

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
G. Thomas Cooper, Circuit Court Judge

S.C. SUPREME COURT

Appellate Case No.: 2017-002205

The State Respondent

v.

John Henry Dial Jr.....Petitioner

APPENDIX

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
G. Thomas Cooper, Circuit Court Judge

Appellate Case No.: 2014-002483

The State Respondent

v.

John Henry Dial Jr.....Appellant

FINAL BRIEF OF APPELLANT

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

DID THE CIRCUIT COURT ERR BY NOT REVERSING THE CASE AND REMANDING IT FOR A NEW TRIAL WHEN THE TRIAL COURT ERRED BY FAILING TO WARN THE APPELLANT OF THE DANGERS OF PROCEEDING TO TRIAL WITHOUT AN ATTORNEY PURSUANT TO FARETTA V. CALIFORNIA?

STATEMENT OF THE CASE

The Appellant, John Henry Dial, Jr., was arrested for three counts of Assault and Battery 3d degree on August 25, 2010. The Appellant requested a jury trial on November 1, 2010 with a pretrial hearing occurring on March 18, 2011. Jury selection for the case occurred on April 25, 2011 and the case went to trial before the Pontiac Magistrate Court jury on April 26, 2011. The jury returned a verdict of guilty on two counts of Assault and Battery 3d degree and not guilty on one count of Assault and Battery 3d degree. An appeal to Richland County Circuit Court was timely filed on April 29, 2011.

A hearing was held before the Honorable G. Thomas Cooper, Circuit Court Judge for Richland County on January 17, 2014. An Order denying the appeal was issued on June 2, 2014 and received on June 16, 2014 by attorney for the Appellant. A timely Motion to Alter Judgment Pursuant to SCRCP 59(e) was filed on June 26, 2014. An order denying the Motion to Alter Judgment was issued on October 9, 2014 and received by the attorney for the Appellant on October 20, 2014. The Notice of Appeal was timely filed.

STATEMENT OF THE FACTS

The Appellant was charged in the Pontiac Magistrate Court with three counts of Assault and Battery 3d degree arising out of the allegations that he sprayed pepper spray on the victims, David Hutchinson, Shelby Hutchinson and Cherish Douglas. The case was called before a jury on April 26, 2011. The Appellant proceeded pro se at the jury trial. The trial court advised him of his right to be represented by an attorney but did not proceed further by advising him of the dangers of proceeding without an attorney. (Return of Appeal p. 1, R. p. 13)

The State called David Hutchinson, Cherish Douglas, Shelby Hutchinson and Wendy Bass to testify. The Defense called Sam Green, John Dial, Sr. and the Appellant, John Dial, Jr. to testify. The Appellant testified that he did not spray the individuals with pepper spray. (Trial Transcript p. 67, R. p. 81 l. 13, T p. 68, R. p. 82 ll18-19, Tp.70, Rp 84 l. 17). After deliberation, the jury found the Appellant guilty of two of the charges of Assault and Battery 3d degree. An appeal to Richland County Circuit Court was timely filed on April 29, 2011. This appeal followed after the denial of appeal by the Circuit Court.

ARGUMENT

THE CIRCUIT COURT ERRED BY NOT REVERSING THE CASE AND REMANDING IT FOR A NEW TRIAL WHEN THE TRIAL COURT ERRED BY FAILING TO WARN THE APPELLANT OF THE DANGERS OF PROCEEDING TO TRIAL WITHOUT AN ATTORNEY PURSUANT TO FARETTA V. CALIFORNIA

The Appellant proceeded to trial in this case without an attorney and he did not make a knowingly and intelligent waiver of his Sixth Amendment right to counsel. After reviewing the transcript of the trial and the Return of Appeal, it is apparent that Magistrate Judge Surles failed to fully advise the Appellant of the dangers of self representation pursuant to Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). Judge Surles states in the Return of Appeal that he advised the Appellant of his right to an attorney on November 1, 2010 and March 18, 2011 and that Appellant assured the court that he wanted to represent himself on April 25, 2011. (Return of Appeal p. 1, R p. 13) However, there is no mention of an advisement of the dangers of self representation.

“Faretta allows an accused to waive his right to counsel if he is (1) advised of his right to counsel, and (2) adequately warned of the dangers of self representation.” Prince v. State, 301 S.C. 422, 424, 392 S.E.2d 462, 463 (1990) as quoted in In re Christopher H. 359 S.C. 161, 596 S.E.2d 500 (S.C. App. 2004). In the absence of a specific inquiry by the trial judge addressing the disadvantages of a *pro se* defense as required by the second Faretta prong, [the appellate court] will look to the record to determine whether petitioner had sufficient background or was apprised of his rights by some other source. To determine if an accused has sufficient background to comprehend the dangers of self-representation, courts consider a variety of factors including:

- (1) the accused's age, educational background, and physical and mental health;
 - (2) whether the accused was previously involved in criminal trials;
 - (3) whether the accused knew the nature of the charge(s) and of the possible penalties;
 - (4) whether the accused was represented by counsel before trial and whether that attorney explained to him the dangers of self-representation;
 - (5) whether the accused was attempting to delay or manipulate the proceedings;
 - (6) whether the court appointed stand-by counsel;
 - (7) whether the accused knew he would be required to comply with the rules of procedure at trial;
 - (8) whether the accused knew of the legal challenges he could raise in defense to the charge(s) against him;
 - (9) whether the exchange between the accused and the court consisted of merely *pro forma* answers to *pro forma* questions; and
 - (10) whether the accused's waiver resulted from either coercion or mistreatment.
- Gardner v. State, 351 S.C. 407, 412-13, 570 W.E.2d 184, 186-87 (2002).

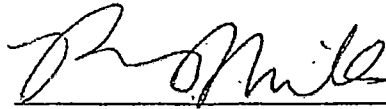
The Return of Appeal and Transcript are silent on these factors and, therefore, this court does not have the ability to determine whether the Appellant had sufficient background or was apprised by any other source of the dangers of self-representation. In the Magistrate's Return on Appeal, Magistrate Surles states that Appellant was advised of his right to an attorney but is silent on the issue of whether he was warned of the dangers of self representation. (Return of Appeal p. 1, R. p. 13). During the trial, objectionable information

was introduced without objection by the Appellant. The opening statement of the prosecuting officer included a statement that the Appellant was on probation. (Trial Transcript p. 17, R.p. 31. ll. 11-12). Since the Appellant did not have counsel, there was no objection to this prejudicial statement. Also, no curative instruction was given to the jury by the trial court. Furthermore, objectionable hearsay evidence which was not a statement against interest of the accused was introduced during the testimony of David Hutchinson. (Trial Transcript p. 22, R.p. 36 ll. 1-3). The witness also raises bad character evidence of the accused. (Trial Transcript p. 28, R.p. 42 ll. 11-15). The Appellant being on probation is again raised by witness Wendy Bass. (Trial Transcript p. 44, R.p. 58, ll. 15-19). Also, the Appellant attempted to produce good character evidence and was denied this opportunity by the trial court. (Trial Transcript p. 60, R.p. 74 ll. 1-19, T.p. 62, R.p. 76 l. 20-T.p. 63, R.p. 77 l. 4, T.p. 65, R.p. 79 ll. 6-13). Clearly, legal issues arose during the trial where the *pro se* Appellant was disadvantaged by being unrepresented by counsel. The objectionable evidence and statements clearly prejudiced the Appellant. Appellant was denied his Sixth Amendment right to counsel since he was not advised of the dangers of self-representation and the record is silent as to the factors to determine whether the Appellant had sufficient background to comprehend the dangers of self-representation.

CONCLUSION

For all the foregoing reasons, the Appellant now asks that the judgment against him be reversed and that his case be remanded for a new trial.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "R. W. Mills", is written over a horizontal line.

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This 9th day of September, 2016

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
G. Thomas Cooper, Circuit Court Judge

Appellate Case No.: 2014-002483

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SC Court of Appeals

The State Respondent

v.

John Henry Dial Jr.....Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant 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."



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September 9, 2016

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
G. Thomas Cooper, Circuit Court Judge

Appellate Case No.: 2014-002483

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SC Court of Appeals

The State Respondent

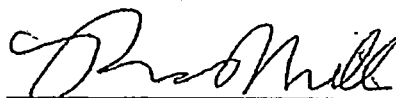
v.

John Henry Dial Jr.....Appellant

PROOF OF SERVICE

I certify that I have served the FINAL BRIEF OF APPELLANT on the State of South Carolina by depositing a copy of it in the United States Mail, postage prepaid, on September 9, 2016 addressed to:

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APPENDIX DIVIDER B

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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11 25 2013

Appeal from Richland County
Honorable G. Thomas Cooper, Jr., Circuit Court Judge
Appellate Case Tracking No. 2014-002483 . SC Court of Appeals

The State,

Respondent,

vs.

John Henry Dial, Jr.,

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IN THE COURT OF APPEALS

Appeal from Richland County
Honorable G. Thomas Cooper, Jr., Circuit Court Judge
Appellate Case Tracking No. 2014-002483

The State,

Respondent,

vs.

John Henry Dial, Jr.,

Appellant.

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<u>Wroten v. State</u> , 301 S.C. 293, 294, 391 S.E.2d 575, 576 (1990)	4

STATEMENT OF ISSUES ON APPEAL

- I. The circuit court did not err in denying Appellant's appeal from the magistrate court because the Record demonstrates Appellant understood the dangers of self-representation.

STATEMENT OF THE CASE

The State agrees with Appellant's procedural Statement of the Case.

ARGUMENT

- I. The circuit court did not err in denying Appellant's appeal from the magistrate court because the Record demonstrates Appellant understood the dangers of self-representation.

Appellant contends the circuit court erred in failing to grant him a new trial because there was no evidence he was properly warned of the dangers of self-representation prior to proceeding to trial *pro se*. The evidence presented clearly indicates he knew he had a right to counsel and voluntarily waived that right to counsel. Further, the Record demonstrates he understood the dangers of self-representation and was aware of the requirements which would be placed on him during trial.

"The Sixth and Fourteenth Amendments of our Constitution guarantee that a person brought to trial in any state or federal court must be afforded the right to the assistance of counsel before he can be validly convicted and punished by imprisonment." Faretta v. California, 422 U.S. 806, 807 (1975). A defendant may waive the right to counsel. "It is the trial court's responsibility to determine whether there was a knowing and intelligent waiver by the accused." State v. Bryant, 383 S.C. 410, 414, 680 S.E.2d 11, 13 (Ct. App. 2009); see also, State v. Dixon, 269 S.C. 107, 236 S.E.2d 419 (1977) ("It is beyond question that an accused person may waive counsel and represent himself. However, it is the responsibility of the trial judge to determine whether there is or is not an intelligent and competent waiver."). "To effectuate a valid waiver, the accused must (1) be advised of the right to counsel and (2) be adequately warned of the dangers of self representation." Bryant, 383 S.C. at 414, 680 S.E.2d at 13 (citing State v. McLauren, 349

S.C. 488, 493 94, 563 S.E.2d 346, 348 49 (Ct. App. 2002)); see also, Faretta, 422 U.S. at 835.

Faretta requires a defendant “be made aware of the dangers and disadvantages of self representation so that the record will establish he knows what he is doing and his choice is made with eyes open.” 422 U.S. at 835. “While a specific inquiry by the trial judge expressly addressing the disadvantages of a pro se defense is preferred, the ultimate test is not the trial judge’s advice but rather the defendant’s understanding.” Wroten v. State, 301 S.C. 293, 294, 391 S.E.2d 575, 576 (1990). If the trial court fails to explicitly address the disadvantages of proceeding *pro se*, as required by the second prong of Faretta, this Court may look to the record to determine whether petitioner had sufficient background to understand the dangers of self-representation or was apprised of his rights by some other source. See Watts v. State, 347 S.C. 399, 402, 556 S.E.2d 368, 370 (2001). Factors this Court considers in determining if an accused had sufficient background to understand the disadvantages of self representation include:

- (1) the accused’s age, educational background, and physical and mental health;
- (2) whether the accused was previously involved in criminal trials;
- (3) whether he knew of the nature of the charge and of the possible penalties;
- (4) whether he was represented by counsel before trial or whether an attorney indicated to him the difficulty of self representation in his particular case;
- (5) whether he was attempting to delay or manipulate the proceedings;
- (6) whether the court appointed stand by counsel;
- (7) whether the accused knew he would be required to comply with the rules of procedure at trial;
- (8) whether he knew of legal challenges he could raise in defense to the charges against him;

- (9) whether the exchange between the accused and the court consisted merely of pro forma answers to pro forma questions; and
- (10) whether the accused's waiver resulted from either coercion or mistreatment.

See State v. Cash, 309 S.C. 40, 43, 419 S.E.2d 811, 813 (Ct. App. 1992); see also, Bryant, 383 S.C. at 415, 680 S.E.2d 11 at 14.

First, the magistrate specifically indicated: "On November 1, 2010 Mr. Dial entered a plea of not guilty and requested a jury trial. He is advised of his right to be represented by an attorney either private or appointed but states he will represent himself." The magistrate noted on April 25, 2011 prior to jury selection, Appellant "again assures the court he wants to represent himself." (Magistrate's Return of Appeal; R. 13-14). These findings coupled with the fact Appellant began filling out the paperwork for an appointed attorney, but ultimately concluded he wished to represent himself, indicate he was aware of the dangers of self-representation. (Affidavit of Indigency and Application for Counsel; R. 120-123). Without transcripts of the hearings before the magistrate on November 1, March 18, and April 25, it is impossible to know exactly what wording was used to make Appellant aware of his right to counsel.¹ However, in responding to his Faretta challenge on appeal, the magistrate indicated all three hearings contained warnings to Appellant and ended with Appellant insisting on representing himself.

¹ It is Appellant's burden to provide the Court with the necessary Record on Appeal in order to evaluate the issues presented. See State v. Brockmeyer, 406 S.C. 324, 338, 751 S.E.2d 645, 653 (2013) (finding it impossible to evaluate the merits of an issue because the appellant failed to include the relevant material in the record on appeal); State v. Knighton, 334 S.C. 125, 136, 512 S.E.2d 117, 123 (Ct. App. 1999) (finding appellant has burden of presenting an adequate record which is sufficiently complete to permit this Court to review lower court's actions).

Additionally, the Record clearly demonstrates Appellant had the requisite understanding to be able to properly represent himself. In looking at the Cash factors, Appellant was born in May 1977, making him almost 34 at the time of trial. (Incident Report; Affidavit of Indigency and Application for Counsel; R. 115; 120-123). The Record divulges no indication he had any physical or mental impairment which would have prevented or hampered his ability to proceed *pro se*. He acknowledged he was on probation from a prior conviction at the time of trial, so he clearly had some exposure to the legal system. (T.82; R. 96). In responding to several forms in which he indicated he wished to proceed *pro se*, Appellant indicated the charges against him were three counts of third degree assault; thereby demonstrating an awareness of the charges against him. (Jury Trial Request form; Pontiac Magistrate Court Trial Information and Plea Sheet; R.124; 125-126).²

Further, the Record demonstrates Appellant was able to fully participate in his trial. He conducted an opening statement, cross-examined the State's witnesses, objected to the admission of evidence, sought to bring in good character evidence, and presented his own witnesses, as well as, his own testimony. Prior to trial, Appellant recognized the importance of seeing the evidence the State had against him and this was ordered by the magistrate. Immediately prior to trial, Appellant sought to obtain copies of the victim and other statements in the possession of the State so he could use those statements at trial. (T.3-4; R. 17-18). Further, he cross-examined witnesses regarding their biases, sought to bring out alternate versions of the events, and tried to impeach witnesses using the statements he obtained prior to trial. He even asked that one witness not be excused

² These forms are completed in Appellant's handwriting so it is clear he was aware of the charges against him.

in the event he needed to recall the witness. (T.49-50; R. 63-64). In addition, he knew of the significance of the trial and the ability to present a defense because he acknowledged during a discussion with the court that he attempted to “read a little bit” before he came to trial. (T.65; R. 79). Finally, there is absolutely no evidence he was coerced or forced into proceeding *pro se* and all of his interactions with the court demonstrate a requisite knowledge of the proceedings and their significance.

Accordingly, even if the Record is insufficient to demonstrate Appellant was adequately warned of the dangers of proceeding *pro se*, his decision to proceed without representation was knowing and voluntary. The Record demonstrates a sufficient background and ability to make a valid waiver pursuant to the Cash factors. See State v. McLauren, 349 S.C. 488, 496, 563 S.E.2d 346, 350 (Ct. App. 2002). As a result, the circuit court properly denied Appellant’s appeal, and Appellant’s conviction and sentence should be affirmed.

Even if this Court disagrees with whether Appellant demonstrated the relevant knowledge and had sufficient background and ability to make a valid waiver pursuant to the Cash factors, the appropriate remedy is to remand for consideration of the voluntariness of his waiver by the magistrate court. See State v. Cash, 304 S.C. 223, 225, 403 S.E.2d 632, 634 (1991) (finding “except in extraordinary cases where it is clear that a hearing on remand would serve no useful purpose, the remedy when the record fails to show a knowing and intelligent waiver of the right to counsel will be a remand for a Dixon hearing.”).

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed or in the alternative remanded to the magistrate court.

Respectfully submitted,

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May 25, 2016

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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MAY 25 2016

Appeal from Richland County
Honorable G. Thomas Cooper, Jr., Circuit Court Judge
Appellate Case Tracking No. 2014-002483

SC Court of Appeals

The State,

Respondent,

vs.

John Henry Dial, Jr.,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this 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."

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May 25, 2016

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County
Honorable G. Thomas Cooper, Jr., Circuit Court Judge
Appellate Case Tracking No. 2014-002483

The State,

Respondent,

vs.

John Henry Dial, Jr.,

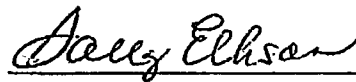
Appellant.

PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Final Brief of Respondent Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Robert W. Mills, Esquire
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I further certify that all parties required by Rule to be served have been served.
This 25th day of May 2016.



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Legal Assistant

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MAY 25 2016

SC Court of Appeals

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ALAN WILSON
ATTORNEY GENERAL

RECEIVED

MAY 25 2016

SC Court of Appeals

May 26, 2016

Robert W. Mills, Esquire
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RE: State v. John Henry Dial, Jr.
Appellate Case Tracking No. 2014-002483

Dear Mr. Mills:

I am enclosing two (2) copies of the Final Brief of Respondent in the above-referenced case.

Sincerely,

William M. Blitch, Jr.
Assistant Attorney General
S.C. Bar No. 15608

Enclosures

cc: ~~Honorable~~ Jenny A. Kitchings (original and 10 copies enclosed)
Victim Services

APPENDIX DIVIDER C

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
G. Thomas Cooper, Circuit Court Judge

Appellate Case No.: 2014-002483

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The State Respondent

v.

John Henry Dial Jr.....Appellant

FINAL REPLY BRIEF OF APPELLANT

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RESPONDENT HAS FAILED TO CONTRADICT THAT THE CIRCUIT COURT ERRED BY NOT REVERSING THE CASE AND REMANDING IT FOR ANEW TRIAL WHEN THE TRIAL COURT ERRED BY FAILING TO WARN THE APPELLANT OF THE DANGERS OF PROCEEDING TO TRIAL WITHOUT AN ATTORNEY PURSUANT TO FARETTA V. CALIFORNIA.....	1
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<u>In re Christopher H.</u> 359 S.C. 161, 596 S.E.2d 500 (S.C. App. 2004).....	2
<u>Gardner v. State</u> , 351 S.C. 407, 412-13, 570 W.E.2d 184, 186-87 (2002).....	3

ARGUMENT

RESPONDENT HAS FAILED TO CONTRADICT THAT THE CIRCUIT COURT ERRED BY NOT REVERSING THE CASE AND REMANDING IT FOR A NEW TRIAL WHEN THE TRIAL COURT ERRED BY FAILING TO WARN THE APPELLANT OF THE DANGERS OF PROCEEDING TO TRIAL WITHOUT AN ATTORNEY PURSUANT TO FARETTA V. CALIFORNIA

Respondent has failed to demonstrate that the Appellant knew of the dangers of self-representation and Respondent has failed to demonstrate that he was aware of the requirements the trial court would require of him during the trial. While correctly citing the factors this court may consider to determine if the accused has sufficient background to understand the dangers of self-representation, Respondent ignores the portions of the record which indicate that Appellant did not have sufficient background to properly represent himself. As stated in Appellant's Brief, during the trial, objectionable information was introduced without objection by the Appellant. The opening statement of the prosecuting officer included a statement that the Appellant was on probation. (Trial Transcript p. 17, R.p.31 ll. 11-12). Since the Appellant did not have counsel, there was no objection to this prejudicial statement. Also, no curative instruction was given to the jury by the trial court. Furthermore, objectionable hearsay evidence which was not a statement against interest of the accused was introduced during the testimony of David Hutchinson. (Trial Transcript p. 22, R.p.36 ll. 1-3). The witness also raises bad character evidence of the accused. (Trial Transcript p. 28, R.p. 42 ll. 11-15). The Appellant being on probation is again raised by witness Wendy Bass. (Trial Transcript p. 44, R.p. 58 ll. 15-19). Also, the Appellant attempted to produce good character evidence and was denied this opportunity by the trial

court. (Trial Transcript p. 60, R.p. 74, ll. 1-19, T.p. 62, R.p. 76, l. 20-T.p. 63, R.p. 77 l.4, T.p. 65, R.p. 79, ll. 6-13). Respondent has failed to contradict that Appellant's conduct during the trial demonstrates that he did not have requisite understanding to be able to properly represent himself. Therefore, while the Appellant did participate in the trial, his participation indicates his lack of knowledge of legal challenges he could raise in defense to the charges against him and his lack of knowledge of the rules of evidence and procedure at trial that resulted in detrimental, inadmissible evidence being presented against him.

