ORIGINAL

STATE OF SOUTH CAROLINA

In The Court of Appeals

THE STATE,

RESPONDENT,

V.

RECEIVED

JUN 29 2017

SC Court of Appeals

DEMARIO MONTE THOMPSON,

APPELLANT.

APPELLATE CASE NO. 2015-000126

Appeal from Lancaster County

Honorable Brian M. Gibbons, Circuit Court Judge

Opinion No. 5492

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, Appellant Demario Thompson respectfully petitions this Court for a rehearing in the above-captioned matter after a published opinion, dated June 14, 2017, affirmed his conviction for first degree burglary. In support of his petition, Appellant respectfully alleges that this Court overlooked or misapprehended the following arguments:

Issue I

As to Issue I(A), this Court erred in concluding that the trespass notice was relevant an element of first degree burglary. Specifically, this Court held that the "letter shows Thompson was not a resident of the apartment complex." Respectfully, this is not what the letter states.

The letter states that Drafton would be evicted and the Sherriff's department would be called if Appellant was found in the apartment complex. The trespass notice letter signed by Drafton and the apartment complex manager four months before the incident giving rise to the charges Appellant was standing trial for; was completely irrelevant and had no bearing on any matter in controversy. S.C. Code Ann. § 16-11-620; Rule 402, SCRE,

In addition, this Court misapprehended how the probative value of the trespass notice, if any, was substantially outweighed by the danger of unfair prejudice to Appellant. Rule 403, SCRE. To the extent the notice letter had any probative value, the letter was substantially outweighed by the very real risk of misleading the jury into wrongfully concluding that the trespass notice established that Appellant did not have consent to enter the apartment because of the landlord's prohibition.

There was also a substantial risk that the letter would lead the jury to erroneously determine that Appellant had the requisite intent to commit a crime inside the dwelling based on the incorrect belief that Appellant knew he was trespassing. *State v. Sachs*, 264 S.C. 541, 216 S.E.2d 501 (1975) *citing State v. Corn*, 215 S.C. 166, 54 S.E.2d 559 (1949) (applying the doctrine of *res inter alios acta* – "things done between strangers out not to injure those who are not parties to them" – in relevancy analysis).

Drafton's unavailability for cross-examination further heightened the unfair prejudice to Appellant. Her failure to appear at trial rendered Appellant unable to confront her about the notice. The risk of misleading the jury and unfairly prejudicing the Appellant was substantial as the letter was with the jury during their deliberations. R. 106, ll. 21 – 111, ll. 7; *State v. Wiles*, 383 S.C. 151, 679 S.E.2d 172 (2009) (evidence admitted under the other-acts rule must be logically relevant to establish a material element of the crime with which the defendant has been charged); *see also*

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

As to Issue I(B) respectfully, this Court misapprehended who the declarant of the trespass notice was for the purposes of determining whether the notice qualified was inadmissible hearsay. Burglary is a crime against habitation, not ownership. *State v. Clamp*, 225 S.C. 89, 102, 80 S.E.2d 918, 924 (1954); *State v. Alford*, 142 S.C. 43, 45, 140 S.E. 261, 262 (1927); *State v. Trapp*, 17 S.C. 467, 471 (1882). The focus in burglary is on the victim's possessory interest. *State v. Singley*, 392 S.C. 270, 709 S.E.2d 603 (2011).

For the trespass notice to be relevant to Appellant's case, Drafton had to be the declarant. *State v. Langley*, 334 S.C. 643, 647, 515 S.E.2d 98, 100 (1999) (*citing* Rule 401, SCRE (providing the definition of relevant evidence). Drafton, not the landlord, held the possessory interest in the apartment. *See* S.C. Code Ann. § 27-40-430; *see also Singley*, 392 S.C. at 445-446, 679 S.E.2d at 542 (ownership of property title did not give defendant possessory interest, lawful possessor's consent was required for entry). Accordingly, this Court erred in concluding that the notice was not hearsay under the business records exception.

With respect to Issue I(C), this Court erred in holding that the trespass letter did not constitute impermissible prior bad act or character evidence under Rule 404, SCRE. Respectfully, this Court's contention that "[a] person could be banned from an apartment for many reasons that do not include committing a prior bad act," is misplaced.

The State argued extensively at trial that the trespass notice letter proved that Appellant had lost the right to be at Drafton's apartment because of his prior behavior. The State freely conceded that the letter could not establish motive, identity, a common scheme or plan, the absence of mistake or accident, or intent. R. 13, ll. 8-24; R. 15, ll. 5-20.

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

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

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

Issue II

As to Issue II, respectfully, this Court erred in holding that the trial court properly admitted the entirety of a 911 call purportedly made by Drafton where the call was not authenticated and where the admission of the call, in its entirety, violated Appellant's Sixth and Fourteenth Amendment rights to confront and cross-examine witnesses.

With respect to voice authentication, Rule 901(b)(5), SCRE, counsels that to conform with Rule 901(a): "[i]dentification of a voice, whether heard firsthand or through mechanical or

electronic transmission or recording, [may be authenticated] by ***opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker***."(*emphasis added*); *see also State v. Porter*, 251 S.C. 393, 162 S.E.2d 843 (1968) (identity of party whom witness talked need not be known at time of the conversation, but knowledge enabling witness to identify other party must be later obtained).

