

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

OCT - 6 2014

On Writ of Certiorari
To the Court of Appeals

S.C. Supreme Court

Appeal From Orangeburg County
Edgar Dickson, Circuit Court Judge
Appellate Case No. 2012-211961

THE STATE,

Petitioner,

vs.

HENRY HAYGOOD,

Respondent.

APPENDIX

ALAN WILSON
Attorney General

JILLIAN D. ULLMAN
BREEN R. STEVENS
First Circuit Public Defender's Office

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

Post Office Box 1112
Orangeburg, SC 29116
(803) 536-5682

JOHN CROOM HUNTER
Assistant Attorney General

ATTORNEY FOR RESPONDENT

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

DAVID M. PASCOE, JR.
Solicitor, First Judicial Circuit

140 North Main Street, Suite 102
Summerville, SC 29483
(843) 871-2640

ATTORNEYS FOR PETITIONER

INDEX

SC COURT OF APPEALS OPINION NO. 5247 (June 30, 2014)	1
RESPONDENT’S PETITION FOR REHEARING	27
ORDER DENYING PETITION FOR REHEARING	39
FINAL BRIEF OF APPELLANT	40
FINAL BRIEF OF RESPONDENT	51
RECORD ON APPEAL	69

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Henry Haygood, Appellant.

Appellate Case No. 2012-211961

Appeal From Orangeburg County
Edgar W. Dickson, Circuit Court Judge

Opinion No. 5247
Heard June 4, 2014 – Filed June 30, 2014

REVERSED AND REMANDED

Breen Richard Stevens, of Orangeburg, for Appellant.

Attorney General Alan McCrory Wilson and Assistant
Attorney General John Croom Colvin Hunter, both of
Columbia, for Respondent.

HUFF, J.: Henry Haygood was convicted of criminal domestic violence (CDV) in magistrate's court. Upon appeal to the circuit court, his conviction was affirmed. We reverse and remand for a new trial.

FACTUAL/PROCEDURAL HISTORY

Haygood appeared before Magistrate Samuel A. Daily for a bench trial on the charge of CDV. The State presented Lieutenant Lacra Jenkins as its only witness, while Haygood presented no evidence at his trial. According to the magistrate's

return,¹ Lt. Jenkins "testified as to what took place during his initial investigation, after he responded to an alleged CDV call" on March 31, 2008. The return indicates the lieutenant testified as follows:

Upon arrival he stated that the victim[,] Towanna Haygood[,] was very upset. During his investigation he stated that the alleged victim, Towanna Haygood[,] stated to him that her husband beg[a]n fighting her in the bedroom and he stated to her that he was going to kill her. Lt. Jenkins then testified that Mrs. Haygood stated that Mr. Haygood went to the bedroom closet and retrieved a brown in color shotgun and that her 14 [year-old] son struggle[d] with him to take the shotgun away from him. Mrs. Haygood then told him that Mr. Haygood reached in his pants pocket where he keeps a small handgun at times. She then grabbed his pants pocket causing some small bullets to fall to the floor. She stated to him that Mr. Haygood then went outside the resident but came back and punch[ed] a hole in the bedroom closet. Lt. Jenkins stated that when he arrived on the scene he observed Mr. Haygood being highly intoxicated. When he tried talking to him[,] he beg[a]n using profanity, stating that this was his house and that he would do anything he wishes. Lt. Jenkins further testified that Henry and Towanna Haygood were married at the time of the incident and ha[d] a child in common.

As to objections and rulings during the trial, the return indicates trial counsel objected to the State's "introduction of verbal statements made by the alleged victim to the investigating officer" that were "pertaining to allegations of what [Haygood] did on the date [in] question." It additionally notes the State took the position that the officer's duty, after being dispatched to an alleged CDV, "was to do an investigation of the incident and be prepared to testify as to the facts (during his investigation) at trial," and that the testimony in question qualified as an excited utterance. The magistrate overruled Haygood's objection, "agree[ing] with the State that in some criminal domestic violence [cases] the investigating officer of

¹ The return indicates these proceedings were recorded electronically. However, Haygood's trial counsel informed the circuit court that when she requested a copy of the recording, she was told the recording was no longer available.

the alleged incident should be allowed to testify as to the finding of facts during his investigation." The magistrate found Haygood guilty of CDV and sentenced him to thirty days in jail or a fine of \$2,130.00, suspended upon completion of a batterer's intervention program.

Haygood appealed his conviction to the circuit court on the ground that the introduction of the alleged verbal statements violated his Sixth Amendment right to confront witnesses against him pursuant to *Crawford v. Washington*, 541 U.S. 36 (2004), arguing the alleged victim was not unavailable for trial and the defense had no opportunity to cross examine the victim such that it was error to admit the testimonial statements. In argument before the circuit court, trial counsel noted she had objected on the basis of *Crawford* to the State's attempt to introduce oral statements given by the victim through the officer. Counsel further recounted for the circuit court that the State had argued the information in the oral statement by the victim was an excited utterance and she again had objected to admission of the evidence before the magistrate based on *Crawford*, noting hearsay was not the issue. Trial counsel reiterated to the circuit court that the magistrate ruled the testimony of the officer was admissible as an excited utterance, but that was not her objection. Rather, her argument was based on *Crawford*, as the officer was eliciting testimony on statements made by the alleged victim and the alleged victim was not present for her to have an opportunity to cross-examine. Counsel asserted that, pursuant to *Crawford*, the State had the burden of proving a victim was unavailable and that the defendant had a previous opportunity to cross-examine the witness.

The solicitor agreed that this case turned on whether or not the statements were "testimony." However, he maintained the State disagreed that *Crawford* provided that excited utterances no longer qualified as exceptions to the rule against hearsay. He argued the magistrate decided the issue "based on whether or not the testimony the officer was giving was that of the testimony of variety," and the magistrate used the correct application of law in deeming it to be an excited utterance exception to hearsay and "not testimony." The solicitor further distinguished the matter at hand from *Crawford* on the basis that *Crawford* involved a recorded statement made during a police interrogation, whereas the statement in the case at hand was made to an officer arriving at the scene and was nontestimonial and qualified as an excited utterance. The solicitor argued, in this case, the magistrate heard testimony that the officer arrived shortly after the incident,² weapons were

² Our review reveals no evidence in the record concerning how soon after the incident occurred the officer arrived.

involved, and the victim's child was involved, showing the victim was in an excited state. Thus, the solicitor maintained, "because the statement was taken immediately after the start of the event while [the declarant] was still under stress from the start of the event," the testimony met every element of an excited utterance.

The circuit court took the matter under advisement and thereafter issued an order denying Haygood's appeal. In its decision, the circuit court noted Haygood's appeal was based on the magistrate's admission of a statement by the victim which was testified to by the responding officer. The court then stated, "[Haygood] claims that this statement should be excluded based on the fact that it is hearsay." After evaluating the statement under Rule 803(2), SCRE, the circuit court found the statement qualified as an excited utterance and found it admissible as an exception to the rule against hearsay. The circuit court additionally found the matter at hand distinguishable from *Crawford* on the basis that case dealt with a recorded statement taken in a custodial interrogation. Further, it determined the United States Supreme Court (USSC) deemed the statement in *Crawford* inadmissible, not because it fell within the excited utterance hearsay exception, but because it bore a particularized guarantee of trustworthiness. The circuit court then concluded the statements testified to by Lt. Jenkins were admissible under the excited utterance exception and, because the statements fell within a long established exception to the rule against hearsay, their admission did not violate the Confrontation Clause. This appeal follows.

ISSUE

Whether Haygood's Sixth Amendment right to confrontation was violated by the admission of testimonial hearsay under the excited utterance exception without an opportunity of cross-examination by the defense.

STANDARD OF REVIEW

"The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice." *State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 845, 847-48 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *Id.* at 429-30, 632 S.E.2d at 848.

LAW/ANALYSIS

Haygood contends the circuit court violated his right to confrontation when it found testimonial hearsay admissible under the excited utterance exception to the rule against hearsay. Haygood first asserts the circuit court erred in finding the testimonial statements made by the alleged victim to the police did not violate the Confrontation Clause because the statements fell within the excited utterance exception to hearsay. He argues, under *Crawford*, the statements were testimonial in nature, and while the statements were arguably given in excited utterance, because they were testimonial in nature they required a Sixth Amendment confrontation by the defense. Haygood also argues the circuit court erred in distinguishing this case from *Crawford* on the bases that the statement in *Crawford* (1) was taken in a custodial interrogation and (2) was not an excited utterance. Lastly, in response to the State's assertion that the issue is not preserved for appellate review, Haygood contends trial counsel presented the arguments to both the magistrate and the circuit court, and both improperly conflated counsel's Sixth Amendment argument with the excited utterance hearsay exception. Based upon the improper admission of the testimonial statements, Haygood requests this court reverse his conviction and remand the matter for a new trial. We find the issue is properly preserved for our review, and agree with Haygood that admission of the statements in question violated his constitutional right to confrontation, requiring reversal of his conviction.

I. Preservation

"It is axiomatic that an issue cannot be raised for the first time on appeal." *State v. Cope*, 405 S.C. 317, 338-39, 748 S.E.2d 194, 205 (2013) (quoting *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2012)). "For an issue to be properly preserved it has to be raised to and ruled on by the trial court." *State v. Jennings*, 394 S.C. 473, 481, 716 S.E.2d 91, 95 (2011). An argument advanced on appeal but not raised and ruled on below is not preserved. *State v. Freiburger*, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005).

"Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) (quoting *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006)). "[T]his is not a 'gotcha' game aimed at embarrassing attorneys or harming litigants, but rather is an adherence to settled principles that serve an important function." *Id.* at 329-30, 730 S.E.2d at 285. Though our appellate courts should follow

longstanding precedent and resolve an issue on preservation grounds when it "clearly is unpreserved," it is "good practice for us to reach the merits of an issue when error preservation is doubtful." *Id.* at 330, 730 S.E.2d at 285.

Although the magistrate's return does not specifically mention *Crawford* or the Confrontation Clause, the return does indicate trial counsel objected to the State's "introduction of verbal statements made by the victim to the investigating officer" that "pertain[ed] to allegations of what [Haygood] did on the date [in] question." Additionally, the return indicates the magistrate overruled Haygood's objection, "agree[ing] with the State that in some criminal domestic violence [cases] the investigating officer of the alleged incident should be allowed to testify as to the finding of facts during his investigation." Thus, a review of the return shows the issue of whether Haygood's Sixth Amendment right to confrontation was violated by the admission of testimonial hearsay under the excited utterance exception without an opportunity of cross-examination by the defense is not "clearly . . . unpreserved." *Id.* Further, the colloquy between trial counsel, counsel for the State, and the circuit court judge during Haygood's appeal to the circuit court indicates this issue was in fact argued before the magistrate. Trial counsel explicitly stated to the circuit court that she informed the magistrate her objection was based on *Crawford*. The fact that trial counsel noted to the circuit court that the magistrate ruled the testimony was admissible as an excited utterance, in spite of the fact that hearsay was not her objection, is an indication that the magistrate believed the excited utterance exception to the hearsay rule was dispositive of trial counsel's *Crawford* argument. We do not agree, as the State propounds, that the argument before the circuit court shows Haygood conceded the magistrate never ruled on the *Crawford* objection. Rather, it simply indicates the magistrate overruled the *Crawford* objection, finding the excited utterance exception to be controlling. Additionally, the solicitor stated to the circuit court, "I agree that this case turns on what [trial counsel] spoke of, and that's specifically whether or not this [statement is] testimony. That's what *Crawford* speaks to." The solicitor also recounted for the circuit court that the magistrate "decided this issue of evidence based on whether or not the testimony the officer was giving was that of the testimony of variety," and the magistrate correctly determined the testimony was admissible as a hearsay exception, "an excited utterance, [and it was] not testimony." Further, the solicitor specifically argued the statement in question was "not a testimonial statement," but was instead an excited utterance, and again proclaimed "[t]his is not a testimonial statement." The solicitor then attempted to

distinguish *Crawford*. Based on the record before us, we find the issue is preserved for our review.³

II. Confrontation Clause Law

The Sixth Amendment's Confrontation Clause guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. "The constitutional right to confront and cross examine witnesses is essential to a fair trial in that it promotes reliability in criminal trials and insures that convictions will not result from testimony of individuals who cannot be challenged at trial." *State v. Martin*, 292 S.C. 437, 439, 357 S.E.2d 21, 22 (1987). An analysis of three seminal USSC cases

³ As previously noted, the trial proceedings were electronically recorded, but when trial counsel sought to obtain the recording in preparation for appeal, she was informed the recording was no longer available. Thus, we do not have the benefit of knowing what occurred at the trial level to determine exactly what arguments were made to the magistrate in regard to admission of this evidence and how the magistrate specifically ruled at that time. The State does not argue *Crawford*, and the Confrontation Clause was never raised to the magistrate, but only that such was never specifically ruled on by the magistrate. However, argument before the circuit court demonstrates the issue was raised to the magistrate, and the return indicates "[t]he court overruled [Haygood's] objections." We do not believe the defendant should be penalized by the loss of the recording and the vagueness of the magistrate's return on this point, especially in light of the fact that the appeal before the circuit court clearly indicates the matter was raised to the magistrate, and the State did not, on appeal to the circuit court, object based on error preservation. Additionally, though the State refers to section 18-7-80 of the South Carolina Code as granting the circuit court the authority to direct the magistrate to amend deficiencies in the return, and thus supporting its argument the matter is not preserved, this section simply allows the appellate court to direct a "further or amended return," should "the return be defective." S.C. Code Ann. § 18-7-80 (2014). There is nothing to indicate the circuit court or either of the parties believed the return was defective or that either party considered the issue not ruled upon by the magistrate or in any way unpreserved for review. Finally, the matter is clearly preserved as far having been raised to the circuit court acting as an intermediate appellate court. *Cf. State v. Oxner*, 391 S.C. 132, 134, 705 S.E.2d 51, 52 (2011) ("An argument that is not raised to an intermediate appellate court is not preserved for review by this Court.").

leads us to the conclusion that the admission of the statements at hand violated Haygood's Sixth Amendment confrontation rights.

A. *Crawford v. Washington*

In *Crawford*, Michael Crawford was convicted of assaulting a man who allegedly tried to rape Crawford's wife. *Id.* at 38, 41. At trial, the State played for the jury the wife's tape-recorded statement to the police describing the stabbing, even though Crawford had no opportunity for cross-examination. *Id.* The State invoked the hearsay exception for statements against penal interest in its quest to admit the wife's statement. *Id.* at 40. Previously, the law set forth in *Ohio v. Roberts*, 448 U.S. 56 (1980), abrogated by *Crawford*, provided that the Confrontation Clause did not bar admission of an unavailable witness's statement against a criminal defendant if the statement bore "adequate 'indicia of reliability'" — a test that could be met by showing the evidence either (1) fell within a firmly rooted hearsay exception, or (2) bore particularized guarantees of trustworthiness. *Id.* at 40. The trial court admitted the statement of Crawford's wife on the basis it bore particularized guarantees of trustworthiness. *Id.* The USSC reversed Crawford's conviction, finding the State admitted the wife's testimonial statement against Crawford despite the fact that he had no opportunity to cross-examine her, thereby violating Crawford's Sixth Amendment rights. *Id.* at 68.

In revisiting *Roberts*, the USSC noted the Confrontation Clause "applies to 'witnesses' against the accused — in other words, those who 'bear testimony.'" *Id.* at 51. It then observed:

"Testimony," in turn, is typically "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement.

Id. at 51 (citation omitted). The USSC found "[a]dmitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation," and though the Confrontation Clause's ultimate goal is to ensure reliability of evidence, it commands that "reliability be assessed in a particular manner: by testing in the

crucible of cross-examination." *Id.* at 61. It determined "[t]he *Roberts* test allow[ed] a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability," and it "replace[d] the constitutionally prescribed method of assessing reliability with a wholly foreign one." *Id.* at 62. The USSC concluded "[t]he unpardonable vice of the *Roberts* test . . . [was] not its unpredictability, but its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude." *Id.* at 63.

Upon reconsideration of *Roberts*, the USSC held the Confrontation Clause bars admission of testimonial hearsay statements of a witness absent from trial unless: (1) the declarant is unavailable to testify at trial, and (2) the accused had a prior opportunity to cross-examine the declarant. 541 U.S. at 53-54, 58, 68. Thus, even if a statement is admissible hearsay, the Confrontation Clause may operate to render the otherwise admissible hearsay evidence inadmissible if it is testimonial in nature. *See id.* at 68 (holding testimonial evidence implicates the Sixth Amendment, which demands unavailability and a prior opportunity for cross-examination, but the admission of nontestimonial hearsay evidence remains the province of each state's development of hearsay law). Included within the "core class of 'testimonial' statements" by the court in *Crawford* are "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial[.]" *Id.* at 51-52. "Statements taken by police officers in the course of interrogations" are considered testimonial. *Id.* at 52; *See also id.* at 53 ("[E]ven if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object, and interrogations by law enforcement officers fall squarely within that class."). The USSC characterized its use of the term "interrogation" as being used in its colloquial sense, "rather than in any technical legal, sense." *Id.* at 53 n.4. Though it declined, in *Crawford*, to "spell out a comprehensive definition of 'testimonial,'" it noted, at a minimum, it applied "to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to *police interrogations*." *Id.* at 68. (emphasis added).

B. Davis v. Washington and Hammon v. Indiana

Following the 2004 *Crawford* opinion, in *Davis v. Washington* and *Hammon v. Indiana*, 547 U.S. 813 (2006), the USSC took steps to "determine more precisely" which statements made pursuant to police interrogation are testimonial in nature. *Id.* at 822. Specifically, the court was tasked with determining whether statements made to law enforcement during a 911 call as well as statements made at a crime scene were "testimonial" and therefore subject to the Confrontation Clause. *Id.* at

817. There, the court dealt with two different domestic disturbance cases: one involving a victim's identification of her abuser in response to initial questions from a 911 emergency operator (*Davis*), and the other involving oral statements made by a victim to police, as well as an affidavit written and signed by the victim, provided at the scene, wherein the victim gave an account of what had occurred between her and her husband (*Hammon*). *Id.* at 817-18, 819-20. In *Davis*, the relevant statements were made in a 911 call wherein the operator ascertained the victim was involved in a domestic situation with Davis, the victim relaying at the time of the call that Davis was jumping on her and using his fists. *Id.* at 817. The police arrived within four minutes of the call and observed the victim in a shaken state with fresh injuries, frantically attempting to gather her belongings and her children so she could leave the residence. *Id.* at 818. In *Hammon*, after police responded to a reported domestic disturbance, they found the victim alone on her front porch, appearing "somewhat frightened," but stating to officers "nothing was the matter." *Id.* at 819. The victim's husband, who was in the kitchen, told the police he and his wife had been in an argument but "everything was fine now," and the argument between them had never become physical. *Id.* While one officer remained with the husband, another attempted to speak with the victim in the living room, again asking her what had occurred. *Id.* The husband made several attempts to participate in the victim's conversation with police, and the officer testified the husband became angry when he insisted the husband stay separated from the victim so the officer could investigate what had happened. *Id.* 819-20. After hearing the victim's account, the officer had her fill out and sign an affidavit, wherein the victim indicated her husband broke their furnace, shoved the victim onto the ground into broken glass, hit her in the chest, threw her down, broke lamps and a phone, tore up her van so she could not leave the house, and attacked the victim's daughter. *Id.* at 820.

In approaching its analysis of the two situations, the USSC stated as follows:

Without attempting to produce an exhaustive classification of all conceivable statements — or even all conceivable statements in response to police interrogation — as either testimonial or nontestimonial, it suffices to decide the present cases to hold as follows: Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances

objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Id. at 822. Additionally, the court noted, "even when interrogation exists, it is in the final analysis the declarant's statements, not the interrogator's questions, that the Confrontation Clause requires [the courts] to evaluate." *Id.* at 822 n.1.

Applying this law to the facts of the two domestic violence cases, the USSC concluded the statements in *Davis* identifying the assailant in the course of the 911 call were nontestimonial, while the statements produced by the interrogation in *Hammon* were "inherently testimonial." *Id.* at 829, 830.

Specifically, as to the 911 call in *Davis*, the USSC noted as follows:

When we said in *Crawford*, *supra*, at 53, 124 S.Ct. 1354, that "interrogations by law enforcement officers fall squarely within [the] class" of testimonial hearsay, we had immediately in mind (for that was the case before us) interrogations solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator. The product of such interrogation, whether reduced to a writing signed by the declarant or embedded in the memory (and perhaps notes) of the interrogating officer, is testimonial. It is, in the terms of the 1828 American dictionary quoted in *Crawford*, "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." 541 U.S., at 51, 124 S.Ct. 1354. . . . A 911 call, on the other hand, and at least the initial interrogation conducted in connection with a 911 call, is ordinarily not designed primarily to "establis[h] or prov[e]" some past fact, but to describe current circumstances requiring police assistance.

