

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Horry County

Honorable Larry B. Hyman, Circuit Court Judge  
\_\_\_\_\_

THE STATE,

RESPONDENT,

V.

JAMAL MARQUIS DANIELS,

APPELLANT

APPELLATE CASE NO. 2017-000135  
\_\_\_\_\_

BRIEF OF APPELLANT  
\_\_\_\_\_

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**TABLE OF CONTENTS**

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ..... ii

STATEMENT OF ISSUE ON APPEAL.....1

STATEMENT OF THE CASE.....2

ARGUMENT

The trial judge erred in overruling appellant’s objection to the 911  
dispatcher’s notes and the recording of the neighbor’s call to 911  
as inadmissible hearsay .....3

CONCLUSION.....8

**TABLE OF AUTHORITIES**

**Cases**

State v. Blackburn, 271 S.C. 324, 247 S.E.2d 334 (1978)..... 5

State v. Hendricks, 408 S.C. 525, 759 S.E.2d 434 (Ct. App. 2014) .....5, 6

**Statutes**

Rule 801(c), SCRE..... 5

Rule 801(d)(1)(B), SCRE ..... 6, 7

**STATEMENT OF ISSUE ON APPEAL**

Whether the trial judge erred in overruling appellant's objection to the 911 dispatcher's notes and the recording of the neighbor's call to 911 as inadmissible hearsay?

### STATEMENT OF THE CASE

An Horry County grand jury indicted appellant Jamal Marquis Daniels for attempted murder, armed robbery, kidnapping, and first-degree burglary. R. 27, l. 19 – R. 28, l. 24. On April 11, 2016, appellant's case was called for trial before the Honorable Larry B. Hyman, Jr. and a jury. R. 1. Appellant was tried in his absence. R. 5, l. 2 – 6, l. 24. Nancy Livesay represented the State. R. 1. Buddy Long represented appellant. R. 1. The jury acquitted appellant of kidnapping, first-degree burglary, armed robbery, and attempted murder. R. 373, l. 10 – 374, l. 16. The jury convicted appellant of the lesser included offenses of robbery and first-degree assault and battery. R. 373, l. 10 – 374, l. 16. Appellant's sentence was sealed and on January 18, 2017, Judge Hyman sentenced appellant to concurrent ten year terms of imprisonment on both charges. R. 384, l. 11 – 386, l. 5. This appeal follows.

## ARGUMENT

The trial judge erred in overruling appellant's objection to the 911 dispatcher's notes and the recording of the neighbor's call to 911 as inadmissible hearsay.

Katrina Daniels and Laura Conklin were drug users who lived together in a condominium. R. 105, l. 25 – 106, l. 14. R. 124, ll. 1 – 11. R. 122, ll. 17 – 22. The pair could not reach their usual drug suppliers, so they drove to an area known as Racepath to buy drugs. R. 106, l. 8 – 107, l. 18. They bought \$100 worth of crack cocaine from a man they called "Polo." R. 106, l. 18 – 107, l. 9. R. 84, l. 21 – 85, l. 19. They had never seen Polo before that afternoon. R. 85, ll. 20 – 22.

The couple smoked their crack cocaine that afternoon and decided they wanted more drugs. R. 107, l. 12 – 108, l. 7. They called Polo and told him they wanted to buy \$400 worth of drugs. R. 85, ll. 10 – 15. They offered to go back to Racepath, but Polo told them he would bring the drugs to their house because it was safer. R. 85, ll. 1 – 9.

The couple let Polo in when he arrived and they went to their bedroom to buy the drugs. R. 86, l. 9 – 87, l. 2. Polo only had \$200 worth of drugs, so the couple bought that amount and Polo left. R. 87, ll. 3 – 17.

Polo called shortly after leaving and told them he found another \$200 worth of drugs in his car and offered to return if they were still interested in buying it. R. 88, ll. 14 – 18. They let Polo back into their house and they again went upstairs to the bedroom. R. 88, l. 14 – 89, l. 5. Polo had the drugs in his hand, but was "fidgeting." R. 89, ll. 10 – 15.

The couple heard a knock on the door. R. 89, ll. 10 – 15. They told Polo no one else was allowed in the house, but Polo ran down the stairs. R. 89, ll. 10 – 25. Polo tried to open the door and Conklin struggled with him to keep it closed. R. 124, l. 12 – 125, l. 11. Polo prevailed and a

masked man with a gun entered the house. R. 124, l. 12 – 125, l. 11. The man shot Conklin in the head and her ears began ringing. R. 125, ll. 7 – 22. The man then hit Daniels, briefly knocking her unconscious. R. 125, l. 25 – 126, l. 4. R. 90, ll. 14 – 20.

When Daniels regained consciousness, the masked man was shaking her by the collar and screaming at her to tell him where she had her money. R. 91, ll. 12 – 17. Polo was similarly shaking and screaming at Conklin. R. 91, ll. 12 – 17. They went upstairs and Conklin told them the money was in her car and gave them the keys. R. 125, l. 5 – 127, l. 9.

Polo went downstairs with the car keys. R. 127, ll. 5 – 9. The masked gunman looked at his phone and then ran down the stairs. R. 127, ll. 10 – 21. The women jumped from their second story bedroom. R. 127, l. 21 – 128, l. 16. They fled to a neighbor's house and he called 911. R. 128, ll. 2 – 16. Daniels eventually identified Polo as appellant in a photo lineup. R. 96, l. 16 – 99, l. 20.

