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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Oconee County

R. Scott Sprouse, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

GEROME CHRIS SMITH

APPELLANT

APPELLATE CASE NO. 2015-001616

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# FINAL BRIEF OF APPELLANT

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The chain of custody for the video of the purported controlled buy was defective as the State failed to establish that the video footage played at trial was a fair and accurate representation of the meeting between Appellant and informant Brandon Hunter.

## STATEMENT OF THE CASE

On April 13, 2015, the Oconee County Grand Jury indicted Appellant Gerome Smith for Distribution of Crack Cocaine Second Offense. R. 157.

On July 13, 15, 2015, Appellant proceeded to trial before the Honorable R. Scott Sprouse and a jury. Gregory L. Cole, Jr. represented Appellant, and Assistant Solicitor Lindsey Satterfield Simons represented the State.

The jury found Appellant guilty as charged. R. 144, ll. 10-23. The trial court sentenced Appellant to eighteen years imprisonment. R. 145, ll. 3-22.

## STATEMENT OF FACTS

After being arrested for on six counts of distributing crack cocaine and marijuana, career criminal Brandon Hunter offered his services to the Sencea Police Department. R. 55, l. 14 - 120, l. 4. His offer of service was readily accepted by law enforcement. *Id.*

Hunter entered into an informant agreement with the Seneca Police Department. R. 148. During his brief career as an informant, Hunter informed law enforcement that he had independently arranged to purchase crack cocaine from Appellant, a longtime family friend. Hunter explained that he already owed Appellant money for an earlier drug deal. *Id.* Police did not witness or record Hunter's alleged arrangement of this drug deal.

On September 4, 2014, Hunter met with Agent B.J. McClure and other law enforcement officers to carry out the controlled purchase from Appellant that Hunter had supposedly arranged. R. 18, l. 6 - 19, l. 2; Supp. R. 1. Police provided Hunter with a concealed camera and microphone. R. 41, l. 7 - 43, l. 15. Police could not visually monitor Hunter as the camera recorded to a disk. However, his microphone provided real-time audio. *Id.*

Hunter was briefly searched and then released several blocks from where he had arranged to meet Appellant. *Id.* Police did not follow Hunter or otherwise maintain visual contact with him. Law enforcement provided him with two hundred dollars in marked funds, Hunter also carried an unknown amount of his own money. *Id.*

The video footage showed Hunter getting into the back seat of Appellant's car. *See* State's Exhibit 4[1]. Appellant and another man were in the front seats. As the group drove around, Hunter handed Appellant an indeterminate sum of money. The camera is then temporarily blinded by a street light. Once the camera re-focused Hunter is holding a small plastic baggie with a powdery

[1] This video exhibit is on file with the Court for viewing.

substance and appears to be shielding it from Appellant's view with his hand. During Hunter's brief conversation with Appellant there was no mention of drugs, drug weights, or a specific amount of cash. In fact, as seen *infra*, Hunter would later repudiate any claim that this was a drug deal.

Hunter, sitting cross legged in the back seat, then placed his baggie into his sock. He left the vehicle a short time later and reported back to law enforcement. Hunter handed over 1.04 grams of crack cocaine. R. 85, ll. 2-20. Law enforcement never had Hunter return the remaining marked money and, in fact, the police paid Hunter an additional sixty dollars for helping them. R. 42, l. 18 - 43, l. 15.

Eight days after Hunter conducted the alleged controlled buy, McClure was informed by the Oconee County Sheriff's Department that Hunter had been involved in a burglary on September 2, 2014, just two days before the controlled buy took place. R. 55, l. 14 - 63, l. 9. McClure took Hunter into custody, terminated his informant agreement, and turned him over Sheriff's deputies. *Id.*

When Appellant was arrested he had no drugs, no drug paraphernalia, and no marked dollar bills. In fact, police never recovered any of the marked money that they had given Hunter. Hunter eventually pled guilty to second degree burglary.

**Hunter's assertion of his Fifth Amendment right against self-incrimination and admission of his written statement under Rule 613(b), SCRE.**

Hunter was supposed to be the State's star witness. He was transported from Lower Savannah Correctional Institution to Oconee County for Appellant's trial. R. 8, l. 12 - 9, l. 23. After answering introductory questions, the State asked Hunter is he had ever worked as a confidential informant for the Seneca Police Department. *Id.* In response, Hunter asserted his Fifth Amendment right against self-incrimination. *Id.*

Outside the presence of the jury, Hunter informed the court that, while he did not know of any pending charges, he was asserting his Fifth Amendment right. R. 10, l. 1 - 11, l. 7. The

solicitor averred that her office had no pending charges against him. *Id.* Defense counsel explained that Hunter appeared to be anticipating that answering questions would expose him to criminal liability. *Id.* Without further inquiry, the court rejected Hunter's Fifth Amendment assertion and directed him to answer the State's questions.

