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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

S.C. Supreme Court

Appeal from Spartanburg County

Roger L. Couch, Circuit Court Judge

ROBERT EDGAR UPCHURCH,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-213235

APPENDIX

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1 STATE OF SOUTH CAROLINA
2 COUNTY OF SPARTANBURG

} COURT OF GENERAL SESSIONS

3
4 STATE OF SOUTH CAROLINA,
5 PLAINTIFF,
6
7 VS.
8 ROBERT EDGAR UPCHURCH,
9 DEFENDANT.

} TRANSCRIPT
} OF
} RECORD
07-GS-42-2773

10 February 28th - 29th, 2008
11 Spartanburg, South Carolina

12 B E F O R E:

13 THE HONORABLE J. DERHAM COLE, Judge, and a jury.
14

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P R O C E E D I N G S

(The following takes place in the presence of the jury venire.)

THE COURT: Good morning, ladies and gentlemen of the jury panel.

I assume Judge Couch introduced me to you in my absence when you were qualified Monday morning, but my name is Derham Cole, and I'm a resident judge here in the Seventh Judicial Circuit, and I am also presiding over a term of General Sessions Court here in this courtroom, and we've been disposing of matters that did not require your participation up until this point, but we are now ready to begin with jury selection in the first case that will require some of your participation here, and the title of that case is The State versus Robert Edgar Upchurch, Jr.

Mr. Upchurch has been accused by the solicitor of having committed four separate and distinct offenses, although they are alleged to have arisen out of different circumstances, but they are alleged to have arisen out of one particular course of conduct which the State alleges occurred, occurred back on November the 17th and November the 18th of -- let me see y'all just a minute please.

(Whereupon, a bench conference was held out of the hearing of the jury at this time.)

1 THE COURT: The State alleges that these offenses
2 occurred on the dates of November the 17th and November the
3 18th of 2009, and he's charged by way of documents called
4 indictments. I don't know if any of you are familiar with
5 that. But documents, indictments are simply documents that
6 bring forth the charge that is brought against a particular
7 individual and in this particular case I have four of these
8 indictments.

9 They charge him with two counts of burglary and two
10 counts of larceny, and the State alleges, by way of these
11 indictments, that Mr. Upchurch did, here in Spartanburg
12 County, on or about November the 17th of 2009 wilfully and
13 unlawfully enter the building of St. Paul the Apostle
14 Catholic Church here in the County of Spartanburg without
15 consent and with the intent to commit a crime therein.

16 They also allege that he did, after committing that
17 crime of burglary, take, steal, and carry away personal
18 property that belonged to the church valued at less than
19 \$1,000 being described as a VCR, and they allege that he did
20 on or about November the 18th of 2009, wilfully and
21 unlawfully enter, without consent and with the intent to
22 commit a crime therein, the Graybar Electrical Company
23 located here in the, the City of Spartanburg, and that he
24 entered that building without consent and with intent to
25 commit a crime therein. And they allege, in a separate

1 indictment, that he did, after committing that burglary,
2 take, steal, and carry away certain goods that belonged to
3 Graybar Electric Company being valued at less than \$1,000
4 and being described as a laptop computer and a clock radio.

5 Now, as to those allegations, and as to each of those
6 charges, the defendant has entered a plea of not guilty and
7 a plea of not guilty places upon the State the burden of
8 proving the allegations that they have set forth in each of
9 these indictments, the burden of proving each of the
10 essential elements of the crimes alleged in this case, the
11 crimes of burglary and larceny, and, therefore, the burden
12 is upon the State to establish the defendant's guilt to the
13 satisfaction of 12 jurors beyond a reasonable doubt before
14 any verdict of guilty could be returned as to any of the
15 separate charges, and, therefore, we're going to be
16 selecting 13 of you.

17 They'll be 12 primary jurors and one additional juror
18 to serve as an alternate, and by way of your participation
19 you're simply gonna be called upon to listen to testimony
20 and to consider any other evidence that might be introduced
21 during the course of the trial. At the conclusion of the
22 trial I'll instruct you on the law that's applicable in
23 cases such as these. You'll go back to deliberate. You'll
24 decide the facts. You'll apply the law, and you'll arrive
25 at a fair and just decision, whatever that decision might

9

1 be, whether it be one of guilty or one of not guilty.

2 Now, before we begin with jury selection I've got some

3 questions that I'm gonna ask you as a group. The purpose of

4 the questions is, is to determine whether or not there is a

5 reason why any one of you jurors should not be selected to

6 participate in the trial of this particular case. And, so,

7 during the course of this process, if you have a reason why

8 you think you could not be fair and impartial, I'll ask that

9 you just please stand and let me know of that fact. But I'm

10 gonna ask you some questions and you will need to respond to

11 those whether you can be impartial or not, and they will

12 relate to whether or not you have any knowledge about the

13 case or you have any knowledge about the, the particular

14 locations where these crimes are alleged to have occurred,

15 ~~whether or not you know any of the witnesses to be called~~

16 during the trial, and whether or not you know either of the

17 lawyers involved in the case.

18 Now, the first thing I'm going to do is to introduce

19 the lawyers and the defendant and the potential witnesses,

20 and then I'll do that because I need to find out if any

21 juror is connected by blood or by marriage to any person

22 that's involved in this case or whether you have any social,

23 business, religious, or any other type of connection with

24 any of these persons, and then I'll discuss with you whether

25 or not that would impair your ability to be fair if you were

1 selected as a juror.

2 So, first of all, as I told you, the person who's
3 accused of these offenses is Robert Edgar Upchurch, Jr.

4 Mr. Upchurch, if you'll stand and face the jury panel.

5 (Whereupon, the defendant and Mr. Poole stood at this
6 time.)

7 THE COURT: Mr. Upchurch is the gentleman standing to
8 your left. The one that's standing to your right is Roger
9 Poole. He is Mr. Upchurch's lawyer and he'll be assisting
10 him in the trial of this case. Mr. Poole is employed in the
11 Seventh Judicial Circuit Public Defender's Office.

12 All right. Thank you. Y'all can be seated.

13 (Whereupon, the parties comply.)

14 THE COURT: Presenting the case on behalf of the State
15 ~~are Wesley Boyd and Zach Ellis. Both of them are assistant~~
16 circuit solicitors for the Seventh Judicial Circuit.

17 (Whereupon, solicitors Boyd and Ellis stand at this
18 time.)

19 THE COURT: As I've told you, the entities who are
20 alleged to have been the victims of these offenses are the
21 St. Paul Catholic Church and Graybar Electric Company. Both
22 located here in the City of Spartanburg.

23 Potential witnesses to be called during the trial of
24 the case include Charlie Tillotson with the Spartanburg
25 Public Safety Department.

1 Jim Gardiner with the Spartanburg Public Safety
2 Department.

3 Travis Spivey with the Spartanburg Public Safety
4 Department.

5 Brian Shaw with the Spartanburg Public Safety
6 Department.

7 Jeff King with the Spartanburg Public Safety
8 Department.

9 Dale Winningham with the Spartanburg Public Safety
10 Department.

11 Robert Taylor with the Spartanburg Public Safety
12 Department.

13 Lawrence Patz with the Spartanburg Public Safety
14 Department.

15 In addition, potential witnesses include Oscar Wesley,
16 a resident of Spartanburg.

17 Cynthia Byrd also a resident of Spartanburg.

18 Justin Durham who is a resident of Cowpens.

19 Now, does any member of the jury panel have any
20 connection whatsoever in any fashion whatsoever with any
21 person who's just been identified for your benefit?

22 That includes the defendant. That includes the
23 lawyers. That includes any person employed in the
24 Seventh Judicial Circuit Solicitor's Office, or the
25 Seventh Judicial Circuit Public Defender's Office. That

1 includes each of the potential witnesses that I have just
2 identified, and that includes any connection with St. Paul,
3 St. Paul's Catholic Church and/or Graybar Electric Company.

4 If you have any connection with any of those I would
5 ask that you please stand.

6 (Jurors respond.)

7 THE COURT: All right. I've got five jurors standing.
8 I'm gonna start to my right. I will work to my left, and I
9 will start with the lady in the black sweater. I guess a
10 lot of you wish you had a sweater right now. Maybe she will
11 share it with you.

12 Tell me your name and your number please and tell me
13 how that question relates to you.

14 JUROR: I'm Lori Ballenger. I'm 113 and Brian Shaw,
15 ~~one of the potential witnesses, I went through school and~~
16 church or I've gone to school and church with him many years
17 ago.

18 THE COURT: All right. And would that have any bearing
19 upon your decision in this case?

20 JUROR: No, sir.

21 THE COURT: Thank you. Be seated.

22 Yes, ma'am.

23 JUROR: Tia Quenneville, Number 135. I did a ride
24 along with Travis Spivey about three years ago, and he's one
25 of the witnesses.

1 THE COURT: Okay. And would that have any bearing upon
2 your decision in this case?

3 JUROR: No, it wouldn't.

4 THE COURT: Thank you. Be seated.

5 Yes, ma'am.

6 JUROR: Anna Rawles, Number 137. I occasionally attend
7 St. Paul's Catholic Church.

8 THE COURT: And would it, that have any bearing upon
9 your decision in this case?

10 JUROR: No, sir.

11 THE COURT: Thank you. Be seated.

12 Yes, ma'am.

13 JUROR: My name is Martha Harris, Number 73. I was
14 once employed by St. Paul's Catholic school.

15 THE COURT: Would that have any bearing upon your
16 decision?

17 JUROR: No, sir.

18 THE COURT: Thank you. Be seated.

19 Yes, ma'am.

20 JUROR: My name is Ashley Gentry and I'm Juror Number
21 63. I have known one of the witnesses, Justin Durham, and
22 my sister use to date him.

23 THE COURT: And would that have any bearing upon your
24 decision in this case?

25 JUROR: No, sir.

1 THE COURT: Thank you. Be seated.

2 Anyone else have any connection with any entity or
3 person whose been identified?

4 (Juror responds.)

5 THE COURT: Yes, ma'am.

6 JUROR: Charlene Graham, Juror Number 67. My husband
7 is a friend of Tillotson.

8 THE COURT: Charlie Tillotson?

9 JUROR: Yeah.

10 THE COURT: Okay. Would that have any bearing upon
11 your decision?

12 JUROR: No, sir.

13 THE COURT: Thank you. Be seated.

14 Is any member of the jury panel related by blood or by
15 marriage to any type of law enforcement officer?

16 One who's employed now or has ever been employed as a
17 law enforcement officer. And the same goes for you. I need
18 to know if you are now or have ever been employed as a law
19 enforcement officer. So, if you are now or have been or
20 you're connected with, by blood or marriage, to any person
21 employed in any law enforcement agency.

22 Now, that includes a lot of different things. It
23 includes Sheriff's Department, City Police Departments,
24 towns, municipal law enforcement agencies, the Department of
25 Corrections, the detention facility, county jail, State Law

1 Enforcement Division, Federal Bureau of Investigation, the
2 FBI, CIA, military or civilian law enforcement agencies, if
3 so, please stand.

4 (Jurors respond.)

5 THE COURT: Okay. I'll start to my right. I'll work
6 to my left. Again, if you'll give me your name and your
7 juror number and tell me how that question relates to you.

8 JUROR: Robert Israel, Number 88. My brother was a
9 former deputy of the Spartanburg County Sheriff's
10 Department.

11 THE COURT: Would it affect your judgment in this case?

12 JUROR: No, sir.

13 THE COURT: Thank you. Be seated.

14 JUROR: Tony Lister, 99. I use to work as a guard at
15 Kirkland.

16 THE COURT: Would that have any bearing upon your
17 decision?

18 JUROR: No, sir.

19 THE COURT: Thank you. Be seated.

20 Yes, ma'am.

21 JUROR: Wanda McMichael, 107. I was employed with the
22 Department of Juvenile Justice.

23 THE COURT: Would that have any bearing upon your
24 decision?

25 JUROR: No.

1 THE COURT: Thank you. Be seated.

2 Yes, ma'am.

3 JUROR: Cindy Goldberg, Juror 66. My sister-in-law and
4 brother-in-law are both county sheriff's in Broward County,
5 Florida.

6 THE COURT: Would that have any bearing upon your
7 decision?

8 JUROR: No, sir.

9 THE COURT: Thank you. Be seated.

10 Yes, sir. Yes, sir.

11 JUROR: George Robinson, Juror 143. Retired military
12 and civilian police officer.

13 THE COURT: Would it have any bearing upon your
14 decision?

15 JUROR: No, sir.

16 THE COURT: Thank you.

17 Yes, ma'am.

18 JUROR: Katie Morgan, Juror 116. My uncle use to be a
19 cop in Laurens and my father is an active member, member of
20 the military.

21 THE COURT: Would that have any bearing upon your
22 decision?

23 JUROR: No, sir.

24 THE COURT: Thank you. Be seated.

25 Yes, ma'am.

1 JUROR: Barbara Drakeford, Juror 45. I'm related to
2 the officer that's sitting up front, Ben Lyles.

3 THE COURT: Would you hold that against him?

4 JUROR: No, sir.

5 THE COURT: Would it have any bearing upon your
6 decision?

7 JUROR: No, sir.

8 THE COURT: Thank you. Be seated.

9 Yes, sir.

10 JUROR: James Blunt, Juror Number 14. My father-in-law
11 use to work for USC-Upstate at the police department and
12 also use to work for Spartanburg City Police Department.

13 THE COURT: And would that have any bearing upon your
14 decision?

15 JUROR: No, sir.

16 THE COURT: Thank you. Be seated.

17 Is any member of the jury panel or any members of your
18 immediate family members of or do you contribute time or
19 money to any types of organizations that might be
20 characterized as law enforcement support types of
21 organizations or victims advocacy types of groups or
22 organizations, and some of those include organizations like
23 Mothers Against Drunk Drivers, Citizens Against Violent
24 Crime, the Honorary Sheriff's Association, the Troopers
25 Association, the Fraternal Order of Police, the Police

1 Benevolence Society, any type of neighborhood watch
2 organization, the Children's Shelter, or the Children's
3 Advocacy Center, or any organization that might be
4 considered to be a victims support group or a law
5 enforcement support type of organization?

6 If you belong to any or you have an immediate family
7 member who does or you or they contribute time or money to
8 any of those types of organizations I would ask that you
9 please stand.

10 (No response.)

11 THE COURT: Nobody?

12 (Juror responds.)

13 THE COURT: Okay.

14 JUROR: I'm on my neighborhood watch. Juror Number 24.

15 THE COURT: Twenty-four?

16 JUROR: Yes, sir.

17 THE COURT: All right. Thank you. Be seated.

18 Anyone else?

19 Troopers Association hadn't gotten y'all?

20 okay. Usually we have lots of those.

21 (Juror responds.)

22 THE COURT: Yes, ma'am.

23 JUROR: Juror 137. I'm in training to be a social
24 worker. I don't know if that would count.

25 THE COURT: That probably wouldn't be included in that.

1 That's okay. We appreciate that information.

2 Has any member of the jury panel or any member of your
3 immediate family ever been the victim of any crime that
4 might be characterized as a violent crime and some crime
5 that you might not think would be included as violent are
6 actually under the law classified as violent, but they, they
7 include crimes like murder, manslaughter, armed robbery,
8 assault and battery with intent to kill, criminal domestic
9 violence of a high and aggravated nature, burglary, criminal
10 sexual conduct, any of those types of, of offenses as well
11 as any of those that are similar to this, that is have you
12 or a family member ever been the victim of, of a burglary or
13 a theft, and while I'm asking that question I'll include not
14 only have you ever, you or a family member ever been the
15 victim of such an offense, but have you or a family member
16 ever been accused of having committed any of the offenses
17 that I've just listed for you, if so, please stand.

18 (Jurors respond.)

19 THE COURT: And those who are standing, you can answer
20 the question where you are, but if for some reason you
21 prefer to come down here and not answer it in front of the
22 audience, you feel free to come down here, but I'll start
23 with you, ma'am, in the white, if you'll give me your name
24 and number and tell me how that question relates to you.

25 JUROR: Leslie Kerber, 93. My house was robbed two

1 years ago.

2 THE COURT: And was someone charged with that?

3 JUROR: No.

4 THE COURT: Okay. would that experience have any
5 bearing upon your decision in this case?

6 JUROR: No.

7 THE COURT: Thank you. Be seated.

8 137?

9 JUROR: Yeah.

10 THE COURT: Okay.

11 JUROR: Our house and cars were burglarized about a
12 year and a half ago.

13 THE COURT: And was anybody charged with that?

14 JUROR: No, sir.

15 THE COURT: would that experience have any bearing upon
16 your decision in the case?

17 JUROR: No, sir.

18 THE COURT: Thank you. Be seated.

19 Yes, sir.

20 JUROR: George Robinson, 143. I was burglarized about
21 three years ago and nobody's ever been charged with that
22 crime and we have not received any word whatsoever.

23 THE COURT: All right. And would it---

24 JUROR: It is possible it would be, you know, I have a
25 strong feeling.

1 THE COURT: All right. Do you think that your own
2 personal experience might impair your judgment or affect
3 your ability to be fair and impartial?

4 JUROR: Yes, sir.

5 THE COURT: All right. We'll excuse Juror 143 from
6 serving in this case, but don't leave yet.

7 Yes, ma'am.

8 JUROR: Katie Morgan, 116. My aunt was mugged in the
9 parking lot a couple of months ago.

10 THE COURT: Your aunt was what?

11 JUROR: Mugged in a Wal-Mart parking lot.

12 THE COURT: And was someone charged?

13 JUROR: Not that I know of.

14 THE COURT: Okay. Would you think that family
15 experience would have any bearing upon your decision in this
16 case?

17 JUROR: No, sir.

18 THE COURT: Thank you. Be seated.

19 Yes, ma'am.

20 JUROR: I'm Juror Number 128. My husband, 40 years
21 ago, had been charged and was convicted. It has been 40
22 years, but it has been 30 or 40 years ago.

23 THE COURT: All right. And would that fact have any
24 bearing upon your decision in this case?

25 JUROR: No, sir, it would not.

1 THE COURT: Thank you, ma'am. You may be seated.

2 Yes, sir.

3 JUROR: Harold Timmons, Juror 171. My vehicle was
4 burglarized a couple of years ago and a laptop was, was
5 stolen and no one was charged.

6 THE COURT: Would that experience have any bearing upon
7 your decision in this case?

8 JUROR: No, sir.

9 THE COURT: Thank you. Be seated.

10 Yes, ma'am.

11 JUROR: I'm Juror Number 175, Kim Turner. About a year
12 ago our rental home was burglarized and someone took our
13 refrigerator and our stove.

14 THE COURT: Would that experience have any bearing upon
15 your decision?

16 JUROR: No, sir.

17 THE COURT: Was anybody charged with that?

18 JUROR: No, sir.

19 THE COURT: Okay. Thank you. Be seated.

20 By any chance does any member of the jury panel know
21 anything about this particular case?

22 Have you heard anything about it from any person or any
23 other source, if so, please stand.

24 (No response.)

25 THE COURT: Is there anything about the nature of this

1 case or the facts as alleged by the State that would prevent
2 any juror from being fair and impartial in this particular
3 case, if so, please stand.

4 (No response.)

5 THE COURT: Is there any reason why any juror has
6 already made up your mind or formed an opinion as to how you
7 think the case ought to be decided based upon what you've
8 heard up till this point or based upon any other
9 consideration, have you already made up your mind, if so,
10 please stand.

11 (No response.)

12 THE COURT: Does any juror know of any reason
13 whatsoever why you think you could not be fair and impartial
14 if you were called upon and selected as a juror to serve in
15 the case, if so, please stand.

16 (No response.)

17 THE COURT: Any other questions requested by the State?

18 SOLICITOR BOYD: No, Your Honor.

19 THE COURT: By the defendant?

20 MR. POOLE: No, sir.

21 THE COURT: All right. Draw us a jury please.

22 All of you have participated in jury selection this
23 week.

24 Did y'all go to Judge Couch's courtroom?

25 You know how the jury's selected?

1 (Jurors nod affirmatively.)

2 THE COURT: Okay. Oh, let me ask you one other thing.

3 Has anybody ever been called to Court to testify in a
4 case as a witness in, in a criminal case?

5 Anyone ever been called either by the State or the
6 defense to testify in a criminal case, if so, please stand.

7 JUROR: Tony, Tony Lister, 99. I had a federal court
8 criminal case.

9 THE COURT: All right. Thank you. Be seated.

10 Yes, sir.

11 JUROR: Graham Poole, 132. I was called to testify in
12 Court a few years ago.

13 THE COURT: Okay. Thank you. Be seated.

14 (Whereupon, a jury was impaneled.)

15 THE COURT: Those jurors who have been selected, I'll
16 ask you to please go with a bailiff to a jury room, and I'll
17 bring you back shortly to begin with the trial.

18 (Whereupon, the following takes place outside the
19 presence of the jury.)

20 THE COURT: Are there any matters to address regarding
21 jury selection by the State?

22 SOLICITOR BOYD: No, Your Honor.

23 THE COURT: By the defendant?

24 MR. POOLE: No, sir, Your Honor.

25 (Pause.)

1 (Whereupon, a map was marked as State's Exhibit No. 1.
2 Fourteen photographs were marked as State's Exhibit Nos. 2
3 through 15. All of the above exhibits were marked for
4 identification purposes only at this time.)

5 THE COURT: All right. Are we ready for the jury?

6 MR. POOLE: Yes, sir.

7 SOLICITOR BOYD: Your Honor, the State has a motion
8 before the jury comes in to move to amend the indictments
9 due to a scribe's error. It says 2007. I believe it
10 should say 2009.

11 THE COURT: Any objection?

12 MR. POOLE: No, sir, there's no objection because we
13 have always known that the year was 2009 and not three years
14 ago.

15 THE COURT: Okay. All right. Anything else?

16 SOLICITOR BOYD: Nothing from the State, Your Honor.

17 THE COURT: All right. Bring the jury in. Ask
18 Mrs. Harris to take the foreperson's seat.

19 (Whereupon, the following takes place in the presence
20 of the jury.)

21 THE COURT: Mr. Hampton, let me ask you to take the
22 foreperson's seat please. We had a slight mix up, but
23 everything's straightened out now.

24 All right. Ladies and gentlemen, we are ready to begin
25 with the trial of the case for which each of you have been

1 selected, and Mr. Hampton, as I told you, you're going to be
2 asked to serve as the, the foreperson of the jury. As the
3 foreperson you'll have three specific duties that none of
4 the other jurors will have.

5 Number one, you'll be asked to serve as the
6 spokesperson for the jury. So, if, during the trial,
7 something needs to be brought to my attention, you let the
8 bailiffs know. He or she will let me know and I'll address
9 it.

10 Secondly, you'll be called upon to preside over jury
11 deliberations when the times comes. So, that won't be until
12 the end of the trial after all the evidence has been
13 received and I've instructed you on the law." But when the
14 time does come for jury deliberations, you're going to be
15 called upon to preside over that process in the jury room
16 simply to ensure that those deliberations are carried out in
17 some orderly fashion.

18 And, thirdly, you will be asked to actually write the
19 verdicts or the decisions of the jury. You'll do that on
20 verdict forms that I will provide you at the trial's
21 conclusion on which you will indicate those decisions.

22 Now, the foreperson has been delegated those
23 responsibilities that I've just indicated. That does not,
24 however, mean that he is any more important than any of you
25 other jurors because the decision of a jury is the unanimous

1 consensus opinion of all 12 of you jurors. And, so, each of
2 you will have an equal say and an equal vote in what the
3 ultimate decision will be in this case. Someone simply has
4 to be delegated those responsibilities that I have just
5 indicated, and I have delegated those to Mr. Hampton in
6 appointing him as the foreperson. But all of you jurors are
7 equally important so far as the ultimate decision is
8 concerned because, as I've stated, the verdict has to be
9 unanimous. All of you must be in agreement.

10 Now, Mrs. Camp, you've been selected as an alternate
11 juror, and your function is to take the place of one of the
12 original 12, if, during the trial, one of these original 12
13 cannot continue to serve for some reason. And, so, if one
14 of the original 12 is called away because of an emergency or
15 ~~an illness or for some other reason and they cannot~~
16 continue, you would be called upon to take that person's
17 place. In that event you would become the 12th juror, and,
18 in that event, you participate throughout the trial
19 including the jury deliberations.

20 If, however, when the time does come for jury
21 deliberations the original 12 are able to participate, your
22 service ends, and you don't participate any further and
23 that's because the verdict of a jury is that of 12. No more
24 than 12 are permitted to engage in the deliberation process.
25 But it is important that you pay just as careful attention

1 of all, as we ask of all the jurors in the case because it
2 does occur, from time to time for one reason or another, one
3 of these original 12 may be unable to continue. In that
4 event you would become the 12th. So, we do appreciate your
5 participation as an alternate juror just as we appreciate
6 the participation of each of you jurors who have been
7 selected for the purpose of deciding the verdict in this
8 particular case.

9 You may swear the panel.

10 (Whereupon, the jury was duly sworn.)

11 THE COURT: Ladies and gentlemen, as you well know,
12 you've been selected to decide the verdicts in the case of
13 the State versus Robert Edgar Upchurch, Junior. As you also
14 know, Mr. Upchurch has been accused by the State of having
15 committed four and four separate and distinct offenses that
16 are alleged to have occurred between November the 17th and
17 November the 18th of 2009 at two separate locations. He's
18 alleged to have committed the crime of burglary at the St.
19 Paul's Catholic Church located here in the City of
20 Spartanburg in stealing certain items from the church. He's
21 also accused of having burglarized or broken into the
22 Graybar Electric Company and having stolen certain items
23 from that location also.

24 As to those allegations, and as to each of those
25 charges, he's entered a plea of not guilty, and as I've told

1 you, that plea of not guilty places a burden upon the State
2 to establish the allegations that they have set forth in
3 each of these indictments.

4 The State has the burden of proving each of the
5 essential elements of the crimes alleged, in this case
6 burglary and larceny, and, therefore, the burden is upon the
7 State to establish the defendant's guilt to the satisfaction
8 of you 12 jurors beyond a reasonable doubt before any
9 verdict of guilty could be returned as to any particular
10 charge, and, as you know, there are four charges. And in
11 this case, as you or when you go to decide the case, your
12 verdicts may be the same as to each charge. They may be
13 different. That, of course, will simply depend upon your
14 determination of the facts as they relate to that charge and
15 your application of the law as I will provide it to you.

16 Every person accused of a crime is presumed to be
17 innocent, and that presumption of innocence remains with any
18 defendant as it does with this defendant from the time that
19 he is placed under arrest and throughout the course of the
20 criminal process, and even throughout the course of the
21 actual trial in the case. That presumption of innocence
22 will be with, will be with Mr. Upchurch even at the time
23 that you're asked to go back and begin with your
24 deliberations at the trial's conclusion. That presumption
25 of innocence will be with him in that jury room, and it will

1 be with him forever unless you 12 jurors determine that he's
2 no longer entitled to the presumption of innocence as it
3 relates to a particular charge.

4 In other words, after you've carefully considered all
5 the evidence in the case as it relates to a charge, after
6 considering that evidence you have decided the facts and
7 upon deciding the facts, you apply the law as I will have
8 provided it to you, if you 12 jurors unanimously determine
9 that his guilt as to a particular charge has been proven
10 beyond a reasonable doubt, then he's longer entitled to the
11 presumption of innocence as it relates to that particular
12 charge. But it is only if, unless, and until you are
13 satisfied of his guilt beyond a reasonable doubt that the
14 presumption of innocence would no longer be applicable as it
15 relates to that particular indictment.

16 Now, the way the trial will proceed is, in a moment,
17 the lawyers are going to address you with what are called
18 opening statements. There are two occasions in a trial of a
19 case where lawyers are permitted to address the jury, and
20 that is at the beginning of the trial before any evidence
21 has been introduced, and then again at the conclusion of the
22 trial after all of the evidence has been received. Keep in
23 mind, as I've just indicated, the statements of the lawyers
24 are not to be considered by you as evidence upon which you
25 will base a decision and that's because the lawyers are not

1 witnesses to anything.

2 They're not going to be telling you anything that they
3 know about this case of their own personal knowledge or
4 perception. Otherwise they'd be a witness and wouldn't be
5 handling the case as a lawyer. They're not gonna take the
6 witness stand. They're not gonna be placed under oath.
7 They're not gonna be subjected to direct and
8 cross-examination on their statements like a witness will
9 be. And, so, what the lawyers tell you in their statements
10 is not to be considered by you as any evidence upon which
11 you will base your decision, but you should listen to what
12 the lawyers have to say because those statements do serve a
13 purpose. The opening statements serve to provide you with a
14 basic understanding as to what this case is about from both
15 the prospective of the State and the defendant so that
16 you'll have some context in which to place the evidence that
17 we will be receiving shortly thereafter.

18 The closing statements, again, occur after all of the
19 evidence has been received. And while those statements are
20 not evidence, it does afford the lawyers an opportunity to
21 discuss with you the evidence that you have seen and heard
22 during the trial, and, through that discussion, each will
23 have an opportunity to try to persuade you or to convince
24 you that that evidence does or does not support a particular
25 decision, and it's in-between those opening, opening and

1 closing statements that we actually receive the evidence
2 upon which you will base your decision.

3 The State, as I've told you, has the burden of proof,
4 and, therefore, the State will go forward first in its
5 presentation of evidence. After the State has concluded, a
6 defendant has the same opportunity to testify and to present
7 evidence, but has no obligation to, and that's because the
8 burden is not upon a defendant to prove that he or she is
9 not guilty. The burden is upon the State to prove that that
10 defendant is guilty.

11 And, so, while the State does have an obligation and a
12 burden to present evidence, a defendant does not have the
13 same obligation or burden. And in a case where a defendant
14 doesn't testify or call any witnesses or produce any
15 evidence, you can't hold that against him. You can't
16 consider it in any way. You can't allow that to weigh, in
17 the slightest degree, against the defendant. You can't talk
18 about it. You can't allow it to enter into your
19 deliberations or in your determination as to whether or not
20 his guilt has been proven beyond a reasonable doubt. But he
21 is afforded an opportunity to testify or present evidence if
22 he, he or she wishes to.

23 So, after all of the evidence has been received and you
24 hear the final summations of the lawyers I will then
25 instruct you fully on the law as it relates to the criminal

1 law in general and as it relates to the crimes of burglary
2 and larceny specifically, and then after which you'll go
3 back and begin with your deliberations, and through that
4 process you'll examine all the evidence, you'll evaluate and
5 assess the credibility of witness testimony. From that
6 evidence you'll determine what you believe to be the true
7 facts as they relate to these allegations. And upon
8 deciding the facts you'll apply the law that I will have
9 provided you, and you will determine whether or not the
10 defendant has been proven guilty of a crime beyond a
11 reasonable doubt. And if he has, then your verdict would be
12 guilty as to that charge, and if he has not, then your
13 verdict would be not guilty as to that particular charge.

14 All that we ask for you to do is to pay careful
15 attention throughout the course of the trial. Give every
16 witness the same degree of attention as they testify so
17 that, when you go back to deliberate, you'll be in a proper
18 position to be able to fairly assess each witness'
19 credibility as it relates to not just that witness'
20 testimony, but as it relates to all of the testimony and all
21 of the evidence received during the trial, and, of course,
22 it's important to keep an open mind throughout the trial,
23 and that just means that you're not to begin making up your
24 minds or formulating your opinions as to what you think the
25 ultimate decisions in this case ought to be until you've

1 heard and seen all of the evidence, until I've instructed
2 you on the law, and until you've been asked to begin your
3 deliberations at the trial's conclusion. That is the
4 process that is designed for you 12 jurors to arrive at a
5 fair and just decision in the case.

6 So, I do want to thank you in advance for your
7 participation as well as for your careful attention. I
8 would ask that you please give the lawyers your attention
9 now as they give you their opening statements. And after
10 they conclude we will recess for lunch and resume with the
11 beginning of the taking of testimony and receiving of
12 evidence after lunch.

13 So, give the lawyers your attention now please.

14 Mr. Boyd.

15 ~~SOLICITOR BOYD: May it please the Court, counsel.~~

16 Ladies and gentlemen of the jury, as you're well aware,
17 this case involves burglaries, and you're aware that one of
18 the burglaries is said to have taken place at St. Paul's on
19 Alabama Street in the City of Spartanburg, and the second
20 burglary at Graybar on Daniel Morgan.

21 Now, you will hear testimony about each of these
22 locations. You'll also hear testimony about a third
23 location, Freemont School Apartments, also in the City of
24 Spartanburg. You'll hear testimony from the officer
25 responding to St. Paul's Catholic School and you'll hear

1 testimony from him about what he saw upon arrival. You'll
2 also hear testimony from several officers about the scene at
3 Graybar when they arrived and what they saw. You'll also
4 hear testimony about the search that ensued by officers
5 around the City of Spartanburg in reference to this Graybar
6 burglary. And after all of that you will hear testimony
7 from officers at Freemont School Apartments where they
8 received a call about some laptops being sold.

9 You'll also hear testimony from the individual who
10 called 9-1-1 from Freemont School Apartments and you will
11 hear testimony about what she saw and what she heard that
12 night. You'll also hear testimony from an individual who
13 says he was with Mr. Upchurch that night at Freemont
14 Apartments, and you'll hear him say what he saw and what he
15 heard.

16 And when all this is done, you should pay close
17 attention to every testimony from each witness that takes
18 the stand and give it full consideration as to what he or
19 she is saying, and at the end of this trial I'll ask you to
20 return a just verdict.

21 Thank you.

22 MR. POOLE: May it please the Court?

23 THE COURT: Mr. Poole.

24 MR. POOLE: Mr. Boyd.

25 Mr. Foreman, ladies and gentlemen, I want to take this

1 opportunity to formally introduce myself to you. I'm Roger
2 Poole. I represent Mr. Upchurch in this case.

3 Right when we started jury selection, if you heard me
4 coughing, I apologize for that. I've got some cough drops
5 now. I think it's just one of those allergic type deals.
6 You may have to put up with me as we go through this case.

7 Mr. Upchurch is an innocent man. He sits there, as
8 Judge Cole has told you, he's presumed innocent up until the
9 time that you begin your deliberations and that you find
10 that he is guilty of committing a crime. He's charged with
11 four, two burglaries and two larcenies. At the end of the
12 case Judge Cole will give you a breakdown on what
13 constitutes each and every element that constitute the
14 definition of burglary and larceny. And at the end, and by
15 that time you will have heard all of the evidence that will,
16 the State has against him in this situation. The State is
17 basically the law enforcement personnel from the City of
18 Spartanburg who had any involvement in the investigation of
19 him.

20 I want you to pay attention to what he said, also to
21 what is not said, to the presence of evidence, and to the
22 lack of evidence, and what I will do, at the end of the case
23 prior to the deliberation and instruction by the, Judge
24 Cole, your deliberation, is speak to you once again and give
25 you our view point, that is Mr. Upchurch's view point of the

1 entire ball of wax, of the entire four cases, and, and then
2 ask you to make your decision.

3 Mr. Upchurch is exercising his right, under the state
4 and federal constitutions, to have the State prove each and
5 every element beyond a reasonable doubt before he can be
6 found guilty of anything.

7 Thank you for your time. It's a pleasure to see you
8 here. I don't know if you really want to be here. I don't
9 guess you have much of a choice. But thank you for being
10 here, and thank you for the time you're going to invest in
11 this case.

12 THE COURT: All right. Excuse me.

13 Ladies and gentlemen, we're going to recess for lunch.
14 Let me caution you before you go that at no time during the
15 trial of this case, until you're instructed to begin jury
16 deliberations, are you permitted to talk about the case.
17 So, you can't discuss the case with anybody whatsoever in
18 any fashion whatsoever and that includes your fellow jurors.
19 You're only permitted to talk about the case when you are
20 involved in jury deliberations, and that, of course, won't
21 be until the end of the trial after all the evidence has
22 been received, I've provided you with the legal instruction,
23 and you've been asked to begin your deliberations. So,
24 during the lunch recess and throughout the course of the
25 trial do not discuss the case in any fashion whatsoever with

1 any person whatsoever.

2 Also, you are never permitted to supplement your
3 knowledge about a case by conducting any outside research or
4 doing, doing your own investigation into any issue. You
5 have to base your decision in a case upon the evidence
6 presented during the trial and the legal instruction that
7 the Court will provide you. So, you can't conduct your own
8 independent research or investigation.

9 So, during your lunch recess, no discussion about the
10 case with anybody. No research. No investigation. Do have
11 a good lunch and I'm gonna ask you to report back to the
12 jury room that you've just been introduced to. Report back
13 to that jury room at three o'clock, at three o'clock this
14 afternoon. I've got some other matters that I've already
15 got scheduled for after lunch. I should be through with
16 those by three o'clock at which time we'll be able to
17 proceed with the trial of this case.

