

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Abbeville County

Honorable Letitia H. Verdin, Circuit Court Judge

RICKEY SANTIONE HENLEY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2022-001690

APPENDIX

JOANNA K. DELANY
Appellate Defender

ALAN WILSON
Attorney General

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ZACHARY W. JONES
Assistant Attorney General
P.O. Box 11629
Columbia, SC 29211
(803) 734-3737

ATTORNEY FOR PETITIONER

ATTORNEYS FOR RESPONDENT

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1 Q All right. What's different?

2 A Part of it's broken off. It looks like tampering,
3 perhaps.

4 Q Is it damaged?

5 A It is; yes, sir.

6 Q Ma'am, this is State's 6. Which part of your house
7 is this?

8 A It's the den right when you come in from that same
9 door.

10 Q Okay. And this right here, what is that?

11 A Part of the doorframe.

12 Q Okay. Where's this?

13 A That's in the same den.

14 Q Okay. What is this?

15 A The damaged doorframe.

16 Q Okay. And, again, I apologize. This was State's 8.
17 So this is?

18 A Damage, the damaged doorframe.

19 Q Okay. And earlier, I'm just going to show it to you
20 again, I forgot to put the evidence number on there, but
21 this is State's 7. What'd you say this is?

22 A The same den.

23 Q This is State's number 11. What is this?

24 A This is the steps that lead up to the carport door.

25 Q Okay. Do you recognize what this object is?

1 A Looks like a cigarette.

2 Q Okay. Is that your cigarette?

3 A No, sir.

4 Q Is that your husband's cigarette?

5 A No, sir.

6 Q And State's 14, what is this?

7 A The door from the carport.

8 Q Okay. But is this the side door?

9 A The side carport door; yes, sir.

10 Q Okay. All right. And you said this already, but
11 I've forgotten what it was. What is your current address?

12 A [REDACTED] Folly Bend Drive in Greenwood.

13 Q Why did you move?

14 A I didn't feel safe in my old house.

15 Q Okay. Folly Bend, is that a neighborhood?

16 A It is; yes, sir.

17 Q Earlier when I pointed you toward a cigarette that
18 was on those steps leading up to the side door, was that
19 there when you left the house?

20 A No, sir.

21 Q What time do you normally leave the house?

22 A Probably between 8:00 and 8:30.

23 Q Would you come home for lunch sometimes?

24 A I would, yes.

25 Q What time would you normally come home for lunch if

1 you were going to come home for lunch?

2 A Around noon most days.

3 Q All right. Do you normally lock your house when you
4 leave?

5 A Yes, sir.

6 MR. ANDREWS: Okay. Ma'am, please answer any
7 questions the Defense may have for you.

8 CROSS-EXAMINATION

9 By Ms. Bolen:

10 Q Good afternoon, Ms. Moss. You said you moved to
11 this, the Folly Bend Drive address in Greenwood in 2015,
12 correct?

13 A Correct.

14 Q And you didn't put your Abbeville house on the market
15 until 2015, correct?

16 A Correct.

17 Q Okay. So for three years, you didn't try to sell the
18 house, right?

19 A Well, we, we've been looking for a house. We just in
20 2015 finally found one in the neighborhood that fit our
21 budget.

22 Q So you sold the, you put the Abbeville house on the
23 market sometime in 2015, sold it sometime in 2015, and
24 moved to Greenwood, correct?

25 A Correct.

1 Q Okay. And the Abbeville house, that's on Highway 28,
2 correct?

3 A Yes.

4 Q And Highway 28 is essentially a country highway,
5 right?

6 A A two-lane highway.

7 Q Two-lane. Okay. A two-lane with double yellow down
8 the middle of the road?

9 A I'm not sure about the yellow line.

10 Q And you're outside the town, that house was outside
11 the town limits, correct?

12 A Outside the county or the city limits.

13 Q City limits?

14 A I'm sorry. Yes.

15 Q Okay. And it's, as we said, sat a good bit back from
16 the road, right, it's not right up on the road, correct?

17 A About 50 yards, I believe; yes ma'am.

18 Q And there's some bushes, shrubbery and some trees in
19 the yard, correct?

20 A Just a couple.

21 Q Okay. And at that point on 28, what is the speed
22 limit, do you know, is it 55?

23 A I'm not sure if it's 45 or 55 right there.

24 MS. BOLEN: I don't have any further questions.

25 Thank you, Your Honor.

1 THE COURT: Anything in redirect?

2 MR. ANDREWS: No redirect, Your Honor. Thank you.

3 THE COURT: You may step down, ma'am.

4 MR. BROWN: The State calls Jamie Moss.

5 THE COURT: All right.

6 JAMIE MOSS, being
7 first duly sworn, testified as follows:

8 DIRECT EXAMINATION

9 By Mr, Brown:

10 Q Good afternoon, Mr. Moss. Now, Mr. Moss, where'd you
11 live back in 2012?

12 A [REDACTED] Highway 28 North, Abbeville.

13 Q It's your house that was broken into on February
14 15th, 2012?

15 A Yes.

16 Q Now, when you left that morning, was the house
17 secured?

18 A It was secured. I left before my wife. I mean, I
19 locked the door when I left.

20 Q Now, and when you left, was there a cigarette butt on
21 that top step going back into your garage?

22 A No.

23 Q At that time, did you know Rickey Henley?

24 A No.

25 Q Do you know Rickey Henley now?

1 A No.

2 Q Did Rickey Henley have any, did you give him any
3 permission to go into your house?

4 A No.

5 Q Did he have any articles of clothing or anything else
6 in the house that he was trying to retrieve that you know
7 of?

8 A No.

9 Q So there's no reason for him to go in your house?

10 A No.

11 Q Again, how far off the road does your house sit off
12 of, from Highway 28?

13 A It's at the most 50 yards.

14 Q 50 yards. Could you clearly see the side door from
15 the road?

16 A Yes.

17 Q There weren't any bushes obstructing your view from
18 there?

19 A No.

20 MR. BROWN: No further questions.

21 THE COURT: Anything else?

22 MS. BOLEN: No cross, Your Honor.

23 THE COURT: You may step down.

24 MR. ANDREWS: We would call Patrick Thompson to the
25 stand.

1 PATRICK THOMPSON, being
2 first duly sworn, testified as follows:

3 DIRECT EXAMINATION

4 By Mr. Andrews:

5 Q Good afternoon, sir.

6 A How are you?

7 Q Please state your name.

8 A I'm Patrick Thompson.

9 Q Which agency do you work for?

10 A I work for Abbeville County Sheriff's Office.

11 Q Sir, how long have you been in law enforcement?

12 A Approximately, 10 years.

13 Q Where did you start?

14 A I actually started my career with Honea Path Police
15 Department.

16 Q When was that?

17 A In 2006.

18 Q How long were you there?

19 A I was there approximately a year before coming down
20 here.

21 Q And when you say coming down here, you mean to
22 Abbeville?

23 A To Abbeville; yes, sir.

24 Q And you haven't been, have you been in Abbeville this
25 entire time?

1 A No, sir.

2 Q Where were you between coming to Abbeville Sheriff's
3 Office and today?

4 A I lived here in 2012, I believe, and went to Anderson
5 for three years and returned back last year.

6 Q Okay. So were you working for the Abbeville
7 Sheriff's Office on February 15th, 2012?

8 A I was.

9 Q In what capacity were you employed with the Sheriff's
10 Office?

11 A At the time of this, I was a detective in property
12 crimes.

13 Q Okay. On February 12th, I'm sorry, February 15th of
14 2012, did you visit the incident location in this case?

15 A I did.

16 Q Okay. Sir, I'm going to show you what's been marked
17 for ID purposes as State's 9, 10, 12, 13, 15, 16, 17 and
18 18. I'm not saying what they are, sir. I'm just looking
19 for a yes or no answer. Do you recognize these
20 photographs?

21 A I do.

22 Q And why did you go to the incident location on this
23 date?

24 A On that date, I was in my vehicle and it actually
25 broadcast over the radio of a burglary that was occurring

1 or had just occurred at the incident location, and myself
2 and other units proceeded to the area.

3 Q Okay. Did you process this scene?

4 A I did.

5 Q Okay. The pictures that I just showed you, are these
6 pictures of the inside of the Moss' home?

7 A They are.

8 Q Okay. Are they an accurate representation of the
9 inside of the Moss home?

10 A Yes, sir; they are.

11 MR. ANDREWS: Your Honor, the State moves to admit
12 State's 9, 10, 12, 13, 15, 16, 17 and 18 into evidence.

13 THE COURT: Any objection?

14 MS. PATEL: Judge, we would just renew our previous
15 objection.

16 THE COURT: Okay. Your objection is noted for the
17 record. I will admit them subject to your objection.

18 MS. PATEL: Thank you, Your Honor.

19 MR. ANDREWS: Thank you.

20 (Whereupon, State's Exhibit Nos. 9, 10, 12, 13, 15,
21 16, 17 and 18 were admitted into evidence.)

22 Q Sir, I'm going to show you State's 9. Do you know
23 what this is?

24 A Yes, sir; I do.

25 Q Okay. What is this?

1 A That's a photograph depicting where--

2 Q Let me stop you for just one second. What, is this
3 noteworthy because of these?

4 A Yes, sir.

5 Q Okay. What are those?

6 A They appear to be footwear impressions on the carpet.

7 Q Okay. Sir, this is number 10. What is this?

8 A That is a close-up of a footwear impression.

9 Q Okay. So this is State's 12. What is this?

10 A That is a cigarette butt that was located at the
11 point of entry to the residence.

12 Q Okay. I'm just going to show you a lot of them. I'm
13 going to zoom out here. This is State's 16, 17 and 18.
14 What are these, sir?

15 A Oh, they're photographs of the footwear impression.

16 Q Okay. All right. And then this is State's 13 I'm
17 showing you. What is this?

18 A That is another photograph of the cigarette butt
19 recovered at the point of entry.

20 Q Okay. Now, without saying what he said, did you have
21 a chance to talk to Mr. Rick Culbreth?

22 A Yes, I did.

23 Q Okay. After your conversation with Mr. Culbreth, did
24 you look for a suspect vehicle?

25 A Yes, I did.

1 Q Okay. Were you able to narrow down your search for a
2 suspect vehicle?

3 A Yes, sir; we were.

4 Q Okay.

5 MR. ANDREWS: Your Honor, pursuant to South Carolina
6 Rule of Evidence 902 Subpart 4, we're going, we offer
7 State's Exhibit 22, marked for ID purposes, into evidence
8 in this case.

9 MS. PATEL: Judge, I would just object to my previous
10 motion.

11 THE COURT: Let me see it. You need to lay a
12 foundation to get it in.

13 MR. ANDREWS: Okay, sir. All right.

14 Q Sir, I'm going to show you what's been marked for
15 identification purposes as State's 22. Do you know what
16 this is?

17 A This is a printout of a '97 Pontiac, Tag No. HSN [REDACTED],
18 Hotel, Sarah, Night [REDACTED] and that was the vehicle that was
19 found during our search through SLED as a possible match
20 to a suspect with, from a tag that was provided.

21 Q Okay. And who are the registered owners?

22 A There's one, there's two owners listed on the like
23 history area, a Rickey Henley and Jolene Clardy Gray.

24 Q Okay. Again, what was that first name that you said?

25 A The first name was Rickey Henley.

1 Q Okay. All right. And, sir, I know we're
2 backtracking a little bit, but when you went to the
3 incident location, do you remember that incident
4 location's address?

5 A It's [REDACTED] Highway 28 North.

6 Q Is that in Abbeville, South Carolina?

7 A Yes, sir; it is.

8 MR. ANDREWS: Okay. Your Honor, the State moves to
9 admit State's ID 22 into evidence.

10 THE COURT: All right. Subject to objection made by
11 Defense Counsel, I'll admit it, there was a proper
12 foundation laid, it's public record. It can be admitted
13 as far as his investigation.

14 MR. ANDREWS: Okay. Thank you, Your Honor.

15 MS. PATEL: Thank you, Your Honor.

16 (Whereupon, State's Exhibit number 22 was admitted
17 into evidence.

18 Q Now, your conversation with Mr. Culbreth, did you
19 show him a photo lineup?

20 A Yes, sir.

21 Q Okay. Was he able to make an identification on that
22 photo lineup?

23 A He was able to narrow it down to two.

24 Q Okay. But he wasn't able to identify a single
25 person?

1 A No, sir.

2 Q Now, based on this information you got from the
3 Department of Motor Vehicles, did you go to an address in
4 Anderson County?

5 A Yes, sir.

6 Q And who was at that address?

7 A Mr. Henley.

8 Q Okay. Do you remember when this was?

9 A Well, about a week later.

10 Q Okay.

11 A It was on the 22nd.

12 Q 22nd of February?

13 A Yes, sir.

14 Q Okay. Who went with you?

15 A It was myself and Sargent Belcher.

16 Q All right. And I know we're skipping around a little
17 bit. I did just want to ask you something. When we saw
18 those pictures of that cigarette--

19 A Yes, sir.

20 Q --what did you do with that cigarette?

21 A The cigarette was collected and turned into evidence.

22 Q Okay. Now, when you say, collected and turned into
23 evidence, break that down for me. Walk me through the
24 collection of evidence step-by-step. How would you get
25 the, "cigarette", into evidence?

1 A The cigarette you would document it by photograph and
2 place. And then a DNA article, which is what it's been
3 collected for, fresh gloves, we put it into a paper bag
4 and not seal it in any kind of plastic that would destroy
5 the evidence for lack of oxygen. And it would be
6 submitted into a clean new bag.

7 Q Okay. When you say you put the, do you just put into
8 just a kind of a sandwich bag, a brown sandwich bag?

9 A Yes, sir.

10 Q All right. Would you seal that sandwich bag in any
11 way?

12 A Yeah, it's sealed with an evidence tamper-proof tape.

13 Q By evidence tamper-proof, do you mean that if
14 somebody tried to tear that tape, you could tell?

15 A Yes, sir. It disintegrates if the seal is attempted
16 to be tampered with. The tape actually is designed to
17 fall apart.

18 Q Okay. Who was it that picked up the cigarette and
19 put it in this bag?

20 A It was myself.

21 Q Did anyone else handle the cigarette before you had a
22 chance to, other than the person who originally had it?

23 A No, sir.

24 Q And to clean that up some, were any other officers
25 handling this cigarette before you got there?

1 A No, sir.

2 Q So you put it in this bag and sealed it with tape?

3 A Yes, sir.

4 Q What was the next step?

5 A Excuse me?

6 Q What was the next step? What did you do with it
7 next?

8 A The next step is we go, come straight to the law
9 enforcement center as quick as we can and everything gets
10 submitted into evidence at the law enforcement center.

11 Q Okay. At the law enforcement center and, again, you
12 would have this tamper-evident tape on it. Did you put it
13 into a drop box, do you hand it to somebody; what happens?

14 A It either gets put in a, it gets put in a drop box or
15 handed directly to the evidence custodian which was at
16 that time was Chief Johnson.

17 Q Okay. And then once, if it's put in the drop box or
18 Chief Johnson gets it, does it go into a safe or something
19 or a secure area?

20 A It goes into our evidence vault which only he has
21 access to.

22 Q Okay. You don't have a key to it?

23 A No, sir.

24 MR. ANDREWS: I beg the Court's indulgence briefly.

25 Q So the only way you could get it out of that vault is

1 with Chief Johnson, or at least at the time, letting you
2 in, is that correct?

3 A Yes, sir. He'd have to sign it out to me.

4 Q Okay. And he was the only person in the Sheriff's
5 Office with access?

6 A Yes, sir.

7 Q All right. I know we're jumping around. I
8 apologize. I'm going to try to clean this up for you,
9 sir. Where we left off, you had visited an apartment
10 complex in Anderson?

11 A Yes, sir.

12 Q Was anyone with you?

13 A Oh, Sergeant Belcher.

14 Q Okay. And this was about a week after the incident,
15 is that correct?

16 A Yes, sir.

17 Q All right. Do you recall what time of day this was?

18 A It was mid-morning, 10:00 or 11:00.

19 Q Okay. And do you remember what the weather was like
20 that day?

21 A I can't remember details, but it wasn't raining or
22 anything. I would say it was a fair day.

23 Q It wasn't extremely cold?

24 A I don't believe so.

25 Q Okay. You went to, did you go to an apartment that

1 you believed Mr. Henley was a resident of?

2 A Yes, sir.

3 Q Okay. Close to that apartment, did you notice any
4 vehicles?

5 A Yes, sir.

6 Q What vehicle did you notice?

7 A The vehicle from the DMV printout was there
8 displaying the tag.

9 Q Okay. Do you remember the name, and do you remember
10 the model name and number of that vehicle and the tag
11 number?

12 A It was a Pontiac Bonneville and HSN [REDACTED] tag number.

13 Q Well, sir, do you remember the tag? If not, I could
14 probably show you something to refresh your recollection.

15 A Yes, sir. That's fine.

16 MR. ANDREWS: Your Honor, permission to approach the
17 witness.

18 THE COURT: Yes.

19 Q Sir, this is State's 22.

20 A Yes, sir. HSN [REDACTED].

21 Q Now, how close is that to what Mr. Culbreth told you
22 about the make and model of the vehicle and the tag
23 number?

24 A Well, initially, he just stated it was a older model
25 Pontiac and we actually did a printout of a bunch of

1 vehicles to establish, try to establish a closer make and
2 model. And after reviewing those photographs, we were
3 able to narrow it down to that generation and that model
4 of Pontiac Bonneville.

5 Q Was the license tag number close?

6 A Yes, sir.

7 Q And do you remember how far off it was?

8 A I believe he stated it was HSN [REDACTED] or HSM [REDACTED], but we
9 knew it was, there was a possibility it could be off,
10 because he was reading it in his rearview mirror.

11 Q All right. Now, when you knocked on the door of the
12 apartment, who answered?

13 A A female came to the door.

14 Q Okay. Was Mr. Henley at the residence?

15 A Yes, sir; he was.

16 Q Did he speak with you?

17 A Yes, sir; he did.

18 Q Where did you talk?

19 A We spoke right there on the front steps right outside
20 the apartment.

21 Q Was it, how far were you from his door?

22 A Three to five feet. It's a small 10-foot area
23 between the front of the vehicles and the front of the
24 residence and there was a, right there on his front stoop,
25 if you would call it that.

1 Q Okay. What were you wearing that day? What was
2 your, were you in uniform?

3 A Oh, we have a, it was a polo shirt with a badge on it
4 and cargo pants.

5 Q Did you have your, was your firearm visible?

6 A On most days we do and a badge on as well.

7 Q Okay. How was Investigator Belcher dressed?

8 A The same.

9 Q Did you guys arrive in one car or took separate cars?

10 A We rode together in one car.

11 Q Can you describe the car for me?

12 A I can't remember whether or not we were in his
13 vehicle or not, but both of us had unmarked vehicles.

14 Q Did you have sirens going?

15 A No, sir.

16 Q Or blue lights flashing?

17 A No, sir.

18 Q How long did your conversation with Mr. Henley last?

19 A It took 15 to 20 minutes.

20 Q Okay. Did you ask him if he'd been in Abbeville
21 recently?

22 A Yes, sir.

23 Q What was his response?

24 A Yes, sir; he had.

25 Q Did he tell you, was he able to give you the name of

1 a road he was on?

2 A He was asked if he was on Highway 28 and he said he
3 was.

4 Q And did he mention if he had spoken with anybody
5 while he was there in Abbeville?

6 A Yes, sir.

7 Q Had he spoken with somebody while he was in
8 Abbeville?

9 A Yeah. He said that he talked to a guy in a truck.

10 Q Did he appear intoxicated or upset in some way?

11 A No, sir.

12 Q Did he look like he had just gotten up?

13 A No, sir.

14 Q Do you remember what he was wearing?

15 A He was just in normal civilian clothes. Nothing out
16 of the ordinary or anything. Just normal dress.

17 Q Did he appear to be under any physical, any physical
18 or mental disability?

19 A No, sir.

20 Q Was he smoking at the time?

21 A Yes, sir; he was.

22 Q And what was he smoking while you were talking to
23 him?

24 A He was smoking one, I believe, it was some of the
25 small cigars.

1 Q Did you ask him whether he smoked cigarettes?

2 A Yes, sir; I did.

3 Q And what did he tell you?

4 A He replied that he did smoke cigarettes.

5 Q Did he say what brand?

6 A And I asked him if he smoked Newport's and he said
7 yes.

8 Q Okay. Do you remember what kind of shoes he was
9 wearing?

10 A Yes, sir. He was wearing work boots.

11 MS. PATEL: Objection, Your Honor. Just subject to
12 our previous motion.

13 THE COURT: Okay. Subject to a previous objection,
14 I'll allow testimony to this extent.

15 Q Did you ask to see the soles of his boots?

16 A Yes, sir.

17 Q And did those soles appear, resemble what you saw in
18 the Moss house?

19 A Yes, sir.

20 Q Sir, if I could show you State's 12. What does that
21 show in State's 12?

22 A That is the cigarette butt at the point of entry.

23 Q Okay. When you say the point of entry, is this at
24 the Moss' house?

25 A Yes, sir; it is.

1 Q Is this on the steps leading up to the side door?

2 A Yes.

3 Q Do you know what kind of cigarette that is?

4 A It's a Newport.

5 Q Okay. Do you remember why Mr. Henley told you he
6 stopped on Highway 28?

7 A He stated he had to stop and use the bathroom.

8 Q That day, I believe you said it was February 22nd of
9 2012, is that correct. The conversation with Mr. Henley?

10 A Yes.

11 Q Sir, did you have an arrest warrant in hand?

12 A No, sir.

13 Q Was Mr. Henley arrested at some point thereafter?

14 A Yes, sir.

15 MR. ANDREWS: Your Honor, beg the Court's indulgence,
16 briefly.

17 THE COURT: All right.

18 Q I believe you said this, but I can't quite remember.
19 Did Mr. Henley say he spoke with somebody while he was on
20 Highway 28?

21 A Yes, sir.

22 Q Who did he say he talked to?

23 A I believe he stated he had just spoken with a guy in
24 a truck.

25 Q Okay. Sir, out at the house, did you attempt to get

1 any fingerprints?

2 A Yes, sir.

3 Q Were you successful in getting any kind of
4 fingerprints from the house?

5 A No, sir.

6 Q Have you participated in investigations where you
7 were unsuccessful in getting fingerprints?

8 A Oh, yes sir.

9 Q How common is it that you get fingerprints?

10 A I'd say maybe a third of the time.

11 MR. ANDREWS: Sir, please answer any questions the
12 Defense may have for you. Oh, Your Honor, I'm sorry.
13 Just briefly before the cross begins.

14 Q The photo lineup that you showed Mr. Culbreth, that's
15 State's number 19. Is Mr. Henley's picture included in
16 this lineup?

17 A Yes, sir; it is.

18 Q Which picture is that?

19 A Mr. Henley is number 2.

20 Q And is Mr. Henley in this courtroom today?

21 A Yes, sir; he is.

22 Q Okay. Could you point him out for us?

23 A He is sitting at the Defense table.

24 Q Okay. Is that him sitting at the end of the Defense
25 table wearing the kind of maroon-colored jacket?

1 A Yes, sir; it is.

2 Q All right. Is that who you spoke with at the
3 apartment complex in Anderson?

4 A Yes, sir.

5 Q Okay.

6 MR. ANDREWS: Please answer any questions the Defense
7 may have for you, sir.

8 CROSS-EXAMINATION

9 By Ms. Patel:

10 Q Good afternoon, Officer Thompson. I'm just going to
11 cover some points that you just went over on direct
12 examination. So, I'm sorry, if we talk about a lot of the
13 same things. So you've been with the Abbeville County
14 Sheriff's Office before you returned for about five years?

15 A Yes, ma'am.

16 Q And over that period of time, you had several
17 different positions?

18 A Yes, ma'am.

19 Q So you probably started with a uniform patrol, and
20 then investigations?

21 A Yes, ma'am.

22 Q Okay. And you left September of 2012?

23 A Yes, ma'am.

24 Q And then you started at the Anderson County Sheriff's
25 Office?

1 A Yes, ma'am.

2 Q Okay. And then Honea Path?

3 A That's where I started my career.

4 Q Okay. And then you returned back with the Abbeville
5 County Sheriff's Office?

6 A Yes, ma'am.

7 Q And you testified earlier that you have about 10
8 years of law enforcement training and experience?

9 A Yes, ma'am.

10 Q Okay. And this training doesn't stop, is that right?

11 A Yes, it's mandated by the Academy for constant
12 mandated training.

13 Q Okay. So you're consistently getting trained on new
14 topics on how to handle evidence, is that right?

15 A Yes, ma'am.

16 Q Okay. And you talked earlier about processing the
17 scene in this case?

18 A Yes, ma'am.

19 Q And that's a specific term law enforcement uses when
20 they're reporting to a crime scene, is that right?

21 A Yeah. Processing is the collection of evidence.

22 Q So it's a procedure that's put in place, is that
23 right?

24 A Yes, ma'am.

25 Q And you go through these trainings to learn the

1 different procedures, I guess, how to handle different
2 types of evidence?

3 A Yes, ma'am.

4 Q And in this case you said you handled DNA evidence?

5 A Yes, ma'am.

6 Q Okay. And you specifically stated that there are
7 special bags used for DNA evidence?

8 A Well, they're not special bags.

9 Q Okay.

10 A It's a special procedure and things that you do to
11 put in place. That way you do not destroy the evidence.

12 Q Okay. But this bag isn't just a regular brown paper
13 bag?

14 A Yes, ma'am; it is.

15 Q It is and it has a special writing on it, is that
16 right?

17 A It's just basically labeled for evidence on the
18 outside for a chain of custody.

19 Q Okay. And it has a heat-sealed pouch on it?

20 A No, ma'am. It's secured by the evidence tape.

21 Q Okay. And so that tape is what I'm saying, if
22 anybody touched or tampered with that tape, it would come
23 off, is that right?

24 A Yes, ma'am.

25 Q Okay. So it's not just a regular paper bag that I

1 would put my lunch in and take to work, right?

2 A It's exactly like that, but they're brand-new and--

3 Q And it's used by law enforcement for evidence?

4 A Yes, ma'am.

5 Q Okay. And the evidence that you collected in this
6 case was a cigarette butt?

7 A Yes, ma'am.

8 Q And we saw a picture of it. You put a ruler against
9 or next to that cigarette butt, right?

10 A Yes, ma'am.

11 Q And that's a different procedure that you use when
12 you're photographing evidence, is that right?

13 A Yes, ma'am.

14 Q And you don't have that cigarette butt with you
15 today?

16 A No, ma'am.

17 Q Okay. And you've testified in many cases before?

18 A Just a very few General Sessions, yes.

19 Q Okay. Have you ever had to testify where you have
20 physical evidence?

21 A Yes, ma'am.

22 Q Okay. And in those cases, did you have the physical
23 evidence with you?

24 A Yes, ma'am.

25 Q And in this case you do not?

1 A No, ma'am.

2 Q So it's unusual that the physical evidence is not
3 with you today?

4 A Yes, ma'am.

5 Q Let's talk just a little about the fingerprints in
6 this case. You didn't collect any fingerprints?

7 A No, ma'am.

8 Q There was a, looked like a picture of a doorframe
9 that you took a photograph of this case?

10 A Yes, ma'am.

11 Q Is it possible that you could have lifted a
12 fingerprint if someone touched it like that?

13 A It depends on the surface.

14 Q Okay.

15 A The doorframe at the point of entry was processed for
16 latent prints, just none were recovered.

17 Q Okay. Were any fingerprints taken from inside the
18 home?

19 A Was the interior of the residence processed?

20 Q Yes. Yes. I'm sorry.

21 A No, ma'am. The regular inside the door. It was not
22 processed anywhere in the house, because it doesn't appear
23 to be manipulated or tampered with inside the house.

24 Q Okay. Let's move along with your investigation. So
25 then you generated a lineup, is that right?

1 A Yes, ma'am.

2 Q And there is also a procedure involved with
3 generating a lineup?

4 A Yes, ma'am.

5 Q And you, you know, you take the characteristics or
6 the description that a witness has given you and you
7 submit that to SLED?

8 A Yes.

9 Q And you get a computerized lineup, is that right?

10 A Yes, ma'am.

11 Q Okay.

12 A We submit a person of interest or the suspect. You
13 submit that name and they'll go through DMV and select
14 likenesses and generate your lineup for you.

15 Q And in this case, the eyewitness, Mr. Culbreth, gave
16 you some general descriptions of the suspect?

17 A Yes, he did.

18 Q And in his statement he said that there was no facial
19 hair on the suspect? Was that included in the report that
20 he gave to you?

21 A I'd have to look at the report and double-check, but
22 there was something about facial hair, whether he did or
23 did not have facial hair.

24 Q What I'm going to, I think, I'm going to hand up the
25 State's Exhibit 19 just so you could refresh your memory.

1 A Yes, ma'am. It was noted that there was no facial
2 hair.

3 Q Right. So he said there was no facial hair on the
4 suspect that he saw on that day, is that right?

5 A Yes, ma'am.

6 Q And he couldn't narrow it down to one person on that
7 lineup, is that right?

8 A Yes, ma'am. He couldn't disseminate between two and
9 three.

10 Q Okay. So there were two people. So that other
11 person would have been a suspect, as well?

12 A Yes, ma'am.

13 Q Did you ever follow up on that lead?

14 A No, ma'am.

15 Q Okay. Was there any reason for ruling that suspect
16 out?

17 A Well, to actually do this, I'd have to get in contact
18 with SLED and figure out who, what, when and where this
19 actual person is from. It could be any person anywhere in
20 the state.

21 Q Okay. Just moving along with the meeting that you
22 had with Mr. Henley in Anderson. You approached Mr.
23 Henley on February 22nd, is that right?

24 A Yes, ma'am.

25 Q And you and Officer Belcher arrived in your unmarked

1 police car?

2 A Yes, ma'am.

3 Q And you announced yourself in your official capacity?

4 A Yes, ma'am.

5 Q And so you had your badge and your firearm?

6 A Yes, ma'am.

7 Q And Mr. Henley on that day, he came out and spoke
8 with you, is that right?

9 A Yes, ma'am.

10 Q Okay. You were there to ask him about his
11 whereabouts?

12 A Or ask him about the vehicle, and then speak to him
13 about where the vehicle was at.

14 Q Okay. And you asked him if he was ever on Highway 28
15 in Abbeville?

16 A Yes, ma'am.

17 Q You never gave him a specific address, is that right?

18 A No, ma'am.

19 Q And you never gave him a specific date like the 16th
20 or the 14th?

21 A No, ma'am. It was like last Tuesday.

22 Q Okay. I'm not from around here, but I know that
23 Highway 28, it's a long road. It goes on for miles,
24 right?

25 A Yes, ma'am.

1 Q Okay. So Highway 28 from Anderson to where you were
2 questioning Mr. Henley all the way to Abbeville is a long
3 road?

4 A Yes, ma'am.

5 Q And there's a good number of miles on that highway?

6 A Yes, ma'am.

7 Q Okay. And you basically asked him if he had ever
8 been in Abbeville on Highway 28 and he said yes?

9 A Yes, ma'am.

10 Q Okay. Did you ever talk to Rickey about his family;
11 where his family lived?

12 A I don't know if they came up in the conversation, but
13 I think he had his residence in Aiken.

14 Q Okay.

15 A In that area.

16 Q Okay. And he told you that he had family in the
17 Aiken area?

18 A I believe it was established that he had a prior
19 residence in Aiken.

20 Q Okay. While you were talking with Rickey, I'm sorry,
21 Mr. Henley, you asked him about his boots, is that right?

22 A Yes, ma'am.

23 Q And you asked to see the bottom of his boots?

24 A Yes, ma'am.

25 Q You never took those boots on that day, did you?

1 A No, ma'am.

2 Q And you never had an opportunity to run an analysis?

3 A No, ma'am.

4 Q And it was, you said about seven days after you had
5 visited the incident location?

6 A Yes, ma'am.

7 Q And it was seven days after you had seen that boot
8 impression at the incident scene?

9 A Yes, ma'am.

10 Q So the second time you had seen, I guess, a boot was
11 on the day a week later at Mr. Henley's house?

12 A And could you rephrase the question?

13 Q I'm sorry. I guess and what I'm asking is the first
14 time you saw that, saw a boot impression in this case was
15 at the incident location?

16 A Yes, ma'am.

17 Q And then you asked about a boot seven days later to
18 Mr. Henley?

19 A Yes, ma'am.

20 Q Okay. And, again, you never took those boots into
21 evidence?

22 A No.

23 Q This whole interaction with Mr. Henley, everything
24 that you said or testified to today, that was never
25 recorded, is that right?

1 A No, ma'am.

2 Q And back in 2012, you didn't have body cams?

3 A No, ma'am.

4 Q But what you did have was a pen and a paper, is that
5 right?

6 A Yes, ma'am.

7 Q And you also received training on how to take
8 statements from witnesses or suspects in different cases,
9 is that right?

10 A Yes, ma'am.

11 Q And in this case there was never a statement taken?

12 A No, ma'am. Not at this time.

13 Q Okay. But right after this incident took place, the
14 eyewitness gave a statement in this case, is that right?

15 A Yes, ma'am.

16 Q And he was able to reduce what he saw to a written
17 statement?

18 A Yes, ma'am.

19 Q And that opportunity was never afforded to Mr.
20 Henley?

21 A It was later attempted to interview him and after he
22 was Mirandized, he requested legal counsel.

23 Q Okay. Also on the day that you were questioning Mr.
24 Henley at his residence, did the woman who answered the
25 door offer to let you come in?

1 A Well, we'd actually stepped inside the residence
2 while she was, I think Mr. Henley was upstairs.

3 Q Okay. Did you ever get a search warrant to go inside
4 the home?

5 A No, ma'am.

6 Q Did you ever try to recover a bandanna from Mr.
7 Henley's belongings?

8 A No, ma'am.

9 Q Mr. Henley later turned himself in, is that right?

10 A I believe so.

11 MS. PATEL: Beg the Court's indulgence.

12 THE COURT: Sure.

13 MS. PATEL: No further questions, Your Honor.

14 THE COURT: Anything, Mr. Andrews?

15 MR. ANDREWS: Your Honor, I beg the Court's
16 indulgence briefly.

17 REDIRECT EXAMINATION

18 By Mr. Andrews:

19 Q Sir, just very briefly. I'm not going to show you
20 again, but do you remember the picture earlier you saw of
21 the cigarette on the stoop?

22 A Yes, sir.

23 Q Okay. Again, was that a Newport cigarette?

24 A Yes, sir.

25 Q And why did you put it in a paper bag?

1 A With your DNA evidence, it has an opportunity to have
2 moisture. If you seal it in a plastic bag, it will
3 actually, the humidity and everything will degrade the DNA
4 material to where it's not usable. So it's got to
5 actually be able to breathe to maintain the integrity of
6 the DNA.

7 Q Okay. What I'm getting at is it part of the
8 investigative protocol for you to put it in a paper bag
9 rather than a plastic bag, is that correct?

10 A Yes, sir.

11 Q Okay. Thank you, sir.

12 THE COURT: All right. You may step down. All
13 right. I'm going to take a little break for three to five
14 minutes. I've been trying to go about an hour. It's
15 easier to break in between witnesses than during a
16 witness. Okay. Y'all step in the jury room and take a
17 few minutes and be back out here shortly.

18 (Whereupon, the jury was excused from open court for
19 a break.)

20 THE COURT: Take about 10 minutes.

21 (Whereupon, a short break was taken.)

22 THE COURT: All right. Bring them in.

23 (Whereupon, the jury came into open court at
24 approximately 3:29 p.m.)

25 THE COURT: Okay, Mr. Brown, call your next witness.

1 MR. BROWN: The State calls Marion Johnson.

2 THE COURT: Mr. Johnson, come up and be sworn.

3 MARION JOHNSON, being
4 first duly sworn, testified as follows:

5 DIRECT EXAMINATION

6 By Mr. Brown:

7 Q Good afternoon.

8 A Good afternoon.

9 Q Mr. Johnson, state your full name?

10 A Marion K. Johnson, Jr.

11 Q And, Mr. Johnson, are you currently employed?

12 A No, sir; I'm retired.

13 Q Retired. And before you retired, where were you
14 employed?

15 A Abbeville County Sheriff's Office.

16 Q And what, how long were you at the Sheriff's Office?

17 A January of 1989 till May of 2013.

18 Q And before the Sheriff's Office, where were you
19 employed?

20 A I was employed with the Abbeville Police Department
21 from 1983 until 1989.

22 Q Now, while you were employed with the Sheriff's
23 Department, what was your last title or your position?

24 A I was the Chief Deputy for the entire time from 1989
25 to 2013.

1 Q Now, being Chief Deputy of the Abbeville County
2 Sheriff's Office, what roles were you in charge of, over?

3 A I had a lot of different roles. But, you know, on a
4 daily basis to make sure that the guys were assigned their
5 patrol, make sure adequate staff, if we have any kind of
6 employee problem or any kind of problem that arose, drug
7 investigations, burglary investigations, such as this, and
8 other stuff. Many different hats every day.

9 Q As part of the Chief Deputy role, were you also the
10 evidence custodian?

11 A I was.

12 Q And describe being the evidence custodian, please?

13 A Well, it's, you know, it's pretty, you have to keep
14 up with it. It's almost a day-to-day thing. Deputies
15 will come in and turn in evidence on a case that they had.
16 I would take it out, log it in, put it in the evidence log
17 and keep it until, if it needs to go to SLED or a court
18 date, I keep it until somebody comes. I give it to them
19 if it had to go to SLED. They drop it off there for
20 analysis.

21 Q Now, how many people in the Sheriff's Office had a
22 key to the evidence locker or room?

23 A I was the only one.

24 Q Now, describe the evidence room for me at the
25 Sheriff's Office?

1 A Generally, it's probably 10-12 foot wide and probably
2 30-foot long, and it's a reinforced concrete steel with a
3 big steel door.

4 Q And does it have a lock on it?

5 A Oh, yes.

6 Q And with you being one of the only person with a key,
7 could anybody else get in there?

8 A No, sir; no one else.

9 Q And the purpose of you being the only one with a key
10 is what?

11 A To maintain the chain-of-custody of evidence that
12 comes in. Take it from the officer, to me, to evidence
13 and out of evidence to me or whoever took it to SLED.
14 Just kept a chain. We knew where it was at the entire
15 time.

16 Q Now, on this particular case we're here for, this
17 burglary occurred on February 15th, 2012?

18 A Yes, sir.

19 Q And it was Amanda and J.B. Moss' house on [REDACTED] Highway
20 28 North here in Abbeville County, is that right?

21 A Very familiar with it.

22 Q Now, on that particular investigation, was there a
23 piece of evidence collected?

24 A Yes, sir.

25 Q What was that?

1 A I remember particularly that cigarette butt. There
2 may have been other things, but I do remember a cigarette
3 butt that was left at the scene. And I think Detective
4 Patrick Thompson is the one who located it and turned it
5 over to me.

6 Q And Patrick Thompson was the investigator or lead
7 investigator on that case?

8 A Yes, sir; he was.

9 Q And when he collected that cigarette butt and
10 packaged that up and sealed it up, did he turn that over
11 to you?

12 A Yes, sir.

13 Q And what did you do with that evidence once it became
14 in your possession?

15 A I logged it in and put it in the evidence locker
16 until I gave it to someone else to take to SLED for
17 analysis.

18 Q And while, after you logged it in and put it in your
19 evidence locker, was it secured?

20 A Yes, sir; it was.

21 Q Now, the next time that piece of evidence was moved
22 or transported, do you know who you gave that evidence to
23 to take down to SLED?

24 A I think it was Investigator Ryan Abernathy.

25 Q And do you remember what date that was that he took

1 it down to SLED?

2 A Not right off the top of my head; no, sir.

3 Q Part of a chain help refresh your memory?

4 A Yes, it would. It looks like March 29th, 2012.

5 Q March 29th, 2012 is when that evidence was submitted
6 into SLED?

7 A Yes, sir.

8 Q And that would have been the same day that you
9 checked that cigarette butt out of the Abbeville County
10 Sheriff's Office control and custody into whose control
11 and custody?

12 A Ryan Abernathy.

13 Q And then Abernathy, who takes it to SLED. Now, after
14 it was down at SLED, you don't know who touched it when
15 it's at SLED, is that correct?

16 A No, sir. I don't remember. I have read the report,
17 but I don't remember who they met.

18 Q Now, who brought that evidence back from SLED to the
19 Abbeville County Sheriff's Office?

20 A I'm wanting to say it was Abernathy again. He was a
21 frequent one that I used, because, basically, because I
22 could depend on him for that kind of stuff.

23 Q Again, I want to show you the chain to see if it
24 refreshes your recollection on who brought it back and
25 also the date.

1 A Yes, sir. Returned on August 10th, 2012 and it's
2 1:29.

3 Q And who is that signed out from SLED to?

4 A Ryan Abernathy.

5 Q And as part of the procedure you had in place there
6 at the Sheriff's Office, once it was signed out of SLED
7 and back into one of your officer's custody, would he
8 bring that directly back to you?

9 A Yes, sir.

10 Q And once he brought it back to you, what would you
11 do?

12 A I immediately lock it back into the evidence room and
13 lock it up.

14 Q In this case, that's what happened?

15 A Absolutely.

16 Q After it was tested down at SLED?

17 A Yes, sir. When he brought it back, it was locked up
18 in the evidence room.

19 Q Now, Chief Johnson, when did you leave the Sheriff's
20 Office?

21 A The middle of May of 2013.

22 Q And during that time, was there a changeover in head
23 of the Sheriff's Office?

24 A Yes, sir.

25 Q And at that time, you retired?

1 A Yes, sir; I did.

2 Q When you left, there was, the cigarette butt was
3 still in the Sheriff's Office?

4 A All the evidence obtained, on this case was in the
5 evidence room.

6 Q And regarding the chain or regarding this case and
7 that cigarette butt, what you're testifying here today,
8 Patrick Thompson who collected that cigarette butt turned
9 it over to you?

10 A Yes, sir.

11 Q You logged it into the evidence at the Abbeville
12 County Sheriff's Office?

13 A Yes, sir.

14 Q You then signed it out to Officer Ryan Abernathy--

15 A Yes, sir.

16 Q --to take to SLED?

17 A Yes, sir.

18 Q And then Ryan Abernathy lawfully brought it back to
19 you to your custody and care?

20 A Yes, sir; in August.

21 Q And then you secured that in the vault at the
22 Abbeville County Sheriff's Office?

23 A I did.

24 Q At any time when you had this package or this Best
25 Pack with this cigarette butt inside, do you ever remember

1 any kind of tampering or any kind of breaking on the seal
2 or anything like that?

3 A Before I give it to any officer to take to SLED, I
4 check the package myself to make sure it's sealed because
5 if it's not, they'll send it right back to us. SLED will
6 not take the package that's been tampered with or seal
7 broken on it, so I know it was checked.

8 Q And today, I've not shown you a cigarette butt today?

9 A No, sir.

10 Q Where it's not, since it was brought back to the
11 Sheriff's Office and actually checked back in through you
12 and in the evidence vault that since you retired, it's
13 missing?

14 A The first I heard of that was, you know, prior.

15 Q Prior to you coming to court?

16 A To the court appearance; yes, sir.

17 Q Yes, sir. Now, you just being a witness in this
18 chain-of-custody, was that your total involvement in this
19 case?

20 A Pretty much.

21 MR. BROWN: No further questions.

22 THE COURT: Any questions, please, ma'am.

23 MS. PATEL: Thank you, Judge.

24 CROSS-EXAMINATION

25 By Ms. Patel:

1 Q Now, Chief Johnson, you were the Chief Deputy with
2 Abbeville Sheriff's from the late eighties to 2013, is
3 that right?

4 A That's correct.

5 Q And one of your roles during that period was the
6 evidence custodian?

7 A Yes, ma'am.

8 Q And there was only one evidence custodian and that
9 was you?

10 A I was their only one.

11 Q Okay. And the evidence room at the Sheriff's Office,
12 it's not located in a public area, is that right?

13 A Yeah, and it's not.

14 Q So you just can't go to the Sheriff's Office and go
15 to the evidence room?

16 A No.

17 Q And that's just to preserve the evidence and make
18 sure no one has access to it except you?

19 A That's correct.

20 Q Okay. And you were the custodian for about 25-26
21 years?

22 A A little over 25.

23 Q Okay. And there is a key to the evidence room?

24 A Yes, ma'am.

25 Q And you were the only person who had that key?

1 A I was, that I know of.

2 Q Okay. And, well, is it possible that someone else
3 had the key?

4 A Yeah, the only other person that might have a key
5 would be the Sheriff, but he never even went in there. He
6 always had me go in there and do the evidence.

7 Q Okay. And your position was highly ranked, is that
8 right, you were second to the Sheriff?

9 A I was second, yes.

10 Q Okay. And so taking care of the evidence was a very
11 important job?

12 A It was.

13 Q And it was important because all of the evidence
14 collected in case they were, it was vital to the case,
15 right?

16 A It was.

17 Q Okay. And so you would agree that one of your key
18 functions of a law enforcement agent of South Carolina is
19 to preserve the evidence before it comes to court?

20 A If you're the custodian; yes, ma'am.

21 Q Okay. And, I'm sorry to keep asking you, but you
22 were the only one with the key, is that right?

23 A And I was.

24 Q And the reason why only one person would have the key
25 is because it limits the possibility of evidence

1 tampering?

2 A Or missing evidence.

3 Q Okay. And in this case, your role is very limited?

4 A In this particular case; yes, ma'am.

5 Q So you weren't an investigator?

6 A No.

7 Q Okay. And the evidence was submitted to you by
8 Officer Thompson, is that right?

9 A That's correct.

10 Q And there are procedures and protocols in place when
11 someone submits evidence to you, is that right?

12 A That's correct.

13 Q And they just don't hand it to you as you're walking
14 in the hallway, right?

15 A Yeah, there's paperwork associated with it.

16 Q Okay. And that they would come to an evidence drop
17 box and they would submit the physical evidence, right?

18 A Or in person.

19 Q Okay. And so everybody at the law enforcement center
20 is trained on how to submit evidence to you?

21 A Yes, ma'am.

22 Q Okay. And before you came to court today, you
23 weren't able to see the evidence, is that right, in this
24 case?

25 A I haven't seen any evidence.

1 Q You never saw the physical cigarette butt in this
2 case before you came to court, right?

3 A Not until, the last time I saw it was that day when
4 it was submitted--

5 Q Okay.

6 A --and then resubmitted.

7 Q And you've testified many times before, is that
8 correct?

9 A Yes, ma'am.

10 Q And does, and in those cases, you've had physical
11 evidence with you during your testimony, is that right?

12 A On some occasions; yes, ma'am.

13 Q Okay. And in this case, you don't have the physical
14 evidence, is that right?

15 A I don't; no, ma'am.

16 Q Okay. Would you say that it's unfortunate what
17 happened with the evidence?

18 A I guess I would say unfortunate.

19 Q Because that's not normal, right, for the Sheriff's
20 Office to lose evidence?

21 A Not when I was there, no.

22 Q Okay. Do you know what happened with the cigarette
23 butt?

24 A All I know is when I left on May the 17th, 2013, the
25 evidence vault was secure and that the items were in

1 there. That's all I can tell you.

2 MS. PATEL: Thank you, Your Honor. I beg the Court's
3 indulgence.

4 THE COURT: Sure.

5 MS. PATEL: I have no further questions, Your Honor.

6 MR. BROWN: Just briefly.

7 REDIRECT EXAMINATION

8 By Mr. Brown:

9 Q Chief Johnson, again, it was, the evidence was sent
10 down through Ryan Abernathy, but before it was sent down,
11 you checked the bag and it was in there?

12 A I do, I do on every bag that I submit.

13 Q And, again, you said that it did not appear to be
14 tampered with?

15 A It did not, it was not tampered with.

16 Q The integrity of the bag was intact?

17 A It was or I would not have submitted it.

18 Q And then after it was actually ultimately tested by
19 SLED, presumably to get a result from a DNA sample,
20 correct, it was sent back to you?

21 A It was.

22 Q And it was re-entered into the vault at the Abbeville
23 County Sheriff's Office?

24 A Yes, sir.

25 Q After it was tested?

1 A After it's tested, Abernathy brought it back.

2 MR. BROWN: No further questions.

3 THE COURT: All right. You can step down.

4 MR. JOHNSON: Thank you, sir.

5 MR. BROWN: The State calls Ryan Abernathy.

6 RYAN ABERNATHY, being

7 first duly sworn, testified as follows:

8 DIRECT EXAMINATION

9 By Mr. Brown:

10 Q Mr. Abernathy, please state your full name?

11 A It's Ryan Abernathy.

12 Q Can you spell your last name for the Court?

13 A A-B-E-R-N-A-T-H-Y.

14 Q Now, Mr. Abernathy, you got a different uniform than
15 a lot of folks that come in here. Where do you work right
16 now?

17 A South Carolina DNR.

18 Q Is that Department of Natural Resources?

19 A Yes, sir; that's correct.

20 Q How long have you been with South Carolina DNR?

21 A Going on four years.

22 Q And before you went to DNR, where'd you work?

23 A The Abbeville Sheriff's Department.

24 Q How long were you with the Sheriff's Department?

25 A 10 to 11 years, somewhere in there.

1 Q And when you left the Abbeville County Sheriff's
2 Office, what role were you in?

3 A Narcotics.

4 Q And being in a narcotics role, did you also have the
5 opportunity to take items to SLED?

6 A Yes, sir.

7 Q And that would be anywhere, property, evidence for
8 property crimes to drug evidence?

9 A Yes, sir; that's correct.

10 Q Now, on this particular case that we're here for
11 today, did you have an opportunity to take down evidence
12 to SLED regarding a burglary that took place on February
13 15th, 2012?

14 A Yes, sir; I did.

15 Q And do you remember the date you took that down to
16 SLED?

17 A No, sir. I do not recall the date.

18 Q Let me see if I can refresh your memory.

19 A It looks like I took it down on March the 29th of
20 2012.

21 Q Do you remember who you gave that to when you took it
22 down to SLED?

23 A Not right offhand, but the paper says it was logged
24 in by technician, Doris Yarborough, at SLED.

25 Q Now, Mr. Abernathy, did you also have the opportunity

1 go back down to SLED and pick up this piece of evidence,
2 this cigarette butt from SLED?

3 A Yes, sir.

4 Q And what day did you pick that up?

5 A August the 10th, 2012.

6 Q Now, when you would pick up, I guess before you took
7 down to SLED, items, how was evidence logged into the
8 Abbeville County Sheriff's Office?

9 A Chief Marion Johnson, he would log it in, and then
10 place it in the evidence locker.

11 Q Now, did you actually have any active part of this
12 investigation?

13 A No, sir.

14 Q Your role was strictly you took the evidence down to
15 SLED, and then brought it back?

16 A That's correct.

17 Q And when evidence was checked out of the Abbeville
18 County Sheriff's Office, who checked that out?

19 A Chief Marion Johnson would have signed it over to
20 myself.

21 Q And given it to you?

22 A Yes, sir.

23 Q And is that what happened in this case?

24 A Yes, sir.

25 Q And once he checked that evidence out to you, in this

1 case, the cigarette butt, what'd you do?

2 A Took it to SLED and turned it over to a technician
3 there at SLED.

4 Q And then the same, retrieve it from SLED and taking
5 it back to the Sheriff's Office, tell me what you would do
6 and what you did in this case?

7 A Pick it up from SLED. They would sign it over to me,
8 and I would bring it back to the Sheriff's Office and give
9 it to Chief Johnson who would sign it back into the
10 evidence locker.

11 Q Now, is Chief Johnson the only person that had a key
12 to that locker that you dealt with?

13 A Yes, sir.

14 Q And is that who you normally would hand those items
15 of evidence back to?

16 A It is, yes.

17 Q Mr. Abernathy, in transporting this piece of
18 evidence, this cigarette butt down to SLED, did you happen
19 to tamper with the evidence bag at all?

20 A No, sir.

21 Q Did you remember if the evidence bag was tampered
22 with at all?

23 A They wouldn't have accepted it at SLED if it would
24 not have been sealed when it got there.

25 Q So while this cigarette butt was in your custody and

1 care, it was intact and bagged; the cigarette butt was
2 safely inside the bag to submit to SLED?

3 A It was in some type of sealed container; yes, sir.

4 Q And is that all the involvement you had in this case?

5 A Yes, sir.

6 MR. BROWN: No further questions.

7 CROSS-EXAMINATION

8 By Ms. Patel:

9 Q Good afternoon, Officer Abernathy. I'm just going to
10 go over your experience first. You've been with law
11 enforcement for about, is it safe to say, 14 years
12 including your time with DNR?

13 A Yes, ma'am.

14 Q Okay. And your role in this case was to transport
15 the evidence, is that right?

16 A Correct.

17 Q And while you were an officer in this case or sorry,
18 yes, in this case, you were a narcotics officer, is that
19 right?

20 A Yes, ma'am.

21 Q And as a narcotics officer, you had to handle
22 physical evidence, is that right?

23 A Yes, ma'am.

24 Q Physical evidence in narcotics cases could be drugs,
25 money, weapons, is that right?

1 A Correct.

2 Q And in your different cases you probably received
3 training on how to handle that physical evidence, right?

4 A Yes, ma'am.

5 Q Okay. And so you, over the course of 14 years,
6 you've probably received multiple trainings on how to
7 preserve that physical evidence that you've collected in
8 your narcotics cases, right?

9 A Yes, ma'am.

10 Q And during that time in your narcotics cases, you had
11 to come to court to testify in those cases, is that right?

12 A Yes, ma'am.

13 Q And so it's safe to say maybe thousands of cases or
14 hundreds of cases?

15 A I don't know exactly.

16 Q Okay.

17 A I'd say a hundred or less.

18 Q Okay. And when you've been in court for those cases,
19 you've had the physical evidence with you?

20 A For the most part; yes, ma'am.

21 Q But you don't have the evidence in this case, is that
22 right?

23 A I do not; no, ma'am.

24 Q Okay. Did you have an opportunity to look at it
25 before you came to court today?

1 A No, ma'am.

2 Q Is that unusual that you wouldn't look at the,
3 wouldn't have the evidence?

4 A The only part that I played in this case was taking
5 it to SLED and bringing it back.

6 Q Well, I'm talking about today in court, is it unusual
7 that you don't have the physical evidence in this case?

8 A I would say usually you would have it.

9 Q So it's unusual?

10 A Yes, ma'am.

11 Q Okay.

12 MS. PATEL: No further questions, Your Honor.

13 MR. BROWN: No redirect.

14 THE COURT: You may step down.

15 MR. ABERNATHY: Thank you, sir.

16 MR. BROWN: Judge, I believe that's the last witness
17 we have for the day. Before close, the State offers some
18 self-authenticating documents, two prior convictions.

19 THE COURT: Okay. All right. Those documents being
20 self-authenticating, the Court will receive them and what
21 are their numbers.

22 MR. BROWN: State's 20 and 21.

23 THE COURT: 20 and 21.

24 MR. BROWN: And we'd move those into evidence.

25 THE COURT: And we discussed this pretrial, so

1 they're going to be admitted as public records.

2 MR. BROWN: Yes, sir.

3 MS. PATEL: I just wanted to renew my previous
4 objection to that.

5 THE COURT: And it is renewed and you're protected on
6 those issues.

7 (Whereupon, State's Exhibit numbers 20 and 21 were
8 admitted into evidence.)

9 THE COURT: All right. Folks, we talked a minute at
10 that last break and the lawyers did, and the State has
11 another witness from Columbia from SLED, and they didn't
12 anticipate the people rolling through so good and
13 efficiently. So that person will be here first thing in
14 the morning. So we're done for the day and be here to
15 offer their witness from SLED in the morning. What time
16 is the witness going to be here?

17 MR. BROWN: She should be here around 9:00 o'clock.

18 THE COURT: All right.

19 MR. BROWN: We might want to build a little cushion
20 in for traffic leaving Columbia, so but she should be
21 around 9:00.

22 THE COURT: All right. Let's say 9:15ish. We'll be
23 here at 9:15. When she gets here and y'all are here,
24 we'll start. Okay. That way, if we start earlier, we'll
25 get done. I envision all the witnesses testifying

1 tomorrow and perhaps y'all deliberate tomorrow. Now, for
2 our purposes, put your notepads in the jury room where
3 y'all can look at them. You're more than welcome to take
4 notes, but make sure you keep up with who's whose. You're
5 free to go for the afternoon. We'll see you in the
6 morning at 9:15. Remember, you can't discuss the case.
7 You can't talk about anything until I say begin your
8 deliberations, so see y'all in the morning.

9 (Whereupon, the jury was excused from open court for
10 the day.)

11 April 6, 2016

12 THE COURT: We ready to go?

13 MR. BROWN: Yes, Your Honor.

14 THE COURT: All right. Bring them in, please.

15 (Whereupon, the jury came into open court at
16 approximately 9:24 a.m.)

17 THE COURT: All right, Solicitor.

18 MR. BROWN: The State calls Maryann Boehm.

19 MARYANN BOEHM, being
20 first duly sworn, testified as follows:

21 DIRECT EXAMINATION

22 By Mr. Brown:

23 Q Good morning, Ms. Boehm.

24 A Good morning.

25 Q Please state your full name and spell your last name

1 for the court reporter?

2 A My name is Maryann E. Boehm, B-O-E-H-M.

3 Q Ms. Boehm, where do you work?

4 A I work at the South Carolina Law Enforcement
5 Division, commonly known as SLED.

6 Q How long have you worked there?

7 A Approximately 10 years.

8 Q And what are your duties there?

9 A I am assigned to the DNA casework department. I
10 analyze evidence in known standards submitted by local
11 agencies regarding a crime.

12 Q Now, to be in that position, tell me a little bit
13 about your educational background?

14 A Sure. I received a Bachelor of Science from James
15 Madison University. That's in Harrisonburg, Virginia. My
16 major was in Forensic Science and Technology with a
17 concentration in Biotechnology.

18 Q And when, once you got to SLED, do you do continuing
19 education?

20 A Yes. Well, first, I was trained for approximately a
21 year by a court-qualified analyst on the techniques and
22 procedures used in our laboratory. And then every year we
23 are required to have at least eight hours of continuing
24 education in the DNA casework field.

25 Q And just so everybody knows, what is DNA?

1 A DNA stands for deoxyribonucleic acid. It is a
2 chemical found in all of the cells of our body, with the
3 exception of red blood cells. It is important for giving
4 us our physical features, such as our hair color, our
5 height, our eye color. It's also important for passing on
6 traits from generation to generation. We get half of our
7 DNA from our mother and half of our father. With the
8 exception of identical twins, no two individuals have the
9 same DNA. So in Forensic Science, we are interested in
10 the portions of DNA that differ between individuals. We
11 test 15 of those locations and the combination of those
12 test results make up what we call a DNA profile.

13 Q Now, as part of your training in order to get, I'm
14 going to jump ahead, in order to get some type of result
15 through DNA testing, are you also trained on population
16 frequencies?

17 A Yes, we are.

18 Q And exactly what is population frequencies?

19 A Population frequencies as it relates to Forensic
20 Science is how often a test result occurs in the
21 population. And, for example, if one of the test results
22 at a specific location is an eight, then there has been
23 studies done to determine how often that occurs in the
24 population because we combine all of the test results and
25 come up with a total frequency of the entire profile.

1 Q Now, Ms. Boehm, have you ever been qualified as an
2 expert in DNA analysis and population frequencies--

3 A Yes, I have.

4 Q --in South Carolina General Sessions Court?

5 A Yes, I have.

6 Q Approximately, how many times?

7 A Approximately, 50 times.

8 MR. BROWN: Judge, at this time, the State moves
9 Maryann Boehm as an expert in DNA analysis and population
10 frequencies.

11 THE COURT: Any voir dire from the Defense?

12 MS. PATEL: None from the Defense, Your Honor.

13 THE COURT: Okay. She'll be so qualified. Folks,
14 and what this means, most witnesses are called so they can
15 testify to what we know and see, saw, smelled, touched,
16 that kind of thing. They're not allowed to give opinions
17 on what they think may have been going on. But experts,
18 when they are qualified and Ms. Boehm has been qualified
19 in any certain field, she can testify to opinions in that
20 field. And so it's slightly different because will offer
21 an opinion in that subject matter. Now, not in something
22 else, but in her field of expertise. All right. Continue
23 on.

24 MR. BROWN: Thank you, Your Honor.

25 Q Ms. Boehm, did you have the occasion or the

1 opportunity to receive evidence in this particular case?

2 A Yes, I did.

3 Q And what was that?

4 A I received a Newport cigarette butt.

5 Q And when it was brought to SLED, when was it actually
6 submitted to SLED?

7 A Can I refer to the chain?

8 Q Yes.

9 A It was brought to SLED on March 29th of 2012.

10 Q And based on the SLED, do you know who brought that?

11 A Yes. Investigator Ryan Abernathy of the Abbeville
12 County Sheriff's Office.

13 Q And based on your internal chain of custody, who did
14 he submit that evidence to at SLED?

15 A It was submitted to forensic technician, Doris
16 Yarborough.

17 Q And then what happened with that evidence once Doris
18 received that?

19 A So the cigarette butt is placed into a heat-sealed
20 SLED pouch that is sealed and dated and initialed by the
21 submitted investigator. It is then put on a secure shelf
22 in the evidence vault. Not many people have access to
23 this. Just the forensic technicians in evidence control
24 and administration are the only ones who have access to
25 this evidence storage location. Then, when I was assigned

1 the case, I retrieved the evidence through an evidence
2 technician, Amy Stevens. She retrieved the evidence, and
3 then handed it to me and I took it into my custody at that
4 time.

5 Q Now, when evidence is submitted by local law
6 enforcement, in this case, Abbeville County Sheriff's
7 Office, when it is submitted to SLED, is that item given a
8 specific number?

9 A Yes. Each case that is submitted to SLED receives a
10 unique case log number, and then each item submitted under
11 that case receives a unique item number.

12 Q And in this case, what was that lab number?

13 A It is L1203811.

14 Q And the specific number for this case, the Newport
15 cigarette, what item number is that?

16 A That's Item 1.

17 Q Now, once you got the Newport cigarette Item 1 for
18 that particular lab number, when you retrieved that item
19 from Amy Stevens, did you inspect the bag that it's
20 contained in?

21 A Yes, I do. I make sure that it has not been tampered
22 or damaged in any way.

23 Q In this case, was the bag that the cigarette butt was
24 sealed in, was it damaged? Was the integrity of the bag
25 damaged in any way?

1 A No, sir.

2 Q So it was completely sealed?

3 A It was sealed.

4 Q Now, if the bag was tampered with in any way, what
5 could you have done?

6 A I would have stopped. I would not have performed
7 analysis on it. I would first figure out what, what was
8 wrong, how it was tampered with. And I would have called
9 Evidence Control, the technicians who logged it in, as
10 well as the investigating agency to see what, how to
11 proceed. And I'd also make a note in my case file of the
12 evidence that was tampered with.

13 Q In this case, there is no documentation that it was
14 tampered with and to your recollection, it was not
15 tampered with?

