IN COURT OF APPEALS OF THE STATE OF MISSISSIPPI
2012-KM-01528-COA

MARK MATHEWS — APPELLANT

V.

CITY OF MADISON, MISSISSIPPI — APPELLEE

BRIEF OF APPELLANT

Oral Argument Requested

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CERTIFICATE OF INTERESTED PERSONS

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 this court may evaluate possible disqualifications or recusal.

1. The City of Madison, Mississippi
2. Mark Matthews
3. Brittany Matthews
4. Pam Sullivan

THIS 23 day of January 2013.

Respectfully submitted,

MARK MATTHEWS

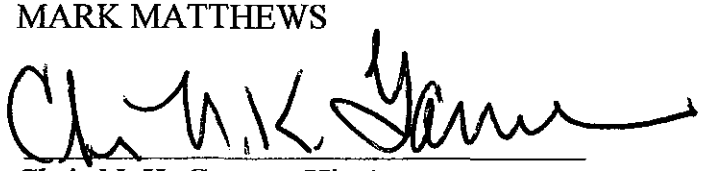
By: 
Chris N. K. Ganner, His Attorney

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF THE ISSUES

ISSUE NO. 1: WAS THERE SUFFICIENT PROOF OF SIMPLE ASSAULT AND WHETHER THE LOWER COURT ERRED BY NOT APPLYING THE CASTLE DOCTRINE?

ISSUE NO. 2: WHETHER THERE WAS SUFFICIENT EVIDENCE OF DISORDERLY CONDUCT UNDER THE CIRCUMSTANCES?

ISSUE NO. 3: WHETHER THE WEIGHT OF EVIDENCE SUPPORTS THE CONVICTIONS FOR DISORDERLY CONDUCT AND SIMPLE ASSAULT?

ISSUE NO. 4: WHETHER THE LOWER COURT ERRED IN EXCLUDING DEFENSE EVIDENCE?

REQUEST FOR ORAL ARGUMENT

Pursuant to M. R. A. P. Rule 34, Appellant respectfully requests oral argument because this appeal addresses the proper application of Mississippi's Castle Doctrine Statute, Miss. Code Ann. §97-3-15(3) and (4)(Rev. 2006). Furthermore, this appeal also involves fundamental rights of due process and fair trial standards in the admission and exclusion of evidence.

STATEMENT OF THE CASE

Mark Mathews was convicted of simple assault and disorderly conduct in the City of Madison Municipal Court on July 28, 2011. [R. 28-29]. Mathews appealed the convictions to the County Court of Madison County in which a *de novo* bench trial conducted September 6, 2011, with the Honorable Edwin Y. Hannan, County Court

Judge presiding, resulted in the same convictions. [T. 120-21; R. 3, 80-82]. Mathews was sentenced on the simple assault conviction to 180 days with 150 days suspended. [T. 120]. For the disorderly conduct, the sentence was a consecutive 180 days with 175 suspended. *Id.* The suspended incarceration was conditioned on satisfactory completion of 2 years of unsupervised probation and attendance of anger management classes. *Id.* Matthews is not presently incarcerated.

The County Court convictions were then appealed to the Circuit Court of Madison County where the Honorable John Emfinger presiding affirmed the County Court verdicts by written opinion entered August 29, 2012. [R. 111-14]. The present appeal followed.

FACTS

Mark Mathews and Brittany Sullivan, both in their twenties, had a daughter, Macy Kate, out of wedlock in 2008. [Ex. S-1; R. 20-27; T. 27-28]. A Final Judgement of Filiation and Support was entered in the Chancery Court of Madison County awarding "joint legal and joint physical" custody to Mark and Brittany "with each having periods of actual physical custody at times and under circumstances as they may agree." *Id.* The Judgement also provided a schedule for visitation when the parties "are unable to agree on which parent should exercise actual physical custody." [R. 22]. Mark was a college student. [T. 75].

Brittany resided with her mother, Pam Sullivan, at 141 Oak Ridge Circle in the City of Madison. [T. 36-37]. Brittany did not have a key to her mother's residence, however, and she had lost the automatic garage door opener used to access entry into the house. [T. 36-37, 86]. Brittany did not have a vehicle and had been in drug rehabilitation for abuse of Xanax.[1] [T. 29-30, 46]. Sullivan was not fond of Mark previously had tried to become guardian of Macy Kate. [T. 29-30, 45-46, 78; Ex. D-2].

