STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

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Certiorari to Oconee County

Honorable Letitia H. Verdin, Circuit Court Judge

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MICHAEL LAMAR COUCH,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-000159

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# SUPPLEMENTAL APPENDIX

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Oconee County

Alexander S. Macaulay, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

MICHAEL L. COUCH,

APPELLANT

Appellate Case No. 2011-203927

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# FINAL BRIEF OF APPELLANT

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## STATEMENT OF ISSUES ON APPEAL

1.

Whether the trial judge erred in admitting a written statement into evidence that contained confidential communications between a husband and wife where the wife asserted the spousal communications privilege and the statement was also inadmissible under Rule 613(b) of the South Carolina Rules of Evidence?

2.

Whether the trial judge erred in failing to sever the cases involving each of the purported victims?

## STATEMENT OF THE CASE

On May 16, 2011, Michael Couch ("Couch") was indicted for the attempted murder of Garry McCall, Jr. ("McCall"). R. 208 (Indictments). Couch was also indicted for the assault and battery of a high and aggravated nature as to McCall. R. 210 (Indictments). Couch was indicted for criminal domestic violence of a high and aggravated nature and a weapons charge for an incident related to his common-law wife, Sommer Grant ("Grant"). R.212 (Indictments).

On October 17 – 19, 2011, Couch was tried in Oconee County before the Honorable Alexander S. Macaulay and a jury. R. 1. Couch was represented by R. Delane Rosemond and the State was represented by Blair Stoudemire. R. 1. The jury convicted Couch of the lesser included offense of ABHAN as to McCall, but convicted Couch on the CDVHAN and weapons charge as to his wife. R. 191, ll. 4 – 20. Judge Macaulay sentenced Couch to twenty years' imprisonment suspended upon service of fifteen years on the ABHAN charge. R. 192, ll. 19 – 25. On the CDVHAN charge, Judge Macaulay sentenced Couch to ten years' imprisonment suspended upon service of five years. R. 193, ll. 5 – 10. Judge Macaulay sentenced Couch to five years' imprisonment on the weapons charge with all of the sentences to run concurrently. R. 193, ll. 1 – 19.

On October 21, 2011, Couch's attorney served a notice of appeal on the assistant solicitor for Oconee County. R. 195 (Notice of Appeal; Proof of Service). On October 26, 2011, the notice of appeal and proof of service were filed with the Oconee County Clerk of Court. R. 196 (Notice of Appeal; Proof of Service). On December 12, 2011, this Court dismissed the appeal for failure to file the notice in the Court of Appeals. R.

197 (Order of Dismissal). On December 22, 2011, Couch filed a "Motion to File Appeal Out of Time" which was construed by this Court as a petition to reinstate and was granted on January 17, 2012. R. 198 (Letter from the South Carolina Court of Appeals to Edward Delane Rosemond dated January 17, 2012). This appeal follows.

## ARGUMENT

1.

The trial judge erred in admitting a written statement into evidence that contained confidential communications between a husband and wife where the wife asserted the spousal communications privilege and the statement was also inadmissible under Rule 613(b) of the South Carolina Rules of Evidence.

**Relevant Facts**

In the early morning hours of February 16, 2011, there was a fight at Garry McCall's residence. R. 207 (Defendant's Exhibit 3). Couch and his wife were spending the night at McCall's house. R. 44, l. 24 – 105, l. 4; R. 31, l. 24 – 92, l. 10. McCall had been drinking and taking Lortab. R. 70, l. 19 – 71, l. 15; R. 91, ll. 7 – 10. McCall was intoxicated. R. 97, ll. 17 – 19. Grant and Couch fell asleep in the living room. R. 34, ll. 14 – 23.

At approximately 3:00 AM, Couch awakened to find his wife, Sommer Grant, and McCall kissing. R. 207 (Defendant's Exhibit 3). Couch yelled at McCall to stop and McCall pulled out a knife. R. 207(Defendant's Exhibit 3). McCall then came at Couch with the knife, cutting Couch in two places, and kicking him. R. 207 (Defendant's Exhibit 3). Couch was able to get the knife away from McCall during the scuffle and McCall received a cut on his cheek from the knife. R. 207 (Defendant's Exhibit 3.). Grant jumped on Couch's back during the fight and was hit during the scuffle. R. 207 (Defendant's Exhibit 3.).

McCall's version of events differed substantially from Couch's version. In McCall's version, Couch woke up from a dead sleep and immediately began beating his

wife. R. 73, ll. 5 – 11. McCall initially could not recall anything that Couch said to either him or Grant except for cursing, but later stated McCall "said something about us being together, and accused her of it." R. 33, ll. 12 – 18. McCall told Couch, "You can't be doing that in my house." R. 74, ll. 4 – 6. McCall claimed that Couch then turned on him and cut him in the face with a knife. R. 74, ll. 7 – 9.

It was undisputed at trial that the knife belonged to McCall. R. 74, ll. 19 – 21. SLED was unable to find usable fingerprints on the knife. R. 151, ll. 13 – 18. Blood found on the hilt of the knife was Couch's. R. 160, ll.15 – 23, According to the arresting officer, McCall was "grossly intoxicated." R. 137, ll. 12 – 19. The arresting officer also put in his report that McCall said "Couch cut him for no reason." R. 138, ll. 13 – 14.

McCall also admitted that portions of his written statement were not true. In his written statement, McCall said that he kicked Couch out of the door, but admitted on cross-examination that was not true. R. 96, ll. 4 – 6. McCall said he included this fiction in his written statement because he "was mad at [Couch]." R. 96, ll. 7 – 8. He also said in his statement that he blacked out, but on cross-examination testified that he never lost consciousness. R. 102, l. 17 – 103, l. 10.