When the jury returned, Hunter continued to assert his Fifth Amendment right not to incriminate himself. R. 11, l. 11 - 14, l. 17. Hunter stood fast after being warned that he would be in contempt of court if he continued to refuse to answer the State's questions. *Id.* Faced with Hunter's unhelpful assertion of his constitutional rights, the State announced that it intended to enter a written statement Hunter signed following the alleged controlled buy under Rule 613, SCRE. *Id.* In that short, typed one paragraph statement, Hunter summarily claimed "I met with Jerome Smith and purchased Crack with the documented funds." Supp. R. 1.

For a final time, the court asked Hunter is he was declining to answer the State's questions. Hunter responded, "***I'm not declining, I'm pleading the Fifth***." R. 13, ll. 9-14. The State argued that under Rule 613, SCRE, "generally when a witness has responded with anything less than an unequivocal admission, the trial court has wide latitude to allow extrinsic evidence of the statement." R. 14, ll. 6-17. The State believed that asserting the Fifth Amendment right against self-incrimination was a "less than an unequivocal admission." *Id.*

Defense counsel objected to the admission of Hunter's written statement arguing that asserting the Fifth Amendment is "wholly different" than denying having made an inconsistent statement. R. 14, l. 20 - 16, l. 22. The court rejected the defense's argument and ruled that the written statement was admissible under Rule 613(b), SCRE. R. 17, l. 6 - 19, l. 15.

Prior to the statement being entered into evidence, defense counsel renewed his objection and further argued that admitting the statement violated Appellant's right to confront adverse

witnesses. R. 28, l. 4 - 29, l. 19. The court again overruled Appellant's objections and admitted Hunter's statement into evidence under Rule 613(b), SCRE. *Id.*

In an effort to impeach Hunter's credibility, defense counsel sought to have admitted a recorded telephone conversation between Hunter and Appellant. R. 21, l. 5 - 26, l. 4. In the conversation, Hunter admitted to Appellant that he did not buy crack cocaine from him, but instead framed Appellant in an effort to reduce his potential sentence. *See* Defense Exhibit No.: 4. Appellant would explain that Hunter had leveraged a debt he owed Appellant from a card game into a reason to arrange a meeting between them.

When asked about his confession during cross-examination, Hunter continued to assert his right against self-incrimination. R. 19, l. 22 - 20, l. 18. Without Hunter admitting or denying having made the confession, the trial court refused to allow the defense to enter the tape into evidence unless Appellant took the stand. *Id.*

**Admission of video footage of the purported controlled buy.**

With Hunter's assertion of his right against self-incrimination, the State had lost the first link in its chain of evidence for admitting the videotape of the alleged controlled buy. The State now had no witnesses who could testify that the video was an accurate representation of the purported controlled buy. Undaunted, the State had McClure testify that he placed the video camera and microphone on Hunter and had listened to the audio from Hunter's meeting with Appellant in real-time. R. 45, l. 2 - 46, l. 6.

McClure reluctantly conceded that the police did not visually monitor the transaction and that neither he nor any other law enforcement officers were present for the alleged controlled buy. R. 64, l. 2 - 74, l. 20. Despite these obvious limitations, McClure happily affirmed that he somehow

knew the video, which purported to show a transaction he did not witness, was a fair and accurate representation of the alleged controlled buy. R. 44, l. 4 - 45, l. 10.

When the State attempted to move the video into evidence, defense counsel objected arguing lack of a proper foundation and authentication. *Id.* Relying on Hunter's written statement and McClure's testimony, the court summarily overruled the objection without taking argument. *Id.*

**Admission of crack cocaine purportedly purchased during controlled buy.**

Mirroring their difficulties with the video, the State also sought to enter into evidence the crack cocaine that Hunter allegedly purchased from Appellant without Hunter testifying that he purchased the crack cocaine from Appellant. R. 85, l. 21 - 90, l. 23. Citing *State v. Sweet*, 374 S.C. 1, 647 S.E.2d 202 (2007), the defense argued that the State had failed to establish an adequate chain of custody.

