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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

S.C. SUPREME COURT

Certiorari to Lancaster County

Honorable Brian M. Gibbons, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DEMARIO MONTE THOMPSON,

PETITIONER

APPELLATE CASE NO. 2017-001992

APPENDIX

LANELLE C. DURANT
Appellate Defender

ALAN WILSON
Attorney General

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

DEBORAH R.J. SHUPE
Senior Assistant Deputy Attorney General
Rembert Dennis Building
1000 Assembly Street, Room 519
Columbia, SC 29201

ATTORNEYS FOR RESPONDENT

ATTORNEY FOR PETITIONER

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*LaNelle
DuRant*

JOHN H. STROM
Appellate Defender

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
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ALAN WILSON
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ATTORNEYS FOR RESPONDENT

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

The State, Respondent,

v.

Demario Monte Thompson, Appellant.

Appellate Case No. 2015-000126

Appeal From Lancaster County
Brian M. Gibbons, Circuit Court Judge

Opinion No. 5492
Heard April 11, 2017 – Filed June 14, 2017

AFFIRMED

Appellate Defender John Harrison Strom, of Columbia,
for Appellant.

Attorney General Alan McCrory Wilson and Assistant
Deputy Attorney General Deborah R.J. Shupe, both of
Columbia; and Solicitor Douglas A. Barfield, Jr., of
Lancaster, all for Respondent.

LEE, A.J.: Demario Monte Thompson appeals his convictions and sentences for first-degree burglary and third-degree assault and battery, arguing the trial court erred by (1) admitting a trespass notice letter into evidence; (2) admitting the entire recording of a 911 call into evidence; (3) denying his motion for a directed verdict on the first-degree burglary charge; and (4) denying his motion for a new trial. We affirm.

FACTS/PROCEDURAL BACKGROUND

A Lancaster County grand jury indicted Thompson for first-degree burglary and attempted murder based on allegations he broke into Keasia Drafton's apartment and tried to kill her on July 2, 2014.¹ Before trial, Thompson moved to suppress a trespass notice letter stating he was banned from the apartment complex where Drafton lived. Thompson argued (1) the letter was irrelevant, (2) the letter presented impermissible character evidence, and (3) the letter's prejudicial effect substantially outweighed its probative value. The State contended because the letter proved Thompson did not live in Drafton's apartment, he did not have inherent consent to be there. Further, the State agreed it would not discuss the reason Thompson was banned from the apartment during trial. The trial court denied Thompson's motion.

At trial, Deputy Reuben Silberman testified he responded to a disturbance at an apartment complex between 4 a.m. and 5 a.m. on July 2, 2014. He recalled the apartment "door appeared to have been kicked in" because "[t]he deadbolt was still engaged[,] and the door was hanging slightly off its hinges." Deputy Silberman stated he spoke with Drafton, who was "very upset" and had wounds on her head and neck. The State introduced photos taken by Deputy Silberman depicting Drafton's wounds and the apartment door. Deputy Silberman believed the wound on Drafton's neck was due to strangulation. According to Deputy Silberman, Drafton answered the door in underwear and a tank top, and her clothes were torn. Deputy Silberman believed a physical altercation had occurred in the living room because "some things were thrown around the apartment."

Dominique Huff testified he lived in the apartment across from Drafton. Huff recalled he heard "a whole bunch of commotion" coming from Drafton's apartment and saw "the door was off the hinges." He stated he went back inside his apartment, but he came out again because "somebody yelled [someone] had a gun." He noted that when he came outside a second time, he saw Thompson "down by the trash can" arguing with a neighbor. Huff recalled Thompson raised his hand, but he could not tell if Thompson had a gun because it was dark. Huff indicated Drafton was crying and appeared "hysterical."

¹ Thompson was also indicted for possession or display of a firearm during a violent crime and two counts of pointing and presenting a firearm, but the trial court granted a directed verdict on these charges.

Janice Sager, the manager of Drafton's apartment complex, testified Thompson was not a resident at the apartment complex, and the State introduced the trespass notice letter over Thompson's objection. Sager explained she drafted the letter stating Thompson was banned from the apartment complex at the direction of her district manager and Drafton signed it on March 18, 2014. The letter stated Drafton's lease would be terminated if she allowed Thompson into her apartment or onto the property, and it noted Thompson would be charged with trespassing.

During the testimony of Sandra Cauthen, Deputy Director of the Lancaster County Public Safety Communications, the State played a recording of a 911 call made by someone who identified herself as Drafton. Cauthen explained calls to 911 were automatically recorded, stored on a server for three years, and regularly maintained by the technology department. Cauthen stated she could not say with absolute certainty that Drafton was the caller. Thompson objected to the introduction of the recording, arguing (1) it was not properly authenticated to show Drafton was the caller and (2) it violated his Confrontation Clause rights because it was testimonial and Drafton did not testify.

In the 911 recording, a woman could be heard crying and stating she needed an officer. When the dispatcher explained an officer was in route, the woman responded, "[Inaudible]. He just kicked my door." The woman stated she did not need an ambulance. The dispatcher determined the man had a gun. When asked where the gun was, the woman said, "He got it in his hand." The woman indicated the man was pointing the gun at her. The woman stated the man's name was "Demario Thompson."

When the dispatcher asked for her name, the woman answered, "Keasia Drafton." The dispatcher said, "Yes, she said he's standing there with a gun in his hand." The caller stated, "He's gone. [Inaudible]. He ran." The dispatcher asked the woman to tell her what the man was wearing. The woman responded, "I don't know. I was asleep and he came kicking my door." A man could be heard in the background asking whether it was "Demario," and the woman replied, "Yes." The man asked which way he ran, and the woman said, "I don't know. He pointed it at the lady downstairs and then he ran." When asked what the man pointed, the woman stated he pointed a gun. When asked if the man hurt her, the woman responded, "Yes he kept pointing at —" before the recording cut off.

Suzanne Collins testified she was the dispatcher who answered the 911 call and indicated the recording accurately depicted the entirety of the call. Collins testified dispatchers rely on information a caller gives—such as the caller's identity—

because dispatchers are unable to independently verify the information.

At the close of the State's case, Thompson moved for a directed verdict on the first-degree burglary charge, arguing the State did not present sufficient evidence to show (1) he did not have consent to enter Drafton's apartment and (2) he intended to commit a crime while inside. The trial court denied the motion, finding the record contained sufficient evidence to submit the issue to the jury. Thompson did not present any evidence at trial. The jury found Thompson guilty of first-degree burglary and third-degree assault and battery. After the verdict, Thompson moved for a new trial, and the trial court denied his motion. The trial court sentenced Thompson to fifteen years' imprisonment for first-degree burglary and time served for third-degree assault and battery. This appeal followed.

STANDARD OF REVIEW

"In criminal cases, an appellate court sits to review only errors of law, and it is bound by the trial court's factual findings unless the findings are clearly erroneous." *State v. Spears*, 403 S.C. 247, 252, 742 S.E.2d 878, 880 (Ct. App. 2013).

LAW/ANALYSIS

I. Trespass Letter

Thompson asserts the trial court erred in admitting the trespass notice letter because the letter was irrelevant, impermissible hearsay evidence, impermissible character evidence, and unfairly prejudicial. We disagree.

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *Id.* This court will not reverse the trial court's decision regarding a Rule 403 objection absent an abuse of discretion and resulting prejudice. *State v. Gray*, 408 S.C. 601, 608, 759 S.E.2d 160, 164 (Ct. App. 2014).

A. Relevance

Thompson argues the letter was not relevant because (1) he needed the tenant's consent to enter the apartment, not the landlord's consent; (2) the State presented

no evidence he was aware of the letter; and (3) the letter was signed four months before the incident giving rise to his charges. We disagree.

"Evidence which is not relevant is not admissible." Rule 402, SCRE. "Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears." *State v. Alexander*, 303 S.C. 377, 380, 401 S.E.2d 146, 148 (1991).

We find the letter was relevant to the element of consent in first-degree burglary. *See State v. Cross*, 323 S.C. 41, 43, 448 S.E.2d 569, 570 (Ct. App. 1994) ("First[-]degree burglary requires the entry of a dwelling without consent with the intent to commit a crime therein, as well as the existence of an aggravating circumstance."). The letter shows Thompson was not a resident of the apartment complex. Therefore, Thompson would not have a possessory interest in Drafton's apartment or inherent consent to be there, requiring him to receive Drafton's consent before entering the apartment. Accordingly, we find the letter was relevant to an element of first-degree burglary in Thompson's case.

B. Hearsay

Thompson asserts the letter was impermissible hearsay because it was offered to prove the fact that Drafton, the declarant, did not consent to Thompson entering her apartment. We disagree.

Hearsay is an out-of-court statement offered in court to prove the truth of the matter asserted. Rule 801(c), SCRE. Hearsay is inadmissible unless an exception or an exclusion applies. Rule 802, SCRE. One such exception is the business records exception, which states:

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness

Rule 803(6), SCRE.

We find the letter was not impermissible hearsay because it fell under the business records exception. Although Thompson argues the letter was a statement made by Drafton, we disagree and find Sager was the declarant. At trial, Sager testified she drafted the trespass notice letter at the request of her district manager to inform Drafton that Thompson was banned from the apartment complex. The letter was drafted by Sager in her capacity of manager of the apartment complex on the apartment's letterhead, and she authenticated it during her testimony at trial. Therefore, we find the trial court did not abuse its discretion in finding the letter was a business record.

C. Prior Bad Act

Thompson argues the letter was impermissible character evidence because it indicated he committed a prior bad act to justify banning him from the apartment complex. We disagree.

"Character evidence is not admissible to prove the accused possesses a criminal character or has a propensity to commit the crime with which he is charged." *State v. Brown*, 344 S.C. 70, 73, 543 S.E.2d 552, 554 (2001). "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Rule 404(b), SCRE. "It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." *Id.* "In addition, 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." *State v. Beck*, 342 S.C. 129, 135, 536 S.E.2d 679, 682-83 (2000). "Once bad act evidence is found admissible under Rule 404(b), the trial court *must* then conduct the prejudice analysis required by Rule 403, SCRE." *Spears*, 403 S.C. at 253, 742 S.E.2d at 881 (emphasis added by court) (quoting *State v. Wallace*, 384 S.C. 428, 435, 683 S.E.2d 275, 278 (2009)).

We find the letter did not constitute improper character evidence. A person could be banned from an apartment for many reasons that do not include committing a prior bad act. Although the letter mentioned Thompson was banned from the apartment complex by the Lancaster County Sheriff's Department, it specified it was at the direction and "on behalf of" the apartment complex. Furthermore, Sager did not testify as to why Thompson was banned from the apartment complex. We therefore find the trial court did not err in ruling the letter was not evidence of a prior bad act.

D. Unfair Prejudice

Thompson contends the danger of unfair prejudice substantially outweighed the letter's probative value because it would mislead the jury into wrongfully concluding (1) he did not have consent to enter the apartment and (2) he had an intent to commit a crime inside the apartment. We disagree.

A trial court may exclude relevant evidence if the danger of unfair prejudice substantially outweighs its probative value. Rule 403, SCRE. Probative value means "the measure of the importance of that tendency to [prove or disprove] the outcome of a case. It is the weight that a piece of relevant evidence will carry in helping the trier of fact decide the issues." *Gray*, 408 S.C. at 610, 759 S.E.2d at 165. "Unfair prejudice means an undue tendency to suggest decision on an improper basis." *State v. Wiles*, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009). "A trial court's decision regarding the comparative probative value versus prejudicial effect of evidence should be reversed only in exceptional circumstances." *State v. Grace*, 350 S.C. 19, 28, 564 S.E.2d 331, 335 (Ct. App. 2002).

We find the trial court did not err in ruling the potential prejudice for the letter did not substantially outweigh its probative value. The relevancy of the letter to the element of consent outweighed any prejudicial effect it may have had. Although the letter may have invited speculation by the jury because it did not specify why Thompson was banned from the apartment complex, we find the danger of unfair prejudice from such speculation was slight compared to the relevancy of the letter. Accordingly, we affirm the trial court's admission of the letter.

II. 911 Recording

Thompson argues the trial court erred in admitting the 911 recording into evidence because it was not properly authenticated and violated his confrontation clause rights. We disagree.

First, we disagree with Thompson's argument the State was required to present testimony of a witness identifying the caller's voice as belonging to Drafton in order to properly authenticate the 911 recording. Rule 901(a) of the South Carolina Rules of Evidence requires authentication "as a condition precedent to admissibility . . . by evidence sufficient to support a finding that the matter in question is what its proponent claims." For this purpose, the rule provides a list of

ten examples illustrating how a party can properly authenticate evidence. *See* Rule 901(b), SCRE. However, Rule 901 explicitly states the examples listed in subsection b are "by way of illustration only" and are not intended to be an exhaustive list of the ways to properly authenticate evidence. The rule provides a voice may be identified "by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker." Rule 901(b)(5), SCRE. Furthermore, telephone conversations with an individual can be authenticated "by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if . . . circumstances, including self-identification, show the person answering to be the one called." Rule 901(b)(6), SCRE.

Authentication of a 911 caller's identity can be accomplished by combining the caller's self-identification with circumstances surrounding the call. Here, the testimony of Cauthen and Collins coupled with the fact that the information the caller gave the dispatcher was confirmed by police when they arrived at the scene proved the recording was reliable, satisfying the purpose of the authentication requirement. Cauthen explained calls to 911 were automatically recorded, stored on a server for three years, and maintained by the technology department. Collins, the dispatcher who spoke with Drafton, testified the recording played at trial was an accurate representation of the 911 call. The caller identified herself as Drafton and informed the dispatcher she needed an officer because Thompson "came kicking [at her] door" while she was asleep and pointed a gun at her. Deputy Silberman indicated he spoke with Drafton after arriving at the scene and her apartment "door appeared to have been kicked in" because "[t]he deadbolt was still engaged and the door was hanging slightly off its hinges." The evidence presented at trial sufficiently establishes the 911 call was what it purported to be—an emergency call made by Drafton.

Furthermore, courts in other jurisdictions have also held a witness is not required to identify a caller's voice when the circumstances surrounding the call indicate the information given by the caller is accurate. *See United States v. Espinoza*, 641 F.2d 153, 170 (4th Cir. 1981) (holding the testimony of a telephone conversation was admissible "even though the witness cannot certainly identify the person with whom he spoke by voice identification, [when] the identity of the person . . . [was] established by circumstantial evidence"); *Rodriguez-Nova v. State*, 763 S.E.2d 698, 701 (Ga. 2014) ("[A]n audio recording can be authenticated by the testimony of one party to the recorded conversation."); *Young v. State*, 696 N.E.2d 386, 389 (Ind. 1998) ("A caller's identity can be established by circumstantial evidence, and need not be proven beyond a reasonable doubt."); *Johnson v. State*, 699 N.E.2d

746, 749 (Ind. Ct. App. 1998) ("A recording is not admissible unless the voices contained thereon are identified. . . . However, circumstantial evidence may be utilized for identification purposes."); *State v. C.D.L.*, 250 P.3d 69, 78 (Utah Ct. App. 2011) ("Authentication of a telephone caller's identity can be accomplished by combining that caller's self-identification during the call with circumstances surrounding the call."); *State v. Williams*, 150 P.3d 111, 118 (Wash. Ct. App. 2007) ("A sound recording, in particular, need not be authenticated by a witness with personal knowledge of the events recorded. Rather, the trial court may consider any information sufficient to support the prima facie showing that the evidence is authentic.").

Next, we disagree with Thompson's contention the 911 call contained testimonial statements that violated his Confrontation Clause rights. The Sixth Amendment guarantees a criminal defendant the right "to be confronted with the witnesses against him." U.S. Const. amend VI. In *Crawford v. Washington*, the United States Supreme Court held the admission of testimonial hearsay statements against an accused violates the Confrontation Clause if (1) the declarant is unavailable to testify at trial and (2) the accused has no prior opportunity to cross-examine the declarant. 541 U.S. 36, 68 (2004). The Supreme Court explained the difference between nontestimonial and testimonial statements in *Davis v. Washington*:

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

547 U.S. 813, 822 (2006).

We find this case to be more like *Davis* than *Crawford* and the recording did not violate Thompson's Confrontation Clause rights. Although Drafton did not testify at trial, her statements on the 911 call were made to obtain police assistance, and the questions during the call were to elicit more information to enable police to assist her. For the first ninety seconds of the recording, the dispatcher asked Drafton questions about present events, such as if Thompson was pointing the gun at her and if she needed an ambulance. *See id.* at 827 (considering whether an interviewee "was speaking about events *as they were actually happening*" to

determine if a 911 call was testimonial). During the call, Drafton informed the dispatcher Thompson kicked in her door while she was asleep and pointed a gun at her and a neighbor. Furthermore, Drafton was upset, breathing hard, and trying to calm down throughout the call. Although the dispatcher and a man at the scene asked five questions after Drafton informed them Thompson was no longer at her apartment, the questions were necessary to gather information to assist officers in determining where the perpetrator went and if Drafton needed medical attention. *See id.* (considering whether the interrogator asked questions that "elicited statements [that] were necessary to be able to *resolve* the present emergency" when determining if a 911 call was testimonial).

III. Directed Verdict

Thompson contends the trial court erred in denying his motion for a directed verdict, claiming the State failed to prove he gained entry to Drafton's apartment, intended to commit a crime once inside the apartment, or caused injuries to Drafton. We disagree.

"An appellate court reviews the denial of a directed verdict by viewing the evidence and all reasonable inferences to be drawn therefrom in the light most favorable to the State." *State v. Gilliland*, 402 S.C. 389, 397, 741 S.E.2d 521, 525 (Ct. App. 2012). "When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight." *State v. Weston*, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). "Accordingly, in ruling on a directed verdict motion [when] the State relies on circumstantial evidence, the court must determine whether the evidence presented is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt." *State v. Pearson*, 415 S.C. 463, 473, 783 S.E.2d 802, 807-08 (2016) (quoting *State v. Bennett*, 415 S.C. 232, 237, 781 S.E.2d 352, 354 (2016)). "[W]hen the [circumstantial] evidence presented merely raises a suspicion of guilt, the trial court should direct a verdict in favor of the accused." *Gilliland*, 402 S.C. at 397, 741 S.E.2d at 525 (second alteration by court) (quoting *State v. Bostick*, 392 S.C. 134, 142, 708 S.E.2d 774, 778 (2011)). "A mere suspicion is a belief that is inspired by 'facts or circumstances which do not amount to proof.'" *Id.* at 397, 741 S.E.2d at 526 (quoting *State v. Lollis*, 343 S.C. 580, 584, 541 S.E.2d 254, 256 (2001)).

"First[-]degree burglary requires the entry of a dwelling without consent with the intent to commit a crime therein, as well as the existence of an aggravating circumstance." *Cross*, 323 S.C. at 43, 448 S.E.2d at 570. "'Enters a building

without consent' means: (a) [t]o enter a building without the consent of the person in lawful possession; or (b) [t]o enter a building by using deception, artifice, trick, or misrepresentation to gain consent to enter from the person in lawful possession." S.C. Code Ann. § 16-11-310 (2015).

Here, the evidence presented by the State warranted submission of the case to the jury. The State presented substantial circumstantial evidence tending to prove Thompson entered Drafton's apartment without consent and with the intent to commit a crime. The trespass notice letter coupled with the circumstances of Thompson's entry show he did not have Drafton's consent to enter the apartment. The 911 call provides further evidence of whether Drafton consented to Thompson entering the apartment, as Drafton was audibly upset during the call and indicated Thompson kicked in her apartment door while she was sleeping. Furthermore, Thompson's intent to commit a crime can be inferred by the circumstances of his entry coupled with Drafton's injuries. *See State v. Tuckness*, 257 S.C. 295, 299, 185 S.E.2d 607, 608 (1971) ("Intent is seldom susceptible to proof by direct evidence and must ordinarily be proved by circumstantial evidence, that is, by facts and circumstances from which intent may be inferred."). Deputy Silberman and Huff both testified Drafton's apartment door had been kicked in and was hanging off the hinges. Deputy Silberman testified Drafton had injuries to her head and neck, and it appeared she had been strangled. The photographs admitted into evidence further show Drafton's injuries on her face and neck. Finally, evidence suggested Thompson gained entry into Drafton's apartment after kicking in the door. Huff testified he heard a commotion coming from Drafton's apartment, and Deputy Silberman recalled it looked like a struggle occurred inside the apartment because Drafton's belongings were thrown around. Moreover, Drafton indicated in the 911 recording Thompson kicked down her door while she was asleep and pointed a gun at her. Therefore, we find no error in the trial court's denial of Thompson's motion for a directed verdict.

IV. New Trial

Last, Thompson asserts the trial court erred in denying his motion for a new trial, when the cumulative effect of the errors was so prejudicial as to deprive him of a fair trial. We find no merit to the argument, as we find no error on the part of the trial court.

"Generally, the grant or refusal of a new trial is within the trial [court]'s discretion and will not be disturbed on appeal without a clear abuse of that discretion." *State v. Garrett*, 350 S.C. 613, 619, 567 S.E.2d 523, 526 (Ct. App. 2002). "Whe[n] there

is competent evidence to sustain a jury's verdict, the trial [court] may not substitute [its] judgment for that of the jury and overturn that verdict." *State v. Miller*, 287 S.C. 280, 283, 337 S.E.2d 883, 885 (1985). "The cumulative error doctrine provides relief to a party when a combination of errors, insignificant by themselves, has the effect of preventing the party from receiving a fair trial, and the cumulative effect of the errors affects the outcome of the trial." *State v. Beekman*, 405 S.C. 225, 237, 746 S.E.2d 483, 490 (Ct. App. 2013), *aff'd*, 415 S.C. 632, 785 S.E.2d 202 (2016). "An appellant must demonstrate more than error in order to qualify for reversal pursuant to the cumulative error doctrine; rather, he must show the errors adversely affected his right to a fair trial to qualify for reversal on this ground." *Id.*

Because we have found no errors in regard to the other issues Thompson raised on appeal and Thompson does not point to any other errors made by the trial court, this issue is without merit. *See State v. Kornahrens*, 290 S.C. 281, 290, 350 S.E.2d 180, 186 (1986) (holding when an appellate court found no errors, appellant's assertion the trial court should have granted a new trial because of the cumulative effect of the asserted trial errors had no merit).

CONCLUSION

We reject Thompson's various challenges to his convictions of first-degree burglary and third-degree assault and battery. We find the trial court properly admitted the trespass notice letter and 911 recording. We further hold the State presented sufficient evidence Thompson broke into Drafton's apartment without her consent and with the intent to injure her to survive his motion for a directed verdict on the first-degree burglary charge. Finally, we find the trial court properly denied Thompson's motion for a new trial. Accordingly, the decision of the trial court is

AFFIRMED.

WILLIAMS and KONDUROS, JJ., concur.

STATE OF SOUTH CAROLINA

In The Court of Appeals

THE STATE,

RESPONDENT,

V.

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. Gullledge, 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 as 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.

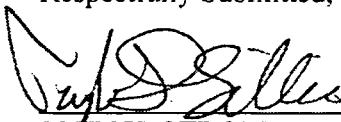
Issue IV

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.

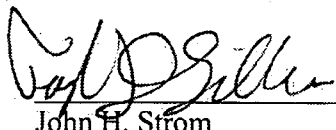
DEMARIO MONTE THOMPSON,

APPELLANT

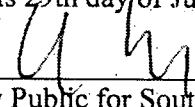
APPELLATE CASE NO. 2015-000126

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

The South Carolina Court of Appeals

The State, Respondent,

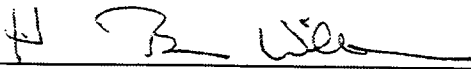
v.

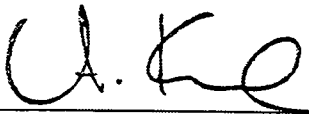
Demario Monte Thompson, Appellant.

Appellate Case No. 2015-000126

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 J.

 J.

 A.J.

Columbia, South Carolina

RECEIVED

AUG 28 2017

APPELLATE DEFENSE

FILED

cc:

Alan McCrory Wilson, Esquire

John Harrison Strom, Esquire

Deborah R.J. Shupe, Esquire

Douglas A. Barfield, Jr., Esquire

August 28, 2017

STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM LANCASTER COUNTY

Brian M. Gibbons, Circuit Court Judge

RECEIVED

OCT 17 2017

S.C. SUPREME COURT

THE STATE,

RESPONDENT,

V.