Grant, defendant's wife, gave two written statements to the police after the incident. R. 203-204 (State's Exhibit 40). Grant did not deny giving the statements, but could not remember what she put in them. R. 40, l. 2 – 41, l. 25. Grant admitted that she was intoxicated that night. R. 55, ll. 17 – 18. She had been taking Lortab. R. 55, ll. 22 – 23. She could not remember how many Lortabs she took but guessed that it was at least four or five. R. 56, ll. 3 – 13. Grant testified, "I don't recall what's in the

statement. Like I said, I took some Lortabs and I was pretty mixed up, I guess." R. 53, ll. 23 – 25.

Grant first testified outside of the presence of the jury. R. 29, l. 25 – 30, l. 2. Grant attempted to assert the spousal privilege against testifying against her husband. R. 36, l. 19 – 38, l. 14. When the State attempted to ask her questions concerning her written statement, Grant said "I'd just rather not answer." R. 40, ll. 11 – 15. After being told that she needed to "speak up," Grant responded "I'd just rather not testify or anything." R. 40, ll. 16 – 17. When asked to explain or deny the written statement, Grant first said, "Okay. I guess it's a denial." R. 43, l. 9. The trial judge then said, "Did she say she denied it?" R. 43, l. 13. Grant then said, "I don't recall what's in the statement, sir." R. 43, ll. 14 – 15. The trial judge, over the objection of the defendant, ruled that the statement was admissible under Rule 613 (B) and that the spousal privilege did not apply. R. 47, l. 8 – 48, l. 8.

**Discussion**

a. Grant's Written Statement Was Inadmissible Because of Her Assertion of the Spousal Communications Privilege

Spouses cannot be compelled to testify in a criminal trial as to communications made during a marriage. Section 19-11-30 of the South Carolina Code states:

> In any trial or inquiry in any suit, action, or proceeding in any court or before any person having, by law or consent of the parties, authority to examine witnesses or hear evidence, no husband or wife may be required to disclose any confidential **or, in a criminal proceeding, any communication** made by one to the other during their marriage.
>
> Notwithstanding the above provisions, a husband or wife is required to disclose any communication, confidential or otherwise, made by one to the other during their marriage where the suit,

> action, or proceeding concerns or is based on child abuse or neglect, the death of a child, criminal sexual conduct involving a minor, or the commission or attempt to commit a lewd act upon a minor.

S.C. Code Ann. § 19-11-30 (emphasis added). This issue was brought to the attention of the trial judge before Grant took the stand. R. 28, l. 5 – 30, l. 2. Defense counsel informed the court that Couch and Grant were common-law married and the spousal privilege applied.[1] R. 28, l. 21 – 29, l. 3.

Grant repeatedly asserted this privilege during her *in camera* testimony:

THE WITNESS: "Um, do I have the right to not testify any further?

THE COURT: You are exercising a privilege?

THE WITNESS: Yes.

THE COURT: What's the privilege?

THE WITNESS: I don't understand your question.

THE COURT: Well, you are saying you don't want to testify, Why don't you want to testify?

THE WITNESS: It's just hard for me to remember a lot of things.

THE COURT: Well, if you don't know the answer, then just tell the Solicitor you don't know the answer. You don't remember.

THE WITNESS: I just, um, I just would rather not testify.

THE COURT: Do what?

THE WITNESS: I would just rather not testify.

THE COURT: Why?

---

[1] The trial judge obviously assumed that there was no real issue as to whether Couch and Grant were married. Grant repeatedly said she was married to Couch and that she held herself out as married to Couch. R. 44, l. 6 – 45, l. 4. See Kirby v. Kirby, 270 S.C. 137, 141-42, 241 S.E.2d 415, 416-17 (1978).

> THE WITNESS: Um, I just feel that I have the right to waive, you know?
>
> THE COURT: Why not?
>
> THE WITNESS: Why do I have a right not to testify?
>
> THE COURT: Do you?
>
> THE WITNESS: Uh-huh.
>
> THE COURT: What is it?
>
> THE WITNESS: I'm not sure. I was asking you do I have a right to not testify?
>
> THE COURT: Well, I need to know what your right is. What right are you talking about not to testify?

R. 36, l. 19 – 37, l. 22. The Court then engaged in discussion with counsel and allowed the attorneys to continue to examine Grant. R. 37, l. 23 – 39, l. 8. Again, Grant tried to assert her right not to testify regarding the written statement saying the following when questioned by the solicitor:

- "I'd just rather not answer." R. 40, l. 15
- "I'd just rather not testify or anything." R. 40, l. 17.
- "I'd just rather not read it out loud." R. 41, l. 17.

The trial judge then ruled that the statement was admissible because "actions in assaulting the Defendant or the witness are not communications." R 47, ll. 21 – 22. The defense's objection was noted at the time of the ruling and again when the State offered Grant's statement into evidence before the jury. R. 48, ll. 7 – 8; R 54, l. 22 – 55, l. 11.

The trial judge relied on State v. Govan, 320 S.C. 392, 465 S.E.2d 574 (Ct. App. 1995) in determining that the written statement is admissible. This was error because, as Govan makes clear, it only rules that the "physical acts of assault cannot be considered

communications." Id. at 395, 465 S.E.2d at 575. Grant's written statement contains more than just a description of a physical attack. It contains multiple verbal communications made by Couch to her and from her to Couch. These verbal communications are privileged. Since the statement contains privileged material and Grant asserted her privilege, it was error to admit them.

The State will likely argue that the privilege does not attach because it was waived when Grant revealed them to the investigating officer or because the statements were made in the presence of McCall. The statutory privilege contains no such limitation in a criminal proceeding. To the contrary, it specifically states that **any communication** is subject to the privilege in a criminal trial. In contrast, during any other proceeding, only confidential communications are protected. McCall said he could not remember any specific statements made during the altercation. R. 73, ll. 12 – 14. Therefore, the spousal privilege applies to the communications made in the written statement and their admission was error.

