327-330; 570-571; R. 191-194; 335-336). Blackwell was subsequently contacted by Agent Michael Sloan of SLED. (T.571; R. 336).

Blackwell received a subsequent call from Milbert telling him to hold off on kidnapping the judge. Blackwell said the reason given was because Appellant's attorney indicated the case would proceed whether or not Judge Williams was present at the hearing. (T.572; R. 337).

Blackwell made a phone call to Milbert which was recorded by Agent Sloan. A further conversation in which Blackwell and Appellant talked at Appellant's home was also recorded. (State's Exhibit 1). During the recording, Appellant told Blackwell to let the dust settle, and they "just have to save it for a later date." (State's Exhibit 1; State's Exhibit 8 p.39-43; R. 884-885). Appellant was subsequently arrested and indicted for solicitation to commit a felony—the kidnapping of Judge Williams.

ARGUMENT

I. The trial court did not err in allowing the State to rebut Appellant's good character evidence after he opened the door regarding his service record in the Secret Service and did not err in denying his motion for a mistrial. Further, the issues are not preserved for review on appeal.

Appellant contends the trial court erred in allowing the State to question Joe Milbert, a State's witness, regarding Appellant's service as a Secret Service Agent to rebut Appellant's questioning of the witness regarding Appellant's good character and "honorable" service. Appellant opened the door to the State's evidence by inserting his good character into the trial by having the witness describe his "honorable" service. The State had the right to rebut the evidence by admitting Appellant's suspension into the record and explain the facts surrounding the suspension.

Preservation

First, the issues raised on appeal regarding the questioning of Milbert are not preserved for review on appeal. When the State began questioning Milbert and asked: "Would you be surprised to know that he was disciplined - - -," the only objection raised by Appellant was to hearsay. The trial court overruled on the basis he opened the door and Appellant never challenged the ruling he opened the door, thereby conceding the holding. As a result, Appellant cannot now complain about any error in the trial court's ruling regarding opening the door or other violations. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("A party may not argue one ground at trial and an alternate ground on appeal."); State v. Benton, 338 S.C. 151, 156–57, 526 S.E.2d 228, 231 (2000) (stating an issue conceded at trial cannot be argued on appeal). Further, when

the allegedly improper question was asked and the State indicated Appellant was suspended for racial slurs, no objection was made on any basis. As a result the issues related to the prejudice resulting from this testimony and the basis for the mistrial are not properly preserved for review on appeal. See State v. Johnson, 363 S.C. 53, 609 S.E.2d 520 (2005) (finding to preserve an issue for review there must be a contemporaneous objection that is ruled on by the lower court).

Next, the issue of the trial court's denial of the motion for a mistrial is not preserved for review on appeal. Appellant waited for several additional witnesses to testify prior to moving for a mistrial. As a result, he failed to contemporaneously raise the issue as he is required. See State v. George, 323 S.C. 496, 510, 476 S.E.2d 903, 912 (1996); State v. Simmons, 384 S.C. 145, 171–72, 682 S.E.2d 19, 32–33 (Ct. App. 2009).

Additionally, after his motion for a mistrial was denied, the trial court offered to make a curative instruction about the basis of the suspension. Appellant responded by staying "I don't know if I want you to do that, so let me think about that." (T.549; R. 314). No curative instruction was requested and none given, so Appellant has waived this issue on appeal. See State v. Tucker, 324 S.C. 155, 169, 478 S.E.2d 260, 267 (1996) (finding issue unpreserved when defendant refused trial court's curative instruction); State v. Bantan, 387 S.C. 412, 418, 692 S.E.2d 201, 204 (Ct. App. 2010) (finding the defendant waived any objection to denial of mistrial when he refused offered curative instruction).

Merits

First, the admission or exclusion of evidence is within the discretion of the trial court and will not be reversed on appeal absent an abuse of that discretion. State v. Saltz,

346 S.C. 114, 551 S.E.2d 240 (2001); see also, State v. Torres, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010) ("The appellate court reviews a trial judge's ruling on admissibility of evidence pursuant to an abuse of discretion standard and gives great deference to the trial court."). An abuse of discretion occurs when the trial court's ruling lacks any evidentiary support or is based on an error of law. State v. McDonald, 343 S.C. 319, 540 S.E.2d 464 (2000).