16 A That is correct.

17 Q So after you received this cigarette butt into your
18 care and custody, what'd you do next?

19 A I then performed DNA analysis on the cigarette butt.
20 I take a small portion of the cigarette butt and, that was
21 inserted into the mouth and put it in a tube, add specific
22 chemicals to extract the DNA off of the cigarette butt and
23 generate that DNA profile.

24 Q Now, how many do you test on, are there 15 points or
25 20 points or 30 points or a thousand points? How many

1 points do you test on in order to get a DNA profile?

2 A Currently, we are testing 15 different locations.

3 Q And is that for every case that comes into SLED on a
4 DNA profile?

5 A Yes, sir.

6 Q I want to show you what's been submitted into
7 evidence as State's 13. What does that appear to be?

8 A This appears to be a cigarette butt. You can see a
9 green line that is consistent with being a Newport
10 cigarette butt. I cannot make out the green line, though,
11 to say exactly that it is a Newport cigarette.

12 Q And to your recollection, does that appear to be the
13 same cigarette butt as when you tested it at SLED?

14 A It is consistent with the same cigarette butt.

15 Q Now, when you did your analysis, how do you go about,
16 what type of analysis do you do on this to get a DNA
17 profile?

18 A Well, first, I will extract the DNA off of the
19 surface, in this case, the cigarette butt. And then we
20 test it using short tandem repeat PCR amplification. It's
21 essentially making a bunch of copies of those locations
22 that vary between individuals in order for us to be able
23 to see or detect them. The generation of those results
24 make up a DNA profile.

25 MR. BROWN: I beg the Court's indulgence.

1 (Whereupon, State's Exhibit number 24 was marked for
2 identification.)

3 Q Now, Ms. Boehm, when you were looking at these 15
4 points that you're testing and getting a profile, you're
5 testing the cigarette butt first and extracting what
6 those, what would you call those identifiers?

7 A They're general terms, locations on the DNA strand
8 that vary between individuals.

9 Q And when you're doing this test, do you, how are
10 those recorded, I guess, those different points, how do
11 you record those?

12 A We report them in a chart format with, it's in a
13 table. The locations are on the top, and then the actual
14 results per item are in the rows next to the item.

15 Q Let me show you what's been marked for identification
16 purposes State's ID number 24. Do you recognize that?

17 A Yes, sir. This is the table that I generated for the
18 reports in this case.

19 Q And does that report have the, I guess, the
20 identification numbers for the cigarette butt or actual
21 DNA from the cigarette?

22 A Yes, sir; it does.

23 Q What else does it have on that table?

24 A It also has the known standard from Rickey Henley,
25 the DNA profile is built from that. Those results are

1 also in this table.

2 MR. BROWN: Judge, at this time, the State moves
3 State's ID 24 into State's Evidence 24.

4 MS. PATEL: No objection, Your Honor.

5 THE COURT: With no objection, 24 is in.

6 (Whereupon, State's Exhibit 24 was admitted into
7 evidence.)

8 Q Now, Ms. Boehm, this is kind of difficult to see, but
9 on the top row or on actually the bottom row is the
10 Newport cigarette results for the DNA?

11 A Yes, sir.

12 Q And can you explain what we're looking at?

13 A Sure. This is the table that I explained that we put
14 in our reports. If you look at the top row, the first
15 column says items and the other ones have a bunch of
16 letters and numbers, those are the actual locations on the
17 DNA that we test. And then in the other two rows, the 2.1
18 is the DNA profile of Rickey Henley. And the numbers that
19 are following are the test results at that location. And
20 then the same things that a Newport cigarette, the Item 1
21 of that last row is the DNA results for the DNA profile of
22 the cigarette butt.

23 Q And in this case, I see in the actual second column
24 there is a 10 and 14 for Rickey Henley, and then below
25 that, Newport cigarette's 10 and 14. What would that

1 signify?

2 A They are a match at that, the evidence developed a
3 1014 at that location and we compared it to minimum
4 standards submitted in the case. So I go by location and
5 the individual comparison as a 1014 at that location, so
6 we say it's a match at that location. However, in order
7 to deem the whole profile matching, it's got to match at
8 every location, not just at that one.

9 Q And in the second column, Rickey Henley's standard is
10 28, 29 and the Newport is 28, 29 below that, but in
11 parentheses, what does that mean?

12 A Yes. Any number that is in with parentheses, it
13 means that we interpret with caution. Low level DNA,
14 there is a range where we interpret with caution. We're
15 not exactly sure if everything is represented, all its
16 test locations have been accounted for. So if you see two
17 numbers with a 28, 29, like the 28, 29, we're confident
18 since there's two numbers there. Each individual has
19 either one number or two numbers for their DNA profile at
20 each location. So if you see, if I see one number that's
21 low level in parentheses, it could either be just that
22 number or could be that number plus another number, so we
23 interpret with caution at those. We don't use those for
24 match purposes.

25 Q And I'm not going to go all the way across the board,

1 but actually the third column, the 9 and 11 on the third
2 and then a 9 below, what would that signify?

3 A Okay. That was the situation I was talking about
4 where the evidence only produced a 9, but it is in that
5 low range, so we interpret with caution. So if an
6 individual has just a 10 or not a 9 at all in their
7 profile, then we would exclude them, but if the individual
8 has a 9 and, or a 9 plus something else, then we would not
9 exclude them. We wouldn't use it for match, but we
10 wouldn't exclude it.

11 Q Now, after doing this analysis with Mr. Henley's
12 standard, known standard of Mr. Henley, and then also the
13 cigarette butt that was submitted by Abbeville County
14 Sheriff's Office, were you able to come to a conclusion or
15 have the result based off of the DNA analysis?

16 A I do. The partial DNA profile developed from Item I,
17 which was the Newport cigarette, matches the DNA profile
18 of Rickey Henley. The probability of randomly selecting
19 an unrelated individual having a DNA profile matching this
20 item is approximately 1 in 1.5 billion.

21 Q Now, if the probability of winning the Power Ball is
22 1.75 million, how much more likely is it to win the Power
23 Ball than to have a DNA profile matching Mr. Rickey
24 Henley?

25 A It's approximately 8 times more likely.

1 Q That you'd win the Power Ball?

2 A Yes, sir.

3 Q Would you say it's safe to say it doesn't happen
4 often?

5 A In my opinion, no.

6 Q Now, after you tested, did your test on the cigarette
7 butt, what did you do next?

8 A After I performed the DNA analysis on the cigarette
9 butt, that's the only item I had for that case, so I
10 issued a report based on my findings. And then I returned
11 the evidence back to evidence control which is within SLED
12 and they return it to the submitting agency.

13 Q And can you tell who from SLED submitted or handed it
14 back over to Abbeville County Sheriff's Office?

15 A Yes. Amy Stevens, a forensic technician in evidence
16 control was the one who handed it back to Ryan Abernathy.

17 Q And what date was that?

18 A On August 10th, 2012.

19 Q Now, Ms. Boehm, I showed you a picture of the
20 cigarette butt, but I didn't actually show you the butt
21 that you tested in the package today. Does that change
22 the fact of your DNA outcome, your results?

23 A No, sir.

24 Q So you seeing that here today does not change your
25 interpretation or the results?

1 A No, sir, not at all.

2 Q And you're saying today that on the day it was
3 submitted to you you did your testing, that the integrity
4 of the bag was intact?

5 A Yes, sir.

6 Q There was no tampering with it at all?

7 A That's correct.

8 MR. BROWN: No further questions.

9 THE COURT: Ms. Patel.

10 MS. PATEL: Thank you, Your Honor.

11 CROSS-EXAMINATION

12 By Ms. Patel:

13 Q Ms. Boehm, I just want to touch on your testimony
14 today about the DNA testing done. You said you looked at
15 15 different locations.

16 A That's correct.

17 Q All right. But you weren't limited to just 15
18 locations, is that right?

19 A I am. With the kits that are validated and we use at
20 SLED, it is those 15 locations.

21 Q But you could test other sites on the evidence?

22 A Not at SLED, no.

23 Q Okay. Is there another facility that you can send it
24 off to to test more locations?

25 A That's not what we typically do. I don't know, to be

1 honest, if other labs are using more testing locations or
2 not.

3 Q Okay. Well, physically, there are more than 15
4 locations, right?

5 A That is correct.

6 Q So there could be thousands of locations, is that
7 right?

8 A It's possible.

9 Q And you stated earlier that while you were testing
10 this evidence, there was a low amount of DNA, is that
11 right?

12 A That's correct.

13 Q All right. And, again, from that 15 location spots,
14 you detected a low amount of DNA?

15 A Well, there is a low amount of DNA extracted. That
16 doesn't matter about how many locations.

17 Q Okay.

18 A No matter how many locations I test, the amount of
19 DNA would still have been low.

20 Q Okay. And you received this case in June of 2012?

21 A Yes, ma'am.

22 Q And after you did your testing you gave the evidence
23 to someone else in SLED in July of 2012?

24 A I'll have to refer to the chain to make sure. Yes, I
25 returned it to, we have a return bin at SLED and I put it

1 in the return bin on July 30th of 2012.

2 Q Okay. And then the evidence left your facility in
3 August of 2012?

4 A That is correct.

5 Q And after you did your analysis, you issued a report
6 in this case?

7 A That's correct.

8 Q And that was in January of 2013, is that right?

9 A Yes, ma'am.

10 Q So that was five months after your testing, is that
11 right?

12 A No, I'm sorry. The original report was actually
13 issued August 8th of 2012.

14 Q Okay. But you issued a report in January of 2013?

15 A Yes. That one consisted of the known standard
16 comparison.

17 Q Okay. You've been with SLED for about 10 years you
18 said?

19 A Yes, ma'am.

20 Q Okay. And you've testified in court 50 to 60 times?

21 A Yes, ma'am.

22 Q Okay. And as a SLED agent, you understand the
23 importance of procedural safeguards taken with physical
24 evidence?

25 A That's correct.

1 Q Okay. And when you get this evidence, you receive
2 this evidence, it doesn't come to you looking like this,
3 right?

4 A No, ma'am.

5 Q All right. Earlier you stated that this is the
6 cigarette butt that you saw?

7 A No. I said it was consistent with a Newport
8 cigarette butt which was submitted in this case.

9 Q Well, Newport cigarettes all look like this, right?

10 A That's correct.

11 Q After you smoke it, does it look like this?

12 A Sometimes, there's distinguishing markings like if it
13 was run over or lipstick or something like that, so not
14 all of them look the same.

15 Q Okay.

16 A But some, most of them do appear that way.

17 Q So most of the cigarette butts that you see or
18 cigarette butts look like this, all of them?

19 A Not all of them.

20 Q Okay.

21 A And it depends on how far they were smoked and all
22 that kind of stuff. It really can differ.

23 Q Okay. But the evidence didn't come to you like this
24 when you got it at SLED, right?

25 A No, it was in packaging.

1 Q And that packaging, can you just explain to us what
2 kind of packing that evidence comes in?

3 A The agency puts it in some type of packaging and then
4 when it gets to the, gets to SLED, it's put into a
5 heat-sealed pouch. And then sealed with the investigator
6 who dropped it off at SLED, and the initials and the date
7 that he dropped it off. And then that's how I receive it.

8 Q And so there's a purpose for the special packaging,
9 is that right?

10 A Yeah. It's to make sure that it hasn't been tampered
11 with.

12 Q And it's, those procedures are to be followed even
13 after the evidence leaves your facility?

14 A It depends on their policy.

15 Q So it's okay to lose evidence after it's been tested?

16 A That's up, not, that's not up to me to make those
17 decisions.

18 Q Well, as a law enforcement agent, you're saying after
19 the evidence leaves your facility--

20 THE COURT: She's an expert testing, not an agent for
21 law enforcement.

22 MS. PATEL: Okay.

23 THE COURT: I don't think she has power to arrest is
24 what I'm saying.

25 MS. PATEL: Okay.

1 THE COURT: So stay in within her expertise.

2 MS. PATEL: Yes, Your Honor.

3 Q After the evidence leaves your facility, you get to
4 see it again, is that right?

5 A Sometimes, if I have the opportunity to come to court
6 and they show the evidence to me. I don't request to see
7 the evidence again or anything like that. I don't need
8 it. I've done my testing. I sealed it up. I returned it
9 to the agency. If there's any further testing done to
10 compare a new standard or something like that, I don't
11 need the original evidence back.

12 Q Okay. So when you testify in court, sometimes you
13 have the evidence with you, is that right?

14 A Sometimes, though, it's at court. I never physically
15 have it in my custody.

16 Q Okay. And you get to hold it before you testify or
17 it's handed up to you during your testimony?

18 A While I'm testifying, it's shown to me most of all
19 the time.

20 Q And you don't have that evidence today, is that
21 right?

22 A I have not seen the evidence today.

23 MS. PATEL: Beg the Court's indulgence. No further
24 questions, Your Honor.

25 THE COURT: You can step down.

1 MR. BROWN: Judge, can we take a moment.

2 THE COURT: Sure. All right. Let's take a couple of
3 minutes break while they try to plan out what they are
4 going to do next or not do next. So y'all step in the
5 jury room and stretch your legs and we'll have you right
6 back here. You can't begin discussing the case.

7 (Whereupon, the jury is excused from open court.)

8 THE COURT: All right. We'll stand at ease a couple
9 of minutes.

10 (Whereupon, a short break was taken.)

11 THE COURT: All right. Let's hear from you, Mr.
12 Brown, and then maybe we can do stuff before we bring the
13 jury back out.

14 MR. BROWN: Judge, at this time, the State will rest.

15 THE COURT: All right. Let's hear y'all's motions,
16 and then we'll bring the jury out and the State rests and
17 go right into it. That way, it makes no difference to the
18 jury how we handle this, but it does make it more
19 efficient for us.

20 MS. BOLEN: Thank you, Your Honor. We are making a
21 motion at this time for a directed verdict on the sole
22 count of burglary on the basis that the State has not
23 presented evidence of the elements of the crime of
24 burglary. Your Honor, the elements as you're aware, but
25 just to put them out there for the record, are that

1 there's a entry without consent with the intent to commit
2 a crime therein; entry of a dwelling without consent with
3 the entry intent to commit a crime therein. There's a
4 number of facts that go to the elements, Your Honor, that
5 are missing from the State's presentation of evidence.
6 Number one, there's no evidence, and the overriding lack
7 of evidence, Your Honor, is there is no positive ID of Mr.
8 Henley as being the individual. The evidence that the
9 State has presented is largely summed up in two witnesses,
10 Mr. Rick Culbreth, and then the DNA evidence that was just
11 presented. Mr. Culbreth, who is the eyewitness says that
12 when he drives by, he sees a black male running around the
13 front of the house and when drives by the second time, he
14 sees a man standing in the door. He is not able to make a
15 positive identification and he calls 911 and tells them,
16 and this was put into evidence by the State, I've seen him
17 before. I've seen that car. I know him. I would know
18 him if I saw him again. He's very clear on the 911 that
19 he's seen him before and he knows the car. Yet, when he's
20 shown a lineup or possibly two lineups two days later,
21 he's not able to pick Mr. Henley out of that lineup.
22 Additionally, Your Honor, he's not able to provide a full
23 positive license plate match to law enforcement and his
24 description of the car on the 911 tape was that it was a
25 silver Buick and in testimony, I believe, it became a gray

1 Pontiac. So, Your Honor, we've got a witness who cannot
2 ID Mr. Henley as being the individual that he saw at that
3 house. Furthermore, Your Honor, and I know the State will
4 bring this up. The cigarette butt which has been
5 testified to as having Mr. Henley's DNA on it was found
6 outside the house and that becomes a very important fact
7 with respect to the element of entry without consent.
8 There is no evidence that Mr. Henley went into the house.
9 First of all, we don't have evidence that it was Mr.
10 Henley at all but, second of all, there's no evidence of
11 entry into the house. There's no smell of smoke inside.
12 Ms. Moss responds to the house very shortly after 911 is
13 called. Goes inside. There is no mention in her
14 testimony that she smelled any smoke inside. There is
15 also no testimony of anything being out of order or
16 anything being disheveled or, you know, furniture having
17 been moved around or papers being out of order, anything
18 like that, Your Honor. And Mr. Culbreth's, by his
19 testimony does not place the man that he saw inside the
20 house. Furthermore, Your Honor, there is not any evidence
21 to meet, the State has not presented any evidence to meet
22 the element of intent to commit a crime inside the house.
23 There has not been any evidence presented of any crime
24 that as Your Honor is aware, the only charge he is facing
25 today is the burglary. There's not any other crime that

1 the State is pursuing at this time. There is no evidence
2 that they have been able to point to of what crime this
3 man would be going into the house to commit. And they've
4 got to show, I understand the case law obviously, is that
5 they don't have to prove the commission of a crime, but
6 they do need to prove beyond a reasonable doubt that there
7 was the intent to commit a crime and that they simply
8 can't prove beyond mere speculation. And mere speculation
9 is not good enough for the level of evidence that they
10 need to present at this stage, Your Honor. They don't
11 have any sort of, you know again, there is no evidence
12 inside that anything, there hasn't been any presentation
13 of any evidence today or over the course of this week that
14 anything was tampered with or messed with. There is no,
15 you know, evidence. Mr. Culbreth doesn't say anything
16 about seeing this man carrying anything. He doesn't, he
17 says that the car doors were open. He doesn't say
18 anything about seeing anything inside, he doesn't see this
19 man walk out with any. And I think all that leads to that
20 they simply don't have any evidence of any intent to
21 commit a crime inside. So between the lack of a positive
22 identification of Mr. Henley being the same individual
23 that Mr. Culbreth saw, because Mr. Culbreth cannot ID
24 Rickey as being that individual. The cigarette butt which
25 is outside of the house and, therefore, wouldn't fit the

1 elements of burglary for entry without consent. That, as
2 well as the fact that Mr. Culbreth cannot put the
3 individual that he saw inside the house.

4 THE COURT: He put him in the doorway, didn't he?

5 MS. BOLEN: He says he's standing in the door; yes,
6 sir.

7 THE COURT: Right.

8 MS. BOLEN: And there's been no evidence presented of
9 any intent to commit a crime. And I think all of that
10 together shows that there's just been simply not enough
11 evidence presented by the State to send the case to the
12 jury. So I want to make sure I didn't miss anything by
13 checking with Ms. Patel. And, Your Honor, and I know I
14 cited this case in the pretrial brief, but the State v.
15 Gilliland case does require that the intent to commit a
16 crime is the crime has to be one that's committed inside
17 the house. And, Your Honor, again, just to reiterate the
18 lack of positive identification. Not only does Mr.
19 Culbreth tell 911 that he knows the man and could see him
20 and could pick him out, again, has seen him before and
21 could pick him out, again, he also testifies that he has a
22 conversation with him for about five seconds. And yet, he
23 is unable to make an ID.

24 THE COURT: All right. As I understand the law this
25 case and what's been presented is largely circumstantial.

1 And understanding the circumstantial evidence, of course
2 the direct testimony of identification of a black male
3 there standing in the doorway, a cigarette butt found on
4 the scene, boot print in the house, somewhat resembling a
5 boot tread the defendant had on when interviewed by the
6 police, his car was backed in with a door open, the short
7 conversation with Mr. Culbreth. These are all the
8 circumstances that the State's trying to tie together. I
9 think there is a weight, there is evidence present and
10 whether or not they got enough weight with all of those
11 circumstances considered together can be argued by the
12 State to the jury. I think there's enough there to get by
13 a directed verdict motion. I understand your argument and
14 you're right, its thin. But putting all those
15 circumstances together, the State has an argument to the
16 jury, for the jury to consider and weigh that evidence.
17 So I think there is enough to get by this motion.

18 MS. BOLEN: Thank you, Your Honor.

19 MR. BROWN: Thank you, Your Honor.

20 THE COURT: Anything else?

21 MS. BOLEN: Your Honor, and we were going to do that
22 in the last break, but can we just have a moment to talk
23 to him about defendant issues?

24 THE COURT: Yes.

25 MR. BROWN: And, Judge, probably at the appropriate

1 time, we can discuss the transcript issue on the record as
2 well.

3 THE COURT: Okay. Let them talk to him first.

4 (Whereupon, a short break was taken.)

5 MS. PATEL: We are getting the testimony transcripts
6 together. Do we have an actor or actress who will play
7 the part?

8 MR. ANDREWS: Judge, we have an intern.

9 MR. BROWN: We got an intern.

10 THE COURT: Get the intern in.

11 MR. BROWN: Judge, it's my understanding that there
12 are two potential defense witnesses that are not here.
13 One, I know, Mike Belcher, who was formerly with Abbeville
14 County Sheriff's Office and is now with the Greenwood
15 County Sheriff's Office. He is out of state. His son was
16 graduating from the Air Force, some type of program with
17 them, and so he's out of state. Judge, he's got a short
18 testimony and so we told him we would, you know, agree to
19 allowing just to read that into the record, his testimony
20 from a prior hearing. Judge, the other one is Jolene
21 Gray; is a former girlfriend of the Defendant in this
22 case. It's my understanding that she is not here today.
23 We did, after yesterday, it was brought to our attention,
24 we were able to contact her through our office, our
25 investigator contacted her and she said she's in Anderson.

1 She's never received a subpoena. Judge, I understand that
2 the Defense just wants to read in a prior transcript of
3 her testimony. Your Honor, my, you know, we're not going
4 to oppose that, but in my cross from a prior hearing, I'm
5 only going to read a portion of it. And then I put on the
6 record, I think, and once I stop at that one portion, that
7 would, the reading of redirect from the Defense would be
8 outside the scope of our cross.

9 THE COURT: Okay.

10 MR. BROWN: And so that's when I would ask that we--

11 THE COURT: And the subject matter of that is
12 something that the police were doing after they were
13 departing or walking away from the apartment during the
14 interview back in February.

15 MS. PATEL: Yes, Your Honor.

16 MR. BROWN: Well, it'd actually be a second time
17 somebody, some other officers came.

18 THE COURT: All right. And, all right. To that
19 extent, the part of the redirect you are wanting, tell me
20 about that and why you need it.

21 MS. PATEL: Your Honor, the redirect portion goes to
22 the officers coming out a second time, searching the home
23 and not finding anything, leaving, searching the premises.
24 The witness says that perhaps someone picked up something
25 off the ground and we would want all of that testimony to

1 come in to show that no items were collected, a doo-rag,
2 burglary tools from the home since Mr. Henley did live
3 there. It's our position that the entire testimony should
4 come in. And, Your Honor, we, our office being multiple--

5 THE COURT: Well, now, we don't know whether
6 something was picked up off the ground or not. That's
7 unknown. She's speculating.

8 MS. BOLEN: She says that she saw, so it was her, you
9 know, what she saw at that moment, but she saw several
10 officers, I think she says near her car.

11 MR. BROWN: And, Judge, one thing to go farther, she
12 never said who those officers were associated with. So
13 that's, that just is, we had our officer testify that he
14 went up there twice. The first time he was not there.
15 The second time he talked to Mr. Henley, and then there
16 was no other times that he went up there. And I, and
17 looking over the transcript again from my cross, that
18 redirect would be out of the scope of that cross.

19 THE COURT: All right. I think I'm going to grant
20 his motion to limit his cross-examination to where he
21 wants to stop. But I do not believe that will limit you
22 or Ms. Bolen, whichever one closes, in saying nothing was
23 taken or recovered from the house or you'd have seen it
24 here today. I think y'all could say something along those
25 lines in your closing argument and you can summarize it,

1 had they gone and found something in that search,
2 certainly it would be here. It's not here.

3 MS. PATEL: Yes, Your Honor.

4 THE COURT: By me, the recross or redirect from you
5 does not prohibit you from arguing what you choose.

6 MS. PATEL: Yes, Your Honor.

7 THE COURT: All right. So let's, we'll limit it to
8 tell your witness, well, once you stop, she'll quit
9 reading.

10 MR. BROWN: Yes, sir. I'll stop reading.

11 MS. PATEL: I have a copy.

12 MR. BROWN: Do you have a second copy so she can have
13 it?

14 MS. PATEL: Yes, I do have a second copy.

15 THE COURT: All right. Bring the jury in while we're
16 getting her ready. What's the intern's name? I don't
17 want to call her intern the rest of her life.

18 MS. PATEL: Your Honor, do we want to do the
19 advisement of rights before the jury?

20 THE COURT: No, let's get them in here. We can deal
21 with that. But he's not going to testify?

22 MS. BOLEN: I believe not.

23 THE COURT: Okay. Let's get this done, and then
24 we'll do that.

25 MR. BROWN: Her name is Rhett Christian.

1 THE COURT: Rhett Christian, intern.

2 (Whereupon, the jury came into open court at
3 approximately 10:21 a.m.)

4 THE COURT: All right. Folks, that break helped us a
5 lot. Mr. Brown, first from the State.

6 MR. BROWN: Your Honor, at this time, the State
7 rests.

8 THE COURT: Okay. The State has presented all of the
9 evidence they're going to present. Now, this young lady
10 and the Defense is ready to present some testimony and
11 witnesses to you. While we were at break, I spoke with
12 the attorneys and, particularly, both sides. There's two
13 witnesses the Defense wishes to call and they're not
14 available. One is in Texas and one is I'm not sure where,
15 but they provided testimony during the investigation that
16 was under oath taken before a court reporter. And so
17 their testimony is recorded in a question/answer sworn
18 format. This young lady, Ms. Christian, is an intern with
19 the court system and she's going to play the part of the
20 first witness. And she's not a witness, but she's going
21 to read the responses just like she were the witness,
22 okay? So, Ms. Christian, if you will sit here and Ms.
23 McMahon, will you place her under oath to read accurately
24 the responses.

25 (Whereupon, Rhett Christian, being first duly sworn,

1 recited the transcript.)

2 THE COURT: And the reason I'm letting her do it,
3 it's a female witness and momentarily, we're going to call
4 another witness who's a gentleman and my law clerk is
5 going to play that part. So we're kind of going to, y'all
6 consider this testimony just as if the witness were here,
7 okay?

8 MS. BOLEN: Your Honor, I would like to renew all the
9 Defense's motions, pretrial motions and objections.

10 THE COURT: Absolutely, and they're renewed.

11 MS. BOLEN: Thank you, Your Honor.

12 THE COURT: And the record is protected.

13 MS. PATEL: Thank you, Your Honor. The State calls,
14 sorry, the defense calls Jolene Gray.

15 (Whereupon, the transcript of Jolene Gray was read
16 into the record for the jury starting at 10:24 a.m.
17 Yasha Patel read the questions, Rhett Christian read
18 the answers.)

19 MR. BROWN: Judge, I would object. She is reading
20 the transcript, I believe the date is the same.

21 MS. PATEL: Okay. Strike that last question.

22 THE COURT: Now, read consistent.

23 MS. PATEL: Strike that last question. I'm sorry.

24 THE COURT: Okay.

25 (Whereupon, the transcript of Jolene Gray

1 continued and concluded at approximately 10:24 a.m.)

2 THE COURT: All right. You may step down. All
3 right. We need a gentlemen to read this time?

4 MS. PATEL: Yes, Your Honor.

5 THE COURT: All right. We got one here. He just
6 volunteered.

7 ROBERT KNEECE, being
8 first duly sworn, testified as follows:

9 (Whereupon, the transcript of Mike Belcher was read
10 into the record starting at 10:38 a.m., ended at
11 10:40 a.m. Questions by Yasha Patel, Answers by
12 Robert Kneece.)

13 THE COURT: All right. You may step down. This
14 young man is my law clerk. All right. We want to take a
15 short break?

16 (Whereupon, Court's Exhibits 2 and 3 were marked for
17 identification only.)

18 MS. PATEL: The Defense has one more witness, Your
19 Honor.

20 THE COURT: Okay.

21 MS. PATEL: I'm going to step outside to get her. Or
22 we can wait until after the break.

23 THE COURT: I mean, I thought y'all wanted a break.
24 I'm sorry.

25 MS. PATEL: Oh, no.

1 THE COURT: Okay.

2 MS. PATEL: Probably after this witness, Your Honor.

3 THE COURT: All right.

4 ELLA JOHNSON, being
5 first duly sworn, testified as follows:

6 DIRECT EXAMINATION

7 By Ms. Patel:

8 Q Ms. Johnson, can you please state your full name for
9 the record?

10 A Ella Louise Johnson.

11 Q And how do you know Rickey Henley?

12 A Rickey Henley is my son.

13 Q Okay. And where do you live right now?

14 A Beech Island, South Carolina.

15 Q And what county is that?

16 A Aiken.

17 THE COURT: Okay. Speak up a little bit.

18 MS. JOHNSON: Okay.

19 THE COURT: Everybody, so you know, everybody up
20 there has got to hear you but, most particularly, this
21 lady right here has got to hear you. She's taking down
22 what I'm saying right now. Okay?

23 MS. JOHNSON: Okay.

24 Q And how long have you lived in Aiken County?

25 A 54 years.

1 Q And is Mr. Henley living with you right now?

2 A No, ma'am.

3 Q Has he lived with you in the past few years?

4 A No, lately, he's been out on his own since the last
5 time I was here.

6 Q Okay. And was he ever living with you in 2012?

7 A No, ma'am.

8 Q Okay. Do you know, do you remember where he was
9 living?

10 A He was living in Anderson, South Carolina.

11 Q Do you know who he was living with?

12 A His fiancé, Jolene.

13 Q Let's talk about February 14th, 2012. I think that
14 was Valentine's Day. Do you remember that day?

15 A Correct. Yes, I do.

16 Q It was four years ago, and we've talked about this
17 day before, have we not?

18 A Yes.

19 Q Okay. And the next day was the 15th. Do you
20 remember that morning?

21 A Yes, ma'am; I do.

22 Q Do you remember what you did that morning?

23 A At 8:00 o'clock, my husband had to be at work, so I
24 took him. Then, after I took him to work, I came back
25 home.

1 Q Where does he work?

2 A At Barrett Supply in Augusta, Georgia.

3 Q Do you always drive him to work?

4 A Yes.

5 Q And do you have to pick him back up?

6 A Yes.

7 Q And what time would you say you would have to pick
8 your husband back up?

9 A I normally leave, I have to pick him up at 5:00, but
10 sometime I leave a little earlier, so I can go into the
11 bank or go shopping and some other things.

12 Q How far is that drive from your house?

13 A Right about 20-something miles.

14 Q And do you remember seeing Mr. Henley on that day, on
15 February 15th, 2012?

16 A Yes, ma'am.

17 Q Can you tell us a little bit about that interaction
18 that you had with your son?

19 A Okay. He had called me up the night before on
20 Valentine's night and he was asking me what I was doing at
21 the time, and I told him, well, I'm cooking dinner. He
22 said, well, I'm doing the same thing. He said me and
23 Jolene, we going to have some shrimp and lobster. I said
24 we cooking shrimp and snow crab. So we was talking about
25 the recipes and everything, and he was telling me how good

1 his was going to be. So he said, well, he said I'm going
2 to come down tomorrow and bring you some and he did.

3 Q Okay. Do you remember what time he came to your
4 house?

5 A He came to my house around about 10:00, around about
6 10:00 o'clock.

7 Q And you had already dropped your husband off at that
8 point?

9 A Correct.

10 Q And did you see Rickey when he showed up to your
11 house?

12 A Yes, ma'am.

13 Q Do you remember if he was wearing anything on his
14 head?

15 A No, ma'am.

16 Q Do you remember if he was wearing a bandanna on his
17 head?

18 A No, ma'am.

19 Q Do you remember if he was wearing a doo-rag on his
20 head?

21 A No, ma'am. Not as I can, he didn't have a doo-rag
22 on.

23 Q Okay. Did he have one in his hand or his pocket?

24 A No, ma'am.

25 Q Did he bring you anything else that day?

1 A No, only shrimp and lobster.

2 Q Okay. And how many hours did you spend with him on
3 that day?

4 A Around about between 10:00 and 2:00 o'clock.

5 Q Okay. And you still live in Beech Island, is that
6 right?

7 A Correct.

8 Q Okay. How long did it take you to get here today?

9 A We left at 7:30 and we had to make a detour and pick
10 Rickey up from the motel, so we took from 7:30 to, it was
11 almost 9:00 o'clock.

12 MS. PATEL: Beg the Court's indulgence. No further
13 questions, Your Honor.

14 CROSS-EXAMINATION

15 By Mr. Andrews:

16 Q Good morning, Ms. Johnson.

17 A Good morning.

18 Q I know your name. You don't know mine. I'm Demetri.
19 I just wanted to make sure that you knew who I was before
20 I started talking with you. You said you lived in Beech
21 Island about 54 years now?

22 A Correct.

23 Q Have you lived at the same address in Beech Island?

24 A No. Actually, I lived with my mother up until 25
25 years of age which is right next door to one another. And

1 I moved next door to her, so I been in the area for 54
2 years.

3 Q Okay. But for the last say 28-29 years, you've been
4 at the same spot?

5 A Correct.

6 Q Okay. Now, you say Rickey is your son, right?

7 A Yes.

8 Q Now, are you Mr. Henley's biological mother or are
9 you an adopted mother or stepmother?

10 A I'm his biological mother.

11 Q Okay. How long did Mr. Henley live with you before
12 he got out on his own?

13 A He was up in his 20's, around about 26-27.

14 Q Okay.

15 A Yeah.

16 Q And he was with you for that entire time from birth
17 to the age of 27, he lived with you?

18 A Yes.

19 Q And then when he moved out, I believe you said that
20 he moved in with his fiancé, Jolene?

21 A Yes.

22 Q How many other children do you have?

23 A I have three other sons.

24 Q Okay. Where are they?

25 A Well, my oldest son, since the last time I was here,

1 he moved to Edgefield. My baby boy and my, Charles, Jr.,
2 they lived in Newberry.

3 Q And you said, earlier, you said you picked Rickey up
4 this morning. Where does Rickey, I'm sorry. I shouldn't
5 be using his first name. Where does Mr. Henley currently
6 live?

7 A I think it's Clearwater on Huber Clay Road.

8 Q In which county?

9 A South Carolina.

10 Q Okay. Is it Anderson, Abbeville?

11 A No, he lived in Beech Island.

12 Q Beech Island. So Mr. Henley currently lives in Beech
13 Island?

14 A It's not Beech Island. It's Clearwater but it is in
15 South Carolina.

16 Q How far does Mr. Henley currently live from you?

17 A Around about 12, 12 miles.

18 Q About 12 miles away?

19 A Right.

20 Q So Mr. Henley is the child of your four who is the
21 closest to you as far as distance goes, is that correct?

22 A Correct.

23 Q You talk to Mr. Henley often?

24 A Yeah. You know, he calling me or I'm calling him
25 now.

1 Q Okay. And that's what every day, every other day?

2 A Every other day.

3 Q So you talk with Mr. Henley every other day?

4 A Every other day.

5 Q Okay. And you said you talked with Mr. Henley on
6 Valentine's Day, the night of February 14th?

7 A Correct.

8 Q He always calls you on Valentine's Day?

9 A No, he don't.

10 Q But at the time, he was still contacting you very
11 frequently or you would call him, you said?

12 A Correct.

13 Q What time did he get to your house on the morning of
14 February 14th?

15 A It was around about 10:00 o'clock, because I had
16 picked my husband up and I was waiting for him to get
17 there, so somewhere about 10:00.

18 Q Did you look at a clock to know it was 10:00?

19 A It was around about 10:00 and I had just took my
20 husband to work, probably about 10:00.

21 Q How do you know it was 10:00 o'clock?

22 A Because I have clocks in my house.

23 Q So just to make sure we're straight. You have a
24 recollection of looking at a clock?

25 A I know what time it was, and I knew about what time

1 it was, because I had took my husband to work and I was
2 looking for him to come, and it was around about 10:00
3 o'clock.

4 Q Okay. But the question was, you remember looking at
5 a clock?

6 A (Witness nods head.)

7 Q Okay. And I mean and the court reporter needs to
8 take down all your answers. So you're nodding. But the
9 answer yes, you remember looking at a clock?

10 A No. I knew it was around about 10:00 o'clock.

11 Q Okay. I apologize for being difficult, but the
12 question is, do you remember looking at a clock?

13 A I remember looking at a clock.

14 Q Okay. Does he visit you frequently?

15 A Yes, he does.

16 Q How often do you actually, I know you guys talk about
17 every other day. How often do you actually see Mr.
18 Henley?

19 A Well, now since he don't live far, either I'm going
20 to visit him or we go fishing a lot together now. And
21 he'll come visit me like every other week or two.

22 Q Okay.

23 A Yeah.

24 Q So you actually see him, let's say every 10 days, is
25 that fair to say?

1 A Yeah. He comes and visit me.

2 Q Okay. But to talk on the phone every other day,
3 every day?

4 A Every other day, we talk on the phone. Either I'm
5 calling him or he's calling me.

6 Q Okay. Of your four children, is it fair to say that
7 Mr. Henley is the one you talk with and you see the most
8 frequently?

9 A Correct.

10 MR. ANDREWS: Beg the Court's indulgence briefly.

11 Q And to your knowledge on February 15th, he came from
12 Aiken to Anderson, I'm sorry from Anderson to Aiken?

13 A Correct.

14 Q Do you know where he was before he got to your house?

15 A I have no idea.

16 Q Okay. So he could have been anywhere before he got
17 to your house?

18 A I know he was on the way to my house.

19 Q Okay.

20 A Like he promised.

21 Q Right.

22 A Right.

23 Q But really the only way you know that is because he
24 arrived at your house, right?

25 A Correct.

1 Q So he could have been coming from anywhere?

2 THE COURT: She said she didn't know.

3 MR. ANDREWS: Okay.

4 A No.

5 Q All right. What kind of car does Mr. Henley drive?

6 A I believe he had a, at the time, he had a Bonneville.

7 Q A Pontiac Bonneville?

8 A I think so.

9 Q What color was it?

10 A Was it like a beige, I believe.

11 Q Okay. All right.

12 A Tan.

13 MR. ANDREWS: Thanks, Your Honor. I have no
14 additional questions.

15 THE COURT: Any redirect?

16 MS. PATEL: No, Your Honor.

17 THE COURT: All right, ma'am. You may stop down.

18 MS. PATEL: Your Honor, if we could take a short
19 recess?

20 THE COURT: That's fine. Y'all step in the jury
21 room. We'll have you back in a few minutes. You can't
22 begin discussing the case yet and we'll get you back in
23 just a few minutes.

24 (Whereupon, the jury was excused from open court.)

25 (Whereupon, a short break was taken.)

1 THE COURT: What y'all got?

2 MS. PATEL: Judge, we would like to introduce into
3 evidence the self, sorry.

4 MS. BOLEN: Self-authenticating copy of the
5 indictment upon which he was acquitted last year. I
6 believe it is self-authenticating just as the indictments
7 that the State introduced are as well. So we're moving to
8 introduce that now.

9 THE COURT: Let me see it.

10 MR. BROWN: Judge, I haven't seen the, how it's
11 certified and what's on there.

12 THE COURT: You have seen it.

13 MR. BROWN: I have, and, Judge, that would, any
14 reference to that will bring in that this case has been
15 tried before. And I don't think that should be in the
16 jury's view on this to decide whether guilt or innocence
17 on this burglary charge. That's the whole point why we
18 have not mentioned it prior to this moment. And so I
19 think that would be just inviting them to speculate on
20 what happened at a prior hearing.

21 MS. BOLEN: And, Your Honor, we would not be doing
22 anything other than introducing that document. We would
23 not be referencing a prior trial on this charge. I think
24 the jury could just as easily gather that there is a
25 separate trial similar to how there's often separate

1 trials for lower court charges and General Sessions
2 charges. I think it's exculpatory information and it is
3 important for the jury to consider. One of the things
4 that the State has to prove is the intent to commit a
5 crime therein. We are permitted to put up a defense,
6 Your Honor. Mr. Henley is certainly entitled to his
7 constitutional right to defend himself and part of our
8 defense is in talking to the jury about that crime of
9 intent to commit a crime that he was acquitted of. It's
10 exculpatory and I think it's important for the jury to
11 know. I don't think it brings up any sort of reference as
12 to any prior trial on this particular charge. I don't
13 think there's any rule that prohibits its admission. It's
14 a self-authenticating document. There is nothing on it
15 that I believe needs to be redacted, but if there was,
16 we'd certainly entertain that. But that is, the Defense
17 is allowed to have a strategy and put up a case and this
18 is part of the case that we wish to put up, Your Honor.

19 MR. ANDREWS: Your Honor, I think admitting that kind
20 of opens the door to talking about the missing evidence.
21 Again, if they want to put that in, I mean, we'd agree
22 that he's been acquitted of it. But the element of
23 burglary is the intent to commit the crime.

24 MS. BOLEN: And, Your Honor, I mean, they can call a
25 rebuttal witness. This is, the Defense doesn't need to

1 let the State know prior to trial what the strategy is
2 going to be and if they feel the need to call a rebuttal
3 witness, that's certainly something they could do.

4 MR. ANDREWS: I mean, all the argument before, I
5 think we had all agreed, because of the prior acquittal
6 that no one was going to say anything about the stolen
7 property. I mean, even the Court mentioned that, I think
8 you said that we had an uphill battle during your directed
9 verdict consideration. That battle certainly becomes far
10 less uphill if we have stolen property to talk about or at
11 least missing property.

12 THE COURT: I don't believe this is allowed. I think
13 it would confuse the jury. It does mention the same date,
14 the same victim, and a piece of personality. To some
15 extent it opens the door to a whole slew of issues. But
16 it seems to me this would confuse the jury more than help
17 the jury in their findings of fact as to his guilt or
18 innocence on this charge. And I'll tell you, it's a novel
19 issue for me. I've never had this presented, so I commend
20 y'all for coming up with this. But I've never thought
21 about that. But I think my ruling would be under, I'm not
22 sure which rule.

23 MS. BOLEN: And, Your Honor, just pulling up the,
24 just so we're clear for the record as of the hearsay rule
25 on self-authentication.

1 THE COURT: Oh, it's self-authenticating. And I
2 don't disagree with that, but you don't just get to admit
3 things because they self-authenticate. I agree with you.
4 This document is a self-authenticating document. I just
5 don't believe it's admissible into evidence.

6 MR. BROWN: Judge, I think it'd be under 401, the
7 relevancy of it. It does not help resolve an issue we're
8 here for on the burglary. And so that would, as you said,
9 it would confuse the issue and bring more speculation to
10 the jury outside of what they have heard in here to go
11 back to another date that this was heard, and have them
12 have all of this conjecture put in.

13 MS. BOLEN: And, Your Honor, just to complete the
14 record, Your Honor, if I can put up our reasoning. I
15 think it does come in under 401. I think it is certainly
16 probative. As we said, the Defense has a constitutional
17 right to defend himself. This is exculpatory information.
18 He was found not guilty of the crime that the State had
19 previously alleged was committed inside the home. I don't
20 think it goes to confuse the jury and that's certainly not
21 the reason we would be seeking to admit it. We'd be
22 seeking to admit it to try to defend against the element
23 of burglary that requires the State to prove intent to
24 commit a crime therein. We'd be using it to show no crime
25 was committed inside the home and that they can't prove

1 any intent to commit a crime inside the home. I think
2 it's exculpatory information. The hearsay rules would
3 permit it. I don't think there's any case law that would
4 not allow it. So just our position is that it should be
5 admissible as part of his right to defend himself and that
6 for certain strategic reasons, we actually went back and
7 forth on whether we wanted to have this brought up during
8 the State's case-in-chief. For strategic reasons, we
9 elected not to and that was also the State's position.
10 But, again, we don't need to disclose our strategy to the
11 State prior and we would submit that it is admissible and
12 we'd ask that it be admitted.

13 THE COURT: All right. I'm going to decline
14 admission, but I want this marked as a Court's exhibit to
15 protect your record.

16 MS. BOLEN: Thank you, Your Honor.

17 THE COURT: All right.

18 (Whereupon, Court's Exhibit number 4 was marked for
19 identification only.)

20 MS. BOLEN: Your Honor, if we could have a moment.

21 THE COURT: All right. We'll stand at ease for a few
22 minutes, and then we'll get the jury back in.

23 (Whereupon, a short break was taken.)

24 THE COURT: All right.

25 MS. BOLEN: Your Honor, I think we just needed the

1 advisement of rights.

2 THE COURT: That's fine. Mr. Henley, stand up
3 please. I'll ask you a few questions. You've been in
4 trial the whole time with these ladies. You have a right
5 to testify or not to testify. It's your decision with the
6 advice of counsel. If you choose to remain silent, I will
7 instruct the jury very specifically that they cannot
8 discuss your not testifying in the deliberation times.
9 They're not even to discuss it at all, and it cannot be
10 used against you in any way. The only way the jury can
11 make a decision as to whether or not the State has proven
12 its case is to discuss the evidence that has been
13 presented by the State and by the few witnesses that y'all
14 have presented. But your not testifying is not to be
15 discussed and is a non-issue in their determination of
16 guilt or innocence. You understand that? And that's
17 basically the last thing I tell the jury is they're not to
18 discuss your deciding to invoke your right to remain
19 silent at all. You understand that?

20 MR. HENLEY: Yes, sir.

21 THE COURT: Have you discussed that with Ms. Bolen
22 and Ms. Patel?

23 MR. HENLEY: Yes, sir.

24 THE COURT: Okay. And you've understood the advice
25 they've given you?

1 MR. HENLEY: Yes, sir.

2 THE COURT: Need any more time with them right now?

3 MR. HENLEY: No. No, sir.

4 THE COURT: Okay. And so have you made a decision
5 now to testify or not?

6 MR. HENLEY: Well, I think it would be in my best
7 interest, not to testify.

8 THE COURT: Okay. All right. That's fair enough.
9 Is there anything else y'all want me to ask him.

10 MS. BOLEN: No, sir.

11 THE COURT: Now, are y'all resting?

12 MS. BOLEN: Yes, sir.

13 THE COURT: And y'all going to present any rebuttal?

14 MR. BROWN: No, sir.

15 THE COURT: All right. That being the case, when the
16 jury comes out, you say the Defense rests, and then I'll
17 say let's, since we've had this break, are y'all ready to
18 go into argument?

19 MS. PATEL: Yes, sir.

20 MS. BOLEN: Yes, sir.

21 THE COURT: All right.

22 MS. PATEL: Judge, we would like to renew all of our
23 motions and objections in this case.

24 MS. BOLEN: Pretrial, as well as any trial motions
25 and objections, Your Honor.

1 THE COURT: The record is protected on all the
2 issues. And I'm certain you're renewing your motions for
3 directed verdict which for the same bases, circumstantial
4 facts of the case haven't changed and it's enough fact for
5 the jury to make a, for it to be a jury issue.

6 MR. BROWN: Judge, assuming the charging the,
7 obviously burg first, and I don't think they brought up
8 alibi.

9 THE COURT: And the Defendant not testifying.

10 MR. BROWN: The Defendant not testifying.

11 THE COURT: Yeah. Plain developed instruction as far
12 as I'm concerned.

13 MR. BROWN: Yes, sir.

14 THE COURT: Okay. Fair enough. And, then I'll give
15 the limiting instruction on the convictions submitted as
16 proof of convictions, not only and not to be discussed as
17 to whether they're relevant in this case or not.

18 MR. BROWN: Judge, also in closing order, we want the
19 defense to just close in full and then us close in full
20 instead of bifurcating the closing. Will be up there for
21 20 seconds, and then sitting back down.

22 THE COURT: Okay. Can y'all live with that?

23 MS. PATEL: Yes. Yes, Your Honor.

24 THE COURT: Okay. Fair enough. All right. Bring
25 them in.

1 (Whereupon, the jury came into open court at
2 approximately 11:18 a.m.)

3 THE COURT: All right. Ms. Bolen.

4 MS. BOLEN: Thank you, Your Honor. May it please the
5 Court? Your Honor, the Defense rests and we renew our
6 pretrial motions and trial motions.

7 THE COURT: All right. We put it all on the record
8 while y'all were in the back. So the Defense has now
9 rested. I've asked the State if they wish to provide any
10 rebuttal witnesses. They declined. They don't have to.
11 It's their option. So y'all have heard all of the
12 testimony. You received some photographs and different
13 things into evidence. Y'all will have that during your
14 deliberations. After the lawyers, they're about to
15 summarize their respective positions and what they believe
16 the case has proved and what the evidence has shown. The
17 Defense will go first and they'll summarize their version
18 of the case, and then the State will summarize it's
19 presentation to you. And then I'll give you my
20 instructions on the law. And then you can begin your
21 deliberations after that. All right. So, understand
22 we've presented all that's going to be presented. It's
23 now the opportunity for the Defense to summarize, so Ms.
24 Bolen.

25 MS. BOLEN: Thank you, Your Honor. Maybe it please

1 the Court?

2 THE COURT: Yes, ma'am.

3 MS. BOLEN: Ladies and gentlemen of the jury, when
4 Ms. Patel spoke with you yesterday at the beginning of
5 this trial, she said the State had it all wrong and that
6 the State just didn't have enough and had this whole
7 situation wrong. And I think when we go through the
8 evidence that the State has presented to you yesterday and
9 today, as well as the evidence that the Defense has
10 presented that you'll see that she's right. One thing I
11 want you to keep in the back of your minds as you're
12 listening to closing and as you're going through all the
13 evidence that you've heard, all the evidence and the
14 testimony is that the State needs to prove this charge of
15 burglary against Mr. Henley, they need to prove it beyond
16 a reasonable doubt. That is the highest standard in our
17 system, and it's a very important standard, because
18 they're, in the criminal court, the State is trying to
19 take away someone's liberty, okay? And what we're asking
20 you to do is to not let the State set the bar as low as
21 they've set it in this case. The evidence that they've
22 given you is just simply not enough to convict Mr. Henley
23 of burglary. They have set the bar too low, and I'm going
24 to go through that evidence to show you why that bar is
25 just far too low and why you need to hold their feet to

1 the fire and not let them do that, okay? Let's look at
2 what they've presented. They started with a 911 call and
3 with Mr. Culbreth, and I'm going to talk about those
4 together, because Mr. Culbreth was the one on the 911
5 call. When Mr. Culbreth testified to you yesterday he
6 said he saw a man running around the front of the house.
7 Mr. Culbreth backed up and went back to the house, saw
8 someone in a doorway. He comes down. He says he has
9 maybe a five-second conversation where basically their
10 cars are pulled up to each other and maybe the window is
11 down and maybe it's not. He said at least one window was
12 down. Had a five-second conversation about yard work.
13 Okay. And he tells you that the person he saw had some
14 facial hair, had a goatee, was tall, he was
15 African-American. But before hearing his testimony, you
16 heard his 911 call, and I think it's common sense for all
17 of us to know that if you're talking to someone right
18 after something happened, no matter whether it's something
19 ordinary or something exciting, you remember it a lot
20 better than than you do four years later. Okay, that's
21 just commonsense. And so remember what he says in his 911
22 call. Okay. He says I've seen that man before, I've seen
23 that car, I know him and if I saw him again, I'd be able
24 to tell you who it was. Remember, he says that. But what
25 happens? Two days after the incident he's shown a lineup

1 after saying I know him, I know the car if you show him to
2 me again, I'll tell you who it is. Does he tell law
3 enforcement who it is? No. He cannot pick Rickey out of
4 a lineup. He gets it down to one out of two, which you
5 might think, okay, you know, he picks it to two people.
6 You might think, okay, well, he got it down to two out of
7 six but, really, statistically, that's just not good
8 enough. 33 percent, not good enough. He got it down to
9 two out of six. And, again, that's just far too low of a
10 bar for you to allow the State to set when they're talking
11 about taking away someone's liberty. I also want you to
12 think about and consider when he was talking about his
13 lineup and remember, he wasn't sure if he was shown one or
14 two lineups and the officer who's shown him the lineup,
15 Officer Thompson, wasn't sure if he showed him one or two.
16 So they're not even sure how many lineups were shown, but
17 he says one of these two guys. And he writes on it, and
18 you'll have this back with you in the jury room so you can
19 look at this. He writes no facial hair. All of these
20 individuals have no facial hair and he says no facial
21 hair, had doo-rag on. So the person he sees at the house
22 has no facial hair, has a doo-rag on and yet, what does he
23 tell you yesterday, yeah, the guy had a goatee. So he's
24 really not sure what he saw. The only thing that you can
25 draw from that with the person he saw can't be Rickey

1 Henley, because he doesn't ID him. He does not identify
2 Rickey. His statements about the car are also likewise
3 inconsistent. Yesterday, he tells you that he thinks it
4 was a gray Pontiac that he saw. Yet, on the 911 tape, he
5 says it's a silver Buick. Have two different kinds of
6 cars; two different colors of car. Then, we've got
7 Officer Thompson, and this is the officer that testified
8 yesterday evening. He was the main investigating officer
9 and he's worked with Abbeville Sheriff's Office, with
10 Anderson and back to Abbeville. He's had years of
11 experience being an officer. He was an investigator with
12 Abbeville back when this happened, okay. And he's the one
13 that responds and what does he do? He takes some pictures
14 and you've seen some of those pictures. He collects a
15 cigarette butt that he says is outside the doorstep. A
16 few days later, he runs a lineup, he maybe runs two
17 lineups. He says something about running two lineups and
18 about a week after the incident, he goes to talk to Rickey
19 in Anderson, right? And the State wants you to think
20 through Officer Thompson's testimony that Rickey confessed
21 to this. They want you to, well, he said oh yeah, he'd
22 been in Abbeville and yeah, he went in the house to use
23 the bathroom. Yeah. That's not all what he said. If you
24 listen closely to what Officer Thompson said that Rickey
25 said, Officer Thompson doesn't give them any sort of

1 specifics. He said about a week ago, were you in
2 Abbeville and he says, yeah, yeah I was. Were you on
3 Highway 28? Yeah. Well, think about it, folks, and again
4 it's commonsense. If you're from, if you live or are from
5 anywhere around here, Highway 28 is a long road. Okay.
6 It goes from Anderson to McCormick. It keeps going into
7 miles and miles. There are 10's, 20, probably hundreds of
8 houses on that road. So for him, for Officer Thompson and
9 the State to want you to think that by saying, did you
10 stop at a house on Highway 28, turns into a confession of
11 a burglary. Yeah, and that's just setting it way too low,
12 okay. What Officer Thompson stated that Rickey said to
13 him was, yes, I was going through Abbeville. I would have
14 driven on 28 and I pulled over somewhere to use the
15 bathroom, somewhere. Now, what could Officer Thompson
16 have done. And a big part of why the State simply doesn't
17 have the evidence to convict Rickey and why the bar is
18 just set way too low is that this was just a shoddy
19 investigation. There just wasn't nearly enough done.
20 There's much more that the State could have presented to
21 you that would make this picture a lot clearer and they
22 haven't and that's why it's not a clear picture and if
23 it's not a clear picture, it's not enough for them to
24 prove guilt beyond a reasonable doubt. Your heard Officer
25 Thompson say that they didn't have body cams at that

1 point. And that's fine, you don't need a body cam, okay,
2 but he did have pen and paper. Did he ask Rickey to write
3 a statement? No. Did he write down notes while Rickey
4 was talking to him? No. Did he ask Rickey, okay, tell me
5 where you stopped and what was it near? Was it near
6 McCormick? Was it near downtown Abbeville? Was it near
7 the Anderson line? Did he ask him details like that? No.
8 Did he ask him, okay, were there any landmarks near you?
9 No. Did he ask him, okay, describe what you saw around
10 you? No. He doesn't ask for any kind of details and
11 those are the sorts of details that can help a jury
12 determine what happened. Without those, you just can't.
13 There's just not enough presented to you for you to decide
14 beyond a reasonable doubt that anyone did anything. And
15 those details wouldn't have been hard to get. You just
16 had to ask. And you heard the testimony from Jolene Gray
17 that Rickey was forthright in talking to them. He offered
18 them the boots he was wearing. Said you can take them.
19 And then you heard her say hey, when he was in lockup,
20 they had the boots then, as well. And you heard Officer
21 Thompson talk about how he, there's a picture of a boot
22 print. He didn't do anything to have that analyzed. He
23 could have, but he didn't. He could have sent it to SLED.
24 He could have sent it to some other agency. He could have
25 collected the boots that he thought it came from and if

1 Rickey hadn't given him the boots and Rickey was willing
2 to, but let's say he wasn't. Officer Thompson could have
3 gotten a search warrant. Could have gotten a search to
4 try to find those boots to do a comparison. So the State
5 could present the jury with, we did an analysis, this is
6 the same boot, but you don't have any of that, because
7 none of it was done. Also, keep in mind when Officer
8 Thompson talked to you about talking to Rickey, but he
9 said Rickey denied burglarizing that house. Okay. He
10 denied it. He maintains his innocence throughout this
11 process. What else would a search warrant maybe have
12 helped Officer Thompson with? Well, you heard Rick
13 Culbreth say the individual was wearing a doo-rag and he
14 wrote that a few days later on the lineup. A search
15 warrant maybe would have produced that doo-rag. What
16 about burglary tools? Why not get a search warrant for
17 the car or the house or something like that to look for
18 burglary tools? Rick Culbreth says he sees the car pulled
19 up to the carport. Why didn't law enforcement even try to
20 get a search warrant to look for some of things that,
21 again, would have made this picture clearer for you and
22 right now, it's just a very, very muddy picture. It's not
23 even to convict someone. Then, let's talk about Officer
24 Thompson, when talking with Ms. Patel where he admitted
25 yeah, there were other suspects. She asked him were there

1 other suspects and he said yeah, there were other
2 suspects. Well, we know for sure that there's another
3 suspect. It's the other person that Mr. Culbreth picks
4 out of the lineup and you didn't hear any testimony about
5 them, law enforcement, trying to do anything to find out
6 who that person was. They didn't try to find out where
7 they live, what kind of car do they drive, where's their
8 commute to and from, what's their name. Nothing. They
9 didn't even try. And what was his answer yesterday. What
10 did Officer Thompson tell Ms. Patel. Oh, yeah, in order
11 to find out who the other suspects were, I would have had
12 to, you know, call down to SLED. So I would have had to
13 do stuff and just didn't do it. But he admits that
14 there's other suspects that he took no steps to
15 investigate. Again, that's a shoddy investigation and
16 it's just not good enough. It's not good enough to let
17 the State set the bar that low and to let the State use
18 that kind of investigation to try to take away someone's
19 liberties. Also, think about Officer Thompson's testimony
20 compared with the testimony you heard read from Ms. Gray
21 and Officer Belcher. Officer Thompson says yeah, I went
22 to his house with Mike Belcher from the Sheriff's Office.
23 Well, you heard testimony from Mike Belcher saying I don't
24 remember going out with him. And you hear testimony from
25 Jolene Gray saying there was an Anderson officer out

1 there. An Anderson Officer and they were both white.
2 That was specifically asked, was one of them
3 African-American? No, they were both white. And she,
4 Jolene Gray, says he came out twice. You didn't hear Mr.
5 Thompson talk about that either. Again, it's just a
6 shoddy investigation. A lot of loose ends and a lot of
7 undone things. A fine, experienced investigator who
8 apparently just didn't care to do it. Also, think about
9 the testimony you heard and I want you to think about this
10 in comparison with what Officer Thompson talked to Rickey
11 about. He said, were you on Highway 28 in Abbeville and
12 Rickey says yes. Well, you hear from Ms. Johnson and from
13 Ms. Gray that Rickey had been staying in Anderson with Ms.
14 Gray and went that morning to visit his mother in Beech
15 Island, about an hour-and-a-half drive from where Ms.
16 Johnson said, probably a little longer to go all the way
17 to Anderson. And you heard from the testimony with Ms.
18 Gray that she, he left around probably 8:00-8:30. You
19 hear from Ms. Johnson that he is at her house between
20 10:00 and 2:00 in Beech Island. There's just no way he
21 could have left Beech Island, come up to Abbeville and
22 been back. Just no way that he could have done that. Why
23 is it important that I'm pointing out, these are the
24 things Officer Thompson did, that he could have done. He
25 could have gotten a search warrant. He could have gotten

1 a comparison of the boots. He could have tried to find
2 burglary tools or a doo-rag. He could have done, gotten a
3 written statement. He could, all of these are part of the
4 standards that law enforcement use. And, again, it goes
5 back to the system of criminal justice that we have and
6 that when the State is trying to take away someone's
7 liberty, there are procedures in place and here, those
8 standards and procedures just weren't followed. Think
9 about also talking about statements when Mr. Culbreth was
10 talking and Ms. Patel showed him a statement that had been
11 written that he had signed. He didn't know who had
12 written it. He said yeah, someone wrote that and I signed
13 it and that statement doesn't have a whole lot of details
14 either. Really, the best statement that you get from him
15 is what he says to 911. It's someone I know. I know the
16 car. I know the person. I'd know him again. And yet, he
17 doesn't know Rickey. Okay. And you know that the person
18 he saw, because he knows the person he saw. Rickey's not
19 from Abbeville. You heard that testimony from Ms. Gray,
20 as well as Ms. Johnson. He had a girlfriend up in
21 Anderson and he lived in the Aiken Beech Island area.
22 He's not from, he's not someone Mr. Culbreth would have
23 recognized and yet, Mr. Culbreth insists that the person
24 he saw was someone he recognized and he recognized the
25 car. What that shows is that Mr. Culbreth didn't see

1 Rickey; he saw someone else. He didn't see Rickey. Let's
2 talk about the biggest missing piece in the State's case
3 and the biggest part of the investigation that they want
4 you to think that it isn't a big deal, but it is a big
5 deal and that's this missing cigarette butt. Now, you
6 heard several officers, as well as the SLED agent testify
7 about collecting this cigarette butt, putting it into
8 evidence, following all those protocols, making sure it's
9 in a special kind of bag, making sure it's folded down
10 correctly. Making sure it's initialed, making sure it's
11 marked, making sure it's put into a special evidence box
12 that only one person in the entire Sheriff's Department
13 has a key to. Making sure it's in a room that no one else
14 has a key to. You heard that from former Chief Deputy
15 Johnson. He talked about how when he ran the evidence
16 room, he was the only person who had a key to it. He had
17 daily access. He talked about how important it was to
18 maintain the integrity of evidence. And very important to
19 maintain that integrity. Very important to make sure the
20 evidence you have is kept intact. You heard other
21 officers talk about, as well, and you heard the SLED agent
22 talk about that as well. And you heard about all the
23 procedures they take on both ends of receiving that
24 evidence. The tamperproof bags. You heard the SLED
25 analyst talk about how she has to make sure that the

1 evidence hadn't been tampered with. If it had been, she
2 wouldn't analyze it, okay. And so there's reasons that
3 they take all these steps and there's reasons they have
4 these procedures and these protocols in place and that's
5 to make sure that evidence isn't messed up with. And yet,
6 after, and remember those were all State's witnesses.
7 After presenting all those witnesses to tell you how
8 important it is to protect the integrity of this evidence,
9 they're coming to you and saying we lost it, but oh well.
10 That's okay. It doesn't matter. It just doesn't matter
11 that we lost it. That's all right. Don't think about
12 that or do think about it, but it really doesn't matter at
13 all because what matters is it was, well, what I want you
14 to think about is, you know, think about it as something
15 besides evidence and DNA. Think about it in these terms.
16 You're going to buy a house. Okay. You found a house you
17 like. You make an offer. Your offer is accepted. You
18 need to get a mortgage. Okay. Not everyone can just pay
19 full price for a house. Very few people can. So you go
20 to the bank and you say all right, I have this house and I
21 want to take out a mortgage and they say great. You're
22 going to need a down payment and you're going to need your
23 closing costs and we need all of that for closing. You
24 say oh, okay, well, I have this great job. I just got a
25 great bonus. Here's my bonus check. I'm going to use

1 that to cover my down payment and my closing. And you
2 just gotten it that day, so you show the bank officer.
3 Here's my check. Here's my bonus check. Here's the
4 amount I need and they say that's great. That's perfect.
5 Let's, you know, set up everything with the lawyers and
6 the bank, come back in two weeks and we'll do your
7 closing. So you show up in two weeks and you sit down
8 with your loan agent from the bank and you're all set to
9 close on your house and you say oh, yeah, you remember
10 that check I showed you that I had, I don't have it
11 anymore. I don't know what happened to it. I don't know
12 where it is. But that's okay, right, we can just go
13 through with the closing? Of course, not. Absolutely,
14 not. We're not going to let you do that, and we ask that
15 you not let the State do that. That we not let the State
16 tell you how important this evidence is, ask you to use it
17 against someone to find them guilty of a crime, and then
18 tell you it's okay that they lost it and have no idea what
19 happened to it, because that's just not okay. It's not.
20 Not when you're talking about the burden that they have.
21 Not when you're talking about taking away someone's
22 liberties. I also want to talk to you just briefly before
23 finishing about the elements that they need to create for
24 you and that's not something that we talked to you a whole
25 lot about. We talked to you about the facts, but you need

1 to use the facts in order to decide, did the State prove a
2 burglary or not. And I think when you look at the facts
3 that the State has presented to you and you look at the
4 elements of burglary, they're going to find that there is
5 just not, they don't match up. They need to prove, number
6 one, unlawful entry without consent into the dwelling of
7 another. Number two, with the intent to commit a crime
8 inside. And it's our position that neither one of those
9 elements is met. They need to prove all of the elements
10 of the crime beyond a reasonable doubt. First of all,
11 they can't prove, they cannot prove that Rickey Henley
12 went inside that house. They can't prove that. No one
13 sees him inside. Mr. Culbreth said something about seeing
14 him running outside and then seeing him in the door, but
15 no, he doesn't say anything about seeing him inside. They
16 say there's a boot, footprint inside. Well, that could
17 have been from the homeowner. That could have been from
18 anyone. There's no cigarette butts inside. The only
19 cigarette butt is found outside. There is no articles of
20 Mr. Henley's found inside. They cannot prove that he was
21 inside of the house. Number two, the second element is an
22 attempt to commit a crime inside of the house. What's the
23 crime? What crime have they presented you, any evidence
24 of that Rickey either committed or was intending to commit
25 inside the house? There is none. You've heard nothing.

