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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM OCONEE COUNTY
Court of General Sessions
R. Lawton McIntosh, Circuit Court Judge

Case No. 2012-GS-37-597
Appellate Case No. 2013-001895

State of South Carolina,

Respondent,

v.

James Richard Bartee, Jr.,

Petitioner

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Pursuant to Rule 242(d)(1), SCACR, counsel for Petitioner certifies that a petition for rehearing was made by Petitioner and finally ruled on by the Court of Appeals.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in affirming the trial court's rulings with respect to examination of a witness concerning Petitioner's disciplinary record and a mistrial motion based on that examination, and in finding this issue unpreserved for review?

2. Did the Court of Appeals err in affirming the trial court's admission of subjective, speculative testimony interpreting certain statements made in a recorded conversation?

3. Did the Court of Appeals err in affirming the trial court's admission of a disk containing an audio recording of certain conversations, its admission of an inaccurate transcript of that recording, and its limitation of cross-examination of a witness about the recording?

STATEMENT OF THE CASE

Petitioner, James Richard Bartee, Jr., was indicted on a charge of solicitation to commit a felony, based on an allegation that he solicited another individual to kidnap James C. Williams, Jr., a retired South Carolina circuit court judge. R. p. 3. Judge R. Lawton McIntosh presided over his trial in the Oconee County Court of General Sessions August 26-30 and September 3, 2013. The jury found Petitioner guilty, and the court sentenced him to a term of 10 years, suspended to five years of active service and five years of probation, plus 250 hours of public service while on probation. R. pp. 4, 843-45. The Court of Appeals affirmed his conviction and denied rehearing. App. pp. 1-4, 17.

ARGUMENT AND AUTHORITIES

Petitioner is retired from a 25-year career with the United States Secret Service, seven years of which were served in South Carolina. R. pp. 625, 627, 630, 741. In 2012, he was a candidate for sheriff of Oconee County in the Republican primary. R. p. 147.

During the sheriff's race, questions surfaced about Petitioner's eligibility to run for sheriff. R. pp. 147, 674. He maintained he was qualified, and the Republican Party certified him to be on the ballot. R. pp. 149-50. In May 2012, Judge Williams brought an action against the Oconee County Republican Party and Oconee County Commission of Registration and Elections, seeking a determination that Petitioner did not meet the qualifications for sheriff and seeking his removal from the ballot. R. pp. 152, 161, 672-73, 905-13. Petitioner moved to intervene and was made a party in that action. R. pp. 675-76, 922-24. This charge arose from an allegation that he asked Nick Blackwell to kidnap Judge Williams, to prevent Williams' presence at a hearing set for May 30.

On May 29, Nick Blackwell told authorities that on May 27, 2012, Petitioner asked him to kidnap Judge Williams and gave him $200 for supplies he would need. R. pp. 192-94, 330-33, 335-36, 385. On the night of May 29-30, officers created a recording of two telephone calls allegedly between Blackwell and Joe Milbert and another allegedly returned by Milbert to Blackwell, and of a wire transmission of an alleged conversation between Blackwell and Petitioner. R. pp. 200, 205. The court admitted this recording into evidence, over defense objections. R. pp. 115-18, 124-25, 254-55, 341. The officers also provided Blackwell with $138 in cash, with recorded serial numbers, to give to Petitioner, ostensibly to return a portion of the funds Blackwell claimed Petitioner had given him. R. pp. 199, 342, 368, 428.

The state contended the recording implicated Petitioner in the solicitation of a felony alleged to have occurred two nights earlier. Over the defense's objection, the court allowed Blackwell to testify to his own subjective, speculative interpretations of what Petitioner meant by certain comments on the recording. R. pp. 345-48, 355-69.

Blackwell and Petitioner had become acquainted during the campaign. R. pp. 316-17, 646-47. Blackwell claimed that on May 26, 2012, at a community festival, Petitioner talked about Judge Williams' civil suit and wondered what would happen if Williams did not show up for court. R. p. 324. After Petitioner had left, Blackwell claimed another individual, Ryan Stancil, gave him a business card with Williams' name and address on the back. R. p. 324. Blackwell claimed the next night, May 27, at Petitioner's house, Petitioner asked him to kidnap Williams. R. pp. 329-30. Another witness, who was in Petitioner's garage, heard their entire conversation over an intercom and testified Petitioner did not plan a kidnapping in that conversation. R. pp. 541, 543, 546, 549.

The defense contended there was never any plan by Petitioner to kidnap Judge Williams and never any solicitation of a felony. R. pp. 652, 697, 699-701, 715, 731, 734. Milbert testified Blackwell, not Petitioner, talked about kidnapping Williams. R. pp. 266, 275, 280-81. Petitioner also heard Blackwell talk about doing something to Williams. R. p. 680. Blackwell had talked about harming others, and Petitioner did not take him seriously. R. p. 680. Blackwell told another witness Petitioner asked him to kidnap a judge, and she also did not think he was serious. R. pp. 301, 305-07. Stancil said Blackwell, not Petitioner, asked him to look up Williams' information. R. pp. 569-70. It was Stancil, not Petitioner, who wrote the information on a business card and gave it to Blackwell. R. pp. 324, 574.

