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IN THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT
STATE OF FLORIDA

MANDI JACKSON,

Appellant,

vs. DCA CASE NO. 5D19-3411

STATE OF FLORIDA,

Appellee.

_____/

**APPEAL FROM THE CIRCUIT COURT**
**IN AND FOR SEMINOLE COUNTY, FLORIDA**

# INITIAL BRIEF OF APPELLANT

Respectfully submitted,

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## STATEMENT OF THE CASE

The Appellant, Mandi Jackson, (hereinafter "Ms. Jackson"), was charged by Indictment # 2016-CF-003668B filed January 12, 2017 with: Count 1 – First degree felony murder, Count 2 – Burglary of a dwelling with an assault or battery, and Count 3- Robbery. (R71)[1]. Ms. Jackson entered a plea of not guilty. (R74-75).

The State presented a motion to compel Mr. Love (Ms. Jackson) to unlock a cell phone recovered during the execution of a search warrant. (R104-108). After arguments presented by all counsel, the Court reserved ruling based on the issue of immunity, and later granted the motion. (R122-125).

On October 29, 2019, Ms. Jackson was tried before the Eighteenth Judicial Circuit for Seminole County. (R1-1681). Defense counsel moved for a judgment of acquittal, which the Court denied. (T1383-1385). The jury found MS. Jackson guilty on all counts. (T1540). Ms. Jackson was sentenced to life in prison on both Counts I and II of the Indictment and to fifteen years of prison in Count III, all counts to run concurrently. (T1558 ).

[1] In this brief, the following abbreviation will be used, followed by the corresponding page number: "R" - References the record on appeal (R#). "T" – Refers to the trial transcript (T#). "SUPP"- Refers to the supplemental record (SUPP#).

A timely Notice of Appeal was filed November 20, 2019. (R1660).

## STATEMENT OF THE FACTS

***Trial Evidence.***

The State presented its first witnesses, the victim's neighbors. The first neighbor remembered that he was woken up around 6:30 a.m. by "yelling and banging and moving around in the apartment right above me, including furniture being moved on the balcony." (T100-118). He tried to go back to sleep, but recalled that there were "multiple voices" and running from one side of the apartment to the other. He did not recognize the gender of the voices, how many people were yelling, or if the voices were angry or scared. Additionally, he did not hear a gun shot. He "leaned to [his] window to look out," but did not see anything, but some joggers passing by. He then laid back down and tried to go back to sleep. The second neighbor was awakened by his alarm at 6:30 a.m. and heard "loud voices and people arguing." (T131--144). After a while, he heard someone calling for help, looked out from the balcony, and saw the victim laying on the ground. He returned inside to get his phone to call for help and returned out to the balcony. He saw that the people passing by were with the victim and the police had arrived; he never went down to the victim and got ready for work.

The next two witnesses were siblings taking a morning walk. The brother recalled that early in the morning, he heard loud voices that were probably male, but he could not recall where they were coming from. He heard a "pop" sound, that he

did not recognize, and someone say “oh no.” The next thing that drew his attention was a man had walked out on the balcony, had raised his arms up over the balcony, when his legs came over the top. The brother yelled out, “no, don’t,” thinking the victim was committing suicide, and the victim went over. He did not see anyone else on the balcony. The sister also recalled some yelling that morning and thought it was a domestic dispute. She heard the “pop” and first looked for light or balloons that may have popped, but then recognized the sounds as gunfire. She referenced her brother telling the victim “no don’t,” as the victim was standing with both feet on the rail of the balcony, but the victim fell, and they called 911.

There was testimony from the bartender at Thee Dollhouse that she knew the victim as they worked together over a number of years and created a personal relationship. (T305-326). At Thee Dollhouse, the bartender would hire entertainers and act as an assistant manager. She recalled that the night of December 13, 2016, the Ms. Jackson came to the club and applied by an application to dance, using the name Brittany. She testified that the Ms. Jackson entertained the night of the 13th, and stayed at the club until they closed at 2:00 a.m.

From Thee Dollhouse, an entertainer also testified that she met the co-defendant after the club had closed. She and the Ms. Jackson talked about a selection of dresses to dance in and the entertainer let her borrow a dress.