18 So, you are excused now for lunch. Please report to
19 your jury room at three o'clock this afternoon. If you're
20 not sure how to get there, talk with the bailiff. They'll
21 provide you with those directions.

22 Okay. Have a good lunch.

23 (Whereupon, the following takes place outside the
24 presence of the jury.)

25 THE COURT: All right. This case is in recess until

1 three o'clock. Court is in recess until 2:30.

2 (Whereupon, a recess was taken.)

3 THE COURT: We are now back with Mr. Upchurch.

4 Everybody ready for the jury?

5 SOLICITOR BOYD: Yes, Your Honor.

6 MR. POOLE: Yes, sir.

7 THE COURT: Okay. Let's bring the jury in please.

8 (Whereupon, the following takes place in the presence
9 of the jury.)

10 THE COURT: Good afternoon, ladies and gentlemen. We
11 are ready to proceed with the trial of the case, and, of
12 course, we'll begin with the State's presentation of
13 evidence.

14 Mr. Boyd.

15 SOLICITOR BOYD: The State calls Charlie Tillotson.

16 CHARLIE TILLOTSON, having been first
17 duly sworn, testified as follows:

18 DIRECT EXAMINATION

19 BY SOLICITOR BOYD:

20 Q Good afternoon, Officer Tillotson. Please introduce
21 yourself to the jury.

22 A I'm Officer Charles Tillotson.

23 Q Where are you employed?

24 A I'm employed with the City of Spartanburg Public Safety
25 Department as a police officer.

Charlie Tillotson - Direct examination
by Solicitor Boyd

1 Q And how long have you been there?

2 A Twenty years.

3 Q And what are your current duties?

4 A I'm a patrol officer assigned to the third shift.

5 Q Were you on duty the night of November 17th of 2009?

6 A Yes, sir.

7 Q Did you receive a report of a break-in that night?

8 A Yes, sir, we received it -- it originally came in as an
9 alarm activation. It's at 12:30 a.m. It's at 166 Alabama
10 Street, which was the St. Paul's Apostle Catholic Church.

11 Q In Spartanburg County?

12 A Yes, sir, it's in the City of Spartanburg in
13 Spartanburg County.

14 SOLICITOR BOYD: Your Honor, may I approach the
15 witness?

16 THE COURT: You may.

17 Q I'm showing you what's been marked for identification
18 as State's Exhibit 1.

19 Would you please mark on that exhibit where St. Paul's
20 Catholic, Catholic Church is?

21 A I just put a small dot there.

22 Q Looking at Exhibit 1, do you recognize it?

23 A Sir?

24 Q Do you recognize Exhibit 1?

25 A Yes, sir, it's a map of part of the City of

1 Spartanburg.

2 Q You think it is a fair and accurate representation of
3 downtown Spartanburg?

4 A Yes, sir.

5 Q Is there any alterations on the map that you're aware
6 of?

7 A No, sir.

8 SOLICITOR BOYD: Okay. Your Honor, I request
9 publication of Exhibit 1 to the jury.

10 MR. POOLE: No objection.

11 THE COURT: It is admitted.

12 (Whereupon, State's Exhibit No. 1 was received into
13 evidence at this time.)

14 Q Using this laser, laser pointer, can you point out the
15 location that you marked on the map?

16 A (Witness complies.)

17 Q Is that Alabama Street?

18 A Yes, sir, just off of East Main.

19 Q What time did you arrive on scene?

20 THE COURT: Excuse me just a minute.

21 When you respond to the question, you'll have to speak
22 into the microphone cause you're turning your back to us.

23 WITNESS: Yes, sir.

24 Q What time did you arrive on scene?

25 A I arrived two times. The first time of the alarm

Charlie Tillotson - Direct examination
by Solicitor Boyd

1 activation was 12:30 a.m. The second time I arrived there
2 was 6:20 a.m.

3 Q The first time you arrived there, what did you observe?

4 A Well, we had received an alarm through a monitoring
5 alarm company that it was the front door of the, the church.
6 The church has two buildings there, and two different lots
7 right beside each other. One of them being a portable
8 classroom, a double wide mobile home. So, we checked the
9 church, what the alarm indicated in the lot next door, and
10 didn't find any break-ins or anything to that building at
11 that time.

12 Q And the second time?

13 A We got called back there in reference to a burglary at
14 6:20 a.m. The portable classroom, which was the double wide
15 mobile home, after checking it, I found that the rear window
16 had been broken out and with a piece of cement and an entry
17 made through that door and some stuff moved, removed.

18 Q Did you identify that window as the point of entry?

19 A Yes, sir.

20 Q And can you describe the room that was broken into?

21 A It was a, it was -- like I say, it was a double wide,
22 like a double wide mobile home, portable classroom. It's
23 about 24-feet wide, maybe 40-foot long. It's one big room
24 and it was used for a kindergarten class.

25 Q Did you determine how the room was broken into?

Charlie Tillotson - Direct examination
by Solicitor Boyd

1 A Sir?

2 Q Did you determine how the room was broken into?

3 A Yes, sir, it was broken in by throwing a piece of
4 cement through the rear window and crawling, climbing in.

5 Q And was there anything reported missing from inside
6 that room?

7 A Yes, sir, there was a VCR, VHS, black in color. I don't
8 have the serial number for it.

9 Q Okay. Showing you what's been marked as State's
10 Exhibit 2 for identification.

11 Do you recognize this?

12 A Yes, sir, that's a picture of the portable classroom,
13 the window in the background, and the rock laying there on
14 the floor with the chair being knocked over.

15 Q Is it a fair and accurate representation---

16 A Yes, sir.

17 Q ---of the scene you arrived on?

18 A Yes, sir.

19 SOLICITOR BOYD: Your Honor, at this time -- has it
20 been altered in any way?

21 A No, sir.

22 SOLICITOR BOYD: Your Honor, at this time we move to
23 admit State's Exhibit 2 into evidence.

24 MR. POOLE: No objection.

25 THE COURT: It's admitted.

Charlie Tillotson - Direct examination
by Solicitor Boyd

1 (Whereupon, State's Exhibit No. 2 was received into
2 evidence at this time.)

3 SOLICITOR BOYD: Request publication to the jury, Your
4 Honor.

5 THE COURT: You may.

6 Q Can you describe what we're looking at?

7 A Yes, sir, that's the, an inside view of that portable
8 classroom that belonged to the church.

9 Q Can you show us where the breaking point was that you
10 determined?

11 A Right there. The rear window.

12 Q Okay. Did you determine what was used to break in that
13 window?

14 A Yes, sir.

15 Q And you're saying that was?

16 A That rock right there---

17 Q Okay.

18 A ---thrown through it.

19 Q And the missing VCR that you said was reported missing,
20 where would that have been in that room?

21 A It's not showing it, but right back over there to the
22 left of that window the way we're looking at it. There was
23 a cart that had a TV and VCR on it. The VCR was gone.

24 Q Okay. Did you see any pieces of glass on the ground
25 inside the classroom?

charlie Tillotson - Direct examination
by Solicitor Boyd

1 A Yes, sir.

2 Q Are they, are they able to be visible -- are they
3 visible on the exhibit?

4 A No, sir.

5 Q Was the room dusted for fingerprints?

6 A Yes, sir.

7 Q Did you dust the room for fingerprints?

8 A Yes, sir.

9 Q Where did you dust for fingerprints?

10 A I dusted around the entry point around the, the window
11 that was broken out and the cart, the metal cart that was,
12 where the VCR VHS player was mounted and it was removed.

13 Q Were any fingerprints detected?

14 A No, sir.

15 Q Does that mean no one was in the room?

16 A No, sir, it just means there wasn't any fingerprints
17 detected there. Nothing lifted.

18 Q Is it possible for someone to be inside a room and not
19 leave fingerprints?

20 A It is.

21 SOLICITOR BOYD: No further questions, Your Honor.

22 CROSS-EXAMINATION

23 BY MR. POOLE:

24 Q Officer Tillotson, how you doing today?

25 A I'm fine, sir.

Charlie Tillotson - Cross-examination
by Mr. Poole

1 Q So, you went to this location on two occasions?

2 A Yes, sir.

3 Q Is that right?

4 And the first occasion was around 12:30 a.m. and what
5 was the date?

6 A It was, it was November the 17th.

7 Q Okay. 12:30 a.m. That is like---

8 A That's after midnight. So, it---

9 Q After midnight?

10 A Yes, sir.

11 Q On November 18th?

12 A Yes, sir.

13 Q So, it just, just occurred.

14 That's the beginning of a day?

15 A Yes, sir, that's 30 minutes into that day.

16 Q And where did you go when you got there at 12:30?

17 A When I got there at 12:30 -- that building has an alarm
18 on it which indicates an area which activates means there's
19 been an intrusion made.

20 Q Uh-huh. (Affirmative).

21 A And I went to the brick building next to the portable
22 classrooms that was sitting to its right.

23 Q Uh-huh. (Affirmative).

24 A There's two lots. That church is got two lots that's
25 separated by a little chain link fence.

Charlie Tillotson - Cross-examination
by Mr. Poole

1 Q Yes, sir.

2 A I went to that building to check that building to see
3 if its been any entry that's been made or any damage to it.

4 Q Was that building the church proper or, or just a
5 building?

6 A Sir?

7 I didn't hear you.

8 Q Was that building that you went into and looked around
9 at, was that, is that where the church is---

10 A That's---

11 Q ---or is that another building?

12 A Well, the church is actually got more than two
13 buildings there.

14 Q Okay.

15 A That's one portion of the church where I was at.

16 Q Okay. Well, what kind of building was that that you
17 went into at 12:30?

18 A 12:30, I didn't go into one at 12:30. I went around
19 the outside of it and didn't find anything broken.

20 Q Okay. All right. Now, the alarm that went off,
21 when -- where, where was it located in the, in the church
22 grounds?

23 where was it located?

24 A Well, the, the alarm company indicated the alarm was
25 activated at the front door, the main entrance.

Charlie Tillotson - Cross-examination
by Mr. Poole

- 1 Q The front door, the main entrance of?
2 A Of that brick building.
3 Q Of the brick building?
4 A Yes, sir.
5 Q Okay. And you saw nothing at that time?
6 A No, sir.
7 Q And then you came back a few hours later.
8 Is that a fair statement?
9 A Yes, sir, it's about 6:20, about six hours later.
10 Q Six hours later you came back and you looked at this
11 building?
12 A Yes, sir, a custodian had come in and called and said
13 there was something wrong there, and that's when we went
14 back and checked that building. It's a portable classroom.
15 Like I was, told the prosecutor, it's a---
16 Q Okay. And you determined that there were basically an
17 entry point, an exit point, and that something had been
18 taken?
19 A Yes, sir.
20 Q And that -- you determined this about six hours after
21 your first trip?
22 A That's right, sir.
23 Q And you dusted for fingerprints?
24 A Yes, sir.
25 Q And found nothing at either the entry point or the

Charlie Tillotson - Cross-examination
by Mr. Poole

1 metal cart --

2 A That's correct.

3 Q -- or the exit point?

4 A That's right.

5 Q And is it fair -- you, you didn't detect any hair or
6 skin or clothing or anything of that nature?

7 A That's correct. I checked around the window, the
8 broken glass---

9 Q Uh-huh. (Affirmative).

10 A ---and I looked for any possibility of blood that might
11 of -- a suspect may of cut himself, hair may have come
12 out---

13 Q Uh-huh. (Affirmative).

14 A ---and skin might of been on the glass and there was
15 none detected. I looked at the glass on the ground and in
16 the windowsill.

17 Q Okay. And, so, essentially when he -- there was no
18 forensic evidence obtained?

19 A No, sir, no forensic or physical evidence there.

20 Q Okay. Thank you.

21 SOLICITOR BOYD: Your Honor, the State has no redirect.

22 THE COURT: You may step down.

23 SOLICITOR BOYD: Your Honor, may the witness be
24 excused?

25 THE COURT: He may be.

Travis Spivey - Direct examination
by Solicitor Boyd

1 (Whereupon, the witness was excused.)

2 SOLICITOR BOYD: The State calls Travis Spivey.

3 TRAVIS SPIVEY, having been first
4 duly sworn, testified as follows:

5 DIRECT EXAMINATION

6 BY SOLICITOR BOYD:

7 Q Good afternoon, Officer Spivey.

8 A Hi.

9 Q How are you?

10 A I'm good.

11 Q Could you please introduce yourself to the jury?

12 A My name is Travis Spivey.

13 Q Where are you employed?

14 A Spartanburg City Police.

15 Q How long have you been there?

16 A Five years.

17 Q What are your current duties?

18 A Patrol officer.

19 Q What shift do you usually work?

20 A At the time of the incident I was on third shift. I'm
21 now currently on day shift.

22 Q Were you on duty the night of November 17th of 2009?

23 A Yes, sir.

24 Q Were you dispatched to 200 Daniel Morgan Avenue that
25 night?

Travis Spivey - Direct examination
by Solicitor Boyd

- 1 A Yes, sir.
- 2 Q Is that in Spartanburg County?
- 3 A Yes, sir.
- 4 SOLICITOR BOYD: Approach the witness, Your Honor?
- 5 (The Court nods affirmatively.)
- 6 Q I'm showing you what's been identified as State's
- 7 Exhibit 1.
- 8 If you would, please mark on it where 200 Daniel Morgan
- 9 is.
- 10 A (Witness complies.)
- 11 SOLICITOR BOYD: Request publication, Your Honor.
- 12 MR. POOLE: No objection.
- 13 Q Can you please identify where you marked?
- 14 A Yes, sir.
- 15 Q What is at that location?
- 16 A It's 200 Daniel Morgan Avenue, Graybar Electric.
- 17 Q Did you say Graybar?
- 18 A Yes, sir.
- 19 Q When did you arrive at that location?
- 20 A I arrived on scene at 12:53 a.m.
- 21 Q When you arrived, what did you observe?
- 22 A I observed a glass window on the front of the business
- 23 that had been busted out with a cement block.
- 24 Q Were there other officers on the scene with you?
- 25 A Officer King and Officer, Lieutenant Andy Monyos

Travis Spivey - Direct examination
by Solicitor Boyd

1 arrived on scene.

2 Q Can you describe the break-in, what you saw?

3 A We approached the business. We seen that the glass was
4 broken out of the front of the business, and there was a
5 cement cinder block laying on the inside portion of the
6 business. As we made entry into the business to check and
7 see if there was anyone inside the business, there was stuff
8 knocked off one of the desks in the floor. There was a
9 computer docking station missing, a computer that was laying
10 in the floor. Also a lot of glass on the inside and outside
11 laying in the floor.

12 Q I show you what's been marked as State's Exhibit 3.

13 Do you recognize this?

14 A Yes, sir.

15 Q What is it?

16 A That's the entry point of Graybar Electric.

17 Q Is that what you observed that night?

18 A Yes, sir.

19 Q Okay. Is it a fair and accurate representation of the
20 scene upon your arrival?

21 A Yes, sir.

22 Q To your knowledge, has it been altered in any way?

23 A No, sir.

24 SOLICITOR BOYD: At this time the State moves the
25 exhibit into evidence, Your Honor.

Travis Spivey - Direct examination
by Solicitor Boyd

1 MR. POOLE: No objection.

2 THE COURT: It's admitted.

3 (Whereupon, State's Exhibit No. 3 was received into
4 evidence at this time.)

5 SOLICITOR BOYD: Request publication, Your Honor.

6 THE COURT: You may.

7 Q Could you describe what we're looking at?

8 A That's the front of Graybar Electric where the glass was
9 broken out of the window and the glass on the ground being
10 the entry point of where the suspect entered the business.

11 Q Does that glass on the ground belong to the window
12 above it?

13 A Yes, sir.

14 Q Okay. Approximately how large is that window?

15 A I would say at least six feet tall.

16 Q Could you fit through that window?

17 A Yes, sir.

18 Q Easily?

19 A If, if I turned sideways, yes. If I didn't have on any
20 gear I could.

21 Q Now, where is that window in location to the business
22 itself?

23 A It's on the front left-hand corner of the business.

24 Q Okay. Showing you what's marked as State's Exhibit 4
25 for identification.

Travis Spivey - Direct examination
by Solicitor Boyd

1 Do you recognize this?

2 A Yes, sir.

3 Q What is that?

4 A That's the glass that was broken out of the window on
5 the ground in front of the entry point.

6 Q Is it a fair and accurate representation?

7 A Yes, sir.

8 Q Has it been altered in any way?

9 A No, sir.

10 SOLICITOR BOYD: State moves Exhibit 4 into evidence.

11 MR. POOLE: No objection.

12 THE COURT: It's admitted.

13 (Whereupon, State's Exhibit No. 4 was received into
14 evidence at this time.)

15 SOLICITOR BOYD: Request publication, Your Honor.

16 THE COURT: You may.

17 Q Now, can you describe what we're looking at here?

18 A That's the glass on the ground that was broken out of
19 the window where entry was gained into the business.

20 Q Now, some of the glass is darker and some of the glass
21 is light, is that correct?

22 A Correct.

23 Q Is that because there's a tint on the window?

24 A There could have been a window tint. I'm not sure.

25 Q Okay. Now, is there anything that we need to know

Travis Spivey - Direct examination
by Solicitor Boyd

1 about this picture that you observed personally that may not
2 be evident?

3 A Before we approached the business a photograph was took
4 of the glass on the ground, and you can see right there it
5 looks to be possibly a foot impression.

6 Q I'm also showing you what's been marked as State's
7 Exhibit 5 for identification.

8 Do you recognize this?

9 A Yes, sir.

10 Q What is it?

11 A That's the entry point where the cinder block was
12 laying on the inside, laying on the ledge, and leading into
13 the business.

14 Q Is it a fair and accurate representation of your view
15 through the window?

16 A Yes, sir.

17 Q Has it been altered?

18 A No, sir.

19 SOLICITOR BOYD: State moves Exhibit 5 into evidence.

20 MR. POOLE: No objection.

21 THE COURT: It's admitted.

22 (Whereupon, State's Exhibit No. 5 was received into
23 evidence at this time.)

24 Q Can you describe what we're looking at?

25 A The main entry point that had been busted out with the

Travis Spivey - Direct examination
by Solicitor Boyd

1 cement cinder block.

2 Q Now, is that picture taken from right outside the
3 window?

4 A Yes, sir.

5 Q Approximately how large is that cinder block?

6 A As, as far as in weight or---

7 Q Size. Dimensions.

8 A Square dimension.

9 Q Okay. Did you determine that cinder block to be the
10 tool of entry?

11 A Yes, sir.

12 Q Now, how much distance is there from that window to
13 where that cinder block is and that block -- looks like a
14 file cabinet on the right side.

15 A It's right over inside the window.

16 Q Did you get an approximate measurement?

17 A Maybe a foot.

18 Q Maybe a foot.

19 Could you, could you have easily fit through that
20 window and past that cinder block?

21 A Actually when we went through the window we had to,
22 because of the filing cabinet and the desk, there's a desk,
23 that may be the conner of it right there where you stepped
24 in, stuff had been disturbed from entering into it. So, we
25 had to step on the desk to get over it.

Travis Spivey - Direct examination
by Solicitor Boyd

1 Q Okay. Did you or other officers search the building?

2 A Yes, sir.

3 Q Okay. Was anyone else in the building?

4 A No, sir.

5 Q Was anything reported missing from the business?

6 A Yes, sir.

7 Q What was reported missing?

8 A From -- the key holder arrived. He stated that a
9 laptop was missing.

10 MR. POOLE: I object to hearsay, Your Honor.

11 THE COURT: Sustained.

12 Q Through your investigation, did you determine whether
13 anything was missing or were you aware, made aware to look
14 for anything?

15 A Lenova laptop.

16 MR. POOLE: Same objection, Your Honor.

17 THE COURT: Well, he can testify that he was looking
18 for one, but he can't testify as to -- well, let me see
19 y'all just a minute.

20 (Whereupon, a bench conference was held off the record
21 in the presence of the jury, but out of the hearing of the
22 jury.)

23 Q Were you looking for a particular laptop?

24 A Yes, sir.

25 Q What particular laptop were you looking for?

Travis Spivey - Direct examination
by Solicitor Boyd

1 A A Lenova Think Pad laptop.

2 Q I show you what's been marked State's Exhibit 6 for
3 identification.

4 Do you recognize this?

5 A Yes, sir, that's a computer docking station that was
6 knocked off the desk.

7 Q Is it an accurate representation of what you saw inside
8 the office?

9 A Yes, sir.

10 Q Has it been altered?

11 A No, sir.

12 SOLICITOR BOYD: State moves Exhibit 6 into evidence,
13 Your Honor.

14 MR. POOLE: No objection.

15 THE COURT: It's admitted.

16 (Whereupon, State's Exhibit No. 6 was received into
17 evidence at this time.)

18 Q Can you describe what we're looking at?

19 A A docking, computer docking station laying in the floor
20 that had been knocked off the desk.

21 Q Okay. Now, where is this in relation to the broken
22 window?

23 A If you enter in through the broken window to your left,
24 it was knocked off one of the desks to your left when you
25 entered in through the window looking at the front of the

Travis Spivey - Direct examination
by Solicitor Boyd

1 window.

2 Q Can you show where the window would be in the picture?

3 A The window would be back this way. This was
4 actually.-- the window would be over here.

5 Q Is there anything on the ground?

6 A You can see glass fragments right there.

7 Q Did you determine that glass would actually be from the
8 window?

9 A Yes, sir.

10 Q Is there anything else on the ground?

11 A You can tell where stuff was disturbed at the point of
12 entry from being knocked off the desk, the name plate
13 knocked off the desk.

14 Q What is that black apparatus in the foreground?

15 A This right here?

16 Q Uh-huh. (Affirmative).

17 A That's the computer docking station.

18 Q After you searched the building, what did you do next?

19 A After searching the building we contacted the key
20 holder.

21 Q Okay. Did you search the area around the building?

22 A We did search the area around the building.

23 Q Why did you initiate a search around the building?

24 A To see possibly if anything was taken from the business
25 that might have been dropped on the outside.

Travis Spivey - Cross-examination
by Mr. Poole

1 Q Did you have a reason to believe that a possible
2 suspect was in the vicinity, the vicinity?

3 A Yes, sir.

4 SOLICITOR BOYD: No further questions, Your Honor.

5 CROSS-EXAMINATION

6 BY MR. POOLE:

7 Q Officer Spivey, the cinder block that you observed, was
8 there any construction sites or anything, any place nearby
9 where there were a collection of cinder blocks or anything
10 like that?

11 A Not to my knowledge, no, sir.

12 Q Okay. And let me ask you this, did you, did you have
13 the place dusted for fingerprints?

14 A Yes, sir.

15 Q Okay. Did you find any?

16 A No, sir.

17 Q Did you find any samples of hair, skin, or clothing?

18 A No, sir.

19 Q So, there's no forensic evidence in this situation,
20 situation either?

21 A No, sir.

22 Q Thank you, officer.

23 SOLICITOR BOYD: The State ask the witness be excused,
24 Your Honor.

25 THE COURT: You may step down. You can also be

Brian Shaw - Direct examination
by Solicitor Boyd

1 excused.

2 (Whereupon, the witness was excused.)

3 SOLICITOR BOYD: The State calls Brian Shaw.

4 BRIAN SHAW, having been first duly
5 sworn, testified as follows:

6 DIRECT EXAMINATION

7 BY SOLICITOR BOYD:

8 Q will you please introduce yourself?

9 Please introduce yourself.

10 A I'm Officer Brian Shaw.

11 Q Where are you employed?

12 A Spartanburg City Public Safety Department.

13 Q How long have you been there?

14 A Almost five years.

15 Q Okay. What are your current duties?

16 A Currently assigned to patrol on A platoon, which is our
17 day shift.

18 Q Were you on patrol the night of November 17th of 2009?

19 A Yes, sir.

20 Q Did you participate in the search relating to the
21 suspected burglary of Graybar?

22 A Yes, sir.

23 Q Were you in your patrol car during the search?

24 A Yes, sir.

25 Q How would you describe your activities during the

Brian Shaw - Direct examination
by Solicitor Boyd

1 search?

2 A Initially set a perimeter around the area around the
3 Graybar business. So, we initiated a search. We didn't
4 find anybody initially. So then we began to patrol the area
5 to see if we could find any evidence or any suspects,
6 anything like that. While I was patrolling the area I found
7 a radio, a radio that was reported missing over the -- it
8 was reported missing over the radio by Officer Spivey as one
9 of the objects that was missing, and found that at the
10 County Administration Building, which is on Alba Court near
11 Krispie Cream Donuts.

12 SOLICITOR BOYD: Approach, Your Honor.

13 (The Court nods affirmatively.)

14 Q Can you mark on State's Exhibit 1 where you found the
15 radio?

16 A All right.

17 Q Can you show us where you marked that you found the
18 radio?

19 A It's right there. It's the County Administration
20 Building right there. It's right there. It's North Church
21 and Alba Court.

22 Q Now, where exactly did you find the radio?

23 A There's actually -- there's an, an overhang right there
24 and I found it underneath the overhang. It was pretty much
25 just in the middle of the parking lot.

Brian Shaw - Direct examination
by Solicitor Boyd

1 Q Did you identify that radio as being from Graybar?

2 A Yes, sir.

3 MR. POOLE: Objection, Your Honor. We haven't
4 connected the fact that the radio was missing from Graybar
5 and, and that it was a particular radio.

6 THE COURT: well, if he has personal knowledge about
7 it, I'm not sure how he could, but he might.

8 Does he have personal knowledge?

9 Q Were you made, were you made aware of---

10 THE COURT: No, does he have personal knowledge. Not
11 did somebody tell him something.

12 SOLICITOR BOYD: I withdraw the question, Your Honor.

13 THE COURT: Okay.

14 Q Approximately how far away was the radio from Graybar?

15 A I would say it's probably three or four hundred yards
16 maybe.

17 Q Okay. And if you were walking from this to, from one
18 to the other location, approximately how long would it take
19 you?

20 A Probably walking a, a normal pace, probably say six
21 minutes.

22 Q Okay. No further questions.

23 CROSS-EXAMINATION

24 BY MR. POOLE:

25 Q Officer Shaw, you said that you put a perimeter---

Brian Shaw - Cross-examination
by Mr. Poole

- 1 A Yes, sir.
- 2 Q ---around the Graybar location?
- 3 A Yes, sir.
- 4 Q And the Graybar location, is that the circled area
- 5 right---
- 6 A Yes.
- 7 Q You've got a better pointer.
- 8 A Right there.
- 9 Q Right there?
- 10 A Yes, sir.
- 11 Q Okay. And where is the administration building?
- 12 A Right there.
- 13 Q That's still listed as Rutledge College?
- 14 A Yes, they're -- I believe that's where they're building
- 15 the -- I'm not sure what that -- I think that may be where
- 16 they're building the college. I'm not a hundred percent
- 17 sure.
- 18 Q Okay. But it is -- it's indicating it's right beside,
- 19 right across from Spartanburg Memorial Auditorium?
- 20 A Yes, sir.
- 21 Q And at one time there was an old college there known as
- 22 Rutledge College?
- 23 A I'm not sure.
- 24 Q Is that it?
- 25 A I haven't been there that long.

Brian Shaw - Cross-examination
by Mr. Poole

- 1 Q You haven't been there that long?
- 2 A No, sir.
- 3 Q Okay. Well, what's, what's there now is the County
- 4 Administration Building, is that right?
- 5 A Yes, sir.
- 6 Q And that -- we all know what the County Administration
- 7 Building is because we all have to pay taxes there, don't
- 8 we?
- 9 A Unfortunately.
- 10 Q Okay. And what time were you there at the County
- 11 Administration Building?
- 12 A My understanding, sir, I don't have that in my report,
- 13 sir. It was after -- the initial report time was at
- 14 12:47 a.m. in the morning.
- 15 Q All right. So, you're starting to work on the Graybar
- 16 break-in or assisting in working on a break-in at what time,
- 17 12:47?
- 18 A Yes, sir, that was the initial---
- 19 THE COURT: Let me ask you to use that microphone
- 20 please instead of putting your back to it.
- 21 Q 12:47?
- 22 A Yes, sir.
- 23 Q When you got to Graybar?
- 24 A Yes, sir.
- 25 Q All right. When did -- how long after that did you go

Brian Shaw - Cross-examination
by Mr. Poole

1 to the County Administration Building?

2 A It was probably, it was probably an hour lapse at
3 least.

4 Q At least.

5 A Somewhere around there, yes, sir.

6 Q At least an hour?

7 A From the initial report time, yes, sir.

8 Q Could it have been as long as two hours?

9 A It could be.

10 Q Could it be as long as two and a half hours?

11 A It could be.

12 Q Could it be as long as three hours?

13 A I don't think it was -- less. I'm pretty sure it was
14 less than three hours.

15 Q Less than three?

16 A Yes, sir.

17 Q Possibly more than two and a half?

18 A Could be.

19 Q Okay. And when you set up the perimeter -- and what
20 was the nature of the perimeter?

21 I mean tell us what that is.

22 A We just set up a perimeter in the -- it's possible
23 thoroughfares that, that somebody may use when they're
24 trying to leave, roadways, alleys, streams, stuff like that.
25 We're just trying to set up a perimeter around -- not at the

Brian Shaw - Cross-examination
by Mr. Poole

1 building, but around the area.

2 Q Uh-huh. (Affirmative).

3 A It could be a couple of hundred yards away from it. It
4 could be several feet depending on the location.

5 Q Okay. So, in other words, officers were placed in
6 certain areas like roads?

7 A Yes, sir.

8 Q Paths?

9 A Yes, sir.

10 Q If they're any paths or -- and what was the distance
11 from Graybar that these officers were placed?

12 A I'm not a hundred percent sure about that. I know I
13 was probably a hundred yards away from, from Daniel Morgan.

14 Q About a hundred yards, yards away?

15 A Yes, sir.

16 Q So, is it fair to say that this, the circumference of
17 the perimeter was about a hundred yards away from Graybar?

18 A No, sir, because third shift is a little slow so far as
19 call volume. So, we have a lot of officers. So, we were,
20 we were able to -- I was probably the closest one, one of
21 the closest ones because I was at North Church and Daniel
22 Morgan, around that area. We had officers down to Pine
23 Street and Daniel Morgan. We had officers to St. John. We
24 had several officers in the area. I mean sometimes we
25 overlap officers in case they made it out past one of us.

Brian Shaw - Cross-examination
by Mr. Poole

1 Q okay. well, could you kind of point to where they were
2 located?

3 A The only one I could -- I mean I can tell you I was
4 about right here. We had another one at the -- they had a
5 construction site for the Cultural Center I think it is now,
6 which is down here on St. John. He was back up around there
7 where they had a -- they have a parking lot. Those are the
8 only two I can tell you for sure.

9 Q okay. Do you know anything about the collection of any
10 or attempted collection of fingerprints or anything like
11 that?

12 A I just know that we usually dust for them.

13 Q okay. And was that done in this case or do you know?

14 A I, I didn't do it.

15 Q okay. Thank you.

16 SOLICITOR BOYD: The State has no redirect, Your Honor.

17 THE COURT: You may step down.

18 SOLICITOR BOYD: We would ask he be excused, Your
19 Honor.

20 THE COURT: He may be.

21 (Whereupon, the witness was excused.)

22 SOLICITOR BOYD: The State calls Dale Winningham,
23 Winningham.

24 DALE WINNINGHAM, having been first duly
25 sworn, testified as follows:

Dale Winningham - Direct examination
by Solicitor Boyd

1 DIRECT EXAMINATION

2 BY SOLICITOR BOYD:

3 Q Good afternoon.

4 A Afternoon.

5 Q Please introduce yourself.

6 A I'm Lieutenant Dale Winningham.

7 Q Were are you employed?

8 A Spartanburg Public Safety Department.

9 Q How long have you worked there?

10 A Fourteen years.

11 Q What are your current duties?

12 A I am the shift commander for A platoon.

13 Q Were you on duty, duty the night of November 17th of
14 2009?

15 A Yes.

16 Q Did you participate in the search relating to the
17 suspected burglary at Graybar?

18 A That is correct.

19 Q How did you participate?

20 A Well, they initially gave the call out and Lieutenant
21 Monyos was on the scene. At this time I was a sergeant. He
22 requested, while they were at the business doing a search,
23 he requested that I, I set up the perimeter with the
24 officers.

25 Q Did you position other officers?

Dale Winningham - Direct examination
by Solicitor Boyd

1 A Yes.

2 Q Where did you position other officers?

3 A I myself -- one moment. I myself positioned myself at
4 Barnette Park in the vicinity I guess near the middle of
5 the, the park. Officer Ostrachek was positioned behind the
6 Cultural Center on St. John Street. Officer Taylor was
7 positioned behind the Montgomery Building. Officer Shaw was
8 positioned at Church and Daniel Morgan. Officer Tillotson
9 was position on Memorial Drive in the vicinity of the
10 railroad tracks behind Graybar. Officer Byrd was
11 positioned, positioned on Memorial Drive near East
12 Cleveland, and Officer Patz was positioned I say near the
13 Liberty Street at East Cleveland in the vicinity near the
14 upper end of the tracks pretty much around, all the way
15 around the incident location.

16 Q Okay. Were you in your patrol car?

17 A When I was out on the perimeter?

18 Q Correct.

19 A No. I positioned -- one of the things we try to do is
20 park the vehicle, turn the lights on, and step away from the
21 vehicle.

22 Q Did you move locations during the search?

23 A That's correct.

24 Q Can you point out about the route you took during the
25 search?

1 A Can I step away?

2 Q Sure.

3 A I really can't see from this angle.

4 Q Sure.

5 (Whereupon, the witness left the stand.)

6 A At the time of the incident I was here is where I was
7 positioned, and after they started tracking I went up Dean
8 Street onto Daniel Morgan. I took a right and went to Pine
9 Street. I went around Pine Street, went up to East Pearl.
10 I came back down until I got to Magnolia Street and Pearl.
11 When I got to Magnolia Street and Pearl I came down to the
12 County Administration Building and parked at the back of the
13 administration building.

14 Q Okay. Did you see anyone during your search?

15 (Whereupon, the witness returned to the stand.)

16 A Yes.

17 Q Where did -- who did you see?

18 A I saw Mr. Upchurch and another gentleman.

19 Q Did you recognize him at the time?

20 A No, sir.

21 Q When you saw what later you found out to be
22 Mr. Upchurch or in your, in your, to your understanding what
23 turned out to be Mr. Upchurch, where were you when you saw
24 him?

25 A When I saw Mr. Upchurch I was at the corner of East

Dale Winningham - Direct examination
by Solicitor Boyd

1 Pearl and Magnolia.

2 Q was he with anyone?

3 A Mr. Justin Durham, Durham.

4 Q How would you describe the appearance of these two when
5 you saw them?

6 A ~~Mr. Durham~~ was wearing a gray sweater and he appeared
7 to be intoxicated. ~~Mr. Upchurch~~ was wearing an orangish-
8 sweater and they both were walking. He didn't appear to be
9 intoxicated. But they crossed right at the front church,
10 the church right at the corner.

11 Q were you able to discern what direction they were
12 headed?

13 A To -- they were walking towards the Freemont School
14 Apartments, 600 Magnolia Street.

15 Q And were you dispatched to Freemont Apartments later
16 that night?

17 A Yes, sir, a little after 2:00.

18 Q Excuse me?

19 A A little after 2:00 a.m.

20 Q Can you identify on Exhibit 1 where these apartments
21 are located?

22 A The apartments are located right here.

23 Q what intersection is that?

24 A That is at Magnolia and, and Pearl Street.

25 Q Thank you.

1 Okay. What did you observe on your arrival at Freemont
2 Apartments?

3 A Excuse me?

4 Q What did you observe on your arrival at Freemont
5 Apartments?

6 A The officers entered the building or we entered the
7 building. We had the exits blocked off and we managed to
8 locate Mr. Upchurch and Mr. Justin Durham at the time.

9 Q Why were you dispatched to Freemont Apartments?

10 A Well, one of the things that was reported missing
11 during the initial burglary was a computer.

12 MR. POOLE: Objection. Hearsay, Your Honor.

13 THE COURT: Don't testify as to hearsay.

14 Q On your arrival, did you see anyone familiar?

15 A When I arrived at the---

16 Q At Freemont Apartments.

17 Did you recognize anyone?

18 A Mr. Upchurch.

19 Q Where was Mr. Upchurch when you arrived?

20 A He was in Mr. Oscar Wesley's residence. I think it's
21 0, Apartment .

22 Q Was anyone else in the apartment?

23 A Mr. Justin Durham.

24 Q Now, did these two individuals, did their appearance
25 match the two individuals that you saw at the, at the church

Dale Winningham - Direct examination
by Solicitor Boyd

1 parking lot?

