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THE 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
Appellate Case No. 2013-001895

State of South Carolina,

Respondent,

v.

James Richard Bartee, Jr.,

Appellant

FINAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

Table of Authorities ii

Statement of Issues on Appeal 1

Statement of the Case 1

Statement of Facts 2

Argument 5

Conclusion 26

TABLE OF AUTHORITIIES

Cases:

Ellenburg v. State, 367 S.C. 66, 625 S.E.2d 224 (2006)....................9

State v. Aragon, 354 S.C. 334, 579 S.E.2d 626 (Ct. App. 2003)....................21, 22

State v. Beam, 336 S.C. 45, 518 S.E.2d 297 (Ct. App. 1999)....................7

State v. Brown, 356 S.C. 496, 589 S.E.2d 781 (Ct. App. 2003)....................13

State v. Burgess, 391 S.C. 15, 703 S.E.2d 512 (Ct. App. 2010)....................12

State v. Chisholm, 395 S.C. 259, 717 S.E.2d 614 (Ct. App. 2011)....................8, 9

State v. Council, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999)....................13

State v. Culbreath, 377 S.C. 326, 659 S.E.2d 268 (Ct. App. 2008)....................7

State v. Dial, 405 S.C. 247, 746 S.E.2d 495 (Ct. App. 2013)....................12

State v. Ferguson, 376 S.C. 615, 658 S.E.2d 101 (Ct. App. 2008)....................9

State v. Freiburger, 366 S.C. 125, 620 S.E.2d 737 (2005)....................22

State v. Glenn, 328 S.C. 300, 492 S.E.2d 393 (Ct. App. 1997)....................22

State v. Gulledge, 277 S.C. 368, 287 S.E. 2d 488 (1982)....................24

State v. Hewins, 409 S.C. 93, 760 S.E.2d 814 (2014)....................19

State v. Ladson, 373 S.C. 320, 644 S.E.2d 271 (Ct. App. 2007)....................26

State v. Lee, 269 S.C. 421, 237 S.E.2d 768 (1977)....................23

State v. Mitchell, 399 S.C. 410, 731 S.E.2d 889 (Ct. App. 2012)....................20

State v. Page, 378 S.C. 476, 663 S.E.2d 357 (Ct. App. 2008)....................6

State v. Portillo, 408 S.C. 66, 757 S.E.2d 721 (Ct. App. 2014)....................8

State v. Sanders, 356 S.C. 214, 588 S.E.2d 142 (Ct. App. 2003)....................13

State v. Stroman, 281 S.C. 508, 316 S.E.2d 395 (1984)....................7

State v. Whatley, 407 S.C. 460, 756 S.E.2d 393 (Ct. App. 2014)....................................25

State v. Young, 378 S.C. 101, 661 S.E.2d 387 (2008)..6, 8

Vaughn v. State, 362 S.C. 163, 607 S.E.2d 72 (2004)..9, 10

Constitutional Provisions:

S.C. Const. art. I, § 3...10, 26

S.C. Const. art. I, § 14...25

U.S. Const. amend. V...10, 26

U.S. Const. amend. VI...25

U.S. Const. amend. XIV...10, 25, 26

Rules of Court:

Rule 102, South Carolina Rules of Evidence..13

Rule 403, South Carolina Rules of Evidence..13

Rule 1001(3), South Carolina Rules of Evidence...19, 20

Rule 1001(4), South Carolina Rules of Evidence..20

Rule 1002, South Carolina Rules of Evidence..19

Rule 1003, South Carolina Rules of Evidence..20

Rule 1004, South Carolina Rules of Evidence..20

STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in allowing questioning concerning a suspension in appellant's employment history and in denying the defense motion for a mistrial based on the solicitor's questions concerning the suspension and the basis for the suspension?

2. Did the trial court err in allowing Nick Blackwell, a prosecution witness, to give his subjective, speculative interpretation of certain statements alleged to have been made by appellant during a recorded conversation?

3. Did the trial court err in admitting a disk containing an audio recording of certain conversations between Nick Blackwell and others, in admitting a purported transcript of that recording, and in limiting the defense's cross-examination of one of the state's witnesses with respect to that recording?