The State's first witness was the 911 operator. R. 67, ll. 6 – 21. The State sought to admit both the 911 recording and the operator's dispatch notes. R. 68, l. 11 – 69, l. 17. Appellant objected on hearsay grounds, but the Court overruled the objection and admitted the call and the notes. R. 69, ll. 7 – 18. When the solicitor began having the witness read from the notes, Judge Hyman excused the jury. R. 70, ll. 4 – 15.

During the *in camera* discussion, appellant again objected on hearsay grounds and argued that the notes were inadmissible because the State did not intend to call the neighbor who telephoned 911 as a witness. R. 72, ll. 4 – 19. The trial judge ultimately admitted the dispatch notes under *res gestae*. R. 75, l. 8 – 77, l. 18.

The trial judge erred in admitting the 911 call and dispatcher's notes. The call and the notes were out of court statements offered for the truth of the matter asserted and should have

been analyzed under the hearsay rules instead of “*res gestae* as explaining the whole story.” R. 76, ll. 5 – 7. See Rule 801(c), SCRE. The solicitor admitted she wanted the notes for the truth of the matter asserted. R. 76, ll. 8 – 15. As appellant argued, no bullet hole, bullet, or shell casing was found and none of the neighbors heard a gunshot. R. 72, ll. 20 – 25. R. 214, l. 13 – 216, l. 9. The solicitor argued the notes were needed to show Conklin and Daniels did not “have time to reflect back and fabricate a story.” R. 76, ll. 8 – 15.

The dispatcher’s notes did not qualify as *res gestae*, but were simply inadmissible hearsay. “In order to qualify as a part of the *res gestae*, a statement must be substantially contemporaneous with the litigated transaction and be the spontaneous utterance of the mind while under the active, immediate influence of the event.” State v. Blackburn, 271 S.C. 324, 327, 247 S.E.2d 334, 336 (1978). “The rationale for the exception lies in the special reliability accorded to a statement uttered in spontaneous excitement which suspends the declarant’s powers of reflection and fabrication.” Id.

The notes were not statements of the witness. The notes were taken by dispatchers who did not testify and from a call made by a declarant who did not testify—the neighbor. The dispatcher’s statements simply do not qualify as *res gestae*.

In State v. Hendricks, 408 S.C. 525, 759 S.E.2d 434 (Ct. App. 2014), the Court ruled that statements in a 911 call did not qualify as present sense impression under the hearsay rules. In Hendricks, the victim claimed the defendant, with whom she had a sporadic romantic relationship, brutally raped her. Id. at 528-29, 759 S.E.2d at 436. When the defendant left, the victim went to her mother’s house. Id. at 529-30, 759 S.E.2d at 436-37. The victim’s mother drove her to the hospital and on the way called 911. Id. Over the defendant’s hearsay objection,

the trial judge admitted the mother's call to 911 as a present sense impression and excited utterance. Id.

On appeal, this Court concluded that the mother's statements to the 911 operator were not admissible as either a present sense impression or as an excited utterance. Id. at 532-36, 759 S.E.2d at 438-40. The Court first analyzed admission of the mother's statements under present sense impression. Id.

There are three elements to the foundation for the admission of a hearsay statement as a present sense impression: (1) the statement must describe or explain an event or condition; (2) the statement must be contemporaneous with the event; and (3) the declarant must have personally perceived the event.

Id. at 533, 759 S.E.2d at 438. The Court held that the mother's statements concerning her daughter's rape did not qualify because the event was the rape, which the mother—the declarant—did not perceive. Just like in Hendricks, the caller was the neighbor and he did not perceive the events of the alleged crime, Conklin and Daniels did.


The Hendricks Court also found that the mother's statements to the 911 operator did not qualify as an excited utterance. Id. at 533-35, 759 S.E.2d at 438-39. The Court found that the State failed to show the nature of the mother's reaction "was such that it generated the spontaneity that gives an excited utterance its inherent reliability." Id. The State also failed to show that the mother "was still under the required stress of excitement when she actually made her statement." Id. The mother testified in Hendricks and the Court still found the State failed to prove these elements. Id. Here, the neighbor (the declarant) did not testify. Therefore, the State failed to meet its burden as the proponent of the evidence and the trial court erred in admitting the call and the notes.

Furthermore, the hearsay rules specifically prohibit these statements. See Rule 801(d)(1)(B). The State was trying to admit the victim's statement to the neighbor (through two

911 witnesses) as a prior consistent statement to rebut any assertion of fabrication. Id. As stated in the rule, the statement “must have been made before the alleged fabrication, or before the alleged improper influence or motive arose.” Id. The motivation to fabricate, if it existed, certainly existed at the time of the 911 call. Therefore, admission under this rule was prohibited and the court erred in allowing this evidence to go to the jury. This Court should reverse.

**CONCLUSION**

For the foregoing reasons, this Court should reverse appellant's convictions and remand this case for a new trial.

A handwritten signature in black ink, appearing to read 'David Alexander', written over a horizontal line.

David Alexander  
Appellate Defender

ATTORNEY FOR APPELLANT

This 19th day of November, 2018.