VOLUME FOUR OF EIGHT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Spartanburg County

Honorable Paul M. Burch, Circuit Court Judge

MARION ALEXANDER LINDSEY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-001271

APPENDIX

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RESPONDENT'S EXHIBIT #10 (SUMMARY OF STATE'S WITNESSES) 3080

RESPONDENT'S EXHIBIT #11 (DISCOVERY FROM SOLICITOR'S OFFICE) 3083

RESPONDENT'S EXHIBIT #12 (JURY PANEL DOCUMENT) 3085

RESPONDENT'S EXHIBIT #13 (EXPERT WITNESS LIST) 3089

RESPONDENT'S EXHIBIT #14 (NOTES) 3090

COURT'S EXHIBIT #1 (ABA GUIDELINES) 3109

PETITIONER'S POST-TRIAL MEMORANDUM 3284

RESPONDENT'S POST-HEARING MEMORANDUM OF LAW 3345

ORDER OF DISMISSAL 3536

MOTION TO RECONSIDER, ALTER AND AMEND 3728

RESPONDENT'S MEMORANDUM IN OPPOSITION TO PETITIONER'S MOTION TO RECONSIDER, ALTER AND AMEND 3738

ORDER DENYING MOTION TO RECONSIDER, ALTER OR AMEND 3751

PROPOSED ORDER OF DISMISSAL 3752

INDICTMENT 3944

THE FOLLOWING EXHIBITS ARE ON FILE WITH THIS COURT:

APPLICANT'S EXHIBIT #26 (AUDIOTAPE)

APPLICANT'S EXHIBIT #27 (PHOTOGRAPH)

APPLICANT'S EXHIBIT #28 (PHOTOGRAPH)

evidence of pictures and things that will be presented in evidence. The windows rolled up in the back.

Marion asked Celeste where are you going, have you seen Nell. As Celeste was telling him that she had not seen Nell since last Sunday, Keysha, the youngest daughter, who was in her car seat -- she was in a car seat in the backseat in the right passenger side. Kiera who is 7 years old was in the middle seat, the middle of the back seat. And Nell was sitting behind the driver's side in the back seat. Julia Martin was sitting in the front passenger seat. Of course, Celeste was driving.

She was talking to him. The youngest one was saying hello to Marion. Marion said roll down the back window so I can see who's back there. She just told him that Kiera was back there sleeping. When she heard that, she gunned as fast as she could. She was going to the Inman Police Department. Nell got on her cell phone and called 911. You will be hearing that tape. You will be hearing the last words that Ruby Lindsey said that night. You will hear what happened from that point on after she called.

What happened was, they arrived at the Inman Police Department. Marion Lindsey was following in his girlfriend's car, Latresse Smith's car. Celeste

pulled in. As the 911 call was being made, Benny Godfrey of the Inman Police Department was out in the parking lot. He was just receiving the call as they pulled out.

Celeste jumped out and asked for help. Marion Lindsey pulls his car behind them and up to the side of them and jumps out of the car, comes to the back of Celeste's vehicle. You will hear Nell Lindsey say I'm not going to get out. Celeste was trying to get her out. She says roll up the window and lock the door.

He comes up to the back window and shoots two shots into the back window. Goes around and shoots two more shots in the side window. Nell Lindsey is sitting there behind the driver's seat with Kiera right beside her in and Keysha in the baby seat. Three of the shots hit Nell Lindsey in the head. She still had the cell phone in her hand.

One of the shots hit her in the back of the neck and went through the backseat right in the center of the back seat into the trunk. Celeste Nesbitt was trying to talk to Officer Godfrey at the time it happened. Mr. Godfrey saw what happened and reacted as quickly as he could and fired shots and shot Marion Lindsey. Marion Lindsey was captured there, taken

custody and taken to the hospital and was treated. Nell Lindsey was dead on the scene.

That is basically the facts of the case, ladies and gentlemen. You will be hearing some law from the Judge. Judge Few will give you the law on this case. The defendant has been charged with murder. Murder is malice aforethought on killing somebody. And malice can be an evil thing, an evil doing or evil thought. It can happen just like that. It is not have to be long. It does not have to be planned out. He followed her to the police department. He used a .38 pistol.

You will see all of this evidence that was found at the scene. We will be showing you pictures. You will be hearing that 911 tape. We just ask you to consider the evidence. Because later on, we will be coming up and talking to you after all the evidence is shown and ask you for verdict of guilty of murder against Marion Lindsey. Thank y'all very much.

Thank you, Your Honor.

MR. BRENNAN: May it please the Court, Your Honor.

THE COURT: Yes, sir.

MR. BRENNAN: Ladies and gentlemen of the jury, on September the 18th, 2002, a tragedy occurred.

Ruby Nell Lindsey was killed. And I am not going to tell you that Marion Lindsey did not cause her death. He did.

Just a minute ago, Mr. Barnett described four shots. Ladies and gentlemen, Mr. Lindsey shot a fifth time too. That fifth shot went to his head. See, Mr. Lindsey was absolutely distraught. His wife had left him. And she was going to make a new life. But as a part of her new life, she was not allowing him to see his two children.

Mr. and Mrs. Lindsey had separated on a number of occasions before, but she had never kept the children from him. This was a difference. These two boys were his life. His two boys were all he had. This time, she was not letting him see his boys. His baby boy, his youngest son he called his road dog. He went everywhere together. This time, he could not see his children.

Mr. Barnett had mentioned a conversation that took place between Marion Lindsey and Celeste. He asked if she could let me see my children. And she said I don't know. Ladies and gentlemen of the jury, the issue in this trial is malice aforethought. That is the issue. We just ask you to sit and listen to all the evidence before you make your decision. Mr.

Lindsey was distraught. Mr. Lindsey's family had fallen apart.

See, Marion Lindsey never had a dad. He never had a dad. He was determined, absolutely determined to be the dad for his two young children that he did not have in his life and the opportunity to be the dad that he wanted to be, that he needed to be for his children --

MR. BARNETT: Objection, Your Honor. I believe we're getting outside of the facts of the case and the relevance of it too, Your Honor.

THE COURT: Mr. Brennan, confine your opening statement to a discussion of the evidence that the jury can expect to hear during the trial and no argument please.

MR. BRENNAN: Yes.

His family had come apart. He was distraught. As a result of that, Ruby Nell Lindsey's life was taken. Ladies and gentlemen, we just ask you to wait and listen to all the evidence before you make your decision. Thank you for your time and your patience.

THE COURT: Call your first witness.

MR. BARNETT: I'll call Freddy Thompson to the stand, Your Honor.

FREDDY THOMPSON

having first being duly sworn testified as follows:

DIRECT EXAMINATION

BY MR. BARNETT:

Q Mr. Thompson, if you will state your name for the record please.

A Fred David Thomas.

Q And where do you work at, sir?

A Spartanburg County Communications 911 Department.

Q What is your position there, sir?

A My title is Assistant Director.

Q And in your duties there, are you there to maintain the records of 911?

A Custodial records, yes.

Q Could you tell the jury a little bit about what 911 does with the records.

A After the calls come in through the radio or telephone, they are then recorded onto a recording device. From there, we take it from that recording device onto tape or CDs to go to the various departments.

Q Did you have a request to do a 911 tape from September 18, 2002?

A Yes, sir. We did.

Q Let me show you State's Exhibit 21(a). Did you make a copy for the sheriff's department and so forth?

A Yes, there was a copy made of this.

Q And was this copy made and given to the Sheriff's Office for the Solicitor's Office?

A Yes.

Q This is the direct tape from 911 communications?

A Correct.

MR. BARNETT: Your Honor, I would like to move 21(a) into evidence at this time.

THE COURT: Any objections?

MR. BRENNAN: Your Honor, for the reasons argued previously, we would object to the admission of that tape.

THE COURT: Well, you're going to have to state them again.

MR. BRENNAN: Your Honor, 404 -- excuse me, 403.

THE COURT: You don't have to argue it. Just tell me what the objection is. You object under Rule 403.

MR. BRENNAN: 403.

THE COURT: Any other objection?

MR. BRENNAN: 404(b), Your Honor.

THE COURT: All right. 403 objection -- this is 21?

MR. BARNETT: 21(a).

THE COURT: 21(a), the 403 objection is overruled. I have some additional statements to make

about the grounds for my ruling that I will make during the next break if you all will remind me. 404(b)?

MR. BRENNAN: Yes, Your Honor.

THE COURT: 404(b)?

MR. BRENNAN: Yes, Your Honor.

THE COURT: Overruled.

MR. BARNETT: Thank you, Your Honor.

BY MR. BARNETT:

Q Please answer any questions Mr. Bartosh may have for you.

MR. BRENNAN: I have no questions, Your Honor.

THE COURT: You can step down, sir.

THE WITNESS: Thank you.

THE COURT: Call your next witness.

MR. BARNETT: I call Rusty Clavenger to the stand.

CHARLES CLAVENGER

having first being duly sworn testified as follows:

DIRECT EXAMINATION

BY MR. BARNETT:

Q If you would, sir, please state your name.

A Charles Russell Clavenger.

Q Where do you work, sir?

A In the Solicitor's Office here in Spartanburg.

Q What is your position?
A I am the Senior Criminal Investigator.
Q Were you given a tape that I believe was marked as 21(a) State's Exhibit of a 911 call that occurred on September 18th?
A Yes, sir.
Q Did you take this tape to Greenville to Ms. Daniels?
A I did, Ms. Diana Daniels.
Q Did she look at the tape and use it and transfer it just simply to enhance the sound of it?
A Yes, sir.
Q Were you present during the time?
A I was.
Q Was this tape your possession from the time from my office all the way over to her office?
A It was.
Q Was transferred to a CD format?
A It was.
Q Did you bring that CD format back along with the tape?
A I did.
Q Is this the CD marked as State's Exhibit 21?
A Yes, sir, it is.
Q That has been in the position of the Solicitor's

Office since?

A That is correct.

Q Thank you, sir. If you would answer any questions Mr. Bartosh or Mr. Brannan may have for you.

MR. BRENNAN: I have no questions, Your Honor.

THE COURT: You can step down, Mr. Clavenger.

MR. GOWDY: May it please the Court, Your Honor. The state would call Diana Waters.

DIANA WALTERS DANIELS

having first being duly sworn testified as follows:

DIRECT EXAMINATION

BY MR. GOWDY:

Q Good morning, ma'am.

A Hey.

Q Can you introduce the yourself to the jury and tell them your name.

A I'm Diane Walters. I'm known in the upstate as Diana Daniels.

Q You say you're known in the upstate as Diana Daniels. Is that because in addition to working for Williamson and Evans, you have another job?

A I do. I work on the radio.

Q And Diana Daniels is your radio name?

A That's correct.

Q What radio station are you on?

A Currently, I work for Clemson University. I produce a show heard statewide.

Q We'll call you Ms. Walters for purpose of this court hearing.

A Yes, sir.

Q Where do you work in Greenville?

A I work at a recording studio called Williams & Evans.

Q Can you tell the ladies of the jury what some of the things that y'all do at William & Evans are?

A Our main purpose is radio and television commercial production, but we have all the equipment to enhance audio. We often offer that service to people.

Q Okay. Let me show you State's Exhibit 21(a) and State's Exhibit 21. With those in front of you, let me ask you this question. The gentleman who just testified, Mr. Clavenger, did he come to your studio at some point and bring State's Exhibit 21(a)?

A Yes, he bought the cassette down there one day.

Q Did you take 21(a) and attempt to enhance or increase the volume?

A Yes, we did.

Q Can you tell the ladies and gentlemen of the jury, what process you go through when you have a known tape that you seek to enhance or raise the clarity of it?

A We took the cassette. We put it in a standard cassette deck and loaded it in to my computer. On my computer, I have a digital editing program called ProTools. In ProTools, you can enhance the volume. You can decrease the volume. You can take out background sounds or whatever. In this particular case, the tape was really good. All we did was raise the volume so you could hear a little bit better.

A When you say all you did was raise the volume, is it fair to conclude that there's nothing on the CD, State's Exhibit 21, that is not also on State's Exhibit 21(a)?

A No, it is exactly the same except louder.

Q You did not add anything to it or take anything off of it?

A No, we did not. In fact, we only enhanced two or three sections of sound for three or four seconds.

Q Do you recall what sections of the tape you were asked to enhance or concluded that needed to be enhanced?

A There was a couple of areas that was some sort of mechanical sound or something some kind of loud bang that they wanted to see if we could make it clear. And we made it louder.

Q When you say mechanical sound, is that a term of art for what could potentially be a gunshot?

A It is something that is not a human voice.

Q It could be a number of things one of which could conclude gunshot?

A I would say that is true.

Q State's Exhibit 21, is that the CD is that you produced at our request?

A Yes, it is.

Q Again, nothing was added or retracted from State's 21(a)?

A No.

Q It were simply made louder?

A Simply made louder.

MR. GOWDY: Your Honor, we would move State's 21 into evidence at this point and ask the Court's permission to publish it to the jury.

MR. BRENNAN: Again, Your Honor, over our 403 objection that we argued previously.

THE COURT: All right. The Rule 403 objection is overruled. Any other objection?

MR. BRENNAN: No, Your Honor.

MR. GOWDY: May I publish it to the jury, Your Honor.

THE COURT: I need to put the basis of my ruling on the record. Is it suitable that with you all -- we discussed it yesterday. Is it suitable to put it on the record during the first break or do you

want me to do it now?

MR. BRENNAN: The break is fine, Your Honor.

THE COURT: You may publish it.

MR. GOWDY: Thank you, Your Honor.

THE COURT: Let me ask this question, Solicitor.

MR. GOWDY: Yes, sir.

THE COURT: The exhibit that you are about to publish, does it contain the entire tape or does it just contain the portion that you had me listen to yesterday afternoon?

MR. GOWDY: It contains the entire tape, I only seek to introduce the part that I played last night.

THE COURT: All right.

MR. GOWDY: We will be standing right beside it to stop it.

THE COURT: I think that for purposes of the record, do you have a counter on that machine so you can tell me where it stopped?

MR. GOWDY: I'm sure there is, Judge. And if I could maybe get Mr. Clavenger to help me figure out where it might be.

THE COURT: If you can't do that, I will just time it myself. And I will put on the record how long

the tape lasted from a certain point.

MR. GOWDY: Yes, sir. There may be a minute clock that goes along with it. And when I stop it, I will tell the Court what that minute clock is.

(WHEREUPON, State's Exhibit 21 was played at approximately 9:47 p.m.)

(WHEREUPON, the tape ended at approximately 9:49 p.m.)

MR. GOWDY: Your Honor, 332 is the clock counter.

THE COURT: I know that the tape played for 18 seconds after she said I'm not getting out.

MR. GOWDY: Okay.

Thank you, Mrs. Walters. Please answer any questions the defense may have for you.

MR. BRENNAN: I have no questions, Your Honor.

THE COURT: Ma'am, you can step down.

Call your next witness.

MR. GOWDY: Your Honor, the State will call Ms. Celeste Nesbitt.

CELESTE NESBITT

having first being duly sworn testified as follows:

DIRECT EXAMINATION

BY MR. GOWDY:

Q Good morning, ma'am.

A Good morning.

Q Ms. Nesbitt, I'm going to ask you to keep your voice open up in a good strong voice so the last two gentlemen of the jury can hear you, okay?

A All right.

Q I want you to introduce yourself to the jury. Tell them where you live?

A My name is Celeste Denise Nesbitt. I live at Inman, South Carolina.

Q For purposes of Madam Court Reporter, is Celeste spelled C-e-l-e-s-t-e?

A Yes, it is.

Q Nesbitt, N-e-s-b-i-t-t?

A Yes.

Q Where do you work, Ms. Nesbitt?

A BMG music in Duncan, South Carolina.

Q How long have you been there?

A 17 years.

Q Did you go to school in Spartanburg?

A Yes, I did.

Q Where did you go to school?

A I went to Chapman High School. Graduated. Two years of Spartanburg Tech but I didn't graduate.

Q What you do at BMG?

A Auto processing.

Q Did you go to school after Chapman High School?

A Yes, Spartanburg Tech.
Q What did you study at Spartanburg Tech?
A General Office Practice and Secretarial Science.
Q Do you have children?
A Yes, I do.
Q What are the ages of your children?
A I have two daughters Kiera and Keysha. The ages are 11 and 5.
Q Keysha is 5 and Kiera is 11. Is that correct?
A Right.
Q Did you know Nell Lindsey?
A Yes, I did.
Q How would you describe your relationship with her?
A We were like sisters. She was like a younger sister to me.
Q What was the age difference if don't mind my asking, Ms. Nesbitt, between you and Mrs. Lindsey?
A She was 28 at the time. I was 39.
Q Y'all have known each other for how long?
A Every since she was 10 years old.
Q I noticed on the tape she referred to you as her sister. Is that the way that y'all referred to each other?
A Yes, we did.
Q Ms. Nesbitt, have you had any occasion to meet

Marion Lindsey?

A Yes, I did.

Q How long have you known Marion Lindsey?

A Since 1996.

Q Did you see him on a frequent enough basis that you knew who he was and what he looked like?

A Yes, I did.

Q Do you see him this morning?

A Yes, I do.

Q I want you to point him out for the jury.

A (Pointing.) He sitting right there between his two lawyers.

Q Okay.

A With the white shirt on.

Q Did you know him as the husband of your friend Nell Lindsey?

A Yes, I did.

Q I want to go to September 18th, 2002. Let's start at say 5 p.m. Where were you and who were you with?

A My mother, my two children. We were headed to the hospital to see my grandmother who I had to admit in the hospital the night before.

Q Okay. Your mother, what is your mother's name?

A Julia Martin.

Q You were at Spartanburg Regional?

A Yes, sir.

Q If I heard your testimony, you just admitted your grandmother the day before?

A Yes, sir.

Q What was the purpose of your visit to Spartanburg Regional on 18th?

A To take care of my grandmother and to see what was the update that the doctors had to give us.

Q You had your two little girls with you?

A Yes.

Q At some point, did you talk to Nell Lindsey while you were at the hospital?

A As I was pulling in the parking lot at 5:45, Nell called me on the cell phone. She asked me where I was at. I said in the parking lot trying to get find a parking lot to come up to see my grandmother. She said I was calling to ask if I could catch a ride home this afternoon. I said sure. She said how long are you going to be there. I said I would wait until she got off from work. She asked me what my grandmother's room was. She said when I get off, I'll be around there.

Q Ms. Nesbitt, through your relationship with Ms. Lindsey had you learned her car had become disabled?

A Yes, I did.

Q She asked you for a ride home?

A Yes.
Q Did you make arrangements on where to meet?
A At my grandmother's room.
Q Ms. Lindsey was an employee of the hospital?
A That's right.
Q She would have been familiar with what your grandmother's room was?
A Yes, sir.
Q Had she come at the time y'all decided upon?
A Yes, she told me she got off at 7:00. She would be around there between 7:15, 7:05 and 7:15. She arrived around 7:15.
Q What happened after Ms. Lindsey arrived at your grandmother's hotel -- at your grandmother's hospital room?
A We sat there and talked for a little while about my grandmother. She told me some helpful things to do to help my grandmother. My sister arrived at 10 'til 8:00. I said Nell, you look like you're tired, so we'll go home. So we left the hospital at 8 o'clock.
Q Where were you living at September 2002?
A In Inman.
Q Where was Nell leaving in September of 2002?
A In Inman.
Q Who was Nell living with?
A Her mother.

Q Do you see her mother in the courtroom here today?

A Yes.

Q Could you point her out for us?

A (Pointing.) She's sitting right there in the brown sweater on, Ms. Caroline Wright.

Q Do you know who else was living with Ms. Caroline Wright and Mrs. Lindsey?

A Nell's two sons.

Q What were their names?

A Alex and Trey L.

Q Do you recall their ages?

A At the time, uh, three and seven.

Q What kind of car were you driving?

A A Mercury Topaz.

Q Did you, your mother, your two daughters and Nell began to work your way towards your car at Spartanburg Regional?

A Yes, we did.

Q You recall where you parked?

A Parked up under Spartanburg Regional garage.

Q Can you tell the ladies and gentlemen of the jury how the folks were situated in the car?

A Yes, I was in the driver's seat. My mother was in the passenger seat. Nell was in the rear driver's back

seat. My oldest daughter was in the middle. And my youngest daughter was in her car seat on the passenger side back seat.

Q Keysha was in the car seat?

A Keysha was in the car seat.

Q Kiera was in the middle?

A In the middle.

Q Now, you said you had a Mercury Topaz. Would you describe to the jury that car as being a large medium or small sized car?

A A medium car.

Q Were the back seats bucket seats or was it a bench seat?

A Bench.

Q There was a car seat in the back did I understand you to say?

A Yes, sir.

Q Would you describe Nell as a tall lady? What size lady was Nell Lindsey?

A She was 5'7. Probably about 150 lbs.

Q She was sitting in the back with your two daughters?

A Yes, she was.

Q Tell the ladies and gentlemen of the jury what happened after you left Spartanburg Regional. What path

you took to get to Inman?

A We left Spartanburg Regional. We went up to 585 to Pine Street. Hit 176. We went all the way up to Inman. As we crossed the high bridge in Inman, we took a right onto Main Street. We traveled so far up and we took another right off Clark Road. Across the railroad track, took a quick left on South Howard Street. As we crossed Howard Street, I said to Nell I thought I saw Tresse's car. She said I thought I saw it too.

Q Let me stop you right there, Ms. Nesbitt. You thought you saw Treese's car?

A Right.

Q Who is Tresse?

A Treese was the girlfriend of Marion Lindsey.

A Are you saying Latresse or Tresse?

A Latresse.

Q Latresse?

A Yes.

Q L-a-t-r-e-s-s-e?

A Yes.

Q Did you know her to be acquainted with Marion Lindsey?

A Yes, I did.

Q Did you know what kind of car she drove?

A Yes, I did.

Q Had you ever seen Marion Lindsey in her car before?

A Yes, I have.

Q Can you describe what kind of car he was in?

A Nissan Sentra.

Q What did you do when you saw Mr. Lindsey in Latresse Smith's car?

A When I saw it and mentioned it to her, she said I thought I saw it turn around back in Springfield. I said why didn't you say anything. She said I did not want to panic or make you panic. So we continued on to her house which was on down Howard Street and turn and went to Pendleton Street.

As we were pulling up to her mother's house, she said that is him driving her car. Don't stop. Keep going. I continued to go on down the street. I pulled into my mother's yard which she lived on the same street. I pulled in and pulled back out and turned around. As I was turning around, he had made a U-turn and turned facing me. How did he come facing you, Ms. Nesbitt?

A At a head-on direction.

Q And you stopped?

A I stopped in the middle of the road.

Q What did he do?

A I rolled the window down. And he rolled the

window down. He said Hey, Celeste. I said Hey, Myron. He said where are you going. I said to take my mother to meet my sister. He said have you talked to Nell. And I said three days ago.

Q I'm going to stop you right here. I'm going to ask you two things. You referred to him as Myron. I have been referring to him as Marion. Did he go by the name Myron?

A Yes, he did.

Q Now I also understood you to say that he asked had you seen Nell and you said I haven't seen her for two days?

A I said I saw her three days ago.

Q Three days ago?

A Yes.

Q But in reality, she was sitting three feet from you, right?

A Right.

Q Why did you tell him that you hadn't seen her for three days?

A Cause I knew they had been through a lot. He told me he had threatened to kill her and threatened to do things. And I didn't want anything to happen right there in my behalf with me and my children.

Q What happened after you told him I haven't seen

her for three days?

A My youngest daughter was speaking to him. And he finally acknowledged and spoke to her. Then he asked who was in the back seat. I said nobody but Keysha. And he said where is your oldest daughter. I said she laying back there sleep. He said is somebody else back there. I said no. He said roll the window down and let me see. I told him no, the window was broken.

Q Let me stop you right there, Ms. Nesbitt. I had in my mind your smallish child being in the car seat. Is she still able to lean forward even though she's in a car seat?

A Yes, she could.

Q How could she do that?

A She slid her arms out of the latch and kind of raised forward. And being that the car is not that big, she kind of raised her head around and was hollering hey.

Q Having been her mother for quite some time, did you ever see her slide her arms out from her car seat before?

A Yes.

Q Is that she was known to do?

A Yes.

Q Can you describe the windows on your car? Were they factory windows? Had they been tinted in any way?

A Yes, they had been tinted.
Q Would you describe tint as light, medium or dark?
A Dark.
Q You have dark tinted windows that are rolled up; is that right?
A Correct.
Q This defendant asked you to roll your windows down to the back seat so he could see who was in the back seat?
A Correct.
Q And you did what?
A I told him no, the window was broken and would not roll down.
Q What happened then?
A He said let me get out and see who was in the back seat. I sped off.
Q You sped off?
A Yes.
Q Where did you go, Ms. Nesbitt?
A I went to the police department. I sped off. Nell asked me should I call my grandmother or call down 911. I said dial 911. She said well, take me to the police station. I said that's where we're going. I went as fast as I could. I ran all the stop signs, ran the red light, jumped the railroad track, hit Main Street and went

straight to the police department.

Q Were you in the courtroom when the jury heard the 911 tape?

A Yes.

Q Is that Nell's voice on the 911 tape?

A Yes, it is.

Q Whose voice that says get out of the car, Nell?

A My voice.

Q Whose voice is it that said I'm not getting out of this car?

A Nell's voice.

Q When you got to the police station, can you describe for the jury for those that are not familiar with a Inman Police Station what the back look like?

A It is like an open parking lot. It is not very big. I pulled into the parking lot. There were several police cars there. I pulled in beside one of the police cars that were already there. I pulled right beside it and tried to get her out.

Q They're going to be setting that up. So try not to let that distract you. I'm going to show you what has been previously marked for identification purposes as State's 22, 23, 24, 25 and 26.

A (Reviewing.)

Q I'm going to ask you to look at each one of those

and tell me whether or not you recognize the scene depicted and is a fair and accurate depiction of what you saw on the evening of September the 18th?

A (Reviewing.)

Q Let me ask you two things. Were you in the courtroom when the 911 enhanced tape was played?

A Yes, sir.

Q Were you in the car for almost the entire time that that phone would've been open and the line would have been opened?

A Yes.

Q At some point, you got out of the car prior to the gunshots. But up until the gunshots, were you in the car?

A Up until the gunshots, I was in the car.

Q Is that a fair and accurate depiction of what happened in the car on September 18?

A Yes, sir, it is.

Q Now you were good enough to look for me as State's 22, 23, 24, 25 and 26. Do these fairly and accurately depict the scene on September the 18th, 2002 in the back parking lot of the Inman police station?

A Yes, sir, it does.

MR. GOWDY: Your Honor, we would move these exhibits into evidence and ask for permission to

publish them to the jury.

THE COURT: Any objection?

MR. BRENNAN: No, sir.

THE COURT: They're admitted. 22 through 26?

MR. GOWDY: Yes, sir, Your Honor.

(WHEREUPON, State's Exhibits 22 through 26 were admitted into evidence.)

BY MR. GOWDY:

Q I'll start by showing you State's 24.

THE COURT: Mr. Parnell, can you see that?

JUROR: Yes, sir.

THE COURT: All right. I want to make sure that each one of you can see everything that is put up on that screen.

So, Mr. Parnell, all you need to do now or later is to tell me that you need to move and we will let you move so you can see it.

And that will also go for the other jurors who are close to the screen.

BY MR. GOWDY:

Q Ms. Nesbitt, can you see that image without having to strain your neck?

A Yes, sir, I can.

Q I'm going to get you to describe that scene for me. If you would take your mouth away from the microphone,

I'm going to get you to stand right here with this laser pointer and keep your voice up for the Court Reporter. Okay?

A Okay.

Q Do you know how to use one of these laser pointers?

A Yes.

Q Again, this is State's Exhibit 24. Ms. Nesbitt, can you tell the jury which car, if any, is yours?

A (Pointing.)

Q That's what you describe as Mercury Topaz?

A Yes, sir.

Q Do you see Latresse Smith's car?

A Yes, sir.

Q Show the jury where that is?

A (Pointing.)

Q Again, who was driving that car on September the 18th?

A Marion Lindsey.

Q Was anyone else in the car with Marion Lindsey?

A No, sir.

Q Is this the way the parking lot looked when you pulled into it?

A Not the fire truck and all of that.

Q Not the fire truck?

A No.

Q How about the blue truck to the left, was it there?

A I can't remember. I think it was.

Q How about the police car?

A Yes, it was.

Q Keeping your voice up, I want you to tell the ladies and gentlemen of the jury -- actually you can have your seat. Tell the ladies and gentlemen of the jury when you got into the parking lot of the police station what happened?

A When I got into the parking lot of the police station, I jumped out. And I tried to get Nell to get out. She told me, she was talking to 911 on the phone. And I was like Nell, get out. Nell, get out. As I was asking her to get out, he was pulling into the parking lot. He jumped out of the car and ran toward the back of the car. As he ran towards the back of my car, I backed up towards the front of the police car.

I saw him pull a gun out and stick the gun to the rear passenger windshield of the car and shot into the car. I then fell to the ground and hollered for help. The police car that I was parked beside had a rear door that was open. I crawled to the back door and crawled inside of the Inman police car and laid on the floor board. I heard shots but

I saw nothing else.

Q Ms. Nesbitt, is there any doubt in your mind as to who you saw shoot into the back of your car?

A No, it is not.

Q Who was it?

A Marion Lindsey.

Q You saw him shoot how many times?

A I saw him shoot one time.

Q After that shot, you did what?

A I fell to the ground and crawled into the back seat of a police car.

Q That police care there?

A Yes, sir.

Q Was there anybody else other than you and Myron Lindsey standing in the parking lot when you got there?

A Yes, it was.

Q Do you know who?

A Officer Godfrey.

Q Officer Godfrey from Inman City?

A Yes.

Q Did Nell ever get out of the car?

A No, she did not.

Q Did your two girls ever get out of the car?

A No, they didn't.

Q Did your mom ever get out of the car?

A No, they didn't.
Q Let me ask you a question about your mom. How is she physically?
A She's all right.
Q How is she mentally?
A She has a touch of Alzheimer's and a loss of long-term memory.
Q How long has she suffered from loss of memory?
A About five or six years.
Q Again, your daughter's ages at the time this night, September 18th, Keysha was how old?
A At the time, she just turned four.
Q Kiera?
A Was 9 getting ready to turn 10.
Q You testified that you crawled and laid down in the back of that police car, is that right?
A Yes, sir.
Q Did you hear additional gunshots?
A Yes.
Q Do you have any idea how many?
A No, I do not. It was a lot.
Q Did you see the police actually fire at Myron?
A When I was crawling, I seen him pull out his gun and run towards me. And I heard shots as I was crawling to the car.

Q Is there any doubt in your mind that that defendant was at parking lot of the Inman City Police Department and shot into the back of your car?

A No, it is no doubt.

Q I'm going to show you State's exhibit 22. That is the front of whose car?

A My car.

Q That is the front of whose car?

A The police car. No, the car that Myron was driving.

Q Is that how close you pulled to the police car that night?

A Yes, it is.

Q I'm going to give the jury one more prospective, Ms. Nesbitt. This is State's Exhibit 26. This is a view going back towards -- well, what is that?

A (No response).

Q That building. Is that the Police Department?

A It's the Police Department, yes.

Q Again, that was your car?

A Yes, it is.

Q That is Latresse Smith's car?

A Yes, it is.

Q Let me ask you this. I don't want you to tell me what he said. I just want ask you his demeanor. When he

stopped you in the roadway in Inman, what was Marion Lindsey's demeanor? Was he enraged? Was he calm? Was he coherent? Could you understand what he was saying?

A I could understand what he was saying. He was not in a rage.

Q After the shooting takes place, Ms. Nesbitt, where did you go?

A After the shooting took place and I heard the officer say that we got him down, I crawled out the police car. And I stood up and was headed to my car. Officer Godfrey stopped me and told me don't go any further. The Officer went to my car and pulled out my mother and went to the back seat and pulled out my two kids, brought them around. My oldest child was screaming that Nell was dead. He took us and told us to go to the side of the building. Then he later told us to go inside of the building.

Q Those cries that we heard on the 911 tape, were those your children?

A Yes, they were.

Q What happened to your car after September 18?

A They transported it to crime lab.

Q Did you ever get it back?

A Yes, I did.

Q How many days later?

A I'm not exactly sure like how many days.

Probably like a week.

Q A week later?

A Yes.

Q Do you still own that car?

A No, I don't.

Q What did you do with it?

A I sold the car.

Q To whom?

A Mary Lyles.

Q Mary Lyles, is that somebody you knew?

A My cousin's grandmother.

Q Did you sell it to her shortly after law enforcement gave it back to you in September?

A The exact same day.

Q The same day?

A Yes, sir.

Q Before you sold it, did you have an opportunity to look in the car or look inside the car one last time?

A Yes, I did.

Q Had the windows been repaired or what damage had been done to the windows, do you know?

A The windows had been repaired from that gunshot. Cause the windows were clear. My windows were tinted. When I got it back, the rear window and the driver's back window was clear. I also have the bullet hole in the

seat.

Q A bullet hole in the car seat itself?

A In the car seat itself, in the rear car seat.

Q Not the baby seat but the back bench of the car seat?

A Yes.

Q You sold the car to Mary Lyles?

A Yes, sir.

Q Please answer any questions the defense may have you. Thank you.

MR. BRENNAN: May it please the Court.

THE COURT: Yes, sir.

BY MR. BRENNAN:

Q Ms. Nesbitt, my name is Doug Brennan. And I am one of Marion Lindsey's attorneys.

THE COURT: Are you going to need the overhead?

MR. BRENNAN: No, I will not, Your Honor.

THE COURT: All right. Let's put the lights back up.

BY MR. BRENNAN:

Q I understand this is difficult and I will try not to make it any more so. You testified that your two young children were in the car that day?

A Yes, sir.

Q Was it only the baby spoke with Myron?
A Spoke to him? Her and my mother spoke.
Q What did your youngest child call Marion Lindsey?
A Uncle Ron.
Q Uncle, I'm sorry. Uncle what?
A Uncle Ron.
Q So they were close with Marion Lindsey; is that correct?
A Yes, sir.
Q Do you remember your oldest child climbing between the two front seats to say hello to Uncle Ron?
A No. She was sleep.
Q Before you got to the police station, you were talking about a conversation that occurred between you and Mr. Lindsey from in your car?
A Yes.
Q Do you remember him asking if Ruby was going to let him see his kids?
A Yes, I do.
Q And what did you say to him?
A I don't know.
Q Okay. Do you have any idea how long it had been since Ruby had let Marion see the kids?
A No, I don't.
Q You were like sisters?

A Yes, sir.
Q Are you aware that Mr. Lindsey and Ruby had separated before?
A Yes, sir.
Q Is this the first time that they had separated that she hadn't let him see the kids?
A That is the first time she didn't let him see the kids.
Q All right. Had she said anything about making changes at work in reference to her husband?
A Yes.
Q What did she say to you about making changes at work?
A Since I'm filing for a divorce, I'm taking him off my insurance.
Q She told you she was taking him off the insurance?
A Yes, she did.
Q Had she ever said that to you before?
A No, that was the first-time.
Q The first time?
A Yes.
Q Was Kiera asleep on the floorboard?
A No, she was not. She was sleep between my youngest daughter and Nell. She was laying on Nell's arm.

Q Okay. Just one second.

You said you first became aware and you met Mr. Lindsey in 1996?

A Yes.

Q You know how long Ruby and Marion had been together?

A Not exact.

Q Were they together before you met him?

A Yes.

Q So it was longer than 1996?

A Yes.

Q All right. When you pulled into the police station, where was Officer Godfrey?

A At a car. At a police car standing outside putting his arm inside of his jacket.

Q Okay. Was it next to that car, was he standing next to the car that you pulled next to?

A No.

Q It was off to the side?

A Yes.

Q Do you remember in a statement stating that Officer Godfrey had come running from behind the side of the building?

A No. The car was not far from where we pulled in at. It was not around a building.

A Okay. But he was not standing next to the car, the white car.

A No, he was not.

Q Thank you, ma'am. I have nothing else.

MR. GOWDY: I do have some brief rebuttal. I would like to respectfully approach the bench for moment before I go into it though.

THE COURT: All right, sir.

(WHEREFORE, a bench conference was held off of the record.)

THE COURT: Ladies and gentlemen, we're going to take a break. Generally, we will go from about an hour and 15 minutes to an hour and 45 minutes between breaks. Breaks will be generally 10 to 15 minutes. I have a legal matter I'm going to take up as soon as you leave. I don't know how long, this break could be a little longer than that, but I'm going to try to get back to you within 10 to 15 minutes. So please go back into the jury room now.

(WHEREUPON, the jury exit at approximately 10:24 a.m.)

THE COURT: Solicitor.

THE COURT: Your Honor, may it please the Court. Mr. Brennan asked a series of questions of Ms. Nesbitt relating to the dissolution of Marion and Nell Lindsey's marriage. He particularly asked about Nell

having Marion Lindsey taken off insurance at work, was this the first time she was not going to let him see the kids despite the fact I think Ms. Nesbitt's testimony is she has answered I don't know when asked if he would be able to see the kids.

Clearly, the notion of the dissolution of their marriage is now in play. I think it is only fair that I ask Ms. Nesbitt why this marriage was dissolved. Because he is the one, he mentioned it in opening and he mentioned it in --

THE COURT: All right. Any objection?

MR. BRENNAN: Yes, Your Honor. I don't believe I opened the door to any prior bad acts yet. I asked about the end of the marriage. That was it.

THE COURT: I don't know what the answers will be to the questions that Mr. Gowdy might ask in rebuttal. But that would be, depending on what those answers will be, that would be when you might possibly could make an objection based on 404(b). Right now, we're talking about relevance, whether or not this witness' knowledge of the reasons for the dissolution of the marriage are relevant. And you asked this witness these two questions was he going to let her, was she going to let Mr. Lindsey see the kids and was this not the first time that he was being taken off

the insurance.

I am assuming that the reason you did that is to bring out evidence that would relate to Mr. Lindsey's state of mind at that time to support the argument that I expect you will eventually make that you are entitled to a charge on the lesser included offense of voluntary manslaughter. In other words, that Mr. Lindsey might possibly had been mad or upset over the fact that his wife would not let him see his kids or over the fact that his wife was taking him off of his insurance and that that is perhaps the sudden heat of passion and could possibly rise to the level of sufficient legal provocation so that you will be entitled to that charge.

What Mr. Gowdy is suggesting, I believe, is that if that is going to be your position, he is entitled to explore with this witness exactly how all of that came about so perhaps we can see whether or not Mr. Lindsey was justified in being mad over it.

Is that right, Mr. Gowdy?

MR. GOWDY: Yes, sir, your Honor.

THE COURT: From that standpoint, the evidence that Mr. Gowdy seeks to bring out on reply is relevant. If there are other objections that you want to raise -- and I don't know why. I don't know

the answer to the question why. I don't know if there's a 404(b) problem or not. You have to make that objection contemporaneously unless you know specifically now. If you know specifically now what some of the answers to those questions are going to be, perhaps we can bring them up now and rule on them.

MR. BRENNAN: The one I would reference to is the 911 tape. The fact that he had been arrested before, actually had gotten out of jail the day before on criminal domestic violence. I am assuming that she knows about that. It has already been played for the jury.

THE COURT: Was that the basis of your 404(b) objection that you made at, for the 911 tape?

MR. BRENNAN: Yes, Your Honor.

THE COURT: I did not understand that. I could not figure out why you were making a 404(b) objection. But now I know. So let me think it through. And I will decide what to do about it. So, the alleged CDV that occurred the night before?

MR. BRENNAN: That's correct.

THE COURT: Anything else that you know of, a specific answer that you would object to under 404(b)?

MR. BRENNAN: Your Honor, because she and the victim were like sisters, I'm assuming that she knows

the details of Ruby Nell Lindsey and Marion Lindsey's marriage and could provide other bad act evidence, Your Honor, or testimony. And for the same 404(b) rules I would, reasons, I would object to those questions or that question which will elicit prior bad act of testimony.

THE COURT: Mr. Gowdy, I'm going to just assume that to the extent that there is evidence in response to these questions that would constitute prior bad acts that you are offering it to show the intent of the defendant so it would be admissible.

MR. GOWDY: Intent, Your Honor. And if I thought about it long enough, it might actually fit into one of the other exceptions of 404(b) also. Hopefully, Barry and Donnie will be thinking while I'm talking.

THE COURT: Well, I don't want to put you in the difficult position of having to think and talk at the same time. So I will be glad to go ahead and take a break if you would like.

MR. GOWDY: That would be fine, Your Honor. My frustration was, of course, that Mr. Brennan is going to have a free swing at the piñata. He was going to be able to put before the jury that Mr. Lindsey was upset about not being able to see his kids

without the context of why that not being able to see his kids was. Which I suspect Mrs. Nell was tired of having the hell beat out of her. So that's the context --

MR. BRENNAN: Objection, Your Honor.

THE COURT: Listen. The tension is high. We all know that. You can make that argument without going into that much of colorful detail in your descriptions.

MR. GOWDY: Yes, sir.

THE COURT: All right. I will rule -- we will resume argument on the 404(b) objection in just a minute. Let me go back for a second. To the 403 objection as to both tapes, first of all, you made the 403 objection on the basis of the tapes being cumulative. I overruled that objection yesterday. I probably did not state my objection as clearly as I should have.

It is not in my view cumulative that at all. Because -- in the first place, because even though the evidence on the 911 tape relates to the subject as the testimony of the eyewitnesses, it is evidence of a completely different character. It is evidence that shows, that corroborates that in a way that is not cumulative. Secondly, at this point in the trial or

at a point in the trial when that tape was offered, it wasn't cumulative at all because it was the only evidence in the record. So 403 as to it being cumulative is overruled.

I discussed it in fair detail my thinking on the question of whether or not the screams on the tape were fairly prejudicial and whether their potential for unfair prejudice outweighed its probative value. I believe I just explained it thoroughly enough except to say this additional thing. That is, I don't think the screams are unfairly prejudicial at all. It will come as no surprise to anybody that a nine-year-old child, she was seven at the time, correct, or is she nine?

MR. GOWDY: I thought she was nine.

MR. BRENNAN: She was nine.

THE COURT: That a nine-year-old child sitting besides an adult that she sees shot and concludes is dead will scream. That is not a surprise to anybody. The fact that there are screams on the tape is not in my opinion likely to shock the jury any more than just hearing the fact that there was a nine-year-old child beside the lady when she got shot. I don't see any unfair prejudice.

I believe that I said yesterday that I would

reserve ruling on the 403 objection for the enhanced version of the tape. As I said yesterday, that is overruled. Or as I predicted yesterday, that is overruled. Because the volume, to me, is not all that much different. I don't hear that much difference between the volume of the unenhanced tape and the enhanced tape. I don't see an reason really to look at the enhanced version of the tape any differently from the unenhanced version of the tape except that you can hear the sounds that the witness described as mechanical sounds more clearly.

It's the State's theory, of course, that those are gunshots. But the fact that you can hear those sounds on the enhanced tape is not any unfair prejudice. But on the other hand, the fact that you can hear the sounds increases substantially the probative value of the enhanced version of the tape. Those objections are overruled.

Now, when the question was asked of Ms. Nesbitt why did you tell Mr. Lindsey that you had not seen his wife in two or three days when in fact she was seated three or feet away from you and her answer was because I knew about the marriage, I know about the threats, he had threatened to kill her and that kind of thing. There is a potential hearsay objection there. I

noted it when it happened.

But it is clear to me that that evidence was not offered to prove the truth of the matter asserted but was simply offered to explain what reasonably needed to be explained to the jury in order to relate to this witnesses credibility why she said something that was not true on that occasion. So it was not offered to prove the truth of the matter asserted in my view. You were certainly justified in not raising an objection to it at that time. We will take a short break. And we will come back and address the 404(b).

(WHEREUPON, a short recess was taken at approximately 10:42 a.m.)

(WHEREUPON, the Court resumed at approximately 10:47 a.m.)

THE COURT: All right. We've got several jurors who smoke. And for example, during this last break, we let three or four of them go out and smoke. I was under the impression that the defendant was going to stay in the courtroom the whole time. But it certainly makes sense that from time to time, he will need to go back and do whatever it is that he needs to do.

I need for Buck Cockrell from S.L.E.D. and you folks from the jail to coordinate how you are going to

move the jury and how you are going to move the defendant and make sure that they will not cross paths under any circumstances. You don't have to do that now. But maybe during the next break, you folks in the jail meet with S.L.E.D. And y'all coordinate how you are going to do that. And make sure that their paths will not cross and it will not be possible at any point in time for the members of the jury to see the defendant when he is handcuffed.

All right. You have it?

MR. GOWDY: Yes, sir, Your Honor. I appreciate the Court for allowing me to argue this. The last thing I would have to say about it, my recollection was Mr. Brennan asked Celeste Nesbitt questions relative to whether or not Nell was going to let him see their children. What I would like to do is put that clear implication that's in the jury's mind in context. I don't know what the answer is. It may very well be --

THE COURT: She can -- you can come on up, ma'am.

MR. GOWDY: We know from the 911 tape that there was a court order in place. For all I know, Nell interpreted the Court order to mean that she and he cannot have contact. Clearly, they were not

supposed to have contact. What I do know is what is left now is the notion that Nell was just not letting him see his children. What I would like to explore is what the basis for that might be. Right now, there's no context around it.

THE COURT: All right. What the Solicitor has done is to announce that he has the intention of asking these questions and to allow the issue of the relevance of those questions to be addressed before he asked them. That is why he suggested that perhaps the defense had opened the door to these questions being asked in other words to make them relevant.

In my view they are relevant. The subject is relevant. It's not that there is anything that you did improper or, you had to bring this up. We had to get into this subject. And in order for the jury to probably understand why or whether Mr. Lindsey might have been in the sudden heat of passion, it is appropriate to examine why it is that these things happened.

To the extent that this witness knows anything about it, you can ask her about it, looking specifically at the question of the incident that occurred that night before. Again, I don't know if she knows anything about it. I don't even know what

it is yet.

But, she has already said, she has already testified that the reason she did not tell Mr. Lindsey the truth about why Nell, about the fact that Nell was in the back seat was because she knew of the history between them. She knew of threats to kill and that is kind of a summary of what she said. If the incident of the night before plays into that, I'm not sure if that it is another crime or act. I'm not sure that it is part of the same event. That's what we used to call res geste.

MR. GOWDY: Res geste, yes.

THE COURT: Are you ready for the jury?

MR. BRENNAN: Your Honor, I am simply saying that she has already answered the question --

THE COURT: Let me do this. If you have an objection make it in limine, make it. Otherwise, I'm bringing the jury in. The only thing I've done is said that if Mr. Gowdy wants to ask questions about why Mr. Lindsey might have been mad about the fact that he could not see his children or the fact that he was being taken off of her insurance, that is relevant. That's all I have done. If you have any other objections you want to make now, make them. Let's don't argue on what I've already ruled on.

MR. BRENNAN: Nothing, Your Honor.

THE COURT: All right. Bring the jury in.

(WHEREUPON, the jury enters at approximately 10:51 a.m.)

THE COURT: Solicitor.

MR. GOWDY: May it please the Court?

THE COURT: Yes, sir.

REDIRECT EXAMINATION

BY MR. GOWDY:

Q Ms. Nesbitt, I have just a few more questions for you. On cross examination, Mr. Brennan asked you whether the defendant asked you on September 18th is Nell going to let me see my children. Do you remember the question?

A Yes.

Q And your question today, and I assume also that night because you testified your answer today was I don't know. What I'm going to ask you now, Ms. Nesbitt, is what was the basis of your answer on September 18th, 2002 to this defendant of I don't know when he asked am I going to be able to see my children? Why did you say I don't know?

A Because I did not know whether she was or not. They have a lot of they had had a lot of altercations before then. She told me she wasn't let him going to see

the kids. Like I said, I didn't know.

Q When you said occasions, do you mean occasions of separation?

A Yes, occasions of separation.

Q Occasions of violence?

A Separation and violence.

MR. BRENNAN: Objection, Your Honor.

THE COURT: On what basis?

MR. BRENNAN: 404(b).

THE COURT: All right, I don't know if you all had time to fill out your lunch menus a minute ago. Maybe you were a little bit too rushed in filling out your lunch menus. So I'm going to give you a chance to study back over your selections and to make sure you did not make a mistake. And I'll be back with you as soon as I can. Please go back to the jury room.

(WHEREUPON, the jury exits at approximately 10:53 a.m.)

THE COURT: All right. Proceed.

MR. GOWDY: Your Honor, I asked the questions the fairest way that I could.

THE COURT: No, I just want to hear the answer.

MR. GOWDY: Well, my argument is that is what puts that comment into context. It is unfair to leave out --

THE COURT: Hold on just a minute.

All right. Let's -- well, as far as the answer that has been given so far which is occasions of separation or occasions of violence or something like that. What was the answer?

MR. BARTOSH: The answer was occasions of altercations.

MR. GOWDY: No, that's not what I said. I said occasions of separation or occasions of violence.

MR. BARTOSH: I'm referring to what the witness said. When he asked the first question, she said they had separated because of altercations.

THE COURT: Well, in event, altercations and violence and separation to the extent those are other crimes or wrongs or bad acts, the objection is overruled because it relates to the question of intent. Now, if -- I'm assuming that Mr. Gowdy if given the opportunity is going to go a little bit deeper and ask for some explanation of that. No?

MR. GOWDY: Your Honor, it would be only a little more context.

THE COURT: I want to hear it now.

MR. GOWDY: Okay.

BY MR. GOWDY:

Q Ms. Nesbitt, you testified that you and Mrs.

Lindsey were like sisters?

A Yes.

Q Did you discuss with her things that happened earlier, a few days before September 18th?

A Yes, I did.

Q Were you aware that there was a court order saying Nell, Marion Lindsey was not supposed to have any contact with Nell Lindsey?

A Yes, I was.

Q Did you discuss that with Nell Lindsey?

A Yes, I did.

Q With respect to her state of mind, do you know whether or not she interpreted that court order to mean he is not supposed to come around her or the children?

A That's what she said.

THE COURT: So she says that she interprets the court order to mean that the defendant could not see the children?

MR. GOWDY: Yes, sir.

THE COURT: What's the objection?

MR. BRENNAN: I don't have an objection to that question, Your Honor.

THE COURT: You could probably come up with a hearsay objection. But I don't believe it would be hearsay. It's not -- if Ruby Lindsey -- well,

apparently Ruby Lindsey must have told this witness what her interpretation of that order was insofar as it relates to the children?

MR. GOWDY: Yes, sir. That's the last question I asked Ms. Nesbitt.

THE COURT: And so her telling Ms. Nesbitt that would be an out-of-court statement?

MR. GOWDY: Relating to her state of mind. It's not a statement of facts. It's state of mind. That's what we're going at here. His state of mind, could he see his kids. And her state of mind, was she being malicious or was she following a court order or her interpretation of a court order.

THE COURT: All right. I am satisfied that it is not hearsay. If it offered to prove the truth of the matter asserted, it is admissible under 803(1) and (3). My understanding is the court order was entered the day before?

MR. BRENNAN: The night before.

THE COURT: So within approximately 24 hours of Mrs. Lindsey's death.

