

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Appeal from Greenville County
Honorable John C. Hayes, Circuit Court Judge

S.C. SUPREME COURT

Opinion No. 2019-MO-012 (S.C. Sup. Ct. Filed February 27, 2019)
Opinion No. 2019-UP-256 (S.C. Ct. App. Filed July 17, 2019)
2013-GS-23-004567, -004568

DEMETRIUS SIMMONS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2019-001770

APPENDIX

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	)	FAMILY COURT
COUNTY OF GREENVILLE	)	2013-GS-23-4562 through 4568
	)	
	)	
	)	
STATE OF SOUTH CAROLINA,	)	
PLAINTIFF,	)	
	)	
vs.	)	TRANSCRIPT OF RECORD
	)	
DEMETRIUS SIMMONS,	)	
DEFENDANT.	)	

December 11-12, 2013
Greenville, South Carolina

B E F O R E:

THE HONORABLE C. VICTOR PYLE, JUDGE.

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

JENNIFER TESSITORE, ESQ.
Attorney for the Plaintiff

JOEY MAXWELL, ESQ.
SARAH HENRY, ESQ.
Attorney for the Defendant

APRIL HERRON
Circuit Court Reporter

I N D E X

(PW) - Denotes Plaintiff's Witness
(DW) - Denotes Defense Witness

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	(State's Exhibits)		
1	1st 911 Call	31	61
2	Photograph	31	46

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All Exhibits were retained by the Clerk of Court for Greenville County.

P R O C E E D I N G S

1
2 MR. MAXWELL: Your Honor, my client is not present. I
3 haven't spoken to him in about two months. The last time I
4 spoke with him, he said he wanted a paid attorney. At that
5 point, he refused Ms. Tessitore's plea offer. Again, I
6 haven't had a chance to speak with him. I would request
7 that you issue a bench warrant and allow us to move this
8 matter to a later date.

9 MS. TESSITORE: Your Honor, it's the State's position
10 that he's been given notice under rule 16 in criminal
11 procedure rules. The Defendant has appeared before. We
12 obviously will establish the foundation to go forward on a
13 TIA.

14 THE COURT: All right. This is the matter of the
15 State vs. Demetrius Simmons. He is indicted for two cases
16 of burglary in the first degree, one case of grand
17 larceny, three cases of breaking and entering an
18 automobile, and lastly, resisting arrest with assault.
19 Mr. Simmons is not present in court today. The State's
20 made a motion to proceed with a trial in absence.

21 All right, Solicitor, you may proceed.

22 MS. TESSITORE: Your Honor, just one brief matter.
23 As far as the resisting arrest charge with assault, the
24 State is going to go forward only on the lesser included
25 offense of resisting arrest.

1 THE COURT: All right.

2 MS. TESSITORE: So, I guess, the only question is
3 when and if the jury is deliberating that they wouldn't
4 get that indictment back with them. But we can address
5 that matter later.

6 THE COURT: Okay.

7 MS. TESSITORE: So I just wanted to alert the Court
8 that we're only going forward on the resisting arrest, not
9 the resisting with assault. And we are prepared to go
10 forward on all the other indictments.

11 THE COURT: All right. You have a list of witnesses?

12 MS. TESSITORE: Yes, sir.

13 THE COURT: Mr. Maxwell, would you have any witnesses
14 other than your --

15 MR. MAXWELL: Your Honor, the only witness I
16 anticipate calling is someone from the records division of
17 Greenville Memorial Hospital. I have sent a colleague of
18 mine down to get in touch with her. I'm not sure exactly
19 that person they will be bringing, though.

20 THE COURT: All right, that's fine.

21 MS. TESSITORE: Your Honor, as far as the testimony,
22 as far as the notice given to the Defendant pursuant to
23 the South Carolina criminal procedure rule 16, the State
24 would call Renee Kelly, who is employed with our office as
25 my investigator.

1 THE COURT: All right, come around, please.

2 RENEE KELLY, after having been duly sworn,
3 testified as follows:

4 THE CLERK: Thank you, please be seated. Please
5 state your name for the record.

6 THE WITNESS: Renee Kelly.

7 DIRECT EXAMINATION (IC)

8 BY MS. TESSITORE:

9 Q Ms. Kelly, how long have you work with the
10 solicitor's office?

11 A Approximately two years and five months.

12 Q How long did you work with the clerk's office before
13 that?

14 A About 11 years.

15 Q Okay. And before that, also, in law enforcement?

16 A Criminal records division at the law enforcement
17 center.

18 Q So you understand how important it is to keep a good
19 record and to provide notice to defendants regarding their
20 Constitutional rights?

21 A Yes.

22 Q Okay. And what -- as part of your duties in the
23 solicitor's office as an investigator, does that include
24 sending bond cards to defendants?

25 A Yes, it does.

1 Q Okay. And focusing on Mr. Demetrius Simmons, can you
2 tell the Court, did you send him bond cards for today to
3 be present today for a trial?

4 A Yes.

5 Q Okay. And how did you -- where did you send those
6 cards to?

7 A I sent a card to the address that is listed on the
8 bond, which is [REDACTED] Longtree Court, Greenville, South
9 Carolina 29605. And I also sent it to the address that's
10 listed on the warrant, which is [REDACTED] Patton Road,
11 Greenville, South Carolina 29605.

12 Q And is that address on all of the warrants that he
13 has, that Patton?

14 A Yes.

15 Q Patton Road -- [REDACTED] Patton Road?

16 A Yes.

17 Q And did you receive any other addresses from the
18 public defender's office at any point in time regarding a
19 change in address?

20 A No.

21 Q And had you sent bond cards to the Defendant before
22 to come to court here in Greenville County?

23 A Yes.

24 Q How many times did you do that?

25 A I believe it was three.

1 Q Okay.

2 A Three other times.

3 Q Okay. Do you have the bond cards?

4 A Not for those dates.

5 Q Okay. Would it help if you saw the file to refresh
6 your memory?

7 A Yes.

8 Q Just take a look at those bond cards. Are those the
9 ones you sent?

10 A Yes.

11 Q And what dates did those require him to come to
12 court?

13 A He had a court date for September 17, 2013, August
14 12, 2013, July 15, 2013.

15 Q Okay. And on those dates, as far as you know, did he
16 appear for court?

17 A He did.

18 Q All right. And have you at any time gotten any
19 indication from the U.S. Postal Service or otherwise that
20 those cards were returned for any type of insufficient
21 address or problem with the address?

22 A No, ma'am.

23 Q Okay. Now, when you send the cards -- when you sent
24 the cards for today, when did you actually send those out?

25 A They were mailed out on November 26th, 2013.

1 Q All right. And who else did you send them to?

2 A I sent one to Joey Maxwell.

3 Q Who is he?

4 A He is the Defendant's attorney.

5 Q Okay.

6 A And I also sent one to Giggy's Bonding, the bonding
7 company listed on the bonds.

8 Q And did you mark those cards in any particular way so
9 as to indicate that it was for trial?

10 A I stamped them in red with a trial stamper at the
11 bottom.

12 Q So it reads trial on it?

13 A Yes.

14 Q All right. And can you just read into the record the
15 language that is -- that appears in the left corner of
16 each of those cards that have been sent to the Defendant
17 every time, including this time, with the trial stamp?

18 A It reads failure to appear may result in trial being
19 conducted in Defendant's absence and/or a bench warrant
20 being issued for Defendant's arrest.

21 Q Okay. And if you refer to the bond from which you
22 had that addressed, do you have a copy of that?

23 A Yes.

24 Q Can you read as far as the offense charged at the top
25 part what charges are included there?

1 A They are resisting arrest, assault on a police,
2 burglary first degree, two counts, grand larceny, less --
3 greater than 2,000, less than 10,000, auto breaking, three
4 counts.

5 Q So it included all the charges that are on the trial
6 docket today, correct?

7 A Correct.

8 Q And if you turn to Page 2 of the bond, at the very
9 top, that paragraph that's labeled as acknowledgment by
10 the Defendant, would you just read that?

11 A I understand that if I violate any condition of this
12 order, a warrant for my arrest will be issued. I
13 understand that I have been informed that I have a right
14 and obligation to be present at trial. And should I fail
15 to attend the court, the trial will proceed in my absence.
16 It has been explained to me that if I fail to appear
17 before the Court as required, a warrant for my arrest will
18 be issued.

19 Q Then below that, does it appear that the Defendant
20 signed that?

21 A It does.

22 Q Okay. And that's the address that appears on the
23 bond card, the one that's right next to his name?

24 A Yes.

25 Q Okay. And is this document filed in the clerk's

1 office?

2 A It is.

3 Q Okay.

4 MS. TESSITORE: I'm going to go ahead and have this
5 marked as Court's Exhibit 1.

6 THE COURT: For the record?

7 MS. TESSITORE: For the record yes, sir.

8 (WHEREUPON, Court's Exhibit No. 1 was marked for
9 identification.)

10 BY MS. TESSITORE:

11 Q So Ms. Kelly, Court's Exhibit No. 1, that is the bond
12 that you -- the only bond that you have in this file,
13 correct?

14 A That is correct.

15 MS. TESSITORE: Okay. At this time, the State would
16 move this Court Exhibit in for purposes of this hearing?

17 MR. MAXWELL: No objection.

18 THE COURT: All right. Without objection, so
19 admitted.

20 (WHEREUPON, Court's Exhibit No. 1 was entered
21 into evidence.)

22 MS. TESSITORE: Answer any questions Mr. Maxwell may
23 have.

24 THE COURT: Mr. Maxwell, any questions?

25 CROSS-EXAMINATION

1 BY MR. MAXWELL:

2 Q You didn't receive any return cards back from the
3 mail; did you?

4 A No.

5 Q Okay. And were you aware that Mr. Simmons was a
6 transient and that this was, in fact, his mother's
7 address?

8 A No, I was not aware of that.

9 MR. MAXWELL: Okay. That's all I have.

10 Your Honor, I would like to call a witness if you
11 would allow that?

12 THE COURT: Sure.

13 You can step down.

14 All right.

15 MR. MAXWELL: Yes, sir, Your Honor, I'd like to call
16 Detective Michael Dean, please.

17 THE COURT: All right.

18 THE CLERK: Morning, sir. Please place your left
19 hand on the Bible and raise your right hand.

20 MICHAEL DEAL, after having been duly sworn,
21 testified as follows:

22 THE CLERK: Thank you. Please be seated. Please
23 state your name for the record.

24 THE WITNESS: Michael Charles Dean.

25 DIRECT EXAMINATION

1 BY MR. MAXWELL:

2 Q Detective, how are you doing?

3 A I'm good.

4 Q Detective, as part of this investigation of this
5 case, you had a chance to interview Mr. Simmons; is that
6 correct?

7 A Yes, sir.

8 Q And at the beginning of that interview, did you ask
9 him where he lived?

10 A I did.

11 Q And what was his response?

12 A He stayed at a motel down near 85.

13 Q And you said he was kind of bouncing around between
14 motels?

15 A Yes, sir.

16 Q In your past, have you had any other interaction with
17 Mr. Simmons?

18 A Not that I recall.

19 Q Do you know him to be a transient in the community?

20 A I do not know.

21 Q Okay. But the address he gave you was not [REDACTED] Patton
22 Road; was it?

23 A I believe I asked him where he got his mail at.
24 That's where he received his mail at, at his mother's
25 house.

1 Q Didn't he say something along the lines of I don't
2 get mail?

3 A I can't -- I'd have to look.

4 Q But he was living in motels and bouncing around
5 motels?

6 A Yes.

7 MR. MAXWELL: Okay. Thank you.

8 THE COURT: Solicitor, any questions?

9 MS. TESSITORE: No, Your Honor.

10 THE COURT: Thank you. You can step down.
11 Anything else?

12 MR. MAXWELL: Your Honor, I'd just like to renew my
13 motion.

14 THE COURT: Certainly. I deny that motion.

15 MR. MAXWELL: Thank you.

16 THE COURT: All right. I find from the testimony and
17 exhibit that the Defendant had been warned that a trial
18 would proceed in his absence if he failed to attend court,
19 That he received notice of his right to be present for his
20 trial. And I think I said that it would proceed in his
21 absence if he failed to appear. And the State has moved
22 to try him in his absence and that is what we will do.

23 All right. Anything before I bring the panel of
24 jurors up.

25 MR. MAXWELL: Your Honor, I do anticipate a Jackson

1 V. Denno hearing, but I imagine we can do that after the
2 selection of jurors.

3 THE COURT: I'm sorry, what?

4 MR. MAXWELL: I do anticipate a Jackson V. Denno
5 hearing. I imagine we can handle that after the jurors.

6 THE COURT: Sure, that's fine.

7 MS. TESSITORE: We'll just need a minute to get the
8 technology up and running, Your Honor, on the computer.
9 So as long as we have time to do that before we get
10 started with them.

11 THE COURT: All right. We'll get a jury, then send
12 the jury out.

13 All right. Strikes are five for the State and 10 for
14 the Defendant.

15 MS. TESSITORE: Yes, sir.

16 (WHEREUPON, the jury venire entered the
17 courtroom at approximately 10:15 a.m.)

18 THE COURT: Ladies and gentlemen, if I could have
19 your attention, at this time, we will select a jury in the
20 case of the State against Demetrius Simmons. Mr. Simmons
21 is indicted on two cases of burglary in the first degree.
22 The first alleges that between January 30 and
23 February 1st, he entered a dwelling at [REDACTED] Brookside Way in
24 Greenville without consent and with the intent to commit
25 burglary while in the house.

1 The next indictment charges that between those same
2 dates, he entered the dwelling of Kenneth Tintinger
3 located at █ Brookside Way in Greenville without consent
4 and with the intent to commit burglary. He is indicted
5 for grand larceny, alleging that on or about January 31st,
6 2013, he feloniously took the property of Kenneth
7 Tintinger, alleged to be a bicycle.

8 The next indictment charges that on or about
9 January 31st, 2013, he unlawfully broke or attempted to
10 break into a motor vehicle belonging to Mr. Tintinger,
11 that alleged to be a 2005 Toyota vehicle. He is indicted
12 for breaking and entering a motor vehicle on January 31st,
13 2013, belonging to Mr. Tintinger, alleged to be a 2006
14 Toyota Prius. He is next indicted for breaking and
15 entering a motor vehicle on January 31st, 2013, belonging
16 to Mr. Tintinger, alleged to be a 2011 Volvo truck. And
17 he is lastly indicted for resisting arrest on
18 January 31st, 2013, alleged to resist the arrest by
19 Officer Dale Dirton, D-i-r-t-o-n.

20 And now Mr. Simmons is not present today to
21 participate in his trial. That is a Constitutional right
22 that he has. A defendant charged in a criminal case has
23 absolutely no burden whatsoever. A defendant does not
24 have to appear and participate in his trial. And that's
25 because the burden is always on the State to prove a

1 defendant guilty beyond a reasonable doubt whether he is
2 present or not present. I will charge more fully
3 concerning that right during the course of my charge.

4 Now, potential witnesses in this case will be Kenneth
5 and Susan Tintinger, Officer Dale Dirton with the
6 Greenville Police Department, Shamieka Sanders with the
7 Greenville Police Department, Officer Dustin Kretschmar,
8 who is with the forensics division, Detective Michael Dean
9 with the Greenville Police Department, and Officer Adam
10 Davis with the forensics division.

11 I will inquire at this time if any member of the jury
12 panel is related by blood or marriage or connected by
13 employment to the Defendant or to any potential witness in
14 the case? Are you sensible or aware of any bias or any
15 prejudice with respect to the Defendant to the State or to
16 the subject matter of the case? Or do you know any reason
17 why you could not give this Defendant and the State a fair
18 and impartial trial based on the law and evidence to be
19 presented? If so, would you please stand and give me your
20 name.

21 (There was no response.)

22 THE COURT: Do I have any member of the panel who has
23 any connection, family, business, social or otherwise with
24 Walt Wilkins, the solicitor, or any member of his staff
25 and Jennifer Tessitore, assistant handling this case, or

1 with law enforcement, whether that be federal, state,
2 county or municipal? If so, would you please stand and
3 give me your name.

4 (There was no response.)

5 THE COURT: Joey Maxwell and Sarah Henry with the
6 public defender's office represent the Defendant in this
7 case. Do I have any clients now or formally of the public
8 defender's office? If so, would you please stand and give
9 me your name?

10 (There was no response.)

11 THE COURT: Do I have any member of the panel who has
12 been the victim of a violent crime? If so, would you
13 please stand and give me your name.

14 Your name, sir?

15 POTENTIAL JUROR: Steve Wagner.

16 THE COURT: All right, sir. Would that fact in any
17 way interfere with your ability to be a fair and impartial
18 juror in this case?

19 PROSPECTIVE JUROR: No, sir.

20 THE COURT: Thank you. You're qualified.

21 All right. Strikes are five for the State and 10 for
22 the Defendant.

23 Ladies and gentlemen, when your name is called, I
24 would ask you to come forward up front to the podium, turn
25 around and face counsel and await further instructions.

1 Thank you.

2 THE CLERK: Juror 140, Linda Whitney.

3 (Linda Whitney, a white female, came forward.)

4 THE CLERK: What says the State?

5 MS. TESSITORE: Please present the juror.

6 THE CLERK: What says the Defendant?

7 MR. MAXWELL: Please excuse Ms. Whitney.

8 THE CLERK: Ms. Whitney, you may be seated back in
9 the gallery. You have been excused from this case.

10 Juror 41, Darlene Ernst.

11 (Darlene Ernst, a white female, came forward.)

12 THE CLERK: What says the State?

13 MS. TESSITORE: Please present the juror.

14 THE CLERK: What says the Defendant?

15 MR. MAXWELL: Please swear the juror.

16 THE CLERK: Ms. Ernst, please have a seat over in the
17 jury box.

18 Juror 18, William Bradshaw.

19 (William Bradshaw, a white male, came forward.)

20 THE CLERK: What says the State?

21 MS. TESSITORE: Please present the juror.

22 THE CLERK: What says the Defendant?

23 MR. MAXWELL: Please excuse Mr. Bradshaw.

24 THE COURT: All right, Mr. Bradshaw, you may be
25 seated back in the gallery. You've been excused from this

1 case.

2 Juror 79, Melinda Lindberg.

3 (Melinda Lindberg, a white female, came forward.)

4 THE CLERK: What says the State?

5 MS. TESSITORE: Please present the juror.

6 THE CLERK: What says the Defendant?

7 MR. MAXWELL: Please swear the juror.

8 THE COURT: Ms. Lindberg, please have a seat in the
9 jury box.

10 Juror 134, Adrian Townes.

11 (Adrian Townes, a black male, came forward.)

12 THE CLERK: What says the State?

13 MS. TESSITORE: Please present the juror.

14 THE CLERK: What says the Defendant?

15 MR. MAXWELL: Please seat Mr. Townes.

16 THE CLERK: Mr. Townes, please have a seat in the
17 jury box.

18 Juror 21, William Brothers.

19 (William Brothers, a white male, came forward.)

20 THE CLERK: What says the State?

21 MS. TESSITORE: Please present the juror.

22 THE CLERK: What says the Defendant?

23 MS. TESSITORE: Please seat Mr. Brothers.

24 THE CLERK: Mr. Brothers, please have a seat in the
25 jury box.

1 Juror 80, Jennifer Littrell.

2 (Jennifer Littrell, a white female, came forward.)

3 THE CLERK: What says the State?

4 MS. TESSITORE: Please present the juror.

5 THE CLERK: What says the Defendant?

6 MR. MAXWELL: Please excuse the juror.

7 THE CLERK: All right, ma'am, please be seated. You
8 have been excused from this case.

9 Juror 63, Donna Huffman.

10 (Donna Huffman, a white female, came forward.)

11 THE CLERK: What says the State?

12 MS. TESSITORE: Please present the juror.

13 THE CLERK: What says the Defendant?

14 MR. MAXWELL: Please excuse Ms. Huffman.

15 THE CLERK: All right, Ms. Huffman, you may be seated
16 in the gallery. You have been excused from this case.

17 Juror 75, Jason Landreth.

18 (Jason Landreth, a white male, came forward.)

19 THE CLERK: What says the State?

20 MS. TESSITORE: Please present the juror.

21 THE CLERK: What says the Defendant?

22 MR. MAXWELL: Please seat Mr. Landreth.

23 THE CLERK: Mr. Landreth, please take a seat in the
24 jury box.

25 Juror 104, Gloria Ramey.

1 (Gloria Ramey, a white female, came forward.)
2 THE CLERK: What says the State?
3 MS. TESSITORE: Please present the juror.
4 THE CLERK: What says the Defendant?
5 MR. MAXWELL: Please seat Ms. Ramey.
6 THE CLERK: Ma'am, please have a seat in the jury
7 box.
8 Juror 147, Joseph McMakin.
9 (Joseph McMakin, a white male, came forward.)
10 THE CLERK: What says the State?
11 MS. TESSITORE: Please seat the juror.
12 THE CLERK: What says the Defendant?
13 MR. MAXWELL: Please seat Mr. McMakin.
14 THE CLERK: Sir, please have a seat in the jury box.
15 Juror 77, Furn Lee.
16 (Furn Lee, a black female, came forward.)
17 THE CLERK: What says the State?
18 MS. TESSITORE: Please present the juror.
19 THE CLERK: What says the Defendant?
20 MR. MAXWELL: Please excuse Ms. Lee.
21 THE CLERK: All right, ma'am, please be seated.
22 You've been excused from this case.
23 Juror 116, Richard Saylor.
24 (Richard Saylor, a white male, came forward.)
25 THE CLERK: What says the State?

1 MS. TESSITORE: Please present the juror.

2 THE CLERK: What says the Defendant?

3 MR. MAXWELL: Please seat Mr. Saylors.

4 THE CLERK: Sir, please have a seat in the jury box.

5 Juror 106, Russell Reeves.

6 (Russell Reeves, a white male, came forward.)

7 THE CLERK: What says the State?

8 MS. TESSITORE: Please present the juror.

9 THE CLERK: What says the Defendant?

10 MR. MAXWELL: Please excuse Mr. Reeves.

11 THE CLERK: All right, sir, please be seated. You
12 have been excused from this case.

13 Juror 61, Sara Howard.

14 (Sara Howard, a white female, came forward.)

15 THE CLERK: What says the State?

16 MS. TESSITORE: Please present the juror.

17 THE CLERK: What says the Defendant?

18 MR. MAXWELL: Please seat Ms. Howard.

19 THE CLERK: Ma'am, please have a seat in the jury
20 box.

21 Juror 46, Jaime Foushee.

22 (Jaime Foushee, a white female, came forward.)

23 THE CLERK: What says the State?

24 MS. TESSITORE: Please present the juror.

25 THE CLERK: What says the Defendant?

1 MR. MAXWELL: Please excuse Ms. Foushee.

2 THE CLERK: All right, please be seated, ma'am. You
3 have been excused from this case.

4 Juror 138, Jackie Wardlaw.

5 (Jackie Wardlaw, a black male, came forward.)

6 THE CLERK: What says the State?

7 MS. TESSITORE: One moment, please. Please excuse
8 the juror.

9 THE CLERK: All right, sir, please be seated. You
10 have been excused from this case.

11 Juror 36, Margaret Dixon.

12 (Margaret Dixon, a white female, came forward.)

13 THE CLERK: What says the State?

14 MR. MAXWELL: Your Honor, may I approach real
15 briefly?

16 THE COURT: Certainly.

17 (WHEREUPON, a bench conference was held.)

18 THE COURT: Okay. Ms. Dixon, we will excuse you from
19 service on this case. You may have a seat, ma'am.

20 THE CLERK: Okay. Juror 137, Kieara Walker.

21 (Kieara Walker, a black female, came forward.)

22 THE CLERK: What says the State?

23 MS. TESSITORE: Please present the juror.

24 THE CLERK: What says the Defendant?

25 MR. MAXWELL: Please seat Ms. Walker.

1 THE CLERK: Ms. Walker, please have a seat in the
2 jury box.

3 Juror 15, Jackie Bolden.

4 (Jackie Bolden, a black male, came forward.)

5 THE CLERK: What says the State?

6 MS. TESSITORE: Please excuse the juror.

7 THE CLERK: All right. Please be seated. You have
8 been excused from the case.

9 Juror 68, Jennifer James.

10 (Jennifer James, a white female, came forward.)

11 THE CLERK: What says the State?

12 MS. TESSITORE: Please present the juror.

13 THE CLERK: What says the Defendant?

14 MR. MAXWELL: Please excuse Ms. James.

15 THE CLERK: All right, ma'am, please be seated.

16 Juror 30, Delvin Choice.

17 (Delvin Choice, a black male, came forward.)

18 THE CLERK: What says the State?

19 MS. TESSITORE: Please excuse the juror.

20 THE CLERK: All right, sir, please be seated. You
21 have been excused from this case.

22 Juror 151, Steve Wagner.

23 (Steve Wagner, a white male, came forward.)

24 THE CLERK: What says the State?

25 MS. TESSITORE: Please present the juror.

1 THE CLERK: What says the Defendant?

2 MR. MAXWELL: Please excuse Mr. Wagner.

3 THE CLERK: Sir, please have a seat back in the

4 gallery.

5 Juror 109, Tamisha Richardson.

6 (Tamisha Richardson, a black female, came forward.)

7 THE CLERK: What says the State?

8 MS. TESSITORE: Please present the juror.

9 THE CLERK: What says the Defendant?

10 MR. MAXWELL: Please seat Ms. Richardson.

11 THE CLERK: All right, ma'am, please have a seat in

12 the jury box.

13 THE COURT: Ms. Richardson, take that first seat and

14 serve as the foreperson on this case for me, please,

15 ma'am.

16 THE CLERK: Juror 14, Fareed Betros.

17 (Fareed Betros, a white male, came forward.)

18 THE CLERK: What says the State?

19 MS. TESSITORE: Please present the juror.

20 THE CLERK: What says the Defendant?

21 MR. MAXWELL: Please seat Mr. Betros.

22 THE CLERK: Sir, please have a seat in the jury box.

23 THE COURT: And one alternate, one for the State and

24 two for the Defense.

25 THE CLERK: All right. Juror 44, David Finley.

1 (David Finley, a white male, came forward.)

2 THE CLERK: What says the State?

3 MS. TESSITORE: Please present the juror.

4 THE CLERK: What says the Defendant?

5 MR. MAXWELL: Please seat Mr. Finley.

6 THE CLERK: Sir, have a seat in the jury box. Thank
7 you.

8 THE COURT: Okay. The balance of the panel, I need
9 to assemble downstairs to the jury assembly room. Thank
10 you.

11 (WHEREUPON, the jury venire was excused at
12 approximately 10:15 a.m.)

13 THE COURT: Now, ladies and gentlemen, there are some
14 matters I need to take up before we start this trial. I
15 will give you a recess while I do that. While on recess,
16 do not talk about this case. You don't do that until
17 you've heard all of the testimony to be presented, the
18 arguments by the attorneys and my charge on the law. So
19 if you'll be at ease, retire to your jury room. We'll
20 start just as soon as we can. Thank you.

21 (WHEREUPON, the jury left the courtroom at
22 approximately 10:16 a.m.)

23 (WHEREUPON, a short break was taken.)

24 MR. MAXWELL: The 911 dispatcher said the same guy's
25 back. Did you hear that a second ago? I'm just kind of

1 concerned about the inference the 911 call operator's
2 making when she has no observation of who was there, who
3 wasn't.

4 MS. TESSITORE: She's getting the information from
5 the two callers.

6 MR. MAXWELL: We don't know that.

7 I mean, it's not the guy saying the same guy's back,
8 she's saying it.

9 THE COURT: Well, can you mute it when that comes
10 out?

11 MR. MAXWELL: We've agreed to redact similar stuff.

12 MS. TESSITORE: I redacted one comment that one of
13 the victims says -- apparently, there was a streak of
14 break-ins, so we've taken that out. But to actually make
15 it without that statement would be time consuming, so if
16 we can just mute that part.

17 THE COURT: Just mute it, that's what I'm saying.
18 You know when it's coming up.

19 MS. TESSITORE: Yeah, it's right at the beginning.

20 MR. MAXWELL: At the very beginning, yeah.

21 MS. TESSITORE: So I'll just mark at what point I
22 should turn it on.

23 THE COURT: Yes.

24 MS. TESSITORE: Then we'll have to coordinate that.

25 MR. MAXWELL: Then as far as the pictures and stuff

1 like that, she's given me copies of all this. I don't
2 have any objection to them.

3 MS. TESSITORE: Okay.

4 THE COURT: Are they going to be individually marked
5 or as a bunch?

6 MS. TESSITORE: We can do it as like this first
7 group.

8 MR. MAXWELL: Being able to reference them, it may be
9 easier individually.

10 THE COURT: Do it individually, that's fine.

11 MR. MAXWELL: Thank you, Your Honor.

12 THE COURT: All right. Now, you've got a Jackson V.
13 Denno hearing, I understand?

14 MR. MAXWELL: Your Honor, it's my understanding, I've
15 spoken with the solicitor and she has no intention on
16 introducing either the written statement of the Defendant
17 or the verbal statement that's videotaped. If that's the
18 case, we have no hearing that needs to be taken up. We
19 also need to -- he is being charged with burglary first
20 based on two prior burglaries. We also agree to stipulate
21 to that as well, that that is the fact.

22 THE COURT: Okay. All right.

23 MS. TESSITORE: Your Honor, I have the stipulation
24 agreement here that reads that the stipulation is that as
25 evidenced in the trial of the case that the Defendant has

1 two or more prior burglary convictions. So it doesn't
2 provide any of the particulars, doesn't even state
3 specifically how many, although, there are more than two.

4 THE COURT: All right, you can publish that to the
5 jury.

6 MS. TESSITORE: Yes, sir. And at the time, maybe
7 before I can do it after the jury is sworn at some point,
8 just introduce the certified convictions for the record
9 for a Court Exhibit. And I don't know if you want all of
10 them or just two of them.

11 THE COURT: Just do two of them and if he is
12 convicted, then at the time of sentencing --

13 MS. TESSITORE: Well, as an element, right, it will
14 be introduced -- the stipulation will be introduced as
15 evidence of the element of two or more.

16 THE COURT: Right.

17 MS. TESSITORE: Okay. So we'll go ahead and have
18 that marked as well.

19 MR. MAXWELL: Your Honor, it's our understanding she
20 does only intend to introduce two --

21 THE COURT: If he is convicted, at the time of
22 sentencing, I'm sure the Judge will want to know if
23 there's any prior record other than those two offenses.

24 MS. TESSITORE: Oh, yes, sir.

25 THE COURT: Okay.

1 MS. TESSITORE: Your Honor, I think there is one --
2 just one more matter. As far as the amendment to the
3 grand larceny indictment, the State would seek to amend
4 that indictment to include not just the bicycle, but the
5 garage opener and several men's shirts. That was alleged
6 in the warrant. It's all throughout the police report. I
7 don't think there's any issue as far as notice to the
8 Defendant. It doesn't change the nature of the charge in
9 any way, but they were items that should have been
10 included, but as a scrivener's error, they were not.

11 THE COURT: Okay.

12 MR. MAXWELL: Your Honor, I would object to that.
13 The solicitor has control of the docket, control of when
14 they call the case. They had ample opportunity to amend
15 the indictments up to this point and they have not. We
16 would just respectfully object on that basis.

17 THE COURT: And I overrule your objection.

18 MR. MAXWELL: Thank you, Your Honor.

19 (WHEREUPON, State's Exhibit Nos. 1 through 26
20 were marked for identification.)

21 (WHEREUPON, Defendant's Exhibit Nos. 1 and 2
22 were marked for identification.)

23 THE COURT: All right. Please remember that I don't
24 allow any arguing in your opening statements.

25 MS. TESSITORE: Yes, sir.

1 THE COURT: Okay, bring the jury in.

2 (WHEREUPON, the jury came into open court at
3 approximately 11:39 a.m.)

4 THE COURT: All right. Brief opening statement,
5 Solicitor.

6 MS. TESSITORE: Thank you, Your Honor.

7 THE COURT: We need to swear them first.

8 THE CLERK: Please stand and raise your right hand
9 for the oath in this case. The proper response is "I
10 will".

11 (WHEREUPON, the jury was sworn)

12 THE CLERK: Thank you. Please be seated.

13 THE COURT: Okay, now brief opening statements.

14 OPENING STATEMENTS

15 MS. TESSITORE: May it please the Court?

16 Mr. Maxwell.

17 Ladies and gentlemen of the jury, my name is Jennifer
18 Tessitore. And I represent the State of South Carolina
19 and the people of Greenville County in this case against
20 Demetrius Simmons. Today is his day in court and he is
21 charged with, as you heard -- the Judge may have explained
22 this to you when you first came in here that burglary
23 first degree, two counts, three counts of auto breaking
24 because the victims had three vehicles in their driveway.
25 He is charged with grand larceny for taking property of

1 the victims that was valued at more than \$2,000, and
2 resisting arrest. When he was confronted, the evidence
3 will show that he did not comply with the officers'
4 demands to get on the ground and to stop running. And the
5 evidence will show that he resisted that arrest and had to
6 be subdued by two officers. And they will describe that
7 to you and how that all unfolded.

8 So basically, you're dealing with seven charges. But
9 the first and foremost is the burglary first degree. And
10 the Judge is going to instruct you about the law at the
11 end of the case as to each crime has elements to it. If
12 you will, those elements are like a checklist. And part
13 of my job is to make sure that I have covered that
14 checklist. And when we finish the trial at the end, I'm
15 just going to go back with you and just -- hopefully, in a
16 helpful fashion just kind of go through the checklist
17 elements with you and show you what we have proven. And
18 at the end of the case, I will ask you to find the
19 Defendant guilty as to all counts.

20 Now, basically, what you're going to hear in this
21 case is the testimony of the victims, Mr. and Mrs.
22 Tintinger, who lived out at █ Brookside Way in Greenville
23 County. And they're going to talk to you about what
24 happened on the evening and into the early morning hours
25 of January 31st of this year. And they're going to tell

1 you each separately what they experienced and what they
2 observed. And those observations are going to be really
3 important. This is not a case where it's going to
4 complicated. It's a very simple case. It's like a puzzle
5 that has a few pieces. And I'm going to give you the
6 pieces to put together that are going to leave you firmly
7 convinced that the Defendant is guilty of all the charges
8 in this case.

9 Now, it's not CSI, so you're not going to get hair
10 fibers and DNA evidence and you're going to hear
11 complicated explanations of DNA and mitochondria and
12 things like that. This is just plain and simple.

13 Evidence will show that this Defendant sometime
14 during the nighttime hours between 11:00 p.m. and 7:30 the
15 next morning while the Tintingers were in their home
16 somebody came and looked through all three of their
17 vehicles that were parked in their driveway. They have a
18 three-story home. And they will tell you that the garage
19 doors, two garage doors are in the basement of their home.
20 They were asleep and up in the house on the second and
21 third floors and didn't hear a thing. So this person went
22 through the vehicles. They opened the garage door that
23 was there and propped it open, took a bicycle, a mountain
24 bike that belonged Mr. Tintinger, took the garage door
25 opener out of the Volvo that was parked in the vehicle

1 tantamount to a key to the house and took some men's
2 shirts that were in a dry cleaning bag. Those were all
3 gone. And they will tell you -- Mrs. Tintinger will tell
4 you what she did when she discovered this and saw the
5 garage door propped open and how she called 911.

6 Well, the police responded. You'll hear from the
7 police and they'll tell you when they came out that
8 morning at 8:00 o'clock. They came out and talked to Mr.
9 Tintinger when they got there and took a look around and
10 then they left.

11 And then Mr. Tintinger is going to tell you what
12 happened when he stayed in the house by himself waiting,
13 hoping that this person would not return and all of a
14 sudden, the garage door went up. He will tell you when he
15 looked out the window who he saw, what he saw. And he
16 will explain to you that he then confronted him, that the
17 man then ran up the driveway and took off on his bike.
18 And then the officers will fill in the rest as far as
19 where they discovered the Defendant and what vehicle he
20 used as his get-away vehicle and how they were able to
21 finally, after his resistance, subdue him and take him
22 into custody and book him. That is what led us to coming
23 to you today.

24 This is his day in court, the State's day in court.
25 I appreciate your observations. And just remember that

1 there is -- you know, the most important thing that you
2 have today that you can use to resolve this case is your
3 common sense. So, it's not CSI, it's common sense 101.
4 That's all you need to do. And there's no app for it,
5 there's no special degree that you have to have. You have
6 your common sense and your life experiences, each one of
7 you, that you can apply. And when you put it all together
8 and the State brings you the pieces of the puzzle, as I
9 said, at the end of the case, I will ask you to find the
10 Defendant guilty because you will be firmly convinced of ,
11 the State's evidence. Thank you.

12 THE COURT: Mr. Maxwell.

13 MR. MAXWELL: Thank you, Your Honor.

14 Solicitor.

15 May it please the Court.

16 THE COURT: Yes, sir.

17 MR. MAXWELL: Thank you. Good morning. My name is
18 Joey Maxwell and as you've heard, I represent Mr. Simmons.
19 As you can tell, Mr. Simmons is not here. The Judge will
20 instruct you that you can't hold that against him. He
21 also will instruct you that there are several elements to
22 every crime that he's accused of, being charged with.

23 Now, one of these elements of these crimes is intent.
24 And I believe that under the burden of proof in our
25 system, beyond a reasonable doubt, that the State failed

1 to prove that Mr. Simmons had the intent to commit these
2 crimes. So what I would like for y'all to do is listen
3 very carefully to all the evidence. The solicitor is
4 right, use your common sense. This is very simple stuff.
5 It's not rocket science. We just ask that you use your
6 common sense, listen to all the elements that are
7 presented and all the testimony and hold off judgment
8 until you hear it all. Wait until the final word when the
9 Judge says you may go back to your chambers and
10 deliberate. And until then, please keep an open mind and
11 consider all the evidence that the State doesn't present.
12 The State will present a lot of stuff. The State won't
13 present a lot of stuff either. I ask y'all to consider
14 that as well.

15 Now, at the end of the day, the solicitor said that
16 this is like a puzzle and you've got to put it all
17 together. Well, she said she's going to give you the
18 pieces. I think she's missing a couple and you're not
19 going to have a complete puzzle at the end of the day.
20 And I feel that you will feel the same once you get this
21 in your chambers. Thank you.

22 THE COURT: Okay, Solicitor.

23 MS. TESSITORE: Thank you, Your Honor. State would
24 call Susan Tintinger.

25 THE CLERK: Ma'am, if you will please pause at the

1 end of the bench. Place your left hand on the Bible and
2 raise your right hand, please.

3 SUSANNE TINTINGER, after being duly sworn,
4 testified as follows:

5 THE CLERK: Thank you. Please be seated. Please
6 state your name for the record.

7 THE WITNESS: My name is Susane Tintinger.

8 THE COURT: Thank you.

9 DIRECT EXAMINATION

10 BY MS. TESSITORE:

11 Q Good morning, Mrs. Tintinger. How are you today?

12 A Doing well, thank you.

13 Q Ms. Tintinger, could you tell the jury where you
14 live?

15 A I live at █ Brookside Way in Greenville, South
16 Carolina.

17 Q And is that in Greenville County?

18 A Yes, it is.

19 Q How long have you lived there?

20 A We've lived there seven and a half years.

21 Q And can you describe for the jury who else lives with
22 you there?

23 A I live with my husband, Kent, and I live with my twin
24 daughters, Lila and Caroline.

25 Q How old are your twin daughters?

1 A They are 10.

2 Q And can you also describe to the jury just generally
3 kind of the neighborhood, where you are in Greenville
4 County, what part of Greenville and give them a little bit
5 of sense of what's the surrounding around your home there?

6 A I live about three miles from downtown. And the area
7 I live is a residential area with -- I have a very wooded
8 yard. It's just a traditional neighborhood. Lots of
9 beautiful trees.

10 Q Is it near any -- well, so it's wooded?

11 A My yard -- I have quite a few trees in my yard.

12 Q And is the neighborhood, would you describe a fairly
13 wooded area or is it just your yard?

14 A It's a fairly wooded area. We have a lot of old oak
15 trees.

16 Q Are there any major landmarks or places around the
17 home just so the jury can kind of get an idea of where --

18 A Oh, it's near Blythe Elementary School off Augusta
19 Road.

20 Q Okay. And does it -- is that near the golf course or
21 the country club there?

22 A Yes, there is a country club about two blocks from my
23 house with a large golf course.

24 Q Would you describe the area as fairly flat or hilly?

25 A Oh, no, it's very hilly. We have quite -- the street

1 in front of my house is a step hill. My yard has a lot of
2 steep hills. There's a little tributary that runs through
3 the back of my yard and there's a bridge over it.

4 Q How many stories is your house?

5 A From the front, it's two stories, but it has a
6 daylight basement.

7 Q And as part of that basement, does it include the
8 garage?

9 A It does, it includes two single garages.

10 Q Are they attached, though?

11 A Yes, they're underneath -- directly under the house.
12 The kitchen is directly above it and my daughters'
13 bedrooms are directly above that.

14 Q All right. And do you use -- did you use at the time
15 those garage -- the double garage there for vehicles?

16 A No. With two children, I'm sorry to say that it's
17 mostly filled with bicycles, scooters, wagons, wheel
18 barrel. I have very outdoorsy children. So it's a
19 traditional clutter garage.

20 Q Okay. And did you or your husband have any bicycles
21 in there?

22 A Yes. We are an avid bike-riding family. We have
23 multiple bikes. My kids have bikes and I have different
24 bikes for different types of riding as does my husband.

25 Q Okay. At the time of this burglary, what kind of

1 bicycles were in the garage?

2 A My husband had a mountain bike and my husband has a
3 road bike, then I have a hybrid road bike, crossover bike,
4 and my two girls have mountain bikes or pseudo mountain
5 bikes.

