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
Appellant Case No. 2013-001895

State of South Carolina,

Respondent,

v.

James Richard Bartee, Jr.,

Appellant

PETITION FOR REHEARING

Pursuant to Rule 221 of the South Carolina Appellate Court Rules, appellant, James Richard Bartee, Jr., respectfully requests rehearing of his appeal, decided June 29, 2016 (Opinion No. 2016-UP-340), based on principles of law and evidence overlooked or misapprehended by the Court of Appeals, as follows:

I. Questioning About Employment Suspension and Mistrial Motion.

Appellant challenged the trial court's ruling that his trial counsel opened the door to the solicitor's questioning of a prosecution witness concerning a disciplinary matter during appellant's Secret Service employment and further challenged the trial court's

denial of a motion for mistrial based on the solicitor's injection of race into the proceedings. The Court of Appeals did not address the merits of this issue, citing principles of error preservation. *See* Opinion, ¶ 1. The Court misapplied those principles and should rehear and decide the merits of this issue.

Specifically, the defense did make a contemporaneous objection to the challenged questioning and the court ruled trial counsel had opened the door in its cross-examination of the witness. R. p. 291, lines 4-6. The defense did not concede the issue. After the jury was excused from the courtroom, the defense argued it had not opened the door, but the court adhered to its ruling. R. pp. 312, line 1 – p. 313, line 2; p. 313, lines 19-21. The issue was clearly raised to and ruled upon by the court. Moreover, the mistrial motion based on the solicitor's injection of the basis for the suspension – alleged racial slurs – was made at the first opportunity after the jury was out of the courtroom. R. p. 311, lines 17-18; p. 311, line 22 – p. 312, line 3; p. 313, lines 7-16.

The Court also misapprehended the applicability of the principle that an objection to denial of a mistrial motion may be waived by refusal of a curative charge. In certain circumstances, such as the circumstances presented here, this principle is inapplicable. Where the prejudicial effect of the improper questioning cannot be removed in any other way, not even by a curative charge, a mistrial is the 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). It is apparent that both the trial court and appellant's trial counsel believed a curative charge was

problematic because it would call attention to the comment about alleged racial slurs. R. p. 313, line 23 – p. 314, line 5. By declining a curative charge that would have directed the jury's attention to and emphasized the prejudicial content of the solicitor's question and thereby enhanced the prejudicial effect, trial counsel did not waive the issue.

The Court should rehear this issue and find the arguments raised in appellant's brief and reply brief, incorporated herein by reference, are preserved. The Court should decide this issue on its merits and hold that the solicitor's questions injecting race into the proceedings were improper and prejudicial and warrant a new trial.

II. Speculative Testimony as to Meaning of Recorded Statements.

Appellant challenged the admission of the testimony of Nick Blackwell concerning the meaning of certain statements made during a recorded conversation and attributed by Blackwell to appellant, on multiple grounds. The Court of Appeals rejected all of appellant's arguments.

With respect to the argument that the testimony was speculative, the State argued and the Court found the issue was conceded at trial. *See* Opinion, ¶ 2. The Court misapprehended the nature of the objection asserted by trial counsel. The lengthy passage in which counsel articulated the multiple facets of the objection, R. p. 345, line 8 – p. 346, line 6; p. 364, lines 12-22; p. 347, line 4 – p. 348, line 9, is set forth verbatim in appellant's reply brief. The Court's finding is apparently premised on the comment by counsel in answer to a question by the trial court, "No, I don't disagree. However, he's not - -" and the answer "It would, Your Honor" to a follow-up question. R. p. 347, lines 13-14, 18. These comments should not operate as a waiver of the objection previously articulated, where the court cut counsel off and did not allow him to finish what he was

trying to say. R. p. 347, line 15. The Court should rehear this issue and find that, in the context of the entire argument of the objection, the objection to the speculative nature of the testimony was not waived.

The Court also misapprehended the applicability of the principle it cited from *State v. Needs*, 333 S.C. 134, 508 S.E.2d 857 (1998), in rejecting appellant's argument based on both the speculative and contradictory nature of the witness's testimony. *See* Opinion, ¶ 3. The issue here was not the competency of a witness but the admissibility of his speculative testimony concerning what appellant had meant, testimony that contradicted three prior statements given by the witness. The argument against the admissibility of this testimony is that it was purely speculative and unreliable testimony. The Court should rehear this facet of its opinion.