The State countered that under *State v. Valentine*, 386 S.C. 499, 689 S.E.2d 608 (2010), the chain of evidence from Appellant to Hunter was adequately established. *Id.* The State contended that Hunter was under direct police control for the entirety of the controlled purchase by virtue of being under "audio surveillance" and that the court could fill in the "gap" at the beginning of the chain of custody. *Id.* Oddly, the State claimed that the defense had sufficiently impeached Hunter's motives and credibility during defense counsel's cross-examination of law enforcement. *Id.*

The court overruled Appellant's motion and allowed the crack cocaine into evidence. The court concluded that ***Sweet* was distinguishable as the informant's identity was unknown in that case**. R. 90, ll. 2-23. The court determined that Appellant had a sufficient opportunity to examine Hunter's motives, thus the chain of evidence was complete as far as was practicable. *Id.*

**Appellant's Testimony**

Appellant, who has a profound stutter, testified that Hunter, a longtime family friend, owed him money from a card game. R. 98, l. 21 - 100, l. 17. Appellant had also loaned Hunter money in the past for child support payments. *Id.* Appellant admitted that he had struggled with drug addiction, but denied selling crack cocaine to Hunter. R. 102, l. 13 - 104, l. 9.

He explained that he had money to loan family friends, like Hunter, because he had lawsuit settlement and an inheritance from his recently deceased adoptive parents. R. 101, ll. 3-24. Defense counsel played the video of the purported drug sale and Appellant stated, "I see Mr. Hunter giving me some money that he owed me. Then I see his hand go beside his leg. Then I see him come back with a baggie cuffed . . . between his forehand and his thumb. . . ." R. 102, ll. 12-23.

Appellant further noted that nobody in the video said anything about crack cocaine. R. 104, l. 20 - 105, l. 18. Appellant observed that "I only said two or three words to him. I remember saying, '[y]ou always think somebody playing about their money.' And I also remember saying that I didn't have nothing but a ten-dollar bill on me." *Id.* Finally, the defense had Appellant explain the telephone call he received from Hunter two weeks before trial. R. 105, l. 24 - 110, l. 24; Defense Exhibit No.: 4. During the call, Hunter denied purchasing crack cocaine from Appellant. *Id.*; *see also* State's Exhibit Nos.:1-4.

## ARGUMENT

### I.

**The trial court violated Appellant's Sixth and Fourteenth Amendment rights to confrontation and cross-examination pursuant to *Crawford v. Washington*, 541 U.S. 36 (2004) by allowing into evidence the written statement of informant Brandon Hunter stating that Appellant had sold him crack cocaine where Hunter was unavailable at trial because he asserted his Fifth Amendment right against self-incrimination.**

At Appellant's trial, informant Brandon Hunter refused to testify and asserted his Fifth Amendment right against self-incrimination. R. 9, l. 5 - 20 l. 18. Hunter had purportedly purchased crack cocaine from Appellant. Just days after his meeting with Appellant, law enforcement terminated Hunter's informant agreement because he was suspected of having committed a burglary. R. 56, l. 1 - 62, l. 18.

Two weeks prior to trial, Hunter called Appellant and confessed to having fabricated Appellant's alleged crack cocaine sale to him. Defense Exhibit No. 4. When Hunter asserted his right against self-incrimination, the State moved to enter into evidence a brief one paragraph statement Hunter signed claiming that he bought crack cocaine from Appellant. R. 12, l. 17 - 18, l. 15. The trial court admitted the statement into evidence over the objections of defense counsel that, among other problems, the statement violated Appellant's right to confront adverse witnesses. *Id.*; Supp. R. 1.

**Discussion**

"The Sixth Amendment's Confrontation Clause provides that, '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.'" *Crawford v. Washington*, 541 U.S. 36, 42 (2004) (quoting U.S. Const. amend. VI). The Confrontation Clause is applicable to the states under the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400 (1965). The South Carolina constitution provides the same protection to criminal

defendants. S.C. Const. art. I, § 14; *see State v. Green*, 269 S.C. 657, 661, 239 S.E.2d 485, 487 (1977).

The right of confrontation is essential to a fair trial in that it promotes reliability in criminal trials and ensures that convictions will not result from testimony of individuals who cannot be challenged at trial. *California v. Green*, 399 U.S. 149 (1970); *State v. Gillian*, 360 S.C. 433, 602 S.E.2d 62 (Ct. App. 2004). The cross-examination of adverse witnesses has been described as the "greatest legal engine ever invented for the discovery of truth." *Green*, 399 U.S. at 158 (internal quotations omitted).