1 You've heard no evidence from a single witness about any
2 crime that Rickey either committed or intended to commit
3 inside that house. None. You didn't hear any testimony
4 about anything in the house being out of order, about
5 papers being shuffled or furniture being moved or anything
6 like that. They have offered you zero interest of the
7 intent to commit a crime there. Zero evidence that there
8 was a crime committed or that there was any attempt to
9 commit a crime inside the house. They've also not offered
10 you evidence that he was inside the house. So what you're
11 left with, where you are now, after hearing the State's
12 case, what you're left with is a shoddy investigation and
13 lost efforts. That's what you've got. You got an
14 investigation that just didn't really go very far, and
15 didn't take steps like writing down a statement, recording
16 it. Didn't take the simple step of getting a search
17 warrant, and didn't take the simple step of collecting
18 boots and getting an analysis. All things are easy to do.
19 Didn't do it. It's just a shoddy investigation and a lot
20 of hurt, and you're left with lost evidence. And we're
21 asking you not to let the State get away with that and not
22 to let them set the bar that low. Not to let them tell
23 you it's okay to have an investigation that's less than
24 half done. It's okay for us to tell you how important all
25 these procedures are and following the integrity of

1 evidence but hey, it's okay that we lose it. That's okay.
2 That shouldn't matter to you. It should matter to you.
3 It should matter to you and it should matter to everyone
4 in this country. Because it's not good enough for the
5 State to come before you and ask you to convict someone of
6 a crime when they haven't offered you evidence of the
7 elements, when they've given you shoddy investigation, and
8 when they have lost evidence. So we're asking you not to
9 let them set the bar that low. We're asking you to hold
10 their feet to the fire. To hold them to their standard of
11 proof beyond a reasonable doubt. We're asking you to find
12 that what they did in this case falls far, far short of
13 proof beyond a reasonable doubt, and we're asking you to
14 find Rickey not guilty. Thank you.

15 THE COURT: Mr. Brown?

16 MR. BROWN: Thank you, Your Honor. May it please the
17 Court?

18 THE COURT: Yes, sir.

19 MR. BROWN: Ladies and gentlemen, at the beginning of
20 the trial, Mr. Andrews stood before you and said a
21 person's home is their castle. It's what you bought and
22 paid for. It's where you live. It's where you go home
23 from work at night and want to lay your head down. You
24 want to sit on that couch and watch TV. If you want to
25 listen to that thing on The Bachelor or American Idol or

1 something like that or read your favorite book. That's
2 what Amanda and Jay Moss were doing who lived there at [REDACTED]
3 Highway 28 North here in Abbeville and that was their
4 castle and on that day February 15, 2012, when they left
5 to go to work that morning or they said they left the
6 house, the door didn't look like that. It wasn't busted
7 open. They left the door locked, secured and didn't tell
8 anybody they could go in their house. Folks, that
9 shouldn't happen, that shouldn't happen in anybody's
10 house. It shouldn't have happened in the Moss' house.
11 Ladies and gentlemen, one thing you've heard the Defense
12 say is don't let the State get away with setting the bar
13 that low. Folks, you know what our response to that is,
14 how much of this evidence are you going to have to ignore
15 to find him not guilty and not find justice in this case.
16 How much you going to have to ignore to get below that
17 threshold beyond a reasonable doubt. Folks, I'll submit
18 to you after we go through all the facts that you heard
19 from that chair there that you do have the evidence. You
20 do have the evidence and the State, us, I feel confident
21 after we go through it all that we can prove to you beyond
22 a reasonable doubt that Mr. Henley did go in their house,
23 broke into that house on that day with the intent to
24 commit a crime. Now, folks, again, talking about the
25 elements of burglary first. What do we have to prove.

1 Let's go over that first before I go into what we heard.
2 Burglary first is the breaking and entering of a dwelling
3 or a house of somebody else, of another person. In this
4 case, it's Amanda and J.B. Moss, with the intent to commit
5 a crime therein. Folks, there is no way you'll hear this,
6 shortly from the Judge, the Judge will read out the law in
7 this case, but there's no way to know what's going on in
8 everybody's mind. What their intent is when they wake up
9 in the morning and what their intent is when they say
10 something or do something. You got to look at the
11 circumstances around it to see. You can't cut his head
12 open and figure out what he was thinking during that time.
13 We got to look at what we do know at that time. So the
14 breaking and entering of the dwelling of another person
15 with the intent to commit a crime, and the person wasn't
16 invited to be there. One other thing we have to prove to
17 prove burglary first, it's just another element and these
18 are not offered for any other reason other than to show
19 two prior convictions and that's all they show is two
20 prior convictions. Now, ladies and gentlemen, we also
21 have to prove to you beyond a reasonable doubt that he
22 committed this, but what is reasonable doubt. Mr. Andrews
23 talked about it in the beginning. Reasonable doubt is the
24 proof of evidence that leaves you firmly convinced in your
25 verdict; firmly convinced that he committed this crime.

1 It's not beyond all doubt, it's not beyond every doubt,
2 and it's not beyond any doubt. It's proof that leaves you
3 firmly convinced. Now, what'd you hear, a 911 call. All
4 right, folks. And Kimberly Wells who is the custodian of
5 records came yesterday. She initialed this disc. We
6 played it. She said the call came in at 11:39 a.m. on
7 February 15th, 2012. 11:39. All right. Here Mr.
8 Culbreth, he's riding by. He's coming home from cutting
9 the cemetery at Long Cane Cemetery. He's coming home to
10 check on his mom and he rides down Highway 28 as he does
11 every day. He looks over and he sees an odd car he
12 believes to be a Pontiac backed into the carport. Backed
13 under this carport. I want you to remember that. It's an
14 important piece of evidence there. He got the car parked
15 under that garage, backed in. The car is not supposed to
16 be there and what else did he say? Back doors are open.
17 Folks, there's only one person in there, if the door is
18 open, you know, you think it might be the driver's door?
19 No, it wasn't the driver's door. It was the backdoor.
20 You know, use your commonsense. The guy is backed in
21 there. Easy way to get out, quick. The backdoor open and
22 then what else do you have? You got a door kicked open.
23 But as you say, as Mr. Culbreth said as he first rode by,
24 he saw a man, an African-American run around the front and
25 by the time he went down and turned around with the truck

1 and trailer he had and pulled back, what'd he see? He saw
2 the man inside the door. The door had already been
3 breached at that point. He was in the house. The Judge
4 will also instruct you on the law of what a breaking and
5 entering. What's a breaking and entering? Folks, it
6 could be his finger if you want to say that or some other
7 tool or anything like that, even a foot. Now, folks, what
8 you do have is you have a boot print inside. He went in.
9 He broke into that house. We talked to J.B. and Amanda.
10 Do they know this man? They don't know him. Did they
11 give him permission to be in their house? No, they didn't
12 give him permission. Did he have any clothing or anything
13 else in there that he was trying to go back in that house
14 to retrieve? No, he'd never been there before. Folks,
15 use your commonsense. Put all this together, because all
16 of this isn't a coincidence. The carport, the car backed
17 in, the back door open, the door kicked in. Folks, I'll
18 submit to you his intent was to go in there and clean them
19 out. Just so happened, Mr. Culbreth came by at the right
20 time and turned around and came back before Mr. Henley
21 could start loading it up. Mr. Culbreth parks on the side
22 of the road and points at him and startles him. The guy
23 knows, Mr. Henley knows he sees him. He points at him.
24 He gets in the car and slams the door as Mr. Culbreth
25 said, gets his Pontiac Bonneville and drives down to the

1 end of the drive and it was short time. It was only a few
2 seconds, five or ten seconds, and Mr. Culbreth tries to
3 remember the most he can about him. He said he's got a
4 doo-rag on. He's got an open shirt. When he saw him
5 standing up inside that door inside the house, he said he
6 was a taller fellow, he was a taller man. Thin and he
7 gave that to law enforcement. He told it. He told it on
8 911. It's consistent on that. He told it to the officer.
9 He said it up there on the scene. Mr. Henley talked to
10 him. He talked to him about cutting grass. Did you need
11 any help, Mr. Culbreth said no, I don't need any help.
12 And so which direction did he go? And remember this, this
13 might seem small. When he first pulls out and goes north
14 towards Anderson. But as you remember Mr. Culbreth said
15 as he got on 911, he turned the car, go right back by. If
16 it ain't going north, which way is it going? It's going
17 south. And what's south, Aiken? Beech Island, South
18 Carolina where he was going to see his mama. See Mr.
19 Culbreth is saying that. Look, these are, that might be a
20 small point we might have all missed, he testified he came
21 from Anderson, went to Beech Island. Mr. Culbreth said
22 that. Listen to all these little points, these little
23 bits and add them up. So later on, Mr. Thompson, Patrick
24 Thompson, the officer gets involved. He gets called out
25 there to start investigating. He says, you know, we went

1 in. I dusted. I couldn't find any finger prints. What I
2 did do, I did see a cigarette butt. It wasn't there. It
3 wasn't there that morning when they left. They don't
4 smoke. They don't smoke Newport's. It's not theirs. It
5 something new. We also heard Mr. Culbreth say he doesn't
6 know what he was throwing down but when the guy came out,
7 Mr. Henley came out of the house, it looked like he threw
8 something down. All right. Add these things up. So what
9 does Patrick Thompson do? He collects it. He puts on a
10 glove and rakes it into a paper bag, seals it up to
11 protect it to make sure no condensation or anything like
12 that does not affect the DNA. He packs it up, seals it up
13 and takes it the Abbeville County Sheriff's Office and
14 checks it in. Folks, after he talks to Mr. Culbreth, he
15 starts doing his investigation. And one thing that the
16 Defense didn't want to hit on too much in their closing is
17 they didn't hit on the car. Pretty ironic that all of
18 these circumstances come together. We got his car. Mr.
19 Culbreth says he looked in his rearview mirror and he's
20 looking in the rearview mirror, looking back and looks at
21 the tag. He gets a partial tag. He says HSN [REDACTED]. After
22 Patrick Thompson starts doing his investigation, he said
23 he goes to the SLED Center and generates all these tag
24 numbers. He's able to narrow it down, make and model.
25 Found out during his investigation and narrowed it down.

1 Showed pictures and saying is this the type of car? Is
2 this the type of car? Is this the color? Pontiac
3 Bonneville. And you'll have this back there, a 1997
4 Pontiac Bonneville. The same color as the one Rickey was
5 driving with tag number HSN [REDACTED], Anderson. It's his car.
6 And what does he do? After he gets that information, he
7 goes and talks to him. He's developing his suspect and
8 he's got to go exhaust his leads. He goes to Anderson.
9 Knocks on the door. Patrick Thompson said he, a female
10 answered and they ask to speak to Mr. Henley, to talk to
11 him. Folks, he wasn't under arrest at that time. He
12 talked to him. So he came outside and Mr. Thompson asked
13 him, been down at Abbeville about last week. Yeah, I was.
14 Well, I stopped to go use the bathroom up there. Folks,
15 he just left, that story he just left Anderson to go down
16 to Beech Island, he's going to stop just ironically on the
17 side of the road to use the bathroom. Yeah, I talked to a
18 man in a white truck. Folks, a lot of points adding up
19 here. What'd Mr. Culbreth say? I was in a white truck
20 toting that tractor and talked to a man in a white truck,
21 and then I went on down Highway 28 going down to see his
22 mama. After that, we also have the photo lineup. He's
23 gotten a suspect, so he generates a photo lineup. Folks,
24 photo lineup, all these guys look very similar. What did
25 Mr. Culbreth do? He says either two or three. Patrick

1 Thompson and asks on the stand is Mr. Henley one of these
2 two guys? Mr. Henley is number two. Going in more, the
3 Defense said, well, it says no facial hair. Well, listen
4 to what Mr. Culbreth said on the stand. I asked him that
5 yesterday. Well, are you saying he had no facial hair?
6 No, he had some on here. It's just he didn't have a full
7 beard like me. Folks, he did have, hitting on the
8 probability that the probability wasn't good. But he has
9 gotten it down to two, but we'll talk about probability
10 here in a minute when we get that DNA butt. So what do
11 they find? And after talking with Mr. Thompson and we
12 talk about what's going into the chain of custody in this
13 cigarette butt. We heard that it was packaged up, sealed
14 and kept under lock and key. They got it down to SLED.
15 We know where it was. Got it down to SLED. The SLED
16 technicians and, ultimately, the SLED analyst who was here
17 today, Maryann Boehm testified to this. They got it to
18 SLED in March, a little over about a month after or a
19 little less than a month after it was submitted in the
20 Abbeville County Sheriff's Office. It's taken down to
21 SLED and then later on, she did test it. She stated that
22 it was sealed up and once it gets to the SLED
23 laboratories, it's in that paper bag. But when it gets to
24 SLED it's put in a heat-sealed pouch. It's sealed up.
25 Puts tamperproof tape on it. If someone rips it, if

1 anybody tries to get in it, you'll see it. She said once
2 she gets it and everything sealed, everything is packaged
3 up and no tampering and if there was, she'd have made a
4 note of or wouldn't have even tested it. So she tests it
5 and what'd she find? Well, she said that it was the
6 likelihood or the probability of randomly selecting
7 another individual with same DNA profile as Rickey Henley
8 is approximately 1 in 1.5 billion. We'll talk more about
9 probability. I asked her, well, what's the probability of
10 winning the Power Ball jackpot? One in 170 million.
11 Well, how much more likely is it to win the Power Ball
12 than it is to have the same DNA profile as Rickey Henley?
13 It's eight-and-a-half times more likely to win the Power
14 Ball than it would be to have his DNA. Folks, these
15 aren't just coincidences. These are all adding up. Well,
16 they said he wasn't ID'd. They say Mr. Culbreth's ID is
17 not good enough. That the boot print was not good enough.
18 That the car is not good enough. That the DNA is not good
19 enough. Ms. Bolen made an analogy about somebody buying a
20 house. About getting a check to submit for their down
21 payment to get approved. They're going to their closing
22 date two weeks later and they get there and say oh man, I
23 lost that check. Well, folks, that's not what happened in
24 this case. Our check was cashed before it got back to
25 Abbeville. The check was cashed. The cigarette butt was

1 tested down at SLED. Those results were tested before it
2 was brought back here to Abbeville County. As you heard
3 Maryann Boehm say no, I don't need to see it. It's not
4 going to change my results. The results are what the
5 results are; Rickey Henley. You heard from Jolene Gray,
6 Rickey's fiancé at the time, girlfriend. They lived
7 together up in Anderson. They, she says they had their
8 Valentine's Day, February 14th, and he was going to leave
9 that next morning to go down to see his mom in Beech
10 Island. I asked her, I said, well, what route did he
11 take, would he take to go down there? He'd go down 28.
12 What time did he leave? He left between 8:00 and 9:00.
13 Folks, he was down in Beech Island by 10:00 o'clock and he
14 left between 8:00 and 9:00, he'd really have to be
15 flooring it, because Anderson is not the next county over
16 to Aiken. You got to go through several counties to go
17 there. Y'all are from around here. You know how long it
18 takes to get from Abbeville to Aiken or from Abbeville to
19 Anderson and then you make that big gap. Folks, I submit
20 to you he did leave that morning. He left Anderson to go
21 down to Beech Island, but he made a stop on the way. He
22 made a stop at the Moss' house to see what they had good
23 in there. They said the windows, you could see right in
24 and see what they had in there and he stopped. He thought
25 he'd get a little treasure trove as he went on down to

1 Aiken. Folks, the Defense, they don't want you to think
2 that we just don't have the evidence. Of course, you have
3 the evidence. This isn't a coincidence. When you add all
4 these points up, the points clear to Rickey Henley. We do
5 have an ID. We do have an eyewitness of what happened.
6 Breaking and entering into the dwelling of another person.
7 The dwelling, Moss' live there. It's their house. They
8 didn't give him permission to be there with intent to
9 commit a crime in this house. Folks, use your everyday
10 experience. See what the facts are. You heard from the
11 testimony from the stand the car backed in, back door
12 open, door kicked in. Folks, submit to you his intent to
13 clean them out, steal. Mr. Culbreth got there in time.
14 Got there in a good neighborhood and called 911. I'm sure
15 he wishes he could get more details of what he looked
16 like. He did the best he could. He narrowed it down to
17 those two. He gave a good description and law enforcement
18 took it from there. Found his car. Looked at his boots
19 when he got there and said yeah, it resembles that boot
20 print inside the house and you'll have all those things in
21 there. You can look at the picture. Folks, I submit to
22 you, you do have evidence to leave you firmly convinced of
23 his guilt and to do justice today. Their house, [REDACTED]
24 Highway 28 North, no longer their castle. They sold that.
25 They sold that house and no longer a castle to them.

1 They're trying to build a new location. They didn't feel
2 safe there anymore. You have the evidence to find him
3 guilty and that's what we're asking you to do.

4 THE COURT: All right. Now, folks, I got about
5 twenty minutes of instructions. Y'all need to eat lunch,
6 then y'all need to deliberate, but not necessarily in that
7 same order. Would y'all like to take a short break and
8 decide whether you want to eat lunch quickly, go on your
9 own, come back, hear my instructions or would y'all like
10 to hear my instructions, and then begin deliberations, and
11 then take a lunch break, or just kind of eat a snack for
12 lunch and y'all work through lunch. Some clerks can get
13 pizza in here fairly quickly. I'm not trying to suggest
14 something to you and not feed you. I'm just telling you
15 it's 12:00 o'clock and I know y'all might be getting
16 hungry. So y'all want to take a short break and decide,
17 hear instructions, deliberate, hear instructions, break
18 for lunch or break for lunch, and then hear instructions.
19 Y'all decide that, and then as soon as y'all really y'all
20 come back, be we're kind of waiting on y'all. What is
21 your name?

22 MS. FOSSETT: Harriet Fossett.

23 THE COURT: Fossett?

24 MS. FOSSETT: Yes.

25 THE COURT: You're the one that had the driver's

1 license issue earlier?

2 MS. FOSSETT: Yes. I guess so.

3 THE COURT: Will you act as my foreperson?

4 MS. FOSSETT: Yes.

5 THE COURT: Thank you. Now, you make that
6 determination and y'all come right back out. Now, don't
7 discuss the case yet. Just hear Judge's instruction, go
8 to lunch and go to lunch, hear Judge's instruction. All
9 right.

10 (Whereupon, the jury was excused from open court for
11 a break.)

12 (Whereupon, a short break was taken.)

13 (Whereupon, the jury came into open court at
14 approximately 12:08 p.m.)

15 THE COURT: Y'all want to keep working or you want to
16 go eat lunch?

17 MS. FOSSETT: We want to hear what you've got to tell
18 us and we want to eat snacks.

19 THE COURT: Okay. So y'all going to eat snacks in
20 here?

21 MS. FOSSETT: Yes, or whatever you want us to do.

22 THE COURT: Okay. So, y'all are going to listen to
23 my instructions and start your deliberations and kind of
24 eat snacks. Once y'all start deliberating you are on your
25 time, if you want to take a break, step outside you can do

1 that. If you want to take a break for thirty minutes you
2 can do that. You are on your time then, you don't have to
3 ask my permission. As long as everybody is there you can
4 talk about the case. If one person needs a break and
5 wants to step outside stop talking about the case and you
6 can talk about the weather. All right.

7 Ms. Fossett and ladies and gentlemen of the jury, the
8 State of South Carolina has charged the defendant, Rickey
9 Henley, with one count of first degree burglary and bear
10 in mind, he pled not guilty. I just told you that early
11 on. Because of that plea, his request for a jury trial,
12 the burden then rests upon the State of South Carolina to
13 prove the case alleging the indictment. Mr. Henley comes
14 into Court clothed with the presumption of innocence and
15 this presumption continues throughout the case and
16 entitles him to a verdict of not guilty until the State
17 has proven each and every element of the offense in the
18 indictment which is burglary first. They must prove that
19 to a standard of proof called beyond a reasonable doubt.
20 Now, under our Constitution and the laws of South
21 Carolina, it makes me the instructor of the law. You must
22 accept the law as I instruct it. So if you have an idea
23 of what the law is or what it might be or what it should
24 be, you must disregard that idea and accept the law as I
25 am instructing it to you here today. That is my job.

1 Now, if I make an error on the instruction of law, there's
2 another time and another place to consider that error, if
3 there is any I make, and, if so, that error would be
4 corrected by another court. But for our purposes here
5 today, accept the law as given to you by me.

6 Now, your job, the same Constitution presents to you,
7 you are the sole fact finders of this case, so you should
8 have listened closely to the evidence. I observed that
9 y'all did. And you must weigh the evidence which is
10 presented using your good judgment and your commonsense.
11 Now, I'm not allowed to suggest what I believe the facts
12 are. Any of my rulings or comments during the trial have
13 indicated that, you must disregard that and it's your job
14 to determine the facts of this case. Now, in passing and
15 doing your job and making determinations of fact, you of
16 course, must evaluate and make judgments of the
17 credibility of the witnesses who have testified and the
18 believability of evidence which has been presented. Now,
19 as judges of the credibility and believability of the
20 witnesses who testified, you can use anything in your good
21 judgment and commonsense you wish in evaluating the
22 witnesses credibility. You may also use several things
23 including or discussed, what was the manner and the
24 appearance of the witnesses that testified. Were they
25 straightforward? Were they hesitant? Were they hesitant

1 in answering in any way? How did any of the witnesses
2 come to know the facts to which he or she testified? What
3 was their ability to recollect these facts? Is there some
4 reason a witness would want to give testimony which would
5 help one side or the other? In other words, was the
6 witness either biased or prejudice toward one side or the
7 other? You can consider whether the witnesses testimony
8 was strengthened or weakened by other testimony or any of
9 the evidence. Now, you may believe as much or as little
10 of any witnesses testimony as you deem appropriate and you
11 as a collective group decide. You can believe one witness
12 against many and many against one. You can believe part
13 of a witnesses testimony and disregard the rest. You as a
14 collective group must determine the facts as you determine
15 the credibility and believability of these witnesses of
16 the facts offered through the testimony and evidence.

17 And, normally, in a case, as was done in this case,
18 there are two types of evidence presented, direct evidence
19 and circumstantial evidence. Direct evidence is generally
20 testimony of a person who will be an eyewitness that claim
21 to have actual knowledge of certain facts. Circumstantial
22 evidence on the other hand is proof of facts and
23 circumstances indicating the existence of another fact.
24 Our laws make no distinction between the weight or value
25 to be given to either the direct evidence or direct

1 testimony or circumstantial evidence nor is a greater
2 degree of certainty required for circumstantial evidence.
3 You should weigh all the evidence presented to you and I
4 instruct you that to the extent the State relies upon
5 circumstantial evidence, all of the circumstances must be
6 consistent with one another and when taken together point
7 conclusively to the guilt of the accused beyond a
8 reasonable doubt. Now, if these circumstances merely
9 portray his behavior as suspicious, then the proof is
10 favorable. But my instructions to you are that after
11 considering all of the evidence presented to you, whether
12 direct or circumstantial or some combination of the two,
13 if you are not convinced of the guilt of the Defendant
14 beyond a reasonable doubt, you must find him not guilty.

15 Now, I instruct you during the presentation of the
16 witnesses that certain witnesses by their education, their
17 experience, they have attained expertise in certain
18 fields. Those are expert witnesses and they may offer
19 opinions in those fields. Now, you're not to consider the
20 expert's testimony any different than that of the other
21 witnesses just because they are an expert. Now, if you
22 decide that an expert's opinion is not based upon
23 sufficient education and experience or if you conclude
24 that the reasons given in support of the opinion is not
25 sound or that the opinion is outweighed by other evidence,

1 you can disregard that opinion entirely. An expert
2 witness' testimony is to be given no greater weight than
3 the other witnesses simply because they're an expert and
4 you're not required to accept their testimony even if it's
5 not contradictory.

6 In every criminal prosecution, the burden of proof,
7 meaning the burden of proving the case is upon the State.
8 According to our Constitution, the State must prove the
9 case to a standard called beyond a reasonable doubt before
10 a finding of guilt may occur. If the State fails to meet
11 that burden, then the State has failed in its burden.

12 What is a reasonable doubt? A reasonable doubt is
13 simply this, is a doubt which would cause a reasonable
14 person to hesitate to act. Reasonable doubt may arise
15 from evidence which is in the case or from a lack or an
16 absence of evidence in the case. Proof of reasonable
17 doubt leaves you firmly convinced of the defendant's
18 guilt. It is the kind of doubt which one can assign a
19 reason, if the assignment of that reason can be done
20 reasonably and convincingly.

21 Now, I charge you that Mr. Henley is entitled to
22 every reasonable doubt which may arise in this case and
23 what that means is that if any of you have any doubt about
24 anything during the trial, you're required to resolve it
25 in his favor. Now, the very fact that you have a full and

1 free discussion on the issue of guilt or innocence does
2 not in and of itself create a reasonable doubt. You must
3 make a determination of whether or not a reasonable doubt
4 exists as to his guilt.

5 Now, criminal intent is a necessary element of each
6 crime which must be proven by the State beyond a
7 reasonable doubt.

8 Criminal intent is always a matter which must be
9 determined by the jury from the circumstances surrounding
10 the situation. There is no way to evaluate or determine
11 to a mathematical certainty intent. There is no way
12 medical science could dissect a person's brain and
13 determine what he or she had in mind. Our law states that
14 criminal intent may be inferred in the circumstances shown
15 to have existed both before and after the fact. Now,
16 criminal intent is a state of mind that operates jointly
17 with an act or omission in the commission of a crime.
18 Criminal intent is a mental state of conscious wrongdoing.
19 Now, it is up to you, the jury, to determine what the
20 Defendant intended to do based upon the circumstances
21 shown to have existed and the State must prove that intent
22 beyond a reasonable doubt just as they must prove the
23 other elements of the burglary first beyond a reasonable
24 doubt.

25 Now, the defendant, Mr. Henley, raised a defense

1 called an alibi. And to establish an alibi, it must be
2 shown that he was at another specified place at the time
3 the crime was committed and that it was, therefore,
4 impossible for him to have been at the scene of the crime.
5 Mere denial of presence at the scene does not constitute
6 an alibi. There is no burden on the defendant to prove an
7 alibi. The burden is upon the State to prove reasonable
8 doubt of the Defendant's guilt and that he was actually
9 present at the scene of the crime, actually participated
10 in or was not somewhere else. In other words, the State
11 has the burden of disproving his alibi.

12 Now, I allow some jurors to take notes during the
13 trial. Please understand that note taking is for the
14 benefit of the note taker. I didn't encourage or
15 discourage anybody from taking notes. But I tell you
16 during your deliberations, if you discuss an issue, a
17 person's memory or recollection of what the testimony was
18 is just as good as to what someone's notes were. Notes
19 are no better than the memory; the memory are no better
20 than the notes. But the notes are for the person that
21 took them, so you need to discuss the issues which are in
22 dispute and resolve those and your verdict must be
23 unanimous.

24 Now, the specifics of law of this case is that Mr.
25 Henley is charged with burglary in the first degree. The

1 State must first prove beyond a reasonable doubt that Mr.
2 Henley entered a dwelling without consent. A dwelling is
3 a building or a portion of a building in which a person
4 ordinarily sleeps. A building constructed as a dwelling
5 that has never been occupied cannot be considered a
6 dwelling for that purpose. A building is a dwelling even
7 if the residents are temporarily absent from the building.
8 In order to prove that the Defendant entered the dwelling,
9 the State does not have to show the Defendant's entire
10 body entered the dwelling. The smallest entry is
11 sufficient. It may be any part of the body such as a hand
12 or foot or even an instrument such as a hook or other
13 instrument. Additionally, the State does not have to
14 prove that any force was used to gain entry. If a person
15 enters a dwelling by using, I'm sorry, that is not
16 appropriate in this case, skip that.

17 The State must also prove the next element beyond a
18 reasonable doubt is that the Defendant intended to commit
19 a crime of either a felony or a misdemeanor at the time of
20 the entry. The mere entry into a dwelling without consent
21 is not a burglary. If the intent to commit a crime is
22 formed after the entry, it is not a burglary. On the
23 other hand, if the Defendant intended to commit a crime at
24 the time of the entry, it is a burglary even if the intent
25 was abandoned after the entry. It does not matter that

1 the intended crime was not completed. Intent may be shown
2 by acts and conduct of the Defendant and by other
3 circumstances which you may naturally and reasonably infer
4 intent.

5 Finally, the State must prove beyond a reasonable
6 doubt for a burglary first, that the defendant has two
7 prior, a record of two or more prior burglary or
8 house-breaking convictions. Evidence of prior offenses
9 committed by the defendant was not offered by the State to
10 prove that he is a bad character or it is not offered to
11 prove that he committed a burglary on this occasion. The
12 prior convictions may be considered by you only for the
13 purposes of determining whether or not it satisfies the
14 element of the offense that makes it a first degree
15 burglary. And so a burglary first is entering a dwelling
16 without consent with intent to commit a crime and you have
17 two prior convictions for burglary and/or house-breaking.

18 Now, before you could consider the evidence of the
19 prior burglaries, you must first find that the State
20 proved beyond a reasonable doubt that a burglary was, in
21 fact, committed by him. Now, if you find a reasonable
22 doubt that the burglary was committed, then you must
23 consider the evidence of the prior convictions as evidence
24 of one or more of the circumstances which would make it a
25 burglary in the first degree.

1 Now, this is important and I emphasize to you this
2 importance is that Mr. Henley decided and elected to not
3 testify. And the fact that he did not testify is not a
4 factor to be considered by any of you in your
5 deliberations. It is not to be considered in the question
6 or guilt or innocence. It must not be considered by you
7 in any manner whatsoever. A defendant has the
8 constitutional right to remain silent and choose to not
9 testify and the fact that he's elected to not testify
10 should not be discussed during your deliberations in any
11 manner. You must decide whether the State's proven their
12 case beyond a reasonable doubt and based upon the evidence
13 which was presented. And so I instruct you that under
14 your oath, you are to draw no conclusion whatsoever from
15 the fact he chose and elected to not testify. So you
16 should not even discuss his failure to testify in the jury
17 room. He's not required to prove anything or disprove
18 anything. The burden remains upon the State.

19 Now, Ms. Fossette and members of the jury, I told you
20 early on in my preliminary instructions that what you
21 needed to decide this case was presented in the courtroom.
22 The testimony has been presented. The evidence has been
23 admitted. You're to consider that evidence, weigh it
24 fairly and impartially and reach a unanimous verdict
25 considering my instructions. If I have done anything

1 which would influence you in thinking I had an opinion,
2 please disregard that. It's not my job and it's not my
3 job to try to influence you in doing your job. My only
4 job is to instruct the law to you, answer your questions
5 on the law if you need any further instructions but
6 encouraging you to remember that you're to consider only
7 the evidence presented and leaving any other outside
8 influences outside of the jury room in making a unanimous
9 decision in this case. All right. I am very confident
10 y'all will do just that.

11 Now, what happens next is I'm going to let you step
12 in the jury room. I get to ask the attorneys, because we
13 briefly discussed my instructions, they get to comment on
14 them and say, Judge, you forgot to instruct the jury on
15 such and such fact or on such and such law that we thought
16 you would and you just inadvertently left it out. They
17 get to comment to me in a moment, after you step in the
18 jury room. So I'm going to ask them momentarily did I
19 leave any instructions out, were my instructions complete.
20 If there is anything I inadvertently left out or need to
21 clear out, I'll bring you back in here and clear that up.
22 If they agree that my instructions were sufficient, then
23 they'll inventory the evidence, hand it to you with a
24 verdict form that will say State of South Carolina vs.
25 Rickey Henley, as to the charge of burglary first degree,

1 guilty or not guilty. It's simple as that and you'll have
2 that verdict form with you. Once you begin your
3 deliberations, I'll pull the alternates out and I'm not
4 sure which ones y'all are, but my clerk, he'll note what
5 your names are. Y'all probably remember who you are, but
6 the last people that were selected, we'll pull y'all out.
7 So y'all don't get to participate in deliberations once
8 they start, but while I do the instruction sequester, I
9 will let you sit back there. If you need further
10 instructions or clarifications by the Court on any of my
11 instructions, write me a note, Judge, please explain
12 reasonable doubt. Judge, please explain burglary first
13 elements again. Whatever you need, write me a note and
14 I'll try, sometimes I can write it back to you and just
15 respond right back. Sometimes I have to bring you back in
16 here and reread some of this to you. Common questions
17 which I can't answer, why didn't the State call such and
18 such a witness. Because y'all, some witnesses weren't
19 available. And whether the State or the Defense called a
20 witness or didn't call a witness, you get what you got.
21 We can't call any further witnesses and we can't question
22 either side as to why they did or didn't do something. It
23 is what it is. So I can't answer questions of why wasn't
24 someone called or where is some other evidence. The
25 evidence is what is received and admitted and that's what

1 you get to consider and nothing else. Now, if you need to
2 hear testimony replayed, I can do that. But note the
3 witnesses name or person that was the police officer who
4 testified about and give me a description if you can't
5 remember his name or her name. Now, I say that kind of
6 cautiously, because Ms. Holston, my court reporter, always
7 cringes when I say that. She has this old set of speakers
8 that aren't as good as those, but she can replay
9 testimony, because she's recorded this also on an audio
10 recording and she's transcribed it. It'll take her a few
11 minutes to set up the audio and replay it back for you if
12 you want to rehear specific testimony. We can do it.
13 It'll just take a little bit of time and you got to give
14 her a few minutes to kind of cue it up. So understand
15 that. All right. Those are my instructions. I'm going
16 to let you step in the jury room and once you receive the
17 evidence and you're in your deliberations, if y'all want
18 to take a break, take a break. If you need something,
19 write me a note, give it to the Bailiff and he'll bring it
20 to me. Fair enough?

21 MS. FOSSETT: Fair enough.

22 THE COURT: All right. Don't discuss the case till
23 you get the evidence. Y'all step in the jury room.

24 (Whereupon, the jury was excused from open court at
25 approximately 12:27 p.m.)

1 THE COURT: All right. Any exceptions to the
2 instructions from the State?

3 MR. BROWN: Not from the State.

4 MS. PATEL: None from the Defense.

5 THE COURT: Okay. All right. Y'all inventory your
6 evidence and we'll get the verdict form. Ms. Boggs is
7 printing it out.

8 MR. ANDREWS: No objection from the State on the
9 verdict form, Your Honor.

10 THE COURT: Does Ms. Patel have any objection to the
11 verdict form?

12 MS. PATEL: No, sir.

13 MR. ANDREWS: No objection to the verdict form from
14 the State.

15 THE COURT: Okay. Good enough. Okay. All right.
16 There is nothing and everything was admitted except it was
17 just a couple of things subject to the objection, but we
18 admitted everything that was presented. Give it to them,
19 it is 12:30.

20 (Whereupon, the jury started deliberations at
21 approximately 12:30 p.m.)

22 (Whereupon, the alternates were excused from the
23 trial of the case at 12:33 p.m.)

24 (Whereupon, the jury sends out a note at
25 approximately 1:10 p.m.)

1 THE COURT: The jury sent out a note which has been
2 identified as number 5. The parties, the lawyers agree to
3 the response which is shown on the back of Exhibit 5 by
4 agreement.

5 (Whereupon, the note with response on the back from
6 the Court was sent back to the jury at approximately
7 1:12 p.m.)

8 (Whereupon, Court's number 5 was marked for
9 identification only.)

10 THE COURT: All right. I understand we have a
11 verdict in this case. Let's get them in.

12 (Whereupon, the jury came into open court with the
13 verdict at approximately 1:25 p.m.)

14 THE COURT: Ms. Fossette, have y'all reached a
15 verdict?

16 MS. FOSSETT: Yes, sir.

17 THE COURT: And was it unanimous?

18 MS. FOSSETT: Yes, sir.

19 THE COURT: Very well.

20 CLERK OF COURT: State of South Carolina, County of
21 Abbeville, the State versus Rickey Santoine Henley,
22 Indictment 2012-GS-01-348. As to the charge of first
23 degree burglary, we find the Defendant guilty. Harriet
24 Fossette, Foreperson of the jury, April 6th, 2016. Madame
25 Forelady and ladies and gentlemen of the jury, is this

1 your verdict, so say you all. Please signify by raising
2 your right hand.

3 (Whereupon, all jurors raised their hands.)

4 THE COURT: All right. Any further issues for the
5 jury, Ms. Patel or Ms. Bolen?

6 MS. BOLEN: We would just want the jury polled, Your
7 Honor.

8 THE COURT: Okay.

9 CLERK OF COURT: Okay. Helen Brownlee, is this your
10 verdict and is it still your verdict?

11 MS. BROWNLEE: Yes.

12 CLERK OF COURT: Charity Mitchell, is this your
13 verdict and is it still your verdict?

14 MS. MITCHELL: Yes.

15 CLERK OF COURT: Elizabeth Cape, is this your verdict
16 and is it still your verdict?

17 MS. CAPE: Yes, ma'am.

18 CLERK OF COURT: Clarice Bolden, is this your verdict
19 and is it still your verdict?

20 MS. BOLDEN: Yes, ma'am.

21 CLERK OF COURT: Tekoshia Lyons, is this your verdict
22 and is it still your verdict?

23 MS. LYONS: Yes, ma'am.

24 CLERK OF COURT: Melissa Ann Lee, is this your
25 verdict and is it still your verdict?

1 MS. LEE: Yes, ma'am.

2 CLERK OF COURT: Steven Taylor, is this your verdict
3 and is it still your verdict?

4 MR. TAYLOR: Yes, ma'am.

5 CLERK OF COURT: Chandra Mcduffie, is this your
6 verdict and is it still your verdict?

7 MS. MCDUFFIE: Yes, ma'am.

8 CLERK OF COURT: Harriet Fossett, is this your
9 verdict and is it still your verdict?

10 MS. FOSSETT: Yes, ma'am.

11 CLERK OF COURT: Sherry Sanders, is this your verdict
12 and is it still your verdict?

13 MS. SANDERS: Yes.

14 CLERK OF COURT: Molly Roberts, is this your verdict
15 and is it still your verdict?

16 MS. ROBERTS: Yes, ma'am.

17 CLERK OF COURT: Michael Abrams, is this your verdict
18 and is it still your verdict?

19 MR. ABRAMS: It is. Yes, ma'am.

20 THE COURT: All right.

21 CLERK OF COURT: Judge, the verdict has been
22 confirmed.

23 THE COURT: Very well. All right. Folks, thank
24 y'all for y'all's efforts in being jurors in this case.
25 You're free to go. You can talk about the case with

1 people now. You don't have to. Your service is done.

2 Thank you for your time. Thank you very much.

3 (Whereupon, the jury was excused from open court.)

4 MR. HENLEY: Your Honor, I have become a great
5 person, Your Honor. Since 2001 I haven't did anything and
6 I am on SSI. And they took my blood after me being
7 incarcerated. And I got found not guilty, I didn't do it.
8 I am just being honest, this is an enhanced charge. I
9 didn't do it. I am telling you the truth and nothing but
10 the truth. That is why his theory has changed more than
11 once and mine has never changed. Because I told the
12 truth. Mine never changed. And I did what I thought was
13 right. Your Honor, why am I being punished for something
14 I didn't do.

15 THE COURT: You will get a chance to talk.

16 MR. HENLEY: Just put me to sleep, this is something
17 I didn't do. Your Honor, if I had of did this I would
18 have had run, to be honest, I would have ran. And they
19 would have had to catch me.

20 THE COURT: Solicitor, are y'all prepared to go
21 forward with sentencing now?

22 MR. BROWN: Yes, Your Honor.

23 THE COURT: All right. Ms. Bolen, you and Ms. Patel,
24 are y'all prepared to go forward with sentencing right now
25 or do y'all want to take a few minutes?

1 MS. PATEL: We want to take a few minutes.

2 MS. BOLEN: If we can just have a moment just to make
3 sure we're all settled right here, Your Honor.

4 THE COURT: All right.

5 MR. HENLEY: That eyewitness couldn't even say it was
6 me, because it wasn't.

7 THE COURT: All right.

8 (Whereupon, a break was taken.)

9 THE COURT: All right. Ms. Bolen, y'all ready now,
10 and Ms. Patel. I'm sorry.

11 MS. BOLEN: Yes, Your Honor.

12 MS. PATEL: Yes, sir.

13 MS. BOLEN: Thank you for the time, Your Honor.

14 THE COURT: Absolutely. Not a problem. Mr. Brown,
15 let me hear from the State first, and then I'll hear back
16 from Ms. Bolen.

17 MR. BROWN: Judge, you've heard the facts of this
18 case. The Moss' were here and they don't wish to add
19 anything new that you have not already heard from the
20 testimony. Judge, we would like to just read in his
21 record. Again, in 2001, on a simple larceny and a petit
22 larceny. Also in 2001, a grand larceny and a burglary
23 second degree. In 2003, I'm not sure if this is a
24 violation or not, but it looks like it's a burglary. He
25 was charged burglary first and a grand larceny. Grand

1 larceny in 2005. Grand larceny and second grand larceny
2 in 2005. Burglary in the second degree in 2005. Burglary
3 in the third degree in 2005. Grand larceny in 2005.
4 Appears to be another grand larceny and petit larceny in
5 2005. It looks like a violation on the burglary in
6 December 2005. In 2009, burglary and in 2009,
7 trespassing. Forgery and a second burglary second.
8 Judge, then came to this time in 2012 where we have what
9 he's been convicted of. So, Judge, it's our position that
10 Mr. Henley is, obviously, he's a danger to the community.
11 He's a nuisance and he's somebody that doesn't respect the
12 value of other people's properties and that's reflected by
13 his record with the number of burglaries and grand
14 larcenies. And, Judge, it'd be our position that some
15 type of lengthy prison sentence would be appropriate, but
16 we'll leave that in your discretion.

17 THE COURT: Okay. All right. Ms. Patel.

18 MS. PATEL: Thank you, Judge. Mr. Henley is 34 years
19 old. He is here today with his mother, Ella Johnson, who
20 we heard from earlier. Your Honor, Rickey grew up in
21 Augusta, Georgia. He was raised in Beech Island. Very
22 early on, he witnessed abuse and violence in his family.
23 He witnessed his father beat his mother. He was actually
24 shot by his biological father when he was attempting to
25 try to break up a fight and all of this is referenced in a

1 mental health evaluation that took place in 2004, '14.
2 I'm going to hand this up to Your Honor after I'm done,
3 but I just want to give you a background of how he grew
4 up, and he didn't grow up like a regular kid. Very early
5 on, as I stated, he grew up with violence and he left his
6 home at the age of 13 and after the age of 13, he grew up
7 in the streets. And I think you can tell a lot by his
8 criminal history, he got into a lot of trouble when he was
9 younger. And it's not because, you know, his parents were
10 teaching him this, it's because he was out on the streets
11 and he didn't know any better. And I just want you to
12 take that in consideration that he didn't have the
13 upbringing that most of us do. Your Honor, he graduated,
14 I'm sorry, he did not graduate. He left school at the
15 age, in tenth grade. He did complete his GED while he was
16 incarcerated. Mr. Henley does suffer from several mental
17 health issues. I think he was taking medication for his
18 bipolar condition. He also has ADHD and also referenced
19 in his evaluation report is that he has psychosis from
20 time to time. I'm not sure if he's on that medication
21 right now, Your Honor, but he does have several mental
22 health issues. He grew up with a significant substance
23 abuse issue and I think, again, that goes back to his
24 upbringing and that he just didn't grow up in a supportive
25 home. But today, Your Honor, he's gotten his life back on

1 track. He talks to his mother regularly. He has a big
2 family. He's very close to his family. His two
3 daughters, both of them live in Augusta, Georgia. Their
4 ages are 16 and 14. He supports his teenage daughters. I
5 believe he pays \$150.00 dollars every two weeks that goes
6 towards their living expenses. Right. And, Your Honor,
7 he has not been in trouble since this arrest in this case.
8 I think the previous charge, I think before he was
9 arrested on this charge, he was arrested in 2008, Your
10 Honor. He keeps to himself these days. He communicates
11 primarily with his family. Tries to earn a honest living
12 and does not get into any trouble. I'd also like to point
13 out the facts of this case. There were no weapons
14 involved. No one was hurt physically. And, Judge, I
15 would like to put up that he was charged under the part of
16 the statute where he has two prior convictions and that
17 this incident did not occur at night or with weapons, and
18 so it was not egregious in nature. Judge, I'm just asking
19 that you consider the minimum in this case. I would also
20 like that you consider what's in this evaluation report,
21 because it will give you a better idea of who Rickey is
22 and why he may have made the decisions that he has in the
23 past. And, Your Honor, I'm also asking that you give him
24 any credit for any of the time he served when he was
25 arrested for this incident.

1 MS. BOLEN: And, Your Honor, I think he has probably,
2 I'd have to check with the public index, but it's at least
3 eight, I would say about eight months or so. But I will
4 doublecheck that.

5 THE COURT: All right. Let me see that report that
6 you have.

7 MS. PATEL: Yes, Your Honor.

8 MR. BROWN: And, Judge, I do believe that's the same
9 report that says Court's Exhibit.

10 THE COURT: All right. I have read the report of Mr.
11 Henley. Does he want, he indicated he may want to speak.
12 If he does, I'll hear from him.

13 MS. PATEL: Yes, Your Honor.

14 THE COURT: Okay. You may do so, Mr. Henley.

15 MR. HENLEY: Your Honor, and to be honest with you,
16 all of that what was back from my younger days when I got
17 in trouble. And that last time, I spent time in the
18 penitentiary and that was a long time. You understand me?
19 I made the decision if I could get up and go to work, get
20 out of there. So I took everything that I had and I give
21 everything I had to do the right thing, you know, and
22 that's all I knew to do. I didn't do that. Your Honor,
23 when somebody is down you pick them up. I don't hold
24 nobody down. Right. She will tell you, she been to my
25 house before. Your Honor, I got more than I can even keep

1 myself, I give to the church, because I had a studio and I
2 closed down my studio. Other than my non-service shop
3 that I had and my car wash, I been on SSI and I still
4 work, Your Honor. You know, I make sure that they don't
5 come back around no more and that person get their stuff
6 back. You know, and she'll tell you, my mom will tell
7 you. I'm telling you now. I mean, she done see me. In
8 my studio we have this all the time. Your Honor, I don't
9 even know how to work that stuff. You know, and I'm going
10 to be honest, if I did this, I would have never turned
11 myself in. I would have took off running. And I'm going
12 to be honest, if I was a thief, looking at the house which
13 I never seen before and I'm being accused of, first thing
14 I would have got and did was take the TV if I was a thief,
15 Your Honor, but I'm not. Because that's how I used to be.
16 But I can tell you from where I came from to where I am
17 now. But, Your Honor, the past is the past and I
18 understand everybody have one. But when you reading the
19 Bible, even in the Bible, God took somebody who used to
20 kill persons, and he changed them and he's proud of them.
21 And, Your Honor, that's what he, and I know nothing else
22 to say besides I apologize that the house got broke into,
23 but I'm not the guy. And to tell you the truth, if I was
24 them, I would have moved, too, because you got the wrong
25 person locked up and they still out there. And they also

1 took me from Abbeville jail to Abbeville hospital to take
2 my blood. I been down the road twice already and had two
3 prior convictions which y'all even know yourself. My
4 blood is in the database. Why did they need to take that
5 before they could come up with a so-called match and then
6 the lady just, she said it's consecutive tubes, but is
7 that the one that you tested? She couldn't say.

8 THE COURT: All right. Considering what I've been
9 told, the prior record, the jury's verdict, the sentence
10 of the Court is that Mr. Henley be confined for 24 years.
11 He gets credit for the days he's served, whatever those
12 days may be. And I'll add those to the sentencing sheet.

13 MS. PATEL: Thank you, Your Honor.

14 MR. BROWN: Thank you, Your Honor.

15 MR. ANDREWS: Thank you, Your Honor.

16 *** END OF REQUESTED TRANSCRIPT OF RECORD ***
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25

1 CERTIFICATE OF REPORTER
2
34 State of South Carolina)
5 County of Newberry)
6
78 I, Joy E. Holston, Official Court Reporter for the
9 Eighth Judicial Circuit of the State of South Carolina, do
10 hereby certify that the foregoing is a true, accurate and
11 complete transcript of record of the proceedings had and
12 evidence introduced in the trial of the captioned case,
13 relative to appeal, in the County of Abbeville, South
14 Carolina on the 5th and 6th day of April, 2016.15 I do further certify that I am neither of kin,
16 counsel nor interest to any party hereto.
17
18

19 September 9, 2016

20 *Joy E. Holston*
21

22 Joy E. Holston, Court Reporter

23 My Commission expires: May 2, 2026
24
25

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Abbeville County

Honorable Eugene C. Griffith, Circuit Court Judge

THE STATE,

V.

RICKEY SANTOINE HENLEY,

RESPONDENT,

APPELLANT

APPELLATE CASE NO 2016-000844

FINAL BRIEF OF APPELLANT

LAURA R. BAER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

ORIGINAL

RECEIVED

AUG 18 2017

SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

I.

Whether the trial court erred in denying Appellant's motion to quash the indictment based on Double Jeopardy where the trial court erred as a matter of law in failing to apply the proper test under *Yeager* and where Appellant's prior acquittal of larceny necessarily decided that Appellant was not the person who stole the homeowner's laptop, the sole item missing after the burglary, precluding the state from relitigating Appellant's identity as the intruder or intent to steal?

II.

Whether the trial court erred in denying the defense's motion to admit evidence of Appellant's acquittal on the prior larceny charge where the state's theory of the case continued to be that the burglar's intention was to steal?

III.

Whether the trial court erred in limiting the admission of Jolene Gray's testimony from the prior trial where Gray was unavailable to the defense and her testimony provided evidence that the police had an opportunity to obtain a cigarette smoked by Appellant from outside of his home?

IV.

Whether the trial court erred in denying the defense's motion to exclude evidence regarding DNA testing conducted on the cigarette butt purportedly found at the scene where the state's negligence in the destruction of the evidence constituted bad faith and where the state could not present a complete a chain of custody for the cigarette butt such that the cigarette butt was not available for comparison to the crime scene photograph at trial?

STATEMENT OF THE CASE

Appellant Rickey Santoine Henley was arrested for first degree burglary and larceny on February 23, 2012, the day after he was questioned by police about the incident. Supp. R.1. On July 27, 2012, the Abbeville County Grand Jury returned indictments against Henley for the same offenses. R. 695.

On April 8-9, 2015, Henley proceeded to trial on both offenses before the Honorable R. Lawton McIntosh and a jury. Henley was represented by Patricia Bolen and Yasha Patel, and the state was represented by assistant solicitors Demetrios Andrews and Yates Brown. R. 1; R. 175. Following an *Allen*¹ charge, the jury returned a verdict of **not guilty on larceny**. However, the jury **hung on the count of first degree burglary**, such that Judge McIntosh declared a mistrial. R. 336 – 350.

Following denial of the defense's motion to preclude retrial under the Double Jeopardy Clause of the Fifth Amendment, on April 4-6, 2016, Henley faced re-trial for the offense of first degree burglary before the Honorable Eugene C. Griffith, Jr. and a jury. R. 363, R. 384 – 402. The jury returned a verdict of guilty, and Judge Griffith sentenced Henley to twenty-four years incarceration. R. 664 – 674.

This appeal follows.

¹ Allen v. United States, 164 U.S. 492 (1896).

ARGUMENT

I.

The trial court erred in denying Appellant's motion to quash the indictment based on Double Jeopardy where the trial court erred as a matter of law in failing to apply the proper test under *Yeager* and where Appellant's prior acquittal of larceny necessarily decided that Appellant was not the person who stole the homeowner's laptop, the sole item missing after the burglary, precluding the state from relitigating Appellant's identity as the intruder or intent to steal.

Relevant Facts

Henley's First Trial

At Henley's first trial for first-degree burglary and larceny the solicitor averred in his opening statement that Moss' door was kicked down and "[s]he had personal property taken." 104, ll. 10-11. He said: "Mr. Henley has two indictments pending against him. One of them is for larceny; the other if for burglary in the first degree." R. 106, l. 24 – 107, l. 1. After reciting the elements of larceny and alleging that Henley took the personal property of Amanda Moss, he discussed the elements and anticipated proof of burglary. R. 107, ll. 1-16. He said:

The elements of burglary are entry into a dwelling without the owner or the occupant's consent with the intent to commit a crime therein. **And in this case, our theory is that Mr. Henley went into Ms. Moss' home, did so without consent, took personal property. And that was the crime he intended to commit.**

As to the burglary case, as to the burglary indictment rather, this is a charge of burglary first. And an additional element is that the person charged with burglary has been convicted of two prior burglaries. And there will be evidence about those two prior burglaries.

R. 107, ll. 6-16.

Ricky Culbreth testified that he was driving by the Moss' home at approximately 11:30 a.m. on February 15, 2012, when he noticed a silver car that he did not recognize backed into their carport with its backdoor open. He saw a black man wearing a do-rag ran from the front of the house to the side of the house. R. 117, l. 6 – 119, l. 4. Culbreth did a U-turn and pointed at

the man, who was standing in the doorway of the house. Culbreth said that it looked like the man threw something on the ground and then got into his car. The man pulled up next to Culbreth's white truck for a few seconds and asked if he needed any "yard help." R. 119, l. 12 – 120, l. 17; R. 130, ll. 22-24; R. 133, ll. 12-20. When Culbreth responded "no," the man turned left towards Anderson, but turned around and drove back past the house. R. 120, ll. 17-22. Culbreth walked to the house and called 911 at 11:39 a.m. He did not think that the call went through, but the dispatcher called him back at 11:43 a.m., at which time Culbreth reported the incident. R. 114, l. 16 – 116, l. 3; R. 120, l. 22 – 121, l. 1; R. 124, l. 16 – 125, l. 24.

Police arrived and found that side door to the Moss' home was open but there were no signs that anything had been tampered with inside of the home. The sole item missing was Ms. Moss' Dell laptop, valued at five hundred dollars, that had been on a bench just inside of the door. R. 136, l. 1 – 137, l. 9; R. 192, ll. 15-19. The laptop was never recovered. R. 231, ll. 17-19. Investigator Patrick Thompson photographed a boot print in the carpet inside of the home approximately one foot from where the laptop was taken. R. 196, l. 21 – 197, l. 6. He also photographed and allegedly collected a Newport cigarette butt from the ground just outside of the doorway to the Moss' home. R. 194, l. 15 – 195, l. 22; R. 197, l. 7 – 200, l. 8; Second Trial State's Exs. 11-12 (photos of cigarette butt). Ms. Moss said that neither she nor her husband were smokers. R. 138, ll. 16-17. Culbreth provided the police with a license plate number of HSN[REDACTED] for the Pontiac Parisienne car that he saw the man driving, which he saw through his rearview mirror. R. 121, ll. 9-22; R. 207, l. 24 – 208, l. 2. When the police could not find a car with that description and plate number, they obtained a list of other possible license plate numbers and makes of cars. Appellant Henley was on that list because he owned a Pontiac

Bonneville with the license plate number HSM[REDACTED]. R. 200, l. 16 – 201, l. 9; R. 207, l. 1 – 208, l. 21.

On February 22, 2012, Thompson went to speak with Henley at his home. According to Thompson, Henley responded affirmatively that he had driven on Hwy 28 near Abbeville the week prior and spoken with a man in a white truck. He said that Henley explained that he had stopped to use the bathroom but denied going into any house. Thompson also claimed that Henley admitted to smoking Newport cigarettes and was wearing boots with a similar pattern as the print found in the Moss' home. R. 208, l. 12 – 209, l. 7; R. 212, l. 21 – 216, l. 19; R. 224, l. 21 – 230, l. 17. A photo array including Henley was shown to Culbreth, but he was only able to narrow it down to two people. R. 122, ll. 3-17; R. 209, l. 19 – 211, l. 15. The police lost the original photo array shown to Culbreth such that only a poor quality black and white copy was available at the first trial. R. 7, ll. 14-23; R. 222, l. 4 – 223, l. 4.

In addition to the lost photo array, the cigarette butt allegedly collected by law enforcement from the scene and accompanying chain of custody log were also lost and unavailable for Henley's trial. R. 219, l. 3 – 220, l. 5. Nonetheless, the judge admitted the state's DNA testing results, which found a match between the DNA on the cigarette provided to SLED and the known standard collected from Henley. R. 55 – 86; R. 160, l. 16 – 172, l. 6. Henley's ex-girlfriend, Jolene Gray, with whom he shared an apartment at the time of the incident, said that five police officers came to her house a second time when Henley was not there. They were walking around and picking something up off of the ground. R. 248, l. 14 – 249, l. 18; R. 259, ll. 5 – 260, l. 23; R. 261, ll. 14-25.

As far as his whereabouts on the date of the offense, Ms. Gray recalled that Henley left their apartment in Anderson, South Carolina between 8:00 a.m. and 9:00 a.m. to go to his

mother's house in Beech Island, South Carolina. She confirmed that Henley owned boots that she had gotten him for Valentine's Day and that he smoked Newport cigarettes. R. 249, l. 19 – 252, l. 23; R. 257, l. 7 – 259, l. 4; R. 260, l. 24 – 261, l. 7. Henley's mother, Ella Johnson, said that on February 15, 2015, Henley arrived at her home at approximately 10:00 a.m. with leftovers from his dinner with Ms. Gray. They went to Moe's Convenience Store at approximately 2:00 p.m., where Henley bought a beer. R. 262, l. 22 – 274, l. 9.

In his opening on the law at closing argument, the solicitor again recited the elements of burglary and larceny in tandem. He said:

Mr. Henley [is] charged with burglary in the first degree. He [is] also charged with larceny. So what is it we have to prove to you to be a burglar first degree? **Burglary is breaking and entering the dwelling of another with the intent to commit a crime inside that house, or inside that dwelling. In this case the dwelling of Amanda Moss and the intent to commit a crime in breaking and entering that dwelling. In this case, he's charged with larceny.** Larceny is the taking and carrying away the goods of another with the intent to permanently deprive that person of those goods. In this case, a laptop .. So those are the-- that's the law of the case. The burglary, going back to burglary first, to make it a burglary first is two prior convictions. And we'll deal with that a little bit later, but that makes it a burglary first.

R. 287, l. 21 – 288, l. 11 (emphasis added). In the latter portion of his closing, noted that a cigarette butt was found “on that side door, going in the side door, the same door that was kicked open and Mr. Henley went walking through **to go get that laptop.**” R. 308, ll. 6-12. He argued that Henley made a stop on his way to see his mother Beech Island and “swung by Ms. Moss's house and decided he wanted to take advantage of what she had inside while she was at work. **What did he take? A laptop.**” R. 309, ll. 13-17 (emphasis added). The solicitor sarcastically said that the boot print was “[m]iraculously close to that pedestal where that laptop was taken from that day.” R. 312, ll. 15-16. Ultimately, the jury acquitted Henley of larceny but hung on the count of first-degree burglary. R. 343, 17 – 349, l. 11.

Importantly, the defense made no challenge to whether a laptop was actually taken from the Moss' home or its value. Rather, the defense focused on alibi, mistaken identity and the unreliability of the DNA evidence. Counsel argued that the state's evidence regarding identity – namely the eyewitness testimony, DNA evidence, and alleged “confession” – were all flawed and failed to prove Henley's guilt beyond a reasonable doubt. R. 290, l. 3 – 306, l. 3. She argued: “[T]he person he [Culbreth] saw at Ann Moss' house was not Rickey Henley.” R. 295, l. 15. Her argument regarding the state's failure to recover a laptop was not a suggestion that none was taken. Counsel pointed to that as another fact illustrating the police's shoddy investigation. R. 299, l. 10 – 300, l. 18.

Notably, the trial judge charged the jury both on alibi and identification. R. 325, l. 23 – 327, l. 2; R. 330, ll. 6-18. Regarding larceny, he charged:

The State must prove beyond a reasonable doubt that the Defendant took and carried away the property of another against the will or without the consent of the other person. The slightest removal of the property or the complete possession of the property even if for an instance by the Defendant is enough to show a taking and carrying away of the property. The State must also prove beyond a reasonable doubt that the Defendant intended to permanently deprive the owner of the property.

R. 329, l. 21 – 330, l. 5.

Double Jeopardy Motion and Retrial

The defense filed a Motion to Quash the Indictment Based on Double Jeopardy pursuant to Ashe v. Swanson, 397 U.S. 436 (1970), and Yeager v. United States, 557 U.S. 110 (2009) R. 352; *see* R. 384, l. 22 – 400, l. 22. Counsel argued that the provision against double jeopardy precluded prosecution in Henley's case on the same conduct for which he was tried in 2015. R. 384, ll. 12-17. Counsel argued that in light of its holding that a hung count was a non-event not to be considered in determining the preclusive effect of the acquitted count, the Yeager Court

instructed lower courts to look at the acquitted count to determine what facts were decided by the jury. R. 384, l. 12 – 389, l. 8. In making such a determination the lower court must “examine the record of a prior proceeding . . . and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.” Yeager, 557 U.S. at 119-20; R. 399, ll. 6-17; R. 400, ll. 18-21.