Id. at 826-27. The Supreme Court then discussed the differences between the call from the 911 victim in *Davis* and the interrogation of the wife in *Crawford*, noting as follows: (1) in *Davis*, the victim was speaking about events as they were actually occurring, rather than describing past events, while the wife's interrogation

in *Crawford* took place hours after the events she described had occurred; (2) unlike the wife in *Crawford*, "any reasonable listener would recognize" that the victim making the 911 call in *Davis* was facing an ongoing emergency; (3) the nature of what was asked and answered in *Davis* was such that the elicited statements were necessary to be able to resolve the present emergency rather than simply to learn, as in *Crawford*, what had occurred in the past; and (4) there were distinct levels of formality between the two cases, with the wife in *Crawford* responding calmly at the station house to a series of questions with the officer-interrogator taping and making notes, while the victim in *Davis* provided frantic answers over the phone in an environment that was not tranquil or even safe. *Id.* at 827. Against this backdrop, the USSC concluded the circumstances of interrogation in *Davis* "objectively indicate[d] its primary purpose was to enable police assistance to meet an ongoing emergency" and the caller in the 911 call was not acting as a witness, she was not testifying, and what she said was not "a weaker substitute for live testimony" at trial. *Id.* at 828. Accordingly, her statements identifying Davis as her assailant were not testimonial. *Id.* at 829.⁴

Applying the law to the facts in *Hammon*, however, led the USSC to conclude the statements in that case were testimonial in nature. *Id.* at 830. It found "it [was] entirely clear from the circumstances that the interrogation [in *Hammon*] was part of an investigation into possibly criminal past conduct — as, indeed, the testifying officer expressly acknowledged." *Id.* at 829. The USSC noted no emergency was in progress at the time the statements were made, when the officers first arrived the victim told them things were fine, and when the officer questioned the victim a second time eliciting the challenged statements, "he was not seeking to determine (as in *Davis*) 'what is happening,' but rather 'what happened.'" *Id.* at 829-30. Viewed objectively, the primary purpose of the interrogation in *Hammon* was to investigate a possible crime. *Id.* at 830. Additionally, the USSC noted, though the interrogation in *Crawford* was more formal, being tape-recorded at the station house following *Miranda*⁵ warnings, the wife's interrogation in *Hammon* was nonetheless "formal enough" as it was conducted in a separate room, "away from her husband (who tried to intervene), with the officer receiving her replies for use

⁴ It should be noted the USSC also cautioned that a conversation which begins as an interrogation to determine the need for emergency assistance may at some point evolve into testimonial statements once the emergency assistance purpose has been achieved. *Id.* at 828.

⁵ *Miranda v. Arizona*, 384 U.S. 436 (1966).

in his 'investigation.'" *Id.* Comparing the circumstances in *Hammon* to those in *Crawford*, the USSC noted as follows: (1) both declarants were actively separated from the defendant; (2) both statements deliberately recounted, in response to police questioning, how potentially criminal past events began and progressed; and (3) both took place some time after the events described were over. *Id.*

Accordingly, the USSC held "[s]uch statements under official interrogation are an obvious substitute for live testimony, because they do precisely *what a witness does* on direct examination; they are inherently testimonial." *Id.* Notably, the court declined to hold "no questions at the scene will yield nontestimonial answers," as officers called to investigate need to know whom they are dealing with so they might assess the situation, the threat to their safety, and any possible danger to a potential victim. *Id.* at 832. Thus, such exigencies may result in initial inquiries which produce nontestimonial statements. *Id.* However, in cases such as *Hammon*, where the "statements were neither a cry for help nor the provision of information enabling officers immediately to end a threatening situation, the fact that they were given at an alleged crime scene and were 'initial inquiries' is immaterial." *Id.*

C. Michigan v. Bryant

In 2011, the USSC issued another opinion addressing whether statements made to police after officers responded to an incident constituted testimonial evidence. In *Michigan v. Bryant*, ___, U.S. ___, ___, 131 S.Ct. 1143 (2011), the USSC further examined the primary-purpose test, expounding on the "ongoing emergency" discussed in *Davis*. *Id.* at 1156.

In *Bryant*, police officers responding to a radio dispatch found a man lying in a gas station parking lot, suffering from a gunshot wound to his abdomen. *Id.* at 1150. The victim subsequently died of his wounds; however, before he was removed from the scene, officers were able to speak with him for five to ten minutes, asking him, "what had happened, who had shot him, and where the shooting had occurred." *Id.* During that discussion, the victim was able to tell officers that Bryant had shot him and was able to relate when and where the shooting occurred. *Id.* At Bryant's trial, officers were allowed to repeat in court what the victim had told them about the incident. *Id.* Bryant argued the victim's statements to police were testimonial under *Crawford* and *Davis* and were therefore inadmissible, while the prosecution argued the statements were admissible as excited utterances under the Michigan Rules of Evidence. *Id.* at 1151. It was undisputed the victim was unavailable at trial and Bryant had not been afforded a prior opportunity to cross-examine him. *Id.* The Supreme Court of Michigan concluded that the

circumstances clearly indicated that the "primary purpose" of the officers' questioning was to establish the facts of an event that had already occurred, and was not to enable police assistance to meet an ongoing emergency. *Id.* It therefore held the admission of the victim's statements to police was reversible error. *Id.*

The USSC disagreed, holding that the circumstances of the interaction between the victim and the police objectively indicated that the primary purpose of the interrogation was to enable police assistance to meet an ongoing emergency and, accordingly, the victim's identification and description of the shooter and the location of the shooting were not testimonial statements, such that their admission at trial did not violate Bryant's Confrontation Clause rights. *Id.* at 1150. In further analyzing which police interrogations produce testimony, thereby implicating a Confrontation Clause bar, the court first noted that not all those questioned by police are witnesses and not all interrogations by them are subject to the Confrontation Clause. *Id.* at 1153. It also noted "the most important instances in which the Clause restricts the introduction of out-of-court statements are those in which state actors are involved in a formal, out-of-court interrogation of a witness to obtain evidence for trial." *Id.* at 1155. Additionally, the court observed there may be circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony, and "[i]n making the primary purpose determination, standard rules of hearsay, designed to identify some statements as reliable, will be relevant." *Id.* "Where no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause." *Id.*

The USSC clarified an objective evaluation is the proper means to determine the matter stating, "To determine whether the 'primary purpose' of an interrogation is 'to enable police assistance to meet an ongoing emergency,' . . . which would render the resulting statements nontestimonial, we objectively evaluate the circumstances in which the encounter occurs and the statements and actions of the parties." *Id.* at 1156 (citation omitted). The court emphasized that the relevant inquiry is not the subjective or actual purpose of the individuals, but "the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred." *Id.* Among the most important circumstances to consider in determining the primary purpose of the interrogation is whether there exists an ongoing emergency at the time of the encounter between the declarant and the police.⁶ *Id.* at 1157.

⁶ Such is relevant because an emergency focuses the participants on something other than an attempt to prove past events which may be potentially relevant to

"[W]hether an emergency exists and is ongoing is a highly context-dependent inquiry." *Id.* at 1158.

The USSC also recognized that domestic violence cases have a narrower zone of potential victims than those situations involving threats to public safety, and because *Davis* and *Hammon* were domestic violence cases, the court "focused only on the threat to the victims and assessed the ongoing emergency from the perspective of whether there was a continuing threat to them." *Id.* However, it concluded "[a]n assessment of whether an emergency that threatens the police and public is ongoing cannot narrowly focus on whether the threat solely to the first victim has been neutralized because the threat to the first responders and public may continue." *Id.* Noting "the duration and scope of an emergency may depend in part on the type of weapon employed," the court distinguished *Davis* and *Hammon* on the basis that those cases involved the use of fists by the assailant, while the emergency in *Bryant* involved the use of a gun. *Id.* However, it further noted, had Hammon been reported to be "armed with a gun," separation of him from the victim by a single household wall might not have been sufficient to end the emergency. *Id.* at 1159.

Additionally, the USSC again recognized that there are limitations as to whether an emergency is ongoing, noting a conversation which may begin as interrogation to determine the need for emergency assistance may evolve into testimonial statements, which portions should be excluded from evidence. *Id.*

This evolution may occur if, for example, a declarant provides police with information that makes clear that what appeared to be an emergency is not or is no longer an emergency or that what appeared to be a public threat is actually a private dispute. It could also occur if a perpetrator is disarmed, surrenders, is apprehended, or, as

later criminal prosecution. *Id.* "[B]ecause the prospect of fabrication in statements given for the primary purpose of resolving that emergency is presumably significantly diminished, the Confrontation Clause does not require such statements to be subject to the crucible of cross-examination." *Id.* The court likened this logic to that justifying the excited utterance exception in hearsay law, noting excited utterances "are considered reliable because the declarant, in the excitement, presumably cannot form a falsehood," and an ongoing emergency has a similar effect of focusing attention on response to the emergency. *Id.*

in *Davis*, flees with little prospect of posing a threat to the public.

Id.

The USSC also made clear that whether or not an ongoing emergency exists is not dispositive of the testimonial inquiry, but is simply a factor to be considered, albeit an important one. *Id.* at 1160. Another factor to consider is the informality of the encounter between a victim and police. *Id.* Observing that the questioning in *Bryant* "occurred in an exposed, public area, prior to the arrival of emergency medical services, and in a disorganized fashion," the court determined those facts made *Bryant* distinguishable from the formal station-house interrogation in *Crawford*. *Id.*

Next the court observed, beyond the circumstances in which the encounter occurs, "the statements and actions of both the declarant and interrogators provide objective evidence of the primary purpose of the interrogation." *Id.* The court emphasized that a combined inquiry that accounts for the actions and statements of both the declarant and the interrogator is required, with the primary purpose of the interrogation often being most accurately determined by looking at the contents of the questions and the answers. *Id.* at 1160-61.

The court ultimately summarized as follows:

As we suggested in *Davis*, when a court must determine whether the Confrontation Clause bars the admission of a statement at trial, it should determine the "primary purpose of the interrogation" by objectively evaluating the statements and actions of the parties to the encounter, in light of the circumstances in which the interrogation occurs. The existence of an emergency or the parties' perception that an emergency is ongoing is among the most important circumstances that courts must take into account in determining whether an interrogation is testimonial because statements made to assist police in addressing an ongoing emergency presumably lack the testimonial purpose that would subject them to the requirement of confrontation. As the context of this case brings into sharp relief, the existence and duration of an

emergency depend on the type and scope of danger posed to the victim, the police, and the public.

Id. at 1162 (footnote omitted).

Applying this analysis to the facts in *Bryant*, the USSC concluded "the circumstances of the encounter as well as the statements and actions of [the declarant] and the police objectively indicate[d] that the 'primary purpose of the interrogation' was 'to enable police assistance to meet an ongoing emergency,'" such that the victim's identification and description of his assailant and the location of the shooting were not testimonial hearsay and were not barred by the Confrontation Clause. *Id.* at 1166-67. In so finding, the court noted as follows:

As to the circumstances in which the encounter occurred, the court found the potential scope of the dispute, and therefore the emergency, in *Bryant* stretched more broadly than that in the domestic disturbance cases of *Davis* and *Hammon*, encompassing a potential threat to the police and the public. *Id.* at 1163-64. Additionally, *Bryant* involved the use of a gun, and while physical separation was sufficient to end the threat in *Hammon*, it did not necessarily end the threat in *Bryant*. *Id.* at 1164. Importantly, the court reiterated that "the existence *vel non* of an ongoing emergency is not the touchstone of the testimonial inquiry; rather, the ultimate inquiry is whether the 'primary purpose of the interrogation [was] to enable police assistance to meet [the] ongoing emergency.'" *Id.* at 1165 (quoting *Davis*, 547 U.S. at 822).

Reviewing the statements and actions of the declarant the court noted, from the description of the victim's condition and report of his statements, it could not say that the primary purpose of a person in such a situation would be to establish or prove past events potentially relevant to later criminal prosecution. *Id.* As to the officers' statements and actions, the court observed the questions they asked — what happened, who had shot him, and where the shooting had occurred — were of the type necessary to allow the officers to access the situation, the threat to their safety, and the possible danger to the victim as well as the public. *Id.* at 1166. "In other words, they solicited the information necessary to enable them 'to meet an ongoing emergency.'" *Id.*

Finally, in considering the informality of the situation and the interrogation, the USSC found the situation in *Bryant* to be more similar to the "harried 911 call in *Davis* than the structured, station-house interview in *Crawford*," with "[t]he informality suggest[ing] that the interrogators' primary purpose was simply to

address what they perceived to be an ongoing emergency, and the circumstances lack[ing] any formality that would have alerted [the declarant] to or focused him on the possible future prosecutorial use of his statements." *Id.*

Based upon this analysis, the USSC held the circumstances of the encounter and statements and actions of the declarant and interrogators in *Bryant* objectively indicated the primary purpose of the interrogation was to enable police assistance to meet an ongoing emergency. *Id.* at 1166-67. Accordingly, the declarant's statements were nontestimonial and therefore were not barred by the Confrontation Clause. *Id.* at 1167.

III. Application of Law to the Facts

As a threshold matter we agree with Haygood that the circuit court erred in finding the testimonial statements made by the victim to the police did not violate the Confrontation Clause because the statements fell within the excited utterance exception to hearsay. Though the circuit court stated in its order that Haygood "claim[ed] that this statement should be excluded based on the fact that it is hearsay," the record is clear that trial counsel twice argued to the circuit court that hearsay was not the issue the defense was raising, but it was arguing inadmissibility based on *Crawford*. Further, *Crawford* plainly provides that a statement which may qualify as admissible hearsay may otherwise be rendered inadmissible by the Confrontation Clause if it is testimonial in nature. *See Crawford*, 541 U.S. at 68. ("Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law. . . . Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination."); *id.* at 56 n.7 ("Involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse — a fact borne out time and again throughout a history with which the Framers were keenly familiar. This consideration does not evaporate when testimony happens to fall within some broad, modern hearsay exception, even if that exception might be justifiable in other circumstances."). Additionally, *Hammon* illustrates although a statement may be considered admissible as an excited utterance exception to the rule against hearsay, that exception will not save it from inadmissibility if otherwise barred by the Confrontation Clause. *See Hammon*, 547 U.S. at 820, 821 ("It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause."). Indeed, while the State appears to have taken the position

before the circuit court that the statements in this matter did not offend the Confrontation Clause because they qualified as excited utterances, it does not continue to take this stance on appeal.⁷ Rather, it recognizes the paramount question is whether the statements made by the victim were testimonial, and maintains only testimonial statements require compliance with the Confrontation Clause while nontestimonial statements are generally admissible, subject to traditional limitations on hearsay evidence. Though a statement's qualification as an excited utterance is relevant in making the primary purpose determination, it is but a consideration. *See Bryant*, 131 S.Ct. at 1155 ("In making the primary purpose determination, standard rules of hearsay, designed to identify some statements as reliable, will be relevant."). Thus, if the statements in question are in fact testimonial, they were erroneously found to be admissible by the circuit court based simply on a finding they qualified as an excited utterance exception to the rule against hearsay.

As well, we agree with Haygood that the circuit court erred in distinguishing this case from *Crawford* on the bases that the statement in *Crawford* (1) was taken in a custodial interrogation and (2) was not an excited utterance. First, the fact that the statements here were not taken at a police station during custodial interrogation, although a proper factor to consider, is not dispositive. *See Davis*, 547 U.S. at 827 (considering the difference in the level of formality between the interview in the station house in *Crawford* and the frantic 911 call in *Davis* as one of the factors in determining whether the statements from the 911 call were testimonial); *Hammon*, 547 U.S. at 830 (recognizing the *Crawford* interrogation was more formal, but determining the interrogation of Hammon's wife was "formal enough" in considering that factor and determining the wife's statements were testimonial); *Bryant*, 131 S.Ct. at 1166-67 (considering the informality of the situation and the interrogation as one of the factors in objectively evaluating the statements and actions of the parties to determine the primary purpose of the interrogation in deciding whether the Confrontation Clause bars admission of a statement). *Davis*, *Hammon*, and *Bryant* demonstrate *Crawford* may apply to prohibit statements regardless of whether statements are made to police in a custodial interrogation or outside of such confines. Second, absolutely nothing in *Crawford* limits its application to statements previously admitted based upon them bearing a particularized guarantee of trustworthiness. Indeed, the language in *Crawford* indicates that consideration of whether the Confrontation Clause is implicated does not evaporate simply because testimony happens to "fall within some broad,

⁷ The State conceded at oral argument that, even if the statements qualified as excited utterances, they would be inadmissible if found to be testimonial in nature.

~ 29:00 "could be"

modern hearsay exception." *Crawford*, 541 U.S. at 56. Further, the *Hammon* case establishes the decision in *Crawford* expressly applies to the sort of statements made here, i.e., those found admissible based upon the excited utterance exception. Thus, the USSC did not seek to limit the provision of the Confrontation Clause by challenging only statements that bore a particularized guarantee of trustworthiness. Accordingly, we agree with Haygood that the circuit court erred in distinguishing this case from *Crawford* on the bases that the statement in *Crawford* was taken in a custodial interrogation and it did not involve an excited utterance. While such circumstances may be appropriate to consider in making an objective determination of the primary purpose of an interrogation in order to determine whether a statement is testimonial or nontestimonial, they are not dispositive of the issue.

Turning to the ultimate issue before us — whether the victim's statements are testimonial or nontestimonial — we note analysis of the case at hand is hampered by the fact that, not only do we not have available the specific questions and answers between the victim and Lt. Jenkins, we have only a summary of testimony from Lt. Jenkins as to what the victim said to him and little other information of the circumstances under which the statements were made. As noted by the State, the limited record before us makes it difficult to ascertain the circumstances surrounding the encounter between the victim and the officer. However, upon considering the restricted scenario before us,⁸ we find it sufficiently demonstrates the statements made by the victim were testimonial, and because there is no evidence the victim was unavailable and no evidence Haygood ever had the opportunity to cross-examine the victim, the admission of the statements violated Haygood's Sixth Amendment confrontation rights.

Summarizing the law, statements are "testimonial when the circumstances objectively indicate that there is no . . . ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution," while they are considered nontestimonial "when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police

⁸ See *Bryant*, 131 S.Ct. at 1162-63 (noting the court was hampered in applying analysis to the facts of that case because (1) it did not have the luxury of reviewing a transcript of the conversation between police and the victim and (2) the pre-*Crawford* and *Davis* trial provided a record that had not been developed to ascertain the primary purpose of the interrogation, but nonetheless making the determination of its nontestimonial nature based upon the record before it).

assistance to meet an ongoing emergency." *Davis* and *Hammon*, 547 U.S. at 822. Further, *Bryant* edifies that "[t]o determine whether the 'primary purpose' of an interrogation is to enable police assistance to meet an ongoing emergency, which would render the resulting statements nontestimonial, we objectively evaluate the circumstances in which the encounter occurs and the statements and actions of the parties." 131 S.Ct. at 1156 (citation omitted). The relevant inquiry is not the subjective or actual purpose of the individuals, but "the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred." *Id.* Among the most important circumstances to consider in determining the primary purpose of the interrogation is whether there exists an ongoing emergency at the time of the encounter between the declarant and the police, and whether or not such an emergency exists and is ongoing "is a highly context-dependent inquiry." *Id.* at 1157, 1158. There are limitations as to whether an emergency is ongoing, as a conversation which may begin as interrogation to determine the need for emergency assistance may evolve into testimonial statements. *Id.* at 1159. Further, whether or not an ongoing emergency exists, although an important factor, is simply one factor to be considered in determining the primary purpose of an interrogation and is not dispositive of the testimonial inquiry. *Id.* at 1160. "[T]he existence *vel non* of an ongoing emergency is not the touchstone of the testimonial inquiry; rather, **the ultimate inquiry is whether the 'primary purpose of the interrogation [was] to enable police assistance to meet [the] ongoing emergency.'**" *Id.* at 1165 (emphasis added) (quoting *Davis*, 547 U.S. at 822).

Objectively evaluating the circumstances in which the encounter occurred between the victim and Lt. Jenkins and the statements and actions of the victim and Lt. Jenkins, we find the primary purpose of the interrogation was not to enable Lt. Jenkins's assistance in order to meet an ongoing emergency but, rather, was to prove past events potentially relevant to later criminal prosecution.

