

ORIGINAL

STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY

G. Edward Welmaker, Circuit Court Judge

RECEIVED

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SC Court of Appeals

THE STATE,

RESPONDENT,

V.

DENIA DAWKINS,

APPELLANT

APPELLATE CASE NO. 2012-212529.

SECOND SUPPLEMENTAL RECORD ON APPEAL

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INDEX

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TRIAL TRANSCRIPT (APRIL 9 – 11, 2013) PAGES 229 – 234; 433 – 446; 456 – 460;
523 – 561 1

CHARGE ON THE LAW27

VERDICT60

CERTIFICATE OF COUNSEL.....65

JAQUAN BOYD - CROSS EXAMINATION BY MS. GORTON

229

1 violation of the Confrontation Clause by showing he was
2 prohibited from engaging in otherwise appropriate cross
3 examination designed to show a prototypical form of bias on
4 the part of the witness and thereby exposed the jury to
5 facts from which the jurors could appropriately draw
6 inferences relating to the reliability of the witness.

7 And ---

8 THE COURT: What -- hang on just a minute. What
9 questions do you want to ask him relating to this? You've
10 asked was he out on bond.

11 MS. GORTON: Right.

12 THE COURT: And when was the charge? And was it
13 related to this or ...

14 MS. GORTON: It was possession of marijuana and
15 possession of crack, I believe, ---

16 THE COURT: From what time-frame?

17 MS. GORTON: It was an arrest in February of 2011,
18 which was four months prior to this. And I am trying to
19 show that he had motive to dispose of the marijuana that we
20 say was on the dresser.

21 THE COURT: What would be his motive? That's not his
22 home, right?

23 MS. GORTON: To not violate bond.

24 THE COURT: But that's not his apartment, is it?

25 MS. GORTON: He's there. If the police had come in and

JAQUAN BOYD - CROSS EXAMINATION BY MS. GORTON

230

1 he is the only one there, and there is marijuana, then, yes,
2 he would be in violation of his bond.

3 MR. IANUARIO: Your Honor, if I may interject.

4 THE COURT: Yes, sir.

5 MR. IANUARIO: Whether or not he had valid grounds for
6 being charged when the police showed up is different from
7 whether he was operating under a fear of being charged when
8 the police showed up. And he -- we believe that he was
9 fearful of being charged with something, thus, destroying
10 any evidence that might be potentially incriminating, thus,
11 a violation of his bond.

12 MS. GORTON: And I have for you State v. Smith, which
13 says it's error to deny cross examination of an eyewitness,
14 a non co-defendant, as we have here regarding pending crack
15 charges.

16 And I have State v. Sims, which is different than State
17 v. Smith, that says non co-defendant pending charges totally
18 unrelated to the pending case, the case at issue, but you
19 have a right to cross examine regarding the pending --
20 regarding his pending -- the witness' pending charge. I
21 would give you State v. Smith and State v. Sims.

22 It goes to show his motive and bias for his actions and
23 the way he is testifying now. He's testifying there was no
24 marijuana in the apartment. Your Honor, we submit that
25 there was. That was the whole purpose of her being there.

JAQUAN BOYD - CROSS EXAMINATION BY MS. GORTON

231

1 And she saw it there and then it's gone. Somebody got rid
2 of it.

3 **THE COURT:** Solicitor, how does this not fall within
4 rule 608?

5 **MS. SALISBURY:** Well, Judge, I think that it's, on its
6 face, outside of what 608 authorizes to the extent that 608
7 contemplates that the Defendant or the witness can be cross
8 examined about convictions. It's apparent this is not a
9 conviction ---

10 **THE COURT:** Well, how about a bias, or a motive or a
11 prejudice to ---

12 **MS. SALISBURY:** Well, my response to that, Judge, is
13 whether there was -- I'll say that I think it's a little bit
14 too tenuous. Whether there was marijuana in that apartment
15 is not relevant to whether these two Defendants are guilty
16 of armed robbery, a conspiracy, burglary, first, and
17 attempted murder.

18 The fact that this defendant may have some motive to do
19 something unconnected to the question of whether these
20 Defendants are guilty is not an element of the defense as
21 contemplated by even rule 405. The only way that this kind
22 of evidence is admissible is if we do a 404(b) Lyle analysis
23 for extrinsic character evidence.

24 And I would say at that point that the character of
25 this witness, considering the fact that his drug use or drug

JAQUAN BOYD - CROSS EXAMINATION BY MS. GORTON

232

1 disposal is not probative of an element of truthfulness or
2 his propensity to tell the truth ---

3 **THE COURT:** Well, I gather that what is being offered
4 is not for character, but for bias and prejudice.

5 **MS. SALISBURY:** And I understand that, Judge. But what
6 I meant by that was that in the sense that it is not an
7 element of the defense because the elements of the defense
8 are that these Defendants, as I understand it, these
9 Defendants did not know the robbery was planned and were not
10 part of a conspiracy. That's the defense.

11 To the extent that this defendant had some motivation
12 to do something related to drugs that may or may not have
13 been in that apartment, in the testimony thus far it's been
14 that there were not drugs in that apartment, is not
15 connected to this defense. Its only -- its only value is as
16 Lyle character evidence value. It's not 405(b) specific
17 instances of conduct value because it's ---

18 **THE COURT:** But isn't it 608(c), bias and prejudice of
19 a witness evidence?

20 **MS. SALISBURY:** No, I don't believe so, Judge, because
21 as I mentioned, 608 is ---

22 **THE COURT:** 608 relates to character that relates to
23 conduct and finally it relates to bias, which as I
24 understand the rules of evidence, (c) is sort of a South
25 Carolina -- unlike the federal rule. I mean, why doesn't

JAQUAN BOYD - CROSS EXAMINATION BY MS. GORTON

233

1 that go to either a pecuniary or interest to this witness to
2 allow the examination?

3 MS. SALISBURY: Well, quite frankly, Your Honor, I
4 think that to the extent that this is a pending charge, as I
5 said yesterday, the witnesses in this case are entitled to
6 the same presumption of innocence that these Defendants are.
7 And that's why historically the courts have been outright
8 reluctant to allow the examination as it relates to the
9 pending charges. That's -- I don't know how else to put it.

10 To start -- to suggest that it is somehow appropriate
11 to offer impeachment evidence based on unrelated drug
12 charges, and as I understand the pending charge, it's a
13 possession with intent to distribute crack cocaine. That is
14 pending.

15 The incident site for which is not in Taylors, not in
16 Cunningham Villas, and this defendant is one of three co-
17 defendants charged in that case. It's -- and more than
18 that, the information in this case has been that it's --
19 that marijuana was in this apartment. We're talking about a
20 pending crack cocaine charge. So on a few levels I don't
21 believe that it's appropriate impeachment material.

22 MS. GORTON: The Mizzell test says before a judge may
23 limit a criminal defendant's right to engage in cross
24 examination to show bias on the part of a witness the record
25 must clearly show that cross examination is inappropriate.

1 If the defendant establishes that he was unfairly prejudiced
2 by the limitation, it is reversible error.

3 Judge, our entire defense is she went over to buy a bag
4 of weed, not commit a robbery.

5 **THE COURT:** Yes, ma'am, I understand that. Again, I
6 understand the State's argument that how does that change a
7 robbery or an attempted murder, but you have your theory.

8 I'll allow the question under rule 608(c), but I will
9 -- I don't -- I believe you will be able to effectively
10 cross examine without bringing out the nature of the charge.
11 Wouldn't you agree that he's out on bond? So as you
12 mentioned to begin with, being on bond could violate a -- is
13 there any probative reason that he would need to be out on
14 -- on what particular charge it is if he's out on a bond and
15 that if there's marijuana around, then it's going to be a
16 violation?

17 **MS. GORTON:** I don't think so, Judge. I think it's all
18 right.

19 **THE COURT:** Okay.

20 **MS. GORTON:** As long as I can establish ---

21 **THE COURT:** That he is out on bond, not the nature of
22 the charge that he's on, but that he's out on bond. And you
23 can follow that up, you know, with just -- don't need to, as
24 I said yesterday, we need to try this case. And I'm
25 certainly going to give you an opportunity to cross examine

1 So with that reminder, I'm going to excuse you. I have
2 some matters I'll need to take care of first thing in the
3 morning. So if you'll be back at 9:30, we'll be ready to
4 start then. Hopefully I won't keep you waiting then. Have
5 a good evening. Everyone else, please remain seated while
6 the jury leaves for the evening.

7 (Whereupon the jury exited the courtroom at 5:37 pm)

8 **THE COURT:** Didn't know if all the exhibits were
9 marked. Is there any other -- obviously we'll put all this
10 on the record before the jury tomorrow. Is the State
11 prepared to rest? All the exhibits in and all the witnesses
12 ---

13 **MS. SALISBURY:** Yes, Judge. I was planning to rest
14 just now in front of the jury, but ---

15 **THE COURT:** Okay. Well, I didn't know if all the
16 exhibits that had been marked had been introduced that
17 needed to be introduced. So I'll let you rest on the record
18 first thing in the morning before the jury.

19 Is there any other matters that we need to take care
20 of, the fact that she has said she rested before we settle
21 the record and I talk with the Defendants about their rights
22 to testify and so forth?

23 **MS. GORTON:** Judge, first of all, I need to clarify for
24 our movement of the directed verdict. Do you want us to
25 wait until she does it in the morning before the jury and

1 then break?

2 **THE COURT:** Well, let's -- that was one of the things
3 -- do you have a motion for a directed verdict? Do you have
4 any other motions?