Additionally, a trial judge's ruling on a motion for a mistrial will not be disturbed absent an abuse of discretion amounting to an error of law. State v. Sparkman, 358 S.C. 491, 495, 596 S.E.2d 375, 377 (2004); State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 628 (2000). This Court favors the exercise of wide discretion of the trial judge in determining the merits of such motion in each individual case. See State v. Patterson, 337 S.C. 215, 226, 522 S.E.2d 845, 851 (Ct. App. 1999).

A mistrial should be declared only when absolutely necessary. In order to receive a mistrial, the defendant must show error and resulting prejudice. Harris, 340 S.C. at 63, 530 S.E.2d at 628; State v. Ward, 374 S.C. 606, 612, 649 S.E.2d 145, 148 (Ct. App. 2007). "A mistrial should only be granted in cases of manifest necessity and with the greatest caution for very plain and obvious reasons." Patterson, 337 S.C. at 227, 522 S.E.2d at 851 (citing State v. Wasson, 299 S.C. 508, 386 S.E.2d 255 (1989); State v. Kirby, 269 S.C. 25, 236 S.E.2d 33 (1977) (power of court to declare mistrial ought to be used with greatest caution under urgent circumstances, and for very plain and obvious causes)). Granting of a mistrial is a serious and extreme measure which should only be taken when the prejudice can be removed no other way. State v. Edwards, 373 S.C. 230,

236, 644 S.E.2d 66, 69 (Ct. App. 2007) (citing State v. Stanley, 365 S.C. 24, 34, 615 S.E.2d 455, 460 (Ct. App. 2005)).

Pursuant to Rule 404(a), SCRE: "Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion." The rule contains several exceptions including: (1) evidence of a pertinent trait of character admitted by the Appellant; or (2) evidence to rebut that good character admitted by the prosecution. Rule 404(a)(1), SCRE. As the Supreme Court stated in State v. Young, 378 S.C. 101, 661 S.E.2d 387 (2008): "when the accused offers evidence of his good character regarding specific character traits relevant to the crime charged, the solicitor has the right to cross-examine him as to particular bad acts or conduct." Young, 378 S.C. at 106, 661 S.E.2d at 389 (citing State v. Major, 301 S.C. 181, 391 S.E.2d 235 (1990)).

Further, the determination of whether a party opened the door to the admission of otherwise inadmissible evidence is within the sound discretion of the trial court and can only be reversed on an abuse of that discretion. See State v. Page, 378 S.C. 476, 483, 663 S.E.2d 357, 360 (Ct. App. 2008). Further, ordinarily, when a party introduces evidence about a particular matter, the other party is entitled to explain it or rebut it if the testimony would otherwise confuse the jury. State v. Beam, 336 S.C. 45, 52, 518 S.E.2d 297, 301 (Ct. App. 1999) (citing State v. Stroman, 281 S.C. 508, 316 S.E.2d 395 (1984)).

Appellant attempts to portray the testimony on cross-examination by Joe Milbert as being an innocuous comment on the "training" received by Appellant in the Secret Service. The testimony actually goes well beyond a simple comment on his exemplary

training and was taken beyond this comment at the direct questioning of Appellant's counsel.

Appellant is correct the initial question asked involved Appellant's training and Milbert's full answer included: "He had exemplary training. I mean, he was nominated for law enforcement officer of the year by judge - - -" (T.508; R. 276) (emphasis added). The only reason the comment was cut off was because of an objection by the State and not because Appellant attempted to prohibit its introduction. Appellant's counsel then rephrased to ask what Milbert knew of Appellant's training and Milbert did not respond about training but instead talked about how he was taken through the White House under two different presidents and how Appellant got him into areas you don't normally get into during a tour. (T.508-509; R. 276-277). Milbert then talked about some of the actual training Appellant had and again discussed his good character by relating the training to how Appellant was able to get a job for MIlbert. Appellant's counsel then asked: "Now, how smart is [Appellant]?" Milbert answered he is "very smart" again addressing relevant character traits regarding whether someone would solicit someone to kidnap a former judge.

