

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Appeal from Newberry County
D. Garrison Hill, Circuit Court Judge

S.C. Supreme Court

Opinion No. 5009 (S.C. Ct. App. filed 7/25/2012)
09-GS-36-0037;0038;0039;0087

THE STATE,

RESPONDENT,

V.

BENNIE MITCHELL,

PETITIONER

APPELLATE CASE NO. ~~2010-159286~~
2012-213463

APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Bennie Mitchell, Appellant.

Appellate Case No. 2010-159286

Appeal From Newberry County
D. Garrison Hill, Circuit Court Judge

Opinion No. 5009
Heard April 25, 2012 – Filed July 25, 2012

AFFIRMED

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and Solicitor Jerry W. Peace, of Greenwood, for the
State.

LOCKEMY, J.: In this criminal action, Bennie Mitchell argues the trial court erred in: (1) allowing a police officer to identify Mitchell from photographs taken by the victim's deer camera because it was in violation of Rule 403, SCRE, and Rule 701, SCRE; (2) admitting a disk containing photographs from a deer camera because it was in violation of Rules 1001, 1002, and 1003, SCRE; and (3) failing

to grant Mitchell's post-trial motion for a new trial on the first-degree burglary charge when all of the elements of the charge were not met. We affirm the trial court.

FACTS

In the early morning of October 28, 2008, Stephen Potts returned to his home in Newberry County and discovered someone had broken into his home during his absence. After reviewing a motion-activated deer camera that had been placed on top of his refrigerator, Potts saw photographs of a man in his kitchen. A police officer subsequently identified the man in the photographs as Mitchell.

In January 2009, the Newberry County Grand Jury (Grand Jury) indicted Mitchell on one count of first-degree burglary, one count of possession of burglary tools, and one count of enhancement of larceny.¹ In February 2010, the Grand Jury also indicted Mitchell on one count of petit larceny. The matter was called for a jury trial on April 19, 2010.

In a pre-trial hearing, Mitchell moved to require the State to establish the authenticity and foundation of the photographs from Potts's deer camera. The trial court denied his request but indicated Mitchell could object at the appropriate time during the trial.

Additionally, Mitchell moved to exclude testimony from Lieutenant (Lt.) Roy McClurkin, of the Newberry Police Department, regarding Lt. McClurkin's identification of Mitchell as the person in the photographs from Potts's deer camera. He objected on several grounds: (1) the testimony was a lay opinion; (2) the jury could determine whether Mitchell was the person in the photographs without Lt. McClurkin's testimony; and (3) the testimony would be unduly prejudicial because of Lt. McClurkin's position as a police officer. The trial court denied his motion, finding the proposed testimony met the requirements for admissibility under Rule 701, SCRE. The trial court further found the testimony's probative value outweighed any prejudice to Mitchell, but it excluded similar testimony from other police officers as cumulative and prejudicial.

Potts testified he lived in Newberry County in October 2008, and due to some break-ins at his home, he mounted a motion-activated deer camera on top of his

¹ The enhancement of larceny indictment was nolle prossed on April 21, 2010.

refrigerator. Potts stated that upon returning home from work at approximately 1:00 a.m. on October 28, 2008, he noticed someone or something had tampered with the window next to his back door. After going inside his home and checking the deer camera, he discovered photographs of someone in his kitchen that he did not recognize. He waited to contact the police until around 10 a.m. and then told them of the photographs.

Mitchell objected to the admission of a disk containing the photographs from the deer camera, arguing it was not the "original" as required by the South Carolina Rules of Evidence and maintaining there was a genuine issue with the original's authenticity. Potts testified during the in camera hearing that he had possession of the deer camera from the time he returned home on the night of the alleged incident until he took it to his business and downloaded the data onto a laptop. He identified the photographs on the disk as the ones he downloaded directly from the camera. Potts stated the police officer viewed the photographs on his personal laptop at his home on October 28 but that laptop could not download the photographs to print them out. He then took the camera to the police station, but the police station was not able to download and print the photographs either. At that point, Potts took the deer camera back to his business where he downloaded the photographs and copied them onto a disk. The State argued that the deer camera photographs were meant to be downloaded and then printed out. It then analogized the deer camera to a regular film camera because when one takes a picture with a regular film camera, the original is on the film and then the person can get them developed to produce a copy of what came from the original. Thus, the State maintained the photographs fell under the definition of an original.

Potts admitted the pictures had a timestamp of 3:00 a.m., even though he testified he returned home from work around 1:00 or 1:30 a.m. He stated the clock was wrong on the deer camera because he had just set it up and had not properly programmed the clock feature yet.

The trial court overruled Mitchell's objection, finding the photographs on the disk were data stored in a computer put in a format readable by sight. Further, the photographs were the same as the ones on the deer camera based upon the foundation offered by the State. The trial court determined the photographs were "originals" as defined in Rule 1001, SCRE. Potts then testified before the jury regarding the photographs and stated he did not know the person pictured in them. Further, he testified that approximately one hundred dollars in quarters, some clothing, and some beer were taken from his home.

Corporal (Cpl.) Allison Moore of the Newberry Police Department testified she responded to Potts's residence on October 28, 2008. She stated Potts showed her the photographs on the deer camera, and she thought they depicted the unknown suspect well. Cpl. Moore could not determine where the person entered Potts's home and could not recover any fingerprints. When Potts came to the police station with the deer camera as requested, he met Cpl. Moore and they discovered the police station did not have the ability to download and print the photographs either. Potts informed Cpl. Moore that he could download the photographs at his place of business. She advised him to bring the photographs to the police department after he downloaded them, and he did so later that day on October 28.

Lt. McClurkin stated that Potts and Cpl. Moore came to his office with the disk on the afternoon of October 28, 2008, and asked him if he recognized the person in the photographs taken from Potts's deer camera. Lt. McClurkin testified, over Mitchell's objection, that he viewed the photographs from the disk on his office computer and recognized Mitchell as the person in the photographs. He stated that in one of the photographs, the person he believed to be Mitchell was standing with a flashlight and a bag in his hands. Lt. McClurkin explained he knew Mitchell from living in Newberry for over twenty years.

The jury convicted Mitchell of first-degree burglary and possession of burglary tools, but it acquitted him of the petit larceny charge. Mitchell moved for a new trial based on the ground that the State failed to establish all elements of the burglary charge because the jury acquitted him of petit larceny. The trial court denied his motion, and this appeal followed.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Thus, an appellate court is bound by the trial court's factual findings unless they are clearly erroneous. *Id.*

LAW/ANALYSIS

I. Identification of Mitchell

Mitchell contends it was reversible error to allow Lt. McClurkin to identify Mitchell at trial from photographs taken from the deer camera because it was in

violation of Rule 701, SCRE, and Rule 403, SCRE. Specifically, Mitchell argues Lt. McClurkin was not an eyewitness to the burglary; therefore, his identification of Mitchell from the photographs from the disk was simply his opinion of what was on the video. Further, Mitchell states the jury could observe the photographs themselves and draw their own conclusion as to identity. We disagree.

"The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice." *State v. Fripp*, 396 S.C. 434, 438, 721 S.E.2d 465, 467 (Ct. App. 2012) (quoting *State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 845, 847-48 (2006)). "Rule 701 of the South Carolina Rules of Evidence explains when lay witness testimony is admissible." *Id.* at 439, 721 S.E.2d at 467.

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience or training.

Rule 701, SCRE. "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." *Fripp*, 396 S.C. at 439, 721 S.E.2d at 467 (quoting Rule 704, SCRE).

Mitchell also argues the police officer's testimony violated Rule 403, SCRE, which states:

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

Rule 403, SCRE.

Mitchell cites *State v. Herring*, 387 S.C. 201, 692 S.E.2d 490 (2009), in support of his argument that the police officer's identification was in violation of Rule 701, SCRE. However, in *Fripp* this court determined that two witnesses could testify to the identity of a person depicted on surveillance videotape. 396 S.C. at 438-40, 721 S.E.2d at 467-68. The defendant was charged with second-degree burglary after he was identified as the suspect in a burglary at a general store. *Id.* at 436-37, 721 S.E.2d at 466. The burglary took place around 4:00 a.m. with no one else present in the general store. *Id.* at 437, 721 S.E.2d at 466. An alarm triggered the police response, and the suspect's image was caught on the store's surveillance videotape. *Id.* In explaining how she was able to identify the suspect on the videotape as being the defendant, one witness, the store manager, indicated she knew the defendant "very well" and "saw him all the time." *Id.* at 437-38, 721 S.E.2d at 466. The second witness, a store employee, testified she was able to identify the defendant because she was acquainted with him through his family. *Id.* at 438, 721 S.E.2d at 466. This court found their testimony was "rationally based on their perceptions of Fripp's appearance including his physical appearance, mannerisms, and clothing." *Id.* at 439, 721 S.E.2d at 467. Additionally, this court concluded the two witnesses' opinions were helpful in determining a key fact in issue—"whether [the defendant] was the person depicted on the videotape." *Id.*

This court then proceeded to analyze federal authority construing the element of helpfulness in determining a key fact in issue.² *Id.* at 439-40, 721 S.E.2d at 467-68. In *United States v. Allen*, 787 F.2d 933 (4th Cir. 1986), *vacated on other grounds*, 479 U.S. 1077 (1987), the court permitted identification testimony by witnesses based on surveillance photographs. That court stated:

We believe . . . testimony by those who knew defendants over a period of time and in a variety of circumstances offers to the jury a perspective it could not acquire in its limited exposure to defendants. Human features develop in the mind's eye over time. These witnesses had interacted with defendants in a way the jury could not,

² Rule 701 of the Federal Rules of Evidence states: "If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702."

and in natural settings that gave them a greater appreciation of defendants' normal appearance. Thus, their testimony provided the jury with the opinion of those whose exposure was not limited to three days in a sterile courtroom setting.

This fuller perspective is especially helpful where, as here, the photographs used for identification are less than clear.

Id. at 936.

"In *United States v. Robinson*, 804 F.2d 280 (4th Cir.1986), the court concluded the defendant's brother's identification testimony, based on surveillance photographs, was admissible under Federal Rule 701 as it would aid the jury in determining a key fact in issue." *Fripp*, 396 S.C. at 440, 721 S.E.2d at 468.

Sylvester Robinson was an individual who could testify under this rule as a lay witness. His testimony was based upon his perceptions from viewing the photographs and from his perceptions of and close association with his brother over the years. Although the defendant's appearance may not have physically changed from the time of the bank surveillance photograph until the time of trial, the individual in the photograph was wearing a hat and dark glasses, and the testimony of Sylvester Robinson could be helpful to the jury on the issue of fact of whether the appellant was the person shown in the bank surveillance photographs. A lay witness may give an opinion concerning the identity of a person depicted in a surveillance photograph if there is some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than is the jury. Sylvester Robinson certainly qualified as a person more likely to correctly identify the individual shown in the photograph.

Id. at 440-41, 721 S.E.2d at 468 (quoting *Robinson*, 804 F.2d at 282).

After analyzing federal law, this court stated "the surveillance video was not crystal clear and the perpetrator sought, in some measure, to obscure his identity by wearing the hood of his jacket up." *Id.* at 441, 721 S.E.2d at 468. "While the jury, having observed Fripp for a relatively brief period of time in the courtroom setting, may have believed Fripp was the person on the videotape, Brown's and Young's testimonies, based on their perceptions of him over time, aided the jury in making an ultimate determination as to the burglar's identity." *Id.* We then found that "the identification of a familiar person does not require any specialized knowledge, skill, experience, or training as contemplated by subpart (3) of Rule 701." *Id.* "Consequently, [this court] affirm[ed] the trial court's admission of Brown's and Young's identification testimonies." *Id.*

Here, we find these facts are analogous to *Fripp*, and the trial court did not err in introducing Lt. McClurkin's testimony pursuant to Rule 701, SCRE. Lt. McClurkin's perception of the person in the photographs was based on his first-hand knowledge of Mitchell. While Lt. McClurkin was not present during the alleged crime, he knew Mitchell through his twenty years of living in the Newberry area. This was the only fact presented at trial that allowed Lt. McClurkin to identify Mitchell, whereas in *Fripp*, the witnesses seemed to be able to describe their knowledge of the defendant from the community in more detail. However, that fact did give a basis for concluding that Lt. McClurkin was more likely to correctly identify the defendant from the photograph than the jury. Furthermore, the identity of the person in the photographs was a fact in issue, and Lt. McClurkin's identification of who he thought was in the photographs was surely helpful to the jury.

As we noted, we do not find Lt. McClurkin's testimony's probative value was outweighed by the prejudicial value under Rule 403, SCRE, based on Mitchell's contention that it was a lay opinion not based on personal observation. We also find the probative value of his testimony was not outweighed by the prejudicial effect based upon Mitchell's argument that Lt. McClurkin was a police officer offering his opinion as to Mitchell's identity. Lt. McClurkin was available for cross-examination by Mitchell, and his basis for identification was stated as simply having been in the Newberry community for twenty years. The trial court's jury instructions further undermined any prejudicial effect Lt. McClurkin's testimony may have had.³ For the foregoing reasons, we affirm the trial court.

³ The jury instructions included the following statements, "[A]s I told you, you must consider and determine the credibility of the witnesses and of the exhibits.

II. Authentication of the disk with downloaded photographs

Mitchell contends the trial court erred in allowing the disk with the downloaded deer camera photographs to be admitted when the photographs were not properly authenticated. Specifically, Mitchell maintains that because the police did not take the camera into custody but left it with Potts to download the photographs onto his business computer, the evidence was admitted in violation of Rules 1001, 1002, and 1003, SCRE.⁴ We disagree.

The pertinent section of Rule 1001, SCRE, states:

An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original".

Rule 1001(3), SCRE. Further, Rule 1001 defines a duplicate as "a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical

And I told you some things you could use in engaging credibility . . . [Y]ou may believe everything a witness says, you may believe nothing a witness says. You may believe parts of a witnesses [sic] testimony and disregard other parts. You may believe one witness over several or several over one. But remember that your job is to determine the true facts of the case and whether the state has met its burden of proof and you do that by weighing all the evidence, regardless of who called the witness."

⁴ At trial, Mitchell objected to the chain of custody of the disk as well. However, he appears to have abandoned that argument on appeal. *See Jinks v. Richland Cnty.*, 355 S.C. 341, 344, 585 S.E.2d 281, 283 (2003) (holding issues not argued in the brief are deemed abandoned and precluded from consideration on appeal).

or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original." Rule 1001(4), SCRE.

Rule 1002, SCRE, in addressing the requirements of an original, states that "[t]o prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute." In addressing the admissibility of duplicates, Rule 1003, SCRE, states that "[a] duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original."

"The question of whether to admit evidence under [Rules 1001 to 1004, collectively known as the best evidence rule,] is also addressed to the discretion of the trial court." *State v. Halcomb*, 382 S.C. 432, 443-44, 676 S.E.2d 149, 154-55 (Ct. App. 2009).

We find the photographs from the disk were originals pursuant to Rule 1001, SCRE. Rule 1001(3), SCRE ("If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an 'original'."). A digital camera was used, and the photographs from the disk were testified to as being the same photographs that were on the deer camera on October 28, 2008. Mitchell had the opportunity to cross-examine Potts and the police officers as to the handling of the photographs and disk on which the photographs were downloaded. We conclude the trial court properly admitted the photographs from the disk as originals, and thus, Rule 1003 is not relevant to our analysis. For the forgoing reasons, we affirm the trial court.

III. Motion for New Trial

Mitchell argues the trial court erred in denying his post-trial motion for a new trial on his first-degree burglary charge. Specifically, Mitchell contends all of the elements of first-degree burglary were not met because the intent to steal element was not proven since the jury found Mitchell not guilty of petit larceny. We disagree.

"The decision whether to grant a new trial rests within the sound discretion of the trial court, and [the appellate court] will not disturb the trial court's decision absent an abuse of discretion." *State v. Senter*, 396 S.C. 547, 552, 722 S.E.2d 233, 236 (Ct. App. 2011) (quoting *State v. Mercer*, 381 S.C. 149, 166, 672 S.E.2d 556, 565

(2009)). "If there is no evidence to support a conviction, [this court] should uphold an order granting a new trial." *State v. Garrett*, 350 S.C. 613, 619, 567 S.E.2d 523, 526 (Ct. App. 2002) (citing *State v. Smith*, 316 S.C. 53, 55, 447 S.E.2d 175, 176 (1993)). "However, if competent evidence supports the jury's verdict, the trial [court] may not substitute [its] own judgment for that of the jury and overturn that verdict." *Id.* (citing *State v. Miller*, 287 S.C. 280, 283, 337 S.E.2d 883, 885 (1985)).

We believe Mitchell's argument is referencing the "inconsistent verdict theory." However, our supreme court has abolished the rule against inconsistent verdicts in this state. *State v. Alexander*, 303 S.C. 377, 383, 401 S.E.2d 146, 150 (1991). Moreover, we find the verdicts are not necessarily inconsistent. Mitchell was charged and convicted of first-degree burglary, pursuant to section 16-11-311(A) of the South Carolina Code (2003). The pertinent portion of the statute states: "A person is guilty of burglary in the first degree if the person enters a dwelling without consent and *with intent to commit a crime in the dwelling . . .*." S.C. Code Ann. § 16-11-311(A) (2003) (emphasis added). Mitchell was identified from photographs on the deer camera in Potts's home. Potts testified that he did not recognize the person in the photographs and had not given permission for that person to be in his home. There was testimony Mitchell held a bag and a flashlight in one of the photographs, and the photograph was admitted into evidence. A jury could have inferred that Mitchell intended to commit a crime while in Potts's home, and due to a multitude of scenarios, was unable or decided not to carry out the intended crime. Thus, the trial court did not err in denying Mitchell's post-trial motion for a new trial. For the forgoing reasons, we affirm the trial court.

CONCLUSION

Accordingly, we find the trial court did not abuse its discretion regarding the issues on appeal. Thus, we affirm the trial court.

AFFIRMED.

WILLIAMS AND THOMAS, JJ., concur.

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

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BENNIE MITCHELL,

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Appeal from Newberry County

D. Garrison Hill, Circuit Court Judge

Opinion No. 5009

PETITION FOR REHEARING

The Court of Appeals affirmed the above named appellant's conviction and sentence on July 25, 2012. In support of this petition for rehearing, which is being submitted on today's date pursuant to Rules 221 and 224 of the South Carolina Appellate Court Rules, appellant submits the following:

Mitchell argued three issues on appeal: (1) the trial court erred in allowing a police officer to identify Mitchell from photographs taken by the victim's deer camera because it was a violation of Rule 403, SCRE and rule 701, SCRE; (2) the trial court erred in admitting a disk containing photographs from a deer camera because it was a violation of Rules 1001, 1002, and 1003, SCRE;

(3) the trial court erred by failing to grant Mitchell's post-trial motion on the burglary first degree charge when all of the elements were not met.

The Court of Appeals affirmed the trial court on all three issues. On Issue One, the Court of Appeals held that the police officer, Lt. McClurkin, was not present at the crime, but he knew Mitchell from twenty years in the community. His identification did not violate rule 701, SCRE because the identity of the person was a fact in issue; Lt. McClurkin was more likely to identify Mitchell than the jury and the identity was helpful to the jury. The Court held that the identity did not violate Rule 403, SCRE because the probative value outweighed the prejudicial because Lt. McClurkin's basis for identification was having been in the community for twenty years.

On Issue Two, the Court of Appeals held that the photographs were originals pursuant to Rule 1001, SCRE, and that the trial court correctly admitted them as originals. Thus Rule 1003 was not relevant to the court's analysis.

On Issue Three, the Court of Appeals held that Mitchell's argument referenced the "inconsistent verdict" theory which has been abolished. The Court held that the statute for burglary first degree requires that the person enters the dwelling with the intent to commit a crime. Because the photograph showed the person with a bag and flashlight, the jury could have inferred the person intended to commit a crime.

The Court of Appeals misapprehended the issues.

ISSUE ONE: Around one o'clock early in the morning of October 28, 2008, Stephen Potts, who was one of the owners of the Blue Moon Restaurant, returned home to find that someone had been in his home and had taken between \$70 and \$100 dollars worth of quarters, socks and beer. R.3, ll. 19 – 25; R.30, ll. 6 – 25; R.31, ll. 1 – 25; R.32, ll. 1 – 25; R.52, ll. 22 – 25; R.53, ll. 1 – 25. Potts knew someone had been in his kitchen because he had set up a deer camera on top of his refrigerator

for the purpose of catching anyone who may break into his home. He did this because about ten days prior to this incident, there was other activity in his house. When he viewed the pictures on the camera, he did not know the person caught on his deer camera. R.3, ll. 19 – 25; R.4, ll. 1 – 25; R.5, ll. 1 – 25; R.32, ll. 21 – 25; R.33, ll. 1 – 25.

When the police arrived the next morning after he called them upon awakening, he told them what happened, and that he did not know the person. R.33, ll. 16 – 25. The police allowed him to take the camera to the Blue Moon and download the pictures onto his laptop computer from which he burned a CD of the pictures. He then provided that CD to the police. R.37, ll. 19 – 25; R.38, ll. 1 – 24; R.45, ll. 1 – 25; R.46, ll. 1 – 25; R.47, ll. 1 – 25; R.48, ll. 1 – 23.

Corporal Allison Moore of the Newberry Police Department, testified that she responded to the call on October 28, 2008, and she went to Potts' home. She could not identify the person on the deer camera. She dusted for fingerprints but could not recover any. R.78, ll. 22 – 25; R.79, ll. 1 – 25; R.80, ll. 1 – 25; R.81, ll. 1 – 25.

Lieutenant Roy McClurkin of the Newberry City Police Department, testified that he had been with the Newberry Police for twenty-seven years. R.100, ll. 11 – 25. He met with Potts on the afternoon of October 28, 2008. Potts brought the DVD that he had made of the pictures from his deer camera on October 27, 2008. R.101, ll. 1 – 25; R.102, ll. 1 – 25; R.103, ll. 1 – 5. Corporal Moore asked Lieutenant McClurkin to view the DVD to see if he could identify the person in the pictures since he had been with the police department a long time. McClurkin loaded the DVD onto his desktop computer and viewed the pictures. He identified the person in the pictures as Bennie Mitchell whom he knew from both of them living in the Newberry community over twenty years. R.103, ll. 1 – 25; R.104, ll. 1 – 25. He obtained an arrest warrant and search warrant for Mitchell's

home. He arrested Mitchell at his home, but did not find any items in Mitchell's home related to the burglary. R.105, ll. 1 – 25.

Defense counsel objected when Lieutenant McClurkin identified Mitchell based on counsel's pretrial objection under Rule 701, SCRE and State v. Herring, 387 S.C. 201, 692 S.E.2d 490 (2009). The judge overruled the objection. R.103, ll. 13 – 25; R.104, ll. 1 – 4. In a pretrial motion, defense counsel argued that the case was based on the mistaken identity of Mitchell from the DVD. Counsel argued that the alleged identification of Mitchell by Lieutenant McClurkin from the DVD should be suppressed because it was lay opinion offered by a police officer in violation of Rule 701, SCRE. Counsel argued that Lieutenant McClurkin was not an eyewitness to the burglary; therefore, his identification of Mitchell from the DVD was simply his opinion of what was on the video. Counsel argued that the jury could observe the DVD or the pictures from it and draw their own conclusion as to the identity. The trial judge stated that as far as the lay opinion, the identity would require expert opinion testimony. R.11, ll. 1 – 25; R.12, ll. 1 – 8.

The judge said: "Doesn't it cause undue prejudice to the defendant to have a police officer say he recognizes that person and in his opinion that is who it is?" He was concerned about the impact on the jury of having the police officer identify Mitchell. R.21, ll. 1 – 16. The state agreed that it was prejudicial but not unduly prejudicial. R.21, ll. 17 – 25; Defense counsel argued that it was unduly prejudicial because the lay witness was a police officer which was a violation of Rule 403, SCRE. R. 22, ll. 23 – 25; R.23, ll. 1 – 25; R.24, ll. 1.

Defense counsel cited the case of State v. Herring, 387 S.C. 201, 692 S.E.2d 490 (2009) to support his argument. Counsel argued that Mitchell's case was very similar to Herring in the legal issues involved. R.12, ll. 9 – 25; R.13, ll. 1 – 25; R.14, ll. 1 – 25; R.15, ll. 1 – 25; R.16, ll. 1 – 25.

In State v. Herring, id., the defendant was convicted of murder when he allegedly shot through his car window hitting a nightclub bouncer and killing him as the defendant was leaving. The incident was caught on video tape. Three lay witnesses offered their interpretation of the video from Chastity's that the flash of light on the video was a gunshot. Defense counsel objected to the lay opinion because the witnesses did not personally observe the events but only viewed them on the tape. Herring's defense counsel asked for a mistrial. The trial judge offered a curative instruction to the jury where he told the jury to strike the lay opinion from their memory because "you are the only ones who can draw from conclusions from what you saw on the tape and testimony in this regard." The trial judge stated further:

It's the same instruction I gave you with regard to another witness that looked at the same video and saw what he thought was one said a light, one said a shot. That's an opinion. Just take it at that. Nobody saw the shot fired based on the testimony we've heard so far. It's all from the video. You are going to have the video. You can look at it. You can determine whatever you choose to determine from it.

State v. Herring, supra, at 217.

The Supreme Court found that the curative instructions were sufficient to cure any prejudice, and there was no error in denying the mistrial motion. State v. Herring, supra.

Mitchell's trial judge stated he saw no rules that the Supreme Court cited regarding lay opinion. R.17, ll. 11 – 25; R.18, ll. 1 – 25. The judge issued his ruling after a lengthy discussion of the issue where he denied defense counsel's motion to exclude the opinion testimony of the officer as to the identity of Mitchell in the deer camera photograph. R.25, ll. 1 – 25; R.11 – 44.

Rule 701, SCRE provides that if the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences must be limited to his opinions which are (a) rationally based on the perception of the witness; (b) are helpful to a clear understanding of the

witness's testimony of determination of a fact in issue; (c) and do not require special knowledge, skill, experience or training.

The opinion must be based upon the personal observations of the witness and not merely upon the statements of another witness. State v. Bottoms, 260 S.C. 187, 195 S.E.2d 116 (1973).

Lieutenant McClurkin did not personally observe Mitchell in the home of Stephen Potts. He offered his opinion as to the identity of the person on the video. This was in the province of the jury because they observed the video, and could draw their own conclusion. The jury in Mitchell's case viewed the DVD. R.48, ll. 1 – 23.

The trial judge misinterpreted the ruling in State v. Herring, *supra*. The trial judge in Herring's case issued a curative instruction to the jury and told them to erase the lay opinions from their memory because the lay witnesses could not give an opinion as to whether the flash was a gunshot. He did not rule that the opinions of the lay witnesses should have been admitted. The Supreme Court affirmed the Herring trial judge by saying the curative instructions were sufficient. The clear implication to be drawn was that the Supreme Court was ruling that the lay witnesses in Herring's case could not offer their opinions to interpret the video.

The Court of Appeals misapprehended the issue because the lay opinion of the police Lieutenant McClurkin that the person in the video was Mitchell was prejudicial. It was a lay opinion not based on personal observation, and the witness was a police officer offering his opinion as to the identity. The fact that a police officer said he knew Mitchell from twenty years in the community could lead the jury to believe that Mitchell had been in trouble with the law for twenty years. This was in violation of Rule 701 and Rule 403, SCRE.

ISSUE TWO: In a pretrial motion, defense counsel moved to exclude the video photographs from the victim's deer camera "based on the requirement that the State authenticates these photographs"

and for a chain of custody. R.7, ll. 10 – 25. Counsel argued that this case “turns on some pictures Mr. Potts says he took”. The judge ruled that a chain of custody was not necessary but that the state would have to “lay the foundation which would be for a witness to authenticate that they constitute an accurate and fair representation of what is depicted on the photograph”. R.8, ll. 1 – 25; R.9, ll. 1 – 25.

The judge told defense counsel that he was “not entitled to a dry run”, but that he could object at the time when the foundation was laid. R.10, ll. 1 – 22.

During the trial, after Potts testified that he had put the deer camera on top of his refrigerator to catch anyone burglarizing his home, the state moved to admit the photographs from the deer camera into evidence. Defense counsel objected and asked for a hearing outside the presence of the jury. R.30, ll. 4 – 25; R.31, ll. 1 – 25; R.32, ll. 1 – 25; R.33, ll. 1 – 25.

Defense counsel argued that the CD with the photographs should not be admitted into evidence because the admission would violate Rules 1002, 1003, and 1004, SCRE because the rules provided that a duplicate was admissible only if there was not a genuine question as to the authenticity of the original. Counsel argued that there was a genuine issue as to the authenticity of the photographs. R.33, ll. 23 – 25; R.34, ll. 1 – 25; R.35, ll. 1 – 25; R.36, ll. 1 – 25. The judge granted counsel’s request to proffer the testimony regarding this issue. R.37, ll. 1 – 20.

Potts testified that he took the camera to the Blue Moon Restaurant where he downloaded nine photographs from the camera to a laptop computer. His girlfriend then “burned” the photographs onto a disk or CD. That was the DVD he provided to the police. He said no alterations had been made to the images. R.37, ll. 22 – 25; R.38, ll. 1 – 25; R.39, ll. 1 – 18.

On cross examination, Potts said he decided which photographs to download, and he downloaded nine pictures although he admitted that the camera held more than nine pictures. There

were pictures of him on the camera as well. R.39, ll. 20 – 25; R.40, ll. 1 – 25; R.41, ll. 1 – 25. Potts testified that the photographs he took to the police had the wrong date stamp of three o'clock A.M., and the pictures had been taken before he arrived at home around one o'clock A.M. He said the clock on the camera was wrong. R.42, ll. 1 – 25. Defense counsel argued at the close of the proffer that there was a genuine question as to the authenticity of the photographs. R.42, ll. 25; R.43, ll. 1 – 10. The judge ruled that the photographs met the definition of 'original' as defined in Rule 1001, SCRE. He overruled defense counsel's motion. R.43, ll. 1 – 25; R.44, ll. 1 – 25.

Corporal Allison Moore of the Newberry Police Department testified that she responded to the call at Potts' home regarding the burglary. R.79, ll. 1 – 25; R.80, ll. 1 – 12. Potts showed her the deer camera and she saw the image of a person on the camera, but could not identify the person. R.80, ll. 13 – 25.

Potts was unable to download the photographs from the camera onto a disk that day, so she told him to go ahead and download it at the Blue Moon and bring it to the police department which he did the next day. Corporal Moore never had the camera or disk in her possession. R.82, ll. 1 – 25; R.84, ll. 1 – 25; R.85, ll. 1 – 5.

On cross examination, Corporal Moore stated that she did not obtain any fingerprints, did not try to obtain any DNA, and did not take any pictures of the crime scene. R.85, ll. 6 – 25; R.86, ll. 1 – 25; R.87, ll. 1 – 25. She did not see an entry into the home. R.88, ll. 13 – 15. She saw the image of a person on the computer but she did not collect or take the computer into police possession because she said it was Potts' personal computer. She did nothing to preserve the image she saw on the camera. She did not check the time stamp on the camera. R.89, ll. 1 – 25; R.90, ll. 1 – 25; R.91, ll. 1 – 25. She admitted that she left the **only** piece of evidence from this crime, the

photographs on the deer camera, with Potts and did nothing to preserve the evidence for trial. R.95, ll. 1 – 25; R.96, ll. 1 – 13.

Rule 1001 (3) , SCRE, provides: “an original of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an original”.

Rule 1003, SCRE, provides concerning the admissibility of duplicates that a “duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.”

Rule 1002, SCRE, provides: “To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute.”

The question of whether to admit evidence under the “Best Evidence Rule” is addressed to the discretion of the trial court. State v. Halcomb, 382 S.C. 432, 676 S.E.2d 149 (Ct. App. 2009). For an error of law to warrant reversal based on the exclusion of evidence, the appellant must prove the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the verdict was influenced by the lack of the evidence. State v. Halcomb, *Id.*

The Court of Appeals misapprehended the issue because the photographs were not stored in the computer but on a deer camera. The victim downloaded nine photographs from the camera to a laptop computer at the restaurant. The photographs were then “burned” onto a disk or CD. That was the DVD the victim provided to the police. Therefore, the authenticity of the photographs remained a question because the photographs were not originals. R.37, ll. 22 – 25; R.38, ll. 1 – 25; R.39, ll. 1 – 18.

ISSUE THREE: Defense counsel filed a post trial motion asking the judge for a new trial or reconsideration of the sentence. Counsel argued a new trial was warranted because all of the elements for burglary first were not met because the intent to steal was not proven after the jury found Mitchell not guilty of the petit larceny. R. 136.

Counsel wrote that the inferred conduct showing intent to steal was that someone stole beer and coins. However, the jury rejected that by returning a verdict of not guilty as to the crime of petit larceny. R. 140. Counsel asked the trial judge to act as the "Thirteenth Juror" by vetoing the verdict and granting a new trial. R. 140-141. Judge Hill denied the motion by order on May 7, 2010.

S.C. Code Section 16-11-311(A) provides:

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

In South Carolina, a trial judge may grant a new trial following a jury verdict under the "Thirteenth Juror" doctrine, which entitles the judge to sit, in essence, as the thirteenth juror when he finds the evidence does not justify the verdict, and then to grant a new trial based solely upon the facts. Lane v. Gilbert Construction Company, LTD., 383 S.C. 590, 681 S.E.2d 879 (2009).

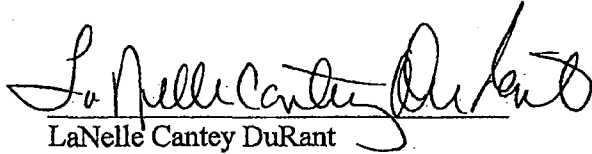
Under the "Thirteenth Juror" doctrine, which is the standard for granting a new trial in state law actions, the trial judge essentially sits as the thirteenth juror and may grant a new trial based solely upon the facts if he finds that the evidence does not justify the verdict. Norton v. Norfolk Southern Railway Company, 350 S.C. 473, 567 S.E.2d 851 (2002). Upon review, a trial judge's order granting or denying a new trial will be upheld unless the order is wholly unsupported by the evidence, or the conclusion reached was controlled by an error of law. Id.

The Court of Appeals misapprehended the issue because Mitchell was not alleging inconsistent verdict. He argued that the elements for burglary first were not proved. The trial judge

should have granted a new trial because the jury basically nullified the burglary first guilty verdict when they found Mitchell not guilty of the petit larceny. The jury heard the law as defined by the state and the judge in his jury charge so they knew that the intent to commit a crime was required for the burglary first conviction. R.116, ll. 1 – 25; R. 117 – 230.

THEREFORE, we respectfully request the Court of Appeals to reconsider its rulings.

Respectfully submitted,


LaNelle Cantey DuRant
Appellate Defender

This 8th day of August, 2012.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Newberry County
D. Garrison Hill, Circuit Court Judge

THE STATE,

RESPONDENT,

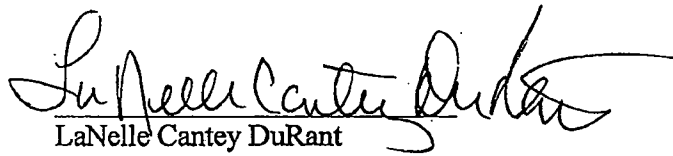
V.

BENNIE MITCHELL,

APPELLANT

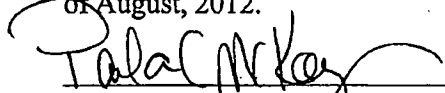
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Deborah R.J. Shupe, Esquire, this 8th day of August, 2012.


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 2nd day
of August, 2012.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: July 24, 2022.

The South Carolina Court of Appeals

The State, Respondent,

v.

Bennie Mitchell, Appellant.

Appellate Case No. 2010-159286

ORDER

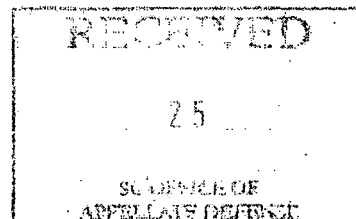
After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

H. B. Wilson J.
Paul D. Kenna J.
James E. Beck J.

Columbia, South Carolina

cc:

Bennie Mitchell
Alan McCrory Wilson
LaNelle Cantey DuRant
John W. McIntosh
Deborah R.J. Shupe
Salley W. Elliott
Bennie D. Mitchell



FILED

October 25, 2012

STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM NEWBERRY COUNTY

D. Garrison Hill, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BENNIE MITCHELL,

APPELLANT

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*****THE FOLLOWING EXHIBITS HAVE BEEN TRANSPORTED TO THE
COURT OF APPEALS: STATE'S EXHIBIT #1 (CD) AND STATE'S
EXHIBIT #2 THROUGH #8 (PHOTOGRAPHS).******

STATE OF SOUTH CAROLINA)
) COURT OF GENERAL SESSION
COUNTY OF NEWBERRY) 2009-GS-36-37, 38, 39

STATE OF SOUTH CAROLINA)
VS.) TRANSCRIPT OF RECORD
BENNIE MITCHELL)
DEFENDANT)

APRIL 19, 2010
NEWBERRY, SOUTH CAROLINA

B E F O R E:

HONORABLE D. GARRISON HILL, JUDGE.

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

AUSTIN MCDANIEL, ASSISTANT SOLICITOR
ATTORNEY FOR THE STATE

MATHIAS CHAPLIN, ESQ.
ATTORNEY FOR THE DEFENDANT

JOY E. HOLSTON
OFFICIAL COURT REPORTER

1 THE COURT: YES SIR, MR. MCDANIEL.

2 MR. MCDANIEL: THANK YOU, YOUR HONOR. THIS IS THE
3 STATE OF SOUTH CAROLINA VERSUS BENNIE MITCHELL.
4 INDICTMENT 2009-GS-36-37, BURGLARY FIRST DEGREE; 38 IS A
5 LARCENY THIRD OFFENSE, 39 IS POSSESSION OF BURGLARY TOOLS.
6 THIS IS A DEFENSE MOTION, I BELIEVE THERE ARE A NUMBER OF
7 PRETRIAL MOTIONS. BEFORE WE GET STARTED THE STATE, WE
8 HAVE HIM REINDICTED. IT LOOKS LIKE THE FIRST INDICTMENT
9 THAT I MENTIONED, THE 2009-GS-36-038 IS AN INDICTMENT FOR
10 LARCENY. THE ACTUAL INDICTMENT IS FOR THE ENHANCEMENT OF
11 A THIRD PROPERTY OFFENSE. SO I REINDICTED HIM FOR JUST
12 PETTY LARCENY, JUDGE. HE NEEDS TO BE ARRAIGNED ON THAT
13 INDICTMENT. HIS DEFENSE COUNSEL HAS SEEN, HE DOES HAVE AN
14 OBJECTION TO, IT LOOKS LIKE THERE IS A SCRIBNER'S ERROR ON
15 THE BACK STATING THAT \$100.00 DOLLARS U.S. CURRENCY WAS
16 STOLEN AND IT WAS ACTUALLY \$70.00 DOLLARS. AND ALSO THERE
17 WAS A PACKAGE OF SOCKS THAT WAS TAKEN AND IT LOOKS LIKE
18 THAT WAS A SEPARATE INCIDENT AND IT WAS INCLUDED IN THE
19 INDICTMENT BY ERROR. WE ARE NOT GOING FORWARD ON THE
20 SECOND SEPARATE INCIDENT, JUDGE. IT LOOKS LIKE THE
21 \$100.00 DOLLARS SHOULD BE \$70.00 DOLLARS AND THE PACKAGE
22 OF SOCKS SHOULD BE OMITTED.

23 MR. CHAPLIN: YOUR HONOR, IF I MAY ADDRESS THE COURT.
24 ATTORNEY MATHIAS CHAPLIN FOR THE DEFENDANT, BENNIE
25 MITCHELL. THAT IS CORRECT, I WOULD LIKE TO HAVE THE

1 WRITTEN, CONTAINS NUMEROUS DIFFERENT INCIDENTS THAT HAVE
2 NOTHING TO DO WITH MY CLIENT. AND THE CONCERN, YOUR
3 HONOR, IS THAT THIS INFORMATION MAY BE MISINTERPRETED BY
4 THE JURY AND THEY MAY ASSOCIATE MR. MITCHELL WITH THESE
5 OTHER EVENTS. THEREFORE I WANT TO MAKE SURE THAT THE ONLY
6 ISSUE THAT MR. MITCHELL IS ANSWERING TO IS THE ONE THAT HE
7 WAS INDICTED ON WHICH IS THE INCIDENT THAT OCCURRED ON
8 10/27/08, NOTHING THAT OCCURRED ON 10/18 OR ANYTHING THAT
9 OCCURRED PRIOR TO THAT OR ANYTHING THAT OCCURRED AFTER
10 10/27. AND THE INCIDENT REPORT, YOUR HONOR, AGAIN IT JUST
11 CONTAINS A WHOLE MISMATCH OF INFORMATION.

12 THE COURT: ALL RIGHT, SIR.

13 MR. MCDANIEL: THE STATE'S POSITION IS THAT WE DON'T
14 WANT TO INTRODUCE PREJUDICIAL EVIDENCE AGAINST THE
15 DEFENDANT THAT HE IS NOT AT TRIAL FOR. I BELIEVE THE
16 DEFENSE'S ISSUE IS, YOUR HONOR, CAN I GIVE YOU A BRIEF
17 FACTUAL OVERVIEW AND I THINK THAT WILL EXPLAIN IT.

18 THE COURT: OKAY.

19 MR. MCDANIEL: THE VICTIM IN THIS CASE COMES HOME TEN
20 DAYS PRIOR TO THIS INCIDENT DATE FROM A CLEMSON GAME ON
21 SATURDAY AND NOTICES THAT SOMEONE HAD BEEN IN HIS HOUSE.
22 AND BASED ON THAT HE BUYS, PURCHASES A DEER CAMERA AND
23 PLACES THAT DEER CAMERA ON THE REFRIGERATOR AND THEN ON
24 THE INCIDENT DATE CATCHES WHO WE BELIEVE IS THE DEFENDANT,
25 ENTERING HIS HOME WHILE HE IS NOT THERE, CATCHES A FEW

1 IMAGES OF THAT.

2 THE COURT: HOW DO YOU PUT IT ON A REFRIGERATOR.

3 MR. MCDANIEL: IT IS JUST ON TOP OF THE REFRIGERATOR,
4 IT IS NOT ACTUALLY CONNECTED TO IT. AND I THINK THE
5 DEFENSE'S CONCERN IS THAT IF WE, ON THAT FIRST INCIDENT
6 THAT HE IS NOT AT TRIAL FOR, NOR DO WE HAVE ANY EVIDENCE
7 THAT HE WAS THE ONE WHO ENTERED THAT HOUSE, HE IS
8 CONCERNED THAT WE WILL GET INTO, I GUESS ON THAT TIME.
9 THE STATE'S POSITION IS THAT I THINK WE CAN GET INTO WHY
10 HE PURCHASED THE CAMERA, YOU KNOW, HE NOTICED SOME ITEMS
11 MISSING FROM HIS HOME AND HE PURCHASED A DEER CAMERA. BUT
12 WE, IN NO WAY, IN OUR CASE-IN-CHIEF ARE GOING TO TRY TO
13 ASSOCIATE THAT THE DEFENDANT ENTERED THE HOME AT THAT
14 TIME. WE JUST WANTED THE JURY TO KNOW AND I THINK IT
15 WOULD BE DETRIMENTAL TO US IF WE JUST WENT IN AND I HAD A
16 DEER CAMERA ON MY REFRIGERATOR. I THINK THE JURY, THE
17 STATE CAN PRESENT SOME EVIDENCE AND IT WILL BE CAREFULLY
18 TAILORED TO WHAT WE ARE TRYING TO ACCOMPLISH, YOU KNOW,
19 SOME CRIMINAL BEHAVIOR OF THE DEFENDANT ON THAT PART. BUT
20 I GUESS WE ARE TRYING TO FIND SOME TYPE OF GUIDANCE FROM
21 YOUR HONOR.

