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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM BERKELEY COUNTY
Court of General Sessions
The Honorable Maite Murphy, Circuit Court Judge

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Appellate Case No. 2019-000687

THE STATE, .....RESPONDENT,

v.

GABRIELLE OLIVA LASHANE DAVIS KOCSIS,.....APPELLANT.

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# INITIAL BRIEF OF RESPONDENT

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ALAN WILSON
Attorney General

WILLIAM F. SCHUMACHER, IV
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3713

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit

101 Meeting Street, Suite 400
OT Wallace Building
Charleston, S.C. 29401
(843) 958-1900

ATTORNEYS FOR RESPONDENT

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II. The trial judge properly denied Appellant's motion for a directed verdict on his burglary charge because the State's evidence, viewed in the light most favorable to the prosecution, proved all the necessary elements of the charge.

III. The trial judge properly sentenced Appellant for murder and for both kidnapping charges because both kidnapping charges were for victims who were not the subject of the murder charge.

IV. The trial judge properly submitted both kidnapping charges to the jury because Appellant, through the theory of hand of one, hand of all, was liable for the other crimes committed by her conspirators during the burglary and murder committed by the group.

V. The trial judge properly admitted the 9-1-1 recording of the phone call by the witnesses pursuant to Rule 403, SCRE and Rule 801(d)(1)(B), SCRE.

## STATEMENT OF THE CASE

Appellant was indicted by the Berkeley County Grand Jury for murder, first-degree burglary, two counts of kidnapping, and criminal conspiracy. On April 8–10, 2019, Appellant proceeded to a jury trial before the Honorable Maite Murphy. Assistant Solicitors Jordan Smith, Esquire, and Bart Stegall, Esquire, represented the State; Grant Smaldone, Esquire, and Jason Luck, Esquire, represented Appellant. The jury found Appellant guilty as charged on all counts and the trial judge sentenced her to fifty years' incarceration for murder, to be served concurrently with a fifty-year sentence for first-degree burglary, two thirty-year sentences for her kidnapping convictions, and a five-year sentence for criminal conspiracy.

Appellant timely filed a notice of appeal and brief. This brief of Respondent now follows.

## STATEMENT OF FACTS

### Evidence at Trial

Prior to trial, trial counsel objected to the admission of a 9-1-1 recording made by witnesses immediately after Victim was shot. The two witnesses heard in the recording, Whitney Chance and Alexis Murray, informed the 9-1-1 operator details about the crimes they had just witnessed. Additionally, the women are heard speaking to Victim, asking him not to die. Trial counsel argued that the women's statements to Victim made the recording more prejudicial than probative because it could stir up emotions in the jurors. In response, the State noted almost every 9-1-1 recording is "emotional in nature," and the emotion in the call was not substantially prejudicial to Appellant. Notably, the recording also included descriptions by the witnesses of the people involved in the crime and the vehicles they drove. Based on information presented "at th[at] juncture," the trial judge found the recording was "intended for corroborative purposes and establishing the elements of the offense," and the probative value of the recording outweighed its potential prejudicial effects. (Tr.p.53, line 11–Tr.p.55, line 10)

At the beginning of trial, the State used Peggy Brown, an employee of the Berkeley County Communications 9-1-1 Center to introduce a recording of the 9-1-1 call made by witnesses shortly after the shooting of Victim. Prior to its admission, trial counsel renewed his objection to the recording based on Rule 403, SCRE. The trial judge noted that for the same reasons he previously referenced, he overruled the objection and allowed it to be played for the jury. (Tr.p.78, line 7–Tr.p.80, line 24; State's Exhibit 1)

Erika Haynes, who was Victims girlfriend around the time of the crime in September 2015, also knew Appellant. Haynes testified she met Appellant several months earlier through her cousin and had been with her earlier in the day while Appellant delivered "meth" to some

customers. Appellant informed Haynes that she was looking for Victim because he had stolen $1500 and a (stolen) motorcycle from her. Haynes refused to disclose the information and was present when Appellant used her phone to put out a "hit" for Victim by promising seven grams of meth to anyone who could "find him, get him, or kill him." Haynes texted Victim and let him know that Appellant had put out a hit for him. (Tr.p.81, line 5–Tr.p.86, line 4; State's Exhibit 19)

Alexis Murray, a long-time friend of Victim, was with him throughout the day and night of the shooting. Murray's vehicle had been sometime prior to the shooting, but Victim and another friend, Richard Curtis, recovered it for her. After Curtis's mother told them to leave the house, the group they were in ended up at Miss Rose's home, about two blocks away from the Curtis residence. While Murray, Victim, Curtis, and another friend were in a back bedroom of the house smoking marijuana, Victim expressed concern that Appellant had placed a "hit" on him due to an issue with stolen property. Eventually, the group went to sleep. In the early hours of the following morning, Murray woke to the sounds of commotion coming from the living room of the house. Murray then heard a female voice screaming, "[W]here the f**k is [Victim]. Where is [Victim]? Where is [Victim]? We know he's in there. We know he's in there." (Tr.p.89, line 7–Tr.p.97, line 15)

Victim and Curtis rolled onto the floor, with Victim fleeing into the connecting bathroom. Murray was sitting on the corner of the bed in the room when the door opened and several people entered the room. The first person, a man with a gun, went directly to Murray, held the gun in her face. Murray testified that while the gun was trained on her, she did not feel free to leave the area. Appellant, who entered with the gunman and was recognized by Murray, screamed, "[W]here the f**k is Mark at? We know Mark's here. Where the f**k is Mark?"