DEMARIO MONTE THOMPSON,

APPELLANT

APPELLATE CASE NO. 2015-000126

RECORD ON APPEAL

JOHN H. STROM
Appellate Defender

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

Attorney for Appellant

ALAN WILSON
Attorney General

DEBORAH R. J. SHUPE
Senior Assistant Deputy Attorney General
Office of the Attorney General
PO Box 11549
Columbia, SC 29211
(803) 734-3727

DOUGLAS A. BARFIELD, JR.
Solicitor, Sixth Judicial Circuit
Post Office Box 607
Lancaster, SC 29721-0607
(803) 283-3855

Attorneys for Respondent

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THE FOLLOWING ARE ON FILE WITH THIS COURT:

**STATE’S EXHIBIT #1 (PHOTOS)
AUDIO RECORDING OF 911 CALL**

1 STATE OF SOUTH CAROLINA
2 COURT OF GENERAL SESSIONS
3 COUNTY OF LANCASTER
4 2014-GS-29-1321 and 1322
5 State of South Carolina
6 vs.
7 Demario M. Thompson
8
9 Lancaster, South Carolina
10 January 5-6, 2015
11 Before the Honorable Brian Gibbons
12

13 APPEARANCES

14 For the State: Andy Cook

15 For the Defendant: Brandon Steen

16

17 Reported by: Michael C. Watkins

18 Official Court Reporter

19

20

21

22

23

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25

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VOIR DIRE

1 case.

2 MR. COOK: Thank you, Your Honor. Your Honor, this is
3 case number 2014-GS-29-1323, State versus Demario Monte
4 Thompson indicted for pointing and presenting a firearm;
5 2014-GS29-1321, burglary first degree; 2014-GS-29-1322,
6 attempted murder; 2014-GS-29-1324, pointing and presenting
7 a firearm; and 2014-GS-29-1325, possession or display of a
8 firearm or a knife during the commission of a violent
9 crime.

10 THE COURT: All right. Thank you. Ladies and
11 gentlemen, as I told you earlier this is what we call
12 criminal court going on this week also known as general
13 sessions court. As you heard the solicitor state, the
14 State has just called the case. We're about to start the
15 trial of the State of South Carolina versus Demario Monte
16 Thompson who has been charged with burglary in the first
17 degree, attempted murder, pointing and presenting a firearm
18 two counts, and possession of a weapon during the
19 commission of a violent crime. And I'll remind you that
20 about an hour ago the clerk put you under oath to answer
21 any questions truthfully and I will have some more
22 questions for you as we attempt to pull a trial jury, so I
23 remind you you're under oath. At this time I'm going to
24 have the State who is going to be prosecuting and any
25 witnesses that you may have with you now, if you will

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1 THE COURT: You just want to do your pretrial motions
2 then at 1:30 and we'll start at 2:00?

3 MR. STEEN: That works, Your Honor.

4 (Court recessed for lunch.)

5 THE COURT: All right. We are on the record for any
6 pretrial in this matter.

7 MR. COOK: No motions from the State, Your Honor.

8 THE COURT: No motions from the State. Mr. Steen?

9 MR. STEEN: Yes, Your Honor. The first motion I have
10 is -- concerns the written statements in this case. Your
11 Honor, pursuant to South Carolina Section 19-1-90, these
12 statements -- unless the State can show the witnesses
13 received a signed receipt that they received a copy of
14 their statement at the time the statement was made it's
15 inadmissible and cannot be referenced during any trial.

16 THE COURT: Section 19-1-90.

17 MR. STEEN: Yes, sir.

18 THE COURT: All right. So your client gave a written
19 statement?

20 MR. STEEN: No. It concerns the written statements of
21 the other witnesses, Your Honor.

22 THE COURT: Oh, okay. Kind of go into detail for me
23 for me to understand the basis of your motion.

24 MR. STEEN: Well, that's the -- there's three
25 sections. Well, section 8-15-50 says whenever any person

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1 employed by the State shall take a written statement in any
2 investigation of any kind or nature of any person, the
3 person receiving or taking the written statement shall give
4 to the person making the statement a copy thereof and shall
5 obtain from the person making the statement a signed
6 receipt for the copy so delivered. Under section 19-1-80
7 that says no witness in any criminal judicial proceeding
8 shall be examined or cross examined by any examiner,
9 solicitor or lawyer if unless it first be shown that at the
10 time of the making of the statement the witness was given
11 the exact copy of the statement, and that before his
12 examination he referenced the statement. And then section
13 19-1-90, unless provisions of section 8-15-50 and 19-1-80
14 have been complied with no statement such as has been
15 referred in those sections shall be admissible in evidence
16 of any case nor shall reference be made to it in the trial
17 of any case.

18 THE COURT: Okay. All right. Solicitor, what's your
19 response to that?

20 MR. COOK: Well, Your Honor, I think if I've got a
21 written statement that the witness is on the stand and can
22 authenticate and testify that, yeah, that is my statement
23 and if they signed it, that's their signature and they
24 recognize it and they can personally testify that they
25 recall giving that statement, they can testify to the

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1 contents of it or change the testimony. If they can
2 identify it and they claim, yes, that is the statement that
3 I gave then I don't see why --

4 THE COURT: Then if their current testimony doesn't
5 match up to what their statement is that's an issue of
6 credibility for the jury to determine. Is that what you're
7 saying?

8 MR. COOK: I understand if the witness is not here I
9 can't introduce the statement given, but if they are
10 here --

11 THE COURT: You concede that if the witness is not
12 here the statement is not coming in.

13 MR. COOK: Exactly, under hearsay.

14 THE COURT: Is that the point you're trying to make?

15 MR. STEEN: I'm not talking about for evidentiary
16 purposes, by statute that statement can't come in unless
17 the State can show that they received a copy of the
18 statement at the time it was given.

19 THE COURT: Give me the statute again.

20 MR. STEEN: Yes, sir. It was 19-1-90 is the one that
21 references the other two.

22 THE COURT: 19-1-90?

23 MR. STEEN: Yes, sir.

24 THE COURT: All right. 19-1-80 says a witness has to
25 be shown -- well -- at the time of the making of the

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1 statement the witness was given an exact copy of the
2 statement they just made, and before his examination the
3 witness was given a copy of the statement and allowed a
4 reasonable time in which to read it. Okay. Solicitor?
5 What the statute seems to say is that you have to let the
6 witness know that you're going to bring up their statement
7 and give them a reasonable time in which to read the
8 witness statement and if you don't do that then it's not
9 admissible. Is that what you're saying, Mr. Steen?

10 MR. STEEN: Your Honor, I'm saying in regards to
11 statutes at the time of the making of the statement they
12 signed a receipt acknowledging that they received a copy of
13 the statement.

14 THE COURT: I understand. Solicitor?

15 MR. COOK: Well, we would have to ask them if they got
16 one. I can't tell you right now if he got a copy of it or
17 not.

18 THE COURT: Hang on, let me look up the other statute,
19 Title 8-15-150, what does that say?

20 MR. STEEN: It requires they be given a copy and be
21 given a receipt.

22 THE COURT: "No witness in a criminal judicial
23 proceeding shall be examined or cross examined by a lawyer
24 concerning a written statement formerly made and given to
25 any person employed by the State or county unless it first

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1 be shown that at the time of the making of the statement
2 the witness was given an exact copy of the statement, and
3 that before his examination the witness was given a copy of
4 the statement and allowing a reasonable time within which
5 to read it." The way I read that is the State has to
6 proffer that testimony or illicit that testimony from
7 somebody giving the statement. In other words, if the
8 witness gets up here and denies making the statement then
9 he can't -- following the way this reads, that's it. But
10 if they admit making the statement they're allowed leeway
11 to say, "Well, did you get a copy of the statement? Yes."
12 Then they've complied with the first section of that
13 before. "And have you had a reasonable time to look over
14 the statement? Yes." So I don't know what you're looking
15 for.

16 MR. STEEN: The section --

17 THE COURT: I've never had this come up before to be
18 quite honest. This is the first time I have ever seen this
19 statute.

20 MR. STEEN: I mean, you can't get any person in any
21 nature in any proceedings, and it says unless both of those
22 sections are complied with you can't make reference to the
23 statement.

24 THE COURT: I understand that. Have you ever had this
25 come up before?

PRETRIAL MOTIONS

1 MR. STEEN: No, sir.

2 THE COURT: Have you ever had this come up before?

3 MR. COOK: No, sir.

4 THE COURT: Maybe we're going to make some law.

5 MR. NEWMAN: Your Honor, I'm not sure if it requires
6 the witness to get an actual copy to take home. I think it
7 means they look at the copy that law enforcement wrote and
8 they read over it and make sure it's correct.

9 THE COURT: Well, that's the way I'm reading it,
10 Solicitor. This is a 1952 law which was codified in 1962
11 and then recodified -- it looks like the last time it was
12 recodified was 1977. Do you have any case law under it,
13 Mr. Steen?

14 MR. STEEN: I checked Your Honor. But it says they
15 shall do a signed receipt --

16 THE COURT: I know exactly what it says.

17 MR. STEEN: -- and if they don't or they didn't as the
18 solicitor said and they had gotten a copy back then they
19 should get a receipt saying they didn't give it to them
20 though.

21 THE COURT: Here is what my ruling is going to be and
22 then, of course, you can renew your objection at the time
23 they do what they're going to do to make a good record for
24 you. I'm going to allow the State to present whatever
25 witnesses they're going to present, and if there's a

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1 statement they can introduce the statement per the South
2 Carolina Rules of Evidence which were enacted after these
3 statutes were enacted. Okay. And provided that they meet
4 the criteria established under the South Carolina Rules of
5 Evidence then I will allow the statements in. I believe in
6 this situation the South Carolina Rules of Evidence to the
7 extent there is a difference between these 1977 statutes
8 with no case law on them, to the extent they conflict the
9 rules of evidence would control. So I'll deal with that as
10 it comes up, but preliminarily I'm going to allow it in
11 the way I previously allowed statements in in cases -- in
12 any kind of criminal case. This is a matter of first
13 impression to me, y'all just indicated it was a matter of
14 first impression to y'all as well, we'll see where it goes.
15 But certainly just like you would be entitled to call a
16 witness and say, "Is this your statement? Take a moment to
17 review it. Have you had a chance to review it? Yes."
18 Then you can go ahead and proceed and question the witness
19 on that. And, of course, it would be the jury's
20 determination to the extent there's a difference in what
21 the statement says and what the witness says on the witness
22 stand, that's a credibility determination for the jury to
23 make. So, you know, I'm denying your motion at this point
24 in time and I'm going to allow the State to call whoever
25 they're going to call as far as -- and introducing any

PRETRIAL MOTIONS

1 formal written statements providing the State comply with
2 the South Carolina Rules of Evidence. You're protected on
3 the record and, of course, you can renew your motion at
4 that time without having to go into detail. All right.
5 What else?

6 MR. STEEN: Your Honor, my second motion involves one
7 of the State's witnesses, Ms. Janice Sager. I would ask
8 this Court to exclude her testimony. She has under Rule
9 602 no personal knowledge of this incident. She's the
10 apartment complex manager and the document I'm assuming the
11 State intends to introduce is a letter that was sent from
12 Ms. Sager to Ms. Drafton four months ago telling Ms.
13 Drafton that Mr. Thompson couldn't come back over there.
14 To me it means she has nothing relevant to this case at
15 all, doesn't know anything about this case.

16 THE COURT: All right. Solicitor?

17 MR. COOK: Your Honor, Ms. Sager, Janice Sager, is the
18 property manager at the [REDACTED] Apartments which is where
19 the incident occurred. The State's intention from Ms.
20 Sager as Mr. Steen says is to testify that Mr. Thompson is
21 not a resident there, which would establish the fact that
22 he did not inherently have consent to go into the apartment
23 where the incident occurred and to establish that that's
24 not his home. So one of the elements of burglary is that
25 you enter a dwelling without consent. If that is your home

PRETRIAL MOTIONS

1 you inherently have consent to go. Ms. Sager, who is the
2 property manager, can testify that is not his home.

3 THE COURT: And that's the purpose of having her as a
4 witness?

5 MR. COOK: Yes, sir, Your Honor.

6 THE COURT: All right. Go ahead.

7 MR. STEEN: That's speculation that she can testify
8 that's not his home. The statute says the person in lawful
9 possession, which is Keasia Drafton, she is the one that
10 has to not give consent. That letter was never sent to Mr.
11 Thompson saying you can't come, it was sent to Ms. Drafton
12 as the lawful occupant of that apartment saying he can't
13 come four months ago.

14 THE COURT: I think that goes more to the credibility
15 of her testimony rather than its admissibility. I believe
16 her testimony, as the solicitor indicates, is admissible.
17 Certainly you can cross examine Ms. Sager and, you know,
18 about him never being sent that letter, you don't know
19 whether he had any idea he was authorized to be there or
20 not, do you? And you can plant that seed of doubt with the
21 jury. So I will deny your motion to exclude her
22 testimony -- finding that that's a credibility issue for
23 the jury to determine.

24 MR. STEEN: Well, Your Honor, I have another one
25 concerning that same --

PRETRIAL MOTIONS

1 THE COURT: Yes, sir. Go ahead.

2 MR. STEEN: Under Rule 404B she's going to get into
3 why he was not allowed, that's clearly inadmissible under
4 character evidence for other wrongs.

5 THE COURT: Okay. Under Rule 602 I deny your motion.
6 Let's talk about Rule 404B now. What's she going to say as
7 to why he's not allowed?

8 MR. COOK: She doesn't have to say why he's not
9 allowed. She's the property manager, she can say who can
10 come there and who can't. She can simply say -- the
11 document in question is a letter from Janice Sager to the
12 attempted murder victim, Keasia Drafton, it says Mr.
13 Demario Thompson is not supposed to be on this property and
14 you acknowledge the fact that he if found in your presence
15 on your property, that you yourself, Ms. Drafton, will be
16 evicted. She signed that in Ms. Sager's presence. Ms.
17 Sager can testify that Keasia Drafton, who is the victim
18 here who may testify, may not, the State is under the
19 impression if she does testify she will say he has consent
20 to be in there, whereas prior she acknowledged the fact
21 that he does not live there. We're anticipating that she
22 will say he lived there where she acknowledged to Ms. Sager
23 I know this is not his apartment. He may stay there but he
24 does not live there.

25 THE COURT: And that goes to her credibility.

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1 MR. COOK: Exactly. But Ms. Sager doesn't have to
2 say, well, he did this, this and this, she can just simply
3 say he's not allowed there and you acknowledge that fact.

4 THE COURT: All right. So the State is not going into
5 anything as to why that letter was generated?

6 MR. COOK: No, Your Honor.

7 THE COURT: Okay. Well, Mr. Steen? If the State was
8 going into why that letter was generated I agree with you
9 100 percent, it can't come in. But I don't see -- convince
10 me otherwise why under 404B that testimony shouldn't come
11 in.

12 MR. STEEN: Because under Rule 404B if there's not a
13 conviction they have to show that clearly and convincing he
14 did something. The State is introducing evidence actually
15 that he has a notice of trespass -- there is no notice of
16 trespass, it's a letter of intent from the apartment
17 manager. It has nothing to do with my client and the State
18 is going to use that that he had a notice of trespass.
19 That is going to inherently create something in the jury's
20 mind that you only get notice of trespasses for one reason,
21 because you did something wrong and they haven't proven
22 anything that he did something wrong to have that notice of
23 trespass.

24 THE COURT: But the notice wasn't directed to your
25 client, it was directed to the occupant of the rental

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1 property.

2 MR. STEEN: Yes, sir. It's being used against my
3 client, though.

4 THE COURT: All right. Go ahead.

5 MR. COOK: Your Honor, it's being used against Mr.
6 Thompson because he's the subject of this letter. I'm not
7 presenting it as a trespass notice that Mr. Thompson should
8 have known he was on notice not to trespass, but Keasia
9 Drafton who is the victim who more than likely if she
10 testifies is going to say it was all right if he was in
11 there. This is to go against her credibility that she
12 knows he does not live there and she acknowledged the fact
13 that he was not supposed to be there. This is not going
14 against Mr. Thompson, this is more so aimed towards Ms.
15 Drafton. He doesn't have to be convicted or anything to be
16 put on trespass notice of an apartment complex. It's a
17 privately owned complex. They can tell me I can't come in
18 there, I haven't done anything in [REDACTED] Apartments but
19 they send a letter saying I'm not supposed to be in there.
20 They can decide who comes and goes from there.

21 THE COURT: Last word, Mr. Steen.

22 MR. STEEN: Yes, sir. Well, solicitor says that this
23 isn't a notice of trespass, this is something between two
24 of his witnesses that's being against my client. How can
25 she use something -- he says she said she acknowledged

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1 this. I don't understand how that has anything to do with
2 the relevancy, how that is relevant to this case with my
3 client that the tenant, the lawful occupant of this
4 apartment, has an agreement with her landlord.

5 THE COURT: All right. Here is what 404B says.
6 "Evidence of other crimes, wrongs or acts is not admissible
7 to prove the character of a person in order to show action
8 in conformity therewith. It may, however, be admissible to
9 show motive, identity, the existence of a common scheme or
10 plan, the absence of a mistake or action or intent." Well,
11 the State is not offering that evidence to show motive,
12 identity, existence of a common scheme or plan, the absence
13 of a mistake or action or intent. And I don't think the
14 State is trying to show through this evidence any character
15 trait of your client under a 404B analysis. I think
16 they're offering it for the exact purpose for which it's
17 being offered, to prove a certain element of the crime that
18 he didn't have consent -- he could not have consent to be
19 there because the person who owns the property regardless
20 of the tenant -- what the tenant says, he was not supposed
21 to be there. So under 404B analysis I'm going to
22 respectfully deny your motion on that as well, motion to
23 exclude.

24 MR. STEEN: Thank you, Your Honor. Just one more.

25 THE COURT: Yes, sir.

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1 MR. STEEN: 403.

2 THE COURT: This is a 403 argument?

3 MR. STEEN: Yes, sir. It's going to mislead the jury
4 to think this has anything to do with these set of charges.
5 It confuses the issues, saying that happened four months
6 ago when we don't know what has happened since then, and it
7 is unfairly prejudicial since there is no probative value
8 period one way or the other.

9 THE COURT: And here is what 403 says. "Although
10 relevant evidence may be excluded if its probative value is
11 substantially outweighed by the danger of unfair prejudice,
12 confusion of the issues or misleading the jury." Okay.
13 Solicitor, tell me how you're not violating Rule 403.

14 MR. COOK: Well, Your Honor, the key word is
15 substantially prejudicial. It's not -- there's not a
16 single word in this document that says that Demario
17 Thompson has done anything wrong at [REDACTED] Apartments.
18 It says that she acknowledges that Janice Sager that Ms.
19 Drafton acknowledges that he is not supposed to be there.

20 THE COURT: How does it not mislead the jury, though?

21 MR. COOK: Because it is simply saying that he does
22 not live there, it is saying that he is not a resident
23 there. That is the only thing that it's being offered for
24 is saying he was not a resident and it was not his
25 apartment.

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1 THE COURT: It name-drops the Lancaster County
2 Sheriff's Department. How is that not showing that there
3 is some prejudicial value in that when the document clearly
4 says -- will your client concede that he didn't have a
5 right to be on the property, stipulate to that?

6 MR. STEEN: No, sir.

7 THE COURT: Well, I mean, I don't know of any other
8 way around it. I'm going to respectfully deny your motion.
9 I don't find any unfair prejudice here doing the -- and I
10 find that the probative value does outweigh any prejudicial
11 value. All right. What else? Y'all mentioned a 911
12 issue. Tell me about that preliminarily so I can have my
13 clerk be researching that when it comes up.

14 MR. COOK: Well, Your Honor, there is a 911 call from
15 the victim in this case. She is not here, she has been
16 subpoenaed to be here. I talked to her about an hour ago
17 and she said, "I'm not coming," and then I said, "You need
18 to be here at 1:30, and she said, "All right, I'll be
19 there." She's not here. The State intends to offer her
20 911 call --

21 THE COURT: Have y'all sent law enforcement out for
22 her? Y'all can get the deputy sheriff to go get her if
23 she's ordered to be here in court. I'll leave that up to
24 you, it's your witnesses.

25 MR. COOK: If she's not picked up the State intends to

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1 offer her 911. Obvious issues with offering her 911 call
2 in her absence is confrontation clause issues and hearsay
3 issues. Confrontation clause is not going to apply because
4 it's non-testimonial. The supreme court has ruled that
5 information given to a 911 dispatcher is non-testimonial in
6 nature, therefore it doesn't violate the confrontation
7 clause because the information is given to a dispatcher or
8 emergency personnel to figure out to assess an emergency
9 situation, what they need to do.

10 THE COURT: All right. The hearsay rule then would
11 be?

12 MR. COOK: The hearsay because she's not here would be
13 we would enter it in as a business record exception through
14 Lancaster County 911.

15 THE COURT: What about excited utterance?

16 MR. COOK: Or excited utterance is the second
17 argument. It happened -- the call was immediately after
18 the fact and we submit that it can be excited utterance if
19 not allowed through the business record exception through
20 911.

21 THE COURT: And, of course, Mr. Steen, I'm not looking
22 for all kinds of arguments right now, I just wanted to know
23 what the issues are going to be and I appreciate y'all
24 Mentioning that to me so I can be preparing what to do and
25 hear y'all argue at the appropriate time, and of course, we

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1 will do that outside the presence of the jury. But what's
2 your opinion on that?

3 MR. STEEN: I concede to a point that confrontation
4 clause would apply to consent under a 911 call, but I think
5 the solicitor is mistaken by saying that excludes it
6 altogether. The South Carolina case law states through a
7 limited procedure they should redact portions of any
8 statement that would become testimonial as they do for
9 exactly with unduly prejudicial portions. That was a 911
10 case, Your Honor, where they said at the point where the
11 emergency safety reasons the non-testimonial reasons
12 stopped, the conversation becomes testimonial.

13 THE COURT: So I may have to listen to the statement
14 and determine what comes in and what doesn't come in.

15 MR. STEEN: Yes, sir. And I'm --

16 THE COURT: Talk to me about the hearsay. Do you
17 contest that it would be an exception to hearsay?

18 MR. STEEN: I believe the State has got the burden to
19 prove that it wasn't an excited utterance and without her
20 testimony I believe that's going to be a little difficult.

21 THE COURT: Do we have the 911 statement in written
22 form?

23 MR. COOK: We do not.

24 THE COURT: How long is the 911 statement?

25 MR. COOK: There's actually seven calls, the one -- we

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1 plan on introducing three or four. The longest one I think
2 is two and a half minutes.

3 THE COURT: All right.

4 MR. COOK: And I've got them readily available right
5 now.

6 THE COURT: Well, I don't want to delay the jury
7 coming in. Why don't we -- when we take the first break,
8 Mr. Steen, you've heard them obviously through discovery, I
9 will be glad to listen to them preliminarily back in
10 chambers and then I can make a determination on the record
11 as we approach that point. When do you think we would be
12 approaching that point, Solicitor, in your presentation,
13 today or tomorrow?

14 MR. COOK: Hopefully today.

15 THE COURT: Okay. Well, why don't we -- we'll get the
16 jury in here and we'll roll until about 3:00 or 3:15, and
17 then at that time -- do you anticipate it coming in with
18 your first one or two witnesses if it comes in?

19 MR. COOK: Well, it wouldn't need to come in until --
20 none of the witnesses that actually showed up --

21 THE COURT: I guess what I'm asking is could you wait
22 until about 3:30 or so on that?

23 MR. COOK: Yes, sir.

24 THE COURT: I don't want to mess up how you're going
25 to present your case. All right. Anything else, Mr.

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1 Steen?

2 MR. STEEN: It can wait until -- is Janice Sager
3 testifying today?

4 MR. COOK: She's not here yet.

5 MR. STEEN: If she's testifying to that document, the
6 State said that it was an acknowledgment by Ms. Drafton,
7 clearly a statement made by the declarant that's not
8 testifying here today is hearsay, Your Honor.

9 THE COURT: All right. I'll listen to all of those
10 arguments then at the appropriate time, we need to go ahead
11 and get the trial started. It's going to take me 15
12 minutes to do my initial instructions to the jury, and
13 then, of course, we have opening statements so we'll
14 probably be closer to 2:30 actually starting the testimony.

15 MR. STEEN: Motion in limine for stuff that has not
16 been ruled upon by the Court?

17 THE COURT: That would probably be a good idea.
18 Solicitor, do you have any problem with that?

19 MR. COOK: No, sir, Your Honor.

20 THE COURT: I haven't ruled yet on the 911 stuff so
21 just stay away from that in your opening. Okay.

22 MR. COOK: All right.

23 THE COURT: All right.

24 (The jury returned to the courtroom.)

25 THE COURT: While you're standing, Mr. Clerk, if you

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1 would swear in the trial jury for me.

2 (The jury was sworn at this time.)