She obtained the Ms. Jacksons phone number to keep in touch and to get the dress back. The Ms. Jackson texted the entertainer at 2:26 a.m. on December 14, 2016.

Detective Athaide (hereinafter "Det. Athaide") responded to the victims apartment on December 15th, to obtain video footage from the property manager. The victim's apartment video surveillance was received into evidence. Det. Athaide narrates the video beginning with the victim entering the first-floor parking garage at 4:22 a.m. and walking out towards Uptown Blvd. The victim walks back towards the apartment, enters the main building from the parking garage, and takes the elevator up to the 5th floor. The victim then traveled back down to the 1st floor and exited the parking garage. (T391-417)

The video continues to reflect Mr. Love attempted to summon the elevator, then take the freight door to the fifth floor. After arriving on the 5th floor, Mr. Love entered the elevator, but does not select a button. He was there for 3 minutes approximately, then reenters the 5th floor. Mr. Love then arranges the freight door to keep from locking.

Next, the victim met with the Ms. Jackson in a black vehicle. The vehicle entered the parking garage using the victim's key fob at approximately 4:57 a.m. The victim was seen with a red cup in his hand, accessing the door from the parking garage. The co-

defendant parked her vehicle on the 5th floor of the parking garage. The victim and the Ms. Jackson are together, and she was wearing a jacket that she was not wearing before.

The Ms. Jackson was seen coming out the door on the 5th floor and at 6:44 a.m. the black vehicle traveling out the parking garage at an increased rate of speed. Det. Athaide confirmed that the time that appeared on the surveillance video was 7 minutes faster than the time that appeared on the time log of the key fob log. (T391-417)

Detective Sprague (hereinafter "Det. Sprague") (testimony T1110-1187) learned that the victim returned home from work around 4:30 a.m. and the 911 call came in regarding the victim around 6:37 a.m. During this time, it appeared that there was an after party and a struggle took place. Det. Sprague became familiar with knowing Mr. Love and the Ms. Jackson while reviewing Walmart surveillance. He was familiar with the clothing that each of them was wearing and the black vehicle.

Det. Sprague physically met Mr. Love for the first time on December 19th at Mr. Love's house, the day Mr. Love was arrested. Upon meeting Mr. Love, Det. Sprague recognized the clothing Mr. Love was wearing from the Walmart surveillance video. He interviewed Mr. Love for approximately 15-20 minutes. During the interview, Mr. Love admitted he may have heard of Jim, James, or GQ, because the Ms. Jackson was a dancer but did not know him personally. The interview continued and Mr. Love stated that he

did not recognize a picture of the victim, and that he has never met him. The detective continued to describe his theory that lead up to the victim's death and Mr. Love denied being at the victim's apartment.

Det. Sprague physically met the Ms. Jackson for the first time on December 19th at the Ms. Jacksons house, the day the Ms. Jackson was arrested. It was unclear if the Ms. Jackson was sitting in the passenger seat when the vehicle was leaving the garage of the victim's apartment. From the angle of the video, Det. Sprague was unable to tell who was driving, who was in the passenger seat, or even if there was a passenger. However, he was able to confirm that upon the vehicle entering the parking garage, the Ms. Jackson was driving, and the victim was in the passenger seat.

The medical examiner (testimony T 933-963) found that the bullet entered the victims left thigh and came out on the left side of the thigh as demonstrated on Exhibit 194. She concluded that the cause of death was from the blunt force injuries, the injuries from the neck and the cervical spine fracture from the fall. The gunshot wound did not sever or cut any major arteries in the victim's leg, and by itself was non-fatal. She did not find injuries being consistent with the victim being restrained; nothing consistent with zip tie injuries. However, the toxicology report of the victim, showed recent cocaine use, use of Viagra, consumption of alcohol at a level of .197. The mixture of cocaine and

alcohol could have been a deadly mix depending on with the cocaine is cut with. Additionally, the medical examiner explained that she did not see any gun powder on the victim, and that it was hard to also determine residue of any tape because while the victim was in the hospital, the staff would have wiped him down to sanitize the area for procedures.