STATEMENT OF THE CASE

Appellant, James Richard Bartee, Jr., was arrested May 30, 2012, 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. An Oconee County grand jury returned a true bill of indictment on the charge on July 9, 2012. R. pp. 1-2. Pretrial hearings were held February 8, 2013, before Judge J.C. Nicholson, Jr., and March 14, 2013, before Judge R. Lawton McIntosh. Judge McIntosh presided over the trial in Oconee County Court of General Sessions August 26-30 and September 3, 2013. The jury found appellant 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.

STATEMENT OF FACTS

Appellant 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. At the time of his arrest, he remained affiliated with the Secret Service, as a special investigator, conducting background investigations for the Secret Service. R. p. 639.

During the sheriff's race, questions surfaced concerning whether appellant met the eligibility requirements to run for sheriff. R. pp. 147, 674. Appellant 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 appellant did not meet the qualifications for sheriff and seeking his removal from the ballot. R. pp. 152, 161, 672-73, 905-13. Appellant moved to intervene and was made a party in that action. R. pp. 675-76, 922-24. An initial hearing was held May 24, 2012, and the case was continued to May 30, 2012. R. pp. 152, 676-79. This criminal charge arose from an allegation that appellant asked Nick Blackwell to kidnap Judge Williams, in order to prevent Williams from being present at the hearing on May 30.

Nick Blackwell alleged that on May 27, 2012, appellant asked him to kidnap Judge Williams and gave him $200 to purchase the supplies he would need. R. pp. 330-33, 385. On May 29, Blackwell reported this allegation to an Oconee County sheriff's deputy. R. pp. 192-94, 335-36. Oconee County referred the allegation to the State Law

Enforcement Division (SLED). R. pp. 195, 336, 415. SLED obtained the assistance of Anderson County sheriff's deputies. R. pp. 197-98, 416-20.

Using equipment of the Anderson County Sheriff's Department, on the night of May 29-30, the officers created a recording of two telephone calls, one allegedly made by Blackwell to Joe Milbert and another allegedly returned by Milbert to Blackwell, and of a wire transmission of an alleged conversation between Blackwell and appellant. R. pp. 200, 205. The court admitted this recording into evidence, over defense objections on multiple grounds. 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 appellant, ostensibly to return a portion of the funds Blackwell claimed appellant had given him. R. pp. 199, 342, 368, 428.

The state contended the recording implicated appellant 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 appellant meant by certain comments on the recording. R. pp. 345-48, 355-69.

Blackwell and appellant had become acquainted during the campaign for sheriff. R. pp. 316-17, 646-47. Blackwell claimed that on May 26, 2012, at a community festival, appellant talked about the civil suit filed by Judge Williams and wondered what would happen if Williams did not show up for court. R. p. 324. After appellant had left, Blackwell claimed another individual, Ryan Stancil, approached and gave him a business card with Williams' name and address on the back. R. p. 324. Blackwell claimed the next night, May 27, at appellant's house, appellant asked him to kidnap Williams. R. pp. 329-30. Another witness, Lewis Stevenson Hunnicutt, who was in appellant's garage,

heard this entire conversation over an intercom and testified appellant did not plan a kidnapping in that conversation. R. pp. 541, 543, 546, 549.

The defense contended there was never any plan by appellant to kidnap Judge Williams and never any solicitation of a felony. R. pp. 652, 697, 699-701, 715, 731, 734. Milbert testified Blackwell, not appellant, talked about kidnapping Judge Williams. R. pp. 266, 275, 280-81. Appellant also heard Blackwell talk about doing something to Judge Williams. R. p. 680. Blackwell had also talked about harming others, and appellant did not take him seriously. R. p. 680. Blackwell told another witness appellant had asked him to kidnap a judge, and she also did not think he was serious. R. pp. 301, 305-07. Stancil said Blackwell, not appellant, asked him to look up Judge Williams' information. R. pp. 569-70. It was Stancil 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 in connection with the campaign. R. pp. 265-67. Witnesses testified that appellant, 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 appellant would say to calm Blackwell down. R. pp. 493-99, 594, 605, 690-91. Witnesses also testified that appellant had loaned $180 to Blackwell on May 19, several days before Judge Williams filed the action to have appellant removed from the ballot. R. pp. 586, 590-92, 671, 699, 905-18. Appellant 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.