The gunman, who kept his weapon trained on Murray, eventually saw Victim in the bathroom's mirror, went towards him. Appellant sprayed some type of "mace or pepper spray" throughout the room while Victim began struggling with the gunman. Appellant screamed, "[S]hoot that N-*-*-*-A!," then Murray heard the gun discharge. Appellant and the gunman fled while Murray went to check on Victim. Murray found Victim in the bathtub and tried screaming for help but had difficulty yelling and even breathing due to the mace or spray in the air. Murray, and another friend named Nick Varner, were able to get Victim onto the porch of the home where they tried to find the wound on Victim while waiting on EMS to arrive. They attempted to stop Victim's bleeding and administer CPR, but were unsuccessful with both efforts. (Tr.p.97, line 16–Tr.p.102, line 10)

Through Murray, the State introduced photographs of the crime scene, including the various rooms of Miss Rose's house. In addition to the bedroom involved in the crime, the photos depict a fully functional house with a living room, bathroom, kitchen and appropriate furniture in all three rooms. (Tr.p.102, line 14–Tr.p.106, line 24)

On cross-examination, trial counsel's strategy was to discredit Murray's testimony by pointing out (1) Murray consumed meth the day before the crime and marijuana before falling asleep that night; (2) Murray had a prior conviction for forgery in the amount of $0.00; and (3) Murray's written statement to police did not mention that Appellant had stated, "shoot that N-*-*-*-A." On redirect examination, Murray testified that it did not surprise her that she may have omitted the statement; she had trouble speaking and was still under the effects of the pepper spray when speaking with police. (Tr.p.110, line 4–Tr.p.120, line 8)

Varner also testified at trial. He explained that he had known Appellant prior to the shooting through the use, trading, and dealing of drugs. Varner and his girlfriend, Whitney

Chance, had been with the group at the Curtis residence and traveled with them to Miss Rose's home. Exhausted, Varner passed out on the living room couch approximately fifteen minutes after the group arrived. He woke in the wee hours of the next morning to someone breaking a window several feet away from him. Shortly thereafter, Chance informed Varner that several people had entered the house. Varner immediately noticed that bear mace or some type of pepper spray permeating the room. When Varner was finally able to lift his head up, he saw Appellant standing right in front of them. Varner recalled hearing Appellant say, "shoot that N-*-*-*-A," and hearing a gun shot several seconds later. Within seconds, he saw several people run out of the house through the front door. Varner gave his phone to Chance and had her call 9-1-1 while he checked on Victim. He helped Murray carry Victim to the front porch of the home and tried to help him out. Varner noted that Victim was "covered" in the mace/pepper spray, especially over his face and mouth. Victim's skin was yellow and yellow fluid oozed out of his nose and mouth. (Tr.p.122, line 14–Tr.p.139, line 1)

Similar to his strategy with Murray, trial counsel's strategy for cross-examining Varner was to discredit him based on his criminal history, prior drug use, and omissions in his statement to police following the shooting. Trial counsel specifically questioned Varner about certain details surrounding the shooting, such as his failure to put into his statement: (1) Appellant was wearing a handkerchief or bandana; and (2) Appellant yelled statements about shooting Victim. (Tr.p.139, line 7–Tr.p.147, line 19)

Tommy Kennedy was also at the house the night and morning of the shooting. He knew both Appellant and Victim prior to the crime. Kennedy confirmed that Victim had stolen a motorcycle and money from Appellant and that Appellant had put out a reward of "[s]even grams of ice" to anyone that would help her located Victim. Kennedy was also asleep in the

living room when the commotion started. After hearing glass breaking and people trying to force the front door to the home open, he fled out the rear of the home. Kennedy spoke with law enforcement about the event while at the hospital and receiving medical treatment for a foot injury he suffered during his flight. (Tr.p.154, line 22–Tr.p.165, line 16)

Curtis testified that he had stayed at Appellant's house for several days just prior to the shooting. There, he overheard Appellant speaking with a person she referred to as "Grayson" and noting that Victim had stolen things from her. In addition to confirming the details of the shooting provided by Murray, he found a phone in Miss Rose's home after police allowed people back into the residence. Later that day, he read the text messages and discovered that Brendan Varner, Nicholas Varner's cousin, had texted Appellant that Victim was at Miss Rose's home. (Tr.p.181, line 17–Tr.p.201, line 8)

Melissa Freeman was friends with several of the individuals who broke into the home that night, but had only met Appellant earlier in the day. Freeman recalled that she had introduced Matt Grainger, the individual who shot Victim, to Grayson Griffin for the purposes of facilitating drug dealing connections. Freeman went with the group to Miss Rose's home, but after seeing Grainger arm himself discovered that the men intended on a violent confrontation with Victim who had robbed Appellant several weeks prior. Freeman remained in a vehicle while the remainder of the group approached the home. Before long, she heard glass breaking and approached the front of the house. As she arrived, she saw Griffin "punching out" a front window to the home with his gun and yelling for the people in the living room to not move. She witnessed several additional events unfold, including Appellant spraying pepper spray around the living room. After Grainger's gun went off, the group fled the home and ran back to their vehicles. Grainger admitted to Freeman that he shot Victim in the leg, and gave the gun to Glenn

Lane. Freeman also testified that Appellant orchestrated the home invasion and confrontation of Victim. (Tr.p.265, line 8–Tr.p.281, line 6)

Whitney Chance testified she was with Victim's group at Miss Rose's during the night in question. She confirmed that the group woke to people running through the door to the home and spraying mace all around the building. Chance testified she did not feel free to leave at that time. She also recognized Appellant, whom she had met through her boyfriend Varner on several occasions. She heard Appellant yell for someone to shoot Victim and heard the gunshot. She called 9-1-1, and solicited help from emergency services. On cross-examination, trial counsel attempted to impeach Chance with her written statement to police[1] in which she omitted any reference to Appellant yelling for someone to shoot Victim. Chance testified she likely did not include every detail of her experience to the police due to the trauma of the event and physical impairment from pepper spray. (Tr.p.201, line 20–Tr.p.220, line 13)