The communications contained in the written statement were extremely prejudicial to Couch. The written statement claims that Couch told Grant he was going to beat her; that he accused her of having an affair with McCall, and that he was going to kill her with the knife. R. 204 (State's Exhibit 40). It also contains the statement by Grant that she was "so scared for my life." R. 203 (State's Exhibit 40). McCall's testimony was, at best, inconsistent. Especially given Grant's testimony that she did not remember what happened that night, without the admission of these statements, the result of the trial likely would have been different.

b. Grant's Written Statement was Inadmissible Under Rule 613(b)

While Grant's written statement is inadmissible for any purpose under the spousal privilege, as an alternative ground for admission the State argued it was admissible under Rule 613(b) and the trial judge ruled in the State's favor on this ground over the defense's objection. Even if the spousal privilege did not apply, the written statement was not admissible under Rule 613(b). Rule 613(b) does not allow the admission of a prior inconsistent statement unless the witness denies making such statement. SCRE 613(b). After her original denial under questioning from the trial judge, Grant then repeatedly said she could not deny giving the written statement, but said she could not remember the statements because she was intoxicated.

"[I]f a witness admits making the prior statement, extrinsic evidence that the prior statement was made is inadmissible." SCRE 613(b). Grant admitted that the documents were in her handwriting and that her signature was on both documents. R. 39, l. 12 – 40, l. 10. Even though she could not remember the contents, this was an unequivocal admission of her giving the written statements. See State v. Carmack, 388 S.C. 190, 694 S.E.2d 224 (Ct. App. 2010) ("When the issue is whether the witness admitted making the prior inconsistent statement, the admission must be unequivocal."). Grant did not testify in a manner inconsistent with her written statement. Therefore, the admission of the extrinsic evidence—the written statement itself—was inadmissible.

2.

<u>The trial judge erred in failing to sever the cases involving each of the purported victims.</u>

**Relevant Facts**

Prior to trial, the defendant filed a motion to sever the cases. R. 199 - 201(Notice of Motion and Motion to Sever Cases). The defendant asked the court to sever the trial for attempted murder involving McCall from the CDVHAN and weapons charge related to Grant. R. 199 - 201 (Notice of Motion and Motion to Sever Cases). The trial judge heard extensive argument on the motion. R. 4, l. 17 – 27, l. 24. The trial judge said that it was a "close" question, but denied the defendant's motion. R. 27, ll. 13 – 24.

**Discussion**

"Where the offenses charged in separate indictments are of the same general nature involving connected transactions closely related in kind, place and character, the trial judge has the power, in his discretion, to order the indictments tried together if the defendant's substantive rights would not be prejudiced." <u>State v. Smith</u>, 322 S.C. 107, 109, 470 S.E.2d 364, 365 (1996). In a trial solely involving the attempted murder of McCall, the issue would be one of self-defense. Couch received a self-defense instruction from the trial judge. The indictments and evidence regarding the altercation with Grant would be inadmissible as prior bad acts under Rule 404(b). <u>See</u> SCRE 404(b).

Conversely, the same would be true in a CDVHAN trial. Allowing the jury to hear the prejudicial evidence related to the other charges limited Couch's ability to

defend himself and affected his substantive rights. Therefore, the trial judge's refusal to sever these cases, which he realized was a close question, was an abuse of discretion.

## CONCLUSION

For the foregoing reasons, Couch's convictions and sentences should be reversed and Couch should be granted a new trial.

Respectfully submitted,

David Alexander
Appellate Defender

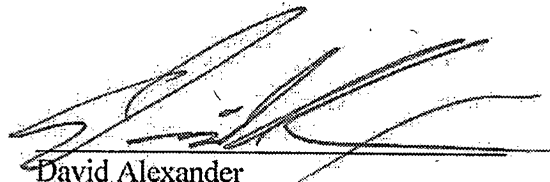
ATTORNEY FOR APPELLANT

This 11th day of February, 2013.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

February 11, 2013



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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Oconee County

Alexander S. Macaulay, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

MICHAEL L. COUCH,

APPELLANT

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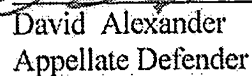
CERTIFICATE OF SERVICE

---

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 11th day of February, 2013.



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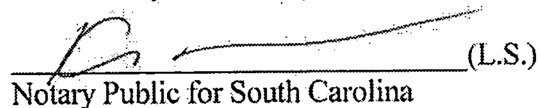
this 11th day of February, 2013



(L.S.)
Notary Public for South Carolina
My Commission Expires: October 13, 2013 .

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Oconee County
Honorable Alexander S. Macaulay, Circuit Court Judge

Appellate Case No: 2011-203927

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THE STATE,

Respondent,

v.

MICHAEL L. COUCH,

Appellant.

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**FINAL BRIEF OF RESPONDENT**

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## STATEMENT OF ISSUES ON APPEAL

I.

The trial court properly admitted a written statement into evidence when the spousal communications privilege did not apply under these circumstances and further, the statement was properly admitted under Rule 613(b), SCRE.

II.

The trial court correctly denied Appellant's motion to sever the cases of the two victims because the charges were of the same general nature involving connected transactions closely related in kind, place, and character and the Appellant's substantive rights were not prejudiced.

## STATEMENT OF THE CASE

An Oconee County Grand Jury indicted Appellant for attempted murder, assault and battery of a high and aggravated nature (ABHAN), criminal domestic violence of a high and aggravated nature (CDVHAN), and possession of a weapon during the commission of a violent crime. (R. p. 208-215) On October 17-19, 2011, Appellant proceeded to trial before a jury. E. Delane Rosemond, Esquire, represented Appellant, and Assistant Solicitor Blair Stoudemire represented the State. The jury found Appellant guilty of ABHAN, CDVHAN, and the weapons charge. (R. p.191 lines 4-20.) The Honorable Alexander S. Macaulay sentenced Appellant to twenty years' imprisonment, suspended upon the service of fifteen years with five years' probation, on the ABHAN charge; ten years' imprisonment, suspended upon the service of five years with five years' probation, on the CDVHAN charge; and five years' imprisonment on the weapons charge. (R. p.192 lines 19-25; R. p.193, lines 1-19.)