***Motion to Compel Hearing***. On August 22, 2017, Ms. Jackson appeared for a hearing on the State's Motion to Compel, to disclose the cell phones password. (R106-107). The State presented Nathaniel McFelia, a cybercrime special agent of the Florida Department of Law Enforcement. (R118-119). S.A. McFelia received the Galaxy S5 cell phone and attempted to extract the contents according to the search warrant, but the device was locked. (R118-119). He continued to try and access the phone using other capabilities, but was unable to bypass the passcode requirement.

The State, relying on *State v. Stahl*, 206 So.3d 124 (Fla. 2nd DCA 2016) the only district case at the time that addressed the issue, argued that compelling the defendant to release the password or to unlock the phone was an issue of first impression. In the present case, the State followed the procedure in *Stahl* and offered "use immunity," Mr. Love and the Ms. Jackson immunity for the "simple act of providing the password" or unlocking the cell phone to give the

State access. In addressing Fifth Amendment privilege, the State conceded that they were compelling information and that the information was incriminating.

As an exception to the Fifth Amendment privilege, the State offered that *Stahl* applied the foregone conclusion doctrine. According to the State, the doctrine requires three elements: that a passcode exists, the passcode is in the defendant's knowledge or control, and that the passcode is authentic. The State argued the three elements are met under the foregone conclusion doctrine and concluded that the exception to the Fifth Amendment privilege applied.

The court inquired as to evidence that the State must show to establish control or possession of the passcode by Mr. Love or Ms. Jackson.
The State responded that the affidavit connected the phone number to the codefendant through the victim's place of employment, being accompanied by the victim the morning of the incident and given to a coworker as a method of contact. The State presented a connection with the cell phone number to Mr. Love's Facebook account through a relationship with the codefendant, a pawn history account, an arrest report, and the last number connected with the victim's phone records. In addition, the State presented that Mr. Love and Ms. Jackson shared a residence where the cell phone was located. Arguments included that a sufficient grant of immunity would need to be in writing and executed by the State Attorney before it could be reviewed or

considered. Arguments relied on *U.S. v. Hubbell*, 530 U.S. 27 (2000) and *In Re Grand Jury Subpoena Duces Tecum*, dated March 25, 2011, 670 F.3d 1335 (11th Cir. 2012). Both cases address the issue of whether an "inference can be drawn from the statement given any criminality." These cases are distinguished from *Stahl* in that *Stahl* addressed only one defendant accused of using a phone in a criminal occurrence.

Arguments continued in "the statement itself of giving the passcode or being compelled to do the act of putting the passcode in draws the inference that that person was able to use the phone." The phone records create a connection between the victim's phone and the cell phone in question, not a connection with any defendant. By either defendant providing the passcode, it would "draw the inference that that person was the person making those communications, because they had the ability to operate the phone at that time." Two people have been connected to one cell phone used in an incident, but no connection has been made to who was making the communications. There is no foregone conclusion that either defendant specifically operated or possessed the cell phone.

Defense counsel made additional arguments to be considered. First, *Stahl* involved a third-degree felony and is distinguished by Mr. Love's case of a first degree murder. A "heightened level of due process" should be applied with the seriousness of the charge. Second, Mr. Love has an "ultimate

right to remain silent" and the State by compelling him to talk by the forgone conclusion is trying to "trump" that right. Furthermore, the State's motion lists the subscriber to the phone as "Beth Love," not Mr. Love; however, the State wants to order him to provide this information instead of the listed subscriber of the cell phone. No evidence has been presented to the Court, other than an assumption that Mr. Love has knowledge of the cell phone passcode.

The Court found that *In Re Grand Jury Subpoena Duces Tecum*, dated March 25, 2011, states under the foregone conclusion doctrine, that "an act of production is not testimonial, even if the act conveys effect regarding the existence of a location, possession, or authenticity of the subpoenaed materials. If the government can show with reasonable particularity that at the time it sought to compel the act of production, it already knew of the materials thereby making any testimonial aspect a foregone conclusion." And in *Stahl*, "the only appellate case in the State of Florida…would define as a foregone conclusion exception, and it again states even the testimonial communication implicit in the act of production does not rise to the level of testimony within the protection of the Fifth Amendment, where the State has established through independent means the existence, possession, and authenticity of the documents."