Witnesses testified that Blackwell had a temper, did not behave well, and was disruptive, frequently upset, crazy, and "a nut." R. pp. 266, 280, 493, 508-10, 574, 590, 603-04, 609-10, 688-90. Blackwell was upset about the way the Sheriff's Department had handled an incident the previous year in which Blackwell had shot someone. R. pp.

278, 315. Recently, Blackwell had gotten into an altercation with Donnie Fricks, a former sheriff's deputy who was also a candidate in the sheriff's race. R. pp. 148, 278-79, 320. Blackwell claimed he and his family had been threatened by supporters of other candidates, and he was frustrated and angry about the things that were happening during the campaign. R. pp. 265-67. Witnesses testified that Petitioner, who was an Aikido instructor, had used and had suggested that they also use verbal Aikido techniques to calm Blackwell down when he became upset. R. pp. 282-83, 493-99, 604-05, 609-10, 688-90. Comments made during the recorded conversation were consistent with what Petitioner would say to calm Blackwell down. R. pp. 493-99, 594, 605, 690-91. Witnesses also testified that Petitioner had loaned $180 to Blackwell on May 19, several days before Judge Williams filed the action to have Petitioner removed from the ballot. R. pp. 586, 590-92, 671, 699, 905-18. Petitioner believed it was this loan that Blackwell was repaying with the funds given to him on the night of May 29-30. R. pp. 713-14.

I. The Court of Appeals erred in affirming the trial court's ruling that allowed questioning concerning a suspension in Petitioner's employment history and its ruling denying a mistrial based on this questioning.

Joe Milbert was a state's witness. During cross-examination, the defense questioned Milbert about Petitioner's training with the Secret Service and he answered, "He had exemplary training." R. p. 275, line 23 – p. 276, line 1. On redirect, the following exchange took place between the solicitor and Milbert:

> Q. And, like I said, I don't want to put words in your mouth, but I believe you testified that he had - - on cross that he had an exemplary record with the Secret Service.
>
> A. As far as I know Rick had an exemplary record. He was respected by a lot of people in the Secret Service. I went to his retirement party and the people spoke nothing but good things of him.
>
> . . . .

Q. Do you have any access to his personnel and disciplinary records while he was at Secret Service?

A. No. I do not.

Q. Would you be surprised to know that he was disciplined - - -

R. p. 290, line 12 – p. 291, line 3. The defense objected, but the court ruled the defense had opened the door to this question. R. p. 291, lines 4-6. Thereafter, the prosecutor questioned the witness about an alleged three-day suspension for using racial slurs while Petitioner was a Secret Service agent. R. p. 291, lines 9-11.

On appeal, Petitioner challenged the court's ruling that his trial counsel opened the door to this questioning 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. App. p. 2, ¶ 1. The Court of Appeals misapplied those principles, and this Court should grant a writ of certiorari and decide the merits of this issue.

Contrary to the Court of Appeals' holding, the defense did not concede or waive this issue. The defense made a contemporaneous objection to the questioning and the court ruled trial counsel had opened the door in its cross-examination of the witness. R. p. 291, lines 4-6. 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 of Appeals also misapplied 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). Both the trial court and Petitioner'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.

On the merits, the defense did not open the door to questioning about Petitioner's disciplinary record. The defense questioned the witness concerning Petitioner's ***training***, which the witness characterized as exemplary. R. p. 275, line 22 – p. 276, line 1. The defense inquired about Petitioner's training, technical skills, and his intellect. R. p. 276, line 15; p. 277, lines 4-6; p. 278, lines 1-2. The defense did not ask any questions whatsoever about Petitioner's employment record. On redirect, the solicitor misstated the witness's prior testimony, saying, "I believe that you testified he had . . . an exemplary ***record*** with the Secret Service." R. p. 290, lines 13-15 (emphasis added). It was this statement by the prosecutor, not any question by the defense, that prompted the witness to

comment on Petitioner's record. The defense did not open the door. *Cf. State v. Young*, 378 S.C. 101, 106, 661 S.E.2d 387, 389 (2008) (defendant's testimony that he hated to see a woman cry did not open the door to admission of his prior convictions for criminal domestic violence and criminal sexual assault); *State v. Page*, 378 S.C. 476, 483, 663 S.E.2d 357, 360 (Ct. App. 2008) (questions on a detective's investigative techniques and sufficiency of evidence linked to defendant did not open the door to introduction of unredacted statement of co-defendant which implicated defendant by name).

Later, discussing the court's door-opening ruling in the context of a mistrial motion made after the jury was out, the defense argued its questions did not open the door. R. p. 312, lines 11-14. The court explained its ruling further, stating,

> . . . It became patently obvious that this witness was doing his best because of his relationship with the Defendant to defend the Defendant, and I don't blame him for doing that because of their friendship. But that basically puts him in a hostile mode against the State. He was going overboard in his statements building up the Defendant in the eyes of the jury, which is his right to do so as a witness. But, in doing so, I think he expanded, he gave the State the opening to go into that particular question because he was going into all these other particular attributes that the Defendant had.
>
> . . . .
>
> . . . I do find the witness opened the door and [the solicitor] had a right to inquire into the record.