5 **MS. GORTON:** Yes, Your Honor, the motion pertaining to
6 her release tonight, I believe. Catch 22, is he still here?
7 He can be here within five minutes.

8 **THE COURT:** Okay. That and the motion for directed
9 verdict, why don't we do that first thing in the morning.
10 And we'll get the record to reflect that you're timely
11 making your motion after -- she has rested now, but has not
12 rested before the jury. So now is the time, but rather than
13 doing them now, let's just wait til first thing in the
14 morning.

15 That's why if y'all could be here at 9:00, we'll get
16 those things taken care of, but I do need to talk with your
17 clients. If y'all could come forward with them now.

18 **MS. GORTON:** Are you denying the motion ---

19 **THE COURT:** We're going to do that in just a minute. I
20 thought you needed five minutes for the ---

21 **MS. GORTON:** Five minutes?

22 **THE COURT:** --- bondsman to be here.

23 **MS. GORTON:** Okay.

24 **THE COURT:** I thought you weren't ready. So if y'all
25 could come forward with your clients. If you'll just stand

1 right there, please, ma'am, and, please, sir, just by your
2 attorney. I need both of you, please, if you would, raise
3 your right hand. Do you swear or affirm the testimony
4 you're about to give me will be the truth, the whole truth
5 and nothing but the truth so help you God?

6 MR. LOMAX: Yes, sir.

7 MS DAWKINS: Yes, sir.

8 THE COURT: Ms. Dawkins and Mr. Lomax, we've reached
9 the stage in the trial where I need to explain to you
10 certain rights that you enjoy under our Constitution under
11 the law of South Carolina. I'm sure you've had a chance to
12 talk with your attorneys and you've probably gone over this
13 with your attorneys, but I need to be satisfied in my own
14 mind that you understand the protections that you enjoy
15 under the Constitution both of South Carolina and of the
16 United States of America.

17 Among those rights that you have, you can claim the
18 protections of the 5th Amendment to the Constitution of the
19 United States, similar language to the Article One of our
20 State Constitution. And it says that no person can be
21 compelled in any criminal case to be a witness against
22 himself or herself.

23 This means, Mr. Lomax and Ms. Dawkins, you can't be
24 required to testify in the case. You have a right to
25 testify on your own behalf, but nobody can make you testify.

1 It's a personal right that you enjoy. And nobody can waive
2 this right except you.

3 Now, if you choose to testify you'll be subject to the
4 same rules that govern any other witness. You can be
5 examined and cross examined on any relevant issue in this
6 case. If either of you have convictions that involve
7 dishonesty, or false statements or any crime punishable by
8 imprisonment for more than one year and the Court determines
9 that the probative value of admitting that evidence
10 outweighs any prejudicial effect to you, then the Solicitor
11 would be allowed to introduce your criminal record to attack
12 your credibility.

13 Now, if you decide to testify, the decision that you
14 make to testify must be made by you in a voluntary way,
15 intelligently made by you with the knowledge of the
16 protections that you're awarded under the 5th Amendment to
17 the Constitution. You also need to intelligently, and
18 knowingly, and freely and voluntarily realize by testifying
19 the consequences that I've explained to you of your decision
20 to testify.

21 Now, either of you or both of you may choose not to
22 testify. If you choose not to testify, I'm going to
23 instruct the jury that they cannot give the fact that you
24 chose not to testify any consideration whatsoever, that it
25 could be absolutely not prejudice to you if you choose to

1 exercise your rights not to testify.

2 Whether to testify or not testify is left entirely up
3 to you. You can certainly talk with your attorney and other
4 members of your family or otherwise, but that decision has
5 got to be made by you and you alone. Do you understand what
6 I've explained to you?

7 MR. LOMAX: Yes, sir.

8 MS. DAWKINS: Yes, sir.

9 THE COURT: Both of you understand. Do you have any
10 questions of me?

11 MS. DAWKINS: No, sir.

12 MR. LOMAX: No, sir.

13 THE COURT: Are there any impeachable offenses,
14 Solicitor, for which you would intend to impeach the
15 witnesses if they testify?

16 MS. SALISBURY: Well, Ms. Dawkins has a 2012 conviction
17 for shoplifting. It's the State's position that that's a
18 crime involving dishonesty or false statement. Mr. Lomax
19 has no criminal charges or criminal convictions, Your Honor.

20 THE COURT: So when was the conviction?

21 MS. SALISBURY: In 2010 ---

22 THE COURT: You said it was this year ---

23 MS. SALISBURY: I'm showing a January 2012 conviction.

24 THE COURT: January? Okay. That's the only conviction
25 of either party?

1 MS. SALISBURY: Yes, Your Honor.

2 THE COURT: Okay.

3 MS. SALISBURY: But to the extent that the Court has
4 allowed the defense attorneys to inquire about pending
5 charges, Mr. Lomax has some other pending charges for which
6 I might attempt the same strategy.

7 MS. GORTON: If we could ask for clarification on the
8 shoplifting charge as to the date. It's important in her
9 decision.

10 THE COURT: Okay. Well, maybe when we ---

11 MS. SALISBURY: Well, it's a 2010 incident.
12 Regardless, it's within ten years.

13 THE COURT: She just wanted to know the date. Do you
14 have when in January it was?

15 MS. GORTON: I believe it went into the court system
16 after she failed PTI in 2010. And I need verification of
17 that since I don't have access ---

18 THE COURT: She can get that for you after we break.
19 I'm sure she can get that. The reason I'm doing this now is
20 to give y'all plenty of opportunities overnight to have a
21 chance to talk with your attorneys to decide whether or not
22 you wish to testify.

23 Ms. Gorton, do you have any -- in other words, you and
24 she can work that out after I finish, okay?

25 MS. GORTON: Yes, sir.

1 **THE COURT:** You need the information, and ---

2 **MS. GORTON:** Yes.

3 **THE COURT:** --- I'm sure she'll get that for you to
4 decide that. But are there any other questions either of
5 you have of me?

6 **MR. LOMAX:** No, sir.

7 **MS. DAWKINS:** No, sir.

8 **THE COURT:** Okay. Certainly, as I said, I won't
9 require your decision tonight as to whether or not you wish
10 to testify, but I'll give you a chance to talk with your
11 attorneys and certainly tomorrow you'll have that
12 opportunity. All right. You can return back to your
13 tables.

14 As far as tomorrow at 9:00 we'll go through your -- any
15 motions you have as far as directed verdicts. If y'all have
16 -- I don't know how long the defenses may take, but probably
17 if we have time tomorrow, before the jury's back at 9:30 we
18 can perhaps talk about charges and verdict forms and things
19 of that nature, assuming that we'll be able to get this case
20 to the jury sometime tomorrow. Do you see any reason that
21 we wouldn't get it to the jury tomorrow?

22 **MS. GORTON:** I don't think so. I think we can get all
23 the defense in tomorrow.

24 **THE COURT:** So if you have those requests, then we can
25 -- you gave me some earlier. I didn't know if you had more

1 or not, but ---

2 MS. GORTON: All right. You should have four from me.

3 THE COURT: I believe we've got those. And I've got
4 those from Mr. Ianuario too. All right. So if y'all will
5 be here at nine in the morning, we'll be ready to talk about
6 that. And then the jury will be ready to present the
7 defense or either the closing statements and the argument if
8 there's no defenses put up at 9:30. All right. Anything
9 else? Do you have the person here?

10 De'NIA'S FATHER: He's on his way.

11 MS. SALISBURY: Well, the building's locked, Judge. I
12 don't ---

13 THE COURT: Oh, he's not going to be able to get in,
14 the building's locked now.

15 THE OFFICER: They do have a guy on the front.

16 MS. GORTON: Judge, if they are going to go into
17 custody my concern is is that she -- by the time they get
18 back to the jail -- she has not eaten other than lunch I
19 brought her today since 2:00 yesterday when she broke for
20 lunch because our schedule is off from the jail's schedule
21 and she's not getting food.

22 THE COURT: Okay.

23 MS. GORTON: These guys are taking great care of her to
24 let me bring her lunch, but over at the jail she's not being
25 fed. So yesterday she had to go from 2:00 until they gave

1 her crackers at ten when we broke.

2 THE COURT: All right. Well, ---

3 MS. GORTON: And I know you can't micro-manage the
4 jail, Judge, but going without food for that long ...

5 THE COURT: We'll be here another ten minutes or so.
6 Can you make sure that she, or a relative, or somebody, if
7 they can just go out and buy her something? Can you work
8 with that?

9 THE OFFICER: Yes, sir.

10 THE COURT: So we'll keep her here. And they can bring
11 -- someone can go get her a hamburger or whatever she wants.
12 And they'll let her have it, examine it. We can't really
13 wait on the bondsman and keep the court reporter here to do
14 that, but we'll certainly provide the food.

15 MS. GORTON: I very much appreciate that, Judge.

16 THE COURT: All right. We'll be at ease til 9:30 or
17 9:00, excuse me. 9:00 in the morning the attorneys and the
18 parties will be here.

19 (Whereupon court was in recess at 5:49 pm)

20 (Whereupon court resumed at 5:52 pm)

21 THE COURT: All right. Ms. Gorton, I believe you have
22 a motion about bond.

23 MS. GORTON: Yes, Judge. I would move to release
24 De'Nia Dawkins on her own recognizance. I believe that her
25 bondsman is here. And I haven't had a chance to speak with

1 him. Obviously, I've been waiting with you. But I am
2 hoping he will say that he is not in opposition to it.