3 THE COURT: All right. Thank you very much, ladies
4 and gentlemen. Before we begin the trial today I want to
5 tell you that this trial is probably going to be different
6 from what you might expect. First of all, can y'all hear
7 me okay? I'm going to try not to have my voice crack.
8 Okay. We'll see how it goes, I won't talk too fast for
9 you. Many people don't have the chance to attend actual
10 court sessions as you're doing now and they tend to think
11 that what they read in books and see on TV and in movies is
12 what trials really are. You know, they tend to think that
13 trials are always full of high drama, intense action and
14 riveting circumstances. Now, while all of these things may
15 be true at times, this trial is not for entertainment,
16 ladies and gentlemen, it is a fundamental part of our
17 democracy to make sure that justice is done between the
18 parties before the Court. Searching for the truth and
19 making sure that justice is done can often times be a slow,
20 deliberate and repetitive process, the opposite of what you
21 may have seen in movies and on TV and read in books. This
22 courtroom is a place of honor dedicated to the protection
23 and preservation of citizens' rights through what many have
24 called the greatest justice system ever created. Now, the
25 attorneys who are appearing in front of you are advocates

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1 for the parties they represent, but first and foremost they
2 are officers of this court sworn to uphold the integrity
3 and fairness of our judicial system, and to help you as
4 jurors in the search for the truth. You should expect them
5 to be professional, competent and ethical in the
6 representation of their client's interest. Remember,
7 ladies and gentlemen, you've just taken an oath to do the
8 same thing and to reach a fair and just verdict, so you
9 also are expected to be professional, reasonable and
10 ethical. Thank you for accepting this important
11 responsibility. Now, let me explain to you briefly how a
12 trial proceeds. And from time to time you'll see me
13 referring to my notes and I'm going to do that because
14 everything I tell you is very important and I want to make
15 sure I get it exactly right so I'll try to sit here and
16 read things to you, I'll look up from time to time. But
17 the first thing that's going to happen in the trial is that
18 the State will make an opening statement to you, and an
19 opening statement is not evidence. It's simply an outline
20 of what the State believes they're going to be able to
21 prove to you as this trial goes forward. The defendant may
22 if he wishes present an opening statement but he doesn't
23 have to, and I'll explain that later on as the trial
24 proceeds. Now, following opening statements you will then
25 hear testimony and you'll receive evidence in the case.

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1 Evidence consists of testimony from State's witnesses who
2 will sit right there in front of you and testify. Also
3 physical exhibits may actually come into evidence.
4 Following the completion of testimony, the attorneys again
5 will have an opportunity to make what is called a closing
6 argument or closing statement to you. That's their
7 opportunity to summarize the case from their respective
8 points of view, and again, try to persuade you to go along
9 with their side. Again, these arguments are not evidence.
10 Following the closing statements of the attorneys, that's
11 when I as the judge of the law, you are the judge of the
12 facts I will explain that here momentarily -- that's when I
13 will instruct you on the law of South Carolina as it
14 pertains to issues which have arisen in this case. After
15 you receive my instructions, that's when you'll be able to
16 go back to your jury room to begin deliberations in order
17 to reach a verdict. Now, as you know as I have explained
18 to you this morning, this is a criminal case that's been
19 brought by the State of South Carolina. The State is
20 represented by a person called a solicitor, that's what we
21 call them in South Carolina, they're called district
22 attorneys in other jurisdictions. But the State has
23 charged the defendant, Mr. Demario Monte Thompson, with
24 burglary in the first degree, attempted murder, pointing or
25 presenting a firearm two counts, and possession or display

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1 of a firearm during the commission of a violent crime.
2 Now, the charges against the defendant are contained in
3 these indictments. Now, these indictments, ladies and
4 gentlemen, are not evidence of anything, these are simply
5 the descriptions of the charges which have been made by the
6 State against the defendant. Now, the defendant has pled
7 not guilty to these charges and is presumed innocent unless
8 and until proven guilty beyond a reasonable doubt. Now, a
9 reasonable doubt, which I will explain to you more in
10 detail at the closing of the trial, let me give you an idea
11 here first, though. A reasonable doubt is the kind of
12 doubt that would cause a reasonable person to hesitate to
13 act. A defendant has the right to not testify and never
14 has to prove innocence or prove anything, or even present
15 any evidence. The burden of proof is always upon the State
16 of South Carolina. Now, it's going to be your duty as
17 jurors to decide from the evidence what the facts are, you
18 and you alone are the judges of the facts. You will hear
19 the evidence, decide what those facts are and then apply
20 those facts to the law which I will give you for you to
21 reach your verdict. In doing so you must follow the law
22 that I give you whether you agree with the law or not. You
23 shouldn't take anything I say or do during the trial as
24 indicating what I think the evidence shows or what your
25 verdict should be. Just like rules which govern sports and

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1 other activities, there are certain rules of evidence in
2 court which controls what can come in and what can't come
3 into evidence. And when a lawyer asks a question or offers
4 an exhibit into evidence and the lawyer on the other side
5 thinks that it violates the rules, that lawyer may object.
6 If I overrule the objection the question can be answered or
7 the exhibit can come into evidence, if I sustain the
8 objection, well, the question cannot be answered or the
9 exhibit cannot be received. Now, whenever I sustain an
10 objection to a question or deny a motion to admit something
11 into evidence you must ignore that question or the
12 existence of the exhibit, and you must not speculate or
13 guess what the answer would have been or what the exhibit
14 would have shown. Sometimes it may be necessary for me to
15 request that you leave the courtroom and go back to your
16 jury room while I discuss certain legal issues with the
17 lawyers. If this occurs you don't need to speculate about
18 what we're talking about. Remember, I'm the judge of the
19 law, y'all are the judge of the facts. Y'all will hear all
20 of the facts, I have to decide what the legal issues are.
21 So that's the method used by all courts and all lawyers to
22 determine what's going to come into evidence, because you,
23 the jury, need to hear the best evidence available. Okay.
24 This is simply a procedure that the law requires when
25 certain legal issues arise. Sometimes rather than have

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1 y'all get up and down and go back to your jury room and
2 such, I will have the lawyers approach the bench so that I
3 can discuss a legal issue with them in private. I will do
4 this as often as possible to keep y'all from having to go
5 back and forth, but again, don't speculate about what we're
6 talking about or why you can't hear, we're not trying to
7 keep anything from you. It's simply a procedure that all
8 lawyers and all courts use to make sure that you hear the
9 best evidence available. Now, in deciding the facts of
10 this case, ladies and gentlemen, you may have to decide
11 which witnesses to believe and which witnesses to not
12 believe. You can believe everything a witness says, only
13 some of it or part of it or none of it, that's solely for
14 you to determine. Now, during the trial you will not be
15 allowed to take notes concerning the testimony of the
16 witnesses. Okay. For this reason I urge that you pay
17 close attention to what the witnesses testify to so that
18 you will be able to accurately discuss them during your
19 deliberations. Also, you will notice right in front of me
20 my court reporter, Mr. Mike Watkins. At the end of the
21 trial you will have to make your decision based upon the
22 evidence presented. You're not going to have a written
23 transcript of the trial to consult back there in the jury
24 room, and it's very time consuming and for my court
25 reporter to bring back testimony and try to play it back,

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1 so please pay close attention to the evidence and the
2 testimony that comes in. Now, until I advise you to begin
3 your deliberations -- and this is important, ladies and
4 gentlemen -- you must not discuss this case with anyone,
5 including yourselves, because you have to wait until you
6 hear everything and until I give you the law before you can
7 accurately discuss the evidence. This includes friends,
8 family members and anyone else involved in the case. When
9 you leave the courthouse today don't go Google and go into
10 your search engine at your house on the internet and look
11 up information about these alleged crimes or look up
12 information about the defendant or me or anyone else
13 involved in this case, or the lawyers, you will be
14 violating your oath as a juror. Because remember, your
15 verdict must be based only on the evidence and testimony
16 received in this courtroom from that witness stand. And if
17 anybody does try to approach you and talk to you about
18 serving as a juror in this case, let me know who that is
19 and I'll take care of that. Okay. And that's very
20 serious. So please don't discuss this case outside of your
21 jury room, and only after you receive instructions from me
22 to do so. It's important, ladies and gentlemen, that you
23 keep an open mind and not decide any issue in this case
24 until all of the evidence has been presented, the parties
25 have made their closing arguments and I have instructed you

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1 on the law of the case. It is your solemn responsibility,
2 ladies and gentlemen, to determine the guilt or innocence
3 of the defendant, and your verdict, -- and it has to be a
4 unanimous verdict -- must be based solely on the evidence
5 as it is presented to you in this trial and on the law as I
6 instruct you at the end. So at this time thank you for
7 accepting this important responsibility. We will proceed
8 with opening statements. Solicitor?

9 MR. COOK: Thank you, Your Honor. May it please the
10 Court?

11 THE COURT: Yes, sir.

12 MR. COOK: Mr. Steen? July 2nd of 2014 Demario
13 Thompson went to [REDACTED] Apartments in Lancaster
14 County, kicked in the door, went inside and assaulted his
15 girlfriend, Keasia Drafton. When he came out neighbors
16 were outside, Mr. Dominique Huff had come out trying to
17 figure out what was going. Mr. Thompson points a gun at
18 him, takes off downstairs fleeing the scene. Ms. Sandra
19 Nelson comes out of her apartment after she hears a ruckus
20 and he points the gun at her. He is charged with five
21 things. He is charged with attempted murder, burglary in
22 the first degree, pointing and presenting a firearm two
23 counts, and possession of a firearm during the commission
24 of a violent crime. Attempted murder. Now, my job is to
25 pretty much walk you through this and present the facts to

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1 you as the State sees them. Your sole job is to decide
2 what happened that night, and I'm going to make it as easy
3 as possible for you to -- the judge is going to tell you
4 what the law is but I'm going to show it to you because you
5 don't really know what to look for unless you know what the
6 elements of each crime is. Attempted murder is pretty self
7 explanatory. It's a person with the intent to kill
8 attempts to kill another person with malice aforethought
9 either expressed or implied commits the offense of
10 attempted murder. Essentially you try to kill somebody and
11 you don't. If you kill them it is murder, if you try to
12 kill them and you don't kill them it's attempted murder.
13 Malice aforethought means he had ill-will towards her.
14 That was his intention when he went to that apartment that
15 he was going to kill her, and that's what we're going to
16 prove to you. And the next one is burglary first degree.
17 This one is -- most people think of burglary as somebody in
18 a black mask crawls through your window and steals your TV,
19 that is a burglary. But burglary is a lot broader than
20 just somebody coming in your house and taking your stuff.
21 Now, Mr. Thompson is charged with burglary in the first
22 degree for a few different reasons. When he came to the
23 house it was dark outside, it was nighttime. I'm going to
24 show you all of the different ways of what burglary is.
25 Burglary in the first degree is when a person enters a

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1 dwelling without consent with the intent to commit a crime
2 therein. There's a lot of different things in that that
3 you wouldn't notice. First of all, dwelling. What is a
4 dwelling? It has to be a house. It has to be an apartment
5 or condo, anywhere somebody lives. It can't be a shed, it
6 can't be an outhouse or a pool house, it has to be a
7 dwelling where somebody lives. Now, this apartment is
8 where Ms. Drafton lived, this is a dwelling. Without
9 consent means he doesn't have permission to be there,
10 that's what consent is. It was like in any other situation
11 consent means you are allowed to be there. And we believe
12 Ms. Drafton did not tell him that he could come in that
13 house. With the intent to commit a crime in a dwelling.
14 He has to in his mind formulate that he is going to commit
15 a crime when he goes inside. Now, what does that mean? If
16 somebody comes in your house with a plan to go to sleep,
17 that's not a burglary because they don't want to do a crime
18 when they get in. What Mr. Thompson did is before he went
19 in that house he was going after Keasia, he knew before he
20 came in the door that when I get in there, "I'm going after
21 her." So he formulated this before he went in the house.
22 So you have to have all of that and either one of these
23 other circumstances. When affecting the entry of the house
24 or immediate flight somebody other than a participant in
25 the crime is armed with a deadly weapon. He came in with a

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1 deadly weapon, we say he had a gun. He came in the house
2 with the intent to commit a crime with a gun on him, that's
3 the one way he satisfies the burglary first degree. Or, he
4 causes physical injury. He injured Keasia Drafton. Keep
5 in mind this is saying or every time, I don't have to prove
6 every one of these, just one of them. Or uses or threatens
7 the use of a dangerous instrument. A gun is a dangerous
8 instrument. Or displays what appears to be a knife,
9 pistol, revolver, shotgun or firearm. I tell you he had a
10 gun, it's or, or, or and he satisfies all of them. This
11 one doesn't apply but I put it in there so it doesn't look
12 like I was hiding anything. If somebody has got two or
13 more previous burglaries and they do another of them, it
14 bumps up to first degree. All of these are aggravating
15 circumstances that would raise something to a higher
16 degree. This one does not apply but I definitely keep it
17 out so y'all wouldn't wonder why I skipped from A to C.
18 The last one, it happens at nighttime. This was between
19 four and five in the morning in July, it's dark outside,
20 Deputy Silberman will tell you that. Pointing and
21 presenting a firearm, there's two counts of this. One of
22 them, he pointed a gun at Dominique Huff, the second one he
23 pointed a gun at Sandra Nelson. The key here is that it is
24 unlawful to point or present a gun if it's loaded or
25 unloaded, I don't have to show that there's a single bullet

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1 in the chamber. If you point a gun at somebody it is
2 illegal unless you're in a play or some type of theatrical
3 and y'all are pretending to shoot each other, but if you're
4 out in public and you pull a gun on somebody it doesn't
5 matter if it is loaded or not you're guilty of pointing and
6 presenting a firearm. So I'll come back, I will call
7 witnesses and you will hear from the officers, you will
8 hear from who was there. Just listen to the witnesses and
9 use your common sense. It's not rocket science. They're
10 going to tell you what happened, what they saw and listen
11 to them, listen to what their motives are behind their
12 testimony, what their credibility, their biases. And at
13 the end of the day I'm going to get back up here and I'm
14 going to ask you to find Mr. Thompson guilty of all of
15 these charges. Thank you.

16 THE COURT: All right. Thank you, Solicitor. Mr.
17 Steen?

18 MR. STEEN: Thank you, Judge. May it please the
19 Court? Like I told y'all earlier, I'm here today to
20 represent Mr. Thompson. The solicitor told you what he
21 will try to show you today. I'm going to try to show you
22 this is the set of facts, this is the set of facts that
23 the evidence is going to show. Ms. Drafton and Mr.
24 Thompson are a couple that got into a lovers quarrel, law
25 enforcement was called, Ms. Drafton nor the lead

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1 investigator on the case believed not even a bandaid was
2 necessary in this case. Law enforcement left, Ms. Drafton
3 went back to sleep. That was the entire incident we are
4 here for today. It lasted from the time law enforcement
5 came and left about an hour, and now we're here because the
6 State has charged Mr. Thompson with burglary first,
7 attempted murder, two counts of pointing and presenting and
8 possession of a weapon. Mr. Thompson did not burglarize
9 his girlfriend's home. He didn't go over there with the
10 intent to murder his girlfriend, he did not break in for
11 that purpose to murder his girlfriend. They are boyfriend
12 and girlfriend, they still are. That's all I'm going to
13 say. I ask that y'all find him not guilty and I think
14 y'all will see that after all of the evidence. Thank you.

15 THE COURT: All right. Thank you, Mr. Steen. State
16 ready to proceed with its first witness?

17 MR. COOK: State calls Reuben Silberman.

18 The witness, REUBEN SILBERMAN, was first duly sworn
19 and testified as follows, on:

20 DIRECT EXAMINATION

21 BY MR. COOK:

22 Q Would you please state your name for the record?

23 A Deputy Reuben Silberman.

24 Q Who is your employer, Mr. Silberman?

25 A The Lancaster County Sheriff's Office.

REUBEN SILBERMAN

1 Q How long have you been with the sheriff's office?

2 A Approximately nine months.

3 Q What's your current rank with the sheriff's office?

4 A It's deputy.

5 Q As a deputy what are your general duties?

6 A To respond to emergency calls that require law
7 enforcement and patrol.

8 Q Can you speak up a little bit?

9 A To respond to emergency situations that require law
10 enforcement and patrol duties.

11 THE COURT: Let me interrupt you. Can y'all hear
12 okay? Back there in the corner, can you hear him okay?
13 All right.

14 Q Did you respond to [REDACTED] Apartments on July
15 2nd, 2014?

16 A Yes, sir.

17 Q What time did you go out there?

18 A It was between 4:00 and 5:00 a.m.

19 Q Why did you go out there?

20 A Dispatch advised me that there was a possible
21 disturbance.

22 Q When you got out there, who did you talk to when you
23 got there?

24 A Ms. Keasia Drafton, or Drayton.

25 Q Is Ms. Drafton the alleged victim in this case?

REUBEN SILBERMAN

- 1 A Yes, sir.
- 2 Q How did she appear to you when you got there?
- 3 A She was very upset. She appeared to have a wound on
- 4 her head, wound on her neck, her clothes were torn and she
- 5 responded to the door in her underwear and a tank top.
- 6 Q Was it -- well, was she in her pajamas or was she
- 7 actually in her underwear?
- 8 A It was underwear.
- 9 Q So when you got to the apartment she's in -- what did
- 10 the apartment itself look like?
- 11 A When I first arrived I noticed the door appeared to
- 12 have been kicked in. The deadbolt was still engaged and
- 13 the door was hanging slightly off its hinges, and it
- 14 looked as though in her living room there was some sort of
- 15 disturbance and sort of a physical altercation that may
- 16 have occurred.
- 17 Q Was anything out of place?
- 18 A Just --
- 19 Q Have you ever been in that apartment before?
- 20 A No, sir.
- 21 Q Did it look like it was in order in the apartment?
- 22 A It looked as though some things were thrown around
- 23 the apartment, the door.
- 24 Q Did you take any pictures of Ms. Drafton that night?
- 25 A Yes, sir.

REUBEN SILBERMAN

1 Q Did you take pictures of the apartment itself?

2 A I took pictures of the door, of Ms. Drayton (sic) and
3 her injuries, and I think I did take a picture of the
4 apartment.

5 Q Do you recognize this?

6 A Yes, sir. That's from inside her apartment looking
7 outwards.

8 Q Can you tell me what this picture shows?

9 A The door that's hanging slightly off the hinges, it
10 looks like there's some personal household items that were
11 possibly strawn about.

12 Q Is this how the apartment looked when you were there
13 that night?

14 A Yes, sir.

15 Q You personally took this picture?

16 A Yes, sir.

17 MR. COOK: State moves to introduce into evidence item
18 number one.

19 MR. STEEN: Without objection, Your Honor.

20 THE COURT: All right. Without objection introduced
21 as State's Number 1.

22 (The photos were received as State's 1.)

23 MR. COOK: May we approach, Your Honor?

24 THE COURT: Yes, sir.

25 (A bench conference was held.)

REUBEN SILBERMAN

1 THE COURT: So, Solicitor, what were you wanting to do
2 then?

3 MR. COOK: Your Honor, I have all of these pictures
4 loaded in the computer and it would be easier to show Mr.
5 Silberman along with the jury at the same time instead of
6 handing him one picture at a time, it would be a lot easier
7 and expedite the process.

8 THE COURT: Any objection to that?

9 MR. STEEN: Without objection.

10 THE COURT: Any objection to all of the photographs
11 coming into evidence as State's 1? Well, why don't we just
12 say State's 1 collectively is the compilation of
13 photographs.

14 MR. COOK: Thank you, Your Honor.

15 THE COURT: All right. Thank you.

16 Q Deputy Silberman, do you recognize what this is?

17 A Yes, sir. That's the apartment building [REDACTED] where
18 Keasia lives.

19 Q All right. Do you recognize what this is?

20 A Yes, sir. That's the atrium that has four
21 apartments, the top right one being apartment D where
22 Keasia lived.

23 Q On that screen in front of you you can mark with your
24 finger, can you put an X over the door where Ms. Drafton
25 lives?

REUBEN SILBERMAN

- 1 A (Witness complies.)
- 2 Q Okay. Is this where you went July 2nd?
- 3 A Yes, sir.
- 4 Q The door under that X, is that the door that you took
5 pictures of?
- 6 A Yes, sir.
- 7 Q Dominique Huff, do you know where he lives? Can you
8 mark where he lives?
- 9 A Yes, sir.
- 10 Q Okay. Can you tell us what this is?
- 11 A That's the stairwell.
- 12 Q Where does that stairwell go to?
- 13 A That will lead up to Keasia's apartment and Mr.
14 Dominique Huff's.
- 15 Q Okay. I know this is repetitive, but can you tell us
16 what this is?
- 17 A That's the stairwell leading up to -- it's Keasia's
18 apartment on the right.
- 19 Q About how far do you think it is from Keasia's door to
20 Mr. Huff's door?
- 21 A Maybe ten or 12 feet.
- 22 Q Do you know the door at the bottom there, do you know
23 who lives there?
- 24 A This one is Ms. Sandra Nelson.
- 25 Q Can you mark on the screen?

REUBEN SILBERMAN

- 1 A (Witness complies.)
- 2 Q Okay. Can you tell us what this is?
- 3 A This is a picture of Keasia's door. You can see the
- 4 door frame has been damaged.
- 5 Q You took this picture, correct?
- 6 A Yes, sir.
- 7 Q The pictures outside of the apartment, did you
- 8 actually take those?
- 9 A Yes, sir.
- 10 Q The ones of the building and the atrium, did you take
- 11 those pictures?
- 12 A Yes, sir.
- 13 Q Are you sure? The ones outside of the building?
- 14 Okay. I'll tell you I took those pictures, the ones of the
- 15 outside of the building.
- 16 A Okay. I thought I took one picture of the outside of
- 17 the building.
- 18 Q Sorry for the confusion. But you've identified that
- 19 is the outside of [REDACTED] Apartments, right?
- 20 A Right.
- 21 Q Can you tell the jury what this is?
- 22 A That's Ms. Keasia's door and the deadbolt which is
- 23 still engaged.
- 24 Q When you responded, was the door open when you got to
- 25 the apartment?

REUBEN SILBERMAN

- 1 A Partially.
- 2 Q Okay. Was she in there -- who was in the apartment at
- 3 [REDACTED] when you got there?
- 4 A It was just Keasia.
- 5 Q Was Mr. Thompson on the scene when you arrived?
- 6 A No, sir.
- 7 Q Can you explain to the jury what this is?
- 8 A It's a picture of Ms. Keasia's door broken into.
- 9 Q This is from inside her apartment?
- 10 A Yes, sir.
- 11 Q Can you identify who this is?
- 12 A That is Keasia.
- 13 Q How long was it before you took this picture when you
- 14 arrived?
- 15 A I would say under 30 minutes, I believe.
- 16 Q Okay. Can you identify who that is?
- 17 A That's also Keasia.
- 18 Q Did you take this picture?
- 19 A Yes, sir.
- 20 Q Is this Ms. Drafton as well?
- 21 A Yes, sir.
- 22 Q Why did you take a picture from this angle? Why did
- 23 you take this picture?
- 24 A I took a picture to show that there was a wound on
- 25 her neck, it appeared to be the result of some sort of

REUBEN SILBERMAN

1 strangulation.

2 Q Can you circle the area that you thought was a fresh
3 injury?

4 A (Witness complies.)

5 Q All right. Thank you. Why did you take this picture?

6 A There appeared to be lump on her head or a hematoma.

7 Q Can you circle why you took this picture?

8 A (Witness complies.)

9 Q Now, same picture. Were all of these pictures taken
10 pretty much at the same time?

11 A Yes, sir.

12 Q And all of these were taken inside of her apartment?

13 A Yes, sir.

14 Q Can you identify what this is for us?

15 A This is just to show that she did appear to be in
16 some sort of physical confrontation due to the torn shirt.

17 Q You can see in this picture she's got what appears to
18 be pants on, correct?

19 A Yes, sir.

20 Q Did she change after you got --

21 A I allowed her to put pants on.

22 Q When you were out at this apartment I know you spoke
23 to Keasia. Who all did you actually speak to?

24 A The other people I spoke to are Mr. Dominique Huff.

25 He lives also in the same apartment atrium but he lives

REUBEN SILBERMAN

1 right across the way.

2 Q Okay. Anyone else?

3 A And Ms. Sandra Nelson, the one that lives downstairs.

4 MR. STEEN: Beg the Court's indulgence one moment,

5 Your Honor?

6 THE COURT: Yes, sir.

7 (Break in proceedings.)

8 Q Deputy Silberman, did you ever see Demario Thompson
9 that night?

10 A No, sir.

11 Q Did you look for him?

12 A Yes, sir.

13 Q Anybody help you look for him?

14 A Yes, sir, Deputy Collins.

15 Q Do you know when he was found?

16 A I can't remember.

17 Q Was he arrested that night?

18 A No, sir.

19 MR. COOK: Nothing further from the State. Answer
20 anything Mr. Steen may have for you. Thank you.

21 MR. STEEN: All right. Thank you. Mr. Steen?

22 CROSS EXAMINATION

23 BY MR. STEEN:

24 Q So Deputy Silberman, no gun was ever recovered; is
25 that correct?

REUBEN SILBERMAN

1 A That's correct, sir.

2 Q And you never saw Mr. Thompson on the scene.

3 A That's correct, sir.

4 Q And you didn't see Mr. Thompson injure Ms. Drafton.

5 A No, sir, I did not.

6 Q And you did not believe her injuries needed EMS
7 treatment, did you?

8 A No, sir.

9 MR. STEEN: No further questions. Thank you, Your
10 Honor.

11 THE COURT: All right. Thank you, sir, you may step
12 down. State can call its next witness.

13 MR. COOK: State calls Mr. Dominique Huff.

14 The witness, DOMINIQUE HUFF, was first duly sworn and
15 testified as follows:

16 DIRECT EXAMINATION

17 BY MR. COOK:

18 Q Would you please state your name for the record?

19 A Dominique Huff.

20 Q Where do you live, Mr. Huff?

21 A In apartment [REDACTED] Drive.

22 Q I'm going to show you something here. Do you
23 recognize this?

24 A Yeah.

25 Q What is that?

DOMINIQUE HUFF

- 1 A Apartment complex.
- 2 Q Is this the one you live in?
- 3 A Yeah.
- 4 Q Do you recognize this?
- 5 A Yeah.
- 6 Q Mark on the screen which one you live in.
- 7 A (Witness complies.)
- 8 Q Who all lives in that apartment?
- 9 A Me, Jamie and my three kids.
- 10 Q Who is Jamie?
- 11 A My girlfriend.
- 12 Q Were you living here July 2nd of last year?
- 13 A Yeah, I was there that night.
- 14 Q Who else was there with you?
- 15 A Jamie and my kids.
- 16 Q Do you know Demario Thompson?
- 17 A Not personally. I've seen him around in Lancaster a
- 18 couple of times, but not personally.
- 19 Q Can you identify him in the courtroom?
- 20 A Right there (indicating.)
- 21 Q We've got to take it down for the record. Can you
- 22 tell us what he's wearing?
- 23 A Oh, he got a blue shirt on.
- 24 Q How are you familiar with him?
- 25 A I'm really not.

