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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of General Sessions

Maite Murphy
Circuit Court Judge

Court of Appeals Case No.: 2019-000687

The State ..... Respondent,

v.

Gabrielle Oliva Lashane Davis-Kocsis.....Appellant.

PETITION FOR REHEARING

Appellant, pursuant to Rule 221, SCACR, respectfully requests rehearing of this matter based on the following[1] points overlooked or misapprehended:

1. The Court's opinion in Part IV conflicts with the holding of *State v. Cheeseboro*, 346 S.C. 526, 547, 552 S.E.2d 300, 311 (2001) ("Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one."). This Court's opinion appears to recognize the 911 call's tendency to suggest a decision on an emotional basis. This

[1] For the Court's edification, Appellant has attached as an appendix an unofficial transcript of the February 16, 2022, oral arguments in this matter. Appellant would note this transcript, prepared by a commercial service in the United Kingdom and not a certified court reporter, contains errors.

tendency is "undue" because the trial court improperly introduced it as corroboration evidence,[2] but the 911 call was the State's first exhibit, introduced by its first witness. Admission of corroboration evidence first requires the existence of evidence to corroborate:

> Corroborative testimony is testimony which tends to strengthen, conform, or make more certain the testimony of another witness. Evidence is admissible to corroborate the testimony of a previous witness, and whether it in fact corroborates the witness' testimony is a question for the jury.

State v. Stroman, 281 S.C. 508, 510, 316 S.E.2d 395, 397 (1984) (quotations and citations removed). This tendency is also "undue" because the State had the ability to, and did, call the two witnesses who spoke to the 911 operator to present less emotional testimony on the elements of the offence(s) at trial. This tendency was also "undue" because the 911 call was not needed to rebut any evidence at that time; the Defendant's opening statement is not evidence. *See e.g., State v. Hughes*, 328 S.C. 146, 493 S.E.2d 821 (1997).

2. The Court's opinion in Part III conflicts with S.C. Code § 16-3-910, which does not allow for a sentence for kidnapping when the defendant has also been convicted of murder. "The cardinal rule of statutory construction is to ascertain and effectual the intent of the legislature." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute." *Id.* "Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *Id.* "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." *Id.*

[2] Appellant's arguments regarding the cumulative nature of the 911 call are properly before this Court because Appellant has appealed the admission of this supposedly corroborative evidence. Improper corroboration evidence has a "cumulative effect" which has a "devastating impact". *State v. Barrett*, 299 S.C. 485, 487, 386 S.E.2d 242, 243 (1989).

(internal quotation omitted). Only "if the language gives rise to doubt or uncertainty as to legislative intent" may the construing court "search for that intent beyond the boards of the act itself." *State v. Morgan*, 352 S.C. 359, 366, 574 S.E.2d 203, 206 (2002).

"The legislature's intent should be ascertained primarily from the plain language of the statute." *Id.* at 367, 574 S.E.2d at 207. "Words must be given their plain and ordinary meaning without resorting to subtle or forced constructions which limits or expands the statute's operation." *Id.* "When faced with an undefined statutory term, the court must interpret the term in accord with its usual and customary meaning." *Id.* "The terms must be construed in context and their meaning determined by looking at the other terms used in the statute." *Id.* "Courts should consider not merely the language of the particular clause being construed, but the word and its meaning in conjunction with the purpose of the whole statute and the policy of the law." *Id.* "Statutes must be read as a whole and sections which are part of the same general statutory scheme must be construed together and each given effect, if it can be done by any reasonable construction." *Id.*

The reviewing court must "seek a construction that gives effect to every word of a statute rather than adopting an interpretation that renders a portion meaningless." *Hinton v. South Carolina Dept. of Probation, Parole and Pardon Services*, 357 S.C. 327, 342, 592 S.E.2d 335, 343 (Ct. App. 2004). The court "must read the statute so that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous." *CFRE, LLC v. Greenville County Assessor*, 395 S.C. 67,74, 716 S.E.2d 877, 881 (2011) (internal quotations omitted).

Pursuant to S.C. Code § 16-3-910: "[w]hoever 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 a 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." The plain reading of the statute requires vacation of Appellant's sentences for kidnapping, as she was also sentenced for murder as provided in Section 16-3-20. Had the Legislature intended for the "unless" portion of the statute to apply only when the victim of the kidnapping is also the victim of the murder, the Legislature could have said so easily; yet, the Legislature did not. Thus, interpreting the statute exactly as it is written, which this Court is obligated to do, requires vacation of Appellant's sentences for kidnapping.

Furthermore, the Legislature amended section 16-3-910 of the Code in 1991. *See* 1991 Act No. 117, § 1. The amendment decreased the penalty for kidnapping from a maximum sentence of life imprisonment to thirty years. *Id.* The Supreme Court decided *Livingston* roughly seven years before this amendment. *State v. Livingston*, 282 S.C. 1, 317 S.E.2d 129 (1984). In *Livingston*, the defendant was convicted of four counts of murder and five counts of kidnapping among other offenses. *Id.* at 4, 317 S.E.2d at 130. He was sentenced to four life sentences for murder and five life sentences for kidnapping. *Id.* at 4, 317 S.E.2d at 131. Based upon section 16-3-910, the South Carolina Supreme Court vacated "[t]he sentences for kidnapping." *Id.* at 8, 317 S.E.2d at 133. The Court made no distinction between the sentences for kidnapping that concerned murder victims and the sentence for kidnapping that did not. *Id.* At the time of Livingston's trial and appeal, the statute provided "[w]however 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 by a parent thereof, shall be guilty of a felony and, upon conviction, shall suffer the punishment of life imprisonment unless sentenced for murder as provided in § 16-3-20." S.C. Code Ann. § 16-3-910 (1985).