MR. BRENNAN: That is correct, yes, Your Honor.

THE COURT: So if Ms. Lindsey told Ms. Nesbitt how she interpreted that order, that statement would have

had to be made during that 24-hour period.

MR. GOWDY: Yes, sir.

MR. BRENNAN: Yes, sir.

THE COURT: So it would have been a statement of her impression in the present tense of some fact that is relevant to the case. So it is admissible. Are you going any further?

MR. GOWDY: That is as far as I'm going.

THE COURT: Bring in the jury.

MR. GOWDY: Unless he wants to go -- that is as far as I'm going right now.

(WHEREUPON, the jury enters at approximately 11:00 a.m.)

MR. GOWDY: May it please the Court, Your Honor?

THE COURT: Yes, sir.

BY MR. GOWDY:

Q Ms. Nesbitt, just a couple more questions. You testified that you and Mrs. Lindsey were like sisters?

A Yes.

Q And y'all have been since many, many, many years ago?

A Correct.

Q Did ya'll talk about the more intimate details of one another's lives?

A Yes, we did.

Q Were you aware of a court order that had been issued in the hours or the day prior to September 18th that existed between Marion Lindsey and Nell Lindsey?

A Yes.

Q Are you aware of whether or not Nell Lindsey interpreted the Court order as to mean her husband was not supposed to come around her or --

MR. BRENNAN: Objection to leading, Your Honor.

MR. GOWDY: I'm trying to lead to avoid the problem, Judge. I'm happy to ask an open-ended question.

THE COURT: Why don't you?

BY MR. GOWDY:

Q Are you aware of a court order or did Mr. Lindsey discuss with you a court order that been issued in the hours or day prior to September 18?

A She discussed with me that a court order had been issued.

Q Do you know what that court order was about?

A A domestic violence of him jumping on her at her job or something.

MR. BRENNAN: Objection, Your Honor, 404(b).

THE COURT: Would you permit Mr. Gowdy to lead the witness so that we can avoid any 404(b) problems?

I will.

You may.

MR. GOWDY: Thank you, Your Honor.

BY MR. GOWDY:

Q Ms. Nesbitt, do you know whether Mrs. Lindsey, Nell Lindsey, interpreted the court order and did she relate to you that she interpreted the Court order to mean this defendant was not supposed to have contact with Nell Lindsey or their children?

A She told me he was not supposed to come around her or her children. That was what the Court, they told her.

Q Thank you very much, Ms. Nesbitt.

MR. GOWDY: That's all the questions I have, Your Honor.

THE COURT: Recross?

MR. BRENNAN: Yes, Your Honor.

RECROSS EXAMINATION

BY MR. BRENNAN:

Q Hade you have seen Mr. Lindsey --

MR. BRENNAN: No questions, Your Honor

THE COURT: Ma'am, you may step down.

MR. GOWDY: Your Honor the State would call Officer Benny Godfrey.

HARVEY "BENNY" GODFREY

having first being duly sworn testified as follows:

DIRECT EXAMINATION

BY MR. GOWDY:

Q Good morning to you. I'm going to ask you in a good strong voice to speak up so the last two jurors in the jury box can hear. Would you introduce yourself to the jury? Tell them where you work.

A Harvey Bernard Godfrey. I work at the Inman City Police Department.

Q Do you go by a name other than Harvey or Bernard?

A Yes, I go by Benny.

Q How long have you been in law enforcement, Officer Godfrey?

A 17 years.

Q How long have you been with Inman City Police?

A Six.

Q Prior to that, where were you?

A Spartanburg County.

Q And let me ask you this, currently what are your duties and responsibilities at the Inman City Police Department?

A Uniform patrol. I patrol the neighborhoods, work traffic and work any crimes that may occur inside the city as far as investigating.

Q In 2002, September 2002 to be more particular

were you also employed with the Inman City Police Department?

A Yes.

Q And were your responsibility substantially similar as they are today?

A Yes.

Q Are you a graduate of the police academy?

A Yes.

Q Have you had any other particular training or is training required to maintain your status as a law-enforcement officer?

A Yes.

Q Tell the jury what is involved in maintaining your status as a police officer.

A We have to have four courses which would be related to various areas in law-enforcement such as drugs. Just your basic investigations. We have to have legal updates at least once a year, driving qualifications.

Q Have you attended any other schools, narcotic schools or any kind of investigative schools with either the Sheriff's Department or the Inman Police?

A Yes.

Q Could you tell the jury what those school might have been.

A I been to narcotics classes. I been to child

abuse and neglect classes, traffic investigations, burglary investigations.

Q Officer Godfrey, I want to go back with you to September the 18th, 2002. Were you on duty in the early evening hours, let's say seven o'clock?

A Yes.

Q What were you doing then?

A I normally would come in at 7:00 and work until 7:00 in the morning. I was just going to work. We had made regular routine patrols around the area. Myself and Officer Tucker who was working that night also made an arrest at one of the local convenience stores. Officer Tucker elected to carry the subject down because I had to meet with another officer to meet with one of our drug informants to show him some picture line ups.

Q Is it fair to say that Inman Police Department in conjunction with the Spartanburg Sheriff's Department were in the middle of a drug roundup or in the investigative stages of a drug roundup back then?

A Yes.

Q Is that what your attention was on back on September the 18th?

A Yes.

Q Was your attention diverted from that on to something else?

A Yes.

Q Tell the jury about a dispatch that you received.

A I was pulling into the Inman Police Department back parking lot to go inside just to receive some pictures to carry to show our informant. At the time I was getting out of the car, Spartanburg County Communications called me and was giving me a call for a rolling domestic.

Q Tell me and the jury what a rolling domestic is.

A A rolling domestic is basically the same thing as a domestic dispute between two people. It just happens to be in either one vehicle or two vehicles.

Q All right. So a domestic is a dispute between family members, partners or something like that?

A Yes.

Q Now, I don't whether you were in court this morning or not when the jury heard the 911 tape.

A Yes.

Q That was not your voice on the 911 tape, is that correct?

A No.

Q Do calls go to a central location and then are dispatched back out to you?

A Yes.

Q At any point, were you ever in contact with Ms. Nell Lindsey?

A No.

Q Did the dispatch inform you that there was a weapon involved?

A No.

Q How did it simply come across?

A It came across as, they called my number. And I answered them. And they said there was a rolling domestic headed your to your P.D. At the same time they were dispatching the call, two cars were pulling into the back parking lot.

Q Did you make any assumptions based on the two cars pulling into the parking lot?

A I assumed that was the rolling domestic.

Q The jury has seen pictures of the back parking lot of the Inman Police Station including pictures of what looks like a blue pickup truck.

A Yes.

Q Do you know whose blue pickup truck that may be?

A That is mine.

Q Well, let's wait and do that in a second. Walk the jury through what happened when those two cars pulled in the back parking lot of the Inman police station.

A When the two cars pulled in, I had my walkie-talkie in my hand and was trying to listen to what the dispatchers had to say. At the same time, the cars pulled

in. A lady from the first car that pulled, it pulled right beside my patrol car, jumped out and was running to the side of the car I was on. I was at the back rear passenger -- driver's corner when she jumped out and came running around.

She was hollering something to the affect that he's going to get her or something like that. At that point, I turned and looked back towards her car. And I saw a black male with a handgun pointing it at the back glass. At that time, I reached for my gun and hollered don't. And he fired two rounds into the back glass.

Q What happened after those two rounds were fired into the back window. When I say the back glass, what car was it fired into?

A Ms. Nesbitt's car.

Q The car she had just gotten out of?

A Yes.

Q At that point, I was taking cover behind the car. I saw a black male run between my car and her car. And I saw to two more flashes that appeared to be from a gun. I started around the back side of the car and I lost sight of him at that point. Several seconds later, he came back out in front of the car pointing the firearm at me. And I fired four rounds.

Q You discharged four rounds from your service

revolver, is that right?

A Yes.

Q Service revolver may be an old term. Your weapon, is that right?

A Yes.

Q I'm going to show you State's Exhibit 5 and ask you whether or not you recognize what is in that box.

A Yes.

Q What is that Officer Godfrey?

A That's my weapon.

Q Even though I referred to that as a revolver, it is in fact a pistol, right?

A Yes, sir.

MR. GOWDY: Your Honor, I would move State's Exhibit 5 into evidence.

THE COURT: Any objection?

MR. BARTOSH: No.

THE COURT: Let me do this and this will govern us for the rest of this trial. I can see that you have a plastic -- is that going through the chamber?

MR. GOWDY: It is going through the, uh, I don't even know what that is.

THE COURT: That is just holding it in the box?

MR. GOWDY: Yes, sir. You want somebody to clear the weapon?

THE COURT: I want, before any weapon is brought into the courtroom, I want a law enforcement officer to make sure that it is not loaded.

MR. GOWDY: Yes, sir.

THE COURT: I do not you want it to be possible for it to become loaded during the course of the trial.

MR. GOWDY: Yes, sir.

THE COURT: So you can take one of those snap ties or whatever and run it through there. If there's going to be any ammunition entered into evidence, we will control that. Is that what you have in the bag?

MR. GOWDY: I think this is the clip and this is the weapon.

THE COURT: Are there any live rounds in the clip?

MR. GOWDY: I would hope not but let me check and see.

THE COURT: Officer, would you check that weapon and make sure is not loaded?

THE WITNESS: Yes, sir.

(WHEREUPON, the officer examined the weapon.)

THE WITNESS: It is not loaded.

THE COURT: All right, sir. No live ammunition in the clip?

MR. GOWDY: None in the clip. None in the gun. The live ammunition is State's Exhibit 7. State's Exhibit 6 is the clip which goes with State's Exhibit 5. At this point, I would introduce 5, 6, and 7 into evidence.

THE COURT: Any objection?

MR. BRENNAN: No, sir.

(WHEREUPON, State's Exhibit 5 through 7 were admitted into evidence.)

THE COURT: All right. With your permission, Solicitor, I want State's Exhibit 7 to be kept over here at the Clerk's desk separate from the other exhibits.

MR. GOWDY: Yes, sir, Your Honor.

THE COURT: If it ever becomes necessary for you to use it or for the jury to examine it, we will deal with it at that time.

MR. GOWDY: Yes, sir.

THE COURT: If you have any more weapons, I want them checked before they are offered into evidence.

MR. GOWDY: Yes, sir.

BY MR. GOWDY:

Q Officer Godfrey, this is your gun and your clip, right?

A Yes, sir.

Q How many cartridges or bullets fit into your clip?

A It is 15 clip.

Q Do you keep one in the gun also?

A Yes, so it is a total of 16 in the weapon.

Q To the best of your recollection, how many rounds did you discharge on September 18th?

A I fired four rounds.

Q Of those four rounds, how many were directed toward Marion Lindsey?

A All four.

Q Do you know whether or not you hit him with any of the rounds?

A I know I did hit him but I cannot tell you where.

Q You know you hit him how? Did he fall?

A Yes.

Q After he fell, what did you do?

A I firing when he fell. And at that point, two other officers that were inside that worked for Spartanburg County came outside. And I told them to cover him. They did at that point. Then another officer that just happened to come up, the Sergeant with Spartanburg County pulled up. And he really did not know what was going on at the time. I told him what was taking place.

They disarmed the defendant at that point. I called

for an ambulance at some point. I had to recover my walkie-talkie. I had dropped it on the ground. And then we retrieved the kids and the other lady out of the car.

Q I want to stop before you get there. And I want to ask you this, did you ever see the face of the man who shot into the back of Celeste Nesbitt's car?

A No.

Q What were you looking at, what were you focused on?

A The weapon he had.

Q Can you tell this jury that the same person you shot is the person that shot into that car?

A Yes.

Q How can you tell them that?

A He was only person that was in the parking lot other than the people who were in the car, Ms. Nesbitt and myself.

Q After you discharged your weapon and struck the shooter, did you ever walk over there to see who the shooter was or were you occupied with other things?

A I was occupied with other things.

Q And I believe I interrupted you when you were beginning to tell the jury that one of things was to get the people out of a car.

A Yes.

Q Tell the jury who you got out and where they were located.

A We got an older lady. When we went around the car on the passenger's side, I tried to get the kids out first but the door was locked. We got the older lady out of the front seat. One of the girls unlocked her back door by the time.

We got both out. One was sitting in a car seat. The other was sitting in the car. We got those out. And I sent them up to Ms. Nesbitt who at that point was up next to the side of the police department. I told them to stay there then we could get everything arranged. Then shortly, just a few minutes later, I had one of the other officers who were there carry them inside to get them out of any danger that may still exist.

Q And you did not have any interaction with the shooter himself other than shooting him after he hit the ground?

A That is correct

Q You have been in law enforcement for 16 years?

A 17 years.

Q 17 years. Is it standard policy or procedure that any time an officer is involved in a shooting that his gun is taken and confiscated?

A Yes.

Q Was that done in this case?
A Yes.
Q Do you recall -- if you don't, that's fine. Do you recall who took your gun?
A Detective Tucker with Spartanburg County.
Q Okay. I'm going to ask Mr. Willingham if he would turn this overhead projector on for me. While he is doing that, I want to ask you did you get Keysha and Kiera out of the car, the two young girls in the back?
A Yes.
Q Did you happen to notice anybody else in the back seat?
A I saw a female that was sitting the left rear seat.
Q Can you describe her condition to the jury.
A She had blood all over the front of her face and down the front of her chest. When we pulled the last girl out, her head slumped over. She appeared to be dead at that point.
Q I am going to let you decide. These are all in evidence, 22 through 26 inclusive. I'm going to put a picture on the overhead for the jury. Which prospective would enable you best to show the jury the full picture of what happened that night?
A This one.

Q All right. And that is State's Exhibit 24. Officer Godfrey, if you will keep your voice up, I'm going to ask you to come down here. Have you used one these before, a laser pointer?

A Yes.

Q There is the button. Describe for the jury where you were standing. Keep your voice up where the Court Reporter can hear you and tell the jury what you did and what happened.

A When I -- I had just pulled into the parking lot here when I received the call. I was stepping out of the car when the dispatcher called. And at the same time the dispatcher was calling me, two cars were pulling in. One pulled here and one pulled over here. I had stepped out. I was standing right over here.

The lady that was driving the car came out of the driver's seat from there and ran around the front of the car over to this side and was hollering at that point. When I turned and focused back this way, she said he was going to get her. I was looking to see who he was. At that point, he was standing there with a gun pointing directly in the back glass right here. Before I could reach my weapon, he had done fired two shots in the back glass.

I went down here. I came across here. And I saw him

running between the two cars. I saw two more shots. At that point, I lost sight of him. He was somewhere up here in front. I started down. I hollered at Celeste to see if she saw him. She said no. I started in between the two cars going towards the front of the car. When he come out from in front on the other side there pointing a gun at me and that's when I fired four rounds. He hit the ground at that point.

Q I believe your testimony was you did not walk over there. Someone else was tending to him and you got the kids?

A I was about middle-ways the car. I kept my gun trained on him. Two other officers came out from inside off the porch. I told them to cover him. And they did at that point.

Q Okay. Thank you. You can have your seat, Officer Godfrey. I have one more question for you if you know the answer to it. When you looked in the back of that Mercury Topaz and got the two little girls out, did you notice anything in Nell Lindsey's hand?

A A cell phone.

Q Those are all the questions I have, Officer. Please answer any questions the defense may have please.

CROSS-EXAMINATION

BY MR. BRENNAN:

Q Officer Godfrey, my name is Doug Brennan. I'm one of Mr. Lindsey's attorneys. You fired four shots at Mr. Lindsey, is that correct?

A That's correct.

Q And you said you lost sight of him. Excuse me. You lost sight of him. And then at some point he came back actually towards you, is that correct?

A Yes. He jumped back in front of the car. He came from the front of my car at the passenger side and was pointing a weapon at me at that point.

Q Right. Are you sure that that weapon that he had in his hand wasn't pointed like this?

A I am positive.

Q Did you shoot him in the head?

A No.

Q He was shot in the head though, is that correct?

A I don't know.

Q You don't know that he was wounded in the head?

A No, I don't.

Q You never looked at him when he was laid on the ground?

A No.

Q But you did not shoot him in the head?

A No, I don't guess.

Q One second.

Officer Godfrey, when those two cars pulled in, were you the only person in the parking lot at that time?

A Yes.

Q It was you by yourself?

A Yes.

Q Nothing further. Thank you.

MR. GOWDY: Nothing on redirect, Your Honor.

THE COURT: You can step down, Officer.

Call your next witness.

MR. BARNETT: Guy Carter.

GUY CARTER

having first being duly sworn testified as follows:

DIRECT EXAMINATION

BY MR. BARNETT:

Q Please tell the jury who you are.

A Guy William Carter, Junior. I am a Master Deputy with the Spartanburg County Sheriff's Department.

Q Were you working back on September 18th, 2002?

A Yes, I was.

Q Were you at the Inman Police Department?

A Yes, sir.

Q If you would, tell the jury why you were at the Inman Police Department.

A I had responded to the Inman P.D. just in conducting routine paperwork. I was not on call or

anything.

Q Were you inside the police station?

A Yes, sir.

Q Could you tell the jury who was in there with you at the time and what happened after that.

A At the time, I received a knock on the door. Detective Mark Finley came to the door. I answered the door and asked him what he was doing up this way. He was working on a case that I was familiar with. Detective Finley went to the restroom. He came back. And we got to talking further about the case. I asked him if he had talked to several individuals. And there was a name he had not mentioned.

I made a phone call to a Jimmy Bobo who was the Assistant Chief of the Fire Department. At which time, I was on the telephone and I heard a series of random loud pops. I advised Mr. Bobo that we had shots fired at the Inman P.D. I dropped the phone and exited the building with Detective Finley behind me. I had my weapon drawn.

I came down the right side of building and saw Officer Godfrey standing in the parking lot behind the patrol vehicle. He told me to cover him. If I could, it was a cuss word. He said cover that he said Cover that motherfucker. I said where is he, Benny. He said he's on the ground in front of the patrol car.

As the picture shows, I went between the blue pick up truck and the Inman patrol car with my weapon drawn. As I approached the front of the patrol car, I observed a black male laying face down. He had a silver revolver in his left hand. And his head was turned to the right. At which time, Detective Finley and Sergeant Berry were behind me also. Then Sergeant Berry said the subject was still breathing.

At which time, Sergeant Berry kicked the weapon from his hand. At which time, two medics were there within a short period of time. I don't know the exact amount of time. At which time, the medics rolled the subjects over. At that time, I observed the individual.

Q You see the individual in court today, sir?

A Yes, sir.

Q Can you identify him for the jury?

A Yes, the individual black male, white shirt, defendant known as Myron Lindsey.

Q That is the individual you saw that night?

A Yes, sir.

Q That is the individual that had the gun in his hand?

A Yes, sir.

Q After that, did y'all cover him and did you check up on the occupants of the vehicle?

A At that time, things got a little hectic. I reholstered my weapon and assisted Officer Godfrey in taking care of the children and the two ladies.

Q Where were the children and the two ladies taken?

A They were taken to the inside of the Inman P.D.

Q And were they very emotional?

A Yes. All of them were crying and very distraught.

Q Y'all secured them in the police station?

A Yes, we took them out of harm's way.

Q And Inman is in Spartanburg County?

A Yes, sir.

Q Please answer any questions Mr. Brennan may have for you.

CROSS-EXAMINATION

BY MR. BRENNAN:

Q Officer Carter, how are you doing?

A I'm fine, sir.

Q You were standing there covering Mr. Lindsey until the EMS got there, is that correct?

A Yes, sir. That's correct.

Q When they rolled him over, did you see the injuries that he had suffered?

A I saw an amount of blood. Where the blood was coming from, I don't know.

Q You don't know where he had been shot?

A No, sir.

Q All right. The revolver that he had, did you look at it?

A No, sir. The only thing I observed was the revolver in his left hand. As for picking it up, touching it or nothing, no, sir.

Q Okay. Nothing further.

MR. BARNETT: No further questions.

THE COURT: You can step down, sir.

MR. BARNETT: We ask that he be excused.

THE COURT: You are excused, sir.

MR. BARNETT: I call Doug Bishop to the stand please.

DOUG BISHOP

having first being duly sworn testified as follows:

DIRECT EXAMINATION

BY MR. WILLINGHAM:

Q Tell the Court who you are.

A My name is Jack D. Bishop.

Q Mr. Bishop, where do you work?

A I work for the Spartanburg County Sheriff's Department.

Q What do you do for them?

A I work in the forensics area.

Q What is the forensics area of the sheriff's office?

A We respond to crime scenes. We do photography, evidence collection at the scenes.

Q Okay. And you did not respond to the crime scene of this case, did you?

A No, sir. I did not.

Q Was that done by Randy Bogan?

A Yes, sir. It was.

Q He's got the same basic jobs as you do?

A Yes, sir.

Q You did attend the autopsy of Ruby Nell Lindsey?

A I did.

Q Do you remember when that autopsy was?

A No, sir. The exact day I do not.

Q Would a copy of your evidence sheet help refresh your recollection?

A It would. (Reviewing.)

September the 19th, 2002.

Q Where was the autopsy of Ms. Lindsey performed

A It was done at Spartanburg Regional Medical Center in the morgue.

Q Who preformed the autopsy?

A Dr. David Wren.

Q I'm going to show you three exhibits. State's

Exhibit 16, State's Exhibit 17 and State's Exhibit 18. When you were at the autopsy, did Doctor Wren remove three projectiles from the body of Ruby Nell Lindsey?

A Yes, he did.

Q Did you take custody and possession of those projectiles?

A Yes, sir. I did.

Q Looking at 16, 17 and 18, are those three projectiles that Dr. Wren gave you?

A Yes, they are.

Q What did you do with those pieces of evidence when you seen them?

A Brought them back to the sheriff's office. I packaged them and turned them to our evidence office to be sent to S.L.E.D.

Q All right.

MR. BARNETT: Your Honor, at this time I move State's Exhibits 16, 17, and 18 into evidence.

MR. BRENNAN: No objection.

THE COURT: Let me see the lawyers up here.

(WHEREFORE, a bench conference was held off of the record.)

THE COURT: Without objection, they are admitted.

(WHEREUPON, State's Exhibits 16 through 18 were

admitted into evidence.)

MR. WILLINGHAM: Thank you, Your Honor.

Would you answer any questions the defense may have for you.

MR. BRENNAN: I have no questions of this witness, Your Honor.

THE COURT: You can step down, sir.

MR. WILLINGHAM: We call Randy Bogan.

RANDY BOGAN

having first being duly sworn testified as follows:

DIRECT EXAMINATION

BY MR. WILLINGHAM:

Q Tell the jury who you are.

A Randall Eugene Bogan.

Q Mr. Bogan, it's obvious from your uniform that you work at the sheriff's office.

A Yes, sir. I do.

Q How long have you been at the sheriff's office?

A A little over 20 years.

Q What do you do for them?

A I work in the forensics department. And I have been for about 5 years.

Q What is the forensics department?

A We go to crime scenes. We collect evidence. Take measurements. We go to different crime scenes,

shootings, suicides, domestics, burglaries. We do fingerprints or collect fingerprints from the scenes.

Q You take pictures?

A Yes.

Q Were you asked to go to the Inman Police Department in response to a shooting there on September of 2002?

A Yes, sir. I was.

Q When you arrived on the scene, what did you find?

A When I arrived on the scene, I spoke with Officer Carter who was there. There was shell cases in the parking lot. There was three cars. One that were in the center of the parking lot. One being a patrol car. And Ms. Lindsey, Ruby Lindsey was located in one of the cars in the back seat on the driver's side. She was deceased. There was a gun in front, I believe, of the patrol car, if I'm not mistaken, along with some live rounds as well.

Q As you found the scene, what was the first thing you did at the scene?

A Actually I called for traffic to come out and GPS the scene. Also I photographed the scene and took photographs. I always take photographs of the scene. Then I placed placards down of each item that I find at the location. And then I take photographs again.

Q Okay. So you survey the scene, is that fair?

A That's correct.
Q You locate any potential evidence?
A Yes, sir.
Q You label it?
A Yes, sir.
Q And you take pictures of it?
A That's correct.
Q Okay. I've got pictures I want to go through with you.
A All right.
Q If you will just bear with me for a second.
A That is fine.
Q I'm going to show you on the overhead projector what's already been admitted into evidence as State's Exhibit 24 and ask if that is the scene as you found it. You might want to watch that microphone too.
A Yes, sir. It is.
Q Using this pointer, show the jury where you found the body of Ms. Lindsey.
A In the backseat of this car right here. (Pointing.)
Q I'm going to show you a series of photographs. I'm going to show you State's Exhibit number 27. You recognize that?
A Yes, sir.

Q What is it?

A A photograph of the vehicle that Ms. Lindsey was in and the shots going through the window.

Q I'm also going to show you a series of photographs, State's Exhibit 28, 29, 30 and 31. Can you tell me what those are?

A All of these are from the same car and also the shots that were going through the window, the rear window and the passenger-side rear window or, excuse me, the driver's side rear window where Ms. Lindsey was seated.

Q Do those photographs accurately reflect the scene as you found it that night?

A Yes, sir. They do.

MR. WILLINGHAM: Your Honor, at this time, I move State's Exhibits number 27, 28, 29, 30 and 31 into evidence.

THE COURT: Any objection?

MR. BRENNAN: No, Your Honor.

THE COURT: They are admitted.

MR. WILLINGHAM: Thank you.

(WHEREUPON, State's Exhibits 27 through 31 were admitted into evidence.)

BY MR. WILLINGHAM:

Q At this point, I'd publish each of these beginning with State's Exhibit number 27. Again, if you

would, tell the jury what they are seeing.

A Actually, this is the back of the vehicle that Ms. Lindsey was in. There is a bullet hole here that goes into the back side of the back window of the vehicle from the rear driver's side.

Q I will now show you State's Exhibit 28.

A This is just a closer photograph showing a bullet hole here and here. There is two right there.

Q There's a total of four?

A Yes, sir.

Q I'll show you State's Exhibit 29.

A This is a photograph of the rear of the vehicle where, of course, the two bullet holes are. It is the same photograph.

Q State's 30.

A This is just showing the side view as well of the two bullet holes.

Q And 31.

A This is a closer view at a different angle of the bullet holes. One here and one in this area.

Q And at some point, did you also find shell casings?

A Yes, sir. I did.

Q Where did you find those?

A They were located on the ground. There was a

couple, I'm not sure exactly how many. I have to see my sketch that I had drawn.

Q Are you referring to the crime scene sketch that you prepared?

A Yes, sir. It was a small sketch that I had done. Thank you. They were actually four casings. The four casings were located actually behind and to the right of the car that you just saw with the holes in it, with the bullet holes in it that Mrs. Lindsey was in and kind of behind the other car parked to the right side of the vehicle she was in.

Q Let me show you State's Exhibit 32 and ask if you recognize that.

A Yes, sir. I do. These are the markings, the four shell casings. It is a total photograph of all four shell casings and where they were located in the parking lot.

Q Likewise, I'm going to show you State's Exhibit 33, 34, 35 and 36. Can you tell me what those are?

A Yes, sir. This is Number 1, which is the number one shell casing that I marked as Number 1. Number 2, excuse me, Number 2 shell casing, Number 3 shell casing and Number 4 shell casing.

Q All right. Do these pictures accurately reflect the scene as you found it?

A Yes, sir. They do.

MR. WILLINGHAM: Your Honor, at this time, I move State's 32 through 35 into evidence.

MR. BRENNAN: No objection.

THE COURT: They are admitted.

(WHEREUPON, State's Exhibits 32 through 35 were admitted into evidence.)

MR. WILLINGHAM: Publish them to the jury, Your Honor.

BY MR. WILLINGHAM:

Q State's Exhibit 32. If you would, tell the jury what they are seeing.

A This is the car to the right. The car that Mrs. Lindsey was in is right over here. This is the vehicle over to the right. There is Number 1, 2, 3 and 4 shell casings.

Q Okay. You collected those four shell casings?

A Yes, sir. I did.

Q Make sure I'm clear, you did collect the four shell casings?

A Yes, sir. I did.

Q Picked them up personally?

A Yes, sir. I did.

Q Took them in evidence?

A Yes, sir. I did.

Q What did you do after you took them over into evidence?

A We actually placed them in an evidence locker. And our evidence custodian collects them and puts them in the evidence.

Q And ultimately sends them to S.L.E.D. for analysis?

A Yes, after I do the analysis paperwork for S.L.E.D.

Q Okay. I'm showing you State's Exhibit 1, 2, 3 and 4 and ask you if those are the 9 millimeter casings.

A Yes, sir. They are.

Q And those you turned into evidence to be forwarded to S.L.E.D. for analysis?

A Yes, that is correct.

MR. WILLINGHAM: Your Honor, at this time, I move State's 1 through 4 into evidence.

THE COURT: They are admitted without objection.

MR. BRENNAN: (Nods head affirmatively.)

(WHEREUPON, State's Exhibits 1 through 4 were admitted into evidence.)

BY MR. WILLINGHAM:

Q Investigator, you also at one point received a 9 millimeter handgun or pistol?

A Yes.

Q I'm showing you State's Exhibit number 5.

THE COURT: Mr. Willingham, I know you did it. But I just want to verify it for the jury and everybody in the courtroom, you made sure that weapon is not loaded as I instructed you to do before?

MR. WILLINGHAM: Yes, Your Honor.

BY MR. WILLINGHAM:

Q Showing you State's Exhibit number 5 which also contains State's Exhibit number 6 which is magnet. And that these are already in evidence. But do you recognize those items?

A Yes, sir.

Q What did you do those times when you received them?

A I collected those and also placed them into evidence to be sent to S.L.E.D.

Q That would be a 9 millimeter --

A That's correct.

Q -- handgun.

A That's correct.

Q I'm going to show you additional pictures. State's Exhibit number 37, do you recognize that?

A Yes, sir. This is the front of the patrol vehicle where the other evidence is located. We took a .38 gun, some blood samples, a shirt. These are all the

markings for those items.

Q The same thing as State's 38, just a different angle?

A Yes, sir. Just a different angle in the front of the patrol car?

Q State's 39 is what?

A That is the group of live rounds that I stated earlier that were in front of the patrol car that I collected.

Q State's 40, do you recognize that?

A Yes, sir. This is the .38 handgun that I collected from the parking lot in front as well of the patrol vehicle.

Q Those photographs all accurately reflect the scene as you found it that night?

A Yes, sir. They do.

MR. WILLINGHAM: At this time, I move State's Exhibit 37, 38, 39 and 40 into evidence.

MR. BRENNAN: No objection.

THE COURT: What were the numbers again, please?

MR. WILLINGHAM: 37 through 40.

THE COURT: Without objection, they are admitted.

(WHEREUPON, State's Exhibits 37 through 40 were admitted into evidence.)

MR. WILLINGHAM: Publishing to the jury State's Exhibit 37.

BY MR. WILLINGHAM:

Q Tell the jury what they are seeing please.

A This is the front of the patrol car and the items that were located in front of it that were collected by me. This is the patrol car. Here again is from the previous photographs that you saw. The bullet holes in this window right here. This is the patrol unit that was to the left of that vehicle with all of the items in front of it.

Q State's 38.

A This is a different angle. The patrol vehicle again. Here is all the items. It is just a different angle. It is the actually looking back towards the police department. The police department is over here.

Q What am I seeing in State's 39?

A This is a group of shell casings that were live, not the cases but the live rounds that were on the ground in front of the patrol vehicle.

Q What caliber were those?

A Those were .38.

Q .38?

A I believe .38. Yes, sir.

Q Okay. I am showing you State's Exhibit 40. What is the jury seeing there?

A That is the handgun, the .38 handgun that I marked as Number 6. It is located in front of the patrol car.

THE COURT: Where is 38?

MR. WILLINGHAM: State's Exhibit 38?

THE COURT: Yeah. Didn't you just admit it?

MR. WILLINGHAM: Your Honor, I admitted 37 through 40. And that is State's 38.

THE COURT: Let me see the picture that you just put up on the screen.

MR. WILLINGHAM: That is State's Exhibit number 40 on the screen.

THE COURT: All right.

BY MR. WILLINGHAM:

Q On this big picture, State's Exhibit 37, show the jury where the hand gun was found.

A The handgun was right here.

Q Marked by Number 6 on your picture?

A Yes.

Q Did you collect a handgun that was labeled as your Item 6?

A Yes, sir. I did.

Q I am showing you State's Exhibit number 13. Ensuring the Court that it has been made safe by court officials. I ask if you recognize that.

A Yes, sir. This is the gun that I collected and marked Item 6 from the parking lot.

Q Okay. What type of gun is that?

A This is a Taurus .38 Special.

Q A Taurus .38?

A Yes, sir.

Q What did you do with that piece of evidence when you collected it?

A I also did the paperwork to send it off to S.L.E.D. for analysis. And I placed it in the evidence locker to be collected by the evidence personnel to be placed into evidence.

MR. WILLINGHAM: Okay. Your Honor, at this time, I move State's Exhibit number 13 into evidence.

MR. BRENNAN: Without objection.

THE COURT: It is admitted.

(WHEREUPON, State's Exhibit 13 was admitted into evidence.)

BY MR. WILLINGHAM:

Q That gun is a revolver?

A That's correct.

Q I'm no gun expert. But I think that that means that when you fire, the cylinder turns and another bullet is ready to fire. Is that fair?

A That is correct.

Q It does not eject shell casings?

A No, sir. It does not.

Q Once a bullet is fired, the casing remains in the gun?

A That's correct.

Q How many bullets does that gun hold?

A This one holds five.

Q I'm going to show you State's Exhibit 9, sorry Your Honor -- 8, 9, 10, 11 and 12. Are these casings that were removed from that gun?

A Yes, sir. They are. They were actually with the gun. Still in the gun.

MR. WILLINGHAM: Okay. Your Honor, at this time, I move State 8, 9, 10, 11, and 12 into evidence.

MR. BRENNAN: No objection.

THE COURT: They are admitted.

(WHEREUPON, State's Exhibit 8 through 12 were admitted into evidence.)

MR. WILLINGHAM: Beg the Court's indulgence.

THE COURT: Yes.

BY MR. WILLINGHAM:

Q Now, Investigator, did you continue to look for evidence and collect evidence at that scene?

A Yes, I did.

Q Did you look inside that Taurus for any evidence?

A Yes, I did.

Q And did you find any inside that Taurus?

A Yes, sir. I did.

Q I am going to show you State's Exhibit number 48 and ask if you recognize that.

A Yes, sir. This is going to be the back seat of the Taurus. And this is a photograph actually of the rear, the entire rear seat. The left side is where Mrs. Lindsey was seated.

MR. WILLINGHAM: Your Honor, at this time, I move State's Exhibit number 48 into evidence.

THE COURT: It is admitted. Without objection.

(WHEREUPON, State's Exhibit 48 was admitted into evidence.)

BY MR. WILLINGHAM:

Q If you would, tell the jury what we are seeing now.

A This is the back seat of the Taurus. On this side, there's a baby seat on the right side of the vehicle. On the left side is a blood stain. That's where Mrs. Lindsey was seated.

Q I'm going to show you State's Exhibit number 50. Can you tell me what that picture is.

A This is a photograph of a bullet hole that goes through the back seat of vehicle that Mrs. Lindsey was in.

Q Tell me again what that was.

A This is a photograph of a bullet hole that goes to the back seat of the vehicle that Mrs. Lindsey was in.

MR. WILLINGHAM: Move State's number 50 into evidence.

MR. BRENNAN: No objection.

THE COURT: It's admitted without objection.

(WHEREUPON, State's Exhibit 50 was admitted into evidence.)

BY MR. WILLINGHAM:

Q Show the jury what you're talking about.

A This small part, this small hole right here is a hole that was a bullet hole that went through the back portion of the seat. It's close to being center-ways of the back seat. The back center of the back seat.

Q And did you look for the bullet that may have caused that bullet hole?

A Yes, sir. I did.

Q And did you find it?

A Yes, sir. I did.

Q Where did you find it?

A In the truck of the vehicle.

Q I'm showing you State's Exhibit numbers 61 and 63. Tell me if you recognize those.

A Yes, sir. I do.

Q And what are they?

A This is a photograph of the trunk of the vehicle. Actually I used a dowel rod. A dowel rod is just a straight piece of wood. It is approximately two to three feet long. It is round. It will go through any openings a bullet hole may have made. Actually, I placed the dowel rod through the back seat here.

And it shows the angle in which the bullet went where we could find the projectile a lot easier. The projectile, of course, is the bullet that is shot from the gun. I followed the dowel rod. And it pointed exactly to where the projectile was located in the trunk in the vehicle. I found the projectile. That is what these pictures depict. The trunk, the dowel rod and the projectile that was located in the trunk.

MR. WILLINGHAM: Your Honor, at this time, I move State's Exhibit 61 and 63 into evidence.

MR. BRENNAN: Without objection.

THE COURT: It's admitted.

(WHEREUPON, State's Exhibits 61 and 63 were admitted into evidence.)

BY MR. WILLINGHAM:

Q I'm showing you first State's Exhibit 61. Tell the jury what that is.

A This is the opposite side of the back seat of

vehicle. This is the dowel rod I was speaking of earlier that I placed through the hole of the front side of the seat. It went through and showed this angle. And you cannot really see it in this picture right here, but right in this area is where the projectile was located. It just shows you the dowel rod that goes and the angle that the bullet went through to the seat and into the trunk of the vehicle.

Q 63 shows the jury what?

A This is a close-up of it. This is the end of the dowel rod that you were just looking at. Here's the projectile here that is located in the trunk.

Q Was that projectile recovered?

A Yes, sir. It was.

Q I'm showing you State's Exhibit number 19 and ask if that is the projectile you recovered.

A Yes, sir. It is.

Q And you turned that to the evidence to be sent for examination at the State Law Enforcement Division?

MR. WILLINGHAM: Your Honor, at this time, I move State's 19 into evidence.

MR. BRENNAN: No objection, Your Honor.

THE COURT: It's admitted.

(WHEREUPON, State's Exhibit 19 was admitted into evidence.)

BY MR. WILLINGHAM:

Q Now, Investigator, did you using that dowel retrace the path of the bullet?

A Yes, sir. I went the opposite direction as well.

Q Was that photographed as well?

A Yes, sir. It was.

Q I'm going to show you a series of photographs. State's Exhibit 54, 55, 56 and 58. Tell me if you recognize those too.

A Yes, sir. This is where I went in reverse. I showed the angle here going from the seat into the trunk. These were photographs of where I showed going through the window on the passenger rear side into the seat. It is actually the reverse from the seat through the window.

Q Those accurately reflect what you did?

A Yes, sir. These are the photographs I took of the dowel rod.

MR. WILLINGHAM: Your Honor, at this time, I move State's Exhibit 54, 55, 56 and 58 into evidence.

MR. BRENNAN: No objection, Your Honor.

THE COURT: Give me the numbers again please.

MR. WILLINGHAM: It will be 54, 55, 56 and 58.

THE COURT: They are admitted.

(WHEREUPON, State's Exhibits 54, 55, 56 and 58 were

admitted into evidence.)

BY MR. WILLINGHAM:

Q I'm showing the jury first exhibit number 58. If you would, tell the jury what they're seeing.

A This is the back seat that you saw earlier. This is the dowel rod that I placed through. You saw the other side of the dowel rod in the trunk. This is the opposite side coming from the seat inside the passenger compartment. This is the dowel rod I placed in the hole to get the angle at which the bullet was fired.

Q State's Exhibit 56, what are we seeing there?

A This is a diagram of the dowel rod, a photograph rather that comes from the seat here where the entrance of where the bullet hole was and going to the right of where the window was located.

Q I'm showing you State's Exhibit 55.

A This is the dowel rod going through the window here. And out of the hole that was inside of the rear passenger side window.

Q State's 54.

A That is a close-up of the same photograph that you just saw.

MR. WILLINGHAM: Beg the Court's indulgence.

If you could, please answer any questions the defense may have.

MR. BRENNAN: May it please the Court, Your Honor.

THE COURT: Yes, sir.

CROSS-EXAMINATION

BY MR. BRENNAN:

Q Deputy Bogan, the pistol, the .38 pistol that was found at the front of Officer Godfrey's car, --

A Yes, sir.

Q Can you tell the Court how many bullets that gun held.

A I don't believe I, I believe I stated five. Yes, sir.

Q That was a five-shot gun.

A That is correct.

Q And you collected the five casings from that weapon, is that correct?

A Yes, sir. They were still in the weapon. Yes, sir.

Q And those have been introduced by evidence?

A Yes, sir.

Q And a casing is an empty shell, right?

A That's correct.

Q The bullet is the part that comes out. The casing is the part that stays in the gun, is that correct?

A That is correct.

Q So that would indicate that that gun has been fired five times, is that correct?

A That is correct.

Q You have identified four bullets that were fired from that gun, is that correct?

A That is correct.

Q Where is the fifth bullet? Do you know?

A No, sir. I don't. I don't know if it may have been shot up in the air or what happened.

Q Now the gun that Officer Godfrey had, it ejects the casings, correct?

A That is correct.

Q The casings that you found behind the patrol car --

MR. BRENNAN: Sorry, Your Honor. Beg the Court's indulgence.

BY MR. BRENNAN:

Q Those casings, those came from Officer Godfrey's gun?

A It does, some. I don't think you can see all four of them. But yes, sir, that's three. I can't really see the fourth one.

Q Those are remnants of the shots fired by Officer Godfrey, is that correct?

A Yes, sir.

Q Those indicate any shots fired by Mr. Lindsey, correct?

A No, sir.

Q When you came upon the scene, was Mr. Lindsey still there?

A No, sir. He already been transported to the hospital.

Q You took this picture, correct?

A Yes, sir. I did.

Q And you took blood samples or blood evidence from that spot, correct?

A Yes, sir. I did.

Q Whose blood was that?

A I never saw the analysis. I'm sorry.

Q Okay. I'm sorry. What is -- what is the white things? What is that and that?

A Those, I think, are towels or sheets that were left by EMS workers.

Q All right. At any point, was Ruby Nell Lindsey lying in this area?

A To the best of my knowledge, no, sir.

Q That is the front of officer Godfrey's car there, isn't that correct?

A Yes, sir. It is.

Q And this little corner here, that is the corner

of the grey Topaz, correct?

A Of the grey vehicle that Mr. Lindsey was in.

Q Okay. I'm going to give that back.

A All right.

Q Sir, I don't have any more questions. Thank you.

MR. WILLINGHAM: No redirect.

THE COURT: You can step down, sir.

MR. WILLINGHAM: The State calls Danny Defreeze.

DANNY DEFREEZE

having first being duly sworn testified as follows:

DIRECT EXAMINATION

BY MR. WILLINGHAM:

Q If you would, tell the jury who you are.

A My name is Frank Dan DeFreeze.

Q Mr. DeFreeze, where do you work?

A I work for the South Carolina Law Enforcement Division. I am assigned to the forensic services laboratory in Columbia. And I work within the unit where we do the identification of firearm and tool mark evidence.

Q And how long have you been at the firearm and tool mark department?

A Since my first employment with S.L.E.D. which was in 1967, I was assigned there then. And I been there with the exception of about a five-year period the entire time.

Q And what type of educational background do you have to allow you to perform your duty?

A I have a Bachelor's Degree from the University of South Carolina. My principal training in the field of firearm and true tool mark information was received at S.L.E.D. As I said, I was first assigned to the firearm and tool mark unit upon my employment. I began a period of instruction in the techniques of firearm and tool mark identification.

I received that instruction from a gentleman named Miller Kate. Mr. Kate established the S.L.E.D. Forensics Laboratory when S.L.E.D. itself was established in 1947. I also studied under others. After a period of about two and a half years of instruction and working cases under his supervision and under that of Lieutenant Carl Stokes who was there at the time, I began accepting cases on my own and testifying as to my results which I have been doing since 1969.

Q So in your 35 plus years experience, have you testified in court before?

A Yes, I have.

Q How many times?

A It is probably in excess of 600 now.

MR. WILLINGHAM: Your Honor, at this time, I move to have Mr. DeFreese qualified as an expert in

the area of firearm and tool mark identification.

MR. BRENNAN: Without objection.

THE COURT: Ladies and gentlemen, let me take a second to explain to you what that means. I do designate Mr. DeFreese as an expert in firearm and tool mark identification. That is what you said?

MR. WILLINGHAM: Yes, Your Honor.

THE COURT: Ladies and gentlemen, ordinarily witnesses are not allowed to give opinions during their testimony. But an expert witness is someone who by experience or training has become an expert in some field or study. An expert witness and one whom I designate as an expert witness is allowed to give opinions within their areas of expertise.

You are expected to evaluate and to judge and weigh this witness' credibility as an expert just as you would judge and weigh the credibility of any other expert. You are not bound to accept the opinion of an expert. You give it the weight that you believe it deserves, if any.

All right, sir. You may proceed.

MR. WILLINGHAM: Thank you, Your Honor.

BY MR. WILLINGHAM:

Q If you would, tell the jury what your job as a firearm analysis and tool mark identification expert is.

A We are frequently asked, because the S.L.E.D. forensic laboratory does different kinds of analyses for police departments and Sheriff's departments throughout this State. They will frequently collect evidence and send it to us for analysis. Within the firearm and tool mark unit, we're most often asked to identify bullets back to the firearms in which they were fired or cartridge cases back to the firearms in which they were fired, in some cases where firearms are not available to identify different ammunition components as perhaps being fired by the same firearm.

And most frequently, in the case of tool marks, we are asked to identify a tool with some, usually a compromised physical security device such as a lock or safe or something to see if we can identify the particular marks on that object as being made by the tool. Firearm identification is actually a rather large sub-specialty of the field of tool mark identification. Because in the case of firearms, the firearm is the tool. It marks the objects that come into contact with it which are bullets and cartridge cases.

Q And did you receive a number of pieces of evidence in this case to analyze?

A I did.

Q I'm going to show you first State's Exhibits

number 5 and 6. I want to ensure the Court that they have been safe. And ask if you received those items for analysis.

A Yes, sir. I did.

Q What is Item 5?

A Item 5 is a Beretta 9 millimeter Luger caliber semiautomatic pistol. Item 6 is the detachable box magazine what fits this Beretta pistol.

Q Okay. Did you find that pistol to be in working order?

A Yes, I did.

Q Explain to the jury what you mean when you say a semiautomatic pistol.

A A semiautomatic pistol is a type of autoloading firearm. It is a handgun in which some of the energy of the cartridge is used to function the firearm. After firing, the recall in this case causes to the mechanism of the firearm to extract and eject a fire cartridge case and to load a round from the magazine to prepare the firearm for the next fire. By semiautomatic, I mean it fires one shot each time the trigger is pulled as distinct from a fully automatic firearm like a machine gun that continues to fire as long as the trigger is pressed and ammunition is present.

Q What happens to that particular weapon when a

bullet is fired?

A When a shot is fired, a bullet goes down the barrel and out of the firearm. A short bit of time later, the cartridge case from which that bullet came is extracted and ejected from the firearm. The firearm is, thereafter, prepared for the next shot to be fired if ammunition is present.

Q So the casing is ejected?

A Yes, automatically without operator doing anything else.

Q I'm showing you State's Exhibits 1, 2, 3 and 4 and ask if you recognize those items.

A (Reviewing.) Yes, sir. I do.

Q What are those Items 1 through 4?

A Items 1, 2, 3 and 4 are four fired 9 millimeter Luger cartridge cases.

Q Did you perform any analysis to compare those four cartridges to State's Exhibit number 5?

A Yes, sir. I did.

Q What analysis did you perform?

A Upon receiving the pistol from Item 5, I collected certain information about it. And I test fired Item 5 to get cartridge casings that I knew it had fired. I later took the test fire cartridge cases from the pistol, Item 5, and first compared them under a microscope with

each other to see what sort of markings were present and whether they were sufficient and identifiable. I find that they were.

Thereafter, I took one of the cartridge cases that I knew this pistol Item 5 had fired. And I microscopically compared it with the cartridge casings that are pressed in Items 1, 2, 3 and 4. I found sufficient matching breach face impressions so that I could conclude that all four of these fired cartridge casings were fired by this pistol and by no other pistol.

Q So those four cartridge cases were fired by this 9 millimeter Beretta?

A Correct.

Q And could not have been fired by any other gun?

A Correct.

Q First, let me show you what has been introduced as State's exhibit number 13.

MR. WILLINGHAM: And again, Your Honor, it has been made safe.

BY MR. WILLINGHAM:

Q And ask if you recognize that item.

A Yes, sir. I do.

Q What is it?

A State's Exhibit 13 is a Taurus .38 special caliber double action revolver.

Q How is that weapon different than State's Exhibit 5?

A State's Exhibit 13 is also a handgun. But it is a type of the handgun that is manually operated. It does not use any of the energy from the firing of the cartridge to operate it. And it unlike the pistol does not automatically extract and eject cartridge cases every time it is fired. Instead of holding ammunition in a detectable box magazine as the 9 millimeter Luger pistol did, this one holds up to five cartridges in the cylinder which rotates it to the central part of the firearm.

It is necessary for the shooter to either manually cock the hammer fired in a single action mode. That is, to manually cock the hammer there after you pull the trigger. Or a single long pull of the trigger will cause the cylinder to be rotated into alignment to bring the next unfired cartridge forward and when the hammer reaches a certain point in its movement, it would be released and cause the cartridge to be fired.

Q I am certainly no firearm's expert. But I believe that if the hammer is pulled back already and the trigger is fired, that's called single action.

A That is the single action mode of the firing in which the trigger does only one thing, which is to fire the cocked hammer.

Q And the term double action in reference to that weapon means what?

A It means the trigger does two things. The trigger both cocks the hammer and it fires the firearm.

Q After that weapon is fired once, does it stay in single action mode or does it go back double action?

A It will require a double action, a long pull of the trigger or it would require manually cocking the firearm. The pistol, State's Exhibit 6, State's Exhibit 5. It is also a double action. But after the first shot, it goes into the single action mode thereafter. Because the slide goes into the rear doing the ejection cycle and cocks the hammer.

It is not so with State's Exhibit 13. It is always manually operated. It is always necessary for the hammer to be manually cocked. Either by cocking it with your thumb or by a long heavy pull of the trigger.

Q Did you test that weapon to find out if it was in working order?

A I did.

Q Can you tell me how many pounds of pressure it takes to pull that trigger in single action mode?

A I measured State's Exhibit 13, single action trigger pull to be three and a half pounds.

Q Did you determine the amount of force necessary

to pull the trigger in double action mode?

A I did.

Q What was that?

A It varied between eleven and eleven and a quarter pounds.

Q Is it fair to say or is it a fair characterization to say that is a fairly significant amount of force to be applied to that trigger in double action mode to cause it to fire?

A Yes, sir. It is. It is a fair amount of pressure. And the pressure is applied over a considerable distance. For the three and a half pound trigger pull, it is not really necessary to pull the trigger very far. For the eleven to eleven and a quarter pound double action trigger pull, it is necessary to pull the trigger at a considerable distance.

Q At eleven pounds of pressure?

A Yes.

Q I want to show you has already been introduced as State's Exhibits 8, 9, 10, 11 and 12 and ask you if you recognize those.

A Yes, sir. I do.

Q Did you perform any analysis on those items?

A Yes, sir. I did.

