THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM DORCHESTER COUNTY
Court of General Sessions
Maite Murphy, Circuit Court Judge

Opinion No. 2017-UP-071 (S.C. Ct. App. filed Feb. 8, 2017)
Appellate Case No. 2017-001006

State of South Carolina, ... Respondent,

v.

Ralph Martin, ... Petitioner.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Whether the Court of Appeals properly affirmed the trial court's admission of Victim's written statement into evidence because the State laid the proper foundation pursuant to Rule 613(b), SCRE, and Victim did not unequivocally admit she wrote the statement. (Petitioner's Issue #2)

II.

Whether the Court of Appeals properly affirmed the trial court's admission of Victim's recorded statements because the State laid the proper foundation when Deputy Powell authenticated the audio recording, the recorded statements were not hearsay, and they were cumulative evidence of her written statements and therefore were harmlessly admitted. (Petitioner's Issue #1)

STATEMENT OF THE CASE

Procedural History

A Dorchester County Grand Jury indicted Petitioner for criminal domestic violence of a high and aggravated nature. (R.139–40). On February 10, 2015, Petitioner proceeded to a one-day trial before the Honorable Maite Murphy. Assistant Solicitors Glenn Justis and Kyle Ward represented the State, and Assistant Public Defenders Pierce Wehman and John Loy represented Petitioner. The jury found Petitioner guilty, and Judge Murphy sentenced him to ten years' imprisonment suspended upon the service of nine years and eleven months with probation to follow for four years. (R. 136, lines 7–14).

Petitioner appealed his conviction and sentence, and the Court of Appeals affirmed the decision in an unpublished opinion. *State v. Martin*, Op. No. 2017-UP-071 (S.C. Ct. App. filed Feb. 8, 2017). (App.1–2). Petitioner filed a petition for rehearing on February 22, 2017, which was denied on March 3, 2017. (App.3–14). A Petition for Writ of Certiorari to the Court of Appeals was submitted to this Court on April 24, 2017, and this Return follows.

Factual Background

On July 1, 2014, Richard Stevens and his wife walked outside onto the porch of their house to smoke when Stevens noticed a shadowy figure in the driveway of the house located three houses down and across the street from his. (R. 10, lines 16–25; R. 11, line 1). Stevens heard this shadowy figure cry for help and a male voice subsequently telling the person to get back into the house. (R. 10, lines 22–25; R. 11, line 1). Stevens called 911 to report a domestic disturbance. (R. 11, lines 2–6).

Deputy Jarrod Powell of the Dorchester County Sheriff's Department responded to the 911 call. When Deputy Powell arrived at the location, he heard a disturbance coming from

inside the residence. (R. 74, lines 22–25; R. 75, lines 1–2). Deputy Powell announced his presence at the door of the residence and heard a female distinctively scream, "Come in and help me!" (R. 75, lines 20–23). Before Deputy Powell entered the house, Petitioner's wife (Victim) opened the door. (R. 77, lines 1–4). Petitioner was standing about twenty feet behind her. (R. 77, lines 7–10). According to Deputy Powell, Victim was sweating, breathing heavily, and had a very distinctive red mark on the side of her neck. (R. 77, lines 11–14). Deputy Powell detained Petitioner in handcuffs and placed him in the back of his police car. (R. 77, lines 24–25; R. 78, lines 8–10). Deputy Powell was wearing a body microphone that recorded the entire incident on the night in question, including verbal statements made by Victim. (R. 83, lines 4–11).

When Deputy Carlin Strickland, also of the Dorchester County Sheriff's Department, arrived at the scene, he testified he noticed Deputy Powell "arguing" and "somewhat wrestling" with Petitioner as he was getting him into handcuffs. (R. 53, lines 15–17). Deputy Strickland testified he noticed Victim had redness around her mouth, which appeared to be dried blood, marks on her wrist, as if something had been tied or wrapped around her wrists, and a mark on the side and back of her neck that was "quite big." (R. 54, lines 14–25; Tr. 55, lines 1–9). Deputy Strickland further testified he stood by and observed Victim write a statement and helped her fill out the form. (R. 61, lines 23–25; R. 62, lines 1–3). Petitioner was arrested and charged with criminal domestic violence of a high and aggravated nature. (R. 77, lines 24–25; R. 81, lines 22–23; R. 139-140).