On October 26, 2011, Appellant filed a Notice of Appeal. On December 12, 2011, this Court dismissed the appeal for failure to file the notice in the Court of Appeals, but this Court later granted Appellant's Motion to File Appeal Out of Time, which it construed as a petition to reinstate, on January 17, 2012. This appeal follows.

## STATEMENT OF FACTS

On February 15-16, 2011, Appellant and Sommer Grant, his common-law wife, stayed the night at the home of their friend Garry McCall. (R. p.31, lines 24-25; R. p.32, lines 1-3.) Each person gave his own version of the events that occurred that night, but the result was that McCall was cut with a knife across his face by Appellant, Grant was hit by Appellant, and the Walhalla Police Department arrived on the scene and arrested Appellant. (R. p.107, lines 14-25; R. p.109, lines 9-21; R. p.112, lines 21-25; R. p.120, lines 1-25; R. p.136, lines 21-23.) Appellant was charged with attempted murder, assault and battery of a high and aggravated nature (ABHAN), criminal domestic violence of a high and aggravated nature (CDVHAN), and possession of a weapon during the commission of a violent crime. (R. p.208-215)

Pretrial, Appellant moved to sever the case into two trials: one for each victim. (R. p.4-7.) Specifically, he argued trying the cases together would confuse the jury. (R. p.6, lines 16-21.) Further, he asserted the evidence he would need to present to establish self-defense to the attempted murder charge could lead to a conviction on the other charges. (R. p.7, lines 4-12.) After a thorough discussion and arguments from both sides, the trial court denied the motion, stating:

> Having so considered the motion, the Court does find that the charges can be tried together because they arise [out] of the single chain of circumstances, are proved by the same evidence, and are of the same general nature, and that no real right of the Defendant has been prejudiced in the sense that he will still have the self-defense charge against the McCall indictment, and they would be introducing the knife . . . in the Sommer [Grant] indictment.

(R. p.27, lines 13-22.)

Prior to calling Sommer Grant to testify, the State informed the trial court that Grant wished to assert a privilege. (R. p.28, lines 6-14.) The trial court allowed Grant to testify *in camera* to determine whether any privilege applied. (R. p.30, lines 1-2.) Grant testified that she and Appellant were in a common-law marriage and had lived together. (R. p.31, lines 7-11.) She further testified she told people she and Appellant were married, held herself out as being married to him, and considered herself married. (R. p.44, lines 10-25; R. p.45, lines 1-4.) The State questioned Grant regarding her written statement to police following the incident. (R. p.39-43.) Grant acknowledged the statement was written in her handwriting. (R. p.39, lines 12-17; p.40, lines 8-10; R. p.41, 4-8.) She admitted to giving the statement but testified she did not remember what she wrote in the statement. (R. p.41, lines 18-25; R. p.42, lines 8-18; R. p.43, lines 14-21.) When the State gave Grant the opportunity to explain or deny the content of her statement, Appellant objected that "[e]xplain or deny is not in the elements of recorded recollection."[1] (R. p.42, lines 19-23.) The trial judge opined that the State was trying to introduce extrinsic evidence under Rule 613(b), SCRE, and the State confirmed this was its intention. (R. p.42, lines 24-25; R. p.43, lines 1-7.) After the *in camera* testimony, the trial judge denied the spousal privilege being applicable to this case and required Grant to testify. (R. p.47, lines 23-25.) He based his ruling on State v. Govan, 320 S.C. 392, 465 S.E.2d 574 (Ct. App. 1995), in which this Court held a witness was not entitled to invoke the privilege to protect actions because the privilege only protects communications between spouses. (R. p.47, lines 8-25.) Further, the trial court ruled that if Grant denied what was in the statement or could not recollect what she wrote in the statement, it would

[1] To the extent Appellant referred to "recorded recollection," the State construes this as a reference to Rule 803(5), SCRE. This rule was not argued at trial or in Appellant's brief.

be admissible under Rule 613(b), SCRE, as extrinsic evidence. (R. p.47, line 25; R. p.48, lines 1-3.) At that point, the trial court noted Appellant's objection. (Tr. 108, line 7.)

Grant then testified before the jury regarding the events that took place on February 15-16, 2011. (R. pp.50-68.) The State introduced Grant's statement and she recalled giving the statement but was not sure if she recalled the contents of the statement. (R. p.54, lines 1-21.) At that point, the State moved to admit the statement under Rule 613(b), SCRE. (R. p.54, lines 22-24.) Appellant objected, arguing that Rule 613(b) did not apply and that because Grant had not denied the statement, it would not come in as a recorded recollection either. (R. p.54, line 25; R. p.55, lines 1-4.) The trial court overruled the objection, stating that Rule 613(b) applies to inconsistent prior statements and, under State v. Miller, 262 S.C. 369, 204 S.E.2d 738 (1974), inability to remember. (R. p.55, lines 5-9.) Grant read a portion of her statement, which included the following:

> I said, ["]No, I'm calling my grandma.["] [Appellant] said, ["]No, you won't have time," picked up a knife and started punching me, Sommer Grant. Then I, Sommer Grant, went to the kitchen to try and get away. [Appellant] followed me, got me, punching me in the face and stomach and back, broke a coffee glass pot over my face or my forehead. Made me - - see made - - okay - - the living room and started beating me again.