Q Based upon those analysis were you able to

determine what weapon fired those shell casings?

A I was.

Q What weapon was it?

A State's Exhibit 13.

Q Which is the .38 Taurus?

A Yes, sir. State's Exhibit 9 through 12 or 8 through 12, excuse me, all fired .38 special caliber cartridge cases which were fired by this revolver.

Q To the exclusion of all others?

A Yes, sir.

Q I'm going to show you first State's Exhibit number 16.

A Yes, sir.

Q Do you recognize that?

A I do.

Q What is it?

A It is a fired plain lead bullet.

Q When you received that bullet, was there any indication from where that bullet had come from?

A The container which it was fired was marked Ruby N. Lindsey.

Q Can you further tell where that bullet had been recovered Mrs. Lindsey?

A It is marked Post-head A.

Q And did you perform any analysis on that item,

State's Exhibit 16?

A I did.

Q And what were you able to conclude as a result of that analysis?

A I compared the bullet with State's Exhibit 16 with test bullets fired by both the 9 millimeter pistol, State's Exhibit 5 and the .38 Special caliber pistol, State's Exhibit 13. I found the same general riffling characteristic on this bullet and on test bullets fired by the revolver, by State's Exhibit 13.

The general riffling characteristics present on this bullet were not, they were different from those of the 9 millimeter pistol. However, this pistol is somewhat variable in the markings it places on even test bullets. Test bullets are difficult to identify with each other. And this bullet in State's Exhibit 16 was very badly damaged. I was not able to identify this bullet as being the one. I can say this, two guns, it could been a fired by this one and could not have been fired by the other one.

Q So there are times in your experience where you have been able to match bullets or, yeah, bullets with a gun?

A Yes, sir. When a bullet is sufficiently undamaged, and when a firearm is consistent in the markings it leaves on bullets that are fired through its barrel, I'm

able to conclude that a particular bullet was fired by a particular riffle firearm which includes pistols and revolvers. When the bullet is too badly damaged or the firearm is not consistent in its markings, I just can't say.

Q So State's Exhibit 16, this bullet could have been fired from State's Exhibit 13?

A Correct.

Q But it could not have been fired by State's Exhibit 5?

A That's correct also.

Q I'm going to show you State's Exhibit number 17.

A Yes, sir.

Q What is that?

A This is also a fired plain lead bullet.

Q Recovered where from?

A It is marked as brain. And it is also marked Ruby N. Lindsey.

Q Okay. And were you able to make any determinations on that piece of evidence?

A My results on Item 17 was the same as Item 16. It had general riffling characteristics similar to test the fired by 13 and different from those in Item 5.

Q To summarize, could it have been fired by the .38 Taurus?

A Correct.

Q But could not have been fired by the 9 millimeter Beretta?

A Also correct.

Q Showing you State's 18. I will ask you the same questions on that?

A Yes, sir.

Q Did you receive that piece of evidence?

A I did.

Q Can you tell where it came from?

A This one is also marked as Ruby Lindsey.

Q Does it indicate that it was from the jaw area?

A It's got so much tape on it. It's a little difficult to read. I believe I wrote it in my notes. Yes, sir. The container was labeled as R-jaw.

Q And it too was a fired plain lead bullet?

A It is.

Q What opinions do you have based upon your analysis of that item?

A The same as Item 16 and 17. It could have been fired by the revolver in State's Exhibit 13. It could not have been fired by the semiautomatic pistol.

Q Finally State's Exhibit number 19.

THE COURT: Let me see y'all up here just one second.

(WHEREFORE, a bench conference was held off of the record.)

BY MR. WILLINGHAM:

Q What is State's 19?

A State's Exhibit 19 is also a fired plain lead bullet.

Q Any indication where it was coming from?

A State's Exhibit 19 was labeled as being removed from the trunk of the vehicle.

Q Okay. And you performed an analysis on that?

A I did.

Q And based upon that analysis, what conclusion did you draw?

A My results were the same as item 16, 17 and 18. It was consistent and could have been fired by Item 13. It could not have been fired by Item 5. But I can't identify it as being fired by Item 13 to the exclusion of all other similar guns.

Q If you would answer any questions that they have for you. Thank you.

CROSS-EXAMINATION

BY MR. BRENNAN:

Q Based on the analysis that you've done and that you testified to, you were shown or you were given five casings from that .38 revolver. Is that correct?

A There were five fired .38 special cartridge pistols received. And I identified all five of them as having been fired in the revolver, yes, sir.

Q Okay. Four bullets?

A There will four bullet specimens received, that is correct?

Q Were you ever told anything about where the fifth one might be?

A No.

Q You were given four bullets that you determined were fired from this nine millimeter, is that correct?

A No, there will four fired cartridge cases which were 9 millimeter Luger cartridge cases which I identified as having been fired by that pistol. They were fired by that gun.

Q Did you do any analysis on the bullets that were fired by that gun?

A I received one bullet which was a jacket, a copper alloy jacket, a hollow point bullet that was marked as removed from the body of Mariana -- Mariana [sic] Lindsey received in a container marked foreign body. The foreign body was a rivet I believe. It was not consistent with an ammunition component. But the bullet that was received with that was fired by the 9 millimeter Luger pistol, State's Exhibit 5.

Q Okay. What you can say is the bullets that were fired, you can't say that those four bullets that you analyzed shot from a .38 caliber weapon specifically came from that gun?

A That is correct.

Q But they did not come from that gun?

A That is also correct. They could have been fired by this one. Could not have been fired by that one.

Q All right. Just for clarification, you've got four bullets from that gun?

A No, we've got four -- we got, yeah, four bullets and five cartridge casings.

Q Five casings, correct?

A Yes, sir.

Q Thank you. I have nothing further.

MR. GOWDY: Nothing further from this witness, Your Honor.

THE COURT: You can step down, sir.

END OF VOLUME 3

1624A

STATE OF SOUTH CAROLINA	IN THE COURT OF GENERAL SESSIONS
COUNTY OF SPARTANBURG	Case No(s).: 02-GS-42-0453
State of South Carolina Plaintiff,	
-VS-	TRANSCRIPT OF RECORD **VOLUME 4 OF 4**
Marion Lindsey Defendant.	

May 17, 2004
Spartanburg, South Carolina

B E F O R E:

HONORABLE JOHN C. FEW, Judge.

A P P E A R A N C E S:

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Solicitor

BARRY BARNETT, Esquire
Assistant Solicitor

DONNIE WILLINGHAM, Esquire
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TERESA B. JOHNSON
OFFICIAL REPORTER

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S-5	Beretta 9 mm	1486	1570,1742
S-6	Black clip	1486	1570,1742
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No exhibits offered.

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P R O C E E D I N G S (con't)

THE COURT: Call your next witness.

MR. GOWDY: Your Honor, if it pleases the Court, the State calls Doctor David Wren.

MR. WILLINGHAM: And we ask that Dan Defreeze be excused.

THE COURT: He's excused.

JOHN DAVID WREN

having first being duly sworn testified as follows:

DIRECT EXAMINATION

BY MR. GOWDY:

Q Good afternoon, Dr. Wren.

A Good afternoon.

Q Could I get you to introduce yourself to the jury and tell them what your specialty in the medical field is.

A My name is John David Wren. I am a pathologist with Spartanburg Pathology Associates. We have a contract with all the hospitals, but I'm specifically with the Spartanburg Regional Medical Center where I'm the Laboratory Medical Director, Chairman of the Department of Pathology and a practicing physician with license in pathology.

Q Can you give the jury the benefit of an overview of your educational background.

A First of all, I have a Bachelor's Degree, a

Master's Degree and a Doctor of Philosophy Degree in Chemical Engineering from Clemson University. I also have a medical degree from the Medical University of South Carolina. And I did a combined anatomic and clinical pathology residency at the Medical University of South Carolina fulfilling my requirements for the, to take the board of combined anatomic and clinical pathology in three years and nine months.

While I was there, I was also assistant medical examiner for Charleston County. One weekend a month under the direction of forensic pathologist at the Medical University, I did forensic autopsies for the State of South Carolina on bodies that were sent to the Medical University usually doing between four and eight each weekend. And that was in partial requirement in fulfilling a residency in pathology -- forensic pathology.

Q Can you give the jury a sense of how many autopsies you have performed in your career?

A I don't have an exact number. But I usually do about a 170 a year for the last probably 15 years. So it is pretty close to 2000 by now.

Q Have you been qualified previously in the state or federal court as an expert in the general field of pathology?

A Yes. I've been qualified in about 20 counties in

South Carolina as an expert in forensic pathology and anatomic and clinical pathology.

MR. GOWDY: Your Honor, at this point, we would move Doctor Wren in as an expert generally in pathology and also more specifically in forensic pathologist.

MR. BRENNAN: No objection.

THE COURT: I qualify him as an expert pathologist and forensic pathologist.

BY MR. GOWDY:

Q Could you tell the jury what forensic pathology is.

A Forensic pathology is a branch of pathology. Specifically, a branch of anatomic pathology in which the pathologist is concerned with medical legal investigations. Whether it be a coroner's autopsy or other medical legal cases, a forensic pathologist is specifically trained to make judgments in that area.

Q Dr. Wren, did you have occasion to do an autopsy involving a Ruby Nell Lindsey?

A Yes, I performed an autopsy on an individual named, identified as Ruby Nell Lindsey in the Spartanburg Regional Medical Center Autopsy Room on September the 19th 2002 beginning at approximately 10 a.m.

Q Can you tell the jury what her cause of death

was?

A I stated that in my opinion the actual cause of death was a distant gunshot wound to the head.

Q When you say distant, Dr. Wren, can you tell the jury what you mean by distant as opposed to contact or near contact?

A Basically gunshot wounds are, on individuals are in three general categories. That being distant meaning that it is so far, the shot was fired so far away from the body that it leaves no other markings except the gunshot wound itself. A contact gunshot wound would be one in which the barrel was placed either tight against the skin or loose against the skin.

In that case there may or may not be, there usually is but may or may not be splitting of the skin around the gunshot wound. It will be powder deposited within the wound itself. If it were a shotgun or something of that nature, one would usually find packing inside the path of the gunshot wound.

The other category is an immediate range gunshot wound in which the barrel is within a distance in which burning powder and soot will be deposited on the skin and can be recognized as either soot on the skin or little abrasions from the burning powder hitting the skin and causing abrasions on the skin. In some cases, one could actually

pick a powder out if it has not completely burned away.

Q Dr. Wren, you described the gunshot contact gunshot wound as one that's either tightly pressed against the skin or against the skin but not tightly compressed. Can you give the jury a sense in terms of distance how far a gun barrel can be from the object that it hits to be classified as an intermediate and then distant, how far can it be and still be classified as distant?

A Immediate is any where from actually not against the skin up to, depending on the weapon, it can be, with larger weapons, it can be up to 12 to 18 inches. In handguns, it is usually no more than 8 to 10 away. One would not see any evidence. Anything further than that away, there would be no other evidence other than the actual hole made by the projectile itself.

Q So if I understood you correctly, Dr. Wren, in handguns, it could be 10 inches and still classified as a distant gunshot?

A That is correct. Basically, if you have a handgun that is being used, a ballistics expert can take that gun, using the same type of ammunition, they can take that weapon and fire it at various distances back from a white target and one can see the pattern that can often be matched to that on the body if it was an immediate gunshot wound. So one can tell approximately how far it was away

if there is any residue or soot there.

Q Dr. Wren, can you show the jury using either my head or yours, whichever you feel more comfortable using, how many injury wounds, exit wounds you identified in Nell Lindsey's head and what the location of those exit and injury wounds was.

A Well, I found evidence of four gunshot wounds. I numbered them arbitrarily. Usually, I number from top to bottom and then from front to back. And it's just to keep track of them. The first gunshot wound that I identified was in the back of the head in this case. It was three and a quarter inches from the top of the head and about three quarters of an inch to the left of midline. So it was in the back of approximately this area here.

This wound was irregular in shape. It measured a half inch or 31 hundreds of an inch. Beneath that wound itself up against the skull itself and partially embedded in the skull was a flattened lead bullet. It did have some visible ends and grooves. It measured 1.8 inches long, 0.97 inches wide and 0.15 inches thick. It was stopped by the skull which was pretty thick in that area. That was the first gunshot wound.

That bullet, I labeled as best I could with the letter zero which was the last number of the autopsy. I mean the number zero, the last number of the autopsy, the letter A,

indicating that it was the first bullet I recovered, and a delta, which is a Greek letter that I use to identify bullets and other objects.

Gunshot number two, I labeled appeared in the left temporal region. Three and a quarter inches from the top of the head. And three and a quarter inches from the left of midline. And from midline around the head, there was four inches circumferentially. This wound was irregular in shape. There was some brain and blood protruding from defect. It measured 0.50 or a half an inch by 0.45 or 45 one-hundredths of an inch in overall dimensions.

This gunshot wound actually passed into the cranial vault. It went through both loads of the cerebrum. It hit the lateral right orbital plate of the base of the, top of the eye rather and the bone above the eye. And the bullet actually came to rest in the brain tissue there in that area. It has, it was distorted. It had visible ends and grooves also. It measured 70 one-hundredths by 50 one-hundredths by 43 one-hundredths.

I labeled that bullet with the Arabic number zero. The letter B and again Delta. I considered the path of that gunshot wound was forward at about 15 degrees from the horizontal. It was downward approximately 28 degrees and left to right in basically in this type manner.

The gunshot wound number three was near the nape of

the neck which was the back of the neck. It was five and a three quarter inches from the top of the head whereas the first one I described was three and a quarter inches. It was a little bit lower. It was one inch to the right of the midline rather than to left the midline.

That bullet passed through the soft tissues of the back of the neck and came to rest near the angle of the jaw in the right jaw region. That bullet was, the wound was irregular in shape. And it measured up to 58 one-hundredths of an inch in diameter. This bullet passed slightly downward, left to right 20 degrees and back to front. That bullet was mildly distorted. It wasn't very distorted. It measured .35 inches in diameter at the base and up to 0.68 or 68 one-hundredths inches long. I labeled that zero again, a C on that one and Delta.

The other gunshot wound that I found was a grazing gun shot wound in the lower postural neck midline. It was diagonally oriented downward and to the right meaning that the left side was a little bit higher than the right. This one was 1.6 inches long. A little bit longer than, about the length of the width of my finger. And it was .45 or 45 one-hundredths inches wide. It's a little bit of hemorrhage around that wound and slightly discolored. There was no actual bullet recovered from that gunshot wound. It was a grazing gunshot wound.

Q If I understood your testimony correctly, you found three injury wounds for gunshots and three bullets actually inside the head, for lack of a better word, of Mrs. Lindsey?

A That is correct.

Q You found evidence of a fourth shot that I guess in layman's terms would be a glancing or superficial blow?

A A grazing gunshot wound.

Q A grazing gunshot?

A Right.

Q But you did not recover the bullet for that because it was not part of the autopsy?

A Right. And I did not go to the scene.

Q Yes, sir. Now I maybe asking you a question outside of your area of expertise. And if I am, I apologize. Could you tell from the injury caused from that grazing gunshot whether enough tissue was taken as to have any appreciable effect of the velocity of that bullet. In other words, would that bullet have been able to continue on given the injury that it did to the back of the neck?

A Yes.

Q Let me show you, Dr. Wren, State's Exhibits 16, 17 and 18 and ask you whether or not you recognize those exhibits.

A Yes, these are three lead bullets that are in

containers that are actually labeled by me and signed by me. I did not measure them but I can tell they fit the general description. And I can make out these scratchings that I did on them.

Q All right. Those would have been the three bullets that you took from Nell Lindsey's head during the autopsy?

A Yes. The flatter one is the one that was recovered from the back of the head that was up against the skull that did not penetrate the skull. The one labeled 17 is rather well distorted. That was the one that was removed from the brain itself. And the other one is only distorted on the nose. It has an intact base. That was the one that was removed from the angle of, near the angle of the jaw.

Q Dr. Wren, in your opinion as a medical doctor and expert in the field of pathology, would either of the two gunshot wounds where you recovered the bullet from inside the cavity of her head been fatal shots?

A I usually identify gunshot wounds as either immediately fatal or potentially fatal. The one that actually entered her head was the one that was immediately fatal. The other two were potentially fatal in that she could have bled to death from -- actually the other three, she could have bled to death or gotten an infection from

any of those three and eventually died. There was not enough bleeding from the two that the, the two others for her to have actually bled to death immediately. But she could have bled to death if she had not been attended to, from any of the others. Not likely, but she could have.

Q Finally, Dr. Wren, I'm going to show you State's 64 and ask you whether or not that was a picture that you recognized or whether you were --

A Yes, this was a picture of all three bullets. It is labeled FA0220 in my writing on a small tape measure type thing where we have photographs of each of the bullets that were recovered at the autopsy. And they are consistent with those in these files here.

MR. GOWDY: Your Honor, we would move State's 64 into evidence.

MR. BRENNAN: No objection.

THE COURT: There are admitted.

(WHEREUPON, State's Exhibit 64 was admitted into evidence.)

MR. GOWDY: Dr. Wren, I have no further questions for you. Thank you for your time. Please answer any questions Mr. Brennan may have.

MR. BRENNAN: I have no questions.

THE COURT: You can step down, sir. Thank you for coming, Dr. Wren.

Ladies and gentlemen, I am told that your lunch is here. So we're going to take a break now and eat lunch. We will resume probably in about an hour, maybe an hour and fifteen minutes. So have a nice lunch. Remember that you may not discuss the case. We will see you shortly.

(WHEREUPON, the jury exits at approximately 1:20 p.m.)

THE COURT: All right. We'll be in recess until I finish my lunch.

MR. GOWDY: Your Honor, I have had a matter brought to my attention that I think is significant enough to bring to the Court's attention.

THE COURT: All right. Go ahead.

MR. GOWDY: We had a call this morning to our office from an Angela Payne. We have her number. She called to report that a juror that I am happy to say is not on the jury but one that was called back yesterday in her judgment had been discussing the case, telling where she was going to be staying and otherwise violated what may have been the Court's instructions. This lady felt compelled to call my office and report it. And I feel compelled to bring to the Court's attention.

THE COURT: This was someone who was in the panel?

MR. GOWDY: She was in the panel. She was not selected. She was juror 134.

THE COURT: All right. Thank you.

MR. GOWDY: Yes, sir.

(WHEREUPON, a lunch recess was taken at approximately 1:21 p.m.)

(WHEREUPON, the Court resumed at approximately 2:22 p.m.)

THE COURT: What do you say, Solicitor?

MR. GOWDY: Your Honor, the State has no more witnesses in its case in chief.

THE COURT: Mr. Bartosh.

MR. BARTOSH: Your Honor, we will offer some testimony. The defense will offer some testimony. However, we have discussed with Mr. Lindsey concerning his right to testify. He -- we told him that he has an absolute right to testify. He has an absolute right not to testify.

We can make a lot of decisions about how to try the case but one decision we can't make is whether or not he testifies. We told him what we think the advantages of testifying are and what the disadvantages are. We've also explained to him that he can talk to anybody he wants to but ultimately the decision has to be his and his alone. We would ask

the Court to inquire of him.

THE COURT: Are you satisfied that he understands everything that you talked to him about concerning his right to testify and his right not to testify?

MR. BARTOSH: Yes, sir. I am.

THE COURT: All right, sir.

Mr. Lindsey, raise your right hand, please, sir.

(WHEREUPON, Mr. Lindsey was sworn.)

THE COURT: All right. You can put your hand down. Now, I'm going to talk to you about what your lawyer has already talked to you about. If I say anything that confuses you or if I ask a question that you don't understand, you stop me. Okay?

MR. LINDSEY: Yes, sir.

THE COURT: Now, do you understand that you have an absolute right under the United States Constitution and the Constitution of South Carolina to remain silent and that you can not be compelled to testify in this case. Do you understand that?

MR. LINDSEY: Yes, sir.

THE COURT: If you choose not to testify, then I will explain to the jury that you have that right not to testify and that that right, that your exercise of that right can not and must not be held against you. You understand that I will do that?

MR. LINDSEY: Yes, sir.

THE COURT: You also understand that you have the right to testify. You do?

MR. LINDSEY: Yes, sir.

THE COURT: And that if you do testify, you would be like any other witness in the case and subject to cross-examination on any subject that might be relevant to this case. Do you understand that?

MR. LINDSEY: Yes, sir.

THE COURT: And do you also understand that that would include the possibility of your being cross-examined about any criminal record that you might have.

MR. LINDSEY: Yes, sir.

THE COURT: And you discussed that with him, Mr. Bartosh?

MR. BARTOSH: We have, Your Honor.

THE COURT: Are there convictions in his past that would be useful to the State in impeaching his credibility?

MR. BARTOSH: There are convictions that the State could use, yes, sir.

THE COURT: Is there any need for me to address those now or are you satisfied that either they will or they won't be able to use those in cross-

examination?

MR. BARTOSH: I am satisfied, Your Honor, that they would be able to use those during the cross-examination.

THE COURT: All right. Mr. Lindsey, as Mr. Bartosh said, your lawyers make a lot of decisions for you in this case. They make a lot of strategic decisions. They decide whether or not to call other witnesses. They decide about cross-examination and all that stuff. You are the one who have to decide whether or not you're going to testify. In preparing yourself to do that, you need to consult with your lawyers. I understand that you have, is that correct?

MR. LINDSEY: Yes, sir.

THE COURT: You also need to consult with anybody else that you rely on for advice and counsel. Have you done that?

MR. LINDSEY: Yes, sir.

THE COURT: Are you ready to make up your mind as to whether or not you wish to testify?

MR. LINDSEY: Yes, sir.

THE COURT: Do you need any more time to talk to your lawyer or anybody else right now before you make up your mind?

MR. LINDSEY: No, sir.

THE COURT: Is there anything about this decision that you don't understand, sir?

MR. LINDSEY: No, sir.

THE COURT: Have you made up your mind?

MR. LINDSEY: Yes, sir.

THE COURT: And are you going to testify?

MR. LINDSEY: No, sir.

THE COURT: Mr. Bartosh, are you satisfied that he has made that decision voluntarily and knowingly and intelligently understanding his rights that we have discussed and that you have discussed with him?

MR. BARTOSH: Yes, sir.

THE COURT: Is there anything else that I need to talk to him about, anything I might not know about such as perhaps his ability to understand what I'm saying, are you satisfied that he understand everything I just said?

MR. BARTOSH: I am satisfied.

THE COURT: Is there anything else we need to talk about before I accept his decision not to testify?

MR. BARTOSH: No, sir. Not as to the issue of whether or not to testify.

THE COURT: All right. Is there anything else?

MR. BARTOSH: The only other thing that I would like to put on the record is that Mr. Lindsey has a conviction of assault and battery with intent to kill from 1996. I have explained to him that no matter what the jury returns, what verdict they return in the guilt phase, the two possible verdicts that he would, the best that he could hope for would be life without parole because he would be brought under the Two Strike Law.

The State also served him with a ten-day letter notifying him that they would seek life without parole if he were to be convicted of manslaughter. I have been served with that note also. So Mr. Lindsey also understands that. That out of everything, the best he can hope for is life without parole.

THE COURT: It is my understanding that you intend to call some other witnesses?

MR. BARTOSH: Yes, sir.

THE COURT: You will discuss with your client whether or not he has changed his mind about his testimony at the end of your having called those witnesses.

MR. BARTOSH: I will, Your Honor.

THE COURT: And if you will remind me, I will also do that.

MR. BARTOSH: Yes, sir.

THE COURT: All right.

MR. BARTOSH: Yes, sir.

THE COURT: I believe that his decision at this point not to testify is made knowingly and intelligently and voluntarily, that he fully understands his right under the Fifth Amendment and also his right to testify. At this point, I will certainly accept that decision.

MR. BARTOSH: Thank you, Your Honor.

THE COURT: Are you ready?

MR. BARTOSH: Yes, sir.

THE COURT: Bring them in.

MR. GOWDY: Would the Court like me to rest on the record when the jury comes in?

THE COURT: I believe so.

(WHEREUPON, the jury enters at approximately 2:30 p.m.)

THE COURT: Solicitor.

MR. GOWDY: May it please the Court, Your Honor, the State rests.

THE COURT: Mr. Bartosh, are you ready to proceed?

MR. BARTOSH: Yes, sir.

MR. BRENNAN: Yes, Your Honor. We call Jason Stewart to the stand please.

JASON STEWART

having first being duly sworn testified as follows:

CROSS-EXAMINATION

BY MR. BRENNAN:

Q Mr. Stewart, how are you today?

A Fine. And you?

Q Good. Would you please state your full name for the record.

A Joseph Stewart.

Q And where are you employed?

A Spartanburg EMS.

Q How long have you held that job?

A I been there four years.

Q And in your job, what are your duties?

A I am a paramedic.

Q Can you tell the Court what training you have.

A I have training in all different medical aspects from medical problems, trauma problems, psychological problems.

Q Were you employed as a paramedic with the Spartanburg Emergency Medical Service on September 18th of 2002?

A I was.

Q All right. Sir, did you respond to an emergency call at the Inman Police Department that evening?

A I did.

Q Did you render assistance or care to Mr. Marion Lindsey?

A Yes, sir. Basic care.

Q Would you tell the Court what injuries Mr. Lindsey sustained.

A He had gunshot wounds.

Q Can you tell the Court to which parts of his body did he have gunshot wounds.

A He had gunshot wounds to the hip area as well as the legs.

Q Did he have a head wound?

A He had a head wound.

Q So there was a head injury, is that right?

A That is correct.

Q As you approached him, did Mr. Lindsey say anything to you?

MR. BARNETT: Objection, Your Honor, hearsay.

THE COURT: Is it written out somewhere where I can look at it?

MR. BRENNAN: Yes, it is.

THE COURT: I am going to have to send you folks

back into the jury room for a few more minutes. We have to cover an evidentiary matter. We will get with you as soon as I can. Thank you.

(WHEREUPON, the jury exits at approximately 2:34 p.m.)

THE COURT: The only thing in here --

Why don't you go ahead and answer the question. What did he say?

THE WITNESS: He said that he shot himself in the head.

THE COURT: Were those his exact words?

THE WITNESS: He said I shot myself in the head.

THE COURT: All right. Is that it?

MR. BRENNAN: Yes, Your Honor. I think it will come in under 803, excited utterance.

MR. BARNETT: Basically, it is a self-serving statement, self-serving hearsay. In our case law and our rules, it basically talks about a statement that a defendant made to the police officers. He wanted to enter those. The statements were not entered in the State's case. And they wanted to enter it in his case.

THE COURT: Is it the case in Orangeburg that Judge Clary tried down there where the man shot his wife in the mobile home?

MR. BARNETT: There's also that case.

THE COURT: What case is that? Let me see the one you got.

MR. BARNETT: Yes, sir.

(WHEREUPON, the Court reviewed the documents.)

MR. BARNETT: Your Honor, I do have another case too. State versus Gosen.

THE COURT: Versus what?

MR. BARNETT: Gosen.

THE COURT: That's fine.

MR. BARNETT: Are you familiar with that or do you need a copy of it?

THE COURT: I need to look at it.

MR. BARNETT: Yes, sir.

(WHEREUPON, there is a pause as Court reviews the documents.)

THE COURT: Your argument is that even though it might be an excited utterance, because it is self-serving, it is inadmissible?

MR. BARNETT: That is one of the reasons. Yes, sir.

THE COURT: Explain that to me.

MR. BARNETT: The main reason I objected is because I suspect they were going to ask why he shot himself. I think that is clearly beyond, first thing, it is irrelevant to the guilt phase that we

talking about. Second thing is it is self-serving hearsay basically. Our courts have held that type of hearsay cannot be allowed especially when the defendant present testify if he wishes to testify.

THE COURT: Those are, in all three of those cases, Terry, Gosen and Caberra, those are statements are made long after the event occurs. After they have time to think about what their interests are and to fashion a statement that is consistent with the defendant's interests.

This is a statement that is made essentially contemporaneous with a crime. The basis of the holding in those other cases, it goes away from the 803 exceptions to the 804 exceptions looking at the unavailability of the witness and to try to make it non-hearsay. So without regard to the fact that this is the defendant testifying, this would be, if relevant, an admissible statement under 803(1). So how does the fact that the defendant is the one making the statement change that analysis?

MR. BARNETT: Hold on one second.

Your Honor, there may not be much difference. The biggest problem we have is with why he shot himself. I think I understand the Court's analysis from the standpoint --

THE COURT: Okay. So are you telling me that you do not object to the answer that the witness just gave that Mr. Lindsey said that he shot himself, he was trying to shoot himself in the head?

MR. BARNETT: Yes, sir. I think --

THE COURT: You withdraw the objection?

MR. BARNETT: Yes, sir. I withdraw the objection.

THE COURT: Are you going any farther with this?

MR. BRENNAN: No, sir.

THE COURT: All right.

MR. BARNETT: I didn't know what his answer was going to be obviously.

THE COURT: I will be right back.

Just one second, sir.

(WHEREUPON, the Court exits the courtroom at approximately 2:38 p.m.)

(WHEREUPON, the Court enters the courtroom at approximately 2:43 p.m.)

THE COURT: Bring in the jury.

The objection is overruled.

MR. BARNETT: Thank you, Your Honor.

(WHEREUPON, the jury enters at approximately 2:46 p.m.)

BY MR. BRENNAN:

Q Mr. Steward, before we took that break, I asked you if as you were approached or after you offered care to Mr. Lindsey, did he say anything to you. I will ask you again. Did he say anything to you?

A He said he shot himself in the head

Q He shot himself in the head?

A Yes, sir.

Q And then at some point, did you and other paramedics transport him to the hospital?

A Other paramedics transported him to the hospital.

Q Okay. So that was really the end of your contact with Mr. Lindsey?

A Yes.

Q I have nothing further.

THE COURT: Any cross-examination?

MR. BARNETT: No, questions, Your Honor.

THE COURT: You can step down, sir.

MR. BRENNAN: Your Honor, the defendant will next Ms. Virginia Lindsey.

May it please the Court, Your Honor?

THE COURT: Yes, sir.

VIRGINIA LINDSEY

having first being duly sworn testified as follows:

DIRECT EXAMINATION

BY MR. BRENNAN:

Q Ma'am, would you please state your name for the Court?

A Virginia May Lindsey.

Q Mrs. Lindsey, would you please tell the members of the jury how you are related to Mr. Marion Lindsey?

A Marion Lindsey is my son.

Q Were you and your son -- are you and your son very close?

A Real close.

Q Do you remember the weeks leading up to September 18, 2002?

A Yes.

Q Was Marion Lindsey being allowed to see his children?

A No.

Q Ma'am, during those weeks, did Mr. Lindsey continue to try to care for the children?

A Yes.

Q Was there an occasion where he bought groceries for the children?

A Yes.

Q How did the children get those groceries?

A Marion brought the groceries to my house. I called to Nell's house. And her mother said she wasn't at home. So I said Marion had brought some groceries for the

kids. I said he need somebody to come and pick them up. She said well, Nell's not here. But I'll tell her when she get here. Later on about 11 o'clock that night, Nell came and picked up the groceries.

Q Those were groceries that Marion had brought for his children?

A For his kids, yes.

Q Some time after he purchased the groceries, did it become hard or impossible for you to contact your grandchildren?

A Yes.

Q Why is that, ma'am?

A Because they did not want them to be around their daddy.

Q Did you will try to call Nell's house?

A Yes, I did.

Q Did you have any luck contacting Nell?

A I contacted her mother. Her mother said that Nell was not home.

MR. WILLINGHAM: Objection, Your Honor, hearsay.

BY MR. BRENNAN:

Q You can't say what anybody said to you, ma'am. I just what to know if you were ever able to talk to children.

A No.

Q Did there come a time when your phone calls were blocked?

A Yes.

MR. WILLINGHAM: Objection, Your Honor. I hate to do it but I don't believe that this is relevant.

THE COURT: Sustained.

MR. WILLINGHAM: Thank you.

BY MR. BRENNAN:

Q Last question. The weeks leading up to -- no further questions. It has already been asked.

THE COURT: Any cross-examination?

MR. WILLINGHAM: No, sir.

THE COURT: You can step down, ma'am.

MR. BRENNAN: Your Honor, I would next call Mr. Christopher Wilkins.

CHRISTOPHER WILKINS

having first being duly sworn testified as follows:

DIRECT EXAMINATION

BY MR. BRENNAN:

Q Would you please state your name for the Court?

A Christopher Lee Wilkins.

Q Is it true that you came from work today to testify?

A Yes.

Q How are you related to Mr. Marion Lindsey?

A We're cousins.

Q Isn't also true that you guys were kind of raised as brothers?

A Yes.

Q Has there been occasions in the past where the two of you had introduced each other as brothers?

A Yes.

Q Very close?

A Very close.

Q Are you familiar with the weeks leading up to September 18, 2002?

A Yes, sir.

Q Was Marion allowed to see his children?

A No, sir.

MR. BARNETT: Objection. I don't understand the relevance of these questions either.

THE COURT: I believe that the question is, the breath of the question makes it impossible to determine whether or not the answer would be relevant. So I sustain the objection.

MR. BRENNAN: Okay.

BY MR. BRENNAN:

Q Was Mr. Lindsey very close with his children?

A Yes, sir.

Q Was there a specific period of time where he was prevented from seeing his children?

A Yes, sir.

MR. BARNETT: Objection, Your Honor. I don't understand the relevance of this also.

THE COURT: I think that the -- that question, I overrule the objection.

MR. BRENNAN: Thank you, Your Honor.

BY MR. BRENNAN:

Q Was there a specific period of time where he was not allowed to see --

THE COURT: He has already answered that question. He said yes.

MR. BRENNAN: I'm sorry, Your Honor. I'm sorry. I didn't hear the answer. Forgive me. Nothing further. Thank you, Your Honor.

THE COURT: Any cross-examination?

MR. BARNETT: Nothing from the State.

THE COURT: All right, sir. You can step down.

MR. BRENNAN: Can I have one second? I need to check with Mr. Bartosh to see if another witness is here.

THE COURT: Uh-huh (affirmative).

(WHEREUPON, there was a pause.)

MR. BRENNAN: Your Honor, the defense rests. We would ask the Court to inquire of Mr. Lindsey --

THE COURT: All right. All right. I will. I will.

Ladies and gentlemen, I need you to step back in your jury room for one minute. I have a matter of law I need to take up.

(WHEREUPON, the jury exits at approximately 2:55 p.m.)

THE COURT: All right. You don't mean to say that you rest because you want a minute to talk to your client about whether or not he wishes to testify.

MR. BRENNAN: Yes, sir.

THE COURT: And then you want me to talk to him about whether or not he wishes to testify. And you did mean to ask me to do that while the jury was sitting in the courtroom. And that's why I stopped you.

MR. BRENNAN: Yes, sir.

THE COURT: So we will take a short break to give you and Mr. Bartosh who needs to come back in here right now to talk to your client about whether or not he wishes to not testify.

(WHEREUPON, a short recess was taken at approximately 2:56 p.m.)

(WHEREUPON, the Court resumed at approximately 3:14

p.m.)

THE COURT: Have you discussed with your client again as to whether or not he wishes to testimony?

MR. BARTOSH: Yes, sir. I have.

THE COURT: He still wishes not to testify?

MR. BARTOSH: He does, Your Honor.

THE COURT: Do I need to get into that with him?

MR. BARTOSH: It's understood.

THE COURT: Sir?

MR. BARTOSH: It's fully understood.

THE COURT: And you don't want to testify?

MR. LINDSEY: No, sir.

THE COURT: All right. Now, Mr. Lindsey, do you understand that you have the right to address the jury yourself? Of course, your lawyer has the right to make a closing argument. But you also have a right to make a closing argument during the guilt phase. Do you want to do that?

MR. LINDSEY: Yes, sir.

THE COURT: You do?

MR. LINDSEY: Yes, sir.

MR. BARTOSH: One moment, Your Honor.

MR. LINDSEY: My bad. No, sir. At the end of the sentencing phase.

THE COURT: You don't want to do it in the guilt

phase?

MR. LINDSEY: No, sir.

THE COURT: All right. You may be seated.

Anything else from the State? I mean, from the defense.

MR. BRENNAN: No, Your Honor.

MR. BARTOSH: No, sir.

THE COURT: And I assume there's nothing from the State?

MR. GOWDY: There's no rebuttal, Your Honor.

THE COURT: Then the case goes to the jury on the question of whether or not the defendant is guilty of murder, correct, Mr. Bartosh?

MR. BARTOSH: Your Honor, we would respectfully request an instruction on the lesser included offense of voluntary manslaughter.

THE COURT: Solicitor.

MR. GOWDY: Your Honor, I think this is one those rare cases where manslaughter is requested where there is neither sufficient legal provocation nor sudden heat of passion. There's been absolutely no testimony as to either.

THE COURT: Let me hear you, Mr. Bartosh articulate a factual basis that would support me charging the lesser included offense of voluntary

manslaughter.

MR. BARTOSH: Yes, sir. After reading State versus Lockclair.

THE COURT: I know what the law is.

MR. BARTOSH: Yes, sir.

THE COURT: I just want to hear what you think the evidence is that is in the record in this case that would support voluntary manslaughter.

MR. BARTOSH: Your Honor, the evidence is that the alleged victim withheld visitation of Mr. Lindsey's children from him several weeks before the incident. There is also evidence that the most important thing in his life were his children. He valued them more than anything.

THE COURT: Let me ask you a question.

MR. BARTOSH: Yes, sir.

THE COURT: Under the evidence in the record, what was the most recent point in time that Ruby Nell Lindsey had done anything in the way of denying visitation to Mr. Lindsey with his children, the most recent point in time?

MR. BARTOSH: The most recent point in time was when they ran into one another --

THE COURT: Okay.

MR. BRENNAN: -- on the road.

THE COURT: Okay.

MR. BARTOSH: Mr. Lindsey had inquired as to when she was going to allow him access to his children.

THE COURT: Right.

MR. BARTOSH: Ms. Nesbitt said I don't know.

THE COURT: All right. Well, you know I'm going to cross-examine you about that. When was the last time that Mrs. Lindsey did anything where evidence supports it to deny Mr. Lindsey visitation? I will acknowledge that within three or four or five minutes of the alleged event, Mrs. Nesbitt made a comment that relates to the subject of whether or not Mr. Lindsey was going to have visitation. But is there any evidence that Mrs. Lindsey in any way participated in her doing that?

MR. BARTOSH: Participated in denying him visitation with his children?

THE COURT: At that point in time.

MR. BARTOSH: At the point where they met?

THE COURT: Yes, sir.

MR. BARTOSH: No, sir. But I think as Ms. Nesbitt testified that she considered Mrs. Lindsey to be --

THE COURT: I hate to cut you off. But since

you just read State versus Lockclair, you will recall that when the mother of the victim threw the cigarette case at the defendant, the Supreme Court said that if there is sufficient legal provocation, it must in some way be related to some act of the victim.

MR. BARTOSH: Your Honor, I would respectfully argue that because of the relationship between Ms. Nesbitt and Mrs. Lindsey, as Mr. Nesbitt testified to earlier that, Mr. Lindsey took upon Ms. Nesbitt's reply that she did not know that, because of that relationship, that Mrs. Lindsey was going to withhold those children. I think his actions afterwards would be an indication that that was the provocation that started this whole thing. It was throughout the entire relationship prior to that, there was never anything like this. But when she said I don't know, and she sped off too --

THE COURT: Who is the she?

MR. BARTOSH: Ms. Nesbitt because she was driving.

THE COURT: I understand that. And I understand that you got this theory about how Ms. Nesbitt and Mrs. Lindsey are tied in so closely together that the act of one is attributable to the act of the other, right?

MR. BARTOSH: Yes, sir

THE COURT: But if you will forgive me for setting that little argument aside for a minute, what is the last thing Mrs. Lindsey had did that could have been sufficient legal provocation to send Mr. Lindsey into the sudden heat of passion?

MR. BARTOSH: On the date of the event?

THE COURT: Any day. You pick the day.

MR. BARTOSH: All right.

THE COURT: You tell me what's the last point in time that she did anything that is sufficient legal provocation.

MR. BARTOSH: When she blocked the phone so that he nor his family could contact his children.

THE COURT: All right. What evidence is in the record as to whether when that occurred.

MR. BARTOSH: I will have to -- I am informed, Your Honor, that his mother testified that it was a week or more before the incident.

THE COURT: Okay. So the last thing that Ms. Lindsey did according to the evidence in this record that could possibly have been sufficient legal provocation was a week or more before she was killed unless I accept this theory of Ms. Nesbitt acting, Ms. Nesbitt's actions being attributable to Ms.

Lindsey?

MR. BARTOSH: Your Honor, the other thing that we would respectfully suggest to the Court is --

THE COURT: Can I have an answer to my question first?

MR. BARTOSH: I'm sorry. Could you repeat it? I was distracted by a note.

THE COURT: Yeah. I want to confirm that what you just told me is that the last thing that Mrs. Lindsey did before her death that could possibly be sufficient legal provocation is to block the telephone calls from Mr. Lindsey. That was a week or more before she was killed. That is correct?

MR. BARTOSH: That is correct, Your Honor.

THE COURT: All right. Go ahead and say what the other thing is.

MR. BARTOSH: The other thing was that when Mr. Lindsey asked the question of Ms. Nesbitt when would she allow him to see her children, Mrs. Lindsey remained silent. She did not say anything. I'm sure it is clear by his actions that he realized that she was in the automobile.

THE COURT: Okay. Anything else?

MR. BARTOSH: I don't want to take, beat a dead horse to death, Your Honor. But I would say that

I think, of course, the standard is if there's any evidence, it does not go to the weight, it goes to the existence of an instruction of a lesser included offense, then we are entitled to the instruction. The defendant is entitled to the instruction.

I think if you take the whole incident on the road as one whole, one continuous event, that shows that there was sufficient legal provocation, the withholding of his children and that he acted in the heat of passion. Because what happened was, they went straight from the, once Mr. Nesbitt left, they went straight from there to the Inman Police Department. And Mr. Nesbitt, Mr. Lindsey according to the testimony got out and that is when the event happened.

I think that that shows that it was one event that was triggered by Mrs. Lindsey refusing to state when he could see his children. As I said, I'll say this and then I will sit down, Your Honor. I just cannot imagine anybody that would be in the heat of passion and to drive to a police station and get out of a car and go around in front of everybody and shoot somebody to death if they were not under the influence of the heat of passion.

THE COURT: Well, the solicitor, if given the opportunity, might point out that it could be malice

instead of the heat of passion.

MR. BARTOSH: Yes, sir. But once again, I respectfully select, would suggest to the Court that it does not go to the weight, it goes to the existence. A reasonable juror, we believe, could find that Mr. Lindsey acted in the heat of passion as a result of legal provocation based on those facts. Then, of course, it's up to the Solicitor and the defense to try to convince the jury as to each one's version.

THE COURT: All right. Well, I'm going to reject argument that something that Ms. Nesbitt did could amount to sufficient legal provocation. If you look at Lockclair and if you look at footnote two in Lockclair and the discussion that surrounds that, South Carolina has made it very clear that that is not the law in South Carolina. Provocation has to come from the victim.

It is possible, it would be possible in this case if Mrs. Lindsey, knowing that this was going on, had communicated something to Ms. Nesbitt who then in turn communicated it to Mr. Lindsey. That could be an act on the part of the victim. There is no evidence that that happened. Is there?

MR. BARTOSH: No, sir. We would respectfully

submit that by being silent, by remaining silent when the question was asked that that would --

THE COURT: Let me ask you this. You are saying that Mrs. Lindsey was silent and that her silence would enrage Mr. Lindsey. What is the evidence in the record of this case that Mr. Lindsey even knew she was in the car at that point in time?

MR. BARTOSH: I think by the fact that he followed the car after he turned around and left that he knew.

THE COURT: He had been following the car for some number of minutes before.

MR. BARTOSH: Yes, sir. And the fact that he got out of the car, he never even looked in the automobile at the police station. He walked up to the car at the station. I think that indicated that he knew she was in the automobile.

THE COURT: Okay. Well, there's evidence in the record that Mr. and Mrs. Lindsey were separated, correct?

MR. BARTOSH: Yes, sir.

MR. BARTOSH: Does the evidence as to what their respective visitation and custody rights were? Is there any evidence in the record beyond that as to what their respective visitation and custody rights

were?

MR. BARTOSH: No, sir.

THE COURT: Other than the statements I suppose from several witnesses that Mr. Lindsey had two children that were also the children also of Mrs. Lindsey, is there any evidence that Mr. Lindsey even had visitation rights with those children legally?

MR. BARTOSH: Well, Your Honor, they were legally married.

THE COURT: Uh-huh (affirmative). Okay. Solicitor anything?

MR. GOWDY: The only thing I would say returning the Court's attention back to Lockclair where death is caused by use of a deadly weapon, words alone are not sufficient to constitute legal provocation. I take the position that it doesn't matter if Nell Lindsey had stuck her head forward and said that's right, you're not going to see your kids.

Under Lockclair, words alone when a deadly weapon is used is never sufficient legal provocation. I cannot imagine the day that silence is legal provocation. That would turn Lockclair more than on its head but on its something else.

THE COURT: Anything else, Mr. Bartosh?

MR. BARTOSH: No, sir.

THE COURT: All right. There's several basis for my ruling that I am not going to charge voluntary manslaughter. First of all, I do not believe that there is ever going to be recognized a situation in South Carolina where a dispute that is not at that moment heated over a custody arrangement will ever be recognized as sufficient legal provocation.

South Carolina has set up a court system, the family court system, whose responsibility is to handle among other things the peaceful and orderly resolution of disputes regarding families and particularly regarding children and particularly regarding visitation. It would just make absolutely no sense to say that if two people get together and have a dispute about visitation of their children when all they've got to do is walk or drive down to Spartanburg and go see a family court judge to resolve that dispute that they can take to guns and violence and killing each other and that be sufficiently or provocation. So that is the basic premise of my ruling.

But secondly, there is not a shred of evidence in the record that Mrs. Lindsey did anything period, at all, that could possibly amount to sufficient legal provocation within a week of her death. I believe

that there is a period of time, there is a period of time that, as a matter of law, is adequate for reflection. I don't know exactly what it is, but it is less than a week. If you can go a week after something happens, you do not any longer have sufficient legal provocation.

I have already said that there is no, I refuse to recognize the idea that Mrs. Lindsey could have done something on behalf of Ms., I'm sorry that Ms. Nesbitt could have done something on behalf of Mrs. Lindsey that would amount to sufficient legal provocation. I also agree with the Solicitor that there is no way that silence could ever be sufficient legal provocation. In fact, silence is what we would hope that, silence and retreat are the two things that we would hope people would resort to in the face of conflict.

And those are the two things that Mrs. Lindsey was engaged in with all of her heart at the time she was killed. She was trying to be quiet. And she was try to hide. And she was trying to run to the police station and get help. And she got killed. And it ain't voluntary manslaughter. So anything else in the charge except for murder?

MR. BARTOSH: Your Honor, out of an abundance

of caution, we would respectfully object to the Court's ruling on our request for instruction of voluntary manslaughter based upon our argument presented to the Court. Moving on to the other instructions, Your Honor, I don't know if you have an instruction that if the jury has reasonable doubt as to any element that they are to resolve that doubt in the defendant's favor. Is that included in your instructions?

THE COURT: It is now.

MR. BARTOSH: Also, Your Honor, I don't know if you have this in your standard instruction. We would request a jury instruction that the jury is not to consider the fact that the defendant did not testify.

THE COURT: I have that.

MR. BARTOSH: Okay, sir.

THE COURT: Anything else?

MR. BARTOSH: No, sir. I believe that would be it.

THE COURT: All right. I am ready. Are y'all ready?

MR. BARNETT: The State is ready. Mr. Gowdy had to run to the bathroom. He'll be back real quick.

THE COURT: Well, there is wisdom in that thought. I think I might do it myself. So why don't

we take five minutes. When we come back, we will take begin with the defendant's closing argument?

MR. BARTOSH: No, sir.

THE COURT: The defense counsel's closing argument?

MR. BARTOSH: No, sir. The State's closing argument.

MR. WILLINGHAM: The State would have to close first, Your Honor.

THE COURT: All right.

(WHEREUPON, a short recess was taken at approximately 3:37 p.m.)

(WHEREUPON, the Court resumed at approximately 3:41 p.m.)

THE COURT: Bring in the jury.

(WHEREUPON, the jury entered at approximately 3:41 p.m.)

THE COURT: All right. Ladies and gentlemen, you have now heard all the testimony and evidence that you will hear. We will now ready to move into what I described for you as the third phase of the trial, the closing arguments of the attorney.

Solicitor.

MR. GOWDY: May it please the Court, Your Honor.

THE COURT: Yes, sir.

MR. GOWDY: Good afternoon, ladies and gentlemen of the jury. I want to begin by thanking you for your service in this case. Ordinary jury service is difficult enough. Service on a capital case where you are exposed to a rather arduous process. We sequester you away from your family and friends. It is an extraordinary service. And I know I speak on behalf of the defense and everybody involved in the prosecution of this case. And I thank you for your service.

This is a simple straightforward case. It's as straightforward a case of murder as you can find. Before I go into the facts of it, before I go into the pieces of evidence that you seen this morning in the limited time we've been in the Court, I want to talk to you for just a second about what your function is.

You are judges. You're every bit of a judge in this case as Judge Few is. You don't have on robes. This may be the only time you ever serve on the jury. Maybe the only time you're ever in this courtroom. Make no mistake about that you are judges in this case. You decide what happened in that parking lot at the Inman police station on September 18, 2002. You and you alone decide those facts.

As you go through the process of deciding what happened, it may seem like a daunting task particularly if you have never served on the jury before. I will tell you this. Listen to what Judge Few tells you when he gives you his instruction. Listen to the qualities that you will use, that you will employ as you go through and consider the testimony and the evidence that has been brought before you.

The only thing that I will add, the only thing that I will tell you is in my judgment, the overarching quality or characteristic of a good juror is simply this, common sense. The same common sense that you use in your everyday lives, in your relationships with family, friends, business, with neighbors, that common sense will serve you well in this case.

I want to move to September the 18th. I want to set the stage for you. Nell Lindsey has completed 12 hours of work. She has got a nurse's uniform on. Her car is disabled so she calls out to her friend Celeste Nesbitt and ask for a ride. They meet in Celeste grandmother's hospital room. They exchanged pleasantries and discuss Celeste's grandmother's condition.

And then they go get in the car. When I say they, I mean five ladies. Celeste Nesbitt in the driver's seat. Julia Martin in the front passenger's seat. Behind Ms. Martin is a little girl named Keysha in a car seat. Beside Keysha in the middle is Kiera, a little girl. And then there is Nell Lindsey sitting behind her sister, if you will, friend for nearly 20 years, Celeste Nesbitt.

They begin to truck from Spartanburg Regional to Inman where both Celeste and Nell live. If you remember from the testimony, Nell was living with her mother and her two boys. As they go up there, Celeste notice that someone as she refers to as Tresse or Latreese Smith's car. A car that they were familiar with. A car that Celeste has seen Myron Lindsey or Marion Lindsey in before.

Nell's remarks, I thought I saw it to, but I did not want to alarm you. Well, she should have been alarmed. They go and they start heading towards Nell's mother's house. And here they see the car coming again. Celeste's testimony was it came straight on and pulled off to the side. He wanted to know where Nell was. When was the last time you talked to her. Celeste lied and says it's been a couple of days.

