STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lancaster County

Brian M. Gibbons, Circuit Court Judge

ORIGINAL

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SC Court of Appeals

THE STATE,

RESPONDENT,

V.

DEMARIO MONTE THOMPSON,

APPELLANT

APPELLATE CASE NO. 2015-000126

FINAL BRIEF OF APPELLANT

JOHN H. STROM
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Constitutional Provisions

STATEMENT OF ISSUES ON APPEAL

I.

The trial court abused its discretion in admitting the trespass notice letter signed by Keasia Drafton and the apartment complex manager, Janice Sager, advising Drafton that she could be evicted if Appellant was found in the apartment complex where:

(A) The letter was irrelevant to the accusations against Appellant.

(B) Assuming *arguendo* that the letter may have been at all relevant, the danger of unfair prejudice substantially outweighed the probative value of the letter.

(C) The letter constituted impermissible hearsay not failing under any hearsay exception.

(D) The letter constituted impermissible prior bad act evidence under Rule 404(b), SCRE, having no logical relation to the crimes for which Appellant was standing trial, and, to the extent the letter had any probative value, its probative value was outweighed by its prejudicial effect.

II.

The trial court erred reversibly in admitting the entirety of a 911 call, purportedly made by Drafton where:

(A) The State failed to present sufficient evidence to authenticate that the self-identifying caller to 911 was Drafton.

(B) The admission of the 911 call violated Appellant's Sixth and Fourteenth Amendment rights to confront and cross-examine witnesses, pursuant to *Crawford v. Washington*, 541 U.S. 36 (2004) and *Davis v. Washington*, 547 U.S. 813 (2006).

III.

The trial court committed reversible error in refusing to grant a directed verdict of acquittal where the State failed to present any substantial circumstantial evidence that Appellant intended to commit a crime once inside Drafton's apartment, or that Appellant injured Drafton in the course of committing a burglary; and where the evidence that the State did present merely raised the suspicion of Appellant's guilt.

IV.

The trial court erred in refusing to grant a new trial where the cumulative effect of the errors was so prejudicial as to deprive Appellant of a fair trial.

STATEMENT OF THE CASE

On October 2, 2014, the Lancaster County Grand Jury indicted Appellant DeMario Thompson for one count of first degree burglary, one count of attempted murder, one count of possession or display of a firearm during a violent crime, and two counts of pointing and presenting a firearm. R. 124-127; R. 3, ll. 2-9.

On January 5, 2015, Appellant proceeded to trial before the Honorable Brian Gibbons and a jury. Brandon Steen represented Appellant and Assistant Solicitor Andrew Cook represented the State. Judge Gibbons granted directed verdicts of acquittal for the two counts of pointing and presenting a firearm. R. 86, ll. 8-23.

The jury found Appellant not guilty of attempted murder and not guilty of possession or display of a firearm during a violent crime. R. 115, ll. 20 – 116, ll. 12. However, the jury did find Appellant guilty of first degree burglary and guilty of the lesser-included offense of assault and battery third degree. *Id.* The trial court sentenced Appellant to time served for assault and battery and to fifteen years imprisonment for first degree burglary. R. 118, ll. 9 – 122, ll. 3.

STATEMENT OF FACTS

In the early morning hours of July 2, 2014, Appellant and his girlfriend, Keasia Drafton, had an argument at the Lancaster County apartment complex where Drafton lived. R. 34, ll. 18 – 35, ll. 14. Drafton's across-the-hall neighbor, Dominque Huff, and Huff's girlfriend, Jamie Hunt, called 911 and reported hearing an unknown person shout that Appellant had a gun. R. 21, ll. 24- 22, ll. 2; R. 55, ll. 2-12. Lancaster County Deputy Rueben Silberman responded to the 911 calls. R. 36, ll. 14-21.

Upon arriving at the apartments, Silberman would recall that Drafton appeared to have bruising on her neck and face and that her clothes were torn. R. State's Exhibit 1; R. 37, ll. 3-8. Silberman testified at trial that:

> When I first arrived I noticed the door appeared to have been kicked in. The ***deadbolt was still engaged and the door was hanging slightly off its hinges***, and it looked as though in her living room there was some sort of disturbance. . .

Id. at ll. 11-16; R. State's Exhibit 1 (*emphasis added*). Silberman would clarify that when he arrived the door was only "partially" open, while the photographs he took showed the door completely open as a result of him walking inside. R. 41, ll. 22 – 42, ll. 10.

Appellant was not at the apartment when law enforcement arrived. R. 42, ll. 5-6. In addition to speaking with Drafton, Silberman also spoke with Huff and another neighbor, Sandra Nelson. R. 43, ll. 22 – 44, ll. 3. Silberman did not see Appellant that night and no gun was ever recovered. R. 44, ll. 23 – 45, ll. 8. Drafton did not seek medical attention and Silberman did not believe her injuries required any treatment. *Id.*

ARGUMENTS

I.

The trial court abused its discretion in admitting the trespass notice letter signed by Keasia Drafton and the apartment complex manager, Janice Sager, advising Drafton that she could be evicted if Appellant was found in the apartment complex where: (A) the letter was irrelevant to the accusations against Appellant; (B) assuming *arguendo* that the letter may have been at all relevant, the danger of unfair prejudice substantially outweighed the probative value of the letter; (C) the letter constituted impermissible hearsay not failing under any hearsay exception; and (D) the letter constituted impermissible prior bad act evidence under Rule 404(b), SCRE, having no logical relation to the crimes for which Appellant was standing trial, and, to the extent the letter had any probative value, its probative value was outweighed by its prejudicial effect

Relevant Facts

The State sought to introduce a trespass notice letter, signed by Drafton four months before the incident in question, where apartment manager, Janice Sager, had Drafton acknowledge that Appellant was not supposed to be at the apartment complex. R. 28, ll. 6-15; R.125. There was no evidence Appellant was aware of this letter.

Pre-Trial Motion to Suppress Sager's Testimony and Letter

Appellant moved to suppress both Sager's testimony and the letter on several grounds: (1) under Rule 602, SCRE, Sager had no personal knowledge of the incident in question making her testimony irrelevant; (2) under Rule 404(b), SCRE, the letter and her testimony constituted impermissible bad character evidence; (3) the letter was irrelevant because there was no proof that Appellant was aware of it; and (4) under Rule 403, SCRE, the letter had no probative value because it was not related to the incident in question but was highly prejudicial. R. 11, ll. 6 – 18, ll. 13.