Finally, the Court rejected appellant's argument based on Rule 403 of the South Carolina Rules of Evidence, deferring to the lower court's discretion in conducting a Rule 403 analysis. *See* Opinion, ¶ 4. The Court should rehear this aspect of the issue, because the Court overlooked the lack of any probative value of the objected-to testimony and the extreme prejudice that resulted from it. This prosecution was premised on an allegation that on May 27, 2012, appellant solicited Blackwell to commit a felony. The state's position was that the solicitation was complete as of May 27, when appellant allegedly asked Blackwell to commit the kidnapping and gave him $200 for that purpose. R. p. 138, lines 8-13; p. 140, lines 12-17; p. 800, lines 8-10; p. 827, lines 21-23; p. 828, lines 12-15. The state contended what occurred thereafter – allegedly calling it off – was wholly irrelevant. R. p. 140, lines 17-19; p. 800, lines 6-11. Similarly, what appellant may have meant by comments made to Blackwell after the alleged crime of solicitation

was complete was also wholly irrelevant. Blackwell's subjective impressions of appellant's meaning had no probative value whatsoever. However, the prejudice resulting from that speculation, conveying to the jury that appellant was of a mind to harm Judge Williams in the future and conveying Blackwell's belief that appellant was threatening him and his family, was substantial. *See* Rule 403, SCRE. The Court should rehear this aspect of the decision and find the lower court committed reversible error in admitting this evidence.

III. Admission of Disk, Use of Transcript, and Limitation of Cross and Proffer.

Appellant challenged various rulings of the trial court with respect to an audio recording and an inaccurate transcript of that recording.

A. Disk.

With respect to the admission of the disk containing the audio recording, *see* Opinion, ¶ 5, the Court misapprehended the applicability of *State v. Mitchell*, 399 S.C. 410, 731 S.E.2d 889 (Ct. App. 2012), and Rules 1002 and 1001(3) of the South Carolina Rules of Evidence in its apparent determination that the recording was an "original." *Mitchell* dealt with photographs from a digital camera. The *Mitchell* court concluded the photographs were the original because the testimony established they were the same photographs that were on the camera. *See Mitchell*, 399 S.C. at 421-22, 731 S.E.2d at 896. Here, the evidence was very different than the evidence in *Mitchell*. Here, the only witness qualified in computer forensics testified it could <u>not</u> be established that the proffered copy on the disk was in fact an accurate copy of the original SD card. The copy was not within the definition of "original" contained in Rule 1001(3).

With respect to the chain of custody, the Court misapprehended the applicability of *State v. Freiburger*, 366 S.C. 125, 620 S.E.2d 737 (2005), and *State v. Aragon*, 354 S.C. 334, 579 S.E.2d 626 (Ct. App. 2003). Non-fungible evidence is evidence that is unique and identifiable. *Freiburger*, 366 S.C. at 134, 620 S.E.2d at 741; *State v. Glenn*, 328 S.C. 300, 305, 492 S.E.2d 393, 395 (Ct. App. 1997). This disk was not a non-fungible item, like the revolver in *Freiburger* or the porcelain fragment in *Glenn*. It was not unique and identifiable in its own right. The recording it contained was susceptible to tampering, and the condition of the recording was susceptible to damage due to the heat and humidity of the truck tool box where it was stored for some three months in the summer. R. pp. 61, 64, 67-68, 98.

Aragon dealt with an audio tape that was admitted without the necessity of establishing a chain of custody because the tape was otherwise authenticated. *See Aragon*, 354 S.C. at 337, 579 S.E.2d at 627. Such is not the case here. This disk *had not been* authenticated, and it *could not be* authenticated because the original had not been preserved. R. pp. 87-102. The requirements of Rule 901(a), SCRE, cited by the Court, were not satisfied. Moreover, a digital recording is not like the tape recording addressed in *Aragon*, because alteration, damage, or tampering with respect to a disk would not be readily discernible as it would with a tape recording. Here, the only competent evidence established that the recording on the disk was *not* a forensic copy and could *not* be authenticated without the original digital recording.

The Court also misapplied *Mitchell*'s statement, noted in a parenthetical explanation, that "the defendant had the opportunity to cross-examine the owner of the digital camera and the police officers as to the handling of the photographs and disk on

which the photographs were downloaded." *See* Opinion, ¶ 5. Here, there was no similar opportunity, because the trial court limited the defense's cross-examination on this critical issue and even prevented the presentation of a complete proffer, as argued in appellant's briefs, and the Court of Appeals found no error in these rulings. *See* Opinion, ¶ 8. The Court cannot justify admission of the disk based on an opportunity to cross-examine the witness, where such opportunity was restricted by the trial court's rulings.

The Court should rehear all aspects of its ruling on the admissibility of the disk.

