

19820

STATE OF SOUTH CAROLINA

ORIGINAL

In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY

J. Derham Cole, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

GERALD CARL PITTS,

APPELLANT

Appellate Case No. 2009-149006

RECORD ON APPEAL

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SC Court of Appeals

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THE FOLLOWING EXHIBIT IS ON FILE WITH THIS COURT:

STATE'S EXHIBIT #5 (VIDEO)

1 STATE OF SOUTH CAROLINA)
2 COUNTY OF SPARTANBURG) IN THE COURT OF GENERAL SESSIONS
3
4 The State,)
5 -vs-) TRANSCRIPT OF RECORD
6 Gerald Pitts,) 2009-GS-42-6603;6604
7 Defendant.) December 15, 16 and 17, 2009
8) Spartanburg, South Carolina
9

10 B E F O R E:

11 HONORABLE J. DERHAM COLE, JUDGE; and a jury
12
13

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

15 AMANDA MORRIS GALLIVAN, ESQUIRE
16 RYAN FREDERICK McCARTY, ESQUIRE
17 Attorneys for the State

18 TANYA R. JONES, ESQUIRE
19 Attorney for the Defendant
20
21

22 Linda D. Moffitt
23 Circuit Court Reporter
24
25

2.

Opening statements

1 MS. GALLIVAN: May it please the Court.

2 THE COURT: Yes, ma'am.

3 MS. GALLIVAN: Good afternoon, ladies and gentlemen.

4 As the judge told you, this is a case about a man who
5 committed burglary and grand larceny. The facts are pretty
6 simple.

7 Sometime around August 2nd of this year the defendant,
8 Gerald Pitts, asked his friend, Marsha Smith, to drive him
9 over to Officer Cooper's home.

10 Once there he got out of the car. He went inside
11 Officer Cooper's garage that's attached to the home and he
12 stole an air compressor, a generator and a weed eater.

13 Now, a person is guilty of burglary in the second
14 degree if they enter a dwelling without consent with the
15 intent to commit a crime. In South Carolina a garage is
16 considered part of a dwelling for the purposes of burglary.

17 Grand larceny is the unlawful taking and carrying away
18 of another person's property with the intent to permanently
19 deprive, that the property is valued over a thousand
20 dollars.

21 We have all of the elements of those offenses here
22 today. Okay. So if it's that simple, why am I standing
23 before you? We're here to resolve the question of
24 identification.

25 We, the state, are firmly convinced that this

Opening statements

1 defendant, Gerald Pitts, is the man that entered Officer
2 Cooper's garage and took his property.

3 The defendant through his attorney is likely to tell
4 you it wasn't me. But we're going to present you with
5 evidence that backs up our allegations.

6 You're going to hear from Officer Cooper, and he's
7 going to tell you that somebody entered his garage and
8 stole his personal property and how that's affected him.

9 You're going to hear from the officer who has worked
10 this investigation from the beginning. And then you're
11 going to hear from Marsha Smith, the defendant's former
12 friend, who drove him over to Officer Cooper's home. She
13 was an eye witness. She saw him take the property. And
14 she was there to witness it. You're going to see a video
15 where she spoke with him about this incident.

16 I'm not here to tell you that Marsha Smith has a
17 sparkling clean background. You saw her attire earlier. I
18 wish that I could call my preacher to the stand to tell you
19 about what the defendant did.

20 MS. JONES: Objection, Your Honor. If she's not going
21 to introduce that evidence she can't talk about it in
22 openings.

23 THE COURT: Overruled.

24 Go ahead.

25 MS. GALLIVAN: But it's often the case that the people

1
Opening statements

1 that know the most about criminal activity are the people
2 who associate themselves with criminal activity, and that's
3 what we are stuck with today.

4 But once you remember that Marsha Smith was there, she
5 witnessed the crimes that take place, and once questioned
6 about it by the officers she told the truth, the truth.
7 That's what we're interested in this case today.

8 All I can ask from you is that you pay close attention
9 to the witnesses that we bring before you, that you listen
10 carefully to the evidence that we're going to present and
11 that, most importantly, you use your common sense. Common
12 sense gets us all through tough decisions in our everyday
13 lives, and I have full faith that it'll lead you to the
14 right decision in this case today. Thank you very much for
15 your time and attention.

16 THE COURT: Ms. Jones.

17 MS. JONES: Thank you, Your Honor.

18 My name is Tanya Jones, and I represent the defendant
19 here today, Mr. Gerald Pitts.

20 Now, the state would have you believe that this is
21 going to be a simple case, an easy case, we're going to put
22 a witness on the stand and she's going to tell you what
23 happened.

24 But they failed to mention she had inconsistent
25 statements, ladies and gentlemen. You're going to hear

Opening statements

1 those inconsistent statements when she was first questioned
2 about the incident.

3 And then later on she was questioned again, and you're
4 also going to hear information regarding things that she
5 said about the incident, who might have the property and
6 how those leads turn to nothing, absolutely nothing.

7 Their star witness as you saw today, ladies and
8 gentlemen, is in orange attire. And there's a reason for
9 that, because she's currently in jail on current charges.

10 Their star witness has a less than stellar background.
11 And you're going to hear information to that today. And
12 that's the only evidence they're going to present today, is
13 that star witness, Marsha Smith. And it's going to come
14 down to whether or not you believe somebody who constantly
15 changes her story when the officers want her to. That's
16 going to be the testimony today.

17 You're also going to see a video, and it's going to --
18 I'm sure the state's going to really jazz it up and really
19 argue it in closing. But you need to pay special attention
20 to it and you need to listen to it with your own ears, and
21 you decide what's being said, not necessarily what Marsha
22 Smith says that it says, because she's going to be
23 saying -- I'm pretty sure the evidence is going to say, she
24 is going to say that he made a confession, he said he did
25 it and he was with me.

3
Jeffrey Scott Cooper
Direct examination by Mr. Gallivan

1 But listen. Keep your ears open. And you are going
2 to have to ask yourself do you hear that, do you see that,
3 is that what he said. And I'm sure at the end of the day
4 when you go back to that jury room you're going to find my
5 client not guilty. Thank you.

6 MS. GALLIVAN: The state would call Deputy Cooper to
7 the stand.

8 JEFFREY SCOTT COOPER, having
9 been first duly sworn, testified as follows:

10 DIRECT EXAMINATION BY MS. GALLIVAN

11 Q Officer Cooper, will you state your full name for the
12 record?

13 A Jeffrey Scott Cooper.

14 Q What's your occupation?

15 A I'm a police officer with the Spartanburg city police
16 department.

17 Q How long have you been doing that?

18 A January 3rd will be 13 years.

19 Q Officer Cooper, tell us where you live.

20 A I live at Road, Chesnee.

21 Q How long have you lived there?

22 A I've been there since 2002.

23 Q Can you describe your house and property for us?

24 A I live on 6.87 acres. I have a long driveway. It's
25 approximately -- my house sets approximately about 120

Jeffrey Scott Cooper
Direct examination by Mr. Gallivan

1 yards off the road. It's all concrete.

2 If you're looking at my house you cannot see in my
3 garage. I have the two windows facing the road. You have
4 to kind of get to the side before you can see in my garage.
5 Once I come down my driveway I make a right-hand turn into
6 my garage.

7 Q Okay.

8 MS. GALLIVAN: Permission, Your Honor, to approach the
9 witness.

10 THE COURT: Yes, ma'am.

11 Q I want to show you what's been marked as State's
12 Exhibits 6, 7, 8 and 9. Will you take a look at those for
13 me? Do you recognize those pictures?

14 A Yes, ma'am.

15 Q Can you tell us what they are?

16 A The first one here, ma'am, it's a picture from the
17 road. It shows how far off the driveway my house is.

18 THE COURT: Wait just a minute.

19 Do you have any objection to 6, 7, 8 and 9,
20 photographs?

21 THE WITNESS: Oh, I'm sorry.

22 MS. JONES: No, Your Honor.

23 THE COURT: They are admitted. Okay.

24 (Photographs marked State's Exhibits Nos. 6, 7, 8 and
25 9.)

Jeffrey Scott Cooper
Direct examination by Mr. Gallivan

1 A The first one I'm holding up has Exhibit 9 on it. It
2 is a shot from the road at my house showing how long the
3 driveway is. And the trees are kinda -- obstruct the
4 garage there, so you can't really see it. But it shows the
5 distance off the road.

6 The second one I'm holding up has Exhibit 8. It's
7 about half way down the driveway. At that point in time
8 you could see that I had to turn left to go into my garage.
9 You can't see inside my garage from the roadway.

10 The one that has Exhibit 6 written on the back of it
11 is a picture inside of my garage from my driveway. It
12 shows where my wife's car always sets and my marked
13 take-home police car always sets. It's always there.

14 When I'm not at home, once I take my police car home I
15 do park it there. I do not drive it for personal reasons.

16 This one here is showing a closeup of where my police
17 car is parked right to the -- the yellow would be the front
18 side, my left side of this picture. In this corner here is
19 where my generator always set right beside the police car.

20 Q Okay. And the generator is obviously not in this
21 picture.

22 A No, ma'am.

23 MS. GALLIVAN: Permission to publish these to the
24 jury, Your Honor.

25 THE COURT: You may.

Jeffrey Scott Cooper
Direct examination by Mr. Gallivan

1 Q When did you notice that you had personal property
2 missing from your garage?

3 A I noticed it on August the 7th.

4 Q Okay. What did you do when you noticed that your
5 property was missing?

6 A I made a police report to the Spartanburg County
7 Sheriff's Office over the phone.

8 Q Can you tell us what items you reported?

9 A I reported a 5500-watt generator; I reported a Cub
10 Cadet weed eater and an unknown name brand on an air
11 compressor.

12 Q Okay. I want to show you documents that have been
13 marked as State's Exhibits 10 and 11. Do you recognize
14 these documents?

15 A Yes, ma'am.

16 Q Can you tell us what they are, what they represent?

17 A This is where I went back to places that I bought the
18 original property from and asked for receipts for the
19 closest items that they had to replace it and what cost it
20 would cost me to replace my items today.

21 MS. GALLIVAN: Your Honor, the state would offer to
22 move these into evidence as well.

23 THE COURT: What numbers are they?

24 MS. GALLIVAN: 10 and 11.

25 MS. JONES: Your Honor, we would object because those

Jeffrey Scott Cooper
Direct examination by Mr. Gallivan

1 are new.

2 THE COURT: Sustained.

3 Q Did you personally obtain these to show the value of
4 the property --

5 A Yes, ma'am.

6 Q -- that was taken?

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

8 (Bench conference held off the record in the presence
9 of the jury but out of the hearing of the jury.)

10 Q Can you give the jury an estimate of how much these
11 items cost you?

12 A Approximately \$1,250.

13 Q And that's the value that it would have, the property
14 would have, to you.

15 A Yes, ma'am.

16 Q Now, around August 2nd, around that date, did anyone
17 have permission besides people that lived in your home
18 obviously to enter your garage?

19 A No, ma'am.

20 Q Had you sold any property out of your garage to
21 anyone?

22 A No, ma'am.

23 Q Now, after you filed the police report, being that
24 you're an officer, was that the end of it? Did you step
25 back or did you do your own personal investigation?

Jeffrey Scott Cooper
Direct examination by Mr. Gallivan

1 A I did some work on my own, ma'am.

2 Q Did you obtain any information about the case?

3 A Yes, ma'am, I did.

4 Q What information did you find out?

5 MS. JONES: We do object at this point. I've never
6 been provided any type of incident report or supplemental
7 report or any written information as to another
8 investigation by the victim. I would be entitled to that
9 information.

10 MS. GALLIVAN: This was his personal, asking around to
11 friends and family members in the community. It was not a
12 professional investigation as a police officer.

13 A I was --

14 THE COURT: You're asking him what information he
15 gathered?

16 MS. GALLIVAN: Yes, Your Honor.

17 THE COURT: Well, that would be hearsay too. I
18 sustain the objection.

19 MS. GALLIVAN: I have no further questions at this
20 time.

21

22

23

24

25

Jeffrey Scott Cooper
Cross-examination by Ms. Jones

1 CROSS-EXAMINATION

2 BY MS. JONES

3 Q Officer Cooper, you indicated that you made a report
4 over the phone, is that correct?

5 A Yes, ma'am.

6 Q Did you ever go back in and file any type of written
7 statement or anything like that?

8 A No, ma'am.

9 Q Okay. And it's your allegation today that you did
10 make a report about an air compressor?

11 A Yes, ma'am.

12 Q Do you have any idea why that information wasn't
13 included in the initial incident report?

14 A No, ma'am.

15 Q I also noticed that this is -- the generator was a
16 5500-watt Briggs & Stratton, correct?

17 A Yes, ma'am.

18 Q Okay. Looks like you got another one at Sears that's,
19 you know, one of those types of stores that would have that
20 type of information, or sell those rather. I am sorry.

21 A Well, no. I do not have another one.

22 Q Let me, let me rephrase it.

23 A I haven't got the money to buy another one.

24 Q A generator you'd maybe buy at Sears, right?

25 A Yes, ma'am. That's the closest I had that I opened.

Jeffrey Scott Cooper
Cross-examination by Ms. Jones

1 Q Okay. And isn't it fair to say that that type of
2 generator would probably weigh somewhere between 172 pounds
3 without fuel?

4 A I'm not sure how much it weighs, ma'am.

5 Q Pretty heavy though.

6 A I picked it up several times and put it on the back of
7 my truck.

8 Q Would you disagree that a generator would probably
9 weigh 172 pounds, give or take without fuel?

10 A I've never read the specs on a generator, ma'am. I
11 don't know how much they weigh.

12 Q And how much fuel did this generator carry, 5 gallons
13 or 6 gallons?

14 A It had a 5-gallon tank, may have been a gallon or a
15 gallon and a half in it.

16 Q Okay. So 5 gallons. I mean, a gallon would be about
17 five pounds at least, wouldn't you agree?

18 A No. A gallon weighs 8 pounds.

19 Q 8 pounds?

20 A 8 pounds.

21 Q So on top of the weight of the generator it could have
22 40 pounds of fuel in it.

23 A But it didn't. I had it put up for the winter. I
24 know it didn't have but about maybe a gallon max in it, or
25 had it put up for the summer. I use it in the winter. I

Matthew Davis

Direct examination by Ms. Gallivan

1 had it put up for the summer.

2 Q And so you say it had about a gallon, at least a
3 gallon and a half.

4 A No. At least a gallon, maybe a gallon and a half.

5 Q And you've never saw anybody going into your garage,
6 isn't that correct?

7 A No, ma'am.

8 MS. JONES: I have nothing further.

9 MS. GALLIVAN: Nothing further from this witness.

10 THE COURT: You may step down.

11 MS. GALLIVAN: The state would call Investigator Davis
12 to the stand.

13 MATTHEW DAVIS, having been
14 first duly sworn, testified as follows:

15 DIRECT EXAMINATION BY MS. GALLIVAN

16 Q Will you please state your full name for the record?

17 A Matthew Davis.

18 Q And where are you employed?

19 A Spartanburg County Sheriff's Office.

20 Q How long have you been employed there?

21 A I've been employed there for a little over a year now.

22 Q Do you have any previous law enforcement experience
23 before that? . /

24 A I do.

25 Q Can you describe that for us?

Matthew Davis
Direct examination by Ms. Gallivan

1 A Back in 2004 I was employed at the City of
2 Spartanburg. It was on patrol there. Also assigned to the
3 tactical unit, SWAT. I was also assigned to crime
4 prevention.

5 Q What were some of your general duties and
6 responsibilities around the time of the defendant's arrest?

7 A Property crimes investigator, investigate various
8 property crimes, thefts, burglaries to houses, cars being
9 broken into, shopliftings.

10 Q Are your present duties the same today?

11 A Yes, ma'am.

12 Q Is one of your duties to insist -- assist in
13 investigations?

14 A To assist other investigators, yes, ma'am.

15 Q Were you involved in the investigation in the burglary
16 and grand larceny that occurred on and around August 2nd in
17 this case?

18 A Yes, ma'am, I was.

19 Q Can you describe the property that the burglary and
20 grand larceny involved?

21 A It involved an air compressor, a weed eater and a
22 generator.

23 Q And where was this property located?

24 A Well, it was before it was taken, it was located on
25 Road at the victim's house. I have the notes

Matthew Davis
Direct examination by Ms. Gallivan

1 that we kept, you know, to know the exact address.

2 Q Correct. Is that -- is the victim's property in
3 Spartanburg County?

4 A Yes.

5 Q Now, through your investigation you questioned Marsha
6 Smith, is that correct?

7 A Yes, ma'am.

8 Q Did you take a statement from Marsha?

9 A I was there when a statement was taken, yes, ma'am.

10 Q Okay. Can you tell us what information she was able
11 to provide in her statement?

12 A She --

13 MS. JONES: Your Honor, I'm going to object. That's
14 hearsay. They're going to call Ms. Smith to the stand.

15 THE COURT: Sustained.

16 Q Was -- did Ms. Smith give more than one statement in
17 this case?

18 A Yes, she did.

19 Q Did she indicate any reason for making multiple
20 statements?

21 A Yes. For fear of her safety.

22 Q Can you describe the items that Mr. Cooper reported
23 stolen?

24 A He described it was a -- right here. He said it was a
25 Briggs & Stratton Power Boss 500-watt generator. It had --

Matthew Davis
Direct examination by Ms. Gallivan

1 it was red in color.

2 He also told us that the -- he had a -- about two
3 years old. It was a straight shaft Club Cadet 4-stroke
4 weed eater. He also said that the air tank at the time, he
5 was unsure, but he remembered it being blue, had a blue
6 tank to it.

7 Q Okay. Now, I want to go back to Ms. Smith. When you
8 questioned Ms. Smith did she -- was she able to identify a
9 suspect in the case?

10 A She was.

11 Q Did she tell you that she actually saw the defendant
12 at the time of the crimes in question?

13 A Yes, and that she had also seen the property at his
14 residence at a later date.

15 Q Did you compile a photo lineup to show Ms. Smith?

16 A I did.

17 Q How did you compile this lineup?

18 A There's a computer that has various pictures, and it
19 prints out similar pictures on there. Then once it has six
20 we take that to the person so that way they can look.

21 Q Do the pictures have similar characteristics?

22 A Yes, ma'am, they do. The computer will automatically
23 do that for us, by a group of people with similar
24 characteristics.

25 Q Did you show Ms. Smith the lineup that you put

Matthew Davis
Direct examination by Ms. Gallivan

1 together?

2 A I did, but I turned it over, so that way it would be
3 impartial. It was turned over. And she was told that --
4 she was not able to view it. I had pulled out the folder
5 and had it setting down and told her to turn it over, for
6 her to look at it and tell me if she recognized the person
7 who she was talking about. And she had already stated it
8 was Gerald Pitts who she knew for years. She turned over
9 the piece of paper without hesitation and pointed to
10 Mr. Pitts and said that's Gerald.

11 Q I'm going to show you what's been marked State's
12 Exhibits 1, 2, 3 and 4. Do you recognize these documents
13 that I am handing to you?

14 A I do.

15 Q Can you tell us what they are, what they represent?

16 A This first one that's listed as Exhibit No. 4 --

17 THE COURT: Don't show it.

18 Q Just describe it, please.

19 A Oh, just describe it. Okay -- is the photo lineup
20 containing Mr. Pitts.

21 No. 3 is the affidavit of photo identification that
22 the sheriff's office does to verify what the person that
23 the -- you know, the person they circled and initialed is
24 the person. And has her give a brief statement as to the
25 person who -- and then she puts below the person who did.

Matthew Davis
Direct examination by Ms. Gallivan

1 And she signed her name to it.

2 Number -- State's Exhibit No. 2 is another photo
3 lineup of a person we believed the property had possibly
4 went to after it left Mr. Pitts' house. Had it identified
5 as to be a -- because we knew a nickname. She identified
6 the person. So that way it was able to help us to gain the
7 person's actual real name.

8 So therefore we could further do our investigation and
9 see if we could track the property down. And it's another
10 affidavit of photographic identification for that one to
11 ensure that we did have the right person.

12 Q So both photo lineups were actually handed to
13 Ms. Smith.

14 A They were put down on a table in front of her, and she
15 flipped over to look at them.

16 Q Do those lineups fairly and accurately represent the
17 photo lineups that you compiled and presented to Ms. Smith
18 as part of your investigation?

19 A Yes, ma'am.

20 Q And was Ms. Smith able to pick out one of those six
21 photographs as a person who committed the burglary and the
22 grand larceny in this case?

23 A Yes, ma'am.

24 Q Who did she pick out?

25 A She picked out Mr. Gerald Pitts as the person who took

Matthew Davis
Direct examination by Ms. Gallivan

1 the items.

2 Q And how long did it take Ms. Smith to pick the photo?

3 A Without hesitation she flipped over the paper and
4 looked and pointed right at him.

5 Q Was she told that the person who committed the
6 burglary and grand larceny may or may not be in that
7 lineup?

8 A She was. As with any photo lineup that I do when I
9 show it, I advise the person that the person may or may not
10 be in this photo lineup, just need them to take a look at
11 it and see if it is, that the person, you know, may or may
12 not be in it. And, obviously, they might have some
13 characteristics that change. They, you know, might have a
14 mustache in the picture or they might now have a mustache
15 and they don't in the picture and so forth.