In *Crawford v. Washington*, 541 U.S. 36, 50-51 (2004), the Supreme Court held that testimonial out-of-court statements are not admissible under the Confrontation Clause unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. The *Crawford* rule applies to all "testimonial" evidence. *Id.* Statements given to police during the course of the investigation are testimonial. *Davis v. Washington*, 547 U.S. 813 (2006) (Confrontation Clause of the Sixth Amendment, as interpreted in *Crawford*, does not apply to "non-testimonial" statements not intended to be preserved as evidence at trial).

The trial court violated Appellant's right to confront and cross-examine witnesses by allowing the State to enter into evidence Hunter's written statement as a substitute for his testimony. Supp. R. 1. Hunter's assertion of his Fifth Amendment right against self-incrimination rendered him unavailable to testify. Rule 804(a)(1),(2), SCRE. However, Appellant had no opportunity to cross-examine him. *State v. Sierra*, 337 S.C. 368, 372-373, 523 S.E.2d 187, 189 (Ct. App. 1999) (defendant's confrontation rights were violated when prosecutor impeached defense witness during cross-examination with prior inconsistent statement that witness allegedly made to prosecutor,

permitting prosecutor to confront witness with that statement implicated prosecutor as witness without affording defendant opportunity to cross-examine).

Beyond question, Hunter's statement was testimonial evidence. *Crawford*, 541 U.S. at 51-52 (testimonial statements include statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available of use at a later trial and statements taken by police officers in the course of interrogations). Hunter had entered into an informant agreement with law enforcement. He signed the statement immediately after he allegedly purchased crack cocaine for the purposes of producing evidence against Appellant. *Davis*, 547 U.S. at 821 (a statement during police questioning is testimonial when the "primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.").

The admission of his statement could not have been harmless error as it was the cornerstone of the State's case. In effect, Hunter's statement became the key witness for the prosecution because he was the only person who witnessed the purported sale. As the video footage was inconclusive as to whether a transaction occurred, the State was reliant on Hunter's statement to support its theory of the case.

Moreover, the State improperly weaponized Hunter's assertion of a constitutional right by repeatedly attributing Hunter's invocation of his Fifth Amendment to completely unsubstantiated allegations of witness intimidation by Appellant. R. 40, ll. 18-25; R. 116, ll. 3-25; R. 138, ll. 3-24. Apparently not satisfied with having trampled on Appellant's Sixth Amendment right to confront adverse witnesses while misappropriating the rules of evidence in her quest for a conviction, the solicitor could not resist "gilding the lily" in closing arguments:

> You can tell [Hunter's] scared. Agent McClure told you it's not uncommon for informants to recant. ***It's not uncommon for them to***

> ***become uncooperative due to pressure that's put on them by -- either on them or pressure on their family, or it's not uncommon for them to fold when they they see mass showings against them.*** He told you all of that. . . .
>
> We don't know why [Appellant] got Brandon Hunter to say that. That is important, that we don't know why. ***I submit to you there was some sort of threats or intimidation made to get Brandon Hunter to make that statement.***

R. 138, l. 18 - 139, l. 17,

Compounding the prejudice to Appellant, Hunter's unavailability also forced Appellant to testify in order to establish a proper foundation for the admission of Hunter's confession. R. 107, l. 5 - 110, l. 9. It is unlikely that Appellant would have otherwise testified. R. 93, l. 20 - 96, l. 24. Because he did, the State was able to cross-examine Appellant, who has a profound speech impediment, on his prior criminal record and other incriminating facts, such as the pending criminal charges of the third passenger in Appellant's car. R. 112, l. 8 - 114, l. 23.

The solicitor then ruthlessly savaged Appellant during closing. "Let's look at the defendant's testimony. He sure didn't want to admit his prior convictions and wanted to argue about them. He hadn't changed one bit. . . . He never looked at you once. He stared straight ahead and gave his rehearsed remarks denying this crime." R. 139, ll. 18-25.

Hunter was a deeply flawed witness with serious credibility problems who had confessed to having fabricated evidence and to having lied to police. Given that his informant agreement was terminated by the State, Hunter's assertion of his Fifth Amendment right against self-incrimination was improperly dismissed by the trial court. Moreover, as Hunter was unavailable to testify, the defense was denied an opportunity to confront Hunter on his criminal record and his confession to having "set-up" Appellant.

The trial court erred in permitting the State to enter into evidence Hunter's written statement. *State v. Pagan,* 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006) (admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion, an abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law). The trial court's ruling effectively turned the Fifth Amendment's privilege against self-incrimination from a shield for the individual into a sword for the prosecution. The admission of Hunter's statement into evidence rendered Appellant trial fundamentally unfair.

