

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Laurens County
D. Garrison Hill, Circuit Court Judge

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JUL 25 2012

Opinion No. 2012-UP-152 (S.C. Ct. App. filed 3/7/2012)
09-GS-30-190-191.

S.C. Supreme Court

THE STATE,

RESPONDENT,

V.

KEVIN SHANE EPTING,

PETITIONER

Appellate Case No. 2009-146146

APPENDIX

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Kevin Shane Epting, Appellant.

Appeal From Laurens County
D. Garrison Hill, Circuit Court Judge

Unpublished Opinion No. 2012-UP-152
Heard February 13, 2012 – Filed March 7, 2012

AFFIRMED

Appellate Defender LaNelle DuRant, of
Columbia, for Appellant.

Attorney General Alan Wilson, Chief Deputy
Attorney General John W. McIntosh, Assistant
Attorney General Salley W. Elliott, Assistant
Attorney General William M. Blitch, all of
Columbia, and Solicitor Jerry W. Peace, of
Greenwood, for Respondent.

PER CURIAM: Kevin Shane Epting appeals from his convictions of first-degree burglary and assault and battery of a high and aggravated nature (ABHAN), arguing the trial court erred in prohibiting him from: (1) introducing evidence of third-party guilt, and (2) cross-examining the victim on a 911 call she made two months prior to the incident. We affirm pursuant to Rule 220(b)(1), SCACR, and the following authorities:

1. As to third-party guilt: Holmes v. South Carolina, 547 U.S. 319, 330-31 (2006) (overruling the application of limits on third-party guilt evidence only to the extent that limits should not rely on the strength of the prosecution's evidence against the defendant, but rather on the strength of the evidence proffered by the defendant to establish third-party guilt); State v. Gregory, 198 S.C. 98, 104, 16 S.E.2d 532, 534 (1941) ("[E]vidence which can have (no) other effect than to

cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible." (quoting 16 C.J. 560)); id. at 104, 16 S.E.2d at 535 ("[B]efore such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party." (quoting 20 Am. Jur. Evidence § 265 (1939))); id. (holding "[r]emote acts, disconnected and outside the crime itself, cannot be separately proved for such a purpose" and a defendant is not "permitted, by way of defense, to indulge in conjectural inferences that some other person might have committed the offense for which he is on trial, or by fanciful analogy to say to the jury that someone other than he is more probably guilty"); State v. Burgess, 391 S.C. 15, 23, 703 S.E.2d 512, 517 (Ct. App. 2010) (stating Holmes v. South Carolina preserves Gregory as the appropriate standard for evaluating the admissibility of evidence of third-party guilt); State v. Williams, 380 S.C. 336, 343, 669 S.E.2d 640, 644 (Ct. App. 2008) (holding a trial judge is given broad discretion in ruling on the admissibility of evidence, and the admission of evidence will not be disturbed on appeal absent an abuse of that discretion); State v. Rice, 375 S.C. 302, 317, 652 S.E.2d 409, 416 (Ct. App. 2007), overruled on other grounds by State v. Byers, 392 S.C. 438, 710 S.E.2d 55 (2011) (ruling evidence offered by a defendant as to the commission of the crime by another person must be limited to facts that are inconsistent with the defendant's guilt, and the evidence must raise a reasonable inference or presumption as to the accused's innocence).

2. As to cross-examination: State v. Page, 378 S.C. 476, 483, 663 S.E.2d 357, 360 (Ct. App. 2008) ("Whether a person opens the door to the admission of otherwise inadmissible evidence during the course of a trial is addressed to the sound discretion of the trial judge."); id. at 481, 663 S.E.2d at 359 ("An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law."); id. at 483, 663 S.E.2d at 360 ("Error is harmless where it could not reasonably have affected the trial's outcome."); State v. Whitner, 380 S.C. 513, 519, 670 S.E.2d 655, 659 (Ct. App. 2008) (holding a violation of a defendant's Sixth Amendment right to confront a witness is not per se reversible error, and this court must determine if the error was harmless beyond a reasonable doubt).

AFFIRMED.

FEW, C.J., and HUFF and SHORT, JJ., concur.

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

KEVIN SHANE EPTING,

APPELLANT

Appeal from Laurens County

D. Garrison Hill, Circuit Court Judge

Opinion No. 2012-UP-152

PETITION FOR REHEARING

The Court of Appeals affirmed the above named appellant's conviction and sentence on December 13, 2011. In support of this petition for rehearing, which is being submitted on today's date pursuant to Rules 221 and 224 of the South Carolina Appellate Court Rules, appellant submits the following:

Epting argued two issues on appeal: (1) that the trial court erred in prohibiting Epting from introducing of third party guilt; and (2) that the trial court erred in prohibiting Epting from cross-examining the victim on a 911 call she made two months prior to the incident.

The Court of Appeals affirmed the trial court on both issues. On Issue One, the Court held that evidence offered by a defendant as to the commission of the crime by another person must be

limited to facts inconsistent with the defendant's guilt, and the evidence must raise a reasonable inference as to the accused's innocence; and the application of the limits on third-party guilt evidence should not rely on the strength of the prosecution's evidence against the defendant, but rather on the strength of the evidence proffered by the defendant. On Issue Two, the Court held that the admission of evidence was addressed to the sound discretion of the trial judge; and a violation of a defendant's Sixth Amendment right to confront a witness was not per se reversible error, and this court must determine if the error was harmless beyond a reasonable doubt.

It is respectfully submitted that the Court of Appeals misapprehended the issues.

ISSUE ONE: Kevin Epting was charged with the burglary of his neighbor, Marilyn Hopkins. Around 1:30 a.m. in the early morning of November 11, 2008, Marilyn Hopkins awoke when she heard someone in her home. She assumed she had locked her front door so she did not check it after going to bed. R. 27, ll. 14 – 25; R. 28, ll. 1 – 25; R. 33, ll. 1 – 25. She went into the dining area and allegedly saw Kevin Epting going into her purse. She said to him: "My son is off limits to my wallet, and you will not go into my billfold." R. 37, ll. 1 – 25. Ms. Hopkins knew Kevin because his mother lived across the street from her and Kevin stayed there with her sometimes. R. 31, ll. 4 – 18.

The burglar then hit her in the eyes and kicked her leaving bruises, and then he left without the purse. R. 35, ll. 1 – 25; R. 36, ll. 1 – 13. She did not call the police. She said she called her sister at 1:40 a.m. R. 36, ll. 2 – 4. Her sister did not call the police until November 12, 2008, almost thirty- eight hours after the incident. R. 40, ll. 17 – 25.; R. 93, ll. 15 – 25; R. 94, ll. 1 – 25; R. 95, ll. 1 – 14.

Her sister, Judy Prather, testified that she called Ms. Hopkins to check on her on November 12. Ms. Prather went over to see her. When she saw her sister's black eyes and bruises, Ms. Prather

told her sister that the person who did this cannot get away with it. Ms. Prather then called the police. Ms. Prather testified that Ms. Hopkins did not call her at 1:40 a.m. after the incident. R. 77, ll. 1 – 21; R. 80, ll. 1 – 25; R. 81, ll. 1 – 25.; R. 82, ll. 1 – 25; R. 83, ll. 1 – 24.; R. 84, ll. 7 – 25; R. 85, ll. 1 – 10.

During her direct testimony, the solicitor asked Ms. Hopkins if she recognized Deputy Juan Galarza. Ms. Hopkins responded that she did because he was the one she talked with about the prior episode with her son, William Sizemore. She said her son had come in and was watching television. The solicitor stopped her at that point. R. 41, ll. 1 – 21.

In a pretrial motion, the solicitor moved for the court to exclude a 911 call made in September 2008 by the victim, Ms. Hopkins, to report that her son was “acting up” which the defense had indicated they wanted to introduce. The state argued that it was not relevant. R. 4, ll. 8 – 25; R. 5, ll. 1 – 25; R. 6, ll. 1 – 25.

Defense counsel argued that appellant should be allowed to introduce evidence of third party guilt and that the 911 call was connected to that. R. 7, ll. 1 – 25. Defense counsel said they wanted to present facts that would show that the victim’s son, Billy Sizemore, was likely the intruder and which facts would meet the standard for third party guilt in South Carolina. R. 10, ll. 20 – 25.

Counsel outlined the law and facts supporting third party guilt. R. 11, ll. 1 – 25; R. 9, ll. 1 – 25; R. 10, ll. 1 – 25; R. 11, ll. 10. In September 2008, just two months before the burglary incident, the victim called 911, and reported that her son was showing out and had knocked a hole in the wall. He left but she wanted a policeman to come out to retrieve her house key from her son who had gone next door. R. 5, ll. 1 – 12; R. 7, ll. 1 – 25.¹

¹ Ms. Hopkins told police in the burglary incident that she did not know the intruder got into her house. R. 37, ll. 18-21.

Other facts were the victim's statement that her son was not allowed near her wallet. Two of the son's co-workers were willing to testify that the son, Billy, hated his mother and talked of wanting her dead. R. 10, ll.1 – 25.

Defense counsel argued that the victim's statement that her wallet was off limits to her son and the 911 call and the co-workers' testimony presented more than mere suspicion and a reasonable inference that the son was the intruder. Defense counsel argued that under Holmes v. South Carolina, 547 U.S. 319 (2006), the issue was not the strength of the state's case, but if there were a reasonable inference that someone other than the accused was the intruder. In this case, that Mr. Sizemore was the intruder. R. 11, ll. 1 – 25; R. 12, ll. 1 – 25; R. 13, ll. 1 – 25; R. 14, ll. 1 – 25; R. 15, ll. 1 – 25; R. 16, ll. 1 – 25.

The judge ruled that based on State v. Gregory, 198 S.C. 98. 16 S.E.2d 532 (1941), there had to be “ a proof of connection with the crime and the train of facts or circumstances tending to clearly point out the other person is the guilty party.” R. 17, ll. 2 – 10.

The judge ruled there was no real connection between the son and this crime except the victim's statement to the intruder that her “son was off limits to her wallet and you will not go in my billfold.” He said that giving the most favorable interpretation to the defense of that statement, then it could be her son who was the intruder. However, he said it was not enough to show that the son was the guilty party. R. 16, ll. 24 – 25; R. 17, ll. 1 – 25; R. 18, ll. 1 – 21.

During the trial, Ms. Hopkins admitted on cross-examination that she had suspected her son, Billy, of taking money from her wallet before but she then thought maybe someone else did it. She also admitted that her son was off limits to her wallet. Her son knew that she kept her money in her purse in the china cabinet. R. 52, ll. 11 – 25; R. 53, ll. 1 – 25; R. 54, ll. 1 – 25.

Ms. Hopkins testified that on the morning of November 11 after the incident, she called Joyce Epting, Kevin's mother, to come to her house to be with her because she "thought the world of her." She admitted that she did not tell Ms. Epting that Kevin had come into her house and attacked her. R. 70, ll. 14 – 25; R. 71, ll. 1 – 15.

Joyce Epting testified for the defense that Ms. Hopkins called her on the morning of November 11 to come over as she had something to show her. When Ms. Epting arrived, Ms. Hopkins had two black eyes and told her that the chemotherapy treatments did that to her. She had been having treatments for cancer. R. 114, 1 – 25; R. 115, ll. 1 – 5; R. 29, ll. 1 – 24.

Sharon Corley, who was the girlfriend of Kevin during this incident, testified for the defense that Kevin spent the night of the alleged incident with her. On Sunday, November 9, 2008, they attended her stepfather's funeral. Then Kevin spent the night on Monday, November 10, and the alleged incident happened that night during the early morning hours of November 11. R. 118, ll. 1 – 25; R. 119, ll. 1 – 25; R. 120, ll. 1 – 25; R. 121, ll. 1 – 25; R. 122, ll. 1 – 25.

Ms. Corley testified that she was a paralegal and worked for an attorney. She also taught English at a reform school for boys under DJJ. R. 116, ll. 1 – 25; R. 117, ll. 1 – 25. She had tried to give a statement to the police to let them know that Kevin could not have done this, but the police were not interested in talking to her. R. 123 – 127. She was "outraged at this injustice." R. 128, ll. 1 – 23.

Kevin testified in his defense. He denied committing this crime. R. 101, ll. 1 – 25; R. 102, ll. 1 – 25. He explained his whereabouts during this time and that he spent the night with Sharon on the night the incident occurred. R. 103 – 113.

The judge allowed defense counsel to proffer the evidence of third party guilt, which he had presented in his pretrial motion, at the close of the state's case. R. 98 – 100.

In Miller v. State, 379 S.C. 108, 665 S.E.2d 596 (2008), the South Carolina Supreme Court found that trial counsel was ineffective for failing to establish Miller's defense of third party guilt. The Supreme Court determined that trial counsel was ineffective for failing to cross-examine a witness regarding similar robberies allegedly committed by a third party because Miller's sole defense was mistaken identity and third-party guilt. A specific third party was named.

In Holmes v. South Carolina, 547 U.S. 319 (2006), the United States Supreme Court held that a criminal defendant's federal constitutional rights were violated by an evidence rule under which the defendant may not introduce evidence of third party guilt if the prosecution has introduced forensic evidence that, if believed, strongly supported a guilty verdict. The South Carolina Supreme Court had held in State v. Holmes, 361 S.C. 333, 605 S.E.2d 19 (2004), that where there was strong evidence of a defendant's guilt, especially strong forensic evidence, the proffered evidence of third party guilt did not raise a reasonable inference of appellant's own innocence.

In Kevin Epting's case, there was no forensic evidence thereby allowing a reasonable inference to his innocence. The police did not check for fingerprints, and there was no sign of forced entry. The mother's inexplicable delay in reporting the incident is also troubling. R. 89, ll. 22 – 25; R. 90, ll. 1 – 8; R. 96, ll. 1 – 25; R. 97, ll. 1 – 10.

The United States Supreme Court also wrote in Holmes v. S.C., Id. that the state had violated a criminal defendant's right to have a meaningful opportunity to present a complete defense. The Court in Holmes, supra, wrote that the rule in State v. Gregory, supra, allowed judges to exclude evidence that was repetitive or marginally relevant. The Court stated that applying this rule to third party guilt cases, the evidence may be excluded where it did not sufficiently connect the other person to the crime. The Court wrote that the point was that by evaluating the strength of only

one party's evidence, no logical conclusion could be reached regarding the strength of contrary evidence offered by the other to cast doubt.

In State v. Rice, 375 S.C. 302, 652 S.E.2d 409 (Ct. App. 2008), the Court of Appeals wrote that the rule for admitting third party guilt in South Carolina was found in State v. Gregory, 198 S.C. 98, 16 S.E. 2d 532 (1941). The rule is:

Evidence offered by an accused as to the commission of a crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have no other effect than to cast a conjectural inference as to the commission of the crime by another, is not admissible.

State v. Gregory, 198 S.C. at 104-105, 16 S.E.2d at 534-535.

The rule in Gregory did not require that a specific third person be named. The rule concerns "facts that are inconsistent with the defendant's guilt."

There was a sufficient connection between Billy Sizemore, the victim's son, and the crime to meet the standard of South Carolina law as cited in State v. Gregory, *supra*. The victim's statement when she saw the intruder, that her son was off limits to her wallet, would be reasonable and logical only if she were talking to her son. The victim did not report the incident and it was only reported thirty-eight hours later after her sister saw her and said the person could not get away with this crime. Her sister called 911.

Kevin had a credible alibi witness in his then girlfriend, Sharon Corley. There was no sign of forced entry and no forensic evidence. A reasonable inference of Kevin Epting's guilt was raised, as well as evidence inconsistent with his guilt.

Ms. Hopkins had a motive to protect her son from going to prison and to save her the embarrassment that her own son would harm her.

During deliberations, the jury sent the judge a request to get a copy of the police report and witness statement. The note said that the jury vote was seven guilty and five not guilty. The judge stated that he had specifically told the jury not to tell him how they stood. He told the attorneys that he would have to tell the jury the record was closed. R. 129, ll. 5 – 25.

It was thus prejudicial to exclude the evidence

ISSUE TWO: In a pretrial motion, defense counsel argued that regardless of the trial court's ruling on third party guilt, the evidence of the 911 call made by Ms. Hopkins in September 2008, just two months before this incident, was relevant because the victim did not know how the intruder got into her home. The officer who responded to the September 911 call had to go to the neighbor's house and retrieve Ms. Hopkins' house key from her son. R. 7, ll. 16 – 25. Ms. Hopkins had told the police in the burglary incident that she did not know how the intruder gained entry to her home. R. 7, ll. 18 – 21.

During her direct testimony, the solicitor asked Ms. Hopkins if she recognized Deputy Juan Galarza. Ms. Hopkins responded that she did because he was the one she talked with about the prior episode with her son, William Sizemore. She said her son had come in and was watching television. The solicitor stopped her at that point. R. 41, ll. 1 – 21.

During cross-examination, when defense counsel asked Ms. Hopkins about that incident, the solicitor objected based on the judge's ruling that evidence of third party guilt was not allowed. The court held an *in camera* hearing. Defense counsel argued that the solicitor had opened the door and he should be allowed to cross examine the witness. The judge allowed defense counsel to proffer the testimony. Counsel questioned Ms. Hopkins where she admitted that Billy had put a hole in the wall. She called the law to get her key returned. R.56 – 60.

Defense counsel argued that he understood the court's ruling on third party guilt but that he was not introducing evidence. He wanted to be allowed to fully cross examine because a factual issue for the jury as to how the intruder may have gained entry. The judge ruled it was not proper questioning. R. 60., ll. 7 – 25; R. 61, ll. 1 – 25; R. 62, ll. 1 – 25; R. 63, ll. 1 – 25; R. 64, ll. 1 – 25.

The Sixth Amendment rights to notice, confrontation, and compulsory process guarantee that a criminal charge may be answered through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence. State v. Gillian, 360 S.C. 433, 449-450, 602 S.E.2d 62, 71 (Ct. App. 2004).

The South Carolina Constitution provides:

The right of trial by jury shall be preserved inviolate. Any person charged with an offense shall enjoy the right to a speedy and public trial by an impartial jury; to be fully informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to be fully heard in his defense by himself or by his counsel or both.

S.C. Const. Art. 1, Sec. 14.

The right to confront and cross-examine witnesses and to call witnesses in one's own behalf are essential to due process. Chambers v. Mississippi, 410 U.S. 284, 302 (1973). The right of cross-examination is implicit in the constitutional right of confrontation. Id. Specifically included in a defendant's Sixth Amendment right to confront the witness is the right to meaningful cross-examination. State v. Gillian, *supra*. The primary interest secured by the Confrontation Clause of the Sixth Amendment is the right to cross-examination. State v. Gillian, *supra*.

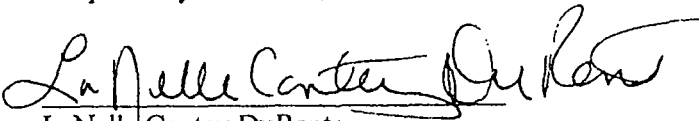
As a general rule, a trial court's ruling on the proper scope of cross-examination will not be disturbed absent a manifest abuse of discretion. State v. Mitchell, 330 S.C. 189, 498 S.E.2d 642 (1998). This rule is subject, however, to the Sixth Amendment's guarantee of a defendant's right to a "meaningful" cross-examination. Id.

The Court of Appeals misapprehended the issues. There was evidence inconsistent with Epting's guilt as he had an alibi from a reliable witness, Sharon Corley. The facts that the victim did not call the police, and did call Epting's mother to come over to assist her were inconsistent with Epting's guilt as it appeared the victim was trying to protect her son.

The Court misapprehended Issue Two as well. The trial judge abused his discretion by violating Epting's Sixth Amendment right to confront the witness against him, the victim, by not allowing Epting to ask her about the 911 call she made when the episode occurred with her son. If the jury had known of this incident, there was a reasonable probability that it would have affected the outcome of the trial.

THEREFORE, we respectfully ask the Court of Appeals to reconsider its rulings.

Respectfully submitted,


LaNelle Cantey DuRant
Appellate Defender

This 21st day of March, 2012.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Laurens County
D. Garrison Hill, Circuit Court Judge

THE STATE,

RESPONDENT,

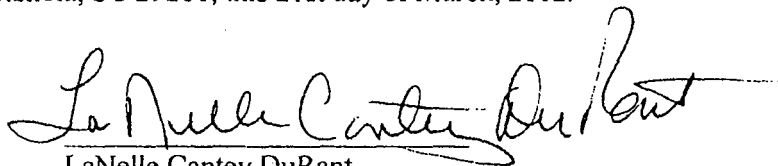
V.

KEVIN SHANE EPTING,

APPELLANT

CERTIFICATE OF SERVICE

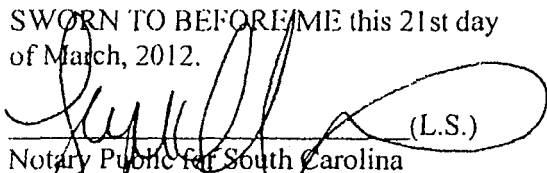
The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon William M. Blitch, Jr., Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 21st day of March, 2012.



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 21st day
of March, 2012.



(L.S.)
Notary Public for South Carolina

My Commission Expires: December 4, 2017.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Laurens County
Hon. D. Garrison Hill Circuit Court Judge

The State,

Respondent,

v.

Kevin Shane Epting,

Appellant.

RETURN TO PETITION FOR REHEARING
OUT OF TIME

On March 7, 2012, this Court affirmed Appellant's conviction and sentence. Appellant maintained the trial court erred in excluding his evidence he alleged demonstrated third party guilt and in prohibiting his cross-examination regarding a 911 call placed by the victim regarding a completely unrelated event. This Court properly found neither issue has merit and affirmed Appellant's conviction and sentence.

Third Party Guilt

In Holmes v. South Carolina, 547 U.S. 319, 324 (2006), the United States Supreme Court articulated its approval of the rule adopted in State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941), for the admission of evidence of third party guilt. Holmes, 547 U.S. at 328. In Gregory, the South Carolina Supreme Court explained:

[E]vidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with

his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible. . . . [B]efore such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the

cannot be separately proved for such a purpose.

State v. Gregory, 198 S.C. 98, 104-105, 16 S.E.2d 532, 534-535 (1941) (internal citations omitted).

Appellant sought to introduce evidence the victim preciously called 911 when her son was acting up and caused damage to her property. Further, he maintained the victim's statement to the burglar supposedly supports the alleged third-party guilt of the victim's son. The victim reported she told the burglar: "My son is off limits to my wallet and you will not go in my billfold." (T.94; R.37).

This Court and the trial court properly utilized and applied the Gregory standard. After quoting the above language from Gregory, the trial court found the 911 call and events disconnected to the crime. The 911 call was two months prior to the burglary and did not involve the theft of money, but instead involved the son damaging her property. (T.47-48; R.17-18). The two events are not related, and the evidence of the 911 tape was irrelevant and would merely serve to confuse the jury as found by the trial court. (T.121; R.64).

Further, the trial court properly found the evidence would not show a reasonable inference of the son's guilt or Appellant's innocence. (T.47-48; R.17-18). The statement made to the burglar certainly did not implicate the son. Why would she have told the burglar that the wallet was off limits to her son and the burglar could not go into it if she was talking to her son? The only rational inference is the victim was talking to someone other than her son. None of the evidence implicates

the son or demonstrates Appellant's innocence. As a result, this Court correctly affirmed relying on Holmes and Gregory.

Cross-Examination

Appellant contends the State and the victim opened the door for testimony regarding the underlying facts of the victim's 911 call to police several months prior to the burglary. The State did not open the door and the trial court properly refused to admit the testimony regarding third party guilt.

This Court correctly found a determination of whether the State opened the door was within the discretion of the trial court and can only be reversed on an abuse of that discretion. See State v. Page, 378 S.C. 476, 483, 663 S.E.2d 357, 360 (Ct. App. 2008). In the instant case, the State did not open the door and any further examination of the 911 call would have only served to confuse the jury.

Further, this Court properly found any error was entirely harmless. Even if the State opened the door, the testimony regarding the 911 call was irrelevant and not properly admissible. See Rules 401 and 402; SCRE. Appellant proffered the testimony he sought to obtain from the victim. The testimony produced the fact the victim's son had slammed open a door knocking a hole in the wall; the victim called the police to retrieve her key from her son; and the deputy retrieved the key and returned it to the victim. (T.114-117; R.57-60). None of these facts are remotely relevant or connected to the burglary for which Appellant was convicted. As a result, the exclusion of the testimony and limitation on cross-examination could not reasonably have affected the outcome of trial. Taylor v. State, 312 S.C. 179, 181, 439 S.E.2d 820, 821 (1993); State v. Pagan, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006).

CONCLUSION

For all of the foregoing reasons, Respondent requests the panel deny the petition for rehearing and affirm Appellant's conviction and sentence.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

April 3, 2012

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Laurens County
Hon. D. Garrison Hill, Circuit Court Judge

The State,

Respondent,

v.

Kevin Shane Epting,

Appellant.

PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Return to Petition for Rehearing Out of Time by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

LaNelle C. DuRant, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served.
This 3rd day of April, 2012.



ELLEN R. DuBOIS
Legal Assistant
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

The South Carolina Court of Appeals

RECEIVED

The State, Respondent,

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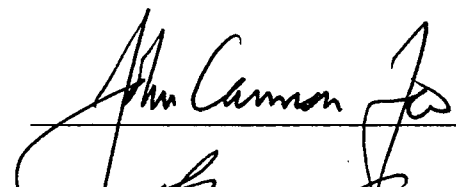
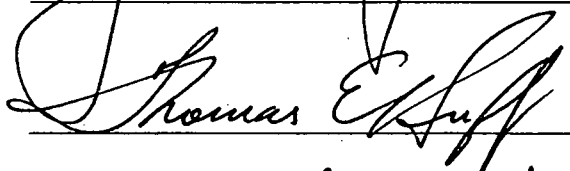
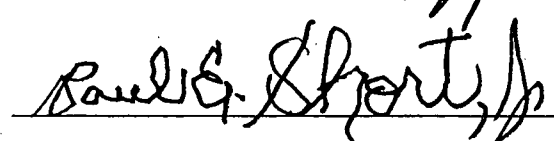
Kevin Shane Epting, Appellant.

SC OFFICE OF
APPELLATE DEFENSE

Appellate Case No. 2009-146146

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 Few, C.J.
 Huff, J.
 Short, J.

Columbia, South Carolina

cc:

LaNelle Cantey DuRant
John W. McIntosh
William M. Blitch, Jr.
Alan McCrory Wilson

FILED

25 May 2012

STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM LAURENS COUNTY

D. Garrison Hill, Circuit Court Judge

RECEIVED

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S.C. Supreme Court

THE STATE,

RESPONDENT,

V.