Glenn Lane and Grayson Griffin both testified for the State. They largely confirmed the details of the events of the shooting, including Appellant's involvement in the crime and Grainger's roll as the gunman who shot Victim. (Tr.p.289, line 21–Tr.p.334, line 12)

Kimberly Vandiver, a Berkeley County Sheriff's Office deputy, arrived at the home before EMS and noted she evacuated the building and spoke with the "owner of the residence" and confirmed no one else was inside. Chrystal Pence, another deputy with the Berkeley County Sheriff's Office, processed the crime scene, and located a shell casing in the bedroom of the house. Sergeant Shane Cook apprehended one of the men involved in the crime, Glenn Lane, shortly thereafter and found guns and several items of clothing associated with the crime. The

[1] Chance denied writing the statement, explaining it was not in her handwriting except for the signature portion. She admitted it was possible that a law enforcement officer wrote it due to her recovering from having mace in her eyes.

gun associated with the shell casing recovered and found with Lane was traced to Grayson Griffin, another man involved in the crime. SLED agent Michelle Eichenmiller confirmed that the spent shell casing possessed marks and characteristics consistent with being fired from Griffin's gun. (Tr.p.169, line 15–Tr.p.176, line 25; Tr.p.220, line 17–Tr.p.230, line 8; Tr.p.249, line 10–Tr.p.259, line 7)

Directed Verdict

At the conclusion of the State's case, trial counsel moved for a directed verdict. Trial counsel claimed the State, in general, failed to meet its burden of proof for the charges. However, trial counsel raised a specific argument as to Appellant's burglary charge, claiming that "Rosemary Hoffberg" did not testify at trial and her identity and ownership interest in the house in which the crimes took place was not proven as the witnesses only referred to a "Miss Rose" throughout the trial. Further, trial counsel alleged that there was no testimony that Rosemary Hoffberg expected "sanctity or peace or security" in her residence; he claimed it was not a dwelling but a "disorderly house" and could not be subject to burglary. (Tr.p.335, line 1–Tr.p.337, line 5)

Trial counsel also claimed there was no proof of kidnapping because there was no proof of a mens rea regarding the kidnapping of the two victims, Chance and Murray, because the State did not provide that it was "practically certain" that the intruders entered the home for the purposes of kidnapping them. Trial counsel finished by claiming that with no burglary and no kidnappings, there could be no felony murder of Victim. (Tr.p.337, line 6–Tr.p.338, line 8)

In response, the State noted that evidence did, in fact, exist to support submission of each of the charges to the jury. The State began by noting the witnesses to the crime all testified that the home in question belonged to Miss Rose. Further, Deputy Vandiver had testified that she

had, in fact, spoken with the owner of the residence and made sure she had exited the building. Further, the State noted trial counsel admitted that Varner's testimony and the 9-1-1 call confirmed Miss Rose was at the home, she lived there, and that she had a possessory interested in the residence. Regardless of any drug activity that occurred in the building, the building was considered a dwelling under the law. Further, Murray testified Grainger pointed a gun to her head and kept it pointed there while Appellant screamed and searched for Victim and Freeman and Chance testified that Griffin pointed his gun into the living room and demanded Chance did not move. Combined with the clear evidence of the conspiracy to break into the home and go after Victim, the State provided direct evidence of all the charged offenses. (Tr.p.338, line 11–Tr.p.341, line 6)

The trial judge denied the directed verdict motion on all counts, specifically noted that the definition of a dwelling was "encompassed" by what the witnesses testified to, and there was testimony that Miss Rose was at the home and asleep throughout the events of the night. Regarding the kidnapping charges, the trial judge noted both Murray and Chance testified they did not feel free to leave and the record indicated they were held at gunpoint, so both direct and circumstantial evidence supported those charges. (Tr.p.341, line 7–Tr.p.342, line 15)

Appellant's Evidence

Appellant elected to testify in her own defense. Appellant confirmed Victim had stolen money and a motorcycle from her and that she had been trying to locate him prior to the shooting. She led the group to Miss Rose's house after receiving a text from "Bird" stating Victim was there. Appellant was with the group when Grainger kicked the door repeatedly until it opened. Appellant claimed she saw Rose Hoffberg just behind the door after it opened. Appellant noted Rose was the "owner of the house" and "a really old lady" who "gets high on

meth." The group entered the house, armed, and started looking for Victim. Appellant conceded she was asking for Victim's location. When they found Victim in the back bedroom, Victim claimed she used pepper spray for the first and only time that night on him. She claimed Victim was shot when Grainger backed up, fell into a hole, and accidentally fired his gun. However, Appellant soon admitted she was high that night and had trouble recalling the events of that night. She also stated she and Griffin fled to North Carolina after the shooting. (Tr.p.348, line 10–Tr.p.395, line 15)

On cross-examination, Appellant admitted that she had offered to exchange drugs in return for Victim's location. She also admitted to giving Grainger a gun, was armed with bear mace, and that it was "accurate" to say that the door was kicked in to Miss Rose's home. She also conceded that she committed a crime within the house. (Tr.p.395, line 22–Tr.p.407, line 24)

Closing Arguments

During his closing, trial counsel argued the State's witnesses were "drug addicts" who "tell their stor[ies], they lie, they make stuff up." He claimed all of them made up their stories while in jail and omitted details from the written statements they provided to police after the shooting. (Tr.p.465, line 22–Tr.p.470, line 20)

Jury Instructions

Trial counsel requested the following change to the trial judge's proposed charge for burglary:

Remove

> IF A PERSON ENTERS A BUILDING BY USING DECEPTION, ARTIFICE, TRICK, OR MISREPRESENTATION TO GET CONSENT TO ENTER, THIS IS AN ENTRY WITHOUT CONSENT.