2 A That's correct.

3 Q About how much time had passed since you saw them the
4 first time until you saw them the second time at Freemont?

5 A I would say probably 30 minutes to an hour.

6 Q Okay. Was a search warrant obtained?

7 A That's correct.

8 Q Upon service, serving of the search warrant for
9 obviously Apartment --

10 A That's correct.

11 Q -- was anything recovered?

12 A Correct.

13 Q Can you tell me what was recovered as a result of the
14 search warrant?

15 A A Lenova laptop computer.

16 Q Thank you. No further questions.

17 CROSS-EXAMINATION

18 BY MR. POOLE:

19 Q Officer Winningham, what time did you become involved
20 in this investigation?

21 A That was right at about 12:52 when the initial call
22 came in.

23 Q 12:52?

24 A That's correct.

25 Q And then you, of course, you came to Graybar?

Dale Winningham - Cross-examination
by Mr. Poole

- 1 A Did I go to Gray---
- 2 Q Did you go---
- 3 A I didn't go to Graybar.
- 4 Q Okay. All right. But you were, you were instrumental
5 in setting up the perimeter?
- 6 A That's correct.
- 7 Q That was your task and role?
- 8 A Yes, part of it.
- 9 Q Okay. And you indicated the route that you took
10 yourself---
- 11 A That's correct.
- 12 Q ---at one time?
- 13 And could you indicate that route one more time for us?
- 14 A I myself left Barnette Park. I went to Dean Street. I
15 drove from Dean Street to East Daniel Morgan. I made a
16 right and went to Pine Street. I went a left and went north
17 on North Pine. I went to East Pearl and I got down on East
18 Pearl and I turned left. I proceeded, I proceeded crossing
19 Church Street until I got to Magnolia Street. There I made
20 a left and came down until I got to the rear of the County
21 Administration Building where I parked.
- 22 Q And you parked?
- 23 A That's correct.
- 24 Q And what time did you begin that route?
25 what time did you start driving?

Dale Winningham - Cross-examination
by Mr. Poole

1 A The actual time I have no idea. It was, based on the,
2 us moving because of the direction that the, the officers,
3 the K-9 officer and the tracking officer was going.

4 Q Okay. All right. So, you, you became involved in the
5 investigation at about 12:52, is that right?

6 A Correct.

7 Q You drove this route?

8 A Correct.

9 Q And you were having the perimeter manned?

10 A That's correct.

11 Q And where did you see Mr. Upchurch and Mr. Durham?

12 A I observed the two gentlemen right here at the, at the
13 corner of Magnolia Street and Pearl Street.

14 Q Okay. I didn't get at, that down.

15 Magnolia and Pearl?

16 A Correct.

17 Q Okay. Now, you describe Mr. Durham as wearing a gray
18 sweater and intoxicated, is that right?

19 A Yeah, he appeared to be under the influence of
20 something.

21 Q And the man that you have come to know as Mr. Upchurch
22 was wearing an orange sweater and he didn't appear to be
23 intoxicated, is that right?

24 A Through my glance, no.

25 Q And you didn't see Mr. Upchurch carrying anything, did

1 you?

2 A At the time, again, it was a glance. I couldn't say.

3 Q Okay. All right. But it was around two o'clock you
4 were dispatched to Freemont, is that right?

5 A 2:00, a little after 2:00.

6 Q Okay. Between 2:00 and 2:30?

7 A I would say yes.

8 Q And I believe your testimony was that the, the time
9 that elapsed between seeing them in the street was about 30
10 minutes to an hour?

11 A Approximately.

12 Q Okay. Could it have been more than an hour?

13 A I wouldn't think so.

14 Q All right. Okay. Thank you, officer.

15 REDIRECT EXAMINATION

16 BY SOLICITOR BOYD:

17 Q Officer Winningham, you said just now when you were at
18 Pearl Street, the first time you saw these two individuals,
19 you just glanced at them?

20 A That's correct.

21 Q After seeing them the second time at Freemont
22 Apartments, how sure are you that the individuals,
23 individuals you saw in the church parking lot are the same
24 individuals you saw there that night at Freemont Apartments?

25 A I was absolutely sure it was the same guys.

Dale Winningham - Redirect examination
by Solicitor Boyd

1 Q A hundred precent sure?

2 A A hundred percent.

3 Q Is there a doubt in your mind?

4 A No, sir.

5 Q No further questions.

6 MR. POOLE: No recross.

7 THE COURT: You may step down.

8 SOLICITOR BOYD: Ask Officer Winningham be excused,
9 Your Honor.

10 THE COURT: He may be.

11 (Whereupon, the witness was excused.)

12 SOLICITOR BOYD: The State calls Jeff King.

13 JEFF KING, having been first duly
14 sworn, testified as follows:

15 DIRECT EXAMINATION

16 BY SOLICITOR BOYD:

17 Q Good afternoon.

18 Will you please introduce yourself?

19 A My name's Officer Jeffrey King.

20 Q And where are you employed?

21 A I'm employed at the Spartanburg City Police Department.

22 Q And how long have you been working there?

23 A I've been working there for approximately seven years.

24 Q What are your current duties?

25 A Right now I'm assigned to the third shift patrol

Jeff King - Direct examination
by Solicitor Boyd

1 working nights.

2 Q Okay. Were you on duty on the same shift, November
3 17th, 2009?

4 A Yes, sir.

5 Q Did you participate in the search relating to the
6 burglary of Graybar?

7 A Yes, sir.

8 Q Okay. More specifically, did you participate in the
9 K-9 track?

10 A Yes, sir.

11 Q Can you describe the route you and the K-9 team took
12 during your search?

13 A The K-9 started at the entry point, the window that was
14 broken out. I remained inside the business. Officer---

15 MR. POOLE: Excuse me, Your Honor. I'm not so sure he
16 can testify as to the K-9 track unless he is a handler
17 himself.

18 SOLICITOR BOYD: Your Honor, he, he went on the K-9
19 track through -- he was participating in the track. He can
20 tell, most certainly say where he went during his search.

21 THE COURT: Well, he can testify what he did, sure. He
22 can't testify about the dog unless he's the handler and is
23 qualified to---

24 SOLICITOR BOYD: He's talking about where he went.

25 THE COURT: Okay.

Jeff King - Direct examination
by Solicitor Boyd

1 Q where did you go on your search?

2 A when we exited or when I exited the window of the
3 business, I made a left and we -- I followed the K-9 behind
4 the business towards the railroad tracks. We worked down
5 onto the railroad tracks and headed towards Church Street.
6 We went under Church Street and underneath the underpass on
7 the railroad tracks and came up on Magnolia Street behind
8 Bob Barnette's. We came up behind Bob Barnette's back
9 across Church Street through the First Citizens Bank parking
10 lot and then back from First Citizens down along the
11 railroad tracks up on a ledge, a ledge up above the railroad
12 tracks. Worked from the ledge of the railroad tracks back
13 towards Graybar and ended up in a vacant lot to the west
14 side of Graybar.

15 Q Okay. Did you discover or recover anything in your
16 search?

17 A When we got to the open lot we just began checking the
18 wood line. There's a small wood line between Graybar and
19 the open lot. At the southern end of the wood line right
20 next to the actual corner of the business I located two
21 VCR's. I believe one was a VCR, DVD combo. Black VCR and a
22 silver VCR.

23 Q Was there anything inside the VCR's?

24 A I believe there was a cassette, but I, I can't testify
25 to what was in it.

Jeff King - Direct examination
by Solicitor Boyd

1 Q Okay. Did you also go to the Freemont School
2 Apartments that night?

3 A Yes, sir.

4 Q About what time did you go there?

5 A It was approximately probably 2:10, 2:15.

6 Q Okay. Did you go to ?

7 A Yes, sir, I did.

8 Q Okay. And who resides in that apartment?

9 A Oscar Wesley.

10 Q When you went to the apartment, was the doors open and
11 who or what did you see?

12 A Mr. Wesley opened the door. Inside the apartment I
13 observed a couch approximately 15 feet from the front door.
14 Mr. Upchurch was sitting on the couch as well as Mr. Durham.

15 Q Can you describe what Mr. Upchurch was wearing?

16 A He had an orange hooded sweatshirt on.

17 Q Okay. Can you describe what his appearance was aside
18 from his clothing?

19 A Once he was outside the apartment we began speaking
20 with him. I noticed specs of very small flakes of glass on
21 his head, a cut to his right ear, as well as some small
22 plants that were attached to his pants.

23 Q I'm showing you what's already been marked for
24 identification as State's Exhibit 7.

25 Do you recognize this?

Jeff King - Direct examination
by Solicitor Boyd

1 A Yes, sir.

2 Q Okay. what are we looking at?

3 A It's a photograph of Mr. Upchurch's, the top of his
4 head or the side of his face.

5 Q Is that a fair and accurate representation of what you
6 observed of Mr. Upchurch that night?

7 A Actually it's not. The photograph was taken in an
8 attempt to see the flakes of glass in his head, but once the
9 photograph was taken it was unable to show.

10 Q Has that photograph been altered in any way to your
11 knowledge?

12 A No, sir.

13 MR. BOYD: The State moves Exhibit 7 into evidence,
14 Your Honor.

15 MR. POOLE: May we approach, Your Honor, please?

16 THE COURT: Yes, sir.

17 (Whereupon, a bench conference was held off the record
18 in the presence of the jury, but out of the hearing of the
19 jury.)

20 THE COURT: All right. Any objection?

21 MR. POOLE: No, sir.

22 THE COURT: It is admitted.

23 (Whereupon, State's Exhibit No. 7 was received into
24 evidence at this time.)

25 Q Officer King, can you describe what we're looking at in

Jeff King - Direct examination
by Solicitor Boyd

1 this picture?

2 A It's, it's a---

3 THE COURT: Excuse me, excuse me just a minute.

4 Mr. Stroupe, let me ask you to take that rope down. We
5 will move the jurors down one seat and we'll give them a
6 little bit more chance to see.

7 A The photograph here is a picture of the, the side of
8 Mr. Upchurch's face. It's the side of his head.

9 Q Using the laser pointer as a guide, can you show us
10 exactly the cuts that you observed on him or what appeared
11 to be cuts on his ear that you observed?

12 A I'm not sure if this picture was actually taken to mark
13 the cuts because I don't, I don't see one here. But it was
14 on his ear right about here. The glass was observed right
15 around this area.

16 Q Focusing on the ear --

17 A Yes, sir.

18 Q -- do those cuts appear to be fresh to you?

19 A Yes, sir.

20 Q Okay. Did you secure the apartment while waiting for
21 the search warrant with Sergeant Winningham?

22 A Yes, sir.

23 Q And upon service of the search warrant, did you find
24 anything on the clothes?

25 A Underneath the small bed in the apartment I located a

Jeff King - Direct examination
by Solicitor Boyd

1 white plastic Save-A-Lot bag. Inside was a black Lenova
2 laptop and some cables, miscellaneous cables.

3 Q Let me show you what's been marked as State's
4 Exhibit 8, and ask you if you recognize this photograph.

5 A Yes, sir.

6 Q Is it a fair and accurate, accurate representation of
7 what you saw?

8 A Yes, sir.

9 Q Has it been altered in any way to your knowledge?

10 A No, sir.

11 SOLICITOR BOYD: Okay. Your Honor, the State moves
12 Exhibit 8 into evidence.

13 MR. POOLE: No objection.

14 (Whereupon, State's Exhibit No. 8 was received into
15 evidence at this time.)

16 Q Can you describe what we're looking at in this picture?

17 A This is a bed frame. We removed the mattress in order
18 to look underneath it. This right, right here is a white
19 plastic bag which was recovered. Inside of it was the black
20 laptop.

21 Q Where is this bed?

22 A If you go inside the apartment you'll come past the
23 couch in the kitchen area. The bed was up against, closer
24 to the window on the far side of the apartment near the
25 front door.

Jeff King - Direct examination
by Solicitor Boyd

1 Q Now, how large an apartment are we talking about?

2 A Very small actually. Possibly eight to ten feet in
3 width and 15 to 20 feet in length.

4 Q Okay. I also show you what's been marked as State's
5 Exhibit 9 for identification.

6 Do you recognize this photograph?

7 A Yes, sir.

8 Q Okay. Does it fairly and accurately, accurately
9 represent what you saw?

10 A Yes, sir.

11 Q Has it been altered in any way to your knowledge?

12 A No, sir.

13 SOLICITOR BOYD: The State moves Exhibit 9 into
14 evidence, Your Honor.

15 MR. POOLE: No objection.

16 THE COURT: It's admitted.

17 (Whereupon, State's Exhibit No. 9 was received into
18 evidence at this time.)

19 Q Can you discuss what we're looking at in this
20 photograph?

21 A This is the white bag that was found. Once it was
22 opened, these cables, along with this laptop, was found
23 inside the white plastic bag.

24 Q Were you able to identify the make and model of that
25 laptop?

Jeff King - Direct examination
by Solicitor Boyd

1 A It was a Lenova Think Pad.

2 Q Okay. I'm also showing you what's marked as State's
3 Exhibit 10 for identification.

4 Do you recognize this?

5 A Yes, sir.

6 Q Okay. What are we looking at or what are you looking
7 at?

8 A This is the -- once the laptop was opened and turned
9 on, control, alt, delete was entered and this privacy screen
10 popped up.

11 Q Does that, does that fairly and accurately show what
12 was on the screen---

13 A Yes, sir.

14 Q ---when you operated the computer?

15 A Yes, sir.

16 Q Okay. Has it been altered in any way?

17 A No, sir.

18 SOLICITOR BOYD: Okay. State moves Exhibit 10 into
19 evidence, Your Honor.

20 MR. POOLE: No objection.

21 THE COURT: It's admitted.

22 (Whereupon, State's Exhibit No. 10 was received into
23 evidence at this time.)

24 Q Was this screen on the laptop that you recovered?

25 A Yes, sir, once the laptop was pulled from the white

Jeff King - Direct examination
by Solicitor Boyd

1 plastic bag, the computer was turned on.

2 Q Okay. And what buttons did you press to get this
3 screen?

4 A Control, alt, and delete.

5 Q And were you able to identify what came on the screen?

6 A Immediately this privacy, which as you can see says
7 Graybar right here, Graybar security notice, it was a
8 privacy screen that popped up immediately.

9 Q Okay. And was Mr. Upchurch arrested at that point?

10 A Yes, sir.

11 Q Now, we talked a little bit about Mr. Durham earlier.

12 Was Mr. Durham at the apartment that night?

13 A Yes, sir.

14 Q And did he also have cuts on his hands?

15 A Yes, sir.

16 Q Was he arrested?

17 A No, sir.

18 Q Okay. And were you able or are you able to say why he
19 was not arrested at that point?

20 A Based on the information we had we couldn't put him
21 inside the business nor could we put him in possession of
22 the laptop. Mr. Upchurch was actually closer in relation to
23 where the laptop was found as far as the apartment was
24 concerned.

25 Q No further questions.

Jeff King - Cross-examination
by Mr. Poole

1 CROSS-EXAMINATION

2 BY MR. POOLE:

3 Q Officer King, let me kind of work backwards here in
4 your testimony if I may.

5 You say that Mr. Durham had cuts on his hands?

6 A Yes, sir.

7 Q And that they were both in this small apartment?

8 A Yes, sir.

9 Q And how big of an apartment, was the apartment
10 dimension wise?

11 A It was approximately eight or ten feet wide, fifteen to
12 twenty feet long. It was a very small one room apartment.

13 Q Okay. And, and you stated that Mr. Upchurch was closer
14 in relation to the laptop?

15 A Yes, sir.

16 Q And that was one of the reasons for arresting him on
17 these charges?

18 A Yes, sir.

19 Q Is that right?

20 A Yes, sir.

21 Q Well, if you're in a small apartment and you've got
22 somebody there, you got two people and there's one that's
23 got cuts on his hands, visible cuts on his hands -- you
24 didn't take any pictures of them?

25 A I did not, no, sir.

Jeff King - Cross-examination
by Mr. Poole

- 1 Q Did anybody else take any pictures?
- 2 A I can't testify to that.
- 3 Q You don't know?
- 4 A I don't know if anybody took pictures of Mr. Durham's
- 5 hands, no.
- 6 Q And, so, they both had to be fairly close in a, in a
- 7 tight apartment to, to the laptop, true?
- 8 A Yes, sir.
- 9 Q And you testified that Mr. Upchurch had what seemed to
- 10 be a fresh cut?
- 11 A Yes, sir.
- 12 Q Did you take a swab or anything to be used for any
- 13 future comparisons with DNA that might exist?
- 14 A No, sir.
- 15 Q And you said -- how about any -- any forensic evidence
- 16 whatsoever taken at Freemont to be placed into a chain of
- 17 custody to be analyzed --
- 18 A No, sir.
- 19 Q -- by SLED or any other lab?
- 20 A No, sir.
- 21 Q And what time did you get there at Freemont?
- 22 A It was approximately ten or fifteen minutes after two
- 23 o'clock in the morning.
- 24 Q 2:15?
- 25 A Yes, sir.

Jeff King - Cross-examination
by Mr. Poole

1 Q And was any blood on any part of any clothing on, on
2 the sweater that Mr. Upchurch was wearing?

3 A No, sir.

4 Q So -- may I see the picture?

5 And these cuts appear to be just right around the
6 center, inner lobe area, do they not?

7 A Yes, sir.

8 Q Right in the inner lobe area?

9 A Right.

10 Q Which could be caused by anything, right?

11 A Sure.

12 Q Okay. And there were a couple of other pictures that
13 show the way this apartment was furnished so to speak that
14 were taken.

15 It was pretty trashy, wasn't it?

16 A Yes, sir.

17 Q Describe for us the condition of the apartment.

18 A It was very unkept, very messy, lots of trash.

19 Q Okay. Were photographs taken of the other areas of the
20 apartment to show how trashy it was?

21 A No, sir.

22 Q Since we don't have any evidence about -- so far we
23 don't have any evidence about cuts on Mr. Durham's hands.

24 Could you describe those for us?

25 A They were very small. They appeared to be fresh just

Jeff King - Cross-examination
by Mr. Poole

1 as the cuts I observed on Mr. Upchurch, but I, I can't give
2 you anything more than that. They were, they were small
3 cuts on the tops and sides of his hands. Not the bottom,
4 the palms, on the top side by his knuckles.

5 Q on the top side?

6 A Yes, sir.

7 Q Okay. Thank you, Officer King.

8 REDIRECT EXAMINATION

9 BY SOLICITOR BOYD:

10 Q You just said that primarily the apartment you
11 described as relatively trashy and unkept?

12 A Yes, sir.

13 Q With the apartment being so trashy and unkept, would
14 you expect to find a Lenova laptop and a white flag under
15 the bed---

16 A No, sir.

17 Q ---in an apartment such as that?

18 A No, sir.

19 Q You wouldn't?

20 A No, sir.

21 Q No further questions.

22 THE COURT: You may step down.

23 SOLICITOR BOYD: Ask the witness be excused, Your
24 Honor.

25 THE COURT: He may be.

Jeff King - Redirect examination
by Solicitor Boyd

1 (Whereupon, the witness was excused.)

2 SOLICITOR BOYD: State calls Cynthia Byrd.

3 CYNTHIA BYRD, having been first duly
4 sworn, testified as follows:

5 SOLICITOR BOYD: Beg the Court's indulgence, Your
6 Honor.

7 (Pause.)

8 DIRECT EXAMINATION

9 BY SOLICITOR BOYD:

10 Q Good afternoon, Mrs. Byrd.

11 A How you doing?

12 Q Good. How are you?

13 Would you please state your name for the record?

14 A Cynthia Byrd.

15 Q Do you have a job?

16 A No, I don't.

17 Q Okay. Where do you live?

18 A Freemont School Apartment.

19 Q How long have you lived there?

20 A Four years.

21 Q Can you describe where your apartment is in the, excuse
22 me, in relation to the entire building itself?

23 A In the basement.

24 Q Are there stairs near your---

25 A Yes, it's stairs from each entrance of my apartment on

Cynthia Byrd - Direct examination
by Solicitor Boyd

1 the left side and on the right side. I can enter the top
2 from either area.

3 Q Okay. With your apartment being located thusly, is it
4 safe to say that you have a pretty, pretty good
5 understanding of who comes in and out of your building?

6 A Yes, I do. I'm a hall monitor and the crime watch lady
7 at Freemont.

8 Q You said the crime watch lady?

9 A Yes.

10 Q What kind of duties does that entail?

11 A That's -- I'm up all night. When something occurs at
12 Freemont, I'm the one -- I'm usually the most likely one to
13 call Public Safety.

14 Q Okay. Do you know a person by the name of Robert
15 Upchurch?

16 A Yes, I do.

17 Q Okay. How do you know that person?

18 A From him coming in the building and we speak, we use to
19 speak.

20 Q How well do you know him?

21 A I don't know him well.

22 Q But you know him by sight?

23 A Yes.

24 Q Were you at home on the night of November 17th,
25 November 17th and the early morning hours of November 18th?

Cynthia Byrd - Direct examination
by Solicitor Boyd

- 1 A Yes, I was.
- 2 Q Did you see Mr. Upchurch that night?
- 3 A Yes, I did.
- 4 Q About what time did you see him?
- 5 A About ten minutes till 2:00 or roughly around ten
- 6 minutes till or two o'clock.
- 7 Q Okay. Did he speak to you?
- 8 A Yes, he did. Kind of vulgar like.
- 9 Q What did he say to you?
- 10 A Something I just don't want to say in court. It's just
- 11 really nasty and it kind of made me kind of mad.
- 12 Q But what he said to you, was it pleasant or unpleasant?
- 13 A It was unpleasant.
- 14 Q Okay. Did you hear him say anything when he wasn't
- 15 speaking to you?
- 16 A He was talking to some other people about selling
- 17 something.
- 18 Q Were you able to hear what he was selling?
- 19 A Computer.
- 20 Q Did he say he was trying to sell a computer?
- 21 A Not sell it, but just unload it really.
- 22 Q He said unload it?
- 23 A Yeah.
- 24 Q He was selling it himself?
- 25 A Or to find a person to get rid of it.

Cynthia Byrd - Direct examination
by Solicitor Boyd

1 Q Okay. And what did he do after you, after your meeting
2 with him?

3 A Well, he, we -- after he said what he said to me kind
4 of abruptly, I got a little angry and I said well, you know,
5 I'll get somebody to do that now, and that's when I went and
6 called the police.

7 Q Okay. Do you remember about what time you called the
8 police?

9 A Approximately around two o'clock or ten minutes after
10 2:00.

11 Q When the police arrived, did you speak to them?

12 A Yes, I did.

13 Q What did you tell them?

14 A They asked me which way did they, did the person go
15 that I called on and I said upstairs on the, on the second
16 floor.

17 Q And at that point did the police go upstairs?

18 A Yes, they went up. I told them Apartment .

19 Q Do you know a person by the name of Oscar wesley?

20 A Yes, I do.

21 Q How do you know him?

22 A I know him from calling the police to help Oscar out.
23 Oscar's a Vietnam veteran and a lot of times he have
24 problems with, you know, cleaning up his house and calming
25 himself down a lot of time and we try to help him out.

Cynthia Byrd - Direct examination
by Solicitor Boyd

1 Q And how long have you known Mr. Wesley?

2 A For the whole four years I been staying there.

3 Q Okay. Did you see him that night---

4 A Yes, sir.

5 Q ---with Mr. Upchurch?

6 A Yes.

7 Q With Mr. Upchurch?

8 A Yes.

9 Q Did you see him in the company of Mr. Upchurch around
10 the building?

11 A Numerous of times.

12 Q That night?

13 A That night maybe once or twice.

14 Q Okay. And the direction you pointed the police when
15 they came to your apartment?

16 A Was upstairs to the second floor.

17 Q Did you tell them where to go on the second floor?

18 A Yes, I did. Apartment .

19 Q And whose apartment---

20 A Mr. Oscar Wesley's apartment.

21 Q Okay. No further questions. Thank you, Mrs. Byrd.

22 CROSS-EXAMINATION

23 BY MR. POOLE:

24 Q Mrs. Byrd, how are you doing today?

25 A I'm fine. How are you?

Cynthia Byrd - Cross-examination
by Mr. Poole

- 1 Q Fine. Thank you.
- 2 I believe you spoke with Officer Jeff King that night,
- 3 didn't you?
- 4 A I guess it was him. I really didn't look on his name
- 5 tag to see who I was speaking to. I just called the police.
- 6 Q And didn't you tell him that you observed two men?
- 7 A Yes.
- 8 Q Okay. And one was Mr. Upchurch?
- 9 A Yes.
- 10 Q And one was?
- 11 A At the time I didn't know that that was Mr. Durham
- 12 cause I had never seen Mr. Durham a day in my life.
- 13 Q Okay. So, you saw---
- 14 A That was the first time I seen Mr. Durham.
- 15 Q You saw Mr. Durham also?
- 16 A Yes, but I didn't know that his name was Durham at the
- 17 time.
- 18 Q Okay. Had you ever seen him before?
- 19 A No, sir.
- 20 Q Okay. And they were both together, weren't they?
- 21 A Yeah.
- 22 Q And did they have in their possession something?
- 23 what did they have in their possession?
- 24 A Mr. Upchurch just had a backpack on.
- 25 Q What did Mr. Durham have?

Cynthia Byrd - Cross-examination
by Mr. Poole

1 A Nothing. I didn't see anything.

2 Q A backpack?

3 A Mr. Upchurch had the backpack.

4 Q Okay. What did Mr. Upchurch have on?

5 A Orange hoody.

6 Q What did Mr. Durham have on?

7 A It was kind of like a grayish something. I really
8 didn't pay Mr. Durham a lot of attention because at the time
9 I was kind of mad---

10 Q I understand.

11 A ---and I really wasn't paying Mr. Durham no attention.
12 I just wanted to strike out at Mr. Upchurch at the time.

13 Q You wanted to strike out at Mr. Upchurch?

14 A Well, I really wanted to curse him out.

15 Q I understand.

16 Okay. Well, didn't you tell Officer King that they
17 were carrying a black laptop in a white plastic bag door to
18 door?

19 A Well, I told him I seen a white plastic bag. I don't
20 know what was in it. Those were my exact words.

21 Q Now, wait a minute. I thought you just said a moment
22 ago that you didn't see Mr. Durham with anything.

23 A I didn't. I seen the, the white bag. I just seen a
24 white bag, but I didn't see which one of them had the bag
25 cause it was like on the side of the building that they was

Cynthia Byrd - Cross-examination
by Mr. Poole

1 standing on the side of the building. I didn't really pay
2 it no attention, but I remember seeing it.

3 Q Your testimony just a moment ago was Mr. Upchurch, the
4 only thing he had was a backpack, right?

5 A That's all I seen, Mr. Upchurch with it.

6 Q All right. And then you saw -- you testified a while
7 ago that Mr. Durham didn't have anything?

8 A I didn't. But before we entered the building---

9 Q And then---

10 A ---there's a white piece, a white bag on the side of
11 the stand right there by the steps. That's where I seen
12 that at. But I, I don't know nothing about if I told
13 anybody that was there or whatever. But like I told you, I
14 was mad.

15 Q Okay.

16 A I was angry.

17 Q All right. And, and did you or did you not tell
18 Officer King that a black male in an orange hooded
19 sweatshirt and a white male in a gray hooded sweatshirt were
20 carrying a black laptop in a white plastic bag door to door
21 trying to sell it?

22 A Well, yeah, earlier that did, yeah, they did do that.

23 Q Okay. Now we got a third change in your testimony.
24 Earlier that day.

25 How much earlier in the day can it be more than

Cynthia Byrd - Cross-examination
by Mr. Poole

1 2:00 a.m.?

2 A You know, with me being a hall monitor and me being up
3 all night I can't keep up with everybody that comes in that
4 building, but as long as they come in and don't come in with
5 any violence or trying to sell something --

6 Q Right.

7 A -- I'm cool.

8 Q We -- you understand I respect your job---

9 A Okay.

10 Q ---and your responsibilities.

11 A Thank you.

12 Q You know that, don't you, ma'am?

13 A I know that.

14 Q But I'm just trying to understand why you would have
15 told the police that there was a computer in a white bag?

16 A I didn't say a computer. I said I, they was carrying a
17 white bag.

18 Q with a black laptop in it.

19 A I didn't say no black laptop. I don't know where that
20 come from.

21 Q Well, one, one more time.

22 Did you state to Officer King that two men were
23 carrying a black laptop in a white plastic bag door to door
24 trying to sell it?

25 A That was earlier that day, earlier that day.

Cynthia Byrd - Cross-examination
by Mr. Poole

- 1 Q Okay.
- 2 A And you didn't say nothing about earlier that day.
- 3 Q Okay. And you were mad at Mr. Upchurch, weren't you?
- 4 A We're talking about two o'clock in the morning.
- 5 Excuse me?
- 6 Q You were at, mad at Mr. Upchurch?
- 7 A Sure was.
- 8 Q Okay. Did you go into that apartment?
- 9 A No, I don't. It's so filthy who wants to go in there.
- 10 I'm so scared something might jump off on me. It ain't been
- 11 clean in four years. I'm not going in there.
- 12 Q who lives there?
- 13 A Oscar Wesley. The man haven't had a bath in a year.
- 14 So, it's a wonder they didn't find snakes and everything
- 15 else in there.
- 16 Q what color was the backpack Mr. Upchurch had on?
- 17 A Black and white.
- 18 Q All right.
- 19 A Mostly -- more black than it was white.
- 20 Q Do you know the brand name of it?
- 21 A No, I don't. I ain't looking for no brand name of
- 22 nothing.
- 23 Q All right. Thank you, ma'am.
- 24 A You're welcome.
- 25 SOLICITOR BOYD: No redirect from the State, Your

Justin Durham - Direct examination
by Solicitor Boyd

1 Honor.

2 THE COURT: You may step down.

3 THE WITNESS: Thank you.

4 SOLICITOR BOYD: State calls Justin Durham to the
5 stand.

6 JUSTIN DURHAM, having been first duly
7 sworn, testified as follows:

8 DIRECT EXAMINATION

9 BY SOLICITOR BOYD:

10 Q State your name for the record.

11 A Justin Ryan Durham.

12 Q How old are you?

13 A Twenty-three.

14 Q Do you have a job?

15 A Yes, sir.

16 Q What kind of work do you do?

17 A I do landscaping and I move furniture.

18 Q How long have you been doing that?

19 A Three years.

20 Q Three years.

21 Some pretty manually, manually intensive job?

22 A Yes, sir, it is.

23 Q Okay. Do you usually get cuts and scrapes from your,
24 your job?

25 A Yes, as a matter of fact I have cuts and scrapes now.

Justin Durham - Direct examination
by Solicitor Boyd

- 1 Q Well, I can't see those.
- 2 Can you describe to me where those cuts and scrapes
- 3 are?
- 4 A On my hands, on my wrists, all over my hands. I have
- 5 cuts now.
- 6 Q Is it fair to say at any given time you have cuts and
- 7 scrapes from your job?
- 8 A Yes, sir, every day.
- 9 Q Where do you live?
- 10 A I live at
- 11 Q Okay. Were you in the City of Spartanburg on the night
- 12 of November 17th, 2009?
- 13 A Yes, I was.
- 14 Q Where were you?
- 15 A I was in the Freemont Apartments.
- 16 Q Okay. Did you spend the entire night there or where
- 17 you---
- 18 A No, sir, just wondering around. I was heavily drunk,
- 19 drinking. I was intoxicated and walked around.
- 20 Q Okay. Do you know a person by the name of Robert
- 21 Upchurch?
- 22 A Never met him before that night. I do now.
- 23 Q The night of November 17th was the first night you laid
- 24 eyes on Mr. Upchurch?
- 25 A Yes, sir.

Justin Durham - Direct examination
by Solicitor Boyd

1 Q Okay. Where did you see him?

2 A I'm not clear if I met him in the apartments or right
3 outside the apartments, but one or the other. That's where
4 I met him.

5 Q When you say right outside the apartments, are we
6 talking about the parking lot or in that vicinity?

7 A It would be at the church or in the parking lot of
8 Freemont. There's always people hanging around. So, one or
9 the other.

10 Q Okay. About what time did you first meet him?

11 A I have no clue. No, cause I think it was like one
12 o'clock in the morning, something like that. It was pretty
13 late.

14 Q Okay. Did you speak with him?

15 A We didn't talk that much. He just said, when I got to
16 the apartment, I was drinking, and, so, I kind of got with
17 him and his friends in an apartment on the first floor.
18 said he had a laptop for sale. Said he wanted seventy-five,
19 eighty dollars, something like that, for the laptop. I said
20 I got like 30 bucks on me or something like that. He said
21 hey, man, you know, 15 or 20 minutes went by. He said hey,
22 man, I'll just take whatever you got. I said no problem. I
23 just thought he was cracked out or whatever. So, I took the
24 laptop and I paid him for it.

25 Q Now, this conversation, did that occur outside the

Justin Durham - Direct examination
by Solicitor Boyd

1 apartments or inside the apartments?

2 A No, sir, that was inside the apartments.

3 Q Inside?

4 A Yes, sir.

5 Q Okay. When you first met Mr. Upchurch either outside
6 the apartments or just outside, I'm assuming, what did he
7 say to you?

8 How, how did the conversation begin?

9 A Just said I could come and hang with him and some
10 friends in the apartment, drinking, whatever. So---

11 Q Okay.

12 A ---I was intoxicated. I didn't want to be on the
13 street.

14 Q Okay.

15 A So, I went up and hung out with him and his friends and
16 that's when he introduced me to the laptop.

17 Q And you said you went inside the Freemont School
18 Apartments?

19 A Yes, sir.

20 Q Do you know what apartment you went into?

21 A It was the first floor I believe. I don't know if
22 that's called the basement or whatever. It was the first
23 floor, go up, and it's to the left.

24 Q Okay.

25 A Just---

Justin Durham - Direct examination
by Solicitor Boyd

1 Q Do you remember an apartment number?

2 A I have no idea. But it's just a couple of apartments
3 down to the left.

4 Q Okay. And who was in the apartment with you?

5 A There was three or four people in the apartment.

6 Q Okay. Was Mr. Upchurch in the apartment?

7 A Yes, sir.

8 Q Did you accompany him into the apartment?

9 A Yes, sir.

10 Q Now, when you went into the apartment, did the
11 conversation continue about the laptop?

12 A He didn't mention it until I got into the building
13 actually. When I got in the building -- like I said, he
14 just told me I could come up and hang out with him and his
15 friends. When I got up there, he said, hey, man, I've got
16 this laptop, seventy-five, eighty bucks, it's yours and I
17 said hey, I got 30 bucks on me.

18 Q Okay.

19 A So, eventually he came down to it. He said hey, you
20 can have it for whatever you got in your pocket. You can
21 have it. Real jittery.

22 Q Did he tell you where he had the laptop?

23 A Well, I saw it. It was on the counter plugged up.

24 Q Okay.

25 A He was letting it charge on the counter beside the

Justin Durham - Direct examination
by Solicitor Boyd

1 sink.

2 Q Can you describe this laptop that you saw?

3 A It was a black laptop, older model. I can't name the
4 name brand, but it was an older model.

5 Q Do you remember what color it was?

6 A Black. Had a little, had a little name brand on the
7 corner I believe.

8 Q Okay. The name brand, do you know what color that was?

9 A Like silver or something.

10 Q Okay. Now, how long were you at the apartment before
11 you heard a knock at the door?

12 A I was about -- at the first apartment, I was about
13 there 15 minutes, something like that. I bought the laptop.
14 He said hey, man, you know, he acted real jittery. He said
15 hey, I got a friend that lives next door, you know, up, the
16 next floor up. We can go up there and chill. I said you
17 know, I don't want to be out in the street intoxicated, I
18 don't want to get arrested. So, I said yeah, let's go up
19 there. We went up to the next floor, sat there probably
20 five minutes, boom boom boom, Spartanburg County. So, I
21 said something ain't right with this. Spartanburg County's
22 knocking on the door. So, as soon as Spartanburg County
23 came, I told them what happened.

24 Q Let me stop you there if you don't mind.

25 A Yeah.

Justin Durham - Direct examination
by Solicitor Boyd

1 Q where were you sitting when the police came to the
2 door?

3 A I was sitting on the couch.

4 Q Okay. Was anyone sitting with you on the couch?

5 A I didn't remember it, but obviously Mr. Upchurch was
6 sitting beside of me.

7 Q Okay. Now, when you were in the apartment, where was
8 the laptop?

9 A It was up underneath the bed.

10 Q Okay. Do you remember how it was stored under the bed?

11 A I have no idea. When he sold it to me he put it in the
12 plastic bag with the cables. I have no idea how it got
13 under the bed, but he sold it to me in the plastic bag.