KEVIN SHANE EPTING,

APPELLANT

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA)

COUNTY OF LAURENS)

COURT OF GENERAL SESSIONS

2009-GS-30-0190

2009-GS-30-0191

STATE OF SOUTH CAROLINA,)

vs.)

TRANSCRIPT OF RECORD

KEVIN SHANE EPTING,)
DEFENDANT.)

ORIGINAL

November 10, 12, and 13, 2009
Laurens, South Carolina

B E F O R E:

THE HONORABLE D. GARRISON HILL, JUDGE.

A P P E A R A N C E S:

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Assistant Solicitor

CLAUDE H. HOWE, III, ESQ.
D. KATHERINE ANDERSON, ESQ.
Attorneys for the Defendant

HOLLIE M. JENKINS
Circuit Court Reporter

1 the case, if the jury determines that the State has proven
2 the crime beyond a reasonable doubt and proven each and
3 every element of that crime beyond a reasonable doubt,
4 then and only then may that presumption of innocence be
5 removed.

6 Mr. Epting does not have any burden of proof. The
7 burden is entirely on the State. Mr. Epting is presumed
8 innocent. He doesn't have to offer any evidence or
9 explanation whatsoever. Instead, it is the State that
10 must prove guilt by proof beyond a reasonable doubt.
11 Mr. Epting does not have to prove his innocence or prove
12 he is not guilty. The burden of proof, again, is entirely
13 on the State.

14 Now, at this stage, these allegations are simply
15 that. The indictments I'm about to read to you are simply
16 words on a piece of paper. And they don't constitute
17 evidence. They don't even constitute a suspicion about
18 this matter. They're simply the way the case gets
19 started. An indictment is simply the ticket, so to speak,
20 that allows the Government to come in this courtroom and
21 begin its case against a citizen, and let the citizen know
22 what he is charged with.

23 In this particular case, in indictment
24 #09-GS-30-0190, it alleges in the indictment that Kevin
25 Shane Epting did in Laurens County, state aforesaid, on or

1 about the 11th day of November, 2008, willfully and
2 unlawfully enter a dwelling without consent and with the
3 intent to commit a crime therein, or the entering or
4 remaining occurred in the nighttime, the said dwelling
5 being owned and/or occupied by Marilyn Hopkins in
6 violation of Section 16-11-311 of the South Carolina Code.

7 The indictment for assault and battery of a high and
8 aggravated nature alleges that Mr. Epting did in this
9 county on or about the 11th day of November, 2008,
10 willfully and unlawfully commit an act of violent injury
11 to the person of another, to wit, Marilyn Hopkins,
12 accompanied by circumstances of aggravation, the use of a
13 deadly weapon, and/or the infliction of serious bodily
14 injury, and/or the intent to commit a felony, and/or a
15 great disparity between the ages and physical conditions
16 of the parties, and/or the difference in sexes, and/or
17 indecent liberties or familiarities with a female, and/or
18 the purposeful infliction of shame and disgrace, and/or
19 resistance of lawful authority in violation of the laws of
20 South Carolina.

21 Now, again, these allegations are just that, they're
22 allegations. They're not evidence of anything. And
23 they're simply a way to notify Mr. Epting what he's
24 charged with, and the statutes he's charged under, and to
25 allow the State to come into court and start this trial.

1 THURSDAY, NOVEMBER 12, 2009

2 THE COURT: We're on the record in case
3 2009-GS-30-0190 and 0191, the State v. Kevin Shane Epting.
4 Mr. Epting is here with his counsel.

5 And I understand there were some matters the parties
6 wish to raise before we have the opening statements. So
7 I'll be glad to entertain those at this time.

8 PRE-TRIAL MOTIONS

9 MR. FLEMING: Thank you, Your Honor.

10 First, just to clear up, I understand the Court
11 sequestered the witnesses. It's my understanding that I
12 am allowed to have my chief investigating officer and the
13 victim in here as well.

14 THE COURT: Oh, yes, sir, absolutely.

15 MR. FLEMING: Thank you.

16 Your Honor, first, the State would move for a motion
17 in limine to exclude a 911 CAD that the Defense has
18 submitted to the Prosecution dealing with a 911 call that
19 was made back in September of '08, Your Honor.

20 I beg the Court's indulgence for one second so I can
21 get to the -- to that CAD.

22 (Pause.)

23 MR. FLEMING: It's my understanding, Your Honor, that
24 that CAD was a call made to 911 in September of '08, which
25 was two months prior than -- to the incident that we're

1 having the trial about, Your Honor, where the victim,
2 Ms. Hopkins, called 911 to report that her son was acting
3 up.

4 And I'm still looking for that CAD, Your Honor. I'm
5 sorry.

6 MR. HOWE: Here, Ron, we have one.

7 MR. FLEMING: Okay. Thanks.

8 Ms. Hopkins called and stated that the subject was
9 her son and he was showing out. He'd knocked a hole in
10 the wall. And that he was now at the next door
11 neighbor's. She would like an officer to come out, Your
12 Honor.

13 The State would move to exclude anything dealing with
14 that CAD or with that call, Your Honor, based on the rules
15 of evidence and relevancy, Your Honor, which states in
16 part, Relevant evidence means any evidence having any
17 tendency to make the existence of any fact that is of
18 consequences to the determination of the action more
19 probable or less probable than it would be without the
20 evidence.

21 Here, obviously, Your Honor, we're dealing with a
22 burglary and ABHAN. That was -- the 911 call occurred
23 back on 9-6 of 2008, which was a little more than two
24 months prior, which is not even near the time the incident
25 happened that we're talking about, Your Honor, and in

1 trial on.

2 Furthermore, it has no -- it tends to -- it does not
3 tend to make any fact of the burglary any more probable or
4 less probable, Your Honor. We're dealing with a totally
5 different thing of where she called and that her
6 husband -- that her son was showing out, Your Honor. And
7 that's the extent of it.

8 The State would, also, move to exclude any kind of
9 third-party testimony, unless that would deal with any
10 other incidents concerning the son, unless they could show
11 that there was evidence that would put the son at the
12 burglary that night at the house. I don't know of any
13 evidence that puts the burglary -- or puts him anywhere
14 near 70 Cindy Drive the night of the burglary, Your Honor,
15 except -- or I don't mean to say except -- where, in fact,
16 at that time, the victim's son, Billy Sizemore, was living
17 in Whitmire. He lived there at a house in Whitmire by
18 himself.

19 Now, if there were evidence that he was in that area
20 and the Defense could prove that, then I think that they
21 could probably submit any kind of third-party testimony as
22 to whether or not he might be guilty of that. But they
23 don't have any evidence to prove that that I know of, Your
24 Honor.

25 So we would move to exclude those two things, Your

1 Honor, at this time.

2 THE COURT: Thank you, sir.

3 Mr. Howe, or, Ms. Anderson.

4 MR. HOWE: Thank you, Your Honor.

5 I'll begin by saying I think -- based on the
6 presentation I'm hearing, I think we'd all agree that the
7 evidence concerning the 911 call does tie in with our
8 position that we think we're entitled to introduce
9 third-party guilt evidence and, actually, call, if
10 necessary, the son, Sizemore, as a Court's witness in this
11 case.

12 Judge, first of all -- and so I'll -- Ms. Anderson is
13 going to be making the presentation and will hand up to
14 the Court a memo regarding that.

15 THE COURT: Thank you.

16 MR. HOWE: And, Your Honor, while she's handing that
17 up, I would, also, contend that, regardless of the Court's
18 ruling on the third-party guilt issue, I think it would
19 still be relevant evidence on the question in this case.
20 Because the -- Ms. Hopkins, in her statement, indicated
21 that she did not know how the intruder got into her home.
22 And we would offer evidence that when law enforcement was
23 called out there in September on this 911 call that law
24 enforcement had to go to the neighbor's house and retrieve
25 the key to the home from her son, Sizemore.

1 And, even though this occurred two months prior,
2 there was a mention in the -- in Ms. Hopkins statement
3 that she had no idea how anybody got into her home. And I
4 don't think there's even going to be any evidence offered
5 that there was a forced entry at all into the home in the
6 way of physical evidence, a door broken, window broken,
7 anything of that nature.

8 But, as far as the third-party guilt, I'm going to
9 turn that over to Ms. Anderson, who's prepared to make
10 that presentation to the Court.

11 Thank you.

12 THE COURT: Thank you, Mr. Howe.

13 Yes, ma'am.

14 MS. ANDERSON: May it please the Court.

15 Mr. Howe briefly outlined the facts. So I'll just go
16 ahead and skip to the prevailing law on this issue. The
17 rule in South Carolina regarding third-party guilt is as
18 follows: Evidence offered by the accused as to the
19 commission of the crime by another person must be limited
20 to such facts as are inconsistent with his own guilt, and
21 to such facts that raise a reasonable inference or
22 presumption as to his own innocence.

23 The main part we're relying on is the facts that
24 raise a reasonable inference or presumption as to his own
25 innocence. I've handed up the case of State v. Williams.

1 In that case, the Defendant was convicted of murdering his
2 wife and son. They were found in a van about six miles
3 from the home. At trial, he sought to introduce evidence
4 regarding manufacturers of marijuana in the area. And
5 they had previously, I believe, either assaulted or
6 threatened the lives of a confidential informant and a
7 narcotics officer, which were completely unrelated to the
8 victims in that case.

9 The trial court properly ruled that that was
10 inadmissible third-party evidence. It was completely
11 unrelated to the crime at hand, and didn't have any
12 bearing on raising a reasonable inference as to the
13 Defendant's guilt in that case.

14 Unlike Williams, in this case, there are a number of
15 factors that we proffer into evidence that does tie
16 Mr. Sizemore's guilt as the actual intruder in the case at
17 hand. First, being that the CAD report, which we seek to
18 introduce into evidence, was very recent in time, a couple
19 months before the incident. It noted that they had had
20 some physical -- or she had felt the need to call the
21 police, that she felt unsafe in her own home with her son
22 there. Also, in her statement to the police, after the
23 incident, she said that her son was off limits to her
24 billfold. The case at hand involves theft of money out of
25 a wallet and the intruder assaulting her.

1. One moment, Your Honor.

2. THE COURT: Yes, ma'am. Take your time.

3. (Pause.)

4. MS. ANDERSON: In addition to the CAD report,
5. Mr. Howe mentioned that the police were requested to
6. retrieve a residential key. I'm unsure if it was,
7. actually, ever retrieved. But it does show that
8. Mr. Sizemore had possession of a key to the victim's home
9. and would have access to explain why there was no forced
10. entry with the incident in question. In light of the CAD
11. report being recent to the offense at hand, displaying
12. that she was uncomfortable with her son being in the home,
13. that she was not -- he was not allowed near the billfold,
14. as evidenced by the police report on November 12th and
15. 13th, I believe.

16. Further, two of Mr. Sizemore's co-workers will be
17. called to introduce evidence that Mr. Sizemore had very
18. severe hatred toward his mother and wished someone would
19. kill her, and that he wanted her dead.

20. In light of all those facts, we believe it does raise
21. a reasonable inference as to Mr. Epting's guilt and does
22. show that Mr. Sizemore is likely the actual intruder in
23. this case. And, under that, we believe it meets South
24. Carolina's standard for third-party guilt.

25. THE COURT: Well, let me ask you, Ms. Anderson, the

1 incident back in September of 2008, involved a breaking
2 into the home of the victim, I know there was a hole
3 knocked in the wall, but was that inside the house or
4 outside the house?

5 MS. ANDERSON: It was inside the house. It wasn't a
6 breaking in, other than there had been a disturbance. He
7 had punched the wall. And then she had later reported, in
8 a separate police report, that he was off limits to her
9 wallet that -- I presume that he had taken money from her
10 in the past.

11 THE COURT: Had he been living there recently?

12 MS. ANDERSON: On and off, Your Honor.

13 THE COURT: All right. Thank you, ma'am.

14 MS. ANDERSON: Thank you.

15 THE COURT: Yes, sir, Mr. Fleming.

16 MR. FLEMING: Your Honor, going back to that, if you
17 will look at the Defense's brief on Page 2 of 3, Your
18 Honor, where it cites the rule at the top. It, basically,
19 states and goes on to state after what Ms. Anderson was
20 telling the Court, it states, To raise such facts as
21 raised -- as to raise a reasonable inference or
22 presumption as to his own innocence. And then it goes on
23 to say, Evidence which can have no other effect than to
24 cast a mere suspicion upon another is not admissible.

25 And that's what the Defense is trying to do here,

1 Your Honor. They're just trying to cast suspicion. This
2 911 CAD where they went out because the mother called the
3 son -- the son was living with the mother at that time.
4 And it has nothing to do with a burglary.

5 THE COURT: What about the wallet connection?

6 MR. FLEMING: Yes, sir. I was going to get to that.

7 THE COURT: I'm sorry. I didn't --

8 MR. FLEMING: Again, they're talking about this
9 wallet saying that she said that he was not -- that
10 Ms. Hopkins said that, You're not allowed to do that.
11 Well, that's what she told the Defendant that night when
12 he was in her house. She never told that to her son. She
13 told that to the Defendant the night in the house, Your
14 Honor.

15 THE COURT: Well, I thought there was some evidence
16 about him getting -- the son getting into a wallet or
17 something and being --

18 MR. FLEMING: No, sir. There's no evidence of that
19 that we know of.

20 They're pulling that off of Ms. Hopkins statement
21 that she made to the police officers that she stated when
22 she came -- she was in the bed. She got out of the bed
23 when she heard somebody coming through the front door.
24 She went to the kitchen. She saw Mr. Epting there with
25 the wallet in his hand -- or purse in his hand. And she

1 told him, You're not supposed to be in here. That's off
2 limits to you. You need to get out or I'm going to call
3 the police. At that time is when he started beating
4 Ms. Hopkins, Your Honor. Once he beat her, he left, Your
5 Honor.

6 And, as far as the key and everything is concerned,
7 Your Honor, it's in evidence -- or we have evidence by
8 testimony from Ms. Hopkins and the police officers that
9 she told them she forgot to lock the front door. That's
10 what happened. She forgot to lock the front door when she
11 went to bed that night, Your Honor.

12 So, basically, what you have is you have nothing
13 that, actually -- no direct evidence that the Defense is
14 wanting to introduce that would be -- that would have any
15 other effect than to bear suspicion in this case. And it
16 should be excluded, Your Honor.

17 In fact, the case that they state, State v. Williams,
18 it was dealing with the murder of some victims, the murder
19 of a wife and son. The victims were found inside the
20 family van. And, at trial, it says, The Defendant
21 proffered evidence that there were marijuana manufacturers
22 in the area where the bodies were found, who had,
23 subsequently, threatened the lives of a confidential
24 informant and a narcotics agent. And, there, the Court
25 upheld that that should be disallowed. You couldn't bring

1 it in. And that's, basically, what we have here, Your
2 Honor, same thing, same scenario.

3 You've got evidence of a 911 call that it was just a
4 family dispute. And then you don't have anything other
5 than some defendants [sic] saying that the son, at one
6 time, said he wished somebody would kill his mother. It
7 has nothing to do with a burglary or robbery, Your Honor.

8 So, based on that, Your Honor, we would argue that
9 any kind of evidence dealing with that should be excluded.

10 THE COURT: Thank you, Mr. Fleming.

11 MR. HOWE: Your Honor, if I may respond.

12 THE COURT: Yes, sir. Sure.

13 MR. HOWE: And Ms. Anderson, if the Court would allow
14 her to jump in on anything concerning the law.

15 Judge, in response, first of all, there is a
16 statement. And if the Court wants to review the statement
17 of Ms. Hopkins, that would be fine. There's no question
18 that she did, in fact, mention in her statement that
19 the -- her wallet was off limits to her son.

20 Mr. Fleming, the Solicitor, has given you one
21 interpretation of that statement. I'm sure that
22 Ms. Hopkins, you know, can testify as to what she meant
23 when she happened to mention her son, in her statement, as
24 far as him being off limits to the wallet. That would be
25 a matter, I think, that would be left for the jury to

1 determine what she meant at that point in time.

2 Judge, as far as the other issue concerning the fact
3 that now I'm hearing that the door was left unlocked, that
4 would be information that we've heard for the first time
5 right now. Because, in her statement, she indicated that
6 she had no idea of how the door had been -- or how entry
7 had been gained. That would be new information that would
8 not have been provided to us.

9 But, Judge, going back to the question as to whether
10 or not Mr. Sizemore would be the intruder, you have not
11 only the issue about the statement mentioning him as being
12 off limits, you have the 911 issue involving the key.

13 Before that, you, also, have the testimony that we
14 would be prepared to offer from co-workers, witnesses, who
15 said that he wished his mother -- somebody would do harm
16 to her. Those things all and all, clearly, point to a
17 reasonable inference that he could have very well been the
18 person that was involved in this. We would contend it's
19 more than just mere suspicion when you tie all that
20 together. And we'd like to have the opportunity to do
21 that.

22 THE COURT: Okay. Bear with me just one minute.

23 (Pause.)

24 THE COURT: May I see the statement, the victim's
25 statement?

1 MR. FLEMING: Yes, sir.

2 THE COURT: Thank you, sir.

3 MR. FLEMING: Yes, sir.

4 Your Honor, if I could.

5 THE COURT: Yes, sir, Mr. Fleming.

6 MR. FLEMING: I just wanted to -- even if that word
7 is "son" -- and it could be interpreted more than one way.
8 But even if that is saying "son," she's, basically,
9 telling who's there that even her son is off limits to
10 that wallet -- to her wallet. And you will not go in my
11 billfold. And he looked up, and she said it was Kevin
12 Epting.

13 So, you know, if we're going to allow that, I think
14 that's going to go up against the case law, Your Honor.
15 And it's going to just cause confusion, which the rule
16 does not allow.

17 MS. ANDERSON: Your Honor, a brief response.

18 Just under State v. Holmes, it's not a weighing test
19 between the State's case of how strong it is that she
20 implicate the Defendant, ultimately, but that there's a
21 reasonable inference given the facts outlined in the brief
22 that someone other -- or Mr. Sizemore is the actual
23 intruder, not Mr. Epting.

24 THE COURT: All right. Well, I agree you can't base
25 it on the strength of the State's case. And I take it

1 into consideration under Holmes.

2 But Holmes did not overrule the basic law outlined in
3 State v. Gregory, which, as has already been quoted,
4 states that, Evidence that just raises a conjectural
5 inference or casts a mere suspicion upon another as to the
6 person that committed the crime is not admissible and not
7 proper third-party guilt evidence. Rather, there has to
8 be a proof of connection with the crime and the train of
9 facts or circumstances tending to clearly point out the
10 other person is the guilty party.

11 And Gregory stated that remote acts disconnected and
12 outside the crime itself cannot be separately proved for
13 such a purpose. And it says, An orderly and unbiased
14 judicial inquiry as to the guilt or innocence of the
15 Defendant on trial does not contemplate that a Defendant
16 be permitted by way of defense to indulge in conjectural
17 inferences that some other person might have committed the
18 offense for which he is on trial, or by fanciful analogy
19 to say to the jury that someone other than he is more
20 probably guilty. And I think other cases have said that
21 third-party guilt evidence is limited to facts that are
22 inconsistent with the Defendant's innocence.

23 Based on what I've heard here and reading the
24 statement, the incident with the son that occurred
25 approximately two months before the alleged crime here was

1 disconnected to this crime. The only connection would be
2 the victim, Ms. Hopkins, statement of her apparent belief
3 that giving us the interpretation most favorable to the
4 Defense that it was her son who had entered her home
5 without consent. Otherwise, why would she put in her
6 statement that she said, Upon discovering the intruder, I
7 said, "My son is off limits to my wallet. And you will
8 not go in my billfold." I believe that is how the
9 statement of November 13th, 2008, reads.

10 Other than that, there's no connection to the son,
11 other than the fact that there was a prior incident where
12 he became enraged and did some physical damage to the
13 victim's home, and the victim had to call police, and
14 later had to retrieve her keys from the son. And the son
15 harboring some grudge against his mom, apparently,
16 threatened her harm.

17 But I just don't find here that it's enough to show a
18 reasonable inference as to the son as the guilty party.
19 And if you need to proffer further evidence on that, I'll
20 be glad to let you do that, Ms. Anderson, or, Mr. Howe.

21 All right. Thank you very much.

22 MR. FLEMING: I just wanted to make sure that we're
23 clear, Your Honor. That includes the testimony by
24 witnesses saying that he made a threat that he wished she
25 was dead as well?

1 THE COURT: I'm sorry. Now, who is "he"? The son?

2 MR. FLEMING: Yeah.

3 The Defense is saying that they're going to put up
4 witnesses who will say that the son made the statement
5 that he wished that she was dead. I don't know when he
6 said it. That hasn't been said.

7 And, again, I don't think that's directly on point
8 dealing with this crime, even if it was said by the son.

9 So does your ruling include that as well?

10 THE COURT: Yes.

11 MR. FLEMING: Thank you, Judge.

12 MR. HOWE: Your Honor --

13 THE COURT: Yes, sir.

14 MR. HOWE: -- just -- and I may have a couple
15 questions so I don't go into anything inconsistent with
16 your ruling.

17 THE COURT: Certainly.

18 MR. HOWE: But, also, we would like to have the
19 opportunity to proffer. Here is the way we did it -- and
20 it's probably my fault for doing it this way. We've got
21 the 911 operator who received the call, as well as the law
22 enforcement officer who answered the call, under subpoena,
23 as well as the two co-workers who made the -- would
24 testify as to what the son said. And we, also, have the
25 son under subpoena.

1 We were not prepared to do this now. Can -- at some
2 point in time during the trial, could we offer that?

3 I -- because it wouldn't come up until we put up our
4 case anyway, that I see. And I will -- as I understand
5 the Court's ruling, I will not be allowed even to ask the
6 mother on cross-examination about the prior incident in
7 September, as I understand all that.

8 Is that correct?

9 THE COURT: Right. Yes, sir.

10 MR. HOWE: And, also, would I be prohibited under
11 your ruling from questioning the mother about the wallet
12 or -- well, I think -- or would I be allowed to question
13 her on anything that came forward in her statement to law
14 enforcement and what she meant by that, or something in
15 that regard? I'm sure Mr. Fleming will bring that out on
16 direct from her.

17 Am I prohibited from going into that at all, also?
18 Do you see what I'm saying?

19 THE COURT: I do, yes. And I appreciate your
20 inquiry.

21 And I'm trying to think through how I can fairly
22 allow you to cross-examine Ms. Hopkins concerning her
23 statement, and give you the full opportunity of
24 confrontation and not let us get bogged down in a
25 disorderly process and have irrelevant factors interjected

1 into the trial.

2 And, you know, I'm treating this as a motion in
3 limine. I mean, I may hear things during the trial that
4 change my mind.

5 MR. HOWE: Yes, sir.

6 THE COURT: So, right now, I think I would let you
7 explore with her why she made the statement. And we'll
8 just have to see where it goes. I mean, I don't know any
9 other way to approach it. Because I don't think it would
10 be fair to totally cut off your right to ask her about
11 what is, essentially, a whole sentence in a fairly short
12 statement --

13 MR. HOWE: Yes, sir.

14 THE COURT: -- that she gave, so. But, right now,
15 that's as far as I'll let you go.

16 MR. HOWE: Yes, sir.

17 And, Your Honor, would I then have permission to
18 proffer, at least, when we're prepared to put up our case
19 that at that time?

20 THE COURT: Yes, sir, absolutely.

21 And, like I say, I may change my mind.

22 MR. HOWE: Yes, sir.

23 THE COURT: I'm just looking at it now without the
24 benefit of a full record, and that's my ruling. But,
25 certainly --

1 MR. FLEMING: So Your Honor -- I'm sorry, Your Honor.

2 THE COURT: Go ahead. Yes, sir, Mr. Fleming.

3 MR. FLEMING: So you're saying -- you're telling the
4 Defense that they can put this evidence up, but they have
5 to stop short. And you're going to decide whether or not
6 you're still going to allow it in or not?

7 THE COURT: Well, all I'm saying now, Mr. Fleming, is
8 that when Ms. Hopkins testifies, the Defense will be
9 allowed to ask her what she meant about the statement.

10 MR. FLEMING: Oh, I understand that, Your Honor.

11 I'm talking about the testimony by these two other
12 supposed witnesses, which you've already ruled cannot come
13 in.

14 THE COURT: I'm saying that he can proffer that
15 outside the presence of the jury for the record.

16 MR. FLEMING: Thank you, Your Honor.

17 THE COURT: Yes, sir.

18 MR. FLEMING: Your Honor, the State does have -- it's
19 my understanding that the Defense is making a motion -- or
20 will make a motion to try to have the State elect under
21 which, I guess, element that we're going to prove the
22 burglary on, Your Honor. And we have a -- we have case
23 law, the State v. John Simmons, Your Honor, 352 S.C. 342,
24 which, basically, it states in there that the State can
25 prove the burglary first on any of the elements. And

1 we're not limited to choosing one of them, Your Honor.

2 THE COURT: All right.

3 MR. HOWE: Your Honor, in response to that, I would
4 contend you still have to go through a 403 analysis, you
5 know. And I would -- it still is extremely prejudicial
6 when you have a Defendant on trial for burglary where
7 there's going to be evidence introduced that the Defendant
8 has committed two prior burglaries. And they don't need
9 to do that. Based on what you've already heard the
10 presentation to -- if the jury believes the State's
11 position, they don't have to use that. Because there's
12 already allegations of a burglary during the nighttime,
13 entry during the nighttime. They don't have to do that.

14 All it does is it tells the jury right off the top
15 that this man has been convicted of two prior burglaries.
16 And that, I would contend, still should go through that
17 analysis. Because it just puts the Defendant in a
18 difficult position.

19 I don't have the case. But I would cite -- I don't
20 know that this is the perfect analogy. But I would ask
21 the Court to consider this that, you know, in cases
22 where -- in a drug trial where the Defendant is accused of
23 a distribution of a drug, I think there's, at least, one
24 case that talks about it's prejudicial to have evidence of
25 a prior record. Of course, that goes, I realize, to

1 sentencing enhancement purposes. But the Courts have
2 ruled that you can't bring up the prior conviction of a
3 similar type offense because it's prejudicial.

4 And, here, in this case, when that's brought up, the
5 testimony that it -- clearly, if you apply that same
6 analysis, it's prejudicial. There's no question about it.
7 I think everybody -- I don't think anybody would disagree
8 with that. It's just -- you know, if they can go under
9 either theory, anybody who's charged with burglary, based
10 on two or more priors, he's behind the eight ball already.

11 THE COURT: Well, I understand your point. I think
12 it is, certainly, a reasonable point to make. But I don't
13 know how it overcomes the law, which sets forth the crime
14 which the State is entitled to pursue and prove by both
15 means about his two prior convictions, or that it occurred
16 in the nighttime.