16 Q So did Ms. Smith indicate that she knew that that was
17 the defendant in this case?

18 A She did. She said 110 percent.

19 Q Was she forced, coerced or threatened in any way to
20 pick someone from this particular lineup?

21 A No, ma'am.

22 Q Did you tell her or suggest in any way who to pick?

23 A No, ma'am. That's why it was placed face down in
24 front of her on a table, so that way it cannot be
25 insinuated that it was coerced or anything. And that's why

Matthew Davis
Direct examination by Ms. Gallivan

1 she was also told that the person may or may not be in
2 here. That's why we need her to take a look at this.

3 MS. GALLIVAN: Your Honor, at this time we'd move to
4 have State's Exhibit 1 through 4 admitted into evidence.

5 MS. JONES: No objection, Your Honor.

6 THE COURT: They are admitted.

7 (Affidavit marked State's Exhibit No. 1; lineup marked
8 State's Exhibit No. 2; affidavit marked State's Exhibit No.
9 3; lineup marked State's Exhibit No. 4.)

10 Q Did you ask Ms. Smith to help further the
11 investigation in this case in any way?

12 A Yes, ma'am.

13 Q Can you describe what you asked her to do?

14 A We asked Ms. Smith if she would, if she could call
15 Mr. Pitts and if we could see if we could -- if he would
16 divulge any of the information, because we knew that
17 Mr. Pitts more likely than not due to his connections in
18 the area knew that we had picked her up and spoke with her.

19 We wanted her to call him to see what the conversation
20 would be, if he wanted -- you know, if he would tell her
21 about it, if she would discuss a little bit more about it
22 with him to see what exactly might have occurred, if he
23 would talk about it to her since they got picked up and was
24 gone for some time from her house.

25 Q Did she actually call Mr. Pitts?

Matthew Davis
Direct examination by Ms. Gallivan

1 A No, she did not call Mr. Pitts because she said she
2 never deals with Mr. Pitts over the phone, that if she --
3 says she doesn't even know his numbers and never called
4 him, so that would be out of the ordinary for him and he
5 would know something was wrong. And she was afraid for her
6 safety if she did that.

7 Q So since she didn't do that did you ask her to do
8 anything else to help investigate?

9 A Yes. I asked her. I said, well, you know, what, what
10 can you do then, you know. I mean, we have multiple things
11 available to us, that we could put a wire on you, which is
12 commonly what's referred to as a recording device that
13 somebody goes into an area with. It records them talking.
14 And some of them do have audio on it. And we asked if she
15 could do that, and she said, oh, yes, I'll be more than
16 happy to.

17 Q Was she offered or promised anything?

18 A Nothing. She was not promised or offered anything in
19 order to do any of that, no. She was actually rather
20 excited to go do this.

21 Q Did she follow through and actually go talk to
22 Mr. Pitts in this case?

23 A She did. She went through, and it was taped, and also
24 was able to get ahold of one of the ones that have the
25 audio and video of it. And we asked her, you know, what,

Matthew Davis

Direct examination by Ms. Gallivan

1 what way can you approach him because you've dealt with
2 Mr. Pitts for years, we don't want you to approach him in a
3 way that's going to make him automatically think. And she
4 said, well, I get Lortabs from him. She said I can go down
5 there. He told me the other day --

6 MS. JONES: We object, Your Honor. This is all
7 hearsay. We can get Ms. Smith on, and we can also listen
8 to the D. V. D.

9 THE COURT: Sustained.

10 MS. GALLIVAN: Beg the Court's indulgence.

11 (Pause.)

12 Q I want to go back to Ms. Smith giving more than one
13 statement in this case.

14 When you met with her initially -- I don't want to go
15 into necessarily the particulars of what she said -- but
16 can you tell us? Did this statement occur on the same day,
17 the new statement?

18 A They both did, yes. Both occurred on the same day.
19 And I believe both of them are true and accurate. She just
20 did not provide, as far as she told us on the first
21 statement about seeing the items in Mr. Pitts' house on
22 another day, and then the statement later she provided us
23 was about her going with him there.

24 Q So how far apart were these statements as far as in
25 time? How far apart were they given?

Matthew Davis
Cross-examination by Ms. Jones.

1 A A few hours would be the best I can remember. It's a
2 few-hours difference from them actually being written out,
3 the different statements.

4 Q And you indicated she had reasoning for giving more
5 than one statement.

6 A Yes. She told me that she was in fear for her safety
7 from Mr. Pitts because he had pointed at a graveyard on the
8 way back and told her if she spoke of it that's where she
9 would be. And I said, well, what do you mean by his
10 pointing at a graveyard. And she says he will put me in
11 that graveyard. And I assured her that I wouldn't let that
12 happen.

13 MS. GALLIVAN: I have no further questions at this
14 time.

15 CROSS-EXAMINATION

16 BY MS. JONES

17 Q Were you the lead investigator on this case?

18 A No, ma'am.

19 Q Okay. But you assisted and you know all of the
20 evidence and information.

21 A I know what I have seen, what I'm assuming that
22 obviously Investigator Forrester showed me everything.

23 Q And you have access to all of the incident reports,
24 supplemental incident reports, and all of that information
25 that's been put into the system, correct?

Matthew Davis
Cross-examination by Ms. Jones

1 A I do.

2 Q Okay. And, in fact, on the initial incident report
3 Jeff Cooper only reported a weed eater, as well as a power
4 boss generator, red in color. Those are the only two
5 things he reported missing, correct?

6 A You are correct.

7 Q And, in fact, in law enforcement you're told or at
8 least taught that reports are important, because a lot of
9 times we don't get into court right away, and those help us
10 refresh your memories, correct?

11 A If you're the officer taking the report, yes. I was
12 not the officer taking the report.

13 Q And it's important to get that information accurate,
14 correct?

15 A For that officer, yes, so when it gets to the
16 investigator he doesn't have to recontact the person and
17 have to do as much, because you don't want to make it
18 uncomfortable for them. But as a common practice we call
19 them to make sure because they notice stuff later on that's
20 missing that they didn't originally in the initial report.

21 Q And you were the investigator, right?

22 A I --

23 Q One of the investigators.

24 A Yes, ma'am.

25 Q Okay. And you got that incident report. And

Matthew Davis
Cross-examination by Ms. Jones

1 according to you only two items were missing, correct, on
2 that incident report?

3 A On the incident report only two items were missing.

4 Q And, in fact, when other information was put into the
5 report and they're talking about the report and the items
6 and putting them into the computer, again, you only had two
7 property sheets, correct? One for the weed eater and one
8 for the generator, correct?

9 A I don't enter them into the computer, so I don't know
10 when it was entered in.

11 (Incident report marked Defendant's Exhibit No. 1 for
12 Identification; incident report marked Defendant's Exhibit
13 No. 2 for Identification; report marked Defendant's Exhibit
14 No. 3 for Identification; report marked Defendant's Exhibit
15 No. 4 for Identification.)

16 Q I'm handing you something that's been labeled
17 Defendant's Exhibit 2 -- 1 and 2. Do you recognize those?

18 A It looks like a printout screening from the system
19 that the sheriff's office has, what it looks like to me.

20 Q And those are the information inputted into the
21 computer system at the sheriff's office in terms of what
22 was stolen, correct, information that was provided at the
23 time of the incident?

24 A That's what was plugged into it by the records clerk.

25 Q And is it fair to say only two items were placed into

Matthew Davis
Cross-examination by Ms. Jones

- 1 the computer system?
- 2 A On 8/4 of '09.
- 3 Q A generator and a weed eater.
- 4 A On 8/4 of '09 at 10:52. When they entered it in that
- 5 was the only thing they had plugged in.
- 6 Q And to your knowledge has there ever been an air
- 7 compressor blue in color ever submitted to your knowledge
- 8 in writing down, corrected, amended incident report,
- 9 supplemental to say, hey, you know what, Mr. Cooper
- 10 remembers something else being gone?
- 11 A No, not to my knowledge there's not.
- 12 Q You also indicated that you talked with Marsha Smith,
- 13 correct?
- 14 A Correct.
- 15 Q You indicated -- it appears that you caught up with
- 16 her riding a bicycle, correct?
- 17 A Correct.
- 18 Q And you asked her questions regarding if she knew
- 19 anything about being with a suspect.
- 20 A As in?
- 21 Q I'm sorry. Let me elaborate. If she knew anything
- 22 about the burglary that had happened and maybe Mr. Pitts
- 23 had something to do with it.
- 24 A I asked her if she had seen the property, that's
- 25 correct.

Matthew Davis
Cross-examination by Ms. Jones

1 Q Okay. And she then at that point volunteered, yes,
2 I've seen it at Mr. Pitts' house. And further
3 investigation revealed she was showing it to a Michael
4 Kennedy from North Carolina, correct?

5 A That was one of the possible suspects that was
6 provided, that your client did provide that we could go
7 look at to see if they actually had the items.

8 Q And she identified according to your own lineup --

9 A Uh-huh.

10 Q -- Michael Kennedy as the person she allegedly saw in
11 Mr. Pitts' garage looking at some items, trying to sell it,
12 right?

13 A She knows him as Tiny, yes. We did the photo lineup
14 to get his actual name, to get an address to try to catch
15 up to speak with him in reference to the incident.

16 Q And, in fact, you did catch up with him. Somebody
17 caught up with him, correct? And they found out that he
18 didn't have any of the items, correct?

19 A We checked the area where he was known to stay, spoke
20 with his father. And actually it was several weeks later
21 when we was actually able to meet with him face to face.
22 And he told us that he did not have any knowledge of what
23 we were talking about so --

24 Q So that lead was a bust, correct? You didn't find
25 anything out from --

Matthew Davis
Cross-examination by Ms. Jones

1 A Correct.

2 Q From this information that Ms. Smith provided.

3 A Correct.

4 Q And isn't it true when you wrote out your, your report
5 you got that information? And it's written in
6 chronological order. You talked with Ms. Smith. She
7 provided you this information. You checked it out in North
8 Carolina. Didn't turn out that way. So then you went back
9 to her and found her peddling on her bicycle and stopped
10 her again. And this time you asked her to come to the
11 sheriff's office, isn't that correct?

12 A I don't remember the events that way. I don't have
13 a -- my writeup. I didn't do a writeup, but I do know what
14 you're referring to.

15 Q I'm handing you something that's marked Defendant's
16 Exhibits 3 and 4. Do you recognize that report?

17 A It's an investigator report by Detective Forrester, or
18 Investigator Forrester.

19 Q And you were assisting Detective Forrester.

20 A I was.

21 Q Okay.

22 A But I did not write this or type it if that's what
23 you're asking.

24 Q And isn't it fair to say when you do an investigative
25 report or you're doing an investigation you're going to do

Matthew Davis
Cross-examination by Ms. Jones

1 it in chronological order? You're going to check out the
2 leads, check out the information you're provided. And if
3 that doesn't pan out you're going to move on, correct? Not
4 going to hodgepodge all over the place.

5 A As far as you're talking about when you do your
6 writeups?

7 Q When you do an investigation, correct? You're going
8 to go from A to B to logically go about this.

9 A Yes. Each investigator has their own way, but that's
10 generally the way I do it.

11 Q And isn't that the way that report is written? You
12 got some information from Martha -- Marsha Smith saying,
13 look, I was over at his garage, he was selling it to this
14 guy from North Carolina. You checked it out. That wasn't
15 true, or at least you couldn't find proof of it. So then
16 you went to talk with her again, and then you invited her
17 down to the police station. Isn't that the way it was
18 investigated and isn't that how it's written in the report?

19 A Can you break those up because there's, there's -- I
20 would yes and a no.

21 Q Okay. Isn't that how it's written in the report? You
22 got the information from Marsha. You checked out that lead
23 in North Carolina. It didn't work out. So you went back
24 and found her riding on her bicycle again and brought her
25 down to the sheriff's office.

Matthew Davis
Cross-examination by Ms. Jones

1 A That is the way this is written. But I think one of
2 these have been misplaced right here because that looks
3 like it's messed up right there from what I recall
4 happening.

5 Q So now you're saying you didn't have that information
6 from North Carolina until weeks later. Is that your
7 testimony today?

8 A No, ma'am.

9 Q Okay.

10 A I did not say weeks later. I said we met up with --
11 we finally caught up with Tiny and spoke to him face to
12 face weeks later.

13 Tiny was discovered the next day. And it was actually
14 by your defendant saying that Tiny Kennedy would be a good
15 person to look at after doing some digging around on that
16 and getting him in a photo lineup and knowing from the
17 night before, getting a statement from Ms. Smith.

18 I took a photo lineup to get her to look at it in
19 order to have that because, as you can see, this one right
20 here is done on the third day with Mr. Pitts, and this one
21 of Mr. Tiny Kennedy is done on the 4th of August. Those
22 are two different dates. That just seems like that must
23 have been clerical error by Investigator Forrester when she
24 was typing it. It's chronological stuff. I didn't get to
25 read it before she submitted it.

Matthew Davis
Cross-examination by Ms. Jones

1 Q So, in other words, you're saying that that's not
2 chronological.

3 A I'm saying that, yes, it looks like she made a typing
4 mistake when she did that, because the information's
5 correct. It just looks like she's got the paragraphs
6 switched in that area.

7 What we did was we had spoke with Ms. Marsha Smith.
8 After speaking with Ms. Marsha Smith she provided us the
9 first statement.

10 After leaving received basically like a neighborhood
11 watch tip that actually Ms. Smith knew and was there when
12 the stuff was taken. So we turned back around in the car.
13 I was driving and went back.

14 Ms. Smith was stopped talking to an African-American
15 gentleman. And then I asked her, I said, Ms. Smith, I need
16 for you to get in the car with me so we can take a ride
17 down to the sheriff's office, I need to speak to you a
18 little bit more about this matter other than just you
19 seeing the objects down there.

20 She said okay. So she went down there, after we were
21 at the sheriff's office for a while spoke with her there
22 and all.

23 She gave us the second statement and told us the
24 reason she didn't give it first time about that part of it
25 was because of fear for her safety and the graveyard and

Matthew Davis
Cross-examination by Ms. Jones

1 all of that stuff and how she's very afraid of Mr. Pitts
2 due to his reputation in the community.

3 Q Well, let's talk a little bit about that, that second
4 interview.

5 You brought her back down, and you didn't indicate to
6 here, golly gee, we heard that you perhaps were part of the
7 burglary, tell me about it, correct? In fact, you told her
8 we have you on a deer camera in the victim's yard with
9 Mr. Pitts and you, and you were stealing, so you best come
10 clean. And isn't that when she broke down crying and
11 giving information?

12 A Actually there was a little break in there, and then
13 when we come back she then confessed actually to being
14 there with him.

15 It wasn't here it is, here's this camera, you need to
16 tell us, because she even stayed after the D. V. D. that we
17 used that was blank that we said there was a deer camera,
18 he's a police officer, he knew his garage door was broken,
19 he knew somebody would come, so he put something up there,
20 you did not know it was there, it took a picture of both of
21 y'all there, it took a picture of y'all loading this up.

22 She still said no. It was later that she finally said
23 yes, that she did out of fear for that.

24 Q I'm going to hand you something that's Exhibit 3 and
25 Exhibit D. Do you recognize that report? And, again,

Matthew Davis
Cross-examination by Ms. Jones

1 reports are written to ensure that they are accurate of the
2 events, correct?

3 A Unless it's a statement. Then it summarizes a
4 statement and refers to a statement, yes.

5 Q Fair enough. It's going to summarize the important
6 parts, the highlights, of that statement, correct?

7 A Uh-huh.

8 Q And whether somebody confesses or not confesses or
9 takes a little bit of extra cajoling to get somebody to
10 confess, that's probably going to be in the report, right?

11 A No. I usually don't put if I take a break in the
12 middle because they need to go to the bathroom, no, ma'am.
13 I just usually put what their statement is, a summarized
14 thing. I try to hit some highlights. And then I know that
15 their statement is there so if there's any questions later
16 that people can look at it, you, prosecution. And then the
17 person will get up here on the stand and they can tell
18 their half of it. So I know the important part is just
19 we've got the statement.

20 Q And an important part wouldn't be that she initially
21 denied it and then after further questioning finally she
22 broke down and confessed to this crime? That's not
23 relevant or important to put in a police report, Officer?

24 A Let me find right here so I can read what this says,
25 because, there again, I did not write this, so I indicated

Matthew Davis
Cross-examination by Ms. Jones

1 this. Looks like it hit the highlights of her statement.

2 I'm not understanding what you're asking. Could you repeat
3 that?

4 Q My question is, Officer, in the course of an
5 investigation isn't it an important -- important enough to
6 put into your report, because, again, it takes a long time
7 sometimes for these things to go to trial -- specifics
8 about whether or not she admitted it right away or didn't
9 and it took a little more questioning in terms of what you
10 needed to do, because according to that statement it
11 happened right away. You presented her that information
12 and at that time she broke down.

13 Isn't that a little bit different than what you're
14 trying to say? Took a while, and first she denied it, and
15 then I came back again real tough and then she admitted it.

16 A I don't think I've ever seen one written that way. So
17 I usually always put the highlights of what their statement
18 was, that if they confessed or if I talked to them and they
19 denied it and what their statement was to it.

20 Q Right.

21 A If they confessed I put yeah, that I spoke with them,
22 after speaking with them this is what they gave me in a
23 statement, because, there again, no coercion or anything
24 involved, so there's --

25 Q And you just said --

Matthew Davis
Cross-examination by Ms. Jones

1 A -- a denial.

2 Q You said that they initially denied it going in that
3 report. It's not in that report, is it?

4 A No, ma'am. I did not say that.

5 Q The initial denial is not in that report, correct?

6 A I said if they said that they didn't do it and they
7 give me a statement saying that they did not do it what it
8 is. I put that they deny any involvement in it and this is
9 the statement they've given up with the highlights.

10 If they confess to it I put this is basically what
11 they confessed to, they told me they were here, they saw
12 this, they saw that, they saw this, you know, information
13 highlights.

14 Then I turn around and put they gave a written
15 statement. So that way, you know, you can refer to the
16 written statement to see indeed specifics of what they
17 said, because if not we'd have to type a whole page or two
18 pages just to type the exact same thing. The statement is
19 word for word. And that's what the statement's there for.

20 Q But, again -- but, again, I think I am only looking
21 for a yes or no here.

22 The idea that she initially denied it and it took some
23 more questioning, that is not in that report. It either is
24 or it isn't, sir.

25 A So the question is that she denied or initially denied

Matthew Davis
Cross-examination by Ms. Jones

1 it.

2 Q Yes. Is that in that report at all?

3 A No. It's not written in there, not that I've seen.

4 Q Thank you.

5 And, in fact, when you took her statements she
6 indicated that what was taken was actually a lot different
7 than what the officer had reported missing, correct? She
8 indicated two weed eaters were taken, an air compressor,
9 which is the first time any of the police reports talk
10 about an air compressor, as well as the generator, correct?

11 A Do you have a copy of that statement? I'll take a
12 look at it. Talking about her first statement, her initial
13 statement, or are you talking about her second statement?

14 Q In her statements. Publish it.

15 A If you will forgive me, I need to read this real quick
16 just to brief-up to make sure.

17 Q Just so we're all on the same page, the 2128.

18 A 2128?

19 Q That would be her second statement for clarification
20 for the record.

21 (Pause.)

22 A Okay. So the part right here you're talking about is
23 Gerald got out and went into the garage and took a red and
24 black generator, blue air compressor and a couple of weed
25 eaters. He put them in the back of the truck and told me

Matthew Davis
Cross-examination by Ms. Jones

1 to speed up.

2 Q Correct. We're just talking about the information or
3 the evidence that she says was taken. And so she's saying
4 a couple of weed eaters, and your information was only one
5 weed eater was taken, correct?

6 A That's what I've been told, yes, ma'am.

7 Q Did you ever get the color of that weed eater to
8 determine whether or not she knew what color it was?

9 A She -- it was not in there. If I remember correctly,
10 it's because she could not remember what the color of the
11 weed eater was at that time.

12 Q Okay. And she also noted that the generator, this
13 alleged generator that they took, was red and black,
14 correct?

15 A That is what she recalled.

16 Q And according to the initial incident report the
17 officer indicated his generator was black in color,
18 correct?

19 A No. In his initial report it says red in color.

20 Q I'm sorry. You're right. Red in color. And she's
21 saying black, am I correct?

22 A Uh-huh. But we had also been in contact with Officer
23 Cooper in between that time because, there again, as
24 investigator I do realize that sometimes patrol officers,
25 or the desk officer in this case, is busy, and sometimes he

Matthew Davis
Cross-examination by Ms. Jones

1 forgets with the volume of reports he's taking to get all
2 the pertinent information that I need in reference to an
3 investigation.

4 So I've been in contact with Officer Cooper, and he
5 got that it was red and black and a couple of other things
6 that are more specific to help aid me in this initial
7 investigation.

8 Q And you being an investigator never bothered to write
9 it down on a piece of paper, correct? You never bothered
10 to fill out an investigative report or anything along those
11 lines as to this newly discovered information or this
12 investigative report, correct?

13 A I never filled out any paperwork, no, ma'am.

14 Q No. So you're just going on memory today, is that
15 fair to say?

16 A Memory? No. That and the notes that we have right
17 here, because this has been pretty ongoing the entire time.

18 Q And there's nothing in your notes or the
19 investigator's report that says you talked with the officer
20 and you got with him, because you're not sure whether or
21 not the patrol officers are doing their jobs, so let me
22 doublecheck with the officer and, golly gee, it was black
23 and red. That's not in any of your reports. That just
24 came up today while you're sitting on the stand, isn't that
25 correct?