R. p. 312, line 16 – p. 313, line 2; p. 313, lines 19-21. The court's ruling is contrary to the principles governing admission of otherwise inadmissible evidence under the rationale that the defense opened the door and thereby invited a response.

A defendant may open the door to otherwise improper evidence through its own introduction of evidence or witness examination. *State v. Culbreath*, 377 S.C. 326, 333, 659 S.E.2d 268, 272 (Ct. App. 2008). Where one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in

explanation or rebuttal thereof, even if the latter evidence would have been incompetent or irrelevant had it been offered initially. *State v. Stroman*, 281 S.C. 508, 513, 316 S.E.2d 395, 399 (1984); *State v. Beam*, 336 S.C. 45, 52, 518 S.E.2d 297, 301 (Ct. App. 1999). A party may not complain of error induced by his own conduct. *Stroman,* 281 S.C. at 513, 316 S.E.2d at 399; *Beam*, 336 S.C. at 52-53, 518 S.E.2d at 301. Here, these principles are not applicable. The door was not opened by the defense's own introduction of evidence or examination of the witness. The question about Petitioner's record was first posed by the ***solicitor*** on redirect. It was not in explanation or rebuttal of anything elicited by the ***defense*** during cross-examination. This was not a situation of the defense's making. Moreover, case precedents do not support the court's conclusion that the ***witness*** opened the door, where the witness was not asked any question by the defense pertaining to the matter about which the solicitor sought to question him.

Although the trial court is afforded discretion in determining whether the defense opened the door to otherwise inadmissible evidence, *see Page*, 378 S.C. at 483, 663 S.E.2d at 360, in this case, the court abused that discretion. An abuse of discretion occurs when the court's ruling is not supported by the evidence or is controlled by an error of law. *State v. Portillo*, 408 S.C. 66, 69, 757 S.E.2d 721, 723 (Ct. App. 2014). Here, the court's ruling is unsupported by the evidence, since the record establishes that the defense did not ask any question that opened the door. The court's ruling is also controlled by an error of law, to the extent it is premised on the notion that a prosecution witness, rather than the defense, may open the door to admission of improper evidence.

The solicitor questioned the witness not only concerning the alleged three-day suspension, but also the alleged basis for that suspension – a report that Petitioner had

used racial slurs. R. p. 291, lines 9-11. Counsel moved for a mistrial, for two reasons: (1) he had not opened the door to evidence about a suspension, and (2) the question went too far by injecting the alleged use of racial slurs. R. p. 312, lines 11-14; p. 313, lines 5-16. Counsel argued the reference to racial slurs was overly prejudicial and far exceeded any probative value the information might have. Especially where the jury included African-Americans, this information had the potential to taint the jury. *Id.*; R. p. 12, line 23 – p. 13, line 5 (seating of juror 253, a black female); p. 14, lines 8-15 (seating of juror 46, a black female). The court abused its discretion in denying the mistrial motion.

Even under the doctrine that the defendant can open the door to admission of otherwise inadmissible evidence, the invited response is allowed only to the extent that it does not unfairly prejudice the defendant. *See Ellenburg v. State*, 367 S.C. 66, 69, 625 S.E.2d 224, 226 (2006); *Vaughn v. State*, 362 S.C. 163, 170-71, 607 S.E.2d 72, 75-76 (2004). Here, the solicitor's redirect far exceeded a fair response, which would have been simply to introduce the fact of the suspension. Instead, the solicitor unnecessarily injected provocative and inflammatory information – that Petitioner had been accused of using racial slurs. The court clearly understood the inflammatory nature of the information, noting that giving a curative charge would further call attention to it and be "like rubbing the scab." R. p. 314, lines 2-3.

Although the grant or denial of a mistrial is a matter in the court's discretion, a mistrial should be granted where both error and resulting prejudice are shown. *State v. Chisholm*, 395 S.C. 259, 274, 717 S.E.2d 614, 622 (Ct. App. 2011). A mistrial is necessary where the prejudicial effect cannot be removed in any other way. *State v. Ferguson*, 376 S.C. 615, 618-19, 658 S.E.2d 101, 103 (Ct. App. 2008); *Chisholm*, 395

S.C. at 274, 717 S.E.2d at 622. The information imparted by the solicitor was highly inflammatory and unduly prejudicial, and no curative charge could remove its prejudicial effect in the minds of the jury. The solicitor's questioning so infected the trial with unfairness as to make the resulting conviction a denial of due process. *See Vaughn*, 362 S.C. at 169-70, 607 S.E.2d at 75; U.S. Const. amend. V, XIV; S.C. Const. art. I, § 3.