Though counsel recognized that the state is not required that the intended crime was actually committed, she argued that the acquittal on larceny necessarily decided that he did not take the laptop. R. 391, l. 8 – 392, l. 21. She noted that the facts in support of probable cause on the burglary warrant included:

That on February 15, 2012, in the county of Abbeville, one Rickey Santoine Henley did enter a dwelling located at . . . Hwy 28 N in Abbeville County, SC, without consent and with intent to commit a crime therein. Once inside the defendant did take, steal and carry away a Dell laptop computer from said residence. The defendant has prior Burglary convictions dated 12/07/2006 and 3/15/2002. Information from affiant and Sheriff’s Dept. investigation, report 12-2-55.

Supp. R. 1. She further noted that “[t]he State’s theory as presented in both of their opening and closing, as well as by their witness testimony, . . . was that Mr. Henley went into this home and took a Dell laptop computer. She submitted that there was no other evidence that any other crime was intended to have been committed inside the home other than theft of the laptop. R. 386, ll. 6-9; R. 390, l. 18 – 391, l. 8.

In response, the solicitor noted that the indictment on burglary made no reference to larceny. However, he admitted that the acquittal on larceny “puts us in a much tougher spot with regard to proving the burglary,” understanding that the state could not mention the laptop at the retrial like they did in their arguments at the first trial. R. 392, l. 23 – 393, l. 23. He pointed the court to State v. Peterson, 336 S.C. 6, 518 S.E.2d 277 (Ct. App. 1999), in support of the state’s

position that it is merely required to prove that there was an intent to commit a crime in the dwelling, not that the underlying crime actually occurred. R. 394, ll. 4-21. He further referenced State ex rel. Taylor v. Janes, 693 S.E.2d 82 (W.Va. 2010), wherein the defendant was acquitted of conspiracy but the state was allowed to retry him on the hung count of murder. R. 394, l. 21 – 395, l. 7. The solicitor submitted that their proof of intent to commit a crime therein would be in the form of testimony that Henley’s case was backed up under the Moss’ garage with the back door open and was startled by the witness who saw him in the house – probably caught right at the beginning of his burglary and didn’t have time to get into that much. R. 395, l. 23 – 396, l. 15.

In response, defense counsel distinguished the West Virginia case by noting that there was no overlapping fact necessary to prove murder and conspiracy to commit murder. However, she argued that in the present case Henley was found not guilty of the only crime that the state could possibly try to prove that he committed therein. R. 396, l. 16 – 399, l. 6. Though counsel averred that review of the transcripts of the first trial was necessary to the court’s finding, the trial judge did not take a copy of the transcript. R. 399, l. 6 – 400, l. 21. He ruled that counsel’s argument was a directed verdict type argument, which she could renew at that stage. He found that the state has the “burden of proving with the intent to commit a crime” but that the acquittal of the larceny did not preclude them from presenting facts from which the jury could infer intent to commit a crime therein. R. 399, l. 18 – 400, l. 10. The trial judge said that he found the Peterson “on point.” R. 402, ll. 1-23.

The second trial proceeded and Henley was convicted of first-degree burglary. R. 664, l. 14 – 666, l. 22. The state presented much of the same evidence as it did at the first trial, but successfully excluded Jolene Gray’s testimony that officers returned to the apartment that she

shared with Henley and picked something up off the ground. See discussion *infra*, Issue III. In his closing argument at the second trial, the solicitor contended:

The carport, the car backed in, the back door open, the door kicked in. Folks, I'll submit to you **his intent was to go in there and clean them out**. Just so happened, Mr. Culbreth came by at the right time and turned around and came back before Mr. Henley could start loading it up.

R. 640, ll. 16-19 (emphasis added); and

He [Henley] left Anderson to go down to Beech Island, but he made a stop on the way. He made a stop at the Moss' house **to see what they had good in there**. They said the windows, you could see right in and **see what they had** in there and he stopped. **He thought he'd get a little treasure trove** as he went on down to Aiken.

R. 646, l. 20 – 647, l. 1 (emphasis added).

Discussion

The Double Jeopardy Clause of the Fifth Amendment, applicable to the states through the Fourteenth Amendment, offers protection to citizens from being subjected to double jeopardy for the same offense. U.S. Const. amend. V (“No person shall be... subject for the same offense to be twice put in jeopardy of life or limb...”); U.S. Const. amend. XIV. The guarantee against double jeopardy offers three separate constitutional protections: (1) protection against a second prosecution for the same offense after acquittal; (2) protection against prosecution for the same offense after conviction; and (3) protection against multiple punishments for the same offense. State v. Cuccia, 353 S.C. 430, 434, 578 S.E.2d 45, 48 (Ct. App. 2003). In Ashe v. Swenson, 397 U.S. 436, 443 (1970), the United States Supreme Court found the previously civil concept of collateral estoppel applicable to criminal cases, writing:

“Collateral estoppel” is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.

See also State v. Hewins, 409 S.C. 93, 106, 760 S.E.2d 814, 821 (2014).

The Double Jeopardy Clause embodies two vitally important interests. Yeager v. United States, 557 U.S. 110, 117 (2009). The first is the “deeply ingrained” principle that “the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.” Id. at 117-18 (quoting Green v. United States, 355 U.S. 184, 187–188 (1957)). The second interest is the preservation of “the finality of judgments.” Id. at 118 (quoting Crist v. Bretz, 437 U.S. 28, 33 (1978)).

In Ashe v. Swenson, 397 U.S. 436, 437 (1970), the defendant was accused of participating along with two or three men in the robbery of six men who were engaged in a poker game in the basement of one of the victims. The men fled in one of the victim's cars, which was discovered in a field. 397 U.S. at 437. Later that morning, three men were arrested by a state trooper while they were walking on a highway not far from where the abandoned car had been found. Id. Ashe was arrested by another officer some distance away. Id. Though charged with seven separate offenses for the armed robbery of each of the six poker players and the theft of the car, the state began its prosecution of Ashe by calling him to trial on the charge of robbing one of the victims, Donald Knight. Id. at 438. The Ashe Court described the evidence that an armed robbery occurred and that personal property was taken from Knight as “unassailable.” Id. However, the state’s evidence that Ashe was one of the robbers was weak, with varying accounts of whether there were three or four robbers and the only positive identification of Ashe limited to his “size, height, and his actions.” Id. The defense did not question whether the holdup itself occurred or the victims’ claims regarding their losses, instead focusing on the identification of Ashe. Id. The jury found Ashe “not guilty due to insufficient evidence.” Id. at 439.

Six weeks later, the state called Ashe to trial again for the robbery of another participant in the poker game. 397 U.S. at 439. The trial court denied the petitioner's motion to dismiss based on his prior acquittal. Id. at 439. The state's evidence at the second trial was generally the same, except that they presented substantially stronger evidence on Ashe's identity. Id. at 439-40. Witnesses who were unable to identify Ashe at the first trial were much more specific in their descriptions and recollections. Id. "The State further refined its case at the second trial by declining to call one of the participants in the poker game whose identification testimony at the first trial had been conspicuously negative." Id. The case went to the jury on instructions virtually identical to those given at the first trial. Id. This time the jury found the petitioner guilty, and he was sentenced to a 35-year term in the state penitentiary. Id.

In reversing Ashe's conviction under double jeopardy, the Court found that the question before them was "whether, after a jury determined by its verdict that the petitioner was not one of the robbers, the State could constitutionally hale him before a new jury to litigate that issue again." 397 U.S. at 446. In finding that it could not, the Court noted that the following the acquittal for the robbery of Knight, the state could certainly not have brought him to trial again upon that charge because the jury determined that there was at least a reasonable doubt that the petitioner was one of the robbers. Id. The Court held: "The situation is constitutionally no different here, even though the second trial related to another victim of the same robbery. For the name of the victim, in the circumstances of this case, had no bearing whatever upon the issue of whether the petitioner was one of the robbers." Id. Further, the state conceded that following Ashe's acquittal, "it treated the first trial as no more than a dry run for the second prosecution." Id. at 447. The Court found that the prosecutors "refine[ment] [of] his presentation in light of the turn of events at the first trial" was "precisely what the constitutional guarantee forbids." Id.

In Yeager v. United States, 557 U.S. 110, 112 (2009), the United States Supreme Court held that an apparent inconsistency between a jury's verdict of acquittal on some counts and its failure to return a verdict on other counts does not affect the acquittals' preclusive force under the Double Jeopardy Clause. The Yeager case involved the criminal prosecution of one of the Enron executives, who was charged with 126 counts of federal securities offenses, which the Court grouped into two general categories – the “fraud counts” and the “insider trader counts” – for ease of reference. 557 U.S. at 112-14. The jury acquitted Yeager on the fraud counts but did not reach a verdict on the insider trading counts. Id. at 114-15. At the re-trial, the government sought a new indictment that charged only Yeager, rather than several other previous co-defendants, and further refined the charges against him. Id. at 115.

Yeager moved the trial court to dismiss the indictments based on issue preclusion and the Double Jeopardy Clause, on the basis that the insider trading counts necessarily required a factual finding that was decided in his favor by virtue of the acquittal on the fraud charges. 557 U.S. at 115-16. Yeager was convicted after the trial court denied his motion, reasoning that “the question whether Yeager possessed insider information was not necessarily resolved in the first trial and could be litigated anew in a second prosecution.” Id. The Court of Appeals affirmed, though it concluded from the record that the jury must have found when it acquitted petitioner that he did not have any insider information that contradicted what was presented to the public. Id. at 116. While the intermediate appellate court acknowledged that this factual determination would normally preclude the Government from retrying petitioner for insider trading or money laundering, it was persuaded “that a truly rational jury, having concluded that petitioner did not have any insider information, would have *acquitted* him on the insider trading counts.” Id. (emphasis in original). Considering “the hung counts along with the acquittals,” the Court of

Appeals court found it “impossible to decide with any certainty what the jury necessarily determined.” Id.

The Yeager Court noted a conflict between jurisdictions regarding whether a jury’s failure to reach a verdict on some count should play any role in determining the preclusive affect of an acquittal. 557 U.S. at 116-17. In holding that the failure to return a verdict has no affect on such analysis, the Court noted the Double Jeopardy Clauses’ interest in preserving the finality of the jury’s judgment. Id. at 117-18. The Court looked to the reasoning of Ashe that “the Double Jeopardy Clause precludes the Government from relitigating any issue that was necessarily decided by a jury’s acquittal in a prior trial.” Id. at 119; but see State v. Easler, 327 S.C. 121, 134, 489 S.E.2d 617, 624–25 (1997) (“As to the double jeopardy issue, we affirm the Court of Appeals’ holding that *Blockburger* is the only remaining test to determine a double jeopardy violation.”). The Yeager Court wrote:

To decipher what a jury has necessarily decided, we held that courts should “examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.”

Id. at 119-20 (quoting Ashe, 397 U.S. at 444) (emphasis added).

Though the Yeager Court noted that Ashe involved an acquittal after trial on a single offense, it found that its reasoning was still controlling “because, for double jeopardy purposes, the jury’s inability to reach a verdict on the insider trading counts was a nonevent and the acquittals on the fraud counts are entitled to the same effect as Ashe’s acquittal.” 557 U.S. at 120. The Court explained that a hung count is not a relevant part of the record of the prior proceeding because there is no way to determine what the hung count represents or why the jury hung. Id. at 121-22. Conversely, “[a] jury’s verdict of acquittal represents the community’s

collective judgment regarding all the evidence and arguments presented to it.” Id. at 122. Thus, “[e]ven if the verdict is based upon an egregiously erroneous foundation, its finality is unassailable.” Id. (internal quotations and citations omitted). In applying these principles to Yeager, the Court ruled that “if the possession of insider information was a critical issue of ultimate fact in all of the charges against petitioner, a jury verdict that necessarily decided that issue in his favor protects him from prosecution for any charge for which that is an essential element.” Id. at 123. The Court remanded the case for further proceedings consistent with its opinion. Id. at 126.

Here, the trial judge erred in failing to apply the test set forth in Yeager to determine whether the State was collaterally estopped from reprosecuting Henley for first-degree burglary following his acquittal for larceny related to the same incident. He improperly likened defense counsel’s argument to that of a motion for directed verdict. See R. 399, l. 18 – 400, l. 10. As noted by the Court in Abney v. United States, 431 U.S. 651, 659-60 (1977):

[T]he very nature of a double jeopardy claim is such that it is collateral to, and separable from the principal issue at the accused’s impending criminal trial, i.e., whether or not the accused is guilty of the offense charged. In arguing that the Double Jeopardy Clause of the Fifth Amendment bars his prosecution, the defendant makes no challenge whatsoever to the merits of the charge against him. Nor does he seek suppression of evidence which the Government plans to use in obtaining a conviction. **Rather, he is contesting the very authority of the Government to hale him into court to face trial on the charge against him.**

(internal citations omitted) (emphasis added). While Double Jeopardy does not bar retrial where a mistrial was declared out of “manifest necessity” due a jury’s inability to reach a decision, the Yeager Court made clear that the inquiry regarding a bar to retrial does not end there. 557 U.S. at 118. Rather, the trial court must determine whether the interest in preserving the finality of the jury’s judgment on the decided count(s) bars a retrial on the undecided count(s) because “the

jury's acquittals unquestionably terminated petitioner's jeopardy with respect to the issues finally decided in those counts." Id.

As pointed out by defense counsel, in making this determination, the trial court's focus should have been on the evidence and arguments presented at the first trial. R. 399, ll. 6-17. Specifically, Yeager provides that the court should "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." 557 U.S. at 119-20 (quoting Ashe, 397 U.S. at 444). The trial court's failure to conduct the requisite analysis is further illustrated by its failure to take the copies of the first trial transcript offered by defense counsel. R. 400, ll. 2-21. Thus, the trial judge erred as a matter of law in failing to determine what facts were necessarily decided in the first action and how those facts bore on the defense's argument of preclusion under the double jeopardy protection.

At retrial, the state was required to prove both the intruder's identity and his intent to commit a crime therein. S.C. CODE ANN. § 16-11-311(A)(2) ("A person is guilty of burglary in the first degree if the person enters a dwelling without consent and *with intent to commit a crime in the dwelling*, and . . . the burglary is committed by a person with a prior record of two or more convictions for burglary or housebreaking or a combination of both." (emphasis added)); see Gibbs v. State, 403 S.C. 484, 496, 744 S.E.2d 170, 176 (2013) (finding no prejudice from failure to request alibi charge "[g]iven the clarity of the jury charge requiring the State to prove identity beyond a reasonable doubt"); see also Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1994) (stating that an alibi charge places "emphasizes that it is the State's burden to prove the defendant was present at and participated in the crime."). Much like Ashe, there was no dispute

at Henley's first trial that the Moss' home was broken into and that her laptop was stolen. Rather, the focus was on the identity of the perpetrator. Thus, the acquittal on larceny was a finding that Henley was not the person who stole the laptop. This impacted the retrial in several ways. First, the state was precluded from relitigating Henley's identity as the intruder. Second, the state was precluded from arguing that the stolen laptop was evidence of Henley's "intent to commit a crime therein." Relatedly, the prior jury's finding that Henlery did not steal precluded the state's continuing theory that the criminal intent was to steal. As such, Henley's retrial for first-degree burglary was barred by the Double Jeopardy Clause because the state was precluded from relitigating the issues that were necessarily decided by the jury's prior acquittal on larceny.

II.

The trial court erred in denying the defense's motion to admit evidence of Appellant's acquittal on the prior larceny charge where the state's theory of the case continued to be that the burglar's intention was to steal.

Relevant Facts

At the close of the defense's case, defense counsel moved to admit the self-authenticating record of the indictment for larceny that reflected Henley's prior acquittal. R. 612, ll. 1-9; R. 691. The solicitor argued against its admission, stating that it would bring to the jury's attention that the case was tried before and that their role was decide to guilt or innocence on the burglary charge. He said that the jury would be invited to speculate on what happened at the prior hearing. R. 612, ll. 13-20.

Defense counsel responded that she was not seeking to admit anything other than the document and that any inference that there was a prior trial from its contents would not be prejudicial, as there are often separate trials for lower court charges and General Sessions charges. R. 612, l. 21 – 613, l. 2. She further argued that the acquittal was exculpatory and a permissible part of the constitutional right to present a defense to the state's attempt to prove that there was "an intent to commit a crime therein." R. 613, ll. 2-11. She noted that there was no reference on the document to the prior trial on the burglary charge. R. 613, ll. 11-18.

The solicitor argued that admission of the document would open the door "to talking about the missing evidence," presumably referring to evidence that a laptop was located on a bench through the window, that the boot print in the carpet was located within a foot of the bench, and that the laptop was missing from the house when the Mosses returned. He said: "Again, if they want to put that in, I mean, we'd agree that he's been acquitted of it. But the element of burglary is the intent to commit the crime." R. 613, ll. 19-23.

Ms. Bolen agreed that the state could call rebuttal witnesses, but reiterated that admission of the prior acquittal was a strategic decision on the part of the defense. R. 613, l. 24 – 614, l. 3. The solicitor said that he thought they had all agreed that "because of the prior acquittal that no one was going to say anything about the stolen property," but that their burden would be easier if they would now be able to talk about the missing property. R. 614, ll. 4-11. The trial judge responded:

I don't believe this is allowed. I think it would confuse the jury. It does mention the same date, the same victim, and a piece of personality. To some extent it opens the door to a whole slew of issues. But it seems to me this would confuse the jury more than help the jury in their findings of fact as to his guilt or innocence on this charge. And I'll tell you, it's a novel issue for me. I've never had this presented, so I commend y'all for coming up with this. But I've never thought about that. But I think my ruling would be under, I'm not sure which rule.

R. 614, ll. 12-22. The judge agreed with defense counsel that the document itself was self-authenticating, but noted that authentication is not the hurdle to admissibility. R. 614, l. 23 – 615, l. 5.

The solicitor interjected that he believed the applicable rule was Rule 401, SCRE, regarding relevance. He argued that the prior acquittal "does not help resolve an issue we're here for on the burglary" and would cause confusion and speculation. R. 615, ll. 6-12. Defense counsel responded that the evidence was probative, arguing:

He was found not guilty of the crime that the State had previously alleged was committed inside the home We'd be seeking to admit it to try to defend against the element of burglary that requires the State to prove intent to commit a crime therein. We'd be using it to show no crime was committed inside the home and that they can't prove any intent to commit a crime inside the home.

R. 615, l. 13 – 616, l. 12. Nevertheless, the trial judge denied the request for admission of the documentation of the prior acquittal. R. 616, ll. 13-15.

Discussion

“‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Rule 401, SCRE. “All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina. Evidence which is not relevant is not admissible.” Rule 402, SCRE. Rule 403, SCRE, provides: “Although relevant, evidence may be excluded if its probative value is *substantially outweighed* by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” (emphasis added).

Though far from a recent case, South Carolina addressed the admissibility of a prior acquittal in State v. Houston, 17 S.C.L. 300 (S.C. App. L. & Eq. 1829). Houston was indicted for uttering and publishing a forged note, purporting to be the promissory note of C. B. Atwood, knowing the same to be forged. 17 S.C.L. at 300. In the prior term, Houston was acquitted on a similar indictment for uttering another forged note. Id. At the second trial, the judge permitted admission of evidence that the note on which the first indictment was based was a forgery. Id. Both notes were in Houston’s handwriting and he was convicted on the Atwood forgery. Id. The Houston Court ruled that the defendant’s prior “acquittal on the note, which was produced in evidence, cannot affect the principle, **although it may weaken the force of the evidence.**” Id. at 303 (emphasis added). The Court noted that there was evidence that the prior acquittal may have been the result of a defect in the original indictment or the absence of witnesses. Id. The Court wrote: “It does not follow, that because a man is acquitted, he is innocent: the legal

consequence is, that he cannot be tried again. But still he may have been guilty, and this guilt may be sh[o]wn in a collateral matter.” *Id.* Thus, Houston recognized the relevance of facts related to a prior acquittal to a subsequent trial for a separate offense.

Similarly here, the trial judge’s denial of the motion to quash the indictment under Double Jeopardy did not render the prior acquittal on larceny irrelevant to the current proceedings. Rather, the defense properly sought its admission to attack the state’s theory that Henley had any intent to commit a crime inside of the residence, specifically to steal. Notably, the solicitor repeatedly argued in his closing that the crime that the intruder sought to commit was theft – saying “I’ll submit to you his intent was to go in there and clean them out;” that Henley stopped “to see what they had good in there;” and that “[h]e thought he’d get a little treasure trove.” R. 640, ll. 16-19; R. 646, l. 20 – 647, l. 1. Any confusion or speculation that concerned the trial judge or solicitor could have been cured with a simple limiting instruction by the trial court rather than exclusion of the evidence or through the solicitor’s argument regarding the weight to be given to prior acquittal. Further, the trial judge never made the requisite finding that the probative value of the evidence *was substantially outweighed* by the danger of unfair prejudice, confusion of the issues, or misleading the jury. See R. 614, l. 22 – 615, l. 5; R. 616, ll. 13-15. As this Court has noted, “[a]ll evidence is meant to be prejudicial; it is only *unfair* prejudice which must be scrutinized under Rule 403.” State v. Gray, 408 S.C. 601, 616, 759 S.E.2d 160, 168 (Ct. App. 2014).

III.

The trial court erred in limiting the admission of Jolene Gray's testimony from the prior trial where Gray was unavailable to the defense and her testimony provided evidence that the police had opportunity to obtain a cigarette smoked by Appellant from outside of his home.

Relevant Facts

At Henley's first trial, Jolene Gray, his girlfriend at the time of the incident, testified on redirect examination that five law enforcement officers came to their apartment complex a second time after they had spoken with Henley. She said that they were walking around and picked something up off of the ground, though she was unsure what they picked up. R. 261, ll. 14-25. In the closing argument at the first trial, defense counsel argued:

Jolene said that one of the times the officers came to talk to Rickey, there were some cars parked out and she saw the officers picking stuff up. She didn't know what they were picking up. It may seem crazy, crazy for us to ask you to draw an inference they were picking up a cigarette butt. But what is equally crazy, is that we've got all this lost evidence in this case and we know it's lost. You would think, you know, that things like this don't happen, but they really do. And the State acknowledges that these things happen. So it's really not that far of a stretch to say, well, maybe, maybe they picked something up that day. Because we don't know where that cigarette butt was until March 29th of 2012.

R. 302, ll. 6-18.

At the second trial, during its pre-trial motions, the defense moved to admit the sworn testimony from the first trial of defense witnesses Jolene Gray and Officer Michael Belcher pursuant to Rule 804(b)(1). Counsel represented that Gray was Henley's girlfriend at the time of the incident but that their investigator had been unable to locate her in order to secure her presence at the retrial. Counsel offered to call her investigator to testify regarding her attempts to located Gray; however, the solicitor said that he did not have any objection to admission of the prior testimony. R. 461, l. 12 – 462, l. 9. In response to the trial judge's question regarding how

much of the testimony they wanted to present, defense counsel said: "All of it. There's not much testimony." R. 462, ll. 10-13.

The solicitor suggested that they would have someone come in to read the witness' portion of the testimony and the attorneys would read their respective portions of the examinations. R. 462, ll. 15-18. The trial judge agreed and said that he would instruct the jury that the person was "going to read some prior testimony which was taken under oath; that witness is not available." R. 462, ll. 19-25.

Defense counsel said that she was having a similar unavailability problem with Officer Belcher, who was under subpoena but traveling out of state the next day. R. 463, ll. 2-5. Again, the solicitor said that he had no problem with the admission of the testimony from the prior trial. R. 463, ll. 6-7. The trial judge said that they would proceed in the same fashion and with the same instruction with respect to Belcher's testimony. R. 463, ll. 8-18.

After the trial judge granted the defense's motion to admit the former trial testimony, the solicitor said: "And, Judge, we are going to probably try to ask our investigator if he can find Ms. Jolene Gray just to see if there is a reason why she's not showing, though." R. 463, l. 20 – 464, l. 2. Judge Griffith responded: "Okay. If you can find her, get her." R. 464, l. 3. The solicitor said: "Yes sir. We'll do that;" and defense counsel said that was fine with her. R. 464, ll. 4-6.

The next day, following its presentation of testimony from the DNA analyst and the defense's motion for directed verdict, the solicitor again represented that he no objection to the reading of Officer Belcher's testimony from the prior trial. R. 593, l. 25 – 594, l. 20. However, with respect to Jolene Gray, he said:

Judge, the other one is Jolene Gray; is a former girlfriend of the Defendant in this case. It's my understanding that she is not here today. We did, after yesterday, it was brought to our attention, we were able to contact her through our office, our investigator contacted her and she said she's in Anderson. She's never received a subpoena. Judge, I understand that the Defense just wants to read in a prior transcript of her testimony. **Your Honor, my, you know, we're not going to oppose that, but in my cross from a prior hearing, I'm only going to read a portion of it. And then I put on the record, I think, and once I stop at that one portion, that would, the reading of redirect from the Defense would be outside the scope of our cross.**

R. 594, l. 20 – 595, l. 8. (emphasis added). The Judge asked defense counsel to explain why the redirect testimony was necessary. R. 595, ll. 11-20. The following exchange occurred:

DEFENSE COUNSEL PATEL: Your Honor, the redirect portion goes to the officers coming out a second time, searching the home and not finding anything, leaving, searching the premises. The witness says that perhaps someone picked up something off the ground and we would want all of that testimony to come in to show that no items were collected, a doo-rag, burglary tools from the home since Mr. Henley did live there. It's our position that the entire testimony should come in. And, Your Honor, we, our office being multiple--

THE COURT: Well, now, we don't know whether something was picked up off the ground or not. That's unknown. She's speculating.

DEFENSE COUNSEL BOLEN: She says that she saw, so it was her, you know, what she saw at that moment, but she saw several officers, I think she says near her car.

MR. BROWN: And, Judge, one thing to go farther, she never said who those officers were associated with. So that's, that just is, we had our officer testify that he went up there twice. The first time he was not there. The second time he talked to Mr. Henley, and then there was no other times that he went up there. And I, and looking over the transcript again from my cross, that redirect would be out of the scope of that cross.

THE COURT: All right. I think I'm going to grant his motion to limit his cross-examination to where he wants to stop. But I do not believe that will limit you Or Ms. Bolen, whichever one closes, in saying nothing was taken or recovered from the house or you'd have seen it here today. I think y'all could say something along those Lines in your closing argument and you can summarize it had they gone and found something in that search, certainly it would be here. It's not here.

MS. PATEL: Yes, Your Honor.

THE COURT: By me, the recross or redirect from you does not prohibit you from arguing what you choose.

MS. PATEL: Yes, Your Honor.

THE COURT: All right. So let's, we'll limit it to tell your witness, well, once you stop, she'll quit reading.

MR. BROWN: Yes, sir. I'll stop reading.

R. 595, l. 21 – 597, l. 10. The defense called Jolene Gray as a witness and a portion of her testimony was read into the record. R. 599, l. – 600, l. 1. 13; R. 676.

Discussion

Rule 804(b)(1), SCRE, provides for the admission of former testimony where the declarant is unavailable as a witness. Specifically, it allows the admission of “[t]estimony given as a witness at another hearing of the same or a different proceeding . . . , if the party against whom the testimony is now offered . . . , had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.” Rule 804(b)(1), SCRE. One of the situations in which a declarant is deemed “unavailable” for purposes of the Rule is when the declarant “is absent from the hearing *and the proponent of a statement has been unable to procure the declarant’s attendance* . . . by process or other reasonable means.” Rule 804(a)(5), SCRE (emphasis added).

In the present case, defense counsel represented that their investigator had been able to locate Jolene Gray in order to serve a subpoena, but that if the solicitor could find her and procure her attendance, she was fine with that. R. 461, l. 12 – 102, l. 6. Though the solicitor was able to contact Gray, the relevant inquiry is whether the proponent of the evidence has been able to procure the declarant’s attendance by process or other reasonable means. The solicitor confirmed that Gray had not been served a subpoena. R. 594, l. 20 – 595, l. 1; Rule 804(a)(5),

SCRE. While the solicitor again represented that he did not oppose the reading of the testimony, he then sought to qualify that by arguing that he should be permitted to read only a portion of his redirect examination, consequently excluding the redirect testimony. R. 595, ll. 1-8. Notably, the solicitor did not argue that there was any evidentiary basis for excluding Gray's testimony and no objections to her redirect were made at the first trial. See R. 261, ll. 14-25.

To the extent that the solicitor was dissatisfied in his cross-examination of Gray at the first trial, it is important to note that "[t]he Confrontation Clause guarantees only an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." State v. Nance, 393 S.C. 289, 294, 712 S.E.2d 446, 449 (2011) (internal citations and quotations omitted) (emphasis in original). However, the real reason for the state's request is apparent from the record – he wanted to exclude the defense's evidence regarding law enforcement's opportunity to obtain a cigarette butt with Henley's DNA from his yard. This testimony was essentially to the defense's attack on the reliability of the DNA analysis on the cigarette butt, which as discussed more fully in Issue IV, was lost along with the Sheriff's Department's chain of custody log. Additionally, Gray's testimony revealed another opportunity for law enforcement to look for corroborating evidence, such as the missing laptop, doo-rag, or burglary tools, which they failed to do. R. 595, l. 21 – 596, l. 10.

The solicitor's attempt to exclude the evidence that he rightly perceived as detrimental to the state's case at the first trial raises double jeopardy concerns, as the United States Supreme Court ruled that "the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found

guilty.” Yeager v. United States, 557 U.S. 110, 117-18 (2009) (quoting Green v. United States, 355 U.S. 184, 187–188 (1957)). It is reminiscent of Ashe v. Swenson, 397 U.S. 436, 440 (1970), where the state “refined its case at the second trial by declining to call one of the participants in the poker game whose identification testimony at the first trial had been conspicuously negative.” There, the Court noted the state’s concession in its brief that “[n]o doubt the prosecutor felt the state had a provable case on the first charge and, when he lost, he did what every good attorney would do—he refined his presentation in light of the turn of events at the first trial.” 397 U.S. at 447. The Court held that “this is precisely what the constitutional guarantee [against double jeopardy] forbids.” Id.

In summary, there being no dispute that the Gray was unavailable to the defense and subject to cross-examination by the same solicitors during the prior trial, the trial court had no basis to exclude a portion of Gray’s former testimony. In doing so, he abused his discretion.

IV.

The trial court erred in denying the defense's motion to exclude evidence regarding DNA testing conducted on the cigarette butt purportedly found at the scene where the state's negligence in the destruction of the evidence constituted bad faith and where the state could not present a complete a chain of custody for the cigarette butt such that the cigarette butt was not available for comparison to the crime scene photograph at trial.

Relevant Facts

Defense counsel made a pre-trial motion to exclude the DNA testing done on the cigarette butt purportedly found at the scene due to the state's inability to produce the cigarette butt and corresponding property log. The trial judge ruled preliminarily that the evidence would be admissible. R. 440, l. 22 – 455, l. 25. Defense counsel renewed her objection when the photographs of the cigarette butt were admitted into evidence, following its motion for directed verdict; and at the conclusion of the defense's case. R. 520, ll. 11-17; R. 599, ll. 8-12; R. 618, ll. 22-25.

Despite the solicitor's attempts to improve the strength of its DNA evidence at Henley's retrial, the loss or destruction of the cigarette butt analyzed by SLED along with the chain of custody log prevented the state from proving that the cigarette butt photographed at the scene was the same one analyzed for DNA. Even the SLED analyst was careful to limit her testimony, saying that the cigarette in the photograph was merely consistent with the cigarette in the photograph. R. 576, ll. 6-14. On cross-examination, she clarified that she cannot say that the cigarette butt in the photograph. She noted that there can be distinguishing markings on a cigarette butt, such being run over, having lipstick on it, or how far down it was smoked. R. 585, ll. 5-22.

The jury was obviously concerned about the chain of custody, sending out a note that asked whether the cigarette butt was turned into the evidence locker "on the 15th." The written

response to the jury was: “There was testimony presented about those facts. If you want testimony replayed, please send another note.” R. 693. In fact, while Officer Thompson claimed that he collected the cigarette butt from the incident location on February 15, 2012, there was no testimony regarding the date on which the cigarette butt was logged in at the evidence locker. See R. 524, l. 16 – 527, l. 6; R. 538, l. 14 – 539, l. 4; R. 550, l. 16 – 551, l. 20. The first documented evidence of a cigarette butts existence was March 29, 2012, when Ryan Abenathy transported one to SLED for testing. However, sometime after the evidence custodian’s retirement in May 2013 and Henley’s first trial, the cigarette butt tested was lost or destroyed. R. 551, l. 21 – 560, l. 1. That is why Jolene Gray’s testimony that officers returned to Henley’s apartment complex and picked something up off the ground near Henley’s car was so important. It provided the factual basis for the defense’s argument that a member of law enforcement picked up a cigarette butt that they knew had Henley’s DNA, perhaps even looking for one that closely matched the photograph, and sent it to SLED for testing rather than the cigarette butt that was found at the scene. See discussion *supra*, Issue II. Without the Sheriff’s Department’s chain of custody log, or even testimony regarding the specific date of submission to the evidence custodian, the evidence regarding chain of custody was incomplete.

Discussion

Defense counsel’s objection to admissibility of the DNA analysis related to the cigarette butt was twofold. First, she argued that its destruction, as speculated to by the solicitor, constituted negligence sufficient to establish bad faith. Second, she argued that the state could not establish that the cigarette butt tested was the same cigarette butt photographed at the scene due to the incomplete chain of custody.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution guarantees a defendant's fundamental right to a fair trial. U.S. Const. amend. XIV. Where a defendant's right to a fair trial due to missing or destroyed evidence is at issue, the applicable standard is derived from the United States Supreme Court's opinion in Arizona v. Youngblood, 488 U.S. 51 (1988). State v. Reaves, 414 S.C. 118, 125, 777 S.E.2d 213, 216 (2015), cert. denied, 136 S. Ct. 855 (2016). Youngblood held that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." Reaves, 414 S.C. at 126, 777 S.E.2d at 217.

In Reaves, the Court ruled that even if accepted the appellant's premise that recklessness can equate to bad faith, he disagreed that the police were reckless in not preserving evidence in this case. 414 S.C. at 128, 777 S.E.2d at 218. There the police had lost three gold chains that a state's witness alleged were "snatched off Reaves' neck by Applewhite moments before the shooting," the victim's clothing, and five witness statements purportedly taken by police officers at the scene that night. *Id.* at 123–24, 777 S.E.2d at 216. The Court ruled that "[a]lthough the record is replete with indications the police investigation was deeply flawed, the record also contains no indication these flaws were the product of more than mere negligence." Here, the missing evidence is of far greater importance, as it relates directly to admissibility of the state's DNA evidence and there was evidence at the first trial that the police went to Henley's residence and picked something up off the ground.

The present case is also distinguishable from State v. Cheeseboro, 346 S.C. 526, 539, 552 S.E.2d 300, 307 (2001), where the Court found the appellant failed to demonstrate bad faith because there the officer's testified that they followed normal procedures for destroying the gun and that there was no indication on the gun connecting it to the barbershop murders at the time of

its destruction. Here, there was no testimony regarding how or why the cigarette butt was lost. Though the solicitor speculated that it was inadvertently destroyed with other drug evidence, he provided no documentation or testimony to support that claim.

Regarding the insufficiency of the chain of custody, State v. Hatcher, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011), provides:

This Court has long held that a party offering into evidence fungible items such as drugs or blood samples must establish a complete chain of custody as far as practicable. Where the substance analyzed has passed through several hands the evidence must not leave it to conjecture as to who had it and what was done with it between the taking and the analysis.

(internal quotations and citations omitted). Even so, case law does not go so far as to require testimony from every person who handled it or negate all possibility of tampering. 392 S.C. at 91-92, 708 S.E.2d at 753. “Courts have abandoned inflexible rules regarding the chain of custody and the admissibility of evidence in favor of a rule granting discretion to the trial courts.” Id. at 94, 708 S.E.2d at 754. “The trial judge’s exercise of discretion must be reviewed in the light of the following factors: the nature of the article, the circumstances surrounding the preservation and custody of it, and the likelihood of intermeddlers tampering with it.” Id. at 94-95, 708 S.E.2d at 754-55 (internal quotations omitted).

At issue here is whether the state could present a sufficient chain of custody to support the admission of the DNA analysis conducted on the cigarette butt. Though the solicitor emphasized the SLED analyst’s testimony that she did not observe any testimony of tampering in his closing argument, no such tampering would be expected if the substituted cigarette butt was submitted to the Sheriff’s Department’s evidence custodian in the first place. The more important portion of the analyst’s testimony was that she could not say that the cigarette butt that she analyzed was the same one in the photograph. Were the cigarette butt and its accompanying

documentation available for admission at the trial, then her response may have been different. Her uncertainty reflects the state's failure to establish a complete chain of custody regarding the cigarette butt, which necessitated exclusion of the DNA analysts' testimony.

CONCLUSION

Based on the foregoing, Appellate Rickey Henley Santoine respectfully requests that this Court vacate his conviction (Issue I) or reverse his conviction and remand his case for a new trial (Issues II, III, and IV).


Laura R. Baer
Appellate Defender

ATTORNEY FOR APPELLANT

This 18th day of August, 2017.

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 April 15, 20014, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

August 18, 2017



Laura R. Baer
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589

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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ABBEVILLE COUNTY

Court of General Sessions

The Honorable Eugene C. Griffith, Circuit Court Judge

Appellate Case No. 2016-000844

THE STATE,

Respondent,

v.

RICKEY SANTOINE HENLEY,

Appellant.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

V. HENRY GUNTER, JR.
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

DAVID M. STUMBO
Solicitor, Eighth Judicial Circuit

Post Office Box 516
Greenwood, SC 29648
(864) 942-8800

ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUES ON APPEAL**I.**

The trial judge properly denied Appellant's motion to quash the indictment based on the Double Jeopardy Clause of the Fifth Amendment where Appellant's second trial was not barred by issue preclusion because his acquittal for larceny did not necessarily decide a critical issue of ultimate fact as to whether Appellant committed burglary in the first degree.

II.

The trial judge properly denied the defense's request to admit evidence of Appellant's acquittal on the larceny charge from his first trial where such evidence was irrelevant and the evidence's probative value was substantially outweighed by the risk of unfair prejudice and misleading the jury.

III.

The trial judge did not err by limiting the admission of Jolene Gray's testimony from Appellant's first trial where the testimony was not admissible under Rule 804(b)(1), SCRE, and Appellant was not prejudiced by the exclusion of a limited portion of the testimony.

IV.

Appellant's argument is not preserved for appellate review where he failed to object to the admission of the evidence at trial. Error preservation concerns notwithstanding, the trial judge properly denied Appellant's motion to exclude the evidence regarding DNA testing performed on the cigarette butt found at the Moss's home that tested positive for Appellant's DNA where there was no presentation that the evidence was lost in bad faith and the State completed a complete chain of custody from the cigarette's collection through the testing of the cigarette by SLED and subsequent return of the evidence to the Abbeville County Sheriff's Office.

STATEMENT OF THE CASE

Appellant was indicted during the July 2012 term of the Grand Jury for Abbeville County for burglary in the first degree and larceny. Appellant proceeded to a jury trial before the Honorable R. Lawton McIntosh from April 8-9, 2015, in Abbeville, South Carolina. At the conclusion of trial, the jury found Appellant not guilty of larceny; however, the jury remained hung as to the charge of burglary in the first degree. After the jury's verdict, Judge McIntosh declared a mistrial as to the burglary charge.

Appellant was subsequently re-tried for burglary in the first degree from April 4-6, 2016 in Abbeville, South Carolina, before the Honorable Eugene C. Griffith, Jr. and a jury. At the conclusion of trial, Appellant was found guilty of burglary in the first degree. He was sentenced by Judge Griffith to imprisonment for a term of twenty-four years. Appellant timely filed a notice of appeal and subsequently submitted a brief. This Brief of Respondent follows.

STATEMENT OF FACTS

Rick Culbreth resided in the same community as Jamie and Amanda Moss in Abbeville, South Carolina. R. pp. 486-87. On February 15, 2012, Culbreth passed the Moss's house on his way home to check on his mother. R. pp. 487-88. As he passed the Moss's home, he noticed a black male running from the front door to a side door and that there was a gray car backed under the carport with the door open. R. pp. 488-89. Recognizing the situation as abnormal, Culbreth turned his vehicle around and went back to the Moss's house. R. pp. 488-89. When he returned to the Moss's home, Culbreth observed the black male standing in the doorway of the house and noted it appeared he had made entry into the home. R. p. 489. Culbreth testified he, "knew in that in my mind that he wasn't supposed to be there." R. p. 490.

After spotting Culbreth, the intruder got into his vehicle and pulled out of the driveway, R. p. 490. The intruder stopped his vehicle in front of Culbreth's white pickup truck, which was pulling a trailer with a lawn mower, and asked him if he needed any help with lawn care, to which Culbreth replied that he did not. R. p. 490. When asked what the intruder looked like, Culbreth stated, "I just remember he had a bandana tied tightly around his head. It went down the back of his neck. Light-skinned from what I could tell. But I do not remember any, you know, marks, facial scars, or anything." R. p. 491. The intruder then drove away and merged onto Highway 28 North. R. p. 491. As the intruder drove past, Culbreth looked into his rearview mirror and was able to get a partial license plate number. R. p. 491. After the intruder turned onto Highway 28 North, Culbreth turned into the driveway and called 911. R. p. 491. Culbreth described the car as a Pontiac that was gray in color and seemed to be a late 1980's or 1990's model. R. p. 498. The license plate number Culbreth provided to law enforcement was "HSN

██████."

Patrick Thompson, a detective in the property crimes division of the Abbeville County Sheriff's Office, was working on February 15, 2012. R. pp. 518-19. Deputy Thompson received a radio call about the apparent burglary at the Moss home and proceeded to the area. R. pp. 519-20. Upon his arrival, Deputy Thompson processed the crime scene. R. p. 520. While processing the scene, Deputy Thompson noticed a footwear impression on the carpet. R. p. 521. Officers also recovered a cigarette butt from the intruder's point of entry. R. p. 521. The cigarette was collected and placed into evidence at the scene. R. p. 524.

Amanda and Jamie Moss both testified at trial. R. pp. 508-17. Mrs. Moss testified that when looking through the home's windows, you can see televisions, speakers, couches, antiques, and pictures. R. p. 509. At trial, Mrs. Moss was shown various photographs which she testified depicted the home's side carport door. R. pp. 511-12. The carport door was partially broken off and appeared to have been tampered with. R. p. 512. The doorframe was also damaged. R. p. 512. Mrs. Moss testified the cigarette found near the steps to the home did not belong to her or her husband, as neither one of them smoked. R. p. 513, 510. Mrs. Moss stated the cigarette was not there when she left the house that morning. R. p. 511. Mrs. Moss noted she normally locked the door to the house when she left. R. p. 514. Mr. Moss also noted the door was locked when he left and there was not a cigarette butt on the steps. R. p. 516.

After speaking with Culbreth, Deputy Thompson searched for a suspect vehicle. R. p. 521. Deputy Thompson searched a SLED vehicle database based on the tag description provided by Culbreth. R. p. 522. The search returned a 1997 Pontiac owned by Appellant and Jolene Gray with the license plate number "HSN [REDACTED]." R. p. 522. Based on information he received from the Department of Motor Vehicles, Deputy Thompson went to Appellant's address in Anderson County on February 22, 2012. R. p. 524. Upon arriving at the apartment, Deputy Thompson

noticed a Pontiac Bonneville with the license plate "HSN [REDACTED]" parked outside. R. p. 528. Deputy Thompson noted this license plate number was close to the description provided by Culbreth and that, "I believe he stated it was HSN [REDACTED] or HSM [REDACTED], but we knew it was, there was a possibility it could be off, because he was reading it from his rearview mirror." R. p. 528. Appellant was at the residence and spoke with law enforcement. R. p. 529. Appellant admitted he had been in Abbeville recently and further acknowledged he had been on Highway 28. R. pp. 530-31. Appellant also recalled speaking to someone in a truck. R. p. 531. Appellant also admitted he smoked cigarettes. R. p. 532. Specifically, Appellant admitted he smoked Newports, which was the type of cigarettes found at the Moss's home. R. pp. 532-33. Deputy Thompson also noticed Appellant was wearing boots, the soles of which resembled the impression left on the Moss's carpet. R. p. 532. Appellant was subsequently placed under arrest. R. p. 533.

Maryanne Boehm works for SLED in the DNA casework department. R. p. 570. Boehm received the Newport cigarette butt for testing on March 29, 2012. R. p. 573. The DNA profile developed from the cigarette butt matched the DNA profile of Appellant. The probability of randomly selecting an unrelated individual with a DNA profile matching the cigarette butt is 1 in 1.5 billion. R. p. 580.

ARGUMENT

I.

The trial judge properly denied Appellant's motion to quash the indictment based on the Double Jeopardy Clause of the Fifth Amendment where Appellant's second trial was not barred by issue preclusion because his acquittal for larceny did not necessarily decide a critical issue of ultimate fact as to whether Appellant committed burglary in the first degree.

Relevant Facts

As noted in Respondent's Statement of the Case, at Appellant's first trial, he was acquitted of larceny and the jury hung on the burglary charge. R. p. 348. At the beginning of Appellant's second trial, Appellant filed a motion to quash the indictment based on Double Jeopardy. R. p. 352-61 (Defendant's Motion to Quash). During a pre-trial hearing, Defense Counsel argued:

So it's our position, Your Honor, that under the Supreme Court case of Yeager that because of this overlap in facts that jeopardy attaches because he was acquitted of full larceny that there is, in order to prove their case at all for a burglary, they need to reference some sort of crime and the only one they can reference is larceny. He's been acquitted of that larceny. So it's our position that under Yeager and Ashe that the issue preclusion analysis offered there and done under the double jeopardy clause of the Fifth Amendment would prevent the State from prosecuting him again on this case.

R. p. 392. In response, the solicitor argued:

While [Defense Counsel] does note that the warrant identifies that petty larceny, we would note that the indictment does not identify that a petty larceny was committed inside. It merely restates the elements of burglary in that Mr. Henley entered with the intent to commit a crime therein. We didn't say there was larceny in the indictment. And to quote Yeager, because a jury speaks only through its verdict, it's failure to reach a verdict cannot by negative implications yield a piece of information that helps out together the trial puzzle. Such conjecture about possible reasons for a jury's failure to reach a decision should play no part in assessing the legal consequences of a unanimous verdict that the jurors did return. Your Honor, we will certainly concede that the not guilty on the larceny puts us in a much tougher spot with regard to proving the burglary. But again we would note the elements of burglary of Code 16-11-311 (a). A person who is guilty of burglary in the first degree if a person enters a dwelling without consent and with

intent to commit a crime in the dwelling. It doesn't say enters without consent and commits a larceny. . . . Mr. Brown and I have pretty much resigned ourselves to the fact that any mention of that lap top will be gone from this trial. But to say that Yeager precludes us from going forward on this case because of double jeopardy is to just read Yeager too broad.

R. pp. 392-93. The solicitor also referred the trial judge to State v. Peterson, 336 S.C. 6, 518 S.E.2d 277 (Ct. App. 1999), and continued:

But it is an assault with intent to commit CSC, along with a burglary case. The Defendant in the assault with intent to commit CSC was found not guilty of the assault with intent to commit CSC but found guilty of the burglary first degree. Defendant appealed and the Court reasoned basically the same reason that there is no requirement that the Defendant has to be found guilty of the underlying crime. Once again to sum it up, Your Honor, the elements of burglary do not require us to prove the underlying larceny. They merely require the State to prove that there is an intent to commit a crime in the dwelling.

R. p. 394. The trial judge ruled:

Here's what I think. I understand your argument. I think it's a directed verdict to fact question as to whether they conclude and get past directed verdict stage. With the intent to commit a crime therein is one of the elements of burglary first and second and third. The State's got that burden of proving with the intent to commit a crime. I don't believe the acquittal of the larceny precludes them from presenting facts which the jury could prove intent to commit a crime therein. They have not had that opportunity yet. So I think your motion should be denied right now, but I feel confident you will most likely renew it at the directed verdict stage in a similar-worded argument if the State's failed to prove anything beyond a suggestion of intent to commit a crime therein. So I don't believe jeopardy attaches to the burden (sic) charge since it's not a specific crime. The indictment does not get quashed at this point, but the Court will be listening.

R. pp. 399-400.

Discussion

Appellant contends the trial judge erred in denying appellant's motion to quash the indictment based on Double Jeopardy. Specifically, Appellant avers the trial judge erred in not applying the test set forth in Yeager v. United States, 557 U.S. 110 (2009), to determine whether the State was collaterally estopped from re-prosecuting Appellant for burglary in the first degree.

Appellant argues his acquittal on the larceny charge during his first trial was a finding that he was not the person who stole the laptop; therefore, the jury's finding Appellant did not steal the laptop precluded the State's theory of the case for the burglary charge that Appellant entered the Moss's home with the intent to commit a crime. Appellant concludes, "[Appellant's] re-trial for first-degree burglary was barred by the Double Jeopardy Clause because the State was precluded from relitigating the issues that were necessarily decided by the jury's prior acquittal on larceny." Br. of App. p. 17. This argument lacks merit. Appellant's acquittal of larceny did not necessarily decide whether Appellant committed burglary in the first degree. An acquittal on larceny is not tantamount to a finding that Appellant did not enter the Moss's home without consent and with the intent to commit a crime in the dwelling. Appellant's re-trial for burglary in the first degree was thus not barred by issue preclusion.

"Simple larceny of any article of goods, choses in action, bank bills, bills receivable, chattels, or other article of personality of which by law larceny may be committed. . . . [with] a value of two thousand dollars or less, is petit larceny." S.C. Code Ann. § 16-13-30(A). By comparison, "a person is guilty of burglary in the first degree if the person enters a dwelling without consent and with intent to commit a crime in the dwelling, and. . . . the burglary is committed by a person with a prior record of two or more convictions for burglary or housebreaking or a combination of both." S.C. Code Ann. §16-11-311(A)(2).

Through their Double Jeopardy Clauses, the United States Constitution and the South Carolina Constitution offer protection to citizens from being subjected to double jeopardy for the same offense. See U.S. Const. amend. V ("No person shall be . . . subject from the same offense to be twice put in jeopardy of life or limb"); S.C. Const. art. I, C ("No person shall be subject for the same offense to be twice put in jeopardy of life or liberty"). The guarantee

against double jeopardy offers three separate constitutional protections: (1) protection against a second prosecution for the same offense after acquittal; (2) protection against prosecution for the same offense after conviction; and (3) protection against multiple punishments for the same offense. State v. Cuccia, 353 S.C. 430, 434, 578 S.E.2d 45, 48 (Ct. App. 2003).

The doctrine of issue preclusion is embodied in the Fifth Amendment's Double Jeopardy Clause. Ashe v. Swenson, 397 U.S. 436, 445-46 (1970). The issue-preclusion principle means that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." Id. at 443. In Ashe, the Court explained "'collateral estoppel' is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice." Id. at 443. The Court advised:

The federal decisions have made clear that the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality. Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.'

Id. at 444. The Supreme Court later examined an issue preclusion challenge involving an attempted re-trial after the defendant was acquitted on some counts and the jury hung on other counts in Yeager v. United States, 557 U.S. 110 (2009). In Yeager, the defendant was indicted for securities fraud and insider trading. Id. at 113. The jury acquitted the defendant on the securities fraud counts; however the jury remained hung on the insider trading charges. Id. at 115. The prosecution subsequently sought to re-try the defendant on the insider trading counts, which prompted the defendant to move to dismiss all counts on the ground that the acquittals on the fraud counts precluded the prosecution from re-trying him for insider trading. Id. The District Court denied the motion, concluding the question of whether the defendant possessed insider

information was not necessarily resolved in the first trial. Id. at 116-17. Despite the fact that Yeager's case was distinguishable from Ashe in that Yeager involved an acquittal on some counts and a mistrial on others, the Supreme Court applied Ashe's reasoning to Yeager's case, noting, "the reasoning in Ashe is nevertheless controlling because, for double jeopardy purposes, the jury's inability to reach a verdict on the insider trading counts was a nonevent and the acquittals on the fraud counts are entitled to the same effect as Ashe's acquittal." Id. at 120. The Supreme Court subsequently found, "if the possession of insider information was a critical issue of ultimate fact in all of the charges against petitioner, a jury verdict that necessarily decided that issue in his favor protects him from prosecution for any charge for which that is an essential element." Id. at 123.

In the current case, Appellant's acquittal on the larceny charges was not dispositive as to whether Appellant committed burglary in the first degree. As a threshold matter, the State takes issue with Appellant's characterization of Appellant's acquittal for larceny as "a finding that [Appellant] was not the person who stole the laptop" and that the State was thus precluded from re-litigating Appellant's identity as the intruder. Br. of App. p. 17. The jury's not-guilty verdict was not necessarily a finding that Appellant was not the individual who broke into the Moss's home, rather, it was the jury finding the State failed to prove beyond a reasonable doubt that Appellant committed the crime of larceny. This is an important distinction, as the State's failure to prove the larceny charge beyond a reasonable doubt did not preclude the possibility that the State would be able to prove Appellant committed burglary in the first degree. In Yeager there could be no insider trading if, as found by the jury, there had been no fraud. Here, there could be burglary without larceny.

In State v. Mitchell, 399 S.C. 410, 422, 731 S.E.2d 889, 896 (Ct. App. 2012), Mitchell sought a new trial on his conviction for burglary in the first degree, contending all of the elements were not met because the intent to steal element was not proven since the jury found Mitchell not guilty of petit larceny. The Court noted that Mitchell seemed to be referencing the “inconsistent verdict theory” and stated:

Mitchell was charged and convicted of first-degree burglary, pursuant to section 16-11-311(A) of the South Carolina Code (2003). The pertinent portion of the statute states: ‘A person is guilty of burglary in the first degree if the person enters a dwelling without consent and with intent to commit a crime in the dwelling....’ S.C. Code Ann. § 16-11-311 (A) (2003) (emphasis added). Mitchell was identified from photographs on the deer camera in Potts’s home. Potts testified that he did not recognize the person in the photographs and had not given permission for that person to be in his home. There was testimony Mitchell held a bag and a flashlight in one of the photographs, and the photograph was admitted into evidence. A jury could have inferred that Mitchell intended to commit a crime while in Potts’s home, and due to a multitude of scenarios, was unable or decided not to carry out the intended crime.

Id. at 422-23. Like Mitchell, Appellant erroneously conflates the intent to commit a crime with the actual commission of a crime. Although the jury in Appellant’s first trial found the State failed to prove the larceny charge, there was no requirement that the State actually prove Appellant committed a separate crime within the home in order to prove the burglary charge. See State v. Peterson, 336 S.C. 6, 7, 518 S.E.2d 277, 278 (Ct. App. 1999) (in a case where defendant was found guilty of first-degree burglary and not guilty of first-degree assault with intent to commit criminal sexual conduct, the Court of Appeals held, “The fact that the jury failed to convict Peterson of the sexual assault charge does not affect the validity of the burglary charge. Indeed, that fact is immaterial.”). Since the larceny charge does not play a determinative role in the State’s ability to prove burglary in the first degree, the jury’s not guilty verdict as to the larceny charge does not represent a decision on a critical issue of ultimate fact. As noted by the solicitor at trial, if the State was required to prove a larceny occurred within the home, the State

may find itself in dire straits under the Yeager framework. However, seeing as Appellant's acquittal for larceny did not settle the critical issue of ultimate fact as to whether he committed a breaking and entering with the intent to commit a crime within the home, the State was not precluded from retrying Appellant for burglary in the first degree. The case was properly presented to the jury. Appellant's conviction and sentence should be affirmed.

II.

The trial judge properly denied the defense's request to admit evidence of Appellant's acquittal on the larceny charge from his first trial where such evidence was irrelevant and the evidence's probative value was substantially outweighed by the risk of unfair prejudice and misleading the jury.

Relevant Facts

At trial, Defense Counsel sought to introduce the self-authenticating copy of the larceny indictment from Appellant's first trial. R. p. 612. Defense Counsel argued:

I think it's exculpatory information and it is important for the jury to consider. One of the things that the state has to prove is the intent to commit a crime therein. We are permitted to put up a defense, Your Honor. [Appellant] is certainly entitled to his constitutional right to defend himself and part of our defense is in talking to the jury about that crime of intent to commit a crime that he was acquitted of. It's exculpatory and I think it's important for the jury to know. I don't think it brings up any sort of reference as to any prior trial on this particular charge. . . .

R. p. 613. The solicitor noted the evidence was wholly irrelevant and had no bearing on the jury's mission to determine Appellant's guilt or innocence on the burglary charge. R. p. 612, 614. The trial judge found, "I don't believe this is allowed. I think it would confuse the jury. It does mention the same date, the same victim, and a piece of personality. . . But it seems to me this would confuse the jury more than help the jury in their findings of fact as to his guilt or innocence on this charge." R. p. 614.

Discussion

Appellant asserts the trial court erred in denying Defense Counsel's motion to admit evidence of his acquittal on the prior larceny charge. Specifically, Appellant avers the evidence was relevant to attack the State's theory that he had an intent to commit a crime within the residence, and that the trial judge never made the requisite finding that the probative value of the evidence was substantially outweighed by the risk of unfair prejudice. This argument lacks merit, as the acquittal for larceny was wholly irrelevant in Appellant's subsequent prosecution for burglary in the first degree. Further, the admission of any such evidence would be exceptionally improper, as whatever probative value the evidence had was substantially outweighed by unfair prejudice. Such evidence is effectively reverse-propensity evidence and suggests a decision on an improper basis, as it essentially invites a jury to find a criminal defendant not guilty simply because another jury has acquitted the defendant of other charges stemming from the same nucleus of fact.

In criminal cases, appellate courts sit to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). When reviewing an evidentiary ruling, the appellate court gives great deference to the trial judge because the reception or exclusion of evidence is a matter left largely to the sound discretion of a trial judge. State v. Groome, 274 S.C. 189, 190-191, 262 S.E.2d 31, 32 (1980); see State v. Torres, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010) ("The appellate court reviews a trial judge's ruling on admissibility of evidence pursuant to an abuse of discretion standard and gives great deference to the trial court."); State v. Bixby, 388 S.C. 528, 556, 698 S.E.2d 572, 587 (2010) ("[D]eference is due to the trial court's admission of the evidence."). An appellate court will not reverse a trial judge's decision to admit or exclude evidence absent a clear prejudicial abuse of the trial judge's broad discretion in evidentiary

matters. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); see 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.”). “An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.” State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

All relevant evidence is admissible, and only relevant evidence should be admitted at trial. Douglas, 369 S.C. at 430, 632 S.E.2d at 848; see Rule 402, SCRE (“All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina. Evidence which is not relevant is not admissible.”). “Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears.” State v. Alexander, 303 S.C. 377, 380, 401 S.E.2d 146, 148 (1991); see Rule 401, SCRE (“‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”).

However, even if relevant, evidence must be excluded from trial if its probative value is **substantially outweighed** by the danger of unfair prejudice. State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009); see Rule 403, SCRE (“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”). The determination of the probative

value of evidence relative to its potential prejudicial effect must be based on the entire record and the result generally hinges on the facts of each particular case. State v. Gillian, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007).

Probative value is the measure of the importance of a piece of evidence's tendency to prove or disprove some fact or issue relevant to the outcome of a case. State v. Collins, 398 S.C. 197, 202, 727 S.E.2d 751, 754 (Ct. App. 2012), rev'd on other grounds, 409 S.C. 524, 763 S.E.2d 22 (2014). Unfair prejudice means an undue tendency to suggest a decision on an improper basis. State v. Dickerson, 341 S.C. 391, 400, 535 S.E.2d 119, 123 (2000).

In the present case, the evidence of Appellant's acquittal on the larceny charge was completely irrelevant, as it did not make the existence of any fact of consequence in the proceeding more or less probable. The fact that Appellant was acquitted of larceny in an earlier proceeding does not have any bearing whatsoever on the State's burden to prove the elements of burglary in the first degree beyond a reasonable doubt. There was no evidentiary link whatsoever presented at trial that would make the larceny acquittal a relevant issue. While the State was required to prove Appellant entered the Moss's home with intent to commit a crime, the fact that Appellant was found not guilty of larceny did not make that fact more or less likely. As was discussed in Respondent's Issue I, there is no requirement that the State prove a crime actually occurred within the home and certainly no requirement that the crime the burglar intended to commit was larceny.

While Appellant argues the trial judge did not conduct a Rule 403 analysis, the trial judge made an express finding that the evidence would "confuse the jury." This is clearly an acknowledgment that Rule 403 was a consideration as to why he was excluding the evidence. Even assuming, *arguendo*, that the evidence was somehow relevant, any probative value was

substantially outweighed by the danger of unfair prejudice and misleading the jury. The evidence of the prior acquittal had little to no probative value, as it did not prove or disprove any fact relevant to the case. Whether Appellant committed a larceny was not essential to the State's burden to prove Appellant committed burglary in the first degree. The evidence had an exceptionally high risk of unfair prejudice, as it would lead to confusion of the issue and inevitably mislead the jury. The admission of the indictment for larceny would invite the jury to speculate about what occurred at the first proceeding and would suggest a decision on an improper basis. The admission of the prior acquittal would effectively allow Appellant to present reverse-propensity evidence. See Rule 404 (b), SCRE (Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent.). By presenting evidence that Appellant was acquitted of a larceny charge stemming from the same incident, Appellant would be impliedly imploring the jury to find him not guilty of burglary simply because the earlier jury had found him not guilty of larceny. This would inevitably suggest a decision on an improper basis, as the jury would concern themselves with the results of the other proceeding instead of the facts presented to them throughout trial. The evidence of Appellant's prior conviction was thus irrelevant and the evidence's probative value was substantially outweighed by unfair prejudice. See West v. State, 228 Ga.App. 713, 492 S.E.2d 576 (Ga. Ct. App. 1997) (finding evidence of defendant's prior acquittals had no probative value in trial for perjury based on statements he made during prior trial for child molestation, because evidence of the acquittals was neither relevant nor material to any issue in the case). Appellant's conviction and sentence should be affirmed.

III.

The trial judge did not err by limiting the admission of Jolene Gray's testimony from Appellant's first trial where the testimony was not admissible under Rule 804(b)(1), SCRE, and Appellant was not prejudiced by the exclusion of a limited portion of the testimony.

Relevant Facts

During Appellant's first trial, his girlfriend, Jolene Gray, asserted during cross-examination by the solicitor that law enforcement came to the residence she shared with Appellant on a second occasion. R. p. 260. On re-direct, Gray testified:

The second time they came, it was five of them, I think. One was at the back, four in the front. My son was living with me at the time. [Appellant's] car be there. My car there and my son's car. They was walking around the grounds, you know, picking up. What they were picking up, I have no idea. But they was walking around. Yes.