6 Q For a 10-year-old?

7 A Correct.

8 Q And just to go back a little bit, now, are you --
9 were you working at the time?

10 A Yes, I was.

11 Q Back in January?

12 A I was an adjunct professor teaching four classes at
13 Greenville Tech.

14 Q And what kind of classes did you teach there?

15 A I was employed in the criminal justice department. I
16 taught juvenile law, that was my area of specialty, and
17 juvenile advocacy and I taught constitutional law and
18 criminal law.

19 Q So your background?

20 A I have a law degree. I practiced law in Seattle --
21 I'm from North Carolina, but I moved to Seattle to go to
22 law school and I met my husband and stayed there for 13
23 years.

24 Q And have you been practicing here in Greenville at
25 all?

1 A No, I have not.. When -- while I was expecting, I was
2 a prosecutor and I had to leave work due to complications
3 with my pregnancy and I have not returned to practicing
4 law.

5 Q So what is it then that you do during the day
6 typically, back in January, other than teaching the
7 courses?

8 A Well, I teach my classes and then come home. And I
9 would do all of my class prep work at my home because my
10 primary role is homemaker, mom and wife and cook,
11 chauffeur.

12 Q You mentioned Blythe, do your kids go to the school
13 there?

14 A No. Both my daughters have some special needs, so
15 they go to a private school in Simpsonville.

16 Q Okay. Do you take them there?

17 A Yes.

18 Q Pick them up?

19 A Except mornings where I taught an 8:00 a.m. class.
20 On those mornings, my husband would drive them to school.

21 Q So back at the end of January, January 30th to the
22 31st is the time period we're talking about, you were
23 teaching those courses. And did you -- the evening of the
24 30th, it was a Wednesday night; is that correct?

25 A Yes.

1 Q Do you recall what time you came home that evening?

2 A It was -- we're never out -- it's very unusual for us
3 to be out late, but I believe we were at something at the
4 peace center and we got home around 10:30.

5 Q Okay. Would that have included your twins?

6 A Yes. They were at my parents that evening.

7 Q And which vehicle do you typically -- well, which
8 vehicle did you use that evening?

9 A That evening we used my car. It's a blue Volvo.

10 Q Okay. And when you returned that evening, did you
11 observe anything in the driveway or at the -- well, where
12 did you park that vehicle when you returned?

13 A We have what we call the million-mile minivan that we
14 haven't gotten rid of and it is parked in front of the
15 left garage door and my husband will park his Prius behind
16 it. And then I park my car directly in front of the right
17 garage door. My husband drove us home that evening and he
18 parked the car directly in front of the right garage door.

19 Q Okay. And did you notice anything about that right
20 garage door --

21 A No.

22 Q -- that was out of the ordinary?

23 A Nothing.

24 Q Was it opened or closed?

25 A Closed.

1 Q And the one on the left?

2 A Closed.

3 Q Okay. And did you -- what did you do when you came
4 home?

5 A We went up -- we have outside stairs beside the
6 garage door that lead into our kitchen and we all four
7 went up those stairs. We were carrying sleepy girls. And
8 went inside and my husband put the girls to bed and I
9 stayed up late working on an exam I was giving the next
10 morning.

11 Q Okay. When you say you stayed up late, how late did
12 you stay up?

13 A About 1:30.

14 Q Okay. Did you get the exam done?

15 A I did.

16 Q Just barely?

17 A Well, I was done. I like to go back and make
18 revisions, keep revising up until the last minute.

19 Q Okay. And you had to be at school at what time?

20 A My class started at 8:00 a.m., but my goal was to be
21 there closer to 7:30 because I needed to make copies of my
22 exam.

23 Q Okay. So what time do you --

24 A 7:45.

25 Q 7:45, you were going to leave?

1 A No, I hoped to be at Greenville at 7:45.

2 Q How long does it take?

3 A It takes me about five minutes, eight minutes.

4 Q So you were able to leave around what time?

5 A Well, I think the goal was 7:15 and I think the
6 reality was closer to a little after 7:30.

7 Q Okay. And before we go to the next area, let me just
8 show you a couple of things here. I'm going to show you
9 what's been marked as State's Exhibit No. 2, 3, 4, 5 and
10 6. And I'm going to ask you to just take a look at each
11 one of those and turn them over. After you've seen them
12 all, I'm going to ask you a question.

13 A The first is the front of my home --

14 Q Well, before getting into them, just take a look at
15 them individually, first.

16 A (The witness complied.)

17 Q Okay. Have you looked at them all?

18 A Yes.

19 Q All right. And in looking at State's Exhibit 2
20 through 6, what do those depict?

21 A They depict the exterior of my house and the view
22 from my house looking towards my neighbor's house. And
23 they also show my garage doors and our cars.

24 Q And just for clarification, were those taken the day
25 that this incident occurred?

1 A No.

2 Q So some things are -- I mean, as far as leaves on the
3 trees and things like that, but as far as structurally,
4 are they essentially the same?

5 A Yes, there's no structural change.

6 Q Okay.

7 MS. TESSITORE: The State would move State's Exhibits
8 2 through 6 into evidence at this time.

9 THE COURT: Any objection?

10 MR. MAXWELL: No objection, Your Honor.

11 THE COURT: Without objection.

12 (WHEREUPON, State's Exhibit Nos. 2 through 6
13 were admitted into evidence.)

14 MS. TESSITORE: Okay.

15 BY MS. TESSITORE:

16 Q And if you could, just identify the first one,
17 State's Exhibit 2, and tell the jury what each one shows
18 and then I will publish those to the jury.

19 A The first picture is of the outside of my house as
20 you approach it. My house is on the right. It's the
21 viewpoint from the street. And my -- to enter my front
22 door, you have to actually go down about nine stairs
23 because my house is on a steep hill.

24 Q So State's Exhibit 2 is the front of the house?

25 A Yes.

1 Q Okay. And State's Exhibit 3?

2 A That's a viewpoint from my driveway. My house is --
3 my house's back porch is in the right corner and the
4 bridge that I mentioned earlier is in the back, behind my
5 house.

6 Q So this would be the view in the back of the house?

7 A Yes. Just the slight -- you can see the edge of my
8 house.

9 Q Okay. And State's Exhibit 4?

10 A That is looking away from my house from my driveway
11 at my neighbor's house.

12 Q Okay.

13 THE COURT: Any objection to any of these
14 photographs?

15 MR. MAXWELL: Your Honor, I'd just like to look at
16 them real quick to make sure I've corresponded the right
17 number with the right picture because I don't have
18 numbers. I'm aware of what they are, I just want to make
19 sure I've got the right pictures.

20 BY MS. TESSITORE:

21 Q Okay. Looking at the next exhibits, No. 5 and 6, if
22 you could tell the jury -- just for the record, we'll
23 start with 5. What does 5 show?

24 A This is the side of my house from the driveway. It's
25 the side of the house where the kitchen door is on a

1 little stoop that you get to by using a flight of stairs.
2 Also, under the stoop is where the two garage doors are.

3 Q Okay. And what is the main door that you come in and
4 out of when you're going places with either the bikes or
5 the cars?

6 A The main point with the bikes is the garage door, but
7 the main door we really use is the one above the garage,
8 the kitchen door.

9 Q And is that picture there?

10 A Yes, it is.

11 Q Okay. And State's Exhibit 6?

12 A Those are my two garage doors. And the door above it
13 is the one I exit and enter when my car is not in the
14 garage.

15 Q And at the time, as you said earlier, you didn't use
16 the garages for the vehicles?

17 A No.

18 Q Do you use them now?

19 A Sometimes.

20 Q Okay. All right.

21 THE COURT: All right. I understand there's no
22 objection to these photographs?

23 MR. MAXWELL: No, Your Honor, there's no objection.
24 I just wanted to make sure I know exactly which
25 photographs we're speaking of.

1 MS. TESSITORE: Your Honor, I'm publishing 5 and 6
2 for the jury.

3 THE COURT: All right.

4 BY MS. TESSITORE:

5 Q Okay. So these pictures will give a general idea of
6 the outside surroundings of your home, correct?

7 A Yes.

8 Q Okay. Now, those pictures also show the vehicles
9 that were involved in this case --

10 A Yes.

11 Q -- is that correct? Okay. And you still have those
12 vehicles today?

13 A Yes.

14 Q Okay. Could you describe when -- while you were
15 getting ready for this exam when you were during the
16 evening hours, where were your girls and where was your
17 husband before you went to bed that night?

18 A They were all in bed. Our bedrooms are all on the
19 same floor and my husband was asleep and the two girls
20 were asleep as well.

21 Q Okay. And which floor is that?

22 A The top, the third floor.

23 Q Okay. And while you were preparing your exam, did
24 you hear anything unusual or see anything?

25 A Well, I did let my dogs out. I have two dogs. And

1 they wanted -- they were scratching at the back door,
2 which is shown in one picture, the porch, where you can
3 just see it in the right corner. And it was about -- it
4 was definitely 1:30, which is unusual, they don't go out
5 -- they're not -- they're usually settled in pretty solid
6 by this time of night. And I opened the door and they
7 went out and just were barking like crazy for quite a
8 while.

9 Q Did you go outside to see what they were barking at?

10 A No.

11 Q What did you do, did you -- at that point?

12 A When they wouldn't stop, I mean, because it was so
13 late, I called them and called them until they finally
14 came in. I finally got them in the house, finally got
15 them upstairs.

16 Q Okay. Did you -- so you didn't hear any doors
17 opening at that point?

18 A No.

19 Q You were working on which floor?

20 A The second floor on the opposite side of the house.
21 My desk is on the opposite side of the house from where
22 the garage doors are.

23 Q Okay.

24 A And where the cars were parked.

25 Q And I assume -- you said you went to bed about 1:30

1 in the morning?

2 A Yes.

3 Q All right. Did you ever go outside before you went
4 to bed?

5 A No.

6 Q Okay. When you woke up in the morning, tell the jury
7 what you found when you went out to your car to go to
8 Greenville Tech?

9 A As I said, I was running a little late and I opened
10 my car door and got in and was putting my briefcase on my
11 seat, as I always do. There's rarely anything on my front
12 seat and there were things strewn all about on my front
13 seat.

14 May I have a Kleenex, I'm about to sneeze?

15 THE COURT: Sure.

16 THE WITNESS: Sorry, I have allergies. I apologize.

17 BY MS. TESSITORE:

18 Q That's okay. So you were saying you put your
19 briefcase on the seat and you noticed what?

20 A That both my -- my glove compartment was opened and
21 things were kind of dangling out of it, like the user's
22 manual, my Kleenex. And I have a console box and it was
23 flipped open and things from it, like, you know, I have
24 pencils and erasers and crayons in there, they were strewn
25 about on the front seat. Everything was sort of in total

1 disarray.

2 Q And so that wasn't the way it was left the night
3 before?

4 A No, it was not.

5 Q Okay. Did you know whether the vehicle was locked
6 that evening?

7 A I do not know.

8 Q Okay. And what else did you notice?

9 A Well, at first, I thought why -- who was in my car?
10 Of course, I was thinking did my husband come look for
11 something, and I'm looking around. And then I look up and
12 I notice that my visor is down and we had just driven the
13 car late last night and the visor wasn't down. And that's
14 where I kept my garage door opener. It has two separate
15 openers, one for each garage, and it was not there.

16 Q Now, it was not there, was there one there and the
17 other one was gone?

18 A No, it's on one component, had a button for each
19 door.

20 Q Oh, okay.

21 A And it was missing. I did use that garage door
22 opener when I could park in the garage, which I had been
23 doing a week before. And I would use it to often open the
24 door, like to take groceries in and things like that. So
25 I always used my garage door opener, if not to put my car

1 in there, to put my Cosco in there.

2 Q Okay.

3 A And I noticed it was gone. And then I looked forward
4 and looked at the garage and my garage door on the right
5 was not -- it was partially opened, not touching the
6 ground as it should be and not open. I had never seen it
7 partially opened before. And one of my daughter's
8 scooters was crammed under it in this odd position. And I
9 thought that was very odd.

10 Q Now, can you explain to the jury -- this remote you
11 said could open both doors. At that time, was the motor
12 working on both doors?

13 A No. That was actually what prompted me to stop
14 parking in the garage is one of the motors, the one on the
15 right door had stopped working. And I've had someone look
16 at it, a friend of the family who does handy work, and he
17 said that the spring was broken and that I needed to have
18 it fixed by a garage door company, that it was not
19 something that we should try ourselves.

20 Q Okay. So on January 30th --

21 A That was about a week prior to this.

22 Q All right. So it had not been fixed?

23 A It had not been fixed.

24 Q All right. When you're referring to the -- let me
25 just get that. Looking at State's Exhibit 6 --

1 A Yes.

2 Q Can you just hold that up and show the jury which
3 door you're talking about.

4 A This door. This door was partially opened and the
5 scooter was right here beside the middle -- the split
6 between the two doors. And it was opened about as far as
7 where the water spigot is.

8 Q Now, in order to open that door without the motor
9 working, how would it have to be opened?

10 A The only way the door could be opened was manually at
11 this time.

12 Q And was there any kind of latch or anything to lift
13 the door with?

14 A There's just a little latch at the bottom. It's a
15 steel piece.

16 Q Okay. And the other side was working or not?

17 A Yes, the other side was working.

18 Q Okay. And --

19 A But you can't lift the other side. It has a handle.
20 When we bought the house, it didn't have a motor on that
21 side and we added a motor. So even though it has a
22 handle, it's impossible to pull it open.

23 Q So the only way to open the right side at that time
24 was by hand?

25 A Yes.

1 Q And the only way to open the left side was by the
2 remote, the opener, garage door opener?

3 A Yes.

4 Q Okay. Thank you. Once you noticed the garage door
5 opener was missing, what did you do?

6 A I started honking my horn to get my husband's
7 attention.

8 Q Okay. And did that work?

9 A It did. He came outside and -- onto the stoop and
10 said, What? I said, Come here. I didn't want to go in
11 and talk about it in front of the children at that point.

12 Q So the children were --

13 A They were all getting their coats on because my
14 husband was driving them to school on his way to work.

15 Q Okay. That was the plan?

16 A Yes.

17 Q Okay. And so when he came out, what did you do?

18 A I said, Did you -- I said, Do you know anything about
19 this? And he said, What? I said, Look at the garage.
20 And he said, I have no idea about that. I said, Have you
21 been in my car this morning at all? He said, Absolutely
22 not. I said, It's totally been, my word was trashed. And
23 he was like, What are you talking about? I said, Look,
24 it's been trashed. My garage door opener is gone. The
25 garage door has something under it. I said, Somebody has

1 broken into the car and the garage.

2 Q And did you and your husband look in the other
3 vehicles?

4 A Not at that point.

5 Q Okay.

6 A Because I had already started my car before I
7 realized all this was happening.

8 Q Okay.

9 A So I was still focused on getting to work.

10 Q Was anything else missing from your vehicle?

11 A I didn't realize it until later, but at that moment,
12 I forgot that my husband was getting ready to go on a
13 business trip and I had a full bag of his laundry. I'm
14 not known for my ironing ability. And I was taking his
15 clothes to the cleaners so they would look good for his
16 business trip. And they had all been taken.

17 Q So those were men's shirts?

18 A They were men's dress shirts.

19 Q All right. Did you purchase those or did he?

20 A I did.

21 Q All right. Approximately how much per shirt, do you
22 remember where you --

23 A Yes. They were from Joseph Banks at the after
24 Christmas sale. And there were seven shirts.

25 Q And about how much per shirt approximately?

1 A Probably about \$50 per shirt.

2 Q All right. Okay. So other than the garage door
3 opener missing and the bag of shirts, was there anything
4 missing out of your car?

5 A I kept some spare dollars just for parking and things
6 like that. All that was gone, but.

7 Q After you discovered that, what else did you observe?

8 A Well, at that point, I didn't really --

9 Q Did you -- you mentioned the garage, right?

10 A Well, the garage was propped up.

11 Q Okay. Was anything -- did you look in the garage --

12 A I did not.

13 Q -- to see if anything was gone?

14 A No. I told my husband, I have to go to school. I
15 have no one I can call to cover for me because it's such
16 an early morning class and no one's close enough and I was
17 giving an exam. So I said -- I kind of told him what we
18 were going to do, which was he would stay here, I would go
19 to school. I would call 911. And I would come home as
20 soon as I found another professor to supervise my exam.

21 Q Okay. Did you look at the other two vehicles before
22 you left?

23 A No, I didn't.

24 Q No. Okay. Did you look at them after when you got
25 back?

1 A Yes.

2 Q Okay. Did they appear to have anything taken or did
3 you observe anything different about them?

4 A Yes. The glove compartment was the same situation in
5 the minivan and that had been locked. Because we don't
6 drive it that often, we keep it locked as a rule. And
7 things were -- movies, just small items, but I can't be
8 specific which ones. My children are sort of in charge of
9 switching them out, they do that. But in my van, I had a
10 GPS device and that was missing.

11 Q What about -- the other vehicle was what?

12 A The Prius.

13 Q And who drives that vehicle?

14 A My husband drives that pretty much exclusively.

15 Q And was there anything taken out of that vehicle?

16 A I believe just the same sort of odd and end things.

17 Q All right. Now -- so did you -- I imagine things
18 were moving pretty quickly. Did you get in the car and
19 head on to Greenville Tech?

20 A Yes. I had already started the car. I had already
21 backed it up a couple of feet before I realized anything
22 was going on, so I knew that -- I knew I had already
23 contaminated -- you know, they weren't going to be able to
24 get any fingerprints or anything, I had already handled
25 everything.

1 Q Okay. So did you make a call to 911?

2 A I did.

3 Q All right. And where were you when you were making
4 that call?

5 A Driving on Mauldin to Pleasantburg to Greenville
6 Tech.

7 Q And just for clarification, when you left, who was
8 left at home?

9 A My husband and my two daughters.

10 Q Okay. And how were your two daughters going to get
11 to school?

12 A After I hung up with 911, I called my parents, who
13 are retired, and told them what had happened and asked
14 them to please go pick up the girls and drive them to
15 their school.

16 Q Okay. What time do they normally leave to go to
17 school?

18 A They normally leave a little before 8:00.

19 Q All right. What about your husband?

20 A My husband usually -- we all usually leave about the
21 same time, a little before 8:00. School starts at 8:30,
22 but on Tuesdays and Thursday when I teach, everyone leaves
23 earlier.

24 Q All right. Did he -- what was the plan as far as
25 when you left to go to Greenville Tech, where was he going

1 to be?

2 A He was going to stay at the house. I told he had to
3 remain there. He would have to meet the police because I
4 had to be at Greenville Tech because I was giving the exam
5 and my immediate response -- my immediate thought was I
6 couldn't let my students down when they've all studied and
7 not have their test. So that was my plan.

8 I did tell my husband, The police are going to come.
9 They're going to take a report. My garage door opener is
10 missing. Do not leave the house. And he questioned, Why?
11 And I said, The garage door opener is missing. That's the
12 same thing as taking the key to the house. And he had --
13 you know, his main thought was that sounds silly. And I
14 said very clearly that if you left the house before -- if
15 the house were empty at any point before I got a new
16 garage door opener and got that one unprogrammed, I would
17 be going to a hotel that afternoon or to my parents'
18 house.

19 Q And why is that?

20 A Because I -- because having been a prosecutor and a
21 defense attorney and studied a lot of cases, I knew there
22 was a possibility of someone returning and they had access
23 to my house.

24 Q Okay. So you did place a call to 911, correct?

25 A I did.

1 Q And I'm showing you what's been marked as State's
2 Exhibit No. 1. And do you recognize that?

3 A Yes. It is the CD recording of my 911 call and I
4 initialed before.

5 Q And have you reviewed it?

6 A I have heard it, yes.

7 Q Is it a fair and accurate recording of the call that
8 you made that day?

9 A Yes, it is.

10 Q Okay.

11 MS. TESSITORE: I'm going to go ahead and request to
12 publish that to the jury, Your Honor.

13 THE COURT: All right.

14 MS. TESSITORE: All right. Just give me one moment
15 here.

16 MR. MAXWELL: No objection, Your Honor.

17 THE COURT: Without objection.

18 MS. TESSITORE: Your Honor, before I do publish it,
19 the State would move State's Exhibit 1 into evidence.

20 THE COURT: All right. I understand it's without
21 objection.

22 MS. TESSITORE: Thank you Your Honor.

23 (WHEREUPON, State's Exhibit No. 1 was admitted
24 into evidence.)

25 THE COURT: I think you need to open your lens.

1 MS. TESSITORE: Oh, Your Honor, it's just the
2 speakers.

3 THE COURT: Okay.

4 MS. TESSITORE: Okay. Thank you.

5 (WHEREUPON, 911 call CD, State's Exhibit No. 1,
6 was published.)

7 BY MS. TESSITORE:

8 Q All right. Now, after you placed this call to 911,
9 did you hear from your husband before or during your exam?

10 A Yes, I did.

11 Q And without saying what he told you, what was the
12 general gist of what he communicated to you?

13 A Other things were missing that I didn't know about.
14 That my father had picked up the children, that the
15 children were doing okay and that the officers -- the
16 first communication was that the police were there.

17 Q So they did respond?

18 A Yes.

19 Q And your husband handled that as far as making a
20 report to the police?

21 A Yes.

22 Q All right. And you mentioned the bike, the expensive
23 bike, what kind of bike are we talking about?

24 A It's a Kline mountain bike.

25 Q Color?

1 A Part of it is like a teal green and part of it is
2 silver.

3 Q And approximately, if you know, what the value of the
4 bike was?

5 A Two thousand dollars.

6 Q And did -- after he let you know that he was taking
7 care of that, were you able to give your exam?

8 A Yes, I was giving the exam. The only other professor
9 I could find was also giving an exam that morning.

10 Q So how long was the exam approximately?

11 A Hour and 15 minutes.

12 Q After that exam, did you have contact with your
13 husband again before --

14 A Yes.

15 Q -- the next -- okay. And during that contact, what
16 was the gist of that?

17 A He said that the police had come, the police had gone
18 and he wanted to know if he could leave and go to work.
19 He wanted to let me know that he was planning to leave and
20 go to work.

21 Q Okay. Did he -- at some point, did he contact --
22 well, how did you respond to that?

23 A I told him, You may not -- I said, You can't leave.
24 And he said, Well, then you need to come home. And I
25 said, I'm giving another exam in my next class, I have no

1 one to cover it. You can work from home, you're staying
2 there.

3 Q All right.

4 A Or I really want you to stay there. And he said, I
5 really wanted to go to work, I have a meeting. I said, If
6 you leave, we're going to be at my parents' house or a
7 hotel tonight.

8 Q All right. Now, shortly after that conversation, did
9 he contact you again?

10 A Yes, he did.

11 Q All right. And again, what was the gist of that?

12 A He said, The police have made an arrest.

13 Q Okay. Did he -- so you were at the school the whole
14 time --

15 A The whole time.

16 Q -- during that? Okay. Did you -- when did you
17 return back to the house?

18 A At that moment, I then got the secretary and said, I
19 have to leave. The police have said come home
20 immediately.

21 Q And you did that?

22 A I did.

23 Q And when you got home, did you have a chance to see
24 the -- any of the items that had been removed, such as the
25 garage door opener or the bicycle?

1 A Not at that -- not initially.

2 Q Okay. At some point?

3 A Yes. While I was there, an officer -- officers were

4 in my home. Officers were in my driveway when I go home.

5 Q Officer Dirton --

6 A Yes.

7 Q -- was he one of them? Okay.

8 A Yes, and a forensics truck was in my driveway. And

9 there was a lot of police activity all around my house.

10 Q Okay. Now --

11 A A number of cars.

12 Q -- when the officers were there, did they -- at any

13 point, did you see -- were any items returned to you --

14 A Yes.

15 Q -- or asked to be identified or anything like that?

16 A Yes. Like I said, there were a number of officers

17 coming and going and officers were receiving updates on

18 activity that had to do with the Defendant, I believe.

19 And someone drove up with a truck -- drove up with a bike

20 and asked if that was my husband's bike. My husband

21 confirmed it was.

22 Q Did you see it, also?

23 A I did after that, yes.

24 Q And any other items?

25 A Yes, a smashed garage door opener was brought in and

1 asked -- I was asked if I recognized it.

2 Q Okay.

3 A I did, except that it had been crushed at that point.

4 Q All right. Now, I'm going to show you a couple more
5 photos. Okay. Ms. Tintinger, I want to ask you to look
6 at State's Exhibit 7, 8, 9 and 10. Take a look at those
7 and see if you recognize those?

8 A I do.

9 Q All right. You've looked at all of them. And who
10 took those pictures?

11 A I did.

12 Q All right. And what are they generally? How would
13 you describe those pictures?

14 A Three of them are inside my garage and one of them is
15 inside my basement just through the door that's pictured.

16 Q Okay. And again, when did you take -- were these
17 taken at the time of the incident?

18 A No.

19 Q All right. When you took them, were -- would you say
20 they're fair and accurate representations of just
21 structurally where the doors are and just to --

22 A Yes.

23 Q -- help the jury see what was inside the garage as
24 far as structurally?

25 A Structurally is the same. And I specifically didn't

1 tidy up. While it's not exactly the same, it kind of
2 gives you an idea of the flavor of how things usually are.

3 Q Okay. State's Exhibit 10 is depicting what?

4 A That's our playroom and exercise mat for my children.

5 Q Where is that?

6 A It's in the basement.

7 Q Okay.

8 A If you were to go through one of the doors, this door

9 --

10 Q When you're saying this door, you're referring to
11 State's Exhibit 9?

12 A Yes. It is a door in my garage that goes into the
13 basement, into the playroom area.

14 Q And that's the one there with the duct work?

15 A Yes, that's the furnace just out of the picture.

16 Q All right.

17 MS. TESSITORE: At this time, the State would move
18 State's Exhibits 7, 8, 9 and 10 into evidence.

19 THE COURT: Any objection?

20 MR. MAXWELL: No objection.

21 (WHEREUPON, State's Exhibit Nos. 7, 8, 9 and 10
22 were admitted into evidence.)

23 BY MS. TESSITORE:

24 Q So looking at State's Exhibits 7, that first one,
25 what does that show?

1 A That shows looking -- that's my garage door from the
2 inside and it also shows another door that goes into an
3 unfinished room in my house.

4 Q So that -- if someone went through that door, they
5 could actually get into the house?

6 A Yes, there's another door in that room that leads
7 back directly into the basement, the living area.

8 Q All right.

9 MS. TESSITORE: Publish State's Exhibit No. 7 to the
10 jury, Your Honor?

11 THE COURT: Sure.

12 BY MS. TESSITORE:

13 Q And State's Exhibit No. 8.

14 A That is inside my garage standing with the garage
15 door to your back, looking directly into my garage.

16 Q Okay. And up at the top, there appears -- what would
17 that unit be at the top of the light bulb?

18 A That would be the garage door opener.

19 Q And that's working now?

20 A It is.

21 Q Okay.

22 A We had it fixed immediately after this incident.

23 Q Did it appear basically the same at the time?

24 A Yes.

25 Q All right.

1 MS. TESSITORE: And I'll publish No. 8.

2 BY MS. TESSITORE:

3 Q Number 9, I think we already talked about, that's the
4 door that goes to where?

5 A That goes into the living space/playroom of my garage
6 -- I mean, of my house.

7 Q Okay. And that's where you said was State Exhibit --

8 A Yes, that is the basement.

9 Q In No. 10?

10 A Yes, that's the basement living space.

11 Q Okay.

12 MS. TESSITORE: I'm going to publish State's Exhibit
13 9 and 10 to the jury. All right. Just one moment.

14 BY MS. TESSITORE:

15 Q So your children were not home at the time when you
16 returned back?

17 A No, they were in school.

18 Q All right. And other than your husband and the
19 police and the forensics officer, did you have any other
20 involvement as far as in this case recording calling --

21 A No.

22 Q -- or anything. And did you ever see those dress
23 shirts ever again?

24 A No.

25 Q All right. And the exam was -- let's see,

1 approximately what time did you return back to the home?

2 A If I can think for a moment. First class started at
3 8:00, ended at 9:15. Second class started at 9:30 and
4 ends at 10:15. I think it was around 10:15, 10:30.

5 Q Okay. All right. And you never saw who went in the
6 house?

7 A No, I did not.

8 Q At any point in time or who went in the cars?

9 A No.

10 MS. TESSITORE: All right. Please answer any
11 questions that Mr. Maxwell may have. Thank you.

12 THE WITNESS: Thank you.

13 THE COURT: Mr. Maxwell.

14 MR. MAXWELL: Thank you. Your Honor, I have no
15 questions for the witness.

16 THE COURT: Thank you. You can step down.

17 THE WITNESS: Thank you, Your Honor.

18 MS. TESSITORE: Your Honor, the State would call
19 Mr. Tintinger.

20 THE CLERK: Sir, if you would please place your left
21 hand on the Bible and raise your right hand.

22 KENNETH TINTINGER, after being duly sworn,
23 testified as follows:

24 THE CLERK: Thank you. Please be seated. Please
25 state your name for the record.

1 THE WITNESS: Kenneth Tintinger.

2 DIRECT EXAMINATION

3 BY MS. TESSITORE:

4 Q Mr. Tintinger, good morning.

5 A Good morning.

6 Q Could you tell the jury basically what your
7 background is as far as what you do for a living?

8 A I work at Michelin in the IT department --

9 Q You're going to have to speak up.

10 A I'm sorry. I'm a technical computer DBA, database
11 administrator for Michelin.

12 Q Okay. How long have you worked for Michelin?

13 A Seven and a half years.

14 Q And before that, what did you do?

15 A I worked for T-Mobile in Seattle in IT as well.

16 Q So basically, the same field consistently?

17 A Yes.

18 Q All right. And as part of your job, do you work from
19 home?

20 A Yes. Working IT has its advantages that way. You
21 can dial in and you can do your work anywhere you want.

22 Q Are you on call?

23 A Occasionally, yes.

24 Q Would -- your wife testified obviously earlier that
25 you have been living in that home for approximately seven

1 years?

2 A Yes.

3 Q [REDACTED] Brookside Way?

4 A Yeah.

5 Q And did you have an office set up in the home at all?

6 A No, I just kind of set up my laptop at the dining
7 room table.

8 Q Do you have an office at Michelin?

9 A I do.

10 Q And taking you back to January 30th, that evening, do
11 you recall where you went that evening?

12 A I don't exactly. I know we were out, probably to the
13 peace center. I'm not exactly sure.

14 Q And when you returned home, I know your wife
15 testified that she had -- she had some work to do for the
16 next morning bright and early. What did you do as far as
17 your --

18 A I got the kids to bed and then the nightly routine of
19 going to brush my teeth and then going to bed myself.

20 Q Okay. So what time did you say that you went to bed?

21 A Probably 11:00.

22 Q Okay. And did you notice anything unusual during the
23 evening?

24 A I did not.

25 Q And where did you sleep that night?

1 A In my bed.

2 Q Which is which floor?

3 A On the third floor on the opposite side of from the
4 garages.

5 Q Would -- and your children, where did they sleep?

6 A On the third floor as well.

7 Q Do they share a bedroom?

8 A They have their separate bedrooms.

9 Q Okay. I'm going to show you -- just one moment.

10 Well, your wife testified that she -- that y'all had some
11 bikes in the garage?

12 A Yes.

13 Q And could you describe for the jury what kind of
14 bikes you had that you would typically use or how often
15 you used them?

16 A So I have -- myself, I have two bikes. I have a road
17 bike. It's an older bike I don't ride very often. And a
18 mountain bike that I ride as much as I can.

19 Q What kind of mountain bike is it?

20 A It's a Kline.

21 Q And approximately how long had you had that bike?

22 A About 12 years.

23 Q Okay.

24 A Maybe a few less than that.

25 Q Approximately how much was the bike worth?

1 A About two thousand dollars.

2 Q What makes a bike -- not being an avid biker, but
3 what makes a bike that valuable?

4 A Well, this particular one, it's aluminum frame and
5 it's hand welded. Kline actually does make them anymore.
6 They're pretty expensive to make. They're not factory
7 made, they're hand welded.

8 Q So customized?

9 A Yeah.

10 Q All right. And how often would you ride that bike?

11 A A few times a week.

12 Q And what about the girls, would you ride with the
13 girls?

14 A Yes, with the girls.

15 Q All right. Where were the bicycles kept?

16 A In the garage.

17 Q And that would be the garage that we already saw
18 pictures of?

19 A Yes.

20 Q Okay. Hold on one moment.

21 (WHEREUPON, State's Exhibit No. 27 was marked
22 for identification.)

23 BY MS. TESSITORE:

24 Q When you would get the bikes out of the garage to
25 ride them, how would you go about typically getting to the

1 bikes?

2 A Two different ways. One, through the house going out
3 -- there's a door that leads into the garage, then use the
4 garage door opener to open the garage door or from the
5 outside and open the garage that way as well.

6 Q Okay. And would you say that -- approximately where
7 in the garage would the bikes be kept to make them
8 accessible?

9 A Either on the right-hand side where a car sometimes
10 could be because we have a lot of storage, a lot of items
11 on the left-hand side, so they would be either on the
12 right side or on the edge of the left.

13 Q So they were accessible if you were to the door, the
14 garage door?

15 A Yes.

16 Q Okay. All right. I'm showing you State's Exhibit
17 No. 27, which is kind of large, but if you could just take
18 a look at that. Do you recognize that?

19 A I do.

20 Q All right. And what area does that depict?

21 A It's our neighborhood.

22 Q You said you're familiar with it, obviously, for the
23 past seven years?

24 A I walk it -- walk or run it every single day.

25 Q Okay. Is that a fair and accurate depiction as far

1 as just the way the streets are laid out?

2 A It is.

3 Q Okay. And does your home appear on there?

4 A It does.

5 Q All right.

6 MS. TESSITORE: The State would move State's Exhibit
7 No. 27 into evidence.

8 THE COURT: No objection.

9 MR. MAXWELL: No objection.

10 THE COURT: Without objection.

11 (WHEREUPON, State's Exhibit No. 27 was admitted into
12 evidence.)

13 BY MS. TESSITORE:

14 Q All right. Okay, Mr. Tintinger, if you can just come
15 on down here.

16 A Sure.

17 Q And I ask you to be nice and loud so the court
18 reporter can hear --

19 THE COURT: I need you to go on the other side so the
20 court reporter -- you can face her as well as the jury.

21 BY MS. TESSITORE:

22 Q Just be nice and loud and clear so she can hear you.

23 A Okay.

24 Q So could you just point out to the jury where your
25 home is located?

1 A It's labeled back here █ Brookside Way.

2 Q All right. And just generally, what is around this
3 area that you can't see as far as up here in this area?

4 A You can see on the corner of Riverside and Bird. You
5 can see -- it's actually a golf course that goes on this
6 way. It runs the length of Riverside all the way down
7 this golf course. It kind of a -- the key box is right
8 there.

9 Q So if you were to trace Riverside, where would it end
10 up although it goes off the map right there?

11 A It would slightly go around up into this area right
12 here and joins right back up here. It's labeled again
13 Riverside. It's kind of an odd area where those -- it
14 changes to Brookside, but if you follow the line, it
15 changes to Riverside about there.

16 Q So pretty normal Greenville road dispute?

17 A Yes.

18 Q All right. So is this a full circle then?

19 A It is.

20 Q Comes around here?

21 A Yes.

22 Q And let's see, so you said your house is right here?

23 A Uh-huh.

24 Q And can you describe just also generally where is
25 Augusta Road in relation to this?

1 A Augusta Road would be on the east about right here.
2 Club and Douglas run into Augusta.

3 Q So we're talking about a pretty highly residential
4 area?

5 A Yes.

6 Q All right. And what I'm going to do is actually ask
7 you to actually just go ahead and have a seat and we'll
8 come back to this.

9 A Okay.

10 Q All right. Now, you're wife testified that she left
11 -- or excuse me, she had sounded the horn that morning.
12 Had you -- when you got up that next morning,
13 January 31st, what did you do when you got up?

14 A I would typically take the dogs for a walk.

15 Q Okay. Did you take the dogs for a walk that morning?

16 A I can't confirm, but I most likely did.

17 Q Were the girls getting ready for school?

18 A They would be, yes.

19 Q All right. Would you help them do that?

20 A No, they can do it by themselves.

21 Q And where would you typically take the dogs for a
22 walk?

23 A Around that loop that was shown in the picture.

24 Q That loop, okay. And when you were out that morning
25 would it have been dark when you took them for a walk?

1 A Yes.

2 Q Did you notice anything when you were out there?

3 A Not at the time, no.

4 Q Did you go -- how would you usually take the dogs
5 out, which door would you use?

6 A The front door.

7 Q Okay. And that front door faces -- State's Exhibit
8 2, is that the door you're talking about when you say
9 front door?

10 A Yes.

11 Q And that faces the street Brookside?

12 A Yep.

13 Q All right. And would you have gone in the same door
14 or a different door?

15 A Gone in and out the same door.

16 Q Okay. So as far as the next thing, did you hear the
17 horn as it was sounded in the driveway?

18 A Yes.

19 Q Had you gone -- before you heard the horn kind of
20 sirened by your wife there, did you notice anything, hear
21 anything unusual, observe anything?

22 A No, I hadn't.

23 Q All right. So once she sounded the horn, then what
24 happened?

25 A I went down to see what she needed.

1 Q What did you observe?

2 A At the time, she asked, Do you know where the garage
3 door opener is -- actually, she said, Do you know where
4 the garage door opener is? And I said, No. And she said
5 there's something wrong in her car. So I went down there
6 and sure enough, there was stuff strewn about in her
7 vehicle. And then she noticed the scooter underneath the
8 garage door and she said, What's going on with that?

9 Q Did you know what was going on with that?

10 A I did not know what was going on with that. So at
11 that point, we determined that something was not right and
12 that somebody had broken into our cars.

13 Q Okay. Did you look at the other cars as well?

14 A At the time, I didn't. I did probably -- you know,
15 she was rushing to get to her exam, so I looked at the
16 cars I think after she left.

17 Q And what did you notice on the other cars?

18 A Same situation. Stuff strewn about, glove
19 compartments open, things -- you know, the console in
20 between the seats ajar and things on this seats.

21 Q Okay. Did you -- at that point, obviously, she was
22 in control of the Volvo?

23 A Yes.

24 Q Did you look in the Volvo at all before she left?

25 A Yeah, I did. I saw that things were around. I did

1 look inside.

2 Q Then when she left, what did you do with respect to
3 the door and scooter?

4 A Well, I wanted to know what -- you know, obviously,
5 something was wrong, so it looked as if someone possibly
6 came inside. So I opened the garage door, looked inside
7 and at that point, I noticed that my mountain bike was
8 missing. So I knew that Susane was going to call the
9 police, 911, and that they would be coming. So then I
10 waited for them to give them a report.

11 Q Okay. So she's the one that made the call to 911 to
12 report that incident?

13 A Yes.

14 Q Were you there when the police responded?

15 A Yes.

16 Q And was that Officer Dirton?

17 A Yes.

18 Q And did he have a recruit with him?

19 A I believe he did, yes.

20 Q Okay. And at that time, did you pretty much describe
21 the gist of what you observed to them?

22 A Yes.

23 Q Did you indicate that you had already opened the
24 garage door?

25 A Yes.

1 Q How did you open the garage door?

2 A In the Prius, we don't have a garage door opener,
3 it's just built into the rearview mirror, so I opened it
4 from the Prius.

5 Q Okay.

6 A The left side.

7 Q The left side?

8 A The left side door.

9 Q All right. What about the right side where the
10 scooter was?

11 A I didn't open that. I let that --

12 Q Okay. Was anything else missing from the garage?

13 A Later, we determined that a bag of dog food was
14 missing, which was strange, but it was. And there was
15 nothing else.

16 Q Okay. From what you could tell, had anybody actually
17 entered into beyond the garage into the living space there
18 that's shown in the photo?

19 A I Couldn't tell.

20 Q Okay. But nothing was missing?

21 A No.

22 Q So was the -- when you say the scooter was there, was
23 that a scooter that belonged to your family?

24 A Yes. To my daughters, one of my daughters. I'm not
25 sure which one it was.

1 Q Okay. One of their scooters?

2 A Yes.

3 Q And when -- after they took the report, what happened
4 at that point?

5 A After they left, I decided -- so I logged into work
6 to try to get some work done. And I was sitting there in
7 the dinning room and I heard the garage door open. The
8 mechanical door, I said garage door, open and I thought
9 that was very strange since the one garage door opener
10 that we had was missing. So I got up and looked out the
11 window of the dining room which looks out onto the
12 driveway and I saw a man run into my garage. At that
13 point, I called 911.

14 Q All right. So let me back you up. When you say you
15 were in the dining room, where is that in relation to the
16 garage and the rest of the house?

17 A It is above the garage and it looks out -- it's on a
18 square where there are windows that face Brookside Road as
19 well as two windows that face the driveway.

20 Q Okay. When you say you heard the garage going up,
21 could you tell if it was the motor that was --

22 A Yeah, I heard the motor of the garage door.

23 Q Okay. And the only motor that was working at that
24 time was which one of the two?

25 A The left side.

1 Q Okay. I'm going to show you State's Exhibit 12, 13
2 and 14 and have you just take a look at those one by one.
3 Okay. Do you recognize those?

4 A I do.

5 Q What -- when you're talking about the windows, what
6 do those show? Start with State's Exhibit 12?

7 A So No. 12 is the window that I was -- this is
8 actually the door that leads to the porch outside that
9 goes into the garage.

10 Q Okay. So is this -- now, this wasn't taken at the
11 time?

12 A No.

13 Q All right.

14 A There are a lot more leaves in this picture because
15 in January, all the leaves are gone.

16 Q All right. Did you look at out that door?

17 A I did.

18 Q All right. And is this a fair and accurate depiction
19 of just the layout as far as where the driveway was and
20 the street?

21 A Yes.

22 Q Okay. And obviously, one of the cars was missing at
23 the time?

24 A That's right.

25 Q All right. I'm going to ask you to look at 13. And

1 what does that show?

2 A It's the same view out of the upper door, I believe,
3 looking out into the driveway.

4 Q Okay. And also 14, what does that show?

5 A So that shows the door that enters the house as well
6 as the window with the stairs going up to the door, up the
7 driveway and two garage doors.

