STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of General Sessions
R. Scott Sprouse, Circuit Court Judge

Appellate Case No. 2015-001616

THE STATE, ...RESPONDENT,

v.

GEROME C. SMITH,.....APPELLANT.

INITIAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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II. The trial judge committed harmless error in admitting witness Brandon Hunter's written statement into evidence because: (1) the statement was cumulative to the other evidence of Appellant's guilt, including a video recording of the drug transaction; and (2) Appellant benefitted from the trial judge's error; relying on the same justification he used in admitting the written statement, the trial judge allowed Appellant to introduce into evidence an otherwise inadmissible phone call recording in which Hunter denied purchasing crack cocaine from Appellant.

STATEMENT OF THE CASE

On April 13, 2015, Appellant was indicted for distribution of crack cocaine, second offense. (2015-GS-37-00399). On July 13 and 15, 2015, Appellant proceeded to a jury trial before the Honorable R. Scott Sprouse. Gregory Lee Cole, Jr., Esquire represented Appellant; Assistant Solicitor Lindsey Satterfield Simmons represented the State. The jury found Appellant guilty as indicted. The trial judge sentenced him to eighteen years' incarceration.

Appellant filed a timely Notice of Appeal and subsequently submitted a Brief in support of his appeal. This Brief of Respondent follows.

STATEMENT OF FACTS

On August 7, 2014, Brandon Hunter entered into a formal agreement with the Seneca Police Department ("Department") to act as a confidential informant. At that time, Hunter was a street-level drug dealer charged with six counts of distributing crack cocaine and marijuana. The Department was attempting to "mov[e] up the chain" to arrest Hunter's supplier, Appellant, and needed Hunter to act as its informant because drug dealers typically do not sell to people with whom they are unfamiliar. The Department paid Hunter for his assistance and Officer B.J. McClure agreed to inform the solicitor that Appellant cooperated with the police and such cooperation could be taken into consideration when the solicitor prosecutes his charges. (Tr.Vol.II.p.103, lines 2–9;Tr.Vol.II.p.104, lines 2–6;Tr.Vol.II.p.116, line 3–p.18, line 4; Tr.Vol.II.p.127, lines 10–18; Defendant's Exhibits 1–2).

On September 4, 2014, Hunter participated in a controlled purchase of crack cocaine. Immediately prior to the controlled purchase, Hunter met with Officers McClure and Jason Sutherland. McClure searched Hunter's body and clothing and made sure that Hunter did not possess any hidden drugs. The officers attached a body-worn camera with night vision capabilities along with a "wire" to Hunter. Although the camera was incapable of broadcasting a live feed to the officers, the wire provided a live audio stream the moment it was attached to Hunter. The officers gave him $200 for the purchase of crack cocaine and Hunter brought money of his own to pay off a prior debt he owed Appellant. (Tr.Vol.II.p.90, line 25–p.91, line 13; Tr.Vol.II.p.94, lines 10–19; Tr.Vol.II.p.100, lines 8–12; Tr.Vol.II.p.105, line 7–p.106, line 6).

The officers dropped Hunter off in a neighborhood near the location of the controlled purchase, and monitored the audio stream from that moment until he returned. When officers

met back up with Hunter, Officer Sutherland removed his wire and Officer McClure downloaded the audio and video recordings to a computer hard drive, which he then copied onto a DVD. Officer McClure also collected the drugs from Hunter and searched him again to ensure that he turned over all illegal drugs to the officers. Officer McClure sealed the evidence in a bag, signed and dated the bag, placed it in a safe that night, and kept it in the safe until it was transferred to an evidence locker and then the evidence lab days later. (Tr.Vol.II.p.94, line 20–p.95; Tr.Vol.II.p.100, lines 8–12; Tr.Vol.II.p.105, line 7–p.107, line 6; Tr.Vol.II.p.107, line 18–p.108, line 3; Tr.Vol.II.p.111, line 25–p.112, line 6; Tr.Vol.II.p.113, line 7–p.114, line 16; State's Exhibit 4).

Shortly after performing the controlled purchase, Hunter was dismissed from his position as an informant. Officer McClure discovered Hunter was wanted for a burglary charge, and took him to other officers to be prosecuted for the offense. (Tr.Vol.II.p.120, line 16–p.121, line 1; Tr.Vol.II.p.124, line 6–p.125, line 4).

ARGUMENT

I.

