**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**2012-KM-01528-COA** E

**MARK MATHEWS** **APPELLANT**

**VS.**

**CITY OF MADISON, MISSISSIPPI** **APPELLEE**

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# BRIEF OF APPELLEE

# THE CITY OF MADISON, MISSISSIPPI

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## CERTIFICATE OF INTERESTED PERSONS

Pursuant to Miss. R. App. P. 28(a)(1), the undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or Court of Appeals may evaluate possible disqualification or recusal.

Hon. John Emfinger, Circuit Court Judge
Hon. Edwin Hannan, County Court Judge
Mark Mathews, Appellant
Chris N.K. Ganner, Counsel for the Appellant
John Hedglin, City of Madison Assistant Prosecutor
Trae Sims, City of Madison Prosecutor
Pam Sullivan, Affiant
Ryan Wigley, Affiant

Certified, this the 27th day of March, 2013.

Respectfully Submitted,

John Hedglin, MSB No. [redacted]
Assistant City Prosecutor

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## STATEMENT OF ISSUES

1. The "Castle Doctrine" is a defense to the offense of homicide, not assault, and even if the doctrine was applicable, the evidence rebuts the "presumption" established by Miss. Code Section 97-3-15.
2. The weight of the evidence, as evaluated by the county court judge sitting as the finder of fact, amply supported the convictions for both simple assault and disorderly conduct.
3. The court's exclusion of the police dispatch report was (a) appropriate because of the defendant's failure to designate the item as required by UCCCR 9.04 and (b) was at most harmless error since the defendant was allowed to testify as to the substance of the document, and his testimony was not contested but was in fact confirmed by the state's witnesses.

## STATEMENT OF THE CASE (FACTS)

On the morning of Thursday, May 26, 2011, Mark Mathews, appellant in this matter, arrived at 141 Oak Ridge Circle in the City of Madison, Mississippi, to deliver Macy Kate Mathews (who at that time was age two years and seven months) to the home of Brittany Sullivan, Macy Kate's mother (T.21-22). Mark Mathews and Brittany Sullivan were not and had never been married (T.18), but custodial arrangements were established pursuant to a "Final Judgment of Filiation and Support" filed in the Chancery Court of Madison County, Mississippi, on November 30, 2010 (State's Exhibit 1, admitted at T.21).

Section 1(b) of the Judgment states, "[Mark shall exercise actual physical custody as follows:] On Wednesday evening beginning at 6:00 p.m. and ending at 8:00 a.m. on

Thursday, with Mark picking Macy Kate up from day care or Brittany's place of residence and returning Macy Kate the next morning at 7:30 a.m. or such time as will accommodate both parents travel to work."

Brittany Sullivan, the child's mother, was not present at the home but her mother, Pam Sullivan, was present pursuant to Brittany's request to accept the child from Mark (T. 49). This was a common practice (T.19, 49-50). Mathews asked to see Brittany, the mother, but Ms. Sullivan advised Mathews that Brittany did not wish to see him at that time. (T.22).

As was the customary practice of the parties when the child was returned, Pam Sullivan then reached into Mark's car to remove the child (T.33-34).

Mark, who was not in the vehicle at the time (T.22), slammed the door on Pam Sullivan, trapping her in the door and repeatedly stating, "Woman, you've done it now." (T.23). Throughout the incident, the child was asking Ms. Sullivan to get her. (T.24).

Pam Sullivan was eventually able to free herself from the door, removed the child, and called the police, as did the defendant Mathews (T.25). Ms. Sullivan testified that she suffered physical pain, as well as huge bruises on her elbow and shoulder and removed skin as a result of the attack (T.27).

Madison police office Mike Brown, who lived across the street from the Sullivan house, arrived almost immediately and separated the parties pending arrival of a dispatched officer (T.27).