The Court ordered Mr. Love to unlock the cell phone. (R122-125). The

Court ruled based on the testimony of S.A. McFelia that one of three different types of passcode must exist to access the phone, the phone number, and the phone were in possession of both defendants, and that *Stahl* declared technology is self-authenticated.

This appeal follows.

## SUMMARY OF THE ARGUMENT

The court erroneously granted the State's motion to compel Mr. Love to disclose the cell phone passcode relying on the foregone conclusion doctrine. As a result, Mr. Love's Fifth Amendment rights were violated.

The State failed to sufficiently prove that either Ms. Jackson or Mr. Love had an intent to commit any crime therein, as a required element of burglary. The court improperly denied Ms. Jackson's motion for judgment of acquittal when there was no evidence amounting to a suggestion of any intent to commit an offense within the residence. At most, the State proved an illegal use of credit cards/ identity theft or theft. Furthermore, the State failed to show that an act of violence or fear was used while taking any property of the victim. The evidence presented in this case is sufficient only to sustain a conviction of grand theft.

## STANDARD OF REVIEW

The standard of review applied to the trial court's factual findings is whether competent, substantial evidence supports the findings. However, the appellate court reviews de novo the trial court's application of the law to the facts." *State v. Quinn*, 41 So. 3d 1011, 1013 (Fla. 5th DCA 2010) (*citing D.B.P. v. State*, 31 So. 3d 883, 885 (Fla. 5th DCA 2010)).

In reviewing a motion for judgment of acquittal, a de novo standard of review applies for the sole purpose of determining whether the evidence is legally sufficient. *Reynolds v. State*, 934 So.2d 1128 (Fla. 2006); *Pagan v. State*, 830 So. 2d 792, 803 (Fla. 2002). The conviction is reversed only where it is not supported by competent, substantial evidence. *Boyd v. State*, 910 So.2d 167, 180 (Fla. 2005); *Pagan* at 803. The appellate court determines, when viewing the evidence in the light most favorable to the State if sufficient evidence exists that would permit a rational trier of fact to find the elements of the crime beyond a reasonable doubt. *Pagan* at 803.

## ARGUMENT

## POINT ONE

THE COURT ERRED IN GRANTING THE STATE'S MOTION TO COMPEL THE CELL PHONE PASSCODE AS THE FOREGONE CONCLUSION EXCEPTION DOES NOT APPLY.

Ms. Jackson argued that the States motion to compel violated her Fifth Amendment right against self-incrimination. The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." *U.S. Const. Amend V.* "The essence of this basic constitutional principle is 'the requirement that the State which proposes to convict and punish an individuals produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips." *Estelle v. Smith*, 451 U.S. 454, 462 (1981) (emphasis omitted) (citation omitted).

By compelling Ms. Jackson to provide the passcode to the cell phone, the court required Ms. Jackson to be a witness against herself and allow the State access to the contents of the cell phone, which were previously unknown. In its argument, the State relied on *State v. Stahl*, 206 So. 3d 124 (Fla. 2nd DCA 2016). The State explained that in *Stahl*, the authorities could not gain access to the cell phone

contents related to a voyeurism offense because the cell phone was passcode protected. The defendant in that case was offered "use immunity."
. The State presented that in following the *Stahl* case, a defendant's Fifth Amendment privilege is assessed by the defendant being compelled to provide information, the information being compelled is testimonial, and that the testimonial communication was incriminating.

The State has conceded that the information requested was incriminating, but argued that the foregone conclusion exception applied. However, *Stahl* finds that "in order for the foregone conclusion doctrine to apply, the State must show with reasonable particularity that, at the time it sought the act of production, it already knew the evidence sought existed, the evidence was in the possession of the accused, and the evidence was authentic." *Stahl* at 135, citing *In re Grand Jury Subpoena Duces Tecum Dated March 25, 2011*, 670 F.3d 1335, 1344 (11th Cir. 2012).