Significantly, the following colloquy occurs between Appellant's counsel and Milbert:

> Q. Okay. You got a, you got a set of scales and you put intelligence, experience, and worldly knowledge on the scale. Where is [Appellant] compared to Blackwell [a State's witness against Appellant]?
> A. [Appellant's] ten times - - -
> . . . .
> Q. Are they in the same socioeconomic class?
> A. No.
> Q. Are they in the same intelligence class, I mean by brain power?

A. No.
Q. Are they in the same class as far as technical training goes?
A. No.
Q. Okay. If I ask you to describe what you know Nick Blackwell in one word, what is it?
A. "Simple."
Q. Do the same thing for [Appellant].
A. One word is hard. "**Honorable.**"
Q. Honorable. Okay. All right. . . .

(T.511-512; R. 279-280)(emphasis added).

The only reason for these questions was to present Appellant in as good a light as possible and to clearly indicate he had characteristics such as intelligence, training, and "honorableness" not to solicit someone "simple" like Nick Blackwell to kidnap someone for him. As a result, the State was certainly entitled to respond to the character evidence directly solicited by Appellant's counsel during his examination of Milbert. See Rule 404(a), SCRE. Further, this testimony certainly opened the door to the State to question just how "honorable" Appellant was during his time as a secret service agent. As a result, the trial court properly allowed the State to demonstrate Appellant was not as "honorable" as Milbert portrayed him.

As it relates to the motion for a mistrial, even if it could be preserved, Appellant did not suffer the type of prejudice necessary to justify the extreme remedy of a mistrial. The trial court specifically found any prejudice suffered did not warrant a mistrial. The court found any prejudice could be cured by a curative instruction, which was refused by Appellant. (T.548-549; R. 313-314). As a result, there is no error in denying the motion for a mistrial.

Finally, the questioning by the State did not result in the admission of any evidence and was merely a question by the State's counsel. Milbert denied knowing

anything about the facts and so no evidence was admitted through the questioning. Even during the questioning of Appellant, he denied the substance of the report and other questions were objected to as hearsay which was sustained. No evidence was admitted, and so even if the questions may have been inappropriate, Appellant cannot demonstrate prejudice. See State v. Watts, 320 S.C. 377, 465 S.E.2d 359 (Ct. App. 1995) (where objectionable questions resulted in no introduction of evidence, defendant suffered no prejudice); see also Gainey v. Tyner, 259 S.C. 629, 631, 193 S.E.2d 525, 526 (1972) (asking of an improper question did not result in prejudice where the witness's response to the question, after the trial judge overruled counsel's objection, was "I don't know").

II. The trial did not err in allowing Blackwell to offer his interpretation of comments made by Appellant to Blackwell based on Blackwell's personal knowledge. Additionally, the issue raised regarding speculation is not preserved for review on appeal.

Appellant maintains the trial court erred in allowing Blackwell to offer his interpretation of comments made by Appellant to Blackwell which were recorded. Appellant maintains that testimony constituted impermissible speculation by Blackwell as to the statements of Appellant. To the contrary, Blackwell's testimony was not based on speculation but, instead, was based on the impressions and natural inferences he drew from events he personally and directly experienced. Further, those impressions are necessary to determine whether Appellant solicited Blackwell to commit a crime. As a result, any possible prejudice could not have substantially outweighed the testimony's probative value. Additionally, Appellant objected on the basis of Rule 403, SCRE at trial and not on the basis of improper speculation or reliability of evidence so those portions of the argument are not preserved for review on appeal.