Shortly thereafter, Madison police officer Ryan Wigley, who was actually on shift at the time, arrived at approximately 8:00 a.m. (T.51). As officer Wigley approached Ms. Sullivan to begin his on-scene investigation, Mathews approached Ms. Sullivan and the police officers. Officer Brown asked Mathews to return to his vehicle, and Mathews refused. Officer Wigley then ordered Mathews to return to his vehicle while he commenced his investigation. The officer testified that Mathews looked "disgruntled" and made an angry gesture (T.51) Mathews turned and walked away, but began making a

call on his cell phone. Officer Wigley ordered Mathews not to use the phone at that point. Mathews told the officer he could not make him hang up the phone and proceeded to make the call (T.51-52). At that point Officer Wigley arrested Mathews for disorderly conduct (failure to comply with the lawful command of a police officer) (T.52). Officer Wigley testified that he had ordered Mathews not to use the cell phone because he did not know who he was calling or why he was making the call and at that point he was concerned for his own safety and the safety of everyone on the scene. (T.53)

Pam Sullivan subsequently filed an affidavit against Mathews for assault.

During the course of the county court trial, the defendant Mathews made a number of statements directly contrary to the testimony presented in the state's case in chief, such as claiming that Ms. Sullivan had gone "beast-mode gorilla" without any physical provocation, leaving him with scars as a result of her attack (T.80); that officer Wigley had used a "martial arts" armlock, slung him around and slammed his faced into the patrol car, leaving his face bruised and scraped (T.85) and that the officer "beat" him (T.97) (testimony which was adamantly refuted by the officer during rebuttal testimony (T.100)); that Ms. Sullivan was the initial aggressor while he, Mathews, remained "calm and collected" and didn't do anything to hold her back or grab her (T.86); and that the child had suffered "physical harm" during the course of Ms. Sullivan's alleged attack (T.80,90) (Mathews subsequently admitted he had no basis for his testimony that the child had suffered physical harm (T.91)). These allegations, in addition to the defendant Mathews' demeanor and other testimony, gave the county court judge ample opportunity to evaluate the defendant's credibility.

Mr. Mathews admitted during cross examination that the chancery court order required him to deliver the child to Brittany's place of residence (T.95), that the order did not state that Brittany had to be present when the child was returned (T.95, Line 14), and that he refused to deliver her the morning of the incident (T.95, Lines 21-23).

During direct examination of Mr. Mathews, he testified that he called the Madison Police after the incident and "told them that a woman aggressively charged me and managed to get around me and snatch my daughter out of the car and jumped back on her property where she knew I was prohibited from going."(T.82).

Mr. Mathews' attorney then conducted the following examination:

Q. (By Mr. Ganner) I want to show you a document, a dispatch sheet from the Madison County Police Department, and I want you to read that and tell me if that accurately reflects what you told them.

A. "Male caller says female at this residence snatched his child out of the vehicle after a physical altercation."

Q. Does that accurately reflect what you told the Madison police?

A. Yes, it does.

(T.82)

After reading the except into the record and eliciting confirmation from Mr. Mathews as to its accuracy, counsel for Mr. Mathews attempted to introduce the document itself into the record, but that motion was denied since the document had not been identified as an exhibit for the defense during pre-trial discovery. However, the state did not move to exclude the testimony where the contents of the document were read into the record and verified.

Mr. Mathews also admitted during cross examination that at the time the officer ordered him to stop using his phone, he was attempting to call his father, even though he had already called and talked to his father (T.96).

## SUMMARY OF ARGUMENT

The court did in fact allow the defendant to establish a "Castle Defense" presumption argument and further allowed argument of the defense at every appropriate

stage; the court simply found, within its discretion as the finder of fact in a bench trial, that the presumption was overcome by the totality of the evidence in the case. The weight of the evidence was overwhelming that the defendant was guilty of the conduct charged; at most, there was a conflict in testimony and the defendant's obvious lack of credibility and outrageous and unsupported claims during his testimony left the court no choice but to accept the testimony of the state's witnesses. The court's refusal to admit the police dispatch report was proper because of the defendant's failure to designate the item as a proposed exhibit during discovery and, in any event, was harmless since the defendant was allowed to testify as to the substance of the document and the state's testimony completely supported the defendant's testimony.

## ARGUMENT

**1. Any presumption that may have been created by operation of Miss. Code Section 97-3-15 is not applicable to assault and was rebutted by the evidence.**

Mathews' primary argument is that he has an absolute defense to his actions in this case as a result of the so-called "castle doctrine," codified as Miss. Code Section 97-3-15, which is not even applicable to the assault statute.