In its attempt to meet the foregone conclusion exception, the State provides that a passcode exists, the passcode is in the defendant's knowledge or control, and that the passcode is authentic. This information is insufficient to meet the threshold of the doctrine. The exception requires "that it already knew the evidence sought," here, the State has not provided any evidence that the contents

were being sought with particularity. The State relied on the meaning of the foregone conclusion to be applied to the passcode; however, it is the passcode that is protecting the contents for which the foregone conclusion applies. The State was compelling Mr. Love to provide them access to the cellphone because they did not know the information in its contents and had expectations of finding incriminating evidence. This act results in an illegal search and a violation of Mr. Love's Fifth Amendments rights.

Since the judgment was filed in this case, the Fourth District of Appeals has held in *G.A.Q.L. v. State*, that cell phone passcodes are testimonial. *G.A.Q.L. v. State*, 257 So.3d 1058 (4th DCA 2018). "Without reasonable particularity as to the documents sought behind the passcode wall, the facts of this case 'plainly fall outside' of the foregone conclusion exception and amount to a mere fishing expedition." *Id.* at 1064. The court held "this holding, which focuses on the passcodes rather than the data behind the wall, misses the mark." *Id*. at 1063. The *G.A.Q.L*. court certified conflict with the *Stahl* case, finding that a passcode is a protected testimonial communication under the Fifth Amendment. The *G.A.Q.L.* court specifically disagreed with *Stahl* regarding the use of the foregone conclusion. The court found that it is important to consider is what is behind the passcode, not the passcode itself.

in the *G.A.Q.L.* case, there was nothing in the record that revealed the evidence the State sought, which was behind the defendant's passcode, besides having a search warrant. The lack of evidence showed that the State hoped the search would produce evidence, rather than the State knew what existed behind the passcode. The *G.A.Q.L.* court concluded, "All of these password cases, with the exception of Stahl, have determined that the compelled production of a passcode is more akin to revealing a combination than producing a key. This is so because revealing one's password requires more than just a physical act; instead, it probes into the contents of an individual's mind and therefore implicates the Fifth Amendment." *G.A.Q.L.* at 1061.[2]

The State erred in misapplying the foregone conclusion doctrine; therefore, the court erred in granting the State's motion to compel. As a violation of his Fifth Amendment rights, Mr. Love is entitled to a new trial with the exclusion of any evidence obtained through the illegal search. Furthermore, as of the date of this filing, the Fifth District Court of Appeal has not weighed in on the issue of whether disclosing the password to a cell phone is testimonial and, by itself, a Fifth

[2] The court referencing: *In re Grand Jury Subpoena Duces Tecum Dated March 25, 2011*, 670 F.3d 1335 (11th Cir. 2012); *United States v. Kirschner*, 823 F. Supp. 2d 665 (E.D. Mich. 2010); *Seo v. State*, 109 N.E.3d 418 (Ind. Ct. App. Aug. 21, 2018).

Amendment violation. If this Court finds that compelling a passcode is a violation, this Court should certify conflict with *Stahl.*

## POINT TWO

JUDGMENT OF ACQUITTAL SHOULD HAVE BEEN GRANTED.

The trial court, in denying the motion for judgment of acquittal, found that the evidence presented by the State was sufficient to prove the offences of burglary, robbery, and felony murder. The trial court erred in denying the judgment as the State has not provided sufficient evidence that: (1) Ms. Jackson while in the victim's residence, had the intent to commit a burglary, (2) force, violence, assault, or fear was used during to obtain the victims credit card or property, and (3) therefore, the victim was killed during the commission of a burglary or robbery.

In a circumstantial evidence case, if the State fails to present evidence from which the jury can exclude every reasonable hypothesis except that of guilt, a motion for judgment should be grated. If the State does not offer evidence which is inconsistent with the defendant's hypothesis of innocence, then the evidence is insufficient as a matter of law to warrant a conviction. *K.S. v. State*, 814 So.2d 1190, 1193 (Fla. 5th DCA 2002). If a court determines that the evidence is insufficient to support a conviction (or adjudication), the proper remedy is

acquittal. *Burks v. United States*, 437 U.S. 1 98S.Ct. 2141, 57 L.Ed.2d 1(1978); *Santiago v. State*, 874 So.2d 617 (Fla. 5th DCA 2004).