I want to create that visual image for you of a woman who's lying to a man a couple of feet away from her while her best friend, her sister, is slouched down in the back seat of the car beside her kids. You want the personification of fear? You got it. I have not seen Nell in a couple of days. Roll the window down. The window does not work. The windows were tinted. The windows were tinted. Roll the window down, Celeste. The windows do not work.

As this defendant begins to get out of the car to come towards his estranged wife and two little girls, Celeste takes off and heads to the sanctuary of a police station. She is running red lights. And she is running stop lights. And she is flying over railroad tracks. This man is following her.

They get to what you would think would be a sanctuary. You are behind the Police Department on the phone with 911 in a friend's car. And it ain't safe enough. He comes up. And he gets out of the car with his .38 Special. And he fires two rounds through that back tinted window. He walks around to the side. And he fires two more rounds through that side tinted window. All four shots hit Nell Lindsey. Three of them in the head, one of them grazed the neck.

I'm not going to play the 911 tape for you again. You'll have it back in the jury room if you want to listen to it. I'm not going to play those kids screaming for you. You can listen to it if you want to. But not only do you have Celeste Nesbitt telling you detail by detail what happened, not only do you have a 17-year veteran police officer telling you detail by detail what happened, but you've got a contemporaneous live recording of what is going on.

A play-by-play description until the shots went out. And you hear a 911 operator saying ma'am, ma'am. But there ain't no answer because ma'am is dead. Ma'am is slumped over with her head like that holding on to a live, the only thing alive about her was the telephone. Those shots came from the gun held by that defendant. That is murder as plainly and simply as you will ever find it.

The judge will tell you that murder is an unlawful killing of another with malice aforethought. You may be wondering what is malice. Is that a term that lawyers came up with? What does malice mean? The Judge will tell you what malice means. Listen to what the judge tells you. I believe he will tell you that malice is a heart fatally bent on mischief. It is a wicked or depraved soul. It is evil.

Malice does not mean premeditation. It can be but it is not required. Malice can arise as Deputy Barnett said in his opening in an instant. Malice, in fact, ladies and gentlemen, can be inferred, just from the use of a deadly weapon. I'm not standing front of you this afternoon talking about any inferences. We don't have to infer anything.

Malice is having a gun in the car as you go hunt down your wife. Malice is shooting into the tinted windows of a car when you know, you know there is a child in the car. Because don't let the fact escape you that that little girl was struggling to get out of her carseat, unstraps her arms and leans forward as only an innocent child can do and not sensing what was going on. And says Hi, Uncle Ron. Hi, Uncle Myron, just a couple minutes before Uncle Myron unloads four bullets into the back window of a car and a side window of the car. A car that that little girl was sitting in.

You want malice? That is malice. You have got a weapon. He's got weapon in the car. He is hunting them down. He fires twice. He walks around to the side and he fires two more times. His has five more live rounds of ammunition on him before Benny Godfrey takes him down. If you want malice,

that's the more malice than you will ever need in this case. This is murder.

Before I sit down, I am tempted not to even address this notion about this defendant not being able to see his children or the other notion of the EMS worker coming in to testify that Myron Lindsey tried to shoot himself and head. I got two things to say about that and then I'm going to be quiet.

There are courtrooms all across this state to deal with child custody issues. There are courtrooms down this hall that deal with child custody disputes. Men and women go down there everyday. You do not shoot your wife in the back of the head three times. You go to court.

On the notion him trying to kill himself, I find it more than ironic that when came time to shoot his wife, he did not miss. He did not miss. David Wren dug three slugs out of her head. When it came to shoot himself, he had a little nick on the back of his head.

You will have some evidence back with you. You will have the 911 tape. I encourage you to listen to it if you need to. You have two guns back there. This is the gun that was used to kill Nell Lindsey. This is Benny Godfrey's gun, the police officer. I

give this to you. And I give you three bullets, four bullets. And I remind you of the ballistic expert.

Three of these bullets were taken out of Nell Lindsey's head. One of them was taken out of the trunk of Celeste's car. None of those four could have been fired by Benny Godfrey's gun. There are only two guns at play into this case, which means they were fired by that gun. And that is the gun that was in his hand. That is the gun that he got out of his car.

If you listen to the tape, you will hear Celeste Nesbitt say come on Nell, let's get out. Nell says I'm not getting out. I am in the back of a police station in a locked car with the windows rolled up on the phone with 911. Ain't it a doggone shame that that was not enough? Even that's not enough to protect her from a husband that wants to kill her. Her husband succeeded. Her call for 911 did not work. I'm asking you to hold him accountable for what he did and to find him guilty of murder.

MR. BRENNAN: Please the Court, Your Honor?

THE COURT: Yes, sir.

MR. BRENNAN: Ladies and gentlemen of the jury, I spoke to you this morning. You heard the testimony and the prosecution's opening argument and their

closing argument. This is the gun that was used. This is the gun that caused the death of Nell Lindsey. These are the bullets. This is the gun that was used by the police officer to shoot Mr. Lindsey.

It was a tragedy that occurred on September the 18th of 2002. But like I said in my opening, the issue is malice. That is the issue. The testimony was of Celeste Nesbitt that these parties had separated before. But in the past Mrs. Lindsey let the two boys go see their dad or let him see his boys.

Celeste testified that she made some changes at work. She took him off of the insurance. She was moving on this time. This time it was different. It wasn't going to be any back together this time. It was different. He was still trying to provide for his children. He brought them groceries. The only way he could get them to the boys was through his mom. That's how they had to work. Then there came a time that even mom could not call anymore. They were completely excluded. The boys were completely excluded from Mr. Lindsey's life.

On that night, he see Celeste. They stop and talk. He asks her do you know when I am going to be able to see my boys. And it's about that time that he realizes that Nell is in the back seat of the car.

But she's not talking to him. She has no intention of letting him see those boys. None whatsoever.

The Solicitor said that she fled and went to what you would think was sanctuary, the police department. Ladies and gentlemen, I'm telling you that he snapped. Who would plan anything like this in the police department? He was told, he learned that he wasn't going to see his babies. That was it. He realized that she was in the car. And she wasn't talking. You're not going to see your kids. And they race off. It happened like that. And he snapped.

Ladies and gentlemen, it was a tragedy. The boys lost their mom but the boys lost their dad too. Many of these people lost a loved one. And it is terrible. Ladies and gentlemen, it is terrible. He loved his children. He wanted to see his children. That's all he wanted. He wanted to see his babies. He could not do it. He snapped.

It did not matter to him, he did not know where it happened. It happened. Ladies and gentlemen, I'm going to tell you that the State has the burden to prove every element beyond a reasonable doubt. The judge will define reasonable doubt for you. But they have to prove malice aforethought beyond a reasonable doubt. A reasonable doubt is a doubt that would cause

a reasonable person to hesitate.

Mr. Lindsey wanted to see his kids. He was being prevented from seeing his boys. He snapped. It is terrible he did not have the necessary malice aforethought. Please consider the evidence. Apply that common sense. We believe that you will find that there was not the necessary malice. Thank you.

THE COURT: Ladies and gentlemen, now that you have heard the evidence that you will hear in this case and the arguments of the lawyers, it becomes my responsibility to give you the law that is applicable to this case.

As I told you in the beginning of this trial, under the South Carolina Constitution and Code of Laws, only the jury can make the findings of fact in this case. I am not permitted to indicate to you how I might feel. So if I have said anything or done anything during the course of this trial that might indicate to you that I have an opinion about the facts, then you must disregard that. This jury must independently weigh the testimony and evidence that has been presented and decide based on that testimony and evidence whether or not the State has met its burden of proof in this case.

Ladies and gentlemen, let me illustrate for you

that last point that I made. You are not so much here to decide what happened as you are to decide whether or not the State has met its burden of proof on the elements of murder as I will define them for you in just a few minutes.

The same Constitution and Code of Laws here in South Carolina that makes you the exclusive judges of the facts also makes me the exclusive judge of the law. If you have some idea as to what the law is or what the law should be and if that differs from what I will tell you the law is, then you are obligated under the oath that you have just taken as jurors to set your notion of the law aside and to except and apply the law precisely as I will give it to you.

The fact that the defendant was arrested and charged and indicted in this case is not evidence. And cannot be considered by you as evidence in any way. The indictment is simply the formal written instrument that serves to process this case and bring it into this court for trial.

The defendant has pled not guilty to that indictment. The plea of not guilty casts the burden on the State to prove the defendant guilty beyond a reasonable doubt. A person charged with committing a criminal offense in South Carolina is never required

to prove themselves innocent.

Ladies and gentlemen, it is a very important rule of law in our country that a defendant in a criminal trial will always be presumed to be innocent of the crime with which he has been indicted unless and until his guilt has been proven by evidence satisfying you of that guilt beyond a reasonable doubt.

This presumption of innocence is not just legal theory. It is not just a phrase that we use. It is a substantial constitutional right to which every defendant is entitled. The presumption of innocence accompanies the defendant from the time he is charged throughout the trial until you reach a verdict of guilt based on evidence satisfying you of that guilt beyond a reasonable doubt.

Now ladies and gentlemen, I instruct you now and I emphasize to you that the fact that the defendant did not testify in this case is not evidence and cannot be considered by you in any way during your deliberations. A defendant has a constitutional right to remain silent. And the exercise of that right cannot and must not be held against the defendant.

Under the oath that you have taken as jurors, you are to draw no inference and no conclusion whatsoever

from the fact that the defendant did not testify. Do not even discuss this in the jury room. The defendant is not required to prove anything. The burden of proof remains on the State.

A reasonable doubt is a doubt that makes an honest, sincere, conscientious juror in search of the truth in the case to hesitate to act. Proof beyond a reasonable doubt must therefore be proof of such a convincing character that a reasonable person would not hesitate to rely on it and act on it in the most important of his or her own affairs. Proof beyond a reasonable doubt can also be described as proof that leaves you firmly convinced of the defendant's guilt.

Now, there are very few things in this world that we know with absolute certainty. And in criminal cases, the law does not require that the State prove with absolute certainty the defendant's guilt. It does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime of murder, then you must find him guilty. But on the other hand, if think that there is a real possibility that the defendant is not guilty, then you must give him the benefit of the doubt and find him not guilty.

Now, in just a second, I'm going to define the crime of murder for you. I'm going to give you the elements of the crime of murder. The State is required under its burden of proof to prove beyond a reasonable doubt each of the elements I will give you. If you have a reasonable doubt as to any of the elements that I give you, you must find the defendant not guilty.

Murder is the intentional killing of a person with malice aforethought. This is what the State must prove beyond a reasonable doubt before you may convict the defendant of murder. That the defendant did kill a person and that the killing was done with malice aforethought.

Malice is the intentional doing of a wrongful act without just cause or excuse and with an intent to inflict injury. Malice is word that suggests a wickedness or a hatred or a determination to do what one knows to be wrong without just cause or excuse or legal provocation. Malice is a heart fatally bent on mischief.

Aforethought means that the intention to do the unlawful act was conceived or planned some time before the actual commission of the unlawful act. However, malice need not be in the mind of the one doing the

killing for any particular length of time before the act of killing in order to render the killing murder. If malice is present in the mind of the one doing the killing any length of time before the act, then its presence would be sufficient to render the killing murder.

Malice may be inferred where one intentionally and deliberately does an unlawful act which he or she knows to be wrong and in violation of his duty to another. Malice may be inferred where no excuse or legal provocation appears for the killing. The law also provides that the inference of malice may arise if one intentionally kills another with a deadly weapon.

A deadly weapon is any object or substance which reasonably could be used to cause bodily harm. If facts are proven beyond a reasonable doubt sufficient to raise one of these inferences of malice, then this inference would simply be one evidentiary fact to be taken into consideration by you along with all of the other evidence in the case bearing on the issue of malice.

And you may give this inference such weight as you determine it should receive. You may reject or accept an inference of malice. Remember that the

State bears the burden of proving malice. The defendant is not required to prove anything and is not required to prove the absence of malice.

Now, ladies and gentlemen, you will have with you in the jury room the exhibits that have been introduced into evidence in this case. You will also have the indictment. Let me talk to you just a little bit about that. The indictment has, on the back of it, a verdict form. In the lower left hand corner, you see the word verdict. Below that word are four blank lines.

On one of those blank lines, the foreperson of the jury -- and I will talk to you about selecting a foreperson in just a second -- will write the jury's verdict and then sign it. All twelve of you must agree before you can write a verdict. Your verdict must be unanimous.

Now, there are two possible options for your verdict in this case. You could have a verdict of guilty or you can have a verdict of not guilty. When the jury has unanimously agreed on one of those two verdicts, the foreperson would write it in, sign it and notify the bailiff that you reached a verdict. And we will get you back out here in the jury room to receive your verdict. I mean in the courtroom to

receive your verdict.

Now, as you heard me say during the course of the day, there are some weapons that have been introduced into evidence. As to one of those weapons, there is some live ammunition. I'm going to keep the live ammunition here in the courtroom. You will not have it in the jury room initially. If any one of you feel that you need to examine that exhibit, you let me know by notifying the bailiff. And we will make arrangements for you to be able to see the ammunition.

With regard to the tape that has been introduced into evidence, if you want to hear --

How are we going to let them hear that when they don't know the stopping point without making them hear it in the courtroom?

If you want to hear the tape, and you are certainly welcome to do that. That is an exhibit that is introduced into evidence. If you want to hear it, you let the bailiff know. And we will bring you into the courtroom and play it for you.

Ladies and gentlemen, as I told you this morning, you are to consider now as you go back into the jury room to deliberate only the question of whether or not the State has met its burden of proof on the question of whether or not the defendant is guilty of murder.

You do not consider sentencing issues at all at this time.

Now, in just a second, I'm going to ask you to go back into the jury room. I'm going to ask you not yet to begin your deliberations. I may have some matters of law to take up with the lawyers. While I do that, I want you twelve people on the jury to select a foreperson to serve the jury.

The job of the foreperson is to preside over the deliberations and when necessary to communicate with the court. And that will need to be in writing. And when the jury has reached a verdict, the foreperson would fill out the verdict form as I explained and sign it and notify the bailiff that you've reached a verdict.

Other than what I just said, the job of the foreperson is no different from that of any other member of the jury. The foreperson's vote certainly counts no more than that of any other member of the jury. Now, I'm giving you the opportunity to select your own foreperson. But if there's any difficulty in doing that, just let me know and I will be happy to appoint somebody.

Mr. Fields, Mr. Seay and Mr. Parnell, would you please remain in your seats.

The rest of you, please go back into the jury room but do not begin your deliberations. As soon as you have decided upon a foreperson, notify the bailiff as to who that is. And then we will bring you the exhibits. And there will be instructions that you can begin your deliberations.

(WHEREUPON, the jury exit at approximately 4:13 p.m.)

THE COURT: Mr. Scruggs, I'm going to need you to take these three gentlemen back and put them into a different jury room. If any of them have anything in the jury room that the other twelve are using, you can get it out for them but do not take them into that room.

THE BAILIFF: Yes, sir.

Come with me, gentlemen.

THE COURT: And gentlemen, you all continue to not discuss this case please.

(WHEREUPON, the alternate jurors exit at approximately 4:14 p.m.)

THE COURT: Any exceptions to the charge?

MR. GOWDY: No objections, no exceptions.

THE COURT: From the defense?

MR. BRENNAN: None, Your Honor.

THE COURT: All right. I want lawyers from both sides to come up here and agree on the proper set of

exhibits that goes back to the jury. Once you have done that, notify me. We'll put it on the record. We'll send them back with the indictment as soon as we get the identity of the foreperson.

(WHEREUPON, the attorneys reviewed the exhibits.)

THE COURT: The foreperson selected by the jury is Ashley Driscoll.

(WHEREUPON, deliberation began at approximately 4:23 p.m.)

(WHEREUPON, the Court resumed at approximately 4:43 p.m.)

THE COURT: We got a verdict. Without making any assumption as to what the verdict might be but considering the possibility that it could be guilty, I will instruct the jury that we are going to observe a waiting period as required by statute of 24 hours. And we will begin -- if as I say the verdict is guilty, when do you want to begin? 4:45 tomorrow afternoon?

MR. GOWDY: We are ready then but whatever suits the Court.

THE COURT: If we do that --

What do you say, Mr. Bartosh?

MR. BARTOSH: Your Honor, I would say wait until Sunday morning. We're going to come back at

4:30 in the afternoon.

THE COURT: Mr. Gowdy.

MR. GOWDY: Yes, sir.

MR. BARTOSH: Do you have preference?

MR. GOWDY: I am fine doing that. If it is a guilty verdict, I am fine starting Sunday morning. But I also wanted the Court to know if the Court wants to start 24 hours from now, we are ready to go. But I have no problem starting Sunday morning.

I don't know what the Court's decision is on whether -- jurors couldn't watch service if they wanted to any way. I suppose they don't have televisions. So that is not going to factor into anything. I've never been in court actually on Sunday morning in a capital case before. That's always been the 24-hour wait.

THE COURT: Well, have you heard the story about Judge Clary's case down in Lexington County when the church bells in downtown Lexington were ringing as the jury walked into the courtroom to deliver the verdict of death? I don't know if may be timing wasn't tinkered with a little bit to make that story better. But I heard that. In fact, one of the S.L.E.D. agents that's here was serving on that case.

I don't know. Why don't I, uh, okay. Let's just

hear the verdict. Then I'm going to send the jury back and I'll decide.

Bring them in.

Now, I want everybody in the courtroom to understand that when this verdict is delivered, I expect everybody to maintain their calm and maintain their composure. And anybody who feels like they can not do that should leave the courtroom now.

Is it suitable just to let the alternates stay back where they are?

MR. GOWDY: It is to us, yes, sir.

MR. BARTOSH: Yes, sir.

THE COURT: All right.

(WHEREUPON, the jury enters at approximately 4:45 p.m.)

THE COURT: Ma'am, has the jury reached a verdict?

THE FOREPERSON: We have, Your Honor.

THE COURT: Would you pass that verdict form to the bailiff?

(WHEREUPON, the verdict form was presented.)

THE COURT: Madam Clerk, you can publish the verdict.

THE CLERK: Indictment number 2002-GS-42-4753, the State versus Marion Alexander Lindsey also known as Mariona Alexander Lindsey, indictment for murder, the

verdict guilty, signed by the forelady.

Madam Forelady, ladies and gentlemen of the jury, is this your verdict and still your verdict so say you all?

(WHEREUPON, all jurors respond affirmatively.)

THE COURT: All right. Ladies and gentlemen, we have some scheduling issues to attend to now. I'm going to address those with the lawyers and ask you all to go back into the jury room for a few minutes. I would like to reimpose upon you the prohibition of discussing this case. So please from now until I give you permission to discuss the case again, don't talk about the case. So go back into the jury room. I will be with you momentarily.

I will tell you this. Perhaps -- I understand that you weren't fed all that well last night. Not that any one of you complained about it. But that's what I was told. I made arrangements for you all to eat a meal tonight that would be a significant improvement over what you had last night. That will give you a little thing to think about and talk about when you are back in the jury room. I will be back with you in a few minutes.

(WHEREUPON, the jury exits at approximately 4:47 p.m.)

THE COURT: All right. Mr. Bartosh, is there

anything that we need to do with the jury in terms of their verdict or polling the jury or anything of that nature now?

MR. BARTOSH: No, sir.

THE COURT: Mr. Gowdy?

MR. GOWDY: No, sir, Your Honor.

THE COURT: All right. I think that it is a significant imposition on the jury to be sequestered as there are. And that if we start tomorrow afternoon at about 4:40, it's now 4:48. If we started about 4:40 tomorrow afternoon, we can get two or three hours of work in and that may or may not save the jury a night at the Marriott. I don't know. But I believe that that is the course that we should follow. And so that's what I intend to do.

I'm going to bring the jury out here now. I'm going to explain to them the 24-hour waiting period. I'm going to tell them when we will resume. Is there anything else y'all want to me talk them about now?

MR. GOWDY: No, sir.

MR. BARTOSH: Nothing from the defense, Your Honor.

THE COURT: Any motions at this time?

MR. BARTOSH: No, sir.

THE COURT: Okay. Bring in -- And I'm going to

ask the alternates to come in as well and tell them what the verdict is as I explain what I just said.

MR. BARTOSH: Yes, sir.

(WHEREUPON, the jury enters at approximately 4:49 p.m.)

THE COURT: Okay. For those three of you who are alternates and if you don't already know, the jury has returned a verdict of guilty of murder in the guilt phase of the trial. And now we move into the sentencing phase or the penalty phase of the trial.

Under South Carolina Law under a statute that has been passed by the General Assembly years ago and signed by the Governor, we must wait 24 hours before we can begin the sentencing phase of the trial. So we're going to break now. And we're going to resume tomorrow afternoon at 4:40 which is exactly 24 hours from when you all returned your verdict.

As I told the jury and let me repeat it now while the alternates are in here, you may not discuss the case. It's just like it was when we began. Don't discuss the case at all. Don't allow anyone to discuss the case with you.

The three alternates weren't in here when I told the jury that you will be fed considerably better tonight than you were last night. I'm not going to

announce publicly where you are eating. But I can assure that of all the meals I have had in Spartanburg County, some of the very best came from the place that you will be eating at tonight. And that's a lot of meals that I have had over here over a lot of years.

So I hope you will enjoy that. And I look forward to seeing you all tomorrow afternoon. You will be in the Courthouse probably around 4:00 or 4:15. I'm not sure. That will be up to S.L.E.D. Then we will begin at 4:40.

Now, that carries us into Sunday morning. And we don't have any kind of formula as to what we do on Sunday morning except that we're all going to be together. That is something that you all can think about. And if any of you have any strong preferences, you can express them to me. I might not be able to accommodate you. But we can either start at 9 o'clock and go or we can start at noon.

We have some flexibility. So it's my decision but is there anybody on the jury who has a strong preference, don't hesitate to express that to me. And you can do that by writing me a little note. I will take it into consideration tomorrow afternoon when I get here.

Obviously, the prohibition against your reading

or watching or listening to any press coverage about this case remains in effect. We appreciate your service. We appreciate the conscientious manner in which you have appeared to attend and listen to the testimony. And we look forward to working with you again beginning tomorrow afternoon at 4:40. So you all have a nice night and a nice day tomorrow. And we will see you tomorrow afternoon.

(WHEREUPON, the jury exits at approximately 4:52 p.m.)

THE COURT: Now, uh, anything further?

MR. GOWDY: Not from the State, Your Honor.

MR. BARTOSH: No, sir.

THE COURT: To the press -- off the record.

(WHEREUPON, the Court went off the record at approximately 4:52 p.m.)

(WHEREUPON, the Court adjourned at approximately 4:53 p.m.)

(WHEREUPON, the Court resumed on May 22, 2004 at approximately 4:00 p.m.)

THE COURT: All right. We are here to address any issues that need to be addressed before we begin with the jury.

MR. GOWDY: Your Honor, from the State's prospective, the only thing I wanted to address with the Court if I could is that the State would have a

motion to allow the jury to view the automobile, the Mercury Topaz that Mrs. Lindsey was killed in. That automobile, I know the Court remembers the testimony was it was sold to Mary Lyles.

She is on our witness list and prepared to testimony. She brought the car and put it in law enforcement custody a month or so ago. It's been at the impound lot. Her testimony would be that other than having -- actually the windows were already fixed when she got it. She hadn't done anything to change the car. We just wanted the jury to be able to see the dimensions of the car and the car itself which is important to us in the sentencing phase.

THE COURT: Would there be any objection to that?

MR. BARTOSH: Yes, sir. There would be. There would be less intrusive ways of them to obtain that. They could take measurements and show the jury the width of the seat.

THE COURT: The objection is under Rule 403?

MR. BARTOSH: Yes, sir.

THE COURT: What's the unfair prejudice?

MR. BARTOSH: Seeing the automobile itself, Your Honor. If all they want to do is talk about the size of the compartment, then there are other ways of doing it.

THE COURT: I don't see any problem with that. You can sit around and tell most people until you are blue in the face what six feet means. But until they see it, they don't understand it. I think it would have some significant probative value. And I don't understand any unfair prejudice. So I would allow it.

MR. BARTOSH: Your Honor, we would respectfully --

THE COURT: I'll tell you what though, why don't we do this. Let's have it brought over.

MR. GOWDY: Yes, sir.

THE COURT: And let's let Mr. Bartosh look at it. There maybe something else in there. Are there still blood stains on the seat?

MR. GOWDY: No, sir.

MR. BARTOSH: Your Honor, I've seen it.

THE COURT: Okay.

MR. GOWDY: I don't believe -- I saw no blood stains.

MR. BARTOSH: No, sir. They cleaned the back seat.

THE COURT: Can you see the bullet hole in the back seat?

MR. GOWDY: Yes, sir.

MR. BARTOSH: Yes, sir.

THE COURT: And you're going to have somebody demonstrate that?

MR. GOWDY: We can all stay up here in the court and the jury goes downstairs.

THE COURT: Are you going to have the officer put a dowel in it or something like you did before?

MR. GOWDY: I wasn't going to.

THE COURT: At this point, I'm inclined to allow it. And of course, I will rule at the time that the offer is made.

MR. GOWDY: I would bring to the Court's attention, giving the fact that we are on Saturday and Sunday that the back parking would be less full, there would be less risk of people being in the back parking lot. We can either do it this evening or we can do it in the morning.

THE COURT: We might, depending on what we decide about our start time, it might be good -- of course, you are in control of when you want to offer it. But if you see fit to offer it first thing in the morning, then it's going to be nice and cool out there and we won't suffer through the heat.

MR. GOWDY: That would our plan.

THE COURT: All right. Mr. Bartosh.

MR. BARTOSH: Yes, sir.

THE COURT: Anything you want to bring to my attention concerning evidence or anything else?

MR. BARTOSH: Yes, sir. My understanding is that the State intends to introduce a statement of a drug charge, a statement made allegedly made concerning a trafficking charge. And we would object to that because it was obtained in violation of his Miranda rights.

THE COURT: Okay.

MR. BARTOSH: I have a copy of the transcript.

THE COURT: Well, I guess we got to have something along the lines of a Jackson v. Deno hearing, don't we?

MR. BARTOSH: Your Honor, I think the transcript speaks for itself.

MR. BARNETT: I believe we probably do need to have a Jackson v. Deno hearing.

THE COURT: All right. Well, when you get ready to offer it, let us know and we will have a hearing.

MR. BARNETT: Yes, sir.

THE COURT: Anything else, Mr. Bartosh?

MR. BARTOSH: Yes, sir. I don't know how you want to handle this. May we approach.

MR. BARNETT: About the photographs?

MR. BARTOSH: Yes.

(WHEREUPON, the attorneys reviewed the exhibits.)

(WHEREUPON, a bench conference was held off the record in the presence of the jury.)

THE COURT: I'm ready if y'all are ready to talk about these pictures.

MR. BARNETT: Yes, sir. I talked to Mr. Bartosh. I think 65, 66, and 67 are pictures from the previous ABWIK. I think he has no objections from those.

MR. BARTOSH: That's correct.

THE COURT: Y'all need to tell me about the ones where there is an objection.

MR. BARNETT: Yes, sir. The objection he's got I believe is number 74 which is a picture of Mrs. Lindsey with her two children. 46 and 73 are two pictures of Nell Lindsey in the back seat. The relevance we would -- well, we'll let Mr. Bartosh put on the record what his objections are to these.

MR. BARTOSH: Your Honor, the larger of those two pictures showing Ms. Lindsey in the back seat I think are more prejudicial than probative. The color intensity of the photograph is much brighter than the small one.

THE COURT: Can I see them while you are talking?

MR. BARNETT: Yes, sir. I will get them. May I approach the bench, Your Honor?

MR. BARTOSH: There are two photographs showing Ms. Lindsey in the backseat of the automobile. One is a larger photograph which is much more color enhanced. The colors are much brighter. The details are much more evident. It is a much gorier photograph, Your Honor, than the second smaller photograph.

We understand that the State seeks to introduce that the relevance of the photograph is that Mrs. Lindsey is holding the cell phone in her hand as shown in the photograph. What we would object to, Your Honor, is the larger of the photographs because of the detail and the gory nature of the photograph because of the colors and the detail.

We would respectfully submit that that would prejudice, its prejudicial value far outweighs the probative value when they have an alternative less prejudicial alternative photograph which is the smaller photograph which shows basically the same thing. Mrs. Lindsey is holding the cell phone in her hand.

THE COURT: All right. Mr. Barnett, what does one photograph show that the other one does not

show?

MR. BARNETT: They both show slightly different angles. The reason why we would like the photograph, Your Honor, is not because of the cell phone. Obviously, there were two children the back seat. One in-between Ms. Lindsey and the baby seat showing how close she was to the children.

THE COURT: Right. I understand. You have other pictures that you had that you showed me a minute ago that shows a truly different angle.

MR. BARNETT: Yes, sir. We will be glad to introduce it from a different angle. We just want to show every possible angle we can so the jury would have no question in their mind. I have those pictures also, Your Honor.

THE COURT: I notice one thing that the larger photograph shows that, is that the bullet hole? Maybe that is not the bullet hole.

MR. BARNETT: Yes, sir. It is the bullet hole. We have another -- what I'm trying do to, Your Honor is --

THE COURT: That is the bullet hole that is right at the center console of the seat?

MR. BARNETT: Yes, sir. If I can make sure that we're talking about the same thing. Yes, sir. That

is a reason why I think that is relevant. It shows a little extra.

THE COURT: Let me see the other picture again.

MR. BARNETT: Yes, sir. That would be picture number 73.

THE COURT: Well, I note of these pictures of the body inside of the car, if you have somebody that is going to testify that that is the bullet hole --

MR. BARNETT: Yes, sir.

THE COURT: -- that is only one that shows the bullet hole.

MR. BARNETT: Yes, sir.

THE COURT: With the aggravating circumstances being -- just leave them right there for just a second -- endangering the lives of other people in a public place, that danger is actually where the sleeping child was sitting, right?

MR. BARNETT: Yes, sir.

THE COURT: It is within what normally looks to me, looks to me to be within what would be normally that child's part of the seat.

MR. BARNETT: Yes, sir.

MR. BARTOSH: Your Honor, there is another photograph of that bullet hole. It was introduced in

the guilt phase with the dowel through it showing the seat.

MR. BARNETT: That is correct.

THE COURT: Let me see that.

MR. BARNETT: That is correct. But I would just argue that obviously we did not have the body in that picture.

THE COURT: Okay. Okay. You have handed me 48, 55, and 54 which don't really show the bullet hole itself although it shows the dowel. Let me hand those back to you.

MR. BARNETT: Yes, sir.

THE COURT: You have shown me 50, 58, and 56 that show the dowel, two of them show the dowel coming out of the bullet hole. Show in relation to where Ms. Lindsey was sitting. It shows it as part of the center seat of the car. And then 50 shows the bullet hole, but you can not tell for sure what part of the seat it was in because it does not show the whole seat. Let me see the one, uh --

MR. BARTOSH: Is that the one with the bullet hole?

MR. BARNETT: Yes, sir.

THE COURT: This is 73. It shows the bullet hole and the body. I think it is, I mean, as Ms.

Lindsey's body has fallen over to her right and her head appears to have hit the car seat, that has sort of stopped her body from falling, her head is what looks to me to be six to ten inches past the bullet hole.

MR. BARNETT: That is correct, Your Honor.

THE COURT: I don't know. I think probative value of showing the amount of space that is between where Mrs. Lindsey was sitting and where the car seat is knowing that or having ready testimony in the record that there was a nine or seven?

MR. BARNETT: Nine.

THE COURT: Nine-year-old child --

MR. BARNETT: Yes, sir.

THE COURT: -- sitting in that seat. You can clearly, well, I won't say clearly. It does appear that the bullet hole is where the child sitting and not where Ms. Lindsey was sitting. I think there is pretty significant probative value to the location of the bullet hole in State's Exhibit 73. That is the only picture that I've seen that you showed me that has both the bullet hole and Ms. Lindsey's body in it.

MR. BARNETT: And the car seat.

THE COURT: And the car seat. I do also note

that of the other photographs that you shown me that show her body in the car, it looks to me like 73 is one of the least gory.

MR. BARNETT: Yes, sir.

THE COURT: These others are not marked.

MR. BARNETT: No, sir. But I will be glad to mark them as court exhibits so that way the record is protected.

THE COURT: Do you disagree with that? Look at those and tell me what you think. 73 is not the least gory.

MR. BARTOSH: No, sir. I agree with that. I understand the Court's position on this that the reason --

THE COURT: Don't be too sure about my position until I figure out what it is. When I figure out what it is, I will rule. But I have not ruled yet. We are just discussing it right now.

MR. BARTOSH: Yes, sir. Well, I would point out, Your Honor, and we would produce a witness on this, one the EMT folks, that Ms. Lindsey's body remained in the car for seven hours before it was removed. So this photograph probably does not show the original. We don't know when this photograph was taken. She is slumped over. It probably doesn't

accurately portray her position when this incident occurred.

THE COURT: We will have to hear the foundation about that. I have, I think I can evaluate the 403 objection. But I want to hear the foundation testimony before I do. Especially in light of your suggestion that that photograph could have been taken long after the death occurred and the body could have been moved. The State needs to lay the proper foundation for that photograph.

MR. BARNETT: We understand, Your Honor.

MR. BARTOSH: Thank you, Your Honor.

MR. BARNETT: Thank you.

THE COURT: All right.

MR. BARNETT: Do you want those marked as Court's exhibits, Your Honor?

THE COURT: Why don't you mark those as Court's Exhibits. Anything else?

MR. BARTOSH: We covered the other photograph. We'll just deal with that --

THE COURT: You want to deal with 76? You have an objection to State's Exhibit 76.

MR. BARTOSH: Yes, sir.

THE COURT: Is there anything prejudicial about this photograph?

MR. BARTOSH: We would just object to relevance, Your Honor.

THE COURT: It is relevant. That objection is overruled. Any other objection?

MR. BARTOSH: I believe that is everything. We're going to have a Jackson v. Deno hearing.

THE COURT: All right. We don't have time to do that now. When do you propose to do that?

MR. GOWDY: Our Deno witness will be here at 5 o'clock. We can do it on break. We can do it at conclusion tonight. We can take the drug witnesses out of order and do them. I don't know how long the Deno hearing would take.

THE COURT: Do we not agree that since Mr. Lindsey takes the position that the statement that he gave was in violation of his rights under Miranda that before I can allow that statement into evidence, I've got to determine that he was read his rights, that he understood them, that he waived them and that the Statement was voluntary?

MR. GOWDY: Unquestionably.

THE COURT: The only way I can do that is by hearing that testimony outside of the presence of the hearing?

MR. GOWDY: That witness will be here at 5:00.

THE COURT: Well, you can do that whenever you are ready. That's up to you. I'm not going to tell you how to -- I might tell you how to argue your objections or respond to them, but I'm not going to tell you how to put up your evidence. I won't tell you how. I might structure it a little bit.

MR. GOWDY: Yes, sir.

THE COURT: Are you ready now? It's 4:36. I assume the jury is here. Are y'all already?

MR. GOWDY: The State is, Your Honor.

MR. BARTOSH: Yes, sir.

MR. BARNETT: The only thing for the record, Your Honor. 74 and 75 is a picture of the children. I don't think Mr. Bartosh has any objection to that.

THE COURT: Is there something about the indictment not being in proper form? The verdict form? The verdict form is not dated. To me, that has no significance. We know when the verdict was reached. But if you want it dated, we will date it.

MR. BARTOSH: Yes, sir. We do want it dated.

THE COURT: I will get Ms. Driscoll to date it when she comes back out. By the way, I'm not going to be bound to have Ms. Driscoll serve as the forelady of the sentencing phase. I am considering either appointing a different foreperson or asking the

jury to spread the load and to consider appointing a different foreperson. Not that there is anything that I know of or that I suspect. That is just what I'm thinking about doing. I just wanted to let y'all know that.

I think what I will do is I will tell -- there's nothing that the foreperson would do except in deliberation anyway. There's no reason for her to be seated in that seat or anything like that that I know of. I'm just going to let it lie for right now. Okay. Anything before we bring the jury in?

MR. GOWDY: Not from the State.

THE COURT: I'm going to take a short break.

(WHEREUPON, a short recess was taken at approximately 4:37 p.m.)

(WHEREUPON, the Court resumed at approximately 4:51 p.m.)

(WHEREUPON, the jury enters at approximately 4:51 p.m.)

THE COURT: It seems like I should say good morning since every other day this week when I seen you first it has been in the morning. But, good afternoon. I hope you all had a nice night and a nice day today so far. You all look bright and cheery and ready to go. So am I. So let's do it.

Let me ask you a couple of questions. Starting with one thing we need to get Ms. Driscoll to date the verdict form with a pin.

If you would kindly put yesterday's date below your signature, I would appreciate it. What is yesterday's date, the 21st?

MR. GOWDY: The 21st.

THE COURT: The 21st.

THE COURT: Has any member of the jury discussed this case with anybody or has anybody attempted to discuss it with you since you returned the verdict yesterday afternoon? If so, please raise your right hand.

(WHEREUPON, there was no response.)

THE COURT: No one is raising their hand. Has anyone read or seen or heard anything about this case since yesterday afternoon when you returned your verdict? If so, raise your hand.

(WHEREUPON, there was no response.)

THE COURT: Nobody has raised their hand. Ladies and gentlemen, because Marion Lindsey was found guilty of murder yesterday as of course you all know, it is necessary that we began the second phase or the sentencing phase of this trial. South Carolina Code Section 16-3-20 provides that if the State proves

beyond a reasonable doubt the existence of one aggravating circumstance, the jury will recommend the sentence either of life in prison or the death sentence.

If you find that the State has proven an aggravating circumstance beyond a reasonable doubt, then you would determine which of those two sentences the defendant will receive. The statute uses the word recommendation. Let me tell you that it is not a recommendation. It is the imposition of a sentence. I am required to follow the recommendation.

Whatever recommendation you make that would be the sentence if you find that the State has proven beyond a reasonable doubt one aggravating circumstance -- if you find that the State has not proven an aggravating circumstance beyond a reasonable doubt, then that will be the end of your verdict. You will stop right there and notify us of your decision. I will talk to you more about that at the end.

This case is going to be just like, this phase will be like any other phase in that it has five independent phases itself. We will start opening statements. We will then have an evidentiary phase when both sides will have a chance to offer evidence either in aggravation or in mitigation of the crime of

murder. Then we will have a third phase when the lawyers will make a closing argument to you. In the fourth phase, I will give you another instruction on the law. Then again a fifth phase when you go back to that jury room and then you would deliberate.

Just as I told you yesterday, don't begin to make up your mind until you have been through all five of those phases especially the fifth phase when you've had a chance to hear each other's views on whether or not or what the sentence should be. Only then will you be in the right position to begin to make up your mind. Just as I told you yesterday, do not talk about this case in any way until I have given you permission to begin your deliberations in the sentencing phase. We will now have the opening statements.

MR. WILLINGHAM: If it pleases the Court?

THE COURT: Yes, sir.

MR. WILLINGHAM: At this time, the State will petition the Court to move all the evidence and exhibits and testimony from the first a phase of the trial into this phase of the trial.

MR. BARTOSH: Your Honor, we would object to any of the items of evidence that the Court admitted over our objection for reasons stated in the guilt phase.

THE COURT: Subject to the objections that I ruled on, the evidence is admitted.

MR. WILLINGHAM: Thank you, Your Honor. May it please the Court.

THE COURT: Yes, sir.

MR. WILLINGHAM: Ladies and gentlemen, I want to begin by thanking you for your verdicts yesterday, a little over 24 hours ago, on behalf of the State of South Carolina and on behalf of the family of Nell Lindsey. I know it is never easy to have to sit in judgment of someone else for what they did but thank you.

Now comes the part of the trial where we decide the sentence. What is the right thing to do with Myron Lindsey? There has been some discussion. I think everyone knows that not all murders are the same. Not all murders are death penalty cases. Not all murders qualify. It has to be something worse. There are no good murders. There's got to be something that makes it worse.

Does the fact that a husband gunned down his wife make it worse? Does the fact that the husband followed her from work at the hospital to Inman --

MR. BARTOSH: Objection, Your Honor.

THE COURT: Sustained. Do not argue in you

opening statement, Mr. Willingham.

MR. WILLINGHAM: Yes, sir.

In South Carolina, there are certain things that by statute make a murder worse. The State is relying, and I'm going to read it to make sure I get it right, that a murder is worse if the offender by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person. You will have all of the evidence, ladies and gentlemen, from the first phase of this trial. You will have the evidence that he took this gun and fired it four times.

MR. BARTOSH: Objection, Your Honor. He is arguing again.

THE COURT: Overruled.

MR. WILLINGHAM: He fired it four times into the back of Celeste Nesbitt's car in a public place. At a police station. The evidence will show that there was endangerment by the deadly weapon to more than one person. He knew it. He knew that there were two little girls in that back seat. He knew.

MR. BARTOSH: I want to object again.

THE COURT: Mr. Willingham, you are very close

to arguing whether or not he knew what he knew. You state what your position is. You state what you expect the evidence to be and then you will be within the bounds that I have set for you that you can not argue.

MR. WILLINGHAM: Yes, sir. The evidence will show that the two little girls were in that back seat. There names are Keysha and Kiera. The evidence will show that Celeste Nesbitt was in that car. Her mother, Julia Martin, was in the car. Nell Lindsey was in that car. The evidence will show that those little girls were in the backseat sitting next to Nell.

The evidence has already shown that three bullets ended up in Ms. Lindsey's head. A fourth one went through her neck, went out, went through the back seat and ended up in the trunk of that car. Why is that important? You will have no clearer evidence of endangerment to more than one person.

THE COURT: Let me see the lawyers at the bench. All of them please.

(WHEREFORE, a bench conference was held off of the record.)

MR. WILLINGHAM: Thank you, Your Honor.

The reason that it is important that that bullet

traveled from the back of her neck and into the seat is because the evidence will show that right where that bullet hole is is where the head of one of those little girls would have been. You will hear those facts.

You will hear the circumstances -- you've heard the circumstances surrounding that. But before we ask you to go to the jury room to deliberate, you need to know more. You need to know more about the victim. Right now, you know that Nell Lindsey was murdered in the parking lot of the Inman Police Department. But you don't know Nell Lindsey. You have a faceless name. You will learn through the testimony that she was a mother, a daughter, and a friend. You will learn about Nell Lindsey as a person. We will put a face with that name.

You will also learn about Marion Lindsey and about things that he has done. You will learn about other acts that he has done to his wife, to the community. And you will learn that this incident at the Inman Police Department was not the first time fired through the windshield of a car at someone.

You will hear from a fellow named Stanford Wilkins who was stopped by this defendant in his car and shot by this defendant. When we finish with the

evidence, you will know about the crimes, you will know about the victim, and you will have a clear understanding of who the defendant is. And he will be death penalty qualified.

MR. BARTOSH: Thank you, Your Honor. May it please the Court.

Ladies and gentlemen of the jury. This has been a long week. I know you all are tired. This is a very emotional experience for everybody involved. I want to thank you for your patience and your forbearance. I know it has been very difficult for you. This is the, you have been away from your family since the first night. I speak for Myron Lindsey, we thank you for your attendance.

I want to talk to you briefly about what this whole second process is about. I would like to point out two things up front. The first one is that in order to consider the death penalty for Myron Lindsey, Marion Lindsey, you have to first of all find if the State has proven the aggravator that they are relying on beyond a reasonable doubt. That is your first step.

If they have failed to prove to each and every one of you beyond a reasonable doubt that that aggravator exist and there is only one, there is only

one, then everything stops there. You cannot consider imposing the death penalty. The State has failed to prove the evidence. It is very important ladies and gentlemen, very important that you keep an open mind as the State attempts to prove that aggravator.

I think they are going to have a great deal of difficulty in doing that. I think what they are going to do is to concentrate --

THE COURT: Mr. Bartosh.

MR. BARTOSH: Yes, sir.

THE COURT: I will caution you just as I did the State --

MR. BARTOSH: I apologize.

THE COURT: -- that you would not argue in your opening statement. And I will, if you don't object, make sure that I remind the jury that the opinions of the lawyers are not evidence.

MR. BARTOSH: I apologize.

What I'm asking you to do is this, you are going to see some very graphic evidence. There are no pretty killings. You are going to see some very, very graphic evidence. Probably things that most of you have never seen before. You're going to hear the tape again, I believe, which has some very graphic

sounds, conjures up some very graphic images.

When you took your oath as jurors, you swore to decide the case fairly based on the testimony from the witness stand. You are not here to reward anybody. You are not here to punish anybody. You are here to decide, first of all, whether or not the State has carried its burden of proof by proving the aggravator beyond a reasonable doubt. Second of all, if you believe that they have and all twelve of you have to believe that they have. You have to agree on what the appropriate sentence is in this case.

You are going to hear as I said some pretty graphic sounds, some pretty graphic images. It is only human to feel sympathy for someone who is going through what Mrs. Lindsey's family is going through. They have lost a daughter. It is only natural that you feel sympathy for them.

This is a most difficult case, ladies and gentlemen. I am not going to you tell any different. It is a most difficult case. What I am asking you to do is to keep an open mind. Try to keep focus on the reasons for being here, in deciding whether or not the State has carried its burden or has met its burden of proving that evidence.

You're going to hear evidence from the defense.

You're going to hear evidence about Marion Lindsey, about his family, about his childhood. He too is a son and a brother and a father. But I ask you not to have any preconceived notions, to keep an open mind, to consider all the evidence that you see fairly and objectively.

I guess if I could pick one word, I ask that you will remain objective. And that you remain true to your oaths as jurors. And to view the evidence objectively, not to reward anyone, not to punish anyone, but to decide whether or not the State has met its burden. Thank you.

MR. GOWDY: May it please the Court, Your Honor. The State will call Ms. Kiera P. She is across the hall. With a moment of the Court's indulgence, she will be brought over.

KIERA P.

was duly sworn:

THE COURT: Solicitor, before you begin, can I see you and the defense counsel up here please.

MR. GOWDY: Yes, sir.

(WHEREFORE, a bench conference was held off of the record.)

THE COURT: Ladies and gentlemen, we need to take a quick break to address something that does not

concern you. I'm going to ask you to go to the jury room for just one second please.

(WHEREUPON, the jury exits at approximately 5:16 p.m.)

THE COURT: Okay, let me have the attention of the media for a minute. I am going to require that you not broadcast any image of this witness. I think it was suggested that maybe Court TV is blocking out their face. How are y'all handling that?

TELEVISION CAMERAMAN: We can crop it out so that you cannot see her face.

THE COURT: In filming it or in showing it.

TELEVISION CAMERAMAN: In showing it as well.

THE COURT: How about the local media?

TELEVISION CAMERAMAN: We'll make sure that she will stay down.

THE COURT: All right. Now, to the solicitor as representative of this victim under the victim's rights act and under the rules, do you see any problem with that?

MR. GOWDY: No, sir. Your Honor. I discussed this issue with Ms. Nesbitt, this child's mother. I just mentioned it to her again.

THE COURT: Is she in here now?

MR. GOWDY: She was, she just left to take Kiera outside.

THE COURT: She knows what we are talking about?

MR. GOWDY: Yes, sir. She does.

THE COURT: She knows that they will be filming her but not displaying her face on screen.

MR. GOWDY: Yes, sir. But if the Court will give me 15 seconds, I will make sure that nothing has changed.

THE COURT: All right, sir.

(WHEREUPON, the Solicitor exits the courtroom at approximately 5:20 p.m.)

(WHEREUPON, the Solicitor enters the courtroom at approximately 5:20 p.m.)

MR. GOWDY: Your Honor, may it please the Court. I just spoke with Ms. Nesbitt. She is comfortable with forbidding the media with her daughter's face not being shown.

THE COURT: All right. And I should have asked this before. I frankly should have seen it coming but I didn't. What about the child's name? It is my understanding that this child is still a resident of Spartanburg County and goes the school here. I don't want her to be subjected to any kind of harassment or embarrassment or anything from people who might see what is shown. What do you think and what does the

mother think about her name being broadcasted and her name being printed?

MR. GOWDY: She has already been subject to the problems that the Court has outlined since this incident took place. I am not aware of any media that has included her name and would obviously on behalf of this child and her mother ask that neither Kiera nor Keysha's names be used. In the past, our local media has always been very sensitive to that.

THE COURT: Court TV agree with that?

TELEVISION CAMERAMAN: Yes, sir.

THE COURT: In order that I comply with the South Carolina Victims Rights Act, let me say that under the authority that is given to me under Rule 605(f)(1)(5) that I am forbidding any media from broadcasting the face of any child and from using the name and printing the name of either of these children. All right.

It is not that I don't believe that you all would have done that any way. It's just that I think I have to do, I have to impose that order under the Victims Rights Act. And it would be useful for you to know that violation of that order subjects you to the contempt powers of the court. If you have any questions, you can ask them.

All right. Bring in the jury.

That doesn't prohibit, of course, anybody from referring generally to the fact that the child testified but just so long as you don't use the name or the face.

(WHEREUPON, the jury enters at approximately 5:22 p.m.)

MR. GOWDY: Kiera P. I can't recall whether she has been sworn or not, Your Honor. I thought she has.

THE COURT: She has.

MR. GOWDY: All right.

KIERA P.

having previously been sworn, testified as follows:

DIRECT EXAMINATION

BY MR. GOWDY:

Q Good evening, Kiera.

A Good evening.

Q I want you to pretend like I'm your little sister and you are yelling at me. I want the last two gentlemen in the jury box to be able to hear you. Okay?

A Okay.

Q That's good. I want you to tell the jury who you are and how old you are. What's your name?

A My name is Kiera P. And I'm 11 years old.

Q I want to get you to keep your voice up. Okay?

A Okay.
Q That's good. Where do you go to school?
A Inman Elementary.
Q What grade are you in, Kiera?
A Fifth.
Q What's your momma's name?
A Celeste Nesbitt.
Q You have a little sister?
A (Nods head affirmatively.)
Q What's her name?
A Keysha P.
Q Keysha? Are you nervous?
A Yes.
MR. BARTOSH: I apologize. If she could speak up. I'm having a little trouble hearing her.
BY MR. GOWDY:
Q Are you a little bit nervous, Kiera?
A Yes.
Q Me too. It will only be a couple of minutes. Okay?
A Okay.
Q I want to go back to September of 2002. September 18. Do you remember the night Nell, your Aunt Nell was shot and killed?
A Yes.

Q Were you in the car when she was shot and killed?
A Yes.
Q Where were you sitting?
A In the middle.
Q Who was to your left?
A My sister.
Q All right. I think I did my left and my right wrong. Who was sitting behind your mom?
A My Aunt Nell.
Q Your Aunt Nell?
A Uh-huh (affirmative).
Q Who was on the other side of you?
A My sister.
Q Was she sitting in a regular seat or was she sitting in a special kind of seat?
A A carseat.
Q What were you doing?
A I was sleep.
Q How were you asleep?
A Just regular sleep.
Q Do you sleep straight up, were you leaning one way or the other?
A I was leaning one way.
Q Which way were you leaning?
A I was leaning on her.