"The Legislature is presumed to be aware of [the appellate courts'] interpretation of its statutes." *Wigfall v. Tideland Utilities, Inc.*, 354 S.C. 100, 111, 580 S.E.2d 100, 105 (2003).

"There is a presumption that the legislature has knowledge of previous legislation as well as of judicial decisions construing that legislation when later statutes are enacted concerning related subjects." *State v. McKnight*, 352 S.C. 635, 648, 576 S.E.2d 168, 175 (2003). Where the Legislature fails to alter a statute over a long period of time, "its inaction is evidence the Legislature agrees with th[e] Court's interpretation." *Wigfall*, 354 S.C. at 111, 580 S.E.2d at 105.

Therefore, in 1991, when the Legislature amended the statute to decrease the maximum penalty for kidnapping, the Legislature was well aware of the Supreme Court's interpretation of the clause excluding punishment for kidnapping when the person was also sentenced for murder – regardless of whether the murder victim and kidnapping victim were one in the same. Aware of this interpretation, the Legislature took no action to change the statutory provision. Thus, the rules of statutory construction require this Court interpret the Legislature's decision to leave that particular clause of the statute alone, while altering the words immediately preceding that clause, to mean that the Legislature intended the statute to have the force and effect given by the Supreme Court in *Livingston*.

As mentioned above, the rules of statutory construction provide if the "language is plain and unambiguous, and conveys a clear and definite meaning, there is no need to employ rules of statutory interpretation." *State v. Dupree*, 354 S.C. 676, 693-94, 583 S.E.2d 437, 446-47 (Ct. App. 2003) (emphasis added). However, where the language "gives rise to doubt or uncertainty as to legislative intent, the construing court may search for that intent beyond the borders of the act itself." *Id.* The statute must "receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers" and "be resolved in favor of a just, equitable, and beneficial operation of the law." *Id.* The statute must be "read in a sense that harmonizes with its subject matter and accords with its general purpose." *Town of Mt. Pleasant v. Roberts*, 393 S.C.

332, 342-43, 713 S.E.2d 278, 283 (2011). Importantly, a penal statute is "construed strictly against the State and in favor of the defendant." *Rainey v. State*, 307 S.C. 150, 151-52, 414 S.E.2d 131, 132 (1992). Where there is "any doubt" about a statute's scope, the interpreting court is "required" to resolve it in the defendant's favor. *State v. Miles*, 421 S.C. 154, 164, 805 S.E.2d 204, 210 (Ct. App. 2017).

3. The Court's reliance on *State v. Vazquez*, 364 S.C. 293, 302, 613 S.E.2d 359, 363 (2005) in Part III of the Opinion is misplaced. The *Vazquez* court's statement on the propriety of its kidnapping sentences was dictum, as the relevant issue before the Supreme Court in that appeal was whether "the trial judge erred in sentencing [the defendant] for the kidnapping <u>of the murder victims</u>." *Id.* (emphasis added). The Vazquez court did not limit or overturn *Livingston*, where the Supreme Court, in vacating five kidnapping sentences (where only four murders occurred) directly held: "We agree with Livingston that § 16-3-910 of the Code prevents the imposition of a life sentence for kidnapping where an accused is sentenced for murder pursuant to § 16-3-20 of the Code." *State v. Livingston*, 282 S.C. 1, 8, 317 S.E.2d 129, 133 (1984); *see also State v. Stroman*, 281 S.C. 508, 514, 316 S.E.2d 395, 400 (1984) ("…S.C. Code Ann. § 16-3-910…prevents the imposition of a life imprisonment sentence for kidnapping if the defendant has also been sentenced for murder pursuant to S.C. Code Ann. § 16-3-20…"). Even if *Livingston* and *Vazquez* do conflict, they at best create an ambiguity, and the rule of lenity (*e.g.*, *Rainey*, supra.) requires this Court strictly construe the ambiguity against the State and in favor of Appellant. Thus, this Court must vacate Appellant's sentences for kidnapping.

CONCLUSION

The petition should be granted.

Dated: 05/10/2022

s/ Jason Scott Luck

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(UNOFFICIAL TRANSCRIPT)

Judge Hills: Afterwards, because I think the **[unintelligible 00:00:04]** that were **[unintelligible 00:00:07]** and **[unintelligible 00:00:10]** probably vote. One or both of those will be **[unintelligible 00:00:16]** in Washington to try to figure that one out.

Battenfield: That's something very **[unintelligible 00:00:19]**

Judge Hills: Yes, **[unintelligible 00:00:22]** cases.

Battenfield: [unintelligible 00:00:27]

Judge Hills: Yes, it did. I'm also excited to get back **[unintelligible 00:00:34]** person. In the last minute they locked it up and made it virtual.

Battenfield: [unintelligible 00:00:39]

Judge Hills: Yes, they're now back to in person. **[inaudible 00:00:45]**. Right now they're saying it's going to be in person.

Battenfield: [unintelligible 00:00:53]

Judge Hills: [inaudible 00:01:01] [unintelligible 00:01:15]

Battenfield: That went through.

Judge Hills: [unintelligible 00:01:35] it's definitely not looking very professional.