Rule 602 Objection

Defense counsel argued Sager had no personal knowledge of the incident and that the trespass notice letter was completely irrelevant to Appellant's charges. *Id.* In reply, the State advanced that Sager's testimony and the letter would

> ***[E]stablish the fact that [Appellant] did not inherently have consent to go into the apartment*** where the incident occurred and to establish that that's not his home. So one of the elements of burglary is that you enter a dwelling without consent. ***If that is your home you inherently have consent to go.***

R. 11, ll. 20 – 12, ll. 2 (*emphasis added*).

Defense counsel countered that consent must be judged from the perspective of the person in lawful possession of the dwelling, not the property owner and that there was no evidence that Appellant was aware of the notice. R. 12, ll. 7-13. Curiously, the trial court held that the letter went only to the credibility of Sager's testimony. *Id.* at ll. 14-23.

Rule 404(b) Objection

Defense counsel next stated that Sager's testimony would have to explain why Appellant was banned from the complex. R. 13, ll. 3-4.In contrast, the State argued that the letter did not constitute prior bad act evidence because it did not say why Appellant was banned. *Id.* at ll. 8-24. The State claimed that it only planned to use Sager and the letter to impeach Drafton if she testified that Appellant had permission to be at the apartment or that he lived at the apartment. *Id.* Drafton did not testify.

Defense counsel countered that the State was actually offering the letter to show that Appellant had notice of the trespass warning. R. 14, ll. 12-23. Further, that the jury would naturally believe that Appellant had to have done something wrong for the letter to have been generated. *Id.* The State reiterated its intention to use the letter to impeach Drafton as she had:

> [A]cknowledged the fact that [Appellant] was not supposed to be there. This is not going against [Appellant], this is more so aimed towards Ms. Drafton. ***He doesn't have to be convicted or anything to be put on trespass notice of an apartment complex***. It's a privately owned complex . . . . They can decide who comes and goes from there.

R. 15, ll. 5-20. In rebuttal, defense counsel again stated that the letter was completely irrelevant because it was a communication between Drafton and Sager and the State could not establish Appellant was even aware of it. R. 15, ll. 22 – 33, ll. 4.

The trial court ruled that the letter was not improper character evidence under Rule 404(b) and was admissible "to prove a certain element of the crime that he didn't have consent -- he could not have consent to be there because the person who owns the property regardless of the tenant -- what the tenant says, he was not supposed to be there." R. 16, ll. 17-21.

Rule 403 Objection

Defense counsel's final pretrial objection to Sager's testimony and the letter was that, pursuant to Rule 403, both would mislead the jury into erroneously believing the trespass notice was related to the incident for which Appellant was standing trial or that it proved an element of burglary. R. 17, ll. 3-8. Moreover, the unfair, prejudicial impact of the letter and Sager's testimony would outweigh any possible probative value. *Id.* The State replied that the letter and Sager's potential testimony were not substantially prejudicial because the letter did not allege a specific bad act by Appellant. *Id.* at ll. 14-25.

Before denying defense's counsel motion, the court asked if Appellant was willing to to "concede that he didn't have a right to be on the property"? R. 18, ll. 1-5. Defense counsel stated that he would not and the trial court denied the motion. *Id.* at ll. 6-13.

Hearsay Objection

Prior to the jury being sworn, defense counsel further objected to the letter as hearsay. R. 22, ll. 5-14. "If [Sager is] testifying to that document, the State said that it was an acknowledgment by Ms. Drafton, clearly a statement made by the declarant that's not testifying here today is hearsay." *Id.* The court declined to rule until hearing the testimony. *Id.* at ll. 9-14.

Trial Testimony of Janice Sager

Defense counsel renewed his pre-trial objections to Sager's testimony and to the trespass notice letter. R. 56, ll. 19-23; R. 58, ll. 13-25. Again the court overruled the objections. Through Sager, the State introduced trespass notice letter. Over defense counsel's renewed objection, Sager testified that the letter was "an acknowledgment that [Appellant] has been banned" from the apartment complex. R. 58, ll. 15-24. Sager stated that Drafton signed the notice in her presence. R. 59, ll. 1-13. The State then moved the letter into evidence and the Court preserved defense counsel's previous objections. *Id.* at ll. 9-15. On cross-examination, Sager admitted that she was not present during the incident for which Appellant was on trial. *Id.* at ll. 19-21.

A. The trial court abused its discretion in admitting the trespass notice letter when it was irrelevant to the accusations against Appellant, having no bearing on any element of the first degree burglary indictment for which Appellant standing trial.

"Evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy." *State v. Langley*, 334 S.C. 643, 647, 515 S.E.2d 98, 100 (1999) (*citing* Rule 401, SCRE (providing the definition of relevant evidence). There was no fact in controversy in Appellant's case that was made more or less probable by the introduction of the trespass notice letter. R. 11, ll. 6 – 14, ll. 6. Burglary is a crime against possession and habitation, not a crime against ownership. *State v. Clamp*, 225 S.C. 89, 102, 80 S.E.2d 918, 924 (1954); *State v. Alford*, 142 S.C. 43, 45, 140 S.E. 261, 262 (1927); *State v.*

Trapp, 17 S.C. 467, 471 (1882). The focus in burglary is on the victim's possessory interest. *State v. Singley*, 392 S.C. 270, 709 S.E.2d 603 (2011).

Perhaps anticipating that Drafton would not testify so there would be nothing to impeach, the State posited that the letter would also somehow establish that Appellant, "did not inherently have consent to go into the apartment." *Id.* Similarly, the trial court ruled that the letter was being offered to, "***prove a certain element of the crime***[,] that he didn't have consent -- he could not have consent to be there because ***the person who owns the property regardless of the tenant*** -- what the tenant says, he was not supposed to be there." R. 16, ll. 5-23 (*emphasis added*).

Drafton, not the landlord, held the possessory interest in the apartment. *See* S.C. Code Ann. § 27-40-430; *see also Singley*, 392 S.C. at 445-446, 679 S.E.2d at 542 (ownership of property title did not give defendant possessory interest, lawful possessor's consent was required for entry). Moreover, the State produced no evidence that Appellant was aware of the four month old letter. R. 14, ll. 12-23.