14 Q Okay. And then when the police came, did you talk to
15 the police?

16 A Yes, sir, I told them everything that went on. I had
17 nothing to hide.

18 Q What exactly did you tell them?

19 A I told them exactly what happened. I told them he sold
20 me the laptop, we went upstairs, five minutes later, five,
21 seven minutes later, Spartanburg County knocked on the door.

22 Q Did you tell them precisely where they could find the
23 laptop?

24 A Yes, told them exactly.

25 Q And, again, how did you know where the laptop was

Justin Durham - Direct examination
by Solicitor Boyd

1 located?

2 A Because I saw him stash it under the bed.

3 Q You saw who stash it under the bed?

4 A Mr. Upchurch.

5 Q Okay. No further questions.

6 CROSS-EXAMINATION

7 BY MR. POOLE:

8 Q Mr. Durham, where did you live at this time?

9 A

10 Q ?

11 A Yes, sir.

12 Q And where's that located in Spartanburg?

13 A That's in Whitney.

14 Q Pardon me?

15 A Whitney.

16 Q Whitney?

17 A Yes, sir.

18 Q Okay. How did you end up in downtown Spartanburg?

19 A Well, I was on some drugs at the time to tell the

20 truth.

21 Q Okay. What kind of drugs?

22 A Cocaine.

23 Q Okay. Crack?

24 A Okay.

25 Q Crack cocaine?

Justin Durham - Cross-examination
by Mr. Poole

- 1 A Cocaine.
- 2 Q Okay. Rock cocaine?
- 3 Smoking it in a pipe?
- 4 A Cocaine is cocaine. You smoke it, you snort it, it's
- 5 still cocaine.
- 6 Q How about powder?
- 7 A Sir?
- 8 Q Rock or powder?
- 9 A However I took it.
- 10 Q Any way you could get it.?
- 11 SOLICITOR BOYD: Objection, Your Honor, relevance.
- 12 THE COURT: Overruled.
- 13 Q Any way you could get it?
- 14 A Sure.
- 15 Q What other drugs?
- 16 A That was it.
- 17 Q Alcohol?
- 18 A Alcohol, weed, crack, whatever.
- 19 Q Okay. Any type of cocaine, alcohol, weed, or crack?
- 20 A Sure.
- 21 Q Okay. Were you doing all these drugs that night?
- 22 A No, sir.
- 23 Q What drugs were you doing that night?
- 24 A Alcohol and cocaine.
- 25 Q Okay. How did you get from Whitney area to downtown

Justin Durham - Cross-examination
by Mr. Poole

1 Spartanburg?

2 A walked.

3 Q Okay. And what was the purpose of coming down to
4 Spartanburg?

5 A Cocaine.

6 Q Okay. Where did you get your cocaine?

7 A Right across the street from Freemont Apartments,
8 Matter of fact, it might have been in the parking lot of
9 Freemont Apartment.

10 Q Okay. How much did you have that night?

11 A Let me see. I probably had \$60 on me. I bought a
12 laptop for 30. So, I spent 30 on it. I had 30 left.

13 Q Okay. So, you, you spent how much on cocaine or drugs?

14 A Thirty.

15 Q Thirty dollars?

16 A Yeah.

17 Q what will that buy you?

18 A what's that?

19 Q what will that buy you on the street?

20 A what will that buy me?

21 Q Yeah.

22 A Thirty dollars worth.

23 Q How much is it?

24 I don't know. This jury doesn't know.

25 Tell us how much it will buy.

Justin Durham - Cross-examination
by Mr. Poole

- 1 A I don't know. I snort it and smoke it. I don't know
2 how much it is. I don't know.
- 3 Q Okay. How much alcohol did you have?
- 4 A A pretty good bit.
- 5 Q All right. What kind?
- 6 A What kind?
- 7 Q Uh-huh. (Affirmative).
- 8 A I like Budweiser.
- 9 Q Okay. Any hard liquor?
- 10 A No, I don't drink liquor.
- 11 Q Okay. Where did you get the alcohol?
- 12 A From the store.
- 13 Q Okay. Carried it around with you?
- 14 A Carry it around with me?
- 15 Q Uh-huh. (Affirmative.)
- 16 A Sure.
- 17 Q So, you carried beer around and you're looking for
18 drugs?
- 19 A Sure.
- 20 Q And it's your testimony the first time you met
21 Mr. Upchurch was right outside of Freemont, is that right?
- 22 A I couldn't tell you where I met him. It could have
23 been inside Freemont or outside of Freemont, but it was in
24 the Freemont vicinity. It was either in the parking lot or
25 inside.

Justin Durham - Cross-examination
by Mr. Poole

- 1 Q So, you are sure about that?
- 2 A Yes, sir.
- 3 Q Okay.
- 4 A I was clear minded. I wasn't drunk at all.
- 5 Q You weren't drunk?
- 6 A I had a couple of beers at the most.
- 7 Q Okay. I thought you, I thought you told us that you
- 8 were under the influence substantially?
- 9 A Yes, sir, I was drinking.
- 10 Q And you were doing drugs?
- 11 A A couple tall boys, yeah.
- 12 Q And you were doing drugs?
- 13 A Sure.
- 14 Q Okay. All right. What were you wearing?
- 15 A What was I wearing?
- 16 Q Uh-huh. (Affirmative).
- 17 A I was wearing a gray sweatshirt, blue jeans, and these
- 18 boots right here.
- 19 Q Okay. And, so, you meet Mr. Upchurch for the first
- 20 time right outside of Freemont, you go inside with him to
- 21 chill out or whatever?
- 22 A Yeah, it's like I hang out with him and his friends.
- 23 Q Did you---
- 24 A Didn't mention anything about a laptop at first. Just
- 25 said I can hang out with him and his friends.

Justin Durham - Cross-examination
by Mr. Poole

1 Q All right. And you bought the laptop from him?

2 A Sure did.

3 Q Okay.

4 A Yeah, I thought he was cracking it out. A deal is a
5 deal.

6 Q Okay. What were you going to do with the laptop?

7 A I was gonna use it. A deal is a deal. At one time I
8 was trying to sell my shoes on the street for \$5, you know.
9 So, I figured he was cracked out, you know, he needed the
10 money. I wanted the laptop.

11 Q Okay. You didn't do any crack with him though, did
12 you?

13 A Sure did.

14 Q Okay. So, wait a minute now. So, y'all become friends
15 then?

16 A We're not friends.

17 Q All right. Well, you start socializing by doing crack
18 together?

19 A I've done a lot of drugs with a lot of people. That
20 don't mean they're my friends.

21 Q Okay. But you did with him, and he's not your friend?

22 A No, he's not. I never met him in my life.

23 Q Okay. And who bought the crack?

24 A I did and obviously he had some also.

25 Q All right. And you go into Freemont and did you buy

Justin Durham - Cross-examination
by Mr. Poole

1 any drugs inside Freemont?

2 A No, sir, I sure didn't.

3 Q And it's your testimony that you bought this laptop for
4 \$30?

5 A Between 20 and 30.

6 Q You would have known it was stolen, weren't you?

7 A No, sir, like I said, I was trying to sell my shoes on
8 the street for a five dollar hit one time. So, I ain't---

9 Q Well, on this particular night. This is what we're
10 interested in, this particular night, you bought this laptop
11 for \$30.

12 A Okay. It's a lot of people that have sold me a lot of
13 things or tried to sell me a lot of things because they were
14 cracked out.

15 Q And you knew they were stolen?

16 A No, sir, that could have been his.

17 How did I know his family didn't buy it for him for a
18 gift?

19 Q Okay.

20 A How did I know it was stolen?

21 Q You told the police everything you told us today?

22 A Yes, sir.

23 Q Did you tell them about buying the crack?

24 A Yes, sir, I don't know if I mentioned crack, but I'm
25 mentioning it now. So --.

Justin Durham - Cross-examination
by Mr. Poole

1 Q Did you tell them about buying the laptop for \$30?

2 A Twenty to thirty, yes, sir.

3 Q Did you tell them that?

4 A Yes, sir, I have the statement paper on it.

5 Q Okay. And you still -- and you didn't get charged with
6 receiving stolen goods or anything like that?

7 You didn't get charged with anything?

8 A Receiving stolen goods?

9 How was I to know it was stolen goods?

10 Q A laptop for \$30 you don't think it's---

11 A He was wanting seventy-five, eighty, a hundred dollars
12 for it.

13 Q What kind of work do you do?

14 A What's that?

15 Q What kind of work do you do?

16 A I do landscaping. I move furniture. I do, I do a lot
17 of things.

18 Q How did you get the marks on your hands?

19 A Do you not see the marks on my hands now?

20 Q Well, are you---

21 A Is there anything broken into now?

22 Q What difference does that make today?

23 How did you get them on that day?

24 My question to you, sir, is how did you get them?

25 A I have them every day.

Justin Durham - Cross-examination
by Mr. Poole

- 1 Q Okay.
- 2 A I have them every day.
- 3 Q Okay. And you had them at twelve o'clock at night and
4 two o'clock in the morning?
- 5 A I have them every day.
- 6 Q Every night, every day?
- 7 A Yes, sir, I give you a phone number you can call to
8 explain---
- 9 Q Okay.
- 10 A ---all my cuts.
- 11 Q who do you work for?
- 12 A I work for Guy Blankenship.
- 13 Q Guy Blankenship.
- 14 A That was on Potters old store. I work for B&B
15 Antiques. I work for Dennis Jolly. He owns a plumbing
16 company. I work for a lot of places.
- 17 Q where did you work---
- 18 A I can verify any of that.
- 19 Q where did you work in November of 2009?
- 20 A Potters old store.
- 21 Q Potters old store?
- 22 A Sure did.
- 23 Q where is that?
- 24 A That's in Cowpens.
- 25 Q Do you hang out there?

Justin Durham - Cross-examination
by Mr. Poole

1 A Do you hang out there?

2 Q Uh-huh. (Affirmative).

3 A No, that's my job. I don't hang out anywhere.

4 Q What do you do there?

5 A I hang out at my house.

6 Q What do you do at Potters?

7 A What do I do at Potters?

8 Q Yes.

9 A I move furniture. I dig holes. I just put up a split
10 rail fence the other day. You know, whatever.

11 MR. POOLE: Okay. Ask for the Court's indulgence just
12 a moment please.

13 (Pause.)

14 Q So, we've got -- let me see if I understand your
15 testimony correctly, Mr. Durham.

16 You walked from Whitney down to Spartanburg downtown
17 area---

18 A Sure did.

19 Q ---to get some alcohol and drugs?

20 A Sure did.

21 Q And you had some cash with you?

22 A Sure did. Just got paid.

23 Q And you bought the alcohol and you bought the drugs?

24 A Absolutely.

25 Q And you ended up at Freemont Apartments?

Justin Durham - Cross-examination
by Mr. Poole

- 1 A Yes, sir.
- 2 Q First time you met Mr. Upchurch?
- 3 A Yes, never seen him in my life.
- 4 Q And the police comes?
- 5 A Uh-huh. (Affirmative).
- 6 Q The guys in the blue uniforms come?
- 7 A Yeah.
- 8 Q You talked to them?
- 9 A Sure did.
- 10 Q You get away. You're not charged with anything.
- 11 A No, I didn't get away with anything. I told the truth.
- 12 Q Okay. You didn't, you didn't get charged with
- 13 anything, did you?
- 14 A No, sir, I sat in the police car for about an hour.
- 15 Q You told them the truth, told them the whole truth?
- 16 A Yeah.
- 17 Q Told them about that crack use?
- 18 A Crack use?
- 19 Q That you'd been on crack the whole time?
- 20 A I didn't mention it to them. They didn't ask. So---
- 21 Q Huh?
- 22 A I didn't mention it to them. They didn't ask.
- 23 Q So, you didn't tell them the whole truth, did you?
- 24 A Is that their fault or mine?
- 25 Q Don't you think it's your fault if they're trying to

Justin Durham - Cross-examination
by Mr. Poole

- 1 conduct an investigation and you don't tell them the whole
2 truth?
- 3 A If they don't ask me, why should I tell them?
- 4 Q You don't see anything wrong with that?
- 5 A Okay. So, I'm gonna get myself charged with something
6 else they don't ask me for?
- 7 Q So, you're telling us---
- 8 A Should I volunteer to get myself charged?
- 9 Q You didn't want to get charged---
- 10 SOLICITOR BOYD: Your Honor, this is argumentative.
11 THE COURT: Overruled.
- 12 Q You didn't want to get charged with anything, did you?
- 13 A I didn't want to get charged with anything?
- 14 Q Right.
- 15 A No, I didn't. Didn't want to get charged with
16 anything, no, sure didn't.
- 17 Q Which you certainly didn't want to get charged with
18 anything, did you?
- 19 A No, sir, I didn't. I told the truth. If they would of
20 asked me---
- 21 Q You didn't tell them the whole truth.
- 22 A ---if I would of done some drugs I would of said heck
23 yeah.
- 24 Q You didn't tell them the whole truth, did you?
- 25 A Didn't tell them the whole truth?

Justin Durham - Cross-examination
by Mr. Poole

1 Q Yeah.

2 A They didn't ask me.

3 Q No more questions.

4 REDIRECT EXAMINATION

5 BY SOLICITOR BOYD:

6 Q You mentioned that -- is it fair to say you had a drug
7 problem at the time?

8 A At the time, yes, sir, I did.

9 Q Are you clean now?

10 A Yes, sir.

11 Q Congratulations.

12 How long have you been clean?

13 A Let me see. That was eight months ago. I'd say seven
14 months.

15 Q Okay. Seven months clean?

16 A Yes, sir.

17 Q Okay. You mentioned a lot of, that you deal with
18 people who are cracked out, is that right?

19 A Sir?

20 Q Sort of cracked out?

21 A Yes, sir, I dealt with a lot of people who were cracked
22 out.

23 Q Can you explain what it means to be cracked out as you
24 used it?

25 A You sell everything you got. whatever you can do for a

Justin Durham - Redirect examination
by Solicitor Boyd

1 dime. That's cracked out.

2 Q You would sell whatever you have for---

3 A Like I said, I was, at one time I was trying to sell my
4 shoes for a five dollar hit on the street.

5 Q Okay.

6 A That's cracked out.

7 Q And you said you met Mr. Upchurch, you perceived him to
8 be cracked out?

9 A How was I to know anything?

10 I, I thought he, somebody might have gave him the
11 laptop. He might have bought it, might have had a good job
12 and lost it, who knows. He might of got on drugs. I
13 thought he was cracking it.

14 Q But because of your drug use at that time, you had a
15 reason to believe that he would sell a laptop for anything?

16 A Yeah, if you go from eight, ninety dollars to twenty or
17 thirty, yeah, you're cracked out.

18 Q Did you have any drugs on you at the time you met
19 Mr. Upchurch?

20 A Yeah.

21 Q Okay. And did you go with Mr. Upchurch to Freemont
22 Apartments thinking that you might be able to participate in
23 more drug use?

24 A Just a place to do it. He offered.

25 Q Okay. And when the police came that night and talked

Justin Durham - Redirect examination
by Solicitor Boyd

1 to you---

2 A Uh-huh. (Affirmative).

3 Q ---they asked you about the laptop---

4 A Uh-huh. (Affirmative).

5 Q ---and what did you tell him?

6 A Absolute truth. I told them exactly where it was,
7 where it was at, everything.

8 Q Okay. Did they, did they seem to be more concerned
9 with finding a laptop and that aspect of their, of their
10 investigation, police investigation?

11 MR. POOLE: I object, Your Honor. That calls for a
12 conclusion and it also is not proper redirect.

13 THE COURT: Sustained.

14 SOLICITOR BOYD: Beg the Court's indulgence, Your
15 Honor.

16 (Pause.)

17 Q You mentioned to, to Mr. Poole that you were
18 intoxicated that night?

19 A Not until the point to not knowing what I was doing. I
20 was clear-headed.

21 Q You had been consuming you said two tall boys?

22 A Yeah, two tall boys. No big deal.

23 Q Tall boys are 22-ounce cans?

24 A No big deal.

25 Q Okay. And you had consumed some drugs?

Justin Durham - Redirect examination
by Solicitor Boyd

1 A Sure.

2 Q Okay. Because you had consumed those drugs and
3 alcohol, did you think of yourself as being incoherent or
4 unable to, to perceive what was going on?

5 A Not at all. When the officer was talking to me, it was
6 no problem.

7 Q Okay.

8 A I was completely coherent.

9 Q Going back to the scope of your work, your
10 employment---

11 A Yes, sir.

12 Q ---what are your hours like?

13 A Let me see. I go in probably 8:30 or nine o'clock in
14 the morning. Probably get home 6:00 or 7:00 at night.

15 Q You would -- would it be fair to say you worked hard
16 all day?

17 A Yes, sir.

18 Q And would it be fair to say that's how you get some
19 scratches during the course of your work?

20 A Like I said, I got them now. All over me.

21 Q Okay. Would you say you get those scratches on a
22 regular basis or a daily basis?

23 A Every day.

24 Q So, at any time you have fresh cuts and scratches on
25 your hands?

Justin Durham - Redirect examination
by Solicitor Boyd

1 A Every day.

2 Q No further questions.

3 THE COURT: You may step down.

4 SOLICITOR BOYD: The State calls Robert Taylor.

5 THE COURT: Let me see y'all just a minute please.

6 (Whereupon, a bench conference was held off the record
7 in the presence of the jury, but out of the hearing of the
8 jury.)

9 ROBERT TAYLOR, having been first duly
10 sworn, testified as follows:

11 DIRECT EXAMINATION

12 BY SOLICITOR BOYD:

13 Q Please introduce yourself.

14 A Robert Taylor.

15 Q Where are you employed?

16 A Spartanburg City.

17 Q How long have you been working there?

18 A Almost five years.

19 Q What are your duties?

20 A I'm currently assigned to the patrol division, third
21 shift.

22 Q Okay. Were you on duty the night of November 17th of
23 2009?

24 A I was, sir.

25 Q Did you participate in the search relating to the

Robbery Taylor - Direct examination
by Solicitor Boyd

1 suspected burglary at Graybar?

2 A I did, sir.

3 Q Okay. Did you go to Freemont School Apartments that
4 night?

5 A I did, sir.

6 Q When you went to the apartment, the door's opened, and
7 who did you see?

8 A I saw Mr. Upchurch, Mr. Durham, and Oscar Wesley.

9 Q Okay. What was Mr. Upchurch wearing?

10 A He was wearing an orange hoodie with gray pants.

11 Q Can you describe the appearance of Mr. Upchurch aside
12 from his sweatshirt?

13 A He had some, some small scratches on the top of his
14 head, scratch on his ear. I also noticed in, when the
15 light, when he got in the light just the right way, you
16 could see a shimmer of, from my knowledge to be like a
17 powder of glass where glass had been freshly broke. He also
18 had what I've commonly referred to as hitchhikers, small
19 pieces of plant material that will attach to the clothing
20 when you walk through heavily vegetated area.

21 Q Let me show you what's been marked as State's Exhibit
22 No. 11.

23 Do you recognize this picture?

24 A I do, sir.

25 Q Okay. How do you recognize it?

Robery Taylor - Direct examination
by Solicitor Boyd

1 A It's a picture of Mr. Upchurch's pants --

2 Q Okay.

3 A -- that night with the triangular shaped plant material
4 commonly referred to as hitchhikers that would be gained
5 through going through heavily vegetated area.

6 Q Does it fairly and accurately represent Mr. Upchurch's
7 pants that night when you saw him?

8 A No, sir.

9 Q Okay. Has it been altered in anyway?

10 A No. No, sir.

11 SOLICITOR BOYD: State moves Exhibit 11 into evidence.

12 MR. POOLE: Let me see it.

13 (Pause.)

14 MR. POOLE: No objection.

15 (Whereupon, State's Exhibit No. 11 was received into
16 evidence at this time.)

17 Q Can you please describe for all of us what you were
18 looking for and what we are looking at?

19 A Obviously Mr. Upchurch's legs, shoes. These little
20 triangular shaped pieces of plant material. Anybody that's
21 ever gone through any heavily vegetated area, tall weeds,
22 pick up on your clothing.

23 Q That night, was that -- at that point that night, was
24 that the first time that you saw those hitchhikers?

25 A No, sir.

Robery Taylor - Direct examination
by Solicitor Boyd

1 Q where had you seen them earlier?

2 A After we broke the perimeter from the K-9 tracking, we
3 all went to a heavily, heavily vegetated area of the, that's
4 directly beside Graybar. We all walked around deep in the
5 vegetation to see if we could find anything that was, that
6 was out of place, that shouldn't have been there, any
7 electronics, anything of that nature, and I did see some
8 there. Actually walking through the vegetation, I actually
9 acquired some of them on my own uniform.

10 Q Okay. Are those hitchhikers on Mr. Upchurch's legs
11 similar to the ones you encountered outside of Graybar?

12 A Yes, sir, they are.

13 Q Okay. I show you what's been marked for identification
14 as State's Exhibit 12.

15 Do you recognize this photograph?

16 A Yes, I do.

17 Q Okay. What are we looking at?

18 A The top of Mr. Upchurch's head.

19 Q Okay.

20 A A couple of small scratches that appear to be fresh.

21 Q Okay. Does this fairly and accurately represent the
22 appearance of Mr. Upchurch that night?

23 A Yes, sir.

24 Q Has it been altered in any way to your knowledge?

25 A No, sir.

Robery Taylor - Direct examination
by Solicitor Boyd

1 SOLICITOR BOYD: The State moves Exhibit 12 into
2 evidence.

3 MR. POOLE: No objection.

4 (Whereupon, State's Exhibit No. 12 was received into
5 evidence at this time.)

6 Q Can you please describe what we're looking at on the
7 projector?

8 A We're looking at the top of Mr. Upchurch's head that
9 night and have a couple of scratches on Mr. Upchurch's head.

10 Q Okay. Did those scratches appear to be fresh to you?

11 A Yes, sir, that night they did.

12 Q Okay. Is there anything else about the photograph that
13 you can, you're aware of?

14 A No, sir.

15 Q No further questions.

16 CROSS-EXAMINATION

17 BY MR. POOLE:

18 Q Just a couple, Officer Taylor.

19 A Yes, sir.

20 Q Where are you from by the way?

21 A Spartanburg, South Carolina.

22 Q You have been raised here?

23 A Yes, sir.

24 Q Okay. These triangular -- well, they're actually like
25 spores, aren't they?

Robert Taylor - Cross-examination
by Mr. Poole

1 Do you call them hitchhikers?

2 A That's what I've always called them.

3 Q You ever heard them called beggar's lice?

4 A Yes, sir.

5 Q Okay. Hitchhikers are the same thing as beggar's lice,
6 correct?

7 A Correct.

8 Q Okay. And in November or December or any time during
9 winter months or late fall, these beggar lice or hitchhikers
10 they're on all sorts of plants because they're dried up,
11 it's fall, and they're easily attached to pants, fabric, or
12 animals, right?

13 A Typically in a vegetated area, correct.

14 Q Yeah, but it doesn't have to be heavily vegetated area.
15 We all know what beggar's lice are. You could walk outside
16 this courtroom, maybe not this month, but in November or
17 December and come across anything that would come up this
18 high that has beggar lice on it and it's gonna snap right on
19 it, isn't it, and we all know that from common experience,
20 wouldn't you agree?

21 A I agree, sir.

22 Q Okay. Thank you.

23 SOLICITOR BOYD: We ask the witness be excused at this
24 time, Your Honor.

25 THE COURT: He may be.

1 (Whereupon, the witness was excused.)

2 THE COURT: Ladies and gentlemen, we're gonna recess
3 for the afternoon. Let me caution you again as I did before
4 we broke for lunch. Don't talk about the case with your
5 friends and spouses and family members. Don't discuss it
6 among yourselves. Don't conduct your own research. Don't
7 do any investigation.

8 Do have a good evening and please report to your jury
9 room at 9:30 in the morning, 9:30 in the morning. Have a
10 good evening.

11 (The following takes place outside the presence of the
12 jury.)

13 THE COURT: Court is in recess until 9:30 in the
14 morning.

15

16 (Whereupon, Court was in recess for the evening.)

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Thursday, July 29th, 2010

(Whereupon, the following takes place outside the presence of the jury.)

(Whereupon, a CD player was marked as State's Exhibit No. 16, and a VCR was marked as State's Exhibit No. 17. Both were for identification purposes only at this time.)

THE COURT: Let me see y'all just a minute, please.

(Bench conference held off the record.)

THE COURT: All right. Are you-all ready?

Patricia Lenthier and Michael Tharpe.

All right. Bring the jury in please.

(Whereupon, the following takes place within the presence of the jury.)

THE COURT: Good morning, ladies and gentlemen.

As you know, when we recessed yesterday, the State was in the midst of their presentation of evidence. So, we'll continue with that shortly.

The State has two additional potential witnesses that were not called out or recited yesterday before you were selected. So, I'm gonna identify those witnesses for you and ask if anybody knows these people. One is Patricia Lenthier, who is connected with St. Paul's Church. The other is Michael Tharpe, who is connected with Graybar Electric.

1 Does any juror know either of those individuals, if so,
2 raise your hand.

3 (No response.)

4 THE COURT: None responding.

5 Okay. Solicitor.

6 SOLICITOR BOYD: Your Honor, the State calls Lawrence
7 Patz.

8 LAWRENCE PATZ, having been first duly
9 sworn, testified as follows:

10 DIRECT EXAMINATION

11 BY SOLICITOR BOYD:

12 Q Good morning, officer. How are you?

13 A Good morning. Good.

14 Q Please introduce yourself to the jury.

15 A My name is Lawrence Patz.

16 Q Where do you work?

17 A I work at Spartanburg Public Safety Department.

18 Q And how long have you worked there?

19 A Approximately two years.

20 Q What are your duties?

21 A Patrol officer assigned to A platoon, which is day
22 shift.

23 Q Okay. Were you on duty the night of November 17th of
24 2009?

25 A I was.

Lawrence Patz - Direct examination
by Solicitor Boyd

1 Q Did you participate in a call relating to Freemont
2 School Apartments?

3 A I did.

4 Q Okay. Did you go to Freemont School Apartments?

5 A I did.

6 Q Did you take any photographs while on the scene there?

7 A Yes, sir.

8 Q Let me show you exhibits, marked for Exhibits 13, 14,
9 and 15.

10 Do you recognize them?

11 A I do. Those are photographs of Mr. Upchurch.

12 Q How do you recognize them?

13 A They were the photos I took while he was sitting in the
14 hallway.

15 Q Do they fairly and accurately represent what you saw
16 and the pictures you took?

17 A They do.

18 Q They are -- are they the pictures you took?

19 A They are the pictures I took.

20 Q Have they been altered in anyway?

21 A No, they have not.

22 SOLICITOR BOYD: Your Honor, the State moves Exhibits
23 13, 14, and 15 in evidence.

24 MR. POOLE: No objection.

25 THE COURT: They're admitted.

Lawrence Patz - Direct examination
by Solicitor Boyd

1 (Whereupon, State's Exhibit Nos. 13 through 15 were
2 received into evidence at this time.)

3 Q Can you describe what we're looking at here?

4 A In this photograph you're looking at the bottom of
5 Mr. Upchurch's boots. On his, what would be his left foot,
6 there is a small piece of glass stuck right there in the
7 shoe, and that's the reason I took that photograph.

8 Q So, the reason you took that photograph is because you
9 saw a piece of glass on the bottom of the shoe?

10 A Correct.

11 Q Okay. And about how -- could you give us the size of
12 how large his feet are, in relative to the size of glass?

13 Is this a small piece or a large piece?

14 A A small piece. Probably a little half -- a couple of
15 centimeters.

16 Q And I know the flashing kind of distorts how an image
17 looks, but is that a light piece of glass or is it just---

18 A No, that's actually a reflection of the flash off the
19 piece of glass.

20 Q And how would you describe what the piece of glass
21 looked like?

22 A A clear little bit darker piece of glass.

23 Q Okay. Okay. Can you tell us what we're looking at
24 here?

25 A That's a photograph of Mr. Upchurch's face.

Lawrence Patz - Direct examination
by Solicitor Boyd

1 Q If I zoom in, are we able to see anything in
2 particular?

3 A Get you to scroll down.

4 Do you mind if I step down so I can see it?

5 (Whereupon, the witness left the stand.)

6 A In this photograph there was a cut there that I saw on
7 here. The picture's a little bit darker, but there was also
8 some cuts on the top of his head here, and that's the reason
9 I took that, the glass. The picture is also of these little
10 flakes in his hair there.

11 Q Okay. Do those cuts appear fresh?

12 A They did.

13 Q Okay. Show you Exhibit 15.

14 Can you tell us what we're looking at in this picture?

15 A That is a photograph of Mr. Upchurch's sweater, a
16 hooded sweater he was wearing.

17 THE COURT: Use the microphone please.

18 A It's a picture of the orange hooded sweater that
19 Mr. Upchurch was wearing that night.

20 Q Is there anything in particular we should know about
21 the picture?

22 A There is. I noticed there was a fresh tear in the
23 sleeve of Mr. Upchurch's jacket, and that's the reason I
24 took that photograph.

25 Q About how large is that tear?

Lawrence Patz - Direct examination
by Solicitor Boyd

1 A Maybe one inch.

2 Q Is it a thick tear or kind of spread out or how would
3 you describe it?

4 A Probably wide. Probably one inch. It just looked like
5 it was caught on something and it was torn. You can see in
6 the picture it's a whole bunch of real fresh loose strings.
7 So, you could tell it was freshly done.

8 Q Okay. No further questions.

9 CROSS-EXAMINATION

10 BY MR. POOLE:

11 Q Officer Patz, any of -- you took any of these items
12 that you just testified about, were any shards of glass,
13 pieces of glass taken into evidence so that they could be
14 compared with what was found at either Graybar or the
15 church?

16 A All of his apparel that he was wearing that night was
17 placed into evidence.

18 Q Okay. Were any comparisons made?

19 A I didn't make any.

20 Q Do you know---

21 A So, I can't testify to that.

22 Q Okay. What about the, the fabric that was supposedly
23 torn, was there any -- was that, was that compared with
24 anything found at the scene?

25 A Once again, I can't testify to that.

Lawrence Patz - Cross-examination
by Mr. Poole

1 Q Okay. All right. Thank you very much.

2 A Yes, sir.

3 SOLICITOR BOYD: We ask the witness be excused, Your
4 Honor.

5 THE COURT: You may step down. You may also be
6 excused.

7 (Whereupon, the witness was excused.)

8 SOLICITOR BOYD: The State recalls Dale Winningham.

9 THE COURT: You were previously placed under oath, and,
10 so, you're still under oath now for the purposes of these
11 questions.

12 DALE WINNINGHAM, having been previously
13 sworn, testified as follows:

14 DIRECT EXAMINATION

15 BY SOLICITOR BOYD:

16 Q Good morning.

17 A Good morning.

18 Q Let me show you what's been marked as State's
19 Exhibit 16.

20 Have you seen this before?

21 A That's correct.

22 Q Where did you first see it?

23 A Well, that was the radio that was located at the County
24 Administration Building.

25 Q Was that taken into evidence that night of September or

Dale Winningham - Direct examination
by Solicitor Boyd

1 November 17th?

2 A That's correct.

3 Q Once it was taken into evidence, what did you do with
4 it?

5 A I actually didn't collect the radio. Officer Shaw did,
6 but it was placed into evidence.

7 Q Okay. Has it been in evidence since the time of that
8 night---

9 A Yes.

10 Q ---until today?

11 A Yes.

12 Q Has it been in the Spartanburg Police custody since
13 that time?

14 A That is correct.

15 Q Okay. Let me show you what's been marked as State's
16 Exhibit 17, and ask you if you recognize this.

17 A Yes, that's the VRC that was collected near Graybar by
18 officers the night of the search.

19 Q Okay. Was it also entered into evidence?

20 A That's correct.

21 Q Was it placed at City Hall?

22 A Correct.

23 Q Has it been outside of the control of your office at
24 any time?

25 A Negative. Not.

Dale Winningham - Direct examination
by Solicitor Boyd

1 Q Until today is the only time it's been outside of
2 custody?

3 A To my knowledge, the only time it's been removed is
4 when I brought it to court.

5 Q No further questions.

6 MR. POOLE: No questions of this witness.

7 THE COURT: You may step down.

8 SOLICITOR BOYD: The State calls Mike Tharpe to the
9 stand.

10 MICHAEL THARPE, having been first
11 duly sworn, testified as follows:

12 DIRECT EXAMINATION

13 BY SOLICITOR BOYD:

14 Q Please state your name.

15 A Michael Tharpe.

16 Q How old are you?

17 A Forty-one.

18 Q Okay. Where do you live?

19 A Cherokee County.

20 Q Okay. Where are you employed?

21 A Graybar Electric.

22 Q And how long have you worked there?

23 A Seventeen years.

24 Q Seventeen years.

25 Okay. Were you aware of a burglary to your place of

Michael Tharpe - Direct examination
by Solicitor Boyd

1 business on November 17th of 2009?

2 A Yes.

3 Q Were you called to the scene?

4 A Yes.

5 Q Upon arrival at that, your, at your place of business,
6 did you notice anything missing from your office?

7 A Yes, a radio, which, when you walk in the, in the
8 window that was busted in, the radio was right there on the
9 left and then my laptop.

10 Q How would you describe this radio?

11 A Just a gray boom kind of radio.

12 Q Okay. Are there any, any distinguishing features about
13 the radio that belonged to you?

14 A A little bit of blue maybe around the---

15 Q Okay.

16 A ---the screen part of it.

17 Q Okay. Let me show you State's Exhibit 16, and ask if
18 you recognize this.

19 A Yes.

20 Q How do you recognize it?

21 A That's the radio that was at Graybar.

22 Q How do you recognize -- how do you know that's your
23 radio?

24 A The blue is what's distinctive for me.

25 Q Okay.

Michael Tharpe - Direct examination
by Solicitor Boyd

1 A The blue part.

2 Q Is this the radio that was in your office that night
3 that was subsequently missing from your office that night?

4 A Yes.

5 SOLICITOR BOYD: Your Honor, at this time the State
6 moves Exhibit 16 into evidence.

7 MR. POOLE: No objection.

8 THE COURT: It's admitted.

9 (Whereupon, State's Exhibit No. 16 was received into
10 evidence at this time.)

11 Q You said, in addition to the radio being missing, what
12 else was missing?

13 A A laptop.

14 Q Laptop.

15 Can you describe this laptop?

16 A Black Lenova Think Pad.

17 Q Okay. Was there anything in particular that would make
18 this laptop stand out?

19 A Once you open it up and turn it on, you hit the
20 control, alt, delete, and then a little security message
21 comes up with Graybar on it.

22 Q Let me show you what's already in evidence as State's
23 Exhibit 9.

24 Do you recognize that?

25 A Yes.

Michael Tharpe - Direct examination
by Solicitor Boyd

1 Q what is that?

2 A That appears to be my laptop.

3 Q How do you know, how do you believe that to be your
4 laptop?

5 A well, it's a Think Pad black.

6 Q Is that identical to the laptop that was in your
7 office?

8 A Yes.

9 Q Let me show you what's already in evidence as State's
10 Exhibit 10.

11 Do you recognize this?

12 A Yes, that's the security thing that pops up as soon as
13 you hit the control, alt, delete on the computer.

14 Q what does it show?

15 what's the purpose of that?

16 A Just says property of Graybar.

17 Q Is that the way for you to see this laptop is property
18 of Graybar, which is your laptop?

19 A Yes.

20 Q Was this missing laptop ever returned to you?

21 A Yes.

22 Q When was it returned to you?

23 A I would say probably three weeks after the break-in.

24 Q Okay. Who gave it back to you?

25 A I went and picked it up at the evidence at the jail.

Michael Tharpe - Direct examination
by Solicitor Boyd

1 Q Okay. Did you pick it up from the evidence?

2 A Yes.

3 SOLICITOR BOYD: No further questions, Your Honor.

4 MR. POOLE: No questions here, Your Honor.

5 THE COURT: You may step down.

6 SOLICITOR BOYD: The State calls Patricia, excuse me,
7 Patricia Lenthier.

8 PATRICIA LENTHIER, having been first
9 duly sworn, testified as follows:

10 DIRECT EXAMINATION

11 BY SOLICITOR BOYD:

12 Q Good morning.

13 A Good morning.

14 Q Please introduce yourself to the jury.

15 A My name is Patricia Lenthier.

16 Q How old are you?

17 A Sixty.

18 Q Where do you live?

19 A I live in Pine Forest in Spartanburg.

20 Q And where do you work?

21 A St. Paul Catholic school.

22 Q And what capacity are you employed there?

23 A I'm the principal of the school.

24 Q Were you aware of the break-in at St. Paul's on the
25 night of November 17th?

Patricia Lenthier - Direct examination
by Solicitor Boyd

- 1 A Yes.
- 2 Q Were you aware of anything missing from the building?
- 3 A Yes.
- 4 Q What was missing from the building?
- 5 A The DVD player from the K-4 portable building was
- 6 missing with a tape inside of it.
- 7 Q DVD player with a tape inside of it?
- 8 A Uh-huh. (Affirmative).
- 9 Q And a player of sorts?
- 10 A Yes.
- 11 Q Let me show you what's been marked as State's
- 12 Exhibit 17 and ask if you recognize this.
- 13 A Yes.
- 14 Q Okay. How do you recognize it?
- 15 A First the piece of tape on top that says K-4.
- 16 Q Right here?
- 17 A Yes, sir, and then the Care Bears video inside.
- 18 Q Is that a tape that was in your building?
- 19 A Yes.
- 20 Q Is there anything else that implies this VCR belonging
- 21 to St. Paul's?
- 22 A Not to my knowledge.
- 23 Q Okay. Is this the first time you've seen this since
- 24 November?
- 25 A I saw it yesterday.