The trial judge properly admitted the video recording of the controlled purchase and the crack cocaine into evidence where the State authenticated the video recording of the controlled purchase and established the chain of custody for the crack cocaine at trial through the officers' testimony and the recording itself.

Appellant argues the trial judge erred in admitting the video of the controlled purchase and the crack cocaine into evidence, alleging that Hunter's refusal to testify at trial prevented the State from: (1) authenticating the video,[1] and (2) establishing the chain of custody for the crack cocaine. The State disagrees with Appellant's allegations of error. The officers' testimony and the continuous, unedited video recording authenticated the video itself and established the chain of custody of the crack cocaine.

Authentication of the Video Recording

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Hatcher, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id.

Evidence may be authenticated through a variety of methods. Rule 901, SCRE provides:

(a) General provision. 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.

[1] The State notes that Appellant titles his argument relating to the video as a chain of custody issue, but in the body of his argument argues only that the State did not properly authenticate the video. The State agrees that authentication is the proper description of Appellant's argument, and further points out that the video was challenged only on authentication grounds at trial. (Br. of Appellant, pp.24–27; Tr.Vol.II.p.96, lines 1–14).

(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) Testimony of Witness With Knowledge. Testimony that a matter is what it is claimed to be.

...

(4) Distinctive Characteristics and the Like. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(6) Telephone Conversations. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

"Readily identifiable items must merely be authenticated by a showing of 'evidence sufficient to support a finding that the matter in question is what its proponent claims.'" State v. Brockmeyer, 406 S.C. 324, 353, 751 S.E.2d 645, 660 (2013). "The burden to authenticate evidence is not high and requires only that the proponent offer a satisfactory foundation from which the jury could reasonably find that the evidence is authentic." Deep Keel, LLC v. Atlantic Private Equity Group, LLC, 413 S.C. 58, 64, 773 S.E.2d 607, 610 (Ct. App. 2015).

In the instant case, the State submitted substantial evidence that the recording was an accurate recording of the controlled purchase between Hunter and Appellant. The officers testified at trial that: (1) prior to the controlled purchase, they searched Hunter and his clothing; (2) they attached the video recording device and a separate audio recording device, the latter of which gave officers a live audio feed; (3) officers monitored the audio feed from the moment they dropped Hunter off to the moment they met back up with him, and used the feed to confirm the drug transaction along with Hunter's movements between leaving the officers and meeting

back up with them; (4) officers removed the video recording device and downloaded the video immediately after the transaction; and (5) the video was not altered in any way. Thus, the State established the officers' knowledge of the events contained in the video, and used their testimony to properly authenticate the video. See Rule 901(b)(1), SCRE; Brockemeyer, 406 S.C. at 353–54, 751 S.E.2d at 660–61; see also Deep Keel, LLC, 423 S.C. at 65–66, 773 S.E.2d at 610–11 (finding a witness who examined loan documents while negotiating an agreement was able to authenticate those documents at trial, despite not knowing "when, how, or by whom the documents were prepared . . ." because the authentication requirement under Rule 901(b)(1), SCRE only requires a witness to have personal knowledge of evidence so as to confirm that the evidence is what it claim to be); c.f. State v. Campbell, 259 S.C. 339, 344, 191 S.E.2d 770, 733 (1972) (finding it unnecessary for a photographer to authenticate his own photographs of a crime scene where a police officer who saw the scene testified the photographs were correct representations of the area they portrayed).

Moreover, the contents of the recording point to its own authenticity. The video is a continuous, twenty-four minute and fifty-three second recording which shows: (1) the officers preparing Hunter for the controlled purchase and included a statement of the date and time (September 4, 2014, at 10:23 p.m.), Appellant's identity[2] as the target, and the terms of the transaction (the purchase of crack cocaine in exchange for $200); (2) the officers dropping Hunter off; (3) Appellant picking Hunter up in his car; (4) Hunter handing Appellant money and grabbing a small plastic bag in the same motion;[3] (5) Hunter displaying the small plastic bag

[2] Officers initially misstated Appellant's first name at the beginning of the video, but Hunter corrected them after meeting back up with police after the transaction. (State's Exhibit 4, 1:17 to 1:24; 23:03 to 23:12).