Around 8:00 a. m. on Thursday May 26, 2011, Mark drove with his daughter on the passenger side of the back seat passenger of his pick-up truck and parked at the curb of 141 Oak Ridge to turn the child over to Brittany after a scheduled Wednesday over-night visitation. [T. 22, 32, 78]. Mark was required to park on the street and stay off of Sullivan's property because he had been charged and convicted of trespassing about a year earlier. [T. 19, 76]. During the episode described herein, Mark never set foot on Sullivan's property [T. 32].

Sullivan testified that on similar occasions, she, Brittany or some other family member, would usually go out to the street and retrieve the child. *Id.* Sometimes Mark's and Brittany's grandparents would do the exchange. *Id.* Mark testified that Sullivan had never came out to the curb for the child, that it was always Brittany. [T. 78-79].

Nevertheless, on this particular morning, Sullivan came out to Mark's truck and

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Xanax ®, a trade name for Alprazolam, "is in a class of medications called benzodiazepines [which work] by decreasing abnormal excitement in the brain." http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0000807

Madison Police officer and now is with the Madison County Sheriff's Office. [T. 43].

Mark's call to police reported that "a female ... snatched his child out the [vehicle] after a physical altercation." [R. 51]. Mike Brown came over in civilian clothes, then two other Madison Police Officers arrived. [T. 51]. The only officer to testify was Ryan Wigley who said Brown was already on the scene when he responded. *Id.*

Officer Wigley testified that, as he was speaking with Brown and Sullivan, he noticed Mark using his cell phone, and asked him not to make a call and to put the cell phone away. [*Id.*, T. 99]. Mark, upset and thinking that his daughter had just been kidnapped, responded to the officer with a disgruntled assertion that the officer could not prevent him from using the phone, and, Mark continued to try and place a call. [T. 51-52, 84].

Mark said at that point, the officer approached him with one hand on his service weapon and the other on his handcuffs, and placed Mark under arrest with some token roughness. [T. 85, 97-98]. The officer said there was no unnecessary roughness and that he merely placed Mark under arrest and charged him with "disorderly conduct - failure to comply" with a law enforcement officer. [T. 52]. Wigley said after getting Mark in the patrol car, he went and spoke with Sullivan himself. [T. 53]. No one ever asked for Mark's side of the events. [T. 58, 60]. Wigley said he did not notice any physical injuries to Sullivan. [T. 55]. The state offered no medical testimony and no photographic proof at trial of any injury to Ms. Sullivan.

Regarding the phone call, Mark said he was trying to reach his father which was confirmed by Sullivan's testimony. [T. 44, 85]. Even though there were three police officers present, fully armed with pistols, shotguns, pepper-spray, batons and radio communication for back-up, Wigley said it was unsafe for Mark to use his cell phone. [T. 59]. Mark did not deny failing to comply with the officer's request, he just said he was so upset about Sullivan snatching his young daughter. [T. 85, 96].

Wigley could not say under which subsection of the disorderly conduct statute Mark was being charged, because the computer just "spits out" the paper work. [T. 101, 104]. Sullivan was never charged with assault or kidnapping or any other offense. [T. 43-44].

SUMMARY OF THE ARGUMENT

The Circuit Court erred in not finding that the County Court Judge failed to afford Mark Mathews the legally prescribed presumptions under Mississippi's Castle Doctrine statute in relation to the simple assault charge. The Circuit Court erred in not finding that the County Court Judge failed to apply the correct legal standard in assessing the evidence on the disorderly conduct charge. The weight of evidence does not support convictions of either charge. The Circuit Court failed to recognize that the trial court erroneously excluded defense evidence and limited Mathews' constitutional right to cross-examine his accusers.

ARGUMENT

ISSUE NO. 1: WAS THERE SUFFICIENT PROOF OF SIMPLE ASSAULT AND WHETHER THE LOWER COURT ERRED BY NOT APPLYING THE CASTLE DOCTRINE?