Replace with

> The entry must be without consent. "Enters a dwelling without consent" means to enter "without the consent of the person in lawful possession." In addition to the

normal meaning of entry without consent, the phrase also includes entering by using deception, artifice, trick or misrepresentation to gain consent to enter from the person in lawful possession.

A person in "lawful possession" has custody and control of, and the right and expectation to be safe and secure in, the dwelling in question.

(April 10, 2019 Memorandum Regarding Jury Charges, p.3)

The trial judge denied the request, noting the trial judge's planned charges already addressed trial counsel's concerns. (Tr.p.449, lines 1–19)

After closing arguments, the trial judge provided with, among others, the following instructions:

> The indictments in this case allege several different offenses against the defendant. Again, those charges are burglary in the first degree, **kidnapping of Whitney Renee Chance, kidnapping of Alexis Nicole Murray**, murder, and criminal conspiracy.
>
> Each indictment charges separate and distinct offenses. You must decide each indictment separately on the evidence and the law applicable, uninfluenced by your decisions as to any other indictment. [Appellant] may be convicted or acquitted on any or all of the offenses charged.
>
> . . .
>
> In order to establish criminal liability, criminal intent is required. For example, the mental state required to be proven by the State for a particular crime might be purpose, intent, knowledge, recklessness, or criminal negligence.
>
> . . .
>
> It is not necessary to establish intent by direct and positive evidence, but intent may be established by inference in the same way as any other fact by taking into consideration the acts of the party and all of the facts and circumstances of the case. Criminal intent is a mental state, a conscience wrongdoing.
>
> It is up to you to determine what [Appellant] intended to do based upon the circumstances shown to have existed. Criminal intent can arise from actions or a failure to act. It may arise from negligence, recklessness, or an indifference to duty or to consequences that is considered by the law to be the equivalent of criminal intent.
>
> . . .

[Appellant] is charged with burglary in the first degree. The State must prove beyond a reasonable doubt that [Appellant] entered a dwelling without consent.

A dwelling is any building or portion of a building in which a person ordinarily sleeps. A building constructed as a dwelling that has never been occupied cannot be considered a dwelling for purposes of a burglary. But a building is a dwelling even if the residents are temporarily absent from the building.

In order to prove that [Appellant] entered the building, the State does not have to show that [Appellant]'s entire body entered the building. The smallest entry is sufficient. It may be any part of the body, such as a hand or a foot, or even an instrument, such as a hook or other instrument.

In addition, the State does not have to prove that force was used to gain entry. If a person enters a building by using deception, artifice, trick, or misrepresentation to get consent to enter, this is an entry without consent.

Next, the State must prove beyond a reasonable doubt that [Appellant] intended to commit a crime, either a felony or a misdemeanor, at the time of entry. Mere entry into a dwelling without consent is not burglary. If the intent to commit a crime is formed after the entry, it is not burglary.

On the other hand, if [Appellant] intended to commit a crime at the time of the entry, it is a burglary even if the intent was abandoned after the entry. It does not matter that the intended crime was not completed.

Intent may be shown by acts and conduct of [Appellant] and other circumstances from which you may naturally and reasonably infer intent.

Finally, the State must prove beyond a reasonable doubt that: When entering – when entering, while in the dwelling, or when fleeing, the defendant or an accomplice was armed with a deadly weapon or explosive.

. . .

When entering, while in the dwelling, or when fleeing, [Appellant] or an accomplice caused physical injury to anyone not participating in the crime; or three, when entering, while in the dwelling, or when fleeing, the defendant or an accomplice used or threatened to use a dangerous object; or, four, when entering, while in the dwelling, or when fleeing, [Appellant] or an accomplice displayed what was or appeared to be a knife, pistol, revolver, rifle, shotgun, machine gun, or other firearm.

[Appellant] is also charged with two counts of kidnapping; specifically kidnapping Whitney Renee Chance and Alexis Nicole Murray. The State must

prove beyond a reasonable doubt that [Appellant] knowingly and unlawfully seized, confined, inveigled, decoyed, kidnapped, abducted, or carried either or both of these persons without the authority of law.

To do a thing unlawfully is to do it willfully against the law. A person is said to act knowingly if he or she is aware the result is practically certain to follow from his or her conduct whatever the desire may be as to that result.

Seize means to take hold of suddenly or forcibly. Confine means to limit, restrict, or enclose within bounds, imprison, or shut or keep in. Inveigle means to lure, entice, or lead astray by false representations, promises, or other deceitful means. Decoy means to lure by or as if by decoy. Decoy is something to entice a person into a trap.

To kidnap is to remove a person against his or her will by unlawful force or by fraud. Abduct means to carry off secretly or by force for illegal purposes. Carry away means to remove.

The State does not have to prove that [Appellant] did all of these things. Instead, if you find beyond a reasonable doubt that [Appellant] did any of these things, you may find [Appellant] guilty of kidnapping.

(Tr.p.500, line 21–Tr.p.510, line 21) (emphasis added)

## STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Decisions to admit or exclude evidence rest in the sound discretion of the trial judge and will only be reversed on appeal for an abuse of discretion. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (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). "[T]he appellate court does not re-evaluate the facts based upon its own view of the preponderance of the evidence, but simply determines whether the trial judge's ruling is supported by any evidence." State v. Miller, 375 S.C. 370, 652 S.E.2d 444 (2008).