DOMINIQUE HUFF

- 1 Q Have you ever seen him at [REDACTED] Apartments?
- 2 A I have seen him walking up and down the roads.
- 3 Q Did you see him on the morning of July 2nd?
- 4 A Yeah.
- 5 Q Where did you see him?
- 6 A Outside of the apartment complex.
- 7 Q What time did you see him?
- 8 A It was between 4:00 and 5:00, it was early morning.
- 9 Q Was it dark outside?
- 10 A Yeah.
- 11 Q Why were you outside at 4:00 in the morning?
- 12 A Because I heard a disturbance and I actually come to
- 13 the door to see what was going on.
- 14 Q Okay. When you came outside -- you heard the
- 15 disturbance, when you came outside, could you tell where
- 16 the disturbance was coming from?
- 17 A Yeah.
- 18 Q Where was it coming from?
- 19 A Across the hall.
- 20 Q Across the hall meaning where?
- 21 A Across the walkway.
- 22 Q Across the breezeway right here in this picture?
- 23 A (Witness indicates.)
- 24 Q What is that? Who lives there?
- 25 A That's -- I know her by Kilo. I don't know how to

DOMINIQUE HUFF

1 pronounce her full name, but that's her apartment.

2 Q So you heard a disturbance and you came outside, based
3 on what you saw you realized it was coming from [REDACTED]?

4 A Yeah.

5 Q What did you actually see?

6 A At that time when I come out I seen the door was off
7 the hinges but it was dark on the inside and all I heard
8 was just a whole bunch of commotion.

9 Q Do you know who all was in there?

10 A No, not at the time.

11 Q What happened next?

12 A I actually went back in my apartment because I had to
13 go to work that morning. I went back in, then I had Jamie
14 call the police because it was other people out there that
15 was calling so I was like might as well go ahead and call
16 and see what was going on, let them get a cop out here
17 just to calm it down and get everybody straight.

18 Q When you went outside you see the door off the hinges,
19 did you ever see anybody come out of the apartment?

20 A No, not the first time.

21 Q So you went out a second time?

22 A Yeah. I actually went out the first time and heard
23 the commotion, seen the door was off the hinges and I went
24 back in my house.

25 Q Why did you come back out?

DOMINIQUE HUFF

- 1 A Because I heard he had a gun.
- 2 Q Somebody --
- 3 A Somebody yelled he had a gun.
- 4 Q Do you know -- have you got any idea who yelled that?
- 5 MR. STEEN: Objection, hearsay.
- 6 THE COURT: Sustained.
- 7 Q You heard somebody yell he's got a gun. What did you
- 8 do?
- 9 A Went back in the house and got mine.
- 10 Q Did you see anybody with a gun?
- 11 A No, I actually didn't see anybody with a gun.
- 12 Q Okay. Did you see Demario?
- 13 A When I actually seen him he was down by the trash
- 14 can.
- 15 Q What was he doing down by the trash can?
- 16 MR. STEEN: Objection, calls for speculation.
- 17 THE COURT: Overruled.
- 18 A He was standing there. At that time one of the
- 19 neighbors downstairs had come outside so they was fussing
- 20 back and forth.
- 21 Q He was arguing with the downstairs neighbor?
- 22 A Yes. She was outside and he was by the trash can and
- 23 they were going back and forth with words.
- 24 (Beg the Court's indulgence one moment.)
- 25 Q Okay. So you said you went inside and got a pistol.

DOMINIQUE HUFF

1 A Yeah.

2 Q Why did you do that?

3 A Because when I heard he had a gun then -- I have
4 three kids in the house, so when I heard that I was legal
5 -- at that time I was actually by law able to carry one,
6 so I went back and got mine because my kids were actually
7 right there in the front room in the floor asleep.

8 Q So you got one just to protect yourself.

9 A I had to.

10 Q Now, you said Demario is downstairs talking to some
11 woman. Do you know who that woman is downstairs?

12 A Ms. Sandra.

13 Q Ms. Sandra? Did you see Demario with a gun?

14 A All I seen was when I came back to the door he was
15 having his words with her so he pointed up like that, so
16 when I seen his hand go up I just pulled mine from my
17 side.

18 Q Was it his hand or was it a gun?

19 A From the distance -- from here to the trash can it's
20 a good distance. And with it being dark, like I said, all
21 I seen was his hand go up like that, and out of instinct I
22 just pulled mine and everything just happened then.

23 Q Did you see him point a gun at Ms. Nelson?

24 A No, I didn't.

25 Q Do you remember giving a statement that night?

DOMINIQUE HUFF

1 A That morning, yeah, I did give a statement.

2 Q Do you remember what you told the officer that
3 morning?

4 A Not correctly, not word for word.

5 MR. COOK: May I approach, Judge?

6 THE COURT: Yes, sir.

7 Q Do you recognize this? You can take a minute to read
8 that.

9 A Yeah.

10 Q Do you remember giving this statement?

11 A Yeah.

12 Q Is that your handwriting?

13 A Yeah.

14 Q Do you remember telling the officer that Demario had a
15 gun and pointed it at the neighbor downstairs?

16 A I don't recall telling the officer that.

17 Q Do you remember writing that in the statement?

18 A I remember writing that. Like I said, when I seen
19 his hand go up -- if I hear there's a gun and I see the
20 hand go up it's like -- it might have been a gun or it
21 might have been a hand, I'm not 100 percent clear. Just
22 for my safety I went and got mine just because of my kids.

23 Q Did he point one at Ms. Nelson?

24 A I don't recall honestly. Like I said, all I know is
25 I heard going back and forth with cuss words, being called

DOMINIQUE HUFF

- 1 B this and B that.
- 2 Q So there was an exchange between Ms. Nelson downstairs
3 and Demario, correct? They talked to each other.
- 4 A Yeah.
- 5 Q Now, did you call 911 that night?
- 6 A I didn't, my girlfriend did.
- 7 Q Did you ever go over to [REDACTED] that night?
- 8 A No. I was actually outside when all of the police
9 and stuff were out there. I actually didn't physically go
10 over there when all of the commotion was going on.
- 11 Q Did you go over there after it cleared out?
- 12 A After the police had cleared up I actually went to
13 work.
- 14 Q At any time that night did you ever go in Ms.
15 Drafton's apartment?
- 16 A Nuh-uh.
- 17 Q Did you ever see her that night?
- 18 A Yeah, I did. I seen her when she come out.
- 19 Q What did she look like?
- 20 A She had just a shirt and underwear on.
- 21 Q Was she upset or was she -- how was she acting?
- 22 A Yeah, she was crying. She was hysterical basically.
- 23 Q So you only saw her -- where did you see her, out on
24 the breezeway out here?
- 25 A Yeah. Because basically once you open the doors up

DOMINIQUE HUFF

1 and you step out you can basically just touch the other
2 person if they're coming out of their apartment, so --

3 Q Did anybody come to your apartment that night?

4 A The police, they asked us to give a statement.

5 Q But nobody but the police.

6 A Yeah.

7 Q Demario never came to your house?

8 A Nuh-uh.

9 Q Keasia didn't come over?

10 A Nuh-uh.

11 MR. COOK: Answer anything Mr. Steen may have for you.

12 Thank you.

13 THE COURT: Mr. Steen?

14 MR. STEEN: Thank you, Your Honor.

15 CROSS EXAMINATION

16 BY MR. STEEN:

17 Q Mr. Huff, you said you knew Ms. Drafton as Kilo.

18 A Yes, sir.

19 Q Did you know her name at the time?

20 A I can't pronounce it.

21 Q Oh, okay. And you never saw Mr. Thompson with a gun
22 that night.

23 A I seen him but I don't know if it was a gun, or like
24 I said, it was just his hand. Like I said, it was dark
25 down by the trash can so all I seen was his hand go up

JAMIE HUNT

1 like this.

2 Q You seen his hand.

3 A Yeah.

4 MR. STEEN: No further questions. Thank you.

5 THE COURT: All right. Thank you, sir, you can step
6 down. Call your next witness.

7 MR. COOK: State calls Jamie Hunt.

8 The witness, JAMIE HUNT, was first duly sworn and
9 testified as follows:

10 DIRECT EXAMINATION

11 BY MR. COOK:

12 Q Please state your name for the record.

13 A Jamie Hunt.

14 Q Where do you live, Ms. Hunt?

15 A At [REDACTED] Drive.

16 Q Can you mark on the screen where you live?

17 A (Witness complies.)

18 Q Do you know Demario Thompson?

19 A No, I just seen him around.

20 Q Can you identify him in the courtroom today?

21 A Yes.

22 Q Do you know Keasia Drafton?

23 A I didn't know her personally but I just seen her
24 outside of the apartments and stuff.

25 Q How long have you lived out at [REDACTED]

JAMIE HUNT

- 1 A Since May.
- 2 Q Did Keasia live next door the whole time you lived out
3 there?
- 4 A Yeah.
- 5 Q Who all lives with you?
- 6 A Dominique and my three kids.
- 7 Q Were you there July 2nd of 2014?
- 8 A Yes.
- 9 Q Did you call 911 that night?
- 10 A Yes.
- 11 Q Why did you call 911?
- 12 A Dominique had come back inside and told me to call
13 911. Because like I woke up, we heard the disturbance and
14 someone kicking in doors and stuff like that, and he went
15 and checked and he come back in and told me to call 911.
- 16 Q Did you ever go outside and see what was going on?
- 17 A No. I had my kids inside so I didn't go out.
- 18 Q Did you -- what did you hear?
- 19 A I just heard a bunch of shouting and stuff and the
20 door being kicked on and stuff.
- 21 Q Did you talk to the police that morning?
- 22 A No.
- 23 Q Did you ever see Keasia that night?
- 24 A Well, when my daughter was crawling around on the
25 floor, Dominique had left the door open, I seen her go sit

JAMIE HUNT

1 on the steps. But other than that I didn't see nothing
2 else.

3 Q Did you ever look out your door and see or did you
4 stay inside the whole time?

5 A Well, from -- the door was cracked, I can see like
6 people walking and I seen her but I didn't like see her up
7 close or anything so I didn't know what she looked like.

8 Q Okay. Do you remember what you told 911?

9 MR. STEEN: Objection, hearsay.

10 MR. COOK: It's what she told her, Your Honor.

11 THE COURT: I understand. Overruled.

12 A Not that I recall. It has been a long time since
13 that happened.

14 MR. COOK: No further questions, Your Honor.

15 THE COURT: Mr. Steen?

16 MR. STEEN: No questions.

17 THE COURT: Thank you, ma'am, you may step down. Are
18 you ready to call your next witness, Solicitor?

19 MR. COOK: Yes, sir. Your Honor, the State calls
20 Janice Sager.

21 MR. STEEN: Your Honor, I renew my objection to Ms.
22 Sager's testimony.

23 THE COURT: I overrule.

24 The witness, JANICE SAGER, was first duly sworn and
25 testified as follows:

JAMIE HUNT

1 DIRECT EXAMINATION

2 BY MR. COOK:

3 Q Please state your name for the record.

4 A My name is Janice Sager.

5 Q Who is your employer, Ms. Sager?

6 A I'm employed by Boyd Management, I'm the property
7 manager of [REDACTED] Apartments and Old Hickory
8 Apartments.

9 Q Can you tell us what that is in that picture?

10 A That is the front side of the 44 building at
11 [REDACTED] Apartments.

12 Q As the property manager, what all are your duties out
13 at [REDACTED]

14 A Well, I don't know if we have time for that. To
15 collect the rent, maintain the integrity of the property
16 and to handle all of the tenant affairs, make sure the
17 property is in good condition at all times.

18 Q How long have you been the property manager out there?

19 A I will be there seven years in March.

20 Q Is your office located on the property?

21 A I'm actually -- my office is located on the other
22 side of this building down below it.

23 Q Where you familiar -- do you know Demario Thompson?

24 A Yes.

25 Q Can you identify him in the courtroom today?

JANICE SAGER

1 A I know who he is, yes, sir. He has a blue shirt on.

2 Q Do you know who Keasia Drafton is?

3 A Yes, sir.

4 Q Are either one of those it tenants of yours?

5 A Keasia Drafton is a tenant -- well, she was a past
6 tenant of mine, she moved out in August.

7 Q Was Keasia Drafton living at [REDACTED] Apartments on
8 July 2nd of 2014?

9 A Yes, she was.

10 Q Was Demario Thompson a resident?

11 A No. He has never been a resident at [REDACTED]
12 Apartments.

13 Q I'm going to show you something. Can you identify
14 what this is?

15 A Yes. This is a letter that I had to draft out per my
16 district manager -- do you need me to read it?

17 Q Yeah, just what it is.

18 A This is an acknowledgment that Mr. Demario Thompson
19 has been banned from [REDACTED] and this is letting --

20 MR. STEEN: Objection, hearsay.

21 THE COURT: Overruled.

22 A Okay. He was banned from [REDACTED] Apartments, and
23 this was on 3-18 of 2014. And --

24 Q Did you sign this?

25 A I did. I signed it and Keasia signed it also.

JANICE SAGER

1 Q Did she sign this in your presence?

2 A Yes, she did.

3 Q Where was this document executed?

4 A It was executed in my office.

5 Q On the premises at [REDACTED]

6 A Yes, on the premises. She had to come and sign that
7 because of --

8 Q Well, okay.

9 MR. COOK: Your Honor, the State moves to introduce
10 this as State's Exhibit Number 2.

11 THE COURT: Over previous objection. All right. The
12 previous objection overruled, allowed into evidence,
13 State's Number 2.

14 (The letter was received as State's 2.)

15 MR. COOK: Nothing further for Ms. Sager, Your Honor.

16 THE COURT: Any questions?

17 CROSS EXAMINATION

18 BY MR. STEEN:

19 Q Ms. Sager, were you present for any of the events that
20 occurred on July 2nd of 2014.

21 A No, after the fact.

22 MR. STEEN: Thank you. No further questions.

23 THE COURT: All right. Thank you, ma'am, you may step
24 down. Ladies and gentlemen of the jury, we're going to
25 take a brief recess at this point in time, midafternoon

JANICE SAGER

1 recess. Please remember, don't talk about the case, you've
2 only heard from three or four witnesses so far so you don't
3 know -- you haven't heard the whole story. So just relax,
4 go get you something to drink, eat some snacks and we'll
5 reconvene here momentarily. Okay. Thank you.

6 (The jury left the courtroom.)

7 THE COURT: Have y'all been able to agree to how much,
8 if any, of the 911 tape comes in? Is that the next one?

9 MR. COOK: Yes, sir.

10 THE COURT: Well, let's play -- let's listen to them.

11 (The tapes were played.)

12 THE COURT: That's the entire tape?

13 MR. COOK: Yes, sir.

14 THE COURT: All right. Arguments, Mr. Steen?

15 MR. STEEN: Thank you, Your Honor. First I would
16 object under the confrontation clause that Ms. Drafton is
17 not here to testify, her testimony is being used against
18 Mr. Thompson. And something we were talking about earlier,
19 I think the point I was going to ask for was that he's
20 gone, that was clear at that point he was gone and the
21 questions became more of an interrogation than what was
22 actually going on. That's what the 911 dispatcher asking
23 her the questions, you know, where is he at, what was he
24 wearing, what did he do to you. So that would be the point
25 I would ask be redacted from it.

JANICE SAGER

1 THE COURT: All right. Solicitor?

2 MR. COOK: Well, Your Honor, when she asked what's he
3 wearing, what did he do, they're still trying to assess the
4 situation, where he's at, who they were looking for and how
5 to assess the situation. I mean, the confrontation clause
6 is not violated in Davis versus Washington, they clarified
7 the Crawford Rule saying that a 911 call where the caller
8 gives the identification of the accuser, which was -- it
9 was a CDV case, that that's non-testimonial in nature and
10 it's not hearsay and it doesn't violate the confrontation
11 clause because it's deemed non-testimonial.

12 THE COURT: Even when further questions -- as Mr.
13 Steen has pointed out in his argument, even when they --
14 whoever is talking to her starts questioning her more about
15 things?

16 MR. COOK: Well, if that's a rule then that would
17 insinuate 911 needs to stop asking questions. 911's main
18 goal is to figure out exactly what's going on, how to best
19 assess the situation.

20 THE COURT: I understand. I'm looking at testimony
21 versus non-testimony.

22 MR. COOK: I think it's all testimony --
23 non-testimony. She's telling -- this is not police
24 interrogation, they're not trying to figure out what
25 happened, they're asking what is going on. This is the

JANICE SAGER

1 first time that any --

2 THE COURT: She's giving her present sense impression
3 in the form of an excited utterance, is that what you're
4 saying? That's the hearsay argument.

5 MR. COOK: Right. But the confrontation clause, this
6 is the first time that anyone has spoken to somebody who is
7 inside of the apartment after the alleged incident
8 occurred. The neighbors who called -- those 911 calls
9 weren't admitted so this is -- Ms. Suzanne Collins, who is
10 the dispatcher that's called, has not spoken to anybody
11 that's inside that room until she talks to Ms. Drafton
12 here. She's trying to get as much information as she can
13 to best advise law enforcement what to do. She needs to
14 ask her is he there and what is he wearing so when they
15 respond and they see a man running out matching the
16 description they can stop that person. Everything she's
17 asking is to handle the situation when they arrive. The
18 end of it where she says -- after she says what he's
19 wearing she's saying he pointed the gun, all of that, that
20 wasn't even in response to Ms. Collins' question, you can
21 tell she's saying that stuff, that would fall under excited
22 utterance, her present sense impression. She's yelling it
23 out, it just happened and you know it just happened because
24 she's on the phone with 911 when she called. I think all
25 of it is admissible, Your Honor.

JANICE SAGER

1 THE COURT: All right. Mr. Steen?

2 MR. STEEN: I'm also using Davis v. Washington. In
3 that case they made those points clear, and then it went on
4 to say at whatever point it becomes testimonial and it says
5 to be pretty easy -- basically when the questions stop
6 being what's happening to what happened they become
7 testimonial.

8 THE COURT: What page of that opinion are you --

9 MR. STEEN: I'm on page 37.

10 THE COURT: Do you mind handing it up to me?

11 MR. STEEN: Yes, sir.

12 THE COURT: I'm listening. Anything else you want to
13 tell me?

14 MR. STEEN: Your Honor, the definition of testimonial
15 from Davis v. Washington is that when the circumstances
16 objectively indicate that there is no such ongoing
17 emergency, the primary purpose of the interrogation is to
18 establish or prove past events potentially later relevant
19 to a criminal prosecution. So I believe at that point when
20 he is gone, well, tell me what happened then becomes the
21 testimonial part. The solicitor said, "Well, what's the
22 point with 911?" We usually have the person making the 911
23 call sitting right there telling us why they're making the
24 911 call. I don't think that -- that's not -- we've got
25 911 for emergency situations, when the emergency is over

JANICE SAGER

1 that's when it becomes testimonial.

2 THE COURT: Such as when you have a reluctant witness
3 who doesn't want to cooperate, to take your argument
4 further. I've got it. Thank you. Yes, sir, anything
5 further from the State?

6 MR. COOK: Your Honor, I would just submit all of it
7 is non-testimonial, that none of this was -- Ms. Collins
8 was never doing an interrogation. The extent of her
9 conversation was simply to identify what was going on and
10 to send emergency personnel. I don't think it ever crossed
11 over to the point where she's sitting there asking, "Well
12 what did he do to you?" She's saying, "Is he there? Yes,
13 and he's got a gun." She's trying to figure out -- it's
14 not -- she's not interrogating her, she's just trying to
15 figure out what in the world is going on. This is the
16 first time she has had a chance to talk to her since this
17 happened.

18 THE COURT: Go back to the last -- at what point on
19 that digital recording does it -- does she say "so he's
20 gone?"

21 MR. STEEN: 147, Your Honor.

22 THE COURT: Pick it up at about 140, and let me listen
23 again.

24 (The DVD was played again.)

25 THE COURT: I heard four questions; what's he wearing,

JANICE SAGER

1 where did he go, pointed what, hurt you. Am I missing
2 something? I mean, that's what I heard.

3 MR. COOK: Well, the last question that Ms. Collins
4 asked is what's he wearing.

5 THE COURT: Right. Who was that other voice? All
6 right. Y'all give me just a moment.

7 (Break in proceedings.)

8 THE COURT: Based upon the arguments of law and
9 considering the evidence presented to the Court I am going
10 to allow the 911 tape in its entirety based upon my
11 interpretation of Davis versus Washington. Your position
12 is certainly preserved in the record if it needs to be, Mr.
13 Steen. Okay. Thank you very much. All right. Any issue
14 before we bring the jury in?

15 MR. COOK: Your Honor, the next witness will be the
16 dispatcher along with Ms. Sandy Cauthen of Lancaster County
17 Public Safety to authenticate the record. They were in the
18 room and to stipulate that they've heard it and then they
19 can testify that they made a recording and then have it --
20 it's already admitted through your ruling but I didn't want
21 a situation where -- they would be able to testify, "I work
22 there, I did make a call," and then play it and that's how
23 we would be able to do it, correct?

24 THE COURT: Yes, sir. Over the objection which has
25 already been noted and ruled upon. Yes, sir?

JANICE SAGER

1 MR. STEEN: Well, Your Honor, I would ask that the 911
2 operator be able to authenticate that it was Ms. Drafton
3 that made the phone call. I mean, that's what is required
4 by the rule, that the identification of the voice must be
5 connected to the alleged speaker, they've got to connect
6 and authenticate that.

7 THE COURT: Well, that goes to the part of laying the
8 proper foundation, and of course, you can object at the
9 time of whether or not a proper foundation has been laid,
10 and then I will have to make that determination then.
11 Right now these are just preliminary rulings. So you
12 question your witness accordingly and we will go from
13 there. Bring the jury in.

14 (The jury returned to the courtroom.)

15 THE COURT: All right. All members of the jury are
16 present. Ladies and gentlemen, thank you for your
17 patience. Don't get mad at them, get mad at me. I had a
18 matter I had to deal with in my chambers and it just took
19 longer than I thought it would be, I'm sorry about that.
20 Before we proceed any further, let me go ahead and appoint
21 the foreperson, or forelady of the jury, that's going to be
22 Ms. Coghill, that's you. Thank you, ma'am. Next time we
23 come in you will be seated up here. But I will appoint you
24 as the forelady for the trial jury. It's going to be your
25 duty to preside in the jury room once you're able to start

SANDRA CAUTHEN

1 deliberating. It will also be your -- you will be the
2 spokesperson for the jury here in court, and you'll also be
3 the only one who writes on the verdict form. Okay. And I
4 will go over that with you towards the end of the trial.
5 Remember that although you're the only person who writes on
6 the verdict form, it still has to be a unanimous verdict.
7 Okay. But I will tell you more about that as the trial
8 proceeds. Thank you very much. All right. State call its
9 next witness.