8 Q And that also -- does that fairly show the way that
9 the --

10 A Yeah, the same structure.

11 Q The structure's the same, good.

12 MS. TESSITORE: At this time, the State would move
13 State's Exhibits 12, 13 and 14 into evidence.

14 THE COURT: Any objection?

15 MR. MAXWELL: No, objection, Your Honor.

16 THE COURT: Without objection.

17 (WHEREUPON, State's Exhibit Nos. 12, 13 and 14
18 were admitted into evidence.)

19 MS. TESSITORE: Request to publish those to the jury,
20 Your Honor.

21 THE COURT: All right.

22 BY MS. TESSITORE:

23 Q Okay. So looking at the door -- I'm going to back up
24 a little bit. Well, when you first looked out the window,
25 let's start there. What did you see as far as -- describe

1 -- you said you saw a man?

2 A Yes.

3 Q All right. Describe what you saw.

4 A So I saw a man wearing a green hoodie sweatshirt, the
5 hood was on. And he was -- I don't want to say sprinting,
6 but moving very quickly into the garage. And so at that
7 point, I called 911 and told them that a man had entered
8 our house. And then when I kept watching out the window,
9 I saw the man dragging out a very large box. It was
10 actually a basketball hoop that was given to my kids. It
11 was still in the box because I hadn't put it together yet.
12 It was a Christmas present that I hadn't put together yet.
13 And so he was dragging that up the driveway.

14 Q Now, that basketball goal and post, is that the same
15 one that's seen in the picture there?

16 A Yes.

17 Q So you did finally put it together?

18 A I did put it together, yes.

19 Q Very good. Let's just go back a little bit to --
20 approximately what time was this when you heard the garage
21 door going up?

22 A I'd say about 9:30.

23 Q And how was the lighting that day as far as being
24 able to --

25 A It was a sunny day. It was good visibility.

1 Q So you had no trouble seeing him?

2 A No.

3 Q And was he -- how would you describe him as far as
4 height, weight?

5 A Medium build, maybe six-foot, maybe a little shorter,
6 relatively athletic because he was running easily down the
7 driveway.

8 Q Was he Caucasian?

9 A He was a black male.

10 Q All right. Did he have any distinguishing
11 characteristics that you could tell from --

12 A I couldn't tell. He was wearing a hoodie.

13 Q All right. But could you -- was he alone?

14 A He was alone.

15 Q And I'm going to show you State's Exhibit No. 15.
16 And do you recognize that?

17 A Yes, that's my driveway.

18 Q All right. From which perspective?

19 A Standing in about the center of the driveway looking
20 back up onto Brookside Way.

21 Q Okay. So when you say he was coming down the
22 driveway, does that help show --

23 A Yes, he -- so he's -- he came down the driveway and
24 into the garage. He came down the driveway.

25 MS. TESSITORE: Move State's 15 into evidence.

1 THE COURT: Any objection?

2 MR. MAXWELL: No objection.

3 (WHEREUPON, State's Exhibit No. 15 was admitted
4 into evidence.)

5 BY MS. TESSITORE:

6 Q All right. And after you said he began to drag a
7 box?

8 A Yeah.

9 Q Can you describe for the jury what kind of box we're
10 talking about?

11 A So it was a foam casing box of a basketball hoop and
12 had a basketball. It had the backboard, the rim, the
13 structure, the platform. It probably weighed 60 pounds,
14 50 to 60 pounds. It still had the straps on it for
15 shipping to keep everything encased.

16 Q What kind of straps?

17 A Just those nylon straps that are kind of welded
18 together or melted together.

19 Q The ones that hurt your fingers when you try to tear
20 it?

21 A Yeah, those kind.

22 Q Okay. And where was that box?

23 A It was inside the garage on the left-hand side -- or
24 left side of the garage on the left-hand side.

25 Q So it was in the garage?

1 A Yes.

2 Q And the -- do you ever -- well, strike that, let me
3 go back a step. As you saw him dragging this box, where
4 was he headed with the box?

5 A Up the driveway towards Brookside Way, to the street.

6 Q And what did you do in response when you saw all this
7 happening?

8 A Well, I called 911 and --

9 Q Did you go outside?

10 A I did. I opened the door that was shown in the
11 picture.

12 Q What door is that?

13 A The driveway door that was shown in, I think, Exhibit
14 12 or --

15 Q Fourteen?

16 A Fourteen, that's it.

17 Q Is that it?

18 A Yes, that's the door. I opened that door and stepped
19 out. I said, The police are on their way. I yelled at
20 him. And he said, F you. So I kind of --

21 Q Did he say -- I mean, cursed it?

22 A Yeah. So I kind of stepped back inside the house.

23 Q Was he facing you or was he --

24 A He was facing me, yes. He was up at the road at that
25 time. He was up at the street.

1 Q Okay.

2 A And it looked like he was -- couldn't totally tell,
3 then I saw him get on a bike.

4 Q All right. Were you able to see the bike from where
5 you were?

6 A I did, I saw the bike. Initially, I said it was
7 silver with a light. It ended up being he was on a green
8 -- on my mountain bike that was stolen out of the garage.

9 Q Which color was that one?

10 A Green.

11 Q All right. That's the aluminum bike you were
12 describing?

13 A Yes.

14 Q And so where was the bike when he got on your bike to
15 leave?

16 A It was on the top of the driveway right at the road.

17 Q Okay. Showing you State's Exhibit No. 16. Is that
18 where you're describing?

19 A Yes. Maybe the picture of the driveway a second ago
20 may be a better depiction.

21 Q What does that show?

22 A This is Brookside Way. It's a parking patch on the
23 right, which is ours as well, and it goes -- our property
24 goes along the right side of the road. And about the
25 middle of the picture is where our driveway meets. That's

1 where he was.

2 Q Okay. So the -- oh, I see. So this is the upper pad
3 where you park on the bricks?

4 A Yes.

5 Q And there's a sign there?

6 A Yep.

7 Q Campaign sign or --

8 A Yeah, campaign sign, yes.

9 Q And your driveway is after that sign?

10 A It is.

11 Q Okay. All right. So looking at State's Exhibit No.
12 16, which road does that?

13 A This is Brookside Way.

14 Q Okay. Looking up or down?

15 A Down.

16 Q Down. All right. And is that a fair and accurate
17 depiction of the way it appeared as far as the streets?

18 A Yes.

19 Q Not the leaves, but --

20 A Yes.

21 Q Okay.

22 MS. TESSITORE: I move State's Exhibit No. 16 into
23 evidence, Your Honor.

24 THE COURT: Any objection?

25 MR. MAXWELL: No objection, Your Honor.

1 (WHEREUPON, State's Exhibit No. 16 was admitted
2 into evidence.)
3 BY MS. TESSITORE:
4 Q All right. And No. 15 is the one with the end of the
5 driveway?
6 A That's right.
7 Q All right.
8 A So he was at the top of the driveway right up the
9 road.
10 Q And that's where the bike was?
11 A Yes.
12 Q All right. Did you ever see the bike anywhere else,
13 down on the driveway or --
14 A No.
15 Q And the last time you had seen that bike was where?
16 A In my garage.
17 Q Is that something you typically keep in your garage?
18 A Yes.
19 Q And when he got on your bike, what happened to the
20 box?
21 A He dropped it. He left it there.
22 Q Okay. And did he have anything else in his hands
23 from what you could tell?
24 A I couldn't tell.
25 Q What did he do at that point?

1 A He rode down -- he rode away down Brookside Way.

2 Q And at what point did you call 911?

3 A I called 911 when he entered the garage.

4 Q When you first heard the --

5 A After the garage door opened, when I heard the motor
6 and I saw him run in, then I called 911.

7 Q Okay. And when you called 911, did you describe to
8 them what was happening?

9 A Yes.

10 Q Is it fair to say you were under the stress of the --
11 of everything that was going on?

12 A I was a little excited, yes.

13 Q And I'm going to show you State's Exhibit No. 11 and
14 ask you if you recognize that?

15 A I do.

16 Q What is that?

17 A It's a recording of the 911 call I made and I
18 initialed it.

19 Q Okay. Is a fair and accurate recording of the call
20 you made that day?

21 A It is.

22 Q All right.

23 MS. TESSITORE: State would move State's Exhibit 11
24 into evidence.

25 THE COURT: Any objection?

1 MR. MAXWELL: No objection.

2 MS. TESSITORE: And request to publish that to the
3 jury, Your Honor.

4 THE COURT: Okay.

5 (WHEREUPON, State's Exhibit No. 11 was admitted
6 into evidence.)

7 THE COURT: I understand the jury's lunch is here, so
8 we'll recess at this time for lunch, then we'll start that
9 after lunch, okay.

10 Take the jury out, please.

11 You can step down now.

12 (WHEREUPON, the jury left the courtroom at
13 approximately 1:05 p.m.)

14 THE COURT: All right, we'll stand in recess. Let's
15 try to start back at quarter till 2:00, 1:45, okay?

16 MS. TESSITORE: Yes, sir.

17 MR. MAXWELL: Thank you, Your Honor.

18 (WHEREUPON, a lunch break was taken.)

19 MS. TESSITORE: Let me get the CD ready to go. If I
20 could, actually, just put it in and set it up to where I'm
21 going to start it.

22 THE COURT: Sure.

23 MS. TESSITORE: That will save me a little bit of
24 time.

25 Ready, Judge.

1 THE COURT: Bring in the jury.

2 (WHEREUPON, the jury entered the courtroom at
3 approximately 2:03 p.m.)

4 THE COURT: Come around, you're still under oath.

5 All right, Solicitor, you may proceed.

6 MS. TESSITORE: Thank you, Your Honor. We request to
7 publish the 911 call?

8 THE COURT: Yes.

9 (WHEREUPON, the second 911 call, State's Exhibit
10 No. 11, was published.)

11 MR. MAXWELL: Objection, Your Honor.

12 THE COURT: Hold on, hold on.

13 Yes, sir.

14 MR. MAXWELL: Your Honor, we had agreed to exclude
15 certain parts --

16 MS. TESSITORE: Your Honor, can we approach?

17 THE COURT: All right.

18 (WHEREUPON, a bench conference was held.)

19 THE COURT: Take the jury out for a minute, please.

20 (WHEREUPON, the jury left the courtroom at
21 approximately 2:07 p.m.)

22 THE COURT: Okay, Mr. Maxwell, what's your objection?

23 MR. MAXWELL: Yes, Your Honor, before trial we had
24 approached and we had agreed to exclude any kind of
25 comment about referring back to he's coming back, you

1 know, referring to this Defendant was once there and he's
2 come back. You know, at the very beginning solicitor
3 redacted it and now she's playing it.

4 MS. TESSITORE: Well, just to clarify that, the issue
5 arose when I was playing the 911 call, which you've had a
6 chance to listen to and review beforehand. And I had
7 approached the public defender with the fact that there
8 was this initial statement that -- where the victim says,
9 apparently, there was a streak of break-ins. So I had
10 gone ahead and taken that statement out so that there
11 wouldn't be any reference to other break-ins.

12 And then Mr. Maxwell heard the 911 call we were
13 playing and at the very beginning of it is the county
14 dispatcher saying -- the dispatcher is stating, The same
15 guy came back. And she's relaying information from,
16 perhaps, the victims or officers or whatever it is.
17 Because the dispatcher is not here to cross-examine and
18 because that could be potentially prejudicial, we agreed
19 to start it at the 30-second mark, which would take out
20 those other voices.

21 And at this point, it's contained to what
22 Mr. Tintinger has said, which is that the same guy came
23 back. That's this witness's out-of-court statement that
24 was made under the stress of the event. It's clearly an
25 excited utterance. He's relaying events as they're

1 occurring, so it's a presence sense impression. So it's
2 admissible in all of those ways. It's his conclusion that
3 it's the same guy. And Mr. Maxwell would certainly be
4 able to cross-examine the witness about why he thought
5 that and what basis he had for thinking that. And has,
6 you know, obviously full abilities to ferret that out for
7 the jury to decide. You know, it's not offered for the
8 truth of the matter, but rather --

9 THE COURT: Okay. All right.

10 MR. MAXWELL: Your Honor, I'm not necessarily
11 objecting to the hearsay aspect of it. I'm not waiving
12 that either at this point. But my contention is that at
13 the beginning, she did approach me about trying to exclude
14 certain things and we even talked about it in front of
15 Your Honor about excluding this one statement from the 911
16 operator about he's coming back. You know, so maybe I
17 would just -- under false impression or something like
18 that, but that's my basis for the objection is that I was
19 under the impression that all these type statements would
20 be excluded or redacted.

21 Now, as far as hearsay goes, I don't know if it's an
22 excited utterance or not. It is a conclusion. It's not
23 an observation of what he's observing. But Your Honor, I
24 would just ask --

25 THE COURT: All right, subject to the objection, I'm

1 going to allow that. I think that's a matter you can take
2 up on cross-examination.

3 MR. MAXWELL: Thank you, Your Honor.

4 THE COURT: Okay, bring the jury in.

5 MS. TESSITORE: Your Honor, there may have been a
6 couple of seconds that were missed, can I just back it up
7 two seconds?

8 THE COURT: No, just start there.

9 MS. TESSITORE: Just leave it where it is, okay.

10 (WHEREUPON, the jury came into the courtroom at
11 approximately 2:10 p.m.)

12 THE COURT: All right, Solicitor, you may proceed.

13 MS. TESSITORE: Thank you, Your Honor.

14 (WHEREUPON, the second 911 call was continued to
15 be played.)

16 MR. MAXWELL: Your Honor, if I may, I'd just like to
17 renew my objection towards those last comments towards the
18 end of the tape there.

19 THE COURT: Certainly, you're protected.

20 BY MS. TESSITORE:

21 Q Okay, Mr. Tintinger, can you just tell the jury when
22 you were talking to other people, who were you talking to
23 other than the dispatcher?

24 A There were people who live in the neighborhood, they
25 were in their cars and I was just asking if they had seen

1 someone riding a bike, kind of giving them my opinion of
2 what happened.

3 Q So a quick version of have you seen this guy?

4 A That's right.

5 Q Okay. And, in fact, in the 911 call, you stated that
6 you did see him as you were talking to the dispatcher; is
7 that correct?

8 A That's right.

9 Q And tell the jury what exactly you saw -- where you
10 were when you saw -- when you described the Defendant?

11 A Okay. So I was outside my house. There's a --
12 should we use the map?

13 Q Sure, if that would help you explain it. I ask you
14 to just step around here again. Does that give you enough
15 space?

16 A Yeah.

17 Q Okay. Go ahead and explain to the jury -- if you can
18 orient them as far as where you were and what you saw.

19 A Okay, so this is my house. At the time I saw him go
20 across the road, I was standing in this intersection. The
21 person I was talking to was at the stop sign. There's a
22 sign right here and I was standing right in this
23 intersection. And I believe I said country club, but it's
24 Club Drive and he came across Club Drive and he crossed
25 Bird. That's when I spoke, I said, There he is. He was

1 crossing this road right here.

2 Q Okay. And if you could, just step back just a little
3 bit. I want to make sure everybody can see what you were
4 describing. So if you could, I'm going to get you a
5 marker, maybe that will help. And what did you see about
6 him as you were looking?

7 A I could see a person with a green sweatshirt on a
8 mountain bike across the road.

9 Q Okay, if you could --

10 MR. MAXWELL: Your Honor, I object to any kind of
11 permanent marking on the exhibit.

12 THE COURT: No, he can do that.

13 Go ahead.

14 BY MS. TESSITORE:

15 Q Mr. Tintinger, if you could just use that marker and
16 just put your initials approximately where you were when
17 you saw him crossing Bird. Here, I'll hold it.

18 A (The witness complied.)

19 Q Okay. And is there any kind of traffic signs or
20 anything right there?

21 A There's a stop sign right there.

22 Q Okay. And if you could circle it just so it's a
23 little bit easier to see.

24 A Sure.

25 Q Okay. So -- and where was the suspect when you saw

1 him, if you could indicate?

2 A He was coming across the road that way.

3 Q Okay. And if you could also indicate on here, when
4 he took -- where's your driveway?

5 A My driveway is right here.

6 Q Okay. Can you mark where at the end of the driveway
7 where the bike was that he got onto it?

8 A It was right here.

9 Q And which direction did he head in, if you could draw
10 an arrow on that X?

11 A (Witness complied.)

12 Q Okay. So if you went down this way and you then saw
13 him approximately a few minutes later as you're calling
14 911?

15 A Yes, on the phone with 911, I saw him cross the road.

16 Q Okay. So if you could, just tell the jury as far as
17 these roads and how they work there, the possible routes
18 he could have taken to get to that point in those three or
19 four seconds.

20 A Our neighborhood, it's a circle and there are no
21 outlet roads coming out of this Riverside/Brookside
22 circle. So there's no way to know, but he could go up
23 Heather, Sylvan. This is an alley, this is the club,
24 which comes across Bird and takes it to Augusta, or all
25 the way around Riverside, which then comes and kicks out

1 up here. So there are really no other ways to get out of
2 the neighborhood.

3 Q All right. And you don't know whether he took
4 Heather, Sylvan or this alleyway right here?

5 A No.

6 Q Okay. All right. Let me see if there's anything
7 else before we put that away. So the -- so your driveway
8 where the garage is on the side of the house, can you just
9 put a mark where the garage is?

10 A The garage is right here.

11 Q Okay. Very good. Okay. You can give me that and
12 take a seat. Okay. So while you were on the phone with
13 911 and you were able to give the description that you
14 gave of him, again, your view is pretty unobscured as far
15 as in the driveway, right?

16 A I'm sorry, could you repeat the question?

17 Q When you saw him in the driveway, was anything
18 different about him when you saw him on the bike a few
19 minutes later?

20 A No.

21 Q Could you tell if he was wearing his hood that second
22 point when you saw him?

23 A The second point, I could not tell.

24 Q All right. And I'm going to show you State's Exhibit
25 17 and ask you to identify what that view is?

1 A That is the view from how I marked looking up the
2 road, up Bird to where he crossed the road.

3 Q Okay. And is that a fair and accurate depiction of
4 how it appeared that day as far as the roadway?

5 A It is.

6 Q Was there any vehicles or anything else obstructing
7 your view from that point looking up the road?

8 A No.

9 Q Okay. So it's a pretty straight shot?

10 A Yep.

11 MS. TESSITORE: At this time, I would move State's
12 Exhibit 17 into evidence.

13 MR. MAXWELL: No objection.

14 THE COURT: Without objection.

15 (WHEREUPON, State's Exhibit No. 17 was admitted
16 into evidence.)

17 BY MS. TESSITORE:

18 Q Okay. And after you spotted him and you hung up with
19 911, what happened after that?

20 A I waited in my house and a while later, a police
21 officer came and said they apprehended the suspect.

22 Q And how quickly was that after you hung up with 911?

23 A That they returned?

24 Q Well, when you saw him, did you see the police as
25 well?

1 A I did. He crossed -- on the 911 tape, you can say
2 there are the police. So it was maybe five, 10 seconds
3 after he crossed the road on the bike as the police
4 officers were coming down Bird, they took a right onto
5 Club.

6 Q In the same direction that he went?

7 A Same direction.

8 Q Okay. Very good. Now, did the police bring a bike
9 back to you?

10 A They did. The forensic team brought the bike back to
11 me.

12 Q Okay. I'm showing you what's been marked as State's
13 Exhibit 18. Do you recognize that?

14 A I do.

15 Q What is that?

16 A That is my bike.

17 Q And is that the bike --

18 A That is the bike that I reported stolen in the
19 morning when the police officers arrived. It's a green
20 bike with silver rims and several components.

21 Q Okay. And is it a fair and accurate depiction of how
22 it appeared that day?

23 A Yes.

24 Q Okay.

25 MS. TESSITORE: State would move State's Exhibit No.

1 18 into evidence.

2 MR. MAXWELL: No objection, Your Honor.

3 THE COURT: Okay.

4 (WHEREUPON, State's Exhibit No. 18 was admitted
5 into evidence.)

6 BY MS. TESSITORE:

7 Q All right. And after they brought the bike to you,
8 did they also discover any other of the items as far as
9 the shirts or the garage door opener?

10 A We found the garage door opener on the road near to
11 where he got on the bike, but it was smashed.

12 Q Okay. What area was that? You said down where the
13 bike was, at what time?

14 A Where he got on the bike above the driveway on the
15 road.

16 Q Okay.

17 A So when he was leaving the house.

18 Q All right. And did you identify that garage door
19 opener?

20 A I did. It was the one that was taken out of our car.

21 Q Okay. I'm showing you State's Exhibit 20 and 21. If
22 you could take a look at those. Do you recognize those?

23 A I do.

24 Q And what are those?

25 A Those are pieces of the garage door opener that had

1 been smashed.

2 Q Okay. And that's how you saw them that day?

3 A Yes.

4 MS. TESSITORE: State would move State's Exhibit 20
5 and 21 in.

6 MR. MAXWELL: No objection.

7 THE COURT: Without objection.

8 (WHEREUPON, State's Exhibit Nos. 20 and 21 were
9 admitted into evidence.)

10 BY MS. TESSITORE:

11 Q And obviously, did you try to use the remote again to
12 see if it would work?

13 A I did not.

14 Q All right. Did you provide -- did you have any
15 security system in place at the time this was all
16 happening?

17 A At the house, we do have a security system.

18 Q Did you have one then?

19 A Yes.

20 Q Did you use it back in January?

21 A We do sometimes. Sometimes we do and sometimes we
22 don't.

23 Q Okay. And now?

24 A We use it much more often.

25 Q So there was no alert as far as -- well, let me ask

1 you this, was it a security system on that evening such
2 that if a door had opened, would you have been signaled?

3 A Yes. Even if the alarm is not set, there are chimes
4 for every door, so the chime would ring on any door
5 opening.

6 Q But not the garage door?

7 A Not the garage door.

8 Q So if the garage door opens, there's no chimes?

9 A No chimes.

10 Q Okay. All right. Just one moment. And when the
11 police came out -- I mean, returned with your bike and the
12 garage door opener, did you have an opportunity at that
13 point to see the suspect that they had in custody?

14 A No.

15 Q Okay. Did -- were you able to provide a statement to
16 the police about the events as they occurred?

17 A I did, yes. I wrote a written statement.

18 Q Essentially, what you've told us here today?

19 A That is correct.

20 Q Do you -- did you have any other involvement as far
21 as after they had cleared the scene?

22 A No.

23 Q Okay. Do you recall the forensic officer coming out?

24 A I do.

25 Q Do you recall -- did you speak with him?

1 A I did.

2 Q All right.

3 A He asked if the bike were mine, I confirmed that it
4 was. And he looked around -- he looked at the cars that
5 were broken into and he said he couldn't get any prints
6 off them.

7 Q Okay. None of the cars were, I mean, visibly damaged
8 in the sense of windows or doors being smashed or --

9 THE COURT: Solicitor, now, what relevance is that?

10 MS. TESSITORE: I'm sorry, withdrawn.

11 Okay. Please answer any questions Mr. Maxwell has.

12 THE COURT: Any questions?

13 MR. MAXWELL: Just a few, Your Honor.

14 CROSS-EXAMINATION

15 BY MR. MAXWELL:

16 Q Mr. Tintinger, how long ago did you purchase the
17 bike?

18 A About 12, 15 years ago.

19 Q In the 1990's?

20 A Yes.

21 Q And this must have been a traumatic event for you?

22 A Yeah.

23 Q I could imagine, you were going -- pretty excited?

24 A Yeah, I was excited.

25 Q You know, I couldn't imagine going through something

1 like this. You said that the individual, you saw him
2 throw down the garage door opener.

3 A I couldn't quite tell. He was making movements by
4 his bike -- by the bike that he was on, mine.

5 Q By the bike, he was making movements like picking up
6 the bike movements?

7 A I couldn't quite discern what he was doing because it
8 was -- he was at the end of the driveway. And I'm not
9 sure if he threw anything down or not.

10 Q So the garage door opener was at the end of your
11 driveway?

12 A What's that?

13 Q The garage door opener, the crushed one, it was at
14 the end of your driveway?

15 A Yes.

16 Q And that's where the bike was?

17 A Yes.

18 Q Okay. And this box that he was moving, where was
19 that?

20 A The box originally was in the garage and he pulled it
21 up the driveway.

22 Q All the way to the end?

23 A Yes.

24 MR. MAXWELL: Okay. That's all I have. Thank you.

25 THE COURT: Thank you, step down.

1 MS. TESSITORE: The State would call Officer Dirton.

2 THE CLERK: Sir, if you would place your left hand on
3 the Bible and raise your right hand.

4 DALE DIRTON, after having been duly sworn,
5 testified as follows:

6 THE CLERK: Thank you, please be seated. Please
7 state your name for the record.

8 THE WITNESS: Yes, my name is Dale M. Dirton.

9 DIRECT EXAMINATION

10 BY MS. TESSITORE:

11 Q Officer Dirton, where do you work?

12 A Greenville City Police Department.

13 Q How long have you worked there?

14 A Seven years, seven months.

15 Q Oak. And how long have you been in law enforcement?

16 A Seven years and seven months.

17 Q Okay. What's your position with the city police?

18 A Patrolman.

19 Q And as a patrolman, generally, what are your duties?

20 A Respond to 911 emergency calls, enforce traffic laws,
21 that's basically it.

22 Q Respond, I'm sorry, you're going to have to speak up
23 just a little bit.

24 A Can you hear me now?

25 Q Yes.

1 A Okay. Basically, respond to 911 emergency calls,
2 enforce traffic laws, that's basically it.

3 Q Okay. As part of your duties, did you have the
4 occasion to go out to █ Brookside Way in Greenville County
5 on Thursday, January 31st in the morning?

6 A Yes, I did.

7 Q Okay. And who was working with you that day?

8 A Officer Robert England.

9 Q Okay. Is he still with the city police?

10 A He is. He's on military leave in Afghanistan.

11 Q Okay. And so you responded with him that morning at
12 8:00 o'clock?

13 A Yes, I was actually his training officer.

14 Q Okay. As his training officer, when you got out
15 there for the first report when Ms. Tintinger called, can
16 you describe for the jury what you discovered when you
17 arrived to the house?

18 A Basically, when we arrived on the scene, we observed
19 two vehicles and Mr. Tintinger. The vehicles appeared to
20 be rummaged through, compartment had been opened. He
21 advised us that items had been removed from the vehicle.

22 Q Okay. And those vehicles that you were looking at
23 were the Prius and minivan?

24 A Yes.

25 Q Okay. And did you observe the -- what did you

1 observe about the doors, the garage doors at that time?

2 A We did take a look inside the garage. He had some
3 items inside the garage that was -- you couldn't put a
4 vehicle in there. He had a lot of items inside.

5 Q Okay. Did Mr. Tintinger indicate that something had
6 been taken from the garage?

7 A Yes, he informed me that a green Kline brand mountain
8 bike had been taken.

9 Q Okay. And other than the shirts and the garage door
10 opener, were there any other items?

11 A No.

12 Q At that time that they knew of?

13 A Not at that time.

14 Q Did you contact forensics?

15 A We made contact with our dispatcher to advise them.
16 They came --

17 Q I'm sorry, can you back up? Tell the jury how it is
18 that you contact a forensic officer in a case.

19 A Okay. Once we arrive on scene for an auto breaking
20 or burglary, we contact our dispatch radio or contact
21 through cell phone or landline and request for forensics
22 to respond. At that time, vehicles -- sometimes they will
23 ask us if the vehicle is wet and if they are at that time,
24 they will not respond at that time because of the
25 conditions of the vehicle.

1 Q So they rely on you to report the condition of the
2 vehicle as far as whether it's wet or dry or?

3 A Yes.

4 Q Okay. And did you indicate to them what the
5 condition was of the two vehicles that were there?

6 A I did, yes.

7 Q And what did you indicate?

8 A That the vehicle still had some wetness on the
9 vehicle, outside of the vehicle -- vehicles.

10 Q This was the morning time, morning dew?

11 A Yes.

12 Q Was it raining that day?

13 A I can't remember.

14 Q Okay.

15 A It was early in the morning. It would have had
16 condensation or dew on the vehicle.

17 Q Dew, I'm sorry, I didn't catch the last part?

18 A Condensation on the vehicle.

19 Q Condensation, okay. So they didn't come out at that
20 point in time?

21 A Yes.

22 Q All right. Did you make a report of all these
23 observations?

24 A I did, yes, I did.

25 Q And you went on your way?

1 A Yes, I cleared the scene.

2 Q All right. Given the fact that the garage door
3 opener had been taken -- well, strike that. After you
4 cleared the scene, were you called back by dispatch
5 regarding the same incident location?

6 A Yeah, they -- what they -- they will send a signal
7 out on the radio, attention to all officers that there is
8 possibly a burglary in progress or crime in progress.

9 Q Okay.

10 A And they gave the location and I announced that I was
11 going to be returning to that location.

12 Q Were you close by?

13 A I was. Yes, I was.

14 Q And this was a little over an hour later, I guess?

15 A Yes.

16 Q Approximately what time did you get the second call?

17 A Around 9:20, approximately 9:20.

18 Q Okay. And when you got that call, what information
19 did you have that you were then responding to?

20 A We were informed by dispatch that there was someone
21 entering into the home of [REDACTED] Brookside.

22 Q Is that in Greenville County?

23 A Yes.

24 Q Okay.

25 A And --

1 Q The Tintingers' home?

2 A The Tintingers' home, yes. And at that point, I
3 advised them I will be responding with lights and sirens
4 to hurry up and get there to that location.

5 Q You're going to have to speak up a little bit more
6 because I'm having a little trouble hearing you.

7 A Okay. I advised dispatch that I would be responding
8 with lights and sirens in a response to hurry up and get
9 there to the scene because the home owner was inside at
10 the time.

11 Q And describe what happened as you were responding.

12 A They told us that the suspect was possibly -- had
13 left the area and was headed towards Riverside Drive.

14 Q What description did you have on that suspect?

15 A Black male, green hoodie and was on a bicycle.

16 Q Okay. Did you have any other information regarding
17 height or weight or anything like that?

18 A I don't recall the height information.

19 Q Would you have noted that in your report?

20 A Yes.

21 Q Okay. Do you have that with you?

22 A I do.

23 Q Can you just take a look and see what the description
24 was that you were -- that you had in responding?

25 A Height is six feet.

1 Q Okay. And was he alone?

2 A Yes, he was alone.

3 Q And what was he -- he was riding a bike you said?

4 A Yes, he was going to be on a bicycle.

5 Q Okay. And given all that information, in the general
6 direction that he was traveling, what did you find?

7 A Well, we turned onto Riverside Drive because that's
8 what dispatch advised us he would possibly be in that
9 area. So as we turned onto Riverside, we came to the
10 intersection of Bird Boulevard. We made an immediate
11 right and as soon as we turned onto Club -- correction,
12 onto Bird, we observed -- I could see a male subject with
13 a green hoodie and a bicycle. At this time, he was
14 standing beside the bike, walking with the bicycle
15 crossing over Bird onto Club Drive.

16 Q Okay. I'm going to ask you to go ahead and step
17 down.

18 A Sure.

19 Q We're just going to use this diagram. Actually, if
20 you could step to that side just to make sure the jury can
21 see what you're doing and over here.

22 A Okay. All right.

23 Q Now, can you put a mark where you saw the Defendant
24 on -- where you first saw the Defendant?

25 A Okay. As soon as we turned from Riverside onto Bird,

1 approximately around here, and seen the Defendant here.

2 Q Okay. And can you describe when you turned in behind
3 him there, you turned onto Club?

4 A Yes.

5 Q All right.

6 A Made a right on Club.

7 Q And just draw an arrow kind of tracking the direction
8 -- the path the Defendant took.

9 A Okay. This is the path that he took. He was on the
10 right side of the road headed towards Augusta Street.

11 Q Okay. And you were in your car?

12 A I was in my vehicle. I turned and pulled beside him
13 and instructed him to stop. He continued on. He actually
14 sped up on the bicycle.

15 Q Did he actually get on the bike or was he walking?

16 A Yeah, he got on the bicycle probably right here. As
17 soon as we crossed over Club -- crossed over Bird on this
18 side right there at Club, he hopped on the bicycle.

19 Q So he's riding the bicycle at a brisk pace?

20 A Yes.

21 Q And then describe where he went and what happened?

22 A All right. So we pulled beside him. I let my window
23 down and instructed him to stop. He continued on. And I
24 instructed my officer, England at the time, to exit the
25 vehicle and make contact with him and detain him.

1 Q Okay.

2 A At that time, he continued on and made a right into
3 Club. And that's a driveway. He continued on up this
4 driveway. And there was like a fence that was closed. At
5 this time, I was thinking that he was going to either try
6 to flee over to this next road. I was unsure at the time,
7 so I stayed in my vehicle and if he did, I was going to
8 try to cut him off on the next street.

9 Q And where does Riverside lead if you follow that way?

10 A Yeah, you can continue on this way, at least, to
11 Augusta Street.

12 Q Okay. Riverside and Club, do they both go out to
13 Augusta?

14 A Yes, run to Augusta Street.

15 Q So what happened?

16 A As I'm watching him to see his path, he hops off the
17 bicycle and tries to jump over this fence.

18 Q How high was the fence approximately?

19 A Six to eight feet.

20 Q So taller than him?

21 A Yes.

22 Q All right. And how was -- was he successful?

23 A He was not.

24 Q Okay.

25 A He come back down the fence and turned around and

1 maybe 10 feet across from Officer England.

2 At that time, I didn't know if he was going to try to
3 challenge him and if he had a weapon, so I exited my
4 vehicle and approached England's right side. At that
5 time, the Defendant started running. And there's a tree
6 line that separates 41 and 45. He crossed over the tree
7 line and I was able to get in front of him and he
8 continued to run.

9 Q While he's running, are you issuing any commands?

10 A I instructed him to stop.

11 Q Okay.

12 A Stop running.

13 Q Did you tell him he was under arrest?

14 A I did tell him to stop running, stop what he was
15 doing and he continued on running towards me.

16 Q Okay.

17 A At that point, I deployed my taser.

18 Q Okay. What happened when you deployed your taser --

19 THE COURT: Can he come back to his seat now?

20 MR. TESSITORE: Yes.

21 BY MS. TESSITORE:

22 Q Can you take your seat, please?

23 A All right.

24 Q It's just easier to hear that way, too.

25 A All right.

1 Q Okay. Just for the jury, deploying the taser, just
2 tell them what that means.

3 A All right. I removed my taser from my holster, which
4 is on my left side. Once I removed it, I brought it up
5 and pointed it at the Defendant.

6 Q Okay. And the taser is generally what kind of
7 tactic?

8 THE COURT: Solicitor, why do you have to describe
9 what the taser is like?

10 MS. TESSITORE: Just trying to help the jury out, but
11 --

12 THE COURT: Please move on.

13 BY MS. TESSITORE:

14 Q Assuming that everyone knows what a taser is, you
15 deployed your taser and that worked to subdue him?

16 A It did not. The threat of using the taser, he
17 continues running towards me.

18 Q At some point, were you able to subdue him?

19 A Yes.

20 Q All right. If you could, just kind of describe to
21 the jury how you were eventually able to detain him.

22 A All right. Officer England was running behind him as
23 I deployed my taser, took him to the ground. England was
24 able to place him on the ground. Once we got him onto the
25 ground, giving him commands and advising him that he was

1 under arrest and stop resisting, give me your hands. His
2 hands was underneath his belly because he was on his
3 stomach. England was trying to remove his right hand and
4 I had to remove his left hand, was able to get him
5 handcuffed.

6 Q Now, did you notice anything on his hands?

7 A Yes. On his left hand, he had a latex glove, clear
8 latex glove.

9 Q Okay. Did he have anything on his right hand?

10 A I don't recall.

11 Q What did you do with the glove?

12 A The glove was collected.

13 Q When you say it was collected, what does that mean?

14 A I removed the glove from his left hand and secured it
15 in my vehicle and placed it into property and evidence.

16 Q All right. We're going to go back to that. I'm just
17 going to show you State's Exhibit 22 and 23 and ask you to
18 identify what those are.

19 A Okay, yes.

20 Q Do you recognize them?

21 A I do.

22 Q What are they?

23 A This is the driveway that he was running towards. He
24 ran into this driveway here --

25 Q I'm going to move this so they can hear you.

1 A All right. And this is also the same driveway, it's
2 a closer view of the fence.

3 Q And that's the fence you were referring to?

4 A Yes.

5 Q Okay. And are those fair and accurate depictions
6 from that day right after you detained him?

7 A Yes, ma'am.

8 Q And does that help refresh your recollection about
9 how the weather was that day?

10 A Yes, ma'am.

11 MS. TESSITORE: The State would move 22 and 23 into
12 evidence.

13 THE COURT: Any objection?

14 MR. MAXWELL: No objection.

15 (WHEREUPON, State's Exhibit Nos. 22 and 23 were
16 admitted into evidence.)

17 BY MS. TESSITORE:

18 Q So you were able to collect the glove you said?

19 A Yes, ma'am.

20 Q Okay. If you could, just take that out of the
21 envelope and just hold it down there and take a look at it
22 and I'll ask you do you recognize that. I'm showing you
23 what's marked as State's Exhibit 25.

24 A Yes.

25 Q Okay. You recognize that, what is that?

1 A This is the glove he had on his left hand.

2 Q Okay. Is that in substantially the same condition as
3 when you collected it and put it into property and
4 evidence?

5 A It is.

6 Q Okay. All right. And as far as how it got to court
7 today, how did it get to court?

8 A Detective Dean checked it out of property and
9 evidence and brought it to the court.

10 Q Okay. And when you say you checked it into property
11 and evidence --

12 MR. MAXWELL: Your Honor, I'll stipulate to the chain
13 of custody.

14 THE COURT: Thank you.

15 Move on.

16 MS. TESSITORE: All right. At this time, the State
17 would move State's Exhibit 25 into evidence.

18 THE COURT: Any objection?

19 MR. MAXWELL: No objection.

20 (WHEREUPON, State's Exhibit No. 25 was admitted
21 into evidence.)

22 BY MS. TESSITORE:

23 Q All right. And other than the -- the bike was
24 recovered, did you also locate the garage door opener that
25 Mr. Tintinger had identified?

1 A Yes.

2 Q Okay. And as far as the location of the garage door
3 opener, approximately where was it located?

4 A The driveway that comes out into the street onto
5 Brookside, it's right there on that right side of the
6 street. It had been smashed.

7 Q Okay. Is that something that you pointed out to
8 forensics?

9 A Yes.

10 Q Okay. I'm going to show you State's Exhibit No. 19
11 and ask you to identify that.

12 A Yep, that's it. Yes.

13 Q When you say that's it, what is that?

14 A This is the garage door opener that was located.

15 Q Was that taken on the day of the incident?

16 A Yes, it was.

17 Q All right. And if your vehicle in there?

18 A Yes, it is.

19 Q Okay. Which one was that?

20 A The white Dodge Charger.

21 Q So you had pulled right up to it?

22 A Yes, ma'am.

23 Q Okay.

24 MS. TESSITORE: State would move State's Exhibit 19
25 into evidence.

1 MR. MAXWELL: No objection.

2 THE COURT: No objection.

3 (WHEREUPON, State's Exhibit No. 19 was admitted
4 into evidence.)

5 BY MS. TESSITORE:

6 Q And other than the -- was the bike brought back to
7 the victim?

8 A It was brought back to the victim.

9 Q Okay. And is this the close-up of that that was
10 taken that day, of the garage door opener?

11 A Yes.

12 Q Okay. That's how you found it?

13 A Yes.

14 Q All right. Now, when you were able to detain the
15 Defendant, what was he wearing?

16 A He had on a green hoodie, had on black tennis shoes.
17 I remember the green hoodie. It was basically a
18 camo-style hoodie.

19 Q All right. And what was his approximate height if
20 you know?

21 A Five-eleven.

22 Q Okay. And did -- what happened after you were able
23 to get the glove from him, what was the next thing that
24 happened?

25 A We -- they were to get him into handcuffs, roll him

1 over. At that time, EMS arrived on the scene.

2 Q Why did EMS arrive on the scene just generally?

3 A Well, basically for two things. Per our policy,
4 anytime we have like a taser --

5 THE COURT: Solicitor, what is the relevance of this?

6 MS. TESSITORE: Your Honor, the only relevance is
7 that the -- to describe what had happened, but we can move
8 on.

9 THE COURT: Please move on.

10 MS. TESSITORE: Okay.

11 BY MS. TESSITORE:

12 Q Was the Defendant injured in the process of detaining
13 him?

14 THE COURT: What difference does it make whether he
15 was injured or not?

16 MS. TESSITORE: I just think it's something that
17 based upon the use the taser that it could be --

18 THE COURT: Please move on.

19 MS. TESSITORE: Okay.

20 BY MS. TESSITORE:

21 Q All right. So at some point, did forensics respond
22 to the scene?

23 A Yes.

24 Q All right. Who was the forensics officer, if you
25 remember?

1 A Officer Kretschmar.

2 Q Kretschmar?

3 A Yes.

4 Q Okay. And did you instruct them as to what needed to
5 be done on the scene?

6 A Yes, I did.

7 Q All right. Did he actually collect any evidence
8 other than take the pictures?

9 A He helped with the bicycle. It couldn't fit in my
10 vehicle, he transported it back to the scene.

11 Q Okay. So he just transported the bike?

12 A Yes.

13 Q Took the photos. And the items were returned to the
14 victims?

15 A Yes.

16 Q Okay. Was there any kind of processing of the glove
17 that's been introduced into evidence?

18 A We did a lab analysis request to see if we could get
19 DNA off the glove.

20 Q Was it for prints or DNA?

21 A For prints, prints.

22 Q Okay. But this is a glove that you took off his
23 hand, right?

24 A Off his left hand, yes.

25 Q Were they ever able to develop any prints?

1 A No.

2 Q All right. And any other glove found?

3 A No.

4 Q All right. All right. Just one moment, please.

5 MS. TESSITORE: All right, please answer any
6 questions that Mr. Maxwell may have.

7 CROSS-EXAMINATION

8 BY MR. MAXWELL:

9 Q How are you doing, Officer?

10 A Doing well.

11 Q Let's start with the initial investigation when you
12 first got there the first time when only two cars were
13 there, the Prius and the minivan.