ARGUMENT

I. THE TRIAL COURT ERRED IN ALLOWING QUESTIONING CONCERNING A SUSPENSION IN APPELLANT'S EMPLOYMENT HISTORY AND FURTHER ERRED IN DENYING THE DEFENSE MISTRIAL MOTION BASED ON THIS QUESTIONING.

The state called Joe Milbert as a witness in its case-in-chief. Milbert and appellant were friends, having known each other since first grade. R. pp. 255-56. During cross-examination, the defense questioned Milbert about appellant's training with the Secret Service. R. p. 275, lines 23-25. Milbert answered, "He had exemplary training." R. 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 interposed an objection, 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 appellant was a Secret Service agent. R. p. 291, lines 9-11.

The court erred in ruling the defense opened the door and in allowing this questioning concerning appellant's alleged disciplinary record. The defense did not open the door. Rather, the defense questioned the witness concerning appellant's *training*, which the witness characterized as exemplary. R. p. 275, line 22 – p. 276, line 1. The defense went on to inquire further about appellant'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 appellant'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 appellant'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) (defense questions on the 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. In this case,

these principles are not applicable. Here, the door was not opened by the defense's own introduction of evidence or examination of the witness. The question concerning appellant's record was first posed by the *solicitor* on redirect. It was not in explanation or rebuttal of anything elicited from the witness by the *defense* during cross-examination. This was not a situation of the defense's making. Nor do the precedents 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 subject 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); *State v. Chisholm*, 395 S.C. 259, 265, 717 S.E.2d 614, 617 (Ct. App. 2011). 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.

Following the court's ruling, the solicitor questioned the witness not only concerning the alleged three-day suspension, but also the alleged basis for that suspension – a report that appellant had used racial slurs. R. p. 291, lines 9-11. The defense moved for a mistrial. Counsel argued two reasons. First, he had not opened the door to evidence about a suspension. R. p. 312, lines 11-14. Second, the solicitor's

question went too far in also stating the alleged basis for the suspension – use of racial slurs. R. p. 313, lines 5-16. The defense 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.*; *see also* 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 appellant 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. *Chisholm*, 395 S.C. at 274, 717 S.E.2d at 622. 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. Here, these requirements are met. The court clearly erred in allowing this improper questioning

of the witness about appellant's prior suspension. Moreover, the information imparted by the solicitor was highly inflammatory and unduly prejudicial, and no curative charge could remove the prejudice resulting from this information 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 by revisiting the issue of appellant's 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. Indeed, the solicitor mentioned the second phrase even after the court sustained a hearsay objection as to the first phrase. R. p. 740, line 16-17. But for the court's prior erroneous ruling that the defense had opened the door, this area of 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. This argument invited the jury to convict because of "what kind of man he really is," not on the basis of a finding that he was guilty of the charged offense beyond a reasonable doubt. Under the circumstances of this case, the erroneous rulings on the defense's objection and motion for mistrial cannot be deemed harmless. This Court should reverse and grant appellant a new trial.

II. THE TRIAL COURT ERRED IN ALLOWING NICK BLACKWELL TO GIVE HIS SUBJECTIVE, SPECULATIVE INTERPRETATION OF CERTAIN STATEMENTS ALLEGED TO HAVE BEEN MADE BY APPELLANT ON THE RECORDING.

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

Later in Blackwell's testimony, the solicitor asked what appellant meant by certain statements contained on the recording of the alleged conversation the night of May 29-30. Blackwell stated what he claimed appellant said about letting the dust settle and not needing a mask. The solicitor asked what appellant 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 by stating,

> 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. The defense 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 appellant 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 appellant 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 appellant 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 appellant's words meant. R. pp. 354-69. Blackwell's subjective impressions, including his expression of the belief that appellant was threatening him personally and his assumption that appellant would harm Williams in the future, were highly prejudicial. R. pp. 363, 369. The court erred in allowing this speculative, prejudicial testimony.

The 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). Admission of 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.