At trial, the State called Victim as a witness. She testified under oath, "I don't remember anything from that night." (R. 17, lines 23–24). Victim was given a copy of her written statement and was asked if she remembered making it. She testified she did remember writing the statement but did not remember the content. (R. 18, lines 2–3). She specifically stated, "I

don't remember what these questions were that I answered. I don't remember that." (R. 18, lines 12–13). She repeated that she remembered making a statement but did not remember the content of the statement. (R. 18, lines 14–22). When the State asked her whether reading her written statement would help refresh her memory about what she told police that night, she responded, "No." (R. 19, lines 9–13). She made no effort to cooperate with the State during her direct examination.

Following a brief bench conference, the jury was excused and Appellant argued the State did not allow Victim to comment on the contents of her statement and, thus, no extrinsic evidence was admissible under Rule 613, SCRE. (R. 43, lines 3–6). Specifically, defense counsel argued, "The contents of that statement were not—were not delved into. We did not hear what she wrote. She did not get a chance to admit or deny that she said those things." (R. 42, line 25–R. 43, line 2). The solicitor then noted that Rule 613(b), SCRE, states that "unless the witness is advised of the substance of the statement," and argued she was so advised because she was given the opportunity to read it, which she did. He further argued she was given the opportunity to explain or deny and she explained that she did not remember. He cited *State v. Moses*[1] as an example of the proposition that wide latitude is granted to trial courts to allow extrinsic evidence when a witness is unable to recall or remember a previous statement.

Prior to the examinations of Deputy Powell and Deputy Strickland, Petitioner objected to the admission of the written and recorded statements. (R. 42, lines 8–25; R. 43, lines 1–6; R. 47, lines 4-25; R. 48, lines 1–12). Defense counsel argued the statements recorded on the body microphone were hearsay. (R. 47, lines 4–11). He also renewed his previous argument as to the

[1] 390 S.C. 502, 522-23, 702 S.E.2d 395, 406 (Ct. App. 2010).

written statement coming in as extrinsic evidence and cited *State v. Galloway*[2] for the proposition that extrinsic evidence of a 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. (R. 47, lines 18–23). The trial court overruled Petitioner's objection and stated:

> The Court's recollection of [Victim's] 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 handwriting, but she doesn't remember making the contents of the statement. . . . She said that she did not remember, so therefore, evidence is admitted when simply – when the witness simply avoids any direct answer, which is what she did. She just basically said that she did not remember. . . . 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 [Victim]'s statement does come in, as does [sic] the oral statements, because statements can be either oral or written, so I think you're free to proceed on those grounds.

(R. 49, lines 2–17; R. 49, line 25–R. 50, line 5) (emphasis added).

The State then called Deputy Strickland and questioned him regarding Victim's written statement because he witnessed her write it. (R. 61, line 15–R. 62, line 3). The State gave him a copy of Victim's written statement, and he was asked to read portions of it. (R. 63, line 13–R. 68, line 9). Deputy Strickland read a portion of the statement, which said:

> [Petitioner] was in the bedroom all day, and when he came out, he started slapping me and punching me. Then he decided to tie me up and tie me with his fishing string and was choking me when police come [sic]. He said he was going to kill me.

(R. 65, lines 3–7). Subsequently, Deputy Strickland read the next section where he asked Victim questions and she wrote her answers:

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[2] 263 S.C. 585, 211 S.E.2d 885 (1975).

> My question was that the first one was, "Where did [Petitioner] slap and punch you?" [Victim] responded with her answer was, "Face, head and back."
>
> The second question was, "How many different things did he tie you up with?" The answer was, "A leash and twine."
>
> The third question was, "How did he tie you up?" The answer was, "First he tied my neck, then my hands and was starting to tie my feet to – when the police came to the door."

(R. 65, lines 24–25; R. 66, lines 1–7). This written statement was admitted into evidence, over objection, as State's Exhibit #5.

The State also called Deputy Powell to the witness stand. Deputy Powell verified the recording from his body microphone on the night in question. (R. 83, lines 12–25). He testified he had an opportunity to listen to the redacted version of the recording and that it was a fair and accurate representation of the events of that evening. (R. 84, lines 1–10). Petitioner objected to the recording based on hearsay. (R. 47, lines 4–11). Portions of the recording from the body microphone were admitted into evidence, over objection, as State's Exhibit #4. (R. 84, line 22–R. 85, line 2). These audio portions were published and played for the jury. (R. 85, lines 7–16).