With proper application of the law, there was an insufficiency of evidence to support a simple assault conviction. The County Court Judge should have sustained Mark Matthew's Motion for Directed Verdict or Motion for Judgment of Acquittal Notwithstanding the Verdict (JNOV). The Circuit Court erred in finding that the Castle Doctrine did not apply in this case and that the evidence was sufficient. [R. 112]. The Circuit Court stated no reason for this conclusion. *Id.*

Defense counsel raised Mississippi's Castle Doctrine codified in Miss. Code Ann §97-3-15(3) and (4)(Rev. 2006) in his motions for directed verdict and for JNOV. [T. 63-65; R. 88].[2] Sullivan was the aggressor and basically kidnapped or abducted the child

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[2] Mississippi Code Annotated section 97–3–15(3) and (4) (Rev. 2006):
(3) A person who uses defensive force shall be presumed to have reasonably feared imminent death or great bodily harm, or the commission of a felony upon him or another or upon his dwelling, or against a vehicle which he was occupying, or against his business or place of employment or the immediate premises of such business or place of employment, if the person against whom the defensive force was used, was in the process of unlawfully and forcibly entering, or had unlawfully and forcibly entered, a dwelling, occupied vehicle, business, place of employment or the immediate premises thereof or if that person had unlawfully removed or was attempting to unlawfully remove another against the other person's will from that dwelling, occupied vehicle, business, place of employment or the immediate premises thereof and the person who used defensive force knew or had reason to believe that the forcible entry or unlawful and forcible act was occurring or had occurred. This presumption shall not apply if the person against whom defensive force was used has a right to be in or is a lawful resident or owner of the dwelling, vehicle, business, place of employment or the immediate premises thereof or is the lawful resident or owner of the dwelling, vehicle, business, place of employment or

from Mathews' vehicle by use of force. [T. 64-65]. The trial court and Circuit Court erred reversibly in not applying the Castle Doctrine to the facts of this case. [T. 67, 127-28; R. 112].

Matthew's actions were legally justified. Mathews' parental rights are paramount to Sullivan's, the grandmother. Parents have a constitutional fundamental right "to make decisions concerning the care, custody, and control of their children." *Troxel v. Granville*, 530 U. S. 57, 66, 120 S. Ct. 2054 (2000). Courts are required to afford "special weight to a fit parent's determination of a child's best interests." *Id.* at 69, 120 S.Ct. 2054. Parents have "a paramount right to control the environment, physical, social, and emotional [situations], to which their children are exposed." *Stacy v. Ross*, 798 So. 2d 1275, 1280 (¶ 23) (Miss. 2001).

Pam Sullivan had no legal authority to seize Mark and Brittany's daughter. She was not a guardian, not a custodial parent, and she did not have grandparent visitation rights. Therefore, Sullivan was attempting to abduct, and did indeed abduct, the child in this case. Under Miss. Code Ann § 93-29-3(1) (1972), "'Abduction' means the wrongful

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the immediate premises thereof or if the person who uses defensive force is engaged in unlawful activity or if the person is a law enforcement officer engaged in the performance of his official duties;
(4) A person who is not the initial aggressor and is not engaged in unlawful activity shall have no duty to retreat before using deadly force under subsection (1) (e) or (f) of this section if the person is in a place where the person has a right to be, and no finder of fact shall be permitted to consider the person's failure to retreat as evidence that the person's use of force was unnecessary, excessive or unreasonable.

removal or wrongful retention of a child."

Even if the child's mother was unavailable, Mathews, with joint physical and legal custody, was not obligated to turn the child over to Sullivan. In *Givens v. Nicholson*, 878 So. 2d 1073, 1076 (¶¶ 13-14) (Miss. Ct. App. 2004), the court found that a chancellor requiring a non-custodial father to leave a child with maternal grandparents for extended periods of time when the child's mother was unavailable was the same as granting the maternal grandparents visitation. *Id.* (¶ 15). The chancellor was wrong, because, the grandparents had not been afforded visitation as required by statute, Miss. Code Ann. §93-16-3 (Rev. 1994). *Id.* (¶ 18).

Without the benefit of statutory grandparent visitation, Sullivan's right of access to the child in this case is summed up from the following language found in *Naveda v. Ahumada* 381 So. 2d 147, 149-50 (Miss. 1980):

> Grandparents have no common-law right to visitation; their rights are derivative through the natural parent, and any obligation of a custodial parent to permit visitation of a grandchild by the grandparent is a moral obligation and not a legal right.