(R. p.65, lines 16-24.) She testified she did not really remember what happened that night and that she had taken four or five Lortabs for a hurt arm. (R. p.56, lines 7-10; p.66, lines 5-6; R. p.67, lines 20-23.)

Garry McCall testified Appellant came to his house on February 15, 2011. (R. p.69, lines 4-15.) He stated he and Appellant drank and talked in McCall's living room and that at some point during the night, Grant joined them. (R. p.70, lines 21-25; R. p.71,

lines 1-25; R. p.72, lines 1-7.) McCall testified Appellant fell asleep and then woke up and started beating Grant up. (R. p.73, lines 9-11.) McCall reported that Appellant "was hitting her in the face and back of the head, on top of the head, and then he drug [sic] her across the living room towards me, and I stood up next to the kitchen door, and he was kicking her in the head and stomping." (R. p.73, lines 22-25; R. p.74, lines 1-3.) McCall also recounted Appellant's "cussing" at Grant and accusing her and McCall of "being together." (R. p.73, lines 12-18.) When McCall told Appellant not to do that in his house, Appellant swung his hand with a knife in it and cut McCall in the face. (R. p.74, lines 5-9; R. p.76, lines 12-23.) McCall testified that he ran out the door after being cut because he was afraid for his life. (R. p.76, lines 24-25; R. p.77, lines 4-5.)

## ARGUMENTS

### I.

**The trial court properly admitted a written statement into evidence when the spousal communications privilege did not apply under these circumstances and further, the statement was properly admitted under Rule 613(b), SCRE.**

Appellant argues the trial court erred in admitting a written statement into evidence that contained confidential communications between a husband and wife where the wife asserted the spousal communications privilege.[2] Additionally, he argues the trial court erred in finding the statement admissible under Rule 613(b), SCRE. However, because the statement pertained to actions and involved a crime between spouses, the spousal privilege did not apply. Further, the trial court correctly found the statement admissible under Rule 613(b) because it was used as extrinsic evidence after the witness did not admit she made the prior inconsistent statement.

### Spousal Privilege

Appellant argues Grant's statement was inadmissible because of her assertion of the spousal communications privilege. However, the trial court did not admit the statement based on the denial of this privilege. The trial court only determined the spousal privilege did not apply and required Grant to testify. Appellant also argues the trial court erred in ruling Grant's statement was admissible because "actions in assaulting the Defendant or the witness are not communications," basing its decision on State v. Govan, 320 S.C. 392, 465 S.E.2d 574 (Ct. App. 1995). To the contrary, the trial court cited Govan to support its decision to require Grant to testify and then clarified, "If she

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[2] In his brief, Appellant mentions two written statements Grant gave to police. However, Exhibit 40 only contains one statement, and most of Appellant's argument refers to only one statement.

either denies what's in the statement or says that she cannot recollect it, then under 613(b) it will be admissible as extrinsic evidence." (R. p.47, line 25; R. p.48, lines 1-3.) Accordingly, Appellant's argument that the court admitted the statement in error after Grant asserted the spousal communication privilege misapprehends the trial court's ruling. To the extent Appellant's argument regarding the spousal privilege can be construed as asserting the trial court erred in denying the privilege and requiring Grant to testify, this argument is not preserved. Although Appellant objected on the basis of recorded recollection, construed as Rule 803(5), SCRE, he did not object at any time to the trial court's denial of the spousal privilege. Thus, this issue is not preserved for appellate review. However, the State will address the merits below in order to examine the public policy reasons the spousal communications privilege should not be used to shield defendants in cases of spousal abuse.

The spousal communication privilege is codified in the following statute:

> In any trial or inquiry in any suit, action, or proceeding in any court or before any person having, by law or consent of the parties, authority to examine witnesses or hear evidence, no husband or wife may be required to disclose any confidential or, in a criminal proceeding, any **communication** made by one to the other during their marriage.

S.C. Code Ann. 19-11-30 (1976 & 2011) (emphasis added). The Supreme Court expressly recognized the communications privilege in 1934. In Wolfle v. United States, the Court noted that the purpose of the privilege is to protect "marital confidences, regarded as so essential to the preservation of the marriage relationship as to outweigh the disadvantages to the administration of justice which the privilege entails." 291 U.S. 7, 14 (1934) (emphasis added). The privilege belongs to the testifying spouse. However, in cases of spousal abuse, it is not unreasonable to suppose a defendant spouse might

intimidate his spouse into asserting the privilege. Allowing the privilege to protect a defendant in this situation would do nothing to achieve the intended purpose of the spousal communications privilege, which is to preserve the marriage relationship. In cases of spousal abuse, the relationship is already damaged and there is arguably nothing to preserve. See 81 Am. Jur. 2d *Witnesses* § 301 (2004) ("A spouse's testimony about a defendant's threats to harm him or her if he or she revealed any of the defendant spouse's criminal activities does not fall within the statutory spousal privilege, because the statements do not enhance the mutual trust and confidence of the marital relationship that the privilege is intended to protect.").

In State v. Govan, 320 S.C. 392, 465 S.E.2d 574 (Ct. App. 1995), Govan was convicted of assault and battery of a high and aggravated nature against his live-in girlfriend, JoAnn Johnson. Johnson requested not to testify pursuant to the spousal immunity privilege, and the trial judge, assuming Govan and Johnson were common-law married, denied the request. Id. at 393, 465 S.E.2d at 575. This Court held that because Govan's actions in assaulting Johnson were not communications, section 19-11-30 did not apply. Id. at 395, 465 S.E.2d at 575. This Court cited Black's Law Dictionary, which defines a communication as "[i]nformation given; the sharing of knowledge by one with another . . . a deliberate interchange of thoughts or opinions between two or more persons." Id. at 395, 465 S.E.2d at 575 (citation and internal quotation marks omitted). This Court then determined "[t]he physical acts of an assault cannot be considered communications[,]" and affirmed Govan's conviction. Id. at 395, 465 S.E.2d at 575. In its opinion, this Court pointed out that the marital communication privilege is

inapplicable in cases that involve crimes committed by a spouse against a spouse. Id.; see 81 Am. Jur. 2d *Witnesses* § 299 (1992).[3]

The law in South Carolina supports the trial court's ruling that Grant's account of the assault is not protected under the spousal privilege due to the nature of the crime. Moreover, the United States Supreme Court has determined the spousal privilege extends generally to utterances, not to acts. Pereira v. United States, 347 U.S. 1, 6 (1954).

