STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

ORIGINAL

Certiorari to Lancaster County

Honorable Brian M. Gibbons, Circuit Court Judge

Opinion No. 5492 (S.C. Ct. App. Filed June 14, 2017)

2014-GS-29-1321, 1322

THE STATE,

RESPONDENT,

V.

DEMARIO MONTE THOMPSON,

PETITIONER

APPELLATE CASE NO. 2017-001992

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on August 28, 2017.

QUESTIONS PRESENTED

I.

The Court of Appeals erred in affirming Petitioner's convictions where the trial court abused its discretion in admitting the trespass notice letter signed by Keasia Drafton and the apartment complex manager, Janice Sager, advising Drafton that she could be evicted if Petitioner was found in the apartment complex because (A) the letter constituted impermissible prior bad act evidence under Rule 404(b), SCRE, and (B) was irrelevant to the accusations against Petitioner, having no bearing on any element of Petitioner's first degree burglary charges and, assuming *arguendo* that the letter may have been at all relevant, the danger of unfair prejudice substantially outweighed the probative value of the letter.

II.

The Court of Appeals erred in affirming Petitioner's convictions (1) where the trial court erroneously admitted a recording of a 911 call into evidence when the State failed to present sufficient evidence to authenticate that the self-identifying caller was Drafton, and (B) where the trial court violated Appellant's Sixth and Fourteenth Amendment rights to confront and to cross-examine witnesses, pursuant to *Crawford v. Washington*[1] and *Davis v. Washington*[2] by allowing the entirety of a 911 call purportedly made by Drafton to be played before the jury as a substitute for her testimony.

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

2 547 U.S. 813 (2006).

STATEMENT OF THE CASE

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

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

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

Petitioner filed a timely notice of appeal and was represented by Appellate Defender John Strom on appeal. On April 22, 2017, Petitioner filed the Final Brief of Appellant at the South Carolina Court of Appeals. On May 6, 2017, the State filed the Final Brief of Respondent. Oral arguments were held at the South Carolina Court of Appeals on April 11, 2017.

On June 14, 2017, the South Carolina Court of Appeals issued a published opinion affirming Petitioner's convictions. On June 29, 2017, Petitioner filed a petition for rehearing with the Court of Appeals. On August 28, 2017, the Court of Appeals denied the petition for rehearing.

This petition follows.

ARGUMENT

I.

The Court of Appeals erred in affirming Petitioner's convictions where the trial court abused its discretion in admitting the trespass notice letter signed by Keasia Drafton and the apartment complex manager, Janice Sager, advising Drafton that she could be evicted if Petitioner was found in the apartment complex because (A) the letter constituted impermissible prior bad act evidence under Rule 404(b), SCRE, and (B) was irrelevant to the accusations against Petitioner, having no bearing on any element of Petitioner's first degree burglary charges and, assuming *arguendo* that the letter may have been at all relevant, the danger of unfair prejudice substantially outweighed the probative value of the letter.

Relevant Facts

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

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

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

Rule 602 Objection

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

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

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

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

Rule 404(b) Objection

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

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

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

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

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

Rule 403 Objection

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

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

Trial Testimony of Janice Sager

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

A. The Court of Appeals erred in affirming the trial court's determination that the trespass notice letter signed by Keasia Drafton and advising Drafton that she could be evicted if Petitioner was found in the apartment complex did not constitute inadmissible prior bad act or character evidence under Rule 404, SCRE.

The Court of Appeals erred in concluding that the trespass letter did not constitute improper character evidence as "[a] person could be banned from an apartment for many reasons that do not include committing a prior bad act." The Court of Appeals' reliance on the lack of evidence as "why" Petitioner was banned is misplaced. 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, Petitioner 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.

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

369 S.C. 201, 631 S.E.2d 262 (2006); *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923).

To be admissible, the bad act must logically relate to the crime with which the defendant has been charged. If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing. *Id.*; *State v. Beck*, 342 S.C. 129, 135–36, 536 S.E.2d 679, 682–83 (2000).

Even if otherwise admissible, prior bad act evidence must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. Rule 404(b), SCRE; *State v. Gillian*, 373 S.C. 601, 646 S.E.2d 872 (2007) (trial court must gauge logical relevancy of prior bad act, whether it reasonably tends to prove a material fact in issue, to the particular purpose for which it is sought to be introduced).

In the present case, the letter constituted inadmissible character and prior bad act evidence that was not the subject of a prior conviction. Therefore, it must satisfy the requirements of Rule 404(b), SCRE, to be admissible. *Beck*, 342 S.C. at 135–36, 536 S.E.2d at 682–83 (admissible when it tends to establish motive, identity, a common scheme or plan, the absence of mistake or accident, or intent, but the evidence must relate to the crime charged). The State freely conceded that the letter could not establish motive, identity, a common scheme or plan, the absence of mistake or accident, or intent. R. 13, ll. 8-24; R. 15, ll. 5-2 ; *see also Singley*, 392 S.C. at 445-446, 679 S.E.2d at 542

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 Petitioner 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 Petitioner. *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).

