STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

RALPH MARTIN,

PETITIONER

APPELLATE CASE NO 2015-000311

Appeal from Dorchester County

Honorable Maite Murphy, Circuit Court Judge

Opinion No. 2017-UP-071

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, counsel for Ralph Martin petitions the Court for rehearing. Counsel respectfully submits that the Court overlooked the fact that the State failed to lay the proper foundation in order to admit extrinsic evidence of prior inconsistent statements. With regard to the recording of statements made by Petitioner's wife, Ms. Martin, the State failed to advise Ms. Martin of the substance of the statements, the time and place the statements were allegedly made and the person to whom it was made. Additionally, Ms. Martin was never given an opportunity to explain or deny the statements prior to admission. In regard to her written statement, Ms. Martin was never given an opportunity to admit or deny the statement.

The jury found Petitioner guilty of criminal domestic violence of a high and aggravated nature. Deputy Jarrod Powell with the Dorchester County Sheriff's Department responded to a 911 call in reference to a domestic disturbance. Deputy Powell wore a body microphone on the night in question and the State moved to admit portions of the audio in evidence. (R. p. 44, line 23 – p. 45, 46, line 1-25). The audio includes statements made by Petitioner's wife, Becky Martin, who had already testified at trial. Petitioner objected to the admission of the audio. (R. p. 47, lines 4-23). Petitioner also renewed his previous objection to the admission of a written statement by Ms. Martin. Petitioner further argued, "And secondly, extrinsic evidence of a statement that she made 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 that's State v. Galloway, which is still good law in South Carolina." (R. p. 47, lines 18-23). The judge, relying on State v. Blalock, 357 S.C. 74, 591 S.E.2d 632, (Ct. App. 2003), overruled the objection. The judge stated, "So based upon that, I think it's clearly – it goes to being offered that the witness told a different story at the time, not for the truth of the matter asserted, so I think the witness's statement does come in, as does the oral statements, because statements can be either oral or written so I think you're free to proceed on those grounds." (R. p. 49, line 25 – p. 50, lines 1-5). The audio was admitted in evidence, over objection, as State's Exhibit #4 and played for the jury. (R. p. 84, line 22 – p. 85, lines 1-16). The trial judge erred in admitting the audio of the body microphone.

Rule 613(b), SCRE, provides, "Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is advised of the substance of the statement, the time and place it was allegedly made, and the person to whom it was made, and is given the opportunity to explain or deny the statement. If a witness does not admit that he has made the prior inconsistent statement, extrinsic evidence of such statement is admissible." The audio from

the body microphone worn by Deputy Powell is extrinsic evidence of a prior inconsistent statement made by Becky Martin. Pursuant to Rule 613(b), the audio was inadmissible unless the State established the proper foundation. The State failed to lay the proper foundation. The State failed to advise Ms. Martin of the substance of the oral statements heard on the audio, the time and place the statements were allegedly made and the person to whom the statement was made. Additionally, the State did not allow Ms. Martin the opportunity to explain or deny the statements heard on the audio. The State's argument in regard to the written statement provided to Deputy Strickland and addressed in issue two below does not carry over to the oral statements heard on the audio from the body microphone worn by Deputy Powell. The trial judge erred in admitting the audio without the proper foundation.

Becky Martin was called as a witness by the State. When asked what she told the police when they arrived, Ms. Martin testified, "I don't remember. I don't remember anything from that night." (R. p. 17, lines 22-24). Ms. Martin testified that she remembered Deputy Powell being at the house on the night in question. (R. p. 19, lines 14-23). The prosecutor, however, never asked Ms. Martin about the statements allegedly made to Deputy Powell and heard on the audio.

The trial judge's reliance on Blalock is misplaced because the issue in Blalock involved whether the witness unequivocally admitted making the prior inconsistent statement. In Blalock this Court wrote:

> In determining whether a witness has admitted making a prior inconsistent statement and thereby obviated the need for extrinsic proof, the courts of our state and other jurisdictions have held that the witness must admit making the prior statement unequivocally and without qualification. See State v. Bottoms, 260 S.C. 187, 194, 195 S.E.2d 116, 118 (1973) (when a witness admits unequivocally that a prior inconsistent statement has been made by him, he has thereby impeached himself and further evidence is unnecessary and inadmissible); 98 C.J.S. Witnesses 727 (2002) (stating admission must be unequivocal).

Blalock, 357 S.C. at 80, 591 S.E.2d at 635. The question in regard to the statements heard on the audio in the present case did not involve whether Ms. Martin unequivocally admitted making the prior statements. Ms. Martin neither admitted nor denied making the statements heard on the audio as she was not asked about these statements. The State failed to lay the proper foundation for admission.