22 THE COURT: YOU ARE NOT PLANNING TO INTRODUCE THE
23 INCIDENT REPORT, ARE YOU?

24 MR. MCDANIEL: NO, SIR.

25 THE COURT: SO, YOU ARE JUST ASKING HOW YOU CAN

1 ELICIT THE EXPLANATION AS TO WHY THE DEER CAMERA WAS
2 PURCHASED?

3 MR. MCDANIEL: YES, SIR.

4 THE COURT: WHAT ABOUT THAT, MR. CHAPLIN?

5 MR. CHAPLIN: YOUR HONOR, THAT IS EXACTLY WHY I AM
6 CONCERNED AND THAT IS THAT NONE OF THE PRIOR INCIDENTS BE
7 ASSOCIATED WITH MR. MITCHELL. AS FAR AS MR. POTTS
8 TESTIFYING AS TO HIS MOTIVE BEHIND DOING SOMETHING OR
9 WHATEVER, THAT WOULD BE, I GUESS THAT WOULD BE HIS OPTION.
10 HOWEVER IT NEEDS TO BE CLEARLY STATED THAT MR. MITCHELL
11 WAS NOT CHARGED WITH ANY ADDITIONAL OFFENSE AND HE IS NOT
12 HERE TO ANSWER TO ANY OF THOSE OFFENSES. AND, YOUR HONOR,
13 I AM CONCERNED, PURSUANT TO RULE 403, WITH REGARDS TO
14 PREJUDICIAL IMPACT OF THAT. I MEAN HE CAN SAY THAT HE HAD
15 SOME PRIOR BREAK-INS AND BOUGHT A DEER CAMERA BUT THE
16 SPECIFICITY OF THIS REPORT CONNECTED TO OUR INCIDENT
17 REPORT OR THE INCIDENT REPORT FROM THE 10/27 INCIDENT THAT
18 WE ARE HERE TO DEFEND, TO ME IT JUST MIGHT LEAD SOMEONE ON
19 THE JURY TO BELIEVE THAT MY CLIENT MIGHT OF BEEN
20 RESPONSIBLE FOR ALL OF THAT AND THAT IS NOT THE CASE.

21 THE COURT: OKAY. SO, IS THAT SUITABLE FOR THE
22 STATE?

23 MR. MCDANIEL: YES, SIR.

24 THE COURT: OKAY. LET'S MAKE SURE THE WITNESSES DO
25 KNOW THE LIMITS OF WHAT THEY NEED TO SAY AND NOT TO SAY.

1 THE COURT: AND THEN NUMBER TEN, YOUR HONOR, WOULD BE
2 ITEMS NOT PROVIDED IN A TIMELY MANNER PURSUANT TO RULE 5
3 AND BRADY WHICH WERE SERVED ON OCTOBER 8TH OF 2009 FROM
4 THE STATE, ASSISTANT SOLICITOR MCDANIEL.

5 MR. MCDANIEL: ALL BRADY MATERIAL HAS BEEN TURNED
6 OVER.

7 THE COURT: OKAY.

8 MR. CHAPLIN: SO, YOUR HONOR, I UNDERSTAND TEN TO BE
9 THAT, IF I DON'T HAVE IT AT THIS TIME IT DOESN'T EXIST AND
10 IT DOESN'T COME IN.

11 MR. MCDANIEL: BRADY RULE 5 MATERIAL, WE HAVE HAD
12 DISCUSSIONS ABOUT WHAT I PLAN TO INTRODUCE AT TRIAL BUT
13 BRADY AND RULE 5 MATERIAL HAVE BEEN TURNED OVER.

14 THE COURT: OKAY.

15 MR. CHAPLIN: SO, IS MY UNDERSTANDING CORRECT, YOUR
16 HONOR?

17 THE COURT: I DON'T KNOW, IT IS NOT REALLY SOMETHING
18 THAT I CAN SAY IT IS A BALL OR STRIKE AT THIS POINT. YOU
19 ARE ASKING ME FOR SOMETHING THAT I CAN'T SEE SO I AM NOT
20 GOING TO DO THAT.

21 MR. CHAPLIN: I AM JUST BASICALLY SAYING, WE ARE AT
22 THE PRETRIAL HEARING ON THIS MATTER AND IT IS MY
23 UNDERSTANDING THAT IF I DO NOT HAVE EVIDENCE, WHAT HAS
24 BEEN TURNED OVER THAT IT SHOULD NOT BE ADMITTED. AND IF
25 IT IS ADMITTED THAT WOULD BE A VIOLATION OF THE RULES OF

1 DISCOVERY AND NON-COMPLIANT WITH THESE MOTIONS.

2 THE COURT: LIKE I SAY, I CAN'T, THERE IS NO WAY FOR
3 ME TO KNOW WHAT TO RULE ON ON THAT. SO, I CAN'T REALLY, I
4 DON'T HAVE ANY CONTEXT FOR RULING, YOU ARE JUST ASKING ME
5 FOR SOME KIND OF ADVISORY OPINION.

6 MR. CHAPLIN: WELL, YOUR HONOR, IF SOMETHING SPECIFIC
7 SHOULD COME UP IN THE MATTER OF THIS HEARING I WILL THEN
8 MAKE THAT MOTION.

9 THE COURT: SURE.

10 MR. CHAPLIN: YOUR HONOR, AT THIS TIME I WOULD LIKE
11 TO GO BACK UP TO ACTUALLY NUMBER SIX. A MOTION TO EXCLUDE
12 VIDEOTAPE PHOTOGRAPHS IN THIS MATTER AND I MAKE THAT
13 MOTION BASED ON REQUIREMENT THAT THE STATE AUTHENTICATE
14 THESE ITEMS AND ALSO SHOW A PROPER CHAIN OF CUSTODY.

15 THE COURT: OKAY. YES SIR, MR. MCDANIEL.

16 MR. MCDANIEL: WELL, YOUR HONOR, WE WILL OFFER AT THE
17 CORRECT TIME THE PHOTOGRAPHS. YOU KNOW, IT IS NOT A
18 VIDEO, THESE ARE PICTURES, THERE IS NO VIDEOTAPE, THEY ARE
19 PICTURES THAT ARE TAKEN FROM A CAMERA THAT A CHAIN OF
20 CUSTODY IS NOT REQUIRED FOR A CAMERA. AS TO THE
21 PHOTOGRAPHS, REALLY ANYONE WHO CAN STATE THAT IT TRULY
22 REFLECTS WHAT I INTEND FOR THAT PICTURE TO REFLECT,
23 WHOEVER CAN AUTHENTICATE IT THAT WAY IS ENOUGH. AND AS
24 FAR AS GETTING PHOTOGRAPHS IN, THE ACTUAL PERSON WHO TOOK
25 THE PICTURES DO NOT, WILL NOT TESTIFY TO THAT. IT IS JUST

1 SOMEBODY WHO HAS SEEN THE SCENE OR WHO HAS SEEN WHAT I AM
2 TRYING TO REFLECT IN THE PICTURE. AND WE PLAN ON DOING
3 THAT, JUDGE.

4 MR. CHAPLIN: YOUR HONOR, LET ME JUST TRY TO BE MORE
5 SPECIFIC. THERE ARE SOME PICTURES OR VIDEO, WHATEVER THE
6 CASE MIGHT BE, THAT THE ALLEGED VICTIM, MR. POTTS, TOOK
7 WITH THE DEER CAMERA. AND I AM ASKING AT THIS PRETRIAL
8 HEARING THAT THAT, THAT THOSE PICTURES BE AUTHENTICATED
9 AND A PROPER CHAIN OF CUSTODY BE ESTABLISHED AT THIS TIME.

10 THE COURT: WELL, I DON'T THINK I CAN MAKE THE STATE,
11 BEFORE TRIAL AND I APPRECIATE WHAT YOU ARE DOING, I
12 UNDERSTAND THAT YOU ARE TRYING--

13 MR. CHAPLIN: AND I DON'T THINK THE STATE IS OPPOSED
14 TO THAT, I THINK THEY ARE PREPARED TO--

15 MR. MCDANIEL: I JUST DON'T THINK THAT, I THINK IT IS
16 A TRIAL ISSUE, I DON'T, I UNDERSTAND WHAT HE IS TRYING TO
17 SHOW BUT TO ME THAT IS SOMETHING THAT HE NEEDS TO PUT UP
18 IN RESPONSE TO THE STATE'S CASE. I WILL DO, I AM PREPARED
19 TO AUTHENTICATE THE PICTURES AND TO SHOW THE PICTURES.
20 BUT TO ME IT APPEARS LIKE THIS IS A TRIAL ISSUE OF WHAT
21 THE DEFENSE IS TRYING TO PUT UP AND NOT, IF I DON'T
22 AUTHENTICATE THE PHOTOS AT TRIAL THEY DON'T COME IN. I
23 DON'T HAVE TO HAVE A CHAIN AS FAR AS THE CAMERA BUT AT
24 LEAST IT DOESN'T SEEM LIKE IT IS AN ITEM THAT DOES REQUIRE
25 A CHAIN.

1 THE COURT: I DON'T THINK HE HAS TO HAVE A CHAIN OF
2 CUSTODY FOR THESE EXHIBITS. IN ORDER TO HAVE THEM
3 ADMITTED INTO EVIDENCE, HOWEVER, HE WOULD HAVE TO LAY THE
4 FOUNDATION WHICH WOULD BE FOR A WITNESS TO AUTHENTICATE
5 THAT THEY CONSTITUTE AN ACCURATE AND FAIR REPRESENTATION
6 OF WHAT IS DEPICTED ON THE PHOTOGRAPH. BEYOND THAT I AM
7 NOT SURE WHAT ELSE WOULD BE REQUIRED UNDER THE RULES OF
8 EVIDENCE TO MAKE IT ADMISSIBLE.

9 MR. CHAPLIN: YOUR HONOR, IT WAS MY UNDERSTANDING
10 THAT ONE OF THE REASONS THAT WE WERE COMING PRIOR TO THIS
11 TRIAL TOMORROW MORNING IS SO THAT WE CAN AUTHENTICATE AND
12 ENSURE, I MEAN THIS CASE TURNS ON SOME PICTURES THAT MR.
13 POTTS SAYS HE TOOK. NOW, IF THOSE PICTURES DON'T COME IN
14 FOR WHATEVER REASON THEN THERE IS A POSSIBILITY THAT WE
15 DON'T HAVE TO STRIKE A JURY OR DO ANYTHING ELSE. IT JUST
16 SEEMS THAT IT WOULD BE APPROPRIATE AT THIS TIME WE HAVE
17 EVERYBODY HERE, WE HAVE THE TECHNOLOGY, WE HAVE EVERYTHING
18 THAT WE NEED THAT WE CAN MOVE FORWARD AND AUTHENTICATE
19 THOSE PICTURES AT THIS TIME.

20 THE COURT: WELL, IS THE STATE INTENDING TO CALL MR.
21 POTTS AS A WITNESS TOMORROW?

22 MR. MCDANIEL: YES, SIR.

23 THE COURT: AND WILL HE BE A WITNESS THROUGH WHICH
24 CERTAIN PHOTOGRAPHS TAKEN FROM THE DEER CAMERA SUBMITTED
25 IN THE STATE'S CASE?

1 MR. MCDANIEL: YES, SIR.

2 THE COURT: I DON'T THINK THAT YOU ARE ENTITLED TO
3 HAVE A DRY RUN OF THAT, MR. CHAPLIN.

4 MR. CHAPLIN: SO, I TAKE IT THEN, YOUR HONOR, THAT
5 YOU ARE DENYING THAT MOTION?

6 THE COURT: WELL, I DON'T KNOW, YOU ARE ASKING FOR A
7 PRETRIAL REHEARSAL OF THE STATE'S CASE AND I DO DENY THAT.
8 AND IF YOU CAN PROVIDE ME AUTHORITY TO SUPPORT THAT I WILL
9 BE GLAD TO CONSIDER IT.

10 MR. CHAPLIN: YOUR HONOR, MAY WE APPROACH?

11 THE COURT: ABSOLUTELY.

12 (WHEREUPON, A BENCH CONFERENCE WAS HELD.)

13 THE COURT: YES SIR, MR. CHAPLIN.

14 MR. CHAPLIN: SO IT IS MY UNDERSTANDING THEN THAT AS
15 FAR AS ITEM SIX IS CONCERNED, THAT THE TRIAL IN THIS
16 MATTER THAT IS WHEN THE FOUNDATION WILL BE LAID AND
17 AUTHENTICATION AND THOSE ISSUES WILL BE ADDRESSED AND I
18 WILL HAVE AN OPPORTUNITY TO OBJECT AT THAT TIME.

19 THE COURT: SO, WHEN THEY ARE, IF THEY ARE PROPOSED
20 AS EVIDENCE IN THIS CASE YOU WILL CERTAINLY HAVE AN
21 OPPORTUNITY TO MAKE ANY OBJECTION YOU DEEM FURTHER, YES
22 SIR.

23 MR. CHAPLIN: YOUR HONOR, THEN WE WILL GO UP TO
24 NUMBER THREE. I GUESS WE CAN DO THREE AND FOUR, EXCLUDING
25 OPINION TESTIMONY BY LIEUTENANT MCCLURKIN AS TO THE

1 IDENTIFICATION OF THE IMAGES IN THE VIDEOTAPE.

2 THE COURT: OKAY.

3 MR. CHAPLIN: YOUR HONOR, THIS IS A SOMEWHAT UNIQUE
4 SITUATION IN THAT UNDER NEIL V. BIGGERS WE WOULD HAVE A
5 HEARING TO DETERMINE WHETHER OR NOT THE ID OF A WITNESS IS
6 RELIABLE. HOWEVER, IN THIS CASE WE HAVE SOMEONE WHO LOOKS
7 AT A PICTURE FROM A DEER CAMERA AND MAKES THE
8 IDENTIFICATION. IT IS MY UNDERSTANDING THAT THIS PERSON
9 WILL BE MAKING AN IN-COURT IDENTIFICATION OF, INTENDS TO
10 SAY THAT IS MY CLIENT IN THE PICTURE. THEREFORE I WANTED
11 TO ADDRESS THE MATTER UNDER NEIL V. BIGGERS AND ASK THE
12 COURT'S GUIDANCE WITH REGARDS TO SINCE THIS IS NOT BASED
13 ON THEIR PERSONAL KNOWLEDGE OF THE INCIDENT, THEY WEREN'T
14 THERE, THEY HAVE NO INFORMATION ON A PERSONAL LEVEL ON
15 WHAT OCCURRED. ALL THEY ARE SEEING IS THAT THEY SEE
16 SOMEBODY IN A PICTURE AND BASED ON LIVING IN THIS
17 COMMUNITY FOR AROUND 20 YEARS THAT THEY MAKE AN
18 IDENTIFICATION. BASICALLY THEY ARE GIVING AN OPINION AS A
19 LAY PERSON IN THIS PARTICULAR MATTER.

20 THE COURT: OKAY. WHAT IS THE STATE'S RESPONSE TO
21 THAT OBJECTION?

22 MR. MCDANIEL: I THINK WE COVERED THAT EARLIER, I
23 GUESS IT IS LAY OPINION BUT IT IS FIRST HAND PERSONAL
24 KNOWLEDGE THAT THAT IS, THE STATE'S POSITION IS THAT, WHAT
25 LAW ENFORCEMENT CAN SAY IS WE THINK THAT IS HIM. THE JURY

1 IS GOING TO DECIDE WHETHER OR NOT THAT IS HIM OR NOT. THE
2 STATE'S POSITION IS THAT THEY CAN TESTIFY TO WHO THEY
3 THOUGHT WAS HIM BASED ON THEIR PERSONAL KNOWLEDGE OF HIM.

4 THE COURT: WELL, AS TO THE OBJECTION OF IT BEING LAY
5 OPINION, WHETHER THEY THINK SOMEONE IN THE PHOTOGRAPH IS A
6 CERTAIN PERSON, IDENTIFY THE INDIVIDUAL WOULD REQUIRE
7 EXPERT OPINION TESTIMONY. I THINK YOUR OBJECTION MAY BE
8 TO THE CONSTITUTIONAL ISSUES, IS THAT RIGHT?

9 MR. CHAPLIN: I WILL TRY TO BE A LITTLE MORE
10 SPECIFIC. YOUR HONOR, THIS EXACT SAME ISSUE WAS BROUGHT
11 TO THE ATTENTION OF THE SUPREME COURT HERE IN SOUTH
12 CAROLINA IN A RECENT CASE OF 2009 WHICH I WILL PROVIDE AND
13 IT IS INVOLVING AN ATTORNEY THAT WAS CONVICTED OF
14 MURDERING SOMEONE IN A NIGHTCLUB. YOUR HONOR, I THINK WE
15 HAVE SOME GUIDANCE IN THIS PARTICULAR MATTER IN THAT THESE
16 CASES ARE VERY SIMILAR. AND IN THE HERRING MATTER, YOUR
17 HONOR, POLICE OFFICERS AND OTHER PERSONS LOOKED AT AN
18 IMAGE AND THEN TESTIFIED TO THE COURT AS TO WHAT THEIR
19 OPINION WAS AT TO WHAT IS IN THAT IMAGE OR THAT PICTURE.
20 THE ATTORNEY FOR MR. HERRING OBJECTED AT THAT TIME AND
21 ASKED FOR A MISTRIAL AS A RESULT OF THAT TESTIMONY. AND
22 IT IS EXACTLY WHAT YOUR HONOR MENTIONED EARLIER, LAY
23 OPINIONS REGARDING THIS MATTER. AND ON PAGE EIGHT OF THAT
24 DECISION, YOUR HONOR, IT CLEARLY STATES LAY OPINIONS
25 REGARDING VIDEOTAPES. PARAGRAPH THREE STATES, THREE

1 WITNESSES TESTIFIED AS TO THEIR INTERPRETATION OF A VIDEO.
2 I COMPARE THAT TO A WITNESS TESTIFYING AS TO HIS
3 INTERPRETATION OF A PICTURE. IN THIS CASE THEY WERE
4 DEPICTING THE OUTSIDE OF A CLUB AT THE NIGHT IN QUESTION.
5 IN MY CASE WE ARE TALKING ABOUT A PICTURE THAT WAS
6 ALLEGEDLY TAKEN AT THE HOME OF MR. POTTS AT THE NIGHT IN
7 QUESTION. SO, IT GOES ON TO SAY TWO WITNESSES AND A
8 POLICE OFFICER TESTIFIED AND THEY SAW A FLASH OF LIGHT
9 COMING FROM THE VEHICLE. THE THIRD WITNESS TESTIFIED THAT
10 HE SAW A SHOT FIRED FROM THE VEHICLE LATER CLARIFYING THAT
11 OBVIOUSLY WE SAW THE VIDEO WHERE THE SHOT WAS FIRED FROM
12 INSIDE THE VEHICLE. SO, THERE ARE LAY PEOPLE LOOKING AT
13 PICTURES OR VIDEOS AND GIVING OPINIONS. AND THE COURT
14 SAID IN RESPONSE TO HERRING'S OBJECTIONS, TO THE TESTIMONY
15 THE TRIAL JUDGE ISSUED A CURATIVE INSTRUCTION TO THE JURY
16 IN EACH INSTANCE. THAT IS WHAT IT TOOK TO RESOLVE THIS
17 MATTER, IT TOOK A CURATIVE INSTRUCTION. AND WHAT THE
18 JUDGE IN THAT SAID, IN THAT CASE SAID TO THE EFFECT THAT
19 THE WITNESS COULD NOT GIVE AN OPINION AS TO WHETHER OR NOT
20 THE FLASH WAS A GUNSHOT. IN MY CASE I AM SAYING THE
21 WITNESS CANNOT SAY WHETHER OR NOT IN THEIR OPINION THE
22 PERSON IN THAT PICTURE IS MR. MITCHELL. AND THEN THE
23 COURT GOES ON TO INSTRUCT, SAID THE JURY SHOULD STRIKE ANY
24 SUCH INFERENCE FROM ITS MEMORY. NOW, WE DON'T HAVE TO
25 WORRY ABOUT THAT IN A CURATIVE MATTER, YOUR HONOR, BECAUSE

1 WE ARE HERE TODAY TO ADDRESS IT UPFRONT. THE TRIAL COURT
2 INSTRUCTED THE JURY THAT YOU ARE, THE ONLY ONES WHO CAN
3 DRAW FROM CONCLUSIONS FOR WHAT YOU SAW ON THE TAPE AND
4 HERRING'S TESTIMONY IN THIS REGARD GOES ON FURTHER TO SAY
5 THAT NOBODY SAW A SHOT FIRED BASED ON THE TESTIMONY THAT
6 WE HAVE HEARD SO FAR, IT IS ALL FROM THE VIDEO. THAT IS
7 THE SAME IN THIS CASE, YOUR HONOR, NO ONE SAW ANYONE IN
8 THAT PARTICULAR HOUSE, IT IS ALL FROM THE PICTURES OR THE
9 VIDEO, WHATEVER WAS CONTAINED IN THAT DEER CAMERA. AND IT
10 GOES ON TO SAY, YOU ARE GOING TO HAVE THE VIDEO, YOU CAN
11 LOOK AT IT, YOU CAN DETERMINE WHATEVER YOU CHOOSE TO
12 DETERMINE FROM IT. I AM ASKING THAT THAT BE THE SAME
13 HERE, I DON'T SEE WHY WE SHOULD DEPART FROM AN ORDER OF
14 THE SUPREME COURT. NOW, THE COURT GAVE A CURATIVE
15 INSTRUCTION IN THAT CASE, YOUR HONOR, BECAUSE AND I STILL
16 DON'T KNOW IF THAT REALLY FIXED THE PROBLEM. I DO NOT
17 THINK THAT THAT WOULD ADDRESS THE ISSUE HERE. AND THE
18 OTHER DISSIMILARITY IS THAT THERE WAS A LOT OF OTHER
19 EVIDENCE THAT THIS JURY COULD PAY ATTENTION TO. IN THIS
20 CASE, YOUR HONOR, THIS IS THE ONLY PIECE OF EVIDENCE THAT
21 IS REALLY GOING OUT THERE TO THEM. THE QUESTION AT THIS
22 TRIAL IS WHO IS THE PERSON IN THIS PICTURE. AND IN THE
23 HERRING DECISION, YOUR HONOR, THE COURT CLEARLY STATES YOU
24 ARE GOING TO HAVE THE VIDEO, IN THIS CASE THEY ARE GOING
25 TO HAVE THE PICTURES, THEY CAN LOOK AT IT AND THEY CAN

1 DETERMINE WHATEVER THEY CHOOSE TO DETERMINE FROM IT. AND
2 I ASK THE COURT NOT DEPART FROM THIS DECISION AND APPLY
3 THE RULING IN HERRING TO THIS PARTICULAR MATTER.

4 THE COURT: WELL, WHAT RULE DID THE SUPREME COURT
5 STATE THAT FOR THE ADMISSION OF THE OPINION TESTIMONY
6 ABOUT WHAT THE GUN FLASH WAS, OR WHATEVER THE GUN FLASH AT
7 NIGHT. WHAT RULE DID THEY SAY THAT VIOLATED, I DON'T
8 UNDERSTAND.

9 MR. CHAPLIN: YOUR HONOR, I AM READING THE ORDER FROM
10 THE SUPREME COURT. I AM LOOKING AT THE FACTS IN THIS
11 CASE, I AM LOOKING AT THE FACTS IN MY CASE, I AM TELLING
12 YOU THAT THESE ARE VERY SIMILAR IN NATURE AND THAT WE
13 SHOULD COMPLY WITH THESE DIRECTIONS. THAT IS MY ARGUMENT.

14 THE COURT: WELL, THEY NEVER DID SAY WHAT WAS WRONG
15 WITH THAT.

16 MR. CHAPLIN: WHAT THEY SAID WAS THAT IT WAS IMPROPER
17 FOR THESE LAY PEOPLE TO TESTIFY AS TO WHAT THEY ARE
18 SEEING, AN ISSUE HERE, YOUR HONOR, IT IS JUST RIGHT IN OUR
19 FACE. THE JURY IS GOING TO SEE THE PICTURES, THEY HAVE AN
20 OPPORTUNITY TO REVIEW IT AND IF ANYTHING THE COURT WAS
21 CONCERNED ABOUT THE PREJUDICIAL IMPACT THAT IT WOULD HAVE
22 OR IT DID HAVE ON MR. HERRING'S CASE FOR THESE PEOPLE TO
23 INTERPRET SOMETHING THAT THE JURY CAN CLEARLY INTERPRET ON
24 THEIR OWN. THESE PEOPLE ARE NOT EXPERTS, THEY ARE GIVING
25 LAY OPINIONS AND IT IS NOT APPROPRIATE. AND THAT IS WHAT

1 THE COURT RULED. AND, YOUR HONOR, THIS CASE IS IDENTICAL
2 TO THE ONE THAT YOUR HONOR WOULD BE HEARING TOMORROW.

3 THE COURT: WELL, I UNDERSTAND YOUR ARGUMENT BASED ON
4 THE HERRING CASE AND MR. MCDANIEL, WHAT IS YOUR POSITION,
5 SIR.

6 MR. MCDANIEL: YOUR HONOR, I THINK WHAT IS IN DISPUTE
7 HERE IS WHAT A FLASH OF LIGHT WAS AND THERE IS NOT AN
8 IDENTIFICATION OF A PERSON. IT ALSO SAYS THAT A CURATIVE
9 INSTRUCTION IS WHAT I THINK YOU WOULD INSTRUCT ANY JURY
10 ABOUT, I MEAN, YOU GIVE IT AS MUCH WEIGHT AS YOU WANT TO
11 AND IT SEEMS LIKE THAT IS WHAT THE COURT DID HERE. AND
12 THEY FOUND THAT THE COURT'S CURATIVE INSTRUCTION WAS
13 SUFFICIENT IN CURING THE PREJUDICE. IT LOOKS LIKE THESE,
14 THEY HAD THREE WITNESSES TRYING TO DETERMINE WHAT A FLASH
15 OF LIGHT WAS. I MEAN IT IS A TOTAL DIFFERENT ISSUE OF TWO
16 LAW ENFORCEMENT OFFICERS THAT HAS KNOWN SOMEBODY FOR 20
17 YEARS AND 35 YEARS AND BEING TO IDENTIFY THE PICTURE OF
18 WHAT THEY THINK OR WHO THEY THINK IS THAT PERSON. I THINK
19 THERE IS CONCERNS THAT, I GUESS HERE WE DON'T KNOW HOW THE
20 FOUNDATION IS LAID, THAT THESE WITNESSES WERE ABLE TO SAY,
21 WELL, THAT IS GUNSHOT. HERE THE LAW ENFORCEMENT WOULD
22 SAY, I HAVE LIVED HERE 20 YEARS AND IDENTIFY BENNIE
23 MITCHELL. SO, THE DIFFERENCE IS WHAT WE ARE LOOKING AT IN
24 A CASE, I AM NOT SURE THAT ANY OF THESE LAY PERSONS WERE
25 QUALIFIED TO DECIDE WHAT A FLASH WAS OR NOT ON VIDEO. BUT

1 HERE THE STATE'S BURDEN, I GUESS LAY A FOUNDATION THAT
2 THEY CAN IDENTIFY AND ALSO IT IS GOING TO DETERMINE
3 WHETHER OR NOT THE JURY FEELS LIKE THEY BELIEVE OR NOT.
4 AND I DON'T KNOW WHETHER IT GOES INTO LAY OPINION
5 TESTIMONY. THE OFFICER WILL SAY I HAVE KNOWN HIM FOR 20
6 YEARS. WE ARE NOT TRYING TO INTERPRET SOMETHING ON VIDEO,
7 THEY ARE POSITIVELY IDENTIFYING SOMEBODY THEY HAVE KNOWN
8 FOR 20 YEARS AND I THINK THAT IS DIFFERENT THAN HAVING
9 THREE PEOPLE TESTIFY TO INTERPRET THIS VIDEO OF WHAT YOU
10 SEE.

11 THE COURT: WELL, I DON'T SEE ANY RULES THAT THE
12 SUPREME COURT EVER RECITED AGAINST DISCUSSION, LAY
13 OPINION. I AM ASSUMING THAT THEY ARE RELYING ON RULE 701
14 AND THE SUPPOSED ERROR WAS IN ADMITTING THE TESTIMONY OF
15 VIEWING THE VIDEOTAPE AND INTERPRETING THE IMAGE ON THE
16 TAPE. THE PEOPLE DID NOT PERSONALLY OBSERVE IS THE
17 QUESTION ON THE TAPE. IN ORDER FOR A LAY OPINION TO BE
18 ADMISSIBLE UNDER RULE 701 IT HAS TO BE BASED OF OPINIONS
19 OR INFERENCES THAT ARE, NUMBER ONE, ARE RATIONALLY BASED
20 ON THE PERCEPTION OF THE WITNESS; NUMBER TWO, IT MUST ALSO
21 BE A CLEAR UNDERSTANDING OF THE WITNESSES TESTIMONY OR THE
22 DETERMINATION OF THE FACT IN ISSUE. AND THIRD, DO NOT
23 REQUIRE SPECIAL KNOWLEDGE, SKILL. IT IS A PERSONAL
24 KNOWLEDGE REQUIREMENT REQUIRED IN THAT FIRST PRONG ON RULE
25 701. BUT I AM NOT SO SURE THAT PERSONAL KNOWLEDGE ELEMENT

1 WOULD NOT BE MET BY SOMEONE IN THE PHOTOGRAPH OF SOMEONE
2 RATHER THAN SEEING THE PERSON. SO, I DON'T HAVE A PROBLEM
3 FINDING THE FIRST PRONG OF THAT. I DO HAVE SOME CONCERN
4 ABOUT WHETHER THE OFFICER'S TESTIMONY ABOUT AND I ASSUME
5 THIS IS GOING TO ARISE IN THE CONTEXT SOME OF THE STATE'S
6 WITNESSES, THE POLICE OFFICERS THAT HAVE SEEN THE
7 PHOTOGRAPHS ON THE DEER CAMERA AND SAYING I LOOKED AT
8 THEM, I RECOGNIZE MR. MITCHELL. AND THE REASON I
9 RECOGNIZE HIM BECAUSE I HAVE KNOWN HIM 20 YEARS. IS THAT
10 CORRECT?

11 MR. MCDANIEL: THAT IS CORRECT.

12 THE COURT: HOW DOES THAT HELP THE JURY?

13 MR. MCDANIEL: WELL, IT GOES TO THE PERSONAL
14 KNOWLEDGE OF THE PICTURE, OF THE IDENTIFICATION. I MEAN
15 IT HELPS THE JURY KNOWING THAT SOMEONE HAS KNOWN THIS
16 PERSON THAT IS ON TRIAL, THAT HAS KNOWN THIS PERSON FOR 20
17 YEARS. SO, IT HELPS THEM, A CLEAR UNDERSTANDING OF THE
18 WITNESSES TESTIMONY OR DETERMINATION OF THE FACT AT ISSUE.
19 THE FACT AT ISSUE IS THAT HE, THE PICTURE, THE PERSON IN
20 THE PICTURE. SO, SOMEONE THAT HAS KNOWN HIM FOR 20 YEARS,
21 THAT WOULD HELP THE JURY TO GO TO THAT ULTIMATE FACT THAT
22 THAT WAS HIM AND THAT IS THE FACT THAT IS IN DISPUTE. AND
23 THAT WOULD AID THE JURY IN DECIDING ONE WAY OR THE OTHER.
24 IT AIDS THEM IN DETERMINING THE ULTIMATE FACT AT ISSUE
25 HERE. WHETHER OR NOT THAT WAS BENNIE MITCHELL IN THE

1 HOUSE AND ON THAT PICTURE.

2 THE COURT: WELL, HOW IS THAT DIFFERENT, YOU THINK
3 THE STATE WOULD BE ABLE TO CALL IN, FOR INSTANCE, MR.
4 MITCHELL'S HIGH SCHOOL CLASSMATES AND ASK THEM TO LOOK AT
5 THE PICTURE AND SAY, DO YOU RECOGNIZE THAT PERSON. DO YOU
6 THINK THAT WOULD BE PROPER?

7 MR. MCDANIEL: I JUST DON'T THINK THAT IT IS, I THINK
8 IT IS OUTSIDE, I DON'T KNOW WHETHER THAT IS PROBATIVE IN
9 THE CASE AT HAND.

10 THE COURT: HOW IS THAT DIFFERENT THAN HAVING AN
11 OFFICER?

12 MR. MCDANIEL: WELL, THIS IS THE INVESTIGATING
13 OFFICER AND HE, IF I JUST BROUGHT SOMEBODY IN THAT
14 WOULDN'T HELP THEM DETERMINE ON THE FACT THAT IT IS GOING
15 TO THIS INCIDENT. WHO WAS IN THAT HOUSE THAT NIGHT. BUT
16 ALSO HAS KNOWN FOR 20 YEARS TO SAY THAT IS BENNIE
17 MITCHELL, THAT GOES TO THE DETERMINING FACT THAT BENNIE
18 MITCHELL WAS IN THE HOUSE THAT NIGHT. I GUESS THAT IS
19 WHAT HE IS BEING TRIED FOR. THE ULTIMATE FACT IS THE
20 IDENTIFICATION AND AN OFFICER THAT HAS KNOWN HIM FOR 20
21 YEARS THAT IS INVOLVED IN THE CASE LENDS ITSELF MUCH MORE
22 TO THE IDENTIFICATION THAN BRINGING SOMEBODY WHO IS NOT
23 INVOLVED IN THE CASE JUST FOR AN IDENTIFIER. I MEAN, THEN
24 I WOULD THINK YOU WOULD HAVE A PROBLEM WITH BIGGERS ISSUE
25 THAT MR. CHAPLIN IS CONCERNED ABOUT. I GUESS SOMEBODY WHO

1 WENT TO HIGH SCHOOL WITH HIM WOULD OF ONLY REMEMBERED HIM
2 AS HE WAS IN HIGH SCHOOL. IT HAS BEEN SOME YEARS LATER
3 AND I THINK SOMEBODY THAT HAS KNOWN HIM OVER 20 YEARS
4 WOULD BE ABLE TO MORE IDENTIFY HIM.

5 THE COURT: WHAT ABOUT A FAMILY MEMBER, WHAT IS YOUR
6 OPINION. ISN'T THAT WHAT THE JURY, AS YOU JUST SAID,
7 ULTIMATELY CHARGED WITH THE RESPONSIBILITY OF DETERMINING
8 WHETHER THAT IS HIM IN THE PICTURE. THAT IS AN ULTIMATE
9 ISSUE WHICH UNDER RULE 704--

10 MR. MCDANIEL: 704?

11 THE COURT: 704. BUT IT STILL HAS TO BE HELPFUL TO
12 THE JURY AND NOT ESSENTIALLY TELL THEM WHAT RESULT TO
13 REACH. THERE IS A LOT OF WHAT OPINION TESTIMONY CASES ARE
14 DISCUSSED. AND AGAIN, ASSUMING THAT IS WHAT THEY WERE
15 CONCERNED ABOUT IN THE HERRING CASE.

16 MR. MCDANIEL: IN THE HERRING CASE, IT LOOKS LIKE YOU
17 HAVE AN EXPERT TO TRY TO DETERMINE WHAT IS ON THAT VIDEO.
18 I MEAN, IT HAS NOTHING TO DO WITH THE IDENTIFICATION OF
19 THE DEFENDANT IN THE HERRING CASE. IT IS THREE PEOPLE
20 THAT WERE ACTUALLY ON THE SCENE THAT NIGHT AND PLAY A
21 VIDEO AND SAY, WHAT DO YOU THINK YOU SEE THERE. I MEAN I
22 AM ASSUMING THAT IS HOW THEY KIND OF OFFERED THE
23 TESTIMONY.

24 THE COURT: WELL, YOU ARE RIGHT, WE DON'T KNOW. BUT
25 I CAN GLEAM FROM THE OPINION ITSELF THAT THEY WERE

1 CONCERNED ABOUT THE PERSONAL KNOWLEDGE REQUIREMENT. AND
2 AGAIN THEIR DISCUSSION ISSUE UNDER LAY OPINION, LAY
3 OPINION REGARDING THE VIDEO TAPE. SO, YOU MAY BE RIGHT,
4 IT MAY OF BEEN MORE THE EXPERT WITNESSES TESTIMONY ISSUE,
5 APPARENTLY WE WILL NEVER KNOW. BUT NEVERTHELESS, I AM
6 CONCERNED HOW IT IS HELPFUL TO THE JURY AND HOW IT
7 OVERCOMES RULE 403, HAVING THE OFFICER IDENTIFY HIM BASED
8 ON VIDEOTAPE. I MAY NOT BE CLEAR, I AM NOT CONCERNED
9 ABOUT PERSONAL KNOWLEDGE REQUIREMENT, I AM CONCERNED ABOUT
10 HELPING THE JURY. WHAT DOES IT REALLY BRING TO THE TABLE
11 FOR A LAW ENFORCEMENT OFFICER TO SAY, YEAH, I RECOGNIZE
12 HIM IN THAT. IF THE IDENTITY OF THE DEFENDANT, THE
13 PERPETRATOR IS IN FACT THE ULTIMATE ISSUE THE JURY HAS TO
14 DETERMINE, DOESN'T IT CAUSE UNDUE PREJUDICE TO THE
15 DEFENDANT TO HAVE A POLICE OFFICER SAY HE RECOGNIZES THAT
16 PERSON AND IN HIS OPINION THAT IS WHO IT IS.

17 MR. MCDANIEL: OF COURSE, THERE IS PREJUDICE, I WOULD
18 ADMIT THAT IT ALWAYS IS IN A COURT OF IDENTIFICATION BUT
19 IT IS NOT UNDUE BASED ON HOW WE HAVE DECIDED TO PRESENT IT
20 TO THE JURY, YOUR HONOR. I MEAN, I THINK YOUR HONOR, I
21 UNDERSTAND THAT IT LOOKS LIKE THE POLICE OFFICER IDENTIFY,
22 IT ADDS BUT THAT IS NO DIFFERENCE THAN BRINGING SOMEONE
23 OFF THE STREET AND JUST SAYING, I HAVE KNOWN HIM FOR 20
24 YEARS AND THAT IS HIM. WE ARE PRESENTING THE FACT THAT I
25 HAVE LIVED IN THIS COMMUNITY AND I KNOW BENNIE MITCHELL.

1 THAT IS HOW FOR THE JURY IT GOES TO THE ULTIMATE FACT.

2 THE COURT: WELL, MR. CHAPLIN, LET ME ASK YOU THIS.

3 LET'S SAY, CHANGE THE SCENARIO A LITTLE BIT. IF THE

4 OFFICER IS, JUST HAPPENS TO BE WALKING BY AND SOMEBODY

5 RUNS OUT OF THE BANK WITH A MASK ON AND A BAG AND DOLLAR

6 BILLS AND TWENTIES AND HUNDREDS ARE FLYING OUT OF THE BAG

7 THROUGH THE WIND AND THE PERPETRATOR HAS GOT A GUN AND HE

8 RUNS AWAY AND THE OFFICER COMES INTO COURT AND SAYS, WELL,

9 I WAS INVESTIGATING THIS CASE AND IN FACT I WAS THERE AND

10 I SAW THE PERSON RUNNING AND HE RUNS JUST LIKE JOE RUSSELL

11 WHO I WENT TO HIGH SCHOOL WITH. AND BASED ON THAT IN MY

12 OPINION THAT WAS MR. RUSSELL WHO RAN OUT OF THE BANK.

13 WHAT RULE OF EVIDENCE IS PART OF THAT TESTIMONY?

14 MR. CHAPLIN: WELL, YOUR HONOR, I THINK THAT THAT

15 SCENARIO IS MORE IN LINE WITH THE NEIL V. BIGGERS ISSUE,

16 THE RELIABILITY OF THE IDENTIFICATION. I THINK WHAT YOUR

17 HONOR JUST STATED IS THAT IF AN OFFICER WAS ON THE SCENE,

18 HE SAW A PERSON RUNNING OUT OF THE BANK WITH A MASK ON, HE

19 HAD PERSONAL KNOWLEDGE OF WHAT WAS GOING ON, THE WHOLE

20 NINE YARDS.

21 THE COURT: MAYBE THE MASK WASN'T A GOOD FACT. I

22 TAKE THE MASK OFF.

23 MR. CHAPLIN: HE IS THERE TESTIFYING AS TO WHAT HE

24 SAW. WHAT THIS CASE IS ABOUT, YOUR HONOR, DIRECTLY ON

25 POINT WITH WHAT WE ARE PRESENTING AND THAT IS SOMEBODY

1 LOOKING AT A VIDEO OR A PICTURE AND THEN GIVING THEIR
2 OPINION TO TWELVE PEOPLE WHO CLEARLY HAVE THE ABILITY TO
3 FORM THEIR OWN OPINION. THAT IS WHAT WE ARE ASKING THEM
4 TO COME HERE TOMORROW AND DO. THEY ARE TELLING THEM WHAT
5 TO PICK AND THAT IS NOT FAIR TO THE DEFENSE. AND I THINK
6 THAT IS WHAT THE SUPREME COURT WAS MORE CONCERNED THAN
7 ANYTHING, IS THAT LIKE IN THAT CASE IT WAS A VERY SERIOUS
8 MATTER. MY CLIENT IS ON TRIAL FOR A VERY SERIOUS MATTER.
9 AND THE OTHER ISSUE IS THAT, IN THE HERRING CASE, YOUR
10 HONOR, I WASN'T THERE BUT I UNDERSTAND THAT THERE WAS A
11 GREAT DEAL OF EVIDENCE FOR THE JURY TO LOOK AT. SO, I
12 THINK THE JURY INSTRUCTION MIGHT OF WORKED IN THAT CASE,
13 IT WON'T WORK HERE BECAUSE THERE IS ONLY ONE THING THAT
14 THE JURY IS GOING TO BE SEEING TOMORROW AND THAT IS A
15 PICTURE. AND THEY WILL HAVE IT, THEY WILL GET TO TAKE IT
16 BACK WITH THEM TO DELIBERATE, THEY WILL LOOK AT, THEY WILL
17 EXAMINE IT UP AND DOWN, THE STATE HAS ALREADY SAID THEY
18 ARE GOING TO HAVE TO AUTHENTICATE IT, TO GET ALL OF THAT
19 DONE. THEN WE ARE GOING TO TURN THAT OVER TO THEM AND
20 SAY, NOW YOU TELL US WHO YOU THINK THAT IS. NOW, FOR A
21 POLICE OFFICER'S TO GET ON THE STAND AND GIVE THEIR LAY
22 OPINION WHICH IS A TOTAL VIOLATION IN THE RULING OF
23 HERRING IS VERY PREJUDICIAL IN VIOLATION OF RULE 403 AND
24 THE OPEN ISSUE THAT WE ARE HERE TO DECIDE, WE ARE
25 BASICALLY DECIDING FOR THEM. AND IT WILL BE A REVERSAL

1 ERROR.

2 THE COURT: THE ISSUE OF THE OFFICER BEING PRESENT AT
3 THE SCENE WHEN THE CRIME OCCURRED, IN OTHER WORDS, THE
4 BASIS OF THE WITNESSES KNOWLEDGE WAS UNIQUE, UNLIKE HERE
5 WHERE THE BASIS OF THE WITNESSES KNOWLEDGE IS SOMETHING
6 THAT YOU SAY THE JURY WILL HAVE AS WELL. CERTAINLY
7 WOULDN'T HAVE THE EYEWITNESS SCENARIO. SO, I GUESS I AM
8 GOING BACK, MR. MCDANIEL, I AM ASKING YOU AGAIN WHAT IS IT
9 THAT WE CAN DO ADVANCE THE BALL OF THE STATE'S CASE TO
10 ALLOW THE OFFICER TO TESTIFY WHAT HIS OPINION IS TO THE
11 VIDEOTAPE.

