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OCT 10 2016

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

Unpublished Opinion No. 2016-UP-340
(S.C. Ct. App. filed June 29, 2016)

The State,

Respondent,

v.

James Richard Bartee, Jr.,

Petitioner.

APPENDIX

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INDEX

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

James Richard Bartee, Jr., Appellant.

Appellate Case No. 2013-001895

Appeal From Oconee County
R. Lawton McIntosh, Circuit Court Judge

Unpublished Opinion No. 2016-UP-340
Heard March 16, 2016 – Filed June 29, 2016

AFFIRMED

Katherine Carruth Goode, of Winnsboro, and Jack B. Swerling, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General William M. Blitch, Jr., both of Columbia; and Solicitor Christina Theos Adams, of Anderson, for Respondent.

PER CURIAM: James Richard Bartee, Jr. appeals his conviction for solicitation to commit a felony, arguing the trial court erred in (1) allowing questioning

concerning a suspension in his employment history and denying his motion for a mistrial based on that questioning; (2) allowing a witness to give a subjective, speculative interpretation of certain statements he allegedly made; and (3) admitting a disk containing the audio recording of a conversation with him, admitting a purported transcript of that recording, and limiting his cross-examination of a witness with respect to that recording. We affirm pursuant to Rule 220(b), SCACR, and the following authorities:

1. As to Bartee's argument that the trial court erred in allowing testimony concerning his employment suspension and in denying his motion for a mistrial: *State v. Brown*, 402 S.C. 119, 125 n.2, 740 S.E.2d 493, 496 n.2 (2013) (stating for an issue to be preserved for appellate review it must have been raised to and ruled upon by the trial court); *State v. Dickman*, 341 S.C. 293, 295, 534 S.E.2d 268, 269 (2000) (stating a party cannot argue one ground below and then argue another ground on appeal); *Wierszewski v. Tokarick*, 308 S.C. 441, 444 n.2, 418 S.E.2d 557, 559 n.2 (Ct. App. 1992) ("An issue is not preserved for appeal merely because the trial court mentions it."); *State v. Hoffman*, 312 S.C. 386, 393, 440 S.E.2d 869, 873 (1994) ("A contemporaneous objection is required to properly preserve an error for appellate review."); *State v. Lynn*, 277 S.C. 222, 226, 284 S.E.2d 786, 789 (1981) (stating the failure to make a proper contemporaneous objection to the admission of evidence "cannot be later bootstrapped by a motion for a mistrial" and waives any objection to the evidence); *State v. Gilmore*, 396 S.C. 72, 84, 719 S.E.2d 688, 694 (Ct. App. 2011) (stating an issue conceded at trial cannot be argued on appeal); *State v. Bantan*, 387 S.C. 412, 418, 692 S.E.2d 201, 204 (Ct. App. 2010) (finding the defendant waived any objection to the denial of his mistrial motion when he refused the curative instruction offered by the trial court).

2. As to Bartee's argument that Nick Blackwell's testimony was speculative: *Gilmore*, 396 S.C. at 84, 719 S.E.2d at 694 (stating an issue conceded at trial cannot be argued on appeal).

3. As to Bartee's argument that Blackwell's testimony was contradictory and lacked credibility: *State v. Needs*, 333 S.C. 134, 144, 508 S.E.2d 857, 862 (1998) ("After the trial court properly has determined a witness is competent, the resolution of the credibility of the witness is within the province of the jury.").

4. As to Bartee's argument that Blackwell's testimony should have been excluded under Rule 403, SCRE: Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."); *Judy v. Judy*, 384 S.C. 634, 641, 682 S.E.2d 836, 839 (Ct. App. 2009) ("The trial court's ruling to admit or exclude evidence will only be reversed if it constitutes an abuse of discretion amounting to an error of law."); *State v. Lee*, 399 S.C. 521, 527, 732 S.E.2d 225, 228 (Ct. App. 2012) ("A trial court has particularly wide discretion in ruling on Rule 403 objections.").

5. As to Bartee's argument that the trial court erred in admitting the audio recordings: *State v. Mitchell*, 399 S.C. 410, 421, 731 S.E.2d 889, 895-96 (Ct. App. 2012) ("The question of whether to admit evidence under [Rules 1001 to 1004, collectively known as the best evidence rule,] is . . . addressed to the discretion of the trial court." (alteration in original) (quoting *State v. Halcomb*, 382 S.C. 432, 443-44, 676 S.E.2d 149, 154-55 (Ct. App. 2009))); Rule 1002, SCRE ("To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute."); Rule 1001(3), SCRE ("An 'original' of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it."); *Mitchell*, 399 S.C. at 421, 731 S.E.2d at 896 (finding digital photographs downloaded from a camera onto a computer and then copied onto a disk were the "original" photographs pursuant to Rule 1001, SCRE); *id.* (noting 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); *State v. Freiburger*, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005) (stating for the admission of non-fungible evidence, a strict chain of custody is not required); *State v. Aragon*, 354 S.C. 334, 336-37, 579 S.E.2d 626, 627 (Ct. App. 2003) (stating that establishing the chain of custody of an audio tape was not necessary for the tape's admissibility because the tape was otherwise authenticated); Rule 901(a), SCRE ("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.").