Moreover, custodial parents "have the right to determine with whom the child will associate." *Id.* at 150. Therefore, a custodial parent has the right to object to a grandparent's association with that parent's child. *Id.* This arises from the "freedom of personal choice in matters of family life [which] is a fundamental liberty interest protected by the Fourteenth Amendment. *Id.*

Therefore, Mathews had a fundamental right to refuse to tender his child to

Sullivan, and Sullivan lacked any standing whatsoever to demand surrender of the child. It follows too that Sullivan lacked any right to extricate and abduct the child from the child's parent's vehicle.

In *Thomas v. State*, 75 So. 3d 1112, 1113-14 (¶¶ 3-8) (Miss. Ct. App. 2011), the Court of Appeals applied the Castle Doctrine to reverse a manslaughter conviction. The events in *Thomas* involved a shooting in a parking lot of the Performing Arts Building in Southaven. After a party, a crowd gathered and one group of men were assaulting another man. *Id.* Security personnel attempted, but, could not stop the fight. *Id.* Thomas, who was not participating in the fray, shot a gun into the air which stopped the attack; Thomas then ran and got into his car. *Id.* The man who was being attacked "was relieved when Thomas shot the gun because he thought the men would have beaten him to death if it had been allowed to continue." *Id.*

Several men then ran after Thomas and tried to open his car doors, but they were locked. *Id.* Thomas reloaded his weapon while the men ran to the rear of his car knocking on the windows and beating the trunk. *Id.* One of the men "threw a cell phone at the car in an attempt to break the back window." In response, Thomas rolled down the window and fired several shots from his car two of which struck one of the men who died from the wounds. *Id.*

In defending the resulting homicide charge, at trial, Thomas sought an instruction requiring the jury to apply the Castle Doctrine presumption. *Id.* 1115-16 (¶13). The trial

court refused. *Id.*

The Court of Appeals said that for the presumptions to arise under Miss. Code Ann. §97–3–15, there had to be a factual basis and proof of the following two prongs: "First, under subsection (4), if the defendant is in a place where he had a right to be, is not the immediate provoker and aggressor, and is not engaged in unlawful activity, he has no duty to retreat before using defensive force. ... And second, if the jury finds that any of the circumstances in subsection (3) are satisfied, the defendant who uses such defensive force is presumed to have reasonably feared imminent death or great bodily harm or the commission of a felony upon him." *Id.* The *Thomas* court reversed on a finding that the trial court should have allowed the instruction under §97-3-15 (3) and (4).

In the present case, Mathews was in a place he had a right to be. He was not the initial aggressor and was not engaged in any unlawful act. So, the County Court and Circuit Court here should have applied the required presumption of justification to Mathews' reaction to Sullivan's aggression as a matter of law.

In *Newell v. State*, 49 So. 3d 66, 68-69 (¶¶ 2-6) (Miss. 2010), the defendant was convicted of manslaughter stemming from a shooting during an altercation with a man in the parking lot of a bar in Lowndes County. The Supreme Court found that the trial court erred reversibly, in part, by refusing an instruction regarding the statutory presumption under the Castle Doctrine. As in *Thomas, supra*, there was a confrontation

and the victim followed Newell back to his truck. The victim "began shouting and beating on the truck" and threatening Newell. Newell said he feared for his life because the victim tried to open the truck door with the obvious intention of beating Newell or pulling him out of the truck." *Id.* Newell was able to push himself out of the truck at which point the victim said "I'm fixing to cut you up" and "grabbed at his pocket", so Newell reached under the seat of the truck, pulled a pistol out, and shot. *Id.* The victim never displayed a weapon, but a pocket knife was found in his pocket. *Id.*

The *Newell* court followed the same two prong approach as in *Thomas. Id.* 74-78 (¶¶ 22-28). Newell had a right to be in the parking lot and in his own truck. Otherwise, Newell's testimony raised the presumption of the Castle Doctrine. *Id.*

The trial court in *Newell* refused an instruction under the Castle Doctrine because Newell was not in his vehicle when the shooting occurred . *Id.* ¶ 27. The Supreme Court disagreed. The statute clearly refers to the "vehicle which he was occupying" and states that the person who uses defensive force is entitled to the presumption "if the person against whom the defensive force was used, was in the process of unlawfully and forcibly entering ... a[n] ... occupied vehicle ... or if that person ... was attempting to unlawfully **remove another against the other person's will from that ... occupied vehicle....**" *Id.* [Emphasis added.].