Here, prejudice is clear. The potential is great that a defendant would be prejudiced in the eyes of any juror, of any race, by an inference that he would express ill-will toward another individual on the basis of race. However, the potential prejudice is exponentially greater where some of the jurors deciding his fate are of a different race and therefore likely to perceive that his racial animus is also directed at them personally. Under these circumstances, it was absolutely necessary to grant a mistrial, to insure that the defendant was convicted based on actual guilt, and not based on an extraneous, improper factor that tended to inflame the passions and prejudices of the jurors.

Allowing this questioning was not harmless. The state opened its cross-examination of Petitioner by revisiting the issue of his suspension, dwelling on it for four pages of the transcript. R. pp. 738-41. The solicitor compounded the prejudice by stating the actual alleged pejorative phrases – "you're a damned black cow" and "a black bitch" – phrases supposedly contained in a report that was never admitted into evidence. R. p. 740, lines 11-12, 22. The solicitor mentioned the second phrase even after the court sustained a hearsay objection as to the first. R. p. 740, line 16-17. But for the prior erroneous ruling that the defense opened the door, such cross-examination would have been absolutely off limits. The state emphasized this evidence in its argument to the jury, stating "it shows you what kind of man he really is." R. p. 815, lines 17-18. Its argument

invited the jury to convict because of "what kind of man he really is," not based on a finding that he was guilty of the charged offense beyond a reasonable doubt. Under these circumstances, the erroneous rulings on the defense's objection and motion for mistrial cannot be deemed harmless. This Court should grant a writ of certiorari and reverse.

II. The Court of Appeals erred in affirming the trial court's admission of Blackwell's subjective, speculative interpretation of certain statements alleged to have been made by Petitioner in the recorded conversation.

Nick Blackwell testified concerning the alleged conversation of May 27 when he claimed Petitioner asked him to kidnap Judge Williams. He claimed Petitioner wanted Williams not to show up for court and suggested Blackwell take Williams to Asheville, North Carolina, and leave him there, so he would not make it back for court. R. p. 331. Blackwell stated Petitioner specifically told him not to kill Williams. R. p. 331.

Later in Blackwell's testimony, the solicitor asked what Petitioner meant by certain statements on the recording made the night of May 29-30. Blackwell claimed Petitioner referred to letting the dust settle and not needing a mask, and the solicitor asked what Petitioner meant. The defense objected, and the objection was sustained. R. p. 345, lines 8-10. Shortly thereafter, the solicitor asked, "Did he tell you not to do it or did he just tell you to wait?" R. p. 345, lines 15-16. Blackwell answered,

> It seems as if he was saying, Let's don't kidnap the judge, let's wait till the dust settles and we're gonna do some other action. It was implied. You know, he never was very specific.

R. p. 345, lines 17-20. The court overruled a defense objection to this testimony. R. p. 345, lines 21-23. Blackwell continued:

> He never was very specific. But it implied to me, my perception of it was when he said I didn't need a mask because they were talking about having a mask before because he couldn't identify me, he said I don't need a

> mask when I sneak up on them because if they were dead, it wouldn't matter if they saw me anyway.

R. p. 345, line 24-p. 346, line 5. Counsel objected and moved to strike. R. p. 346, line 6.

Out of the presence of the jury, the defense stated multiple grounds for the objection: (1) Blackwell specifically testified Petitioner said not to kill Williams, (2) prejudice would result from the jury hearing words like "dead" or "murdered," especially where such references contradicted Blackwell's own testimony that Petitioner specifically said not to kill Williams, (3) Blackwell was embellishing beyond anything he had expressed before in any of three written statements he had given, and (4) Blackwell could not know what Petitioner was implying. The defense argued the prejudice resulting from this testimony far outweighed any probative value. R. pp. 346-48. The court overruled the objection. R. p. 348. When Blackwell's testimony resumed in the presence of the jury, he repeatedly gave his own subjective, speculative impressions of what Petitioner's words meant. R. pp. 354-69. Blackwell's subjective impressions, including his expression of the belief that Petitioner was threatening him personally and his assumption that Petitioner would harm Williams in the future, were highly prejudicial. R. pp. 363, 369. The trial court erred in allowing this speculative, prejudicial testimony, and the Court of Appeals erred in affirming the trial court's ruling. App. pp. 2-3, ¶¶ 2-4.

The Court of Appeals erred in its conclusion that this issue was conceded at trial. App. p. 2, ¶ 2. This conclusion 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. The entire passage in which those comments appear is quoted in the Final Reply Brief of Appellant, pages 8-10, incorporated herein by reference. As more fully argued there, the

isolated comments quoted above were part of the complete, multi-faceted objection and did not waive any of the objections previously articulated. Where the court cut counsel off and did not allow him to finish what he was trying to say, the objection was not waived. R. p. 347, line 15. This Court should grant certiorari and reach the merits.

A trial court should not admit testimony that is merely speculation, conjecture, or surmise. *See State v. Dial*, 405 S.C. 247, 256, 746 S.E.2d 495, 499 (Ct. App. 2013); *State v. Burgess*, 391 S.C. 15, 23, 703 S.E.2d 512, 516 (Ct. App. 2010). Such testimony does not serve the purpose of the law of evidence that the truth be ascertained and judicial proceedings be justly determined. *See* Rule 102, SCRE.