14 A Yes.

15 Q You said those were rummaged through?

16 A Yes.

17 Q And you also said that there was no forced entry?

18 A No.

19 Q Okay. Were the doors locked?

20 A No.

21 Q Okay. And nothing was stolen?

22 A At that time, the victim did not inform me of
23 anything that was taken.

24 Q Did she ever inform you that anything was taken?

25 A No.

1 Q All right. Okay. Now, you said that the car was
2 rummaged through the inside. You didn't think to do any
3 kind of fingerprints on the inside of the car?

4 A Whenever the vehicles are wet, forensics policy, they
5 won't come out until the vehicle is dry. And the
6 procedure is once the vehicle is dry, they will come and
7 then process the whole vehicle.

8 Q Okay. Well, the forensics came, didn't they?

9 A They came, yes.

10 Q Did you process the inside of the car for
11 fingerprints?

12 A I don't know if they processed the vehicle.

13 Q Well, did they check for fingerprints?

14 A I'm not sure.

15 Q You're not sure?

16 A No.

17 Q Okay. Did -- was the inside of the car wet?

18 A No.

19 Q Okay. What about the garage door, did you check on
20 the handle of the garage door?

21 A No.

22 Q The inside of the garage door?

23 A No.

24 Q Any of the interior doors inside the garage?

25 A No.

1 Q No doorknobs, no nothing?

2 A No.

3 Q Okay. Now, you said you saw the Defendant cross Bird
4 coming on Club and you pulled in behind him and you
5 followed him in your car while you sent Officer England
6 out to chase him down?

7 A Yes.

8 Q Okay. And at that point, did you have your siren on?

9 A No.

10 Q Did you have your blue lights on?

11 A No.

12 Q Okay. Was Officer England telling him to stop?

13 A I instructed England to exit the vehicle and I could
14 hear England telling him to stop, yelling at him.

15 Q Did you have your car windows down?

16 A I did.

17 Q Okay. So he ran away from England and that's when
18 you tased him. How far away were you when you tased him?

19 A When I tased the Defendant, approximately -- I don't
20 know, some feet.

21 Q Five, ten?

22 A I'm not sure.

23 Q Okay. Well, how many times did you tase him?

24 A I tased him --

25 MS. TESSITORE: Objection relevance. I thought --

1 THE COURT: What's the relevance of this?

2 MR. MAXWELL: Your Honor, as part of the State's
3 case, we're going to submit he does not have the capacity
4 to form intent of the crime. And if would just give us a
5 little bit of leeway, we'll get there.

6 THE COURT: All right.

7 BY MR. MAXWELL:

8 Q So your unsure how many times you tased him?

9 A The first time when he approached me, I deployed my
10 taser, that was once. England took him to the ground and
11 he was not compliant to our commands. Stop resisting. I
12 pulled the trigger, I think, two additional times there.
13 Then I went down to the ankles, so I think it was a total
14 of four times.

15 Q And you said this Defendant was flailing his arms and
16 not being compliant?

17 A Throughout the --

18 Q You know, kicking his feet and all that good stuff?

19 A Throughout when he was on the ground, he would go
20 back and forth with the elbows -- with his elbows.

21 Q Okay. So it was just -- but no legs, just his elbow?

22 A Yes, sir.

23 Q All right. So after you subdued him or anything, EMS
24 came immediately. At that point, he had said, Let me die,
25 let me die, all that stuff, right?

1 A Yes.

2 Q Okay. And then EMS transported him to the hospital
3 for a drug overdose; isn't that correct?

4 MS. TESSITORE: Objection, Your Honor.

5 THE COURT: I'll sustain the objection and instruct
6 the jury to disregard that.

7 BY MR. MAXWELL:

8 Q Do you know why he was transported to the hospital?

9 A I think he was making comments to let me die and he
10 would not answer any of my questions kind of thing. EMS
11 did ask him some questions. I think they felt the need to
12 transport him to the hospital.

13 Q Okay. After he was transported to the hospital and
14 released, did you get a chance to read his discharge
15 papers?

16 A Yes.

17 Q And according to the discharge papers, they said he
18 had been admitted for cocaine abuse; is that correct?

19 A Yes.

20 Q And alcohol abuse?

21 A I think he had consumed alcohol. They had a BAC
22 level.

23 Q Okay. Okay. Now, bear with me. Let's go back to
24 the photos, okay. Now, this Defendant -- first of all, do
25 you recognize these?

1 A I do, yes.

2 MS. TESSITORE: Mr. Maxwell, can I see what you're
3 showing him?

4 MR. MAXWELL: You supplied them to me, I thought you
5 knew.

6 MS. TESSITORE: Your Honor, could we briefly be heard
7 on this?

8 THE COURT: Take the jury out, please.

9 (WHEREUPON, the jury leaves the courtroom at
10 approximately 3:00 p.m.)

11 THE COURT: All right. What do you have,
12 Mr. Maxwell?

13 MR. MAXWELL: Your Honor, I'm prepared to introduce
14 these pictures to show the condition that this Defendant
15 was in to show that he didn't have the capacity to form
16 intent for these crimes. These are reflective of what
17 kind of condition the Defendant was in and at the time of
18 the crimes charged. I don't know why the solicitor has an
19 issue with them. I'd like to hear the reason why she
20 doesn't want them to be introduced.

21 MS. TESSITORE: Well, Your Honor, those are pictures
22 that were taken because the taser were deployed. They
23 took pictures of the Defendant laying on the ground after
24 a full speed chase on the bike and on foot and wrestling
25 with the officers. So how he looks here is after he's

1 expended all that energy and put himself in that
2 situation. They're -- I believe Mr. Maxwell is trying to
3 introduce them to try to arouse sympathy for the Defendant
4 because because it looks like -- you know, he's got his
5 eyes closed and he's up against wheel well of the car.
6 And I mean, I don't understand what the relevance is.

7 THE COURT: I sustain the objection. They will not
8 be admitted into evidence.

9 MR. MAXWELL: Your Honor, if I may be heard briefly?

10 THE COURT: Sure, go ahead.

11 MR. MAXWELL: My intent is not to go for sympathy at
12 all. My intent is to show the capacity of this Defendant
13 at the time of this. This is the basis of our Defense
14 argument. He does not have the capacity to form intent to
15 commit the crime. I mean, we're trying to show this
16 Defendant's capacity, his demeanor at the time of these
17 incidents. Yes, he was tased, yes, he was, but he's also
18 high on drugs and that's part of our foundation for one of
19 the reasons he can't form the capacity --

20 THE COURT: Well, I think that would be pure
21 speculation on the part of this jury. If you have some
22 expert opinions on it, then --

23 MR. MAXWELL: Your Honor, I'm prepared to introduce
24 some medical records that show that he was high on
25 cocaine. The medical records show that the reason he was

1 introduced into the hospital for being treated for a
2 cocaine overdose, that's the complaint, along with tasing
3 symptoms. It also shows we have alcohol-related stuff in
4 here as well.

5 THE COURT: Well, I think if you have the doctors to
6 come in to testify, that would be one thing, but not just
7 a report from the hospital.

8 MR. MAXWELL: Well, Your Honor, I feel that we can
9 still get the reports in here just with the custodian of
10 the Greenville Memorial Hospital. As Your Honor might
11 recall, that was one of the reasons I had asked you for a
12 bench warrant. We had not had a chance to speak with the
13 Defendant about this and we were hoping to check out some
14 medical avenues. Again, without the Defendant here
15 present, we were unable to do that.

16 MS. TESSITORE: Your Honor, with respect to the taser
17 and taser symptoms, I think that's absolutely irrelevant.
18 It doesn't have anything to do with his demeanor or
19 ability to form intent prior to and during the crimes that
20 were being committed. So I think that's an easy one. As
21 far as the --

22 MR. MAXWELL: Your Honor, we have no problem with
23 that, we'll take out the taser stuff. We're interested in
24 the cocaine and alcohol.

25 MS. TESSITORE: So as far as the cocaine and alcohol,

1 those are clearly intoxicates that are illegal and
2 voluntary intoxication is not a defense. Unless Mr.
3 Maxwell has evidence that he was drugged by somebody else
4 and coerced to take drugs, all of this falls into
5 voluntary intoxication, which is not to defense. So it's
6 just not relevant in any form or fashion. He's already
7 had the officer testify that he said that it was cocaine
8 and alcohol abuse.

9 THE COURT: All right, I sustain the objection.

10 MR. MAXWELL: Thank you, Your Honor.

11 THE COURT: All right, bring the jury.

12 MR. MAXWELL: Your Honor, if I may briefly before the
13 jury comes back in, do I understand your order as
14 excluding the medical records as well?

15 THE COURT: Yeah.

16 MR. MAXWELL: Okay. Thank you.

17 (WHEREUPON, the jury entered the courtroom at
18 approximately 3:05 p.m.)

19 THE COURT: All right. You may proceed.

20 MR. MAXWELL: Thank you, Your Honor.

21 CONTINUED CROSS-EXAMINATION

22 BY MR. MAXWELL:

23 Q Officer, did you see the razor scooter that the
24 witnesses said was propping the door open?

25 A I don't recall.

1 Q You don't recall?

2 A No, sir.

3 Q Okay. But you said you did look in the garage?

4 A Yes.

5 Q But you don't recall that in there?

6 A Don't recall.

7 Q Do you recall any other items in the garage?

8 A A lot of different stuff.

9 Q A lot of small stuff, easy to carry stuff?

10 A I think it was some bicycles in there. I noticed
11 there was multiple bicycles in there.

12 Q Multiple bicycles, anything else?

13 A Nothing out of the ordinary that stuck out.

14 Q Okay. You just testified that you instructed the
15 forensics officer what to do and what to take pictures of
16 and all that. Did you take a picture of this basketball
17 goal?

18 A No, sir, I didn't.

19 Q You did not, okay. Did you take a picture of this
20 little razor scooter?

21 A I did not.

22 Q Okay. Did you process any of the -- did you ask the
23 forensics guy to process the garage door opener for
24 fingerprints?

25 A What I did was told them the items that were -- that

1 I --

2 Q But you didn't ask them to process the garage door
3 opener, did you?

4 A All I did was show it to them.

5 Q I thought you instructed him on what to do?

6 A Let me clarify that. What I did was told them that
7 -- what was taken, items that I seen and then they do
8 their job.

9 Q Okay. So you didn't fingerprint the garage door
10 opener then?

11 A I didn't fingerprint anything.

12 Q Okay. Well, the forensics guy didn't fingerprint the
13 garage door opener?

14 A Okay.

15 Q I'm sorry?

16 A I didn't fingerprint anything.

17 Q The forensics guy didn't fingerprint the garage door
18 opener?

19 A I don't know what the forensics guy did.

20 Q So you weren't telling him what was taken and what
21 was moved?

22 A I explained to him -- I did point out that there was
23 a garage door that was outside in the roadway. So we did
24 talk about that, but I didn't process anything.

25 Q Okay. The Defendant, when you finally apprehended

1 him, he only had one glove on, correct?

2 A I only observed one glove.

3 Q Okay. And you didn't find a second glove?

4 A I did not.

5 Q Okay. And did you canvas the area for a second
6 glove?

7 A The immediate area, yes.

8 Q And you -- with no results?

9 A No.

10 Q Okay. Now, the basketball goal, it was in the box,
11 correct?

12 A That's what the victim said.

13 Q So the basketball goal wasn't out on the street when
14 you got there?

15 A I didn't see the basketball goal.

16 Q You never saw a basketball goal?

17 A I didn't see the basketball goal on the street, no.

18 Q And you didn't see it in the garage?

19 A No.

20 Q Okay. When you got there, were the garage doors
21 propped up, were they shut?

22 A When I got there, I observed the -- I think the left
23 door was closed and I can't recall about the right door.
24 I think the left door was closed. I remember there was
25 conversation about one of the doors didn't work properly.

1 Q Okay. I bring your attention to one thing here.
2 Exhibit 19, State's Exhibit 19, you testified this is a
3 picture of your police car and then the garage door
4 opener?

5 A Yes.

6 Q Okay. And can you tell me where this forensics truck
7 is?

8 A I think he's parked off the road, I believe.

9 Q He's parked off the road?

10 A Yeah. I can't tell from that.

11 Q Was this the victim's house?

12 A Yes.

13 Q Okay. And it appears to be the forensics truck is in
14 the driveway; wouldn't you say?

15 A From that angle, I can't say.

16 Q Well, what is this? What does this appear to be?

17 A It should be Brookside.

18 Q Yeah, this is Brookside, you're correct. What is
19 this street or is it a driveway?

20 A I don't know. It appears to be a driveway.

21 Q Okay. Now, on this map here, it may be a little bit
22 better. It appears to be -- sorry, bear with me. It
23 appears to be two driveways coming up here connected
24 together, one from the neighbor's yard and one from this
25 yard; is that correct?

1 A Yes.

2 Q So in actuality, this garage door opener wasn't even
3 in front of the victim's driveway, he was down the street?

4 A It could have been a little bit further down.

5 Q All right. Thank you.

6 A I stand corrected on that.

7 Q Now, I believe I asked you about the two cars
8 initially when you first got there. When you got back
9 there, the Volvo, the third car finally arrived; is that
10 correct?

11 A I don't recall that.

12 Q Okay. Did you do any forensics testing on that,
13 fingerprints on the interior?

14 A Now, let me -- I guess let me just be clear. I don't
15 do any type of processing at all.

16 Q Did you order the forensics or request that they do
17 any kind of forensics?

18 A I did request for them to respond. I did, yes. And
19 I explained to them the vehicles. During that time, I was
20 talking both to the victim, detectives and forensics. So
21 I wasn't there with forensics standing beside them the
22 whole time.

23 Q Based on your continuing investigation and continuing
24 participation in this case, are you aware that forensics
25 didn't any kind of fingerprinting, any other kind of

1 forensics evidence gathering from the interior of the car,
2 from the Volvo?

3 A I don't recall any.

4 Q You don't recall any?

5 A No, sir.

6 Q Okay. Would it refresh your memory if I showed you
7 the forensics report?

8 A Yes.

9 MR. MAXWELL: Bear with me one second, Your Honor.

10 BY MR. MAXWELL:

11 Q If you will, read the last -- well, you don't have to
12 read it out loud, just read the last sentence and then
13 I'll ask you the question again.

14 A Okay.

15 Q So are you aware of any fingerprints, any other
16 forensic evidence taken from the interior of any of the
17 cars that day?

18 A Again, I cannot -- reading that, I cannot be sure.

19 THE COURT: Okay, he's answered that question, now
20 move on.

21 MR. MAXWELL: That's all I have, Your Honor.

22 THE COURT: Thank you, you can step down.

23 MS. TESSITORE: Your Honor, may I request just a
24 10-minute break?

25 THE COURT: All right, take the jury out for a

1 recess.

2 (WHEREUPON, the jury left the courtroom at
3 approximately 3:16 p.m.)

4 THE COURT: All right, take a very short recess.

5 MS. TESSITORE: Thank you, Your Honor.

6 (WHEREUPON, a short break was taken.)

7 THE COURT: Remain seated.

8 MS. TESSITORE: Before the jury comes back in, Your
9 Honor, the State has the stipulation agreement that's been
10 signed by the Defense and the State as far as the chain of
11 custody on the glove.

12 THE COURT: Okay, you can publish it.

13 MS. TESSITORE: Okay. You can go ahead and mark
14 that.

15 (WHEREUPON, State's Exhibit No. 29 was marked
16 for identification.)

17 MS. TESSITORE: And we also have the stipulation
18 agreement --

19 THE COURT: Those are for the record, not for the
20 jury?

21 MS. TESSITORE: The stipulation as far as the chain?

22 THE COURT: Yeah.

23 MS. TESSITORE: Yeah, just for the record. I mean --

24 MR. MAXWELL: I've already consented to it on the
25 record.

1 MS. TESSITORE: And then the other one is State's
2 Exhibit 24, which is a stipulation agreement that the
3 Defendant has two or more prior burglary convictions,
4 which I will publish to the jury or how do you want to
5 handle that?

6 THE COURT: Yeah, just publish it and make it a part
7 of the record.

8 (WHEREUPON, State's Exhibit No. 24 was admitted
9 into evidence.)

10 MS. TESSITORE: Okay. Your Honor, it's the State's
11 intent to recall Mr. Tintinger for a couple of questions
12 on the box that was brought up by Defense counsel and that
13 will be it and the State will rest.

14 THE COURT: Okay, bring the jury in.

15 Mr. Maxwell, I guess you're not going to have any
16 testimony?

17 MR. MAXWELL: No, Your Honor.

18 THE COURT: Well, I'll let you rest in the presence
19 of the jury.

20 MR. MAXWELL: Yes, Your Honor. And I would like to
21 renew my objections --

22 THE COURT: Sure, we're going to do all that.
23 Normally, I would argue and charge this afternoon, but one
24 of the jurors have a sick baby and I think we'll just go
25 ahead and recess and argue and charge in the morning.

1 That will give her a chance to get home and take care of
2 her child.

3 MS. TESSITORE: Yes, sir.

4 MR. MAXWELL: Thank you, Your Honor.

5 (WHEREUPON, the jury entered the courtroom at
6 approximately 3:24 p.m.)

7 THE COURT: All right, Solicitor, you may proceed.

8 MS. TESSITORE: The State would recall Kenneth
9 Tintinger.

10 THE COURT: Come back around, sir. You're still
11 under oath.

12 REDIRECT EXAMINATION

13 BY MS. TESSITORE:

14 Q Just for clarification, Mr. Tintinger, Mr. Maxwell
15 had asked about the location of the garage door opener and
16 what road it was in front of. I'm showing you State's
17 Exhibit 19. Can you clarify what driveway that garage
18 door opener is in front of?

19 A It is our neighbor's. The forensic truck is in our
20 driveway and the police officer's patrol car is also right
21 in front -- at the end of our driveway. And this is
22 connecting -- it's not connecting, there's about 20 feet
23 between our driveways.

24 Q So that's just coming down from your driveway. Is
25 that the direction in which the Defendant was traveling

1 when he took off on your bike?

2 A Yes.

3 Q Thank you. And Mr. Maxwell had also asked the
4 officer about the box that you saw him -- you testified
5 earlier about him pulling it up the driveway and then he
6 dropped it. Just remind us where he dropped it?

7 A At the top of the driveway in the road on Brookside.

8 Q And did you do anything with that box before the
9 officers arrived and forensics arrived?

10 A I did, I took it out of the road and brought it back
11 to our garage because it was in the middle of the road.

12 Q Okay.

13 MS. TESSITORE: All right. And answer any questions
14 that Mr. Maxwell may have?

15 THE COURT: Mr. Maxwell, any questions?

16 MR. MAXWELL: No, Your Honor, I have no questions.
17 Thank you.

18 THE COURT: Thank you, sir, you can step down.

19 MS. TESSITORE: Your Honor, at this time, I would ask
20 to publish the stipulation agreement in State's Exhibit
21 No. 24.

22 THE COURT: Go right, ahead.

23 MS. TESSITORE: Ladies and gentlemen, the stipulation
24 agreement has now come to the State by and through the
25 undersigned representative of the Greenville County

1 Sheriff's Office and the Defendant, through his attorney,
2 Joey Maxwell, who stipulate the following is evidence in
3 the trial of this case. The Defendant has two or more
4 prior burglary convictions. And that stipulation is
5 signed by both attorneys.

6 Thank you, Your Honor. The State rests.

7 THE COURT: All right, take the jury out a minute,
8 please.

9 (WHEREUPON, the jury left the courtroom at
10 approximately 3:30 p.m.)

11 THE COURT: Okay. Now, any motions?

12 MR. MAXWELL: Your Honor, we just move for a directed
13 verdict.

14 THE COURT: And I'd have to deny your motion.

15 MR. MAXWELL: Yes, Your Honor.

16 THE COURT: Okay. Now, I understand that you have no
17 testimony?

18 MR. MAXWELL: Yes, Your Honor. We are not planning
19 on presenting any more testimony. Our only wish is to
20 reobject to your ruling that we were not allowed to put in
21 testimony regarding the Defendant's hospital visit and as
22 well as Defendant's -- the pictures of the Defendant after
23 he was arrested.

24 THE COURT: Okay. Thank you. Now, since you have no
25 testimony to present, you get the closing argument.

1 MR. MAXWELL: Yes, sir. .

2 THE COURT: Okay. All right bring the jury in,
3 please.

4 (WHEREUPON, the jury entered the courtroom at
5 approximately 3:31 p.m.)

6 THE COURT: Ladies and gentlemen, as I explained to
7 you earlier, a defendant does not have to appear or
8 testify in his defense. So the testimony in this case is
9 complete. What we have left is the arguments by the
10 attorneys and then my charge on the law. Normally, I'd go
11 ahead and do that at this time, but I understand that one
12 of you have a sick baby at home so we're going to suspend
13 at this time. We'll pick back up tomorrow morning at
14 9:00 o'clock. At that time, you'll hear the closing
15 arguments by the attorneys, then my charge on the law.

16 Please remember when you leave, do not talk about
17 this case among yourselves or with anyone else. This
18 includes even members of your own family. If anybody
19 contacts you and tries to talk to you about the case, get
20 their names and addresses and report that to me. Please
21 keep your badges on, have them on when you come back in
22 the morning. I ask that you do that so that everyone
23 involved in this case will know that you are a juror and
24 it would be highly wrong for them to discuss and talk
25 about this case in your presence. So please keep your

1 badges on, have them on when you come back in the morning.
2 Please be back promptly at 9:00 o'clock in the morning,
3 9:00 o'clock. Thank you.

4 (WHEREUPON, the jury left the courtroom at
5 approximately 3:34 p.m.)

6 THE COURT: All right, see you in the morning.

7 (WHEREUPON, Court was adjourned for the day to
8 be reconvened on Thursday, December 12, 2013.)

9 THURSDAY, DECEMBER 12, 2013

10 THE COURT: Are you ready?

11 MR. MAXWELL: Yes, Your Honor.

12 MS. TESSITORE: Yes, Your Honor.

13 THE COURT: Bring the jury in.

14 MS. TESSITORE: Your Honor, just one quick question
15 before they come in. Is it your intention as far as the
16 fact that we're going forward on the lesser included and
17 resisting without the assault that the jury will not be
18 getting indictments back with them?

19 THE COURT: Well, what I've done is I've just struck
20 out the language about the assault, initialed it and
21 explain to the jury that we're not proceeding on that.
22 Are you totally dropping it?

23 MS. TESSITORE: No, my only concern is that they'll
24 see that it was charged -- that he was charged with the
25 greater, but we're proceeding on the lesser.

1 MR. MAXWELL: Your Honor, I kind of share the same
2 concern, but I'm going to leave it up to your discretion.

3 THE COURT: Well, I can do that.

4 MS. TESSITORE: I mean, I think if they don't have
5 the indictment on that one --

6 THE COURT: Well, what I can do is send them a copy
7 and just strike out -- black it out.

8 MS. TESSITORE: That would be fine.

9 THE COURT: Can you make me a front and back copy of
10 this?

11 See if that will suffice, if not, you can put it any
12 way you suggest. I've got to have something to send in
13 and something they can sign on.

14 MS. TESSITORE: Yes, sir. Will they also get a
15 verdict form? Is that the -- okay.

16 MR. MAXWELL: Your Honor, I'm going to agree with Ms.
17 Tessitore about the white-out. I think they would start
18 to question --

19 THE COURT: All right. Do whatever you want, but
20 I've got to have an indictment to send into the jury to
21 find him guilty or not guilty.

22 MS. TESSITORE: Yes, sir. Yes, sir. I could have
23 someone in my office do that while we're doing the
24 argument and charge and then by the time --

25 THE COURT: That'll be fine. That'll be fine.

1 MS. TESSITORE: Okay. Yes, sir. Thank you.

2 THE COURT: Okay. Bring in the jury.

3 (WHEREUPON, the jury entered the courtroom at
4 approximately 9:15 a.m.)

5 THURSDAY, DECEMBER 12, 2013

6 THE COURT: Good morning.

7 All right, Solicitor, you may proceed.

8 CLOSING ARGUMENT BY THE STATE

9 MS. TESSITORE: Thank you, Your Honor. May it please
10 the Court.

11 Mr. Maxwell.

12 Ms. Henry.

13 Ladies and gentlemen of the jury, when we began in
14 this case when I first spoke to you, I told you that it
15 was going to be a simple case and that you just needed to
16 use your common sense. And I think that the tendency
17 today is, you know, there's always technological devices
18 that we can use now. We can get answers quick on a Google
19 search. We can pick an app. And we can do all sorts of
20 things with technology and with computers and calculators
21 and can get quick results.

22 And one of the tendencies -- and I think most people
23 have had this experience and the cashier can't even figure
24 out how to make change because they expect the register to
25 tell us how much change. And you're sitting there

1 thinking just count it, you know, just use your good old
2 common sense, the kind of common sense our parents have
3 and our grandparents had and, hopefully, we all got from
4 them just learning that basic good old common sense.

5 And that's what I'm going to ask you to use here
6 today is your good old common sense. There's no special
7 tools. As I said at the beginning of this case, you can
8 collectively pool your common sense from your life
9 experiences together and you have a great resource right
10 there. That's why you were all chosen, each one of you
11 carefully chosen by the State and the Defense so that you
12 could put together those resources and use the tools that
13 you brought with you here today.

14 And the main this is, as I said, it's simple and you
15 don't need to overthink it. And in preparing and
16 presenting this case to you, that's what the State has
17 done. And what I'm going to do is -- I told you that at
18 the end of this case the Judge will charge you on the law
19 as it is in South Carolina and the law that you will apply
20 to the facts because you, each one of you is a fact
21 finder. That's what you do. You were sitting here
22 listening to the testimony that you heard from Ms.
23 Tintinger, Mr. Tintinger and Officer Dirton. You didn't
24 hear from the other officer because he's serving our
25 country in Afghanistan right now. You heard that from

1 Officer Dirton.

2 So you heard from those three witnesses and they
3 described to you what they observed. They described to
4 you their experience and everything that they could tell
5 you within this time period to be able to convey to you
6 the important facts that you need to find the Defendant
7 guilty in this case. And I told you that we were going to
8 go through a checklist as to each crime that Demetrius
9 Simmons is charged with.

10 Now, I'm just going to give this to you as kind of
11 mental checklist that you can have in your mind as I go
12 through the evidence. And then the Judge will give you
13 the law again and will read it to you. So you can kind of
14 have this and it will probably sound very familiar.

15 First of all, burglary. There are two counts of
16 burglary in this case as you've heard. There's two
17 separate incidents, but the State has shown that both
18 incidents are clearly connected and they're connected by
19 the Defendant, Demetrius Simmons. He is the common
20 denominator right there. So you heard that the first
21 incident was in the evening between 11:00 p.m. and 7:30 in
22 the a.m. the next day. This was a Wednesday night into a
23 Thursday morning.

24 And the first element of burglary first is entry.
25 And that entry, as the Judge will tell you, it doesn't

1 have to include force. It doesn't have to include, you
2 know, breaking a window or breaking a lock or using pry
3 tools to open a door. Simply opening the door to
4 somebody's dwelling is burglary as long as that person has
5 the intent to commit a crime inside. And the Judge will
6 charge you on the definition of what a dwelling is, the
7 dwelling of another. That is where people, obviously,
8 sleep, where they have their property, where they go to
9 sleep at night and they shut all their doors. Some people
10 lock them, some people don't. You heard now the
11 Tintingers use their security system. They've had an
12 experience that has jaded them such that now they have to
13 use more security to feel for more secure because of what
14 happened here. But that's where people sleep, it's where
15 they have their and so -- that could include the screen
16 porch, it could include the garage, any part of that
17 dwelling.

18 So it's not necessary that he actually go into the
19 living space and go into their bedroom to commit burglary.
20 As long as he went into the enclosed garage, which is what
21 the State has shown, and has made entry into there.
22 There's no allegation that he actually went into the
23 interior of the home. Because as you heard, as Mr.
24 Tintinger told you, if he had opened the door to go in
25 that night, there would have been a chime that went off,

1 but there was no chime on the garage doors.

2 So just when the -- when the Judge goes over that,
3 just think about the fact that this is a dwelling, he went
4 in the garage and that is one of the elements of burglary
5 first degree. Obviously, it was without the consent of
6 the Tintingers, I don't think there's any question about
7 that. They did not invite Mr. Simmons into their home
8 that night. They didn't invite Mr. Simmons back to their
9 home the next morning for brunch. So he was not there
10 with consent and that is one element that is clearly
11 uncontested.

12 As far as the intent to commit a crime therein.
13 Okay, focus on the first burglary during the nighttime.
14 How do we know that he had the intent to commit a crime
15 therein? Well, it's at night -- look at all the
16 circumstances. It's at night, the garage door is opened.
17 Not the one with the garage door remote because that would
18 engage the motor. That motor makes noise, it's under the
19 dining room and that's going to, obviously, wake people up
20 and alert people that somebody is going into their garage.

21 Ms. Tintinger told you that the motor on the right
22 side of the garage was not working. And that was the
23 garage door that she found opened the next morning. So
24 that garage door had been opened quietly in the nighttime.
25 And there was an item propped up so that there could be

1 access. If he didn't have anything propping it up, it was
2 probably going to fall on his head. So in order to keep
3 it quiet, it's lifted open. The mountain bike is in
4 there. He's able to get access in there, seize all this
5 stuff that the Tintingers described they keep in there
6 garage. They don't keep cars because they have twin girls
7 and they have bikes, they have scooters, they have pool
8 tables, they have all sorts of stuff that's in that
9 garage. And you can see those pictures when you go back
10 into the jury room.

11 So the bike was removed, so we know that there was
12 the intent to steal something and something was stolen,
13 the mountain bike, the green mountain bike that was found
14 the next morning with the Defendant riding it. Then you
15 have the basketball goal in the box. And that was
16 something the next day in the morning when Mr. Tintinger
17 sees the box -- sees the Defendant taking the box and
18 dragging it, which had been in the garage, out of the
19 garage after he engaged the motor on the left side. And
20 we're going to talk about that a little bit more. So you
21 have the intent to commit a crime, which is the crime of
22 larceny. And we're going to talk about the larceny in
23 just a second.

24 Finally, the last element that you have to find is
25 that there were circumstances of aggravation. And when I

1 stood up and I read you the stipulation agreement, that's
2 another uncontested fact because there's a stipulation and
3 agreement by the Defense and the State that the Defendant
4 does have two or more prior burglaries. So that is
5 already decided as far as fact, but that's for you to
6 consider as far as the final element of circumstances of
7 aggravation that make it burglary first degree.

8 Okay. So then we move on to auto breaking. The
9 elements on the checklist there. You have breaking into a
10 motor vehicle with the intent to steal, either the motor
11 vehicle or the things that are in it. Clearly, this is an
12 attempt to canvas the vehicles, look for items of value,
13 get them and get out of there. And it's easy to do that
14 when people are asleep in a house and it's dark at night
15 and it's a residential area surrounded by woods. And Mr.
16 Simmons was out there lurking about and looking in these
17 cars that again probably should have been locked, but two
18 kids, they come home late at night. They were ready to go
19 bed and the doors were not locked because there was no
20 sign there was any kind of forced entry into the vehicles.
21 And Ms. Tintinger told you she noticed that the remote was
22 stolen out of her vehicle. There were some shirts that
23 were taken. So obviously, there was an intent to steal
24 when the Volvo was entered, we know that. Even if the
25 other cars were entered, items were rummaged. They

1 described there were items -- just kind of compartments
2 opened, consoles opened and things were all disturbed.
3 Well, that sounds like a classic sign of looking for
4 something to take.

5 So there are the two elements, breaking into the
6 motor vehicle with the intent to steal. And again, the
7 breaking, just like in the burglary, it doesn't require
8 force. It doesn't require a broken window. It's like --
9 it's during football season, so I'll use a football
10 analogy. It's like when that football crosses a plane and
11 all that runner, receiver has to do is cross the plane
12 with the football and have control of it. So as long as
13 he reaches in the window of a car or he opens the door and
14 enters the car, he has crossed the plane. The Judge will
15 explain that to you, but I just wanted to emphasize that
16 because we're not talking about any kind of malicious
17 damage or destruction here, this was quiet, in the night,
18 kind of surreptitious, sneaking, lurking, entering the
19 cars, looking around for things, checking the doors,
20 realizing that the right side garage door with the latch
21 that's on the bottom of it that you can see in the
22 picture, that latch, all someone had to do was lift it up
23 and realize hey, it's going up. And he got lucky. He
24 thought he got really lucky that night.

25 So the other thing I wanted to talk about was the

1 larceny. You're going to hear about the elements of
2 larceny. And that is the taking and carrying away of
3 property of another with the intent to permanently deprive
4 the person of it, to take it. To do what with it, it
5 doesn't matter whether it was to go get more drugs, go get
6 something out, turn it into cash for whatever, we don't --
7 it doesn't really matter. But obviously, there was the
8 taking and carrying away. And we talked about that, the
9 different items that were taken and carried away. And
10 just because they found some of them doesn't mean that
11 crimes were not committed.

12 So we have one count of grand larceny and that is
13 based on value. More than \$2,000 is grand larceny. And
14 the witness testified as to the value. This was a
15 customized bike, it's lasted a long time. It's an
16 expensive customized bike. He's had it for several years.
17 He said it was approximately \$2,000. It's aluminum and
18 silver and green. And the men's shirts were about \$200.
19 So that's a fact that you must find as far as whether
20 there's nothing with a value being over \$2,000. That's
21 what makes it grand larceny. If it's less than 2,000,
22 it's petit larceny. So that's the law on larceny.

23 And finally, resisting arrest. And that is pretty
24 much what it says. Resisting arrest is you know that the
25 police -- or you reasonably should know that the people

1 chasing you are the police. Mr. Simmons had all
2 indications. You know, they go out there and as you could
3 see when the officer testified, he's got his uniform and
4 he's driving a police car. He did not engage his lights
5 or siren or anything like that, but that's not necessary
6 to let Mr. Simmons know that he is being pursued. And
7 they were trying to arrest him for what was described by
8 the victim on the 911 call for what he had just gotten,
9 which was that second burglary when he came back.

10 So the fact that he ran, jumped on the bike, tried to
11 speed away and once he was being chased to the fence at [REDACTED]
12 Club Drive, that's when he realized he couldn't drive the
13 bike through the fence. He was going to have to drop the
14 bike and he was going to try to jump the fence. Well, his
15 superhero powers were not working that day. He couldn't
16 make it over the fence. And then that's when the police
17 confronted him and were able -- it took two officers to
18 actually get him subdued. And you heard that the taser
19 was used, which is, you know, obviously, not deadly force
20 and was reasonable force under the circumstances where he
21 was fighting them and it took officers and he's grabbing
22 their hands. So those are the elements of resisting
23 arrest. I think that the facts were pretty clear on that.

24 So what I want to do is talk to you about the burden
25 of proof. The Judge is going to charge you that the State

1 has the burden of proving Demetrius Simmons's guilt as to
2 each charge. And you will consider each charge separately
3 and you will determine if the State has proven each and
4 every element that I just went through beyond a reasonable
5 doubt.

6 Now, he's going to define reasonable doubt, what does
7 that really mean. You know, there are very few things
8 that we know in life with 100 percent certainty. So one
9 way to describe it is, is the evidence sufficient to leave
10 you firmly convinced that Demetrius Simmons committed
11 these crimes? Firmly convinced.

12 Well, in a perfect world, we could absolutely
13 convince you, but we don't live in a perfect world. And
14 at the beginning of this case, Mr. Maxwell told you he
15 thinks there's a few pieces missing in my puzzle. Well,
16 ladies and gentlemen, we don't have every single piece as
17 we don't live in a perfect world. What we brought you is
18 what the State had as far as the evidence, what we could
19 bring you to give to you to decide whether there's enough
20 evidence, whether we have firmly convinced you.

21 And you know, sometimes, you might be working on a
22 zigsaw puzzle or see someone else working on one and
23 you're looking over their shoulder and they can't find
24 there's like two or three pieces. And they're looking at
25 the box and they're looking under and they can't find

1 those pieces. And you're looking at it going okay, but
2 look, you can see what the image is. You don't need all
3 the pieces. You don't need every single piece to know
4 what the picture is in that puzzle. And that's just
5 reality, that's life, but we have the common sense that we
6 don't need every single I dotted and T crossed to know
7 that Demetrius Simmons committed these crimes.

8 So what I'm going to submit to you is that you do
9 have the pieces. And the major pieces in this case are
10 the garage door opener that you've heard about and saw
11 pictures of, damaged found in the path of where the
12 Defendant took off when he jumped on the bike and it was
13 found going down the hill where he logically would take
14 off. I mean, who, if they're trying to get away, would
15 ride up a hill. So he goes down the hill, thinks he's got
16 a great escape plan and it didn't work out so well for
17 him. You have the bicycle, which he was riding the next
18 day, that morning, which is the same bicycle that was
19 taken the night before.

20 So those two items, taken the night before, found the
21 next day. Where were they found? When the Defendant uses
22 it to open the garage and poor Mr. Tintinger sitting in
23 his dining room hears the motor of the garage and realizes
24 he's back, he back to finish the job. And that's exactly
25 what he was there to do.

1 He did not -- if you think about it, when he came
2 back, it was at 9:20 in the morning. 9:20 in the morning,
3 most people are at work. Yep, it's about 9:30. We're all
4 here, we're all working. Kids are in school, it's a
5 weekday. You heard the two girls were going off to
6 school. That's when people leave the house. In fact, one
7 of the cars was missing, was gone. Ms. Tintinger had to
8 rush to go give an exam. And she was all stressed out and
9 she was trying to do the right thing, but she had to give
10 those exams. These officers were trying to get their
11 degrees and she didn't have backup.

12 So you, basically -- you know, she told you she was
13 in a rush, she took the Volvo, so the Volvo is gone. So
14 it looks like oh, the family vehicle is gone. It's quiet.
15 And that's when he used the garage door opener to open
16 that door. The motor, it's okay because probably no one's
17 home at this point. And then he comes down the driveway
18 with a purpose. He didn't just look around like he didn't
19 know where he was. He knew right where he was. He's
20 right where he was the night before when he took those
21 items and basically had a key to the house with that
22 remote. He knew he could come back and get it.

23 So this remote is a big piece of the puzzle right
24 here. And this together makes it an even stronger piece
25 because this is the bike that was stolen that he got on

1 that Mr. Tintinger said he was up at the end of the
2 driveway. So he had parked it there, came down to the
3 garage with a purpose, started dragging that box. I mean,
4 the box he described had plastic ties on it like the kind
5 you try to carry the box with and, like he said, you know,
6 they kind of cut up your hand and you realize this is
7 probably not a good idea, but it's a whole lot easier than
8 trying to pull the full box.

9 Well, if you have a plastic -- or latex, excuse me,
10 and you're trying to juggle a box, drag it up the driveway
11 and see if you can get away with it, you tend to do some
12 damage. And you can see, when they found this glove on
13 the Defendant's hand, it's tattered, it's torn. It looks
14 like it was a busy glove. It was used the night before.
15 And where there's one glove, ladies and gentlemen, there's
16 two gloves. Why would a burglar just wear one glove?
17 Unless he's going to hold his other hand behind him and
18 he's just going to use that one hand and he only has that
19 one glove. These are easy gloves to come by, latex
20 gloves. What better way to conceal a fingerprint?

21 And that's why there was no forensic officer out
22 there looking for prints. Once they found him and they
23 found this glove, they knew there weren't going to be any
24 prints because he was smart enough that he used the gloves
25 when he came back the next morning. And you can see, it's

1 well worn. He probably used these gloves the -- or used
2 this glove and another one the night before. So he was
3 smart enough to do that.

4 But you heard about the fact that he used drugs and
5 alcohol and went to the hospital and they discovered this.
6 Well, drugs and alcohol might have impaired his decisions,
7 might have impaired his ability to come up with a good
8 escape plan. Because if you think about it, he's got a
9 bike and that's the best he can do. He's going to have to
10 speed away.

11 And when he did, what did he do? He started right
12 here at ■ Brookside Way -- started at ■ Brookside Way that
13 took him to his house, jumped on the bike, came down the
14 hill, garage door opener is found right in here somewhere
15 crushed and damaged at that point. He drops that. He
16 just wants to get away. He rides the bike as fast as he
17 can up Brookside.

18 And he's got a few choices here. You know, he's in a
19 rush. Is he going to take the first left and he thinks
20 oh, I can get out to Augusta Road and get away. Is he
21 going to go all the way down here if he has a quick access
22 route? Probably not. So we don't know whether he took
23 Heather or Sylvan or took this long alleyway here, but one
24 way or another, we know that within three to four minutes
25 while Mr. Tintinger is still on the phone with 911, he

1 says, He just left. And he's talking to them, telling
2 them what happened, describing the bike. He got all
3 excited and stressed out, obviously. He's saying, I think
4 it was a silver bike. He's thinking about the bikes in
5 the garage. And it was, in fact, a green bike with the
6 aluminum. So he's saying, But I know where he's going to
7 come out and he's telling them, this is where he could be.
8 And they're relaying this to the officer. And the officer
9 is listening and he's figuring it out.

10 So the officers come down here just about the same
11 time the Defendant crosses over Bird Drive, which is
12 within view. And you saw the picture. Look, it's a
13 straight shot, it's right up the street. And he can see,
14 broad -- this is the day it happened. The weather is nice
15 and clear and Mr. Tintinger can see him right across the
16 street on his bike. And he says, That's the same guy.
17 He's got a green hoodie.

18 And where does he end up? The police come in, turn
19 behind him at ■ Club Drive. And that's where he lands
20 with the bike. So within three to four minutes, they
21 catch him wearing the same green hoodie. He's got the
22 glove on his hand. I mean, again, don't overthink it.
23 It's very simple.