Preservation

When Blackwell began testifying regarding his interpretation of Appellant's comments, Appellant objected. After a discussion with the trial court, Appellant waived any objection on any ground except Rule 403, SCRE, that the probative value of the testimony was substantially outweighed by the prejudice created. At trial, the following colloquy occurred:

Court:	What evidentiary rule are you using other than it's just not right?
Counsel:	Well, Your Honor, how does he know what Mr. Bartee was implying, if anything?

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?
Counsel:	No, I don't disagree. However, he's not - -
Court:	And I'll hear you. But wouldn't that be a matter of Cross-Examination just like the civil suit and the other matters we brought up at pretrial?
Counsel:	It would, Your Honor.

. . . .

Court:	Okay. What evidentiary rule should I consider in considering your request? . . . .
Counsel:	Its prejudicial value far outweighs any probative value of this testimony.
Court:	403?
Counsel:	Yes, sir.

(T.582-583; R. 347-348) (emphasis added). As a result, Appellant acknowledged any previous arguments regarding speculation, whether Blackwell was contradicting himself, and whether he ever had the same impression before were not a proper basis for excluding the testimony. He raised his one sole proper objection based on Rule 403 and whether the prejudice from the testimony substantially outweighed the probative value. This is the only issue preserved for review on appeal and all other grounds were waived at trial. See State v. Bryant, 372 S.C. 305, 315–16, 642 S.E.2d 582, 588 (2007) (holding an issue conceded in the trial court cannot be argued on appeal); State v. Gilmore, 396 S.C. 72, 84, 719 S.E.2d 688, 694 (Ct. App. 2011) (same); see also, Burke v. AnMed Health, 393 S.C. 48, 55, 710 S.E.2d 84, 88 (Ct. App. 2011) ("When a party states to the trial court that it has no objection to the introduction of evidence, even though the party previously made a motion to exclude the evidence, the issue raised in the previous motion is not preserved for appellate review.").

Merits

As discussed above, the admission of evidence is within the trial court's discretion and will only be reversed based upon an abuse of that discretion amounting to an error of law. See State v. Torres, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010) ("The appellate court reviews a trial judge's ruling on admissibility of evidence pursuant to an abuse of discretion standard and gives great deference to the trial court."). In the instant case, the trial court properly found Blackwell was entitled to offer his impressions of the conversation in which he was involved with Appellant.[1] The court also properly overruled the objection based on Rule 403.

Lay witnesses are permitted to offer opinion testimony when the opinion or inference: (1) is rationally based on the witness' perception; (2) is helpful to a clear understanding of the witness' testimony or to the determination of a fact in issue; and (3) does not require special knowledge, skill, experience, or training. Rule 701, SCRE; see State v. Williams, 321 S.C. 455, 463, 469 S.E.2d 49, 54 (1996). "[C]onclusions or opinions of laymen should be rejected only when they are superfluous in the sense that they will be of no value to the jury." State v. McClinton, 265 S.C. 171, 176-177, 217 S.E.2d 584, 586 (1975). "The terms 'fact' and 'opinion' denote merely a difference of degree of concreteness of description. Some statements are not mere opinions but are impressions drawn from collected, observed facts." Williams, 321 S.C. at 463-464, 469 S.E.2d at 54 (internal citations omitted).

[1] Counsel for Appellant at trial obviously agreed his arguments were better suited to the weight of the evidence in front of the jury as opposed to the admissibility of the evidence in the court's gatekeeper function based on his concession to the trial court that he did not disagree the arguments he raised were appropriate for cross-examination. (T.582; R. 347).

Here, Blackwell was a participant in the conversation with Appellant. The conversation involved a discussion of events and possible plans involving Blackwell. As a result, his impressions are certainly relevant to the jury's understanding of the conversation which was recorded and are permissible as they are certainly within his personal knowledge and based on his own perception. The impressions are definitely based on "collected, observed facts" from his dealings with Appellant and the conversation itself. As a result, the trial court properly concluded he could testify about his impressions regarding the conversation.