Matthew Davis
Cross-examination by Ms. Jones

1 A No, it did not just come up today while I was on the
2 stand.

3 Q Show me where it is in any report or any report that
4 you wrote.

5 A You asked me if I -- if it just come up today. No, it
6 didn't come up today. Now, is it in any of these? No.
7 But it did not just come up today.

8 Q And, again, isn't important information supposed to be
9 in reports?

10 A It is and what is important --

11 Q And isn't it important to know whether or not the
12 generator -- you keep saying, oh, you know what, I made a
13 mistake, it's black and white. Isn't that an important
14 detail when you have a witness saying it was black and red?
15 You don't find that an important detail to note?

16 A We have the model and serial number. That's more
17 important than that because that can positively identify
18 it. So that's more of identification than red and black
19 that's stamped out in 50 to a hundred to thousands of those
20 sent across the United States. The serial number and model
21 number help put that exactly in that I can go say this is
22 your generator right here.

23 Q But you never recovered the generator, isn't that
24 correct?

25 A No, ma'am. We have not to date.

Matthew Davis
Cross-examination by Ms. Jones

- 1 Q And, again, you've got to go on what you can go with.
- 2 And she said she saw a red and black generator if we're to
- 3 believe Ms. Smith, correct? And now you're saying that you
- 4 haven't put in any report today that you actually did a
- 5 little leg work, talked with Mr. -- the officer involved.
- 6 MS. GALLIVAN: Objection, Your Honor. Argumentative.
- 7 I'd ask that she ask the questions.
- 8 THE COURT: Yeah. And let's ask one question at a
- 9 time. Don't give him multiple questions.
- 10 MS. JONES: Thank you, Your Honor.
- 11 Q Let me rephrase. She didn't give you serial numbers,
- 12 correct? Ms. Smith did not give you a serial number off
- 13 the generator, fair to say?
- 14 A No, ma'am. She did not.
- 15 Q Okay. Fair to say the only identifying information
- 16 she gave you was the color.
- 17 A Yes, ma'am.
- 18 Q Okay. And she said it was red and black, correct?
- 19 A Yes, ma'am.
- 20 Q And in your incident report one of the identifying
- 21 features was it was red in color, isn't that correct?
- 22 A You're correct. One feature, yes.
- 23 Q Okay.
- 24 A Black would be another feature -- model, serial
- 25 number, additional features also.

Matthew Davis
Cross-examination by Ms. Jones

1 Q But at this point the only thing you have is the
2 color --

3 A No. In the initial report --

4 Q -- and you are saying --

5 A You're talking about the initial report or --

6 Q I'm talking about you're an investigator.

7 A Uh-huh.

8 Q You've gotten this information. I have she says she
9 saw a red and black compressor, correct? And you're
10 saying -- and a red one was stolen, correct?

11 A No. At that point as an investigator what I had was
12 make, model, additional contact with Officer Cooper. Also,
13 had that she's given me a description of one that looks
14 just like the one he's described to me. I'm trying to
15 track that down to verify that information. And your
16 client kept sending me to different places, and I could
17 never find it in all the different places. I spent
18 probably an hour looking through a junkyard at a bunch of
19 generators one day up in North Carolina.

20 Q Let's move on.

21 You indicated that -- or at least one of her
22 statements is, oh, my gosh, she's terrified of Mr. Pitts,
23 correct?

24 A Correct.

25 Q Okay. In fact, in her statement she indicated she had

Matthew Davis
Cross-examination by Ms. Jones

1 no idea what was going on, right? He just gave her some
2 directions. He said that he bought some stuff and they
3 were going to pick it up, correct?

4 A Bought some stuff and going to pick it up if I recall
5 correctly, yes.

6 Q Okay. And she maintained she had no idea what was
7 going on, correct?

8 A Until they were leaving. That was in her statement.
9 If you want I can find it for you. It's going to be in the
10 second one to make sure. It's the 2128. Okay. Right
11 there starting at the bottom of that page. "Gerald had
12 told me," at the very first page. "Gerald had told me that
13 he had bought that stuff. I believed him because there was
14 a police car there. I didn't think he would be that stupid
15 to steal from a police officer's house. That's the truth."
16 And he still had the stuff on Saturday.

17 Q Right. So at the time of the --

18 MS. GALLIVAN: Your Honor, I ask that she allow him to
19 answer the questions that he's asking her.

20 THE COURT: All right. Let him finish his answer.

21 A Says she didn't know what he was getting was stolen.
22 "She told me in the investigation that he had told her."
23 Let's see. That there -- "And he still had the stuff on
24 Saturday when I was there getting air in my tire just like
25 my first statement said, because I was scared of Gerald.

Matthew Davis
Cross-examination by Ms. Jones

1 When we got back he pointed to the graveyard and told me
2 that running my mouth will get me put there." She said
3 that's when she knew.

4 Q Right?

5 A She said because if he actually purchased it, why when
6 they drove by a graveyard would say if you run your mouth
7 about what just occurred I'll put you right there and
8 pointed at a graveyard. She said she knew right then this
9 ain't good. And that's a police officer's house is what
10 she told me.

11 Q Let me ask you this. How long have you been an
12 investigator?

13 A How long have I been an investigator?

14 Q Yes.

15 A Well, actually if we want to go by training we're
16 taught to do that from the very beginning, to do the
17 initial investigations to investigate crimes.

18 Q Can you -- around about how long have you been an
19 investigator -- five years, six years, seven years?

20 A It'll be six years in July.

21 Q Okay. So you have been doing this kind of work for
22 six years, and you didn't find it sort of odd that she's
23 saying I didn't know what was going on and blah, blah, blah
24 and everything was going good. And then all of a sudden
25 she mentioned that she's scared of Gerald and they're going

Matthew Davis
Cross-examination by Ms. Jones

1 by a graveyard and he's threatening her. Do you find that
2 kind of odd if everybody -- everything seems to be okay?

3 A My job as an investigator is to check out and verify
4 the information that's given to me to see. I have to go
5 verify this because it's plausible that that could be the
6 truth. So that's what I attempt to verify.

7 Just because someone makes a statement that that's
8 when they realized, just because I might would have
9 realized it based on my training and knowledge and me being
10 out there investigating property crimes would know it a lot
11 earlier doesn't mean that someone that doesn't have the
12 training that I did, I can't get them for not knowing it
13 until they realized it later on.

14 She might not have ever been the victim of a crime and
15 might not have realized that. I don't know.

16 Q And, in fact, one of the big reasons why she wasn't
17 charged according to the police report is that she didn't
18 have knowledge that the items were being stolen, correct?

19 A Correct. What that would actually be is accessory
20 after the fact, because burglary, you would need to know
21 knowledge. You need to prove that element, that she was
22 there, she knew this stuff, what was going on. The more
23 fitting charge would have been accessory after the fact but
24 if she did cooperate with --

25 Q Okay. She wasn't charged with accessory after the

Matthew Davis
Cross-examination by Ms. Jones

1 fact either.

2 A No, because she told us what happened and aided in our
3 investigation.

4 If I went around and people told me and helped me
5 recover people's property and then charged them with
6 accessory after the fact because they got property or had
7 seen it, we would never find anybody's property. Stuff
8 would be gone.

9 That accessory, she had knowledge of it when she was
10 confronted with it. She gave also a little bit. Did a
11 little bit of investigating, checked on some statements.
12 Sat there and checked on her some more. And we were able
13 to get the full thing and was able to help in this
14 investigation greatly.

15 But as far as burglary, in my opinion she did not meet
16 knowing what was going on and so forth there to be charged
17 with burglary.

18 Q Or accessory after the fact or anything, correct?

19 A The accessory after the fact, she was able to help us
20 in this investigation a great deal. Now, that accessory
21 would be her knowingly hiding, doing stuff to hurt our
22 investigation and sending us up to various places in North
23 Carolina off track as was done by Mr. Pitts.

24 Q In fact, doesn't Ms. Smith work for you at the
25 sheriff's department as a confidential informant?

Matthew Davis
Cross-examination by Ms. Jones

1 A Actually, if you'd like for me to go over that, what
2 it was is when Ms. Smith actually agreed to wear the wire
3 that had a little camera in it and all so that way we could
4 later on see that piece of evidence, we told her when you
5 come in there we need to sign some things, you know, some
6 things that list and you're doing this on your own free
7 will and we ain't threatening you and we're not promising
8 you. There's just paperwork like that.

9 Once we got her to the sheriff's office we brought her
10 in there with the guys who knew about the equipment who
11 work narcotics. She saw one of them. She goes, hey, I
12 remember you from a couple of years ago and you said --

13 MS. JONES: Your Honor, this is hearsay.

14 A I was in the room and she had done something a couple
15 of years ago.

16 THE COURT: Excuse me just a minute.

17 The question I think was did she work as a
18 confidential reliable informant for the sheriff's
19 department.

20 Is that a yes or a no?

21 THE WITNESS: Then that would have to be hearsay
22 because I've never -- I don't know enough to know.

23 THE COURT: If you don't know, say you don't know.

24 THE WITNESS: Okay.

25 A I can't say without a hundred and ten percent positive

Matthew Davis
Cross-examination by Ms. Jones

1 other than the conversation that was told through a
2 sergeant and her with me in the room to where we didn't
3 have to fill out another packet of confidential informant
4 packet. I can't answer that question one way or the other.

5 Q Were you not there when she -- when the video began
6 when y'all sent her on her bicycle down to Mr. Pitts'
7 house?

8 A I was there, yes, ma'am.

9 Q Okay. And, in fact, on the very beginning of that
10 video it says here's confidential reliable informant going
11 down to Mr. Pitts' house, correct?

12 A That would be from one of the narcotics officers. So
13 that would be one of the guys that would know that without
14 me being able to talk about their discussion. I can't
15 answer that.

16 MS. JONES: Your Honor, can you instruct him to say
17 yes or no?

18 THE WITNESS: I don't understand the question.

19 THE COURT: Well, okay. Then ask her to repeat it.
20 But in that -- if you know an answer to the question is
21 yes, say yes. If you don't know the answer or you know the
22 answer is no, say no. If you don't know the answer, say I
23 don't know. So that's where we are -- yes, no or I don't
24 know could be reasonable responses to the last two
25 questions.

Matthew Davis
Cross-examination by Ms. Jones

1 THE WITNESS: Okay.

2 THE COURT: So ask your question again.

3 THE WITNESS: So if we don't know a hundred percent --

4 THE COURT: Just listen to the question.

5 THE WITNESS: Okay.

6 Q So you were actually at the scene, correct, when
7 Ms. Smith was sent down on her bicycle to Mr. Pitts' house,
8 correct?

9 A Yes, ma'am.

10 Q Okay. And so you weren't there when they -- at the
11 beginning of the video they say this is a confidential
12 informant going down to do X, Y and Z? You didn't hear
13 that part?

14 A I was there. It's -- I would need to listen to it
15 again to say with some certainty. But if that's what it
16 says on there, I can't contest it, so yes.

17 Q Well, let me ask you this. Do you know whether or not
18 she's a confidential informant?

19 A Without any certainty, no, ma'am, other than what that
20 statement was made, but I thought you said that was hearsay
21 earlier if --

22 Q All right. So it's your testimony today you have no
23 idea whether or not Ms. Smith is a confidential informant
24 for your office. Is that what you're saying?

25 A I'm saying I've never seen any paperwork put in front

Matthew Davis

Redirect examination by Ms. Gallivan

1 of me other than what's been told to me verbally, no,
2 ma'am.

3 Q It's either a yes or no answer, sir.

4 A Okay. I have to go off the trust of the officer, so,
5 yes, she would have to be then, yes.

6 Q So you had knowledge that she is a confidential
7 informant and, in fact, works for the sheriff's department.

8 A I don't know when she's worked or not, so, no, I can't
9 say that. I can say she signed up into that confidential
10 informant, but I don't know when she goes out and when she
11 doesn't with narcotics or anything.

12 MS. JONES: Nothing further.

13 REDIRECT EXAMINATION

14 BY MS. GALLIVAN

15 Q It's your job as an investigator to gather information
16 about the property that was reported stolen in this case,
17 correct?

18 A Yes, ma'am.

19 Q Officer Cooper provided you with certain information.
20 And what did he provide?

21 A He provided additional information to Investigator
22 Forrester as far as colors. I was right there with her
23 when this was going on that said, you know, said red. He
24 said it's red and black. You know, obviously the engine on
25 it's black. He said red frame going through it like that.

Matthew Davis
Redirect examination by Ms. Gallivan

1 He had the model and serial numbers. It's okay. See
2 something close to that we can check the model and serial
3 number on that to verify a hundred percent. He went on to
4 describe about his weed eater and the air tank and
5 different things like that.

6 Q What do you use as your best case of being able to
7 recover property later down the line?

8 A Just by talking to the people who actually came in
9 contact with the property or saw the property to help point
10 us in the direction of where it's at. But the description
11 that we're given is obviously what helps get us there.

12 Q And a serial number helps you definitely confirm a
13 certain item is the match of an item that was reported
14 stolen, correct?

15 A That's better than -- better than writing your
16 statement name on the side of it, yes.

17 Q Okay. And since Officer Cooper provided a serial
18 number, then you also gained additional information from
19 Ms. Smith when you talked to her. And what did she
20 provide?

21 A She provided that it was red and black.

22 Q Okay. Now, you told her a second ago that the
23 defendant gave you statements about the items stolen. Did
24 the defendant ever describe the property to you when he was
25 questioned?

Matthew Davis
Redirect examination by Ms. Gallivan

1 A No, ma'am, he didn't.

2 MS. JONES: I'm going to object. I have never been
3 provided any type of statement that my client has ever said
4 or indicated or that he talked with this officer. I am
5 clearly entitled to that under Rule Five, as well as the
6 Constitution of the United States. And then we may need a
7 Jackson vs. Denno hearing.

8 MS. GALLIVAN: I was never provided with information
9 either. She brought it out during her conversation with
10 him. I was just following up on the statement that he
11 made.

12 THE COURT: Overruled.

13 Go ahead.

14 Q You said that you were led to believe the items may be
15 in other places.

16 A Affirmative, yes, ma'am.

17 Q Correct.

18 A Yes, ma'am.

19 Q Did this information come from -- where did that
20 information come from?

21 A It came from Mr. Pitts. He actually called me on the
22 telephone several times and told me places to go check.

23 Q Now, I want to go to the statements that Ms. Smith
24 gave you.

25 When she said that it didn't make sense for her to

Matthew Davis
Redirect examination by Ms. Gallivan

1 change her story and say, you know, she didn't tell you
2 before because she was scared, as an investigator in your
3 opinion does that actually make sense for a person to not
4 tell you complete information to begin with and then give
5 you more information later because they were scared?

6 A I've ran into that before, yes, ma'am.

7 Q Was it -- was Ms. Smith's story and statement
8 believable to you?

9 MS. JONES: Objection, Your Honor. That's clearly --

10 THE COURT: Sustained.

11 Q Now, when did you believe that Ms. Smith actually --

12 MS. JONES: Objection, Your Honor. It doesn't matter
13 what that defendant believes or the witness believes.

14 THE COURT: Well, let me hear the question first.

15 Q You said that Ms. Smith was not charged in this case
16 based on her lack of knowledge that these items were stolen
17 until a certain point.

18 When -- when did she indicate to you that she had
19 knowledge that these items were stolen?

20 A That when they were driving by the graveyard and he
21 pointed to it and said if you run your mouth about it this
22 is where you'll be or you'll end up, something to that
23 effect -- I've got the statement -- pointed out reading it,
24 again, that she said at that point she knew. She said she
25 knew without a shadow of a doubt right then.

Matthew Davis
Redirect examination by Ms. Gallivan

1 MS. GALLIVAN: I beg the Court's indulgence.

2 (Pause.)

3 Q During your interview with Ms. Smith did you suggest
4 the defendant's name to Ms. Smith or implicate him in any
5 way in these crimes?

6 A No, ma'am. I was trying to recover the property.

7 Q Who provided the defendant's name to you?

8 A Marsha is the person who was there with her, because
9 as we got the name -- you're taking about as far as where?

10 Q As far as the lead to identify the defendant as a
11 suspect in this case. That information came from your
12 conversations with Marsha Smith.

13 A Actually the leads that he had come in contact with
14 the property had come from a neighborhood watch, tips that
15 we had gotten from hearing throughout the community that
16 that's where the property had possibly went.

17 It's known to check in that area, to go check with
18 Mr. Pitts when things are missing. Went to there to check
19 with him throughout the investigation. With that his -- it
20 developed into him being a suspect, and asking her directly
21 about him, and the statements with her and him
22 participating because we received information that she was
23 there with a person who did it.

24 Q Okay. So then when she was asked she identified the
25 person she drove to Officer Cooper's home was the

Matthew Davis
Redirect examination by Ms. Gallivan

1 defendant.

2 A Yes, one night she said she had drove him there, yes.

3 MS. GALLIVAN: I have no further questions.

4 THE COURT: You may step down.

5 Let's take a short break.

6 I'll ask the jury to please go to your jury room. Do
7 not yet discuss the case. I'll bring you back shortly to
8 continue.

9 (The following takes place outside the presence of the
10 jury.)

11 THE COURT: Ms. Jones, is there anything you need to
12 put on the record about any statement made by the defendant
13 now that the jury is excused?

14 MS. JONES: Your Honor, I have never been provided any
15 type of information regarding anything that my client has
16 said.

17 I wasn't even aware that he was contacted by phone on
18 several occasions, evidently, according to Officer Davis.
19 That information needs to be written down. I have an
20 absolute right to that information, and it wasn't provided
21 to me. Therefore I ask for a mistrial.

22 THE COURT: All right. Ms. Gallivan.

23 MS. GALLIVAN: Your Honor, according to the same
24 information that I was provided, we were not provided that
25 information either. What I have she was provided in this

1 case.

2 That information came out through the officer's
3 testimony on cross-examination by Ms. Jones, and therefore
4 I just followed up on her line of questioning.

5 THE COURT: Well, I understand. But do I understand
6 that the defendant did make some statements to the officers
7 in this case based on contact by them with him? Because if
8 that's true, then I don't understand why that wasn't
9 disclosed.

10 (Pause.)

11 MS. GALLIVAN: Your Honor, we were not aware of any
12 supplemental reports or statements that were made, recorded
13 as far as the defendant's statement to the officer.

14 THE COURT: Well, I thought he testified to some
15 statements made by the defendant.

16 There obviously was some kind of conversations between
17 the officer and the defendant because he kept saying that
18 the defendant was sending him basically off on a wild-geese
19 chase. So that had to be a conversation which resulted in
20 a statement being obtained.

21 MS. GALLIVAN: That's correct, Your Honor.

22 THE COURT: I mean, statements -- you have to
23 understand. I thought we knew this by now. But statements
24 aren't just those things that are written down on that form
25 that says voluntary statement at the top. Statements are

1 conversations between law enforcement and the defendant.

2 So we'll take a short break. Y'all make that
3 determination, and we'll address it when I come back.
4 Let's take 15 minutes.

5 (Whereupon, a recess was taken.)

6 THE COURT: All right. Bring the Pitts jury in.

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

9 THE COURT: Thank you for your patience, ladies and
10 gentlemen.

11 I was trying to work some other things in during the
12 break. And they took longer than I thought. I've got
13 another jury out deliberating that I've got some matters I
14 need to deal with.

15 So we're going to excuse you for the balance of the
16 afternoon. And I'll simply ask that you please report back
17 to your jury room at 9:30 in the morning at which time
18 we'll continue with the trial.

19 During the overnight recess keep in mind the caution
20 that I've previously given you. You are to have no
21 discussions about the case with any person whatsoever in
22 any fashion whatsoever. Don't conduct any research or do
23 your own investigation into any issue that might arise
24 during the trial.

25 You've got to base your decision upon what you see and

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hear during the trial of the case. You can't supplement that knowledge by trying to obtain outside information to assist you.

Okay. With that caution have a good evening. Please report to your jury room at 9:30 in the morning -- 9:30 in the morning. Have a good evening.

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

THE COURT: All right.

END OF PROCEEDINGS DECEMBER 15, 2009

1 (Proceedings December 16, 2009)

2 (The following takes place outside the presence of the
3 jury.)

4 THE COURT: All right. Let me inquire of the lawyers
5 as to whether or not after the break yesterday each of you
6 had an opportunity to discuss with any person you need to
7 discuss it with any oral statements made by the defendant
8 that relate to this particular case that the state has or
9 that has been introduced into evidence either by the state
10 through direct examination or the defense through
11 cross-examination, the nature of those statements and the
12 context in which they were given.

13 Has that been accomplished?

14 MS. GALLIVAN: Yes, Your Honor.

15 MS. JONES: Yes, Your Honor.

16 THE COURT: All right. And so we're all now on the
17 same page as to what statements were made and the context
18 in which they were made?

19 MS. GALLIVAN: We are, Your Honor.

20 THE COURT: You are?

21 MS. JONES: Yes, sir.

22 THE COURT: Okay. Now, having that understanding, do
23 we have any matters we need to address before the jury
24 comes in?

25 MS. JONES: We would continue our motion for a

1 mistrial, Your Honor.