10 The witness, SANDRA CAUTHEN, was first duly sworn and
11 testified as follows:

12 DIRECT EXAMINATION

13 BY MR. COOK:

14 Q Will you please state your name for the record?

15 A Sandra Cauthen.

16 Q Who is your employer, Ms. Cauthen?

17 A I work for Lancaster County Public Safety
18 Communications.

19 Q What's your role with public safety?

20 A I'm the deputy director.

21 Q As deputy director, what do your duties entail? What
22 did you do?

23 A I am over the running of the dispatch center, the
24 daily operation.

25 Q What is dispatch?

SANDRA CAUTHEN

1 A That would be the 911 dispatch center, taking the 911
2 calls.

3 Q Where is that located?

4 A At 1941 Pageland Highway.

5 Q Here in Lancaster County?

6 A Yes.

7 Q Is that the old sheriff's office?

8 A It is.

9 Q As deputy director, do you oversee the maintenance of
10 calls or storage of calls?

11 A I do.

12 Q Is every call -- if someone calls 911, is that call
13 automatically recorded?

14 A It is.

15 Q How is it recorded? Is it a tape? Is it digital?

16 A It's all stored digitally.

17 Q Okay. Is it a local server or memory card, how do you
18 guys keep it.

19 A It's on a server.

20 Q Is the server located locally?

21 A Yes, sir, it is.

22 Q Is it down at the office?

23 A It is.

24 Q Is there some type of protocol as far as maintenance,
25 keeping up with it? Do you have an IT staff or somebody

SANDRA CAUTHEN

- 1 that keeps up with it?
- 2 A We do have an IT staff.
- 3 Q Are they regularly maintained?
- 4 A They do, yes, sir.
- 5 Q How long have you been with Lancaster County 911?
- 6 A I started dispatch in 1988.
- 7 Q So were you working July 2nd of 2014 -- were you in
- 8 your current capacity at that time?
- 9 A I was.
- 10 Q Okay. When a call comes in the dispatchers are people
- 11 who actually take the call, correct?
- 12 A Exactly, yes, sir.
- 13 Q Do they have to do anything to make sure a call is
- 14 recorded or is it automatically recorded?
- 15 A No, sir, all calls are automatically recorded.
- 16 Q Once the calls go onto the server, are they there for
- 17 a certain amount of time? How long do you guys these keeps
- 18 records.
- 19 A We have them stored for about three years.
- 20 Q Who all has access to these stored calls?
- 21 A Myself and the director, Chris Nunnery.
- 22 Q Have you heard the 911 -- had you heard any 911 calls
- 23 from July 2nd of 2014?
- 24 A Yes, sir, I have.
- 25 Q Have you heard one allegedly involving Mr. Demario

SANDRA CAUTHEN

1 Thompson?

2 A Yes, sir, I have.

3 MR. COOK: Your Honor, State moves to play the audio
4 recording.

5 THE COURT: Any objection?

6 MR. STEEN: Object, lack of foundation and
7 authentication that this is Ms. Drafton.

8 THE COURT: All right. Objection overruled.

9 (At this time the 911 DVD was played.)

10 MR. COOK: No further questions for Ms. Cauthen.

11 THE COURT: Mr. Steen?

12 CROSS EXAMINATION

13 BY MR. STEEN:

14 Q Director Cauthen, are you 100 percent positive that's
15 Ms. Keasia Drafton that called?

16 A No, sir, I can't answer that that is who called.

17 Q And was this phone call ever attached back to her
18 number or the residence or anything like that, or
19 connected -- was that number ever connected -- was the
20 number that belonged to Keasia Drafton ever connected to
21 that phone call?

22 A I can't answer that question, I'm not familiar.

23 MR. STEEN: That's all. No further questions. Thank
24 you.

25 THE COURT: All right. Thank you, ma'am, you are free

SUZANNE COLLINS

1 to leave, you may step down.

2 MR. COOK: State calls Ms. Suzanne Collins.

3 The witness, SUZANNE COLLINS, was first duly sworn and
4 testified as follows, on:

5 DIRECT EXAMINATION

6 BY MR. COOK:

7 Q Please state your name for the record.

8 A Suzanne Collins.

9 Q Ms. Collins, who is your employer?

10 A I'm currently unemployed.

11 Q Okay. Where were you working July 2nd of last year?

12 A I was working at Lancaster County 911, I can't
13 remember what it is now exactly.

14 Q I don't know exactly what the name of it is either.

15 A Public Safety Communications.

16 Q So did you hear the call that we just played in the
17 courtroom?

18 A I did.

19 Q Was that your voice on the recording?

20 A Yes, sir, it was.

21 Q Do you remember taking that call?

22 A Now that I listen to it, yes, I do remember her.

23 Q When a call comes in, what do you do when you get a
24 call? What's the first thing you do when someone calls 911
25 and you answer the call, what are you trained to do?

SUZANNE COLLINS

1 A First we would answer the call as I said, Lancaster
2 County 911, we would ask what their emergency was. The
3 next thing we do is we open the screen, we start typing
4 the information in that the person gives us.

5 Q Is it your job to identify who the caller is?

6 A We have to rely on the information that the person
7 gives because there's no way that we can verify it because
8 we can't actually see them or anything. We can see the
9 phone number. If they call from the land line it will
10 have the person's name and address, but we have to verify
11 that the name that's on the screen is the person that's
12 calling.

13 Q The call that you listened to that you heard a few
14 moments ago, are there any gaps or is that -- is it fair to
15 say that was the entirety of the conversation?

16 A That was the entirety of the conversation. The parts
17 where I was not talking to her I was actually typing the
18 information in that she was giving me.

19 Q At the end I know it cut off. Was there anything
20 missing that you recall, or was that --

21 A The person may have hung up because the system only
22 runs as long as the call is active.

23 Q And I asked this question to Ms. Cauthen. Do you have
24 to do anything to actually record the call or is it
25 automatically recorded?

SUZANNE COLLINS

1 A The system automatically starts recording as soon as
2 you answer the call.

3 Q So from the beginning to the end there's no point
4 where you're hitting a button and making sure that you
5 started it and cut it off, it just automatically does it?

6 A It automatically does it.

7 MR. COOK: Thank you. That's all.

8 THE COURT: Mr. Steen?

9 CROSS EXAMINATION

10 BY MR. STEEN:

11 Q Ms. Collins, you testified that y'all have to rely on
12 the information that y'all are given, correct?

13 A That is correct.

14 Q In your years that did you this job, did you ever have
15 anyone call and give a false name?

16 A Not as far as I know.

17 MR. STEEN: No further questions of Ms. Collins.

18 THE COURT: Thank you, ma'am, you may step down. Call
19 your next witness.

20 MR. COOK: Beg the Court's indulgence for one moment,
21 Your Honor.

22 THE COURT: Yes, sir.

23 (Break in proceedings.)

24 MR. COOK: State rests, Your Honor.

25 THE COURT: All right. State rests. Ladies and

1 gentlemen of the jury, if you will please retire to the
2 jury room, I have some matters of law I need to take up
3 with the lawyers, we will get you back out here soon.
4 Please do not discuss the case. Thank you very much.

5 (The jury left the courtroom.)

6 THE COURT: Mr. Steen?

7 MR. STEEN: Thank you Your Honor. At this time we
8 would move for directed verdicts.

9 (Break in proceedings.)

10 THE COURT: All right. Solicitor, let me hear your
11 response to that.

12 MR. COOK: Wait a second, I was trying to put them in
13 order, Your Honor.

14 THE COURT: Okay. I thought you were talking about in
15 its entirety. Sir, you can be seated. Thank you.

16 MR. STEEN: Your Honor, with regards to indictment
17 1332, pointing and presenting a firearm with the alleged
18 victim being Dominique Huff, the defense moves for a
19 directed verdict. The only evidence that -- actually there
20 is no evidence that came in that he pointed a gun at Mr.
21 Huff based on Mr. Huff's own testimony.

22 THE COURT: Okay. Solicitor?

23 MR. COOK: Your Honor, Mr. Huff said that Mr. Thompson
24 was at the bottom of the steps, he was doing this motion he
25 said, "I don't know if he had a gun or not." Based on the

1 rest of the testimony everybody else said he had a gun, I
2 think they can find that it was actually a gun that he
3 pointed at Mr. Huff.

4 MR. STEEN: No one else testified that he had a gun.

5 THE COURT: Who else testified -- other than the 911
6 call, who else testified that he had a gun?

7 MR. COOK: Well, Ms. Drafton said he's got a gun, Ms.
8 Hunt said that she heard her screaming that he has got a
9 gun. Mr. Huff said that he looked down at him and he
10 points up what he believed could have been a gun or
11 couldn't. I think that's something for the jury to decide
12 if it was a gun in his hand or not.

13 MR. STEEN: Ms. Hunt never testified, she never left
14 the apartment, she never testified that he had a gun. The
15 only person that testified that he had a gun was the tape.

16 THE COURT: Well, you know, the standard on a directed
17 verdict stage is whether or not there's any evidence, not
18 the weight and sufficiency of the evidence, but that's
19 something for the jury to determine. The 911 tape, which
20 came in over objection, the victim herself said he had a
21 gun, Mr. Huff's testimony, whether credible or not, has to
22 be left up to the jury. So I'm going to deny your
23 objection on the Dominique Huff indictment, 1323. What's
24 the next one?

25 MR. STEEN: The next pointing and presenting

1 indictment, Your Honor, number 1324, alleges the victim
2 Sandra Nelson -- the victim didn't testify he had a gun.
3 There's been no evidence that he pointed a gun at any
4 Sandra Nelson. I mean, the State has to prove that Sandra
5 Nelson is a person.

6 MR. COOK: Your Honor, on the 911 call Ms. Drafton
7 says he ran, he pointed the gun at the lady downstairs.
8 There's testimony that there is a lady downstairs named
9 Sandra Nelson. And Mr. Huff said that Demario was
10 downstairs arguing with Ms. Sandra and he was going back
11 and forth and when he saw Mr. Huff he pointed up that way.
12 Ms. Drafton said he pointed the gun at the lady downstairs,
13 Mr. Huff said that Demario and Ms. Sandra who is Ms. Sandra
14 Nelson, I believe we have proven there's a person
15 downstairs named Sandra. Officer Silberman even talked to
16 Ms. Nelson and said that he talked with her that night.

17 MR. STEEN: Your Honor, there was another problem
18 downstairs, there was no evidence -- and I don't know who
19 stayed there and there was no one who said he pointed a gun
20 at Sandra Nelson.

21 THE COURT: All right. I'm going to grant the defense
22 motion for a direct verdict on that charge, so that's
23 indictment 1324, that's out. What is the next one?

24 MR. STEEN: Yes, Your Honor. We will go 1322, the
25 attempted murder. Your Honor, we move for a directed

1 verdict on this case. The State put forth no evidence
2 again that he had any intent to kill Ms. Drafton. No one
3 testified to any malice, disagreement, no one testified
4 that there was any intent to kill Ms. Drafton. When it
5 goes to malice aforethought, again, no one testified that
6 there was any malice or ill will. No one saw the
7 confrontation take place and we don't have the victim say
8 he attempted to kill me.

9 THE COURT: Help me out on this one, Solicitor,
10 because I'm looking at the indictment. The indictment
11 says -- I understand about implied malice, I know that's
12 where your argument is going to be talking about. But the
13 indictment says he held a handgun to her head and he pulled
14 the trigger multiple times and implied that he intended to
15 shoot her. There's been no evidence of that.

16 MR. COOK: There has not been any evidence of that,
17 Your Honor, but --

18 THE COURT: There has been evidence from the officer
19 about the --

20 MR. COOK: The strangling, the choking.

21 THE COURT: Right.

22 MR. COOK: Your Honor, he's charged with attempted
23 murder and the key part of that is attempt, what he tried
24 to do. If I attempt to run 10 miles and I run one mile or
25 I run nine miles, I still failed to do what I attempted.

1 There are different degrees of attempt. He got in that
2 house and the surrounding circumstances, he comes in at
3 4:00 in the morning, Ms. Drafton says he kicks the door in,
4 he comes inside, puts the gun to her, she has obviously got
5 physical injuries that Deputy Silberman took pictures of.
6 There was definitely a physical altercation, there's people
7 who heard it and heard a struggle from -- you can see it
8 and it was testified that it was ten to 12 feet across the
9 hall and directly below. Now, she's got marks on her neck
10 which would indicate choking.

11 THE COURT: I'm with you on the marks on the neck, I'm
12 with you on the fear in her voice, I'm with you on all of
13 that. What I'm not with you on is that what has been laid
14 out in front of the jury is not what's on the indictment.
15 It may go toward a lesser-included offense but it certainly
16 at this point in time doesn't go toward attempted murder.

17 MR. STEEN: Your Honor, in the 911 call she never
18 stated that --

19 THE COURT: Hold on a second. But you can't get to
20 your lesser-included offenses unless attempted murder goes
21 to the jury. So talk to me, I'm listening.

22 MR. STEEN: Say that one more time, Your Honor. I'm
23 thinking out loud here, your Honor. The 911 call, there's
24 no evidence in that that says he pointed a gun at me.
25 Having a gun makes you guilty -- it does not make you

1 guilty of attempted murder and that's the only thing in her
2 statement concerning the gun is he has a gun in his hand.
3 The allegations are that he put it to her head and pulled
4 the trigger multiple times, which did not come in
5 whatsoever.

6 THE COURT: Coming back to you, Solicitor.

7 MR. COOK: Well, Your Honor, there's not a piece of
8 evidence that I could show you that he actually intended to
9 kill her, I can't show you a scan of his brain saying this
10 is what he intended. But looking at the totality of the
11 circumstances you can infer that he went in there in the
12 middle of the night with the gun and he assaulted her but
13 he was interrupted by something, that's why it was
14 attempted murder. Luckily it was not a murder because it
15 was interrupted and that's why it's an attempt.

16 THE COURT: I'll deny your motion for a directed
17 verdict on that and allow that to go to the jury.

18 MR. STEEN: Your Honor, can I argue to the jury that
19 the indictment says this and that wouldn't proven?

20 THE COURT: I certainly thinks that's fair, I
21 certainly think that's a fair argument. But certainly from
22 what I've heard is -- do you intend on introducing any
23 evidence?

24 MR. STEEN: No, sir.

25 THE COURT: I think every lesser-included offense is

1 going to come in as well. I don't see how -- Solicitor, if
2 you want -- and we'll have a charge conference later on but
3 my gut tells me everything is on the table; attempted
4 murder, ABHAN, A and B first, A and B second and A and B
5 third, simple assault and battery.

6 MR. COOK: Yes, sir.

7 THE COURT: All right. What's the next one?

8 MR. STEEN: Your Honor, we will go to the burglary.
9 We move for a directed verdict on that case again. The
10 State proved no evidence that Ms. Drafton was the lawful
11 occupant disallowed him to come in.

12 THE COURT: That's the easy one, I can deny your
13 motion on that one. I think there is enough evidence in
14 the record to submit that issue to the jury.

15 MR. STEEN: The main thing, there was no evidence that
16 he went over there to do a crime. I mean, there was no
17 evidence that he went over there to do this, either implied
18 or expressed that that's the reason that he went over
19 there.

20 THE COURT: I mean, the door was busted in. We have a
21 911 call from the alleged victim, or at least somebody who
22 said she was the alleged victim, which, of course, is
23 circumstantial evidence. I think that invades the province
24 of the jury and I'm going to allow that to go to the jury.
25 What is the last one?

1 MR. STEEN: Possession of a weapon.

2 THE COURT: Denied as well. So I granted your motion
3 for directed verdict on the pointing and presenting a
4 firearm to the victim, Sandra Nelson under the
5 circumstances, I don't think there's enough in the record
6 to sustain that charge. All right. Anything else before I
7 bring the jury in? We will argue and charge in the
8 morning. Do you plan on doing anything?

9 MR. STEEN: No, sir.

10 THE COURT: As far as introducing any evidence?

11 MR. STEEN: No, sir.

12 THE COURT: Well, let me go ahead and talk to your
13 client then. Sir, if you will please stand.

14 (The defendant was sworn.)

15 THE COURT: See that microphone there on your table?
16 Pull that up to you, sir. All right. First of all, at
17 this time I will explain to you certain rights that you
18 have. I know your lawyer has gone over these with you but
19 I will go over them with you as well. Okay. Can you hear
20 me okay?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: Now, if you don't understand anything I
23 tell you let me know and I'll try to explain it to you
24 again and I'll explain anything in more detail if you need
25 me to do that. Okay?

1 THE DEFENDANT: Yes, sir.

2 THE COURT: We've now reached a stage in the trial
3 where you can present your defense. Now, that won't be
4 done today, that can be done tomorrow so I may ask you a
5 couple of follow-up questions tomorrow morning. Okay?

6 THE DEFENDANT: Okay.

7 THE COURT: All right. Now, you heard me tell the
8 jury at the very beginning you don't have to prove
9 anything, the State has the entire burden of proof against
10 you. You have the right to claim the protections given to
11 you by the Fifth Amendment to our United States
12 Constitution which says no person shall be compelled in any
13 criminal case to be a witness against himself, this means
14 that you cannot be required to testify in this case. Now,
15 certainly you have the right to testify if you want to,
16 however nobody can make you testify. That is a personal
17 right you have and nobody can take that away from you
18 except for you, do you understand?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: All right. Now, if you do decide to
21 testify and tell your side of the story, of course you
22 could be cross examined by the lawyer for the State and he
23 could try to make you look bad, trip you up and mess up
24 your testimony in front of the jury, and any prior record
25 that you have which may be relevant and which may can come

1 in through evidence or any crime you have involving
2 dishonesty or false statement can come in to try to make
3 you look bad in front of the jury. Do you understand that?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: Now, if you decide to testify your
6 decision to do that must be freely, voluntarily and
7 intelligently made based upon your discussions with your
8 lawyer. Do you understand that?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: And if you decide not to testify I will
11 instruct the jury and emphasize to them that they cannot
12 even consider that fact, they can't even bring it up in the
13 jury room when they're deliberating a verdict and they
14 cannot have any prejudice against you because you didn't
15 testify. Do you understand that?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: Now, have you talked to your lawyer about
18 whether or not you intend to testify?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: Do you need to talk to anybody else about
21 that?

22 THE DEFENDANT: No, sir.

23 THE COURT: All right. And do you intend to testify?

24 THE DEFENDANT: No, sir.

25 THE COURT: All right. Do you understand everything

1 that I explained to you?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: Do you have any questions that I need to
4 go over with you again?

5 THE DEFENDANT: No, sir.

6 THE COURT: Are you satisfied with your attorney so
7 far?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: And has he answered all of your questions
10 on this subject at least?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: And so you do not wish to testify; is that
13 correct?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: And Mr. Steen, do you concur in your
16 client's decision to not testify?

17 MR. STEEN: Yes, Your Honor.

18 THE COURT: All right. Thank you. So gentleman, what
19 we're going to do is I'm going to bring the jury back in
20 and release them for the day. And Mr. Steen, I will call
21 on you since the State has rested and you can say you rest.
22 And then tomorrow morning 9:45?

23 MR. STEEN: Yes, sir.

24 THE COURT: 9:45 we'll argue and charge. Okay.
25 Gentleman, any proposed or request to charge, if y'all

1 could email them to me this afternoon or first thing in the
2 morning, we could have a charge conference or anything on
3 the record before we actually start, but Bart has been
4 working on the charges, I think he the pretty much has
5 everything in line.

6 (The jury returned to the courtroom.)

7 THE COURT: Thank you, ladies and gentlemen of the
8 jury. The State has rested. Mr. Steen?

9 MR. STEEN: The defense rests Your Honor.

10 THE COURT: The defense rests. All right. Ladies and
11 gentlemen of the jury, we've now reached a convenient time,
12 it's about ten after 4:00, where we're going to -- I'm not
13 going to keep you here late this evening, we will go ahead
14 and break for the day. I would like you back in the jury
15 room tomorrow morning at 9:45. Remember the cautionary
16 instruction I gave you earlier today as we started the
17 trial, don't do any independent research, don't go Google
18 names, don't talk to anybody about your jury service. If
19 your spouse or significant other asks what you're doing
20 just tell them, "I'm serving on a jury and the judge told
21 me I can't talk about it," so just blame it on me, I'm used
22 to being the bad guy. Have a good evening, we'll see you
23 in the morning at 9:45.

24 (The jury left the courtroom.)

25 THE COURT: All right, we are in recess until

1 tomorrow.

2 MR. STEEN: To protect the record, the defense renews
3 its directed verdict motions it made at the conclusion of
4 the presentation of the State's evidence.

5 THE COURT: Okay. And those are denied.

6 (Trial adjourned for the evening and resumed on
7 January 6, 2015 at 10:00 a.m.)

8 THE COURT: While we're waiting on the charge to be
9 printed out, gentleman, I have decided to revisit my ruling
10 on a directed motion from the pointing and presenting a
11 firearm, that's indictment 14-GS-29-1323, no further
12 argument is necessary, y'all's positions is, I believe,
13 clearly stated in the record. But I'm going to reverse
14 myself, vacate my previous decision and direct a verdict on
15 the issue of pointing and presenting a firearm so I'm
16 dismissing that charge as well. So both pointing and
17 presenting firearms as indicted, 14-GS-29-1323 and 1324,
18 are dismissed against Mr. Thompson. Okay. The only three
19 charges that are surviving pursuant to my rulings are the
20 burglary charge, the attempted murder charge with all
21 lesser-includes as well as possession of a weapon during
22 the commission of a violent crime charge. Any one of y'all
23 like to be heard further on my ruling?

24 MR. COOK: Nothing from the State, Your Honor.

25 THE COURT: Okay. Anything?

1 MR. STEEN: No, sir, Your Honor.

2 THE COURT: All right. Thank you. We're just in a
3 holding pattern, just give me a moment.

4 (Break in proceedings.)

5 THE COURT: Any objection, gentlemen, to the proposed
6 charge?

7 MR. COOK: To the verdict form, Your Honor.

8 THE COURT: There is an objection to that? All right.

9 (Bench conference was held.)

10 THE COURT: All right. Gentleman, any other
11 objections or concerns about the verdict form as it's
12 presented with my initials on it with my writing saying
13 only choose one under paragraph two?

14 MR. COOK: Nothing from the State.

15 MR. STEEN: Nothing.

16 THE COURT: And any objections to what y'all saw the
17 proposed charge was?

18 MR. COOK: Nothing from the State.

19 MR. STEEN: Nothing, Your Honor.

20 THE COURT: Any additional charge or request from
21 either side?

22 MR. COOK: No, Your Honor.

23 THE COURT: All right. Bring the jury in.

24 (The jury returned to the courtroom.)

25 THE COURT: All right. All members of the jury are

1 present. Once again my time is off, I apologize on the
2 delay, that's on me, not the lawyers, get mad at me, not
3 them, I apologize. Hopefully y'all have gotten to know
4 each other a little bit back in the jury room while you're
5 waiting on things to start. I will tell you at this point
6 we've reached a point in the trial where we have -- where
7 the lawyers are allowed to make closing arguments or
8 closing statements to you. And again, as I told you
9 yesterday, these arguments are not evidence, they're simply
10 the lawyer's the opportunity to argue to you what they
11 believe the evidence shows to try to convince you as to
12 what your verdict should be. Lastly before we commenced
13 closing arguments I will state to you that there will be
14 three charges for you to consider in your deliberations
15 today, those are the charges of burglary first degree,
16 attempted murder and various lesser-included offenses which
17 I will explain to you when I charge you, as well as
18 possession of a weapon during the commission of a violent
19 crime. Those will be the three charges for you to
20 consider. Okay. Thank you very much. At this point in
21 time we'll go to closing arguments. Solicitor?

22 MR. COOK: Thank you, Your Honor. Mr. Steen. Y'all
23 remembered yesterday the first thing Mr. Thompson's lawyer
24 said was this is a lover's quarrel. That's not the case.
25 It wasn't a lover's quarrel, it wasn't even a fight.