12 MR. MCDANIEL: IT IS THE ONLY IDENTIFICATION THAT CAN
13 BE MADE IN THIS CASE. I MEAN, THERE IS NO EYEWITNESS,
14 NOBODY WAS PRESENT IN THE HOME AND THE VICTIM IN THIS CASE
15 WAS UNABLE TO IDENTIFY THE DEFENDANT. IT FURTHERS THE
16 CASE IN THAT THE IDENTITY OF THE DEFENDANT IS AT ISSUE AND
17 I HAVE A LAW ENFORCEMENT OFFICER WHO HAS KNOWN HIM FOR 20
18 YEARS WHO CAN POSITIVELY IDENTIFY HIM. NOW, IT IS HIS
19 OPINION BASED ON HIS PERSONAL KNOWLEDGE OF THE DEFENDANT.
20 AND I THINK THAT IS WHAT THE JURY ULTIMATELY DECIDES, HOW
21 MUCH WEIGHT THEY GIVE THAT BUT IT ADVANCES THE STATE'S
22 CASE IN THAT IT IS THE CRITICAL ELEMENT OF US PROVING THAT
23 THE DEFENDANT ACTUALLY WAS THE DEFENDANT IN THAT HOUSE
24 THAT NIGHT AND HE IS THE CORRECT INDIVIDUAL BEING TRIED
25 BEFORE A JURY.

1 THE COURT: WELL, THE JURY OF COURSE MAKES THE
2 ULTIMATE DETERMINATION. THEY CERTAINLY CAN DECIDE THE
3 FACT, THE CREDIBILITY OF THE EVIDENCE, WHETHER TO ACCEPT
4 IT OR REJECT IT WOULD BE THE WEIGHT THAT THEY THINK IT
5 DESERVES. I DO FIND THAT THE IDENTIFICATION IS RELEVANT.
6 I DO FIND THAT IN THIS CASE WHAT HAS BEEN PRESENTED TO ME
7 MEETS THE CRITERIA OF RULE 701. AND THAT IT IS LAY
8 EVIDENCE AND CAN FORM AN OPINION, IT IS RATIONAL BASED ON
9 EXCEPTION OF A WITNESS, IT IS HELPFUL IN DETERMINATION OF
10 THE FACT OF ISSUE AND A CLEAR UNDERSTANDING OF THE
11 WITNESSES TESTIMONY. IT DOES NOT REQUIRE SPECIAL
12 KNOWLEDGE, SKILL, EXPERIENCE OR TRAINING. I FIND THAT ITS
13 PROBATIVE VALUE IS NOT SUBSTANTIALLY OUTWEIGHED BY THE
14 UNFAIR PREJUDICE OF MISLEADING THE JURY OR ANY OTHER
15 CONSIDERATION. I WOULD RESPECTFULLY DENY THE DEFENSE
16 MOTION EXCLUDING OPINION TESTIMONY OF THE OFFICER AS AN
17 IDENTITY AS A PERSON IN THE DEER CAMERA PHOTOGRAPH.

18 MR. CHAPLIN: YOUR HONOR.

19 THE COURT: YES, SIR.

20 MR. CHAPLIN: I WOULD JUST LIKE TO SAY AT THIS POINT
21 THAT THE COURT IN HERRING WAS SO SPECIFIC AS TO SAY THAT
22 AN OFFICER COULD IDENTIFY OR GIVE THEIR OPINION AS TO
23 WHETHER OR NOT A GUNSHOT WAS A GUNSHOT. BECAUSE THEY
24 WEREN'T THERE, THEY ARE LOOKING AT A VIDEO.

25 THE COURT: RIGHT.

1 MR. CHAPLIN: AND I STRUGGLE TO SEE THE DISTINCTION
2 FROM THAT CASE TO THIS CASE.

3 THE COURT: WELL, FIRST OF ALL I HAVE ALREADY RULED.
4 AND I UNDERSTAND THAT YOU DON'T AGREE WITH MY RULING AND I
5 NOTE YOUR OBJECTION TO IT. I WILL MAKE THIS THE FINAL
6 WORD ON THE SUBJECT. THE RATHER BRIEF DISCUSSION IN
7 HERRING BEGINS AFTER A SESSION CALLED LAY OPINIONS
8 REGARDING THE VIDEOTAPE. IT CONCERNED A GUNSHOT
9 IDENTIFICATION TESTIMONY. THEY NEVER SAID WHETHER IT WAS
10 IN ERROR FOR THE STATE TO ADMIT THAT EVIDENCE, FOR THE
11 TRIAL JUDGE TO ALLOW ITS ADMISSION. THEY NEVER DID SAY
12 THAT, THEY NEVER CITED A RULE, THEY NEVER CITED A CASE
13 THAT DEALT WITH WHETHER IT WAS ERROR. ALL THEY DID, MR.
14 CHAPLIN, IS FIND THAT THE TRIAL COURT'S CURATIVE
15 INSTRUCTION WAS SUFFICIENT TO CURE ANY PREJUDICE SUCH THAT
16 THERE WAS NO ERROR IN DENYING THE DEFENDANT'S MOTION FOR A
17 MISTRIAL. SO IT CAME UP IN THE CONTEXT OF A MOTION FOR A
18 MISTRIAL. THEY NEVER ELABORATED ON IF, NEVER MADE ANY
19 FINDING ABOUT WHETHER THE IDENTIFICATION TESTIMONY WAS
20 REVERSIBLE ERROR. SO IT IS HARD FOR ME TO TAKE FROM THAT
21 TO THE CONCLUSION THAT YOU WISH ME TO REACH. AND RELYING
22 ON THE LAW OF THE RULES OF EVIDENCE, SPECIFIC RULES AND
23 HOW THEY ARE INTERPRETED IN CASE LAW I HAVE MADE MY
24 RULING. WHAT IS THE NEXT MOTION.

25 MR. CHAPLIN: I BEG THE COURT'S INDULGENCE.

1 THE COURT: OKAY. LET'S TAKE A BREAK.

2 (WHEREUPON, A SHORT BREAK WAS TAKEN.)

3 THE COURT: YES SIR, MR. CHAPLIN.

4 MR. CHAPLIN: YOUR HONOR, I WILL AGAIN ASK, I GUESS
5 THE ONLY THING LEFT WOULD BE NUMBER FOUR. AND I WOULD
6 ARGUE THAT ADDITIONAL OFFICERS WOULD BE CUMULATIVE AND I
7 WOULD AGAIN BE CONCERNED OF THE PREJUDICIAL EFFECT THAT
8 THAT WOULD HAVE.

9 THE COURT: NUMBER FIVE?

10 MR. CHAPLIN: NUMBER FOUR.

11 THE COURT: OKAY. ALL RIGHT. MR. MCDANIEL, WHAT IS
12 YOUR RESPONSE TO THAT.

13 MR. MCDANIEL: I DON'T THINK IT WOULD BE CUMULATIVE,
14 JUDGE, IT IS JUST A SECOND INDICATION, FACTUALLY AFTER
15 LIEUTENANT MCCLURKIN MAKES AN IDENTIFICATION THEN CHIEF
16 SWINDLER WILL ALSO MAKE AN IDENTIFICATION.

17 THE COURT: I NEED TO KNOW EXACTLY WHAT THE TESTIMONY
18 IS GOING TO BE.

19 MR. MCDANIEL: I MEAN BASICALLY THE SAME AS MR.
20 MCCLURKIN THAT I VIEWED THE PICTURE, THAT IS BENNIE
21 MITCHELL.

22 THE COURT: I THINK I AM GOING TO GRANT THE DEFENSE
23 MOTION ON THAT. I THINK WHAT IT WOULD BE IS ALMOST
24 BOLSTERING THE CREDIBILITY WITH LIEUTENANT MCCLURKIN BY
25 OTHER OFFICERS. I THINK ALLOWING LIEUTENANT MCCLURKIN TO

1 IDENTIFY WOULD BE SUFFICIENT TO EXPLAIN TO THE JURY
2 ESSENTIALLY WHY MR. MITCHELL WAS ON TRIAL, WHY HE WAS
3 DEVELOPED AS A SUSPECT. I THINK BEYOND THAT IT BECOMES
4 CUMULATIVE AND RULE 403 CONCERNS WOULD BE INDICATED TO THE
5 POINT THAT THAT SHOULD NOT BE ALLOWED.

6 MR. MCDANIEL: YES, SIR.

7 MR. CHAPLIN: YOUR HONOR, JUST TO BE THOROUGH, IF I
8 COULD, GO BACK TO NUMBER ONE. THAT MOTION WAS GRANTED.
9 NUMBER TWO, WE AGREED THAT THE ONLY TESTIMONY WOULD BE
10 PERTAINING TO MATTERS DIRECTLY RELATED TO THE INCIDENT ON
11 10/27/08. ALTHOUGH I HAVE OBJECTED AND DISAGREE FOR YOU
12 TO ALLOW LIEUTENANT MCCLURKIN TO PROVIDE ANY TESTIMONY AS
13 TO THE IDENTIFICATION IN THE PICTURE THAT WAS DENIED.
14 FOUR, GRANTED IT ON THE GROUNDS THAT IT WOULD BE
15 CUMULATIVE AND PURSUANT TO RULE 403, PREJUDICIAL,
16 BOLSTERING. NUMBER FIVE, STATE'S WITNESSES CAN ONLY SAY
17 THAT THEY KNOW MR. MITCHELL BECAUSE THEY LIVED IN THE
18 COMMUNITY OVER THE PAST 20 YEARS AND KNOW MR. MITCHELL AS
19 A MEMBER OF THE COMMUNITY. AS FAR AS THE VIDEOTAPE OR
20 PICTURES OF THE INCIDENT ALLEGEDLY TAKEN BY MR. POTTS ON
21 THE NIGHT OF 10/27, WE WILL ADDRESS THOSE ISSUES AT THE
22 TIME THE STATE INTENDS TO INTRODUCE THAT. SO THAT IS
23 DEFERRED. NUMBER SEVEN, UNDERSTAND AS LONG AS MR.
24 MITCHELL DOES NOT TAKE THE STAND THAT THERE WILL BE NO
25 TESTIMONY REGARDING ANY PRIOR CRIMES. AS FAR AS EIGHT,

1 MR. POTTS IS LIMITED TO SAYING THAT HE HAS HAD PRIOR
2 BREAK-INS AND THAT IS THE EXTENT. JUST SO THE JURY WILL
3 UNDERSTAND THE BASIS OF PROVIDING THE DEER CAMERA. NUMBER
4 NINE, WE SETTLED THAT, THE TESTIMONY WILL BE THEY SEARCHED
5 THE HOME OF MR. MITCHELL AND DIDN'T FIND ANYTHING PURSUANT
6 TO THAT SEARCH WARRANT. AND THEN WE ALSO ADDRESSED THE
7 MATTER OF NOLLE PROSING THE ENHANCEMENT INDICTMENT AND
8 REPLACING IT WITH A PETTY LARCENY INDICTMENT WHICH I NOTED
9 MY CONCERNS REGARDING THE DESCRIPTION OF THAT INDICTMENT
10 PRIOR TO MR MITCHELL'S ARRAIGNMENT. THANK YOU, YOUR
11 HONOR.

12 THE COURT: LET ME JUST SAY THAT SOME CASES COULD OF
13 ALLOWED LAY OPINIONS ON SIMILAR ISSUES WOULD INCLUDE
14 UNITED STATES VERSUS YAZZIE, 976, F2D, 1252, 9TH CIRCUIT,
15 1992 TO ALLOW LAY OPINION EVIDENCE ON A STATUTORY RAPE
16 TRIAL. UNITED STATES VERSUS LOPEZ, 478, F.3D, 1213, IT IS
17 A TENTH CIRCUIT CASE FROM 2007 WHICH UPHELD THE
18 ADMISSIBILITY OF THE LAY OPINION THAT WAS AN
19 IDENTIFICATION BY AN FBI AGENT VOICE ON AN AUDIOTAPE AND
20 AN IMAGE ON A VIDEOTAPE. SO, WITH THAT IS THERE ANYTHING
21 FURTHER FOR CONSIDERATION TODAY?

22 MR. CHAPLIN: THOSE TWO CASES, CAN YOU GIVE THEM
23 AGAIN?

24 THE COURT: SURE. 478, F.3D, 1213 IS UNITED STATES
25 VERSUS LOPEZ. AND UNTIED STATES VERSUS YAZZIE, 976, F2D,

1 THE COURT: BRING THE JURY IN, PLEASE.

2 (WHEREUPON, THE JURY CAME INTO OPEN COURT AT
3 APPROXIMATELY 1:45 P.M.)

4 THE COURT: MR. MCDANIEL, YOU MAY CALL YOUR FIRST
5 WITNESS.

6 MR. MCDANIEL: THE STATE CALLS STEPHEN LEE POTTS.

7 STEPHEN LEE POTTS, AFTER BEING DULY SWORN,
8 TESTIFIED AS FOLLOWS:

9 DIRECT EXAMINATION

10 BY MR. MCDANIEL:

11 Q MR. POTTS, WHERE DO YOU WORK?

12 A A THE BLUE MOON.

13 Q HOW LONG HAVE YOU WORKED THERE?

14 A I AM WORKING ON SEVEN YEARS NOW.

15 Q HOW OLD ARE YOU?

16 A I AM 39.

17 Q HOW LONG HAVE YOU LIVED IN NEWBERRY?

18 A 16 YEARS, 14 YEARS, EXCUSE ME.

19 Q AND WHERE DO YOU LIVE?

20 A ON PAULINE STREET.

21 Q IS THAT LOCATED IN NEWBERRY COUNTY?

22 A YES, IT IS.

23 Q AND HOW LONG HAVE YOU LIVED THERE?

24 A ALMOST 10 YEARS.

25 Q YOU SAID YOU WORK AT THE BLUE MOON, WHAT KIND OF

1 HOURS DO YOU WORK THERE?

2 A THEY VARY, BUT USUALLY I GO IN LATE MORNING AND LEAVE
3 SOMETIME EARLY THE FOLLOWING MORNING, SAY ABOUT LUNCH TIME
4 TO MAY 12:00 TO MAYBE 2:00 O'CLOCK IN THE MORNING.

5 Q NOW, I WANT TO GO BACK TO THE NIGHT OF OCTOBER 27TH,
6 MAYBE JUST THE DAY OF OCTOBER 27TH. DID YOU WORK THAT
7 DAY?

8 A I DID.

9 Q WHAT TIME DID YOU GO TO WORK?

10 A I HAD GONE IN EARLY AND THEN I HAD GONE BACK HOME AND
11 THEN I LEFT AGAIN AFTER 7:00 O'CLOCK OR SOMETHING LIKE
12 THAT TO GO BACK IN FOR THE NIGHT.

13 Q WHAT DO YOU DO THERE?

14 A ALL DIFFERENT THINGS. WE DO STOCKING, INVENTORY, I
15 ALSO DO SOME BARTENDING, WORK THE DOOR SOMETIMES, JUST
16 GENERAL MANAGER DUTIES.

17 Q WHAT IS YOUR TITLE THERE?

18 A I AM ONE OF THE OWNERS.

19 Q SO, YOU HAD GONE BACK AROUND 7:00 O'CLOCK AT NIGHT?

20 A YES.

21 Q WHAT TIME DID YOU GET OFF?

22 A I BELIEVE IT WAS IN THE BALLPARK OF 1:00 OR 1:30,
23 SOMEWHERE IN THAT BALLPARK.

24 Q THAT WOULD BE OCTOBER 28TH?

25 A YES, EARLY IN THE MORNING.

1 Q AND DO YOU REMEMBER ABOUT WHAT TIME YOU GOT HOME?

2 A I ONLY LIVE ABOUT A MILE AWAY, IT WAS SOON AFTER

3 THAT.

4 Q SO, 1:00 IN THE MORNING?

5 A YES, SOMETHING LIKE THAT.

6 Q AND WERE YOU ALONE?

7 A MY GIRLFRIEND WAS WITH ME THAT NIGHT.

8 Q SO, WHAT DID YOU DO WHEN YOU GOT HOME?

9 A WHEN I WALKED UP TO THE BACKDOOR I NOTICED THAT THE

10 WINDOW BESIDE THE BACKDOOR HAD BEEN DUG AT WITH A TOOL OF

11 SOME SORT, IT WAS A WINDOW THAT HAD BEEN MESSED WITH

12 BEFORE SO I LOOK AT THAT WINDOW FREQUENTLY NOW.

13 Q SO, DID YOU ENTER THE HOUSE, DID YOU CALL THE POLICE

14 THERE?

15 A I TOLD MY GIRLFRIEND TO WAIT OUTSIDE AND THEN I

16 WALKED THROUGH THE HOUSE TO MAKE SURE NOBODY WAS STILL

17 THERE.

18 Q WAS THERE ANYBODY THERE?

19 A NO.

20 Q WERE YOU ABLE TO FIGURE OUT WHAT HAPPENED?

21 A SOMEBODY HAD BEEN IN THE HOUSE, I COULD SEE THAT. I

22 HAD SET UP A CAMERA IN THE KITCHEN.

23 Q WHERE WAS IT?

24 A IT WAS ON TOP OF THE REFRIGERATOR IN THE KITCHEN. SO

25 I IMMEDIATELY WENT AND CHECKED THAT AND SAW SOME

1 PHOTOGRAPHS OF SOMEONE IN MY KITCHEN.

2 Q DID YOU KNOW WHO THEY WERE?

3 A I HAD NEVER SEEN THEM BEFORE, NO.

4 Q WHY DID YOU HAVE A DEER CAMERA ON THE REFRIGERATOR?

5 A ABOUT TEN DAYS PRIOR TO THAT I HAD HAD A, THERE HAD
6 BEEN SOME ACTIVITY IN MY HOUSE BEFORE. AND I HAD WENT AND
7 PURCHASED A CAMERA.

8 Q DID YOU PURCHASE IT BEFORE THAT SPECIFIC--

9 A PRETTY MUCH.

10 Q NOW, DID YOU CALL THE POLICE THAT NIGHT OR EARLY IN
11 THE MORNING?

12 A I DID NOT, WE WENT AHEAD AND WENT TO BED AND I CALLED
13 THEM THE NEXT MORNING.

14 Q WHAT TIME DID YOU GET UP?

15 A IT WAS 10:00 OR 10:30 WHEN I GOT UP.

16 Q AND WHAT DID YOU DO WHEN YOU GOT UP THAT MORNING?

17 A I TOOK A SHOWER AND THEN I CALLED THE POLICE PRETTY
18 MUCH AND JUST TOLD THEM WHAT I HAD FOUND.

19 Q I AM GOING TO HAND YOU WHAT HAS BEEN MARKED STATE'S
20 IDENTIFICATION, STATE'S EXHIBIT 1 FOR IDENTIFICATION.

21 MR. CHAPLIN: YOUR HONOR.

22 THE COURT: YES, SIR.

23 MR. CHAPLIN: THE DEFENSE HAS AN OBJECTION TO THIS
24 EVIDENCE AND WE WOULD LIKE TO HAVE THAT MATTER HEARD
25 OUTSIDE THE PRESENCE OF THE JURY.

1 THE COURT: OKAY. LADIES AND GENTLEMEN, I ASK YOU TO
2 GO BACK TO THE JURY ROOM AND DON'T TALK ABOUT THE CASE AND
3 WE WILL RESUME MOMENTARILY. THANK YOU.

4 (WHEREUPON, THE JURY WAS EXCUSED FROM OPEN COURT.)

5 THE COURT: MR. CHAPLIN.

6 MR. CHAPLIN: YOUR HONOR, THIS MOTION IS BEING MADE
7 PURSUANT TO THE VIDEO OR CD THAT THE STATE HAS SHOWN ME
8 AND I AM MAKING THIS OBJECTION TO THE ADMISSION OF THAT CD
9 BASED ON RULES 1002 OF THE SOUTH CAROLINA RULES OF
10 EVIDENCE OR 1003, SOUTH CAROLINA RULES OF EVIDENCE AND
11 RULE 1004. FIRST AND FOREMOST, YOUR HONOR, RULE 1002 SAYS
12 THAT THERE IS A REQUIREMENT OF AN ORIGINAL. I THINK THE
13 TESTIMONY WE ARE ABOUT TO HEAR IS THAT THAT IS NOT AN
14 ORIGINAL. RULE 1002, EXCUSE ME, 1002, THAT SAYS THAT
15 EXCEPT AS OTHERWISE PROVIDED IN THE RULES BY STATUTE.
16 THEN I MOVE OVER TO 1003, YOUR HONOR, THAT THESE ARE
17 DUPLICATES. AND IT SAYS A DUPLICATE IS ADMISSIBLE
18 PROVIDED THERE IS NOT A GENUINE QUESTION AS TO THE
19 AUTHENTICITY OF THE ORIGINAL. GOES ON TO SAY THAT DUE TO
20 CIRCUMSTANCES THAT IT WOULD BE UNFAIR TO ADMIT THE
21 DUPLICATE OF THE ORIGINAL. YOUR HONOR, THESE IS A GENUINE
22 ISSUE AS TO THE AUTHENTICITY OF THE ORIGINAL OF THIS
23 DOCUMENT. THEN I MOVE ON TO RULE 1004, YOUR HONOR. AND
24 IT SAYS, IF THE ORIGINALS ARE LOST OR DESTROYED DUPLICATES
25 CAN BE ADMITTED UNLESS THE PROPONENT LOST OR DESTROYED IN

1 BAD FAITH. AND WE ARE SUGGESTING THAT THAT IS THE CASE IN
2 THIS SITUATION. THEREFORE WE ARE ASKING THAT THE VIDEO
3 NOT BE ADMITTED INTO EVIDENCE, IT CAN'T BE PROPERLY
4 AUTHENTICATED AND I THINK IT VIOLATES SEVERAL RULES OF
5 SOUTH CAROLINA RULES OF EVIDENCE.

6 THE COURT: MR. MCDANIEL.

7 MR. MCDANIEL: YOUR HONOR, I JUST WANT TO MAKE SURE,
8 HE IS ALLEGING BAD FAITH THAT THE ORIGINALS WERE, IS THAT
9 WHAT YOU ARE AND I AM SORRY. YOU ARE SAYING THAT THESE
10 CAN'T COME IN BECAUSE THEY HAVE BEEN LOST OR DESTROYED IN
11 BAD FAITH. I JUST WANT A CLARIFICATION.

12 MR. CHAPLIN: WELL, I AM SAYING THAT WHAT YOU HAVE IS
13 NOT AN ORIGINAL, I AM SAYING THAT IT IS ACCEPTABLE, A
14 DUPLICATE IS ACCEPTABLE PROVIDED THERE IS NOT A GENUINE
15 QUESTION RAISED AS TO THE AUTHENTICITY OF THE ORIGINAL
16 WHICH I AM RAISING THAT QUESTION. AND THE CIRCUMSTANCES,
17 UNDER THESE CIRCUMSTANCES TO BE UNFAIR TO ADMIT THE
18 DUPLICATE IN LIEU OF THE ORIGINAL. I AM FURTHER ALLEGING
19 AND ARGUING THAT THE ADMISSIBILITY OF OTHER EVIDENCE OR
20 CONTENTS OR EVEN SECOND, THIRD OR FORTH DOWNLOAD OF WHAT
21 YOU HAVE, IF IT FALLS UNDER THE FACT THAT THE ORIGINAL HAS
22 BEEN LOST OR DESTROYED I THEN SAY THE ORIGINAL WAS
23 DESTROYED IN BAD FAITH.

24 MR. MCDANIEL: YOUR HONOR, THERE HAS BEEN NO EVIDENCE
25 OF BAD FAITH. I MEAN, I HAVEN'T EVEN, HE HASN'T, THE

1 AUTHENTICITY HASN'T BEEN ESTABLISHED HERE. TO CALL THIS A
2 COPY OF THE ORIGINAL IS A STRETCH, BECAUSE THESE CAMERAS
3 WERE MEANT TO DOWNLOAD, PRINT THEM OUT. THAT IS THE SAME
4 AS SAYING THAT YOUR OLD REGULAR FILM CAMERAS, WHEN YOU
5 TAKE THAT PICTURE, THAT THE ORIGINALS IS ACTUALLY WHAT IS
6 ON THE FILM. AND THEN WHEN YOU GET THEM DEVELOPED THAT IS
7 A COPY OF WHAT CAME FROM THE ORIGINAL. THAT IS THE WAY I
8 SEE THAT. NOW, I ALSO THINK THAT UNDER, IF YOUR HONOR WAS
9 TO FIND THAT THE ORIGINAL HAS BEEN LOST OR DESTROYED WE
10 WOULD ASK THAT AND WE ARE NOT CONTENDING THAT THESE ARE
11 COPIES. AND I WOULD SAY THAT THESE ARE THE ORIGINALS THAT
12 CAME FROM THAT VIDEO, THAT THOSE ORIGINALS CAN'T BE
13 OBTAINED. AND THAT A COPY, ASSUMING THAT THE PROPER
14 FOUNDATION AND AUTHENTICITY HAS BEEN ESTABLISHED WILL
15 SERVE THE SAME PURPOSE AS THE ORIGINAL. NOW, MY POSITION
16 IS THAT THESE ARE THE ORIGINALS AND I THINK WE ESTABLISHED
17 IN PRETRIAL MOTIONS YESTERDAY THAT ALTHOUGH THIS CAMERA
18 DID NOT NEED A CHAIN OF CUSTODY THAT THE CAMERA WAS NEVER
19 OUT OF HIS POSSESSION, THAT HE DOWNLOADED THOSE IMAGES AND
20 BURNED THEM ONTO A CD WHICH HE PRESENTED TO THE POLICE. I
21 DO NOT SEE HOW THAT IS ANY DIFFERENT THAN THE POLICE
22 TAKING, EVERY LAW ENFORCEMENT OFFICER HAS A DIGITAL CAMERA
23 IN THEIR CAR AND HOW THEY SNAP PICTURES OF CRIME SCENES OR
24 WHATEVER, THEY DOWNLOAD THOSE AND THOSE ARE THE ORIGINALS.
25 ONE OF THESE ARE ORIGINALS. TWO, IF YOUR HONOR DOES NOT

1 FEEL THAT THEY ARE ORIGINALS THAT THE ORIGINALS HAVE BEEN
2 DESTROYED, I GUESS, THE MEMORY IN THE CAMERA WOULD HOLD SO
3 MANY PICTURES. SO, I KNOW THEY ARE NOT ACTUALLY ON A HARD
4 DRIVE. BUT THEY WERE DOWNLOADED AND THOSE COPIES WITH
5 BARRING MR. MATHIAS' ACCUSATION THAT THIS WAS DONE IN BAD
6 FAITH, WE WOULD ASK THAT THEY COME IN UNDER RULE 1004(2).
7 STATING THAT THE ORIGINAL IS NOT REQUIRED AND OTHER
8 EVIDENCE OF THE CONTENTS OF A WRITING OR RECORDING OR
9 PHOTOGRAPH IS ADMISSIBLE. AND NO ORIGINAL CAN BE OBTAINED
10 BY ANY JUDICIAL PROCESS. AND I AM SORRY, I THINK IT
11 REQUIRES THERE BE AN ISSUE OF AUTHENTICITY AND I THINK HE
12 JUST, I THINK THE DEFENSE IS SAYING WE DON'T AGREE THAT
13 THEY ARE AUTHENTIC WITH THE FOUNDATION LAID.

14 THE COURT: OKAY. ANY FURTHER ARGUMENT, MR. CHAPLIN.

15 MR. CHAPLIN: YOUR HONOR, OUTSIDE THE PRESENCE OF THE
16 JURY I WOULD LIKE TO ASK THE COURT TO INSTRUCT THAT WE
17 HAVE A PROFFER, HOW THIS WAS AUTHENTICATED. I MAY HAVE
18 CONCERNS WITH THAT PROCESS.

19 THE COURT: WHY DON'T YOU GO AHEAD AND PROFFER THE
20 TESTIMONY.

21 PROFFER DIRECT EXAMINATION

22 BY MR. MCDANIEL:

23 Q MR. POTTS, I AM GOING TO HAND YOU WHAT HAS BEEN
24 MARKED AS STATE'S EXHIBIT 1 FOR PURPOSES OF
25 IDENTIFICATION. HAVE YOU EVER SEEN THAT?

1 A YES.

2 Q WHAT IS THAT?

3 A THIS IS THE DVD THAT I PROVIDED TO THE POLICE.

4 Q CAN YOU DESCRIBE TO US HOW THAT DVD WAS MADE?

5 A I TOOK THAT CAMERA ON TOP OF THE REFRIGERATOR THAT
6 HAD TAKEN THE PHOTOS OF THE PERSON IN MY KITCHEN.

7 Q HOW MANY PHOTOS WERE THERE?

8 A THERE WAS NINE PHOTOS THAT WAS IN THAT LITTLE BLOCK.
9 WE TOOK IT TO THE LAPTOP, DOWNLOADED THEM ON THE LAPTOP
10 AND BURNED THEM STRAIGHT ONTO THE CD.

11 Q AND WHERE WAS THAT LAPTOP?

12 A INSIDE THE BLUE MOON.

13 Q AT ANY TIME WAS THE CAMERA OUT OF YOUR POSSESSION?

14 A NO.

15 Q DID YOU TRY TO LET ANYBODY ELSE TRY TO DOWNLOAD IT?

16 A NO.

17 Q AND YOU DOWNLOADED THE IMAGES?

18 A YES, I PUT THEM ON THE COMPUTER.

19 Q AND YOU BURNED THEM TO THAT DISK?

20 A MY GIRLFRIEND BURNED THEM WITH ME PRESENT.

21 Q AND YOU HAVE SEEN THE IMAGES THAT IS ON HERE?

22 A YES, SIR.

23 Q AND HOW MANY IMAGES ARE THERE?

24 A THERE IS NINE.

25 Q AND DO THOSE IMAGES FAIRLY AND ACCURATELY REPRESENT

1 THE EVENTS THAT TOOK PLACE THAT NIGHT?

2 A YES.

3 Q NO ALTERATIONS OR DELETIONS HAVE BEEN MADE?

4 A NO.

5 Q BY YOU?

6 A NO.

7 Q BY ANYBODY?

8 A NO.

9 Q AND YOU PROVIDED THIS TO THE POLICE, CORRECT?

10 A CORRECT.

11 Q WHO TOOK IT TO THE POLICE?

12 A I DID.

13 Q AND WHO DID YOU GIVE IT TO?

14 A OFFICER MCCLURKIN.

15 Q SO, UNTIL THEN WAS THIS DISK EVER OUT OF YOUR
16 POSSESSION?

17 A NO.

18 Q THANK YOU.

19 PROFFER CROSS-EXAMINATION

20 BY MR. CHAPLIN:

21 Q GOOD AFTERNOON, MR. POTTS. MR. POTTS, SO IT IS YOUR
22 TESTIMONY THAT YOU CAME HOME, I AM SORRY, THAT YOU WENT TO
23 WORK EARLIER THAT DAY?

24 A YES.

25 Q CAME HOME AND YOU WENT BACK TO WORK AT 7:00 O'CLOCK.

1 THE COURT: NOW, YOU ARE GOING TO HAVE TO CONFINE
2 YOUR QUESTIONS TO THE AUTHENTICITY, THIS ISN'T A DISCOVERY
3 FORM.

4 Q MR. POTTS, SO WHEN YOU CAME HOME YOU NOTICED THAT
5 THERE WAS A PICTURE IN THE CAMERA?

6 A YES.

7 Q HOW DID YOU NOTICE THAT?

8 A BECAUSE I WENT, THERE IS A VIEWER ON THE CAMERA.

9 Q SO, YOU WENT TO THE CAMERA?

10 A AND I COULD SEE A SMALL PICTURE ON IT, YES.

11 Q IS THE CAMERA MOTION ACTIVATED?

12 A YES.

13 Q WHEN YOU CHECKED THE CAMERA DID IT TAKE A PICTURE OF
14 YOU?

15 A YES, I AM SURE IT DID.

16 Q YOU PROVIDED THE POLICE DEPARTMENT WITH NINE
17 PICTURES?

18 A YES.

19 Q AND YOUR CAMERA HOLDS HOW MANY PICTURES?

20 A I DON'T KNOW THAT.

21 Q DOES IT HOLD MORE THAN NINE?

22 A YES.

23 Q SO, YOU DOWNLOADED THE PICTURES TO A COMPUTER AT THE
24 BLUE MOON, IS THAT WHAT YOU SAY?

25 A RIGHT.

1 Q WHO SELECTED WHICH PICTURES WERE DOWNLOADED?

2 A THE CAMERA PUT ALL OF THEM ON THERE ONTO THE
3 COMPUTER.

4 Q YOU SAID THE CAMERA HOLDS MORE THAN NINE?

5 A YES.

6 Q AND THAT IS ALSO TOOK A PICTURE OF YOU?

7 A THERE WERE SEVERAL PICTURES OF ME DURING SEVERAL
8 DIFFERENT DAYS, I CAN GO BACK AND CHECK IT.

9 Q BUT YOU DIDN'T PROVIDE THOSE PICTURES TO THE DOWNLOAD
10 THAT YOU MADE AT THE BLUE MOON?

11 A NO.

12 Q WHY NOT?

13 A BECAUSE THEY DIDN'T HAVE ANY BEARING FOR THIS. ME
14 WALKING THROUGH THE HOUSE TWO DAYS EARLIER DOESN'T HAVE
15 ANY BEARING ON THIS.

16 Q WHAT ABOUT THE PICTURE OF YOU CHECKING THE CAMERA ON
17 THE NIGHT OF THE 27TH?

18 A IT IS NOT ON THAT DISK.

19 Q WHY NOT?

20 A BECAUSE I DON'T NEED A PICTURE OF ME.

21 Q SO, YOU DETERMINE WHAT PICTURES YOU ARE GOING TO
22 PROVIDE THE POLICE?

23 A YES.

24 Q FROM THE ORIGINALS?

25 A YES.

1 Q NOW, WHEN YOU LOOKED AT THE PICTURES DID YOU, YOU SAY
2 YOU CAME HOME AT--

3 A 1:00 OR 1:30, AROUND THAT BALLPARK.

4 Q BUT THE PICTURES YOU PROVIDED THE POLICE HAVE A DATE
5 TIMESTAMP OF 3:00 O'CLOCK IN THE MORNING?

6 A YES.

7 Q SO, WERE YOU HOME WHEN THOSE PICTURES WERE TAKEN?

8 A NO, THE CLOCK WAS WRONG ON THE CAMERA. THAT IS
9 SOMETHING THAT I HAD JUST SET UP AND I HADN'T SET THAT UP
10 YET. THAT DOESN'T HAVE TO BE SET UP TO TAKE PICTURES.

11 Q NOW, THE PICTURES THAT YOU PROVIDED LAW ENFORCEMENT,
12 A NUMBER 187 THROUGH 195.

13 A OKAY.

14 Q WHERE ARE PICTURES 1 THROUGH 186?

15 A THEY WERE ON THE COMPUTER.

16 Q I BEG YOUR PARDON?

17 A THEY WERE ON THE COMPUTER.

18 Q AND WHERE ARE THEY NOW?

19 A THEY MAY STILL BE ON THERE, I HAVEN'T LOOKED IN A
20 WHILE. THEY WERE NOT OF THIS DAY.

21 Q SO, WHEN THE OFFICER CAME TO YOUR HOME ON THE MORNING
22 OF THE 28TH--

23 MR. MCDANIEL: JUDGE, THIS HAS NOTHING TO DO WITH THE
24 AUTHENTICITY OF THE PICTURES. HE IS GOING--

25 MR. CHAPLIN: YOUR HONOR, MY ISSUE HERE IS GOING BACK

1 TO THE QUESTION IN RULE 103, WITH REGARDS TO UNLESS IT IS
2 A GENUINE QUESTION OF AUTHENTICITY. AND I CAN STOP NOW
3 BUT, YOUR HONOR, I OFFER THAT AS THERE IS A GENUINE
4 QUESTION AS TO AUTHENTICITY OF WHAT, THAT THESE ARE
5 DUPLICATES BASED ON HIS TESTIMONY, THESE ARE DUPLICATES,
6 NOT ORIGINALS. HE SAID HE MAY HAVE THE ORIGINALS
7 SOMEWHERE AT HIS HOUSE OR SOMETHING LIKE THAT BUT WE DON'T
8 HAVE ORIGINALS. SO, NOW WE ARE OVER TO THE ADMISSIBILITY
9 OF DUPLICATES AND IF WE ARE IN THE ADMISSIBILITY OF
10 DUPLICATES WE DON'T EVEN HAVE ALL THE DUPLICATES.

11 THE COURT: WELL, HELP ME OUT. MY RECOLLECTION IS
12 THAT MR. POTTS SAID HE DOWNLOADED THE DEER CAMERA DATA TO
13 HIS COMPUTER, FROM THAT HE BURNED THIS DISK THAT IS NOW
14 SEEKING TO BE INTRODUCED, IS THAT RIGHT?

15 MR. MCDANIEL: THAT IS CORRECT, JUDGE.

16 THE COURT: IS THAT RIGHT?

17 MR. CHAPLIN: THAT IS WHAT I UNDERSTAND AS WELL, YOUR
18 HONOR.

19 THE COURT: YOUR OBJECTION IS UNDER THE BEST EVIDENCE
20 RULE CODIFIED BY RULES 1001 THROUGH 1004 WHICH REQUIRES IN
21 ORDER TO PROVE THE CONTENTS OF THE PHOTOGRAPHS THE
22 ORIGINAL IS REQUIRED. THE DEFINITION OF ORIGINAL UNDER
23 RULE 1001 SAYS, AN ORIGINAL OF A PHOTOGRAPH INCLUDES THE
24 NEGATIVE OR ANY PRINT THEREFROM. IF DATA ARE STORED IN A
25 COMPUTER OR SIMILAR DEVICE, ANY PRINTOUT OR OTHER OUTPUT

1 READABLE BY SIGHT SHOWN TO REFLECT THE DATA ACCURATELY IS
2 AN ORIGINAL. SO, HOW COULD THAT NOT BE AN ORIGINAL BASED
3 ON THE TESTIMONY WE HAVE BEFORE US BECAUSE IT IS DATA
4 STORED IN A COMPUTER THAT WILL BE OUTPUT READABLE BY
5 SIGHT. IT IS THE SAME PICTURE THAT WAS ON THE DEER CAMERA
6 BASED ON THE FOUNDATION MADE BY THE STATE. I THINK THE
7 BEST EVIDENCE RULE WAS DESIGNED TO KEEP TESTIMONY AND
8 EVIDENCE COMING IN ABOUT A LETTER, FOR INSTANCE, WITHOUT
9 PUTTING IN THE ORIGINAL LETTER ITSELF BECAUSE THE LETTER
10 WOULD BE, "THE BEST EVIDENCE OF THE CONTENTS." THAT IS
11 WHAT THE RULE IS DESIGNED TO DO. AND HERE THOSE PURPOSES
12 AREN'T SERVED BY SOME RULE THAT WOULD REQUIRE THE ORIGINAL
13 IMAGE OF WHATEVER REALITY THAT WAS CAPTURED BY THE
14 PHOTOGRAPH WHEN IT WAS TAKEN. IT COULD GET INTO CERATIN
15 SITUATIONS WHERE THE ORIGINAL WOULD BE FOUND THAT WAS AN
16 IMAGE THAT WAS SEEN THROUGH THE VIEWFINDER AT THE TIME THE
17 SHUTTER CLOSED OR SOMETHING OF THAT NATURE. BUT THAT IS
18 NOT WHAT THE RULE SAYS. THE RULE SAYS, IT DEFINES THE
19 ORIGINAL THE WAY I QUOTED IT AND I THINK BASED ON THE
20 TESTIMONY THAT THE CONTENTS ON THAT CD WOULD QUALIFY AS AN
21 ORIGINAL UNDER THAT DEFINITION. SO, I RESPECTFULLY
22 OVERRULE YOUR OBJECTION.

23 MR. CHAPLIN: THANK YOU, YOUR HONOR.

24 THE COURT: ANYTHING BEFORE WE BRING THE JURY BACK
25 IN?

1 MR. CHAPLIN: NO, SIR.

2 MR. MCDANIEL: NO, SIR.

3 THE COURT: BRING THE JURY IN.

4 (WHEREUPON, THE JURY CAME INTO OPEN COURT AT
5 APPROXIMATELY 2:10 P.M.)

6 DIRECT EXAMINATION

7 BY MR. MCDANIEL:

8 Q YOU HAD TALKED ABOUT PUTTING THE CAMERA ON THE
9 REFRIGERATOR?

10 A RIGHT.

11 Q TO CAPTURE AN IMAGE OF SOMEBODY?

12 A RIGHT.

13 Q I AM GOING TO HAND YOU, WHAT IS THAT?

14 A THIS IS THE CAMERA THAT I USED TO PUT ON THE
15 REFRIGERATOR.

16 Q AND THAT IS YOUR CAMERA, RIGHT?

17 A YES.

18 Q CAN YOU EXPLAIN TO US HOW THAT WORKS?

19 A OKAY. BASICALLY YOU SET IT UP AND CUT IT ON TO TAKE
20 PHOTOGRAPHS AND IT IS--

21 Q CAN YOU TAKE PICTURES DURING THE DAY?

22 A YES, I CAN. I HAD TO SET IT UP FOR A BURST OF THREE
23 DIFFERENT PICTURES. AND DURING THE DAY IT CAN TAKE MORE
24 PICTURES WITHOUT A FLASH AND AT NIGHT IT HAS A RED SENSOR
25 AND IT DOES AN INFRARED FLASH AND IT TAKES PICTURES THEN.

1 BUT THAT ONLY HAPPENS AT NIGHT.

2 Q WHEN YOU SAY FLASH?

3 A IT IS A LITTLE RED PULSE ACROSS THIS BAR RIGHT HERE,
4 THAT IS RED.

5 Q BUT IT IS NOT LIKE WHEN WE--

6 A IT IS NOT A CAMERA FLASH, IT IS KIND OF A LITTLE GLOW
7 ON IT.

8 Q AND WHAT ACTIVATES THAT CAMERA?

9 A IT HAS A MOTION SENSOR ON THE FRONT HERE AND THEN
10 WHATEVER GOES IN FRONT OF IT WHETHER IT IS ME OR THE CAT
11 OR SOMEONE ELSE IN THE HOUSE, IT ACTIVATES AND THEN IT
12 STARTS TAKING PICTURES.