"Faretta allows an accused to waive his right to counsel if he is (1) advised of his right to counsel, and (2) adequately warned of the dangers of self representation." Prince v. State, 301 S.C. 422, 424, 392 S.E.2d 462, 463 (1990) as quoted in In re Christopher H. 359 S.C. 161, 596 S.E.2d 500 (S.C. App. 2004). In the absence of a specific inquiry by the trial judge addressing the disadvantages of a *pro se* defense as required by the second Faretta prong, [the appellate court] will look to the record to determine whether petitioner had sufficient background or was apprised of his rights by some other source. To determine if an accused has sufficient background to comprehend the dangers of self-representation, courts consider a variety of factors including:

- (1) the accused's age, educational background, and physical and mental health;
- (2) whether the accused was previously involved in criminal trials;
- (3) whether the accused knew the nature of the charge(s) and of the possible penalties;
- (4) whether the accused was represented by counsel before trial and whether that attorney explained to him the dangers of self-representation;

- (5) whether the accused was attempting to delay or manipulate the proceedings;
 - (6) whether the court appointed stand-by counsel;
 - (7) whether the accused knew he would be required to comply with the rules of procedure at trial;
 - (8) whether the accused knew of the legal challenges he could raise in defense to the charge(s) against him;
 - (9) whether the exchange between the accused and the court consisted of merely *pro forma* answers to *pro forma* questions; and
 - (10) whether the accused's waiver resulted from either coercion or mistreatment.
- Gardner v. State, 351 S.C. 407, 412-13, 570 W.E.2d 184, 186-87 (2002).

Respondent has failed to contradict that legal issues arose during the trial where the *pro se* Appellant was disadvantaged by being unrepresented by counsel. Furthermore, Respondent has failed to contradict that Appellant was denied his Sixth Amendment right to counsel since he was not advised of the dangers of self-representation.

CONCLUSION

For all the foregoing reasons, as well as those addressed in the Appellant's Initial Brief to this Court, the Appellant now asks that the judgment against him be reversed and that his case be remanded for a new trial.

Respectfully submitted,



Robert W. Mills
1728 Main Street
Columbia, South Carolina 29201
(803) 252-9648
ATTORNEY FOR APPELLANT

This 9th day of September, 2016

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
G. Thomas Cooper, Circuit Court Judge

RECEIVED

SEP 09 2016

SC Court of Appeals

Appellate Case No.: 2014-002483

The State Respondent

v.

John Henry Dial Jr.....Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief of Appellant 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."



Robert W. Mills
1728 Main Street
Columbia, South Carolina 29201
(803) 252-9648
Attorney for the Appellant

September 9, 2016

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
G. Thomas Cooper, Circuit Court Judge

RECEIVED

SEP 09 2016
SC Court of Appeals

Appellate Case No.: 2014-002483

The State Respondent

v.

John Henry Dial Jr.....Appellant

PROOF OF SERVICE

I certify that I have served the FINAL REPLY BRIEF OF APPELLANT on the State of South Carolina by depositing a copy of it in the United States Mail, postage prepaid, on September 9, 2016 addressed to:

William M. Blitch, Esquire
SC Attorney General's Office
P.O. Box 11549
Columbia, SC 29211



Robert W. Mills
1728 Main Street
Columbia, South Carolina 29201
(803) 252-9648
Attorney for the Appellant

September 9, 2016

APPENDIX DIVIDER D

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

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

The State, Respondent,

v.

John Henry Dial, Jr., Appellant.

Appellate Case No. 2014-002483

Appeal From Richland County
G. Thomas Cooper, Jr., Circuit Court Judge

Unpublished Opinion No. 2017-UP-339
Submitted May 1, 2017 – Filed August 9, 2017

AFFIRMED

Robert William Mills, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Assistant
Attorney General William M. Blich, Jr. and Solicitor
Daniel E. Johnson, all of Columbia, for Respondent.

PER CURIAM: John Henry Dial, Jr. appeals the circuit court's order affirming his conviction in the magistrate's court for two counts of aggravated assault and his resulting sentence of sixty days' imprisonment. On appeal, Dial argues the circuit court erred by not reversing and remanding his case for a new trial because the magistrate's court failed to warn him of the dangers of self-representation. We

affirm¹ pursuant to Rule 220(b), SCACR, and the following authorities: *Indigo Assocs. v. Ryan Inv. Co.*, 314 S.C. 519, 523, 431 S.E.2d 271, 273 (Ct. App. 1993) ("The circuit court, acting as an appellate court in a case heard by the magistrate, cannot consider questions that have not been presented to the magistrate."); *State v. Henderson*, 347 S.C. 455, 457, 556 S.E.2d 691, 692 (Ct. App. 2001) ("In criminal appeals from magistrate or municipal court, the circuit court does not conduct a *de novo* review, but instead reviews for preserved error raised to it by appropriate exception.").

AFFIRMED.

WILLIAMS and KONDUROS, JJ., and LEE, A.J., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

APPENDIX DIVIDER E

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
G. Thomas Cooper, Circuit Court Judge

RECEIVED

AUG 23 2017

Appellate Case No.: 2014-002483

SC Court of Appeals

The State Respondent

v.

John Henry Dial Jr.....Appellant

PETITION FOR REHEARING

Robert W. Mills
1728 Main Street
Columbia, South Carolina 29201
(803) 252-9648
Attorney for the Appellant

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<u>Faretta v. California</u> , 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).....	1
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ARGUMENT

Pursuant to Rule 221(a) and Rule 240(i), SCACR, the Appellant respectfully petitions this Court for a rehearing of Opinion No, 2017-UP-339. Rehearing is warranted when the Court has overlooked or misapprehended an argument. This Court ruled that “the circuit court, acting as an appellate court in a case heard by the magistrate, cannot consider questions that have not been presented to the magistrate.” Indigo Assocs. V. Ryan Inv. Co., 314 S.C. 519, 523, 431 S.E.2d 271, 272 (Ct. App. 1993)

Appellant respectfully requests that this Court reconsider this finding in this case since the basis of the argument is that Appellant was not warned of the dangers of self representation at the magistrate court. Since Appellant was not an attorney and was not warned of the dangers of self representation it would be highly improbable that he would have objected to the failure of the magistrate court to warn of the dangers of self representation. One of the dangers of self representation of which Appellant was not warned is the danger of not objecting to objectionable evidence or proceedings. Preservation of the record cannot be accomplished on the issue of the failure to be warned of the dangers of self representation by someone not warned of the dangers of self representation. “Faretta allows an accused to waive his right to counsel if he is (1) advised of his right to counsel, and (2) adequately warned of the dangers of self representation.” Prince v. State, 301 S.C. 422, 424, 392 S.E.2d 462, 463 (1990) as quoted in In re Christopher H. 359 S.C. 161, 596 S.E.2d 500 (S.C. App. 2004). See Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

“It is the trial court’s responsibility to determine whether there was a knowing and intelligent waiver by the accused.” State v. Bryant, 383 S.C. 410, 414, 680 S.E.2d 11, 13 (Ct. App. 2009).

Therefore, a knowing and intelligent waiver of Appellant's Sixth Amendment right to counsel is a proactive duty of the trial court and not a responsibility of the Appellant to raise. Furthermore, as Respondent argued in their brief citing State v. Cash, 304 S.C. 223, 225, 403 S.E.2d 632, 634 (1991), "except in extraordinary cases where it is clear that a hearing on remand would serve no useful purpose, the remedy when the record fails to show a knowing and intelligent waiver of the right to counsel will be a remand for a Dixon hearing." See State v. Dixon, 269 S.C. 107, 236 S.E. 2d 419 (1977).

CONCLUSION

For all the foregoing reasons, as well as those addressed in the Appellant's Initial Brief and Reply Brief to this Court, the Appellant now seeks an Order granting Rehearing.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R. W. Mills', written over a horizontal line.

Robert W. Mills
1728 Main Street
Columbia, South Carolina 29201
(803) 252-9648
ATTORNEY FOR APPELLANT

This 23rd day of August, 2017

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
G. Thomas Cooper, Circuit Court Judge

RECEIVED

AUG 23 2017

SC Court of Appeals

Appellate Case No.: 2014-002483

The State Respondent

v.

John Henry Dial Jr.....Appellant

PROOF OF SERVICE

I certify that I have served the PETITION FOR REHEARING on the State of South Carolina by depositing a copy of it in the United States Mail, postage prepaid, on August 23, 2017 addressed to:

William M. Blitch, Esquire
SC Attorney General's Office
P.O. Box 11549
Columbia, SC 29211



Robert W. Mills
1728 Main Street
Columbia, South Carolina 29201
(803) 252-9648
Attorney for the Appellant

August 23, 2017

APPENDIX DIVIDER F

The South Carolina Court of Appeals

The State, Respondent,

v.

John Henry Dial, Jr., Appellant.

Appellate Case No. 2014-002483

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.

H B Wa J.
OKO J.
Al Lee Lee A.J.

Columbia, South Carolina

cc:

Alan McCrory Wilson, Esquire
Robert William Mills, Esquire
William M. Blich, Jr., Esquire
The Honorable G. Thomas Cooper, Jr.

FILED

September 22, 2017

APPENDIX DIVIDER G

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

JUL 11 2016

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
G. Thomas Cooper, Circuit Court Judge

SC Court of Appeals

Appellate Case No: 2014-002483

The State of South Carolina.....Respondent

v.

John Henry Dial Jr.....Appellant

RECORD ON APPEAL

Robert W. Mills
1728 Main Street
Columbia, South Carolina 29201
(803) 252-9648
Attorney for Appellant

William M. Blitch Jr.
S.C. Attorney General's Office
P.O. Box 11549
Columbia, SC, 29211
(803) 734-3727
Attorney for the Respondent

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STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2011-CP-40-02877

State of South Carolina

John Henry Dial, Jr.

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried and heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other ☐ Dismissed without prejudice
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

Plaintiff's Appeal is DENIED. Plaintiff's Conviction is AFFIRMED.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk : _____

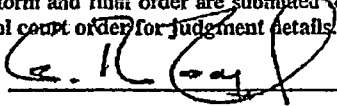
INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge



Judge Code

2126

Date

6-2-14

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 9 day of June, 2014 to attorneys of record or to parties (when appearing pro se) as follows:

Joseph Yechiel Shenkar

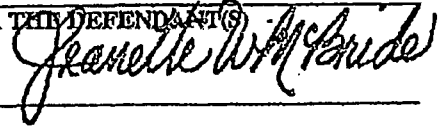
ATTORNEY(S) FOR THE PLAINTIFF(S)

Robert William Mills

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

Clerk of Court



SCANNED

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

The State of South Carolina,
Respondent,

vs.

John Henry Dial, Jr.,

Appellant.

IN THE COURT OF COMMON PLEAS
IN THE FIFTH JUDICIAL CIRCUIT

Case No. 2011-CP-40-02877

ORDER DENYING PLAINTIFF'S MOTION
TO ALTER JUDGMENT

2014 OCT 9 AM 9:29
JENNETTE L. LUSK
Clerk of Court

This matter comes before the Court by way of Appellant's Motion to Alter Judgment pursuant to Rule 59(e), SCRPC. Specifically, Appellant asks this Court to reconsider its Order denying Appellant's appeal filed June 6, 2014.

After careful consideration of the record in this case and the submissions of the parties, this Court is unable to discover any material fact or principle of law that has either been overlooked or disregarded and further finds no error of law or facts not appropriately considered. Accordingly, this Court hereby DENIES Plaintiff's Motion under Rule 59(e), SCRPC, to Reconsider this Court's Order filed June 6, 2014. Pursuant to Rule 59(f), the Court is of the opinion that oral argument is not necessary.

IT IS SO ORDERED.

Columbia, South Carolina
October 9, 2014


G. Thomas Cooper, Jr. Judge
Fifth Judicial Circuit

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGM F IN A CIVIL CASE

CASE NUMBER: 2011CP4002877

State of South Carolina

John Henry Dial Jr

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge _____ Judge Code _____ Date _____

For Clerk of Court Office Use Only

This judgment was entered on the ____ day of _____, 20 ____ and a copy mailed first class or placed in the appropriate attorney's box on this 14 October 2014 to attorneys of record or to parties (when appearing pro se) as follows:

Joseph Yechiel Shenkar

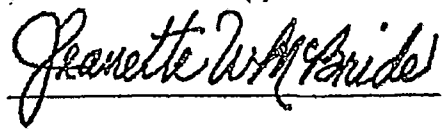
Robert William Mills

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court



STATE OF SOUTH CAROLINA)
)
 COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

2011-CP-40-02877

THE STATE)
)
 Respondent,)
 v.)
)
 JOHN HENRY DIAL, JR.,)
)
 Appellant.)
 _____)

MOTION TO ALTER JUDGMENT
 PURSUANT TO SCRCP 59(e)

The above captioned Appellant, through his undersigned attorney, hereby moves to alter the judgment pursuant to SCRCP Rule 59(e). Applicant's Attorney received the Judgment in a Civil Case in this case on June 16, 2014. Appellant moves that this court alter the judgment for the following grounds:

The Appellant proceeded to trial in this case without an attorney and he did not make a knowingly and intelligent waiver of his Sixth Amendment right to counsel. After reviewing the transcript of the trial and the Return of Appeal, it is apparent that Magistrate Judge Surles failed to fully advise the Appellant of the dangers of self representation pursuant to Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). Judge Surles states in the Return of Appeal that he advised the Appellant of his right to an attorney on November 1, 2010 and March 18, 2011 and that Appellant assured the court that he wanted to represent himself on April 25, 2011. However, there is no mention of an advisement of the dangers of self representation.

"Faretta allows an accused to waive his right to counsel if he is (1) advised of his right to counsel, and (2) adequately warned of the dangers of self representation." Prince v. State, 301 S.C. 422, 424, 392 S.E.2d 462, 463 (1990) as quoted in In re Christopher H., 359 S.C. 161, 596 S.E.2d

500 (S.C. App. 2004). In the absence of a specific inquiry by the trial judge addressing the disadvantages of a *pro se* defense as required by the second Faretta prong, [the appellate court] will look to the record to determine whether petitioner had sufficient background or was apprised of his rights by some other source. To determine if an accused has sufficient background to comprehend the dangers of self-representation, courts consider a variety of factors including:

- (1) the accused's age, educational background, and physical and mental health;
- (2) whether the accused was previously involved in criminal trials;
- (3) whether the accused knew the nature of the charge(s) and of the possible penalties;
- (4) whether the accused was represented by counsel before trial and whether that attorney explained to him the dangers of self-representation;
- (5) whether the accused was attempting to delay or manipulate the proceedings;
- (6) whether the court appointed stand-by counsel;
- (7) whether the accused knew he would be required to comply with the rules of procedure at trial;
- (8) whether the accused knew of the legal challenges he could raise in defense to the charge(s) against him;
- (9) whether the exchange between the accused and the court consisted of merely *pro forma* answers to *pro forma* questions; and
- (10) whether the accused's waiver resulted from either coercion or mistreatment. Gardner v. State, 351 S.C. 407, 412-13, 570 W.E.2d 184, 186-87 (2002).

The Record of Appeal and Transcript are silent on these factors and, therefore, this court does not have the ability to determine whether the Appellant had sufficient background or was apprised

by any other source of the dangers of self-representation. Therefore, Appellant moves that this court alter its judgment and find that the Appellant was denied his Sixth Amendment right to counsel since he was not advised of the dangers of self-representation and the record is silent as to the factors to determine whether the Appellant had sufficient background to comprehend the dangers of self-representation. Appellant further moves that since Appellant was denied this constitutional right that this court reverse the conviction and sentence and remand this case for a new trial.

I SO MOVE:



Robert W. Mills
Attorney for the Defendant
1728 Main Street
Columbia, SC 29201
803-252-9648

Date: 6-26-14
Columbia, SC

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

2011-CP-40-02877

THE STATE)
Respondent,)
v.)
JOHN HENRY DIAL, JR.,)
Appellant.)

CERTIFICATE OF SERVICE

I certify that I have on June 26, 2014 served a copy of the attached Motion to Alter Judgment Pursuant to SCRCP 59(e) upon the State by depositing it in the U.S. Mail in an envelope with sufficient postage affixed, addressed to:

Joseph Shenkar
Assistant Solicitor
P.O. Box 192
Columbia, SC 29202



Robert W. Mills
Attorney for the Defendant
1728 Main Street
Columbia, SC 29201
803-252-9648

Date: 6-26-14
Columbia, SC

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Vs.

John Henry Dial, Jr.

IN THE PONTIAC MAGISTRATE COURT
Warrant# I938516, I938517

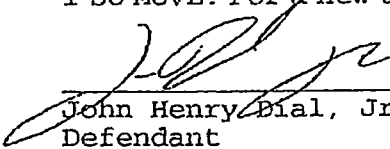
MOTION FOR NEW TRIAL

The Defendant requests that the Court to grant a New Trial on the above captioned case based upon the following:

The State admitted improper testimony and improper information about prior bad act evidence and that prejudice the jury beyond repair. The State also gave false testimony involving a prior incident that didn't happen. The State also violated Rule 5, by turning over discovery of evidence only 15 minutes before my trial. I did not have an attorney to represent me and I will be obtaining Tivis Sutherland for the new trial. I also move for stay of the implementation of sentence pending a new trial.

RECEIVED
PONTIAC
2011 APR 28 PM 2:19

I SO MOVE: For a new trail and stay of the implentation of the sentence.



John Henry Dial, Jr.

Defendant

Date: April 28, 2011

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

THE STATE)
Respondent,)
vs.)
JOHN HENRY DIAL, JR,)
Appellant.)

NOTICE OF APPEAL

Warrant Nos.: I938516, I938517

JEAN L. C. H. FURKID
C.C.P. & G.S.

2011 APR 29 PM 1:53

RICHLAND COUNTY
FILED

John Henry Dial, Jr. hereby appeals his conviction and sentence in this case. The sentence was imposed by the Honorable Judge Surles, Pontiac Magistrate on April 26, 2011.

The grounds for the appeal are as follows:

1. The prosecution had not made available discovery material to the appellant until minutes before trial. The trial judge erred by not granting a continuance
2. By not granting a continuance Appellant was denied the right to explore exculpatory witnesses and testimony for his case. The trial judge erred by not granting this a continuance.
3. The appellant was not represented by counsel and did not waive his right to counsel. This error denied appellant his Sixth Amendment right to counsel. The trial judge erred by not continuing the case in order for the Appellant to retain counsel.
4. Prior bad act evidence was presented that was highly prejudicial and denied Appellant the right to a fair trial. The trial court erred by not suppressing this evidence.
5. A directed verdict should have been granted to the Defendant on the charge since sufficient evidence was not presented to allow the jury to consider this charge. The trial court erred by not granting a direct verdict.

6. Evidence of prior incidents were improperly allowed into evidence. The trial judge erred by allowing this evidence into evidence.

7. The trial judge erred by not granting a new trial.

For the foregoing reasons, Appellant prays that this Court reverse the conviction and sentence and remand this case for a new trial.