Q When you see on her, you mean on your Aunt Nell?
A Uh-huh (affirmative).
Q When the shooting started, what did you do?
A I ducked under my sister's seat.
Q I want you to say it one more time so the jury can hear you. Okay?
A Okay.
Q What did you do when the shooting started?
A I ducked under my sister's car seat.
Q You ducked under your sister's car seat?
A Yes.
Q Were you and your sister crying?
A Yes.

MR. GOWDY: Your Honor, those are all the question I have for Ms. P.

THE COURT: Any questions, Mr. Bartosh?

MR. BARTOSH: Yes, sir.

CROSS-EXAMINATION

BY MR. BARTOSH:

Q Kiera, I just have a few questions. My name is Mike Bartosh. I will try to be as brief as I can be. This happened two years ago, didn't it?
A Yes.
Q I missed when you said you said how old you are now?

A 11.
Q So you would have been nine back then?
A 10.
Q Do you recall how tall you were back then?
A About one inch tall.
Q I'm sorry?
A I was about one inch tall. I don't know.
Q You don't how tall you were?
A Huh-uh (negative).
Q You were asleep on the car?
A Yes.
Q I mean asleep on the seat. Could it been that you sleeping on the floorboard of the car?
A No.
Q When you first heard the shots that you ducked under your sister's car seat?
A I ducked a little bit. It was like a small bitty kind of way.
Q Are you talking about the edge of the car seat?
A Yeah, the edge.
Q The foot of the car seat?
A Not the foot but the kind of the edge of the back.

MR. BARTOSH: That's all.

REDIRECT EXAMINATION

BY MR. GOWDY:

Q One last question, Kiera. I want you to stand up for a second okay. Come stand up right here beside me. Mr. Bartosh asked I how tall you were back in. I see how tall you were right now. I want you squat down just a little bit as to how much you have grown in the last year and a half.

A (Demonstrating.)

Q Is that about where you were back then?

A Uh-huh (affirmative).

Q Okay. That is all the questions I have for you.

RECROSS EXAMINATION

BY MR. BARTOSH:

Q If you would, just remain by right there, Kiera. Do you know how high those heels are that you are wearing?

A Huh-uh (negative).

Q Do you think they are about two inches high?

A Maybe.

Q Okay. Thank you?

MR. GOWDY: We would ask permission that she be excused.

THE COURT: She is excused.

MR. GOWDY: We will call Celeste Nesbitt.

CELESTE NESBITT

having first being duly sworn testified as follows:

DIRECT EXAMINATION

BY MR. GOWDY:

Q Good evening, Ms. Nesbitt.

A Good evening.

Q Was the little girl who just testified for the jury your daughter?

A Yes, she was.

Q How old is she now?

A 11.

Q I believe you testified yesterday or maybe the day before, my memory fails me, she was in the car the night that Nell was killed?

A Yes, she was.

Q Did you have another child in the car that night?

A Yes, I did.

Q What is her name?

A Keysha P.

MR. GOWDY: Your Honor, a moment of the Court's indulgence.

(WHEREUPON, a little girl enters the courtroom.)

BY MR. GOWDY:

Q And what is this little girl's name?

A Kresha P.

Q Was she in the car that night?

A Yes, she was.

Q What was she sitting in?

A A car seat.

(WHEREUPON, the little girl exits the courtroom.)

BY MR. GOWDY:

Q I'm going to show you State's Exhibit 77, Ms. Nesbitt, and ask if you recognize this.

A Yes, that is my daughter's seat that was in the car the night.

MR. BARTOSH: No objection.

MR. GOWDY: Your Honor, we move State's Exhibit 77 into evidence.

THE COURT: It's admitted without objection.

(WHEREUPON, State's Exhibit 77 was admitted into evidence.)

BY MR. GOWDY:

Q I want to ask you about Kiera. What was she like before September 18, 2002?

A She was a very happy child.

MR. BARTOSH: Your Honor, I'm going to object to that as to relevance.

THE COURT: I suspect that we will benefit by having a few minutes to discuss this while y'all wait in the jury room. So please go back to the jury room for just a second.

(WHEREUPON, the jury exits at approximately 5:32 p.m.)

THE COURT: Mr. Bartosh, I will hear you out.

MR. BARTOSH: Your Honor, the State is relying on the aggravator the defendant by his act of murder knowingly created a danger the more than one person in a public place by means of a deadly weapon or a device which normally would be hazardous to the lives of more than one person. There is nothing about any kind of traumatic experience that person may have suffered in the course of that. That has nothing to with the aggravator. So we would object to any discussion on how she was then versus how she is now on the basis of relevance.

THE COURT: Mr. Gowdy.

MR. GOWDY: Your Honor, Mr. Bartosh, I think, misapprehends the reason for that question. It is twofold. That young lady is a victim. The victim's impact testimony is inherently admissible on two fronts. Number one, there was testimony that this witness, Celeste Nesbitt, and the victim Nell Lindsey were like sisters. The last witness, Kiera P. testified that she called her Aunt Nell. I think it is entirely probative and admissible what impact Aunt Nell's death had on her.

Secondarily, this young lady was in the car. She is a victim of what this defendant did. It is entirely

admissible what his impact his actions have had on her. They have been traumatic. It has nothing to do with the aggravator. This is pure victim impact testimony.

MR. BARTOSH: Your Honor, if I could be heard on that. It is clearly intended to inflate --

THE COURT: I'll tell you what, in order for me to evaluate impact this testimony will have, it would be helpful to me to listen to it and then rule.

MR. BARTOSH: Thank you, Your Honor.

MR. GOWDY: Yes, sir. Would you like me to proffer Ms. Nesbitt?

THE COURT: Yes, sir.

BY MR. GOWDY:

Q I had asked you what your daughter Kiera was like prior to September 18, 2002.

A She was a happy child, she had very good grades in school. She was doing well.

Q After September 18th, 2002, what is Kiera like?

A She has manic depression, panic attacks. She is on medication. Her grades fell all the way down.

Q Has there been any other traumatic episode her life other than sitting next a woman who was shot that in your judgment as her mother could explain the difference between her pre-September 18th and pro-September 18?

A No.

Q Was she in fact injured during the course of this crime?

A Yes, she was cut with glass on her arm.

Q Glass that came through the window that this victim was shot?

A Yes.

Q Is that her that we hear screaming?

A Yes, it is.

Q Was she in a car with Nell for a period of time while Nell was dead?

A Yes, she was.

Q Was she sitting immediately beside Nell?

A Laying on her arm from the beginning.

Q Is she in counseling as a direct result of what happened on September 18?

A Yes, she is still now.

Q Does she take medication as a result of what happened on September 18, 2002?

A Yes, she takes Zoloft.

MR. GOWDY: That would be the State's proffer, Your Honor.

THE COURT: Mr. Bartosh?

MR. BARTOSH: Once again, Your Honor, I would object to relevance. It does not make it any more or

any less.

THE COURT: The relevance objection is overruled. You are really talking about -- you are saying that to allow this testimony is unfairly prejudicial?

MR. BARTOSH: Yes, sir.

THE COURT: And that unfair prejudice substantially outweighs the probative value?

MR. BARTOSH: Yes, sir.

THE COURT: So it's a Rule 403 objection?

MR. BARTOSH: Yes, sir.

THE COURT: And it is also based on the constitutional principle that victim impact evidence can not be admitted if it renders the defendant's trial fundamentally unfair?

MR. BARTOSH: Yes, sir.

THE COURT: All right. The thing that, there are two things. One thing that concerns me is the last questions. You got her to essentially render a medical diagnosis of manic depressive and what caused it and why she is taking medication. I am a little concerned about that. That is trading into the expert realm.

Maybe the doctors told her that, in which case, it is hearsay. Maybe she is just figuring that, she

is her mother, she is entitled to give her impressions. But to give a medical diagnosis carries it to a little bit different level.

MR. GOWDY: Your Honor, I would agree with that. I would limit my questions to being more general as opposed to a specific diagnosis. I think that a mother would be qualified to discuss the changes in a child's behavior, schoolwork, particularly when the foundation has been laid that there's been no other traumatic episode other than this incident.

And the fact that she is in counseling, but in terms of a specific diagnosis of being manic depressive -- I am not certain -- this witness certainly knows that prior to September 18th, she was not taking Zoloft. Pro-September 18, she's taking Zoloft. I would think that she would not be able to draw any conclusions on that other than to say that that is a fact.

THE COURT: I believe that Ms. Nesbitt testified in the guilt phase about the relationship between her and Ms. Lindsey and her children and Ms. Lindsey.

MR. GOWDY: Yes, sir.

THE COURT: All right.

MR. GOWDY: Kiera herself referred to her as Aunt Nell. That's in her testimony.

THE COURT: Okay. All right. There is no doubt in my mind that in order to, for the jury to understand all of the facts and circumstances that they need to understand in order to render the appropriate sentence, they need to have the hands all the way around the effect that this crime has had. And that these children are not only victims of the crime for having been present, but victims of the crime because of fact that they are so close to the lady that was killed.

In having heard the, uh, I don't believe that the potential for unfair prejudice substantially outweighs its probative value. We are in the sentencing phase of the trial. The State is given more latitude in terms of what it can do, both sides are. I believe that the probative value of hearing how this crime has affected this child is high. So the unfair prejudice certainly as we said the other day, it is prejudicial.

But looking at that prejudice and looking at it compared to everything else that the jury already is going to know about this crime and the fact that the two children were there, their ages, their relationship to the victim of the murder, the testimony that I just heard does not add significantly to the prejudicial impact that the situation of the

crime will have the jury.

So I don't believe that the potential for unfair prejudice substantially outweighs its probative value. I'll overrule the objection. With the solicitor's concession that he would not ask the witness for any kind of medical type diagnosis, then I think we are ready to go forward.

MR. BARTOSH: Your Honor, we would just respectfully object to your ruling on that based upon prior argument.

THE COURT: All right.

Bring in the jury.

(WHEREUPON, the jury enters at approximately 5:43 p.m.)

MR. GOWDY: May it please the Court, Your Honor

THE COURT: Yes, sir.

BY MR. GOWDY:

Q You testified that you and Nell were like sisters?

A Yes

Q I'm going to ask you to elaborate on that a little bit. How long had you and Nell been friends?

A Every since she was around the age of 10. My best friend was her cousin by marriage. That's how I met her. We became close from then on. All throughout her

life.

Q When you say close friends or like sisters, how often would you see Nell on a weekly basis?

A Two or three times out of the week. If I did not see her, she would call.

Q Were your children close to Nell?

A Yes, they were.

Q Did they call her anything other than Nell?

A They called her Aunt Nell.

Q How often would you imagine that your two daughters Kiera and Kresha were around Nell Lindsey?

A My oldest daughter, Nell taught her all the way through daycare until she started public school. My youngest daughter she taught her for about a year in day care.

Q Okay. I want you to tell the jury from your perspective as a mother, what was different about your daughter Kiera after September 18 and before September 18?

A From a happy child to a depressed child. A child that would go in her room and wouldn't say nothing. We would tell her to come out and play, she was afraid. If we was in the car riding down the road at night and it turned dark, she would cry to go home. She was scared to ride in the car after dark.

A child that would be in her room when night fall. If

I go in my room and go to sleep, she would come while I was sleep and stand over me. I would wake up and ask her why and she would say I hear gunshots. I say, No, you don't, baby. Go back to sleep. She would say I can't sleep.

MR. BARTOSH: Objection to hearsay, Your Honor.

MR. GOWDY: It's not offered to prove that to the matter asserted, Your Honor.

THE COURT: Objection is overruled.

MR. GOWDY: Thank you, Your Honor.

BY MR. GOWDY:

Q Ms. Nesbitt, is your daughter Kiera in counseling?

A Yes, she is.

Q Was she in counseling before September 18th?

A No, she was not.

Q Is your daughter taking medication now?

A Yes, she is.

Q Was she taking medication prior to September the 18th, 2002?

A No, she was not.

Q Other than sitting by her aunt while she was being shot in the head four times, has anything else traumatic happened to Kiera that could explain in your judgment as her mother the changes in her?

A No.

Q Was she injured, however slight, on September 18, 2002?

A Yes.

Q Let me show you two pictures, State's Exhibit 74 and State's Exhibit 75. I want to ask you if you recognize those pictures and if you can tell the Court what date those pictures represent?

A The date the pictures were taken?

Q Yes, if you know.

A These pictures were taken September the 19th.

Q Of what year?

A 2002.

Q They are pictures of what?

A Of Kiera and her arm after the incident.

MR. GOWDY: Your Honor, we would move State 74 and State 75 into evidence.

MR. BARTOSH: No objection.

THE COURT: they are admitted.

(WHEREUPON, State's Exhibits 74 and 75 were admitted into evidence.)

BY MR. GOWDY:

Q I see a Band-Aid on your daughter's left arm. Is that correct?

A Yes.

Q What was that Band-Aid for?

A Where they picked glass out of her arm.
Q They picked glass out of her arm?
A Yes.
Q Did that glass come from either the side window or the back windshield of Celeste -- of your car?
A Yes.
Q You had two little girls in the car that night. Let me ask you about Keysha. How old was Keysha that night?
A Four.
Q Is Keysha okay today?
A Yes.
Q Does she talk about the incident?
A No, every now and then but she is too young to even remember.
Q How about Kiera?
A She remembers the whole thing.
Q Is she having trouble in school?
A Yes.
Q Is she having trouble with her friendships and relationships?
A Yes.
Q Can you think of anything other than watching her aunt shot that could explain the change in your daughter?
A No, nothing else.

Q While Mr. Barnett is setting up the overhead, Celeste, I want to ask you to give the jury a sense of what Nell Lindsey was like as a person.

A She was a sweet person. A hard-working person, a friendly person, a good person. A person that was willing to do anything for anyone. She was a loving mother. She loved her kids, your kids, anyone's kids. She wanted to be happy. She tried to make everybody else happy. When you was mad, she make you smile. She did everything that she could to try to be happy and make everyone else happy.

Q You mentioned she was a good mother. How many children did Nell have?

A Nell had two sons.

Q Was she the primary caregiver for those two sons? In other words, did they live with her?

A Yes, they did.

Q Did you believe that she was a good mother?

A A very good mother. She kept her sons with her at all times. Even if she felt that you were tired of her sons, she would tell you that me and my children will go home. We used laugh about it. She would say I'll take my children and I'll go home. She loved her kids.

Q During the time that you had known or the time that you knew Nell, was she employed most of the time?

A Yes, she was.

Q Let me show you what has been marked as State's Exhibit 76 and ask you if you recognize that picture.

A Yes, I do.

Q What is that?

A This is Nell and her two sons.

Q How close to the time of her death would you estimate Ms. Nesbitt that that picture was taken?

MR. BARTOSH: Objection, Your Honor, that calls for speculation on her part.

BY MR. GOWDY:

Q If you know.

A One month.

Q One month?

A Uh-huh (affirmative).

MR. GOWDY: Your Honor, we would move State 76 into evidence.

MR. BARTOSH: We would object to it based on our prior argument.

THE COURT: Let me get back to the objection to the question about when the picture was taken. It is apparent to me that Ms. Nesbitt would have the familiarity with the family to have a basis to answer that question. That objection is overruled. As far as the admission of the photograph itself, what is the basis of the objection?

MR. BARTOSH: Relevance, Your Honor.

THE COURT: Overruled. I have also considered that exhibit under Rule 403 as to whether or not it renders the trial fundamentally unfair. It does not. It is admissible under Rule 403.

MR. GOWDY: Thank you, Your Honor. Permission to publish it to the jury.

(WHEREUPON, State's Exhibit 76 was admitted into evidence.)

BY MR. GOWDY:

Q Tell the jury what they are looking at, Celeste.

A They are looking at Nell in the middle, which is the mother. Her oldest son on her back, which is Alex. Her youngest son in the front, which is Trey.

Q Trey?

A Yes.

Q Do you know how long Nell had been working at Spartanburg Regional prior to September 2002?

A I don't know the exact dates.

Q She been there less than a year?

A Some months.

Q It has been some months, right?

A Yes.

Q Let me ask you it this way, during the course of your relationship with Nell, did you also have occasion to

be around Myron Lindsey?

A Yes, I did.

Q How often, give us a monthly estimate. In a given month, how often would you see Myron Lindsey?

A Maybe two or three times out the month.

Q Did you ever travel out of town with Nell and Myron Lindsey?

A Yes, I did.

Q Did you ever see Myron Lindsey interact with his wife, Nell?

A Yes, I did.

Q Did you ever see Myron Lindsey interact with his children Alex and Trey?

A Yes, I have.

Q Did you ever see Myron Lindsey beat his wife?

A Yes, I have.

Q Tell the jury about some of those times.

A The incident when we traveled out of town and went to the beach. She and I went out of town to shop. We played around and killed some time. He and the guys went their way. When we came back, he met us across the parking lot. He walked up to us. We thought everything was calm. He hauled off and hit her so hard until he almost broke her jaw. She feel to the ground. He snatched her jewelry. The very next day, we went over and we picked up jewelry

that was still left in the parking lot.

Q This was a family vacation I take it?

A Yes. She asked me to go. I told her I did not want to go. I did not have any money. She was like you just come and go. He's paying for the room. And just have you something to eat, money for food. And I said okay.

Q You testified he hit her in her jaw with his fist or with his hand?

A With his fist.

Q Did you happen to know if anything Nell did prior to getting her jaw punched?

A He said we came back too late.

Q You came to back too came back to late?

A It was only 11 o'clock. On the beach during bike week, it was a lot of people out there. We got caught up in traffic. A couple of days later, he admitted that he thought it was one o'clock.

Q Okay. Did you ever see Myron Lindsey hit wife, Nell, other than down at the beach for coming back for what he thought was late?

A Not from coming back from what was late but I saw him hit her before.

Q Tell the jury about another time you saw Myron Lindsey hit his wife, Nell.

A When he walked into my house and hit her laying

across my bed. We were in there looking on the computer at jobs. He came and hit her because she would not get up and go to her mother's house to receive a gallon of milk out of his hand, directly out of his hand.

Q I'm going to have to get you to tell me that again. He hit her for what reason?

A Because she would not leave my house and go to her mother's house and receive a gallon of milk out of his hand.

Q So he came to your house?

A Yes. Walked straight through the door and hit her.

Q Was anyone present when he hit his wife, when he hit Nell other than you?

A Yes, my mother and my two children.

Q What did you do after he hit his wife in your house?

A I told him to get out. At the time, he had outside in the vehicle his brother and two of his friends. They jumped out and come running in. I said get out of my house. Get out. He called back. And he apologized.

Q To you or to her?

A To me.

Q Can you tell the jury about any other times when you had seen this defendant strike, choke, push his wife?

A One other time, a matter of fact, the first of the year 2002, a friend and I were going out to a get-together. Nell called and asked if she could go. I said sure, let me call my friend girl and ask if she has an extra ticket for you to go. She said sure. I will pay her way. A few minutes before Neil pulled up, Myron pulled up. He said I thought she was on her way around here. I said she is. He said I'll wait for her.

When she pulled up, he said what are you going to the baby because he had the baby that weekend. She say give him here. I will take him back to my mother. So me and my friend went in the house. All of a sudden, we heard some fussing. I goes back to the door. He took the fist, he took his fist and knocked the glass of her Lexis out. Glass went all over her and the child. She sped off and went home to her mother.

Q Were you present at Applebee's on the occasion when Mr. Lindsey showed up to assault his wife?

A Yes.

Q Can you tell the jury about that.

A That particular night, a friend of mine was taking me out to eat. His job called him into work. Nell called me and asked me what I was doing. I said I was going out to eat but my friend had to work, so I'm not going. She said, well, I'll go. I said you know what I'll

pay your way if you come and go with me. She said okay. She came to my house. She said my mother brought me a shirt to wear so I could go with you. I said okay. So me and her went.

He called on the phone to ask where was she. We said we're going to Applebee's. We're going to go and have a few drinks and eat. He said I will be in there. When we backed into the parking space, he pulls up. He comes to the window and say Nell come out. She locked the door and she said Go on, Myron.

I said Get out. He probably wants to talk to you. So she got out. It wasn't like anything was really going on, I felt. So when she got out I felt the car jar back and forth, back and forth. So I didn't think anything was wrong. When she stepped back in my car, he had done hit her up side the face.

MR. BARTOSH: Objection, Your Honor. She did not witness the event.

MR. GOWDY: Your Honor, may I lay a proper foundation?

THE COURT: Yes, sir.

BY MR. GOWDY:

Q Ms. Nesbitt, before she got out of your car at Applebee's, before her husband Myron Lindsey showed up, did you notice marks or scratches or bruises on her face?

A No, I did not.
Q Was her jewelry in tact?
A Yes, it was.
Q Were her clothes in tact?
A Yes, it was.
Q After she got out to speak to her husband, did you notice anything different about her?
A When she got back in, her shirt was ripped and her jewelry was thrown across the parking lot.
Q Do you know whether or not Nell Lindsey --
THE COURT: Solicitor, if you're changing the subject, I would like to see you and Mr. Bartosh up at the bench.
MR. GOWDY: Yes, sir.
(WHEREFORE, a bench conference was held off of the record.)
BY MR. GOWDY:
Q Let me go back very briefly to the incident of the Applebee's. You were still inside the car, correct?
A Yes, I was.
Q Nell got out because her husband showed up at her window?
A Yes.
Q Were you still in the car?
A Yes, I was.

Q Could you still see what was happening between them?

A No, he was standing very close to her.

Q You testified you felt the car move.

A Yes, I felt the car move. But he was standing very close to her.

Q Did you see any physical contact between this defendant and Mrs. Lindsey?

A No, I did not see the physical contact. I just know the car was jarred. He was standing very close to her.

Q Did you notice anything different about Mrs. Lindsey after she got back in the car and before she got out to speak to her husband?

A Yes, I did.

Q What did you notice different?

A She was crying. She was scratched and bruised down her neck. Her shirt was ripped and her jewelry was gone.

THE COURT: All right. The, uh -- never mind.

BY MR. GOWDY:

Q Ms. Nesbitt, do you know whether or not Nell Lindsey had taken steps to divorce Myron Lindsey?

A Yes.

Q How do you know that?

A She told me. She made a few phone calls in front of me.

Q She made phone calls in front of you?

A Yes, she called different lawyers and legal aid.

Q Did you ever hear this defendant threaten his wife?

A Yes.

Q Tell the jury about the substance of those threats.

A He would tell her, if I catch you doing anything, I will kill you, bitch.

Q I would kill you what?

A Bitch.

Q Is the word "bitch" one that he liked to use?

MR. BARTOSH: Objection, Your Honor.

THE COURT: Sustained as to what he liked.

MR. GOWDY: Thank you, Your Honor.

BY MR. GOWDY:

Q How did he refer to Nell?

A Bitch.

Q Was that an infrequent reference or a frequent reference?

A Frequent.

MR. GOWDY: One moment, Your Honor.

BY MR. GOWDY:

Q After September the 18th, you testified during the guilt phase that you got the car back from law enforcement, right?

A Yes.

Q I believe you also testified that you sold that car?

A Yes.

Q Tell us who you sold it to.

A Mary Lyles.

Q For the time that you got it back from law enforcement until the time that you sold it to Mary Lyles, did you do anything to the car?

A No, I did not. I looked in the car at the crime lab. That was it. Once it was in the crime lab, it went straight to her.

Q Is this the same car seat, not a replica, but the same car seat that was in the car on September 18th that Keysha was sitting in?

A Yes, it is.

Q Please answer questions Mr. Bartosh may have.

CROSS-EXAMINATION

BY MR. BARTOSH:

Q Ms. Nesbitt, are you related to Mrs. Lindsey?

A No, I'm not.

Q Is your daughter related by blood to Nell

Lindsey?

A No.

Q Are either one of your daughters related by blood to Nell Lindsey?

A No.

MR. BARTOSH: Your Honor, we respectfully ask the Court to strike any of the testimony concerning the impact on the daughter because she is not a member of her family. She is not a member of victim's family.

THE COURT: Motion denied.

BY MR. BARTOSH:

Q On the times that, let me start from the beginning. When were Myron, when was Mr. Lindsey and Mrs. Lindsey married?

A I don't remember the exact year or date.

Q When did you first met Mrs. Lindsey?

A I met her when she was 10 years old. When they got married, I did not find out until three months later.

Q Do you know when that was?

A It was March. I'm not sure of the date.

Q That you know how long they had been together?

A No, not the exact years. But some years.

Q Well, more than five?

A Yes, more than five. They had two children.

Q More than 10?
A Around 10.
Q But you don't know how long they have been married?
A How long they had been married?
Q Yes, ma'am.
A Maybe about five or six years.
Q About how long? I'm sorry.
A Five or six years.
Q Over that entire period that they were together, you knew them?
A Yes.
Q You would have social interaction of Mr. and Mrs. Lindsey, correct?
A Yes.
Q And did you ever refer to Mr. Lindsey as your brother?
A I used to call him brother.
Q Did he ever sign for a car for you?
A Yes, he did.
Q How would you describe Mr. and Mrs. Lindsey's relationship?
A Off and on.
Q All right. They would separate?
A Yes.

Q From time to time?
A Yes, they would.
Q She would take the children?
A Yes, she would.
Q Where would she go when they would separate?
A To her mother's house.
Q She would stay there?
A Until he would ask her to come back to wherever he would be at.
Q So it would always be that he insisted and never hers?
A Right.
Q She would always go back?
A Yeah, she would go back.
Q Okay. Now she was at Spartanburg Tech, right?
A Yes.
Q Who put her through Spartanburg Tech?
A He paid some of it. She had financial aid, to my knowledge, for the rest of it.
Q At least some of it was paid for by Mr. Lindsey?
A Yes.
Q Those incidents that you described of violence between Mr. and Mrs. Lindsey, where there ever any police reports or any law enforcement called to them?
A The police were called to my house on that

incident.

Q On which incident?

A When he came to the house and hit her because she would not accept a gallon of milk out of his hand.

Q How about Applebee's?

A Yes, the police was called then.

Q Okay. And what did you say happened at Applebee's?

A She got out of the car. When he pulled up to Applebee's, he came to the window and asked her to get out. She got out of the car, I felt the jar of the car. When she had gotten back in, he had hit her, bruised her, tore her shirt, threw all of her jewelry.

Q You remember giving a statement on that incident?

A Yes.

Q Have you reviewed it?

A No.

Q Is that the statement that you gave?

A Yes.

Q It is?

A Yes.

Q Did you mention anything about Mr. Lindsey hitting Mrs. Lindsey?

A No, I did not mention anything about that because he said -- when I talked to the officer, he said he just

wanted to know about the parking lot.

Q The officer told you he did not want to know about Mr. Lindsey hitting Mrs. Lindsey?

A No, he asked me what kind of condition she was in when he got out, I told him the same thing that was asked here. He asked me what kind of condition it was when she got back in.

Q Did you mention anything in the statement about him hitting her?

A No.

Q Did you mention anything about any bruises or any scratching?

A No, I did not in that statement.

Q The officer came and saw Ms. Lindsey?

A Yes, he did.

Q Does he mention, he did not say anything about scratches and bruising?

A Yes, he did.

Q He did?

A It is in her statement.

Q But you saw that?

A No, I did not see the actual licks. I was in the car.

Q I understand that. But you saw it afterwards?

A Afterwards, I saw the bruises on her. She did

not have them when she stepped out of the car.

Q In the statement, you said she did open the car door and got back in. And there was no words passed back and forth?

A Yes.

Q No mention about any bruises or scratching or anything like that?

A Not in that statement.

Q Okay. Of all the times you say there was violence between Mr. and Mrs. Lindsey, there are no police reports other than Applebee's and the time that you said that he came into your house?

A Yes. I don't know if she called the police and the police pulled up and she talked to the police. The police did not even talk to me. The police pulled up and that's when they talked to the police.

Q After the incident in Applebee's, did they separate?

A They were already separated.

Q Did they ever get back together after that?

A Not to my knowledge.

Q So they never got back, never got back together after Applebee's?

A Not together, no. They spent nights and days or weeks together. But that was it. She was still living

with her mother.

Q Did he live with them?

A No.

Q They would spend nights together?

A Yes.

Q Who had the children?

A Her mother.

Q She did not have them?

A She had the children. But when they would be together most of the time, her mother would keep them.

Q The time you described about when she was going to a get-together and she had her child and she was going to go with you, was it a party?

A (Nods head affirmatively.)

Q How old was her child at that time?

A And he had to be two or three.

Q What time of day or night was this?

A This was about 9 o'clock at night.

Q She was going to take the child to the party?

A No, her mother was going to keep the child. He had the child --

Q Okay.

A -- and was bringing the child back. Her mother was keeping the child.

Q Okay. You said they got out and had another

argument?

A (Nods head affirmatively.)

Q Where was, whose mother was going to keep the child at that incident?

A Her mother.

Q Not your mother?

A No.

Q She wasn't going to keep the baby at her house?

A Her mother was keeping her child at her mother's house.

Q Now the photograph that we saw, do you know where that was taken?

A I can't call the name off of my mind.

Q Did you go with them when they had it taken?

A No.

Q Did you see all the photographs that were taken?

A Yes, I did.

Q Was there a photograph of Mr. Lindsey and his two children?

A No.

Q There was not?

A I did not see any.

Q Do you know whether there was one?

A I don't know because I did not see any. I saw several poses of her and her kids.

Q That's all?

A That is all.

Q That's all I have.

MR. GOWDY: Nothing on redirect, Your Honor.

THE COURT: You can step down, ma'am.

MR. BARNETT: I'd like to call Randy Bogan to the stand please.

THE COURT: How long will his testimony be?

MR. BARNETT: Not very long I don't believe.

THE COURT: (Nods head affirmatively.)

RANDY BOGAN

having first being duly sworn testified as follows:

DIRECT EXAMINATION

BY MR. BARNETT:

Q Officer Bogan, you have already testified in front of the jury before?

A Yes.

Q What I would like to do is show you two pictures. When you arrived at a crime scene, what is one of the first things that you do at the crime scene?

A The first thing I do is I photograph the crime scene. Then I look for potential evidence. Then I place placards at the evidence. Then I re-photograph.

Q So you would have arrived, how long, within an hour after the incident occurred?

A Yes, I would say 45 minutes to an hour.

Q So you would have took pictures after that?

A That's correct.

Q Let me show you what has been marked as State's Exhibit number 3. Does that photograph fairly represent what you saw that night?

A Yes, sir. It does.

Q When you arrived, you are would have took that picture?

A Yes, I took that photograph.

(WHEREUPON, the photograph was presented to the defense.)

MR. BARTOSH: Your Honor, may I have the opportunity to cross-examine Officer Bogan before the picture?

THE COURT: You can voir dire him about the foundation for the admissibility of the exhibit.

BY MR. BARTOSH:

Q Officer Bogan, do you keep a time sheet or an arrival sheet or a crime log?

A No, sir. I'm not the one to keep the crime log. Usually the initial officer who is on the scene creates the crime log.

Q So you would not know the exact time that you arrived?

A No, sir. Not unless it was on the crime log which it should be.

Q So when you say you are going by what you normally would do, it takes you usually 45 minutes to an hour to get on the scene?

A Yes, sir. Usually 45 minutes to an hour.

Q Okay. And you process the scene in a certain order?

A Yes, sir.

Q Okay. What is that order?

A I look at the scene. I photograph the scene. I -- after I take a photograph of the scene, I look at the scene again to verify any evidence or potential evidence that is at the scene. Then I mark that and I re-photograph it.

Q I guess that's my question. Do you have any particular order that you photograph?

A Whenever I usually get there.

Q What I am saying is do you photograph the car or the items that are found?

A I photograph everything, everything.

Q I understand but is there any particular order that you go when you photograph?

A I'm not sure.

Q I don't know that I make myself clear. What I'm

saying is when you arrive, you say okay, I'm going to take a picture of anything that is on the ground first. And then I'm going to take a picture of the house or something like that or if it is a murder scene, what do you normally photograph first?

A It depends on the type of murder that it is because some are outside, some are inside. And in this case, it was outside but the victim was in a car. Therefore I would photograph the entire scene of the vehicles and everything. And then I would focus on the victim.

Q So it's possible from the time that you, 45 minutes to an hour to get there. And then say another what, half hour to 45 minutes to photograph the scene?

A I would say so.

Q So it's possible it could have been as much as 2 hours before you took that photograph?

A It is possible.

Q That's all I have.

MR. BARNETT: I still move the exhibit into evidence at this time.

MR. BARTOSH: Your Honor, we would object to that because there is no foundation to say that that was how she --

THE COURT: All right. These are the best

opportunities to take breaks. So we're going to take about a 15-minute break. I will get you get you back in here and resume testimony in about 15 minutes.

THE COURT: Court is still in session please.

(WHEREUPON, the jury exits at approximately 6:24 p.m.)

THE COURT: All right. The objection is what?

MR. BARTOSH: Your Honor, that that photograph does not accurately reflect how she appeared at the time of the incident. What it does reflect is at some point up to two hours later. Now if they are introducing it to show the position of the body inside the car at the time of the incident, then there's no way that somebody can verify that that is how the body, that is where the body was at the time of the incident.

MR. BARNETT: No, sir. What I'm doing is I'm introducing this, remember Officer Godfrey's testimony is that she slumped over once she was pulled out. This is the way it was but obviously they secured a crime scene.

THE COURT: Officer Godfrey said she slumped over when they pulled the children out.

MR. BARNETT: Yes, sir. I remember that was part of the record and so forth. I'm not introducing it to show exactly -- obviously, that was not the

position that she was in when she got shot. But she is definitely still holding the cell phone there. It shows the approximation of where the bullet is and also where the car seat is. And that is why it is being shown.

THE COURT: It shows where her rear-end is situated on the seat.

MR. BARNETT: Yes, sir. I don't think that that has moved at all but obviously there's evidence to show that.

THE COURT: What you are saying basically is that the foundation for the introduction of this exhibit has not been laid because there is not a sufficient basis for the fact-finder to conclude that the photograph fairly and accurately depicts what it purports to show.

MR. BARTOSH: Your Honor, I think we can solve this because there is a photograph that we were provided for, we were provided in discovery, it is 316070.

MR. BARNETT: That is State's Exhibit 46, Your Honor. The one that, this is also provided to me in discovery also.

THE COURT: Wait a minute. I am not sure what you're talking about. We are not talking about that

exhibit. We are talking about this exhibit. The State is offering this exhibit into evidence. I have to rule on it. I can not tell the State which exhibits to offer and which not to offer.

MR. BARTOSH: That would be our objection, Your Honor. It does not accurately reflect.

THE COURT: That objection is overruled. Any other objection?

MR. BARTOSH: No, sir.

THE COURT: We'll take a short break.

(WHEREUPON, a short recess was taken at approximately 6:29 p.m.)

(WHEREUPON, the Court resumed at approximately 6:39 p.m.)

THE COURT: Bring in the jury.

Did you find the other picture?

MR. BARNETT: Yes, sir. I did.

THE COURT: Good. Who had it?

(WHEREUPON, the jury enters at approximately 6:40 p.m.)

MR. BARNETT: May it please the Court, Your Honor?

THE COURT: Yes, sir.

BY MR. BARNETT:

Q Let me show you what has also been marked as

State's Exhibit 46. Does that picture fairly represent what you took or saw that night?

A Yes, sir. It does.

Q When you go to a crime scene, do you first photograph everything?

A Yes, sir.

Q You would have done that immediately when you arrive at the scene?

A Yes, sir. What I do is I observe the crime scene to see what I have initially, then I photograph. Then I, of course, observe again and find out what type of evidence that I have. I mark it. And then I photograph it.

Q The items in this pictures, did they change from the time you observed them to the time you photographed them?

A No, sir.

Q Okay.

MR. BARNETT: Your Honor, I would like to move State's Exhibit 73 and 46 into evidence.

MR. BARTOSH: We object to them, Your Honor, based on our prior objection, our prior reasons.

THE COURT: Did we address, we addressed the foundation objection. Did we address the 403? Did I discuss my ruling on that?

MR. BARTOSH: My understanding was you had not

ruled on that, Your Honor.

THE COURT: I'm talking about when we first took this break just now. That was just foundation.

MR. BARTOSH: Yes, sir. My understanding is that you ruled on the 403.

THE COURT: That I what?

MR. BARTOSH: That you had ruled on the 403.

THE COURT: Did I explain my ruling?

MR. BARNETT: And we talked to you about earlier about it, Your Honor. I think you did put it on the record.

MR. BARTOSH: Yes, sir.

THE COURT: In any event, overrule the objection. I will explain the weighing of the factors during the next break.

MR. BARNETT: Thank you, Your Honor. May I publish these pictures to the jury, Your Honor?

THE COURT: Yes, sir.

(WHEREUPON, State's Exhibit 73 and 46 were admitted into evidence.)

BY MR. BARNETT:

Q Let me show you State's Exhibit 73, Mr. Bogan. If you would, sir, please describe what we are seeing in this picture, sir.

A This is Mrs. Lindsey. There is a cell phone in

her right hand. She is slumped over. This is the baby seat, or the car seat and space in between her right here. Previously, on some photographs, there was a mark in the center of rear seat. This was the same mark which is a bullet hole that went through and into the trunk.

Q Was that the dowel that you put through it in the early pictures?

A Yes, sir. It was.

Q Let me show you State's Exhibit 46. Is this a picture of the same scene but at a different angle?

A Yes, sir. Actually if you turned it up like that --

Q I apologize.

A This is actually a photograph looking through the passenger side rear of the vehicle and into the vehicle. This is basically the same photograph but a different angle than what you just saw.

Q In the earlier pictures that you described to the jury a few days before, you showed where the bullet hole and the dowel and the angle of the bullet was?

A That is correct

MR. BARNETT: One moment, Your Honor.

Please answer any questions Mr. Bartosh has for you.

CROSS-EXAMINATION

BY MR. BARTOSH:

Q Officer, you took those programs with a digital camera?

A Yes, sir.

Q Do you have the capability of placing the time of day on those photographs?

A On the digital, at that time, no, sir. The cameras would not put the date and time on there.

Q Would you ordinarily write the date and time on the photographs?

A No, sir. I never have.

Q You don't do any type of notation as to the time you took the photographs?

A No, sir. I have never taped the times on the photographs.

Q Just so I understand, are you saying that that is the position that Ms. Lindsey was in when you arrived?

A That is correct.

Q Okay. That is all I have.

MR. BARNETT: No further questions of this witness, Your Honor. We ask that he be excused.

THE COURT: He is excused.

MR. BARNETT: I would like to call Doug Bishop to the stand.

DOUG BISHOP

having first being duly sworn testified as follows:

DIRECT EXAMINATION

BY MR. BARNETT:

Q You have already testified in front of the jury before in the guilt phase. Let me show you what's been marked as State's Exhibits 71, 72, 69, 70 and 68. If you would, review those for a second.

THE COURT: Let me ask you this, the two exhibits that you just introduced, 74 --

MR. BARNETT: 73 and 46, Your Honor.

BY MR. BARNETT:

Q You attended the autopsy of Nell Lindsey, is that right?

A Yes, I did.

Q Did you take these pictures at the autopsy?

A Yes, I did.

Q Do these pictures fairly represent what you saw at the autopsy?

A Yes, sir.

MR. BARNETT: Your Honor, I will move these into evidence at this time.

MR. BARTOSH: No objection.

THE COURT: They are admitted. Give me the numbers please.

MR. BARNETT: Yes, sir. 68, 69, 70, and 71, and

72. I would like to publish them to the jury at this times.

THE COURT: Yes, sir.

(WHEREUPON, State's Exhibits 68 through 72 were admitted into evidence.)

BY MR. BARNETT:

Q This has been marked as State's Exhibit 68. If you would, describe what the jury sees here.

A Yes, sir. This is the back of her head right here. There's a gunshot wound here to the back of her head.

THE COURT: Move that microphone off of his shoulder please.

MR. BARNETT: Yes, sir.

THE WITNESS: I'm sorry. There was the gunshot wound here at the top of her head. A gunshot wound here at the base of her neck. This is like a graze wound across the back of her neck.

BY MR. BARNETT:

Q This is Doctor Wren holding the sign up?

A Yes. This is what they used to be able to tell which, which autopsy this is.

Q Let me show you what has been marked as State's Exhibit 69. Can you describe what this is for the jury, sir?

A Yes. This is the side of her head. You can see her ear and her eye. There is a gunshot wound to the temple area.

Q Did Doctor Wren do x-rays of her head?

A Yes, sir. He did.

Q These x-rays I'm showing you is State's Exhibit 72. In these x-rays, especially down at the jaw region, what does that show?

A That is a bullet that is inside of her head.

Q That is where it was located in her head?

A Yes, sir.

Q Did it also show other bullets? I don't know if we can see it on the presentation up there. But did it also show other bullets that was in her head also.

A It did.

Q Can we see the bullets now?

A Yes, it is right there.

Q Let me show you what has been marked as State's Exhibit 71. Is there another bullet on that skull also, on that picture on the back of her head?

A It's right there.

Q Thank you, sir. Please answer any questions Mr. Bartosh has for you.

MR. BARTOSH: No questions, Your Honor.

MR. BARNETT: We ask that he be excused, Your

Honor.

THE COURT: You are excused, sir.

THE WITNESS: Thank you.

MR. BARNETT: I would like to call Mary Lyles to the stand, Your Honor.

MARY LYLES

having first being duly sworn testified as follows:

DIRECT EXAMINATION

BY MR. BARNETT:

Q If you would, give your full name for the record and let the jury know who you are.

A My name is Mary Davenport Miles.

Q Where do you live?

A I live at , Welford, South Carolina.

Q What you do?

A I am a custodian for the school.

Q Do you know Celeste Nesbitt?

A I do.

Q Did you purchase an automobile from her?

A I did.

Q What type of automobile did you purchase from her?

A It was a Mercury, I believe.

Q A Topaz?

A Yes.

Q Has the automobile been in your possession since you brought it from Ms. Nesbitt?

A Yes, it has.

Q Has it changed in any way? Have you done anything to the car?

A No, I only drove it to work.

Q About the first of April, were you contacted by the Solicitor's office?

A I was.

Q Did Investigator Todd Wilson come and pick the car up?

A He did.

Q It has been in the Solicitor's possession since then or behind the jail since then?

A Yes.

Q Please answer -- let me ask one other question. The windows, had they been fixed by the time that you purchased the car?

A It had.

Q The windows that are fixed, are they clear now?

A Yes.

Q The windows that were not fixed, are they clear or tinted?

A Clear.

MR. BARNETT: One moment, Your Honor.

BY MR. BARNETT:

Q Let me show you what's been marked as State's Exhibit 23. Is that the car that you purchased off Celeste Nesbitt?

A Yes.

Q And does that appear -- I'm showing -- that's State's Exhibit 23. State's Exhibit 50, is that the bullet hole?

A Yes.

Q Is that bullet hole still in the back seat?

A Yes, it is.

Q And is that the way it was when you turned it over to the Solicitor's office?

A Yes, sir.

Q Please answer any questions Mr. Bartosh has for you.

CROSS-EXAMINATION

BY MR. BARTOSH:

Q Ms. Lyles, has the car been in an accident since you brought it?

A No, sir.

Q Did you put a trailer hitch on it?

A One of those little things you --

Q Yes, ma'am.

A Yeah. I did that.

Q But the back bumper hasn't been damaged since you had it?

A No.

Q Okay. That's all I have.

MR. BARNETT: That's all the questions we have for Ms. Lyles. I call Sharon Smith, the next witness.

SHARON SMITH

having first being duly sworn testified as follows:

DIRECT EXAMINATION

BY MR. BARNETT:

Q Ms. Smith, if you would, give your full name for the record please.

A Sharon Smith.

Q I'm going to ask you to talk a little bit louder so we can all hear back here.

A Sharon Smith.

Q What do you do, ma'am?

A I'm a home health nurse.

Q Did you know Ruby Nell Lindsey?

A Yes, she was my first cousin and later on became my sister. Her mom adopted me at 14.

Q How long did you know Nell Lindsey?

A We were born together. We lived in the same

house. Her mom and my mom were sisters. We all lived in the same house. We went to preschool together.

Q You have known her for a long time?

A Yes.

Q Can you tell the jury what kind of person Nell Lindsey was.

A She, she always tried to make everybody else feel better no matter how she felt. She was cheerful to be around. And she made you laugh.

Q How was she with children?

A She loved children. I didn't understand how she could go into work at day cares all day and deal with all those kids. She loved kids.

Q She worked in a day care?

A Yes.

Q She did that before she started working the patient care field?

A Yes, she did.

Q How long did she work at day care?

A Uh, I don't know exactly. Maybe a year, two years. Maybe three years.

Q Later on, did you encourage her to enter into the patient care field?

A Yes, I did. She couldn't see herself doing it but she finally did it.

Q When did she start doing patient care?

A She started in the nursing homes. I know exactly but she worked in two different nursing homes in the last year.

Q You got to keep your voice up so we can hear you. I know you are nervous. But you've got to keep that voice up. When she started working in there, did you use to go to her house?

A Yeah, I would go every now and then.

Q And who was her two children?

A Trey and Alex.

Q Did she love them?

A Yeah, she loved them. She made sure they had the best of everything.

Q Did you know Marion Lindsey?

A Yes, a little bit.

Q Marion Lindsey, did you see how he treated the two children?

A Yes. They love their daddy, but I didn't like the way that he talked to them.

Q How did he treat the oldest one Alex?

A He showed favoritism toward Trey. He would take Trey more places, the younger one, with him. I believe because Trey could not talk. Alex, I heard him call him 'lil fag or little punk sometimes.

MR. BARTOSH: I'm going to object to this as irrelevant.

MR. BARNETT: I think one of the things that the defense has brought up about the two children is how he felt about the children and so forth and all of that. We heard all through the guilt phase about that.

THE COURT: Let me think about this for a minute.

I need for you all to go back to the jury room please.

(WHEREUPON, the jury exits at approximately 6:59 p.m.)

THE COURT: Is there something you want to say?

MR. BARNETT: Yes, sir. The other thing too is we are talking about the defendant's character. I think one of the things would be the character on how the defendant treats his children as to all of that. We heard all of that in the guilt phase that that was one of the reasons why he did what he did.

(WHEREUPON, there was a pause.)

THE COURT: I think that I will overrule the objection. The testimony is relevant. In response to the suggestion that was made in closing argument of the defendant that suggested that Mr. Lindsey just wanted to maintain a close relationship with his

children and all he wanted to do was see his children.

Now, I guess the thing that kind of concerns me is a dad is not out of line in kind of joking around with his son in ways that other folks might not understand. But I believe that that is something that can be addressed during cross-examination. Exactly what is the nature of these comments is something that could be bought out with rebuttal evidence. There is no question in my mind that the evidence is relevant.

MR. BARNETT: Your Honor, I know Mr. Bartosh has no objection to this. I'm going to ask her about the youngest one about what the dad used to give him to drink in the baby bottle, beer. I'm going to going down that line. I think it goes to character and obviously what they brought up during the guilt phase. I think it is totally relevant.

THE COURT: There is apparently some evidence that he gave the child beer out of a baby bottle?

MR. BARNETT: Yes, sir.

THE COURT: What else?

MR. BARNETT: The other stuff, we'll be talking about him hitting Nell and things like that. That is totally relevant. Concerning the two kids, his oldest son he called a fag. That's what we're talking

about. How he treated the oldest one.

There's been an incident where basically if I understand what the testimony is going to be, his own son wanted to go with him one day. He told the oldest son you're not going with me, Trey's going. The other son came in crying. She witnessed that.

THE COURT: Let's take it one at a time. If there's evidence that he gave a young child beer, that is a crime. That is not just something that somebody should do. That is a crime. Aren't they entitled to prove crimes as bad acts even though there is no conviction?

MR. BARTOSH: I am not so concerned about that, Your Honor, as I am with what the witness initially said when asked about his children, she said he loved, they loved their dad. But there were things that he did that she did not approve of.

THE COURT: I am going to draw the line. I think that telling the oldest son that he cannot go unless there is some -- I mean I have done that. I take my children places sometimes. I don't let them all go. I just don't see the significance. I don't see the relevance of that. If there's more to it, maybe we need to hear it.

MR. BARNETT: The reason he wouldn't let him go

is because he wouldn't be able to tell on his girlfriend and things like that. Trey couldn't talk about it cause he was too young.

THE COURT: That is an argument that may be made based on evidence that may come in. How are you going to get the evidence in through this witness?

MR. BARNETT: She observed and saw what the --

THE COURT: She observed that he would not let the oldest child go. But she obviously does not know what's going on inside of the mind of Mr. Lindsey as to why. How did she know why? How does she know that he did that in order to keep the oldest child from being able to tell that he went off with other women?

MR. BARNETT: That is basically what he told several people. I don't know if he has personally told her that or not.

MR. BARTOSH: That who told?

THE COURT: Yes, sir.

MR. BARNETT: Basically Alex had told his mother. That's why he quit taking him places. She witnessed that conversation, the oldest son Alex.

MR. BARTOSH: How old was he?

THE COURT: Alex told the mother, this witness will testify that she saw Alex tell his mother that

one time when he went off with Mr. Lindsey, Mr. Lindsey was messing around with other women.

MR. BARNETT: Uh-huh (affirmative). That is correct.

THE COURT: From that point forward, Mr. Lindsey would not take Alex with him.

MR. BARNETT: Yes. I hate to bring this up early. But I know he is going to have objections to this. We may as well clear it up while the jury is not in here.

THE COURT: I don't think I have any problem with there being evidence that he was doing things with other women while he had his children with him. But to me, it is a fairly big leap to say, for me to allow the jury to -- you're going to argue to the jury that the reason he quit taking Alex with him was because Alex would tell on him.

MR. BARNETT: I'm not argue that to the jury.

THE COURT: That is the inference you want the jury to draw. You just got finish telling me that.

MR. BARNETT: Yes, sir. We're not going to be arguing. Obviously, she's going to testifying.

THE COURT: That is the inference you want to draw from this testimony.

MR. BARNETT: Yes, sir.

THE COURT: I think that is too big of a leap based on what I've heard. I think that to get the jury to conclude that that's the reason that he -- to me, what is important is that he was doing it, that he was messing around with other women while he had his children with him. You might could, I can see how that could be useful to prove that by proving that in order to keep from being discovered for that, he quit taking his oldest son was him. Somehow, you've got to get -- I think you have not yet established the foundation for why he stopped taking Alex with him.

MR. BARNETT: Yes, sir.

THE COURT: You are welcome to try to do that now or do it in front of the jury. At this point, I'm inclined to sustain his objection about him not taking Alex with him when he took Trey.

MR. BARNETT: What you like for me to ask a few questions?

THE COURT: That will be fine. That's up to you.

BY MR. BARNETT:

Q Ms. Smith, would he take Alex with him all the time when he would go out?

A Not often.

Q Who would he take with him?

A He usually would take Trey.

Q Did you witness an occasion when Alex went out and jumped in his truck?

A Yes, I was in the front yard. I heard him calling a boy. I thought he was calling both of them. But when Trey jumped in and Alex jumped him, he told Trey to get out.

Q What does Alex do?

A He jumped down and went crying. He went back into the house.

Q Did he ever in front of you tell Nell or tell his dad or did his dad ever say why he could not go?