Appellant attempts to argue reliability must be established prior to admitting the testimony. As the trial court noted and Appellant's trial counsel specifically agreed, any issues related to reliability or inconsistency could be addressed and should be addressed to the jury as those issues go to the weight of the evidence and not its initial admissibility. Appellant now points to State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999) and other cases to argue reliability must be established. The cases cited are clearly inapposite to witness testimony and instead involve specific situations such as scientific evidence or identification testimony. Here, just like every other lay witness who testified, Blackwell was merely recounting his personal observations and perceptions. Accordingly, the trial court properly allowed the testimony regarding Blackwell's impression of the conversation with Appellant.

Appellant also argues the testimony was without any probative value and was unduly prejudicial to Appellant. In order to convict Appellant of solicitation to commit a felony the State had to prove he counselled, enticed or induced another to commit a crime. See State v. Prince, 316 S.C. 57, 66, 447 S.E.2d 177, 182 (1993). The

conversation and the impressions of the conversation by Blackwell assist the jury in determining whether Appellant was counselling, enticing, or inducing Blackwell to commit a crime.

The conversation and Blackwell's impressions from it are part of the res gestae of Appellant's solicitation of Blackwell to commit a felony—the kidnapping of Judge Williams. The res gestae theory recognizes that evidence of other bad acts may be an integral part of the crime with which the defendant is charged or may be needed to aid the fact finder in understanding the context in which the crime occurred. See State v. Owens, 346 S.C. 637, 552 S.E.2d 745 (2001); State v. Wood, 362 S.C. 520, 608 S.E.2d 435 (Ct. App. 2004). This evidence of other crimes is admissible:

> when such evidence "furnishes part of the context of the crime" or is necessary to a "full presentation" of the case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its "environment" that its proof is appropriate in order "to complete the story of the crime on trial by proving its immediate context or the 'res gestae' " or the "uncharged offense is 'so linked together in point of time and circumstances with the crime charged that one cannot be fully shown without proving the other ... '[and is thus] part of the res gestae of the crime charged.' And where evidence is admissible to provide this 'full presentation' of the offense," [t]here is no reason to fragmentize the event under inquiry" by suppressing parts of the "res gestae."

State v. Adams, 322 S.C. 114, 122, 470 S.E.2d 366, 370 (1996) (quoting United States v. Masters, 622 F.2d 83, 86 (4th Cir.1980) (citations omitted)).

The conversation established a continuing conspiracy to remove Judge Williams as a threat to Appellant's candidacy for sheriff. The solicitation to kidnap was part of the overall plan to eliminate Judge Williams and prevent him from stopping Appellant from

running. The conversation continued the plan originally established by Appellant which included Blackwell kidnapping the Judge. The conversation detailed a new solicitation in which Appellant was indicating Blackwell would still need to kidnap Judge Williams after the dust settled.[2] The distinction being instead of dropping Judge Williams off somewhere, something else would happen to him. Clearly, the probative value of the recording is that it can establish its own charge for solicitation to commit a felony, or in the alternative, indicated Appellant's desire that something happen to Judge Williams to remove him as a threat to Appellant's candidacy for sheriff.

Even if the original solicitation for kidnapping was already completed when Blackwell originally was asked and paid to kidnap Judge Williams, the later conversation explained why it did not occur and further established Appellant's intent under the original solicitation by showing he still intended something to happen to Judge Williams and it was not just a misunderstanding by Blackwell. The conversation was part of the overall res gestae establishing Appellant's intent to remove the Judge, Blackwell's part in the overall plan, and the fact Appellant was the person soliciting Blackwell's assistance in the plan. As a result, the probative value of the recording is incredibly high and any prejudice is minimal given Appellant's ability to cross-examine Blackwell on his impressions and the inconsistencies in Blackwell's statements. (T.617-618; R. 382-383). Accordingly, the trial court did not err in denying the objection based on Rule 403.

[2] Appellant seems to argue the conversation cannot be evidence of the solicitation to kidnap because it included killing Judge Williams. As a result, he appears to be arguing it is not a solicitation to commit kidnapping but instead evidence of a solicitation to commit murder.