3 MR. MILLS: And I'm sorry I didn't dress better.

4 THE COURT: Yes, sir. What's your name, please?

5 MR. MILLS: It's Adam Mills.

6 THE COURT: All right. Mr. Mills, do you understand
7 your bond expired once this case started?

8 MR. MILLS: Yes, sir.

9 THE COURT: And you're no longer required to be on the
10 bond?

11 MR. MILLS: Yes, sir.

12 THE COURT: All right. Are you wanting to stay on the
13 bond and be responsible for her appearance tomorrow?

14 MR. MILLS: I'd be willing to do that, Judge.

15 THE COURT: All right. You understand then that if
16 she's not here tomorrow you'll owe the full amount. How
17 much is the bond?

18 MR. MILLS: Thirty-five, I think.

19 THE COURT: Thirty-five thousand?

20 MR. MILLS: (Affirmative nod).

21 THE COURT: Okay. So you understand you'll have full
22 responsibility for making sure that she's present tomorrow?

23 MR. MILLS: Yes, sir.

24 THE COURT: And that if she's not present that you'll
25 be required to make the bond payment to the Court?

1 MR. MILLS: Yes, sir.

2 THE COURT: Are you willing to take that on even though
3 the law allows you to be off the bond now?

4 MR. MILLS: That's fine, sir.

5 THE COURT: All right, sir. Ms. Dawkins, if I release
6 you on this bond based upon his statement that he's before
7 the Court that he's assuming the bond, you understand you
8 have to be here tomorrow?

9 MS. DAWKINS: Yes, sir.

10 THE COURT: And you understand that if you're not here
11 the trial is going to proceed in your absence?

12 MS. DAWKINS: Yes, sir.

13 THE COURT: I certainly would recommend you be here for
14 the benefit of your attorney because if there's an empty
15 chair there, that's not going to help your case any. But
16 you understand fully that the case will proceed whether or
17 not you're here?

18 MS. DAWKINS: Yes, sir.

19 THE COURT: And you understand you need to be here, I
20 guess, at 8:30 to talk with your attorney?

21 MS. DAWKINS: Oh, I'm always here when the doors open.

22 THE COURT: All right. All right, Mr. Mills, based
23 upon your statement to the Court, I'll -- Mills or Miles?

24 MR. MILLS: Mills, M-i-l-l-s.

25 THE COURT: Okay. And what was your first name again?

1 MR. MILLS: Adam.

2 THE COURT: Okay. And you're with ---

3 MR. MILLS: Catch 22.

4 THE COURT: --- Catch 22 Bonding?

5 MR. MILLS: Yes, sir.

6 THE COURT: All right. I'll release her for the
7 evening. You need to be back at 8:30 in the morning. And
8 you need to make sure she's here, Mr. Mills.

9 MR. MILLS: Yes, sir.

10 THE COURT: All right.

11 MR. IANUARIO: I'd also like to have the same motion
12 for my client, Your Honor, ---

13 THE COURT: Are you on his bond too?

14 MR. MILLS: Yes, sir.

15 THE COURT: And you're doing that one too?

16 MR. MILLS: Yes, sir.

17 THE COURT: And how much is his bond?

18 MR. MILLS: Twenty thousand.

19 THE COURT: Okay. And you're going to ensure his
20 presence tomorrow ---

21 MR. MILLS: Yes, sir.

22 THE COURT: --- also? Okay. Mr. Lomax, you understand
23 that if you're not here the case will proceed in your
24 absence?

25 MR. LOMAX: Yes, sir.

1 **THE COURT:** And that your attorneys will be presenting
2 the case without the benefit of the client here?

3 **MR. LOMAX:** Yes, sir.

4 **THE COURT:** Presenting any defense.

5 **MR. LOMAX:** Yes, sir.

6 **THE COURT:** Do both of you understand that you
7 certainly have the right to talk to your attorneys about
8 this matter, but there should not be any contact with
9 witnesses who have previously discussed -- unless they're
10 going to be witnesses for you, you understand that?

11 **MR. LOMAX:** Yes, sir.

12 **THE COURT:** I want to make sure that we have peace in
13 the community during the night.

14 **MR. LOMAX:** Yes, sir.

15 **THE COURT:** All right. I'll -- based on Mr. Mills'
16 statement that he's on the bond for both of these
17 individuals, and will ensure their presence in the morning
18 and with the full knowledge that both Defendants understand
19 the trial will proceed, I'll release them tonight.

20 **MR. IANUARIO:** Thank you, Your Honor.

21 **THE COURT:** Okay. Be ready to start back at 9:00 in
22 the morning. I understand the jail will need something to
23 say that I'm releasing them on bond. If y'all would like to
24 prepare something for me to that effect or maybe Mr. Mills
25 has something to that effect.

1 **MS. GORTON:** I can scribble it out on notebook paper,
2 Judge. Judge, is this technically on her own recognizance
3 or on continued bond?

4 **THE COURT:** Continued bond. It's not ---

5 **MS. GORTON:** Yes, sir.

6 **THE COURT:** --- on PR, no. In fact, it would probably
7 be good to have the Catch 22 representative sign that as
8 well on the bottom that he's continuing on the bond.

9 (Whereupon court was in recess at 5:58 pm)

1 But short of any evidence indicating that there was an
2 intervening act, it's the State's position that the shooting
3 was a natural and reasonable consequence that flows from the
4 plan of the armed robbery. And for that reason there's no
5 basis to charge intervening act.

6 **MS. GORTON:** I believe that the charge she has issue
7 with is independent act, which specifically comes from State
8 v. Adams and says specifically when two or more conspire to
9 commit a crime, they're responsible for all incidental and
10 consequential acts growing out of the common design. And
11 then it goes on to say, however, conspirators are not
12 responsible for an independent act committed by another
13 conspirator or conspirators that was not part of the common
14 design.

15 And I do have the case law in support of that, which is
16 not on -- it's just -- stands for the general proposition
17 that you're entitled to an instruction whenever it's ---

18 **THE COURT:** Okay.

19 **MS. GORTON:** --- can be inferred from the evidence.

20 **THE COURT:** State versus Adams is ---

21 **MS. GORTON:** Adams is the one that specifies -- this,
22 in fact, I believe I plagiarized Adams' instruction in this.

23 **THE COURT:** All right. I'll charge that over the
24 State's objection.

25 **MS. GORTON:** Judge, in addition to those four written

1 instructions that I gave you, I'll be asking for a charge of
2 duress. That hasn't been the theme of our case, but it
3 could be reasonably inferred from the jury.

4 The jury could reasonably conclude that she did know
5 about the robbery beforehand, but that due to the physical
6 violations that they've heard of and the nature of the gang
7 itself, it is a reasonable inference that they could draw
8 from the evidence before them that if she did help plan the
9 robbery, she acted under duress to do so.

10 **THE COURT:** And what is the evidence of that right now?
11 Again, I know we're going a little ahead of things just
12 because we have a few moments here, but maybe I can revisit
13 that after hearing all the testimony. But ...

14 **MS. GORTON:** I think both Smoke and Fats talked about
15 what happens if you don't follow orders of those who are in
16 charge, that being Raymond Young and Envy. Raymond Young
17 was the one giving the other members instructions on how
18 this was going to go down. He was the one briefing Fats and
19 Smoke in the car as to how this was going to go down and
20 that if you did not follow the orders of the Higher
21 Authority, the King or the Queen, that you were subject to
22 physical violations, which included six on one beatings for
23 six minutes..

24 I'd like the record to reflect that Ms. De'Nia Dawkins
25 is a very tiny person. I could have her ---

1 **THE COURT:** Well, we'll -- let's talk about that one
2 after you put up your defense. But I think that would be a
3 little premature now until I hear what the other evidence is
4 as to whether or not that should be charged. Again, all of
5 our jurors are here now.

6 The charge you proposed on circumstantial evidence, do
7 you have authority for that other than State v. Edwards?
8 Have you ---

9 **MS. GORTON:** Judge, frankly, I can't even locate my
10 copy of that motion. But all of my motions tend to cite
11 authority. And if you'll ---

12 **THE COURT:** Well, I'm going to charge circumstantial
13 evidence under the law under Gippon and as Cherry
14 interpreted it. I think the later case law states
15 specifically what we are to charge as ---

16 **MS. GORTON:** Yeah, I ---

17 **THE COURT:** --- under circumstantial evidence. So I'll
18 charge the -- I'll charge ---

19 **MS. GORTON:** My circumstantial evidence charge that I
20 requested was another plagiarism straight out of Manis.

21 **THE COURT:** Well, that's -- I'll charge circumstantial
22 evidence, but, again, it'll be the charge that I have and
23 not the one you've proposed.

24 **MS. GORTON:** And you said not the reasonable doubt
25 instruction that we requested pursuant to State v. Manning

1 will also be denied?

2 THE COURT: Under which one now?

3 MS. GORTON: State v. Manning.

4 THE COURT: But under -- which charge are you asking
5 about?

6 MS. GORTON: Reasonable doubt.

7 THE COURT: I'll charge reasonable doubt. I'll charge
8 -- yeah, I think your reasonable doubt charge is to cause a
9 reasonable person to hesitate to act.

10 MS. GORTON: Yes.

11 THE COURT: That will certainly be included in my
12 charge.

13 MS. GORTON: Thank you.

14 THE COURT: And the one Mr. Ianuario just handed me
15 about a statement, I'll certainly give the jury a charge on
16 voluntariness of a statement.

17 MR. IANUARIO: Thank you, Your Honor.

18 THE COURT: So the independent act will be the only one
19 that's not already covered. And then we'll talk about the
20 coercion or duress. Is the State going to seek a hand of
21 one charge?