[3] State's Exhibit 4, 13:33 to 13:39.

right in front of the camera;[4] (6) Hunter exiting the vehicle; (7) Hunter being picked back up by the officers; and (8) officers listing the new time as 10:42 p.m. and describing the transaction and drugs recovered. Notably, Hunter's arm tattoo is clearly seen at multiple points in the video;[5] a tattoo of his girlfriend's name, Candace. Thus, the content of the video also proved its authenticity. See Rule 901(b)(4), SCRE; Deep Keel, LLC, 413 S.C. at 66, 773 S.E.2d at 611 (finding the appearance, contents, substance, and distinctive characteristics of the loan documents, which included the names of the borrower and lender, the mortgage amount, and the date of execution proved the loan documents in dispute were authentic under Rule 901(b)(4), SCRE).

Finally, Appellant admitted at trial to picking Hunter up in his car on the night of August 4, 2014, and to Hunter handing him money during the course of that car ride. (Tr.Vol.II.p.168, line 6–p.169, line 14). Accordingly, Appellant's own testimony further authenticated the video. See Brockmeyer, 406 S.C. at 354, 751 S.E.2d at 661 (finding defendant's admission to possessing a gun at the time it was fired and throwing the gun and its magazine into the woods afterwards was a self-identification of the items which rendered meritless his authentication and chain of custody arguments, and "negate[d] any possible prejudice in the admission of [those] items").

Accordingly, the trial judge did not err in admitting the video recording into evidence.

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[4] State's Exhibit 4, 13:50; 14:38 to 14:44.

[5] Hunter's "Candace" arm tattoo is clearly seen at multiple points in the video. Candace was identified as Hunter's girlfriend by both Officer McClure and Appellant at trial. At one point during the video, Hunter attempts to answer his phone, and says the name "Candace" several times. (State's Exhibit 4, 4:13 to 4:18; 13:13 to 13:18; 17:15 to 17:18; 20:23 to 20:40).

Chain of Custody for the Crack Cocaine

South Carolina courts have long held that "a party offering into evidence fungible items such as drugs or blood samples must establish a complete chain of custody as far as practicable." Hatcher, 392 S.C. at 91, 708 S.E.2d at 753 (citing State v. Sweet, 374 S.C. 1, 6, 647 S.E.2d 202, 205 (2007)). "Where the substance analyzed has passed through several hands the evidence must not leave it to conjecture as to who had it and what was done with it between the taking and the analysis." Benton v. Pellum, 232 S.C. 26, 33–34, 100 S.E.2d 534, 537 (1957) (citation omitted). "Testimony from each custodian of fungible evidence, however, is not a prerequisite to establishing a chain of custody sufficient for admissibility." Sweet, 374 S.C. at 7, 647 S.E.2d at 206 (citing State v. Taylor, 360 S.C. 18, 27, 598 S.E.2d 735, 739 (Ct.App.2004)). "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." Id. Ultimately, the goal of chain of custody requirements is simply "to ensure that the item is what it is purported to be." Hatcher, 392 S.C. at 95, 708 S.E.2d at 755.

The State presented substantial evidence at trial which established the chain of custody for the crack cocaine. In fact, the evidence provided by the State exceeded the amount and quality of evidence presented in State v. Valentine, 386 S.C. 499, 689 S.E.2d 608 (2010), a case in which the South Carolina Supreme Court upheld the admission of drug evidence obtained from a controlled purchase which occurred outside of officers' direct visual observation, even without the confidential informant's testimony at trial.

In Valentine, the confidential informant was searched, wired, provided with marked bills, and taken to the apartment complex where Valentine lived. Officers watched the informant and

Valentine speak outside the building, and then enter Valentine's apartment. They listened to, but did not observe, the controlled purchase. The informant exited the apartment approximately ten minutes later, and officers watched him walk through the apartment complex to a parking lot where he met police. There, the informant gave the purchased drugs to police. As soon as the informant began to leave the scene, officers approached Valentine's apartment and found Valentine was the only person present. After Valentine's arrest, the officers obtained a search warrant and found the marked bills, drug paraphernalia, and marijuana. Valentine, 386 S.C. at 501, 689 S.E.2d at 608–09.