If the court were correct that it could allow a witness to give his impression of another's meaning, Blackwell's impressions should not have been allowed in this case because they were contradicted by his earlier testimony that Petitioner had specifically said not to kill Williams and they were not contained in any of his three written statements. His testimony about what he thought Petitioner meant was not credible and was patently unreliable. Reliability is the benchmark for admission of all evidence, and this testimony should have been excluded. *See State v. Council*, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999) (scientific evidence is admissible only if it will assist the trier of fact, the expert is qualified, and the underlying science is reliable); *State v. Brown*, 356 S.C. 496, 504, 589 S.E.2d 781, 785 (Ct. App. 2003) (reliability is linchpin in determining admissibility of identification testimony); *State v. Sanders*, 356 S.C. 214, 217, 588 S.E.2d 142, 143-44 (Ct. App. 2003) (hearsay statements are admissible if they have adequate indicia of reliability, either under a firmly rooted hearsay exception or because reliability is established through a showing of particularized guarantees of trustworthiness).

The Court of Appeals misapplied a statement from *State v. Needs*, 333 S.C. 134, 508 S.E.2d 857 (1998), in rejecting Petitioner's argument based on both the speculative and contradictory nature of the witness's testimony. App. p. 2, ¶ 3. The issue here was not the competency of the witness but the admissibility of his speculative and unreliable testimony concerning the meaning of certain statements, and *Needs* is not applicable.

The Court of Appeals also erred in its deference to the trial court's ruling on the objection based on Rule 403, SCRE. App. p. 2A, ¶ 4. Blackwell's testimony lacked ***any*** probative value, and its ***only purpose*** was to unduly prejudice Petitioner. What Petitioner may have meant in the comments made on May 29-30 was entirely irrelevant to what he actually said and did on the night of May 27. This prosecution was for solicitation of another to commit a felony. Under the state's theory, the solicitation was complete as of May 27, when Petitioner 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. It was irrelevant that he allegedly called off the plan before May 29-30. R. p. 140, lines 17-19; p. 800, lines 6-8, 10-11. What he may have meant in comments made to Blackwell after the alleged crime was complete was also irrelevant. The state conceded events after May 27, when the solicitation allegedly occurred, "are wholly irrelevant." R. p. 800, line 10. Blackwell's subjective impressions of Petitioner's meaning in later comments had no probative value whatsoever.

However, this testimony was clearly prejudicial. It conveyed that Petitioner was of a mind to harm Judge Williams in the future. It conveyed Blackwell's purported belief that Petitioner was also threatening him and his family with harm. It invited the jury to convict Petitioner not on the basis of proof beyond a reasonable doubt that he solicited

the commission of a felony on May 27 but on the improper basis of a perception that Petitioner was a bad and dangerous person. Because the testimony had no probative value but a substantial prejudicial effect, the court abused its discretion in admitting it.

This error was not harmless. The state's evidence was challenged by defense witness accounts that indicated it was Blackwell who was volatile, angry, frustrated, and talking of harming others. It was Blackwell who had been involved in an earlier shooting, and it was Blackwell who had gotten into a physical altercation with another candidate. It was Blackwell who kept talking of doing something to Judge Williams. One witness heard the entire conversation between Blackwell and Petitioner when the plan to kidnap Williams was allegedly hatched, and that witness testified that Petitioner did not plan a kidnapping during that conversation. R. pp. 543, 546, 549. Where such evidence directly conflicted with Blackwell's testimony, it is extremely likely that his embellishments, his allusions to someone's death, and his purported perception that he and his family were being threatened influenced the passions and prejudices of the jury and resulted in their finding of guilt. This Court should grant certiorari and reverse.

III. The Court of Appeals erred in affirming the trial court's admission of a disk containing and audio recording of certain conversations, its admission of an inaccurate transcript of that recording, and its limitation of cross-examination about the recording.

The defense moved in limine to exclude the disk containing the recording made the night of May 29-30. It contended the disk was not the original recording, it was not an authenticated duplicate, and it had a defective chain of custody. R. pp. 15-118, 126-27. It also objected to admission of a court reporter's transcript of the recording, because the recording needed to stand on its own. Two transcripts had been produced, and they were different. The defense argued the jury should hear whatever it hears on the

recording, without having a transcript. R. pp. 120-22. The court erred in admitting this evidence and in limiting cross-examination of a prosecution witness about this evidence. R. pp. 124-25. 127-28, 254, 341, 473-75. The Court of Appeals erred in affirming the trial court's rulings on this issue, and this Court should grant certiorari and reverse.