22 MS. SALISBURY: Yes, Your Honor.

23 THE COURT: Okay.

24 MS. SALISBURY: I believe the facts presented support
25 that.

1 **THE COURT:** Okay. All right. Let's ---

2 **MS. GORTON:** Judge, just so that there's no more
3 interruptions once the jury comes in, I am concerned that I
4 see and have heard that Ms. Salisbury will be playing a
5 video tape. And I'm not sure what the video tape is for
6 closing argument, but there is case law that says you can't
7 refer to statements that weren't entered into evidence. And
8 I just don't want a video that wasn't admitted into evidence
9 being played.

10 **THE COURT:** Okay.

11 **MS. SALISBURY:** Judge, I have no idea what she's
12 talking about.

13 **THE COURT:** She heard a bad rumor?

14 **MS. SALISBURY:** Apparently. I don't have any video.

15 **THE COURT:** Okay.

16 **MS. GORTON:** Okay. Thank you. Good. Glad to hear it.

17 **THE COURT:** So that's put to rest. I'll be -- we'll
18 have a verdict form ready for you to review as to the -- the
19 verdict form will just -- I'm going to try to have it into
20 four pieces of paper. We'll have each Defendant with two of
21 the charges on one, two of the charges on the other, either
22 guilty or not guilty. And then we'll do two on the other.
23 I'll certainly give y'all a chance to look over the verdict
24 forms before they go back to the jury. Okay.

25 We'll proceed with the defense. So that you know the

1 **THE COURT:** I deny your motions for directed verdict.

2 **MR. IANUARIO:** Thank you, Your Honor.

3 **MS. GORTON:** The second motion I have, Your Honor, is
4 to renew my motion for the duress instruction.

5 **MR. IANUARIO:** I'd also like to join in that one, Your
6 Honor.

7 **THE COURT:** I presume the State's opposed to that.

8 **MS. SALISBURY:** Yes, Your Honor. It's my understanding
9 that the law in this State is that for duress or coercion to
10 be a defense the coercion or duress must be present,
11 imminent and of such a nature as to induce a well-grounded
12 apprehension of death or serious bodily injury if that act
13 is not done.

14 I don't believe there's been any evidence to support
15 that these two Defendants were forced to commit this crime.
16 And there's certainly no evidence that there was any
17 imminent danger should they not do it. I'd also note that
18 that comes from the Court of Appeals opinion in State versus
19 Holliday.

20 I'd also direct the Court's attention to Brown versus
21 Bailey, which is a Supreme Court opinion and State versus
22 Blurton, which is a Supreme Court opinion both of which
23 indicate that it is not a defense to commit a crime at the
24 instruction of another person, which I believe more closely
25 fits what may have happened in the facts in this case. So,

CHARGE OF THE COURT

524

1 yes, for those reasons, Judge, I would oppose the
2 instruction.

3 THE COURT: All right. I'll charge that as you
4 requested.

5 MR. IANUARIO: Thank you, Your Honor.

6 MS. GORTON: Thank you.

7 THE COURT: Okay. If our jury is ready you can have
8 them come in, Ms. Sims.

9 (Whereupon the jury entered the courtroom at 12:15 pm)

10 THE COURT: Ladies and gentlemen and Madame Forelady,
11 it's now my opportunity to instruct you on the law. Let me
12 remind you that we have indictments here and these
13 indictments, as you're well aware, charge these Defendants
14 with conspiracy and burglary in the first degree with
15 attempted murder and with armed robbery.

16 The fact that we have indictments and these Defendants
17 have been arrested and charged and indicted, that's not
18 evidence in the case. It shouldn't be considered as
19 evidence by you. It doesn't create any presumption by you
20 of their guilt. The indictment is merely the charging paper
21 by which the case is brought before this Court for
22 disposition.

23 The fact that there's four different charges on each of
24 these Defendants should be considered by you as separate and
25 distinct offenses. In other words, you can decide each or

CHARGE OF THE COURT

525

1 you should decide each indictment separately on the evidence
2 and the law applicable to that particular charge
3 uninfluenced by your decision on the other indictments.

4 In other words, a defendant can be convicted or
5 acquitted on any or all of the offenses charged. I'll have
6 separate verdict forms for you to fill out as to the guilt
7 or innocence for each indictment and for each defendant.

8 This case involves two Defendants. And the case of
9 each of these Defendants and the evidence involved
10 concerning that particular Defendant should be considered by
11 you separately and individually. Your verdict does not have
12 to be the same for both Defendants. The fact that you may
13 find one Defendant guilty or not guilty should not control
14 your verdict as to the other Defendant.

15 When more than one person is charged with a crime, if
16 the evidence warrants, you may convict one, acquit the
17 other, or you may acquit both or you may convict both. It
18 will depend upon your view of the testimony and the
19 evidence. And you must take each Defendant -- consider the
20 evidence as to that Defendant and my instructions to you on
21 the law.

22 Again, you will have verdict forms that will reflect
23 that for each Defendant as well. And as I go through the
24 instruction to you, of course, you should keep that in mind
25 that there are multiple charges, but also two Defendants in

CHARGE OF THE COURT

526

1 the case. And when I say the Defendant, of course, it
2 refers to both Defendants.

3 Each of them have entered a plea of not guilty to each
4 of these indictments. And that plea places the burden on
5 the State to prove the Defendant guilty. A person charged
6 with committing a criminal offense in South Carolina is
7 never required to prove himself or herself innocent. That's
8 an important rule of law, that in a criminal trial, no
9 matter how serious that charge may be, the defendant will
10 always be presumed innocent of the crime for which the
11 indictment was issued unless guilt has been proven by
12 evidence satisfying you of that guilt beyond a reasonable
13 doubt.

14 Presumption of innocence doesn't end when you begin
15 your deliberations. It accompanies the Defendant throughout
16 the trial until you've reached a verdict of guilt based on
17 evidence satisfying you of that guilt beyond a reasonable
18 doubt.

19 Presumption of innocence has often been described as a
20 robe a righteousness that's placed about the shoulders of an
21 individual, remains with that defendant until it's been
22 stripped from him or her by evidence satisfying you of that
23 defendant's guilt beyond a reasonable doubt.

24 Presumption of innocence is not a mere legal theory.
25 It's not a legal phrase that's used. It is a substantial

CHARGE OF THE COURT

527

1 right to which every defendant is entitled unless you, the
2 jury, are satisfied from the evidence of that defendant's
3 guilt beyond a reasonable doubt. You may ask yourself what
4 is a reasonable doubt in the law? Reasonable doubt is the
5 kind of doubt that would cause a reasonable person to
6 hesitate to act.

7 Now, some of you in the past may have served as a juror
8 in civil cases where you were told that it was only
9 necessary to prove that a fact was more likely true than not
10 true by what was called the preponderance of the evidence or
11 the greater weight of the evidence. In criminal cases the
12 State's proof is more powerful than that. It must be beyond
13 a reasonable doubt. Proof beyond a reasonable doubt is
14 proof that leaves you firmly convinced of a defendant's
15 guilt.

16 Now there are very few things in this world that we
17 know with absolutely certainty. And in criminal cases the
18 law doesn't require proof that overcomes every possible
19 doubt.

20 If, based upon your consideration of the evidence,
21 you're firmly convinced the Defendant is guilty of the crime
22 charged, then you must find the Defendant guilty. If, on
23 the other hand, you think there's a real possibility that
24 the Defendant is not guilty, you must give the Defendant the
25 benefit of the doubt and find that Defendant not guilty.

CHARGE OF THE COURT

528

1 Now, I remind you, ladies and gentlemen, during the
2 course of this trial you and I have had certain duties to
3 perform. As a trial judge it's my responsibility to preside
4 over the trial of the case, to rule on the admissibility of
5 evidence that's been offered during the course of the trial.
6 You're to consider only the competent evidence that is
7 before you, the testimony that's been presented from the
8 witness stand, the exhibits that have been made a part of
9 the record and introduced into the trial.

10 My job is also to charge you the applicable law
11 relating to this case. I'm the sole judge of the law. It's
12 your duty as jurors to accept the law and apply the law just
13 as I state it to you.

14 If you already have an idea of what the law is or even
15 a notion of what the law ought to be and it's not in concert
16 with what I now tell you the law is, then you must abandon
17 such an idea because under your oath you've sworn to accept
18 the law and apply the law just as I state it to you now.

19 Every case that's tried in this courtroom before a
20 jury, that jury becomes the sole exclusive judge of the
21 facts in the case. A trial judge can't intimate, or state,
22 or comment on or make any statement whatsoever to a trial
23 jury about the facts in a case.

24 Since you, the jury, are the sole judges of the facts
25 you're not to infer from what I've said during the progress

CHARGE OF THE COURT

1 of the trial, any rulings I've made on the admissibility of
2 evidence or otherwise, anything I say to you now in the
3 course of this instruction to you that I have an opinion
4 about the facts. I don't have an opinion about the facts.

5 As I stated to you at the beginning, our Constitution
6 in South Carolina prohibits a trial judge from expressing
7 any opinion or having any opinion about the facts in a case.
8 That's a matter solely up to you, ladies and gentlemen, to
9 determine. It's your duty to decide the effect, the value,
10 the weight and the truth of the evidence that's been
11 presented during this trial.

12 Normally in every trial there's two types of evidence
13 presented. There's direct evidence and there's
14 circumstantial evidence. Direct evidence is the testimony
15 of a person who claims to have actual knowledge of a fact
16 such as an eyewitness. It's evidence which immediately
17 establishes the main fact to be proved.