Informant Brandon Hunter's written statement was inadmissible testimonial hearsay, its admission violated Appellant's Sixth and Fourteenth Amendment right to cross-examine and confront adverse witnesses and constitutes reversible error. *Crawford*, 541 U.S. at 42. Accordingly, Appellant is entitled to a new trial.

## II.

**The trial court reversibly erred in admitting a written statement signed by informant Brandon Hunter into evidence pursuant to Rule 613(b),SCRE, as the written statement did not qualify as a prior inconsistent statement under the rule because Hunter had asserted his Fifth Amendment right against self-incrimination when called to the stand thus, he neither admitted nor denied making the written statement.**

After Hunter asserted his Fifth Amendment right against self-incrimination, the State introduced his written statement as extrinsic evidence of a prior inconsistent statement under Rule 613(b), SCRE. R. 12, l. 14 - 16, l. 22. Defense counsel objected that Hunter's assertion of a constitutional right did not qualify as an admission or denial of having made a prior inconsistent statement. *Id.* The trial court overruled the objection and allowed Hunter's written statement into evidence. *Id.*

**Discussion**

Rule 613(b) of the South Carolina Rules of Evidence provides that:

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

(*emphasis added*). A prior inconsistent statement may be admitted as substantive evidence when the declarant testifies at trial and is subject to cross-examination. *State v. Copeland,* 278 S.C. 572, 300 S.E.2d 63 (1982). Anything less than an "unequivocal admission" to having made the prior inconsistent statement renders the prior statement admissible. *State v. Carmack*, 390 S.C. 502, 702 S.E.2d 395 (Ct. App. 2010).

However, a witness's assertion of the privilege against self-incrimination is not an admission or a denial of having made a prior inconsistent statement. *United States v. Torres-Colon*, 790 F.3d 26, 30-31 (1st Cir. 2015) (witness's refusal to testify following invocation of Fifth Amendment left no testimonial statements to impeach). An assertion of the constitutional right against self-incrimination cannot be inconsistent with a prior statement. *People v. Redd*, 553 N.E.2d 316, 335-340 (Ill. 1990) ("A witness who does nothing but assert the Fifth Amendment privilege against self-incrimination is not asserting anything other than that he believes he has reasonable grounds to fear incriminating himself.").

Furthermore, a witness asserting his privilege against self-incrimination is not an "available witness" subject to cross-examination. *Cf. State v. Stokes*, 381 S.C. 390, 399-400, 673 S.E.2d. 434, 438 (2009) (admission of extrinsic evidence of a witness's prior inconsistent statement was proper even though witness denied making the statement ***as defendant had opportunity to cross examine witness***) (*emphasis added*).

In Appellant's case, the trial court determined that Hunter's assertion of his right against self-incrimination was without merit and constituted a prior inconsistent statement. R. 14, l. 20 - 16, l. 22. This was an error of law. Given the circumstances surrounding Hunter's involvement in Appellant's case, Hunter's silence was justified. *Mason v. United States*, 244 U.S. 362, 365 (1917) ("A question which might appear at first sight a very innocent one might, by affording a link in a chain of evidence, become the means of bringing home an offense to the party answering.").

By the time of Appellant's trial, law enforcement had terminated Hunter's informant agreement and Hunter had confessed in a recorded conversation with Appellant that he had lied to police about Appellant having sold him crack cocaine. R. 55, l. 14 - 63, l. 9; Defense Exhibit No.: 4. The solicitor's assurance that Hunter had no pending charges was insufficient as Hunter still had

"reasonable cause to apprehend danger" of incriminating himself when answering questions about his involvement in Appellant's case. *Mason*, 244 U.S. at 365.

Permitting the State to enter Hunter's statement into evidence as a prior inconsistent statement constituted an error of law. *See Pagan, supra.* None of the requirements of Rule 613(b) were satisfied. *State v. Blalock*, 357 S.C. 74, 591 S.E.2d 632 (Ct. App. 2004) (discussing foundational requirements for admission of extrinsic evidence of a prior inconsistent statement). Hunter never admitted or denied signing the written statement. Hunter never attempted to explain the statement. Most importantly, the defense had no opportunity to cross-examine Hunter on the written statement.

Accordingly, the trial court reversibly erred in admitting the written statement signed by Hunter into evidence pursuant to Rule 613(b), SCRE, where the written statement did not qualify as a prior inconsistent statement as Hunter had asserted his Fifth Amendment right against self-incrimination when called to the stand, thus, neither admitting nor denying having made the written statement.

Appellant is entitled to a new trial.