The recording at issue was made on a "micro SD card" within a recording device maintained by the Anderson County Sheriff's Department. R. p. 20. Anderson County had only one such card. R. pp. 21-22. Following the May 29-30 events, officers removed the SD card from the device. Deputy Mark Gregory testified he used the "copy" function to place the recording on SLED agent Michael Sloan's computer that night. R. pp. 32, 28, 46. The next day, he used the "cut" function to "transfer" the recording from the SD card to his computer's hard drive. R. pp. 32, 46. State's Exhibit 1 was a disk he generated from his hard drive. R. p. 44. He gave this disk to Sloan but did not know when. R. pp. 38, 45. Sloan said he received the disk May 31, 2012. R. p. 61. No chain of custody document accounted for its whereabouts until August 15, 2012. R. pp. 61, 64.

At a pretrial hearing, the solicitor represented that the original recording on the digital device was still available. R. pp. 6-7, 9-10. The court directed the state to make the original digital recording available so the defense could compare the copy on the disk to the original digital recording. R. p. 8, 10. When the defense's expert, Alfred Johnson,[1] went to conduct that comparison, he was unable to view or analyze the

[1] The state stipulated Johnson is an expert in computer forensics. R. p. 81. Johnson is a graduate of South Carolina State University and a 13-year veteran of the United States Army. R. pp. 76-77. He received a master's degree in business and information systems from Central Michigan University. R. p. 76. He worked for the FBI for 31 years, the first 21 as an agent and the last 10 as a supervisory special agent. R. p. 76. With the FBI, he worked on white-collar crimes, specifically in the computer and digital evidence areas. R. p. 77. After leaving the FBI, he was the director of the National Law Enforcement

original. R. p. 83. He asked for the original of the sound file and was told there was no original, meaning there was no longer a file on the SD card. R. pp. 83, 92.

Johnson testified a copy is not necessarily a forensics duplicate. R. p. 84. To be a forensics duplicate, the copy must be authenticated with the original. R. p. 84. Under industry standards, the original is the first entity to which the information is recorded, which in this case was the SD card. R. pp. 86-87. The Anderson County Sheriff's Department's standard operating procedures with respect to photographs define originals and copies in keeping with this industry standard. R. p. 104.

In order to ensure that every copy can be authenticated to the original, a "hash" function must be performed on the original. R. pp. 87-88. With the software Johnson uses to hash a recording, the hash process assigns a unique 128-bit mathematical number to the file that will then appear on any replica. R. pp. 87-88. That number becomes the file's "DNA." R. p. 88. If the file is later moved, that "DNA" goes with it. R. p. 88.

Johnson explained the difference between a copy and a forensics export. Before the file is exported, the forensic software performs a hash against the file and assigns it an acquisition hash, its "DNA." When the software completes the export, it performs a verification hash and matches the verification hash with the acquisition hash. If a data file is forensically exported, a duplicate original has been created. R. p. 89.

Johnson reviewed two disks, using hashing software, and concluded they were both copies and were identical to each other. R. pp. 89-91, 97, 101. However, nothing

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Center, Southeast Region, from 2005 to 2009. R. p. 75. Currently, he is CEO and chief investigator of JLA Investigations and Securities, LLC. R. p. 75. While at the FBI and every year since, he has undergone extensive training in the area of computer forensics. R. pp. 77-78. He has served as an instructor in computer forensics at the FBI Academy. R. p. 79. He currently serves as an adjunct professor at a technical college, teaching computer forensics, crime scene investigations, and digital forensics. R. p. 78.

proved where they came from, and it was not scientifically or mathematically possible to do so. R. p. 91. If the original were available, he could prove if the disk was an accurate copy. R. p. 92. Without the original, however, there was no way to establish the authenticity of the copies. R. pp. 92, 102. Matching them with each other without authenticating them to the original is worthless. R. p. 102.

Johnson testified that FBI procedure for an operation such as the one performed in this case would require that the SD card be removed from the device and retained. R. pp. 93-94. The FBI's procedure is consistent with the written standard operating procedures of the Anderson County Sheriff's Department with respect to photographs. R. pp. 93-94. Under FBI procedures, a forensics examiner conducts a hash of the file on the SD card before it is exported. R. p. 94. If, in the future, it needs to be exported, its "DNA" is there. R. p. 95. Similarly, when Johnson works on a SLED case, SLED provides him with a hard drive containing the image that has been authenticated and verified with a hash value, against which he runs a hash to arrive at a match. R. pp. 111-12. Johnson has had matches 100 percent of the times he has worked with SLED files. R. p. 112.

Johnson is familiar with the rules of evidence, uses them in his profession, and was taught and has taught them at the FBI Academy, and in his opinion the disk does not meet the standards for admission under the evidence rules. R. pp. 98-99.

The trial court erred in admitting State's Exhibit 1. The admission of evidence is left to the sound discretion of the trial court, and the court's decision will not be reversed absent an abuse of that discretion. *State v. Hewins*, 409 S.C. 93, 103, 760 S.E.2d 814, 819 (2014). An abuse of discretion occurs when the court's decision is based upon an error of law or upon factual findings that are without evidentiary support. *Id.*

To prove the content of a recording, the original recording is required, except as otherwise provided by the South Carolina Rules of Evidence or by statute. Rule 1002, SCRE. The evidence before the court was undisputed that the original digital recording – the recording initially contained on the SD card – was no longer in existence. An "original" with respect to data stored in a computer or similar device is "any printout or other output readable by sight, shown to reflect the data accurately." Rule 1001(3), SCRE. In this case, the uncontroverted testimony of the only expert is that there is no ability, without the original, to establish that the proffered exhibit – a disk containing a non-forensic copy – is accurate. Because the definition of Rule 1001(3) is not satisfied, the court erred in concluding the disk was the original recording.