Battenfield: Oh, man. **[unintelligible 00:01:43]**

Judge Hills: Totally.

Battenfield: [unintelligible 00:01:56] that's a big claim.

Judge Hills: Yes, **[unintelligible 00:02:10]** again, it looks like a loss. **[unintelligible 00:02:12]**. This is the first time in my life **[unintelligible 00:02:19]**

Battenfield: Oh wow.

Judge Hills: It was out of place with only one reason.

Battenfield: [unintelligible 00:02:29]

Judge Hills: I don't even have any red paper **[unintelligible 00:02:31]**

Battenfield: Absolutely.

Judge Hills: [unintelligible 00:02:52]

[background conversation]

[pause 00:03:44]

[background conversation]

[laughter]

Madam Clerk: Yes, stand-in for the court.

Judge Getters: Good morning, please be seated.

[background noise]

Judge Getters: Madam Clerk, if you please, call our case.

Madam Clerk: Case number 2019-000687. The state vs. Gabrielle Kocsis.

Judge Getters: Thank you, Mr. Luck.

Luck: [silence] May I please the court, I'd like to immediately begin with a discussion of the 911 call and the recording that was introduced into evidence, which I believe is the chief reason that my client is entitled to the new trial in this matter. So it is my fifth argument, but it's what I want to discuss first. What-- Your honor. I see you already have a question.

Judge Getters: Um, what I'm wondering here is, um, should we give you the notice regarding the motion that was filed about the brief, the reply brief in this case? The reply brief?

Luck: Yes, your honor. Uh, it's the reply brief, the final reply.

Judge Hills: That-that Ms. Hackett filed.

Luck: Yes, your honor.

Judge Hills: Um, and so there were **[unintelligible 00:05:51]** judge-judges are wondering, uh, should we address whether we're going to consider or not as to--?

Judge Getters: We will-- Do you have any objection that you'd like to voice, um, Mr. Luck in regard to the reply brief, just to get it on the record before--?

Luck: Absolutely. No objection to my reply brief being considered, your honor.

Man: No objection from the state.

Woman: No objection from the state.

Judge Getters: Okay. Thank you.

Luck: Well, thank you, your honor. So regarding this 911 call, I really want to emphasize that there is no legitimate purpose for this 911 recording to be considered. Uh, if you look this at the record, this recording, 10 minutes of it was introduced as the state's first exhibit, its first exhibit without really any context. Without really any explanation. It is, "Welcome. I am the attorney for the state. Now here's 10 minutes of audio of a man dying." There is no reason to introduce that at this-- Especially at the beginning of this case.

Judge Hills: Can we consider as the trial went on, though, and as the, uh, people that are on the 911, especially the two ladies, that their credibility was, uh, challenged and therefore now looking at it after the whole trial was over, that it may have been needed.

Luck: That's potentially a reason to consider it, but that wasn't why it was introduced if, and potentially if it had been introduced for that purpose. Depending on the context of it, depending on--

Judge Hills: Now that the trial is over, can we not look at the entire totality of the situation?

Luck: Well, your honor, if we look backwards like that to say if we-- Then I would also be able to argue probably that this, uh, recording is also cumulative. If they want-- If this wants to-- If the state wants to argue, this is now corroborative evidence looking backwards because time only goes in one direction, then I should also be able to argue that this is all cumulative evidence similarly, but this-- That's not what happened. What happened now is that it was introduced at the beginning for what it really appears to be an improper purpose. I mean, what was the reason this recording was entered? The court says that it was for, if I have correct here, corroborative purposes and establishing elements of the offense. What is it corroborating? This was the--

Judge Getters: Objection, it was 403.

Luck: You're right, your honor. It was- it was, uh, 403 unfair prejudice. Confusion of the issues. Misleading.

Judge Getters: Why are we talking about corroboration?

Luck: Well, your honor. It's-- I brought it up only because if-- Now for a-- Well, why don't we talk about corroboration? Because the judge said that, that's what-- That was the reason that she brought it in, at least according to the trial ruling. Now what--

Judge Getters: I mean, you-you-you don't dispute that as relevant, right?

Luck: I can't con- I can't dispute that it is relevant, your honor. If I provided some foundation, again, it needs-- When it was introduced, it was introduced at the beginning, out of context. In a--

Judge Getters: Was a-was a proper objection made that you're voicing now? Was that objection made below?

Luck: No, your honor it was only prejudice, but prejudice, confusion of the issues--

Judge Getters: But that's kind of the point that Mr-- That Judge Hills is-is speaking to correct?

Luck: In that?

Judge Getters: We should only be speaking about it in regard to 403.

Luck: And that's fine, your honor. We can-- I would love to speak to it as it to its, uh, effect as for unfair prejudice because that is really what its chief problem is, is that this is a-- The 10 minutes-- This is 10 minutes of a gut punch. This is a 10-minute recording, again, pre- presented without real context to cause the jurors to look at the facts differently. It-it will-- The-- After listening to 10 minutes of these two women crying in-in the background, a man dying. Now you expect these 12, or I think it's 13 jurors here to then, uh, rationally sort of soberly, sanely, calmly, then review the testimony that's then presented by the state. And that's not possible at this point. And that is the chief problem with this 911 call. And of course, with an issue such as this, when we're talking about an evidence matter, we have to discuss, you know, was my client prejudiced by it? And so to look at the prejudice, sometimes, you know, we don't have-- I'm not so lucky and most lawyers aren't so lucky to have a juror walk to them afterwards and say, "My passions were inflamed by this evidence."