Applying *Newell* here, Matthews and his daughter were "occupying" his vehicle when Sullivan initiated an aggressive act against the child by trying to extract her from

the back seat. Therefore, under the Castle Doctrine, Mathews actions were justified and clearly lawful. Like Newell, Mathews "utilized force while he was still 'in the immediate premises' of the truck and while he perceived danger instigated by and from" Sullivan. *Id.* 76 (¶30).

The County Court and Circuit Court should have been led by the presumption and acquitted Mathews of the simple assault charge, or at a minimum, should have granted him a new trial. According to *Maye v. State*, 49 So. 3d 1124, 1130 (¶¶ 13-14) (Miss. 2010), "the burden of proof to prove self-defense [or defense of another] is not on the defendant. Rather, it lies with the State to prove that the defendant did not act in self-defense. *Id.* [Citing *Pierce v. State*, 289 So. 2d 901 (Miss. 1974)]. This the state failed to do.

Therefore, the presumptions afforded Mr. Mathews by the legislature's adopting the of the Castle Doctrine coupled with his fundamental rights as a parent, would require a directed verdict or JNOV of acquittal or a trial de novo in Circuit Court pursuant to UCCCR Rule 12.03.

ISSUE NO. 2: WHETHER THERE WAS SUFFICIENT EVIDENCE OF DISORDERLY CONDUCT UNDER THE CIRCUMSTANCES?

The First Amendment to the United States Constitution provides in pertinent part that "Congress shall make no law ... abridging the freedom of speech." U.S. Const.

Amend. I. The Fourteenth Amendment prohibits the states from "abridg[ing] the privileges and immunities" granted to us by way of the U.S. Constitution. U.S. Const. Amend. XIV. However, the freedom of speech is not absolute. *Schenck v. United States*, 249 U.S. 47, 52, 39 S.Ct. 247, 63 L.Ed. 470 (1919). Lewd or obscene language, profanity, libel, and insulting or 'fighting' words are subject to limitation. *Id.* at 574, 62 S.Ct. 766. There was no evidence here that Mathews was lewd or obscene and he did not offer any insult or fighting words. He was not in the process of breaching any peace.

Our disorderly conduct statute Miss. Code Ann. § 97-35-7 (1972) provides for a charge arising during a breach of peace against one who "fails or refuses to promptly comply with or obey a request, command, or order of a law enforcement officer, having the authority to then and there arrest any person for a violation of the law." [3]

A review of the facts in this case shows, primarily, there was no existing, or threatened breach of peace confronting Officer Wigley when he voiced his command to Mathews. Secondly, when Officer Wigley told Mathews to put the cell phone away

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§ 97-35-7. (1972) Disorderly conduct; refusal to comply with police request
(1) Whoever, with intent to provoke a breach of the peace, or under such circumstances as may lead to a breach of the peace, or which may cause or occasion a breach of the peace, fails or refuses to promptly comply with or obey a request, command, or order of a law enforcement officer, having the authority to then and there arrest any person for a violation of the law, to:
...
(i) Act or do or refrain from acting or doing as ordered, requested or commanded by said officer to avoid any breach of the peace at or near the place of issuance of such order, request or command, shall be guilty of disorderly conduct, which is made a misdemeanor and, upon conviction thereof, such person or persons shall be punished by a fine of not more than Five Hundred Dollars ($500.00) or imprisonment in the county jail for not more than six (6) months, or by both such fine and imprisonment.

Wigley did not have "authority to then and there arrest" Mathews. These factors in and of themselves should have required a directed verdict or JNOV of acquittal. *Jones v. State*, 798 So. 2d 1241, 1248 (Miss. 2001).

The facts of Mathews' case share similarities to the facts in *Smith v. City of Picayune*, 701 So. 2d 1101 (Miss. 1997). Smith owned an arcade in Picayune. One day Smith heard a ruckus outdoors in the parking lot of the arcade. *Smith* at (¶3). So, he grabbed a baseball bat and walked out on to the lot. *Id.* About the time he got outside, two Picayune Police officers arrived and ordered Smith off the lot and told him to go back inside. *Id.* at 1102. Smith refused and was arrested and charged, like Mathews, with failing to "promptly comply with the command of a law enforcement officer." *Id.*