Respectfully submitted,



Robert W. Mills
Attorney for the Appellant
1728 Main Street
Columbia, SC 29201
(803) 252-9648

April 29, 2011

Other Counsel of Record:

None known

RICHLAND COUNTY
FILED
JUL -1 PM 3:52
STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)
JER. C.C. AND G.S.)

IN THE PONTIAC MAGISTRATE'S
COURT
CP# 2011CP4002877
CASE NUMBER: I938516 and I938517

State of South Carolina	)	
STATE,	)	
	)	
VS.	)	RETURN OF APPEAL
	)	
John Dial, Jr.	)	
	)	
DEFENDANT	)	

This case arises from an alleged assault and battery on David Hutchinson, Shelby Hutchinson a minor and Cherish Douglas. Mr. Hutchinson was leaving Ms. Bass with whom he was living with as boy friend and girl friend. Ms. Bass allowed Mr. Hutchinson to borrow her truck to move items to Ms. Douglas's home where Mr. Hutchinson would now reside. Mr. Dial assisted Mr. Hutchinson in loading the items into the truck. Ms. Bass agrees Mr. Hutchinson could return the truck the next day. Ms. Bass changed her mind and calls Mr. Hutchinson telling him she now wanted her truck back today. They arrange to meet and Mr. Hutchinson returns the keys. Mr. Dial rode with Ms. Bass to pick up the truck. The events that follow differ from victim and defendant.

On August 25, 2010 Mr. Dial was arrested for three counts of Assault and Battery 3rd degree for spraying two adults and one minor girl with pepper spray. On November 1, 2010 Mr. Dial entered a plea of not guilty and requested a jury trial. He is advised of his right to be represented by an attorney either private or appointed but states he will represent himself.

A pre trial hearing was held on March 18, 2011 and after again being advised of his right to be represented by an attorney he states he has private counsel from the Foster Law Firm. On March 18, 2011 the court receives a fax from the Foster Law office with a copy of the incident report stating the Foster Law Firm will not be representing Mr. Dial. The fax was received from Candace M. Oxner, Paralegal. Mr. Dial fills out documents for an appointed attorney then states he will represent himself.

The jury trial is scheduled for April 26, 2011 with jury selection on April 25, 2011. At jury selection Mr. Dial again assures the court he wants to represent himself. Mr. Dial also asks if he could see the evidence the State has against him. Investigator Spears informed the court Mr. Dial had not filed a rule five or requested any information. The court learns the only items are the incident report and witness statements and a canister of pepper spray. The court tells the investigator to allow Mr. Dial to review all evidence the State plans to introduce. The next

morning at trial Mr. Dial states he does not have copies of the incident report or statements. The investigator states she allows Mr. Dial to review the document but did not provide a copy. The court orders a recess and the court clerk makes copies of the documents and Mr. Dial is given an opportunity exceeding thirty minutes to review the documents. None of the documents are introduced and the State relies on witness testimony. Mr. Dial questions each witness. When the State introduces the pepper spray canister Mr. Dial objects stating the State has not subjected the canister to finger print analysis. The court over rules the objection and the canister is introduced. The State calls four witnesses one of which is a minor girl. Three of the witnesses are victims including the minor and one is the driver of the vehicle, Ms. Bass. All testify that Mr. Dial was the passenger and when the victims approached the vehicle Mr. Dial sprayed them with the pepper spray. Ms. Bass also testified Mr. Dial was the one who sprayed the victims. He told her to tell the investigator she did it because he was on probation. Ms. Bass originally tells the investigator she did it then recants her story and says Mr. Dial sprayed the victims. Mr. Dial first testified that Ms. Bass sprayed the victims then stated he was attacked by one of the victims while sitting in the car and used the spray in self defense. Mr. Dial testified the canister is his. The canister is the size of a small fire extinguisher and was issued to him when he was a security employee.

Mr. Dial's father and another witness testified about other items but were not witnesses to the spraying.

Both the State and Mr. Dial fully participated in opening remarks the questioning and introduction of witnesses and closing remarks. After hearing the testimony the jury found Mr. Bass guilty of two counts of assault and battery 3rd and not guilty of the assault on the minor stating there was no direct intent by Mr. Dial to spray the minor girl only the adults. Mr. Dial was sentenced to sixty days in the Alvin Glenn Detention Center beginning that Tuesday April 26, 2011. Mr. Dial asks to delay the sentence to allow him to attend funeral services for his grand father that afternoon. The court agrees and orders Mr. Dial to surrender himself that Friday by 9:00 AM to investigator Spears. Mr. Dial agrees but fails to attend the services or turn himself in and acquires the legal services of Mr. Mills to represent him post trial. A bench warrant is issued for failing to meet the Friday deadline. Mr. Mill files an appeal. A bond hearing is requested. Judge Surles enters MUSC for cancer surgery and will not return to the bench until July. Judge Newsom hears the bond request. A bond is set at \$2186.00 on May 9th. Mr. Mills request that a surety bond be allowed on May 10th and Judge Newsom agrees. The court has not received any bond.


G A Surles
Pontiac Magistrate

This 30th day of June, 2011

Page 1

1 THE STATE OF)
2 SOUTH CAROLINA)

3 VERSUS)

4 JOHN DIAL, JR)
5 _____)

TRIAL OF
JOHN DIAL, JR.

6
7
8 Transcribed by KATHRYN BOSTROM, Court Reporter and
9 Notary Public for the STATE OF SOUTH CAROLINA.
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A P P E A R A N C E S

THE HONORABLE JUDGE SURLES PRESIDING

FOR THE STATE OF
SOUTH CAROLINA: INVESTIGATOR SPEARS
RICHLAND COUNTY
COLUMBIA, SC

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PROCEEDINGS

1
2 THE COURT: Good morning, ladies and gentleman,
3 I'm Judge Surles and my clerk tells me that we
4 have gone through everything now and that are
5 all ready to go. Before I bring the jury in,
6 let me just ask, Mr. Dial, do you have any
7 questions or anything you want me to go over
8 with you before we get started?

9 MR. DIAL: Yes, sir. Yesterday when you told
10 Ms. Spears to provide me with the evidence
11 against me, the only thing I was provided was
12 to take a look at the incident report and a
13 picture of a (inaudible) can next to a dollar
14 bill. I didn't get any of the statements made
15 by the victims or anything else to go over, so
16 to prepare my defense, I'm pretty much just
17 going on the truth of what happened, so I don't
18 have their statements to actually --

19 THE COURT: Were there any written statements
20 taken?

21 THE STATE: Yes, sir.

22 THE COURT: Do you have time to get those?

23 THE STATE: I can copy those. We just didn't
24 provide kind of motion for discovery. Was he
25 supposed to do that at all?

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1 THE COURT: Well, typically they file
2 (inaudible) and you do it at court and y'all
3 would just exchange information. You know, the
4 basic premise is he's got a right to see what
5 you're going to use against him. The cards are
6 just on the table, but you just see where they
7 go from there. What I'll do, Mr. Dial, it's
8 looks like there's several pages here. I'll
9 get my staff to make a copy. I'll take a
10 little break to give you time to look over
11 those and you can familiarize yourself. I
12 mean, that's the way the courtroom works. The
13 facts are the facts and the facts are out there
14 and then we got from there, so.

15 MR. DIAL: Yes, sir. Thank you, sir.

16 THE COURT: All right. And let's make a copy
17 for him. I'll just step to the back and y'all
18 just let me know when you're ready to go. Have
19 y'all got water and everything? You
20 comfortable? Okay. Just let me know.

21 (Off the record)

22 THE COURT: All right.

23 THE STATE: I'm not sure of all the names before
24 we get it to who his witnesses are. I do
25 (inaudible) one. If you could present the

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1 names as motions, I guess.

2 THE COURT: All right. You want a witness
3 list (inaudible.)

4 THE STATE: Yeah. And then I possible have some
5 motions for that after I have the chance.

6 THE COURT: All right. Mr. Dial, would you
7 call out the names of the individuals you are
8 going to call as witnesses? And when Mr. Dial
9 does that, I'm going to ask you to please
10 stand, okay?

11 MR. DIAL: Sam Green.

12 THE COURT: Sam Groom.

13 MR. DIAL: Green.

14 THE COURT: All right. One second. I've got
15 that. Okay.

16 MR. DIAL: Kimberly Mahee.

17 THE COURT: All right.

18 MR. DIAL: John (inaudible)

19 THE COURT: All right. John (inaudible) thank
20 y'all. Please have a seat.

21 THE STATE: And Your Honor, at this time I'd
22 like to make a pre-trial motion in reference to
23 all three of those individuals. All three of
24 these witnesses apparently for the defendant
25 had no bearing or information, were not at the

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1 incident location at that time. They have no
2 bearing to this case whatsoever. They were not
3 there. They were not privy. They were not
4 part of the incident whatsoever. I think it
5 would be waste of The Court's time to bring
6 them in as witnesses today. It has no bearing
7 at this point.

8 THE COURT: All right. Well, I'll have to see
9 that. I'm going to overrule your motion. I'm
10 going to let it come in.

11 THE STATE: Okay.

12 THE COURT: If he does call them as witness,
13 then I have to see whether -- you can certainly
14 raise objections as to relevancy.

15 THE STATE: Okay.

16 THE COURT: I don't know what they're going to
17 testify about, but certainly being present on
18 scene is an important matter. If not, then I'm
19 just going to have to weigh the value of what
20 it is (inaudible)

21 THE STATE: Okay.

22 THE COURT: Okay? All right.

23 THE STATE: Yes, sir.

24 THE COURT: Any other motions? Ready to bring
25 the jury in?

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1 THE STATE: I'm good at this time, Your Honor.

2 THE COURT: Ready to go forward?

3 MR. DIAL: Yes, sir.

4 THE COURT: All right. Madam Clerk, I'm going
5 to ask that you bring in the jury panel please.

6
7 THE CLERK: All rise for the jury.

8 THE COURT: All right. Please take your
9 seats. Good morning, ladies and gentlemen of
10 the jury. It looks like we are now ready to
11 get started. What I'm going to do right now is
12 ask my clerk to call out your names. And when
13 she does, I'd like for you to please stand. I
14 want to make sure that we've got all the right
15 members of the jury panel. And then following
16 that, I'm going to issue an oath to you, the
17 juror's oath. And then I'm going to select
18 somebody to be the jury foreman. I'll call on
19 someone, but before you tell me you will do it
20 or you're uncomfortable with it, I'll layout
21 what it is that I would ask the jury foreman to
22 do. And if you're comfortable with that, I'll
23 ask one of you to serve as the jury foreman.
24 All right. Madam Clerk, if you would call the
25 names of our prospective jurors.

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1 THE CLERK: Denise Weathers. Antonio Lloyd.
2 Dayshia Washington. Leslie Goblin, Victor
3 Strong, Steven Jakes.

4 THE COURT: All right. And at this time, I'd
5 ask each of you to please raise your right
6 hand. And do each of you solemnly swear or
7 affirm that you will well and truly try the
8 issues in this case according to the law and
9 the charges as I give them to you. If so,
10 please say I will.

11 THE JURY: I will.

12 THE COURT: All right. Please have a seat.
13 And Mr. Strong, I'm going to ask if you would
14 be willing to serve as our jury foreman. And
15 what I would ask the jury foreman to do are the
16 following things. One: when your jury is
17 deliberation at the conclusion of the trial, I
18 would just ask that you make sure that each and
19 every member of your jury panel had a full and
20 complete opportunity to express themselves and
21 their views and their opinions about the facts
22 and the issues, that nobody is restrained from
23 speaking. Secondly, then I would ask that
24 during the course of the trial, it might be
25 necessary for me to ask the jury to step to the

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1 back while I take up some legal matters, and I
2 would just want you to make sure for me that
3 nobody begins discussing the case until its
4 conclusion, and I'll explain in a little bit
5 why that is so important. And then finally, I
6 would burden you with advising The Court of the
7 decision of the jury panel. Would you be
8 willing to do that for me?

9 MR. STRONG; Yes, Your Honor.

10 THE COURT: Thank you very much. I appreciate
11 that. What we're going to have today is a
12 trial. You're going to help us seek the truth
13 and that's what the verdict and the jury is
14 for. That's the only reason we're here, is
15 we're looking for the truth. There's been an
16 event and there are two different sides to this
17 event. And we're going to explore the facts
18 and the issues and then make a determination
19 about what the outcome of this event is going
20 to be. Now, in a courtroom, each of the
21 parties are here because each of the parties
22 plays a different role. You play the most
23 important role today. You are the tryers of
24 fact. That means that you were the one that
25 are going to hear the testimony, decided what

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1 facts you want to use, what facts you believe,
2 what facts you don't believe, what witness you
3 believe, what witness you don't believe and
4 anything that can help you in deciding what the
5 truth is. And there're two different sides to
6 this story and we've got to find when the truth
7 lies. Now the State is represented by serving
8 as the prosecutor today. And what the State is
9 going to do is she is the one that's was going
10 to present the case. She's the one who
11 investigated the case, she has some witnesses,
12 she's going to call the witnesses forward. And
13 the State is going to present their side of the
14 story and I want you to listen very carefully
15 with an open mind to all of the facts and
16 things that the State presents. Now, the State
17 carries a burden and that burden is the State
18 has to prove the case. The defendant doesn't
19 have to prove that he's innocent. In fact, the
20 defendant doesn't have to say anything at all.
21 The defendant doesn't have to testify, doesn't
22 have to do anything. The burden rests on the
23 State to prove the case. As the defendant sits
24 before us right now, he's innocent of all the
25 charges. And he's going to stay innocent until

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1 the State can build its case and prove to you,
2 the jury, by the facts and the evidence beyond
3 a reasonable doubt that the defendant is guilty
4 of the charge, if they can do that. Now, the
5 defendant has an opportunity to testify, if he
6 wants to. He can certainly ask questions if he
7 wants to. He can call witnesses if he wants
8 to, but he doesn't have to. He doesn't have to
9 prove that he's innocent. The State has to
10 prove that he's guilty. And that's going to be
11 your role as the jury is to be the tryers of
12 the fact and decide what to believe and what
13 not to believe. Now, my role in this is the
14 simplest role today. I am not the tryer of
15 fact. I'm simply like a referee. In any
16 criminal proceeding, like a sports game or an
17 event, there's certain rules of procedure that
18 have to be followed. And my role would be to
19 make sure that those rules and procedures are,
20 in fact, followed. Occasionally, you might
21 hear somebody say, "I object." An objection
22 means "Judge, I think one of the rules have
23 been bent or violated, and I'd like you to make
24 a determination whether that question can go
25 forward or not go forward, or if it's

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1 appropriate or it's not appropriate.

2 Sometimes, in order for me to do that, I'll
3 have to ask you to step in the back so I can
4 explore it in more detail. There could be
5 matters that could be inappropriate for you as
6 a jury to hear. So that's when, Mr. Foreman,
7 I would ask that you make sure that nobody
8 begins discussing the case. Why is that?

9 Well, there are two sides the story and if you
10 start discussing the case before you've heard
11 all of it, then you're going to begin
12 formulating an opinion and I don't want you to
13 formulate an opinion until you have both sides
14 of the coin, all the facts and issues. Now,
15 when a trial opens, there's a process we call
16 an opening statement. And the State can make
17 an opening statement and the defendant can make
18 an opening statement and they don't have to do
19 that if they don't want to. But an opening
20 statement generally is kind of a summary of
21 what it is I'm going to present to you, what it
22 is I'd like you to see in my presentation, you
23 might have seen this, you know, on television
24 or some things. Lawyers stand up and make an
25 opening statement. And it's generally an

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1 outline or a brief presentation of what's going
2 to be presented to you and what I'd like for
3 you to look for during the time that I'm
4 presenting my facts and evidence to you. But
5 an opening statement is not evidence. They are
6 not facts. They are not anything more than
7 just a general summary of what's going to be
8 presented. All of the facts and all of the
9 evidence will come from this juror box after
10 I've sworn the person in. Then the parties
11 will ask questions and the witnesses will tell
12 their story to you and that's where the facts
13 and the evidence will come from. And I want
14 you to pay very close attention to everything
15 it is that they say to you, because the truth
16 is in there somewhere. You're going to have to
17 find it. At the conclusion of the trial, I'll
18 give both sides an opportunity to make what we
19 call a closing statement. And a closing
20 statement again is not testimony, they're not
21 facts, they're not evidence. You might again
22 be somewhat familiar with closing statements
23 from presentations that you've seen. They are
24 generally a summary of what was presented to
25 you, what it is that I, as the attorney, hope

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1 you got out of what I've presented to you and
2 why it is I want you to rule in my favor. It's
3 just a summary. Not testimony, not facts, not
4 evidence. All that comes from (inaudible).
5 When they have finished, and what I will do, is
6 then I'll give you the law. I'll tell you what
7 the law is. And I'll give you some charges.
8 And the charges are basically a parameter
9 around which you're going to decide the facts
10 and the evidence. I don't want you to go out
11 here or way out there, I want you to stay
12 within the parameters that I give you and the
13 law that I give you. That's your foundation
14 for discussing what the facts are, what's
15 relevant, what's not relevant, and what the
16 truth is. Okay? And then you will step back
17 and deliberate and come back. And I'll have
18 somebody at the door. You let us know when the
19 verdict is ready and we'll go from there.
20 We're seekers of the truth today. That's what
21 we're looking for. That's all we're looking
22 for. Is the State ready to go forward?

23 THE STATE: Yes, Your Honor.

24 THE COURT: All right. Mr. Dial, are you
25 ready to go forward?

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1 MR. DIAL: Yes, sir.

2 THE COURT: All right. And for the jury, I'm
3 just going to briefly just tell you that what
4 this is, is it's a criminal case and it
5 involves the charge, three charges of what we
6 would call -- it's assault and battery third
7 degree, also known as simple assault and
8 battery. That's the main framework around
9 which this case is going to take place. All
10 right.

11 THE STATE: Morning everyone. Thank you for
12 being here today. Basically, this case again
13 is assault and battery third degree is what the
14 defendant is charged with. Back on July 3,
15 2010, is was Westchester Ave and (inaudible)
16 Road in Richland County, Cherish Douglas, David
17 Hutchinson had reported John Dial, Jr, had been
18 calling and harassing David about picking up
19 Wendy's vehicle. John Dial continued to make
20 some verbal threats to David over the telephone
21 and he and Wendy had headed over to David's
22 home to pick up that vehicle. David advised
23 him to pick it up. David and Cherish were
24 outside visiting with some friends and family
25 when they saw Wendy Bass and John Dial drive up

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1 (inaudible) Road. David and Cherish, the kids
2 had also followed, began walking down to the
3 stop sign of Westchester Ave and (inaudible)
4 Road at the corner. Once they did this, Wendy
5 stopped, Wendy was going to obtain the keys to
6 the explorer. That is when John Dial then
7 began spraying pepper spray out of the car at
8 David and Cherish. David's daughter, Shelby
9 was 12 at the time, was also hit with pepper
10 spray in the chest. The neighbors came out to
11 help David and Cherish because they were
12 sprayed so badly they couldn't see. And they
13 were burned badly all over their body. David
14 and Cherish were transported to the hospital
15 and treated. David's daughter was transported
16 -- I'm sorry, she was treated on site.
17 Officers respond to the scene, traffic stop was
18 completed on Wendy's vehicle at that time. She
19 was driving a red Dodge Neon. Officers found
20 inside the vehicle, OC17, which is a
21 (inaudible) and pepper spray bottle. And also
22 law enforcement (inaudible). Wendy gave law
23 enforcement a sworn statement implicated John
24 Dial and also stated that he'd used her car
25 just before, he had gone home, changed his

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1 clothes. Mrs. Bass also advised that she had
2 no idea that the pepper spray or baton were in
3 her vehicle, only that John had gone home to
4 change his clothes and possibly put those
5 things in her vehicle. Ms. Bass also advised
6 that they'd gone only to pick up the vehicle
7 and were going to head back to her house. She
8 did implicate John at that point in time. She
9 stated that he wanted her to take the blame for
10 spraying the pepper spray because he was on
11 probation and it would be a violation of his
12 probation at that time.

13 THE COURT: Ms. Spears, you don't need to
14 bring that up.

15 THE STATE: I'm sorry. (Inaudible) on that.
16 Wendy did show up at the hospital to see if
17 David and everyone else was okay and also drop
18 the keys back off to the explorer for David at
19 that time. Wendy had been very cooperative at
20 that point, giving statements, talking to us
21 about the incident. She is a witness in this
22 case. John Dial is a nephew of hers also.
23 It's now your job as a juror of Richland County
24 to decide if beyond a reasonable doubt if John
25 Dial did commit this assault and battery third

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1 upon his victims which caused them great
2 discomfort and pain. I'm not sure if anyone
3 here has ever been sprayed with pepper spray.
4 It's not very pleasant, but it's now up to you
5 to decide based on testimony from all the
6 witnesses and the victims what transpired that
7 day. Please listen to carefully. You decide
8 as the jury of Richland county what transpired.
9 Thank you.

