

State of Arizona  
COMMISSION ON JUDICIAL CONDUCT

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Disposition of Complaint 16-254

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Judge:

Complainant:

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**ORDER**

The commission initiated an investigation into a superior court judge's alleged abuse of discretion after disclosure of such possibility in an appellate court opinion.

The responsibility of the Commission on Judicial Conduct is to impartially determine if the judge engaged in conduct that violated the provisions of Article 6.1 of the Arizona Constitution or the Code of Judicial Conduct and, if so, to take appropriate disciplinary action. The purpose and authority of the commission is limited to this mission.

The commission does not have jurisdiction to review the legal sufficiency of the judge's rulings. The commission found no evidence of ethical misconduct and concluded that the judge did not violate the Code in this case. Accordingly, the file in this matter is closed, pursuant to Rules 16(a) and 23(a).

Commission members Peter J. Eckerstrom, George H. Foster, Jr., and Art Hinshaw did not participate in the consideration of this matter.

Dated: January 31, 2017

FOR THE COMMISSION

/s/ George A. Riemer

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George A. Riemer  
Executive Director

A copy of this order was mailed  
to the judge on January 31, 2017.

*This order may not be used as a basis for disqualification of a judge.*

Judge \_\_\_\_\_ delivered the decision of the Court, in which  
 Presiding Judge \_\_\_\_\_ and Judge \_\_\_\_\_  
 joined.

Judge:

¶1 The \_\_\_\_\_ petitions for special action review of the trial court's order determining audio recordings of a victim's 9-1-1 telephone calls were cumulative and, therefore, inadmissible. For the following reasons, we accept jurisdiction and grant relief by vacating the court's order.

#### FACTS AND PROCEDURAL HISTORY

¶2 In the course of its prosecution of \_\_\_\_\_ for the alleged unlawful imprisonment and assault of \_\_\_\_\_ disclosed audio recordings of two 9-1-1 telephone calls made by \_\_\_\_\_ and a return call initiated by \_\_\_\_\_ after \_\_\_\_\_ disconnected the second call. The calls were all made during the course of events that gave rise to the charges against \_\_\_\_\_. At a bench conference held during voir dire, the trial court entered an order precluding the audio recordings of the 9-1-1 telephone calls on the basis that they would be cumulative to \_\_\_\_\_ anticipated trial testimony.<sup>1</sup> The court did so on its own motion, without listening to the recordings, holding a hearing, or permitting the parties to provide additional briefing or argument on their admissibility.

¶3 \_\_\_\_\_ made an unsuccessful motion for reconsideration, and this petition followed. In the exercise of our discretion, we accept jurisdiction, recognizing \_\_\_\_\_ has no adequate remedy by appeal. See Ariz. R.P. Spec. Act. 1(a); *State ex rel. Romley v. Fields*, 201 Ariz. 321, 323, ¶ 4 (App. 2001); see also Ariz. Rev. Stat. § 13-4032 (2016); *Rolph v. Mesa City*

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<sup>1</sup> \_\_\_\_\_ argues the trial court never ruled on the admissibility of the 9-1-1 recordings, instead offering only its " \_\_\_\_\_." However, \_\_\_\_\_ clearly evidenced its understanding that a ruling had been made when it filed a "

" And, in summarily denying the motion to reconsider, the court offered no explanation to suggest it considered the issue unresolved or the motion premature.

*Court*, 127 Ariz. 155, 158 (1980) (“The state is not authorized to appeal from a judgment of acquittal . . . even though ‘the acquittal was based upon an egregiously erroneous foundation.’”) (quoting *Arizona v. Washington*, 434 U.S. 497, 503 (1978)).

## DISCUSSION

¶4 argues the trial court’s order precluding the 9-1-1 calls was error. We review evidentiary rulings for an abuse of discretion. *State ex rel. Montgomery v. Padilla*, 238 Ariz. 560, 564, ¶ 12 (App. 2015) (citing *State v. Bernstein*, 237 Ariz. 226, 228, ¶ 9 (2015)). A trial court abuses its discretion when a “discretionary conclusion was reached without consideration of the evidence.” *Grant v. Ariz. Pub. Serv. Co.*, 133 Ariz. 434, 455-56 (1982) (supplemental op.) (citing *Knollmiller v. Welch*, 128 Ariz. 34, 36-37 (App. 1980)).

¶5 There is no apparent dispute regarding the relevancy of the 9-1-1 calls; therefore, they are admissible unless there is some basis to exclude them. See Ariz. R. Evid. 402. Relevant evidence may be excluded “if its probative value is substantially outweighed by a danger of . . . needlessly presenting cumulative evidence.” Ariz. R. Evid. 403. The balancing test contemplated by Rule 403 is a fact- and context-intensive inquiry, requiring examination of various factors, including the specific relevant evidence at issue, the other evidence received at trial, and the nature of the charges. See *Hudgins v. Sw. Airlines, Co.*, 221 Ariz. 472, 481, ¶ 13 (App. 2009) (noting “‘probative value’ and ‘the danger of unfair prejudice’ are not easily quantifiable factors”) (citing *State v. Gibson*, 202 Ariz. 321, 324, ¶ 17 (2002)). Generally, the trial court is in the best position to perform this balancing test. *State v. Spencer*, 176 Ariz. 36, 41 (1993) (“Rule 403 weighing is best left to the trial court.”) (citing *State v. Robles*, 135 Ariz. 92, 95 (1983)).

¶6 The trial court here precluded the 9-1-1 calls without knowing either the substance of trial testimony or the contents of the recordings. The court did not make and, without having reviewed this information, could not have made, any findings regarding the probative value of the calls or the extent to which their content would overlap with, rather than corroborate, proposed testimony. This record does not reflect a proper balancing in finding the calls inadmissible under Rule 403. Nor could the court properly evaluate whether statements within the 9-1-1 calls were separately admissible as a present sense impression or an excited utterance pursuant to Arizona Rule of Evidence 803(1) and (2) without having heard them. For these reasons, the court had no basis upon which to make an admissibility determination and thereby erred.

¶7 We accept jurisdiction and grant relief by vacating the trial court's order.