ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Dorchester County

Maite Murphy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RALPH MARTIN,

APPELLANT

APPELLATE CASE NO. 2015-000311

FINAL REPLY BRIEF OF APPELLANT

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

ARGUMENTS IN REPLY

1. The trial judge erred in admitting in evidence a recording of statements made by Appellant's wife when the State failed to lay the proper foundation for admission pursuant to Rule 613(b) SCRE.

Respondent argues that Appellant only challenged the State's failure to lay a proper foundation pursuant to Rule 613(b) SCRE in regard to the written statement and not the oral statements recorded on the officer's body microphone. (IBOR pp. 12-13). The objection based on lack of foundation was made in regard to both the written and the recorded oral statements. Appellant first objected to the admission of the written statement arguing:

> I believe the State is intending to call the deputy to elicit the statement that's been made. And the defense's argument would be that the witness has been called to the stand. She has been confronted with this statement. She admitted that she signed the statement. She did deny not remembering what was in the statement.
>
> However, the Rule 613 does allow impeachment of a witness on their own statement. However, it must be – she must be confronted with what is in the statement. The solicitor is well within his rights to go through that statement, advise her of what is in there, have her admit or deny on the record whether she made that statement.
>
> At that point, if she denies making the contents of that statement, extrinsic evidence of that statement is admissible. He can publish the statement. He can try to submit it into evidence. However, in this case, she was presented with the statement. She said that was her signature. The contents of that statement were not – were not delved into. We did not hear what she wrote. She did not get a chance to admit or deny that she said these things.
>
> Based on that, we would argue on – based on the notes on Rule 613 that the State did not allow her to comment on the contents of that statement and, therefore, no further extrinsic evidence of that statement is admissible.

(R. p. 42, line 8 – p. 43, lines 1-6). The judge overruled the objection stating, "Pursuant to Rule 613, a witness's own out-of-court statement is hearsay if offered for its truth. However, when a witness's prior inconsistent statement is offered for impeachment, however, it's being offered

merely to show the witness told a different story at a different time, so it's admissible." (R. p. 44, lines 16-21).

Immediately following the ruling on the written statement, the State advised the trial judge that there was a similar situation with some recorded oral statements.

> And, Your Honor, if we might real quick, before we bring the jury out, we have a similar situation with oral statement that were made to Deputy Powell. Deputy Powell had his body mic on the entire time, and she makes some oral statements similar – I mean, similar to what she puts in her written statement. She makes some oral statements, and it would be our intention with Deputy Powell to get into those oral statements. We have provided that recording, and that was provided to the defense also.
>
> So we have the same issue. Rather than having to bring the jury in and out, if you want to address it, we would make the same argument that she – you know, I asked her about oral statements that she made to the police officers. She, again, said she couldn't remember.

(R. p. 44, line 23 – p. 45, lines 1-12). The prosecutor discussed some redactions he intended to make before moving to admit the recording and a brief recess was taken to address the redactions. (R. p. 45, lines 13- p. 46, lines 1-17). Appellant objected to the oral statements arguing:

> It's my understanding that there will be four segments of audio from, I believe, Officer Powell that will be attempted to be introduced into evidence. And we would make the argument that these are captured on a body microphone. There's no video. It's just his dash cam was on and he was recording. His body mic picked up all these statements made by Becky, Becky Martin. We would argue that these are hearsay.
>
> And secondly, we would kind of renew our previous argument as to the written statement. We would argue that this is extrinsic evidence of a statement. First, she – that statement that she made in writing is going to be introduced into evidence. You've already ruled on that a few moments ago.

> And secondly, extrinsic evidence of a statement that she made is not admissible unless the witness is advised of the substance of the statement, the time and the place it was allegedly made and the person to whom it was made. And that's State v. Galloway, which is still good law in South Carolina.