10 THE COURT: Mr. Dial? Opening remarks?

11 MR. DIAL: Good morning. What we have here is
12 pretty much a lover's quarrel that went wrong.
13 I was at my aunt's house prior to that evening.
14 She did get the pepper spray. I did give the
15 pepper spray to her because she had had an
16 altercation with David's wife prior to this, so
17 she went to pick up the vehicle. I was in her
18 house. She was suicidal. EMS was called out
19 there. I remained at her house to stay with
20 her. I rode with her to get the vehicle. At
21 that time, David struck me in my face and
22 that's when Wendy sprayed the pepper spray.
23 Here's a police report right here. It states
24 on this police report Deputy Pitcher actually
25 responded to the scene. (Inaudible), Deputy

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1 Pitcher observed a red Dodge Neon occupied by
2 Dial and Ms. Bass.

3 THE COURT: Mr. Dial, I hate to interrupt,
4 you can't put in to testify statements made by
5 somebody that's not present.

6 MR. DIAL: She is present, sir. This is a
7 police report where Deputy Pitcher -

8 THE COURT: You can say what she said, but
9 not what the officer said.

10 MR. DIAL: Okay. Well, she said, Bass stated
11 to Deputy Pitcher that Bass said that when she
12 was (inaudible) location, her red Dodge Neon
13 was surrounded by approximately ten subjects,
14 one of them (inaudible) in the face, which was
15 me. Bass said that she spray the subject with
16 police (inaudible) OC17. I also told the
17 officer that I was struck in the face. He said
18 there would be a follow-up investigation.
19 There was a follow-up investigation. I was
20 never questioned, never given a chance to take
21 a polygraph test. The only thing that warrants
22 were issued only. I just y'all to find out the
23 truth today of what happened. This is a
24 quarrel. I've got some witnesses to present of
25 her character. Me and David were friends up

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1 until that. I actually helped him move out
2 that day prior to that. I actually helped him
3 pack his stuff, (inaudible) and everything
4 else. Hopefully, y'all will find out the truth
5 and everything. I was just there to help my
6 aunt and that's what I did. I did not spray.
7 I'm kind of new to this, so I guess all the
8 other facts will come out. Thank you for
9 listening to me.

10 THE COURT: All right. Is the State ready to
11 call its first witness?

12 THE STATE: Yes, Your Honor. The State wishes
13 to call David Hutchinson to the stand,

14 (The witness, David Hutchinson, was sworn in):

15 THE COURT: All right. Investigator Spears,
16 he's your witness.

17 DIRECT EXAMINATION

18 BY MS. SPEARS:

19 Q Could you tell the court where you live?

20 A I live on 132 Westchester Lane Avenue.

21 Q Is that Richland county?

22 A Yes, ma'am.

23 Q And can you tell The Court what happened on July 3,
24 2010?

25 A Well, me and Wendy was boyfriend and girlfriend. We

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1 broke up. I was moving out and I was packing my
2 stuff up. John Dial did come over there to help me
3 out. So I left and I took the Ford Explorer that
4 she told me I could use. I had to bring it back at
5 seven o'clock the next morning. So I knew there was
6 a bunch of (inaudible). So I took the Explorer and
7 then I kept getting phone calls from both of them,
8 you know, when you trying to work things out with
9 me? And then, me and John were friends. It's like
10 two bulls meeting. If you want to butt heads, we
11 can butt heads. And I kept telling John, you know,
12 John I ain't trying to go through all this and
13 stuff. I said I'll call Wendy back later, and he
14 kept calling my phone and calling my phone. And I
15 finally told Wendy, I said, Wendy, just come get the
16 car, come get the truck. I don't want no
17 confrontations or anything, because I'm not try to
18 start no fight with nobody, I'm just trying to get
19 out of this, you know. So she came -- they kept
20 driving up and down. Meanwhile, he called me on the
21 phone and I said John, I don't want to talk to you
22 no more. And he said, well, Wendy's not around. I
23 said, well, where's she at? He said, she's at the
24 house. Because she was kind of upset and stuff and
25 nobody wanted her to drive. I said, well where are

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1 you going? He said, well, I'm going to the house to
2 get a change of clothes. I'm taking Wendy out
3 tonight so she can meet some decent fellow. And I'm
4 like I don't care. And then he started running his
5 mouth and throwing threats out there at me. And my
6 brother was standing beside me.

7 THE COURT: Just take your time. Would you like
8 some water?

9 A And he threatened to kill my brother.

10 Q Take a second, okay. His brother (inaudible).

11 A So I said you know, just come get the truck and
12 stuff. So when we called me on the phone and said
13 I'm right around the -- turning on the dirt road.
14 He kept driving up and down. And so I said, stop,
15 I'm just going to take the keys down there to him.
16 I started walking down there. Cherish was walking
17 behind me and my daughter was walking behind me and
18 my niece was walking with me too. So I walked down
19 there. Johnny jumps out the car and it looks like
20 he has something like a gun. And he points it at me
21 and it starts spraying. And I was like whoa. And I
22 walked off to the other side and he gets back in the
23 car. And an SUV pulled in front of their car, so I
24 walked around the SUV. And I went on Wendy's side
25 and Johnny reaches across the window and sprays me

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1 all on this side of my body with pepper mace and all
2 in my mouth. He got Cherish and then he sprayed my
3 daughter. And then my niece come over there and
4 said calm down, uncle David, because you're going to
5 hyperventilate and stuff. And she helped us out
6 with that. And then when he got out, they was
7 taking me -- they was pulling off, he was hollering
8 out "fat boy, that's what you get." Hollering at
9 me, talking about "fat boy, that's what you get. I
10 told you I was going to get you," and left.

11 Q Now were there any prior arrangements made for her
12 picking up the vehicle that evening?

13 A No. Well, I just told her to come get it because I
14 didn't want all the arguments and stuff to continue
15 on. And I also tried, I said we can wait until the
16 morning and we can sit down and talk when
17 everybody's cooled off. And it's like, Johnny kept
18 pushing everything for it to be done at that time.

19 Q Can you describe the injuries that you sustained
20 from this incident?

21 A I was sprayed all over my -- I think it was my right
22 side, you know, my right side of my body -- I mean,
23 my left side. All in my eyes and everything. They
24 had to rush me to Providence Northeast because I had
25 burns all over my body from the pepper spray.

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1 Q And can you identify the person in the courtroom
2 that sprayed you with the OC at the time causing
3 great pain and discomfort?

4 A Yes, ma'am.

5 Q Could you point that person out?

6 A John Dial.

7 Q And you know the name of the person that sprayed you
8 with the pepper spray?

9 A Yes, ma'am.

10 Q What is the name of that person?

11 A John Dial.

12 Q Okay.

13 THE STATE: And the State would like to also ask
14 if I can put this in as an exhibit?

15 THE COURT: Mr. Dial, any objection?

16 MR. DIAL: I'd like to ask if they were
17 fingerprinted? Or anything else? Do you have
18 any evidence of it being fingerprinted, the
19 prints on it, or anything?

20 THE STATE: No. We don't.

21 MR. DIAL: Because that would be helpful to me
22 to show that (inaudible)

23 THE STATE: I have prior knowledge of
24 (inaudible)

25 THE COURT: All right. Enter that as State's

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1 Exhibit Number 1, please.

2 (State's Exhibit No. 1 was marked for identification.)

3 Q And so Mr. Hutchinson, this can here, do you
4 recognize this at all?

5 A Yeah.

6 Q Does this appear to be the can (inaudible)

7 A Yes, ma'am.

8 Q (inaudible)

9 A Yes, ma'am.

10 THE STATE: At this time, I don't have any other
11 questions for this witness.

12 THE COURT: Mr. Dial, do you have questions
13 for this witness?

14 MR. DIAL: Yes, sir.

15 CROSS EXAMINATION

16 BY MR. DIAL:

17 Q On the day prior to this incident, did you move out
18 of Wendy's mobile home on Hardscrabble Road and move
19 back in with your wife, Shelby?

20 A No, sir.

21 Q You stated earlier that I was helping you pack.

22 A Yeah. I did not move back in with my wife, Shelby.

23 Q Okay.

24 A I moved in with my girlfriend Cherish.

25 Q Is Cherish here?

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1 A Yes, sir.

2 Q So, David, I wasn't even aware that you had a
3 brother. I just found out you had a brother --

4 THE COURT: Mr. Dial, just questions.

5 Q Were you aware that EMS was called to Wendy's house
6 for attempted suicide while you was moving out?

7 A Yes. And you know I was too.

8 Q (Inaudible)

9 A Yes. I was.

10 Q I had read an incident report that you had called
11 the police out there because you were afraid Wendy
12 was going to hit you again; is that correct?

13 A No. The reason the police was called back out there
14 was because I knew you and I wasn't trying to have
15 no confrontation with you.

16 Q Who was with me at Wendy's house that day?

17 A Some guy you work with. I think his name was Sam.

18 Q Is that Sam Green right there?

19 A I don't know. He was sitting in the truck. I
20 wasn't paying attention because me and my son was
21 trying to get my stuff out of there.

22 Q I'm trying to find -- it's written in here. C.

23 Douglas, I'm sorry. Were you aware that your
24 girlfriend, Cherish, made a statement that said you
25 called the police out there because Wendy had hit

1 you?

2 A That statement was never made.

3 MR. DIAL: (to Ms. Cherish Douglas) I guess --
4 is this your handwriting?

5 MS. DOUGLAS: That's totally not my
6 handwriting?

7 MR. DIAL: Cherish Douglas?

8 MS. DOUGLAS: That's not my handwriting.

9 MR. DIAL: Okay. It's signed by a Cherish
10 Douglas.

11 MS. DOUGLAS: That's my signature at the
12 bottom, but that's not my handwriting
13 (inaudible)

14 THE STATE: Your Honor, I have an objection.
15 I'm not quite sure where he's going with this
16 question at this point in time.

17 THE COURT: Mr. Dial, at this time, you just
18 need to direct your question to this witness.
19 Not --

20 MR. DIAL: Well, I'm trying to establish
21 credibility and that, you know, the truth is
22 not being told here. And if I don't know who
23 -- I mean, Cherish signed it and I don't know
24 either who said this or who's saying --

25 THE COURT: What your role is, is to ask him

1 questions and he can give you responses to
2 those questions. You can't go and ask anybody
3 in the courtroom a question or anybody sitting
4 in the (inaudible) a question. This is your
5 witness. You can ask him questions, get
6 responses. The jury will be the one to decide
7 what's true and what's not true.

8 Q So you wasn't aware that the statement was made that
9 the police actually come out there because you were
10 afraid that Wendy was going to hit you?

11 A No. I was no aware of that statement. The
12 statement that I made was I had called the law
13 because you was out there at Wendy's house and I
14 know your background. And I'm not looking for an
15 altercation with anybody. I was just trying to get
16 my stuff out of the house.

17 Q Were you aware that I was at the house before you
18 showed up?

19 A Yes. I was because I talked to you three times on
20 the phone and I asked you who the police officer was
21 and you said I don't have to worry about it.

22 Q Was a police dispatched out there in --

23 A Yes, sir.

24 Q (inaudible) ex-husband --

25 A I don't know.

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1 Q (inaudible) because she was threatening suicide.

2 A I do not understand. I do not know, sir. Alls I
3 know is there was one police officer there and then
4 when I showed up they dispatched another one out
5 there.

6 Q I helped you get your stuff in the vehicle. We had
7 no conversation at all; is that correct?

8 A Not at all.

9 Q I do believe it was you and your son there?

10 A Yes, sir.

11 MR. DIAL: That's all my questions, sir.

12 THE COURT: Okay. Any re-direct?

13 THE STATE: Not at the time, Your Honor.

14 THE COURT: All right. Sir, you may step down.

15 Thank you very much for your testimony. All
16 right. Does the state have another witness?

17 THE STATE: Yes, sir. I call Cherish Douglas to
18 the stand.

19 (THE WITNESS, CHERISH DOUGLAS, WAS SWORN IN):

20 DIRECT EXAMINATION

21 BY MS. SPEARS:

22 Q Can you tell The Court your address?

23 A It's 132 Westchester Avenue.

24 Q Is that in Richland County?

25 A Yes, ma'am.

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1 Q Can you explain to The Court what happened on July 3
2 (inaudible?)

3 A Yes. I can. earlier that day, David had called me
4 and told me that he was coming back home, that he
5 was going to leave Wendy. I didn't hear from him
6 for a little bit. I'd went to the store and come
7 back and when I came back, his son's girlfriend that
8 was there had told me that his son had left to go
9 help David get his stuff out of Wendy's house to
10 come back. Maybe about an hour later they arrived
11 back at the house. After that, I had had our phone
12 numbers changed, because we were having problems
13 with Wendy and John calling the phone. Well, the
14 walky talkies on the Boost Mobile, they won't change
15 the walky talky number, so you can call on the radio
16 still. So they kept calling and calling on the
17 radio. And first it was her, crying, talking,
18 wanting to talk to David and just back and forth.
19 Well, after that, Mr. Dial kept calling. I didn't
20 know Mr. Dial before that, before this happened. I
21 didn't even know who he was on the phone. I only
22 knew because of him telling me who it was. He kept
23 making threatening gestures on the phone. He didn't
24 understand why David had left his aunt and stuff
25 like that. And like I told him, I mean, I was sorry

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1 that it happened, but that wasn't my problem.

2 Q Right.

3 A Well, he just kept calling and kept calling. And
4 finally he said that David told me to tell them --
5 and he was standing there, because like I said, it
6 was on walky talky radio -- to go ahead and come get
7 the car. So there wouldn't be anymore confrontation
8 with the car.

9 Q Okay.

10 A Because that was all that was left, you know, was
11 giving the car back. So, I think they kept calling
12 as they were coming, but we actually didn't know
13 they were until we seen them riding up and down the
14 road. We had went out the house and went outside
15 because we had a lot of company over that night.
16 There was a lot of kids in the yards. I've got four
17 kids, so they were in the yard. His daughter was in
18 the yard. His niece, which lives three houses down,
19 his brother, so we seen them riding up and down.
20 Because where our trailer's at, if you look over to
21 the right, there's the stop sign where the dirt road
22 runs. So we proceeded to walk towards the stop
23 sign, you know, to keep everything away from all the
24 children.

25 Q Right.

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1 A Well, Shelby followed us and his niece followed us.
2 My kids kind of stayed back some. Which my 19 year
3 old followed us too. She ended up getting sprayed
4 too. She just didn't follow up with it. She went
5 home. But as we approached the stop sign, David
6 went to go around to her side, but as he went to go
7 around to her side to give her the keys, he started
8 spraying out of the window.

9 Q Okay.

10 A I was standing behind David. It was so thick, it
11 just covered both of us.

12 Q Okay.

13 A So then he went to go around and as he went around
14 to her side, got to her side, he was spraying it all
15 over the top, the top of the car. So it was still
16 steady hitting him, hitting me, hitting his
17 daughter. After that, I pretty much couldn't see.

18 Q Right.

19 A Because it had gotten us in the eyes so bad. And
20 I've never felt pain like that. I've had four kids
21 and I've never felt pain like that before ever in my
22 life. So his niece pretty much helped us get back
23 to the house to try to wash it out, but it didn't do
24 any good. They had to call 911 for an ambulance to
25 take us, you know, to Providence Northeast. So I

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1 don't know what happened after that, after we left
2 by ambulance.

3 Q Right.

4 A We were told, you know, that the police had ended up
5 getting there. I don't know what happened
6 afterwards. But like I said, before that happened
7 that night, I didn't even know this gentleman at
8 all. I knew her, because, you know, David had left
9 me a couple of times before and went to live with
10 her. But I had no idea that she would bring
11 somebody over to my house like that that would, you
12 know, hurt, you know, people like that. Especially
13 she knows we have a lot of kids and stuff, so.

14 Q And can you tell The Court the name of your niece
15 that actually helped --

16 A Jennifer Moyer.

17 Q And what were the extent of your injuries?

18 A It was all in the eyes, all over my chest, my face.
19 Our whole bodies were covered. Just red, red, red.

20 Q Did you have to stay in the hospital overnight?

21 A They had us in the contamination shower, scrubbed,
22 pain medication. We were there until morning time.
23 And then they sent us home with pain meds and stuff.
24 Because they said stuff like that usually has to try
25 to wear off.

1 Q Right.

2 A So, but it was a week, two weeks and you could still
3 feel the burning of your skin and your eyes. And I
4 had to work, so.

5 Q Can I ask if you recognize seeing this that --

6 A Yes, ma'am.

7 Q Do you remember seeing it that evening as well?

8 A Yes, ma'am.

9 Q And can you identify the person in the courtroom
10 that sprayed you with the OC at the time causing
11 great pain and discomfort?

12 A Yeah. It was Mr. Dial.

13 THE STATE: I have no further questions at this
14 time.

15 THE COURT: All right. (Inaudible) Ma'am,
16 please.

17 CROSS EXAMINATION

18 BY MR. DIAL:

19 Q (inaudible) when David took Wendy's explorer that is
20 belonging to Wendy, did he threaten to break the
21 windows out of Wendy's explorer if she didn't come
22 and get it right away?

23 A No, sir. I didn't.

24 Q What time of night did this incident happen?

25 A I was right after dark fall.

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1 Q How dark was it?

2 A It was dark, but it just had gotten dark.

3 Q Does one o'clock in the morning sound about right?

4 A No. I don't think it was -- I don't know exactly
5 what time it was.

6 Q Are there any street lights or anything on your
7 road?

8 A Yeah. There's a street light in our yard and
9 there's a street light -- I think there's a street
10 light down where the car was. There was a street
11 light down at the end.

12 Q (inaudible) located right here, right? I guess this
13 would be Two Notch Road out here and dirt comes up
14 through here, like in a gravel road.

15 A Two Notch goes down (inaudible) a dirt road --

16 Q Yeah. Two Notch is right here and --

17 A You round around a corner.

18 Q Right. And then this is y'all's --

19 A And then you make a left to go down my dirt road.

20 Q That's correct. How long is your mobile home --
21 wouldn't you agree with me that Wendy's car was
22 parked right about here?

23 A Wendy's car was parked directly in front of our
24 trailer, by the crosstires. And I know it was

25 because right before y'all pulled up, Shelby

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1 threw her computer into the explorer, her laptop.

2 Q Did you see the white Ford Explorer pull in front of
3 Wendy and block her in?

4 A The SUV?

5 Q It was a white Ford Explorer that pulled in in front
6 of Wendy. Did you see that?

7 A I know that there was a car that pulled in front of
8 her to try to keep y'all from leaving until the
9 police got there. I do know that.

10 Q I believe that a white Ford Explorer pulled in
11 before the (inaudible) with the spray. Were you
12 carrying anything in your hand when you walked up to
13 the vehicle?

14 A No. I wasn't.

15 Q What side of the vehicle did you approach?

16 A Well, we approached your -- we were at your side
17 first, but not in your window. Probably like from
18 me to these jurors.

19 Q Is there a street light down there where the
20 vehicle's parked at?

21 A Where the vehicle was?

22 Q That's correct.

23 A No. Not right where the vehicle was parked, there's
24 not. Our street light is in the little driveway
25 that comes in our yard where we park. That's where

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1 it sits. It sits in our yard.

2 Q Approximately say 75 yards from where Wendy's
3 vehicle's parked at?

4 A How far is 75 yards?

5 Q A little shy of a football field.

6 A No. No. No. No. No. He vehicle from the street
7 light would probably be from here to your dad over
8 there.

9 Q Do you think Wendy was angry at you the night she
10 come to pick up her vehicle?

11 A I'm sure she was. I'm sure she was. But the thing
12 about it is I didn't ask any of y'all to come to my
13 house other than to pick up keys to take a vehicle
14 out of there. And I'm sure that you were angry also
15 because that's your aunt.

16 Q Okay. (Inaudible) to make sure she didn't hurt
17 herself.

18 THE COURT: Just questions and answers,
19 please.

20 Q Were you angry at Wendy that night?

21 A You know, I was angry, but I had what I wanted,
22 okay. So there was no need in me being -- the only
23 thing that really made me mad is y'all kept calling
24 my phone prior to coming to my house. Calling
25 David's phone like y'all did. If he left, why would

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1 you keep calling and calling and calling over and
2 over again?