Even if the court were correct in its belief that it could allow a witness to give his impression of another person's meaning, Blackwell's impressions should not have been allowed in this case because those impressions were contradicted by his own earlier testimony that appellant had specifically said not to kill Williams and those impressions were not contained in any of Blackwell's three written statements. Under these circumstances, his testimony about what he thought appellant meant was not credible and was patently unreliable. Because reliability is the benchmark for admission of all evidence, 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 the 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) (rationale for admitting certain hearsay statements is that they have adequate indicia of reliability, either because they fall within a firmly rooted hearsay exception or because reliability is established through a showing of particularized guarantees of trustworthiness).

Most importantly, however, this testimony was without *any* probative value, and its *only purpose* was to unduly prejudice appellant. *See* Rule 403, SCRE. What appellant 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. 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. It was irrelevant that appellant allegedly called off the plan before the night of May 29-30. R. p. 140, lines 17-19; p. 800, lines 6-8, 10-11. It was also irrelevant what appellant may have meant by comments made to Blackwell after the alleged crime of solicitation was complete. Indeed, the state itself asserted that events after May 27 when the solicitation was alleged to have occurred "are wholly irrelevant." R. p. 800, line 10. Blackwell's subjective impressions of appellant's meaning had no probative value whatsoever.

However, this testimony was clearly prejudicial. It conveyed to the jury that appellant was of a mind to harm Judge Williams in the future. It conveyed to the jury Blackwell's purported belief that appellant was also threatening him and his family with harm. It invited the jury to convict appellant 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 appellant was a bad and dangerous person. The prejudicial effect of this testimony was extreme. 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 appellant when the plan to kidnap Williams was allegedly hatched, and that witness testified that appellant did not plan a kidnapping during that conversation. R. pp. 543, 546, 549. In the face of this evidence directly in conflict with the testimony of Blackwell, it is extremely likely that Blackwell's 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. Appellant should be granted a new trial.

III. THE TRIAL COURT ERRED IN ADMITTING A DISK CONTAINING THE PURPORTED AUDIO RECORDING OF TELEPHONE CALLS AND A CONVERSATION WITH APPELLANT, IN ADMITTING A PURPORTED TRANSCRIPT OF THAT RECORDING, AND IN LIMITING THE DEFENSE'S CROSS-EXAMINATION OF A WITNESS WITH RESPECT TO THAT RECORDING.

The defense moved in limine to exclude the disk containing the recording of the purported phone calls between Blackwell and Milbert and the purported conversation with appellant on the night of May 29-30. The defense 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. The defense also objected to the admission of a court reporter's transcription of this 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 the defense in its cross-examination of a prosecution witness about this evidence. R. pp. 124-25. 127-28, 254, 341, 473-75. This Court should reverse and grant appellant a new trial.

A. The recording was inadmissible because it was not the original or an accurate, authenticated duplicate of the original, and because of a defective chain of custody of the disk.

The evidence established that a digital recording 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. At the conclusion of the events of May 29-30, officers removed the SD card from the device. Anderson County 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 Gregory generated from his hard drive. R. p. 44. At some point he gave this disk to Sloan but he did not know when. R. pp. 38, 45. Sloan stated he received the disk May 31, 2012. R. p. 61. However, no chain of custody document accounted for its whereabouts until August 15, 2012. R. pp. 61, 64.

At a pretrial hearing held February 8, 2013, the solicitor represented to the court that the original recording on the digital device was still available. R. pp. 6-7, 9-10. The defense sought to compare the copy on the disk to the original digital recording. R. p. 8. The court directed the state to make the original digital recording available so that the defense could make this comparison. R. p. 10. Alfred Johnson, an expert hired by the defense to make this comparison, testified that when he was there to make the comparison on March 6, 2013, he was told there was no original. R. p. 83.

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 Federal Bureau of Investigation (FBI) for 31 years, the first 21 years as an agent and the last 10 years as a supervisory special agent. R. p. 76. While 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 Center, Southeast Region, from 2005 to 2009. R. p. 75. Currently, he is the 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 in Charleston, teaching computer forensics, crime scene investigations, and digital forensics. R. p. 78.