2 THE COURT: Well, I don't think you've made that
3 motion on the record yet.

4 MS. JONES: I believe I made it when she started
5 cross-examining or questioning the officer about the
6 statement, that I moved for a mistrial based upon
7 violations of Rule Five, as well as the applicable
8 constitutions, and of course Brady, Your Honor.

9 THE COURT: All right. Tell me how it violates Rule
10 Five.

11 MS. JONES: These are statements given by my client
12 that allegedly he sent these officers on a wild-goose chase
13 through North Carolina, as well as the officers came to my
14 client's residence and engaged in conversation about stolen
15 property.

16 He allowed them to search the home. We think that
17 that is relevant information that should have been turned
18 over. And it's certainly exculpatory.

19 If they can't find the property that they're looking
20 for and he's a suspect at this point, because Marsha Smith
21 has already spoken and pointed the finger that that
22 information or that evidence should be at his house, that's
23 certainly exculpatory information, and I am entitled to it
24 at least under Brady vs. Maryland.

25 THE COURT: Now, well, maybe I misunderstand.

1 You think the defendant telling a prosecution agent
2 where stolen property can be found is exculpatory?

3 MS. JONES: As far as the -- not in the context of
4 going on this wild-goose chase evidently in North Carolina.

5 I'm talking about the disclosures in chambers
6 yesterday that the officers went to my client's house,
7 talked with him. He gave permission for them to search the
8 home, and nothing was found.

9 And this is after Ms. Smith had already given a
10 statement saying where -- that he had the property,
11 somebody was trying to buy it from North Carolina, Your
12 Honor.

13 THE COURT: Well, I understand, but that's not a
14 statement made by the defendant.

15 The fact that he granted them permission to search his
16 residence and did not find property, that's evidence that's
17 going to be introduced during the trial if it's not already
18 been, but that's not a statement.

19 I thought what we were addressing were oral statements
20 made by the defendant to prosecution agents.

21 MS. JONES: That's true, Your Honor --

22 THE COURT: Well.

23 MS. JONES: -- giving permission to search. And I
24 believe that there was some kind of conversation they had
25 of I-don't-know, take-a-look-around, and nothing was found.

1 Clearly that's in the exculpatory type of information that
2 I'm allowed to have, because if I had known that I
3 certainly would have cross-examined the officer on that
4 information. I didn't cross-examine him on it because I
5 didn't know it, Your Honor.

6 THE COURT: You didn't know that they had been to his
7 residence and he gave them permission to search the
8 residence and they didn't find the property?

9 MS. JONES: I did not.

10 THE COURT: All right. But that's not a statement
11 made by the defendant.

12 I thought we were discussing relevant oral statements
13 made by the defendant which I assume would be -- you say
14 they are exculpatory. I'm not certain how they are but --

15 MS. JONES: I think that information was exculpatory.
16 If you want me to move on to the specifics --

17 THE COURT: Well, but that information can be
18 developed. That's not a, that's not a -- I thought we were
19 addressing oral statements made by the defendant to
20 prosecution agents that were not disclosed.

21 I mean, the fact that they went to his house and
22 searched the residence and didn't find any stolen property
23 is not a statement. That's just a fact in the case which
24 can clearly be developed.

25 MS. JONES: I understand your position, Your Honor.

1 THE COURT: Well, maybe I don't understand yours. I
2 thought you were -- as I recall, the objection arose when
3 the prosecution agent was testifying about oral statements
4 the defendant made.

5 MS. JONES: That's correct, Your Honor. And then we
6 developed in chambers all of these different kinds of
7 allegations regarding various statements and various times
8 they talked with my client. And I'm saying taken together
9 we were entitled to all of that information. I --

10 THE COURT: Well, that's what I'm trying to find out.

11 Tell me where, what rule, what case provides that you
12 are entitled to an oral statement -- if that's what we're
13 discussing, and I thought we were -- that your client made
14 to a prosecution agent.

15 MS. JONES: If we're talking about running around in
16 North Carolina, Your Honor, he obviously had some kind of
17 conversation regarding this, this equipment. I think I was
18 entitled to know when this --

19 THE COURT: Well, let's do this. Let's do this before
20 you finish it.

21 Look at Rule Five and then tell me where this applies
22 in Rule Five, and then we'll address Brady if we need to.

23 MS. JONES: Rule Five indicates I'm entitled to
24 statements given by my client that are under interrogation.

25 THE COURT: Is that what it says -- is that what it

1 says? That's what I want you to look at. Read it for me,
2 or read it to yourself.

3 (Pause.)

4 THE COURT: Before we get to that point, you did make
5 a discovery request pursuant to Rule Five and Brady?

6 MS. JONES: I did, Your Honor.

7 THE COURT: Okay. All right. Now, tell me where any
8 oral statement that's the subject of testimony of this
9 police officer attributed to your client is discoverable
10 under Rule Five and/or Brady.

11 MS. JONES: It indicates any relevant or written or
12 recorded information.

13 THE COURT: Well, read the -- read the whole rule. We
14 can't pick it word by word.

15 "Upon request by a defendant, the prosecution shall
16 permit the defendant to inspect and copy or photograph any
17 relevant written or recorded statements made by the
18 defendant, or copies, that are within the possession,
19 custody or control of the prosecution, the existence of
20 which is known, or by the exercise of due diligence may
21 become known to the attorney for the prosecution."

22 All right. Well, that doesn't apply here because we
23 don't have any relevant written or recorded statements.

24 All right. So the next provision of the rule is, "And
25 the substance of any oral statement which the prosecution

1 intends to offer into evidence at trial made by the
2 defendant, whether before or after an arrest, in response
3 to an interrogation by any person known to the defendant to
4 be a prosecution agent."

5 Now, that's what I'm trying to determine. These are
6 oral statements. I don't recall the context. I don't -- I
7 don't recall the state having introduced that evidence, is
8 what I'm trying to get to.

9 I know that the defense introduced that evidence
10 through cross-examination or it came out through
11 cross-examination by defense counsel. I don't have a
12 recollection as to whether it ever came out during direct
13 examination by the prosecutor. Do you know the answer to
14 that question?

15 MS. JONES: No, I do not, because we objected to that
16 information being put on the record since it hadn't been
17 supplied to us. And then we immediately broke at that
18 point yesterday.

19 THE COURT: Well, that was during the
20 cross-examination, was it not?

21 MS. JONES: That was after Ms. Gallivan got up and
22 started talking about defendant's statements. And I had
23 never been in receipt of any of my client's statements that
24 had been made.

25 THE COURT: I know that, but the statements that we're

1 talking about, were they not first revealed here in the
2 course of this trial during cross-examination of the
3 witness?

4 MS. JONES: Yes..

5 THE COURT: All right. Well, the Rule Five relates to
6 the substance being oral statement which the prosecution
7 intends to offer into evidence. And I'm not certain at
8 this point whether the prosecution ever intended to offer
9 it, and I'm not certain. That's why I'm asking the
10 question. I don't recall that they did offer it.

11 I thought it was elicited through cross-examination of
12 the witness, that the prosecution didn't offer the
13 substance of the oral statements.

14 The witness revealed those statements pursuant to your
15 cross-examination of him in criticizing his lack of a
16 proper investigation. And he stated that as the reason for
17 the investigation, was that your client was sending him to
18 various places to try to locate the stolen property that
19 did not or was not at these various locations. And if
20 that's the -- if I'm right, if that is the context, then
21 that doesn't fall under Rule Five, does it?

22 MS. JONES: Well, Your Honor, Ms. Gallivan was getting
23 up to cross-examine or to redirect and put some of that
24 information on the record, so she was going to utilize it.
25 And that is when we objected, Your Honor. And when they

1 intend to use it by asking questions regarding a statement,
2 I think that that can fall under the rule, that they're
3 intending to use that information.

4 THE COURT: You mean they intended to wait to see if
5 you fell into a trap and then to get back up on redirect
6 and develop that testimony? Now, surely you're not stating
7 that -- you're not saying that the solicitor is that
8 cunning.

9 MS. JONES: I'm not here to comment.

10 THE COURT: You're not? Well, that's why we're here,
11 what I am trying to determine, whether or not this motion
12 for a mistrial ought to be granted.

13 Well, is it fair to say that your recollection of the
14 testimony is that this, these statements, were not
15 developed or brought out on direct examination of the
16 witness by the prosecutor?

17 MS. JONES: No, Your Honor, or, yes, Your Honor,
18 that's a correct statement.

19 THE COURT: That's your recollection.

20 MS. JONES: That is.

21 THE COURT: All right. And so the first time that the
22 statements were disclosed was during cross-examination.

23 MS. JONES: That's correct.

24 THE COURT: Okay. All right. Well, that being the
25 case -- well, let me ask Ms. Gallivan and/or Mr. McCarty.

1 Did you intend to set a trap for the defense counsel?

2 MS. GALLIVAN: No, Your Honor. That was never the
3 state's intention, and the information came out. We were
4 unaware of the information at that time.

5 THE COURT: You were not aware of any oral statement
6 made by the defendant --

7 MS. GALLIVAN: We were not, not until today.

8 THE COURT: -- prior to the statement or prior to the
9 witness testifying about it?

10 MS. GALLIVAN: Correct.

11 THE COURT: However you would agree that those
12 statements would be disclosed in the exercise of due
13 diligence.

14 In other words, of course I don't know what your
15 conversations were with Mr. Davis. Did y'all ask Mr. Davis
16 if the defendant had made any oral statement?

17 MR. McCARDY: Your Honor, following yesterday's break
18 I spoke with Investigator Davis.

19 THE COURT: No. I'm talking about prior to this case
20 being tried. Prior to him being called to the witness
21 stand did anybody ask him if the defendant made any oral
22 statements?

23 MS. GALLIVAN: I did not ever have a conversation with
24 him about prior statements by the defendant.

25 THE COURT: Well, he was not asked --

1 MS. GALLIVAN: He was not.

2 THE COURT: -- if the defendant made any oral
3 statements.

4 Okay. All right. Well, it appears, it would appear,
5 to me that the statements do not fall under Rule Five then.

6 Now, what about Brady, Ms. Jones?

7 MS. JONES: Under Brady they're required to disclose
8 any type of exculpatory information and anything relevant
9 basically to the case.

10 And there's also -- we're under a court edict here in
11 terms of the Court controlling the docket. And I believe
12 that there is a specific provision in there that all
13 discovery has to be shared. And that would include
14 relevant information regarding what my client may have
15 said.

16 THE COURT: That's in a special rule or is that --

17 MS. JONES: It's in the administrative order that
18 we're all operating under that discovery has to be shared.

19 THE COURT: Oh, well, I understand that. But isn't
20 that based upon Rule Five or Brady vs. Maryland both?

21 I mean, I don't think the Court intended to alter the
22 status of the law in this state or the United States, for
23 that matter, did they?

24 I mean, I realize they've got to comply with Rule Five
25 and got to comply with Brady vs. Maryland. Are you telling

1 me that that order states that something else or more has
2 to be complied with?

3 MS. JONES: My understanding is that even witness
4 statements and the like have to be disclosed. I think it's
5 ten days before trial.

6 That's why we have a second appearance, is to ensure
7 that everything has been disclosed. And we stand up and
8 indicate whether or not discovery has been shared and what
9 we're missing, if we're missing witness statements, if
10 we're missing drug reports, if we're missing SLED reports
11 to accurately set those cases for trial.

12 THE COURT: Well, I'm satisfied that probably a rule
13 requires that all discovery be shared prior to trial. But
14 I was not aware that the rule was intending to offer the
15 status of what's required by way of discovery with Rule
16 Five or Brady vs. Maryland.

17 MR. McCARDY: Your Honor, I would only offer that. I
18 agree with Ms. Jones that production of discovery is
19 fundamental in every case. But as it becomes known to the
20 prosecution is an important aspect in this case.

21 Certainly the information that there may have been a
22 conversation or oral statement made by the defendant to a
23 law enforcement officer in the investigation of this case
24 did not become known, at least to the solicitor,
25 Ms. Gallivan and myself, until yesterday when it was

1 flushed out on cross-examination as it was not contained,
2 Your Honor, in any report as reported to the Court.

3 THE COURT: Well, I mean, that's important so far as
4 any intent that you or Ms. Gallivan may have, but that's
5 not important so far as what's required to be disclosed.

6 If a statement is a statement that is required to be
7 provided pursuant to Rule Five or Brady vs. Maryland, it
8 doesn't matter whether the prosecuting attorney has
9 knowledge of it or not.

10 I mean, if a prosecution agent has knowledge of it and
11 through the exercise of due diligence that can be
12 determined, it has to be disclosed.

13 I mean, the fact that a police officer doesn't provide
14 you -- let's say it's a written statement. The fact that
15 the police officer or the arresting officer or whomever has
16 a written statement from the defendant and they don't
17 provide it to you doesn't mean it does not have to be
18 provided to the defense.

19 I mean, you can't -- you can't claim ignorance and
20 then just say, well, we don't have to comply with discovery
21 because no police officer told us about it.

22 You've got to exercise due diligence too, and you've
23 got to inquire, because statements are required, at least
24 written statements are required, to be disclosed pursuant
25 to Rule Five. And so you have an obligation to inquire

1 did-y'all-take-any-written-statements. And it would also
2 obviously be prudent to ask if there were any oral
3 statements made by the defendant, because those might need
4 to be disclosed too if you intend to offer them in trial or
5 if they're exculpatory.

6 MS. GALLIVAN: Your Honor, the state would argue that
7 under Rule Five and under State vs. Muller that exactly
8 like they're saying, that we're under an obligation to
9 produce anything that we intend to introduce as evidence in
10 the trial.

11 I think it was obvious from our intentions that we did
12 not bring these issues up on direct examination that we did
13 not intend to use them in the course of the trial.

14 THE COURT: All right. So then the next question I
15 guess is going to be, is whether or not any of these oral
16 statements were -- well, No. 1, were they the product of
17 any interrogation, and, No. 2, are they favorable or
18 exculpatory.

19 Were these statements the product of any
20 interrogation?

21 MR. MCCARDY: Your Honor, from my conversation with
22 Investigator Davis they were not.

23 The defendant was never in custody during any of these
24 statements. The statements or the conversations were
25 initiated outside of this search or outside of the time of

1 the property, the defendant's property, where they were on
2 his property, were initiated by the defendant according to
3 Investigator Davis' statement to me.

4 THE COURT: Okay. What's the defendant's position,
5 Ms. Jones?

6 MS. JONES: Well, he was clearly a suspect when they
7 went to his, his house and basically questioned him. I
8 think that that would probably fall within an
9 interrogation.

10 It doesn't necessarily mean to be a Miranda type
11 situation. Just simply speaking with somebody, you already
12 them to be a suspect, wanting to search their house and
13 look through things, and then engage in more conversations
14 regarding where this equipment and generator can be found,
15 you know, that certainly, if that's not police questioning
16 and interrogation, then what would be, I mean, unless
17 you're in handcuffs in a little room? Some of that, you
18 know, is a gray area.

19 THE COURT: Well, you'd agree that all police
20 questioning, even regarding criminal activity, is not
21 necessarily an interrogation.

22 MS. JONES: No, not all, no. I would agree with that.

23 THE COURT: Let me ask you this.

24 Brady vs. Maryland I think requires information to be
25 shared that is material and favorable to the defendant.

1 MS. JONES: And exculpatory.

2 THE COURT: Well, that would be favorable.

3 Do you contend that any of these statements are
4 favorable or exculpatory to the defendant?

5 MS. JONES: I think perhaps in terms of exactly what
6 type of situation that they arose in. I mean, we don't
7 even really know other than some of the conversations we
8 had back in chambers. I think it was a telephone call, or
9 if it was a car ride, something along those lines, it may
10 have been favorable.

11 THE COURT: I'm talking about the statements as they
12 were elicited in court. Are they in any way favorable or
13 exculpatory? I mean, as I understood what the statements
14 were, is that he was telling the police officers where --
15 that he had knowledge of where they could find property
16 that had been stolen, and I don't exactly know.

17 MS. JONES: And I think the officer also testified
18 that my client allegedly helped identify the person from
19 North Carolina. I think that's one of the ways that they
20 got his name.

21 Clearly, if he was helping with the investigation and
22 providing a name that they were looking for that's
23 favorable evidence, because that shows he is perhaps
24 helping with the investigation.

25 THE COURT: All right. Well, that was developed

1 through examination, was it not?

2 MS. JONES: Yes.

3 THE COURT: All right. So then that -- if it is
4 favorable, that information, while it might not have been
5 shared pretrial, it has been disclosed to the jury in the
6 course of this trial.

7 I mean, it's not something that, in other words, we
8 have concluded the trial and it was favorable information
9 that was not shared that the jury doesn't have benefit of.
10 So they do have benefit of that favorable information. Is
11 that a fair statement?

12 MS. JONES: It is a fair statement, Your Honor, but I
13 do believe that the defense is entitled to that information
14 in the proper context prior to trial.

15 THE COURT: Well, I don't disagree that you're
16 entitled to favorable or exculpatory information in the
17 course of discovery.

18 I'm having a little bit of difficulty in understanding
19 how that's exculpatory because it shows knowledge of stolen
20 property.

21 However, let's just assume for the sake of argument
22 that it is. And you may be right. It may be favorable; it
23 may be exculpatory. And if it is, then it has to be
24 disclosed.

25 But the problem is and the reason for the disclosure

1 of course is so that the defense has benefit of that
2 information to share with the jury so that the jury knows
3 that there is this favorable information here, or
4 exculpatory information, about the defendant.

5 What I'm saying is I know it might have been shared or
6 it might not have been shared at all, but it might have
7 been developed untimely pursuant to discovery rules, but
8 the jury has benefit of the information. So the
9 defendant's not prejudiced in that he didn't have an
10 opportunity for the jury to know that information, is what
11 I'm saying. Would that be a fair statement?

12 MS. JONES: Well, I would say that the jury got to
13 hear that information, Your Honor. But, unfortunately, I
14 could have probably developed it in a little bit different
15 way.

16 Certainly I'm entitled to it in preparation for my
17 trial in talking about that information with my client so
18 that I can get the proper context.

19 When information isn't disclosed to me it's very
20 difficult to come in sort of blind. There are rules for a
21 reason. And if there's no teeth in the rules, then there's
22 nothing to prevent this officer from going out and
23 continually just not writing anything down. That's
24 prejudice.

25 THE COURT: Well, I don't disagree with you that you

1 are entitled to it ahead of time, and I don't disagree with
2 you that the -- that someone who is intending to commit
3 fraud or deceit could not disclose anything, and there are
4 rules for that and there are sanctions for that, but what
5 I'm looking at this case or this -- any violation of the
6 rules in the context of this particular case.

7 In this particular case it would appear to me that the
8 state nor the officer was intending to perpetrate a fraud
9 or withhold information about the -- that appears to me to
10 be inculpatory.

11 They didn't disclose it. They didn't intend to offer
12 it from what I can understand. It wasn't intended to be
13 offered at the trial of the case. It was developed through
14 cross-examination.

15 So, I mean, I just, I have a hard time believing that
16 there was this agreement or conspiracy between the officers
17 and the prosecutors to keep this information secret and
18 wait for you to develop it and then have it sprung that
19 way. I just don't find that to be reasonable, quite
20 frankly. I'm not saying it's not possible, but I just
21 don't find it to be reasonable in this particular case.

22 Recognizing that it was a surprise to you yesterday,
23 and now that you've had, you know, overnight to think about
24 it, do you -- I mean, I'll be happy to require Mr. Davis to
25 resume his seat on the stand and allow you to continue any

1 cross-examination you wish to have of the defendant, excuse
2 me, of the witness if that's something you wish to do.

3 MS. JONES: At this time I don't intend to put Officer
4 Davis on the stand.

5 THE COURT: No. I'm not asking you to put him on the
6 stand. That's not something you ought to have to do.

7 What I'm saying is he was on the stand. He was a
8 state's witness. And I'll call him. I will require that
9 he retake the stand so that you can continue any
10 examination you wish to make of him.

11 You won't have to call him as a witness. I'm going to
12 put him back up there if you want me to, I mean, if that's
13 going to alleviate any inability that you had to make what
14 you consider to be an appropriate examination of him.

15 MS. JONES: I think it's already out there, Your
16 Honor, and me cross-examining him and putting him up and
17 wreaking any other isn't going to cure what already
18 happened, Your Honor.

19 THE COURT: Well, so there's nothing else you feel
20 like you need to develop on that point.

21 MS. JONES: I think the cat is already out of the bag,
22 and it's already there. And anything that we do after this
23 point cannot cure that problem that happened yesterday.
24 That's our position. You ruled against me, but that's our
25 position.

1 THE COURT: All right. Well, based upon the facts of
2 this matter I do find that the state did not intend to
3 offer the oral statements in their case in chief and were
4 not even aware, the prosecuting attorneys were not even
5 aware, of the statement.

6 Those statements were not elicited on direct
7 examination of the witness, and the state did not intend to
8 produce them or introduce them in the trial of the case.
9 The statements were revealed and they were introduced
10 through cross-examination of the witness, which is
11 perfectly permissible.

12 I also find in my view that the statements were not
13 favorable or exculpatory to the defendant and therefore not
14 required to be disclosed pursuant to Brady because the
15 statements actually show knowledge on the part of the
16 defendant as to, or appear to show knowledge on the part of
17 the defendant as to, where stolen property is located, that
18 is he had knowledge of where the stolen property can be
19 found. And I don't find that to be exculpatory.