Accordingly, the trespass notice letter signed by Drafton and the apartment complex manager four months before the incident giving rise to the charges Appellant was standing trial for; was completely irrelevant and had no bearing on any matter in controversy. S.C. Code Ann. § 16-11-620; Rule 402, SCRE,

B. The trial court abused its discretion in admitting the letter signed by Drafton and the apartment complex manager advising Drafton that she could be evicted if Appellant was found in the apartment complex where, assuming *arguendo* that the letter may have been at all relevant, the danger of unfair prejudice substantially outweighed the probative value of the letter.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Rule

403, SCRE. "[A] court analyzing probative value considers the importance of the evidence and the significance of the issues to which the evidence relates." *State v. Collins*, 398 S.C. 197, 203, 727 S.E.2d 751, 754 (Ct. App. 2012). "Like probative value, unfair prejudice should be evaluated in the practical context of the issues at stake in the trial of the case." *Collins*, 398 S.C. at 207, 727 S.E.2d at 757; *see also State v. Wilson*, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001).

Any probative value the letter had was substantially outweighed by the danger of unfair prejudice and the very real risk of misleading the jury into wrongfully concluding that the trespass notice established that Appellant did not have consent to enter the apartment because of the landlord's prohibition. Additionally, there was also a substantial risk that the letter would lead the jury to erroneously determine that Appellant had the requisite intent to commit a crime inside the dwelling based on the incorrect belief that Appellant knew he was trespassing. *State v. Sachs*, 264 S.C. 541, 216 S.E.2d 501 (1975) *citing State v. Corn*, 215 S.C. 166, 54 S.E.2d 559 (1949) (applying the doctrine of *res inter alios acta* – "things done between strangers out not to injure those who are not parties to them" – in relevancy analysis).

In light of Drafton's unavailability at trial, the admission of the trespass letter was unfairly prejudicial to Appellant. Morover, the State repeatedly stressed in its closing arguments that the letter and Sager's testimony proved that Appellant did not have consent: "Janice Sager . . . .even showed a paper that Demario is not even supposed to be at the entire apartment complex, let alone Ms. Drafton's house." R. 92, ll. 10-16; R. 93, ll. 16-18.

The risk of misleading the jury and unfairly prejudicing the Appellant was substantial as the letter was with the jury during their deliberations. R. 106, ll. 21 – 111, ll. 7; *State v. Wiles*, 383 S.C. 151, 679 S.E.2d 172 (2009) (evidence admitted under the other-acts rule must be logically relevant to establish a material element of the crime with which the defendant has been charged); *see also*

State v. Gulledge, 277 S.C. 368, 287 S.E.2d 488 (1982) (allowing jury to have transcript of deceased police officer's radio call was an abuse of discretion as it unduly emphasized that evidence).

C. The trial court abused its discretion in admitting the trespass notice letter signed by Drafton and the apartment complex manager advising Drafton that she could be evicted if Appellant was found in the apartment complex where the letter was impermissible hearsay which improperly and misleadingly bolstered the State's case.

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE; *see State v. Townsend*, 321 S.C. 55, 59, 467 S.E.2d 138, 141 (Ct. App. 1996) (holding hearsay is an out of court statement offered to prove the truth of the matter asserted). Notably, "[h]earsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court of this State or by statute." Rule 802, SCRE.

Whether an entry is made without consent is determined from the perspective of the lawful possessor of the dwelling. *Singley*, 383 S.C. at 442. Drafton was the lawful possessor of the apartment, not the apartment complex owner. The State presented Drafton's signature on the trespass letter as proof that Appellant "did not have an inherent right" to be in complex; thus Drafton was the declarant. *State v. Nelson*, 380 S.C. 226, 669 S.E.2d 595 (Ct. App. 2008) (co-conspirator was declarant as he made statements intended to be assertions).

The letter was an assertion offered by the State as proof of an element of first degree burglary: that Appellant did not have consent to enter Drafton's apartment. Therefore, the letter was impermissible hearsay and the trial court abused its discretion in ruling it admissible. Rule 802, SCRE.

D. The trial court abused its discretion in admitting the trespass notice letter signed by Keasia Drafton and the apartment complex manager advising Drafton that she could be evicted if Appellant was found in the apartment complex where the letter constituted impermissible prior bad act evidence under Rule 404(b), SCRE, having no logical relation to the crimes for which Appellant was standing trial, and, to the extent the letter had any probative value, its probative value was outweighed by its prejudicial effect.

Under Rule 404(b), SCRE, evidence of other crimes, wrongs, or acts are generally not admissible to prove the defendant's guilt for the crime charged. *State v. Fletcher*, 379 S.C. 17, 23, 664 S.E.2d 480, 483 (2008). However, such evidence is admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent. *State v. Pagan,* 369 S.C. 201, 631 S.E.2d 262 (2006); *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923).

To be admissible, the bad act must logically relate to the crime with which the defendant has been charged. If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing. *Id.*; *State v. Beck*, 342 S.C. 129, 135–36, 536 S.E.2d 679, 682–83 (2000). Even if otherwise admissible, prior bad act evidence must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. Rule 404(b), SCRE; *State v. Gillian*, 373 S.C. 601, 646 S.E.2d 872 (2007) (trial court must gauge logical relevancy of prior bad act, whether it reasonably tends to prove a material fact in issue, to the particular purpose for which it is sought to be introduced).

In the present case, the trial court erred reversibly by ruling that Rule 404(b) was inapplicable to the trespass notice letter. R. 16, ll. 5-23. The trial court incorrectly ruled that the letter was being offered to prove that Appellant did not have consent to be in the apartment. *Id.* As examined in sub-section (A) of this argument, burglary is crime against possession not ownership. Drafton, not the landlord, held the possessory interest in the apartment. *See* S.C. Code Ann. § 27-

40-430; *see also Singley*, 392 S.C. at 445-446, 679 S.E.2d at 542

Thus, the letter is evidence of an alleged other bad act that is not the subject of a conviction and must satisfy the requirements of Rule 404(b), SCRE, to be admissible. *Beck*, 342 S.C. at 135–36, 536 S.E.2d at 682–83 (admissible when it tends to establish motive, identity, a common scheme or plan, the absence of mistake or accident, or intent, but the evidence must relate to the crime charged). The State freely conceded that the letter could not establish motive, identity, a common scheme or plan, the absence of mistake or accident, or intent. R. 13, ll. 8-24; R. 15, ll. 5-20.

Moreover, the State could produce no evidence, let alone clear and convincing evidence, that there was a logical connection between the letter and the allegations Appellant faced at trial. *Id.*; *State v. Holder*, 382 S.C. 278, 676 S.E.2d 690 (2009). The letter did not allege any specific act by the Appellant. *Cf: State v. Scott*, 405 S.C. 489, 748 S.E.2d 236 (Ct. App. 2013)(evidence of prior bad acts was specific, credible, and similar to the charged offenses).