Unlike *Davis*, the case at hand does not involve a 911 call, which is traditionally designed, not to prove or establish some fact from the past, "but to describe current circumstances requiring police assistance." *Davis*, 547 U.S. 827. We cannot say, as the USSC did in *Davis*, that any reasonable listener would recognize from the statements made by the victim at hand that she was facing an ongoing emergency or that her statements were a plea for help "against a bona fide physical threat." *Id.* Though the restricted record before us does not give us the benefit of knowing specifically what questions were asked by Lt. Jenkins and what the victim answered, the testimony of Lt. Jenkins does not demonstrate, as it did in *Davis*, that the elicited answers of the victim were necessary to resolve a present

emergency. Rather, the nature of the statements tend to indicate the information was elicited in order for Lt. Jenkins "simply to learn (as in Crawford) what had happened in the past." *Id.* Additionally, while we agree with the State that, based upon the imperfect record, it is difficult to ascertain the level of formality involved between Lt. Jenkins and the victim, there is nothing to suggest the victim here was frantic in speaking with Lt. Jenkins or that the environment was unsafe at the time the victim made her statements, as was the case in *Davis*. *Id.*

Though, as the State observes, Lt. Jenkins testified the victim was visibly upset when he arrived at the scene, there is simply no indication she remained in that state when she made the statements in question or that her statements were a cry for help. Notably, the victim in *Hammon* was characterized as "somewhat frightened" upon the arrival of the police, yet the USSC ultimately found her statements to be testimonial. *Hammon*, 547 U.S. at 819. The State also places much emphasis on the fact that Lt. Jenkins testified Haygood was highly intoxicated when he arrived on the scene, was hostile toward the officer, and told the officer "this was his house and that he would do anything he wishes." It is not clear at what point these matters occurred in relation to the victim's interview by the officer and under what circumstances, thus it is difficult to say whether these matters lend support to the State's assertion that they indicated the domestic disturbance was ongoing. At any rate, we note the facts in *Hammon* likewise demonstrated some hostile and belligerent behavior by the husband when he attempted to participate in the victim's conversation with the police and became angry after he was rebuffed and separated from the victim. *Id.* at 819-20.

Further, we do not believe *Bryant* requires a finding that the statements in the case at hand were nontestimonial. First, unlike *Bryant*, this matter involved a domestic dispute, which the USSC in *Bryant* recognized is typically more limited in the scope of the emergency in terms of the threat to individuals other than the initial victim. *Bryant*, 131 S.Ct. 1158, 1163. The State, however, points to the fact that a gun was involved in this situation, asserting the scope of the emergency was heightened because the police found a gun in Haygood's possession. While *Bryant* recognized the involvement of a gun may create a continuing threat even in a domestic situation, as separation of the parties in a domestic matter by a single household wall might not be sufficient to end the emergency, *id.* at 1158-59, 1164, there is nothing in the record before us to indicate Haygood was actually armed with a gun at the time the police arrived, much less that he was in possession of such while the victim was giving her statement. Indeed, the record shows only that, while Haygood retrieved a shotgun during the dispute with the victim, the teenage son struggled with him to take the shotgun away, and though the victim

knew Haygood kept a small handgun in his pocket "at times," when he reached in his pocket the victim grabbed the pocket causing small bullets, not a gun, to fall to the floor. At that point, Haygood went outside and then returned to punch a hole in the closet. Thus, there is no evidence, as the State suggests, that Haygood was armed with a gun at the time the police arrived at the residence such that any emergency had not yet ended. Indeed, under the evidence of record, while Haygood may have attempted to arm himself with a shotgun, the teenage son struggled with him to take the shotgun away during the incident. Simply put, there is nothing in the narrative to indicate there was any perceived danger from Haygood at the time the victim's statements were made to Lt. Jenkins. From the report of the victim's statements in this case, we cannot say that a person in her situation would have had a primary purpose of anything other than "establish[ing] or prov[ing] past events potentially relevant to later criminal prosecution." *Id.* at 1165.

Additionally, though certainly not as formal as the station-house interview in *Crawford*, neither did the matter at hand involve a "harried 911 call" as in *Davis*, or the "fluid," and "somewhat confused," situation with the "[un]structured interrogation" that occurred in *Bryant*. *Id.* at 1166. Rather, based upon the circumstances in this case, it appears, like the situation in *Hammon*, the interrogation was "formal enough." *Hammon*, 547 U.S. 830. Though it is not clear whether or not the victim here was actively separated from Haygood as she spoke to Lt. Jenkins about the matter, there is nothing to indicate she or anyone else was in any danger. Rather, it appears from the context of the situation that the victim "deliberately recounted" for the officer "how potentially criminal past events began and progressed." *Id.*

Finally, the State correctly notes that the USSC in *Bryant* likened the underlying rationale for considering the existence *vel non* of an ongoing emergency as one of the most important factors in determining the primary purpose of an interrogation as being similar to that justifying the excited utterance exception to the rule against hearsay. *Bryant*, 131 S.Ct. at 1157. From this, the State extrapolates that the magistrate's determination that the victim's statements were admissible under the excited utterance exception "illustrates the freshness of the domestic disturbance." First, as previously noted, the fact that a statement may qualify as an excited utterance will not necessarily save it from exclusion under the Confrontation Clause. Further, there is absolutely no indication in the record that the police arrived and took the victim's statement very shortly after the domestic incident occurred. Thus, while the victim may have still been "under the stress of

excitement caused by the event or condition,"⁹ this does not necessarily indicate that the incident occurred immediately prior to the officer's arrival or that an emergency was ongoing at that point. Finally, even assuming *arguendo* that its qualification as an excited utterance is an indication of how "fresh" the statement is, the relationship in time between the domestic incident and the statement is certainly but one of the considerations in determining the context in which the victim made her statements to the police.

We find the case at hand is more similar to that of *Hammon*, wherein the interrogation occurred after police responded to the scene following a domestic disturbance. Most tellingly, we note the magistrate's return reflects that Lt. Jenkins "testified as to what took place during his initial *investigation* after he responded to an alleged CDV call," and that "*during his investigation*" the victim made the statements relating "what [Haygood] did on the date [in] question." Additionally, the return acknowledges it was the State's position that it was the officer's duty, upon being dispatched to the alleged CDV incident, "to *do an investigation* of the incident and be prepared to *testify as to the facts (during his investigation)* at trial," and that the magistrate agreed with the State that in some CDV cases, the "investigating officer . . . should be allowed to testify as to the *finding of facts during his investigation.*" Thus the return indicates the statements from the victim were elicited as a result of Lt. Jenkins' investigation of the matter. Contrarily, there is nothing in the return to specifically indicate any of the statements were made in order to enable Lt. Jenkins to respond to or resolve a present emergency or threatening situation. The State cites to notations in the return's summary of testimony indicating Haygood was belligerent and intoxicated, and the victim was highly upset; however, these matters do not necessarily evince an ongoing emergency and the summary does not relate any such emergency. Further, though the State also maintains the return shows Haygood had been armed with one, and possibly two, guns, it does not indicate Haygood was still in possession of a weapon at the time the police arrived or that Lt. Jenkins had to disarm him. Moreover, the summary of Lt. Jenkins' testimony as to the victim's statements is a recitation of how Haygood's potentially past criminal behavior began and progressed, thus acting as a substitute for live testimony of the victim. Though the State asserts the primary purpose of the interrogation was to enable police

⁹ See Rule 803(2), SCRE (providing an excited utterance is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition").

assistance to meet an ongoing emergency, its characterization of it as such simply does not make it so. *See id.* at 832 n.6 ("While prosecutors may hope that inculpatory "nontestimonial" evidence is gathered, this is essentially beyond police control. Their saying that an emergency exists cannot make it be so. The Confrontation Clause in no way governs police conduct, because it is the trial use of, not the investigatory collection of, ex parte testimonial statements which offends that provision. But neither can police conduct govern the Confrontation Clause; testimonial statements are what they are."). We find the primary purpose of the interrogation — resulting in the victim's statements — was to investigate a possible crime. *See id.* at 829 ("It is entirely clear from the circumstances that the interrogation was part of an investigation into possibly criminal past conduct — as, indeed, the testifying officer expressly acknowledged.").

Accordingly, after review of the record before us, we conclude an objective evaluation of the circumstances in which the encounter occurred as well as the statements and actions of the parties indicates the primary purpose of the interrogation was not to enable police assistance to meet an ongoing emergency. Rather, the primary purpose of the interrogation was to investigate a possible crime, and the victim's statements to Lt. Jenkins are "an obvious substitute for live testimony, because they do precisely *what a witness does* on direct examination." *Id.* at 830. We therefore hold the victim's statements in this matter were testimonial, and because there is nothing to indicate the declarant was not unavailable to testify at trial and the accused did not have a prior opportunity to cross-examine the declarant, admission of the statements violated Haygood's Sixth Amendment right to confrontation.

CONCLUSION

Based on the foregoing, we reverse Haygood's conviction and remand for a new trial consistent with this court's opinion. We recognize the difficulties the State often encounters in prosecuting CDV cases. As noted by the USSC in *Davis* and *Hammon*, domestic abuse crimes are "notoriously susceptible to intimidation or coercion of the victim to ensure that she does not testify at trial," and when this occurs, the offender reaps a windfall from the Confrontation Clause. 547 U.S. at 832-33. Nonetheless, our courts "may not . . . vitiate constitutional guarantees" because they may "have the effect of allowing the guilty to go free." *Id.* at 833. Therefore, we are constrained to reverse Haygood's conviction based on the erroneous admission of the inherently testimonial statements of his wife to the officer.

REVERSED AND REMANDED.**PIEPER, J., concurs in result only.**

THOMAS, J.: I concur in the result reached in the majority opinion to reverse Haygood's conviction and remand for a new trial. I would reverse and remand exclusively on the grounds that the court erred in distinguishing this case from *Crawford v. Washington*, 541 U.S. 36 (2004), and subsequently failing to make a determination as to whether the victim's statements were testimonial or nontestimonial. While I am aware that an appellate court may engage in a *Crawford* analysis¹⁰, I do not believe this court can perform such an analysis here given the summary of the testimony¹¹ and the lack of findings by the magistrate and the circuit court as to this issue. See *State v. Ladson*, 373 S.C. 320, 327-28, 644 S.E.2d 271, 275 (Ct. App. 2007) (reversing and remanding for a new trial where the record "lack[ed] the completeness and reliability necessary for this court to engage in meaningful appellate review").

¹⁰ See *State v. Ladner*, 373 S.C. 103, 114-15, 644 S.E.2d 684, 689-90 (2007) (finding a statement nontestimonial under *Crawford*).

¹¹ The proceedings in magistrate's court were electronically recorded pursuant to section 22-3-790 of the South Carolina Code (Supp. 2013). However, Haygood's trial counsel informed the circuit court that upon requesting a copy of the recording, she was told the recording was no longer available. Therefore, the only testimony from the trial in magistrate's court that we have before us is the magistrate's summary of the proceedings.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Orangeburg County
The Honorable Edgar W. Dickson, Circuit Court Judge
Appellate Case No. 2012-211961

The State,

Respondent,

vs.

Henry Haygood,

Appellant.

PETITION FOR REHEARING

Comes now Respondent, above named, by and through the Attorney General of South Carolina, and pursuant to Rule 221(a), SCACR, hereby respectfully petitions this Court to rehear this matter.

I. Preservation

Respondent respectfully submits this Court overlooked some key facts in finding Appellant's Crawford¹ objection was preserved for review. Under South Carolina law, an issue must be raised and ruled upon in order for an appellate court to consider the issue on appeal. State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-694 (2003); State v. Freiburger, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005). Also, in order for an appellate court to consider an issue on appeal, the objecting party must make a specific objection to the admission of the evidence. McKissick v. J.F. Cleckley & Co., 325 S.C. 327, 344, 479 S.E.2d 67, 75 (Ct. App. 1996). The objection should be specific enough so

¹ Crawford v. Washington, 541 U.S. 36 (2004).

that the trial judge can reasonably understand the alleged error. Id. Further, the objecting party must argue the same ground on appeal as he or she did at the trial level. Id. In other words, the objecting party cannot change his or her argument once he or she reaches the appellate level. Id.

In this case, Appellant failed to preserve the Crawford issue because Appellant never obtained a ruling from the trial judge regarding his Crawford objection. Nowhere in the magistrate's return is there any mention of Crawford or the Confrontation Clause. The trial judge's ruling seemed to focus solely on hearsay, not the Confrontation Clause. While it is true that the objecting party does not have to use the exact name of the legal doctrine employed, it must be clear to the appellate court that the argument presented on appeal was presented to the trial court. State v. Miller, 397 S.C. 630, 636, 725 S.E.2d 724, 727 (Ct. App. 2012). Respondent submits it is not clear in this case what was argued to the trial court.

Respondent respectfully submits that this Court misapprehended the facts when it noted, "There is nothing to indicate the circuit court or either of the parties believed the return was defective or that either party considered the issue not ruled upon by the magistrate or in any way unpreserved for review," in reference to Respondent's supporting use of S.C. Code Ann. § 18-7-80 (2014). In fact, Appellant's trial counsel conceded that the trial judge never ruled on Appellant's Crawford objection. (R. p. 20 lines 11-16; App. Br. p. 4). At that point, Appellant should have asked the circuit court to instruct the Magistrate to amend his return to reflect his ruling on the Crawford objection. Because Appellant did not move to have the return amended, the issue was never properly ruled upon, and it was not preserved for appellate review. Furthermore,

Respondent submits the only party who had any duty to raise the issue was the party challenging the trial judge's ruling, i.e. the Appellant.

Simply put, Respondent respectfully submits that because Appellant failed to obtain a ruling on the Crawford objection, the issue was not preserved for appellate review.

II. Merits

Respondent respectfully submits this Court misapplied the facts of this case to the holdings of Crawford, Davis v. Washington and Hammon v. Indiana, 547 U.S. 813 (2006), and Michigan v. Bryant, 131 S.Ct. 1143 (2011), in ruling the victim's statements were testimonial and thus violated the Confrontation Clause.

In Crawford, the United States Supreme Court held that the Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." Crawford, 541 U.S. at 53-54. Critically, only testimonial statements require compliance with the Confrontation Clause. Id. at 68. Thus, a non-testimonial statement would be admissible, subject to traditional limitations upon hearsay evidence, even though the defendant never had the opportunity to cross-examine the declarant. Id. The Court listed four examples of when a statement would be considered testimonial: 1) prior testimony at a preliminary hearing; 2) prior testimony before a grand jury; 3) prior testimony at a former trial; and 4) statements made during police interrogations. Id.

Two years later, in Davis v. Washington, 547 U.S. 813, 822 (2006), the United States Supreme Court provided further clarification on the Crawford decision. In Davis, the Court dealt with two different domestic violence cases. Although the Court was clear

that it did not want to create a list of every type of testimonial or non-testimonial statement, the Court held the following:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Id. (emphasis added). Thus, not all interrogations by the police are subject to the Confrontation Clause bar. Michigan v. Bryant, 131 S.Ct. 1143, 1153 (2011).

In Davis's case, the Court held that the victim's statements to the 911 operator were not subject to the Confrontation Clause bar because the statements were nontestimonial. Davis, 547 U.S. at 828. The victim made statements to a 911 operator during a domestic disturbance with the defendant. Id. at 817. The victim told the 911 operator: " 'He's here jumpin' on me again . . . He's usin' his fists.' " Id. During the 911 call, the victim identified the defendant as the assailant. Id. at 818. In its reasoning, the Court stated that the primary purpose of the victim's statements to the 911 operator was to "enable police assistance to meet an ongoing emergency." Id. at 828. Simply put, the victim was not acting as a witness; the victim was not testifying. Id.

But the Court reached the opposite result in Hammon's case. See Davis, 547 U.S. at 834. In Hammon's case, the Court held that the victim's statements were testimonial statements barred by the Confrontation Clause. Id. at 831-832. The police responded to a reported domestic disturbance at the defendant's home. Id. at 819. When the police arrived, the victim was alone on the front porch and was " 'somewhat frightened,' but she

told the officers that ‘nothing was the matter[.]’ ” Id. The defendant was in the kitchen, and the defendant told the police that everything was fine. Id. While separated from the defendant, the victim informed the officers that the defendant shoved her on the floor, hit her in the chest, and attacked her daughter. Id. at 820. The defendant attempted to participate in the victim’s conversation with the police. Id. at 819-820.

In support of its holding in Hammon’s case, the Court noted that it was clear from the circumstances that the police’s interrogation was part of an investigation into past criminal conduct. Id. at 829. Further, the testifying officer expressly acknowledged that the purpose of his interrogation was to investigate into past criminal conduct. Id. Moreover, there was no ongoing emergency; the officer testified that he did not hear any arguments or see anyone throwing or breaking anything when he arrived at the scene. Id. The Court pointed out that when the officers arrived at the scene, the victim told the officers everything was okay and there was no immediate threat to the victim. Id. In other words, the victim’s statements “were neither a cry for help nor the provision of information enabling officers immediately to end a threatening situation[.]” Id. at 832.

Approximately five years after the United States Supreme Court decided Davis, the Court revisited the “primary purpose” exception to the Confrontation Clause bar in Michigan v. Bryant. See Bryant, 131 S.Ct. at 1150. Clarifying what it meant in Davis when it said “ ‘the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency[.]’ ” the Bryant Court held that courts must “**objectively** evaluate the circumstances in which the encounter occurs and the statements and actions of the parties.” Id. at 1156 (internal citation omitted). The Court explained:

An objective analysis of the circumstances of an encounter and the statements and actions of the parties to it provides

the most accurate assessment of the “primary purpose of the interrogation.” The **circumstances in which an encounter occurs— e.g., at or near the scene of the crime versus at a police station, during an ongoing emergency or afterwards—**are clearly matters of objective fact. The statements and actions of the parties must also be objectively evaluated. That is, the relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred.

Id. (emphasis added).

Notably, the Bryant Court explained the logic behind why the ongoing emergency circumstance was considered non-testimonial and not subject to the Confrontation Clause bar, and the Court compared that logic to the logic behind the excited utterance exception to the hearsay rule²:

Implicit in Davis is the idea that because the prospect of fabrication in statements given for the primary purpose of resolving that emergency is presumably significantly diminished, the Confrontation Clause does not require such statements to be subject to the crucible of cross-examination.

This logic is not unlike that justifying the excited utterance exception in hearsay law. Statements “relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition,” are considered reliable because the declarant, in the excitement, presumably cannot form a falsehood.

Id.

Further, the Bryant Court noted that whether an ongoing emergency exists is only one factor – although an important factor – used in the primary purpose analysis. Id. at

² Respondent submits this Court misconstrued Respondent's statements at oral argument where the Court noted in footnote 7, “The State conceded at oral argument that, even if the statements qualified as excited utterances, they would be inadmissible if found to be testimonial in nature.” Respondent submits the answer given to the Court was that such statements “could be” inadmissible.

1160. Another factor courts should take in account is the formality of the encounter between the victim and the police. Id.

Respondent respectfully submits this Court erred in finding the primary purpose of the officer's questions was to prove past events potentially relevant to later criminal prosecution, rather than to meet an ongoing emergency. Thus, Respondent submits the Confrontation Clause did not bar the admission of the victim's statements.

Objectively viewing the circumstances in which the police encounter occurred, the following facts demonstrate why Hammon's case in the Davis opinion is distinguishable from this case:

- The victim was visibly upset when the officer arrived at the scene.³
(Return.)
- Appellant was highly intoxicated and hostile towards the officer. (Return.)
- Appellant told the officer that this was his house and that he would do anything he wished. (Return.)

Unlike the domestic disturbance in Hammon's case, the domestic disturbance in this case was still ongoing. Further, unlike the victim in Hammon's case, the victim in this case was very upset, indicating that there was an ongoing dispute when the police arrived. Appellant's comment to the officer that the officer that this was house and that he would do indicated that he wished indicated that Appellant was not done fighting. Also, the fact that the police found a gun in Appellant's possession heightened the scope of the

³ The Court notes that there is no information in the record to indicate that the victim remained upset upon the officer's arrival; however, Respondent submits there is no information in the record to indicate the victim did not remain upset.

emergency.⁴ See Bryant, 131 S.Ct. at 1158 (“The Michigan Supreme Court also did not appreciate that the duration and scope of an emergency may depend in part on the type of weapon employed. The court relied on Davis and Hammon, in which the assailants used their fists, as controlling the scope of the emergency here, which involved the use of a gun.”).

Although separating Hammon from the victim was sufficient to end the emergency in that case, the same cannot be said with respect to this case because Appellant had at least one, and possibly two guns in his possession. See Bryant, 131 S.Ct. at 1159 (“Hammon was armed only with his fists when he attacked his wife, so removing [his wife] to a separate room was sufficient to end the emergency. If [Hammon] had been reported to be armed with a gun, however, separation by a single household wall might not have been sufficient to end the emergency.”). Thus, the fact Appellant had a gun in his possession demonstrates the danger of the situation, not only for the victims involved but also for the responding officers. In contrast to Hammon’s case, where the situation was subdued by the time the officers arrived at the scene, we have no indication from the Record that the domestic dispute in this case was subdued at the time the officers arrived.

Additionally, the fact the trial judge ruled the statements admissible under the excited utterance exception to the hearsay rule⁵ illustrates the freshness of the domestic

⁴ The Court asserts, “Simply put, there is nothing in the narrative to indicate there was any perceived danger from Haygood at the time the victim’s statements were made to Lt. Jenkins”; however, Respondent submits that the absence of any sort of timeline from the record makes such an assertion overly broad. The record does not provide enough facts to determine when the victim made the statements to the officer, or what Appellant’s behavior was, other than noting he was visibly intoxicated. Furthermore, there is no indication as to the location of the shotgun after Appellant’s son took it away from him. Finally, the handgun the victim stated Appellant customarily kept in his pocket was never recovered.