In many respects 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 discussed *infra*, the letter served only 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 Petitioner was standing trial, and, to the extent the letter had any probative value, its probative value was outweighed by its prejudicial effect.

B. The Court of Appeals erred in affirming the trial court's admission the trespass notice letter when it was irrelevant to the accusations against Petitioner, having no bearing on any element of the first degree burglary indictment for which Petitioner standing trial and, assuming *arguendo* that the letter may have been at all relevant, the danger of unfair prejudice substantially outweighed the probative value of the letter.

"Evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy." *State v. Langley*, 334 S.C. 643, 647, 515 S.E.2d 98, 100 (1999) (*citing* Rule 401, SCRE (providing the definition of relevant evidence). There was no fact in controversy in Petitioner's case that was made more or less probable by the introduction of the trespass notice letter. R. 11, ll. 6 – 14, ll. 6. Burglary is a crime against possession and habitation, not a crime against ownership. *State v. Clamp*, 225 S.C. 89, 102, 80 S.E.2d 918, 924 (1954); *State v. Alford*, 142 S.C. 43, 45, 140 S.E. 261, 262 (1927); *State v. Trapp*, 17 S.C. 467, 471 (1882). The focus in burglary is on the victim's possessory interest. *State v. Singley*, 392 S.C. 270, 709 S.E.2d 603 (2011).

Perhaps anticipating that Drafton would not testify so there would be nothing to impeach, the State posited that the letter would also somehow establish that Petitioner, "did not inherently have consent to go into the apartment." *Id.* Similarly, the trial court ruled that the letter was being offered to, "***prove a certain element of the crime***[,] that he didn't have consent -- he could

not have consent to be there because ***the person who owns the property regardless of the tenant*** -- what the tenant says, he was not supposed to be there." R. 16, ll. 5-23 (*emphasis added*).

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

Accordingly, the trespass notice letter signed by Drafton and the apartment complex manager four months before the incident giving rise to the charges Petitioner 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,

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Rule 403, SCRE. "[A] court analyzing probative value considers the importance of the evidence and the significance of the issues to which the evidence relates." *State v. Collins*, 398 S.C. 197, 203, 727 S.E.2d 751, 754 (Ct. App. 2012). "Like probative value, unfair prejudice should be evaluated in the practical context of the issues at stake in the trial of the case." *Collins*, 398 S.C. at 207, 727 S.E.2d at 757; *see also State v. Wilson*, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001).

Any probative value the letter had was substantially outweighed by the danger of unfair prejudice and the very real risk of misleading the jury into wrongfully concluding that the trespass notice established that Petitioner did not have consent to enter the apartment because of the landlord's prohibition. Additionally, there was also a substantial risk that the letter would lead the

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

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

The risk of misleading the jury and unfairly prejudicing the Petitioner 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).

Harmless Error Analysis

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

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

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

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

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

II.

The Court of Appeals erred in affirming Petitioner's convictions where the trial court erroneously admitted a recording of a 911 call into evidence when the State failed to present sufficient evidence to authenticate that the self-identifying caller was Drafton, and (B) where the trial court violated Appellant's Sixth and Fourteenth Amendment rights to confront and to cross-examine witnesses, pursuant to *Crawford v. Washington*[3] and *Davis v. Washington*[4] by allowing the entirety of a 911 call purportedly made by Drafton to be played before the jury as a substitute for her testimony.

Pre-Trial Motion to Suppress 911 call

Drafton did not testify at trial. In lieu of her testimony, the State sought to introduce into evidence a 911 call made on the night of the incident by an individual purporting to be Drafton. R. 18, ll. 14 – 19, ll. 20. Defense counsel objected. *Id.* The trial court elected to withhold a final ruling on admissibility until the call was offered into evidence, but invited the State to summarize its arguments. *Id.* at ll. 21-24.

The State posited that the call was non-testimonial and "therefore it doesn't violate the confrontation clause because the information is given to a dispatcher or emergency personnel to figure out to assess an emergency situation." R. 19, ll. 1-9. The State claimed that the 911 call fell within the business records hearsay exception, or as suggested by the trial court, under the hearsay exception for excited utterance. R. 19, ll. 1-20.

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3 541 U.S. 36 (2004).

4 547 U.S. 813 (2006).