First, the statute applies to *justifiable homicide*, not *assault*.

The second essential flaw in his argument is that, in the light most favorable to Mathews, the castle doctrine merely creates a *presumption* that Mathews acted in reasonable defense of his property or the occupant of his vehicle.

A "presumption," as the appellate courts have recognized, is always subject to review in light of evidence presented by the opposing party.

"[P]resumptions yield to facts." *Wilson v. City of Lexington*, 153 Miss. 212, 121 So. 859, 863 (Miss.1929). Application of a doctrine that a presumption of intent is

established is a question of fact, and may be rebutted by circumstances. *Estate of Lyles*, 615 So.2d 1186, 1189 (Miss.1993). "While a presumption that a letter, properly addressed, stamped, and mailed, reached the addressee is not conclusive, but may be rebutted by evidence showing that the letter in fact was not received, whether the rebutting evidence is sufficient to overcome the presumption is a question for a jury." *McCreary v. Stevens*, 156 Miss.. 330, 126 So. 4,6 (Miss.1930).

In the present case, the court was presented with numerous facts indicating that Mathews had no concern regarding his personal safety, the safety of the child or the safety of his property:

A. The victim, Pam Sullivan, was conducting herself in accordance with a long established procedure that parties had utilized in transferring custody of the child.

B. The victim, Pam Sullivan, was acting in accordance with a request from the child's mother, who had the right to make such decisions. (It is ironic that the Appellant's brief emphasizes the right of the custodial parent to determine the best interests of the child and with whom the child should associate. In this case, the child's mother was clearly the parent with paramount custodial rights at the time of the incident, and the uncontested proof was that the child's mother had requested Pam Sullivan to take the child. This was the mother's right and absolutely in accordance with the clear language of the chancery court's custody order.).

C. The defendant's own testimony was that he was withholding turning over the child in conformity with the requirements of the chancery court judgment in order to coerce the child's mother into contact that she did not want at that time (T.78-80).

D. The child was actually requesting Ms. Sullivan to take her from the car.

E. Mathews himself volunteered that he had previously been convicted of trespassing with respect to Ms. Sullivan's property, and protective conditions concerning his behavior were in place.

F. When the police arrived, Mathews refused to cooperate in the orderly investigation of the incident, but attempted to interfere with the officers' discussion with the other party and then disobeyed the direct orders of the police officers with regard to his conduct during the investigation.

G. In addition, the county court judge was in a position to evaluate the relative size, demeanor and credibility of the witnesses in the light of widely conflicting testimony.

Mathews had every opportunity to present his defense under the Castle doctrine, to utilize whatever presumptions may have been available to him and to argue that defense strenuously throughout the trial.

The simple truth is the county court judge, when faced with the totality of the evidence of this case, determined that the "presumption" that the defendant Mathews was in reasonable fear of imminent death, or great bodily harm, or the commission of a felony upon him or another person was overcome by the totality of the evidence.

Moreover, the uncontested testimony was that Mathews was not occupying his vehicle at the time he assaulted Ms. Sullivan. The only person in the vehicle was a child that Ms. Sullivan had every legal right to take, since the mother – who had primary custodial rights at that point in time under the clear terms of the custody order – had requested Ms. Sullivan to do so.

Ms. Sullivan was taking an action that she was permitted to do by authority of permission and request of the child's mother. The child's mother, and not Mr. Mathews, had the right to primary custody at the time of the incident, and Mathews was withholding custody in clear violation of the court order.

Miss. Code Section 97-3-15(4) also does not apply because Mathews did not retreat; he interfered with Ms. Sullivan's right to exercise physical custody over the child in accordance with the mother's wishes and he, not Ms. Sullivan was the primary aggressor.

In summary, the Castle Doctrine does not apply in this case, but the defendant was given ample opportunity to present evidence and argument in support of that defense, but was simply overcome by the weight of the evidence.

**2. The weight of the evidence, as evaluated by the county court judge sitting as the finder of fact, amply supported the convictions for both simple assault and disorderly conduct.**

The Mississippi Supreme Court has always condemned the practice of "second-guessing" the jury with respect to factual determinations. The law pertaining to a defendant's request to overturn a jury verdict based on the weight of the evidence is clear and well established.