III. The trial court did not err in finding the recording of the conversation between Appellant and Blackwell to be admissible as it was properly authenticated and constituted the best evidence available. Further, the trial court did not err in allowing the jury to use a transcript of the recordings as an aid while it was being played. Finally, the trial court did not improperly limit Appellant's cross-examination.

Appellant contends the trial court erred in 1) allowing into evidence a recording of a conversation between Appellant and Blackwell; 2) admitting a transcript of the recording and allowing the jury to use the transcript during the play of the recording when he contends it conflicts with a second transcript; and 3) limiting his cross-examination regarding the recording device and the SD card used as storage. The trial court did not err in admitting the properly authenticated recording. Further, the trial court did not err in allowing the jury to use a transcript of the recording and any error is entirely harmless when both transcripts were available to the jury. Finally, the trial court properly prevented Appellant from confusing the jury by correctly limiting cross-examination into a prior discovery motion hearing, and any possible error was harmless in light of Appellant's ability to explore the nature of the recordings with his expert witness.

Admissibility of Recording

Appellant raises several challenges to the admissibility of the recording. First, he argues it was not the best evidence because it was not an "original" and the only way to verify its accuracy is through the original. He also seems to challenge the chain of custody and lack of authentication of the audio recording. The trial court properly ruled the digital recording found on the disc as State's Exhibit 1 was an original within the meaning of Rule 1001(3), SCRE. Further, the trial court properly ruled the State

authenticated the recording through the testimony of both Investigator Gregory and Agent Sloan.

Except as otherwise provided by the Rules of Evidence, an original recording is required to prove its contents. Rule 1002, SCRE (best evidence rule). The question of whether to admit evidence under the best evidence rule is addressed to the trial court's discretion. State v. Halcomb , 382 S.C. 432, 676 S.E.3d 149, 154 (Ct. App. 2009).

Rule 1001(3) defines "original" and states: "An 'original' of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it." In the instant case, Investigator Gregory and Agent Sloan both testified the recording included on the disc was the recording made of the conversation between Appellant and Blackwell.

The case is very similar to State v. Mitchell, 399 S.C. 410, 731 S.E.2d 889 (Ct. App. 2012), in which this Court found digital photographs removed from a camera, placed into a computer, and then transferred to a disc for use at trial were the original photographs. A very similar sequence occurred in the instant case with the digital recording. The digital recording was on an SD card, copied onto both Agent Sloan and Investigator Gregory's computers, and then transferred to disc. The testimony by the law enforcement officers indicated nothing altered the data copied onto the disc. As a result, notwithstanding the expert's testimony he could not forensically guarantee the data was the same, the only testimony regarding the nature of the recording indicated nothing changed regarding the recording. While the device holding the original recording may have changed from the SD card to the computer to the disc, the data—the recording

itself—did not change. As a result, the trial court did not err in finding the data on the disc constituted the original recording.

Even if the recording on the disc is considered a copy, it was still admissible under Rules 1003 and 1004, SCRE. Rule 1003 states: "[a] duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original." Rule 1004 provides: "The original is not required, and other evidence of the contents of a . . . recording . . . is admissible if—(1) All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith . . . . "

In the instant case, there is no genuine question regarding the authenticity of the original recording. As will be discussed later, the recording was properly authenticated by both Investigator Gregory and Agent Sloan during the in camera hearing. It was further authenticated by Blackwell in front of the jury in which he identified who was on the recording and that it was an accurate recording of the conversation between himself and Appellant. (T.590; R. 355).[3] As a result, there is no genuine issue regarding the authenticity of the recording.

Further, there is no unfairness in admitting the recording on the disc. Appellant was able to thoroughly examine the law enforcement officers regarding the making of the disc as well as all parties regarding the conversation on the disc and its recording. Further, he presented his own expert witness who testified regarding the inability to forensically guarantee the data on the disc is identical to the original data. Accordingly,

[3] Appellant even acknowledged he was the party on the recording during his own testimony, and never contended the recording failed to include any portion of the conversation or was otherwise altered, thereby making any question regarding its authenticity waived. (5T.88-89; R. 702-703.