Petitioner was found guilty of criminal domestic violence of a high and aggravated nature and was sentenced to ten years in prison suspended upon the service of nine years and eleven months followed by four years of probation. (R. 136, lines 7–14).

ARGUMENT

I.

The Court of Appeals properly affirmed the trial court's admission of Victim's written statement into evidence because the State laid the proper foundation pursuant to Rule 613(b), SCRE, and Victim did not unequivocally admit she wrote the statement. (Petitioner's Issue #2)

On appeal to the Court of Appeals, Petitioner argued the trial court erred in admitting Victim's written statement because she did not have the opportunity to admit or deny its content. However, the State presented Victim with a copy of her written statement and she was given an opportunity to read over the content of the statement. Still, she consistently denied recalling the content. Thus, the trial court properly admitted the written statement pursuant to Rule 613, SCRE, and the Court of Appeals properly affirmed its decision.

> 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.

Rule 613(b), SCRE (emphasis added). It is uncontested that Victim was advised of the time, place, and to whom the written statement was made.

> Q. So you don't recall **giving a written statement to Deputy Strickland that evening**?
>
> A. No, sir.
>
> Q. I'm showing you what has 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.

(R. 18, lines 4–10) (emphasis added). After the solicitor asked her to take a moment to look at the statement, she stated she did not remember "what these questions were that I answered" and she did not remember the content. (R. 18, lines 7–22). This testimony demonstrates Victim's knowledge of the substance of the statement by her ability to assert she did not remember it. Further, her comment on the questions shows she did review the statement when asked to look at it.

While the copy of the written statement was in front of Victim, the State asked, "Would it help if you read this to refresh your memory about what you told police that night?" (R. 19, lines 9-10). She simply answered, "No." (R. 19, line 11). However, Victim had already been sufficiently presented with the substance of her written statement as required by Rule 613(b), SCRE, because although she denied remembering the content of her statement and she declared it could not refresh her memory, the State provided her with a copy of the statement and gave her an opportunity to read it. And as addressed above, her testimony demonstrates she actually took the opportunity to read over the statement, at the very least enough to read the questions the officer asked her and to conclude she did not remember the content.

Further, Victim did not unequivocally admit she made the written statement. Evidence of prior inconsistent statements is inadmissible when the witness admits "making the prior statement unequivocally and without qualification." *State v. Blalock*, 357 S.C. 74, 80, 591 S.E.2d 632, 635 (Ct. App. 2003). *See* 98 C.J.S. *Witnesses* § 727 (2012) (stating admission must be unequivocal).

> 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. For example, **a witness's failure to fully recall her prior statement**

> **has been found to be a sufficient denial to allow extrinsic evidence.**

Blalock, 357 S.C. at 80, 591 S.E.2d at 636 (emphasis added) (citing *State v. Brown*, 296 S.C. 191, 193, 371 S.E.2d 523, 524 (1988)). "Extrinsic evidence is also usually admitted when the witness simply avoids any direct answer." *Blalock*, 357 S.C. at 80, 591 S.E.2d at 636. Similarly, extrinsic evidence is admissible to impeach a witness when the witness merely testifies that he does not remember, or has no recollection of, making the statements presented. *State v. Miller*, 262 S.C. 369, 371, 204 S.E.2d 738, 738–39 (1974).

> If the witness neither directly admit [sic] nor deny [sic] the act or declaration, as when he merely says that he does not recollect, or, as it seems, gives any other indirect answer not amounting to an admission, it is competent for the adversary to prove the affirmative, for **otherwise the witness might in every such case exclude evidence of what he had done or said by answering that he did not remember.**

Blalock, 357 S.C. at 80, 591 S.E.2d at 636 (emphasis added) (quoting *State v. Sullivan*, 43 S.C. 205, 211, 21 S.E. 4, 7 (1895)). The Court of Appeals cited *Blalock* for the following: "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," and "[A] witness's failure to fully recall her prior statement has been found to be a sufficient denial to allow extrinsic evidence."