In State v. McLeod, 362 S.C. 73, 81, 606 S.E.2d 215, 219 (Ct. App. 2004), this Court wrote:

> The South Carolina rule differs from the federal rule in that a proper foundation must be laid before admitting a prior inconsistent statement. It is mandatory that a witness be permitted to admit, deny, or explain a prior inconsistent statement. Under Rule 613(b), extrinsic evidence of the statement 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. Rule 613(b) explicates the procedure for impeachment by a prior inconsistent statement and requires laying the foundation. See State v. Sierra, 337 S.C. 368, 523 S.E.2d 187 (Ct.App.1999).

In McLeod this Court found that the trial judge did not abuse his discretion in excluding testimony in regard to a prior inconsistent statement due to the failure to provide a sufficient foundation. In the present case the trial judge abused his discretion in allowing the audio when the State failed to provide a sufficient foundation for admission.

In addition to the recorded statements discussed above in issue one, the State also moved to admit a written statement Becky Martin provided to Deputy Strickland on the night in question. (R. p. 43, lines 8 – p. 44, lines 1-15). The State relied on Rule 613(b) SCRE and State v. Moses, 390 S.C. 502, 702 S.E.2d 395 (Ct. App. 2010). Petitioner objected and argued that Ms. Martin was not given the opportunity to admit or deny the content of the written statement. (R. p. 42, line 8 – p. 43, lines 1-6). The State responded stating, "She [Ms. Martin] looked at the entire statement, both pages; the time and place it was allegedly made, we did cover that with

her; and the person to whom it was made, we said Deputy Strickland, given the opportunity to explain or deny it. Her explanation was she didn't remember. She didn't say she didn't make the statement; she didn't say she did. She said, "I don't remember. It's my handwriting, but I don't remember." (R. p. 43, lines 14-22). The judge overruled the objection stating, "Pursuant to Rule 613, a witness's own out-of-court statement is hearsay if offered for its truth. However, when a witness's prior inconsistent statement is offered for impeachment, however, it's being offered merely to show the witness told a different story at a different time, so it's admissible." (R. p. 44, lines 16-21).

The trial judge heard further argument in regard to Ms. Martin's written statement and then stated, "The Court's recollection of her testimony was that she was given the statement. She indicated that it was her handwriting on the date in question, which was July 1st. She also stated that it was her signature. Her testimony, however, was not unequivocal admission that she made the statement, said it was her writing, but she doesn't remember making the contents of the statement." (R. p. 49, lines 2-8). The judge, again relying on State v. Blalock, 357 S.C. 74, 591 S.E.2d 632, (Ct. App. 2003), ruled that the written statement was admissible. (R. p. 49, line 9 – p. 50, lines 1-5).

When the State moved to admit the written statement as State's Exhibit #5 (R. p. 63, lines 2-3), Petitioner objected stating, "Your Honor, we would object. I would renew my previous motion. Also, we would argue that foundation hasn't been laid at this point. It's not consistent or inconsistent." (R. p. 63, lines 5-8). The judge overruled the objection, admitted the written statement and the statement was published for the jury. (R. p. 63, lines 9-14). The trial judge erred.

During trial Becky Martin testified as follows:

Q. And what did you tell police when they arrived?

A. I don't remember. I don't remember anything from that night.

Q. Okay. Do you remember giving a written statement to police that evening?

A. No. I mean, I remember writing, but I don't remember what I wrote or why.

Q. So you don't recall giving a written statement to Deputy Strickland that evening?

A. No, sir.

Q. I'm showing you what's been marked as State's Exhibit 5. Do you recognize it? Please take a moment to look at it. Do you recognize that?

A. Yes, that's my handwriting.

Q. Okay.

A. But I don't remember what these questions were that I answered. I don't remember that.

Q. So you remember making a statement, but you don't remember - -

A. Yes.

Q. - - the content of the statement?

A. No.

Q. Would that be a fair - -

A. Yes.

Q. - - statement to say?

A. Yes.

(R. p. 17, lines 22 - p. 18, lines 1-22). Contrary to the State's argument, Ms. Martin remembered making the statement but simply did not remember the content of the statement. Ms. Martin

confirmed that the statement was dated July 1st, was in her handwriting and her signature appeared on the bottom. (R. p. 18, lines 23 – p. 19, lines 1-8). When asked if reading the statement would refresh her memory about what she told the police on the night in question, Ms. Martin responded, "No." (R. p. 19, lines 9-13). The State failed to ask any further questions of Ms. Martin in regard to the written statement. Critically, the State never asked her if she made the statement.

The present case is distinguished from Blalock, the case relied upon by the trial judge. In Blalock a State's witness, upon being asked about a prior statement, was declared hostile pursuant to Rule 607, SCRE and then the State attempted to impeach the witness with her prior statement. The State then sought to introduce extrinsic evidence of the prior inconsistent statement pursuant to Rule 613(b) SCRE. As discussed above, the issue in Blalock involved whether the witness unequivocally admitted making the prior inconsistent statement. This Court in Blalock wrote:

> In this case, we find Ms. Blalocks response, when confronted with her prior statement, does not meet the standard of a clear and unequivocal admission that the precedent case law demands. We are mindful that, towards the end of the solicitors examination of Ms. Blalock regarding the statement, she does admit that she said the portion of the statement quoted. She is adamant throughout her testimony, however, that the statement as recorded by the detective was incomplete. As demonstrated in the excerpted testimony above, Ms. Blalock repeatedly insists that she did not merely say she saw her husband's hand on Janes backside, but that she saw his hand on the back side of her leg. When the solicitor presses her on when and to whom she said back side of her leg, Ms. Blalock testifies that she feel[s] like that is what she told Detective Lindsey at the time he took her statement. Ultimately, she equivocates as to whether the statement was in fact her own words, testifying that she may have been unclear or that Detective Lindsey had paraphrased what she said.