However, the insinuation from the letter is as damning as it is obvious: in the opinion of the apartment manager, not a judge employing the clear and convincing evidence standard, Appellant committed a bad act to justify banning him from the complex and the bad act was in some way related to Drafton, the State's alleged victim. In this respect, the dearth of specifics in the letter enhanced the unfair prejudice as it invited speculation by the jury and allowed the letter to evade the proper application of Rule 404(b), SCRE. As detailed in the above-subsections, the letter further served to confuse the issues and mislead the jury as to the elements of first-degree burglary.

Accordingly, trial court abused its discretion in admitting the trespass notice letter because it constituted impermissible prior bad act evidence under Rule 404(b), SCRE, having no logical relation to the crimes for which Appellant was standing trial, and, to the extent the letter had any probative value, its probative value was outweighed by its prejudicial effect.

Harmless Error Analysis

While the admission of evidence is subject to harmless error analysis, it does not apply to the instant case because the evidence presented by the State was not overwhelming and the admission of the unduly prejudicial and irrelevant trespass notice letter did affect the outcome of the trial. *State v. Davis*, 371 S.C. 170, 638 S.E.2d 170 (2006) (admission of hearsay statement was not harmless statement to witness was a crucial piece of evidence linking defendant both to the scene of the crime and the murder weapon).

The State emphasized that, under their theory of the case, the letter proved Appellant did not have consent to enter Drafton's apartment:

> Janice Sager, who is the property manager at Northwest, she even showed a paper that Demario is not even supposed to be at the entire apartment complex, let alone Ms. Drafton's house. Keasia signed a paper saying that she acknowledged the fact if he was even seen on her property she would be evicted herself. He has no business at Northwest Apartments, whether it's in the neighbor's house, Ms. Nelson's house, on the playground, in the parking lot, he's not supposed to be anywhere close to Ms. Drafton's house, let alone inside beating on her.

R. 93, ll. 15-25; *see Chaffee v. State*, 294 S.C. 88, 362 S.E.2d 875 (1987) (where solicitor avails himself of evidentiary error in closing argument, the error is not harmless).

Accordingly, the trial court abused its discretion in admitting the letter because it was irrelevant to Appellant's case; any marginal relevance was outweighed by the substantial risk of unfair prejudice; the substantial risk of misleading the jury; or because the letter constituted inadmissible hearsay not falling within any exception.

II.

The trial court erred reversibly in admitting the entirety of the 911 call, purportedly made by Drafton where: (A) the State failed to present sufficient evidence to authenticate that the self-identifying caller to 911 was Drafton; and (B) where the admission of the 911 call violated Appellant's Sixth and Fourteenth Amendment rights to confront and cross-examine witnesses, pursuant to *Crawford v. Washington*[1] and *Davis v. Washington*[2].

Relevant Facts

Drafton did not testify at trial. In lieu of her testimony, the State sought to introduce into evidence a 911 call made on the night of the incident by an individual purporting to be Drafton. R. 18, ll. 14 – 19, ll. 20. Defense counsel objected to the recording's admission. *Id.*

Pre-Trial Motion to Suppress 911 call

The trial court elected to withhold a final ruling on admissibility until the call was offered into evidence, but invited the State to summarize its arguments. *Id.* at ll. 21-24. The State posited that the call was non-testimonial and "therefore it doesn't violate the confrontation clause because the information is given to a dispatcher or emergency personnel to figure out to assess an emergency situation." R. 19, ll. 1-9. The State claimed that the 911 call fell within the business records hearsay exception, or as suggested by the trial court, under the hearsay exception for excited utterance. R. 19, ll. 1-20.

Defense counsel countered that, at a minimum, the call should be substantially redacted to remove the testimonial portions. R. 20, ll. 3-12. Counsel noted that a 911 call becomes testimonial when the "emergency safety reasons . . . stop." *Id.*

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[1] 541 U.S. 36 (2004).

[2] 547 U.S. 813 (2006).

Introduction of the 911 Call

The 911 call was the climax of the State's case against Appellant. Prior to its introduction, defense counsel objected to the tape on confrontation clause grounds as Drafton was not present to testify at trial and the unauthenticated, unsubstantiated testimony in the tape was obviously being used against Appellant. R. 60, ll. 15-25. Counsel argued that the content of the 911 call makes it clear that Appellant had left the area by the time the call was made. *Id.*

The State averred that the 911 operator was still attempting to assess the situation to "determine who they are looking for, what the Appellant did, and what he was wearing." R. 61, ll. 2-11. The State argued that *Davis v. Washington* held that "the identification of the accused is non-testimonial in nature" during a 911 call. *Id.* When asked by the court about 911 tape overhearing an unidentified third party question the caller, the State complained that redacting the tape would "insinuate [that] 911 needs to stop asking questions." *Id.* at ll. 16-19.

The State averred that the entire tape was non-testimonial hearsay and thus admissible. R. 61, ll. 23 – 62, ll. 25. Defense counsel succinctly countered that *Davis* holds "when the questions stop being 'what's happening' to [become] 'what's happened' they become testimonial." R. 63, ll. 2-7. Citing *Davis*, defense counsel noted that, at the very least, the call became testimonial after Appellant fled. *Id.* at ll. 14-25. Counsel also took issue with the State's contention that limiting the admissibility of 911 tapes would discourage information gathering, noting that in most cases the State is able to have the 911 caller testify as to what he or she saw. *Id.*

The court ruled that the entire tape was non-testimonial and admissible. *Id.* at ll. 8-14. The State then called Lancaster County Public Safety Deputy Director Sandra Cauthen to authenticate the tape. R. 65, ll. 15-25.

Trial Testimony of Sandra Cauthen

Defense counsel immediately objected that Cauthen would not be able to authenticate the tape unless she could identify the voice as Drafton. R. 66, ll. 1-13. The trial overruled the objection and noted that identification of the voice "goes to the part of laying the proper foundation" and that he would rule when the State sought to put the tape into evidence. *Id.*

Cauthen testified that all calls to the 911 center were automatically recorded on a secure server and stored for three years. R. 68, ll. 7-24. Cauthen then identified the tape in question and the State asked for permission to move it into evidence. R. 70, ll. 3-11. Counsel objected for lack of foundation. The court summarily overruled him and the tape was played before the jury. *Id.* On cross-examination, Cauthen admitted that she had never met Drafton, had no way of knowing that the caller was Drafton, and that the 911 operations center could not connect the telephone number originating the call with Drafton. *Id.* at ll. 14-24.