## III.

**The chain of custody for the crack cocaine was clearly defective as the State alleged that informant Brandon Hunter purchased crack cocaine from Appellant and later gave it to the police, however Hunter refused to testify at trial so he never affirmed that the crack cocaine he turned over to the police was purchased from Appellant.**

The State's failure to have informant Brandon Hunter testify as to his place in the chain of custody made the chain of custody for crack cocaine hopelessly defective. The State has the duty to establish a chain of custody as far as practicable. *State v. Governor,* 362 S.C. 609, 608 S.E.2d 474 (Ct. App. 2005). Where the identity of each person handling the evidence is established, and the manner of handling is reasonably demonstrated, the trial court acts within its discretion in admitting the evidence ***absent proof of tampering, bad faith, or ill-motive***. *State v. Taylor,* 360 S.C. 18, 25, 598 S.E.2d 735, 738 (Ct.App.2004) (*emphasis added*).

At trial the State argued that *State v. Valentine*, 386 S.C. 499, 689 S.E.2d 608 (2010), stood for the proposition that Hunter's unavailability was not fatal to the chain of evidence. R. 87, l. 10 - 88, l. 13. *Valentine* is readily distinguishable from Appellant's case in a number of key respects and those important differences illustrate why the trial court committed an abuse of discretion in Appellant's case.

First, the informant in *Valentine* had testified at a previous mistrial. 386 S.C. at 501-502, 689 S.E.2d at 608-609. Therefore, unlike Hunter, he had been cross-examined extensively on his criminal history and on the benefit that he received for acting as an informant. *Id.* Second, the *Valentine* informant was under much closer police supervision while he purchased crack cocaine and evidence collected by police while searching the Valentine's residence immediately after the sale (uncovering drugs, marked money, and scales) corroborated the informant's purchase. *Id.* In addition, Valentine was arrested almost immediately after making the sale and was alone. *Id.*

Here, Hunter arranged the supposed drug buy independently and ***without police supervision***. ***Hunter was not under continuous visual police surveillance***, but was simply dropped off by police and walked a number of blocks to Appellant's car, which had another passenger. R. 42, l. 18 - 43, l. 17. ***Police did not recover any of the marked money*** that they had given Hunter and found no incriminating evidence on Appellant when he was arrested several days after the purported sale.

Lastly, the ***Valentine informant never recanted*** the controlled purchase and ***did not have his informant agreement terminated*** for committing a crime while an informant. 386 S.C. at 501-502, 689 S.E.2d at 608-609. In contrast, ***Hunter made a taped confession to having faked the purchase of crack cocaine*** from Appellant. Defense Exhibit No.: 4. Hunter also had his informant agreement revoked because he had committed a burglary only days before making the purported controlled buy from Appellant. R. 55, l. 14 - 63, l. 9.

Hunter was under even less police control than the informant in *State v. Sweet*, 374 S.C. 1, 647 S.E.2d 202. In *Sweet* the informant, Richard King, was not produced at trial.[2] Unlike in Appellant's case, law enforcement had arranged for King to purchase drugs from Sweet at a Greenville County motel. 374 S.C. at 3-4, 647 S.E.2d at 204. King and his car were searched prior to the controlled buy and police closely followed King as he drove to the motel. *Id.* Law enforcement had video surveillance of the motel parking lot and King was "wired" with a

[2] The Court in *Valentine* distinguished that case from *Sweet* by erroneously stating that the identity of the informant in *Sweet* was not known. 386 S.C. at 501-502, 689 S.E.2d at 608-609. This is likely because the Court in *Sweet* refers to the informant as a "confidential informant". 374 S.C. 1, 647 S.E.2d 202. Respectfully, this was incorrect. The *Sweet* informant was Richard King. His identity was disclosed to the defense and he was named at trial, but did not testify. Therefore, the trial court's claim in Appellant's case that the chain of evidence in *Sweet* was defective, in part, because the informant's identity was not disclosed was in error. R. 90, ll. 2-15.

microphone allowing the police to monitor the transaction contemporaneously. Police did not "visually witness what occurred inside the motel room." *Id.*

After leaving the motel room, King drove to the police station, again closely followed by police, and turned over the crack cocaine he allegedly purchased. *Id.* Officers waiting back at the motel arrested Sweet shortly after the sale, he was alone and police saw no one else enter or leave the motel room between the sale and his arrest. *Id.* On appeal, our Supreme Court held that "without the testimony of the confidential informant, the State's proof fails to establish a complete chain of custody. None of the chain of custody witnesses testified to seeing inside the motel room in order to establish who was in the room making the alleged transaction." *Id.* at 7, 647 S.E.2d at 206.