## ARGUMENT

### I.

**The trial judge properly charged the jury on the correct and current South Carolina law of burglary which was applicable to Appellant's case.**

Appellant argues the trial judge erred in failing to use his proposed jury charge for burglary. The State disagrees with this assertion of error for numerous reasons. Initially, the State notes the trial judge provided an accurate and complete description of the law pertaining to burglary: specifically that a dwelling is "any building or portion of a building in which a person ordinarily sleeps. Further, the only notable change requested by trial counsel was for language referring to "lawful possession" of the dwelling in question, based on the language of State v. Singley, 392 S.C. 270, 277, 709 S.E.2d 603, 606–07 (2011) as interpreted by Judge Anderson. See Ralph King Anderson, Jr., South Carolina Requests to Charge — Criminal, 2012, § 2-13(2). As explained below, the trial judge properly refused inclusion of this additional language for several reasons.

The law to be charged to the jury is determined by the evidence presented at trial. State v. Holland, 385 S.C. 159, 165, 682 S.E.2d 898, 901 (Ct. App. 2009). "No instruction should be given by the trial judge, at the request of the appellant, which tenders an issue which is not presented or supported by the evidence." State v. Weaver, 265 S.C. 130, 137, 217 S.E.2d 31, 34 (1975). "Ordinarily, the trial court has the duty to give requested instructions which correctly state the law applicable to the issues and which are supported by the evidence." State v. Peer, 320 S.C. 546, 553, 466 S.E.2d 375, 380 (Ct. App. 1996). The trial court only commits reversible error if it fails to give a requested charge on an issue raised by the evidence. State v. Hill, 315 S.C. 260, 262, 433 S.E.2d 838, 849 (1993).

First, the State notes no argument or justification was provided for the charge at trial. It can only be assumed the reasons for the motion were similar to the arguments posited by trial counsel during his directed verdict motion: there was no proof "Miss Rose" was Rosemary Hoffberg and no testimony she expected peace and security in her home. However, as explained in supra in Issue I, there was no factual dispute at trial that Miss Rose was the owner of the residence. Deputy Vandiver testified that when she arrived at the scene, she spoke with the owner of the residence, Ms. Rose. Further, all the witnesses at trial, **including Appellant,** confirmed the scene of the crime was known to everyone as Miss Rose's home. Accordingly, all the evidence at trial supported the assertion that Ms. Rose was live-in owner of the home, and without any dispute in the evidence as to Miss Rose's ownership and possession of the party trial counsel's additional language was improper. See Weaver, 265 S.C. at 137, 217 S.E.2d at 34.

Second, the Singley language applies to a distinctly difference factual scenario than the instant case: in Singley, the named defendant was trying to argue that he was innocent of burglary because he possessed an ownership interest in the property he burglarized. The Supreme Court of South Carolina found "that the mere holding of title to property is not dispositive of whether the owner can be convicted of burglarizing it." Id. at 276, 709 S.E.2d at 606. Notably, and antithetical to Appellant's arguments at trial, the court also found "our burglary laws protect an interest separate and apart from ownership: the **right** to be safe and secure in one's home." Id. at 276–77, 709 709 S.E.2d at 606. (emphasis added)

As noted above, Miss Rosemary Hoffberg's possession and ownership of the property was not in dispute at trial. Both the prosecution and defense presented evidence that Miss Hoffberg owned and possessed the property. As noted by the Supreme Court of South Carolina in Singley, those in possession of property have a right to be safe and secure in their homes.

Prior commotion or arguing is not equivalent to an expectation that masked intruders will break-into a residence, assault the people within, and murder a guest. Accordingly, the trial judge properly refused to add trial counsel's requested language to his jury charge.

## II.

**The trial judge properly denied Appellant's motion for a directed verdict on his burglary charge because the State's evidence, viewed in the light most favorable to the prosecution, proved all the necessary elements of the charge.**

Appellant argues the trial judge improperly submitted the crime of burglary, alleging the State failed to provide "any evidence" supporting the elements of the crime because Miss Rose's home did not constitute a "dwelling" under the burglary statute. The State disagrees with this allegation of error. The State provided direct and circumstantial evidence supporting the charge at trial.

When ruling on a motion for a directed verdict, the trial court is concerned with the existence or non-existence of evidence, not its weight. State v. Curtis, 356 S.C. 622, 633, 591 S.E.2d 600, 605 (2004); State v. Condrey, 349 S.C. 184, 190, 562 S.E.2d 320, 323 (Ct. App. 2002). Ultimately, the question is whether, in view of the evidence in the light most favorable to the State, a rational trier of fact could find all the elements of the crime beyond a reasonable doubt. State v. Robinson, 310 S.C. 535, 539, 426 S.E.2d 317, 318 (1992) (finding any rational trier of fact could have found all the elements of the crime beyond a reasonable doubt in affirming the denial of a motion for directed verdict and citing Jackson v. Virginia, 443 U.S. 307 (1979)). The task of the trial court is to simply determine "whether the evidence presented is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt." State v. Bennett, 415 S.C. 232, 237, 781 S.E.2d 352, 354 (2016). The reviewing court should affirm if in viewing the evidence in the light most favorable to the State, "the evidence could induce a reasonable juror to find [the defendant] guilty." See State v. Pearson, 415 S.C. 463, 474, 783 S.E.2d 802, 808 (2016); see also State v. Richburg, 250 S.C. 451, 459, 158 S.E.2d

769, 772 (1968) ("When the evidence is susceptible of more than one reasonable inference, questions of fact must be submitted to the jury.").