20 Now, the fact that he is willing to share information
21 might be exculpatory, but that information has been
22 developed during, through the cross-examination of the
23 witness, that the defendant did try to help the law
24 enforcement officers, or at least appeared to try to help
25 the law enforcement officers, in recovery of the property.

1 So to the extent that that's exculpatory or favorable,
2 that evidence has been disclosed to the jury through
3 examination of the witness. So in that event there's no
4 prejudice to the defendant.

5 So based upon that analysis I find that the
6 defendant's motion for a mistrial should be denied.

7 Anything else we need to address before the jury is
8 brought in?

9 MS. GALLIVAN: Nothing from the state, Your Honor.

10 MS. JONES: Your Honor, my understanding is that
11 they're going to call Marsha Smith. And I would just renew
12 my motion for discovery in terms of confidential-informant
13 agreement.

14 You ruled at a bench conference basically that I was
15 not entitled to that information, but certainly I could
16 cross-examine and question her on that information, and
17 that if she didn't tell the truth that it would be
18 incumbent upon the solicitor to correct the record.

19 We just renew our request for that information, Your
20 Honor, and put it on the record.

21 THE COURT: Okay. Well, we need to put on the record
22 what exactly it is that you're requesting.

23 Now, as I understood it from the bench conference,
24 which was not on the record, that you are requesting
25 specific written documents or agreements between the

1 sheriff's department and Ms. Smith relating to any work she
2 has done prior to this case or prior to this day, and I
3 believe that's regarding drug transactions or purchases
4 from individuals. And is that -- I don't know how clear
5 that is, but is that a fair statement?

6 MS. JONES: Your Honor, we were basically -- it was
7 our understanding that she's a confidential informant and
8 that she had been working for the sheriff's office.

9 I requested that the actual agreement be disclosed,
10 because, generally speaking, those agreements usually call
11 for "X" amount of buys or if they get paid "X" amount of
12 money for favorable drug buys.

13 That is the information that we requested, and I think
14 even the officer yesterday testified that she signed
15 something. And that is the information that we requested,
16 and as well as, you know, basically what the deal is,
17 because a lot of times when you use a confidential
18 informant it's not just one little case that they're
19 getting the benefit from. It's the series. And if they
20 commit the series of things, then it's the benefit.

21 So she might not have gotten something specific in
22 terms of Mr. Pitts, but over all in the course of her
23 activity or working with the sheriff's department there
24 most likely was some type of benefit.

25 We were inquiring as to that information. We believe

1 that that is impeachable information. It's relevant
2 information to my cross-examination. That is what we were
3 basically asking for.

4 THE COURT: All right. And I asked the solicitor to
5 obtain that agreement or documents related thereto so that
6 she could review those and be aware of what any agreement
7 was.

8 Solicitor, did you obtain the documents?

9 MS. GALLIVAN: Through our communication with
10 representatives from the sheriff's department if Ms. Smith
11 has ever operated as a confidential informant they do not
12 have any records of such at their disposal at this point,
13 so that they have not provided us with any records to be
14 able to verify whether or not she has worked as a
15 confidential informant.

16 THE COURT: You say if she has ever worked as a
17 confidential reliable informant? I thought that was an
18 established fact.

19 MS. GALLIVAN: They don't have a packet or any
20 information as to where she was actually ever signed up as
21 a confidential informant.

22 THE COURT: All right. You're telling me that you've
23 inquired of the sheriff's department and they're -- who
24 told you this information?

25 MR. McCARDY: If I may speak, Your Honor, following

1 yesterday's conference I called a representative of the
2 sheriff's department, Sergeant Joe Farris.

3 THE COURT: Is this somebody that has this
4 information?

5 MR. McCARDY: He's somebody that he could find it or
6 it would be readily available to him.

7 Sergeant Farris is a sergeant in the narcotics unit,
8 division, Your Honor.

9 THE COURT: Okay.

10 MR. McCARDY: He was aware of the name and had been
11 looking to find it, and even possibly under a different
12 name other than the name she's currently using right now,
13 and was unable to locate any information regarding this
14 next witness, Your Honor.

15 THE COURT: Is it fair to say that the typical policy
16 and procedure of the sheriff's department in retention of
17 confidential reliable informants is to have a written
18 agreement with that individual who is going to be working
19 for the sheriff's department?

20 MR. McCARDY: Your Honor, I can't -- I don't know
21 honestly to tell the Court how often that occurs. I know
22 that I see it, but I know that they have --

23 THE COURT: It's not uncommon.

24 MR. McCARDY: It's not uncommon.

25 THE COURT: And you've seen it yourself.

1 MR. McCARDY: Yes, Your Honor.

2 THE COURT: That there are written agreements between
3 informants and the sheriff's department.

4 MR. McCARDY: Yes, Your Honor.

5 THE COURT: And you're saying in this case you
6 conducted the appropriate inquiry and that the sheriff's
7 department representative who is a narcotics -- a sergeant
8 in the narcotics office has stated that there is no written
9 documentation or written agreement evidencing Ms. Smith's
10 employment as a confidential reliable informant by the
11 Spartanburg County Sheriff's Department.

12 MR. McCARDY: Yes, sir, Your Honor.

13 THE COURT: Well, is there any oral agreement with the
14 narcotics department or any department of the sheriff's
15 office employing her as a confidential reliable informant
16 for any purpose?

17 MR. McCARDY: Your Honor, I'm aware of the situation
18 which Sergeant Farris related to me that they did speak
19 with her in the past regarding possibly using her in
20 narcotics investigations.

21 Your Honor, a search of his records, as well as
22 looking in another place, major-crime-units area of the
23 Spartanburg County Sheriff's Office for information
24 regarding Ms. Smith, who also used a different last name at
25 one point looking for either of those files of information,

1 that he was unable to locate anything written.

2 He did indicate to me that they had at least spoken to
3 her regarding that, regarding doing these types of
4 involvement in these investigation charges.

5 THE COURT: Well, is it the state's position that she
6 has never been employed as a confidential reliable
7 informant outside of this particular case, if she was one
8 in this case?

9 MR. McCARDY: No, sir, I don't believe it's our --
10 that's our position.

11 THE COURT: Well, what is your position?

12 MR. McCARDY: I believe that, as Sergeant Farris
13 indicated to me, that they have attempted to use her. But
14 for whatever reason it was -- it didn't work out for that
15 particular investigation.

16 THE COURT: Well, that's what I'm saying. So she's
17 never -- in other words, they've attempted to employ her
18 services, but she's never made a case or never assisted in
19 a case for the sheriff's department?

20 MR. McCARDY: This is the information that was
21 revealed to me, yes, Your Honor, correct.

22 THE COURT: Okay. Ms. Jones, I don't know what else
23 to do to attempt to get that information for your benefit.

24 They're representing that no such documents exist and
25 no such agreement has been made and she's never actually

1 worked a case or been involved in a case.

2 Now, that doesn't preclude you from asking her about
3 it when she comes in here to testify but...

4 MR. McCARDY: Your Honor, I can only tell the Court
5 that we have no documents to produce or none were produced
6 to us regarding anything where she may have signed up any
7 information or signed an agreement to say she would come in
8 and work for the sheriff's office in a confidential manner.

9 THE COURT: I understand.

10 And did you also inquire as to whether there's ever
11 been any oral agreement between Ms. Smith and the narcotics
12 office for her to assist them in making cases?

13 MR. McCARDY: Just as I related, Your Honor, that they
14 attempted to use her in an occasion or two and for whatever
15 reason that didn't result in an arrest or an actual case
16 being made against a person.

17 THE COURT: Has Ms. Smith ever been paid any money by
18 the sheriff's department for any work that she's done on
19 their behalf?

20 MR. McCARDY: If I can, Your Honor.

21 (Pause.)

22 MR. McCARDY: Your Honor, I don't know the specifics
23 to that question. I can inquire of Ms. Smith as to that
24 question.

25 THE COURT: Well, I really want to know from the

1 sheriff's department. That's the point.

2 MR. MCCARDY: I can certainly ask as to regards to
3 that. I didn't ask that specific question, Your Honor,
4 with regard to an attempt to use her.

5 THE COURT: Okay. Well, I need for you to develop
6 that.

7 Find out that information for me. I'm going to
8 continue with the trial, but I need for you to find out if
9 there is such an agreement, and, if so, we need to know it.

10 MR. MCCARDY: Yes, sir. I'll go right now.

11 (Pause.)

12 THE COURT: All right. Any other matters we need to
13 address before the jury is brought in?

14 MS. JONES: Your Honor, I just remembered as I was
15 sitting here when I initially inquired for this information
16 regarding the confidential-informant information
17 Ms. Gallivan responded to my request for that information
18 that all of -- it was their position that all of the buys
19 she made they wanted to keep confidential and that I could
20 raise what I wanted in front of Your Honor.

21 I think that that sort of imputes that she has been
22 making buys. So this is a real big surprise to me all of a
23 sudden that they don't have any records, that she's never
24 worked for them. And now it's kinda their position that
25 she's not even a C. I., even when we had officer Davis on

1 the stand yesterday saying that there was some type of
2 agreement signed.

3 That's our position, Your Honor, and I think that that
4 adds a little bit more to -- I don't want to say bad faith,
5 but certainly something's going on here that's not being
6 fully disclosed with the Court, and more importantly the
7 defense.

8 THE COURT: All right. Ms. Gallivan.

9 MS. GALLIVAN: Your Honor, my response to that e-mail
10 was based on my inquiries with people in our office that
11 worked with confidential informants that told me that there
12 was a public interest in keeping these profiles
13 confidential where they so exist.

14 At that time I had no knowledge of whether or not a
15 profile actually did exist on Ms. Smith and started
16 checking into that after that e-mail was sent only to find
17 that we were not able to be provided with any sort of
18 information.

19 It was not, that e-mail was not, sent in bad faith.
20 It was not sent to misled in any way. It was just stating
21 the position that were any files to exist on Ms. Smith that
22 it was the sheriff's department's position that they would
23 like to keep those profiles confidential.

24 THE COURT: Well, I understand that, but that would
25 presume that there were such files.

1 I mean, surely if she were not a confidential reliable
2 informant and she did not work for the sheriff's department
3 and she had not made any purchases of drugs it would be a
4 simple thing to simply tell the defense counsel that she's
5 not a confidential reliable informant, she hasn't been
6 working for the sheriff's department, there's nothing to
7 divulge, she doesn't work for the sheriff's department, she
8 just helped them in this case.

9 MS. GALLIVAN: And at that time I believed that it was
10 possible that she had based on what Ryan has told me, the
11 conversations that they had attempted to use her in the
12 past, and then we found out that there was actually nothing
13 in writing after that point for those attempts.

14 THE COURT: All right. But you're saying at the time
15 you responded to Ms. Jones' request you had no information
16 or no knowledge that Ms. Smith had actually been employed
17 as an informant for the sheriff's department?

18 MS. GALLIVAN: I knew of what her actions were in this
19 case. I did not know of any -- I did not know the details
20 of any prior agreements at that time.

21 THE COURT: Well, the details of any prior agreement
22 supposes that there's a prior agreement and you just don't
23 know the details.

24 Did you know of any agreement at all, whether you knew
25 the details or not?

1 MS. GALLIVAN: Through speaking to the investigators
2 in this case I was told that she had been -- that they had
3 attempted to use her before.

4 They were under the impression that she had been used
5 before, and based on that was my response to the e-mail.
6 It was only after that that I found out that she actually
7 was never actually signed up as a confidential informant in
8 any of these others.

9 THE COURT: Who was understand the impression she had
10 been used before?

11 MS. GALLIVAN: The investigators in this case,
12 Investigator Forrester and Davis --

13 THE COURT: Neither one of them had ever used her
14 before?

15 OFFICER DAVIS: No, sir, Your Honor.

16 MS. GALLIVAN: No, Your Honor.

17 THE COURT: Okay. All right. Well, I understand the
18 representation is that she is not a confidential reliable
19 informant, she's never provided any information or worked
20 with the sheriff's department except in this particular
21 case.

22 Is that the state's position?

23 MS. GALLIVAN: That is, Your Honor.

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

25 MS. GALLIVAN: Nothing from the state..

1 MS. JONES: Your Honor, I would just ask for leave of
2 the Court when we do take a break at the appropriate time,
3 I'd like to print that e-mail and put it into evidence.

4 THE COURT: Okay. All right. Bring the jury in,
5 please.

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

8 THE COURT: Good morning, ladies and gentlemen.

9 Again, I'm sorry for the delay in having you brought
10 in, but I had some matters that I had to address, and they
11 took longer than I thought, but we are ready now to
12 continue with the trial of the case.

13 As you know, when we recessed yesterday the state was
14 in the midst of their presentation. So we'll continue with
15 that presentation this morning.

16 Ms. Gallivan.

17 MS. GALLIVAN: The state would call Marsha Smith to
18 the stand.

19 (Pause.)

20 THE COURT: Ms. Gallivan, do you know what the delay
21 is? Have they been notified to bring her in?

22 MS. GALLIVAN: They have, Your Honor. I saw the
23 witness was right in the room right there. I'm not sure
24 what the delay is. I can check.

25 (Pause.)

Marsha Elaine Smith
Direct examination by Ms. Gallivan

1 MARSHA ELAINE SMITH, having
2 been first duly sworn, testified as follows:
3 DIRECT EXAMINATION BY MS. GALLIVAN
4 Q Ms. Smith, I want you to speak up, and you can use the
5 microphone. And look at me and the jury and speak loud
6 enough so they can hear you. Okay? Can you state your
7 full name for the record?
8 A Marsha Elaine Smith.
9 THE COURT: You are going to have to speak up louder
10 than that.
11 THE WITNESS: Marsha Elaine Smith.
12 Q Can you tell us where you live?
13 A
14 Q Is that near the defendant's residence?
15 A Yes, ma'am.
16 Q Where are you currently staying right now?
17 A
18 Q No. I mean where did you spend the night last night.
19 A Oh, Spartanburg County.
20 Q And do you have current pending charges? Is that why
21 you are there?
22 A Yes. My charges will be off of me Friday.
23 Q Now, do you know the defendant in this case, Gerald
24 Pitts?
25 A Yes, ma'am.

Marsha Elaine Smith
Direct examination by Ms. Gallivan

- 1 Q How do you know him?
- 2 A He lives down the street from my house.
- 3 Q Now, were you questioned by the police officers about
- 4 the facts of this case?
- 5 A Yes, ma'am.
- 6 Q Who questioned you?
- 7 A Matt Davis and Heather Forrester.
- 8 Q Okay. And you gave them two different statements, is
- 9 that correct?
- 10 A Yes, ma'am.
- 11 Q Were they on the same day?
- 12 A No, ma'am.
- 13 Q Now, in your first statement -- well, first of all,
- 14 let me remind you.
- 15 MS. GALLIVAN: Permission to approach the witness,
- 16 Your Honor.
- 17 THE COURT: Yes.
- 18 Q I just want to show you the dates. Does that date say
- 19 8/30/09?
- 20 A Yes, ma'am.
- 21 Q Is that your signature right there at the bottom?
- 22 A Yes, ma'am.
- 23 Q And does this also state 8/3/09, August 3rd of '09?
- 24 A Yes, ma'am. That is on the same day.
- 25 Q And that's your signature there at the bottom?

Marsha Elaine Smith
Direct examination by Ms. Gallivan

1 A Yes, ma'am.

2 Q Okay. And this one, in fact, says it was at 7:20 in
3 the evening.

4 THE COURT: Be careful with the microphone, please.

5 A Yes, ma'am.

6 Q Okay. And then your next statement says it was at
7 9:15 in the evening.

8 A Yes, ma'am.

9 Q Okay. So it's possible that these statements were
10 made on the same day.

11 A Yes, ma'am.

12 Q Okay. Now, when they first questioned you in your
13 first statement, what information were you able to provide
14 officers?

15 A The information about the property that I had seen at
16 the household.

17 Q Okay.

18 THE COURT: Ma'am, let me ask you.

19 Don't, don't get right up on the microphone and eat
20 it. Just, just speak up loudly, and the mic should pick it
21 up. I know it's not the best one in the world, but you can
22 adjust it too. Just don't lean over into the microphone.

23 Q You can sit up and talk normal.

24 THE COURT: Yeah. Just speak out loud and it should
25 pick it up.

Marsha Elaine Smith
Direct examination by Ms. Gallivan

1 Q Just speak up normal.

2 Now, you said you saw the property. Can you tell us
3 about where you saw the property?

4 A In the building beside of his house. He has a shop
5 right there.

6 Q Whose house, when you say his house?

7 A Gerald Pitts.

8 Q Okay. And go ahead.

9 A He has a shop that has -- was in the shop beside of
10 his house.

11 Q Okay. And what property did you see in that shop?

12 A Generator, air compressors and weed eaters.

13 Q Okay. And what else? What was the other information
14 that you gave the officers in your first statement?

15 A The other information that I gave them?

16 Q Did you tell them anything else in that first
17 statement about what you saw at the house that day?

18 A Oh, I, like model cars and --

19 Q What were the circumstances of you being at Gerald's
20 house that day?

21 A What was the circumstances?

22 Q Why were you over there?

23 A I wasn't in his house, you know. As I pass up and
24 down the road I stop by his house, you know, occasional
25 times, you know what I am saying? I mean, I went by there

Marsha Elaine Smith
Direct examination by Ms. Gallivan

1 and stopped, you know, a few times.

2 Q Okay. Were you ale to identify the property that the
3 officers were asking you about --

4 THE COURT: Ma'am, back up. (Referring to
5 microphone.)

6 Q -- on that day at Gerald's house? Is that correct?

7 A Yes, ma'am.

8 Q Okay. Now, they -- did the detective show you lineups
9 through this investigation?

10 A Yes, ma'am.

11 Q Did they show you more than one?

12 A Yes, ma'am.

13 Q One was of the defendant, correct?

14 A Yes, ma'am.

15 Q Why did they show you a second lineup?

16 A To -- it was a picture of a guy that I had seen at his
17 house, that I had seen at his house, that I had seen him
18 talking with.

19 Q Okay. And that -- you told the officers about the guy
20 that you saw at his house in your first statement?

21 A I believe it was my second, the second statement.

22 THE COURT: Mr. Turner, you have taken the microphone
23 away from her face entirely.

24 Pull that chair up and sit up. Don't lay over in the
25 chair. Sit up in the chair and speak loudly. The jury can

Marsha Elaine Smith
Direct examination by Ms. Gallivan

1 hear your testimony. That's not a hard instruction.

2 Q You can sit up. You don't have to lean forward.

3 Okay. Now, I'm going to let you look at this just so
4 you can help remember. Okay. Do you remember in this
5 statement telling about another man being at the house?
6 This is your first statement, correct?

7 A Yes, ma'am.

8 Q Okay. Do you remember in this statement telling about
9 the other man being at the house?

10 A Yes, ma'am.

11 Q Okay. Now, when you gave this first statement and the
12 officers were asking you about what you knew in this case
13 did you tell them everything that you knew initially or did
14 you -- what did you tell them, all the details that you can
15 recall?

16 A I just told them about the property that I had seen
17 and who I had seen at the house and, and just what I had
18 seen.

19 Q Okay. And the other man that you saw at the house,
20 did you know why he was at the defendant's house that day?

21 A I mean, they were talking, but I don't know the exact
22 reason why he was there, I mean.

23 Q Okay. You didn't -- did you give the officers any
24 information to indicate that you might know why he was
25 there that day?

Marsha Elaine Smith
Direct examination by Ms. Gallivan

1 A Yes, ma'am.

2 Q Why did you tell the officers that he was there that
3 day?

4 A Discussing him purchasing some of the belongings.

5 Q Okay. He was discussing purchasing some of the items
6 Gerald had at his house?

7 A Yes, ma'am.

8 Q Okay. Now --

9 THE COURT: Sit up, please, ma'am.

10 Q Later that day around 9:15 you gave a second
11 statement, is that correct?

12 A Yes, ma'am.

13 Q Do you recall telling the officers more information at
14 that time?

15 A Yes, ma'am. I think I'm for sure --

16 Q Can you tell us what you were able to provide the
17 officers in your second statement?

18 A I think that's when I chose the lineup.

19 Q Okay. They, the officers, asked you to identify
20 someone in a lineup. But before that I think you gave them
21 more information about the property they were looking for
22 and about --

23 MS. JONES: I am going to object to leading, Your
24 Honor?

25 THE COURT: Sustained.

Marsha Elaine Smith
Direct examination by Ms. Gallivan

1 Q Can you tell me what you gave them in the second
2 statement, what information you told them at that time?

3 THE COURT: Excuse me before you answer that. Stop.
4 Let me see y'all just a minute.

5 (Bench conference held off the record in the presence
6 of the jury but out of the hearing of the jury.)

7 Q Okay. Let's do this. On August 2nd, around
8 August 2nd, did the defendant ask you to do anything for
9 him?

10 A Drive a vehicle.

11 Q Okay. Where did he ask you to drive the vehicle?

12 A Parris Bridge Road.

13 Q Do you remember where he took you or he asked you to
14 drive?

15 A It was on the Parris Bridge Road.

16 Q Okay. Describe, can you describe, the property or
17 describe where you went that day?

18 A It was on Parris Bridge Road. It was like a brick
19 house that had like a S. U. V. setting in the yard and had
20 a white and blue police car in the yard.

