

**Amended Final Brief**  
**THE STATE OF SOUTH CAROLINA**  
**In The Court of Appeals**

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**APPEAL FROM HORRY COUNTY**  
**Court of Common Pleas**  
**D. Craig Brown, Circuit Court Judge**

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**Case No, 2013-CP-26-00432**

**Benny L. Webb**

**Appellant**

**vs.**

**The State**

**Respondent**

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**Amended Final Brief**

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## APPELLANT 'S STATEMENT OF ISSUE ON APPEAL

DID THE TRAIL COURT ERR IN ADMITTING A TAPE RECORDING WHEN THE STATE,AS WELL AS THE PARTY, ADMITTED THAT THE TAPE HAD BEEN ALTERED AND EDITED, WITH DELETIONS MADE AND WAS NOT COMPLETE. FURTHER, THAT THE TAPE SHOWN IN COURT WAS NOT AND ORIGINAL AND THE PARTY COULD NOT IDENTIFY IT EVEN AS A DUPLICATE OF THE ORIGINAL SINCE NO ORIGINAL HAD EVER BEEN SUBMITTED INTO EVIDENCE. ADMISSION OF THE TAPE IS CONTRARY TO THE RULES OF EVIDENCE, INCLUDING THE CHAIN OF CUSTODY AND RULE 901, 901 (B), 901 (B) (1), SCRE 401, AND SCRE 403.....	6.
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**APPELLANT STATEMENT OF ISSUE ON APPEAL**

**THIS IS AN APPEAL OF THE CONVICTION OF, BENNY L. WEBB,  
FROM THE HORRY COUNTY MAGISTRATE COURT, DATED  
JANUARY10, 2013 AND AFFIRMED BY CIRCUIT COURT JUDGE  
D. CRAIG BROWN ON MAY 14, 2014.**

## APPELLANT'S STATEMENTS OF FACTS

The current appeal is from a conviction related to an incident that occurred on January 31, 2012 at the Atlantic Beach Town Hall. On that date, Paul Curry, drove to the Atlantic Beach Town Hall for the purpose of requesting a copy of Atlantic Beach's contract for legal services. After Curry made his request, the town hall secretary asked him to sign in). Curry refused, and Benny Webb, the acting town manager at the time and appellant in this case, then came out of his office and in an attempt to protect the town employees demanded that Curry leave. Curry refused, and did not leave until he was asked by a police officer. Mr. Webb raised his voice, and escorted Curry from the building. Upon entering the town hall building, Curry began using a digital audio recorder. (Tr.P 47). The recording that was played in court, however, it was not the original tape, but an edited version that had been transferred to a cd optical disc. (Tr. P45). When questioned by the state about the recording. Curry admitted that the original recording was nearly 28 minutes long, whereas the recording that was admitted at trial was only 8 minutes long. (Tr.P 48). An original was never provided to defendant's counsel, or the court. By the proponents own admission, the recording contained deletions of a material nature. (Tr.P 48). Shelia Singletary testified to the question ask of her by the prosecutor did she see Benny Webb lay his hands on Paul Curry ( Tr. P 97) and she said she saw Benny Webb reached down and touched his hand and she left the room. (Tr. P 98) After a leading question by the prosecutor and an objection by Mr. Oleary, Singletary was ask a question by the prosecutor if Paul Curry hand was on the chair in the reception area, and did Benny Webb reached down (Tr. P 98), and Shelia Singletary testified that if Paul Curry arm was on the chair and Benny Webb reached down and grabbed his arm, and she left the room( Tr. P 98 and 99). Shelia Singletary testified to a question by Mr. Oleary whether she was terminated by Benny Webb after this incident and she said yeah (Tr. P 102). Shelia Singletary testified to a question ask by Mr. Oleary asking her if she recall in an interview with Chief Michael Gordon( the correct pronouncement is Bordner) that she never saw Benny Webb grab a clipboard or grab the left upper arm of Paul Curry and Singletary testified that she did not know ( Tr. P. 102 and 103). Shelia Singletary was also ask by Mr. Oleary did she ever see Benny Webb grabbed a clipboard from Paul Curry and She said that she did not know(Tr. P 103).Officer John Jackson testified that when he got to the front of the building her saw Benny Webb waiving his finger at Paul Curry ( Tr. P 117). Officer Jackson also testified