A One time he came in the house crying saying his daddy or somebody got mad at him because he wouldn't call some girl he was with mama.

Q Did he ever say that, did you ever hear Nell or did you ever hear Marion say that he wouldn't take him because he would tell Nell what was going on?

A No, he wouldn't say it.

THE COURT: All right. If that comes up, I'm inclined to sustain the objection.

MR. BARNETT: Yes, sir.

THE COURT: Bring in the jury.

(WHEREUPON, the jury enters at approximately 7:10 p.m.)

THE COURT: Go ahead.

MR. BARNETT: Thank you, Your Honor.

BY MR. BARNETT:

Q Ms. Smith, what would he call his oldest son Alex?

A I heard him call him a fag.

MR. BARTOSH: Your Honor, I would object to that.

THE COURT: Already ruled. Overruled.

BY MR. BARNETT:

Q Why would he call him that?

MR. BARTOSH: I'm going to --

THE COURT: Sustained.

MR. BARTOSH: -- object to that. How would she know.

THE COURT: Sustained.

BY MR. BARNETT:

Q Did he ever say why he called him that?

A Yes.

MR. BARTOSH: Your Honor --

THE COURT: Wait, wait, wait, wait. That would be a yes or no question.

THE WITNESS: Huh?

THE COURT: Answer that question yes or no.

THE WITNESS: Oh, yes.

BY MR. BARNETT:

Q And Mr. Lindsey said that?

A Uh-huh (affirmative).

Q Mr. Lindsey said why, is that right?

A Oh, yeah.

Q And why did he say that he called him that?

A He wanted to play with dolls and pocketbooks. He only played with little girls because I had girls. Plus he was always with his mom when she went places. He was around women and girls.

Q His youngest son, what did his youngest son call him?

A His road dawg.

Q Would Marion give him something to drink in a baby bottle?

A He would give him beer.

Q Why did he give him beer?

A He said it made a man out of him.

Q Did you see him drinking beer?

A Yeah. Nell would try to fuss. But she did not want to cause nothing so she would be quiet.

Q Was you at their house one time when Marion drove up on a motorcycle?

A Yes. I was over there. He pulled up on a motorcycle. He came in the house. It looked like he was

getting something. Nell happened to walk past the door. And she said who is that girl on your bike. And he said what girl. She said it was a girl sitting on there your bike. She wanted to know who she was.

He said Get away from the door. It's none of your business. She said No, I want to know who this girl is on your bike. He said Didn't I tell you to shut up. Then he turned around. And he hit her. And she fell on Trey. So I grabbed Trey and put him in the bedroom and Alex and told them to grab a book and I would read a book to them.

I went back out and asked Nell if she was okay. She said she was okay. They were fussing or whatever they were doing. I went in the bedroom with the boys and closed the door and started reading a book.

Q Slow down a little bit.

A Uh-huh (affirmative).

Q When you went in the room and you started reading the book, what happened then?

A I just heard fussing and fighting. They were fussing and screaming. They finally left out.

Q The kids were in there with you?

A Yes.

Q And why did you take them in the room?

A Because he told me to go home. I told him I wasn't leaving until I knew the boys were okay.

Q And did he do this in front of the boys?

A Yes.

Q Did Mr. Lindsey have friends come over?

A Yes. He had friends come over often. I don't know if they watched -- yeah, they watched games or whatever.

Q And when they came over and after they left, who would clean the house?

A Nell would have to get up. Even if she's already went to bed. She wouldn't fuss about it. She would just have cleaned the house up. She had to have the house clean before she went to bed or whatever. She would have to get right back up and clean it up again.

Q So she would work during the day --

MR. BARTOSH: Your Honor, I'm going to object to that as irrelevant.

MR. BARNETT: Your Honor, I think it goes to character.

THE COURT: Well, I'm not sure that you might didn't leave something out. Let me see you for a second.

(WHEREFORE, a bench conference was held off of the record.)

BY MR. BARNETT:

Q Did you ever see bruises on Nell?

A Yes, I have.

Q Where did you see the bruises at?

A She had a black eye a lot and maybe bruises on her arm.

Q Where did she say she got them from?

A She always fell. She'd said I fell or I this or that. Anything other than being hit by him.

Q Before this incident occurred when she was killed, had she talked to you?

A She called me the night before. She wanted me to help her. She call me and wanted me to help get a job at Greenville Memorial because I used to work there. She wanted me to help her relocate to Greenville because she said she wanted to get away. I said I wasn't going to help her move to Greenville because we wouldn't be able to help her if she is way in Greenville. She said do you think they would let him out of jail and I said no way. Ain't no way.

MR. BARTOSH: Objection. Your Honor, may we approach?

(WHEREFORE, a bench conference was held off of the record.)

THE COURT: The objection was made as to foundation. I believe a sufficient foundation is laid because there is an inference to be drawn from the

witness that what she said was what she heard to have been said. The proper foundation has been laid. Overruled.

BY MR. BARNETT:

Q She called you that night and she wanted to leave Spartanburg?

A She wanted me to help her move to Greenville and get a job in Greenville.

Q You did not want her to move?

A I told them if she moved to Greenville, there would be no family there to help her. She was in the bathtub at that time. And she mentioned, she asked me about him getting out of jail. I told her I did not believe they would let him out.

It stuck to me because I could hear her get out of the bathtub and go look out of the window because she said she heard loud music. That's what got to me. She was really scared that he was going to be out. I said I know somebody will call you and let you know that he's out. They're not just going to let him out like that.

Q She was scared?

A She was scared.

Q You heard her get out?

A Yeah, I heard the water.

Q Please answer any questions Mr. Bartosh may have

for you.

CROSS-EXAMINATION

BY MR. BARTOSH:

Q How much time did you spend over at their house?

A After a certain point, I told her I would no longer be able to come over there because I was afraid I would get in trouble at their house. I told her if she needed me or if she ever needed anything to call me.

Q That is not my question, ma'am. How much time did you spend their house?

A Which house?

Q All right. Tell me which house.

A When they were behind Ingles, I might have went over there maybe out of a month, maybe four times. But when they moved to Inman, I would not go over there as much. I went over the maybe twice out of the month. Like I said, I tried to keep myself away from him because I figured I would get in trouble or in between something that will go on at the house.

Q But you're speculating on that.

A No. I had a discussion with my husband because at that time they were fighting. I wanted to go and get involved. And after that, I felt like I will be endangering myself.

Q So you wanted to step in the middle of it?

A Yes, I did.
Q And when you saw Mr. Lindsey give his child beer in a bottle --
A Uh-huh (affirmative).
Q -- you were present?
A Yeah.
Q How did he do it? Was it in a can or in a bottle?
A In a bottle.
Q What did he do?
A He poured it in a bottle and sent it outside to him and give it to him.
Q Sent it outside?
A Yeah, by his brother or whoever or he would bring it.
Q You would see him drink it?
A Yes.
Q You go out there with them?
A Yes.
Q The house, which was the first house that they lived in?
A They moved in with a friend one time, from my knowledge over behind Ingles on Asheville Highway.
Q What did the house look like?
A It was a trailer.

Q Where did they go from there?
A I believe they moved in with his friend Chris and his wife.
Q How long did they live there?
A I'm not sure. That is the point. That is the time I did not go around that much. Those were his friends and at his friend's house. I did not what to be involved.
Q Okay. You remember the color of the trailer?
A The one they lived in?
Q Uh-huh (affirmative).
A It was gray or brown I believe. I'm not sure.
Q You have no way of knowing -- when Mrs. Lindsey told you that you saw the bruising and black eyes and things like that, she said she fell?
A What about it?
Q Is that what she told you?
A Yes, she would tell everybody.
Q Okay. You had no reason to believe otherwise, did you?
A Of course.
Q I'm sorry?
A Yes.
Q You had actual knowledge of how she got those bruises?

A No.

Q So you had no reason to believe any different than what she told you?

A Uh, yes.

Q Did you have actual knowledge how she got them?

A I don't know how she got it --

MR. BARNETT: Objection, Your Honor.

THE COURT: Overruled. Overruled.

BY MR. BARTOSH:

Q So you're speculating on how she got it?

A No, it is just a belief.

Q That is all I have.

MR. BARNETT: Just a couple on follow-up, Your Honor.

REDIRECT EXAMINATION

BY MR. BARNETT:

Q Again, why did you quit going to the house?

A Like I said, I didn't want to get involved. When I saw him hit her, I always told her that she was bigger than him. I would always laugh. I said why don't you smack him around. You are bigger than him. She was not a fighter. She wanted do anything to keep peace.

Q Why was that?

A She said she did not grow up with her dad present and she wanted for her boys to have their dad around. I

told her that for the boys to see that, that ain't going to help in the future. No matter how long she was with him, that was not going to help the boys. But she suggested that the reason that she stayed was because she wanted them to be with their dad.

Q Thank you, ma'am.

MR. BARTOSH: Nothing further.

THE COURT: You can step down, ma'am.

MR. BARNETT: May we approach?

(WHEREFORE, a bench conference was held off of the record.)

CHRIS SMITH

having first being duly sworn testified as follows:

DIRECT EXAMINATION

BY MR. WILLINGHAM:

Q Tell the jury who you are.

A My name is Chris Smith.

Q Mr. Smith, where do you work?

A Right now, I'm employed by the DEA. I am in basic training in Virginia.

Q Where did you work back in September of 2000?

A I was a narcotics investigator with the Spartanburg County Sheriff's Office.

Q As a narcotics investigator on September the 14th 2000, you had an opportunity to arrest Marion Lindsey?

A Yes, I did.
Q Do you see Marion Lindsey in this courtroom?
A Yes, I do.
Q Point him out for the jury.
A (Pointing.) He's sitting here in the gray plants and the striped long sleeve shirt.
Q Tell the jury where you arrested Marion Lindsey?
A I arrested him on Highway 290. It was right off of Interstate 290 in Duncan. It was in the parking lot or just as you exit the parking lot of the Denny's restaurant.
Q That is in Spartanburg County?
A That is in Spartanburg County.
Q How did you get to that location?
A We did what we call an order take down. That is where you order up a quantity of drugs from an individual who you target. As your target brings the drugs that you requested, you stop on the way of right afterwards.
Q In this case, who was the target?
A The target was Marion Lindsey who we referred to as Myron.
Q What did you order up?
A We ordered up two ounces of crack cocaine.
Q Where were you supposed to initially meet?
A We originally planned on meeting there at the Pilot gas station which is just off of 290.

Q Did you in fact meet there?
A No, we did not.
Q Where did you ultimately end up?
A We ended up in the Denny's parking lot.
Q What happened in the Denny's parking lot?
A At the Denny's parking lot, we were, we established surveillance of the parking lot, established surveillance of the source in the parking lot. Lindsey pulled up to the parking lot. We received information to go ahead and proceed with the take down of Mr. Lindsey.
Q When you say proceed with the takedown, tell the jury what you mean, what did you do?
A As his vehicle exited the parking lot, we pulled along behind Mr. Lindsey. We had another narcotics unit pulled in front of him. So we would have a vehicle containment on the front and the rear side of his black suburban. We pulled up behind his black suburban. I observed him toss a package, a clear package out of the passenger window.
Q Now you said he was in a black suburban?
A Yes.
Q Was he driving the black suburban?
A No, he was the passenger.
Q Who was driving?
A He had a female, I believe, her last name was

Curly that was driving.

Q Where was the defendant Mr. Lindsey sitting?

A He was sitting in the front passenger side.

Q Where did you see the object come out of the vehicle?

A The object came out of the front passenger side.

Q You indicated you saw an arm?

A Yes, sir. You could see an arm come out.

Q Whose arm?

A It was Mr. Lindsey's arm.

Q Did you in fact recover what was thrown out of the window?

A Yes.

Q Where did you recover it?

A It was sitting there by the curb on the asphalt.

Q Who recovered it?

A I recovered it.

Q What did you do with it after you recovered it?

A We placed it in evidence. We field tested it to see if it tested positive for crack cocaine. Then we placed it in the, we called it an emergency drop box. It is a drop box at the sheriff's office where you place drugs in after-hours if there is no evidence custodian.

Q Was it placed in a best bag?

A Yes.

Q Explain to the jury what a best bag is.

A A best bag is just a bag. It's supposed to be a tamper proof bag plastic bag that you place the drugs in. You sign it, put a custody of evidence on it. Custody of evidence would be who touched it first and a sequence of who touches the evidence from that point on.

Q Was that bag sealed?

A Yes, it was.

Q Was the substance inside?

A Yes.

Q You said you placed that into a drop box?

A Yes, in a drop box.

Q Why did you not give it to an evidence technician?

A Late at night, there is not an evidence custodian working. We have a metal drop box. It looks like basically the same shape as a mailbox. It is a door that pulls down and the evidence falls into it.

Q Did you in fact sign the arrest warrant for Marion Lindsey?

A Yes, sir.

Q What did you charge him with?

A Trafficking crack cocaine.

Q As far as you know, is that charge still pending against Mr. Lindsey?

A Yes.

Q Whose responsibility is it to prosecute those cases?

A Pardon me?

Q Whose responsibility is it to prosecute those cases?

A The State of South Carolina.

Q Ours?

A Yes, sir.

MR. GOWDY: Your Honor, at this time --

THE COURT: All right. We are experiencing or they are experiencing some minor witness coordination issues. We're going to take a short break right now, wait for another witness to arrive. We will resume immediately upon their arrival. Take a short break.

(WHEREUPON, the jury exits at approximately 7:34 p.m.)

THE COURT: Didn't I go through my analysis under Rule 403 on those pictures of Mrs. Lindsey in the car? Didn't I do that?

MR. BARNETE: Yes, sir. Me and Mr. Bartosh approached you before and you addressed it.

THE COURT: On the record?

MR. BARNETE: I don't know if you went on the record. You went at sidebar, the analysis, Your Honor.

MR. BARNETE: I believe you did, Your Honor.

THE COURT: Well, bring me the pictures.

MR. BARNETE: Yes, sir. That was 73 and 46, right, Your Honor? We also have four Court Exhibits that you entered into the record also.

THE COURT: I remember discussing all of that on record.

MR. BARNETT: Yes, sir. You did discuss that on the record. I do remember the Court exhibits. You had put that on the record. We have four exhibits that were court exhibits. We talked about those being more gory than the ones that were in the evidence. Mr. Bartosh did verify that. We discussed that on the record.

THE COURT: I discussed on the record how the proximity of the bullet hole to where she is sitting is one of the reasons I found it to be, have high probative value?

MR. BARNETE: Yes, sir.

THE COURT: I think I did.

MR. BARNETE: Yes, sir. You did.

THE COURT: I'm going to step out in the back hall. Be ready to jump as soon as that witness gets here.

(WHEREUPON, a short recess was taken at approximately

7:35 p.m.)

(WHEREUPON, the Court resumed at approximately 7:58 p.m.)

THE COURT: All right. Bring in the jury.

Let me ask you this. Based on where we are right now, what do you expect in terms of when the State will finish in terms of putting up its evidence in this phase?

MR. GOWDY: 11:30 or 12:00 tomorrow, Your Honor.

THE COURT: Okay.

(WHEREUPON, the jury enters at approximately 8:01 p.m.)

THE COURT: All right. Ladies and gentlemen, many times you see me having to weigh one thing on side and one thing on the other. Right now, I am weighing the fact that there's supposed to be hot pizza waiting on you at your hotel in a few minutes against the need to get a little bit more work done tonight. I decided that the pizza substantially outweighs the need for work.

I am taking a break for the night and sending you to the hotel. We will start back tomorrow morning at 9 o'clock. We would treat tomorrow just like any other work day. We look forward to seeing you all in

the morning. Have a nice night.

(WHEREUPON, the jury exits at approximately 8:02 p.m.)

THE COURT: All right. Y'all need to take anything up before we break?

MR. BARTOSH: No, sir.

MR. GOWDY: Not from the State, Your Honor.

THE COURT: All right. We will be in recess until 9:00. Again, I would be here at least by 8:15. So if y'all need to bring anything up, bring it up in time for us to be finished with it before 9:00.

MR. GOWDY: In light of that and in light of tomorrow being Sunday and the weather, would you like for us to have the automobile ready to be viewed first thing at 9:00.

THE COURT: That will be fine.

MR. GOWDY: Okay.

THE COURT: Yeah. That will be good.

MR. GOWDY: Okay.

(WHEREUPON, the Court adjourned at approximately 8:03 p.m.)

(WHEREUPON, the Court resumed on May 23, 2004 at approximately 9:00 a.m.)

THE COURT: Good morning.

MR. GOWDY: Good morning.

THE COURT: All right. I understand we have an

issue with the car seat in the car. You're going to put up a, are y'all going to show the car first?

MR. GOWDY: Your Honor, we would like to. In light of the fact, I didn't tell Ms. Nesbitt to be back here this morning. And in light of that, she is not here. We are fine with the jury seeing the car without the car seat in it. There are pictures that show the car seat in it and where it was. I am fine having the jury view the car without the car seat.

THE COURT: Okay. Whatever you want to do. Then, is that what you want to do first?

MR. GOWDY: It's suits us fine, Your Honor. And given the fact that it is quiet outside and not hot.

THE COURT: Okay. And let's see. You've got an objection? Did we deal with that?

MR. BARTOSH: To the?

THE COURT: To the car.

MR. BARTOSH: Yes, sir.

THE COURT: To the view of the car.

MR. BARTOSH: Yes, sir. We dealt with that. And you overruled my objection.

THE COURT: I'm not sure that I did. I think I said that I needed to go see the car before I would rule on it, didn't I? Let's do this. What is the

objection?

MR. BARTOSH: The objection is, Your Honor, my understanding the reason they want to view the car is to see the sides and the back seat.

THE COURT: Okay. Show me the Rule number under which you make an objection. Is it Rule 403?

MR. BARTOSH: Yes, sir. There are other ways to avoid a possible prejudicial effect.

THE COURT: What I'm going to do then is I'm going to walk out there right now with y'all and look at the car. But before I do that, I want you to tell me on the record what you believe the potential for unfair prejudice is.

MR. BARTOSH: Your Honor, it's the automobile that -- they've been showing pictures of a person and a person died. It's very seldom that a jury gets to see the actual place where the crime occurred. Very seldom do they take people out to --

THE COURT: How is that any different from them having in evidence the weapon that fired the shots? It's the actual weapon that fired the shots that killed the lady.

MR. BARTOSH: I just think there is a difference. They've got to prove that. They've got to prove that that was the weapon. Here they don't

have to.

THE COURT: All right. Anything else?

MR. BARTOSH: No, sir.

THE COURT: Let's go look at it.

(WHEREUPON, the Court exits the courtroom at approximately 9:05 a.m.)

(WHEREUPON, the Court enters the courtroom at approximately 9:11 a.m.)

THE COURT: All right. Mr. Gowdy?

MR. GOWDY: Yes, sir, Your Honor. Ms. Nesbitt is actually on her way to the courthouse and should be here in less than 30 minutes. In light of that, we would propose to continue on with our presentation of other witnesses. And assuming she does get here in a reasonable period of time, then take her as a sponsoring witness.

THE COURT: That will be fine. All right. Now, we're going to -- you're going to go forward with this attempt to prove the drug trafficking charge?

MR. GOWDY: Yes, sir.

THE COURT: Any objection at this time, Mr. Bartosh?

MR. BARTOSH: Your Honor, overnight, Mr. Brennan did some research and he found a case. The State versus Nadie which they've got a chemist and a

solid chain of custody then they could do that. They could introduce it into evidence without the drugs.

THE COURT: So you have no objection?

MR. BARTOSH: The issues that we raised.

THE COURT: All right. Bring the jury in.

Mr. Smith, you can go ahead and sit in the jury box. I will remind you that you are still under oath.

THE WITNESS: Yes, sir.

(WHEREUPON, the jury enters at approximately 9:16 a.m.)

THE COURT: You know, I'll tell you what, I'm going to, I have one quick thing that I'm going to have to go on the record outside of the presence of the jury before we move forward. I apologize to y'all. Good morning to you first of all. It's good to see you.

I know you've seen a lot of this in and out. And you might wonder sometimes what in the world they are up to. But I've got something that we need to take up. And it probably won't take one minute. So I need you to go back in the jury room. And then we will have you right back in here. I'm sorry. It's my responsibility. I take it.

(WHEREUPON, the jury exits at approximately 9:17 a.m.)

THE COURT: All right. What State versus May

Baxley says is not that they don't have the drug in the courtroom. It says that the defendant is afforded under the due process clause the right to have a meaningful opportunity to present his defense. That includes the privilege to request and obtain material from the State for testing. If the defendant had thought or had wanted to put up evidence showing that whatever that was was not crack cocaine, the due process clause affords him the opportunity to do that at the appropriate time. It is my understanding that this case was on the trial docket for some period of time, about a week after this murder occurred, is that correct, Mr. Gowdy?

MR. GOWDY: Yes, sir, Your Honor.

THE COURT: So in order to make that -- so what you're saying is the drug case, the trafficking case was going to be tried or was at least on the docket to be tried some time in the late September of 2002 time frame?

MR. GOWDY: Yes, sir.

THE COURT: And the date, Mr. Smith, of your arrest was what?

THE WITNESS: I believe it was September of 2000.

MR. GOWDY: September of 2000. The case

was two years old at the time of the murder and two years old at the time it had been put on the trial docket.

Mr. Bartosh, I'm assuming that you what you mean when you say it's already been ruled on, you're just assuming that that 2-year period of time is sufficiently long for Mr. Lindsey to have sought some independent testing if that's what he wanted to do?

MR. BARTOSH: Yes, sir.

THE COURT: He had a meaningful opportunity to present a complete defense which would have included the privilege of examining that evidence by an independent chemist to determine exactly what it was.

MR. BARTOSH: Yes, sir.

THE COURT: And so you see no point in not going forward. I agree with you. I just want to make it clear that we all understand exactly what it is that that case said, not just that the State has a right to prove a drug case without the drugs.

This case addresses what the defendant's rights are in terms of being able to examine the evidence and present exculpatory evidence. The defendant has a burden under this case of proving either that the State destroyed it in bad faith or that the State destroyed it and it had exculpatory value before the

defendant had a chance to explore the exculpatory value.

MR. BARTOSH: Correct.

THE COURT: All right. Bring in the jury.

(WHEREUPON, the jury enters at approximately 9:21 a.m.)

THE COURT: Mr. Willingham.

MR. WILLINGHAM: Thank you, Your Honor.

CHRIS SMITH

having previously been sworn, testified as follows:

DIRECT EXAMINATION (con't)

BY MR. WILLINGHAM:

Q Mr. Smith, you testified the last evening that the drugs that you retrieved off of Highway 290, that you placed in evidence?

A Yes, sir.

Q And in a drop box?

A Yes, sir.

Q And before you placed it in a drug box, you placed into a best bag?

A Yes.

Q Which is sealed?

A Yes, sir.

Q Does that best bag have a control number?

A Yes, sir.

Q What is the purpose of the control member?
A The purpose of the control number is to keep the best bag coordinated with your chain of custody paperwork.
Q Is that control number unique to that best bag?
A Yes, it is.
Q Did you fill out a chain of custody form?
A Yes, sir.
Q Is the control number on that piece of evidence 001816?
A Yes, sir.
Q And it was sealed when you put it in the drop box?
A Yes, sir.
Q Thank you.

THE COURT: Cross-examination?

CROSS-EXAMINATION

BY MR. BARTOSH:

Q Officer Smith, you said you received information that Mr. Lindsey had the drugs?
A That he had the drugs?
Q Yes.
A He said he had the drugs on that day. I'm sorry. I misunderstood you.
Q You said in your incident report -- have you reviewed it?

A Yes, sir.

Q -- that you have received information that Mr. Lindsey had the drugs on his person?

A Yes, sir.

Q Who did you receive that information from?

A A confidential source that I was working with at the time.

Q All right. Had that source provided information before?

A Yes, sir.

Q Had that source provided information that had led to the arrest of other individuals?

A Yes, sir.

Q Had that source provided info that lead to convictions --

A Yes, the source had.

Q -- of other individuals?

A Yes.

Q Now, was this event or incident videotaped?

A No, we did not videotape this.

Q Was it audiotaped?

A Yes, sir. We had what we call a kill recording. That is a recording of a body transmitter. And we also had a telephone recording.

Q Who was wearing the wiring?

A The confidential source.

Q The confidential source was in the vehicle with Mr. Lindsey?

A No, sir. The confidential source was not in the vehicle with Mr. Lindsey.

Q Well, the way I read your report was, you received the information. You see Mr. Lindsey in a black suburban. And you stopped him.

A Yes, sir.

Q Okay. There was no purchase?

A No, sir.

Q Where was the confidential source?

A That confidential source was there on the grounds of Denny's restaurant just to, the purpose of the confidential source there was just to confirm that Mr. Lindsey was there.

Q I mean, you saw him, right?

A Sir?

Q You saw Mr. Lindsey?

A I saw, from where I was, I saw his vehicle pull in. And we got information from a source stating that he is here. Obviously, they did not have any money to make a purchase. They were not supplied with any funds. He is here. Come on in and make the arrest.

Q So, there was no purchase of anything?

A No, sir. There was no purchase.
Q And what happened, Mr. Lindsey, he never stopped, did he?
A Pardon me?
Q He never stopped and talked to the source?
A He pulled alongside the source. I don't think there was any conversation made between Mr. Lindsey and the source. The source pulled away. And as Mr. Lindsey pulled away, that is when the stop was made.
Q Mr. Lindsey, isn't it true that he never stopped in the parking lot?
A I believe he pulled in beside the source for just a moment.
Q And then backed out?
A I am not sure how he pulled along, if he pulled away or backed out. But yes, he was beside the source for just a moment.
Q Was there any conversation between them?
A Uh, there may have been a brief conversation. I cannot recollect what it was at this point.
Q Did you listen to the tape?
A Yes, sir.
Q Was there conversation between them?
A I did not hear a conversation on that tape.
Q So there was no conversation between the two of

them?

A I did not hear one on the tape. I can only tell you what the source told me.

Q So Mr. Lindsey drove, well, he was not driving, was he?

A No, sir.

Q He was a passenger in the car?

A He was a passenger.

Q He just drove through the parking lot or the driver drove through parking lot?

A Yes, that is correct.

Q And left?

A Uh, was attempting to leave.

Q And you stopped them?

A Yes, sir.

Q You stopped the car?

A Yes, sir.

Q Based on what?

A Based on the source relaying the information on the wire something to the effect of he is here. We don't have money to make purchase. As I stated, I could not, from my recollection, I could not hear Lindsey's voice over the wire transmission. So go ahead. The source was giving us the go ahead to make the arrest.

Q The source did not know whether or not Mr.

Lindsey had drugs, did he?

A I can recount what the source told me later.

Q I'm talking about before.

A Well, a phone call have been made from the source to Mr. Lindsey to purchase the drugs.

Q But no purchase was made?

A No purchase was made. That's correct.

Q No money was exchanged?

A No money was exchanged.

Q As a matter of fact, you didn't even give the source any money, right?

A That is correct. The source did not have money.

Q So you obviously didn't think that a buy was going to be made?

A We were not intending to make a buy. We intending to order the drugs and stop him either along the way or right as he was leaving.

Q You didn't trust the source?

A Yes, sir.

Q And you say you stopped the vehicle that Mr. Lindsey was in?

A Yes, sir.

Q Mr. Lindsey was in the passenger side?

A Yes, he was in the passenger side.

Q When did you see the passenger or the object

leave the car?

A Just as soon as we pulled up behind him and had him stopped, it was almost immediately after that.

Q How do you know that it was Mr. Lindsey that threw the drugs out?

A I can see an arm toss it out the window, the passenger-side window.

Q Right.

A The driver was a small Asian female. The arm did it appeared to be Mr. Lindsey's and not that of the female.

Q You did not actually see who threw the drugs out?

A I saw an arm that appeared to be a male arm from the passenger-side window.

Q You did not see who threw the drugs out?

A Are you asking did I see a face with the arm?

Q Do you know the person that did?

A I did not see the face attached to that arm.

Q Describe the area where this happened.

A It is in Denny's parking lot. It is off of 290. If you come off of I-85 and you are traveling south towards Greenville, there's a Denny's parking lot and a Denny's restaurant just to the left of 290.

Q So it is fair to say that the source was a material witness to the event, is that correct?

A Can you define material witness in this event?
Q He set it up. He witnessed it.
A The source was there, yes, sir.
Q I mean he set it up and he witnessed it?
A Yes. Uh, excuse me. The source was not there for the takedown.
Q No, what I am saying is that he set it up?
A Yes. That's correct.
Q He was present when he came by?
A Present when? Excuse me.
Q When the car arrived.
A Yes, sir.
Q Okay. So he was a material witness to this event?
A Yes, sir.
Q What is his name?
A The source?
Q Yes.
A A John Miller.
Q Is he here? Is he available?
A No, he is not here at this time.
Q Okay. This was in the parking lot at Denny's?
A Yes, sir.
Q Can you describe the lighting?
A Denny's parking lot is well lit at night. It

has the halogen lights. It is a well lit parking lot.

Q So, what you are saying is that the person you believed to be Mr. Lindsey threw out a package in a well lit parking lot?

A Yes, sir.

Q In front of you?

A Yes, sir.

Q And you went right to it?

A Yes, sir.

Q That is all I have.

MR. WILLINGHAM: Your Honor, can we approach?

THE COURT: Yes, sir.

(WHEREFORE, a bench conference was held off of the record.)

(WHEREUPON, the following bench conference was held on the record.)

THE COURT: All right. Did you get on the record what he just said? He said that he thinks, Mr. Willingham said he thinks that by the defense lawyer asking questions about the reliability of the source, that he has opened the door to going into other incidents with where Mr. Lindsey sold --

MR. WILLINGHAM: Yes.

THE COURT: -- sold drugs. I don't see the

connection myself. To me, those will be relevant and admissible any way I believe. If -- were they the same confidential informant?

MR. WILLINGHAM: Yes, sir.

THE COURT: Then they are in my view an additional, an additional source of relevance.

MR. WILLINGHAM: Yes, sir.

THE COURT: That's what you're talking about?

MR. WILLINGHAM: Yes, sir.

MR. BARTOSH: I would say that they would have to have a source here to testify. I'm assuming the sales were made to the source.

MR. WILLINGHAM: That is the other thing. We could use the informant --

THE COURT: Mr. Smith can testify based on his personal knowledge.

MR. WILLINGHAM: Yeah. Right.

THE COURT: If he monitored the transactions, he should be able to testify about it. What you're telling us is you're going to ask him about the other two incidents?

MR. WILLINGHAM: There are two other cases with a controlled buy.

THE COURT: You have an objection?

MR. BARTOSH: The source is not here. The

person who actually made the buy is not here.

THE COURT: So he -- all right. I am inclined, I don't think I will sustain that objection. But I am not sure that we're all on the same page here. So what I think I will do is I will send the jury out and let you ask him the questions. And we will all hear the answers. And we will talk about it.

MR. WILLINGHAM: Okay.

MR. BARTOSH: All right.

(WHEREUPON, the bench conference concluded.)

THE COURT: Okay. Ladies and gentlemen, I will have a matter of law that I will take up now. I will send you back to the jury room for just a few minutes.

(WHEREUPON, the jury exits at approximately 9:36 a.m.)

THE COURT: Go ahead.

BY MR. WILLINGHAM:

Q Mr. Smith, the reason for the order up take down on September 14, 2000 was because you had had two prior transactions with Mr. Lindsey, is that correct?

A Yes, sir. That is correct.

Q That was on August 11, 2000 and June 28, 2000?

A Yes, sir.

Q And that case, those were actually drug buys?

A Yes, sir. Those were purchases.

Q Of crack cocaine?

A Yes, sir.
Q You were there?
A Yes, sir.
Q You monitored the transaction?
A Yes, sir.
Q Money was exchanged?
A Yes, sir..
Q Drugs were exchanged?
A Yes, sir.
Q They were taken into your custody?
A Yes, sir.
Q Because of those two prior incidents, that's how you knew on September 14th, 2000, when you ordered up two ounces of cocaine or crack cocaine, that Mr. Lindsey would come with that material?
A Yes, he had been reliable in the past.
Q Was it the same informant on all three incidents?
A Yes.
Q That goes to reliability of your informant as well, does it not?
A Yes, sir.
THE COURT: Mr. Bartosh, what objections, if any, do you have to that line of questioning?
MR. BARTOSH: Your Honor, I think it violates Mr. Lindsey's rights to confrontation. The person

who actually made the buy or who actually got the drugs is not here. And it denies him his due right of confrontation of that person. We would object to that.

THE COURT: Let me make sure that I have my hands on the full extent of Mr. Smith's personal knowledge about what happened and what it is that was sold.

MR. WILLINGHAM: Okay.

BY MR. WILLINGHAM:

Q Mr. Smith, on the June and August transaction --

A Yes, sir.

Q -- of 2000, you monitored the transaction?

A Yes, sir.

Q How?

A Visually and with recording.

Q On each occasion, how much drugs were brought?

A I have to look at the report. I think it was from a half ounce to an ounce. Yes, it was a half ounce. An ounce was requested on the second transaction. It fell just about three grams short.

Q Okay. You supplied money to the informant?

A Yes, sir.

Q And the informant completed the transaction?

A Yes, sir.

Q In your view?
A Yes, sir.
Q In your view?
A Yes, sir.
Q Under your supervision?
A The first one was out of my view, but they pulled around momentarily behind a building. Then they came right back out. The second one was in view of the investigators.
Q Yes, sir.
Q The substance that was purchased was what?
A Crack cocaine.
Q On both occasions?
A Yes, sir.

THE COURT: When you say in view of the investigators the second time, were you one of the investigators who saw it?

THE WITNESS: No, I saw the cars pull up beside one another. But I believe it was Investigator Henderson that was actually there to witness that transaction.

THE COURT: The second one?

THE WITNESS: Yes, sir.

THE COURT: During the course of the second transaction, did you see Mr. Lindsey?

THE WITNESS: Yes, sir.

THE COURT: And during the course of the first transaction, did you see Mr. Lindsey?

THE WITNESS: Yes, sir. I saw him drive into the lot.

THE COURT: And you recognized him?

THE WITNESS: Yes, sir. I knew him.

THE COURT: All right. How do you know it was crack cocaine?

THE WITNESS: I believe we had it field tested it. And we had a lab report from both incidences stating it was crack cocaine.

MR. BARTOSH: Your Honor, if I could, this witness saw neither transaction.

MR. WILLINGHAM: Judge, out of the abundance of process because I want to afford the defendant every possible privilege of due process, I will withdraw that offer to go into his prior drug transactions. I will ask Mr. Smith a few more questions in front of the jury but not dealing with his prior drug transactions.

THE COURT: Okay. Bring in the jury.

(WHEREUPON, jury enters at approximately 9:42 a.m.)

MR. WILLINGHAM: May it please the Court.

BY MR. WILLINGHAM:

Q Mr. Smith, in your testimony last night, you indicated this occurrence or transaction is what you termed a order up take down?

A Yes, sir.

Q You testified last night that in those situations you order an amount of control substance?

A Yes, sir.

Q The transaction does not take place?

A That correct.

Q And the take down occurs?

A Yes, sir.

Q That is different from a buy bust?

A Yes.

Q Tell the jury what a buy bust is.

A A buy bust is where money is exchanged. There is a transaction there. You come in and make the arrest basically while both parties being, your source and the target, is there on the scene.

Q The September 2000 incident was not a buy bust?

A No, sir.

Q No money was to exchange hands?

A No, sir.

Q No transaction was to take place?

A Yes, sir.

Q You are present for the order being placed?

A Yes, sir.
Q You are present for the take down?
A Yes, sir.
Q Do you know Marion Lindsey?
A Yes, sir.
Q Was Marion Lindsey in that parking lot?
A Yes, sir.
Q In the passenger's seat?
A He was in the passenger's seat.
Q Point him out to the jurors.
A (Pointing.) The gentleman sitting here the defense table with the white shirt on.
Q Thank you, sir.
A Yes, sir.

MR. BARTOSH: One further question, Your Honor.

CROSS-EXAMINATION

BY MR. BARTOSH:

Q The windows in that vehicle, were they all dark tinted?
A I cannot recollect that, sir.
Q You can not identify who was in the vehicle until you got them out?
A That is correct.
Q Okay.

THE COURT: All right, sir. You can step down.

MR. BARNETT: Your Honor, the State would like to call Brian Duncan to the stand please.

BRIAN DUNCAN

having first being duly sworn testified as follows:

DIRECT EXAMINATION

BY MR. BARNETT:

Q If you would, tell the jury your full name.

A My name is Brian Curtis Duncan.

Q Where do you work?

A Spartanburg County Sheriff's Office.

Q What is your position?

A Master Deputy on uniform patrol on first shift.

Q Back in September 14th of 2000, what was your position and where were you working? What division?

A I was working for the sheriff's office at that time as well. I was the Lieutenant Supervisor over Narcotics.

Q Back then, did you also work with Chris Smith in the narcotics' unit?

A I did.

Q Were you the supervisor for him?

A Yes.

Q On that date, did you have an occasion to meet Marion Lindsey, the defendant in this case?

A Yes, I did.

Q If you would, explain to the jury the situation a that led you up to meeting with him that day.

A Investigator Smith had an informant that had been giving us information. We had been investigating Mr. Lindsey. At that time on that day, the source called up Mr. Lindsey and ordered up two ounces of crack cocaine. There was discussion of a meeting place which was the Denny's on 290 there in Duncan and a time to meet there.

We had investigators in the parking lot as well as the source. Mr. Lindsey arrived in a vehicle that we knew to belong to him. As he was getting ready to leave the parking lot, we basically blocked his vehicle in where he could not flee. We took the vehicle down. And we handcuffed the subject.

Before that happened, I was in the vehicle with Investigator Smith. I saw a hand throw an object out of the passenger-side window. The object was recovered by Investigator Smith. I saw it on the ground as well. At that time, it appeared to me to be crack cocaine. Mr. Lindsey was arrested that day.

Q This is Denny's off Exits 63, is that right?

A That is correct.

Q How was the lighting there?

A The lighting was good in the parking lot. There are street lights as well as parking lot lights up at the

Denny's restaurant.

Q You knew what vehicle Mr. Lindsey was going to be driving?

A Yes, we did.

Q When you saw the arm being thrown out, which side was it thrown out of?

A It was thrown out of the passenger side front window.

Q What kind of arm did that appear to be?

A The arm of an African-American. You can not tell if it was male or not, but you could tell that it was African-American.

Q And when y'all stopped the car, how quickly after that was thrown out did y'all stop the car?

A Immediately.

Q When you immediately stopped it, who was the occupants of the vehicle?

A Latrell Crump was driving the vehicle and Marion Lindsey who was the passenger in the front passenger seat.

Q The lady that was driving, what race was she?

A From my recollection, she was an Asian female.

Q Did she appear to have the arm that threw the crack cocaine out of that window?

A No, she did not.

Q This was in Spartanburg County?

A Yes, it was.

MR. BARNETT: One moment, Your Honor.

Please answer any questions Mr. Bartosh may have for you. Thank you, sir.

CROSS-EXAMINATION

BY MR. BARTOSH:

Q It is fair to say you did not see person who threw the object that was thrown out of the window, right?

A My testimony is it was the arm of an African-American.

Q You didn't see the person. You don't know who that person was.

A I know who the person was. I didn't see the face.

Q You are assuming that?

A Sitting in the front passenger seat where it was thrown out of.

Q I understand that. This incident happened September 14th of 2000?

A Yes.

Q As of September 18, 2002, had the case gone to court?

A Not to my knowledge.

Q Thank you.

MR. BARNETT: Short follow-up, Your Honor.

May it please the Court.

REDIRECT EXAMINATION

BY MR. BARNETT:

Q Y'all stopped him immediately. Is that correct?

A Immediately.

Q Who was the man that was in the passenger side of that vehicle?

A Marion Lindsey.

Q Do you see him sitting in the courtroom today?

A Yes, sir. He is sitting at the defense table with the white shirt on.

Q Thank you, sir.

THE COURT: You can step down, sir.

MR. BARNETT: We ask that the witness be excused.

THE COURT: You are excused.

MR. WILLINGHAM: We call Jane Millwood.

JANE MILLWOOD

having first being duly sworn testified as follows:

DIRECT EXAMINATION

BY MR. WILLINGHAM:

Q Tell the jury who you are.

A Jane Millwood.

Q You work for the sheriff's department?

A Yes, I do.

Q How long you been at the sheriff's department?
A 24 years.
Q What do you do for them?
A Right now, for the past 11 years, I have been a Master Deputy in the evidence division.
Q What does the Master Deputy in the evidence division, what do you do on a daily basis?
A We pick up any evidence including drugs from the drop box which is in the squad room and also from a locker that is in the I.D. division.
Q You maintain custody of the evidence in your patrol?
A Yes, we do until it goes to court or an officer tell us that may be destroyed.
Q It is a secured facility?
A Yes, it is. There are only three keys to it. I have one. And the other officer as a key. And our captain has a key.
Q Back in September, September the 20th of 2000, did you receive a best bag from the drop box that had been placed in there by Chris Smith?
A Yes, I did.
Q Was it sealed when you received it?
A Yeah. A best bag is a sealed bag.
Q That bag has a control number?

A Yes, it did.
Q That control number on that bag is 001816?
A Yes, it was.
Q What did you do with that best bag?
A When I pick up one of these packages and it has it's chain, this Form C, I take it back to my office and just signed it in when I received it and which officer I received it from, where I got it. In this case, I got it from the drop box which would've been in this squad room. I signed for a sealed best bag because I don't touch the drugs. Then on September 22nd, I took it to Ashley Harris to be tested.
Q During the time that it was in your custody and possession on September 22nd, was that seal ever broken?
A No, sir.
Q Were the drugs ever tampered with or altered in any way?
A No, sir. Once I log them in our computer, they are locked in our drug box.
Q Who -- you said you gave it to Ashley Harris. Is that correct?
A I did.
Q Who is Ashley Harris?
A He is our chemist at the lab.
Q Okay. And it was submitted to him for analysis?

A Yes, they were.

Q After they were submitted for analysis, it was my understanding that the actual substance itself was true?

A Yes, it was.

Q When was that?

A 9/26/01.

Q That is after it had been analyzed?

A Yes.

Q Thank you. If you would answer any questions Mr. Bartosh has.

MR. BARTOSH: No questions, ma'am.

THE COURT: All right, ma'am. You can step down.

MR. WILLINGHAM: Your Honor, we call Ashley Harris to the stand.

ASHLEY HARRIS

having first being duly sworn testified as follows:

DIRECT EXAMINATION

BY MR. WILLINGHAM:

Q Tell the jury who you are.

A Ashley Carlton Harris.

Q You work for the Sheriff's Office?

A Yes, I do.

Q What do you do?

A I'm the lieutenant over the forensic lab

responsible for testing controlled substances or drugs and arson cases.

Q How long have you been at the sheriff's office?

A A little over five years.

Q Where did you work before you came to the sheriff's office?

A In 1997, I was hired by the State Law Enforcement Division or S.L.E.D. in Columbia. I worked there for a little over two years before coming up to Spartanburg to run a lab in Spartanburg.

Q Did you do the same type of work for S.L.E.D. as you do for the sheriff's office?

A Yes, I did controlled substance analysis. And Spartanburg County was one of my assigned counties when I was at S.L.E.D.

Q What type of educational background do you have that allow you to perform your duties?

A I have a Bachelor of Science and Chemistry from Wofford College in Spartanburg. I have a Master of Science and Analytical Chemistry from Furman University in Greenville.

Q What kind of training do you have to allow you to perform the duties?

A When I was hired in 1997, I was at graduate school in analytical chemistry when I was hired in 1997 by

S.L.E.D. Upon being hired by S.L.E.D. I went through a four-month training program in forensic drug analysis. After completing that training course, I started receiving cases. And we have a continuing education. I've been taking at least 30 to 40 hours in training every year since then in forensic analysis and instrumentation.

Q Have you have testified before concerning drug analysis identification?

A Yes, sir. I have been qualified as an expert in the State of South Carolina Courts 61 times prior to today.

MR. WILLINGHAM: At this time, I would ask to have Ashley Harris qualified as an expert in the area of drug identification analysis.

MR. BARTOSH: No objection.

THE COURT: All right. He is qualified as an expert in that area.

MR. WILLINGHAM: Thank you, Your Honor.

BY MR. WILLINGHAM:

Q Tell the jury what you do whenever you analyze a drug? When a drug comes to you, would you do with it?

A When a drug comes to the Spartanburg Sheriff's Office, I go over and pick up those drugs. The drugs will be dropped in the drop box because there are cases being made and the evidence officers not there. I will go to the evidence department and pick up evidence that has come

in.

They will be assigned a unique lab number. The lab number is L for lab number and then two digits, 18 and the year. If a case come in 2000, it will have 00 and then it will have a four digit number after that. The digit will be the number in which it came in in that year L00 would be for the year 2000. 419 will be the 419th case that came in. It is assigned a unique lab number.

It is also inspected to make sure the case is sealed, that it has not been tampered with in any way. When items are placed in a best bag, it is a temporary evident bag. I will check over the seals of that bag to make sure it has not been tampered with, no one has tried to open it or changed the contents of that bag.

After it has been inspected or go back to the lab, I will log it into our laboratory information management system. When it comes time for it to be analyzed, I analyze it. I will do another inspection of the bag to make sure that it is properly sealed and hasn't been tampered with. Then I will run an analysis on a sample that is within that bag.

Q Did you receive a sample or a best bag in this case?

A Yes, I did.

Q Did that best bag have a control number?

A Yes, sir. It did.
Q What was that control number?
A L001816.
Q When you received that bag, was it sealed?
A Yes, it was.
Q If it had not been sealed, what would you have done?
A If evidence is found to be unsealed, the lab would not analyze it.
Q At some point, did you break the seal?
A Yes, sir. On the day that I analyzed the case, as I said, when it comes down for it to be analyzed, I take it out of the safe that it is stored in our lab. Analyze it to make sure that that bag has not been tampered with. I simply place my initials, the letters OK, and the date that I'm going to prep that case on the outside of that bag and open that bag. I take everything out of the bag and do inventory on it and start a laboratory worksheet on the case itself.
Q Have you performed an analysis on the substance that was in that bag?
A Yes, I did.
Q Based on that analysis, do you have an opinion as to what that substance is?
A Yes.

Q What is that analysis?

A I would refer back to the report.

Q Let me show you what's just been marked as State's Exhibit 81. Do you recognize that?

A Yes, sir. This is the lab report and my Form A for L00897. The 897th case that come in in 2000.

Q That is that accompanying report to match up with the best bag 001816?

A That's correct.

Q Does that report accurately reflect the results of your analysis?

A Yes, it does.

MR. WILLINGHAM: Your Honor, I move State's 81 into evidence.

MR. BARTOSH: No objection.

THE COURT: Hold on just a second. Let me see the exhibit please.

(WHEREUPON, the Court reviewed the document.)

THE COURT: Without objection -- have you seen it?

MR. BARTOSH: Yes, sir.

THE COURT: It is admitted.

(WHEREUPON, State's Exhibit 81 was admitted into evidence.)

MR. WILLINGHAM: Thank you.

BY MR. WILLINGHAM:

Q Based upon your analysis, were you able to determine what the substance was?

A Yes.

Q What was it?

A I found it to be crack cocaine. Total weight of 11.41 grams.

Q Do you know the value of that substance?

A I know the approximate value.

MR. BARTOSH: Objection, Your Honor. He can not say that. No foundation has been laid to where he can say it.

THE COURT: Well, you are one or two questions ahead. The question is do you know the value. The answer is either Yes or No. That, before you get any further, you have to lay a little foundation.

MR. WILLINGHAM: Yes, sir.

BY MR. WILLINGHAM:

Q Do you know the value --

THE COURT: So, that objection is overruled.

THE WITNESS: Yes, I would know the approximate value.

BY MR. WILLINGHAM:

Q How would you know the approximate value?

A I have been doing drug analysis for about seven

and a half years now. I've assisted the narcotics units in making take downs. I've assisted narcotics units in prepping cases. And I've testified 61 times prior to today. I worked with narcotics officers enough to gain knowledge on what drugs are sold on the street for.

Q Do you know the approximate value of drugs on the street based upon your experience in witnessing these transactions?

A Yes, that's correct.

Q How much are those drugs worth?

THE COURT: Hold on one second.

MR. BARTOSH: Your Honor --

THE COURT: Is there an objection?

MR. BARTOSH: Yes, there is an objection.

THE COURT: State your objection.

MR. BARTOSH: The objection is that he is not an expert on the value of drugs. He is a chemist. He analyzes drugs.

THE COURT: Sustained at this point. Foundation is incomplete.

If you would lay a little bit more detail of foundation, I will be happy to reconsider the question.

BY MR. WILLINGHAM:

Q Tell me again how much were those drugs.

A 11.41 grams.

Q Okay. Thank you.

MR. WILLINGHAM: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. BARTOSH:

Q Officer Harris, after you analyzed those drugs, what did you do with them?

A After drugs are analyzed, they are sealed in a bag with my initials, the date that they are sealed and a lab number and heat sealed. Those are stored in the laboratory safe until they are returned to the Sheriff's office. I actually wait until I get a box from the Sheriff's Office. It's our largest contributor of cases to be analyzed. I wait until I get a box and I take them back over to the Sheriff's Office and return them back into their evidence room with the chain of custody.

Q Is that what you did with these drugs?

A Yes, sir. It is.

Q Do you know when they were returned to the Sheriff's Office?

A I would have to pull up the evidence transfer log. I don't know off the top of my head.

Q Can you estimate or does it vary?

A Typically, it runs between two and four weeks to contain enough to fill the box to return.

Q Then you get some sort of document where someone signs that they have received the drugs?

A Yes, we have an evidence transfer sheet that goes with that box. It has an entire listing of the every case including the lab number and the control number. So the lab number that I've assigned it and the control number that was on that bag is listed for every case that was inside that box at the time.

Q That was done in this case?

A Yes, sir. It was. That was standard operating procedure.

MR. BARTOSH: That's all I have.

MR. WILLINGHAM: Nothing further.

THE COURT: All right. You can step down, sir.

All right. Let me see Mr. Willingham and Mr. Bartosh up here and anybody else who wants to come.

(WHEREUPON, a bench conference was held off the record.)

MR. GOWDY: The State would call Celeste Nesbitt.

CELESTE NESBITT

having first being duly sworn testified as follows:

DIRECT EXAMINATION

BY MR. GOWDY:

Q Good morning, Ms. Nesbitt.

A Good morning.

Q I have a couple more questions for you. Your testimony previously, I believe that that you were in September of 2002 the owner of a Mercury Topaz?

A Yes, I was.

Q Which you then sold to Ms. Mary Lyles?

A Correct.

Q In the same condition that you received it back from the sheriff's department, is that right?

A That is right.

Q I believe your testimony previously has also been that this is actually the car seat that was in the car on September 18, 2002?

A Yes, it is.

Q I don't believe that I asked you a dumb question, but I may any way. How does that fit into a car as a mother or anybody else who knows how to put a car seat in, how do you strap that in your car?

A You sit in the car and you take the seat belt that would actually go over a person that was sitting in the seat. And you would stick it through the back right here and lock it in.

Q Through those holes and latch it in?