Smith was convicted in municipal court and appealed to the circuit court where he was convicted again in a bench trial *de novo*. *Id.* at (¶4). On appeal to the Supreme Court, Smith argued that Miss. Code Ann. §97-35-7 (1972) is "over-broad, vague and so devoid of guidelines that it encourages arbitrary enforcement and infringement of fundamental rights guaranteed by the First Amendment. *Id.* (¶6). Smith argued that the language of the statute authorizing a police officer to arrest anyone who fails to comply with a request or command allowed police to arbitrarily infringe on fundamental rights of free speech and assembly and move about freely. *Id.*

The *Smith* court recognized that, "[w]here the activity to be regulated is capable of reaching First Amendment rights, the statute or ordinance should be subjected to

heightened scrutiny." *Id.* 1103 (¶8). [Citing *Nichols v. City of Gulfport*, 589 So. 2d 1280, 1283 (Miss. 1992) citing *Keyishian v. Board of Regents*, 385 U. S. 589, 604, 87 S. Ct. 675, 684 (1967)].

The *Smith* court pointed out that the statute in that case was applied to conduct, not speech and that it was reasonable to order the baseball bat wielding Smith back inside and arrest him for disorderly conduct under the statute because of the inherent danger of a man with a baseball bat under the circumstanced. *Id.* (¶9). The court said that, "the case does not concern the right of Smith to remain upon the part of his property of his choosing, but rather ... the right of the officer to control the conduct on the property ... and remove the greatest danger." *Id.*

Here in Mathews case, Officer Wigley's command was to stop exercising Mathews' right of free speech as well as Mathews' right to be on a public street. So, here a heightened scrutiny analysis should be followed.

In *Papachristou v. Jacksonville*, 405 U. S. 156, 92 S. Ct. 839 (1972), the court "determined that vague disorderly conduct statutes allow arbitrary and discriminatory law enforcement by impermissibly delegating basis policy matters to police officers, ... for resolution on a an ad hoc and subjective basis." That is what happened here.

Here, there was no existing breach of peace, no danger nor threat of danger to anyone when Wigley issued his command. There were multiple, well equipped officers present. There was no reasonable indication that Mathews was committing or about to

commit a crime. There was no immediate danger by Mathews completing his call.

Under a heightened scrutiny analysis, Wigley's actions were unreasonable, arbitrary, ad hoc and subjective. Wigley did not even know under what authority he was charging Mathews. He relied on a computer to "spit out" the appropriate language.

The heightened level of scrutiny required was pointed out to the county court judge here, but it was not applied. [T. 74]. The court merely said the state met its burden of proof and the charge was "clear." *Id.*

The present case is distinguishable from *Bovan v. State*, 706 So. 2d 254 (Miss. Ct. App. 1997) cited by the prosecution at trial. In *Bovan*, the defendant tried to prevent officers from entering a residence to arrest another person for whom the officers had an outstanding warrant. Bovan was a guest at the house and lied denying that the person lived at the residence, when in fact, he was hiding inside. *Id.* Bovan expressly said that the man did not reside at the house and refused to give consent to enter. The officers arrested Bovan and charged him with disorderly conduct.

The facts in *Bovan* are clearly distinguishable from the facts here. Bovan was not exercising a fundamental right. He was not the owner or occupier of the premises, he was a guest. He had no standing to prevent, or consent to, the officers entering the residence in that case.

The *Bovan* court acknowledged that a person has the right to resist an unlawful arrest, but not the right to resist an unlawful request or order from a police officer,

"unless the police commands fall outside a broad range of reasonableness." *Id.* at 257 (¶13). The law on resisting an unlawful arrest is set out in *Jones v. State*, 798 So. 2d 1241, 1248 (Miss. 2001). In *Jones* the Court found that a sheriff's deputy did not have sufficient evidence to believe that a breach of the peace was being threatened or a crime was about to be committed. Wigley could also be said not have witnessed any breach of peace, and it is no crime to use a cell phone. Otherwise, Wigley command that Mathews not use his cell phone was unreasonable under the circumstances applying the standard required.

Mathews was entitled to have the disorderly conduct charges dismissed by the lower court which is the relief he respectfully requests under this issue by a rendering of acquittal. Otherwise, Mathews respectfully request a trial *de novo* in Circuit Court under UCCCR Rule 12.03.

ISSUE NO. 3: WHETHER THE WEIGHT OF EVIDENCE SUPPORTS THE CONVICTIONS FOR DISORDERLY CONDUCT AND SIMPLE ASSAULT?