24 You've got three major pieces. You can see the path
25 that he took. It was not a good escape plan. Clearly, it

1 didn't work. And at this time, he's worn out, he's
2 exhausted, he's fighting with the police. And then he has
3 to be tased to be subdued. So yeah, he had a rough day.
4 Because he hadn't really thought about that part to
5 finishing the crime. He was there to finish the job. And
6 what I'm going to ask you, ladies and gentlemen, is use
7 your common sense.

8 The Judge will instruct you about the voluntary
9 intoxication. The fact that he had drugs or alcohol,
10 that's not a defense. You can't excuse people's behavior
11 because they choose to use illegal drugs. That's not a
12 defense. But it might explain why he was doing what he
13 was doing when he was out there to steal. He was out
14 there trying to support that habit. You know, it was
15 whatever he could grab. And he was possibly impaired, but
16 not too impaired that he couldn't do what he did and get
17 away on a bike. He didn't hurt himself. He didn't drive
18 into a wall. He was pretty deliberate about what he did,
19 deliberate about everything from the night before to the
20 next day when he returned. And he violated the sanctity
21 and the security of the Tintingers' home and their
22 property, although I think you can hear that this was a
23 pretty traumatic event for them. They've learned a lot
24 from it. And they're hoping that there will be -- that
25 Mr. Simmons, Demetrius Simmons, who committed these crimes

1 will be held responsible for those crimes. And just like
2 you can see through this latex glove, it's clear, a little
3 dirty, but you can see through all of this.

4 The Defense attorney is going to talk to you and then
5 the Judge is going to talk to you. Now, Mr. Maxwell might
6 want to talk to you about all the things that the State
7 didn't bring to you today, but, ladies and gentlemen, I
8 would submit that your job and your oath before you began
9 this case was to render a verdict based on the evidence,
10 not on what we didn't bring, but what we did bring. And
11 we brought you pieces of this puzzle to put together and
12 use your common sense and not overthink it and come back
13 with a guilty verdict as to all these charges. Thank you.

14 THE COURT: Mr. Maxwell.

15 CLOSING ARGUMENT BY THE DEFENSE

16 MR. MAXWELL: Thank you, Your Honor.

17 Solicitor. May it please the Court.

18 Assumptions, we all make them. Sometimes it's good
19 to make assumptions, sometimes it's bad. A lot of times
20 it comes back and bites us in the butt. Here, a lot of
21 assumptions were made. The police made assumptions, the
22 solicitor made assumptions, the victims made assumptions.
23 None of those assumptions have been proven true.

24 Let's talk about the police. The police made
25 assumptions right off the bat. We've got this guy. He's

1 been on this stuff. Let's stack all these charges on him.
2 Wait, wait, wait, let's hold back. The police are here to
3 protect us and they do a great job of it. And I really
4 respect them for that. But they're also here to gather
5 evidence to convict these criminals.

6 Now, as part of this investigation, the police didn't
7 do their job and they didn't gather any evidence that
8 connected this Defendant to some of these charges that
9 he's accused of doing.

10 Let's talk about this first burglary earlier in the
11 night. They say that he got this garage remote and that
12 he was smart enough to know that oh, if I press the
13 button, the motor will work, so this door's motor doesn't
14 work, so let me just lift it up. Who thinks that? Who
15 knows if the motor works or not? If this guy had the
16 remote and he wanted to get in, he would have pressed the
17 button.

18 Let's talk about the garage door handle. Did they
19 test for fingerprints? No. It's a metal object.
20 Fingerprints remain on that. They say he had gloves on.
21 Ladies and gentlemen, we have one glove. They said it was
22 on his left hand. There's another hand that didn't have a
23 glove on it. Well, that hand could have left
24 fingerprints. Why don't we test?

25 What about this scooter? We've heard talks about it,

1 have we seen it? No. The officer said he never saw it.
2 What about the cars? He had to get this remote from
3 somewhere. They say he got it from the car, but again,
4 they didn't test. The officer said because it was wet.
5 Well, use your common sense, ladies and gentlemen, if this
6 gentleman is inside the car taking things, why wouldn't he
7 touch the glove box, touch the console, touch everything?
8 He's got one hand open. Wouldn't you think to test, at
9 least, to eliminate who could have been in there, who
10 couldn't have been in there? And as you heard, the
11 aggravating circumstances of this Defendant's prior
12 record, they had his fingerprints. They knew what they
13 would be. Could have been simple, like that.

14 You know, it makes me think. They did test
15 something. They tested the glove, the glove they got off
16 the guy's hand. How much sense does that make? They
17 physically took it off his hand and said oh, let's test
18 this for fingerprints. It may have his fingerprints on
19 it. That doesn't make a whole lot of sense, ladies and
20 gentlemen. The few things that they could have tested to
21 determine if he did touch it, they didn't do it.

22 Let's talk about the pictures. Again, they're
23 talking about this basketball goal in the box. No
24 pictures of it. Where is it? We've got pictures of the
25 house. We've got pictures of all this other stuff.

1 Where's this basketball goal? Again, the police officer
2 said he never saw the basketball goal. He looked in the
3 garage, he said, I didn't see it. He looked in the
4 driveway, I didn't see it. I didn't know where it was.
5 Are there pictures of the interior of the car? No. No
6 pictures. No pictures of the rummage. No pictures of the
7 glove box being open. None of that.

8 So while doing their job, the police assumed, hey, we
9 have this guy. You know, they say somebody burglarized
10 them last night, well, let's just put it all on him. And
11 they quit and they left. It wouldn't have been much
12 harder to test it. As you heard, the forensics people
13 were out there, they could have done it very simply.

14 Now, as far as the first burglary, there were no
15 eyewitnesses. The victim said that he was asleep during
16 this. Nobody knows who went in that garage. All we know
17 is that there was a bike found later in the day. A large
18 amount of time elapsed between 1:30 and 9:30 in the
19 morning. The bike could have come from anywhere.

20 That also goes to show the Defense's [sic] theory is
21 kind of a little skewed. This guy is supposed to have
22 criminal intent, the capacity to form this plan that he's
23 got this remote and he's going to go back and he's going
24 to have a great pay day, you know, he's going to make tons
25 of money off of this. So he rides back on the most

1 expensive item that he supposedly took to go steal a
2 basketball goal that's in a box that he can't even carry,
3 that he has to drag up this hill. How is he going to take
4 it anywhere? Ride it on the bike? I don't think so.

5 While we're on the subject of the bike, let's talk
6 about value. As part of grand larceny, you have to prove
7 the value was over \$2,000. The victim testified that he
8 bought this bike back in the 1990's. It was a great bike,
9 custom made. You know, it was great. And he may have
10 bought that bike for \$2,000 back in the 1990's, but you
11 know what, he also said he rides it two or three times a
12 week. You know what, that's, at least, 15 years or 13
13 years of wear and tear. Ladies and gentlemen, items
14 depreciate. And I submit to you that bike is nowhere near
15 \$2,000 in today's value. Again, the shirts, \$200, four of
16 them at \$50. I really have concerns about the value of
17 \$2,000 for the bike. Plus, there's no receipt. We don't
18 know how much he paid for it. He says he thinks \$2,000.
19 Again, it's a long time ago. Do you remember how much you
20 paid for something 13 years ago?

21 What I'm going to do now is I'm going to go through
22 some of the elements of these crimes. As you heard, the
23 State does have the burden to prove every element beyond a
24 reasonable doubt. Now, on each of these crimes, I believe
25 there is, at least, one or two elements that the State's

1 missing.

2 On burglary, let's talk about the first one. She's
3 pointed all these elements out for you, but I think she
4 left one key one out. Burglary statute reads, A person
5 who, so that's -- she's assuming she knows who the person
6 is. We've got to look at the evidence. She said look at
7 the evidence that's here. We don't know who it was.
8 Nobody knows who it was. We're assuming that it was him.
9 We don't know. We're assuming. And again, I'm just going
10 to back to why would he prop the door open and know to use
11 the manual one when he's got the remote? That just
12 doesn't make sense to me. How would he know that the
13 motor didn't work?

14 The auto breakings. All three cars, not tested.
15 They may have been entered, but we don't know who entered
16 them. The Defendant when he was arrested, he had no items
17 that were from the cars in his possession. No evidence of
18 that. He didn't have any money, didn't have any change
19 that they said he grabbed out of the glove box. He didn't
20 have the GPS that they said. He didn't have any of that
21 stuff on him. There's no evidence that places him inside
22 the cars. Going back to the bike, grand larceny, the
23 value. Again, 1990's, depreciation, nowhere near \$2,000.

24 Now, let's talk about the second burglary and let's
25 talk about how crazy and how bizarre the story is. We've

1 got this guy riding his bike, which is supposedly the most
2 valuable think in the garage. Back to the house to run
3 inside to grab an item which is half his size, he can't
4 carry and is trying to steal and carry up the hilly wooded
5 area. You know, I hate walking uphill. I can't imagine
6 dragging a 60-pound item uphill. It just goes to show how
7 bizarre, how weird this is to show that this gentleman, he
8 couldn't have formulated this plan. He couldn't have
9 formulated -- the capacity to have this intent element of
10 the charge. It's not possible. He's not there. He was
11 high on drugs, just doing all this crazy stuff. He's got
12 one glove on. Who is he, Michael Jackson? I mean, what
13 is he doing? It's just weird, bizarre. This guy is not
14 in his right mental state and it's obvious.

15 Now, the Judge will instruct you that voluntary
16 intoxication, drugs and alcohol, is not a defense. And
17 it's not, but it is something you can consider in his
18 capacity to form intent. We believe that his mind didn't
19 have the capacity to form the required intent to be
20 charged with this crime.

21 Now, ladies and gentlemen, I'm not up here trying to
22 bash these officers. I'm not trying to bash the victims.
23 I feel for them. I've been through similar things in my
24 life. But we just need to step back and we need to really
25 evaluate everything that's in front of us and really think

1 hard about it. Are we really just assuming all this stuff
2 or are we really proving this? And in my mind, I think
3 it's just all assumptions. You know, I don't think
4 there's any proof. And, you know, sometimes I guess
5 assumptions is kind of like excuses, they'll stink. And
6 you know, sometimes you've just got to get rid of them.
7 You've got to move on, just focus on what we know and what
8 we don't know.

9 Now, as the solicitor said, the burden of proof is
10 beyond a reasonable doubt. She gave you an example of
11 beyond a reasonable doubt. I'm going to give you what I
12 feel is beyond a reasonable doubt and what I believe the
13 Judge will tell you what beyond a reasonable doubt means.
14 It means a doubt that causes you to hesitate, causes you
15 to hesitate to act.

16 Ladies and gentlemen, as I've heard all this stuff,
17 I've been hesitating a lot. Hesitating about why weren't
18 there fingerprints? Why didn't they interview other
19 people? And why wouldn't they take pictures if they're
20 saying this and this happened? You know, it's not because
21 they didn't have the people or the resources. We heard
22 the people were there. They wasted resources on testing a
23 glove that was taken off the Defendant.

24 I also think about reasonable doubt kind of like a
25 trash can. So you're sitting in your living room and you

1 start to smell something coming out of the kitchen. You
2 trace it back to the trash and it stinks. In that trash,
3 you know there may be some fish in there over the week,
4 maybe a steak, whatever. You threw it in there and you
5 forgot about it and it stinks. Well, it's not your job to
6 go digging through the trash and investigate what stinks.
7 Who does that? Nobody. You don't do it. What do you do?
8 You pick up that trash and you take it out. And that's
9 what beyond a reasonable doubt means here. If you feel
10 that something stinks about this, which I do, then you
11 must throw it out. That's your burden.

12 Now, ladies and gentlemen, I appreciate the service
13 y'all have done. Mr. Simmons could not have his day in
14 court without you. It's a great honor to do this and I
15 appreciate your time. I trust at the end of the day, you
16 will reach the correct verdict. Thank you.

17 CHARGE BY THE COURT

18 THE COURT: Now, ladies and gentlemen of the jury,
19 the Defendant in this case is first indicted for auto
20 breaking. This is a statutory charge. And section
21 16-13-160 of our code of laws provides in part as follows:
22 It is unlawful for a person to break or attempt to break
23 into a motor vehicle or its compartment with the intent to
24 steal it or anything of value from it, or attached or
25 annexed to it, or used in connection with it or the

1 perpetration of any criminal offense.

2 Now, ladies and gentlemen, breaking into a motor
3 vehicle or commonly called auto breaking, as defined in
4 the statute is the breaking and entering of an automobile
5 for the purpose of stealing it or anything of value from
6 it.

7 Now, there's several elements of this offense each of
8 which must be proved by the State beyond a reasonable
9 doubt. First of all, there must be a breaking. Now, it
10 need not be by means of any great force because any force
11 which is necessary to make an opening would be sufficient.
12 Therefore, if the car door is closed, even though not
13 locked, an opening of that door will institute a breaking.
14 There must be an entering or an attempt to enter into the
15 automobile. The placing of a head into or reaching into
16 an automobile with an arm would constitute an entering.
17 Next, there must be an intent to steal the automobile
18 itself or something of value from it. Intent is defined
19 as a purpose or the state of a person's mind which directs
20 his actions toward a specific object.

21 So if you find that the automobile and/or automobiles
22 in this case was -- or were entered with the purpose or
23 aimed to steal it or anything of value from it, this would
24 constitute the attempt necessary to satisfy the element of
25 auto breaking.

1 The Defendant is next indicted for burglary first
2 degree. This, too, is a statutory offense. And section
3 16-11-312 provides in part as follows: A person is guilty
4 of burglary if a person enters a dwelling without consent
5 and with the intent to commit a crime therein and the
6 entering or remaining occurs in the nighttime. And it is
7 also defined as entering a building or a dwelling with one
8 or -- two or more convictions for burglary. So with
9 respect to burglary, I charge you that dwelling means a
10 structure wherein someone sleeps. It would include any
11 garage, any outhouse or any shed of within 200 yards of
12 the dwelling.

13 Now, it must be entered without consent. Consent
14 means to enter without consent of the person in lawful
15 possession or by using deception, artifice, trick or
16 misrepresentation to gain entry. Now, there must have
17 been an intent to commit a crime once in the dwelling, but
18 intended crime need not be actually committed or
19 accomplished. Incident, ladies and gentlemen, means a
20 purpose, an aim or design. It means the state of a
21 person's mind which directs his actions toward a specific
22 subject.

23 The Defendant is next indicted for larceny. Larceny
24 is defined as the taking and carrying away by any person
25 of goods or things personal of another with the felonious

1 or unlawful intent to permanently deprive that person of
2 his or her own property. There are, of course, several
3 elements of this offense, each of which the State must
4 prove beyond a reasonable doubt.

5 First, there must be a taking and carrying away of
6 the personal property of another. And it is personal
7 property or chattels as opposed to real estate. Secondly,
8 the property must be the property of another and the
9 ownership of that property must be proved and its value of
10 \$2,000 or more. Third, there must be a felonious, that is
11 an unlawful attempt to permanently deprive that person of
12 his or her own use and convert it to the taker's own use.
13 That, ladies and gentlemen, is larceny.

14 Now, the value of an item means the fair market
15 value, not the price at which the owner would be willing
16 to sell. For used items, the fair market value is the
17 reasonable selling price of the item in its condition at
18 the time of the theft.

19 The Defendant is lastly charged, ladies and
20 gentlemen, with resisting arrest. This, too, is a
21 statutory offense. And section 16-9-32 of our code
22 provides in part as follows: It is unlawful for a person
23 knowingly and willfully to oppose or to resist an arrest
24 being made by one whom a person knows or reasonably should
25 know is a law enforcement officer.

1 Now, in connection with this, ladies and gentlemen, I
2 charge you that a person has a right to resist an unlawful
3 arrest even to the extent of taking life. However, when a
4 law enforcement officer or a uniformed police officer
5 places a person under arrest for the commission of an
6 alleged crime, it is the duty of that person arrested to
7 submit peacefully.

8 Now, the obstruction of or resistance to a police
9 officer is a statutory offense that I have read to you.
10 And resist means to oppose, to strive against or, more
11 specifically, to obstruct. Obstruct means to interpose
12 obstacles or impediments, hinder, impede or in any manner
13 intrude or prevent. The term does not necessarily imply
14 the use of direct force. It includes any passive and
15 direct or secure an impediment to an arrest or to the
16 service or execution of a process.

17 Now, ladies and gentlemen of the jury, as juries in
18 this case, you have a function or a responsibility that is
19 entirely separate and distinct from my function as the
20 trial judge. The constitution of our state does not allow
21 me to charge you on the facts of this case or discuss the
22 facts with you or in any way or manner let you know what
23 my personal feelings, if any, are about this case. That's
24 because you and you alone are the judges of the facts.
25 Therefore, if during the course of this trial or during

1 the course of my charge, you have a feeling or you have
2 been left with the impression that I have a personal
3 feeling about this case one way or the other, then you
4 disregard that feeling or that impression. You and you
5 alone are the judges of the facts.

6 Now, it's your duty and your duty alone to weigh the
7 testimony and evidence presented in this case and to pass
8 upon the credibility or the believability of the witnesses
9 you heard testify. In this connection, you have a right
10 to believe all that a witness told you or you can
11 disbelieve all that a witness told you. You can believe a
12 part of what a witness told you and disbelieve a part of
13 what a witness told you. You can believe one witness as
14 against several or you can believe several against one.
15 You also have the right to take into consideration any
16 bias or prejudice or sympathy you may have in reaching
17 your verdict.

18 Now, as the judge of the law in this case, it's my
19 duty to charge you the law applicable to the facts in this
20 case. It's not a question of what you feel the law might
21 be or what it should be. It is not necessarily what the
22 lawyers may have told you because under your oath, you are
23 required to take the law as I give it to you, apply that
24 law to the facts as you determine those facts to be and to
25 write your verdict accordingly.

1 Ladies and gentlemen, in this case, as in all
2 criminal cases, this Defendant comes into this courtroom
3 presumed to be innocent. And this presumption continues
4 and carries through the entire trial until and unless it
5 is removed by evidence that satisfies you of his guilt
6 beyond a reasonable doubt. The burden is on the State in
7 this case to prove this Defendant guilty and to prove each
8 and every element of the offenses with which he is charged
9 beyond a reasonable doubt.

10 Now, some of you may have in the past served as
11 jurors on civil cases. And if so, you were most likely
12 told that it was only necessary to prove that a fact was
13 more likely true than not true. In criminal cases, the
14 burden is more powerful. As I've told you, it must be
15 beyond a reasonable doubt.

16 Now, proof beyond a reasonable doubt is proof that
17 leaves you firmly convinced of this Defendant's guilt.
18 There are very few things in this world that we know with
19 absolute certainty. And in criminal cases, our law does
20 not require proof that overcomes every possible doubt. If
21 based on your consideration of the testimony and evidence
22 in this case you're firmly convinced that this Defendant
23 is guilty, then you must find him guilty. If on the other
24 hand, you think there is a real possibility that he is not
25 guilty, then you must give him the benefit of that doubt.

1 and find him not guilty.

2 Ladies and gentlemen, our law never compels a
3 defendant in a criminal case to take the stand and testify
4 on his behalf. And no presumption of guilt may be raised
5 and no inference of any kind can be drawn from this
6 Defendant's decision not to appear in court and testify in
7 his defense. Our law never imposes upon a defendant in a
8 criminal case the burden or duty of calling any witnesses
9 or producing any evidence or testifying. Therefore, the
10 decision of this Defendant not to take the stand and
11 testify in his behalf cannot be taken, held, discussed or
12 in any manner held against him.

13 Now, ladies and gentlemen, I charge you that
14 voluntary intoxication is never an excuse for or a defense
15 to the commission of a crime. A person who voluntarily
16 renders himself intoxicated is no less responsible for his
17 acts while in that condition. If one voluntarily drinks
18 intoxicating liquors, beer or wine, or is under the
19 influence of drugs and become intoxicated to any degree,
20 and if while in that condition commits an act for which it
21 would be a crime had it been committed by a sober person,
22 the fact of intoxication would not relieve the intoxicated
23 person from responsibility.

24 Ladies and gentlemen, if from the evidence in this
25 case you have a reasonable doubt about whether or not this

1 Defendant is guilty as charged, it would be your duty to
2 acquit him. It is your duty to lay aside all outside
3 opinions, bias or prejudice or sympathy you may have in
4 reaching your verdict. The word verdict is taken from the
5 Latin word veredicto. It means to speak the truth. You
6 have no friends to reward in this case or enemies to
7 punish. I charge you to abide by your oath and return
8 verdicts that speak the truth.

9 Now, at this time, I am required to suspend and go
10 over my charge with the lawyers. I need you to go back
11 into your jury room, but don't begin deliberations until I
12 send word in for you to do so. Thank you.

13 (WHEREUPON, the jury left the courtroom at
14 approximately 10:10 a.m.)

15 THE COURT: All right. You have that indictment?

16 MS. TESSITORE: Yes, Your Honor, and I think we have
17 -- let me show it to Mr. Maxwell.

18 So both parties have looked at that, Your Honor.
19 We're in agreement that that would be a fair way to
20 present that indictment given the fact that it's a lesser
21 included.

22 THE COURT: Okay.

23 MR. MAXWELL: As far as the charge, Your Honor, I
24 would request one additional one. I don't think at any
25 time we instructed the jury as to the prior burglaries

1 that are introduced as an aggravating factor. I would
2 request that you give them a charge that they cannot
3 consider that as necessarily guilty for this one.

4 MS. HENRY: Your Honor, I would agree. I think that
5 under State v. Hamilton and Benton and the other cases I
6 follow that the evidence of prior conviction should only
7 be considered in determining if the requisite aggravated
8 circumstances are met, not as evidence of the Defendant's
9 bad character, evidence that he acted in accordance with
10 prior bad conduct. I don't have that typed up, except I
11 have the language. And I can get you those cases.

12 MR. MAXWELL: Your Honor, I'm satisfied with this if
13 Your Honor would just wish to read that.

14 THE COURT: Yeah. Let me have it, I'll see what I
15 can do.

16 MS. HENRY: Yes, sir. Your Honor, I have the State
17 v. Benton, which is cited -- let's see, lower down on that
18 same sheet, 526 S.E.2d 228 --

19 THE COURT: I'm just going to use this that you gave
20 me.

21 MS. HENRY: Okay. I think as long as we have that --

22 THE COURT: I also neglected to charge them about
23 petit larceny, which I will do.

24 MS. HENRY: And Your Honor, the only other one we did
25 not observe was the circumstantial evidence charge. Since

1 the first burglary involves quite a big of circumstantial
2 evidence, we would request that as well.

3 THE COURT: Okay.

4 Okay, bring them back, please.

5 (WHEREUPON, the jury entered the courtroom at
6 approximately 10:15 a.m.)

7 THE COURT: Now, ladies and gentlemen, with respect
8 to the indictments for burglary, I further charge you that
9 the prior convictions of this Defendant for burglary can
10 only be considered by you in determining if the requisite
11 aggravating circumstances of the burglary charges in this
12 case are met and cannot be used as evidence of his bad
13 character nor as evidence that he acted in accordance with
14 prior bad conduct.

15 I further charge you, ladies and gentlemen, that in
16 the trial of a case, the State can rely on direct evidence
17 or on circumstantial evidence or on a combination of the
18 two, as in this case. Direct evidence proves the
19 existence of a fact -- of a disputed fact by using one or
20 more of our five senses without the aid of any inferences.
21 For example, the testimony of a person who asserts or
22 claims to have actual knowledge of a fact. In other
23 words, an eyewitness, that is direct evidence.

24 Circumstantial evidence, on the other hand, is where
25 certain facts known through using one or more of our five

1 senses deduces a logical inference that other facts exist
2 without directly proving those facts. That is
3 circumstantial evidence.

4 Now, as I've told you, the State may rely on either
5 or both of this type evidence, direct or circumstantial,
6 and neither is superior to the other. One is as good as
7 the other and equally convincing to you and they are each
8 entitled to the same weight. Now, you should weigh all
9 the evidence in this case and in doing so, if you are not
10 convinced that this Defendant is guilty beyond a
11 reasonable doubt, then you must find him not guilty.

12 Now, ladies and gentlemen, with respect to the
13 indictment for larceny, as I told you -- grand larceny in
14 this case, the State must prove that the value of the
15 bicycle was 2000 or more dollars. If you -- that is an
16 element of this offense. If you find that he stole the
17 bike, but its value is less than \$2,000, then you would
18 find him guilty of petit larceny. So with respect to the
19 indictment for larceny, there are one of three possible
20 verdicts, guilty, not guilty or guilty of petit larceny.

21 Madam Foreman, I have written out the three possible
22 verdicts for larceny on this sheet and I'll send that in
23 with you. You can use it simply to be sure that you
24 correctly write out whatever the verdict of the jury is on
25 that charge. With respect to each of the other

1 indictments, there is only one of two possible verdicts,
2 guilty or not guilty. And whatever your verdicts are,
3 they must be unanimous, that is all 12 of you must agree.

4 Okay, at this time, if you will retire and begin your
5 review of this case. I'll have the exhibits and
6 indictments sent into you momentarily. At this time, just
7 retire and go ahead and start your deliberations.

8 Mr. Alternate, you can remain in the courtroom.

9 (WHEREUPON, the jury left the courtroom at
10 approximately 10:20 a.m.)

11 THE COURT: I'm happy to tell you you're through for
12 the week. You don't have to come back today or tomorrow.
13 So thank you so much for coming and serving. I've enjoyed
14 working with you. What I need for you to do is go back
15 downstairs to the jury assembly room and they will have a
16 voucher to give to you and attached to that will be a slip
17 for you to give to your employer should you need that. Do
18 you have any question I can try to answer for you?

19 MR. ALTERNATE: I need to get my stuff.

20 THE COURT: All right. Sure. Then you can go down
21 the back way, too. They'll get it for you.

22 MR. ALTERNATE: Thank you.

23 THE COURT: All right. Do you have the exhibits?
24 I'm not going to send in those disks. If they want
25 something played back, we can bring them in the courtroom.

1 (WHEREUPON, the jury began deliberations at
2 approximately 10:23 a.m.)

3 THE COURT: All right. We'll be at ease. Stay
4 nearby.

5 (WHEREUPON, court was in recess awaiting a
6 verdict.)

7 THE COURT: Okay. The jury has a question. They
8 want to know if there was another person involved. Of
9 course, I can't answer that question. Even if there was,
10 that would make no difference. The State alleges that
11 this Defendant alone did everything, so.

12 MS. TESSITORE: Well, I mean that the circumstantial
13 evidence in the first burglary does not preclude that
14 there could have been someone else involved, but we
15 haven't --

16 THE COURT: But you allege that this Defendant --

17 MS. TESSITORE: Yes.

18 THE COURT: -- did everything and so it wouldn't make
19 any difference if there was anybody else involved.

20 MS. TESSITORE: Right, I mean, it would be the hand
21 of one, hand of all basically. If there were other
22 people, I'm just saying.

23 MR. MAXWELL: Your Honor, I think her allegation the
24 whole time was the Defendant did all of this and they
25 haven't made any attempt to include other evidence through

1 -- you know, outside of the record. There were mentions
2 of other incidents in the neighborhood that day --

3 THE COURT: You argued that to the jury.

4 MS. MAXWELL: Yeah.

5 MS. TESSITORE: No, no, you're right, Your Honor. I
6 argued that he -- that the only question they had before
7 them was whether this Defendant committed these acts.

8 THE COURT: Right. So I mean -- well, I can't answer
9 the question, first of all, because that would be an issue
10 of fact for them to determine if it was relevant.

11 MS. TESSITORE: Right. And I think that's what they
12 need to know.

13 THE COURT: All right, bring the jury.

14 MS. TESSITORE: But I think a statement that he acted
15 alone would be misleading, that's all.

16 (WHEREUPON, the jury entered the courtroom at
17 approximately 11:26 a.m.)

18 THE COURT: Madam Foreman, you sent in the question,
19 Was there another person involved? Now, I cannot answer
20 that question for you because that would be an issue of
21 fact for you to determine. But I charge you that it would
22 make no difference whether there was another person
23 involved or not. The State allegations in this case that
24 this Defendant committed these acts. And the burden is on
25 them to prove that he committed the burglaries, the auto

1 breakings, the larceny and resisting arrest.

2 Okay. I'm sorry. Thank you. Go back and please
3 continue with your deliberations.

4 (WHEREUPON, the jury left the courtroom at
5 approximately 11:28 p.m.)

6 THE COURT: All right, be at ease.

7 (WHEREUPON, Court's Exhibit No. 2 was admitted
8 into evidence.)

9 (WHEREUPON, the jury entered the courtroom at
10 approximately 12:00 p.m.)

11 THE COURT: Ladies and gentlemen, at this time, we're
12 going to recess for lunch and we'll pick back up at 1:30.
13 During the lunch recess, do not talk about this case
14 amongst yourselves or with anyone else. If anybody
15 contacts you and tries to talk to you about the case, get
16 their names and addresses and report back to me. Please
17 keep your badges on during the lunch recess so that
18 everyone involved with this case will know that you are a
19 juror and they should not talk about the case in your
20 presence.

21 Madam Foreman, one thing I neglected to tell you
22 after my charge, whatever the verdicts are that you reach,
23 you'll find a place on the back of the indictment and
24 write out that verdict in that space and then sign your
25 name on the line where it says foreperson. Okay.

1 All right. Go to lunch and then be back and begin
2 your deliberation at 1:30. But do not discuss this case
3 while you're on lunch break. Please be back at 1:30.

4 (WHEREUPON, the jury left the courtroom at
5 approximately 12:02 p.m.)

6 THE COURT: All right. Please be back to take the
7 verdict any time after 1:30. We'll give you a call.

8 MS. TESSITORE: Thank you, Your Honor.

9 (WHEREUPON, a lunch break was taken.)

10 THE COURT: All right, anything before I bring the
11 jury in?

12 MS. TESSITORE: Not from the State, Your Honor.

13 MR. MAXWELL: No, Your Honor.

14 THE COURT: All right, bring them in, please.

15 (WHEREUPON, the jury entered the courtroom at
16 approximately 1:57 p.m.)

17 THE COURT: Madam Foreman, if you've reached a
18 verdict, would you hand it to the bailiff, please, ma'am.

19 Okay, would you please publish the verdicts.

20 VERDICT

21 THE CLERK: Your Honor, in the case of
22 2013-GS-23-4564, the State vs. Demetrius Simmons, he's
23 indicted for breaking and entering into a motor vehicle,
24 the verdict is not guilty. In the case of
25 2013-GS-23-4565, Mr. Simmons is indicted for breaking and

1 entering a motor vehicle, not guilty. In the case of
2 2013-GS-23-4568, the State vs. Demetrius Simmons, he's
3 indicted for burglary in the first degree, verdict is
4 guilty. In the case of 2013-GS-23-4567, Mr. Simmons is
5 indicted for burglary in the first degree, the verdict is
6 guilty. In the case of 2013-GS-23-4562, Mr. Simmons is
7 indicted for resisting arrest, the verdict is guilty. In
8 the case of 2013-GS-23-4566, Mr. Simmons is indicted for
9 grand larceny, he is convicted of -- guilty of petit
10 larceny. In the case of 2013-GS-23-4563, Mr. Simmons is
11 indicted for breaking and entering a motor vehicle, the
12 verdict is guilty.

13 Ladies and gentlemen, if you agree these are the
14 verdicts you reached in your deliberation room, would you
15 please raise your right hand.

16 (WHEREUPON, all members of the jury raised their
17 right hand.)

18 THE CLERK: Thank you.

19 THE COURT: All right. Anything further from the
20 jury, Counsel?

21 MS. TESSITORE: Not from the State, Your Honor.

22 MR. MAXWELL: No, Your Honor.

23 THE COURT: Thank you, ladies and gentlemen, so much
24 for your service on this case and your service for this
25 week. As you know, you're through, you don't have to come

1 back the rest of today or tomorrow. So I want to take
2 this opportunity to thank you for coming and serving. I
3 want you to know I'm well aware of the fact that jury
4 service is a burden to you. But I do hope you understand
5 the importance of being here this week. As I told you on
6 Monday, I know one thing for sure that is if you found
7 yourself in this courthouse involved in some type
8 litigation, certainly, you would want a good fair jury on
9 your case and I think you've been a very fair and
10 impartial jury this week. And I thank you very much for
11 that service.

12 Now, if you'll report to the jury assembly room, Judy
13 will have a voucher to give to you for your service this
14 week, attached to that voucher will be a slip for you to
15 give to your employer should you need that.

16 Before I let you go, does anyone have a question I
17 can try to answer for you? Okay. I've enjoyed working
18 with you, you're free to go. Thank you.

19 (WHEREUPON, the jury left the courtroom at
20 approximately 2:00 p.m.)

21 THE COURT: All right, anything further, Counsel?

22 MS. TESSITORE: Your Honor, as far as the verdict,
23 no, but as far as -- I understand that you won't be
24 imposing your sentence -- well, you will be, but sealed,
25 so as far as the prior convictions, I'd just like to put

1 those on the record.

2 THE COURT: Sure.

3 MS. TESSITORE: Okay. And let's see, I guess Mary
4 left. Your Honor, as far as a prior record, the Defendant
5 was convicted in 2002 of unlawful carrying of a pistol,
6 possession of marijuana, failure to stop for a blue
7 lights, possession of crack. 2003, possession of cocaine.
8 2007, auto breaking and petty larceny. In 2010, he was
9 convicted of three counts of burglary second degree
10 nonviolent and a count of burglary third degree. He was
11 placed on probation for three years and was actually on
12 probation when he committed these current burglaries. I
13 will pass up to the Court certified convictions as to all
14 of those burglaries and would just note that the three
15 burglaries that are in the second degree are all involving
16 dwellings.

17 THE COURT: All right. I don't know need them. You
18 want to make it part of the record?

19 MS. TESSITORE: Yes, sir.

20 THE COURT: All right.

21 (WHEREUPON, Court's Exhibit No. 3 was admitted
22 into evidence.)

23 MR. MAXWELL: Your Honor, if I also, may I put in as
24 an exhibit the medical records just for the record. And
25 also return these to the court reporter. They're the

1 exact same ones, the few pages, and actually the ones we
2 had struck through all that.

3 THE COURT: All right. Then I will sentence and seal
4 the record and a bench warrant will be issued. And when
5 he's apprehended, he will be brought in to sentencing.

6 MS. TESSITORE: Your Honor, you want an order for a
7 bench warrant to sign?

8 THE COURT: Yes.

9 (WHEREUPON, Court's Exhibit No. 4 was admitted
10 into evidence.)

11 (WHEREUPON, the proceedings were concluded.)

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CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)

I, PENNY M. JOHNSON, Official Court Reporter for the
Second Judicial Circuit of the State of South Carolina, do
hereby certify that the foregoing is a true, accurate, and
complete Transcript of Record of the proceedings had and the
evidence introduced in the trial of the captioned case,
relative to appeal, in General Sessions Court for Greenville
County, South Carolina, on the 11th and 12th day of
December, 2013.

I do further certify that I am neither of kin, counsel,
nor interest to any party hereto.

March 21, 2016

Penny M. Johnson

Penny M. Johnson Court Reporter

My Commission Expires: 06/16/2018

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF GENERAL SESSIONS

STATE OF SOUTH CAROLINA,)
)
 PLAINTIFF,)
)
)
 -VS-)
)
 DEMETRIUS SIMMONS,)
)
 DEFENDANT.)
 _____)

2013-GS-23-04562 & 04563
2013-GS-23-04566 - 04568

TRANSCRIPT OF RECORD

OCTOBER 16, 2014
GREENVILLE, SOUTH CAROLINA

BEFORE:

THE HONORABLE C. VICTOR PYLE, JR.

APPEARANCES:

ATTORNEY FOR PLAINTIFF:

JENNIFER TESSITORE, ASSISTANT SOLICITOR

ATTORNEY FOR DEFENDANT:

JOEY MAXWELL, ESQ.

SUSAN W. HUDGINS
CIRCUIT COURT REPORTER

INDEXWITNESSPAGE NO.

CERTIFICATE OF REPORTER -----

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EXHIBITS

<u>NO</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EVIDENCE</u>

(No exhibits were produced during this hearing)

1 **THE COURT:** You are Demetrius Simmons?

2 **MR. SIMMONS:** Yes, sir.

3 **THE COURT:** Mr. Simmons, you were tried in your absence
4 back in December of 2013. And you were found guilty by the
5 jury to breaking and entering a motor vehicle, resisting
6 arrest, larceny and burglary. And at this time I will read
7 the sentences to you. Is there anything before I publish
8 these sentences?

9 **MS. TESSITORE:** Nothing from the State, Your Honor.

10 **MR. MAXWELL:** Your Honor, I don't know if you're
11 allowed to, but we would ask that you give him credit. He
12 was actually in Georgia in prison for quite a while after
13 these charges and after the trial. And we would ask that,
14 if you could, give him time for that time as well, credit
15 for that time.

16 **MS. TESSITORE:** That was on unrelated drug charges ---

17 **THE COURT:** I think so. I don't believe that's -- he's
18 entitled to any credit for that. All right.

19 Mr. Simmons, on the indictment for burglary the
20 sentence of the Court is you be committed to the Department
21 of Corrections for a period of fifteen years. On the next
22 indictment, burglary, the sentence is you be committed to
23 the Department of Corrections for a period of fifteen years,
24 concurrent to the other sentence.

25 On the indictment for breaking and entering a motor

1 vehicle, the sentence of the Court is you be committed for a
2 period of five years, concurrent to the other sentence.

3 And on the indictment -- is that the one for larceny
4 and he was found guilty of petty larceny?

5 **MS. TESSITORE:** Yes, sir.

6 **THE COURT:** The sentence of the Court is you be
7 committed to the Department of Corrections for a period of
8 one year, concurrent to the other sentences. Okay.

9 **MR. MAXWELL:** Thank you, Your Honor.

10 **MS. TESSITORE:** Thank you, Your Honor.

11 (Pause)

12 **THE COURT:** All right. I'm sorry, sir. On the
13 indictment for petty larceny, the sentence is actually
14 thirty days, concurrent. And on the last indictment, that's
15 one -- one year, concurrent.

16 **MADAME CLERK:** One year? Yes, sir.

17 **THE COURT:** Okay.

18 **MR. MAXWELL:** All right. Thank you, Your Honor.

19 (Hearing Ended at 9:15 am)

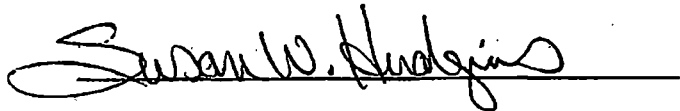
20 (End of Requested Transcript of Record)

Certificate of Reporter

I, the undersigned, Susan W. Hudgins, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial/hearing of the captioned case, relative to appeal, in the Circuit Court for Greenville County, South Carolina, on the 16th day of October 2014.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

December 22, 2015

A handwritten signature in cursive script, reading "Susan W. Hudgins", is written over a horizontal line.

Circuit Court Reporter

FORM 5

STATE OF SOUTH CAROLINA

County of GreenvilleDemetrius Simmons # 283195

Full name and prison number (if any) of Applicant

v.

State of South Carolina

GREENVILLE COUNTY

IN THE COURT OF COMMON PLEAS

2015-CP-23- 05741

APPLICATION FOR
POST-CONVICTION RELIEFFILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER
2015 SEP 17 PM 4 33INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention McCormick CT. 386 Redemption Way
McCormick, SC 29699
2. Name and location of Court which imposed sentence GREENVILLE County Clerk of Court
305 EAST NORTH ST. GREENVILLE S.C. 29605
3. Name(s) of co-defendant(s) (if any) NONE
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) INDICTMENT # 13-GS-2304568
 - (b) BURGLARY - PETIT LARCENY - CAR BREAKING

- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) 9-17-2014
- (b) 15 YEARS
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty N/A
- (b) after a plea of not guilty YES
- (c) after a plea of nolo contendere N/A
7. Did you appeal from the judgment of conviction or the imposition of sentence?
NO. COUNSEL FAILED TO DO HIS DUTY
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. _____
- ii. N/A
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. _____
- ii. N/A
- iii. _____
- (c) the date of each such result:
- i. _____
- ii. N/A
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. _____
- ii. N/A
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) FRAZERV S.C. COUNSEL FAILED TO DO HIS
- (b) DUTY. C. INDICATED TO HIMSELF A CLAIM
TO A FIVE YEAR 2, DEFENDANT WAS SENTENCED
TO A FIVE YEAR

- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully: FAILURE TO SUPPRESS EVIDENCE
- (a) INEFFECTIVENESS OF COUNSEL
- (b) FAILURE TO APPEAL SUBJECT MATTER JURISDICTION
- (c) FAILURE TO INVESTIGATE AND PREJUDICED BY COUNSEL
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) SEE ATTACHMENT FACTS
- (b) SEE ATTACHMENT FACTS
- (c) SEE ATTACHMENT FACTS
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? N/A
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? FIRST BITE OF THE APPLE
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? N/A
- (d) any other petitions, motions or applications in this or any other Court? NONE
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. N/A
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. _____
- ii. N/A
- iii. _____
- iv. _____

(c) the disposition thereof:

- i. _____
- ii. N/A
- iii. _____
- iv. _____

(d) the date of each such disposition:

- i. _____
- ii. N/A
- iii. _____
- iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

- i. _____
- ii. N/A
- iii. _____
- iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

NONE

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

- i. NONE
- ii. _____
- iii. _____

(b) the proceedings in which each ground was raised:

- i. _____
- ii. N/A
- iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) FIRST TIME ON P.C.R.
 (b) NOTHING WAS SEATED TO RAISE TO APPEAL
 (c) COUNSEL DID NOT HAVE KNOWLEDGE TO DO SO

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? N/A
 (b) your trial, if any? YES
 (c) your sentencing? YES
 (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? COUNSEL FAILED TO DO HIS DUTY
 (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?
N/A

18. If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:

i. JOEY MAXWELL
PUBLIC DEFENDER
 ii. 305 E. NORTH ST.
GREENVILLE S.C. 29601

iii.