13 Q AND YOU SAID SOMETHING ABOUT LIKE THREE PICTURE
14 BURST. HOW DID YOU HAVE THAT SET UP?

15 A I HAD IT SET FOR THREE AND AS SOON AS IT IS ACTIVATED
16 IT WILL TAKE ONE PICTURE AND THERE IS A DELAY OF TEN TO
17 TWELVE OR THIRTEEN SECONDS, SOMETHING LIKE THAT. AND THEN
18 IT TAKES ANOTHER PICTURE AND ANOTHER DELAY AND THEN IT
19 TAKES ANOTHER PICTURE.

20 Q AND THAT IS A SETTING, RIGHT?

21 A I CAN SET IT UP TO DO ONE PICTURE AND THEN RESET SO I
22 CAN SET IT TO DO TWO OR THREE AND IT CAN DO VIDEO ALSO BUT
23 I DIDN'T HAVE IT ON THAT.

24 Q SO, IT IS UP TO THREE AND YOU HAD IT SET ON THE
25 THREE?

1 A THE THREE PICTURE BURST, YES.

2 Q AND JUST WANT TO MAKE SURE I AM CLEAR. SO, WHEN IT
3 DETECTS MOTION IT TAKES A PICTURE?

4 A CORRECT.

5 Q AND THEN THERE IS A DELAY AND IT TAKES ANOTHER
6 PICTURE AND THEN THE DELAY AND THEN IT TAKES ANOTHER
7 PICTURE AND THEN THAT IS THE END OF THAT CYCLE?

8 A RIGHT.

9 Q AND THAT IS HOW YOU HAD IT SET UP THAT NIGHT?

10 A RIGHT.

11 Q THANK YOU.

12 MR. CHAPLIN: I RENEW THE OBJECTION I MADE EARLIER,
13 YOUR HONOR.

14 THE COURT: OKAY.

15 MR. CHAPLIN: ABOUT THE ADMISSIBILITY OF THE CD.

16 THE COURT: THANK YOU, MR. CHAPLIN.

17 Q I AM GOING TO HAND YOU WHAT HAS BEEN MARKED STATE'S
18 EXHIBIT 1 FOR IDENTIFICATION PURPOSES.

19 A OKAY.

20 Q DO YOU KNOW WHAT THAT IS?

21 A THIS IS THE DVD THAT I PROVIDED TO THE POLICE OF THE
22 PICTURES ON THAT CAMERA.

23 Q DID YOU DOWNLOAD?

24 A YES.

25 Q HOW DID YOU OBTAIN THESE PICTURES?

1 A WE TOOK IT BACK TO A LAPTOP AND DOWNLOADED ON THE
2 LAPTOP AND THEN PRINTED IT ON A DVD.

3 Q HAVE YOU SEEN THE PICTURES ON THERE?

4 A YES.

5 Q HOW MANY PICTURES ARE ON THERE?

6 A THERE ARE NINE PICTURES ON THERE.

7 Q AND DO THEY FAIRLY AND ACCURATELY REPRESENT THE
8 OFFENSE THAT TOOK PLACE THAT NIGHT?

9 A YES.

10 Q ANY ALTERATIONS OR DELETIONS MADE?

11 A NO.

12 Q THANK YOU.

13 MR. MCDANIEL: YOUR HONOR, I WOULD ASK THAT STATE'S
14 EXHIBIT 1 BE MOVED INTO EVIDENCE IN THIS CASE.

15 THE COURT: IT IS IN EVIDENCE SUBJECT TO THE DEFENSE
16 OBJECTION.

17 (WHEREUPON, STATE'S EXHIBIT NO. 1 WAS ADMITTED INTO
18 EVIDENCE.)

19 MR. MCDANIEL: YOUR HONOR, PERMISSION TO PUBLISH
20 STATE'S 1 TO THE JURY.

21 THE COURT: YES, SIR.

22 MR. MCDANIEL: THANK YOU.

23 (WHEREUPON, THE DVD WAS PLAYED FOR THE JURY.)

24 Q MR. POTTS, I WILL ASK YOU TO GET DOWN FROM THE STAND
25 AND SHOW ME THESE PICTURES AND SPEAK UP SO EVERYBODY CAN

1 HEAR YOU. WHAT IS THAT PICTURE OF?

2 A THAT IS A PICTURE OF THE DOORWAY COMING INTO MY
3 KITCHEN, THE REFRIGERATOR WOULD BE ABOUT THERE.

4 Q BEFORE WE GET STARTED, ON THE BOTTOM THERE, WHAT ARE
5 THOSE?

6 A HERE?

7 Q YES.

8 A THAT IS LITTLE -- DATE AND TIME IS OFF.

9 Q HAD YOU SET THAT TIME?

10 A I DON'T THINK THAT I SET THE TIME, I SET THE DATE ON
11 IT.

12 Q SO THE TIME IS OFF A COUPLE OF HOURS?

13 A RIGHT.

14 Q I AM GOING TO GO TO THE NEXT PICTURE. THAT IS
15 PICTURE NUMBER TWO, THE SAME?

16 A YES.

17 Q AND I WILL GO TO THE NEXT ONE.

18 A ANY MOTION WILL SET THAT CAMERA OFF, THE DOOR, IF YOU
19 WALK PAST THE DOORWAY IT WILL SET IT OFF.

20 Q OKAY. THAT WOULD BE THE THIRD?

21 A THE THIRD IN THE SERIES.

22 Q AND WHAT IS THE DELAY BETWEEN THOSE AGAIN?

23 A APPROXIMATELY THIRTEEN SECONDS, SOMEWHERE IN THAT.

24 Q IS THAT THE IMAGE THAT YOU SAW THAT NIGHT?

25 A YES.

1 Q SO, THAT IS IMAGE FOUR, CORRECT?

2 A YES.

3 Q SO, THAT IS THE FIFTH IMAGE?

4 A RIGHT.

5 Q THERE IS A DELAY, RIGHT?

6 A RIGHT.

7 Q SO, WHAT IS THE CAMERA DOING IN THOSE THIRTEEN
8 SECONDS?

9 A IT IS JUST TAKING A PICTURE OF THE SAME SPOT.

10 Q WHY DOES IT WAIT, WHAT IS THE PURPOSE OF THE THIRTEEN
11 SECONDS?

12 A SO IT WON'T TAKE THE SAME PICTURE THREE TIMES. IT IS
13 SET UP FOR DEER, SO YOU DON'T TAKE A PICTURE OF THE SAME
14 DEER MOVING AROUND, MULTIPLE PICTURES.

15 Q SO, THAT WOULD BE, THAT IS THE SIXTH PICTURE?

16 A THAT IS THE THIRD ONE IN THE SECOND SERIES. AND THEN
17 THERE IS ANOTHER DELAY.

18 Q AND THIS WOULD START?

19 A IT WOULD SET UP AGAIN AND START ANOTHER SERIES.

20 Q THIS IS NUMBER TWO?

21 A THERE IS A LIGHT, THIS IS THE DOOR BEING OPENED RIGHT
22 THERE.

23 Q AND THIS IS THE LAST PICTURE AND THOSE ARE THE NINE
24 PICTURES?

25 A THOSE ARE THE NINE PICTURE.

1 Q THANK YOU, YOU CAN HAVE A SEAT. YOU DIDN'T KNOW WHO
2 WAS ON THAT CAMERA, RIGHT?

3 A NO, I HAD NEVER SEEN THAT PERSON BEFORE.

4 Q ANYBODY HAVE PERMISSION TO GO INTO YOUR HOUSE?

5 A ONLY MY GIRLFRIEND.

6 Q WHOEVER IS ON THERE DID NOT HAVE PERMISSION?

7 A NO.

8 Q DO YOU KEEP YOUR HOUSE LOCKED?

9 A YES.

10 Q ARE YOU ABLE TO TELL HOW THE PERSON GOT IN THE HOUSE
11 THAT NIGHT?

12 A IT APPEARED THEY CAME THROUGH THE BEDROOM WINDOW
13 WHERE I HAD A WINDOW UNIT.

14 Q WHAT IS A WINDOW UNIT?

15 A AIR-CONDITIONING UNIT, STUCK IN THE WINDOW THERE.
16 THAT WINDOW WASN'T LOCKED BECAUSE IT WAS SITTING IN THERE.

17 Q WAS THE AIR-CONDITIONING UNIT THERE THAT MORNING?

18 A IT WAS BACK IN PLACE, YES, THERE WAS, OUTSIDE OF THE
19 WINDOW YOU CAN SEE WHERE SOMEBODY HAD BEEN WALKING AROUND
20 AND A CHAIR HAD BEEN MOVED OVER NEAR THE WINDOW. AND
21 THERE WAS SOME OLD WINDOW FRAMES AND HAD BEEN STEPPED ON
22 AND BROKEN TO GET INTO THE WINDOW.

23 Q BUT THE WINDOW UNIT WAS PUT BACK?

24 A THE WINDOW WAS PUT BACK THE WAY IT WAS.

25 Q WHO PUT THE WINDOW UNIT IN?

1 A I DID. IT IS A SMALL UNIT THAT YOU CAN BUY JUST FOR
2 ONE ROOM.

3 Q SO, YOU CAN MOVE THESE?

4 A YES.

5 Q DO YOU REMEMBER ABOUT WHAT TIME YOU CALLED THE
6 POLICE?

7 A IT WAS LATE IN THE MORNING, 10:00 TO 11:00, SOMEWHERE
8 IN THAT BALLPARK.

9 Q AND ABOUT HOW LONG YOU THINK IT TOOK THE POLICE TO
10 SHOW UP?

11 A NOT TOO LONG, TWENTY MINUTES MAYBE.

12 Q WHO WAS THERE AT THE HOUSE WHEN THEY CAME?

13 A JUST MYSELF.

14 Q WERE YOU ABLE TO DOWNLOAD THE PICTURES THERE?

15 A I VIEWED THEM, MY COMPUTER WASN'T CAPABLE TO DO THAT.
16 THAT IS WHY I TOOK IT TO ONE THAT COULD DO THAT ON.

17 Q AND I KNOW YOU ALREADY TOLD THE, WHERE DID YOU
18 DOWNLOAD THE PICTURES?

19 A ONTO A LAPTOP AT WORK WE HAD AT THE BLUE MOON.

20 Q NOW, DO YOU KNOW THE DEFENDANT?

21 A NO.

22 Q MR. POTTS, WHAT WAS TAKEN FROM YOUR HOME?

23 A IT WAS ABOUT \$100.00 DOLLARS WORTH OF QUARTERS I HAD
24 IN A BOX.

25 Q WHERE WAS THAT?

1 A IT WAS ON MY CHESTER DRAWERS IN THE BEDROOM. AND A
2 FEW ARTICLES OF CLOTHING INCLUDING SOME SOCKS AND A HAT,
3 STUFF LIKE THAT.

4 MR. CHAPLIN: OBJECTION, YOUR HONOR. YOUR HONOR,
5 PURSUANT TO THE MOTION THAT WAS HEARD YESTERDAY I THINK WE
6 DISCUSSED THIS ISSUE. AND I AM CONCERNED WITH YOUR RULING
7 IN THAT SITUATION.

8 THE COURT: I OVERRULE THE OBJECTION, GO AHEAD.

9 Q ANYTHING ELSE TAKEN?

10 A AND THEN THERE WAS SOME BEER TAKEN OUT OF THE
11 REFRIGERATOR.

12 Q HOW MANY?

13 A FOUR OR FIVE CANS OF BEER.

14 Q HOW MUCH WAS THE BEER WORTH?

15 A SIX DOLLARS, IT WAS CHEAP BEER.

16 Q UNDER \$1,000.00 DOLLARS?

17 A YES, UNDER \$1,000.00 DOLLARS.

18 Q AND NOBODY HAD PERMISSION TO COME TO YOUR HOUSE?

19 A NO.

20 Q TO TAKE ANYTHING?

21 A NO.

22 Q ANYBODY HAVE A KEY?

23 A ONLY MY GIRLFRIEND HAS A KEY.

24 Q NO FURTHER QUESTIONS.

25 THE COURT: MR. CHAPLIN.

1 CROSS-EXAMINATION

2 BY MR. CHAPLIN:

3 Q GOOD AFTERNOON AGAIN, MR. POTTS. I THINK THAT YOU
4 STATED THAT YOU LIVE AT 819 PAULINE STREET?

5 A THAT IS CORRECT.

6 Q AND YOU LIVE THERE ALONE?

7 A I DO.

8 Q AND ON OCTOBER 27TH OR THE MORNING OF OCTOBER 28TH
9 YOU REPORTED TO NEWBERRY POLICE THAT THERE WAS A BURGLARY
10 AT YOUR HOME?

11 A ON THAT NEXT MORNING, YES.

12 Q MR. POTTS, LET'S JUST TALK ABOUT YOUR HOME FOR A
13 SECOND. DO YOU HAVE TELEVISIONS IN THE HOUSE?

14 A YES.

15 Q DO YOU HAVE STEREOS?

16 A NO.

17 Q DO YOU HAVE COMPUTERS?

18 A YES.

19 Q DO YOU HAVE CD'S?

20 A A FEW.

21 Q WHAT ABOUT VIDEO GAMES?

22 A NO.

23 Q YOU HAVE CAMERAS?

24 A OTHER THAN THIS ONE, I DIDN'T AT THE TIME, NO.

25 Q BUT YOU DID HAVE A CAMERA?

1 A THE ONE THAT I USED TO TAKE THESE PICTURES, YES.

2 Q YOU HAVE FURNITURE?

3 A YES.

4 Q WHAT ABOUT LAWNMOWERS AND LAWN EQUIPMENT, SOMEWHERE
5 NEAR THE HOUSE ON YOUR PROPERTY?

6 A THAT HAS ALREADY BEEN TAKEN TO BE HONEST WITH YOU.

7 Q YOU HAVE A BAR IN THE HOUSE?

8 A I HAVE ALCOHOL IN THE HOUSE, YES. I DON'T HAVE A
9 BAR, NO.

10 Q ARE ANY OF THOSE THINGS TAKEN TO YOUR KNOWLEDGE ON
11 THE MORNING OF 10/28?

12 A THE BEER WAS TAKEN.

13 Q BEER?

14 A YES.

15 Q AND I THINK YOU INDICATED THAT AROUND \$100.00 DOLLARS
16 IN COINS?

17 A YES.

18 Q TAKEN?

19 A YES.

20 Q MR. POTTS, DO YOU REMEMBER CALLING THE POLICE THE
21 FOLLOWING MORNING REGARDING, TO REPORT THIS BREAK-IN?

22 A YES.

23 Q AND DO YOU REMEMBER SPEAKING WITH AN OFFICER BY THE
24 NAME OF OFFICER MOORE?

25 A I DON'T REMEMBER THE NAME.

1 Q DO YOU REMEMBER SPEAKING WITH AN OFFICER?

2 A YES. AT LEAST DISPATCH.

3 Q AND DID YOU PROVIDE THE OFFICER WITH INFORMATION AT
4 THAT TIME?

5 A I BELIEVE I JUST SAID THAT SOMEONE HAD BROKEN INTO MY
6 HOUSE AND I NEEDED SOMEONE TO COME AND INVESTIGATE.

7 Q AND DID SOMEBODY INVESTIGATE?

8 A YES.

9 Q AT THAT TIME WHEN THEY INVESTIGATED DID YOU TELL THEM
10 THAT YOU WERE MISSING \$100.00 DOLLARS OR \$70.00 DOLLARS?

11 A \$100.00.

12 Q MR. POTTS, ISN'T IT TRUE THAT IT WASN'T UNTIL THE
13 30TH, MAYBE TWO OR THREE DAYS LATER THAT YOU CALLED BACK
14 AND SAID YOU WERE MISSING \$70.00 DOLLARS.

15 A I ADDED TO THE LIST, ONCE I HAD DONE A FULL INVENTORY
16 OF EVERYTHING IN THE HOUSE.

17 Q SO, YOU DIDN'T TELL THEM THAT ON THE, THE MORNING OF
18 THE 28TH?

19 A I AM NOT SURE WHICH ITEM I TOLD THEM THAT MORNING AND
20 WHICH ITEMS I TOLD LATER.

21 Q BUT YOU ARE CERTAIN THAT YOU SAID \$100.00 DOLLARS AND
22 NOT \$70.00?

23 A IT WAS APPROXIMATELY \$100.00 DOLLARS BECAUSE I WAS
24 COLLECTING THE STATE COINS AND I WAS TRYING TO KEEP A
25 DOLLAR OF EACH STATE AND THEY WERE ALL GONE.

1 Q MY QUESTION IS, WHAT DID YOU TELL THE OFFICER WHEN
2 YOU REPORTED THE BURGLARY, \$70.00 OR \$100.00?

3 A I BELIEVE I TOLD THEM \$100.00.

4 Q NOW, YOU SAID YOU CAME IN AND YOU NOTICED THERE WAS A
5 PICTURE ON YOUR DEER CAMERA?

6 A YES.

7 Q LET ME JUST BACK UP FOR A SECOND. YOU SAID YOU HAD
8 SOME OTHER PROBLEMS AT THAT LOCATION SO YOU BOUGHT A DEER
9 CAMERA?

10 A YES.

11 Q DID YOU EVER USE THE DEER CAMERA BEFORE?

12 A I HADN'T USED THAT ONE BECAUSE I HADN'T GOTTEN ONE
13 BUT I HAD USED ONE BEFORE, YES.

14 Q YOU HAVE?

15 A YES.

16 Q SO YOU HAVE SET THEM UP?

17 A YES. AND I HAD USED THAT ONE THAT FULL WEEK TESTING
18 SO I HAD PICTURES OF MYSELF JUST TO SEE IT WORK.

19 Q SO, YOU TOOK PICTURES OF YOURSELF THE WHOLE WEEK?

20 A EVERYTHING THAT MADE A MOTION IN THAT KITCHEN GOT A
21 PICTURE TAKEN OF IT THAT WAS IN THE VIEW OF THE CAMERA.
22 SO, IF IT WAS MY CAT JUMPING ON THE COUNTER OR ME WALKING
23 THROUGH THE HALLWAY, THAT IS WHAT IT GOT A PICTURE OF.

24 Q SO, WHEN YOU CAME HOME YOU CHECKED THE CAMERA BECAUSE
25 YOU THOUGHT SOMEBODY HAD BEEN IN THE HOUSE?

1 A CORRECT.

2 Q AND THEN YOU, I THINK YOU SAID YOU HAD YOUR
3 GIRLFRIEND WITH YOU?

4 A YES.

5 Q SO, YOU THEN WALKED THROUGH THE HOUSE TO MAKE SURE IT
6 WAS CLEAR?

7 A I WALKED THROUGH THE HOUSE FIRST.

8 Q WHAT DO YOU MEAN BY FIRST?

9 A WHEN WE FIRST GOT THERE I COULD TELL SOMEBODY TRIED
10 TO BREAK INTO THE HOUSE SO I TOLD HER TO WAIT OUTSIDE AND
11 I WALKED THROUGH.

12 Q RIGHT.

13 A AND THEN I CHECKED THE CAMERA WHILE I WAS IN THERE.

14 Q AND THEN AFTER YOU CHECKED THE CAMERA WHAT DID YOU
15 DO?

16 A WE WENT TO BED.

17 Q YOU SAW THERE WAS A PICTURE OF A PERSON ON THE
18 CAMERA?

19 A YES.

20 Q YOU WEREN'T CONCERNED THAT MAYBE YOU MIGHT OF MISSED
21 IT AND THE PERSON WAS STILL THERE?

22 A I CAN'T SAY IT WAS A CONCERN BUT I DIDN'T SEE
23 ANYBODY.

24 Q AT THAT TIME YOU CALLED YOUR GIRLFRIEND AND THEN
25 Y'ALL WENT TO BED?

1 A YES, SHE WAS RIGHT OUTSIDE.

2 Q AND THEN THE NEXT MORNING YOU CALLED THE POLICE?

3 A CORRECT.

4 Q WHEN WAS THAT?

5 A SOMEWHERE BETWEEN 10:00 AND 11:00 I THINK IT WAS, I
6 AM NOT EXACTLY SURE WHAT TIME IT WAS.

7 Q AND YOU SAID THAT YOU THOUGHT SOMEONE HAD ENTERED
8 YOUR HOME BECAUSE IT LOOKED LIKE A WINDOW HAD BEEN
9 TAMPERED WITH?

10 A THERE WAS A WINDOW BESIDE THE BACKDOOR WHERE I ALWAYS
11 ENTER AND IT HAD BEEN BROKEN INTO BEFORE, SOMEBODY JUST
12 SLID IT OPEN BECAUSE IT WASN'T LOCKED. AND I HAD PUT A
13 BOARD ON THE WINDOW SO IT COULDN'T BE SLID UP ANYMORE BUT
14 OBVIOUSLY YOU COULD SEE WHERE SOMEONE HAD DUG INTO THE
15 WINDOW WITH A TOOL OF SOME SORT TO TRY TO GET IN.

16 Q SO HOW DO YOU THINK THE PERSON GOT IN IF THEY DIDN'T
17 GET IN THERE?

18 A THEY MOVED OVER TO THE NEXT WINDOW AND CRAWLED IN, I
19 AM ASSUMING TO THAT WINDOW.

20 Q THROUGH THE NEXT WINDOW?

21 A RIGHT.

22 Q AND THAT WINDOW CONTAINS AN AIR-CONDITIONING UNIT?

23 A YES.

24 Q SO, WHEN YOU GOT HOME WAS THE AIR-CONDITIONING UNIT
25 SITTING ON THE GROUND?

1 A NO.

2 Q IT WAS IN THE WINDOW?

3 A CORRECT.

4 Q SO, YOU ARE SAYING THAT THE PERSON TOOK THE UNIT OUT
5 AND WENT IN AND TOOK FOUR OR FIVE CANS OF BEER AND SOME
6 COINS. LEFT THE HOUSE, PUT THE UNIT BACK?

7 A I DIDN'T SAY IT LIKE THAT. I SAID IT WAS EVIDENCE
8 THAT SOMEBODY HAD TRIED TO GO IN THROUGH THAT WINDOW, THEY
9 HAD BROKEN A WINDOW PANE, MOVED A CHAIR AROUND, THAT IS
10 WHERE IT APPEARS THE WAY THEY WENT IN. I KNEW THEY HAD
11 BEEN IN WHEN I FOUND THE PICTURE. THEY MAY OF TRIED TO GO
12 IN THAT WINDOW BUT WENT IN A DIFFERENT WINDOW BUT I
13 COULDN'T TELL. I JUST NOTICED THAT THERE WAS EVIDENCE
14 THAT SOMEONE HAD TRIED TO GO THROUGH THAT WINDOW.

15 Q SO, DID YOU EVER DETERMINE HOW THE PERSON IN THE
16 PICTURE ENTERED YOUR HOME?

17 A I CAN'T FOR SURE DETERMINE HOW HE GOT IN THERE, I
18 JUST KNOW THAT HE WAS IN THERE ACCORDING TO THE PICTURE.

19 Q WERE YOUR DOORS LOCKED WHEN YOU CAME HOME?

20 A YES.

21 Q WERE ANY WINDOWS BROKEN?

22 A THERE WAS DAMAGE TO ONE, IT WASN'T BROKEN.

23 Q WAS ANY GLASS BROKEN IN THE WINDOWS?

24 A NO.

25 Q WHEN YOU CAME IN THE HOME WAS IT IN SHAMBLES,

1 DISTURBED?

2 A NOT REALLY, NO.

3 Q SO, LET'S TALK ABOUT THE CAMERA THAT YOU SAY YOU PUT
4 IN THE HOUSE. YOU INDICATED THAT YOU HAD SOME PROBLEMS AT
5 THAT LOCATION IN THE PAST?

6 A YES.

7 Q SO, YOUR RESPONSE TO THAT WAS TO BUY A DEER CAMERA?

8 A YES.

9 Q AND INSTALL IT IN YOUR KITCHEN?

10 A CORRECT.

11 Q WAS IT FACING ANY ENTRY DOORS TO THE HOUSE?

12 A NO.

13 Q DO YOU HAVE A LOT OF VALUABLES IN YOUR KITCHEN?

14 A NOT REALLY, NO.

15 Q IS THERE A REASON WHY YOU PUT IT IN THE KITCHEN?

16 A BECAUSE THERE WAS ALMOST AN IDENTICAL BURGLARY ABOUT
17 A WEEK BEFORE, ABOUT TEN DAYS BEFORE. SOMEBODY HAD GONE
18 THROUGH MY HOUSE THROUGH THAT SAME WINDOW THAT HAD BEEN
19 DAMAGED.

20 Q WAS THE CAMERA FACING THAT WINDOW?

21 A NO. AND THEY HAD GONE INTO THE REFRIGERATOR AND
22 STOLE SOME OTHER BEER AND SOME LIQUOR AND STUFF IN THE
23 HOUSE. SO, I HAD JUST NATURALLY ASSUMED THEY MAY COME
24 BACK BECAUSE THEY GOT AWAY WITH IT THE FIRST TIME.

25 Q SO, WHEN SOMEBODY MOVES AROUND IN YOUR KITCHEN IT

1 TAKES A PICTURE OF THAT PERSON, RIGHT?

2 A AS LONG AS THEY ARE IN FRONT OF THE CAMERA, YES.

3 Q WHEN SOMEONE ENTERS THE KITCHEN IT TAKES A PICTURE?

4 A THROUGH THAT PARTICULAR DOOR, THERE IS ANOTHER DOOR.

5 Q IF SOMEONE LEAVES THE KITCHEN IT WOULD TAKE A
6 PICTURE?

7 A AS LONG AS IT WASN'T IN THE MIDDLE OF A CYCLE OR
8 SOMETHING LIKE THAT, YES.

9 Q AND SOMEBODY MOVES AROUND IN THE KITCHEN IT WOULD
10 TAKE A PICTURE ALSO?

11 A IT WILL TAKE PICTURES AS LONG AS SOMEBODY IS MOVING
12 WITH THOSE DELAYS IN BETWEEN, AS LONG AS IT IS IN FRONT OF
13 THAT MOTION SENSOR.

14 Q I THINK YOU TESTIFIED THAT YOU HAD BEEN IN AND OUT OF
15 THE KITCHEN THAT ENTIRE DAY TESTING THE CAMERA?

16 A I DIDN'T SAY THAT, NO.

17 Q HAD YOU BEEN IN THE KITCHEN THAT DAY?

18 A PROBABLY, YES.

19 Q WAS THE CAMERA INSTALLED?

20 A YES.

21 Q NOW, THE PICTURES THAT WE SAW A SECOND AGO WAS A
22 TOTAL OF NINE?

23 A YES.

24 Q DOES THE CAMERA HOLD MORE THAN NINE PICTURES?

25 A YES.

1 Q BUT WE ONLY SAW NINE?

2 A CORRECT.

3 Q AND WHO DECIDED WHICH NINE YOU COULD SEE?

4 A I DID.

5 Q SO, YOU ARE SAYING THAT ALL THE PICTURES, WE HAVEN'T
6 SEEN ALL THE PICTURES?

7 A YOU HAVE SEEN ALL THE PICTURES THAT WERE IN THIS
8 TIMEFRAME. THERE IS NO REASON TO SHOW A PICTURE OF ME
9 WALKING AROUND IN A TOWEL.

10 Q WE ARE NOT SURE WHAT TIMEFRAME THERE IS BECAUSE YOU
11 SAY IT HAPPENED AT ONE TIME AND THE CAMERA SAYS IT IS A
12 DIFFERENT TIME. SO, YOU MADE THAT DECISION AS WELL?

13 A WHAT DO YOU MEAN?

14 Q JUST TO SHOW US A CERTAIN NUMBER OF PICTURES?

15 A THAT WAS THE ONLY ONES WHILE I WAS GONE THAT NIGHT,
16 YES.

17 Q BUT YOU CAME HOME AND YOU CHECKED THE CAMERA THAT
18 NIGHT AS WELL, RIGHT?

19 A YES.

20 Q AND IT TOOK A PICTURE OF YOU AT THAT TIME?

21 A I ASSUME IT DID, I DON'T REMEMBER EXACTLY.

22 Q AND YOU SAID THE CAMERA HAD BEEN INSTALLED DURING THE
23 DAY IN YOUR KITCHEN?

24 A YES.

25 Q AND IT TOOK PICTURES OF YOU, IT IS MOTION ACTIVATED

1 SO IT TOOK PICTURES OF YOU DURING THE DAY?

2 A CORRECT.

3 Q SO, IT IS POSSIBLE THERE ARE PICTURES TAKEN BY THAT
4 CAMERA THAT WE MIGHT THINK IS HELPFUL THAT WE HAVEN'T
5 SEEN. IS THAT POSSIBLE?

6 A I DON'T THINK SO.

7 Q WHY NOT?

8 A BECAUSE THERE IS NOTHING ELSE ON THOSE PICTURES OTHER
9 THAN MYSELF WALKING DURING THE DAY.

10 Q WELL, THE CAMERA, I THINK YOU STATED THAT THE CAMERA
11 HOLDS MORE THAN NINE PICTURES?

12 A YES.

13 Q BUT THE ONLY ONES THAT YOU PROVIDED US ARE THE ONES
14 YOU THOUGHT WERE THE IMPORTANT ONES?

15 A THEY WERE THE ONLY ONES THAT SHOWED THE OCCURRENCE
16 THAT NIGHT.

17 Q BASED ON YOUR OPINION?

18 A THAT IS WHAT IS ON THE CAMERA.

19 Q WHERE ARE THE OTHER PICTURES?

20 A THEY ARE PROBABLY STILL ON THE COMPUTER.

21 Q NOW, WHEN THE POLICE OFFICER CAME TO YOUR HOME THAT
22 MORNING DID YOU SHOW THAT PERSON THE PICTURES?

23 A I SHOWED HIM THESE NINE PICTURES, YES.

24 Q YOU SHOWED HIM ONLY NINE. SO, SOMETIME BETWEEN, SO
25 WHEN DID YOU SELECT THE NINE, BEFORE YOU CALLED THE

1 POLICE?

2 A I LOOKED AT THEM BEFORE I CALLED THE POLICE. THAT IS
3 HOW I KNEW SOMEBODY WAS IN MY HOUSE.

4 Q SO, YOU PICKED OUT NINE AND THAT IS WHAT YOU SHOWED
5 THE POLICE?

6 A THERE WERE SOME DIFFERENT DAYS ON THERE SO THERE WAS
7 NO REASON, THEY WERE NOT IMPORTANT TO THIS CASE.

8 Q DID THE OFFICER SAY THAT OR DID YOU SAY THAT?

9 A I SAID THAT.

10 Q I THINK A LITTLE EARLIER YOU AND THE SOLICITOR WERE
11 KIND OF CHUCKLING OVER THE BEER IN THERE. YOU SAID FOUR
12 CANS OF BEER WERE TAKEN?

13 A I JUST KNOW THAT THE BEERS IN THERE WERE GONE, THERE
14 WERE FOUR OR FIVE CANS. I DON'T KNOW THE EXACT COUNT.

15 Q WHEN DID YOU BUY THE BEER?

16 A I DON'T RECALL THAT. I WOULD PROBABLY SAY THE WEEK
17 BEFORE.

18 Q BUT YOU ARE NOT CERTAIN?

19 A NOT CERTAIN.

20 Q DO YOU EVER HAVE ANY GUESTS IN YOUR HOME?

21 A OTHER THAN MY GIRLFRIEND IT IS VERY RARE.

22 Q DOES IT EVER OCCUR?

23 A IT HAS, YES.

24 Q NOW, YOU SAID YOU LOOKED AT THE PHOTO ON THE CAMERA?

25 A YES.

1 Q AND I THINK IT IS YOUR TESTIMONY THAT YOU HAVE NO
2 CLUE WHO THAT INDIVIDUAL MIGHT BE?

3 A I HAVE NEVER SEEN HIM BEFORE, NO.

4 Q AND THEN YOU, YOU SAID YOU DOWNLOADED THE PICTURES
5 ONTO A LAPTOP AT THE BLUE MOON THE NEXT MORNING?

6 A CORRECT.

7 Q IS THAT BEFORE YOU CALLED THE POLICE?

8 A THAT WAS AFTER.

9 Q AFTER. SO, DID THE POLICE LOOK AT ANY PICTURES THAT
10 WERE MADE OUT THERE?

11 A THEY COULD VIEW IT ON MY LAPTOP BUT I COULDN'T PRINT
12 THEM OFF.

13 Q SO, YOU ACTUALLY DOWNLOADED IT ONTO YOUR LAPTOP?

14 A IT IS NOT DOWNLOADED ON THERE, YOU CAN VIEW THEM ON
15 THERE.

16 Q YOU JUST VIEWED IT FROM YOUR LAPTOP?

17 A RIGHT.

18 Q WHEN THE POLICE WERE THERE?

19 A I SHOWED THEM THAT PICTURE THAT YOU SAW THERE.

20 Q THE NINE?

21 A YES.

22 Q DID THE POLICE ASK TO SEE ANY OTHER PICTURES?

23 A I DON'T RECALL.

24 Q DID YOU TELL THEM THERE WERE OTHERS?

25 A I DON'T RECALL.

1 Q SO, THEN AFTER YOU TOOK THE CAMERA YOU, THE POLICE
2 VIEWED THE PICTURES ON YOUR LAPTOP. YOU THEN, THE POLICE
3 LEFT, IS THAT CORRECT?

4 A YES.

5 Q AND DID THEY GIVE YOU INSTRUCTIONS AS TO WHAT TO DO?

6 A THEY TOLD ME TO BRING IT DOWN THERE OR TO, SO THEY
7 COULD MAKE A COPY OF IT.

8 Q BRING WHAT DOWN?

9 A THE CAMERA.

10 Q AND DID YOU TAKE THE CAMERA TO THE POLICE?

11 A I TOOK IT UP THERE EARLIER AND WE COULDN'T MAKE A
12 COPY OF IT SO I TOOK IT TO MY COMPUTER.

13 Q SO, YOU TOOK THE CAMERA TO THE POLICE STATION?

14 A SURE.

15 Q YOU KNOW WHAT TIME THAT WAS?

16 A I DON'T RECALL EXACTLY, IT WAS EARLY.

17 Q BEFORE DARK THAT DAY?

18 A YES.

19 Q OKAY. AND WHO DID YOU TALK TO AT THE POLICE STATION?

20 A I DON'T REMEMBER THAT PART. I REMEMBER WHO I TALKED
21 TO WHEN I BROUGHT THE COPY DOWN THERE.

22 Q WHEN YOU TOOK THE CAMERA TO THE POLICE DEPARTMENT YOU
23 DON'T KNOW WHO YOU SPOKE TO?

24 A I DON'T RECALL.

25 Q BUT THAT PERSON TOLD YOU TO LEAVE WITH THE CAMERA AND

1 DO WHAT?

2 A I TOLD THEM WE COULD MAKE A COPY OF IT ON OUR LAPTOP
3 AND BRING IT TO THEM.

4 Q WHO IS WE?

5 A ME AND MY GIRLFRIEND.

6 Q SHE OBVIOUSLY CAME BACK TO YOUR HOUSE?

7 A NO, SHE WAS AT WORK AND THAT WAS THE COMPUTER WE USED
8 AT WORK.

9 Q I SEE. SO, THEN YOU LEFT THE POLICE STATION AND THEN
10 YOU WENT TO THE BLUE MOON TO DOWNLOAD?

11 A CORRECT.

12 Q NOW, WAS YOUR GIRLFRIEND WITH YOU THE FIRST TIME YOU
13 WENT TO POLICE STATION?

14 A NO.

15 Q BUT WHEN YOU WENT TO THE BLUE MOON AND YOU MADE THE
16 DISK THEN YOU AND YOUR GIRLFRIEND CAME BACK AND BROUGHT
17 THE CD TO THE POLICE?

18 A NO, I CAME ALONE AGAIN.

19 Q NOW, I THOUGHT YOU SAID WE A SECOND AGO. YOU CAME
20 BACK ALONE AND YOU GAVE THE CAMERA TO, THE DISK TO WHOM?

21 A I GAVE THE DISK TO OFFICER MCCLURKIN.

22 Q AND THEN YOU LEFT?

23 A THEY MADE AN IDENTIFICATION AS TO WHO WAS ON THAT.

24 Q THEN YOU LEFT?

25 A THEN I LEFT, YES.

1 Q MR. POTTS, YOU CALLED THE POLICE PROBABLY AROUND
2 11:00 O'CLOCK OR SO THE MORNING OF THE 28TH?

3 A IN THAT BALLPARK, I DON'T REMEMBER EXACTLY WHAT TIME.

4 Q NOW, MR. POTTS, THE INCIDENT REPORT WAS WRITTEN UP AS
5 A RESULT OF A CALL BEING MADE FROM YOUR HOUSE. DID YOU
6 EVER SEE THAT REPORT?

7 A I DON'T THINK SO.

8 Q NO. WAS IT OFFERED TO YOU FOR REVIEW?

9 A I DON'T THINK SO.

10 Q NO. NOW, WHEN THE POLICE GOT THERE THAT MORNING WERE
11 YOU WITH THE POLICE THE ENTIRE TIME?

12 A I THINK SO, YES.

13 Q WERE ANY FINGERPRINTS OBTAINED?

14 A I AM NOT SURE ABOUT THAT.

15 Q DID YOU SEE ANYBODY DUST FOR FINGERPRINTS?

16 A THEY DID ATTEMPT TO, YES.

17 Q WERE ANY PICTURES TAKEN AT THAT TIME?

18 A I DON'T KNOW.

19 Q YOU INDICATED THAT THERE WERE FOOTPRINTS OUTSIDE NEAR
20 CHAIRS. WERE ANY PICTURES TAKEN OF THAT?

21 A I DON'T KNOW.

22 Q DID YOU EVER SEE ANY PICTURES OF THAT?

23 A I DON'T THINK SO, NO.

24 Q NOW, THE INCIDENT REPORT SAID THAT YOU SAID THAT THE
25 PERSON ENTERED THROUGH A WINDOW THAT HOLDS AN

1 AIR-CONDITIONER. DID YOU SAY THAT?

2 MR. MCDANIEL: YOUR HONOR, THAT IS HEARSAY, I OBJECT.

3 THE COURT: SUSTAINED.

4 Q HOW DID YOU SAY THE PERSON ENTERED?

5 A I ACTUALLY DON'T RECALL EXACTLY WHAT I SAID THAT DAY,
6 SIR.

7 Q DO YOU RECALL CALLING THE POLICE?

8 A YES.

9 Q DO YOU RECALL CALLING BACK AND TELLING THEM ABOUT
10 SOME COINS MISSING?

11 A YES.

12 Q BUT YOU DON'T RECALL WHAT YOU SAID WHEN THEY CAME TO
13 YOUR HOUSE ON THE 28TH?

14 A I DON'T REMEMBER EXACTLY WHAT I SAID, NO.

15 Q I DON'T HAVE ANY FURTHER QUESTION AT THIS TIME.

16 THE COURT: REDIRECT?

17 MR. MCDANIEL: YES, SIR.

18 REDIRECT EXAMINATION

19 BY MR. MCDANIEL:

20 Q I AM GOING TO HAND YOU WHAT HAS BEEN MARKED FOR--

21 MR. CHAPLIN: YOUR HONOR, I HAVE AN OBJECTION, THE
22 PHOTOS THAT THE STATE IS TRYING TO PRESENT AT THIS TIME.

23 MR. MCDANIEL: JUDGE, CAN WE DO THIS OUTSIDE THE
24 PRESENCE OF THE JURY, PLEASE.

25 THE COURT: LADIES AND GENTLEMEN, LET'S TAKE A BREAK

1 AND DON'T TALK ABOUT THE CASE AND LET'S KEEP AN OPEN MIND.

2 (WHEREUPON, THE JURY WAS EXCUSED FROM OPEN COURT FOR
3 A BREAK.)

4 THE COURT: YES, SIR.

5 MR. CHAPLIN: YOUR HONOR, THERE ARE PHOTOGRAPHS THAT
6 THE STATE HAS THAT WERE TAKEN ALMOST A YEAR AFTER THIS
7 INCIDENT OCCURRED. I THINK THAT THE LOCATION HAS CHANGED
8 GREATLY OVER THAT ONE YEAR PERIOD. AND I AM ASSUMING THAT
9 THESE PHOTOGRAPHS ARE NOT RELEVANT EVIDENCE AND I AM
10 SAYING IF YOU FIND THAT THEY ARE RELEVANT THAT THEY ARE
11 PREJUDICIAL IN THAT I BELIEVE THEY SHOW CONDITIONS THAT
12 ARE NOT APPLICABLE TO THE TIME AND DATE THAT WE ARE
13 TALKING ABOUT.

14 THE COURT: MR. MCDANIEL.

15 MR. MCDANIEL: YOUR HONOR, THEY ARE RELEVANT AND I
16 WILL HAND THEM UP IF YOU WOULD LIKE SEE THEM. THEY ARE
17 WHERE HE PLACED THE DEER CAMERA ON THE REFRIGERATOR. I
18 THINK THEY WERE TAKEN ON JANUARY OF THIS YEAR BY THE
19 OFFICERS PURELY USING THEM AS DEMONSTRATIVE EVIDENCE OF
20 HOW, JUST SO THE JURY CAN SEE HOW IT WAS SET UP. I THINK
21 THEY HAVE A RIGHT TO SEE THAT, I DON'T KNOW IF IT WOULD BE
22 PREJUDICIAL OR CONFUSING BECAUSE IT WAS ALREADY
23 ESTABLISHED WHEN THOSE PICTURES WERE TAKEN ON THE DATE IN
24 QUESTION, THE INCIDENT DATE. THESE WERE PICTURES LATER
25 THAT I ASKED TO BE TAKEN SO THE JURY COULD SEE HOW IT WAS

1 SET UP. I BELIEVE THE DEFENSE WENT IN ON SOME LENGTH OF
2 HOW THE CAMERA WAS IN THE KITCHEN, I THINK THE JURY WOULD
3 HAVE A RIGHT TO SEE THAT SHOULD I LAY THE PROPER
4 FOUNDATION FOR IT. THE OTHER IS THE FACT IT WAS IN THE
5 HOME TAKEN JANUARY OF 2008. THERE WAS ON CROSS, AGAIN, A
6 LONG LINE OF QUESTIONING ABOUT WHAT WINDOWS THE ALLEGED
7 DEFENDANT WENT IN AND THE BACKDOOR. I DON'T KNOW THAT
8 CONDITIONS HAVE CHANGED ENOUGH OR AT ALL OTHER THAN THE
9 WINDOW THAT ONCE HELD THE AIR-CONDITIONING UNIT HAS BEEN
10 MOVED TO ANOTHER WINDOW. I WASN'T GETTING INTO ANY
11 TESTIMONY LIKE THAT AND I THINK THE JURY WOULD KNOW THAT
12 THIS PICTURE WAS TAKEN A FEW MONTHS AGO. THE STATE WOULD
13 LIKE TO INTRODUCE JUST SO THEY CAN SEE THE BACK OF THE
14 HOUSE, THIS IS THE WINDOW, THIS IS THIS WINDOW AND THIS IS
15 THE BACKDOOR.