In *Herring v. State*, 691 So.2d 948,957 (Mississippi 1957), the Court noted:

> In determining whether a jury verdict is against the overwhelming weight of the evidence, this Court must accept as true the evidence which supports the verdict and will reverse only when convinced that the circuit court has abused its discretion in failing to grant a new trial. Thornhill v. State, 561 So.2d 1025, 1030 (Miss.1989), rehearing denied, 563 So.2d 609 (Miss.1990). Only when the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice will this Court disturb it on appeal. Benson v.

State, 551 So.2d 188, 193 (Miss.1989) (citing McFee v. State, 511 So.2d 130, 133-134 (Miss.1987)). Thus, the scope of review on this issue is limited in that all evidence must be construed in the light most favorable to the verdict. Mitchell v. State, 572 So.2d 865, 867 (Miss.1990).

In *Morgan v. State*, 681 So.2d 82,93 (Miss. 1996), the Court held:

> When this Court reviews the sufficiency of the evidence, we look to all of the evidence before the jurors to determine whether or not a reasonable, hypothetical juror could find, beyond a reasonable doubt, that the defendant is guilty. Jackson v. State, 614 So.2d 965, 972 (Miss.1993). The evidence which supports the verdict is accepted as true, and the State is given the benefit of all reasonable inferences flowing from that evidence. Id. (citing Hammond v. State, 465 So.2d 1031, 1035 (Miss.1985)). We will not reverse a trial judge's denial of a motion for a new trial unless we are convinced that the verdict is so contrary to the weight of the evidence that, if it is allowed to stand, it would sanction an unconscionable injustice. Groseclose v. State, 440 So.2d 297, 300 (Miss.1983).

In *Gibson v. State*, 660 So.2d 1268,1272 (Miss. 1995), Justice Pittman, in a dissenting opinion, reviewed the applicable standard:

> In Wash v. State, 521 So.2d 890 (Miss.1988), this Court addressed whether the jury verdict of guilty should be overturned because it was against the weight of the evidence. The Court, in emphasizing the limitations upon its scope of review of a finding of fact made by the jury, said, " 'the jury is the sole judge of the credibility of witnesses, and the jury's decision based on conflicting evidence will not be set aside where there is substantial and believable evidence supporting the verdict.' " Id. at 896 (quoting Billiot v. State, 454 So.2d 445, 463 (Miss.1984)). Put another way, "the reviewing court cannot set aside a verdict unless it is clear that the verdict is a result of prejudice, bias or fraud, or is manifestly against the weight of credible evidence." Dixon v. State, 519 So.2d 1226, 1229 (Miss.1988); Marr v. State, 248 Miss. 281, 159 So.2d 167 (1963).

In *Pharr v. State*, 465 So.2d 294,301 (Miss. 1984), the Court held:

> Where a defendant has moved for j.n.o.v., the trial court must consider all of the evidence--not just the evidence which supports the state's case--in the light most favorable to the state. May v. State, 460 So.2d 778, 781 (Miss.1984). The state must be given the benefit of all favorable inferences that may reasonably be drawn from the evidence. Glass v. State, 278 So.2d 384, 386 (Miss.1973). If the facts and inferences so

> considered point in favor of the defendant with sufficient force that reasonable men could not have found beyond a reasonable doubt that the defendant was guilty, granting the motion is required. On the other hand, if there is substantial evidence opposed to the motion, that is, evidence of such quality and weight that, having in mind the beyond a reasonable doubt burden of proof standard, reasonable fair-minded men in the exercise of impartial judgment might reach different conclusions, the motion should be denied and the jury's verdict allowed to stand. May v. State, 460 So.2d 778, 781 (Miss.1984).
>
> In other words, once the jury has returned a verdict of guilty in a criminal case, we are not at liberty to direct that the defendant be discharged short of a conclusion on our part that the evidence, taken in the light most favorable to the verdict, no reasonable, hypothetical juror could find beyond a reasonable doubt that the defendant was guilty. May v. State, 460 So.2d 778, 781 (Miss.1984); Fairchild v. State, 459 So.2d 793, 798 (Miss.1984); Pearson v. State, 428 So.2d 1361, 1364 (Miss.1983).