17 I know there are cases, I think, where, you know, if
18 someone has a multitude of prior burglary convictions,
19 there has to be some limit on how many can be put in. I
20 don't understand that to be the case here. I don't know
21 how many priors there are. I would have to find that the
22 State can pursue and proceed with that prior conviction
23 method of establishing burglary first.

24 As far as Rule 403, you know, I think you're right,
25 Mr. Howe.

1 There are cases under Rule 609 that talk about -- or
2 Rule 404, for that matter, that talk about bad acts or
3 convictions that are similar to the case that the
4 Defendant is, currently, charged with, certainly, enhances
5 the prejudicial value and effects that analysis. But, you
6 know, here, there's no way to sanitize the prior
7 convictions without eroding what I find to be the State's
8 clear right, under the statute, to proceed using that
9 method of proof.

10 I mean, the only analogy I can think about is the
11 cases involving a felon in possession of a firearm, and
12 the State or the federal government is entitled to prove
13 those by proving the prior felony. I know there are cases
14 saying that even if the Defense offers to stipulate to the
15 felonies, it is not enough to cut off the State's right to
16 have that brought before the jury in its full particulars.

17 Although this is different because we're talking
18 about a crime exactly of the nature for which the
19 Defendant has previous convictions for. So it becomes
20 almost an automatic form of character evidence. But it is
21 what it is. And I can't change the statute.

22 So thank you for your argument, but I respectfully
23 deny it.

24 MR. HOWE: Judge, you brought up a good point, if I
25 can. And not to belabor this. We would have offered to

1 stipulate that for you making that determination without
2 that going to the jury. We, certainly, would have done
3 that --

4 THE COURT: Right. And I would have --

5 MR. HOWE: -- to make -- to add to the argument
6 that's being presented.

7 THE COURT: Yes, sir.

8 MR. HOWE: Because you pointed that out very wisely.

9 THE COURT: Okay. Anything further?

10 MR. FLEMING: Yes, sir. One more motion, Your Honor.

11 Your Honor, pursuant to Rule 404 of the South
12 Carolina Rules of Evidence, Your Honor, which allows to
13 show the conduct of other crimes or wrongs or acts, Your
14 Honor, the State would move, at the appropriate time, to
15 proffer into evidence a letter written by the Defendant
16 after he was arrested. He sent the letter from the jail.
17 Basically, he sent the letter to the victim, Your Honor,
18 saying that he doesn't know why she is doing this to him
19 after he cut her grass, took her to the movies, took her
20 to the doctor.

21 And he goes on to say that, "You know what I need
22 right about now is to play with some big tits. I've got
23 me some lowtron [phonetic] I have to use every couple of
24 days. You know what you need is a little bit of this
25 peter in you. When I do get out, that's what I'm going to

1 gentlemen. That's where we are. We're at opening
2 statements. That's where we are. And that's what I ask
3 you and urge you to do, to keep an open mind and give us
4 the chance to present that before you make your decision.
5 I appreciate very much your willingness to do that.

6 Thank you.

7 THE COURT: Thank you, Mr. Howe.

8 Mr. Fleming, you may call your first witness.

9 MR. FLEMING: Thank you, Your Honor.

10 We would call Marilyn Hopkins to the stand.

11 THE BAILIFF: If you'll put your left hand on the
12 Bible and raise your right hand and turn that way.

13 WHEREUPON,

14 MARILYN DIANE HOPKINS,
15 after first having been duly sworn, testified as follows:

16 THE CLERK: Thank you.

17 You may be seated.

18 MR. FLEMING: May it please the Court, Your Honor.

19 THE COURT: Yes, sir.

20 MR. FLEMING: Thank you.

21 DIRECT EXAMINATION

22 BY MR. FLEMING:

23 Q Ms. Hopkins, could you just state your full name for
24 the record?

25 A Marilyn Diane Hopkins.

1 Q Okay. And where do you live, Ms. Hopkins?

2 A 70 Cindy Drive, Cross Hill, South Carolina.

3 Q Okay. 70 Cindy Drive?

4 A 70.

5 Q Okay. And is that in Laurens County?

6 A Laurens County.

7 Q Okay. And how long have you been living there?

8 A Oh, going on 4 years.

9 Q Okay. And, prior to living there, where did you
10 live?

11 A I lived in Greenville up until about four and a half
12 years ago when I lost my husband in ICU from a bad car
13 wreck.

14 Q Okay. So, prior to living in Laurens, you lived in
15 Greenville County with your husband?

16 A Yes, sir.

17 Q Okay. And, so after he passed away, you moved here
18 to Laurens. Is that what you're saying?

19 A I lived with my sister for a year. And then I moved
20 over where I'm living now.

21 Q Okay. And who is your sister?

22 A Judy Prather.

23 Q Okay. And how old are you, Ms. Hopkins?

24 A 57.

25 Q Okay. And do you work anywhere?

1 A I don't.

2 Q Okay. Where did you last work?

3 A I worked at different places, at J.P. Stevens until
4 my health went downhill.

5 Q Okay. And you said your health went downhill. What
6 happened back in August of '08, at that time, concerning
7 your health?

8 A Well, I found out I had lung cancer. And I had it in
9 the left lung. They did a biopsy. The pathology was done
10 on it. And I started taking chemo and radiation. And it
11 made me real weak and pulled me down and -- you know, like
12 that.

13 Q Okay. In November of 2008, were you still undergoing
14 chemotherapy and radiation?

15 A I was.

16 Q Okay. And what about now, are you taking any
17 treatment now?

18 A No. I took the chemo and radiation. I don't have to
19 take it now.

20 Q I'm sorry. You said what now?

21 A I don't have to take it now.

22 Q Okay. So are you still -- do you still have the
23 cancer, or is it gone?

24 A It's gone.

25 Q Okay. And you had some trouble here recently,

1 though, did you not?

2 A I did with breathing with my lungs, and emphysema,
3 and all that. I was breathing on oxygen. I was doing
4 breathing treatments. I just got out of the hospital
5 yesterday, it's in and out.

6 Q Okay. Why did you move down here to Laurens?

7 A Why did I move down here to Laurens?

8 Q Yeah.

9 A Because I didn't no longer want to be -- there's too
10 many memories there of me and my husband. Because we were
11 married about 17 years. And I moved down here to be
12 closer to my sister.

13 Q Okay. And do you have children?

14 A I have a son.

15 Q And what's his name?

16 A William Earl Sizemore.

17 Q Okay. He goes by "Billy"?

18 A Billy.

19 Q Okay. And do you drive?

20 A I never drove.

21 Q Never?

22 A My sister took me places. And then my son took me
23 places and brought me back home.

24 Q So you've relied on others to get you places; correct?

25 A Uh-huh.

1 Q At 70 Cindy Drive, the place that you live, is it a
2 regular house, or is it a mobile, home or --

3 A Mobile home.

4 Q Okay. And are there other houses around you there?

5 A I have someone that lives to the right. That's my
6 friend, Ms. Norma. And then on the other side -- well,
7 that mobile home was moved. She was a real good friend of
8 mine. And I loved her to death.

9 Q Okay. How about across the street?

10 A Across the street? Are you talking about to the
11 left? Are you talking about Joyce?

12 Q Yes. Who lives across the street from you?

13 A Joyce Epting.

14 Q Joyce Epting?

15 A Uh-huh.

16 Q Okay. And who stayed there with Ms. Epting?

17 A Her son, Kevin Epting. And she, also, had a son
18 there...

19 Q Okay. Let's go back to November the 11th of 2008.

20 A Sure.

21 Q What did you do that day?

22 A I did my laundry, vacuumed my floors, and mopped.
23 And I did all the things a woman does.

24 Q Was that a good day for you as far as physically?

25 A A perfect day.

1 Q Okay.

2 A Perfect.

3 Q What kind of side effects had you been experiencing
4 because of the treatment you were going under?

5 A From the -- Dr. Vician, one of the cancer ladies -- I
6 was having a lot of back pain and all that from the chemo.
7 It made me real sick.

8 Q It made you real sick?

9 A Yes.

10 Q How?

11 A Just some nausea.

12 Q Okay. What about your strength, did it have any
13 effect on your strength?

14 A I was real weak.

15 Q Did you go anywhere that day, on November the 11th?

16 A Not to my knowledge.

17 Q If you had, you would have had to call somebody --

18 A To come get me.

19 Q Okay. What time did you go to bed that evening?

20 A I went to bed that night about -- well, about 10:30
21 or 15 until 11:00.

22 Q So, somewhere in that time frame, you went to bed?

23 A Uh-huh.

24 Q And when you go to bed -- or when you went to bed
25 that night, do you turn all the lights out or --

1 A I turn them all out.

2 Q Okay.

3 A Sometimes I have trouble getting off to sleep when I
4 lay down, because I can't breathe good.

5 Q Okay. Well, that night, did you turn all the lights
6 off that night?

7 A I turned all the lights off.

8 Q Okay. Even -- in your bedroom -- what about the
9 other rooms? Did you turn off all the lights --

10 A I cut them out, too.

11 Q Okay. And did you go to sleep immediately when you
12 went to bed?

13 A I didn't. Because I wasn't breathing good. I had to
14 put myself up against the wall and use some breathing
15 stuff and then get my oxygen on. I had trouble breathing.
16 I felt like I was going to take my last breath.

17 Q Well, what happened after you went to bed?

18 A I, finally, laid there and I got off to sleep. And I
19 thought -- I said, I'm not going to -- I assume I've got
20 my front door locked. I said, I don't want to get back up
21 and go check it. So I didn't get up and go check it. I
22 just laid there and went to sleep.

23 Q Okay. What happened next?

24 A Next, I heard somebody in there. And I got up. And
25 it was the Defendant.

1 Q Let's go back a little bit.

2 A Okay.

3 Q You said you heard somebody. Were you awake when you
4 heard them, or did it wake you up?

5 A It woke me up.

6 Q Okay. So whoever -- whatever you heard woke you up?

7 A It woke me up.

8 Q Okay. What did it sound like?

9 A Somebody coming in the front door.

10 Q Okay. And what did you do after you heard that?

11 A I heard that. And I said, What are you doing with my
12 pocketbook and all? And he started walking toward me and
13 kicking me, and hitting me, and all that. And I told him
14 if he didn't get out of the house, I'd call the police.

15 Q Who was it?

16 A The Defendant, Kevin Epting.

17 Q Is there any doubt in your mind that that's who it
18 was?

19 A He was the one.

20 Q Okay.

21 A He was the one.

22 Q All right. How did you know it was him?

23 A Because he had been in my house several times with my
24 son eating chili beans. He would cook on the grill and
25 take it over there, and bring boxes of clothes to my son.

1 Q Okay. Well, how were you able to determine that it
2 was Mr. Epting that was there in your house?

3 A Because from the tattoos on his arms and on his legs.

4 Q Okay. And how about the lighting in there? You said
5 you had turned all the lights out when you went to bed?

6 A I did.

7 Q Okay.

8 A When I come through, I turned the hall light on.
9 That's when he came hitting me, and kicking me, and all
10 that after me going through cancer.

11 Q All right. And what did he have in his hand when you
12 saw him?

13 A He had my pocketbook.

14 Q Okay. And how many times did Mr. Epting hit you?

15 A Several times.

16 Q Okay. Where did he hit you at?

17 A In the eyes. He kept kicking me. And then I had
18 bruises on my legs where he kicked me.

19 Q Okay.

20 A Just somebody going through cancer and then somebody
21 comes up and does something like that to a 57-year-old.

22 Q Okay. Well, what happened after he kicked you?

23 A I told him that he best get on out the door or I was
24 going to call the police. And he went on out the door.
25 And, about an hour later, he was down at a trailer park on

1 down from me trying to sell some tapes.

2 Q Now, did you immediately call the police at that
3 time?

4 A I didn't.

5 Q Why not?

6 A I was frightened, and scared, and everything. I
7 called my sister and woke her at about 1:40 in the
8 morning.

9 Q Okay. And did he take your pocketbook?

10 A He didn't take it. He dropped it on the couch.

11 Q Okay. So he dropped the pocketbook and then he
12 left?

13 A He left.

14 Q Had Mr. Epting helped you out before in the past?

15 A Sure has. There was a time when my sister couldn't
16 take me for chemo or radiation. And him and his mother
17 took me over there. And I got the gas for them to go over
18 there. And they brought me back and everything.

19 She would get him to go along with her, because her
20 car wasn't working good. She was scared it would cut off.
21 And he drove. He never had no driver's license or
22 anything. He just drove her car on his own free will.

23 Q Okay. Let me let you read that, Ms. Hopkins.

24 A Sure.

25 Q Can you identify that document there?

1 A (There was no response.)

2 Q Is that your statement that you gave to police?

3 A It sure is.

4 Q Okay. Well, let me hold it back again. Let me ask
5 you this. Right here, you say you heard someone in the
6 kitchen and you opened your bedroom door and someone was
7 at the china hutch. And I said, My son is off limits to
8 my wallet and you will not go in my billfold. And they
9 looked up and you said it was Kevin Epting?

10 A Correct.

11 Q And when you say that part about your son, you say
12 your son is off limits to your wallet. What were you
13 meaning by that?

14 A Well, because up here one time, her mother had Sharon
15 and Joyce Epting. And she had Kimberly over there. And,
16 at one time, what I mean by that is when I said he was off
17 limits to my billfold, because I took it one time -- he
18 had gotten money out of my billfold. But it was Kimberly
19 that went and purchased some stuff high up and paid way up
20 money for it. And people has to be on, you know...

21 Q Okay. So were you saying -- this night when you said
22 your son is off limits to your wallet, were you saying --
23 was it your son --

24 MR. HOWE: Objection. He's leading, Judge.

25 THE COURT: All right. Sustained.

1 BY MR. FLEMING:

2 Q When you say -- when you make the statement, My son
3 is off limits, were you directing that to him?

4 MR. HOWE: Objection, Your Honor. Again, that's
5 leading.

6 THE COURT: Sustained.

7 BY MR. FLEMING:

8 Q What did you mean by, My son is off limits to my
9 wallet or my -- I said, My son is off limits to my wallet?

10 A Because I thought he had been in there. He hadn't.
11 Kimberly had been in and gotten money out of it.

12 Q Who?

13 A Kimberly was staying with Kevin's mother over at
14 Joyce's next door beside me.

15 Q Was your son there the night of the 11th in your purse?

16 A No, sir, he was not.

17 Q Who was it?

18 A Kevin Epting.

19 MR. FLEMING: I beg the Court's indulgence for one
20 minute, Your Honor.

21 THE COURT: Yes, sir.

22 (Pause.)

23 BY MR. FLEMING:

24 Q Ms. Hopkins, let me show you this. Is that a fairly
25 good representation of the schematics of your home?

1 A It sure is.

2 Q Okay. And does it show your bedroom on there?

3 A Uh-huh, right here.

4 Q And if you hold that up and show the jury, point to
5 your bedroom?

6 A My bedroom is here.

7 Q Okay. And your bedroom goes out into what?

8 A This is -- it just goes back into the big bathroom in
9 my bedroom.

10 Q Yeah. But I'm talking about, to get out of your
11 bedroom to go to the kitchen, what does it go out into?

12 A In the hallway.

13 Q Okay. And, the hallway, is that where you say you
14 turned on the light?

15 A That's right.

16 Q Okay. And, as you come around the hallway into the
17 kitchen, what is right there on the wall there?

18 A Right here?

19 Q No. Up top?

20 A Up top?

21 Q No. As you're coming around the corner from -- into
22 the kitchen?

23 A That's another bedroom on --

24 Q No. Let me show you. As you come around the hall to
25 the kitchen area against the wall, what is that?

1 A The dining room where the table and everything sits.

2 Q All right. What's this right here that's up against
3 the wall there?

4 A That's my china hutch.

5 Q Okay. And is that where you kept your --

6 A That's where I kept it.

7 Q And so you came around and that's where you saw
8 Mr. Epting; is that correct?

9 A Correct.

10 MR. FLEMING: Your Honor, the State would like to
11 move this into evidence as State's Exhibit No. 1.

12 MR. HOWE: No objection to that, Judge.

13 THE COURT: All right. It's in evidence.

14 (WHEREUPON, State's Exhibit No. 1 was marked for
15 identification and admitted into evidence.)

16 BY MR. FLEMING:

17 Q Ms. Epting [sic], I think I said this in my opening,
18 but you didn't call the police until the 12th; is that
19 correct?

20 A The 12th?

21 Q Yeah, November the 12th.

22 A On the 12th, my sister did.

23 Q Okay. Your sister called?

24 A Uh-huh.

25 Q And who did you talk with?

1 A I don't know who she talked with.

2 Q I'm talking about when the police got there, who did
3 you talk with?

4 A Oh, I talked with Ken and another one come by,
5 another officer. I don't recall his name. And then Joel
6 Turner come by one day.

7 Q Okay. Do you recognize Deputy Galarza here?

8 A Sitting right here?

9 Q Yes.

10 A Sure do.

11 Q Did you talk to him?

12 A He's the one I called when the episode occurred with
13 my son, William Earl Sizemore.

14 Q Okay. Did you talk to him the day after Kevin Epting
15 broke into your house?

16 A Not to my knowledge. I called him on behalf --
17 because my son had come in. He was watching TV. I was
18 watching TV. And he went into the bedroom. He was
19 sleeping in and --

20 Q Okay. We're not going into that right now.

21 A Okay.

22 Q The day that your sister called, wasn't it Deputy
23 Galarza that came out to talk to you?

24 A That's where he was.

25 MR. FLEMING: I beg the Court's indulgence for one

1 second, Your Honor.

2 THE COURT: Yes, sir.

3 (Pause.)

4 BY MR. FLEMING:

5 Q Did you have to go to the hospital as a result of the
6 injuries you received from --

7 A I sure did.

8 MR. FLEMING: I have no further questions, Your
9 Honor.

10 MR. HOWE: Your Honor, may we approach real quick?

11 THE COURT: Sure.

12 (WHEREUPON, a bench conference was held.)

13 THE COURT: Okay. Ladies and gentlemen, we're going
14 to break for lunch. I just ask you to be back in the jury
15 room at 2:15. And we'll resume the case at that time.

16 Don't talk about the case. And continue to keep an
17 open mind.

18 Thank you very much.

19 (WHEREUPON, the jury was excused from open court at
20 approximately 1:02 p.m.)

21 THE COURT: Okay. We'll see you back at 2:15.

22 (WHEREUPON, a lunch break was taken.)

23 THE COURT: Are you all ready for the jury?

24 MR. FLEMING: Yes, sir.

25 Just one thing, I noticed before we started and I

1 meant to bring it up, there's only 13 jurors there. And
2 we didn't know anything about that, Judge. And that's --
3 nobody told us.

4 THE COURT: Sir?

5 MR. FLEMING: Nobody told us that --

6 THE COURT: Well, let's see. I don't know where --
7 Ms. Lancaster called me yesterday and said that --

8 What was the juror's name?

9 THE CLERK: Was it Erin Morris?

10 I think that's it.

11 THE COURT: She had a child-care issue. And I asked
12 her to call back and confirm that the child was under
13 seven and asked if she had custody, care, and control of
14 the child, and doesn't have any other way to take care of
15 the child. She said that her child care had fallen
16 through, from what she had told Ms. Lancaster. So I just
17 told her to go ahead and excuse her.

18 But if anybody has anything they want to put on the
19 record in regard to that, I'll be glad to let them do it.
20 And I apologize for not disclosing that earlier. But I,
21 frankly, forgot about it since yesterday. But I don't
22 know if she was a regular juror or an alternate.

23 MR. FLEMING: Nothing from State, Your Honor.

24 MR. HOWE: Nothing, Judge.

25 THE COURT: Okay.

1 MR. HOWE: Was she a regular?

2 THE CLERK: She was a regular.

3 THE COURT: She was a regular juror. But it seemed
4 to me that she met the criteria to be exempt anyway, so.

5 All right. Anything further?

6 MR. FLEMING: Nothing from the State, Your Honor.

7 MR. HOWE: Your Honor, again, I don't want to risk
8 any of the Court's previous rulings. But, now, I think
9 under cross-examination, anything that was testified to
10 would be proper cross-examination; is that correct,
11 without going beyond the Court's ruling?

12 THE COURT: Well, I think I --

13 MR. HOWE: Are you just going to rule on that at the
14 time?

15 What I'm trying to do -- I'm not asking for an
16 advisory opinion. I mean, I just don't want to stop the
17 flow of the cross-examination. But it may have to happen
18 anyway. We'll see how it develops.

19 THE COURT: Well, I may be anticipating where you're
20 going, which is probably erroneous on my part. But we'll
21 just have to see where it goes.

22 MR. HOWE: Yes, sir.

23 THE COURT: Yes, sir. You can bring the jury on in.

24 (WHEREUPON, the jury came into open court at
25 approximately 2:25 p.m.)

1 THE BAILIFF: They're all present, Your Honor.

2 THE COURT: Thank you.

3 Yes, sir, Mr. Howe.

4 MR. HOWE: Thank you, Your Honor.

5 THE COURT: Cross-examination.

6 MR. HOWE: Thank you.

7 CROSS-EXAMINATION

8 BY MR. HOWE:

9 Q Ms. Hopkins, how are you doing?

10 A Fine.

11 Q Good. I understand that you just got out of the
12 hospital, I think, just the other day; is that right?

13 A I did yesterday afternoon.

14 Q Yes, ma'am. You've been having breathing problems?

15 A Uh-huh.

16 Q And emphysema?

17 A Emphysema.

18 Q Yes, ma'am. Were you smoker?

19 A I was.

20 Q Okay. I understand. Now, let's talk a little bit
21 about, if we can, Kevin first.

22 A Excuse me. I need to do this (indicating and raising
23 her hand).

24 Q Ma'am?

25 A I need to do this (indicating and raising her hand).

1 Q No, ma'am. You've already done that. Okay. You
2 don't have to do that again.

3 Kevin -- you knew Kevin Epting; right?

4 A Sure did.

5 Q Okay. And Joyce, his mother, lived real close to
6 you; right?

7 A Yeah. She was real good friend to me.

8 Q Okay. And, as a matter of fact, Kevin would cut your
9 grass sometimes?

10 A Uh-huh.

11 Q Even in the summertime?

12 A Uh-huh.

13 Q Okay. So you had a chance to see any tattoos or
14 anything like that, I guess, when he was cutting your
15 grass and riding you home; is that right?

16 A Uh-huh.

17 Q All right. And, in fact, you know, he helped out --
18 you know, any time you asked him about anything, he would
19 help out, or his mom would help you out?

20 A Sure.

21 Q Because you indicated that you needed help at
22 different times?

23 A Sure.

24 Q You didn't drive?

25 A I didn't drive.

1 Q And they helped you out with stuff like that; right?

2 A Right.

3 Q Yes, ma'am. And let me ask you, the -- on the
4 Tuesday -- on the evening we're talking about, November
5 the 10th, you said you went to sleep, you know, sometime,
6 I think, you said you were having trouble breathing. But
7 you thought you went -- tried to go to sleep about a
8 quarter of 11:00; right?

9 A Correct.

10 Q Okay. And you were taking, I guess, some medication
11 for your cancer during that time; right?

12 A I was taking something.

13 Q Yes, ma'am. Were you taking, I think, Xanax?

14 A Oh, no.

15 Q You weren't taking anything like that?

16 A Oh, no.

17 Q The doctor never had prescribed that for anxiety or
18 anything?

19 A I just took stuff for chemo and radiation.

20 Q Okay. What kind of medicine was it? Do you
21 remember?

22 A Just stuff that run through my IV veins. And you
23 have to lay in the bed and take it and the chemo. And
24 then you go to radiation.

25 Q Okay. So the doctor's records talking about that --

1 you didn't take the Xanax?

2 A Huh-uh.

3 Q Did he ever prescribe it for you?

4 A Oh, no.

5 Q Okay. Now, the -- I heard you say that you thought
6 about whether or not to lock the door. That's what I
7 heard you testify to; right?

8 A I sure did.

9 Q Your door -- you could lock your door; right?

10 A I could lock my door.

11 Q With keys?

12 A Uh-huh.

13 Q All right. Is that right, with keys?

14 A That's right.

15 Q Okay. And I believe you testified that you heard
16 someone open the door. That's what I heard you testify to
17 when you were talking to Mr. Fleming; is that right?

18 A Uh-huh.

19 Q Okay. And I believe you testified then that you
20 opened your bedroom door; right?

21 A Correct.

22 Q Okay. So your bedroom door was closed; right?

23 A Uh-huh.

24 Q Now, when I looked at that statement -- and that was
25 the statement that Mr. Fleming was asking you about

1 earlier.

2 MR. HOWE: Let's see if we can have that -- fine
3 where that statement is.

4 Do you have that?

5 MR. FLEMING: Here it is.

6 BY MR. HOWE:

7 Q This was the statement that he was talking to you
8 earlier about; right?

9 A That's it.

10 Q Yes, ma'am. And that was the statement that you gave
11 back on November the 13th, 2008, at about 12:45 in the
12 daytime; right?

13 A Correct.

14 Q Okay. And your sister is Judy Prather; right?

15 A Judy Prather.

16 Q And she was a witness to the statement; right?

17 A Uh-huh.

18 Q And, in that statement, Ms. Hopkins, you didn't say
19 anything about leaving your door unlocked, did you?

20 A I didn't say anything about leaving it locked or
21 unlocked. But I went on off to sleep that night. And
22 then I thought, I'm -- I'll go back in and check my door.
23 I believe it's locked. Evidently, it wasn't locked.

24 Q Okay. You didn't -- but in your statement that you
25 gave law enforcement -- and that was back on November the

1 13th of last year -- you didn't tell the police officers
2 that investigated the case that, I didn't lock my door.
3 You didn't tell them that, did you?

4 A Not to my knowledge. I don't think I did. I just
5 told them I didn't get up and go check it.

6 Q As a matter of fact, you --

7 A It was unlocked, though.

8 Q Okay. And don't let me interrupt. I'm having a hard
9 time hearing you sometimes and understanding you.

10 A Okay.

11 Q But, in fact, you told the police officers that you
12 didn't know -- back on November the 13th, when they first
13 investigated the case that you didn't know how anybody
14 came into your home. You told them that, didn't you?

15 A Uh-huh.

16 Q Okay. So you didn't mention anything about hearing
17 the front door open, did you?

18 A No.

19 Q To the police officers back then?

20 A No.

21 Q Okay. And this drawing -- you helped out, I believe,
22 with the drawing of the inside of your home; right?

23 A I did.

24 Q Okay. And the door that we're talking about is the
25 front door; right?

1 A The front door.

2 Q And then the front door leads, actually, into the
3 living room; right?

4 A Uh-huh.

5 Q It doesn't lead directly into the kitchen, does it?

6 A Huh-uh.

7 Q Okay. And then your bedroom is off to the left from
8 the kitchen some distance away?

9 A From the dining area.

10 Q Okay. And this is a -- I'm not going to ask you to
11 stand up. I understand that. But that drawing of the
12 front door, and the living room, and the kitchen, and the
13 bedroom, that's pretty much the way it is in your home; is
14 that correct?