On appeal, Valentine argued that because the informant did not testify at trial, the chain of custody for the cocaine evidence was inadmissible and the trial judge abused his discretion in admitting it. The South Carolina Supreme Court found the State adequately established the chain of custody of the drugs, even without the informant testifying at trial, noting: (1) the identity of the informant was known to the appellant;[6] (2) the defense was able to fully explore the informant's criminal history and the terms of the drug transaction; (3) the informant was under direct police observation during the transaction, and during the ten-minute period the informant was in Valentine's apartment police maintained live audio surveillance of the informant. Thus, the court found that the "gaps" in the chain of custody of the drug evidence were insignificant because the State established the informant's identity and "reasonably

[6] By way of anecdote, Appellant asserts our Supreme Court mistakenly distinguished Valentine from Sweet because, contrary to the Court's opinion, the identity of the informant in Sweet was known to that defendant. Appellant provides no evidence of this assertion in his brief. (Br. of Appellant p.21 n.3). More importantly, however, the alleged mistake is irrelevant to the present case; even if the Valentine Court was mistaken on that fact, it still unequivocally found that the State providing a defendant with the identity of a criminal informant is one means by which the State may prove the chain of custody for evidence obtained by a non-testifying informant. Valentine, 386 S.C. at 502, 689 S.E.2d at 609.

Appellant also claims the informant in Valentine had testified at a previous mistrial, and cites to the South Carolina Supreme Court's opinion as verification of his claim. However, the court's opinion makes no mention of such fact. Rather, the court noted Valentine was fully aware of the informant's identity, and that information along with the State's evidence reasonably demonstrating the manner in which the cocaine was handled established the proper chain of custody for the cocaine evidence. Id.

demonstrated the manner in which the cocaine was handled. Valentine, 386 S.C. at 502, 689 S.E.2d at 609.

Here, as in Valentine: (1) Appellant was informed of the informant's identity and able to fully explore his criminal history and the terms of his confidential informant agreement by cross-examining the officers at trial; (2) Appellant was searched immediately before and after the drug transaction; and (3) Appellant was under continuous audio surveillance when outside the sight of the officers. Admittedly, Hunter was out of the officers' sight for a period of time longer than the Valentine informant; however, this discrepancy was more than remedied by the video recording which covered the entire time period during which Hunter was out of the officers' visual supervision and also showed Appellant handing him the drugs, all of which was confirmed by the live audio feed. Thus, the video recording and other evidence presented by the State established Appellant as the source of the crack cocaine and its chain of custody after it was sold to Hunter. The trial judge did not err in admitting it into evidence.

II.

The trial judge committed harmless error in admitting witness Brandon Hunter's written statement into evidence because: (1) the statement was cumulative to the other evidence of Appellant's guilt, including a video recording of the drug transaction; and (2) Appellant benefitted from the trial judge's error; relying on the same justification he used in admitting the written statement, the trial judge allowed Appellant to introduce into evidence an otherwise inadmissible phone call recording in which Hunter denied purchasing crack cocaine from Appellant.

At trial, the solicitor called Hunter to testify about his involvement in the controlled purchase. However, Hunter invoked his Fifth Amendment right against self-incrimination and refused to testify. The trial judge asked whether Hunter had any pending or anticipated charges, and both Hunter and the solicitor confirmed Hunter's prior charges had all been resolved. Still, Hunter refused to testify about his involvement in the drug transaction. As a result of Hunter's refusal to testify, the solicitor sought to introduce Hunter's prior written statement, made to Officer McClure immediately after completing the drug transaction with Appellant. The solicitor claimed the statement should be admitted under Rule 613(b), SCRE, which allows a party to introduce extrinsic evidence of a witness's prior inconsistent statement if a witness does not admit to making the statement.[7] Citing to State v. Carmack, 388 S.C. 190, 694 S.E.2d 224 (Ct. App. 2010), the solicitor argued that anything less than an unequivocal admission to making the

[7] In relevant part, Rule 613(b), SCRE provides:

> Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is advised of the substance of the statement, the time and place it was allegedly made, and the person to whom it was made, and is given the opportunity to explain or deny the statement. If a witness does not admit that he has made the prior inconsistent statement, extrinsic evidence of such statement is admissible. However, if a witness admits making the prior statement, extrinsic evidence that the prior statement was made is inadmissible.

prior statement permitted her to introduce the written statement. (Tr.Vol.II.p.72, line 12–p.78, line 17).

Counsel objected to the use of the prior statement, contending that Rule 613(b) and Carmack do not apply to a defendant invoking his Fifth Amendment rights. The trial judge disagreed, stating he felt Hunter was improperly invoking his Fifth Amendment rights because he had no pending charges at the time of his testimony. The trial judge ruled the solicitor could impeach Hunter with his written statement, but that it would need to be authenticated by another witness before it could be introduced into evidence. (Tr.Vol.II.p.78, line 20–p.81, line 18; Tr.Vol.II.p.83, lines 5–14).