Johnson was supposed to review the original recording on March 6, 2013. R. pp. 81-82. He testified he was unable to view or analyze the original. R. p. 82. 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 on March 6, using hashing software, and concluded they were both copies and were identical to each other. R. pp. 89-91, 97, 101. However, nothing 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. Then, in the future, if it needs to be exported, its "DNA" is there. R. p. 95. Similarly, when Johnson works on a case handled by SLED, 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 and comes up with 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 procedure, uses them in his profession, and was taught and has taught them at the FBI Academy. R. pp. 98-99. In his opinion, the disk being offered as State's Exhibit 1 does not meet the standards for admission under the evidence rules. R. p. 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). As previously noted, 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 court relied on *State v. Mitchell*, 399 S.C. 410, 731 S.E.2d 889 (Ct. App. 2012), in finding that the disk was the original. R. p. 124. This reliance was misplaced. *Mitchell* dealt with photographs from a digital camera. The court concluded that 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 in keeping with the evidence in *Mitchell*. In this case, the only witness qualified in computer forensics testified that it could not be established that the proffered copy was in fact an accurate copy of the original SD card. The court's conclusion was contrary to the evidence and to the definition contained in Rule 1001(3).

The 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. As noted above, the expert testified that it could not be established that the copy on the disk was an accurate copy of the original recording on the SD card, which was no longer in existence. R. p. 114. The court erred in finding this copy to be a "duplicate" under Rule 1001(4) and therefore admissible under Rule 1004. However, if the disk could be deemed a duplicate despite the undisputed expert testimony to the contrary, it nonetheless was not admissible under Rule 1003, because the copy 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 court further erred in admitting this disk because of the substantial defects in the chain of custody of the evidence. Gregory claimed he created the copy of the

recording 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 from Gregory 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 into contact with the disk from the time it was created on May 30, 2012, until 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. However, he also acknowledged that it was removed and handled by others from time to time while this charge was pending. R. pp. 63, 68-70. The chain of custody document provided to the defense first accounted for the disk on August 15, 2012, two and one-half months after Sloan claimed he received it. R. pp. 61, 64. The chain of custody document failed to indicate who handled the disk, 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 that has contact with the item signs for it. R. p. 94. Johnson also testified that a disk, which Sloan kept in the toolbox in the bed of his truck throughout the summer months, could be affected by heat or cold and possibly by humidity. R. p. 98.

The defense contended the recording was inadmissible because of the defective chain of custody. The court relied on *State v. Aragon*, 354 S.C. 334, 579 S.E.2d 626 (Ct. App. 2003), to find that no chain of custody was necessary for admission of this disk. *Aragon* is not controlling in this case. *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 discernable. In this case, the only competent evidence established that the copy was not a forensic copy and could not be authenticated without the original digital recording. Under these circumstances, the state was required to establish the chain of custody.

The state contended the chain was not necessary because the recording was not a fungible item. Non-fungible evidence is evidence that is unique and identifiable, for which establishment of a strict chain of custody is not necessary. *State v. Freiburger*, 366 S.C. 125, 134, 620 S.E.2d 737, 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. Here, the court erred in admitting this recording where the state could not strictly establish the chain of custody for a two-and-one-half-month period.

B. The court erred in admitting the transcript of the recording.

Over the defense's objection, each juror was given a copy of a court reporter's transcription 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 still 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 the two transcripts were not identical. R. pp. 618-22, 718, 846-904, 925-32. There are many discrepancies between the two transcripts. Each transcript contains notations that passages 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 transcription contains a significant misstatement of one passage attributed to "Male # 2," alleged to be appellant. 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"). A careful review of the recording itself reveals that the speaker actually states, "You don't want to get in trouble." State's Exhibit 1. The transcript was reviewed repeatedly throughout the witness testimony, with the jurors reading along with the incorrect version each time. This transcript was ultimately made an exhibit that went back to the jury room during deliberations, and the jurors requested and were allowed to have individual copies of the incorrect transcript during their deliberations. R. pp. 171, 175.

Where the transcript was demonstrably inaccurate, the court abused its discretion in allowing the jurors to read it while the recording was being played. *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 appellant asked Blackwell to kidnap Judge Williams on May 27, but then called off that 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 version of the statement "I just don't want to get in trouble" bolstered the state's theory: appellant 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, is in keeping with the defense's case: Blackwell was the one who had talked about 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 appellant. *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 the use of this inaccurate transcript was an abuse of discretion.