21 Q Can you tell me anything else about the property that
22 you saw that day?

23 A The carport was not completely closed. It was like it
24 was partially open.

25 Q Okay. Now, what happened when you got to that

Marsha Elaine Smith
Direct examination by Ms. Gullivan

1 location?

2 A Stuff was being loaded.

3 Q Where was stuff being loaded from?

4 A From the carport.

5 Q By who?

6 A Gerald Pitts.

7 Q Can you describe the things that he was loading from
8 the carport into the car?

9 A A weed eater, air compressor and generator.

10 Q Okay.

11 THE COURT: Sit back, please.

12 Q Now, what happened next after the things were loaded
13 into the car?

14 A We drove back to his house.

15 Q Okay. During this time did you believe that things
16 were being stolen?

17 A No.

18 Q Why did you have that belief?

19 A Why did I believe it was being stolen? Well, for one
20 reason I was told that it was bought, and the second reason
21 is because I didn't think he'd pull up in beside a police
22 car and steal something.

23 Q Okay. Now, at any point during this time did you ever
24 change that belief that these things had been bought?

25 A At the very end when I was -- the detectives started

Marsha Elaine Smith
Direct examination by Ms. Gullivan

- 1 questioning me, yeah, then I knew.
- 2 Q Okay. Now, you indicated that you were shown a
3 lineup, is that correct?
- 4 A Yes.
- 5 Q I want to show you. I show you what has been marked
6 as State's Exhibits 1 and 2. Do you recognize these
7 documents?
- 8 A Yes.
- 9 Q Is that your signature on this page?
- 10 A Yes, ma'am.
- 11 Q Now, who, can you tell us who, you were identifying in
12 this lineup?
- 13 A Who I was identifying?
- 14 Q Correct.
- 15 A A guy that I had seen at, at Gerald's residence.
- 16 Q Okay. I want to show you State's Exhibits 3 and 4.
17 Do you remember being shown those documents?
- 18 A Yes, ma'am.
- 19 Q And is that your signature identifying a person in
20 this lineup?
- 21 A Yes, ma'am.
- 22 Q Can you tell the jury who you identified in that
23 lineup?
- 24 A Gerald Pitts.
- 25 Q Why did you identify Gerald Pitts in that lineup?

Marsha Elaine Smith
Direct examination by Ms. Gallivan

1 A Why did I identify him?

2 Q Yeah. Who, what were you identifying him to show in
3 that lineup?

4 A That that was the person that I had driven for.

5 Q Okay. Now, before I take this one, is the person in
6 this lineup that you identified, is he in the courtroom
7 today?

8 A Yes, ma'am.

9 Q Can you point him out for me and tell me what he is
10 wearing?

11 A Blue shirt.

12 Q Now, after you were questioned by the officers did
13 they help -- did they ask you to help further their
14 investigation in any way?

15 A After what?

16 Q After you were questioned by the officers and you gave
17 them information did they ask you to help further their
18 investigation in any way?

19 A Yes, ma'am.

20 Q What did they ask you to do?

21 A Purchase a quantity of Lortab.

22 Q Okay. And how did they ask you to do this?

23 A To put a wire.

24 Q Okay. They put a wire on you. And then what did they
25 ask you to do?

Marsha Elaine Smith
Direct examination by Ms. Gallivan

- 1 A Purchase a quantity of Lortab.
- 2 Q Okay. Did you actually help them further their
3 investigation?
- 4 A Yes, ma'am.
- 5 Q Now, you said they put a wire on you. Was that a wire
6 with sound and video equipment?
- 7 A Yes, ma'am.
- 8 Q And after they wired you, you went over and attempted
9 to buy Lortab from the defendant.
- 10 A Yes, ma'am.
- 11 Q While there was Lortab the only thing you discussed?
- 12 A Yes, ma'am. You talking about the purchase?
- 13 Q Just while you were there wired with equipment what
14 did you talk to the defendant about.
- 15 A I asked him about Lortab, and then I asked him
16 questions like had the police been bothering him, had they
17 harassed him. That was to see if he would, if he would
18 talk and say that he had went to the house.
- 19 Q Okay. Now, did he have any information about the case
20 at that point?
- 21 A He just made a statement he didn't care if it was the
22 sheriff's house. If he had wanted it, he would have gotten
23 it.
- 24 Q I want to show you what's been marked as State's
25 Exhibit 5. Do you recognize this? You may not recognize

Marsha Elaine Smith
Direct examination by Ms. Gallivan

1 the package. This contains a video. Have you seen the
2 video of your wiring and going to attempt to buy the
3 Lortab? Have you had a chance to watch that before coming
4 into court today?

5 A Yes, ma'am.

6 Q Now, when you watched it was the video a fair and
7 accurate representation of the conversation that took place
8 between you and the defendant on that day?

9 A Yes, ma'am.

10 Q Did you feel the video had been altered or edited in
11 any way?

12 A No, ma'am.

13 MS. GALLIVAN: Your Honor, the state would offer
14 State's Exhibit 5 into evidence at this time.

15 MS. JONES: No objection, Your Honor.

16 THE COURT: It is admitted.

17 (Video marked State's Exhibit No. 5.)

18 MS. GALLIVAN: Permission to publish to the jury.

19 THE COURT: You may.

20 (Whereupon, the tape was played for the jury.)

21 Q Now, Ms. Smith, you just watched the video. Can you
22 tell us who the man in the reddish-colored shirt was?

23 A Gerald Pitts.

24 Q Now, at the end, towards the end, there when you were
25 talking to him, and then you were explaining to the

Marsha Elaine Smith
Direct examination by Ms. Gallivan

1 officers in the car, he made a statement to you, "I don't
2 give a damn." Can you tell us what he was referring to
3 there?

4 A When I had mentioned going to the police's house he
5 said that he didn't give a damn if it was the sheriff's
6 house. If he would want it, he would get it.

7 Q Okay. Now, before doing this have you ever worked as
8 a confidential informant in the past?

9 A One time about five years ago.

10 Q One time about five years ago. Now, were you paid or
11 did you have any charges dropped or were you given anything
12 in return for your services with the sheriff's department?

13 A No.

14 Q No. Okay. Has telling the truth been easy for you in
15 this situation?

16 A Well, it at first, it was a lot of intimidating, but
17 now it's easy for me to.

18 Q Okay. Have you told the truth today?

19 A Yes.

20 MS. GALLIVAN: Beg the Court's indulgence.

21 (Pause.)

22 MS. GALLIVAN: No further questions, Your Honor.

23 THE COURT: Mr. Jones.

24 MS. JONES: Thank you, Your Honor.

25

Marsha Elaine Smith
Cross-examination by Ms. Jones

1 CROSS-EXAMINATION

2 BY MS. JONES

3 Q Ms. Smith, you're currently in jail on pending
4 charges?

5 A Yes, ma'am.

6 Q Is it fair to say that those shopliftings are third or
7 subsequent enhanced offense?

8 A Yes, ma'am.

9 Q You've actually been convicted of two other
10 shopliftings, correct?

11 A Yes, ma'am.

12 THE COURT: Please don't exhale into the microphone.

13 Q And are you aware that that enhanced penalty is now a
14 felony? Were you aware of that?

15 A Yes, ma'am.

16 Q But those charges are going to be off on you on
17 Friday. That was your testimony, correct?

18 A No. I have an old past bench warrant that will be off
19 of me Friday, and then I'll be able to be bonded out
20 Friday.

21 Q You testified that -- let me ask you this. I'm not
22 sure that you necessarily testified to that. How were you
23 initially approached in this case, do you recall?

24 A How was I what?

25 Q Approached? How were you approached by the officers

Marsha Elaine Smith
Cross-examination by Ms. Jones

1 in this case?

2 A They had just came to me and asked, asked me if I knew
3 anything about it.

4 Q They asked you whether or not you knew about any of
5 the missing items, correct?

6 A Yes.

7 Q So they told you basically that somebody's house had
8 been broken into, X, Y and Z had been taken, and do you
9 know anything about that, correct?

10 A Yes.

11 Q Okay. And you indicated to them at that moment, well,
12 yes, officers, I do, correct?

13 A Yes.

14 Q Okay. You indicated, as a matter of fact, I was over
15 at Mr. Pitts' house Saturday filling up air in my tire and,
16 low and behold, I saw those missing items in Mr. Pitts'
17 garage, correct?

18 A Yes.

19 Q And, in fact, he was talking with somebody from North
20 Carolina, correct?

21 A Yes.

22 Q I think he was trying to sell those items,
23 Mr. Officer, correct?

24 A Yes.

25 Q You indicated at that point -- when did -- let me

Marsha Elaine Smith
Cross-examination by Ms. Jones

1 rephrase that. You indicated on direct that you were then
2 questioned again, correct?

3 A Yes.

4 Q Was this a couple of days later?

5 A I don't think it would've been a couple. I think it
6 might have been about the next, next day. I don't think it
7 had been a couple of days.

8 Q Well, it's your testimony. Do you recall when the
9 officers came to see you again?

10 A I seen them quite a few times. I mean, they...

11 Q Well, at some point did the officers come back to you
12 and tell you, Ms. Smith, you need to come with us down to
13 the police station?

14 A Yes.

15 Q Do you recall the timeframe in which that would have
16 been from your initial statement of saying, hey, it's all
17 in Mr. Pitts' garage to, Ms. Smith, you need to come down
18 to the police station with us?

19 A It was the same day.

20 Q So they approached you again. You went down to the
21 police station, correct?

22 A Yes.

23 Q And the officers confronted you, correct?

24 A Yes.

25 Q And they said you know what, Ms. Smith, we have you on

Marsha Elaine Smith
Cross-examination by Ms. Jones

1 surveillance at the victim's house because there's deer
2 camera? Isn't that the information they provided to you?

3 A Yes.

4 Q And they said you, we saw you as well as Mr. Pitts,
5 correct?

6 A Yes.

7 Q That's how they interrogated you, correct?

8 A Yes.

9 Q And at that point the story changed, correct? It
10 wasn't that I saw it in his garage. I was actually there.
11 And you know who else was there?

12 MS. GALLIVAN: Objection, Your Honor. Argumentative.
13 I would ask that she ask questions of the witness.

14 THE COURT: Overruled.

15 Go ahead.

16 Do not blow into the microphone. Okay?

17 THE WITNESS: Okay.

18 THE COURT: Go ahead.

19 Q After you were confronted and said we have information
20 that you and Mr. Pitts were at this house, you have changed
21 your story, correct?

22 A Did I change my story?

23 Q You then said you were actually there, correct?

24 A Yes.

25 Q And you indicated that you were driving, correct?

Marsha Elaine Smith
Cross-examination by Ms. Jones

- 1 A Yes.
- 2 Q And you had no idea what was going on and you were
3 just along for the ride, correct?
- 4 A Yes.
- 5 Q And at that point, at some point, you agreed to be a
6 confidential informant, correct?
- 7 A Yes.
- 8 Q Who asked you to do that?
- 9 A Matt and Heather.
- 10 Q Okay. What did they specifically ask you to do?
- 11 A If I could buy some Lortabs from Gerald.
- 12 Q How did Lortabs even come into the conversation?
- 13 A I was asked if I had ever seen any kind of drug at his
14 house, and I had told them that he had had some, previously
15 had some, Lortabs.
- 16 Q So the investigation turned from burglary and larceny
17 that they were just going to use you to try and get some
18 Lortabs, correct? Correct?
- 19 A I don't feel that they were just using me just to...
- 20 Q Well, let me rephrase. Let me just move on.
21 So you agreed to wear a wire, correct?
- 22 A Yes.
- 23 Q Go to his house.
- 24 A Yes.
- 25 Q And, in fact, this is an identification case. You

Marsha Elaine Smith
Cross-examination by Ms. Jones

1 know Mr. Pitts, correct?

2 A Yes.

3 Q How long have you been a neighbor of Mr. Pitts?

4 A About seven or eight years.

5 Q Okay. So when they show you a lineup, clearly you

6 know who you are referring to when you talk about

7 Mr. Pitts, correct?

8 A Yes.

9 Q So you go over to his house and you engage him in
10 conversation, correct?

11 A Yes.

12 Q And after that conversation you head back, and you're
13 debriefed, correct? You get back into the car where the
14 officers are, correct?

15 A Yes.

16 Q And you actually indicate that he was cussing, he was
17 M. F., those M. F.'ers, correct?

18 A Yes.

19 Q And so you're under oath testifying that you heard
20 that type of language on that video?

21 A That he said he didn't give a damn if it was the
22 sheriff. If he wanted it, he would get it.

23 Q That wasn't my question, ma'am. My question was --
24 you're under oath. Was he using language like M. F.'ers?
25 Did you hear that?

Marsha Elaine Smith
Cross-examination by Ms. Jones

1 A No. He said he didn't give a damn if it was the
2 sheriff's house. If he wanted it, he would get it.

3 Q I don't think you're understanding me.

4 When you were talking with the police officers you
5 indicated that he was calling them M. F.'ers, correct? You
6 just saw the video.

7 A Yes, ma'am.

8 Q Would you agree that that type of word wasn't even
9 used? Couldn't hear that on the video, correct?

10 A Yes.

11 Q And also when you were talking with the officers about
12 what was being said you indicated that you were talking
13 about the police. And he says I don't give a F, correct?

14 A If it was the sheriff.

15 Q And then you go on saying you're trying to tell me you
16 don't know. And that's when you say that he allegedly says
17 I don't care whether it's the sheriff or the police.

18 THE COURT: Ma'am, please do not blow into that
19 microphone.

20 Q Is that correct?

21 A Yes.

22 Q You just saw that video, correct?

23 A Yes.

24 Q Okay. Do you recall you ever saying to him so you're
25 trying to tell me, and go into that long speech? Do you

Marsha Elaine Smith
Cross-examination by Ms. Jones

1 ever remember seeing that on the video?

2 A I told -- I asked him if he had been harassed by the
3 police, and he said hell yeah, he'd been harassed, that
4 they had ran numbers on a bicycle that he had. And then I
5 told -- then I went on to say that I couldn't believe it
6 was the police's house. And then that's when he stated he
7 didn't give a damn if it was the sheriff. If he wanted it,
8 he would get it.

9 Q Ma'am, that wasn't my question. My question was you
10 saw the video. Was there any conversation where you
11 started basically saying you're trying to tell me that you
12 went and did blah, blah, blah? Was that even on the video?

13 A I couldn't say him telling me he went on and...

14 Q But that's what you told the police, correct, when you
15 were in that car?

16 A I told them what he had said about the sheriff.

17 MS. JONES: I will move on, Your Honor.

18 Q You were never charged in this case, were you?

19 A No, ma'am.

20 Q Weren't even charged with accessory, correct?

21 A Yes, ma'am.

22 Q And we've heard from the officer already numerous
23 times saying that you were very frightened of Mr. Pitts,
24 correct?

25 A Yes, ma'am.

Marsha Elaine Smith
Cross-examination by Ms. Jones

1 Q But yet you still went over to his house, engaged in
2 conversation with him, correct?

3 A Not since this occurred, no. I haven't.

4 Q At the time all of this was going on, correct? You
5 agree?

6 A I went at first, but not, I mean, not, since, not
7 since he had found out that I had wrote statements and
8 stuff. I haven't been.

9 Q But at the time you wrote your second statement you
10 basically said golly, gee, I'm scared for my life, correct?

11 A Yes, ma'am.

12 Q Okay. But you nevertheless agreed to become a
13 confidential informant, correct?

14 A I didn't say I was scared for my life until after I
15 had did confidential informant.

16 Q So you're saying you weren't scared for your life?

17 A After I did it.

18 Q Okay. So prior to you being a confidential informant
19 you were never scared of Mr. Pitts. Is that fair to say?

20 A No.

21 Q It's not fair to say? Well, let me ask you in a
22 different way that's more direct.

23 Were you scared of Mr. Pitts prior to you putting on
24 the wire? Were you scared of him?

25 A No.

Marsha Elaine Smith
Redirect examination by Ms. Gollivan

1 MS. JONES: Nothing further.

2 THE COURT: Anything else?

3 MS. GALLIVAN: One moment, Your Honor.

4 (Pause.)

5 REDIRECT EXAMINATION

6 BY MS. GALLIVAN

7 Q Do you recall informing investigators about a
8 statement that was made to you involving a graveyard?

9 A Yes.

10 Q What? Why did you tell them about that statement?

11 A Because there were messages being left at several
12 places that I went by Gerald and his exwife leaving
13 messages for me. And she had left a message for me down at
14 my friend Bobby Brown's house that I better call Gerald's
15 lawyer and tell her that none of this was true.

16 Q But about the graveyard, when you told them about
17 that, who, who made that statement to you about the
18 graveyard?

19 A My friend, my friend that lives, that I hang at his
20 house said that that message was left there for me by
21 Gerald.

22 Q In your statement that you gave to investigators you
23 made a statement that --

24 MS. JONES: I am going to object to leading.

25 THE COURT: Don't lead her.

Marsha Elaine Smith
Redirect examination by Ms. Gallivan

1 Q Okay. Was that the only time that a graveyard was
2 mentioned to you? Is that the only time you informed the
3 officers about a statement being made to you in reference
4 to a graveyard?

5 A When I heard that the message about the graveyard --
6 yes, I told the officers.

7 Q Okay. And for your testimony today have you been
8 promised or offered anything in return?

9 A No.

10 MS. GALLIVAN: No further questions, Your Honor.

11 MS. JONES: No redirect, Your Honor.

12 THE COURT: You may step down.

13 We are going to take a short break before we go
14 further.

15 I'll ask the jury to please go to your jury room. Do
16 not discuss the case. I'll bring you back after that break
17 to continue.

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

20 THE COURT: Court's in recess for 15 minutes.

21 How many more witnesses have you got, Solicitor?

22 MS. GALLIVAN: That will be the state's case, Your
23 Honor.

24 (Whereupon, a recess was taken.)

25 THE COURT: Ms. Jones, I understand the state has

1 indicated they're going to rest.

2 Have you discussed with your client his right to
3 testify, as well as not testify?

4 MS. JONES: I have, Your Honor.

5 THE COURT: And what does he indicate to you his
6 desire is?

7 MS. JONES: He is not going to testify, Your Honor.

8 THE COURT: All right. Mr. Pitts, you heard your
9 lawyer tell me that you and she discussed your right to
10 testify, as well as not, and that you've indicated to her
11 you did not wish to testify. Is that true?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: Do you understand that when you're accused
14 of any type of crime and the case comes to trial you have
15 an absolute right to remain silent?

16 That just means nobody can make you take the witness
17 stand and testify. Nobody can require that you provide a
18 statement or answer any questions that relate to the
19 charge.

20 You have an absolute right to remain silent and to
21 require the state to come into court with sufficient
22 evidence to establish your guilt to the satisfaction of the
23 jury beyond a reasonable doubt, and you don't ever have to
24 assist them in their efforts to prove your guilt by you
25 taking the witness stand and testifying or answering

1 questions that might tend to prove your own guilt.

2 At the same time, if you wish to provide this jury
3 with any testimony now is the only opportunity that you
4 will have to do so. But it's your choice. Only you can
5 make that decision. Do you understand that?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: Have you and Ms. Jones discussed the
8 advantages and disadvantages of testifying, as well as not
9 testifying?

10 THE DEFENDANT: Yes.

11 THE COURT: And do you appreciate what those
12 advantages and disadvantages are?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: And have you had time to reflect upon your
15 decision as to whether or not you will testify?

16 THE DEFENDANT: Yes. I am not going to testify.

17 THE COURT: You're not going to?

18 THE DEFENDANT: No.

19 THE COURT: And that's a decision that you've reached
20 of your own free will and accord?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: Anybody forced you or pressured you into
23 it?

24 THE DEFENDANT: No, sir.

25 THE COURT: You made that on your own?

1 THE DEFENDANT: Yes, sir.

2 THE COURT: And you're satisfied with it?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: Okay. You can have a seat.

5 Ms. Jones, do you have any others witnesses you're
6 going to call on behalf of the defendant?

7 MS. JONES: No, Your Honor.

8 THE COURT: All right. Do you have any motions you
9 want to make?

10 MS. JONES: Motion for a directed verdict after they
11 rest.

12 THE COURT: They have rested, and they're going to do
13 it on the record. But I'm not going to bring the jury back
14 to do that and send them right back out.

15 MS. JONES: All right, Your Honor.

16 We would make a motion for a directed verdict based
17 upon the insufficiency of the evidence. The only credible
18 evidence that they have produced is an accomplice who has
19 changed her story two times. And it hasn't been
20 corroborated. And that's their evidence, Your Honor. And
21 we would allege that's just simply not sufficient.

22 We would also make a motion for a directed verdict
23 based upon our extensive discussions on the mistrial. And
24 there's no need to rehash those, Your Honor, but we would
25 also make a motion on that as well for a directed verdict.

1 THE COURT: All right. Those motions are denied.

2 Any requests for jury instructions from the state?

3 MS. GALLIVAN: Just the standard.

4 THE COURT: The defendant?

5 MS. JONES: The standard, as well as impeachment by a
6 conviction of a crime.

7 THE COURT: Okay.

8 MS. JONES: And prior inconsistent statements as well.
9 He testified to two different stories.

10 THE COURT: All right. Bring the jury in, please.

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

13 THE COURT: All right. Solicitor.

14 MS. GALLIVAN: The state rests, Your Honor.

15 THE COURT: All right. That's all of the testimony or
16 evidence to be offered by the state, at least in their case
17 in chief.