18 Circumstantial evidence is proof of a chain of facts,
19 circumstances that indicate the existence of a fact. It's
20 evidence which immediately establishes collateral facts from
21 which the main fact may be inferred. Circumstantial
22 evidence then is based on inference and not on personal
23 knowledge or observation.

24 The law makes absolutely no distinction between the
25 weight or the value to be given either direct evidence or

CHARGE OF THE COURT

530

1 circumstantial evidence. Nor is a greater degree of
2 certainty required of circumstantial evidence than of direct
3 evidence.

4 You should weigh all the evidence in the case. And
5 after weighing that evidence if you're not convinced of the
6 guilt of each of the Defendants beyond a reasonable doubt,
7 then you must find that Defendant not guilty.

8 Of necessity, ladies and gentlemen, you must determine
9 the credibility of witnesses who've testified in the case.
10 Credibility simply means believability. It becomes your
11 duty as jurors to analyze and evaluate the evidence, decide
12 which evidence convinces you of its truth.

13 In determining the believability of witnesses who've
14 testified, you can believe one witness over several
15 witnesses, you can believe several witnesses over one
16 witness. In your discretion you can believe part of the
17 testimony of a witness. You can -- and reject the remaining
18 part of the testimony of that very same witness.

19 You can believe the testimony of a witness in its
20 entirety or reject the testimony of a witness in its
21 entirety. You can consider whether any witness has
22 exhibited to you any interest, or bias, or prejudice or
23 other motive in the case.

24 You can consider the appearance of the witness, the
25 demeanor of the witness while on the witness stand. Was he

CHARGE OF THE COURT

531

1 or she straight-forward or hesitant in answering? Was the
2 testimony consistent or inconsistent? What was the ability
3 of the witness to know the facts to which that witness
4 testified? Was the testimony of a witness strengthened or
5 weakened by other testimony or evidence in the case? It's
6 your prerogative to determine the credibility of witnesses.

7 Now, in order to establish criminal liability, criminal
8 intent is required. It must be proven by the State beyond a
9 reasonable doubt. Criminal intent is always a matter that
10 must be determined by the jury from the circumstances
11 surrounding the situation.

12 There's no way to prove intent to a mathematical
13 certainty. No way that medical science has devised to
14 dissect a person's brain and determine what that person had
15 in mind. So the law says that criminal intent may be
16 inferred from the circumstances shown to have existed.

17 It's not necessary to establish intent by direct and
18 positive evidence, but intent may be established by
19 inference, in the same way as any other fact, by taking into
20 consideration the acts of the parties, all the facts and
21 circumstances of the case.

22 Criminal intent is a mental state. It's a conscious
23 wrong-doing. It's up to you to determine what the
24 Defendants intended to do based upon the circumstances shown
25 to have existed.

CHARGE OF THE COURT

532

1 Now, statements alleged to have been made by Defendants
2 have been admitted into evidence in this case. And while
3 the Court has determined that the statements -- as to the
4 admissibility of the statements, I instruct you that you
5 make the ultimate decision of whether or not the statement
6 was made as to each Defendant.

7 If the Defendant did make the statement, you must
8 determine whether the statement was made by that Defendant
9 voluntarily and by his or her own free will. This means the
10 statement was not caused by pressure, or force, or fear, or
11 threats, or coercion, or intimidation, or by the hope of or
12 a promise of leniency or a reward of any kind.

13 In determining whether the statement was voluntary you
14 should consider both the characteristics of the Defendant
15 and the details of the questioning. Some of the factors
16 that you may consider would be the age of the -- each
17 Defendant, the education or lack of education, the mental
18 ability and capacity, the background, the environment, the
19 place, the length of the detention, the nature of the
20 questioning and the advice or lack thereof as to the
21 Defendants Constitutional rights including, but not limited
22 to, the right to remain silent, that any statements could be
23 used against him or her in a court of law, the right to have
24 a lawyer present, that if that Defendant could not afford a
25 lawyer, a lawyer would be appointed to represent him or her

CHARGE OF THE COURT

533

1 without any costs and that the Defendant could stop making a
2 statement at any time. You must carefully consider all the
3 surrounding circumstances before you give any weight to an
4 alleged statement.

5 The State has the burden of proving beyond a reasonable
6 doubt that the alleged statement was voluntary. If you
7 determine it was, you may give the statement any further
8 consideration that you deem proper. You must decide what
9 weight, if any, should be given to the alleged statement.
10 If you determine the alleged statement was not the free and
11 voluntary statement of the Defendant, you must not consider
12 the statement at all.

13 Now, I instruct you and I emphasize to you the fact
14 that the Defendants did not testify is not a factor to be
15 considered by you in any way in your deliberations and in
16 your consideration of the question of the guilt or the
17 innocence of the Defendant. It must not be considered by
18 you in any manner whatsoever.

19 A Defendant has a Constitutional right to remain
20 silent. And the assertion of this right must not be
21 considered by you in your deliberations. I repeat, under
22 your oath you're not to draw any conclusions whatsoever from
23 the fact that the Defendants in this case did not testify.
24 That fact that there was no testimony by the Defendants
25 should not even be discussed by you in the jury room.

CHARGE OF THE COURT

534

1 The burden of proof, as I've stated, is on the State of
2 South Carolina. The Defendant is not required to prove his
3 or her innocence. That burden remains on the State
4 throughout the trial to prove guilt beyond a reasonable
5 doubt.

6 You have heard testimony concerning the penalty a
7 person can serve for the crimes alleged in the indictments.
8 In determining the guilt or innocence of the Defendant, you
9 cannot consider any possible penalty for any particular
10 crime. The punishment for a crime or crimes is a matter for
11 me to determine. It should never be considered by you in
12 any way whatsoever at arriving at a fair and impartial
13 verdict as to the guilt or the innocence of each Defendant.

14 Now, the Defendants in this case, ladies and gentlemen,
15 have been charged with violation of State law with
16 conspiracy. To prove conspiracy the State must establish
17 beyond a reasonable doubt that the Defendant combined with
18 one or more persons for the purpose of committing an
19 unlawful act or of committing a lawful act by unlawful
20 means.

21 There must be a mutual understanding, an agreement or a
22 common intention in plan. Mere passive knowledge of or
23 consent to the criminal conduct of another is not enough to
24 make a person a conspirator. There must be guilty knowledge
25 and participation.

CHARGE OF THE COURT

535

1 Similarly, the mere fact that the Defendant may have
2 associated with another person, or met with another person,
3 or discussed common aims or interests does not necessarily
4 establish proof of the existence of a conspiracy or that the
5 Defendant was involved in a conspiracy. On the other hand,
6 it's not necessary that the agreement be a formal one, that
7 it be in writing, that the person -- the people hold a
8 meeting and expressly state the terms of a common plan or
9 that the agreement be stated in words between them.

10 The agreement of a criminal conspiracy may come into
11 being through an implied, a mutual understanding, the
12 willful intentional and knowing adoption by two or more
13 persons of a common plan is sufficient. No overt acts need
14 to be shown to establish a conspiracy.

15 A conspiracy may be shown by circumstantial evidence
16 and the conduct of the parties. In order to convict a
17 Defendant of conspiracy the State must prove beyond a
18 reasonable doubt not only that the Defendant knew of the
19 unlawful conduct, but that the Defendant agreed to combine
20 with other persons for the purpose of accomplishing the
21 unlawful conduct.

22 When two or more individuals conspire to commit a
23 crime, they're responsible for all incidental and
24 consequential acts growing out of the common design.
25 However, conspirators are not responsible for an independent

CHARGE OF THE COURT

536

1 act committed by another conspirator or conspirators that
2 are not part of the common design.

3 Each Defendant also is charged with first degree
4 burglary. The State must prove beyond a reasonable doubt
5 that the Defendant entered a dwelling without consent. A
6 dwelling is any building or a portion of a building in which
7 the -- a person ordinarily sleeps.

8 In order to prove the Defendant entered the dwelling
9 the State does not have to show the Defendant's entire body
10 entered the dwelling. The smallest entry is sufficient. It
11 may be any part of a body such as a hand, or a foot or even
12 an instrument such as a hook or other instrument.

13 In addition, the State does not have to prove that
14 force was used to gain the entry. If a person enters a
15 building by using deception, a trick or a misrepresentation
16 to get consent to enter, then this entry would be without
17 consent.

18 Next, the State must prove beyond a reasonable doubt
19 that the Defendant intended to commit a crime, either a
20 felony or a misdemeanor, at the time of the entry. The mere
21 entry into a dwelling without consent is not burglary.

22 If the intent to commit a crime is formed after the
23 entry, it's not a burglary. On the other hand, if the
24 Defendant intended to commit a crime at the time of entry,
25 it is a burglary even if the intent was abandoned after the

CHARGE OF THE COURT

537

1 entry. It does not matter that the intended crime was not
2 completed. Intent may be shown by acts and conduct of the
3 Defendant and other circumstances from which you may
4 naturally and reasonably infer intent.

5 Finally, to prove burglary in the first degree the
6 State must prove beyond a reasonable doubt that either when
7 entering, or while in the dwelling, or when fleeing the
8 Defendant or an accomplice was armed or displayed a deadly
9 weapon. A deadly weapon, as I'll explain to you now and
10 perhaps later, is any article, or instrument, or a substance
11 which is likely to cause death or great bodily harm.
12 Whether an instrument has been used as a deadly weapon
13 depends upon the facts and circumstances.

14 An example of a deadly weapon, of course, would be a
15 pistol, or a shotgun, or rifle, a knife. A gun may be a
16 deadly weapon even if it's not operating.

17 When entering the building, or while in the dwelling or
18 when fleeing the Defendant or an accomplice caused physical
19 injury to anyone not participating, that would be the second
20 way that a crime of first degree burglary could be
21 established beyond a reasonable doubt.