B. Transcript.

The Court upheld the trial court's ruling allowing the jury to read along with a transcript of the audio recording. *See* Opinion, ¶ 6. The Court misapprehended appellant's argument with respect to this issue, citing authorities that have upheld use of transcripts as a matter within the court's discretion. Here, the transcript that was used was demonstrably *inaccurate*. Moreover, the inaccuracy went to the heart of the case – with the inaccurate version buttressing the state's case while the correct statement contained on the recording and in a different transcript favored the defense. Allowing use of an *inaccurate* transcript constituted an abuse of discretion. *Cf. State v. Lee*, 269 S.C. 421, 429, 237 S.E.2d 768, 771 (1977) (court appropriately ruled an inaccurate transcript of a preliminary hearing, with many words omitted because inaudible, could not be admitted).

As to the Court's ruling that appellant waived its objection to use of the transcript, *see* Opinion, ¶ 7, the Court misapprehended how the treatment of the transcript developed throughout the trial and ultimately resulted in its use by the jury during its deliberations. The course of the treatment of the transcript is laid out fully in appellant's

reply brief, incorporated herein by reference. In limine, the defense objected to *any* use of the transcript. R. pp. 120-22. During the trial, when the state was ready to play the recording and use the court reporter's transcript, the defense renewed its objection, out of the presence of the jury. R. pp. 349-50. When the jury returned, the state immediately gave the witness and jury copies of the transcript. R. p. 353. Because the objection had been made both in limine and during the trial, had been finally ruled upon, and nothing had intervened to affect that ruling, the defense was not required to renew the objection when the jury returned. Moreover, the defense's later confirmation, at the conclusion of the trial, that the court had ruled both transcripts would go with the jury into its deliberations did not waive the earlier objection to *any* use of either transcript, where the court had ruled on that objection, its ruling was final, and the transcript had been used throughout the witness's testimony. *Cf. State v. Mueller*, 319 S.C. 266, 268-69, 460 S.E.2d 409, 410-11 (Ct. App. 1995) (counsel's strategic decision to elicit evidence of prior conviction during direct examination did not waive earlier objection to admission of such evidence, where ruling of trial court allowing the evidence was final).

C. Limitation of Cross-Examination and Refusal of Proffer.

The Court rejected appellant's argument that the trial court abused its discretion by limiting the defense's cross-examination of a state witness concerning the original of the recording created on a SD card, which had not been preserved, and by not allowing a proffer of that evidence. *See* Opinion, ¶¶ 8, 9. First, the Court deferred to the discretion of the trial court over the scope of cross-examination. Such deference is not appropriate in this case, especially where the purported existence of the opportunity to cross-examine the witness served as one of the underpinnings for the Court's ruling that the trial court

did not err in admitting the disk containing the audio recording. *See* Opinion, ¶ 5. Second, the argument that the trial court abused its discretion in refusing the proffer is preserved. The defense began its cross-examination of the witness concerning the original, the court *sua sponte* excused the jury and informed the defense that it would not allow such questioning, and the defense then sought and was allowed to begin to proffer the testimony of the witness. When the court terminated the proffer, nothing further was required of the defense to preserve its argument that the court abused its discretion and violated appellant's due process rights by its limitation of cross-examination and its refusal of the proffer.

IV. Conclusion.

For the reasons set forth above, the Court should rehear every aspect of its decision and find, as set out in the appellant's final brief and reply brief, which are incorporated herein by reference, that the trial court erred and abused its discretion in multiple prejudicial rulings, and that appellant is entitled to a new trial.

Respectfully submitted,

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PROOF OF SERVICE

I certify that I have served the Petition for Rehearing upon respondent, by mailing a copy, postage prepaid, to counsel of record, William M. Blitch, Jr., Assistant Attorney General, Office of the South Carolina Attorney General, Post Office Box 11549, Columbia, South Carolina 29211-1549, on July 14, 2016.

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July 14, 2016

VIA HAND-DELIVERY
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RE: State of South Carolina v. James Richard Bartee, Jr.
Appellate Case No.: 2013-001895

Dear Ms. Kitchings:

Enclosed for filing are the original and six (6) copies of the Petition for Rehearing, along with the Proof of Service, in the above referenced matter.

By copy of this letter, I am serving William M. Blitch, Jr., Assistant Attorney General, with a copy of same.

If you have any questions, do not hesitate to contact me.

Very truly yours,

Jack B. Swerling

JBS/kas
Enclosure

cc: William M. Blitch, Jr., Assistant Attorney General
Katherine Carruth Goode, Esquire
James Richard Bartee, Jr. #00356847