South Carolina case law has never before recognized that a caller's identification can be authenticated without a witness identifying the caller or the caller identifying themselves. *See State v. Porter*, 251 S.C. 393, 162 S.E.2d 843 (1968) (identity of party whom witness talked need not be known at time of the conversation, but knowledge enabling witness to identify other party must be later obtained); *State v. Shuler*, 353 S.C. 176, 577 S.E.2d 438 (2003); *State v. Aragon*, 354 S.C. 334, 579 S.E.2d 626 (Ct. App. 2003).

This Court's reliance "circumstances surrounding the call" is misplaced as the call incorrectly alleged that Appellant had a gun. Contradicting the 911 caller's allegations, the witnesses at trial all testified that they did not see Appellant with a gun. R. 50, ll. 10-22; R. 86, ll. 8-23; R. 116, ll. 2-12. Therefore, the "circumstances surrounding the call" could not have provided an independent basis for authenticating the call.

The admission of the 911 call also violated Appellant's confrontation clause rights under the Sixth and Fourteenth Amendment. Statements given to police during the course of the investigation are testimonial. *Davis v. Washington*, 547 U.S. 813 (2006) (Confrontation Clause of the Sixth Amendment, as interpreted in *Crawford*, does not apply to "non-testimonial" statements not intended to be preserved as evidence at trial). Testimonial out-of-court statements are not admissible under the Confrontation Clause unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. *Id.*

The State sought to use the 911 call in question against Appellant during its case-in-chief as a substitute for Drafton's testimony. R. 61, ll. 2 – 62, ll. 25. Appellant had no prior opportunity to cross-examine Drafton. The call at issue was the seventh call to 911 regarding the incident. The police were at the apartment by the end of the end of call and many of the questions asked by the 911 operator sought to establish what happened during the incident rather than what was ongoing.

At a minimum, large portions of the 911 call were testimonial and the trial court's refusal to redact any portion of the call also violated Appellant's constitutional right to cross-examine and confront the witnesses against him. *Id.*

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

Issue III

As to Issue III, this Court erred affirming the trial court's refusal to grant a directed verdict of acquittal where the State failed to present any substantial circumstantial evidence that Appellant intended to commit a crime once inside Drafton's apartment, or that Appellant injured Drafton in the course of committing a burglary; and where the evidence that the State did present merely raised the suspicion of Appellant's guilt.

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

As an initial matter, the State failed to establish that Appellant ever gained access to the apartment after kicking the door. *State v. Kornahrens*, 290 S.C. 281, 350 S.E.2d 180 (1986) (burglary requires that, if there is an obstruction to entry, the physical force used must be sufficient to remove the obstruction). The State presented no direct or substantial circumstantial evidence that Appellant intended to commit a crime once he entered the apartment.

Deputy Silbermann stated that the door was "hanging slightly off the hinges' and the deadbolt was still engaged when he arrived. R. 38, ll. 8-11; R. 41, ll. 21-23. He also admitted that the door was only partially open when he arrived. R. 41, ll. 24 – 59, ll. 1. Likewise, Huff never saw Appellant in Drafton's apartment. R. 48, ll. 6-10; R. 66, ll. 7-23.

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

Accordingly, the evidence relied upon by the State does not amount to substantial circumstantial evidence reasonably tending to prove Appellant's guilt, or from which his guilt may be fairly and logically deduced. *See Bostick*, 392 S.C. at 139, 708 S.E.2d at 776-777.

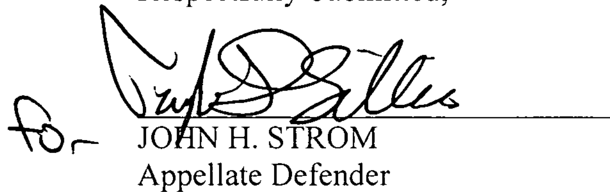
Issue IV

As to Issue IV, respectfully, this Court misjudged the cumulative impact of the errors alleged in Issues I and II on Appellant's trial.

Conclusion

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

Respectfully Submitted,



for JOHN H. STROM
Appellate Defender

This 29th day of June, 2017.

STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM LANCASTER COUNTY

Brian M. Gibbons, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

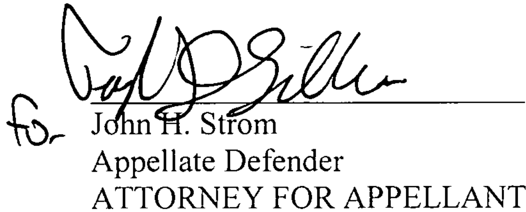
DEMARIO MONTE THOMPSON,

APPELLANT

APPELLATE CASE NO. 2015-000126

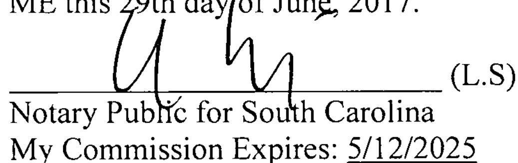
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon Deborah R.J. Shupe, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Demario M. Thompson, #323258, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 29th day of June, 2017.



for John H. Strom
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE ME this 29th day of June, 2017.



____________________ (L.S)
Notary Public for South Carolina
My Commission Expires: 5/12/2025