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1 Demario Thompson kicked the door in and beat up Keasia
2 Drafton. Mr. Steen said Mr. Thompson went over there like
3 he does all of the time, Ms. Drafton didn't even go to the
4 hospital, everybody went home that night. Well, that's
5 true. But he's charged for attempted murder not based on
6 what happened to her but what he intended to do when he got
7 there. The most important word is attempt. Now, attempt
8 is very broad. For example, if I attempt to run -- say I
9 attempt 10 miles. If I go outside and I run one mile and
10 run out of air and pass out, I ran one out of ten. If I go
11 train and I try to again later on say I get nine miles done
12 and I fall out again, whether I completed nine miles or one
13 mile, my intent was to run 10 miles either way if I did one
14 or none. Now, Mr. Thompson, luckily he didn't get very far
15 on the spectrum, he's down here. It could still be an
16 attempted murder if he went in there and shot her and she's
17 on the edge of death, but that's not where he got. But
18 we're lucky he didn't, he's down here, he's in the
19 beginning stages of it. And for some reason he was
20 interrupted and didn't get all the way over here. But he
21 went over there with the intent to kill Ms. Drafton. It
22 was 4:00 in the morning, he comes in with a gun and beats
23 her, and by the time law enforcement gets there he's gone.
24 She doesn't have to sit there and let him beat on her so
25 I've got a stronger case that he tried to kill her. What

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1 else was he going over there to do at 4:00 in the morning,
2 the door is locked and he kicks the doors of the hinges to
3 get there? He's not going over there to have a
4 conversation with her. Something has made him so mad that
5 he's going over there in the middle of the night while
6 she's in the bed to go after her. There is no
7 conversation, there's not time for conversation. By the
8 time that 911 is called and deputies get there he's gone.
9 And they're going to argue that he didn't intend to kill
10 her. What's he going to do? And it's an attempt. We know
11 he at least hit her, she's got knots on her head and her
12 hair has been pulled out and her shirt is torn. He went
13 there to kill her. Now, I understand that some of you are
14 not going to agree with me on that, that based on what
15 happened that he might not have actually wanted her to end
16 up dead that night. Well, under the law we've got
17 lesser-included offenses. It starts out with murder and
18 attempted murder and it comes down to assault and battery
19 of a high and aggravated nature. Assault and battery of a
20 high and aggravated nature is essentially the same as
21 attempted murder except that you don't actually believe
22 that he was trying to kill her. I'll show you -- the law
23 of assault and battery high and aggravated nature is when a
24 person commits the offense -- I'm going to call it ABHAN,
25 easier to say -- commits ABHAN when the person unlawfully

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1 injures another person and great bodily injury results, or
2 the act is accomplished by means likely to produce death or
3 bodily injury. I highlighted the second one because you
4 don't even have to have an injury for ABHAN to occur. She
5 had an injury which satisfies the top, unlawfully injures a
6 person. You can see -- and I'll show you the pictures and
7 you can take them back there with you, she's got knots on
8 her head, she's got knots on her neck. How did he do that?
9 He choked her. You can easily kill somebody by choking
10 her. And that's what this means, that the means likely to
11 produce death or great bodily injury. Even if she didn't
12 die you can have serious injury when somebody comes and
13 chokes you. She also said he had a gun. Luckily he didn't
14 use the gun on her, but she said on that 911 call that he's
15 got a gun. You can definitely have great bodily injury or
16 death with a firearm and that's all you need for ABHAN.
17 And the judge is going to tell you, well, if you don't
18 think it's ABHAN you can do assault and battery first
19 degree or second degree or third degree. I'm not even
20 going to talk about those because if you think he went in
21 there, choked her, had a gun with him it's ABHAN, nothing
22 else. But I'm not going to talk to any of the other ones
23 because I don't think that they apply. Under the law he's
24 going to tell you they do, I'm saying don't even consider
25 that. Now, that's up to you to decide whether or not he

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1 wants to kill her and that's the difference between
2 attempted murder and assault and battery high and
3 aggravated nature. Now, he's also charged with burglary in
4 the first degree. The one thing you need to realize is
5 whether you think he went in there to attempt to murder her
6 or if he went in there to attempt to slap her in the face
7 or to just pull her out, it doesn't mean what he intended
8 to do when he got in there, it's still burglary if he goes
9 in there and if he commits a crime, if he goes in this
10 house without consent. Now, the burglary statute says a
11 person is guilty of burglary in the first degree if a
12 person enters a dwelling without consent with the intent to
13 commit a crime in the dwelling. Dwelling. This is [REDACTED]
14 [REDACTED] Apartments. It's an apartment complex. You saw
15 a picture of it. You saw the property manager. She got up
16 here and told you what it was, you saw a picture of it.
17 There's no question it's a dwelling. Okay. Entering. Did
18 he go inside there? Yeah, he went inside. He went inside
19 because he busted the door off the hinges and went in there
20 and got Ms. Drafton. Ms. Drafton is in her apartment, and
21 she calls 911 and what did she say? She said, "Demario
22 Thompson kicked my door in." He was inside that apartment.
23 Dominique Huff came and said, "I saw him out there when he
24 left, he came out of the apartment." There's no question
25 he was inside that apartment, he was inside the dwelling.

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1 Without consent. There's no question he did not have
2 permission to be in there that night. I'm sure in the past
3 he's gone there plenty of times, that was his girlfriend.
4 At 4:00 in the morning this night he did not have consent
5 to be there, if he did he wouldn't have to kick the door
6 down to get inside. Ms. Drafton even said on the 911 call,
7 they asked her, said, "What was he wearing? I don't know,
8 I was asleep." How is she going to consent to him coming
9 in if she's asleep? Just like in anything else, silence
10 itself is not consent for anything, let alone for somebody
11 to come in your house. If somebody knocks on the door and
12 you don't answer, that does not give them consent to come
13 in. Because you didn't say no, because you didn't answer,
14 they did not have the right to come in, let alone kick the
15 door off the hinges to get in there. Janice Sager, who is
16 the property manager at [REDACTED] she even showed a paper
17 that Demario is not even supposed to be at the entire
18 apartment complex, let alone Ms. Drafton's house. Keasia
19 signed a paper saying that she acknowledged the fact if he
20 was even seen on her property she would be evicted herself.
21 He has no business at [REDACTED] Apartments, whether it's in
22 the neighbor's house, Ms. Nelson's house, on the
23 playground, in the parking lot, he's not supposed to be
24 anywhere close to Ms. Drafton's house, let alone inside
25 beating on her. Now, I think the biggest argument they are

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1 going to have is he didn't have an intent to commit a crime
2 when he went in. Like I said earlier, what in the world is
3 he going to do? He kicks the door in to get to Ms.
4 Drafton, it's 4:00 in the morning. Now I can't get up here
5 and say I know exactly what's going on in Mr. Thompson's
6 head, there's not a single piece of evidence I can show
7 you. I can't show you a scan of his brain or a video of
8 him saying, "I'm going over there, I'm going to kill her,
9 I'm going to get her," I can't do that. But look at
10 everything surrounding this. Look at everything together.
11 It's 4:00 in the morning, he kicks the door in. She's got
12 bumps on her head, her eyes are red, she's got marks on her
13 neck. He knew before he went in that door that he was
14 going to go after her, whether he was going in there to
15 kill her or hit her or strangle her or whatever he was
16 doing, he knew before he crossed that -- when he got from
17 this side of the door to that side of the door that he was
18 going after her if he got in there. Like I said, I can't
19 show you his intent in his head, but you can pretty much
20 figure it out by looking at what he did. Now, the crime to
21 commit a crime in a dwelling. He had the intent to do it.
22 It doesn't matter what crime it is that he does in there,
23 and the reason that is is because if there is one place Ms.
24 Drafton should be safe it's in her own home. It doesn't
25 matter what he's coming in there to do. If he's coming in

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1 there to commit a crime, that's the last place he is
2 allowed to go into is somebody else's home when he's not
3 even supposed to be there. There wasn't even time for him
4 to formulate this after he got in there. As soon as he
5 went in he jumped on her, he left, she called the police.
6 There was no argument between the two of them, there wasn't
7 time for that. He rushed in and went after her. Whatever
8 motive he had he formed it outside that door. The statute
9 says and/either. So all it is is he went in the dwelling
10 without consent to commit a crime, and either when going in
11 the house he or somebody else participated in the crime, it
12 was just him, is armed with a deadly weapon. You heard Ms.
13 Drafton's 911 call, she's screaming, "He's got a gun." He
14 has a gun. There it is right there. Or causes physical
15 injury to a person not participating in the crime. Ms.
16 Drafton didn't do anything wrong, she was asleep, it was
17 4:00 in the morning. She's not participating, she's
18 injured. Who did it? Demario Thompson injured her. He
19 hit her in the head, he choked her, he slammed her on the
20 floor. Or uses or threatens the use of a dangerous
21 instrument. A gun is a dangerous instrument. You heard
22 her on the 911 call, she's terrified. She said he's
23 standing there with the gun in his hand. It couldn't be
24 much clearer than he's standing there with a gun in his
25 hand. "He's got a gun, he's in my apartment." Or displays

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1 what appears to be a pistol, revolver, knife, shotgun,
2 machine gun. She knew exactly what it was, she told 911
3 it's a gun. I told you yesterday this one doesn't apply.
4 If somebody has two or more burglaries, it's still on there
5 but that's not what he did. You only have to have one of
6 these, so far we've got four in the first. Or this
7 happened at nighttime. Deputy Silberman, he couldn't
8 remember -- he was having trouble remembering what he saw
9 taking the pictures because it was dark outside. It was
10 4:00 in the morning. Dominique Huff said "I walked
11 outside, I was having trouble seeing, it was dark." It was
12 nighttime, there's no question. It's July in South
13 Carolina, it's 4:00 in the morning, it's dark outside,
14 there's no question it was nighttime. So just taking the
15 top part, he went in the house without consent to commit a
16 crime, which is an assault, at night. That's burglary in
17 the first degree. Or you could say he went in the house
18 without consent to commit a crime and had he a gun. Or he
19 went in the house without consent to commit a crime and he
20 showed a gun. Any of them he's guilty of burglary first
21 degree. That's a rare case, he's guilty by every single
22 way except that he doesn't have two prior burglaries.
23 Every other way under the entire law he's guilty. You can
24 just pick one and choose and go with it, it doesn't matter,
25 he's guilty of all of it. Now, Ms. Collins from 911, she

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1 said something interesting yesterday. She said -- I wrote
2 it down when she said it. Mr. Steen asked her, "How did
3 you know that was Keasia Drafton on the phone?" She said,
4 "We must rely on the information we are given." Now, she
5 can't see Keasia Drafton through the phone, she can't see
6 Demario Thompson through the phone in the apartment. But a
7 call comes in, says he kicked in my door, he's got a gun,
8 my name is Keasia Drafton, and where she lives. Deputy
9 Silberman goes to the location, he finds a woman in that
10 apartment who has been assaulted, her name is Keasia
11 Drafton. I don't think there's any question that the
12 person who called 911 and talked to Suzanne Collins was
13 Keasia Drafton. Although Suzanne Collins never saw Keasia
14 Drafton, I think it's pretty safe to say Keasia Drafton
15 called 911. You saw these yesterday. There's the door.
16 Is that consent? No. The door is hanging off the frame,
17 it's ripped, the deadbolt is still engaged. He had to kick
18 the deadbolt through the wood, bust it open on the inside,
19 it's hanging there. It's a wreck. The mirror is busted,
20 there's stuff in the floor. There's Keasia. She's got
21 marks on her neck, she's got knots on her head. You can
22 tell she's been crying, her clothes are ripped. When
23 Officer Silberman got there she didn't even have clothes
24 on. She was standing in her underwear, she didn't have
25 time to get dressed before Demario jumped on her. That

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1 alone tells you that he formulated the intent before he
2 went inside. She's in the bed in her underwear in her own
3 home with the door locked and this man comes inside and
4 beats on her. Now, you heard the 911 call yesterday, I
5 want you to listen to it one more time.

6 (At this time the call was played.)

7 MR. COOK: I don't know where Keasia Drafton is today,
8 I don't know where she was yesterday, but I know where she
9 was July 2nd of 2014. She was in bed minding her own
10 business when Demario Thompson kicked in her door and tried
11 to kill her. She's terrified. And for that reason he's
12 guilty of attempted murder, burglary in the first degree
13 and possession of a firearm during the commission of a
14 violent crime. Thank you.

15 THE COURT: Thank you, Solicitor. Mr. Steen?

16 MR. STEEN: Good morning. Mr. Cook wants you to find
17 my client guilty here today. He wants you to blindly trust
18 the evidence he's presented to you guys. That kind of
19 blind justice has no place in our criminal justice system.
20 Let's review the State's evidence. Start with Ms. Keasia
21 Drafton. She did not testify. Mr. Cook just stated he
22 didn't know why she didn't testify. I don't know why. I
23 can't speculate why, I ask you not to speculate why. But I
24 do ask that you not hold that against my client because his
25 witness did not testify in this trial this week. Without

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1 her testimony we have no evidentiary proof that's Ms.
2 Drafton in those pictures. We have no evidentiary proof
3 that that's her voice on that 911 call. We have no proof
4 that Ms. Drafton was a victim in this case. All I know is
5 without her being here, without her testimony, without her
6 telling us all what happened, the State is asking us to
7 trust that they have a victim. We have a 911 call. Mr.
8 Cook says it was made by Ms. Drafton, but you heard the
9 testimony that he just told you that the 911 dispatcher
10 said the only information we know is they tell us and
11 there's no way to safeguard that, so there's no way to know
12 if that was Ms. Drafton who called. People call 911 and
13 give false names. Do you know why? Because police get
14 that information, and a lot of times they do that for those
15 reasons. We do not know that that's her. Without
16 confirmation of the caller we have no proof that that call
17 was made by Ms. Drafton. All I know is without Ms. Drafton
18 being here, without confirmation of her identity on the
19 phone, without any safeguards in place at 911 to prevent
20 any false identifications, the State is saying, "I know I
21 presented no proof to you guys today that she made this 911
22 call, but we're the State, trust us anyway." The banning
23 notice, the letter that Ms. Sager from [REDACTED] Apartments
24 gave to Ms. Drafton. First of all, that had nothing to do
25 with my client, that was between the landlord and a tenant.

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1 That does not show that my client was not an occupant of
2 that apartment. You don't ban people who aren't there, so
3 obviously he has been around. They know who he was, he was
4 her boyfriend. Now, all this letter does is threaten Ms.
5 Drafton with eviction if he is found at her apartment.
6 Gives her good reason to say that Mr. Thompson did not have
7 permission to be there, because if she did she would get
8 kicked out, a good reason not to tell the truth and she's
9 not here to tell us otherwise. All I know is with the only
10 evidence of Mr. Thompson not being an occupant of that
11 apartment is this anti-love letter you can't be with your
12 boyfriend. The State is saying, "I know I presented no
13 proof that Mr. Thompson is not an occupant of this
14 apartment, but we're the State, trust us anyway." And the
15 gun. It's essential to pretty much every charge the State
16 has presented. What kind of gun was it? What color was
17 it? How big was it? What did it look like? We have no
18 answer to any of these questions because there was no gun.
19 Six people testified for you yesterday, not one of those
20 six people testified that they saw a gun. The only mention
21 of a gun is in that 911 call that I still say cannot be --
22 conclusively say that was Ms. Drafton who made it. Without
23 presenting any evidence the State is again asking you to
24 trust us, we know what's best. The State was unable to
25 present any credible evidence this week because there is no

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1 credible evidence because my client did not commit these
2 charges. Let's start with the attempted murder like Mr.
3 Cook. This is what the State is alleging, and I'll read
4 straight off the indictment, that Demario Thompson did in
5 Lancaster County on or about July 2nd with the intent to
6 kill, attempt to kill Keasia Drafton with malice
7 aforethought, either expressed or implied, by holding a
8 handgun to her head and pulling the trigger multiple times
9 in an attempt to shoot her. That's what the State is
10 alleging, that's what they're alleging how he attempted to
11 kill her, by putting a gun to her head and pulling the
12 trigger. There was no evidence whatsoever yesterday that
13 he ever put a gun to Ms. Drafton's head, that he ever, ever
14 pulled any triggers. Without the State proving that they
15 cannot -- there's no possible way to convict on the
16 attempted murder, but we'll look at the evidence right
17 quick. The State must show that my client had the intent
18 to kill Ms. Drafton, that is he had the purpose between
19 4:00 and 5:00 a.m. to murder his girlfriend. Again, the
20 State presented no evidence that my client intended to hurt
21 his girlfriend by putting the gun to her head and pulling
22 the trigger multiple times. Again, he's saying that's the
23 attempt, he's saying he put the gun to her head, pulled the
24 trigger, she didn't die, that's why it's intent. That's
25 why it is on his scale. He created a new scale based on

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1 new evidence this week with strangulation. The only
2 evidence of a strangulation is Deputy Silberman testified
3 that that mark was made by strangulation. Deputy Silberman
4 is no more a doctor than any of us, that was his own
5 opinion based on what he saw was a little bruise on the
6 neck. It could be a hickey for all I know. But no one
7 testified to any other thing besides that. And that my
8 client attempted to kill with malice aforethought. Hatred,
9 ill-will, hostility, nothing outside of what the State is
10 alleging my client did shows that he had any problems with
11 Ms. Drafton, they were boyfriend and girlfriend. There was
12 no reason to think that had he any malice that led to him
13 intending or wanting to kill his girlfriend. The State
14 must prove all three of those elements beyond a reasonable
15 doubt, they have proved none. The State goes in about the
16 ABHAN, don't think he killed her, the only possible choice
17 is to convict him of ABHAN because either strangulation or
18 he had a gun. Again, the only evidence of a strangulation
19 is from Deputy Silberman who based that on no reasoning
20 whatsoever that he had a gun. Again, they're alleging he
21 put the gun to Ms. Drafton's head and he pulled the
22 trigger. Again, the only evidence in the case is that in
23 that 911 call he had a gun, that's the evidence of the gun
24 in this case. With that ABHAN you've got to have the
25 intention to kill or cause this great bodily injury. This

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1 great bodily injury leaves you permanently disfigured,
2 leaves you permanently impaired. This is not a simple
3 assault, this is something major, this is life changing,
4 he's talking about the first, second and the third. On the
5 second degree it requires moderate bodily injury. That
6 requires some kind of puncture, you have to break the skin.
7 By statute it's not anything to the skin or to a muscle,
8 that's moderate, and moderate has to actually cause some
9 kind of true penetration of the skin really. Outside of
10 that it's assault and battery third degree which requires
11 an injury. Don't care what the injury is there, it was an
12 injury there. If you don't think my client attempted to
13 kill Ms. Drafton, the only thing that the State could
14 possibly prove if you believe those pictures is that he
15 committed a simple assault, that he caused some sort of an
16 injury, that bruise or something on the side of her neck,
17 that is the only charge of the lesser-included that is
18 applicable to this case. Then we've got the burglary
19 first. The State alleges that my client entered Ms.
20 Drafton's apartment without Ms. Drafton's consent with the
21 intent to kill her, that is to put a gun to her head and
22 shoot multiple times without killing her. I hate to be a
23 broken record, but the State has presented no evidence of
24 that again. That is an element of burglary, that he
25 intended to commit the crime therein. His crime therein

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1 was the attempted murder by putting the gun to her head and
2 pulling the trigger. There's no evidence, one is the basis
3 of the other. Let's start with the first element, that my
4 client entered Ms. Drafton's apartment. Ms. Drafton didn't
5 testify that he entered her apartment. The 911 call that
6 purports to be Ms. Drafton said he broke the door, still no
7 allegations of any entrance into the apartment. Mr. Huff
8 and Ms. Hunt, the only eye witness is the people who lived
9 across the breezeway, testified that they never saw Mr.
10 Thompson inside the apartment. And I'm pretty sure the
11 State said when Mr. Hunt (sic) said he saw him come out, and
12 Mr. Hunt (sic) testified he saw Mr. Thompson about 4:00 or
13 5:00 a.m. out in front of the apartment complex this was
14 down by the neighbor's place. He never said anything about
15 him coming out of the apartment. And that my client
16 entered without Ms. Drafton's consent. The only person who
17 has the lawful right to withhold consent is the lawful
18 occupant of that apartment, Ms. Drafton, she's the only
19 person. She did not tell us that he did not have consent
20 to be there. Ms. Sager doesn't matter. She cannot tell
21 her you cannot have a -- this person cannot be in your
22 apartment. They can evict her for breaking their rules but
23 they cannot tell her you cannot hang around with this
24 person because they are not law enforcement. So without
25 Ms. Drafton testifying that he could not be there, we don't

CLOSING ARGUMENTS

1 know that he could not be there. And that he had the
2 intent to commit the murder. I won't discuss that again,
3 but there's no evidence that he put a gun to her head and
4 he pulled the trigger attempting to shoot her. The State
5 must prove all four of those elements beyond a reasonable
6 doubt, again they've proven none. We all heard Judge
7 Gibbons at the beginning of this trial saying we have the
8 best justice system in the world. We do, he's right, and
9 that's because we cannot convict based on blindly trusting
10 the evidence presented by the State. The State must
11 produce competent evidence of every element of every charge
12 beyond a reasonable doubt for you to find him guilty of
13 these charges. The State has not met its burden here
14 today. My client is not guilty of these charges, the State
15 has failed to provide evidence that my client is guilty of
16 these charges. I ask you, I beg you to please find my
17 client not guilty here today. Thank you.

18 THE COURT: All right. Thank you, Mr. Steen. All
19 right. Ladies and gentlemen of the jury, I'm going to ask
20 that you pay close attention to what I'm fixin' to tell
21 you. I am going to slide over here, I want to make sure
22 I'm still in the microphone. Can y'all hear me okay? All
23 right. I am now going to charge you the law as it pertains
24 in this case, and I'm not going to sit here and read it, I
25 know there's nothing worse than a talking head reading

JURY CHARGE

1 you've received those exhibits and you've received the
2 verdict form. Once you've received those from the bailiff
3 that will be your signal to begin your deliberations, and
4 once you begin your deliberations you will deliberate until
5 you've reached a verdict at which time you will knock on
6 the door and advise the bailiff and we will bring you out
7 to receive your verdict. Thank you very much. You may now
8 retire to your jury room to except my alternate, Mr.
9 Blackwell, if you will stick with us please.

10 (The jury left the courtroom.)

11 THE COURT: Any exceptions to the charge from the
12 State?

13 MR. COOK: None from the State.

14 THE COURT: From the defense?

15 MR. STEEN: None, Your Honor.

16 THE COURT: Thank you. Y'all come check the exhibits
17 out and check the verdict form again.

18 (The alternate juror was dismissed.)

19 (The jury began deliberations and returned with a
20 Question.)

21 THE COURT: All right. Gentleman, I have received a
22 question from the jury, I've had it marked and entered as
23 Court's Exhibit 1, and it is as follows, "May we please
24 have a copy of law for attempted murder and burglary first
25 degree?" Y'all think about it. I don't mind sending my

JURY CHARGE

1 written charge just on burglary first degree and attempted
2 murder back. If you object to that let me know, or however
3 y'all want to handle it.

4 MR. COOK: Your Honor, if one is going to go back I
5 would move it would be an actual copy of the statute rather
6 than the charge, because the charge explains stuff actually
7 and what they asked for is just a copy of the law. This
8 expounds on reasonable doubt and other things but they're
9 just asking for the law.

10 THE COURT: Mr. Steen?

11 MR. STEEN: Well, Your Honor, I would agree that the
12 jury charges should go back, but this is the law as
13 presented to the jury and was used at the trial, let's just
14 keep it that way instead of giving them the statue.

15 THE COURT: Does the defense have any objection to my
16 written charge going back to the jury?

17 MR. STEEN: I would ask that the lesser-includeds be
18 included with the attempted murder.

19 THE COURT: Okay. Does the State have any objection
20 to my written charge of the law, burglary in the first and
21 attempted murder, going back?

22 MR. COOK: I would ask that it be the law.

23 THE COURT: Okay. We'll bring the jury out and I'll
24 read them my charge. Thank you. All right. The second
25 question mark and identified is, "May we please listen to

JURY CHARGE

1 the 911 tape again? Thank you." Also, "Request copy of
2 Dominique's testimony, the copy that the police took on the
3 night of the assault." In other words they want the
4 statement that was not introduced into evidence, I'm not
5 going to let them see that. I'll simply instruct them that
6 they have to deliberate based upon the evidence received
7 from the witness stand and the evidence which they have.
8 On the 911 tape again, any objection to playing that again?

9 MR. STEEN: No, Your Honor.

10 MR. COOK: No objection.

11 THE COURT: That's what we'll do then. I am going to
12 recharge them on first degree burglary and the attempted
13 murder, and then I'm going to let them hear the 911 tape
14 again and I'll tell them about the other one. All right.
15 Bring them in.

16 (The jury returned to the courtroom.)

17 THE COURT: All members of the jury are present.

18 Madam Forelady, did you write these notes?

19 THE JUROR: I did.

20 THE COURT: Let me compliment you on your handwriting,
21 I can read it very well. What I'm going to do on Court's
22 Exhibit Number 1, which is the first question about have a
23 copy of the law for attempted murder and burglary first
24 degree, I cannot give you a written copy but I will state
25 it again to you here momentarily. As to your question

JURY CHARGE

1 about the 911 tape, again we will, of course, play that
2 back for you. And the last question was requesting a copy
3 of Dominique's testimony, the copy the police took on the
4 night of the assault. That was not introduced into
5 evidence so that cannot be considered by you in your
6 deliberations. Remember, your deliberations are solely
7 confined to the testimony and the evidence in the record,
8 testimony from this witness stand and the evidence which
9 you have back there. Okay. So let me go ahead and state
10 to you again the law of first degree burglary and attempted
11 murder. Okay. The defendant is charged with first degree
12 burglary. The State must first prove beyond a reasonable
13 doubt that the defendant entered a dwelling without
14 consent. A dwelling is any building or portion of a
15 building in which a person ordinarily sleeps. In order to
16 prove that the defendant entered the dwelling the State
17 does not have to show that the defendant's entire body
18 entered the dwelling. The smallest entry is sufficient.
19 It may be any part of the body, such as a hand or foot, or
20 even an instrument such as a hook or other instrument.
21 Next, the State must prove beyond a reasonable doubt that
22 the defendant intended to commit a crime, either a felony
23 or a misdemeanor at the time of the entry. The mere entry
24 into a dwelling without consent is not burglary. If the
25 intent to commit a crime is formed after the entry it is

JURY CHARGE

1 not burglary. On the other hand, if the defendant intended
2 to commit a crime at the time of the entry it is a
3 burglary, even if the intent was abandoned after the entry.
4 It does not matter that the intended crime was not -- it
5 does not matter that the intended crime was not completed.
6 Intent may be shown by acts and conduct of the defendant or
7 other circumstances from which you may naturally and
8 reasonably infer intent. Finally, the State must prove
9 beyond a reasonable doubt that when entering while in the
10 dwelling or when fleeing the defendant was armed with a
11 deadly weapon or explosive. A deadly weapon is any
12 article, instrument or substance which is likely to cause
13 death or great bodily injury -- or great bodily harm,
14 excuse me. Whether an instrument has been used as a deadly
15 weapon depends on the facts and circumstances of each case.
16 A pistol is considered a deadly weapon. The State must
17 prove beyond a reasonable doubt either that number one --
18 or number two, when entering, while in the dwelling or when
19 fleeing the defendant caused physical injury to anyone not
20 participating in the crime. Number three, when entering,
21 while in the dwelling or when fleeing the defendant used or
22 threatened to use a dangerous object. Number four, when
23 entering, while in the dwelling or when fleeing the
24 defendant displayed what was or appeared to be a knife,
25 pistol, revolver, rifle, shotgun, machine gun or other

JURY CHARGE

1 firearm. Or number six, the defendant entered or remained
2 in the dwelling in the nighttime. Nighttime is the period
3 between sunset and sunrise during which there is not enough
4 daylight to recognize a person's face except by artificial
5 light or moonlight. At this point since my voice is
6 cracking up, can you play the 911 tape? And then I can get
7 my voice back and do the attempted murder.