(b) the proceedings at which each such attorney represented you:

i. TRIAL & SENTENCING
 ii.
 iii.

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, DEMETRIUS SIMMONS^H 283195, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Demetrius Simmons
Applicant

SWORN or affirmed to and subscribed before me this

26 day of May, 2015

JC Franklin
Notary Public

My Commission Expires: 12-16-2019

19. State clearly the relief you seek in filing this application:

TO VACATE SENTENCE REMAND FOR NEW TRIAL. DEFENDANT HAS A CONSTITUTIONAL RIGHT TO BE PRESENT AT HIS TRIAL.

20. Are you now under sentence from any other court that you have not challenged?

NO. P.S.M. IS TO BE LEFT OPEN TO ADJUDICATE AND ADMEND AT A LATER DATE.

STATE OF SOUTH CAROLINA)

County of GREENVILLE)

VERIFICATION

I, DEMETRIUS SIMMONS #283195, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Demetrius Simmons

SWORN to and subscribed before me this 26
day of May, 2015.

J. C. Franklin (L.S.)
Notary Public

My Commission Expires: 12-16-2019

ATTACHMENT "FACTS"

INEFFECTIVENESS OF COUNSEL

DEFENDANT WAS SENTENCED IN HIS ADSENCE, DEFENDANT NEVER RECEIVED A NOTICE IN THE MAIL TO BE IN OPEN COURT. THIS IS A CONSTITUTIONAL VIOLATION OF HIS DUE-PROCESS OF RIGHTS. ART. I.] SEC. I. 3.] DUE-PROCESS IS THE EQUAL PROTECTION OF RIGHTS TO BE AFFORDED TO ALL. THIS IS A SHALL PROVISION OF LAW THAT IS MANDATORY. UNDER OUR 17-23-60 ACCUSED'S RIGHTS TO COUNSEL, TO PRODUCE WITNESSES AND PROOFS, AND TO CONFRONT WITNESSES, WAS NOT AFFORDED TO THE DEFENDANT. THE 17-23-60 AND 17-23-80 AND 17-23-90 AND 17-23-120 AND 17-23-13 AND 17-23-140 WAS NOT AFFORDED, AND THIS CASE SHOULD BE VACATED AND REMANED FOR NEW TRIAL.

[UNITED STATES V. WOOD, 879 F.2D 927, 934 [D.C. CIR. 1989]]

SUPPRESSION OF EVIDENCE

TO MAKE OUT A CLAIM OF INEFFECTIVE ASSISTANCE RELATED TO AN ATTORNEY'S FAILURE TO MOVE FOR SUPPRESSION OF EVIDENCE, THE MOVANT MUST SHOW THAT THE CLAIM HAD MERIT AND THERE IS A REASONABLE PROBABILITY THAT BUT FOR THE EXCLUDABLE EVIDENCE THE VERDICT WOULD HAVE BEEN DIFFERENT. DEFENDANT NEVER GOT THE CHANCE TO BE IN OPEN COURT TO DEFEND HIS SELF, AS THE CONSTITUTION STATES THAT WE SHALL ENJOY.

ATTACHMENT FACTSFAILURE TO FILE APPEAL

FRAZER V. SOUTH CAROLINA, 430 F.3D 696 [4TH CIR 2005]
INEFFECTIVE ASSISTANCE WHERE COUNSEL FAILED TO FILE
AND APPEAL.

UNITED STATES V. SANDOVAL-LOPEZ 409 F.3D 1193 [9TH CIR.
2005] ATTORNEY'S FAILURE TO FILE APPEAL WAS INEFFECT-
-IVE ASSISTANCE WHERE DEFENDANT TOLD ATTORNEY TO FILE
APPEAL BUT ATTORNEY DISREGARDED CLIENT'S WISHES
BECAUSE DEFENDANT KNEW HIS CONSTITUTIONAL RIGHTS
HAD BEEN VIOLATED.

ATTACHMENT FACTS:SUBJECT MATTER JURISDICTION

AS A PRELIMINARY MATTER, IT MUST BE NOTED THAT ISSUES
RELATED TO SUBJECT MATTER JURISDICTION MAY BE RAISED AT
ANY TIME. CARTER V. STATE 329 S.C. 355, 495, 495 S.E.2D 773
[1998] PURSUANT TO S.C. CODE ANN § 17-19-20 [1985] AN INDICT-
-MENT IS DEEMED SUFFICIENT WHERE, IN ADDITION TO ALLEGA-
-TIONS AS TO TIME AND PLACE, THESE INDICTMENTS WERE
TRUED BILLED IN GREENVILLE AND LEFT THE GRAND JURY
TO SPECULATE ON THE ESSENTIAL ELEMENTS, THIS IS DEFECTIVE:
COURT DID NOT HAVE JURISDICTION VESTED TO PASS ANY SENTENCE.
BROWNING V. STATE 320 S.C. 366, 368, 465 S.E.2D. 358, 359 [1995]
STATE V. SHOEMAKER, 276 S.C. 26, 275 S.E.2D 878 [1981]

ATTACHMENT FACTS

FAILURE TO INVESTIGATE AND INTERVIEW

THE SIXTH AMENDMENT TO THE U.S. CONSTITUTION GUARANTEES THE RIGHT TO EFFECTIVE COUNSEL. STRICKLAND V. WASHINGTON, 466 U.S. 668, 104 S. CT. 2052, 2068, 80 L. ED. 2D 674 [1984] A DEFENDANT IS ENTITLED TO A NEW TRIAL IF HE CAN SHOW [1.] THAT TRIAL COUNSEL'S PERFORMANCE WAS DEFICIENT; AND [2.] A REASONABLE PROBABILITY THAT, BUT FOR THE DEFICIENT PERFORMANCE, THE OUTCOME OF THE PROCEEDING WOULD HAVE BEEN DIFFERENT. A PETITIONER CAN MEET THIS STANDARD BY SHOWING THAT COUNSEL FAILED TO CONDUCT ADEQUATE PRETRIAL INVESTIGATION. JONES V. WOOD, 114 F.3D 1002 [9TH CIR. 1997] BEFORE AN ATTORNEY CAN MAKE A REASONABLE STRATEGIC CHOICE AGAINST PURSUING A CERTAIN LINE OF INVESTIGATION, THE ATTORNEY MUST OBTAIN THE FACTS NEEDED TO MAKE THE DECISION FOSTER V. LOCKHART, 9 F.3D 722, 726 [8TH CIR. 1993] SEE ALSO SANDERS V. RATELLE, 21 F.3D 1446, 1456 [9TH CIR. 1994]

DEFENDANT WAS PREJUDICED BY COUNSEL'S ERRORS

THE PREJUDICIAL EFFECT OF COUNSEL'S ERRORS MUST BE CONSIDERED CUMULATIVELY RATHER THAN INDIVIDUALLY. WILLIAMS V. TAYLOR, 529 U.S. 362, 120 S. CT 1495, 1515, 146 L. ED. 2D. 389 [2000] HARRIS V. WOOD, 64 F.3D 1432, 1438-39 [9TH CIR. 1995] BASING THAT CONCLUSION ON STRICKLAND. FOR ALL THESE REASONS THIS CASE SHOULD BE REOPENED FOR A NEW TRIAL.

Dorothy Simms
DEFENDANT

Dover vs state 405 SE. 2nd 391 (SC. 1991)
talked to Counsel 3x for 30 minutes.
Didn't understand Plea Agreement. Inter-
viewed 5-10 minutes each time

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

Demetrius Simmons, #283195,

2015-CP-23-5741

Applicant,

v.

RETURN¹

State of South Carolina,

Respondent.

In response to the post-conviction relief application filed on September 17, 2015, Respondent would show this Court:

I.

Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Greenville County Clerk of Court's orders of commitment. Applicant was indicted by the October 2013 term of the Greenville County Grand Jury for one (1) count of Resisting Arrest (2013-GS-23-004562), one (1) count of Breaking and Entering a Motor Vehicle (2013-GS-23-004563), two (2) counts of Larceny/Breaking into a Motor Vehicle (2013-GS-23-004564, -004565), one (1) count of Grand Larceny (2013-GS-23-004566), and two (2) counts of Burglary, First Degree (2013-GS-23-004567, -4568). Joey Maxwell, Esquire and Sarah Henry, Esquire represented him. On December 11, 2013, Applicant was tried in his absence and found guilty as indicted on all charges except each count of Larceny/Breaking into a Motor Vehicle. On October 16, 2014, The Honorable Victor Pyle, Jr. sentenced Applicant to confinement for one (1) year for the count of Resisting Arrest, five (5)

years for the count of Breaking and Entering a Motor Vehicle, thirty (30) days for the count of Grand Larceny, and fifteen (15) years for each count of Burglary, First Degree. The sentences are set to run concurrently. Applicant did not appeal his conviction or sentence.

II.

In his application for post-conviction relief Applicant alleges that he is being held in custody unlawfully for the following reasons:

- a. Failure to suppress evidence;
- b. Ineffectiveness of counsel;
- c. Failure to appeal subject matter jurisdiction;
- d. Failure to investigate and prejudiced by counsel.

For the purpose of this Return, Respondent incorporates the Clerk of Court records, and the South Carolina Department of Corrections' records, the trial transcript, and the sentencing transcript. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

III.

Respondent construes Applicant's allegations as alleging ineffective assistance of counsel. Respondent asserts that Applicant's allegation of ineffective assistance of trial counsel is without merit. Respondent also asserts that Applicant's attorney rendered effective assistance well within the standard of reasonableness within professional norms for a criminal defense attorney.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its reasonableness under professional norms. Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625, (citing Strickland v. Washington). The proper measure of performance is

¹ Respondent requests that counsel be appointed.

whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland v. Washington. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Second, counsel's deficient performance must have prejudiced Applicant such that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). In other words, where ineffective assistance of counsel is alleged as a ground for relief, the Petitioner must prove that counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

Respondent submits that Applicant cannot satisfy either requirement of the Strickland v. Washington test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. Respondent requests an evidentiary hearing to fully resolve this issue. Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

Applicant claims that the trial court lacked subject matter jurisdiction due to defects in his indictment. Defects in the indictment do not affect subject matter jurisdiction. See State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005); U.S. v. Cotton, 535 U.S. 625, 122 S.Ct. 1781 (2002). The indictment is a notice document, and any challenges to its sufficiency must be made in accordance with S.C. Code Ann. ' 17-19-90 (2003). See also S.C. Code ' 17-19-20 (2003). Subject matter

jurisdiction is the power of a court to hear a particular class of cases, and it has nothing to do with the indictment document. See Gentry, supra; Dove v. Gold Kist, Inc., 314 S.C. 235, 442 S.E.2d 598 (1994).

In post-conviction relief, an Applicant wishing to raise challenges to the sufficiency of an indictment must do so in the context of ineffective assistance of counsel, basically alleging that his trial counsel failed to properly move to quash the indictment in accordance with S.C. Code Ann. ' 17-19-90 (2003). A claim of this nature is subject to the procedural bars in the Uniform Post-Conviction Procedure Act notably the statute of limitations and successiveness. See S.C. Code " 17-27-45 and -90 (2003).

An Applicant may still challenge the subject matter jurisdiction of the trial court, and such a claim is one that may be raised at any time. See Brown v. State, 343 S.C. 342, 540 S.E.2d 846 (2001), *overruled in part by Gentry, supra*. However, circuit courts obviously have subject matter jurisdiction to try criminal matters. Gentry, supra. Thus, Applicant must present evidence that his case is of some class over which the circuit court does not have the authority to preside. The Applicant's conviction involved a criminal charge in General Sessions Court. Thus, the circuit court had subject matter jurisdiction.

V.

Applicant's also alleges that he was also denied due process of law, as a result of being sentenced in his absence. Applicant's allegation claims infringement of his rights under certain amendments to the United States Constitution. However, Applicant fails to set forth with specificity the grounds upon which these constitutional violations are based. The Uniform Post-Conviction Procedure Act requires that Applicant must "... specifically set forth the grounds upon which the application is based." Section 17-27-50 of the Code of Laws of South Carolina (1976). In an

application for post-conviction relief, it is incumbent upon Applicant to make at least a prima facie showing which would entitle him to relief before an evidentiary hearing will be scheduled and held. Welch v. MacDougall, 246 S.C. 258, 143 S.E.2d 455 (1965); Blandshaw v. State, 245 S.C. 385, 140 S.E.2d 784 (1965). Since Applicant has failed to make even a prima facie showing, the Respondent would submit that this allegation should be dismissed for failing to meet the requirements of the Uniform Post-Conviction Procedures Act.

VI.

Each and every allegation contained within the application not hereinbefore either expressly admitted, qualified or explained is hereby denied.

[Signature follows]

VII.

WHEREFORE, Respondent requests that counsel be appointed and an evidentiary hearing be held.

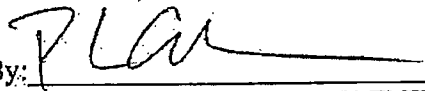
Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

JOHANNA C. VALENZUELA
Senior Assistant Deputy Attorney General

PATRICK SCHMECKPEPER
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

July 7, 2016

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

DEMETRIUS SIMMONS, 283195

Applicant,

vs

STATE OF SOUTH CAROLINA,

Respondent.

IN THE COURT OF COMMON PLEAS

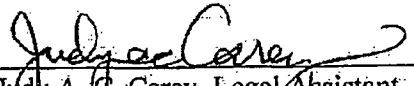
2015-CP-23-5741

AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the Return in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Demetrius Simmons, 283195
 McCormick Correctional Institution
 386 Redemption Way
 McCormick SC 29899

DATED this 7th day of July, 2016.


 Judy A. C. Carey, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

DEMETRIUS SIMMONS,)

APPLICANT,)

-VS-)

STATE OF SOUTH CAROLINA,)

RESPONDENT.)

2015-CP-23-05741

TRANSCRIPT OF RECORD

DECEMBER 9, 2016
GREENVILLE, SOUTH CAROLINA

B E F O R E:

THE HONORABLE JOHN C. HAYES, III

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

ATTORNEY FOR APPLICANT:

R. MILLS ARIAIL, JR., ESQ.

ATTORNEY FOR RESPONDENT:

PATRICK SCHMECKPEPER
ASSISTANT ATTORNEY GENERAL

SUSAN W. HUDGINS
CIRCUIT COURT REPORTER

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EXHIBITS

<u>NO</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EVIDENCE</u>

(No Exhibits Were Presented During This Hearing)

4

1 **MR. SCHMECKPEPER:** May it please the Court, Your Honor?

2 This is Demetrius Simmons versus the State of South

3 Carolina, 2015-CP-23-5741.

4 The Applicant was indicted for one count of resisting
5 arrest, one count of breaking and entering a motor vehicle,
6 two counts of larceny/breaking into a motor vehicle and one
7 count of grand larceny, two counts of burglary, first
8 degree. He was represented by Joey Maxwell and Sarah Henry.

9 On December 11th, 2013 the Applicant was tried in his
10 absence and found guilty as indicted on all charges except
11 for each count of larceny/breaking into a motor vehicle.

On October 16th, 2014 Judge Pyle sentenced the Applicant to confinement for one year for resisting arrest, five years for breaking and entering a motor vehicle, thirty days for a count of grand larceny and fifteen years for each count of burglary, first degree, all to run concurrently. The Applicant did not appeal his conviction or sentence. At this point I'll turn it over to Mr. Ariail.

19 **THE COURT:** All right. Mr. Ariail.

20 MR. ARIAIL: Yes, Your Honor. I'm ready to proceed.

21 And I call Mr. Simmons to the stand.

22 THE COURT: All right.

23 **MADAME CLERK:** Mr. Simmons, please raise your right
24 hand.

25 Demetrius Simmons, being

DEMETRIUS SIMMONS - DIRECT EXAMINATION BY MR. ARIAIL

5

1 duly sworn testified as follows;

2 **MADAME CLERK:** Thank you. You may be seated. Please
3 state your full name for the record.

4 **MR. SIMMONS:** Demetrius Simmons.

5 **Direct Examination by Mr. Ariail:**

6 Q. Mr. Simmons, how you doing today?

7 A. I'm doing all right.

8 Q. Good. Okay. The last time we were here I think we
9 were in front of Judge Hayes, you had asked for a copy of
10 your transcript. And we got you a copy. Have you had time
11 to go through that in detail?

12 A. Yes, sir.

13 Q. Okay. Now, I want to go through a little bit of the
14 background in regards to your case so we can kind of get a
15 little understanding and put your issues on the record. You
16 were represented, it says as part of this, by Joey Maxwell
17 and Sarah Henry, is that correct?

18 A. I couldn't understand.

19 Q. You were represented in the matters that were put on
20 the record by Joey Maxwell and Sarah Henry, correct?

21 A. Yes, sir.

22 Q. Okay. Now, both of them -- is Joey the main one that
23 represented you on this case?

24 A. Yes, sir.

25 Q. Okay. Now, who did you have your discussions with

DEMETRIUS SIMMONS - DIRECT EXAMINATION BY MR. ARIAIL

6

1 during the time you were represented? Was it Joey or Sarah?

2 A. Joey.

3 Q. Okay. Now, as part of this you -- you were arrested on
4 these charges. And you heard the charges that were put on

5 the record. Did you get out on bond at any time during

6 these charges?

7 A. Yes, sir.

8 Q. Okay. So how long after you were arrested did you post
9 a bond?

10 A. Like three months.

11 Q. Three months? Okay. So during that period of time
12 while you were incarcerated did you -- you got appointed

13 counsel, correct?

14 A. Oh, yes, sir.

15 Q. Okay. And that was Mr. Maxwell, is that right?

16 A. The first -- the first time I had the woman, Ms. Sarah.

17 Then later on they gave me Joey Maxwell.

18 Q. Okay. So Sarah -- Ms. Henry was appointed to you in
19 the beginning, is that correct?

20 A. Yes, sir.

21 Q. Did you talk to her about your case during the
22 beginning of it?

23 A. Yes -- yes, sir.

24 Q. Okay. Now, when Mr. Maxwell came on, how long after

25 were -- you were still incarcerated when he kind of came on

DEMETRIUS SIMMONS - DIRECT EXAMINATION BY MR. ARIAIL

7

1 and took over the case?

2 (Pause)

3 A. I'm trying to remember. I mean, no, sir.

4 Q. Okay. So you were out?

5 A. Yeah.

6 Q. Okay. When he came on and took the case, how long
7 after it was, I guess, when you were arrested how long after
8 did he take over the case?

9 A. I couldn't remember the months. I think it was about
10 maybe seven or eight months after.

11 Q. Seven or eight months. Okay. Did you have discussions
12 with him about the case?

13 A. No, sir.

14 Q. You didn't have any discussion?

15 A. No. No, sir.

16 Q. I mean, you never went to his office?

17 A. No. I was showing up to my roll calls.

18 Q. Okay.

19 A. That's the only time I discussed anything with him.

20 Q. Okay. But y'all didn't sit down and discuss the
21 evidence in your case or the discovery?

22 A. No, sir.

23 Q. I mean, did he tell you, hey, this is what the charges
24 are against you or anything like that?

25 A. At my roll calls, when I show up for the roll call.

DEMETRIUS SIMMONS - DIRECT EXAMINATION BY MR. ARIAIL

8

1 Q. Okay. When you show up at the roll calls what
2 discussion did you have with him about your charges?

3 A. I think he just telling me what the time I was facing
4 and stuff.

5 Q. Okay. At some point in time you got a plea offer,
6 correct?

7 A. Yes, sir.

8 Q. Okay. What was that for?

9 A. He told me six years.

10 Q. Okay. And you've sent me a document which shows ten on
11 something, I believe, is that correct?

12 A. Yeah. Yeah.

13 Q. Was it six years at one time?

14 A. He told me six on or at the -- at my roll call.

15 Q. Okay. And then you got the document you say shows ten
16 years, correct?

17 A. Yes, sir.

18 Q. Okay. So it's either six or ten. Did you discuss with
19 him about pleading guilty?

20 A. No, sir.

21 Q. Okay. So, I mean, you got that document, correct?

22 A. Yes, sir.

23 Q. So did you have a discussion with him saying, well,
24 hey, I don't, you know, I don't want to plead guilty or what
25 was the discussion about that plea offer?

DEMETRIUS SIMMONS - DIRECT EXAMINATION BY MR. ARIAIL

9

1 A. I told him I didn't want to plead guilty. I was going
2 to try to get me another lawyer.

3 Q. Okay. So you said you were going to have to retain an
4 attorney?

5 A. Yes, sir.

6 Q. Did you ever do that?

7 A. No, sir.

8 Q. Okay. So he represented you the whole time?

9 A. Yes, sir.

10 Q. Okay. Did y'all at any time during your representation
11 by Mr. Maxwell discuss the case and what evidence they had?

12 A. No, sir.

13 Q. Okay. Now, getting to trial on this -- so at some
14 point you turned down the plea offers and they scheduled you
15 for trial, correct?

16 A. Yes, sir.

17 Q. Okay. Did you get notice of the trial?

18 A. No, sir.

19 Q. Okay. Because it says you did not appear at your
20 trial.

21 A. I didn't get the court document. I meant I didn't get
22 no notice.

23 Q. Okay. Did you change addresses?

24 A. I had the same address.

25 Q. Same address the entire time?

DEMETRIUS SIMMONS - DIRECT EXAMINATION BY MR. ARIAIL

10

1 A. Yes, sir.

2 Q. Okay. And did you ever hear from -- did you ever get a
3 phone call or anything about your court date?

4 A. It was -- my mama had got in touch with me -- after the
5 court date she told me something about being there December
6 the 2nd. But I had seen her on like on the 5th, and it was
7 like too late to get in contact with them.

8 Q. Well, your case was not heard until December 11th and
9 12th. I mean, are you saying you heard about it before or
10 you heard it after? I'm trying to get your dates right on
11 this.

12 A. I think she had told me December the 2nd, but I never
13 got one of them -- the white cards in the box.

14 Q. Okay. So you didn't know -- what you're saying is you
15 didn't know to show up for your trial, which apparently was
16 set on December 11th and 12th?

17 A. Yes, sir. I didn't -- I didn't know.

18 Q. Okay. And you didn't show up for it?

19 A. That's right.

20 Q. When was the first time you were aware that you were
21 tried in your absence?

22 A. I think it was on December 30th.

23 Q. Okay. And where did you find out about that?

24 A. In Georgia.

25 Q. You were in Georgia? What were you doing down there?

DEMETRIUS SIMMONS - DIRECT EXAMINATION BY MR. ARIAIL

11

- 1 A. Shopping.
- 2 Q. Okay. When you found out what did you do?
- 3 A. Well, Georgia had hold me down there because I didn't
- 4 have my ID and I had that bench warrant.
- 5 Q. So you were incarcerated in Georgia?
- 6 A. Yeah. Yes, sir.
- 7 Q. Okay. So when did you get incarcerated in Georgia?
- 8 A. On, I think, December the 3rd -- 27th or 3rd,
- 9 something, one of them days.
- 10 Q. December 27th or December 23rd?
- 11 A. Yeah, 27th.
- 12 Q. Okay. So you weren't incarcerated at the time of
- 13 December 11th and 12th?
- 14 A. No, sir.
- 15 Q. Okay. But you just didn't get notice of the hearing?
- 16 A. Yeah. Yes, sir.
- 17 Q. So when you were, I guess, down there incarcerated did
- 18 they have a hold on you based on this?
- 19 A. Yeah. They had -- Greenville County came and got me.
- 20 Q. Okay. So Greenville County came back and picked you
- 21 up?
- 22 A. Yes, sir.
- 23 Q. I know I've gone through a little bit and you wanted to
- 24 raise some other issues that you said you had. Are there
- 25 other things, I mean, things that you -- we've kind of

DEMETRIUS SIMMONS - DIRECT EXAMINATION BY MR. ARIAIL

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1 concentrated on you saying he -- you didn't have any
2 discussions with Mr. Maxwell, didn't know any court date.
3 Are there other things that you want to bring up that he did
4 or should have done that you say ---

5 A. Yes, sir.

6 Q. What are they?

7 A. Ineffective assistance of counsel.

8 Q. Yeah.

9 A. He didn't file -- I asked for an appeal. He said I
10 couldn't get one.

11 Q. Okay. So when you -- when you talked to him about an
12 appeal, when was that?

13 A. That was at the end -- after the sealed sentence, after
14 they gave me the time.

15 Q. Okay. You asked for an appeal and he didn't appeal?

16 A. Yeah. He said I couldn't have one.

17 Q. Okay. Did you ask him why you couldn't have one?

18 A. I think yeah -- yes, sir.

19 Q. What did he say?

20 A. He told me I had to go down the road and file it down
21 there or something.

22 Q. Okay. But you specifically asked for an appeal?

23 A. I tried, yes, sir.

24 Q. Okay. Do you have anything in writing you sent him or
25 is it just a conversation you had with him?

DEMETRIUS SIMMONS - DIRECT EXAMINATION BY MR. ARIAIL

13

1 A. Just a conversation right at the desk when they gave me
2 my time.

3 Q. Okay.

4 A. I tried to get it started as soon as they gave me my
5 time.

6 Q. Okay. So that's another issue about appealing. Tell
7 me -- any other things you've written down?

8 A. The argument Fourteenth Amendment due process granting
9 me the right to appeal my conviction. Also granting me the
10 right to ineffective assistance of counsel as a right.

11 Q. Okay.

12 A. I didn't plead to the case. And I had a trial.
13 Therefore, I do have the right to appeal my Fourteenth
14 Amendment to grant me the right to appeal my conviction.

15 Q. Okay.

16 A. And also grant me the right to ineffective of counsel
17 as a right to -- because I was granted my constitutional
18 right to appeal and counsel. Okay. That's on that. I got
19 another issue too.

20 Q. Okay. Go ahead. Tell me what that issue is.

21 A. The court lacked subject matter jurisdiction.

22 Q. Okay.

23 A. The issue, Your Honor, is that my counsel did not
24 entertain that a general session court did not have
25 jurisdiction to hear the grand larceny charges against me.

DEMETRIUS SIMMONS - DIRECT EXAMINATION BY MR. ARIAIL

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1 And the basic charge of grand larceny was -- I challenge
2 today as a matter of law because our Supreme Court clearly
3 states not just petty offenses but all offenses subject up
4 to five hundred dollars imprisonment up to thirty days. My
5 constitutional right to a jury trial does not apply to petty
6 offenses. I was denied due process. This Court should
7 dismiss this case.

8 Q. Okay. Any other issues you got?

9 A. Yeah, yeah. Yes, sir.

10 Q. Okay.

11 A. I request a jury trial on the charges I faced without
12 any direct notification from counsel, the solicitor's office
13 or the trial court. Both took my mere conduct in failing to
14 appear at trial as a right to be present.

15 With respect, Your Honor, the court gave me no warning
16 or indication that if I failed to appear that the State
17 would proceed in my absence, nor did I sign agreement to
18 waive my right to a jury trial. Therefore, in no way did I
19 voluntarily and knowingly relinquish my right to have
20 members of my -- of my community hear my case to be heard.

21 And the court and the State cannot just presume absence
22 as a consent to proceed. My afforded due process requires
23 the court to at least look at the total circumstances.

24 Q. Okay.

25 A. That's it.

DEMETRIUS SIMMONS - CROSS EXAMINATION BY MR. SCHMECKPEPER

15

1 Q. That's it right there?

2 A. (Affirmative nod).

3 Q. Okay. I'm going to let them ask you some questions,
4 okay? Thank you.

5 **MR. ARIAIL:** No further questions, Your Honor.

6 **THE COURT:** All right.

7 **Cross Examination by Mr. Schmeckpeper:**

8 Q. Good morning, Mr. Simmons.

9 A. Yes, sir.

10 Q. I think your first allegation is -- so you're saying
11 your counsel didn't meet with you enough? Or your counsel
12 never told you the evidence in your case?

13 A. He told me evidence.

14 Q. What did he tell you?

15 A. He always just -- I just -- he just didn't have time to
16 go over my stuff with me.

17 Q. I thought -- correct me if I'm wrong, I thought you
18 said he didn't discuss about -- discuss with you about your
19 case, only met with you at roll call and didn't discuss
20 discovery. Did he do those things or did he not?

21 A. He didn't.

22 Q. So he did not discuss discovery with you?

23 A. No.

24 Q. He didn't -- he didn't show you the evidence the State
25 had against you?

DEMETRIUS SIMMONS - CROSS EXAMINATION BY MR. SCHMECKPEPER

16

1 A. No, sir.

2 Q. How many times do you think he met with you? You said
3 it was only at roll call.

4 A. Only at -- I met -- I showed up to three roll calls.

5 Q. Did you have his phone number?

6 A. I think on the paper.

7 Q. Did you have ---

8 A. Yeah.

9 Q. --- your attorney's phone number? Did you give him
10 your phone number?

11 A. Yeah. I gave him my -- the phone number I currently
12 had.

13 Q. Do you know where his office was?

14 A. Yes, sir.

15 Q. Did you ever go to his office?

16 A. No, sir.

17 Q. Why not?

18 (Pause)

19 Q. Did you ever try to go to his office?

20 A. Because I don't know the law. It's something he's
21 supposed to do.

22 Q. Did you ever try to go to his office or call him to
23 schedule meetings?

24 A. No, sir.

25 Q. Now you said you did see a paper offer?

DEMETRIUS SIMMONS - CROSS EXAMINATION BY MR. SCHMECKPEPER

17

- 1 A. Yes, sir.
- 2 Q. What did that paper offer say? It was a plea offer,
- 3 right?
- 4 A. He offered me six years.
- 5 Q. And you didn't want to take it?
- 6 A. No. I asked for a new lawyer.
- 7 Q. Did you want to plead guilty?
- 8 A. No, sir.
- 9 Q. Did you want to go to trial?
- 10 A. I didn't -- I didn't make no decision at that time.
- 11 Q. So you just didn't decide whether or not you wanted to
- 12 plead guilty to that?
- 13 A. Yes, sir.
- 14 Q. Now you said you never got a notice of trial? You
- 15 didn't know your trial was going to happen when it happened?
- 16 A. Yes, sir.
- 17 Q. And I think you testified you never got a card?
- 18 A. Yeah. On that -- I never got a card on that date.
- 19 Q. I know you weren't present, but you would agree that
- 20 the record would reflect whether or not the judge went over
- 21 all that at the trial?
- 22 A. Um-hum (affirmative).
- 23 Q. Okay. And that -- just for the record, that's pages 1
- 24 through 10. You also testified that your mom told you on
- 25 December 2nd that you've got a trial coming up.

DEMETRIUS SIMMONS - CROSS EXAMINATION BY MR. SCHMECKPEPER

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1 A. She said on the 2nd.

2 Q. She told you on the 2nd or she ---

3 A. She told me on the 2nd.

4 Q. What did she tell you on the 2nd?

5 A. She told me I had a court date on December 2nd.

6 Q. Did you go to court that day?

7 A. No, sir.

8 Q. Did you call your attorney?

9 A. No, sir.

10 Q. Did you -- did you -- what did you do in response to
11 your mom telling you you had a court date?

12 A. I told her if I had a court date they'll send me
13 another box in the mail like they always do.

14 Q. So you have gotten boxes -- you have gotten cards
15 previously?

16 A. Yeah. And I showed up to all three of them.

17 Q. And you didn't move?

18 A. No, sir.

19 Q. You didn't change addresses?

20 A. No, sir.

21 Q. Did your -- did your attorney ever call you on your
22 phone, ever?

23 A. I didn't have a phone.

24 Q. Did you ever give him a phone number that he could
25 reach you at?

DEMETRIUS SIMMONS - CROSS EXAMINATION BY MR. SCHMECKPEPER

19

1 A. Yes, sir.

2 Q. And did he ever call you on that number?

3 A. No, sir.

4 Q. Never, ever?

5 A. (Negative nod).

6 Q. So you only talked to him, and I'm sorry to beat a dead
7 horse, so you only talked to him at roll call, and that was
8 it?

9 A. That's it.

10 Q. I think you testified you asked your attorney for an
11 appeal and he didn't file one?

12 A. Yes, sir.

13 Q. And this was after you were sentenced?

14 A. Yes, sir.

15 **MR. SCHMECKPEPER:** I beg the Court's indulgence.

16 (Pause)

17 **MR. SCHMECKPEPER:** Your Honor, I have no further
18 questions.

19 **THE COURT:** All right.

20 **MR. ARIAIL:** Nothing further, Your Honor.

21 **THE COURT:** You can step down and have a seat with your
22 counsel. Call your next witness.

23 **MR. ARIAIL:** Yes, Your Honor. I call Mr. Maxwell to
24 the stand.

25 **MADAME CLERK:** Mr. Maxwell, please place your left hand

JOSEPH MAXWELL - DIRECT EXAMINATION BY MR. ARIAIL

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1 on the Bible and raise your right hand.

2 **Joseph Maxwell**, being
3 duly sworn testified as follows;

4 **MADAME CLERK:** Thank you. You may be seated. And
5 please state your full name for the record.

6 **MR. MAXWELL:** It's Joseph Brantley Maxwell.

7 **Direct Examination by Mr. Ariail:**

8 Q. Mr. Maxwell, how you doing today?

9 A. I'm doing well. Thank you.

10 Q. Good. Now you represented Mr. Simmons in these
11 matters, I guess, is that correct?

12 A. I did.

13 Q. Okay. How long have you been -- you're with the public
14 defender's office?

15 A. I was.

16 Q. Oh, you were? Okay. And then how long were you with
17 them?

18 A. Total over -- a little over three years.

19 Q. Three years? Okay. During this time, I guess, you
20 were appointed to represent him, is that correct?

21 A. I was. I believe Susannah Ross was originally
22 appointed to represent him.

23 Q. Okay.

24 A. And then I don't remember exactly what happened. I
25 think she might have left. And then I inherited his case.

JOSEPH MAXWELL - DIRECT EXAMINATION BY MR. ARIAIL

21

1 Q. Okay. And we went through some of the numbers in
2 regards to it after he was arrested. How long after, I
3 guess, he was arrested did you come on the case?

4 A. So I believe he was -- when I first met -- given the
5 file it was on the -- on July 2nd I called and left a
6 message with his uncle to call -- call me back.

7 **THE COURT:** What year?

8 A. That would have been 2013.

9 Q. So you reached out to his uncle at that time?

10 A. Yes.

11 Q. Do you -- in your records how many times or when was
12 the first time you met with him or talked to Mr. Simmons
13 about the case?

14 A. The first time would have been on the 15th of July, the
15 same year. The Defendant was bond carded. He was a no-
16 show. Talked to the solicitor regarding dropping the
17 charges or reducing them, and she said she would bond card
18 him back.

19 Q. Okay. So he wasn't there on that 15th?

20 A. That's correct.

21 Q. So when's the first time you see any record that you
22 talked to him about his case?

23 A. That would be, let's see, August the 12th Defendant
24 bond carded and reviewed discovery, an offer with Defendant.
25 Defendant wants to think about offer. I told him he has

JOSEPH MAXWELL - DIRECT EXAMINATION BY MR. ARIAIL

22

1 until 8/24 to decide and get signed up, otherwise, offer
2 will be withdrawn and he'll be put on the trial docket.
3 Defendant said he would call me by the 24th.

4 Q. Okay. That's 8/12/2013?

5 A. Yes, sir.

6 Q. That offer, if I'm not mistaken -- let me see if I've
7 got it. I had an offer that was dated 6/26/2013. Is that
8 the offer?

9 A. I believe so.

10 Q. Okay. There's a -- Ms. Tessitore was the solicitor on
11 the case, correct?

12 A. She was.

13 Q. The one I have has a recommendation of twelve to
14 fourteen years, has a strike through and it says ten years.

15 A. Yes.

16 Q. Okay. He's testified that there was a six year plea
17 out there. Are you aware of six years on a plea?

18 A. No, I was not aware of six years. You know, that was
19 as low as I could get Ms. Tessitore to go was ten years.

20 Q. Okay.

21 A. And she agreed to that.

22 Q. So you had ten years. And she actually put some years
23 on probation for burglaries at the time and got a huge break
24 on those charges. So this is the best you could do is what
25 you're saying?

JOSEPH MAXWELL - DIRECT EXAMINATION BY MR. ARIAIL

23

1 A. Yes.

2 Q. Okay. That -- your note in there was, excuse me,
3 August 12th meeting with him. Is that the plea offer you
4 discussed with him?

5 A. Yes, sir.

6 Q. When you say you also discussed discovery, do you
7 remember what you discussed with him in this case?

8 A. I don't remember exactly what I discussed with him. My
9 normal practice was when I first met him was to read the
10 entire discovery packet that I had. I would read that. And
11 then we would talk about the offer, and then talk about, you
12 know, his version of events and then kind of go -- see where
13 that led.

14 Q. Okay. Do you remember -- you put notes down. Do you
15 remember any questions he had or did he say in that meeting
16 that he wasn't going to accept it?

17 A. No. I've had -- the only notes that I have -- it says
18 -- the next meeting we had on 9/17 he said he just wants a
19 paid lawyer, doesn't want to take any offer and just he knew
20 that it was going to expire. And he said he would get back
21 to me if he doesn't get a paid lawyer.

22 Q. Okay. So this plea offer -- and I think if I'm right,
23 you got it 6/26, you talked to him about it on 8/12 at a
24 roll call, and it's going to expire on 8/24.

25 A. Well, I didn't receive it on 6/26. I received it, I

JOSEPH MAXWELL - DIRECT EXAMINATION BY MR. ARIAIL

24

1 guess, when I inherited the case, which ---

2 Q. Yeah.

3 A. --- was in July.

4 Q. Okay.

5 A. And then Ms. Tessitore had extended the deadline. You
6 know, this was her original offer. And I think -- what did
7 I -- I said the 24th, yeah.

8 Q. Okay.

9 A. And so she was willing to work with us. And then he
10 just never responded back.

11 Q. Okay. So you never received -- you never received a
12 response back from him about accepting that or not?

13 A. That's correct.

14 Q. Okay. So on May 24 that plea offer expired, correct?

15 A. On paper it did. I believe Ms. Tessitore would have --
16 if he would have came back next month, I believe she would
17 have accepted it. But, yes, it did expire.

18 Q. Okay. So the next time you talked with him, I think,
19 it was 9 ...

20 A. 9/17.

21 Q. 9/17/2013. What does he say during that meeting?

22 A. He says he wants a paid lawyer. Says he wants more
23 time. Told him the offer was expired and that we would not
24 be able to get any offer back. He said -- would be put on
25 the trial docket. Defendant said he still wanted a paid

JOSEPH MAXWELL - DIRECT EXAMINATION BY MR. ARIAIL

25

1 attorney.

2 Q. Okay. Now at this time, all this is going on, did you
3 have, I mean, his current address or contact information?

4 A. No. It's my understanding he was a transient. I had
5 his address and phone number for his mother or someone that
6 lived there.

7 Q. Right.

8 A. I had spoke with her several times. Once I found out
9 that it was being placed on the trial docket, I called her
10 several times trying to get in touch with him, left her
11 messages, talked to her, told her he was put on the trial
12 docket. And she said, okay, okay; I've told him; He'll call
13 you back. Never heard a thing back.

14 Q. Okay. So do you remember having any conversation with
15 him prior to the trial about, hey, you're on the trial
16 docket?

17 A. I've never directly told him he was on the trial
18 docket.

19 Q. Okay. Did you send him a letter or anything to that
20 address saying, hey, you're on the trial docket?

21 A. I don't recall if I sent him a letter. I do know that
22 he was bond carded in. I received the bond card for the
23 trial. I remember in the trial they actually presented it
24 and had a witness testify that she had sent it. But I
25 didn't send him anything in writing. I'd talked to his

JOSEPH MAXWELL - DIRECT EXAMINATION BY MR. ARIAIL

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1 mother. And she said that he [sic] had talked to him.

2 So ...

3 Q. Okay. And his mother -- I guess you're saying his
4 mother indicated that she had spoken with him and said --
5 told him that it was set for a trial, is that correct?

6 A. Yeah.

7 Q. Okay. Now, clearly when it came to trial he didn't
8 appear, is that right?

9 A. That's right.

10 Q. And as part of that you asked -- I think you asked for,
11 you know, basically a bond -- a bench warrant so that you
12 could have the time to, I guess, get him there after he got
13 arrested, correct?

14 A. Yes, sir. I would have loved to talk -- talk with him
15 about the case and try to come up with some kind of trial
16 strategy, but certainly wasn't able to. And certainly
17 didn't want him to be tried in his absence either.

18 Q. Okay. Now, before you had this discussion and before
19 this issue with him did y'all discuss what y'all were going
20 to present at trial or any other things?

21 A. No. We just reviewed the -- as I said, we just
22 reviewed the discovery, just reading through it.

23 Q. Okay. Now, as part of this, once he was tried and he
24 was found guilty, he eventually was arrested, I think, he
25 said December 30th or sometime around in there down in

JOSEPH MAXWELL - DIRECT EXAMINATION BY MR. ARIAIL

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1 Georgia and he came back and he was sentenced. He's
2 indicated that he asked you to appeal. Do you remember that
3 conversation?

4 A. I don't remember that conversation. You know, I would
5 have told him he had ten days. I don't think we had any
6 appealable issues. I think he asked something about a PCR,
7 but I don't really remember much of our conversation at all.

8 I remember telling him, I think, that he's probably
9 going to get hit pretty hard. And I think we were both
10 shocked that he -- when he got fifteen considering the
11 charges.

12 Q. Okay. Did you say -- did you have any discussion with
13 him about any appellate issues in regards to his appearance
14 or anything, you know, putting it on for trial or anything
15 like that?

16 A. No, not that I remember.

17 Q. Okay. You don't -- so you don't remember any
18 conversations with him about asking for an appeal?

19 A. No.

20 Q. Okay. Do you think he was -- adequately understood the
21 charges against him after your discussions with him about
22 the evidence and discovery?