22 Another method that could be used to establish burglary
23 in the first degree is that the Defendant entered or
24 remained in the dwelling in the nighttime. Nighttime is the
25 period between sunset and sunrise during which there's not

CHARGE OF THE COURT

538

1 enough daylight to recognize a person's face except by
2 artificial light or moonlight.

3 Next, each of the Defendants are charged with the crime
4 of armed robbery. In order to prove this offense the State
5 must prove beyond a reasonable doubt that the Defendant took
6 personal property from the person or presence of another
7 person. The property is in the presence of a person if it's
8 within that person's reach, inspection, or observation or
9 control so that the person could, if not overcome with
10 violence or prevented by fear, keep possession of that
11 property.

12 The State must also prove beyond a reasonable doubt
13 that the Defendant carried the property away intending to
14 permanently deprive the owner of the property and to keep
15 the property for the Defendant's own use. The slightest
16 removal of the property or the complete possession of the
17 property, even for an instant, by the Defendant is
18 sufficient to show a taking and carrying away of the
19 property. The taking and carrying away of the property must
20 have been done with violence or putting the owner of the
21 property in fear of violence.

22 Finally, the State must prove beyond a reasonable doubt
23 that the Defendant was armed with a deadly weapon during the
24 robbery. Again, a deadly weapon is any article or
25 instrument which is likely to cause death or great bodily

CHARGE OF THE COURT

539

1 harm. And a pistol would be considered a -- as an example
2 of a deadly weapon.

3 Finally, each of the Defendants is charged with
4 attempted murder. In order to prove this crime the State
5 must prove the Defendant attempted to kill another person
6 with malice aforethought, either express or implied.

7 Malice is hatred or ill-will or hostility toward
8 another person. It's the intentional doing of a wrongful
9 act without just cause or excuse and with the intent to
10 inflict an injury or under the circumstances that the law
11 will infer an evil intent.

12 Malice aforethought does not require that malice exist
13 for any particular time before the act is committed, but
14 malice must exist in the mind of the Defendant just before
15 and at the time of the act being committed. Therefore,
16 there must be a combination of the previous evil intent and
17 the act.

18 Malice aforethought may be expressed or inferred.
19 These terms do not mean different kinds of malice, but
20 merely the manner in which the malice may be shown to exist,
21 that is either by direct evidence or by an inference from
22 the facts and circumstances which are proved.

23 Expressed malice is shown when a person speaks words
24 which express hatred or ill-will for another or when the
25 person prepared beforehand to do the act which was later

CHARGE OF THE COURT

540

1 accomplished. Malice may be inferred from conduct showing a
2 total disregard for human life. Inferred malice may also
3 arise when the deed is done with a deadly weapon. And I've
4 explained to you what a deadly weapon is.

5 If facts are proved beyond a reasonable doubt
6 sufficient to raise an inference of malice to your
7 satisfaction, this inference would be simply an evidentiary
8 fact to be considered by you, the jury, along with other
9 evidence in the case. And you may give it the weight that
10 you decide it should receive.

11 Now, ladies and gentlemen, if a crime is committed by
12 two or more people who are acting together, in committing a
13 crime the act of one is the act of all. A person who joins
14 with another to commit an unlawful act is criminally
15 responsible for everything done by the other person which
16 happens as a probable and natural consequence of the acts
17 done in carrying out the common plan and purpose.

18 For an example; two people could be guilty of the crime
19 of arson even though there was only one box of matches and
20 -- but two people were there and only one struck the match
21 and one lit the fire, both could be legally responsible for
22 that arson. If two or more people are acting together,
23 assisting each other in committing the offense, the act of
24 one is the act of all or as sometimes said, the hand of one
25 is the hand of all.

CHARGE OF THE COURT

541

1 Prior knowledge that a crime is going to be committed
2 without more is not sufficient to make a person guilty of
3 that crime. Mere knowledge that another person is going to
4 commit a crime, even if the Defendant is present when the
5 crime is committed, is not sufficient.

6 To convict a defendant as a principal, guilt as a
7 principal is shown by actual or constructive presence at the
8 scene as a result of prior arrangement. Therefore, a
9 finding of a prior arranged plan or a common scheme to -- is
10 necessary for a finding of guilt as a principal. The State
11 must prove beyond a reasonable doubt by competent evidence
12 the theory of the hand of one is the hand of all.

13 A principal in a crime is one who either actually
14 commits the crime or who is present, aiding, abetting or
15 assisting in committing the crime. When a person doesn't
16 act in the presence of or with the assistance of another,
17 the act is done by both where two or more acting with a
18 common plan or intent are present at the commission of a
19 crime. Does not matter who actually commits the crime: All
20 are guilty. As I said, the hand of one is the hand of all.

21 Presence at the commission of a crime means to be
22 sufficiently near to aid, and abet and assist in the
23 commission of the crime. However, mere presence at the
24 scene of a crime is not sufficient to convict one as a
25 principal on the theory of aiding and abetting.

CHARGE OF THE COURT

542

1 Intent is also a necessary element for there must have
2 -- be a common design or intent to commit the crime. And
3 the crime must have been pursuant thereto with the person
4 aiding and abetting by some overt act.

5 Intent means intending the results which actually
6 occurred, not accidentally or involuntarily. Intent may be
7 shown by acts and conducts of the Defendant by other
8 circumstances from which you may naturally and reasonably
9 infer intent.

10 The State must prove these elements, of course, beyond
11 a reasonable doubt. I stated to you that mere presence at
12 the scene is not sufficient to prove someone guilty of a
13 crime. A Defendant's presence where a crime is being
14 committed or mere association with the person who commits a
15 crime does not make the Defendant an accomplice or an aider
16 and abetter of the person committing the crime.

17 The burden is on the State to prove every element of
18 the crimes charged. If you find after reviewing all the
19 evidence that the State has proved that the Defendant was
20 only present at the scene of the crime and that the
21 Defendant had or the State has not proven beyond a
22 reasonable doubt any other participation in the crime, then
23 you must find the Defendant not guilty. The law is that
24 proof of -- at the scene of a crime is not sufficient to
25 find someone guilty.

CHARGE OF THE COURT

543

1 The Defendant has raised the defense of coercion or
2 duress. Coercion or duress is when a person makes another
3 person commit a crime against someone else's person or
4 property by the threat of immediate physical violence. The
5 coercion or duress must be present, imminent and of the type
6 to create a well-grounded fear of death or serious bodily
7 harm if the act is not done.

8 The fear of injury must be reasonable. Coercion or
9 duress is not a defense if there's any reasonable way other
10 than committing the crime for which the Defendant to escape
11 the threat of harm.

12 Defendant must prove the defense of duress by a
13 preponderance of the evidence. If you find the Defendant
14 was coerced into committing the crime, then, of course, you
15 would find the Defendant not guilty.

16 Madame Forelady, I have prepared verdict forms. I
17 believe they'll be self-explanatory for you. The verdict
18 forms are two pages for each Defendant. They have -- rather
19 than making four separate pages, I've put two of the
20 offenses on one page, two on the other. And as I stated to
21 you at the beginning, each of these charges must be
22 considered separate and distinct, one from another.

23 As to each of the Defendants there's a charge of
24 conspiracy and burglary in the first degree. There's a
25 charge of armed robbery, charge of attempted murder with a

CHARGE OF THE COURT

544

1 choice of either guilty or not guilty based upon your
2 finding of the proof by the State.

3 There's no significance in the order in which guilt or
4 not -- guilty or not guilty is listed. One has to be listed
5 before the other. So you certainly should not take into
6 consideration the order in any way.

7 After you have determined each of these offenses as to
8 each of the Defendants, then, of course, you would check the
9 appropriate block, sign your name as Foreperson on behalf of
10 your fellow jurors and date it. And then we will receive
11 your verdict back in the courtroom.

12 Your verdict must be a unanimous verdict. All twelve
13 of you must agree upon that verdict. Your verdict cannot be
14 based upon sympathy, or passion, or prejudice, or emotion or
15 any other consideration not in evidence in the case.

16 I remind you, Madame Forelady, and ladies and
17 gentlemen, that you're certainly free to ask me any
18 questions relating to the law and the instructions that I've
19 given you now. Remember, it's impermissible for me to
20 answer any questions you may have about the facts of the
21 case. The facts have been presented. That's your duty and
22 yours alone to be the sole fact-finders.

23 I'm going to ask if you would now please retire back to
24 your jury room. Don't start discussing the case just yet.
25 There's a final matter of law that I need to take care of

CHARGE OF THE COURT

545

1 with the attorneys.

2 After which, hopefully we'll be able to send the
3 verdict forms back with the evidence for you to review with
4 instructions then to begin your deliberations. But for
5 right now, don't start your deliberations. I'll call you
6 back in just a few moments. You may retire to your jury
7 room.

8 (Whereupon the jury exited the courtroom at 12:48 pm)

9 **THE COURT:** Any exceptions to the charge from the
10 State?

11 **MS. SALISBURY:** No exceptions from the State, Your
12 Honor.

13 **THE COURT:** From the Defense?

14 **MS. GORTON:** Judge, I need to inquire about the
15 reasonable doubt. Was your ruling earlier that you would
16 not give my requested instruction ---

17 **THE COURT:** I did give your -- I gave your -- your
18 requested instruction was the doubt for which you can give a
19 reason.

20 **MS. GORTON:** Reason to pause. Did you read that?

21 **THE COURT:** I charged the doubt for which you could
22 give a reason. Do you have other exceptions other than
23 that?