Counsel attempted to cross-examine Hunter about whether he made a phone call to Appellant a few weeks prior to trial in which he stated he did not purchase drugs from Appellant during the controlled buy. Again, Hunter invoked his Fifth Amendment right against self-incrimination. The jury was sent out from the courtroom, and Counsel presented the court with a thirty-second phone call recording which contained a man claiming to be Hunter telling Appellant he did not buy drugs from him during controlled purchase. Counsel claimed it was admissible as a prior inconsistent under Rule 613(b), due to the trial judge admitting Hunter's written statement. The solicitor objected, noting Counsel did not provide the recording during discovery and made no mention of it until that moment and arguing such actions were a violation of the reciprocal discovery rules. The trial judge informed Counsel that another party with knowledge of the recording would have to authenticate it, similar to his ruling on Hunter's written statement. (Tr.Vol.II.p.84, line 9–p.87, line 10).

The solicitor authenticated Hunter's written statement through the testimony of Officer Sutherland. After considering Counsel's objections based on hearsay, the Confrontation Clause,

and the fact that Rule 613(b) does not apply to a witness invoking the Fifth Amendment, the trial judge admitted the written statement into evidence. Counsel authenticated the phone call recording through Appellant's testimony, and the trial judge likewise admitted it into evidence. (Tr.Vol.II.p.92, line 4–p.93, line 23; Tr.Vol.II.p.171, line 24–p.171, line 22; Defense Exhibit 4).

Harmless Error

Appellant argues the trial judge erred in allowing the solicitor to introduce Hunter's written statement at trial, as Hunter's invocation of his Fifth Amendment right against self-incrimination made him unavailable as a witness and was a non-statement to which Rule 613, SCRE was inapplicable. The State agrees admission of Hunter's written statement was improper, as his invocation of his Fifth Amendment right against self-incrimination and was not a "statement" for the purposes of Rule 613; however, such error was clearly harmless in light of the overwhelming evidence against Appellant, including the video recording of the controlled purchase. Moreover, due to the admission of the written statement, the trial judge allowed Appellant to introduce evidence of the alleged phone call between Hunter and Appellant, evidence which, like Hunter's written statement was inadmissible under Rule 613 because of Hunter's non-testimony at trial. Additionally, such evidence was inadmissible under Rule 901(b)(6), SCRE because it was not properly authenticated. Thus, even if this Court ordered a new trial in this case, Appellant would be unable to present the phone call evidence in a new proceeding, and Appellant would be convicted again based on overwhelming evidence of his guilt.

The Confrontation Clause of the Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend VI. The United States Supreme Court has held that this provision bars

"admission of testimonial statements of a witness who did not appear at trial unless he was available to testify, and the defendant had had a prior opportunity for cross-examination." Crawford v. Washington, 541 U.S. 36, 53–54 (2004). According to the Supreme Court

> when a court must determine whether the Confrontation Clause bars the admission of a statement at trial, it should determine the "primary purpose of the interrogation" by objectively evaluating the statements and actions of the parties to the encounter, in light of the circumstances in which the interrogation occurs. The existence of an emergency or the parties' perception that an emergency is ongoing is among the most important circumstances that courts must take into account in determining whether an interrogation is testimonial because statements made to assist police in addressing an ongoing emergency presumably lack the testimonial purpose that would subject them to the requirement of confrontation.

Michigan v. Bryant, 562 U.S. 344, 131 S.Ct. 1143, 1162 (2011).

"A violation of the Confrontation Clause is not per se reversible but is subject to a harmless error analysis." State v. Gracely, 399 S.C. 363, 375, 731 S.E.2d 880, 886 (2012) (citing Delaware v. Van Arsdall, 475 U.S. 813, 822 (2006)). "Whether such an error is harmless in a particular case depends upon a host of factors . . . . The factors include [1] the importance of the witness's testimony in the prosecution's case, [2] whether the testimony was cumulative, [3] the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, [4] the extent of cross-examination otherwise permitted, and, of course, [5] the overall strength of the prosecution's case." Id. (quoting Van Arsdall, 475 U.S. at 684 (emphasis added in Gracely)).