⁵ Rule 803 of the South Carolina Rules of evidence provides numerous exceptions to the rule generally prohibiting the admission of hearsay. One of the exceptions listed in Rule 803 is an excited utterance. An excited utterance is “[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.” Rule 803 (2), SCRE.

disturbance⁶. See generally Bryant, 131 S.Ct. at 1156 (noting that the underlining rational for the ongoing emergency rule was similar to the rational for the excited utterance rule).

Finally, with respect to the formality factor in the primary purpose analysis, there is no evidence in the record that the encounter between the victim and the police was formal. See Bryant, 131 S.Ct. at 1160 (“[F]ormality suggests the absence of an emergency[.]”). However, it is known that the police encounter occurred at the scene of the crime, not at a police station; thus, there is some evidence in the record that the encounter was informal.

Due to the limited record in this case,⁷ it is impossible to ascertain whether or not the police asked formal questions. See Id. at 1160-1161 (“As the Michigan Supreme Court correctly recognized, Davis requires a combined inquiry that accounts for both the declarant and the interrogator. In many instances, the primary purpose of the interrogation will be most accurately ascertained by looking to the contents of both the questions and the answers.”) (internal citations omitted).⁸

Because the formality of the situation and questions asked cannot be ascertained from the record in this case, Respondent submits this Court misconstrued the record before it in determining the evidence “sufficiently demonstrates the statements made by the victim were testimonial...” State v. Haygood, 5247, 2014 WL 2930457 (S.C. Ct.

⁶ The Court notes, “there is absolutely no indication in the record that the police arrived and took the victim’s statement very shortly after the domestic incident occurred.” However, Respondent submits the lower court’s ruling that the statements were admissible as excited utterances is, in and of itself, an indication of the close proximity in time between the incident and the statements.

⁷ The burden is on appellant to provide a sufficient record for review. State v. Mitchell, 330 S.C. 189, 194, 498 S.E.2d 642, 644 (1998); State v. Williams, 321 S.C. 455, 469 S.E.2d 49 (1996). Appellant has the burden of presenting an adequate record that is sufficiently complete so that the appellate court is able to review the lower court’s actions. State v. Knighton, 334 S.C. 125, 136, 512 S.E.2d 117, 123 (Ct. App. 1999).

⁸ The Court makes note of the language in the magistrate’s return referring to the officer’s *investigation* and uses that to make the assertion that the statements from the victim were elicited as a result of the officer’s investigation, rather than as a response to an ongoing emergency. Respondent submits the assertion is overly broad in consideration of the paucity of information recorded in the return.

App. June 30, 2014). Respondent submits the insufficiency of the record fails to provide any evidence to overturn the rulings of both the magistrate court and the circuit court that the victim's statements were admissible. "In criminal appeals from magistrate ... court, the circuit court does not conduct a *de novo* review, but instead reviews for preserved error raised to it by appropriate exception." State v. Henderson, 347 S.C. 455, 457, 556 S.E.2d 691, 692 (Ct.App.2001); S.C.Code Ann. § 18-3-70 (2014). Furthermore, the circuit court is bound by the magistrate court's findings of fact if any evidence in the record reasonably supports them. State v. Gordon, 2013-000515, 2014 WL 3511153 (S.C. Ct. App. June 11, 2014). Finally, this Court will review the decision of the circuit court for errors of law only. City of Rock Hill v. Suchenski, 374 S.C. 12, 15, 646 S.E.2d 879, 880 (2007); Henderson, 347 S.C. at 457, 556 S.E.2d at 692. Respondent submits that in this case, the record provided to the Court is simply insufficient to determine the statements given by the victim were testimonial and violated the Confrontation Clause. The trial court and the circuit court ruled the statements were admissible, and there is no evidence in the record to conclude their rulings were based on any error of law. As such, this Court erred in not affirming the lower court rulings.⁹

CONCLUSION

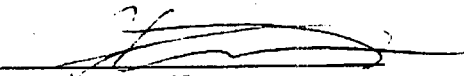
For all of the foregoing reasons, the State requests the panel grant the petition for rehearing, find the Crawford issue was not preserved for review, or in the alternative, find the trial court properly held the victim's statements were non-testimonial, and affirm Appellant's conviction and sentence.

⁹ Respondent respectfully submits the Concurrence's use of State v. Ladson, 373 S.C. 320, 327-28, 644 S.E.2d 271, 275 (Ct. App. 2007) to reverse and remand for a new trial is inappropriate because that case dealt with an insufficiently reconstructed record. Appellant has made no attempt to reconstruct the record in this case.

Respectfully submitted,

ALAN WILSON
Attorney General

J. CROOM HUNTER
Assistant Attorney General

BY: 

J. Croom Hunter
S.C. Bar No. 101253
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

July 24, 2014

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Orangeburg County
The Honorable Edgar W. Dickson, Presiding Judge

Appellate Case No: 2012-211961

THE STATE,

Respondent,

vs.

HENRY HAYGOOD,

Appellant.

PROOF OF SERVICE

I, Ellen DuBois, certify that I have served the Petition for Rehearing on appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney, Breen R. Stevens, Esquire, First Circuit Public Defender's Office, Post Office Box 1112, Orangeburg, South Carolina, 29116.

I further certify that all parties required by Rule to be served have been served.

This 25th day of July, 2014.



Ellen DuBois
Legal Assistant

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

The South Carolina Court of Appeals

The State, Respondent,

v.

Henry Haygood, Appellant.

Appellate Case No. 2012-211961

RECEIVED

AUG 22 2014

ATTORNEY GENERALS
OFFICE

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.

Thomas C. Hoff

J.

Paul W. Thomas

J.

U. Ke

J.

Columbia, South Carolina

cc:

Breen Richard Stevens, Esquire

John Croom Colvin Hunter, Esquire

FILED

August 20, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY

Honorable Edgar Dickson, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

HENRY HAYGOOD,

APPELLANT.

Appellate Case No. 2012-211961

FINAL BRIEF OF APPELLANT

JILLIAN D. ULLMAN
BREEN R. STEVENS
First Circuit Public Defender Office
P.O. Box 1112
Orangeburg, SC 29116
(803) 536-5682
Attorneys for Appellant

RECEIVED

OCT 10 2013

SC Court of Appeals

TABLE OF CONTENTS

TABLE OF CONTENTS.....	1
TABLE OF AUTHORITIES	2
STATEMENT OF ISSUE ON APPEAL.....	3
STATEMENT OF THE CASE.....	4
ARGUMENT	
The circuit court violated appellant's 6th amendment right to confrontation by admitting testimonial hearsay into the record under the excited utterance exception without an opportunity of cross-examination by the defense.....	5
CONCLUSION.....	9

TABLE OF AUTHORITIES**Cases**

<u>Crawford v. Washington</u> , 541 U.S. 36 (2004).....	5, 6
<u>Davis v. Washington</u> , 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006)	6, 7

Other Authorities

U.S. Const. amend. VI.....	5, 6, 7
----------------------------	---------

STATEMENT OF ISSUE ON APPEAL

Did the circuit court violate appellant's 6th amendment right to confrontation by admitting testimonial hearsay into the record under the excited utterance exception without an opportunity of cross-examination by the defense?

STATEMENT OF THE CASE

This case was tried before the court on September 25, 2009. During the trial an objection was made by the defense to the state's introduction of verbal statements allegedly made by the alleged victim to the investigating officer. The objected to statements pertained to all allegations of what the defendant allegedly did on the date in question. The court overruled defendant's objections and admitted the statement under the "excited utterance" exception to the hearsay rule. It should be noted that (1) the alleged victim was not present for the trial of the state; (2) the alleged victim resides in Orangeburg County and was available for the trial; (3) the state did not subpoena the victim; (4) prior to the trial of the case, the alleged victim provided the defense with two written statements indicating (a) that she did not recall the events in question and (b) that she did not want the defendant to prosecuted; and (5) that these statements were shown to the state prior to the case being remanded to the Magistrate Court. An appeal was made on October 2nd, 2009 to overturn the conviction and remand the case for a new trial. The appeal was denied on May 4th 2012. This appeal follows.

ARGUMENT

The circuit court violated appellant's 6th amendment right to confrontation by admitting testimonial hearsay into the record under the excited utterance exception without an opportunity of cross-examination by the defense.

1. The Circuit Court erred in finding that the testimonial of the alleged victim did not violate the Confrontation Clause by finding the statement in this case to fall within an established exception to hearsay.

The Sixth Amendment Confrontation Clause provides that "in all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him" In Crawford v. Washington, 541 U.S. 36 (2004), the United States Supreme Court mandated that where testimonial statements are at issue, the only indicia of reliability sufficient to satisfy constitutional demands is confrontation. Further, the Court stated that testimony is typically "a solemn declaration or affirmation made for the purpose of establishing or proving some fact." An accuser who makes a formal statement to government officers bears testimony. . . ." Id. 541 U.S. 36 (2004).

In this case, the court admitted testimonial statements made by the alleged victim to the police into evidence. The statement was made by the alleged victim to the police at the scene of the incident after the police had responded to a 911 call. The alleged victim was not in attendance at court and there was no opportunity for cross-examination by the defense.

The court erroneously admitted the testimonial statement under the hearsay exception of excited utterance. In Crawford, the Court stated that "[i]nvolvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse-a fact borne out time and again throughout a history with which the Framers were keenly familiar. This consideration does not

evaporate when testimony happens to fall within some broad, modern hearsay exception, even if that exception might be justifiable in other circumstances." Id. 541 U.S. at 56, 124 S.Ct. at 1367. In this case, the statements made by the alleged victim were arguably given in excited utterance when the police responded to the scene. However, the statements were also testimonial in nature, given that they were "...declarations or affirmations made for the purpose of establishing or proving some fact" and therefore require a sixth amendment confrontation by the defense. Id. As stated in Crawford, any testimonial statement made to a police officer is not admissible under the hearsay exceptions of the rules of evidence, if the Sixth Amendment right to confrontation is not met. Here, the testimony was erroneously admitted into evidence despite the precedent in Crawford.

2. The Circuit Court erred in distinguishing the facts of this case from Crawford by ruling that the statement made in Crawford was (a) taken in a custodial interrogation and (b) not an excited utterance.

(a) The Court of Appeals erred in distinguishing the present case from Crawford by exclaiming that the statements here were made at the scene of the alleged domestic disturbance to the responding police officers, while in Crawford the statements were made during a custodial interrogation.

However, the Crawford Court stated that "We use the term 'interrogation' in its colloquial, rather than any technical legal, sense. Cf. *Rhode Island v. Innis*, 446 U.S. 291, 300-301, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980). Just as various definitions of 'testimonial' exist, one can imagine various definitions of 'interrogation,' and we need not select among them in this case." Crawford, 541 U.S. at 53, 124 S.Ct. at 1365. The above language indicates that the Supreme Court did not provide the foundation

relied upon in the order of denial of the court of appeals that Crawford distinguishes itself from the present case by only applying to testimonials made during custodial interrogations.

Not only does this theory go unsupported in Crawford but it is directly refuted in the case of Davis v. Washington, 547 U.S. 813, 126 S.Ct. 2266, 165 L. Ed. 2d 224 (2006). In Davis, the alleged victim made a 911 call in response to ongoing domestic disturbance. Police responded to the scene and recorded the alleged victim's written testimony outside the residence with the suspect still inside the house. The Court ruled that the statements the alleged victim made during the 911 call fell under the excited utterance hearsay exception and were admissible. However, the written statement given to the responding police officers outside the residence was not admissible. In their reasoning, the Court stated that "[a]lleged domestic battery victim's written statements in affidavit given to police officer who responded to domestic disturbance call were 'testimonial' and, therefore, subject to Confrontation Clause; there was no emergency in progress when statements were given, as alleged battery had happened before police arrived, so that primary purpose of officer's interrogation was to investigate a possible past crime." U.S. Const. amend. VI; Davis, 547 U.S. 813, 126 S. Ct. 2266.

The Davis Court advocates a closer examination of statements made to the police to determine at what point testimonial statements require a sixth amendment confrontation. "A conversation which begins as an interrogation to determine the need for emergency assistance, and is not subject to the Confrontation Clause, may evolve into testimonial statements subject to the Confrontation Clause once that purpose has been achieved; trial courts should recognize the point at which, for Sixth Amendment

purposes, statements in response to interrogations become testimonial and, through in limine procedure, should redact or exclude the portions of any statement that have become testimonial." U.S. Const. amend. VI; Davis, 547 U.S. 813, 126 S. Ct. 2266.

(b) The Appellate Court states that the case applies only specifically to the type of hearsay exception present in Crawford, one that "bears indicia of reliability" and does not extend to excited utterance. This assumption is not supported by the Supreme Court's reasoning in the Crawford decision as the Court states that, "This consideration does not evaporate when testimony happens to fall within some broad, modern hearsay exception, even if that exception might be justifiable in other circumstances."

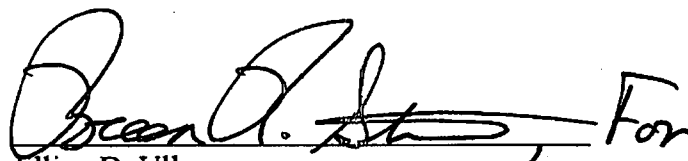
In furtherance, the Crawford decision has been expressly extended to apply to the sort of statements made here by the alleged victim to the police during their response to the scene of the incident in the case of Davis, 547 U.S. 813, 126 S. Ct. 2266. "Alleged domestic battery victim's written statements in affidavit given to police officer who responded to domestic disturbance call were "testimonial" and, therefore, subject to Confrontation Clause; there was no emergency in progress when statements were given, as alleged battery had happened before police arrived, so that primary purpose of officer's interrogation was to investigate a possible past crime." U.S.C.A. Const. Amend. 6; Davis, 547 U.S. 813, 126 S. Ct. 2266.

As can be seen by Davis, the Court did not seek to establish a limited provision for the confrontation clause by challenging only statements that bore indicia of reliability, such as statements made to the police during a custodial interrogation, but that instead it sought to cover any statements made to the police that are testimonial in nature.

CONCLUSION

Based on the above reasons, the order of the appeals court should be reversed and the case be remanded accordingly.

October 16th, 2013

A handwritten signature in black ink, appearing to read "Jillian D. Ullman", followed by a horizontal line and the word "For" written in a cursive script.

Jillian D. Ullman
Breen Richard Stevens
Assistant Public Defenders

First Circuit Public Defender's Office
Orangeburg Office
P.O. Box 1112
Orangeburg, SC 29116
(803) 536-5682

ATTORNEYS FOR APPELLANT

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Orangeburg County
Edgar W. Dickson, Circuit Court Judge

RECEIVED
OCT 16 2013
SC Court of Appeals

THE STATE,

RESPONDENT,

V.

HENRY HAYGOOD,

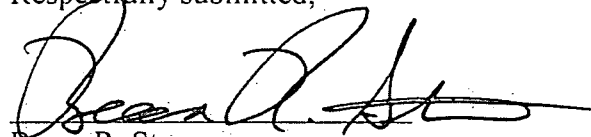
APPELLANT

APPELLATE CASE NO. 2012-211961

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 Julie Kate Keeney, Esquire, Assistant Attorney General, Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211, and the South Carolina Court of Appeals, this 16th day of October 2013.

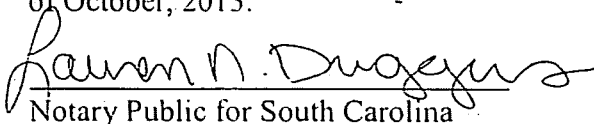
Respectfully submitted,



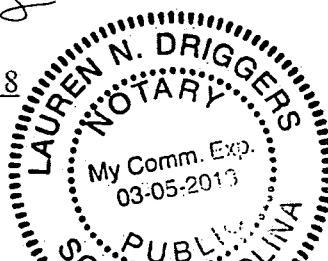
Breen R. Stevens
Public Defender
First Judicial District

Attorney for Appellant

SWORN TO BEFORE ME this 16th day
of October, 2013.


Notary Public for South Carolina

My Commission Expires: March 5, 2018



STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Orangeburg County
Honorable Edgar Dickson, Circuit Court Judge
Appellate Case No. 2012-211961

THE STATE

Respondent

vs.

HENRY HAYGOOD

Appellant

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

JULIE KATE KEENEY
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUE ON APPEAL.....	1
STATEMENT OF THE CASE.....	2
STATEMENT OF THE FACTS	3
ARGUMENT	4
I. The issue on appeal is not preserved because the trial judge never ruled on the <u>Crawford</u> issue. Regardless of preservation, the Circuit Court properly affirmed Appellant's conviction and sentence because the victim's statements were nontestimonial. Thus, the Confrontation Clause did not bar the admission of the statements.	4
CONCLUSION.....	13

TABLE OF AUTHORITIES

Cases

<u>Crawford v. Washington</u> , 541 U.S. 36 (2004)	4, 5, 6, 7
<u>Davis v. Washington</u> , 547 U.S. 813 (2006)	6, 7, 8, 9, 10
<u>McKissick v. J.F. Cleckley & Co.</u> , 325 S.C. 327, 479 S.E.2d 67 (Ct. App. 1996).....	5
<u>Michigan v. Bryant</u> , 131 S.Ct. 1143 (2011).....	7, 8, 9, 10, 11, 12
<u>State v. Dunbar</u> , 356 S.C. 138, 587 S.E.2d 691 (2003)	4
<u>State v. Freiburger</u> , 366 S.C. 125, 620 S.E.2d 737 (2005)	4-5
<u>State v. Knighton</u> , 334 S.C. 125, 512 S.E.2d 117 (Ct. App. 1999).....	11
<u>State v. Lopez</u> , 352 S.C. 373, 574 S.E.2d 210 (Ct. App. 2002).....	4
<u>State v. Miller</u> , 397 S.C. 630, 25 S.E.2d 724 (Ct. App. 2012).....	5
<u>State v. Mitchell</u> , 330 S.C. 189, 498 S.E.2d 642 (1998).....	11
<u>State v. Sheldon</u> , 344 S.C. 340, 543 S.E.2d 585 (Ct. App. 2001).....	4
<u>State v. Williams</u> , 321 S.C. 455, 469 S.E.2d 49 (1996).....	11
<u>State v. Wilson</u> , 345 S.C. 1, 545 S.E.2d 827 (2001).....	4

Other Authorities

U.S. Const. Amend. VI	6
-----------------------------	---

Rules

Rule 803 (2), SCRE	11
--------------------------	----

STATEMENT OF ISSUE ON APPEAL

I.

The issue on appeal is not preserved because the trial judge never ruled on the Crawford issue. Regardless of preservation, the Circuit Court properly affirmed Appellant's conviction and sentence because the victim's statements were nontestimonial. Thus, the Confrontation Clause did not bar the admission of the statements.

STATEMENT OF THE CASE

On September 25, 2009, the Honorable Samuel A. Daily, magistrate judge, found Appellant guilty of criminal domestic violence (first offense). Assistant Public Defender Jillian Ullman represented Appellant at trial.

On October 2, 2009, Appellant filed a notice of appeal with the Orangeburg County Clerk of Circuit Court. On September 16, 2011, the Honorable Edgar W. Dickson heard oral arguments on the matter. Assistant Public Defender Jillian Ullman represented Appellant, and Assistant Solicitor B.J. Jeffries represented the State. On May 4, 2012, Judge Dickson denied Appellant's appeal. On May 9, 2012, Appellant filed a notice of appeal with this Court.

STATEMENT OF FACTS

On March 31, 2008, Officer Jenkins responded to a domestic violence call at Appellant's residence. (R. p. 3.) When Officer Jenkins arrived at the scene, Towanna Haygood, Appellant's wife, was very upset. (R. p. 3.) Appellant was highly intoxicated and cussed at Officer Jenkins. (R. p. 3.) Appellant told Officer Jenkins that it was his house and he would do anything he wished. (R. p. 3.) When Officer Jenkins arrived, Towanna told Officer Jenkins that Appellant retrieved a shotgun from the bedroom closet and told her that he was going to kill her. (R. p. 3.) Appellant's son tried to take the shotgun away from Appellant. (R. p. 3.) Thereafter, Appellant reached in his pocket where he kept a small handgun. (R. p. 3.) When Towanna grabbed Appellant's pocket, bullets fell from Appellant's pocket onto the floor. (R. p. 3.) Appellant went outside the residence but came back inside and punched a hole in the bedroom closet. (R. p. 3.)

ARGUMENT

I.

The issue on appeal is not preserved because the trial judge never ruled on the Crawford issue. Regardless of preservation, the Circuit Court properly affirmed Appellant's conviction and sentence because the victim's statements were nontestimonial. Thus, the Confrontation Clause did not bar the admission of the statements.