16 THE COURT: I OVERRULE THE OBJECTION. LET'S TAKE
17 ABOUT A TEN MINUTE BREAK.

18 (WHEREUPON, A SHORT BREAK WAS TAKEN.)

19 THE COURT: ARE YOU READY FOR THE JURY?

20 MR. MCDANIEL: JUDGE, WE HAVE ONE SCHEDULING ISSUE.
21 WE WOULD ASK THAT THE STATE GO THROUGH ITS SECOND WITNESS.
22 I HAVE MS. MOORE WITH THE NEWBERRY POLICE DEPARTMENT. WE
23 WOULD ASK THAT WHEN HER TESTIMONY IS COMPLETE THAT WE
24 START AGAIN IN THE MORNING AS EARLY AS POSSIBLE. THE
25 CONCERN THAT HE WILL BE THE MOST LENGTHY.

1 THE COURT: OKAY.

2 MR. CHAPLIN: HOW EARLY CAN WE START IN THE MORNING.

3 I DO HAVE A WITNESS TO BE BACK AT CLEMSON FOR A 1:00
4 O'CLOCK CLASS TOMORROW.

5 THE COURT: I CAN'T MAKE EVERYBODY HAPPY, WE CAN
6 START AT 9:30 BUT AND I KNOW YOU CAN'T GUARANTEE THEM, I
7 KNOW YOU HAVE GOT TO TRY TO ACCOMMODATE TOO. WHOEVER THE
8 WITNESS IS, JUST REMIND THAT THIS ISN'T A TEA PARTY WE ARE
9 HAVING HERE. OKAY. LET'S BRING THE JURY IN.

10 (WHEREUPON, THE JURY CAME INTO OPEN COURT AT
11 APPROXIMATELY 3:25 P.M.)

12 THE COURT: MR. MCDANIEL, YOU CAN CONTINUE WITH
13 REDIRECT.

14 REDIRECT EXAMINATION.

15 BY MR. MCDANIEL:

16 Q MR. POTTS, IN CROSS YOU SAID YOU LIVED AT 819 PAULINE
17 STREET?

18 A CORRECT.

19 Q AND TO THE BEST OF YOUR KNOWLEDGE NO PICTURES WERE
20 TAKEN THAT DAY, CORRECT?

21 A I DON'T RECALL THAT.

22 Q I AM GOING TO HAND YOU STATE'S EXHIBITS 4, 5 AND 6
23 FOR IDENTIFICATION. TAKE A MOMENT TO LOOK AT THEM,
24 PLEASE.

25 A OKAY.

1 Q DO YOU KNOW WHAT THOSE PICTURES ARE?

2 A YES.

3 Q HAVE YOU SEEN THOSE BEFORE?

4 A I HAVEN'T SEEN THE ACTUAL PICTURES BEFORE, NO.

5 Q WHAT IS IN THE PICTURE?

6 A NUMBER 4 IS THE BACK OF MY HOUSE. LET'S SEE, NUMBER

7 5 IS THAT CAMERA ON TOP OF MY REFRIGERATOR. THEN A

8 CLOSEUP VIEW AND THEN A MORE DISTANCE VIEW IN NUMBER 6.

9 Q AND DO THOSE FAIRLY AND ACCURATELY REPRESENT THE
10 IMAGES THAT WERE TAKEN THAT DAY?

11 A YES.

12 Q AND, AGAIN, WERE THOSE TAKEN AT SOME OTHER DATE?

13 A YES.

14 Q DO YOU ROUGHLY REMEMBER WHEN THOSE PICTURES WERE
15 TAKEN?

16 A A COUPLE OF MONTHS AGO.

17 Q THEY WERE NOT TAKEN ON THE INCIDENT DATE?

18 A NO.

19 MR. MCDANIEL: YOUR HONOR, I WOULD ASK THAT STATE'S
20 EXHIBITS 4, 5 AND 6 BE MOVED INTO EVIDENCE.

21 MR. CHAPLIN: YOUR HONOR, I RENEW MY PREVIOUS
22 OBJECTION.

23 THE COURT: OKAY. SUBJECT TO PREVIOUS OBJECTION.

24 (WHEREUPON, STATE'S EXHIBIT NOS 4, 5 AND 6 WERE
25 ADMITTED INTO EVIDENCE.)

1 (WHEREUPON, STATE'S EXHIBIT NOS. 2 AND 3 WERE
2 ADMITTED INTO EVIDENCE.)

3 MR. MCDANIEL: PERMISSION TO PUBLISH TO THE JURY,
4 YOUR HONOR.

5 THE COURT: OKAY.

6 Q NOW, ON CROSS THERE WAS I GUESS A LOT OF TESTIMONY
7 WHICH WINDOWS AND DOOR, CAN YOU EXPLAIN THIS TO US?

8 A THIS IS THE BACK OF WHAT I USUALLY USE. AND THIS IS
9 THE WINDOW, THIS IS THE BOARD I ACTUALLY USE THROUGH THE
10 WINDOW TO BLOCK SOMEONE FROM COMING IN. THAT IS WHEN I
11 SAW IT HAD BEEN TAMPERED WITH AGAIN. AND THE FOOTPRINTS
12 AND THE CHAIR AND ALL--

13 Q YOU HAD MOVED THE WINDOW UNIT?

14 A YES.

15 Q OKAY. BUT THAT IS WHERE IT WAS DURING THE INCIDENT
16 DATE?

17 A THAT IS CORRECT.

18 Q WHAT HAS CHANGED JUST SO THE JURY KNOWS.

19 A THERE IS PROBABLY SOME TRASH THERE, THIS IS THE
20 WINDOW UNIT HERE AND THERE WAS SOME WINDOW PANES HERE
21 WHICH WERE STEPPED ON AND BROKEN. SO THEY HAD BEEN
22 REMOVED.

23 Q OKAY. AND THAT IS THE BACKDOOR IN THE EARLY MORNING
24 OF OCTOBER 28TH?

25 A CORRECT.

1 Q THANK YOU. STATE'S EXHIBIT 6, WHAT IS THAT?

2 A THAT IS MY REFRIGERATOR INSIDE THE KITCHEN, THIS IS
3 THE CAMERA AND IN A VERY SIMILAR POSITION AS THE NIGHT OF
4 THE INCIDENT.

5 Q AND STATE'S EXHIBIT 5?

6 A A CLOSER VIEW.

7 Q AND SIMILAR TO THE WAY IT WAS THAT NIGHT?

8 A YES.

9 Q AND YOU HAD SET THAT UP SINCE YOU PURCHASED IT, I
10 MEAN BEFORE THE INCIDENT DATE?

11 A YES, THE DAY AFTER, I PURCHASED IT PROBABLY A WEEK
12 BEFORE THE INCIDENT HAPPENED AND IT WAS SET UP PROBABLY
13 FOUR OR FIVE DAYS BEFORE THE INCIDENT HAPPENED.

14 Q NOW, YOU SAID THAT YOU WEREN'T SURE HOW SOMEBODY GOT
15 IN YOUR HOUSE THAT NIGHT?

16 A NO.

17 Q BUT YOU DO KNOW SOMEBODY WAS IN YOUR HOUSE?

18 A YES.

19 Q AND DID ANYBODY HAVE PERMISSION TO BE IN YOUR HOME?

20 A NO.

21 Q HAVE YOU AT ALL TAMPERED WITH THE IMAGES?

22 A NO.

23 Q THIS NINE PICTURES THAT YOU SELECTED TO GIVE THE
24 POLICE, CAN YOU TELL US WHAT THE OTHER IMAGES WERE?

25 A AS I SAID EARLIER, JUST EITHER THE CAT WENT INTO THE

1 ROOM OR ME WONDERING INTO THE KITCHEN TO GET SOMETHING TO
2 DRINK MYSELF, THINGS OF THAT NATURE.

3 Q AND THESE NINE THAT WERE GIVEN TO THE POLICE WERE THE
4 NINE THAT YOU THOUGHT WERE RELEVANT IN THIS CASE?

5 A YES, THEY WERE ALL IN A BLOCK OF TIME RIGHT THERE.

6 Q WAS THERE ANY OTHER PICTURES OF UNIDENTIFIED PEOPLE
7 IN YOUR HOUSE?

8 A NO.

9 Q THE CAMERA, WAS THAT EVER OUT OF YOUR POSSESSION?

10 A NO.

11 Q DIDN'T LEAVE IT WITH ANYBODY FOR ANY PERIOD?

12 A NO.

13 Q WHEN YOU DOWNLOADED IT AT THE BLUE MOON THE CAMERA
14 WAS WITH YOU?

15 A YES, I WAS THERE.

16 Q THE CAMERA WAS ALWAYS IN YOUR POSSESSION?

17 A YES.

18 Q ALWAYS HAD THE DISK ONCE IT WAS BURNED?

19 A IT WAS BRIEF, I GUESS. IT WENT STRAIGHT FROM THE
20 BLUE MOON TO THE POLICE STATION.

21 Q AND AGAIN WHO DID YOU TURN THAT OVER TO?

22 A TO OFFICER MCCLURKIN.

23 Q NO FURTHER QUESTIONS.

24 THE COURT: RECROSS?

25 MR. CHAPLIN: VERY BRIEF, YOUR HONOR.

RECROSS-EXAMINATION

BY MR. CHAPLIN:

Q MR. POTTS, THIS WINDOW YOU SAID THE NIGHT THAT YOU
CAME HOME HAD AN AIR-CONDITIONER IN IT, IS THAT CORRECT?

A CORRECT.

Q AND LATER YOU REMOVED THAT AIR-CONDITIONER YOURSELF?

A CORRECT.

Q SO, NOW IT LOOKS DIFFERENT, IT IS WITHOUT AN
AIR-CONDITIONER?

A THAT IS THE WAY IT LOOKS NOW.

Q THAT IS THE WAY IT LOOKS NOW. AND YOU ALSO SAID THAT
THESE PICTURES, YOU AGREE THAT THESE PICTURES WERE NOT
TAKEN THE DAY THAT YOU REPORTED THE INCIDENT BUT ALMOST A
YEAR LATER?

A THAT IS CORRECT.

Q HERE IS THE DEER CAMERA ON TOP OF YOUR REFRIGERATOR,
DO YOU KNOW IF IT WAS WORKING AT THIS TIME?

A YES, WE DID TEST IT, YES.

Q THAT IS ALL I HAVE.

THE COURT: THANK YOU, MR. POTTS. CALL YOUR NEXT
WITNESS.

MR. MCDANIEL: THE STATE CALLS ALLISON MOORE.

ALLISON MOORE, AFTER BEING DULY SWORN,
TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

- 1 BY MR. MCDANIEL:
- 2 Q WHERE DO YOU WORK?
- 3 A NEWBERRY POLICE DEPARTMENT.
- 4 Q HOW LONG HAVE YOU WORKED THERE?
- 5 A FOUR YEARS.
- 6 Q ANY OTHER LAW ENFORCEMENT EXPERIENCE?
- 7 A YES SIR, I HAVE HAD TEN YEARS PRIOR.
- 8 Q WHERE WAS THAT AT?
- 9 A AT CLINTON POLICE DEPARTMENT.
- 10 Q WHAT IS YOUR RANK NOW?
- 11 A I AM JUST A CORPORAL.
- 12 Q WHAT IS YOUR DUTIES AS A CORPORAL?
- 13 A I AM ON ROAD PATROL.
- 14 Q WHAT DO YOU DO ON ROAD PATROL?
- 15 A ANSWER CALLS THAT ARE GIVEN, RIDE AROUND AND CHECK
- 16 PROPERTY.
- 17 Q NOW, WERE YOU WORKING ON OCTOBER 28TH OF 2008?
- 18 A YES, SIR.
- 19 Q WHAT TIME DID YOU START?
- 20 A 6:00 A.M.
- 21 Q WHAT WAS YOUR RANK THAT DAY?
- 22 A JUST PATROLMAN.
- 23 Q AND SAME DUTIES OR HAD YOUR DUTIES CHANGED?
- 24 A NO SIR, SAME DUTIES.
- 25 Q RESPOND TO CALLS?

1 A YES, SIR.

2 Q NOW, DID YOU COME INTO CONTACT WITH LEE POTTS THAT

3 DAY?

4 A YES, SIR.

5 Q ABOUT WHAT TIME?

6 A A LITTLE AFTER 11:00 A.M.

7 Q DID YOU GO TO HIS HOME?

8 A YES, SIR.

9 Q DO YOU KNOW WHERE THAT IS LOCATED?

10 A ON PAULINE STREET.

11 Q WHO WAS THERE WHEN YOU GOT THERE?

12 A MR. POTTS.

13 Q DID HE SHOW YOU A DEER CAMERA?

14 A YES, HE DID.

15 Q AND DID HE SHOW YOU THIS DEER CAMERA?

16 A YES, SIR.

17 Q WHAT WAS ON IT?

18 A AN IMAGE OF SOMEONE COMING INTO HIS KITCHEN.

19 Q WERE YOU ABLE TO IDENTIFY THAT IMAGE?

20 A NO, SIR.

21 Q I WANT TO SHOW YOU WHAT HAS BEEN MARKED AS STATE'S

22 EXHIBIT 1. AND CAN YOU TELL ME, IS THAT THE IMAGE YOU SAW

23 THAT DAY?

24 A YES, SIR.

25 Q AND YOU COULD NOT IDENTIFY THAT IMAGE?

1 A NO, SIR.

2 Q THANK YOU. SO, AFTER YOU SAW THAT IMAGE TELL ME WHAT
3 YOU DID IN THE HOUSE?

4 A AFTER I SAW THE IMAGE WE BEGAN TO CHECK THE EXTERIOR
5 OF THE HOME TO FIND OUT WHERE THE INDIVIDUAL ENTERED THE
6 HOME.

7 Q WERE YOU ABLE TO DETERMINE WHERE SOMEONE ENTERED?

8 A NO, SIR. I DUSTED FOR FINGERPRINTS ON THE
9 AIR-CONDITIONER WHERE WE ASSUMED THE SUBJECT ENTERED THE
10 HOME.

11 Q WERE YOU ABLE TO RECOVER ANY PRINTS?

12 A NO, SIR.

13 Q DID YOU CHECK THE INTERIOR OF THE HOME?

14 A THE INTERIOR, NO SIR.

15 Q DID YOU TAKE PICTURES?

16 A NO, SIR.

17 Q WHY DIDN'T YOU TAKE PICTURES?

18 A JUST AFTER SEEING THE IMAGE I THOUGHT IT WAS A PRETTY
19 GOOD IMAGE OF THE SUSPECT, THAT I KNEW THAT THE PERSON
20 COULD BE IDENTIFIED SO I JUST, I DIDN'T, I FAILED TO TAKE
21 PICTURES.

22 Q HOW LONG WERE YOU AT THE HOUSE?

23 A APPROXIMATELY FORTY-FIVE MINUTES.

24 Q AND YOU BASICALLY STAYED ON THE EXTERIOR OF THE HOME?

25 A WELL, I WAS INSIDE LOOKING AT THE IMAGE FOR ABOUT TEN

1 OR FIFTEEN MINUTES AND PRETTY MUCH STAYED ON THE EXTERIOR,
2 YES.

3 Q DID YOU DO ANYTHING IN THE HOUSE, DUST FOR PRINTS?

4 A NO, SIR.

5 Q SO, WHAT DID YOU TELL HIM TO DO WITH THE IMAGE?

6 A HE WAS UNABLE TO DOWNLOAD IT ON A DISK THAT DAY FOR
7 US SO I ADVISED HIM IF HE COULD GET IT DOWNLOADED BECAUSE
8 HE SAID HE COULD AT THE BLUE MOON. AND THEN I TOLD HIM TO
9 BRING IT TO THE POLICE DEPARTMENT AND HE DID.

10 Q WERE YOU THERE WHEN HE CAME TO THE POLICE DEPARTMENT?

11 A YES, SIR.

12 Q WERE YOU THERE WHEN MR. MCCLURKIN PUT THE DISK IN?

13 A YES, SIR.

14 Q DO YOU KNOW WHAT ITEMS MR. POTTS BROUGHT TO THE
15 POLICE DEPARTMENT?

16 A THE DISK AND THE VIDEO CAMERA.

17 Q AT ANY TIME DID YOU HAVE THE DEER CAMERA IN YOUR
18 POSSESSION?

19 A NO, SIR.

20 Q THE DISK IN YOUR POSSESSION?

21 A NO, SIR.

22 Q I AM GOING TO GO BACK WHEN YOU DUSTED FOR PRINTS,
23 WHERE DID YOU DUST FOR PRINTS?

24 A I DUSTED ON THE OUTSIDE OF THE HOME ON THE DOOR
25 HANDLE AND ON THE AIR-CONDITIONER UNIT AND THE CHAIR.

1 Q YOU REMEMBER WHAT THE CHAIR LOOKED LIKE?

2 A IT WAS GREEN IN COLOR, PLASTIC CHAIR.

3 Q THAT IS THE CHAIR, STATE'S EXHIBIT 4?

4 A YES SIR, IT DOES RESEMBLE.

5 Q SHOW ME, IF YOU CAN, WHERE YOU DUSTED?

6 A THE AIR-CONDITIONING WINDOW WAS IN THIS WINDOW,
7 DUSTED FOR PRINTS ON THIS AIR-CONDITIONER. DUSTED FOR
8 PRINTS ON THIS CHAIR AND THEN ON THE DOOR HANDLE TO THE
9 DOOR.

10 Q NO PRINTS WERE LIFTED?

11 A NO PRINTS WERE LIFTED.

12 Q CAN YOU DESCRIBE THE AIR-CONDITIONER THAT WAS IN
13 THERE?

14 A IT WAS A SMALL UNIT THAT COULD BE JUST PLACED INTO
15 THE WINDOW WITH THE WINDOW CLOSING DOWN ON THE UNIT
16 ITSELF.

17 Q THANK YOU. WERE YOU SHOWN ANY SCRAPINGS ON THE
18 WINDOW?

19 A YES, SIR.

20 Q WHERE WAS THAT?

21 A IT WAS ON THE LEFT WINDOW TO THE LEFT OF THE DOOR,
22 THE WINDOW THAT I WAS TOLD THAT HAD BEEN PREVIOUSLY
23 ENTERED.

24 Q AND WHAT DID THAT LOOK LIKE?

25 A IT LOOKED LIKE SOME TYPE OF A TOOL, LIKE A

1 SCREWDRIVER, KNIFE, HAD, YOU KNOW, JUST TRIED TO LIFT IT.

2 Q YOU HAD SAID A SECOND AGO THAT YOU ASSUMED THE ENTRY
3 WAS AT, WHERE THE AIR-CONDITIONER WAS?

4 A YES, SIR.

5 Q WHY DID YOU ASSUME THAT?

6 A BECAUSE MR. POTTS ADVISED ME THAT THE CHAIR THAT WAS
7 NEAR THE AIR-CONDITIONER HAD NOT BEEN LIKE THAT
8 PREVIOUSLY.

9 Q AND THAT IS THE GREEN CHAIR THAT YOU DUSTED?

10 A YES, SIR.

11 Q ANYTHING ELSE THAT YOU SAW?

12 A NO, SIR.

13 Q SO, AFTER YOU PROCESSED, WHERE DID YOU GO WHEN YOU
14 PROCESSED THIS?

15 A I BELIEVE THAT WAS, WE ENDED THE CALL AT THAT POINT.

16 Q AND WHEN YOU END A CALL WHAT HAPPENS TO THE CASE
17 AFTER YOU RESPOND?

18 A IT IS FORWARDED TO AN INVESTIGATOR.

19 Q AND IN THIS CASE IT WAS FORWARDED TO WHO?

20 A LIEUTENANT MCCLURKIN.

21 Q AS I GUESS THE INITIAL RESPONDER, HOW DO YOU INFORM
22 MR. MCCLURKIN OF THE CASE THAT YOU HAVE?

23 A WELL, THAT VARIES. USUALLY SOMETIME THE NEXT MORNING
24 THEY ARE ASSIGNED DIFFERENT CASES BUT THIS INCIDENT, I
25 BROUGHT IT TO HIS ATTENTION BECAUSE I KNEW THAT MR. POTTS

1 WAS COMING DOWN WITH THE IMAGE.

2 Q DO YOU REMEMBER WHAT TIME MR. POTTS CAME DOWN?

3 A IT WAS LATER ON IN THE AFTERNOON.

4 Q THANK YOU.

5 THE COURT: MR. CHAPLIN.

6 CROSS-EXAMINATION

7 BY MR. CHAPLIN:

8 Q GOOD AFTERNOON, CORPORAL MOORE.

9 A GOOD AFTERNOON, SIR.

10 Q NOW, YOU TESTIFIED THAT YOU HAD BEEN A POLICE OFFICER
11 FOR 14 YEARS?

12 A YES, SIR.

13 Q AND WHERE DID YOU DO YOUR TRAINING?

14 A AT THE SOUTH CAROLINA STATE POLICE ACADEMY.

15 Q AND DURING THAT TRAINING PROCESS WERE YOU TRAINED HOW
16 TO PROCESS CRIME SCENES?

17 A NO SIR, NOT AT THE BASIC TRAINING.

18 Q WERE YOU EVER TRAINED TO PROCESS CRIME SCENES?

19 A YES, SIR.

20 Q AT WHAT TIME?

21 A IT WAS APPROXIMATELY MAYBE IN THE YEAR OF 2000.

22 Q 2000?

23 A YES.

24 Q DID YOU TAKE A PARTICULAR CLASS IN THAT AREA?

25 A YES SIR, IT WAS CALLED BASIC DETECTIVE CLASS.

- 1 Q BASIC DETECTIVE CLASS?
- 2 A YES.
- 3 Q AND I BET YOU DID WELL?
- 4 A YES, SIR.
- 5 Q GOOD. NOW, YOU RESPONDED TO THE SCENE IN THIS
- 6 MATTER. THAT IS CORRECT, RIGHT?
- 7 A YES, SIR.
- 8 Q AND I THINK IT IS YOUR TESTIMONY THAT YOU DIDN'T GET
- 9 ANY FINGERPRINTS FROM THIS CRIME SCENE THAT WOULD MATCH MY
- 10 CLIENT, MR. MITCHELL?
- 11 A I DID NOT GET ANY PRINTS, NO SIR.
- 12 Q SO, YOU DID NOT GET ANY MATCHES?
- 13 A I DID NOT GET ANY FINGERPRINTS.
- 14 Q AND AS FAR AS PICTURES OF THE CRIME SCENE YOU DIDN'T
- 15 GET, YOU DIDN'T TAKE ANY PICTURES?
- 16 A NO, SIR.
- 17 Q IS THAT WHAT THEY TRAINED YOU AT THE POLICE ACADEMY?
- 18 A I DO NOT RECALL TAKING PHOTOGRAPH CLASS DURING BASIC
- 19 DETECTIVE.
- 20 Q WHEN YOU WERE TRAINED BY THE PROCESS OF CRIME SCENE,
- 21 TAKING PHOTOGRAPHS WASN'T IN THAT TRAINING?
- 22 A I DON'T RECALL.
- 23 Q DID YOU ATTEMPT TO GET ANY DNA SAMPLES FROM THE CRIME
- 24 SCENE?
- 25 A NO, SIR.

1 Q I THINK EARLIER MR. POTTS TESTIFIED THAT THERE HAS
2 BEEN SOME FOOTPRINTS OUTSIDE. DID YOU SEE THOSE
3 FOOTPRINTS?

4 A I BELIEVE THERE WAS SOME MARRING OF THE GROUND BUT
5 THERE WAS NO IMPRESSION OF A FOOTPRINT.

6 Q DID YOU TAKE A PHOTOGRAPH OF THE MARRING?

7 A NO, SIR.

8 Q NOW, DID YOU CANVAS THE NEIGHBORHOOD TO SEE IF
9 ANYBODY SAW ANYBODY ENTERING MR. POTTS HOME?

10 A NO, SIR.

11 Q WHY NOT?

12 A I JUST DIDN'T SIR, I DIDN'T.

13 Q I THINK YOU SAID THAT MR. POTTS SHOWED YOU AN IMAGE?

14 A YES, SIR.

15 Q SO, HE DIDN'T SHOW YOU NINE PICTURES?

16 A I DON'T RECALL HOW MANY PICTURES HE SHOWED ME BUT I
17 DO REMEMBER THE IMAGE, THE PHOTOGRAPH IMAGE OF THE PERSON
18 IN THE KITCHEN.

19 Q DID YOU TAKE NOTES WHEN YOU WERE DOING THIS?

20 A A LITTLE BIT FROM MY REPORT.

21 Q DID YOU BRING THOSE NOTES WITH YOU TODAY?

22 A NO, SIR.

23 Q WHY NOT?

24 A WELL, THEY ARE JUST NOTES ON A PAD, LIKE HIS NAME,
25 ADDRESS, DATE OF BIRTH AND THINGS LIKE THAT FOR THE

1 INCIDENT REPORT.

2 Q BUT YOU KNEW I WAS GOING TO BE QUESTIONING YOU TODAY,
3 CORRECT?

4 A YES, SIR.

5 Q SO, YOU DIDN'T THINK THOSE NOTES WOULD HELP?

6 A WELL, THEY ARE NOT OFFICIAL CRIME SCENE NOTES, THEY
7 ARE JUST NOTES FOR THE INCIDENT REPORT.

8 Q SO, YOU ARE NOT SURE HOW MANY PICTURES YOU SAW ON
9 THIS CAMERA?

10 A I DO NOT RECALL HOW MANY, NO SIR.

11 Q BUT YOU TESTIFIED THAT YOU SAW AN IMAGE?

12 A AN IMAGE OF A PERSON, YES SIR.

13 Q DID YOU EVER ESTABLISH THAT THERE WAS ENTRY INTO THE
14 HOME, SOME ENTRY?

15 A I DIDN'T SEE AN ENTRY INTO THE HOME.

16 Q I THINK YOU SAID THAT ONCE YOU SAW THE PICTURE, DID
17 YOU SAY, ONCE I SAW THE PICTURE I STOPPED THERE?

18 A I DON'T RECALL, I DON'T UNDERSTAND YOUR QUESTION.

19 Q WHEN YOU, YOU DIDN'T ESTABLISH THERE WAS AN ENTRY
20 INTO THE HOME. AND I THINK MR. POTTS TESTIFIED THAT HE
21 HAD PRIOR BREAK-INS AT THIS LOCATION, CORRECT, DID HE TELL
22 YOU THAT?

23 A YES, SIR.

24 Q SO, YOU ARE NOT ONE-HUNDRED PERCENT SURE AS TO WHAT
25 EXACTLY WAS TAKEN AT THIS TIME, ON THIS OCCASION, ARE YOU?

1 A ONLY WHAT MR. POTTS TOLD ME.

2 Q I THINK YOU SAID THAT YOU DIDN'T WALK THROUGH THE
3 HOME?

4 A NO SIR, I DID NOT.

5 Q SO, YOU GOT TO THE HOUSE AND WHO ANSWERED THE DOOR?

6 A MR. POTTS.

7 Q AND THEN YOU WALKED IN AND YOU STARTED TALKING TO MR.
8 POTTS, CORRECT?

9 A YES, SIR.

10 Q AND MR. POTTS TOLD YOU THAT SOMEBODY HAD BROKEN IN?

11 A YES, SIR.

12 Q AT THAT TIME DID HE SHOW YOU THE IMAGE?

13 A YES SIR, HE WAS IN THE PROCESS OF BRINGING IT UP ON
14 HIS COMPUTER.

15 Q SO, THEN YOU LOOKED AT THE COMPUTER?

16 A YES, SIR.

17 Q BUT YOU ARE NOT SURE WHAT YOU SAW ON THE COMPUTER?

18 A I SAW AN IMAGE OF A SUBJECT.

19 Q YOU SAW AN IMAGE?

20 A YES SIR, ENTERING THE KITCHEN IN MR. POTTS HOME.

21 Q AT THAT TIME DID YOU SUSPECT THAT THAT IMAGE MIGHT BE
22 EVIDENCE?

23 A YES, SIR.

24 Q SO, AT THE POLICE ACADEMY WHAT DID THEY TELL YOU TO
25 DO WHEN YOU THINK YOU HAVE EVIDENCE?

1 A WE NEED TO COLLECT IT.

2 Q DID YOU COLLECT THIS?

3 A NO SIR, BECAUSE IT WAS HIS PERSONAL COMPUTER.

4 Q SO, IF EVIDENCE IS PERSONAL YOU DON'T COLLECT IT?

5 A I DID NOT, SIR, IN THIS CASE.

6 Q SO, YOU DID NOTHING TO PRESERVE THAT IMAGE THAT YOU
7 LOOKED AT?

8 A NO SIR, I LOOKED AT IT AND I REMEMBERED IT.

9 Q BUT AS FAR AS PRESERVING IT TO MAKE SURE IT IS
10 PRESERVED FOR THIS TRIAL, YOU DID NOT?

11 A NO, SIR.

12 Q NOW MR. POTTS, DID HE TELL YOU THAT, I THINK YOU SAID
13 WHEN YOU GOT THERE MR. POTTS WAS ALONE?

14 A YES, SIR.

15 Q I THINK EARLIER MR. POTTS TESTIFIED THAT HE CAME HOME
16 WITH HIS GIRLFRIEND, DID HE TELL YOU THAT?

17 A I DO NOT RECALL.

18 Q DID YOU ASK HIM HOW MANY PEOPLE WERE IN THE HOUSE
19 WHEN HE NOTICED THIS IMAGE?

20 A NO, SIR.

21 Q SO, YOU DIDN'T GET A WITNESS STATEMENT FROM HIS
22 GIRLFRIEND, DID YOU?

23 A NO, SIR.

24 Q YOU THINK IF HE HAD TOLD YOU THAT THERE WAS A
25 GIRLFRIEND YOU WOULD OF TRIED?

1 A NO, SIR.

2 Q WHY NOT?

3 A I DON'T SEE HOW THAT IS RELEVANT.

4 Q IT IS ANOTHER PERSON THAT MIGHT HAVE INFORMATION
5 REGARDING WHAT WAS SEEN WHEN THEY CAME HOME AND YOU DON'T
6 SEE THAT AS RELEVANT?

7 A NO SIR, BECAUSE MR. POTTS IS THE OWNER OF THE HOME
8 AND THE PERSON WHO RESIDES THERE. HE WOULD KNOW WHAT IS
9 MISSING AND WHAT IS NOT.

10 Q SO, IN YOUR REPORT YOU DIDN'T EVEN MENTION THERE WAS
11 ANOTHER POTENTIAL WITNESS?

12 A I WAS UNAWARE THAT THERE WAS ANOTHER PERSON THERE.

13 Q YOU WERE NOT AWARE?

14 A I WAS NOT AWARE.

15 Q SO, MR. POTTS NEVER TOLD YOU THAT?

16 A NO SIR, I DID NOT KNOW THERE WAS ANOTHER INDIVIDUAL
17 THERE.

18 Q WHEN YOU LOOKED AT THE IMAGE FROM THE COMPUTER DID
19 YOU NOTICE THAT THE TIMESTAMP WAS OFF?

20 A I DON'T RECALL.

21 Q DID YOU ASK MR. POTTS WHY IT SAID 3:00 O'CLOCK IF IT
22 OCCURRED AT MIDNIGHT?

23 A I DON'T RECALL US QUESTIONING ABOUT THE TIME.

24 Q DO YOU RECALL WHAT TIME, SO YOU DON'T EVEN KNOW WHAT
25 TIME IT SAID ON THE PICTURE, YOU CAN'T TESTIFY TO THAT?

1 A NO SIR, I DO NOT RECALL THAT.

2 Q SO, YOU ARE NOT EVEN CERTAIN IT SAID 3:00 O'CLOCK
3 WHEN YOU LOOKED AT THAT PICTURE OF THAT IMAGE?

4 A I DO NOT RECALL.

5 Q YOU DO NOT RECALL. SO, WHEN YOU ESTABLISHED THE TIME
6 OF THE BREAK-IN THAT WAS BASED ON THE INFORMATION YOU GOT
7 FROM MR. POTTS SOLELY, RIGHT?

8 A YES, SIR.

9 Q AND AS FAR AS WHAT WAS STOLEN, THAT IS INFORMATION
10 YOU GOT FROM MR. POTTS?

11 A YES, SIR.

12 Q SO, YOU TESTIFIED THAT YOU TRIED TO GET FINGERPRINTS
13 AND YOU COULDN'T GET ANY. AND YOU SAID YOU COULDN'T GET
14 ANY FINGERPRINTS FROM THE AIR-CONDITIONING UNIT, ISN'T
15 THAT METAL. THE AIR-CONDITIONING, WASN'T IT METAL?

16 A YES SIR, I AM ASSUMING SO.

17 Q SO WHY COULDN'T YOU GET A PRINT OFF OF THAT?

18 A IT DEPENDS, GETTING A PRINT COULD DEPEND ON MANY
19 THINGS.

20 Q YOU WERE TRAINED TO DO FINGERPRINTS?

21 A YES, SIR.

22 Q AND THAT WAS AT THE POLICE ACADEMY?

23 A DURING THAT BASIC DETECTIVE CLASS.

24 Q SO ROUGHLY 14 YEARS AGO?

25 A 10 YEARS AGO, YES.

1 Q OKAY. AND THE PRINTS ON THE DOOR, DID YOU TRY TO GET
2 A PRINT OFF THE DOORKNOB?

3 A YES, SIR.

4 Q AND YOU, IS THAT METAL ALSO?

5 A I AM ASSUMING THAT IS WHAT A DOORKNOB IS MADE OUT OF.

6 Q AND YOU COULDN'T GET A PRINT OFF OF THAT?

7 A NO, SIR.

8 Q AND YOU SAID YOU WERE SHOWN SCRAPINGS FROM SOMETHING
9 THAT HAPPENED EARLIER?

10 A THE SCRAPINGS MR. POTTS ADVISED THAT HAD OCCURRED
11 THIS TIME, ON THIS INCIDENT WHERE THE INDIVIDUAL ATTEMPTED
12 TO GAIN ENTRY INTO THE HOME.

13 Q WERE YOU ABLE TO DETERMINE, BASED ON YOUR TRAINING,
14 WHETHER THOSE SCRAPINGS HAD OCCURRED THROUGH JUST NATURAL
15 WEAR AND TEAR OR ACTUALLY THAT DAY YOU TOOK MR. POTTS WORD
16 FOR IT?

17 A NO SIR, I EXAMINED IT AND IT DID LOOK FRESH.

18 Q WHAT DO YOU MEAN THEY LOOKED FRESH?

19 A THEY APPEARED FRESH, THEY DID NOT APPEAR TO BE OLD
20 PIECES OF WOOD, IT WAS FRESHLY PIECES OF WOOD AND IT WAS
21 NOT FROM WEAR AND TEAR. IT APPEARED FROM A TOOL.

22 Q BUT YOU ALSO SAID IT APPEARED THAT NO ONE ENTERED
23 THROUGH THAT WINDOW AT THAT TIME?

24 A NO, SIR.

25 Q NOW, YOU SAID YOU SAW FRESH SCRAPINGS?

- 1 A YES.
- 2 Q DID YOU TAKE A PICTURE OF IT?
- 3 A NO, SIR.
- 4 Q WHY NOT?
- 5 A I DIDN'T, I JUST DIDN'T TAKE PICTURES.
- 6 Q DID YOU HAVE A CAMERA?
- 7 A NO, SIR.
- 8 Q NOW, YOU SAID THAT YOU ARE ON THE ROAD PATROL?
- 9 A YES, SIR.
- 10 Q AND YOU ANSWER CALLS FROM PEOPLE?
- 11 A YES, SIR.
- 12 Q AND BUT THAT DOESN'T INCLUDE, AND YOU INVESTIGATE
- 13 CRIME SCENES?
- 14 A NEWBERRY CITY IS A SMALL DEPARTMENT AND WE DO ASSIST
- 15 THE INVESTIGATORS WHEN WE RESPOND TO CALLS.
- 16 Q DID YOU CALL IN AN INVESTIGATOR TO THIS SCENE?
- 17 A NO, SIR.
- 18 Q WHY NOT?
- 19 A BECAUSE WE ASSIST THEM AND I FELT THIS WAS A CRIME
- 20 SCENE THAT I COULD HANDLE.
- 21 Q WELL, WHEN YOU REALIZED YOU COULDN'T GET ANY PRINTS
- 22 AND YOU DIDN'T HAVE A CAMERA YOU STILL FELT LIKE YOU COULD
- 23 HANDLE IT?
- 24 A YES, SIR.
- 25 Q SO, BASICALLY WHEN YOU LEFT THIS LOCATION THERE WAS

1 ONE PIECE OF EVIDENCE THAT YOU WERE AWARE OF THAT, WHICH
2 IS AN IMAGE ON A CAMERA?

3 A YES, SIR.

4 Q BECAUSE YOU HADN'T TAKEN ANY PICTURES OR ANYTHING
5 ELSE?

6 A NO, SIR.

7 Q THAT IS THE ONLY EVIDENCE TO SUPPORT THAT THERE HAD
8 BEEN AN ALLEGED BREAK-IN?

9 A YES, SIR.

10 Q SO, LET'S TALK ABOUT HOW YOU HANDLED THAT EVIDENCE.
11 HERE IS A CAMERA, IT IS SITTING IN THE COURTROOM TODAY.
12 DID YOU TRY TO TAKE IT THAT DAY?

13 A NO, SIR.

14 Q WHY NOT?

15 A MR. POTTS KNEW HOW TO OPERATE THAT CAMERA AND HE SAID
16 THAT HE COULD DOWNLOAD IT, SINCE HE KNEW HOW TO OPERATE IT
17 I WAS GOING TO ALLOW HIM TO DO SO.

18 Q COULD YOU HAVE CALLED SOMEONE FROM THE INVESTIGATION
19 DEPARTMENT TO COME OVER AND HANDLE THAT FOR YOU AND
20 DOWNLOAD AND PRESERVE IT. IS THAT POSSIBLE, COULD YOU
21 HAVE DONE IT?

22 A YES.

23 Q BUT YOU DIDN'T THINK THAT WAS NECESSARY?

24 A NO, SIR.

25 Q WHY NOT?

1 A I FELT LIKE I COULD HANDLE THE SCENE.

2 Q BUT YOU COULDN'T GET THE PICTURES BECAUSE YOU SAID
3 YOU DIDN'T UNDERSTAND THE CAMERA. SO, WHY DIDN'T YOU CALL
4 SOMEONE FOR BACKUP?

5 A I DIDN'T SAY I COULDN'T UNDERSTAND THE CAMERA. HE
6 OWNED AND OPERATED THAT CAMERA.

7 Q OH, YES. IT IS PERSONAL, IT IS A PERSONAL BELONGING?

8 A YES SIR, HE OWNS IT, YES SIR.

9 Q BUT IT CONTAINED THE ONLY PIECE OF EVIDENCE REGARDING
10 THIS ALLEGED CRIME?

11 A YES, SIR.

12 Q AND YOU LEFT IT WITH HIM?

13 A YES, SIR.

14 Q SO, WHAT IF MR. POTTS HAD MISHANDLED THE EVIDENCE
15 WHEN YOU LEFT.

16 MR. MCDANIEL: YOUR HONOR, THAT IS SPECULATION.

17 THE COURT: SUSTAINED.

18 Q I WILL REWORD OR WITHDRAW. SO, YOU TOLD MR. POTTS TO
19 BRING THE CAMERA TO THE POLICE DEPARTMENT?

20 A ONCE HE GOT THE IMAGE DOWNLOADED, YES SIR.

21 Q NOW, WHEN YOU SAW THE IMAGES ON THE CAMERA, AGAIN, I
22 DON'T MEAN TO BE REDUNDANT AND I AM PROBABLY GOING TO GET
23 OBJECTED TO. BUT YOU ONLY SAW ONE PICTURE?

24 A I JUST RECALL SEEING ONE PICTURE.

25 Q ONE PICTURE?

- 1 A YES, SIR.
- 2 Q MR. POTTS SAID HE THOUGHT THAT NINE PICTURE WERE
3 RELEVANT BUT YOU ONLY SAW ONE?
- 4 A YES, SIR.
- 5 Q YOU GO TO A CRIME SCENE AND YOU FIND A GUN, THIS
6 PERSONAL PROPERTY OF SOMEONE AND YOU THINK THAT IT MIGHT
7 BE EVIDENCE, YOU TELL THE PERSON, THE OWNER TO BRING IT TO
8 THE POLICE DEPARTMENT OR DO YOU COLLECT IT RIGHT THEN?
- 9 A I WOULD COLLECT THAT.
- 10 Q OFFICER MOORE, CORPORAL MOORE, DID YOU DISCUSS YOUR
11 INCIDENT REPORT THAT YOU CREATED ON THIS INCIDENT WITH MR.
12 POTTS?
- 13 A NO, SIR.
- 14 Q IS THAT STANDARD THAT YOU JUST NOT CONFER WITH THE
15 ALLEGED VICTIM?
- 16 A YES, SIR.
- 17 Q YOU NEVER GO BACK AND MAKE SURE IT IS ACCURATE?
- 18 A NO, SIR.
- 19 Q IS THAT HOW YOU WERE TRAINED AT THE POLICE ACADEMY OR
20 IS THAT HOW THEY DO IT IN NEWBERRY?
- 21 A I DON'T RECALL THAT TRAINING AT THE POLICE ACADEMY
22 BUT THAT IS JUST HOW IT IS DONE.
- 23 Q IN NEWBERRY YOU DON'T GO BACK TO THE VICTIM AND SAY,
24 THIS IS WHAT YOU TOLD ME?
- 25 A NO, SIR.

1 Q SO, DID YOU DISCUSS THIS INVESTIGATION WITH OFFICER
2 MCCLURKIN WHEN YOU GOT BACK TO THE POLICE DEPARTMENT?

3 A YES, SIR.

4 Q AND YOU TOLD HIM AT THE TIME THAT YOU WEREN'T ABLE TO
5 COLLECT ANY EVIDENCE?

6 A YES, SIR.

7 Q AND YOU TOLD HIM THE ONLY EVIDENCE WAS CONTAINED IN
8 THE DEER CAMERA?

9 A YES, SIR.

10 Q AND YOU TOLD HIM THE HOMEOWNER WAS GOING TO BRING THE
11 DEER CAMERA AROUND WHEN THEY COULD?

12 A YES, SIR.

13 Q AT THAT POINT DID THE NEWBERRY POLICE SEND ANYBODY
14 BEHIND YOU TO TRY TO REINVESTIGATE THE MATTER?

15 A I AM NOT AWARE OF THAT, NO.

16 Q DID YOU ASK FOR ANYBODY TO GO BACK?

17 A NO.

18 Q NOW, WERE YOU THERE WHEN THE DISK OR THE CD FINALLY
19 SHOWED UP AT THE POLICE DEPARTMENT?

20 A YES, SIR.

21 Q OKAY. AND DID YOU LOOK AT IT THEN?

22 A YES, SIR.

23 Q THAT IS ALL I HAVE. THANK YOU.

24 THE COURT: REDIRECT.

25 REDIRECT EXAMINATION

1 BY MR. MCDANIEL:

2 Q IS THAT THE PICTURE THAT YOU SAW?

3 A YES, SIR.

4 Q DID MR. POTTS SHOW YOU THAT PICTURE?

5 A YES, SIR.

6 Q DID YOU TELL HIM WHAT TO DO WITH THE CAMERA?

7 A YES, SIR.

8 Q WHAT DID YOU TELL HIM TO DO?

9 A I TOLD HIM THAT ONCE HE GOT IT DOWNLOADED HE NEEDED

10 TO RETURN TO THE PD ASAP.

11 Q DID HE DO THAT?

12 A YES, SIR.

13 Q AND WERE YOU THERE WHEN HE SHOWED UP WITH IT?

14 A YES, SIR.

15 Q CAN YOU ALWAYS GET A PRINT OFF OF SOMETHING THAT YOU

16 ARE DUSTING FOR PRINTS?

17 A NO, SIR.

18 Q NOW, YOU DID GO IN HIS HOUSE, RIGHT?

19 A YES, SIR.

20 Q HOW BIG IS HIS HOUSE?

21 A APPROXIMATELY 1500 SQUARE FEET.

22 Q IS IT A SMALL HOUSE?

23 A A SMALL HOUSE, YES.

24 Q BUT IT IS NOT SOME ESTATE THAT YOU DIDN'T SCOUR THE

25 GROUNDS?

1 A NO, SIR.

2 Q NO FURTHER QUESTIONS.

3 MR. CHAPLIN: YOUR HONOR, NO FURTHER QUESTIONS BUT I
4 WOULD LIKE OFFICER MOORE TO BE AVAILABLE IN CASE I NEED TO
5 CALL HER AT A LATER TIME.