15 A That's the way it is.

16 Q Okay. And you didn't even tell the officers, did
17 you, that you heard the front door open? Did you?

18 A I didn't.

19 Q In fact, you told them that you heard somebody in the
20 kitchen area of your home, not the living room area where
21 the front door --

22 A It woke me up. And I heard it. And I got up.

23 Q Right. Okay. But you told -- but what I heard you
24 testify to earlier was that you heard the front door open.
25 But, now -- but going back to your statement, you told the

1 officer then that the -- that you heard somebody in the
2 kitchen, didn't you?

3 A I did.

4 Q Okay. And you didn't say anything about hearing the
5 front door open; right?

6 A Huh-uh.

7 Q You would agree with that, wouldn't you?

8 A Huh?

9 Q You would agree with that, wouldn't you?

10 A Uh-huh.

11 Q All right. Now, you indicated in your statement and,
12 I believe, you even testified to that and you said someone
13 was at your china cabinet. And that's in the kitchen;
14 right?

15 A In the kitchen next to the dining room table.

16 Q Okay. And I believe you told Mr. Fleming that that's
17 where you kept your money?

18 A Correct.

19 Q And you kept your money in a purse, as I understand
20 it; is that right?

21 A Uh-huh.

22 Q And was there a wallet in the purse?

23 A A wallet in my pocketbook.

24 Q Yes, ma'am. And sometimes you called your wallet a
25 purse -- I mean, excuse me. I'm sorry. I'm having

1 trouble.

2 Sometimes, in your purse, you called it a wallet and
3 other times you called it a billfold; right?

4 A Uh-huh.

5 Q But when we're talking about wallet and billfold,
6 just so I can understand, we're talking about the same
7 thing?

8 A Uh-huh.

9 Q Okay. And you said, in your statement, that someone
10 was at your china cabinet. And then the next sentence
11 that I read in your statement was, But I said my son is
12 off limits to my wallet. You said that someone was there;
13 right?

14 A Uh-huh.

15 Q But you said your son was off limits to your wallet;
16 right? That's what you said?

17 A Uh-huh.

18 Q And that's your son, Billy, that you referred to as
19 "Billy"; right?

20 A Yeah.

21 Q And I heard you say that earlier -- sometime earlier
22 you had suspected Billy of taking your money from you
23 before, but then you thought that somebody else did it; is
24 that right?

25 A Sure.

1 Q And Billy knew where you kept your money, didn't he?

2 A He did.

3 Q In the china cabinet?

4 A Uh-huh.

5 Q Okay. And so, back to the statement, when you're
6 trying to tell these officers back on November 13th of
7 last year, when you're trying to tell them the way this
8 happened, you said that someone -- you mentioned that
9 someone was at the china cabinet. And then the very next
10 thing you do is you talk about Billy. And you told us now
11 that the reason you were talking about Billy is because
12 you had suspected him before of getting your money from
13 your purse that was in your china cabinet?

14 A Correct.

15 Q Okay. Now, you, also, testified -- and I believe I
16 heard you testify when Mr. Fleming was asking you about
17 officers coming to your home at different times, you
18 mentioned something about you recognized this officer
19 right here?

20 A Uh-huh.

21 MR. HOWE: And I apologize. Help me with
22 pronunciation.

23 DEPUTY JUAN GALARZA: Deputy Galarza.

24 MR. HOWE: Galarza, Officer Galarza.

25 Thank you.

1 BY MR. HOWE:

2 Q You recognized him. And you were talking before,
3 when Mr. Fleming asked another question about Billy,
4 something about seeing this officer when Billy was
5 sleeping somewhere. Would you go on and tell us what
6 that's about?

7 MR. FLEMING: Your Honor, again, I'm going to object
8 to all this.

9 THE COURT: All right. Let me just talk to y'all
10 over here real quickly.

11 (WHEREUPON, a bench conference was held.)

12 THE COURT: All right. Ladies and gentlemen, we're
13 going to take just a quick recess to resolve a matter out
14 here.

15 Don't talk about the case. And continue to keep an
16 open mind. You'll be returning shortly.

17 (WHEREUPON, the jury was excused from open court at
18 approximately 2:38 p.m.)

19 THE COURT: Okay. There was an objection made. We
20 had a bench conference. Mr. Fleming indicated that his
21 objection was based on an earlier in-limine ruling
22 regarding third-party guilt evidence. And Mr. Howe
23 responded that he believed the door had been opened by
24 Ms. Hopkins during her direct testimony.

25 I'll give both sides an opportunity to further

1 elaborate on their arguments.

2 And, Mr. Howe, I'll give you an opportunity to
3 proffer the testimony. And my inclination is to sustain
4 the objection at this point. But I want to let y'all have
5 the opportunity to put whatever you need to on the record.

6 MR. HOWE: Thank you, Judge.

7 Would it benefit the Court in the ultimate ruling if
8 we go ahead and continue with the testimony?

9 THE COURT: Yes, sir. That's fine.

10 MR. HOWE: Yes, sir.

11 CROSS-EXAMINATION (IN-CAMERA)

12 BY MR. HOWE:

13 Q Let me see if I can get us back to where we are --
14 where we were, Ms. Hopkins.

15 A Excuse me.

16 Q Are you okay? Do you want some water?

17 THE BAILIFF: She's got some water.

18 MR. HOWE: She's got it. Okay.

19 BY MR. HOWE:

20 Q Ms. Hopkins, remember, we were talking about you
21 seeing officer -- the officer --

22 DEPUTY JUAN GALARZA: Galarza.

23 MR. HOWE: I can do better. I promise. But I'm
24 struggling. I apologize.

25 It's Galarza?

1 DEPUTY JUAN GALARZA: Yes.

2 BY MR. HOWE:

3 Q And you were mentioning before Mr. Fleming asked you
4 another question about when Billy was sleeping. Could you
5 tell the Court now what was happening when Billy was
6 sleeping, what was going on, and why the officer was at
7 your -- in your presence?

8 A I --

9 MR. FLEMING: Your Honor, I'd like to object to one
10 thing. I never mentioned anything about Billy sleeping,
11 as Mr. Howe told it. I asked her, specifically, did she
12 ever remember talking to Officer Galarza after she was
13 robbed when he came out to the house. I never mentioned
14 anything about Billy sleeping.

15 THE COURT: Okay. Well, my memory is the same, but
16 the record will speak for itself.

17 MR. FLEMING: Yes, sir.

18 MR. HOWE: Your Honor, if I said that Mr. Fleming
19 asked when he was sleeping, that is incorrect. I was -- I
20 thought I was trying to cover it and say that that's what
21 she was testifying to about was Billy sleeping. Her
22 response was something about Billy sleeping, not
23 Mr. Fleming's question. So if I phrased the question
24 improperly, Mr. Fleming is absolutely correct.

25 THE COURT: Okay. Yes, sir.

1 BY MR. HOWE:

2 Q You were talking about Billy sleeping and seeing this
3 officer, could you tell the Court about that?

4 A I was speaking on the times that -- when he came in,
5 he went in there into the bedroom and laid down. And I
6 had the TV on. And I had it on kind of loud. And he got
7 up and he opened the -- when he slung the door back, you
8 know, there was a little place like that on the wall. And
9 I had to call him about it.

10 Q You had to call the law about that?

11 A Uh-huh.

12 Q Okay. And is that when he went over next door --
13 Billy went next door to Joyce Epting's?

14 A Uh-huh, and Kevin's

15 Q And you called 911?

16 A Uh-huh.

17 Q And the police came?

18 A Uh-huh.

19 Q Some police officer came?

20 A Well, he didn't bring my key back to me.

21 Q Who didn't bring it back?

22 A The officer brought it back to me.

23 Q Okay. So the officer -- Billy didn't bring it back?

24 A Huh-uh.

25 Q Why would he have had your key?

1 A Because he carried it with him on the weekends when
2 he went to Whitmire to get back in when he come on the
3 weekends.

4 Q Okay. So Billy did have your key --

5 A Uh-huh.

6 Q -- on a regular basis. And he was staying with you
7 during that time?

8 A No. He wasn't staying with me at that time. He was
9 in Whitmire.

10 Q Okay. But he -- but the reason he had your key was
11 what?

12 A When he would go to Whitmire and all to get back in
13 when he come back in on the weekends.

14 Q And was he staying with you just before the November
15 11th incident?

16 A No, he wasn't.

17 Q Okay. Had he been with you any time shortly before
18 that?

19 A He hadn't.

20 Q Okay. You hadn't seen him?

21 A I hadn't seen him, hadn't seen him.

22 Q Okay. You hadn't seen him. But back whenever the
23 officer came whenever that date was, he had your key?

24 A He had my key.

25 Q And you had to send the officer next door to get it

1 back from him when he was over at Joyce Epting's?

2 A To get the key.

3 MR. HOWE: Judge, that would be, at this stage, what
4 we'd be proffering. And it will be my position -- well, I
5 don't know if you want to hear from -- he may --

6 THE COURT: No. You go ahead.

7 MR. HOWE: It would be my position that I understand
8 the Court's ruling with regard to us offering third-party
9 guilt evidence by calling witnesses on that issue. This
10 is cross-examination as a result of testimony. Whether it
11 was illicit from the Solicitor or not, it's cross -- it
12 was direct testimony from the Prosecution's witness.

13 Now, so with the other factors involved with the
14 testimony about suspecting that one time that her son,
15 Billy, had taken her money with the testimony in -- at
16 least, it would be a factual issue for the jury as to how
17 an entry was gained and whether or not the door was left
18 unlocked, which was not mentioned in the statement, or
19 whether entry was gained in some other fashion.

20 With all that, I would submit that on
21 cross-examination, at this stage, we're not introducing
22 evidence. We're cross-examining, and that we would be
23 entitled to cross-examine on anything that was brought out
24 on direct examination. And that's -- that would be our
25 position.

1 I understand the Court's ruling, at least, right now
2 without a full proffer of other potential evidence is that
3 we can't introduce anything in our case. But this is
4 cross-examination and it's -- and I would submit that we
5 can't be prohibited from going into something that was
6 testified to. And that would be our position, Judge.

7 THE COURT: Thank you, Mr. Howe.

8 MR. FLEMING: Your Honor, again, you know, I asked a
9 specific question. And she started to blurt out something
10 else and I stopped her as quick as I could, Your Honor.

11 Again, what Mr. Howe has just brought out from
12 Ms. Hopkins on the stand is no different than what was
13 said earlier to this Court. And it has no effect and
14 has -- doesn't raise a reasonable inference or presumption
15 of innocence on the Defendant. Because it's dealing with
16 a matter where the victim, Ms. Hopkins, son came in, I
17 guess, mad or whatever and slammed the door and put a hole
18 in the wall. And that's all it was dealing with.

19 I don't see how that raises an inference or
20 presumption to his client. It does cast suspicion -- just
21 mere suspicion. And that's not admissible under the rule,
22 Your Honor. So that's what would -- that's what our
23 argument would be as to that.

24 Now, I understand that, you know, there was some
25 testimony -- or almost some testimony that she was getting

1 into about some money in the pocketbook. Well, I think
2 she has further stated that she found out that it wasn't
3 her son. It was somebody else that got the money out of
4 there. And she has no ill will against her son, Your
5 Honor.

6 But, again, I would say -- I would put forth that,
7 you know, your earlier ruling should stand. Because what
8 is being asked here is just trying to cast suspicion and
9 offers no reasonable inference or presumption to the
10 Defendant's innocence.

11 THE COURT: Any further argument?

12 MR. FLEMING: Nothing from the State, Your Honor.

13 MR. HOWE: Your Honor, I'm going to let Ms. Anderson
14 speak to it.

15 MS. ANDERSON: Just briefly, Your Honor.

16 THE COURT: Okay.

17 MS. ANDERSON: Just that even though your motion in
18 limine ruling stands, it doesn't aggregate the rules of
19 evidence and the ability to go into cross. Just under
20 brief research, State v. Rice, there was an issue of
21 third-party guilt. I suppose it was in limine. But it
22 was denied by the trial court. And then another issue was
23 brought up later in trial for impeachment purposes, but
24 dealt with third-party guilt.

25 The Defense attorney was allowed to go into the

1 testimony, even though it dealt with third-party guilt
2 because it had an impeachment quality. Just an analogy,
3 the motion doesn't disallow us to go into a regular
4 cross-examination since she testified on direct that there
5 was a -- that Officer Galarza responded to an episode
6 which occurred with her son, William Sizemore. And that's
7 all I have to add, Your Honor.

8 THE COURT: Well, how would that be -- I mean, if
9 it's not third-party guilt testimony, how is it relevant,
10 or how does it go to her bias, or testing her credibility
11 or otherwise constituting impeachment evidence?

12 MS. ANDERSON: I wasn't trying to propose it was
13 impeachment evidence. But just by analogy in State v.
14 Rice where it was allowed, that we'd still be allowed to
15 go into cross-examination.

16 THE COURT: Okay.

17 MR. FLEMING: Your Honor, I haven't seen the case,
18 but I would agree with that if I had asked the question
19 going into that area. I did not. My question was not a
20 question that went into that area, but a totally different
21 area. And, as soon as she made -- started commenting on
22 her son, that's when I stopped her.

23 Now, if my question would have been directed toward
24 her son and the incident with her son, I think that they
25 would be allowed to come in and do that. But that's -- my

1 question was not addressed to that area. And it's
2 different, I would think, than what's in the Rice case.

3 THE COURT: All right, again, I just -- in looking at
4 State v. Rice, and, State v. Cope, and Gregory, I just
5 don't find that there's in the record, as it stands now,
6 such proof connection to the crime by the alleged third
7 party as it tends to, clearly, point out that person is
8 the guilty party. And it would just be absolute
9 speculation, at this point, to try to link the son to the
10 crime.

11 I think that's exactly what the third-party guilt
12 rule was designed to prohibit. In part, because it
13 confuses the issues and could be misleading to the jury.
14 And while it is commendable for the Defense to try to
15 illicit such testimony, I just don't find it would be
16 proper under the rules.

17 So I'm adhering to my earlier ruling. And I sustain
18 the State's objection.

19 Okay. Anything else before we bring the jury back?

20 MR. FLEMING: Nothing from State, Your Honor.

21 MR. HOWE: Nothing.

22 THE COURT: All right. Bring the jury in.

23 (WHEREUPON, the jury came into open court at
24 approximately 2:56 p.m.)

25 THE BAILIFF: They're all present, Your Honor.

1 THE COURT: Yes, sir, Mr. Howe.

2 MR. HOWE: Thank you, Your Honor.

3 CONTINUED CROSS-EXAMINATION

4 BY MR. HOWE:

5 Q Ms. Hopkins, after this happened, I think you would
6 agree there was no furniture broken, no damage to the
7 home, no damage to the door, window, anything like that;
8 correct?

9 A No.

10 Q Nothing was, actually, taken; right?

11 A No.

12 Q You had a phone that worked at the time, didn't you?

13 A I did.

14 Q Okay. And you even told -- according to your
15 statement, you told the intruder that you would -- that
16 you were going to call the police or call law enforcement
17 if they didn't leave; correct? That's what you said?

18 A Correct.

19 Q Okay. And then you said that you were attacked and
20 beaten; correct? I heard you say that.

21 A I was what?

22 Q That you were attacked after that, even though you
23 said, If you don't leave, I'm going to call the police?

24 A Uh-huh.

25 Q And then you said you got attacked?

1 A Uh-huh.

2 Q Okay. And, even after the attack, you didn't call
3 the police, did you?

4 A I didn't.

5 Q Now, you testified, I believe, that after this
6 happened, your testimony was that you saw Kevin Epting at
7 the trailer park trying to sell tapes. That's what I
8 heard you testify to before lunch; right?

9 A After he left my way, he went down the other way and
10 he tried to sell them.

11 Q Okay. Now, this is 1:30, 1:40 in the morning; right?

12 A Right.

13 Q Okay. And would you tell the jury where at the
14 trailer park that was taking place?

15 A Maybe one trailer down from me. It would be the next
16 trailer on the right and the one over across from there.

17 Q Okay. I couldn't hear that last part of your answer.

18 A One trailer down from me on the right.

19 Q Yes, ma'am.

20 A And then there's another trailer there on the right.
21 And across from the other one on the right was another
22 one.

23 Q Okay. And you saw him -- so I assume you're telling
24 this jury that you -- after this happened, you looked
25 outside and saw, you say, Kevin Epting standing out there

1 selling -- attempting to sell some kind of tapes?

2 A No. He wasn't standing out there. He was standing
3 in his mother's car.

4 Q In his mother's?

5 A Car.

6 Q Car?

7 A He didn't drive. He didn't have no license.

8 Q But he was down there in his mother's car trying to
9 sell tapes?

10 A Correct.

11 Q Okay. And did the distance -- could you tell me how
12 far away you were to be able to see that?

13 A I couldn't see good because it was dark. But I got
14 hearsay he was down there, you know.

15 Q You got hearsay that he was down there?

16 A Uh-huh.

17 Q Okay. Well, that -- so let me get this straight now.
18 Because this is real important. You testified earlier
19 that you saw this and that's what you said under oath when
20 you -- like you were doing earlier when you put your hand
21 on that Bible; right?

22 A I put my hand on the Bible. I told the truth.

23 MR. FLEMING: Your Honor, I would object.

24 Could we have a side bar?

25 THE COURT: Okay.

1 (WHEREUPON, a bench conference was held.)

2 BY MR. HOWE:

3 Q Ms. Hopkins, I don't want to put words in your mouth.
4 I'm not going to try to do that. But let me ask you this.
5 Now, you --

6 A Sure.

7 Q -- testified earlier that -- I thought -- when you
8 were talking to Mr. Fleming that you saw Kevin Epting down
9 there selling tapes. That's what you testified earlier to
10 before lunch; right?

11 A I was saying that he was down that way trying to sell
12 tapes after he left my way.

13 Q Okay. And you indicated that you saw him down there.
14 Because you were describing where he was in the car -- in
15 his mother's car down in front of his mother's --

16 A He was in his mother's car driving with no license or
17 nothing.

18 Q Okay. I understand that about the no license. We've
19 covered that. But you said you saw that. But, now,
20 you're telling the jury that you didn't see that?

21 A You can only see so far. And it was dark, you know.
22 The car was sitting down there.

23 Q Okay. But help me out. I don't want to -- we're not
24 going to sit here and argue about it all night. I don't
25 want to do that. But didn't you tell the jury earlier

1 that you saw it?

2 A I did.

3 Q Okay. That you saw it?

4 A Yes.

5 Q But, now, you're saying you just heard it. Because
6 when we started talking about how dark it was and how hard
7 it might be to see, now, you're saying you just heard it.
8 Is that what you're saying now?

9 A I'm just going to say I heard it.

10 Q You're just going to say you heard you?

11 A Uh-huh.

12 Q Even though, you would agree with me that before
13 lunch, you said, I saw it?

14 A Uh-huh. I'm going to say I heard it.

15 Q Okay. Now, what you've testified to today, including
16 what we just talked about, you're saying that all that is
17 true?

18 A True.

19 Q You're saying that what you said before lunch and
20 what you said now about any of these events, it's all
21 true?

22 A All true.

23 Q Even though -- now, you're telling this jury that
24 maybe what you said before lunch wasn't exactly true.
25 That's what you're saying now?

1 A Well, what I'm saying is it is true about the episode
2 with the tapes down at the trailer.

3 Q You're saying you saw it?

4 A I saw it. The car was parked down there from what I
5 could see from my porch.

6 Q So, now, you're telling us again -- and, again, I'm
7 not -- now, you're saying you saw it?

8 MR. FLEMING: Your Honor, I'm going to object again.
9 I'd like to talk about this at a side bar again as well,
10 Your Honor.

11 THE COURT: All right.

12 (WHEREUPON, a bench conference was held.)

13 BY MR. HOWE:

14 Q Ms. Hopkins, you saw Ms. Joyce Epting the morning of
15 November the 11th, didn't you?

16 A I most certainly did.

17 Q You called her to come to your home, didn't you?

18 A I did. I did not make dinner that day.

19 Q Okay. You called her to come to your home?

20 A I did.

21 Q All right. And she was at your home for a period of
22 time, wasn't she?

23 A Until my sister came over and took me to the
24 emergency room.

25 Q Okay. She was at your home?

1 A She was at my home.

2 Q Okay. On November the 11th?

3 A November the 11th.

4 Q And you never told Ms. Epting that her son had been
5 the person who had come into your home and attacked you
6 just hours before?

7 A I did not go that route telling her that. She would
8 say her son did not do that to me.

9 Q But you didn't tell her that?

10 A I didn't tell her that, no.

11 Q You invited her in your home?

12 A I invited her into my home. I thought the world of
13 her.

14 Q Okay. And you say that y'all did not have a meal?

15 A We did not have no meal.

16 Q Okay. So if -- I'll let you know now I'm going to
17 call Ms. Epting to testify. I'm going to put you on
18 notice now that I'm going to have her testify that y'all
19 had a meal and she was over there for some time.

20 A No. We didn't have no meal that day.

21 Q And that testimony is just as true as anything else
22 you've said; is that right, that you didn't have a meal?

23 A We did not have no meal. There was no meal cooked
24 that day.

25 Q All right. And --

1 A That's the day my sister came over after the incident
2 occurred that night.

3 Q Okay. But that's not the day it was reported to law
4 enforcement, was it?

5 A Yes. It was reported to law enforcement. Because
6 she carried me to the emergency room later on that
7 afternoon.

8 Q On the 11th?

9 A On the 11th.

10 Q And not the 12th?

11 A Not the 12th.

12 Q You're sure about that as anything else you've
13 testified to?

14 A There's nothing else to testify to.

15 Q So how many times did Judy come to your house before
16 law enforcement got involved?

17 A She came to my house two times before the law
18 enforcement got involved --

19 Q Before?

20 A -- and investigated and made pictures and all.

21 Q Okay. Did she come -- and it's your testimony she
22 came on the 11th, the morning after this happened?

23 A Huh?

24 Q The morning after this happened?

25 A The morning after that happened.

1 Q And it's your testimony then she came another time?

2 A She came back later on in the afternoon and took me
3 to the emergency room. And she stayed over there.

4 Q And that would have been on the 11th?

5 A On the 11th.

6 Q According to your testimony?

7 A Uh-huh

8 MR. HOWE: I don't have any further questions at this
9 time, Judge.

10 THE COURT: Redirect, Mr. Fleming?

11 MR. FLEMING: Yes, sir, Your Honor.

12 REDIRECT EXAMINATION

13 BY MR. FLEMING:

14 Q Ms. Hopkins, you stated earlier that your son had
15 brought Kevin Epting over to your house on a number of
16 occasions; is that correct?

17 A On a number of occasions.

18 Q Okay. And, while he was over there with your son,
19 was it possible that he saw where you put your purse?

20 MR. HOWE: Objection, Your Honor. That calls for
21 speculation.

22 THE COURT: Overruled.

23 BY MR. FLEMING:

24 Q You can answer the question.

25 A Sure.

1 Q Let me let you look at your statement again. And
2 I'll let you borrow those, if you need them. Do you need
3 these glasses, Ms. Hopkins?

4 A Sure.

5 Q I'll let you borrow those.

6 A All right.

7 Q Thank you.

8 Now, you did not put in there that you heard someone
9 coming in the front door; is that correct?

10 A I didn't state that on there.

11 Q Okay. Did you tell the officers that?

12 A I did.

13 Q Okay. And you, also, didn't put in there that you
14 saw Kevin Epting with your purse in his hand; is that
15 correct?

16 A Huh-uh.

17 Q Did you tell the officers that?

18 A When they come out and investigated.

19 Q Okay. But you, also, didn't put anything in this
20 written statement about you possibly leaving the door
21 unlocked, did you?

22 A I didn't.

23 Q But did you tell the officers that?

24 A I did.

25 Q Let's get back to -- or go back to when Mr. Howe

1 questioned you about Mr. Epting and what he did after he
2 left. You stated that you saw him go down the street in
3 his mother's car; correct?

4 A Uh-huh.

5 Q Okay. And you didn't see him selling the tapes; is
6 that correct?

7 A I didn't see him selling them, but...

8 Q That's what you were told?

9 A Uh-huh.

10 MR. HOWE: Objection, Your Honor. Leading.

11 THE COURT: Sustained.

12 BY MR. FLEMING:

13 Q Is that what you were told?

14 MR. HOWE: Objection, Your Honor. Leading.

15 THE COURT: Sustained.

16 BY MR. FLEMING:

17 Q How did you find that out?

18 A From someone that lived down the street.

19 MR. HOWE: I object. It's hearsay then.

20 MR. FLEMING: It's already come in, Judge.

21 THE COURT: I'm going to -- I'll overrule the
22 objection.

23 BY MR. FLEMING:

24 Q So, earlier, when you testified that you saw
25 Mr. Epting down there, you were -- were you referring --

1 MR. HOWE: Objection, Your Honor. Leading.

2 THE COURT: He hasn't finished the question yet.

3 MR. HOWE: Okay.

4 BY MR. FLEMING:

5 Q Were you referring to Mr. Epting driving the car down
6 there?

7 MR. HOWE: Objection. Leading.

8 THE WITNESS: I was.

9 THE COURT: I overrule.

10 BY MR. FLEMING:

11 Q So when you stated that you saw Mr. Epting go down
12 there, you were not referring to seeing him selling
13 tapes?

14 MR. HOWE: Same objection, Your Honor. Leading.

15 THE WITNESS: No.

16 THE COURT: I sustain that objection.

17 MR. FLEMING: I have no further questions, Your
18 Honor.

19 THE COURT: Mr. Howe?

20 MR. HOWE: No recross, Judge.

21 THE COURT: All right. You may step down, ma'am.

22 MR. FLEMING: Your Honor, the State would call Judy
23 Prather to the stand.

24 THE BAILIFF: Step right up here and place your left
25 hand on the Bible and raise your right hand.

1 WHEREUPON,

2 JUDY PRATHER,

3 after first having been duly sworn, testified as follows:

4 THE CLERK: Thank you.

5 THE BAILIFF: Now, have a seat.

6 MR. FLEMING: May it please the Court, Your Honor.

7 THE COURT: Yes, sir.

8 MR. FLEMING: Thank you.

9 DIRECT EXAMINATION

10 BY MR. FLEMING:

11 Q Ms. Prather, where do you live?

12 A I live in Mountville, South Carolina, on Garlington
13 Road.

14 Q Excuse me?

15 A On Garlington Road in Mountville, South Carolina.

16 Q Okay. And how long have you lived there?

17 A About 28 years.

18 Q Okay. And are you related to Marilyn Hopkins?

19 A Yes, sir.

20 Q How are you related to her?

21 A I'm her sister.

22 Q Okay. And, at some point in time, did she come to
23 live with you?

24 A Yes, she did.

25 Q Do you recall about when that was?

- 1 A I can't remember the date, no, sir.
- 2 Q About how long did she live with you?
- 3 A She lived with me for almost a year.
- 4 Q Okay. And where did she move to after that?
- 5 A To Cross Hill to Ms. Simpson's trailer park.
- 6 Q Is that on --
- 7 A It's Connie Turner Road --
- 8 Q Okay. On Connie Drive or --
- 9 A No. It's on 70 Cindy Drive.
- 10 Q 70 Cindy Drive?
- 11 A Yes, sir.
- 12 Q That's where she moved to?
- 13 A Yes, sir.
- 14 Q And where did she live prior to living with you?
- 15 A She lived in Greenville.
- 16 Q Okay. And why did she leave Greenville?
- 17 A Because her husband died and left her alone.
- 18 Q Okay. Now, in August of 2008, was your sister
- 19 diagnosed with cancer?
- 20 A Yes, sir, she was.
- 21 Q What kind?
- 22 A All I know is lymphoma. Cancer of the lungs is all I
- 23 can tell you.
- 24 Q Okay. Did she have to undergo treatment for that?
- 25 A Yes, she did.