Trial Testimony of Suzzane Collins

Suzzane Collins was the former 911 operator who answered the call at issue. *Id.* at ll. 7-20. She recognized her own voice on the call. *Id.* Interestingly, she denied that it was her responsibility to identify the caller: "***we have to rely on the information that the person gives because there's no way that we can verify it because we can't actually see them or anything***." R. 72, ll. 6-17 (*emphasis added*).

On cross-examination, Collins reiterated that they rely solely on information provided by the caller, but that she had never known someone to give a false name. *Id.* Collins did not elaborate on how she would know someone had given her a false name when she admittedly had no way of verifying the individual's identity.

Discussion

A. The trial court erred reversibly in admitting the 911 tape because the State failed to present sufficient evidence to authenticate that the self-identifying caller to 911 was Drafton.

The trial court erred in permitting the State to play the 911 tape before the jury where the State did not adequately establish that the self-identifying caller was Drafton. Rule 901(a), SCRE, provides, "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." The State simply failed to present sufficient evidence to support the trial court's ruling that the 911 caller could be identified as Drafton.

With respect to voice identification, Rule 901(b)(5), SCRE, counsels that to conform with Rule 901(a): "[i]dentification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, [may be authenticated] by ***opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.***"(*emphasis added*); *see also State v. Porter*, 251 S.C. 393, 162 S.E.2d 843 (1968) (identity of party whom witness talked need not be known at time of the conversation, but knowledge enabling witness to identify other party must be later obtained).

In *State v. Shuler* the solicitor played a portion of the murder victim's 911 call ***after the victim's father identified the voice*** as belonging to his daughter. 353 S.C. 176, 577 S.E.2d, 438 (2003) (*emphasis added*). Additionally, in *State v. Aragon* an audio tape of victim's telephone conversation with defendant was sufficiently authenticated ***where victim testified*** at trial that she had known defendant for over 10 years, that she telephoned him from sheriff's office knowing the conversation was taped, she had since listened to tape, she recognized tape from her initials

on it, the tape fairly and accurately represented the phone conversation, and the tape had not been edited or altered in any way. 354 S.C. 334, 579 S.E.2d 626 (Ct. App. 2003) (*emphasis added*)

Appellant could find no South Carolina authority where, as in the present case, the prosecution sought to present to the jury a telephone call purporting to be from the complainant without having a witness recognize complainant's voice in that call.[3] "Mere announcement of identity by a person who has placed a telephone call does not suffice to make it admissible against the person so identified." *See United States v. Benjamin*, 328 F.2d 854, 864 n. 3 (2d Cir.1964). However, under Rule 901 of the Federal Rules of Evidence, the identity of the person with whom the witness is alleged to have had the conversation may be established by circumstantial evidence. *U.S. v. Espinoza*, 641 F.2d 153 (4th. Cir. 1981).

In *Espinoza*, the defendant argued that there was insufficient evidence to identify him as the person with whom an informant placed an order for child pornography by telephone. *Id.* at 171. The government presented no voice recognition evidence. *Id.* The Court noted that, while the defendant responded in a manner that would be expected by the call's order, this was not sufficient to establish identity. *Id.* at 170 (*citing Van Riper v. United States*, 13 F.2d 961 (2d Cir. 1926)). Nor was it sufficient that the phone number in question belonged to defendant's company. *Id.* The Court held that the identification was admissible. The defendant's fingerprint was found on an invoice sent with the pornography to the agreed upon address, this provided

[3] *See State v. Plyler*, 275 S.C. 291, 270 S.E.2d 126 (1980) (telephone call admissible as witness identified voice of accused and victim); *State v. Steadman*, 216 S.C. 579, 59 S.E.2d 168 (1950) (witness had met accused and recognized her voice); *State v. Smith*, 307 S.C. 376, 415 S.E.2d 409 (1992) (911 dispatcher identified defendant's voice as that of anonymous caller after defendant later visited police station in person); *State v. Hester*, 137 S.C. 145, 134 S.E. 885 (1926)(admissions of defendant recorded on detectaphone were admissible as witness testified that he recognized defendant's voice).

sufficient corroboration that the defendant was the call's recipient or that the order placed by the call was completed by him. *Id.*

In the present case, the State presented no witnesses who could identify the voice on the 911 as belonging to Drafton. The State's only authentication witness, Sandra Cauthen, explicitly stated that she could not identify the voice on the call. R. 70, ll. 14-24. Likewise Collins, the 911 operator, admitted that there was no way to verify the identity of the caller. R. 72, ll. 6-17. The State also failed to link the telephone number associated with the call to Drafton. *Id.* Accordingly, the State could not authenticate the telephone call to 911 or identify the caller as Drafton under Rule 901(b)(5).

While the State advanced no other arguments for the authentication or identification of the 911 call at trial, the circumstantial evidence presented was also insufficient to support, as a precedent to admissibility, that Drafton was the caller. The 911 call was approximately two minutes and fifteen seconds long. The caller alleged that Appellant is "standing there with the gun in his hands" pointing it at her. R. (911 recording). Only seconds later, the caller stated that Appellant was actually gone, that she was asleep when he kicked her door, and that he pointed a gun at "a lady downstairs." *Id.* An unidentified third party's voice can be heard asking where Appellant went. *Id.* The caller's statements were chronologically inconsistent. *Id.*

No gun was ever located. None of the State's witnesses testified that they saw Appellant with a gun, including Huff who saw Appellant arguing with the downstairs neighbor. R. 50, ll. 10-22. The Court granted a directed verdict of acquittal on both charges of pointing or presenting a firearm and the jury acquitted Appellant of the possession of a weapon charge. R. 86, ll. 8-23; R. 116, ll. 2-12.

Espinoza's holding is instructive, if prosecutors are unable present witness testimony recognizing the voice at issue, the State must put forward sufficient circumstantial evidence supporting that the voice in question is who the State alleges. 641 F.2d at 170. In *Espinosa*, the fingerprint on the invoice provided the necessary corroboration. *Id.* In the present case, not even Deputy Silbermann, the first officer on the scene, testified that he recognized Drafton's voice or that he saw Drafton on the phone when he first arrived. R. 37, ll. 2-16.