6. As to Bartee's argument that the trial court erred in allowing the jury to use the court reporter's transcript of the audio recordings while the recordings were being played in the courtroom: *United States v. Collazo*, 732 F.2d 1200, 1203 (4th Cir. 1984) ("Whether to allow the use of transcripts to aid in the presentation of tape recorded evidence is within the [trial] court's sound discretion."); *State v. Winkler*, 388 S.C. 574, 585, 698 S.E.2d 596, 602 (2010) (finding the trial court did not abuse its discretion by allowing the jury to review a 911 call transcript while the 911 tape was replayed in the courtroom, which mirrored the way the evidence was presented at trial).

7. As to Bartee's argument that the trial court erred in allowing the jury to take the court reporter's transcript of the audio recordings into the jury room during deliberations: *Hoffman*, 312 S.C. at 393, 440 S.E.2d at 873 ("A contemporaneous objection is required to properly preserve an error for appellate review."); *State v. Stroman*, 281 S.C. 508, 513, 316 S.E.2d 395, 399 (1984) ("[A] party 'cannot complain of an error which his own conduct has induced.'" (quoting *State v. Worthy*, 239 S.C. 449, 465, 123 S.E.2d 835 (1962))); *Gilmore*, 396 S.C. at 84, 719 S.E.2d at 694 (stating an issue conceded at trial cannot be argued on appeal).

8. As to Bartee's argument that the trial court erred in limiting his cross-examination of Agent Michael Sloan regarding the audio recordings: *State v. Aleksey*, 343 S.C. 20, 33-34, 538 S.E.2d 248, 255 (2000) ("The right to a meaningful cross-examination of an adverse witness is included in the defendant's Sixth Amendment right to confront his accusers. This does not mean, however, that trial courts conducting criminal trials lose their usual discretion to limit the scope of cross-examination." (citation omitted)); *id.* at 34, 538 S.E.2d at 255 ("On the contrary, 'trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, witness' safety, or interrogation that is repetitive or only marginally relevant.'" (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986))).

9. As to Bartee's argument that the trial court denied his due process right to meaningful review by refusing to allow him to proffer additional testimony from Agent Sloan: *Brown*, 402 S.C. at 125 n.2, 740 S.E.2d at 496 n.2 (stating for an issue to be preserved for appellate review the issue must have been raised to and ruled upon by the trial court).

AFFIRMED.

LOCKEMY, C.J., and WILLIAMS and MCDONALD, JJ., concur.

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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August 08, 2016

Mr. Jack B. Swerling, Esquire
1720 Main St. #301
Columbia SC 29201

Re: The State v. James Richard Bartee, Jr.
Appellate Case No. 2013-001895

Dear Counsel:

This will acknowledge receipt of your petition for rehearing.

By copy of this letter, opposing counsel is requested to file a return to this motion no later than ten (10) days from the date of this letter.

Very truly yours,

V. Claire Allen, Deputy

CLERK

cc: Alan McCrory Wilson, Esquire
William M. Blitch, Jr., Esquire
Katherine Carruth Goode, Esquire
Christina Theos Adams, Esquire

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Oconee County
Honorable R. Lawton McIntosh, Circuit Court Judge
Appellate Case No. 2013-001895

The State Respondent,

v.

James Richard Bartee, Appellant.

RETURN TO PETITION FOR REHEARING

On June 29, 2016, this Court correctly affirmed Appellant's conviction and sentence. In his Petition for Rehearing, Appellant has not demonstrated how this Court misapprehended or overlooked any relevant fact or law. Instead, he merely objects to the outcome determined by the Court on each of the issues raised. The Court's findings and conclusions of law are entirely supported by the Record and the case law cited in the Court's opinion. Accordingly, the Court should deny the Petition for Rehearing.

The State relies on its Final Brief of Respondent for any further discussion of the issues because all issues raised in the Petition for Rehearing have been previously addressed in total by the State in its Final Brief. The State asserts this Court completely and correctly addressed the issues and rehearing is not warranted. Accordingly, this Court should deny the Petition for Rehearing.

CONCLUSION

For all of the foregoing reasons, the State requests the panel deny the petition for rehearing.

Respectfully submitted,

ALAN WILSON
Attorney General

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ATTORNEYS FOR RESPONDENT

August 18, 2016

The South Carolina Court of Appeals

The State, Respondent,

v.

James Richard Bartee, Jr., Appellant.

Appellate Case No. 2013-001895

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

C.J.

J.

J.

Columbia, South Carolina

cc: The Honorable R. Lawton McIntosh
Alan McCrory Wilson, Esquire
Jack B. Swerling, Esquire
William M. Blitch, Jr., Esquire
Katherine Carruth Goode, Esquire
Christina Theos Adams, Esquire