6 THE COURT: OKAY, THANK YOU. LET ME SEE THE LAWYERS
7 OVER HERE REAL QUICK, IF I COULD.

8 (WHEREUPON, A BENCH CONFERENCE WAS HELD IN THE
9 PRESENCE OF THE JURY BUT OUT OF THE HEARING OF THE
10 JURY.)

11 THE COURT: CALL YOUR NEXT WITNESS, MR. MCDANIEL.

12 MR. MCDANIEL: THE STATE CALLS ROY MCCLURKIN TO THE
13 STAND.

14 ROY MCCLURKIN, AFTER BEING DULY SWORN,
15 TESTIFIED AS FOLLOWS:

16 DIRECT EXAMINATION

17 BY MR. MCCLURKIN:

18 Q WHERE DO YOU WORK, MR. MCCLURKIN?

19 A WITH THE NEWBERRY CITY POLICE DEPARTMENT.

20 Q WHAT IS YOUR RANK?

21 A I AM A LIEUTENANT.

22 Q HOW LONG HAVE YOU WORKED THERE?

23 A NOVEMBER OF THIS YEAR WILL BE 27 YEARS.

24 Q NOW, AS A LIEUTENANT, WHAT IS YOUR DUTIES?

25 A I AM LIEUTENANT ASSIGNED TO THE INVESTIGATIONS

1 DIVISION.

2 Q CAN YOU EXPLAIN WHAT THAT MEANS?

3 A WELL, WHAT I DO IS EVERY MORNING WE GO THROUGH THE
4 INCIDENT REPORTS AND DETERMINE WHAT NEEDS TO BE FOLLOWED
5 UP ON. ONCE WE DETERMINE WHAT NEEDS TO BE FOLLOWED UP ON
6 I TAKE THAT INCIDENT REPORT AND I GO OUT AND I INTERVIEW
7 WITNESSES, VICTIMS. ALSO DETERMINE WHETHER ANYTHING
8 FURTHER NEEDS TO BE DONE ON THE INCIDENTS REPORTS.

9 Q WERE YOU WORKING ON OCTOBER 28TH OF 2008?

10 A YES SIR, I WAS.

11 Q WHAT TIME DID YOU COME IN?

12 A I CAME TO WORK THAT MORNING AT 8:30 A.M.

13 Q WHAT WAS YOUR RANK AT THAT TIME?

14 A IT WAS STILL LIEUTENANT.

15 Q AND JUST TO GO BACK FOR A LITTLE BIT. YOU HAD BEEN
16 THERE FOR 27 YEARS, WHAT OTHER RANKS HAVE YOU HELD?

17 A WELL, I HAVE BEEN A PATROLMAN WHEN I FIRST STARTED.

18 Q WHEN DID YOU FIRST START?

19 A 1983. AND IN '87 I MADE CORPORAL, '89 I MADE
20 SERGEANT AND IN '91 I MADE LIEUTENANT. I WAS A LIEUTENANT
21 ON THE ROAD IN CHARGE OF A SHIFT AT THAT TIME WHERE I WAS
22 RESPONSIBLE FOR FOUR OTHER EMPLOYEES. I WAS BASICALLY
23 OVER A ROAD PATROL CREW AND WHAT I DID WAS I ASSIGNED
24 CALLS FOR SERVICE, ALSO ANSWERED CALLS MYSELF. I WORKED
25 TRAFFIC, BASICALLY DOING EVERYTHING THAT A PATROLMAN DOES

1 BUT ALSO HAVING THE RESPONSIBILITY TO MAKE SURE THAT THEY
2 DIDN'T GET IN ANY TROUBLE AND DID WHAT THEY NEEDED TO DO.
3 AFTER STAYING ON THE ROAD IN, I THINK IT WAS 2003 I MADE
4 AN INVESTIGATOR. SO, I HAVE BEEN AN INVESTIGATOR FOR
5 APPROXIMATELY SEVEN YEARS NOW.

6 Q THANK YOU. SO, YOU HAVE HAD ABOUT ALL THE JOBS IN
7 NEWBERRY?

8 A THERE ARE ONLY TWO OTHERS AND I DON'T THINK I'LL MAKE
9 THAT, I DON'T THINK I WILL STAY HERE THAT LONG.

10 Q NOW, WERE YOU WORKING OCTOBER 28TH?

11 A YES SIR, I WAS.

12 Q I THINK YOU CAME IN ABOUT 8:00 A.M.

13 A 8:30.

14 Q NOW, DID YOU COME INTO CONTACT WITH MR. POTTS THAT
15 DAY?

16 A I DID.

17 Q DO YOU KNOW HOW THAT CAME ABOUT, WHAT TIME?

18 A YES, IT WAS APPROXIMATELY MAYBE 4:00 OR 4:15 IN THE
19 AFTERNOON. MR. POTTS CAME TO MY OFFICE WITH CORPORAL
20 MOORE. CORPORAL MOORE TOLD ME THAT MR. POTTS HAD BEEN A
21 VICTIM OF A BURGLARY AT 819 PAULINE STREET. AND IN THE
22 COURSE OF HER GOING TO HIS RESIDENCE AND SPEAKING WITH HIM
23 HE HAD SHOWED HER AN IMAGE ON A DEER CAMERA THAT HE
24 INSTALLED IN HIS HOUSE OF THE SUSPECT INSIDE OF HIS
25 RESIDENCE. CORPORAL MOORE TOLD ME THAT SHE DID NOT

1 RECOGNIZE THE INDIVIDUAL AND MR. POTTS DID NOT RECOGNIZE
2 THE INDIVIDUAL. MR. POTTS HAD IN HIS POSSESSION A DVD OF
3 THE IMAGE OFF OF HIS DEER CAMERA. SHE ASKED IF I WOULD
4 LOOK AT IT AND SEE IF I KNEW THE INDIVIDUAL BECAUSE I HAD
5 BEEN HERE THAT LONG SHE THOUGHT I MIGHT KNOW WHO IT WAS.

6 Q DID YOU LOAD THAT DVD INTO YOUR COMPUTER?

7 A YES SIR, I LOADED IT INTO MY DESKTOP COMPUTER IN MY
8 OFFICE.

9 Q AND STATE'S EXHIBIT 1, IS THAT WHAT YOU LOADED INTO
10 YOUR COMPUTER?

11 A YES, SIR. THAT PARTICULAR DVD.

12 Q HOW MANY IMAGES POPPED UP?

13 A WHEN I LOADED IT INTO MY COMPUTER ONLY ONE IMAGE
14 POPPED UP. THE FIRST IMAGE WHICH I BELIEVE WAS JUST A
15 PICTURE OF THE KITCHEN. SO, MR. POTTS TOLD ME THAT I
16 NEEDED TO GO ON THROUGH THE DVD AND I CONTINUED TO CLICK
17 ON IT TO GO TO THE IMAGES UNTIL I GOT TO THIS IMAGE HERE.
18 I DON'T RECALL WHICH IMAGE IT WAS BUT IT WASN'T THE FIRST
19 IMAGE.

20 Q OKAY. SO, THIS IS STATE'S EXHIBIT 1. IS THAT THE
21 PICTURE YOU USED TO IDENTIFY?

22 A YES SIR, IT IS.

23 Q NOW, WHO DID YOU IDENTIFY AS BEING IN THAT--

24 MR. CHAPLIN: OBJECTION, YOUR HONOR. I WANT TO RENEW
25 MY ORIGINAL OBJECTION IN THIS MATTER UNDER HERRING AND

1 RULE 701, SOUTH CAROLINA RULES OF EVIDENCE.

2 THE COURT: OKAY. OVERRULED, GO AHEAD.

3 A I IDENTIFIED THAT PARTICULAR IMAGE THERE AS BEING
4 BENNIE DARRON MITCHELL.

5 Q HOW DO YOU KNOW IT IS MR. MITCHELL?

6 A I KNOW MR. MITCHELL FROM LIVING IN NEWBERRY FOR OVER
7 20 YEARS AND HE LIVING IN THE COMMUNITY OF NEWBERRY ALSO.

8 Q NOW, IS HE IN THE COURTROOM TODAY?

9 A YES SIR, HE IS.

10 Q COULD YOU PLEASE POINT TO HIM?

11 A HE IS SITTING RIGHT THERE WITH THE WHITE SHIRT ON AT
12 THE DEFENSE TABLE WITH GLASSES.

13 MR. MCDANIEL: YOUR HONOR, MAY THE RECORD REFLECT
14 THAT THE LIEUTENANT POSITIVELY IDENTIFIED BENNIE MITCHELL
15 AS THE PERSON IN THAT PICTURE.

16 THE COURT: OKAY, YOU CAN PROCEED.

17 Q NOW, WHAT IS IN HIS HANDS?

18 A IN THAT PARTICULAR IMAGE THERE IN MR. MITCHELL'S HAND
19 IS A FLASHLIGHT AND ALSO A BAG.

20 Q WHAT WAS YOUR NEXT MOVE AFTER YOU SAW THAT PICTURE?

21 A AFTER I SAW THAT PICTURE IT WAS GETTING CLOSE TO
22 AROUND 4:30 AND GOT OFF AT 5:00 O'CLOCK SO WHAT I DID IS
23 JUST SECURE THE DVD, MR. POTTS LEFT IT WITH ME AND I
24 SECURED IT AT THE POLICE DEPARTMENT ON THE NEXT DAY ON THE
25 29TH. WHEN I CAME IN I TALKED WITH JUDGE KOON, ONE OF OUR

1 MUNICIPAL JUDGES AND EXPLAINED THE CASE TO HIM AS FAR AS
2 THE BURGLARY AND WHAT EVIDENCE I HAD AS FAR AS THE IMAGE
3 OF THE SUBJECT INSIDE THE RESIDENCE AND HE SAID THERE WAS
4 PROBABLE CAUSE FOR AN ARREST WARRANT. SO, I DREW UP AN
5 ARREST WARRANT AND I ALSO DREW UP A SEARCH WARRANT FOR THE
6 RESIDENCE WHERE MR. MITCHELL LIVED.

7 Q AND DID YOU EXECUTE THAT SEARCH WARRANT?

8 A YES SIR, I DID.

9 Q AND WHERE WAS THAT?

10 A 810 HAVIRD STREET IN THE CITY OF NEWBERRY.

11 Q WAS THE DEFENDANT THERE?

12 A YES SIR, HE WAS.

13 Q AND DID YOU ARREST HIM THERE?

14 A YES SIR, WE TOOK HIM INTO CUSTODY ON THE ARREST
15 WARRANT THAT I HAD.

16 Q DID YOU RECOVER ANY ITEMS?

17 A NO SIR, I DID NOT RECOVER ANY ITEMS PURSUANT TO THE
18 SEARCH WARRANT.

19 Q OKAY. I AM GOING TO HAND YOU WHAT HAS BEEN MARKED AS
20 STATE'S EXHIBIT 9 FOR PURPOSES OF IDENTIFICATION. DO YOU
21 KNOW WHAT THAT IS?

22 A YES SIR, THIS IS AN AERIAL PHOTOGRAPH SHOWING THE
23 LOCATION WHERE MR. POTTS AND ALSO MR. MITCHELL LIVES.

24 Q AND DOES THAT FAIRLY AND ACCURATELY REPRESENT THAT
25 AREA?

1 A YES, IT DOES.

2 Q HAVE ANY ALTERATIONS OR DELETIONS BEEN MADE?

3 A NONE THAT I CAN SEE.

4 MR. MCDANIEL: YOUR HONOR, I WOULD ASK THAT STATE'S
5 EXHIBIT 9 BE MOVED INTO EVIDENCE.

6 MR. CHAPLIN: YOUR HONOR, I AM GOING TO OBJECT TO
7 THAT AS TO RELEVANCE.

8 THE COURT: OKAY, OVERRULED.

9 (WHEREUPON, STATE'S EXHIBIT NO. 9 WAS ADMITTED INTO
10 EVIDENCE.)

11 Q CAN YOU LOCATE THE VICTIM'S HOUSE THERE?

12 A IF YOU ARE FAMILIAR WITH ANYTHING IN NEWBERRY, THIS
13 IS BOUNDARY STREET GOING OUT OF TOWN TOWARDS HIGHWAY 34.
14 WHAT YOU DO IS THIS WOULD BE BACK TOWARDS TOWN AND YOU
15 COME DOWN, THIS IS PAULINE STREET HERE. AND THIS IS THE
16 VICTIM'S HOUSE HERE, 819 PAULINE STREET.

17 Q AND CAN YOU LOCATE THE DEFENDANT'S HOUSE?

18 A YES, SIR. THIS IS HAVIRD STREET THAT RUNS OFF OF
19 BOUNDARY STREET AND THIS IS THE SUSPECTS RESIDENCE HERE,
20 18 HAVIRD STREET.

21 Q AND THAT IS WHERE YOU EXECUTED THE SEARCH WARRANT?

22 A THAT IS CORRECT.

23 Q AND THAT IS WHERE THE DEFENDANT WAS ARRESTED,
24 CORRECT?

25 A THAT IS CORRECT.

1 Q DO YOU KNOW THE DISTANCE BETWEEN THOSE TWO HOUSES?

2 A YES SIR, THE DISTANCE BETWEEN THE VICTIM'S HOUSE AND
3 THE SUSPECTS HOUSE IS APPROXIMATELY TWO-TENTHS OF A MILE.

4 Q AND HOW DO YOU KNOW THAT?

5 A BECAUSE I DROVE MY PATROL CAR FROM HERE AND USED THE
6 ODOMETER.

7 Q THANK YOU, VERY MUCH. NOW, AFTER THE DEFENDANT WAS
8 ARRESTED DID YOU EVER GO TO MR. POTTS HOME?

9 A YES SIR, I DID.

10 Q DID YOU GO ON THE INCIDENT DATE?

11 A NO SIR, I DID NOT.

12 Q WHY DIDN'T YOU GO ON THE INCIDENT DATE?

13 A CORPORAL MOORE TOLD ME THAT SHE HAD PROCESSED THE
14 CRIME SCENE BY TAKING FINGERPRINTS AND THE EVIDENCE THAT
15 SHE BROUGHT ME, WELL THAT MR. POTTS BROUGHT ME WAS THE
16 PHOTOGRAPH SHOWING THE SUSPECT INSIDE OF THE RESIDENCE.
17 AND I KNEW WHO THE SUSPECT WAS SO I DIDN'T GO BACK TO THE
18 RESIDENCE THAT DAY, I DIDN'T HAVE ANY NEED TO.

19 Q SO, BASICALLY FROM THAT PICTURE YOU GOT AN ARREST
20 WARRANT AND A SEARCH WARRANT?

21 A YES, SIR.

22 Q YOU SAID YOU HAVE BEEN TO THE INCIDENT LOCATION?

23 A YES SIR, I HAVE BEEN BACK TO THE INCIDENT LOCATION.

24 Q AND YOU REMEMBER WHEN YOU WENT TO THE INCIDENT
25 LOCATION?

1 A I THINK IT WAS JANUARY OF THIS YEAR.

2 Q I AM GOING TO HAND YOU WHAT HAS BEEN MARKED AS
3 STATE'S EXHIBIT 7 AND 8 FOR IDENTIFICATION. HAVE YOU SEEN
4 THOSE BEFORE?

5 A YES SIR, I HAVE.

6 Q WHAT ARE THEY?

7 A THESE ARE PICTURES OF SOME MEASUREMENTS I TOOK INSIDE
8 OF MR. POTTS HOUSE IN JANUARY.

9 Q DOES THAT FAIRLY AND ACCURATELY REPRESENT THE EVENTS
10 THAT TAKES PLACE THAT DAY?

11 A YES SIR, IT DOES.

12 Q ANY ALTERATIONS OR DELETIONS BEEN MADE?

13 A NO, SIR.

14 MR. MCDANIEL: YOUR HONOR, I ASK THAT STATE'S
15 EXHIBITS 7 AND 8 BE INTRODUCED INTO EVIDENCE IN THIS CASE.

16 MR. CHAPLIN: OBJECTION, YOUR HONOR. I RENEW THE
17 SAME OBJECTION I MADE EARLIER WITH REGARDS TO SUBSEQUENTLY
18 TAKING PHOTOGRAPHS UNDER RULE 402 AND 403.

19 THE COURT: OKAY, THANK YOU MR. CHAPLIN. I FIND THE
20 PHOTOGRAPHS ARE ADMISSIBLE. THANK YOU.

21 (WHEREUPON, STATE'S EXHIBIT NOS. 7 AND 8 WERE
22 ADMITTED INTO EVIDENCE.)

23 MR. MCDANIEL: PERMISSION TO PUBLISH TO THE JURY,
24 YOUR HONOR.

25 THE COURT: YES, SIR.

1 Q OKAY, TELL US WHAT THAT IS?

2 A THIS IS THE MEASUREMENT FROM THE FLOOR TO UP ON THE
3 DOOR. WHAT I DID IS I TOOK THE IMAGE OF HIM INSIDE OF THE
4 KITCHEN DOOR THERE OF THE RESIDENCE AND THE IMAGE ON THE
5 DOOR WHERE THE TOP OF HIS HEAD WAS. AND WHAT I DID WAS
6 CAME OVER TO THE DOOR AND MEASURED TO APPROXIMATELY WHERE
7 HIS HEAD WAS ENTERING THE KITCHEN THROUGH THE DOOR. THAT
8 DISTANCE FROM THE FLOOR TO HERE WAS APPROXIMATELY 5'8"
9 TALL.

10 Q HOW TALL IS MR. MITCHELL?

11 A APPROXIMATELY 5'8" TALL.

12 Q AND I AM GOING TO SHOW YOU 8, STATE'S EXHIBIT 8.
13 WHAT IS THIS?

14 A THIS IS COMING INTO THE KITCHEN. AND, AGAIN, WHAT I
15 DID WAS FOUND A REFERENCE POINT OVER HERE ALONG THE WALL
16 IN THE KITCHEN DOOR TO THE SHELF HERE TO APPROXIMATELY
17 WHERE THE TOP OF HIS HEAD WAS COMING INTO THE DOOR AND
18 TOOK A MEASUREMENT. AND THAT MEASUREMENT WAS ALSO
19 APPROXIMATELY 5'8" TALL.

20 Q SHOW US ON THIS WHERE YOU TOOK YOUR MEASUREMENT.

21 A YOU CAN SEE THE TOP HERE AND WHAT I DID WAS DRAW A
22 REFERENCE LINE FROM THE TOP OF HIS HEAD TO OVER HERE AND
23 MEASURE UP.

24 Q STATE'S EXHIBIT 7, WHERE IS THAT MEASUREMENT?

25 A THIS MEASUREMENT IS ALONG THE INSIDE, THIS PANEL IS ON

1 THE OUTSIDE OF THE DOOR. THERE IS ALSO ONE ON THE INSIDE
2 OF THE DOOR RIGHT HERE THAT WE DID ALSO, DRAWING A
3 REFERENCE POINT. AND THAT IS THE PANEL TO WHERE I
4 MEASURED FROM THE FLOOR UP TO THERE AND IT IS
5 APPROXIMATELY 5'8" TALL.

6 Q OKAY. NOW, HAVE YOU SEEN ALL THE IMAGES THAT ARE ON
7 STATE'S EXHIBIT 1?

8 A YES SIR, I WENT THROUGH ALL THE IMAGES.

9 Q THAT IMAGE, I AM GOING TO HAND YOU STATE'S EXHIBIT 8.
10 DID YOU USE THAT AS A REFERENCE POINT?

11 A NO SIR, I DIDN'T USE THAT IMAGE THERE AS A REFERENCE
12 POINT.

13 Q NOW, THESE ARE ALL THE SAME DISK, CORRECT?

14 A THAT IS CORRECT.

15 Q AND THAT IS THE SAME IMAGE, THAT IS A DIFFERENT VIEW
16 OF THE SAME IMAGE?

17 A YES SIR, IT IS.

18 Q CAN YOU EXPLAIN THE PROCESS AND IT HAS BEEN MENTIONED
19 IN HERE OF, YOU AS AN INVESTIGATOR GETTING REPORTS THAT
20 YOU NEED TO INVESTIGATE?

21 A YES, USUALLY WHAT HAPPENS IS THE REPORTS ARE
22 GENERATED AND THE NEXT MORNING WHEN I COME TO WORK WE GET
23 EVERY INCIDENT REPORT THAT HAS BEEN GENERATED BY THE PRIOR
24 SHIFT. AND WE GO THROUGH THEM AND I DON'T DETERMINE WHAT
25 NEEDS FOLLOWING UP ON, MY CAPTAIN DOES. HE DETERMINES

1 WHAT NEEDS TO BE FOLLOWED UP ON AND HE ASSIGNS THOSE CASES
2 TO EACH INDIVIDUAL INVESTIGATOR TO BE FOLLOWED UP ON.

3 Q ARE YOU ASSIGNED ANY SPECIFIC CASE, WHO DOES THAT
4 WORK?

5 A WELL, BECAUSE WE ARE A SMALL DEPARTMENT I BASICALLY
6 HAVE TO INVESTIGATE EVERYTHING. A LOT OF THE LARGER
7 DEPARTMENTS, WHAT THEY DO IS THEY SPECIALIZE IN SOMETHING.
8 WE DON'T SPECIALIZE ON ANYTHING SO I HAVE TO INVESTIGATE
9 ANYTHING FROM VANDALISM, LARCENIES, ASSAULTS, BURGLARIES,
10 ALL THE WAY UP.

11 Q NOW, IN THIS CASE AND YOU ARE AWARE THAT NO PICTURES
12 WERE TAKEN?

13 A THAT IS CORRECT.

14 Q AND NO EVIDENCE WAS RECOVERED?

15 A THAT IS CORRECT.

16 Q WHY DID YOU DETERMINE THAT YOU DIDN'T NEED TO GO BACK
17 TO THE SCENE?

18 A WELL, BASICALLY WHAT I WOULD OF BEEN GOING BACK TO DO
19 WAS TO TRY TO GET FINGERPRINTS AND STUFF LIKE THAT. AND
20 CORPORAL MOORE WHO IS AN OFFICER TOLD ME SHE HAD
21 DETERMINED THAT, WELL, SHE HAD TRIED TO GET FINGERPRINTS
22 AND THERE WASN'T ANY FINGERPRINTS TO OBTAIN. SO, I DIDN'T
23 SEE ANY NEED FOR ME TO GO BACK OVER THERE. IF SHE HAD OF
24 NEEDED AN INVESTIGATOR SHE WOULD OF CALLED ONE.

25 Q IS IT NORMAL OR NOT TO FIND FINGERPRINTS?

1 A YES SIR, IT IS NORMAL. I PROCESS CRIME SCENES AND
2 DIDN'T FIND FINGERPRINTS. I HAVE PROCESSED CRIME SCENES
3 AND FOUND SMUDGES. WHEN YOU ARE DEALING WITH FINGERPRINTS
4 YOU ARE LOOKING FOR RIDGE DETAIL. SO, I COULD PROCESS A
5 CRIME SCENE AND FIND SMUDGES BUT IT WOULD BE IDENTIFIED
6 RIDGE DETAIL TO IDENTIFY SOMEBODY USING FINGERPRINTS.

7 Q SOME SURFACES BETTER TO GET A FINGERPRINT FROM
8 OTHERS?

9 A YES SIR, IT IS.

10 Q REGARDING RECOVERING NO FINGERPRINTS, ARE YOU
11 SURPRISED?

12 A NO SIR, I AM NOT SURPRISED.

13 Q THANK YOU. NO FURTHER QUESTIONS.

14 THE COURT: Y'ALL APPROACH.

15 (WHEREUPON, A BENCH CONFERENCE WAS HELD IN THE
16 PRESENCE OF THE JURY BUT OUT OF THE HEARING OF THE
17 JURY.)

18 THE COURT: WE ARE GOING TO BREAK FOR THE DAY, LADIES
19 AND GENTLEMEN. WE WILL START BACK IN THE MORNING AT 9:30.
20 PLEASE DON'T TALK ABOUT THE CASE AND KEEP AN OPEN MIND.
21 THANK YOU. YOU ARE EXCUSED.

22 (WHEREUPON, THE JURY WAS EXCUSED FROM OPEN COURT FOR
23 THE DAY.)

24 (WHEREUPON, THE TRIAL WILL RESUME THE NEXT MORNING AT
25 9:30 A.M.)

1 THE COURT: WE ARE BACK ON THE RECORD OF THE STATE
2 VERSUS BENNIE D. MITCHELL. THE REASON WE ARE GETTING A
3 LATE START THIS MORNING IS ONE OF THE JURORS, SHANI M.
4 SHELLS, JUROR NUMBER 135 HAS NOT REPORTED YET THIS
5 MORNING. WE WERE SUPPOSE TO START COURT AT 9:30, IT IS
6 NOW 10:00 O'CLOCK. WE HAVE TRIED THROUGH THE CLERK TO
7 CONTACT HER HOME WHERE THERE WAS NO ANSWER, CONTACTED HER
8 EMERGENCY CONTACT, IT WAS HER MOTHER AND ARE TRYING TO TRY
9 TO FIND OUT HER WHEREABOUTS. WE ARE GOING TO SUBSTITUTE
10 MS. MAYBIN, THE ALTERNATE JUROR, NUMBER 95 IN PLACE OF MS.
11 SHELLS SO WE CAN GET THE CASE UNDERWAY. ANYTHING ELSE
12 BEFORE WE BRING THE JURY OUT?

13 MR. MCDANIEL: NOT FROM THE STATE, YOUR HONOR.

14 MR. CHAPLIN: NOT FROM THE DEFENSE.

15 THE COURT: LIEUTENANT, YOU CAN RESUME THE STAND AND
16 YOU ARE STILL UNDER OATH. BRING THEM IN, PLEASE.

17 (WHEREUPON, THE JURY CAME INTO OPEN COURT AT
18 APPROXIMATELY 10:00 A.M.)

19 THE COURT: ALL RIGHT, LADIES AND GENTLEMEN, THE
20 REASON IS WE ARE DELAYED THIS MORNING IS THAT ONE OF YOUR
21 FELLOW JURORS HADN'T REPORTED YET AND WE ARE TRYING TO
22 FIND WHERE SHE IS. BUT IN THE MEANTIME MS. MAYBIN, YOU
23 ARE NOW A REGULAR JUROR. WE WILL HAVE THE
24 CROSS-EXAMINATION. MR. CHAPLIN.

25 CROSS-EXAMINATION

1 BY MR. CHAPLIN:

2 Q OFFICER MCCLURKIN, DO YOU HAVE ANY TRAINING IN THE
3 USE OF INFRARED ILLUMINATION?

4 A NO SIR, I DO NOT.

5 Q SO, YOU DON'T KNOW WHAT INFRARED ILLUMINATION, WHEN
6 THIS BECOMES VISIBLE TO THE HUMAN EYE?

7 A NO SIR, I DO NOT.

8 Q YOU DON'T KNOW THE LEVEL OF INFRARED USED IN THIS
9 CAMERA, THE DEER CAMERA?

10 A NO SIR, I DO NOT.

11 Q DO YOU KNOW WHAT THE EFFECT OF INFRARED ILLUMINATION
12 HAS ON SKIN TONE?

13 A NO SIR, I DO NOT.

14 MR. MCDANIEL: JUDGE, HE HAS ESTABLISHED THAT HE
15 DOESN'T KNOW THE INFRARED.

16 MR. CHAPLIN: YOUR HONOR, I WILL MOVE ON.

17 THE COURT: OKAY.

18 Q MR. MCCLURKIN, WHEN MR. POTTS CALLED BACK, I THINK ON
19 THE 30TH AND REPORTED THAT MONEY WAS TAKEN FROM A BOX DID
20 YOU OR ANYONE ELSE GO BACK TO THE HOME TO INVESTIGATE
21 THAT?

22 A NO SIR, WE DID NOT.

23 Q NO FURTHER QUESTIONS FOR OFFICER MCCLURKIN.

24 THE COURT: ANY REDIRECT?

25 MR. MCDANIEL: NONE FROM THE STATE.

1 THE COURT: THE STATE MAY CALL ITS NEXT WITNESS.

2 MR. MCDANIEL: THE STATE RESTS.

3 THE COURT: LADIES AND GENTLEMEN, THE STATE HAS
4 CONCLUDED ITS PRESENTATION OF EVIDENCE AND I HAVE TO TAKE
5 A MATTER UP WITH THE LAWYERS SO I WILL DO THAT NOW. DON'T
6 TALK ABOUT THE CASE AND CONTINUE TO KEEP AN OPEN MIND.
7 THANK YOU.

8 (WHEREUPON, THE JURY WAS EXCUSED FROM OPEN COURT.)

9 THE COURT: OKAY, ANY MOTIONS OR MATTERS AT THIS
10 TIME?

11 MR. CHAPLIN: YES, SIR.

12 THE COURT: YES SIR, MR. CHAPLIN.

13 MR. CHAPLIN: YES, SIR. THE DEFENSE ASK FOR A
14 DIRECTED VERDICT AT THIS TIME, YOUR HONOR. WE ARE BASING
15 THAT MOTION ON THE FACT THAT THE STATE HAS FAILED TO PROVE
16 EVERY ELEMENT BEYOND A REASONABLE DOUBT IN THIS MATTER TO
17 INCLUDE THE ID OF THE PERSON IN THE PICTURE.

18 THE COURT: ALL RIGHT. OF COURSE I CAN'T WEIGH THE
19 EVIDENCE AT THIS POINT, I CAN ONLY DETERMINE IF EVIDENCE
20 IS IN EXISTENCE AND I CAN'T MAKE ANY KIND OF CREDIBILITY
21 DETERMINATION. SO, I HAVE TO CONSTRUE THE EVIDENCE IN THE
22 LIGHT MOST FAVORABLE TO THE STATE AND I THINK THERE IS
23 SUFFICIENT EVIDENCE IN THE RECORD NOW AND TO SEND THE CASE
24 TO THE JURY UNDER THE STANDARD SET FORTH BY RULE 19. SO,
25 I RESPECTFULLY DENY THE MOTION.

1 SOLICITORS OFFICE IS ALLOWED, THE STATE IS ALLOWED TO OPEN
2 WITH THE LAW AND REVIEW WHAT THE DEFENDANT IS AT TRIAL
3 FOR. AND I WILL ADDRESS YOU AGAIN AFTER THE DEFENSE
4 CLOSES. HE IS CHARGED WITH FIRST DEGREE BURGLARY. AND
5 WHAT THE STATE HAS TO PROVE IS BEYOND A REASONABLE DOUBT
6 IS THAT THE DEFENDANT ENTERED A DWELLING WITHOUT CONSENT
7 WITH THE INTENT TO COMMIT A CRIME IN THAT DWELLING AND
8 THAT OCCURRED IN THE NIGHTTIME. THAT IS FIRST DEGREE
9 BURGLARY. POSSESSING TOOLS OR BURGLARY TOOLS AND THIS
10 INCLUDES A NUMBER OF ITEMS. IT IS UNLAWFUL FOR A PERSON
11 TO MAKE, TO BE MADE IN HIS POSSESSION AND IT LIST A NUMBER
12 OF EXAMPLES OF STUFF. AND IT ALSO SAYS THAT REALLY
13 ANYTHING THAT WOULD AID IN THE USE OF THE BURGLARY. THE
14 JUDGE, IF I MESS ANYTHING UP OR WHEN YOU HEAR THE JUDGE
15 AND HE WILL GIVE YOU AN INSTRUCTION ON THE LAW AND HIS IS
16 DIFFERENT THAN MINE, ALWAYS LISTEN TO HIM. IF I MESS
17 SOMETHING UP THE JUDGE WILL CORRECT IT AND YOU TAKE WHAT
18 HE SAYS AS THE LAW, NOT WHAT I SAY. AND FINALLY IT IS
19 PETTY LARCENY. AND IT HAS A NUMBER OF NAMES, PETTY
20 LARCENY, SIMPLE LARCENY. THAT IS BASICALLY TAKING
21 ARTICLES OF GOODS FROM SOMEONE WITHOUT PERMISSION AND THE
22 VALUE THAT IS LESS THAN A THOUSAND DOLLARS. AND THOSE ARE
23 THE THREE CHARGES IN THIS CASE. AGAIN, I WILL ADDRESS YOU
24 ON MY CLOSING IN A FEW MINUTES. BUT I WILL SAY THAT I ASK
25 YOU TO FIND HIM GUILTY BEYOND A REASONABLE DOUBT.

1 HOME. THAT IS IT, THAT IS WHAT THIS CASE IS ABOUT. THE
2 DEFENSE STIRRED THE POT, NO PICTURES WERE TAKEN, NO
3 EVIDENCE WAS CLAIMED. THEY DIDN'T GET FINGERPRINTS. I
4 WISH THEY HAD TAKEN PICTURES. OF WHAT, REALLY, ULTIMATELY
5 WHAT YOU ARE TRYING TO DECIDE IS WHO DID IT. AND WHEN YOU
6 SHOW UP WITH A PICTURE OF WHO DID IT WHAT ELSE IS THERE TO
7 COLLECT. NOTHING WAS MANIPULATED, NO MISIDENTIFICATION,
8 THAT IS BENNIE MITCHELL. AND WHAT DO WE KNOW. BENNIE
9 MITCHELL DIDN'T HAVE PERMISSION TO BE THERE, BENNIE
10 MITCHELL DID THIS AT NIGHT. MR. POTTS DIDN'T SAY ANYBODY
11 COULD GO IN THERE BUT HIS GIRLFRIEND. BENNIE MITCHELL
12 STOLE ITEMS THAT WERE LESS THAN A THOUSAND DOLLARS, A
13 FLASHLIGHT AND A BAG IN HIS HAND TO HELP HIM TO DO IT.
14 THOSE ARE THE TOOLS THAT HE USED. THAT IS IT. THIS IS
15 ONLY IN THE SOUTH THAT THIS COULD HAPPEN AND THAT IS TRUE.
16 IT IS A DEER CAMERA AND IT IS ACCURATE AND THAT IS WHAT IT
17 TOOK A PICTURE OF, BENNIE MITCHELL. LADIES AND GENTLEMEN,
18 I ASK YOU, I TOLD YOU I WAS GOING TO STAND UP IN FRONT OF
19 YOU AT THE END AND SAY THAT I WANT YOU TO FIND HIM GUILTY
20 OF FIRST DEGREE BURGLARY AND POSSESSION OF BURGLARY TOOLS
21 AND PETTY LARCENY. BENNIE MITCHELL IS GUILTY OF THOSE
22 THREE CRIMES AND I ASK YOU TO RETURN A VERDICT OF GUILTY.
23 THANK YOU.

24 THE COURT: THANK YOU, MR. MCDANIEL. LADIES AND
25 GENTLEMEN, YOU HAVE NOW HEARD ALL THE EVIDENCE AND YOU

1 HAVE HEARD THE ARGUMENTS OF THE LAWYERS AND IT IS NOW MY
2 RESPONSIBILITY TO CHARGE YOU ON THE LAW THAT YOU MUST
3 APPLY TO THE FACTS OF THIS CASE. IT WILL SOON BE YOUR
4 RESPONSIBILITY TO DETERMINE WHAT THE FACTS OF THIS CASE
5 ARE AND TO THOSE FACTS YOU MUST APPLY THE LAW AS I GIVE IT
6 TO YOU AND YOU SHOULD NOT BE CONCERNED WITH WHAT THE LAW
7 SHOULD BE BUT WHAT THE LAW IS. AND THAT MEANS THAT YOU
8 SHOULD NOT BE INFLUENCED IN THIS CASE BY ANY KIND OF
9 BIASED OR PREJUDICE OR UNDUE SYMPATHY OR ANY LIKES OR
10 DISLIKES. AND THAT MEANS THAT YOU MUST DECIDE THIS CASE
11 SOLELY ON THE EVIDENCE ACCORDING TO THE LAW. AND YOU WILL
12 RECALL THAT WHEN YOU TOOK THE OATH YESTERDAY THAT IS
13 EXACTLY WHAT THE OATH SAID, TO DECIDE THE CASE ACCORDING
14 TO THE EVIDENCE AND THE LAW.

15 NOW, PLEASE DO NOT READ INTO ANYTHING THAT I MAY OF
16 SAID OR DONE DURING THE COURSE OF THIS TRIAL OR TO
17 ANYTHING THAT I MAY SAY DURING THE COURSE OF GIVING THESE
18 INSTRUCTIONS AS ANY INDICATION AS TO WHAT I THINK THE
19 FACTS OF THIS CASE ARE OR WHAT I THINK YOUR VERDICT SHOULD
20 BE BECAUSE AS I TOLD YOU AT THE OUTSET YOU AND YOU ALONE
21 ARE THE EXCLUSIVE JUDGE OF THE FACTS. I AM NOT GOING TO
22 INTERFERE WITH YOUR RIGHT TO DETERMINE WHAT THE FACTS ARE,
23 OUR CONSTITUTION GIVES YOU THAT RIGHT EXCLUSIVELY. AND I
24 KNOW THAT YOU WOULD NOT INTERFERE WITH MY RIGHT TO TELL
25 YOU WHAT THE LAW IS. BECAUSE AS THE JUDGE OF THE LAW THAT

1 IS MY PREROGATIVE TO GIVE YOU THE LAW THAT YOU MUST APPLY
2 TO THE FACTS OF THIS CASE. NOW, HOW DO YOU DETERMINE WHAT
3 THE FACTS ARE. YOU DO THAT EVALUATING OR WEIGHING THE
4 EVIDENCE YOU HAVE HEARD DURING THE COURSE OF THIS TRIAL.
5 THERE IS NO WAY FOR YOU TO WEIGH EVIDENCE. I CAN'T GIVE
6 YOU A SET OF SCALES, IT IS INSTEAD A MENTAL PROCESS AND
7 YOU WEIGH AND EVALUATE EVIDENCE SIMPLY BY USING YOUR GOOD
8 COMMON SENSE, YOUR SENSE OF LOGIC AND REASON AND YOUR LIFE
9 EXPERIENCES. YOU BRING THOSE THINGS TO BEAR ON THE
10 EVIDENCE YOU HEARD DURING THE COURSE OF THIS TRIAL.

11 NOW, I TOLD YOU IN DETERMINING THE FACTS YOU WOULD
12 HAVE TO CONFINE YOUR DECISION TO THE EVIDENCE. AND I TOLD
13 YOU EVIDENCE CONSISTS OF TWO SOURCES. ONE IS BY SWORN
14 WITNESS TESTIMONY AND EXHIBITS. THOSE ARE THE ONLY THINGS
15 YOU CAN CONSIDER IN DETERMINING WHAT THE FACTS ARE. YOU
16 CANNOT CONSIDER AS EVIDENCE THE ARGUMENTS OR STATEMENTS OF
17 THE LAWYERS BECAUSE AGAIN THEY ARE NOT WITNESSES. AND
18 WHAT THEY SAY IS NOT EVIDENCE. LIKEWISE YOU SHOULD NOT BE
19 INFLUENCED BY ANY QUESTIONS OR OBJECTIONS THAT THE LAWYERS
20 MAY OF MADE BECAUSE THAT IS THEIR DUTY TO MAKE THE
21 OBJECTIONS AND THAT IS NOT EVIDENCE EITHER. IN ADDITION
22 TO THE DIFFERENT SOURCES OF EVIDENCE THERE IS ALSO
23 DIFFERENT TYPES OF EVIDENCE. AND WHAT I AM TALKING ABOUT
24 IS DIRECT AND CIRCUMSTANTIAL EVIDENCE. DIRECT EVIDENCE IS
25 THE TESTIMONY OF A PERSON WHO CLAIMS TO HAVE ACTUAL AND

1 DIRECT KNOWLEDGE OF A FACT SUCH AS AN EYEWITNESS.
2 CIRCUMSTANTIAL EVIDENCE IS INDIRECT EVIDENCE OR TO PUT
3 ANOTHER WAY CIRCUMSTANTIAL EVIDENCE IS PROOF OF A CHAIN OF
4 FACTS AND CIRCUMSTANCES FROM WHICH YOU COULD FIND ANOTHER
5 FACT EXIST. NOW, THE LAW MAKES NO DISTINCTION BETWEEN THE
6 WEIGHT OR VALUE TO BE GIVEN TO DIRECT OR CIRCUMSTANTIAL
7 EVIDENCE. YOU ARE ENTITLED TO CONSIDER BOTH KINDS. THERE
8 IS NOT A GREATER DEGREE OF CERTAINTY REQUIRED OF
9 CIRCUMSTANTIAL EVIDENCE OVER DIRECT EVIDENCE. AND YOU
10 MUST CONSIDER ALL THE EVIDENCE YOU HAVE HEARD IN THE CASE
11 IN LIGHT OF REASON, COMMON SENSE AND EXPERIENCE. AND
12 AFTER WEIGHING ALL THE EVIDENCE, IF YOU ARE NOT CONVINCED
13 OF THE GUILT OF MR. MITCHELL BEYOND A REASONABLE DOUBT YOU
14 MUST FIND HIM NOT GUILTY. ON THE OTHER HAND IF YOU ARE
15 CONVINCED OF HIS GUILTY BEYOND A REASONABLE DOUBT YOU
16 WOULD BE OBLIGATED TO FIND HIM GUILTY.

17 NOW, IN DETERMINING THE FACTS OF THE CASE, AS I TOLD
18 YOU, YOU MUST CONSIDER AND DETERMINE THE CREDIBILITY OF
19 THE WITNESSES AND OF THE EXHIBITS. AND I TOLD YOU SOME
20 THINGS YOU COULD USE IN ENGAGING CREDIBILITY, I AM NOT
21 GOING TO REPEAT THAT BECAUSE I KNOW YOU HEARD ME THE FIRST
22 TIME. BUT LET ME JUST TELL YOU THAT YOU MAY BELIEVE
23 EVERYTHING A WITNESS SAYS, YOU MAY BELIEVE NOTHING A
24 WITNESS SAYS. YOU MAY BELIEVE PARTS OF A WITNESSES
25 TESTIMONY AND DISREGARD OTHER PARTS. YOU MAY BELIEVE ONE

1 WITNESS OVER SEVERAL OR SEVERAL OVER ONE. BUT REMEMBER
2 THAT YOUR JOB IS TO DETERMINE THE TRUE FACTS OF THE CASE
3 AND WHETHER THE STATE HAS MET ITS BURDEN OF PROOF AND YOU
4 DO THAT BY WEIGHING ALL THE EVIDENCE, REGARDLESS OF WHO
5 CALLED THE WITNESS.