18 Does the defendant wish to offer any additional
19 evidence?

20 MS. JONES: No, Your Honor.

21 THE COURT: All right. Ladies and gentlemen, that is
22 all of the testimony or evidence to be offered in the trial
23 of the case. And therefore what remains to be done are the
24 lawyers' final summations, after which I'll instruct you on
25 the law. And then you can begin deliberations.

Closing arguments

1 THE COURT: Okay. Bring them in.

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

4 THE COURT: Good afternoon, ladies and gentlemen.

5 As you know, what remains to be done are the lawyers'
6 final summations, after which I'll instruct you on the law,
7 and then you can begin your deliberations in the case.

8 So please give the lawyers your attention now as they
9 give you their final summations.

10 Ms. Gallivan.

11 MS. GALLIVAN: May it please the Court.

12 If he wants it, he gets it -- if he wants it, he gets
13 it.

14 On August 2nd of this year Gerald Pitts wanted a
15 generator, an air compressor and a weed eater. He didn't
16 care whose house it was. He did what he had to do to get
17 it.

18 He asked Marsha Smith to drive him up Parris Bridge
19 Road that runs off Minnow Farm Road where Officer Cooper's
20 home, house is.

21 Once they got to Officer Cooper's house Marsha Smith
22 gave you specific details. She could describe the
23 property. She knew it was a brick house that set back off
24 the road where the garage was off to the side. There was a
25 small S. U. V. and a blue and white police car. She knows

Closing arguments

1 because she was there.

2 She saw Gerald Pitts get out of the truck, go into the
3 garage and take the air compressor and generator and the
4 weed eater and put them in his truck.

5 And then they drove off. When they drove off as
6 they're going down the road Gerald Pitts looks at Marsha
7 Smith and points at a graveyard and says if you run your
8 mouth that's where you'll end up.

9 Gerald Pitts is guilty of burglary in the second
10 degree because he went into Officer Cooper's home without
11 his consent and committed the crime of grand larceny. He
12 committed grand larceny because he took and carried away
13 Officer Cooper's personal property permanently depriving
14 him of this property, and the property has a value of
15 \$1,250 to Officer Cooper.

16 Those are the facts. I told you at the beginning the
17 facts are simple in this case. And I've tried really hard
18 to keep them very simple.

19 But the defense would have you believe there's all of
20 these confusing issues in this case. Ms. Jones wants to
21 split hairs with Investigator Davis when he was on the
22 stand about whether the serial number or the color of the
23 generator mattered for an investigation.

24 She wants to criticize Ms. Smith on the stand about
25 her way of paraphrasing what Gerald Smith said to her in

Closing arguments

1 the video. Well, we played the video for you. You don't
2 have to listen to the way she paraphrased it because you
3 can watch it yourself. You did watch it yourself. And
4 it'll be available to you during your deliberations.

5 The video doesn't have a bias. The video doesn't lie.
6 You can listen for yourself. I heard Gerald Pitts say if I
7 want it, I get it, I don't give a damn whether it's the
8 sheriff or a judge's house. Well, again, I'm paraphrasing,
9 so you judge for yourself.

10 I asked you in the beginning and I'm asking you again
11 now just use your common sense. I'm asking you to sort
12 through all of the confusion the defense would have you
13 believe exists in this case and think to yourself what
14 logically makes sense that happened on that day.

15 If he wants it, he gets it. Gerald Pitts wants a free
16 pass. He wants a lucky break. Don't give it to him.
17 We're asking you to find the defendant, Gerald Pitts,
18 guilty of burglary in the second degree and grand larceny.
19 Thank you for your time, ladies and gentlemen.

20 THE COURT: Ms. Jones.

21 MS. JONES: Thank you, Your Honor.

22 Ladies and gentlemen, I agree that this is a simple
23 case. This is a simple case, and it boils really down to
24 one issue.

25 Do you believe their star witness, that star witness

Closing arguments

1 they came in and paraded before you and put down and raised
2 her right hand? Did you believe her? Because that's all
3 the evidence that's been presented to connect Mr. Pitts to
4 this crime, is Marsha Smith.

5 You have to decide whether you believe what she's
6 offering, because if you don't believe her you're going to
7 have to find my client not guilty because there's no other
8 evidence. There's nothing. They don't have any
9 fingerprints; they don't have photos; they don't have any
10 other corroborating evidence except her testimony.

11 And you heard her testimony today, how confused she
12 was. She couldn't really recall a lot. And you also heard
13 when the solicitor tried to elicit the graveyard.

14 We heard about that from Officer Davis about five or
15 six times whenever he got a chance to throw it in. He
16 said, oh, she was so scared of him because he pointed to
17 that graveyard and said if she didn't cooperate and she
18 didn't keep her mouth shut he was going to send her there.

19 That's why she initially lied. That's why she said
20 what she said at the initial time about having this stuff
21 in the car and, I'm sorry, in the -- at Mr. Pitts' house.
22 That's the reason why she changed her story, is because she
23 was scared. And I'll protect you. That's what Officer
24 Davis said. I'll protect you.

25 Did she say that? Did you ever hear that come from

Closing arguments

1 her mouth when they were riding home from this alleged
2 crime scene, that he threatened to send her to the grave?
3 No. She couldn't recall that because it didn't happen.
4 She came up with some other incident evidently now a friend
5 passed along in notes. Does that make any sense?

6 Ladies and gentlemen, let's look at what facts have
7 been presented. We all know that Officer Cooper's house
8 has been burglarized. There's no reason to say that he
9 didn't get things stolen. And that's a terrible situation.
10 And they started to investigate.

11 Whose name came up? Was it Mr. Pitts' name? Marsha
12 Smith. She's the one that they actually went to interview.
13 And did they just simply say, hey, do you know something
14 about perhaps a burglary?

15 You heard her testify. They went to her and said do
16 you know about these missing items X, Y and Z, do you know
17 about the generator missing, weed eater and an air
18 compressor?

19 She testified to that on the stand. So now of course
20 she knows what's missing. They'd given her that
21 information. She's got to think if she knows. She's under
22 the gun. I don't want to be charged with this. She stands
23 in Mr. Pitts' way.

24 Is there any evidence that any of these items were
25 located in Mr. Pitts' house?

Closing arguments

1 She also says, you know, I think a guy from North
2 Carolina was involved. They track him down. Nothing,
3 nothing develops.

4 Then they go back and talk with Ms. Smith again,
5 because, again, she's the common-denominator confronter.

6 Now, this time they lie and basically say, look, we
7 know you were there and we know Mr. Pitts was there. So,
8 again, they're supplying her with the information they want
9 her to say.

10 And so what does she say? I was, and we took the
11 items that you say that you want -- the air compressor, the
12 weed eater, the generator. We did it. We drove in a
13 truck. I was driving.

14 Well, what about the evidence? Was she ever driving
15 anything? Whenever the officers were talking with her she
16 was always on a bicycle.

17 What can we infer about her driver's license? Was
18 there any evidence presented that Mr. Pitts even owns a
19 pickup truck? In fact, if you looked at that video there's
20 a car in front of his house.

21 She was there for about -- I think that video's 27
22 minutes. She was there for a good 15 minutes. Where's
23 this truck, this alleged truck? The investigator didn't
24 even bother to get that information down because he
25 believed her.

Closing arguments

1 When she is presented with a little inconsistency
2 here, first you say you saw it and now you say you're
3 involved, oh, I'm scared, but I'll volunteer to be a C. I.,
4 absolutely. Where do I sign up?

5 She gets on her bicycle and she peddles over there.
6 Does that sound like somebody who is scared? And when
7 confronted with that she said, no, I've known Mr. Pitts for
8 a long time.

9 The prosecution initially said that this was going to
10 be an identification case. This is not an identification
11 case. We all know Mr. Pitts and we all know that they know
12 each other. They're neighbors. They've been neighbors for
13 a long time.

14 This is not about identification. This is about who
15 you believe and credible evidence. You're going to have to
16 find a man guilty based upon Ms. Smith's lies, her
17 inconsistencies.

18 When we confronted Officer Davis about some of these
19 inconsistencies in the investigation he did, you heard him
20 on the stand. He was evasive. He didn't want to answer
21 questions. He wouldn't even give me a straight answer as
22 to how many years he's been an investigator. That's not a
23 trick question, just asking a question. Couldn't even
24 answer that.

25 And when the prosecution alleges that I'm trying to

Closing arguments

1 split hairs regarding serial numbers, I wasn't asking about
2 serial numbers. I was asking about specific colors. There
3 was a discrepancy in what was reported stolen as far as the
4 colors go and what Ms. Smith said she saw. Sounds like
5 something valid. It's not meshing.

6 And when I asked Investigator Davis about that, didn't
7 want to deal with that. He's like we don't deal with
8 color, we deal with serial numbers. And he went into this
9 long speech about serial numbers and how that's the best
10 evidence.

11 The problem is it wasn't recovered. We can't compare
12 serial numbers. That's not the issue. So I again asked
13 him again. And again he goes into this long speech about
14 serial numbers.

15 And when he's finally caught and he has to answer the
16 question a new fact appears. Oh, you know what? I called
17 the victim and he told me it is black and white. So
18 naturally it matches now what she has to say.

19 That's not in the police report. And you heard him
20 time and time again say I don't write police reports. And
21 when I confronted him about discrepancies in the notes, his
22 own statements in the police report, it's like I have to
23 disagree with that police report.

24 Ladies and gentlemen, officers write reports to have
25 that information, have the important information so that

Closing arguments

1 when they're here a year later after they've investigated
2 numerous cases they have it in front of them.

3 He can't be bothered with that. And the type of
4 officer who can't be bothered with police reports is
5 somebody who wants to play fast and loose rules, and fast
6 and loose with the truth. Whenever he was cornered a new
7 fact appeared. Think about it. Evasive, and new facts
8 appear.

9 This case is full of holes. There is reasonable doubt
10 all over the place, but ultimately you have to believe
11 Ms. Smith.

12 You can watch the D. V. D. We have nothing to hide.
13 You can listen for yourself again and again whether or not
14 you hear, I don't give a damn if it's the judge, the
15 sheriff, I just take what I want.

16 I certainly didn't hear it. And, in fact, when she
17 first starts talking to him did you notice he's walking
18 away? He doesn't want any part of her. And you can even
19 hear him say I don't, I don't know police, I don't know
20 where he lives. He's walking away.

21 Does that sound like somebody who is connected to
22 Ms. Smith who is involved with this crime? He didn't come
23 back over and say you be quiet, don't be talking. He is
24 walking away, walking away, walking away. Doesn't want any
25 more to do with her; doesn't want to talk with her.

Jury charge

1 You also heard some information about Lortabs. We're
2 not here today to discuss that or he's not on trial for
3 that. But she couldn't even do that.

4 Ladies and gentlemen, this lady is just full of lies.
5 And if you're going to convict him you have to believe
6 those lies because that's all they offered you today. And
7 I submit to you that is reasonable doubt. And we request
8 that you come back with a not-guilty verdict.

9 THE COURT: Mr. Foreman and ladies and gentlemen of
10 the jury, you have now heard and seen all of the evidence,
11 as well as the final summations of the lawyers. And so now
12 I will instruct you on the law that's applicable in this
13 case. Then you'll be asked to go back and begin with your
14 deliberations. And through that process you'll examine the
15 evidence, decide the facts, apply the law and arrive at a
16 fair and just decision.

17 It is your exclusive duty to determine what the facts
18 are. You do that through your own common-sense examination
19 and evaluation of all of the testimony and other evidence
20 received during the trial of the case.

21 You 12 jurors alone will decide what weight, value and
22 effect to give to any particular witness' testimony, or
23 even portions of that testimony.

24 Your sole objective is to simply reach the truth in
25 the matter, and by doing that you will have fulfilled your

Jury charge

1 obligations as jurors, and that is to simply give both the
2 state and the defendant a fair and impartial trial.

3 Now, in this case, as you know, the state has charged
4 the defendant by way of these indictments with the crimes
5 of burglary in the second degree and grand larceny.

6 Those allegations are set forth in the indictments.
7 But as I told you, these indictments are not evidence of
8 anything. They don't prove anything. They don't establish
9 anything.

10 The indictments will be in the jury room simply to
11 serve as the verdict forms. It will be on the back of each
12 indictment, Mr. Foreman, that you'll be asked to indicate
13 the jury's unanimous decision as it relates to that
14 particular charge. But the defendant is charged with the
15 crime of burglary in the second degree and grand larceny.

16 Now, as to each of those charges and as to the
17 allegations contained therein the defendant has entered a
18 plea of not guilty. And as I've told you, that plea of not
19 guilty has placed upon the state the burden of proving the
20 allegations that they have made against the defendant, the
21 burden of proving each of the essential elements of the
22 crimes alleged against the defendant; and therefore the
23 burden is upon the state to establish the defendant's guilt
24 to the satisfaction of you 12 jurors beyond a reasonable
25 doubt before any verdict of guilty could be returned as to

Jury charge

1 either indictment.

2 The burden is never upon a defendant or a person
3 accused of a crime to prove that they are not guilty or to
4 prove that they are innocent because in some cases that
5 might not be possible.

6 The burden is always upon the state because they have
7 made the accusation to establish the defendant's guilt
8 beyond a reasonable doubt.

9 You are instructed that it is a vital, important and
10 cardinal rule of law that every defendant in a criminal
11 trial, and it doesn't matter how serious the offense might
12 be for which that person stands charged, that person is
13 always presumed innocent of the charge.

14 That presumption of innocence remains with every
15 defendant, as it does with this defendant, from the time
16 that he is placed under arrest and throughout the course of
17 the criminal process, even throughout the course of the
18 actual trial.

19 As I have told you, that presumption of innocence will
20 be with the defendant even when you go back to begin with
21 your deliberations in this case.

22 That presumption of innocence will be with him in that
23 jury room, and it'll be with him forever unless you 12
24 jurors determine that he's no longer entitled to that
25 presumption of innocence.

Jury charge

1 That is after you've carefully considered all of the
2 evidence in the case, and from that evidence you've
3 determined what you believe to be the true facts, and upon
4 deciding those facts you apply the law that I will have
5 provided you, if you 12 jurors unanimously determine that
6 his guilt as to a particular charge has been proven beyond
7 a reasonable doubt, then you may find the defendant guilty.
8 But it's only if, unless and until you are satisfied of the
9 defendant's guilt beyond a reasonable doubt that the
10 presumption of innocence would no longer be applicable.

11 Now, while the state does have the burden of proving
12 the defendant's guilt beyond a reasonable doubt, that
13 doesn't mean that they have to prove his guilt beyond all
14 doubt or beyond any possible doubt. But it does require
15 the state to prove his guilt to your satisfaction beyond a
16 reasonable doubt.

17 The term reasonable doubt should be given its plain
18 and ordinary meaning. A reasonable doubt is the kind of
19 doubt that would cause a reasonable person to hesitate to
20 act upon the information provided.

21 A defendant in a criminal trial is entitled to any
22 reasonable doubt that arises from the evidence or lack of
23 evidence in a case. And if upon any factual issue
24 essential to a finding of a verdict of guilty you have some
25 reasonable doubt as to how that issue should be resolved it

Jury charge

1 would be your duty to resolve that reasonable doubt in
2 favor of the defendant.

3 And therefore if upon your consideration of the whole
4 case you have a reasonable doubt as to his guilt as it
5 relates to a particular charge, it is your duty and
6 obligation to resolve that doubt in his favor and to return
7 a verdict of not guilty.

8 At the same time after you've considered all of the
9 evidence, decided the facts and applied the law, if you
10 have no reasonable doubt as to the defendant's guilt as it
11 relates to a particular charge, then it would be your
12 corresponding duty to convict the defendant of that charge
13 which has been proven to your satisfaction beyond a
14 reasonable doubt.

15 Now, the same law that provides that you are the
16 judges of the facts also provides that I am the judge of
17 the law. And that simply means that nobody is going to
18 tell you how to arrive at your determination of fact in
19 this case.

20 You do that, as I've already stated, through the
21 exercise of good judgment and common sense conscientiously
22 applied to the testimony and the evidence received during
23 the trial of the case.

24 You must however under your oath as a juror accept the
25 law as I provide it to you as being the law that is

Jury charge

1 applicable in this particular case.

2 In other words, you're not to concern yourself with
3 what you thought the law was before you came to serve as a
4 juror this week or what you think the law ought to be. You
5 must simply accept the law as I provide it to you as being
6 the law that is applicable in this particular case.

7 Then you take that law and you apply it to the facts
8 as you 12 jurors have determined those facts to be based
9 upon your common sense examination and evaluation of the
10 evidence in the case.

11 Now, because you are the sole judges of the facts in
12 this case you are therefore, as I've previously told you,
13 necessarily the sole judges of the credibility and the
14 believability of each witness that has testified during the
15 course of the trial.

16 You 12 jurors alone will decide what weight, value and
17 effect to give to any particular witness' testimony, or
18 even a portion of that testimony. And so there are several
19 factors which you should consider in arriving at your
20 assessment as to a witness' credibility. And I'm going to
21 list those factors for you.

22 You should consider the demeanor of the witness, that
23 is how the witness appeared to you when the witness
24 testified from that witness stand.

25 Was the witness straightforward in responding to

Jury charge

1 questions, or was the witness hesitant or evasive in
2 responding to questions that were asked of that witness?
3 Simply put, did the witness appear to you to be telling the
4 truth and to have knowledge of the facts to which that
5 witness has testified.

6 You may also consider whether or not the testimony of
7 a witness is consistent, or is it inconsistent with
8 testimony provided here in court, as well as in comparison
9 to statements provided outside of court by the same
10 witness.

11 You may consider whether or not the testimony of a
12 witness is consistent, or is it inconsistent with other
13 testimony or other evidence received during the trial?

14 You should also consider how the witness came to know
15 the facts to which a witness has testified. In other
16 words, what was a particular witness' opportunity and
17 ability to perceive the existence of those facts to which
18 that witness has testified by having previously used his or
19 her senses, and then what is that particular witness'
20 ability to be able to come into court and to accurately
21 recollect to you as to what that witness has previously
22 perceived.

23 You may also consider any bias, prejudice or interest
24 that a witness might have in a case. In other words, do
25 you find some reason that a particular witness would come

Jury charge

1 into court and would testify one way or another to help or
2 to hurt one side or the other.

3 You may consider any interest that a witness might
4 have in the outcome of the case if you determine that a
5 witness does have such an interest and you find that that
6 interest would bear upon that particular witness'
7 credibility.

8 Of course you should also consider whether or not the
9 testimony of a witness is strengthened, or is it weakened
10 by other testimony or other evidence received during the
11 trial.

12 Now, during the course of this trial you have heard
13 certain evidence relating to one of the witnesses having a
14 prior conviction of prior criminal offenses.

15 Ordinarily a prior criminal record is not admissible
16 because that evidence is not relevant to any issue that the
17 jury has to decide. Where however a witness does have a
18 record of convictions for certain types of criminal
19 offenses, especially where they involve dishonesty or
20 deceit, evidence of those convictions may be introduced
21 during the testimony of that witness for the purpose of
22 impeachment but for no other purpose.

23 In other words, that evidence is introduced for the
24 purpose of attacking the credibility of that witness and
25 his or her testimony. So you may consider it if you find

Jury charge

1 it appropriate and probative on that issue, you may
2 consider it on the issue of that witness' credibility or
3 believability where a witness does have such a conviction.

4 Now, because you are the sole judges of the facts and
5 because you are the sole judges of the credibility of each
6 witness you are permitted to believe as much or as little
7 of what a witness has testified to as you deem is
8 appropriate.

9 And therefore you may believe everything that a
10 witness testified to; you may choose to believe none of it.
11 You may believe some portion of a witness' testimony and
12 reject some other portion of that same witness' testimony.
13 And in a given case you could believe one witness as
14 opposed to many, or many as opposed to one.

15 But whatever your good judgment and common sense tells
16 you is the most believable and credible testimony is the
17 testimony you should accept, and you should reject any
18 testimony or other evidence that you find not to be
19 credible or believable.

20 Again, your sole objective is to simply reach the
21 truth in the matter, and by doing that you will have
22 fulfilled your obligations as jurors, which is to give both
23 the state and the defendant a fair and impartial trial.

24 Now, in this case, as you know, the state has charged
25 the defendant with two separate and distinct offenses, and

Jury charge

1 those crimes are burglary in the second degree and grand
2 larceny.

3 Burglary in the second degree is a statutory offense.
4 The offense is set forth in a code section in the Code of
5 Laws of South Carolina at Section 16-11-312.

6 That code section defines what a burglary in the
7 second degree consists of and therefore what the state has
8 to prove in order for the defendant to be found guilty of a
9 violation of that particular section of law.

10 Section 16-11-312 provides in its pertinent and
11 relevant parts that a person is guilty of burglary in the
12 second degree if that person enters a dwelling without
13 consent and with the intent to commit a crime therein.

14 Now, based upon the foregoing statute before you could
15 return a verdict of guilty as to the crime of burglary in
16 the second degree it would be necessary that the state has
17 established three essential elements beyond a reasonable
18 doubt.

19 First, the state must have proven that the defendant
20 did enter a dwelling. Entry is an indispensable element in
21 the crime of burglary. Entry is defined as the act of
22 going into a dwelling or any room or structure attached or
23 pertinent thereto.