Appellant's argument on appeal fails for two reasons. First, Appellant failed to preserve the issue on appeal because Appellant never obtained a ruling regarding his Crawford¹ argument; the trial judge's ruling only addressed hearsay. Second, the victim's statements were nontestimonial statements; therefore, the Confrontation Clause did not bar the admission of the statements.

Standard of Review

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). An appellate court will not reverse a trial court's ruling absent a prejudicial abuse of discretion. State v. Sheldon, 344 S.C. 340, 342, 543 S.E.2d 585, 585-586 (Ct. App. 2001). An abuse of discretion occurs when the trial court's decision lacks evidentiary support or is controlled by an error of law. State v. Lopez, 352 S.C. 373, 378, 574 S.E.2d 210, 212 (Ct. App. 2002)

A. Preservation

First, Appellant's argument on appeal fails because Appellant never obtained a ruling from the trial judge regarding his Crawford objection.

Under South Carolina law, an issue must be raised and ruled upon in order for an appellate court to consider the issue on appeal. State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-694 (2003); State v. Freiburger, 366 S.C. 125, 135, 620 S.E.2d 737, 742

¹ Crawford v. Washington, 541 U.S. 36 (2004).

(2005). Also, in order for an appellate court to consider an issue on appeal, the objecting party must make a specific objection to the admission of the evidence. McKissick v. J.F. Cleckley & Co., 325 S.C. 327, 344, 479 S.E.2d 67, 75 (Ct. App. 1996). The objection should be specific enough so that the trial judge can reasonably understand the alleged error. Id. Further, the objecting party must argue the same ground on appeal as he or she did at the trial level. Id. In other words, the objecting party cannot change his or her argument once he or she reaches the appellate level. Id.

In this case, Appellant failed to preserve the Crawford issue because Appellant never obtained a ruling from the trial judge regarding his Crawford objection. According to the magistrate's return, Appellant objected to the officer's testimony regarding the victim's statements to the officer.² (R. p. 4.) The State's argument at trial was based on hearsay related rules, not the Confrontation Clause. The trial judge stated that he agreed with the State. (R. p. 4.) Also, the trial judge stated "that in some criminal domestic violence [cases] the investigating officer . . . should be allowed to testify as to the finding of facts during his investigation." (R. p. 4.) Nowhere in the magistrate's return is there any mention of Crawford or the Confrontation Clause. The trial judge's ruling seemed to focus solely on hearsay, not the Confrontation Clause. In fact, Appellant conceded that the trial judge never ruled on Appellant's Crawford objection. (R. p. 20 lines 11-16; App. Br. p. 4.)

² Notably, the magistrate's summary of Appellant's argument at trial does not mention Crawford or the Confrontation Clause. (R. p. 4.) While it is true that the objecting party does not have to use the exact name of the legal doctrine employed, it must be clear to the appellate court that the argument presented on appeal was presented to the trial court. State v. Miller, 397 S.C. 630, 636, 725 S.E.2d 724, 727 (Ct. App. 2012). In the case at hand, it is unclear from the magistrate's return if Appellant objected to the officer's testimony on Confrontation Clause grounds. However, Appellant's counsel argued on appeal at the circuit court that she did challenge the officer's testimony on Confrontation Clause grounds (R. pp. 18-19.)

Simply put, Appellant failed to obtain a ruling on the Crawford issue; thus, the issue on appeal is not preserved for appellate review.

B. Merits

Second, Appellant's argument on appeal fails because the victim's statements to the officer were nontestimonial statements made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation was to enable police assistance to meet an ongoing emergency. Thus, the Confrontation Clause did not bar the admission of the statements.

The Confrontation Clause of the Sixth Amendment states the following: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. Amend. VI. This procedural safeguard is also applicable to state prosecutions. Crawford, 541 U.S. at 42.

In Crawford, the United States Supreme Court held that the Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." Crawford, 541 U.S. at 53-54. Critically, only testimonial statements require compliance with the Confrontation Clause. Id. at 68. Thus, a nontestimonial statement would be admissible, subject to traditional limitations upon hearsay evidence, even though the defendant never had the opportunity to cross-examine the declarant. Id. The Court listed four examples of when a statement would be considered testimonial: 1) prior testimony at a preliminary hearing; 2) prior testimony before a grand jury; 3) prior testimony at a former trial; and 4) statements made during police interrogations. Id.

Two years later, in Davis v. Washington, 547 U.S. 813, 822 (2006), the United States Supreme Court provided further clarification on the Crawford decision. In Davis,

the Court dealt with two different domestic violence cases. Although the Court was clear that it did not want to create a list of every type of testimonial or nontestimonial statement, the Court held the following:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Id. (emphasis added). Thus, not all interrogations by the police are subject to the Confrontation Clause bar. Michigan v. Bryant, 131 S.Ct. 1143, 1153 (2011).

In Davis' case, the Court held that the victim's statements to the 911 operator were not subject to the Confrontation Clause bar because the statements were nontestimonial. Davis, 547 U.S. at 828. The victim made statements to a 911 operator during a domestic disturbance with the defendant. Id. at 817. The victim told the 911 operator: " 'He's here jumpin' on me again . . . He's usin' his fists.' " Id. During the 911 call, the victim identified the defendant as the assailant. Id. at 818. In its reasoning, the Court stated that the primary purpose of the victim's statements to the 911 operator was to "enable police assistance to meet an ongoing emergency." Id. at 828. Simply put, the victim was not acting as a witness; the victim was not testifying. Id.

But the Court reached the opposite result in Hammon's case. See Davis, 547 U.S. at 834. In Hammon's case, the Court held that the victim's statements were testimonial statements barred by the Confrontation Clause. Id. at 831-832. The police responded to a reported domestic disturbance at the defendant's home. Id. at 819. When the police arrived, the victim was alone on the front porch and was " 'somewhat frightened,' but she

told the officers that ‘nothing was the matter[.]’ ” Id. The defendant was in the kitchen, and the defendant told the police that everything was fine. Id. While separated from the defendant, the victim informed the officers that the defendant shoved her on the floor, hit her in the chest, and attacked her daughter. Id. at 820. The defendant attempted to participate in the victim’s conversation with the police. Id. at 819-820.

In support of its holding in Hammon’s case, the Court noted that it was clear from the circumstances that the police’s interrogation was part of an investigation into past criminal conduct. Id. at 829. Further, the testifying officer expressly acknowledged that the purpose of his interrogation was to investigate into past criminal conduct. Id. Moreover, there was no ongoing emergency; the officer testified that he did not hear any arguments or see anyone throwing or breaking anything when he arrived at the scene. Id. The Court pointed out that when the officers arrived at the scene, the victim told the officers everything was okay and there was no immediate threat to the victim. Id. In other words, the victim’s statements “were neither a cry for help nor the provision of information enabling officers immediately to end a threatening situation[.]” Id. at 832.

Approximately five years after the United States Supreme Court decided Davis, the Court revisited the “primary purpose” exception to the Confrontation Clause bar in Michigan v. Bryant. See Bryant, 131 S.Ct. at 1150. Clarifying what it meant in Davis when it said “ ‘the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency[.]’ ” the Bryant Court held that courts must “objectively evaluate the circumstances in which the encounter occurs and the statements and actions of the parties.” Id. at 1156 (internal citation omitted). The Court explained:

An objective analysis of the circumstances of an encounter and the statements and actions of the parties to it provides the most accurate assessment of the “primary purpose of

the interrogation.” The circumstances in which an encounter occurs— *e.g.*, at or near the scene of the crime versus at a police station, during an ongoing emergency or afterwards—are clearly matters of objective fact. The statements and actions of the parties must also be objectively evaluated. That is, the relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred.

Id. (emphasis added).

Notably, the Bryant Court explained the logic behind why the ongoing emergency circumstance was considered nontestimonial and not subject to the Confrontation Clause bar, and the Court compared that logic to the logic behind the excited utterance exception to the hearsay rule:

Implicit in Davis is the idea that because the prospect of fabrication in statements given for the primary purpose of resolving that emergency is presumably significantly diminished, the Confrontation Clause does not require such statements to be subject to the crucible of cross-examination.

This logic is not unlike that justifying the excited utterance exception in hearsay law. Statements “relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition,” are considered reliable because the declarant, in the excitement, presumably cannot form a falsehood.

Id. Further, the Court in Bryant noted that whether an ongoing emergency exists is only one factor – although an important factor – used in the primary purpose analysis. Id. at 1160. Another factor courts should take in account is the formality of the encounter between the victim and the police. Id.

In the case at hand, the victim’s statements were nontestimonial because the primary purpose of the interrogation was to enable police assistance to meet an ongoing

emergency. Thus, the Confrontation Clause did not bar the admission of the victim's statements.

Objectively viewing the circumstances in which the police encounter occurred, the following facts demonstrate why Hammon's case in the Davis opinion is distinguishable from this case:

- The victim was visibly upset when the officer arrived at the scene. (R. p. 3.)
- Appellant was highly intoxicated and hostile towards the officer. (R. p. 3.)
- Appellant told the officer it was his house and he would do anything he wished. (R. p. 3.)

Unlike the domestic disturbance in Hammon's case, the domestic disturbance in this case was still ongoing. Further, unlike the victim in Hammon's case, the victim in this case was very upset, indicating that there was an ongoing dispute when the police arrived. Appellant's comment to the officer that it was his house and he would do what he wished indicated that Appellant was not done fighting. Also, the fact the police found a gun in Appellant's possession heightened the scope of the emergency. See Bryant, 131 S.Ct. at 1158 ("The Michigan Supreme Court also did not appreciate that the duration and scope of an emergency may depend in part on the type of weapon employed. The court relied on Davis and Hammon, in which the assailants used their fists, as controlling the scope of the emergency here, which involved the use of a gun.").

Although separating Hammon from the victim was sufficient to end the emergency in that case, the same cannot be said with respect to this case because Appellant had two guns in his possession. See Bryant, 131 S.Ct. at 1159 ("Hammon was

armed only with his fists when he attacked his wife, so removing [his wife] to a separate room was sufficient to end the emergency. If [Hammon] had been reported to be armed with a gun, however, separation by a single household wall might not have been sufficient to end the emergency.”). Thus, the fact Appellant had a gun in his possession demonstrates the dangerousness of the situation, not only for the victims involved but also for the responding officers. In contrast to Hammon’s case, where the situation was subdued by the time the officers arrived at the scene, the domestic dispute in this case was far from subdued at the time the officers arrived.

Additionally, the fact the trial judge ruled the statements admissible under the excited utterance exception to the hearsay rule³ illustrates the freshness of the domestic disturbance. See generally Bryant, 131 S.Ct. at 1156 (noting that the underlining rational for the ongoing emergency rule was similar to the rational for the excited utterance rule).

Finally, with respect to the formality factor in the primary purpose analysis, there is no evidence in the record that the encounter between the victim and the police was formal. See Bryant, 131 S.Ct. at 1160 (“[F]ormality suggests the absence of an emergency[.]”). The police encounter occurred at the scene of the crime not at a police station; thus, there is some evidence in the record that the encounter was informal. Due to the limited record in this case,⁴ it is difficult to ascertain whether or not the police asked

³ Rule 803 of the South Carolina Rules of evidence provides numerous exceptions to the rule generally prohibiting the admission of hearsay. One of the exceptions listed in Rule 803 is an excited utterance. An excited utterance is “[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.” Rule 803 (2), SCRE. Notably, Appellant does not challenge the trial judge’s ruling that the victim’s statements were excited utterances.

⁴ The burden is on appellant to provide a sufficient record for review. State v. Mitchell, 330 S.C. 189, 194, 498 S.E.2d 642, 644 (1998); State v. Williams, 321 S.C. 455, 469 S.E.2d 49 (1996). Appellant has the burden of presenting an adequate record that is sufficiently complete so that the appellate court is able to review the lower court’s actions. State v. Knighton, 334 S.C. 125, 136, 512 S.E.2d 117, 123 (Ct. App. 1999).

formal questions. See Id. at 1160-1161 (“As the Michigan Supreme Court correctly recognized, Davis requires a combined inquiry that accounts for both the declarant and the interrogator. In many instances, the primary purpose of the interrogation will be most accurately ascertained by looking to the contents of both the questions and the answers.”) (internal citations omitted).

In summary, Appellant’s issue on appeal is not preserved because Appellant failed to obtain a ruling on his Crawford objection. But regardless of preservation, the victim’s statements were nontestimonial; therefore, not subject to the Confrontation Clause bar.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

JULIE KATE KEENEY
Assistant Attorney General

BY: Julie Kate Keeney
Julie Kate Keeney
S.C. Bar # 100145

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

November 5, 2013

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Orangeburg County
Honorable Edgar Dickson, Circuit Court Judge
Appellate Case No. 2012-211961

THE STATE,

Respondent,

vs.

HENRY HAYGOOD,

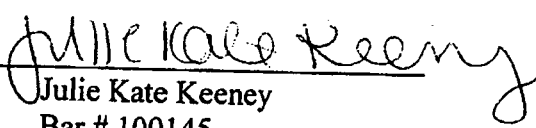
Appellant.

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."

ALAN WILSON
Attorney General

JULIE KATE KEENEY
Assistant Attorney General
S.C. Bar # 100145

BY: 
Julie Kate Keeney
Bar # 100145

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

November 5, 2013

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Orangeburg County
Honorable Edgar Dickson, Circuit Court Judge
Appellate Case No. 2012-211961

THE STATE,

Respondent,

vs.

HENRY HAYGOOD,

Appellant.

PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Final Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Breen R. Stevens, Esquire
First Circuit Public Defender's Office
Post Office Box 1112
Orangeburg, SC 29116

I further certify that all parties required by Rule to be served have been served.

This 5th day of November, 2013.

Ellen DuBois

ELLEN DUBOIS
Legal Assistant

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY

Honorable Edgar Dickson, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

HENRY HAYGOOD,

APPELLANT.

Appellate Case No. 2012-211961

RECORD ON APPEAL

BREEN R. STEVENS
First Circuit Public Defender Office
P.O. Box 1112
Orangeburg, SC 29116
(803) 536-5682
Attorney for Appellant

ALAN WILSON
Attorney General

JULIE KATE KEENEY
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211
(803) 734-3727
Attorneys for Respondent

RECEIVED
OCT 1 2013
SC Court of Appeals

INDEX

Index	i
Magistrate's Return.....	1
Circuit Court Appellate Transcript	16
Circuit Court Order Denying Appeal	29
Certificate of Appellant.....	31

2010-CP-38-00314

STATE OF SOUTH CAROLINA)

COUNTY OF ORANGEBURG)

STATE OF SOUTH CAROLINA)

V.)

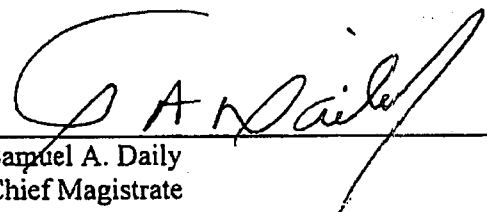
HENRY HAYGOOD)
421 TECZA DRIVE)
ORANGEBURG, SC 29115)

APPELLANT)

IN THE CIRCUIT COURT

WARRANT NO: K-238481

RETURN

2010 AUG 18 1 P 3:11
FILED FOR RECORD
WINNIE B CLARK
CLERK OF COURT
ORANGEBURG, SC

Samuel A. Daily
Chief Magistrate

January 11, 2009

STATE OF SOUTH CAROLINA
COURT

IN THE CIRCUIT

COUNTY OF ORANGEBURG

WARRANT NO: k-238481

THE STATE OF SOUTH CAROLINA

MAGISTRATE'S RETURN
OF CRIMINAL APPEAL

V.

HENRY HAYGOOD
421 TECZA DRIVE
ORANGEBURG, SC 29115
DEFENDANT

FILED FOR RECORD
WILLIAM B. CLARK
CLERK OF COURT
ORANGEBURG, SC

2010 AUG 18 1 P 3:21

THIS MATTER IS ON APPEAL FROM REGIONAL MAGISTRATE
CRIMINAL DOMESTIC VIOLENCE COURT OF ORANGEBURG COUNTY,
SOUTH CAROLINA, THE HONORABLE JUDGE SAMUEL A. DAILY,
PRESIDING JUDGE.

THE DEFENDANT, HENRY HAYGOOD, WAS CHARGED WITH
VIOLATING S.C. CODE ANN. 16-25-0065, WHICH IS COMMONLY
REFERRED TO AS CRIMINAL DOMESTIC VIOLENCE HIGH &
AGGRAVATED NATURE. (CDVHAN), ON APRIL 1, 2008.

ON JUNE 8, 2009 THE CHARGE WAS REMANDED AND CHARGED WITH
VIOLATING S.C. CODE ANN. 16-25-0020, WHICH IS COMMONLY REFERRED
TO AS CRIMINAL DOMESTIC VIOLENCE 1ST. (CDV 1ST.)

ON JUNE 22, 2009 A JURY TRIAL WAS REQUESTED BY ASSISTANT PUBLIC
DEFENDER, JILLIAN D. ULLMAN ON BEHALF OF DEFENDANT.

ON SEPTEMBER 4, 2009 THE REQUEST FOR A JURY STRICKING AND JURY
TRIAL WAS CANCELED AND THE REQUEST WAS MADE FOR A BENCH
TRIAL.

THIS MATTER WAS HEARD IN A BENCH TRIAL ON SEPTEMBER 25,
2009 AND THE NOTICE OF APPEAL FILED ON OCTOBER 2, 2009.

THE PROCEEDINGS WERE:

{ X } RECORDED ELECTRONICALLY.

LIST OF STATES WITNESS (ES):

(1) LT. LACRA JENKINS (ORANGEBURG COUNTY SHERIFF'S OFFICE)

LIST OF DEFENDANT'S WITNESS (ES):

1. THE DEFENSE OFFERED NO WITNESS, TESTIMONY OR EVIDENCE AT TRIAL.

A SUMMARY OF THE STATE'S WITNESS TESTIMONY AT TRIAL:

1. THE STATED CALLED LT. LACRA JENKINS AS THE ONLY WITNESS PRESENT FOR THE ABOVE TRIAL. AFTER BEING PUT UNDER OATH, TESTIFIED AS TO WHAT TOOK PLACE DURING HIS INITIAL INVESTIGATION AFTER HE RESPONDED TO AN ALLEDGED CDV CALL AT 421 TECZA DRIVE, ORANGEBURG, SC 29115 ON MARCH 31, 2008. UPON ARRIVAL HE STATED THAT THE VICTIM TOWANNA HAYGOOD WAS VERY UPSET. DURING HIS INVESTIGATION HE STATED THAT THE ALLEDGE VICTIM, TOWANNA HAYGOOD STATED TO HIM THAT HER HUSBAND BEGIN FIGHTING HER IN THE BEDROOM AND HE STATED TO HER THAT HE WAS GOING TO KILL HER. LT. JENKINS THEN TESTIFIED THAT MRS. HAYGOOD STATED THAT MR. HAYGOOD WENT TO THE BEDROOM CLOSET AND RETRIEVED A BROWN IN COLOR SHOTGUN AND THAT HER 14 YEARS OLD SON STRUGGLE WITH HIM TO TAKE THE SHOTGUN AWAY FROM HIM. MRS. HAYGOOD THEN TOLD HIM THAT MR. HAYGOOD REACHED IN HIS PANTS POCKET WHERE HE KEEPS A SMALL HANDGUN AT TIMES. SHE THEN GRABED HIS PANTS POCKET CAUSING SOME SMALL BULLETS TO FALL TO THE FLOOR. SHE STATED TO HIM THAT MR. HAYGOOD THEN WENT OUTSIDE THE RESIDENT BUT CAME BACK AND PUNCH A HOLE IN THE BEDROOM CLOSET. LT. JENKINS STATED THAT WHEN HE ARRIVED ON THE SECENE HE OBSERVED MR. HAYGOOD BEING HIGHLY INTOXICATED. WHEN HE TRIED TO TALKING TO HIM HE BEGIN USING PROFANITY, STATING THAT THIS WAS HIS HOUSE AND THAT HE WOULD DO ANYTHING HE WISHES. LT. JENKINS FURTHER TESTIFIED THAT HENRY AND TOWANNA HAYGOOD WERE MARRIED AT THE TIME OF THE INCIDENT AND HAS A CHILD IN COMMON.

THE DEFENDANT MADE THE FOLLOWING MOTIONS OR OBJECTIONS THROUGH HIS ATTORNEY:

1. DURING THE TRIAL OBJECTIONS WERE MADE BY THE DEFENSE ATTORNEY AS TO THE STATE'S INTRODUCTION OF VERBAL STATEMENTS MADE BY THE ALLEDGED VICTIM TO THE INVESTIGATING OFFICER.
2. OBJECTED TO STATEMENTS PRETAINING TO ALLEGATIONS OF WHAT THE DEFENDANT'S DID ON THE DATE OF QUESTION.