In *Holmes v. State*, 660 So.2d 1225,1227 (Miss. 1995) the Court held:

> Holmes asserts the State showed no evidence of violence or threat of injury, therefore the jury's verdict was wrong and against the overwhelming weight of the evidence. In determining whether a jury verdict is against the overwhelming weight of the evidence, this Court accepts as true all evidence which supports the verdict and will reverse only when convinced that reasonable and fair-minded jurors could only find the defendant not guilty. Green v. State, 614 So.2d 926, 932 (Miss.1992).
>
> In this case a single witness, Sims, stated that Holmes snatched over one hundred dollars out of his hand and ran away. Sims said Holmes later offered to repay the money if Sims would drop the charges. The jury clearly believed Sims. Testimony from a single credible witness is sufficient to sustain a conviction. Williams v. State, 512 So.2d 666, 670 (Miss.1987).

Where the trial judge sits as the finder of fact in a bench trial, his findings of fact are entitled to the same deference as those of a jury. *Christian v. State*, 859 So.2d 1068, 1072 (Miss.App.2005).

In the case before the Court, the defendant's argument is based on the premise that the appellate court should disregard the trial judge's findings regarding credibility of

the witnesses and interpretation of the evidence. As the cases cited above demonstrate, the appellate court should not disturb the factual findings on the part of the trial judge, where, as here, there are facts in evidence that support the verdict.

**The Assault Charge:**

The circumstances surrounding the assault charge have been discussed in previous sections. At most, the defendant can point to a dispute as to who the primary aggressor might have been and, based on the case law cited above, it is the province of the finder of fact – in a bench trial, the judge – to determine the relative credibility of the witnesses and whose version of the facts is most believable.

The defendant's allegation that there was insufficient proof of injury is totally without merit. Sullivan testified as to bruises, scraped skin and physical pain. This is clearly sufficient under *Murrell v. State*, 655 So.2d 881 (Miss.1995), where the court held that it was sufficient if a victim simply stated that he suffered pain. "Either the officer suffered pain or he did not and it is a simple task to ask him." See Pam Sullivan's testimony at T.27.

**The Disorderly Conduct Charge:**

Officer Wigley arrived on the scene of a call that was designated as a domestic violence call. His first concern was to separate the parties and ensure that no additional violence occurred. The only way to accomplish this was by establishing control of the parties during the investigative phase.

In effect, he established an investigative detention while he sorted the situation out. As any reasonable police officer would do, he attempted to do so by polite request first, but when Mathews did not cooperate, he issued a direct order.

In order to determine whether an investigative detention is reasonable under the Fourth Amendment, a two step inquiry must be conducted.

First, the court must ascertain whether the detention was justified at its inception. *Terry v. Ohio*, 392 U.S. 1, 20 (1968). For a detention to be valid, the officer must have an articulable suspicion that a detainee has committed a crime or is about to commit a crime. *Florida v. Royer*, 460 U.S. 491, 498 (1983); *Jones v. State*, 801 So.2d 751, 756 (Miss.App.2001). In this case there were mutual accusations of violent behavior.

Second, there must be a determination as to whether the officer's actions are reasonably related in scope to the circumstances which justified the interference in the first place. *Terry* at 20.

The "reasonable suspicion" standard required for a Terry investigative detention requires only a minimal level of "objective justification" which is "considerably less than proof of wrongdoing by a preponderance of the evidence." *United States v. Sokolow*, 490 U.S. 1, 7 (1989).

In response to the first inquiry, the court must make a determination based on the facts known to the officer at the time he makes the decision regarding an investigative detention. *Qualls v. State*, 947 So.2d 365, 371 (Miss.App.2007), citing *Singletary v. State* 318 So.2d 873, 877 (Miss.1975)(citing *Terry* at 21-22). In the present case, at the time Wigley ordered Mathews to move away from Sullivan and put the phone away, he knew the following things:

(a) The officer had been dispatched to deal with a call alleging domestic violence.

(b) The defendant Mathews exhibited a "disgruntled" attitude. (By his own admission, he was "extraordinarily frustrated."(T. 81).