(R. p. 47, lines 4-23). While counsel for Appellant then discussed the written statement, the above objection was to the oral statements based on the lack of a proper foundation pursuant to Rule 613(b), SCRE. Appellant had previously objected to the written statement based on the failure to lay a proper foundation pursuant to Rule 613(b) and the judge overruled the objection. Appellant objected to the oral statements on hearsay grounds but additionally objected because the State failed to advise the witness of the substance of the prior oral statements. Appellant renewed the Rule 613(b) objection but this time in reference to the oral rather than the written statement, specifically noting that the judge had previously ruled on the written statment.

The objection to the admission of the prior statements recorded on the officer's body microphone based on the State's failure to lay a proper foundation was raised to the trial judge although Appellant did not reference the specific rule number. Appellant referenced the content of Rule 613(b) in the objection to the oral statements and had specifically referenced Rule 613(b) in the earlier objection to the written statement that was overruled by the judge. A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground. State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003). It is clear that Appellant objected to the admission of the oral statements based on the fact that the State failed to advise the witness of the substance of the statements, the time and the place the statements were allegedly made and the person to whom the statements were made.

The judge, relying on State v. Blalock, 357 S.C. 74, 591 S.E.2d 632, (Ct. App. 2003), overruled the objection stating, "So based upon that, I think it's clearly – it goes to being offered that the witness told a different story at the time, not for the truth of the matter asserted, so I think the witness's statement does come in, as does the oral statements, because statements can be either oral or written so I think you're free to proceed on those grounds." (R. p. 49, line 25 – p. 50, lines 1-5). The audio was admitted in evidence, over objection, as State's Exhibit #4 and played for the jury. (R. p. 84, line 22 – p. 85, lines 1-16). The trial judge erred in admitting the audio of the body microphone. The issue in regard to the State's failure to lay a proper foundation pursuant to Rule 613(b) for the admission of the oral statements was raised by Appellant and ruled upon erroneously by the trial judge. The issue is preserved for appellate review.

This Court should find that the trial judge erred in admitting in evidence a recording of statements made by Appellant's wife when the State failed to lay the proper foundation for admission pursuant to Rule 613(b) SCRE. In support, Appellant incorporates by reference the arguments presented in Appellant's initial brief. The error in admitting the oral statements is not harmless. As the Court noted in Saltz, "Erroneously admitted corroboration testimony is not harmless merely because it is cumulative. On the contrary, 'it is precisely this cumulative effect which enhances the devastating impact of improper corroboration.' Jolly v. State, 314 S.C. 17, 21, 443 S.E.2d 566, 569 (1994)." 346 S.C. at 124, 551 S.E.2d at 246.

2. The trial judge erred in admitting in evidence a written statement made by Appellant's wife when the wife admitted to making the statement but at trial testified that she could not remember the contents of the statement.

Appellant's wife, Becky Martin, never denied making the statements contained in her written statement. Importantly, Ms. Martin never testified that she did not remember making the statement. She simply testified that she did not remember the content of the written statement. Ms. Martin testified as follows:

Q. And what did you tell police when they arrived?

A. I don't remember. I don't remember anything from that night.

Q. Okay. Do you remember giving a written statement to police that evening?

A. No. I mean, I remember writing, but I don't remember what I wrote or why.

Q. So you don't recall giving a written statement to Deputy Strickland that evening?

A. No, sir.

Q. I'm showing you what's been marked as State's Exhibit 5. Do you recognize it? Please take a moment to look at it. Do you recognize that?

A. Yes, that's my handwriting.

Q. Okay.

A. But I don't remember what these questions were that I answered. I don't remember that.

Q. So you remember making a statement, but you don't remember - -

A. Yes.

Q. - - the content of the statement?

A. No.

Q. Would that be a fair - -

A. Yes.

Q. - - statement to say?

A. Yes.

(R. p. 17, lines 22 - p. 18, lines 1-22). Contrary to the State's argument, Ms. Martin remembered making the statement but simply did not remember the content of the statement. Ms. Martin confirmed that the statement was dated July 1st, was in her handwriting and her signature appeared on the bottom. (R. p. 18, lines 23 – p. 19, lines 1-8). When asked if reading the statement would refresh her memory about what she told the police on the night in question, Ms. Martin responded, "No." (R. p. 19, lines 9-13). The State failed to ask any further questions of Ms. Martin in regard to the written statement. Critically, the State never asked Ms. Martin if she made the specific statements contained in the written statement. It was incumbent upon the State to confront Ms. Martin with her written statement. Simply asking her to review the statement is not sufficient.