In sum, the State failed to present sufficient authentication or identification evidence to support a finding that the 911 call in question was placed by Drafton. Rule 901(a), (b)(5), SCRE. Thus the trial court erred reversibly in allowing the unauthenticated and insufficiently identified call to be played before the jury. R. 60, ll. 7 – 66, ll. 13.

B. The trial court violated Appellant's Sixth and Fourteenth Amendment rights to confront and to cross-examine witnesses, pursuant to *Crawford v. Washington* and *Davis v. Washington*, by allowing the entirety of a 911 call purportedly made by complainant to be played before the jury as a substitution for Drafton's testimony, which implicated Appellant in the burglary.

"The Sixth Amendment's Confrontation Clause provides that, '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.'" *Crawford v. Washington*, 541 U.S. 36, 42 (2004) (quoting U.S. Const. amend. VI). The Confrontation Clause is applicable to the states under the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400 (1965). The South Carolina constitution provides the same protection to criminal defendants. S.C. Const. art. I, § 14; *see State v. Green*, 269 S.C. 657, 661, 239 S.E.2d 485, 487 (1977).

The right of confrontation is essential to a fair trial in that it promotes reliability in criminal trials and ensures that convictions will not result from testimony of individuals who cannot be challenged at trial. *California v. Green*, 399 U.S. 149 (1970); *State v. Gillian*, 360

S.C. 433, 602 S.E.2d 62 (Ct. App. 2004). The cross-examination of adverse witnesses has been described as the "greatest legal engine ever invented for the discovery of truth." *Green*, 399 U.S. at 158 (internal quotations omitted).

The trial court violated Appellant's right to confront and cross-examine witnesses by allowing the entirety of a 911 call purportedly made by the unavailable complaining witness Keasia Drafton to be played as a substitute for her testimony. R. 70, ll. 9-10.

In *Crawford v. Washington*, 541 U.S. 36, 50-51 (2004), the Supreme Court held that testimonial out-of-court statements are not admissible under the Confrontation Clause unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. The *Crawford* rule applies to all "testimonial" evidence. *Id.* Statements given to police during the course of the investigation are testimonial. *Davis v. Washington*, 547 U.S. 813 (2006) (Confrontation Clause of the Sixth Amendment, as interpreted in *Crawford*, does not apply to "non-testimonial" statements not intended to be preserved as evidence at trial).

The State sought to use the 911 call in question against Appellant during its case-in-chief as a substitute for Drafton's testimony. R. 61, ll. 2 – 62, ll. 25. Appellant had no prior opportunity to cross-examine Drafton. Thus, if the 911 call is testimonial, its introduction at trial violated Appellant's Sixth and Fourteenth Amendment rights to cross-examine and confront the witnesses against him. *Crawford*, 541 U.S. at 42. At a minimum, large portions of the 911 call were testimonial and the trial court's refusal to redact any portion of the call also violated Appellant's constitutional right to cross-examine and confront the witnesses against him. *Id.* Whether a 911 call is testimonial or non-testimonial hearsay is determined by the purpose behind law enforcement's interrogation:

> Statements are non-testimonial 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.

Davis, 547 U.S. at 813-814. Applying the *Davis* factors to Appellant's case militates against finding the call was non-testimonial because law enforcement already had sufficient information to respond to the emergency and the State explicitly used the 911 call to circumvent Drafton's unavailability.

Placing the call in the broader context of the police response is crucial. The State misapprehended how the call fit in the broader emergency response and mischaracterized its role in the trial:

> ***The neighbors who called -- those 911 calls weren't admitted*** so this is -- Ms. Suzanne Collins, who is the dispatcher that's called, has not spoken to anybody that's inside that room until she talks to Ms. Drafton here. She's trying to get as much information as she can to best advise law enforcement what to do. She needs to ask her is he there and what is he wearing so when they respond and they see a man running out matching the description they can stop that person. Everything she's asking is to handle the situation when they arrive. The end of it where she says -- after she says what he's wearing she's saying he pointed the gun, all of that, ***that wasn't even in response to Ms. Collins' question*** . . . .
>
> The extent of her conversation was simply to ***identify what was going on and to send emergency personnel***. I don't think it ever crossed over to the point where she's sitting there asking, "Well ***what did he do to you***?" She's saying, "Is he there? Yes, and he's got a gun.' . . . she's not interrogating her, she's just trying to figure out what in the world is going on.

R. 62, ll. 5 – 64, ll. 17. The State elected not to attempt to admit the other seven calls; R. 20, ll. 16 – 21, ll. 5. The call at issue was the sixth call that operators had received about the incident and, at least, the third call which identified Appellant as involved in the "commotion". *Id.*

Nor was the 911 call in question the first call to allege that Appellant had a gun. It was however, ***the only call where a caller purports to actually see a gun*** as opposed to reporting that they hear someone shouting that Appellant has a gun. R. 95, ll. 9-18. This distinction is important when prosecuting a crime, but immaterial when responding to an emergency. *See People v. Dobbin*, 791 N.Y.S.2d 897 (Sup. Ct. 2004) (911 caller was making an out of court statement to officer for the purpose of establishing defendant was committing a robbery and was aware that providing his name and being asked for other identifying information was for purpose of later involvement as witness).

Moreover, the call in question was the only evidence presented at trial which even possibly places Appellant inside Drafton's apartment during the incident, as opposed to the other calls and trial testimony which only place Appellant in the vicinity of Drafton's apartment. R. 48, ll. 6-10; R. 53, ll. 23 – 54, ll. 1. Further, the State presented no evidence that the 911 operator relayed the information from the call to the responding law enforcement officers.

The State should not be permitted to circumvent the protections of the confrontation clause by introducing a 911 call that, in light of what law enforcement already knew when the call was made, did not provide police with additional information necessary to respond to the emergency. The 911 call's role at trial was particularly odious as it was an obvious replacement for the testimony of the unavailable complaining witness whom Appellant would have had the right to cross-examine. *Crawford*, 541 U.S. at 42; *see State v. Powers*, 99 P.3d 1262 (Wa. Ct. App. 2004) (non-testifying wife's 911 call was testimonial: she reported husband's violation of protective order, gave a description of him to assist in apprehension and prosecution, rather than to protect herself).

Even if a portion of the 911 call is deemed non-testimonial, a large percentage of it was testimonial and the trial court reversibly erred in not redacting any of the call. R. 65, ll. 8-15. At a

minimum, the testimonial portion of the call began when the caller stated that Appellant was "gone" and continued to the end of the call where the caller was questioned by an unidentified third person. R. 63, ll. 14 – 64, ll. 1.