R. p. 261. Defense Counsel referenced Gray's testimony during her closing argument in support the defense theory that the State's DNA evidence was not credible because of poor investigative protocols, noting:

You also remember Officer Thompson isn't really sure what other officers were there. And that's another thing that's not good enough. He doesn't know which officers were there. An officer he says was there doesn't remember being there. But Jolene said that one of the times the officers came to talk to [Appellant], there were some cars parked out and she saw the officers picking stuff up. She didn't know what they were picking up. It may seem crazy, crazy for us to ask you to draw an inference they were picking up a cigarette butt. But what is equally crazy, is that we've got all this lost evidence in this case and we know it's lost. You would think, you know, that things like this don't happen, but they really do. And the State acknowledges that these things happen. So it's really not that far of a stretch to say, well, maybe, maybe they picked something up that day. Because we don't know where that cigarette butt was until March 29th of 2012. And, again, you heard from the SLED agent all the care that they take. And that they had that cigarette butt from March 29th until sometime in August of 2012. They tested it in August. They sent it back to the agency in 2012. But yet she doesn't return her actual analysis until January 2013.

R. p. 302.

During Appellant's subsequent re-trial for burglary in the first degree, Defense Counsel indicated he had a motion to admit former testimony from a previous trial. R. p. 461. Defense Counsel stated, "Ms. Gray was the client, my client's girlfriend. She had some testimony, we have been unable to locate her. I can have our investigator come up and we can have her testify as to all of the efforts that she made to try to locate Ms. Gray." R. pp. 461-462. Defense Counsel continued, "But we would ask under Rule 804 (b)(1), which is the hearsay exception where declarant is unavailable to introduce Ms. Gray's testimony from the previous trial." R. p. 462. The solicitor replied, "Judge, I really don't have an objection to it. If we were in the same boat, I'd be asking the same thing." R. p. 462. The trial judge granted Defense Counsel's motion, stating, "motion granted." R. p. 463. The solicitor subsequently told the trial judge, "And, Judge, we are going to probably try to ask our investigator if he can find Ms. Jolene Gray just to see if there is a reason why she's not showing, though." R. pp. 463-64. The trial judge replied, "Okay. If you can find her, get her." R. p. 464. Defense Counsel indicated her agreement by stating, "I'm fine with that." R. p. 464.

After the State rested its case-in-chief, the solicitor stated:

Judge, it's my understanding that there are two potential defense witnesses that are not here. . . . Judge, the other one is Jolene Gray; is a former girlfriend of the Defendant in this case. It's my understanding that she is not here today. We did, after yesterday, it was brought to our attention, we were able to contact her through our office, our investigator contacted her and she said she's in Anderson. She's never received a subpoena. Judge, I understand that the Defense just wants to read in a prior transcript of her testimony. Your Honor, my, you know, we're not going to oppose that, but in my cross from a prior hearing, I'm only going to read a portion of it. And then I put on the record, I think, and once I stop at that one portion, that would, the reading of redirect from the Defense would be outside the scope of our cross.

R. pp. 594-95. Defense Counsel responded:

Your Honor, the redirect portion goes to the officers coming out a second time, searching the home and not finding anything, leaving, searching the premises. The witness says that perhaps someone picked up something off the ground and we would want all of that testimony to come in to show that no items were collected, a doo-rag, burglary tools from the home since [Appellant] did live there. It's our position that the entire testimony should come in.

R. pp. 595-96. The Court observed, "Well, now, we don't know whether something was picked up off the ground or not. That's unknown. She's speculating." R. p. 596. Defense Counsel replied, "She says that she saw, so it was her, you know, what she saw at that moment, but she saw several officers, I think she says near her car." R. p. 596. The solicitor noted:

And Judge, one thing to go farther, she never said who those officers were associated with. So that's, that just is, we had our officer testify that he went up there twice. The first time he was not there. The second time he talked to [Appellant], and then there was no other times that he went up there. And I, and looking over the transcript again from my cross, that redirect would be out of the scope of that cross.

R. p. 596. The trial judge found:

All right. I think I'm going to grant his motion to limit his cross-examination to where he wants to stop. But I do not believe that will limit you or Ms. Bolen, whichever one closes, in saying nothing was taken or recovered from the house or you'd have seen it here today. I think y'all could say something along those lines in your closing argument and you can summarize it, had they gone and found something in that search, certainly it would be here. It's not here.

R. p. 596-97.

During her closing argument, Defense Counsel noted:

What else would a search warrant maybe have helped Officer Thompson with? Well, you heard Rick Culbreth say the individual was wearing a doo-rag and he wrote that a few days later on the lineup. A search warrant maybe would have produced that doo-rag. What about burglary tools? Why not get a search warrant for the car or the house or something like that to look for burglary tools?

R. p. 627. Defense Counsel later argued Officer Thompson, "could have gotten a search warrant. He could have gotten a comparison of the boots. He could have tried to find burglary tools or a doo-rag." R. p. 629-30.

Discussion

Appellant contends the trial judge erred in limiting the presentation of Jolene Gray's testimony from Appellant's first trial. Appellant asserts Gray's testimony provided evidence that the police had an opportunity to obtain a cigarette butt smoked by Appellant from outside of his home, as well as other corroborating evidence like a doo-rag or burglary tools. This argument lacks merit. Jolene Gray's testimony was not admissible pursuant to Rule 804(b)(1), as Defense Counsel did not even subpoena Gray to attempt to secure her appearance at trial. Further, Appellant was not prejudiced by the exclusion of a portion of Gray's testimony where he was still able to effectively argue that the State did not seek a search warrant and seek to find corroborating evidence at Appellant's home.

Rule 804(b)(1) of the South Carolina Rules of Evidence provides that the prior testimony of a witness is not excluded by the rule against hearsay if the declarant is unavailable as a witness. Rule 804(b)(1), SCRE. Specifically, the rule allows:

Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

Rule 804(b)(1), SCRE. Rule 804(a) provides the various scenarios in which a declarant is deemed to be "unavailable." The only pertinent scenario in Appellant's case is Rule 801(a)(5), which provides that a witness is unavailable for hearsay purposes if the witness, "is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means." Rule 801(a)(5), SCRE.

In Appellant case, he is unable to meet the prerequisites of Rule 804 with respect to Jolene Gray's testimony. Appellant notes, "the solicitor did not argue that there was any evidentiary basis for excluding Gray's testimony and no objections to her redirect were made at the first trial." Br. of App. p. 26. However, this Court can find the testimony inadmissible on hearsay grounds despite the fact that the solicitor did not make the argument below. See Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal."). While Defense Counsel asserted that her investigator made efforts to locate Gray, the solicitor apparently had no difficulty locating Gray during trial. Critically, Gray told the solicitor that she was never even subpoenaed for the trial. Rule 801(a)(5) provides that for a witness to be unavailable, the proponent of the statement must seek the declarant's statement through service of process or through "other reasonable means." Appellant utterly failed to make such a showing where Gray was never subpoenaed and the assertion that Gray was unobtainable was directly rebutted by the solicitor's ability to locate Gray overnight in the middle of trial. Gray's prior testimony was thus inadmissible under Rule 804, SCRE, as inadmissible hearsay.

Regardless of whether Gray's prior testimony was properly admissible under Rule 804(b)(1), SCRE, Appellant suffered no prejudice from the exclusion of a limited portion of Gray's prior testimony. An appellate court will not reverse based on the erroneous admission or exclusion of evidence unless prejudice has been shown. State v. Taylor, 333 S.C. 159, 172, 508 S.E.2d 870, 876 (1998). Accordingly, appellate courts will decline to set aside convictions for insubstantial errors which could not reasonably have affected the result. State v. Price, 368 S.C. 494, 499, 629 S.E.2d 363, 366 (2006). As to the assertion that Gray's testimony provided evidence that the police had opportunity to obtain a cigarette smoked by Appellant from outside

of the home, it is unclear whether Appellant is alleging law enforcement used a second cigarette found at Appellant's home to fabricate DNA evidence or whether Appellant is asseverating the collection of another cigarette would have somehow altered the positive DNA result with respect to the cigarette found at the Moss's home. Regardless, Appellant was not prejudiced by the evidence's exclusion where the chain of custody for the cigarette established that law enforcement collected a cigarette from the Moss's home, sent it to SLED for testing, and the test returned a positive result as to Appellant's DNA. The collection of a second cigarette at Appellant's home by law enforcement would have done nothing to change this result. As to the assertion that Gray's testimony was necessary to support the defense argument that law enforcement neglected to obtain a search warrant and search Appellant's home for corroborating evidence such as a doo-rag or burglary tools, Appellant was not prejudiced by the evidence's exclusion where that theory was still presented to the jury. As noted by the trial judge in his ruling, Defense Counsel had the opportunity to, and did, emphasize multiple times during closing argument that law enforcement declined to search Appellant's home for a doo-rag, burglary tools, or other corroborating evidence. Appellant thus suffered no prejudice from the exclusion of the testimony. Appellant's conviction and sentence should be affirmed.

IV.

Appellant's argument is not preserved for appellate review where he failed to object to the admission of the evidence at trial. Error preservation concerns notwithstanding, the trial judge properly denied Appellant's motion to exclude the evidence regarding DNA testing performed on the cigarette butt found at the Moss's home that tested positive for Appellant's DNA where there was no presentation that the evidence was lost in bad faith and the State completed a complete chain of custody from the cigarette's collection through the testing of the cigarette by SLED and subsequent return of the evidence to the Abbeville County Sheriff's Office.

Relevant Facts

During his direct examination, Deputy Thompson testified the cigarette butt found at the Moss's residence was collected and turned into evidence. Deputy Thompson described the procedure employed, testifying:

The cigarette you would document it by photograph and place. And then a DNA article, which is what it's been collected for, fresh gloves, we put it into a paper bag and not seal it in any kind of plastic that would destroy the evidence for lack of oxygen. And it would be submitted into a clean new bag.

R. p. 525. The evidence bag was then sealed with tamper-proof tape. R. p. 525. Deputy Thompson testified he picked the cigarette butt up, placed it into the evidence bag, and sealed it with tape. R. pp. 525-26. Deputy Thompson stated no other officers handled the cigarette butt prior to his arrival at the crime scene. R. p. 525. Deputy Thompson testified that after collecting the evidence, the next step is to take the evidence to the law enforcement center whether it is either put into a secure drop-box or is handed directly to Chief Marion Johnson, who was the evidence custodian at the time. R. p. 526.

Chief Johnson was employed as the Chief Deputy of the Abbeville County Sheriff's Office from 1989 to 2013. R. p. 548. Chief Johnson was also the department's evidence custodian. R. p. 549. Chief Johnson testified that after Deputy Thompson collected and sealed the cigarette butt, it was turned over to him. R. p. 551. After receiving the cigarette butt, Chief

Johnson logged the evidence in and put it in the evidence locker. R. p. 551. On March 29, 2012, Chief Johnson gave the cigarette butt to Investigator Ryan Abernathy, who transported it to SLED. R. pp. 551-52, 562-63. Before sending the bag to SLED, Chief Johnson confirmed the bag had not been tampered with. R. p. 560. Investigator Abernathy subsequently transported the cigarette butt back to the Abbeville County Sheriff's Office from SLED on August 10, 2012. R. pp. 552-53, 563.

Maryanne Boehm is employed in the DNA casework department at SLED. R. p. 570. Boehm received a Newport cigarette butt for testing in Appellant's case. R. p. 573. Boehm testified the cigarette butt was transported from the Abbeville County Sheriff's Office on March 29, 2012, by Investigator Abernathy. R. p. 573. When Abernathy arrived, the evidence was submitted to Doris Yarbrough, a forensic technician. Boehm testified that once the evidence was received:

So the cigarette butt is placed into a heat-sealed SLED pouch that is sealed and dated and initialed by the submitted investigator. It is then put on a secure shelf in the evidence vault. Not many people have access to this. Just the forensic technicians in evidence control and administration are the only ones who have access to this evidence storage location. Then, when I was assigned the case, I retrieved the evidence through an evidence technician, Amy Stevens. She retrieved the evidence, and then handed it to me and I took it into my custody at that time.

R. pp. 573-74. Boehm testified that the evidence bag had not been tampered with or damaged in any way. R. p. 574. Boehm subsequently performed DNA analysis on the cigarette butt. R. p. 575. Boehm was shown the photograph of the cigarette butt collected at the Moss's home and testified that it was consistent with the cigarette butt she tested. R. p. 576. As noted in Respondent's Statement of Facts, the DNA profile developed from the cigarette butt matched the DNA profile of Appellant. R. p. 580. After the positive result, Boehm issued a report based on her findings and returned the evidence back to SLED's evidence control unit. R. p. 581. The

solicitor asked Boehm, “Now, Ms. Boehm, I showed you a picture of the cigarette butt, but I didn’t actually show you the butt that you tested in the package today. Does that change the fact of your DNA outcome, your results?” Boehm replied, “No, sir.” Boehm testified the absence of the cigarette at trial did not change her interpretation of the evidence or the test’s results. R. p. 581-82.

Chief Johnson retired from the Abbeville County Sheriff’s Office in May of 2013. R. p. 553. At the time of his retirement, all the evidence obtained in Appellant’s case was still in the evidence room. R. p. 554. Sometime after the evidence was returned to the sheriff’s office, it went missing. R. p. 555. Prior to trial, Appellant made a motion to suppress any testimony or mention of the cigarette butt. R. p. 440. Defense Counsel made an exceptionally detailed argument based on various criticisms of the chain of custody and asserting the admission would violate Appellant’s rights under the Due Process Clause of the Fourteenth Amendment. See RA. pp. 441-454. The trial judge ruled:

I don’t think it’s suppressed, though. Now, on that, I’m going to leave it more or less a motion in limine, because the summary by both of y’all as to the facts, because a summary of facts is not sworn testimony. If we get in trial and I hear something different, I may change my mind. . . . It seems more to be a motion in limine and that’s how I’m ruling on it. Assuming everything comes in as y’all outlined it; that will be my findings. It will be a careless or negligent losing of the evidence but will be admitted; the DNA result will be. Assuming the foundation for all the others can be met, but if the testimony doesn’t support what y’all have outlined, then I may change my ruling and you can renew that motion and suppress. That make sense? I think that’s the best way to handle it.

R. p. 455.

Discussion

Appellant asserts the trial judge erred in denying the defense’s motion to exclude evidence regarding the DNA testing performed on the cigarette butt found at the Moss’s home that tested positive for Appellant’s DNA. Appellant makes this argument on two separate

grounds. First, Appellant contends the State's negligence in maintaining the evidence constitutes bad faith. Second, Appellant avers the State presented an insufficient chain of custody because the physical cigarette was not available for comparison to the crime scene photograph at trial. These arguments lack merit. Appellant failed to present any evidence of bad faith on the part of law enforcement in losing the cigarette butt. Further, the State presented a clear and complete chain of custody of the cigarette butt from the time of collection through the item's testing by SLED and subsequent return to the Abbeville County Sheriff's Office.

As a threshold matter, Appellant's argument is not preserved for appellate review because he failed to object to the evidence's admission at trial. The trial judge indicated he was making a ruling *in limine*, and that his ruling was subject to change. It was then incumbent upon Defense Counsel to contemporaneously object in order to get a final ruling and preserve the issue for appellate review. An *in limine* ruling is not final and a contemporaneous objection is required to preserve an issue for appeal. State v. Wannamaker, 346 S.C. 495, 499, 552 S.E.2d 284, 286 (2001). A pre-trial ruling on the admission of evidence is not considered final and a party must renew his objection at the time the evidence is admitted. State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993). Appellant failed to offer a contemporaneous objection at the time the evidence concerning DNA testing of the cigarette butt was admitted. The issue is thus not preserved for review by this Court.

Error preservation concerns notwithstanding, Appellant's argument wholly fails on the merits. "Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness." California v. Trombetta, 467 U.S. 479, 485 (1984). The fundamental fairness standard requires criminal defendants to be given a meaningful opportunity to present a complete defense. Id.; see State v. Harris, 311 S.C.

162, 167, 427 S.E.2d 909, 912 (Ct. App. 1993) (“Due process requires that a criminal defendant be given a reasonable opportunity to present a complete defense.”). However, “[t]he State does not have an absolute duty to preserve potentially useful evidence that might exonerate a defendant.” State v. Cheeseboro, 346 S.C. 526, 538, 552 S.E.2d 300, 307 (2001). In order to warrant suppression based on the loss or destruction of evidence, the defendant must show either: (1) the State destroyed the evidence in bad faith; or (2) the State destroyed evidence possessing an exculpatory value apparent before the evidence was destroyed and no other evidence of comparable value can be obtained by other means. State v. Mabe, 306 S.C. 355, 358-359, 412 S.E.2d 386, 388 (1991). “Whatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect’s defense.” Trombetta, 467 U.S. at 488. Critically, “[t]he mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish ‘materiality’ in the constitutional sense.” United States v. Agurs, 427 U.S. 97, 109-110 (1976); see Arizona v. Youngblood, 488 U.S. 51, 57 (1988) (“[W]e think the Due Process Clause requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant.”).

In State v. Reaves, 414 S.C. 118, 777 S.E.2d 213 (2015), the South Carolina Supreme Court dealt with a case where multiple pieces of evidence were collected at the crime scene but were missing at the time of trial. On appeal, Reaves argued the evidence lost by police in the investigation of his case effectively deprived him of his fundamental right to a fair trial under the Due Process Clause of the Fourteenth Amendment of the United States Constitution. Id. at 125. Reaves made no allegation the police acted intentionally, however he asserted the police’s

actions in failing to preserve the evidence were so egregious and negligent that it constituted bad faith. Id. at 127. The Supreme Court disagreed, noting, “Although the record is replete with indications the police investigation was deeply flawed, the record also contains no indications these flaws were the product of more than mere negligence.” Id. at 129. The Supreme Court ruled, “Accordingly, although we acknowledge there are deeply troubling aspects of the investigation in this case, the errors made by the police do not indicate bad faith as is required to dismiss an indictment under the federal constitutional test.” Id. at 129.

In Appellant’s case, as in Reaves, Appellant is unable to make any showing concerning bad faith. While the State admittedly lost the cigarette butt sometime before trial, the only evidence presented was that the evidence was returned to the Abbeville County Sheriff’s Office and was lost sometime after Chief Graham’s retirement. Appellant failed to present any evidence concerning bad faith on the part of law enforcement. The actions of law enforcement in losing the evidence were at the most mere negligence, and it cannot be inferred that law enforcement acted in bad faith simply because the evidence was lost. See State v. Breeze, 379 S.C. 538, 546, 665 S.E.2d 247, 251 (Ct. App. 2008) (“The foregoing demonstrates the State’s actions were not in bad faith but rather an inadvertent mistake.”); Jean v. Collins, 221 F.3d 656, 663 (4th Cir. 2000) (instructing bad faith in the context of the loss or destruction of evidence “requires that the officer have intentionally withheld the evidence for the purpose of depriving the plaintiff of the use of that evidence during his criminal trial”); United States v. Vera, 61 F.App’x. 330, 331 (9th Cir. 2003) (“An officer does not act in bad faith unless he or she acts with the purpose of depriving the defendant of the potentially exculpatory evidence. Although the property officer may have acted negligently or even recklessly in destroying the chemical samples, there is no evidence that the officer acted in bad faith by deliberately destroying the evidence to deprive [the

defendant] of access to relevant evidence.”). Appellant attempts to distinguish Reaves by arguing, “Here, the missing evidence is of far greater importance, as it relates directly to the admissibility of the state’s DNA evidence and there was evidence at the first trial that the police went to [Appellant’s] residence and picked something off the ground.” Br. of App. p. 30. Appellant’s argument wholly ignores the underlying reasoning of Reaves, where, regardless of the evidence’s importance, there was absolutely no proof of bad faith on the part of law enforcement. Furthermore, the State disagrees with Appellant’s characterization of the cigarette butt as critical evidence. The DNA test result was certainly critical evidence; however, the presence of the cigarette butt itself at trial would have done nothing to change that evidence. The presence of the physical cigarette for comparison would have contributed nothing of value, as Defense Counsel would have undoubtedly pointed out that the cigarette was a non-descript item without any telling markings, therefore it was impossible to tell whether that was the same one as the cigarette butt in the photograph taken at the Moss’s home. The State would also note that the presence of the physical cigarette would have contributed nothing to Appellant’s defense, as it was inculpatory evidence, rather than exculpatory. See Breeze, 379 S.C. at 546, 665 S.E.2d at 252 (“Here, the destroyed evidence [the appellant] complains of was inculpatory rather than exculpatory.”).

As to Appellant’s argument concerning the chain of custody, the absence of the cigarette butt at trial did not render the chain of custody incomplete. The whereabouts of the cigarette butt were fully accounted for from the time of collection through the evidence’s return to the Abbeville County Sheriff’s Office after the testing by SLED was completed. “The ultimate goal of chain of custody requirements is simply to ensure that the item is what it is purported to be.” State v. Hatcher, 392 S.C. 86, 95, 708 S.E.2d 750, 755 (2011); see United States v. Howard-

Arias, 679 F.2d 363, 366 (4th Cir. 1982) (“The purpose of this threshold requirement is to establish that the item to be introduced, i.e., marijuana, is what it purports to be, i.e., marijuana seized from the ‘Don Frank.’”). Notably, “[c]ourts have abandoned inflexible rules regarding the chain of custody and the admissibility of evidence in favor of a rule granting discretion to the trial courts.” Hatcher, 392 S.C. at 94, 708 S.E.2d at 754. The proof of the chain of custody need not exclude every possibility of tampering. State v. Smith, 326 S.C. 39, 41, 482 S.E.2d 777, 778 (1997); see State v. Rogers, 361 S.C. 178, 187, 603 S.E.2d 910, 915 (Ct. App. 2004) (“South Carolina law does not require testimony as to the exclusion of any possibility of tampering.”). The State did not seek to introduce the cigarette butt at trial. Nevertheless, the State presented the chain of custody, traveling from Deputy Thompson’s initial collection and sealing of the evidence with tamper-proof tape through the evidence’s testing by SLED. There is no requirement that the physical item tested for DNA be present at trial for the results to be admissible. While Appellant attaches importance to Boehm’s testimony where she noted she could not definitively say the cigarette she tested was the same as the one in the photograph taken by Deputy Thompson, her response would have been the same if the physical cigarette butt was present at trial, as she could not definitively say the generic cigarette butt in front of her was the same cigarette she tested. Critically, Boehm testified the presence of the physical cigarette butt at trial would have done nothing to change her conclusions regarding the DNA match. Further, Appellant was not disadvantaged by the absence of the cigarette butt at trial. In actuality, Appellant was advantaged by the fact that the evidence was lost, as it provided him considerable ammunition with which to criticize the State’s investigation. See Reaves, 414 S.C. at 128, 777 S.E.2d at 218 (“Further, to the extent Reaves was disadvantaged by the State’s loss of evidence, Reaves’ attorney was allowed to forcefully cross-examine the police officers on the

deficiencies in their investigation.”). The chain of custody of the cigarette butt from collection through testing was therefore clearly sufficient. Appellant’s conviction and sentence should be affirmed.

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

V. HENRY GUNTER, JR.
Assistant Attorney General

DAVID M. STUMBO
Solicitor, Eighth Judicial Circuit

BY: 
V. Henry Gunter, Jr.
Bar # 102259

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

August 21, 2017

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ABBEVILLE COUNTY
The Honorable Eugene C. Griffith, Circuit Court Judge

Appellate Case No. 2016-000844

THE STATE, ...RESPONDENT

v.

RICKY SANTOINE HENLEY, ...APPELLANT.

CERTIFICATE OF COUNSEL

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

ALAN WILSON
Attorney General

V. HENRY GUNTER, JR.
Assistant Attorney General

DAVID M. STUMBO
Solicitor, Eighth Judicial Circuit

BY: 
V. HENRY GUNTER, JR.
S.C. Bar No. 102259

RECEIVED
AUG 21 2017
SC Court of Appeals

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3727

ATTORNEYS FOR RESPONDENT

August 21, 2017

STATE OF SOUTH CAROLINA
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Appeal From Abbeville County
The Honorable Eugene C. Griffith, Circuit Court Judge

Appellate Case No: 2016-000844

THE STATE,

Respondent,

v.

RICKEY SANTOINE HENLEY,

Appellant.

PROOF OF SERVICE

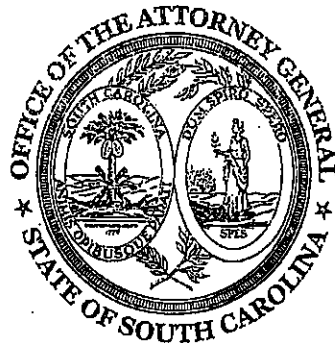
I, Anne Mueller, certify that I have served the Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record Laura R. Baer, Esquire, S.C. Commission on Indigent Defense, Division of Appellate Defense, Post Office Box 11589, Columbia, South Carolina 29211-1589.

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

This 21st day of August, 2017.


Anne A. Mueller
Legal Assistant
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

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AUG 21 2017
SC Court of Appeals



ALAN WILSON
ATTORNEY GENERAL

August 21, 2017

The Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29201

Re: The State v. Rickey Santoine Henley
Appellate Case No: 2016-000844

Dear Ms. Kitchings:

Enclosed please find an original and nine (9) copies of the Final Brief of Respondent, including proof of service, in the above-referenced case.

Sincerely,

V. Henry Gunter, Jr.
Senior Assistant Attorney General
S.C. Bar No: 102259

VHG/aam
Enclosures

cc: Laura R. Baer (with two copies)
Ms. Trisha Allen

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AUG 21 2017

SC Court of Appeals

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

The State, Respondent.

v.

Rickey Santoine Henley, Appellant.

Appellate Case No. 2016-000844

Appeal From Abbeville County
Eugene C. Griffith, Jr., Circuit Court Judge

Opinion No. 5694
Heard February 12, 2019 – Filed December 11, 2019

AFFIRMED

Appellate Defender Susan Barber Hackett, of Columbia,
for Appellant.

Attorney General Alan McCrory Wilson, Senior
Assistant Deputy Attorney General William M. Blich,
Jr., and Assistant Attorney General Vann Henry Gunter,
Jr., of Columbia, and Solicitor David Matthew Stumbo,
of Greenwood, all for Respondent.

MCDONALD, J.: Rickey Santoine Henley appeals his first degree burglary conviction, arguing the circuit court erred by (1) finding his prior larceny acquittal did not bar his retrial for burglary; (2) excluding evidence of the prior larceny acquittal; (3) limiting the admission of a witness's prior trial testimony; and (4) admitting evidence of DNA testing conducted on a cigarette butt found at the crime scene. We affirm.

Facts and Procedural History

On the morning of February 15, 2012, Richard Culbreth drove past the Abbeville County home of Amanda Moss (Victim) and her husband Jamie Moss (Husband) while on the way to visit his mother.¹ Culbreth saw a gray car backed into Victim's carport with the back door open and a black male running from the home's front door to a side door. As Culbreth found this unusual, he turned around and drove back to Victim's house, where he observed the same man standing in the doorway.

After spotting Culbreth, the alleged intruder got into his car, pulled out of Victim's driveway, stopped in front of Culbreth's pickup truck—which was pulling a trailer with a lawn mower—and asked him if he needed any help with lawn care. Culbreth replied he did not need any help, and the man drove away, merging onto Highway 28 North toward Anderson County. Culbreth called 911 and described the car as a dirty, gray, late 1980s or 1990s model Pontiac with the license plate number "HSN [REDACTED]." Culbreth described the man as having facial hair and testified, "I just remember he had a bandana tied tightly around his head. It went down the back of his neck. Light-skinned from what I could tell. But I do not remember any, you know, marks, facial scars, or anything."

Deputy Patrick Thompson, a detective in the Abbeville County Sheriff's Office (ACSO) property crimes division, responded to Victim's home. While processing the scene, Deputy Thompson noticed a footwear impression on the carpet. Officers recovered a cigarette butt from the intruder's point of entry, which they collected and placed into evidence.² The sole item missing from Victim's home was a Dell laptop computer, valued at five hundred dollars, which Victim reported had been on a bench just inside the carport door.³

¹ Culbreth works as the caretaker for Long Cane Cemetery on Beltline Road in Abbeville. He testified he knew Victim through her former employer, Harris Funeral Home.

² The DNA profile developed from the cigarette butt matched Henley's DNA profile. Trial testimony established the probability of randomly selecting an unrelated individual with a DNA profile matching the cigarette butt was 1 in 1.5 billion.

³ Victim's laptop was never recovered.

At trial, Victim identified photographs of the side carport door, which was partially broken off its hinge and appeared to have been tampered with; the doorframe was also damaged. Victim testified a cigarette butt found near her steps did not belong to her or Husband as neither smoked, and the cigarette was not there when she left the home that morning. Victim noted she normally locked the door to the house when she left. Likewise, Husband testified the door was locked and there was no cigarette butt on the steps when he left the house.

Deputy Thompson used Culbreath's description and tag number to search for the suspect vehicle on the South Carolina Law Enforcement Division (SLED) vehicle database. The search revealed a 1997 Pontiac Bonneville owned by Henley and his then girlfriend, Jolene Gray, bearing the license plate number "[REDACTED]". Based on information he received from the Department of Motor Vehicles, Deputy Thompson went to Henley's Anderson County residence on February 22, 2012. Parked outside, he saw a Pontiac Bonneville matching the description provided by Culbreath with the license plate "[REDACTED]".

Henley was at the residence and spoke with law enforcement. He admitted he had recently been in Abbeville and acknowledged he had been on Highway 28. Henley recalled speaking to someone in a pickup truck and admitted he smoked Newport cigarettes. Deputy Thompson noticed Henley was wearing boots, the soles of which resembled the impression left on Victim's carpet. Henley was arrested for first degree burglary and larceny on February 23, 2012.⁴

According to Gray, five police officers came to her house a second time when Henley was not there. She stated she saw the officers walking around, and one officer picked something up off of the ground. Regarding Henley's location on the day of the burglary, Gray claimed Henley left their Anderson County apartment between 8:00 a.m. and 9:00 a.m. to go to his mother's house in Beech Island.⁵ Gray confirmed Henley owned a pair of boots and smoked Newport cigarettes.

Henley's mother, Ella Johnson, stated that on February 15, 2012, Henley arrived at her home at approximately 10:00 a.m. with leftover shrimp and lobster from his

⁴ Henley has two prior burglary convictions from December 7, 2006, and March 15, 2002.

⁵ Beech Island is an unincorporated community in Aiken County.

Valentine's Day dinner with Gray. Johnson testified she and Henley went to Moe's Convenience Store at approximately 2:00 p.m.

Henley's first jury trial began April 8, 2015. Following an *Allen* charge, the jury returned a verdict of not guilty on the larceny charge connected with the burglary at Victim's home. However, the jury hung on the first degree burglary charge, and the circuit court declared a mistrial on April 9, 2015. After the circuit court's denial of Henley's motion to preclude retrial under the Double Jeopardy Clause of the Fifth Amendment, Henley was retried on the burglary charge. The jury found Henley guilty of first degree burglary, and the circuit court sentenced him to twenty-four years' imprisonment.

Law and Analysis

I. Double Jeopardy

Henley argues the circuit court erred by denying his motion to quash the burglary indictment on double jeopardy grounds because (1) it failed to apply the proper test of *Yeager v. United States*, 557 U.S. 110 (2009), and (2) his prior acquittal on the larceny charge relating to the Dell computer necessarily determined he was "not guilty" of burglary as the sole item missing following the burglary was the Dell laptop. We disagree.

At Henley's first trial, the jury acquitted Henley of the larceny of Victim's Dell computer but was unable to reach a unanimous verdict on the first degree burglary charge. Prior to the start of his second trial, Henley moved to quash the burglary indictment, arguing any retrial would violate both the federal and state Double Jeopardy Clauses. Following a pretrial hearing, the circuit court concluded:

Here's what I think. I understand your argument. I think it's a directed verdict to fact [sic] question as to whether they conclude and get past directed verdict stage. With the intent to commit a crime therein is one of the elements of burglary first and second and third. The State's got that burden of proving with the intent to commit a crime. I don't believe the acquittal of the larceny precludes them from presenting facts which the jury could prove intent to commit a crime therein. They have not had that opportunity yet. So I think your motion should be denied right now, but I feel confident you will

most likely renew it at the directed verdict stage in a similar-worded argument if the State's failed to prove anything beyond a suggestion of intent to commit a crime therein. So I don't believe jeopardy attaches to the [burglary] charge since it's not a specific crime. The indictment does not get quashed at this point, but the Court will be listening.

The Double Jeopardy Clauses of the United States and South Carolina Constitutions protect citizens from being subjected to repetitive conclusive prosecutions and multiple punishments for the same offense. U.S. Const. amend. V ("[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb. . . ."); S.C. Const, art. I, C ("No person shall be subject for the same offense to be twice put in jeopardy of life or liberty"). "In interpreting the Double Jeopardy clause, [our supreme court] has stated that '[t]he Double Jeopardy Clause protects against a second prosecution for the same offense after acquittal or conviction, and protects against multiple punishments for the same offense.'" *State v. Brandt*, 393 S.C. 526, 538, 713 S.E.2d 591, 597 (2011) (quoting *Stevenson v. State*, 335 S.C. 193, 198, 516 S.E.2d 434, 436 (1999)). However, "[a] defendant may be severally indicted and punished for separate offenses without being placed in double jeopardy where a single act consists of two 'distinct' offenses." *Id.* (quoting *State v. Moyd*, 321 S.C. 256, 258, 468 S.E.2d 7, 9 (Ct. App. 1996)).

The doctrine of issue preclusion is embodied in the Fifth Amendment's Double Jeopardy Clause. *Ashe v. Swenson*, 397 U.S. 436, 445–46 (1970). Issue preclusion means that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Id.* at 443. In *Ashe*, the United States Supreme Court explained that "'collateral estoppel' is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice." *Id.* at 443. In emphasizing the rule of collateral estoppel in criminal cases should be applied with "realism and rationality," the Court advised:

Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an

issue other than that which the defendant seeks to foreclose from consideration."

Id. at 444. *Ashe* is not dispositive here as the issue determined there was "simply whether, after a jury determined by its verdict that the petitioner was not one of the robbers, the State could constitutionally hale him before a new jury to litigate that issue again." *Id.* at 446.

Yeager v. United States, 557 U.S. 110, 113 (2009), which involved charges of securities fraud and insider trading, is more helpful to our analysis. There, the Supreme Court examined an issue preclusion challenge involving an attempted retrial after the jury acquitted the defendant on the securities fraud counts but could not reach a verdict on his insider trading charges. *Id.* at 115. When the prosecution subsequently sought to retry the defendant on the insider trading counts, the defendant moved to dismiss, arguing the acquittals on securities fraud precluded his retrial for insider trading. *Id.* The district court denied the motion, concluding the question of whether the defendant possessed insider information was not necessarily resolved in the first trial. *Id.* at 116–17. Although *Yeager* is distinguishable from *Ashe* in that *Yeager* involved an acquittal on some counts and a hung jury on others, the Supreme Court explained "the reasoning in *Ashe* is nevertheless controlling because, for double jeopardy purposes, the jury's inability to reach a verdict on the insider trading counts was a nonevent and the acquittals on the fraud counts are entitled to the same effect as *Ashe*'s acquittal." *Id.* at 120. The Supreme Court subsequently found, "if the possession of insider information was a critical issue of ultimate fact in all of the charges against petitioner, a jury verdict that necessarily decided that issue in his favor protects him from prosecution for any charge for which that is an essential element." *Id.* at 123.

Here, Henley's acquittal for larceny—the taking of the Dell computer—is not dispositive of whether the State could satisfy the elements necessary for a first degree burglary conviction. In *Yeager*, there could be no insider trading if, as found by the jury, there had been no fraud. But an acquittal for larceny does not foreclose any element necessary for a first degree burglary conviction. See S.C. Code Ann. § 16-13-30(A) ("Simple larceny of any article of goods, choses in action, bank bills, bills receivable, chattels, or other article of personalty of which by law larceny may be committed, or of any fixture, part, or product of the soil severed from the soil by an unlawful act, or has a value of two thousand dollars or less, is petit larceny, a misdemeanor, triable in the magistrates court or municipal court. . . ."); S.C. Code Ann. § 16-11-311(A) ("A person is guilty of burglary in the first degree if the person enters a dwelling without consent and with intent to

commit a crime in the dwelling, and either: (1) . . . ; or (2) the burglary is committed by a person with a prior record of two or more convictions for burglary or housebreaking or a combination of both; or (3) . . . "). While larceny is defined as "the felonious taking and carrying away of the goods of another against the owner's will or without his consent," *State v. Moore*, 374 S.C. 468, 477, 649 S.E.2d 84, 88 (Ct. App. 2007), burglary merely requires that "the person enters a dwelling *without consent and with intent to commit a crime in the dwelling.*" S.C. Code Ann. § 16-11-311(A) (emphasis added). Each of the offenses requires proof of different critical elements. *See Blockburger v. United States*, 284 U.S. 299, 304, (1932) ("The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.").

Additionally, we agree with the State that the jury's "not guilty" verdict was not necessarily a finding that Henley was not the individual who entered Victim's home without consent and with intent to commit a crime therein; rather, the prior jury found only that the State failed to prove beyond a reasonable doubt that Henley took the Dell computer. Henley's acquittal on the larceny charge did not preclude the State from presenting facts—that Henley's car was backed into Victim's carport with the back door open, Culbreth witnessed Henley standing in the doorway of Victim's home, and Victim's door and doorframe were damaged—as proof of the first degree burglary charge.

In *State v. Mitchell*, 399 S.C. 410, 422, 731 S.E.2d 889, 896 (Ct. App. 2012), the defendant sought relief from his conviction for burglary in the first degree, contending the intent to steal element could not be proven since the jury found Mitchell not guilty of petit larceny. This court noted Mitchell seemed to be referencing the "inconsistent verdict theory" and stated:

Mitchell was charged and convicted of first-degree burglary, pursuant to section 16-11-311(A) of the South Carolina Code (2003). The pertinent portion of the statute states: "A person is guilty of burglary in the first degree if the person enters a dwelling without consent and *with intent to commit a crime in the dwelling . . .*" S.C. Code Ann. § 16-11-311(A)(2003) (emphasis added). Mitchell was identified from photographs on the deer camera in Potts's home. Potts testified that he did not recognize the person in the photographs and had not

given permission for that person to be in his home. There was testimony Mitchell held a bag and a flashlight in one of the photographs, and the photograph was admitted into evidence. A jury could have inferred that Mitchell intended to commit a crime while in Potts's home, and due to a multitude of scenarios, was unable or decided not to carry out the intended crime.

Id. at 422–23. Like the defendant in *Mitchell*, Henley conflates the intent to commit a crime with the successful commission of the crime. Although the jury in Henley's first trial found the State failed to prove the larceny charge, there was no requirement that the State actually prove he successfully committed a separate crime within Victim's home to prove the burglary charge. *See State v. Peterson*, 336 S.C. 6, 7, 518 S.E.2d 277, 278 (Ct. App. 1999) ("The fact that the jury failed to convict Peterson of the sexual assault charge does not affect the validity of the burglary charge. Indeed, that fact is immaterial."). Because Henley's acquittal for larceny did not settle the critical issue of ultimate fact as to whether he entered Victim's home without consent with the intent to commit a crime, the State was not precluded from retrying him for first degree burglary. Accordingly, we find the circuit court properly declined to quash the indictment and properly denied Henley's motion for a directed verdict.

II. Larceny Acquittal

Henley argues the circuit court erred by excluding evidence of his acquittal on the larceny charge where the State maintained its theory that the burglar's intention in entering Victim's home was to steal. We disagree.

At Henley's second trial, he sought to introduce the self-authenticating copy of the larceny indictment from his first trial, arguing it was exculpatory information. Conversely, the State argued the evidence was wholly irrelevant and had no bearing on the jury's determination of Henley's burglary charge. The circuit court ruled:

I don't believe this is allowed. I think it would confuse the jury. It does mention the same date, the same victim, and a piece of [personalty]. To some extent[,] it opens the door to a whole slew of issues. But it seems to me this would confuse the jury more than help the jury in

their findings of fact as to his guilt or innocence on this charge.

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." *See State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *Id.* "To warrant reversal, an error must result in prejudice to the appealing party." *State v. Black*, 400 S.C. 10, 16–17, 732 S.E.2d 880, 884 (2012).

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina. Evidence which is not relevant is not admissible." Rule 402, SCRE. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE. "The determination of the prejudicial effect of the evidence must be based on the entire record and the result will generally turn on the facts of each case." *State v. Gillian*, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007). "'Probative' means '[t]ending to prove or disprove.'" *State v. Gray*, 408 S.C. 601, 609–10, 759 S.E.2d 160, 165 (Ct. App. 2014) (quoting *Probative Value*, Black's Law Dictionary (9th ed. 2009)). "'Probative value' is the measure of the importance of that tendency to the outcome of a case. It is the weight that a piece of relevant evidence will carry in helping the trier of fact decide the issues. '[T]he more essential the evidence, the greater its probative value.'" *Id.* (quoting *United States v. Stout*, 509 F.3d 796, 804 (6th Cir. 2007)).

Here, Henley's acquittal on the larceny charge was irrelevant; it did not make the existence of any fact of consequence in the proceeding more or less probable with respect to the elements of first degree burglary. *See* Rule 401, SCRE (defining relevance). While the State was required to prove Henley entered Victim's home without her consent and with the intent to commit a crime, there was no requirement that the State prove Henley entered Victim's home without consent and successfully committed the crime of taking Victim's Dell computer.

Henley further argues the circuit court failed to conduct the necessary Rule 403 balancing analysis; however, our review of the record reveals the circuit court made an express finding that the evidence "would confuse the jury more than help the jury in their findings of fact as to his guilt or innocence on this charge." Thus, we find the circuit court properly applied Rule 403 in excluding evidence of the larceny acquittal. Even assuming, *arguendo*, that the evidence was relevant, the circuit court did not abuse its discretion in determining that any probative value was substantially outweighed by the danger of unfair prejudice and misleading the jury. The evidence of Henley's prior acquittal had little to no probative value as it did not prove or disprove any element necessary to the first degree burglary charge; yet, admission of the evidence would have likely led to jury confusion because it would have invited the jury to speculate about what occurred at the first trial. *See* Rule 403, SCRE (explaining that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . ."). Therefore, we affirm the circuit court's exclusion of evidence of the larceny indictment and resulting "not guilty" verdict from Henley's earlier trial.

III. Jolene Gray's Testimony

Henley argues the circuit court erred by limiting the admission of Jolene Gray's testimony from the first trial where Gray was unavailable to the defense during the second trial and her testimony provided evidence that the police had an opportunity to obtain a cigarette smoked by Henley from outside of his own home. We disagree.

On cross-examination during Henley's first trial, Gray claimed law enforcement returned to the residence she shared with Henley on a second occasion when he was not present. On re-direct, Gray testified:

The second time they came, it was five of them, I think. One was at the back, four in the front. My son was living with me at the time. [Henley's] car [was] there. My car there and my son's car. They was walking around the grounds, you know, picking up. What they were picking up, I have no idea. But they was walking around. Yes.

In the first trial, Henley referenced Gray's testimony during his closing argument in support of the defense theory that the State's DNA evidence was not credible because of poor investigative protocols, noting:

You also remember Officer Thompson isn't really sure what other officers were there. And that's another thing that's not good enough. He doesn't know which officers were there. An officer he says was there doesn't remember being there. But [Gray] said that one of the times the officers came to talk to [Henley], there were some cars parked out and she saw the officers picking stuff up. [Gray] didn't know what they were picking up. It may seem crazy, crazy for us to ask you to draw an inference they were picking up a cigarette butt. But what is equally crazy, is that we've got all this lost evidence in this case and we know it's lost. You would think, you know, that things like this don't happen, but they really do. And the State acknowledges that these things happen. So it's really not that far of a stretch to say, well, maybe, maybe they picked something up that day. Because we don't know where that cigarette butt was until March 29th of 2012. And, again, you heard from the SLED agent all the care that they take. And that they had that cigarette butt from March 29th until sometime in August of 2012. They tested it in August. They sent it back to the agency in 2012. But yet she doesn't return her actual analysis until January 2013.

At the retrial, Henley moved to admit Gray's testimony from the first trial. Defense Counsel stated:

Ms. Gray was the client, my client's girlfriend. She had some testimony, we have been unable to locate her. I can have our investigator come up and we can have her testify as to all of the efforts that she made to try to locate Ms. Gray. But we would ask under Rule 804(b)(1), [SCRE,] which is the hearsay exception where declarant is unavailable[,] to introduce Ms. Gray's testimony from the previous trial.

The State replied, "Judge, I really don't have an objection to it. If we were in the same boat, I'd be asking the same thing." The circuit court granted Henley's motion. Thereafter, the State informed the circuit court, "And, Judge, we are going

to probably try to ask our investigator if he can find Ms. Jolene Gray just to see if there is a reason why she's not showing, though." The court replied, "Okay. If you can find her, get her." Defense Counsel indicated she was "fine with that."

After the State rested its case-in-chief, the solicitor stated:

Judge, it's my understanding that there are two potential defense witnesses that are not here one is Jolene Gray; is a former girlfriend of [Henley] We did, after yesterday, it was brought to our attention, we were able to contact her through our office, our investigator contacted her and she said she's in Anderson. She's never received a subpoena. Judge, I understand that [Henley] just wants to read in a prior transcript of her testimony. Your Honor, my, you know, we're not going to oppose that, but in my cross from a prior hearing, I'm only going to read a portion of it. And then I put on the record, I think, and once I stop at that one portion, that would, the reading of redirect from the Defense would be outside the scope of our cross.

Henley responded:

Your Honor, the redirect portion goes to the officers coming out a second time, searching the home and not finding anything, leaving, searching the premises. The witness says that perhaps someone picked up something off the ground and we would want all of that testimony to come in to show that no items were collected, a doo-rag, burglary tools from the home since Mr. Henley did live there. It's our position that the entire testimony should come in.

The circuit court observed, "Well, now, we don't know whether something was picked up off the ground or not. That's unknown. She's speculating." Ultimately, the court ruled:

All right. I think I'm going to grant [the State's] motion to limit [its] cross-examination to where [it] wants to stop. But I do not believe that will limit you or . . . ,

whichever one closes, in saying nothing was taken or recovered from the house or you'd have seen it here today. I think y'all could say something along those lines in your closing argument and you can summarize it, had they gone and found something in that search, certainly it would be here. It's not here.

Rule 804(b)(1), SCRE, provides for the admission of former testimony where the declarant is unavailable as a witness. Specifically, it allows the admission of "[t]estimony given as a witness at another hearing of the same or a different proceeding . . . , if the party against whom the testimony is now offered . . . , had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." *Id.* One of the situations in which a declarant is deemed "unavailable" for purposes of the rule is when the declarant "is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance . . . by process or other reasonable means." Rule 804(a)(5), SCRE.

Henley represented that his investigator had been unable to locate Gray in order to serve a subpoena, but that if the State could find Gray and procure her attendance, he had no objection. Although the State was able to contact Gray at her Anderson County residence, the relevant inquiry is whether Henley was able to procure Gray's attendance by process or other reasonable means. The State confirmed Henley's statement that Gray had not been served with a subpoena. While the State again represented that it did not oppose the reading of the testimony, the solicitor argued Henley should only be permitted to read the portion of his redirect examination responsive to the cross, consequently excluding the redirect testimony Henley sought to procure. Notably, the State did not argue any evidentiary basis for excluding Gray's testimony, and it did not object to her testimony on redirect during Henley's first trial. However, because Rule 804(a)(5) requires the declarant's unavailability despite "process or other reasonable means," we believe Gray's testimony was inadmissible hearsay. *See* Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision, or judgment upon any ground(s) appearing in the Record on Appeal."). Our review of the record reveals the circuit court ruled as much without specifically citing Rule 804(a)(5).

Nevertheless, we are concerned that instead of excluding all of Gray's testimony from the prior trial, the circuit court allowed the State to select the portions of her former testimony to be read, while excluding the portion Henley sought to present. However, we do not find this error prejudiced Henley. *See e.g., State v. Adams*, 354 S.C. 361, 381, 580 S.E.2d 785, 795 (Ct. App. 2003) ("[A]n insubstantial error

not affecting the result of the trial is harmless where 'guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached.'" (quoting *State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989), *cert. denied*, (2004)). Culbreth testified he witnessed a black male at Victim's home around 11:30 a.m. on February 15, 2012; he accurately described Henley's Pontiac sedan, was able to provide law enforcement with a partial plate number matching Henley's license plate, and recounted an interaction with the intruder. Henley admitted to law enforcement that he had recently been in Abbeville and acknowledged he had been on Highway 28. Henley also recalled speaking to someone, presumably Culbreth, driving a pickup truck in Abbeville. Finally, Victim testified the door to her home was intact when she left for work that morning and damaged when she returned home. Thus, to the extent the circuit court erred in allowing the State to pick and choose portions of Gray's prior testimony after agreeing to admit it, we find such error was harmless.

IV. DNA Testing

Henley argues the circuit court erred in denying his motion to exclude evidence of DNA testing conducted on the cigarette butt found at the crime scene because the State could not present a complete chain of custody and the cigarette butt was not available for comparison to the crime scene photograph at trial. Henley further asserts the State's negligence in the destruction of the cigarette butt constituted bad faith. We disagree.

During his direct examination at Henley's second trial, Deputy Thompson explained the procedure for preserving evidence of the cigarette butt found at Victim's residence:

The cigarette you would document it by photograph and place. And then a DNA article, which is what it's been collected for, fresh gloves, we put it into a paper bag and not seal it in any kind of plastic that would destroy the evidence for lack of oxygen. And it would be submitted into a clean new bag.

Deputy Thompson testified he picked the cigarette butt up, placed it into the evidence bag, and sealed it with tape. No other officers handled the cigarette butt prior to his arrival at the crime scene. Deputy Thompson explained that after collecting the evidence, the next step is to take the evidence to the law enforcement

center where it is either placed in a secure drop-box or handed directly to Chief Marion Johnson, who was the evidence custodian at the time.

Chief Johnson was employed as the Chief Deputy of the Abbeville County Sheriff's Office (ACSO) from 1989 to 2013. He was also the ACSO's evidence custodian. Chief Johnson testified that after Deputy Thompson collected and secured the cigarette butt, it was turned over to him. Chief Johnson logged in the evidence and put it in the evidence locker. On March 29, 2012, Chief Johnson gave the cigarette butt to Investigator Ryan Abernathy, who transported it to SLED. Before sending the bag to SLED, Chief Johnson confirmed the bag had not been tampered with. Investigator Abernathy later transported the cigarette butt back to ACSO from SLED.

Maryanne Boehm, who is employed in the DNA casework department at SLED, received the Newport cigarette butt for testing from Investigator Abernathy on March 29, 2012. Regarding procedure, Boehm testified:

So the cigarette butt is placed into a heat-sealed SLED pouch that is sealed and dated and initialed by the submitted investigator. It is then put on a secure shelf in the evidence vault. Not many people have access to this. Just the forensic technicians in evidence control and administration are the only ones who have access to this evidence storage location. Then, when I was assigned the case, I retrieved the evidence through an evidence technician, Amy Stevens. She retrieved the evidence, and then handed it to me and I took it into my custody at that time.

Boehm subsequently performed a DNA analysis on the cigarette butt in August 2012. Upon being shown the photograph of the cigarette butt collected at Victim's home, Boehm testified it was consistent with the cigarette butt she tested. She explained the DNA profile developed from the cigarette butt matched Henley's DNA profile. After the positive result, Boehm issued a report of her findings in January 2013, and returned the evidence back to SLED's evidence control unit.

The following colloquy ensued between the State and Boehm:

Q: Now, Ms. Boehm, I showed you a picture of the cigarette butt, but I didn't actually show you the butt that

you tested in the package today. Does that change the fact of your DNA outcome, your results?

A: No, sir.

Q: So you seeing that here today does not change your interpretation or the results?

A: No, sir, not at all.

Q: And you're saying today that on the day it was submitted to you[,] you did your testing, that the integrity of the bag was intact?

A: Yes, sir.

Q: There was no tampering with it at all?

A: That's correct.

At the time of Chief Johnson's retirement in May 2013, all evidence obtained in Henley's case was still in the evidence room. Sometime after the evidence was returned from SLED to ACSO, it was either destroyed or misplaced. Prior to trial, Henley moved to suppress any testimony or mention of the cigarette butt. Ultimately, the circuit court ruled:

I don't think it's suppressed, though. Now, on that, I'm going to leave it more or less a motion in limine, because the summary by both of y'all as to the facts, because a summary of facts is not sworn testimony. If we get in trial and I hear something different, I may change my mind It seems more to be a motion in limine and that's how I'm ruling on it. Assuming everything comes in as y'all outlined it; that will be my findings. It will be a careless or negligent losing of the evidence but will be admitted; the DNA result will be. Assuming the foundation for all the others can be met, but if the testimony doesn't support what y'all have outlined, then I may change my ruling and you can renew that motion

and suppress. That make sense? I think that's the best way to handle it.

Henley contends the State's negligence in maintaining the evidence constitutes bad faith. He also asserts the State presented an insufficient chain of custody because the physical cigarette was not available for comparison to the crime scene photograph at trial. We disagree. Initially, we note Henley failed to present any evidence of bad faith on the part of law enforcement in losing the cigarette butt. Moreover, the State presented a clear and complete chain of custody of the cigarette butt from the time of collection through the item's testing by SLED and its subsequent return to ACSO.

As a threshold matter, we question whether this argument is preserved for review because Henley failed to renew his objection to the admission of this evidence during Boehm's testimony. In its ruling, the circuit court explained it was making a ruling in limine, and that its ruling was subject to change. Thus, it was incumbent upon Henley to contemporaneously object in order to get a final ruling and preserve the issue for appellate review. *See State v. Hoffman*, 312 S.C. 386, 393, 440 S.E.2d 869, 873 (1994) ("A contemporaneous objection is required to properly preserve an error for appellate review.").

Still, even if this argument were properly preserved, we find it to be without merit. "Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness." *California v. Trombetta*, 467 U.S. 479, 485 (1984). While the fundamental fairness standard requires criminal defendants to be given a meaningful opportunity to present a complete defense, to set forth a due process violation, a criminal defendant "must demonstrate either that the state destroyed evidence in bad faith, or that the state destroyed evidence that possessed an exculpatory value that is apparent before the evidence was destroyed and the defendant cannot obtain other evidence of comparable value by other means." *State v. Mabe*, 306 S.C. 355, 358–59, 412 S.E.2d 386, 388 (1991); *see also State v. Cheeseboro*, 346 S.C. 526, 538–39, 552 S.E.2d 300, 307 (2001) (affirming circuit court's denial of defendant's motions to suppress and to dismiss indictments where there was no bad faith in destruction of gun, bullets were still available to the defense, and "there was no prejudice to the defense because the gun was incriminating rather than exculpatory"); *State v. Reaves*, 414 S.C. 118, 129, 777 S.E.2d 213, 218 (2015) (finding that although multiple pieces of evidence were collected at the crime scene but missing at the time of trial, the errors made did "not indicate bad faith as is required to dismiss an indictment under the federal constitutional test").

Here, Henley is unable to make the showing of bad faith required to support exclusion of the DNA evidence. While the State admittedly lost the cigarette butt before trial, the only evidence presented was that it was returned from SLED to ACSO and then was either destroyed or misplaced following Chief Johnson's retirement. Bad faith cannot be inferred simply because the evidence was lost. *See State v. Breeze*, 379 S.C. 538, 546, 665 S.E.2d 247, 251 (Ct. App. 2008) ("The foregoing demonstrates the State's actions were not in bad faith but rather an inadvertent mistake.").

Furthermore, while the DNA test result was certainly critical evidence, the presence of the cigarette butt itself would have done nothing to change the report generated from SLED's processing of that evidence. The presence of the physical cigarette for comparison would have contributed nothing of value, as Henley would have undoubtedly noted the cigarette was a nondescript item without any significant or distinguishing markings. Finally, as this evidence was inculpatory rather than exculpatory, the presence of the physical cigarette would have been more damaging to Henley's defense than its absence.⁶

As to Henley's argument concerning the chain of custody, the absence of the cigarette butt at trial did not render the chain of custody incomplete. Although the whereabouts of the cigarette butt were accounted for from the time of its collection on February 15, 2012, through the time it was returned to ACSO after the SLED testing, we acknowledge there was no testimony regarding the date on which the cigarette was initially logged into the evidence locker at ACSO. *But see State v. Hatcher*, 392 S.C. 86, 95, 708 S.E.2d 750, 755 (2011) ("The ultimate goal of chain of custody requirement's is simply to ensure that the item is what it is purported to be."). Notably, "[c]ourts have abandoned inflexible rules regarding the chain of custody and the admissibility of evidence in favor of a rule granting discretion to the trial courts." *Hatcher*, 392 S.C. at 94, 708 S.E.2d at 754. We find the chain of custody of the cigarette butt from the time of collection through testing was sufficient, and the circuit court properly exercised its discretion in admitting evidence of the DNA collection and test results.

⁶ Instead, the fact that the evidence was lost provided Henley with considerable ammunition with which to criticize the State's investigation. *See Reaves*, 414 S.C. at 128, 777 S.E.2d at 218 ("Further, to the extent Reaves was disadvantaged by the State's loss of evidence, Reaves' attorney was allowed to forcefully cross-examine the police officers on the deficiencies in their investigation.").

Conclusion

For the foregoing reasons, Henley's conviction is

AFFIRMED.

LOCKEMY, C.J. and SHORT, J., concur.

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

RICKEY SANTOINE HENLEY,

APPELLANT

APPELLATE CASE NO. 2016-000844

Appeal from Abbeville County

Eugene C. Griffith, Circuit Court Judge

Opinion No. 5694

PETITION FOR REHEARING

RECEIVED

DEC 27 2019

SC Court of Appeals

On December 11, 2019, this Court affirmed Appellant's conviction for burglary in a published opinion. State v. Henley, Op. No. 5694 (S.C. Ct. App. filed Dec. 11, 2019). Pursuant to Rule 221(a), SCACR, Appellant now files this Petition for rehearing due to the significant points overlooked and/or misapprehended by this Court.

Appellant's conviction violates Double Jeopardy.

On July 27, 2012, the Abbeville County grand jury returned indictments against Appellant for larceny and burglary. On April 8-9, 2015, Appellant proceeded to trial on both offenses before the Honorable R. Lawton McIntosh and a jury. The jury returned a verdict of **not guilty on**

larceny. However, the jury hung on the count of first-degree burglary, and Judge McIntosh declared a mistrial.

Following denial of the defense's motion to preclude retrial under the Double Jeopardy Clause of the Fifth Amendment, on April 4-6, 2016, Appellant faced re-trial for the offense of first-degree burglary before the Honorable Eugene C. Griffith, Jr., and a jury. The jury returned a verdict of guilty, and Judge Griffith sentenced Appellant to twenty-four years incarceration.

On appeal, Appellant argued his acquittal for larceny precluded his second trial for burglary in the first degree. Misapprehending Yeager v. United States, 557 U.S. 110 (2009), this Court held Appellant's "acquittal for larceny – the taking of the Dell computer – [was] not dispositive of whether the state could satisfy the elements necessary for a first-degree burglary conviction." Instead of employing the analysis from Yeager, this Court used Blockburger v. United States, 284 U.S. 299 (1932), to hold that "[e]ach of the offenses require[d] proof of different critical elements." According to this Court, "[b]ecause Henley's acquittal for larceny did not settle the critical issue of ultimate fact as to whether he entered Victim's home without consent with the intent to commit a crime, the state was not precluded from retrying him for first degree burglary." This holding misapprehends controlling Supreme Court law.

In Yeager v. United States, 557 U.S. 110, 112 (2009), the United States Supreme Court held that an apparent inconsistency between a jury's verdict of acquittal on some counts and its failure to return a verdict on other counts does not affect the acquittals' preclusive force under the Double Jeopardy Clause. The Yeager case involved the criminal prosecution of one of the Enron executives, who was charged with 126 counts of federal securities offenses, which the Court grouped into two general categories – the "fraud counts" and the "insider trader counts" – for ease of reference. 557 U.S. at 112-14. The jury acquitted Yeager on the fraud counts but did not reach

a verdict on the insider trading counts. Id. at 114-15. At the re-trial, the government sought a new indictment that charged only Yeager, rather than several other previous co-defendants, and further refined the charges against him. Id. at 115.

Yeager moved the trial court to dismiss the indictments based on issue preclusion and the Double Jeopardy Clause, on the basis that the insider trading counts necessarily required a factual finding that was decided in his favor by virtue of the acquittal on the fraud charges. 557 U.S. at 115-16. Yeager was convicted after the trial court denied his motion, reasoning that “the question whether Yeager possessed insider information was not necessarily resolved in the first trial and could be litigated anew in a second prosecution.” Id.

“A jury’s verdict of acquittal represents the community’s collective judgment regarding all the evidence and arguments presented to it.” Id. at 122. Thus, “[e]ven if the verdict is based upon an egregiously erroneous foundation, its finality is unassailable.” Id. (internal quotations and citations omitted). The Yeager Court wrote:

To decipher what a jury has necessarily decided, we held that courts should examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.

Id. at 119-20 (internal quotation omitted) (emphasis added). In applying these principles to Yeager, the Court ruled that “if the possession of insider information was a critical issue of ultimate fact in all of the charges against petitioner, a jury verdict that necessarily decided that issue in his favor protects him from prosecution for any charge for which that is an essential element.” Id. at 123.

Here, both this Court and the trial judge erred in failing to apply the test set forth in Yeager to determine whether the state was collaterally estopped from re-prosecuting Appellant for first-

degree burglary following his acquittal for larceny related to the same incident. As noted by the Court in Abney v. United States, 431 U.S. 651, 659-60 (1977):

[T]he very nature of a double jeopardy claim is such that it is collateral to, and separable from the principal issue at the accused's impending criminal trial, i.e., whether or not the accused is guilty of the offense charged. In arguing that the Double Jeopardy Clause of the Fifth Amendment bars his prosecution, the defendant makes no challenge whatsoever to the merits of the charge against him. Nor does he seek suppression of evidence which the Government plans to use in obtaining a conviction. **Rather, he is contesting the very authority of the Government to hale him into court to face trial on the charge against him.**

(internal citations omitted) (emphasis added). While Double Jeopardy does not bar retrial where a mistrial was declared out of "manifest necessity" due to a jury's inability to reach a decision, the Yeager Court made clear that the inquiry regarding a bar to retrial does not end there. 557 U.S. at 118. Rather, the trial court must determine whether the interest in preserving the finality of the jury's judgment on the decided count bars a retrial on the undecided count because "the jury's acquittals unquestionably terminated petitioner's jeopardy with respect to the issues finally decided in those counts." Id.

In making this determination, this Court's focus should have been on the evidence and arguments presented at the first trial as mandated by Yeager, not on whether the two offenses had the same elements.¹ Undertaking the proper analysis requires holding Appellant's second trial violated Double Jeopardy.

At Appellant's first trial for first-degree burglary and larceny the solicitor averred in his opening statement that Moss's door was kicked down and "[s]he had personal property taken."

¹ The trial court's failure to conduct the requisite analysis is illustrated by its failure to take the copies of the first trial transcript offered by defense counsel. R. 400, ll. 2-21. Thus, the trial judge erred as a matter of law in failing to determine what facts were necessarily decided in the first action and how those facts bore on the defense's argument of preclusion under the double jeopardy protection.