That doesn't happen, but we can look at some of the circumstantial evidence. And I think the most powerful evidence of prejudice here and how this recording really affected the jury is in the jury questions. They wanted to hear it again. This was significant enough that they wanted to hear it again. And I think that that gives you an idea of the effect that this recording had on the jury and that it-- The weight that the jury gave it. And so there-there have been a number of other reasons possibly to justify bringing this in. I think the-the state's brief mentions rebuttal, but again, rebutting, what? It's the first-it's the first exhibit entered in by the state. It's rebutting nothing.

Judge Hills: Well, I mean, the tape does talk about the fact that the two ladies who are there with the person who's dying, that they were pepper-sprayed, which goes towards the kidnapping issue. Uh, it also talks about the fact they were asleep when, um, uh, when the people came in, indicating maybe this is a dwelling because people are sleeping, uh, or sleeping there.

And, um, uh, they, um, uh, they identify, uh, **[unintelligible 00:12:08]** as being the person who shot that, now that's on the tape. Now, why is that not important information? Because your, uh, a couple of your major concerns are, is it a dwelling or not, uh, is kidnapping appropriate. Uh, so this is information regarding that in

addition to the sad nature of them asking him not to die, please don't die. And I know how emotional that is, but why is the state not, uh, able to put in some information regarding that if they anticipate what your case is gonna be?

Luck: Well, the state was able to introduce evidence of that in multiple-multiple witnesses. Uh, gosh, I don't remember how many at this point, but many-many witnesses to all of those facts that you've mentioned there.

Judge Hills: And every witness **[unintelligible 00:12:54]**, not everyone, but many of the witnesses include these two people that they put up, their credibility was attacked.

Luck: Many--

Judge Hills: Because of their convictions. Because of their drug use and everything else. Well, even though they may have testified to it personally, you still had an attack on their credibility. So isn't the state allowed to put up additional evidence to sort of show that, uh, they were a 911 call in a situation of, um, heat of-- Not heat of passion, but **[unintelligible 00:13:22]** impression and everything else that they were saying these things that they said later at trial.

Luck: Well, your honor, they are entitled to at least corroborate if necessary, but there are limits to, and we've know-- We've talked about 403 before. There are limits to what you can introduce as relevant evidence. And with-- As you just mentioned right there, that what purpose does it serve to bring in front of the jury, the-these two women turning to this person or saying to this person, "Please don't die- please don't die." That doesn't prove any element. And in fact, only causes more emotional-- Really-really it triggers the emotional side of [crosstalk]

Judge Hills: So your motion was to redact portions of it, or was your motion to basically keep the entire thing out?

Luck: The motion was to keep the entire thing out. And so there was never an offer to redact the-the record.

Judge Hills: Or request.

Luck: Or request, your honor, but it's-- Again, enough witnesses were presented at trial. It's not like-- It is not like the two witnesses that were presented in this recording were the only witnesses for the state. There were many others, the state brought in a rogues gallery of-of witnesses, and all of whom more or less sometimes did, sometimes didn't, but they all testified somewhat consistently. And so what was the need of bringing in this recording? There wasn't. There was no need. And--

Judge Hills: Mr. Luck, I apologize. I thought that your time was gonna be set at 15 minutes. And it's only set for 10. I know you got two other issues you wanna-- Uh, if Judge Getters permit, would you wanna continue on the other two issues?

Luck: Be happy to, and I see I've just been-been, uh, boarded five more minutes. This is-- Thank you very much. So yeah, the other issue that I really wanted to bring up here, I'm glad we got to talk about 911 but is also this issue of burglary and that's the-- This has been kind of near and dear to my heart. The burglary issue sort of has two prongs to it. One is the-- An inadequate jury instruction that miss-- That does not, uh, fully incorporate the current law of South Carolina through singly. The other issue is just a directed verdict issue. It's a fact, it's a proof issue and they both get to. And you-- As you had mentioned before, was this a dwelling? Is this a legally protected right? I-- Last night I was reading, uh, through Blackstone of all things, uh, looking sort of the history of what is burglary, you know, burglary is--

Judge Getters: We all do that every night.

Luck: [laughs] Thank-- I'm glad I'm not alone.

Judge Hills: Wait a minute. Was it Blackstone or Blacks Law dictionary? [laughs]

Luck: Blackstone.

Judge Hills: So you were reading Blackstone's commentaries?

Luck: It's, uh, it gives me a headache sometimes, your honor. Those Ss are very difficult to read, but you know, there-- Blackstone talks about how the crime of burglary is-- It has an **[unintelligible 00:16:18]** from the Anglo-Saxon law of, uh, let's call it hamesucken. It's an ancient, and it's also a Scottish law as well, still current Scottish law of hamesucken, which is a crime of attacking someone in someone's house. I mean, our-our four bears, legal four bears saw fit to make a crime of attacking someone in their home and attacking the sanctity of the home more serious than other types of crimes.

Burglary at common law was a- was a defense punishable by death. I think of-- Was, uh, a very heinous offense Blackstone called it. And so to warrant this level of protection in this elevated status, you also have to have a domicile, a dwelling that is worthy of that protection. I, uh, looking at some other quotes I saw from Blackstone last night, the law regards thus highly nothing but permanent edifices, a tent or booth erected in a market or fair is not something that is-- That can be burglarized. It is the folly of the owner to lodge in so fragile at tenement. And so now our--

Judge Getters: That, well, that's from the three little pigs.