3 Q I guess Wendy's kind of attached to David.

4 A Well, she needs to get unattached. Because this is
5 something that's still going on as far as her
6 calling and harassing people.

7 Q That night when David was placed into the ambulance,
8 did Wendy --

9 A I was placed in it with him.

10 Q Okay.

11 A We went together in the back of the ambulance.

12 Q Was Wendy at the back of the ambulance screaming and
13 crying (inaudible)

14 A How am I supposed to know? I couldn't see.

15 (Multiple speakers, inaudible)

16 A I mean, I couldn't see.

17 THE COURT: He can ask that question.

18 THE STATE: Okay.

19 A I couldn't see anything. His niece is the only
20 reason I got into the dirt road into my house where
21 the water was. I couldn't see to even get to my own
22 house.

23 Q So you're saying you got sprayed from the passenger
24 side, but then you walked around to the right side?

25 A I was following him to keep him from trying to get

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1 hurt.

2 Q (inaudible)

3 A Yeah.

4 Q So you could see after you got sprayed --

5 A Well, you can't see to walk, but you can feel your
6 feet walking on the ground. But it wasn't as bad
7 though, because you continued to spray it over the
8 top of the car whenever I got over on the other
9 side.

10 Q You're saying that I got out of the vehicle or I
11 (inaudible)

12 A No. You were still in the car spraying it over the
13 top of the car.

14 MR. DIAL: (inaudible)

15 THE COURT: Any further questions?

16 THE STATE: No. Your Honor.

17 THE COURT: All right, ma'am, you may step
18 down. Thank you very much for your time. Next
19 witness for the State?

20 THE STATE: Your Honor, I now call Shelby
21 Hutchinson.

22 (WHEREUPON, THE WITNESS, SHELBY HUTCHINSON, WAS SWORN):

23 THE COURT: And hold old are you, Shelby?

24 THE WITNESS: Twelve.

25 THE COURT: You're 12 years old, okay.

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1 THE WITNESS: Yes, sir.

2 THE COURT: Have you ever been in a courtroom
3 before?

4 THE WITNESS: No, sir.

5 THE COURT: All right. Well, I want you to just
6 try to relax and all we're going to ask you to
7 do is just answer some questions and tell the
8 truth, okay?

9 THE WITNESS: Yes, sir.

10 THE COURT: Okay. You okay?

11 THE WITNESS: Uh-huh.

12 DIRECT EXAMINATION

13 BY MS. SPEARS:

14 Q Hi Shelby. You know the difference between the
15 truth and a lie?

16 A Yes, ma'am.

17 Q Could you tell The Court --

18 THE COURT: Could you turn the air off? I'm
19 going to ask you to speak up just a little bit.
20 You have a soft voice.

21 Q Can you tell The Court what happened on July 3, 2010
22 what you witnessed?

23 A Yes, ma'am. My dad left Wendy and they kept
24 calling. And Daddy and John -- John or Johnny --
25 they were kind of arguing.

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1 THE COURT: Speak a little louder. Yell if you
2 want to.

3 A They were arguing on the phone. I don't remember
4 what was said. But then they came and then my dad
5 was walking up to the car to give her the keys to
6 the Explorer. I didn't see the bottle, what was
7 sprayed --

8 Q Okay.

9 A But my dad got sprayed, I got like mist from it.

10 Q Okay.

11 A And she was sprayed.

12 Q Who's she?

13 A Cherish and Megan.

14 Q And do you know what kind of injury you got that
15 day?

16 A I wasn't as bad. I didn't have to like stay in the
17 hospital, like my dad and Cherish had to.

18 Q Did EMS treat you there when they came to the house?

19 A No, ma'am.

20 Q Okay.

21 A I just got it a little on my chest.

22 Q Did you just put a little bit of water on it?

23 A Yes, ma'am.

24 Q Okay. And can you identify the person that injured
25 you from that day (Inaudible)

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1 A I'm not sure, but it was from the passenger seat.

2 Q Okay. From the passenger seat. And that's what you
3 can remember?

4 A Yes, ma'am.

5 THE STATE: I have nothing further for this
6 witness, Your Honor.

7 THE COURT: Mr. Dial, questions for this
8 witness.

9 MR. DIAL: No, sir.

10 THE COURT: You may step down. You did very
11 good. Thank you. Anything further from the
12 State?

13 THE STATE: Your Honor, I wish to call Wendy
14 Bass at this time.

15 (THE WITNESS, WENDY BASS, WAS SWORN IN):

16 DIRECT EXAMINATION

17 BY MS. SPEARS:

18 Q Hi Ms. Bass.

19 A Hi.

20 Q Can you tell The Court where you live?

21 A Currently, I live at 324 Lee Road, but at that time,
22 I lived on Hardscrabble Road.

23 Q Both those addresses are in Richland County?

24 A Yes, ma'am.

25 Q And can you tell The Court what happened on July 3,

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1 2010?

2 A David and I did live together and at that time that

3 day, he did come home and we had an argument and he

4 was leaving. And we had an argument or whatever.

5 The police were called so he could get his stuff out

6 and leave and everything. It was no altercations

7 between us. I never touched him. I never hit him,

8 anything like that. I did agree to him to let him

9 have the Explorer and he was to bring it back the

10 next morning. After he did leave, I did call him.

11 I was very upset, tried to talk to him, whatever.

12 And it just went back and forth. And I did talk to

13 Cherish a couple of times on the phone and it went

14 back and forth. And so David did tell me to come

15 get the vehicle. And at that time, Johnny did come

16 to my house. Someone did bring him by. He'd stayed

17 and he decided that he would go with me to get it.

18 I actually had taken a couple of prescribed

19 medications for me to calm me down or whatever

20 because I was really upset. He had asked if he

21 could drive my car to go to his house to go to get

22 clothes to change. So he did and when he came back,

23 he said he was ready. I did not hear the whole

24 conversations that was going on with everything. I

25 don't remember all that.

1 Q Okay.

2 A We did go by the driveway, turned around, came back
3 and I saw David and Cherish coming up to the car. I
4 did not see Shelby. I did not see her there at all.
5 Johnny did reach out the can and spray. I saw him
6 reach out the can from underneath the seat and start
7 spraying. And I told him not to do that. And I did
8 see David and Cherish on the other side of the car
9 and I didn't see what was going on, but David was
10 holding his face and things like that.

11 Q Okay.

12 A We did leave the scene. I was pulled over by
13 Richland County. They had asked me if I could come
14 back and if the car could be searched. I said yes.
15 And at that time when we were getting pulled over,
16 Johnny did ask me to hold the can so my fingerprints
17 would be on the can and I told him I did not -- was
18 not going to do that because he said that he could
19 not go to jail because he was on probation. And he
20 did ask me would I take the blame. And I told him
21 no, I was not taking the blame for something I did
22 not do.

23 Q What is your relationship with the defendant?

24 A He's my nephew.

25 Q And can you tell The Court how you felt in the

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1 presence of the defendant based on his background on
2 that particular day after this all occurred?

3 A I mean, after that I was very angry with him and
4 things like that, but I still didn't want anything
5 to happen to anybody.

6 Q Okay. And at any point, did you spray the can of
7 pepper spray at David, Cherish or Shelby?

8 A No, ma'am. I did not.

9 Q And do you see the person in the courtroom that
10 sprayed the can of pepper spray at David, Cherish or
11 Shelby?

12 A Yes, ma'am. John Dial, Jr.

13 THE STATE: And Your Honor, can I see the
14 exhibit again to show it to the witness.

15 Q Can I ask you, do you remember seeing this
16 particular exhibit on the date in question?

17 A I do not. I cannot honestly say that I saw that can
18 because I did not see it. Only thing I did see him
19 holding something out of my window.

20 Q Okay. All right. Thank you. And so can you tell
21 The Court what led the defendant to spray the pepper
22 spray?

23 A The only thing I know is that he was saying that he
24 didn't want anything to happen or whatever, that he
25 has something to protect himself, or whatever. When

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1 David and Cherish was walking down, they did not
2 have anything in their hands. They did not threaten
3 us at all when we were there. He had just held the
4 can out and started spraying. There was no threats,
5 you know, no bodily harm. Neither one of us got
6 hit, nothing like that.

7 Q Okay. And did you go the hospital to check on the
8 victims after this happened?

9 A I did.

10 Q Okay. And do you know where the defendant went
11 after the incident, after (inaudible.)

12 A I had dropped him off at his house.

13 Q All right.

14 THE STATE: Nothing further of this witness.

15 THE COURT: All right. Mr. Dial, your
16 witness.

17 CROSS EXAMINATION

18 BY MR. DIAL:

19 Q On the day of the incident, what was the reason that
20 I came to your house?

21 A We had talked earlier that week and you had said
22 that you wanted to come over earlier that week and
23 hang out with me. And I said that was fine, we
24 could do it on Friday.

25 Q And I stopped by there and you were upset. Did your

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1 ex-husband, Jimmy Bass, call EMS and the police
2 because you had a toooken pills and was threatening
3 suicide?

4 A Not at that time when you first came over, no, he
5 did not.

6 Q Was I there when EMS was there?

7 A I do not recall you being there when the EMS was
8 there.

9 Q DO you recall me taking the pills from you and
10 talking to the EMS?

11 A I remember you taking the pills and you were
12 talking to -- I do not remember you talking to the
13 EMS.

14 Q While I was over there, did I help David pack up his
15 stuff and --

16 A Yes. David and his son did come over and you did
17 help him get his stuff out of my house, yes, you
18 did.

19 Q Were you upset and crying David was leaving?

20 A Yes. I was.

21 Q When I rode with you to retrieve your vehicle, was
22 the reason why you went out there that night was to
23 talk to David or because Cherish was threatening to
24 bust your windows out?

25 A I went to get my vehicle from that site.

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1 Q Did Cherish threaten to vandalize your vehicle?

2 A At one time, at that point, Cherish did state, you
3 know, to come get the vehicles before she did bust
4 out the windows.

5 Q And the phone conversations, it was mainly you
6 calling and at one point, David thought I had a
7 problem with him and I got on the nextel and said,
8 "I don't have a problem with you. You know, I'm
9 not in this" because he thought that I said
10 something in the background when I didn't. Did I
11 not get on the Nextel and tell David that I'm not in
12 that, that's between y'all two?

13 A I did not hear the whole conversations with you two.

14
15 Q Okay. But there was no me cussing or yelling at
16 David.

17 A Again, I did not hear the whole conversation between
18 you two, so I cannot testify, yes, I heard that.

19 Q Have you have any physical confrontations with
20 Cherish before?

21 A No. We have not. No physical.

22 Q Did she threaten you on the phone that she has beat
23 your butt before and she'll do it again (inaudible)?

24 A No. No. We have never had physical contact with
25 each other.

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1 Q Is it true that I gave you the OC spray because that
2 comment was made?

3 A No. It is not. No. It is not.

4 Q You actually took me to my house and you parked at
5 the church, and I walked down there because I didn't
6 want the family to know that I was with you because
7 they kind of just has some bad ideas?

8 A No. It's not.

9 Q That's not true?

10 A No. It's not true?

11 Q Were you angry at David that night?

12 A Yes.

13 Q Were you angry at Cherish?

14 A No.

15 MR. DIAL: That's all the questions.

16 THE COURT: All right. Any redirect?

17 THE STATE: Nothing further at this time, Your
18 Honor.

19 THE COURT: Okay, you may step down. Thank
20 you very much for your testimony.

21 THE STATE: (inaudible)

22 THE COURT: Any objections to this witness
23 being released?

24 MR. DIAL: I'm going to ave to cross examine
25 her. I've got a witness that was over there

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1 while EMS was there and everything else, so.
2 Well, she might have something else to say. I
3 mean, I know the rule that I can't say anything
4 without her here (inaudible.)

5 THE COURT: Well, she's testified. Do you
6 have any other questions you want to ask her at
7 this time before she steps away from the stand,
8 cross examination?

9 MR. DIAL: Not at this timer, Your Honor.

10 THE COURT: All right. I'm going to ask her
11 to stay for a little while just to see where it
12 goes, just in case she's needed for rebuttal.
13 You might need her for rebuttal, he might need
14 her for rebuttal. Okay?

15 THE STATE: All right.

16 THE COURT: All right. Any other witnesses
17 from The State?

18 THE STATE: I'm sorry. You Honor, I'm sorry.

19 THE COURT: That's all tight. Any other
20 witnesses for the State?

21 THE STATE: I have one more witness for The
22 State. That is Jennifer Moyer.

23 (THE WITNESS, JENNIFER MOYER, IS SWORN IN):

24 DIRECT EXAMINATION

25 BY MS. SPEARS:

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1 Q Hi Jennifer, can you tell The Court where you live?

2 A I live at 120 Westchester.

3 Q And is that in Richland County?

4 A Yes, ma'am.

5 Q And can you explain to the Court what you observed
6 on the date in question?

7 A Well, I was walking down to my uncle David's house
8 and I seen a red vehicle at the end of the road. I
9 also seen the proceeding down there. I always
10 follow my uncles around. At that time also, my
11 deceased uncle was there and we have followed David
12 down to the car. Well, I was standing on the left
13 side. He reached his hand out of the car and was
14 spraying with pepper spray.

15 Q And can you identify the person in the courtroom
16 that you saw spray the pepper spray that day?

17 A He's sitting right there.

18 Q Okay. And at that point in time, what was your role
19 as they were all sprayed with pepper spray at point
20 in time, David, Cherish, and (inaudible)?

21 A I'm considered a home health care nurse, so I know
22 how to give the first aid to a person that's been
23 sprayed with pepper spray. I was also sprayed with
24 pepper spray that day too. It wasn't quite as bad
25 as they were, but my main worry was to get them into

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1 the house and get water on them as quickly as
2 possible.

3 Q Okay. And who was the one that called EMS that day
4 -- that night?

5 A I'm not quite sure.

6 Q You're not sure. Okay.

7 THE STATE: Nothing further of this witness.

8 THE COURT: Mr. Dial, question for this
9 witness.

10 CROSS EXAMINATION

11 BY MR. DIAL:

12 Q So you didn't agree that the vehicle was parked out
13 here away from the house, not directly in front of
14 the house (inaudible)?

15 A Y'all were in-between the -- like at the end of the
16 road where the stop sign were, y'all were like right
17 at the end of the road.

18 Q Is this end of the road, I guess there's a stop sign
19 with one sign of that, but Wendy's vehicle was
20 parked here, correct?

21 A Yes.

22 Q You said that I sprayed the pepper spray from inside
23 the car?

24 A Yes. And you also stepped out at one point in time
25 and sprayed.

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1 Q Where did I step out?

2 A whenever he was on Wendy's side, you stepped out and
3 you sprayed across the car.

4 Q Did David approach my side of the vehicle?

5 A He did, but only to try and give y'all the keys.

6 Q So striking me in my face --

7 A I did not see him strike you at all. I was standing
8 right behind him at that present moment.

9 Q SO you got sprayed too, but did you file a police
10 report or anything?

11 A No. Because I helped myself. I didn't feel the
12 need to go to the hospital. I also have a four-
13 year-old child that I had to attend to at the house
14 at that time.

15 Q Were you there when the police showed up?

16 A Yes.

17 Q But no statements was given to the police or --

18 A I didn't make no statements, no.

19 MR. DIAL: Okay.

20 THE COURT: All right. Any redirect?

21 THE STATE: No, Your Honor.

22 THE COURT: All right. You may step down.

23 Thank you very much for your testimony.

24 THE STATE: Your Honor, I'd like to bring David
25 Hutchinson back to the stand.

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1 THE COURT: All right. Yes, sir. You're
2 still under oath.

3 REDIRECT EXAMINATION

4 BY MS. SPEARS:

5 Q Mr. Hutchinson, did you at any point in time,
6 strike, hit punch John dial in the face that
7 evening?

8 A No, ma'am. Can I ask a question, Your Honor?

9 THE COURT: (Inaudible) questions to ask.

10 A You see how big I am.

11 Q Yes, sir.

12 A If you sitting in the car and I was to hit you in
13 the jaw, you think I would do some damage to you if
14 I was to hit you?

15 Q I would assume so.

16 A And wouldn't I leave a mark?

17 Q Probably so.

18 A Thank you.

19 Q Now, answer my question. Did you strike --

20 A No, ma'am. I did not.

21 THE STATE: No further questions of this
22 witness.

23 THE COURT: Mr. Dial, questions?

24 RECROSS EXAMINATION

25 BY MR. DIAL:

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1 Q On the - it's not in the incident report, but on the
2 night that it happened, and it rolled off of my face
3 because I was sitting in the car.

4 A Johnny, I'm going to be very nice about this and I'm
5 not trying to be a butt or nothing like this, If I
6 were to have hit you, I would have broke your jaw.

7 Q Are you known for hitting people in (inaudible)?

8 A No. But I'm telling you, I know my own strength.
9 You're sitting down, I know what I could do to you.

10 Q That's correct.

11 A Okay. If I were to hit you, I would have broke your
12 jaw.

13 Q Okay.

14 A And there's no way I glanced you or nothing, because
15 I did not come to your side of the car or nothing.
16 I was going to come to your side of the car and you
17 decided to spray me with pepper spray, so I walked
18 around to where Wendy was and Wendy was getting
19 ready to roll her window down. You stepped out and
20 you sprayed me dead in my face because you hit me in
21 the eye.

22 Q You're saying I stepped out and everybody else is
23 saying I sprayed from inside the vehicle?

24 A You did. You stepped out -- Let me calm down. I
25 was sitting and you was in the car. You started

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1 spraying and then you stepped out and did just like
2 that around the windshield so you could get a good
3 shot at me.

4 Q So you approached Wendy's side of the vehicle first?

5 A I come down the road, your side -- bring that thing
6 up here. Bring that thing up here.

7 Q (Inaudible) the car was parked here, correct?

8 A This is the dirt road. The car is parked right
9 about here. So we live here. We come down right
10 about here and he stepped out of the car and he
11 started spraying. And I went around like this and a
12 blue or green Explorer, I think, pulled up right
13 here. And I went around the Explorer because
14 everyone was telling, the Explorer, to block them in
15 until the law got there and I come around this way,
16 got on this side of the car. And he started
17 spraying again and he reached out and he started
18 spraying me in my face.

19 Q When did you get hit with the pepper spray?

20 A The first time I got hit was when I was coming
21 around the car, right there at the front of the hood
22 of the car.

23 Q So you got sprayed with pepper spray from which side
24 of the vehicle, that's what I'm saying? I was
25 sitting in the passenger.

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1 A Yeah.

2 Q As you're aware.

3 A Yeah.

4 Q So I stepped out and sprayed you and then you walked
5 around to the other side of the vehicle?

6 A No. When I was coming down the dirt road, you
7 stepped out and sprayed and I wasn't close enough.
8 And then you stopped and you got back in the car.
9 So I went around the other SUV to give Wendy the
10 keys and she was rolling her, I guess she was
11 rolling her window down or something because she was
12 looking at me and you turned around and sprayed me.
13 And as you were spraying, you stood up and turned
14 around a little bit more, so you could get a little
15 bit of extra pump in there, I think.

16 Q Were you angry that night?

17 A Why would I be angry? I just left Wendy. Yeah, I
18 was mad because you kept calling my phone and I told
19 you not to.

20 Q How many times did we speak on the phone?

21 A The majority of the time we was on the phone because
22 you kept talking about we're bulls, we can butt
23 heads.

24 Q David, I never had any problem with you (inaudible)

25 A I never had any problem with you until you started

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1 talking about butting my head. And you told me
2 brother you was going to kill me.

3 (Multiple speakers - Inaudible)

4 Q Did you tell Jimmy Bass, Wendy's husband, like two
5 days after this incident that you wasn't sure who
6 sprayed you?

7 A No. I didn't. You can bring him in here.

8 Q Well, he had to work today. He was going to come,
9 but he didn't want to get in a family issue.

10 A I didn't talk to nobody about the case because I was
11 not told to say anything about it. So I don't talk
12 about my business.