**Burglary**. Pursuant to the jury instructions, to prove the crime of burglary, the State must prove: At the time of entering, Scott Love had the intent to commit an offense in that structure; or Scott Love, after entering the structure, remained therein with the intent to commit a Robbery, or an Aggravated Battery.

Defense counsel properly argues that the element of trespass is required to prove the offense of burglary. Pursuant to *Pepitone v. State*, 846 So.2d 640 (Fla. 2d DCA 2003), when an accused enters a dwelling of another with the intent to commit an offense, then a burglary has been complete; however, if the accused enters a dwelling of another with no intent to commit an offense, then a trespass has occurred. "Burglary is a specific intent crime because it requires that the 'entering or remaining in' be with the intent to commit a crime. It is this specific intent which distinguishes burglary from a simple trespass, which requires no such intent." *M.H. v. State*, 936 So.2d 1, 3 (Fla. 3rd DCA 2006).

The record does not reflect that Mr. Love entered the apartment of the victim, or obtained after entrance, the intent to commit a crime. The record accurately demonstrates that after a period of time, while in the apartment, Mr.

Love and the victim had an altercation, which resulted in the victim getting shot in the leg. Mr. Love's actions comport with the facts established by the State, but the weight of the evidence supports Mr. Love's reasonable hypothesis of innocence. The State has the burden to prove all of the elements charged, but failed to prove a specific intent to commit an offense. The evidence presented would only support a conviction of assault, battery, or trespass.

**Robbery**. Pursuant to the jury instructions, to support a conviction of robbery, the State must prove force, violence, assault, or putting in fear was used during the taking. "When the evidence against a criminally accused person is circumstantial, a motion for judgment of acquittal should be granted if the state fails to present evidence from which the jury can exclude every reasonable hypothesis except that of guilt." *Brothers v. State*, 853 So.2d 1124, 1125 (Fla. 5th DCA 2003).

The record clearly reflects that the victim was shot in the leg and died as a result of falling from his 5th floor balcony which seems to be intentional on the part of the alleged victim. However, the State has not presented sufficient evidence to establish that these injuries occurred during a crime, rather than the result of an alteration. The alleged victim was so high on cocaine and booze that suicide could not be ruled ruled out as theory of defense.

F**elony Murder**. The evidence is insufficient to warrant a conviction for burglary or robbery; therefore, insufficient to support a felony murder conviction. There was no evidence presented by the State that contradicts or is inconsistent with Appellants theory of the case that the victim consented to Mr. Love coming into the apartment, the gun belonged to the victim, the victim was the aggressor, and the credit card was found after leaving the apartment.

The State has not presented direct evidence showing that Mr. Love had the intent at the residence, to commit a crime, nor that any aspect of violence or fear was used in taking the credit card. Mr. Love's conviction and sentence for burglary, robbery, and first-degree felony murder should be reversed and vacated, remanded with further instructions.

## CONCLUSION

BASED UPON the foregoing cases, legal arguments, authorities, and policies presented herein, Ms. Jackson, by undersigned counsel, respectfully submits that the conviction and sentence should be reversed and vacated, and remanded with further instructions.

Respectfully submitted,

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## CERTIFICATE OF FONT

I HEREBY CERTIFY that the font used in this brief is 14 point proportionally spaced Times New Roman.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been filed electronically through the Florida Courts E-Filing Portal in the Fifth District Court of Appeal, 300 South Beach Street, Daytona Beach, Florida 32114, at https://www.myflcourtaccess.com; which will email a copy to the Office of the Attorney General, 444 Seabreeze Boulevard, Fifth floor, Daytona Beach, FL 32118, at crimappdab@myfloridalegal.com; and a true and correct copy thereof delivered by USPS to Ms. Mandi Jackson, Inmate #G90650, 3700 NW 111th Place Ocala, Florida 34482-1479 on this 25th day of May 2020.

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