Here, Victim failed to recall her prior statement. When asked if she recognized the statement, she answered, "Yes, that's my handwriting. . . . But I don't remember what these questions were that I answered. I don't remember that." (R. 18, lines 10–13). Upon clarification by the State, Victim reiterated she remembered making a statement but did not remember the content of the statement. (R. 18, lines 14–18). Thus, under the circumstances, the trial court correctly exercised its wide latitude to allow extrinsic evidence and admitted the statement

because Victim's difficulty recalling the statement does not amount to an "unequivocal admission."

Furthermore, during the State's direct examination, Victim was uncooperative and clearly became an adverse witness. It would have been fruitless for the State to ask her to admit or deny her statements because she reiterated numerous times that she did not remember what she told police, stated that she did not remember anything from that night, and refused to attempt to refresh her memory. (R. p.17, lines 23–24; R. 19, lines 9–13). Therefore, the trial court did not err in admitting Victim's written statement because, as in *Blalock*, exclusion of this extrinsic evidence would allow Victim to avoid impeachment by merely stating she did not remember her prior statement. *See Blalock*, 357 S.C. at 80, 591 S.E.2d at 636 (allowing extrinsic evidence when witness does not recollect or gives other indirect answer not amounting to an admission or denial because "otherwise the witness might in every such case exclude evidence of what she had done or said by answering that he did not remember"). The Court of Appeals properly affirmed the trial court. *See Blalock*, 357 S.C. at 80, 591 S.E.2d at 636 ("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."); *see also State v. Moses*, 390 S.C. 502, 522–23, 702 S.E.2d 395, 406 (Ct. App. 2010) (recognizing the wide latitude granted to trial courts to allow extrinsic evidence when a witness is unable to recall or remember a previous statement).

II.

The Court of Appeals properly affirmed the trial court's admission of Victim's recorded statements because the State laid the proper foundation when Deputy Powell authenticated the audio recording, the recorded statements were not hearsay, and they were cumulative evidence of her written statements and therefore were harmlessly admitted. (Petitioner's Issue #1)

On appeal to the Court of Appeals, Petitioner argued the trial court improperly admitted the audio recording from Deputy Powell's body microphone because the State failed to lay the proper foundation pursuant to Rule 613(b), SCRE. However, the State laid the proper foundation, the recorded statements were not hearsay, and the audio recording was cumulative to Victim's written statements, which were properly admitted earlier in the trial; thus, any possible error in the admission of the audio recording was harmless. Therefore, the trial court correctly admitted the audio recording over Petitioner's hearsay objection, and the Court of Appeals properly affirmed its decision.

According to American Jurisprudence, audio recordings today "have almost universal approval as an acceptable form of evidence providing a proper foundation is first established for their admission." 23 Am. Jur. 3d *Proof of Facts* § 315 (1993). "Foundation" in terms of audio recordings refers to the preliminary questions asked of a witness that establish their admissibility. *Id.* Before introducing any audio recording as evidence, the proponent is required to "lay a foundation" through a properly qualified witness. *Id.* Thus, the "first requirement for introducing a [] recording is that a foundation must be laid demonstrating that the [recording] is authentic and correct." *Id.*

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted" in the statement.

Rule 801(c), SCRE. "Hearsay is not admissible" unless an exception applies, or "as provided by . . . other rules . . . or by statute." Rule 802, SCRE. *See* Rule 803(1), SCRE (defining present sense impression as "a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter"); Rule 803(2), SCRE (defining excited utterance as "a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition"). *State v. Hendricks*, 408 S.C. 525, 530, 759 S.E.2d 434, 437 (Ct. App. 2014).

First, the State did lay a proper foundation when it had Detective Powell authenticate the recording by testifying it was a fair and accurate representation of what took place on the night in question. Detective Powell testified his department's policy is to carry a body microphone (mic) at all times so that it can audio record what officers are saying and what is going on during an investigation. (R. 82, line 23–R. 83, line 3). He testified he was wearing his body mic the night of the incident involving Petitioner and Victim and that the body mic recorded the investigation. (R. 83, lines 4–11). He then identified State's Exhibit #4 as a CDR recording of the incident. (R. 83, lines 12–25). Detective Powell verified he watched and listened to the recording and testified it was a fair and accurate representation of the events of the evening. (R. 84, lines 1–10). He confirmed that the audio recording included statements from Victim about what occurred that evening. (R. 85, lines 3–6).