Luck: [laughs] I do believe that there are-- Perhaps there's some, uh, connection there. There-- The connection here with our burglary statute. Now, admittedly, it is a statutory crime now, but it-it encompasses the old common law burglary and the idea here-- And if we look at, I believe the, uh, the case was, uh, going back to singly again, burglary is not a crime against ownership. It's a crime against habitation and possession. It's a-a violation.

Man: Objection that Ms. Rose did not, um, inhabit this dwelling or did not, um, possess this dwelling.

Luck: She possessed at least a part of it. And it was a part that wasn't invaded. That would be her bedroom, but what was the rest of this house?

Judge Getters: Are you separating the bedroom from the rest of the house in applying this law?

Luck: You almost have to, your honor, this isn't a house. This is not an ordinary home. I mean, this is what we talked in the common parlance, this is a trap house. Yeah. It's not a trap home. It's a trap house. This is a place of ill reput. It's a grand central station of various characters coming in and out with no ability to lock the door, I might add. They can block the door, but not lock the door.

It's not too much different than-- We talk about attempt in a marketplace or sleeping on a park bench. Do you have a legitimate expectation of privacy and safety when you're sleeping in such places like that? You're not. And so this is an issue that needed-- Or this-- Because of that, this house, this dwelling was not necessarily a dwelling, as we would understand. Now, keep in mind, there are el- there are several elements of burglary.

Judge Hills: You have any case at all to back this up as far as a summer situation of someone that is-- Where a lot of people are coming to visit illegal purposes, maybe, but yet the person lives there.

Luck: I have been looking and looking. That was something I was looking for last night. Your honor. I can only--

Judge Hills: Well, maybe Mr. Blackstone may have had something there, but he did not.

Luck: Unfortunately, Mr. Blackstone did--

Judge Hills: John Lock or maybe someone like that.

Luck: I'm afraid none of them were very, uh, well versed in the, uh, the crystal methamphetamine culture, your honor, I'm-I'm afraid the-the-- Here we are looking at, at least my argument. I see I only have 10 seconds, but the argument of, did-- There needs to be an expectation of security and peace and possession--

Judge Hills: As your time, right. Could I ask you about the other issue you have, I need to ask you a question.

Luck: Oh, absolutely.

Judge Hills: About the issue of kidnapping. Ah, how do you-how do you feel your argument if-if judge Getters would-- Could I ask?

Judge Getters: Yes, sir.

Judge Hills: Uh, the vast quest-- Case, the rece-- That's come out, uh, regarding kidnapping can be of individuals and the sentence is appropriate if you're not convicted of murdering that individual, but you're kidnapping someone else and of course your client was convicted of kidnapping through the hand of one and hand of all, but still it was different people than your client was charged with killing. Now, how does Vasquez line up with even the, uh, um, reply brief, uh, because Vasquez was decided after the case that, uh, Ms. Hackett sites in her **[unintelligible 00:20:52]**.

Luck: Well, your honor, looking at the kidnapping statute, this is a-a tough-a tough argument to make but when you look at someone like--

Judge Hills: I just thought of that dwelling argument, but go ahead.

Luck: [laughs] When you look at the statute itself, well let's at least re-rewind here. It is well settled that you cannot be convicted of both the murder and the kidnapping of the same victim. I think that Vasquez as that, Vasquez says that, other cases say that. Now this-- Now turn and look at the plain text of 16-3, 910. It does-- The-the statute doesn't have that level of specificity. Let me try to analogize-analogize it like this. If I were to ask you, does a spider have two legs? The answer is yes. If I were to ask you, does a spider have only two legs? The answer is no, because a spider having eight legs of course has two legs. It also has four legs. The idea here is the statute.

The plain text of the statute definitely supports the contention that yes, a victim and-a victim of a murder cannot-- Or a person cannot be convicted of both the murder and the kidnapping of the same victim. However, that is still consistent with my argument based on the plain text of the statute, which is a penal statute, and must be construed strictly against the state that says it doesn't make that connection. It doesn't say that the victim has to be the same. It just says that you cannot be convicted of both. Now we are not here to rewrite the statute. However, in artfully drafted, it might be.

Now, I-I see that it's been drafted that way since the 19th century, but nonetheless, the plain language of the statute says what it says and that's why-- And I would normally say this is an eye roller of an argument, but do look at the Livingston and Stroman cases that I cited in my brief. In both of those, you have four murders, five kidnappings. What does the Supreme Court do in both cases? It vacates all five kidnappings. There's only four murders, which means that there was one kidnapping that was not related to a murder that was vacated and vacated under the grounds of 16-3, 910 so that's when you say, I guess you maybe ask, "Do I have a case that supports my position?" Those two cases, I believe support that position, that the statute is broader than the case law that has been cited, says it is.

Judge Getters: Thank you, Mr. Luck, we'll hear from you and reply.

Luck: Thank you, your honors.

Judge Hills: By the way, Mr. Luck, you're a new resident of the PD. There is a six legged spider in **[unintelligible 00:23:49]** area to let you know.

Luck: I will keep an eye out for it.

Judge Hills: All right, thank you.

Judge Getters: Ms. Battenfield.