State v. Blalock, 357 S.C. 74, 80-81, 591 S.E.2d 632, 636 (Ct. App. 2003).

In the present case the State failed to declare Ms. Martin hostile pursuant to Rule 607, SCRE and failed to attempt to impeach Ms. Martin with her prior statement. Pursuant to Rule 613(b), if the State had asked Ms. Martin if she made the written statement and Ms. Martin stated that she did not remember **making** the statement, then the State could have properly moved to admit the prior written statement as extrinsic evidence of a prior inconsistent statement. The State, however, failed to ask the critical question in order to lay the proper foundation. Unlike the witness in Blalock, Ms. Martin was not confronted with her prior statement. Ms. Martin's statement that she did not remember the content of her statement, standing alone, is not sufficient to establish the foundation required to admit the prior written statement. The State should have confronted her with the content of her statement so that she could either admit or deny. Contrary to the State's argument, simply showing the statement to the witness does not constitute confronting the witness and advising the witness of the substance of the statement as required by Rule 613(b).

The present case is also distinguished from State v. Moses, 390 S.C. 502, 702 S.E.2d 395 (Ct. App. 2010). In Moses the witness did not remember making the prior inconsistent statement and the State properly introduced extrinsic evidence of the prior inconsistent statement. In contrast, in the present case Ms. Martin did not testify that she did not remember making the statement.

In affirming the conviction this Court wrote:

> Affirmed pursuant to Rule 220(b), SCACR, and the following authorities: State v. Carmack, 388 S.C. 190, 201, 694 S.E.2d 224, 229 (Ct. App. 2010) ("A decision to admit extrinsic evidence of a prior inconsistent statement will not be reversed absent a manifest abuse of discretion that prejudiced the Petitioner."); Rule 613(b), SCRE ("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."); State v. Blalock, 357 S.C. 74, 80, 591 S.E.2d 632, 636 (Ct. App. 2003) ("Generally, where the witness has responded with anything less than an unequivocal admission, trial courts have been granted wide latitude to allow extrinsic evidence proving the statement."); id. ("[A] witness's failure to fully recall her prior statement has been found to be a sufficient denial to allow extrinsic evidence.").

Counsel respectfully submits that this Court's reliance on State v. Carmack is misplaced. In Carmack the witness did not unequivocally admit making a prior inconsistent statement, making extrinsic evidence of the Prior inconsistent statement admissible. In contrast, in the present case Ms. Martin was never given the opportunity to admit or deny the statements. If Ms. Martin had been confronted with her statements and indicated certain details were missing, then, pursuant to Carmack, extrinsic evidence of the prior inconsistent statements would have been admissible. Ms. Martin, however, was never asked to admit or deny the statements.

Respectfully, as discussed above, counsel submits this Court's reliance on State v. Blalock is misplaced. Again, the issue in Blalock involved whether the witness unequivocally admitted making the prior inconsistent statement. In the present case, Ms. Martin was never asked to admit or deny the statements. The issue in the present case does not involve whether Ms. Martin unequivocally admitted the prior inconsistent statements the State failed to question her about the statements. The State failed to lay the proper foundation for admission pursuant to Rule 613(b) SCRE. The error in admitting the statements is not harmless. As the Court noted in Saltz, "Erroneously admitted corroboration testimony is not harmless merely because it is cumulative. On the contrary, 'it is precisely this cumulative effect which enhances the devastating impact of improper corroboration.' Jolly v. State, 314 S.C. 17, 21, 443 S.E.2d 566, 569 (1994)." 346 S.C. at 124, 551 S.E.2d at 246.

Based on the above arguments, counsel respectfully petitions this Court for rehearing and asks this Court to reverse the sentence and conviction and remand for a new trial.

Respectfully Submitted,

KATHRINE H. HUDGINS
Appellate Defender

This 22nd day of February, 2017.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED
FEB 22 2017
SC Court of Appeals

Appeal from Dorchester County

Honorable Maite Murphy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RALPH MARTIN,

PETITIONER

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon Jennifer Ellis Roberts, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Ralph Martin, #298165, at Trenton Correctional Institution, 84 Greenhouse Road, Trenton, SC 29847, this 22nd day of February, 2017.

Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO BEFORE
ME this 22nd day of February, 2017.

(L.S)
Notary Public for South Carolina
My Commission Expires: 5/12/2025