In order to establish the statutory offense of first-degree burglary in South Carolina, the State must prove the defendant: (1) entered the dwelling of another; (2) without consent; (3) with the intent to commit a crime therein; and (4) with at least one aggravating circumstance present. S.C. Code Ann. § 16-11-311(A). Significantly, pursuant to South Carolina law, a "dwelling" for burglary purposes includes "any house, outhouse, apartment, building, erection, shed or box in which there sleeps a proprietor, tenant, watchman, clerk, laborer or person who lodges there with a view to the protection of property" along with "all houses, outhouses, buildings, sheds and erections" that are within two-hundred yards of and appurtenant to a dwelling house. S.C. Code Ann. § 16-11-10; see S.C. Code Ann. § 16-11-310(2) ("'Dwelling' means its definition found in Section 16-11-10 and also means the living quarters of a building which is used or normally used for sleeping, living, or lodging by a person.").

In the case sub judice, the trial judge denied trial counsel's directed verdict motion because the State provided direct evidence and/or substantial circumstantial elements of each of the elements of first-degree burglary. All of the State's witnesses who were present during the shooting confirmed that Appellant and her co-conspirators forcefully entered the house while armed. Varner and Kennedy both testified to the group breaking windows to the home and barging into the house shortly thereafter. Freeman, who was with the conspirators, specifically testified to the group forcing its way into the home without the consent of anyone within. Freeman also confirmed that the group invaded the home that night with the specific goal of finding Victim and, at the very least, threatening him in order to retrieve the money and motorcycle he stole from Appellant. The circumstantial evidence only confirms their nefarious

motives: the masked group was armed with guns and mace, with Appellant spraying the mace throughout the home to incapacitate anyone within who may try to resist the invasion.

Trial counsel's sole challenges to the burglary charge was that the State "failed" to prove Rosemary Hoffberg, the person named in the burglary indictment, was the "Ms. Rose" everyone referred to at trial, because Hoffberg did not testify at trial. However, Hoffberg was not required to testify at trial: the State only needed to provided evidence that Hoffberg was indeed aggrieved in the charged manner. The States witnesses were unanimous in testifying that the home belonged to and was occupied by Ms. Rose. Deputy Vandiver specifically testified to meeting with all of the people present at the house, including Ms. Hoffberg, and speaking with her after the incident. Even the defense's case supported this conclusion: Appellant herself testified that she knew the subject property was the home of Ms. Rose.

Further, as discussed in Issue I, Appellant's attempt to confuse the idea of prior "commotion" in the house with armed men and women forcing their way into the home, spraying bear mace at every individual within, and killing a person is outrageous. It is a paradigm of both state and federal law that people have a right to "be secure in their persons, houses papers, and effects . . . ." See, e.g., U.S. CONST. amend. IV. Drug use within a home does not deprive an owner or occupant of said rights. See, e.g., State v. Bash, 419 S.C. 263, 797 S.E.2d 721 (2017) (reversing defendant's conviction for trafficking in cocaine and cocaine base, finding officer's warrantless entry into grassy area for purposes of a "knock and talk" was protected under the Fourth Amendment). Accordingly, the trial judge properly denied Appellant's motion for a directed verdict.

## III.

**The trial judge properly sentenced Appellant for murder and for both kidnapping charges because both kidnapping charges were for victims who were not the subject of the murder charge.**

Appellant asserts she cannot be sentenced for kidnapping in light of her murder sentence because she cannot be sentenced for both murdering and kidnapping Victim. The State generally agrees with the assertion that, had Appellant been convicted of both the kidnapping and murder of Victim, South Carolina law prohibits a sentence for kidnapping in addition to a sentence for murder. However, such is not the case in the current situation because Appellant was not charged with the kidnapping of Victim, but the kidnappings of Murray and Chance and the jury was explicitly instructed of such. Thus, Appellant's kidnapping sentence was entirely appropriate.

S.C. Code Ann § 16-3-910 provides:

> Whoever shall unlawfully seize, confine, inveigle, decoy, kidnap, abduct or carry away any other person by any means whatsoever without authority of law, except when a minor is seized or taken by his parent, is guilty of a felony and, upon conviction, must be imprisoned for a period not to exceed thirty years ***unless sentenced for murder as provided in Section 16-3-20.***

(emphasis added).

"The [Supreme] Court has summarily vacated life sentences for kidnapping when the defendant received a **concurrent** sentence under the murder statute." Owens v. State, 331 S.C. 582, 585, 503 S.E.2d 462, 463 (1998) (collecting cases) (emphasis added). "Our courts have long held, where an appellant has been sentenced for murder of a victim, this code section precludes a sentence for kidnapping **of that victim**, and any such sentence should be vacated. State v. Vick, 384 S.C. 189, 201–02, 682 S.E.2d 275, 281 (Ct. App. 2009) (emphasis added).

In the instant case, the trial judge properly sentenced Appellant for kidnapping because these convictions pertained not to Victim, but to Murray and Chance. Nothing in South Carolina law prohibits a trial court from sentencing a defendant for the murder of one victim and the for the kidnapping of a separate victim. See, e.g., Vick, 384 S.C. at 201–02, 682 S.E.2d at 281. Further, despite Appellant's claims to the contrary, the jury was explicitly informed that neither of the kidnapping charges applied to Victim. Further, the trial judge instructed the jurors that they were to determine Appellant's guilt for the kidnappings of Chance and Murray, not Victim, and specifically returned verdicts for Chance and Murray, not Victim. Accordingly, the trial judge did not err in sentencing Appellant for kidnapping when neither kidnapping conviction applied to Victim.