[pause 00:23:55]

Battenfield: Good morning, your honors, may please the court. Juliana Battenfield for the respondent. There is overwhelming circumstantial and direct evidence, this-- That Ms. Gabby Davis committed all five of these crimes. In fact, she got on the stand herself and admitted to all of these crimes. The defense was, she was coerced by Grayson Griffin and that all of the five individuals who went to a crime scene that day did not have a solid PhD written plan to come into this house but that doesn't mean she isn't guilty of all the crimes.

Judge Getters: Why don't you go ahead and start with the 911, um, tape that Mr, um, Luck, um, spent a good deal of time on--

Battenfield: Absolutely Judge.

Judge Getters: Even he would concede that it's relevant, but he suggests that it should not have come in because it, um, did not have a proper foundation, didn't set the proper basis and you heard his argument.

Battenfield: Yes, well, state versus Gilcrest held that unfair prejudice does not mean damage to the defendant's case that results from legitimate probative force of evidence. Only that the evidence was admitted on an improper basis, meaning from an emotional basis, this as the trial court judge held, this-this 911 call had significant direct and circumstantial evidence to prove the elements of this crime. For example, the mace canister was never found by law enforcement, so because this 911 call was placed directly after Mark Connor was shot, that's direct evidence that mace was used by Ms. Davis in this case and, um--

Judge Getters: He indicated that it was a gut punch and that it was, um, un-unduly prejudicial?

Battenfield: Yes, well, I mean, 911 calls are very common to be entered into evidence. The defendant doesn't have the, uh, the right to not have prejudicial evidence entered against him. It's just that it's substantially if the prejudicial value substantially outweighs its probative effect and the trial court judge did follow the proper rules, uh, of the 403 balancing test and the standard of review under state

versus Brachi, which is just, uh, cited by the appellant in his brief, a trial court's decision regarding a 403 analysis should only be reversed in exceptional circumstances because the trial judge can weigh all the evidence and find, uh-- In real time and find if the prejudicial value outweighs the personal effect.

Judge Hills: And Ms. Battenfield, Mr. Luck talks about that the-- It was the Br-- Beginning of the trial before all the witnesses had testified, uh, uh, but yet, uh, I understand in the opening statement, uh, the, uh, defense and the opening statement, uh, said that the witnesses that the state were going to present, that, uh, they had, um, uh-- Their motives should be challenged, their drug users, uh, they used methamphetamines, uh, you need to consider the credibility, their motives and testifying, and, um, and that, uh, uh, they're drug dealers.

So in the opening statement, there were strong challenges to the credibility of the witnesses you're all gonna present, these witnesses who were on the tape. Uh, and you mentioned a verification of, um, a port of weapon, part of thing, and everything else, um, so would that have been sort of a reason to put it in, um, even before they testify?

Battenfield: Absolutely your honor. It is to corroborate as well as rehabilitate as we cited in our brief, uh, rule 801 D, 1B under the South Carolina rules of evidence, but it's-it's evidence of many elements of the crime first and foremost and that's the most important reason it was placed into evidence. The call has Alexis Maria on it confirming that Ms. Rose's house is 512 Mc-McCrystal circle. She states, "We just got pepper sprayed, and my friend got shot. There was a guy and a girl, and then the--" She gives descriptions of the two vehicles that arrived at the scene and as well as other, uh, evidence, your honor, but **[unintelligible 00:28:34]** quickly move to the burglary. It-- Does anybody-- Do any of you have any other questions about the 911 call? To move on to issue number one, the burglary charge.

The law to be charged is determined by the evidence presented at trial so the-the judge did charge the correct law of burglary. Uh, the defense would like to put state versus singly forward and add the language of our burglary-- Oh, excuse me. A person in lawful possession is custody and control of and the right and expectation to be safe and secure in the dwelling in question but that was not an issue raised at trial. All of the witnesses from both at the state and the defense said, this is Ms. Rose's house.

We heard on the 911 call that it's Ms. Rose's house. Deputy Vandervier testified that she spoke with Ms. Rose right after, uh, the scene of the crime when she first got to the scene and besides she spoke to the owner of the house, there was overwhelming evidence that this is Ms. Rose's house. We don't need, under South Carolina law, to introduce tax maps or show mortgage statements. We just have to show that the person entered into the dwelling without consent of the person in possession of the property. Now, the definition of without consent is in section 16-11-3-12-- Or excuse me, 310 under dwelling, but the elements of their crime are under section 16-11-3-11. And that's what the trial judge charged because it wasn't an

element or an issue that was raised at trial of who had lawful possession of the home. Therefore they didn't have to go into the language and state versus Singly, but I would like to point out that in state versus Singly, that is a case where it's a question of whether the defendant can burglarize his or her own home. And here, Ms. Rose is in on trial for burglarizing her own home. She was present, it was her home. Even the appellant got on the stand and said it was Ms. Rose's home in 512 McCrystal circle.

So to move on to the murder and kidnapping concurrent sentences, which is appellants issue number three, state versus Vasquez, that was a-a-a case decided in 2005, the appellant was convicted of two counts of murder, four counts of kidnapping, as well as some other offenses. This was a death penalty case. So he was sentenced to death for murder, and then 30 years for each kidnapping charge and the Supreme Court throughout the murder and the kidnapping charges where it was the same victim, but upheld the kidnapping charges where it was a di-different victim for each victim has the right to his or her own day in court. So that issue has already been decided by our Supreme Court. Now, appellant does cite state cases, such as state versus Owens, state versus Vic, et cetera, uh, state versus East. But all of those cases, it's the same exact victim and or there was a life sentence received.