1 Q Okay. Did you take her for any of those treatments?

2 A Yes, sir. Every treatment she went to, I took her.

3 Q Okay. Why did you have to do that?

4 A Because she can't drive. She's never drove.

5 Q Okay. And, getting toward November the 11th of 2008,
6 had she -- was she still taking treatments? Was she
7 finishing up her treatments?

8 A She was finishing them up. But she was still taking
9 them.

10 Q And had you noticed a change in her physically?

11 A Yes, sir, a great change.

12 Q And what was that?

13 A Do you mean pertaining to her cancer?

14 Q Yeah. Physically --

15 A She was real weak. She didn't have no hair. She
16 lost her hair. She had to wear a wig.

17 Q Okay. Anything else?

18 A Pertaining to the cancer?

19 Q Yes.

20 A She was just real weak, real tired, and just couldn't
21 hardly do for herself, you know. That's why I had to do a
22 lot for her.

23 Q All right. Well, now on November the 11th of 2008,
24 she's testified that that's the morning -- early morning
25 of November the 11th that Mr. Epting broke into her home.

1 When did you come to find out about it?

2 A That morning. I called her to check on her and she
3 was, you know, real upset. And so I got in my car and
4 went over there.

5 Q On November the 11th?

6 A Yes, sir.

7 Q Okay. And what did you do when you got there?

8 A When I got there, I just said, Marilyn, what in the
9 world is wrong with you? Because I found her with two
10 black eyes, you know, a big knot on her head, a bruise on
11 her side and her leg, her glasses broke all to pieces.
12 And she was just in a state of shock.

13 Q Okay.

14 A So I got the cell phone -- well, my daughter was with
15 me. She called the Laurens County Police to come out
16 there.

17 Q Okay. Are you sure you're not confused about that?

18 A I may be confused about the date, but not about that,
19 no.

20 Q Okay. So --

21 A Because she was pitiful looking. She was in a state
22 of shock.

23 Q All right. Did you go over there the exact morning
24 after it happened, or was it later?

25 A The exact -- no, sir. It was the exact morning.

1 Q Are you sure?

2 A I'm sure.

3 Q Okay. Did you call the police on that exact day?

4 A Yes, I did. Now, I may have the dates wrong. I'm
5 not good at remembering dates. But, now, yes, sir, I went
6 over the same morning that she had told me she had been
7 broken into and somebody beat her up.

8 Q Okay. And you took her to the doctor?

9 A Yes, sir, after the police left. They stayed for a
10 long time. And I took her to the Laurens emergency room.

11 Q Did she tell you who had done that to her?

12 MR. HOWE: Objection, Your Honor --

13 THE WITNESS: Yes.

14 MR. HOWE: -- to what she told her.

15 THE COURT: Sustained.

16 BY MR. FLEMING:

17 Q Did you ask her who inflicted the injuries to her?

18 A Yes, sir, I did. I said, Marilyn, what in the world
19 happened to you? Who done this to you? You can't let
20 them get by with this. Why didn't you call me last night?
21 Those were my very words. And she said --

22 MR. HOWE: Objection.

23 THE COURT: What's the basis of your objection?

24 MR. HOWE: Objection. It's improper bolstering,
25 Judge.

1 THE COURT: I don't know what she's going to say.

2 So --

3 MR. FLEMING: I don't know either, Your Honor.

4 THE COURT: Overruled.

5 BY MR. FLEMING:

6 Q Go ahead and answer.

7 A I just asked her, you know, what happened to her.

8 Because it scared me and upset me so bad. And she said
9 somebody broke in on her that night, beat her up, and was
10 trying to get in her pocketbook, and beat her up, you
11 know, broke her glasses, bruised her eyes, and all that.

12 And I said, Marilyn, why didn't you call me last
13 night? That was my very words. You asked for my very
14 words and that's what I said. She said, I was scared.

15 Q Okay. At what time -- approximately what time did
16 you take her to the doctor?

17 A The approximate time, I don't remember. But it was
18 late that afternoon.

19 Q Okay.

20 A Because we didn't get out of the emergency room until
21 it was after dark.

22 Q Okay. Did you -- did the police arrive before you
23 took her to the doctor or after?

24 A Yes, sir, before. And they stayed a good while.

25 Q And who was the officer that responded?

1 A Sir, I can't remember all their names. But I think
2 one of them name was Bobby. And there was another one,
3 but I do not remember his name.

4 MR. FLEMING: I beg the Court's indulgence, Your
5 Honor.

6 THE COURT: Yes, sir.

7 (Pause.)

8 BY MR. FLEMING:

9 Q And, as far as your sister's injuries are concerned,
10 what did you observe?

11 A Well, I observed -- what I observed was trauma to me.
12 Because she had two black eyes that was swelled up. She
13 couldn't hardly see out of one of them. She had a bruise
14 on her head, a bruise on her side, and a bruise on her
15 leg. And her glasses was crushed. She couldn't even see
16 out of them. She can't see without them. Her whole face
17 was swelled up.

18 Q Again, what was -- what was her state when you got
19 there? How did you perceive her as being, other than the
20 two black eyes?

21 A In a state of shock like she was scared to death,
22 terrified. That's why I asked her why didn't she call me
23 before. But, by looking at her, she probably wasn't able
24 to call me before.

25 MR. HOWE: Objection, Your Honor. It calls for

1 was probably three or four days, until she got better, and
2 got color back in her face and all, and her strength back.

3 MR. FLEMING: I have no further questions, Your
4 Honor.

5 THE COURT: Cross-examination.

6 MR. HOWE: Thank you, Judge.

7 CROSS-EXAMINATION

8 BY MR. HOWE:

9 Q Ms. Prather -- it's Prather, isn't it?

10 A Yes, sir.

11 Q Yes, ma'am. You said that you asked your sister why
12 she didn't call you. So she didn't call you around 1:40
13 to 1:45, or something like that, in the morning on
14 November the 11th, did she?

15 A To my knowledge, she may have. I just don't
16 remember.

17 Q Well, if she called you at 1:40 in the morning --
18 early morning hours of November the 11th to tell you that
19 she had been attacked by an intruder, you would have
20 remembered that, wouldn't you?

21 A If she had told me that, yes, sir, I would.

22 Q Okay. So she didn't -- so your testimony is that
23 you -- she didn't call you at any 1:40 in the morning
24 telling you she had been attacked?

25 A If she did, I don't remember.

1 Q Well, that would be real important now. Help me out.

2 A Yes. It would be important. But I don't remember
3 her calling me.

4 Q Okay. And if she would have called you with
5 something that important --

6 A I would have been over there that night and called
7 the police, yes, sir.

8 Q Thank you, ma'am.

9 That's what I wanted to get to.

10 A That's exactly what I'd have done.

11 Q As a matter of fact, she didn't call you -- you came
12 over to see her --

13 A Yes, I did.

14 Q -- that next morning. And that would have been the
15 morning of November the 11th, when you say you discovered
16 her; correct?

17 A If you say so, sir. Because I can't remember dates.

18 Q Well, I understand. Well, let's do it another way.

19 I understand your situation about dates. I have that
20 problem, too.

21 But let me ask you this. You say it was the morning
22 after she had been attacked in the early morning hours of
23 the same morning is when you came over?

24 A Yes, sir.

25 Q You came over not as a result of her calling you --

1 THE COURT: Yes, sir.

2 (Pause.)

3 MR. HOWE: Thank you.

4 MR. FLEMING: Your Honor, the State would call Deputy
5 Bobby Galarza to the stand..

6 THE BAILIFF: If you'll put your left hand on the
7 Bible and raise your right hand and turn that way.

8 WHEREUPON,

9 JUAN GALARZA,

10 after first having been duly sworn, testified as follows:

11 THE CLERK: Thank you.

12 You may be seated.

13 MR. FLEMING: May it please the Court, Your Honor.

14 THE COURT: Yes, sir.

15 DIRECT EXAMINATION

16 BY MR. FLEMING:

17 Q Deputy Galarza, who do you work for?

18 A I work for Laurens County Sheriff's Office.

19 Q And how long have you worked there?

20 A For about six years.

21 Q Okay. And what are your chief duties with the
22 Laurens County Sheriff's Office?

23 A Road patrol.

24 Q And have you been doing that the whole four years?

25 A Yes, sir.

1 Q Okay. And did you work anywhere prior to the
2 Sheriff's Department?

3 A Yes, sir. I worked for Summerville Police Department
4 and Simpsonville at one time, their police department.

5 Q Okay. How long did you work for them?

6 A About a year and a half or so. And about two years
7 with the Summerville Police Department.

8 Q Okay. And, during your time working in law
9 enforcement, how many burglary cases have you been a part
10 of responding to?

11 A Countless, quite a few.

12 Q More than 20?

13 A Definitely.

14 Q Okay. Now, you received a call to a burglary that
15 occurred at 70 Cindy Drive, did you not?

16 A Yes, sir.

17 Q Did you respond there?

18 A Yes, sir.

19 Q Okay. And can you tell the jury the date and the
20 time that you responded?

21 A This -- the incident took place -- or the time I
22 responded -- the date I responded was November 12th, 2008.

23 Q Okay. At what time on November the 12th?

24 A It was at 3:00 in the afternoon on November the 12th,
25 3:13 to be exact.

1 Q Okay. So Ms. Prather and Ms. Hopkins are saying that
2 it was on the 11th, and they are confused; is that
3 correct?

4 MR. HOWE: Objection, Your Honor. That calls --

5 THE COURT: Sustained.

6 MR. HOWE: Thank you.

7 BY MR. FLEMING:

8 Q Is that different than the dates that they gave?

9 A Yes, sir. It is different than the dates that they
10 gave.

11 Q Okay. Now, when you went out there, who was the
12 first person that you talked to?

13 A I spoke with -- the complainant who made the call was
14 Ms. Judy Prather.

15 Q Okay. And, as a result of your conversation from --
16 with her, what did you find out?

17 A I found out -- she had explained to me that she had
18 gone over to check on her sister in reference to before
19 that --

20 MR. HOWE: I'm going to object to hearsay testimony.

21 MR. FLEMING: It's already been testified to.

22 THE COURT: Sustained.

23 THE WITNESS: That she got there --

24 THE COURT: I'm sorry. I sustained the objection.

25 Okay. So you have to ask another question.

1 BY MR. FLEMING:

2 Q What was the -- you talked to Ms. Prather. What did
3 you do after you talked to Ms. Prather?

4 A After I spoke with Ms. Prather, I approached the
5 victim, Ms. Marilyn Hopkins. And I questioned her about
6 the incident and her injuries.

7 Q Okay. And what did you observe by just looking at
8 Ms. Hopkins when you saw her?

9 A I observed she had two black eyes. She had bruises
10 on her face area and, also, to her leg.

11 Q Okay. And did she state what had happened to her at
12 that time?

13 A Yes, sir, she did.

14 Q What was that?

15 A She stated to me that earlier on the -- November 11th
16 at about 1:30 a.m. or 1:45 a.m., somewhere around there,
17 she heard a noise in the kitchen. She got up to see what
18 was going on. And she was confronted with a white male
19 who she described as being Mr. Kevin Epting. She said she
20 saw him with her purse in his hands. And when she tried
21 to take it away from him, he assaulted her.

22 Q Okay. And did you check the house for any evidence
23 of a break-in?

24 A Yes, I did.

25 Q And what did you find?

1 A From my experience, I didn't see anything that was
2 forced on any of the locks or the doors, forced entry.

3 Q And did you bring that fact up to Ms. Hopkins?

4 A Yes, I did.

5 Q And what did she state?

6 A She said she wasn't sure if she had left the door
7 open -- unlocked. She thought she probably hadn't locked
8 it. But, at the time, she was not sure.

9 Q Okay. And how did Ms. Hopkins identify Mr. Epting as
10 the person who broke into her house?

11 A She identified him by knowing him being a neighbor.
12 She, also, went on saying about his tattoos and
13 describing -- giving me a description of what he looked
14 like and his tattoos especially.

15 Q Was that description accurate?

16 A Yes, sir. It was accurate at the time.

17 Q Okay. And what did you do after you had talked with
18 Ms. Hopkins? What did you do next?

19 A After talking to Ms. Hopkins and getting all her
20 information, then -- in the meantime, being a patrol
21 officer on the streets, I had to do other things. And the
22 very next day, on the 13th, I went in and obtained some
23 warrants. I, also, went back to Ms. Hopkins where I
24 retrieved a statement that she wrote for me.

25 Q Okay. Well, let's go back before you left the

1 residence the day you met with Ms. Hopkins. Did you take
2 photographs?

3 A Yes, I did. I took photographs of her injuries and
4 pretty much of the kitchen showing more or less where the
5 incident took place.

6 Q Okay. And after that is when -- you said the next
7 day, you obtained warrants for Mr. Epting's arrest?

8 A Uh-huh.

9 Q Okay. Did you find him the day that you had the
10 warrants issued?

11 A Yes. We found him later on that morning. We found
12 him in another area.

13 Q And where was that?

14 A That was in the city of Clinton, South Carolina.

15 Q Okay. How far away was that from his mother's house?

16 A That's approximately -- I want to say 20 miles or
17 more.

18 Q Okay. Other than the physical injuries to
19 Ms. Hopkins, when you went there, initially, what did you
20 observe about her demeanor?

21 A The subject was very upset, very nervous, very
22 scared. She really didn't want to open up, at that time,
23 while I was there. It took a bit for her to open up and
24 give me the statement of what happened.

25 Q Okay. Now, did -- the victim, Ms. Hopkins, did she

1 tell you when you first met with her that she had heard
2 noises and that's why she got up?

3 A She said she heard noises coming from the kitchen,
4 the kitchen area.

5 Q Okay. Did you, at some point in time, present a
6 photo of the Defendant to Ms. Hopkins?

7 A I believe I did on the --

8 MR. HOWE: Objection, Your Honor. There's a matter
9 for the Court.

10 THE COURT: All right. I'll tell you what, ladies
11 and gentlemen, we're going to go ahead and take a short
12 recess at this time.

13 Don't talk about the case. And continue to keep an
14 open mind.

15 Thank you very much.

16 (WHEREUPON, the jury was excused from open court at
17 approximately 3:45 p.m.)

18 THE COURT: Yes, sir.

19 MR. HOWE: Thank you, Your Honor.

20 Judge, even though I understand the Court's ruling
21 with regards to the evidence concerning the two prior
22 burglaries, I think I'm probably obligated to object to
23 any testimony about any kind of a photo. Because it may
24 imply or lead to evidence concerning my client having a
25 previous criminal history. And I would object to that at

1 this time, Your Honor.

2 THE COURT: Cross-examination.

3 MR. HOWE: Your Honor, would you want me to go on
4 while the photos are being --

5 THE COURT: Well, you can wait until everyone has
6 seen them.

7 MR. HOWE: -- passed, or wait until they're done with
8 that, so then I can question him?

9 THE COURT: Certainly.

10 MR. HOWE: Thank you.

11 (Pause.)

12 MR. HOWE: I think we're ready, Judge.

13 THE COURT: Go ahead.

14 MR. HOWE: Thank you.

15 CROSS-EXAMINATION

16 BY MR. HOWE:

17 Q Officer Galarza -- and I'm just going to call you
18 "Officer."

19 A Okay, sir.

20 Q That will help all of us. You indicated that --
21 according to the report, y'all received the call from the
22 complainant -- and that was Judy Prather; correct?

23 A Correct.

24 Q And you testified that that call was received on
25 November the 12th, which was on a Wednesday, and that was

1 in the afternoon. And you said y'all were, actually,
2 dispatched about 3:13 p.m. in the afternoon; correct?

3 A Correct.

4 Q And the information that -- in your investigation was
5 that this incident had happened barely into November the
6 11th, at approximately 1:45 in the morning; correct?

7 A Correct, 1:30, 1:45.

8 Q 1:30 to 1:45?

9 A Yes, sir.

10 Q And so the -- so it's a fair statement then that the
11 report -- the information that you received, regardless of
12 the dates, was not the morning -- the same morning that
13 this incident occurred, it was the afternoon hours later;
14 correct?

15 A Correct.

16 Q In fact, I was trying to do the math. And help me if
17 I'm wrong. But the way -- let's do it this way. 1:30
18 a.m. on November the 11th until 1:30 a.m. on November the
19 12th would be 24 hours; right?

20 A Correct.

21 Q And then 1:30 in the morning on the 12th until 1:30
22 in the afternoon on the 12th would be another 12 hours,
23 wouldn't it?

24 A Correct.

25 Q So we're up to 36 hours; right?

1 A Yes, sir.

2 Q And then 3:13 in the afternoon on the 12th would be
3 another hour and a half, wouldn't it?

4 A Okay.

5 Q So something like 38 hours after the incident,
6 actually, occurred is when it was reported to law
7 enforcement; correct?

8 A Correct.

9 Q Not the next morning?

10 A No, not the next morning.

11 Q And the records that you keep in a case like this,
12 one of the things you do is you do an incident report;
13 right?

14 A Yes, sir.

15 Q Okay. And let me ask you while we're -- did you make
16 any other personal notes to record anything having to do
17 with conversations, anything to do with your investigation
18 that you could share with us that I have not seen through
19 what you call "discovery" where the law enforcement --
20 where the Solicitor gives us what they have?

21 A No, sir. All I've got is the statement that I got --
22 received and I typed, the report, and the supplement.
23 That's it.

24 Q Okay. So that incident report that you typed would
25 be an accurate reflection of the events as -- from your

1 come up later, what you put in the incident report was
2 that said she had no idea?

3 A That's true. Yes, sir.

4 Q You didn't put in the incident report that she said
5 that, I heard the front door open and I must have left the
6 front door open -- unlocked?

7 A No, sir. She didn't say that.

8 Q All right. Now, when you got to the -- to Cindy
9 Drive out there in Cross Hill, you say -- you know,
10 obviously, you took the photographs?

11 A Yes, sir.

12 Q Okay. And we've got the photographs. And she showed
13 you -- did you take any -- or call anybody in or either do
14 it yourself to do a dusting for any kind of fingerprints?

15 A The reason we didn't -- I did speak to a
16 supervisor --

17 Q Would your answer be "no" first?

18 A No, first.

19 Q Okay.

20 A The reason further for not doing fingerprints, first
21 of all, it was raining outside. The doors were all wet.
22 Okay. You try to come up with something. We don't have
23 the equipment to get fingerprints --

24 Q SLED does, don't they?

25 A SLED does, yes.

1 Q And, if you called them in, they would come, I guess,
2 if you requested it, wouldn't they? I would hope.

3 A It would go through upper ladders, not myself. It
4 was questioned.

5 Q Okay. So is it a fair statement that none -- there
6 were no fingerprints taken of either the doorknob, or the
7 purse, or, in fact, anything in the home?

8 A No, sir.

9 Q Nothing was taken?

10 A No, sir.

11 Q And that was -- I guess you're saying that was a
12 judgment call by somebody else?

13 A Yes. And the only reason for that is it's a day and
14 a half later that it was called in. And she already had
15 grabbed the purse, used the purse, put her fingerprints
16 all over it herself, and cleaned up the area. So
17 whatever, if possible, was any prints, it would have been
18 gone.

19 Q Do you know that she had cleaned it up?

20 A According to what she told me. Well, you know --

21 Q Okay. I didn't see --

22 A -- picking up. Well, I --

23 Q I didn't see anything --

24 A -- didn't put anything about the prints. That's why
25 I didn't put anything else about cleaning up.

1 (WHEREUPON, State's Exhibit Nos. 4 and 5 were marked
2 for identification and admitted into evidence.)

3 THE COURT: Okay. Whenever you're ready.

4 MR. HOWE: Thank you, Your Honor.

5 As I understand it, the State is willing to stipulate
6 to certain facts, which would be proffered outside the
7 presence of the jury, that go to the efforts by the
8 Defense to introduce third-party guilt evidence. And by
9 proffering this evidence, of course, we would be
10 preserving the record. And by stipulation by agreement,
11 it would keep -- it would -- in the interest of time, it
12 would prevent the -- it would eliminate the necessity,
13 rather, for the witnesses to have to, actually, be called.

14 And if Mr. Fleming has any disagreement with what I'm
15 about to state, I suppose we can discuss that. But,
16 basically, Judge, the evidence that you heard in -- or
17 what you heard was presented in our argument that
18 Ms. Anderson presented on that issue.

19 We would have attempted to call a witness -- two
20 witnesses concerning a 911 complaint made by Marilyn
21 Hopkins on September 6th, 2008, at her address -- her home
22 at 70 Cindy Drive, Cross Hill, where the complaint had to
23 do with disorderly conduct, with the report to the 911
24 dispatch that Billy Sizemore was listed as a suspect. The
25 complaint said that this subject is her son. He is

1 showing out, knocked a hole in the wall. The subject is
2 now at the next door neighbor's and would like an officer
3 to come out.

4 We would have, also, called Officer Nelson, whose
5 first name escapes me. Mr. Fleming, I think, spoke with
6 him yesterday. He was the responding officer who would
7 have testified that he responded to the call.

8 Your Honor, we would, also, have called my client's
9 mother, Joyce Epting, to testify she was the neighbor
10 that -- where Billy Sizemore went to her home and was
11 asleep. And when the officer was called on to go to her
12 home to retrieve the house key to Ms. Hopkins house that
13 she woke up Billy Sizemore. And he returned the key to
14 the officer.

15 So that addresses that. And, perhaps, I need to, at
16 least, make the 911 report a part of the record in this
17 case.

18 THE COURT: Okay, sir.

19 MR. HOWE: Mr. Fleming has got a copy of it, I
20 believe, too. So if I could do that. And I'll hand that
21 to the court reporter.

22 MR. FLEMING: Well, it's a Court's Exhibit; correct,
23 Your Honor?

24 MR. HOWE: A Court's Exhibit?

25 THE COURT: That's fine, yes. It's not to go to the

1 jury.

2 (WHEREUPON, Court's Exhibit No. 1 was marked for
3 identification and admitted into evidence.)

4 MR. HOWE: And, Your Honor, we would, also, have
5 called two witnesses, David Davenport and Steven
6 Davenport, who were co-workers of Billy Sizemore, who
7 would have testified that Billy hated his mother, wanted
8 her dead, expressed his anger because she had harmed him
9 when he was a child. She was responsible for the way he
10 was, and that he wished that there was some way that he
11 could kill her.

12 And that would have been the testimony from,
13 essentially, both of those witnesses had we -- had that
14 matter gone the way we viewed it should have gone.

15 THE COURT: Yes, sir.

16 MR. HOWE: And what this does, Judge, then is this --
17 as I understand it, this would be a proffer of that
18 testimony for the purposes of the record.

19 THE COURT: All right.

20 MR. HOWE: I think that's it, Judge.

21 THE COURT: Okay. Thank you.

22 Let me go over with Mr. Epting his rights to testify
23 and not testify while we're at --

24 MR. HOWE: Do you want him to stand up, Judge?

25 THE COURT: He can stay seated. I'm just going to

1 THE CLERK: Thank you.

2 You may be seated.

3 DIRECT EXAMINATION

4 BY MR. HOWE:

5 Q Kevin, give us your full name.

6 A Kevin Shane Epting.

7 Q Kevin, how old are you?

8 A 46.

9 Q Okay. And have you grown up in Laurens County?

10 A Yes, sir.

11 Q Okay. Do you have family here?

12 A Yes, sir.

13 Q Who do you have in the way of family here?

14 A I have my mother and my brothers.

15 Q Okay. Your mom's name is what?

16 A Linda Joyce Epting.

17 Q Okay. Does she go by "Joyce"?

18 A Yes, sir.

19 Q Okay. And, during periods of your life, have you
20 lived with your mom?

21 A Yes, sir.

22 Q Okay. Now, let me ask you a couple of things first
23 of all, because we just saw -- and the Judge just told the
24 jury about the purpose for your previous convictions on
25 burglary. There's no question you -- in fact, you entered

1 guilty pleas to those two burglaries; is that right?

2 A Yes, sir.

3 Q And there's no question about that?

4 A No, sir.

5 Q Did you commit this burglary and assault that we're
6 here on trial for today?

7 A No, sir.

8 Q Okay. Kevin, I want you to tell the jury, if you
9 can, your recollection of the events leading up to your
10 arrest and where you were at different points in time.
11 And I'll ask the questions, but I want you to do that.

12 Let me ask you. During the month of November of last
13 year, where -- you know, leading up before even the 10th
14 of November, where were you living?

15 A I lived at momma's. And I'd go stay with my
16 girlfriend.

17 Q Okay. And your girlfriend is who?

18 A Sharon Corley.

19 Q Okay. Now, your mother's address was what?

20 A 62 Cindy Drive.

21 Q 62?

22 A Yes, sir.

23 Q Okay. And so it would have been a short distance
24 away from Ms. Marilyn Hopkins address?

25 A Yes, sir. Our driveway runs the same way.

1 Q The same way. How -- could you estimate -- tell the
2 jury about how far away the homes were.

3 A From here to that wall.

4 Q Okay. Now, how long -- do you know about how long
5 your mother had been living over there at Cindy Drive,
6 Cross Hill?