In Grant's statement, she is merely describing the acts that took place when her common-law husband assaulted her. While there are references to communications, they are in the form of threats, which are part of the act. For example, Grant stated that she told Appellant she was calling her grandmother and Appellant said, "No, you won't have time." This is not a communication, but rather a threat accompanying the act of violence between the spouses. Other examples include Appellant "cussing" Grant, accusing her of some involvement with McCall, telling her he was going to kill her, telling her he was going to beat her, and confronting her about getting up to change by saying, "What did I tell you about getting up without me?" All of these are of a threatening, abusive nature. Appellant was charged with, and convicted of, criminal domestic violence of a high and aggravated nature which entails: "(1) an assault and battery which involves the use of a deadly weapon or results in serious bodily injury to the victim; or (2) an assault, with or without an accompanying battery, which would reasonably cause a person to fear imminent serious bodily injury or death." S.C. Code Ann. § 16-25-65 (2003 & 2011). Under either subsection, one of the necessary elements is assault. Assault is "[t]he threat

[3] This section has since been changed to § 287 (2004) ("A spouse's testimony as to physical acts of cruelty or abuse by the other spouse is admissible on the ground that no confidential communication is involved, or that the information was not gained as a result of the marital relation.").

or use of force on another that causes that person to have a reasonable apprehension of imminent harmful or offensive contact; the act of putting another person in reasonable fear or apprehension of an immediate battery by means of an act amounting to an attempt or threat to commit a battery." Black's Law Dictionary 130 (9th ed. 2009). Therefore, by the very definition of assault, Appellant's use of the words, "No, you won't have time," was a threat to cause fear and apprehension in Grant, indicating he was going to harm her immediately, leaving her no time to call for help. Similarly, the other examples also qualified as threats. Rather than a protected "interchange of thoughts or opinions between two or more persons," these threats were part of the crime. Additionally, abusive language has been determined to fall outside the parameters of the privilege. "Abusive language is not privileged since it is not warranted or induced by the marital relation." 81 Am. Jur. 2d *Witnesses* § 314 (2004); see also 81 Am. Jur. 2d *Witnesses* § 287 (2004) ("Threats to a victim spouse by the defendant in the course of, or in furtherance of, an assault against the spouse and crimes against the spouse are not privileged.").

Additionally, the fact that Appellant communicated the threats to his common-law wife in the presence of a third party, McCall, could be seen to waive the privilege. Although Appellant argues that because South Carolina's statute is written so that in a criminal proceeding, "any communication" falls under the spousal privilege, communications between spouses are presumptively confidential. Pereira v. United States, 347 U.S. 1, 6 (1954) (citing Blau v. United States, 340 U.S. 332 (1951); Wolfle v. United States, 291 U.S. 7 (1934)). Forty-nine states and the District of Columbia have codified the marital communications privilege. Mikah K. Story, *Twenty-First Century Pillow-Talk: Applicability of the Marital Communications Privilege to Electronic Mail,*

58 S.C. L. Rev. 275, 281 (2006). Courts in forty-seven states and the District of Columbia have held that the presence of a third party destroys any privilege that might attach to a communication between spouses. Id. at 282. However, South Carolina courts have not addressed the third party presence rule. In light of this overwhelming majority, it would be prudent for courts in South Carolina to consider adopting this rule of waiver of the spousal communications privilege in the presence of a third party. South Carolina has already adopted a similar rule pertaining to attorney-client privilege. See Marshall v. Marshall, 282 S.C. 534, 538, 320 S.E.2d 44, 46-47 (Ct. App. 1984) (citing Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146 (D. S.C. 1975); United States v. Jones, 696 F.2d 1069 (4th Cir. 1982) ("Any voluntary disclosure by a client to a third party waives the attorney-client privilege not only as to the specific communication disclosed but also to all communications between the same attorney and the same client on the same subject.")

Even if the trial court erred in its decision to deny the spousal privilege and require Grant to testify, any error was harmless. If the trial court had determined the "communications" parts of the statement were privileged and required the State to redact those portions, the remaining statement would still have described the assault and battery Grant suffered at the hands of Appellant. Thus, there was no prejudice to Appellant in the fact the communications were also recounted in her statement. Moreover, the prior statement was cumulative to McCall's testimony regarding Appellant's assault on Grant. McCall testified regarding the assault itself but also recounted Appellant's "cussing" at Grant and accusing her and McCall of "being together."

**Rule 613(b), SCRE**

The trial court properly admitted the statement under 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.** 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). Appellant argues that because Grant did not deny the statement was in her handwriting, she admitted making the prior statement and extrinsic evidence was inadmissible under the rule. However, admitting a statement is in her handwriting is not the same as admitting she "has made the prior inconsistent statement" as specified in the rule. Grant clearly did not admit making the statement.

"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." State v. Blalock, 357 S.C. 74, 80, 591 S.E.2d 632, 635 (Ct. App. 2003), *cert. dismissed as improv. granted, mem.*, 2005-MO-022 (May 31, 2005). 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.**

Id. at 80, 591 S.E.2d at 636 (citing State v. Brown, 296 S.C. 191, 193, 371 S.E.2d 523, 524 (1988); State v. Miller, 262 S.C. 369, 371, 204 S.E.2d 738, 738-39 (1974) (emphasis added)). "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.