104, ll. 10-11. He said: "Mr. Henley has two indictments pending against him. One of them is for larceny; the other if for burglary in the first degree." R. 106, l. 24 – 107, l. 1. After reciting the elements of larceny and alleging that Henley took the personal property of Amanda Moss, he discussed the elements and anticipated proof of burglary. R. 107, ll. 1-16. He said:

The elements of burglary are entry into a dwelling without the owner or the occupant's consent with the intent to commit a crime therein. **And in this case, our theory is that Mr. Henley went into Ms. Moss' home, did so without consent, took personal property. And that was the crime he intended to commit.**

As to the burglary case, as to the burglary indictment rather, this is a charge of burglary first. And an additional element is that the person charged with burglary has been convicted of two prior burglaries. And there will be evidence about those two prior burglaries.

R. 107, ll. 6-16.

The testimony that developed during the trial indicated that when police arrived and found the side door to the Moss's home was open, and the sole item missing was Ms. Moss's Dell laptop, valued at five hundred dollars, that had been on a bench just in side of the door. R. 136, l. 1 – 137, l. 9; R. 192, ll. 15-19. The laptop was never recovered. R. 231, ll. 17-19.

In his closing argument, the solicitor again recited the elements of burglary and larceny in tandem. He said:

Mr. Henley [is] charged with burglary in the first degree. He [is] also charged with larceny. So what is it we have to prove to you to be a burglar first degree? **Burglary is breaking and entering the dwelling of another with the intent to commit a crime inside that house, or inside that dwelling. In this case the dwelling of Amanda Moss and the intent to commit a crime in breaking and entering that dwelling. In this case, he's charged with larceny.** Larceny is the taking and carrying away the goods of another with the intent to permanently deprive that person of those goods. In this case, a laptop .. So those are the-- that's the law of the case. The burglary, going back to burglary first, to make it a burglary first is two prior convictions. And we'll deal with that a little bit later, but that makes it a burglary first.

R. 287, l. 21 – 288, l. 11 (emphasis added). In the latter portion of his closing, the solicitor argued Appellant kicked open the door and "went walking through **to go get that laptop.**" R. 308, ll. 6-12

(emphasis added). He argued that Henley made a stop on his way to see his mother in Beech Island and “swung by Ms. Moss’s house and decided he wanted to take advantage of what she had inside while she was at work. **What did he take? A laptop.**” R. 309, ll. 13-17 (emphasis added).

There was no dispute at Henley’s first trial that the Moss’ home was broken into and that her laptop was stolen. Rather, the focus was on the identity of the perpetrator. Thus, the acquittal on larceny was a finding that Henley was not the person who stole the laptop. This impacted the retrial in several ways. First, the state was precluded from re-litigating Henley’s identity as the intruder. Second, the state was precluded from arguing that the stolen laptop was evidence of Henley’s “intent to commit a crime therein.” Relatedly, the prior jury’s finding that Henley did not steal precluded the state’s continuing theory that the criminal intent was to steal. As such, Henley’s retrial for first-degree burglary was barred by the Double Jeopardy Clause because the state was precluded from re-litigating the issues that were necessarily decided by the jury’s prior acquittal on larceny.

Evidence of Appellant’s acquittal on the larceny charge was admissible.

This Court held Appellant’s acquittal on the larceny charge was irrelevant because “it did not make the existence of any fact of consequence in the proceeding more or less probable with respect to the elements of first-degree burglary.” According to this Court, the state was required to prove Appellant entered Moss’s home without her consent and with the intent to commit a crime, but “there was no requirement that the state prove [Appellant] entered Victim’s home without consent and successfully committed the crime of taking Victim’s Dell computer.” Next, this Court held that assuming the evidence was relevant, the trial judge “did not abuse [his] discretion in determining that any probative value was substantially outweighed by the danger of unfair prejudice and misleading the jury.” In this Court’s view, Appellant’s “prior acquittal had

little to no probative value as it did not prove or disprove any element necessary to the first degree burglary charge; yet admission of the evidence would have likely led to jury confusion because it would have invited the jury to speculate about what occurred at the first trial.” This Court misapprehended the relevant case law and Appellant’s constitutional rights when arriving at this conclusion.

South Carolina addressed the admissibility of a prior acquittal in State v. Houston, 17 S.C.L. 300 (S.C. App. L. & Eq. 1829). Houston was indicted for uttering and publishing a forged note, purporting to be the promissory note of C. B. Atwood, knowing the same to be forged. 17 S.C.L. at 300. In the prior term, Houston was acquitted on a similar indictment for uttering another forged note. Id. At the second trial, the judge permitted admission of evidence that the note on which the first indictment was based was a forgery. Id. Both notes were in Houston’s handwriting and he was convicted on the Atwood forgery. Id. The Houston Court ruled that the defendant’s prior “acquittal on the note, which was produced in evidence, cannot affect the principle, **although it may weaken the force of the evidence.**” Id. at 303 (emphasis added). The Court noted that there was evidence that the prior acquittal may have been the result of a defect in the original indictment or the absence of witnesses. Id. The Court wrote: “It does not follow, that because a man is acquitted, he is innocent: the legal consequence is, that he cannot be tried again. But still he may have been guilty, and this guilt may be sh[o]wn in a collateral matter.” *Id.* Thus, Houston recognized the relevance of facts related to a prior acquittal to a subsequent trial for a separate offense.

Similarly here, the trial judge’s denial of the motion to quash the indictment under Double Jeopardy did not render the prior acquittal on larceny irrelevant to the current proceedings. Rather, the defense properly sought its admission to attack the state’s theory that Appellant had any intent.

to commit a crime inside of the residence, specifically to steal. Notably, the solicitor repeatedly argued in his closing that the crime that the intruder sought to commit was theft – saying “I’ll submit to you his intent was to go in there and clean them out;” that Appellant stopped “to see what they had good in there;” and that “[h]e thought he’d get a little treasure trove.” R. 640, ll. 16-19; R. 646, l. 20 – 647, l. 1. Any confusion or speculation that concerned the trial judge or solicitor could have been cured with a simple limiting instruction by the trial court rather than exclusion of the evidence or through the solicitor’s argument regarding the weight to be given to prior acquittal. Further, the trial judge never made the requisite finding that the probative value of the evidence *was substantially outweighed* by the danger of unfair prejudice, confusion of the issues, or misleading the jury. See R. 614, l. 22 – 615, l. 5; R. 616, ll. 13-15. As this Court has noted, “[a]ll evidence is meant to be prejudicial; it is only *unfair* prejudice which must be scrutinized under Rule 403.” State v. Gray, 408 S.C. 601, 616, 759 S.E.2d 160, 168 (Ct. App. 2014).

The trial judge’s limitation on the admission of Jolene Gray’s prior testimony was not harmless beyond a reasonable doubt.

At Appellant’s first trial, Jolene Gray, his girlfriend at the time of the incident, testified on redirect examination that five law enforcement officers came to their apartment complex a second time after they had spoken with Appellant. She said that they were walking around and picked something up off of the ground, though she was unsure what they picked up. R. 261, ll. 14-25. In the closing argument at the first trial, defense counsel argued:

Jolene said that one of the times the officers came to talk to Rickey, there were some cars parked out and she saw the officers picking stuff up. She didn’t know what they were picking up. It may seem crazy, crazy for us to ask you to draw an inference they were picking up a cigarette butt. But what is equally crazy, is that we’ve got all this lost evidence in this case and we know it’s lost. You would think, you know, that things like this don’t happen, but they really do. And the State

acknowledges that these things happen. So it's really not that far of a stretch to say, well, maybe, maybe they picked something up that day. Because we don't know where that cigarette butt was until March 29th of 2012.

R. 302, ll. 6-18.

At the second trial, during its pre-trial motions, the defense moved to admit the sworn testimony from the first trial of defense witnesses Jolene Gray and Officer Michael Belcher pursuant to Rule 804(b)(1). Defense counsel explained her investigator had been unable to locate Gray in order to secure her presence at the retrial. Counsel offered to call her investigator to testify regarding her attempts to located Gray; however, the solicitor said that he did not have any objection to admission of the prior testimony. R. 461, l. 12 – R. 462, l. 9.

After the trial judge granted the defense's motion to admit the former trial testimony, the solicitor said: "And, Judge, we are going to probably try to ask our investigator if he can find Ms. Jolene Gray just to see if there is a reason why she's not showing, though." R. 463, l. 20 – R. 464, l. 2. Judge Griffith responded: "Okay. If you can find her, get her." R. 464, l. 3. The solicitor said: "Yes sir. We'll do that;" and defense counsel said that was fine with her. R. 464, ll. 4-6.

The next day, with respect to Jolene Gray, the solicitor said:

Judge, the other one is Jolene Gray; is a former girlfriend of the Defendant in this case. It's my understanding that she is not here today. We did, after yesterday, it was brought to our attention, we were able to contact her through our office, our investigator contacted her and she said she's in Anderson. She's never received a subpoena. Judge, I understand that the Defense just wants to read in a prior transcript of her testimony. **Your Honor, my, you know, we're not going to oppose that, but in my cross from a prior hearing, I'm only going to read a portion of it. And then I put on the record, I think, and once I stop at that one portion, that would, the reading of redirect from the Defense would be outside the scope of our cross.**

R. 594, l. 20 – R. 595, l. 8. (emphasis added). The Judge asked defense counsel to explain why the redirect testimony was necessary. R. 595, ll. 11-20. The following exchange occurred:

DEFENSE COUNSEL PATEL: Your Honor, the redirect portion goes to the officers coming out a second time, searching the home and not finding anything, leaving, searching the premises. The witness says that perhaps someone picked up something off the ground and we would want all of that testimony to come in to show that no items were collected, a doo-rag, burglary tools from the home since Mr. Henley did live there. It's our position that the entire testimony should come in. And, Your Honor, we, our office being multiple--

THE COURT: Well, now, we don't know whether something was picked up off the ground or not. That's unknown. She's speculating.

DEFENSE COUNSEL BOLEN: She says that she saw, so it was her, you know, what she saw at that moment, but she saw several officers, I think she says near her car.

MR. BROWN: And, Judge, one thing to go farther, she never said who those officers were associated with. So that's, that just is, we had our officer testify that he went up there twice. The first time he was not there. The second time he talked to Mr. Henley, and then there was no other times that he went up there. And I, and looking over the transcript again from my cross, that redirect would be out of the scope of that cross.

THE COURT: All right. I think I'm going to grant his motion to limit his cross-examination to where he wants to stop. But I do not believe that will limit you Or Ms. Bolen, whichever one closes, in saying nothing was taken or recovered from the house or you'd have seen it here today. I think y'all could say something along those Lines in your closing argument and you can summarize it had they gone and found something in that search, certainly it would be here. It's not here.

MS. PATEL: Yes, Your Honor.

THE COURT: By me, the recross or redirect from you does not prohibit you from arguing what you choose.

MS. PATEL: Yes, Your Honor.

THE COURT: All right. So let's, we'll limit it to tell your witness, well, once you stop, she'll quit reading.

MR. BROWN: Yes, sir. I'll stop reading.

R. 595, l. 21 – R. 597, l. 10. The defense called Jolene Gray as a witness and a portion of her testimony was read into the record. R. 599, l. – R. 600, l. 1. 13; R. 676.

Rule 804(b)(1), SCRE, provides for the admission of former testimony where the declarant is unavailable as a witness. Specifically, it allows the admission of “[t]estimony given as a witness at another hearing of the same or a different proceeding . . . , if the party against whom the testimony is now offered . . . , had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.” Rule 804(b)(1), SCRE. One of the situations in which a declarant is deemed “unavailable” for purposes of the Rule is when the declarant “is absent from the hearing *and the proponent of a statement has been unable to procure the declarant’s attendance . . . by process or other reasonable means.*” Rule 804(a)(5), SCRE (emphasis added).

In the present case, defense counsel represented that their investigator had been able to locate Jolene Gray in order to serve a subpoena, but that if the solicitor could find her and procure her attendance, she was fine with that. R. 461, l. 12 – R. 102, l. 6. Though the solicitor was able to contact Gray, the relevant inquiry is whether the proponent of the evidence has been able to procure the declarant’s attendance by process or other reasonable means. The solicitor confirmed that Gray had not been served a subpoena. R. 594, l. 20 – 595, l. 1; Rule 804(a)(5), SCRE. While the solicitor again represented that he did not oppose the reading of the testimony, he then sought to qualify that by arguing that he should be permitted to read only a portion of his redirect examination, consequently excluding the redirect testimony. R. 595, ll. 1-8. Notably, the solicitor did not argue that there was any evidentiary basis for excluding Gray’s testimony and no objections to her redirect were made at the first trial. See R. 261, ll. 14-25.

This Court held that Gray’s testimony was inadmissible hearsay in accordance with Rule 804(a)(5), SCRE, because she was not served with a subpoena. This Court neglected to consider the remaining portion of the rule, which provides the declarant is unavailable if the proponent of the statement has been unable to procure her attendance by process “or other reasonable means.”

Defense counsel offered to call her investigator to detail the “other reasonable means” undertaken by the defense to secure Gray’s attendance; however, this presentation was rendered unnecessary when the state conceded Gray’s unavailability. This Court’s holding that Gray’s prior testimony was hearsay is error in light of the state’s concession making the development of the record in this regard unnecessary.

This Court expressed “concern” that the trial judge permitted the state to select portions of Gray’s testimony to be read and excluded portions Appellant sought to present. Appellant requests this Court hold the trial judge committed error in allowing the state to cherry pick portions of Gray’s testimony to be presented to the jury and disallow the portions Appellant desired.

Although this Court showed concern over the trial judge’s handling of the prior testimony, this Court found the error was not prejudicial to Appellant. Appellant respectfully requests this Court hold the error was not harmless beyond a reasonable doubt. The real reason for the state’s request is apparent from the record – he wanted to exclude the defense’s evidence regarding law enforcement’s opportunity to obtain a cigarette butt with Appellant’s DNA from his yard. This testimony was essentially to the defense’s attack on the reliability of the DNA analysis on the cigarette butt, which was lost along with the Sheriff’s Department’s chain of custody log. Additionally, Gray’s testimony revealed another opportunity for law enforcement to look for corroborating evidence, such as the missing laptop, doo-rag, or burglary tools, which they failed to do. R. 595, l. 21 – 596, l. 10.

The solicitor’s attempt to exclude the evidence that he rightly perceived as detrimental to the state’s case at the first trial raises double jeopardy concerns, as the United States Supreme Court ruled that “the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment,

expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.” Yeager v. United States, 557 U.S. 110, 117-18 (2009) (quoting Green v. United States, 355 U.S. 184, 187–188 (1957)). It is reminiscent of Ashe v. Swenson, 397 U.S. 436, 440 (1970), where the state “refined its case at the second trial by declining to call one of the participants in the poker game whose identification testimony at the first trial had been conspicuously negative.” There, the Court noted the state’s concession in its brief that “[n]o doubt the prosecutor felt the state had a provable case on the first charge and, when he lost, he did what every good attorney would do—he refined his presentation in light of the turn of events at the first trial.” 397 U.S. at 447. The Court held that “this is precisely what the constitutional guarantee [against double jeopardy] forbids.” Id.

Juxtaposing the evidence presented at the first trial with the evidence presented at the second trial along with the outcomes of those trials also demonstrates how the error was not harmless beyond a reasonable doubt. The state’s evidence was almost identical in each trial. The defense too presented almost the identical evidence in the second trial as it had the first. The greatest difference between the two trials was the exclusion of the portion of Gray’s testimony in which she described law enforcement showing up at her home and picking up items off the ground. At the first trial, Gray’s testimony combined with the other evidence showing the police conducted a poor investigation – lost evidence, lost chain of custody – resulted in the jury acquitting Appellant of larceny and being unable to render a verdict on the burglary count. Speculation is unnecessary here to determine what effect the erroneous ruling had on the jury’s verdict because the first trial demonstrates the absence of Gray’s testimony was substantial.

Appellant respectfully requests this Court rehear the matter pursuant to Rule 221(a), SCACR.

Respectfully Submitted,

A handwritten signature in cursive script, reading "Susan B. Hackett", is written over a horizontal line.

SUSAN B. HACKETT
Appellate Defender

This 27th day of December, 2019.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Abbeville County

Eugene C. Griffith, Circuit Court Judge

RECEIVED
DEC 27 2019
SC Court of Appeals

THE STATE,

RESPONDENT,

V.

RICKEY SANTOINE HENLEY,

APPELLANT

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 V. Henry Gunter, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Rickey Santoine Henley, #290970, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 27th day of December, 2019.

Susan B. Hackett

Susan B. Hackett

Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE
ME this 27th day of December, 2019.

[Signature] (L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022

The South Carolina Court of Appeals

The State, Respondent.

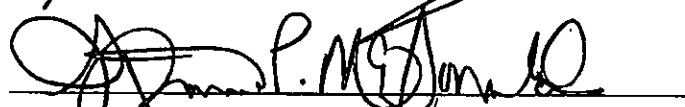
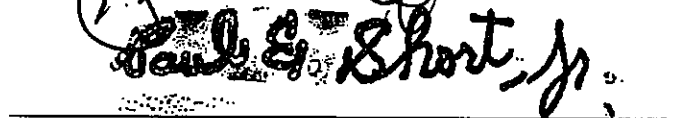
v.

Rickey Santoine Henley, Appellant.

Appellate Case No. 2016-000844

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 C.J.
 J.
 A.J.

Columbia, South Carolina

cc:

Alan McCrory Wilson, Esquire
Vann Henry Gunter, Jr., Esquire
David Matthew Stumbo, Esquire
Susan Barber Hackett, Esquire

FILED

February 13, 2020

William M. Blitch, Jr., Esquire

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Abbeville County
Eugene C. Griffith, Jr., Circuit Court Judge

Opinion No. 5694 (S.C. Ct. App. filed December 11, 2019)

2012-GS-01-348

THE STATE,

RESPONDENT,

V.

RICKEY SANTOINE HENLEY,

PETITIONER

APPELLATE CASE NO. 2016-000844

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

SUSAN B. HACKETT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

RECEIVED

MAR 16 2020

S.C. SUPREME COURT

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on February 13, 2020. App. 35-36.

QUESTIONS PRESENTED

- I. Did the Court of Appeals err in denying Henley's motion to quash the burglary indictment based on Double Jeopardy where the Court erred as a matter of law in failing to apply the proper test under Yeager and where Henley's prior acquittal of larceny necessarily decided that Henley was not the person who stole the homeowner's laptop, the sole item missing after the burglary, precluding the state from relitigating Henley's identity as the intruder or intent to steal?
- II. Did the Court of Appeals err by affirming the trial court's denial of the defense's motion to admit evidence of Henley's acquittal on the prior larceny charge where the state's theory of the case continued to be that the burglar's intention was to steal?
- III. Did the Court of Appeals err in affirming the trial judge's limitation on the admission of Jolene Gray's testimony from the prior trial where Gray was unavailable to the defense and her testimony provided evidence that the police had an opportunity to obtain a cigarette smoked by Henley from outside of his home?

STATEMENT OF THE CASE

On December 11, 2019, the South Carolina Court of Appeals published its opinion in State v. Henley, 428 S.C. 649, 837 S.E.2d 639 (Ct. App. 2019). App. 1-19. Among the issues addressed was a double jeopardy matter interpreting the United States Supreme Court's opinion Yeager v. United States, 557 U.S. 110 (2009). App. 1-19. Although the Supreme Court issued Yeager over a decade ago, Henley is the first case in South Carolina interpreting Yeager. Thus, the instant matter presents a novel question of law for South Carolina. As such, this Court should grant certiorari to review the Court of Appeals' decision. See Rule 242(b)(1), SCACR.

Further, the Court of Appeals misapprehended the Supreme Court's opinion when it concluded Henley's "acquittal for larceny – the taking of the Dell computer – [was] not dispositive of whether the state could satisfy the elements necessary for a first-degree burglary conviction." App. 6. Instead of employing the analysis from Yeager, the Court used Blockburger v. United States, 284 U.S. 299 (1932), to hold that "[e]ach of the offenses require[d] proof of different critical elements." App. 7. According to the Court, "[b]ecause Henley's acquittal for larceny did not settle the critical issue of ultimate fact as to whether he entered Victim's home without consent with the intent to commit a crime, the state was not precluded from retrying him for first degree burglary." App. 8. This holding misapprehends controlling Supreme Court law, and this Court should grant certiorari to address the conflict between the opinion from the Court of Appeals and the United States Supreme Court. See Rule 242(b)(5), SCACR.

Finally, it is without question that substantial constitutional issues are directly involved because the trial judge violated Petitioner's protection from double jeopardy pursuant to the Fifth Amendment to the United States Constitution by requiring him to stand trial for a second time

for the burglary charge after the jury acquitted him of larceny. In light of the substantial constitutional issues involved, this Court should grant certiorari. See Rule 242(b)(4), SCACR.

On February 23, 2012, Rickey Santoine Henley was arrested for first degree burglary and larceny the day. Supp. R. 1. On July 27, 2012, the Abbeville County Grand Jury returned indictments against Henley for the same offenses. R. 695. On April 8-9, 2015, Henley proceeded to trial on both offenses before the Honorable R. Lawton McIntosh and a jury. Henley was represented by Patricia Bolen and Yasha Patel, and the state was represented by Demetrios Andrews and Yates Brown. R. 1; R. 175.

When Ricky Culbreth was driving by the Moss' home at approximately 11:30 a.m. on February 15, 2012, he noticed a silver car that he did not recognize backed into their carport with its backdoor open. He saw a black man wearing a do-rag ran from the front of the house to the side of the house. R. 117, l. 6 – R. 119, l. 4. Culbreth did a U-turn and pointed at the man, who was standing in the doorway of the house. Culbreth said that it looked like the man threw something on the ground and then got into his car. The man pulled up next to Culbreth's white truck for a few seconds and asked if he needed any "yard help." R. 119, l. 12 – R. 120, l. 17; R. 130, ll. 22-24; R. 133, ll. 12-20. When Culbreth responded "no," the man left. R. 120, ll. 17-22. Culbreth walked to the house and called 911. R. 114, l. 16 – R. 116, l. 3; R. 120, l. 22 – R. 121, l. 1; R. 124, l. 16 – R. 125, l. 24.

When the police arrived, the side door to the Moss' home was open but there were no signs that anything had been tampered with inside of the home. The sole item missing was Ms. Moss' Dell laptop, valued at five hundred dollars, that had been on a bench just in side of the door. R. 136, l. 1 – R. 137, l. 9; R. 192, ll. 15-19. The laptop was never recovered. R. 231, ll.

17-19. Investigator Patrick Thompson photographed a boot print in the carpet inside of the home approximately one foot from where the laptop was taken. R. 196, l. 21 – R. 197, l. 6.

He also photographed and allegedly collected a Newport cigarette butt from the ground just outside of the doorway to the Moss' home. R. 194, l. 15 – R. 195, l. 22; R. 197, l. 7 – R. 200, l. 8; Second Trial State's Exs. 11-12 (photos of cigarette butt). Ms. Moss said that neither she nor her husband were smokers. R. 138, ll. 16-17. Culbreth provided the police with a license plate number of HSN[REDACTED] for the Pontiac Parisienne car that he saw the man driving, which he saw through his rearview mirror. R. 121, ll. 9-22; R. 207, l. 24 – R. 208, l. 2. When the police could not find a car with that description and plate number, they obtained a list of other possible license plate numbers and makes of cars. Henley was on that list because he owned a Pontiac Bonneville with the license plate number HSM[REDACTED]. R. 200, l. 16 – R. 201, l. 9; R. 207, l. 1 – R. 208, l. 21.

On February 22, 2012, Thompson went to speak with Henley at his home. According to Thompson, Henley responded affirmatively that he had driven on Hwy 28 near Abbeville the week prior and spoken with a man in a white truck. He said that Henley explained that he had stopped to use the bathroom but denied going into any house. Thompson also claimed that Henley admitted to smoking Newport cigarettes and was wearing boots with a similar pattern as the print found in the Moss' home. R. 208, l. 12 – R. 209, l. 7; R. 212, l. 21 – R. 216, l. 19; R. 224, l. 21 – R. 230, l. 17. A photo array including Henley was shown to Culbreth, but he was only able to narrow it down to two people. R. 122, ll. 3-17; R. 209, l. 19 – R. 211, l. 15. The police lost the original photo array shown to Culbreth such that only a poor quality black and white copy was available at the first trial. R. 7, ll. 14-23; R. 222, l. 4 – R. 223, l. 4.

In addition to the lost photo array, the cigarette butt allegedly collected by law enforcement from the scene and accompanying chain of custody log were also lost and unavailable for Henley's trial. R. 219, l. 3 – R. 220, l. 5. Nonetheless, the judge admitted the state's DNA testing results, which found a match between the DNA on the cigarette provided to SLED and the known standard collected from Henley. R. 55-86; R. 160, l. 16 – R. 172, l. 6. Henley's ex-girlfriend, Jolene Gray, with whom he shared an apartment at the time of the incident, said that five police officers came to her house a second time when Henley was not there. They were walking around and picking something up off of the ground. R. 248, l. 14 – 249, l. 18; R. 259, ll. 5 – R. 260, l. 23; R. 261, ll. 14-25.

As far as his whereabouts on the date of the offense, Ms. Gray recalled that Henley left their apartment in Anderson between 8:00 a.m. and 9:00 a.m. to go to his mother's house in Beech Island. She confirmed that Henley owned boots that she had gotten him for Valentine's Day and that he smoked Newport cigarettes. R. 249, l. 19 – R. 252, l. 23; R. 257, l. 7 – R. 259, l. 4; R. 260, l. 24 – R. 261, l. 7. Henley's mother, Ella Johnson, said that on February 15, 2015, Henley arrived at her home at approximately 10:00 a.m. with leftovers from his dinner with Ms. Gray. They went to Moe's Convenience Store at approximately 2:00 p.m., where Henley bought a beer. R. 262, l. 22 – R. 274, l. 9.

Notably, the trial judge charged the jury both on alibi and identification. R. 325, l. 23 – R. 327, l. 2; R. 330, ll. 6-18. Regarding larceny, he charged:

The State must prove beyond a reasonable doubt that the Defendant took and carried away the property of another against the will or without the consent of the other person. The slightest removal of the property or the complete possession of the property even if for an instance by the Defendant is enough to show a taking and carrying away of the property. The State must also prove beyond a reasonable doubt that the Defendant intended to permanently deprive the owner of the property.

R. 329, l. 21 – R. 330, l. 5. Following a charge pursuant to Allen v. United States, 164 U.S. 492 (1896), the jury returned a verdict of **not guilty on larceny**. However, the jury **hung on the count of first degree burglary**. R. 336-350.

Following denial of the defense's motion to preclude retrial under the Double Jeopardy Clause of the Fifth Amendment, on April 4-6, 2016, Henley faced re-trial for the offense of first degree burglary before the Honorable Eugene C. Griffith, Jr. and a jury. R. 363, R. 384-402.

The state presented much of the same evidence as it did at the first trial, but successfully excluded Jolene Gray's testimony that officers returned to the apartment that she shared with Henley and picked something up off the ground. See discussion *infra*, Issue III. In his closing argument at the second trial, the solicitor contended:

The carport, the car backed in, the back door open, the door kicked in. Folks, I'll submit to you **his intent was to go in there and clean them out**. Just so happened, Mr. Culbreth came by at the right time and turned around and came back before Mr. Henley could start loading it up.

R. 640, ll. 16-19 (emphasis added); and

He [Henley] left Anderson to go down to Beech Island, but he made a stop on the way. He made a stop at the Moss' house **to see what they had good in there**. They said the windows, you could see right in and **see what they had** in there and he stopped. **He thought he'd get a little treasure trove** as he went on down to Aiken.

R. 646, l. 20 – R. 647, l. 1 (emphasis added).

The jury returned a verdict of guilty, and Judge Griffith sentenced Henley to twenty-four years incarceration. R. 664-674.

On April 14, 2016, Henley served his notice of appeal. After entertaining brief and argument, the Court of Appeals affirmed. App. 1-19. Henley filed a petition for rehearing, which was denied. App. 20-36. This petition for writ of certiorari follows.

ARGUMENT

I. The Court of Appeals erred in denying Henley's motion to quash the indictment based on Double Jeopardy where the Court erred as a matter of law in failing to apply the proper test under *Yeager* and where Henley's prior acquittal of larceny necessarily decided that Henley was not the person who stole the homeowner's laptop, the sole item missing after the burglary, precluding the state from relitigating Henley's identity as the intruder or intent to steal.

Relevant facts

At Henley's first trial, the solicitor averred in his opening statement that Moss' door was kicked down and "[s]he had personal property taken." 104, ll. 10-11. He said: "Mr. Henley has two indictments pending against him. One of them is for larceny; the other if for burglary in the first degree." R. 106, l. 24 – R. 107, l. 1. After reciting the elements of larceny and alleging that Henley took the personal property of Amanda Moss, he discussed the elements and anticipated proof of burglary. R. 107, ll. 1-16. He said:

The elements of burglary are entry into a dwelling without the owner or the occupant's consent with the intent to commit a crime therein. **And in this case, our theory is that Mr. Henley went into Ms. Moss' home, did so without consent, took personal property. And that was the crime he intended to commit.**

As to the burglary case, as to the burglary indictment rather, this is a charge of burglary first. And an additional element is that the person charged with burglary has been convicted of two prior burglaries. And there will be evidence about those two prior burglaries.

R. 107, ll. 6-16.

In his opening on the law at closing argument, the solicitor again recited the elements of burglary and larceny in tandem. He said:

Mr. Henley [is] charged with burglary in the first degree. He [is] also charged with larceny. So what is it we have to prove to you to be a burglar first degree? **Burglary is breaking and entering the dwelling of another with the intent to commit a crime inside that house, or inside that dwelling. In this case the dwelling of Amanda Moss and the intent to commit a crime in breaking and**

entering that dwelling. In this case, he's charged with larceny. Larceny is the taking and carrying away the goods of another with the intent to permanently deprive that person of those goods. In this case, a laptop .. So those are the-- that's the law of the case. The burglary, going back to burglary first, to make it a burglary first is two prior convictions. And we'll deal with that a little bit later, but that makes it a burglary first.

R. 287, l. 21 – R. 288, l. 11 (emphasis added). In the latter portion of his closing, noted that a cigarette butt was found “on that side door, going in the side door, the same door that was kicked open and Mr. Henley went walking through **to go get that laptop.**” R. 308, ll. 6-12. He argued that Henley made a stop on his way to see his mother Beech Island and “swung by Ms. Moss’s house and decided he wanted to take advantage of what she had inside while she was at work. **What did he take? A laptop.**” R. 309, ll. 13-17 (emphasis added). The solicitor sarcastically said that the boot print was “[m]iraculously close to that pedestal where that laptop was taken from that day.” R. 312, ll. 15-16. Ultimately, the jury acquitted Henley of larceny but hung on the count of first-degree burglary. R. 343, l. 17 – R. 349, l. 11.

Importantly, the defense made no challenge to whether a laptop was actually taken from the Moss’ home or its value. Rather, the defense focused on alibi, mistaken identity, and the unreliability of the DNA evidence. Counsel argued that the state’s evidence regarding identity – namely the eyewitness testimony, DNA evidence, and alleged “confession” – were all flawed and failed to prove Henley’s guilt beyond a reasonable doubt. R. 290, l. 3 – R. 306, l. 3. She argued: “[T]he person he [Culbreth] saw at Ann Moss’ house was not Rickey Henley.” R. 295, l. 15. Her argument regarding the state’s failure to recover a laptop was not a suggestion that none was taken. Counsel pointed to that as another fact illustrating the shoddy police investigation. R. 299, l. 10 – R. 300, l. 18.

At the commencement of Henley’s second trial, defense counsel filed a Motion to Quash the Indictment Based on Double Jeopardy pursuant to Ashe v. Swanson, 397 U.S. 436 (1970),

and Yeager v. United States, 557 U.S. 110 (2009) R. 352; see R. 384, l. 22 – R. 400, l. 22. Counsel argued that the provision against double jeopardy precluded prosecution in Henley’s case on the same conduct for which he was tried in 2015. R. 384, ll. 12-17. Counsel argued that in light of its holding that a hung count was a non-event not to be considered in determining the preclusive effect of the acquitted count, the Yeager Court instructed lower courts to look at the acquitted count to determine what facts were decided by the jury. R. 384, l. 12 – R. 389, l. 8. In making such a determination the lower court must “examine the record of a prior proceeding . . . and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.” Yeager, 557 U.S. at 119-20; R. 399, ll. 6-17; R. 400, ll. 18-21.

Though counsel recognized that the state is not required to prove the intended crime was actually committed, she argued that the acquittal on larceny necessarily decided that he did not take the laptop. R. 391, l. 8 – R. 392, l. 21. She noted that the facts in support of probable cause on the burglary warrant included:

That on February 15, 2012, in the county of Abbeville, one Rickey Santoine Henley did enter a dwelling located at . . . Hwy 28 N in Abbeville County, SC, without consent and with intent to commit a crime therein. Once inside the defendant did take, steal and carry away a Dell laptop computer from said residence. The defendant has prior Burglary convictions dated 12/07/2006 and 3/15/2002. Information from affiant and Sheriff’s Dept. investigation, report 12-2-55.

Supp. R. 1. She further noted that “[t]he State’s theory as presented in both of their opening and closing, as well as by their witness testimony, . . . was that Mr. Henley went into this home and took a Dell laptop computer. She submitted that there was no other evidence that any other crime was intended to have been committed inside the home other than theft of the laptop. R. 386, ll. 6-9; R. 390, l. 18 – R. 391, l. 8.

In response, the solicitor noted that the indictment on burglary made no reference to larceny. However, he admitted that the acquittal on larceny “puts us in a much tougher spot with regard to proving the burglary,” understanding that the state could not mention the laptop at the retrial like they did in their arguments at the first trial. R. 392, l. 23 – R. 393, l. 23. He pointed the court to State v. Peterson, 336 S.C. 6, 518 S.E.2d 277 (Ct. App. 1999), in support of the state’s position that it is merely required to prove that there was an intent to commit a crime in the dwelling, not that the underlying crime actually occurred. R. 394, ll. 4-21. He further referenced State ex rel. Taylor v. Janes, 693 S.E.2d 82 (W.Va. 2010), wherein the defendant was acquitted of conspiracy but the state was allowed to retry him on the hung count of murder. R. 394, l. 21 – R. 395, l. 7. The solicitor submitted that their proof of intent to commit a crime therein would be in the form of testimony that Henley’s car was backed up under the Moss’ garage with the back door open and Henley was startled by the witness who saw him in the house – probably caught right at the beginning of his burglary and didn’t have time to get into that much. R. 395, l. 23 – R. 396, l. 15.

In response, defense counsel distinguished the West Virginia case by noting that there was no overlapping fact necessary to prove murder and conspiracy to commit murder. However, she argued that in the present case Henley was found not guilty of the only crime that the state could possibly try to prove that he had the intent to commit therein. R. 396, l. 16 – R. 399, l. 6. Though counsel averred that review of the transcripts of the first trial was necessary to the court’s finding, the trial judge did *not* take a copy of the transcript. R. 399, l. 6 – R. 400, l. 21. Instead, he ruled that counsel’s argument was a directed verdict type argument, which she could renew at that stage. He found that the state has the “burden of proving with the intent to commit a crime” but that the acquittal of the larceny did not preclude them from presenting facts from

which the jury could infer intent to commit a crime therein. R. 399, l. 18 – R. 400, l. 10. The trial judge said that he found the Peterson case “on point.” R. 402, ll. 1-23.

Discussion

Misapprehending Yeager v. United States, 557 U.S. 110 (2009), the Court of Appeals held Henley’s “acquittal for larceny – the taking of the Dell computer – [was] not dispositive of whether the state could satisfy the elements necessary for a first-degree burglary conviction.” Instead of employing the analysis from Yeager, the Court used Blockburger v. United States, 284 U.S. 299 (1932), to hold that “[e]ach of the offenses require[d] proof of different critical elements.” According to the Court, “[b]ecause Henley’s acquittal for larceny did not settle the critical issue of ultimate fact as to whether he entered Victim’s home without consent with the intent to commit a crime, the state was not precluded from retrying him for first degree burglary.” App. 8. This holding misapprehends controlling Supreme Court law.

The Double Jeopardy Clause of the Fifth Amendment, applicable to the states through the Fourteenth Amendment, offers protection to citizens from being subjected to double jeopardy for the same offense. U.S. Const. amend. V (“No person shall be... subject for the same offense to be twice put in jeopardy of life or limb...”); U.S. Const. amend. XIV. The guarantee against double jeopardy offers three separate constitutional protections: (1) protection against a second prosecution for the same offense after acquittal; (2) protection against prosecution for the same offense after conviction; and (3) protection against multiple punishments for the same offense. State v. Cuccia, 353 S.C. 430, 434, 578 S.E.2d 45, 48 (Ct. App. 2003). In Ashe v. Swenson, 397 U.S. 436, 443 (1970), the United States Supreme Court found the previously civil concept of collateral estoppel applicable to criminal cases, writing:

“Collateral estoppel” is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that when

an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.

See also State v. Hewins, 409 S.C. 93, 106, 760 S.E.2d 814, 821 (2014).

The Double Jeopardy Clause embodies two vitally important interests. Yeager v. United States, 557 U.S. 110, 117 (2009). The first is the “deeply ingrained” principle that “the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.” Id. at 117-18 (quoting Green v. United States, 355 U.S. 184, 187–188 (1957)). The second interest is the preservation of “the finality of judgments.” Id. at 118 (quoting Crist v. Bretz, 437 U.S. 28, 33 (1978)).

In Yeager v. United States, 557 U.S. 110, 112 (2009), the United States Supreme Court held that an apparent inconsistency between a jury’s verdict of acquittal on some counts and its failure to return a verdict on other counts does not affect the acquittals’ preclusive force under the Double Jeopardy Clause. The Yeager case involved the criminal prosecution of one of the Enron executives, who was charged with 126 counts of federal securities offenses, which the Court grouped into two general categories – the “fraud counts” and the “insider trader counts” – for ease of reference. 557 U.S. at 112-14. The jury acquitted Yeager on the fraud counts but did not reach a verdict on the insider trading counts. Id. at 114-15. At the re-trial, the government sought a new indictment that charged only Yeager, rather than several other previous co-defendants, and further refined the charges against him. Id. at 115.

Yeager moved the trial court to dismiss the indictments based on issue preclusion and the Double Jeopardy Clause, on the basis that the insider trading counts necessarily required a factual finding that was decided in his favor by virtue of the acquittal on the fraud charges. 557

U.S. at 115-16. Yeager was convicted after the trial court denied his motion, reasoning that “the question whether Yeager possessed insider information was not necessarily resolved in the first trial and could be litigated anew in a second prosecution.” *Id.* The Court of Appeals affirmed, though it concluded from the record that the jury must have found when it acquitted petitioner that he did not have any insider information that contradicted what was presented to the public. *Id.* at 116. While the intermediate appellate court acknowledged that this factual determination would normally preclude the Government from retrying petitioner for insider trading or money laundering, it was persuaded “that a truly rational jury, having concluded that petitioner did not have any insider information, would have *acquitted* him on the insider trading counts.” *Id.* (emphasis in original). Considering “the hung counts along with the acquittals,” the Court of Appeals court found it “impossible to decide with any certainty what the jury necessarily determined.” *Id.*

The *Yeager* Court noted a conflict between jurisdictions regarding whether a jury’s failure to reach a verdict on some count should play any role in determining the preclusive affect of an acquittal. 557 U.S. at 116-17. In holding that the failure to return a verdict has no affect on such analysis, the Court noted the Double Jeopardy Clauses’ interest in preserving the finality of the jury’s judgment. *Id.* at 117-18. The Court looked to the reasoning of *Ashe v. Swenson*, 397 U.S. 436, 437 (1970), that “the Double Jeopardy Clause precludes the Government from relitigating any issue that was necessarily decided by a jury’s acquittal in a prior trial.” *Yeager*, 557 U.S. at 119; *but see State v. Easler*, 327 S.C. 121, 134, 489 S.E.2d 617, 624–25 (1997) (“As to the double jeopardy issue, we affirm the Court of Appeals’ holding that *Blockburger* is the only remaining test to determine a double jeopardy violation.”). The *Yeager* Court wrote:

To decipher what a jury has necessarily decided, we held that courts should “examine the record of a prior proceeding, taking into account the pleadings,

evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.”

Id. at 119-20 (quoting Ashe, 397 U.S. at 444) (emphasis added).

Though the Yeager Court noted that Ashe involved an acquittal after trial on a single offense, it found that its reasoning was still controlling “because, for double jeopardy purposes, the jury’s inability to reach a verdict on the insider trading counts was a nonevent and the acquittals on the fraud counts are entitled to the same effect as Ashe’s acquittal.” 557 U.S. at 120. The Court explained that a hung count is not a relevant part of the record of the prior proceeding because there is no way to determine what the hung count represents or why the jury hung. Id. at 121-22. Conversely, “[a] jury’s verdict of acquittal represents the community’s collective judgment regarding all the evidence and arguments presented to it.” Id. at 122. Thus, “[e]ven if the verdict is based upon an egregiously erroneous foundation, its finality is unassailable.” Id. (internal quotations and citations omitted). In applying these principles to Yeager, the Court ruled that “if the possession of insider information was a critical issue of ultimate fact in all of the charges against petitioner, a jury verdict that necessarily decided that issue in his favor protects him from prosecution for any charge for which that is an essential element.” Id. at 123. The Court remanded the case for further proceedings consistent with its opinion. Id. at 126.

Here, both the Court of Appeals and the trial judge erred in failing to apply the test set forth in Yeager to determine whether the state was collaterally estopped from re-prosecuting Henley for first-degree burglary following his acquittal for larceny related to the same incident. The trial judge improperly likened defense counsel’s argument to that of a motion for directed

verdict. See R. 399, l. 18 – 400, l. 10. As noted by the Court in Abney v. United States, 431 U.S. 651, 659-60 (1977):

[T]he very nature of a double jeopardy claim is such that it is collateral to, and separable from the principal issue at the accused's impending criminal trial, i.e., whether or not the accused is guilty of the offense charged. In arguing that the Double Jeopardy Clause of the Fifth Amendment bars his prosecution, the defendant makes no challenge whatsoever to the merits of the charge against him. Nor does he seek suppression of evidence which the Government plans to use in obtaining a conviction. **Rather, he is contesting the very authority of the Government to hale him into court to face trial on the charge against him.**

(internal citations omitted) (emphasis added). While Double Jeopardy does not bar retrial where a mistrial was declared out of “manifest necessity” due a jury’s inability to reach a decision, the Yeager Court made clear that the inquiry regarding a bar to retrial does not end there. 557 U.S. at 118. Rather, the trial court must determine whether the interest in preserving the finality of the jury’s judgment on the decided count(s) bars a retrial on the undecided count(s) because “the jury’s acquittals unquestionably terminated petitioner’s jeopardy with respect to the issues finally decided in those counts.” Id.

In making this determination, the focus of the Court of Appeals should have been on the evidence and arguments presented at the first trial as mandated by Yeager, not on whether the two offenses had the same elements. Undertaking the proper analysis requires holding Henley’s second trial violated Double Jeopardy. Specifically, Yeager provides that the court should “examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.” 557 U.S. at 119-20 (quoting Ashe, 397 U.S. at 444). The trial court’s failure to conduct the requisite analysis is further illustrated by its failure to take the copies of the first trial transcript offered by defense counsel. R. 400, ll. 2-21. Thus, the trial judge erred as a matter of law in failing to

determine what facts were necessarily decided in the first action and how those facts bore on the defense's argument of preclusion under the double jeopardy protection.

At retrial, the state was required to prove both the intruder's identity and his intent to commit a crime therein. S.C. Code Ann. § 16-11-311(A)(2) ("A person is guilty of burglary in the first degree if the person enters a dwelling without consent and *with intent to commit a crime in the dwelling*, and . . . the burglary is committed by a person with a prior record of two or more convictions for burglary or housebreaking or a combination of both." (emphasis added)); see Gibbs v. State, 403 S.C. 484, 496, 744 S.E.2d 170, 176 (2013) (finding no prejudice from failure to request alibi charge "[g]iven the clarity of the jury charge requiring the State to prove identity beyond a reasonable doubt"); see also Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1994) (stating that an alibi charge places "emphasizes that it is the State's burden to prove the defendant was present at and participated in the crime."). There was no dispute at Henley's first trial that the Moss' home was broken into and that her laptop was stolen. Rather, the focus was on the identity of the perpetrator. Thus, the acquittal on larceny was a finding that Henley was not the person who stole the laptop. This impacted the retrial in several ways. First, the state was precluded from relitigating Henley's identity as the intruder. Second, the state was precluded from arguing that the stolen laptop was evidence of Henley's "intent to commit a crime therein." Relatedly, the prior jury's finding that Henley did not steal precluded the state's continuing theory that the criminal intent was to steal. As such, Henley's retrial for first-degree burglary was barred by the Double Jeopardy Clause because the state was precluded from relitigating the issues that were necessarily decided by the jury's prior acquittal on larceny.

II. The Court of Appeals erred by affirming the trial court's denial of the defense's motion to admit evidence of Henley's acquittal on the prior larceny charge where the state's theory of the case continued to be that the burglar's intention was to steal.

Relevant Facts

Defense counsel moved to admit the record of the indictment for larceny that reflected Henley's prior acquittal. R. 612, ll. 1-9; R. 691. The solicitor objected, claiming that it would bring to the jury's attention that the case was tried previously, which would invite speculation on what happened at the prior hearing. R. 612, ll. 13-20. Defense counsel noted there are often separate trials for lower court charges and General Sessions charges. R. 612, l. 21 – R. 613, l. 2. She further argued that the acquittal was exculpatory and a permissible part of the constitutional right to present a defense to the state's attempt to prove that there was "an intent to commit a crime therein." R. 613, ll. 2-11. She noted that there was no reference on the document to the prior trial on the burglary charge. R. 613, ll. 11-18.

The solicitor argued that admission of the document would open the door "to talking about the missing evidence," presumably referring to evidence that a laptop was located on a bench through the window, that the boot print in the carpet was located within a foot of the bench, and that the laptop was missing from the house when the Mosses returned. He said: "Again, if they want to put that in, I mean, we'd agree that he's been acquitted of it. But the element of burglary is the intent to commit the crime." R. 613, ll. 19-23.

The trial judge responded:

I don't believe this is allowed. I think it would confuse the jury. It does mention the same date, the same victim, and a piece of personality. To some extent it opens the door to a whole slew of issues. But it seems to me this would confuse the jury more than help the jury in their findings of fact as to his guilt or innocence on this charge. And I'll tell you, it's a novel issue for me. I've never

had this presented, so I commend y'all for coming up with this. But I've never thought about that. But I think my ruling would be under, I'm not sure which rule.

R. 614, ll. 12-22.

The solicitor interjected that he believed the applicable rule was Rule 401, SCRE, regarding relevance. He argued that the prior acquittal "does not help resolve an issue we're here for on the burglary" and would cause confusion and speculation. R. 615, ll. 6-12. Defense counsel responded that the evidence was probative, arguing:

He was found not guilty of the crime that the State had previously alleged was committed inside the home We'd be seeking to admit it to try to defend against the element of burglary that requires the State to prove intent to commit a crime therein. We'd be using it to show no crime was committed inside the home and that they can't prove any intent to commit a crime inside the home.

R. 615, l. 13 – R. 616, l. 12. Nevertheless, the trial judge denied the request for admission of the documentation of the prior acquittal. R. 616, ll. 13-15.

Discussion

The Court of Appeals held Henley's acquittal on the larceny charge was irrelevant because "it did not make the existence of any fact of consequence in the proceeding more or less probable with respect to the elements of first-degree burglary." App. 9. According to the Court, the state was required to prove Henley entered Moss's home without her consent and with the intent to commit a crime; but "there was no requirement that the state prove [Henley] entered Victim's home without consent and successfully committed the crime of taking Victim's Dell computer." App. 9. Next, the Court held that assuming the evidence was relevant, the trial judge "did not abuse [his] discretion in determining that any probative value was substantially outweighed by the danger of unfair prejudice and misleading the jury." App. 10. In the Court's view, Henley's "prior acquittal had little to no probative value as it did not prove or disprove any element necessary to the first degree burglary charge; yet admission of the evidence would have

likely led to jury confusion because it would have invited the jury to speculate about what occurred at the first trial.” App. 10. The Court misapprehended the relevant case law and Henley’s constitutional rights when arriving at this conclusion.

“‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Rule 401, SCRE. “All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina. Evidence which is not relevant is not admissible.” Rule 402, SCRE. Rule 403, SCRE, provides: “Although relevant, evidence may be excluded if its probative value is *substantially outweighed* by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” (emphasis added).

South Carolina addressed the admissibility of a prior acquittal in State v. Houston, 17 S.C.L. 300 (S.C. App. L. & Eq. 1829). Houston was indicted for uttering and publishing a forged note, purporting to be the promissory note of C. B. Atwood, knowing the same to be forged. 17 S.C.L. at 300. In the prior term, Houston was acquitted on a similar indictment for uttering another forged note. Id. At the second trial, the judge permitted admission of evidence that the note on which the first indictment was based was a forgery. Id. Both notes were in Houston’s handwriting and he was convicted on the Atwood forgery. Id. The Houston Court ruled that the defendant’s prior “acquittal on the note, which was produced in evidence, cannot affect the principle, **although it may weaken the force of the evidence.**” Id. at 303 (emphasis added). The Court noted that there was evidence that the prior acquittal may have been the result

of a defect in the original indictment or the absence of witnesses. *Id.* The Court wrote: “It does not follow, that because a man is acquitted, he is innocent: the legal consequence is, that he cannot be tried again. But still he may have been guilty, and this guilt may be sh[o]wn in a collateral matter.” *Id.* Thus, Houston recognized the relevance of facts related to a prior acquittal to a subsequent trial for a separate offense.

Similarly, here the prior acquittal on larceny was relevant to the current proceedings. The defense properly sought its admission to attack the state’s theory that Henley had any intent to commit a crime inside of the residence, specifically to steal. Notably, the solicitor repeatedly argued in his closing that the crime that the intruder sought to commit was theft – saying “I’ll submit to you his intent was to go in there and clean them out;” that Henley stopped “to see what they had good in there;” and that “[h]e thought he’d get a little treasure trove.” R. 640, ll. 16-19; R. 646, l. 20 – R. 647, l. 1. Any confusion or speculation that concerned the trial judge or solicitor could have been cured with a simple limiting instruction by the trial court rather than exclusion of the evidence or through the solicitor’s argument regarding the weight to be given to prior acquittal. Further, the trial judge never made the requisite finding that the probative value of the evidence *was substantially outweighed* by the danger of unfair prejudice, confusion of the issues, or misleading the jury. *See* R. 614, l. 22 – 615, l. 5; R. 616, ll. 13-15. As the Court of Appeals has noted previously, “[a]ll evidence is meant to be prejudicial; it is only *unfair* prejudice which must be scrutinized under Rule 403.” State v. Gray, 408 S.C. 601, 616, 759 S.E.2d 160, 168 (Ct. App. 2014). However, in this case, the Court neglected its duty by affirming the trial judge’s decision to exclude the relevant and highly probative evidence.

III. The Court of Appeals erred in affirming the trial judge's limitation on the admission of Jolene Gray's testimony from the prior trial where Gray was unavailable to the defense and her testimony provided evidence that the police had an opportunity to obtain a cigarette smoked by Henley from outside of his home.

Relevant Facts

At Henley's first trial, Jolene Gray, his girlfriend at the time of the incident, testified on redirect examination that five law enforcement officers came to their apartment complex a second time after they had spoken with Henley. She said that they were walking around and picked something up off of the ground, though she was unsure what they picked up. R. 261, ll.

14-25. In the closing argument at the first trial, defense counsel argued:

Jolene said that one of the times the officers came to talk to Rickey, there were some cars parked out and she saw the officers picking stuff up. She didn't know what they were picking up. It may seem crazy, crazy for us to ask you to draw an inference they were picking up a cigarette butt. But what is equally crazy, is that we've got all this lost evidence in this case and we know it's lost. You would think, you know, that things like this don't happen, but they really do. And the State acknowledges that these things happen. So it's really not that far of a stretch to say, well, maybe, maybe they picked something up that day. Because we don't know where that cigarette butt was until March 29th of 2012.

R. 302, ll. 6-18.

At the second trial, during its pre-trial motions, the defense moved to admit the sworn testimony from the first trial of defense witnesses Jolene Gray and Officer Michael Belcher pursuant to Rule 804(b)(1). Counsel represented that Gray was Henley's girlfriend at the time of the incident but that their investigator had been unable to locate her in order to secure her presence at the retrial. Counsel offered to call her investigator to testify regarding her attempts to located Gray; however, the solicitor said that he did not have any objection to admission of the prior testimony. R. 461, l. 12 – R. 462, l. 9. In response to the trial judge's question regarding

how much of the testimony they wanted to present, defense counsel said: "All of it. There's not much testimony." R. 462, ll. 10-13.

After the trial judge granted the defense's motion to admit the former trial testimony, the solicitor said: "And, Judge, we are going to probably try to ask our investigator if he can find Ms. Jolene Gray just to see if there is a reason why she's not showing, though." R. 463, l. 20 – R. 464, l. 2. Judge Griffith responded: "Okay. If you can find her, get her." R. 464, l. 3. The solicitor said: "Yes sir. We'll do that;" and defense counsel said that was fine with her. R. 464, ll. 4-6.

The next day, the solicitor again represented that he no objection to the reading of Officer Belcher's testimony from the prior trial. R. 593, l. 25 – R. 594, l. 20. However, with respect to Jolene Gray, he said:

Judge, the other one is Jolene Gray; is a former girlfriend of the Defendant in this case. It's my understanding that she is not here today. We did, after yesterday, it was brought to our attention, we were able to contact her through our office, our investigator contacted her and she said she's in Anderson. She's never received a subpoena. Judge, I understand that the Defense just wants to read in a prior transcript of her testimony. **Your Honor, my, you know, we're not going to oppose that, but in my cross from a prior hearing, I'm only going to read a portion of it. And then I put on the record, I think, and once I stop at that one portion, that would, the reading of redirect from the Defense would be outside the scope of our cross.**

R. 594, l. 20 – R. 595, l. 8. (emphasis added). Defense counsel responded that Gray's testimony on redirect was critical to the defense due to the testimony about the cigarette butt. R. 595, l. 21 – R. 597, l. 10. However, the judge ruled Gray's testimony would not be presented in full; instead, the jury would only hear the portions the state wanted. R. 595, l. 21 – R. 597, l. 10. The defense called Jolene Gray as a witness and a portion of her testimony was read into the record. R. 599, l. – R. 600, l. 1. 13; R. 676.

Discussion

The Court of Appeals held that Gray's testimony was inadmissible hearsay in accordance with Rule 804(a)(5), SCRE, because she was not served with a subpoena. App. 13. The Court neglected to consider the remaining portion of the rule, which provides the declarant is unavailable if the proponent of the statement has been unable to procure her attendance by process "or other reasonable means." Defense counsel offered to call her investigator to detail the "other reasonable means" undertaken by the defense to secure Gray's attendance; however, this presentation was rendered unnecessary when the state conceded Gray's unavailability. The Court erred by holding that Gray's prior testimony was hearsay in light of the state's concession making the development of the record in this regard unnecessary.

The Court of Appeals expressed "concern" that the trial judge permitted the state to select portions of Gray's testimony to be read and excluded portions Henley sought to present. Although the Court showed concern over the trial judge's handling of the prior testimony, the Court found the error was not prejudicial to Henley. The real reason for the state's request is apparent from the record – he wanted to exclude the defense's evidence regarding law enforcement's opportunity to obtain a cigarette butt with Henley's DNA from his yard. This testimony was essential to the defense's attack on the reliability of the DNA analysis on the cigarette butt, which was lost along with the Sheriff's Department's chain of custody log. Additionally, Gray's testimony revealed another opportunity for law enforcement to look for corroborating evidence, such as the missing laptop, doo-rag, or burglary tools, which they failed to do. R. 595, l. 21 – R. 596, l. 10.

In summary, there being no dispute that the Gray was unavailable to the defense and subject to cross-examination by the same solicitors during the prior trial, the trial court had no

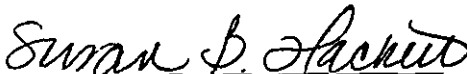
basis to exclude a portion of Gray's former testimony. In doing so, he abused his discretion, and the Court of Appeals by affirming the trial judge's ruling.

Juxtaposing the evidence presented at the first trial with the evidence presented at the second trial along with the outcomes of those trials also demonstrates how the error was not harmless beyond a reasonable doubt. The state's evidence was almost identical in each trial. The defense too presented almost the identical evidence in the second trial as it had the first. The greatest difference between the two trials was the exclusion of the portion of Gray's testimony in which she described law enforcement showing up at her home and picking up items off the ground. At the first trial, Gray's testimony combined with the other evidence showing the police conducted a poor investigation – lost evidence, lost chain of custody – resulted in the jury acquitting Henley of larceny and being unable to render a verdict on the burglary count. Speculation is unnecessary here to determine what effect the erroneous ruling had on the jury's verdict because the first trial demonstrates the absence of Gray's testimony was substantial.

CONCLUSION

Petitioner respectfully requests this Court grant certiorari on the issues presented and order full briefing.

Respectfully Submitted,


 Susan B. Hackett
 Appellate Defender

ATTORNEY FOR PETITIONER

This 16th day of March, 2020.

RECEIVED

MAR 16 2020

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Abbeville County
Eugene C. Griffith, Jr., Circuit Court Judge

Opinion No. 5694 (S.C. Ct. App. filed December 11, 2019)
2012-GS-01-348

THE STATE,

RESPONDENT,

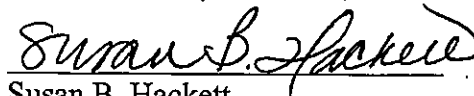
V.

RICKEY SANTOINE HENLEY,

PETITIONER

CERTIFICATE OF SERVICE

I certify that a copy of the Petition for Writ of Certiorari and a copy of the Appendix in this case has been served on V. Henry Gunter, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Rickey Henley, #290970, at Kirkland Correctional Institution, 4344 Broad River Road, Columbia, SC 29210; and the Court of Appeals, at 1220 Senate Street, Columbia, SC 29201, this 16th day of March, 2020.


Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO BEFORE
ME this 16th day of March, 2020.

 (L.S)
Notary Public for South Carolina
My Commission Expires: September 30, 2029

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MAR 16 2020

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM ABBEVILLE COUNTY

Court of General Sessions

The Honorable Eugene C. Griffith, Circuit Court Judge

Appellate Case No. 2020-000482

THE STATE,

Respondent,

v.

RICKEY SANTOINE HENLEY,

Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

JOSHUA A. EDWARDS
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

DAVID M. STUMBO
Solicitor, Eighth Judicial Circuit

Post Office Box 516
Greenwood, SC 29648
(864) 942-8800

ATTORNEYS FOR RESPONDENT

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Apr 20 2020

S.C. SUPREME COURT

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STATEMENT OF ISSUES ON APPEAL

I.

The trial judge properly denied Henley's motion to quash the indictment on double jeopardy grounds because his prior acquittal for larceny did not decide the ultimate question of whether he entered the dwelling with criminal intent.

II.

The trial judge properly denied the defense's request to admit evidence of Henley's prior acquittal for larceny where the evidence was irrelevant and risked misleading the jury.

III.

The trial judge properly limited the admission of hearsay testimony from Henley's first trial because Henley did not show the witness was unavailable, and Henley was not prejudiced by the exclusion of a portion of the testimony.

STATEMENT OF THE CASE

Ricky Henley was indicted during the July 2012 term of the Grand Jury for Abbeville County for burglary in the first degree and larceny. He proceeded to a jury trial before the Honorable R. Lawton McIntosh from April 8-9, 2015, in Abbeville, South Carolina. The jury found Henley not guilty of larceny, but remained hung on the burglary charge. Judge McIntosh declared a mistrial on the burglary charge.

Henley was subsequently re-tried for burglary in the first degree from April 4-6, 2016 in Abbeville, before the Honorable Eugene C. Griffith, Jr. and a jury. Henley was found guilty of burglary in the first degree. He was sentenced by Judge Griffith to imprisonment for a term of twenty-four years.

STATEMENT OF FACTS

Rick Culbreth resided in the same community as Jamie and Amanda Moss in Abbeville. R. pp. 486-87. On February 15, 2012, Culbreth passed by the Moss's house and noticed a black male running from the front door to a side door and observed a gray car backed under the carport with the door open. R. pp. 488-89. Recognizing the situation as abnormal, Culbreth turned his vehicle around and went back to the Moss's house. R. pp. 488-89. Culbreth observed the black male standing in the doorway of the house and noted it appeared he had made entry into the home. R. p. 489. Culbreth testified he could tell the man wasn't supposed to be there. R. p. 490.

After spotting Culbreth, the intruder got into his vehicle and pulled out of the driveway. R. p. 490. The intruder stopped his vehicle in front of Culbreth's white pickup truck, which was pulling a trailer with a lawn mower, and asked him if he needed any help with lawn care, to which Culbreth replied that he did not. R. p. 490. When asked what the intruder looked like, Culbreth stated, "I just remember he had a bandana tied tightly around his head. It went down the back of his neck. Light-skinned from what I could tell. But I do not remember any, you know, marks, facial scars, or anything." R. p. 491. The intruder then drove away and merged onto Highway 28 North. R. p. 491. As the intruder drove past, Culbreth looked into his rearview mirror and was able to get a partial license plate number. R. p. 491. After the intruder turned onto Highway 28 North, Culbreth turned into the driveway and called 911. R. p. 491. Culbreth described the car as a Pontiac that was gray in color and seemed to be a late 1980's or 1990's model. R. p. 498. The license plate number Culbreth provided to law enforcement was "HSN [REDACTED]." [REDACTED]."

Patrick Thompson, a detective in the property crimes division of the Abbeville County Sheriff's Office, was working on February 15, 2012. R. pp. 518-19. Deputy Thompson received a radio call about the apparent burglary at the Moss home and proceeded to the area. R. pp. 519-

20. Upon his arrival, Deputy Thompson processed the crime scene. R. p. 520. While processing the scene, Deputy Thompson noticed a footwear impression on the carpet. R. p. 521. Officers also recovered a cigarette butt from the intruder's point of entry. R. p. 521. The cigarette was collected and placed into evidence at the scene. R. p. 524.

Amanda and Jamie Moss both testified at trial. R. pp. 508-17. Mrs. Moss testified that when looking through the home's windows, you can see televisions, speakers, couches, antiques, and pictures. R. p. 509. At trial, Mrs. Moss was shown various photographs which she testified depicted the home's side carport door. R. pp. 511-12. The carport door was partially broken off and appeared to have been tampered with. R. p. 512. The doorframe was also damaged. R. p. 512. Mrs. Moss testified the cigarette found near the steps to the home did not belong to her or her husband, as neither one of them smoked. R. p. 513, 510. Mrs. Moss stated the cigarette was not there when she left the house that morning. R. p. 511. Mrs. Moss noted she normally locked the door to the house when she left. R. p. 514. Mr. Moss also noted the door was locked when he left and there was not a cigarette butt on the steps. R. p. 516. A laptop computer was missing from the home. R. p. 136).