The Court in *Sweet* further determined that the officer's testimony regarding the circumstances of the controlled buy did not "fill the gap in the chain of custody left by the unavailable informant". *Id.* In reversing Appellant's conviction, the Court stated that "in the absence of testimony from the confidential informant, the State's proof of chain of custody is incomplete because it fails to establish the identity of each custodian and ***the manner of handling of the evidence***." *Id.*

In Appellant's case the video footage of the purported controlled buy was inconclusive. Hunter's walk to meet Appellant was unmonitored by law enforcement, as was his arranging of the purported drug deal with Appellant. None of the marked money that Hunter supposedly used to purchase crack cocaine was recovered. R. 60, l. 6 - 66, l. 10. Hunter's invocation of his Fifth Amendment protections, his confession to having faked the controlled buy, and the dramatic termination of his informant agreement all call into question his reliability and are significant evidence of tampering, bad faith, and ill-motive. *Taylor,* 360 S.C. 18, 25, 598 S.E.2d 735, 738.

***The State could have given Hunter immunity from prosecution***. *State v. Thrift,* 312 S.C. 282, 440 S.E.2d 341 (1994) (transactional immunity shields witness from any prosecution for transaction or offense to which her compelled testimony relates). They chose not too and, thus, simply failed to present proof of the chain of custody as far as practicable. *State v. Chisolm*, 355 S.C. 175, 584 S.E.2d 401 (Ct. App. 2003) (holding that the names and signatures of two evidence technicians on the evidence bag did not sufficiently prove the chain of custody where the technicians did not testify at trial).

Finally, the chain of custody of the drug evidence was also fatally defective to the extent that the trial court relied on Hunter's written statement to complete the chain. *See Argument I, supra.* The statement was inadmissible hearsay not fitting within any exception and its admission pursuant to Rule 613(b), SCRE, was an error of law. The statement also fails to satisfy the requirements of Rule 6(b), SCRCrimP, because it is an unsworn statement and the defense requested the presence of every witness who handled the evidence. *Chisolm*, 355 S.C. 175, 584 S.E.2d 401; *see also State v. Joseph*, 328 S.C. 352, 491 S.E.2d 275 (Ct. App. 1997) (failure to produce chemist after defense objection to report rendered chain of evidence inadmissible).

While weak links in the chain of custody are typically a question of credibility for the jury, what happened to the evidence, how it was taken and collected, and by whom and where it was taken from, cannot be left to conjecture. The manner of handling must still be demonstrated. *State v. Hatcher*, 392 S.C. 86, 995, 708 S.E.2d 750, 755 (2011) ("evidence is still required as to how the item was obtained and how it was handled").

Accordingly, Defense counsel correctly objected that the State had not proven the drugs they introduced came from Appellant through Hunter and were then given to the police. Appellant should be granted a new trial. *State v. Sweet, supra.*

## IV.

**The chain of custody for the video of the purported controlled buy was defective as the State failed to establish that the video footage played at trial was a fair and accurate representation of the meeting between Appellant and informant Brandon Hunter.**

At trial, Officer Jason Sutherland testified that he removed the video camera and microphone from Hunter after the purported controlled buy. R. 33, l. 21 - 34, l. 22. Since Hunter was not available to testify at trial, the State attempted to establish the necessary foundation for admitting the video by referencing Hunter's written statement and using McClure's in-trial identification of Appellant on the video. R. 32, l. 17 - 37, l. 1. Defense counsel objected on the grounds that the State had failed to lay the necessary foundation. R. 32, ll. 1-14. The trial court summarily overruled the objection. R. 33, ll. 7-14.

The trial court erred in admitting the video recording of the alleged drug transaction into evidence because the State did not lay a proper foundation for its admissibility. South Carolina Rule of Evidence 901(a) requires "authentication or identification as a condition precedent to" the admissibility of evidence. This requirement "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Rule 901(a), SCRE.

Under Rule 901(b)(1) authentication can be accomplished by testimony from someone familiar with and with knowledge of the contents of the document or recording. Authentication can therefore be accomplished through someone with knowledge of the events depicted on a videotape. *See State v. Campbell*, 259 S.C. 339, 344, 191 S.E.2d 770, 773 (1972) ("Normally it is sufficient to justify admittance of photographs into evidence if a person familiar with the scene can say that the pictures truly represent the scene involved.").