A SUMMARY OF THE STATES' POSITION ON EACH MOTION:

1. THE STATE ARGUMENT TO THE MOTION IS THAT, THE OFFICER WAS DISPATCHED TO AN ALLEDGED CRIMINAL DOMESTIC VIOLENCE INCIDENT AND DID FOLLOWING PROCEDURE AS IT RELATES TO THE CDV STATUE IN SOUTH CAROLINA. HIS DUTY WAS TO DO AN INVESTIGATION OF THE INCIDENT AND BE PREPARED TO TESTFY AS TO THE FACTS (DURING HIS INVESTIGATION) AT TRIAL.
2. THE STATE ARGUED THAT THE ALLEGED INCIDENT WAS A PART OF THE OFFICE'S INVESTIGATION IS ANY CDV CASE IN SC AND THAT THIS WA AN ACT OF EXCIDED UTTERANCE AND WAS NOT AN EXCEPTION TO THE HEARSAY RULE.

THE COURT'S RULING TO THE MOTIONS ARE AS FOLLOWS:

1. THE COURT OVERRULED THE DEFENDANTS OBJECTIONS AND AGREED WITH THE STATE THAT IN SOME CRIMINAL DOMESTIC VIOLENCE THE INVESTIGATING OFFICER OF THE ALLEDGED INCIDENT SHOULD BE ALLOWED TO TESTIFY AS TO THE FINDING OF FACTS DURING HIS INVESTIGATION.

THE STATE OFFERED THE FOLLOWING ITEMS INTO EVIDENCE:

1. ONE BROWN IN COLOR SHOTGUN AS STATES EXIBIT #1 AND TAGGED AS ITEM # 2008-004815.
2. TESTIMONY OF LT. LACRA JENKINS OF THE ORANGEBURG COUNTY SHERIFF'S OFFICE.
3. _____
4. _____
5. _____

THE DEFENDANT RAISED THE FOLLOWING OBJECTIONS OF THE ITEMS THAT STATE SOUGHT TO INTRODUCE INTO EVIDENCE:

1. THE DEFENSE RAISED NO OBJECTIONS AS TO THE SHOTGUN BEING INTRODUCED INTO EVIDENCE.
2. THE DEFENSE OBJECTED TO THE STATE VERBAL STATEMENT OF THE INVESTIGATING OFFICER.
3. THE DEFENSE OBJECTED TO THE STATEMENT PERTAINING TO WHAT THE ALLEGEDLY DID ON THE DATE OF QUESTION.
4. _____
5. _____

THE STATE RAISED THE FOLLOWING OBJECTIONS TO THE ITEMS THAT THE DEFENDANT SOUGHT TO INTRODUCE INTO EVIDENCE:

1. THE DEFENSE INTRODUCED NO EVIDENCE.
2. _____
3. _____
4. _____

A SUMMARY OF THE STATE'S AND DEFENDANT'S POSITION AND THE COURT'S RULING ON THE OBJECTION IS ATTACHED.

THE DEFENDANT WAS FOUND GUILTY OF VIOLATING S.C. CODE ANN. 16-25-0020, COMMONLY KNOWN AS CRIMINAL DOMESTIC VIOLENCE 1ST. (CDV 1ST.), AND THE COURT IMPOSED THE FOLLOWING SENTENCE:

30 DAYS IN JAIL OR \$2,130.00 SUSPENDED UPON COMPLETION OF THE CASA BATTERER'S INTERVENTION PROGRAM.

THE DEFENDANT THROUGH HIS ATTORNEY REQUESTED TO SERVE THE 30 DAYS SENTENCE ON THE WEEKEND AND TO BE (CREDITED WITH 7 DAYS). ALSO, SENTENCING WAS TO BEGIN IN 30 DAYS FROM 9/25/09 WAS "GRANTED".

ON OCTOBER 23, 2009 AN ORDER STAYING SENTENCE WAS FILED BY THE DEFENDANT'S ATTORNEY AND "GRANTED" BY THE COURT.

ATTACHED ARE COPIES OF THE ITEMS WHICH ARE CHECKED.

{ X } ARREST WARRANT NO. K-238481 AND ALL BONDING PROCEEDING PAPERS.

{ X } COURT DISPOSITION SHEET

{ X } LIST OF WITNESS AND A SUMMARY OF THEIR TESTIMONY.

{ X } LIST OF MOTIONS, A SUMMARY OF THE PARTIES' POSITIONS, AND THE COURT'S RULING.

{ X } LIST OF ITEMS OFFERED INTO EVIDENCE , A SUMMARY OF OBJECTIONS, AND THE COURT RULING.

{ X } EXIBITS PUT INTO RECORD.

{ X } THE NOTICE OF APPEAL.

{ X } ACCEPTANCE OF SERVICE

{ X } WRIT OF MANDAMUS

{ X } ORDER STAYING SENTENCE

K- 238481

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of
ORANGEBURG COUNTY

THE STATE 2008004815
against

HENRY HAYGOOD III

ress: 421 TECZA DRIVE
ORANGEBURG SC 29115

ne: SSN:
M Race: B Height: 5 Weight: 245

State: DL#:
k: 10/31/72 Agency ORI#:

ecuting Agency: SHERIFF'S DEPARTMENT

ecuting Officer: DEP L JENKINS

nse: CRIMINAL DOMESTIC

LENCE HIGH & Offense Code: 2390

e/Ordinance Sec: 16-25-0065

Warrant is CERTIFIED FOR SERVICE in the
County/ ☐ Municipality of

The accused
to be arrested and brought before me to be
t with according to law.

Signature of Judge (L.S.)

RETURN

opy of this arrest warrant was delivered to
ndant HENRY HAYGOOD (III)

Signature of Constable/Law Enforcement Officer

URN WARRANT TO:

ANGEBURG MAGISTRATES 1 DOREMUS
- BOX 9000
ANGEBURG SC 29116

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of
ORANGEBURG COUNTY

AFFIDAVIT

Form Approved by
S.C. Attorney General
April 21, 2003
SCCA 618

Personally appeared before me the affiant DEP L JENKINS who
being duly sworn deposes and says that defendant HENRY HAYGOOD (III)
did within this county and state on 3/31/08 violate the criminal laws of the

State of South Carolina (or ordinance of ☒ County/ ☐ Municipality of ORANGEBURG COUNTY)
in the following particulars:

DESCRIPTION OF OFFENSE: CRIMINAL DOMESTIC VIOLENCE HIGH &
AGGRAVATED NATURE

I further state that there is probable cause to believe that the defendant named above did commit
the crime set forth and that probable cause is based on the following facts:
THAT ON OR ABOUT MARCH 31, 2008 BETWEEN 2100 HRS AND 2140 HRS,
LOCATED AT 421 TECZA DRIVE, ORANGEBURG, SC ONE HENRY HAYGOOD, III
DID COMMIT THE CRIME OF CRIMINAL DOMESTIC VIOLENCE HIGH AND
AGGRAVATED NATURE IN THAT HE DID PULL THE VICTIM, TAWANNA HAYGOOD
OFF THE BED WHILE YELLING THAT HE WAS GOING TO KILL THE VICTIM.
DEFENDANT RETRIEVED A BROWN IN COLOR SHOTGUN, SERIAL # 110724,
FROM THE BEDROOM CLOSET. THE VICTIM WAS ABLE TO WRESTLE THE
SHOTGUN AWAY FROM THE DEFENDANT BEFORE HE COULD DISCHARGE IT. THE
VICTIM AND DEFENDANT ARE MARRIED. THIS INCIDENT OCCURRED IN THE
COUNTY OF ORANGEBURG, STATE OF SOUTH CAROLINA.

Signature of Affiant

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of
ORANGEBURG COUNTY

Affiant's Address P.O. BOX 9000
ORANGEBURG SC 29115
Affiant's Telephone 803 531-4647

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that
on 3/31/08 defendant HENRY HAYGOOD (III)
did violate the criminal laws of the State of South Carolina (or ordinance of

☒ County/ ☐ Municipality of ORANGEBURG COUNTY) as set forth below:

DESCRIPTION OF OFFENSE: CRIMINAL DOMESTIC VIOLENCE HIGH &
AGGRAVATED NATURE

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said
defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to
the defendant at the time of its execution, or as soon thereafter as is practicable.

Sworn to and subscribed before me

on 4/01/08
Peggy D. Doremus (L.S.)
Signature of Issuing Judge

Judge Code: 721

Judge's Address P.O. BOX 9000
ORANGEBURG SC 29116

Judge's Telephone 803 533-5843
Issuing Court: ☒ Magistrate ☐ Municipal ☐ Circuit

ORIGINAL

COURT DISPOSITION

Court Date: SEPTEMBER 25, 2009 @ 10:00 AM

Defendant Name: HENRY HAYGOOD III

Present: ☒ Not Present: ☐

Defendant Attorney: Jill Ullman

Case #: K238481

Charge: CRIMINAL DOMESTIC VIOLENCE

Affiant Name: L. JENKINS

Present: ☒ Not Present: ☐

Victim Name: TAWANNA HAYGOOD

Present: ☐ Not Present: ☒

Victim/Affiant Attorney: _____

Presiding Judge: S.A. Daily (L.S.)

Dispositions

☐ Pled Guilty ☒ Bench Trial ☐ Tried in absence

☐ Forfeited Bond ☐ Dismissed

☐ Nolo Contendere

☐ Not Guilty

☒ Guilty (30 Days Suspended / \$2130 Suspended /

CASA or New Directions)

☐ Guilty (Time Served)

☐ Guilty (Committed to jail for 30 days)

☐ Other _____

Notes: 9 Shot Gun was place in evidence

2008 00415

* Appeal by Attorney Ullman = defendant wants to do
time - Judge Daily granted - ~~order~~ time to be served
on weekends starting Friday @ 6pm - Sunday @ 6pm
time to be served is 23 days (Credit time served 7 days)
 Ⓢ This is to begin 30 day from today (9-25-09)

FILED FOR RECORD
 WINIFRED CLARK
 CLERK OF COURT
 ORANGEBURG, SC
 2009 AUG 19 10 32

THE STATE OF SOUTH CAROLINA)
COUNTY OF ORANGEBURG)

THE COUNTY)

v.)

HENRY HAYGOOD,)

DEFENDANT.)

IN THE MAGISTRATE'S COURT

Charge(s): CDVHAN
Warrant/Indictment Nos.: K-237481

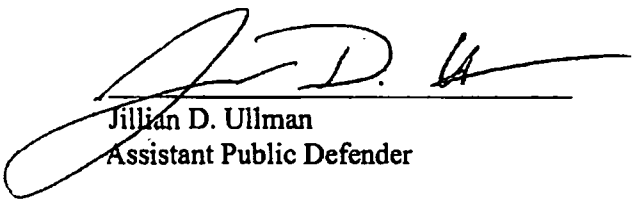
NOTICE OF APPEAL

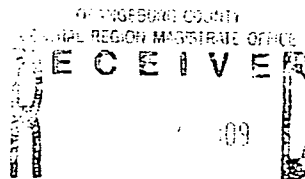
Defendant Henry Haygood, by and through his attorney, is hereby appealing the conviction of the above-referenced warrant entered on September 25, 2009. As required by S.C. Statute 22-3-790, please file this notice, together with the record, a statement of all the proceedings in the case, and the testimony taken at the trial in the office of the Clerk of Circuit Court within ten (10) days from today. Following this notice is a statement of the grounds for the appeal.

The defendant requests that the Court of Common Pleas grant oral argument, overturn the conviction, and remand the case for a new trial.

Respectfully Submitted:

October 2, 2009


Jillian D. Ullman
Assistant Public Defender



BY _____

STATEMENT OF GROUNDS FOR APPEAL

Procedural History:

This case was tried before the court on September 25, 2009. During the trial an objection was made by the defense to the state's introduction of verbal statements allegedly made by the alleged victim to the investigating officer. The objected to statements pertained to allegations of what the defendant allegedly did on the date in question. The court overruled defendant's objections and admitted the statement under the "excited utterance" exception to the hearsay rule. It should be noted that (1) the alleged victim was not present for the trial of the state; (2) the alleged victim resides in Orangeburg County and was available for trial; (3) the state did not subpoena the victim; (4) prior to the trial of the case, the alleged victim provided the defense with two written statements indicating (a) that she did not recall the events in question and (b) that she did not want the defendant to be prosecuted; and (5) that these statements were shown to the state prior to the case being remanded to the Magistrate Court.

The grounds for this appeal are as follows:

1. The introduction of the alleged verbal statements violated Defendant's Sixth Amendment right to confront the witnesses against him.

The Sixth Amendment Confrontation Clause provides that, "in all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him" In Crawford v. Washington, 541 U.S. 36 (2004), the United States Supreme Court has mandated that where testimonial statements are at issue, the only indicia of reliability sufficient to satisfy constitutional demands is confrontation. In the present case, the verbal statements to law enforcement constitute testimonial statements. In Crawford, the court stated that, testimony is typically "a solemn declaration or affirmation made for the purpose of establishing or proving some fact." "An accuser who makes a formal statement to government officers bears testimony..." 541 U.S. 36 (2004). In the present case, the alleged statements made by the victim constitute formal statements made to government officers. Because the statements were

testimonial, confrontation was mandatory under the 6th Amendment.

2. The alleged victim was available for trial; it was error to admit the verbal statements of the victim.

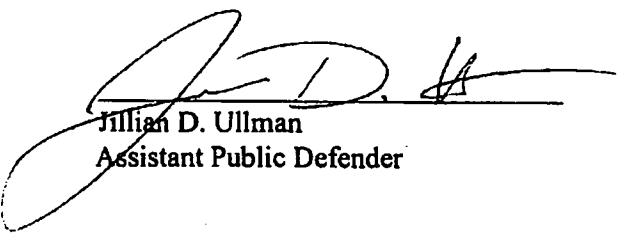
Out of court testimonial statements are admissible under the 6th Amendment only if: (1) the witness was unavailable at the trial of the case and (2) the defense had an opportunity prior to trial to cross examine the witness. Crawford v. Washington, 541 U.S. 36 (2004). In the present case the alleged victim was not "unavailable" No effort was made by the state to compel the testimony of this witness nor were efforts made to ensure this witness's attendance at the trial of this case. Furthermore, the defense had no opportunity to cross examine the victim prior to the trial of this case.

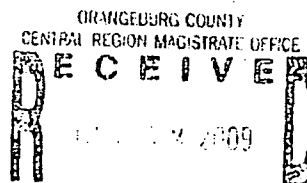
CONCLUSION

For the foregoing reasons, Defendant respectfully requests the Court to overturn the conviction and remand the case to Magistrate's Court for a new trial.

Respectfully Submitted:

October 2, 2009


Jillian D. Ullman
Assistant Public Defender



BY _____

THE STATE OF SOUTH CAROLINA)
 COUNTY OF ORANGEBURG)

IN THE MAGISTRATE'S COURT

Charge(s): CDV-1st
 Warrant/Indictment Nos.: K-238481

THE COUNTY)

v.)

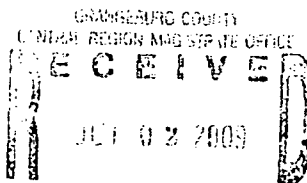
HENRY HAYGOOD,)

DEFENDANT.)

ACCEPTANCE OF SERVICE

Due and legal service of the within NOTICE OF APPEAL with a
 STATEMENT OF GROUNDS by the attorney for the above defendant, in the above
 entitled action is hereby accepted and a copy retained by Chief Magistrate Samuel Daily,
 in Orangeburg, South Carolina, this 2nd day of October 2009.

Samuel Bell Coleman
 Chief Magistrate Samuel Daily



BY _____

THE STATE OF SOUTH CAROLINA)
 COUNTY OF ORANGEBURG)

THE STATE)

v.)

HENRY HAYGOOD,)

DEFENDANT.)

IN THE COURT OF COMMON PLEAS
 FIRST JUDICIAL CIRCUIT

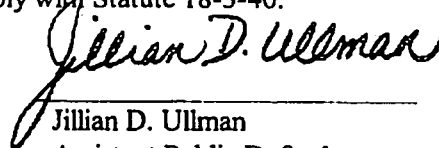
Charge(s): CDV-1st
 Warrant/Indictment Nos.: K-238481

WRIT OF MANDAMUS

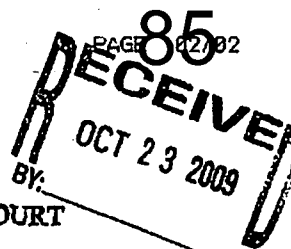
Now comes the Defendant, by and through his attorney, Jillian D. Ullman, respectfully requesting this Court mandate the Magistrate Court of Orangeburg County comply with S.C. Code 18-3-40.

On October 2, 2009, the Defendant filed a Notice of Appeal and Statement of Grounds from a bench trial held on September 25, 2009 in the Magistrate Court. S.C. Code 18-3-40 requires the Magistrate Court file the notice of appeal, the record, a statement of all proceedings in the case, and the testimony taken at the trial in the office of the clerk of circuit court. As of October 21, 2009, the Magistrate Court has not complied with this requirement. Defendant has a right to appeal the conviction and sentence of the Magistrate Court. S.C. Code 18-3-10. Unless the Magistrate complies with S.C. Code 18-3-40, Defendant's appeal cannot be heard.

For the foregoing reasons, Defendant respectfully requests this Court mandate the Magistrate Court of Orangeburg County comply with Statute 18-3-40.


 Jillian D. Ullman
 Assistant Public Defender

Date: October 22, 09
 Orangeburg, South Carolina



THE STATE OF SOUTH CAROLINA)
COUNTY OF ORANGEBURG)

THE STATE)

v.)

HENRY HAYGOOD,)

DEFENDANT.)

IN THE MAGISTRATE'S COURT

Charge(s): CDV-1st
Warrant/Indictment Nos.: K-238481

ORDER STAYING SENTENCE

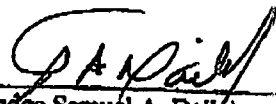
At the conclusion of a bench trial, Defendant was found guilty of CDV 1st on September 25, 2009. Defendant was sentenced to 30 days incarceration to be served on the weekends with credit for 7 days time served. Defendant immediately informed the Court of his intent to appeal the conviction. Defendant, by and through his attorney, requested the court allow at least 30 days for the Court of Common Pleas to hear the appeal. The Magistrate Court granted this request, requiring Defendant report to the Orangeburg County Detention Center on October 23, 2009.

On October 2, 2009, Defendant, by and through his attorney, filed a Notice of Appeal and Statement of Grounds in the Magistrate Court. Receipt of this Notice by the Magistrate Court stays all prior orders of this Court, until the appeal is heard by the Court of Common Pleas. Therefore, Defendant, Henry Haygood, does not have to report to the Orangeburg County Detention Center on October 23, 2009. This Court will notify the Orangeburg County Detention Center when the sentence is re-imposed, so that they may expect Mr. Haygood's appearance. Until the Orangeburg County Detention Center receives notice from this Court, Mr. Henry Haygood does not have to report to the Orangeburg County Detention.

IT IS SO ORDERED.

October 23, 2009.

OCT 23 2009 RCUD


Judge Samuel A. Daily

INDEX

Index	i
Magistrate's Return.....	1
Circuit Court Appellate Transcript	16
Circuit Court Order Denying Appeal.....	29
Certificate of Appellant.....	31

2010-CP-38-00314

STATE OF SOUTH CAROLINA)

COUNTY OF ORANGEBURG)

STATE OF SOUTH CAROLINA)

V.)

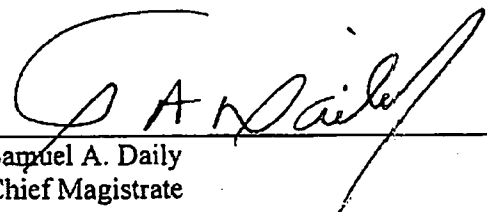
HENRY HAYGOOD)
421 TECZA DRIVE)
ORANGEBURG, SC 29115)

APPELLANT)

IN THE CIRCUIT COURT

WARRANT NO: K-238481

RETURN

2010 AUG 18 1P 3:11
FILED FOR REC'D
WINNIE B. CLARK
CLERK OF COURT
ORANGEBURG, SC

Samuel A. Daily
Chief Magistrate

January 11, 2009

STATE OF SOUTH CAROLINA
COURT

IN THE CIRCUIT

COUNTY OF ORANGEBURG

WARRANT NO: k-238481

THE STATE OF SOUTH CAROLINA

MAGISTRATE'S RETURN
OF CRIMINAL APPEAL

V.

HENRY HAYGOOD
421 TECZA DRIVE
ORANGEBURG, SC 29115
DEFENDANT

FILED FOR RECORD
VINNIE B. CLARK
CLERK OF COURT
ORANGEBURG, SC

2010 AUG 18 10 3 21

THIS MATTER IS ON APPEAL FROM REGIONAL MAGISTRATE
CRIMINAL DOMESTIC VIOLENCE COURT OF ORANGEBURG COUNTY,
SOUTH CAROLINA, THE HONORABLE JUDGE SAMUEL A. DAILY,
PRESIDING JUDGE.