Mathews primary position under this weight of evidence argument is that the presumptions required by the Castle Doctrine addressed above control this issue also. The following supplements that position.

The police fell victim to Sullivan's manipulation of the situation. After lying to Mathews about Brittany being inside, Sullivan said she was calling the police, but she actually called a neighbor who was a Madison Policeman knowing that the neighbor

would arrive first and side with her. When other officers arrived, she knew they would align themselves with the neighbor police officer.

Under *Garrett v. State*, 549 So. 2d 1325, 1331 (Miss. 1989), reversal based on the weight of evidence is required when the evidence and inferences therefrom weigh on the side of the accused with "such sufficient force that reasonable men could not have found beyond a reasonable doubt that he was guilty." The evidence in this case, as pointed out under this issue and other places in the brief, under both convictions weigh much greater in favor of Mathews than in support of the convictions.

A person is guilty of simple assault if he (a) attempts to cause or purposely, knowingly or recklessly causes bodily injury to another; or (b) negligently causes bodily injury to another with a deadly weapon or other means likely to produce death or serious bodily harm; or (c) attempts by physical menace to put another in fear of imminent serious bodily harm. Miss. Code Ann. § 97-3-7 (Rev. 2000).

In *Reynolds v. State*, 818 So. 2d 1287, 1288 (¶1-3) (Miss. Ct. App. 2002), Reynolds was in the process of being arrested for suspicion of driving while under the influence of intoxicants and allegedly physically resisted an officer's efforts to place him in handcuffs. The officer testified that Reynolds "swung at him with a closed fist" and landed "a glancing blow." *Id.* There was no proof of any injury or bruising. *Id.* Here, Officer Wigley testified he did not notice any injury to Sullivan. [T. 55].

The law is clear that, to prove simple assault, the State must prove that the victim

suffered bodily injury. *Id.* [Citing *Murrell v. State*, 655 So. 2d 881, 883-885 (Miss. 1995)]. If the alleged injury is only established by inferences or circumstantial evidence, then such proof is "so weak in that regard that a new trial is required." *Id.* See also, *Henderson v. State*, 758 So. 2d 1047 (Miss. Ct. App. 2000).

As to the disorderly conduct charge the weight of evidence does not establish the disobeying of a reasonable command during a breach of peace. A new trial or acquittal is in order.

Mathews respectfully requests a reversal and rendering of both convictions or a trial *de novo* in Circuit Court under UCCCR Rule 12.03.

ISSUE NO. 4: WHETHER THE COURT ERRED IN EXCLUDING A DEFENSE EVIDENCE?

Through normal discovery, the state provided Mathews' counsel with a copy of a Madison Police dispatch report regarding this incident. [R. 49, 51]. At trial, the County Court excluded the report when offered by the defense on the state's objection that Mathews had not disclosed the report through reciprocal discovery. [T. 82-84]. Mathews trial counsel informed the court that the state had provided the document and, therefore, he did not perceive a duty to re-disclosed it. *Id.* The trial court said that since it was not re-submitted to the state, that it should be excluded. *Id.*

Rule 9.04 (I) of the Uniform Circuit And County Court provides:

[i]f during the course of trial, the [defense] attempts to introduce evidence

> which has not been timely disclosed to the [prosecution] as required by these rules, and the [prosecution] objects to the introduction for that reason, the court shall act as follows:
> 1. Grant the [prosecution] a reasonable opportunity to interview the newly discovered witness, to examine the newly produced documents, photographs or other evidence; and
> 2. If, after such opportunity, the [prosecution] claims unfair surprise or undue prejudice and seeks a continuance or mistrial, the court shall, in the interest of justice and absent unusual circumstances, exclude the evidence or grant a continuance for a period of time reasonably necessary for the defense to meet the non-disclosed evidence or grant a mistrial.
> 3. The court shall not be required to grant either a continuance or mistrial for such a discovery violation if the [defense] withdraws its efforts to introduce such evidence.

The Circuit Court erroneously failed to recognize that the County Court Judge was too hasty in excluding the evidence. The trial court did not have before it documented proof that Mathews was the complaining witness reporting that his child had been abducted. The state could not claim surprise because it was the source of the document. The state could not claim prejudice because the report is a police document relevant to the charges. Contrarily, Matthew suffered prejudice by exclusion of the evidence.