So because there are different victims here, Alexis Murray and Whitney Chance were the kidnapping victims.

Mark Connor was the murder victim. The trial judge properly sentenced Ms. Cokes Davis to kidnapping and murder. Now to issue number two, the elements of burglary, the state proved all of the elements of the crime, especially to get past a motion for a directed verdict. Now, the sole question is the existence or non-existence of evidence here and not whether-- It's not the trial court's job or the appellate court's job to weigh the evidence. Here, the facts are that Ms. Davis and her-- And Grayson Griffin, Matt Grainger, Glenn Lane, Melissa Freeman entered a dwelling, which it's clear. There's seven people asleep at the time of the crime. You can look at state's exhibits numbers two through nine and see the photographs. There are pictures on the wall. There's a smoke detector, there's a bed.

There's a headboard. There's a calendar on the wall. There's laundry machines. This is a normal home. The appellant of course, would like to say, this is a place where drugs happened. And therefore this person is not entitled to the protections under the law, but in state versus Bash, a 2017 case, that case held that drug use within a home does not deprive the owner of the occupant of the fourth amendment rights. Just because some unsavory things happen within a home does not mean that Ms. Rose was saying, "Hey, if you come in and give me some drugs, I'll give you a chance to sleep here. Possibly do drugs here." That's not the same as giving consent for armed, masked people to come in and spray pepper spray everywhere, and then shoot and kill someone within her home. So to the second element of

burglary without consent, there was overwhelming, substantial, and direct evidence they entered without consent.

If I would direct your honors to the record pages 116 to 117. Tommy Kennedy, who is a state's witness, testified that there was a gentleman coming and going that night. So he closed the door and put a door stopper under the door before they all went to sleep indicating that the invited guests who came into Ms. Rose's house, who were asleep on the couch, Whitney Chance, and Nick Varner were asleep on the couch, Tommy Kennedy, also in the living room, as well as three others. The victim, Mark Connor and Alexis Murray, and Rick Curtis were asleep in the bedroom, indicating they wanted to have safety and security within the home to go to sleep. Just because somebody is a drug user does not mean they lose the dignity of a human being, where they want someone to come in and rob them, or, um, spray pepper spray on them in the middle of the night.

So there were a circum-- Overwhelming, uh, circumstantial evidence that they did not come in without consent. Now, Ms. Rose, yes, Ms. Rose did not testify. Would it have been best practices for Ms. Rose to get on the stand and say-- Perhaps cry and say, "Yes, I really want-- I was so scared I had a-- I had an expectation of safety and security," of course, but things happen. The record does not reflect why Ms. Rose did not testify, but here under the law, Ms. Rose did not need to testify in order for the state to prove they entered without consent. Just because, well, for the-the sole reason of they broke in. Grayson Griffin broke the window on the front porch with his weapon, and then Matt Grainger and the appellant broke the door down. It took two tries to get through the door. And then they went in. That's overwhelming evidence that they went in without consent. Now to commit a crime bearing-- The appellant, even admitted on the stand that she communicated the seven **[unintelligible 00:35:50]** put out on Mark Connor for-- Because he took money and a motorcycle from her and Erica Haynes was the victim's girlfriend.

At the time she corroborated that, she testified that seven days before the incident, she heard about this hit in, uh, communicated via Facebook messenger to Mark Connor, which is state's exhibit 19, and said, "Hey, the hit's been put out on you, be careful." The date of the incident, three witnesses testified that Mark was very nervous because he knew about this hit. So there's plenty of circumstantial evidence. They had intent to commit a crime when they went to this place. Two vehicles came, um, and met-- And Gabby Davis gave a weapon to Matt Grainger in the other vehicle. And then they both drove in concert, which leads me to issue number four, to this home and entered. And of course the last element of burglaries, arms is a deadly weapon that was-- There was no dispute that they were armed. The Smith and West and 40 caliber was recovered and matched to Grayson Griffin. So to issue number four, the trial court properly denied the directed verdict.

And because the intent to kidnap was proven by circumstantial evidences, Ms. Gabby Davis rode with Grayson Griffin to the scene of the crime, along with another vehicle of people who were staying in a Best Western and get a call from her around

5:30 AM that morning and said, "We're gonna go take a ride." There was overwhelming evidence at trial that the intent was to go there and get the money back from Mark. Did they have a plan where they sat down and wrote it out on paper? "This is what you're gonna do when we go in, this is what you're gonna do." No, but we do have evidence that they joined together, which is all the state needs to prove-to prove conspiracy, to commit an unlawful act inside this home. And so they go in and they break in, and of course, Mark Connor unfortunately ends up being shot. So Ms. Davis is guilty of hand of all of the crimes under hand of one hand of all.

Judge Hills: And Mr. Grainger, who actually did the shooting pled guilty to murder, did he not?

Battenfield: Yes, sir.

Judge Hills: Um, and I think one of the offenses was that there was a-an accident. The gun just went off. They were just trying to scare him, but yet he pleads guilty to murder.

Battenfield: Correct.

Judge Hills: Is that before the trial?

Battenfield: Yes, sir.

Judge Hills: Okay.