THE DEFENDANT, HENRY HAYGOOD, WAS CHARGED WITH
VIOLATING S.C. CODE ANN. 16-25-0065, WHICH IS COMMONLY
REFERRED TO AS CRIMINAL DOMESTIC VIOLENCE HIGH &
AGGRAVATED NATURE. (CDVHAN), ON APRIL 1, 2008.

ON JUNE 8, 2009 THE CHARGE WAS REMANDED AND CHARGED WITH
VIOLATING S.C. CODE ANN. 16-25-0020, WHICH IS COMMONLY REFERRED
TO AS CRIMINAL DOMESTIC VIOLENCE 1ST. (CDV 1ST.)

ON JUNE 22, 2009 A JURY TRIAL WAS REQUESTED BY ASSISTANT PUBLIC
DEFENDER, JILLIAN D. ULLMAN ON BEHALF OF DEFENDANT.

ON SEPTEMBER 4, 2009 THE REQUEST FOR A JURY STRICKING AND JURY
TRIAL WAS CANCELED AND THE REQUEST WAS MADE FOR A BENCH
TRIAL.

THIS MATTER WAS HEARD IN A BENCH TRIAL ON SEPTEMBER 25,
2009 AND THE NOTICE OF APPEAL FILED ON OCTOBER 2, 2009.

THE PROCEEDINGS WERE:

{ X } RECORDED ELECTRONICALLY.

LIST OF STATES WITNESS (ES):

- (1) LT. LACRA JENKINS (ORANGEBURG COUNTY SHERIFF'S OFFICE)

LIST OF DEFENDANT'S WITNESS (ES):

1. THE DEFENSE OFFERED NO WITNESS, TESTIMONY OR EVIDENCE AT TRIAL.

A SUMMARY OF THE STATE'S WITNESS TESTIMONY AT TRIAL:

1. THE STATED CALLED LT. LACRA JENKINS AS THE ONLY WITNESS PRESENT FOR THE ABOVE TRIAL. AFTER BEING PUT UNDER OATH, TESTIFIED AS TO WHAT TOOK PLACE DURING HIS INITIAL INVESTIGATION AFTER HE RESPONDED TO AN ALLEDGED CDV CALL AT 421 TECZA DRIVE, ORANGEBURG, SC 29115 ON MARCH 31, 2008. UPON ARRIVAL HE STATED THAT THE VICTIM TOWANNA HAYGOOD WAS VERY UPSET. DURING HIS INVESTIGATION HE STATED THAT THE ALLEDGE VICTIM, TOWANNA HAYGOOD STATED TO HIM THAT HER HUSBAND BEGIN FIGHTING HER IN THE BEDROOM AND HE STATED TO HER THAT HE WAS GOING TO KILL HER. LT. JENKINS THEN TESTIFIED THAT MRS. HAYGOOD STATED THAT MR. HAYGOOD WENT TO THE BEDROOM CLOSET AND RETRIEVED A BROWN IN COLOR SHOTGUN AND THAT HER 14 YEARS OLD SON STRUGGLE WITH HIM TO TAKE THE SHOTGUN AWAY FROM HIM. MRS. HAYGOOD THEN TOLD HIM THAT MR. HAYGOOD REACHED IN HIS PANTS POCKET WHERE HE KEEPS A SMALL HANDGUN AT TIMES. SHE THEN GRABED HIS PANTS POCKET CAUSING SOME SMALL BULLETS TO FALL TO THE FLOOR. SHE STATED TO HIM THAT MR. HAYGOOD THEN WENT OUTSIDE THE RESIDENT BUT CAME BACK AND PUNCH A HOLE IN THE BEDROOM CLOSET. LT. JENKINS STATED THAT WHEN HE ARRIVED ON THE SECENE HE OBSERVED MR. HAYGOOD BEING HIGHLY INTOXICATED. WHEN HE TRIED TO TALKING TO HIM HE BEGIN USING PROFANITY, STATING THAT THIS WAS HIS HOUSE AND THAT HE WOULD DO ANYTHING HE WISHES. LT. JENKINS FURTHER TESTIFIED THAT HENRY AND TOWANNA HAYGOOD WERE MARRIED AT THE TIME OF THE INCIDENT AND HAS A CHILD IN COMMON.

THE DEFENDANT MADE THE FOLLOWING MOTIONS OR OBJECTIONS THROUGH HIS ATTORNEY:

1. DURING THE TRIAL OBJECTIONS WERE MADE BY THE DEFENSE ATTORNEY AS TO THE STATE'S INTRODUCTION OF VERBAL STATEMENTS MADE BY THE ALLEDGED VICTIM TO THE INVESTIGATING OFFICER.
2. OBJECTED TO STATEMENTS PRETAINING TO ALLEGATIONS OF WHAT THE DEFENDANT'S DID ON THE DATE OF QUESTION.

A SUMMARY OF THE STATES' POSITION ON EACH MOTION:

1. THE STATE ARGUMENT TO THE MOTION IS THAT, THE OFFICER WAS DISPATCHED TO AN ALLEDGED CRIMINAL DOMESTIC VIOLENCE INCIDENT AND DID FOLLOWING PROCEDURE AS IT RELATES TO THE CDV STATUE IN SOUTH CAROLINA. HIS DUTY WAS TO DO AN INVESTIGATION OF THE INCIDENT AND BE PREPARED TO TESTFY AS TO THE FACTS (DURING HIS INVESTIGATION) AT TRIAL.
2. THE STATE ARGUED THAT THE ALLEGED INCIDENT WAS A PART OF THE OFFICE'S INVESTIGATION IS ANY CDV CASE IN SC AND THAT THIS WA AN ACT OF EXCIDED UTTERANCE AND WAS NOT AN EXCEPTION TO THE HEARSAY RULE.

THE COURT'S RULING TO THE MOTIONS ARE AS FOLLOWS:

1. THE COURT OVERRULED THE DEFENDANTS OBJECTIONS AND AGREED WITH THE STATE THAT IN SOME CRIMINAL DOMESTIC VIOLENCE THE INVESTIGATING OFFICER OF THE ALLEDGED INCIDENT SHOULD BE ALLOWED TO TESTIFY AS TO THE FINDING OF FACTS DURING HIS INVESTIGATION.

THE STATE OFFERED THE FOLLOWING ITEMS INTO EVIDENCE:

1. ONE BROWN IN COLOR SHOTGUN AS STATES EXIBIT #1 AND TAGGED AS ITEM # 2008-004815.
2. TESTIMONY OF LT. LACRA JENKINS OF THE ORANGEBURG COUNTY SHERIFF'S OFFICE.
3. _____
4. _____
5. _____

THE DEFENDANT RAISED THE FOLLOWING OBJECTIONS OF THE ITEMS THAT STATE SOUGHT TO INTRODUCE INTO EVIDENCE:

1. THE DEFENSE RAISED NO OBJECTIONS AS TO THE SHOTGUN BEING INTRODUCED INTO EVIDENCE.
2. THE DEFENSE OBJECTED TO THE STATE VERBAL STATEMENT OF THE INVESTIGATING OFFICER.
3. THE DEFENSE OBJECTED TO THE STATEMENT PERTAINING TO WHAT THE ALLEGEDLY DID ON THE DATE OF QUESTION.
4. _____
5. _____

THE STATE RAISED THE FOLLOWING OBJECTIONS TO THE ITEMS THAT THE DEFENDANT SOUGHT TO INTRODUCE INTO EVIDENCE:

1. THE DEFENSE INTRODUCED NO EVIDENCE.
2. _____
3. _____
4. _____

**A SUMMARY OF THE STATE'S AND DEFENDANT'S POSITION AND THE
COURT'S RULING ON THE OBJECTION IS ATTACHED.**

THE DEFENDANT WAS FOUND GUILTY OF VIOLATING S.C. CODE ANN.
16-25-0020, COMMONLY KNOWN AS CRIMINAL DOMESTIC
VIOLENCE 1ST. (CDV 1ST.), AND THE COURT IMPOSED THE
FOLLOWING SENTENCE:

30 DAYS IN JAIL OR \$2,130.00 SUSPENDED UPON COMPLETION OF THE
CASA BATTERER'S INTERVENTION PROGRAM.

THE DEFENDANT THROUGH HIS ATTORNEY REQUESTED TO SERVE THE 30
DAYS SENTENCE ON THE WEEKEND AND TO BE (CREDITED WITH 7
DAYS). ALSO, SENTENCING WAS TO BEGIN IN 30 DAYS FROM 9/25/09
WAS "GRANTED".

ON OCTOBER 23, 2009 AN ORDER STAYING SENTENCE WAS FILED BY THE
DEFENDANT'S ATTORNEY AND "GRANTED" BY THE COURT.

ATTACHED ARE COPIES OF THE ITEMS WHICH ARE CHECKED.

{ X } ARREST WARRANT NO. K-238481 AND ALL BONDING PROCEEDING PAPERS.

{ X } COURT DISPOSITION SHEET

{ X } LIST OF WITNESS AND A SUMMARY OF THEIR TESTIMONY.

{ X } LIST OF MOTIONS, A SUMMARY OF THE PARTIES' POSITIONS, AND THE COURT'S RULING.

{ X } LIST OF ITEMS OFFERED INTO EVIDENCE, A SUMMARY OF OBJECTIONS, AND THE COURT RULING.

{ X } EXHIBITS PUT INTO RECORD.

{ X } THE NOTICE OF APPEAL.

{ X } ACCEPTANCE OF SERVICE

{ X } WRIT OF MANDAMUS

{ X } ORDER STAYING SENTENCE

K- 238481

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of
ORANGEBURG COUNTY

THE STATE 2008004815
against

HENRY HAYGOOD (III)

Address: 421 TECZA DRIVE
ORANGEBURG SC 29115

DOB: _____ SSN: _____
M Race: B Height: 5 Weight: 245

State: _____ DL#: _____
Arrest Date: 10/31/72 Agency ORI#: _____

Arresting Agency: SHERIFF'S DEPARTMENT

Arresting Officer: DEP L JENKINS

Offense: CRIMINAL DOMESTIC

Violence High & Offense Code: 2390

Ordinance Sec: 16-25-0065

Warrant is CERTIFIED FOR SERVICE in the
County/ ☐ Municipality of _____

The accused
to be arrested and brought before me to be
held with according to law.

Signature of Judge _____ (L.S.)

RETURN

Copy of this arrest warrant was delivered to
defendant HENRY HAYGOOD (III)

Signature of Constable/Law Enforcement Officer _____

RETURN WARRANT TO:

ORANGEBURG MAGISTRATES 1 DOREMUS
P.O. BOX 9000
ORANGEBURG SC 29116

STATE OF SOUTH CAROLINA)

☒ County/ ☐ Municipality of
ORANGEBURG COUNTY)

AFFIDAVIT

Form Approved by
S.C. Attorney General
April 21, 2003
SCCA 618

Personally appeared before me the affiant DEP L JENKINS who
being duly sworn deposes and says that defendant HENRY HAYGOOD (III)
did within this county and state on 3/31/08 violate the criminal laws of the

State of South Carolina (or ordinance of ☒ County/ ☐ Municipality of ORANGEBURG COUNTY)
in the following particulars:

DESCRIPTION OF OFFENSE: CRIMINAL DOMESTIC VIOLENCE HIGH &
AGGRAVATED NATURE

I further state that there is probable cause to believe that the defendant named above did commit
the crime set forth and that probable cause is based on the following facts:
THAT ON OR ABOUT MARCH 31, 2008 BETWEEN 2100 HRS AND 2140 HRS,
LOCATED AT 421 TECZA DRIVE, ORANGEBURG, SC ONE HENRY HAYGOOD, III
DID COMMIT THE CRIME OF CRIMINAL DOMESTIC VIOLENCE HIGH AND
AGGRAVATED NATURE IN THAT HE DID PULL THE VICTIM, TAWANNA HAYGOOD
OFF THE BED WHILE YELLING THAT HE WAS GOING TO KILL THE VICTIM.
DEFENDANT RETRIEVED A BROWN IN COLOR SHOTGUN, SERIAL # 110724,
FROM THE BEDROOM CLOSET. THE VICTIM WAS ABLE TO WRESTLE THE
SHOTGUN AWAY FROM THE DEFENDANT BEFORE HE COULD DISCHARGE IT. THE
VICTIM AND DEFENDANT ARE MARRIED. THIS INCIDENT OCCURRED IN THE
COUNTY OF ORANGEBURG, STATE OF SOUTH CAROLINA.

Signature of Affiant _____

STATE OF SOUTH CAROLINA)

☒ County/ ☐ Municipality of
ORANGEBURG COUNTY)

Affiant's Address P.O. BOX 9000
ORANGEBURG SC 29115
Affiant's Telephone 803 531-4647

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that
on 3/31/08 defendant HENRY HAYGOOD (III)
did violate the criminal laws of the State of South Carolina (or ordinance of

☒ County/ ☐ Municipality of ORANGEBURG COUNTY) as set forth below:

DESCRIPTION OF OFFENSE: CRIMINAL DOMESTIC VIOLENCE HIGH &
AGGRAVATED NATURE

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said
defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to
the defendant at the time of its execution, or as soon thereafter as is practicable.

Sworn to and subscribed before me)

on 4/01/08)

Peggy D. Doremus (s.))

Signature of Issuing Judge)

Judge Code: 721)

Judge's Address P.O. BOX 9000

ORANGEBURG SC 29116

Judge's Telephone 803 533-5843

Issuing Court: ☒ Magistrate ☐ Municipal ☐ Circuit

ORIGINAL

COURT DISPOSITION

Court Date: SEPTEMBER 25, 2009 @ 10:00 AM

Defendant Name: HENRY HAYGOOD III

Present: ☒ Not Present: ☐

Defendant Attorney: Jill Ullman

Case #: K238481

Charge: CRIMINAL DOMESTIC VIOLENCE

Affiant Name: L. JENKINS

Present: ☒ Not Present: ☐

Victim Name: TAWANNA HAYGOOD

Present: ☐ Not Present: ☒

Victim/Affiant Attorney: _____

Presiding Judge: S.A. Daily (L.S.)

Dispositions

☐ Pled Guilty ☒ Bench Trial ☐ Tried in absence

☐ Forfeited Bond ☐ Dismissed

☐ Nolo Contendere

☐ Not Guilty

☒ Guilty (30 Days Suspended / \$2130 Suspended /

CASA or New Directions)

☐ Guilty (Time Served)

☐ Guilty (Committed to jail for 30 days)

☐ Other _____

Notes: 9 Shot Gun was place in evidence

2008 00415

* Appeal by Attorney Ullman = defendant wants to do
time - Judge Daily granted - ~~seater~~ time to be served
on weekends starting Friday @ 6pm - Sunday @ 6pm
time to be served is 23 days (Credit time served 7 days)
Ⓢ This is to begin 30 days from today (9-25-09)

2009 AUG 19 11 P 3:21
 FILED FOR RECORD
 WINIFRED CLARK
 CLERK OF COURT
 ORANGEBURG, SC

THE STATE OF SOUTH CAROLINA)
COUNTY OF ORANGEBURG)

THE COUNTY)

v.)

HENRY HAYGOOD,)

DEFENDANT.)

IN THE MAGISTRATE'S COURT

Charge(s): CDVHAN

Warrant/Indictment Nos.: K-237481

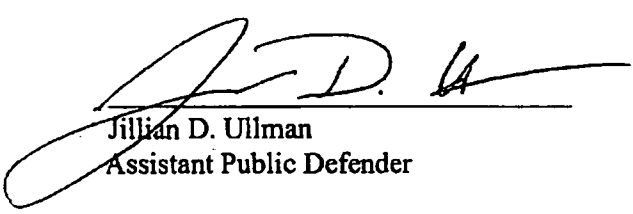
NOTICE OF APPEAL

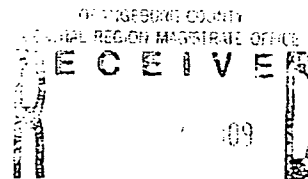
Defendant Henry Haygood, by and through his attorney, is hereby appealing the conviction of the above-referenced warrant entered on September 25, 2009. As required by S.C. Statute 22-3-790, please file this notice, together with the record, a statement of all the proceedings in the case, and the testimony taken at the trial in the office of the Clerk of Circuit Court within ten (10) days from today. Following this notice is a statement of the grounds for the appeal.

The defendant requests that the Court of Common Pleas grant oral argument, overturn the conviction, and remand the case for a new trial.

Respectfully Submitted:

October 2, 2009


Jillian D. Ullman
Assistant Public Defender



BY _____

STATEMENT OF GROUNDS FOR APPEAL

Procedural History:

This case was tried before the court on September 25, 2009. During the trial an objection was made by the defense to the state's introduction of verbal statements allegedly made by the alleged victim to the investigating officer. The objected to statements pertained to allegations of what the defendant allegedly did on the date in question. The court overruled defendant's objections and admitted the statement under the "excited utterance" exception to the hearsay rule. It should be noted that (1) the alleged victim was not present for the trial of the state; (2) the alleged victim resides in Orangeburg County and was available for trial; (3) the state did not subpoena the victim; (4) prior to the trial of the case, the alleged victim provided the defense with two written statements indicating (a) that she did not recall the events in question and (b) that she did not want the defendant to be prosecuted; and (5) that these statements were shown to the state prior to the case being remanded to the Magistrate Court.

The grounds for this appeal are as follows:

1. The introduction of the alleged verbal statements violated Defendant's Sixth Amendment right to confront the witnesses against him.

The Sixth Amendment Confrontation Clause provides that, "in all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him" In Crawford v. Washington, 541 U.S. 36 (2004), the United States Supreme Court has mandated that where testimonial statements are at issue, the only indicia of reliability sufficient to satisfy constitutional demands is confrontation. In the present case, the verbal statements to law enforcement constitute testimonial statements. In Crawford, the court stated that, testimony is typically "a solemn declaration or affirmation made for the purpose of establishing or proving some fact." "An accuser who makes a formal statement to government officers bears testimony..." 541 U.S. 36 (2004). In the present case, the alleged statements made by the victim constitute formal statements made to government officers. Because the statements were

testimonial, confrontation was mandatory under the 6th Amendment.

2. The alleged victim was available for trial; it was error to admit the verbal statements of the victim.

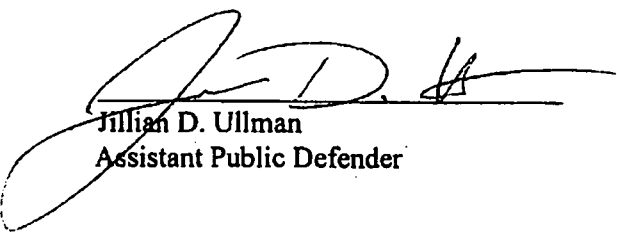
Out of court testimonial statements are admissible under the 6th Amendment only if: (1) the witness was unavailable at the trial of the case and (2) the defense had an opportunity prior to trial to cross examine the witness. Crawford v. Washington, 541 U.S. 36 (2004). In the present case the alleged victim was not "unavailable" No effort was made by the state to compel the testimony of this witness nor were efforts made to ensure this witness's attendance at the trial of this case. Furthermore, the defense had no opportunity to cross examine the victim prior to the trial of this case.

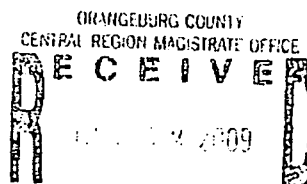
CONCLUSION

For the foregoing reasons, Defendant respectfully requests the Court to overturn the conviction and remand the case to Magistrate's Court for a new trial.

Respectfully Submitted:

October 2, 2009


Jillian D. Ullman
Assistant Public Defender



BY _____

THE STATE OF SOUTH CAROLINA)
 COUNTY OF ORANGEBURG)

IN THE MAGISTRATE'S COURT

Charge(s): CDV-1st

Warrant/Indictment Nos.: K-238481

THE COUNTY)

v.)

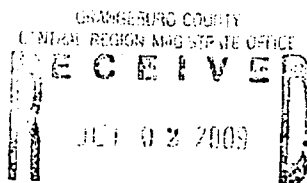
HENRY HAYGOOD,)

DEFENDANT.)

ACCEPTANCE OF SERVICE

Due and legal service of the within NOTICE OF APPEAL with a
 STATEMENT OF GROUNDS by the attorney for the above defendant, in the above
 entitled action is hereby accepted and a copy retained by Chief Magistrate Samuel Daily,
 in Orangeburg, South Carolina, this 2nd day of October 2009.

Samuel Bell Coleman
 Chief Magistrate Samuel Daily



BY _____

THE STATE OF SOUTH CAROLINA)
 COUNTY OF ORANGEBURG)

THE STATE)

v.)

HENRY HAYGOOD,)

DEFENDANT.)