Appellant cannot demonstrate how he was prejudiced by the admission of recording on the disc as opposed to the same recording on the SD card.

Finally, the recording is clearly admissible under Rule 1004. Investigator Gregory testified he "cut" the recording off the SD card to remove it from the SD card and place it on his computer. In doing so, he "destroyed" the "original" housed on the SD card. After he removed the data from the SD card, it only existed on the computer or the disc. There is no allegation of bad faith made in the record, and as a result, the "copy" on the disc was properly admitted as other evidence of the contents of the recording.

Authentication

The disc containing the recording was a non-fungible item. It was readily identifiable and not easily subjected to change. See State v. Brockmeyer, 406 S.C. 324, 751 S.E.2d 645 (2013); State v. Aragon, 354 S.C. 334, 579 S.E.2d 626 (Ct. App. 2003). Accordingly, a strict chain of custody is not required. Even if a chain of custody was required, Agent Sloan provided a chain of custody by identifying all individuals who handled the disc and what was done with the disc prior to trial. (T.98; 102; 104; R. 64; 68; 70). See State v. Sweet, 374 S.C. 1, 7, 647 S.E.2d 202, 206 (2007) ("Testimony from each custodian of fungible evidence, however, is not a prerequisite to establishing a chain of custody sufficient for admissibility. Where other evidence establishes the identity of those who have handled the evidence and reasonably demonstrates the manner of handling of the evidence, our courts have been willing to fill gaps in the chain of custody due to an absent witness.").

Additionally, the recording was properly authenticated under Rule 901, SCRE. Rule 901 states: "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Further, Rule 901(b), SCRE, provides "[t]estimony that a matter is what it is claimed to be" is an acceptable method of authentication. Agent Sloan testified he was present when the conversation between Blackwell and Appellant occurred; he listened to the conversation as it was being recorded; the recording on the disc was 100% accurate as to the conversation; there was no tampering or altering of the recording; and he recognized the voices of both Blackwell and Appellant on the recording. (T.105-106; R. 71-72). Investigator Gregory testified similarly. (T.78-79; R. 44-45). As a result, the authentication was sufficient to establish the reliability of the recording.

Accordingly, the trial court properly admitted the recording. Following Appellant's reasoning that because the original was not available nothing could be presented to the jury is contrary to the Rules of Evidence and would lead to the absurd result that very little digital evidence would ever be admitted at trial.[4]

Transcript

Appellant contends it was error for the trial court to allow the jury to use a transcript as an aid while listening to the recorded conversation between Blackwell and Appellant. In this case, two transcripts of the recording were created. (State's Exhibit 8;

[4] For example, under Appellant's argument, the video from a security system of a business that records a robbery or burglary as it occurs could never be introduced unless the system can be taken apart and brought to court to be played or have someone forensically test it before the recording is moved to another device or disc. Clearly, the Rules provide for the evidence to still be used and available without having to have the recording, solely because it is of a digital nature, subjected to forensic analysis or rules that do not apply to other similar evidence.

Defense Exhibit 7; R. 846-903; 925-933). One by an employee of the Solicitor's office, and one by a certified court reporter. There were minor discrepancies between the two transcripts. The Court allowed the jury to read along with the certified court reporter's transcript while the recording discussed above was played for the jury. It is within the trial court's discretion whether to allow the transcript to be used as an aid while listening to the transcript. The Court initially ruled it would not go back to the jury during deliberations, but could only be used by the jury during the play of the recording. (T.584; R.349). As a result, it was marked as a Court Exhibit. The trial court did not abuse his discretion. See e.g., U.S. v. Clark, 986 F.2d 65 (4th Cir. 1993) (finding no abuse in discretion in allowing use of transcript as an aid).