23 A. I think so. I mean, from what I remember from my
24 conversations about the discovery and everything, I think --
25 I was pretty clear about I don't think you have a case, I

JOSEPH MAXWELL - CROSS EXAMINATION BY MR. SCHMECKPEPER

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1 don't, you know, caught him, you know, on the spot. You
2 know, it wasn't a whodunnit issue, you know, with the
3 merchandise or the goods, I guess, the objects. So I think
4 he understood that he was in a tight spot and didn't want to
5 come to answer, didn't know what the right decision was.

6 Q. Okay.

7 A. And was having a hard time making it and just didn't
8 want to pull the trigger one way or the other.

9 Q. Okay.

10 **MR. ARIAIL:** I have no further questions, Your Honor.

11 **Cross Examination by Mr. Schmeckpeper:**

12 Q. Good morning, Mr. Maxwell.

13 A. Good morning.

14 Q. If you could, just for the record, go over your
15 experience in criminal law.

16 A. Well, directly out of law school I clerked for a judge
17 here in Greenville County. After that year of clerkship I
18 directly entered the public defender's office and then
19 remained there for a little over three years. I'm currently
20 in private practice. I'm no longer doing -- primarily doing
21 transactional work, but occasionally coming back into the
22 criminal defense.

23 Q. And I think you said you inherited this case from
24 Susannah Ross?

25 A. That's correct.

JOSEPH MAXWELL - CROSS EXAMINATION BY MR. SCHMECKPEPER

29

1 Q. But you got the offer and you relayed that to the
2 Applicant?

3 A. I did.

4 Q. And his response was pretty much, well, I'll think
5 about it, but I want a different attorney?

6 A. Yes.

7 Q. Do you remember roughly how many times you met with
8 him? I think there's been some testimony of that.

9 A. Give me a second.

10 (Pause)

11 A. So according to this I've -- I've met with him twice
12 face-to-face.

13 Q. And would you have liked to meet with him more?

14 A. Absolutely.

15 Q. Was there a reason you didn't -- you mentioned he was
16 transient. Did you have trouble getting in touch with him?

17 A. I did. I didn't have a direct phone number for him. I
18 had an address and phone number for his mother. And that's
19 how -- that's the number he gave me to call. And I would
20 call that and ask that, you know, he call me back.

21 Q. Did he have your contact information?

22 A. He did.

23 Q. So would he have understood that it was normal that
24 that's how he would get in touch with you? You'd call his
25 mom, his mom would relay the message and he needs to get

JOSEPH MAXWELL - CROSS EXAMINATION BY MR. SCHMECKPEPER

30

1 back in touch with you?

2 A. Yeah, that was by his request.

3 Q. Now he was bonded out, right?

4 A. Yes.

5 Q. And so he got bond cards. You said he did show up for
6 appearances, missed one, but generally showed up?

7 A. Yeah. Of course my notes say he missed one and showed
8 up for the next two.

9 Q. And I would just ask, the record would reflect whether
10 or not the judge addressed whether or not the Applicant
11 waived his right to appear at trial?

12 A. Yes.

13 Q. And did you try -- I think you testified -- did you try
14 and notify him that he had a court date coming up?

15 A. Yes, I did.

16 Q. Now, this was a TIA. The Applicant was subsequently
17 sentenced, I guess, they opened the sealed sentence and then
18 sentenced the Applicant about a year later, is that correct?

19 A. I believe so. Sometime in 2014. Yeah, October or so,
20 I believe.

21 Q. And did you have an opportunity to talk with the
22 Applicant after sentencing?

23 A. Yes, I believe we did talk.

24 Q. And I know you testified that you don't remember
25 whether or not he asked you to file an appeal, is that fair

JOSEPH MAXWELL - CROSS EXAMINATION BY MR. SCHMECKPEPER

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1 to say?

2 A. Yes. I don't remember that conversation. You know, I
3 normally would tell them they have ten days to appeal, go
4 over any appeal issues I think they may have. In this case
5 I don't think you have any.

6 Q. Now, let me ask you, having practiced criminal law,
7 what is your normal practice when asked to file an appeal?

8 A. Well, I would go to the office and draft the appeal,
9 pull the transcripts and all that was needed to do.

10 Q. Now would you file an appeal even if you didn't think
11 there were any appealable issues when asked by your client?

12 A. Yes. If the client wanted to, yes.

13 Q. Can you think of any reason why you wouldn't file an
14 appeal if asked to do so?

15 A. No.

16 **MR. SCHMECKPEPER:** I have no further questions.

17 **MR. ARIAIL:** Nothing further, Your Honor.

18 **THE COURT:** You can step down. Thank you.

19 **MR. ARIAIL:** That is our case, Your Honor.

20 **THE COURT:** All right. Anything from the State?

21 **MR. SCHMECKPEPER:** Nothing from the State, Your Honor.

22 **THE COURT:** All right. Mr. Maxwell, appreciate your
23 time. You can be excused.

24 **MR. MAXWELL:** Thank you, Your Honor.

25 **THE COURT:** All right.

- 1 (Hearing Ended at 11:20 am)
- 2 (End of Requested Transcript of Record)

Certificate of Reporter

I, The undersigned, Susan W. Hudgins, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial/hearing of the captioned case, relative to appeal, in the Circuit Court for Greenville County, South Carolina, on the 9th day of December 2016.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

February 15, 2017

S/Susan W. Hudgins

Circuit Court Reporter

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

Demetrius Simmons,
SCDC No. 283195,

Applicant,

vs.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

C.A. No.: 2015-CP-23-5741

ORDER

ENTERED COMPUTER

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. HICKMAN
2017 JAN 5 PM 1 22

Applicant filed this Application for Post-Conviction Relief September 17, 2015.¹ This matter was heard December 9, 2016. Applicant was represented by R. Mills Ariail, Jr., Esquire. The State was represented by Patrick Schmeckpeper, Esquire.

Applicant is currently incarcerated with the South Carolina Department of Corrections pursuant to the Greenville County Clerk of Court's orders of commitment. Applicant was indicted by the October 2013 term of the Greenville County Grand Jury for one count of Resisting Arrest (2013-GS-23-004562), one count of Breaking and Entering a Motor Vehicle (2013-GS-23-004563), two counts of Larceny/Breaking into a Motor Vehicle (2013-GS-23-004564, -004565), one count of Grand Larceny (2013-GS-23-004566), and two counts of Burglary, First Degree (2013-GS-23-004567, -004568). Joey Maxwell, Esquire, and Sarah Henry, Esquire, represented Applicant.

On December 11, 2013, Applicant was tried in his absence and found guilty as indicted on all charges except the two counts of Larceny/Breaking into a Motor Vehicle. On October 16, 2014,

¹ Applicant filed an amendment to his application on August 10, 2016. It is addressed in this order.

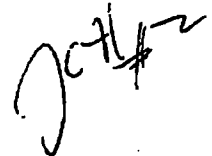
The Honorable Victor Pyle, Jr. sentenced Applicant to confinement for one (1) year for Resisting Arrest, five (5) years for Break and Entering a Motor Vehicle, thirty (30) days for Grand Larceny, and fifteen (15) years on each count of Burglary, First Degree. The sentences are set to run concurrently. Applicant did not appeal his conviction or sentence.

In his Application for Post-Conviction Relief, Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Failure to suppress evidence;
2. Ineffectiveness of counsel;
3. Failure to appeal subject matter jurisdiction;
4. Failure to investigate and prejudiced by counsel.

Applicant alleges ineffective assistance of counsel as a ground for relief. The crux of Applicant's argument is that trial counsel failed to have an incriminating recording of Applicant's voice suppressed at trial. In a post-conviction relief proceeding, Applicant bears the burden of proving the allegations in their application. See *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 690, 104 S. Ct. at 2066. The Applicant must overcome this



presumption in order to receive relief. *See Cherry v. State*, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under prevailing professional norms." *Cherry v. State*, 300 S.C. at 117, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 688, 104 S. Ct. at 2065). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing *Strickland*, 466 U.S. at 688, 104 S. Ct. 2052 (1984)).

Applicant claims that the trial court lacked subject matter jurisdiction due to defects in his indictment. Defects in the indictment do not affect subject matter jurisdiction. *See U.S. v. Cotton*, 535 U.S. 625, 122 S. Ct. 1781 (2002); *State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005). The indictment is a notice document, and any challenges to its sufficiency must be made in accordance with S.C. Code Ann. § 17-19-90 (2003). *See also* S.C. Code Ann. § 17-19-20 (2003). Subject matter jurisdiction is the power of a court to hear a particular class of cases, and it has nothing to do with the indictment document. *See Gentry, supra; Dove v. Gold Kist, Inc.*, 314 S.C. 235, 442 S.E.2d 598 (1994). A circuit court has subject matter jurisdiction if there has been an indictment that sufficiently states the offense, there has been a waiver of indictment, or the charge is a lesser included offense of the crime charged in the incident. *Jones v. State*, No. 2004-MO-060, 2004 WL 6396025, at *1 (Nov. 11, 2004).

9-4-03

In post-conviction relief, an Applicant wishing to raise challenges to the sufficiency of an indictment must do so in the context of ineffective assistance of counsel, basically alleging that his trial counsel failed to properly move to quash the indictment in accordance with S.C. Code Ann. § 17-19-90 (2003). A claim of this nature is subject to the procedural bars in the Uniform Post-Conviction Procedure Act B, notably the statute of limitations and successiveness. *See* S.C. Code Ann. § 17-27-45 and -90 (2003).

Applicant also alleges that he was denied due process of law as a result of being sentenced in his absence.

Applicant testified he was represented by attorneys Sarah Henry and Joey Maxwell. Applicant testified he dealt primarily with Mr. Maxwell. Applicant testified he did not discuss his case with Mr. Maxwell, who was appointed to the case after Ms. Henry. Applicant testified that he had talked with Ms. Henry. Applicant testified he would discuss the case with Mr. Maxwell at roll call.² Applicant testified Mr. Maxwell never went over discovery, the State's case, or the State's evidence with him. Further, Applicant testified that he discussed, with Mr. Maxwell, the time he was facing at roll calls. Applicant testified he was told that he would "get out" after six years while some "document" (not in the record) showed ten years.

Applicant testified he did not want to plead guilty and was going to get another lawyer (which he never did). Applicant testified he never got notice of the scheduling of his trial although he acknowledges that his mother told him a notice had come indicating he would be tried December 5, 2013. On cross examination Applicant acknowledged that after receiving his

² The court notes the inconsistencies of having "never" discussed the case with Mr. Maxwell and the testimony regarding discussions at roll calls.

Handwritten signature/initials: J. H. H. H.

information from his mother he did not go to see Mr. Maxwell nor did he go to court on December 5, 2013.

Applicant testified he was "picked up" in Georgia on December 21, 2016 by Greenville County.

Applicant isolated his claims of ineffective assistance of counsel into several categories discussed herein below.

Applicant testified he asked trial counsel to file an appeal and was told he could not do so until after the sealed sentence was imposed and that he would have to "go down the road and file down there³." While trial counsel testified he did not recall any discussion with Applicant about an appeal, he does recall Applicant asking about post-conviction relief. Trial counsel testified that he saw no appealable issues but would have filed an appeal if Applicant had asked him to do so. The record reflects that no Notice of Appeal was filed. On this issue, trial counsel offered credible evidence that he was not asked by Applicant to file an appeal. Therefore Applicant has failed to carry his burden of proof on this ground.

Applicant testified that trial counsel failed to protect his Fourteenth Amendment rights.⁴ This ground is not specific and too general to support Applicant's claim. Therefore, as to this claim, Applicant has failed to carry his burden of proof.

Applicant testified that the trial court lacked jurisdiction over his case. This claim is patently without merit.

³ This ground was one of two raised in his amendment to his post-conviction relief application.

⁴ While he referred only to the amendment by number, clearly his reference is to the Fourteenth Amendment to the Constitution of the United States of America.

Applicant testified he wanted a jury trial, which he got. He testified that he had no warning the State would proceed in his absence and did not waive his right to a jury. As set forth above, Applicant's case was tried by a jury.

Applicant's argument that he did not understand he could be tried in his absence is dispelled by the record. (See TR p. 5, l. 21 through p.12, l. 8).

By way of an amendment to his post-conviction relief application, Applicant contends trial counsel was ineffective for failing to request a continuance as, prior to trial, Applicant had met with counsel and signed a guilty plea for six years. Trial counsel testified he did discuss a plea offer of ten years with Applicant and that he was not aware of any six-year offer. Trial counsel further testified that the ten year offer was "the best he could get." There is no evidence in the record, save Applicant's testimony (which lacks credibility), that any offer of six years was extended by the State. Further, there is nothing in the record signed by Applicant evidencing his acceptance of a six-year offer.

Additionally, Applicant offered no evidence of any grounds for a continuance motion other than his claim he did not get notice of the impending trial. He of course did acknowledge his mother told him his trial was set for December 2013 and, while there may be confusion on his part as to the day of the trial, it is clear he responded to the notice in no way. Applicant did not contact trial counsel and did not appear at court on the date his mother gave to him. Finally, as to this claim, Applicant has established no viable grounds upon which trial counsel could request a hearing. Notice was properly established in the record. (See TR p. 5, l. 21 through p. 12, l. 8) and his mother had, as noted, advised him of the impending trial. That he simply did not show up constitutes no basis for a continuance. This ground is without merit.

jc H #6

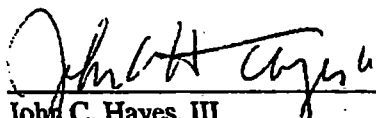
Applicant has failed to carry his burden of proof and has not proven trial counsel's representation of him was ineffective in any way.

Trial counsel provided to Applicant representation within the range of competence required in criminal cases and, in his representation of Applicant, exercised reasonable professional judgment. Therefore, Applicant's Application for Post-Conviction Relief is denied and dismissed with prejudice.

This Court hereby advises Applicant that he must file and serve a Petition for Writ of Certiorari within thirty (30) days of the service of this Order to secure appellate review. See Rules 203 and 243, South Carolina Appellate Court Rules (SCACR). The Applicant's attention is directed to Rule 243, SCACR, for the procedures following the filing and service of the Petition.

IT IS SO ORDERED.

December 29th, 2016
Greenville, South Carolina


John C. Hayes, III
Presiding Judge 

WITNESSES

D Dirton

Greenville Police Department *CBP*

2/1/2013

ARREST WARRANT NUMBER
2013A2320600260

ACTION OF GRAND JURY

TRUE BILL

[Signature]
FOREMAN GRAND JURY

Foreperson of Grand Jury

VERDICT

GUILTY

OF RESISTING ARREST

Tamara Richardson 12-12-13

Foreperson of Petit Jury

Date:

DOCKET NO. 2013-GS-23-
JRT

004562

The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

October

TERM 2013

THE STATE

vs.

DEMETRIUS SIMMONS

Indictment for

0326
0256 JRT

RESISTING ARREST WITH ASSAULT JRT

VIOLATION § 16-09-0320 (b) (A)
JRT

**ENTERED
ACCT** *[Signature]*

FILED

MAY 30 2013

Clerk of Court
Greenville County

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

INDICTMENT FOR
RESISTING ARREST WITH ASSAULT
JCT

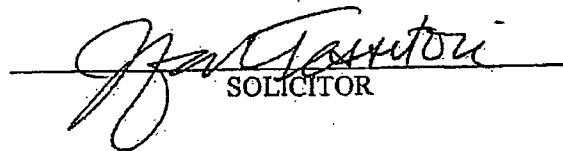
At a Court of General Sessions, convened on
County present upon their oath:

OCT 22 2013

the Grand Jurors of Greenville

That DEMETRIUS SIMMONS did in Greenville County, on or about the 31st day of January, 2013, knowingly and willfully and unlawfully ~~assault, beat or wound D. Dorton with the Greenville Police Department while~~ resisting an arrest by one whom he knew or reasonably should have known was a law enforcement officer. This is in violation of §16-9-320(B) 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 case made and provided.


SOLICITOR

WITNESSES

M C Dean

Greenville Police Department *CB*

2/1/2013

ARREST WARRANT NUMBER

2013A2320600266

ACTION OF GRAND JURY

TRUE BILL

FOREMAN GRAND JURY

Foreperson of Grand Jury

VERDICT

GUILTY

Tamisha Richardson 12-12-13

Foreperson of Petit Jury

Date:

DOCKET NO. 2013-GS-23-

JRT

The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

October

TERM 2013

THE STATE

vs.

DEMETRIUS SIMMONS

Indictment for

0258

BREAKING AND ENTERING A MOTOR VEHICLE

VIOLATION § 16-13-0160

**ENTERED
ACCT**

004563

FILED

MAY 30 2013

Clerk of Court
Greenville County

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

INDICTMENT FOR
BREAKING AND ENTERING A MOTOR VEHICLE

At a Court of General Sessions, convened on

OCT 22 2013

the Grand Jurors of Greenville

County present upon their oath:

That DEMETRIUS SIMMONS did in Greenville County, on or about the 31st day of January 2013, unlawfully break or attempt to break into a motor vehicle belonging to KENNETH TINTINGER, to wit: a 2011 Volvo XC90 Truck, with the intent to steal the same or anything of value therefrom. This is in violation of §16-13-160 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 case made and provided.


SOLICITOR

WITNESSES

M C Dean

Greenville Police Department *gbl*

2/1/2013

ARREST WARRANT NUMBER
2013A2320600263

ACTION OF GRAND JURY

TRUE BILL

[Signature]
FOREMAN GRAND JURY

Foreperson of Grand Jury

VERDICT

GUILTY OF PETIT LARCENY

Tamicha Richardson 12-12-13
Foreperson of Petit Jury
Date:

DOCKET NO. 2013-GS-23-
JRT

004566

The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

October TERM 2013

THE STATE

vs.

DEMETRIUS SIMMONS

Indictment for

3420

GRAND LARCENY

VIOLATION § 16-13-0030

**ENTERED
ACCT.** *[Signature]*

FILED

MAY 30 2013

Clerk of Court
Greenville County

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

INDICTMENT FOR
GRAND LARCENY

At a Court of General Sessions, convened on

OCT 22 2013

the Grand Jurors of Greenville

County present upon their oath:

That DEMETRIUS SIMMONS did in Greenville County, on or about the 31st day of January, 2013, feloniously take and carry away the personal property of KENNETH TINTINGER to wit: a Pulso brand bicycle, with a total value of more than Two Thousand Dollars with the intent to deprive the owner permanently of such property. This is in violation of §16-13-0030 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 case made and provided.


SOLICITOR

WITNESSES

M C Dean

Greenville Police Department *MSB*

2/1/2013

ARREST WARRANT NUMBER
2013A2320600262

ACTION OF GRAND JURY

TRUE BILL

FOREMAN GRAND JURY

Foreperson of Grand Jury

VERDICT
GUILTY

Taminda Richardson 12-12-13

Foreperson of Petit Jury

Date:

DOCKET NO. 2013-GS-23- 004567

JRT

The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

October

TERM 2013

THE STATE

vs.

DEMETRIUS SIMMONS

Indictment for

0079

BURGLARY FIRST DEGREE

VIOLATION § 16-11-0311

**ENTERED
ACCT.**

FILED

MAY 30 2013

Clerk of Court
Greenville County

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

INDICTMENT FOR
BURGLARY FIRST DEGREE

At a Court of General Sessions, convened on
County present upon their oath:

OCT 22 2013

the Grand Jurors of Greenville

That DEMETRIUS SIMMONS did in Greenville County, on or about the 31st day of January 2013, willfully and unlawfully enter the dwelling of KENNETH TINTINGER located at █ Brookside Way, Greenville, SC, without consent and with the intent to commit a crime therein, and the burglary was accompanied by circumstances of aggravation, to wit: the defendant has two or more prior convictions of Burglary. This is in violation of §16-11-0311 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 case made and provided.


SOLICITOR

WITNESSES

M C Dean

Greenville Police Department *CRB*

2/1/2013

ARREST WARRANT NUMBER

2013A2320600267

ACTION OF GRAND JURY

TRUE BILL

[Signature]
FOREMAN GRAND JURY

Foreperson of Grand Jury

VERDICT

GUILTY

Tamisha Richardson 12-12-13

Foreperson of Petit Jury

Date:

DOCKET NO. 2013-GS-23-

JRT

004568

The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

October

TERM 2013

THE STATE

vs.

DEMETRIUS SIMMONS

Indictment for

0079

BURGLARY FIRST DEGREE

VIOLATION § 16-11-0311

**ENTERED
ACCT.** *[Signature]*

FILED

MAY 30 2013

Clerk of Court
Greenville County

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

INDICTMENT FOR
BURGLARY FIRST DEGREE

At a Court of General Sessions, convened on **OCT. 22 2013** the Grand Jurors of Greenville
County present upon their oath:

That DEMETRIUS SIMMONS did in Greenville County, between 30th day of January 2013 and 1st day of February, 2013, willfully and unlawfully enter the dwelling of KENNETH TINTINGER located at █ Brookside Way, Greenville, SC, without consent and with the intent to commit a crime therein, and the burglary was accompanied by circumstances of aggravation, to wit: the defendant has two or more prior convictions for Burglary. This is in violation of §16-11-0311 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 case made and provided.


SOLICITOR

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

Honorable John C. Hayes, Circuit Court Judge

DEMETRIUS SIMMONS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-000057

JOHNSON PETITION FOR WRIT OF CERTIORARI

Wanda H. Carter
Deputy Chief Appellate Defender

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

ATTORNEY FOR PETITIONER

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The PCR judge erred in denying petitioner's claim that he did not voluntarily waive his right to a direct appeal in the case.	3
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ISSUE PRESENTED

The PCR judge erred in denying petitioner's claim that he did not voluntarily waive his right to a direct appeal in the case.

STATEMENT

Petitioner Demetrius Simmons was tried in his absence and convicted of petit larceny, resisting arrest, breaking and entering into a motor vehicle and two counts of first degree burglary per a jury trial held during the December 2013 term of the Greenville County General Sessions Court before Judge C. Victor Pyle. Attorneys Joseph Maxwell and Sarah Henry represented petitioner at trial, and Assistant Solicitor Jennifer Tessitore appeared on behalf of the state. Judge Pyle's sealed sentence was published by Judge Pyle on October 16, 2014, at the sentencing hearing held in the case. Petitioner, Joseph Maxwell, Esquire, and Assistant Solicitor Jennifer Tessitore were present at the sentencing hearing. Petitioner was sentenced to imprisonment for an aggregate period of fifteen years. App. 198-202. Petitioner did not enjoy the benefit of a direct appeal in the case.

On September 17, 2015, petitioner filed a PCR application with the Greenville County Office of the Clerk of Court. App. 204-214. The respondent filed a return dated July 7, 2016, requesting that a hearing be held in response to petitioner's PCR action. App. 215-220.

A PCR hearing was convened on December 9, 2016, at the Greenville County Courthouse before Judge John C. Hayes, III. App. 222-253.

On December 20, 2016, Judge Hayes signed an Order of Dismissal denying PCR relief to petitioner. App. 255-261.

Petitioner appealed Judge Hayes' Order. This petition follows.

ARGUMENT

The PCR judge erred in denying petitioner's claim that he did not voluntarily waive his right to a direct appeal in the case.

Petitioner was tried in absentia. Only three witnesses testified at trial on behalf of the state: Mr. and Mrs. Tintinger and the arresting police officer. Susanne Tintinger testified that on the morning of January 31, 2013, she entered her car parked in the garage of her home and noticed that her car had been rummaged through ("trashed") after she saw that the console and glove compartment had been opened and that her garage door opener was missing. Tintinger stated that she called the police and reported this while driving to work. Also, their mountain bike that was parked in the garage was missing. App. 38, l. 9 – p. 69, l. 11. Kenneth Tintinger (husband) testified that he stayed home on that morning, but shortly thereafter, he heard the garage door go up and looked out to see a male wearing a green hooded sweat top pulling a box out of their garage. He called 911 and shortly thereafter, the perpetrator, who was later identified as petitioner, was apprehended in the neighborhood and arrested. App. 70, l. 22 – p. 108, l. 6; App. 110, l. 4 – p. 121, l. 5.

During the PCR hearing, petitioner testified that he asked trial counsel to appeal the case after the sentencing hearing, but was told by counsel that "he couldn't have one," and that "he had to go down the road and file it there." App. 233, l. 9 – p. 234, l. 18.

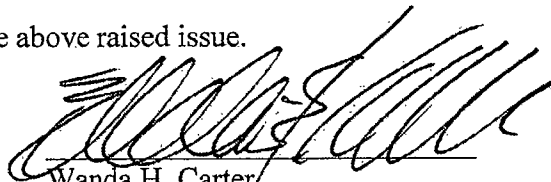
Trial counsel testified at the PCR hearing and stated that he did not recall petitioner's request for an appeal and that there were no appealable issues in the case. App. 248, l. 1-19.

The PCR judge found credible trial counsel's testimony that petitioner did not ask for an appeal and ruled that petitioner failed to carry his burden of proof on this ground. App. 259.

Trial counsel has a duty to make certain a client is fully aware of the right to appeal and ascertain whether his client desires an appeal, and then file an appeal if the client wishes to appeal. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989); Frasier v. State, 306 S.C.158, 410 S.E.2d 572 (1991). Here, trial counsel did not perform his duty with respect to petitioner's appellate rights. A defendant is entitled to an appeal where there has been no intelligent or voluntary waiver of the right to an appeal made by the defendant. White v. State, 263 S.C. 110, 208 S.E.2d 35 (1975). Petitioner desired an appeal of his case and did not voluntarily waive his right to an appeal. Therefore, trial counsel erred in failing to take the appropriate steps to ensure petitioner's right to have his case reviewed on direct appeal. If after an indigent client requesting an appeal the client wishes to appeal, then trial counsel must serve and file a notice of appeal. In Re Anonymous Member of the Bar, 303 S.C. 306, 400 S.E. 483 (1991).

CONCLUSION

Based on the foregoing argument, counsel for petitioner would request that this Court grant the petition and allow full briefing on the above raised issue.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 24th day of July, 2017.

STATEMENT OF ISSUES ON DIRECT APPEAL

- 1.) The trial judge erred in allowing prejudicial prior crime testimony into evidence at trial.
- 2.) The trial judge erred in denying appellant's motion to admit his hospital records and his crime scene picture as proof that he did not possess the intent to commit the crimes charged against him.
- 3.) The trial judge denied appellant's motion for a directed verdict of acquittal in the case and an a new trial on the issue of the sufficiency of the evidence.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

 Certiorari to Greenville County

 Honorable John C. Hayes, Circuit Court Judge

DEMETRIUS SIMMONS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

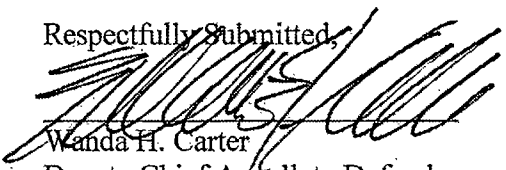
 PETITION TO BE RELIEVED AS COUNSEL

Counsel for Demetrius Simmons states that:

1. She is Deputy Chief Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. She has reviewed the record of petitioner's trial before Judge John C. Hayes, which was held on December 9, 2016, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Demetrius Simmons.

Respectfully Submitted,

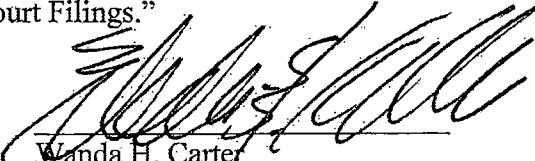

 Wanda H. Carter

 Deputy Chief Appellate Defender
 ATTORNEY FOR PETITIONER

This 24th day of July, 2017.

CERTIFICATE OF COUNSEL

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



Wanda H. Carter
Deputy Chief Appellate Defender

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

ATTORNEY FOR PETITIONER

This 24th day of July, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

 Certiorari to Greenville County

 Honorable John C. Hayes, Circuit Court Judge

DEMETRIUS SIMMONS,

PETITIONER

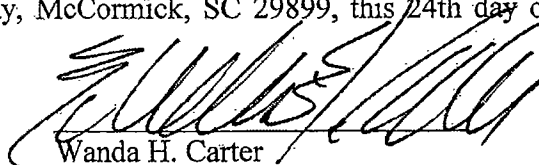
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

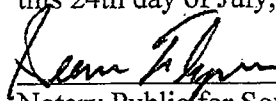
 CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon DeShawn H. Mitchell, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on Demetrius Simmons, ##283195, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 24th day of July, 2017.



Wanda H. Carter
Deputy Chief Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 24th day of July, 2017.

 (L.S)
Notary Public for South Carolina
My Commission Expires: 10/30/2022

The Supreme Court of South Carolina

Demetrius Simmons, Petitioner,

v.

State of South Carolina, Respondent.

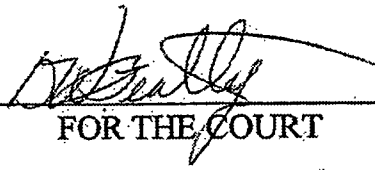
Appellate Case No. 2017-000057

ORDER

Counsel has submitted a petition pursuant to *Johnson v. State*, 294 S.C. 310, 364 S.E.2d 201 (1988), and a motion to be relieved as counsel. We deny the motion to be relieved as counsel and direct the parties to address the following question:

Did the post-conviction relief judge err in denying petitioner's claim that he did not knowingly and voluntarily waive his right to a direct appeal?

Petitioner shall serve and file a petition on this question within thirty (30) days of the date of this order. At the same time, petitioner shall, pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974), serve and file a brief addressing the direct appeal issues. Thereafter, respondent shall have thirty (30) days to serve and file its return to the petition and a brief addressing the direct appeal issues. Within ten (10) days after service of respondent's brief, petitioner may file a reply brief on the direct appeal issues.


FOR THE COURT

C.J.

Columbia, South Carolina

November 27, 2017

RECEIVED

NOV 27 2017

APPELLATE DIVISION

cc:

DeShawn Herman Mitchell, Esquire

Wanda H. Carter, Esquire

Demetrius Simmons, 283195

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

John C. Hayes, Circuit Court Judge

DEMETRIUS SIMMONS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-000057

PETITION FOR WRIT OF CERTIORARI

Wanda H. Carter
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

The PCR judge erred in denying petitioner's claim that he did not voluntarily waive his right to a direct appeal in the case.

STATEMENT

Petitioner Demetrius Simmons was tried in his absence and convicted of petit larceny, resisting arrest, breaking and entering into a motor vehicle and two counts of first degree burglary per a jury trial held during the December 2013 term of the Greenville County General Sessions Court before Judge C. Victor Pyle. Attorneys Joseph Maxwell and Sarah Henry represented petitioner at trial, and Assistant Solicitor Jennifer Tessitore appeared on behalf of the state. Judge Pyle's sealed sentence was published by Judge Pyle on October 16, 2014, at the sentencing hearing held in the case. Petitioner, Joseph Maxwell, Esquire, and Assistant Solicitor Jennifer Tessitore were present at the sentencing hearing. Petitioner was sentenced to imprisonment for an aggregate period of fifteen years. App. 198-202. Petitioner did not enjoy the benefit of a direct appeal in the case.

On September 17, 2015, petitioner filed a PCR application with the Greenville County Office of the Clerk of Court. App. 204-214. The respondent filed a return dated July 7, 2016, requesting that a hearing be held in response to petitioner's PCR action. App. 215-220.

A PCR hearing was convened on December 9, 2016, at the Greenville County Courthouse before Judge John C. Hayes, III. App, 222-253.

On December 20, 2016, Judge Hayes signed an Order of Dismissal denying PCR relief to petitioner. App. 255-261.

Petitioner appealed Judge Hayes' Order and a Johnson Petition for Writ of Certiorari was filed on his behalf. On November 27, 2017, this Court issue an Order requiring a merit Petition for Writ of Certiorari and brief per White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974) to be filed in the case This petition follows.

ARGUMENT

The PCR judge erred in denying petitioner's claim that he did not voluntarily waive his right to a direct appeal in the case.

Petitioner was tried in absentia. Only three witnesses testified at trial on behalf of the state: Mr. and Mrs. Tintinger and the arresting police officer. Susanne Tintinger testified that on the morning of January 31, 2013, she entered her car parked in the garage of her home and noticed that her car had been rummaged through ("trashed") after she saw that the console and glove compartment had been opened and that her garage door opener was missing and that the right garage dooe (which had not been operating properly) was partially opened from the bottom. Also, their mountain bike that was parked in the garage was missing. Tintinger stated that she called the police and reported this while driving to work. App. 38, l. 9 – p. 69, l. 11. Kenneth Tintinger (husband) testified that he stayed home on that morning, but shortly thereafter, he heard the garage door go up and looked out to see a male wearing a green hooded sweat top pulling a box out of their garage. He called 911 and shortly thereafter, the perpetrator, who was later identified as petitioner, was apprehended in the neighborhood and arrested. App. 70, l. 22 – p. 108, l. 6; App. 110, l. 4 – p. 121, l. 5.

During the PCR hearing, petitioner testified that he asked trial counsel to appeal the case after the sentencing hearing, but was told by counsel that "he couldn't have one," and that "he had to go down the road and file it there." App. 233, l. 9 – p. 234, l. 18.

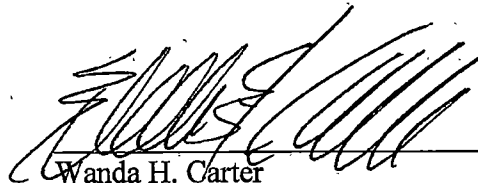
Trial counsel testified at the PCR hearing and stated that he did not recall petitioner's request for an appeal and that there were no appealable issues in the case. App. 248, l. 1-19.

The PCR judge found credible trial counsel's testimony that petitioner did not ask for an appeal and ruled that petitioner failed to carry his burden of proof on this ground. App. 259.

Trial counsel has a duty to make certain a client is fully aware of the right to appeal and ascertain whether his client desires an appeal, and then file an appeal if the client wishes to appeal. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989); Frasier v. State, 306 S.C.158, 410 S.E.2d 572 (1991). Here, trial counsel did not perform his duty with respect to petitioner's appellate rights. A defendant is entitled to an appeal where there has been no intelligent or voluntary waiver of the right to an appeal made by the defendant. White v. State, 263 S.C. 110, 208 S.E.2d 35 (1975). Petitioner desired an appeal of his case and did not voluntarily waive his right to an appeal. Therefore, trial counsel erred in failing to take the appropriate steps to ensure petitioner's right to have his case reviewed on direct appeal. If after an indigent client requesting an appeal the client wishes to appeal, then trial counsel must serve and file a notice of appeal. In Re Anonymous Member of the Bar, 303 S.C. 306, 400 S.E. 483 (1991).

CONCLUSION

Based on the foregoing argument, counsel for petitioner would request that this Court conduct its appellate review of the brief filed pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974) on appeal.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 26th day of January, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

 Certiorari to Greenville County

 Honorable John C. Hayes, Circuit Court Judge

DEMETRIUS SIMMONS,

PETITIONER

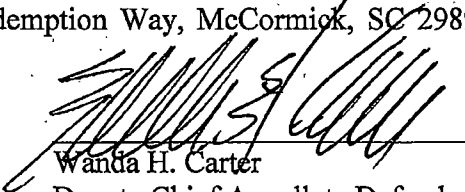
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

 CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari in the above referenced case has been served upon DeShawn H. Mitchell, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari have been served on Demetrius Simmons, ##283195, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 26th day of January, 2018.


 Wanda H. Carter

 Deputy Chief Appellate Defender
 ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
 this 26th day of January, 2018.

Mark Hendel (L.S.)

Notary Public for South Carolina

My Commission Expires: July 3, 2023

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Greenville County

Honorable John C. Hayes, Circuit Court Judge

DEMETRIUS SIMMONS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-000057

BRIEF OF APPELLANT PURSUANT
TO WHITE V. STATE

WANDA H. CARTER
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PO Box 11589
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

The trial judge erred in allowing a prior crime 911 recording into evidence at trial that suggested that appellant, who was being tried on two burglary charges from the same residence and had been seen when the second break-in occurred at the homeowner's garage, presumably broke into that garage hours earlier, which was when the first break-in occurred, because this was prejudicial information that likely led the jury to hand down their guilty findings based on an improper basis.

STATEMENT OF THE CASE

Petitioner Demetrius Simmons was tried in his absence and convicted of petit larceny, resisting arrest, breaking and entering into a motor vehicle and two counts of first degree burglary per a jury trial held during the December 2013 term of the Greenville County General Sessions Court before Judge C. Victor Pyle. Attorneys Joseph Maxwell and Sarah Henry represented petitioner at trial, and Assistant Solicitor Jennifer Tessitore appeared on behalf of the state. Judge Pyle's sealed sentence was published by him (Judge Pyle) on October 16, 2014, at the sentencing hearing held in the case. Petitioner, Joseph Maxwell, Esquire, and Assistant Solicitor Jennifer Tessitore were present at the sentencing hearing. Petitioner was sentenced to imprisonment for an aggregate period of fifteen years. App. 198-202. Petitioner did not enjoy the benefit of a direct appeal in the case.

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A PCR hearing was convened on December 9, 2016, at the Greenville County Courthouse before Judge John C. Hayes, III. App, 222-253.

On December 20, 2016, Judge Hayes signed an Order of Dismissal denying PCR relief to petitioner. App. 255-261.

Petitioner appealed Judge Hayes' Order and a Johnson Petition for Writ of Certiorari was filed on his behalf. On November 27, 2017, this Court issued an Order for a brief to be filed pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974) in the appeal. This brief follows.

ARGUMENT

The trial judge erred in allowing a prior crime 911 recording into evidence at trial that suggested that appellant, who was being tried on two burglary charges from the same residence and had been seen when the second break-in occurred at the homeowner's garage, presumably broke into that garage hours earlier, which was when the first break-in occurred, because this prejudicial information that likely led the jury to hand down their guilty findings based on an improper basis.

Petitioner was tried in absentia on two burglaries charges and other related charges emanating from a break-in that occurred at the Tintinger residence. Only three witnesses testified at trial on behalf of the state: Mr. Tintinger, Mrs. Tintinger, and the arresting police officer.

Susanne Tintinger testified that on the morning of January 31, 2013, she entered her car parked in the garage of her home and noticed that it had been rummaged through ("trashed") and that after she saw that the console and glove compartment had been opened up and that her garage door opener was missing, she then saw also that the right garage door (which had not been operating properly) was partially opened from the bottom. Also, their mountain bike that was parked in the garage was missing. Mrs. Tintinger stated that she called the police and reported this while driving to work on that morning. App. 38, l. 9 – p. 69, l. 11.

Kenneth Tintinger (husband) testified that he stayed home on that morning, but shortly thereafter he heard the garage door go up and looked out to see a male wearing a green hooded sweat top pulling a box out of their garage. He called 911 and within minutes, the perpetrator, who was later identified as petitioner, was apprehended in the neighborhood and arrested. App. 70, l. 22 – p. 108, l. 6; App. 110, l. 4 – p. 121, l. 5.

In this case, police received two 911 calls: one call from Mrs. Tintinger and one call from Mr. Tintinger. Mrs. Tintinger called 911 while commuting to work on the morning of January 31, 2013, to report the break-in while Mr. Tintinger stayed at home; but while he was home, he called 911 just hours later on the same morning when the second garage break in occurred.

Prior to trial, the agreement was reached by all parties to have the following words/phrases muted (redacted) from the 911 tape (see Tr. 27, l. 24 – Tr. 28, l. 18) as follows:

- 1.) The portion where the 911 dispatcher that said “the same guy’s back” presumably when Mr. Tintinger called to report the second break in; and
- 2.) The portion where the 911 call includes a statement about a “streak of break-ins” apparently in the area.

However, when the 911 tape was played and there was a statement made on the 911 tape to the effect where statement was made (allegedly by Mr. Tintinger) that the “same guy came back,” the defense objected, but the trial judge overruled the objection. Tr. 95, l. 11 – p. 98, l. 3.

Generally, prior crimes or bad acts cannot be presented to show that the defendant had the propensity to commit the crime charged, i.e., that he is a bad person. State v. Peake, 302 S.C. 378, 396 S.E.2d 362 (1990). State v. Smith, 309 S.C. 409, 419 S.E.2d 816 (1992); State v. Martucci, 380 S.C. 232, 669 S.E.2d 598 (2008). Also, even if prior crimes are considered under the Lyle¹ exceptions, nonetheless, the value of the priors must outweigh the prejudicial value. State v. Fletcher, 379 S.C. 17, 664 S.E.2d 480 (2008). Moreover, there is a heightened prejudice in admitting a prior crime that is strikingly similar to the one for which the accused on trial because it suggests that appellant had the propensity to commit the similar crime charged. State v. Colf, 337 S.C. 622, 525 S.E.2d 246 (2000). Prior crime evidence must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the

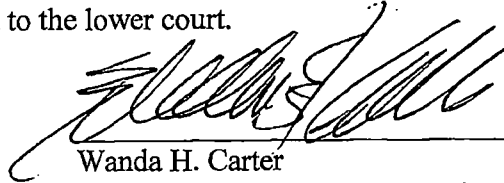
¹ Prior crimes can only be used in order to show motive, intent, identity, absence of mistake or accident or common scheme or plan. State v. Lyle, 125 S.C. 406, 118 S.E.2d 803 (1923).

issues, or misleading the jury. State v. Spears, 403 S.C. 247, 742 S.E.2d 878 (2013). Unfair prejudice results when there is an undue tendency to make a decision on improper basis, and also prejudice comes into play when jury's verdict influenced by the challenged evidence. State v. Martucci, *supra*.

In the case at bar, the prior bad evidence made it seem as though appellant, who was arrested based on the description given from the second Tintinger break-in, was guilty of the first break in as well in addition to other burglaries in the neighborhood. As a result, appellant was portrayed as having the criminal disposition and propensity to commit burglaries and the prejudice came into play, again, because the jury was presented with the assumption that appellant was guilty of the first Tintinger burglary based on the prior bad acts evidence that he was guilty as charged on the second Tintinger burglary and all of the other offenses charged against him combined. Although Mr. Tintinger witnessed a perpetrator (not identified as appellant at that time) committing the second burglary, there were no eyewitnesses to the first Tintinger burglary, but nonetheless, the prior bad acts evidence on the second burglary was used to link appellant to the first burglary. This error violated appellant's right to a fair trial via the Fourteenth Amendment because there was no probative value in the prior crime evidence, and even if probative value existed (arguably), the prejudicial value outweighed any probative value, especially since it was highly likely that the prior bad crime evidence contributed to the jury's guilty verdicts so the admission error cannot be considered harmless error. See State v. Charping, 313 S.C. 147, 437 S.E.2d 88 (1991), citing to Chapman v. California, 386 U.S. 18 (1967).