IN THE COURT OF COMMON PLEAS
 FIRST JUDICIAL CIRCUIT

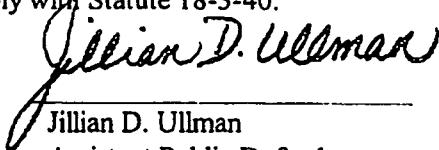
Charge(s): CDV-1st
 Warrant/Indictment Nos.: K-238481

WRIT OF MANDAMUS

Now comes the Defendant, by and through his attorney, Jillian D. Ullman, respectfully requesting this Court mandate the Magistrate Court of Orangeburg County comply with S.C. Code 18-3-40.

On October 2, 2009, the Defendant filed a Notice of Appeal and Statement of Grounds from a bench trial held on September 25, 2009 in the Magistrate Court. S.C. Code 18-3-40 requires the Magistrate Court file the notice of appeal, the record, a statement of all proceedings in the case, and the testimony taken at the trial in the office of the clerk of circuit court. As of October 21, 2009, the Magistrate Court has not complied with this requirement. Defendant has a right to appeal the conviction and sentence of the Magistrate Court. S.C. Code 18-3-10. Unless the Magistrate complies with S.C. Code 18-3-40, Defendant's appeal cannot be heard.

For the foregoing reasons, Defendant respectfully requests this Court mandate the Magistrate Court of Orangeburg County comply with Statute 18-3-40.


 Jillian D. Ullman
 Assistant Public Defender

Date: October 22, 09
 Orangeburg, South Carolina

101
PAGE 02/02
RECEIVED
OCT 23 2009
BY:

THE STATE OF SOUTH CAROLINA)
COUNTY OF ORANGEBURG)

THE STATE)

v.)

HENRY HAYGOOD,)

DEFENDANT.)

IN THE MAGISTRATE'S COURT

Charge(s): CDV-1st
Warrant/Indictment Nos.: K-238481

ORDER STAYING SENTENCE

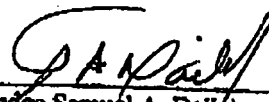
At the conclusion of a bench trial, Defendant was found guilty of CDV 1st on September 25, 2009. Defendant was sentenced to 30 days incarceration to be served on the weekends with credit for 7 days time served. Defendant immediately informed the Court of his intent to appeal the conviction. Defendant, by and through his attorney, requested the court allow at least 30 days for the Court of Common Pleas to hear the appeal. The Magistrate Court granted this request, requiring Defendant report to the Orangeburg County Detention Center on October 23, 2009.

On October 2, 2009, Defendant, by and through his attorney, filed a Notice of Appeal and Statement of Grounds in the Magistrate Court. Receipt of this Notice by the Magistrate Court stays all prior orders of this Court, until the appeal is heard by the Court of Common Pleas. Therefore, Defendant, Henry Haygood, does not have to report to the Orangeburg County Detention Center on October 23, 2009. This Court will notify the Orangeburg County Detention Center when the sentence is re-imposed, so that they may expect Mr. Haygood's appearance. Until the Orangeburg County Detention Center receives notice from this Court, Mr. Henry Haygood does not have to report to the Orangeburg County Detention.

IT IS SO ORDERED.

October 23, 2009.

OCT 23 2009 RCUD


Judge Samuel A. Dailly

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT
CASE NO. 2010-CP-38-0314

STATE OF SOUTH CAROLINA

) APPEAL FROM
) MAGISTRATE'S COURT
)

versus

) TRANSCRIPT OF RECORD
)

HENRY HAYGOOD,

) DATE:
)

DEFENDANT

) SEPTEMBER 16, 2011
)

BEFORE:

HONORABLE EDGAR W. DICKSON PRESIDING JUDGE

APPEARANCES:

B. J. JEFFRIES, ESQUIRE

ASSISTANT SOLICITOR

FOR THE STATE

JILLIAN D. ULLMAN, ESQUIRE

PUBLIC DEFENDER

FOR THE DEFENDANT

SCANNED

DATE: 1/4/12

INITIALS: LK

JAN - 3 2013

HARRY A. WALKER (MRS.)
COURT REPORTER, FIRST JUDICIAL CIRCUIT
POST OFFICE BOX 127
ROWESVILLE, SOUTH CAROLINA 29133

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT
CASE NO. 2010-CP-38-0314

STATE OF SOUTH CAROLINA

versus

HENRY HAYGOOD,

DEFENDANT

) APPEAL FROM
) MAGISTRATE'S COURT

) TRANSCRIPT OF RECORD

) DATE:

) SEPTEMBER 16, 2011

BEFORE: . . .

HONORABLE EDGAR W. DICKSON PRESIDING JUDGE

APPEARANCES:

B. J. JEFFRIES, ESQUIRE

ASSISTANT SOLICITOR

FOR THE STATE

JILLIAN D. ULLMAN, ESQUIRE

PUBLIC DEFENDER

FOR THE DEFENDANT

SCANNED

DATE: 1/4/12

INITIALS: LV

JAN - 3 2013

HARRY A. WALKER (MRS.)
COURT REPORTER, FIRST JUDICIAL CIRCUIT
POST OFFICE BOX 127
ROWESVILLE, SOUTH CAROLINA 29133

I N D E X

	<u>PAGE</u>
ARGUMENT BY MS. ULLMAN	3
ARGUMENT BY SOL. JEFFRIES	7

1 DATE:

2 SEPTEMBER 16, 2011

3 COURT REPORTER: I don't have a name or anything.

4 MS. ULLMAN: I'm sorry. This is Henry Haygood.

5 COURT REPORTER: Okay.

6 THE COURT: Ms. Harry Dot, this is the State of South
7 Carolina versus Henry Haygood. It is 2010-CP-38-314, and it
8 is an appeal from a criminal domestic violence case that was
9 heard in front of Judge Davis. Is that correct?

10 MS. ULLMAN: Yes, sir.

11 THE COURT: Alright, Ms. Ullman. And this is a copy I
12 can ...

13 SOLICITOR JEFFRIES: You can keep that one.

14 THE COURT: Okay, Ms. Ullman, I'll hear from you.

15 MS. ULLMAN: Thank you, Your Honor.

16 ARGUMENT BY MS. ULLMAN:

17 Mr. Haygood was charged with criminal domestic
18 violence, and we had a bench trial in Magistrate's Court.
19 At that bench trial, Your Honor, I was present, the
20 defendant was present, Mr. Jeffries representing the State
21 was present, and an officer was present. The victim of the
22 case nor any other witnesses were present at that time.

23 I have appealed, Your Honor, because the State
24 attempted to introduce oral statements given by the victim
25 through the officer. I objected to that information under

1 the Crawford case. Basically, Crawford versus Washington,
2 Cite 541 U.S. 36 of the Two thousand four U. S. Supreme
3 Court case. Your Honor, in that case the U. S. Supreme
4 Court has decided that any testimony given to an officer,
5 given to a government agent, any information that could be
6 considered testimonial needs to be given by the person who
7 actually made that statement because the Sixth Amendment
8 requires that a defendant have the ability to cross-examine
9 any witnesses against him. When I made that objection, Your
10 Honor, the State stated that the information in the oral
11 statement given by the victim was an excited utterance, that
12 her presence was not necessary to get that in. At that
13 time, Your Honor, I again objected based on Crawford, I
14 stated that hearsay was not the issue I was even addressing,
15 it was more of a cross-examination, and she -- again the
16 officer testified that when he arrived on the scene, the
17 incident, whatever may or may not have happened had already
18 ended. The parties were separated, he was actually able to
19 speak with both parties on the scene. In speaking with the
20 alleged victim in this case he was obviously trying to
21 gather information to determine who he was going to arrest
22 and what kind of charges he was going to place. That is
23 under the Crawford case exactly what testimonial statements
24 are. A non-testimonial statement, Your Honor, would be if
25 the officer showed up and heard the victim yelling, help me,

1 help me, he's got a knife, something like that, that's her
2 cry for help, that's not a statement given for the purposes
3 of explaining what happened and potentially ending up in
4 Court giving that exact same statement. The oral statements
5 that the officer gave, also, Your Honor, if you would look
6 at her written statement, is pretty much word for word what
7 was given in her written statement. The main difference
8 would just be the tense, the verb tense used versus her
9 talking in first person. The officer gave these statements
10 in third person, claiming that she stated this, she stated
11 that. So again, Your Honor, I understand that the Court
12 actually ruled that this was an excited utterance and
13 allowed it in, but again, that was not my objection in the
14 first place, it was the Crawford issue because the officer
15 was obviously eliciting testimony on information or
16 statements from the alleged victim. The alleged victim was
17 not present for me to have any opportunity to cross-examine.

18 Crawford also states, Your Honor, where a victim is
19 unavailable, then the State has the burden of proving that
20 that victim, or that the witness is unavailable, and the
21 defendant's had previous opportunity to cross-examine, then
22 Crawford doesn't come into play. Unfortunately, Your Honor,
23 I had no opportunity to cross-examine this alleged victim,
24 and as far as I know she resided in Orangeburg, she was not
25 under subpoena. I would certainly say the State didn't

1 prove its burden or bear its burden of proving that she was
2 unavailable. So, that's the basis for the appeal, Your
3 Honor.

4 THE COURT: Okay. And Ms. Ullman, you don't happen to
5 have a copy of the Crawford case with you?

6 MS. ULLMAN: I do not have a copy of it but I can ...

7 SOLICITOR JEFFRIES: I've got a copy of it.

8 MS. ULLMAN: --- but I can get it over here in a
9 second.

10 THE COURT: You'd better be glad he's got all the stuff
11 you needed.

12 MS. ULLMAN: I know it. In my defense, I was under the
13 impression I ...

14 THE COURT: Why, why?

15 MS. ULLMAN: Yesterday I was busy,...

16 THE COURT: Oh, yeah, that's true, yesterday you were
17 busy, that's right, that's right.

18 MS. ULLMAN: Monday we did everybody's appearance.

19 THE COURT: I understand, I understand.

20 SOLICITOR JEFFRIES: I've just been sitting around this
21 week, I didn't have anything going on.

22 MS. ULLMAN: I was not implying that, all I meant was
23 he was not sitting in Court.

24 SOLICITOR JEFFRIES: May I approach, Your Honor?

25 THE COURT: Yes, sir.

1 SOLICITOR JEFFRIES: Here's a copy of Crawford versus
2 Washington.

3 THE COURT: Have you already highlighted it?

4 SOLICITOR JEFFRIES: I have not, Your Honor, I have
5 mine that's highlighted.

6 THE COURT: Okay. That's okay, I can highlight it
7 myself. Thank you, sir.

8 ARGUMENT BY SOLICITOR JEFFRIES:

9 But I agree that this case turns on what Ms. Ullman
10 spoke of, and that's specifically whether or not this
11 statement's testimony. That's what Crawford speaks to.
12 What I disagree with is the proposition that Crawford vs.
13 Washington stands for the proposition that, that now that
14 excited utterance are no longer exceptions to the hearsay
15 rule. I mean, that's what this turns on. The judge decided
16 this case based on, or decided this issue of evidence based
17 on whether or not the testimony the officer was giving was
18 that of the testimony of variety, and I submit to you that
19 the judge used the correct application of law in deeming
20 that this was a hearsay exception, an excited utterance,
21 it's not testimony.

22 And citing Crawford versus Washington, that case dealt
23 with the State introducing a recorded statement that the
24 petitioner's wife had made during a police interrogation,
25 this was a recorded statement. And then they went into the

1 fact that the statement may or may not be admissible under
2 the marital exception to statements being admitted into
3 evidence because we're dealing with a husband and wife. We
4 don't have to go that far in this case, this is not a
5 testimonial statement, this was an excited utterance of the
6 garden variety, excited utterance type under Rule Eight O
7 Three, Two. The judge heard during the testimony that he
8 arrived very shortly after the incident had happened, there
9 were weapons involved, the victim's child was involved. I
10 say all that because it just shows what an excited state she
11 was in and because the statement was taken immediately after
12 the start of the event while she was still under stress from
13 the start of the event. It meets every element of an
14 excited utterance.

15 This is not a testimonial statement, I think the judge
16 used his discretion in hearing the argument of both parties
17 and used the correct application of the law allowing the
18 statement in. If the judge did err, and I don't believe he
19 did, I would submit to the Court it was a harmless error.
20 You will see in the record that the defendant also gave an
21 admission at the scene that was corroborated by the victim's
22 statement. So, what you had was the victim saying the
23 defendant did A, B, and C, and then you had the defendant,
24 when he was asked about it while the officer was
25 investigating, he said, "You haven't seen nothing yet, I'm

1 the man of this house", giving the implication, you know,
2 that he did what she accused him of doing. So that was an
3 admission that the judge had to consider along with the
4 excited utterance, so if he erred on the law, and again I
5 don't believe he did, it was a harmless error, because you
6 also had the evidence from the defendant, his own admission.
7 He had evidence brought in, the weapons that were in the
8 home were introduced into evidence, at least the photos, I
9 think it was the actual gun that I had admitted into
10 evidence, but at the very least it was the photos and the
11 testimony from the officer that he seized these weapons that
12 were allegedly part of this criminal domestic violence
13 offense.

14 But I'd ask you to look at Crawford, and if you
15 distinguish it, and that that was a statement made, a
16 recorded statement made during interrogation, whereas, this
17 is an officer arriving at the scene, speaking to both
18 parties to find out what's going on, and an excited
19 utterance that the defendant did A, B and C, which
20 ultimately constituted criminal domestic violence. For
21 those reasons I'd ask you to not disturb the opinion of the
22 lower court in that there was no error of law, there was no
23 abuse of discretion, therefore, there's nothing for this
24 case to be reversed or remanded over. And that is the
25 State's position.

1 THE COURT: Alright, sir. The Return that I have says
2 that he stated that the alleged victim, Tawana Haygood,
3 stated to him that her husband began fighting her in the
4 bedroom and he stated to her that he was going to kill her.
5 And then stated that Mr. Haygood went to the bedroom closet
6 and received a brown in color shotgun, and that her Fourteen
7 year old son struggled with him to take the shotgun away
8 from him. Then she told him that Mr. Haygood reached into
9 his pants pocket where he kept a small hand gun, and she
10 grabbed his pants pocket causing some small bullets to fall
11 to the floor. Is this the whole statement that she said, I
12 mean, is that ...

13 SOLICITOR JEFFRIES: I couldn't speak to that being the
14 entire statement she gave.

15 THE COURT: Okay. And do we have -- we don't have --
16 was the hearing transcribed?

17 SOLICITOR JEFFRIES: It should have been, it should
18 have been.

19 MS. ULLMAN: It was electronically recorded. I
20 actually requested a copy of that recording and they told me
21 that they no longer had it, and I didn't get it, so they
22 created this record. Your Honor, what I would tell you, and
23 if you wanted to see or make part of the record, what you're
24 reading is what the officer read from his incident report.
25 He basically read his incident report that he wrote where he

1 says, I showed up, spoke to the victim. The victim stated,
2 blah, blah, blah.

3 SOLICITOR JEFFRIES: I mean, that's a factual, I mean,
4 that's an issue of fact I don't think you can just take for
5 granted. We're dealing with the issues of whether or not
6 the correct application of law was used based on what we
7 know.

8 THE COURT: And so, we don't have the taped recording?

9 MS. ULLMAN: No, sir.

10 SOLICITOR JEFFRIES: I was not aware of that either,
11 but ...

12 THE COURT: Okay. And this appeal was filed
13 immediately after the hearing?

14 MS. ULLMAN: Yes, sir.

15 THE COURT: Because that's, on my Return it looks like,
16 it has your appeal.

17 MS. ULLMAN: Yes, sir.

18 SOLICITOR JEFFRIES: It was my recollection you made
19 that appeal immediately after ...

20 MS. ULLMAN; Yeah, actually, when we were done at the
21 bench I told B. J. immediately we'd be appealing it, and I
22 believe I filed the notice on the same day. And then I had
23 problems getting the Return filed, I had to do a Writ of
24 Mandamus to get it done, and when the Return was filed
25 January Eleventh, Two thousand nine, -- that has to be Two

1 thousand ten, Your Honor, because this was all done at the
2 end of Two thousand nine -- when I saw the Return I then
3 tried to get a copy of the recording, which I requested that
4 February Third, Two thousand ten. Court was held on
5 September Twenty-fifth, Two thousand nine. And what
6 happened, they called my secretary and told her that the
7 recording was no longer available and we couldn't get a
8 copy.

9 THE COURT: Alright. Well, let me see what I can
10 determine from this. Okay? And I'll see. Okay?

11 SOLICITOR JEFFRIES: Thank you, Judge.

12 THE COURT: Ms. Ullman, what I'll do is, let me run a
13 copy of this and I'll give you ...

14 MS. ULLMAN: Is that the Notice?

15 THE COURT: That's your notice.

16 (END OF TRANSCRIPT)

CERTIFICATE

I, the undersigned, Mrs. Harry A. Walker, of Rowesville, South Carolina, Official Court Reporter for the First Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the captioned cause, relative to appeal, in the Court of Common Pleas for Orangeburg County, South Carolina, on the Sixteenth day of September, 2011.

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

DATE: January 2, 2013

Harry A. Walker
(MRS.) HARRY A. WALKER

116
MAY - 9 2012

STATE OF SOUTH CAROLINA)
COUNTY OF ORANGEBURG)

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

HENRY HAYGOOD,
Appellant

Case Number: 2010-CP-38-00314

vs.

ORDER DENYING APPEAL

The State of South Carolina)
Respondent)

This matter comes before me upon Motion of Jillian D. Ullman, Esq., representing the Appellant, to reverse and remand a conviction resulting from a bench trial held on September 25, 2009 in Orangeburg County Central Court. A hearing upon this Motion took place on September 16, 2011 with Bryan Jeffries representing the State. The Defendant was also present with his attorney, Ms. Ullman. Based on testimony offered during the hearing and the arguments made by both Counsel for the Defendant and for the State, I make the following findings:

1. This appeal is based on the lower court allowing into evidence a statement by the victim testified to by the responding officer. This statement was taken upon the officer's arrival to the scene. Appellant claims that this statement should be excluded based on the fact that it is hearsay. This Court disagrees and finds that the statement was admissible based on the hearsay exception found in Rule 803(2), which states that a statement can be admissible if it is an excited utterance. There are three elements that must be met to find a statement to be an excited utterance: (1) the statement must relate to a startling event or condition; (2) the statement must have been made while the declarant was under the stress of excitement; and (3) the stress of excitement must be caused by the startling event.

ATTEST: TRUE COPY

1/2

Wing B. Clark
CLERK OF COURT
ORANGEBURG COUNTY, SC

or condition. The statement in question was taken directly after the incident of being threatened. The officer's testimony shows that the victim was still very upset when she gave the statement, and the excitement or stress was caused by the assault that had occurred.

2. The Crawford case provided by defense counsel is distinguishable from these facts because the statement in that case was a recorded taken in a custodial interrogation. Further, the Supreme Court overturned the statement that was deemed admissible by the lower court, not because it fell within the excited utterance hearsay exception, but because it bore a "particularized guarantee of trustworthiness." The Supreme Court determined that was in violation of the Confrontation Clause. This Court finds that the statement testified to by the officer is admissible under the excited utterance exception and that there was no error by the lower court. Because this statement was falls within a long established exception to hearsay, its admission does not violate the Confrontation Clause.

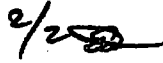
THEREFORE, IT IS ORDERED THAT the defendant's Appeal in the above-captioned matter is denied.

AND IT IS SO ORDERED.



Honorable Judge Edgar Warren Dickson
Presiding Circuit Court Judge
First Judicial Circuit

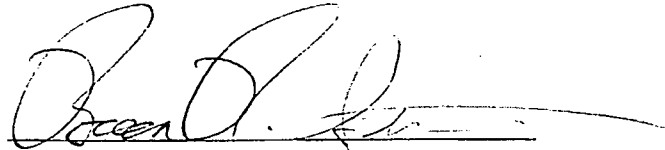
Orangeburg, South Carolina
This 4th day of May, 2012



CERTIFICATE OF COUNSEL FOR APPELLANT

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

October 16th, 2013



Breen Richard Stevens
Assistant Public Defender

First Circuit Public Defender's Office
Orangeburg Office
P.O. Box 1112
Orangeburg, SC 29116
(803) 536-5682

ATTORNEY FOR APPELLANT

RECEIVED
OCT 16 2013
SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Writ of Certiorari
To the Court of Appeals

Appeal From Orangeburg County
Edgar Dickson, Circuit Court Judge
Appellate Case No. 2012-211961

THE STATE,

Petitioner,

vs.

HENRY HAYGOOD,

Respondent.

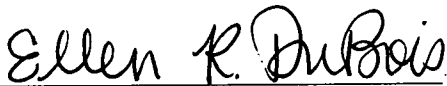
PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Appendix on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record,

Jillian D. Ullman, Esquire
Breen R. Stevens, Esquire
First Circuit Public Defender's Office
Post Office Box 1112
Orangeburg, SC 29116

I further certify that all parties required by Rule to be served have been served.

This 6th day of October, 2014.


ELLEN R. DuBOIS
Legal Assistant

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727