Patricia Lenthier - Direct examination
by Solicitor Boyd

1 Q Where did you see it yesterday?

2 A Right outside this room.

3 SOLICITOR BOYD: Okay. Your Honor, at this time the
4 State moves Exhibit 17 into evidence.

5 MR. POOLE: No objection.

6 THE COURT: It's admitted.

7 (Whereupon, State's Exhibit No. 17 was received into
8 evidence at this time.)

9 SOLICITOR BOYD: No further questions.

10 MR. POOLE: No questions here, Your Honor.

11 THE COURT: You may step down.

12 SOLICITOR BOYD: Your Honor, the State rests at this
13 time.

14 THE COURT: All right. Ladies and gentlemen, that's
15 all of the testimony or evidence to be offered by the State
16 at least in their case in chief. Before we go further I've
17 got a couple of matters I'll need to address with the
18 lawyers. I will ask you to go to your jury room. Do not
19 yet discuss the case in any fashion. I will bring you back
20 shortly to continue.

21 (The following takes place outside the presence of the
22 jury.)

23 THE COURT: All right. The State has rested.

24 Any motions or other matters to address?

25 MR. POOLE: Yes, sir, Your Honor.

1 May it please the Court, I respectfully move at this
2 time for a directed verdict on all of these cases. On the
3 two charges of burglary in the second degree, the
4 evidence -- there's no evidence placing Mr. Upchurch at the
5 scenes of either the Graybar intrusion and breaking and
6 entering or the church's. The testimony that has been given
7 was that there appeared, appeared to be certain cuts or
8 certain pieces of glass on or about his person at some time
9 afterwards. There has been no evidence that if it was
10 glass, was it compared to the glass that was found at the
11 scene of either one of these burglaries. In other words,
12 there's no forensics whatsoever to tie him into the actual
13 breaking and entering of either one of these entities.

14 On the indictment for the Graybar burglary, there is no
15 wording as to whether or not it, it was in the nighttime or
16 any of the statutory provisions that would make it a second
17 degree offense. On the petty larcenies, the only evidence
18 that we have is that a, I think the Think Pad, the Lenova or
19 whatever the trade name of that Think Pad laptop was found
20 in the vicinity of him in a small apartment there at the
21 Freemont, and the indictment on the petty larceny mentions a
22 VCR, which was never linked to being in the possession of
23 Mr. Upchurch whatsoever.

24 There was some testimony from two lay witnesses. Those
25 witnesses were, gave contradictory testimony both from the

1 witness stand and in their version of who was in the
2 possession of what there at Freemont Apartments, and
3 accordingly we say and take the position that a directed
4 verdict should be made and found by this Court not guilty on
5 the petty larceny charges also.

6 THE COURT: All right. Mr. Boyd.

7 SOLICITOR BOYD: Your Honor, it's the State's position
8 that directed verdict should not be granted. Taking all
9 evidence viewed in a light most favorable to the State
10 concerning this burglary at St. Paul's, cumulative evidence
11 and testimony shows that the same method was broken into at
12 St. Paul's as at Graybar. A VCR was stolen and identified
13 by the property owner and testimony that it was the stolen
14 VCR from St. Paul's was found right outside of Graybar.

15 Also, as regards to the burglary at Graybar, you have
16 direct testimony by Cynthia Byrd as to the defendant trying
17 to sell the laptop that night. You have lay witness, Justin
18 Durham, putting the possession of the laptop with
19 Mr. Upchurch. You have Officer King, upon seeing the laptop
20 and hitting control, alt, delete, having the Graybar
21 security panel show. You have the observations of most of
22 the officers testifying, most notably King and Taylor, as to
23 the appearance of the defendant that night with various cuts
24 on his ears and face and the top of his head, and to, and to
25 his orange hooded sweatshirt as well as the hitchhikers that

1 were on his pants. There is testimony that the hitchhikers
2 on Mr. Upchurch's pants were similar to the hitchhikers or
3 beggar lice in the heavily vegetated area around Graybar.
4 You also have testimony by Lieutenant Winningham about
5 seeing Mr. Upchurch in the vicinity of the corner of Pearl
6 and Magnolia that night near Graybar with Mr. Durham.

7 As regards to the petty larcenies, you have direct
8 testimony identifying the property stolen by the property
9 owners, Mrs. Lenthier, and, excuse me, Mr. Tharpe. You have
10 testimony of Officer Spivey that the police were actively
11 looking for the laptop, and you have testimony by Justin
12 Durham putting the defendant, and at the very least,
13 constructive possession of the stolen laptop.

14 As regards the, Mr. Poole's claims about contradictory
15 testimony of lay witnesses, that goes to the weight of the
16 evidence, not the existence of which, and that deserves to
17 go to the jury.

18 As regards to his, his objection to the indictments,
19 State v. Gentry tells us that once the jury is sworn, all
20 claims to that effect are waived. So, for those reasons, a
21 directed verdict should not be granted upon all four
22 charges, Your Honor.

23 THE COURT: Any reply, Mr. Poole?

24 MR. POOLE: No, sir.

25 THE COURT: Well, there is direct testimony of the

1 defendant's possession of recently stolen property. That
2 being the laptop computer. There's also substantial
3 circumstantial evidence which tends to place the defendant
4 at the location of the burglaries and where the theft of
5 property took place, and any defect in an indictment has to
6 be raised prior to the jury being sworn, and, therefore, the
7 defendant's motions for directed verdict are denied.

8 Any other matters we need to address before we
9 continue?

10 MR. POOLE: Your Honor, I've spoken to Mr. Upchurch
11 about his right to testify in his own defense and he has
12 chosen not to do so.

13 THE COURT: All right. Mr. Upchurch, Mr. Poole tells
14 me that you and he have discussed your right to testify if
15 you wish to as well as your right to remain silent if you
16 prefer. When you're charged with a crime, you have a right
17 to take the witness stand and testify during the trial if
18 you want do. Nobody can require that because you also have
19 the right to remain silent.

20 Have you and Mr. Poole discussed, in detail, your right
21 to testify as well as not?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: And do you appreciate the or have you and
24 he discussed the advantages and disadvantages of testifying
25 as well as not testifying?

1 THE DEFENDANT: Yes, sir.

2 THE COURT: And do you appreciate what those advantages
3 and disadvantages are?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: And he says that you have made a decision
6 about whether or not you will testify.

7 Is that true?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: And what's your decision?

10 THE DEFENDANT: I decided willingly not to testify.

11 THE COURT: And has anybody forced you to that
12 decision?

13 THE DEFENDANT: No, sir.

14 THE COURT: Anybody pressured you into it?

15 THE DEFENDANT: No, sir.

16 THE COURT: Did you make it on your own after time to
17 reflect upon it?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: Are you satisfied with the decision?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: Okay. Any other witnesses you intend to
22 call, Mr. Poole?

23 MR. POOLE: No, sir.

24 THE COURT: Do you have any other witnesses you want
25 Mr. Poole to call---

1 THE DEFENDANT: No, sir.

2 THE COURT: ---Mr. Upchurch?

3 THE DEFENDANT: No, sir.

4 THE COURT: Okay. Thank you. Be seated.

5 Any requests for instructions from the State?

6 SOLICITOR BOYD: None, Your Honor.

7 THE COURT: From the defendant?

8 MR. POOLE: Your Honor is very very thorough in giving
9 the appropriate charges. Mere presence as relates to the
10 laptop in the Freemont Apartment, would you be willing to
11 instruct mere presence?

12 THE COURT: Well, I'm gonna charge them they have to
13 prove he stole it. So, I think that would negate mere
14 presence being sufficient to establish the theft, wouldn't
15 it?

16 MR. POOLE: Yes, sir, but there, there could be, the
17 jury could possibly come to the conclusion that he did not,
18 was not the one that stole the, the laptop.

19 THE COURT: I know. That's what I'm going to tell
20 them. They have to, they have to be satisfied he did steal
21 it.

22 MR. POOLE: Okay.

23 THE COURT: I'll do something.

24 MR. POOLE: Okay.

25 THE COURT: All right. Anything else?

1 SOLICITOR BOYD: No, Your Honor.

2 THE COURT: All right. Y'all ready to argue?

3 MR. POOLE: Yeah.

4 SOLICITOR BOYD: We are, Your Honor.

5 THE COURT: Okay. Bring them back.

6 MR. POOLE: Your Honor, it's my understanding and I
7 hope it still is the case that since we have proffered no
8 evidence the defense would go last in argument.

9 THE COURT: You will.

10 MR. POOLE: Thank you.

11 (Whereupon, The following takes place in the presence
12 of the jury.)

13 THE COURT: All right. Ladies and gentlemen, as you
14 know, the State has rested in their presentation. So, we'll
15 now proceed with any additional evidence to be offered by
16 the defendant.

17 Mr. Poole, do you have any additional evidence you want
18 to present?

19 MR. POOLE: No, sir.

20 THE COURT: All right. The defense has also rested.
21 Therefore, that's all the evidence that's going to be
22 received in the case. What remains to be done are the
23 lawyers final summations after which I'll instruct you on
24 the law you are to apply, and then you can begin with your
25 deliberations. So, please give the lawyers your attention

1 now as they give you their final summations.

2 Mr. Boyd.

3 SOLICITOR BOYD: May it please the Court, Your Honor,
4 defense counsel.

5 Ladies and gentlemen of the jury, you've heard a lot of
6 testimony yesterday, a little bit this morning. It was a
7 lot to process and you have to take a step back and view
8 this kind of like you're doing a puzzle. You don't know
9 what the puzzle looks like until you put it together.
10 You've got different pieces. Maybe you start with the
11 corner, and work on the sides, and put the pieces together
12 piece by piece. And sooner or later, the more you work on
13 that puzzle, the more you see how pieces are put together,
14 you come to find out what that puzzle's all about and you'll
15 see the final picture of what the puzzle's going to be.

16 The exact same thing in this case. You've heard
17 testimony by the State that the defendant started out and
18 was at St. Paul's Catholic School right here. You also
19 heard that Graybar was broken into, and you saw the
20 testimony by Officer Shaw that the radio from Graybar was
21 found right here in the back of the County Admin Building.
22 You saw testimony and heard testimony from Officer
23 Winningham that he saw the defendant right here at the
24 corner of Pearl Street and Magnolia Street and you heard
25 from several individuals, Mrs. Byrd and Mr. Durham, that he

1 was with Mr. Durham at Freemont School Apartments that night
2 trying to sell this laptop from Graybar.

3 It started out and I don't think, excuse me, on Alabama
4 Street throwing a brick, a stone through the window of the
5 kindergarten classroom, walked in there, saw a VCR he wanted
6 to take, and he took it. Went all the way up to Graybar,
7 threw a cinder block through that window, and saw a laptop
8 and a radio. It wasn't his. And decided to take it. Upon
9 getting the laptop and the radio, the VCR ended up on the
10 ground next to a heavily vegetated area where hitchhikers
11 are. He walked from Graybar to the County Admin Building
12 and left the radio there. That radio right there, that VCR
13 right there.

14 The VCR, outside Graybar. VCR, County Admin Building.
15 Took the VCR with him, the cords, the white bag, walked over
16 to Freemont.

17 The testimony of Justin Durham said hey, I want to sell
18 this. I'll give you \$30 for it. Done. Sold. Let's go
19 upstairs where the, where the laptop is and this is Mr.
20 Wesley's apartment, Apartment .

21 By the time he got there, knock, knock, knock, police.
22 How did the police get there?

23 Cynthia Byrd overheard, overheard him say I want to
24 sell this laptop, where can I unload this laptop. They went
25 upstairs. Justin Durham, when asked by the police, what

1 they wanted to know, was forthright. Told them everything
2 they wanted to know about why they were there that night.

3 Do you know anything about a laptop being here?

4 He said yes, sir, I do. It's under that bed in that
5 bedroom right there. He pointed it out to him directly and
6 went straight there and saw the laptop. Turned on the
7 laptop, hit control, alt, delete, and the Graybar screen
8 came up. Mr. Tharpe identified that laptop as being his.
9 Fortunately he was able to get it back three weeks later.

10 When you look at all the pictures that you saw admitted
11 into evidence, a lot, a lot of pictures, 15 pictures. You
12 see the break-in at St. Paul's and compare that to the
13 break-in at Graybar. Cinder block at Graybar, and concrete
14 block at St. Paul's. Break window, walk in, take what you
15 want, and leave.

16 You saw the testimony of officers showing what looked
17 to be footprints or, you know, a place where a foot would of
18 been on the sidewalk at Graybar with the cinder block's
19 thrown through the wall. And just this morning you saw the
20 pictures of Mr. Upchurch's foot that night with glass and
21 shard in his shoe.

22 Now, the reasonable inference would be, you know, what
23 are you doing walking around on glass unless you threw a
24 cinder block through at Graybar. You are entitled to make
25 those assumptions and those inferences from the evidence you

1 saw.

2 Now, you also heard yesterday from Mrs. Cynthia Byrd
3 who is the self-described crime watch dog at Freemont School
4 Apartments. You heard her say how she knows Mr. Upchurch
5 hanging around there. She knows him by sight. You heard
6 her tell you, tell the whole courtroom about him trying to
7 unload a laptop that night, where can I unload this laptop.
8 He didn't want it on him. He wanted to get rid of it as
9 soon as he could.

10 Fortunately, Mr. Upchurch, as I said before, ran into
11 Mr. Durham. Fortunately, at the time, y'all are well aware,
12 Mr. Durham had a drug problem. He liked, he liked to do
13 drugs. So, he was going to do anything and everything to
14 facilitate that drug habit, which is why he was around
15 Freemont School Apartments that night.

16 Also he knows what it's like to be on drugs and to be
17 cracked out and how people operate if they're on drugs. He
18 assumed, since Mr. Upchurch was trying to sell this laptop
19 for, like he said, seventy, eighty, a hundred dollars, he
20 really worked him down to \$30. He said okay, fine. I can
21 take advantage of this. I don't know where the laptop came
22 from. I don't care, but I'm going to buy this laptop for
23 \$30 and use it. Do whatever I want with it. It's mine now.

24 Fortunately he never got that chance. Saw the police
25 work. Basically the entire third shift of Spartanburg City

1 Police were out that night running patrol when they found
2 out what happened at Graybar and they set up perimeters.
3 You heard from each officer who participated, participated
4 in the search. You heard from Officer King, Tillotson,
5 Spivey, Shaw, Winningham. Everyone that you heard from had
6 a role to play and played an important role in this search.

7 Officer King recovered the VCR and found the laptop.
8 Officer Winningham went from Vic Bailey all the way around
9 Pine Street. You heard him talk about going all the way
10 around Pine Street and going up Pearl Street. Didn't really
11 get to search. At the end of the search he saw that man in
12 this orange hoodie, no one's contesting whether he was
13 wearing an orange shirt or not, that night at the corner of
14 Pearl Street heading towards Freemont School Apartments
15 approximately an hour after the, the alarm went off at
16 Graybar.

17 The alarm went off at Graybar at 12:52. A call came in
18 from Mrs. Byrd at 2:17. It's an hour to do whatever you
19 want with the laptop, put it in Freemont, try to sell it.
20 Plenty of time to do that. These events didn't occur over
21 some great distance or some great amount of time, and didn't
22 require weeks long, months long, years long investigation.

23 You saw the police work connecting St. Paul's to
24 Graybar to the County Admin Building over to Freemont where
25 they found this man with the stolen laptop in Apartment

1 having hitchhikers on his pants, cuts on his shirt, cuts on
2 his face, on his ear, and the top of his head. You're
3 allowed to make any reasonable inferences you want from
4 every piece of evidence, everything on that table you've
5 seen, you've heard about.

6 I ask you to take everything, treat it fairly, and make
7 any, any reasonable inferences you want to from it, and
8 taking everything into consideration. You will see, just
9 like that puzzle I talked about at the beginning of this
10 opening statement, you put the pieces together. You put
11 Graybar, and you put St. Paul's, put Freemont, the laptop,
12 all these different pieces basically floating around, but
13 after these, this last day and a half, you've seen how these
14 pieces fit together, and you've seen how these pieces fit
15 together, and you've seen how, how this man broke into St.
16 Paul's, broke into Graybar, stole the laptop, stole the VCR,
17 stole the radio, and, and ended up at Freemont where he was
18 caught redhanded with that laptop by Spartanburg City police
19 officers.

20 Thank you very much.

21 MR. POOLE: May it please the Court?

22 THE COURT: Mr. Poole.

23 MR. POOLE: Mr. Foreman, appreciate your attention
24 shown during the trial of this case. It's important to
25 Mr. Upchurch. It's important to the State of South

1 Carolina. Mr. Boyd has just used the analogy of taking a
2 puzzle and putting pieces together and coming up with a
3 conclusion, and the facts that you have heard, and that's
4 all the facts that you will hear.

5 Now, at the very beginning of this case you were told
6 that the State has the burden of proving every element of
7 every crime to your satisfaction and that satisfaction must
8 be beyond a reasonable doubt, and I submit to you that if we
9 wanted to go with the analogy of the puzzle you're not going
10 to be able to put it together because they're missing pieces
11 and it is disconnected and disjointed.

12 Mr. Boyd says, and these are arguments, and Judge Cole
13 says that when the lawyers speak to you it's not evidence.
14 But it's just our prospective or our relative positions, and
15 by our definitions, our positions are opposite. The
16 defendant's position is opposite from the State.

17 Mr. Boyd says that Mr. Upchurch picked up a cinder
18 block and threw it through a window. He picked up a cinder
19 block and threw it through a window. He sold items at two
20 of these locations, two locations. One of them being, which
21 being Graybar. One of them being St. Paul's. And that he
22 saw items and that he took those items with him.

23 Now, that's just -- those are remarks. There's no
24 evidence of that. There's no evidence whatsoever of that.

25 There is, there is no evidence of link putting him

1 anywhere near these places by any witnesses. There, there
2 was -- the police did their job. They set up a little
3 perimeter and they came out and started their investigation
4 as quickly as possible. In the instance of the church, no
5 discovery of a breaking into it was made until the officer
6 came back a few hours later and saw that the kids classrooms
7 had been broken into.

8 Now, I won't go back over the issues of the timeframes,
9 but it's relatively important that of the timeframes as to
10 where the police were, where they came to investigate the
11 scenes, and where they ended up at Freemont to be taken into
12 consideration, and you have -- it's not been that long ago
13 since you heard that evidence, and I'm sure that you
14 remember the timeframes involved. And the testimony that
15 has been presented is very slight. I mean what we've got
16 here is the testimony that is contradictory and I want to
17 talk a little bit about the lay witnesses that we testified
18 yesterday.

19 That was the lady who was the hall monitor,
20 Mrs. Cynthia Byrd. She was the monitor or whatever that is
21 at, at Freemont Apartments.

22 Now, she gave three different types of testimony. All
23 of which were contradictory. At first she stated that she
24 didn't see Mr. Upchurch with anything. The only thing he
25 had on was a black, a backpack that was black and white.

1 She testified that she was mad at him and believe me there
2 was somebody mad at Mr. Upchurch that night and she was one
3 of them, and she was, she was upset yesterday.

4 Now, Mr. Upchurch probably had no reason to say
5 whatever he said to her to tick her off like that. But
6 we're not here to decide whether or not whatever he said is
7 what he's on trial for or if I said it and she got mad,
8 well, that's just simply the case. But she gave three
9 different testimony, testimony types of evidence that he had
10 a laptop, didn't see him with a laptop, saw him only with a
11 backpack.

12 The testimony of one of the officers, I think it was
13 Officer Winningham, said that he saw two people, one of
14 which he knows as Mr. Upchurch or found, came to know as
15 Mr. Upchurch, and the other young man, Justin Durham, at the
16 corner of Pearl and Magnolia. Now, he saw them when he was
17 doing the perimeter bit. He saw two people, two people
18 about a hour later if my memory serves correctly. Two
19 people.

20 Now, Mr. Durham, and let me get his name right, Justin
21 Durham, you saw what kind of witness he was. I mean he sat
22 over here in this witness stand as comfortable as if he was
23 sitting in his own living room rared back saying I will take
24 any type of drug, I'll take alcohol, I'll take meth, I'll
25 take crack cocaine, I'll take cocaine. As long as cocaine

1 is cocaine I'll take it. Now, he, he puts everything on
2 Mr. Upchurch. He puts everything on him. He's not charged
3 with anything. He walks out that door right there, and
4 after he, gives his testimony, he walks out. He's not
5 charged with anything. He has cuts on the back of his hand.

6 Now, let me ask you, don't you think photographs should
7 have been taken?

8 Don't you think that he should have been interrogated
9 and charged with something?

10 He was seen and remember this also. When he was seen
11 at the corner of Pearl and Magnolia with Mr. Upchurch,
12 Mr. Winningham, if I've got the officer's name right, the
13 officer who was doing the perimeter management, saw them.
14 He saw them. These are trained officers and he did not
15 recall them having anything that they were carrying. Okay.
16 These are trained officers. They're experienced.

17 When they observe, they observe. They notice. They
18 pay attention. He was on high alert. You're trying to
19 investigate a crime. You look at people. And if they look
20 suspicious, then they, then you, you interrogate them. But
21 that did not occur.

22 So, what we've got basically is the evidence presented
23 by Mrs. Byrd. We've got the evidence presented by the
24 arrogant Mr. Durham, who went back and forth I don't know
25 how many times. And then you've got the testimony of flex,

1 of specs of glass in the sole of a shoe, cuts that appeared
2 to be fresh. You can take a look at the pictures. They
3 speak for themselves. Take a look at them. See what you
4 think.

5 So what?

6 So what?

7 If every one of you looks at the soles of your shoes,
8 probably one of you or more will find a piece of glass. If
9 this was Fall or winter, and you live anywhere near plants,
10 you could walk from this courtroom and have two or three
11 pieces of beggar's lice or hitchhikers. That's the first
12 time I've heard them called that.

13 So what?

14 It doesn't add up. There's no forensic evidence.
15 There's no prints. There's no blood samples. There's no
16 DNA. There's no hair samples taken from the scene. There's
17 no fabric found at the scene. No blood. Nothing.

18 what you have basically is evidence, testimony that
19 there appeared to be glass on or about Mr. Upchurch. It was
20 not compared with the glass of either one of these places.
21 That can easily be done. It was not done.

22 There's not enough evidence to convict Mr. Upchurch of
23 any one of these charges because the State simply has failed
24 to prove its case beyond a reasonable doubt, and what I'm
25 asking you to do, is when you go back to that jury room, to

1 deliberate, think about it, and come back with a verdict
2 which speaks the truth. That's what verdicts comes from,
3 Latin, that means to speak the truth. And find him not
4 guilty.

5 Thank you very much.

6 THE COURT: Mr. Foreman, ladies and gentlemen of the
7 jury, you have now heard and seen all of the evidence as
8 well as the final summations of the lawyers, and, therefore,
9 it's now my duty and obligation to instruct you on the law
10 that's applicable in this case, and then you'll be asked to
11 go back and begin with jury deliberations, and through that
12 process you will examine the evidence, decide the facts,
13 apply the law, and arrive at a fair and just decision in the
14 case.

15 It is your exclusive duty to determine what the facts
16 are, and you do that through your own common sense
17 examination and evaluation of all of the testimony and the
18 other evidence received during the trial of this case. And
19 you 12 jurors alone will decide what weight, value, and
20 effect to give any particular testimony or other evidence in
21 the case. Your sole objective is to simply reach the truth
22 in the matter. And by doing that, you will have fulfilled
23 your obligations as jurors, and that is to simply give both
24 the state and the defendant a fair and impartial trial.

25 Now, in this case, as you know, the defendant has been

1 accused by the prosecutor by way of these indictments with
2 having committed four separate and distinct offenses. They
3 are alleged to have arisen out of one particular course of
4 events, which the State has alleged occurred back in
5 November 17th and 18th of 2009.

6 And by way of these four indictments, they allege that
7 he committed the crime of burglary in that he entered a
8 building that belonged to St. Paul's Church, and that he
9 entered a building that belonged to Graybar Electric Company,
10 that he entered each of these buildings without the consent
11 of the owner or the person in lawful possession of the
12 property, and that he entered that building without consent
13 and with the intent to commit a crime therein. And in this
14 case they're alleging that crime to be the crime of larceny.
15 And they further allege that what constitutes a burglary in
16 the second degree is that that burglary took place in the
17 nighttime. And they allege that he took, stole, and carried
18 away property that belonged to each of those separate
19 persons or entities and he took that property with the
20 intention of permanently depriving the true owner of the use
21 and possession of that property thus constituting larceny.

22 Now, as to those allegations and as to those charges,
23 as you know, the defendant has entered a plea of not guilty,
24 and as I've told you, that plea of not guilty has placed
25 upon the State the burden of proving the allegations that

1 they have set forth in each of the indictments, the burden
2 of proving each of the essential elements of the crimes of
3 burglary in the second degree, and of larceny, and,
4 therefore, the burden is upon the State to establish the
5 defendant's guilt to the satisfaction of you 12 jurors
6 beyond a reasonable doubt before any verdict of guilty could
7 be returned as to any of, of the charges.

8 The burden is never upon a defendant or a person
9 accused of a crime to prove that they are not guilty or to
10 prove that they are innocent because, in some cases, that
11 might not be possible. The burden is always upon the State
12 because they have brought the charge against another to
13 establish that person's guilt beyond a reasonable doubt.
14 You are further instructed that it is a vital, important,
15 and cardinal rule of law that every defendant in a criminal
16 trial, and it doesn't matter how serious the offense might
17 be for which that person stands charged, that person shall
18 always be presumed innocent of the charge, and that
19 presumption of innocence remains with any defendant as it
20 does with this defendant from the time that he is placed
21 under arrest and throughout the course of the criminal
22 process, and even throughout the course of the actual trial
23 in the case.

24 That presumption of innocence, as I told you, will be
25 with him as you go back to begin with your deliberations in

1 this case. And that presumption of innocence will be with
2 him in that jury room and it will be with him forever unless
3 you 12 jurors unanimously determine that he's no longer
4 entitled to the presumption of innocence. That is after
5 you've carefully considered all of the evidence, and from
6 that evidence, you've determined what you believe to be the
7 true facts. And once you decide those facts, you apply the
8 law that I will have provided you. If you 12 jurors
9 unanimously determine that his guilt has been proven beyond
10 a reasonable doubt as it relates to a particular charge,
11 then a defendant would no longer be entitled to the
12 presumption of innocence as it relates to that charge. But
13 it's only if, unless, and until you are satisfied of his
14 guilt beyond a reasonable doubt that the presumption of
15 innocence would no longer be applicable.

16 Now, while the State does have the burden of proving
17 the defendant's guilt beyond a reasonable doubt, that
18 doesn't mean that they have to prove his guilt beyond all
19 doubt or beyond any possible doubt. But it does require the
20 State to prove his guilt to your satisfaction beyond a
21 reasonable doubt, and the term reasonable doubt should be
22 given its plain and ordinary meaning.

23 A reasonable doubt is the kind of doubt that would
24 cause a reasonable person to hesitate to act upon the
25 information provided, and a defendant in a criminal trial is

1 entitled to any reasonable doubt that arises from the
2 evidence or lack of evidence in a case. And if, upon any
3 factual issue essential to a finding of a verdict of guilty,
4 you have a reasonable doubt as to how that issue should be
5 resolved, it would be your duty to resolve that reasonable
6 doubt in favor of the defendant.

7 And, therefore, if, after your consideration of all of
8 the evidence in the case, you have a reasonable doubt as to
9 his guilt as it relates to a particular charge, you must
10 resolve that reasonable doubt in his favor and return a
11 verdict of not guilty on that particular indictment. And on
12 the other hand, after you've carefully considered all the
13 evidence in the case and decided the facts and applied the
14 law, if you have no reasonable doubt as to his guilt, then
15 it would be your corresponding duty to convict him of any
16 crime that has been proven to your satisfaction beyond a
17 reasonable doubt.

18 The same law that provides you are the judges of the
19 facts also provides that I am the judge of the law. And
20 that simply means that nobody is going to tell you how to
21 arrive at your determination of fact in this case. You do
22 that, as I've already stated, through the exercise of good
23 judgment and common sense conscientiously applied to the
24 testimony and the evidence received during the trial.

25 As -- under your oath as a juror, you must, however,

1 accept the law as I provide it to you as being the law that
2 you are to apply to the case. In other words, you're not to
3 concern yourselves with what you thought the law was before
4 you came to serve as a juror this week or what you think it
5 ought to be. You must simply accept it as I provide it to
6 you as being the law that you are to apply in the case. You
7 then take that law and you apply it to the facts as you 12
8 jurors determine those facts to be based upon your own
9 common sense examination and evaluation of the evidence.

10 Now, as I've stated, you are the sole judges of the
11 facts in this case, and you are, therefore, necessarily the
12 sole judges of the credibility and the believability of each
13 witness that has testified during the trial. And you 12
14 jurors alone will decide what weight, value, and effect to
15 give to any particular witnesses testimony or any portions
16 of that testimony.

17 There are a number of factors which you should take
18 into consideration in arriving at your assessment as to a
19 particular witness' credibility, and I'm going to list those
20 factors for you. You should consider the demeanor of the
21 witness. That is how the witness appeared to you as the
22 witness testified.

23 Was the witness straightforward in responding or was
24 the witness hesitant or evasive in responding to questions
25 that were asked of the witness?

1 Simply put, did the witness appear to you to be telling
2 the truth and to have knowledge of that facts to which that
3 witness has testified.

4 You should also consider whether or not the testimony
5 of a witness is consistent or is it inconsistent with that
6 witness' own testimony provided here in Court or with that
7 witness' testimony and statements that might have been made
8 outside of court. And you should also consider whether or
9 not the testimony of a witness is consistent or is it
10 inconsistent with other witness' testimony or other evidence
11 received during the trial.

12 You should also consider how the witness came to know
13 the facts to which a witness has testified. In other words,
14 what was a particular witness' opportunity and ability to
15 perceive the existence of those facts to which that witness
16 has testified by having previously used his or her senses,
17 and then what is that witness' ability to be able to come
18 into court and to accurately recollect to you as to what
19 they have previously perceived.

20 You may also and should consider any bias, prejudice,
21 or interest that a particular witness has with respect to a
22 case. In other words, do you find some reason that a
23 particular witness would come into Court and would testify
24 one way or the other to help or hurt one side or the other,
25 and you may consider any interest that a witness might have

1 in the outcome of the case if you determine that a witness
2 does have such an interest, and you find that that interest
3 would bear upon that particular witness' credibility, and
4 you should also consider whether or not the testimony of a
5 witness is strengthened or is it weakened by other testimony
6 or other evidence received during the trial.

7 Now, because you are the sole judges of the facts and,
8 therefore, the sole judges of the credibility of each
9 witness, you are permitted to believe as much or as little
10 of what a witness has testified to as you deem is
11 appropriate, and, therefore, you may believe everything that
12 a witness testified to. You may choose to believe none of
13 it. You may believe one portion of a witness' testimony and
14 reject some other portion of that same witness' testimony.
15 In a given case, you can believe one witness as opposed to
16 several or several as opposed to one. But whatever your
17 good judgment and common sense tells you is the most
18 believable and credible evidence is the evidence that you
19 should accept and you should reject any testimony or other
20 evidence that you find not to be credible or believable.

21 Again, your sole objective is to simply reach the truth
22 in the matter, and by doing that, you will have fulfilled
23 your obligations, and that is to give both the State and
24 this defendant a fair and impartial trial.

25 Now, while there are various forms of evidence such as

1 testimony, photographs, documents, charts, and other types
2 of physical exhibits, there are really only two types of
3 evidence. Either or both of those types of evidence may be
4 used independently or in combination in order to prove some
5 fact in issue. But the two types of evidence are direct
6 evidence and circumstantial evidence.

7 Now, direct evidence is the testimony of a person who
8 testifies from actual knowledge of a fact. It is testimony
9 by a person who has perceived the existence of a fact by
10 means of his or her senses, and then that person comes into
11 court and they testify as to what they have previously
12 perceived as where a person views the commission of some
13 act, and then they come into court and they testify as to
14 what they've previously seen.

15 Circumstantial evidence, on the other hand, is the
16 proof of some other fact or set of facts, which taken either
17 singularly or collectively, may prove the existence of a
18 fact in question as a necessary consequence. That is
19 through an inference. And an inference is simply a
20 deduction of fact that may logically and reasonably be drawn
21 from the proof of some other fact or set of facts.

22 In other words, it's not a fact proven by the direct
23 testimony of a witness based upon personal perception. But
24 it is a conclusion which might reasonably be drawn from the
25 proof of other facts. In other words, you may infer that a

1 particular event occurred or that a particular fact exists
2 based upon the proof of sufficient factual circumstances
3 which would reasonably warrant your arriving at a particular
4 conclusion.

5 The law, however, makes absolutely no distinction
6 between, between the weight or value to be given to direct
7 evidence or circumstantial evidence nor is a greater degree
8 of certainty required of circumstantial evidence as opposed
9 to direct evidence. Whatever the type of evidence used to
10 prove any fact, you should consider all the evidence
11 presented in the trial of the case, and after carefully
12 considering that evidence and weighing it in your minds, if
13 you are not convinced of the guilt of the defendant beyond a
14 reasonable doubt as it relates to a particular charge, you
15 must resolve that doubt in the defendant's favor, and return
16 a verdict of not guilty as to that charge.

17 Now, in this case, as you know, the defendant has been
18 accused by the State, through these indictments, with the
19 crimes of burglary in the second degree and of larceny.
20 There are two separate charges of burglary. There are two
21 separate charges of larceny. But the law that you are to
22 apply applies equally to both of those separate charges.

23 Burglary in the second degree is a statutory offense as
24 is larceny, and that just means that the Legislature has
25 defined what constitutes that crime. Every year the

1 Legislature meets from January to June, and during the
2 course of that session they pass certain laws. Many of
3 these laws regulate or govern conduct that we engage in
4 during the normal courses of, of our lives. But some of
5 those statutes are criminal statutes, and that just means
6 that the Legislature has defined a crime and prohibits the
7 citizens from engaging in conduct in violation of that
8 statute. And where a person is found to have engaged in
9 that conduct in violation of the statute, then it subjects
10 that person to some form of punishment or penalty.

11 Please understand, however, that you are never to be
12 concerned with the punishment or penalty. That's not
13 something that a jury decides in a case. Your sole
14 obligation and duty in this case is to determine whether or
15 not the defendant's guilt has been proven beyond a
16 reasonable doubt, and you should make that determination
17 without regard to any consequence to that decision.

18 As I stated, Section 16-11-312 is the section of law
19 that defines the crime of burglary in the second degree, and
20 that particular section provides that a person is guilty of
21 burglary in the second degree if the person enters a
22 building without consent and with the intent to commit a
23 crime therein, and either when, in effecting entry or while
24 in the building or in immediate flight therefrom, the
25 defendant or another participant in the crime is armed with

1 a deadly weapon or causes physical injury to a person who's
2 not a participant in the crime or uses or threatens the use
3 of a dangerous, dangerous instrument, or displays what is or
4 appears to be a knife, pistol, revolver, rifle, shotgun,
5 machine gun, or other firearm, or, excuse me, or the
6 entering occurs in the nighttime.

7 Therefore, based upon the foregoing statute, before you
8 could return a verdict of guilty as to the crime of burglary
9 in the second degree, it would be necessary that the
10 evidence in this case has established, to your satisfaction
11 beyond a reasonable doubt, that the defendant entered a
12 building. Entry is an indispensable element in the crime of
13 burglary. Entry is the act of going into a building. It is
14 not necessary, however, that the entire body of a person
15 shall get into a building. The least entry is sufficient.
16 And the entry must also be into a building, and a building
17 is defined in the law as any structure where any person
18 lodges or lives or where people assemble for purposes of
19 business or where goods are stored.