## IV.

**The trial judge properly submitted both kidnapping charges to the jury because Appellant, through the theory of hand of one, hand of all, was liable for the other crimes committed by her conspirators during the burglary and murder committed by the group.**

Appellant claims the trial judge improperly failed to direct verdicts in her favor for both kidnapping charges because the prosecution did not provide evidence that Appellant intended to kidnap Chance and Murray when she burgled Hoffberg's home that night. The State disagrees with this assertion of error because the State provided direct evidence that Appellant's coconspirators held Chance and Murray against their will during the burglary and murder of Victim, which through the hand of one, hand of all theory of liability supported a finding of Appellant's guilt for these charges.

"'Under the **hand** of **one** is the **hand** of all theory [of accomplice liability], one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose.'" State v. Thompson, 374 S.C. 257, 261–62, 647 S.E.2d 702, 704–05 (Ct. App. 2007) (alteration in original) (quoting State v. Condrey, 349 S.C. 184, 194, 562 S.E.2d 320, 324 (Ct. App. 2002)) (internal quotation marks omitted). "Mere presence and prior knowledge that a crime was going to be committed, without more, is insufficient to constitute guilt." Id. at 262, 647 S.E.2d at 705. "However, 'presence at the scene of a crime by pre-arrangement to aid, encourage, or abet in the perpetration of the crime constitutes guilt as a [principal].'" Id. (alteration in original) (quoting State v. Hill, 268 S.C. 390, 395–96, 234 S.E.2d 219, 221 (1977)).

Initially, the State notes that Appellant incorrectly asserts that she had never met Chance and Murray before that night. (Br. of Appellant p.11). However, both women testified to

meeting Appellant on multiple occasions prior to the shooting and were able to easily identify her during the crime. More importantly, however, Appellant's guilt for the kidnapping charges was not dependent on any knowledge of Chance or Murray being in the home prior to entry of the home but on the "hand of one, hand of all" theory of accomplice liability. Pursuant to the hand of one, hand of all theory, "one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose.'" Thompson, 374 S.C. at 261–62, 647 S.E.2d at 704–05 (Ct. App. 2007). Both Murray and Chance testified they were held at gunpoint by Appellant's co-conspirators and that they did not feel free to move or leave at that time, providing direct evidence for both kidnapping charges. Further, these events occurred as a result of Appellant's burglary of Miss Rose's home and her illegal attack on the residents within. Due to the hand of one, hand of all theory of accomplice liability, Appellant was guilty of the kidnappings performed by her coconspirators. Accordingly, the trial judge properly refused to direct acquittals on Appellant's two kidnapping charges.

## V.

**The trial judge properly admitted the 9-1-1 recording of the phone call by the witnesses pursuant to Rule 403, SCRE and Rule 801(d)(1)(B), SCRE.**

Appellant claims the trial judge erred in allowing the State to play the 9-1-1 recording for the jury because it "served no purpose but to inflame its passions." The State disagrees with these allegations. The 9-1-1 recording was important evidence regarding the only issue in the case: whether Appellant and her coconspirators possessed a criminal intent when they entered Miss Hoffberg's home. Additionally, Appellant's repeated attacks on the victims' veracity and recollection of events further increased the recording's probative value and rendered it necessary evidence for the determination of Appellant's guilt. Finally, admission of the 9-1-1 recording was proper because, pursuant to Rule 801(d)(1)(B), SCRE, it was used to rehabilitate the witnesses and counter the direct and indirect allegations that the victims fabricated their testimonies regarding Appellant's actions that night.

"The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." State v. Black, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." State v. Jennings, 394 S.C. 473, 477–78, 716 S.E.2d 91, 93 (2011).

"Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears." State v. Alexander, 303 S.C. 377, 380, 401 S.E.2d 146, 148 (1991); see Rule 401, SCRE (defining relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence"). If a piece of

evidence could assist the jury in arriving at the truth of an issue, it is relevant and should be admitted during trial. State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 403 (1986). However, even relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE.

Pursuant to Rule 801(d)(1)(B), SCRE a prior statement by a witness which is consistent with that witness's testimony is admissible for the purposes of rebutting an express or implied charge against the witness of recent fabrication or improper influence or motive. However, the statement must have been made by the witness before the alleged fabrication or alleged improper influence or motive arose. Id.

**General Admissibility of 9-1-1 Recording**

Initially, the State notes Appellant does not dispute that 9-1-1 recordings are, absent evidentiary concerns with specific recordings, generally admissible as evidence at trial. In fact, two cases cited by Appellant, State v. Bratschi, 413 S.C. 97, 755 S.E.2d 39 (Ct. App. 2015), cited by Appellant in her brief, directly supports this proposition. In Bratschi, this Court found admission of a 9-1-1 recording was proper even though the victim was audibly distressed within it because it provided evidence regarding an important issue at trial: the victim feared for his life. Id. at 118, 775 S.E.2d at 50. Further, the recording provided an explanation for some of the injuries found on his body. Id.

Similarly, in and State v. Shuler, 353 S.C. 176, 577 S.E.2d 438 (2003), the Supreme Court of South Carolina found admission of the deceased victim's recorded 9-1-1 call during the penalty phase of his capital trial was properly admitted because it described the crime scene

immediately after her and her family were shot. Id. at 184, 577 S.E.2d at 442. Further, even though the decedent was audibly distressed, such distress was relevant to establishing the aggravating circumstance of physical torture which more "fully chronicle[d]" her suffering better than the pathologist's testimony describing her wounds as painful. Id. at 185, 577 S.E.2d at 442.