7 A 20 years.

8 Q Okay. And did she have -- did she own a home there?

9 A Yes, sir.

10 Q What kind of home?

11 A A mobile home.

12 Q Okay. And so were you in and out of going to see her
13 over that period of time that she lived there?

14 A Yes, sir.

15 Q All right. Now, did you have -- was there a time
16 when Ms. Hopkins moved there?

17 A She moved there about three years ago.

18 Q Okay. Did you meet her?

19 A No, sir. I just met her last year.

20 Q Last year?

21 A Yes, sir.

22 Q Okay. About when did you meet her last year?

23 A July.

24 Q All right. And, when you met her, would you tell the
25 jury how y'all got along?

1 A We got along just fine. I mean, I'd take her places.
2 I cut her grass. I took her to the doctor, took her to
3 get groceries, cut her grass regular, I mean, you know.

4 Q Right.

5 A If she needed something --

6 Q Did you know she was sick?

7 A Sir?

8 Q Did you know she was sick?

9 A Yes, sir.

10 Q All right. And did she have family that came around
11 to see her?

12 A Yes, sir. They come, you know, every few days or so.

13 Q Okay. Did you know Judy Prather?

14 A I never met her.

15 Q Okay. You're not saying she didn't go there, you
16 just never met her?

17 A I never met her.

18 Q Okay. And did you know her son, Billy?

19 A Yeah. I know Billy.

20 Q In fact, did y'all work together at some point?

21 A I got him a job at Wal-Mart.

22 Q Wal-Mart. What were y'all doing?

23 A The new Wal-Mart, we was building it. We was doing
24 electrical work, all the electrical work up there.

25 Q Now, and you say that you got along with Ms. Hopkins?

1 A Yes, sir.

2 Q Now, Kevin, if you could, tell us -- and we're
3 talking about a year ago today. In fact, you got
4 arrested, I believe, a year ago today; is that right?

5 A Yes, sir.

6 Q Did -- can you tell us where you stayed on Monday,
7 November the 10th, 2008?

8 A I stayed at Sharon Corley's.

9 Q Okay. Now, where did Sharon live?

10 A Sharon lived about two or three miles up the road
11 from momma's right there in Cross Hill.

12 Q Okay. What kind of vehicle were you driving then?

13 A I had a '96 Ford Ranger truck.

14 Q A truck?

15 A Yes, sir.

16 Q You didn't drive a car?

17 A No, sir.

18 Q Okay. And how did you get around? In that truck?

19 A Yes, sir.

20 Q All right. And so Monday, November the 10th, into
21 the early morning hours of Tuesday, November the 11th, you
22 were staying where?

23 A With Sharon.

24 Q Now, would you tell the jury what you remember about
25 your activities on that Tuesday leading up to staying over

1 there that night?

2 A I woke up Tuesday morning. I fixed --

3 Q Okay. Let's go over Monday first.

4 A Monday. Okay.

5 Q Let's go over Monday, the day before, so the jury
6 will have, you know, an understanding. Okay. Tell us
7 about Monday and what you recall.

8 A Okay. Monday, well, the same thing. I woke up at
9 Sharon's. And I got up. And I fixed Sharon, me, and her
10 daughter breakfast. And I sent them off to work. She
11 went off to work about 7:00. And when she'd leave, I'd
12 leave. And I'd go by momma's.

13 And I went by momma's. And I called a good friend of
14 mine and got his son, who was about 17, Jordan Morris, to
15 come help me load some plywood up. I was working for
16 Steve Patterson, a Laurens City police officer. I was
17 building him a shop -- I was building him an office in his
18 shop up there on Airport Road.

19 So I went over and got -- I went to momma's and sat
20 at momma's for a few minutes, drank a cup of coffee or
21 something, you know, and just talked to her. Then I left
22 there and went and got Jordan and come back. I got -- all
23 the plywood was in my yard. And I loaded the plywood. We
24 went up there -- me and him went up there. And he helped
25 me tear walls out and stuff. We worked there all day

1 until about 6:00.

2 Sharon don't never get home until about 8:30. So I
3 went over there. And I had got a deer processed. So I
4 had laid it out that morning. So I went over there and
5 cooked deer for all of us, the kids and us. Sharon got
6 there about 8:30 or so. And we ate and everything, went
7 to bed. I got up the next morning and done started the
8 same routine again.

9 Q Okay. The next morning would have been Veterans Day,
10 Tuesday, November the 11th; is that right?

11 A Yes, sir.

12 Q And did you -- what -- tell the jury, basically, what
13 your activities were that day.

14 A I got up and done the same thing again. I always
15 fixed breakfast for Sharon while she's getting dressed and
16 everything. And I get Mik up and get her ready -- tell
17 her to get ready to go to school. And they leave. They
18 always leave. It's always the same time. At five after
19 7:00, she's leaving.

20 So I sat there and see them off and everything. And
21 I leave behind them usually. I might sit around and mess
22 around a minute and drink a cup of coffee or something.
23 Then I leave there and I go to momma's. I go over to
24 momma's. And I do the same routine again.

25 Q Did you -- all right. So you were there on Tuesday,

1 November the 11th, at your mother's?

2 A Tuesday morning, I went there.

3 Q Okay. Did you see Ms. Hopkins?

4 A No, sir.

5 Q Okay. What time do you think you got to your
6 mother's?

7 A I got to momma's about 7:25, 7:30.

8 Q In the morning?

9 A Yes, sir.

10 Q Okay. And then did you stay there all morning or did
11 you leave?

12 A No, I left. I went back again. I done the same
13 process I done the day before. Because I was getting wood
14 and hauling wood back and forth to -- I'd go get Jordan to
15 help me load it. It was plywood. Three or four plywood
16 is pretty heavy.

17 Q Okay. Where did you spend Tuesday, the night of
18 Tuesday, November the 11th?

19 A I come and stayed at momma's. I come to watch the
20 country awards. And I stayed at momma's.

21 Q Okay. You came to watch what?

22 A The country awards.

23 Q The music awards?

24 A Yes, sir.

25 Q Okay. And that was last year on November the 11th,

1 on that Tuesday?

2 A Yes, sir.

3 Q And you stayed at your mother's that night?

4 A Yes, sir.

5 Q Okay. From November the 11th, that morning, until --
6 and even until that evening when you stayed at your
7 mother's, had you heard anything -- any claim that you had
8 gone over and burglarized and assaulted Ms. Hopkins?

9 A No, sir.

10 Q Did you see any law enforcement over there around the
11 house or anything like that?

12 A No, sir.

13 Q All right. What -- so you spent Tuesday night at
14 your mother's and you watched those awards?

15 A Yes, sir.

16 Q Okay. What did you do after that?

17 A I went to bed. And I got up early that morning and
18 run over to Sharon's, got them up, woke them up, fixed
19 breakfast, talked to her a little bit. I come back and
20 done the same routine again. I went back to Steve
21 Patterson's up there building that shop. I went back and
22 got Jordan, my little buddy. And he was up there kind of
23 helping me out a little bit.

24 Q Okay. And where did you spend November the 12th?

25 A I come back home that night. And Sharon come by and

1 seen me. She come by the house on her way home. I was at
2 momma's. Because I was always messing around in the yard
3 or something. She come by and we sat there and talked a
4 little bit. And I went and stayed the night at momma's.

5 Q At your momma's. On November the 12th, that would
6 have been on the -- I believe the Wednesday; correct?

7 A Yes, sir.

8 Q Okay. Again, did you hear any claim, at that point
9 in time, that you had done this -- what you've been
10 charged with?

11 A No, sir.

12 Q All right. And tell us about your activities on
13 November the 13th, which would have been a year ago.

14 A Yes, sir.

15 Q Tell us about that.

16 A I got up at the same time at momma's. I run over to
17 Sharon's and talked to her, and got them up, and messed
18 around like the same -- I did that every day. And then I
19 got -- I left there. I didn't have to haul no more wood
20 or nothing.

21 So I got in momma's car. I told momma, I said, let
22 me drive her car. And I went and got my -- I went to my
23 little nephew's.

24 Q And who is your little nephew?

25 A Robin Epting.

1 Q Okay. Where does he live?

2 A He lives in Joanna. So I went over there to him --
3 with him. And Jordan didn't go with me that day. So I
4 went and got him, and we got in his car, and left. And we
5 were going to -- up to Steve Patterson's to work.

6 Q Okay. And what happens?

7 A I got a phone call that -- from law enforcement. And
8 I thought -- I just told them, I said, You're messing with
9 me. You know what I mean? I knowed I hadn't done
10 nothing. And the phone cuts off. And I went on about my
11 business and everything.

12 And I got my nephew, I guess, and after about an
13 hour, I told him I would take him back to his house. I
14 was going to take him back to, you know, get his car. I
15 was going over to momma's. I was going to go back to
16 momma's to see what was going on. I got back to where
17 momma's car was and drove Robin's. And they locked me up.

18 Q All right. You didn't do this?

19 A No, sir.

20 Q And the first you learned about it was when -- was
21 the phone call from whoever called you from law
22 enforcement?

23 A (Witness nodded.)

24 Q Well, what did they tell you?

25 A No. The first I learned about it was when I was

1 asking them. They handcuffed me in the house.

2 Q Okay. When you got arrested?

3 A And I was asking them, What have you got me for?

4 Q Okay. I understand. What -- in your dealings with
5 Ms. Hopkins, what was her mental condition as far as you
6 knew?

7 A I think she was a little bit off. I mean, just --

8 MR. FLEMING: I object to that, Your Honor. That
9 calls for speculation on his part.

10 THE COURT: Overruled.

11 BY MR. HOWE:

12 Q How did she appear to you? What do you mean "a
13 little bit off"?

14 A She -- I don't know. She just -- well, like maybe
15 not off, just ain't -- she'd joke and mess around with
16 you, you know, with me. She'd joke and always -- you
17 know, she called me, you know.

18 If I would go over to momma's and she'd see me coming
19 and going or something, she'd call me 20 times, you know,
20 joking and stuff, messing around, you know, and call me.
21 She might call me and tell me she's got -- I'm the flower
22 company or something, you know. I've got some flowers,
23 you know, or something.

24 Q Did you have -- did you ever have any disagreements
25 with her or anything like that?

1 A No, sir. I ain't never had no problems with her.

2 MR. HOWE: Answer any questions that Mr. Fleming may
3 have for you, Kevin.

4 THE WITNESS: Yes, sir.

5 THE COURT: Cross-examination.

6 MR. FLEMING: Yes, sir, Your Honor.

7 CROSS-EXAMINATION

8 BY MR. FLEMING:

9 Q Mr. Epting, you stated to Mr. Howe that during this
10 period of time, you were living with your mother; is that
11 correct?

12 A I was living with momma. And I'd stay at Sharon's a
13 lot, too.

14 Q Okay. And you met Ms. Hopkins in July of 2009 [sic]?

15 A Yes, sir.

16 Q Okay. And how did you met her? Was that through her
17 son?

18 A I would say more like momma probably.

19 Q Okay. Your mother?

20 A Yeah.

21 Q They were good friends?

22 A They was real good friends.

23 Q Okay. And how about you and Billy Sizemore, who was
24 the son to Ms. Hopkins, were y'all friends?

25 A Yeah. He'd come over, you know. And he'd stay with

1 Q Okay. On the Monday?

2 A Huh-uh.

3 Q Now, on -- but that night, on Veterans Day, he spent
4 the night with you?

5 A Yes, he sure did.

6 Q Okay. And the next night on November the 12th, that
7 Wednesday, did he stay with you again?

8 A I think that's when he got locked up.

9 Q Okay. You're not sure if he got locked up that
10 Wednesday or that Thursday?

11 A Huh-uh.

12 Q When did you -- did you happen to see Ms. Hopkins on
13 Tuesday, November the 11th, at any time?

14 A Yeah.

15 Q How did that happen?

16 A She called me up.

17 Q About what time?

18 A 9:00 or 9:30.

19 Q Okay. She called you up?

20 A She called me at 9:00 or 9:30.

21 Q And what did she say?

22 A She said, Joyce, I want you to come out here. I've
23 got something I've got to show you. And I said, I'll be
24 out there just in a few minutes.

25 And so I went on out there. I knocked on the door.

1 And when I knocked on the door, she come to the door with
2 two black eyes.

3 Q Okay.

4 A And she said, See what chemotherapy did to me. And
5 that's what she said to me.

6 Q Okay. What did you say?

7 A And I said, Well, I sure wouldn't take
8 chemotherapy --

9 MR. FLEMING: Your Honor, I have to object to all
10 this being hearsay.

11 THE COURT: Sustained.

12 MR. FLEMING: And I'd like an instruction for the
13 jury to disregard what she testified to as to what
14 Ms. Hopkins might have said.

15 THE COURT: All right. I --

16 MR. HOWE: Well, let me -- excuse me.

17 THE COURT: I sustain the objection. And the jury is
18 to disregard that.

19 BY MR. HOWE:

20 Q As a result, did you stay there with her that day for
21 a period of time?

22 A Until 12:00. We ate dinner together.

23 Q All right. Who cooked?

24 A She did.

25 Q What did you have?

DIRECT EXAMINATION

BY MR. HOWE:

Q Your name, please?

A Sharon Corley.

Q Sharon, let me ask you a little bit about you. How old are you, please, ma'am?

A 38.

Q Okay. And where do you live?

A At 25 Little Trestle Road in Cross Hill, South Carolina.

Q All right. And about how long have you lived there?

A 11 years.

Q Where did you go to school?

A Clinton High School.

Q Okay. And what year did you graduate?

A 1989.

Q And do you have children?

A I do. I have two.

Q Okay. And their ages?

A I have a 19-year-old son, Darrell, who's serving his country in the Army in Virginia right now. And my daughter is 14.

Q Okay. And does your daughter live with you?

A She does.

Q Where do you work?

1 A I work for Donna Jackson. She's an attorney in
2 Clinton.

3 Q Okay. What do you do there?

4 A I'm a paralegal.

5 Q All right. And do you have another job that you had
6 at one time that -- or do you still have that job?

7 A I was teaching at Piedmont Wilderness Institute,
8 which is a reform school. It's a residential placement
9 for teenage boys in DJJ custody.

10 Q Okay. The Department of Juvenile Justice?

11 A Yes, sir. I taught English there for nine months
12 last year.

13 Q Last year?

14 A Uh-huh.

15 Q During the time that these events that we're talking
16 about were going on?

17 A Yes, sir.

18 Q Okay. You know, of course, Kevin Epting and his
19 mother; correct?

20 A I do.

21 Q All right. And there's been some testimony already.
22 Would you describe -- let's cover it -- back in November
23 of last year, would you describe your relationship with
24 Kevin?

25 A We had become friends about July and developed a

1 right off the bat. Based on the relationship then and
2 now, are you here to tell anything that's not true to help
3 him?

4 A Of course not.

5 Q Okay. You have your own reputation?

6 A I absolutely do.

7 Q All right. Are you proud of the work that you do?

8 A I am. I'm, also, a member of the board of trustees
9 for the Laurens County Safe Home. So I would never
10 support somebody in attacking a woman. I'm, also, the
11 mother of a beautiful 14-year-old daughter. So I'm very
12 sensitive to womens issues. I would never, never defend
13 Kevin if I thought there was any chance that he had hurt a
14 woman.

15 Q Now, back in November of 2008, was Kevin staying with
16 you during some of that time in November of 2008?

17 A Yes, sir.

18 Q Okay. Do you recollect -- starting maybe around even
19 the 9th of November, do you recollect when you would have
20 had occasion to see Kevin and under what circumstances?

21 A What day of the week was that?

22 Q November the 9th would have been Sunday.

23 A A Sunday, yes, sir. My stepfather's father passed
24 away. We attended a funeral in Florence. And my daughter
25 stayed home. And she spent half the day with Kevin. They

1 were over at Dottie Morrow's house cutting trees. And
2 Mikalah was with him half the day.

3 And when I got home, sometime that evening probably
4 5:00, he was there. And we cooked supper and ate together
5 that night. And he spent the night with me that night,
6 Sunday.

7 Q That Sunday. Now, did anything unusual happen that
8 day, the next Monday -- the following Monday? And I'll
9 ask you, did you work?

10 A I did. I worked Monday.

11 Q Okay. Do you recall what your activities were?
12 Anything special?

13 A I got up that morning. As I recall, Kevin fixed
14 breakfast, toast and coffee. And I went to PWI and worked
15 all day. I --

16 Q PWI being Piedmont Wilderness Institute?

17 A I'm sorry, Piedmont Wilderness Institute. Yes, I
18 did. I was in the classroom all day. I don't have access
19 to a telephone there. So I didn't have any contact with
20 anybody throughout the day on Monday.

21 Monday evening -- at that time that I was working at
22 PWI full-time, I was still working at the law office in
23 the evenings going back and catching up some things. So I
24 spent some time at the law office that evening. And I got
25 home -- it was around 8:00.

1 My sister had come by looking for a coffee cup that
2 she had left in my car. And she called me from there at
3 work and told me that she wanted some help finding the
4 coffee cup. And Kevin was there cooking supper for my
5 children and for Jordan Morris, who's Dottie Morris son.
6 And I talked to him on the phone then. So that was
7 around -- I don't know -- 6:30, 7:00. And then I got home
8 about 8:00. And he was there. And they had already
9 eaten.

10 So I ate leftovers while Kevin cleaned up and we
11 talked. I did give him some money for some shirts. I had
12 gotten some -- at Piedmont Wilderness, they require you to
13 wear uniforms with stitching on them. And I had some over
14 at Carolina Stitches that I needed picked up the following
15 morning. So I did give Kevin \$40 to pick up those shirts
16 for me at Piedmont Wilderness, which he did the following
17 morning.

18 Q And where did Kevin spend Monday night?

19 A He spent the night with me.

20 Q Okay. And you're absolutely sure about that?

21 A Positive.

22 Q Okay. And do you recall about what time y'all went
23 to bed or anything like that?

24 A I got home about 8:00. We ate. He cleaned up the
25 kitchen. We talked. We took showers, got ready for bed.

1 So we were in bed by 10:00, and talked, and were asleep by
2 11:00.

3 Q Okay. And do you recall anything else that happened
4 after 11:00 that night?

5 A I do. About 4:00 in the morning, I woke up because
6 it was really, really cold. And Kevin was sleeping. And
7 I woke him up. And I said, Did you turn off the heat?

8 And he said, It's freezing in here. Why would I turn
9 off the heat?

10 I said, I don't know, but I think it's hot -- it's
11 cold in here.

12 And he said, No, I didn't.

13 And I said, Well, go check it and see if it's on.

14 And he said, I'm not getting up. It's cold.

15 And I said, Well, I'm not going to get up either.
16 It's cold.

17 So we didn't get up. But I was restless for the rest
18 of the night because of the cold.

19 Q Now, let me ask you. How long have you been a single
20 parent?

21 A 19 years. My son is 19 years old.

22 Q All right. Would you consider yourself a heavy
23 sleeper or a light sleeper?

24 A Anything wakes me up. I'm a very light sleeper.
25 I'm, also, accustomed to sleeping alone. So having

1 somebody else sleep with me, it makes me an even lighter
2 sleeper than I ordinarily would be.

3 Q If Kevin had gotten up and had gone anywhere that
4 night, would you have noticed that?

5 A Absolutely, without a doubt. His truck is, also,
6 loud. If he had gotten in his truck and driven away, it
7 would have woken everybody up.

8 Q Okay. And that was the vehicle that he was driving?

9 A Yes, sir.

10 Q Now, tell us what happened the next morning.

11 A Tuesday morning, we woke up. Kevin woke the kids up.
12 My son didn't have school that day so there was a little
13 commotion about his being woken up when it wasn't necessary.

14 My daughter did get up and get ready for school.
15 Kevin fixed us breakfast. And we talked about picking up
16 the shirts for Piedmont Wilderness. And I went to work.
17 And I don't know what anybody else did past that point,
18 because I was in the classroom and didn't have access to a
19 telephone.

20 Q Okay. And where did -- did you see Kevin the night
21 of November the 11th?

22 A That's Tuesday?

23 Q Yeah.

24 A I did not see him on Tuesday. I talked to him on the
25 phone when I got home from work --

1 there. He had some other people out there. And they were
2 stripping wire. They were doing something. I don't know.
3 But he was working in the yard out there. And we stood
4 out there and visited for a little while, probably half an
5 hour or so.

6 Q Okay. But he didn't spend November the 12th with
7 you, did he? Is that --

8 A No, sir. Actually, that Monday night, when Marilyn
9 claims he attacked her was the last night that he spent
10 with me.

11 Q Okay. On -- now, we're into Thursday, November the
12 13th. And that's when he got arrested that day?

13 A Yes.

14 Q Did you happen to see him that day?

15 A Wednesday?

16 Q On Thursday, November the 13th?

17 A No, I didn't. I worked that day. And my son called
18 me at work and told me what had happened.

19 Q Okay. Now, after you learned that he was arrested --
20 about when did you learn the circumstances of the arrest?

21 A It was really confusing there for a little while. My
22 son called me at Piedmont Wilderness --

23 Q You can't say what your son said because there might
24 be an objection to that. But you --

25 A Well, that's how I learned that he -- well, that's

1 how I learned that the police were looking for him.
2 Actually, they had not made an arrest at that point.

3 So I did try to call Kevin on his cell phone to find
4 out what was going on. And I wasn't able to reach him,
5 undoubtedly, because they already had him in custody. I
6 don't know.

7 So I wasn't allowed to visit until Saturday. I did
8 talk to Kevin on the telephone. And he told me that he
9 had been accused of attacking somebody. And when he told
10 me the date that they said that -- he said, It was Monday
11 night they claim that I did this. And I, actually,
12 laughed. At that point, we didn't realize that he was
13 going to be sitting in jail for a year for something he
14 hadn't done. And I said, Oh, good. You were with me.
15 That's great. Because he couldn't possibly have done it.
16 There was just no chance that he could have done it.

17 Q And did -- once you learned that and knew that --
18 knew the time -- and you say you learned about that that
19 Saturday; is that correct, more of the circumstances?

20 A I talked to him on the phone. I think it was Friday
21 when I, finally, got to talk to him on the phone. And he
22 told me that. He didn't have the warrants.

23 So we didn't know any details. And I didn't know who
24 his accuser was at that point. So it was Saturday before
25 I got any real details. Jordan Morris and I went over to

1 the jail and we visited with Kevin. And he had the
2 warrant with him up there then. And he told me who the
3 investigator was and who, the accuser was, the date, the
4 warrant number, that sort of thing. So when Jordan and I
5 left the -- should I continue?

6 Q Yeah.

7 A Okay. When Jordan and I left the jailhouse, I had
8 some errands to run in town. And he and I talked. And we
9 said, This is just too ludicrous to be believed. I wasn't
10 sure if the police had made something up, or if Marilyn
11 had. I just could not understand how this lie could just
12 be carried on this far.

13 So I thought if I talked to Marilyn that maybe we
14 could make some sense of it and understand why she would
15 tell these things. So we went over there. Jordan and --
16 Joyce, who is Kevin's mother, and Marilyn lived in a
17 trailer park. And their trailers were adjacent to one
18 another. So Jordan went over to Joyce's house while I
19 went to Marilyn's. And I introduced myself, my name. I
20 said, I'm Sharon Corley. And she said --

21 MR. FLEMING: Your Honor, I'd object to hearsay.

22 THE COURT: Sustained.

23 BY MR. HOWE:

24 Q You can't say what she said. I'll tell you, we just
25 won't go into that conversation.

1 A Okay.

2 Q But let me ask. After you learned a little bit more
3 details, did you attempt to contact law enforcement and
4 give them information on where Kevin was when this
5 happened?

6 A I didn't just attempt. I, actually, had a 30- to
7 40-minute conversation with Officer Galarza.

8 Q Okay. And do you know him?

9 A No, I don't. In fact, I didn't know that's who that
10 was. I only talked to him on the phone. I've never met
11 with him in person.

12 Q Okay. And what was the gist of your conversation?

13 A Well, first, I did try to contact him over the
14 weekend. After I had met with Kevin and spoken with
15 Marilyn, I did try to call him then. And he wasn't
16 available. He just wasn't on duty over the weekend.

17 So the dispatcher asked me to call back on the Monday
18 when he was on duty. And I did that. When I got off work
19 at Piedmont Wilderness on Monday, I went over to the
20 jailhouse to pick up Kevin's personal belongings. And, on
21 the way there, I called dispatch and asked to have Officer
22 Galarza return my phone call. And he did do that
23 immediately. He called me within five minutes.

24 I introduced myself to him. And I said, I have some
25 information relevant to this investigation that you're

1 conducting. You have arrested Kevin Epting. You have him
2 in custody. And I want you to know that he couldn't
3 possibly have committed the crime that you're accusing him
4 of because he was with me at the time that it, supposedly,
5 occurred. And he said --

6 MR. FLEMING: Objection, Your Honor.

7 THE COURT: Sustained.

8 BY MR. HOWE:

9 Q As a result of that conversation, did -- were you
10 ever asked to come to law enforcement and make a formal
11 statement or anything of that nature?

12 A Absolutely not. And I offered to do so.

13 Q Okay. As a result of that conversation, did you form
14 an opinion as to whether or not this officer was
15 interested in talking with you?

16 A He wasn't at all. He was not at all interested in
17 the truth.

18 Q Okay. Now, that would have been a few days after
19 Kevin's arrest?

20 A That was Monday. Kevin was arrested on Thursday. So
21 I attempted to call on Sunday. And then I, finally, did
22 have that conversation with him on Monday. And that was
23 almost exactly a year ago. And I have yet to speak to
24 Officer Galarza or any other investigator. Nobody has
25 ever talked to me about it.

1 this, you talked with Deputy Galarza that Monday after
2 Mr. Epting was arrested; is that correct?

3 A Yes, sir.

4 Q And you stated, at that time, that you told him that
5 Mr. Epting stayed with you the night of the 10th; is that
6 correct?

7 A Yes, sir.

8 Q Did you talk with anybody else about it?

9 A I talked with everybody else about it.

10 Q Specifically, who --

11 A And I have for the last year. I've discussed it with
12 everyone I've come in contact with.

13 Q Because I thought that when Mr. Howe asked you did --
14 he asked you did anybody else in law enforcement or
15 anybody else ask you --

16 A Nobody interviewed me. Nobody was interested. I,
17 actually, last week was at a vigil for the Laurens County
18 safe home and ran into law enforcement officers there and
19 discussed this with them at random. Because I'm so
20 outraged at this injustice that I was, actually, talking
21 to anybody that I thought might have the slightest
22 interest.

23 Q Okay.

24 A Of course, they're not -- they don't have the
25 authority to do anything about it. It's not their

1 THE COURT: Yes.

2 (WHEREUPON, the proceedings were recessed at
3 approximately 1:39 p.m.)

4 QUESTION FROM THE JURY

5 THE COURT: We have Mr. Epting present and all
6 counsel present.

7 We have a note from the jury that I'll make a Court's
8 exhibit. And the note is as follows, "Can we get a copy
9 of the police report and witness statement, please?" And
10 then it says, "Jury vote is seven guilty, five not guilty.
11 Thanks."