24 It is not necessary that any actual force be used to
25 accomplish any entry, nor does any door or window or other

Jury charge

1 barrier have to be opened or removed in order to effect an
2 entry.

3 As stated, there must be an entry, and the entry must
4 also be into a dwelling. A dwelling is defined in the law
5 as a building or structure which is used or normally used
6 for sleeping, living or lodging by a person; and that would
7 include any structures, rooms or sheds to the dwelling, as
8 well as any outhouses, buildings, sheds or other structures
9 which are within 200 yards of it and which are pertinent to
10 it and connected with the actual dwelling house.

11 Secondly, the state must prove that there has been an
12 entry of the dwelling without consent. Entering without
13 consent means to enter a dwelling, as it's been defined for
14 you, without the consent of the owner or person otherwise
15 in lawful possession of the premises.

16 And, thirdly, there must be an entry of the dwelling
17 without consent and with the intent to commit a crime
18 therein. There must be an intent to commit a crime,
19 whether or not the crime is actually committed.

20 The mere entering of a dwelling without an intent to
21 commit a crime does not constitute a burglary under the
22 statute. It is only when there is an entering of a
23 dwelling accompanied with an intent to commit a crime
24 therein that the crime of burglary would be complete. And
25 a crime of any grade or severity is sufficient to satisfy

Jury charge

1 this element of the crime of burglary.

2 It's also essential that the intent to commit a crime
3 exist at the time of the entering of a dwelling, and it's
4 not sufficient that some intent was formed after entry had
5 been accomplished.

6 On the other hand, where the intent to commit a crime
7 exists at the time of the entering is no defense to a
8 charge of burglary that the intent was abandoned later.

9 The term intent means the state of a person's mind
10 which directs his actions towards a specific object or
11 goal. And therefore based upon the statute what is
12 necessary to be established beyond a reasonable doubt
13 before the defendant could be found guilty of burglary in
14 the second degree is that the defendant did enter a
15 dwelling without consent and with the intent to commit a
16 crime therein.

17 Now, in the second indictment the defendant is charged
18 with the crime of grand larceny.

19 Larceny is defined in the law as the taking, the
20 stealing and the carrying away of the personal property of
21 another person with the intention of permanently depriving
22 the true owner of use and possession of his property and
23 with the intent of converting that property to the taker's
24 own use.

25 A larceny of goods or property having a value of

Jury charge

1 \$1,000 or less is classified as petit larceny. A larceny
2 of goods or property having a value of more than \$1,000 is
3 classified as grand larceny.

4 Now, in this case, as I previously instructed you, the
5 fact that a defendant does not testify during the course of
6 a criminal trial is not a factor which may be considered by
7 the jury in any way whatsoever in your deliberations or in
8 your determination as to whether or not his guilt has been
9 proven beyond a reasonable doubt.

10 As I have previously stated, the burden is never upon
11 a defendant to prove that he or she is not guilty or to
12 prove that he or she is innocent because in some cases that
13 would not be possible.

14 The burden is always upon the state because they have
15 brought the accusation to establish the defendant's guilt
16 beyond a reasonable doubt. And therefore you are not
17 permitted to draw any inference or reach any conclusion
18 from the fact that a defendant does not testify during the
19 trial of a case, nor may that fact even be discussed by you
20 while you are engaged in your deliberations.

21 Now, Mr. Foreman and ladies and gentlemen of the jury,
22 I am not in any way concerned with what your decisions are,
23 but, as I told you, the decisions of the jury must be
24 unanimous. All 12 jurors must be in agreement.

25 Now, Mr. Foreman, as I've indicated to you, in

Jury charge

1 addition to any evidence which has been introduced in the
2 case you will also have these two indictments which are
3 solely there for purposes of serving as the verdict forms.

4 One indictment charges burglary in the second degree;
5 the other indictment charges grand larceny.

6 Now, with respect to the indictment charging burglary
7 in the second degree, you have two potential verdict forms.
8 Those potential verdict forms are guilty and not guilty.

9 So whichever that decision is, enter that decision in
10 the space provided on the back of the indictment. In the
11 lower left-hand corner you'll see the word verdict. And
12 it's beneath that word that you'll indicate the jury's
13 unanimous decision.

14 There's also a space for you to sign your name as the
15 foreperson and place the appropriate date. You are the
16 only juror that needs to sign the verdict form.

17 Now, with regard to the indictment charging grand
18 larceny, you have three potential verdict forms. Those
19 three potential verdict forms are guilty, which means
20 guilty of the crime alleged in the indictment, which is
21 grand larceny.

22 You may also consider the lesser included offense of
23 petit larceny. So if you find the state has failed to
24 prove grand larceny but the state has proven to your
25 satisfaction beyond a reasonable doubt the lesser included

Jury charge

1 offense of petit larceny, then that verdict form would be
2 guilty of petit larceny. You'd have to write that out,
3 guilty of petit larceny.

4 If the state has not proved either of those offenses
5 beyond a reasonable doubt your verdict form would be not
6 guilty.

7 So, again, with regard to the indictment for burglary
8 in the second degree the two potential verdict forms are
9 guilty and not guilty. And the three potential verdict
10 forms on the indictment for grand larceny are guilty, and
11 guilty of petit larceny, and not guilty.

12 So whatever the decisions are indicate them in the
13 space provided and sign your name and date it. Notify the
14 bailiff that you've reached a decision. We'll bring you
15 back to receive those verdicts.

16 Now, I don't know if we have any smokers on the jury.
17 But if you want to smoke, you can smoke, but you have to go
18 outside. You are instructed however that if any juror is
19 absent for any authorized purpose the deliberations have to
20 stop. They may only be resumed when all 12 jurors are
21 present so that all may participate.

22 If at any time during your deliberations you have a
23 question about evidence or about the facts, I am never
24 permitted to respond to those questions.

25 Further, if you wonder if there's some other piece of

Jury charge

1 evidence, document, photograph, chart, otherwise -- there's
2 some other piece of evidence that you think might help you
3 resolve this case, even if it exists you cannot have it.

4 All of the evidence that has been introduced has been
5 introduced, and now that you're going back to begin
6 deliberations no additional evidence may be received. So I
7 can't answer any questions of fact and I can't allow you to
8 have any additional evidence even if it exists.

9 If you think a question of fact can be answered by
10 having testimony replayed in whole or in part, we can make
11 arrangements for you to come back into the courtroom to
12 have a witness' testimony replayed.

13 I don't have a transcript of witnesses' testimony, but
14 if you want to rehear it we can bring you back and the
15 court reporter can locate that witness' testimony.

16 If you ever have a question about the law that is
17 applicable, I am permitted to answer those questions. So
18 if you need an additional explanation or a clarification of
19 the law, let me know, and I'll be happy to provide that
20 additional explanation or clarification.

21 So, Mr. Foreman, if at any time you need to address
22 some matter to me if you'll write it on a piece of paper
23 and provide it to the bailiff, he'll provide it to me and
24 I'll respond accordingly.

25 With the exception of Ms. White, I'll ask the 12

Jury charge

1 primary jurors to please retire to your jury room. But do
2 not begin deliberations until I send you word to do so.

3 (Whereupon, the jury retired to deliberate at
4 2:08 p.m.)

5 (Whereupon, the alternate juror was excused.)

6 THE COURT: Are there any exceptions taken to the
7 instruction or requests for additions to the instruction by
8 the state?

9 MS. GALLIVAN: None by the state, Your Honor.

10 THE COURT: By the defendant?

11 MS. JONES: No, Your Honor.

12 THE COURT: All right. Let me ask y'all to verify any
13 exhibits.

14 (Pause.)

15 THE COURT: All of the exhibits are accounted for?

16 MS. GALLIVAN: Yes, Your Honor.

17 MS. JONES: Yes, Your Honor.

18 THE COURT: Okay. Send them back and ask the jury to
19 begin deliberations and notify us when they have concluded.

20 We will be at ease while the jury is deliberating.

21 (Whereupon, a recess was taken.)

22 THE COURT: Okay. The jury indicated they needed to
23 hear testimony replayed, and so I sent a note back asking
24 if they wanted to hear it tonight or rather come back in
25 the morning, and they sent me a note saying they had rather

1 return in the morning. So I'm going to let them do that.

2 I'll excuse them and bring them back in the morning.

3 Okay. Bring the jury in.

4 (Whereupon, the jury returned to the courtroom at
5 5:28 p.m.)

6 THE COURT: Mr. Foreman, I understand from your note
7 that you and your fellow jurors wish to have some testimony
8 replayed.

9 As I indicated to you by note, the court reporter
10 estimates that'll take about an hour and a half. And I
11 understand that based upon that fact that the jury wishes
12 to recess for the day and resume with the hearing of that
13 testimony and your deliberations in the morning. So we are
14 going to excuse you now.

15 I'll again remind you of the caution previously given
16 you, and of course it is always of utmost importance that
17 you follow the instructions of the Court, and that is
18 during the overnight recess you are not to have any
19 discussions whatsoever with any person whatsoever about
20 this case, nor are you to conduct any research or do your
21 own investigation into any issue that might have arisen
22 during the trial.

23 That includes you still are not permitted to even talk
24 about the case with your fellow jurors until in the morning
25 and only after all 12 of you jurors are present in the jury

1 (Proceedings December 17, 2009)

2 (The following takes place outside the presence of the
3 jury.)

4 THE COURT: All right. The jury wanted to rehear some
5 testimony, so we are going to bring them in and have that
6 played for their benefit.

7 Bring them in.

8 (Whereupon, the jury returned to the courtroom at
9 9:07 a.m.)

10 THE COURT: Good morning, ladies and gentlemen.

11 You had requested to have the testimony replayed, so
12 the court reporter has located the testimony.

13 It will be replayed from start to finish unless you
14 want us to stop somewhere. So if you hear what you want to
15 hear, you can tell us to stop. Otherwise it will be played
16 in its entirety.

17 And of course it was hard enough to hear when it was
18 being testified live, so I don't know about the recording.
19 But we do the best we can. If you -- once we go through if
20 you need to hear it again, let us know. We'll also make
21 those arrangements.

22 If for some reason somebody can't hear during it,
23 raise your hand and we'll try to see if we can do better.
24 I am not sure if we can, but let us know if you cannot hear
25 it.

1 (Whereupon, the testimony was replayed for the jury.)

2 THE COURT: All right. Ladies and gentlemen, that
3 concludes the testimony you wished to have reheard.

4 There was one other question that you asked, and that
5 was how is the value of property determined.

6 You are instructed that the value of property is not
7 the replacement cost, nor is it the sentimental value to
8 the owner, but the value of property taken is the fair
9 market value of that property at the time that it is
10 alleged to have been taken.

11 All right. Please retire to your jury room and
12 continue with your deliberations.

13 (Whereupon, the jury retired to deliberate at
14 10:37 a.m.)

15 THE COURT: We will be at ease for ten minutes, and
16 then we will resume with the Thompson trial.

17 (Question from the jury marked Court's Exhibit No. 1;
18 question from the jury marked Court's Exhibit No. 2.)

19 (Whereupon, a recess was taken.)

20 THE COURT: All right. We have got everybody back in
21 the Pitts matter.

22 Are we ready for the jury? Okay. Bring them in.

23 (Whereupon, the jury returned to the courtroom at
24 11:15 a.m. to report its verdict.)

25 THE COURT: Mr. Foreman, have you and your fellow

Verdict

1 jurors reached a unanimous decision as to each of the
2 separate indictments?

3 THE FOREMAN: Yes, sir.

4 THE COURT: And have you indicated those decisions on
5 the back of the indictments as requested?

6 THE FOREMAN: Yes, sir.

7 THE COURT: Did you sign your name as the foreperson
8 and date it the appropriate date?

9 THE FOREMAN: Yes, sir.

10 THE COURT: If you would, please hand those verdict
11 forms up by way of the bailiff.

12 All right. You may publish the verdicts.

13 THE CLERK: State of South Carolina, County of
14 Spartanburg, State vs. Gerald Phillips, as to Indictment
15 2009-GS-42-6603, charged with grand larceny, we, the jury,
16 find the defendant guilty of petty larceny.

17 Indictment No. 2009-GS-42-6604, indictment for
18 burglary second degree, we, the jury, find the defendant
19 guilty. Signed today's date. Foreperson, Timothy Graham.

20 Ladies and gentlemen, if this is your verdict and
21 still your verdict, please raise your right hand.

22 (Whereupon, all jurors responded in the affirmative.)

23 THE CLERK: So say you all.

24 THE COURT: Does the defendant wish to have the jury
25 polled?

Sentence

1 Honor.

2 THE COURT: I've been handed up an order for
3 restitution. It's signed by Mr. Pitts as agreeing to the
4 amount. Is that true?

5 MS. JONES: It is true, Your Honor. We will agree to
6 pay the restitution back.

7 THE COURT: Okay. Mr. Pitts, anything you want to add
8 to what your lawyer has told me?

9 THE DEFENDANT: Just that the mercy -- the Court have
10 mercy on me, sentence that I get.

11 THE COURT: Okay. All right. On Indictment
12 2009-6603, indictment for grand larceny, wherein you have
13 been found guilty by a jury of petit larceny, the Sentence
14 of the Court is you be confined to the Spartanburg County
15 Detention Facility for a period of 30 days.

16 Indictment 2009-6604, an indictment for burglary in
17 the second degree, wherein you have been found guilty by a
18 jury of that offense, Sentence of the Court is you, Gerald
19 Pitts, be confined to the South Carolina Department of
20 Corrections for a period of 15 years.

21 That sentence is suspended upon the service of ten.
22 Placed on probation for five. Conditions of probation,
23 make restitution in the sum of \$1,200 as shown on the
24 restitution order signed today. And pay \$500 for your
25 appointed counsel in the case.

THE STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
COUNTY OF SPARTANBURG	)	SEVENTH JUDICIAL CIRCUIT
THE STATE OF SOUTH CAROLINA	)	INDICTMENTS:
Vs.	)	WARRANTS: M115488; M115489;
	)	M115439; M115440
GERALD CARL PITTS	)	NOTICE OF APPEARANCE
	)	AND REQUEST FOR DISCOVERY
<u>DEFENDANT</u>	)	

The Defendant respectfully requests that the Solicitor produce or otherwise make available to the Defense statements of the Defendant, the Defendant's prior record, all documents, tangible objects, reports of examination and tests, witness statements, physical evidence and any other information subject to disclosure pursuant to Rule 5 and 6 of the South Carolina Rules of Criminal Procedure.

The Defendant further requests the Solicitor to produce all evidence favorable to the Defendant subject to disclosure pursuant to Brady v. Maryland, 373 U.S. 83 (1963), Kyles v. Whitney, 514 U.S. 419 (1995), and their progeny. This includes all information which may tend to exculpate the Defendant and which may tend to mitigate any punishment should he be found guilty.

This request is a continuing request for all such discoverable information as it becomes known to the prosecution or any prosecution agents or which, by the exercise of due diligence, may become known to the prosecution.

The Defendant hereby asserts his Fifth Amendment right to remain silent and does not wish to be questioned in the absence of counsel, pursuant to McNeil v. Wisconsin, 111 S. Ct. 220 (1991) and Edwards v. Arizona, 451 U.S. 477 (1981).

Furthermore, pursuant to Rule 6 of the South Carolina Rules of Criminal Procedure, Defendant objects to the introduction of a chemist's or analyst's report without such person being personally present at trial. Defendant also requests the appearance in Court of all persons within the chain of custody of all physical evidence.

Respectfully Submitted,

Tanya R. Jones

Bar Number: 77355

SPARTANBURG COUNTY PUBLIC DEFENDER OFFICE

Spartanburg, South Carolina

Dated: August 31, 2009

FILED
2009 AUG 31 AM 11:27
Tanya R. Jones
A 09-00000002
MAR 10 2010

THE STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

IN THE COURT OF GENERAL SESSIONS
SEVENTH JUDICIAL CIRCUIT

STATE OF SOUTH CAROLINA

CERTIFICATE OF SERVICE

Vs.

INDICTMENTS:

WARRANTS: M115488; M115489;
M115439; M115440

GERALD CARL PITTS

FILED
AUG 31 2009
CLERK OF COURT

Personally appeared before me, Rebecca Madden who being duly sworn, deposes and says that she is employed by the Spartanburg County Public Defender's Office, and is a person of such age and discretion as to be competent to serve papers.

That on 8-31, 2009, she served a copy of the Notice Of Appearance And Request For Discovery, by delivering a copy of same to the person herein after named at the address given below:

ADDRESSEE: Trey Gowdy
Solicitor, Seventh Judicial Circuit
Spartanburg County Judicial Center
180 Magnolia Street
Spartanburg, SC 29306

Rebecca Madden

Sworn to before me this

31 day of Aug., 2009

Leena L. L. L.

NOTARY PUBLIC FOR SOUTH CAROLINA

My Commission expires: 7/19/2014

I ACCEPT SERVICE:

[Signature]

Seventh Judicial Circuit Solicitor's Office

8-31-09

Date

WITNESSESS

DOCKET NO. -

09-GS-42-6603
The State of South Carolina

County of Spartanburg

Trey Gowdy, *Solicitor*

CLERK OF COURT
SPARTANBURG COUNTY

2009 DEC 10 PM 12:20

MARC KITCHENS

SPTBG. CO. SHERIFF'S OFFICE

2. REPORT ENDED

3. CARD PULLED

5. CHECKED WARRANTS

6. CHECKED SIGNATURE

ARREST WARRANT NUMBER

8. TRAFFIC VIOLATION COPY

M-115489

ACTION OF GRAND JURY

VERDICT

Guilty - Petit Larceny

Foreperson of Grand Jury
Date: *11-20-09*

Foreperson of Petit Jury
Date: *12-17-09*

Computer

Computer

COURT OF GENERAL SESSIONS

NOV 30 2009

TERM.

THE STATE
vs.

GERALD PITTS

Indictment for
GRAND LARCENY

SC Code: 16-13-30 (B) (1)
CDR Code: 0478
Class FEL-F

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

INDICTMENT

Aug 24 2009

At a Court of General Sessions, convened on _____ the

Grand Jurors of Spartanburg County present upon their oath:

GRAND LARCENY

That the defendant, Gerald Pitts, did in Spartanburg County on or about August 2, 2009, feloniously take and carry away goods or property of Jeffrey Cooper, valued at greater than One Thousand Dollars, but less than Five Thousand Dollars, described as follows: a generator, air compressor, and a weed eater, with the intent to deprive the owners permanently of such property, all in violation of Section 16-13-30 (B) (1), *THE CODE OF LAWS OF SOUTH CAROLINA*, (1976, as amended).

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

Simondia Callahan
ASSISTANT SOLICITOR

WITNESSESS

SPRINGER, CO. SHERIFF'S DEPT.

1. SENTENCE MADE

2. REPORT ENDED

3. CARD PULLED

4. INDEXED *Callahan*

5. CHECKED WARRANTS

6. CHECKED SIGNATURE

7. ASSESSMENT AND

FINE CARD MADE

ARREST WARRANT NUMBER

8. TRAFFIC VIOLATION COURT

M115488

ACTION OF GRAND JURY

Foreperson of Grand Jury

Date: *11-24-09*

VERDICT

Guilty

Foreperson of Petit Jury

Date: *11-17-09*

DOCKET NO.

09-GS-42-6604

The State of South Carolina

County of Spartanburg

Computer

Trey Gowdy, Solicitor

COURT OF GENERAL SESSIONS

NOV 30 2009

Computer

TERM

THE STATE

vs.

GERALD PITTS

Indictment for

BURGLARY, SECOND DEGREE
(Dwelling)

SC Code: 16-11-0312

CDR Code: 0080

Class FEL-D

SPRINGER, CO. SHERIFF'S DEPT.

RECORDED TO FILED

MARC KITCHENS

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

INDICTMENT

At a Court of General Sessions, convened on NOV 24 2009 the
Grand Jurors of Spartanburg County present upon their oath:

BURGLARY, SECOND DEGREE

That the defendant, Gerald Pitts, did in Spartanburg County, on or about August 2, 2009, willfully and unlawfully enter without consent and with intent to commit a crime therein, a dwelling belonging to Jeffrey Cooper, located at Chesnee, South Carolina, in violation of §16-11-312, *THE CODE OF LAWS OF SOUTH CAROLINA* (1976), as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

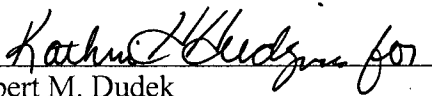
Amanda Ballman
ASSISTANT SOLICITOR

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CERTIFICATE OF COUNSEL FOR APPELLANT

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

August 6th, 2012


Robert M. Dudek
Chief Appellate Defender

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

ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

 ORIGINAL

Appeal from Spartanburg County

J. Derham Cole, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

GERALD CARL PITTS,

APPELLANT

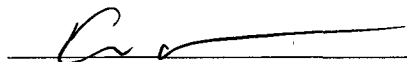
CERTIFICATE OF SERVICE

I certify that a true copy of the Record on Appeal in the above referenced case has been served upon William M. Blich, Jr., Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 6th day of August, 2012.



Brandon Hall
Administrative Specialist

SUBSCRIBED AND SWORN TO before me
this 6th day of August, 2012.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: October 2, 2013

RECEIVED
AUG 08 2012
SC COURT OF APPEALS