Under Rule 613(b), SCRE, a party may introduce a witness's prior inconsistent statement in certain situations. Specifically, Rule 613(b) provides:

> Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is advised of the substance of the statement, the time and place it was allegedly made, and the person to whom it was made, and is given the opportunity to explain or deny the statement. If a witness does not admit that he has made the prior inconsistent statement, extrinsic evidence of such

> statement is admissible. However, if a witness admits making the prior statement, extrinsic evidence that the prior statement was made is inadmissible.

(emphasis added). Anything less than an "unequivocal admission" of the statement allows a party to introduce extrinsic evidence of its existence. Carmack, 388 S.C. at 201–02, 694 S.E.2d at 229–30. "A decision to admit extrinsic evidence of a prior inconsistent statement will not be reversed absent a manifest abuse of discretion that prejudiced the appellant." Id. at 201, 694 S.E.2d at 229.

Here, the trial judge erred in admitting the extrinsic evidence of Hunter's written statement. The State concurs that Hunter's invocation of his Fifth Amendment right against self-incrimination was a non-statement and admission of the written statement violated the Confrontation Clause. However, admission of the statement was harmless error. Hunter's written statement was superfluous evidence of Appellant's guilt: as mentioned above, the officers' testimonies, video recording of the controlled purchase, and drug evidence firmly established Hunter bought crack cocaine from Appellant. Furthermore, any corroborative impact from that statement was severely lessened by admission of the phone call which stood in direct conflict with the statement. Given the video recording and the other testimony, there is no possibility exclusion of the written statement would have changed the outcome at trial.

Purported Phone Call Recording between Hunter and Appellant

The State notes that throughout his brief, Appellant claims that the recording of the alleged phone call between Appellant and Hunter proves that the admission of Hunter's written statement, the video recording, and the crack cocaine were not harmless error. Specifically, he contends the phone call recording showed that Hunter lied to police and as a result the remainder of the evidence against Appellant could not be trusted. He also contends that because of the trial judge's admission of Hunter's written statement he was forced to testify in order to introduce the

phone call evidence, which opened him up to cross-examination and allowed the State to explore Appellant's criminal history on cross-examination and in closing arguments.

Amazingly, Appellant fails to recognize the inherent fallacy in his argument; if, as Appellant argues, the admission of Hunter's written statement violated Rule 613(b), the phone call recording was also inadmissible under that rule. Hunter's invocation of his Fifth Amendment right was a non-statement, and Hunter was unavailable for any sort of examination by the State. Hunter never admitted or denied making the making the call to Appellant and never attempted to explain the call. Thus, Appellant failed to satisfy the requirements of Rule 613(b).

Appellant's phone call evidence also failed to meet the requirements of Rule 901. To authenticate a telephone call, Rule 901(b)(6), SCRE requires "evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called . . . ." Appellant failed to present any evidence that the person who identified himself as Hunter was, in fact Hunter. The low-quality phone call recording contains no other identifying information, and Appellant failed to present any evidence regarding the phone number called and the owner of said line. Without Hunter's testimony the source of the statements cannot be verified.

Thus, even if this Court awarded Appellant a new trial, he would be unable to present evidence of the phone call. Assuming, as Appellant argues, that his efforts to introduce the phone call were the sole reason for him testifying, Appellant would have no reason to testify in a new trial. Without his testimony or the phone call, the evidence against Appellant is even more overwhelming. Accordingly, this Court should reject Appellant's arguments that the phone call evidence supports his issues on appeal.

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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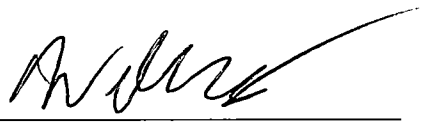
BY: 

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August 15, 2016

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of General Sessions
R. Scott Sprouse, Circuit Court Judge

Appellate Case No. 2015-001616

THE STATE, ...RESPONDENT,

v.

GEROME C. SMITH,.....APPELLANT.

PROOF OF SERVICE

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

John H. Strom, Esquire
S.C. Commission on Indigent Defense
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I further certify that all parties required by Rule to be served have been served.
This 15th day of August, 2016.

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August 15, 2016

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RE: State v. Gerome C. Smith
Appellate Case No. 2015-001616

Dear Mr. Strom:

I am enclosing two (2) copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

William F. Schumacher, IV
Assistant Attorney General
S.C. Bar No. 100231

Enclosures

cc: Honorable Jenny A. Kitchings (original and one enclosed)
Victim Services