Once confronted with the written statements, if Ms. Martin denied making the statements or testified that she did not remember **making** the statements, the State, pursuant to Rule 613(b), could have properly moved to introduce the written statement as extrinsic evidence of a prior inconsistent statement. The State, however, never confronted Ms. Martin with the specific statements contained in her written statement. On the other hand, once confronted with the written statements, Ms. Martin may have confirmed that she made the statements and the written statement would have bee inadmissible.

In State v. Miller, 262 S.C. 369, 371, 204 S.E.2d 738, 738-39 (1974) the South Carolina Supreme Court wrote:

> The appellant called as his witness the co-defendant, Raymond L. Davis, who admitted his guilt of the crime but named one 'Robert Smith' as his accomplice. On cross-examination of this witness the State attempted to impeach and contradict him by a prior written inconsistent statement which he admitted having signed. However, when confronted with the statement therein inculpating the appellant, Davis answered by saying 'I don't remember.' His prior inconsistent statement was admissible to impeach his trial testimony which exculpated the appellant.

In contrast to the present case, in Miller the witness was first confronted with the prior inconsistent statement. His prior inconsistent statement was only admissible after he testified that he did not remember making the statement. In the present case the State never confronted Ms. Martin with the prior written statement. Ms. Martin did not testify that she did not remember making the statement.

Similarly, in State v. Blalock, 357 S.C. 74, 80-81, 591 S.E.2d 632, 636 (Ct. App. 2003), this Court wrote:

> In this case, we find Ms. Blalocks response, when confronted with her prior statement, does not meet the standard of a clear and unequivocal admission that the precedent case law demands. We are mindful that, towards the end of the solicitors examination of Ms. Blalock regarding the statement, she does admit that she said the portion of the statement quoted. She is adamant throughout her testimony, however, that the statement as recorded by the detective was incomplete. As demonstrated in the excerpted testimony above, Ms. Blalock repeatedly insists that she did not merely say she saw her husbands hand on Janes backside, but that she saw his hand on the back side of her leg. When the solicitor presses her on when and to whom she said back side of her leg, Ms. Blalock testifies that she feel[s] like that is what she told Detective Lindsey at the time he took her statement. Ultimately, she equivocates as to whether the statement was in fact her own words, testifying that she may have been unclear or that Detective Lindsey had paraphrased what she said.

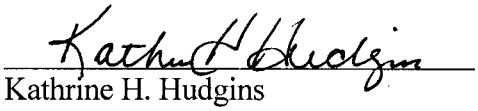
In the present case Ms. Martin was not given an opportunity to equivocate as to whether she in fact made the statements contained in her written statement because the State never

confronted her with those statements. Simply showing the statement to the witness does not constitute confronting the witness and advising the witness of the substance of the statement as required by Rule 613(b). In the present case the State simply did not meet the requirements of Rule 613(b) allowing admission into evidence of the written statement as extrinsic evidence of a prior inconsistent statement. The error in admitting the written statement is not harmless. As the Court noted in Saltz, "Erroneously admitted corroboration testimony is not harmless merely because it is cumulative. On the contrary, 'it is precisely this cumulative effect which enhances the devastating impact of improper corroboration.' Jolly v. State, 314 S.C. 17, 21, 443 S.E.2d 566, 569 (1994)." 346 S.C. at 124, 551 S.E.2d at 246.

CONCLUSION

Based on the above arguments, Appellants conviction and sentence should be reversed and the case remanded for a new trial.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT.

This 23rd day of May, 2016.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Reply Brief complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

May 23rd, 2016

Kathrine H. Hudgins
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1330

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Reply Brief of Appellant in the above referenced case has been served upon Jennifer Ellis Roberts, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 23rd day of May, 2016.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
This 23rd day of May, 2016.

(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.