12 Now, I thought we had gotten the sleeping juror off
13 the jury. Because I do remember, specifically, telling
14 the jury that, among other things, at the close of my
15 charge that I couldn't give them anything that was
16 referred to during the trial that they didn't already have
17 back there as an exhibit, and not to tell me how they
18 stood, if they ever had to communicate with me.

19 So all I know to do is write them back and say, "The
20 record is closed. Do not inform me of how the jury
21 stands."

22 Does anybody have any other suggestion?

23 MR. FLEMING: The State has no objection to that.

24 MR. HOWE: We don't have any objection, Judge.

25 THE COURT: All right. I'll let you all look at this

VERDICT

THE CLERK: In the case of the State v. Kevin Shane Epting, case 2009-GS-30-0190 and 0191.

As to the charge of burglary, indictment number 2009-GS-30-0190, we, the jury, unanimously find the Defendant guilty.

As to the charge of assault and battery of a high and aggravated nature, which is indictment number 2009-GS-30-0191, we, the jury, unanimously find the Defendant guilty.

Ladies and gentlemen, the verdict that I just published, if that was your verdict in the jury room, would you, please, signify by your upraised right hand.

(WHEREUPON, all jurors raised their right hand.)

THE CLERK: Thank you.

THE COURT: Okay. Any matters or motions before the jury is discharged from the State?

MR. FLEMING: Nothing --

MR. HOWE: Not before the jury is discharged.

MR. FLEMING: Nothing from the State, Your Honor.

THE COURT: Is there any request for a poll?

MR. HOWE: No, sir.

THE COURT: All right. Ladies and gentlemen, thank you for your service this week. And I --

THE CLERK: I've got their checks.

1 What I think we should do now -- I think it's
2 imperative that the Court hear his extensive record, Your
3 Honor. And I will attempt to inform the Court of what
4 that is. I just beg the Court's indulgence for just a few
5 minutes, Your Honor, so I can get to it.

6 (Pause.)

7 MR. FLEMING: Your Honor, starting with some of his
8 out-of-state convictions, he does have a felony maiming
9 charge -- or felony maiming conviction in Newport News in
10 1983. He's got a possession with intent to distribute
11 marijuana in Newport News in 1984, Your Honor. He has a
12 driving under the influence in Danielsville, Georgia, it
13 looks like in 1987; driving while suspended in the same
14 jurisdiction, Your Honor. It looks like another driving
15 under the influence in Georgia, Your Honor, in 2002.
16 Unlawful possession of liquor, Your Honor. He's got
17 resisting arrest, driving left of center, driving under
18 suspension more than first. And I don't see a date on
19 those, Your Honor. Driving under the influence more than
20 first in 1989, Your Honor; possession of marijuana in
21 1979, Your Honor; obstructing police in 1980; failure to
22 stop in 1980, Your Honor. And all these are in South
23 Carolina, Your Honor. I'm sorry. Habitual offender,
24 1983; public drunk, 1989; resisting arrest in, 1989, Your
25 Honor; receiving stolen goods in 1990; resisting arrest in

1 1991; shoplifting in 1991; burglary second, 1994; driving
2 under the influence, 1994; driving under the influence
3 fourth, driving under the influence fifth as well, driving
4 under the influence sixth in 1997; giving false
5 information in 1997, Your Honor; burglary second, again,
6 in 2004, Your Honor; simple possession of marijuana, 2004;
7 resisting arrest, 2004. He has other minor traffic
8 offenses, Your Honor. That's it.

9 Your Honor, considering the facts of the case, you
10 know, the age of the victim, her physical health at that
11 time, we think that this is a very serious case and
12 that any kind of sentence should reflect the seriousness
13 of this case and his past criminal history, Your Honor.

14 The victim is not here. I think she got worn out
15 yesterday and didn't feel good. And that's the reason
16 she's not here today. Otherwise, I think she would be
17 here to address this Court.

18 So the State's position is that any sentence given by
19 this Court should be a heavy sentence and that would be in
20 line with the acts perpetrated and the past criminal
21 history, Your Honor.

22 THE COURT: Thank you, Mr. Fleming.

23 Yes, sir, Mr. Howe.

24 MR. HOWE: Thank you, Your Honor.

25 May it please the Court.

1 years old before his release from the Department of
2 Corrections.

3 THE COURT: Thank you, Mr. Howe. And thank you,
4 again, for your fine representation.

5 Mr. Epting, I'll be glad to hear anything you'd like
6 to say, sir.

7 MR. HOWE: Judge, I've told him just to refrain from
8 saying anything.

9 THE COURT: Okay.

10 MR. HOWE: Obviously, there would be things that
11 might need to be said. But I think he probably would
12 be -- it would be in his best interest to not get into
13 that, at this point in time.

14 THE COURT: Okay.

15 MR. HOWE: And that would be with no disrespect to
16 this Court. I just think it's --

17 THE COURT: No. I can -- I understand the reasons
18 why he may not want to --

19 MR. HOWE: Yes, sir.

20 THE COURT: And I respect that. I'm not -- he,
21 certainly, has the absolute right to exercise his right to
22 a jury trial.

23 SENTENCING

24 THE COURT: On the burglary first, the sentence is
25 you be committed to the Department of Corrections for a

1 period of 20 years. And, on the assault and battery of a
2 high and aggravated nature, the sentence is you be
3 committed to the Department of Corrections for a period of
4 10 years, concurrent.

5 Thank you.

6 *****END OF TRANSCRIPT OF RECORD*****
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11/10/2009
11:18:08

Laurens County 911
CAD Incident Detail

PAGE 1 135
USER SANDR

CAD Incident: 2008-00054882
Phone : 864 998-5134
Name : HOPKINS, MARILYN
Address : 70 CINDY DR
Community: CROSS HILL
Jurisdctn: CRH
Intersect:
SubDivisn: TURNER PLACE MHP

ESN : 7361
Law : SHERIFF
Fire : CROSS HILL
EMS : MEDIC 4
Rescue:

Disp : 4
Source: 911

L F E R
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11 22 25
M4

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CAD Call Times: DISORDERLY CONDUCT
.....

Incoming Call: 09/06/2008 17:12:50
Call Created : 09/06/2008 17:12:50
Call Send Time : 17:13:46
Call Dispatch Time: 17:15:30
Call Enroute Time : 17:15:35
Call Arrival Time : 18:03:00
Call Clear Time : 18:18:21
Call Closed : 09/06/2008 18:18:21

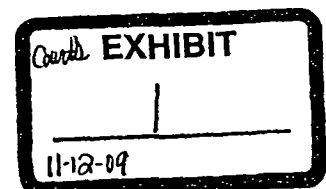
Created By: ATHOMPSON Pos:005 DISPATC
Sent By : ATHOMPSON Action:
Event : 1049F 1 Language:
Law : 1049F 1
Fire : 1049F 1
EMS : 1049F 1
Rescue: 1049F 1

.....
Original Dispatch Remarks:

BILLY SEIZMORE / COMP SAID THAT THIS SUBJ IS HER SON / HE IS
SHOWING OUT / KNOCKED A HOLE IN THE WALL / SUBJ IS NOW AT THE NEXT
DOOR NEIGHBOR / WOULD LIKE AN OFFICER TO COME OUT
.....

Vehicle Information
.....

UNIT	DEPT	STATUS/DSP/CASE	LOCATION/REMARK	USER	DATE	TIME
240	L01	DSP		KBARR	09/06	17:15:30
240	L01	1017		KBARR	09/06	17:15:35
240	L01	1023		KBARR	09/06	18:03:00
240	L01	108		KBARR	09/06	18:18:20



136 11/10/2009
11:18:33

Laurens County 911
CAD Incident Detail

PAGE 1
USER SANDR

CAD Incident: 2009-00014783	ESN : 7361	L F E R
Phone : 864 998-5134	Law : SHERIFF	17
Name : SIZEMORE, BILL	Fire : CROSS HILL	11 22 25
Address : 70 CINDY DR	EMS : MEDIC 4	M4
Community: CROSS HILL	Rescue:	
Jurisdctn: CRH		
Intersect:	Disp : 1	
SubDivisn: TURNER PLACE MHP	Source: N9C	

.....
CAD Call Times: CARDIAC ARREST
.....

Incoming Call: 03/11/2009 11:38:51	Created By: DCHESTEIN	Pos:001 DISPATC
Call Created : 03/11/2009 11:38:51	Sent By : DCHESTEIN	Action:
Call Send Time : 11:40:28	Event : SIG83 1	Language:
Call Dispatch Time: 11:40:02	Law :	
Call Enroute Time : 11:40:42	Fire : SIG83 1	
Call Arrival Time : 11:44:34	EMS : SIG83 1	
Call Clear Time : 13:37:42	Rescue: SIG83 1	
Call Closed :03/11/2009 13:37:42		

.....
Original Dispatch Remarks:
F SUBJ / AGE 56 / CARDIAC ARREST
.....

.....
Narratives
.....

Narrative By: DCHESTEIN 03/11/2009 11:40
GRAY SWMH
.....

.....
Vehicle Information
.....

UNIT	DEPT	STATUS/DSP/CASE	LOCATION/REMARK	USER	DATE	TIME
SUPV	E15	DSP	0000002339	RGREE	03/11	11:40:02
M4	E04	DSP		RGREE	03/11	11:40:02
11T	F11	DSP	0000000075	ARIDL	03/11	11:40:22
M4	E04	1017		RGREE	03/11	11:40:42
SUPV	E15	1017		RGREE	03/11	11:41:45
FC1	F02	DSP	0000000024	ARIDL	03/11	11:42:39
FC1	F02	1017		ARIDL	03/11	11:42:42
11T	F11	1017	1151	ARIDL	03/11	11:43:06
11T	F11	1017	1163	RGREE	03/11	11:43:15
11T	F11	1023	1151 1023	ARIDL	03/11	11:44:34
M4	E04	1023		RGREE	03/11	11:44:35
M4	E04	LOG	NEG SIG 83	RGREE	03/11	11:45:46
SUPV	E15	SIG94 1	CANCEL PER M4	RGREE	03/11	11:46:01
FC1	F02	108	CANCEL PER EMS	ARIDL	03/11	11:52:12
11T	F11	108 1		DCHES	03/11	12:03:30
M4	E04	1017	C1 SELF AMS BM 96.8	RGREE	03/11	12:08:28
SUPV	E15	*EMS#	Del>>>>>2343	RGREE	03/11	12:11:22
M4	E04	EMS#	0000002343	RGREE	03/11	12:12:43

11/10/2009
11:18:33

Laurens County 911
CAD Incident Detail

PAGE 2 137
USER SANDR

M4 E04 1023
M4 E04 1017
M4 E04 108 1

SELF EM 113
10-91 COUNTY

RGREE 03/11 12:32:30
DCHES 03/11 13:04:17
DCHES 03/11 13:37:36

138/10/2009
11:19:05

Laurens County 911
CAD Incident Detail

PAGE 1
USER SANDR

CAD Incident: 2009-00064832
Phone : 864 998-5134
Name : LOREEN RILEY
Address : 70 CINDY DR
Community: CROSS HILL
Jurisdctn: CRH
Intersect:
SubDivisn: TURNER PLACE MHP

ESN : 7361
Law : SHERIFF
Fire : CROSS HILL
EMS : MEDIC 4
Rescue:

L F E R
17
11 22 25
M4

Disp : 1
Source: N9C

.....
CAD Call Times: RESPIRATORY DISTRESS
.....

Incoming Call: 10/27/2009 14:18:16
Call Created : 10/27/2009 14:18:16
Call Send Time : 14:19:30
Call Dispatch Time: 14:20:22
Call Enroute Time : 14:21:42
Call Arrival Time : 14:26:18
Call Clear Time : 15:44:48
Call Closed :10/27/2009 15:44:48

Created By: DDEITZ Pos:001 DISPATC
Sent By : DDEITZ Action:
Event : SIG74 1 Language:
Law :
Fire : SIG74 1
EMS : SIG74 1
Rescue: SIG74 1

.....
Original Dispatch Remarks:
shortness of breath weak
red jeep cherokee in the yard
.....

.....
Vehicle Information
.....

UNIT	DEPT	STATUS/DSP/CASE	LOCATION/REMARK	USER	DATE	TIME
M4	E04	DSP	0000010134	DDEIT	10/27	14:20:22
11T	F11	DSP	0000000347	DDEIT	10/27	14:20:22
M4	E04	1017		DDEIT	10/27	14:21:42
11T	F11	1017		JSHER	10/27	14:26:02
M4	E04	1023		JSHER	10/27	14:26:18
M4	E04	LOG	CANCEL 11T	JSHER	10/27	14:27:54
11T	F11	108 1	CANCEL PER M4	JSHER	10/27	14:28:01
M4	E04	1017	C1 SELF SICK PERSON BM 0	JSHER	10/27	14:46:22
M4	E04	1023	SELF EM 16	JSHER	10/27	15:13:40
M4	E04	1017	BACK TO CNTY	JSHER	10/27	15:25:55
M4	E04	108 1	BACK IN CNTY	JSHER	10/27	15:44:47

11/10/2009
11:18:55

Laurens County 911
CAD Incident Detail

PAGE 139
USER SANDR

CAD Incident: 2009-00066706
Phone : 864 323-5363
Name : LORINE RILEY
Address : 70 CINDY DR
Community: CROSS HILL
Jurisdctn: CRH

ESN : 7361
Law : SHERIFF
Fire : CROSS HILL
EMS : MEDIC 4
Rescue:

L F E R
17
11 22 25
M4

Intersect:
SubDivisn: TURNER PLACE MHP
Caller Address: 97 GOOD HOPE CH RD

Disp : 1
Source: CEL

.....
CAD Call Times: RESPIRATORY DISTRESS
.....

Incoming Call: 11/05/2009 12:21:31

Call Created : 11/05/2009 12:21:41

Created By: ARIDLEY

Pos:005 DISPATC

Call Send Time : 12:23:12

Sent By : ARIDLEY

Action:

Call Dispatch Time: 12:23:25

Event : SIG74 1

Language:

Call Enroute Time : 12:25:11

Law :

Call Arrival Time : 12:30:10

Fire : SIG74 1

Call Clear Time : 13:56:49

EMS : SIG74 1

Call Closed :11/05/2009 13:56:49

Rescue: SIG74 1
.....

Original Dispatch Remarks:

MARILYN HOPKINS RELEASED FROM SELF 11/4 COMP HOME HEALTH
BURSE OXYGEN SATS ARE 87% ON 2 LITERS O2 PT HAS COPD
SWMH BEIGE W/ BLUE SHUTTERS 1ST TRAILER ON RIGHT
.....

Narratives
.....

Narrative By: DANIELLE 11/05/2009 12:23

BOLO Reference # 2008000061 CAD Incident: 2009-0000013796

Location/Tag:97 GOOD HOPE CH RD

Name: TOWER

Phone: () Agn: Off:

THIS IS A CELL TOWER SITE, IT MAY BE NECESSARY TO VERIFY THE
CALLER'S ADDRESS

Narrative By: KBARRETT 11/05/2009 12:23

BOLO Reference # 2008000061 CAD Incident: 2009-0000013796

Location/Tag:97 GOOD HOPE CH RD

Name: TOWER

Phone: () Agn: Off:

THIS IS A CELL TOWER SITE, IT MAY BE NECESSARY TO VERIFY THE
CALLER'S ADDRESS

Narrative By: ARIDLEY 11/05/2009 12:24

BOLO Reference # 2008000061 CAD Incident: 2009-0000013796

Location/Tag:97 GOOD HOPE CH RD

Name: TOWER

Phone: () Agn: Off:

THIS IS A CELL TOWER SITE, IT MAY BE NECESSARY TO VERIFY THE
CALLER'S ADDRESS

140
11/10/2009
1:18:55

Laurens County 911
CAD Incident Detail

PAGE 2
USER SANDR

Narrative By: DANIELLE 11/05/2009 12:25
SOLO Reference # 2008000061 CAD Incident: 2009-0000013796
Location/Tag: 97 GOOD HOPE CH RD
Name: TOWER
Phone: () Agn: Off:
THIS IS A CELL TOWER SITE, IT MAY BE NECESSARY TO VERIFY THE
CALLER'S ADDRESS

.....
Vehicle Information
.....

UNIT	DEPT	STATUS/DSP/CASE	LOCATION/REMARK	USER	DATE	TIME
M4	E04	DSP	0000010415	DANIE	11/05	12:23:25
11T	F11	DSP	0000000356	DANIE	11/05	12:23:25
M4	E04	LOG	COPIES	DANIE	11/05	12:24:16
M4	E04	1017		DANIE	11/05	12:25:11
11T	F11	1017	1151	DANIE	11/05	12:26:04
M4	E04	1023		DANIE	11/05	12:30:10
11T	F11	1023		DANIE	11/05	12:31:38
11T	F11	LOG	1151	DANIE	11/05	12:31:52
11T	F11	108		DANIE	11/05	12:48:24
M4	E04	LOG	10-4 PREPARING TRANSPORT	DANIE	11/05	12:48:53
M4	E04	1017	C1 SELF SIG74 BM 04	DANIE	11/05	12:58:06
M4	E04	1023	EM 21 @ SELF	DANIE	11/05	13:28:56
M4	E04	1017	1091	DANIE	11/05	13:38:26
M4	E04	108		DANIE	11/05	13:56:48

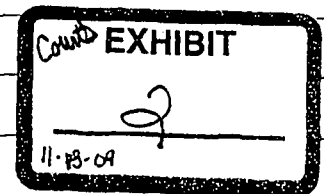
Can we get
a copy of
the police report
and witness
Statement please?

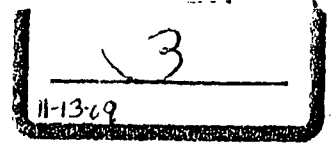
Jury vote is

7- Guilty

5- not Guilty

Thanks





In response to your note, as
I have already instructed you:

(1) The record is closed.
You have all the exhibits that
were admitted as evidence.

(2) Please do not tell
me what the numerical vote
is.

G. Hill

11/13/09

**STATE'S
EXHIBIT**

4

11-12-09

五

STATE OF SOUTH CAROLINA

COUNTY OF Laurens
STATE VS.AKA: Kevin Shawn Epling
Race: White Sex: Male Age: 41
DOB: --- SS#: ---
Address: ---
City, State, Zip: ---
DL# --- SID# ---

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#:

03 -GS- 30 - 1029
AW#: H474118
Date of Offense: 6-26-03
S.C. Code §: 16-11-311
CDR Code #: 01 01 7 19
☐ CASE RESTORED
SENTENCE
☒ PLEA ☐ TRIALIn disposition of the said indictment comes now the Defendant who was ☐ CONVICTED OF or ☒ PLEADSTO: Burglaryin violation of § 16-11-312 of the S.C. Code of Laws, bearing CDR Code # 01 01 810☒ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ 17-25-45The charge is: ☐ As Indicted, ☐ Defendant Waives Presentment to Grand Jury.The plea is: ☐ Without Negotiations or Recommendation, ☒ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

[Signature]
Solicitor[Signature]
Defendant[Signature]
Attorney for DefendantWHEREFORE, the Defendant is committed to the ☐ State Department of Corrections, ☐ County Detention Center, for a determinate term of --- ☐ under the Youthful Offender Act not to exceed --- years and/or to pay a fine of \$ ---; provided that upon the service of --- years and/or payment of \$ ---; plus costs and assessments as applicable*; the balance is suspended with ---

and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on:☒ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied on the State Department of Corrections. ---

SPECIAL CONDITIONS:

☐ Heard, ☐ Waived, ---Total: --- plus 20% fee: \$ ---Payment Terms: ---☐ set by SCDPPPS ---Recipient: ---*Fine: \$ ---\$14-1-206 (Assessments 107.5%) \$ ---\$14-1-211(A)(1) (Conv. Surcharge) \$ ---\$14-1-211(A)(2) (DUI Surcharge) \$100 \$ ---\$56-5-2995 (DUI Assessment) \$12 \$ ---\$35.13 (Public Def/Prob) ---\$73.3, 1B TP (Law Enforce. Funding) ---\$33.7, 1B TP (Drug Court Surcharge) \$100 \$ ---\$50-21-114(BUI Breath Test Fee) \$50 \$ ---\$56-5-2942(J) (Vehicle Assessment) \$40/ea \$ ---% to County (if paid in installments) ---TOTAL ---Barbara T. Nasson
Clerk of Court/Deputy ClerkCourt Reporter: [Signature]PTUP ---Hours Public Service EmploymentLaurens County CCCP & GSAttend Voc. Rehab. or Job Corp. ---May serve W/E beginning ---Substance Abuse Counseling ---Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ --- beginning ---\$ --- paid to Public Defender FundOther: ---☐ Appointed PD or appointed other counsel, \$35.13 TP
Requires \$500 be paid to Clerk during probation.PRESIDING JUDGE [Signature]Judge Code: 11 11 31 1Sentence Date: 8/12/04

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

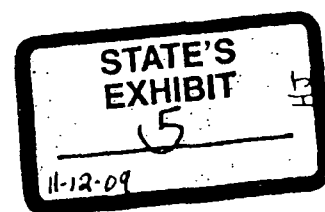
[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]



S E N T E N C E

STATE OF SOUTH CAROLINA

Case # 43 GS 30-61

LAURENS COUNTY

PLED/CONVICTED

The Defendant KEVIN SHANNERTINE hereby appears in his own proper person, waives grand jury presentment and pleads guilty to the charge of BATTERY (NO DEFENSE (NON-VIOLENT)) as is evidenced by his signature below.

The Defendant further recognizes, the charge above listed to which he is pleading guilty to carries a minimum sentence of [REDACTED] and a maximum sentence of [REDACTED] months.

Kevin Shannertine
Defendant (1/8/94)

As such, the defendant KEVIN SHANNERTINE is committed to the State Department of Corrections for a term [REDACTED] pay a fine of \$ [REDACTED]; provided upon the service of [REDACTED] and/or payment of \$ [REDACTED]; plus pay [REDACTED] costs and assessments as applicable, the [REDACTED]

Restitution

For physical injury \$ [REDACTED]

~~Yes~~/NoA TRUE COPY OF ORIGINAL
Property damage \$ [REDACTED]

to be paid [REDACTED]

Lynn W. LancasterLynn W. Lancaster
Laurens County C.C.C.D. & GS

to clerk for [REDACTED]

Other Conditions: [REDACTED]

Date

December 8, 1994[Signature]
Presiding Judge

WITNESSES

Jan Galarza
Laurens County Sheriff

WARRANT NUMBER

5303 True Bill

John D. Brown

Foreman of the Grand Jury

2/6/09

VERDICT

nan

THE STATE OF SOUTH CAROLINA

COUNTY OF LAURENS

COURT OF GENERAL SESSIONS

February Term, 2009

Indictment # 09GS30- 0191

THE STATE

IC

vs.

Kevin Shane Epting

INDICTMENT FOR

ASSAULT AND BATTERY OF A HIGH AND
AGGRAVATED NATURE

17-25-0

FILED
FEB 10 2009
CLERK OF COURT
LAURENS COUNTY
SOUTH CAROLINA

THE STATE OF SOUTH CAROLINA

COUNTY OF LAURENS

INDICTMENT FOR

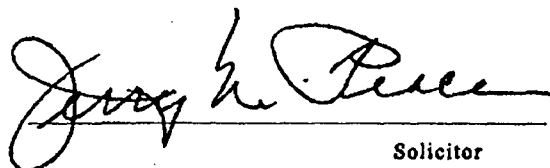
ASSAULT AND BATTERY OF A HIGH AND
AGGRAVATED NATURE

17-25-0

At a Court of General Sessions, convened on the 6th day of February, 2009 the Grand Jurors of Laurens County present upon their oath:

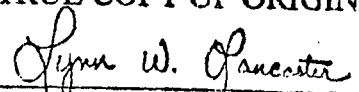
That Kevin Shane Epting, did in Laurens County, state aforesaid, on or about the 11th day of November, 2008 willfully and unlawfully commit an act of violent injury to the person of another, to wit: Marilyn Hopkins, accompanied by circumstances of aggravation, the use of a deadly weapon, and/or the infliction of serious bodily injury, and/or the intent to commit a felony, and/or the great disparity between the ages and physical conditions of the parties, and/or the difference in sexes, and/or indecent liberties or familiarities with a female, and/or the purposeful infliction of shame and disgrace, and/or resistance of lawful authority, in violation of the laws of South Carolina.

Against the peace and dignity of the State, and contrary to the statute in such cases made and provided.



Solicitor

A TRUE COPY OF ORIGINAL



Lynn W. Lancaster
Laurens County CCCP & GS

WITNESSES

ian Galarza

aurens County Sheriff

THE STATE OF SOUTH CAROLINA

COUNTY OF LAURENS

COURT OF GENERAL SESSIONS

February Term, 2009

Indictment # 09GS30- 0190

WARRANT NUMBER

5302

True Bill

THE STATE

IC

vs.

Kevin Shane Epting

J. M. D. Brown

Foreman of the Grand Jury

2/6/09

VERDICT

INDICTMENT FOR

BURGLARY

16-11-0311

nan

16-11-0311
 09GS30-0190
 2/6/09
 J. M. D. Brown
 Foreman of the Grand Jury

THE STATE OF SOUTH CAROLINA

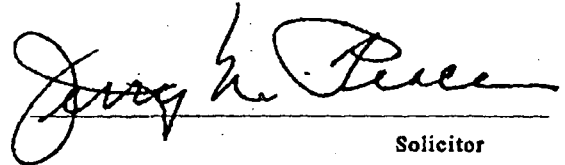
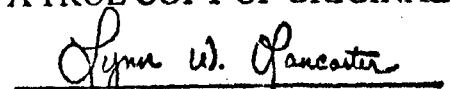
COUNTY OF LAURENS

INDICTMENT FOR**BURGLARY
16-11-0311**

At a Court of General Sessions, convened on the 6th day of February, 2009 the Grand Jurors of Laurens County present upon their oath:

That Kevin Shane Epting, did in Laurens County, state aforesaid, on or about the 11th day of November, 2008 with a prior record of two or more convictions for burglary and/or housebreaking, willfully and unlawfully enter a dwelling without consent and with intent to commit a crime therein, or the entering or remaining occurred in the nighttime, the said dwelling being owned and/or occupied by Marilyn Hopkins, in violation of Section 16-11-311 of the South Carolina Code of Laws, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such cases made and provided.