13 Q Right.

14 MR. DIAL: That's all I've got to say.

15 THE COURT: All right.

16 THE STATE: Nothing further, Your Honor.

17 THE COURT: You may step down. All right.

18 Any other witnesses?

19 THE STATE: No other witnesses, Your Honor.

20 THE COURT: No other witnesses. The State
21 rests? All right. Mr. Dial, witnesses or -

22 MR. DIAL: I'd like to call Sam Green.

23 (THE WITNESS, SAM GREEN, WAS SWORN IN):

24 DIRECT EXAMINATION

25 BY MR. DIAL:

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- 1 Q Sam, what is our relationship together, just kind
2 of give the jury --
- 3 A Sometimes we work together.
- 4 Q That's correct. Now, you wouldn't lie for me, would
5 you?
- 6 A No. I ain't got no reason to lie for you.
- 7 Q But I did ask you to come here today.
- 8 A Yes.
- 9 Q Okay. On the day -- well, he knows about the
10 incident and what happened, but he was the one that
11 bring me over to Wendy's house. How long did you
12 stay there?
- 13 A About an hour and 45 minutes.
- 14 Q Did you witness me and David talking and
15 socializing, talking about construction work, just
16 helping him pack his stuff and everything else?
- 17 A Yes.
- 18 Q Was Wendy upset?
- 19 A Yes. She was crying.
- 20 Q Do you know why EMS was called there?
- 21 A Yes. Because she was about to --
- 22 THE STATE: Your Honor, I'm not sure where he's
23 going with this and how it has any relevance to
24 this case at all?
- 25 THE COURT: Mr. Dial, lay it out.

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1 MR. DIAL: Pretty much, just character. That
2 everybody got together after this incident.
3 Wendy still had a connection with David and
4 it's juts pretty much just character that
5 there's just all (inaudible) story.

6 THE COURT: Mr. Dial, the only thing that
7 this jury and I are interested in are the
8 events that took place that night and the
9 accusation that have been made. Not family
10 history or prior socialization or anything like
11 that. Just the set of facts and set of events
12 that took place on that night. If he was a
13 witness to that, He can testify to it. He can
14 testify as to what he saw at the house. That's
15 all been introduced in the testimony already
16 for testimony about the events that took place
17 at the, you know, moving out. And if he was a
18 witness to that, he can confirm, but he can
19 certainly respond to those questions.

20 THE WITNESS: Can I say something?

21 THE COURT: No, sir. You can if you're
22 asked. I don't mean to be hard on you, but
23 it's kind of a question and answer thing.

24 Q Sam, have you ever known me to be a violent person?

25 A No. Not really.

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1 Q How long have we known each other, Sam?

2 A About two years. Two or three years.

3 Q A little bit longer than that, but.

4 MR. DIAL: That's all I got to say. That that
5 day I was over there to comfort my aunt and
6 that he was the one that took me over there.

7 THE COURT: He was there. I appreciate that.

8 MR. GREEN: Judge, please let me say something.

9 THE COURT: No, sir. Now, Ms. Spears, do you
10 have any questions for this witness?

11 THE STATE: No, I don't believe I do, Your Honor.

12 THE COURT: All right. Sir, you may step
13 down. Thank you very much for your testimony.
14 All right. Mr. Bass, anything --

15 MR. DIAL: Mr. Dial.

16 THE COURT: Mr. Dial. I'm sorry, I keep
17 calling you --

18 MR. DIAL: If you convict me today, you can
19 convict Mr. Bass.

20 THE COURT: Mr. Dial, anything else?

21 MR. DIAL: I'd like to call my father. This is
22 pretty much a conversation that Wendy visited
23 and had a conversation with my father and she
24 admitted what she did and everything else.

25 THE COURT: Call your witness.

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1 MR. DIAL: I'd like to call John Dial, Senior.
2 (THE WITNESS; JOHN DIAL, SR, WAS SWORN IN):

3 DIRECT EXAMINATION

4 BY MR. DIAL:

5 Q Dad, how long ago was Wendy in a relationship with
6 David Hutchinson?

7 A Probably a year, year and a half.

8 Q Off and on.

9 A Yeah. Off and on.

10 Q While she was married, correct?

11 A Yeah. While she was still married to Jimmy Bass.

12 Q Do you know david?

13 A Yes. I know david. I thought david was a friend of
14 our, but it don't look like it is.

15 Q Prior to this incident, one of my friends had come
16 over to the house to get somethig out my garage. I
17 live behind my parents. I wasn't at the house at
18 that time. Did david try to strike him while he was
19 in the vehicle also?

20 A Yes. He tried to suck punch him.

21 THE STATE: Your Honor --

22 THE COURT: The State's making an objection.
23 That's not relevant to this case.

24 MR. DIAL: It's character --

25 THE COURT: If you want to bring in character,

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1 they can bring in your character and everything
2 behind that as well. It's not a character
3 issue. It's a factual issue, whether an event
4 did or did not take place.

5 Q When did Wendy come over and visit you and mom?

6 A A couple of days after she got out of the
7 institution.

8 Q What was she --(Richland Springs)?

9 A Yeah. Richland Springs.

10 Q What did she sit down and tell you and mom about the
11 incident?

12 A Well, she was telling us it was all her fault --

13 THE STATE: I think that falls under hearsay.

14 A Hearsay. She said it.

15 Q She was there in front of my dad. I wasn't present
16 there.

17 THE COURT: You can't testify to what somebody
18 else said. They can take the stand and
19 testify, but you can't testify about what
20 somebody else said.

21 MR. DIAL: But she's not telling the truth,
22 sir.

23 THE COURT: The just will decide who's telling
24 the truth. And the relevnace of this case is
25 dealing around the incident that took place

1 taht night, the factual yevidence, what did or
2 did not occurr that night, not extransou
3 factors that are -- like relationships and
4 such.

5 MR. DIAL: Yes, sir. I was just trying, you
6 know, like credibility, because before, david
7 hutchinson said he wasn't staying with Wendy
8 and in all actuallity, he was. So, if you're
9 going to lie under oath about that and that's a
10 proven lie, you'll lie about anything else. I
11 don't want to step on anybody's toes. I'm not
12 an attorney. I don't know how to present stuff.
13 I'm just trying to present my side of the case
14 and let the jury know what actually what
15 happened.

16 THE COURT: Well, Mr. Dial, the way that you
17 did taht is that you questioned the witness on
18 the stand, you provided questions, the witness
19 provided answers to those questions and then
20 the jury heard the questions, the jury heard
21 the answers to those questions, and the jury
22 ewill make the determination whether he's
23 telling the truth or not telling the truth or
24 telling a (inaudbile) truth or not telling the
25 truth. You can't get into a character

1 (inaudible) about events that are not directly
2 related to this. You see what I'm trying to
3 explain to you?

4 MR. DIAL: I tried to read a little bit online
5 before I came here.

6 THE COURT: And if you do introduce character
7 of the witness, The State can introduce issues
8 involving your character and your background
9 and they can go on and explore all that. None
10 of which is relevant to the case. It wouldn't
11 matter to me if you sang in a choir or didn't
12 sing in a choir, it just doesn't matter. What
13 matters is what took place that day.

14 Q Did Wendy Bass tell you that she sprayed David
15 Hutchinson?

16 A Yes. In a sense, she did, yes.

17 Q Okay. Did Wendy Bass tell you that David Hutchinson
18 struck me while I was in the vehicle?

19 A Yes.

20 MR. DIAL: That's all the questions I have.

21 THE COURT: All right. Questions for this
22 witness?

23 THE STATE: No, Your Honor.

24 THE COURT: All right. Sir, you may step
25 down. Thank you for your testimony. All

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1 right, Mr. Bass. I'm sorry, Mr. Dial I keep
2 saying that. I don't know why. Please excuse
3 me, I just have Mr. Bass' name on my mind for
4 some reason. Mr. Dial?

5 MR. DIAL: Sir, I don't have anymore witnesses.
6 I've got an ex-girlfridn that's friends with
7 Wendy and everything. Pretty much the same
8 thing. She visited Wendy anfter she got out of
9 the hospital and pretty much the same thing
10 that my dad says. I don't want to bring her up
11 here for that too, so that's pretty much it.

12 THE COURT: And you can take the stand
13 yourself. That's your option.

14 MR. DIAL: (inaudible) ask any questions.

15 THE COURT: You just tell your story. You
16 don't have to testify if you don't want to.

17 MR. DIAL: Oh, I want to tell the truth, sir.

18 THE COURT: All right. And if you testify,
19 the jury will listen to it and The State will
20 have a chance to ask you some questions.

21 (THE WITNESS, JOHN DIAL, JR WAS SWORN):

22 THE COURT: And Mr. Dial, what wold you like to
23 tell this jury?

24 MR. DIAL: On the night of this, what happened,
25 I went to me aunt's house. She was upset. She

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1 was angry. Had a relationship off and on. I
2 did get on the phone and talk to David after he
3 left because Cherish was threatening to bust
4 Wendy's windows out. I advised Wendy when we
5 were going to go up there, let's call the law,
6 have them meet us up there. Wendy said there's
7 not going to be any problem. When we arrived
8 there, I was sitting in the passenger seat.
9 David struck me. He kind of just rolled off of
10 me. Deputy Pitcher was there on the scene.
11 Wendy told the truth of what happened that
12 night and then she changed her story. It's all
13 in the incident report. I did not spray. I
14 did give Wendy the OC spray because of prior
15 conflicts between them. That's pretty much all
16 I've got to say. That's the whole truth. I
17 believe all of this is family and they're still
18 having relationships back and forth. So all of
19 them is just conglomerating on a story in which
20 I just got the evidence this morning against me
21 and read over briefly and the statements that
22 are made are, like, just different stories.
23 That's all I've got to say to y'all. I hope
24 y'all look into it and find out that I'm telling
25 y'all the truth.

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1 THE COURT: Your witness.

2 CROSS EXAMINATION

3 BY MS. SPEARS:

4 Q Mr. Dial, is the can of pepper spray your can of
5 pepper spray?

6 A It was.

7 Q And did you place the item in the car when you went
8 home to change clothes?

9 A Wendy took me to the house. She parked it in the
10 church. I walked down there because it was late and
11 I didn't want to, you know, my brother, my family, I
12 didn't want a car pullup in the yard and they asked
13 me who I'm with or whatever, because they really
14 didn't want me socializing with Wendy because they
15 didn't want me to get in trouble. I walked down
16 there, got the pepper spray, gave it to Wendy. I
17 told Wendy if Cherish tries to jump on her again,
18 spray her with this. I did tell her that, but I did
19 not spray that pepper spray.

20 Q Wendy testified before the jury that there was no
21 physical confrontations between her and Cherish,
22 they'd never had a physical confrontation.

23 A Wendy testified to a lot that's not true. I'm
24 telling you what was stated that night. I heard her
25 on the Nextel because the DC speaker. She actually

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1 said to Wendy, come on up here, she threatened to
2 bust the windows out, she said come on up here and
3 I'll kick your butt like I've done before.

4 Q People could make verabl threats but never do
5 anything.

6 A Well, she said "like I kicked your butt before. So
7 that leads me to believe that they had an
8 altercation before that. I don't know wendy very
9 well and don't socialize with her that much. I was
10 just over there because of her mental state.

11 Q And whgat is your relationship with Wendy Bass?

12 A That's my aunt.

13 Q But you don't know her very well?

14 A I mean, I don't socialize with her that much. I
15 mean, we don't hang out. We don't have a close
16 family. My mom, my dad and my brother, we're all
17 close. And my kids and we're all close, but as far
18 as aunts and uncles and such, we don't socialize
19 that much.

20 Q And can you tell The Court is this the same pepper
21 spray bottle that you sprayed your ex-girlfriend,
22 Sarah, with? (Inaudible)

23 A No. Object.

24 THE COURT: You can't object.

25 A Well, Sarah's not here. That's just hearsay and

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1 Sarah --
2 (multiple speakers - Inaudible)
3 A -- Sarah never sprayed with pepper spray.
4 THE COURT: She can ask the question and you
5 can respond.
6 A If you follow the incident report, Sarah got tased
7 because she was high on crystal-meth. She never got
8 sprayed.
9 Q She was tased and pepper sprayed.
10 A She was never pepper sprayed.
11 Q I personally observed that (inaudible)
12 THE COURT: (Inaudible)
13 A How many of those bottles -- I'm not denying that
14 that's not my bottle because I used to do private
15 security. That's not -- I'm not denying that.
16 Q Okay.
17 A What I'm denying is spraying these people.
18 Q And how many bottles do ypu typically carry or keep
19 of this pepper spray?
20 A When I was doing private security, they would give
21 us one and we would keep one in our vehicle and we'd
22 wear one on a leg holster.
23 Q Like what kind of holsters do you have?
24 A Just --
25 Q Like a packet --

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1 (multiple speakers - inaudible)

2 A Five eleven (inaudible) holster.

3 Q And what was the name of the private security you
4 were working for?

5 A Liberty.

6 Q Liberty.

7 A Liberty Security.

8 THE STATE: Nothing further, Your Honor.

9 THE COURT: All right. Mr. Dial, any other
10 statements for the jury?

11 MR. DIAL: I'd like for them not to take into
12 consideration that she said I sprayed an ex-
13 girlfriend because you can call both of them and
14 that never did happen. So that's it.

15 THE COURT: All right. Any other witnesses,
16 Mr. Dial?

17 MR. DIAL: No, sir.

18 THE COURT: Have you finished presenting your
19 case?

20 MR. DIAL: Yes.

21 THE COURT: I'm going to ask the jury just to
22 step out for a brief moment. I'm just going to
23 take up a few matters of law with the parties.

24 JUROR: Is there any way we can see that
25 incident report he's talking about?

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1 THE COURT: No, sir. Now, all the facts and
2 the testimonies that they're talking about come
3 from these witnesses. This is where the
4 evidence is. No where else. And Mr. Foreman,
5 please make sure no one begins discussing the
6 case.

7 (Off the record)

8 THE COURT: All right. Please take your
9 seats. It looks like all of our witnesses have
10 been presented and everything. All you're
11 going to do now is I'll allow you to closing
12 statements. Mr. Bass (sic) since you did
13 testify, The State gets to go last. You get to
14 do yours first. If you want to make a closing
15 statement, you're welcome to. Again, it's
16 usually a summary of what you hope they got out
17 of the testimony of witnesses and why you feel
18 like they should go your way. The State, the
19 same thing. It's not a time to introduce new
20 evidence. It's just a closing statement, a
21 summary of what was presented. And The State
22 will have an opportunity to go last. And
23 following that, I'll give them the charges.
24 I'm just going to give the normal jury charge
25 that you give in every criminal case. I don't

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1 want them to be prejudiced or biased, I want
2 them to use their own good common sense and
3 want them to feel free to believe or disbelieve
4 any of the testimony of any of the parties they
5 want. (Inaudible) different types of evidence,
6 direct evidence and circumstantial. Talk about
7 the presumption of innocent, if you are
8 innocent or did The State prove that you're
9 guilty beyond a reasonable doubt. I gave them
10 a brief definition of what reasonable doubt is.
11 And then I will read to them what the statute
12 says with regards to a simple assault and
13 battery. So they'll know what the law is.
14 They're now what the parameters are when the
15 charge is given. I'll allow them to go back
16 and deliberate and y'all are free to stay
17 around in the general area while they're doing
18 that. I'll have somebody outside the door and
19 when they're ready, they'll knock on the door.
20 And We have three separate charges, so I'm
21 going to ask them to bring back three separate
22 verdicts, one on each of the charges. Okay.
23 All right. Any questions are anything before
24 we bring them back in?

25 MR. DIAL: I cannot submit this police report

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1 to them that the juror requested?

2 THE COURT: Statements are not admissible in
3 court.

4 MR. DIAL: This is the actual officer that
5 responded.

6 THE COURT: The police statment is not
7 admissible evidence. (Inaudible) The officer
8 can be present. He can testify. And you can
9 question the witnesses that are the stand about
10 took place, but The State cannot introduce
11 their witness statements, police reports,
12 (inaudible) is not admissible documents.

13 MR. DIAL: Okay. (Inaudible) asking questions
14 (inaudible)

15 THE COURT: If he were here, you could put him
16 on the stand and ask him questions, but even he
17 could not read (Inaudible) read his incident
18 report or something like that. He could just
19 tell you what took place. And you can use the
20 incident report to impeach somebody's
21 statement, where you say you're saying this on
22 the stand, but ealier you said so and so
23 (inadubile) and if they're not present, you
24 can't use them. All right. Let's bring the
25 jury back in.

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1 THE STATE: May I request that Ms. Bass be
2 released from the courtroom?

3 THE COURT: Yes. Ms. Bass, there's no reason
4 to keep you any further. You're free to go.
5 Any of the witnessed are free to go at this
6 time. You're welcome to stay as well.

7 (The jury returns)

8 THE COURT: (Inaudible) series of events,
9 factual evidence that was based on that, it
10 leads to a story of what took place in regards
11 to that. That's circumstantial evidence. Most
12 of what's been presented to you today is direct
13 evidence. You have the ability to examine the
14 witnesses, to decide who you believe and who
15 you don't believe and I just want you to use
16 what the good Lord gave you and that's your
17 good common sense to evaluate the facts and the
18 testimony and then come back to us with a
19 decision. Now, in the course of this, the
20 burden rests with The State. It rests with the
21 victim. The State has to prove the case to you
22 and the standard that we use is a standard
23 called beyond a reasonable doubt. And a good
24 definition of a reasonable doubt would be that
25 if based on your consideration of the evidence,

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1 you are firmly convinced the defendant is
2 guilty of the crimes charged, you should find
3 the defendant guilty. However, if on the other
4 hand, you think that there's a real possibility
5 the defendant is not guilty, then you should
6 find the defendant not guilty. That's a good
7 solid definition of what reasonable doubt is.
8 Now, Mr. Dial is presumed to be innocent.
9 That's the way our system works. We start off
10 with the presumption that he is innocent of the
11 charges, unless the State with the facts from
12 the witnesses can prove to you beyond this
13 reasonable doubt that he is in fact, guilty of
14 the charges. Now we actually have three
15 charges against Mr. Dial and I'm going to ask
16 you to pass on each one of those separately.
17 Three victims involved, three charges were
18 made. You've heard testimony regarding all
19 three of them, what took place. And you have
20 the right to say one is so and the other is not
21 so or two are so, three are so, but in any
22 decision that you make with regards to each of
23 the victims, or each of The State's charges,
24 your decision has to be unanimous. It can't be
25 a five-one or a four-two, it has to be

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1 unanimous. All six of you have to agree if you
2 decide that Mr. Dial is guilty of any one or
3 all three of those charges. Okay? And Mr.
4 Foreman, I'm going to give you the jury foreman
5 sheet. It has the victims' names on it, and it
6 has the warrant number on it up there at the
7 top. You'll have a copy of the warrant. And
8 I will give you the one exhibit that we had.
9 You'll take this back and after your jury has
10 deliberated, there's a section over here. If
11 you believe that Mr. Dial is not guilty of the
12 charge made with regard to this victim, you
13 would circle not guilty. If you believe he is
14 guilty, you would circle guilty and sign and
15 the same will be true for the other two. All
16 right? Okay. In that case, I'm going to ask
17 everybody to please rise for the jury and Madam
18 Clerk, I'm going to please ask you to take
19 these documents back to the jury room.

20 (Off the record)

21 THE COURT: All right. The jury has asked a
22 question about a simple assault and battery
23 statute. I'm bringing them back in just to
24 give a brief explanation of the difference
25 between simple assault and simple assault and

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1 battery. All right. Please take your seats.
2 Mr. Foreman, the clerk brought me a question
3 with regards to simple assault and simple
4 assault and battery. So let me just briefly
5 review that with you so you'll have a good
6 understanding of it. An assault is an unlawful
7 attempt to offer, to assist in a violation
8 action upon another person coupled with the
9 present ability to complete the attempt or
10 offer by a battery. In other words, an assault
11 would be like an offer or a suggestion or a
12 movement that I am going to do something to
13 you. It can be verbal, it can be moving
14 towards physical, but there's no contact made.
15 Okay. A battery is the use of force against
16 another resulting in a harmful or offensive
17 contact. It is the assault brought to
18 completion. The battery can be done by the
19 person, striking, or by something that the
20 person puts in motion, throws something at you,
21 a rock, swings a bat. It doesn't have to be
22 their own physical body. It can be something
23 that they put in motion that then strikes you
24 and that's what the battery is. So the assault
25 is the movement towards or the assertion that

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1 I'm going to do something to you and I have the
2 ability to do. I'm going to stand in front of
3 you, confront you, I'm going to do something
4 and I have the ability to strike you or say
5 something or put you in fear and I have the
6 ability to do it. Not like I'm a hundred yards
7 away and I say I'm going kick you. I'm
8 standing right in front of you. The battery is
9 the actual carrying out of the strike. I say
10 I'm going to do it and I actually do it. Now I
11 don't have to do it with my own hands and feet.
12 I can do it by using a weapon, a bat, putting
13 an object into motion that does in fact strike
14 the individual. And that's basically the
15 difference between an assault which doesn't
16 involve a physical contact, but does involve
17 the threat of such, and a battery, which does
18 involve the threat and the carrying out by the
19 striking of the individual. That would be the
20 battery aspect of it. I hope that will help
21 you in your deliberations and we look forward
22 to hearing your verdict when the time is right.
23 Okay. Thank you. All rise for the jury,
24 please.