Appellant also contends it was error and prejudicial to send the transcript to the jury. The transcript by the court reporter was not to go back to the jury, but instead only for use as a demonstrative aid. It was marked as a Court's Exhibit to make certain it did not go back to the jury. (T. 584; R. 349). However, Appellant moved into evidence the second transcript of the same recording. He used this transcript extensively during his examination of Appellant to note the discrepancies between the transcripts. (5Tr. 70-71; 104; R.684-685; 718). At the end of trial prior to deliberations, Appellant's counsel notes for the judge that the transcript marked only as a Court's Exhibit will need to be remarked a State's Exhibit and sent back to the jury. As a matter of fact, he states: "But when I moved - - we all agree that this is now going back." (5Tr.250; R.835) (emphasis added). As a result of Appellant's request, both transcripts go to the jury, the certified court reporter's transcript was remarked as State's Exhibit 8. Further, when the jury specifically requested copies of the transcripts for each juror, Appellant's counsel

indicated no objection. (T5.252; R. 837). He cannot now complain any error was committed when he requested the transcripts go to the jury or at a minimum waived any objection. See State v.. Stroman, 281 S.C. 508, 513, 316 S.E.2d 395, 399 (1984) ("[A] party cannot complain of an error which his own conduct has induced." (internal quotation marks omitted)).

Finally, any possible error was entirely harmless in light of the fact the jury was presented both transcripts and the audio recording. Appellant's counsel was able to fully explore the discrepancies with Appellant and which Appellant believed to be more accurate. Further, the fact the jury had the recording as well as both transcripts eliminated any possible prejudice as they had for deliberation and consideration all possible alternatives. See State v. Pagan, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006) ("Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result. Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained.").

Cross-examination subject to limitation

Appellant next contends the trial court erred in limiting his cross-examination of Agent Sloan regarding a pretrial discovery hearing. The trial judge retains discretion to impose reasonable limits on the scope of cross examination. State v. Sherard, 303 S.C. 172, 399 S.E.2d 595 (1991); accord, Delaware v. Van Arsdall, 475 U.S. 673, 680 (1986).

During cross-examination, Appellant sought to question Agent Sloan about representations made at a hearing, not by Sloan, but by the Solicitor's office. During proffered testimony, Appellant's counsel had Agent Sloan read from a transcript of a colloquy between a different circuit court judge and Solicitor Adams regarding the

possible existence of the recording device. (T.722; R. 474). Appellant's counsel then indicated he would ask the following questions: "Did you ever produce the device?" and "Was the device ever produced?" The trial court then interposed the limitation on the testimony because the questioning was about the device and not about the recording.

The court ruled questioning about the device and not the recording would confuse the jury, especially in light of his prior finding that he was admitting the recording as the original. As a result, he placed a proper limitation on cross-examination. See State v. Johnson, 338 S.C. 114, 124, 525 S.E.2d 519, 524 (2000) ("[A] trial judge may impose reasonable limits on cross-examination based upon concerns about, among other things, harassment, prejudice, confusion of the issues, witness safety, or interrogation that is repetitive or only marginally relevant."

Further, Appellant's counsel waived any objection by acquiescing in the trial court's ruling. See e.g., State v. Mitchell, 330 S.C. 189, 195, 498 S.E.2d 642, 645 (1998) (party waives an objection to limitation on cross-examination by acquiescing in court's ruling).

Finally, any limitation was entirely harmless given Appellant's ability to explore the difference in the recording on the SD card from the difference in the recording on the disc with his expert. The trial court specifically indicated he was not limiting the testimony on the issue of the SD card recording when the State questioned the breadth of the holding regarding the limitation placed that is now subject to appeal. (T.740-741; R. 484-485). As a result, any information he sought to disclose about the existence of the SD Card and the fact it was the original device holding the recording was amply discussed and presented to the jury. (T.767-789; R. 511-533).

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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May 13, 2015

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Oconee County
Honorable R. Lawton McIntosh, Circuit Court Judge
Appellate Case No. 2013-001895

The State Respondent,

v.

James Richard Bartee, Appellant.

CERTIFICATE OF COUNSEL

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

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PROOF OF SERVICE

I, Sally Ellison certify that I have served the within Amended Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Jack B. Swerling, Esquire
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I further certify that all parties required by Rule to be served have been served.
This 13th day of May, 2015.

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