(c) The defendant Mathews had made an "angry gesture.

Based on these factors, Wigley had more than adequate grounds for instituting an investigative detention to resolve an "ambiguous" situation. *Singletary v. State*, 318

So.2d 873, 876-7(Miss.1975). A collection of actions which, individually, are subject to innocent explanation may be sufficient to create reasonable circumstances under the totality of the circumstances. *Qualls* at 371, citing *Anderson v. State*, 864 So.2d 948, 951 (Miss.App.2003)(citing *United States v. Arvitzu*, 534 U.S. 266, 274 (2002)).

"In evaluating the factors alleged in support of reasonable suspicion, the court 'judge[s] the officer's conduct in light of common sense and ordinary human experience .... This approach is intended to avoid unrealistic second-guessing of police officers' decisions and to accord appropriate deference to the ability of a trained law enforcement officer to distinguish between innocent and suspicious actions." *United States v. Alvarez*, 68 F.3d 1242, 1244 (10th Cir.1995).

As noted by the Mississippi Court of Appeals in *Bovan v. State*, 706 So.2d 254, 257 (Miss.App.1997), "Every citizen cannot be a lay magistrate, determining what is valid or not, unless the police commands fall outside a broad range of reasonableness."

Since the *Terry* decision in 1968, the Supreme Court has expanded the scope of a permissible *Terry*-stop from simply conducting a weapons pat-down to 'ask[ing] the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions. *Berkemer v. McCarty*, 468 U.S. 420, 439-440(1984).

Numerous jurisdictions, including Mississippi, have recognized an aggressive physical stance as a factor which can be considered in serving as the basis for a *Terry* detention. *Tate v. State*, 946 So.2d 376 (Miss.App.2006)(the defendant "squared off" and assumed a "defensive stance."380-381); *United States v. Meindl*, 83 F.Supp.2d 1207(D.Kansas 1999)("animated and aggressive behavior in an open and public setting ... angry demeanor"1222.); *United States v. Smith*, 217 F.3d 746 (9th Cir.2000)("threatening posture"750.);*Johnson v. Hanada* 2008 WL 2329222(D.Or.)("The fact that the Plaintiff quickened his pace away from the summoning officer and ultimately turned to confront him in a stance suggesting a willingness to fight would,

under the totality of these circumstances, lean an objectively reasonable police officer to believe "criminal activity was afoot: and would justify a Terry stop of any such person for the purpose of dispelling such reasonable suspicion.").

Numerous jurisdictions, including Mississippi, have also recognized that the use of "intrusive precautions" (such restraining the suspect, even by the use of handcuffs or placing a suspect on the ground) during a *Terry* detention do not transform a *Terry* detention into an arrest under the Fourth Amendment. *Jones v. State*, 801. So.2d751, 756 (Miss.App.2001); *Gallegos v. City of Colorado Springs*, 114 F.3d 1024 (10th.Cir.1997)(Use of force was justified during *Terry* detention where suspect pivoted toward officer, assumed a wrestler's position, was yelling appeared angry and smelled as if he had been drinking); *United States v. Perdue*, 8 F.3d 1455, 1462-1463 (10th Cir.1993)("While *Terry* stops generally must be fairly nonintrusive, officers may take necessary steps to protect themselves if the circumstances reasonably warrant such measures .... Directing the suspect to lie on the ground provided the officers with a better view of the suspect and prevented him from obtaining weapons which might have been in the car or on his person .... This holding is consistent with the recent trend allowing police to use handcuffs or place suspects on the ground during a *Terry* stop. Nine courts of appeals, including the Tenth Circuit, have determined that such intrusive precautionary measures do no necessarily turn a lawful *Terry* stop into an arrest under the Fourth Amendment [*citations omitted*]."

In this case, the officer simply made the least intrusive command decision reasonably possible; he separated the parties and requested that Mathews stop using his cell phone. The office did not handcuff Mathews or put him on the ground or exercise any other physical restraint until Mathews adamantly disobeyed his direction. The officer was faced with a potentially violent situation – in fact, a situation where violence had already been reported – and he had no obligation to allow Mathews or anyone else to take action that might be designed to summon other combatants or potential combatants

to the scene and escalate whatever problem had already occurred. As the investigation progressed, allowing the use of the phone might have been reasonable, but at this early stage the officer was justified in taking reasonable measures to secure the scene and the parties.