The trial court and the Court of Appeals erred in relying on *State v. Mitchell*, 399 S.C. 410, 731 S.E.2d 889 (Ct. App. 2012), to find the disk admissible. *Mitchell* dealt with photographs from a digital camera. The 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 not like that in *Mitchell*. The only witness qualified in computer forensics testified it could not be established that the proffered copy was in fact an accurate copy of the original SD card. The Court of Appeals also misapplied the statement quoted from *Mitchell* with respect to an opportunity to cross-examine. That principle does not apply here, because the trial court ***limited*** cross-examination on this issue and even ***denied*** a proffer of such cross-examination, rulings the Court affirmed. App. pp. 3-4, ¶¶ 8, 9.

The trial court also erred in its alternative conclusion that the disk was admissible as a duplicate under Rule 1003 and 1004 of the Rules of Evidence. A "duplicate" is

defined as "a counterpart produced by the same impression as the original, or from the same matrix, . . . or by other equivalent techniques which accurately reproduces the original." *See* Rule 1001(4), SCRE. The expert testified it could not be established that the copy on the disk was an accurate copy of the original recording on the SD card, which no longer existed. R. p. 114. The court erred in finding it to be a "duplicate" under Rule 1001(4) and therefore admissible under Rules 1003 and 1004. If the copy could be deemed a duplicate despite the undisputed testimony to the contrary, it was not admissible because it could not be authenticated to the destroyed original and it would be unfair to admit a recording that could not be so authenticated. *See* Rule 1003, SCRE.

The trial court and Court of Appeals rulings were also erroneous because of the substantial defects in the chain of custody. Gregory claimed he created the copy on this disk the day after the original was recorded. R. pp. 33, 46. At some point he gave the disk to Sloan, but he did not know when. R. pp. 38, 45. Sloan claimed he received the disk on May 31. R. pp. 60-61. No chain of custody document was created to reflect the whereabouts of the disk or the individuals that came in contact with it between its creation on May 30, 2012, and August 15, 2012. R. pp. 33, 38, 49, 60-61, 63-65, 68-70.

Sloan testified he placed the disk in the exterior tool box in the bed of his truck. R. pp. 61, 67-68. It was removed and handled by others while the case was pending. R. pp. 63, 68-70. The chain document first accounted for it on August 15, 2012, two and a half months after he claimed he received it. R. pp. 61, 64. That document omitted who handled it, copied it, or manipulated it while it was in Sloan's possession. R. pp. 68-70.

Johnson testified that under FBI procedures, the chain of custody is started immediately upon removal of the SD card from the recording device and its placement

into an evidence envelope. R. p. 94. Everyone in contact with the item signs for it. R. p. 94. He stated a disk could be affected by heat or cold and possibly humidity. R. p. 98.

The Court of Appeals erred in relying on *State v. Aragon*, 354 S.C. 334, 579 S.E.2d 626 (Ct. App. 2003), to find no chain of custody was necessary. *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. Here, the state was offering a copy of a digital recording, the original of which had been on the SD card and had not been preserved. A digital recording is not the same as a tape recording, where alteration, damage, or tampering would be readily discernible. Here, the only competent evidence established the copy was not a forensic copy and could not be authenticated without the original. Under these circumstances, the state was required to establish the chain of custody.

The Court of Appeals also erred in relying on *State v. Freiburger*, 366 S.C. 125, 620 S.E.2d 737 (2005), which addressed an item of non-fungible evidence. Non-fungible evidence is evidence that is unique and identifiable, for which establishing a strict chain of custody is not necessary. *Freiburger*, 366 S.C. at 134, 620 S.E.2d at 741 (2005); *State v. Glenn*, 328 S.C. 300, 305, 492 S.E.2d 393, 395 (Ct. App. 1997). The disk of a recorded conversation is not like the non-fungible items in *Freiburger* – a revolver – and in *Glenn* – a porcelain fragment. The disk was not unique and identifiable in its own right, the recording on it was susceptible to tampering, and the condition of the recording was susceptible to damage due to the heat and humidity of the location where Sloan kept it during those summer months. It was error to admit the recording where the state could not strictly establish the chain of custody for two and one-half months.

Over a defense objection, each juror was given a copy of a court reporter's transcript of the recording to read while the recording was played. R. p. 349, line 4 – p. 350, line 23; p. 353, lines 13-25; p. 354, line 19 – p. 355, line 20. In addition, Blackwell frequently read from the transcript, with the jury following along. R. p. 371, lines 17-19. Two transcripts had been created – one by an employee of the solicitor's office and the other by a court reporter – and they were not identical. R. pp. 618-22, 718, 846-904, 925-32. There are many discrepancies between the two, and each notes passages of the recording are inaudible. Under the circumstances of this case, the court abused its discretion in allowing the jurors to follow along with the court reporter's transcription.