After speaking with Culbreth, Deputy Thompson searched for a suspect vehicle. R. p. 521. Deputy Thompson searched a SLED vehicle database based on the tag description provided by Culbreth. R. p. 522. The search returned a 1997 Pontiac owned by Henley and Jolene Gray with the license plate number "HSN [REDACTED]." R. p. 522. Based on information he received from the Department of Motor Vehicles, Deputy Thompson went to Henley's address in Anderson County on February 22, 2012. R. p. 524. Upon arriving at the apartment, Deputy Thompson noticed a Pontiac Bonneville with the license plate "HSN [REDACTED]" parked outside. R. p. 528. Deputy Thompson noted this license plate number was close to the description provided by Culbreth and

that, "I believe he stated it was HSN [REDACTED] or HSM [REDACTED], but we knew it was, there was a possibility it could be off, because he was reading it from his rearview mirror." R. p. 528. Henley was at the residence and spoke with law enforcement. R. p. 529. Henley admitted he had been in Abbeville recently and further acknowledged he had been on Highway 28. R. pp. 530-31. Henley also recalled speaking to someone in a truck. R. p. 531. Henley also admitted he smoked Newport cigarettes, the type of cigarette found at the Mosses' home. R. pp. 532-33. Deputy Thompson also noticed Henley was wearing boots, the soles of which resembled the impression left on the Moss's carpet. R. p. 532. Henley was later placed under arrest. R. p. 533. The laptop computer was never recovered. R. p. 231.

Maryanne Boehm works for SLED in the DNA casework department. R. p. 570. Boehm received the Newport cigarette butt for testing on March 29, 2012. R. p. 573. The DNA profile developed from the cigarette butt matched the DNA profile of Henley. The probability of randomly selecting an unrelated individual with a DNA profile matching the cigarette butt is 1 in 1.5 billion. R. p. 580.

ARGUMENT

I.

The trial judge properly denied Henley's motion to quash the indictment on double jeopardy grounds because his prior acquittal for larceny did not decide the ultimate question of whether he entered the dwelling with criminal intent.

Henley contends the trial judge erred by denying his motion to quash the burglary indictment in his retrial on double jeopardy grounds, citing Yeager v. United States, 557 U.S. 110 (2009). Henley argues his acquittal on the larceny charge during his first trial should have barred the State from re-trying him for burglary because this would be "relitigating the issues that were necessarily decided by the jury's prior acquittal on larceny." Br. of App. p. 17. Henley's argument fails because his prior acquittal of larceny did not decide whether Henley committed burglary. The issue of whether Henley entered the Moss's home without consent and with the intent to commit a crime is different from whether he stole the laptop, and was not decided in his first trial. Henley's re-trial for burglary in the first degree was not barred by issue preclusion. Certiorari should be denied.

Relevant Facts

As noted in Respondent's Statement of the Case, at Henley's first trial, he was acquitted of larceny and the jury hung on the burglary charge. R. p. 348. At the beginning of Henley's second trial, Henley filed a motion to quash the indictment based on Double Jeopardy. R. p. 352-61 (Defendant's Motion to Quash). During a pre-trial hearing, Defense Counsel argued:

So it's our position, Your Honor, that under the Supreme Court case of Yeager that because of this overlap in facts that jeopardy attaches because he was acquitted of full larceny that there is, in order to prove their case at all for a burglary, they need to reference some sort of crime and the only one they can reference is larceny. He's been acquitted of that larceny. So it's our position that under Yeager and Ashe that the issue preclusion analysis offered there and done

under the double jeopardy clause of the Fifth Amendment would prevent the State from prosecuting him again on this case.

R. p. 392. In response, the solicitor argued:

While [Defense Counsel] does note that the warrant identifies that petty larceny, we would note that the indictment does not identify that a petty larceny was committed inside. It merely restates the elements of burglary in that Mr. Henley entered with the intent to commit a crime therein. We didn't say there was larceny in the indictment. And to quote Yeager, because a jury speaks only through its verdict, it's failure to reach a verdict cannot by negative implications yield a piece of information that helps put together the trial puzzle. Such conjecture about possible reasons for a jury's failure to reach a decision should play no part in assessing the legal consequences of a unanimous verdict that the jurors did return. Your Honor, we will certainly concede that the not guilty on the larceny puts us in a much tougher spot with regard to proving the burglary. But again we would note the elements of burglary of Code 16-11-311 (a). A person who is guilty of burglary in the first degree if a person enters a dwelling without consent and with intent to commit a crime in the dwelling. It doesn't say enters without consent and commits a larceny. . . . Mr. Brown and I have pretty much resigned ourselves to the fact that any mention of that lap top will be gone from this trial. But to say that Yeager precludes us from going forward on this case because of double jeopardy is to just read Yeager too broad.

R. pp. 392-93. The solicitor also referred the trial judge to State v. Peterson, 336 S.C. 6, 518 S.E.2d 277 (Ct. App. 1999), and continued:

But it is an assault with intent to commit CSC, along with a burglary case. The Defendant in the assault with intent to commit CSC was found not guilty of the assault with intent to commit CSC but found guilty of the burglary first degree. Defendant appealed and the Court reasoned basically the same reason that there is no requirement that the Defendant has to be found guilty of the underlying crime. Once again to sum it up, Your Honor, the elements of burglary do not require us to prove the underlying larceny. They merely require the State to prove that there is an intent to commit a crime in the dwelling.

R. p. 394. The trial judge ruled:

Here's what I think. I understand your argument. I think it's a directed verdict to fact question as to whether they conclude and get past directed verdict stage. With the intent to commit a crime therein is one of the elements of burglary first and second and third. The State's got that burden of proving with the intent to commit a crime. I don't believe the acquittal of the larceny precludes them from presenting facts which the jury could prove intent to commit a crime therein. They have not had that opportunity yet. So I think your motion should be denied right

now, but I feel confident you will most likely renew it at the directed verdict stage in a similar-worded argument if the State's failed to prove anything beyond a suggestion of intent to commit a crime therein. So I don't believe jeopardy attaches to the burden (sic) charge since it's not a specific crime. The indictment does not get quashed at this point, but the Court will be listening.

R. pp. 399-400.

Standard of Review

In criminal cases, appellate courts sit to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001).

Discussion

"Simple larceny of any article of goods, choses in action, bank bills, bills receivable, chattels, or other article of personalty of which by law larceny may be committed. . . . [with] a value of two thousand dollars or less, is petit larceny." S.C. Code Ann. § 16-13-30(A). By comparison, "a person is guilty of burglary in the first degree if the person enters a dwelling without consent and with intent to commit a crime in the dwelling, and. . . . the burglary is committed by a person with a prior record of two or more convictions for burglary or housebreaking or a combination of both." S.C. Code Ann. §16-11-311(A)(2).

Through their Double Jeopardy Clauses, the United States Constitution and the South Carolina Constitution offer protection to citizens from being subjected to double jeopardy for the same offense. See U.S. Const. amend. V ("No person shall be . . . subject from the same offense to be twice put in jeopardy of life or limb"); S.C. Const. art. I, C ("No person shall be subject for the same offense to be twice put in jeopardy of life or liberty"). The guarantee against double jeopardy offers three separate constitutional protections: (1) protection against a second prosecution for the same offense after acquittal; (2) protection against prosecution for the

same offense after conviction; and (3) protection against multiple punishments for the same offense. State v. Cuccia, 353 S.C. 430, 434, 578 S.E.2d 45, 48 (Ct. App. 2003).

The doctrine of issue preclusion is embodied in the Fifth Amendment's Double Jeopardy Clause. Ashe v. Swenson, 397 U.S. 436, 445-46 (1970). The issue-preclusion principle means that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." Id. at 443. In Ashe, the Court explained "'collateral estoppel' is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice." Id. at 443. The Court advised:

The federal decisions have made clear that the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality. Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.'

Id. at 444.

The Supreme Court later examined an issue preclusion challenge involving an attempted re-trial after the defendant was acquitted on some counts and the jury hung on other counts in Yeager v. United States, 557 U.S. 110 (2009). In Yeager, the defendant was indicted for securities fraud and insider trading. Id. at 113. The jury acquitted the defendant on the securities fraud counts; however the jury remained hung on the insider trading charges. Id. at 115. The prosecution subsequently sought to re-try the defendant on the insider trading counts, which prompted the defendant to move to dismiss all counts on the ground that the acquittals on the fraud counts precluded the prosecution from re-trying him for insider trading. Id. The District Court denied the motion, concluding the question of whether the defendant possessed insider information was not necessarily resolved in the first trial. Id. at 116-17. Despite the fact that

Yeager's case was distinguishable from Ashe in that Yeager involved an acquittal on some counts and a mistrial on others, the Supreme Court applied Ashe's reasoning to Yeager's case, noting, "the reasoning in Ashe is nevertheless controlling because, for double jeopardy purposes, the jury's inability to reach a verdict on the insider trading counts was a nonevent and the acquittals on the fraud counts are entitled to the same effect as Ashe's acquittal." Id. at 120. The Supreme Court subsequently found, "if the possession of insider information was a critical issue of ultimate fact in all of the charges against petitioner, a jury verdict that necessarily decided that issue in his favor protects him from prosecution for any charge for which that is an essential element." Id. at 123.

In this case, Henley's prior acquittal of larceny did not bar retrial for burglary. The dispositive fact in a burglary case is the entering of a dwelling with criminal intent, not the completion of a particular crime once inside. These are different issues. Henley's acquittal of larceny did not settle whether he entered the home with criminal intent. On the contrary, the fact that the first jury hung on the burglary charge shows they did not make a determination on that issue.

State v. Mitchell, 399 S.C. 410, 731 S.E.2d 889 (Ct. App. 2012), is instructive. In that case, Mitchell sought a new trial on his conviction for burglary in the first degree because the jury found Mitchell not guilty of petit larceny alleged to have occurred during the burglary. The Court noted that Mitchell seemed to be referencing the "inconsistent verdict theory" and explained:

Mitchell was charged and convicted of first-degree burglary, pursuant to section 16-11-311(A) of the South Carolina Code (2003). The pertinent portion of the statute states: 'A person is guilty of burglary in the first degree if the person enters a dwelling without consent and with intent to commit a crime in the dwelling....' S.C. Code Ann. § 16-11-311 (A) (2003) (emphasis added). Mitchell was identified from photographs on the deer camera in Potts's home. Potts testified

that he did not recognize the person in the photographs and had not given permission for that person to be in his home. There was testimony Mitchell held a bag and a flashlight in one of the photographs, and the photograph was admitted into evidence. A jury could have inferred that Mitchell intended to commit a crime while in Potts's home, and due to a multitude of scenarios, was unable or decided not to carry out the intended crime.

Id. at 422-23. Like Mitchell, Henley conflates entering with the intent to commit a crime with the actual commission of a crime. Although the jury in Henley's first trial found the State failed to prove the larceny charge, there was no requirement that the State actually prove he committed a separate crime within the home in order to prove the burglary charge. See State v. Peterson, 336 S.C. 6, 7, 518 S.E.2d 277, 278 (Ct. App. 1999) (in a case where defendant was found guilty of first-degree burglary and not guilty of first-degree assault with intent to commit criminal sexual conduct, the Court of Appeals held the "fact that the jury failed to convict Peterson of the sexual assault charge does not affect the validity of the burglary charge. Indeed, that fact is immaterial."). As noted by the solicitor at trial, if the State was required to prove a larceny occurred within the home, the State may find itself in dire straits under the Yeager framework. But as in Mitchell, the jury could have concluded Henley criminally entered the home, yet been unconvinced he stole the laptop, which was never recovered. R p. 231. Because Henley's acquittal for larceny did not settle whether he entered the home with the intent to commit a crime, the State was not precluded from retrying Henley for burglary. Certiorari should be denied.

II.

The trial judge properly denied the defense's request to admit evidence of Henley's prior acquittal for larceny because the evidence was irrelevant and risked misleading the jury.

Henley asserts the trial court erred in denying his motion to admit evidence of his prior acquittal on the larceny charge relating to the laptop that was stolen from the Mosses' house. Specifically, Henley avers the prior verdict was relevant to attack the State's theory that he had the intent to commit a crime within the residence, and that the trial judge never made the requisite finding that the probative value of the evidence was substantially outweighed by the risk of unfair prejudice. This argument fails because the larceny acquittal was irrelevant in Henley's subsequent prosecution for burglary and any probative value the evidence had was substantially outweighed by unfair prejudice. Certiorari should be denied.

Relevant Facts

At trial, Defense Counsel sought to introduce the self-authenticating copy of the larceny indictment from Henley's first trial. R. p. 612. Defense Counsel argued:

I think it's exculpatory information and it is important for the jury to consider. One of the things that the state has to prove is the intent to commit a crime therein. We are permitted to put up a defense, Your Honor. [Henley] is certainly entitled to his constitutional right to defend himself and part of our defense is in talking to the jury about that crime of intent to commit a crime that he was acquitted of. It's exculpatory and I think it's important for the jury to know. I don't think it brings up any sort of reference as to any prior trial on this particular charge. . . .

R. p. 613. The solicitor argued the evidence was irrelevant. R. p. 612, 614. The trial judge found, "I don't believe this is allowed. I think it would confuse the jury. It does mention the same date, the same victim, and a piece of personality. . . But it seems to me this would confuse the jury

more than help the jury in their findings of fact as to his guilt or innocence on this charge.” R. p. 614.

Standard of Review

In criminal cases, appellate courts sit to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). When reviewing an evidentiary ruling, the appellate court gives great deference to the trial judge because the reception or exclusion of evidence is a matter left largely to the sound discretion of a trial judge. State v. Groome, 274 S.C. 189, 190-191, 262 S.E.2d 31, 32 (1980). An appellate court will not reverse a trial judge’s decision to admit or exclude evidence absent a clear prejudicial abuse of the trial judge’s broad discretion in evidentiary matters. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847-48 (2006). “An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.” State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

Discussion

Only relevant evidence should be admitted at trial. Douglas, 369 S.C. at 430, 632 S.E.2d at 848; Rule 402, SCRE. “Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears.” State v. Alexander, 303 S.C. 377, 380, 401 S.E.2d 146, 148 (1991); see Rule 401, SCRE.

However, even if relevant, evidence must be excluded from trial if its probative value is substantially outweighed by the danger of unfair prejudice. State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009); see Rule 403, SCRE (“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of

time, or needless presentation of cumulative evidence.”). The determination of the probative value of evidence relative to its potential prejudicial effect must be based on the entire record and the result generally hinges on the facts of each particular case. State v. Gillian, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007).

Probative value is the measure of the importance of a piece of evidence’s tendency to prove or disprove some fact or issue relevant to the outcome of a case. State v. Collins, 398 S.C. 197, 202, 727 S.E.2d 751, 754 (Ct. App. 2012), rev’d on other grounds, 409 S.C. 524, 763 S.E.2d 22 (2014). Unfair prejudice means an undue tendency to suggest a decision on an improper basis. State v. Dickerson, 341 S.C. 391, 400, 535 S.E.2d 119, 123 (2000).

Evidence of Henley’s acquittal on the larceny charge was irrelevant because it did not make the existence of any fact of consequence more or less probable. The prior verdict was not evidence at all; it was a previous jury’s determination of guilt of a separate, uncharged crime. There was no evidentiary link whatsoever presented at trial that would make the larceny acquittal a relevant issue. While the State was required to prove Henley entered the Moss’s home with intent to commit a crime, the fact that Henley was found not guilty of larceny did not make that fact more or less likely. As discussed above, the State was not required to prove a crime actually occurred within the home, much less that the crime was larceny.

Henley further claims the trial court erred by not conducting a Rule 403 analysis. Because the evidence was irrelevant, it had no probative value and no 403 balancing test was required. But even if the evidence had some probative value necessitating a 403 balancing test, the trial judge made an express finding that the evidence would “confuse the jury.” This is clearly an acknowledgment that he considered Rule 403 was before excluding the evidence. The trial judge correctly concluded the prior acquittal carried a high risk of unfair prejudice because

it would have confused the issues and misled the jury. The admission of the indictment for larceny would invite the jury to speculate about what occurred at the first proceeding and would suggest a decision on an improper basis. By presenting evidence that Henley was acquitted of a larceny charge stemming from the same incident, Henley would be impliedly imploring the jury to find him not guilty of burglary simply because the earlier jury had found him not guilty of larceny. This would suggest a decision on an improper basis, as the jury would concern themselves with the results of the other proceeding instead of the facts presented to them throughout trial. The evidence of Henley's prior conviction was thus irrelevant and carried the risk of unfair prejudice. See West v. State, 228 Ga.App. 713, 492 S.E.2d 576 (Ga. Ct. App. 1997) (finding evidence of defendant's prior acquittals had no probative value in trial for perjury based on statements he made during prior trial for child molestation, because evidence of the acquittals was neither relevant nor material to any issue in the case). Certiorari should be denied.

III.

The trial judge properly limited the admission of hearsay testimony from Henley's first trial because Henley did not show the witness was unavailable, and Henley was not prejudiced by the exclusion of a portion of the testimony.

Henley contends the trial judge erred in limiting the admission of Jolene Gray's testimony from Henley's first trial. At trial, Henley asserted Gray's testimony would provide evidence that the police neglected to obtain corroborating evidence like a doo-rag or burglary tools when they first visited Gray's home. Now on appeal, Henley makes a different argument; he asserts the testimony was relevant to show it was possible police picked up a different cigarette off the ground at Gray's house, and tested it instead of the one from the crime scene. His argument fails for several reasons. First, his argument on appeal is different from his argument at trial, and thus unpreserved. Second, Henley did not show Jolene Gray was unavailable pursuant to Rule 804(b)(1), as defense counsel did not even subpoena Gray to secure her appearance at trial. While the Solicitor graciously did not object to the bulk of the prior testimony coming in, he did not consent to the admission of the redirect examination from the first trial. It was within the trial court's discretion to refuse to admit this portion of the testimony because it was hearsay. Finally, Henley was not prejudiced by the exclusion of Gray's redirect testimony because it was not important to the case and he was still able to argue that the State neglected to seek a search warrant and find corroborating evidence at Gray's home. Certiorari should be denied.

Relevant Facts

During Henley's first trial, his girlfriend, Jolene Gray, asserted during cross-examination by the solicitor that law enforcement came to the residence she shared with Henley on a second occasion. R. p. 260. On re-direct, Gray testified:

The second time they came, it was five of them, I think. One was at the back, four in the front. My son was living with me at the time. [Henley's] car be there. My car there and my son's car. They was walking around the grounds, you know, picking up. What they were picking up, I have no idea. But they was walking around. Yes.

R. p. 261. Defense Counsel referenced Gray's testimony during her closing argument in support the defense theory that the State's DNA evidence was not credible because of poor investigative protocols, noting:

You also remember Officer Thompson isn't really sure what other officers were there. And that's another thing that's not good enough. He doesn't know which officers were there. An officer he says was there doesn't remember being there. But Jolene said that one of the times the officers came to talk to [Henley], there were some cars parked out and she saw the officers picking stuff up. She didn't know what they were picking up. It may seem crazy, crazy for us to ask you to draw an inference they were picking up a cigarette butt. But what is equally crazy, is that we've got all this lost evidence in this case and we know it's lost. You would think, you know, that things like this don't happen, but they really do. And the State acknowledges that these things happen. So it's really not that far of a stretch to say, well, maybe, maybe they picked something up that day. Because we don't know where that cigarette butt was until March 29th of 2012. And, again, you heard from the SLED agent all the care that they take. And that they had that cigarette butt from March 29th until sometime in August of 2012. They tested it in August. They sent it back to the agency in 2012. But yet she doesn't return her actual analysis until January 2013.

R. p. 302.

During Henley's subsequent re-trial for burglary in the first degree, defense counsel moved to admit former testimony from a previous trial. R. p. 461. Defense Counsel stated, "Ms. Gray was the client, my client's girlfriend. She had some testimony, we have been unable to locate her. I can have our investigator come up and we can have her testify as to all of the efforts that she made to try to locate Ms. Gray." R. pp. 461-462. Defense Counsel continued, "But we would ask under Rule 804 (b)(1), which is the hearsay exception where declarant is unavailable to introduce Ms. Gray's testimony from the previous trial." R. p. 462. The solicitor replied, "Judge, I really don't have an objection to it. If we were in the same boat, I'd be asking the same

thing.” R. p. 462. The trial judge granted Defense Counsel’s motion, stating, “motion granted.” R. p. 463. However, the solicitor reserved his right to double-check whether Gray was actually unavailable: “[a]nd, Judge, we are going to probably try to ask our investigator if he can find Ms. Jolene Gray just to see if there is a reason why she’s not showing, though.” R. pp. 463-64. The trial judge replied, “Okay. If you can find her, get her.” R. p. 464. Defense Counsel indicated her agreement by stating, “I’m fine with that.” R. p. 464.

After the State rested its case-in-chief, the solicitor stated:

Judge, it’s my understanding that there are two potential defense witnesses that are not here. . . . Judge, the other one is Jolene Gray; is a former girlfriend of the Defendant in this case. It’s my understanding that she is not here today. We did, after yesterday, it was brought to our attention, we were able to contact her through our office, our investigator contacted her and she said she’s in Anderson. She’s never received a subpoena. Judge, I understand that the Defense just wants to read in a prior transcript of her testimony. Your Honor, my, you know, we’re not going to oppose that, but in my cross from a prior hearing, I’m only going to read a portion of it. And then I put on the record, I think, and once I stop at that one portion, that would, the reading of redirect from the Defense would be outside the scope of our cross.

R. pp. 594-95. Defense Counsel responded:

Your Honor, the redirect portion goes to the officers coming out a second time, searching the home and not finding anything, leaving, searching the premises. The witness says that perhaps someone picked up something off the ground and we would want all of that testimony to come in to show that no items were collected, a doo-rag, burglary tools from the home since [Henley] did live there. It’s our position that the entire testimony should come in.

R. pp. 595-96. The Court observed, “Well, now, we don’t know whether something was picked up off the ground or not. That’s unknown. She’s speculating.” R. p. 596. Defense Counsel replied, “She says that she saw, so it was her, you know, what she saw at that moment, but she saw several officers, I think she says near her car.” R. p. 596. The solicitor noted:

And Judge, one thing to go farther, she never said who those officers were associated with. So that’s, that just is, we had our officer testify that he went up there twice. The first time he was not there. The second time he talked to

[Henley], and then there was no other times that he went up there. And I, and looking over the transcript again from my cross, that redirect would be out of the scope of that cross.

R. p. 596. The trial judge found:

All right. I think I'm going to grant his motion to limit his cross-examination to where he wants to stop. But I do not believe that will limit you or Ms. Bolen, whichever one closes, in saying nothing was taken or recovered from the house or you'd have seen it here today. I think y'all could say something along those lines in your closing argument and you can summarize it, had they gone and found something in that search, certainly it would be here. It's not here.

R. p. 596-97.

During her closing argument, Defense Counsel noted:

What else would a search warrant maybe have helped Officer Thompson with? Well, you heard Rick Culbreth say the individual was wearing a doo-rag and he wrote that a few days later on the lineup. A search warrant maybe would have produced that doo-rag. What about burglary tools? Why not get a search warrant for the car or the house or something like that to look for burglary tools?

R. p. 627. Defense Counsel later argued Officer Thompson, "could have gotten a search warrant. He could have gotten a comparison of the boots. He could have tried to find burglary tools or a doo-rag." R. p. 629-30.

Standard of Review

A trial judge's determination of whether a statement is admissible under Rule 804(b)(3) will not be disturbed absent an abuse of discretion. Dodd v. Berlinsky, 344 S.C. 172, 176, 543 S.E.2d 237, 239 (Ct. App. 2001).

Discussion

Rule 804(b)(1) of the South Carolina Rules of Evidence provides that the prior testimony of a witness is not excluded by the rule against hearsay if the declarant is unavailable as a witness. Rule 804(b)(1), SCRE. Specifically, the rule allows:

Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

Rule 804(b)(1), SCRE. Rule 804(a) provides the various scenarios in which a declarant is deemed to be “unavailable.” The only pertinent scenario in Henley’s case is Rule 801(a)(5), which provides that a witness is unavailable for hearsay purposes if the witness, “is absent from the hearing and the proponent of a statement has been unable to procure the declarant’s attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant’s attendance or testimony) by process or other reasonable means.” Rule 801(a)(5), SCRE. The party offering the statement bears the burden of establishing unavailability. Dodd v. Berlinsky, 344 S.C. 172, 177, 543 S.E.2d 237, 240 (Ct. App. 2001).

Henley failed to show Jolene Gray was unavailable. While defense counsel asserted her investigator could not locate Gray, the solicitor’s office had no difficulty locating her on short notice in the middle of trial. Gray told the solicitor’s office she was never served with a subpoena. The record supports a finding that Gray was not unavailable, making her testimony inadmissible hearsay.

Henley had the burden of showing unavailability. Not only does the record belie his assertion that Gray was unavailable, he failed to make any offer of proof at trial showing what “reasonable means” he used to find Gray. See Wright v. Hiester Const. Co., 389 S.C. 504, 520, 698 S.E.2d 822, 831 (Ct. App. 2010) (explaining prior testimony was inadmissible “because there was no showing that [witnesses] were unavailable as witnesses”). Henley failed to show deviation from the standard hearsay rule was warranted. The solicitor was within his rights to

refuse to consent to this portion of the prior testimony, particular where the redirect examination was outside the scope of cross-examination.

Henley notes, “the solicitor did not argue that there was any evidentiary basis for excluding Gray’s testimony and no objections to her redirect were made at the first trial.” Br. of App. p. 26. However, this Court can find the testimony inadmissible on hearsay grounds despite the fact that the solicitor consented to admission of a portion of the prior testimony. See Rule 220(c), SCACR (“The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.”).

Regardless of whether Gray’s prior testimony was properly admissible under Rule 804(b)(1), SCRE, Henley suffered no prejudice from the exclusion of a limited portion of the testimony. An appellate court will not reverse a conviction based on the erroneous admission or exclusion of evidence unless prejudice has been shown. State v. Taylor, 333 S.C. 159, 172, 508 S.E.2d 870, 876 (1998). Appellate courts will decline to set aside convictions for insubstantial errors which could not reasonably have affected the result. State v. Price, 368 S.C. 494, 499, 629 S.E.2d 363, 366 (2006).

The prior testimony in question was not important to the outcome of the case. This was the entirety of the testimony in question:

The second time they came, it was five of them, I think. One was at the back, four in the front. My son was living with me at the time. Ricky car be there. My car there and my son’s car. They was walking around the grounds, you know, picking up. What they were picking up, I have no idea. But they was walking around.

(App.p.262).

Henley argued Gray’s testimony was necessary to support the defense argument that law enforcement neglected to obtain a search warrant and search Henley’s home for corroborating

evidence such as a doo-rag or burglary tools on this particular occasion.¹ But that fact was evident from the evidence presented at trial, and the theory was still presented to the jury. As noted by the trial judge in his ruling, defense counsel had the opportunity to, and did, emphasize multiple times during closing argument that law enforcement declined to search Henley's home for a doo-rag, burglary tools, or other corroborating evidence on that occasion. Although Henley now argues the testimony may have been relevant to show there was a possibility police tested a different cigarette than the one recovered from the crime scene, he did not argue this basis to the trial court. In any case, the testimony was not important and could not have affected the outcome of the case. Henley thus suffered no prejudice from the exclusion of the hearsay testimony. Certiorari should be denied.

¹ Police did later obtain a search warrant and search Gray's home. (App.p.259).

CONCLUSION

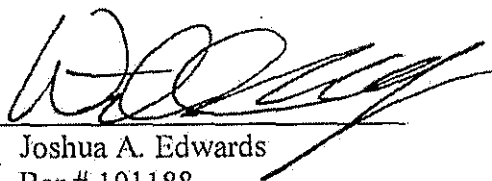
For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

JOSHUA A. EDWARDS
Assistant Attorney General

DAVID M. STUMBO
Solicitor, Eighth Judicial Circuit

BY: 
FOR Joshua A. Edwards
Bar # 101188

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

April 20, 2020

The Supreme Court of South Carolina

The State, Respondent,

v.

Rickey Santoine Henley, Petitioner.

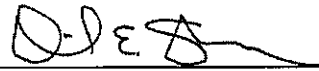
Appellate Case No. 2020-000482

ORDER

Based on the vote of the Court, the petition for a writ of certiorari is denied.

FOR THE COURT

BY



CLERK

Columbia, South Carolina
October 19, 2020

cc:

Susan Barber Hackett, Esquire
Alan McCrory Wilson, Esquire
Vann Henry Gunter, Jr., Esquire
David Matthew Stumbo, Esquire
Joshua Abraham Edwards, Esquire
The Honorable Jenny Abbott Kitchings



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
CHIEF DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1220 SENATE STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

October 19, 2020

The Honorable Emily Yeargin McMahan
PO Box 99
Abbeville SC 29620-0099

REMITTITUR

Re: The State v. Rickey Henley
Lower Court Case No. 2012GS0100348
Appellate Case No. 2016-000844

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.

The following exhibits filed in this case are being returned to you:

State's exhibit 11, 12 : photographs of cigarette butt

Please sign and return the enclosed copy of this letter acknowledging receipt of these items.

Exhibit Receipt Acknowledgment

Name: _____ Date: _____

Very truly yours,

V. Claire Allen

CLERK

Enclosure

cc: Alan McCrory Wilson, Esquire
Vann Henry Gunter, Jr., Esquire
David Matthew Stumbo, Esquire
Susan Barber Hackett, Esquire
William M. Blich, Jr., Esquire

FORM 5

STATE OF SOUTH CAROLINA

County of Abbeville# 290970-Rickey Santione Hewley
Full name and prison number (if any) of Applicant

v.

State of South Carolina

IN THE COURT OF COMMON PLEAS

2021-CP-01-085

2021 MAR 30 PM 12:30

FILED
STATE OF SOUTH CAROLINAAPPLICATION FOR
POST-CONVICTION RELIEFTRUE COPY
BY V. J. J. J.
ABBEVILLE COUNTY CLERK OF COURTINSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Abbeville County Jail / SCDC
2. Name and location of Court which imposed sentence 102 Court Sq Ste,
Abbeville Court (103, Abbeville S.C. 29620)
3. Name(s) of co-defendant(s) (if any) N/A
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2012G50100348
 - (b) 0679-Burglary (After June 20, 1985)- First degree

- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) 04/06/2016
- (b) 24 years defendant to be given Credit for jail
- (c) time served 215 days
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty Trail Guilty
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
April 14, 2016 (yes)
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. Abbeville General Sessions Court
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. they Affirmed.
- ii. the Circuit Court-April 8, 2015 -Jury returned a Verdict
- iii. of Not guilty on Larceny Charge.
- (c) the date of each such result:
- i. Jury was hung of first degree burglary charge,
- ii. the Circuit Court declared a mistrial on April 9, 2015
- iii. Circuit Court's denial of Henley's motion to preclude retrail.
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. (1) finding his prior larceny acquittal did not bar
- ii. his retrail for burglary; (2) excluding
- iii. evidence of the prior larceny acquittal (3) limiting the
- admission of a witness prior trial testimony (4) admitting evidence
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) of DNA Testing Conducted on a Cigarette butt found at the Crime
Scene.
- (b) _____

- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) Henley argues the Court erred by denying his motion
 (b) to quash the burglary indictment on double jeopardy
 (c) grounds. because it failed the proper test.
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) Prior to the state of his second trial, Henley made
 (b) to quash the burglary indictment, arguing any retrial
 (c) would violate both the federal and state Double Jeopardy
Clauses.
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? NO
 (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? NO
 (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? NO
 (d) any other petitions, motions or applications in this or any other Court? NO
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. _____
 ii. _____
 iii. _____
 iv. _____
- (b) the name and location of the Court in which each was filed:
- i. _____
 ii. _____
 iii. _____
 iv. _____

(c) the disposition thereof:

- i. _____
- ii. _____
- iii. _____
- iv. _____

(d) the date of each such disposition:

- i. _____
- ii. _____
- iii. _____
- iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

- i. _____
- ii. _____
- iii. _____
- iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

yes

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

- i. Circuit Court, denying his motion to quash
- ii. the Burglary indictment on double jeopardy grounds
- iii. because it failed to apply the proper test.

(b) the proceedings in which each ground was raised:

- i. prior to the state of his second trial, Henry
- ii. moved to quash the burglary indictment, arguing
- iii. any retrial would violate both the federal and
State Double Jeopardy Clauses.

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

- (a) the jury hung on first degree burglary charge and
 (b) the Circuit Court declared a mistrial on April 9, 2015
 (c) after the Circuit Court denial of Henley's motion to preclude retial

17. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? _____
 (b) your trial, if any? yes
 (c) your sentencing? yes
 (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? yes
 (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?

18. If you answered "yes" to one or more parts of (17), list:

- (a) the name and address of each attorney who represented you:
 i. Appellate Defender Susan Barber Hackett R.S. H.
public Defender - South Carolina Commission of Indigent Defense
 ii. Susan Barber Division of Appellate Defense P.O. Box 11569 Columbia
Shane Edwin Goranson, Eight Circuit public defender office SC 29211
 iii. Yasha Pravin, Patel - Box P-133 Park Plaza, Ste 208
Greenwood, S.C. 29646
 (b) the proceedings at which each such attorney represented you:
 i. Susan Barber Hackett - file appeal
Patricia A. Bolden - Attorney
 ii. Shane Edwin Goranson - Attorney
Yasha Pravin, Patel - Attorney
 iii.

19. State clearly the relief you seek in filing this application:

In filing this application I seek relief for a New
Trail or reduce Sentence ~~RS~~ or Free to go home.
Because in this trail I was treated Unfair.

20. Are you now under sentence from any other court that you have not challenged?

NO

STATE OF SOUTH CAROLINA)

County of Abbeville)

VERIFICATION

I, Rickey Santoine Henley, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Rickey S. Henley

SWORN to and subscribed before me this 23
 day of MARCH, 2021.

[Signature] (L.S.)
 Notary Public

CHELSEA N. JOHNSON
 Notary Public, State of South Carolina
 My Commission Expires 4/4/2027

My Commission Expires: April 4, 2027

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, Rickey Santoine Henley, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

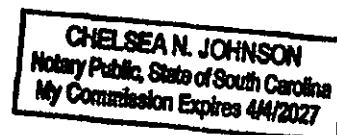
- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Rickey S. Henley
Applicant

SWORN or affirmed to and subscribed before me this

23 day of March, 2021.

[Signature]
Notary Public



My Commission Expires: April 4, 2027

STATE OF SOUTH CAROLINA
COUNTY OF ABBEVILLE

Rickey Santione Henley, #290970,
Applicant,

v.

State of South Carolina,
Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE EIGHTH JUDICIAL CIRCUIT

Case No.: 2021-CP-01-085

RETURN AND MOTION TO DISMISS

In response to Rickey Santione Henley's (Applicant) action for post-conviction relief (PCR) commenced March 23, 2021, the State makes this return and moves to dismiss this application for failure to state a cognizable claim for relief, as well as being barred by the doctrine of *res judicata*¹.

I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections (SCDC) pursuant to orders of commitment of the Abbeville County Clerk of Court. Applicant was indicted at the July 2012 term of the Abbeville County Grand Jury for Burglary, First Degree (2012-GS-01-00348, and Larceny, \$2,000 or less (2012-GS-01-00349). Applicant was represented by Assistant

TRUE COPY
BY V. Clark
ABBEVILLE COUNTY CLERK OF COURT

¹ Respondent's return to Applicant's PCR application was originally due on July 6, 2021. See Rule 12(a), SCRCP ("[T]he State of South Carolina shall answer or otherwise respond to an application for post-conviction relief within 60 days after service of the application, if it arises out of a guilty plea, and 90 days if it arises out of a trial.") However, having completed the return required in this matter, and in light of no demonstrable prejudice to Applicant as a consequence of the delay, Respondent respectfully asks this Court to accept this return as timely filed. See S.C. Code Ann. § 17-27-70(a) (establishing that the Court may fix the time in which Respondent must respond and that "respondent shall file with its answer the record or portions thereof that are material to the questions raised in the application."); *Guinyard v. State*, 260 S.C. 220, 195 S.E.2d 392 (1973) (holding the trial court may extend the time for filing and that the time limit prescribed by the statute is not mandatory, but discretionary with the trial court.).

Public Defenders Patricia A. Bolen, Esquire, and Yasha Patel, Esquire. Assistant Solicitor Demetri Andrews, Esquire prosecuted the case.

On April 8, 2015, Applicant proceeded to trial by jury before the Honorable R. Lawton McIntosh. At the conclusion of trial, the jury's verdict found Applicant not guilty of larceny, however the jury remained hung as to the charge of burglary in the first degree. After the jury's verdict, Judge McIntosh declared a mistrial as to the burglary charge.

Applicant was subsequently retried for burglary in the first degree from April 4-6, 2016 before the Honorable Eugene C. Griffith, Jr. and a jury. At the conclusion of trial, Applicant was found guilty of burglary in the first degree. Judge Griffith sentenced Applicant to imprisonment for a term of twenty-four years.

Applicant timely filed a notice of intent to appeal his conviction and sentence. Laura R. Baer, Esquire, of the Office of Appellate Defense represented Applicant on appeal and presented the following issue:

1. Did the trial court err in denying Appellant's motion to quash the indictment based on Double Jeopardy where the trial court erred as a matter of law in failing to apply the proper test under *Yeager* and where Appellant's prior acquittal of larceny necessarily decided that Appellant was not the person who stole the homeowner's laptop, the sole item missing after the burglary, precluding the State from relitigating Appellant's identity as the intruder or intent to steal.
2. Did the trial court err in denying the defense's motion to admit evidence of Appellant's acquittal on the prior larceny charge where the state's theory of the case continued to be that the burglar's intention was to steal.
3. Did the trial court err in limiting the admission of Jolene Gray's testimony from the prior trial where Gray was unavailable to the defense and her testimony provided evidence that the police had an opportunity to obtain a cigarette smoked by Appellant from outside of his home.

After briefing and oral arguments, the court of appeals affirmed the lower court's decision, holding that Applicant's acquittal for larceny did not preclude the State from retrying Applicant for first degree burglary, evidence of Applicant's larceny acquittal was irrelevant, and the trial courts error in allowing the State to read portions of testimony from Applicant's former girlfriend constituted harmless error. *State v. Henley*, 428 S.C. 649, 837 S.E.2d 639 (Ct. App. 2019). The case was remitted back to the circuit court on October 19, 2020.

On March 16, 2020, Applicant, through appellate counsel Susan B. Hackett, filed a petition for writ of certiorari with the South Carolina Supreme Court, presenting the same issues raised to the South Carolina Court of Appeals. On October 19, 2020, the South Carolina Supreme Court denied Applicant's Petition for Writ of Certiorari through a written order.

II. CURRENT APPLICATION

Applicant timely commenced this PCR action on March 23, 2021. Applicant asserts he is being held in custody unlawfully for the following reason (verbatim):

1. "Henley argues the Court erred by denying his motion to quash the burglary indictment on double jeopardy grounds. Because it failed the proper test."
 - a. "Prior to the state [*sic*] of his second trail [*sic*], Henley move to quash the burglary indictment arguing any retrail [*sic*] would violate both the federal and state double jeopardy clauses."

As requested relief, Applicant is seeking "a new trial, or reduced sentence, or free to go home. Because in this trial I was treated unfair."

Attached herewith and incorporated herein are the Abbeville County Clerk of Court records regarding the subject conviction, Applicant's SCDC records, the trial transcript, the appellate records (including the record on appeal), and the records of this PCR action. The State reserves the right to amend this return upon receipt of any relevant materials.

III. MOTION TO DISMISS

Respondent moves for summary dismissal pursuant to section 17-27-70(b) of the South Carolina Code of Laws on the basis that applicant is not entitled to post-conviction relief due to procedural bars prohibiting his application and no purpose would be served by any further proceedings. Because Applicant's application is procedurally barred, Respondent requests the Court issue a conditional order of dismissal indicating the Court's intent to dismiss the application and its reasons for so doing.² See S.C. Code Ann. § 17-27-70(b) (establishing procedure for summary disposition of PCR applications); Leamon v. State, 363 S.C. 432, 434, 611 S.E.2d 494, 495 (2005) (summary disposition appropriate when there is no need to develop facts and the applicant is not entitled to relief). Respondent moves for summary dismissal for the following reasons:

Failure to State a Claim

Applicant's claim the trial court erred in denying his motion to quash the burglary indictment (2012-GS-01-00348) on double jeopardy grounds, because the indictment failed the proper test, should be summarily dismissed for failure to state a cognizable claim. See, e.g., *Drayton v. Evatt*, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993) ("[PCR] is not a substitute for appeal or a place for asserting errors for the first time which could have been reviewed on direct appeal.").

An applicant may commence a post-conviction relief action on the following grounds:

1. United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;

² A proposed Conditional Order of Dismissal consistent with this return and motion to dismiss is concurrently submitted for the Court's consideration.

4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
5. That his sentence has expired, his probation, parole or conditional release [was] unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy....

S.C. Code Ann. § 17-27-20(A).

However, Respondent contends that claims of trial court error are not cognizable under the Uniform Post-Conviction Procedure Act. *See Roscoe v. State*, 345 S.C. 26, 20, 546 S.E.2d 417, 419 (2001) (noting that allegations of trial court error are not cognizable on PCR); *Simmons v. State*, 264 S.C. 417, 215 S.E.2d 883 (1975) (finding that alleged trial errors and sufficiency of evidence are direct appeal issues that are not cognizable PCR claims); *Stephey v. State*, 278 S.C. 47, 292 S.E.2d 41 (1982) (explaining that issues that could have been raised on direct appeal cannot be considered on PCR application absent claims of ineffective assistance of appellate counsel).

Applicant's allegations do not support a cognizable claim for post-conviction relief under any of the statutory grounds. Applicant has previously raised the same issue in his direct appeal. The South Carolina Court of Appeals ruled that Applicant's acquittal for larceny did not preclude the State from retrying Applicant for burglary, because Applicant's acquittal for larceny is not dispositive of whether the State could satisfy the elements necessary for a first degree burglary conviction. Applicant now seeks to raise the same issue in his post-conviction relief application to subvert the ruling of the South Carolina Court of Appeals, and relitigate this issue.

Accordingly, the State moves to dismiss these allegations pursuant to Rule 12(b)(6), SCRCF, for failure to state a cognizable claim. The State further moves for summary dismissal of

this claim pursuant to section 17-27-70 because there is no genuine issue of material fact which would necessitate an evidentiary hearing and these allegations should be dismissed as a matter of law.

Res Judicata

Res judicata prohibits subsequent actions by the same parties on the same issues. *Bell v. Bennett*, 307 S.C. 286, 414 S.E.2d 786 (Ct. App. 1992). A final judgment on the merits in a prior action bars subsequent consideration of those issues in a new action. *Foran v. USAA Cas. Ins. Co.*, 311 S.C. 189, 427 S.E.2d 918 (Ct. App. 1993). *Res judicata* also bars any issues that could have been raised in the former action. *Id.*; see also *Foxworth*, 275 S.C. 615, 274 S.E.2d 415.

Before the Court will hold an evidentiary hearing, Applicant must make a *prima facie* showing he is entitled to relief. *Welch*, 246 S.C. 258, 143 S.E.2d 455. Issue preclusion means that “when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.” *Ashe v. Swenson*, 397 U.S. 436, 445-46 (1970). Applicant had a full opportunity to litigate his allegation during his direct appeal, and subsequent petition for writ of certiorari. Applicant raised this allegation both during his direct appeal to the South Carolina Court of Appeals, and his petition for writ of certiorari to the South Carolina Supreme Court. Applicant’s claim was denied by the South Carolina Court of Appeals in a written opinion published by the South Carolina Court of Appeals, finding Applicant’s acquittal for larceny did preclude the State from retrying Applicant for first degree burglary. *State v. Henley*, 428 S.C. 649, 837 S.E.2d 639 (2019). Further, the finality of the previous court’s rulings should be respected, and this Court should summarily dismiss these allegations as barred by the principles of *res judicata*.

V. ANY AND ALL OTHER ALLEGATIONS

Each and every allegation contained within the application not expressly admitted, qualified, or explained in this return is hereby denied.

VI. CONCLUSION

WHEREFORE, the State respectfully requests the Court summarily dismiss this application for failure to state a cognizable claim for relief, and as barred by the doctrine of *res judicata*.

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

MICHAEL J. NEUBAUER
Assistant Attorney General

By:



ATTORNEYS FOR RESPONDENT
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211

August 3, 2021

STATE OF SOUTH CAROLINA
COUNTY OF ABBEVILLE

IN THE COURT OF COMMON PLEAS
FOR THE EIGHTH JUDICIAL CIRCUIT

Rickey Santione Henley, #290970,

Case No. 2021-CP-01-085

Applicant,

v.

CONDITIONAL ORDER OF DISMISSAL

State of South Carolina,

Respondent.

FILED
STATE OF
SOUTH CAROLINA
COUNTY OF ABBEVILLE
21 AUG 30 PM 10:57
CLERK OF COURT

This matter comes before the Court by way of a post-conviction relief (PCR) action commenced by Rickey Santione Henley (Applicant) on March 23, 2021. The State made its return on July 30, 2021, requesting the action be summarily dismissed.¹

I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections (SCDC) pursuant to orders of commitment of the Abbeville County Clerk of Court. Applicant was indicted at the July 2012 term of the Abbeville County Grand Jury for Burglary, First Degree (2012-GS-01-00348, and Larceny, \$2,000 or less (2012-GS-01-00349). Applicant was represented by Assistant

¹ The State's return was originally due on July 6, 2021. See Rule 12(a), SCRCP ("[T]he State of South Carolina shall answer or otherwise respond to an application for post-conviction relief within 60 days after service of the application, if it arises out of a guilty plea, and 90 days if it arises out of a trial.") However, having completed the return required in this matter, and in light of no demonstrable prejudice to Applicant as a consequence of the delay, this Court grants the State's request accept its return as timely filed. See S.C. Code Ann. § 17-27-70(a) (establishing that the Court may fix the time in which the State must respond and that "respondent shall file with its answer the record or portions thereof that are material to the questions raised in the application."); *Guinyard v. State*, 260 S.C. 220, 195 S.E.2d 392 (1973) (holding the trial court may extend the time for filing and that the time limit prescribed by the statute is not mandatory, but discretionary with the trial court.).

TRUE COPY
BY Vanessa Clark
ABBEVILLE COUNTY CLERK OF COURT

Public Defenders Patricia A. Bolen, Esquire, and Yasha Patel, Esquire. Assistant Solicitor Demetri Andrews, Esquire prosecuted the case.

On April 8, 2015, Applicant proceeded to trial by jury before the Honorable R. Lawton McIntosh. At the conclusion of trial, the jury's verdict found Applicant not guilty of larceny, however the jury remained hung as to the charge of burglary in the first degree. After the jury's verdict, Judge McIntosh declared a mistrial as to the burglary charge.

Applicant was subsequently retried for burglary in the first degree from April 4-6, 2016 before the Honorable Eugene C. Griffith, Jr. and a jury. At the conclusion of trial, Applicant was found guilty of burglary in the first degree. Judge Griffith sentenced Applicant to imprisonment for a term of twenty-four years.

Applicant timely filed a notice of intent to appeal his conviction and sentence. Laura R. Baer, Esquire, of the Office of Appellate Defense represented Applicant on appeal and presented the following issue:

1. Did the trial court err in denying Appellant's motion to quash the indictment based on Double Jeopardy where the trial court erred as a matter of law in failing to apply the proper test under *Yeager* and where Appellant's prior acquittal of larceny necessarily decided that Appellant was not the person who stole the homeowner's laptop, the sole item missing after the burglary, precluding the State from relitigating Appellant's identity as the intruder or intent to steal.
2. Did the trial court err in denying the defense's motion to admit evidence of Appellant's acquittal on the prior larceny charge where the state's theory of the case continued to be that the burglar's intention was to steal.
3. Did the trial court err in limiting the admission of Jolene Gray's testimony from the prior trial where Gray was unavailable to the defense and her testimony provided evidence that the police had an opportunity to obtain a cigarette smoked by Appellant from outside of his home.



After briefing and oral arguments, the court of appeals affirmed the lower court's decision, holding that Applicant's acquittal for larceny did not preclude the State from retrying Applicant for first degree burglary, evidence of Applicant's larceny acquittal was irrelevant, and the trial courts error in allowing the State to read portions of testimony from Applicant's former girlfriend constituted harmless error. *State v. Henley*, 428 S.C. 649, 837 S.E.2d 639 (Ct. App. 2019). The case was remitted back to the circuit court on October 19, 2020.

On March 16, 2020, Applicant, through appellate counsel Susan B. Hackett, filed a petition for writ of certiorari with the South Carolina Supreme Court, presenting the same issues raised to the South Carolina Court of Appeals. On October 19, 2020, the South Carolina Supreme Court denied Applicant's Petition for Writ of Certiorari through a written order.

II. CURRENT APPLICATION

In his current application for post-conviction relief, Applicant alleges he is being held in custody unlawfully based on the following (excerpt verbatim):

1. "Henley argues the Court erred by denying his motion to quash the burglary indictment on double jeopardy grounds. Because it failed the proper test."
 - a. "Prior to the state [sic] of his second trail [sic], Henley move to quash the burglary indictment arguing any retrail [sic] would violate both the federal and state double jeopardy clauses."

As requested relief, Applicant states he is seeking "a new trial, or reduced sentence, or free to go home. Because in this trial I was treated unfair."

Before this Court are the Abbeville County Clerk of Court records regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the trial transcript, the appellate records including the record on appeal, and the records of the current PCR action.

III. FINDINGS OF FACT & CONCLUSIONS OF LAW

This Court has reviewed the pleadings, the records submitted to it by the parties, and the applicable law. This Court finds there is no genuine issue of material fact which would necessitate an evidentiary hearing. *See* S.C. Code Ann. § 17-27-70(b) (establishing procedure for summary disposition of PCR applications); *Leamon v. State*, 363 S.C. 432, 434, 611 S.E.2d 494, 495 (2005) (summary disposition appropriate when there is no need to develop facts and the applicant is not entitled to relief); *See also Welch v. MacDougall*, 246 S.C. 258, 260, 143 S.E.2d 455, 456 (1965) (requiring a PCR applicant to make a prima facie showing he is entitled to relief before the court will hold an evidentiary hearing). Pursuant to South Carolina Code Annotated Sections 17-27-70 and -80, this Court informs the parties of its intent to dismiss the application based upon the following findings:

Failure to State a Claim

Applicant's claim the trial court erred in denying his motion to quash the burglary indictment (2012-GS-01-00348) on double jeopardy grounds, because the indictment failed the proper test, should be summarily dismissed for failure to state a cognizable claim. *See, e.g., Drayton v. Evatt*, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993) ("[PCR] is not a substitute for appeal or a place for asserting errors for the first time which could have been reviewed on direct appeal."). An applicant may commence a post-conviction relief action on the following grounds:

1. United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;
4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
5. That his sentence has expired, his probation, parole or conditional release [was] unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or

6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy....

S.C. Code Ann. § 17-27-20(A).

However, our Supreme Court has held that claims of trial court error are not cognizable under the Uniform Post-Conviction Procedure Act. *See Roscoe v. State*, 345 S.C. 26, 20, 546 S.E.2d 417, 419 (2001) (noting that allegations of trial court error are not cognizable on PCR); *Simmons v. State*, 264 S.C. 417, 215 S.E.2d 883 (1975) (finding that alleged trial errors and sufficiency of evidence are direct appeal issues that are not cognizable PCR claims); *Stephey v. State*, 278 S.C. 47, 292 S.E.2d 41 (1982) (explaining that issues that could have been raised on direct appeal cannot be considered on PCR application absent claims of ineffective assistance of appellate counsel).

Applicant's allegations do not support a cognizable claim for post-conviction relief under any of the statutory grounds. Applicant has previously raised the same issue in his direct appeal. The South Carolina Court of Appeals ruled that Applicant's acquittal for larceny did not preclude the State from retrying Applicant for burglary, because Applicant's acquittal for larceny is not dispositive of whether the State could satisfy the elements necessary for a first degree burglary conviction. Applicant now seeks to raise the same issue in his post-conviction relief application to subvert the ruling of the South Carolina Court of Appeals, and relitigate this issue.

Accordingly, this action must be summarily dismissed pursuant to Rule 12(b)(6), SCRCP, for failure to state a cognizable claim. Further, this action must be summarily dismissed pursuant to section 17-27-70 because there is no genuine issue of material fact which would necessitate an evidentiary hearing and these allegations should be dismissed as a matter of law.

Res Judicata

Page 5 of 7

2021-CP-01-085

Res judicata prohibits subsequent actions by the same parties on the same issues. *Bell v. Bennett*, 307 S.C. 286, 414 S.E.2d 786 (Ct. App. 1992). A final judgment on the merits in a prior action bars subsequent consideration of those issues in a new action. *Foran v. USAA Cas. Ins. Co.*, 311 S.C. 189, 427 S.E.2d 918 (Ct. App. 1993). *Res judicata* also bars any issues that could have been raised in the former action. *Id.*; see also *Foxworth*, 275 S.C. 615, 274 S.E.2d 415.

Before the Court will hold an evidentiary hearing, Applicant must make a *prima facie* showing he is entitled to relief. *Welch*, 246 S.C. 258, 143 S.E.2d 455. Issue preclusion means that “when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.” *Ashe v. Swenson*, 397 U.S. 436, 445-46 (1970). Applicant had a full opportunity to litigate his allegation during his direct appeal, and subsequent petition for writ of certiorari. Applicant raised this allegation both during his direct appeal to the South Carolina Court of Appeals, and his petition for writ of certiorari to the South Carolina Supreme Court. Applicant’s claim was denied by the South Carolina Court of Appeals in a written opinion published by the South Carolina Court of Appeals, finding Applicant’s acquittal for larceny did preclude the State from retrying Applicant for first degree burglary. *State v. Henley*, 428 S.C. 649, 837 S.E.2d 639 (2019). Further, the finality of the previous court’s rulings should be respected. Accordingly, this allegation shall be summarily dismissed as barred by the principles of *res judicata*.

IV. CONCLUSION

Pursuant to S.C. Code Ann. § 17-27-70(b), this Court intends to dismiss this application with prejudice unless Applicant provides specific reasons, factual or legal, why the application should not be dismissed in its entirety. Applicant is granted twenty (20) days from the date of service of this Order upon him to show why this Order should not become final. Applicant shall

Abbeville (TSN)

file any reasons he may have with the Union County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
 Michael J. Neubauer
 Post-Conviction Relief Division – 8th Circuit
 Post Office Box 11549
 Columbia, South Carolina 29211

Applicant is cautioned that his response to this order must be actually received by the Union County Clerk of Court and opposing counsel within twenty (20) days, and this Court will not consider any issues raised in his response if not so timely filed and served.

AND IT IS SO ORDERED this 30 day of Aug, 2021.


 DONALD B. HOCKER
 Chief Administrative Judge
 Eighth Judicial Circuit

Laurens, South Carolina

STATE OF SOUTH CAROLINA)

COUNTY OF ABBEVILLE)

Rickey Santione Henley, #290970,)

APPLICANT,)

V.)

State of South Carolina,)

RESPONDENT.)

IN THE COURT OF COMMON PLEAS
EIGHTH JUDICIAL CIRCUIT

2021-CP-01-085

AMENDED POST-CONVICTION
RELIEF APPLICATION

The Applicant, by and through his undersigned attorney, hereby amends the Applicant's PCR application filed on March 23, 2021, to assert the following allegations:

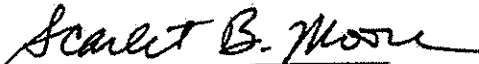
1. *Ineffective assistance of appellate counsel of Susan Barber Hackett, Esq.:*

- a. Appellate counsel failed to raise the issue in brief of the propriety of the trial judge's denial of the Petitioner's Motion for Directed Verdict following the presentation of the state's case-in-chief. The trial court erred in denying the Petitioner's Motion for Directed Verdict, and appellate counsel should have raised this as an appellate issue for review by the South Carolina appellate courts.

2. Applicant requests that he be permitted to amend his PCR application to conform to the evidence presented at the PCR hearing should any new or unaddressed issues arise during the course of the hearing that have not been specifically addressed in the Application. *See Simpson v. Moore*, 367 S.C. 587, 627 S.E.2d 701 (2006).

Respectfully Submitted:

BY:



SCARLET B. MOORE, #72534

P.O. BOX 17615

GREENVILLE, S.C. 29615

(864) 214-5805

(864) 752-0930 (FAX)

ATTORNEY FOR THE APPLICANT

November 2, 2021.

Greenville, South Carolina

TRUE COPY
BY *Vanna Clark*
ABBEVILLE COUNTY CLERK OF COURT

OF SERVICE

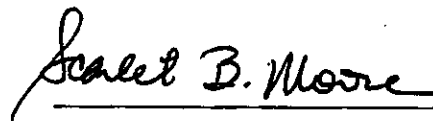
I certify I that I have served this document via email to:

Michael Neubauer, Esq.

Assistant Attorney General

michaelneubauer@scag.gov

This 2nd day of November, 2021.

A handwritten signature in cursive script that reads "Scarlet B. Moore". The signature is written in black ink and is positioned above a horizontal line.

Scarlet B. Moore

Attorney for Applicant

STATE OF SOUTH CAROLINA,
COUNTY OF ABBEVILLE.

IN THE COURT OF COMMON PLEAS.

Rickey Santione Henley, #290970

Applicant,

v.

State of South Carolina,

Respondent.

CERTIFICATE OF SERVICE BY MAIL

2021-CP-01-00-085

The undersigned, an employee of the Abbeville County Clerk of Court's Office, does hereby certify that a copy of Application for Amended Post-Conviction Relief in the above-referenced matter was made upon the following persons by placing same in the United States Mail, first class postage prepaid, at the below listed address clearly indicated on said envelope this 4th day of November, 2021, addressed as follows:

Michael J. Neubauer, Esq.
Office of the Attorney General
Post Conviction Relief
Post Office Box 11549
Columbia, SC 29211-1549

Scarlett Bell Moore
P.O. Box 17615
Greenville, SC 29606

Vanessa Clark
Vanessa Clark, Common Pleas Clerk

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF ABBEVILLE	)	FOR THE EIGHTH JUDICIAL CIRCUIT
	)	
Rickey Santione Henley, #290970,	)	
Applicant,	)	Case No.: 2021-CP-01-085
	)	
v.	)	AMENDED RETURN AND PARTIAL
	)	MOTION TO DISMISS
State of South Carolina,	)	(Counsel Already Appointed)
Respondent.	)	

In response to amended application for post-conviction relief filed by appointed counsel on behalf of Applicant Rickey Santione Henley, Respondent, the State of South Carolina, makes the following amended return and requests an evidentiary hearing to resolve the claims as set forth in Applicant's amended application.

I. Procedural History

Applicant is confined in the South Carolina Department of Corrections (SCDC). Applicant was indicted at the July 2012 term of the Abbeville County Grand Jury for first-degree burglary (2012-GS-01-00348), and larceny, \$2,000 or less (2012-GS-01-00349). Applicant was represented by Assistant Public Defenders Patricia A. Bolen and Yasha Patel of the Eighth Circuit Public Defender's Office. Assistant Solicitor Demetri Andrews of the Eighth Circuit Solicitor's Office prosecuted the case.

On April 8, 2015, Applicant proceeded to a jury trial before the Honorable R. Lawton McIntosh, circuit court judge. At the conclusion of trial, the jury acquitted Applicant of larceny, however the jury remained hung as to the charge of first-degree burglary. Judge McIntosh declared a mistrial as to the burglary charge.

On April 4, 2016, the State retried Applicant for first-degree burglary before the Honorable Eugene C. Griffith, Jr., circuit court judge and a jury. At the conclusion of trial, the jury convicted Applicant. Judge Griffith sentenced Applicant to imprisonment for a term of twenty-four years.

Applicant timely filed a notice of appeal and was represented on appeal by Appellate Defender Laura R. Baer of the Office of Appellate Defense, who raised the following issues:

1. Did the trial court err in denying Appellant's motion to quash the indictment based on Double Jeopardy where the trial court erred as a matter of law in failing to apply the proper test under *Yeager* and where Appellant's prior acquittal of larceny necessarily decided that Appellant was not the person who stole the homeowner's laptop, the sole item missing after the burglary, precluding the State from relitigating Appellant's identity as the intruder or intent to steal.
2. Did the trial court err in denying the defense's motion to admit evidence of Appellant's acquittal on the prior larceny charge where the State's theory of the case continued to be that the burglar's intention was to steal.
3. Did the trial court err in limiting the admission of Jolene Gray's testimony from the prior trial where Gray was unavailable to the defense and her testimony provided evidence that the police had an opportunity to obtain a cigarette smoked by Appellant from outside his home.

After briefing and oral arguments, the Court of Appeals affirmed Applicant's conviction, holding that Applicant's acquittal for larceny did not preclude the State from retrying Applicant for first degree burglary, evidence of Applicant's larceny acquittal was irrelevant, and the trial courts error in allowing the State to read portions of testimony from Applicant's former girlfriend constituted harmless error. *State v. Henley*, 428 S.C. 649, 837 S.E.2d 639 (Ct. App. 2019).

On March 16, 2020, Applicant, through appellate counsel Susan B. Hackett of the Office of Appellate Defense, filed a petition for writ of certiorari with the South Carolina Supreme Court, presenting the same issues raised to the South Carolina Court of Appeals. On October 19, 2020,

the Supreme Court denied Applicant's Petition for Writ of Certiorari through a written order. The Remittitur was issued on October 19, 2020.

II. Facts Giving Rise to the Conviction

On February 15, 2012, Rick Culbreth drove through his neighborhood and noticed a grey car backed into a carport with the door open, and black male running from the front door to the side door. Tr. p. 124, l. 20- p. 127, l. 4. Recognizing the situation was abnormal, Culbreth turned around and went back to the house. Tr. p. 126, l. 18- p. 127, l. 4. When Culbreth returned, he observed the black male standing in the doorway of the house and noticed the male had made entry into the house. Tr. p. 127, l. 5-14. After seeing Culbreth, the male got into his vehicle and pulled out of the driveway. Tr. p. 128, l. 7-17. While leaving, the intruder stopped in front of Culbreth's vehicle and asked if Culbreth needed any help with lawn care, to which Culbreth replied that he did not. Tr. p. 128, l. 7-17. As the intruder left, Culbreth looked into his rearview mirror and was able to get a partial license plate number from the vehicle. Tr. p. 129, l. 17-24. After the intruder left, Culbreth called 911, and provided the police with a description of the car as well as the partial license plate number "HSN [REDACTED]." Tr. p. 129, l. 19-24; p. 132, l. 6- p. 133, l. 9. Deputy Patrick Thompson, of the Abbeville County Sheriff's Office, received a radio call about a possible burglary and proceeded to the home. Tr. p. 157, l. 22- p. 158, l. 22, l. 4. While processing the scene, Deputy Thompson noticed a footwear impression on the carpet, along with a cigarette butt which Deputy Thompson recovered and placed into evidence. Tr. p. 159, l. 1-25; p. 162, l. 16- p. 163, l. 23. After speaking with Culbreth, Deputy Thompson searched for the suspect vehicle, by searching a SLED database based on the tag description provided by Culbreth. Tr. p. 159, l. 23- p. 160, l. 25. The search returned a car matching the description provided by Culbreth, with a license plate number "HSN [REDACTED]." Tr. p. 160, l. 1-20. Based on this information, Deputy Thompson went to

Applicant's address in Anderson County on February 22, 2012 and noticed a car matching the description with the license plate number "HSN [REDACTED]." Tr. p. 162, l. 2-15; p. 165, l. 7- p. 167, l. 10. Applicant was at the residence and spoke with law enforcement. Tr. p. 167, l. 11- 20. Applicant admitted he had been in Abbeville recently, and that he spoke with someone in a truck. Tr. p. 168, l. 18- p. 169, l. 9. Applicant further admitted he smoked cigarettes, specifically, Applicant admitted he smoked Newport's which was the type of cigarette found at the victim's home. Tr. p. 169, l. 20- p. 170, l. 7. Deputy Thompson also noticed Applicant was wearing boots with soles that resembled the impression left on the victim's carpet. Tr. p. 170, l. 8- 19. Applicant was subsequently arrested. Tr. p. 171, l. 11-14.