Second, the trial court's ruling that the statements included in the audio recording were not hearsay was correct. Because the recording was offered to show the inconsistency between what Victim said the night of the incident and what she said at trial, it was not offered for the "truth of the matter asserted" and, thus, was not hearsay. As the trial court noted, the recording of Victim's statements was "being offered [to show] that the witness told a different story at the

time, not for the truth of the matter asserted." (R. 50, lines 1–2). However, if this Court determines the recording somehow constitutes hearsay, the State submits it was properly admitted under two hearsay exceptions: present sense impression and excited utterance. *See* Rule 803(1), SCRE (defining present sense impression as "a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter"); Rule 803(2), SCRE (defining excited utterance as "a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition").

Finally, even if the audio recording of the incident was improperly admitted, Appellant suffered no prejudice because it was cumulative to Victim's written statement given to police that same night, which was already properly admitted. The Court of Appeals has held an "[e]rror is harmless where it could not reasonably have affected the result of the trial." *State v. Kirton*, 381 S.C. 7, 37, 671 S.E.2d 107, 122 (Ct. App. 2008). Appellate courts will generally not set aside convictions based on insubstantial errors not affecting the result. *State v. Sherard*, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991). Thus, an insubstantial error that does not affect the result of the trial is harmless when guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached. *Kirton*, 381 S.C. at 37, 671 S.E.2d at 122 (citing *State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989)). "The admission of improper evidence is harmless where the evidence is merely cumulative to other properly admitted evidence." *Id.* "Cumulative evidence has repeatedly been defined to be additional evidence of the same kind to the same point." *State v. Funderburke*, 251 S.C. 536, 540, 164 S.E.2d 309, 311 (1968).

Here, even though one statement was verbal and the other was written, they are evidence of the same kind because they are both statements from and about the same incident. Furthermore, the recorded statements merely tended to show what had already been established by the written statement. Both statements tended to prove, at the very least, Victim's fear and the abuse she endured on the night in question. The statements were introduced to show inconsistency with Victim's trial testimony. Accordingly, introduction of the recorded statements was harmless because it did not reasonably affect the result of the trial. Even absent the recorded statements, Petitioner's guilt had already been conclusively proven through witness testimony (including neighbor Richard Stevens who saw and heard a disturbance concerning enough to call the police), multiple photographs of Victim's injuries, Victim's statements and behavior at the scene (including calling for Deputy Powell to come and help her when he announced his presence), and Victim's written statement. Likewise, the inconsistencies between her trial testimony and her prior statement were shown by the written statement. Admission of the audio recorded statements was harmless beyond a reasonable doubt.

Petitioner cites *State v. McLeod*, 362 S.C. 73, 81, 606 S.E.2d 215, 219 (Ct. App. 2004), to argue that Victim was not given an opportunity to admit or deny her statements, as the Court of Appeals held was mandatory. He argues this is the foundation that was required for admission of the statements and that the State failed to lay this foundation because it did not ask Victim about the statements or allow her to admit or deny them. He attempts to distinguish *Carmack* and *Blalock*, claiming the Court of Appeals' reliance on them is misplaced. However, the distinction Petitioner makes—that *Carmack* and *Blalock* involved whether the witness unequivocally admitted making the prior inconsistent statement while this case involved the State's failure to question Victim about the statement or give her the opportunity to admit or deny them—is of no

moment. The State did question Victim about the written statements and gave her the opportunity to admit or deny them, as explained in detail in Issue I above. And as noted above, the verbal and written statements were "of the same kind to the same point." *Funderburke*, 251 S.C. 536, 540, 164 S.E.2d 309, 311 (1968).

CONCLUSION

Respondent respectfully submits that this Court should deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, Respondent asks permission under the rules to fully brief the issues.

Respectfully submitted,

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May 22, 2017

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PROOF OF SERVICE

I, Angela Bennett, certify that I have served the Return to Petition for Writ of Certiorari on petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney Kathrine H. Hudgins, Esquire, S.C. Commission on Indigent Defense, Office of Appellate Defense, P.O. Box 11589, Columbia, SC 29211.

I further certify that all parties required by Rule to be served have been served.

This 22nd day of May, 2017.

ANGELA BENNETT
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