The standard of review regarding the admission or exclusion of evidence is abuse of discretion. *Burton v. State*, 875 So. 2d 1120(¶ 6) (Miss. Ct. App. 2004). The case of *Taylor v. Illinois*, 484 U.S. 400, 415-17, 108 S.Ct. 646, 656-57, 98 L.Ed. 2d 798, 814 (1988) is an appropriate starting point for the analysis of this issue. Generally, there is overriding principle that the Compulsory Process Clause bestows upon a criminal defendant to present evidence and "the right to compel the presence and present the testimony of witnesses" 484 U.S. at 409, 108 S.Ct. 646.

The *Taylor* Court, however, recognized a narrow exception to compulsory process holding that exclusion of defense evidence which has been wilfully withheld from the state during the discovery process by a defendant with the motivation of obtaining a tactical advantage did not violate the the Sixth Amendment Compulsory Process Clause. 484 U.S. 415-17, 108 S.Ct. 656-57.

In *Taylor*, non-disclosure of a defense witness was found to be willful because Taylor's lawyer had actually interviewed the non-disclosed witness the week before the trial and waited a week to make the disclosure to the state at trial when there had been ample opportunity to do previously. *Id.* This led the Court to infer that the defense deliberately sought a tactical advantage. *Id.*

The Mississippi Supreme Court referenced the *Taylor* decision the same year it was decided in *Houston v. State*, 531 So. 2d 598, 612 (Miss. 1988), and made clear limitations to the exception stating:

> [i]n this context, the radical sanction of exclusion of a substantial portion of the defendant's evidence is one that should rarely be used. Generally, it ought to be reserved for cases in which the defendant participates significantly in some deliberate, cynical scheme to gain a substantial tactical advantage.

In *Sandefer v. State* 952 So. 2d 281, 293 (Miss. Ct. App. 2007), the court recognized that homage must always be paid to "the compulsory process clause of the Sixth Amendment" in ruling on discovery violations of a defendant under UCCCR Rule 9.04, because, even if the procedures under the rules are followed, the trial court cannot

exclude defense evidence unless the "court determine[s] that the 'defendant's discovery violation [was] 'willful and motivated by a desire to obtain a tactical advantage.'" *Id.*

In *Sandefer*, the court found no proof that the discovery violation there was "willful or motivated by a desire to obtain an unfair advantage over the State", because, defense counsel learned of the unnamed witness at issue "shortly before it was disclosed to the court". 952 So. 2d at 293. The *Sandefer* court found that the defense witness should not have been excluded and reversed with remand for a new trial. *Id.*

The present case does not involve a "cynical scheme" nor wilful misconduct by either defense counsel nor the defendant. Instead, here there was just the impression that, since the state provided the information, it knew about the information and that the information did not have to be re-disclosed under Rule 9.04.

The extreme punitive measure of evidence exclusion is reserved for the worst cases of defendant misconduct of which there is none in the record of this case. Not only was there no showing of misconduct here by the defense, there was absolutely no prejudice to the state. To affirm the County court's exclusion of the dispatch report here violates the sound rule that a defendant always has a right to establish a defense. *Washington v. Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920, 1923, 18 L.Ed. 2d 1019 (1967), *Wilson v. State*, 390 So. 2d 575, 581 (Miss. 1980). *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S.Ct. 1038, 1049, 35 L.Ed. 2d 297 (1973).

A trial de novo in Circuit Court is respectfully requested under this issue pursuant

to UCCCR Rule 12.03.

CONCLUSION

Mark Mathews is entitled to have both convictions in this case reversed and rendered or reversed with a trial *de novo* in Circuit Court pursuant to UCCCR Rule 12.03.

Respectfully submitted,

MARK MATHEWS

By: 
Chris N. K. Ganner, His Attorney

CERTIFICATE

I, Chris N. K. Ganner, do hereby certify that I have this the 23 day of January, 2013, mailed a true and correct copy of the above and foregoing Brief Of Appellant to Hon. John Emfinger, Circuit Court Judge, P. O. Box 1885, Brandon MS 39043, Hon. Edwin Y. Hannan, County Court Judge, P. O. Box 1626, Canton MS 39046, Hon. John Hedglin, P. O. Box 40, Madison MS 39130, and Hon. John R. Henry, Jr., Asst. Atty. General, P. O. Box 220, Jackson MS 39205.

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