The State presented no witnesses who could testify that the video accurately depicted the alleged drug transaction. McClure conceded he did not observe the alleged transaction. R. 40, l. 18

- 112, l. 10; R. 64, l. 2 - 70, l. 18. While law enforcement officers testified that they could hear the conversation during the alleged transaction, there were never any references to drugs, let alone crack cocaine, rendering the audio surveillance largely irrelevant. *Id.*; *Cf. State v. Aragon*, 354 S.C. 334, 336, 579 S.E.2d 626, 626-27 (Ct. App. 2003) (finding the State properly authenticated taped telephone conversation between victim and defendant where victim had known defendant for over ten years and recognized his voice during the conversation).

As detailed above, Hunter asserted his Fifth Amendment privilege against self-incrimination and it was a legal error for the trial court to admit his written statement into evidence. *See Arguments I and II, supra.* Hunter also called Appellant on the eve of trial and confessed to having faked the controlled buy. *See* Defense Exhibit No.: 4.

Both Hunter, via his taped confession, and Appellant, who testified at trial, denied that a drug transaction occurred. Appellant stated that Hunter owed him money from a card game and had used this debt as an excuse to meet Appellant and fake the controlled buy to deceive police. R. 107, l. 5 - 110, l. 24; *see also* Defense Exhibit No.: 4. Since Hunter was unavailable to testify, the State had no witness who could testify that the video recording accurately represented the events that occurred during the alleged drug transaction.

Courts from other jurisdictions have allowed the admission of a video recording of a drug transaction where the prosecution made a proper foundation for admission through the testimony of someone who witnessed the occurrence videotaped. *See United States v. Rivera-Maldonado*, 194 F.3d 224, 236-37 (1st Cir. 1999) (finding admission of drug transaction videotapes proper where agent who had actually videotaped the crime scenes testified that "each daily video accurately reflected what he had observed as it was being taped"); *United States v. Medina-Herrera*, 606 F.2d 770, 774 (7th Cir. 1979) (finding "proper foundation for the admission of tapes was made through

the testimony of agents who witnessed the defendant's actions and made the tapes"); *Trull v. State,* 811 So.2d 243, 246 (Miss. Ct. App. 2000) (holding videotape of the drug transfer was properly authenticated where the agent testified that he "was present when the events on the videotape transpired, and that the video was an accurate depiction of the events as they transpired that day.").

In Appellant's case, the State did not offer the testimony of anyone who witnessed the alleged drug transaction. It was an error of law to admit a videotape without a proper foundation, and this Court should reverse the trial court's ruling. *See State v. Lee*, 399 S.C. 521, 526-27, 732 S.E.2d 225, 228 (Ct. App. 2012) (providing appellate standard of review for trial court's ruling on the admission of evidence).

The trial court's improper admission of the video recording was not harmless where "there was a reasonable probability that the jury's verdict was influenced by the challenged evidence." *Lee,* 339 S.C. at 527, 732 S.E.2d at 228. The State was totally reliant on the videotape to identify Appellant as the individual who allegedly sold drugs to Hunter. In the State's opening statement, the solicitor dramatically informed the jury that the drug transaction was recorded on video and told jurors that they should expect to view the video. R. 2, l. 8 - 3, l. 13.

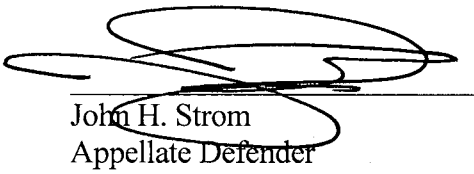
During trial, McClure could only identify Appellant as the person who allegedly sold the drugs by watching the video since he did not observe the transaction firsthand. R. 40, l. 18 - 48, l. 10; R. 64, l. 2 - 70, l. 18. The State also repeatedly played the videotape and even went so far as to have McClure opine as to when the alleged hand-to-hand transaction occurred, despite the video being inconclusive as to whether a transaction occurred at all. R. 68, l. 11 - 75, l. 20. During the State's closing, the solicitor also highlighted the video, showing it to the jury and reminding them that they saw the entire video of the transaction. R. 137, l. 18 - 142, l. 21.

The admission of the video recording, relied upon so heavily by the State under these circumstances, was not harmless beyond a reasonable doubt. Accordingly, it was error for the trial court to have admitted the video recording into evidence. Appellant is entitled to a new trial.

## CONCLUSION

By reason of the foregoing arguments, Appellant's conviction should be reversed and this case remanded to the Oconee County Court of General Sessions for a new trial.

Respectfully submitted,



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ATTORNEY FOR APPELLANT

This 28th day of October, 2016.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

October 28, 2016

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