that in his statement he wrote that he came up after the fact and all that he saw was Benny Webb and Paul Curry arguing (Tr. P 120). Officer Jackson also testified under re-direct by Mr. Oleary when Mr. Oleary ask Officer Jackson did he ever saw Benny Webb hit or strike Paul Curry in any way, and Officer Jackson said No, sir ( Tr. P 130). Benny Webb testified that when he to the lobby and saw Paul Curry refusing to leave that he pointed his finger at Paul Curry and told him to leave now ( Tr. P 140). Benny Webb also testified that the contents on the tape were different from what was said and that he knew that the tape was altered (Tr.P141). Webb also testified that it was not the complete tape (Tr. P142). Benny Webb also testified that he told Shelia Singletary that she needed to write a statement and in her first statement that Benny Webb did not put his hand on Paul Curry (Tr. P 144- 145). Mr. Oleary asks Benny Webb whether he heard the testimony in the court today, and is it Benny Webb opinion that the tape is edited. Benny Webb testified that no doubt in his mind that the tape is edited (Tr. P 147). Benny Webb testified under cross-examination to a question ask of him by Mr. Hucks whether Mr. Webb told Paul Curry to leave and that Mr. Webb went over to Paul Curry and Mr. Webb said that he never touched him, and Mr. Webb said. Never touch him (Tr. P 160).

## ARGUMENT

The issue in the instant appeal involves whether the court should have allowed a voice recording, which contained material alterations and deletions to be admitted into evidence at trial. A foundation must be laid in order for evidence to be admitted at trial. The South Carolina Rules of Evidence, specifically rule 901, require that evidence be authenticated before being admitted at trial. SCRE § 901, states that "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." In one of the leading cases on the admissibility of voice recordings, the court in *United States v. McMillan*, reaffirmed the court's decision in *United States v. McKeever*, 271, F.2d 669 (1959), where the court held that in order for a sound recording to be admitted, a foundation must be laid establishing that, among other requirements, the recording is authentic and correct, that changes, additions, or deletions have not been made in the recording, and that the conversation elicited was made voluntarily and in good faith, without any kind of inducements *United States v. McMillan*, 508F.2d 101 (1974). The current case involves a voice recording that was admitted into evidence despite a large portion of the original being deleted. In fact, the proponent of the recording admitted at trial that the recording was in addition to not being in its original format but had been reduced from being twenty eight minutes long to being only eight minutes long. The amount of editing that was done makes the changes by its very nature material, which in turn goes to the authenticity and ultimately the relevancy of the evidence. According to SCRE Rule 401, relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Evidence that cannot be properly authenticated due to material alterations or deletions and lacks relevancy due to its suspect nature it does not cause a fact of consequence to be more or less probable. A voice recording that may or may not be an accurate portrayal of the actual event recorded does not tend to make a fact of consequence any more or less probable, because its accuracy cannot be properly weighed due to its incompleteness. That is the situation faced in the instant case. Mr. Curry decided to go to Atlantic Beach Town Hall for questionable reasons, and upon arrival used a digital audio recorder to make a record of his visit. He then used the device to make a voice recording without the knowledge or consent of those he was recording. He then altered the recording and transferred it to a CD, distributed it to the media and then to the police in its altered

state. The original was never offered at trial. The altered version contained material deletions, and should not have been admitted due to the fact that its alterations and deletions make it unable to be properly authenticated. If this Honorable Court allow this appeal to fail, this court will setback years of precedent regarding the preservation of evidence and the use of voice recordings that has not been authenticated. There is strong dispute regarding the content of the audio recording and the only way this can be settled in a way that is fundamental to fairness is to have the state introduce the original recording in a trial in a court of competent jurisdiction. Shelia Singletary who was a witness for the state that she saw Benny Webb reached down and touched Paul Curry hand and she then left the room. Officer John Jackson testified that he saw Benny Webb waving his finger in Paul Curry's face, but he did not see him touch Curry.