25 (Off the record)

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1 THE COURT: All rise for the jury. Please take
2 your seats. Mr. Foreman, if you would please
3 rise. Mr. Foreman, has your jury reached a
4 verdict in this case?

5 MR. FOREMAN: We have, Your Honor.

6 THE COURT: Has your jury reached a verdict
7 with regards to all three counts in this case?

8 MR. FOREMAN: We have.

9 THE COURT: All right. Mr. Foreman, would
10 you please inform us of the outcome of your
11 jury's deliberation.

12 MR. FOREMAN: The jury has found the defendant
13 not guilty on one count.

14 THE COURT: Which count was that?

15 MR. FOREMAN: The count on Shelby Hutchinson.

16 THE COURT: Okay, Shelby Hutchinson, not
17 guilty.

18 MR. FOREMAN: Guilty on count for Cherish
19 Douglas and guilty of the count of David
20 Hutchinson.

21 THE COURT: Okay. So two out of the three
22 counts, your jury found the defendant as
23 charged. And was this a unanimous decision of
24 all six members of your jury panel?

25 MR. FOREMAN: It was, sir.

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1 THE COURT: Thank you very much, Mr.
2 Foreman. All right, ladies and gentleman, I'd
3 like to at this time thank you very much. I
4 watched you, you paid very close attention,
5 you're a good jury, you listened with an open
6 mind, you took the case back, you discussed it,
7 you asked good questions for definitions, you
8 deliberated and you reached a conclusion. You
9 sought the truth, found the truth, you rendered
10 a verdict in this case and we just can't ask
11 for anything more than that. For a party that
12 it's accused could ask for six people to come
13 in, hear the facts of the case and make a
14 determination and all six people agree on the
15 outcome of what should be the verdict in this
16 case. And you've done that. Thank you very
17 much. I think you are free for the rest of the
18 week. There's no other trial unless you are
19 selected for another jury trial down in Judge
20 Newsome's office, you're all free to go and we
21 will send you a small check for your mileage
22 and your time. I wouldn't bank on going to the
23 Bahamas for the weekend on it or anything, but
24 it's just a small token from the county to help
25 offset some of the expense. Thank you very

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1 much for your participation. All right, Mr.
2 Dial, if you would, I'm going to ask you to
3 please rise. The jury has heard the testimony
4 in this case. On one instance, they have found
5 you not guilty of the charge. So be it. On
6 the other two instances, they have found that
7 you are guilty as charged of assault and
8 battery and for that your sentence is going to
9 be 60 days at the Alvin Glenn Detention.

10 MR. DIAL: Can I turn myself in a few so I
11 could go to my grandfather's funeral.

12 (Inaudible) is this afternoon and the funeral's
13 tomorrow. (Inaudible)

14 THE COURT: (Inaudible) Ms. Spears, do you
15 have a problem with that?

16 THE STATE: Your Honor, I mean, I don't know if
17 we have a guaranty that he will definitely turn
18 himself in (Inaudible) problems with it is the
19 past. It's your call.

20 MR. DIAL: (Inaudible) on probation. I'm not
21 going to run.

22 THE COURT: Mr. Dial, I'm going to give you
23 the benefit of the doubt. Family services are
24 important. What is today? Tuesday. Services
25 were today.

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1 MR. DIAL: Today and tomorrow.
2 THE COURT: All right. So then I'd like you
3 to turn yourself in by Friday to start your
4 sentence. Do you want him to turn himself in
5 to Richland --
6 THE STATE: He can come turn himself in to me on
7 Friday. I'll make sure (Inaudible).
8 THE COURT: All right. If you'll come and
9 see Investigator Spears Friday at --
10 THE STATE: At Headquarters.
11 THE COURT: Headquarters. Do you know where
12 that is?
13 MR. DIAL: (Inaudible)
14 THE COURT: If you do fail to do that, then
15 I'll add a contempt charge to it and add
16 another thirty days.
17 MR. DIAL: (Inaudible) five o'clock?
18 THE STATE: (Inaudible) five o'clock. How
19 about nine o'clock in the morning.
20 MR. DIAL: (Inaudible)
21 THE COURT: No, sir. Thank y'all very much.
22 We're adjourned.
23
24
25

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1 STATE OF SOUTH CAROLINA)
2 : C-E-R-T-I-F-I-C-A-T-E
3 COUNTY OF RICHLAND)

4 I, KATHRYN BOSTROM, Court Reporter and Notary
5 Public, certify that I did transcribe the within trial
6 transcript to the best of my ability, and that the pages
7 constitute a true and accurate transcript of the audio
8 to me.

9 I further certify that I am not of counsel or kin to
10 any of the parties to this cause of action, nor am I
11 interested in any manner in its outcome.

12 IN WITNESS WHEREOF, I have hereunto set my hand and
13 seal this the 5TH day of DECEMBER, 2013.

14
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18 Kathryn B. Bostrom
19 Notary Public for South Carolina
20 My Commission Expires: August 28, 2022
21
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25

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STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	2011-CP-40-2877
	)	
	)	
	)	
John Henry Dials, Jr.,	)	)
	)	
vs.	)	TRANSCRIPT OF RECORD
	)	
State of South Carolina	)	)
DEFENDANT	)	January 17, 2014
		Columbia, SC

B E F O R E:

THE HONORABLE G. THOMAS COOPER, JUDGE.

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

ROBERT W. MILLS, ESQ.
Attorney for the Plaintiff

JOSEPH Y. SHENKAR, ESQ.
Attorney for the Defendant

KESHIA REED
Official Court Reporter

I N D E X

(WHEREUPON, no witnesses were called.)

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1 THE COURT: The State vs. John Henry Dials.

2 MR. MILLS: That's mine, Your Honor. Your
3 Honor, the first motion I would have is for a continuance.
4 I'm having trouble finding Mr. Dial, but I happen to get
5 the docket for Tuesday's motions yesterday. And I see
6 that Mr. Dial is on there for a motion to revoke his bond.
7 He does have some pending charges. Your Honor, I would
8 ask that you ---

9 THE COURT: He's got ---

10 MR. MILLS: He's got new charges unrelated to
11 the charges of this appeal.

12 THE COURT: And there's a present motion in the
13 general sessions court to revoke his bond?

14 MR. MILLS: That's correct. And I would like to
15 be able to have him present. I've had trouble finding
16 him. One time -- last time ---

17 THE COURT: You checked the detention center?

18 MR. MILLS: Yeah, we did. He's not in there.
19 So he should be here Tuesday and I can give him notice of
20 another hearing if Your Honor so see fit.

21 THE COURT: What's the State's position?

22 MR. SHENKAR: Your Honor, the State's position
23 is that this matter has been continued several times
24 already.

25 THE COURT: It has?

1 MR. MILLS: One time I moved for a continuance
2 when he was in prison, when we found out he was in prison.

3 MR. SHENKAR: Various reasons, Your Honor,
4 several times because of conflict of the Court. One time
5 on behalf of Mr. Mills. The issues are clear in this case
6 everything has been submitted to the Court. It is not a
7 guarantee that Mr. Dial would even show up for his motion
8 to revoke bond.

9 THE COURT: I'm sure it's probable that he want
10 show up.

11 MR. SHENKAR: What I'm trying to say is that
12 obviously he had an opportunity to get with his attorney
13 and he failed to do so. I'm not sure that continuing this
14 case while all the parties are here and ready to continue
15 on the matter on appeal that continuance shouldn't be
16 granted in this case.

17 THE COURT: Mr. Mills, if appealed a matter to
18 South Carolina Court of Appeals, it's not necessary that
19 your client be present.

20 MR. MILLS: I understand, Your Honor. I just
21 would like to have him present. He's got the right to be
22 present.

23 THE COURT: Well, he can't testify.

24 MR. MILLS: I understand, Your Honor.

25 THE COURT: And if he's on the -- if he's at

1 large so to speak...

2 MR. MILLS: He is. But I think he's -- knowing
3 now that he has been in -- charges that I represent him
4 on, I can more likely give him proper notice through a
5 bondsman or if I can even if he doesn't show up just to
6 let him know that there's a hearing. I assume there will
7 be hearings next month, so it wouldn't be a long
8 continuance, Your Honor, if Your Honor would so see fit to
9 continue it. We ask ---

10 THE COURT: You represented him on the
11 underlying charges?

12 MR. MILLS: I represented him on the appeal.

13 THE COURT: On the appeal that's what I mean?

14 MR. MILLS: Yes, sir, these charges. I did not
15 represent him at the hearing that's on the issues of the
16 case at the original trial. He did not have an attorney
17 actually, Your Honor.

18 THE COURT: When was this trial? When did he
19 appeal?

20 MR. MILLS: Back in 2011.

21 THE COURT: Motion's denied. Got to clear it up
22 get it off the docket.

23 MR. MILLS: Thank you.

24 THE COURT: You may proceed, Mr. Mills.

25 MR. MILLS: Thank you, Your Honor. Your Honor,

1 this is an appeal from a trial in the Pontiac magistrate
2 the State vs. John Henry Dial, who's tried for three
3 counts of assault and battery third degree. He was found
4 guilty of two counts of assault and battery third degree.
5 Your Honor should have a trial transcript in the file.

6 THE COURT: I do.

7 MR. MILLS: Your Honor, the first issue I think
8 is the most important issue in this case is the fact that
9 he proceeded pro se. There is no evidence in the return
10 or in the transcript that the trial judge properly warned
11 him under Faretta vs. California of the dangers of
12 proceeding pro se. Of course, there are quite a few
13 phases the Court would look at. Your Honor, I'm quoting
14 from State vs. Christopher Age, which is a 2004 South
15 Carolina Court of Appeals opinion 596 Southeast Second
16 500. Your Honor, gives great detail of the Faretta courts
17 requirement.

18 THE COURT: What's that cite again?

19 MR. MILLS: It's -- this case is 596 ---

20 THE COURT: I mean, what's the name of it?

21 MR. MILLS: Pardon.

22 THE COURT: Name of it?

23 MR. MILLS: Oh, I'm sorry in the interest of
24 Christopher Age.

25 THE COURT: Christopher Age.

1 MR. MILLS: Yes, sir. And, of course, Faretta
2 allows an accused to waive as counsel if he's advised of
3 his right to counsel adequately warned of the dangers of
4 self-representation. And there's no evidence at all in
5 the record in the terms by the judge or the transcript
6 that he was warned of the dangers of proceeding without an
7 attorney.

8 THE COURT: All right.

9 MR. MILLS: And, Your Honor, that's the first --
10 I think that goes to -- it comes out during the trial of
11 the case because there is several issues that arise that
12 could have been objected to that weren't or were sua
13 sponte objected to by the judge when they shouldn't have
14 been. On page 17, the transcript provided to the Court
15 and to the Solicitor's office the -- there is a mention
16 that Mr. Dial was on probation at the time.

17 THE COURT: This was a jury trial ---

18 MR. MILLS: Pardon.

19 THE COURT: --- or bench trial.

20 MR. MILLS: This was during -- this was a jury
21 trial, Your Honor.

22 THE COURT: Jury trial.

23 MR. MILLS: And so there's a jury involved and
24 there's a mention on page 17 that he was on probation.
25 Again, that was mentioned in ---

1 THE COURT: Show me where? I'm on page 17.

2 MR. MILLS: Yes, sir. Lines 11 and 12.

3 THE COURT: Okay, I see it. He was on probation
4 would be a violation of his probation at that time. Who
5 said that?

6 MR. MILLS: That was the witness -- this is an
7 opening statement by the State about the officer's fear.
8 It was the State's prosecuting witness -- prosecutor also
9 the prosecuting ---

10 THE COURT: Mr. Spears or Mrs. Spears?

11 MR. MILLS: Mrs. Spears I believe.

12 THE COURT: All right.

13 MR. MILLS: He was also a Richland County
14 deputy, so that was brought up that he was on probation
15 bring character evidence before the Court. The Court did
16 say you don't have to bring that up. He gave no curative
17 instructions to the jury. Your Honor, there was hearsay
18 brought up on page 22. This was during witness David
19 Hutchinson that -- during that same witness on page 28
20 there is a -- I know your background he said on lines 13
21 through 14. I mean, he says I know your background, so
22 that raises character again, Your Honor, without any ---

23 THE COURT: Page 22?

24 MR. MILLS: Page 28. Twenty-two is just some
25 hearsay lines...

1 THE COURT: Okay.

2 MR. MILLS: Twenty-eight lines 13 through 14
3 there is another mention of character evidence page 28.
4 Page 44 again during a witness testimony. There again
5 defendant was mention to be on probation.

6 THE COURT: Okay. All right.

7 MR. MILLS: Again, that was lines 18 through 19
8 on page 44. Then, Your Honor, on during the defendant's
9 case, he was trying to bring up some good character pages
10 60, 63 and 65 where the judge does keep him from bringing
11 up some good character stops him along the way during
12 testimony. Of course, Your Honor, he's both -- since he
13 was pro se he was both attorney and witness at that point.
14 And we ask you to consider that one. And I think all this
15 comes around to the fact that he was pro se without being
16 warned of his Faretta warnings. The dangers of proceeding
17 without an attorney, which is no evidence whatsoever of
18 that. All his accumulation of errors that occurred
19 without objection, but due to the fact that he was -- he
20 is not a lawyer. And he was not warned of the dangers of
21 proceeding without an attorney.

22 THE COURT: All right. Let me hear from the
23 State.

24 MR. SHENKAR: Thank you, Your Honor. May it
25 please the Court, address the issue of not being

1 represented first, Your Honor. Based on the return from
2 the magistrate judge, the (inaudible) provide in this
3 case, I will address, Your Honor, and defer him to this
4 particular page where the defendant did sign the fact that
5 he wanted him to represent himself.

6 THE COURT: Hold on.

7 MR. SHENKAR: That is the thing first event of
8 the magistrate judge.

9 THE COURT: Wait. You going to have to show me
10 that.

11 MR. SHENKAR: They did not label the pages on
12 this one. May I approach?

13 THE COURT: Sure.

14 MR. SHENKAR: Not on the transcript, but this
15 particular page jury trial of the Court.

16 THE COURT: All right.

17 MR. SHENKAR: Your Honor, basic information
18 includes like defendant request to represent himself that
19 day was November 1st of 2010. Furthermore, Your Honor,
20 the defendant at one point did state to the magistrate
21 judge that they wish to have a lawyer from the Foster Law
22 Firm represent himself.

23 THE COURT: From what law firm?

24 MR. SHENKAR: Foster -- Foster Law Firm. It is
25 part of the return where the attorneys or paralegal of

1 that law firm did apply to the judge and stated that they
2 would not be representing this defendant. The defendant
3 was based on the transcript was asked if he wanted to
4 proceed forward that day. There is a specific mentioning
5 as to representation by attorney, but it seems that the
6 defendant was fully involved with the trial as well as
7 providing his own witnesses and doing cross-examination on
8 State witnesses. Based on all that, Your Honor, we would
9 argue that a sufficient opportunity was given to him to
10 retain an attorney. And the hearing was postponed
11 initially to allow him to get an attorney from another law
12 firm. However, he failed to do that. Furthermore, did
13 sign the waiver that he waived the attorney to be present
14 or to represent him.

15 In addition to that, Your Honor, if I would go
16 to the issues that Mr. Mills brought up with relations to
17 the trial to all the objections that were supposed to be
18 made but were not made, because the defendant did not have
19 an attorney. Your Honor, it's well settled law that a
20 failure to object during the trial has not preserved a
21 right to argue this matter on appeal. Again, if the Court
22 did find that he had sufficient opportunity to retain an
23 attorney, then his failure to object at trial should count
24 towards not being able to appeal the issue later on. That
25 goes toward all the bad character evidence as well as to

1 the failure to state a directed verdict motion as well as
2 to the failure to request a new trial. All of those
3 motions would have been made had it been represented by an
4 attorney. However, he did sign the waiver. Did not wish
5 to be presented.

6 As far as the defendant's argument or Mr. Mills'
7 argument that he did not have sufficient information,
8 sufficient opportunity to find any kind of exculpatory
9 witnesses or some kind of evidence related to this case by
10 not providing all of the discovery to the defendant.
11 Again, all stems from the fact that he was not represented
12 by an attorney. He did not serve a Rule 5 on the State.
13 Therefore, the State did not provide him the information
14 before the trial. However, when the judge did find out,
15 that information was not provided. It did allow him first
16 time to postpone the trial to allow him to get the
17 incident report and on the second time allow me to review
18 a set of additional information prior to the trial. This
19 was a very straight forward and simple situation.

20 All of the witnesses were known to the
21 defendant. He brought several additional people from his
22 side to testify as to his character. Again, he was fully
23 engaged and fully involved in this trial. And therefore,
24 we don't see any problem with the fact he waived the
25 attorney, the presence of the attorney. No problem with

1 the fact that he was found guilty with his charges, Your
2 Honor, just make sure I got all of the issues. We'll just
3 add new trial motion as stated by Mr. Mills. I think it
4 was point six on his appeal motion that a new trial motion
5 was required by the judge. However, there was no motion
6 for a new trial can only be based on error of law and not
7 on the facts. We assert to the Court that once the
8 judge -- the magistrate judge waive all the evidence they
9 made a decision in a criminal case ---

10 THE COURT: Well, he didn't it was a jury.

11 MR. SHENKAR: Well, I'm sorry the verdict came
12 in -- I'm referring to before the directed verdict motion
13 when he decided to go ahead and send this case to the jury
14 based on all the evidence that he had ---

15 THE COURT: Did he make a directed verdict
16 motion?

17 MR. SHENKAR: He -- well, there is a transition
18 between the State's case to the defendant's. However,
19 there is no motion for a directed verdict and the judge
20 based on the transcript of the judge advising the
21 defendant that he had the right for a directed verdict at
22 that point. However, the defendant did not raise the
23 motion as well. Based on all of that and the fact that
24 the judge did see sufficient evidence to turn it over to
25 the jury absent any kind of error of abuse of discretion

1 by a magistrate judge, the State's position would be that
2 the Court sitting in this jurisdiction cannot probably
3 (sic) to the evidentiary weight but that only concentrate
4 on any type of error of law related to the magistrate
5 conduct. Other than that, the State will reiterate the
6 fact that he had the right for an attorney. He waive that
7 right. It's on the paper and I will point -- our request
8 is that this court will affirm the magistrate court's
9 decision to find the defendant guilty. Thank you, Your
10 Honor.

11 THE COURT: Anything further, Mr. Mills?

12 MR. MILLS: Yes, sir, Your Honor. I think this
13 reiterates the fact that he was not warned properly under
14 Faretta according to any of the -- whether the transcript
15 or in the ---

16 THE COURT: All he knows is fully I understand I
17 have a right to have an attorney present to assist me,
18 that's on the form.

19 MR. MILLS: It does not give the second prong of
20 Faretta which is the warning that adequately warned of the
21 dangers of self-representation which he has not done
22 anywhere in the transcript or anywhere in the return. And
23 just to clarify, he did file a motion for a new trial that
24 was filed in the -- Your Honor, I think all of these
25 issues doth the discovery issues, the character evidence

1 issue, the hearsay issues all come down to the fact that
2 he's not properly warned, directed verdict issues. He was
3 not properly warned of the dangers of proceeding under the
4 Faretta vs. California. And therefore, we do -- the case
5 be reversed and remanded.

6 THE COURT: All right. I will read the
7 transcript and I will let you know. .

8 END OF REQUESTED TRANSCRIPT
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CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
COUNTY OF FLORENCE)

I, Keshia Reed, Court Reporter and Notary Public
in and for the State of South Carolina At Large, do hereby
certify that the above-entitled cause was heard as
hereinafter set out; that I was authorized to and did
transcribe the said proceedings; and that the foregoing
and annexed paged, numbered 1 through 16, inclusive,
constitute a true and accurate transcription of my
stenographic report of the said cause taken during the
said hearing. In the Court of Common Pleas for Richland
County, South Carolina, on the 17th day of January, 2014.