By his own testimony, Mathews had already called the police and his own father. He did not claim that he was in need of medical assistance or that he was calling for medical assistance. There was no compelling reason for Mathews to insist upon using the phone to call his father *again* except Mathews' own explanation that he was in "kind of an emotion funk."(T.96).

Mathews' deliberate and unequivocal decision to disobey the reasonable order of a police officer who was simply trying to establish control of a volatile scene, where a report of violence had already occurred, more that justified the charge and conviction of disorderly conduct.

**3. The court's exclusion of the police dispatch report was (a) appropriate because of the defendant's failure to designate the item as required by UCCCR 9.04 and (b) was at most harmless error since the defendant was allowed to testify as to the substance of the document, and his testimony was not contested but was in fact confirmed by the state's witnesses.**

The defendant does not dispute that he failed to designate the dispatch report that he moved to introduce as a potential exhibit in his case in chief as required by UCCCR 9.04. Under the provisions cited by the Appellant, the trial judge was clearly justified in excluding the evidence. The prosecution was familiar with the document and never claimed otherwise, but contended that it was unfair to designate its introduction as an exhibit in the defendant's case in chief at that late stage. The rule gives the judge the discretion to exclude the document at that point.

More important, exclusion of the document could not possibly prejudice the defendant or hinder presentation of a possible defense since the defendant was allowed to have the relevant portion of the document read into evidence and verified by the defendant, without objection by the prosecution.

Again, consider the following excerpt from the trial transcript:

> Q. (By Mr. Ganner) I want to show you a document, a dispatch sheet from the Madison County Police Department, and I want you to read that and tell me if that accurately reflects what you told them.
>
> A. "Male caller says female at this residence snatched his child out of the vehicle after a physical altercation."
>
> Q. Does that accurately reflect what you told the Madison police?
>
> A. Yes, it does.
>
> (T.82)

If there was any error on the part of the court by exclusion of the physical document, it was more than cured by allowing the defendant to read the relevant portions into the record, without objection. At most, this would constitute harmless error, and is not grounds for reversal. As the Mississippi Supreme Court held in *Thorson v. State*, 895 So.2d 85, 123(Miss.2004):

> A party must do more than simply show some technical error has occurred before he will be entitled to a reversal on the exclusion or admission of evidence; there must be some showing of prejudice. "[F]or a case to be reversed on the admission or exclusion of evidence, it must result in prejudice and harm or adversely affect a substantial right of a party." Terrain Enter., Inc. v. Mockbee, 654 So.2d 1122, 1131 (Miss.1995) (citing Hansen v. State, 592 So.2d 114 (Miss.1991)); Russell v. State, 607 So.2d 1107, 1114 (Miss.1992); Miss. R. Evid. 103(a).

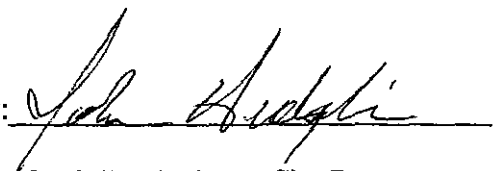
This is especially true in light of the fact that the victim herself confirmed that Mathews called the Madison Police. This physical document was merely cumulative of testimony already in the record and never contested by the state.

## CONCLUSION

Based upon the foregoing arguments, the State of Mississippi, acting by and through the City of Madison, respectfully request that the convictions of assault and disorderly conduct be affirmed.

Respectfully submitted, this the 27th day of March, 2013.

The City of Madison, Mississippi

By: 

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CERTIFICATE OF SERVICE

I, John Hedglin, certify that I have this day serve a copy of the above and foregoing pleading by United States Mail upon Chris Ganner, Esq., 405 Tombigbee Street, Jackson, MS, 39201, and by personal service upon the Hon. John Emfinger, Madison County Circuit Court Judge, and the Hon. Edwin Hannan, Madison County Court Judge, at the Madison County Court House in Canton, Mississippi, on this the 27th day of March, 2013.