24 **MS. GORTON:** Did you read independent act?

25 **THE COURT:** I did.

1 MS. GORTON: All right. Then, no.

2 THE COURT: I think I -- the charge I had on reasonable
3 doubt is reasonable doubt is the kind of doubt that would
4 cause a reasonable person to hesitate to act. I think I
5 read that. I'm confident that I did. And I'm sure I read
6 the independent act ---

7 MS. GORTON: All right. Thank you.

8 THE COURT: --- from the other one 'cause I had it in
9 my notes.

10 MR. IANUARIO: I have no exceptions, Your Honor.

11 THE COURT: Okay.

12 MS. GORTON: Thank you.

13 THE COURT: All right. If y'all would make sure all of
14 the exhibits are together. And I'll give you a verdict
15 form. Y'all make sure all the exhibits that were in
16 evidence are going back. And there are the verdict forms.

17 (Pause)

18 (Whereupon all the exhibits were agreed upon by the
19 attorneys)

20 THE COURT: Everything there? Okay. Ms. Sims, if you
21 would take the verdict forms back with the exhibits. And
22 tell the jury they can begin their deliberations. I need to
23 have the two alternates, Mr. Reese and Mr. Watson, out here
24 before they start to deliberate.

25 (Pause)

1 **THE COURT:** Mr. Watson and Mr. Reese, thank y'all very
2 much for serving. Your fellow jurors survived. We didn't
3 need you after all. So you're free to go.

4 I'm sure you've ordered lunch. And you won't be able
5 to eat with your fellow jurors, but you can take it with you
6 if you want to wait for it or you can eat it back in one of
7 the rooms back there.

8 If you want to stay with us, we'd love to have you.
9 But you can't be back there with the first twelve jurors
10 now. You're welcome to come and go in the courtroom, if you
11 want to hang around or if you want to go home.

12 I don't know when we'll need you back. I think the
13 latest message is you need to call tonight after 6:00. Be
14 sure to do that. Just call that number that you have and
15 there'll be instructions about whether we'll be starting
16 another trial tomorrow or not. Thank you very much for your
17 service. I appreciate it.

18 **MR. REESE:** Thank you.

19 **MR. WATSON:** Thank you.

20 **THE COURT:** Mr. Dougherty will show you where you need
21 to be to get your lunch, okay?

22 (Whereupon the alternate jurors exited the courtroom)

23 **THE COURT:** All right. We'll be at ease til we hear
24 from our jury.

25 (Whereupon court was in recess at 12:54 pm)

1 (Whereupon the jury began deliberating at 1:02 pm)

2 (Whereupon court resumed at 2:16 pm)

3 **THE COURT:** Thank you very much, ladies and gentlemen.

4 All right. Ladies and gentlemen, we've received a note from
5 the Foreperson of the jury, a short note. It says elements
6 of all the charges in writing, please. It's a request.

7 I'm going to bring the jury out and tell them I'm not
8 going to be sending any written charges back with them
9 pursuant to my understanding of the law. But I'll be glad
10 to re-instruct them on the crime of conspiracy, the crime of
11 attempted murder, and the crime of armed robbery and the
12 crime of burglary in the first degree.

13 If they want to stay and listen to it or if they feel
14 like they have enough, then that's what I'll give them at
15 this time. Any comments from either side about my proposed
16 instruction to them?

17 **MS. SALISBURY:** No, Judge. I'd note for the record
18 that I don't have any objection to you sending back a
19 written version of your instructions, but that solution
20 suits me just fine.

21 **THE COURT:** Well, I don't know how the other side
22 feels, but as I understand the case law, that's not
23 encouraged to send a charge back. If y'all want to work out
24 an agreement on that, then that might be different. But I
25 -- my written charge is not necessarily legible to the jury

CHARGE OF THE COURT

1 anyhow unless we do a lot of editing.

2 **MS. GORTON:** I was going to say, Judge, I wouldn't have
3 an objection as long as it was the whole charge package.

4 **THE COURT:** Well, what's written and what I said may be
5 different anyhow. Let's have our jury come in. I'm marking
6 this note as a Court exhibit.

7 (Whereupon Court's exhibit 2 was marked)

8 (Whereupon the jury entered the courtroom at 2:21 pm)

9 **THE COURT:** Madame Forelady and ladies and gentlemen,
10 you've requested the elements of the criminal charges. And
11 I'll be glad now to -- I can't give you a written copy of
12 them, but I'll be glad to go over any and all of those with
13 you. And I'll do so now. And I'll try to do it in a
14 concise way for you to understand.

15 The first charge that I'll go over is that of
16 conspiracy. And what must be proven by the State for this
17 charge, and again, always beyond a reasonable doubt, is that
18 the Defendant combined with one or more persons for the
19 purpose of committing an unlawful act or committing a lawful
20 act by an unlawful means.

21 There must be a mutual understanding, an agreement or a
22 common intention and plan. Mere passive knowledge of or a
23 consent to the criminal conduct of another is not enough to
24 make a person a conspirator. There must be guilty knowledge
25 and participation.

CHARGE OF THE COURT

550

1 Similarly, the mere fact that a Defendant may have
2 associated with another person or met with another person,
3 discussed common aims and interests does not necessarily
4 establish proof of the existence of a conspiracy or that the
5 Defendant was involved in a conspiracy. On the other hand,
6 if -- it is not necessary that an agreement be a formal one,
7 that it be in writing, that the person -- the persons
8 involved hold a meeting and expressly state the terms of the
9 common plan or that the agreement be stated in words between
10 them.

11 The agreement of a criminal conspiracy may come into
12 being through an implied, mutual understanding. The
13 willful, intentional and knowing adoption by two or more
14 persons of a common plan is sufficient. No overt acts need
15 be shown to establish a conspiracy.

16 Conspiracy may be shown by circumstantial evidence and
17 the conduct of the parties. In order to convict a Defendant
18 of conspiracy the State must prove beyond a reasonable doubt
19 not only that the Defendant knew of the unlawful conduct,
20 but that the Defendant agreed to combine with the other
21 persons for the purpose of accomplishing the unlawful
22 conduct.

23 When two or more individuals conspire to commit a
24 crime, they're responsible for all incidental and
25 consequential acts growing out of that common design.

CHARGE OF THE COURT

551

1 However, conspirators are not responsible for an independent
2 act committed by another conspirator that was not part of
3 the common design.

4 Now, as to the charge for first degree burglary, to
5 prove this the State must prove, again, by the standard of
6 beyond a reasonable doubt that the Defendant entered a
7 dwelling without consent. A dwelling is any building or a
8 portion of a building in which a person ordinarily sleeps.

9 Now, to prove the Defendant entered a dwelling the
10 State does not have to show that the Defendant's entire body
11 entered the dwelling. The smallest entry is sufficient. It
12 could be part of the body such as a hand or a foot or even
13 an instrument such as a hook or any other instrument.

14 The State does not have to prove that the force was
15 used to gain entry. If a person enters a building by using
16 deception, or trick or misrepresentation to get consent to
17 enter, then that entry is without consent.

18 Now, again, for burglary the next thing the State must
19 prove beyond a reasonable doubt is that the Defendant
20 intended to commit a crime, either a felony or a
21 misdemeanor, at the time of the entry. The mere entry into
22 a dwelling without consent is not in and of itself a
23 burglary.

24 If the intent to commit a crime is formed after the
25 entry, it's not burglary. On the other hand, if the

CHARGE OF THE COURT

552

1 Defendant intended to commit a crime at the time of the
2 entry, it is burglary even if the intent was later abandoned
3 after entering the building. It does not matter that the
4 intended crime was not completed. Intent may be shown by
5 acts and conduct of the Defendant and other circumstances
6 from which you may naturally and reasonably infer intent.

7 The final element of proof for burglary in the first
8 degree the State must prove beyond a reasonable doubt at
9 least one of the following; first of all that when entering
10 while in the dwelling or while fleeing the Defendant or an
11 accomplice was armed or displayed a deadly weapon. I
12 explained to you that -- including examples of deadly
13 weapons would be a pistol.

14 Secondly, the State must prove in addition or either
15 number one or number two that when entering or while in the
16 dwelling or when fleeing the Defendant or an accomplice
17 caused physical injury to anyone that was not participating
18 in the crime.

19 Another way that this crime of burglary in the first
20 degree could be proven by the State would be that the
21 Defendant entered or remained in the dwelling in the
22 nighttime. Nighttime is the period between sunset and
23 sunrise during which there's not enough daylight to
24 recognize a person's face except through artificial light or
25 moonlight.

CHARGE OF THE COURT

553

1 The third offense charged is that of armed robbery.

2 The State must first prove beyond a reasonable doubt that
3 the Defendant took personal property from the person or the
4 presence of another person. Property is in the presence of
5 a person if it's within that person's reach, or inspection,
6 or observation or control so that the person could, if not
7 overcome with violence or prevented by fear, keep possession
8 of that property.

9 The State must also prove beyond a reasonable doubt
10 that the Defendant carried the property away intending to
11 permanently deprive the owner of the property and to keep
12 the property for the Defendant's own use. The slightest
13 removal of the property or the complete possession of the
14 property, even for an instant, by the Defendant is
15 sufficient to show a taking and a carrying away of the
16 property. Now, the taking and the carrying away of the
17 property must have been done with violence or putting the
18 owner of that property in fear of violence.

19 Finally, the State must prove beyond a reasonable doubt
20 that the Defendant was armed with a deadly weapon during the
21 robbery. Deadly weapon is any article, or instrument or
22 substance which is likely to cause death or great bodily
23 harm. And whether an instrument has been used as a deadly
24 weapon depends upon the facts and circumstances of the case.