8 (The 911 tape was played.)

9 THE COURT: Attempted murder. The defendant is
10 charged with attempted murder. In order to prove this
11 crime the State must prove the defendant attempted to kill
12 another person with malice aforethought, either expressed
13 or implied. Malice is hatred, ill-will or hostility
14 towards another person. It is the intentional doing of a
15 wrongful act without just cause or excuse and with an
16 intent to inflict an injury, or under circumstances that
17 the law will infer an evil intent. Malice aforethought
18 does not require that malice exists for any particular time
19 before the act is committed, but malice must exist in the
20 mind of the defendant just before and at the act -- and at
21 the time the act is committed. Therefore there must be a
22 combination of the previous evil intent and the act.
23 Malice aforethought may be expressed or inferred. These
24 terms express and inferred do not mean different kinds of
25 malice but merely the manner in which the malice may be

JURY CHARGE

1 shown to exist, that is either by direct evidence or by
2 inference from the facts and circumstances which are proved
3 to your satisfaction, the jury. Expressed malice is shown
4 when a person speaks words which express hatred or ill-will
5 for another, or when the person prepared beforehand to do
6 the act which was later accomplished, for example lying in
7 wait for a person or any other acts of preparation going to
8 show that the deed was within the defendant's mind. That's
9 an example of expressed malice. Malice can also be
10 inferred from conduct which shows a total disregard for
11 human life. If facts are proved beyond a reasonable doubt
12 sufficient to raise an inference of malice to your, the
13 jury's, satisfaction this inference will simply be an
14 evidentiary fact to be considered by you along with the
15 other evidence in the case, and you may give it the weight
16 you decide it should receive. A specific intent to kill is
17 not an element of attempted murder, but there must be a
18 general intent to commit serious bodily injury. Intent
19 means intending the result which actually occurs, not
20 accidentally or involuntarily. Intent may be shown by acts
21 and conduct of the defendant and other circumstances from
22 which you may naturally and reasonably infer intent.
23 Evidence of the character of the act, the character of the
24 instrument used, the manner in which it was used, the
25 purpose to be accomplished and the resulting wound or

JURY CHARGE

1 injuries may be considered in determining the intent with
2 which the act was committed. Intent may also be inferred
3 when it is demonstrated that the defendant voluntarily and
4 willfully commits an act, the natural tendency of which is
5 to destroy another's life. Ladies and gentlemen, I am
6 going to allow you to return to your deliberations, it is
7 approaching the lunch hour at this time. Madam Forelady,
8 you can go talk to your fellow jurors to see if y'all want
9 to push on through or keep deliberating, you are the
10 spokesperson here. If you want to break for lunch just let
11 the bailiff know and we can do that and I'll have you back
12 here at -- I'll let you know the time when you come back if
13 you want to but that's going to be solely up to y'all. I
14 will let you discuss that in your jury room. Thank you
15 very much, you can return to your jury room.

16 (The jury left the courtroom.)

17 THE COURT: All right. Anything else?

18 MR. COOK: Nothing from the State, Your Honor.

19 MR. STEEN: Nothing from the defense.

20 THE COURT: All right. Thank you. We're in recess.

21 (A lunch break was taken.)

22 (The jury resumed deliberations and returned with a
23 Question.)

24 THE COURT: I've got a third note. They want to hear
25 the definition of display of a firearm during the

JURY CHARGE

1 commission of a violent crime, so I will give them my
2 charge again concerning that charge. Okay. They're on
3 their way now.

4 (The returned to the courtroom.)

5 THE COURT: All right, All members of the jury are
6 present. Ladies and gentlemen, it's my understanding you
7 wish for me to define possession of a weapon during the
8 commission of a violent crime, I'll do that now as I did
9 earlier, please listen carefully. The defendant is charged
10 with possession of a weapon during the commission of a
11 violent crime. The State must prove beyond a reasonable
12 doubt that the defendant was in possession of a firearm or
13 visibly displayed what appeared to be a firearm during the
14 commission of a violent crime. A firearm means any machine
15 gun, automatic rifle, revolver, pistol or any weapon which
16 will, is designed to or may readily be converted to expel a
17 projectile. In order to find the defendant guilty of
18 possession of a weapon during the commission of a violent
19 crime you must first find the defendant guilty of either
20 committing a violent crime or attempting to commit a
21 violent crime. Burglary, attempted murder and assault and
22 battery of a high and aggravated nature are defined as
23 violent crimes. The State must prove beyond a reasonable
24 doubt that the weapon furthered, advanced or helped in the
25 commission of the crime. That's the law on that charge,

JURY VERDICT

1 y'all may resume your deliberations. Thank you.

2 (The jury left the courtroom and resumed
3 Deliberations.)

4 THE COURT: Anything else?

5 MR. STEEN: No, sir.

6 MR. COOK: No, sir.

7 (The jury returned with a verdict.)

8 THE COURT: We have a verdict, y'all bring them in.

9 (The jury returned to the courtroom.)

10 THE COURT: All right. All members of the jury are
11 present. Madam Forelady, it's my understanding that the
12 jury has reached a verdict.

13 THE JUROR: Yes, we have.

14 THE COURT: Is the verdict unanimous?

15 THE JUROR: It is.

16 THE COURT: Did you fill out the verdict form?

17 THE JUROR: I certainly did.

18 THE COURT: If you will hand it to the clerk at this
19 time. All right, Mr. Clerk, you may publish the verdict.

20 THE CLERK: Yes, sir, Your Honor. We, the jury,
21 unanimously find the defendant, Demario Thompson,
22 concerning the offense of burglary first degree, indictment
23 number 2014-GS-29-1321, guilty. We, the jury, unanimously
24 find the defendant, Demario Thompson, concerning the
25 offense of attempted murder, indictment number

JURY VERDICT

1 2014-GS-29-1322, guilty of the lesser-included offense of
2 assault and battery third degree. We, the jury,
3 unanimously find the defendant, Demario Thompson,
4 concerning the offense of possession or display of a
5 firearm during the commission of a violent crime,
6 indictment number 2014-GS-29-1325, not guilty. I certify
7 this decision was the unanimous decision of the jury, Nancy
8 Coghill, forelady of the grand jury (sic). Ladies and
9 gentlemen of the jury, if this be your verdict so say you
10 all by the raising of your right hands. Let the record
11 reflect all jurors raised their right hands. We need to
12 get the date on that, Your Honor.

13 THE COURT: All right. Have her date it then. All
14 right. Ladies and gentlemen, thank you so much for your
15 jury service. Your jury service has ended for the day,
16 obviously, I need you to call back in this afternoon after
17 6:00 p.m. You are free to leave at this point in time but
18 you're more than welcome to stick around for sentencing if
19 you wish to do so, but you don't have to do so if you don't
20 want to do that. Thank you so much for your service.
21 Solicitor, are you going to prepare a sentencing sheet for
22 me?

23 MR. COOK: I will prepare one upstairs, Your Honor.

24 THE COURT: We will be in recess for about ten minutes
25 while we get that done and then we'll take care of

SENTENCING HEARING

1 sentencing.

2 (A recess was taken and the jury left the courtroom.)

3 THE COURT: Anything further from the State?

4 MR. COOK: Nothing from the State, Your Honor.

5 THE COURT: From the defense?

6 MR. STEEN: Yes, Your Honor. I move for a new trial
7 in regards to the offense of burglary first. The State did
8 not present the evidence that Ms. Drafton did not give him
9 consent -- that he entered the -- or credible evidence that
10 he had a gun.

11 THE COURT: Well, your client won on the possession of
12 a weapon charge and he also won on the attempted murder
13 charge. But obviously the jury believed at least from my
14 view of the evidence that he went into a dwelling without
15 consent of the owner during the nighttime hours with the
16 intent to commit a crime, which fits the definition of
17 burglary. So I'm going to respectfully deny your motion.

18 MR. COOK: Your Honor, in regard to Mr. Thompson's
19 record, in 2001 ABC violation, in 2003 open container, 2004
20 criminal domestic violence, 2005 disorderly conduct, 2005
21 driving under suspension, 2005 manufacturing a controlled
22 substance with intent to distribute, he received a Youthful
23 Offender Act, it was five years suspended to three years
24 probation, unlawful carrying of a weapon, driving under
25 suspension and open container. 2006 giving false

SENTENCING HEARING

1 information and driving under suspension, 2007 driving
2 under suspension, 2010 manufacturing controlled substance
3 with intent to distribute. 2013 criminal domestic violence
4 second offense and malicious injury to property. That is
5 the extent of his record, Your Honor.

6 THE COURT: All right. Anything from the State as far
7 as any sentencing recommendation before I go to the defense
8 for mitigation?

9 MR. COOK: Well, Your Honor, obviously the assault is
10 a 30 day offense, it would be time served. Burglary first,
11 it's a statutory -- it's a -- 15 is the lowest sentence you
12 can go on that. I understand it's a suspendible sentence
13 because it doesn't specifically say in the statute that you
14 can't suspend it, however I don't think -- if you would
15 like to hear what the offers are as part of --

16 THE COURT: I want you to tell me whatever you want to
17 tell me, now is your time.

18 MR. COOK: I offered Mr. Thompson a ten year sentence,
19 I offered him to plead to ABHAN and burglary second
20 violent. That was his offer from day one until last week
21 when I came back and I said if he'll let us know right now
22 that he is going to plead -- that offer would have been 85
23 percent because ABHAN carries 20 years. And I came back
24 last week and I informed him through Mr. Steen that I would
25 allow him to plead to assault and battery first degree and

SENTENCING HEARING

1 burglary second violent, neither one of those carry 20 so
2 he would essentially have to do 60 or 65 percent of a ten
3 year sentence, neither one of them are categorized violent
4 or 20 years. So when he got to SCDC he would essentially
5 be doing five, maybe six years. He refused to take that
6 offer. He was found guilty by a jury on burglary first
7 degree, which it's a blatant burglary first degree. He
8 went in at night, he kicked the door in and assaulted Ms.
9 Drafton. It's a most basic burglary first as you can get
10 and it is a mandatory -- it's not a mandatory minimum 15
11 like armed robbery is mandatory minimum of ten because you
12 can suspend it but I don't think it should be suspended.
13 He had an offer to go to 10 and that's why we do these
14 offers is to grant them leniency. We offered him 10, he
15 rolled the dice and he was found guilty of what he actually
16 did versus pleading down to a lesser-included charge. Now,
17 you could do a split sentence in which I think they may ask
18 but I don't think that's appropriate, because I think if
19 you do these split sentences with lengthy time in SCDC
20 you're setting them up for failure to come out and be on
21 probation after they've been locked up over an extended
22 period of time, they come out, they don't report and don't
23 pay and I don't think that's the right thing to do. I
24 think he should get no less than 15 and I think it should
25 be active time, Your Honor.

SENTENCING HEARING

1 THE COURT: Thank you, Solicitor. Mr. Steen?

2 MR. STEEN: Thank you Your Honor. Well, I would ask
3 for the mercy of this Court. On the assault and battery
4 third degree, he has done more than 30 days on that charge.
5 Your Honor, this was a case that needed to go to trial, the
6 victim wanted nothing to do with it. I would respectfully
7 ask Your Honor not to trial tax Mr. Thompson in this
8 situation. He was found guilty of a A and B third on a
9 charge where the Solicitor's only offer was A and B first
10 or an ABHAN. That shows that this trial was necessary on
11 at least one charge and listened to the two directed
12 verdicts and the one not guilty. Mr. Cook read Mr.
13 Thompson's record. Your Honor, he had no prior burglaries.
14 He has a lengthy record, most of it was DUS's and drug
15 charges. He did have the CDV, which basically is what this
16 was, Your Honor, it got blown out of proportion. But we
17 would ask for my mercy of the Court. Mr. Thompson is 31,
18 he's got six kids, his youngest is five, let him get home
19 and see them graduate.

20 THE COURT: Yes, sir. Mr. Thompson, I would be glad
21 to hear from you?

22 THE DEFENDANT: I would just like to apologize to the
23 Courts and ask you to have mercy on me in sentencing.

24 THE COURT: What was this dispute all about?

25 THE DEFENDANT: Me and my girl had an argument and I

SENTENCING HEARING

1 just wanted to come in the house and she didn't let me in
2 basically. I had been staying there, though. If she were
3 here today she would tell you that, she would tell you that
4 I had been staying there. She didn't want this to happen.
5 She tried to get the charges dropped but they wouldn't drop
6 them.

7 THE COURT: Do y'all have any children together?

8 THE DEFENDANT: No, sir.

9 THE COURT: Well, you know, going back to -- going
10 back to what you said, Mr. Steen, you know, the Court
11 doesn't recognize a trial tax. I understand that that's
12 what the lawyers say and, you know, I never penalize
13 somebody for their right to a trial. They're presumed
14 innocent until proven guilty beyond a reasonable doubt, but
15 I understand what you're saying. You know, the pointing
16 and presenting a firearms, I directed a verdict for you, I
17 mean, the jury didn't get to consider that so you won on
18 tat. You won on the attempted murder and you won on the
19 possession of a weapon, that's four out of five, that's not
20 bad. So I understand the case -- some cases need to be
21 tried, I understand that. But I tend to agree with the
22 solicitor, in the Court's opinion it was a slam dunk
23 burglary case, regardless of the weapon or not it appeared
24 to be a slam dunk burglary case. I'm concerned about two
25 prior CDV's within a ten year timeframe of this happening.

SENTENCING HEARING

1 This could have been a lot worse, Mr. Thompson, of course,
2 you know that. I'm going to sentence you to 15 years.
3 Good luck to you.

4 (End of trial proceedings.)

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Northwest Apartments

3058 NW Apt Drive • Lancaster, SC 29720

Phone (803) 286-4822 • Fax (803) 283-1276 • TDD 800-735-2905

03/18/14

Ms. Keasia Drafton

[REDACTED] NW Apartment Drive, [REDACTED]

Lancaster, SC 29720

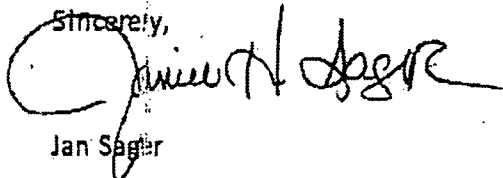
RE: Demario Monte Thompson

Dear Ms. Keasia Drafton

Let this letter serve as official notice that Mr. Demario Monte Thompson has been banned from Northwest Apartments by the Lancaster County Sheriff's Department on our behalf. He will be charged with trespassing if he comes back on the property.

By signing this letter you are acknowledging that you understand that we will take legal steps to terminate your lease if you, or a guest of yours, allow Mr. Demario Monte Thompson to enter your apartment or if you are found in his presence on this property.

Sincerely,



Jan Sager

Site Manager

Cc: Resident's File


Signature3 18 14
Date

"This institution is an equal opportunity provider and employer."

If you wish to file a Civil Rights program complaint of discrimination, complete the USDA Program Discrimination Complaint Form, found online at http://www.ascr.usda.gov/complaint_filing_cust.html, or at any USDA office, or call (866) 632-9992 to request the form. You may also write a letter containing all of the information requested in the form. Send your completed complaint form or letter to us by mail at U.S. Department of Agriculture, Director, Office of Adjudication, 1400 Independence Avenue, S.W., Washington, D.C. 20250-9410, by fax (202) 690-7442 or email at program.intake@usda.gov.

WITNESSES

Silberman - LCSO #14-24035

[Signature]

ARREST WARRANT NUMBER/DOA

2014A2910100788 DOA (7-17-14)

ACTION OF GRAND JURY

[Signature]
Foreperson of Grand Jury
Date: 10/02/2014

VERDICT

TRUE BILL

Foreperson of Petit Jury
Date:

DOCKET NO. 2014-GS-29-1321

The State of South Carolina

County of Lancaster

COURT OF GENERAL SESSIONS

OCTOBER TERM 2014

THE STATE
vs.

Demario Monte Thompson 1321-15

Indictment for

Burglary, First Degree

SC Code: §16-11-311(A)(1)(b)
CDR Code: 0079
Class: Felony, EXM

FILED
OFFICE OF CLERK
OF COURT

2014 OCT -2 PM 12:10

CLERK OF COURT
LANCASTER, SC

RECEIVED

JAN 12 2015

SC Court of Appeals

STATE OF SOUTH CAROLINA)
)
COUNTY OF LANCASTER)

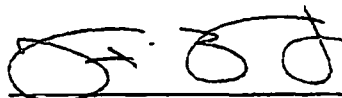
INDICTMENT

At a Court of General Sessions, convened on October 2, 2014, the Grand Jurors of Lancaster County present upon their oath:

BURGLARY, FIRST DEGREE

That Demario Monte Thompson did in Lancaster County on or about July 2, 2014, enter the dwelling of Keasia Drafton without consent and with intent to commit a crime in the dwelling and while effecting entry or while in the dwelling or in immediate flight from the dwelling, he or another participant in the crime caused physical injury to a person who was not a participant in the burglary, to wit: Keasia Drafton, and the Defendant did enter in the nighttime, in violation of §16-11-311(A)(1)(b), *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.



Douglas A. Barfield, Jr., SOLICITOR

WITNESSES

Silberman - LCSO #14-24035

[Signature]

ARREST WARRANT NUMBER/DOA

2014A2910100789 (DOA-7-17-14)

ACTION OF GRAND JURY

[Signature]

Foreperson of Grand Jury

Date: 10/02/2014

VERDICT

TRUE BILL

Foreperson of Petit Jury

Date:

DOCKET NO. 2014-GS-29-1322

The State of South Carolina

County of Lancaster

COURT OF GENERAL SESSIONS

OCTOBER TERM 2014

THE STATE

vs.

Demario Monte Thompson 021-26

ATTEMPTED MURDER

SC Code: §16-3-29

CDR Code: 3410

Class: Felony A

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OF COURT
2014 OCT -2 PM 12:10
CLERK OF COURT
LANCASTER, SC

STATE OF SOUTH CAROLINA)
)
 COUNTY OF LANCASTER)

INDICTMENT

At a Court of General Sessions, convened on October 2, 2014, the Grand Jurors of Lancaster County present upon their oath:

ATTEMPTED MURDER

That Demario Monte Thompson did in Lancaster County on or about July 2, 2014, with intent to kill, attempt to kill Keasia Drafton with malice aforethought, either expressed or implied, by holdiing a handgun to her head and pulling the trigger multiple times in an attempt to shoot her, implying that he intended to shoot/kill her, in violation of Section 16-3-29 of 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.



Douglas A. Barfield, Jr., SOLICITOR

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 April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

April 15th, 2016


John H. Strom
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

Appeal from Lancaster County

Brian M. Gibbons, Circuit Court Judge

RECEIVED

OCT 17 2017

S.C. SUPREME COURT

THE STATE,

RESPONDENT,

V.

DEMARIO MONTE THOMPSON,

APPELLANT

APPELLATE CASE NO. 2015-000126

FINAL BRIEF OF APPELLANT

JOHN H. STROM
Appellate Defender

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

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I.

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

- (A) The letter was irrelevant to the accusations against Appellant.
- (B) Assuming *arguendo* that the letter may have been at all relevant, the danger of unfair prejudice substantially outweighed the probative value of the letter.
- (C) The letter constituted impermissible hearsay not failing under any hearsay exception.
- (D) The letter constituted impermissible prior bad act evidence under Rule 404(b), SCRE, having no logical relation to the crimes for which Appellant was standing trial, and, to the extent the letter had any probative value, its probative value was outweighed by its prejudicial effect.

II.

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

- (A) The State failed to present sufficient evidence to authenticate that the self-identifying caller to 911 was Drafton.
- (B) The admission of the 911 call violated Appellant's Sixth and Fourteenth Amendment rights to confront and cross-examine witnesses, pursuant to *Crawford v. Washington*, 541 U.S. 36 (2004) and *Davis v. Washington*, 547 U.S. 813 (2006).

III.

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

IV.

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

STATEMENT OF THE CASE

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

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

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

STATEMENT OF FACTS

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

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

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

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

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

ARGUMENTS

I.

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

Relevant Facts

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

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

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

Rule 602 Objection

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

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

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

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

Rule 404(b) Objection

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

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

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

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

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

Rule 403 Objection

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

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

Hearsay Objection

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

Trial Testimony of Janice Sager

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Harmless Error Analysis

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

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

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

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

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

II.

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

Relevant Facts

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

Pre-Trial Motion to Suppress 911 call

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

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

¹ 541 U.S. 36 (2004).

² 547 U.S. 813 (2006).

Introduction of the 911 Call

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

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

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

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

Trial Testimony of Sandra Cauthen

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

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

Trial Testimony of Suzzane Collins

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

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

Discussion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Statements are non-testimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the

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

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

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

The neighbors who called -- those 911 calls weren't admitted so this is -- Ms. Suzanne Collins, who is the dispatcher that's called, has not spoken to anybody that's inside that room until she talks to Ms. Drafton here. She's trying to get as much information as she can to best advise law enforcement what to do. She needs to ask her is he there and what is he wearing so when they respond and they see a man running out matching the description they can stop that person. Everything she's asking is to handle the situation when they arrive. The end of it where she says -- after she says what he's wearing she's saying he pointed the gun, all of that, *that wasn't even in response to Ms. Collins' question*

The extent of her conversation was simply to *identify what was going on and to send emergency personnel*. I don't think it ever crossed over to the point where she's sitting there asking, "Well *what did he do to you?*" She's saying, "Is he there? Yes, and he's got a gun." . . . she's not interrogating her, she's just trying to figure out what in the world is going on.

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

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

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

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

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

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

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

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

III.

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

Introduction

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

Testimony of Dominique Huff

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

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

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

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

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

Trial Testimony of Jamie Hunt

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

Directed Verdict Motion: First Degree Burglary

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

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

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

Motion for a New Trial and Sentencing

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

Discussion

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

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

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

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

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

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

R. 125.

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

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

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

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

IV.

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

Discussion

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

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

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

CONCLUSION

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

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John H. Strom", written over a horizontal line.

John H. Strom
Appellate Defender

ATTORNEY FOR APPELLANT

This 22nd day of April, 2015.

CERTIFICATE OF COUNSEL FOR APPELLANT

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

April 22nd, 2016

A handwritten signature in black ink, appearing to read "John Harrison Strom", written over a horizontal line.

John Harrison Strom
Appellate Defender

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

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lancaster County

Brian M. Gibbons, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

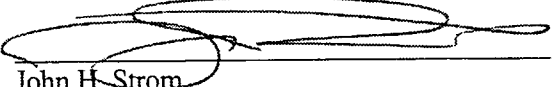
DEMARJO MONTE THOMPSON,

APPELLANT

APPELLATE CASE NO. 2015-000126

CERTIFICATE OF SERVICE

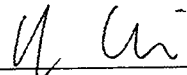
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Deborah R. J. Shupe, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 22nd day of April, 2015.



John H. Strom
Appellate Defender

ATTORNEY FOR APPELLANT

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



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

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED

MAR 14 2017

Appeal From Lancaster County
The Honorable Brian M. Gibbons, Circuit Court Judge
Appellate Case No. 2015-000126

SC Court of Appeals

THE STATE,

Respondent,

v.

DEMARIO MONTE THOMPSON,

Appellant.

AMENDED FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

DEBORAH R.J. SHUPE
Senior Assistant Deputy Attorney General
SC Bar No. 5098

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

DOUGLAS A. BARFIELD, JR.
Solicitor, Sixth Judicial Circuit

PO Box 607
Lancaster, South Carolina 29721
(864) 596-575

ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. The circuit court properly admitted the trespass notice letter because it was directly relevant to an element of first degree burglary, the probative value far outweighed any potential prejudice to Appellant, it was admissible as a business record prepared in the ordinary course of business, and it was not prior bad act evidence.

II. The circuit court properly admitted the 911 recording, which was authenticated by the Director of Public Communications and the dispatcher who took the call, and its contents did not violate Appellant's rights under the Confrontation Clause.

III. The circuit court properly denied Appellant's directed verdict motion because there was ample evidence in the record from which the jury could, and did, find Appellant entered the victim's apartment without consent in the nighttime, and with the intent to commit a crime therein.

IV. The circuit court properly denied Appellant's motion for a new trial because the court did not commit errors so prejudicial as to deprive Appellant of a fair trial.

STATEMENT OF THE CASE

Respondent concurs with Appellant's procedural Statement of the Case.