20 Secondly, there must be an entry of a building without
21 consent. Entering without consent means to enter a building
22 without the consent of the owner or person otherwise in
23 lawful possession of the premises.

24 Thirdly, there must be an entry of a building without
25 consent and with the intent to commit a crime in the

1 building. There must be an intent to commit a crime whether
2 or not a crime is actually accomplished. But the mere
3 entering of a building without an intent to commit a crime
4 does not constitute the crime of burglary. It is only when
5 there is an entering accompanied with an intent to commit a
6 crime therein that the crime of burglary is complete, and
7 the crime of any grade or severity is sufficient to satisfy
8 this particular element of the crime of burglary.

9 The entering of a building without consent and with
10 intent to commit a crime therein completes the crime of
11 burglary, and in order to prove burglary in the second
12 degree, the State has to prove an additional element and
13 that is, in this particular case, the State is alleging that
14 additional factor, which I've read from the statute, is the
15 fact that the burglary occurred in the nighttime, and the
16 nighttime is that period of time between sunset and sunrise
17 during which the face of a person cannot be discerned by the
18 light of the sun.

19 The defendant is also charged, in two separate
20 indictments, with the crime of larceny. In this case,
21 they're alleging petit larceny. Larceny is commonly
22 referred to and known as stealing. Larceny is defined in
23 the law as the taking, the stealing, and the carrying away
24 of the personal property of another with the intention of
25 permanently depriving the true owner of his or her property

1 and converting that property to the taker's own use. You
2 are instructed, however, that proof of mere presence of the
3 defendant at a location where stolen property is found is
4 insufficient to prove him guilty of the crime of larceny.
5 In order to be proven guilty of the crime of larceny, it is
6 necessary that the State prove, by direct evidence or
7 circumstantial evidence or a combination of the two types of
8 evidence, that the defendant did take, steal, and carry away
9 the property of another with the intent to convert that
10 property to his own use and purpose. That is with an intent
11 to steal it, and a larceny of goods or other property having
12 a value of \$1,000 or less is classified as petit larceny
13 under the law.

14 You are further instructed and I emphasize to you that
15 the fact that a defendant does not testify during the trial
16 of a criminal case is not a circumstance that may be
17 considered by the jury in any way during your deliberations
18 or in your determination as to whether or not his guilt has
19 been proven beyond a reasonable doubt. You may not permit
20 such a fact to weigh in the slightest degree against a
21 defendant.

22 As I have told you, the burden is upon the State to
23 establish a defendant's guilt beyond a reasonable doubt.
24 The burden is never upon a defendant to prove that he is not
25 guilty or to prove that he is innocent because, in some

1 cases, that might not be possible, and, therefore, you may
2 not draw any inference nor reach any conclusion from the
3 fact that a defendant does not testify during the trial of a
4 criminal case. Nor may that fact even be discussed by you
5 while you are engaged in your deliberations nor may you
6 allow such a fact to influence you in your decision.

7 Now, ladies and gentlemen, as I've told you previously,
8 your verdict has to be unanimous. I'm not concerned with
9 what it is, but it does have to be unanimous before any
10 decision may be reached as to any particular indictment.

11 Now, Mr. Foreman, as you know, you're going to be
12 called upon to preside over jury deliberations in the jury
13 room simply to ensure that those deliberations are carried
14 out in some orderly fashion, and it will also be you who
15 will actually write the verdict or the decision of the jury
16 as it relates to a particular indictment. You have four.

17 As I've previously stated, your verdicts may be the
18 same with all of the indictments. They may be different.
19 That, of course, will depend upon your determination of fact
20 as it relates to that charge and then your application of
21 the law as I provided it to you.

22 With respect to each of the indictments, there are two
23 potential verdict forms. Those two verdict forms are guilty
24 and not guilty.

25 So, whatever the decision is that relates to a

1 particular indictment, Mr. Foreman, you indicate that
2 decision. On the back of each of these indictments you'll
3 see in the lower left hand corner the word verdict. It is
4 beneath that word that you'll indicate a jury's decision as
5 to that particular charge. There's also space for you to
6 sign your name as the foreperson. You're the only juror
7 that needs to sign the verdict form, and there's also a
8 space for you to put the appropriate date.

9 So, after the jury has reached a unanimous, a unanimous
10 decision, Mr. Foreman, indicate that verdict. And once
11 you've completed your deliberations with respect to all the
12 cases, and you've indicated the verdicts on the back of the
13 form, knock on the door, notify the bailiff you've reached a
14 decision, and then we'll bring you back to the courtroom to
15 receive those verdicts.

16 Now, during your deliberations there may come a time
17 where you have some question about the facts or testimony or
18 evidence. You may even wonder if there's something else
19 that you can have, does something else exist that we can get
20 to help us resolve the case. Please understand it, now that
21 you're going back to begin your deliberations, all of the
22 evidence that is going to be introduced and that can be
23 introduced has been received. So, even if there's something
24 out there that you think might help, you can't have it even
25 if it exists because the evidence is closed.

1 If you need to have testimony reheard we can bring you
2 back into the courtroom to have testimony replayed of a
3 witness in whole or in part. I do not have transcripts of
4 the witness' testimony, but if you want to have a testimony,
5 have testimony of a witness replayed, let us know what
6 witness you want to hear and we'll bring you back into the
7 courtroom to have that testimony replayed in whole or in
8 part.

9 If at any time you need an, an additional instruction,
10 a clarification, or more detailed explanation perhaps of, of
11 the law that is applicable, I am permitted to answer those
12 questions. So, while I can't answer questions of fact, I am
13 permitted to answer questions that relates to the law that
14 you are to apply. So, if you need that guidance, let me
15 know and I'll be happy to respond to that question.

16 If we have any smokers on the jury, you can't smoke in
17 the jury room. You can smoke outside if you want to. If
18 you need to smoke, let the bailiff know. They'll take you
19 outside. But you are instructed that if any juror is absent
20 for some authorized purpose, the deliberations have to stop.
21 They may only be resumed when all 12 jurors are present so
22 that all may participate, and I think that concludes
23 everything I need to tell you. If not, I'll bring you back.

24 Right now, with the exception of Mrs. Camp, I will ask
25 the 12 primary jurors, if you will, please retire to your

1 jury room. Do not begin deliberations until I send you word
2 to do so. I've got some matters I'll need to address with
3 the lawyers. If I don't need to bring you back I will send
4 word by way of the bailiff that you can begin your
5 deliberations. In that event, he'll bring to the jury room
6 all of the exhibits which have been introduced.

7 And to you, Mr. Foreman, he'll also bring the
8 indictments which will serve as the verdict forms. So,
9 please retire, but don't begin deliberations until I send
10 you word to do so.

11 Mrs. Camp, you can just stay in the courtroom with me,
12 please.

13 (Whereupon, the jury retired to deliberate at
14 11:00 a.m.)

15 (Whereupon, the alternate juror was excused.)

16 THE COURT: Are there any exceptions taken to the
17 instruction or requests for additions to the instruction by
18 the State?

19 SOLICITOR BOYD: No, sir, Your Honor.

20 THE COURT: By the defendant?

21 MR. POOLE: No, sir.

22 THE COURT: Let me ask y'all to verify the exhibits
23 before they go back please.

24 (Pause.)

25 THE COURT: All of the exhibits are accounted for?

1 SOLICITOR BOYD: Yes, sir, Your Honor.

2 MR. POOLE: Yes, sir.

3 THE COURT: All right. Send them back and tell the
4 jury to begin deliberations and notify us when they have
5 concluded.

6 We will be at ease while the jury is deliberating.

7 (Whereupon, a recess was taken.)

8 THE COURT: All right. The jury has reached a verdict.
9 Are we ready to receive it?

10 MR. POOLE: Yes, sir.

11 THE COURT: All right. Bring them in.

12 (Whereupon, the jury returned to the courtroom at
13 12:48 p.m.)

14 THE COURT: Mr. Foreman, have you and your fellow
15 jurors reached a unanimous decision?

16 THE FOREMAN: Yes, sir.

17 THE COURT: Have you indicated those decisions on the
18 back of the indictments as requested?

19 THE FOREMAN: Yes, sir.

20 THE COURT: Did you sign them and date them?

21 THE FOREMAN: Yes, sir.

22 THE COURT: If you'll please hand those up by way of
23 the bailiff.

24 (Foreman complies.)

25 THE COURT: You may publish the verdict.

1 THE CLERK: State of South Carolina, County of
2 Spartanburg, State vs. Robert Upchurch, Indictment Number
3 2010-GS-42-3628, we, the jury, find the defendant not
4 guilty.

5 Indictment Number 2010-GS-42-3629, we, the jury, find
6 the defendant not guilty.

7 Indictment Number 2010-GS-42-708, we, the jury, find
8 the defendant guilty.

9 2010-GS-42-709, we, the jury, find the defendant
10 guilty. Signed today's date by foreperson, Matthew Hampton.

11 Ladies and gentlemen, if this is your verdict and still
12 your verdicts, please raise your right hand.

13 (Whereupon, all jurors raise their hands at this time.)

14 THE CLERK: So say you all.

15 THE COURT: Now, are there any other matters that need
16 to be addressed prior to the jury being excused?

17 SOLICITOR BOYD: Nothing from the State, Your Honor.

18 MR. POOLE: No, sir.

19 Could I ask that the clerk ask the jury to raise their
20 right hand once more?

21 THE COURT: Do you want to have them polled?

22 MR. POOLE: Yes, sir.

23 THE COURT: Okay. Poll the jury please.

24 (Whereupon, the jury was polled and all jurors answer
25 that this was and is still their verdicts.)

1 THE COURT: All right. Any other matters that need to
2 be addressed with the jury?

3 MR. POOLE: No, sir.

4 (Whereupon, the trial jury was excused.)

5 THE COURT: All right. Any other matters to address
6 prior to the imposition of sentence?

7 MR. POOLE: May it please the Court, Your Honor?

8 THE COURT: Yes, sir.

9 MR. POOLE: At this time we would move our motion for a
10 directed verdict and move for a new trial based upon the, my
11 prior motion of a motion for a directed verdict. I move for
12 a new trial based upon the reasons stated in my prior
13 motion.

14 THE COURT: All right. Those motions are denied.
15 Any other matters to address?

16 MR. POOLE: Your Honor, Mr. Upchurch is claiming that
17 this is not his third or subsequent offense, and I've looked
18 at it and I've been given his record. I have gone over the
19 record. He does have some offense that the State can
20 provide and he -- I presented this sentence sheet for his
21 signature and he refuses to sign it.

22 THE COURT: Well, okay. Let me hear about his record.
23 What do you have there, solicitor?

24 SOLICITOR BOYD: Your Honor, his record starts back
25 from 1984, two counts of auto theft.

1 1985, breaking and entering a building at night.

2 2006, two counts of breaking and entering, three counts
3 of possession of a stolen vehicle, and one count of larceny
4 of motor vehicle, one count of obtaining money under false
5 pretenses.

6 1988, escape. Those were all in Rhode Island, sir.

7 North Carolina charges, 1997, breaking and entering,
8 larceny after breaking and entering.

9 '98, break and entering.

10 1999, breaking and entering, larceny after breaking and
11 entering.

12 2000, malicious injury to real property, second degree
13 trespassing, misdemeanor larceny, breaking and entering,
14 felony larceny.

15 2001, probation violation.

16 COURT REPORTER: Wait a minute.

17 THE COURT: We got a disturbance over here at the back
18 door.

19 SOLICITOR BOYD: Go back to 2000, malicious injury to
20 property, second degree trespass, misdemeanor larceny,
21 breaking and entering, felony larceny.

22 2001, probation violation.

23 2002, three counts of uttering a forged instrument, one
24 count of breaking and entering, one count of larceny after
25 break and entering value onever \$1,000.

1 2004, two counts of forgery, two counts of common law
2 uttering, resisting a public officer, obtaining property by
3 false pretense.

4 2007, habitual felon, possession of stolen goods.

5 In south Carolina, in 2009, he has two counts of
6 drinking alcohol in public.

7 THE COURT: All right. Mr. Poole, what, what about
8 that record does he disagree with?

9 MR. POOLE: Your Honor, may we address it?

10 THE COURT: Do you have a copy of his record?

11 MR. POOLE: Yes, sir.

12 THE COURT: Y'all sit down and look at it and you just
13 highlight what he agrees with and what he doesn't agree with
14 and then we'll discuss it.

15 (Pause.)

16 THE COURT: Let's do it like this. I have heard the
17 record. I'm not so much concerned about that as far as
18 whether all of it is correct. What I need to know is what
19 offenses the State is relying upon for purpose of any
20 enhancement of sentence and what that enhancement would be
21 and then whether or not he agrees or disagrees with those
22 convictions.

23 So, why don't y'all discuss that?

24 We'll come back after lunch and y'all can figure that
25 out and let me know.

1 Court's in recess until 2:30,

2 (Whereupon, a recess was taken.)

3 THE COURT: All right. Did you-all resolve the issue
4 of the record?

5 MR. POOLE: Well, yes, sir.

6 May it please the Court.

7 We went over the record. In fact, Mr. Boyd, myself,
8 and Mr. Upchurch had a meeting and went over his prior
9 record. This will be a third or subsequent offense,
10 property offense. There are convictions in Rhode Island and
11 North Carolina. However, when -- prior to lunch and when I
12 was signing my portion of the sentencing sheet, Mr. Upchurch
13 noticed that it had been written on the sentencing sheet
14 third, third or subsequent property violation.

15 On the indictment that he was sentenced, found guilty
16 of, it does not reference the enhancement statute. It
17 simply references the simple petty larceny statute. And,
18 so, his position on that is that since it's not referenced,
19 it's not enhanced, and stands as petty, simple petty
20 larceny.

21 THE COURT: Okay. Mr. Boyd.

22 SOLICITOR BULSA: Your Honor, I'll handle that one.
23 That's not an element of the offense and it doesn't need to
24 be noted in the indictment. That's as far as a sentencing
25 issue.

1 THE COURT: Okay. Does it have any application to the
2 burglary second degree anyway?

3 SOLICITOR BULSA: Excuse me, Your Honor?

4 THE COURT: Does it have any application to the
5 burglary indictment?

6 SOLICITOR BULSA: No, sir.

7 THE COURT: Okay.

8 SOLICITOR BULSA: I don't know what you're talking
9 about actually. The third or subsequent property offense is
10 for the petty larceny.

11 THE COURT: I understand the enhancement statute has
12 nothing to do with the burglary in any event. It's just the
13 petty larceny.

14 SOLICITOR BULSA: No, sir, the burglary is a burglary
15 second.

16 MR. POOLE: May I say one more thing?

17 THE COURT: Sure.

18 MR. POOLE: In the indictment for which he was found
19 not guilty the enhancement statute is referenced.

20 THE COURT: Okay.

21 MR. POOLE: Just -- that's all.

22 THE COURT: What is that statute number?

23 MR. POOLE: 16-1-57.

24 THE COURT: Class E Felony is ten years, isn't it?

25 MR. POOLE: Yes, sir.

1 go get mental health. They have my records there and I
2 haven't been on any medication for the depression and such,
3 and I ask that you please give me some leniency, sir, and
4 take into consideration that.

5 THE COURT: All right. On Indictment 2010-0708, that's
6 the indictment for burglary, Sentence of the Court is you be
7 confined to the Department of Corrections for a period of 15
8 years. Give him credit for any time he's entitled to
9 pursuant to 24-13-40.

10 On Indictment 2010-0709, larceny, ten years concurrent
11 with that sentence imposed on 708.

12 Mr. Upchurch, you have a right to appeal the verdict of
13 the jury and the sentence of the Court. You must file any
14 notice of your intention to appeal within ten days of
15 today's date. Mr. Poole will assist you with that.

16 THE DEFENDANT: Thank you, Your Honor.

17 THE COURT: Okay.

18

19 * * *END OF REQUESTED TRANSCRIPT OF RECORD* * *

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County

J. Derham Cole, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ROBERT EDGAR UPCHURCH,

APPELLANT

INITIAL ANDERS BRIEF OF APPELLANT

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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

The trial judge erred in allowing into evidence prejudicial hearsay testimony from one who overheard appellant allegedly offering a computer laptop for sale where the state's case hinged on this information because but for the same, there would have been insufficient evidence upon which to convict appellant of burglary and larceny?

STATEMENT OF THE CASE

Appellant Robert Edgar Upchurch was convicted of second degree burglary and larceny during the February, 2008 term of the Spartanburg County General Sessions Court before the Honorable J. Derham Cole, Judge. Appellant was sentenced to imprisonment for an aggregate period of fifteen years.

Appellant appealed. This brief follows.

ARGUMENT

The trial judge erred in allowing into evidence prejudicial hearsay testimony from one who overheard appellant allegedly offering a computer laptop for sale where the state's case hinged on this information because but for the same, there would have been insufficient evidence upon which to convict appellant of burglary and larceny.

At trial, Spartanburg Police Officer Travis Spivey testified that he was patrolling on the night of November 17, 2009, when he received a call at 12:53 a.m. on November 18, 2009, regarding a break-in at Graybar Electric Company in Spartanburg County. Upon arriving at the scene, Officer Spivey surmised that a cement block had been thrown through the front window of the company. An inspection of the interior of the company revealed that a computer laptop was missing from the company. Apparently, police believed that the suspect was in the vicinity of the company and as a result, Officers Spivy, Brian Shaw, Dale Winningham and Jeff King began searching for a suspect in that area. However, their search yielded no leads until they received a break in the case from Cynthia Byrd.

Cynthia Byrd testified at trial. Byrd explained that appellant was in the apartment complex where she lived on the morning of November 18, 2009, talking to others about selling ("unloading") a computer. Thereafter, Byrd contacted police and relayed this information to them and further directed them to Oscar Wesley's apartment when they arrived at the complex. Tr. 92, l. 3 – p. 96, l. 20. Officer Winningham testified that he went to the apartment complex in question and that when he entered the apartment belonging to Oscar Wesley, he found appellant and Justin Durham, and he also saw and recovered a computer laptop from there. Tr. 69, l. 1 – p. 74, l. 16.

Justin Durham testified that he was at that apartment complex on the morning in question when he encountered a male, whom he later learned was appellant, looking for someone to buy a laptop he had for sale. Durham stated that he bought the laptop from appellant and that after they both migrated to Oscar Wesley's apartment. Thereafter, the police arrived, searched¹ the apartment, and confiscated the laptop. Tr. 102, l. 6 – p. 109, l. 4. Graybar Electric Company employee Michael Tharpe testified at trial and identified the computer laptop as property of their company. Tr. 140, l. 10 – p. 144, l. 2.

Clearly, the police had no case against appellant until Cynthia Byrd gave them a lead that ultimately resulted in burglary and larceny charges being lodged against appellant. Thus, Byrd's call reporting what she heard was the linchpin in the case. However, the use of Byrd's hearsay knowledge to assist the police was acceptable, but apprising the jury of Byrd's knowledge via hearsay testimony constituted error. Byrd's inadmissible hearsay testimony was used to link appellant to the burglary and larceny charges in the jurors' minds. This was error. Byrd's hearsay testimony follows:

Q Okay. Did you hear him say anything when he wasn't speaking to you?
 A He was talking to some other people about selling something.
 Q Were you able to hear what he was selling?
 A. Computer.
 Q. Did he say he was trying to sell a computer?
 A. Not sell it, but just unload it really.
 Q He said unload it?
 A Yeah.
 Tr. 94, l. 14-23.

Hearsay is a statement other than one made by the declarant while testifying at the trial offered to prove the truth of the matter asserted. Rules 801 and 803, SCRE; Ezell v.

¹ Winningham testified that he obtained a search warrant before searching the apartment.

State, 345 S.C. 312, 548 S.E.2d 852 (2001); State v. Weaver, 361 S.C. 73, 602 S.E.2d 786 (2006); State v. Price, 368 S.C. 494, 629 S.E.2d 363 (2006). Here, Byrd repeated a statement appellant made regarding an offer to sell a laptop which he apparently was in possession of on the night in question. The hearsay testimony went to the heart of the case because this linked appellant to the burglary and larceny charges. This out-of-court statement made by appellant offered to prove that the laptop appellant offered to sell was the same laptop stolen from Graybar and that it was in his possession because he obtained it when he burglarized Graybar Electric Company. Thus, the hearsay testimony was offered for the truth of the matter asserted, i.e. that appellant was guilty of burglarizing Graybar Electric Company as charged.

The error is not harmless because the hearsay testimony was not cumulative to any other testimony or evidence, but rather served as the linchpin to solve the case for the police and provide proof of guilt to the jury. But for the hearsay evidence, there was no competent evidence of appellant's guilt. Also, the improperly submitted hearsay evidence was served only to prejudice the defense because sans Byrd's linchpin evidence, the State presented no evidence that was cumulative to or that corroborated the hearsay evidence. In other words, there was no direct or circumstantial evidence to establish guilt on the charges.

The improper admission of hearsay evidence is reversible error if the admission of the same causes prejudice. State v. Mitchell, 286 S.C. 572, 336 S.E.2d 150 (1985). An insubstantial error which affects the result of the trial is not harmless. State v. Price, *supra*, citing to State v. Bailey, 298 S.C. 1, 377 S.E.2d 584 (1989). In the case at bar, but for Byrd's hearsay testimony in question, appellant would most likely not have been convicted because

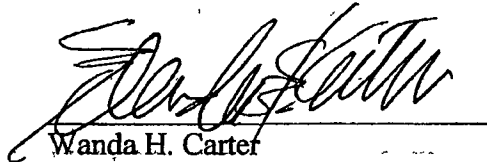
there was no competent or overwhelming evidence of guilt. See, Ezell v. State, *supra*, where the Court held that since there was no overwhelming evidence of the defendant's guilt, the hearsay evidence presented prejudiced the case for the defense. In Ezell, the confidential informant who purchased the crack from the defendant was unavailable for trial and one of the officers who monitored the confidential informant's purchase did not see the transaction, and the other officer who could not identify the defendant as the seller. The only other evidence that the state used to gain a conviction was hearsay evidence from the audio tape which contained the confidential informant's hearsay statement identifying appellant as the crack cocaine seller. The present case is similar because there was no overwhelming evidence of guilt save Byrd's testimony, which was the only piece of evidence that gave any credence to the State's burglary charge levied against appellant.

The trial judge erred in allowing into evidence prejudicial hearsay testimony in this case because, but for the same, the State's case, which hinged on circumstantial evidence only, would not have been sufficient to convict appellant on the burglary and larceny charges. The error violated Rules 801 and 803, SCRE, and his right to a fair trial guaranteed under the Fourteenth Amendment to the United States Constitution and article 1, §3 of the South Carolina State Constitution.

CONCLUSION

Based on the foregoing argument, appellant's convictions and sentences should be reversed and his case remanded to the lower court for a new trial.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read 'Wanda H. Carter', is written over a horizontal line.

Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 18th day of February, 2011.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County

J. Derham Cole, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ROBERT EDGAR UPCHURCH,

APPELLANT

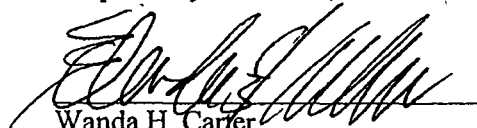
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Robert Edgar Upchurch states:

1. She is Deputy Chief Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. She has reviewed the record of appellant's trial before Judge J. Derham Cole, which was held on July 29, 2010, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Robert Edgar Upchurch.

Respectfully submitted,


Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 18th day of February, 2011.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County

J. Derham Cole, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ROBERT EDGAR UPCHURCH,

APPELLANT

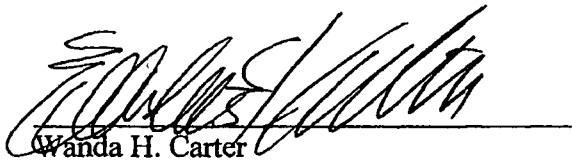
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictment(s);
- (2) Entire Trial Transcript

I certify that this designation contains no matter which is irrelevant to this appeal.

February 18th, 2011

Wanda H. Carter
Deputy Chief Appellate DefenderSouth Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

Attorney for Appellant

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County

J. Derham Cole, Circuit Court Judge

THE STATE,

RESPONDENT,

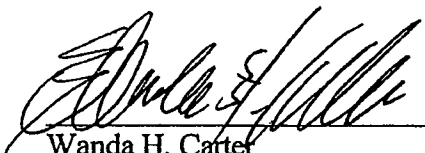
V.

ROBERT EDGAR UPCHURCH,

APPELLANT

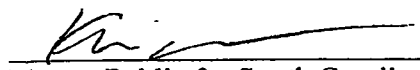
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Anders Brief of Appellant and Designation of Matter 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; and on Robert Edgar Upchurch, #342017 at Kirkland Correctional Institution, this 18th day of February, 2011.


Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 18th day of February, 2011.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: October 12, 2013.

RECEIVED

MAR 14 2011

ATTORNEY GENERALS
OFFICESE
Post
file
for
reviewState of South Carolina
In The Court of Appeals

The States

V.

Robert Edgar Upchurch Jr.Motion for Relief of Counsel, and
motion To Withdraw Appeal

The Appellant, Robert Edgar Upchurch, Jr., moves for an order to have deputy chief appellate defendant be relieved as his counsel. In addition, appellant moves for an order to withdraw his appeal with due diligence.

Appellant further states:

1. Appellate counsel filed an Anders brief and a motion to be relieved as his counsel.

2. Appellant defendant agrees with counsel's motion.

3 Appellant moves to withdraw his appeal that he may pursue Post conviction relief

WHEREFORE, Appellant asks the Court to grant both motions

Respectfully Submitted,

Robert Edgar Upchurch, Jr.

Robert Edgar Upchurch, Jr.
Arlendale Corr. Inst. F3 B46
1057 Revolutionary Trail
Fairfax, SC 29827

Verification:

Under the penalty of Perjury I, Robert Edgar Upchurch, Jr. deposes and states that both above actions are true to best of my ability

Robert Edgar Upchurch, Jr.

State of South Carolina
In the Court of Appeals

The State

v.

Robert Edgar Upchurch, Jr.

Certificate of Service

I, Robert Edgar Upchurch, Jr. hereby certifies that a true copy of appellant's Motion for Relief of Counsel and Motion to Withdraw Appeal has been served upon Salley W. Elliot, Esquire at Rembert Dennis Building, 1000 Assembly Street, Rm 519, Columbia, SC 29201 and Deputy Chief Appellate Defender Wanda H. Carter, Division of Appellate Defense, P.O. Box 11589, Columbia, SC 29211-1589, this the 7th day of March, 2011.

Robert Edgar Upchurch Jr.

Robert Edgar Upchurch Jr.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County
The Honorable J. Derham Cole, Circuit Court Judge

THE STATE,

Respondent,

vs.

ROBERT EDGAR UPCHURCH,

Appellant.

RETURN TO MOTION FOR RELIEF OF COUNSEL AND TO WITHDRAW APPEAL

Respondent, by and through undersigned counsel and making Return to the "Motion for Relief of Counsel and Motion to Withdraw Appeal," would respectfully show unto this Court:

1. Appellant was convicted of second degree burglary and larceny after a jury trial held before the Honorable J. Derham Cole in February 2008, in Spartanburg County. An aggregate sentence of fifteen years was imposed.
2. Appellant filed and served notice of appeal and is represented by the South Carolina Office of Appellate Defense.
3. On February 18, 2011, Deputy Chief Appellate Defender Wanda H. Carter submitted an Initial Anders Brief of Appellant presenting the issue whether the trial court erred in allowing

into evidence hearsay testimony from one who overheard appellant allegedly offering a computer laptop for sale where the state's case hinged on this information because but for the same, there would have been insufficient evidence upon which to convict appellant of burglary and larceny. Appellant has not yet submitted a pro se brief.

4. Appellant now moves to have appellate counsel relieved and his appeal withdrawn. Appellant states that he agrees with his appellate attorney's motion to be relieved and indicates that he would like to withdraw his appeal to pursue post-conviction relief.

5. Respondent opposes Appellant's request to have appellate counsel relieved unless this Court is inclined to grant Appellant's motion to withdraw the appeal. Unless the appeal is dismissed, Appellant has not shown good cause to have his counsel relieved at this point in the appellate process. U.S. Gallop, 838 F.2d 105 (4th Cir. 1988); U.S. v. Mullen, 32 F.3d 831 (4th Cir. 1994)(good cause shown). Respondent submits, however, that some written indication from Appellant as to his understanding of the consequences of withdrawing the appeal should be obtained before either request is ruled upon.

WHEREFORE, having made Return, Respondent respectfully requests that this Court obtain from Appellant some written documentation indicating his understanding of the consequences of withdrawing his appeal and that his request to have appellate counsel relieved should only be granted if the appeal is withdrawn.

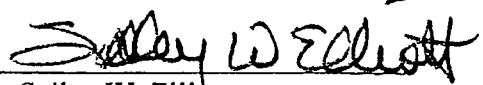
Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

BARRY BARNETTE
Solicitor, 7th Judicial Circuit

BY: 

Salley W. Elliott
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

March 17, 2011

ATTORNEYS FOR RESPONDENT

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County

The Honorable J. Derham Cole. Circuit Court Judge

THE STATE,

RESPONDENT.

v.

ROBERT EDGAR UPCHURCH,

APPELLANT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return to Motion for Relief of Counsel and to Withdraw Appeal has been served upon opposing counsel by placing one (1) copy in the United States mail, postage prepaid, addressed to:

Robert Upchurch, Jr., #342017
Allendale Correctional Inst.
1057 Revolutionary Trail
Fairfax, SC 29827

Wanda H. Carter, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211

This 17th day of March, 2011


ANGELA BENNETT
LEGAL ASSISTANT



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file
RECEIVED

APR - 7 2011

The South Carolina Court of Appeals
ATTORNEY GENERALS
OFFICE

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE (803) 734-1890
FAX (803) 734-1839
www.sccourts.org

April 6, 2011

Robert Upchurch #342017
Allendale Correctional Institution
P. O. Box 1151, Hwy 47
Fairfax, SC 29827

Re: The State v. Upchurch, Robert

Dear Mr. Upchurch:

The following Order has been endorsed on your Motion For Relief of Counsel and Motion to Withdraw Appeal in the above entitled case on appeal.

"Granted.

s/ C. Tolbert Goolsby, A.J.

By copy of this order, all interested parties are advised of the Court's decision regarding the above matter.

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/lb

cc: Chief Appellate Defender Robert M. Dudek
Assistant Deputy Attorney General Salley W. Elliott

The South Carolina Court of Appeals

The State,

Respondent

RECEIVED

APR 11 2011

v.

Robert Upchurch,

Appellant

**ATTORNEY GENERALS
OFFICE**

The Honorable J. Derham Cole
Spartanburg County
Trial Court Case No. 2010-GS-42-00708

REMITTITUR

This Court has granted a motion filed by the appellant to withdraw his appeal.

IT IS SO ORDERED that the above appeal be and hereby is remitted to the Clerk of Court for Spartanburg County.

JOHN CANNON FEW, CHIEF JUDGE

BY V. Claire Allen, Deputy
Clerk

Columbia, South Carolina

Original to: The Honorable Hope Blackey

cc: Chief Appellate Defender Robert M. Dudek

Robert Upchurch #342017

Assistant Deputy Attorney General Salley W. Elliott

The Honorable M Hope Blackey

FILED

4/21

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	SEVENTH JUDICIAL CIRCUIT
	)	
<u>ROBERT E. UPCHURCH, JR. (#342017),</u>	)	
Plaintiff,	)	
	)	BRIEF
Vs.	)	
	)	
<u>STATE OF SOUTH CAROLINA,</u>	)	Docket Number:
Defendant.	)	<u>2011-CP-42-2084</u>

The Plaintiff named above, through the undersigned attorney, would respectfully show this Court as follows:

1. The Plaintiff was convicted on July 29, 2010 of Second Degree Burglary (2010-GS-42-0708) and Petit Larceny (2010-GS-42-0709). He was sentenced at trial to fifteen years on the Burglary conviction and ten years on the Petit Larceny conviction, with the sentences to run concurrently. An appeal was filed; however, with Plaintiff's consent, the appeal was withdrawn.
2. At trial, Plaintiff was represented by Attorney Roger Poole.
3. Plaintiff filed this action on May 10, 2011 seeking Post-Conviction Relief.
4. The Grand Jury indicted the Plaintiff on the Burglary charge on January 15, 2010. The indictment reads:

"That Robert Edgar Upchurch, Jr. did in Spartanburg County on or about November 18, 200, willfully and unlawfully enter without consent and with intent to commit a crime there in to wit: a business, Graybar Electrical Co. located at 200 East Daniel Morgan Avenue, Spartanburg, South Carolina, without consent and intending to commit a crime therein, in violation of Section 16-11-312, THE CODE OF LAWS OF SOUTH CAROLINA (1976 as amended).

5. Third degree burglary requires that the Defendant enter a building without consent and with the intent to commit a crime therein. S.C. Code Ann. § 16-11-313(A). Third degree burglary is punishable by up to five years in prison. S.C. Code Ann. § 16-11-313(B). All of the elements of third degree burglary are present in the indictment against Robert Edgar Upchurch, Jr.

6. However, he was charged with second degree burglary, which is punishable by up to fifteen years in prison. S.C. Code Ann. § 16-11-312(C)(2). When a Defendant is accused of burglary of a business (i.e. – not a “dwelling”), second degree burglary requires the same elements of third degree burglary plus one of six aggravating factors:

- Armed with deadly weapon or explosive while entering, in, or immediately leaving the building – 16-11-312(B)(1)(a)
- Causes physical injury to someone while entering, in, or immediately leaving the building – 16-11-312(B)(1)(b)
- Uses or threatens the use of a dangerous instrument while entering, in, or immediately leaving the building – 16-11-312(B)(1)(c)
- Displays what is or may be a knife or firearm while entering, in, or immediately leaving the building – 16-11-312(B)(1)(d)
- Two or more prior convictions for burglary – 16-11-312(B)(2)
- The burglary occurs at night – 16-11-312(B)(3).

7. None of these aggravating factors are listed in the indictment.

8. It is undisputed that Roger Poole did not challenge the sufficiency of this indictment until the completion of the State’s case. It is undisputed that Roger Poole’s first attack on this indictment came during his Motion for Directed Verdict. In response to this attack, the State argued (and the Court found) that under State v. Gentry, 363 S.C. 93, 610 S.E 2d 494 (2005), any objections to the sufficiency of the indictment had to be made prior to the jury being sworn. (Transcript p. 149, line 18 – p. 150, line 7). The Court sided with the State.

9. In Gentry, the South Carolina Supreme Court clarified the law in South Carolina regarding defective indictments. The Court held “that if an indictment is challenged as insufficient or defective, the defendant must raise that issue before the jury is sworn and not afterwards.” State v. Gentry, 363 S.C. 93, 99, 610 S.E.2d 494, 499 (2005). The legislature has codified this under South Carolina Code Section 17-19-90.

10. It appears that after a jury is sworn, the only way to amend an indictment is to follow the procedure set up by South Carolina Code Section 17-19-100:

If (a) there be any defect in form in any indictments or (b) on the trial of any case there shall appear to be any variance between the allegations of the indictment and the evidence offered in proof thereof, the court before which the trial shall be had may amend the indictment (according to the proof, if the amendment be because of a variance) if such amendment does not change the nature of the offense charged. After such amendment the trial shall proceed in all respects and with the same consequences as if the indictment had originally been returned as so amended, unless such amendment shall operate as a surprise to the defendant, in which case the defendant shall be entitled, upon demand, to a continuance of the cause.

11. It is clear in South Carolina that after Gentry, Post-Conviction Relief Applications must focus on the sufficiency of the indictments and not the Court’s Subject Matter Jurisdiction. See, e.g., Edwards v. State, 372 S.C. 493, 642 S.E.2d 738 (2007).

12. Ten years prior to Gentry, in Browning v. State, 320 S.C. 366, 465 S.E.2d 358 (1995), the Supreme Court looked at the same issue we have in this case: the differences between second and third degree burglary. In Browning, the applicant sought post-conviction relief because the indictment for second degree burglary had none of the aggravating factors necessary to differentiate it from third degree burglary. Id. at 367, 465 S.E.2d at 358. The Court found the indictments “insufficient.” Id. at 369, 465 S.E.2d at 359. The Court went on to say – as per the pre-Gentry law of this State – that the trial court had no jurisdiction. Id.

13. Six years prior to Gentry, in Weinhauer v. State, 334 S.C. 327, 513 S.E.2d 840 (S.C. 1999), the Supreme Court overturned the trial court's denial of the applicant's Post-Conviction relief application based on problems with the burglary indictment. The applicant pled guilty to, among other charges, second degree burglary under 16-11-312(B). Id. at 329, 513 S.E.2d at 840. The indictment, however, was consistent with 16-11-312(A). Id. at 332, 513 S.E.2d at 842. The solicitor orally amended the indictment at the hearing to include the aggravating factor of "nighttime," thus changing the punishment of the crime from a ten-year max to a fifteen-year max. Id. Again, because this decision came before Gentry, the Court found that the trial court lacked the jurisdiction to hear the plea. Id.