I do further certify that I am neither of kin,
counsel nor interest to any party hereto. In witness
whereof, I have hereunto affixed my signature this 24th
day of February 2015.


Keshia Reed, Court Reporter

Mar. 18. 2011 9:31AM

FOS⁷⁵⁰ LAW OFFICES

No. 0679 P. 3

ADDITIONAL NARRATIVE

Agency/Name:	CR#: SC4409999	Report Date/Time:	OCA#:
RICHLAND COUNTY SHERIFFS DEPT		7/22/2010 12:01:58 AM	1007020069

THEN BASS SPRAYED THE SUBJECT WITH HER OC. BASS THEN CHANGED HER STORY AND STATED THAT SHE NEVER HAD THE SPRAY IN HER HAND AND THAT DIAL SPRAYED THE SUBJECTS AFTER THEY SURROUNDED THE VEHICLE.

DEPUTY PITCHER MADE CONTACT WITH HUTCHISON AND DOUGLAS AT PROVIDENCE NE HOSPITAL AFTER THEY WERE TRANSPORTED BY EMS. HUTCHISON AND DOUGLAS STATED THAT THEY WENT UP TO THE BASS TO TALK TO HER ABOUT PICKING UP HER TRUCK. HUTCHISON STATED BEFORE HE STARTED TALKING TO BASS, DIAL GOT OUT OF THE PASSENGER SEAT AND USED THE OC-17 SPRAY HITTING HIM AND DOUGLAS IN THE FACE AND UPPER BODY. HUTCHISON AND DOUGLAS RECEIVED REDNESS AND BURNING THROUGHOUT THEIR UPPER BODIES, FACE AND EYES. HUTCHISON STATED THAT DIAL HAD AN OBJECT IN HIS OTHER HAND AND POINTED IT AT HIM. HUTCHISON AND DOUGLAS STATED THAT THEY WANT TO PRESS CHARGES. CASE NUMBER ISSUED.

DEPUTY PITCHER SECURED THE OC-17 SPRAY AND A COLLAPSIBLE BATON LOCATED IN THE BACK SEAT OF THE RED DODGE NEON. BATON WAS TURNED INTO RCSD EVIDENCE. OC SPRAY WAS PHOTOGRAPHED AND SECURED. MWD OLIPHANT WAS ON SCENE. CPL GORE AND DEBK SERGEANT WERE NOTIFIED.

AGENCY: RICHLAND COUNTY SHERIFFS
 CR#: SC4409999
 Report Date / Time: 07/03/2010 00:01

Mar. 18. 2011 9:32AM

FOSBER LAW OFFICES

No. 0679 P. 4

ADDITIONAL VEHICLES

STATUS:	RELATED TO:	VEHICLE TYPE:	
VIN AND/OR LICENSE NO.	BOAT HULL NO. AND/OR REG. NO.		
SERIAL AND/OR OWNER APPLIED NO.	STATE		SC
YEAR OF REGISTRATION	YEAR OF EXPIRATION	YEAR	MAKE
MODEL	STYLE	COLOR	CID NO.
COMMENTS			
STATUS:	RELATED TO:	VEHICLE TYPE:	
VIN AND/OR LICENSE NO.	BOAT HULL NO. AND/OR REG. NO.		
SERIAL AND/OR OWNER APPLIED NO.	STATE		
YEAR OF REGISTRATION	YEAR OF EXPIRATION	YEAR	MAKE
MODEL	STYLE	COLOR	CID NO.
COMMENTS			
STATUS:	RELATED TO:	VEHICLE TYPE:	
VIN AND/OR LICENSE NO.	BOAT HULL NO. AND/OR REG. NO.		
SERIAL AND/OR OWNER APPLIED NO.	STATE		
YEAR OF REGISTRATION	YEAR OF EXPIRATION	YEAR	MAKE
MODEL	STYLE	COLOR	CID NO.
COMMENTS			
STATUS:	RELATED TO:	VEHICLE TYPE:	
VIN AND/OR LICENSE NO.	BOAT HULL NO. AND/OR REG. NO.		
SERIAL AND/OR OWNER APPLIED NO.	STATE		
YEAR OF REGISTRATION	YEAR OF EXPIRATION	YEAR	MAKE
MODEL	STYLE	COLOR	CID NO.
COMMENTS			
STATUS:	RELATED TO:	VEHICLE TYPE:	
VIN AND/OR LICENSE NO.	BOAT HULL NO. AND/OR REG. NO.		
SERIAL AND/OR OWNER APPLIED NO.	STATE		
YEAR OF REGISTRATION	YEAR OF EXPIRATION	YEAR	MAKE
MODEL	STYLE	COLOR	CID NO.
COMMENTS			
STATUS:	RELATED TO:	VEHICLE TYPE:	
VIN AND/OR LICENSE NO.	BOAT HULL NO. AND/OR REG. NO.		
SERIAL AND/OR OWNER APPLIED NO.	STATE		
YEAR OF REGISTRATION	YEAR OF EXPIRATION	YEAR	MAKE
MODEL	STYLE	COLOR	CID NO.
COMMENTS			
STATUS:	RELATED TO:	VEHICLE TYPE:	
VIN AND/OR LICENSE NO.	BOAT HULL NO. AND/OR REG. NO.		
SERIAL AND/OR OWNER APPLIED NO.	STATE		
YEAR OF REGISTRATION	YEAR OF EXPIRATION	YEAR	MAKE
MODEL	STYLE	COLOR	CID NO.
COMMENTS			

AGENCY: RICHLAND COUNTY
 ORI #: 07612010 0001
 Report Date/Time: 07/18/2010 0001
 Incident #: 100702000

INCIDENT REPORT
ADDITIONAL OTHERS

PERSON TYPE VICTIM	NAME (LAST, FIRST, MIDDLE) HUTCHINSON, SHELLEY				RELATIONSHIP TO VICTIM OK	RESIDENT J	RACE W	SEX F	AGE 12	D.O.B. N
	HEIGHT 408	WEIGHT 85	HAIR 2	EYES 4 GREEN	PHYSICAL MARKS, SCARS, TATTOOS, GLASSES, CUTS, PHYSICAL PECuliarITIES, ETC.					
	ADDRESS 132 WESTCHESTER AVE				CITY ELGIN	STATE SC	ZIP CODE 29043	LOCATION NO.	DAYTIME PHONE 803-608-9418	EVENING PHONE P
VEHICLE: YES NO EXPLAIN										
COMPARISON OF FINGERPRINTS: YES NO										

Mar. 18, 2011, 9:32AM

FOSTER LAW OFFICES

No. 0679 P. 5

PERSON TYPE VICTIM	NAME (LAST, FIRST, MIDDLE) DOUGLAS, CHERISH				RELATIONSHIP TO SUSPECT AQ AD			RESIDENT J	RACE W	SEX F	AGE 34	D.O.B. 12/20/1970	ETH N
	HEIGHT 500	WEIGHT 200	HAIR BRN	EYES BRN	FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.								
	ADDRESS 132 WESHCHESTER AVE				CITY ELGIN	STATE SC	ZIP CODE 20016	LOCATION NO.	DAYTIME PHONE 8000003750	EVENING PHONE 800780077			
VEGETARIAN ☐ YES ☒ NO ☐ EXPLAIN:													
USING ALCOHOL ☐ YES ☒ NO ☐ DRUGS ☐ YES ☒ NO ☐ UNK ☐ TYPE:													

PERSON TYPE SUSPECT	NAME (LAST, FIRST, MIDDLE) BASS, WENDY				RELATIONSHIP TO SUSPECT AQ AD			RESIDENT J	RACE W	SEX F	AGE 41	D.O.B. 12/23/1968	ETH N
	HEIGHT 504	WEIGHT 200	HAIR BLN	EYES BRN	FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.								
	ADDRESS 4931 HARDECRABBLE RD				CITY COLUMBIA	STATE SC	ZIP CODE 29223	LOCATION NO.	DAYTIME PHONE 803/231613	EVENING PHONE			
VEGETARIAN ☐ YES ☒ NO ☐ EXPLAIN:													
USING ALCOHOL ☐ YES ☒ NO ☐ DRUGS ☐ YES ☒ NO ☐ UNK ☐ TYPE:													

PERSON TYPE	NAME (LAST, FIRST, MIDDLE)				RELATIONSHIP TO SUSPECT			RESIDENT	RACE	SEX	AGE	D.O.B.	ETH
	HEIGHT	WEIGHT	HAIR	EYES	FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.								
	ADDRESS				CITY	STATE	ZIP CODE	LOCATION NO.	DAYTIME PHONE	EVENING PHONE			
VEGETARIAN ☐ YES ☒ NO ☐ EXPLAIN:													
USING ALCOHOL ☐ YES ☒ NO ☐ DRUGS ☐ YES ☒ NO ☐ UNK ☐ TYPE:													

PERSON TYPE	NAME (LAST, FIRST, MIDDLE)				RELATIONSHIP TO SUSPECT			RESIDENT	RACE	SEX	AGE	D.O.B.	ETH
	HEIGHT	WEIGHT	HAIR	EYES	FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.								
	ADDRESS				CITY	STATE	ZIP CODE	LOCATION NO.	DAYTIME PHONE	EVENING PHONE			
VEGETARIAN ☐ YES ☒ NO ☐ EXPLAIN:													
USING ALCOHOL ☐ YES ☒ NO ☐ DRUGS ☐ YES ☒ NO ☐ UNK ☐ TYPE:													

PERSON TYPE	NAME (LAST, FIRST, MIDDLE)				RELATIONSHIP TO SUSPECT			RESIDENT	RACE	SEX	AGE	D.O.B.	ETH
	HEIGHT	WEIGHT	HAIR	EYES	FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.								
	ADDRESS				CITY	STATE	ZIP CODE	LOCATION NO.	DAYTIME PHONE	EVENING PHONE			
VEGETARIAN ☐ YES ☒ NO ☐ EXPLAIN:													
USING ALCOHOL ☐ YES ☒ NO ☐ DRUGS ☐ YES ☒ NO ☐ UNK ☐ TYPE:													

Mar. 18. 2011 9:32AM

FOSCO LAW OFFICES

No. 0679 P. 6

ADDITIONAL NARRATIVE

Agency Name: RICHMOND COUNTY SHERIFFS DEPT	CRIME: 00000000	REPORT DATE/TIME: 7/3/2010 12:01:00 AM	OCALR: 1007020001
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AGGRAVATED ASSAULT 13A

INCIDENT TITLE: AGGRAVATED ASSAULT

INCIDENT LOCATION: WESTCHESTER AVE AND VALLENGA RD

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF GENERAL SESSIONS
FIFTH JUDICIAL CIRCUIT

The State of South Carolina

vs.

John Dial Jr.

Defendant.

**AFFIDAVIT OF INDIGENCY
AND
APPLICATION FOR COUNSEL**
(Defense of Indigency Act, Form No.2)

Case Number: Charge Description:

		2011 MAR 18	1:10

ADDRESS	360 E. 2nd St.		
TELEPHONE NUMBER(S)	803-705-9844 / 803-609-4430		
DATE OF BIRTH	5/29/27	SOCIAL SECURITY #	0 [REDACTED]
NAMES OF CO-DEFENDANTS			

1. Are you presently employed? Yes ☒ No ☐
- a. If "yes", state the amount of your salary or wages per month, and give the name and address of your employer.

SALARY OR WAGES PER MONTH	NAME AND ADDRESS OF EMPLOYER
\$800.00	Johnny's Painting & Remodeling

If "no", state the name and address of last employment, date of termination of employment, and amount of your salary or wages per month.

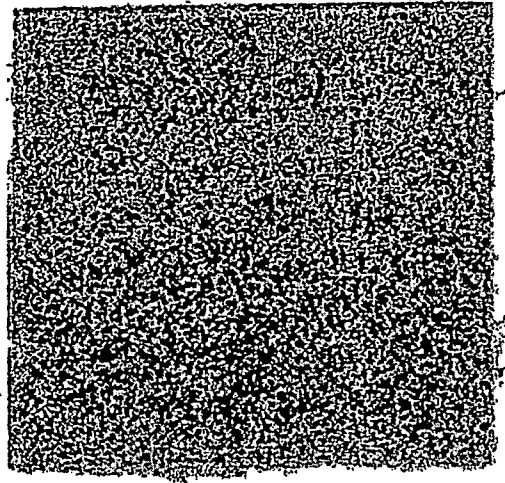
SALARY OR WAGES PER MONTH	NAME AND ADDRESS OF EMPLOYER	TERMINATION DATE

2. Include employment information for the spouse, if applicable.

SALARY OR WAGES PER MONTH	NAME AND ADDRESS OF EMPLOYER

If the spouse is not currently employed, state the name and address of last employment, date of termination of employment, and amount of salary or wages per month.

SALARY OR WAGES PER MONTH	NAME AND ADDRESS OF EMPLOYER	TERMINATION DATE



3. List by name, age and relationship to you, any persons who are dependent upon you for support. Indicate beside each how much you contribute toward their support.

NAME	AGE	RELATIONSHIP	AMOUNT OF SUPPORT
John Dick III	12	Son	100.00
Matthew Dick	11	Son	100.00
Trevor Dick	6	Son	100.00
Daniel Dick	1	Son	100.00
Jerry Kelly			

4. Have you received within the past twelve months any money from any of the following sources?

- a. Business, profession or form of self-employment? Yes ☐ No ☒
- b. Rent payments, interest or dividends? Yes ☐ No ☒
- c. Pensions, annuities or life insurance payments? Yes ☐ No ☒
- d. Gifts or inheritances? Yes ☐ No ☒
- e. Any other sources? Yes ☒ No ☐

If the answer to any of the above is "yes", describe each source of money and state the amount received from each during the past twelve months.

SOURCE OF MONEY	AMOUNT
Side jobs	Differs 100.00 - 150.00

5. Do you own cash, or do you have any money in a checking or savings account?
Yes ☐ No ☒ If the answer is "yes", state the total amount of the cash owned.
6. Do you own any real estate, stocks, bonds, notes, or other valuable property (excluding ordinary household furnishings and clothing)? Yes ☐ No ☒
If the answer is "yes", describe the property and state the appropriate value of the items owned.
7. What kind of motor vehicle do you own? 2004 Chevy Is it paid for? Yes ☒ No ☐
If not, what are the payments?
8. How much do you owe (on liens, mortgages, other encumbrances or debts)?

I do solemnly swear that the account by me delivered into this court of my application for counsel does contain a true and full account of all my real and personal estate, debts, credits and effects whatsoever without exception, which I or any person in trust for me have or at the time of my possession had, or am or was, in any respect, entitled to, in possession, remainder or reversion and that I have not at any time since charges were made against me or before, directly or indirectly sold, leased, assigned or otherwise disposed of or made over, in trust for myself or otherwise, other than is mentioned herein.

I understand the appointment of counsel creates a claim against the assets and estate of the person who is provided counsel or the parents or legal guardians of a juvenile in an amount equal to the cost of representation less the amount paid to appointed counsel, the public defender office and/or the Commission on Indigent Defense. I understand that such claim shall be filed in the office of the Clerk of Court in the county where I, my child, or ward are assigned counsel, but that the filing of a claim shall not constitute a lien against my real or personal property unless, in the discretion of the court, part of all of such claim is reduced to judgment by appropriate order of the court after serving me with at least thirty (30) days notice that judgment will be entered.

I am financially unable to employ counsel and request that counsel be assigned to represent me. I understand that I am entitled to at least thirty days' notice before a claim against me may be reduced to judgment, and I do hereby waive the right to such notice.

This 14 day of March, 2009

[Signature]
Director of Parent/Guardian of Defendant if applicable

Subscribed and sworn to before me this _____ day of _____, 2009 (U.S.)
Notary Public for South Carolina
My Commission Expires: _____

The applicant's request for court-appointed counsel is hereby ☒ granted / ☐ denied.

Dated: _____

Judge/Clerk or Deputy Clerk

South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND COUNTY

Court Date And Time: _____

STATE OF SOUTH CAROLINA

VS

JURY TRIAL REQUEST

John D. G.

Case Number(s):

3 Counts 3rd Degree Aggravated Assault

Officer / Agency:

Richland County / Spears

Permanent Address:

360 Lee rd. Columbia SC 29229
City Apt # State Zip

Mailing Address:

360 Lee rd. Columbia SC 29229
City Apt # State Zip

Phone Number:

803-705-0338

Attorney of Record:

None - Representing myself

Address:

City Apt # State Zip

Phone Number:

I understand that if my address changes, it is MY responsibility to notify the COURT in writing immediately.

I further understand if I fail to appear for my Trial, my failure to appear is to be construed by the court as my expressed waiver of my right to a Jury Trial and that my case will then be heard by a Judge in my absence without a Jury.

Signature of Defendant

Date

11-1-2020

Court Address: Pontiac Magistrate Court, 10509 Two Notch Road, Elgin, SC 29045
Mailing address: Pontiac Magistrate Court, 10509 Two Notch Road, Elgin, SC 29045
Phone: (803) 576-2520 Facsimile: (803) 576-2522.

**PONTIAC MAGISTRATE COURT
TRIAL INFORMATION AND PLEA SHEET**

NAME: John Dial Jr
 ADDRESS: 360 Lee rd.
 CITY/STATE: Ala. Sec ZIP CODE: 20229
 CHARGE(S): 3 counts Assault 3rd degree
 WARRANT/TICKET #: _____

1). CHARGES (S) I FULLY UNDERSTAND THE CHARGE(S) AGAINST ME. ☒ YES ☐ NO

2). JURY TRIAL: I FULLY UNDERSTAND THAT IT IS MY CONSTITUTIONAL RIGHT TO HAVE A JURY TRIAL:

2 I DO NOT WANT A JURY TRIAL
John I WANT A JURY TRIAL

3). RIGHT TO AN ATTORNEY: I FULLY UNDERSTAND THAT I HAVE RIGHT TO HAVE AN ATTORNEY PRESENT TO ASSIST ME.

☒ I WAIVE MY RIGHT TO ANY ATTORNEY
☐ I DO NOT WAIVE MY RIGHTS TO AN ATTORNEY. MY ATTORNEY'S NAME IS _____
 IF YOU CANNOT AFFORD AN ATTORNEY BECAUSE OF YOUR INDIGENT STATUS THE COURT MAY APPOINT AN ATTORNEY TO REPRESENT YOU. HOWEVER, YOU MUST PROVE TO THE COURT THAT YOU ARE INDIGENT BEFORE AN ATTORNEY CAN BE APPOINTED.

4). PLEA: I FULLY UNDERSTAND THAT I HAVE A RIGHT TO FACE MY ACCUSERS AND THAT THE STATE MUST PROVE BEYOND A REASONABLE DOUBT THAT I AM GUILTY OF THE CHARGE(S).

☐ GUILTY ☒ NOT GUILTY ☐ NOLO CONTENDERE (do not contest charge(s))

5). FRAUDULENT CHECK(S) ONLY: RESTITUTION HAS BEEN MADE _____
 RESTITUTION HAS NOT BEEN MADE _____

I CERTIFY THAT THE ABOVE INFORMATION PROVIDED TO THE RICHLAND COUNTY MAGISTRATE COURT ON THIS DATE IS THE WHOLE TRUTH. ALSO, I HAVE GIVEN THIS INFORMATION WITH FULL KNOWLEDGE OF MY RIGHTS AS A DEFENDANT AND THE CONSEQUENCES OF PROVIDING FALSE INFORMATION TO THE COURT.

John Dial Jr
 DEFENDANT'S SIGNATURE

Nov 1, 2010
 DATE

 JUDGE GEORGE A. SURLS

 DATE

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

May 20, 2016



Robert W. Mills
1728 Main Street
Columbia, SC, 29201
(803) 252-9648
Attorney for Appellant

RECEIVED

JUL 11 2016

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

NOV 13 2017

APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

S.C. SUPREME COURT

Appellate Case No.: 2017-002205

Opinion No. 2017-UP-339 (S.C. Ct. App. Filed August 9, 2017)

The State Respondent

v.

John Henry Dial Jr.....Appellant

PROOF OF SERVICE

I certify that I have served the APPENDIX on the State of South Carolina by depositing a copy of it in the United States Mail, postage prepaid, on November 13, 2017 addressed to:

William M. Blitch, Esquire
SC Attorney General's Office
P.O. Box 11549
Columbia, SC 29211



Robert W. Mills
1728 Main Street
Columbia, South Carolina 29201
(803) 252-9648
Attorney for the Appellant

November 13, 2017