25 Defendants also charged with attempted murder. In

CHARGE OF THE COURT

554

1 order to prove this crime the State must prove the Defendant
2 attempted to kill another person with malice aforethought,
3 that malice aforethought either being express or implied.

4 Malice is hatred or ill-will or hostility toward
5 another person. It's the intentional doing of a wrongful
6 act without just cause or excuse and with the intent to
7 inflict an injury or under circumstances that the law would
8 infer an evil intent.

9 Malice aforethought does not require that malice exist
10 any particular time before the act is committed, but malice
11 must exist in the mind of the Defendant just before and at
12 the time of the act being committed. Therefore, there must
13 be a combination of the previous evil intent and the act.

14 Malice aforethought may be expressed or inferred.
15 These terms, expressed or inferred, do not mean different
16 kinds of malice, but merely the manner in which the malice
17 may be shown to exist, that is either by direct evidence or
18 by an inference from the facts and circumstances which are
19 proved.

20 Expressed malice is shown when a person speaks words
21 which express hatred or ill-will for another or when the
22 person prepared beforehand to do the act which is later
23 accomplished. Malice may be inferred from conduct showing a
24 total disregard for human life. Inferred malice may also
25 arise when the deed is done with a deadly weapon. And I

CHARGE OF THE COURT

555

1 explained to you earlier what kind of instrument would be a
2 deadly weapon, an example of which would be a pistol.

3 If facts are proved beyond a reasonable doubt
4 sufficient to raise an inference of malice to your
5 satisfaction, this inference would simply be an evidentiary
6 fact to be considered by you, the jury, along with other
7 evidence in the case. And you can give it the weight that
8 you decide it should receive.

9 That is the law as to the particular offenses that have
10 been charged. I hope that helps you in your deliberations,
11 ladies and gentlemen. If I can help you in other matters of
12 the law, I'll be glad to do so. You may retire to your jury
13 room and continue your deliberations.

14 (Whereupon the jury exited the courtroom at 2:32 pm)

15 **THE COURT:** Any exceptions to the charge from the
16 State?

17 **MS. SALISBURY:** Nothing from the State, Your Honor.

18 **THE COURT:** From the Defense?

19 **MR. IANUARIO:** Nothing, Your Honor.

20 **MS. GORTON:** No.

21 **THE COURT:** All right. We'll be at ease til we hear
22 from our jury.

23 (Whereupon court was in recess at 2:33 pm)

24 (Whereupon court resumed at 2:48 pm)

25 **THE COURT:** The jury is deliberating now. I wanted to

1 let all the parties know that I just received an emergency
2 call. My daughter and her family have been in an automobile
3 accident in North Carolina.

4 I'm going to be leaving to go check on them. Judge
5 Verdin, who is the Administrative Judge for General Sessions
6 purposes will handle the rest of the trial as far as any
7 questions from the jury or taking the verdict.

8 And she'll make the decision whether or not to let the
9 jury continue deliberating tomorrow or whatever. But she's
10 on down the hall and is ready to step in at any time we have
11 a verdict or need anything from the jury.

12 I wanted all of you to know that, but I'll be absent
13 for the rest of the day. Don't know about tomorrow, but if
14 it goes over til then, everything will be up to her to
15 continue working with the case for the rest of the
16 afternoon. Okay. Thank you very much.

17 (Whereupon court was in recess at 2:49 pm)

18 (Whereupon court resumed at 3:20 pm with Judge Verdin
19 presiding)

20 **THE COURT:** Thank y'all. Y'all be seated. All right.
21 It's my understanding that the jury has a verdict. Is there
22 anything we need to take up before we bring the jury back
23 in?

24 **MS. SALISBURY:** Nothing from the State, Judge.

25 **THE COURT:** All right. Anything from the Defense?

VERDICT OF THE JURY

557

1 **MR. IANUARIO:** Nothing from me, Your Honor.

2 **MS. GORTON:** No.

3 **THE COURT:** All right, then. Thank you.

4 (Whereupon the jury entered the courtroom at 3:22 pm)

5 **THE COURT:** Ladies and gentlemen, of the jury, you
6 might have been a little bit surprised when you walked in to
7 see somebody other than Judge Welmaker here. I'm going to
8 tell you that he has had a personal emergency. He feels
9 like everything's going to be fine. But he has had a
10 personal emergency.

11 And never in his career has he ever had to ask anyone
12 to do this, but he had to ask me to be in here to receive
13 your verdict. I am -- my name is -- I don't know that I
14 introduced myself. So I will. My name is Letitia Verdin.
15 And I'm also a judge here in Greenville County.

16 It's my understanding that the jury's reached a
17 verdict. Is that correct?

18 **MADAME FORELADY:** You're right, Your Honor.

19 **THE COURT:** Would you, please, hand the verdict forms
20 to the bailiff.

21 **MADAME FORELADY:** Yes, ma'am.

22 **THE COURT:** The verdict forms appear to be in order.
23 Madame Clerk, will you publish them, please.

24 **MADAME CLERK:** Yes, ma'am. Your Honor, in the case of
25 the State of South Carolina versus De'Nia Zsirita On'Jean

VERDICT OF THE JURY

558

1 Dawkins in the indictments of 2011-GS-23-8019, 8020, 8021
2 and 8022, we, the jury, unanimously find the Defendant,
3 De'Nia Zsirita On'Jean Dawkins, as to the charge of
4 conspiracy, guilty. As to the charge of burglary in the
5 first degree, guilty. As to the charge of armed robbery,
6 guilty. As to the charge of attempted murder, guilty.

7 In the indictments of 2011-GS-23-7990, 7991, 2011-97 --
8 excuse me, 9673A and 9676A, the State of South Carolina
9 versus Juwan Darnell Lomax, we, the jury, unanimously find
10 the Defendant, Juwan Darnell Lomax, as to the charge of
11 conspiracy, guilty. As to the charge of burglary in the
12 first degree, guilty. As to the charge of armed robbery,
13 guilty. As to the charge of attempted murder, guilty.

14 These are all signed by our Forelady, Elizabeth Klotz.
15 Ladies and gentlemen, if you agree these are the verdicts
16 you reached in your deliberation room, would you please
17 raise your right hand.

18 (Whereupon all jurors raised their right hand except
19 for one)

20 **MADAME CLERK:** All right. Sir?

21 **THE COURT:** I see. Sir? Sir? I didn't see you raise
22 your hand. Is this not your verdict?

23 (Whereupon the juror raised his right hand)

24 **THE COURT:** Oh, you did? I'm sorry.

25 **MADAME CLERK:** Thank you.

VERDICT OF THE JURY

559

1 **THE COURT:** All right. That makes it then unanimous.
2 Could I ask again, I just -- just to be absolutely clear.
3 And I hate to put you on the spot. But if this is -- if
4 this is your verdict, if you will please signify by raising
5 your right hand.

6 (Whereupon all jurors raised their right hand)

7 **THE COURT:** All right. And it is unanimous. Thank
8 you. Thank you so much. Is there anything to take up from
9 the State before I release the jury?

10 **MS. SALISBURY:** No, Your Honor.

11 **THE COURT:** Any matters before I release the jury from
12 the Defense?

13 **MR. IANUARIO:** No, Your Honor.

14 **MS. GORTON:** No.

15 **THE COURT:** All right, then. All right. Ladies and
16 gentlemen, I thank you for your service. I'm going to step
17 back and speak to you very briefly, and then I'll be back in
18 the courtroom momentarily.

19 (Whereupon the jury exited the courtroom at 3:25 pm)

20 (Whereupon court was in recess at 3:26 pm)

21 (Whereupon court resumed at 3:29 pm)

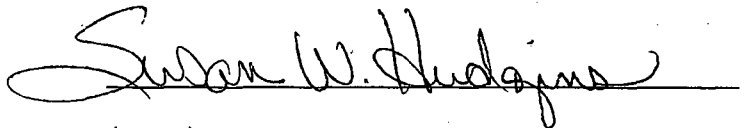
22 **THE COURT:** All right. There is some good news about
23 Judge -- from Judge Welmaker. And that is that I think
24 initial reports were that everything was going to be fine
25 and they do think ultimately that things will be fine,

1 Certificate of Reporter

2 I, the undersigned, Susan W. Hudgins, Official Court
3 Reporter for the Thirteenth Judicial Circuit of the State of
4 South Carolina, do hereby certify that the foregoing is a
5 true, accurate, and complete transcript of record of all the
6 proceedings had and evidence introduced in the trial/hearing
7 of the captioned case, relative to appeal, in the Circuit
8 Court for Greenville County, South Carolina, on the 9th -
9 11th day of April 2012.

10 I do further certify that I am neither of kin, counsel,
11 nor interest to any party hereto.

12 October 10, 2012

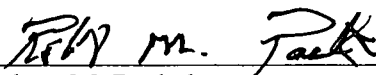
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16 Circuit Court Reporter

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Second Supplemental Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability, with the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

October 10, 2013



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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County

G. Edward Welmaker, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DENIA DAWKINS,

APPELLANT

APPELLATE CASE NO. 2012-212529

CERTIFICATE OF SERVICE

RECEIVED
OCT 10 2013

SC Court of Appeals

I certify that a true copy of the Second Supplemental Record on Appeal in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 10th day of October, 2013.

Brandon Hall

Brandon Hall
Administrative Specialist

SUBSCRIBED AND SWORN TO before me
this 10th day of October, 2013.

Talal McKay (L.S.)

Notary Public for South Carolina
My Commission Expires: July 24, 2022.