STATEMENT OF FACTS

In October 2014, the Lancaster County Grand Jury indicted Appellant Demario Monte Thompson on one count of attempted murder, one count of first degree burglary, one count of possession or display of a firearm during a violent crime, and two counts of pointing and presenting a firearm. The case was called for a jury trial on January 5, 2015, before the Honorable Brian Gibbons, Circuit Court Judge.

During pre-trial motions, Appellant moved to suppress testimony from the apartment complex manager regarding a trespass notice indicating Appellant was banned from coming on the complex property. The State argued the testimony and letter went directly to the first degree burglary charge because it established Appellant was not a resident of the complex, and could not have had consent to enter the victim's apartment. The court denied Appellant's motion, finding the fact the victim received the trespass notice as the apartment occupant went to the manager's credibility, and Appellant could cross-examine her about whether she sent a copy of the letter to him personally. (Trial Transcript [TT], pp. 23-30; Record on Appeal [R.], pp. 6-13).

Appellant then moved to suppress the testimony and notice under Rule 404(B), SCRE, arguing it was inadmissible character evidence. The State indicated it did not intend to ask the manager about why the notice was issued, but was presenting the notice to show Appellant was not a resident at the complex, and the victim could not give him consent to be there. The court denied the motion to suppress under Rule 404(B), finding the State was not offering the letter as character evidence, but to prove a specific element of the crime. (TT, pp. 30-32; R., pp. 13-15).

Appellant then moved to suppress the testimony and notice as unduly prejudicial. The court denied the motion, finding the evidence's probative value on the issue of Appellant's right to be in the victim's apartment outweighed any prejudicial value. (TT, pp. 34-35; R., pp. 17-18).

Deputy Rueben Silberman of the Lancaster County Sheriff's Office testified he responded to a disturbance call at an apartment complex between 4:00 a.m. and 5:00 a.m. on the morning of July 2, 2014. When he arrived at the complex, he spoke with the victim, who was very upset, had wounds on her head and neck, torn clothes, and appeared like she had been in a physical altercation. He saw the victim's apartment door had been kicked in, and was hanging off the hinges. The apartment living room looked like a disturbance and physical altercation had occurred there. Appellant was not present, but Deputy Silberman spoke with the victim's neighbors. (TT, pp. 52-61, State's Exhibit 1 [Photos]; R., pp. 35-44).¹

Dominique Huff testified he lived across the hallway from the victim's apartment, and he was in his apartment the morning of July 2, 2014, when he heard a disturbance coming from the victim's apartment. He went outside and saw the victim's apartment door hanging off the hinges. It was dark inside the apartment, but he heard "just a whole bunch of commotion" inside. He returned to his apartment, but then heard someone yell "he had a gun," so he grabbed his gun and went back outside. At that time, he saw Appellant downstairs in a verbal altercation with another neighbor. He also saw the victim come out of her apartment wearing a shirt and underwear, and crying hysterically. (TT, pp. 62-70; R., pp. 45-53).

¹ State's Exhibit #1 is on file with the Court.

Jamie Hunt testified she lived with Dominique Huff and their three children, and they woke up early on the morning of July 2, 2014, when they “heard the disturbance and someone kicking in doors and stuff like that.” After Mr. Huff went outside to check on it, he came back in and told her to call 911, which she did. (TT, pp. 71-73; R., pp. 54-56).

The apartment complex manager testified, over Appellant’s objection, she had been the manager at the victim’s apartment complex for seven years, and Appellant had never been a resident at the complex. She further testified she prepared a letter dated March 18, 2014, advising the victim Appellant was banned from the complex. She personally presented the letter to the victim, and had the victim sign at the bottom of the letter acknowledging she received and understood the letter’s contents. (TT, pp. 73-76; R., pp. 56-59).

The letter stated Appellant was banned from the complex and would be charged with trespassing if he came back on the property. It also advised the victim the complex would take legal action to terminate her lease if she, or a guest of hers, allowed Appellant to enter her apartment, or if she was found in Appellant’s presence on the property. (State’s Exhibit 2; R., p. 123).

Appellant then objected to introduction of the recording of the victim’s 911 call, arguing it violated the Confrontation Clause because the victim’s statements during the call were testimonial in nature, and he did not have an opportunity to cross-examine the declarant (victim), who was not present to testify at trial. The State argued the call was non-testimonial because it was not the result of an interrogation, and all the dispatcher’s questions were aimed at obtaining as much information as possible for the responding officers. (TT, pp. 77-82; R., pp. 60-65). After listening to the recording, the court

overruled Appellant's objection. (TT, pp. 82-83, Audio Recording of 911 Call; R., pp. 65-66).²

The Deputy Director for Lancaster County Public Communications testified about the recording and maintenance process for 911 calls, and identified the recordings associated with the July 2, 2014, incident. The 911 dispatcher on duty that night verified she handled the call in question, and identified her own voice in the recording. (TT, pp. 84-90; R., pp. 67-73).

The circuit court granted Appellant's directed verdict motion on both pointing and presenting charges, but submitted the remaining charges to the jury. The court also submitted multiple lesser included offenses as to the attempted murder charge. (TT, pp. 91-98, 103; R., pp. 74-81, 86).

The jury convicted Appellant on the first degree burglary charge and the lesser-included offense of assault and battery third degree on the attempted murder charge, and acquitted him on the possession or display of a firearm during a violent crime charge. The circuit court sentenced him to fifteen years incarceration on the first degree burglary conviction, and time served on the assault and battery third degree conviction. This appeal followed.

²The Audio Recording of the 911 call is on file with the Court.

ARGUMENT

I. The circuit court properly admitted the trespass notice letter because it was directly relevant to an element of first degree burglary, the probative value far outweighed any potential prejudice to Appellant, it was admissible as a business record prepared in the ordinary course of business, and it was not prior bad act evidence.

Appellant contends the circuit court erred in admitting the trespass notice letter because it was irrelevant, unduly prejudicial, impermissible hearsay, and inadmissible prior bad act evidence. To the contrary, the circuit court acted well within its discretion in determining the apartment manager's testimony and the trespass notice letter were directly relevant to the first degree burglary charge, the probative value outweighed any prejudicial effect, the apartment manager's testimony the victim signed it in her presence was not inadmissible hearsay, and the evidence presented did not contain anything about purported prior bad acts.

“The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion.” State v. Black, 400 S.C. 10, 732 S.E.2d 880, 884 (2012) (quoting State v. Saltz, 346 S.C. 114, 551 S.E.2d 240, 244 [2001]). “An abuse of discretion occurs when the [circuit] court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support.” *Id.* (quoting State v. Jennings, 394 S.C. 473, 716 S.E.2d 91, 93 [2011]). “To warrant reversal, an error must result in prejudice to the appealing party.” *Id.*; see also State v. King, Op. No. 2012-213461, 2016 WL 1039478, at *7 (S.C. Ct. App., filed March. 16, 2016).

A) A person is guilty of burglary in the first degree if the person enters a dwelling without consent and with intent to commit a crime in the dwelling, and either:

(1) when, in effecting entry or while in the dwelling or in immediate flight, he or another participant in the crime:

(a) is armed with a deadly weapon or explosive; or

(b) causes physical injury to a person who is not a participant in the crime; or

(c) uses or threatens the use of a dangerous instrument; or

(d) displays what is or appears to be a knife, pistol, revolver, rifle, shotgun, machine gun, or other firearm; or

(2) the burglary is committed by a person with a prior record of two or more convictions for burglary or housebreaking or a combination of both; or

(3) the entering or remaining occurs in the nighttime.

S.C. Code Ann. § 16-11-311 (2015). In this case, it is undisputed Appellant entered the victim's apartment during the early morning hours of July 2, 2014, and the primary issue in dispute at trial was whether he entered without consent.

A. Relevancy

Appellant contends the circuit court erred in admitting the trespass notice because it was irrelevant to any issue at trial, and was unduly prejudicial. As the circuit court found, however, it is readily apparent the trespass notice was directly relevant to the issue of consent by substantiating Appellant was not a resident, and had no possessory interest in the apartment giving him implicit consent to enter it.

Appellant's reliance on State v. Singley, 392 S.C. 270, 709 S.E.2d 602 (2011), is misplaced. The defendant in Singley inherited a one-half undivided interest in his mother's house after the death of his father. He lived in the house with his mother for a period of time, but she ultimately evicted him. He subsequently broke into the house through a window while his mother was out, and attacked her when she came home. *Id.* at 604.

At trial and on appeal, the defendant argued it was legally impossible for him to burglarize the house because he was an owner. The Court acknowledged the well-established axiom that a person cannot burglarize his own home, but noted merely holding title to property is not dispositive of the consent issue. Rather, the court must look beyond title to the totality of the circumstances in determining whether the defendant “had custody and control of, and the right and expectation to be safe and secure in the dwelling burglarized.” *Id.* at 606. The Court concluded the jury could find the defendant did not have a possessory interest in the home, even though he did have an ownership interest. *Id.* at 607.

In this case, while the victim did have a possessory interest in the apartment, the extent of her interest was governed by the terms of the rental agreement between her and the property owner. After she acknowledged receipt of the trespass notice, it effectively became a part of the rental agreement, the victim’s possessory interest was subject to its terms, and she could not legally give consent for Appellant to enter the apartment for any purpose.

The State never alleged Appellant knew about the trespass notice. Rather, the notice was offered to show Appellant was not a resident of the apartment on July 2, 2014, and the victim risked eviction if she allowed him to enter the apartment.³ Nor did the State “repeatedly” stress the trespass notice during closing argument as Appellant alleges, but mentioned it once as only one piece of evidence on the consent issue. (TT, pp. 109-110; R., pp. 92-93).

³Unfortunately, as frequently happens in cases involving domestic violence, the victim would not testify against her assailant at trial.

B. Hearsay

Appellant also argues the trespass notice was inadmissible hearsay because the victim was the declarant, which is patently incorrect. The property manager prepared the notice, making her the declarant, and the victim's signature merely acknowledged receipt of the notice. In addition, the notice was a business record prepared and maintained in the ordinary course of the apartment complex's business, authenticated by the property manager as the custodian of those records, and as such, it was not inadmissible hearsay. See Rule 803(6), SCRE (business records prepared in the ordinary course of business activity are not inadmissible hearsay).⁴

C. Prior Bad Acts

Appellant also asserts the notice constituted prior bad act evidence, contending "the insinuation from the letter is as damning as it is obvious." The notice did not allege, and the property manager did not testify, it was premised on any bad act committed by Appellant. There are a myriad of reasons a property owner may issue a trespass notice, most of which do not involve criminal activity. For instance, Appellant could have been banned simply because the property manager did not like his looks, other tenants complained about him playing loud music, or his car muffler was too loud, none of which constitute criminal acts.⁵

⁴Further, the notice was not offered to prove Appellant was banned from the property, but as evidence he was not a resident of the complex. Thus, it is arguable the notice was not hearsay under Rule 801(c), SCRE, because it was not offered for the truth of the matter asserted therein.

⁵Appellant's assertion the notice "invited speculation by the jury" is itself rank speculation. The State told the jury exactly what the notice showed in connection with the burglary charge - Appellant was not a resident of the apartment complex, and did not have consent to be on the property on July 2, 2014.

D. Harmless Error

Finally, any error in admitting the notice was harmless beyond any reasonable doubt in light of the overwhelming evidence of Appellant's guilt. *See State v. Keenon*, 356 S.C. 457, 590 S.E.2d 34,35 (2003) (evidentiary error was harmless error in light of the overwhelming evidence of the defendant's guilt).

As discussed above, the assailant's identity was not disputed, and consent was the primary issue at trial. The fact Appellant kicked in the apartment door to gain entry, as shown by the photographs entered into evidence without objection, the victim's 911 call (discussed below in Issue II), combined with the extent of the victim's injuries shown in the photographs, fairly conclusively established Appellant did not have consent to enter the apartment. If the victim willingly invited Appellant into the apartment, it is highly unlikely he just kicked in the door for no reason. It is also highly unlikely the victim invited him inside to beat her.

The circuit court properly considered the relevance and probative value of the trespass notice, as well as the prejudice to Appellant, and did not abuse its discretion in admitting the notice into the evidence. Further, any error in admitting the notice was harmless. Accordingly, the circuit court's rulings and Appellant's conviction should be affirmed.

II. The circuit court properly admitted the 911 recording, which was authenticated by the Department of Public Communications and the dispatcher who took the call, and its contents did not violate Appellant's rights under the Confrontation Clause.

Appellant asserts the circuit court erred in admitting the recording of the victim's 911 call. He argues the State failed to establish a proper foundation showing the victim was the actual caller, and admitting the recordings violated his Sixth and Fourteenth confrontation rights as discussed in Crawford v. Washington, 541 U.S. 36 (2004), and Davis v. Washington, 547 U.S. 813 (2006). Both contentions are meritless.

A. Foundation

The Director of Lancaster County Public Communications testified the County's 911 calls are automatically recorded on County servers, and maintained on the servers for three years. She identified the 911 calls involving the incident on July 2, 2014, and the victim's 911 call recording was published to the jury over Appellant's objection.⁶

The 911 dispatcher who took the victim's call identified her own voice on the recording. She further testified the recording contained the entire conversation, and dispatchers have to rely on information they receive from the caller in order to dispatch necessary services. She could not testify with certainty the woman who called was the victim.

Appellant correctly notes there are no South Carolina cases addressing the particular foundational situation at issue in this case, however, other jurisdictions have addressed it. In State v. Williams, 136 Wash. App. 486, 150 P.3d 111, 118 (2007), the court held a sound recording need not be authenticated by a witness with personal

⁶The State indicated there were seven related recordings, and it intended to introduce several of the recordings, but it is unclear from the record whether any recordings other than the victim's recording were published to the jury.

knowledge of the events recorded, but the proponent can authenticate a recording with conversation on it by any method that produces evidence sufficient to support basic findings of identification and authentication. See also Johnson v. State, 699 N.E.2d 746, 749 (Ind. Ct. App. 1998) (voices on a recording may be identified by circumstantial evidence).

In State v. C.D.L., 250 P.3d 69 (Utah 2011), the court interpreted Rule 901 of the Utah Rules of Evidence, which is virtually identical to Rule 901, SCRE, and sets forth authentication requirements for evidence. The court stated:

Rule 901 of the Utah Rules of Evidence requires authentication by “evidence sufficient to support a finding that the matter in question is what its proponent claims.” Utah R. Evid. 901. To this end, the rule provides a nonexhaustive list of examples illustrating how authentication can be satisfied, noting, for example, that a voice may be identified “by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker” or where “circumstances, including self-identification, show the person answering to be the one called.” *Id.* R. 901(b)(5), (6). Proper authentication does not require conclusive proof but, instead, requires only that the trial court determine that there is “evidence sufficient to support a finding of the fulfillment of [a] condition” of fact

Authentication of a telephone caller's identity can be accomplished by combining that caller's self-identification during the call with circumstances surrounding the call. Particularly, “[t]he identity of a telephone caller may be established by self-identification of the caller coupled with additional evidence such as the context and timing of the telephone call, the contents of the statement challenged, internal patterns or other distinctive characteristics, and disclosure of knowledge of facts known peculiarly to the caller.” United States v. Orozco-Santillan, 903 F.2d 1262, 1266 (9th Cir.1990), overruled in part on other grounds by United States v. Hanna, 293 F.3d 1080, 1088 n. 5 (9th Cir.2002); see also State v. Rushton, 2003 UT App 25U, para. 4, 2003 WL 21299576 (mem.) (looking to self-identification and other contextual evidence to authenticate a caller's identity); United States v. Puerta Restrepo, 814 F.2d 1236, 1239 (7th Cir.1987) (“[I]t is not necessary that someone familiar with the speaker's voice identify it. The authentication may be established by circumstantial evidence such as the similarity between what was discussed by the speakers and what each subsequently did.” (citation omitted))

Id. at 69, 78 (emphasis added); *see also* Rodriguez-Nova v. State, 295 Ga. 868, 763 S.E.2d 698, 701 (2014) (proper foundation established by the 911 operator who received the call verifying the 911 recording's accuracy, and the employee who made the recording verifying the authenticity of the copy; an audio recording can be authenticated by testimony of one party to the recorded conversation).

The cases cited and discussed above set forth a reasonable analysis for the authentication of 911 recordings. In this case, the Director and dispatcher verified the authenticity of the recording, and the dispatcher identified her voice on the recording of the victim's call. During the call, the victim identified herself and Appellant, gave the 911 dispatcher her specific address, and said Appellant kicked in her apartment door while she was sleeping, pointed a gun at her and beat her. Except for Appellant's possession of a gun, when they arrived at the apartment, law enforcement verified all of the information provided to 911 by observing the damaged door, indications of a struggle inside the apartment, and the victim's injuries, and by interviewing neighbors about the incident. Considered in totality, there was substantial circumstantial evidence from which the jury could find the victim was the caller on the recording.

B. Confrontation Clause

Citing Crawford and Davis, Appellant contends admitting the recording of the victim's 911 call violated the Confrontation Clause because "large portions" of the recording contained testimonial statements he never had an opportunity to cross-examine. Neither Crawford nor Davis support Appellant's contention.

Appellant engages in the same misapprehension and mischaracterization regarding the 911 call he accuses the State of engaging in before the circuit court. In his

attempt to make the victim's 911 call testimonial, it is clear Appellant has no understanding of police and 911 procedures because he insists the emergency was over when the victim called, and therefore, the dispatcher interrogated the victim for purposes of a subsequent prosecution. When considered in light of the existing circumstances surrounding the victim's call, the fallacy of Appellant's argument becomes clear.

Two of the seven 911 calls received that night (including the victim's) mentioned the assailant had a gun, and he was injuring the victim.⁷ Therefore, the officers were responding to a violent situation, with the potential for an active shooter, and the dispatcher's job was to provide them with as much information as possible for safety reasons. When the victim stated Appellant was no longer at the apartment, contrary to Appellant's contention, the emergency situation was not over. Rather, the potentially armed assailant could still be in the area, and possibly return to the apartment, and it was important for the dispatcher to get a description of his clothes so the responding officers could distinguish him from other people who might be in the area.

⁷Appellant attempts to draw some distinction between the one call reporting someone said he had a gun and the victim's call stating he had a gun and pointed it at her, and argues the distinction "is important when prosecuting a case, but immaterial when responding to an emergency." (Brief of Appellant, p. 28). This attempt further illustrates Appellant's complete lack of knowledge regarding law enforcement procedures when responding to an emergency. The distinction Appellant makes is truly "immaterial" to responding officers because they have to proceed as if a gun is involved, and take the necessary precautions to protect themselves and the public. Likewise, contrary to Appellant's contention there was no evidence the dispatcher relayed the information she got from the victim to the officers, she testified the times she was not talking during the call, she was typing the information provided by the victim. (TT, p. 89; R., pp. 72). Modern emergency notification systems send the information the dispatcher types directly to computers in the officers' patrol cars in real time. If the officers' cars are not equipped with computers, the dispatcher's information is immediately relayed to the officers by radio.

Rather than supporting Appellant's contention the recording at issue was testimonial under Crawford, Davis is almost on point with the facts of this case, and clearly establishes Crawford does not apply to the recording at issue. Davis also involved a domestic dispute, and the victim, who did not testify at trial, called 911.

The 911 dispatcher asked the victim multiple questions regarding the assailant's identity, the presence of any weapons in the house, and whether the assailant had been drinking. 547 U.S. at 817-818 The Court held the victim's responses to those questions were nontestimonial because the questions and responses were about events as they were actually happening, rather than information about past events. "A 911 call ... and at least the initial interrogation conducted in connection with a 911 call, is ordinarily not designed primarily to 'establis[h] or prov[e]' some past fact, but to describe current circumstances requiring police assistance." *Id.* at 827-828. The Court concluded from all the circumstances the primary purpose of the questions and responses was to enable police assistance to meet an ongoing emergency, and the victim was not acting as a witness or testifying at that time. *Id.* at 828.

In State v. Bratschi, 413 S.C. 97, 775 S.E.2d 39 (Ct. App. 2015), the South Carolina Court of Appeals acknowledged the distinction between the testimonial statements at issue in Crawford, and the non-testimonial statements in Davis, and held the circuit court did not err in admitting the victim's 911 call.⁸ The Court stated the 911 call at issue fell "between those in Crawford and Davis," but was "closer to Davis." *Id.* at 48-

⁸The victim in Bratschi could not testify at trial because the defendant (his wife) murdered him at some point after the 911 call, and the Court's opinion does not indicate whether someone was able to identify the victim's voice on the recording.

50. Significantly, the 911 recording in Bratschi was much longer, with substantially more substance, than the call at issue in this case

Under the holdings in Davis and Bratschi, the circuit court properly determined the victim's statements were non-testimonial and admitted the 911 recording into evidence. Accordingly, there was no Confrontation Clause violation, and the circuit court's ruling should be affirmed.

III. The circuit court properly denied Appellant's directed verdict motion because there was ample evidence in the record from which the jury could, and did, find Appellant entered the victim's apartment without consent in the nighttime and with the intent to commit a crime therein.

Appellant asserts the circuit court erred in denying his directed verdict motion on the burglary charge, contending the State failed to present sufficient evidence regarding his intent to commit a crime in the apartment, or that he injured the victim in the course of committing the burglary, and the evidence presented merely raised suspicion Appellant was guilty. On the contrary, there was substantial circumstantial evidence that warranted submitting the burglary charge to the jury.

In reviewing a defendant's directed verdict motion, the trial judge is only concerned with the existence of evidence, not with its weight, and the appellate courts must view the evidence and reasonable inferences in the light most favorable to the State. State v. Larmand, 415 S.C. 23, 780 S.E.2d 892, 895 (2015). If there is either any direct evidence or any substantial circumstantial evidence reasonably tending to prove the defendant's guilt, appellate courts must find the trial judge properly submitted the case to the jury. *Id.*

In addition to the victim's 911 recording identifying Appellant by name, and stating he kicked the door in while she slept and beat her up, the pictures of the door revealed it was forced open with such force the deadbolt lock could not withstand it. The pictures of the victim's injuries show exactly what Appellant did after forcing his way into the apartment. (State's Exhibit 1 [Photos]; R., pp. ____).⁹

⁹ State's Exhibit 1 on file with the Court.

Further, Dominique Huff testified he came out of his apartment when he heard a commotion outside, and saw the victim's door hanging open. The apartment interior was dark so he could not see anyone inside, but he heard "a whole bunch of commotion" coming from the apartment. He went back inside his apartment, but came outside a second time after he heard the man had a gun. At that time, he saw Appellant standing downstairs arguing with another neighbor. He also saw the victim come outside her apartment wearing only a shirt and underwear, and she was crying and "hysterical." (TT, pp. 64-70; R., pp. 47-53).

Considering the evidence, and all reasonable inferences, in the light most favorable to the State, the jury could, and did, easily conclude Appellant entered the victim's apartment without consent, in the nighttime, and with the intent to harm her. Therefore, the circuit court properly denied Appellant's directed verdict motion and submitted the burglary charge to the jury.

CONCLUSION

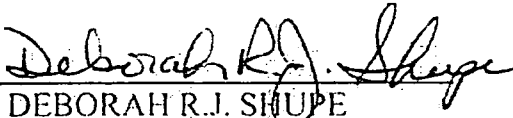
Based on the foregoing, Respondent submits Appellant's convictions should be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

DEBORAH R.J. SHUPE
Senior Assistant Deputy Attorney General
SC Bar No. 5098

DOUGLAS A. BARFIELD, JR.
Solicitor, Sixth Judicial Circuit

By: 
DEBORAH R.J. SHUPE

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

ATTORNEYS FOR RESPONDENT

March 14, 2017

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Lancaster County
The Honorable Brian M. Gibbons, Circuit Court Judge
Appellate Case No: 2015-000126

THE STATE,

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DEMARIO MONTE THOMPSON,

Appellant.

CERTIFICATE OF COUNSEL

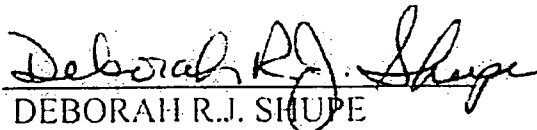
The undersigned certifies that this Amended Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled, "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

ALAN WILSON
Attorney General

DEBORAH R.J. SHUPE
Senior Assistant Deputy Attorney General
SC Bar No. 5098

DOUGLAS A. BARFIELD, JR.
Solicitor, Sixth Judicial Circuit

By:


DEBORAH R.J. SHUPE

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

ATTORNEYS FOR RESPONDENT

March 14, 2017

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Lancaster County
The Honorable Brian M. Gibbons, Circuit Court Judge
Appellate Case No. 2015-000126

THE STATE,

Respondent,

v.

DEMARIO MONTE THOMPSON,

Appellant.

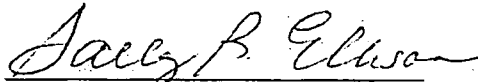
PROOF OF SERVICE

I, Sally B. Ellison, certify I served the Amended Final Brief of Respondent on Appellant by depositing two copies in the United States mail, postage prepaid, addressed to:

John H. Strom
Assistant Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

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

This 14th day of March 2017



SALLY B. ELLISON
Administrative Assistant

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