A Through the holes and latch the car seat in.

Q Okay. I believe you testified that this car

seat was in the back seat behind the passenger, right?

A Correct.

Q Would this car seat had been in your car on September the 18th, 2002 in the manner in which you just described for this jury?

A Yes.

Q You did not have different ways of putting the car seat in?

A No.

Q It would have been the same every time?

A No. It stayed in the car.

Q I won't show you that. Just one moment. Let me show you what's been admitted as State's Exhibit 48.

A Okay.

Q Do you recognize that?

A Yes.

Q Is that where the car seat was when Keysha was sitting in it?

A Yes, it is.

Q On September the 18th, 2002?

A Yes, it is.

MR. GOWDY: Those are all the questions that I would have.

Your Honor, may Mr. Bartosh and I approach for one second?

THE COURT: Yes, sir.

(WHEREFORE, a bench conference was held off of the record.)

BY MR. GOWDY:

Q Ms. Nesbitt, if you would, I'm going to ask you to do something. I'm going to ask that someone accompany you to the car which is on the premises, the Mercury Topaz. I'm going to ask you to put that car seat back in the car just like it was on September the 18th, okay?

A Okay.

MR. GOWDY: Your Honor, I would ask permission for Ms. Nesbitt to go be able to do that.

THE COURT: All right. We will need to take a short break, ladies and gentlemen, to do that. I'm going to send you back in the jury room right now.

(WHEREFORE, the jury exits at approximately 10:10 a.m.)

THE COURT: All right. I'm going to go out there, Ms. Nesbitt. Someone would carry that seat for you. When we get out there, you put it in as the Solicitor directed.

After she puts in, I'm going to look at it so I can evaluate the 403 objection. You folks, the lawyers are certainly welcome to come.

Mr. Bartosh, with your permission, what I would

like for you to do is to be really ready to either show me while we are out there what you believe the unfair prejudice is. And if you want to, I can have the Court Reporter come out there. And she could put all that out on the record. I don't actually think that is necessary.

Or you could just wait until we get back in here and tell me what the unfair prejudice is. But I kind of rather you do that while we are out there so I that I can maybe ask you, that is why I was going to offer the Court Reporter. We may have a little discussion about it.

It is a legal matter. It is not really something that I think has to be put on the record as long as I come back in and put my findings on the record. Does that satisfy you?

MR. BARTOSH: Yes, sir.

THE COURT: All right.

MR. GOWDY: I'm going to ask for the Rusty Clavenger from the Sheriff's Department, actually my office, the Solicitor's office who has the keys to the car if he would carry the car seat down there and accompany Ms. Nesbitt.

THE COURT: All right. Let me ask you a question on a different subject. Do either of you

have the verdict forms in electronic format so that I can finalize those without having to redo them?

MR. GOWDY: We have.

THE COURT: If you do, I believe you have my e-mail address. If you would just e-mail it to me, then I could finalize those. That would keep me from having to retype it.

MR. GOWDY: Yes, sir.

THE COURT: All right.

MR. BARTOSH: Your Honor, just so that I understand, we're all going to go down there now?

THE COURT: Right now. Yes, sir.

(WHEREUPON, the Court exits at approximately 10:11 a.m.)

(WHEREUPON, the Court enters at approximately 10:20 a.m.)

THE COURT: All right. Let me say a couple of things. We've been to the car. I've seen it. I've seen it with the car seat in it. Why don't you for my purposes go ahead ask her in just a second the questions that you need to ask her.

MR. GOWDY: Yes, sir.

THE COURT: Before you do, as I was walking out of the back of the courtroom, I realized that the jury room faces where we were going to be. So -- and I

immediately asked S.L.E.D. to move the jury to the jury room that is here in the middle of the building. After they made the move, I saw the press and Ms. Nesbitt come into sight as you walk out towards where the jail is.

So giving that sequence of events, there is no way the jury could have seen anything that we are doing outside. But from the jury room where they were, you could see into that secure area where the car is. I don't think you can see the car because of the angle. You have to be able to look past that white trailer. I'm pretty sure that from that angle, you can not see the car. But they would have seen the people walking out there.

I don't know that that makes any difference. I stopped that from happening by moving them to a different jury room. And they don't know why they were moved.

MR. BARTOSH: Okay.

THE COURT: They were just moved.

MR. BARTOSH: But they are back in the original jury room now?

THE COURT: No, sir. They are still where I moved them.

MR. BARTOSH: Well, out of abundance of

caution, Your Honor, could we walk in there and see what you can see from that window?

THE COURT: Sure. Let's go.

(WHEREUPON, the Court exits at approximately 10:23 a.m.)

(WHEREUPON, the Court enters at approximately 10:28 a.m.)

THE COURT: Be seated.

Mr. Bartosh.

MR. BARTOSH: Your Honor, we just returned from the jury room after the jury had been moved across the hall to see what view they have out of the window of that jury room. We agree that you cannot see the automobile.

THE COURT: All right.

Mr. Gowdy.

MR. GOWDY: May it please the Court, Your Honor.

BY MR. GOWDY:

Q Ms. Nesbitt, a moment ago, I asked you to go out to the Topaz that you formerly owned and place your car seat in the car as it was on September 18th, 2002. Did you do that?

A Yes, I did.

Q Is the car seat in the same position it was on

September 18th, 2002?

A Yes, it is.

Q Is there any difference about the position of the car seat or the position of the back seat than it was September the 18th, 2002?

A No.

Q That's all the questions I have.

THE COURT: Mr. Bartosh, if you wanted to, you can examine her in response to the questions that Mr. Gowdy just asked her.

MR. BARTOSH: No, sir.

THE COURT: All right. Let me hear your arguments then. The objections under 403.

MR. BARTOSH: Your Honor, I am assuming which is always dangerous. But I am assuming that the reason the solicitor is requesting this viewing is so that the jury be able to get a spacial, to see the spacial relationship between the size of the backseat, the position of the car seat, so that they can appreciate the size.

THE COURT: Yes, sir. I assume so. Plus, as we have discussed, the size of the backseat in relation to the location of that bullet hole is I believe what they have said in the past is the primary reason they want the jury to see this.

MR. BARTOSH: Well, our argument would be that that can be accomplished in a less prejudicial ways. They already introduced several photographs showing the scene that they wish to take the jury out including the location of the bullet hole. There is one picture where the bullet hole has a dowel rod pointing through the hole.

What that doesn't show, Your Honor, it shows the position of the car seat but it is incomplete if that is what they're trying to do. You don't know how much space Ms. Lindsey took up. All they are left with is the car seat and the backseat. If they are trying to get an idea of how close was she to the car seat or how close was to car seat was to her, you cannot do that.

It is really an incomplete demonstration if that is what they're trying to do. I would suggest that there are other ways. There are other less prejudicial ways that they can accomplish that. They can do a sketch showing a --

THE COURT: It is not my job to tell the State my favorite way for them to go about doing what they want to do. The question is not whether there are less prejudicial ways to accomplish what they want to do. The question is whether the way that they have

chosen has the potential for unfair prejudice that substantially outweighs the probative value.

MR. BARTOSH: That is my argument.

THE COURT: Let's stay focused there.

MR. BARTOSH: That is my argument. That this, what they are trying to do or what they want to do, the prejudicial value far outweighs the probative value. Because as I say, I think what they're trying to do is they are trying to get the jury to appreciate the spacial relationships.

THE COURT: Yeah.

MR. BARTOSH: What that is going to do is twelve people of the jury are going to look in there and see where a woman was shot to death. That is what they're going to be concentrating on. Not about how wide the seat is or where the car seat is. But, --

THE COURT: Can I see exhibit 73 and --

MR. BARNETT: 46, Your Honor.

THE COURT: 46. I just need one of them really. I have 73 in my hand.

MR. GOWDY: 73, Your Honor. And 46.

(WHEREUPON, the Court reviewed the documents.)

THE COURT: All right. I have been out there. And I have seen it. Of course as I have said several times and as is obvious, I am not

looking at, in making this analysis, the prejudice. I am looking at the unfair prejudice. I don't see any unfair prejudice, zero.

I have seen the car. I seen the car seat in it. You cannot see blood on the seat. To me, it does not look like you expect it to look if you saw Exhibit 73. If you saw Exhibit 73 and you think all right, now I am going to look at the car, you can expect to see blood everywhere. To me, it looks very tamed, the car itself. There is nothing about it that strikes me as being unfairly prejudicial at all.

On the other hand, as I have said also before, that bullet hole is well within the seating area. It appears to me, now, of course, the jury has got to decide this. But it appears to me that the bullet hole is well within the seating area of Kiera. You can look at the lines on the seat, the upholstery lines on the seat. You can see that Mrs. Lindsey's right hip, the edge of her right hip is to the left of an upholstery line and it looks to me like maybe an inch and a half.

The bullet hole is to the right of that same upholstery line. The bullet hole is maybe 3 inches outside the farthest point that Mrs. Lindsey would have taken up if she was sitting up straight. That

is not a finding of fact. That is just the way I see this exhibit.

It is important to me to be able to understand the aggravating circumstance for the jury to be able to see both -- that might cut both ways. You might say the bullet hole is close to where Mrs. Lindsey was sitting. Therefore, it would be unlikely to hit Kiera even if she was sitting up straight and not hiding under the edge of the car seat as she described in her testimony.

That is just -- to me, that perspective is important for both sides. I am not saying that the evidence weighs heavily in favor of the State or that it weighs in favor of the defendant in terms of aggravating circumstance. It's just important evidence. To me, the probative value of seeing that car with that car seat in it and seeing the bullet hole is high. Since I see no potential for the unfair prejudice, I overrule the objection under Rule 403.

MR. BARTOSH: Thank you, Your Honor.

THE COURT: All right.

Bring in the jury.

You are going to ask her those same questions. Then offer her the car with the car seat in it.

We'll go out there. I will instruct -- this is a proposal. You all tell me if you want me to do it differently. I will instruct the jury that they may not talk at all while they are out there. We will of course have the bailiffs, all of the bailiffs will be with us, maybe not all of them, but several of them will be, that will make sure the jury don't talk.

Hold on just a second.

We will not have the Court Reporter with us although we can if you want to. But we, I will be out there. You all have the right to be out there. And we will let them take a few minutes to look at it. Then we will come back in.

MR. GOWDY: Your Honor, what will be the Court's pleasure with respect to the defendant and his positioning relative to the jury during the jury view.

THE COURT: I believe that he is entitled to be present. It may be that he is required to be present.

What you say about that, Mr. Bartosh?

MR. BARTOSH: Your Honor, I really have not thought of that.

THE COURT: How about if we let the detention officers take him out there and put him in a place close by, remove his shackles and then just let him

observe?

MR. BARTOSH: Your Honor, Mr. Lindsey indicates to me that he does not wish to do that.

THE COURT: All right. Let me ask you this, Captain. Is there a place inside that, I know where we're going to be looking is right outside of the jail. Is there a place where he can look out the window and watch what's going on?

DETENTION OFFICER: I will check on that, Your Honor, and make sure that there is.

THE COURT: Will that be suitable?

MR. BARTOSH: Your Honor, it is not a question of, he just does not want to view it in any form or fashion.

MR. LINDSEY: I see it every day, Your Honor.

(WHEREUPON, there was a pause.)

THE COURT: All right. Let me -- it is my belief that South Carolina Law requires the defendant to be present at every phase of a capital trial. You are asking me to not require him to go and see this jury view?

MR. BARTOSH: I am doing that at his request, Your Honor.

THE COURT: At his request. Okay. Well, even if I took him out there, he could close his eyes and

didn't have to look. So if he's telling me that he doesn't want to go out there, --

Mr. Lindsey, is that true?

MR. LINDSEY: Yes, sir. I see the car two times a day, Your Honor.

THE COURT: Okay. It has -- it does have some logistical benefit because it's going to take some time to move him out there and allow, keep the jury contained while they do that.

Yes, sir.

MR. GOWDY: Your Honor, I would just in support of what the Court has already said cite State versus Clap and State versus Littlejohn, the jury view is not the partaking of evidence. And so long as the trial judge accompanies the jury, the defendant's presence is not required under South Carolina Law.

THE COURT: All right. Thank you. Okay.

Bring in the jury.

(WHEREUPON, the jury enters at approximately 10:44 a.m.)

THE COURT: Okay. Ladies and gentlemen, -- I'm sorry.

Solicitor, you may continue.

MR. GOWDY: May it please the Court.

BY MR. GOWDY:

Q Ms. Nesbitt, before we broke a moment ago, I asked you to go down to the car that you formerly owned and place a car seat in there exactly as it was on September the 18th, 2002. Did you do so?

A Yes, I did.

Q Is the car seat in exactly the same position as you recall it being on the night of Nell Lindsey's murder?

A Yes, it is.

MR. GOWDY: Those are all the questions I have for Ms. Nesbitt, Your Honor.

THE COURT: All right.

MR. GOWDY: The State would request that the ladies and gentlemen of the jury be allowed to view the car at this point, Your Honor.

THE COURT: All right. Objection is noted. And I don't believe we need to address it now since nothing has changed since we addressed it about 90 seconds ago.

MR. BARTOSH: Yes, sir.

THE COURT: Ladies and gentlemen, we are going to go outside now. And we are going to look at this exhibit, this vehicle that you have just heard described. Here is how we're going to do it. We will have the bailiffs to take you out there in a line. We can not allow any conversation at all.

Now, if something that is completely unrelated to this case were to come up, maybe somebody trips or something happens or you need to bring something like that to our attention, fine. But you may not discuss anything. We won't have it on the record.

We'll be watching you. I'll be watching you and the bailiffs. And so we're all going to be keeping track to make sure that there's no conversation. Each of you will have an opportunity to look at the car for a few moments. You can walk around. You can open doors. You can just look at it and just kind of see what you think. And then we will come back.

Let me see the lawyers real quick.

(WHEREUPON, a bench conference was held off the record.)

THE COURT: All right. Let me see the bailiffs up here who will be going with us to take the jury outside.

(WHEREUPON, the bailiffs approach the bench.

THE COURT: Mr. Scruggs, Mr. Humphries and Mr. Nesbitt, would you raise your right hands please.

(WHEREUPON, each bailiff complies.)

THE COURT: Do each of you swear or affirm that you will accompany the jury outside on the viewing that we have described on the record and that you will

allow no person to speak with them and that you will not allow them to speak among themselves or to speak with anyone while they are out there and you will return them to the jury room at my direction so help you God?

(WHEREUPON, all bailiffs respond affirmatively.)

THE COURT: All right. We will go straight from the courtroom.

We will go down the back stairs?

MR. GOWDY: That's fine.

THE COURT: Straight from the courtroom, down the back stairs, outside. Each of you will have an opportunity to view it. We will get back in line. You will come straight back in.

And you can take them to their original jury room. Then we will bring them back in when we are ready. Let's go.

(WHEREUPON, the jury exits at approximately 10:47 a.m.)

(WHEREUPON, a short recess was taken.)

(WHEREUPON, the Court resumes at approximately 10:59 a.m.)

THE COURT: All right. Mr. Bartosh, anything you need to put on the record about the jury view? Any objection?

MR. BARTOSH: Your Honor, I guess it would be best to wait for Mr. Brennan. But he told me that Juror, I think, Ms. Sallis, as she left, she put her hand on the car and appeared to be in silent prayer.

THE COURT: When she left?

MR. BARTOSH: As she was leaving the vehicle.

THE COURT: She was the last person to get in line to come back?

MR. BARTOSH: Yes, sir. That was one of the things that I thought might happen.

THE COURT: What?

MR. BARTOSH: I'll withdraw the objection.

THE COURT: Well, if there's anything that anybody saw while we were out there that causes you concern, it needs to be put on the record now. I was standing behind Ms. Sallis. And when I told Mr. Humphries to go and form a line so that those members of the jury who were finished looking at the car could get in line, he did that.

Everybody got in line pretty much immediately except for Ms. Sallis who then walked from the passenger side of the car, around the back to the driver's side of the car. Looked in that rear driver's side door. I was standing behind her. I don't recall seeing anything. It's possible that she

did that and I couldn't tell that she was doing it. But if she did something like that, it would have only been for a second. She didn't pause to me except while she was looking inside the car.

MR. BARTOSH: The other thing, Your Honor, Mr. Mauldin, I believe, was using his arm as a dowel or a measurement. He measured both the front driver's seat and the back seat of the automobile I'm assuming to get an idea of the position of the people. Of course, Ms. Nesbitt was not in the car.

THE COURT: Right. I saw Mr. Mauldin doing something. He was standing beside the driver's door. The driver's door was closed. The driver's side rear door was open. And he reached his hand through the opening. It looked like he had his hand on the seat back of the driver's seat. Other than that, I couldn't tell what he was doing.

MR. BARTOSH: I think --

You want to describe it?

MS. QUIMBY: I was standing more towards the rear of the vehicle. His arm was through the back door opening. He rested it on the back of the driver's seat. But he also was trying to do an angle. It looked like he was trying to match up his elbow. He was trying to figure out the angles. We wanted to

bring that to the attention of the Court.

THE COURT: Okay. Is there anything significant about that?

MR. BARTOSH: Your Honor, jurors aren't supposed to conduct their own investigation.

THE COURT: They are supposed to look at the evidence.

MR. BARTOSH: Exactly, they are supposed to view the evidence. But we feel in this case, he started to conduct his own investigation as to angles and things like that.

THE COURT: Uh, well, I think the jury has to ultimately get around to looking carefully at those angles cause that's a very key piece of evidence that relates to the aggravating circumstance that is alleged.

MR. BARTOSH: Yes, but my point is, it is not his responsibility to conduct his own investigation and determine on his own what the angles are. They can look at the evidence and what the police officer testified to as to angles and distance and measurements and things like that, but a juror cannot conduct his own investigation.

THE COURT: So the suggestion is that if the juror examines the evidence that I have decided that

they can examine too closely, under the Court's supervision, then he is conducting his own investigation?

MR. BARTOSH: No, sir. What I am suggesting is this, they can go out. They can look in the car. They can open the door. They can look inside the car. They can look at all the items that they want to. But once they start trying to determine distances on their own, by their own estimates and see angles by their own estimates, then I think that is improper. They certainly are entitled to view it. I would also suggest, Your Honor, he was the only one that did.

THE COURT: Specifically, what it is that he did that you say that I need to attend to is to use his arm?

MR. BARTOSH: What he did was he stuck his arm from the door jam to determine the length from the door jam to the middle of the head rest in the front. He did the same thing in the back. He stuck it, he put his arm, he was attempting to use the length of his arm to estimated distance is what it appeared to me.

THE COURT: Solicitor.

MR. GOWDY: Your Honor, I guess falling under the heading of the under liability eyewitness

testimony, the three of us were also out there contemporaneous with defense counsel. If anything, we thought the juror in question put his hand in to test a tint of the window. We saw nothing about any angles.

But even if there had been, what is to stop a juror from mentally conducting the same calculations that they thought he was doing with his arms. I saw nothing including Ms. Sallis who paused for less than a second at that car to suggest an independent evaluation. Nothing.

THE COURT: Let's figure out if we can what is the, where the line at what a juror can and cannot do when they are looking at a piece of evidence that I allow them to do.

MR. BARTOSH: You just said the word, Your Honor, view. That was the whole purpose of them going out there was for them to view the automobile and to see how things were placed.

THE COURT: What is it that you think that they did that went beyond a view?

MR. BARTOSH: It wasn't they, Your Honor. It was Mr. Mauldin.

THE COURT: What did he do?

MR. BARTOSH: He conducted measurements on his

own. He went beyond viewing.

THE COURT: Let's assume that Mr. Mauldin did that with this arm. And let's assume that another juror goes out there and looks and says it looks to me to be about 48 inches between the left side rear door and the edge of the car seat. Am I going to have to go and interrogate each juror as to whether or not they made some attempt to estimated distances?

MR. BARTOSH: No, sir.

THE COURT: What is the difference between what you say Mr. Mauldin did and what another juror might have done?

MR. BARTOSH: That is pure speculation as to whether the juror did that or not. We don't know. We can't get inside their heads. Clearly, Mr. Mauldin did. His was demonstrative.

THE COURT: What do you propose I do?

MR. BARTOSH: Replace him with an alternate, Your Honor.

THE COURT: Uh-huh (affirmative).

MR. BARTOSH: That would be the simple remedy.

THE COURT: You know I cannot do that just right off the bat. Before I do that, I would have to come to the conclusion that he is not a fair and impartial juror or that he has seen some evidence that

is not in the record. What is my next step under your view of this?

THE COURT: Under my view of this, would have him, question him as to what he was doing and what was the purpose of him holding his hand like that. If he says I just wanted to feel the seat or something like that, that was one thing. If he goes to say I was trying to figure out how far it was.

THE COURT: What is wrong with trying to figure out how far it was? What is wrong with that? They are going to do that. That is part of their job. If I had a juror who said, who stopped me at the beginning of deliberations and said Judge, look, I just thought about this. And I'm just not going to try to figure out what those distances are, you would be ranting and raving to have that the juror taken off the jury. What is wrong with trying to figure out the distances?

MR. BARTOSH: First of all, Your Honor, it is a viewing. That is what the whole purpose was for them to go out there and look at it. He went beyond that.

MR. GOWDY: Your Honor, what is the difference between a juror using part of his body -- and I can't stress enough that the three of us who watched him do the exact same thing have reached a 180 degree

different conclusion. But assuming Mr. Bartosh is correct, what is difference between on juror using part of his body for measurement purposes and the other fourteen to using their mind to do the exact same thing. Are we also going to voir dire them for what they thought while they were out here?

MR. BARTOSH: Suppose one of them had pulled out their pocket and pulled a tape measurer and measured it. I don't think that would have been proper.

THE COURT: I am going to then remove from the jury every juror who pulled a tape measurer out of their pocket during that viewing and conducted a measurement. I think where this line is drawn is the jury is entitled to view and analyze the evidence based on the basic characteristics that every person bring into their role as jurors. Of course, that includes their common sense and the things that are in their mind.

That common sense would include how each different person analyzes the things that come before them during the course of their lives. Some people can look at an object and estimate its size or its distance without the need of any kind of measuring device.

I can look at a table. I can look at a box. I

can pretty much tell you how big it is just by looking at it. There would be some error. But I think I'm just pretty good at estimating distances. I don't need my arm usually to do that. Some other juror, some other people in the world may have different ways of going about doing something like that.

I don't believe that it is appropriate for me to screen jurors based on how they go about doing the things that we call on them to do in their role as jurors unless that involves using something that is outside the scope of evidence. That juror using his arm to make an estimate of distance is no different from me or some other member of the jury using their eyes to make an estimate of distance. So I don't see, I don't believe that there's anything for me to do.

I believe that it would be -- if I were to get that juror in here and ask him what he was doing, then I'm getting into the mind of that juror and perhaps making a suggestion to him that the way he goes about doing one particular thing that he thinks he need just to do in the course of his duty is not a proper way to do that. I am reluctant to do that. I believe that would be improper.

I believe that I got a good view of everything

Mr. Mauldin did. I was watching him. I actually was standing up towards the front driver's side of the car about 15 feet away probably even with the front of the car when I first saw him go over and stick his hand in through the back driver's side door. Wanting to get a good handle on exactly what he was doing, I moved toward the back and watched him the whole time. I don't know what he was doing. But to me, he was not doing anything that was a whole lot different than what the other members of the jury were doing.

So I don't see anything to do. I don't see any indication based on what I heard, looking at it the way you said you saw it and the way your people saw it that he was trying to make some measuring with his arm, I don't see anything improper in that.

MR. BARTOSH: We are understand the Court's ruling. We would respectfully object to it. Out of abundance of caution, we preserve the objection. We would object to that, Your Honor. We would request that Mr. Mauldin be removed. We just preserve our objection. That's why we make it based on the argument that we made.

THE COURT: Here's what I'm going to do. I instructed the jury that they cannot talk about the case. There's nothing magic about this particular

moment in the trial for him being removed, correct?

MR. BARTOSH: Yes, sir.

THE COURT: If I remove him at any time prior to their deliberation beginning, there will be no error in the delay. Correct?

MR. BARTOSH: No, sir.

THE COURT: Then I am directing you or somebody on your team go and find me some law that supports your position. All right. I am expecting you to bring that back to my attention before the jury begins their deliberation.

MR. BARTOSH: Yes, sir.

THE COURT: Is the jury back?

THE BAILIFF: Yes, sir.

THE COURT: Y'all ready?

MR. GOWDY: Yes, Your Honor.

THE COURT: Bring in the jury.

(WHEREFORE, the jury enters at approximately 11:17 a.m.)

THE COURT: You may proceed, Solicitor.

MR. WILLINGHAM: Thank you, Your Honor. The State calls Jimmy Sligh.

THE COURT: Hold on one second. When we left, Ms. Nesbitt was on the stand. Did you have any cross-examination you wanted to conduct on Ms.

Nesbitt?

MR. BARTOSH: No, sir. I did not.

THE COURT: All right. Go ahead.

MR. WILLINGHAM: Jimmy Sligh.

JAMES SLIGH

having first being duly sworn testified as follows:

DIRECT EXAMINATION

BY MR. WILLINGHAM:

Q Tell the jury who you are.

A James E. Sligh, Junior.

Q Were do you work?

A I'm the Division Director of Classification of Inmate Records for the South Carolina Department of Corrections.

Q How long have you been with the Department of Corrections?

A Uh, about 22 and a half years.

Q Are you familiar with how inmates are classified and housed at the Department of Corrections?

A Yes, sir.

Q If an inmate comes to your department having received a life sentence, where would he be housed?

A Initially in a Level 3 institution, which is high security.

Q Can you tell this jury what type of housing he

would be provided?

A He would be assigned to a cell that could be anywhere from 75 to 100 square feet. In all likelihood, he would have either one or two cell mates in that cell.

Q Is it possible that at some point he could have more than two cell mates?

A I would certainly hope not but anything is possible.

Q What a person in that have access to a yard?

A Yes, sir.

Q Explain to the jury what the yard is.

A The yard is just a common area of the institution. The institution is set up with housing units basically around an open area and there are support buildings along one side.

Q While that person has access to the yard, would that person have opportunities to have contact with other individuals?

A Yes, sir.

Q Could you tell me how many?

A Well, he is going to be housed in a living unit with as many as 300 other inmates. He has access to move throughout that unit with some restrictions. Depending upon the nature of the job assignment or the school assignment or whatever, he is going to be interacting with

other inmates throughout the day and visitation or recreational opportunities. It will be almost impossible to say how many. Obviously, quite a number.

Q You indicated he would have an opportunity to have a job and go to school?

A Correct.

Q Explain to the jury about that. What kind of jobs do you have?

A The inmates do all of the work, whether it's cafeteria work, custodial work, maintenance, whatever is required in the institution with employee supervision. The inmates pretty much perform all of the work.

Q Are those jobs usually solitary type jobs or are they with other people?

A It could be both. But in most cases, they are working along side other inmates.

Q The same with school?

A Correct.

Q You have more than one person involved in a school?

A Right. Classroom-type setting.

Q What about meals?

A You're normally fed. We feed by units. One unit at a time. So you are fed with other inmates in your unit in a cafeteria style setting.

Q Generally, how many folks are in a unit?

A They are designed normally in that type of institution for somewhere in the neighborhood of 250. But it could where be anywhere up to 300 in a particular unit.

Q You indicated you have recreational privileges?

A Yes.

Q Tell the jury about that.

A Each unit has a fenced in yard that the inmates have access to. If they are not working or not in school, kind of on their own time during daylight hours, they are probably 50 feet by 50 feet roughly. There could be any number of inmates out there at any time during the day.

Q How about visitation?

A We have central visitation rooms. Normally, they can hold up to as many as 500 people including visitors usually on the weekends. So, they are obviously coming and going for visitation.

Q And he would have contact with other inmates. We've already discussed that. How about contact with other guards or employees?

A Obviously, the supervision aspect of what we do, there are officers that are located and posted in living units and through all of the work areas and all of the officers and employees who do supervision also. It is going to be sight or sound supervision pretty much wherever

he is in the institution.

MR. WILLINGHAM: I beg the Court's indulgence.

BY MR. WILLINGHAM:

Q I may have asked you this. I may be thinking about my next question. As far as visitation, is it contact visitation?

A Contact visitation.

Q What does contact mean?

A No barriers between the inmate and the visitors. They sit in an open room at either a round or square table depending upon the nature of what the institution has.

Q How often can you have these?

A Depending on your custody which determines your privileges, it could be up to 8 visits per month.

Q Thank you.

CROSS-EXAMINATION

BY MR. BARTOSH:

Q How many inmates are currently incarcerated in the Department of Corrections?

A Approximately 20, it's probably 23,500. Somewhere in that.

Q Of those 23,500, how many of them are doing life without parole?

A Life without parole?

Q Yes.

A I could only, I have an idea of life sentences but not life without parole.

Q How many are doing life?

A Approximately 2000.

Q So about 10 percent?

A A little less than 10 percent.

Q Is there still patrol movement in the Department of Corrections?

A Yes, sir.

Q Can you explain to the jury what patrol movement is?

A Patrol movement is scheduled and set up at each institution. It determines when inmates will move from one place or the another, whether it's from cafeteria to the work assignment, school, to visitation, to whatever activities are going on at the institution. It is normally done on the hour. It is monitored very closely by correctional officers and supervisors and work supervisors.

Q Under patrol control movement, the inmates when they're not at work, they are generally in their dorms?

A Yes, sir.

Q How much yard privileges do they get?

A Define yard.

Q If they're not at work and they are not at school, then they are in their dorms, right, or in their

cells?

A Yes, sir. Unless they've got a pass to go somewhere else.

Q When they have on yard privileges when they are allowed to go on the yard, how long of a period is that?

A It is just the time it takes them to move from one area to the other. There's no milling on yard or anything like if that's what you're asking. It's just a matter of moving from one place to another.

Q So basically they're going to spend -- when they are not working or they are not in school, they are spending their time inside the housing unit?

A That is correct.

Q So there's really no yard privileges, right?

A I think in the context that you're asking me, No, sir. We don't allow inmates to just walk out on the yard when they are allowed on the yard.

Q Okay. So thank you.

REDIRECT EXAMINATION

BY MR. WILLINGHAM:

Q But there's opportunity as you indicated earlier for recreation?

A Correct.

Q Where would that take place?

A Either in a fenced area that is adjacent to each

living unit. Some institutions have centralized recreation areas.

Q How many hours a day do you have access to that?

A Depending on what his job or work assignment is. Pretty much daylight hours around those.

Q So daylight, he could be outside his cell doing something?

A Yes, sir.

Q It is not like he's sitting in his cell all day unless he is working or going to school.

A No, sir.

Q You indicated that there are approximately 2000 people serving life sentences?

A Approximately.

Q He is not going to be housed, a person serving a life sentence is not going to be housed exclusively with other prisoners serving life sentences, are they?

A No, sir.

Q People with lesser sentences would also be present?

A Yes, sir.

Q They are not going to be categorized by what sentence they have.

A That is one part of it. But that is not the driving force.

Q All 2000 people serving life are not housed in one particular facility to the exclusion of all other sentences

A Yes, sir.

Q You have plenty other inmates to interact with?

A Correct.

Q Serving less than life?

A Correct.

Q Thank you.

RECROSS-EXAMINATION

BY MR. BARTOSH:

Q The one that would determine where he goes is how they are classified, correct? Violent offenders are classified, people who are classified as violent offenders go to a maximum-security prison, correct?

A They could. That's not -- that is one of a combination of things that would determine that.

Q It just depends on how a person would score at R&E?

A Yes, sir. Correct.

Q Could you tell the folks about R&E?

A The Reception and Evaluation Center?

Q Yes, sir.

A The Reception and Evaluation Center for males is at Kirkland Correctional Institution in Columbia. All

newly committed inmates at the Department of Corrections go to the R&E Center for basically an evaluation period. There is the classification process that determines the security level and therefore, the type of institution that the inmate will be assigned to. There is also some testing done relative to academic levels, mental health issues, substance issues and some medical testing that's going to determine if the inmate has any medical issues to be dealt with.

MR. BARTOSH: Thank you. That's all I have.

THE COURT: All right, sir. You can step down. You are free to go.

MR. WILLINGHAM: The State will call Deputy White.

BRIAN WHITE

having first being duly sworn testified as follows:

DIRECT EXAMINATION

BY MR. WILLINGHAM:

Q Tell the jury who you are.

A I am Brian Douglas White. I work for the Sheriff's Office.

Q How long you been at the Sheriff's Office?

A About 3 and a half years.

Q I need you to speak up so everybody can hear.

A Yes, sir.

Q How long?
A Three and a half years.
Q Thank you. You are a detective?
A Yes, sir.
Q Were you a detective back in December 2001?
A No, sir. I was not.
Q What were you back in December 2001?
A I was a second shift Uniform Patrol Deputy.
Q As a deputy, is your job responsibility to patrol Spartanburg County?
A Yes, sir. It is.
Q To answer any calls?
A Yes, sir. It is.
Q Did you receive any calls on December 2001 to go to Applebee's?
A Yes, sir.
Q Which Applebee's is that?
A It is Applebee's located on Highway 29 across from the Lowe's. It was Greenville Highway at the time now. Now it is called William Abernathy Highway in front of the old Wal-Mart.
Q Okay. Why did you go there?
A It came out dispatched as a couple fighting in the parking lot of the Applebee's restaurant.
Q When you got there, what did you find?

A When I got there, as I was driving into look for the couple fighting in the parking lot, I observed a black male outside of a vehicle parked in a parking space near the building arguing and yelling to a subject inside of a vehicle.

Q Did you learn who that black male was?

A I did.

Q Who was it?

A It was Marion Lindsey.

Q You see Marion Lindsey in this courtroom today?

A I do, sir.

Q Point him to the jury.

A He is the black male in the white shirt at the defendant's table.

Q Did you speak with Mr. Lindsey?

A I did. As I approached the parking lot, he came directly to my patrol car. I got out of the car. I asked what was going on. He explained to me that, he identified himself as Marion Lindsey and said that he was arguing with his wife. I asked what had happened. He said he was just arguing. I asked if he had touched her. He said no.

I said, there were some people across the parking lot looking for something. I said what are those people over there looking for. He said jewelry. He said he had

pulled off her jewelry and threw it across the parking lot.

Q Whenever you learned that from Mr. Lindsey, what did you tell him then?

A I asked him to remain standing in front of my patrol car. As I approached the car where he was yelling at someone in the car.

Q Did you notice any kind of injuries on Mr. Lindsey?

A No, sir. I did not.

Q Did he point any injuries out to you?

A No, sir. He did not.

Q Did you talk to someone else after you told Mr. Lindsey to stay put?

A I did. I went to the car. As I approached the car, I observed a black female woman who was very emotional and she was crying. I asked her to identify herself. She said that her name was Ruby Lindsey.

Q Ruby Lindsey?

A Yes, sir.

Q Were you able to determine any injuries on Ms. Lindsey?

A I did.

Q What did you see?

A I saw her where the left side of her face was beginning to swell. She had scratches on her hands and

scratches just above her eye on her face too.

Q What were they doing out there in the field?

A She had told me that she and her cousin, Ms. Nesbitt, had gone to Applebee's to eat. When she got there, Marion Lindsey, her husband, had arrived and pulled her out of the car and hit her. And they got into an argument. Then I arrived.

Q What were they looking for in the field?

A They were looking for the jewelry that she explained was taken off of her and that he threw across the parking lot.

Q Did you sign a warrant in this case?

A I did.

Q For what charge?

A Criminal domestic violence.

Q Was Mr. Lindsey arrested that evening?

A No, sir. He was not.

Q Why not?

A Because when I went to approach the car that Mrs. Lindsey was in, after I learned that she had been assaulted, I went to go talk to Mr. Lindsey. I observed him walking off around the building. I was unable to determine what car he got in when he left the scene.

Q And the injuries that Mrs. Ruby Lindsey had were what?

A Swelling to the left side of her face with the scratches on her face and on her hands.

Q How about her clothes?

A She also explained to me that she had a ripped shirt from when he pulled her out of the car.

Q Did you see that?

A Yes, sir. I did.

Q Thank you. Answer any questions they may have for you.

CROSS-EXAMINATION

BY MR. BARTOSH:

Q Detective, did you to bring your case file?

A Yes, sir. I did.

Q Do you have a copy of the statements that you took from the folks that night?

A Yes, sir. I do.

Q In the file?

A Yes, I do.

Q Do you have the one from Celeste Nesbitt?

A Yes, sir. I do.

Q Have you reviewed it?

A Yes, sir. I did.

Q Does that statement from Ms. Nesbitt mention anything about any argument, not an argument, but about Ms. Lindsey being hit or struck or getting scratched or

anything like that?

A No, sir.

Q She does not mention anything about that at all?

A I have to refer to my --

Q All right.

A It says here that she saw him snatch her jewelry and threw it across the parking lot.

Q But no mention of seeing Mr. Lindsey striking Ms. Lindsey or scratching her or anything like that?

A It does not mention that directly. She says snatched.

Q Snatched her jewelry?

A Right.

Q She does not mention that he hit her?

A No, sir.

Q Or scratched her?

A No, sir.

Q Or anything like that?

A No, sir.

Q All right. Thank you.

MR. WILLINGHAM: Nothing else from this witness.

THE COURT: You can step down, sir.

MR. WILLINGHAM: We call Cathy Mullinax.

CATHY MULLINAX

having first being duly sworn testified as follows:

DIRECT EXAMINATION

BY MR. WILLINGHAM:

Q Tell the jury your name.

A Cathy Mullinax.

Q You live here in Spartanburg County?

A Yes,

Q Back in December 2001, December the 1st, 2001, were you at the Applebee's on Greenville Highway?

A Yes, I was.

Q Who were you with?

A My husband.

Q Why were you out there?

A To eat dinner.

Q Okay. Did you have the opportunity to eat dinner?

A We did.

Q At some point, you left?

A Right.

Q Tell me what you witnessed happening at that point.

A As we were coming out of the side door of the restaurant, I think the first thing we noticed was that there was cars in the parking lot. I think we both knew something was going on. But I'm nervous, excuse me.

Q That's all right. Don't be nervous. I need you

to speak up just a little bit.

A Okay. The first thing I saw was there was a couple in front of us standing beside a car. You don't really pay attention. But as we went by, I saw a guy hit the girl right in the face with his closed fist. I said to my husband right then, I said he just cold copped her. That is the words that I used.

Q Right.

A My husband said to get in the car.

Q Okay.

A As we approached our car, which was only two cars beside the car that they was standing, he opened my door. I was getting in. As I was getting in, he was coming around the car. We knew there was a car behind us that he was going to have to get them to move the car to let us out. But when I sat down and I looked back, I saw the gentleman, the man grab, hit the girl, grabbed the chain on her neck. Just grab it and fling it.

Q Right.

A The girl was frightened obviously.

Q Right.

A When my husband got in, he sat there for a minute waiting on someone to move the car so we could back out. They did not. No one came. So my husband got out. And he walked towards the group of people that was standing

around. There was a young girl. I don't know if my husband spoke to her or not. But there was a girl who came and moved the car so we could back out.

Q Okay. Where was --

A And as -- I'm sorry.

Q I'm sorry. You go ahead.

A As we were leaving, again I saw the girl who was being hit, I think that her attempt was to slap him. And I saw him hit her again with an open hand. We called the police at that time.

Q You called 911?

A 911.

Q Did you wait for the police to arrive?

A We were leaving because it was just obvious there was commotion going. So we pulled across the street as we were talking to 911 telling them what was going on. We pulled across the street into the, I think it was the McDonald's parking lot facing Applebee's to make sure the police got there.

Q Did you stay there until the police arrived?

A We did.

Q Ms. Mullinax, do you see this man today, the man that you described?

A Absolutely.

Q Would you point him out for me?

A That man right there.
Q Point him out for me.
A (Pointing.)
Q What is he wearing now?
A What is he wearing now?
Q Yes.
A A white shirt and black pants.
Q What is his race?
A Black.
Q Please answer any questions the defense may have.

CROSS-EXAMINATION

BY MR. BARTOSH:

Q Ms. Mullinax, you said that you saw the, let me ask you this, did you give a statement that night?
A I did not.
Q The officer that just testified did not take a statement?
A Not from me, no, sir.
Q What did he do, take your name and contact information?
A We talked with 911 on the radio. That's all we talked to.
Q How did they locate you as a witness?
A Through our cell phone I would imagine.
Q How long much after this were you contacted?

A I don't know. A couple of months, maybe.
Q You were never asked to give a statement?
A Yes, I was.
Q Did you give one?
A Uh-huh (affirmative).
Q A written statement?
A No.
Q You just gave a verbal statement?
A A verbal statement.
Q They never offered to ask you to write down what you saw?
A No, sir.
Q All of the events that you described were outside of the automobiles?
A Yes.
Q When you say you saw Mr. Lindsey hit Ms. Lindsey, they were standing outside of the cars?
A Yes.
Q Do you remember what kind of cars they were? There were two separate cars, right?
A The car that I saw that, Mrs. Lindsey, I am assuming that was Mrs. Lindsey. I never seen her before. The lady was standing -- I don't know the car. I can not tell you. I just know that her back was leaning against driver's window, that part of the door.

Q Of her car?
A I don't know whose car it was.
Q Of a car?
A Yes.
Q Were the windows tinted or do you not remember?
A I don't remember.
Q The man you have identified as Mr. Lindsey, where was he standing?
A Directly in front of her.
Q Okay. And she was leaning against the car?
A Uh-huh (affirmative).
Q Correct?
A Uh-huh (affirmative).
Q Was there another car that you saw? You said the car behind you, a young girl came out and moved it?
A She -- I don't know where the girl was.
Q Right.
A We were just, the car was parked directly behind our car. The door was open and music was playing. Blocking our exit.
Q You don't know whether or not that person was connected with the Lindseys?
A I don't have a clue.
Q Okay. Do you remember what side the Ms. Lindsey was standing on the car. You said she was standing on the

passenger's side or the driver's side?

A The driver's side.

Q That is all I have.

THE COURT: You can step down, ma'am.

MR. BARNETT: Your Honor, the State would like to call Sarah Simmons to the stand, Your Honor.

SARAH SIMMONS

having first being duly sworn testified as follows:

DIRECT EXAMINATION

BY MR. BARNETT:

Q If you would, ma'am, please tell the jury your full name.

A My name is Sarah Randall Simmons.

Q What do you do, ma'am?

A I'm employed in the Spartanburg County Magistrate Court as the Judge.

Q You are the Magistrate Judge, is that right?

A Uh-huh (affirmative).

Q How long have you been a Magistrate Judge?

A I have been a magistrate for three and a half years.

THE COURT: Ma'am, that microphone is rubbing up against your blouse. Just push it away so it won't make the squeaking noise. Thank you.

BY MR. BARNETT:

Q Judge, back on September 17, 2002, were you working that day?

A Yes, I was the presiding judge that evening.

Q You were the evening shift Judge?

A Evening shift.

Q One of the duties of being evening shift Judge, you set bonds on defendants that come in from the jail?

A At the Spartanburg County Detention Center at 8 p.m., I am the official judge to set bonds.

Q On September 17th 2002, did you have occasion, did Marion Lindsey come before you that night?

A Yes. He was one of the persons that were there on that evening.

Q When you do bonds, you have several defendants that appear before you?

A Yeah, I had about 10 other persons.

Q That night, he was brought in on criminal domestic violence warrant, is that correct?

A That is true.

Q Let me show you what has been marked as State's Exhibit 78. I believe that is a copy of the jail card that night.

A Yes. This is correct.

Q He was brought in on a CDV charge that night?

A Yes, he was.

Q That night if you would, tell you the jury, you arraigned the defendant on a criminal domestic violence charge?

A Yes, I did.

Q Would you explain to the jury what arraignment means?

A Okay. At that time, I set bond and also give them their rights. Would you like for me to explain?

Q (Nods head affirmatively.)

A Before I do anything, before I set my bonds, I always review files. Therefore, all the persons that were there that evening, I reviewed their files and made preparation for the bond arraignment for the bonds to be set.

Q When you arraign them, you explain to them their right to an attorney and what their charge consist of?

A The first thing I do is share with them their rights. After I share with them their rights, I also share with them their violation, whatever they are there for. If he was there for CDV, the charges and when he is supposed to attend court and what the fine might be of the penalty at that time for a CDV. If found guilty of that, it would be a fine of up to $1000 or 30 days.

Q Afterwards, you set the bond, is that right?

A Yes, I did.

Q When you talked to him, did he request a certain kind of bond when you were talking to him about his case?

A Well, at the beginning of the bond arraignment, I did call Mr. Lindsey's name. He did not answer first. So what I did, I took care of all the other nine individuals that were in there. Then when I called for Mr. Lindsey again, the officer went over and touched him because I asked the officer did Mr. Lindsey hear me call his name.

When I called his name, he approached the bench. I shared with him why he was there the violation. And he asked me at that time was he going to receive a PR bond. I told him no. I explained to him why he was not going to receive a PR bond. At that time, I explained to him the charges. And I shared it with him. And I did share with him on here, if you see on the paper where I wrote that I was going to, he was going to have a surety bond of $1000.

I also gave him stipulations. I asked Mr. Lindsey, I repeated it three times, do you understand what I'm saying. Because at first, there was no response. When I shared it with him again, I said Mr. Lindsey, do you understand that there is to be no contact with the victim who is Nell Lindsey. And he said yeah. I asked him again did he understand. At that time, he just said yeah again.

But as he was being exited out the door, he began to

mumble. So I put asked the officer to bring him back. I asked officer to bring him back to me to make sure that he understand what I said. At that time, I repeated myself again. I said Mr. Lindsey, do you understand your violation, do you understand. And he said yeah.

The comment he made was at that time when I asked him, he understood. I said Mr. Lindsey, are you sure you understand. And he said yeah. He said well you not going to give me a PR bond. I said no. This is what he said, the Statement he made was he said well, I'm not going back there anyway because I been away for 7 seven years. And I did not make a statement. I just looked at him because that was not what I was interested in hearing at the time.

I said do you understand again Mr. Lindsey that you're not going to get a PR bond. He said well, anyway, I'm not going back. I been away for 7 years anyway. I have a friend. That was the comment he made. I asked the other officer just go ahead and take him out because he still continued to mumble.

Q Did he say, he said he been away from her for 7 years?

A Yes, that's what he said.

Q Did he say he had a girlfriend or a friend?

A He said I have a girlfriend anyway. At that time, I made no statement. I just asked him to leave.

Q Was he showing you disrespect or was he just not paying attention?

A Uh, Mr. Lindsey at that time, when I called him the first time to approached the bench, he did not, apparently he did not hear me or I don't know what the problem was. But I called his name. I always do that three times. He still never moved.

So I don't know if there was something that, if there was a problem at that time. But he didn't make a comment. And the last time when I told him that he was not going to receive a PR bond, he did mumble. He talked back. And I told the officer to just take him out. I came back out the courtroom. I said if it needs to be shared again that he is to have no contact with Nell Lindsey, I'll be glad to do that.

Q Let me ask you for the jury edification.

A Okay.

Q Can you tell me what a PR bond is?

A Personal recognizance. He asked me are you going to let me sign myself out. That is a PR, personal recognizance.

Q They don't put any money up or anything. They just sign a piece of paper?

A Sign their names out.

Q You did not do that?

A I did not. I gave him a surety bond of $1000.

Q So he had to put up a surety of $1000 before he gets out?

A Yes.

Q And the conditions of that bond was he was to have no contact?

A The conditions, and I repeated the conditions. I always repeat the conditions more than three times. There should be no contact with the victim while this case is pending. I asked again do you understand while this case is pending there should be no contact with Nell Lindsey.

Q Let me show you also State's Exhibit 79. Is that a copy of the Bond sheet he would receive when he left the jail?

A Yes. The Clerk always give him the sheet. They also shares with him that there should be no contact with the victim while this case is pending.

Q He was verbally told several times by you?

A Several times.

Q And it was also given to him in writing?

A It was given to him in writing.

MR. BARNETT: Your Honor, I would like to move State's Exhibit 78 and 79 in evidence at this time.

MR. BARTOSH: No objection, Your Honor.

THE COURT: They are admitted.

(WHEREUPON, State's Exhibit 78 and 79 were admitted into evidence.)

MR. BARNETT: I would like to publish them to the jury at this time.

THE COURT: Yes, sir.

MR. BARNETT: One moment, Your Honor, please.

BY MR. BARNETT:

Q And Judge, when he was given this bond, it was n on the night of September 17th, 2002?

A Yes, it was.

Q Later that time, did you find out something had happened the next day?

A Yes, I did.

Q Did he also come before you again at a later time?

A Yes, he did. I was the first judge to see Mr. Lindsey after he returned from the hospital. He was the only person that was in the arraignment that night with me along with the officer. That's the time, that's when the bond was denied that he would be going to General Sessions Court. I explained it to him. And he made comments that night. If you want me to just share those comments?

Q Not at this time. I think the most relevant thing is what happened the night before. Thank you.

A Okay.

Q Answer any questions Mr. Bartosh may have.

CROSS-EXAMINATION

BY MR. BARTOSH:

Q How are you, Judge Simmons?

A I'm fine. Thank you.

Q Let me ask you a couple questions.

A Yes, sir.

Q Did you receive or did anybody in magistrate court receive a phone call that Mr. Lindsey was on his way to turn himself in if you recall?

A No.

Q And the warrant that was served on him that night, do you know how old the warrant was?

A No, I did not check that.

Q Could it have been as much as a year? What night was this?

A I think this was the night --

Q What, uh --

A That Monday night.

Q Which would have been the 17th or the 16th?

A It was that Monday or Tuesday.

Q You do not know the age of the warrant?

A I did not look at that specifically. I may check the file the records and review it and everything. But I did not look at that.

Q It could be possible that it was a year old?

A I am not sure.

Q How long was Mr. Lindsey in the hospital? Do you know?

A I am not sure. I don't know. I did not keep up with that.

Q That's all. Oh, I'm sorry. One more question. Did you know that Mr. Lindsey had children with Ms. Lindsey?

A No. I did not know Mr. Lindsey.

Q Did you did not know there was any children?

A No, I did not know Mr. Lindsey.

Q Your order did not address visitation of the children?

A No, that had nothing to do with that.

Q Thank you.

MR. BARNETT: No further questions for this witness. We ask that she be excused.

THE COURT: Thank you for coming, Judge Simmons. You are free to go.

THE WITNESS: Thank you.

THE COURT: We need to take a short break. The Clerk is going to come back there with some menus for you all to order lunch during this break. So we will be back with you in just a few minutes please.

(WHEREUPON, the jury exits at approximately 11:55 a.m.)

THE COURT: We'll take a short break.

(WHEREUPON, a short recess was taken at approximately 11:55 a.m.)

(WHEREUPON, the Court resumed at approximately 12:09 p.m.)

THE COURT: All right. Y'all ready?

MR. BARNETT: The State is ready.

THE COURT: Where are your partners?

MS. QUIMBY: Your Honor, I'll check.

THE COURT: Why don't you stay in here, Ms. Quimby and let's let somebody else go check.

MS. QUIMBY: Yes, sir.

(WHEREUPON, Mr. Bartosh enters at approximately 12:10 p.m.)

THE COURT: All right. Bring in the jury.