> 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.

Id. (quoting State v. Sullivan, 43 S.C. 205, 211, 21 S.E. 4, 7 (1895)).

Here, Grant failed to fully recall her prior statement. When asked if she recognized the statement, she explained, "I really don't remember what all I wrote in it, but that's my handwriting." (R. p.39, lines 12-17.) At one point, she answered, "It's got my writing on it, so I guess I did." (R. p.39, lines 23-24.) When asked whether she was saying she did not remember the contents of the statement, she stated, "I don't, like, I don't remember really what I put in the statement; no, sir, I don't." (R. p.41, lines 18-21.) She further testified, "No, I cannot confirm what was all in the statement because I don't remember what I put." (R. p.41, lines 24-25.) Twice more she stated she did not recall what was in the statement. (R. p.43, lines 14-15, 20-21.) Only after Grant's insistence that she did not remember what she wrote in the statement did the trial court rule the statement admissible under Rule 613(b). (R. p.48, lines 1-3.) The trial court was correct in admitting the statement under the circumstances, as Grant's difficulty in recalling could hardly be called an unequivocal admission.

## II.

**The trial court correctly denied Appellant's motion to sever the cases of the two victims because the charges were of the same general nature involving connected transactions closely related in kind, place, and character and the Appellant's substantive rights were not prejudiced.**

Appellant argues the trial court erred in failing to sever the cases involving each of the victims. Specifically, he argues the indictments and evidence regarding the charges involving Grant would have been inadmissible as prior bad acts under Rule 404(b), SCRE, if he had been tried separately for the charges involving McCall. However, because the charges were of the same general nature involving connected transactions closely related in kind, place, and character, and the Appellant's substantive rights were not prejudiced, the trial court did not abuse its discretion in denying the motion to sever.

"Where the offenses charged in separate indictments are of the same general nature involving connected transactions closely related in kind, place and character, the trial judge has the power, in his discretion, to order the indictments tried together if the defendant's substantive rights would not be prejudiced." State v. Smith, 322 S.C. 107, 109, 470 S.E.2d 364, 365 (1996). "A motion for severance is addressed to the sound discretion of the trial court." State v. Simmons, 352 S.C. 342, 350, 573 S.E.2d 856, 860 (Ct. App. 2002) (citing State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996); McCrary v. State, 249 S.C. 14, 152 S.E.2d 235 (1967); State v. Carter, 324 S.C. 383, 478 S.E.2d 86 (Ct. App. 1996); State v. Anderson, 318 S.C. 395, 458 S.E.2d 56 (Ct. App. 1995)). "The court's ruling will not be disturbed on appeal absent an abuse of that discretion." Simmons, 352 S.C. at 350, 573 S.E.2d at 860 (citing Tucker, 324 S.C. at 164, 478 S.E.2d

at 265; State v. Prince, 316 S.C. 57, 447 S.E.2d 177 (1993); State v. Deal, 319 S.C. 49, 459 S.E.2d 93 (Ct. App. 1995)). "A motion for severance is addressed to the trial court and should not be disturbed unless an abuse of discretion is shown." State v. Harris, 351 S.C. 643, 652, 572 S.E.2d 267, 272 (2002).

In Simmons, this Court found the joinder of the defendant's two offenses was proper because the break-in at the first victim's home was very close in time and proximity to the attempted break-in at the second victim's home. Simmons, 352 S.C. at 351, 573 S.E.2d at 861. This Court noted that "both the indictments in the Brooks matter and the Thompson matter arose out of a single chain of events, were of the same nature, and were proved by the same evidence and witnesses" and found "the trial court did not abuse its discretion in refusing to sever the indictments." Id.

Here, there is no dispute the offenses against the two victims happened at the same time and place and were intertwined. According to McCall's testimony, Appellant began beating Grant first and then when McCall told Appellant not to do that in his house, Appellant swung his hand with a knife in it and cut McCall in the face. Moreover, Grant's statement also confirmed the two offenses arose from a single chain of events. She wrote, "[Appellant] was talking to Gary McCall and accused us of [sic] each other than [sic] swung the knife and [Appellant] came back over to where I was and started punching me again." It is clear from both accounts that both offenses occurred during the same sequence of events. Each victim was the only witness to the other's assault, and the same knife was used in both crimes.

Our appellate courts have found joinder improper in cases where the offenses did not arise out of the same chain of circumstances and required different evidence for proof. In State v. Middleton, 288 S.C. 21, 339 S.E.2d 692 (1986), the Supreme Court

determined the facts of the case did not meet the requirements for consolidation. Middleton escaped from a prison work detail and raped and murdered two victims within two days. Id. at 23, 339 S.E.2d 692 at 693. The State argued the crimes were part of a crime spree and should be tried together. Id. "In support of this contention, the State note[d] the similarity of the murders, and the fact the crimes were committed within a radius of a few miles . . . [and] the same knife was used in the crimes." Id. However, the Supreme Court held the "case clearly fail[ed] to meet the requirements for consolidation . . . [because t]he crimes did not arise out of a single chain of circumstances, and required different evidence for proof. Furthermore, the prejudice to appellant is apparent." Id. In State v. Tate, 286 S.C. 462, 334 S.E.2d 289 (Ct. App. 1985), this Court determined joinder would be prejudicial in a case involving multiple forgeries because the offenses were of the same nature, but they did not arise out of a single chain of circumstances and were not provable by the same evidence. Further, this Court found joinder would be prejudicial because it was "likely the jury would infer criminal disposition based on evidence of one forgery and on that basis alone find Tate guilty of another forgery." Id. at 464, 334 S.E.2d at 290.