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

Introduction of the 911 Call

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

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

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

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

Trial Testimony of Sandra Cauthen

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

Cauthen testified that all calls to the 911 center were automatically recorded on a secure server and stored for three years. R. 68, ll. 7-24. Cauthen then identified the tape in question and the State asked for permission to move it into evidence. R. 70, ll. 3-11. Counsel objected for lack of foundation. The court summarily overruled him and the tape was played before the jury. *Id.* On cross-examination, Cauthen admitted that she had no way of knowing that the caller was Drafton. *Id.* at ll. 14-24.

Trial Testimony of Suzzane Collins

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

Discussion

A. The Court of Appeals erred in affirming Petitioner's convictions where the trial court erroneously admitted a recording of a 911 call into evidence

when the State failed to present sufficient evidence to authenticate that the self-identifying caller to 911 was Drafton.

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

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

Prior to Petitioner's case, no South Carolina appellate court has affirmed a party's authentication of a telephone call based solely on the self-identification of the caller during the phone call without also having a witness or the caller recognize the caller's voice at trial. *See State v. Plyler*, 275 S.C. 291, 270 S.E.2d 126 (1980) (telephone call admissible as witness identified voice of accused and victim); *State v. Steadman*, 216 S.C. 579, 59 S.E.2d 168 (1950) (witness had met accused and recognized her voice); *State v. Smith*, 307 S.C. 376, 415 S.E.2d 409 (1992) (911 dispatcher identified defendant's voice as that of anonymous caller after defendant later visited police station in person); *State v. Hester*, 137 S.C. 145, 134 S.E. 885 (1926)(admissions of defendant recorded on detectaphone were admissible as witness testified

that he recognized defendant's voice). This Court should reverse the Court of Appeals and hold that in Petitioner's case, the State failed to authenticate that the caller was Drafton.

The cases relied upon by the Court of Appeals are readily distinguishable from Petitioner's case by the substantial amount of corroborated information the self-identifying caller provided. *See Johnson v. State*, 699 N.E.2d (1998) (self-identifying complainant caller stayed on 911 until located by emergency personnel); *State v. C.D.L.*, 250 P.3d 69 (UT Ct. App. 2011) (self-identifying caller authenticated by witness present during 911 call); *State v. Williams*, 150 P.3d 111 (WA Ct. App Div. 1 2007) (affirming where trial court had opportunity to hear self-identifying caller speak and made determination that voice in 911 matched).

Looking to the Federal Rules of Evidence, the Circuit Courts of Appeals have held that, "[m]ere announcement of identity by a person who has placed a telephone call does not suffice to make it admissible against the person so identified." *See United States v. Benjamin*, 328 F.2d 854, 864 n. 3 (2d Cir.1964). For instance, in *U.S. v. Espinoza*, the defendant argued that there was insufficient evidence to identify him as the person with whom an informant placed an order for child pornography by telephone. 641 F.2d 153 (4th. Cir. 1981). The government presented no voice recognition evidence. *Id.* The Court noted that, while the defendant responded in a manner that would be expected by the call's order, this was not sufficient to establish identity. *Id.* at 170 (*citing Van Riper v. United States*, 13 F.2d 961 (2d Cir. 1926)).

Nor was it sufficient that the phone number in question belonged to defendant's company. *Id.* The Court held that the identification was admissible. The defendant's fingerprint was found on an invoice sent with the pornography to the agreed upon address, this provided sufficient corroboration that the defendant was the call's recipient or that the order placed by the call was completed by him. *Id.*

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

While not argued by the State, the circumstantial evidence presented was also insufficient to support, as a precedent to admissibility, that Drafton was the caller. The 911 call was approximately two minutes and fifteen seconds long. The caller alleged that Appellant is "standing there with the gun in his hands" pointing it at her. R. (911 recording). Only seconds later, the caller stated that Appellant was actually gone, that she was asleep when he kicked her door, and that he pointed a gun at "a lady downstairs." *Id.* An unidentified third party – never identified – can be heard asking "where did he go." *Id.* The caller's statements were chronologically confused. *Id.*

Similarly, the evidence adduced at trial did not corroborate the caller's claims. No gun was ever located. None of the State's witnesses testified that they saw Appellant with a gun, including Huff or the downstairs neighbor who Huff watched argue with Petitioner. R. 50, ll. 10-22. To wit, the Court granted a directed verdict of acquittal on both charges of pointing or presenting a firearm and the jury acquitted Appellant of the possession of a weapon charge. R. 86, ll. 8-23; R. 116, ll. 2-12. Moreover, the call at issue was only one of multiple calls received regarding the incident from multiple people. R. 62, ll. 5 – 64, ll. 17.