III. Current Application

Applicant timely commenced this PCR action on March 23, 2021. Applicant asserts he is being held in custody unlawfully, alleging:

1. "Henley argues the Court erred by denying his motion to quash the burglary indictment on double jeopardy grounds. Because it failed the proper test."
 - a. "Prior to the state [*sic*] of his second trail [*sic*], Henley move to quash the burglary indictment arguing any retrail [*sic*] would violate both the federal and state double jeopardy clauses."

As requested relief, Applicant is seeking "a new trial, or reduced sentence, or free to go home. Because in this trial I was treated unfair."

On August 3, 2021, Respondent filed their Return and Motion to Dismiss Applicant's application for post-conviction relief, arguing Applicant failed to state a cognizable claim for post-conviction relief, and Applicant's allegation was barred by the doctrine of *res judicata*.

A Conditional Order of Dismissal was concurrently submitted for the Court's consideration, which the Court signed on August 30, 2021 and filed with the Abbeville County

Clerk of Court. Applicant's counsel did not respond to the Conditional Order of Dismissal, and instead requested an opportunity to file an amended application for post-conviction relief containing a cognizable claim for relief. Instead of signing a Final Order of Dismissal in this matter, the Court allowed Applicant's counsel twenty days to file an amended application for post-conviction relief.

On November 2, 2021, Applicant, through his counsel, filed an amended application for post-conviction relief. Applicant asserts he is being held in custody unlawfully, alleging:

1. "Ineffective Assistance of Appellate Counsel of Susan Barber Hackett, Esq.:"
 - a. Appellant counsel failed to raise the issue in brief of the propriety of the trial judge's denial of the Petitioner's Motion for Directed Verdict following the presentation of the state's case-in-chief. The trial court erred in denying the Petitioner's Motion for Directed Verdict, and appellant counsel should have raised this as an appellate issue for review by the South Carolina appellate courts.
2. "Applicant requests that he be permitted to amend his PCR application to conform to the evidence presented at the PCR hearing should any new or unaddressed issues arise during the course of the hearing that have not been specifically addressed in this Application. *See Simpson v. Moore*, 367 S.C. 587, 627 S.E.2d 701 (2006).

Attached herewith and incorporated herein are the Abbeville County Clerk of Court records regarding the subject conviction, Applicant's SCDC records, the trial transcript, the appellate records (including the record on appeal), and the records of this PCR action. The State reserves the right to amend this return upon receipt of any relevant materials.

IV. Partial Motion to Dismiss

Applicant's allegation that the trial court erred in denying his motion to quash the burglary indictment (2012-GS-01-00348) on double jeopardy grounds, because the indictment failed the proper test, should be summarily dismissed for failure to state a cognizable claim under the

Uniform Post-Conviction Procedure Act¹ (the Act). *See, e.g., Drayton v. Evatt*, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993) (“[PCR] is not a substitute for appeal or a place for asserting errors for the first time which could have been reviewed on direct appeal.”). An applicant may commence a post-conviction relief action on the following grounds:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;
4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
5. That his sentence has expired, his probation, parole or conditional release [was] unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy....

S.C. Code Ann. § 17-27-20(A).

Our Supreme Court has held that claims of trial court error are not cognizable under the Uniform Post-Conviction Procedure Act. Since an application for post-conviction relief is not a substitute for a direct appeal, and because of the modern simplification of criminal jurisdiction jurisprudence in South Carolina, the *overwhelming* majority of cognizable claims fall under the broad umbrella of “ineffective assistance of counsel,” a contention under the Sixth Amendment of the United States Constitution. *See Roscoe v. State*, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001)

¹ S.C. Code Ann. § 17-27-10 to -160.

(noting that allegations of trial court error are not cognizable on PCR); *Simmons v. State*, 264 S.C. 417, 215 S.E.2d 883 (1975) (finding that alleged trial errors and sufficiency of evidence are direct appeal issues that are not cognizable PCR claims); *Stepney v. State*, 278 S.C. 47, 292 S.E.2d 41 (1982) (explaining that issues that could have been raised on direct appeal cannot be considered on PCR application absent claims of ineffective assistance of appellate counsel).

Applicant's allegation of trial court error does not support a cognizable claim for post-conviction relief under any of the statutory grounds. Applicant has previously raised the same issue in his direct appeal. The South Carolina Court of Appeals ruled that Applicant's acquittal for larceny did not preclude the State from retrying Applicant for burglary, because Applicant's acquittal for larceny is not dispositive of whether the State could satisfy the elements necessary for a first degree burglary conviction. Applicant now seeks to raise the same issue in his post-conviction relief application to subvert the ruling of the South Carolina Court of Appeals, and relitigate this issue.

This allegation should be summarily dismissed pursuant to Rule 12(b)(6), SCRPC, for failure to state a cognizable claim. Further, this allegation should be summarily dismissed pursuant to section 17-27-70 because there is no genuine issue of material fact which would necessitate an evidentiary hearing and this allegation should be dismissed as a matter of law.

V. Response to Allegations of Ineffective Assistance of Appellate Counsel

Applicant alleges ineffective assistance of appellate counsel due to appellate counsel's failure to raise the issue of the trial judge denying Applicant's Motion for a Directed Verdict. Beyond the right to effective assistance of counsel at trial, a criminal defendant is constitutionally entitled to effective assistance of appellate counsel on direct appeal. *Evitts v. Lucey*, 469 U.S. 387,

404–05 (1985) (finding that to be effective, appellate counsel must give assistance of such quality as to make appellate proceedings fair); *accord. Thrift v. State*, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990). The analysis of counsel’s performance under *Strickland* remains unchanged—the applicant must demonstrate (1) that his “counsel’s representation fell below an objective standard of reasonableness” in light of the prevailing professional norms, *Strickland*, 466 U.S. at 688, and (2) that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694; *cf. Smith v. Robbins*, 528 U.S. 259, 285 (2000) (holding that habeas applicant must demonstrate that “counsel was objectively unreasonable” in failing to file a merits brief addressing a non-frivolous issue, and that there is “a reasonable probability that, but for his counsel’s unreasonable failure . . . , he would have prevailed on his appeal”).

In applying *Strickland* to claims of ineffective assistance of appellate counsel, reviewing courts must accord appellate counsel the “presumption that he decided which issues were most likely to afford relief on appeal. A decision with respect to appeal is entitled to the same presumption that protects sound trial strategy.” *Pruett v. Thompson*, 996 F.2d 1560, 1568 (4th Cir. 1993).

Although appellate counsel is required to provide effective assistance of counsel, “appellate counsel is *not* required to raise every non-frivolous issue that is presented by the record.” *Thrift v. State*, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) citing *Jones v. Barnes*, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). Indeed, “[w]innowing out weaker arguments on appeal and focusing on those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy.” *Smith v. Murray*, 477 U.S. 527, 536 (1986). “For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to

raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy . . ." *Jones*, 463 U.S. at 754, 103 S.Ct. 3308.

Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." *Robbins*, 528 U.S. at 288 (quoting *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986)). To prove prejudice, the applicant must show that, but for counsel's errors, there is a reasonable probability he would have prevailed on appeal. *Anderson v. State*, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003).

Here, Applicant alleges appellate counsel was ineffective for failing to raise the issue of the trial judge denying Applicant's Motion for a Directed Verdict. On direct appeal, Applicant's appellate counsel briefed three issues which were submitted to the South Carolina Court of Appeals. Though Applicant's appellate counsel did not brief the issue specified in Applicant's amended application for post-conviction relief, Applicant's counsel thoroughly addressed multiple issues which counsel felt warranted appellate review. Therefore, Respondent contends Applicant's appellate counsel was not ineffective. However, the ineffective assistance of appellate counsel allegations probably raise questions of fact that the record does not conclusively refute. Accordingly, Respondent respectfully requests an evidentiary hearing to fully resolve this issue. *See Sharper v. State*, 279 S.C. 264, 265, 305 S.E.2d 247, 248 (1983) ("Where an application for post-conviction relief alleges specific instances of ineffective assistance of counsel which are not conclusively refuted by the record before the lower court, a question of fact is raised which can only be resolved by an evidentiary hearing.").

VI. Any Future Amendments and Invocation of Discovery

Applicant must specify any claims he intends to raise at the PCR evidentiary hearing. All claims should be made well in advance of the evidentiary hearing. Because Applicant has been

appointed an attorney, the attorney, and not Applicant, is the only individual authorized to file amendments to this application. *See* Rule 11, SCRPC. *Pro se* filings will not be considered at the PCR hearing. The State reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to the State pursuant to *Love v. State*, 428 S.C. 231, 834 S.E.2d 196 (2019), or, alternatively, the State will request a continuance in the matter. *See id.* at 245, 834 S.E.2d at 203 (Kittredge, J., dissent) (“If, however, the proposed amendment . . . would truly prejudice the State, the better course of action would be to continue the matter and thus remove any possibility of prejudice resulting from the belated amendments.”).

Pursuant to section 17-27-150 of the South Carolina Code, Applicant may not invoke formal discovery processes to issue subpoenas or otherwise obtain discovery materials unless granted leave from the Court upon a showing of good cause. Further, the State requests that all potential exhibits and materials used to produce potential expert witness testimony be sent to the State well in advance of the evidentiary hearing. As noted above, the State reserves the right to request a continuance and oppose witness testimony and exhibits that are withheld until the last minute resulting in undue prejudice to the State. *See Love*, 428 S.C. 231, 834 S.E.2d 196.

VII. Any and All other Allegations

Each and every allegation contained within the application not expressly admitted, qualified, or explained in this return is hereby denied.

VIII. Conclusion

WHEREFORE, the State requests this Court grant its partial motion to dismiss, as Applicant’s allegation of trial court error be summarily dismissed for failure to state a cognizable claim for post-conviction relief. Further, the State requests an evidentiary hearing be held only on to address Applicant’s claim of ineffective assistance of appellate counsel.

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

MICHAEL J. NEUBAUER
Assistant Attorney General

By:



ATTORNEYS FOR RESPONDENT
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211

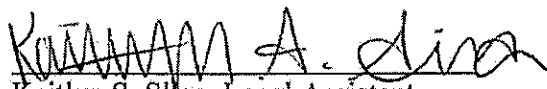
December 2, 2021

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF ABBEVILLE	)	
	)	
	)	2021-CP-01-290970
	)	
RICKEY SANTIONE HENLEY, #290970,	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the Amended Return and Partial Motion to Dismiss the Application for Post-Conviction Relief in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Scarlet B. Moore, Esquire
 Post Office Box 17615
 Greenville, South Carolina 29606

DATED this the 2nd day of December, 2021.


 Kaitlyn S. Slice, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA
COUNTY OF ABBEVILLE

IN THE COURT OF COMMON PLEAS
EIGHTH JUDICIAL CIRCUIT

2021-CP-01-085

Rickey Santione Henley, #290970,

APPLICANT,

V.

State of South Carolina,

RESPONDENT.

MEMORANDUM IN SUPPORT OF
AMENDED POST-CONVICTION
RELIEF APPLICATION

NOW INTO COURT, comes the Applicant Rickey Santione Henley (Mr. Henley), through his undersigned attorney, who submits the following Memorandum in support of his Amended Post-Conviction Relief Application, alleging appellate counsel should have raised the issue on appeal that the trial court erred in denying Mr. Henley's Motion for Directed Verdict, for the following reasons, to wit:

I. Statement of the Case

This matter stems from a criminal prosecution of Mr. Henley in Abbeville County. On or about February 29, 2012, Mr. Henley was indicted on one count of 1st degree burglary and one count of petit larceny. Specifically, Mr. Henley was accused of entering into the home of the alleged victims, Amanda and Jamie Moss, without their consent and that he did take, steal and carry away one Dell laptop from their residence valued at approximately \$500.00. The only theory advanced by the state at the trial was that Mr. Henley entered the residence with the intent of stealing the laptop – with no other crimes mentioned in the charging documents. Mr. Henley was tried on both indictments on April 6, 8 and 9, 2015: the jury acquitted him on the larceny charge, but hung on the issue of his guilt on the burglary charge. (ROA pp. 1-351.) Subsequently, Mr. Henley was re-tried on the

burglary charge on April 4-6, 2016, and the jury found Mr. Henley guilty of first-degree burglary. (ROA pp. 352-675.) Mr. Henley was sentenced to twenty-four (24) years in prison. Mr. Henley timely appealed his conviction, which conviction was affirmed by the S.C. Court of Appeals. Through appellate counsel, Mr. Henley petitioned the S.C. Supreme Court for a Writ of Certiorari, which was denied. Mr. Henley filed a timely application for post-conviction relief. The application was amended by undersigned counsel alleging ineffective assistance of appellate counsel for failing to raise the issue on appeal of the denial of Mr. Henley's trial motion for a directed verdict.

II. Statement of the Facts

At the re-trial of Mr. Henley in 2016 on the charge of first-degree burglary, which is the subject of this application for post-conviction relief, the State was faced with an acquittal of Mr. Henley for the crime of larceny, but yet pursued a prosecution for first degree burglary despite the fact that the state had the burden of showing that Mr. Henley entered the Moss residence with the intent to commit a crime therein. The state's only theory of a crime committed by Mr. Henley was the theft of the laptop, as the evidence presented at the first trial established that only a laptop computer was stolen from the Moss residence. (ROA p. 136, lines 1-4.) Nevertheless, despite the best efforts of trial defense counsel to quash the burglary indictment and pursuit of other motions favorable to Mr. Henley due to his acquittal on the larceny charge (which motions were all denied), the prosecution went forward with the trial court finding that the state only had the burden of proving that Mr. Henley entered the Moss residence with the intent to commit "a" crime for a burglary conviction.

At trial, the state presented evidence and testimony against Mr. Henley of the crime of first-degree burglary, which evidence was described as "thin" by Trial Judge Eugene C. Griffith during the course of the directed verdict motion urged by Henley's trial counsel. (ROA p. 593, lines 13-14.)

The state presented the testimony of eight (8) witnesses at trial. Significantly, the state called the

alleged victims Amanda and Jamie Moss to the stand, who failed to establish that any crime was committed inside their residence. (ROA pp. 146-156.) Mrs. Moss testified that a doorframe going into the side carport door had part of it broken off and was damaged, but otherwise failed to testify about any evidence supporting that a crime was committed in her residence. Neither did Mr. Moss. Additionally, the state presented testimony of the Moss' acquaintance Rick Culbreath, who testified that he made contact with an unknown man who was parked in the driveway of the Moss home on the day of the alleged incident, who Culbreath was unable to solely identify in a photograph lineup, which included a photograph of Mr. Henley. (ROA p. 495, lines 18-23.) Culbreath further testified that the contact he made with the man was outside the residence and that the man asked Culbreath if he had any yard work that needed to be done. (ROA p. 490, lines 15-17.) The state also presented testimony of Abbeville County Sheriff's Deputy Patrick Thompson, who testified about seeing "footwear impressions" on the Moss' carpet that allegedly resembled boots worn by Mr. Henley on the date that Thompson questioned Mr. Henley about the incident at the Moss residence. (ROA p. 521, lines 1-6.) However, Thompson certainly did not testify as an expert in footprint patterns. During questioning by Thompson, Mr. Henley never admitted to entering the home of the Moss', but admitted that he had made contact with a man in a truck on the highway where the Moss residence is located, and that he smoked cigarettes. (ROA p. 531, lines 1-25; p. 532, lines 1-7.) Thompson also testified regarding allegedly finding a cigarette butt outside the residence which was sent to SLED for analysis. Retired Abbeville County Sheriff's Department Deputy Marion Johnson also testified about serving as a records custodian for a cigarette butt found outside the residence, as did DNR Officer and former Abbeville County Sheriff's Deputy Ryan Abernathy, who testified that he took the cigarette butt to SLED for processing. Lastly, the state presented the testimony of Mary Boehm, a SLED analyst who works in the DNA casework department who linked the cigarette butt found

outside the residence to Mr. Henley through DNA analysis. (ROA pp. 569 – 587.)

Following the presentation of the state's evidence, Mr. Henley's trial counsel moved for a directed verdict on multiple points. (ROA pp. 588-593.) Trial counsel for Mr. Henley argued that the state had failed to produce evidence of the crime of burglary which requires entry into a dwelling without consent with the intent to commit a crime therein. There was no evidence presented of any crime that occurred in the Moss home, nor was there evidence that anyone had intent to commit a crime in the residence. Counsel argued that there was never a positive identification by Mr. Culbreath of the man that he saw at the Moss home, as he was unable to definitively identify Mr. Henley as the man he saw at the residence. The state did present DNA evidence linking Mr. Henley to the cigarette butt found outside the Moss residence; however, in Mr. Henley's statement to Thompson he admitted that he had spoken to a man on the highway, and that he smoked cigarettes. Culbreath specifically testified that the man he made contact with at the Moss home asked him about whether he needed yardwork to be done. In denying the motion for directed verdict, Judge Griffith acknowledged that he agreed with defense counsel that the evidence against Mr. Henley was "thin," but yet allowed the matter to proceed to a jury verdict. (ROA p. 593, lines 13-14.)

III. Law and Analysis

Appellate counsel for Mr. Henley should have raised as an issue on appeal the denial of the directed verdict motion following the presentation of the state's case. In *State v. Ashley Hepburn*, 406 S.C. 416, 753 S.E.2d 402 (S.C. 2014), the South Carolina Supreme Court reversed the trial court's denial of the defendant's motion for directed verdict. The Supreme Court found that where the State has failed to present evidence of the offense charged, a criminal defendant is entitled to a directed verdict. *State v. Cherry*, 361 S.C. 588, 593, 606 S.E.2d 475, 478 (2004). The Court held that the trial court should "grant the directed verdict motion when the evidence merely raises a

suspicion that the accused is guilty, as ‘suspicion’ implies a belief or opinion as to guilt based upon facts and circumstances which do not amount to proof.” *Cherry*, 361 S.C. at 594, 606 S.E.2d at 478.

On appeal, the Supreme Court held in *Hepburn* that “when reviewing a denial of a directed verdict, this Court must view the evidence and all reasonable inferences in the light most favorable to the state.” If the state has presented “any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused,” the Court must affirm the trial court’s decision to submit the case to the jury. In *Hepburn*, a prosecution of a mother for homicide by child abuse for the death of her child, the Supreme Court held that the trial court should have granted the directed verdict despite the fact that the evidence and testimony established that the Mother had been inside the residence with the child on the date that her daughter was the victim of homicide – arguably substantial circumstantial evidence which was rejected by the Supreme Court. The Supreme Court held that the state failed to present substantial circumstantial evidence of Hepburn’s guilt.

In this case, the state utterly failed to present any substantial circumstantial evidence of the guilt of Mr. Henley. In fact, the record is devoid of any direct evidence against Mr. Henley, thus the state had to rely solely on “thin” circumstantial evidence, as described by Judge Griffith. There was no testimony of any witness showing that Mr. Henley broke into the Moss home nor damaged the door frame. There was no testimony from Amanda nor Jamie Moss that anything was taken from their residence, nor was there evidence that anyone was harmed in the residence – no evidence of any crime committed in the residence whatsoever. Even viewing the evidence most favorable to the state, the evidence established that Mr. Henley was seen at the residence in the doorway of the residence, with his DNA on a cigarette butt outside the residence, making contact with Mr. Culbreath and asking if he had the need for yardwork – a legitimate explanation for why Mr. Henley would have been outside the residence. Mr. Henley was sentenced to twenty-four (24) years in

prison on the first-degree burglary conviction, with evidence that should have considered by the appellate courts on the issue of the denial of the directed verdict. The issue of the denial of the directed verdict should have been presented to the appellate courts, and Mr. Henley's petition for post-conviction relief should be granted.

Respectfully Submitted:

BY: s/Scarlet B. Moore
SCARLET B. MOORE, #72534
P.O. BOX 17615
GREENVILLE, S.C. 29615
(864) 214-5805
(864) 752-0930 (FAX)
ATTORNEY FOR RICKEY HENLEY

September 6, 2022.
Greenville, South Carolina

STATE OF SOUTH CAROLINA.

COUNTY OF ABBEVILLE.

IN THE COURT OF COMMON PLEAS.

Rickey Santione Henley, #290970
Applicant

CERTIFICATE OF SERVICE BY MAIL

vs.

State of South Carolina,
Respondent

2021-CP-01-085

The undersigned, an employee of the Abbeville County Clerk of Court's Office, does hereby certify that a copy of the Memorandum in Opposition to Amended Post - Conviction Relief Application in the above-referenced matter was made upon the following persons by placing same in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 12th day of September, 2022, addressed as follows:

Zachary W Jones
Asst. Attorney General
Post Office Box 11549
Columbia, SC 29211-1549

Scarlet B. Moore, Esquire
Post Office Box 17615
Greenville, SC 29606

TRUE COPY

BY _____
 ABBEVILLE COUNTY CLERK OF COURTS

Tra Tanus Agnew
Tra Tanus Agnew, Common Pleas Clerk

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF ABBEVILLE	)	FOR THE EIGHTH JUDICIAL CIRCUIT
	)	
Rickey Santione Henley, #290970,	)	
Applicant,	)	Case No.: 2021-CP-01-085
	)	
v.	)	MEMORANDUM IN OPPOSITION TO
	)	AMENDED POST-CONVICTION
State of South Carolina,	)	RELIEF APPLICATION
Respondent.	)	

In this action for post-conviction relief brought by Applicant Rickey Santione Henley, Respondent, the State of South Carolina, submits the following memorandum of law, arguing that Applicant's claim of ineffective assistance of counsel fails as a matter of law and requesting that the Court deny and dismiss Applicant's post-conviction relief application with prejudice.

I. Procedural History

Applicant is confined in the South Carolina Department of Corrections (SCDC). Applicant was indicted at the July 2012 term of the Abbeville County Grand Jury for first-degree burglary (2012-GS-01-00348) and larceny, \$2,000 or less (2012-GS-01-00349). Applicant was represented by Assistant Public Defenders Patricia A. Bolen and Yasha Patel of the Eighth Circuit Public Defender's Office. Assistant Solicitor Demetri Andrews of the Eighth Circuit Solicitor's Office prosecuted the case.

On April 8, 2015, Applicant proceeded to a jury trial before the Honorable R. Lawton McIntosh, circuit court judge. At the conclusion of trial, the jury acquitted Applicant of larceny, however the jury remained hung as to the charge of first-degree burglary. Judge McIntosh declared a mistrial as to the burglary charge.

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BY _____
ABBEVILLE COUNTY CLERK OF COURT

On April 4, 2016, the State retried Applicant for first-degree burglary before the Honorable Eugene C. Griffith, Jr., circuit court judge and a jury. At the conclusion of trial, the jury convicted Applicant. Judge Griffith sentenced Applicant to imprisonment for a term of twenty-four years.

Applicant timely filed a notice of appeal and was represented on appeal by Appellate Defender Laura R. Baer of the Office of Appellate Defense, who raised the following issues:

1. Did the trial court err in denying Appellant's motion to quash the indictment based on Double Jeopardy where the trial court failed to apply the proper test under *Yeager* and where Appellant's prior acquittal of larceny necessarily decided that Appellant was not the person who stole the homeowner's laptop, the sole item missing after the burglary, precluding the State from relitigating Appellant's identity as the intruder or intent to steal?
2. Did the trial court err in denying the defense's motion to admit evidence of Appellant's acquittal on the prior larceny charge where the State's theory of the case continued to be that the burglar's intention was to steal?
3. Did the trial court err in limiting the admission of Jolene Gray's testimony from the prior trial where Gray was unavailable to the defense and her testimony provided evidence that the police had an opportunity to obtain a cigarette smoked by Appellant from outside his home?
4. Did the trial court err in denying the defense's motion to exclude evidence regarding DNA testing conducted on the cigarette butt purportedly found at the scene where the State's negligence in the destruction of the evidence constituted *bas faith* and where the State could not present a complete chain of custody for the cigarette butt such that the cigarette butt was not available for comparison to the crime scene photograph at trial?

After briefing and oral arguments, the Court of Appeals affirmed Applicant's conviction, holding that Applicant's acquittal for larceny did not preclude the State from retrying Applicant for first degree burglary, evidence of Applicant's larceny acquittal was irrelevant, and the trial courts error in allowing the State to read portions of testimony from Applicant's former girlfriend constituted harmless error. *State v. Henley*, 428 S.C. 649, 837 S.E.2d 639 (Ct. App. 2019).

On March 16, 2020, Applicant, through appellate counsel Susan B. Hackett of the Office of Appellate Defense, filed a petition for writ of certiorari with the South Carolina Supreme Court, presenting the same issues raised to the South Carolina Court of Appeals. On October 19, 2020, the Supreme Court denied Applicant's Petition for Writ of Certiorari through a written order. The Remittitur was issued on October 19, 2020.

II. Facts Giving Rise to the Conviction

On February 15, 2012, Rick Culbreth drove through his neighborhood and noticed a grey car backed into the carport of his neighbors' house and a black male running from the front door to the side door. (Tr. p. 124, l. 20–p. 127, l. 4). Recognizing the situation was abnormal, Culbreth turned around and went back to the house. (Tr. p. 126, l. 18–p. 127, l. 4). When Culbreth returned, he observed the man standing in the open doorway of the house. (Tr. p. 127, ll. 5–14). Culbreth noticed that the rear passenger side door of the stranger's car was open. (Tr. p. 127, ll. 15–20). After seeing Culbreth, the man got into his vehicle and pulled out of the driveway. (Tr. p. 128, ll. 7–17). While leaving, the intruder stopped in front of Culbreth's vehicle and asked if Culbreth needed any help with lawn care, and Culbreth replied that he did not. (Tr. p. 128, ll. 7–17). As the intruder left, Culbreth looked into his rearview mirror and was able to get a partial license plate number from the vehicle. (Tr. p. 129, ll. 17–24). After the intruder left, Culbreth called 911 and provided the police with a description of the car as well as the partial license plate number "HSN [REDACTED]." (Tr. p. 129, ll. 19–24; p. 132, l. 6–p. 133, l. 9). At trial, Amanda Moss, the owner of the house at the time of the incident, testified that the doorframe of the side carport door had been damaged and part of it had been broken off. (Tr. p. 149, l. 18–p. 150, l. 18).

Deputy Patrick Thompson, of the Abbeville County Sheriff's Office, received a radio call about a possible burglary and proceeded to the home. (Tr. p. 157, l. 22–p. 158, l. 4). While

processing the scene, Deputy Thompson noticed footwear impressions on the carpet inside the house, along with a cigarette butt which Deputy Thompson recovered and placed into evidence. (Tr. p. 159, ll. 1–25; p. 162, l. 16–p. 163, l. 23). After speaking with Culbreth, Deputy Thompson searched for the suspect vehicle in a SLED database based on the tag description provided by Culbreth. (Tr. p. 159, l. 23–p. 160, l. 25). The search returned a car matching the description provided by Culbreth, with a license plate number “HSN [REDACTED].” (Tr. p. 160, ll. 1–20). Based on this information, Deputy Thompson went to Applicant’s address in Anderson County on February 22, 2012, and noticed a car matching the description with the license plate number “HSN [REDACTED].” (Tr. p. 162, ll. 2–15; p. 165, l. 7–p. 167, l. 10). Applicant was at the residence and spoke with law enforcement. (Tr. p. 167, ll. 11–20). Applicant admitted that he had been in Abbeville recently and that he spoke with someone in a truck. (Tr. p. 168, l. 18–p. 169, l. 9). Applicant further admitted he smoked Newport cigarettes; the cigarette found at the victims’ home was a Newport. (Tr. p. 169, l. 20–p. 171, l. 4). Deputy Thompson also noticed Applicant was wearing work boots; he asked to see the soles of the boots and observed that they resembled the impressions left on the victim’s carpet. (Tr. p. 170, ll. 8–19). Applicant was subsequently arrested. (Tr. p. 171, ll. 11–14). DNA recovered from the Newport cigarette found at the scene matched Applicant’s DNA profile. (Tr. p. 218, ll. 11–20).

III. Current Application

Applicant timely filed his initial PCR application on March 23, 2021, asserting he is being held in custody unlawfully for the following reason:

1. “Henley argues the Court erred by denying his motion to quash the burglary indictment on double jeopardy grounds. Because it failed the proper test.”
 - a. “Prior to the state [*sic*] of his second trail [*sic*], Henley move to quash the burglary indictment arguing any retrial [*sic*]

would violate both the federal and state double jeopardy clauses.”

Applicant requested relief in the form of “a new trial, or reduced sentence, or free to go home. Because in this trial I was treated unfair.”

On August 3, 2021, Respondent filed their Return and Motion to Dismiss Applicant’s application for post-conviction relief, arguing that Applicant failed to state a cognizable claim for post-conviction relief and that Applicant’s allegation was barred by the doctrine of *res judicata*.

A Conditional Order of Dismissal was concurrently submitted for the Court’s consideration, which the Court signed on August 30, 2021, and filed with the Abbeville County Clerk of Court. Applicant’s counsel did not respond to the Conditional Order of Dismissal, and instead requested an opportunity to file an amended application for post-conviction relief containing a cognizable claim for relief. Instead of signing a Final Order of Dismissal in this matter, the Court allowed Applicant’s counsel an opportunity to file an amended application for post-conviction relief.

On November 2, 2021, Applicant, through his counsel, filed an amended application for post-conviction relief. Applicant asserts he is being held in custody unlawfully, alleging:

1. “Ineffective Assistance of Appellate Counsel of Susan Barber Hackett,¹ Esq.,”
 - a. Appellant counsel failed to raise the issue in brief of the propriety of the trial judge’s denial of the Petitioner’s Motion for Directed Verdict following the presentation of the state’s case-in-chief. The trial court erred in denying the Petitioner’s Motion for Directed Verdict, and appellant counsel should have raised this as an appellate issue for review by the South Carolina appellate courts.
2. “Applicant requests that he be permitted to amend his PCR application to conform to the evidence presented at the PCR hearing should any new or unaddressed issues arise during

¹ The author of Applicant’s appellate brief was Laura Baer, Esquire, not Ms. Hackett. Because Applicant’s allegation of ineffective assistance relates only to which issues were raised on appeal, Respondent submits that Ms. Baer, rather than Ms. Hackett, is the attorney whose effectiveness Applicant is contesting.

the course of the hearing that have not been specifically addressed in this Application. See *Simpson v. Moore*, 367 S.C. 587, 627 S.E.2d 701 (2006).

An evidentiary hearing was scheduled to be held on August 2, 2022, at the Newberry County Courthouse. Prior to the hearing, however, counsel for the parties agreed that Applicant's ineffective assistance of appellate counsel claim—the only cognizable claim raised in his amended application—presented a purely legal issue that could be resolved as a matter of law. Accordingly, the Court permitted the parties to brief the issue rather than proceed with the evidentiary hearing.

IV. Response to Allegation of Ineffective Assistance of Appellate Counsel

Applicant alleges ineffective assistance of appellate counsel due to appellate counsel's failure to raise the issue of the trial judge denying Applicant's Motion for a Directed Verdict. Beyond the right to effective assistance of counsel at trial, a criminal defendant is constitutionally entitled to effective assistance of appellate counsel on direct appeal. *Evitts v. Lucey*, 469 U.S. 387, 404–05 (1985) (finding that to be effective, appellate counsel must give assistance of such quality as to make appellate proceedings fair); accord. *Thrift v. State*, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990). The analysis of counsel's performance under *Strickland* remains unchanged—the applicant must demonstrate (1) that his “counsel's representation fell below an objective standard of reasonableness” in light of the prevailing professional norms, *Strickland*, 466 U.S. at 688, and (2) that “there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694; cf. *Smith v. Robbins*, 528 U.S. 259, 285 (2000) (holding that a habeas applicant must demonstrate that “counsel was objectively unreasonable” in failing to file a merits brief addressing a non-frivolous issue, and that there is “a reasonable probability that, but for his counsel's unreasonable failure . . . , he would have prevailed on his appeal”).

In applying *Strickland* to claims of ineffective assistance of appellate counsel, reviewing courts must accord appellate counsel the “presumption that he decided which issues were most likely to afford relief on appeal. A decision with respect to appeal is entitled to the same presumption that protects sound trial strategy.” *Pruett v. Thompson*, 996 F.2d 1560, 1568 (4th Cir. 1993).

Although appellate counsel is required to provide effective assistance of counsel, “appellate counsel is *not* required to raise every non-frivolous issue that is presented by the record.” *Thrift v. State*, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) (citing *Jones v. Barnes*, 463 U.S. 745 (1983)). Indeed, “[w]innowing out weaker arguments on appeal and focusing on those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy.” *Smith v. Murray*, 477 U.S. 527, 536 (1986). “For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every ‘colorable’ claim suggested by a client would disserve the very goal of vigorous and effective advocacy . . .” *Jones*, 463 U.S. at 754.

“Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.” *Robbins*, 528 U.S. at 288 (quoting *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986)). To prove prejudice, the applicant must show that, but for counsel's errors, there is a reasonable probability he would have prevailed on appeal. *Anderson v. State*, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003).

Here, Applicant alleges appellate counsel was ineffective for failing to raise the issue of the trial judge denying Applicant’s motion for a directed verdict. On direct appeal, Applicant’s appellate counsel briefed four issues which were submitted to the South Carolina Court of Appeals. Though Applicant’s appellate counsel did not brief the issue specified in Applicant’s amended

application for post-conviction relief, Applicant's counsel thoroughly addressed multiple issues which counsel felt warranted appellate review. Applicant does not explain how the directed verdict issue was "clearly stronger" than any of the issues actually raised by appellate counsel; therefore, he has failed to overcome the presumption of effective assistance. *Robbins*, 528 U.S. at 288. Moreover, because appellate counsel may exercise reasonable professional judgment in determining which issues to raise, counsel had no duty to raise the directed verdict issue in particular, even if there were some merit to that issue on appeal. *See Thrift*, 302 S.C. at 539, 397 S.E.2d at 526. Accordingly, Applicant has failed to prove that counsel was deficient.

Nevertheless, even if appellate counsel's performance was deficient, Applicant cannot prove prejudice because there is no reasonable probability that he would have prevailed on his directed verdict argument on appeal. *See Anderson*, 354 S.C. at 434, 581 S.E.2d at 835 (holding prejudice requires showing a reasonable probability of prevailing on appeal). On appeal from the denial of a directed verdict, the appellate court views the evidence in the light most favorable to the State; if there is any evidence from which the defendant's guilt can be fairly and logically deduced, the jury verdict will not be disturbed. *See State v. Brown*, 360 S.C. 581, 586, 602 S.E.2d 392, 395 (2004). Therefore, even if appellate counsel had raised the directed verdict issue to the court of appeals, Applicant could only have prevailed if there was *no* evidence from which his guilt could have been deduced, when viewed in the light most favorable to the State.

The State introduced considerable evidence of Applicant's guilt as to every element of burglary. Mr. Culbreth testified he saw Applicant standing in the open door between the house and the carport, Amanda Moss testified her carport door had been broken in, and Deputy Thompson found footprints on the carpet inside the house that matched the work boots worn by Applicant; these facts—viewed in the light most favorable to the State—showed that Applicant

had broken into the Mosses' home without their consent. In addition to the fact of the break-in, the fact that Applicant had backed his car into the carport and left the rear passenger-side door open (not the front driver-side door, which one would expect if Applicant had merely gotten out of his car to use the bathroom as he claimed) supports the State's theory that Applicant intended "to go in there and clean them out." (Tr. p. 278, ll. 16–19). In addition, the State introduced considerable evidence identifying Applicant as the intruder: Mr. Culbreth's visual identification of Applicant standing in the open doorway to the house; his identification of Applicant's car from the make, model, and license plate number; the DNA evidence linking Applicant to the cigarette found at the scene of the break-in; and the footprints inside the house matching the soles of Applicant's work boots. All of this evidence, viewed in the light most favorable to the State, establishes that Applicant broke into the Mosses' home with the intent to steal their belongings.

Applicant now claims that, because there was no testimony that anything had been stolen from the house, the State failed to present any evidence that a crime was committed during the break-in. Burglary, however, only requires the State to prove *intent* to commit a crime, which could be "fairly and logically deduced" both from the suspicious parking of Applicant's car with the rear passenger door open and from the break-in itself. In its closing argument, the State presented its theory that Applicant's intent to steal was foiled by the sudden appearance of Mr. Culbreth, which is sufficient to explain the lack of evidence that anything had actually been stolen. (Tr. p. 278, ll. 16–23). The mere fact that nothing was stolen from the home is irrelevant to whether the State presented *some* evidence of Applicant's intent to steal.

Applicant argues that State's evidence was merely circumstantial, rather than direct, and was described by the trial court as "thin." (Tr. p. 231, ll. 13–14). However, circumstantial evidence is sufficient to deny a directed verdict motion, and "[the] court is concerned with the

existence of evidence rather than its weight in ruling on a motion for a directed verdict.” *State v. Spann*, 279 S.C. 399, 402, 308 S.E.2d 518, 520 (1983) (holding circumstantial evidence, such as smudged palmprints, chipped paint, and blood of the defendant’s blood type found on a windowsill, was sufficient to sustain a burglary conviction).

For all these reasons, no appellate court would have disturbed the trial court’s refusal to direct a verdict, even if appellate counsel had raised the issue on appeal. Therefore, Applicant has failed to prove either prejudice or deficiency regarding appellate counsel’s omission to raise the directed verdict issue; under *Strickland*, therefore, Applicant’s claim of ineffective assistance of counsel must fail as a matter of law. *See Robbins*, 528 U.S. at 285. As Applicant’s amended application for post-conviction relief does not raise any other cognizable claims, Respondent respectfully asks that the application be denied and dismissed with prejudice.

Respectfully submitted,

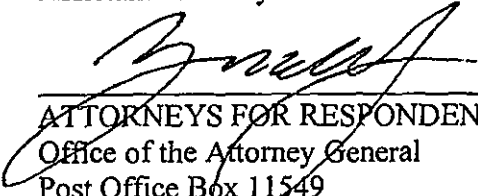
ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

ZACHARY W. JONES
Assistant Attorney General

By:



ATTORNEYS FOR RESPONDENT
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211

Sept. 6, 2022

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF ABBEVILLE	)	FOR THE EIGHTH JUDICIAL CIRCUIT
Rickey Santione Henley, #290970,	)	
Applicant,	)	Case No.: 2021-CP-01-085
v.	)	ORDER OF DISMISSAL
State of South Carolina,	)	
Respondent.	)	

This matter is before the Court by way of an application for post-conviction relief filed by Applicant Rickey Santione Henley on March 23, 2021, and amended on November 2, 2021. An evidentiary hearing was scheduled to be held on August 2, 2022, at the Newberry County Courthouse. Prior to the hearing, however, counsel for the parties agreed that Applicant's ineffective assistance of appellate counsel claim—the only cognizable claim raised in his amended application—presented a purely legal issue that could be resolved as a matter of law. Accordingly, the Court permitted the parties to brief the issue rather than proceed with the evidentiary hearing. After reviewing the parties' briefs and all the other records before the Court, the Court finds Applicant's claim of ineffective assistance of appellate counsel fails as a matter of law and, therefore, the post-conviction relief application should be denied and dismissed with prejudice.

I. Procedural History

Applicant is confined in the South Carolina Department of Corrections (SCDC). Applicant was indicted at the July 2012 term of the Abbeville County Grand Jury for first-degree burglary (2012-GS-01-00348) and larceny, \$2,000 or less (2012-GS-01-00349). Applicant was represented by Assistant Public Defenders Patricia A. Bolen and Yasha Patel of the Eighth Circuit Public Defender's Office. Assistant Solicitor Demetri Andrews of the Eighth Circuit Solicitor's Office prosecuted the case.

On April 8, 2015, Applicant proceeded to a jury trial before the Honorable R. Lawton McIntosh, circuit court judge. At the conclusion of trial, the jury acquitted Applicant of larceny; however, the jury remained hung as to the charge of first-degree burglary. Judge McIntosh declared a mistrial as to the burglary charge.

On April 4, 2016, the State retried Applicant for first-degree burglary before the Honorable Eugene C. Griffith, Jr., circuit court judge, and a jury. At the conclusion of trial, the jury convicted Applicant. Judge Griffith sentenced Applicant to imprisonment for a term of twenty-four years.

Applicant timely filed a notice of appeal and was represented on appeal by Appellate Defender Laura R. Baer of the Office of Appellate Defense, who raised the following issues:

1. Did the trial court err in denying Appellant's motion to quash the indictment based on Double Jeopardy where the trial court failed to apply the proper test under *Yeager* and where Appellant's prior acquittal of larceny necessarily decided that Appellant was not the person who stole the homeowner's laptop, the sole item missing after the burglary, precluding the State from relitigating Appellant's identity as the intruder or intent to steal?
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3. Did the trial court err in limiting the admission of Jolene Gray's testimony from the prior trial where Gray was unavailable to the defense and her testimony provided evidence that the police had an opportunity to obtain a cigarette smoked by Appellant from outside his home?
4. Did the trial court err in denying the defense's motion to exclude evidence regarding DNA testing conducted on the cigarette butt purportedly found at the scene where the State's negligence in the destruction of the evidence constituted bad faith and where the State could not present a complete chain of custody for the cigarette butt such that the cigarette butt was not available for comparison to the crime scene photograph at trial?

After briefing and oral arguments, the Court of Appeals affirmed Applicant's conviction, holding that Applicant's acquittal for larceny did not preclude the State from retrying Applicant

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for first degree burglary, evidence of Applicant's larceny acquittal was irrelevant, and the trial court's error in allowing the State to read portions of testimony from Applicant's former girlfriend constituted harmless error. *State v. Henley*, 428 S.C. 649, 837 S.E.2d 639 (Ct. App. 2019).

On March 16, 2020, Applicant, through appellate counsel Susan B. Hackett of the Office of Appellate Defense, filed a petition for a writ of certiorari with the South Carolina Supreme Court, presenting the same issues raised to the South Carolina Court of Appeals. On October 19, 2020, the Supreme Court denied Applicant's petition for a writ of certiorari through a written order. The remittitur was issued on October 19, 2020.

II. Facts Giving Rise to the Conviction

On February 15, 2012, Rick Culbreth drove through his neighborhood and noticed a grey car backed into the carport of his neighbors' house and a black male running from the front door to the side door. (Tr. p. 124, l. 20–p. 127, l. 4). Recognizing the situation was abnormal, Culbreth turned around and went back to the house. (Tr. p. 126, l. 18–p. 127, l. 4). When Culbreth returned, he observed the man standing in the open doorway of the house. (Tr. p. 127, ll. 5–14). Culbreth noticed that the rear passenger side door of the stranger's car was open. (Tr. p. 127, ll. 15–20). After seeing Culbreth, the man got into his vehicle and pulled out of the driveway. (Tr. p. 128, ll. 7–17). While leaving, the intruder stopped in front of Culbreth's vehicle and asked if Culbreth needed any help with lawn care, and Culbreth replied that he did not. (Tr. p. 128, ll. 7–17). As the intruder left, Culbreth looked into his rearview mirror and was able to get a partial license plate number from the vehicle. (Tr. p. 129, ll. 17–24). After the intruder left, Culbreth called 911 and provided the police with a description of the car as well as the partial license plate number "HSN [REDACTED]." (Tr. p. 129, ll. 19–24; p. 132, l. 6–p. 133, l. 9). At trial, Amanda Moss, the owner of the

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house at the time of the incident, testified that the doorframe of the side carport door had been damaged and part of it had been broken off. (Tr. p. 149, l. 18–p. 150, l. 18).

Deputy Patrick Thompson, of the Abbeville County Sheriff's Office, received a radio call about a possible burglary and proceeded to the home. (Tr. p. 157, l. 22–p. 158, l. 4). While processing the scene, Deputy Thompson noticed footwear impressions on the carpet inside the house, along with a cigarette butt which Deputy Thompson recovered and placed into evidence. (Tr. p. 159, ll. 1–25; p. 162, l. 16–p. 163, l. 23). After speaking with Culbreth, Deputy Thompson searched for the suspect vehicle in a SLED database based on the tag description provided by Culbreth. (Tr. p. 159, l. 23–p. 160, l. 25). The search returned a car matching the description provided by Culbreth, with a license plate number "HSN [REDACTED]." (Tr. p. 160, ll. 1–20). Based on this information, Deputy Thompson went to Applicant's address in Anderson County on February 22, 2012, and noticed a car matching the description with the license plate number "HSN [REDACTED]." (Tr. p. 162, ll. 2–15; p. 165, l. 7–p. 167, l. 10). Applicant was at the residence and spoke with law enforcement. (Tr. p. 167, ll. 11–20). Applicant admitted that he had been in Abbeville recently and that he spoke with someone in a truck. (Tr. p. 168, l. 18–p. 169, l. 9). Applicant further admitted he smoked Newport cigarettes; the cigarette found at the victims' home was a Newport. (Tr. p. 169, l. 20–p. 171, l. 4). Deputy Thompson also noticed Applicant was wearing work boots; he asked to see the soles of the boots and observed that they resembled the impressions left on the victim's carpet. (Tr. p. 170, ll. 8–19). Applicant was subsequently arrested. (Tr. p. 171, ll. 11–14). DNA recovered from the Newport cigarette found at the scene matched Applicant's DNA profile. (Tr. p. 218, ll. 11–20).

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III. Current Application

Applicant timely filed his initial PCR application on March 23, 2021, asserting he is being held in custody unlawfully for the following reason:

1. "Henley argues the Court erred by denying his motion to quash the burglary indictment on double jeopardy grounds. Because it failed the proper test."
 - a. "Prior to the state [*sic*] of his second trail [*sic*], Henley move to quash the burglary indictment arguing any retrail [*sic*] would violate both the federal and state double jeopardy clauses."

Applicant requested relief in the form of "a new trial, or reduced sentence, or free to go home. Because in this trial I was treated unfair."

On August 3, 2021, Respondent filed its return and motion to dismiss Applicant's application for post-conviction relief, arguing that Applicant failed to state a cognizable claim for post-conviction relief and that Applicant's allegation was barred by the doctrine of *res judicata*.

A conditional order of dismissal was concurrently submitted for the Court's consideration, which the Court signed on August 30, 2021, and filed with the Abbeville County Clerk of Court. Applicant's counsel did not respond to the conditional order of dismissal, and instead requested an opportunity to file an amended application for post-conviction relief containing a cognizable claim for relief. Instead of signing a final order of dismissal in this matter, the Court allowed Applicant's counsel an opportunity to file an amended application for post-conviction relief.

On November 2, 2021, Applicant, through his counsel, filed an amended application for post-conviction relief. Applicant asserts he is being held in custody unlawfully, alleging:

1. "Ineffective Assistance of Appellate Counsel of Susan Barber Hackett,¹ Esq.:"

¹ The author of Applicant's appellate brief was Laura Baer, not Susan Hackett. Because Applicant's allegation of ineffective assistance relates only to which issues were raised on

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- a. Appellant counsel failed to raise the issue in brief of the propriety of the trial judge's denial of the Petitioner's Motion for Directed Verdict following the presentation of the state's case-in-chief. The trial court erred in denying the Petitioner's Motion for Directed Verdict, and appellant counsel should have raised this as an appellate issue for review by the South Carolina appellate courts.
2. "Applicant requests that he be permitted to amend his PCR application to conform to the evidence presented at the PCR hearing should any new or unaddressed issues arise during the course of the hearing that have not been specifically addressed in this Application. See *Simpson v. Moore*, 367 S.C. 587, 627 S.E.2d 701 (2006).

The Court permitted the parties to submit briefs on the issue in lieu of holding an evidentiary hearing.

IV. Findings of Fact and Conclusions of Law

Before the Court are Applicant's records from the South Carolina Department of Corrections, the records of the Abbeville County Clerk of Court regarding the subject conviction, the transcript of Applicant's trial, Applicant's appellate records, the records of this post-conviction relief action, and the briefs submitted by the parties. After reviewing all records, arguments, and evidence before this Court, the Court finds and concludes that Applicant is not entitled to post-conviction relief.

Applicant alleges ineffective assistance of appellate counsel due to appellate counsel's failure to raise the issue of the trial judge denying Applicant's motion for a directed verdict. The Court finds this allegation is without merit. In a PCR action, Applicant bears the burden of proving the allegations in his application by a preponderance of the evidence. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985); Rule 71.1(e), SCRCP. Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that "counsel's conduct so

appeal, counsel for the parties have agreed that Ms. Baer, rather than Ms. Hackett, is the attorney whose effectiveness Applicant is contesting.

undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result.” *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in *Strickland*. First, Applicant must prove that counsel’s performance was deficient. *Strickland*, 466 U.S. at 687; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney’s performance by its “reasonableness under prevailing professional norms.” *Cherry*, 300 S.C. at 117, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. “When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect.” *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690).

Second, counsel’s deficient performance must have prejudiced Applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 694).

Beyond the right to effective assistance of counsel at trial, a criminal defendant is constitutionally entitled to effective assistance of appellate counsel on direct appeal. *Evitts v. Lucey*, 469 U.S. 387, 404–05 (1985) (finding that to be effective, appellate counsel must give assistance of such quality as to make appellate proceedings fair); accord. *Thrift v. State*, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990). The analysis of counsel’s performance under *Strickland* remains unchanged—the applicant must demonstrate (1) that his “counsel’s representation fell

below an objective standard of reasonableness” in light of the prevailing professional norms, *Strickland*, 466 U.S. at 688, and (2) that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694; *cf. Smith v. Robbins*, 528 U.S. 259, 285 (2000) (holding that a habeas applicant must demonstrate that “counsel was objectively unreasonable” in failing to file a merits brief addressing a non-frivolous issue, and that there is “a reasonable probability that, but for his counsel’s unreasonable failure . . . , he would have prevailed on his appeal”).

In applying *Strickland* to claims of ineffective assistance of appellate counsel, reviewing courts must accord appellate counsel the “presumption that he decided which issues were most likely to afford relief on appeal. A decision with respect to appeal is entitled to the same presumption that protects sound trial strategy.” *Pruett v. Thompson*, 996 F.2d 1560, 1568 (4th Cir. 1993).

Although appellate counsel is required to provide effective assistance of counsel, “appellate counsel is *not* required to raise every non-frivolous issue that is presented by the record.” *Thrift*, 302 S.C. at 539, 397 S.E.2d at 526 (citing *Jones v. Barnes*, 463 U.S. 745 (1983)). Indeed, “[w]innowing out weaker arguments on appeal and focusing on those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy.” *Smith v. Murray*, 477 U.S. 527, 536 (1986). “For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every ‘colorable’ claim suggested by a client would disserve the very goal of vigorous and effective advocacy . . .” *Jones*, 463 U.S. at 754.

“Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.” *Robbins*, 528 U.S. at 288 (quoting *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986)). To prove prejudice, the applicant must show

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that, but for counsel's errors, there is a reasonable probability he would have prevailed on appeal. *Anderson v. State*, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003).

Here, Applicant alleges appellate counsel was ineffective for failing to raise the issue of the trial court's denying Applicant's motion for a directed verdict. On direct appeal, Applicant's appellate counsel briefed four issues which were submitted to the South Carolina Court of Appeals. Though Applicant's appellate counsel did not brief the directed verdict issue, she thoroughly addressed multiple issues which she felt warranted appellate review. Applicant does not explain how the directed verdict issue was "clearly stronger" than any of the issues actually raised by appellate counsel; therefore, he has failed to overcome the presumption of effective assistance. *Robbins*, 528 U.S. at 288. Moreover, because appellate counsel may exercise reasonable professional judgment in determining which issues to raise, counsel had no duty to raise the directed verdict issue in particular, even if there were some merit to that issue on appeal. *See Thrift*, 302 S.C. at 539, 397 S.E.2d at 526. Accordingly, Applicant has failed to prove that counsel was deficient.

Nevertheless, even if appellate counsel's performance was deficient, Applicant cannot prove prejudice because there is no reasonable probability that he would have prevailed on his directed verdict argument on appeal. *See Anderson*, 354 S.C. at 434, 581 S.E.2d at 835 (holding prejudice requires showing a reasonable probability of prevailing on appeal). On appeal from the denial of a directed verdict, the appellate court views the evidence in the light most favorable to the State; if there is any evidence from which the defendant's guilt can be fairly and logically deduced, the jury verdict will not be disturbed. *See State v. Brown*, 360 S.C. 581, 586, 602 S.E.2d 392, 395 (2004). Therefore, even if appellate counsel had raised the directed verdict issue to the court of appeals, Applicant could only have prevailed if there was *no* evidence from which his

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guilt could have been deduced, when viewed in the light most favorable to the State.

The State introduced considerable evidence of Applicant's guilt as to every element of first-degree burglary. *See* S.C. Code Ann. § 16-11-311(A) ("A person is guilty of burglary in the first degree if the person enters a dwelling without consent and with intent to commit a crime in the dwelling, and . . . with a prior record of two or more convictions for burglary . . ."). Mr. Culbreth testified he saw Applicant standing in the open door between the house and the carport, Amanda Moss testified her carport door had been broken in, and Deputy Thompson found footprints on the carpet inside the house that matched the work boots worn by Applicant. These facts—viewed in the light most favorable to the State—showed that Applicant had broken into the Mosses' home without their consent. In addition to the fact of the break-in, the fact that Applicant had backed his car into the carport and left the rear passenger-side door open (not the front driver-side door, which one would expect if Applicant had merely gotten out of his car to use the bathroom as he claimed) supports the State's theory that Applicant intended to commit a crime in the dwelling—specifically, "to go in there and clean them out." (Tr. p. 278, ll. 16–19). In addition, the State introduced considerable evidence identifying Applicant as the intruder: Mr. Culbreth's visual identification of Applicant standing in the open doorway to the house; his identification of Applicant's car from the make, model, and license plate number; the DNA evidence linking Applicant to the cigarette found at the scene of the break-in; and the footprints inside the house matching the soles of Applicant's work boots. All of this evidence, viewed in the light most favorable to the State, establishes that Applicant broke into the Mosses' home with the intent to steal their belongings.

Applicant now claims that, because there was no testimony that anything had been stolen from the house, the State failed to present any evidence that a crime was committed during the

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break-in. Burglary, however, only requires the State to prove *intent* to commit a crime, which could be “fairly and logically deduced” both from the suspicious parking of Applicant’s car with the rear passenger door open and from the break-in itself. In its closing argument, the State presented its theory that Applicant’s intent to steal was foiled by the sudden appearance of Mr. Culbreth, which is sufficient to explain the lack of evidence that anything had actually been stolen. (Tr. p. 278, ll. 16–23). The mere fact that nothing was stolen from the home is irrelevant to whether the State presented *some* evidence of Applicant’s intent to steal.

Applicant argues that State’s evidence was merely circumstantial, rather than direct, and was described by the trial court as “thin.” (Tr. p. 231, ll. 13–14). However, circumstantial evidence is sufficient to deny a directed verdict motion, and “[the] court is concerned with the existence of evidence rather than its weight in ruling on a motion for a directed verdict.” *State v. Spann*, 279 S.C. 399, 402, 308 S.E.2d 518, 520 (1983) (holding circumstantial evidence, such as smudged palmprints, chipped paint, and blood of the defendant’s blood type found on a windowsill, was sufficient to sustain a burglary conviction).

For all these reasons, it is not likely that any appellate court would have disturbed the trial court’s refusal to direct a verdict, even if appellate counsel had raised the issue on appeal. Therefore, Applicant has failed to prove either prejudice or deficiency regarding appellate counsel’s omission to raise the directed verdict issue; under *Strickland*, therefore, Applicant’s claim of ineffective assistance of counsel fails as a matter of law. *See Robbins*, 528 U.S. at 285. As Applicant’s amended application for post-conviction relief does not raise any other cognizable claims, the Court finds that Applicant’s application must be denied and dismissed with prejudice.

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ANDREWS COUNTY CLERK OF COURT

III. CONCLUSION

Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notifies Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), an applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a notice of appeal on the applicant's behalf. Applicant's attention is directed to Rule 243, SCACR, for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief be denied and dismissed with prejudice; and
2. The Applicant be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 26 day of Oct, 2022.


 LETHIA H. VERDIN
 Presiding Judge
 Eighth Judicial Circuit

Greenville, South Carolina

STATE OF SOUTH CAROLINA,
COUNTY OF ABBEVILLE.

IN THE COURT OF COMMON PLEAS.

Rickey Santione Henley, 290970
Applicant

CERTIFICATE OF SERVICE BY MAIL

vs.

State of South Carolina,
Respondent

2021-CP-01-085

The undersigned, an employee of the Abbeville County Clerk of Court's Office, does hereby certify that a clocked copy of an Order of Dismissal for Post- Conviction Relief in the above-referenced matter was made upon the following persons by placing same in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 01th day of November, 2022, addressed as follows:

Zachary W. Jones
Asst. Attorney General
Post Office Box 11549
Columbia, SC 29211-1549

Scarlet B. Moore, Esquire
P.O Box 17615
Greenville, SC 29606

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CLERK OF COURT

2022 NOV - 1 AM 11: 23

FILED
STATE OF
SOUTH CAROLINA
COUNTY OF ABBEVILLE

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Tra Tanus Agnew, Common Pleas Clerk

CLERK OF COURT

WITNESSES

Patrick Thompson
Abbeville County Sheriff

THE STATE OF SOUTH CAROLINA

COUNTY OF ABBEVILLE

COURT OF GENERAL SESSIONS

July Term, 2012

Indictment # 12GS01-348

WARRANT NUMBER

M511171

THE STATE

vs.

Rickey Santoinc Henley

Kathy Hagen

Foreman of the Grand Jury

Date: JUL 27 2012

TRUE BILL

VERDICT

Hung Jury (4-8-15)

[Signature]
Foreman

INDICTMENT FOR

BURGLARY
16-11-0311

Retrial on 4/14/2016
Guilty (see verdict
Form)

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BY *[Signature]*
ABBEVILLE COUNTY CLERK OF COURT

THE STATE OF SOUTH CAROLINA

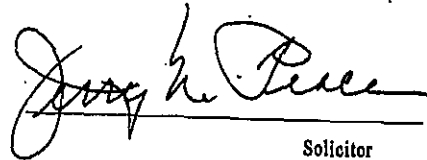
COUNTY OF ABBEVILLE

INDICTMENT FOR**BURGLARY
16-11-0311**

At a Court of General Sessions, convened on the 27th day of July, 2012 the Grand Jurors of Abbeville County present upon their oath:

That Rickey Santoine Henley, did in Abbeville County, state aforesaid, on or about the 15th day of February, 2012 with a prior record of two or more convictions for burglary and/or housebreaking, willfully and unlawfully enter a dwelling without consent and with intent to commit a crime therein, the said dwelling being owned and/or occupied by Amanda Moss, in violation of Section 16-11-311 of the South Carolina Code of Laws, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such cases made and provided.


Solicitor

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

907

COUNTY OF Abbeville
 STATE VS.
Rickey Santoine Henley
 A:
 Race: AFRICAN AME Sex: M Age: 34
 DOB: [REDACTED] SS#: [REDACTED]
 Address: [REDACTED] Cherry Ave.
 City, State, Zip: Anderson, SC 29621
 #: [REDACTED] SID#: [REDACTED]

INDICTMENT/CASE#: 12GS01-0348
 A/W#: M511171
 Date of Offense: 2/15/2012
 S.C. Code § : 16-11-0311
 CDR Code #: 0079

SENTENCE SHEET

DL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐
 disposition of the said indictment comes now the Defendant who was
 charged with: Burglary / Burglary (After June 20, 1985) - First degree

☒ CONVICTED OF or ☐ PLEADS

violation of § 16-11-0311 of the S.C. Code of Laws, bearing CDR Code # 0079
 NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC ☐ §17-25-45
 w/minor 1st or Lewd Act)

Charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)
 Plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

TEST: [Signature] 7860
Brown, C. Yates SC Bar# [REDACTED] Defendant Attorney for Defendant SC Bar# [REDACTED]

HEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
 a determinate term of 24 days/months/years or ☐ under the Youthful Offender Act not to exceed years
 or to pay a fine of \$; provided that upon the service of days/months/years and/or payment
 \$; plus costs and assessments as applicable*; the balance is suspended with probation for

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
 probation, which are incorporated by reference.

CONCURRENT or ☐ CONSECUTIVE to sentence on:

The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
 the State Department of Corrections. 215 days

The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal
 Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

total: \$ plus 20% fee: \$

Payment Terms:

Set by SCDPPPS

Recipient:

fine:	\$	
4-1-206 (Assessments 107.5 %)	\$	
4-1-211(A)(1) (Conv. Surcharge)	\$100	\$ <u>100.00</u>
4-1-211(A)(2) (DUI Surcharge)	\$100	\$ <u> </u>
56-5-2995 (DUI Assessment)	\$12	\$ <u> </u>
56-1-286 (DUI Breath Test)	\$25	\$ <u> </u>
Advisory 47.9 (Public Def/Prob)	\$500	\$ <u> </u>
14-1-212 (Law Enforce. Funding)	\$25	\$ <u>25.00</u>
14-1-213 (Drug Court Surcharge)	\$150	\$ <u> </u>
50-21-114(BUI Breath Test Fee)	\$50	\$ <u> </u>
6-5-2942(J) (Vehicle Assessment)	\$40/ca	\$ <u> </u>
Advisory 90.5 (SCCJA Surcharge)	\$5	\$ <u>5.00</u>
to County (if paid in installments)	\$	\$ <u>3.90</u>
TOTAL	\$	\$ <u>133.90</u>

PTUP

 days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. or Job Corp.

May serve W/E beginning

Substance Abuse Counseling ☐

Random Drug/Alcohol testing ☐

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$ beginning

\$ paid to Public Defender Fund

Other:

☐ Appointed PD or appointed other counsel,
 § 47.12 requires \$500 be paid to Clerk
 during probation.

Clerk of Court/ Deputy Clerk [Signature]
 Court Reporter: [Signature]
 CA/217 (03/2011)

Presiding Judge [Signature]
 Judge Code: 2154
 Sentence Date: 4-6-16

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 ABBEVILLE COUNTY CLERK OF COURT