In the instant case, the joinder of the separate offenses was proper. The two assaults happened at the same time, in the same place. In the cases above, the prejudice to the defendants' substantive rights was apparent due to the circumstances of the crimes being separate and distinct and not provable by the same evidence. Here, no prejudice existed because both the indictments arose out of a single chain of events, were of the same nature, and were proved by the same evidence and witnesses. Moreover, even if the two offenses had been tried separately, the other offense would likely have been admitted under the *res gestae* theory. "The rationale underlying the *res gestae* theory is that

evidence of other criminal conduct that occurs contemporaneously with or is part and parcel of the crime charged is considered part of the *res gestae* of that offense." State v. Williams, 321 S.C. 455, 462, 469 S.E.2d 49, 53 (1996). "The *res gestae* theory recognizes evidence of other bad acts may be an integral part of the crime with which the defendant is charged, or may be needed to aid the fact finder in understanding the context in which the crime occurred." State v. King, 334 S.C. 504, 512, 514 S.E.2d 578, 582 (1999). Under *res gestae*, evidence of other crimes is admissible:

> when such evidence "furnishes part of the context of the crime" or is necessary to a "full presentation" of the case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its "environment" that its proof is appropriate in order "to complete the story of the crime on trial by proving its immediate context or the 'res gestae'" or the "uncharged offense is 'so linked together in point of time and circumstances with the crime charged that one cannot be fully shown without proving the other . . .' [and is thus] part of the res gestae of the crime charged."

Id. at 512-13, 514 S.E.2d at 582-83 (quoting State v. Adams, 322 S.C. 114, 122, 470 S.E.2d 366, 370-71 (1996)).

Therefore, the trial court did not abuse its discretion in denying the motion to sever the indictments.

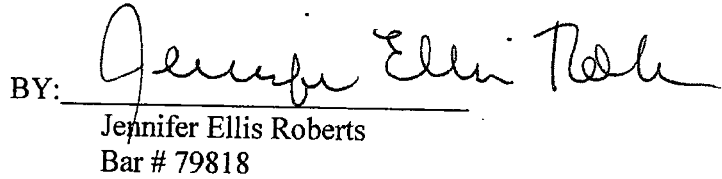
## CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

JENNIFER ELLIS ROBERTS
Assistant Attorney General

BY: 
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ATTORNEYS FOR RESPONDENT

February 14, 2013

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Oconee County
Honorable Alexander S. Macaulay, Circuit Court Judge

Appellate Case No: 2011-203927

THE STATE,

Respondent,

v.

MICHAEL L. COUCH,

Appellant.

**CERTIFICATE OF COUNSEL**

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.


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Attorney General

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**PROOF OF SERVICE**

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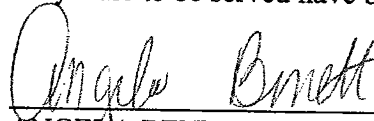
I, Angela Bennett, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

David Alexander, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This 14th day of February, 2013.



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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

The State, Respondent,

v.

Michael L. Couch, Appellant.

Appellate Case No. 2011-203927

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Appeal From Oconee County
Alexander S. Macaulay, Circuit Court Judge

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Unpublished Opinion No. 2013-UP-313
Heard June 13, 2013 – Filed July 10, 2013

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**AFFIRMED**

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Appellate Defender David Alexander, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General Jennifer Ellis Roberts, both of Columbia, for Respondent.

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**PER CURIAM:** Michael L. Couch appeals his conviction for assault and battery of a high and aggravated nature, criminal domestic violence of a high and

aggravated nature, and possession of a weapon during the commission of a violent crime. We affirm pursuant to Rule 220(b), SCACR, and the following authorities:

1. As to whether the trial court erred in admitting a written statement into evidence despite the writer's invocation of the spousal communications privilege and pursuant to Rule 613(b) of the South Carolina Rules of Evidence: *State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 845, 847-48 (2006) ("The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice."); *State v. Govan*, 320 S.C. 392, 395, 465 S.E.2d 574, 575 (Ct. App. 1995) ("A communication is defined as '[i]nformation given; the sharing of knowledge by one with another . . . a deliberate interchange of thoughts or opinions between two or more persons.' The physical acts of an assault cannot be considered communications." (citation omitted)(alterations by Court)); Rule 613(b), SCRE ("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."); *State v. Miller*, 262 S.C. 369, 371, 204 S.E.2d 738, 738-39 (1974) (affirming the admission of extrinsic evidence when the witness admitted signing a statement but when confronted with a portion of the statement said "I don't remember"); *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. For example, a witness's failure to fully recall her prior statement has been found to be a sufficient denial to allow extrinsic evidence.").

2. As to whether the trial court erred in failing to sever the cases involving each of the victims: *State v. Simmons*, 352 S.C. 342, 350, 573 S.E.2d 856, 860 (Ct. App. 2002) ("A motion for severance is addressed to the sound discretion of the trial court. The court's ruling will not be disturbed on appeal absent an abuse of that discretion." (citations omitted)); *id.* at 350, 573 S.E.2d at 860 ("Where the offenses charged in separate indictments are of the same general nature involving connected transactions closely related in kind, place and character, the trial judge has the power, in his discretion, to order the indictments tried together if the defendant's substantive rights would not be prejudiced."); *id.* ("Offenses are considered to be of the same general nature where they are interconnected.").

**AFFIRMED.**

**HUFF, WILLIAMS, and KONDUROS, JJ., concur.**

# The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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August 16, 2013

The Honorable Beverly H. Whitfield
PO Box 678
Walhalla SC 29691-0678

**REMITTITUR**

Re: The State v. Couch, Michael L.
Lower Court Case No. 2011GS3700391
Appellate Case No. 2011-203927

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

V. Claire Allen, Deputy

CLERK

cc: David Alexander
Jennifer Ellis Roberts