6 NOW, YOU HAVE HEARD TESTIMONY IN THIS CASE FROM
7 PEOPLE WHO WERE DESCRIBED AND QUALIFIED AS EXPERTS AND I
8 TOLD YOU WHAT AN EXPERT WITNESS WAS AS DEFINED BY THE LAW.
9 BUT I WILL TELL YOU AGAIN THAT EXPERT TESTIMONY SHOULD BE
10 JUDGED JUST AS ANY OTHER TESTIMONY IN THIS IMPORTANT
11 SENSE. YOU MAY ACCEPT OR REJECT IT AND GIVE IT AS MUCH
12 WEIGHT AS YOU THINK IT DESERVES CONSIDERING THE WITNESSES
13 EDUCATION OR EXPERIENCE, THE REASONS GIVEN FOR THE OPINION
14 AND ALL THE OTHER EVIDENCE IN THE CASE.

15 NOW, LADIES AND GENTLEMEN, THIS IS A CRIMINAL CASE
16 AND AS I HAVE ALREADY INSTRUCTED YOU THERE ARE CERTAIN
17 PRINCIPLES THAT APPLY TO CRIMINAL CASES. BEGINNING WITH
18 THE PRINCIPLE THAT THE MERE FACT THAT SOMEONE HAS BEEN
19 INDICTED IS NOT EVIDENCE. THE MERE FACT THAT SOMEONE HAS
20 BEEN CHARGED CANNOT BE CONSIDERED BY YOU AS EVIDENCE OF
21 GUILT OR EVEN CREATING A SUSPICION OF GUILT. IT IS SIMPLY
22 THE FORMAL WAY IN WHICH A CASE BEGINS. MR. MITCHELL HAS
23 PLEAD NOT GUILTY TO THE INDICTMENTS AND THAT PUTS THE
24 BURDEN OF PROOF ON THE STATE. A PERSON CHARGED WITH
25 COMMITTING A CRIME IS NEVER REQUIRED TO PROVE HIMSELF

1 INNOCENT OR PROVE HIMSELF NOT GUILTY. AND IT IS A
2 FUNDAMENTAL RULE OF LAW THAT A DEFENDANT, NO MATTER WHAT
3 THE CHARGE MAY BE, WILL ALWAYS BE PRESUMED INNOCENT UNLESS
4 AND UNTIL GUILT HAS BEEN PROVEN BY EVIDENCE SATISFYING YOU
5 OF THAT GUILT BEYOND A REASONABLE DOUBT. THIS PRESUMPTION
6 OF INNOCENCE DOES NOT END WHEN YOU BEGIN YOUR
7 DELIBERATIONS. IT REMAINS WITH THE DEFENDANT AND
8 ACCOMPANIES HIM THROUGHOUT THE TRIAL UNLESS AND UNTIL YOU
9 REACH A VERDICT OF GUILT BY EVIDENCE SATISFYING YOU OF
10 GUILT BEYOND A REASONABLE DOUBT. NOW THE PRESUMPTION OF
11 INNOCENCE IS NOT SOME TECHNICALITY, IT IS INSTEAD A
12 SUBSTANTIAL AND IMPORTANT RIGHT TO WHICH EVERYONE IS
13 ENTITLED TO UNLESS YOU, THE JURY, ARE SATISFIED FROM THE
14 EVIDENCE OF GUILT BEYOND A REASONABLE DOUBT.

15 NOW, WHAT IS A REASONABLE DOUBT IN THE LAW. THE LAW
16 DEFINES A REASONABLE DOUBT AS THE KIND OF DOUBT THAT WOULD
17 CAUSE A REASONABLE SINCERE, HONEST AND CONSCIENTIOUS
18 PERSON TO HESITATE TO ACT IN AN IMPORTANT MATTER IN THEIR
19 OWN AFFAIRS. PROOF BEYOND A REASONABLE DOUBT IS PROOF
20 THAT LEAVES YOU FIRMLY CONVINCED OF THE DEFENDANT'S GUILT.
21 AND OF COURSE THERE ARE FEW THINGS THAT WE CAN KNOW WITH
22 ABSOLUTE CERTAINTY. AND IN CRIMINAL CASES THE LAW DOES
23 NOT REQUIRE PROOF THAT OVERCOMES EVERY POSSIBLE DOUBT. IF
24 BASED ON YOUR VIEW AND WEIGHING OF THE EVIDENCE YOU ARE
25 FIRMLY CONVINCED THAT MR. MITCHELL IS GUILTY OF THE CRIME

1 CHARGED YOU MUST FIND HIM GUILTY. IF ON THE OTHER HAND
2 YOU THINK THERE IS A REAL POSSIBILITY THAT HE IS NOT
3 GUILTY YOU MUST GIVE HIM THE BENEFIT OF THAT DOUBT AND
4 FIND HIM NOT GUILTY. A REASONABLE DOUBT MAY ARISE FROM
5 THE EVIDENCE OR FROM A LACK OF EVIDENCE. AND A DEFENDANT
6 IS ENTITLED TO EVERY REASONABLE DOUBT THAT ARISES IN A
7 CASE WHICH MEANS UPON AN ISSUE OF FACT THAT MAY BE
8 ESSENTIAL TO A CONVICTION AND A VERDICT OF GUILTY, YOU
9 HAVE A REASONABLE DOUBT AS TO HOW THAT ISSUE SHOULD BE
10 RESOLVED IT IS YOUR DUTY TO RESOLVE THAT DOUBT IN FAVOR OF
11 MR. MITCHELL.

12 NOW, LADIES AND GENTLEMEN, THERE ARE THREE CHARGES IN
13 THE CASE AND YOU MUST WEIGH THE EVIDENCE AS TO EACH CHARGE
14 SEPARATELY AND INDIVIDUALLY AND NOT LET YOUR DECISION ON
15 ONE CHARGE AFFECT YOUR DECISION ON THE OTHERS. AND I AM
16 GOING TO GO OVER WITH YOU EACH OF THE CRIMES AND THE
17 ELEMENTS OF THOSE CRIMES AND BEFORE I DO THAT I WANT TO
18 REMIND YOU THAT, OF COURSE, A DEFENDANT DOESN'T HAVE ANY
19 BURDEN OF PROOF. AND THE FACT THAT A DEFENDANT DOES NOT
20 TESTIFY IS NOT A FACTOR TO BE CONSIDERED BY YOU IN ANY WAY
21 IN YOUR DELIBERATIONS AND IN YOUR CONSIDERATIONS OF THE
22 QUESTION OF GUILT OR NOT GUILTY, IT MUST NOT BE CONSIDERED
23 BY YOU IN ANY MANNER WHATSOEVER. EVERY CITIZEN HAS A
24 CONSTITUTIONAL RIGHT TO REMAIN SILENT AND THE CLAIMING OF
25 THIS RIGHT MUST NOT BE CONSIDERED BY YOU IN YOUR

1 DELIBERATIONS. SO, UNDER YOUR OATH YOU ARE NOT TO DRAW
2 ANY CONCLUSION, WHATSOEVER, FROM THE FACT THAT MR.
3 MITCHELL DID NOT TESTIFY AND THE FACT THAT HE DID NOT
4 TESTIFY SHOULD NOT EVEN BE DISCUSSED IN THE JURY ROOM.
5 THE BURDEN OF PROOF, AS I HAVE REPEATEDLY STATED IS ON THE
6 STATE. MR. MITCHELL IS NOT REQUIRED TO PROVE HIMSELF
7 INNOCENT, OR PROVE HIMSELF NOT GUILTY. THE BURDEN OF
8 PROOF IS ALWAYS ON THE STATE.

9 NOW, THE FIRST CHARGE IS BURGLARY. AND IN ORDER TO
10 CONVICT MR. MITCHELL OF THIS CHARGE THE STATE MUST PROVE
11 BEYOND A REASONABLE DOUBT THAT HE ENTERED A DWELLING
12 WITHOUT CONSENT. A DWELLING IS ANY BUILDING OR PORTION OF
13 A BUILDING IN WHICH A PERSON ORDINARILY SLEEPS. A
14 BUILDING CONSTRUCTED IS A DWELLING THAT HAS NEVER BEEN
15 OCCUPIED, IT CANNOT BE CONSIDERED A DWELLING. BUT A
16 BUILDING IS A DWELLING EVEN IF THE RESIDENTS ARE
17 TEMPORARILY ABSENT FROM THE BUILDING. IN ORDER TO PROVE
18 THAT A DEFENDANT ENTERED THE DWELLING THE STATE DOES NOT
19 HAVE TO SHOW THAT THE DEFENDANT'S ENTIRE BODY ENTERED THE
20 DWELLING, THE SMALLEST ENTRY IS SUFFICIENT. IT MAY BE ANY
21 PART OF THE BODY, SUCH AS A HAND OR A FOOT OR EVEN AN
22 INSTRUMENT SUCH AS A HOOK OR OTHER INSTRUMENT. IN
23 ADDITION, THE STATE DOES NOT HAVE TO PROVE THAT FORCE WAS
24 USED TO GAIN ENTRY. IF A PERSON ENTERS A BUILDING BY
25 USING DECEPTION OR TRICK OR MISREPRESENTATION TO GET

1 CONSENT TO ENTER THIS IS AN ENTRY WITHOUT CONSENT. THE
2 NEXT THING THE STATE MUST PROVE IN ORDER TO CONVICT ONE OF
3 BURGLARY IS THAT THE DEFENDANT INTENDED TO COMMIT A CRIME,
4 EITHER A FELONY OR MISDEMEANOR AT THE TIME OF THE ENTRY.
5 THE MERE ENTRY INTO A DWELLING WITHOUT CONSENT IS NOT
6 BURGLARY. IF THE INTENT TO COMMIT A CRIME IS FORMED AFTER
7 THE ENTRY IT IS NOT BURGLARY. ON THE OTHER HAND, IF THE
8 DEFENDANT INTENDED TO COMMIT A CRIME AT THE TIME OF THE
9 ENTRY IT IS A BURGLARY EVEN IF THE INTENT WAS ABANDONED
10 AFTER THE ENTRY OCCURRED. IT DOES NOT MATTER THAT THE
11 INTENDED CRIME WAS NOT COMPLETED. INTENT MAY BE SHOWN BY
12 ACTS AND CONDUCTS OF THE DEFENDANT AND OTHER CIRCUMSTANCES
13 FROM WHICH YOU MAY NATURALLY AND REASONABLY INFER INTENT.
14 FINALLY THE STATE MUST PROVE BEYOND A REASONABLE DOUBT
15 THAT THE DEFENDANT ENTERED OR REMAINED IN THE DWELLING IN
16 THE NIGHTTIME. NIGHTTIME IS THE PERIOD BETWEEN SUNSET AND
17 SUNRISE DURING WHICH THERE IS NOT ENOUGH DAYLIGHT TO
18 RECOGNIZE A PERSON'S FACE EXCEPT BY ARTIFICIAL LIGHT OR
19 MOONLIGHT.

20 NOW, THE NEXT CHARGE THAT I AM GOING TO DEFINE FOR
21 YOU IS POSSESSION OF BURGLARY TOOLS. AND I WILL TELL YOU
22 THAT UNDER SECTION 16-11-20 OF THE SOUTH CAROLINA CODE OF
23 LAWS IT STATES IN PART: IT IS UNLAWFUL FOR A PERSON TO
24 MAKE OR MEND, CAUSE TO BE MADE OR MENDED, OR HAVE IN HIS
25 POSSESSION ANY ENGINE, MACHINE, TOOL, FALSE KEY, PICKLOCK,

1 BIT, NIPPERS, NITROGLYCERINE, DYNAMITE CAP, COIL OR FUSE,
2 STEEL WEDGE, DRILL, TAP-PIN, OR OTHER IMPLEMENT OR THING
3 ADAPTED, DESIGNED, OR COMMONLY USED FOR THE COMMISSION OF
4 BURGLARY, LARCENY, SAFECRACKING, OR OTHER CRIME, UNDER
5 CIRCUMSTANCES EVINCING AN INTENT TO USE, EMPLOY, OR ALL
6 THE SAME TO BE USED OR EMPLOYED IN THE COMMISSION OF A
7 CRIME, OR KNOWING THAT THE SAME ARE INTENDED TO BE SO
8 USED.

9 FINALLY THE DEFENDANT, MR. MITCHELL, IS CHARGED WITH
10 LARCENY, PETTY LARCENY. AND IN ORDER TO CONVICT MR.
11 MITCHELL OF THIS OFFENSE THE STATE MUST PROVE BEYOND A
12 REASONABLE DOUBT THAT MR. MITCHELL TOOK AND CARRIED AWAY
13 THE PROPERTY OF ANOTHER AGAINST THE WILL OR WITHOUT THE
14 CONSENT OF THE OTHER PERSON. THE SLIGHTEST REMOVAL OF THE
15 PROPERTY OR THE COMPLETE POSSESSION OF THE PROPERTY, EVEN
16 FOR AN INSTANCE BY THE DEFENDANT, IS ENOUGH TO SHOW A
17 TAKING AND CARRYING AWAY OF THE PROPERTY. THE STATE MUST
18 ALSO PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT TO
19 PERMANENTLY DEPRIVED THE OWNER OF THE PROPERTY.

20 NOW, LADIES AND GENTLEMEN, IN EVERY CASE THE STATE
21 BEARS THE BURDEN OF PROVING CRIMINAL INTENT. CRIMINAL
22 INTENT IS THE STATE OF MIND, IT IS A CONSCIOUS WRONGDOING
23 AND IT IS UP TO YOU TO DETERMINE WHAT THE DEFENDANT
24 INTENDED TO DO AT THE TIME. OF COURSE, MEDICAL SCIENCE
25 DOES NOT ALLOW US TO DISSECT A PERSON'S BRAIN AND

1 DETERMINE WHAT THEY HAD IN MIND AT A CERTAIN POINT IN
2 TIME. AND BECAUSE OF THAT THE LAW SAYS THAT CRIMINAL
3 INTENT MAY BE INFERRED FROM THE CIRCUMSTANCES SHOWN TO
4 HAVE EXISTED. IT IS NOT NECESSARY TO ESTABLISH INTENT BY
5 DIRECT AND POSITIVE EVIDENCE. BUT IT MAY ESTABLISHED BY
6 CIRCUMSTANTIAL OR INFERENCE AS THE SAME WAY OF ANY OTHER
7 FACT BY TAKING INTO CONSIDERATION THE ACTS OF THE PARTIES
8 AND ALL THE FACTS AND CIRCUMSTANCES.

9 IN ANY CRIMINAL CASE IDENTIFICATION OF THE DEFENDANT
10 AS THE PERSON WHO COMMITTED THE CRIME IS SOMETHING THE
11 STATE BEARS THE BURDEN OF PROVING BEYOND A REASONABLE
12 DOUBT. YOU MUST BE SATISFIED BEYOND A REASONABLE DOUBT OF
13 THE ACCURACY OF THE IDENTIFICATION OF THE DEFENDANT BEFORE
14 YOU MAY CONVICT HIM. IDENTIFICATION TESTIMONY IS AN
15 EXPRESSION OF BELIEF OR IMPRESSION BY A WITNESS. YOU MUST
16 DETERMINE THE ACCURACY OF THE IDENTIFICATION, YOU MAY
17 CONSIDER AND MUST CONSIDER THE BELIEVABILITY OF EACH
18 IDENTIFICATION WITNESS IN THE SAME WAY AS ANY OTHER
19 WITNESS. YOU MAY CONSIDER WHETHER THE WITNESS HAD AN
20 ADEQUATE OPPORTUNITY TO OBSERVE THE OFFENDER AT THE TIME
21 OF THE OFFENSE. THIS WILL BE AFFECTED BY THINGS LIKE HOW
22 LONG OR SHORT OF TIME WAS AVAILABLE, HOW FAR OR HOW CLOSE
23 THE WITNESS WAS, THE LIGHTING CONDITIONS AND WHETHER THE
24 WITNESS HAD THE CHANCE TO SEE OR KNOW THE PERSON IN THE
25 PAST. ONCE AGAIN, I INSTRUCT YOU THAT THE BURDEN OF PROOF

1 OF THE STATE EXTENDS TO EVERY ELEMENT OF THE CRIME CHARGED
2 AND THIS INCLUDES THE BURDEN OF PROVING BEYOND A
3 REASONABLE DOUBT THE IDENTITY OF THE DEFENDANT AS THE
4 PERSON WHO COMMITTED THE CRIME.

5 NOW, THAT COVERS ALL THE SUBSTANTIVE LAW. AND LET ME
6 JUST GIVE YOU A FEW REMARKS ON YOUR DELIBERATIONS BEFORE
7 YOU RETIRE TO THE JURY ROOM TO DO THAT AND START TALKING
8 ABOUT THE CASE. FIRST OF ALL, REMEMBER THAT YOU WEREN'T
9 CHOSEN TO BE A JURY IN THIS CASE, TO BE A PARTISAN OR
10 ADVOCATE FOR EITHER THE STATE OR FOR MR. MITCHELL. YOU
11 WERE CHOSEN BECAUSE BOTH SIDES BELIEVED YOU COULD BE FAIR
12 AND IMPARTIAL AND YOU CAN DECIDE THIS CASE WITHOUT ANY
13 KIND OF BIASED OR PREJUDICE OR PRECONCEIVED IDEAS. AND
14 THAT MEANS YOU USE YOUR COMMON SENSE AND YOUR SENSE OF
15 LOGIC AND REASONS AND YOUR LIFE EXPERIENCES. AND YOU LOOK
16 AT THE EVIDENCE IN THIS CASE AND DETERMINE THE FACTS FROM
17 THAT EVIDENCE, TAKE THE LAW THAT I HAVE GIVEN TO YOU AND
18 APPLY IT TO THOSE FACTS AND ULTIMATELY REACH A VERDICT.
19 IF YOU LOOKED UP THE WORD, JURY, YOU SEE IT CAME AS AN OLD
20 WORD, IT MEANS A COMPANY OF PEOPLE WHO, EXCUSE ME, SWORN
21 TO RENDER A TRUE ANSWER. AND YOU ARE NOT FOR ONE SIDE OR
22 THE OTHER, YOU ARE JUDGES, JUDGES OF THE FACTS AND TO
23 DETERMINE WHAT THE FACTS ARE AND WHETHER THE STATE HAS MET
24 ITS BURDEN OF PROOF BEYOND A REASONABLE DOUBT. NOW, I
25 HAVE PREPARED A VERDICT FORM AND MR. MELLINGER, I WILL ASK

1 YOU TO LOOK AT THIS FORM AND IT SETS FORTH THE THREE
2 CHARGES AND ASK YOU TO RETURN WHETHER MR. MITCHELL IS
3 GUILTY OR NOT GUILTY OF THOSE CHARGES. DON'T PLACE ANY
4 SIGNIFICANCE ON WHICH ANSWER I PUT FIRST, I HAVE TO PUT
5 ONE FIRST AND THAT DOESN'T MEAN ANYTHING. OF COURSE, YOU
6 ARE ONLY AUTHORIZED TO SIGN THE FORM WHEN THE VERDICT IS
7 UNANIMOUS. NOW, THE GENIUS OF OUR JURY SYSTEM OF COURSE
8 IS IT ALLOWED TWELVE PEOPLE FROM DIFFERENT BACKGROUNDS AND
9 WALKS OF LIFE AND LIFE EXPERIENCES TO COME TOGETHER AND
10 DISCUSS THE EVIDENCE AND ULTIMATELY REACH A VERDICT.
11 DON'T BE AFRAID TO CHANGE YOUR OPINION IF YOUR DISCUSSIONS
12 PERSUADE THAT YOU SHOULD. BUT DON'T CHANGE YOUR OPINION
13 SIMPLY TO GET THE CASE OVER WITH OR TO REACH A UNANIMOUS
14 VERDICT BECAUSE THIS CASE IS IMPORTANT, IT IS IMPORTANT
15 FOR THE STATE AND FOR MR. MITCHELL. AND THIS IS EVERYONES
16 DAY IN COURT ON THIS MATTER AND THEY ARE ALL ENTITLED TO
17 YOUR FAIR AND IMPARTIAL CONSIDERATION OF THE EVIDENCE AND
18 YOUR VERDICT. THE RECORD IS CLOSED, THERE ARE NOT GOING
19 TO BE ANY MORE WITNESSES AND THERE ARE NOT GOING TO BE ANY
20 MORE EXHIBITS SO YOU WILL HAVE TO DETERMINE THE CASE ON
21 EITHER THE EXHIBITS YOU HAVE IN THERE OR YOUR MEMORY OF
22 THE TESTIMONY. IF YOU NEED TO CONTACT ME IT MUST BE BY
23 WAY OF A NOTE. DON'T START TALKING ABOUT THE CASE YET
24 BECAUSE I HAVE ONE MORE MATTER TO TAKE UP WITH THE LAWYERS
25 AND WHEN YOU RECEIVE THE EXHIBITS THAT WILL BE YOUR SIGNAL

1 THAT YOU CAN BEGIN DELIBERATING ABOUT THIS MATTER. THANK
2 YOU FOR YOUR ATTENTION AND ALSO I WILL LET YOU KNOW THE
3 CLERK'S OFFICE HAS ORDERED LUNCH. IT SHOULD BE HERE IN
4 THE NEXT FIFTEEN MINUTES OR SO.

5 FOREPERSON: WILL WE HAVE A CHANCE TO VIEW THAT
6 PICTURE A LITTLE BIT CLOSER.

7 THE COURT: YOU ARE TALKING ABOUT WHAT IS ON THE
8 DISK?

9 FOREPERSON: THE PICTURE OF THE SUBJECT.

10 THE COURT: LET ME TALK TO THE LAWYERS ABOUT HOW WE
11 CAN ARRANGE THAT AND I WILL LET YOU KNOW. WHEN YOU GET
12 THE EXHIBITS, DON'T START TALKING ABOUT THE CASE UNTIL
13 THEN. THANK YOU VERY MUCH.

14 (WHEREUPON, THE JURY WAS EXCUSED FROM OPEN COURT.)

15 THE COURT: OKAY, ANY OBJECTIONS OR EXCEPTIONS TO THE
16 CHARGE FROM THE STATE?

17 MR. MCDANIEL: NOT FROM THE STATE.

18 THE COURT: FROM THE DEFENSE?

19 MR. CHAPLIN: NOT FROM THE DEFENSE, YOUR HONOR.

20 THE COURT: WHAT ABOUT THE REQUEST TO VIEW THE
21 PICTURE.

22 MR. MCDANIEL: I DO HAVE A HARD COPY OF THOSE. IT
23 SOUNDED LIKE HE WANTED SOMETHING TO ACTUALLY EXAMINE.

24 THE COURT: WELL, IF THE DISK WHICH IS EXHIBIT 1,
25 STATE'S EXHIBIT 1 GOES BACK THERE IS THERE NO WAY THEY

1 (WHEREUPON, THE JURY CAME INTO OPEN COURT TO VIEW THE
2 PICTURE AT APPROXIMATELY 2:00 P.M.)

3 (WHEREUPON, THE JURY WAS EXCUSED TO CONTINUE
4 DELIBERATIONS AT APPROXIMATELY 2:03 P.M.)

5 THE COURT: THE JURY HAS REACHED A VERDICT. ANY
6 MATTERS BEFORE WE BRING THE JURY OUT?

7 MR. MCDANIEL: NOT FROM THE STATE, JUDGE.

8 MR. CHAPLIN: NOTHING.

9 THE COURT: I APPRECIATE THE PRESENTATION FROM BOTH
10 SIDES AND WITH THAT BRING THE JURY IN.

11 (WHEREUPON, THE JURY CAME INTO OPEN COURT WITH THE
12 VERDICT AT APPROXIMATELY 2:25 P.M.)

13 THE COURT: ALL RIGHT, MR. FOREMAN, HAS THE JURY
14 REACHED A UNANIMOUS VERDICT, SIR?

15 FOREPERSON: YES, SIR.

16 THE COURT: IF YOU WILL HAND IT TO MR. COATS WE WILL
17 RECEIVE IT AND PUBLISH IT.

18 (WHEREUPON, THE FOREPERSON HANDS THE VERDICT TO THE
19 BAILIFF.)

20 THE COURT: OKAY, MADAM CLERK.

21 THE CLERK: THE STATE OF SOUTH CAROLINA VERSUS BENNIE
22 DARRON MITCHELL, INDICTMENT 2009-GS-36-39, 37 AND
23 2010-GS-36-87. AS TO THE CHARGE OF BURGLARY, INDICTMENT
24 2009-GS-36-37, WE THE JURY UNANIMOUSLY FIND THE DEFENDANT
25 GUILTY.

1 AS TO THE CHARGE OF POSSESSION OF BURGLARY TOOLS,
2 2009-GS-36-39, WE THE JURY UNANIMOUSLY FIND THE DEFENDANT
3 GUILTY.

4 AS TO THE CHARGE OF PETTY LARCENY, 2010-GS-36-87, WE
5 THE JURY UNANIMOUSLY FIND THE DEFENDANT NOT GUILTY.

6 THAT IS SIGNED, TERRY E. MELLINGER, FOREPERSON.

7 MR. FOREMAN AND LADIES AND GENTLEMEN, IF THESE ARE
8 YOUR VERDICTS PLEASE INDICATE BY RAISING YOUR RIGHT HAND.

9 (WHEREUPON, ALL JURORS RAISED THEIR HAND.)

10 THE COURT: IS THERE A REQUEST OF POLLING OF THE
11 JURY?

12 MR. MCDANIEL: NOT FROM THE STATE.

13 MR. CHAPLIN: YES, YOUR HONOR.

14 THE COURT: YES MA'AM, MS. BOWERS, IF YOU WILL POLL
15 THE JURY.

16 THE CLERK: AS I CALL YOUR NAME PLEASE RAISE YOUR
17 HAND.

18 THE CLERK: CAROL M. MAZZA, WAS THIS YOUR VERDICT?

19 JUROR: YES.

20 THE CLERK: IS IT STILL YOUR VERDICT?

21 JUROR: YES.

22 THE CLERK: JACQUELINE SMITH, WAS THIS YOUR VERDICT?

23 JUROR: YES.

24 THE CLERK: IS IT STILL YOUR VERDICT?

25 JUROR: YES.

1 YOU HAVE A THREE YEAR EXEMPTION FROM BEING CALLED TO
2 CIRCUIT COURT JURY DUTY. THANK YOU FOR YOU PATIENCE WITH
3 THIS WEEK AND IF YOU NEED ANYTHING FOR WORK FOR
4 VERIFICATION THAT YOU WERE HERE, THE CLERK'S STAFF CAN DO
5 THAT FOR YOU. THANK YOU AGAIN FOR YOUR SERVICE.

6 (WHEREUPON, THE JURY WAS EXCUSED FROM OPEN COURT AT
7 APPROXIMATELY 2:27 P.M.)

8 THE COURT: ANY MOTIONS AT THIS TIME?

9 MR. MCDANIEL: NOT FROM THE STATE.

10 MR. CHAPLIN: NOT AT THIS TIME, YOUR HONOR.

11 THE COURT: ALL RIGHT, MR. MCDANIEL.

12 MR. MCDANIEL: YOUR HONOR, THE ONLY ADDITION TO ADD
13 IS MR. MITCHELL'S PRIOR RECORD. '81 IS A PETTY LARCENY;
14 SHOPLIFTING, '81'; '82 IS BREAKING INTO MOTOR VEHICLES,
15 TWO COUNTS AND A GRAND LARCENY; '84 IS SIMPLE ASSAULT;
16 '85, DUI; '86 BREAKING INTO A MOTOR VEHICLE AND PETTY
17 LARCENY AND RECEIVED 3 YEARS. IN '87, ATTEMPTED BREAKING
18 INTO A MOTOR VEHICLE, 18 MONTHS; '89, BREAKING INTO A
19 MOTOR VEHICLE; IT LOOKS LIKE THREE COUNTS OF THAT IN '89;
20 '90 IS A BURGLARY SECOND AND A LARCENY; '95, DISTRIBUTION
21 OF CRACK, 5 YEARS; 2001 RECEIVING STOLEN GOODS; 2003 WAS A
22 THIRD OR SUBSEQUENT PROPERTY OFFENSE AND I BELIEVE HE
23 RECEIVED 8 YEARS ON THAT AND I BELIEVE THAT WAS A TRIAL.
24 IT WAS THREE BREAKING INTO MOTOR VEHICLES AND TWO PETTY
25 LARCENIES. SOME MINOR STUFF AND THEN IN '08, BREAKING

1 INTO AN AUTO IN '08 AND RECEIVED ONE YEAR. AND THAT IS
2 HIS PRIOR RECORD.

3 THE COURT: MR. CHAPLIN, ARE YOU READY TO COME
4 AROUND?

5 MR. CHAPLIN: YES.

6 THE COURT: YOU CAN GO AHEAD AND CUFF HIM, PLEASE.
7 YES SIR, MR. CHAPLIN.

8 MR. CHAPLIN: YOUR HONOR, I REPRESENT MR. BENNIE
9 MITCHELL IN THIS PARTICULAR MATTER AND FOR THE VERDICT AND
10 FOR NOW HERE FOR SENTENCING.

11 THE COURT: AND I APPRECIATE THE REPRESENTATION YOU
12 PROVIDED TO HIM AND THE SUBSTANTIALLY DEFENSE YOU PROVIDED
13 HIM AND I APPRECIATE THE COURTESIES ON BOTH SIDES. DID
14 THE VICTIMS WISH TO SPEAK?

15 VICTIM ADVOCATE: NO SIR, THEY ARE SATISFIED WITH THE
16 RESULTS.

17 THE COURT: OKAY. AND, MR. MITCHELL, ANYTHING THAT
18 YOU WOULD LIKE TO SAY, SIR?

19 MR. MITCHELL: I KNOW--

20 MR. CHAPLIN: YOUR HONOR, I THINK MR. MITCHELL IS A
21 LITTLE OVERWHELMED AT THIS POINT BUT IF I COULD, TO TAKE
22 THE OPPORTUNITY TO SAY THAT, YOU KNOW, I HAD THE
23 OPPORTUNITY TO REALLY GET TO KNOW MR. MITCHELL THROUGHOUT
24 MY REPRESENTATION. MR. MITCHELL IS A GOOD GUY, I THINK
25 HIS RECORD CLEARLY, THERE MAY BE CONCERNS WITH THAT AND

1 MR. MITCHELL HAS NOT GOTTEN INTO ANY SERIOUS TROUBLE FOR
2 SOME TIME. MR. MITCHELL IS SOMEONE THAT WOULD BENEFIT
3 FROM ANY TYPE OF REHABILITATION OR WHATEVER THE CASE YOUR
4 HONOR MIGHT SUGGEST. AND MR. MITCHELL HAS AN ELDERLY
5 MOTHER, SHE IS 80 SOMETHING YEARS OLD AND SHE WOULD
6 BENEFIT FROM HIM BEING AROUND TO ASSIST HER. SHE IS NOT
7 VERY AMBULATORY. AND WE JUST ASK THE COURT FOR MERCY WITH
8 REGARDS TO SENTENCING IN THIS MATTER.

9 THE COURT: THANK YOU. OKAY. HOW LONG HAS HE BEEN
10 IN CUSTODY?

11 MR. CHAPLIN: GOING ON 19 MONTHS, YOUR HONOR.

12 MR. MITCHELL: YOUR HONOR?

13 THE COURT: YES SIR, MR. MITCHELL.

14 MR. MITCHELL: I HAVE -- HAVE MERCY.

15 THE COURT: OKAY, THE OFFENSE OF BURGLARY FIRST IS
16 CLASSIFIED AS A VIOLENT OFFENSE AND A MOST SERIOUS OFFENSE
17 UNDER STATE LAW, IT CARRIES A POTENTIAL SENTENCE OF 15 TO
18 LIFE. POSSESSION OF BURGLARY TOOLS CARRIES A MAXIMUM
19 SENTENCE OF 5 YEARS. THE SENTENCE OF THE COURT ON
20 BURGLARY FIRST IS YOU BE COMMITTED TO THE DEPARTMENT OF
21 CORRECTIONS FOR A PERIOD OF 20 YEARS. THE SENTENCE ON THE
22 BURGLARY TOOLS IS YOU BE COMMITTED TO THE DEPARTMENT OF
23 CORRECTIONS FOR A PERIOD OF 5 YEARS, CONCURRENT. GOOD
24 LUCK TO YOU, SIR.

25 MR. MCDANIEL: THANK YOU, YOUR HONOR.

STATE OF SOUTH CAROLINA)
 COUNTY OF NEWBERRY)

IN THE COURT OF GENERAL SESSIONS
 FOR THE EIGHTH JUDICIAL CIRCUIT

WARRANT NOs.: I-008487, I-008488,
 I-008490

STATE OF SOUTH CAROLINA,)

POST TRIAL MOTIONS

VS.)

NOTICE AND MOTION TO RECONSIDER
 SENTENCE/ MOTION FOR A NEW TRIAL

BENNIE MITCHELL.)

TO: Assistant Solicitor Austin McDaniel

YOU WILL PLEASE TAKE NOTICE that on April 27, 2010 or as soon thereafter as counsel may be heard, the defendant will move through his attorney, Mathias G. Chaplin, before the Court for a hearing regarding reconsideration of the sentence imposed by the Honorable D. Garrison Hill on April 21, 2010 or a new trial.

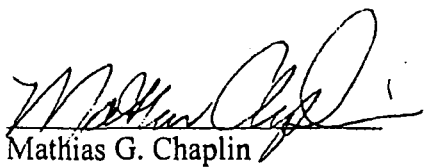
The Defendant was convicted and sentenced to 20 years in the Department of Corrections for Burglary 1st and Possession of Burglary Tools.

The Defendant, Bennie Mitchell, is currently in the custody of the Newberry County Detention Center. This notice is a formal request to have the Defendant transported to the Newberry County Courthouse from the Newberry County Detention Center or from the Department of Corrections at the time of this hearing.

Counsel is respectfully requesting an opportunity to bring the Defendant in front your honor for the purposes indicated above. Fifteen minutes is requested for this matter.

Respectfully Submitted,

FILED
 APR 26 2010
 1:34 PM
 CLERK OF COURT
 NEWBERRY COUNTY, SC



Mathias G. Chaplin
Attorney for Defendant
Columbia, SC

April 26, 2010

STATE OF SOUTH CAROLINA
COUNTY OF NEWBERRY

IN THE COURT OF GENERAL SESSIONS
FOR THE EIGHTH JUDICIAL CIRCUIT

WARRANT NOS.: I-008487, I-008488,
I-008490

STATE OF SOUTH CAROLINA,

CASE NO's: 2009-GS-36-0037, 2009-GS-36-
00038, 2009-GS-36-0039, 2010-GS-36-0087

**MEMORANDUM TO SUPPORT
POST TRIAL MOTIONS**

VS.

BENNIE MITCHELL.

TO: Assistant Solicitor Austin McDaniel

YOU WILL PLEASE TAKE NOTICE that as soon as counsel may be heard, the defendant will move through his attorney, Mathias G. Chaplin, before the Court for a hearing regarding a new trial or reconsideration of the sentence imposed by the Honorable D. Garrison Hill on April 21, 2010.

The Defendant, Bennie Mitchell, is currently in the custody of the Kirkland Correctional Facility on Broad River Road in Columbia, SC. This notice is a formal request to have the Defendant transported to the Newberry County Courthouse at the time of this hearing. Counsel is respectfully requesting an opportunity to bring the Defendant in front of your honor for the purposes indicated above. Fifteen minutes is requested for this matter.

This Post Trial Motion was filed with the Newberry County Clerk of Court on April 26, 2010. Assistant Solicitor Austin McDaniel was personally served a copy of this Post Trial Motion on April 26, 2010 by Attorney Mathias G. Chaplin. This

SCANNED

B.M. copy

Memorandum has been prepared to provide additional information to the Solicitor and Court regarding notice and the grounds for this Post Trial Motion.

MEMORANDUM

Defendant Bennie D. Mitchell hereby moves the Court, pursuant to Rule 29, S.C. R. Crim.P. for a new trial. In the alternative, Bennie D. Mitchell hereby moves the Court, pursuant to Rule 29, S.C.R. Crim.P. for reconsideration of the 20 year sentence imposed at the conclusion of this trial.

The motion for a new trial is based upon the grounds that the jury found Bennie D. Mitchell innocent of petit larceny in this matter. In short, he is not guilty of stealing anything from the home of Steven Potts.

The motion for reconsideration of the sentence imposed is based upon the fact that alternative sentencing options are available and the Defendant respectfully requests that a suspended sentence of less time be considered.

MOTION FOR A NEW TRIAL

Bennie D. Mitchell was charged with Burglary 1st (Section 16-11-311(A)). Under this statute, the State must prove four elements: 1)entry into a dwelling, 2)without consent, 3)with the intent to commit a crime therein, 4)presence of an aggravating circumstance. Based on the fact the Defendant was found not guilty of petit larceny, the Defense argues element 3 has not been met. The jury charge in this matter clearly states: "Mere entry into a dwelling without consent is not sufficient to constitute first degree burglary; there must have been an intent to commit a crime once inside." *Ralph King Anderson, Jr., South Carolina Requests to Charge – Criminal, 2007, Section 2-13.* Proof of intent necessarily rests on inference from conduct. *Ralph King Anderson, Jr.,*

B.M.

South Carolina Requests to Charge – Criminal, 2007, Section 2-13. The inferred conduct in this case was that someone stole beers and coins. However, the jury rejected this notion and returned a verdict of not guilty as to the crime of petit larceny. Therefore, any inference made to the conduct of stealing appears to have been eliminated.

Criminal intent includes those consequences which represent the very purpose for which an act is done. *Ralph King Anderson, Jr., South Carolina Requests to Charge – Criminal, 2007, Section 2-13.* In this matter the State represents the purpose for which the act was done was to take away beers and coins from the home of Steven Potts. However, the jury determined this act was not done.

The trial judge is empowered by South Carolina law to sit as an alternate “Thirteenth Juror.” The South Carolina Supreme Court reaffirmed and explained this doctrine a few years ago:

This Court has reviewed the thirteenth juror doctrine on several occasions and has refused to abolish it or to require trial judges to provide reasons for their decisions... As the “thirteenth juror”, the trial judge can hang the jury by refusing to agree to the jury’s otherwise unanimous verdict. Norton v. Norfolk Southern Ry. Co., 350 SC 473, 567 S.E. 2d 851 (S.C. 2002).

The Thirteenth Juror Doctrine provides an all important, fail safe for justice. If the Judge, in his role as the “Thirteenth Juror”, finds reasonable doubt about the propriety of the verdict, then he is empowered by law to veto the verdict. Here, the fact that the jury returned a verdict of not guilty as to Petit Larceny appears to create an issue with the verdict of guilty as to the crime of Burglary 1st. We ask that your honor consider this issue as the Thirteenth Juror.

B.M.

When a Judge exercises his prerogatives under this doctrine, he is doing precisely what the South Carolina case law instructs him to do. Fundamentally, the Court must answer for itself the crucial question: "Is this Court really prepared to send the Defendant to jail for 20 years for a crime, the basis of which, the jury states did not occur.

Therefore, a new trial is requested on the premise that the required element of intent to commit a crime therein has not been established based upon the fact the jury found the Defendant not guilty of the crime of petit larceny.

MOTION TO RECONSIDER

It appears there was no consideration given to the fact that the sentence for Burglary 1st may be suspended. The general power to suspend sentences derives from S.C. Code Ann. 24-21-410 (1989). This power does not extend to offenses where the legislature has specifically mandated that no part of a sentence may be suspended. State v. Johnson, 343, S.C. 693, 541 S.E. 2d 855 (Ct. App. 2001); State v. Taub, 336 S.C. 310, 519 S.E. 2d 797 (Ct. App. 1999); and State v. Tisdale, 321 S.C. 153, 467 S.E. 2d 270 (Ct. App. 1996).

The criminal statute violated in this case allows the Court, in its discretion to sentence the Defendant to a term of not less than 15 years . (Section 16-11-311 SC Code of Laws). This statute does not specifically prohibit suspension of this sentence.

The cardinal rule of statutory construction is to ascertain and effectuate the intention of legislature. Howell v. US Fidelity and Guar. Ins. Co., 370 S.C. 505, 636 S.E. 2d 626 (2006). Penal statutes are to be construed strictly against the State and in favor of the defendant. State v. Muldrow, 348 S.C. 264, 559 S.E. 2d 847 (2002).

In numerous penal statutes, the legislature has included specific provisions to

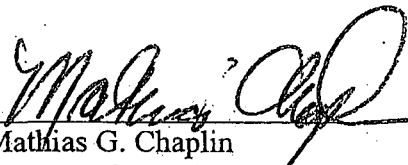
B.M.

prohibit suspension, in whole or in part, of sentences to fines and imprisonment. The legislature expressly included limiting provisions in numerous statutes. Here, however, the omission of any such provision in the statute for Burglary 1st, indicates the legislature did not intend to limit the general authority to suspend sentences for this offense.

Therefore, it is requested that this Court consider suspending the sentence imposed in this matter. The purpose of incarceration should be to rehabilitate a person. Bennie Mitchell is 48 years old and has an ailing mother that needs his attention. The home owner in this matter did not request a particular sentence and a shorter sentence is not in violation of the statute he is charged with violating.

Therefore, the Defendant, Bennie Mitchell, begs upon this court for a reduced sentence that will allow him to return to society in a shorter amount of time and be a responsible citizen.

Respectfully Submitted,


Mathias G. Chaplin
Attorney for Defendant

Columbia, SC

April 30, 2010



STATE OF SOUTH CAROLINA)
COUNTY OF NEWBERRY)

IN THE COURT OF GENERAL SESSIONS
FOR THE EIGHTH JUDICIAL CIRCUIT

WARRANT NOs.: I-008487, I-008488,
I-008490

STATE OF SOUTH CAROLINA,)

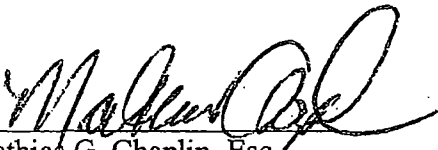
CASE NO's: 2009-GS-36-0037, 2009-GS-36-
00038, 2009-GS-36-0039, 2010-GS-36-0087

VS.)

Proof of Service

BENNIE MITCHELL.)

The undersigned, Mathias G. Chaplin, being sworn says that he served the Memorandum to Support Post Trial Motions and a copy of Post Trial Motions (personally served on ASOL McDaniel on April 26, 2010) by depositing a copy of each in the United States Mail, postage prepaid, on April 30, 2010 addressed to Assistant Solicitor Austin McDaniel of the Newberry County Solicitor's Office, P.O. Box 516, Greenwood, South Carolina 29648. Copies of same were also mailed to Judge G. Hill and the Newberry Clerk of Court for filing on April 30, 2010.


Mathias G. Chaplin, Esq.
Attorney for Defendant Bennie Mitchell



STATE OF SOUTH CAROLINA
COUNTY OF NEWBERRY

)
) IN THE COURT OF GENERAL SESSIONS
)

State of South Carolina,

) C.A. Nos: 2009-GS-36-0037, 0038, 0039
) 2010-GS-36-0087
)

Plaintiff,

v.