As demonstrated above, South Carolina law allows for the admission of 9-1-1 recordings are admissible even when they contain statements by audibly-distressed victims. In fact, the audible distress can itself be relevant evidence pertaining to the conviction and sentencing. See Id.; Bratschi, 413 S.C. at 118, 775 S.E.2d at 50.

**Rule 403, SCRE**

As discussed infra, the 9-1-1 recording was admissible as it was directly relevant to determination of the issues in this case.

In State v. Stephens, 398 S.C. 314, 728 S.E.2d 68 (2012), the named defendant challenged his conviction for murder claiming the trial court erred in admitting a photographic lineup of him because his "mug shot" unfairly prejudiced him, especially because introduction of the photo was "needlessly cumulative" given the witness who identified him in the line-up also identified him during trial. Id. at 319–320, 728 S.E.2d at 71–72. Ultimately, the State found introduction of the line-up was not error for several reasons. First Stephens's trial strategy, seen through cross-examination and in his attorney's closing arguments, was focused on discrediting the witness and her identification of him. As explained by the court, this strategy made it important for the jury to review the lineup to determine for itself whether the allegedly poor picture quality and other issues with the lineup influenced the witness's identification. Thus, the defendant's actions increased the lineup's probative value and made it so that its introduction was not "needlessly" cumulative. Id. at 320–21, 728 S.E.2d at 72.

Second, Stephens failed to show that the admission of the lineup caused him unfair prejudice which outweighed the lineup's probative value; his argument that his photo implied he had a prior criminal record, was unpersuasive on its face because: (1) photographic lineups have been regularly deemed admissible evidence, including photos suggestive of a criminal background; and (2) Stephens's photo did not suggest a criminal history. Notably, Stephens's photo was included in a lineup in which he and the other subjects were each wearing street clothes and each of the photographs could have been obtained from driver's licenses, identification badges, or other sources. Id. at 321–22, 728 S.E.2d at 72.

Similar to the defendant in Stephens, trial counsel's strategy of impugning the character and veracity of the victims necessitated use of the 9-1-1 recording. As noted supra, the identity of the intruders in the victims' home was uncontested at trial. Instead, trial counsel's strategy was to discredit the witnesses' testimonies that Appellant and her coconspirators demonstrated a criminal intent while entering and moving around the home. From the outset, trial counsel's efforts focused on discrediting their memories of the events and indicating their memories of that night could not be trusted. His leading questions all implied the witnesses never mentioned that Appellant yelled for Grainger to shoot Victim. By his closing statements, trial counsel's accusations progressed to direct claims that the witnesses' were drug addicts who were intentionally lying about Appellant's actions before and during the burglary of Miss Rose Hoffberg's home.

Here, like in Stephens, trial counsel's efforts to discredit the States' witnesses and make their testimony appear fabricated necessitated introduction of the 9-1-1 recording into evidence. The witnesses' responses in the recording directly contradicted trial counsel's assertions that they fabricated testimony regarding Appellant's criminal actions. Accordingly, because it was used to

rehabilitate the victims' testimonies and demonstrate that Appellant possessed a criminal intent while in the home, the 9-1-1 recording was relevant and probative of guilt and outweighed any remote potential for unfair prejudice.

**Rule 801(d)(1)(B), SCRE**

Finally, pursuant to Rule 801(d)(1)(B), SCRE, the 9-1-1 recording was admissible because it contained prior consistent statements by some of the State's witnesses, namely Chance and Murray, and used to rehabilitate their testimony. Pursuant to Rule 801(d)(1)(B), SCRE, a prior statement by a witness which is consistent with that witness's testimony is admissible for the purposes of rebutting an express or implied charge against the witness of recent fabrication or improper influence or motive. Here, the 9-1-1 recording contained the witnesses' fresh recollections of the event surrounding the burglary and the shooting of Victim. As noted above, trial counsel made express and implied charges against the Witnesses that they fabricated testimony, such as Appellant shouting for Grainger to shoot Victim. Thus, admission of the recording was entirely appropriate through this rule to rebut trial counsel's allegations of impropriety.

## CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgments and convictions of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

WILLIAM F. SCHUMACHER, IV
Assistant Attorney General

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit

BY: _____
for William F. Schumacher, IV
Bar # 100231
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-0368

ATTORNEYS FOR RESPONDENT

June 10, 2019

STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
Jun 10 2020
SC Court of Appeals

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APPEAL FROM BERKELEY COUNTY
Court of General Sessions
The Honorable Maite Murphy, Circuit Court Judge

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Appellate Case No. 2019-000687

THE STATE, .....RESPONDENT,

v.

GABRIELLE OLIVA LASHANE DAVIS KOCSIS,.....APPELLANT.

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**PROOF OF SERVICE**

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I, Shana Montgomery, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by email to the address listed in AIS and with a copy of the same to follow in the United States mail, postage prepaid, addressed to:

Susan B. Hackett, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served this 10th day of June, 2020.

Shana Montgomery

Shana Montgomery
Legal Assistant
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-0368

**Shana Montgomery**

**From:** Shana Montgomery
**Sent:** Wednesday, June 10, 2020 12:43 PM
**To:** 'Kasperski, Katriel'; Hackett, Susan
**Cc:** Shana Montgomery; Bill Schumacher
**Subject:** State V. Gabrielle Davis-Kocsis; Appellate Case No. 2019-00687
**Attachments:** 02298315.PDF

Good Afternoon,

Please find attached a copy of the Initial Brief of Respondent and Designation of Matter for the above reference case. Please confirm receipt. A hard copy will be sent out in today's mail. Also a copy will be uploaded to the court today using our AIS system. Please let me know if you have any questions or concerns.

Thank You.

Shana Montgomery
Legal Assistant
Office of the Attorney General