(WHEREUPON, the jury enters at approximately 12:11 p.m.)

MR. WILLINGHAM: Please the Court. We call Stanford Wilkins.

STANFORD WILKINS

having first being duly sworn testified as follows:

DIRECT EXAMINATION

BY MR. WILLINGHAM:

Q Tell the jury who you are.
A My name is Stanford Wilkins.
Q Where do you live?
A Boiling Springs.
Q Do you know the defendant Marion Lindsey?
A I know of him.
Q Okay. Did you have an opportunity to see him on February 20th, 1994?
A Oh, yeah.
Q Where were you?
A In Inman.
Q Who were you with?
A Jessica Cannon.
Q What were you doing?
A We were getting ready to go down to her grandmother's house to eat dinner.
Q Okay. Were you driving?
A Yes, I was.
Q What were you driving?
A A '92 Honda Prelude.
Q You left her home or Jessica's home?
A Jessica's.
Q Left Jessica's home. What happened then?
A Me and Jessica's dad walked outside. We were sitting outside talking. Then we seen a Honda Accord come

by.

Q Okay. Did you know who in the Honda Accord?

A Not at the time.

Q Did you learn later who was in the Honda Accord?

A Yes, I did.

Q Who was it?

A Myron Lindsey.

Q After that Honda rode by, what happened?

A He rode back by. Me and Jessica proceeded to get in the car to go to her grandmother's house to eat.

Q Okay.

A We got probably a quarter of a mile maybe or less. I seen headlights coming towards my car?

Q What time of day was this?

A It was probably 8 o'clock at night, 9:00. It was nighttime.

Q Okay. You saw headlights coming at you. What did you do?

A I stopped. He blocked me in the middle of the road. He had my car blocked like that.

(Demonstrating.)

Q All right. You stopped because your car was blocked?

A Yes.

Q What is your car blocked by?

A Another vehicle, the Honda Accord.

Q The Honda Accord. After you stopped, what happened?

A Myron Lindsey got out and shot twice, hit me once. Shot through my windshield.

Q Okay. Where was he standing when he shot you?

A Directly in front of my car with my headlights on him.

Q Did you get a look at him?

A Yes.

Q Where did he shoot?

A He shot me in the arm.

Q It came through your front windshield?

A Front windshield.

Q Where was Jessica at?

A She was in the passenger seat.

Q Did she get hurt?

A No.

Q Do you see in this courtroom the man who shot you?

A Right there.

(Pointing.)

Q Tell me what he's wearing?

A A white shirt.

Q What does he look like?

A A black male.
Q What did you do then?
A I backed up. Then I got back in Jessica's driveway. We parked the car up under the garage and went into the house and called 911 and the ambulance.
Q Did the ambulance come and get you?
A Yes.
Q What kind of injury did you have?
A Sustained a bullet which is still in my arm with a .45 caliber gun.
Q I'm going to show you State's Exhibit 67 and ask you if you recognize that?
A Yes. That is my vehicle, the '92 Prelude.
Q Does that accurately reflect how your car looked after this incident?
A Yes.
Q I'm going to show you State's Exhibit 66 and ask you if you recognize that?
A It is the bullet, directly where the bullet come in.
Q The photograph's showing the same thing from the inside of the car?
A Yes.
Q Does that accurately reflect how it looked that day?

A Yes.

Q And then State's Exhibit 65, you recognize that?

A Yes, that is my bullet wound.

Q That is the injury to your arm?

A Yes.

Q Does that it accurately reflect the way it looked?

A Yes.

MR. WILLINGHAM: Your Honor, at this time I move State's 65, 66 and 67 into evidence.

MR. BARTOSH: No objection.

THE COURT: They are admitted.

(WHEREUPON, State's Exhibits 65 through 67 were admitted into evidence.)

MR. WILLINGHAM: Your Honor, request permission to publish to the jury.

THE COURT: Yes, sir.

BY MR. WILLINGHAM:

Q I am first going to show you what was entered as State's Exhibit 67. If you would, tell the jury what they are seeing?

A That's my '92 Honda Prelude. I was sitting in the driver's seat. And the bullet came through the windshield and hit me in the arm.

Q What is that right there?

A That is the bullet hole.

Q Now, I'm going to show you State's Exhibit 66. Tell me what that is.

A That is the inside of my '92 Honda Prelude where the bullet came in aiming directly towards me.

Q What is that right there?

A That is the bullet hole.

Q This where you were sitting?

A Yes.

Q State's Exhibit 65. Tell the jury what that is?

A That's my bullet wound. The bullet went inside of my arm where it remains.

Q If you would, answer any questions that they have for you. Thank you.

CROSS-EXAMINATION

BY MR. BARTOSH:

Q Mr. Wilkins, did you go to court, were you present when Mr. Lindsey was sentenced on this charge?

A No, I was not present.

Q Were you ever told what the sentence was?

A Yes, my mother and my father were present.

Q Can you tell the jury what the --

MR. WILLINGHAM: Objection, Your Honor. That would be hearsay. There will be proper testimony as to what the conviction was offered by the Clerk later

on.

MR. BARTOSH: And the sentence?

MR. WILLINGHAM: Yes, sir.

MR. BARTOSH: Then I have no questions.

THE COURT: All right. Sir, you can step down.

MR. WILLINGHAM: We call Jessica Cannon.

JESSICA CANNON

having first being duly sworn testified as follows:

DIRECT EXAMINATION

BY MR. WILLINGHAM:

Q Tell me your name.

A Jessica Renee Cannon.

Q Ms. Cannon, you live here in Spartanburg County?

A No, sir. I now live in Greenville County.

Q Did you use to live in Greenville?

A I did. I lived in Inman.

Q Do you know a fellow by the name of Stanford Wilkins?

A Yes, at the time, he was my boyfriend. And we have one child together.

Q Were y'all together on February 20th, 1994?

A Yes, it was three days before my birthday.

Q Tell the jury what happened.

A Okay. We were at my house. I lived at my

parent's house with my father. We were standing outside. It was getting dark. We were standing outside. And we all saw the Honda Accord -- it was like a tan color -- ride down the road. I heard things being said out of the car. This happen like twice.

So I told Stanford let's just leave. Because I knew leading up to that, there had been a confrontation before where we were riding through downtown. And we saw Myron or Marion in the car in that same Honda at a red light. And he got real close to our car. I actually questioned his friend at a gas station. Actually me and Nell, we were at a gas station in Inman. And I asked him what was his problem.

MR. BARTOSH: Objection, Your Honor. That is hearsay.

MR. WILLINGHAM: Let the judge rule and then we will go.

THE WITNESS: Okay.

MR. WILLINGHAM: I agree it probably is.

THE COURT: So, ma'am, he is not going to want you to say what y'all said during the conversation.

THE WITNESS: Okay.

BY MR. WILLINGHAM:

Q Back to the date in question?

THE COURT: Let me address, when she repeated

her question to Nell, that is not hearsay. That objection is overruled. You are anticipating what was coming. Mr. Willingham says he is not going any further than the conversation.

THE WITNESS: I gotcha.

MR. WILLINGHAM: Thank you, Your Honor.

BY MR. WILLINGHAM:

Q Back in February 20, 1994, did you know Marion Lindsey?

A I did.

Q Did you see him that night?

A I did.

Q Tell me what happened after you pulled out of your driveway.

A Okay.

Q Who were you with?

A I was the Stan Wilkins.

Q What were you in?

A His Honda Prelude.

Q Where were you sitting?

A I was sitting in the passenger seat.

Q You pulled out of the driveway. What happened?

A We backed out of the driveway. We drove, we went to the left towards Highway 292. We got about three houses down. This Honda Accord was coming toward us. We

were going straight. And this car was coming on our side of the road and made us almost go in the ditch. So we stopped.

At that point, I saw Myron get out of the car with a gun pointing towards our car. We started going backwards. I was screaming to Stan to just go back to our house. I saw the gun.

Q That's okay.

A He pointed the gun towards our car, the car we were riding in. Then I heard a shot. And I ducked down in the seat. And then I heard the glass like shatter. At the time, I was covering my head. The bullet came in. I felt the glass hit my arm. And I just kept, was screaming go back to my house. And Stanford said he got me, he got me.

We pulled into my parent's garage. And we were blowing the horn. And my daddy came running out of the house because he said he heard a gun shot. He came running out of house. What's going on? And Stan was screaming.

MR. BARTOSH: Objection, Your Honor, hearsay as to what her father said.

MR. WILLINGHAM: Not offered to prove --

THE COURT: He said what is going on. That is not hearsay. Overruled.

BY MR. WILLINGHAM:

Q Was 911 called?

A Yes, my dad called 911.

Q Did the ambulance come and take care of Mr. Wilkins?

A Yes.

Q Do you see the man in this courtroom today who stopped you in the road?

A Yes.

Q Point him out to the jury.

A Marion Lindsey with the white shirt on, black male, the defendant.

Q Thank you. Answer any questions the defense may have.

THE COURT: All right. Let me --

MR. BARTOSH: No questions.

THE COURT: Do you have any questions?

MR. BARTOSH: No, sir.

THE COURT: You can step down, ma'am.

THE WITNESS: Thank you.

MR. WILLINGHAM: I'll call Martha Smith to the stand please.

MARTHA SMITH

having first being duly sworn testified as follows:

DIRECT EXAMINATION

BY MR. WILLINGHAM:

Q If you would, identify yourself for the record please.

A Martha Ann Smith.

Q Were do you work at, ma'am?

A Spartanburg County Clerk of Court.

Q How long have you been there, ma'am?

A Almost 22, 23 Years.

Q Is part of your duties to take care of records of the court?

A Yes, sir.

Q Does that include criminal indictments?

A Yes, sir.

Q Let me show you what is been marked as State's Exhibit number 80. Is that the copy of an ABWIK conviction against Marion Lindsey?

A Yes, sir. It is.

MR. WILLINGHAM: Your Honor, I move this into evidence at this time.

MR. BARTOSH: No objection, Your Honor.

THE COURT: It is admitted.

(WHEREUPON, State's Exhibit 80 was admitted into evidence.)

BY MR. WILLINGHAM:

Q I was wondering if I could ask you, I call it an

ABWIK. Can you tell what the charge officially was?

A Assault and battery with intent to kill.

Q Did he plead no contest to that?

A Yes, sir.

Q When did he plead to that?

A December 14th, 1996.

Q What was the sentence he received?

A He got two years suspended to one year and one years probation. Restitution.

Q Thank you, ma'am.

THE COURT: Let me see that.

MR. WILLINGHAM: Yes, sir.

BY MR. WILLINGHAM:

Q If you would, tell us who the victim was in that case?

A Stanford R. Wilkins.

Q Thank you, ma'am. If you would, answer any questions Mr. Bartosh may have.

THE COURT: Let me see it again.

MR. BARNETT: Yes, Your Honor.

THE COURT: Do you have any questions?

MR. BARTOSH: No, sir.

THE COURT: You can step down, Martha.

MR. GOWDY: Your Honor, if the pleases the Court, the State will call Mr. Stanley Staggs.

STANLEY STAGGS

having first being duly sworn testified as follows:

DIRECT EXAMINATION

BY MR. GOWDY:

Q Good afternoon, sir.

A Good afternoon.

Q Mr. Staggs, you have a good strong clear voice. I'm going to ask you the keep it up so the last lady and the last gentleman can hear you. Tell us name and where you live?

A My name is Stanley Earl Staggs. I live in Roebuck, South Carolina.

Q If you don't mind my asking, Mr. Staggs, what age gentleman are you?

A I'm 45.

Q Do you have a family here in Spartanburg?

A Yes, I do.

Q How many children do you have?

A I have currently two children, two biological children. And I have custody of my two grandchildren. And Nell was my daughter.

Q Mr. Staggs, what do you do for a living?

A Quite a few things. I own a restaurant. I work as a production and control manager in a manufacturing facility. I coach high school track.

Q Where do you coach track?
A At Woodruff High school.
Q Any specialty?
A I think sprints and hurdles, they say. I don't know.
Q Was Nell Lindsey your daughter?
A Yes.
Q How old were you when she was born?
A Nell was born when I was 16. Her mother and I were both young when she was born and kind of grew up with us.
Q Did you and Nell's mama, Ms. Wright, ever marry one another?
A No. We were never married. But Nell was always acknowledged as my child. And I was her father. And Carol and I had relationship. And we raised her. Unfortunately, I was not in the home with her but I was a part of her life, entire life from the time she was a baby.
Q When you say she was a part of your life, Mr. Staggs, I want you to give the jury a sense of what kind of involvement you had with Nell throughout her life?
A As a 16-year-old, I used to work in the summer. My mother worked at Albert Laboratory. They manufacture Similac milk for babies. So I know what it cost to buy 96 Pampers out of Toys-R-Us and buy a cases of milk. So even

as a little baby, I was involved with her. She stayed with, came to my house and stayed with me and my parents on weekends. And that continued.

Even as she grew up and went to school, I was involved with her. I remember her going to homecoming. I remember her getting her first car. I remember her going to the prom. I was not physically there in the house, but I knew as much about her as I do with my kids. And she was a good kid. She was a good kid.

Q Let me ask you this, Mr. Staggs, what characteristics stick out most in your mind about your daughter now?

A Her independence, her commitment to being a good mother. I remember when she had the baby before she was married and got her own place. Had her own trailer. Was working and providing for her family without the assistance of her mother or me. We helped her when we had to. She was very conscientious of trying to do it on her own. I commend her for that.

Q Was this before one Marion Lindsey came into her life that she had all of these independent things?

A Absolutely. Before she became a part of her life, she was self-sufficient. She was working hard. She was a good mother. She was a good person.

Q I want to ask you this. I want to go back to

September of 2002. In the days or weeks before Nell's killing, did she come to you as her father and have any conversations with you about her intentions of leaving Marion Lindsey for good?

A Yes, she did. The Saturday before she was killed, she came to restaurant. It was about 8:45. She walked in. And I was actually standing behind a bar. I looked up and said what are you doing here. She always laughed. And she said she wanted french fries. She left Inman to come all the way down to Roebuck to get back to get french fries. I kid her about McDonald's and Hardee's and everything else on the way.

I could sense that something was bothering her. We talked a little bit about her marital situation. And we talked before, but this time seemed different. She told she was done and that she wanted my help. And I said if you're serious about this, you go home and you call me back. And we will do what we have to. I would get in touch with a lawyer. And we would get this done. But she left me that Saturday night with the commitment and she was going to do that.

She called me back Sunday night to remind me that she was serious. I spoke with her even Monday after she got some information about a couple of lawyers. She was going to let me know how much it cost. I was going to help her do

this.

Q You offered financially to help her?

A Yes. Because I will be blunt with you, when my daughter married Marion, it was probably three or four months before she came to me to tell me she was married to him. It was not matter of whether I approve or disapprove of him, but I think she knows that I know he did not have her best interest at heart from day one. That was, I think, the reason she was very hesitant about telling me.

Q Did your family have traditions at the holidays particularly Christmas?

A Yes. Every Christmas Eve for the last 20 years, we've had dinner at my house, my family which included my daughter Nell. She's come to all of those. Since she was married or involved with Marion, she always came, her and the boys. He came once in the entire time that they were together to my house.

Q One time?

A One time in the entire six or seven years or eight years, whatever their involvement was. But one time. I thought that was strange. Holidays are for families. We had the boys. And we had her. That was okay.

Q Do you recall the time, Mr. Staggs, when this defendant took his wife off his auto insurance and you had

to rent a car for her?

A Yes. She had a car accident and called me up and said dad I need to get a rental car. And I said wait a minute, you had a car accident. You have rental insurance right. She said no because Marion don't have it on the car. The bad thing was there was a car sitting in the driveway. And he wouldn't give her access to drive it. So we went ahead and got her a car with a credit card.

So I thought that was totally out of character for anybody. My thing was they had kids who had to go to school. I could not comprehend or understand that why him as a father and as a man would not want to make sure that at least his kids were taken care of.

Q I purposely did not ask you about this at the time that you mentioned it. But you mentioned that in addition to your own biological children, you are raising two other children right now?

A That's correct.

Q Who lives with you, Mr. Staggs?

A Trey and Alex L.

Q Nell's two boys?

A Nell's two boys and Myron's kids.

Q They stay with you during the week and stay with their grandmama, Ms. Wright, on the weekend?

A That is correct.

Q Do you have custody or some formal arrangement with the Court for them?

A Yes, we do. We've got formal custody. To be blunt, the night that Nell was killed, I actually physically picked them up. I was concerned that with everything that was going on, it would be overwhelming for a two-year-old or a seven-year-old to deal with it.

So one of the things we cautioned ourselves was to get them out of that environment. Not that it was not necessarily bad. But we knew if we took them to Roebuck, nobody knew them there. And they could be normal kids. And we could try to put our lives back together. That's the reason we did that.

Shortly after that, we did go to court, Carol and I. And Myron was there. We got legal custody of the boys. During that process, the one thing that really stuck out was they asked him one question. They asked him did he feel the boys were in the right environment. And his answer was yes. And me sitting there, my question was the big thing is the environment would have been great if he had a mother and a father. That's who they needed.

Q How are the boys doing now?

A The boys are doing good. They are your normal four and eight year olds. Just like every kid in America, they like cartoons. They eat all day. They live

outdoors. They are doing well. I have been blessed to have an opportunity to be with them.

My daughter is 17. My son is 22. Nell was the oldest. All three of these guys were close. They grew up as brothers and sisters. They were never different from anybody. It is kind of funny now. The boys view my son as uncle and my daughter as sister. I guess because she's there. And he's off in college. But they've got a big sister. And they've got an uncle. But they are doing good.

Q Do either Alex or Trey ever ask about their mother?

A Yes. Initially when we got them, Trey was in diapers. He was two. Alex was seven, six, I'm sorry. But yeah, they asked about their mother. Initially, let's be honest, here you have a two-year-old. And that's the only thing he knew was mama.

When we first got him, he probably thought he had 20 or 30 moms because everybody was overwhelming them. And I know it confused him for a while. But they both asked about their mom. They do today.

Alex is more on the emotional side. I think he was closer to his mom simply because of the relationship he had with his father. He spent a lot of time with his mom. You sense that because he is a bright kid, very artistic. He

had to go through some counseling since this incident. It has been tough. But he's doing well. He is doing well.

Q Do you have any special rules in the Staggs' household relative to what kind of toys they can play with or what kind of toys can be in the house?

A Absolutely. When we first got them, I will be blunt with you, Trey had a fetish for guns initially. Since this happened, we kind of took all the guns away. No water guns, no cap guns, none whatsoever. It was strange because most little boys grow up with guns. But it reminded me so much of their mother's violent death that we put that away. They have adjusted. They're okay.

Q The first Christmas after the Christmas of 2002, the 20-year-old Staggs tradition, what changed about having Christmas the way you used to have it?

A We normally had it my house. We have enough room there. But it was just so tough missing her that first year that we just went to a restaurant and actually had some of Carol's family down. And it was very different. Normally, you got the fireplace and you're there. And she was always -- Nell was a great kid about Christmas. She loved Christmas and she loved family.

I can remember plenty of Christmases with her sitting on the floor when the boys were little playing with toys and just being by the fireplace and just actually enjoying

family. It seemed to be the one time she had some peace and rest.

Q What kind of mother was she, Mr. Staggs?

A My daughter was a great mother. She was a great mother. If there was a picture of a mother in the dictionary, that would be her. She worked hard everyday. She wanted to give the boys the very best. I mean, never wanted to short cut them. That's all you can ask for your child. I admired the fact that she worked so hard by herself.

I will be blunt Myron or Marion or whatever you want to call him, he and I have never been close. I guess that was rightfully so. But my daughter, I saw her with those boys. I knew what she was willing to commit to and what she was going to do to take care of them. That was the most important thing to her. I think it had been brought out that, like I said, physically I was not there with my daughter.

But I think she understood the value of family. And for a long time, I thought about the fact that what she endured was simply because of that. She wanted to make sure the boys had a normal family. Quote, unquote, "a two-parent family" and the things we all believe in, but at what price.

Q Mr. Staggs, let me ask you this final question.

Since September of 2002, you have had Trey and Alex with you virtually nonstop since except for weekends when they were with Ms. Wright, is that correct?

A Right.

Q During those coming on two years, how many times has their father written them, called them, sent them a Christmas card, sent them a birthday card?

A Nothing, not a word. The only time I been around him was in the courtroom setting. And he mentioned when we were getting the custody hearing to get the boys, he mentioned seeing them then. One of the things I shared with anyone was we never denied him or his family access to them. We never said, uh, we've got the boys hidden some place. You would be led to believe that that's the case. That is not.

It concerns me when I hear his passion for his children, but I don't see any effort. It's been almost two years. Again, never a letter. I would not deny those kids. I will be blunt with you. Trey when we initially brought him home asked about his dad. But dad has become very, very little now. They have developed their life without him being a part of it.

They know that their mother is gone. I guess they have accepted that they have no father. That is the thing that really sticks me. This thing not only took away their

mother, it took away their father. It created orphans out of my grandkids. And that's something that is tough because they didn't ask for this.

Q Thank you, Mr. Staggs. Please answer any questions Mr. Bartosh has.

CROSS-EXAMINATION

BY MR. BARTOSH:

Q Mr. Staggs, I got the impression from your testimony that you were not a family, I apologize, not in the house with your daughter.

A I did not live with her because I did not marry her mother.

A Basically she was raised in a single parent home?

Q She was raised in a single parent home in a physical sense. In terms of my involvement with my child, no. My child knew who I was from the time she could speak. And I was dealing with her when she was an infant.

Q I understand but you never lived with her?

A No.

Q Okay. You supported her?

A I supported her, but she is also spent time with me in my house. So I guess she did live with me.

Q Like a normally divorced couple where they would, the kids would have visitation. Her mother was her main support and her main parent.

A Okay.
Q Is that true?
A True.
Q Okay. And you provided financial assistance I --
A Yes.
Q -- I assume for her well-being and for when you come by to see her?
A Yes.
Q But your roll was minimal as far as her rearing?
A I don't think so. It was, I think it was a little more involved than just visitation on the weekend. As I said earlier, the things that normal fathers do. Taking my daughter to homecoming. Riding her in a convertible, escorting her and doing those things. I guess that would be a normal maintenance in a strange family or whatever. But in addition to that, my daughter spent time with me in the summers when she was not in school.
Q But day-to-day.
A Okay. Day-to-day.
Q Day to day, she was in her mother's care?
A Correct.
Q Okay. Now your understanding that the solicitor's asked you about Mr. Lindsey not contacting his sons. Well, let's go back to the custody first of all.

Did he agree to sign over custody to you?

A Yes.

Q He did not contest it?

A No.

Q Of course, he was incarcerated, correct?

Q So what would have been the best environment for his boys giving the choices between being incarcerated and your situation?

A Are you asking me that?

Q Yes.

A What would have been the best situation --

Q Where do you think that they should have gone other than you?

A You're asking me my opinion?

Q Yes.

A You're asking my opinion now or do you want to -- you're asking me my opinion? My opinion would have been that if he was so concerned about the well-being of boys and that his family was there to support him, he would have made the effort to try to get them involved in it.

Q Did they make an effort to see the children?

A No, sir.

Q They never asked?

A No, sir.

Q Not in those two years?

A No, sir.
Q Never contacted you?
A No, sir.
Q If you had not taken the children, where would the children had gone if you know?
A I'm assume and again this is just speculation on my part that Carol would probably have them, the grandmother here.
Q Or DSS perhaps?
A No, that would not have happened.
Q You also understand that Mr. Lindsey's had these charges pending the entire time since you've had those children?
A Yes.
Q And it was his lawyer's advice not to contact them.
A I --
Q Not to contact anybody.
A I have no idea that. If you are sharing that with me, --
Q Yes, I'm sharing that with you.
A -- I guess that's a fact.
Q Did Ms. Wright ever say that she wasn't able was take care of the children because of her health?
A Pardon?

Q Did Ms. Wright ever say she was not able to take care of the children because of her health?

A Did she ever say that?

Q At the, uh --

A The hearing?

Q At the hearing.

A At the custody hearing?

Q Yes.

A Uh, no. You want to know what was said at the custody?

Q No.

A Okay.

Q I just want to know if she ever said -- let me take it a bit farther. Has she ever said that she felt that she would be unable to properly care for the children because of her health?

A The statement was that she felt because of her health the boys, being active and young as they were, the boys would probably be better situated with me.

Q Okay. Thank you. So just to kind of back up a little. Your involvement with your daughter was as a nonresident father?

A If that is your terminology, yes.

Q You were not in the home like many divorced couples?

A Yes.
Q Okay. You would provide financial support her?
A Yes.
Q Okay. Now you mentioned the thing about, I was kind of confused about the thing about she had to get rental car because of insurance?
A Yes.
Q Did Mr. Lindsey buy her a new car every year or do you know?
A To my knowledge, I don't know for sure.
Q Okay. But she told you that because it was no insurance on the car, they had no car to drive?
A She had no rental coverage on the car. The insurance was all in his name. And he would not get her a car to drive.
Q Okay. So the fact was there was no rental coverage --
A Correct.
Q -- for the car?
A Correct.
Q And he would provide her a car to drive?
A That they had in their driveway, another car.
Q Okay. Weren't all the cars that they owned in her name?
A I'm not sure of that.

Q That's all I have.

MR. GOWDY: I have nothing on redirect, Mr. Staggs.

THE COURT: You can step down.

MR. GOWDY: Your Honor, the State rest.

THE COURT: Ladies and gentlemen, we're going to take a lunch break now. It's going to be a little bit longer lunch break than usual. Your food has been ordered. It's my understanding that you will be taken back the hotel where your food will be served. We should have you back down here to resume in about two hours. So have a nice lunch. And we will see you then.

(WHEREUPON, the jury exits at approximately 12:51 p.m.)

THE COURT: All right. Y'all need to take anything up now before we break for lunch?

MR. BARTOSH: Well, I've got some motions, Your Honor. But they might take a while. Do you want to take them up now or do you want to wait until after lunch?

THE COURT: I'd rather do them now.

MR. BARTOSH: Okay. Your Honor, we would for a directed verdict as to the aggravating circumstance that the State is relying on in that no reasonable

juror could find that the State has proven all the elements of the aggravating circumstance beyond a reasonable doubt.

Your Honor, under Sawyer v. Whitley, the Supreme Court has said in order to avoid arbitrary and capricious impositions of a death sentence, the states have adopted narrowing factors to limit the class of offenders upon which the death penalty may be imposed. If the aggravating circumstance in the case is too broadly interpreted, it will not sufficiently narrow the class of persons eligible for the death penalty and would become potentially arbitrary and capricious and violate the Eight Amendment prohibition against cruel and unusual punishment.

In this case, they relied upon 16-3-23. That the offender by his act of murder knowingly created a great risk of death of more than one person in a public place by means of a weapon or a device which would normally be hazardous to the lives of more than one person. Now, what they must prove is first of all that there was a great risk of death, that there was a public place, and that the use of the device which would be hazardous to the lives of more than one person.

Now, we would argue, Your Honor, in the cases

that I have found in South Carolina where this aggravator has been relied on, I believe there are four of them. There is State versus Lockclair, State versus Rogers, State versus Ivy and State versus Fissora. Now, in each of those, Your Honor, the issue of whether or not the State had violated the Eighth Amendment with the aggravator of public place that they were talking about was never addressed except in Lockclair.

And I think that this case is distinguishable from Lockclair because in Lockclair, as I remember, there was more indiscriminate fire into a crowd. Whereas, here what we have is a small number of people, basically two children and two adults, in an automobile. Whereas, in Lockclair, you have a large number of people standing in the yard. And also according to the opinion, there were children that were on the road next door playing in the street. There was a large number of people.

I think the biggest, the biggest differential is the fact that there was more indiscriminate firing in Lockclair than there is here. Here, there is four shots. All four shots struck -- first of all, the weapon was a .38, a five shot .38 caliber pistol. There were four, five shots fired. Four shots struck

the victim. And the fifth shot struck Mr. Lindsey.

Now, where I have found some law, Georgia has the same aggravator. And it's the same language in the Georgia statute as in the South Carolina statute. In State v. Polk, the facts were that a drug store, there were two people in the drug store. He pulled the pistol out on aisle and grabbed the cash register. Then he put the two of them in the cooler.

And they waited in there for a while. They thought he left. They came out. He was still there. He struggles with one of the employees, shot him and then shot the other.

The Georgia Supreme Court in that case held that one of the aggravating circumstances found by the jury was that the defendant by his act of murder -- Your Honor, this is on page 14 -- armed robbery or kidnaping when he knowingly created a great risk of death to more than one person in a public place by means of a weapon or a device which would normally be hazardous to the lives of more than one person. As I said, that tracks the South Carolina statute.

THE COURT: Let me stop you right there. You have given me, I believe, more than you meant to give me.

MR. BARTOSH: I apologize, Your Honor.

THE COURT: There is what looks like an outline in

here that you probably didn't want to give me.

MR. BARTOSH: Okay. But the statutory aggravating circumstances, both of which much be satisfied. First the evidence that shows that the defendant by his act of murder knowingly created a great risk of death to more than one person in a public place. And second, the evidence must show that this great risk resulted from the use of the weapon or a device that is normally hazardous to the lives of more than one person.

It goes on to say that a pistol used in a public place may be hazardous to the lives of more than one person. But depending on how it is used, it does not necessarily create a great risk of death of more than one person. Great risk does not mean near possibility but likelihood or high probability. Firing a gun into a crowd can create a great risk of death to more than one person. Shooting someone from fairly close range does not by itself create a great risk of death to more than one person simply because others may be in the vicinity.

Your Honor, that is what I would say we have in this case. You had a, you had someone firing at a fairly short distance at one person. And so it has to, it can't just be a likelihood. It has to be

higher than that. And we would suggest that if the State is going to prove that the facts of this -- I also have an unpublished Fourth Circuit opinion, Your Honor, from Georgia.

In the case, they found an aggravating circumstance where a man knowingly created a very risky death to more than one person by means of a weapon, a butcher knife which would normally be hazardous to the lives of more than one person. This is 856 S. 2d. 187. And they go on to discuss that a butcher knife is not a weapon which would normally be hazardous to the lives of more than one person.

They cite some Georgia, I apologize, North Carolina cases. They say that the legislature intended this aggravating factor to be limited to those weapons for the devices which are indiscriminate in their hazardous power. Automatic weapons such as machine guns would fit that description. These weapons are normally hazardous to the lives of more than one person.

They cite a North Carolina case, the State versus Jones which is 351 S. E. 2d. 122. It's a 1986 case where they say a .38 caliber handgun is not a weapon normally dangerous to the lives of more than one person. So relying on these cases, Your Honor, we

would ask the Court to direct a verdict as to the aggravating circumstance.

MR. GOWDY: Your Honor, may it please the Court. Lockclair says for a number of propositions I would argue to the Court are submitted. Number one, it stands for the proposition that a firearm is a weapon capable of killing more than one person. I think that is clear. I think that the back parking lot of the Inman Police Station is clearly a public place which brings us to that third element about knowingly creating a great risk.

And I noted that Mr. Bartosh mentioned that these were close range shots. I couldn't help but also notice that he tried to shoot himself at point blank range and managed to miss. So this was further away than his attempt to shoot himself. The fact is, he did miss one of those four times. In a second, I'm going to get to the fact that even though he hit Nell, that doesn't foreclose the possibility of this aggravator being into place.

Lockclair says this, Your Honor, Lockclair put more than one person at the risk of danger because he attempted, attempted to fire the gun several times but the safety was on. That is South Carolina Law. He attempted to fire the gun but the safety was on.

The facts that play here were much more egregious than that. He knew there were children in the car. One leaned up to say hello. Celeste Nesbitt according to the evidence said the other one was asleep laying in the back. Tinted windows. He fired to times from the back of Nell head to the front. And then he walked around and fired two more times directly in the direction of two children.

The fact is one of those bullets missed and lodged in the trunk. One of those bullets, Your Honor, we saw from the x-ray went in one side of her skull and went out the other side and lodged in her skin but outside of the skull. Which doesn't foreclosed the possibility of a through and through injury. One of those bullets could have gone through her head and still hit the children.

But the fact is that one did miss. That is all that is necessary. I submit to you that even if none of them had miss, he created a risk. There is no requirement that these bystanders be injured. They were not injured in Lockclair. There is no requirement that the bystanders actually be hit by a bullet. He created a great risk of danger to two children.

It is not even get to the Benny Godfrey

testimony. Benny Godrey testified this defendant pointed the gun at him, at Officer Godfrey. It was a public place with a weapon capable of killing more than one person that presented a great risk. But for the fact that her head was laying either on the front, car seat or on her aunt's shoulder, we very well could have two homicides in this case. South Carolina is Carolina law is attempting to fire the gun with the safety on qualified in Locklair.

THE COURT: The facts of the Georgia case seem to me to be a good bit different. This case is pretty simple to me. The evidence is that on the two occasions that Mr. Lindsey apparently saw Ms. Nesbitt's car, he was unable to tell that Ms., that his wife was in there because of the tint in the windows. Once when he passed them and they were driving through Spartanburg to Inman. But more importantly as they stopped side-by-side on the street in Inman outside of the house of Mrs. Nesbitt's mother I believe she said.

They were close enough to have a conversation through the window. And yet Mr. Lindsey could not tell that Mrs. Lindsey was in the back seat because of the tinted windows. Nevertheless, he fired shots into the window from two different angles while the

vehicle was parked in a public place. And the second time around looking presumably to through the same window that he could not identify her through only minutes before. He fired shots in the direction of two children.

I have seen the bullet hole in the car, in the seat. The bullet hole is in the area that Kiera would have been sitting in. If she had decided in her -- none of us would know how to react to that situation. Certainly, a nine -- she was nine at the time, right?

MR. GOWDY: Yes, sir.

THE COURT: Certainly, a nine-year-old child is not going to have an ability to make a rational calculated decision as to how to best protect herself in the seconds that followed shots being fired into the head of the adult sitting next to her in the back seat. It is very possible that Kiera could have leaned the other way. She might could have leaned toward Nell for protection. And if she had done that, she would be dead. That bullet goes right through the space that she would have leaned into.

If she had not leaned away, from my view of the evidence she probably would have been hit. I've got absolutely no doubt that the facts in this case are

sufficient to go to the jury on the aggravating circumstance of creating a great risk of death in a public place using a weapon that is capable of producing death. I did not get the language, I did not quote the statute. But I have no doubt that that is sufficient. Motion is denied.

MR. BARTOSH: Thank you, Your Honor.

THE COURT: Anything further? All right. We'll be in recess until, we will say 2:30.

MR. BARTOSH: Okay.

THE COURT: I will certainly be here before 2:30. If you would just stay in touch with me about how you're coming and how much time you need, we would decide exactly when we will start. It will be some time in the 2:30 to a quarter of 3 range whenever I expect.

MR. BARTOSH: Thank you, Your Honor.

(WHEREUPON, a lunch recess was taken at approximately 1:13 p.m.)

(WHEREUPON, the Court resumed at approximately 3:03 p.m.)

THE COURT: My law clerk found a couple of cases that I think are very instructive on the question of what Mr. Mauldin did or not -- either did or did not do when we were viewing the vehicle.

MR. BARTOSH: Yes, sir.

THE COURT: In Ruby versus Anderson, 195 S.C. 422, 11 S.E. 2d. 860.

MR. BARTOSH: Yes, sir.

THE COURT: And Stone versus the City of Florence, 203 S.C. 522, 28 S.E. 2d. 409. That's 1943. But there's no reason that I know of why the law on the subject would have changed. So I give you those citations so that you can --

MR. BARTOSH: We have them, Your Honor.

THE COURT: You have them?

MR. BARTOSH: Yes, sir.

THE COURT: We'll deal with them when we need to.

MR. BARTOSH: Okay, sir.

THE COURT: Now, you have something you need me to take care of?

MR. BARTOSH: Yes, sir. Your Honor, our first witness will be Ms. Ann Howard.

THE COURT: Ms. Howard.

You don't need to swear her in right now.

I understand that you have some issues that you need for me to help you with regarding whether or not you can testify. So you have information within your control, information that you are aware of that came from potentially privileged conversations with either

you or members of the South Carolina Department of Mental Health and Mr. Lindsey?

MS. HOWARD: There is a state statute that says that I have to ask you to ask me to testify before I can.

THE COURT: Right. And Mr. Bartosh, I'm assuming that Mr. Lindsey would like for this young lady to testify about the things that she knows?

MR. BARTOSH: That's correct.

THE COURT: So the extent there is any kind of privilege, he's waiving it?

MR. BARTOSH: That's correct, Your Honor.

THE COURT: Ma'am, with that, I will order you to give the testimony that you can give in response to the questions that you will be asked today. Is that sufficient?

MS. HOWARD: Yes, sir.

THE COURT: All right. Thank you. You can take your seat. When the jury comes back in, he'll call you.

MR. BARTOSH: Thank you, Your Honor.

THE COURT: Okay. Are we ready?

MR. BARTOSH: Yes, sir.

THE COURT: Bring in the jury.

(WHEREUPON, the jury enters at approximately 3:11

p.m.)

MR. BARTOSH: Thank you, Your Honor. We will call Ann Howard.

ANN HOWARD

having first being duly sworn testified as follows:

DIRECT EXAMINATION

BY MR. BARTOSH:

Q You are Ann Howard?

A I am Ann Howard.

Q Where are you employed?

A I'm Spartanburg County Mental Health Center.

Q How long have you been employed there?

A I've been there since 1989.

Q What is your job title there?

A My job title is Special Services Coordinator which really does not say much.

Q Can you tell us what your duties are?

A My duties on varied. I have several jobs collectively. One of them is that I am a professional, mental health professional. My job basically is I have a case load. There are certain things that I am credentialed to do at Mental Health. And one of my jobs is to go to Spartanburg County Detention Center at least twice a month and see clients or potential clients or people who have asked to see someone from Mental Health.

Q Can you give us the benefit of your education?

A I have a diploma, Registered Nurse. I have a Bachelor of Science from Wofford College. I have a Masters in Education from the University of South Carolina in Columbia.

Q Can you tell us about the first time you saw Marion Lindsey?

A Yes, sir. May I refer to my notes?

Q Certainly.

A The first time I met Mr. Lindsey was on September 8, 2002. I was asked to see him. He presented suicidal. He was crying, depressed. He said he did not remember what had happened. All he could say was they said I did. He was very upset. He was very depressed. He told me that he heard voices. I thought that was enough evidence there that I thought he needed to come to Spartanburg Area Mental Health Center for further assessment and to be seen by a psychiatrist.

Q Okay. You have a diagnosis or an impression when you first saw him?

A When I first saw him, I knew he was depressed. I did what we call a deferred diagnosis. Which is just sort of, I did not feel like I had enough information. So we had a lot of rule out, but I did not give him a particular diagnosis at that time.

Q That was because you felt like you did not have enough information to make one?

A Right.

Q Did you see him at a later date at Mental Health?

A Yes. I saw him two days later and did about another hour assessment on him. And I got him in to see the psychiatrist.

Q At that time that you saw him the second time, had you made a diagnosis or did you have impression?

A The second time that I saw him was when I made that diagnosis, the deferred diagnosis.

Q Okay.

A First time, I did not make a diagnosis.

Q And he saw a psychiatrist?

A Yes, sir.

Q Who was that psychiatrist?

A Freeman Smith.

Q Do you have the benefit of Doctor Smith's notes?

MR. BARNETT: Your Honor, I'm going to object at this time. Basically she is looking at somebody else notes. And a lay witness should not be allowed to do that, to base their diagnosis off those notes.

THE COURT: The question is did she have the benefit of the notes. That would be a proper question. You may be a little ahead of yourself.

When he gets around to asking for her opinion, that is where you're wanting to object?

MR. BARNETT: Yes, sir.

THE COURT: Overruled at that time.

MR. BARTOSH: Thank you, Your Honor.

BY MR. BARTOSH:

Q You do not make any diagnosis or any prescription or anything. You're not allowed to write prescriptions?

A I do not write prescriptions. I am allowed to make a temporary diagnosis.

Q If you feel that it is appropriate, then you refer the person to a --

A A psychiatrist.

Q -- a psychiatrist. In this case, that's what you did?

A Yes, sir.

Q Did the doctor that you referred him to, did he make diagnosis?

A No, sir. He made an impression. He made it as an impression, not a diagnosis.

Q What was the impression?

MR. BARNETT: Your Honor, I would object at this time.

THE COURT: Sustained.

MR. BARTOSH: What was the objection? What was the basis of his objection?

THE COURT: Hearsay, lack of foundation for the qualifications of the expert.

MR. BARNETT: That's correct, Your Honor.

BY MR. BARTOSH:

Q Anyway, was Mr. Lindsey prescribed any medication?

A When I saw Mr. Lindsey the first time, he had been at Spartanburg Regional Medical Center. He was released on Celexa and Depakote.

Q Can you tell us what those drugs are?

A Celexa is an antidepressant. Depakote is a mood stabilizer.

Q And after, were there any other prescriptions ordered for him?

A When he saw Dr. Smith, Dr. Smith put him on an anti-psychotic.

Q Can you tell us what that drug was?

A Zyprexa.

Q That was an anti-psychotic drug?

A Yes, sir.

Q Have you seen Mr. Lindsey since that time?

A Yes, sir. I have seen him several times at the jail at since that time.

Q Is he still on those medications?

A No, sir. At some point, he was taken off of the Zyprexa and put on Abilify.

Q What kind of drug is that?

A Abilify is a different anti-psychotic, but it is still an anti-psychotic.

Q He is still receiving medication for being psychotic?

A My last records indicate that he was still being given the Celexa, Depakote and Abilify.

Q One is anti-psychotic. One is for depression. The other is a mood stabilizer.

A Right.

Q He is still receiving those?

A As far as I know.

Q That is all I have.

CROSS-EXAMINATION

BY MR. BARNETT:

Q Do you know what the word malingering means?

A Malingering?

Q Yes, ma'am.

A I think I do.

Q Can tell us what you think that means.

A Basically, it means to create circumstances to avoid other circumstances. I may not be saying that

exactly right.

Q So a person will create different circumstances that may not be true to cover for other circumstances?

A Wait a minute. Repeat that please.

Q Basically you're saying they are creating different circumstances that may not be true to cover other circumstances up, is that right?

A Basically. You may be creating symptoms, creating reasons to avoid something else.

Q Would that be to cover one's responsibility, making up different reasons to not accept responsibility?

A I am not sure. I am not sure.

Q Wouldn't malingering be the intentional production of false or exaggerated physical symptoms or psychological symptoms motivated by reasons to have those symptoms?

A Since you're reading from the DSM 40, yes, sir.

Q All you had was reasons that he gave to you, is that right?

A He?

Q Mr. Lindsey. That is in your information that is provided to me?

A I'm not sure that you what you are referring to.

Q Your notes and so forth that you took on him that intake interview with him.

A On the intake interview and on the follow-up assessment, I went on what he told me.

Q That was information like he told you he worked at BMW?

A Yes, sir.

Q You don't know if that's true or not?

A No, sir.

Q Also you have in your intake obsessions. Is that correct?

A Obsessions?

Q I don't know if you have a copy in your report with you or not.

A Can I look at that please.

Q Sure.

A (Reading.) I did check that. I am not sure why I checked that or what I was referring to. Sorry.

Q But obsessions would be if someone had an obsession with some thing, isn't that correct?

A It could be. It could be just thinking things. Thinking about things over and over.

Q You felt like he was thinking things over and over and over again in his mind.

A Obviously, something he said to me must have made me check that.

Q You also said something about homicidal. I don't

know if that's tendencies. I don't know what that is.

A He killed his wife. That is why I checked that.

Q He said he did not remember anything?

A He told --

Q I'm sorry. He did not remember anything or had a poor memory about anything?

A I'm not sure what you are referring to.

Q That night, he said he did not remember anything about the night that he shot and killed his wife?

A Right. He told me that he had no memory of shooting and killing his wife.

Q Did he remember anything from that night?

A I don't remember him being specific about what he did or did not remember.

Q Did you ask him about anything he did that day?

A Probably not.

Q Did he tell you about anything that he did that day?

A I'm sorry. I don't remember.

Q You put a note in here.

MR. BARNETT: May I approach the witness?

BY MR. BARNETT:

Q Is that your note, ma'am?

A Yes, sir.

Q If I am reading that right, it says seems logical

most of the time.

A He would talk about not remembering certain incidences. Then he would be logical about other circumstances. But that is when I would ask him about family about history of whatever.

Q You felt like he was being logical most of the time, I am assuming from that note?

A Yes.

Q That is when he was talking about family, not talking about that night?

A When he was talking about anything except that night. In our assessment, we ask a lot of questions about family history or other things. So, he would be logical about that.

Q You don't know if he told you the truth about all of this or not? You just had to take his word for it?

A Yes, sir.

MR. BARNETT: One moment, Your Honor, please. Thank you, ma'am.

THE COURT: Any redirect?

MR. BARTOSH: Your Honor, Yes, sir.

REDIRECT EXAMINATION

BY MR. BARTOSH:

Q Ms. Howard, did you consider malingering?

MR. BARNETT: Objection, Your Honor. That is

based on opinion. She is not qualified.

THE COURT: Did you consider it?

MR. BARTOSH: Yes, sir.

THE COURT: I'm asking her. I don't understand the question. Are you asking her to give an opinion on whether or not he was malingering?

MR. BARTOSH: Did she consider him to be malingering.

THE COURT: Your objection?

MR. BARNETT: Objection. She is not qualified as an expert on --

THE COURT: Wasn't that the same question you asked her?

MR. BARNETT: I asked her what malingering meant.

THE COURT: You asked her about checking malingering on some form, didn't you?

MR. BARTOSH: No, sir. I just asked her what the definition was and what was her understanding. I asked her about obsessions and about things like that that she marked on her report. I did not ask her about malingering. I did not ask her opinion on malingering.

THE COURT: I'm going to have to be reacquainted with what testimony this witness has given as foundation for her ability to give that opinion in

court. Do you want to do it outside the presence of the jury or you want to do it now?

MR. BARTOSH: We can do now.

BY MR. BARTOSH:

Q Ms. Howard, basically, you do a psychological assessment, is that right?

A Yes, sir.

Q As part of that psychological assessment, you determine whether or not you believe them to be malingering?

A Yes, sir.

Q Did you do that in Mr. Lindsey's case?

A I did.

MR. BARTOSH: Your Honor, I would object at this point. She has not been qualified as an expert in that field or any field concerning that area.

THE COURT: Sustained.

MR. BARTOSH: That is all I have.

THE COURT: You can step down, ma'am.

Let me see the lawyers for just a second please.

Ma'am, you can need to stay with us for just a few minutes.

THE WITNESS: I can do that.

– (WHEREFORE, a bench conference was held off of the record.)

THE COURT: Ladies and gentlemen, I going to ask you to step back in the jury room for just a second please.

(WHEREUPON, the jury exits at approximately 3:32 p.m.)

THE COURT: All right. As far as her qualifications, you basically got her to say that she is a mental health specialist, that she's got a college degree and that she has a Masters --

What's your Masters in?

THE WITNESS: Masters in Education.

THE COURT: Then you went straight into talking about what she did in this case. I don't think that's sufficient qualifications to get an opinion from her in whether or not this man meets a clinical, the elements for a clinical diagnosis of being a malingerer. So that's my ruling. If you want to --

MR. BARTOSH: No, sir.

THE COURT: -- explore any further foundation, that's fine. But it's my understanding you have a witness coming in a few minutes who can gave that diagnosis.

MR. BARTOSH: Yes, sir.

THE COURT: All right. I'm going to take a short break.

You are free to go, ma'am.

(WHEREUPON, a short recess was taken at approximately 3:34 p.m.)

(WHEREUPON, the Court resumed at approximately 3:40 p.m.)

THE COURT: All right.

MR. BARTOSH: If I could, Your Honor, sort of lay the foundation for what I think the hearing is about.

THE COURT: Where is Ms. Mitts?

Okay. Ma'am, we'll get to you in just a second. You can remain seated for a second.

MR. BARTOSH: Your Honor, when I arrived this morning, I went over to see Mr. Lindsey. He told me that he had a concern from some of the testimony that he heard yesterday that there was some information that was elicited in direct examination that he felt no one could have known other than information that he could have conveyed to us.

He believes that his -- what he's been doing is he's been asking a lady at the detention facility to copy certain documents for him. Some of them were his notes. Some were discovery materials and things like that. And she would copy them for him and then return it. He believes that the only way this information could have been obtained by the State was through

those documents, the copying of those documents.

Your Honor, I have explained to him that by giving her those documents to copy that he has waived any privilege that may exist although there was never privilege between him and Ms. Mitts. But there is no legal privilege between the two of them. I bring this to the Court's attention because he brought it to my attention.

THE COURT: Ms. Mitts, would you come up for a minute please and let me ask you a few questions.

MS. MITTS: Yes, sir.

(WHEREUPON, Rachel Mitts was duly sworn.)

THE COURT: You work over at the jail?

MS. MITTS: Yes, sir.

THE COURT: And over the last period of time, you've been doing some copying of notes that Mr. Lindsey has made?

MS. MITTS: Yes, sir.

THE COURT: How many times have you done that?

MS. MITTS: I can't specifically say. I would say three, four, five times. Someplace along in there.

THE COURT: Have you ever done anything other than just take what he gave you and copy it and give the originals and the copies back to him?

MS. MITTS: No, sir.

THE COURT: Have you ever shown those notes or the copies of those notes to anybody?

MS. MITTS: No, sir.

THE COURT: Have you ever left them sitting around where maybe somebody could have looked at them?

MS. MITTS: No, sir. That's confidential.

THE COURT: And you treated them as confidential?

MS. MITTS: Yes, sir.

THE COURT: All right. So as far as you know, is there any way that anybody could have known what was in those notes except for Mr. Lindsey?

MS. MITTS: No, sir.

THE COURT: Have you ever read the notes yourself?

MS. MITTS: I glanced over them to make sure that they are legal because that's all we make copies of.

THE COURT: I see.

MS. MITTS: We don't make personal copies.

THE COURT: You just looked at it to make sure that it related to his case?

MS. MITTS: I just glanced to make sure that they were related to his case. And that's all.

THE COURT: Okay. Thank you. Just hold right there for just a minute.

Any follow up you want me to ask?

MR. BARTOSH: No, sir.

THE COURT: Thank you for coming, Ms. Mitts, you are free to go.

MS. MITTS: Thank you.

THE COURT: Sorry to have interrupted your Sunday.

MS. MITTS: That's all right.

THE COURT: Ma'am, let me get you to tell me your full name and spell your last name.

MS. MITTS: It's Rachel Mitts, Mitts.

THE COURT: Okay. Great. Thank you.

Bring in the jury please.

(WHEREUPON, the jury enters at approximately 3:42 p.m.)

MR. BARTOSH: We call Dr. Margaret Melikian.

MARGARET MELIKIAN

having first being duly sworn testified as follows:

DIRECT EXAMINATION

BY MR. BARTOSH:

Q Would you state your name and spell it please, ma'am?

A My name is Margaret Melikian. M-e-l-i-k-i-a-n.

Q Okay. And you are a psychiatrist?

A I am a forensic psychiatrist.

Q Okay. Could you give us the benefit of your education?

A I received a Bachelor of Science in Electrical