Solicitor**A TRUE COPY OF ORIGINAL**
Lynn W. Lancaster
Laurens County CCCP & GS

CERTIFICATE OF COUNSEL FOR APPELLANT

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

February 4th, 2011.

for *Rob du Rant*
LaNelle Cantey DuRant
Appellate Defender

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

ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA

In The Court of Appeals

RECEIVED

JUL 25 2012

APPEAL FROM LAURENS COUNTY

S.C. Supreme Court

D. Garrison Hill, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KEVIN SHANE EPTING,

APPELLANT

SUPPLEMENTAL
RECORD ON APPEAL

LANELLE CANTEY DURANT
Appellate Defender

ALAN WILSON
Attorney General

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Solicitor, Eighth Judicial Circuit
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Greenwood, SC 29648-0516
(864) 942-8800

Attorneys for Respondent

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1 (WHEREUPON, the jury came into open court at
2 approximately 4:17 p.m.)

3 THE BAILIFF: All are present, Your Honor.

4 THE COURT: Thank you, sir.

5 Yes, sir, Mr. Fleming. You may resume.

6 MR. FLEMING: Thank you, Your Honor.

7 CONTINUED DIRECT EXAMINATION

8 BY MR. FLEMING:

9 Q Deputy Galarza, I was asking you -- you showed a
10 photo to Ms. Hopkins of the Defendant; is that correct?

11 A That's correct.

12 Q And did she identify that person as the person who
13 burglarized her home?

14 A Yes, she did.

15 Q Did she recognize that person as the one who
16 committed the assault?

17 A Yes, she did.

18 Q Okay. Now, after that, you stated that you -- the
19 next day, you went and got warrants on the Defendant; is
20 that correct?

21 A Correct.

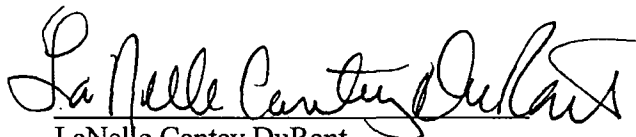
22 Q Okay. And did you assist in looking for the
23 Defendant to try to apprehend him and serve those warrants
24 on him?

25 A Yes. I was involved in the search.

CERTIFICATE OF COUNSEL FOR APPELLANT

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

March 10th, 2011.


LaNelle Cantey DuRant
Appellate Defender

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

ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Laurens County

D. Garrison Hill, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KEVIN SHANE EPTING,

APPELLANT

FINAL BRIEF OF APPELLANT

LANELLE CANTEY DURANT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S.C. 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Whether the trial court erred in not allowing appellant to introduce evidence of third party guilt that the victim's son was the perpetrator when the victim did not report the crime; there was an incident two months earlier between the victim and her son documented by a 911 call; the victim told the burglar that her son was not allowed to go into her purse; the victim admitted that she had suspected her son of taking money from her; and appellant presented an alibi witness.

2. Whether the trial court erred in not allowing defense counsel to cross examine the victim on the 911 call she made regarding her son two months prior to this incident when the state opened the door on direct testimony when the victim said that she recognized Officer Galarza because he came out and talked to her when the episode occurred with her son, William Sizemore.

STATEMENT OF THE CASE

The Laurens County Grand Jury indicted Kevin Shane Epting on the charge of burglary first degree (Indictment # 09-GS-30-0190) and assault and battery of a high and aggravated nature (ABHAN). On November 10, 12, 13, 2009, Epting proceeded to trial before the Honorable D. Garrison Hill and a jury. The jury returned verdicts of guilty as indicted. Judge Hill sentenced Epting to twenty years on the burglary first and ten years on the ABHAN to run concurrently. Epting's attorney filed a notice of appeal. This appeal follows.

ARGUMENT

I.

The trial court erred in not allowing appellant to introduce evidence of third party guilt that the victim's son was the perpetrator when the victim did not report the crime; there was an incident two months earlier between the victim and her son documented by a 911 call; the victim told the burglar that her son was not allowed to go into her purse; the victim admitted that she had suspected her son of taking money from her; and appellant presented an alibi witness.

Around 1:30 a.m. in the early morning of November 11, 2008, Marilyn Hopkins awoke when she heard someone in her home. She assumed she had locked her front door so she did not check it after going to bed. R. 27, ll. 14 – 25; R. 28, ll. 1 – 25; R. 33, ll. 1 – 25. She went into the dining area and allegedly saw Kevin Epting going into her purse. She said to him: “My son is off limits to my wallet, and you will not go into my billfold.” R. 37, ll. 1 – 25.

Ms. Hopkins knew Kevin because his mother lived across the street from her and Kevin stayed there with her sometimes. R. 31, ll. 4 – 18. Kevin and his mother had helped her in the past. R. 36, ll. 14 – 22. Kevin had been to her house and eaten dinner with her and her son, Billy. R. 34, ll. 1 – 25.

The burglar then hit her in the eyes and kicked her leaving bruises, and then he left without the purse. R. 35, ll. 1 – 25; R. 36, ll. 1 – 13. She did not call the police. She said she called her sister at 1:40 a.m. R. 36, ll. 2 – 4. Her sister called the police on November 12, 2008, almost thirty- eight hours after the incident. R. 40, ll. 17 – 25.; R. 93, ll. 15 – 25; R. 94, ll. 1 – 25; R. 95, ll. 1 – 14.

Her sister, Judy Prather, testified that she called Ms. Hopkins to check on her on November 12. Ms. Hopkins sounded very upset so Ms. Prather went over to see her. When she saw her sister's black eyes and bruises, Ms. Prather told her sister that the person who did this cannot get away with it. Ms. Prather then called the police. Ms. Prather testified that Ms. Hopkins did not call her at 1:40 a.m. after the incident. R. 77, ll. 1 – 21; R. 80, ll. 1 – 25; R. 81, ll. 1 – 25.; R. 82, ll. 1 – 25; R. 83, ll. 1 – 24.; R. 84, ll. 7 – 25; R. 85, ll. 1 – 10.

During her direct testimony, the solicitor asked Ms. Hopkins if she recognized Deputy Juan Galarza. Ms. Hopkins responded that she did because he was the one she talked with about the prior episode with her son, William Sizemore. She said her son had come in and was watching television. The solicitor stopped her at that point. R. 41, ll. 1 – 21.

In a pretrial motion, the solicitor moved for the court to exclude a 911 call made in September 2008 by the victim, Ms. Hopkins, to report that her son was “acting up” which the defense had indicated they wanted to introduce. The state argued that it was not relevant. R. 4, ll. 8 – 25; R. 5, ll. 1 – 25; R. 6, ll. 1 – 25.

Defense counsel argued that appellant should be allowed to introduce evidence of third party guilt and that the 911 call was connected to that. R. 7, ll. 1 – 25. Defense counsel said they wanted to present facts that would show that the victim's son, Billy Sizemore, was likely the intruder and which facts would meet the standard for third party guilt in South Carolina. R. 10, ll. 20 – 25.

Counsel outlined the law and facts supporting third party guilt. R. 11, ll. 1 – 25; R. 9, ll. 1 – 25; R. 10, ll. 1 – 25; R. 11, ll. 10. In September 2008, just two months before the burglary incident, the victim called 911, and reported that her son was showing out and had

knocked a hole in the wall. He left but she wanted a policeman to come out and retrieve her house key from her son who had gone next door. R. 5, ll. 1 – 12; R. 7, ll. 1 – 25.¹

Other facts were the victim's statement that her son was not allowed near her wallet. Two of the son's co-workers were willing to testify that the son, Billy, hated his mother and talked of wanting her dead. R. 10, ll. 1 – 25.

Defense counsel argued that the victim's statement that her wallet was off limits to her son and the 911 call and the co-workers' testimony presented more than mere suspicion and a reasonable inference that the son was the intruder. Defense counsel argued that under Holmes v. South Carolina, 547 U.S. 319 (2006), it was not the strength of the state's case, but if there were a reasonable inference that someone other than the accused was the intruder. In this case, that Mr. Sizemore was the intruder. R. 11, ll. 1 – 25; R. 12, ll. 1 – 25; R. 13, ll. 1 – 25; R. 14, ll. 1 – 25; R. 15, ll. 1 – 25; R. 16, ll. 1 – 25.

The judge ruled that based on State v. Gregory, 198 S.C. 98. 16 S.E.2d 532 (1941), there had to be "a proof of connection with the crime and the train of facts or circumstances tending to clearly point out the other person is the guilty party." R. 17, ll. 2 – 10.

The judge ruled there was no real connection between the son and this crime except the victim's statement to the intruder that her "son was off limits to her wallet and you will not go in my billfold." He said that giving the most favorable interpretation to the defense of that statement, then it could be her son who was the intruder. However, he said it was not enough to show that the son was the guilty party. R. 16, ll. 24 – 25; R. 17, ll. 1 – 25; R. 18, ll. 1 – 21.

¹ Ms. Hopkins told police in the burglary incident that she did not know the intruder got into her house. R. 37, ll. 18-21.

During the trial, Ms. Hopkins admitted on cross-examination that she had suspected her son, Billy, of taking money from her wallet before but she then thought maybe someone else did it. She also admitted that her son was off limits to her wallet. Her son knew that she kept her money in her purse in the china cabinet. R. 52, ll. 11 – 25; R. 53, ll. 1 – 25; R. 54, ll. 1 – 25.

Ms. Hopkins testified that on the morning of November 11 after the incident, she called Joyce Epting, Kevin's mother, to come to her house to be with her because she "thought the world of her." She admitted that she did not tell Ms. Epting that Kevin had come into her house and attacked her. R. 70, ll. 14 – 25; R. 71, ll. 1 – 15.

Joyce Epting testified for the defense that Ms. Hopkins called her on the morning of November 11 to come over as she had something to show her. When Ms. Epting arrived, Ms. Hopkins had two black eyes and told her that the chemotherapy treatments did that to her. She had been having treatments for cancer. R. 114, 1 – 25; R. 115, ll. 1 – 5; R. 29, ll. 1 – 24.

Sharon Corley, who was the girlfriend of Kevin during this incident, testified for the defense that Kevin spent the night of the alleged incident with her. On Sunday, November 9, 2008, they attended her stepfather's funeral. Then Kevin spent the night on Monday, November 10, and the alleged incident happened that night during the early morning hours of November 11. R. 118, ll. 1 – 25; R. 119, ll. 1 – 25; R. 120, ll. 1 – 25; R. 121, ll. 1 – 25; R. 122, ll. 1 – 25.

Ms. Corley testified that she was a paralegal and worked for an attorney. She also taught English at a reform school for boys under DJJ. R. 116, ll. 1 – 25; R. 117, ll. 1 – 25. She had tried to give a statement to the police to let them know that Kevin could not have

done this, but the police were not interested in talking to her. R. 123 – 127. She said she was “outraged at this injustice.” R. 128, ll. 1 – 23.

Kevin testified in his defense. He denied committing this crime. R. 101, ll. 1 – 25; R. 102, ll. 1 – 25. He explained his whereabouts during this time and that he spent the night with Sharon on the night the incident occurred. R. 103 – 113.

The judge allowed defense counsel to proffer the evidence of third party guilt, which he had presented in his pretrial motion, at the close of the state’s case. R. 98 – 100.

In Miller v. State, 379 S.C. 108, 665 S.E.2d 596 (2008), the South Carolina Supreme Court found that trial counsel was ineffective for failing to establish Miller’s defense of third party guilt. The Supreme Court determined that trial counsel was ineffective for failing to cross-examine a witness regarding similar robberies allegedly committed by a third party because Miller’s sole defense was mistaken identity and third-party guilt. A specific third party was named.

In Holmes v. South Carolina, 547 U.S. 319 (2006), the United States Supreme Court held that a criminal defendant’s federal constitutional rights were violated by an evidence rule under which the defendant may not introduce evidence of third party guilt if the prosecution has introduced forensic evidence that, if believed, strongly supported a guilty verdict. The South Carolina Supreme Court had held in State v. Holmes, 361 S.C. 333, 605 S.E.2d 19 (2004), that where there was strong evidence of a defendant’s guilt, especially strong forensic evidence, the proffered evidence of third party guilt did not raise a reasonable inference of appellant’s own innocence.

In Kevin Epting’s case, there was no forensic evidence thereby allowing a reasonable inference to his innocence. The police did not check for fingerprints, and there

was no sign of forced entry. R. 89, ll. 22 – 25; R. 90, ll. 1 – 8; R. 96, ll. 1 – 25; R. 97, ll. 1 – 10.

The United States Supreme Court also wrote in Holmes v. S.C., Id. that the state had violated a criminal defendant's right to have a meaningful opportunity to present a complete defense. The Court in Holmes, *supra*, wrote that the rule in State v. Gregory, *supra*, was of the type that allowed judges to exclude evidence that was repetitive or marginally relevant. The Court stated that applying this rule to third party guilt cases, the evidence may be excluded where it did not sufficiently connect the other person to the crime. The Court wrote that the point was that by evaluating the strength of only one party's evidence, no logical conclusion could be reached regarding the strength of contrary evidence offered by the other to cast doubt.

In State v. Rice, 375 S.C. 302, 652 S.E.2d 409 (Ct. App. 2008), the Court of Appeals wrote that the rule for admitting third party guilt in South Carolina was found in State v. Gregory, 198 S.C. 98, 16 S.E. 2d 532 (1941). The rule is:

Evidence offered by an accused as to the commission of a crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have no other effect than to cast a conjectural inference as to the commission of the crime by another, is not admissible.

State v. Gregory, 198 S.C. at 104-105, 16 S.E.2d at 534-535.

The rule in Gregory did not require that a specific third person be named. The rule concerns "facts that are inconsistent with the defendant's guilt."

There was a sufficient connection between Billy Sizemore, the victim's son, and the crime to meet the standard of South Carolina law as cited in State v. Gregory, *supra*. The

victim's statement when she saw the intruder, that her son was off limits to her wallet, would be reasonable and logical only if she were talking to her son. The victim did not report the incident and it was only reported thirty-eight hours later after her sister saw her and said the person could not get away with this crime. Her sister called 911.

Kevin had a credible alibi witness in his then girlfriend, Sharon Corley. There was no sign of forced entry and no forensic evidence. A reasonable inference of Kevin Epting's guilt was raised, as well as evidence inconsistent with his guilt.

There was a recent history of violence on the part of the son as documented by the 911 call, and evidence that his mother suspected him of taking money from her in the past. Ms. Hopkins had a motive to protect her son from going to prison and to save her the embarrassment that her own son would harm her.

During deliberations, the jury sent the judge a request to get a copy of the police report and witness statement. The note said that the jury vote was seven guilty and five not guilty. The judge stated that he had specifically told the jury not to tell him how they stood. He told the attorneys that he would have to tell the jury the record was closed. R. 129, ll. 5 – 25.

It was thus prejudicial to exclude the evidence.

ARGUMENT

II.

The trial court erred in not allowing defense counsel to cross examine the victim on the 911 call she made regarding her son two months prior to this incident when the state opened the door on direct testimony when the victim said that she recognized Officer Galarza because he came out and talked to her when the episode occurred with her son, William Sizemore.

In a pretrial motion, defense counsel argued that regardless of the trial court's ruling on third party guilt, the evidence of the 911 call made by Ms. Hopkins in September 2008, just two months before this incident, was relevant because the victim did not know how the intruder got into her home. The officer who responded to the September 911 call had to go to the neighbor's house and retrieve Ms. Hopkins' house key from her son. R. 7, ll. 16 – 25. Ms. Hopkins had told the police in the burglary incident that she did not know how the intruder gained entry to her home. R. 7, ll. 18 – 21.

During her direct testimony, the solicitor asked Ms. Hopkins if she recognized Deputy Juan Galarza. Ms. Hopkins responded that she did because he was the one she talked with about the prior episode with her son, William Sizemore. She said her son had come in and was watching television. The solicitor stopped her at that point. R. 41, ll. 1 – 21.

During cross-examination, when defense counsel asked Ms. Hopkins about that incident, the solicitor objected based on the judge's ruling that evidence of third party guilt was not allowed. The court held an *in camera* hearing. Defense counsel argued that the

solicitor had opened the door and he should be allowed to cross examine the witness. The judge allowed defense counsel to proffer the testimony. Counsel questioned Ms. Hopkins where she admitted that Billy had put a hole in the wall. She called the law to get her key returned. R.56 – 60.

Defense counsel argued that he understood the court's ruling on third party guilt but that he was not introducing evidence. He wanted to be allowed to fully cross examine because a factual issue for the jury as to how the intruder may have gained entry. The judge ruled it was not proper questioning. R. 60., ll. 7 – 25; R. 61, ll. 1 – 25; R. 62, ll. 1 – 25; R. 63, ll. 1 – 25; R. 64, ll. 1 – 25.

The Sixth Amendment rights to notice, confrontation, and compulsory process guarantee that a criminal charge may be answered through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence. State v. Gillian, 360 S.C. 433, 449-450, 602 S.E.2d 62, 71 (Ct. App. 2004).

The South Carolina Constitution provides:

The right of trial by jury shall be preserved inviolate. Any person charged with an offense shall enjoy the right to a speedy and public trial by an impartial jury; to be fully informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to be fully heard in his defense by himself or by his counsel or both.

S.C. Const. Art. 1, Sec. 14.

The right to confront and cross-examine witnesses and to call witnesses in one's own behalf are essential to due process. Chambers v. Mississippi, 410 U.S. 284, 302

(1973). The right of cross-examination is implicit in the constitutional right of confrontation. Id. Specifically included in a defendant's Sixth Amendment right to confront the witness is the right to meaningful cross-examination. State v. Gillian, *supra*. The primary interest secured by the Confrontation Clause of the Sixth Amendment is the right to cross-examination. State v. Gillian, *supra*.

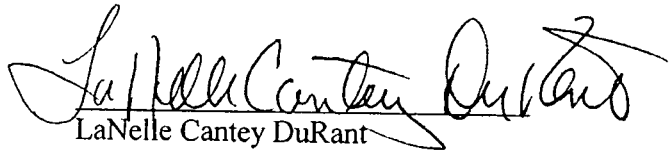
As a general rule, a trial court's ruling on the proper scope of cross-examination will not be disturbed absent a manifest abuse of discretion. State v. Mitchell, 330 S.C. 189, 498 S.E.2d 642 (1998). This rule is subject, however, to the Sixth Amendment's guarantee of a defendant's right to a "meaningful" cross-examination. Id.

Defense counsel should have been allowed to question Ms. Hopkins on the prior incident with her son.

CONCLUSION

Based on the above, the convictions and sentences should be reversed, and the case remanded for a new trial.

Respectfully submitted,


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

This 24th day of February, 2011.

CERTIFICATE OF COUNSEL

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

A handwritten signature in black ink, appearing to read "Lanelle Canthey Durant", is written over a horizontal line.

LANELLE CANTEY DURANT
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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Laurens County
D. Garrison Hill, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KEVIN SHANE EPTING,

APPELLANT

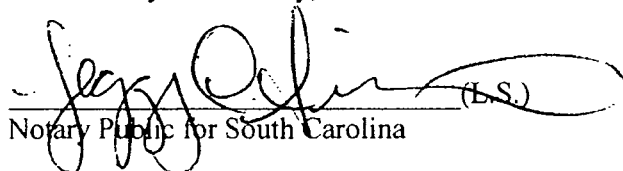
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon William Blitch, Esquire, at Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, SC 29201, this 24th day of February, 2011.


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 24th day of February, 2011.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: December 4, 2017.



SCCID

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Robert M. Dudek, Chief Appellate Defender
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February 24, 2011

William M. Blitch, Esquire
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Re: The State v. Keven Shane Epting

Dear William:

Enclosed are two copies of the Final Brief of Appellant in the above-entitled case, which I have filed today with the South Carolina Court of Appeals.

Please call me if you have any questions.

Sincerely,

LaNelle Cantey DuRant
Appellate Defender

LCD/pds

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Final Brief of Respondent

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STATEMENT OF ISSUES ON APPEAL

- I. The trial court properly excluded testimony related to a prior 911 call involving the victim's son and the admission of evidence of third party guilt because the evidence presented was mere conjecture and was not inconsistent with defendant's guilt so as to be admissible.
- II. The State did not open the door to testimony related to the prior 911 call involving the victim's son so the trial court did not err in limiting Appellant's cross-examination of the victim.

STATEMENT OF THE CASE

The State agree with Appellant's procedural Statement of the Case.

STATEMENT OF FACTS

On November 11, 2008, the victim awoke to the sound of someone in her home. She went to the kitchen and found Appellant at the china hutch going through her pocketbook. (T.90-91; 94; R. 33-34; 37). The victim recognized the burglar as Appellant because he had been to her home before with her son. (T.91-92; R.34-35).

The victim confronted Appellant and told him: "My son is off limits to my wallet and you will not go in my billfold." (T.94; R.37). Appellant stated walking toward the victim and began hitting and kicking her. (T.91; R.34). Appellant left without taking the purse or any money. (T.93; R.36). The victim had two black eyes, a knot on her head, bruises on her side. The victim admitted not calling the police right away because she was frightened. She later called her sister, who subsequently called the police. (T.93; 123; 129; 137-138; R.36; 66; 72; 80-81).

Deputy Galarza responded to the sister's call. (T.147-149; R.87-89). He took the statement of the victim, whom he described as upset, nervous, and scared. (T.150-151; R.90-91). She described Appellant and later identified him as the burglar and the one who assaulted her from a photo shown by Deputy Galarza. (T.157; Supplemental R. 1).

ARGUMENT

- I. **The trial court properly excluded testimony related to a prior 911 call involving the victim's son and the admission of evidence of third party guilt because the evidence presented was mere conjecture and was not inconsistent with defendant's guilt so as to be admissible.**

Appellant contends the trial court erred in excluding testimony of third party guilt. He maintained he should be allowed to admit a 911 call made by the victim involving her son as well as testimony that the son had a grudge against his mom. The evidence would not have raised an inference of Appellant's innocence and was mere conjecture at best regarding the guilt of the victim's son. Accordingly, the trial court properly excluded the evidence.

The United States Constitution guarantees a criminal defendant a meaningful opportunity to present a complete defense. Holmes v. South Carolina, 547 U.S. 319, 324 (2006); Crane v. Kentucky, 476 U.S. 683, 690 (1986). However, the right to introduce even relevant evidence "is not unlimited, but rather is subject to reasonable restrictions." U.S. v. Scheffer, 523 U.S. 303, 308 (1998).

In Holmes, the United States Supreme Court articulated its approval of the rule adopted in State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941), for the admission of evidence of third party guilt. Holmes, 547 U.S. at 328. In Gregory, the South Carolina Supreme Court explained:

[E]vidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as

to the commission of the crime by another, is not admissible. . . . [B]efore such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party. Remote acts, disconnected and outside the crime itself, cannot be separately proved for such a purpose.

State v. Gregory, 198 S.C. 98, 104-105, 16 S.E.2d 532, 534-535 (1941) (internal citations omitted).

Prior to trial, the State moved to exclude a 911 call from September 2008, approximately two months before the burglary involved in this case, involving the victim's son. The victim called 911 and indicated her son was acting up and had knocked a hole in the wall of her home. (T.34-35; R.4-5). The victim called 911 in order for an officer to retrieve the son's house key so he could not return. Additionally, Appellant argues the victim's statement to the burglar implicated the son. The victim reported she told the burglar: "My son is off limits to my wallet and you will not go in my billfold." (T.94; R.37).

The trial court properly utilized and applied the Gregory standard. After quoting the above language from Gregory, the trial court found the 911 call and events disconnected to the crime. The 911 call was two months prior to the burglary and did not involve the theft of money, but instead involved the son damaging her property. (T.47-48; R.17-18). The two events are not related, and the evidence of the 911 tape was irrelevant and would merely serve to confuse the jury as found by the trial court. (T.121; R.64).

Further, the trial court properly found the evidence, even given "the interpretation most favorable to the Defense," would not show a reasonable inference of the son's guilt or

Appellant's innocence. (T.47-48; R.17-18). The statement made to the burglar certainly did not implicate the son. Why would she have told the burglar that the wallet was off limits to her son and the burglar could not go into it if she was talking to her son? The only rational inference is the victim was talking to someone other than her son.

None of the evidence implicates the son or demonstrates Appellant's innocence. Appellant failed to produce any evidence even placing the son near the area of the victim's home on the night in question. As the Supreme Court stated in Gregory: "An orderly and unbiased judicial inquiry as to the guilt or innocence of a defendant on trial does not contemplate that such defendant be permitted, by way of defense, to indulge in conjectural inferences that some other person might have committed the offense for which he is on trial, or by fanciful analogy to say to the jury that someone other than he is more probably guilty." Id. at 105, 16 S.E.2d 532, 535. As a result, the trial court properly excluded the evidence of third party guilt.

II. The State did not open the door to testimony related to the prior 911 call involving the victim's son so the trial court did not err in limiting Appellant's cross-examination of the victim.

Appellant contends the trial court opened the door for testimony regarding the underlying facts of the victim's 911 call to police several months prior to the burglary. The State did not open the door and the trial court properly refused to admit the testimony regarding third party guilt.

Ordinarily, when a party introduces evidence about a particular matter, the other party is entitled to explain it or rebut it, even if the latter evidence would have been incompetent or irrelevant had it been offered initially. State v. Beam, 336 S.C. 45, 52, 518 S.E.2d 297, 301 (Ct. App. 1999) (citing State v. Stroman, 281 S.C. 508, 316 S.E.2d 395 (1984)).

In this particular case, the State asked the victim if she recognized the Deputy with whom she spoke after the police were called about the burglary. The victim responded by stating: "He's the one I called when the episode occurred with my son, William Earl Sizemore." The State then redirected the victim by stating: "Okay. Did you talk to him the day after Kevin Epting broke into your house?" The victim answered: "Not to my knowledge. I called him on behalf - - because my son had come in. He was watching TV. I was watching TV. And he went into the bedroom. He was sleeping in and - -" The State again interrupted her answer so she could not go into the episode related to the 911 call. (T.98; R.41).

The victim began an explanation the officer had previously been called, but the State interrupted as soon as possible to prevent any improper disclosure of the facts of the 911 call.

As a result, the State did not open the door to any further details of the 911 call being admitted into evidence.

Even if the State opened the door, the testimony regarding the 911 call was irrelevant and not properly admissible. See Rule 401, SCRE (“‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”) and Rule 402; SCRE (“All relevant evidence is admissible Evidence which is not relevant is not admissible.”).

Appellant proffered the testimony he sought to obtain from the victim. The testimony produced the fact the victim’s son had slammed open a door knocking a hole in the wall; the victim called the police to retrieve her key from her son; and the deputy retrieved the key and returned it to the victim. (T.114-117; R.57-60). None of these facts are remotely relevant or connected to the burglary for which Appellant was convicted. As a result, the trial court properly excluded the evidence.

CONCLUSION

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

Respectfully submitted,

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March 17, 2011

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Laurens County
Hon. D. Garrison Hill, Circuit Court Judge

The State,

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Kevin Shane Epting,

Appellant.

CERTIFICATE OF COUNSEL

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

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The State,

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v.

Kevin Shane Epting,

Appellant.

PROOF OF SERVICE

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

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I further certify that all parties required by Rule to be served have been served.
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