The admission or exclusion of evidence is left to the sound discretion of the trial judge. State v. Gaster, 349 S.C.545, 564 S.E 2d (2002). In this instance the trial judge and the appellant judge abused their discretionary authority by allowing a tape to be admitted into evidence when the tape has been edited and contain deletions of an exculpatory nature to the defense. An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support. State v. Irick, 344 S.C. 460,464, 545 S.E 2d 282, 284 (2001). In this instance there is no evidentiary support to what Paul Curry is alleged happen other than the edited tape and his self-serving testimony. To the contrary, Shelia Singletary testified that Benny Webb reached down and touched Paul Curry hand, and she left the room. Officer John Jackson testified that he saw Benny Webb waving his finger in Paul Curry's face but he did not see Benny Webb touched Paul Curry. And even if Benny Webb testimony is self-serving it counteracts and contradicts the testimony of Paul Curry. That leaves only the edit audio tape as the state's case-in chief. The decision of a trial court respecting the comparative probative value and the prejudicial effect of evidence should be reversed only in exceptional circumstances. State v. Slocumb, 336 S.C. 619, 633, 512 S.E 2d 507, 514 (Ct. App. 1999). In the instance case the appellant contends that this is an exceptional circumstance as the court must decide if a recording that has been edit with no supporting testimony should be admitted into evidence, even when the state, as well as party admitted that the tape had been edited, with deletions made and was not complete, and with no (emphasis added) supporting testimony other than the party self-serving testimony. Even if the court view this case in the light most favorable to the state, then this court must decide if a person can be found guilty when the only evidence is a deleted audio tape and can a person be convicted and have a record for touching someone's hand. If the court rule in the favor of the state in this instance this honorable court would have criminalize handshakes, pats on the shoulder, high-five, sports team players patting a teammate on the buttocks and hugs. I don't believe it is the intent of this court or the legislature by common law or statutory law to penalize for such trivial occurrences.

Appellant submits that there were abuse of discretion in the trial court's admission of the recording and the circuit court improperly affirmed the ruling on appeal. The admission of the audio recording does not comport with the requirements for authentication enumerated in the South Carolina Rules of Evidence. Rule 901, SCRE, provides:

A) General Provisions. The requirement of authentication or identification as a condition precedent to admissibility is by evidence sufficient to support a finding that the matter is what its proponent claims.

1() Testimony of witness with knowledge. Testimony that a matter is what it is claimed to be.

At trial, Paul Curry's testimony did not authenticate the tape under Rule 901(b) (1) and Rule (901)(b) When presented with the physical copy of the of the audio disk, Curry stated that it was not the original the original recording that he made on a digital audio recorder and that this was a copy the he provided to the police and the solicitors office (Tr. P 45). Benny Webb later testified that the that the recording was not the complete tape (Tr. P142) The Court erroneously found that the State, consistent with the requirements of Rule 901, SCRE, established that the tape in question was what it claimed to be. To the contrary, the trial court error in that even Paul Curry could not testify to the location of the original recording and he testify that the alleged original recording was 28 minutes, but the edited tape was only 8 minutes long. A 20 minute difference.

The appellant strongly submit that the admission of the taped conversation violated Rule 401, SCRE, and Rule 403, SCRE. The appellant submits that the evidence was improperly admitted, as it was highly relevant, but it did not satisfy the Rule 403 balancing test. Under Rule 403 "the probative worth of any particular bit of evidence is obviously affected by the scarcity or abundance of the other evidence on the same point" Old Chief v. United States, 519 U.S. at 185, 117 S. Ct at 652, 136 L.Ed 2<sup>nd</sup> at 590.

State v. Benton, 338 S.C. 151, 526, S.E. 2d 228. The probative value the audio recording is not outweighed by its prejudicial effect.

There is evidentiary support that the tape contains deletions, and is not complete. Paul curry in his own testimony admitted that the tape was not an original and that no original was presented to the police and the solicitor's office.

Counsels argument that the audio tape was merely cumulative to the other evidence admitted at trial is species and without merit. To the contrary the evidence as presented by the testimony of Shelia Singletary, Officer John Jackson, and Benny Webb refuted the evidence presented in this case. Shelia Singletary testified that she saw Benny Webb hand

touch Paul Curry hand, and she left the room. Officer John Jackson testified that Benny Webb waived his finger in Paul Curry face. And Benny Webb testified that he did not touch Paul Curry. The only other evidence is Paul Curry testimony and the edited tape.

In the current case the evidence that was presented at trial was not cumulative to the testimony of the two independent witness and it does not pass the requirements of State v. Kirton, 381 S.C. 7, 37-38, 671 S.E. 2d 107, 122-23 (Ct. App.).

#### CONCLUSION

For the reason stated, the Court should reverse the judgment of the circuit court.

November 6, 2015

Respectfully submitted

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