The admission of the 911 call could not have been a harmless error as it was the cornerstone of the State's case. In closing arguments the State replayed the 911 call in full and referenced the call no fewer than a dozen times. R. 90, ll. 4 – 98, ll. 14. The 911 call was the only evidence that directly attributed the damage to Drafton's door to Appellant.

The 911 call also provided the only purported eyewitness evidence that Appellant had a gun. Moreover, the court referenced the call in over-ruling Appellant's directed verdict motion on the burglary indictment. Tr. 80, ll. 20-25. Accordingly, the 911 call was testimonial hearsay; its admission at trial violated Appellant's Sixth and Fourteenth Amendment rights to cross-examine and confront the witnesses against him and constitutes reversible error. *Crawford*, 541 U.S. at 42.

III.

The trial court committed reversible error in refusing to grant a directed verdict of acquittal where the State failed to present any substantial circumstantial evidence that Appellant intended to commit a crime once inside Drafton's apartment, or that Appellant injured Drafton in the course of committing a burglary; and where the evidence that the State did present merely raised the suspicion of Appellant's guilt.

Introduction

Based on the evidence put forward by the State at trial, Appellant was entitled to a directed verdict on the indictment for first degree burglary as the State failed to present any substantial circumstantial evidence that Appellant intended to commit a crime once inside Drafton's apartment, or that Appellant injured Drafton in the course of committing a burglary.

Testimony of Dominque Huff

On the night of the incident, Drafton's across-the-hall neighbor, Dominque Huff, heard a disturbance coming from "across the walkway" in the direction of Drafton's apartment. R. 47, ll. 3 – 48, ll. 4. When asked by the State what he actually saw, Huff replied: "when I come out I seen the door was off the hinges but it was dark on the inside and all I heard was just a whole bunch of commotion." R. 48, ll. 6-10. Huff did not know who was in the apartment. *Id.* Huff then returned to his apartment where he and Jamie Hunt, his live-in girlfriend, called the police. *Id.* at ll. 12-17.

At trial, Huff reluctantly admitted that he when he returned to his apartment, he also grabbed his pistol before walking back into the hallway a second time. R. 48, ll. 18 – 51, ll. 22. Huff alleged that he retrieved his pistol because he heard someone shout that Appellant had a gun. *Id.*, Huff recalled that when he returned to the hallway, he still did not see anyone inside the apartment and that "***I actually didn't see anybody with a gun***." *Id.* (*emphasis added*).

Instead, Huff testified that he saw Appellant downstairs standing by a trashcan on the ground floor arguing with neighbor Sandra Nelson. R. 49, ll. 12-23. Huff stated that he observed

Appellant pointing towards Drafton's unit while arguing with Nelson, a gesture Huff recollected he wrongly conflated with Appellant pointing a gun. R. 50, ll. 10-17. When pressed by the State, ***Huff denied ever seeing Appellant point a gun at Nelson***. *Id.* at ll. 23-24 (*emphasis added*). Huff also adamantly denied that he ever went to Drafton's unit that night: "I was actually outside when all of the police and stuff were out there. ***I actually didn't physically go over there when all of the commotion was going on. . . .***" R. 52, ll. 7-16 (*emphasis added*).

On cross-examination, Huff repeated that he was doubtful that Appellant had a gun and that Appellant was very likely simply gesturing with his hand, "I seen him but I don't know if it was a gun, or like I said, it was just his hand. Like I said, it was dark down by the trash can so all I seen was his hand go up. . ." R. 53, ll. 23 – 71, ll. 1.

Trial Testimony of Jamie Hunt

Hunt testified that she also heard a disturbance and that she called 911 at Huff's direction. R. 55, ll. 11-22. Hunt did not leave their apartment and only saw Drafton briefly while the complainant was standing outside her apartment. *Id.* She did not see Appellant that night. *Id.*

Directed Verdict Motion: First Degree Burglary

At the close of the State's case, Appellant moved for a direct verdict of acquittal on all charges. R. 74, ll. 7-8. With respect to the first degree burglary charge, defense counsel argued that the State presented no evidence that Drafton, as the lawful possessor of the apartment, did not consent to Appellant's entry. R. 80, ll. 8-11. Without taking argument from the State, the trial court ruled, "that's an easy one, I deny your motion. . ." *Id.* at ll. 12-14.

Defense counsel continued, arguing that the State had also failed to put forward sufficient evidence that Appellant entered the apartment with the intent to commit a crime. R. 80, ll. 15-18. The court, again without asking for the State's input, denied the motion, citing to the door and the

911 call purportedly made by Drafton. *Id.* at ll. 20-25. Appellant renewed all of his motions after the jury returned its verdict. R. 117, ll. 6-10.

Motion for a New Trial and Sentencing

After the jury was dismissed, defense counsel motioned for a new trial on the first degree burglary charge arguing that the State did not present credible evidence that Appellant entered Drafton's apartment without consent or credible evidence that he was armed. R. 117, ll. 6-10. Again without asking for the State's argument, the court denied defense counsel's motion, noting "your client won on the possession of a weapon charge and he also won on the attempted murder charge." *Id.* at ll. 11-17. The trial court sentenced Appellant to fifteen years. R. 122, ll. 2-3.

Discussion

Appellant was entitled to a directed verdict on the indictment for first degree burglary as the State failed to present any substantial circumstantial evidence that Appellant entered Drafton's dwelling with the intent to commit a crime and failed to present any substantial circumstantial evidence that Appellant caused physical injury to Drafton while committing the alleged burglary.

Our Supreme Court has held that when reviewing a trial judge's refusal of a defendant's motion for a directed verdict, an appellate court considers "not whether there is 'any' evidence to support the conviction, but whether viewing the evidence in the light most favorable to the prosecution, there is sufficient evidence to justify a rational trier of fact to find guilt beyond a reasonable doubt." *State v. Stewart*, 278 S.C. 296, 295 S.E.2d 627, 632 (1982), *citing Jackson v. Virginia*, 443 U.S. 307 (1979). The accused is entitled to a directed verdict when the State fails to present evidence to support every element of the charged offense. *State v. Brown*, 360 S.C. 581, 586, 602 S.E.2d 392, 395 (2004); *see also State v. Bostick*, 392 S.C. 134, 708 S.E.2d 774 (2011).