Espinoza's holding is instructive, when prosecutors are unable present witness testimony recognizing the voice at issue, the State must put forward substantial circumstantial evidence supporting that the voice in question is who the State alleges. 641 F.2d at 170. In *Espinosa*, the

fingerprint on the invoice provided the necessary corroboration. *Id.* By contrast, in Petitioner's case, not even Deputy Silbermann, the first officer on the scene, testified that he recognized Drafton's voice or that he saw Drafton on the phone when he first arrived. R. 37, ll. 2-16.

South Carolina has never before recognized that a caller's identification may be sufficiently authenticated based solely on the disputed voice's self-identification and the circumstances of the call. If South Carolina is to adopt this new method of authentication, Petitioner's case is manifestly not the vehicle for such a drastic change in evidentiary law. Should the Court decide to adopt this method of authentication, the State failed to present sufficient circumstantial evidence in Petitioner's case to authenticate that the 911 call in question was placed by Drafton. Rule 901(a), (b)(5), SCRE. Thus, the Court of Appeals erred in affirming the trial court's admission of the 911 call. R. 60, ll. 7 – 66, ll. 13.

B. The Court of Appeals erred in affirming Petitioner's convictions where the trial court violated Appellant's Sixth and Fourteenth Amendment rights to confront and to cross-examine witnesses, pursuant to *Crawford v. Washington* and *Davis v. Washington*, by allowing the entirety of a 911 call purportedly made by Drafton to be played before the jury as a substitute for her testimony.

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

The right of confrontation is essential to a fair trial in that it promotes reliability in criminal trials and ensures that convictions will not result from testimony of individuals who

cannot be challenged at trial. *California v. Green*, 399 U.S. 149 (1970); *State v. Gillian*, 360 S.C. 433, 602 S.E.2d 62 (Ct. App. 2004). The cross-examination of adverse witnesses has been described as the "greatest legal engine ever invented for the discovery of truth." *Green*, 399 U.S. at 158 (internal quotations omitted).

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

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

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

Whether a 911 call is testimonial or non-testimonial hearsay is determined by the purpose behind law enforcement's interrogation:

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

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

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

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

> gun.'. . . she's not interrogating her, she's just trying to figure out what in the world is going on.

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

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

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

The State should not be permitted to circumvent the protections of the confrontation clause by introducing a 911 call that, in light of what law enforcement already knew when the call was made, did not provide police with additional information necessary to respond to the emergency. The 911 call's role at trial was particularly odious as it was an obvious replacement for the testimony of the unavailable complaining witness whom Appellant would have had the right to cross-examine. *Crawford*, 541 U.S. at 42; *see State v. Powers*, 99 P.3d 1262 (Wa. Ct. App. 2004)

(non-testifying wife's 911 call was testimonial: she reported husband's violation of protective order, gave a description of him to assist in apprehension and prosecution, rather than to protect herself).

Even if a portion of the 911 call is deemed non-testimonial, a large percentage of it was testimonial and the trial court reversibly erred in not redacting any of the call. R. 65, ll. 8-15. At a minimum, the testimonial portion of the call began when the caller stated that Appellant was "gone" and continued to the end of the call where the caller was questioned by an unidentified third person. R. 63, ll. 14 – 64, ll. 1.

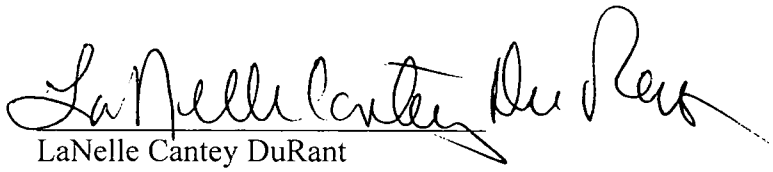
The admission of the 911 call could not have been a harmless error as it was the cornerstone of the State's case. In closing arguments the State replayed the 911 call in full and referenced the call no fewer than a dozen times. R. 90, ll. 4 – 98, ll. 14. The 911 call was the only evidence that directly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

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

CONCLUSION

By reason of the foregoing arguments, Petitioner respectfully requests this Court grant his petition for writ of certiorari to allow for full briefing on the above raised issues.

Respectfully Submitted,



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 17th day of October, 2017.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Lancaster County
Honorable Brian M. Gibbons, Circuit Court Judge

Opinion No. 5492 (S.C. Ct. App. filed June 14, 2017)
2014-GS-29-1321, 1322

THE STATE,

RESPONDENT,

V.

DEMARIO MONTE THOMPSON,

PETITIONER

CERTIFICATE OF SERVICE

I certify that a copy of the Petition for Writ of Certiorari and a copy of the Appendix in this case has been served on 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 17th day of October, 2017.

LaNelle Cantey DuRant
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO BEFORE
ME this 17th day of October, 2017.

(L.S)
Notary Public for South Carolina
My Commission Expires: May 2, 2027.