Battenfield: And all of the other co-defendants were charged as well, but those were not, uh, adjudicated until after Ms. Davis' trial. But yes, it's very clear that Ms. Davis joined with another to accomplish the purposes here. So she's certainly guilty under hand of one hand of all. Burglary is a crime against habitation, and it's clear that Ms. Rose habitated there and invited guests to also habitate there and they had the expectation to be safe inside, the state ne-- Did not need to prove safety and security as an element of the offense. That's simply a policy reason, but none of the individuals inside Ms. Rose's home, just because they were drug dealers did not deserve to have the protections of the law taken away from them. So we ask you to affirm the trial court. Thank you.

Judge Getters: Thank you, Ms. Battefield, Mr. Luck.

Luck: The inhabitants of McCrystal Circle were absolutely entitled to the protection of the law and common law robbery, armed robbery, trespassing, malicious injury, to real property, unlawful entry. Any of these things are possible. They're just not entitled to the protection of our burglary statute. That is all. Just because they have engaged in illegal activities does not mean that they are not entitled to be protected. Now, just not burglary. Now, regarding identification, at least with Ms. Rose. I want to point out to the court, uh, record, on the record page 109, 110. That is where, uh, I believe it's deputy or officer Vandervier supposedly identifies, uh, Ms. Rose, and

there, she only says that she speaks with the owner. There's no identification of Ms. Rose. And I bring this up repeatedly, I guess, I had **[unintelligible 00:40:26]** at trial, who is Rosemary Hoffburg, because no one explains who she is. The closest that we get to it is an explanation by Ms. Coxes during her testimony that ends with the-the phrase, "I don't know." And I don't think I have ever seen an identification that ends with, "I don't know," that works very well at all. So what I look at here is we talk about what is-- What happened with the burglary? There is-- There was no proof of burglary because you could not prove the possession and ownership, or at least you couldn't prove who owned it, and that's-- I think that's a-a fatal link in the chain. It should have been a fatal link in the chain at the first directed verdict motion, but it still is at this point in the trial. Now, uh, I know I discussed this in my brief, but when the opening statement is made-- An opening statement--

Judge Hills: Oh, uh, on page 117 of the record, um, you have, um, Kennedy testifying that Ms. Rose slept in the house?

Luck: Correct, your honor.

Judge Hills: It says in her-in her room, meaning not someone else's room, but her room, meaning her house. So you have people. And then on page 100 someone else that Ms. Rose was sleeping there and it was her house.

Luck: Yes, your honor. Many times, more than that, actually, who's Ms. Rose?

Judge Hills: Well, that's not enough evidence to show that that's Ms. Rose's-- At least circumstantial that it's her-her residence, her home? She sleeps there. She lives there. You have also photographs that show a calendar that had the current date on it, you have the-the, um, information regarding washing machines. Everything else, like anybody else's house would have.

Luck: I don't know if I would call it a normal house, your honor.

Judge Hills: Oh, okay. I know, but I didn't say, "And like a normal house."

Luck: Okay.

Judge Hills: Uh, uh, abnormal things went on, but they had-- And-and Ms. Rose slept there. And she was at the-at the home when the police came in.

Luck: She was-- But she was in her room. Wasn't she not? She was in her room. There were other areas of this house that were not her room. I don't think you're going to find her sleeping in the room that two of the other, uh, witnesses slept in. The one, I believe that had the wall knocked out between.

Judge Hills: So make sure I understand your position, Mr. Luck, is your position is her room is her house. But the rest of this thing connected to it is not a house.

Luck: In this case--

Judge Hills: Not a home.

Luck: Yes, your honor.

Judge Hills: As you say, that's a very novel argument.

Luck: I don't know if it's that novel, your honor, because it's-it's consistent with the policy behind burglary that goes back centuries. It's consistent really with even the-the law that I've seen, at least was it singly I believe, it's consistent with singly. Where-where do you have the expectation of peace? Where do you have the expectation that this is your home and you habitate there? Where is it? And you-- Sometimes the jury has to take these issues of fact and parse them out. And so--

Judge Hills: So when Ms. Rose left her room to go to the refrigerator, she was leaving her house and went to an open area to get something outta the refrigerator or to wash clothes.

Luck: She would be leaving her dwelling as it's considered under the burglary statue. Yes, it is her house **[unintelligible 00:43:41]** large. But what part of this house is protected and what part of this house is not protected?

Judge Hills: Okay.

Luck: A-a screened in front porch can be considered part of the dwelling under certain circumstances. There's some case law for that, but you need to-- The-the actual fact-intensive inquiry is made by the jury to determine what parts are-- In this case we're talking about a pertinent parts to a, uh, to a dwelling. The jury decides this. And so the jury should have been instructed to decide this and should have determined this. And that goes back to again, the jury instruction, it's a relatively simple, and I think very-very consistent. I believe I even took that directly from Judge Anderson. Uh, that particular instruction could make that possible. And so maybe the jury would have not seen it our way. Maybe they would have. The problem is we didn't get to explain it, we didn't get the instruction to have them make that decision. And that's why we need another chance to try this case.

Judge Getters: Thank you, Mr. Luck.

Luck: Thank you, your honor.

Judge Getters: We're adjourned. Thank you.

Madam Clerk: You are upstanding for the court.

[00:45:16] [END OF AUDIO]

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of General Sessions

Maite Murphy
Circuit Court Judge

Court of Appeals Case No.: 2019-000687

The State ..... Respondent,

v.

Gabrielle Oliva Lashane Davis-Kocsis.....Appellant.

CERTIFICATE OF SERVICE

I certify that I have served a copy of Appellant's May 10, 2022, Petition for Rehearing to the following attorneys via their AIS email addresses on the date set forth below:

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