When considering a motion for directed verdict of acquittal, "the trial court is concerned with the existence or non-existence of evidence, not its weight." *Brown*, 360 S.C. at 586, 602 S.E.2d at 395. "When the State fails to produce ***substantial circumstantial evidence*** that the defendant committed a particular crime, the defendant is entitled to a directed verdict." *State v. Odems*, 395 S.C. 582, 720 S.E.2d 48 (2011) (*emphasis added*). A trial court "should grant a directed verdict motion when the evidence *merely raises a suspicion* that the accused is guilty." *Id.* at 586, 720 S.E.2d at 50 (emphasis added) (citation omitted).

"Suspicion implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof." *See State v. Buckmon*, 347 S.C. 316, 322, 555 S.E.2d 402, 404-05 (2001). Therefore, a case based solely upon circumstantial evidence should be submitted to the jury only "if there is any substantial circumstantial evidence which reasonably tends to prove the guilt of the accused or from which his guilt may be fairly and logically deduced." *Bostick*, 392 S.C. at 139, 708 S.E.2d at 776-777 (*citing State v. Mitchell,* 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000)).

Appellant was indicted for first degree burglary under S.C. Code Ann. § 16-11-311(A)(1)(b):

> "entered the dwelling of Keasia Drafton without consent and with intent to commit a crime in the dwelling and while effecting entry or while in the dwelling or in immediate flight from the dwelling, he or another participant in the crime caused physical injury to a person who was not a participant in the burglary, to wit: Keasia Drafton, and the Defendant did enter in the nighttime.

R. 125.

First, the State presented no direct or substantial circumstantial evidence that Appellant intended to commit a crime once he entered the apartment. As an initial matter, the State failed to establish that Appellant ever gained access to the apartment after kicking the door. *State v.*

Kornahrens, 290 S.C. 281, 350 S.E.2d 180 (1986) (burglary requires that, if there is an obstruction to entry, the physical force used must be sufficient to remove the obstruction). Deputy Silbermann stated that the door was "hanging slightly off the hinges' and the deadbolt was still engaged when he arrived. R. 38, ll. 8-11; R. 41, ll. 21-23. He also admitted that the door was only partially open when he arrived. R. 41, ll. 24 – 59, ll. 1. Likewise, Huff never saw Appellant in Drafton's apartment. R. 48, ll. 6-10; R. 66, ll. 7-23.

Second, the State presented no testimony that Appellant injured Drafton after entering her apartment. Evaluating the 911 call in the light most favorable to the State, only raises a mere suspicion that Appellant ever entered the apartment with the intent to commit a crime or that Appellant injured Drafton after entry. The caller never stated that Appellant gained entry, only that he that Appellant "came kicking my door". R. (911 recording).

Accordingly, the evidence relied upon by the State does not amount to substantial circumstantial evidence reasonably tending to prove Appellant's guilt, or from which his guilt may be fairly and logically deduced. *See Bostick*, 392 S.C. at 139, 708 S.E.2d at 776-777. The court erred in refusing to grant a directed verdict on Appellant's indictment for first degree burglary as the evidence merely raised the suspicion of Appellant's guilt, and the State failed to present substantial circumstantial evidence that Appellant entered Drafton's dwelling with the intent to commit a crime or that Appellant injured Drafton in the course of committing the alleged burglary.

IV.

The trial court erred in refusing to grant a new trial where the cumulative effect of the errors were so prejudicial as to deprive Appellant of a fair trial.

Discussion

In *State v. Johnson*, our Supreme Court held that an appellant must demonstrate more than error in order to qualify for reversal pursuant to the cumulative error doctrine. 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999). Specifically, the errors must adversely affect a defendant's right to a fair trial to qualify for reversal. Id. Further, the Court has "stressed on more than one occasion, the Constitution entitles a criminal defendant to a fair trial, not a perfect one." *Id.* (*quoting State v. Mitchell*, 330 S.C. 189, 199–200, 498 S.E.2d 642, 647–48 (1998)).

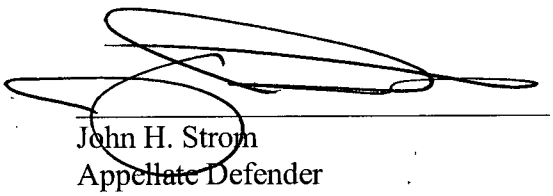
Even if this Court finds that the errors identified in Issues I and II do not individually rise to a level mandating reversal, the cumulative effect of those errors, in light of the Court's rulings, were so prejudicial as to deprive Appellant of a fair trial. *See Johnson*, 334 S.C. at 93, 512 S.E.2d at 803. The key evidence put forward by the State consisted of an unauthenticated 911 call used in lieu of complainant's testimony and a trespass notice letter signed by complainant and her landlord, which the State could not establish Appellant had knowledge of and which was irrelevant to the case. None of the witnesses called by the State testified that they saw Appellant in Drafton's residence and the jury acquitted Appellant of all gun-related charges.

Accordingly, the trial court erred in refusing to grant a new trial because the cumulative effect of the errors were so prejudicial as to deprive Appellant of a fair trial. *See Johnson,* 334 S.C. at 93, 512 S.E.2d at 803; *see also State v. Peterson*, 287 S.C. 244, 335 S.E.2d 800 (1985) (combination of numerous errors by trial court compels reversal) *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991).

CONCLUSION

For the reasons herein stated, Appellant DeMario Thompson respectfully requests that his conviction be reversed and remanded to the Lancaster County Court of General Sessions for a new trial (Issues I, II, and IV); or, in the alternative, that this Court issue an Order of Acquittal on his conviction for First Degree Burglary (Issue III).

Respectfully submitted,



John H. Strom
Appellate Defender

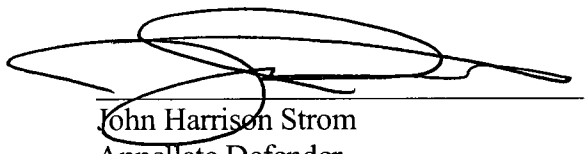
ATTORNEY FOR APPELLANT

This 22nd day of April, 2015.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

April 22nd, 2016



John Harrison Strom
Appellate Defender

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

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lancaster County

Brian M. Gibbons, Circuit Court Judge

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SC Court of Appeals

THE STATE,

RESPONDENT,

V.

DEMARIO MONTE THOMPSON,

APPELLANT

APPELLATE CASE NO. 2015-000126

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 Deborah R. J. Shupe, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 22nd day of April, 2015.

John H. Strom
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 22nd day of April, 2015.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: May 12, 2025.