14. The Appendix of Gentry lists both Browning and Weinhauer among cases that the court finds, as the result of Gentry, "are overruled to the extent they combine the concept of the sufficiency of an indictment and the concept of subject matter jurisdiction, i.e. a trial court's power to hear a charge." State v. Gentry, 363 S.C. 93, 102, 610 S.E.2d 494, 501-502 (2005).

15. However, it appears that the reasoning in Weinhauer remains good law after Gentry even though the analysis is now on indictment sufficiency and not jurisdiction. As noted the year after Gentry:

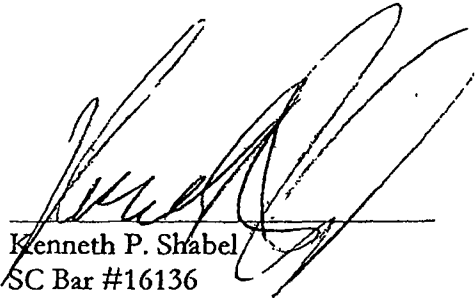
[T]he court should determine whether the proposed amendment changes the nature of the offense set forth in the original indictment. If it does, the motion to amend must be denied unless the amended indictment states a lesser included offense of the crime charged in the original indictment or the defendant chooses to waive presentment of the amended indictment to the grand jury and plead guilty. To rule otherwise would violate the defendant's statutory and constitutional right to demand that a properly constituted grand jury consider his case and decide whether to issue a sufficient indictment. See, e.g., . . . Weinhauer v. State, 334 S.C. 327, 513 S.E.2d 840 (1999) (granting post-conviction relief where prosecutor verbally amended indictment for second-degree burglary to state that the burglary occurred at nighttime; amendment changed the nature of the offense charged by

changing the classification from nonviolent to violent), overruled on other grounds, Gentry

State v. Means, 367 S.C. 374, 387, 626 S.E.2d 348, 355 (2006) (emphasis added).

16. Therefore, under Means, the logic behind the decision in Weinhaur remains sound, good law.

Respectfully Submitted,



Kenneth P. Shabel

SC Bar #16136

CAMPBELL & SHABEL, Attorneys at Law
104 North Daniel Morgan Avenue, Suite 201
Spartanburg, South Carolina 29306
864.583.0001
864.583.1199 (Fax)

Dated: 7/5/12
Spartanburg, South Carolina

FORM 5

STATE OF SOUTH CAROLINA

County of SPARTANBURGROBERT EDGAR WACHURRI, JR.
Full name and prison number (if any) of Applicant

v.

State of South Carolina

IN THE COURT OF COMMON PLEAS

2011 CP-42-2084

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - 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 ALLENDALE CORR. INST., POST OFFICE BOX 1181, FAYETTE, SC 29127
2. Name and location of Court which imposed sentence COURT OF GENERAL SESSIONS, SEVENTH CIRCUIT
3. Name(s) of co-defendant(s) (if any) _____
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2010-ES-42-708, BURGLARY 1st CA
 - (b) 2010-ES-42-709, BURGLARY

- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) 7-29-10, 15 YEARS
- (b) 7-29-10, 10 YEARS
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty X
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
YES
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. S.C. COURT OF APPEALS
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. APPEAL WITHDRAWN
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. 4-6 2011
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. _____
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____
- (b) _____

- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) FEDERAL AND STATE LAW VIOLATIONS
- (b) INEFFECTIVE ASSISTANCE OF COUNSEL
- (c) RESERVED FOR AMENDMENT
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) _____
- (b) SEE ATTACHMENT
- (c) _____
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?

_____ NO _____

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

- i. _____
- ii. _____
- iii. _____

(b) the proceedings in which each ground was raised:

- i. _____
- ii. _____
- iii. _____

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) SEE PARAGRAPH 10 AND SECTION 17-27-10
 (b) _____
 (c) _____

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? YES
 (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?

N/A

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. TRIAL ATTORNEY J. ROGER POOLE, SEVENTH JUDICIAL
CIRCUIT PUBLIC DEFENDER, 360 N. LAKELH ST, SUITE 3000
SPARTANBURG, SC 29303
 ii. APPELLATE COUNSEL WANDA H. CARTER, ESQUIRE, SC COMMISSION
ON INDIGENT DEFENSE, DIVISION OF APPELLATE DEFENSE
P.O. BOX 11589, COLUMBIA, SC 29211

iii. _____

(b) the proceedings at which each such attorney represented you:

i. TRIAL

ii. APPEAL

iii. _____

ATTACHMENT TO PCR APPLICATIONGROUND ONEFEDERAL AND STATE LAW VIOLATIONS

a) THE CONVICTIONS AND SENTENCE IS AN VIOLATION OF THE U.S CONSTITUTION, S.C. CONSTITUTION, STATE LAW, AND RULES OF THE COURT.

GROUND TWOINEFFECTIVE ASSISTANCE OF COUNSEL

b) TRIAL COUNSEL WAS INEFFECTIVE IN TRIAL, AND BECAUSE OF HIS ERROR, THE APPLICANT HAS BEEN SUBSTANTIALLY PREJUDICED, AND IF NOT FOR SUCH ERROR, THE OUTCOME WOULD HAVE BEEN DIFFERENT.

AMENDMENT RESERVED

SEE RULE 71.1. SCREEN P.

RECEIVED 10 PM 3-31

19 State clearly the relief you seek in filing this application:

VACATION OF THE CONVICTION AND SENTENCE.

20 Are you now under sentence from any other court that you have not challenged?

NO

STATE OF SOUTH CAROLINA)

County of SPARTANBURG)

VERIFICATION

I, ROBERT EDGAR UPCHURCH, JR., 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.

Robert Edgar Upchurch Jr.

SWORN to and subscribed before me this 9
day of May, 2011

Robert Edgar Upchurch Jr.

Helen P. Freeman (L.S.)
Notary Public

My Commission Expires: 5/18/14

APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF

I, ROBERT EDGAR UPCHURCH, 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.

Robert Edgar Upchurch Jr.
Applicant

SWORN or affirmed to and subscribed before me this

2 day of May, 2011.

Helen P. Freeman
Notary Public

My Commission Expires: 5/18/14

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	
	)	
Robert Edgar Upchurch, Jr., #342017,	)	2011-CP-42-2084
	)	
Applicant,	)	
	)	
v.	)	RETURN
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

The Respondent, making its Return to the application for post conviction relief (PCR) filed May 10, 2011, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. The Applicant was indicted at the January 2010 term of the Spartanburg County Grand Jury for burglary – 2nd degree (10-GS-42-0708) and petit larceny – 3rd or subsequent (10-GS-42-0709). He was represented by J. Roger Poole, Esquire. On July 29, 2010, the Applicant proceeded to trial, where he was found guilty of the charges by a jury. He was sentenced by the Honorable J. Derham Cole to confinement for concurrent terms of fifteen years for burglary – 2nd degree and ten years for petit larceny – 3rd or subsequent.

A timely notice of appeal was filed. However, following the submission of an Anders brief on Applicant's behalf, the Applicant filed a *pro se* Motion for Relief of Counsel and Withdraw his Appeal. The Motion was granted by the South Carolina Court of Appeals on April 6, 2011. The Remittitur was issued on April 8, 2011.

Attached herewith and incorporated herein are the records of the Spartanburg County Clerk of Court regarding the subject conviction(s), the Applicant's records from the South Carolina Department of Corrections, Applicant's appellate records, and the trial transcript. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

In his current Application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel, in that;
 - a. Counsel was ineffective in trial and because of his error, the Applicant was substantially prejudiced,
2. Federal and state law violations, in that;
 - a. The conviction and sentence is in violation of the U.S. Constitution, S.C. Constitution, State law, and rules of the court.

III.

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the 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. With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, the Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

The Applicant also alleges that his conviction and sentence are in violation of Federal and State laws. However, the Applicant does not explain with any specificity the grounds upon which these violations are based. The Uniform Post-Conviction Procedure Act requires the Applicant to "specifically set forth the grounds upon which the application is based." S.C. Code Ann. § 17-27-50 (1985).

Before the Court will hold an evidentiary hearing, the Applicant must make a *prima facie* showing that he is entitled to relief. Welch v. MacDougall, 246 S.C. 258, 143 S.E.2d 455 (1965);

Blandshaw v. State, 245 S.C. 385, 140 S.E.2d 784 (1965). This allegation is so vague that it is impossible for the State to respond. The Respondent submits that this ground for relief is totally without merit.

V.

Each and every allegation contained within the application not hereinbefore expressly admitted, qualified or explained is hereby denied.

VI.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held.

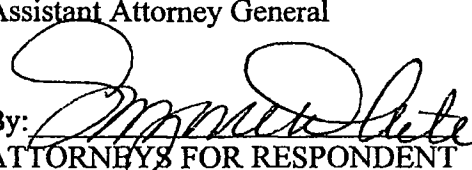
Respectfully submitted,

ALAN WILSON
Attorney General

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By: 
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May 2, 2012.

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

)
)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

Robert Edgar Upchurch, Jr.,

)
)

2011-CP-42-2084

Applicant,

)
)

v.

)
)

CERTIFICATE OF SERVICE BY MAIL

State of South Carolina,

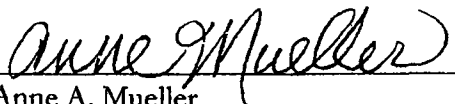
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Respondent.

)
)

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 Respondent's Return in the above-captioned matter on the following person(s) by depositing same in the United States mail, postage prepaid:

Kenneth P. Shabel, Esquire
Campbell & Shabel, LLC
P.O. Box 1793
Spartanburg, South Carolina 29306



Anne A. Mueller
Legal Assistant for the Respondent

DATED this 2nd day of May, 2012.

1 STATE OF SOUTH CAROLINA
2 COUNTY OF SPARTANBURG } COURT OF COMMON PLEAS NONJURY

3
4 ROBERT EDGAR UPCHURCH, JR.,)
5 APPLICANT,) TRANSCRIPT
6 VS.) OF
7 STATE OF SOUTH CAROLINA,) RECORD
8 RESPONDENT.) 2011-CP-42-212
9

10 June 12th, 2012
11 Spartanburg, South Carolina
12

13 B E F O R E:

14 THE HONORABLE ROGER L. COUCH, Judge.

15 A P P E A R A N C E S:

16 KENNETH SHABEL
17 ESQ.
18 Attorney for the Applicant

19 ASHLEIGH R. WILSON
20 ASSISTANT ATTORNEY GENERAL
21 Attorney for the Respondent

22
23 PAMELA E. GREEN
24 Circuit Court Reporter
25 Seventh Judicial Circuit

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E X H I B I T S

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P R O C E E D I N G S

1
2
3 THE COURT: You may call the next case.

4 MS. WILSON: Thank you, Your Honor.

5 The next case is Robert Upchurch, Junior versus the
6 State. It's Docket Number 2011-CP-42-2084. Mr. Upchurch
7 was originally indicted for two counts of second degree
8 burglary and two counts of larceny.

9 He proceeded to trial and was convicted of one count of
10 second degree burglary and one count of larceny third or
11 above subsequent property offense. He was sentenced to
12 confinement by Judge Cole to 15 years on the burglary and
13 ten years on the larceny. The sentences were to run
14 concurrently.

15 His application for post-conviction relief was filed
16 May 10th, 2010. The applicant alleges his convictions and
17 sentences and violation of the U.S. Constitution, South
18 Carolina Constitution, State Law, and the Rules of Court,
19 and he also alleges ineffective assistance of counsel.

20 At this time I'll hand it over to Mr. Shabel.

21 THE COURT: Yes, Mr. Shabel.

22 MR. SHABEL: May it please the Court?

23 THE COURT: I'll hear from you.

24 MR. SHABEL: We are prepared to go forward with a brief
25 summation before we begin.

1 THE COURT: Yes, sir.

2 MR. SHABEL: I would note the highlights of the case
3 we're gonna be covering today.

4 Number one, we're gonna be attacking the representation
5 by Mr. Roger Poole with respect to the burglary second
6 indictment that it was defective on its face and not
7 objected to properly and timely which prejudiced my client
8 at trial.

9 Number two, we'll be attacking the lack of proper
10 cross-examination of one of the major witnesses at trial,
11 Mr. Justin Durham, whose testimony begins on Page 102 of the
12 trial transcript which I believe has been submitted to the
13 Court by the State as part of their presentation, as part of
14 their packet.

15 Number three, Your Honor, we'll be attacking the
16 failure on the part of Mr. Poole to at least file a motion
17 to quash the search warrant that led to discovery of a
18 laptop which was the fundamental basis of, of the
19 convictions in this matter.

20 We are prepared to go forward at this time. I am
21 prepared to call my first witness.

22 THE COURT: Please do.

23 MR. SHABEL: Mr. Upchurch.

24 THE COURT: Come forward, sir, and be sworn. Right
25 over here.

Robert Upchurch - Direct examination
by Mr. Shabel

1 ROBERT UPCHURCH, having been first
2 duly sworn, testified as follows:

3 THE COURT: Have a seat please.

4 (Witness complies.)

5 THE COURT: State your name please.

6 WITNESS: Robert Edgar Upchurch, Jr.

7 THE COURT: Thank you.

8 You are -- your witness, counselor.

9 MR. SHABEL: Thank you.

10 May it please the Court?

11 THE COURT: Yes, sir.

12 DIRECT EXAMINATION

13 BY MR. SHABEL:

14 Q Mr. Upchurch, how old are you, sir?

15 A I am 48 years old.

16 Q What's the highest level of education you completed?

17 A Twelfth grade.

18 Q And did you complete any college?

19 Did you go to college?

20 A I had completed some courses.

21 Q Okay. You're currently incarcerated?

22 A Yes, sir.

23 Q At what institution?

24 A Allendale Correctional Institution.

25 Q Approximately how long have you been in Allendale?

Robert Upchurch - Direct examination
by Mr. Shabel

1 A Since October 8th, 2010.

2 Q And are you currently serving a 15 year sentence for
3 two indictments and two convictions?

4 A Yes, sir.

5 Q And that's one for burglary in the second degree and
6 one for petty larceny, is that correct?

7 A Yes.

8 Q For the record, a conviction on petty larceny was then
9 an enhanced charge based on some allegations of prior
10 convictions?

11 A Meaning.

12 Q The petty larceny, meaning was that an enhanced charge
13 as it goes to the misdemeanor charge?

14 A Yeah.

15 Q Okay. Now, when you came to Court on those two
16 indictments, on those two charges, did you go to trial or
17 did you plead guilty?

18 A I pled -- I went to trial.

19 Q Okay. And were there other charges involved in that
20 trial?

21 A Yes, sir.

22 Q And were those dismissed, found not guilty?

23 A Yes.

24 Q Okay. The two charges that we're talking about today,
25 the burglary second and the petty larceny, were you

Robert Upchurch - Direct examination
by Mr. Shabel

1 represented by the same attorney?

2 A Yes.

3 Q Who was that attorney?

4 A Roger Poole.

5 Q Okay. And did you meet with him prior to going to
6 trial on several occasions?

7 A Yes, I did.

8 Q Did you discuss various trial strategies?

9 A Yes.

10 Q Did you discuss the elements of the crimes that you'd
11 been charged with?

12 A No.

13 Q Okay. At any point prior to going to trial were you --
14 did Mr. Poole advise you of the elements of second degree
15 burglary?

16 A I don't believe so.

17 Q Okay. Now that you've had time to look back, have you
18 done some research on your own?

19 A Yes.

20 Q Are you now familiar with the elements of what it takes
21 to commit a second degree burglary?

22 A Yes, I am.

23 Q For the record, the conviction for burglary, was that
24 based on a home or a business?

25 A A business.

Robert Upchurch - Direct examination
by Mr. Shabel

1 Q Okay. Do you remember the name of the business?

2 A Graybar.

3 Q All right. So, you were convicted under second degree
4 burglary for breaking into a building?

5 A Yes.

6 Q Okay. Are you aware of the term aggravated
7 circumstances?

8 A I am now.

9 Q Okay. From your understanding, what is your
10 understanding now of aggravated circumstances when it comes
11 to second degree burglary?

12 A Being at nighttime entering it with force.

13 Q And with a weapon?

14 A Yes.

15 Q In this particular case what was the State alleging was
16 the aggravating circumstance for second degree burglary?

17 A That it happened at nighttime.

18 Q Okay. Now, were you, in fact, indicted by the Grand
19 Jury for second degree burglary to the best of your
20 knowledge?

21 A Yes.

22 Q And have you seen the indictment that was presented
23 against you?

24 A I've seen it one, after I was convicted.

25 Q And would you recognize that indictment if you saw it

Robert Upchurch - Direct examination
by Mr. Shabel

1 today?

2 A Yes.

3 MR. SHABEL: May I approach the witness?

4 THE COURT: You may.

5 (WHEREUPON, an indictment was marked as Applicant's
6 Exhibit No. 1 for identification purposes only at this
7 time.)

8 Q Mr. Upchurch, I'm handing you what the court reporter
9 has marked as Applicant's Exhibit No. 1.

10 Is that, in fact, the indictment that was presented to
11 you for burglary in the second degree?

12 A Yes.

13 Q Is there anything on that indictment about it happening
14 at nighttime?

15 A No.

16 Q It says you unlawfully entered a building of a
17 business, Graybar Electrical Company, without consent and
18 intending to commit a crime therein?

19 A Yes, sir.

20 Q And then it cites the statute for second degree
21 burglary?

22 A Yes.

23 Q Nothing about entering at nighttime?

24 A No, sir.

25 Q Nothing about entering with force?

Robert Upchurch - Direct examination
by Mr. Shabel

1 A No.

2 Q Nothing about entering with a weapon?

3 A No.

4 MR. SHABEL: Your Honor, I offer this as Applicant's 1.

5 THE COURT: Any objection?

6 MS. WILSON: No, Your Honor..

7 THE COURT: Without objection it will be admitted as so
8 marked.

9 MR. SHABEL: Thank you.

10 (WHEREUPON, Applicant's Exhibit No. 1 was received into
11 evidence at this time.)

12 Q Mr. Upchurch, have you now had an opportunity to
13 research the matter, and do you believe that indictment to
14 be defective?

15 A Yes, I do.

16 Q Based on the fact that it does not talk about it being
17 at nighttime?

18 A That is correct.

19 Q What should the indictment have been for if you just go
20 by the letter of the indictment?

21 A Third degree burglary.

22 Q And you under -- and you have knowledge of what third
23 degree burglary should be?

24 A Yes.

25 Q Did your attorney -- I'm gonna ask two different

Robert Upchurch - Direct examination
by Mr. Shabel

1 questions two different ways.

2 At any point during the trial of your case did
3 Mr. Poole object to the indictment or bring up the defect in
4 the indictment to the Court?

5 A After the Court, after the State rested.

6 Q Okay. So, he did bring it up?

7 A Yes.

8 Q And what was the argument that the State used in---

9 A They cited---

10 Q ---attempting to attack that argument?

11 A They cited State versus Gentry---

12 Q Okay.

13 A ---that all defects, all challenges to the defects of
14 the indictment have to be done before the jury was sworn.

15 Q Okay. And did your attorney make any motions with
16 respect to the defect in the indictment prior to the jury
17 being sworn in?

18 A No.

19 Q Did he show you any written indictments or, excuse me,
20 any written motions that he was gonna present to the Court
21 to attempt to quash that indictment?

22 A No, he did not.

23 Q So, to your knowledge, he did nothing to attack the
24 defect in that indictment?

25 A That is correct.

Robert Upchurch - Direct examination
by Mr. Shabel

1 Q And did that prejudice you at trial?

2 A Yes.

3 Q From your understanding, what's the maximum you can
4 receive on a second degree burglary?

5 A Fifteen years.

6 Q From your understanding, what's the maximum you can
7 receive on a third degree burglary?

8 A Five years.

9 Q Okay. Now, let's talk about the trial itself.

10 Among those who testified at trial, was a, was one of
11 the individuals who testified against you a gentleman by the
12 name of Justin Durham?

13 A That is correct.

14 Q And without going into too much detail, was he the guy
15 that was with you when you were found by police when you
16 were arrested?

17 A Yes.

18 Q And did he testify at trial as to what happened that
19 night?

20 A Yes, he did.

21 Q What did he testify to at trial?

22 A He claimed -- he stated, testified for the State that
23 he bought a laptop computer off of me.

24 Q Did he testify that he offered him a chance to buy a
25 laptop?

Robert Upchurch - Direct examination
by Mr. Shabel

1 A Yes.

2 Q And did he testify at trial that he was willing to buy
3 the laptop?

4 A Yes.

5 Q A couple -- about thirty, forty dollars I think was the
6 testimony?

7 A Twenty to thirty dollars.

8 Q Okay. So, he testified at trial that you asked him to
9 buy the laptop and he said he'd buy it and you negotiated a
10 price?

11 A That is correct.

12 Q All right. Was there a search warrant issued for the
13 home where you were found that night?

14 A Yes, there was.

15 Q Okay. First of all, is that your home?

16 A No.

17 Q Was it an acquaintance's home?

18 A It was a friend, yes, sir.

19 Q Okay. Now, have you seen the affidavit that was
20 presented by law enforcement in order to obtain that search
21 warrant?

22 A No, I did not.

23 Q Okay. Did you---

24 A Not at that time.

25 Q At that time?

Robert Upchurch - Direct examination
by Mr. Shabel

1 A No.

2 Q Have you since seen it?

3 A Yes.

4 Q Have you since been provided with a copy?

5 A Yes.

6 Q And would you recognize that if you saw it today?

7 A Yes.

8 MR. SHABEL: May I approach the witness, Your Honor?

9 THE COURT: You may.

10 (WHEREUPON, an affidavit was marked as Applicant's
11 Exhibit No. 2 for identification purposes only at this
12 time.)

13 Q Mr. Upchurch, I'm handing you what is been marked by
14 the court reporter as Applicant's Exhibit No. 2.

15 Do you recognize that document?

16 A Yes, I do.

17 Q Is that, in fact, the, a copy of the affidavit that was
18 submitted by law enforcement in order to obtain the search
19 warrant?

20 A Yes.

21 Q Okay. Now, first of all, what color skin was this
22 gentleman?

23 A He was white.

24 Q Okay. And I think there were allegations he was
25 wearing gray and you were wearing orange?

Robert Upchurch - Direct examination
by Mr. Shabel

1 A Yes.

2 Q Okay. Would you read for me the last four lines
3 beginning with the white male subject, the last four lines
4 of the affidavit, of the reason for affiant's belief that
5 the property sought is on the subject premises?

6 A The white male subject advised in a statement that the
7 black male approached him about purchasing a laptop
8 computer.

9 Q Okay.

10 A He advised that he wasn't interested and that he needed
11 a place to sleep. He advised that the black male took him
12 to Oscar Wesley's apartment and shortly afterwards the
13 police arrived.

14 Q Okay.

15 A He also advised that the computer was inside Oscar's
16 apartment.

17 Q Thank you.

18 Offer this as Applicant's Exhibit No. 2.

19 THE COURT: Any objection?

20 MS. WILSON: No, Your Honor.

21 THE COURT: Without objection it will be marked and
22 entered.

23 (WHEREUPON, Applicant's Exhibit No. 2 was received into
24 evidence at this time.)

25 Q Mr. Upchurch, was that witness' testimony at trial the

Robert Upchurch - Direct examination
by Mr. Shabel

1 same or different than what's listed in that affidavit for
2 the search warrant?

3 A It is different.

4 Q How is it different?

5 A In the affidavit he stated that he wasn't interested in
6 buying a laptop.

7 Q Right.

8 A But although it -- at trial he said that he did buy it
9 from him.

10 Q Now, understanding, of course, that that's not the
11 affidavit of the same individual, correct?

12 A Yes.

13 Q That's the affidavit of the officer who got the search
14 warrant---

15 A That is correct.

16 Q ---right?

17 He also testified at trial, correct?

18 A Yes.

19 Q All right. And when he testified at trial, did he talk
20 about that statement?

21 A No, he did not.

22 Q Okay. Did he talk about whether or not this particular
23 witness, Mr. Durham, excuse me, I apologize, yes, Mr.

24 Durham, made that statement, made a statement to him in
25 writing or orally?

Robert Upchurch - Direct examination
by Mr. Shabel

1 A He didn't say anything about it.

2 Q Okay. Did Mr. Durham testify as to whether or not he
3 made an oral or written statement?

4 A Yes, he testified that he gave a written statement.

5 Q At any point in your representation by Mr. Poole were
6 you shown a copy of a written statement by Mr. Durham?

7 A No, I was not.

8 Q Did your attorney at trial cross-examine either
9 Mr. Durham or Mr. Willingham, who did the search warrant
10 affidavit, about the differences between Mr. Durham's
11 testimony and what is on that search warrant affidavit?

12 A No, he did not.

13 Q Did Mr. Willingham actually testify a second time at
14 this trial?

15 A Yes, he did.

16 Q And did that second form of testimony take place after
17 Mr. Durham testified?

18 A Yes.

19 Q So, did the -- did Mr. Poole have an additional
20 opportunity to cross-examine Mr. Willingham---

21 A Yes.

22 Q ---about this statement?

23 A Yes, he did.

24 Q Did he take advantage?

25 A No, he did not.

Robert Upchurch - Direct examination
by Mr. Shabel

1 Q Do you believe that discrepancy, that error prejudiced
2 you at trial?

3 A Yes, I believe so.

4 Q Did the jury get a chance to hear the difference
5 between the two statements?

6 A No, they did not.

7 Q Did he even ask anybody did you tell officer Willingham
8 this?

9 A No.

10 Q Did he ever ask Officer Willingham did you get a
11 statement from Mr. Durham?

12 A No, he did not.

13 Q Did he address the difference at all?

14 A No.

15 Q Now, did your attorney make any motions to quash that
16 search warrant either before trial or during trial?

17 A No, he did not.

18 Q Did he let the evidence come in without challenging it?

19 A That is correct.

20 Q What sort of problems did you have with that looking
21 back?

22 A I had a problem with it because his, cause his both --
23 both his stories contradicted each other---

24 Q Okay.

25 A ---and that evidence was admitted. By him, by him not

Robert Upchurch - Direct examination
by Mr. Shabel

1 objecting, that evidence was admitted and used against me in
2 trial.

3 Q Were you ever shown a chain of custody form?

4 A No, I was not.

5 Q Were you ever advised that there was proper chain of
6 custody by your lawyer?

7 A No.

8 Q Did you have some concerns about the chain of custody?

9 A Yes, I did.

10 Q What chain -- what concerns did you have?

11 A That there wasn't a complete chain of custody form at
12 trial.

13 Q Okay. And---

14 THE COURT: What items are we talking about here?

15 MR. SHABEL: Your Honor, there was some testimony at
16 trial about a laptop and some cords that were seized in
17 accordance with the search warrant.

18 THE COURT: Yes, sir.

19 MR. SHABEL: Mr. Upchurch's concern was that he was
20 never provided or never shown any chain of custody forms and
21 that his---

22 THE COURT: So, you're contending that there should of
23 been a chain of custody for a laptop?

24 MR. SHABEL: A chain of custody for a laptop because it
25 was seized pursuant to a search warrant.

Robert Upchurch - Direct examination
by Mr. Shabel

1 THE COURT: Go ahead.

2 Q Going back a little bit to Mr. Durham's testimony,
3 again, you were never shown that written statement that he
4 made?

5 A No, I was not.

6 Q Did your attorney cross-examine either him or the
7 officer about that written statement?

8 A No, he did not.

9 Q Did your attorney ever question anybody about the
10 existence of that statement?

11 A No, he did not.

12 Q And you believe that could of potentially been
13 exculpatory evidence?

14 A Yes, I do.

15 Q So, to your knowledge, have you seen proof that that
16 statement even exists?

17 A No, I have not.

18 Q And at this time are you now serving a concurrent
19 sentence for 15 years based on that trial?

20 A Yes, I am.

21 Q And do you believe you had ineffective assistance of
22 counsel at that trial?

23 A Yes, I do.

24 Q Are you asking this Court to grant you post-conviction
25 relief?

Robert Upchurch - Direct examination
by Mr. Shabel

1 A Yes.

2 Q Do you understand, Mr. Upchurch, that if this Court
3 grants your application that you're going to get a new trial
4 as to both of these charges?

5 A Yes.

6 Q Do you understand that this is not an opportunity for
7 you to have any modification of sentencing, but that if you
8 get a new trial you could be subject to a brand new trial
9 and could suffer, could, could face a greater sentence or a
10 lesser sentence or no sentence at all?

11 Do you understand that?

12 A Yes.

13 Q Knowing that risk, do you still wish this Court to
14 grant you post-conviction relief?

15 A Yes, I do.

16 Q Sir, I have no further questions for you at this time.
17 Please answer any questions the State may have for you.

18 THE COURT: All right. Yes, ma'am.

19 MS. WILSON: Thank you.

20 CROSS-EXAMINATION

21 BY MS. WILSON:

22 Q Mr. Upchurch, Mr. Upchurch, you testified that your
23 indictment is invalid because it doesn't specify or your
24 indictment has no aggravating circumstances?

25 A Yes.

Robert Upchurch - Cross-examination
by Ms. Wilson

1 Q Okay. And your -- the aggravating circumstances that
2 you were aware of was that these, these occurrences took
3 place at night?

4 A Yes.

5 Q What, what prejudice resulted from those words not
6 being on your indictment?

7 A That they weren't -- that there were elements of the
8 crime. So, they weren't on that indictment and that
9 prejudiced me.

10 Q Were you aware of the elements of the crime when you
11 proceeded to trial with Mr. Poole?

12 A No.

13 Q Do you recall -- do you recall at trial when Mr. Durham
14 testified?

15 Do you recall his testimony?

16 A Not word for word, but I, I remember some of it.

17 Q Okay. Do you recall Mr. Poole, your attorney,
18 cross-examining Mr. Durham on the, on the stand, witness
19 stand?

20 A Yes, uh-huh. (Affirmative).

21 Q Do you also recall Mr. Poole trying to impeach, to
22 impeach his credibility related to some drug usage?

23 A No.

24 MS. WILSON: Your Honor, may I approach the witness?

25 THE COURT: You certainly may.

Robert Upchurch - Cross-examination
by Ms. Wilson

1 Q Turn to Page 109.

2 I've just handed the witness a copy of his trial
3 transcript.

4 THE COURT: Yes, you may.

5 MR. SHABEL: Can you repeat the page number please?

6 MS. WILSON: 109.

7 MR. SHABEL: Thank you.

8 A Okay.

9 Q Okay. We're on Page 109, and I'm gonna read for you
10 starting at Line 18.

11 Are you with me there?

12 A Yeah.

13 Q Okay. And this is the question -- this is the back and
14 forth between Mr. Poole and Mr. Durham.

15 Mr. Poole says okay. How did you end up in
16 Spartanburg, and Mr. Durham says well, I was on some drugs
17 at the time to tell the truth. Mr. Durham says okay, what
18 kind of drugs, and the -- Mr. Durham says cocaine.

19 Okay. Okay. Let's go to Page 110, and on, on 110, at
20 Line 15, Mr., Mr. Poole starts off what other drugs, and
21 Mr. Durham says that was it. Mr. Poole says alcohol.

22 Mr. Durham says alcohol, weed, crack, whatever.

23 Is that what the record, your record of the transcript
24 reflects?

25 A Yes.

Robert Upchurch - Cross-examination
by Ms. Wilson

1 Q Do you remember that discussion that day at trial?

2 A I remember some of it.

3 Q And do you, in general, remember a discussion with Mr.
4 Poole, between Mr. Poole and Mr. Durham about Mr. Durham's
5 drug usage that night?

6 A Yes.

7 Q Okay. And do you think that that was an attempt by Mr.
8 Poole to impeach Mr. Durham's credibility on the stand?

9 A No.

10 Q Do you think that -- why do you think Mr. Poole asked
11 those questions to Mr. Durham?

12 A Because Mr. Durham was saying that he was drinking beer
13 and doing drugs.

14 Q Could you turn to Page 116?

15 A Uh-huh. (Affirmative).

16 Q And I'm, I'm -- I am -- can we flip back to 115, I'm
17 sorry, and we're gonna start at, we're gonna start at Line
18 21. And this is where Mr. Poole is talks, still talking to
19 Mr. Durham on cross-examination.

20 He says you told the police everything you told us
21 today and he says yes, sir, and then he says did you tell
22 them about buying the crack. And then he says yes, sir, I
23 don't know if I mentioned the crack, but I'm mentioning it,
24 mentioning it now. And he says -- Mr. Poole says did you
25 tell them about buying the laptop for \$30, and Mr. Durham

Robert Upchurch - Cross-examination
by Ms. Wilson

1 says twenty to thirty, yes, sir. And then Mr. Poole said
2 did you tell them that, and he says yes, sir, I have the
3 statement paper on it.

4 Is that where you were referencing that Mr. Durham made
5 a, had a, some type of written statement?

6 Is that what you were referencing?

7 A Yes.

8 Q Okay. And is there any indication from Mr., from Mr.
9 Durham's testimony that we just read that it was a written
10 statement at the -- go ahead.

11 A It says a statement paper. So, I'm, I'm taking it as
12 being a written statement. Also the affidavit, the search
13 warrant affidavit said that a written statement -- he --
14 they took a written statement from Justin Durham.

15 Q Okay. And could it also have been possible, from this
16 statement, that he had a copy of his statement that he gave
17 orally to the officer that day?

18 A There was nothing said about it being oral.

19 Q Thank you.

20 I don't have any further questions, Your Honor.

21 THE COURT: Yes, sir, anything further?

22 MR. SHABEL: Briefly, Your Honor.

23 REDIRECT EXAMINATION

24 BY MR. SHABEL:

25 Q You still have Page 115 of the transcript---

Robert Upchurch - Redirect examination
by Mr. Shabel

1 A okay.

2 Q ---open?

3 A Yes, sir.

4 Q okay. I think she, the assistant attorney general read
5 from Line 21 where your attorney asked you told the police
6 everything you told us today, and his answer was yes, sir.

7 Based on that search warrant affidavit, do you believe
8 that that might not have been a true statement?

9 A Yes, I do believe.

10 MR. SHABEL: That's all I have, Your Honor.

11 THE COURT: Anything further, Ms. Wilson?

12 MS. WILSON: Nothing further, Your Honor.

13 THE COURT: You may step down, sir.

14 Applicant may call its next witness.

15 MR. SHABEL: Your Honor, I don't have any other
16 witnesses. I do have case law to present. I don't know if
17 you want that now or at the close.

18 THE COURT: We'll take some argument once we complete
19 the evidence.

20 MR. SHABEL: Thank you. Then I have nothing further at
21 this time.

22 THE COURT: Thank you.

23 State may call its witnesses.

24 MS. WILSON: Your Honor, I'd like to call Mr. Roger
25 Poole.

Roger Poole - Direct examination
by Ms. Wilson

1 THE COURT: Come forward, sir, and be sworn.

2 ROGER POOLE, having been first duly
3 sworn, testified as follows:

4 THE COURT: Have a seat. Once you're seated, state
5 your name please.

6 WITNESS: Roger Poole.

7 THE COURT: You may proceed.

8 DIRECT EXAMINATION

9 BY MS. WILSON:

10 Q Mr. Poole, how long have you been practicing law?

11 A Thirty-three years.

12 Q And has the majority of that been in criminal law?

13 A Yes.

14 Q Are were you appointed or retained to represent Mr.
15 Upchurch?

16 A I was employed in the Public Defender's Office and his
17 case was assigned to me.

18 Q All right. Do you recall objecting to the indictment,
19 to Mr. Upchurch's indictment for one of the burglary second
20 charges?

21 A I did not object to the indictment. I did raise the
22 issue at the end of the State's case, but that was the only
23 time I raised the issue.

24 Q Do you think that, had you requested, had you objected
25 to Mr. Upchurch's indictment at the beginning prior to the,

Roger Poole - Direct examination
by Ms. Wilson

1 the jury being brought in, that it, that he would have been
2 reindicted?

3 A Yes, absolutely.

4 MS. WILSON: Beg the Court's indulgence.

5 THE COURT: Yes.

6 (Pause.)

7 Q Mr. Poole, did you discover any written statement from
8 Mr. Durham?

9 A I was looking through the file when this issue was
10 brought up a moment ago, and I don't see a written statement
11 in there. I'd be glad to look at it if one exists. But I
12 don't have one in my file.

13 Q And were you aware if -- were you aware of any issues
14 about, about the search warrant for the apartment where Mr.
15 Upchurch was found?