C. The court improperly limited the defense's cross-examination with respect to the disk.

SLED agent Sloan testified that the disk was considered the original audio recording. R. p. 426. On cross-examination, the defense sought to introduce evidence concerning the state's representations during the earlier evidentiary hearing concerning

the existence of a different original. R. p. 472, line 24 – p. 473, line 7. Without any objection by the state, the court interrupted the questioning, excused the jury, and informed defense counsel that 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.

At the beginning of its proffer, the defense established the solicitor's assurance to the court in the earlier hearing that the state had the original recording on the digital device and would make it available to the defense. 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 that 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, by not even allowing a proffer of the evidence the defense sought to elicit.

The right to meaningful cross-examination of the state's witnesses is a component of a defendant's right to confront his accusers. *State v. Whatley*, 407 S.C. 460, 467, 756 S.E.2d 393, 396 (Ct. App. 2014); *see* U.S.Const. amend. VI, XIV; S.C. Const. art. I, § 14. Even though the court had ruled the recording was admissible as the original, the defense nonetheless had the right to present a full account of what had happened to the SD card from the recording device and how the disk admitted into evidence had come into being.

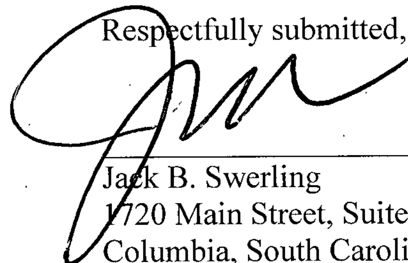
By curtailing the defense in fully developing this evidence, the court deprived it of the opportunity to have the jury fully assess the credibility of this evidence and the weight to give it.

The right to meaningful appellate review is a component of a defendant's right to due process. *See* U.S. Const. amend. V, XIV; S.C. Const. art. I, § 3; *cf. State v. Ladson*, 373 S.C. 320, 327, 644 S.E.2d 271, 274-75 (Ct. App. 2007) (new trial was required where inability to reconstruct missing transcript deprived defendant of meaningful appellate review). In the absence of a proffer of the evidence to be elicited from the witness, appellant is deprived of the opportunity to demonstrate to the appellate court the nature of the prejudice resulting from the limitation of cross-examination. The recording was the critical piece of evidence in the state's case against appellant. Its contents and accuracy were central issues in the case. This court should find the trial court abused its discretion in refusing the proffer and, because of the unique circumstances of this case and the potential prejudice that may have resulted from exclusion of this evidence, reverse and remand for a new trial.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the circuit court and grant appellant a new trial.

Respectfully submitted,



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STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Oconee County
Court of General Sessions
R. Lawton McIntosh, Circuit Court Judge

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

State of South Carolina,

Respondent,

v.

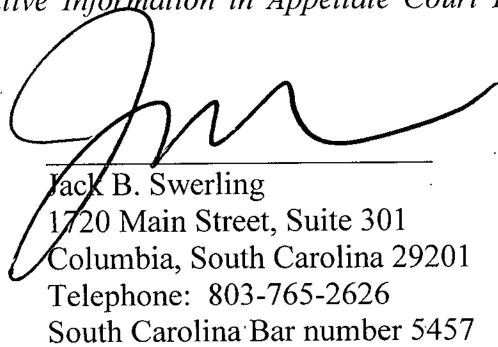
James Richard Bartee,

Appellant

CERTIFICATE OF COUNSEL

Counsel hereby certifies that the final brief and final reply brief of appellant comply with Rule 211(b) of the South Carolina Appellate Court Rules.

Counsel further certifies that the final brief and final reply brief of appellant comply with the Order of the Supreme Court of South Carolina, *Re Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings*, 407 S.C. 607, 757 S.E.2d 421 (April 15, 2014).



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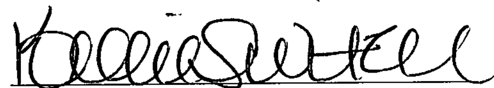
PROOF OF SERVICE

I certify that I have served the final brief of appellant, final reply brief of appellant, and certificate of counsel upon respondent, by mailing a copy of each, postage prepaid, to Assistant Attorney General William M. Blitch, Jr., P.O. Box 11549, Columbia, South Carolina 29211, on May 19, 2015.



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