The court reporter's transcript contains a significant misstatement of one passage attributed to "Male # 2," alleged to be Petitioner. On page 40 (R. p. 885), lines 13-14, the transcript reads, "I just don't want to get in trouble." The other transcript reflects this passage as "You don't want to get in trouble." R. p. 928 (third passage attributed to "JB"). The recording itself reveals that the speaker actually states, "You don't want to get in trouble." State's Exhibit 1. The incorrect transcript was reviewed repeatedly throughout the witness testimony, with the jurors reading along with the incorrect version each time. This incorrect transcript was ultimately made an exhibit that went into the jury room during deliberations, and the jurors requested and were allowed to have individual copies of it during their deliberations. R. pp. 171, 175.

Where the transcript was demonstrably inaccurate, the Court of Appeals erred in deferring to the trial court's discretion, App. p. 3, ¶ 6, and the trial court abused its discretion in allowing the transcript's use. *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). The error in allowing use of the inaccurate transcript was prejudicial. The state contended Petitioner asked Blackwell to kidnap Judge Williams on May 27, then called off the plan before May 29, the date the recording was made. The defense contended the only person who ever talked about harming anyone or doing anything to Williams was Blackwell. The court reporter's erroneous transcription – "I just don't want to get in trouble" – bolstered the state's theory that Petitioner had been involved in a kidnapping plan, had called it off, and was now saying he did not want to get in trouble. The correct version, contained in the other transcript and clearly audible on the recording, bolstered the defense's case – it was Blackwell who had talked of doing something to Williams, and the speaker is saying to Blackwell, "You don't want to get in trouble." The incorrect version of the transcript, which the jurors read repeatedly throughout the trial, unduly emphasized an inaccurate – and incriminating – comment attributed to Petitioner. *Cf. State v. Gulledge*, 277 S.C. 368, 371-72, 287 S.E. 2d 488, 490 (1982) (allowing jury to take transcript of a recording into jury room unduly emphasized the evidence). Allowing use of this inaccurate transcript was an abuse of discretion.

Contrary to the Court of Appeals' finding, App. p. 3, ¶ 7, this issue is preserved. The objection was made in limine and during the trial and was finally ruled upon. R. pp. 120-22, 349-50, 353. Nothing counsel did thereafter waived the earlier objection, which had been finally ruled upon. *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).

Agent Sloan testified the disk was considered the original audio recording. R. p. 426. On cross-examination, the defense sought to introduce evidence of the state's representations during the pre-trial hearing as to the existence of a different original. R. p. 472, line 24 – p. 473, line 7. The court interrupted, excused the jury, and informed counsel it would not allow testimony concerning another original. However, the court indicated it would allow a proffer of the evidence. R. p. 473, lines 8-21. In its proffer, the defense established the solicitor's earlier assurance to the court that the state had the original recording on the digital device and would make it available. R. p. 474. The defense then sought to establish whether the device was ever produced. R. p. 474. The court stated the defense was interchanging the original and the device and this line of questioning would confuse the jury. R. p. 475, lines 3-5. The court stated it had ruled the transferred version was the original and had been made available to the defense, and this line of questioning would confuse the jury. R. p. 475, lines 3-9. The court then refused to allow the proffer and refused to allow this questioning before the jury. R. p. 475, lines 9-13. This ruling improperly limited both the right to meaningful cross-examination and the right to meaningful appellate review of the court's evidentiary ruling, as more fully argued in the Final Brief of Appellant, pp. 24-26, incorporated herein by reference.

The Court of Appeals erred in rejecting Petitioner's arguments that the trial court abused its discretion by limiting cross-examination of this witness concerning the original of the recording on the SD card, which had not been preserved, and by not allowing a proffer of that evidence. *See* App. pp. 3-4, ¶¶ 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* App. p. 2A, ¶ 5. Second, the argument that the trial court abused its discretion in refusing the proffer is preserved. The defense began its cross-examination with questions about the original recording, the court *sua sponte* excused the jury and informed the defense it would not allow such questioning, and the defense then attempted to proffer the testimony. 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. This Court should grant *certiorari*, decide the issue on its merits, and reverse.

CONCLUSION

For the foregoing reasons, this Court should grant a writ of certiorari, reverse the rulings of the Court of Appeals and the circuit court, and grant Petitioner a new trial.

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THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM OCONEE COUNTY
Court of General Sessions
R. Lawton McIntosh, Circuit Court Judge

Case No. 2012-GS-37-597
Appellate Case No. 2013-001895

State of South Carolina,

Respondent,

v.

James Richard Bartee, Jr.,

Petitioner

PROOF OF SERVICE

I hereby certify that I have served copies of the Petition for Writ of Certiorari and Appendix upon respondent, by mail to its counsel of record, Assistant Attorney General William M. Blitch, Jr., Post Office Box 11549, Columbia, South Carolina 29211, on October 10, 2016.

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