CONCLUSION

Based on the foregoing argument, counsel for appellant requests that his convictions and sentences be reversed and his case remanded to the lower court.

A handwritten signature in black ink, appearing to read 'Wanda H. Carter', is written over a horizontal line.

Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 26th day of January, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Greenville County

Honorable John C. Hayes, Circuit Court Judge

DEMETRIUS SIMMONS,

PETITIONER

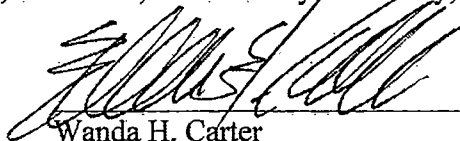
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Appellant in the above referenced case has been served upon DeShawn H. Mitchell, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Brief of Appellant have been served on Demetrius Simmons, ##283195, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 26th day of January, 2018.



Wanda H. Carter

Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 26th day of January, 2018.

 (L.S)

Notary Public for South Carolina

My Commission Expires: July 3, 2023.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County
Court of Common Pleas
The Honorable John C. Hayes., Circuit Court Judge

Appellate Case No. 2017-000057

DEMETRIUS SIMMONS,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

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ATTORNEYS FOR RESPONDENT

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RESPONDENT'S QUESTIONS PRESENTED

- I. Is Petitioner entitled to a direct appeal pursuant to White v. State where he did not knowingly and voluntarily waive his right to a direct appeal?

STATEMENT OF THE CASE

Petitioner is currently incarcerated with the South Carolina Department of Corrections pursuant to the Greenville County Clerk of Court's orders of commitment. Petitioner was indicted by the October 2013 term of the Greenville County Grand Jury for one count of Resisting Arrest (2013-GS-23-004562), one count of Breaking and Entering a Motor Vehicle (2013-GS-23- 004563), two counts of Larceny/Breaking into a Motor Vehicle (2013-GS-23-004564, -004565), one count of Grand Larceny (2013-GS-23-004566), and two counts of Burglary, First Degree (2013-GS-23-004567, -004568). Joey Maxwell, Esquire, and Sarah Henry, Esquire, represented Petitioner.

On December 11, 2013, Petitioner was tried in his absence before the Honorable Victor Pyle, Jr and jury. Petitioner was found guilty as indicted on all charges except the two counts of Larceny/Breaking into a Motor Vehicle. Judge Pyle sealed the record. On October 16, 2014, Judge Pyle sentenced Petitioner to confinement for one year for Resisting Arrest, five years for Break and Entering a Motor Vehicle, thirty days for Grand Larceny, and fifteen years on each count of Burglary, First Degree. The sentences were set to run concurrently. Petitioner did not appeal his conviction or sentence.

On September 17, 2015, Petitioner filed a PCR application with the Greenville County Office of the Clerk of Court. App. 204-214. Respondent filed a return dated July 7, 2016, requesting that an evidentiary hearing be held. App. 215-220. A PCR hearing was convened on December 9, 2016, at the Greenville County Courthouse before Judge John C. Hayes, III. App. 222-253. Petitioner was present at the hearing and was represented by R. Mills Ariail, Jr., Esquire. Respondent was represented by Patrick Schmeckpeper, Esquire, of the South Carolina

Attorney General's Office. On December 20, 2016, Judge Hayes signed an Order of Dismissal denying Petitioner's PCR application. App. 255-261.

Petitioner filed a timely notice of appeal and a Johnson Petition for Writ of Certiorari was filed on his behalf. On November 27, 2017, this Court issued an Order requiring Petitioner to file a merit Petition for Writ of Certiorari and brief pursuant to White v. State¹ to be filed in the case Petitioner submitted both on January 26, 2018. This Return to Petition for Writ of Certiorari follows.

¹ 263 S.C. 110 (1974)

STANDARD OF REVIEW

The standard of review in post-conviction relief (PCR) cases depends on the specific issue before the reviewing court. It will defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them; but will review questions of law de novo, with no deference to trial courts. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). In a PCR proceeding, the petitioner bears the burden of proving the allegations in his or her application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 441, 334 S.E.2d at 814.

The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 689. An applicant must overcome this presumption in order to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel, and both prongs must be established by an applicant to receive relief. Strickland, 466 U.S. at 687. First, an applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland, at 688. Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding

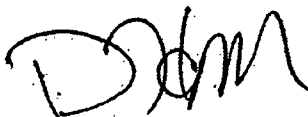
CONCLUSION

For the foregoing reasons, Respondent does not challenge a review of direct appeal issues pursuant to White v. State.

Respectfully submitted,

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May 29, 2018

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY

The Honorable John C. Hayes III, Circuit Court Judge

Appellate Case No. 2017-000057

DEMETRIUS SIMMONS,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return to Petition for Writ of Certiorari, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Wanda H. Carter, Esquire
SC Commission of Indigent Defense
Post Office Box 11589
Columbia, South Carolina 29211

This 29th day of May, 2018


CAROLINE COLLINS
Administrative Coordinator

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY

The Honorable John C. Hayes III, Circuit Court Judge

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DEMETRIUS SIMMONS,

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STATE OF SOUTH CAROLINA,

RESPONDENT

**BRIEF OF RESPONDENT PURSUANT
TO WHITE V. STATE**

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STATEMENT OF ISSUES ON APPEAL

Petitioner's argument that the trial court erred in allowing the 911 recording into evidence is not preserved for this Court's review because no argument about prior bad acts or crimes was made at trial. Regardless of preservation concerns, the trial court properly admitted the 911 recording into evidence because its significant probative value was not substantially outweighed by the danger of unfair prejudice. Moreover, assuming the trial court erred in admitting the 911 recording, any error is harmless because it had no impact on the jury's verdict.

STATEMENT OF THE CASE

Petitioner is currently incarcerated with the South Carolina Department of Corrections pursuant to the Greenville County Clerk of Court's orders of commitment. Petitioner was indicted by the October 2013 term of the Greenville County Grand Jury for one count of Resisting Arrest (2013-GS-23-004562), one count of Breaking and Entering a Motor Vehicle (2013-GS-23- 004563), two counts of Larceny/Breaking into a Motor Vehicle (2013-GS-23-004564, -004565), one count of Grand Larceny (2013-GS-23-004566), and two counts of Burglary, First Degree (2013-GS-23-004567, -004568). Joey Maxwell, Esquire, and Sarah Henry, Esquire, represented Petitioner.

On December 11, 2013, Petitioner was tried in his absence before the Honorable Victor Pyle, Jr and jury. Petitioner was found guilty as indicted on all charges except the two counts of Larceny/Breaking into a Motor Vehicle. Judge Pyle sealed Petitioner's sentence. On October 16, 2014, Petitioner appeared before Judge Pyle for a sentencing hearing during which Judge Pyle unsealed his sentence of confinement for one year for Resisting Arrest, five years for Break and Entering a Motor Vehicle, thirty days for Grand Larceny, and fifteen years on each count of Burglary, First Degree. The sentences were set to run concurrently. Petitioner did not appeal his conviction or sentence.

On September 17, 2015, Petitioner filed a PCR application with the Greenville County Office of the Clerk of Court. App. 204-214. Respondent filed a return dated July 7, 2016, requesting that an evidentiary hearing be held. App. 215-220. A PCR hearing was convened on December 9, 2016, at the Greenville County Courthouse before Judge John C. Hayes, III. App. 222-253. Petitioner was present at the hearing and was represented by R. Mills Ariail, Jr., Esquire. Respondent was represented by Patrick Schmeckpeper, Esquire, of the South Carolina

Attorney General's Office. On December 20, 2016, Judge Hayes signed an Order of Dismissal denying Petitioner's PCR application. App. 255-261.

Petitioner filed a timely notice of appeal and a Johnson¹ Petition for Writ of Certiorari was filed on his behalf. On November 27, 2017, this Court issued an Order requiring Petitioner to file a merit Petition for Writ of Certiorari and brief pursuant to White v. State² in the case. Petitioner submitted both on January 26, 2018. This Brief of Respondent follows.

¹294 S.C. 310 (1988)

²263 S.C. 110 (1974)

STATEMENT OF FACTS

Petitioner was tried in absentia on two burglaries charges and other related charges from a break-in that occurred at the Tintinger's residence. Only three witnesses testified at trial on behalf of the state: Mr. Tintinger, Mrs. Tintinger, and the arresting police officer.

Susanne Tintinger testified that on the morning of January 31, 2013, she entered her car parked in the garage of her home and noticed that it had been rummaged through ("trashed") and that after she saw that the console and glove compartment had been opened up and that her garage door remote was missing, she then saw also that the right garage door (which had not been operating properly) was partially opened from the bottom. Also, their green mountain bike that was parked in the garage was missing. Mrs. Tintinger stated that she called the police and reported this while driving to work on that morning. (App. 38,1. 9 - p. 69,1.11.)

Kenneth Tintinger (husband) testified that he stayed home on that morning. He testified police showed up at his residence after his wife had made the first 911 call. He testified he gave the police a report containing what was missing from the garage which included his green mountain bike. Shortly thereafter the police leaving, he heard the garage door go up and looked out to see a male wearing a green hooded sweat top pulling a box out of their garage. He called 911 and within minutes, the perpetrator, who was later identified as Petitioner, was apprehended in the neighborhood and arrested. App. 70,1. 22-p. 108,1. 6; App. 110,1.4-p. 121,1. 5.

In this case, police received two 911 calls: one call from Mrs. Tintinger and one call from Mr. Tintinger. Mrs. Tintinger called 911 while commuting to work on the morning of January 31, 2013, to report the break-in while Mr. Tintinger stayed at home; but while he was home, he called 911 just hours later on the same morning when the second garage break in occurred.

Prior to trial, the agreement was reached by all parties to have the following words/phrases muted (redacted) from the 911 tape (see Tr. 27,1. 24 - Tr. 28,1. 18) as follows: 1.)

The portion where the 911 dispatcher that said "the same guy's back" presumably when Mr. Tintinger called to report the second break in; and 2.) The portion where the 911 call includes a statement about a "streak of break-ins" apparently in the area.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001); State v. Butler, 353 S.C. 383, 388, 577 S.E.2d 498, 500 (Ct. App. 2003). “The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion.” State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006); State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001). “An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.” Pagan, 369 S.C. at 208, 631 S.E.2d at 265; State v. McDonald, 343 S.C. 319, 540 S.E.2d 464 (2000). “A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice.” State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995). “Prejudice occurs when there is reasonable probability the wrongly admitted evidence influenced the jury’s verdict.” State v. Byers, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011).

ARGUMENT

Petitioner's argument that the trial court erred in allowing the 911 recording into evidence is not preserved for this Court's review because no argument about prior bad acts or crimes was made at trial. Regardless of preservation concerns, the trial court properly admitted the 911 recording into evidence because its significant probative value was not substantially outweighed by the danger of unfair prejudice. Moreover, assuming the trial court erred in admitting the 911 recording, any error is harmless because it had no impact on the jury's verdict.

Petitioner asserts the trial judge erred in allowing a prior crime 911 recording into evidence at trial that suggested that Petitioner, who was being tried on two burglary charges from the same residence and had been seen when the second break-in occurred at the homeowner's garage, presumably broke into that garage hours earlier, which was when the first break-in occurred, because this prejudicial information that likely led the jury to hand down their guilty findings based on an improper basis. First, the issue on appeal is unpreserved because Petitioner's argument on appeal forms a different basis than the one offered at the time of trial. Second, the evidence's significant probative value was not substantially outweighed by the risk of unfair prejudice or confusing the jury. Third, any error is harmless because it had no impact on the jury's verdict

Petitioner's argument that the trial court erred in allowing the 911 recording into evidence is not preserved for this Court's review because no argument about prior bad acts or crimes was made at trial.

When a court rules upon the admissibility of a piece of evidence *in limine*, proper issue preservation requires an objection contemporaneous to its introduction. State v. Forrester, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001). A motion to exclude evidence made at the beginning of trial does not preserve an issue for review because a motion *in limine* is not a final determination. *Id.* The moving party must make a contemporaneous objection when the evidence is offered for introduction before the jury. State v. Simpson, 325 S.C. 37, 479 S.E.2d 57 (1996).

The aggrieved party must also consistently object to the challenged evidence upon the same legal basis in order to preserve the objection for appellate review. "A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground." State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003). "[A]n objection should be sufficiently specific to bring into focus the precise nature of the alleged error so it can be reasonably understood by the trial judge." State v. Prioleau, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001).

Moreover, an issue will be precluded from appellate review when the substance of the objection at trial does not comport with the specific issue raised on appeal. State v. Dickman, 341 S.C. 293, 295, 534 S.E.2d 268, 269 (2000); State v. Tucker, 319 S.C. 425, 428, 462 S.E.2d 263, 265 (1995). "A party may not argue one ground at trial and an alternate ground on appeal." State v. Dunbar, supra; State v. Prioleau, supra.

Prior to opening statement being made and the jury being sworn the following exchange between the solicitor (Ms. Tessitore), Petitioner's trial counsel (Mr. Maxwell) and the trial judge took place: (App.p.27-28)

Mr. Maxwell: The 911 dispatcher said the same guy's back. Did you hear that a second ago? I'm just kind of concerned about the inference the 911 call operator's making when she has no observation of who was there, who wasn't.

Ms. Tessitore: She's getting the information from the two callers.

Mr. Maxwell: We don't know that. I mean, it's not the guy (victim) saying the same guy's back, she's saying it.

The Court: Well, can you mute it when that comes out?

Mr. Maxwell: We've agreed to redact similar stuff.

Ms. Tessitore: I redacted one comment that one of the victims says -- apparently, there was a streak of break-ins, so we've taken that out. But to

actually make it without that statement would be time consuming, so if we can just mute that part.

The Court: Just mute it, that's what I'm saying. You know when it's coming up.

Ms. Tessitore: Yeah, it's right at the beginning.

Mr. Maxwell: At the very beginning, yeah. So I'll just mark at what point I should turn it on.

The Court: Yes.

On direct examination of one the victims Mr. Tentinger, the following exchange took place while the 911 call was being published to the jury: (App.p.95-98)

Mr. Maxwell: Objection, Your Honor.

The Court: Hold on, hold on. Yes, sir.

Mr. Maxwell: Your Honor, we had agreed to exclude certain parts --

Ms. Tessitore: Your Honor, can we approach?

The Court: All right. (whereupon, a bench conference was held.)

The Court: Take the jury out for a minute, please. (whereupon, the jury left the courtroom at approximately 2:07 p.m.)

The Court: Okay, Mr. Maxwell, what's your objection?

Mr. Maxwell: Yes, Your Honor, before trial we had approached and we had agreed to exclude any kind of comment about referring back to he's coming back, you know, referring to this Defendant was once there and he's come back. You know, at the very beginning solicitor redacted it and now she's playing it.

Ms. Tessitore: Well, just to clarify that, the issue arose when I was playing the 911 call, which you've had a chance to listen to and review beforehand. And I had approached the public defender with the fact that there was this initial statement that -- where the victim says, apparently, there was a streak of break-ins. So I had gone ahead and taken that statement out so that there wouldn't be any reference to other break-ins. And then Mr. Maxwell heard the 911 call we were playing and at the very beginning of it is the county dispatcher saying -- the dispatcher is stating, the same guy came

back. And she's relaying information from, perhaps, the victims or officers or whatever it is. Because the dispatcher is not here to cross-examine and because that could be potentially prejudicial, we agreed to start it at the 30-second mark, which would take out those other voices. And at this point, it's contained to what Mr. Tintinger has said, which is that the same guy came back. That's this witness's out-of-court statement that was made under the stress of the event. It's clearly an excited utterance. He's relaying events as they're occurring, so it's a presence sense impression. So it's admissible in all of those ways. It's his conclusion that it's the same guy. And Mr. Maxwell would certainly be able to cross-examine the witness about why he thought that and what basis he had for thinking that. And has, you know, obviously full abilities to ferret that out for the jury to decide. You know, it's not offered for the truth of the matter, but rather --

The Court: Okay. All right.

Mr. Maxwell: Your Honor, I'm not necessarily objecting to the hearsay aspect of it. I'm not waiving that either at this point. But my contention is that at the beginning, she did approach me about trying to exclude certain things and we even talked about it in front of Your Honor about excluding this one statement from the 911 operator about he's coming back. You know, so maybe I would just -- under false impression or something like that, but that's my basis for the objection is that I was under the impression that all these type statements would be excluded or redacted. Now, as far as hearsay goes, I don't know if it's an excited utterance or not. It is a conclusion. It's not an observation of what he's observing. But Your Honor, I would just ask

The Court: All right, subject to the objection, I'm going to allow that. I think that's a matter you can take up on cross-examination.

Mr. Maxwell: Thank you, Your Honor.

On appeal, Petitioner argues the prior bad evidence (911 call) introduced made it seem as though Petitioner, who was arrested based on the description given from the second break-in, was guilty of the first break in as well in addition to other burglaries in the neighborhood. Petitioner made no argument about prior bad acts or crimes as a basis for his objection at trial. Because Petitioner cannot argue one issue at trial and another on appeal, Petitioner failed to

preserve the issue presented for appellate review.

The 911 Tape's Probative Value Was Not Substantially Outweighed by Unfair Prejudice.

The crux of Petitioner argument rests on the notion that the admission of the 911 call from Mr. Tintinger, the second call made that morning to police, contained prior bad evidence that made it seem as though Petitioner who was arrested based on the description given from the second break-in, was guilty of the first break in as well in addition to other burglaries in the neighborhood.

Even if relevant, evidence must be excluded from trial if its probative value is substantially outweighed by the danger of unfair prejudice. State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009); see Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."). The determination of the probative value of evidence relative to its potential prejudicial effect must be based on the entire record and the result generally hinges on the facts of each particular case. State v. Gillian, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007).

Probative value is the measure of the importance of a piece of evidence's tendency to prove or disprove some fact or issue relevant to the outcome of a case. State v. Collins, 398 S.C. 197, 202, 727 S.E.2d 751, 754 (Ct. App. 2012), rev'd on other grounds, 409 S.C. 524, 763 S.E.2d 22 (2014). Meanwhile, unfair prejudice means an undue tendency to suggest a decision on an improper basis. State v. Dickerson, 341 S.C. 391, 400, 535 S.E.2d 119, 123 (2000); see Old Chief v. United States, 519 U.S. 172, 181 (1997) ("The term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the

factfinder into declaring guilt on a ground different from proof specific to the offense charged.”). However, unfair prejudice does not mean damage to a defendant’s case that results from the legitimate probative force of a piece of evidence. State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998). That is true because all evidence introduced by the State in a criminal trial is meant to be prejudicial to the defendant, and it is only unfair prejudice that must be avoided. Id.

When ruling on the comparative probative value and potential prejudicial effect of evidence, trial judges have “particularly wide discretion[.]” Collins, 398 S.C. at 209, 727 S.E.2d at 757. As a result, a trial judge’s ruling on such a matter should be afforded great deference on appeal and should only be reversed in exceptional circumstances. State v. Lyles, 379 S.C. 328, 339-340, 665 S.E.2d 201, 207 (Ct. App. 2008). Importantly, “[a] trial judge’s balancing decision under Rule 403 should not be reversed simply because an appellate court believes it would have decided the matter otherwise because of a differing view of the highly subjective factors of the probative value or the prejudice presented by the evidence.” State v. Hamilton, 344 S.C. 344, 358, 543 S.E.2d 586, 593-94 (Ct. App. 2001), overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). “If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal.” Id. at 358, 543 S.E.2d at 594.

Further, evidence of other bad acts is not admissible to prove the defendant’s guilt except to show motive, identity, existence of a common scheme or plan, absence of mistake or accident, or intent. Rule 404(b), SCRE; State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). When there is a close degree of similarity between the crime charged and the prior bad act, both this Court and the South Carolina Court of Appeals have held prior bad acts are admissible to demonstrate a common scheme or plan. See e.g., State v. Gaines, 380 S.C. 23, 30, 667 S.E.2d 728, 731 (2008).

“When determining whether evidence is admissible as common scheme or plan, the trial court must analyze the similarities and dissimilarities between the crime charged and the bad act evidence to determine whether there is a close degree of similarity.” State v. Wallace, 384 S.C. 428, 433, 683 S.E.2d 275, 277-78 (2009). “When the similarities outweigh the dissimilarities, the bad act evidence is admissible under Rule 404(b).” Id. Evidence of prior bad acts must logically relate to the charged offense, and the probative value of the evidence must outweigh any danger of unfair prejudice. State v. Holder, 382 S.C. 278, 293, 676 S.E.2d 690, 698 (2009). “The acid test of admissibility is the logical relevancy of the other crimes.” State v. Cutro, 332 S.C. 100, 103, 504 S.E.2d 324, 325 (1998).

“Even if prior bad act evidence is clear and convincing and falls within an exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant.” State v. Clasby, 385 S.C. 148, 150, 682 S.E.2d 892, 896 (2009) (citing Rule 403, SCRE; Gaines, 380 S.C. at 29, 667 S.E.2d at 731; State v. Gillian, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007)). “The determination of the prejudicial effect of the evidence must be based on the entire record and the result will generally turn on the facts of each case.” Id. (citing State v. Fletcher, 379 S.C. 17, 24, 664 S.E.2d 480, 483 (2008)).

In Petitioner’s case, the trial judge did not abuse his broad discretion by admitting portions of the recording of the 911 call. As was noted by the solicitor, the recording made by the victim (Mr. Tintinger), was his out-of-court statement that was made under the stress of the event and that he was relaying events as they were occurring. The call gave the jury an idea of what was going on giving the evidence an exceptionally high probative value. While Petitioner claims the tape was prejudicial because some of Mr. Tintinger statements were “speculative,” that speculation was readily apparent to the jury and Defense Counsel had the ability to cross-

examine Mr. Tintinger regarding his statements to the 911 dispatcher being speculative or without foundation.

Any prejudice to Petitioner stems from the evidence's substantial probative value and did not suggest a decision on an improper basis. While Petitioner claims the tape was prejudicial because Petitioner was portrayed as having the criminal disposition and propensity to commit burglaries and the prejudice came into play because the jury was presented with the assumption that Petitioner was guilty of the first burglary based on the prior bad acts evidence. However, that assumption or speculation was readily apparent to the jury and Defense Counsel had the ability to cross-examine Mr. Tintinger regarding his statements being an assumption or speculative. The 911 recording was properly admitted as the evidence's probative value was not substantially outweighed by the risk of unfair prejudice.

Additionally, the 911 call was introduced for the purpose of showing the *res gestae* and providing the full context of the event. Evidence of other crimes is admissible under the *res gestae* theory when the other actions are so intimately connected with the crime charged that their admission is necessary for a full presentation of the case." Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003); State v. Sweat, 362 S.C. 117, 606 S.E.2d 508 (Ct. App. 2004) (finding temporal proximity of other acts to the charged crime is important in determining admissibility). "When evidence is admissible to provide this full presentation of the offense, there is no reason to fragmentize the event under inquiry by suppressing parts of the *res gestae*." State v. McGee, 408 S.C. 278, 288, 758 S.E.2d 730, 735-36 (Ct. App. 2014) (internal quotation marks omitted) (quoting State v. Preslar, 364 S.C. 466, 474, 613 S.E.2d 381, 385 (Ct. App. 2005)). Accordingly, the 911 recording was properly admitted.

Any error in admitting the 911 recording is harmless because it had no impact on the jury's verdict.

Notwithstanding, even assuming the trial judge erred in admitting the 911 tape, Petitioner did not suffer the requisite prejudice to require a new trial. Appellate courts will generally not set aside a judgment based on insubstantial errors not affecting the result. State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991). An error is harmless beyond a reasonable doubt if it does not contribute to the verdict. State v. Fletcher, 379 S.C. 17, 25, 664 S.E.2d 480, 484 (2008); see also State v. Tapp, 398 S.C. 376, 389, 728 S.E.2d 468, 475 (2012) ("Engaging in this harmless error analysis, we note that our jurisprudence requires us not to question whether the State proved its case beyond a reasonable doubt, but whether beyond a reasonable doubt the trial error did not contribute to the guilty verdict."). Any error with respect to the admission of the 911 call was harmless because it could not have reasonably affected the verdict. The portion of the recording that makes references to "the same guy's back" was not a critical piece of the State's evidence. The State presented the same testimony Mrs. Tintinger, who testified she reported to the police that her garage remote had been stolen out of her car that night. Additionally, once police arrived at the home, Mr. Tintinger in giving a police report testified his green mountain bike had been stolen. After police had left, Mr. Tintinger observed a black male enter his garage after hearing the motor of the garage door open. The black male was wearing a green hoodie. Mr. Tintinger then called the police. Shortly thereafter the police apprehended a black male suspect wearing a green hoodie riding a green mountain bike that was later identified as belonging to Mr. Tintinger. Here, Petitioner was found riding the stolen green mountain bike that had been identified as being stolen prior to Mr. Tintinger making his 911 call to police. Additionally, the stolen garage door remote was found in the direction Petitioner was traveling when he left after being spotted by Mr. Tintinger. Since this information was presented to the jury, Petitioner could

not reasonably have been prejudiced by the admission of the 911 recording which presented the same allegations against Petitioner. Petitioner's convictions and sentences should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

DESHAWN H. MITCHELL
Assistant Attorney General
SC Bar No. 101813

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
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Columbia, South Carolina 29211
(803) 734-3737

May 29, 2018

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY

The Honorable John C. Hayes III, Circuit Court Judge

Appellate Case No. 2017-000057

DEMETRIUS SIMMONS,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Respondent Pursuant to White v. State, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Wanda H. Carter, Esquire
SC Commission of Indigent Defense
Post Office Box 11589
Columbia, South Carolina 29211

This 29th day of May, 2018


CAROLINE COLLINS
Administrative Coordinator

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

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

Demetrius Simmons, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2017-000057

ON WRIT OF CERTIORARI

Appeal From Greenville County
The Honorable C. Victor Pyle
The Honorable John C. Hayes, III, Post-Conviction
Judge

Opinion No. 2019-MO-012
Submitted January 8, 2019 – Filed February 27, 2019

REVERSED

Deputy Chief Appellate Defender Wanda H. Carter, of
Columbia, for Petitioner.

Attorney General Alan Wilson and Assistant Attorney
General Megan Harrigan Jameson, both of Columbia, for
Respondent.

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APPELLATE DEFENSE

PER CURIAM: Petitioner seeks a writ of certiorari to review the denial of his application for post-conviction relief (PCR). We grant the petition for a writ of certiorari, dispense with further briefing, and reverse the order of the PCR court.

Petitioner contends he did not voluntarily waive his right to an appeal. He argues defense counsel erred in failing to take the appropriate steps to ensure petitioner's right to have his case reviewed on appeal. The State concedes petitioner is entitled to a belated review of his direct appeal issues pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974), because the record does not support the PCR court's finding that petitioner knowingly and intelligently waived his right to a direct appeal. We agree.

Following a trial, counsel is required to make certain the defendant is made fully aware of the right to appeal. See *White*, 263 S.C. at 118, 208 S.E.2d at 39. In the absence of an intelligent waiver by the defendant, counsel must either initiate an appeal or comply with the procedure in *Anders v. California*, 386 U.S. 738 (1967). *Id.*

We find the record does not support the conclusion that petitioner knowingly and intelligently waived his right to a direct appeal. We, therefore, reverse the denial of petitioner's PCR application. See *Lowry v. State*, 376 S.C. 499, 504, 657 S.E.2d 760, 763 (2008) ("If no probative evidence exists to support the PCR court's findings, this Court will reverse."). We transfer the direct appeal issues to the court of appeals to review pursuant to *Davis v. State*, 288 S.C. 290, 342 S.E.2d 60 (1986).

REVERSED.

BEATTY, C.J., KITTREDGE, HEARN, FEW and JAMES, JJ., concur.

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

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

Demetrius Simmons, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2017-000057

Appeal From Greenville County
C. Victor Pyle, Jr., Trial Judge
John C. Hayes, III, PCR Judge

Unpublished Opinion No. 2019-UP-256
Submitted June 1, 2019 – Filed July 17, 2019

AFFIRMED

Deputy Chief Appellate Defender Wanda H. Carter, of
Columbia, for Petitioner.

Attorney General Alan Wilson, Senior Assistant Deputy
Attorney General Megan Harrigan Jameson, and
Assistant Attorney General Taylor Zane Smith, all of
Columbia, for Respondent.

PER CURIAM: Petitioner was tried *in absentia* and convicted of two counts of first-degree burglary and one count each of petit larceny, resisting arrest, and

breaking and entering an automobile. Petitioner was later sentenced to an aggregate term of fifteen years' imprisonment. No direct appeal was taken. Petitioner subsequently filed an application for post-conviction relief (PCR), which the PCR court denied. Our supreme court reversed, finding Petitioner was entitled to a belated review of his direct appeal issue pursuant to *White v. State*¹ because the record did not support the PCR court's conclusion that Petitioner knowingly and intelligently waived his right to a direct appeal. *See Simmons v. State*, Op. No. 2019-MO-012 (S.C. Sup. Ct. filed Feb. 27, 2019). The supreme court transferred Petitioner's direct appeal issue to this court for review.

Petitioner was convicted of committing two burglaries that took place within hours of each other at the same residence. During the second burglary, the victim saw Petitioner enter his garage and gave police a physical description of Petitioner. Soon after, Petitioner, who matched the description given by the victim, was found in the area in possession of a bicycle stolen during the first burglary. Petitioner argues the trial court erred by admitting into evidence a portion of the 911 call made by the victim during the second burglary in which he stated "the same guy came back." Petitioner contends the statement should have been excluded as improper prior bad act evidence. We affirm pursuant to Rule 220(b), SCACR, and the following authorities: *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial [court]."); *id.* at 142, 587 S.E.2d at 693-94 ("Issues not raised and ruled upon in the trial court will not be considered on appeal."); *id.* at 142, 587 S.E.2d at 694 ("A party may not argue one ground at trial and an alternate ground on appeal."); Rule 404(b), SCRE ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent."); *State v. King*, 424 S.C. 188, 200, 818 S.E.2d 204, 210 (2018) ("If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing." (quoting *State v. Fletcher*, 379 S.C. 17, 23, 664 S.E.2d 480, 483 (2008))); *State v. Kirton*, 381 S.C. 7, 27, 671 S.E.2d 107, 117 (Ct. App. 2008) ("A close degree of similarity or connection between the prior bad act and the crime for which the defendant is on trial is required to support admissibility under the common scheme or plan exception." (quoting *State v. Cheeseboro*, 346 S.C. 526, 546, 552 S.E.2d 300, 311 (2001))); *King*, 424 S.C. at 200, 818 S.E.2d at 210 ("Nevertheless, this other bad act evidence must be excluded if its probative value is substantially outweighed by the danger of unfair

¹ 263 S.C. 110, 208 S.E.2d 35 (1974).

prejudice to the defendant.").

AFFIRMED.²

HUFF, THOMAS, and KONDUROS, JJ., concur.

² We decide this case without oral argument pursuant to Rule 215, SCACR.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

DEMETRIUS SIMMONS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2017-000057

Appeal from Greenville County

Honorable John C. Hayes, Circuit Court Judge

Opinion No. 2019-MO-012

PETITION FOR REHEARING

Pursuant to Rules 221 and 240, SCACR, counsel for petitioner would petition for rehearing regarding this Court's no error finding on the prior bad act evidence admitted at trial because this Court might have overlooked the overwhelming unfair prejudice connected to the prior bad act evidence and how greatly the same outweighed any probative value, particularly where the prior bad act was an alleged prior burglary, for which petitioner was already on trial, and where petitioner was also on trial for a second burglary that allegedly occurred a few hours later on the very same date and at the very same residence where the prior burglary occurred. In support of this petition, counsel would direct this Court's attention to the following points.

1.) The issue raised on direct appeal in this case follows:

The trial judge erred in allowing a prior crime 911 recording into evidence at trial that suggested that [petitioner], who was being tried on two burglary charges from the same residence and had been seen when the second break-in occurred at the homeowner's garage, presumably broke into that garage hours earlier, which was when the first break-in occurred, because this prejudicial information likely led to the jury to hand down their guilty findings based on an improper basis.

2.) The Court of Appeals held as follows on the issue:

Petitioner was convicted of committing two burglaries that took place within hours of each other at the same residence. During the second burglary, the victim saw Petitioner enter his garage and gave police a physical description of Petitioner. Soon after, Petitioner, who matched the description given by the victim, was found in the area in possession of a bicycle stolen during the first burglary. Petitioner argues the trial court erred by admitting into evidence a portion of the 911 call made by the victim during the second burglary in which he stated "the same guy came back." Petitioner contends the statement should have been excluded as improper prior bad act evidence. We affirm pursuant to Rule 220(b), SCACR, and the following authorities: *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial [court]."); *id.* At 142, 587 S.E.2d at 693-94 ("Issues not raised and ruled upon in the trial court will not be considered on appeal."); *id.* at 142, 587, S.E.2d at 694 ("A party may not argue one ground at trial and an alternate ground on appeal."); Rule 404(b), SCRE (Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent."); *State v. King*, 424 S.C. 188, 200, 818 S.E.2d 204, 210 (2018) ("If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing." (quoting *State v. Fletcher*, 379 S.C. 17, 23, 664, S.E.2d 204, 210 (2018) ("If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing." (quoting *State v. Fletcher*, 379, S.C. 17, 23, 664 S.E.2d 480, 483 (2008)))); *State v. Kirton*, 381 S.C. 7, 27, 671 S.E.2d 107, 117, (Ct. App. 2008) ("A close degree of similarity or connection between the prior bad act and the crime for which the defendant is on trial is required to support admissibility under the common scheme or plan exception." (quoting *State v. Cheeseboro*, 346 S.C. 526, 546, 552 S.E.2d 300, 311 (2001))); *King*, 424 S.C. at 200, 818 S.E.2d at 210 ("Nevertheless, this other bad act evidence must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant.")

¹ 263 S.C. 110, 208 S.E.2d 35 (1974).

3.) To the contrary, this Court apparently overlooked the fact that the overwhelming prejudice of the prior bad act evidence heard by the jury at trial clearly outweighed any possible probative value because the prior was used to bootstrap petitioner as guilty on both burglary charges. Petitioner was tried in absentia on two burglary charges and other related charges emanating from a break-in that occurred within hours or each other on the same date at the Tintinger residence located in Greenville, South Carolina. Only three witnesses testified at trial on behalf of the state: Mr. Tintinger, Mrs. Tintinger, and the arresting police officer.

Susanne Tintinger testified that on the morning of January 31, 2013, she entered her car parked in the garage of her home and noticed that it had been rummaged through (“trashed”) and that after she saw that the console and glove compartment had been opened up and that her garage door opener was missing, she then saw also that the right garage door (which had not been operating properly) was partially opened from the bottom. Also, their mountain bike that was parked in the garage was missing. Mrs. Tintinger stated that she called the police and reported this while driving to work on that morning. App. 38, l. 9 – p. 69, l. 11.

Kenneth Tintinger (husband) testified that he stayed home on that morning, but shortly thereafter he heard the garage door go up and looked out to see a male wearing a green hooded sweat top pulling a box out of their garage. He called 911 and within minutes, the perpetrator, who was later identified as petitioner, was apprehended in the neighborhood and arrested. App. 70, l. 22 – p. 108, l. 6; App. 110, l. 4 – p. 121, l. 5.

In this case, police received two 911 calls: one call from Mrs. Tintinger and one call from Mr. Tintinger. Mrs. Tintinger called 911 while commuting to work on the morning of January 31, 2013, to report the break-in while Mr. Tintinger stayed at home; but while he was home, he called 911 just hours later on the same morning when the second garage break in occurred.

Prior to trial, the agreement was reached by all parties to have the following words/phrases muted (redacted) from the 911 tape (see Tr. 27, l. 24 – Tr. 28, l. 18) as follows:

- 1.) The portion where the 911 dispatcher that said “the same guy’s back” presumably when Mr. Tintinger called to report the second break in; and
- 2.) The portion where the 911 call includes a statement about a “streak of break-ins” apparently in the area.

However, when the 911 tape was played and there was a statement made on the 911 tape (allegedly by Mr. Tintinger) to the effect that the “same guy came back,” the defense objected, but the trial judge overruled the objection. Tr. 95, l. 11 – p. 98, l. 3.

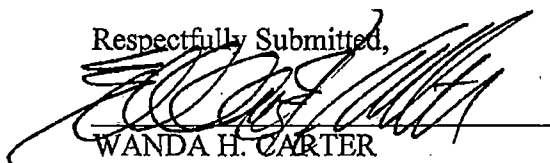
4.) Generally, prior crimes or bad acts cannot be presented to show that the defendant had the propensity to commit the crime charged, i.e., that he is a bad person. State v. Peake, 302 S.C. 378, 396 S.E.2d 362 (1990). State v. Smith, 309 S.C. 409, 419 S.E.2d 816 (1992); State v. Martucci, 380 S.C. 232, 669 S.E.2d 598 (2008). Also, even if prior crimes are considered under the Lyle¹ exceptions, nonetheless, the value of the priors must outweigh the prejudicial value. State v. Fletcher, 379 S.C. 17, 664 S.E.2d 480 (2008). Moreover, there is a heightened prejudice in admitting a prior crime that is strikingly similar to the one for which the accused on trial because it suggests that defendant had the propensity to commit the similar crime charged. State v. Colf, 337 S.C. 622, 525 S.E.2d 246 (2000). Prior crime evidence must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. State v. Spears, 403 S.C. 247, 742 S.E.2d 878 (2013). Unfair prejudice results when there is an undue tendency to make a decision on improper basis, and also prejudice comes into play when jury’s verdict influenced by the challenged evidence. State v. Martucci, *supra*.

¹ Prior crimes can only be used in order to show motive, intent, identity, absence of mistake or accident or common scheme or plan. State v. Lyle, 125 S.C. 406, 118 S.E.2d 803 (1923).

5.) In the case at bar, the prior bad evidence made it seem as though petitioner, who was arrested based on the description given from the second Tintinger break-in, was guilty of the first break in as well, in addition to other burglaries in the neighborhood. As a result, petitioner was portrayed as having the criminal disposition and propensity to commit burglaries and the prejudice came into play, again, because the jury was presented with the assumption that petitioner was guilty of the first Tintinger burglary based on the prior bad acts evidence, and that he was guilty as charged on the second Tintinger burglary, and all of the other offenses charged against him combined. Although Mr. Tintinger witnessed a perpetrator (not identified as petitioner at that time) committing the second burglary, there were no eyewitnesses to the first Tintinger burglary, but nonetheless, the prior bad acts evidence on the second burglary was used to link petitioner to the first burglary. This error violated petitioner's right to a fair trial via the Fourteenth Amendment because there was no probative value in the prior crime evidence, and even if probative value existed (arguably), the prejudicial value outweighed any probative value, especially since it was highly likely that the prior bad crime evidence contributed to the jury's guilty verdicts which meant that the admission of the same cannot be considered harmless error. See State v. Charping, 313 S.C. 147, 437 S.E.2d 88 (1991), citing to Chapman v. California, 386 U.S. 18 (1967). Also, the issue was preserved via objections at trial for appellate review.

WHEREFORE, based on the foregoing points, counsel for petitioner would request a rehearing on the issue above in connection with this Court's holding on appeal.

Respectfully Submitted,



WANDA H. CARTER
Deputy Chief Appellate Defender

This 1st day August, 2019

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable John C. Hayes, Circuit Court Judge

DEMETRIUS SIMMONS,

PETITIONER

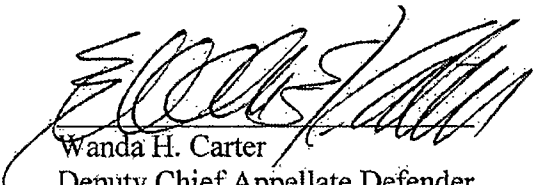
V.

STATE OF SOUTH CAROLINA,

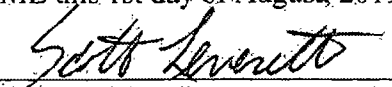
RESPONDENT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon Taylor Z. Smith, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Demetrius Simmons, ##283195, at Trenton Correctional Institution, 84 Greenhouse Road, Trenton, SC 29847, this 1st day of August, 2019.


Wanda H. Carter
Deputy Chief Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE
ME this 1st day of August, 2019.

 (L.S)
Notary Public for South Carolina
My Commission Expires: September 27, 2028.

The South Carolina Court of Appeals

Demetrius Simmons, Petitioner,

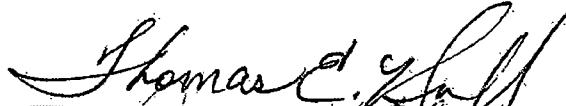
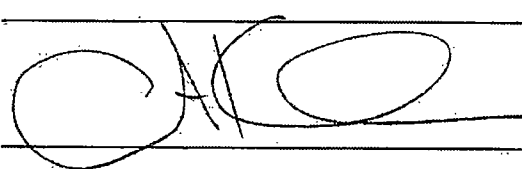
v.

State of South Carolina, Respondent.

Appellate Case No. 2017-000057

ORDER

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

 J.
 J.
 J.

Columbia, South Carolina

cc:

Wanda H. Carter, Esquire
 Megan Harrigan Jameson, Esquire
 Taylor Zane Smith, Esquire
 Alan McCrory Wilson, Esquire
 Demetrius Simmons, 283195

FILED

September 19, 2019

The Honorable John C. Hayes, III
The Honorable C. Victor Pyle, Jr.

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APPELLATE DEFENSE