) **ORDER DENYING DEFENDANT'S**
) **POST-TRIAL MOTION TO RECONSIDER**
) **AND MOTION FOR A NEW TRIAL**
)

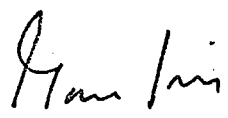
Bennie Mitchell,

Defendant.

_____)
The court has carefully reviewed Defendant's Post Trial Motion to Reconsider the Sentence imposed on April 21, 2010 as well as Defendant's Motion for a New Trial. The court finds these motions are without merit, therefore they are respectfully DENIED.

IT IS SO ORDERED!

May 7, 2010
Greenville, South Carolina



D. Garrison Hill
13th Circuit Judge

(B.M.)

RECEIVED
MAY 14 2010
CLERK OF COURT
NEWBERRY COUNTY

STATE OF SOUTH CAROLINA

COUNTY OF NEWBERRY

IN THE COURT OF GENERAL SESSIONS

State of South Carolina,

Plaintiff,

v.

Bennie Mitchell,

Defendant.

C.A. Nos: 2009-GS-36-0037, 0038, 0039

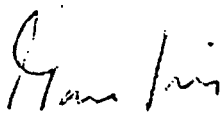
2010-GS-36-0087

**ORDER DENYING DEFENDANT'S
POST-TRIAL MOTION TO RECONSIDER
AND MOTION FOR A NEW TRIAL**

The court has carefully reviewed Defendant's Post Trial Motion to Reconsider the Sentence imposed on April 21, 2010 as well as Defendant's Motion for a New Trial. The court finds these motions are without merit, therefore they are respectfully DENIED.

IT IS SO ORDERED!

May 7, 2010
Greenville, South Carolina



D. Garrison Hill
13th Circuit Judge

WITNESSES

Roy McClurkin
Newberry Police Department

WARRANT NUMBER

008487

Lois M. Braaman

Foreman of the Grand Jury

Date: *1-26-09*

VERDICT

Guilty

Guilty April 21, 2010

Terry E. Melling

Foreman

THE STATE OF SOUTH CAROLINA

COUNTY OF NEWBERRY

COURT OF GENERAL SESSIONS

January Term, 2009

Indictment # 09GS36-

37

THE STATE

vs.

Bennie Darron Mitchell

INDICTMENT FOR

Burglary 1st Degree
16-11-0311

Guilty

THE STATE OF SOUTH CAROLINA

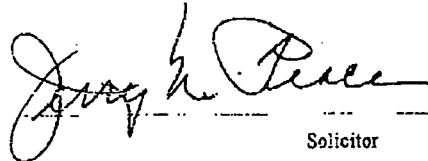
COUNTY OF NEWBERRY

INDICTMENT FOR**Burglary 1st Degree**
16-11-0311

At a Court of General Sessions, convened on the 26th day of January, 2009 the Grand Jurors of Newberry County present upon their oath:

That Bennie Darron Mitchell, did in Newberry County, state aforesaid, between the dates of 27th day of October, 2008 and the 28th day of October, 2008 willfully and unlawfully enter a dwelling without consent and with intent to commit a crime therein, when such entering or remaining occurred in the nighttime, the said dwelling being owned and/or occupied by Stephen Lee Potts, in violation of Section 16-11-311 of the South Carolina Code of Laws, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such cases made and provided.


Solicitor

WITNESSES

Roy McClurkin
Newberry Police Department

WARRANT NUMBER

1008490

Lee M. Brannan
Foreman of the Grand Jury
Date: *1-20-09*

VERDICT

Guilty April 21, 2010

Terry E. Melling
Foreman

THE STATE OF SOUTH CAROLINA

COUNTY OF NEWBERRY

COURT OF GENERAL SESSIONS

January Term, 2009

Indictment # 09GS36-

39

THE STATE

vs.

Bennie Darron Mitchell

INDICTMENT FOR

Possession of Burglary Tools
16-11-0020

THE STATE OF SOUTH CAROLINA**INDICTMENT FOR**

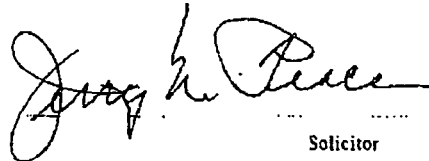
COUNTY OF NEWBERRY

**Possession of Burglary Tools
16-11-0020**

At a Court of General Sessions, convened on the 26th day of January, 2009 the Grand Jurors of Newberry County present upon their oath:

That Bennie Darron Mitchell, did in Newberry County, state aforesaid, on or about the 27th day of October, 2008 did knowingly, willfully, and unlawfully make, or cause to be made, and/or possess any implement or thing adapted, designed, or commonly used for the commission of burglary, larceny, safecracking, or other crime in violation of Section 16-11-20 of the South Carolina Code of Laws, 1976, as amended

Against the peace and dignity of the State, and contrary to the statute in such cases made and provided.



.....
Solicitor

WITNESSES

Roy McClurkin
Newberry Police Department

WARRANT NUMBER

10-INFO-36-0018

RETURN BILL

Renee A. Weber
Foreman of the Grand Jury

Date: *2/5/10*

VERDICT

Not Guilty April 21, 2010

Terry Z. Meelinger
Foreman

THE STATE OF SOUTH CAROLINA

COUNTY OF NEWBERRY

COURT OF GENERAL SESSIONS

February Term, 2010
Indictment # 10GS36-0087

THE STATE

vs.
Bernie Darron Mitchell

Assignment 4/19/10

INDICTMENT FOR

PETIT LARCENY
16-13-0030

THE STATE OF SOUTH CAROLINA

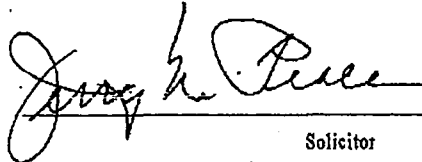
COUNTY OF NEWBERRY

INDICTMENT FOR**PETIT LARCENY**
16-13-0030

At a Court of General Sessions, convened on the 5th day of February, 2010 the Grand Jurors of Newberry County present upon their oath:

That Bennie Darron Mitchell, did in Newberry County, state aforesaid, on or about the 27th day of October, 2008 feloniously take and carry away the personal goods of Stephen Lee Potts of the value of less than one thousand dollars described as follows: four (4) to five (5) cans of beer, \$100 United States Currency, one (1) package of socks, with intent to deprive the owner permanently of such goods, in violation of Section 16-13-30(A) of the South Carolina Code of Laws, 1976, as amended.

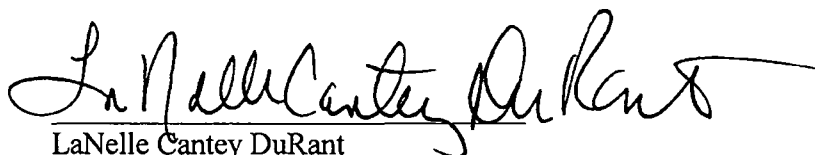
Against the peace and dignity of the State, and contrary to the statute in such cases made and provided.


Solicitor

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability, with the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

July 13th, 2011

A handwritten signature in black ink, reading "LaNelle Cantey DuRant". The signature is fluid and cursive, with a long horizontal flourish extending to the right.

LaNelle Cantey DuRant
Appellate Defender

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

ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Newberry County

D. Garrison Hill, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BENNIE MITCHELL,

APPELLANT

FINAL BRIEF OF APPELLANT

LANELLE CANTEY DURANT
Appellate Defender

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

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in allowing a lay witness, the police officer, Lieutenant McClurkin, to identify appellant from the photographs taken by the victim's deer camera, which had been mounted on the victim's refrigerator, on the basis that Lieutenant McClurkin knew appellant from being in the same community with him for twenty years when this identification by the police officer was prejudicial in violation of Rule 403, SCRE, and Rule 701, SCRE?
2. Did the trial court err in allowing the CD from the deer camera which contained the photographs to be admitted into evidence when the photographs were not properly authenticated because the police did not take the camera into custody but left it with the victim to download the photographs onto his personal computer which violated Rules 1001, 1002, and 1003, SCRE ?
3. Did the trial court err by not granting appellant's post trial motion for a new trial on the burglary first charge when all of the elements of burglary first were not met when the jury found appellant not guilty of petty larceny which meant the intent to commit a crime element was not proven?

STATEMENT OF THE CASE

In January 2009, the Newberry County Grand Jury indicted Bennie Darron Mitchell on the charges of burglary first degree, possession of burglary tools, and larceny. The state withdrew the larceny indictment and re-indicted Mitchell on the charge of petty larceny. R.2, ll. 1 – 22. On April 19, 2010, Mitchell proceeded to trial before the Honorable D. Garrison Hill and a jury. The jury returned a verdict of not guilty on the petty larceny charge but found him guilty of the burglary first degree and the possession of burglary tools. Judge Hill sentenced Mitchell to twenty years on the burglary charge and to five years concurrent on the possession of burglary tools. Mitchell's attorney filed a post trial motion for a new trial or reconsideration of the sentence on April 26, 2010. Judge Hill issued an order on May 7, 2010 denying the post trial motion for a new trial or reconsideration of the sentence. Mitchell's attorney filed a notice of appeal. This appeal follows.

ARGUMENT

I.

The trial court erred in allowing a lay witness, the police officer, Lieutenant McClurkin, to identify appellant from the photographs taken by the victim's deer camera, which had been mounted on the victim's refrigerator, on the basis that Lieutenant McClurkin knew appellant from being in the same community with him for twenty years when this identification by the police officer was prejudicial in violation of Rule 403, SCRE and Rule 701, SCRE.

Around one o'clock early in the morning of October 28, 2008, Stephen Potts, who was one of the owners of the Blue Moon Restaurant, returned home to find that someone had been in his home and had taken between \$70 and \$100 dollars worth of quarters, socks and beer. R.3, ll. 19 – 25; R.30, ll. 6 – 25; R.31, ll. 1 – 25; R.32, ll. 1 – 25; R.52, ll. 22 – 25; R.53, ll. 1 – 25. Potts knew someone had been in his kitchen because he set up a deer camera on top of his refrigerator for the purpose of catching anyone who may break into his home. He did this because about ten days prior to this incident, there was other activity in his house. When he viewed the pictures on the camera, he did not know the person caught on his deer camera. R.3, ll. 19 – 25; R.4, ll. 1 – 25; R.5, ll. 1 – 25; R.32, ll. 21 – 25; R.33, ll. 1 – 25.

When the police arrived the next morning after he called them upon awakening, he told them what happened, and that he did not know the person. R.33, ll. 16 – 25. The police allowed him to take the camera to the Blue Moon and download the pictures onto his laptop computer from which he burned a CD of the pictures. He then provided that CD to the

police. R.37, ll. 19 – 25; R.38, ll. 1 – 24; R.45, ll. 1 – 25; R.46, ll. 1 – 25; R.47, ll. 1 – 25; R.48, ll. 1 – 23.

Corporal Allison Moore of the Newberry Police Department, testified that she responded to the call on October 28, 2008, and she went to Potts' home. She could not identify the person on the deer camera. She dusted for fingerprints but could not recover any. R.78, ll. 22 – 25; R.79, ll. 1 – 25; R.80, ll. 1 – 25; R.81, ll. 1 – 25.

Lieutenant Roy McClurkin of the Newberry City Police Department, testified that he had been with the Newberry Police for twenty-seven years. R.100, ll. 11 – 25. He met with Potts on the afternoon of October 28, 2008, when Potts brought the DVD to the police that he made of the pictures on his deer camera on October 27, 2008. R.101, ll. 1 – 25; R.102, ll. 1 – 25; R.103, ll. 1 – 5. Corporal Moore asked Lieutenant McClurkin to view the DVD to see if he could identify the person in the pictures since he had been with the police department a long time. He loaded the DVD onto his desktop computer and viewed the pictures. He identified the person in the pictures as Bennie Mitchell whom he knew from both of them living in the Newberry community over twenty years. R.103, ll. 1 – 25; R.104, ll. 1 – 25. He obtained an arrest warrant and search warrant for Mitchell's home. He arrested Mitchell at his home, but did not find any items in Mitchell's home related to the burglary. R.105, ll. 1 – 25.

Defense counsel objected when Lieutenant McClurkin identified Mitchell based on counsel's pretrial objection under Rule 701, SCRE and State v. Herring, 387 S.C. 201, 692 S.E.2d 490 (2009). The judge overruled the objection. R.103, ll. 13 – 25; R.104, ll. 1 – 4.

In a pretrial motion, defense counsel argued that the case was based on the mistaken identity of Mitchell from the DVD. Counsel argued that the alleged identification of

Mitchell by Lieutenant McClurkin from the DVD should be suppressed because it was lay opinion offered by a police officer in violation of Rule 701, SCRE . Counsel argued that Lieutenant McClurkin was not an eyewitness to the burglary; therefore, his identification of Mitchell from the DVD was simply his opinion of what was on the video. Counsel argued that the jury could observe the DVD or the pictures from it and draw their own conclusion as to the identity. The trial judge stated that as far as the lay opinion, the identity would require expert opinion testimony. R.11, ll. 1 – 25; R.12, ll. 1 – 8.

The judge said: “Doesn’t it cause undue prejudice to the defendant to have a police officer say he recognizes that person and in his opinion that is who it is?” He was concerned about the impact on the jury of having the police officer identify Mitchell. R.21, ll. 1 – 16. The state agreed that it was prejudicial but not unduly prejudicial. R.21, ll. 17 – 25; Defense counsel argued that it was unduly prejudicial because the lay witness was a police officer which was a violation of Rule 403, SCRE. R. 22, ll. 23 – 25; R.23, ll. 1 – 25; R.24, ll. 1.

Defense counsel cited the case of State v. Herring, 387 S.C. 201, ^92 S.E.2d 490 (2009) to support his argument. Counsel argued that Mitchell’s case was very similar to Herring in the legal issues involved. R.12, ll. 9 – 25; R.13, ll. 1 – 25; R.14, ll. 1 – 25; R.15, ll. 1 – 25; R.16, ll. 1 – 25.

In State v. Herring, id., the defendant was convicted of murder when he allegedly shot through his car window hitting the bouncer and killing him as the defendant was leaving Chastity’s night club. The incident was caught on video tape. Three lay witnesses offered their interpretation of the video from Chastity’s that the flash of light on the video was a gunshot. Defense counsel objected to the lay opinion because the witnesses did not personally observe the events but only viewed them on the tape. Herring’s defense counsel

asked for a mistrial. The trial judge offered a curative instruction to the jury where he told the jury to strike the lay opinion from their memory because “you are the only ones who can draw from conclusions from what you saw on the tape and testimony in this regard.” The trial judge stated further:

It’s the same instruction I gave you with regard to another witness that looked at the same video and saw what he thought was one said a light, one said a shot. That’s an opinion. Just take it at that. Nobody saw the shot fired based on the testimony we’ve heard so far. It’s all from the video. You are going to have the video. You can look at it. You can determine whatever you choose to determine from it.

State v. Herring, *supra*, at 217.

The Supreme Court found that the curative instructions were sufficient to cure any prejudice, and there was no error in denying the mistrial motion. State v. Herring, *supra*.

Mitchell’s trial judge stated he saw no rules that the Supreme Court cited regarding lay opinion. R.17, ll. 11 – 25; R.18, ll. 1 – 25. The judge issued his ruling after a lengthy discussion of the issue where he denied defense counsel’s motion to exclude the opinion testimony of the officer as to the identity of Mitchell in the deer camera photograph. R.25, ll. 1 – 25; R.11 – 44.

Rule 701, SCRE provides that if the witness is not testifying as an expert, the witness’s testimony in the form of opinions or inferences must be limited to his opinions which are (a) rationally based on the perception of the witness; (b) are helpful to a clear understanding of the witness’s testimony of determination of a fact in issue; (c) and do not require special knowledge, skill, experience or training.

The opinion must be based upon the personal observations of the witness and not merely upon the statements of another witness. State v. Bottoms, 260 S.C. 187, 195 S.E.2d 116 (1973).

Lieutenant McClurkin did not personally observe Mitchell in the home of Stephen Potts. He offered his opinion as to the identity of the person on the video. This was in the province of the jury because they observed the video, and could draw their own conclusion. The jury in Mitchell's case viewed the DVD. R.48, ll. 1 – 23.

The trial judge misinterpreted the ruling in State v. Herring, *supra*. Because the trial judge in Herring's case issued a curative instruction to the jury and told them to erase the lay opinions from their memory because the lay witnesses could not give an opinion as to whether the flash was a gunshot, he was saying the opinions of the lay witnesses should not have been admitted. When the Supreme Court affirmed the Herring trial judge by saying the curative instructions were sufficient, the implication to be drawn was that the Supreme Court was stating that the lay witnesses in Herring's case could not offer their lay opinions as to their interpretation of the video.

The lay opinion of the police lieutenant McClurkin that the person in the video was Mitchell was prejudicial because it was a lay opinion not based on personal observation, and the witness was a police officer offering his opinion as to the identity. This was in violation of Rule 701 and Rule 403, SCRE.

ARGUMENT

II.

The trial court erred in allowing the CD from the deer camera which contained the photographs to be admitted into evidence when the photographs were not properly authenticated because the police did not take the camera into custody but left it with the victim to download the photographs onto his personal computer which violated Rules 1001, 1002, and 1003, SCRE.

In a pretrial motion, defense counsel moved to exclude the video photographs from the victim's deer camera "based on the requirement that the State authenticates these photographs" and for a chain of custody. R.7, ll. 10 – 25. Counsel argued that this case "turns on some pictures Mr. Potts says he took". The judge ruled that a chain of custody was not necessary but that the state would have to "lay the foundation which would be for a witness to authenticate that they constitute an accurate and fair representation of what is depicted on the photograph". R.8, ll. 1 – 25; R.9, ll. 1 – 25.

The judge told defense counsel that he was "not entitled to a dry run", but that he could object at the time when the foundation was laid. R.10, ll. 1 – 22.

During the trial, after Potts testified that he had put the deer camera on top of his refrigerator to catch anyone burglarizing his home, the state moved to admit the photographs from the deer camera into evidence. Defense counsel objected and asked for a hearing outside the presence of the jury. R.30, ll. 4 – 25; R.31, ll. 1 – 25; R.32, ll. 1 – 25; R.33, ll. 1 – 25.

Defense counsel argued that the CD with the photographs should not be admitted into evidence because the admission would violate Rules 1002, 1003, and 1004 , SCRE

because the rules provided that a duplicate was admissible only if there was not a genuine question as to the authenticity of the original. Counsel argued that there was a genuine issue as to the authenticity of the photographs. R.33, ll. 23 – 25; R.34, ll. 1 – 25; R.35, ll. 1 – 25; R.36, ll. 1 – 25. The judge granted counsel's request to proffer the testimony regarding this issue. R.37, ll. 1 – 20.

Potts testified that he took the camera to the Blue Moon where he downloaded nine photographs from the camera to a laptop computer at the restaurant. His girlfriend then "burned" the photographs onto a disk or CD. That was the DVD he provided to the police. He said no alterations had been made to the images. R.37, ll. 22 – 25; R.38, ll. 1 – 25; R.39, ll. 1 – 18.

On cross examination, Potts said he decided which photographs to download, and he downloaded nine pictures although he admitted that the camera held more than nine pictures. There were pictures of him on the camera as well. R.39, ll. 20 – 25; R.40, ll. 1 – 25; R.41, ll. 1 – 25. Potts testified that the photographs he took to the police had the wrong date stamp of three o'clock A.M., and the pictures had been taken before he arrived at home around one o'clock A.M. He said the clock on the camera was wrong. R.42, ll. 1 – 25.

Defense counsel argued at the close of the proffer that there was a genuine question as to the authenticity of the photographs. R.42, ll. 25; R.43, ll. 1 – 10. The judge ruled that the photographs met the definition of "original" as defined in Rule 1001, SCRE. He overruled defense counsel's motion. R.43, ll. 1 – 25; R.44, ll. 1 – 25.

Corporal Allison Moore of the Newberry Police Department testified that she responded to the call at Potts' home regarding the burglary. R.79, ll. 1 – 25; R.80, ll. 1 – 12.

Potts showed her the deer camera and she saw the image of a person on the camera, but could not identify the person. R.80, ll. 13 – 25.

Potts was unable to download the photographs from the camera onto a disk that day, so she told him to go ahead and download it at the Blue Moon and bring it to the police department which he did the next day. Corporal Moore never had the camera or disk in her possession. R.82, ll. 1 – 25; R.84, ll. 1 – 25; R.85, ll. 1 – 5.

On cross examination, Corporal Moore stated that she did not obtain any fingerprints, did not try to obtain any DNA, and did not take any pictures of the crime scene. R.85, ll. 6 – 25; R.86, ll. 1 – 25; R.87, ll. 1 – 25. She did not see an entry into the home. R.88, ll. 13 – 15. She saw the image of a person on the computer but she did not collect or take the computer into police possession because she said it was Potts' personal computer. She did nothing to preserve the image she saw on the camera. She did not check the time stamp on the camera. R.89, ll. 1 – 25; R.90, ll. 1 – 25; R.91, ll. 1 – 25. She admitted that she left the **only** piece of evidence from this crime, the photographs on the deer camera, with Potts and did nothing to preserve the evidence for trial. R.95, ll. 1 – 25; R.96, ll. 1 – 13.

Rule 1001 (3) , SCRE, provides: “an original of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an original”.

Rule 1003, SCRE, provides concerning the admissibility of duplicates that a “duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.”

Rule 1002, SCRE, provides: “To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute.”

The question of whether to admit evidence under the “Best Evidence Rule” is addressed to the discretion of the trial court. State v. Halcomb, 382 S.C. 432, 676 S.E.2d 149 (Ct. App. 2009). For an error of law to warrant reversal based on the exclusion of evidence, the appellant must prove the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the verdict was influenced by the lack of the evidence. State v. Halcomb, Id.

ARGUMENT

III.

The trial court erred by not granting appellant's post trial motion for a new trial on the burglary first charge when all of the elements of burglary first were not met when the jury found appellant not guilty of petty larceny which meant the intent to steal element was not proven.

Defense counsel filed a post trial motion asking the judge for a new trial or reconsideration of the sentence. Counsel argued a new trial was warranted because all of the elements for burglary first were not met because the intent to steal was not proven after the jury found Mitchell not guilty of the petit larceny. R. 136.

Counsel wrote that the inferred conduct showing intent to steal was that someone stole beer and coins. However, the jury rejected that by returning a verdict of not guilty as to the crime of petit larceny. R. 140. Counsel asked the trial judge to act as the "Thirteenth Juror" by vetoing the verdict and granting a new trial. R. 140-141. Judge Hill denied the motion by order on May 7, 2010.

S.C. Code Section 16-11-311(A) provides:

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

In South Carolina, a trial judge may grant a new trial following a jury verdict under the "Thirteenth Juror" doctrine, which entitles the judge to sit, in essence, as the thirteenth juror when he finds the evidence does not justify the verdict, and then to grant a new trial

based solely upon the facts. Lane v. Gilbert Construction Company, LTD., 383 S.C. 590, 681 S.E.2d 879 (2009).

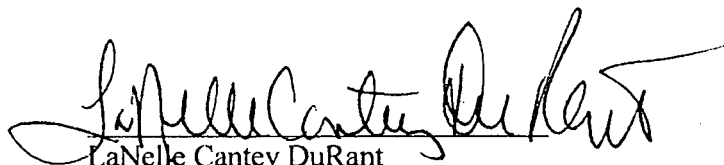
Under the “Thirteenth Juror” doctrine, which is the standard for granting a new trial in state law actions, the trial judge essentially sits as the thirteenth juror and may grant a new trial based solely upon the facts if he finds that the evidence does not justify the verdict. Norton v. Norfolk Southern Railway Company, 350 S.C. 473, 567 S.E.2d 851 (2002). Upon review, a trial judge’s order granting or denying a new trial will be upheld unless the order is wholly unsupported by the evidence, or the conclusion reached was controlled by an error of law. Id.

The trial judge should have granted a new trial because the jury basically nullified the burglary first guilty verdict when they found Mitchell not guilty of the petit larceny. The jury heard the law as defined by the state and the judge in his jury charge so they knew that the intent to commit a crime was required for the burglary first conviction. R.116, ll. 1 – 25; R. 117 – 230.

CONCLUSION

Based on the above, the convictions and sentences should be reversed, and the case remanded for a new trial.

Respectfully submitted,

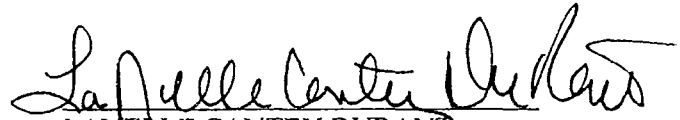

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

This 2nd day of August, 2011.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."


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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Newberry County

D. Garrison Hill, Circuit Court Judge

THE STATE,

RESPONDENT,

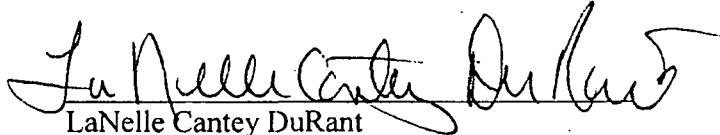
V.

BENNIE MITCHELL,

APPELLANT

CERTIFICATE OF SERVICE

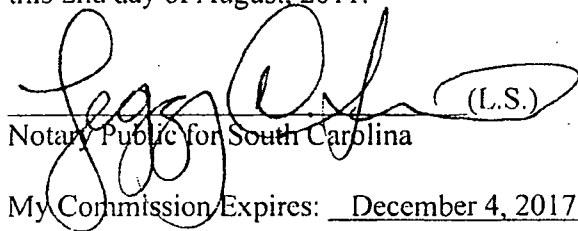
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Deborah R.J. Shupe, Esquire, at Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, SC 29201, this 2nd day of August, 2011.



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 2nd day of August, 2011.



(L.S.)
Notary Public for South Carolina
My Commission Expires: December 4, 2017.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Newberry County
The Honorable D. Garrison Hill, Circuit Court Judge

THE STATE

Respondent

vs.

BENNIE MITCHELL

Appellant

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I.

The circuit court properly allowed a witness to identify Mitchell as the person in the deer camera photographs based on the witness' personal knowledge of Appellant.

II.

The circuit court did not abuse its discretion in allowing into evidence a disk of photographs the victim prepared and turned over to police.

III.

The circuit court properly denied Mitchell's new trial motion on the first degree burglary charge because there was ample evidence to support the jury's determination he broke into the victim's home in the nighttime with the intent to commit a crime therein.

STATEMENT OF THE CASE

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

STATEMENT OF FACTS

In the early morning hours of October 27, 2008, Stephen Potts ("Potts"), returned to his home in Newberry County, South Carolina, and realized someone broke into the house while he was gone. When he checked a motion-activated deer camera on top of his refrigerator, Potts saw photographs of a man in the kitchen. A police officer subsequently identified the man in the photographs as Appellant Bennie Mitchell ("Mitchell").

In January 2009, the Newberry County Grand Jury indicted Mitchell on one count of first degree burglary, one count of possession of burglary tools, and one count of enhancement of larceny.¹ In February 2010, the Grand Jury also indicted Mitchell on one count of petit larceny. (Indictment Nos. 2009-GS-36-037, 2009-GS-36-039, 2010-GS-36-087; Record on Appeal [R.], pp. 146-151). The matter was called for a jury trial on April 29, 2010, before the Honorable D. Garrison Hill, Circuit Court Judge.

Prior to trial, Mitchell moved to require the State to establish the authenticity and foundation for the photographs from Potts' deer camera. The circuit court denied the request to conduct that inquiry pre-trial, but indicated Mitchell could object at the appropriate time during trial. (TT, pp. 25-28; R., pp. 7-10).

Mitchell also moved to exclude testimony from Lieutenant Roy McClurkin ("Lt. McClurkin"), of the Newberry Police Department, regarding his identification of Mitchell as the person in the photographs from Potts' deer camera. He contended the testimony was a lay opinion, the jury could determine whether he was the person in the photographs without the testimony, and allowing the testimony would be unduly prejudicial because of Lt.

¹The enhancement of larceny indictment was *nolle prossed* on April 21, 2010.

McClurkin's police officer status. The circuit court denied the motion, finding the proposed testimony met the requirements for admissibility under Rule 701, SCRE. The court further found the testimony's probative value outweighed any prejudice to Mitchell, but excluded similar testimony from other police officers as cumulative and prejudicial. (TT, pp. 28-47; R., pp. 10-29).

Potts testified he lived in Newberry County in October 2008, and due to some break-ins at his home, he mounted a motion-activated deer camera on top of his refrigerator. When he returned home from work at approximately 1:00 a.m. on October 28, 2008, he noticed the window next to his back door was messed up. He went inside and checked the camera, which had taken photographs of someone in the kitchen that night. He contacted the police and told them what he found. (TT, pp. 83-86; R., pp. 30-33).

Mitchell objected to admission of the disk containing the photographs, arguing it was not the "original" as required by the South Carolina Rules of Evidence, and there was a genuine issue regarding the original's authenticity. Potts testified *in camera* that he had possession of the deer camera from the time he returned home on the night in question until he took it to his business and personally downloaded the photographs to his computer, and he was present when his girlfriend used the computer to put the photographs on a disk. He then identified the photographs on the disk as the ones he downloaded directly from the camera. (TT, pp. 87-95, State's Exhibit 1 (CD); R., pp. 34-42).²

The circuit court overruled Mitchell's objection, finding the photographs on the disk were data stored in a computer put in a format readable by sight, and were "originals" as

²State's Exhibit 1 (CD) has been transported to the Court for consideration.

defined in Rule 1001, SCRE. (TT, pp. 95-97; R., pp. 42-44). Potts then testified before the jury about the photographs, and stated he did not know the person in the photographs. He testified approximately \$100 in quarters, some clothing and some beer were taken from his home. (TT, pp. 98-131; R., pp. 45-60).

Corporal Allison Moore ("Cpl. Moore"), of the Newberry Police Department, testified she responded to Potts' residence on October 28, 2008, and he showed her the photographs on the deer camera. Potts was unable to download the photographs at his residence, but told her he could download them on the computer at his business. She advised him to bring the photographs to the police department after he got them downloaded, and he brought a disk containing the photographs to the department later that day. (TT, pp. 132-138; R., pp. 79-85).

Lt. McClurkin testified Potts and Cpl. Moore came to his office the afternoon of October 28, 2008, and asked him if he recognized the person in the photographs from Potts' deer camera. He brought the photographs up on his office computer, and recognized Mitchell as the person in the photographs. Lt. McClurkin testified, over Mitchell's objection, he knew Mitchell from living in Newberry for over twenty years. (TT, pp. 153-157; R., pp. 100-104).

The jury convicted Mitchell on the first degree burglary and possession of burglary tools charges, and acquitted him on the petty larceny charge. (TT, pp. 234-235; R., pp. 131-132). Mitchell moved for a new trial on the ground the State failed to establish all elements of the burglary charge because the jury acquitted him of petty larceny. (Post-Trial Motions dated April 26, 2010; R., pp. 136-137). The circuit court denied the motion, and this appeal

followed. (Order dated May 7, 2010; R., p. 144).

ARGUMENT

I. The circuit court properly allowed a witness to identify Mitchell as the person in the deer camera photographs based on the witness' personal knowledge of Appellant.

Mitchell contends the circuit court erred in allowing Lt. McClurkin to identify Mitchell as the person in the photographs from Potts' deer camera. Relying on State v. Herring, 387 S.C. 201, 692 S.E.2d 490 (2009), he argues the identification constituted inadmissible lay opinion testimony.

The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion. State v. Wright, 391 S.C. 436, 706 S.E.2d 324, 326 (2011) (*citing* State v. Gaster, 349 S.C. 545, 564 S.E.2d 87 [2002]). An abuse of discretion occurs when the trial court's ruling is based on an error of law, or is without evidentiary support when grounded on factual conclusions. *Id.* (*citing* Clark v. Cantrell, 339 S.C. 369, 529 S.E.2d 528 [2000]).

The opinion or inference of a lay witness is admissible if it is a) rationally based on the perception of the witness, b) helpful to the determination of a fact in issue, and c) does not require special knowledge. Rule 701, SCRE; *see also* State v. Williams, 321 S.C. 455, 469 S.E.2d 49, 54 (1996); 31A Am.Jur.2d Expert and Opinion Evidence §30; 23 C.J.S. Criminal Law §1050. Conclusions or opinions of laymen should be rejected only when they are superfluous in the sense they will be of no value to the jury. Williams, 469 S.E.2d at 54.

"The terms 'fact' and 'opinion' denote merely a difference of degree of concreteness of description." *Id.* (*citing* McCormick on Evidence, 12 [3rd Ed.1984]). Some statements are impressions drawn from collected, observed facts, rather than mere opinions, and a

natural inference based on stated facts is not opinion evidence. *Id.* "Where the distinction between fact and opinion is blurred, it is often best to leave the matter to the discretion of the trial judge." *Id.*

Lt. McClurkin personally knew Mitchell based on twenty years of living in the same community. Therefore, his identification of Mitchell from the deer camera photographs was a natural inference based on observed facts rather than mere "opinion" testimony.

Even if the identification testimony constituted lay opinion evidence, however, the circuit court properly admitted it. A lay witness may give an opinion regarding the identity of a person in a surveillance photograph if there is some basis for concluding the witness is more likely to correctly identify the person from the photograph than the jury. See United States v. Ellis, 121 F.3d 908, 926-927 (4th Cir. 1997) (citing United States v. Robinson, 804 F.2d 280 [4th Cir. 1986]); see also United States v. Pierce, 136 F.3d 770, 774-75 (11th Cir. 1998) (discussing similar cases from other circuits, and holding probation officer's identification of defendant from surveillance photograph was admissible); Hardy v. State, 804 So.2d 247, 268-269 (Ala. Ct.Crim.App. 1999) (police officers' identification of defendant as person in surveillance videotape was properly admitted even though officers did not know defendant prior to the crime); State v. Benton, 567 So.2d 1067 (Fla. 2d. D.C.App. 1990). "[T]estimony by those who knew defendants over a period of time and in a variety of circumstances offers to the jury a perspective it could not acquire in its limited exposure to defendants." United States v. Allen, 787 F.2d 933, 936 (4th Cir.1986).

Mitchell's reliance on Herring is misplaced. In Herring, the lay witnesses, none of whom personally witnessed the incident but viewed a videotape of it, testified a flash of light

coming from inside the defendant's vehicle was a gunshot. The defendant objected and moved for a mistrial on the ground the witnesses did not personally observe the events. The trial court denied the mistrial motion, and gave a curative instruction to the jury to the effect the witnesses could not give an opinion about whether the flash of light was a gunshot, which was a question for the jury's determination. The Supreme Court affirmed, finding the curative instruction cured any prejudice from the witnesses' testimony regarding the flash of light. 692 S.E.2d at 498.

There was no evidence the witnesses in Herring had any prior experience with gunshots, or any special knowledge about muzzle flashes associated with gunshots, that would assist the jury in determining whether the flash of light inside the defendant's car was from a gunshot. In this case, however, Lt. McClurkin's identification testimony was based on his personal knowledge of Mitchell after a twenty year history with him in the community, which was undisputed. The photographs at issue were grainy black and white photographs taken with infrared lighting, his twenty year history with Mitchell made it more likely Lt. McClurkin could correctly identify the person in the photographs, and his testimony could assist the jury.³ (State's Exhibit 1 [CD]). Therefore, the Herring analysis is inapplicable.

Mitchell correctly notes the circuit court expressed concern about the potential prejudice from having a police officer identify Mitchell as the person in the photographs. The court then found the probative value of Lt. McClurkin's testimony outweighed the potential prejudice, but excluded testimony from another police officer who also recognized

³Lt. McClurkin's testimony was also relevant, and indeed critical, to show how the police investigation developed Mitchell as a suspect.

Mitchell. (TT, pp. 38-39, 43, 45; R., pp. 20-21, 25, 27). The court clearly conducted the appropriate Rule 403, SCRE, probative value/prejudice analysis, and its ruling is supported by the record.

Lt. McClurkin simply testified he knew Mitchell from “living in Newberry for over 20 years and he (sic) living in the community of Newberry also.” (TT, p. 157; R., p. 104). He did not even imply he knew Mitchell through his position as a police officer, or that Mitchell had prior interaction with law enforcement. Therefore, the potential prejudice from having a police officer identify Mitchell in the photographs was minimized by the content of Lt. McClurkin’s actual testimony.

The circuit court properly exercised its discretion in allowing Lt. McClurkin’s testimony identifying Mitchell as the person in the photographs from Potts’ deer camera. Accordingly, the court’s ruling should be affirmed.

II. The circuit court did not abuse its discretion in allowing into evidence a disk of photographs the victim prepared and turned over to police.

Mitchell also contends the circuit court erred in admitting the disk containing photographs from Potts' deer camera because the State failed to properly authenticate the photographs. He asserts the photographs were inadmissible because police left the camera with Potts, who downloaded the photographs onto his personal computer and created the disk offered as evidence.

For purposes of the Rules of Evidence, a "photograph" is defined as "still photographs, X-ray films, video tapes, motion pictures or other similar methods of recording information." Rule 1001(2), SCRE. An "'original' of a photograph includes the negative or any print therefrom." Rule 1001(3), SCRE. "If data are stored in a computer **or similar device**, any printout or **other output** readable by sight, shown to reflect the data accurately, is an 'original.'" *Id.* (emphasis added).

Except as otherwise provided by the Rules of Evidence, an original photograph is required to prove its contents. Rule 1002, SCRE (best evidence rule). The question of whether to admit evidence under the best evidence rule is addressed to the trial court's discretion. State v. Halcomb, 382 S.C. 432, 676 S.E.3d 149, 154 (Ct.App. 2009).

Mitchell contends the circuit court abused its discretion in admitting the disk containing the photographs from Potts' deer camera because he challenged the authenticity of the photographs under Rule 1003, SCRE. The fallacy of his contention is that Rule 1003 only applies if a "duplicate" is offered as evidence rather than an "original."

As set forth above, Rule 1001(3) expressly provides that in cases involving data

“stored in a computer or **any similar device**,” “original” for evidentiary purposes includes “any printout or **other output** readable by sight, shown to reflect the data accurately.” The deer camera was clearly a device similar to a computer in that it stored data. The circuit court expressly determined the disk constituted “other output readable by sight,” and therefore, the disk was an “original” for purposes of the best evidence rule. (TT, pp.95-97; R., pp. 42-44).

Mitchell does not challenge the validity of the circuit court’s ruling, but merely recites the evidence presented. At most, Mitchell’s argument goes to the weight of the evidence.

Sufficiency of evidence regarding the creation and verification of particular data goes to the weight of the evidence rather than its admissibility, and thus constitutes a question for the jury. State v. McFadden, 318 S.C. 404, 458 S.E.2d 61, 66 (Ct. App. 1995). Where the identity of persons handling evidence is established, evidence regarding its care goes only to its weight as credible evidence. State v. Carter, 344 S.C. 419, 544 S.E.2d 835, 837 (2001).

Potts testified regarding how the deer camera worked and how the disk containing the photographs at issue was created, and stated the photographs on the disk accurately reflected the photographs on the deer camera. The sufficiency of the evidence presented goes to its weight rather than admissibility, and the circuit court’s ruling should be affirmed.

III. The circuit court properly denied Mitchell's new trial motion on the first degree burglary charge because there was ample evidence to support the jury's determination he broke into the victim's home in the nighttime with the intent to commit a crime therein.

Relying on the "thirteenth juror" doctrine, Mitchell contends the circuit court erred in denying his motion for a new trial on the burglary charge. He asserts his acquittal on the petty larceny charge mandated a finding the State failed to prove an intent to commit a crime in Potts' home for purposes of the burglary charge, essentially nullifying the burglary conviction. In essence, Mitchell argues the verdicts were inconsistent because the jury's determination he did not steal anything from Potts' home necessarily leads to the conclusion he did not enter Potts' home with the intent to commit a crime.

Generally, the grant or refusal of a new trial is within the trial judge's discretion and will not be disturbed on appeal without a clear abuse of discretion. State v. Smith, 316 S.C. 53, 447 S.E.2d 175, 176 (1993); State v. Garrett, 350 S.C. 613, 567 S.E.2d 523, 526 (Ct.App. 2002). An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law. State v. Hughes, 346 S.C. 339, 552 S.E.2d 35, 36 (Ct.App. 2001).

In State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991), the Supreme Court abolished the rule prohibiting inconsistent verdicts. See Wertz v. State, 349 S.C. 291, 562 S.E.2d 654, 657 (2002); see also Garrett, 567 S.E.2d at 526 (same). Citing United States v. Powell, 469 U.S. 57 (1984), the Court acknowledged "a jury might merely be lenient towards a defendant when it refuses to convict him of all counts," and "the government has no recourse to attack the inconsistency by arguing on appeal for conviction on all counts."

Alexander, 401 S.E.2d at 149-150. Therefore, even if the verdicts in this case are inconsistent, and the State submits they are not, a new trial is not required.

As a threshold matter, to establish burglary, the State must prove the defendant entered "without consent and with **the intent** to commit a crime," S.C. Code §16-11-311(A) (2003) (emphasis added). The State is **not** required to prove the defendant actually committed a separate crime after entry. The jury may well find the defendant intended to commit a crime at the time he entered the building, but failed to complete a separate criminal offense after he entered. Significantly, the circuit court instructed the jury in this case, without objection, that in order to convict Mitchell of burglary, it had to find he **intended** to commit a crime at the time he entered Potts' home, even if he abandoned that intent after entry occurred and the intended crime was **not** completed. (TT, pp. 225-226, 231; R., pp. 124-125, 130).

It is undisputed Mitchell did not have consent to enter Potts' home. Once the jury determined Mitchell was the person who entered the home, it could infer he intended to commit a crime therein from the circumstances, including the time of entry and the fact he had a flashlight and a bag in his hands when he walked into the kitchen.

Even though it clearly found Mitchell intended to commit a crime when he entered Potts' home, the jury could, and apparently did, find there was insufficient evidence he actually committed a separate crime after he entered the home. Such a finding mandated acquittal on the petty larceny charge, but did not preclude conviction on the burglary charge

or require a new trial.⁴ Therefore, the circuit court's denial of Mitchell's new trial motion should be affirmed.

⁴Noise from the camera or outside the home could have made Mitchell leave before he took anything. Also, there was some confusion regarding when the missing items were taken because there were earlier break-ins at Potts' home.

CONCLUSION

Based on the foregoing, Respondent respectfully submits that Appellant's conviction and sentence should be affirmed.

Respectfully submitted,

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July 27, 2011

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Newberry County
The Honorable D. Garrison Hill, Circuit Court Judge

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Respondent,

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BENNIE MITCHELL,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

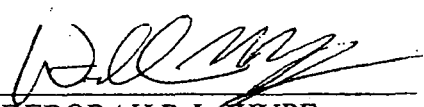
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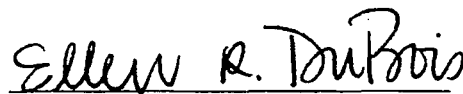
PROOF OF SERVICE

I, Ellen R. DuBois, certify I served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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I further certify all parties required by Rule to be served have been served.

This 27th day of July, 2011.


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