16 A No, not really. It never crossed my mind that there
17 was a problem with it.

18 Q Did you review the elements -- with Mr. Upchurch, did
19 you review the elements of burg, second degree burglary and
20 the larceny charges that he were, he was facing prior to
21 trial?

22 A We talked about these cases at length prior to the
23 trial and, of course, during the trial. I would see him in
24 the jail. I saw him at his preliminary hearing. We talked
25 about the facts, we talked about the law, and necessarily

Roger Poole - Direct examination
by Ms. Wilson

1 about the elements of, of all of the crimes. So, we talked
2 about every aspect of the facts and the law to the best of
3 my ability and he seemed to understand everything.

4 Q Did you see any reason, at, at trial, to attack any
5 testimony given any or did you see conflicting testimony
6 given by Mr. Durham at trial while you were cross-examining
7 him?

8 A Did I see any conflicting---

9 Q Let me rephrase that for you.

10 A Yeah. Okay.

11 Q Did you have any evidence of Mr. Durham giving any
12 conflicting statements?

13 A It wasn't in the forefront of my attention, I'll tell
14 you that. I wasn't aware of any statements or
15 inconsistencies between what he had said or others or
16 whatever.

17 Q Was it your strategy to impeach Mr. Durham's
18 credibility at trial when you were discussing his drug
19 history?

20 A Well certainly. It was necessary to try to make him
21 out to be as bad of a character as possible.

22 Q I don't have any further questions of this witness,
23 Your Honor.

24 THE COURT: You may cross-examine.

25 MR. SHABEL: May it please the Court?

Roger Poole - Cross-examination
by Mr. Shabel

1 THE COURT: Yes, sir.

2 CROSS-EXAMINATION

3 BY MR. SHABEL:

4 Q Mr. Poole, I don't know how much of your file you
5 brought with you, and I recognize I didn't ask you or
6 subpoena you to bring your file with you, but do you recall
7 the actual initial incident report that was filed in the
8 case back in November of 2009?

9 A I'll be glad to take a look at it, Mr. Shabel.

10 MR. SHABEL: Beg the Court's brief indulgence, Your
11 Honor.

12 THE COURT: Yes, ma'am. Yes, sir. Excuse me.

13 (Pause.)

14 MR. SHABEL: If I may approach the witness, Your Honor?

15 THE COURT: You may.

16 (WHEREUPON, an incident report was marked as
17 Applicant's Exhibit No. 3 for identification purposes only
18 at this time.)

19 Q Mr. Poole, I'm handing you what's been marked as
20 Applicant's 3.

21 From your recollection of your case, and I know it's on
22 double sided, but does that appear to be the initial police
23 report that was filed in the case against Mr. Upchurch?

24 A Yeah, just looking at it---

25 Q Yeah.

Roger Poole - Cross-examination
by Mr. Shabel

1 A ---it looks like the format, yes, sir.

2 Q Okay. On the back, on the back page where it says
3 narrative one, continuation Page 1, would you read the
4 beginning of the second paragraph?

5 A Upon speaking further with Mr. Durham, Officer Pruett
6 and I advised Mr. Durham of his rights and took a statement,
7 which indicated that a black laptop was hidden in a white
8 plastic bag.

9 Q Thank you.

10 Your Honor, I offer this as Applicant's 3.

11 THE COURT: Any objection?

12 MS. WILSON: No objection, Your Honor.

13 THE COURT: Be received as marked, and mark it please.

14 MR. SHABEL: It is marked already, Your Honor.

15 THE COURT: Okay. Thank you.

16 (WHEREUPON, Applicant's Exhibit No. 3 was received into
17 evidence at this time.)

18 Q And I'll show the witness Applicant's 2.

19 Mr. Poole, were you also aware of the affidavit that
20 led to the search warrant that found the laptop?

21 A Yes.

22 Q And now having looked back at this, you are aware that
23 both the police report and the affidavit for the search
24 warrant reference a statement from Mr. Durham to police?

25 A Yes.

Roger Poole - Cross-examination
by Mr. Shabel

1 Q Okay. And you would agree that the affidavit for the
2 search warrant talks about him saying he didn't want the
3 laptop, he wasn't interested in the laptop?

4 A That's what it says.

5 Q Okay. You would also -- thank you.

6 You would also agree, having looked back now, that, at
7 a trial, Mr. Durham testified to something completely
8 different?

9 A Yes, he did.

10 Q That would of been an important thing to go over with
11 him, would it not?

12 A It perhaps may have.

13 Q Okay.

14 A That's one of the -- that's the benefit of the
15 hindsight we have in these cases.

16 Q Sure.

17 Part of the credibility attack on Mr. Durham, correct?

18 A Right.

19 Q All right. And you agree that, in all likelihood, more
20 likely than not, you had copies of both of those documents
21 in your file at the start of your trial?

22 A Sure.

23 Q All right. Did you ever make any inquiries, with law
24 enforcement or the Solicitor's Office, as to the existence
25 of a written statement by Mr. Durham to police?

Roger Poole - Cross-examination
by Mr. Shabel

1 A Not that I recall.

2 MR. SHABEL: That's all I have for the witness, Your
3 Honor.

4 THE COURT: Anything further?

5 MS. WILSON: No, Your Honor.

6 THE COURT: You may step down.

7 State wish to call additional witnesses?

8 MS. WILSON: No, no further witnesses, Your Honor.

9 MR. SHABEL: Your Honor, beg the Court's indulgence.

10 THE COURT: Yes, sir.

11 (Pause.)

12 MR. SHABEL: Would the Court -- Your Honor, I
13 apologize. I forgot one specific line of cross-examination.

14 MS. WILSON: As I did, Your Honor.

15 THE COURT: Any objection?

16 MS. WILSON: No, Your Honor.

17 THE COURT: All right. Mr. Poole, resume the stand.
18 You remain under oath.

19 MR. SHABEL: Both attorneys did the same. We
20 apologize.

21 THE COURT: They're not quite through with you.

22 ROGER POOLE, having been previously
23 sworn, testified as follows:

24 CROSS-EXAMINATION

25 BY MR. SHABEL:

Roger Poole - Cross-examination
by Mr. Shabel

1 Q Mr. Poole, very briefly, from your recollection, did
2 Mr. Upchurch have two prior convictions for property crimes?

3 A Yes.

4 Q Do you know -- do you remember what those were off the
5 top of your head?

6 A No, I don't remember independently. I just remember
7 reading it in the transcript.

8 Q Okay.

9 A But we had to review all that---

10 Q Okay.

11 A ---and took a little time to go through his record---

12 Q Okay.

13 A ---to make sure that that was proper.

14 Q And were you shown his record during that -- I think
15 there was a lunch break or something on day two.

16 A That's right.

17 Q Okay. And from your recollection, his record indicated
18 that there were two prior property crimes?

19 A That is correct.

20 Q Does the file that you have with you today have that
21 record with you?

22 A I'm not sure that it does.

23 Q Okay. Thank you. That's all that I have.
24 Thank you for the Court's indulgence.

25 THE COURT: Yes, ma'am.

Roger Poole - Redirect examination
by Ms. Wilson

1 MS. WILSON: One more question, Your Honor.

2 REDIRECT EXAMINATION

3 BY MS. WILSON:

4 Q Mr. Poole, did you file a Brady and/or a Rule 5 motion
5 with the Court---

6 A Yes.

7 Q ---in this case?

8 A Yes, we did.

9 Q Thank you.

10 THE COURT: Anything further?

11 MR. SHABEL: No, thank you.

12 MS. WILSON: No, sir.

13 THE COURT: You may step down.

14 MR. SHABEL: We mean it this time.

15 THE COURT: All right. You may argue for your client,
16 counsel.

17 MR. SHABEL: If it please the Court?

18 If I may approach, I do have two cases for the Court's
19 consideration.

20 THE COURT: Yes.

21 MR. SHABEL: We mentioned State v. Gentry, and I'm sure
22 the Court is familiar with that.

23 THE COURT: You can pass that up.

24 MR. SHABEL: So, I will not bother handing the Court an
25 extra copy of that.

1 But the two cases I'm presenting are both very relevant
2 to this case insofar as they deal with the subject jury, the
3 matter of jurisdiction with the Court with respect to
4 burglary indictments that are both post-conviction relief
5 applications, and they're both cases in which the Supreme
6 Court has, in essence, reversed the decision of the Trial
7 Court which denied PCR. So, in essence, granted a
8 post-conviction relief.

9 One is Browning versus State, 465 S.E.2d 358, and the
10 other is, 313, 513 S.E. 2d 814, which is Windehower versus
11 State. In essence, I'll highlight Browning. Both of them
12 were guilty pleas. But, in Browning, very similar
13 circumstance. He pled guilty to second degree burglary.
14 The, the indictment itself did not have the enhancement
15 factor, did not have the element of the aggravating
16 circumstances of it being at night, and because of that
17 defect the Court found that the Court did not have subject
18 matter jurisdiction to even accept the plea.

19 Windehower goes into another statute that's relevant in
20 this case, which is South Carolina Code Section 17-19-100
21 which allows for the oral amendment of indictments under
22 certain circumstances if such indictment, amendment does not
23 change the nature of the offense charged. In Windehower the
24 Supreme Court ruled that, by leaving out the enhancing
25 factor that burglary being at night, that does, in fact,

1 change the nature of the offense charged, and is very
2 relevant to the charge that needs to be made. Therefore,
3 again, the Court had no subject matter jurisdiction to
4 accept the plea of burglary second and granted
5 post-conviction relief because the attorney of record did
6 not move---

7 THE COURT: All right. Both of these, and I've just,
8 just gone over them, are pre-Gentry.

9 MR. SHABEL: They are pre-Gentry, Your Honor.

10 THE COURT: And, of course, pre-Gentry cases allowed
11 you to attack the jurisdiction of the Court through
12 post-conviction relief.

13 MR. SHABEL: Correct.

14 THE COURT: Post-Gentry you're not allowed to do that.

15 MR. SHABEL: That's correct, and I think, had there
16 been a plea, had this been a plea, I don't think these cases
17 would be relevant at all. However---

18 THE COURT: I understand that, but I can understand
19 your argument with respect to the attorney should of
20 objected and maybe that was defective.

21 MR. SHABEL: That's correct, Your Honor.

22 THE COURT: But none of these cases are really directly
23 on point given the post-Gentry.

24 MR. SHABEL: There have been no cases, to my research
25 and to my knowledge, that are directly on point post-Gentry,

1 but it does give a cite---

2 THE COURT: Where someone's failed to object to a
3 defective indictment, allowed the case to go forward, and,
4 therefore, Court does have jurisdiction and under Gentry.

5 MR. SHABEL: That's correct.

6 THE COURT: And there -- so, there's no jurisdictional
7 objection to, that's been waived.

8 MR. SHABEL: That's correct.

9 THE COURT: All right.

10 MR. SHABEL: What we have is the post-conviction relief
11 argument that his failure to object pursuant to Gentry and
12 pursuant to the case progeny that I just mentioned to the
13 Court prejudice by client and makes my client eligible for
14 post-conviction relief.

15 THE COURT: Do you want to discuss the statement
16 situation?

17 MR. SHABEL: And, Your Honor, I think Mr. Poole did
18 mention and did acknowledge at trial that he had all the
19 information to potentially cross-examine him on two very
20 very different statements. One in which doesn't implicate
21 him at all in any purchase of stolen goods, and one which
22 the testimony absolutely implicates him. They're two very
23 different statements. He didn't attack this witness. I
24 think that was a key witness in this matter because it was
25 the witness who---

1 THE COURT: Well, what -- he did attack the witness.
2 He just didn't attack him on that.

3 MR. SHABEL: He didn't attack him on that very critical
4 issue, Your Honor, and that failure to attack---

5 THE COURT: But the witness' credibility was attacked
6 it does appear.

7 MR. SHABEL: It was attacked. It was attacked based on
8 drug use, but it was not attacked, not attacked -- it was
9 not attacked based on truthfulness of the statements, and I
10 think that's a much different credibility attack.

11 THE COURT: I'll hear from the State.

12 MS. WILSON: Yes, Your Honor.

13 Related, related to the ineffective, ineffective,
14 related to the invalid, invalidities, sorry, of the
15 indictment against Mr. Upchurch, it's the State's position
16 that no prejudice resulted, but I will admit, Your Honor,
17 that I'd like to do a little additional research because
18 this issue was not specifically pled in the applicant's
19 post-conviction relief application.

20 However, Your Honor, it's the State's position that we
21 agree with the Court that the issues discussed in Gentry go
22 to notice and not the subject matter jurisdiction of the
23 Court when it comes to those indictment issues.

24 When it comes to the cross-examination of the witness
25 Mr. Durham, there was no -- counsel testified that there was

1 no evidence of any conflicting statements that Mr. Durham
2 had made, and it's the State's, State's position that he
3 effectively cross-examined Mr. Durham and impeached his
4 credibility, credibility, and counsel says that, you know,
5 he didn't effectively impeach his credibility as to, as to
6 truthfulness, but he clearly tried to point out Mr. Durham
7 to be a drug user who may have had something to gain from
8 this particular statement.

9 So, I think that was effective and went to his
10 credibility. It's the State's request to the Court that
11 they deny Mr. Upchurch's post-conviction relief application,
12 and I will look into the indictment issue further and
13 provide a memo to the Court.

14 THE COURT: All right. If there's any case law from
15 other jurisdictions where it follows the same reasoning
16 that's followed in Gentry, which is that once the case, the
17 jury's sworn, the trial starts, all indictment defects are
18 waived, if there's any cases that are similar to that from
19 other jurisdictions, I'd entertain those as well because
20 surely somewhere out there that's happened I would think.

21 MS. WILSON: Yes, Your Honor. I will look.

22 MR. SHABEL: Large dictate, Your Honor.

23 THE COURT: Yes.

24 So, I'll give you some time to take a look. I'll give
25 you two weeks to submit any additional authority on either

1 side.

2 MR. SHABEL: Thank you, Your Honor.

3 THE COURT: All right.

4 MS. WILSON: Thank you, Your Honor.

5 THE COURT: Thank you.

6

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8 * * *END OF REQUESTED TRANSCRIPT OF RECORD* * *

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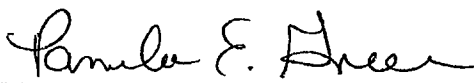
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C E R T I F I C A T E

I, Pamela E. Green, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas Nonjury for Spartanburg County, South Carolina, on the 12th day of June, 2012.

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

November 16th, 2012



PAMELA E. GREEN, Court Reporter

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

INDICTMENT

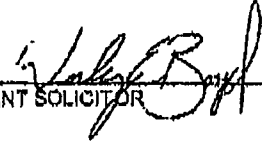
At a Court of General Sessions, convened on JAN 14 2010 the
Grand Jurors of Spartanburg County present upon their oath:

BURGLARY, SECOND DEGREE
(Business)

That Robert Edgar Upchurch, Jr., did in Spartanburg County on or about November 18, 2007, willfully and unlawfully enter without consent and with intent to commit a crime therein, to wit: a business, Graybar Electrical Co. located at 200 East Daniel Morgan Avenue, Spartanburg, South Carolina, without consent and intending to commit a crime therein, in violation of §16-11-312, *THE CODE OF LAWS OF SOUTH CAROLINA*, (1976 as amended).



Against the peace and dignity of the State, and contrary to the statute in such case made and provided,


ASSISTANT SOLICITOR

STATE OF SOUTH CAROLINA

AFFIDAVIT

COUNTY OF SPARTANBURG, SCPersonally appeared before me, one Sgt. Dale Winningham

Who, being duly sworn, says that there is probable cause to believe that certain property subject to seizure under provisions of Section 17-13-140, 1976 Code of Laws of South Carolina, as amended, is located on the following premises in this county. Spartanburg

DESCRIPTION OF PROPERTY SOUGHT

A black Lenovo Laptop Computer that belongs to the Graybar Company - 200 E. Daniel Morgan Ave.

DESCRIPTION OF PREMISES (PERSON, PLACE OR THING) TO BE SEARCHED

Fremont School Apartments -

Apartment

The multifamily structure is made of red brick with white trimming. Apartment number and a No Smoking Sign attached.

Door green with the

REASON FOR AFFIANT'S BELIEF THAT THE PROPERTY SOUGHT IS ON THE SUBJECT PREMISES

Officers received an alarm call at 200 E. Daniel Morgan Ave. and when they arrived discovered that it was burglarized. A perimeter was set up and the k-9 tracked to N. Church St. where it lost the scent. During the course of the perimeter being shifted, Sgt. Dale Winningham observed a white male in a grey sweater and a balding black male in an orange sweater. They were seen walking through the front lawn of the church at the corner of W. Pearl St. and Magnolia St. towards Magnolia St. Officer Winningham observed this while in route to his perimeter position. During the investigation it was determined that a portable radio and a black Lenovo Laptop Computer were stolen from the company. Officers discovered a radio in the parking lot of the County Administration Building that belonged to Graybar Company. Officers were later dispatched to Magnolia St after receiving an anonymous tip that two males (white male with a grey sweater and blue jeans/ black male bald with an orange sweater) entered the apartment building and one was carrying a laptop computer. The complainant advised that the subjects went in to Oscar Wesley's apartment # 10 and that they have been bringing stolen items into the building all week. Officers responded and discovered the two male subjects inside apartment of Fremont School Apartments. The white male subject advised in a statement that the black male approached him about purchasing a laptop computer. He advised that he wasn't interested and that he needed a place to sleep. He advised that the black male took him to Oscar Wesley's apartment and shortly afterwards the police arrived. He also advised that the computer was inside Oscar's apartment.

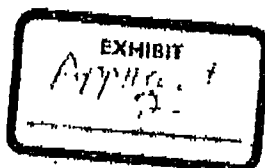
Sworn to and Subscribed before me

This

18 day of NOV, 2009

[Signature]

0435 Signature of Judge



This is a certified true copy
of the records kept in the
Court of the Clerk of Court

[Signature]
7-28-10

Address

[Signature]

245 W. Pearl St
Spartanburg, SC 29246

Phone

261-506-2123

11060906

[illegible]

Narrative 1 Continuation. Page 1

SPEAKING WITH THE WHITE MALE, HE WAS IDENTIFIED AS MR JUSTIN RYAN DURHAM. I OBSERVED FRESH CUTS ON MR DURHAM'S HANDS. THE OTHER MALE, IDENTIFIED AS ROBERT UPCHURCH JR, HAD A FRESH CUT TO HIS LEFT EAR AND GLASS DUST ON HIS HEAD, WHICH IS A RESULT OF FRESHLY BROKEN GLASS. I ALSO OBSERVED SMALL PIECES OF STICKY PLANTS ATTACHED TO HIS PANTS LEGS. AT THAT TIME THE APARTMENT WAS SECURED FOR A SEARCH WARRANT TO BE OBTAINED.

UPON SPEAKING FURTHER WITH MR DURHAM, OFFICER PRUITT AND I ADVISED MR DURHAM OF HIS RIGHTS AND TOOK A STATEMENT WHICH INDICATED THAT A BLACK LAPTOP WAS HIDDEN IN A WHITE PLASTIC BAG WHEN THE POLICE KNOCKED ON THE DOOR OF APARTMENT. MR DURHAM STATED THAT HE JUST MET MR UPCHURCH AND DID NOT KNOW WHERE THE LAPTOP CAME FROM.

SGT WINNINGHAM SECURED A SEARCH WARRANT FOR THE RESIDENCE WHICH WAS EXECUTED BY OFFICER BYRD, OFFICER PATZ, AND MYSELF. UPON LOOKING UNDER THE BED I FOUND A WHITE PLASTIC SAVE-A-LOT BAG WITH A BLACK LENOVO LAPTOP AND MISC CABLES INSIDE. UPON POWERING UP THE LAPTOP AND PRESSING CONTROL, ALT AND DELETE SIMULTANEOUSLY, AS INDICATED BY THE KEYHOLDER AT GREYBAR, A GREYBAR PRIVACY POLICY SCREEN APPEARED CONFIRMING THE LAPTOP TO BE STOLEN FROM THE BURGLARY SCENE. THE LAPTOP WAS PHOTOGRAPHED AND PLACED IN EVIDENCE AT CITY HALL. MR UPCHURCH WAS TRANSPORTED TO THE COUNTY JAIL FOR BOOKING.

APPROVED BY SGT D WINNINGHAM/ 11-18-2009 @ 0638 HRS

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	)	2011-CP-42-2084
Robert Edgar Upchurch, #342017,	)	
Applicant,	)	ORDER OF DISMISSAL
v.	)	
State of South Carolina,	)	
Respondent.	)	

This matter comes before the Court by way of an application for post-conviction relief (PCR) dated May 10, 2011. The Respondent made its return on May 2, 2012. An evidentiary hearing on the matter was convened on June 12, 2012 at the Spartanburg County Courthouse. The Applicant was present at the hearing and represented by Kenneth P. Shabel, Esquire. Ashleigh R. Wilson, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant testified at the hearing along with J. Roger Poole, Esquire. The Court had before it the trial transcript, the Spartanburg County Clerk of Court records, and the Applicant's records from the South Carolina Department of Corrections, the Applicant's application, the Respondent's return, and the Applicant's appellate records.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Spartanburg County Clerk of Court. The Applicant was indicted at the January 2010 term of the Spartanburg County

Handwritten signature/initials

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. Sec. 17-27-80 (2003).

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, "the burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002).

For the Applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984), Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052).

The Applicant was present and testified at his evidentiary hearing. The Applicant testified that he was represented by trial counsel and met with him several times prior to trial. The Applicant testified that he discussed his trial strategy with trial counsel, but was not advised on the elements of second-degree burglary. He testified that trial counsel should have objected to his second-degree burglary indictment prior to the jury being sworn. He testified that his indictment did not include the aggravating circumstance for second-degree burglary and that trial counsel should have objected to this before the jury was sworn and not during the Defense's motion for directed verdict. The Applicant testified further that as a result of counsel's failure to object he was prejudiced because he was unaware of the elements of the crime he was charged with.

The Applicant also testified that trial counsel should have brought up at trial Justin Durham's inconsistent statements. He testified that Durham, the State's witness, made inconsistent statements during his testimony at trial and that trial counsel did not address these inconsistencies during the trial. Lastly, the Applicant testified that he had not seen the affidavit for the search warrant of the acquaintances home where the stolen goods were found. The Applicant testified that trial counsel should have requested that the search warrant be quashed.

Trial counsel also testified at the Applicant's evidentiary hearing. Trial counsel testified that he has been practicing law for about thirty-three years and that he has lots of experience in criminal law. He also testified that he was appointed to represent the Applicant through the public defender's office. Counsel testified that he did not object to the indictment, but raised the issue on directed verdict. He testified that he did not object to

the indictment earlier because it is likely the State would have simply re-indicted the Applicant.

Counsel testified that he reviewed and discussed at length with the Applicant the elements of the crimes he was facing. He also testified that he was unaware of a written statement from Justin Durham and that he was unaware of any conflicting statements made by Durham at trial. He testified further that he impeached Durham's credibility at trial on cross-examination. Lastly, counsel testified that he did not see any objectionable issues regarding the search warrant.

This Court finds the Applicant's testimony is not credible, while also finding trial counsel's testimony is credible. This Court further finds trial counsel adequately conferred with the Applicant, conducted a proper investigation, and was thoroughly competent in his representation.

Failure to object to the sufficiency of the indictment prior to the swearing of the jury

This Court finds that the Applicant failed to meet his burden of proving trial counsel was ineffective for failing to object to the sufficiency of the indictment prior to the swearing of the jury. Our courts are understandably wary of second-guessing defense counsel's trial tactics. Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992). See also Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005) and McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003). The validity of counsel's strategy is viewed under an objective standard of reasonableness. Lounds v. State, 380 S.C. 454, 462, 60 S.E.2d 646, 659 (2008). The United States Supreme Court has cautioned that "every effort be made to eliminate the distorting effects of

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hindsight" and evaluate counsel's decisions at the time they were made. Strickland, 466 U.S. at 689, 104 S.Ct. at 2052.

This Court finds that trial counsel articulated a valid trial strategy for his failure to object to the sufficiency of the indictment prior to the swearing of the jury. Trial counsel gave credible testimony that he did not object to the sufficiency of the Applicant's second degree burglary charge indictment. Counsel testified that he did mention the insufficiency of the indictment during his argument for directed verdict, but that he did not object because had he objected it was likely the State would have just re-indicted the Applicant on the same charge to correct the omission. This Court finds that trial counsel articulated a valid trial strategy for failing to object to the insufficiency of the indictment. This Court finds that trial counsel's performance was reasonable under the circumstances because counsel did not think that objecting to the insufficiency of the Applicant's indictment would have had any appreciable affect on the outcome of the Applicant's trial. This Court finds that the Applicant has failed to prove that trial counsel's performance was deficient.

This Court finds further that even if trial counsel's performance was deficient, the Applicant has put forth no evidence to show that as a result of counsel's performance the outcome of his trial would have been different. The indictment is a notice document. State v. Gentry, 363 S.C. 93, 102, 610 S.E.2d 494, 500 (S.C. 2005). A challenge to the indictment on the ground of insufficiency must be made before the jury is sworn. Id. at 103. In determining whether an indictment meets the sufficiency standard, the court must look at the indictment with a practical eye in the view of all the surrounding circumstances. Id. The Supreme Court noted further that the sufficiency of an indictment is determined by



looking at (1) whether the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer and (2) whether it apprises the defense of the offense that is intended to be charged. Id. at 102.

Whether or not the indictment could be made more definite and certain is irrelevant. State v. Baker, 390 S.C. 56, 62, 700 S.E.2d 440, 442 (Ct. App. 2010) (citing Gentry, 363 at 102-103). An indictment passes legal muster when it charges the crime substantially in the language of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood. Id. at 63, 700 S.E.2d at 443 (citing State v. Tumbleston, 376 S.C. 90, 98, 654 S.E.2d 849, 853 (Ct. App. 2007)). A court reviewing an indictment for sufficiency should consider the indictment on its face and consider the events at trial. State v. Reddick, 348 S.C. 631, 636, 560 S.E.2d 441, 443 (Ct. App. 2002).

This Court finds that no prejudice resulted from trial counsel's failure to object because it is likely that the trial court would have overruled the objection and found that the indictment was sufficient to put the Applicant on notice of the charges against him. This Court finds the Applicant's second-degree burglary indictment charges the crime of second-degree burglary substantially in the language of the statute. The Applicant was charged under S.C. Code Ann. § 16-11-312 which states "a person is guilty of burglary in the second degree if the person enters a building without consent and with intent to commit a crime therein". The Applicant's indictment on its face charges the Applicant with "Burglary, Second Degree (Business)" and references "SC Code: 16-11-312". The language on the face of the indictment states further: "That Robert Edgar Upchurch, Jr. did in Spartanburg County on or about November 18, 2009 willfully and unlawfully enter without

consent and with intent to commit a crime therein, to wit: a business, Graybar Electrical Co. located at 200 East Daniel Morgan Avenue, Spartanburg, South Carolina without consent and intending to commit a crime therein, in violation of §16-11-312, THE CODE OF LAWS OF SOUTH CAROLINA, (1976 as amended)." Although the language on the indictment did not specify which aggravating circumstance was applicable, the indictment correctly cites the statute and offense title and describes the offense substantially in the language of the statute.

This Court finds further that the Applicant was given notice of the aggravating circumstance on the face of the arrest warrant. The arrest warrant describes the offense for which the Applicant was charged as "Burglary/Burglary (Violent) (After 06/20/85)-Second degree". The arrest warrant further states "that between November 17, 2009 and November 18, 2009, in the city of Spartanburg, one Robert Edgar Upchurch did enter a building located at 166 ALABAMA ST. SPARTANBURG, SC without consent and with the intent to commit a crime therein and the entering occurred in the nighttime." The Applicant was made aware of the nature of the charge against him not only on the face of the indictment, but also on the warrant for his arrest.

This Courts finds that the trial court was also put on notice of what judgment was pronounced at the Applicant's trial. This is apparent from the trial judge's instruction to the jury at the end of the Applicant's trial. The Court instructed the jury twice as the elements of second-degree burglary including the aggravating element of nighttime. First, the Court states "and they further allege that what constituted a burglary in the second degree is that that burglary took place in the nighttime". (Transcript 166, ln.15-17) Second, the Court states "the entering of a building without consent and with intent to commit a

crime therein completed the crime of burglary, and in order to prove burglary in the second degree, the State has to prove an additional element and additional factor, which I've read from the statute, is the fact that the burglary occurred in the nighttime, and the nighttime is that period of time between sunset and sunrise during which the face of a person cannot be discerned by the light of the sun." (Transcript 177, ln. 9-18). From these statements to the jury, it is obvious that the Court was aware of what judgment to pronounce at the Applicant's trial.

Looking at the totality of the circumstances, this Court finds that the Applicant was well aware that he was defending against a charge of second-degree burglary with the aggravating circumstance of it occurring at nighttime. It is unlikely an objection by trial counsel challenging the sufficiency of the indictment would have been successful. The Applicant was apprised of the elements of the charge in both the indictment and in the arrest warrant. Viewed with a practical eye, both the Court and the Applicant were aware of the nature of the charges that the Applicant was facing at trial.

The overriding concern when the sufficiency of an indictment is challenged is notice to the defendant and fairness at trial. This Court finds that the Applicant has not shown that he did not have notice of the nature of the second-degree burglary charge against him or that he did not receive a fair trial as a result. This Court finds that the Applicant has not shown that the outcome of his trial would have been different had trial counsel objected to the insufficiency of the indictment. This Court finds that the Applicant has failed to carry his burden of proving that trial counsel's performance was ineffective.

Failure to properly cross-examine Justin Durham on his inconsistent statement

This Court finds that the Applicant failed to meet his burden of proving trial counsel failed to properly cross-examine Justin Durham on his inconsistent statements. This Court finds that trial counsel effectively cross-examined Durham during the Applicant's trial. The record reflects that trial counsel vigorously cross-examined the State's witness on his drug use (T. 109-110), his knowledge that the laptop he purchased was stolen (T. 115-116), the scratches on his hands (T. 116-117), and his untruthfulness to police (T. 119-120).

This Court also finds that the Applicant has put forth no evidence of the substance of the witness' alleged inconsistent statements and has not shown how impeachment based on those statements would have affected the outcome of his trial. Trial counsel gave credible testimony that he was unaware of any conflicting statements made by the witness. This Court finds that the Applicant has failed to prove that trial counsel was ineffective for failing to cross-examine the witness on his inconsistent statements.

Failure to make a motion to quash the search warrant

This Court finds that the Applicant failed to meet his burden of proving trial counsel was ineffective for failing to make a motion to quash the search warrant. This Court finds that the Applicant has put forth no evidence that the search warrant was objectionable in any way. In addition, trial counsel gave credible testimony that he was unaware of any reason why the search warrant would be objectionable. This Court also find that the Applicant has failed to prove that the outcome of his trial would have been different had trial counsel moved to quash the search warrant.

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Accordingly, this Court finds the Applicant failed to prove the first prong of the Strickland test- that trial counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that trial counsel committed either errors or omissions in their representation of the Applicant. This Court also finds the Applicant has failed to prove the second prong of Strickland- that he was prejudiced by trial counsel's performance. This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

All Other Allegations

As to any and all allegations that were raised in the application at the hearing in this matter and not specifically addressed in this Order, this Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds the Applicant waived such allegations and failed to meet his burden of proof regarding them. Therefore they are hereby denied and dismissed.

CONCLUSION

Based on all the forgoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient and the Applicant was not prejudiced by counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate

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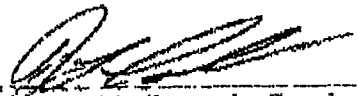
2012 SEP 18 PM 4:23
M. HOPKINS
CLERK OF COURT

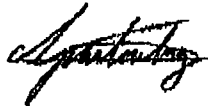
review. His attention is directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 18th day of September, 20 12


The Honorable Roger L. Couch
Presiding Judge
7th Judicial Circuit

 South Carolina.

CLERK OF COURT
SOUTH CAROLINA
2012 SEP 18 PM 4:23
M. HOPE BRADLEY

Spartanburg County

Spartanburg County Court House
180 Magnolia Street
P. O Box 3483
Spartanburg, SC 29304-3483



Phone (864) 596-2591
Fax (864) 596-2239

M. Hope Blackley
Clerk of Court

Gail Moffitt
Assistant Clerk of Court

STATE OF SOUTH CAROLINA
COMMON PLEAS
COUNTY OF SPARTANBURG
CIRCUIT

Robert Edgar Upchurch #312017
Applicant

IN THE COURT OF

7TH JUDICIAL

CA:2011-CP-42-2084

VS

State of South Carolina
Respondent

CERTIFICATE OF SERVICE

I certify that, on this date, I served a copy of the Order of Dismissal
In this action dated Sept 18, 2012 on Sept 19, 2012

By mailing to him/her, at his/her last known address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

Suzanne H White Esq

Kenneth P Shabel

Robert Edgar Upchurch #312017

9-19-12
(Date)

Nadalee Bichon
(Signature)

10-GS-42-0708

The State of South Carolina

County of Spartanburg

2010 MAY 10 PM 3:31

Trey Gowdy, Solicitor

COURT OF GENERAL SESSIONS

JAN 18 2010

TERM

THE STATE
vs.

Robert Edgar Upchurch, Jr.

Indictment for

BURGLARY, SECOND DEGREE
(BUSINESS)

SC Code: 16-11-312

CDR Code: 0080

Class FEL/D

2010 JAN 27 PM 3:08
MARC KITCHENS

291

Spartanburg County Police Department

Computer

Computer

REPORT ENTERED

3. CARD PULLED

4. INDEXED

5. CHECKED WARRANTS

6. CHECKED SIGNATURE

7. ASSESSMENT AND
CARD MADE

ARREST WARRANT NUMBER

M 120460

ACTION OF GRAND JURY

True Bill

Representative of Grand Jury

Date: 1-15-10

VERDICT

with

Person of Petit Jury

7-29-10

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

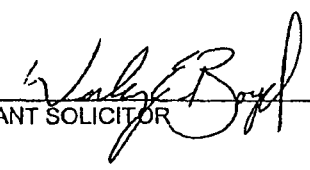
INDICTMENT

At a Court of General Sessions, convened on JAN 15 2010, the
Grand Jurors of Spartanburg County present upon their oath:

BURGLARY, SECOND DEGREE
(Business)

That Robert Edgar Upchurch, Jr., did in Spartanburg County on or about
November 18, 2007, willfully and unlawfully enter without consent and with intent to
commit a crime therein, to wit: a business, Graybar Electrical Co. located at 200 East
Daniel Morgan Avenue, Spartanburg, South Carolina, without consent and intending to
commit a crime therein, in violation of § 16-11-312, ~~THE CODE OF LAWS OF SOUTH~~
~~CAROLINA, (1976 as amended).~~

Against the peace and dignity of the State, and contrary to the statute in such
case made and provided.


ASSISTANT SOLICITOR

10-65-42-0709

The State of South Carolina

County of Spartanburg

Trey Gowdy, Solicitor

COURT OF GENERAL SESSIONS

JAN 18 2010

TERM

THE STATE
vs.

Robert Edgar Upchurch, Jr.

Indictment for
PETIT LARCENY

SC Code: 16-13-0030 (A)
CDR Code: 0480
Class MIS/UNC

2010 JAN 27 PM 3:08
HARC KITCHENS

2010 JAN 27 PM 3:08
HARC KITCHENS

293

Spartanburg City Police Department

1. SENTENCE MADE

2. REPORT ENDED

3. CARD FILLED

4. INDEXED

5. CHECKED WARRANTS

6. CHECKED SIGNATURE

ARREST WARRANT

7. ASSESSMENT AND
FINE CARD MADE

8. TRAFFIC VIOLATIONS COPY

N 420461

ACTION OF GRAND JURY

Foreperson of Grand Jury

Date: 1-15-10

VERDICT

Foreperson of Petit Jury

Date: 1-29-10

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

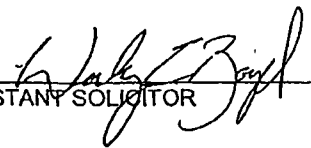
INDICTMENT

At a Court of General Sessions, convened on JAN 15 2010 , the Grand Jurors of Spartanburg County present upon their oath.

PETIT LARCENY

That Robert Edgar Upchurch, Jr. did, in Spartanburg County on or about November 18, 2009, feloniously take and carry away the goods and/or monies of Graybar Electric Co., the value of less than One Thousand Dollars, described as follows: laptop computer and clock radio, with the intent to deprive the owner permanently of such property, in violation of ~~§ 16-13-0030(A)~~, of ~~THE CODE OF LAWS OF SOUTH CAROLINA (1976)~~, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


ASSISTANT SOLICITOR