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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CALHOUN COUNTY
Court of Common Pleas
Post Conviction Relief

Honorable Robin B. Stilwell, Circuit Court Judge

Appellate Case No. 2019-000528

David Jamar Benjamin, Petitioner,

vs.

State of South Carolina Respondent.

APPENDIX
VOLUME II OF III

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INDEX

Trial Transcript.....1

Arrest Warrant, Indictments and Sentencing Sheets.....721

Brief of Appellant.....735

Brief of Respondent.....783

Opinion, South Carolina Court of Appeals.....838

Petition for Rehearing.....841

Order Denying Petition.....845

Remittitur.....847

Application for Post Conviction Relief.....848

Return.....855

Discovery Order.....862

Amendment to Application for Post Conviction Relief.....867

PCR Evidentiary Hearing Transcript.....871

Order of Dismissal.....1081

Rule 59, SCRCP, Motion.....1107

Order Denying Motion.....1142

Q. All right. Now, how about items 57, 58 and 59?

And let me back up real quick. Those .45 caliber -- describe just some -- I probably should have asked you this early on. We are talking about different calibers; a .40 caliber, a .380, a .32, a .45, and ultimately we are talking about 9-millimeters also. What do those numbers represent?

A. A .45 auto caliber is a caliber designation and the bullets would be roughly .45 or .451 inches in diameter at the base. So there is no way a .45 could be fired in a .40, because it's so much larger, relatively speaking, than the .40. A .45 is so large that it cannot be fired in any of the firings that were submitted in this case.

Q. So a .45 is a fairly large handgun?

A. Yes, sir.

Q. Okay. And then a .40, that represents --

A. A .40 is another caliber designation. It's 40 S&W, Smith & Wesson. It's also larger than a .380 and a .32.

So the .40's could not have been fired in either the revolver or State's Exhibit 36, the Highpoint pistol.

And it's actually too small to be fired in the firearm that fired State's Exhibit 42 through 46.

Q. All right. And how about a 9-millimeter? We are going to talk about them in a few minutes. Where does that kind of fall in the size range?

A. It's a nominal .38 caliber, so it's in line with a .380

auto, which is the State's Exhibit 36 pistol. However, it is slightly larger and longer.

Q. Okay. Thank you.

I think we were at State's Exhibit 57 through 59?

A. Yes, sir. State's Exhibit 59, 58 and 57 were three fired bullets which I have previously examined.

Q. Okay. What are they consistent with, as far as caliber?

A. They are consistent with being a .45 auto or a .45 gap caliber cartridges.

Q. And the three of them, State's 47 -- I'm sorry, 57, 58 and 59, are those all consistent with the type of bullets which would have come out of those five shell casings that you have up there?

A. Yes, sir.

Q. All right. And what can you tell us about those three, 57, 58 and 59, with regards to each other?

A. State's Exhibit 57 and 58 were fired by the same firearm.

And State's Exhibit 59 was inconclusive with 57 and 58, based on damage. You can't really see it, but the bullet is heavily damaged. The jacket was abraded and gouged.

Q. Let me ask you if a bullet had hit a vehicle -- had hit a vehicle door, penetrated and hit the door post, would that cause the kind of damage that you see in State's Exhibit --

which one was that?
A. 59.
Q. 59?
A. Possibly, yes, sir, that could be an explanation.
Q. All right. So, therefore -- so the other two were fired by the same gun; and that one, due to the damage to it, you can't tell?
A. Right.
Q. But it's the same size caliber?
A. Right, it's the similar general rifling characteristics; the same caliber, same bullet, composition, although that doesn't mean fired by, but there was enough there to make me say inconclusive answer.
Q. Okay. Nothing obviously then that excludes it from --
A. No, sir.
Q. -- comparing it to those other two?
A. No.
Q. All right. Let me show you State's Exhibits 38 and 39.
A. State's Exhibits 38 and 39 are two fired .32 S&W long caliber cartridge cases.
Q. Did you do anything with those two casings?
A. Other than document that I had them, no, sir. SLED evidence submission guidelines state that if cartridge cases are removed from the cylinder of a revolver or to have to be pried out of the cylinder of a pistol, we do not have to

microscopically examine them. So since these were said to have been removed from the cylinder of State's Exhibit 37, based on the log-in sheets, I did not microscopically compare them.

Q. I'm showing you State's Exhibit No. 16.

So those would be consistent with those two casings that are depicted in this picture of that revolver?

A. Yes, sir.

Q. Okay. Obviously those are the right caliber and size to have been fired by that revolver, is that correct?

A. Yes, sir.

Q. And, lastly, let me show you State's Exhibit 51 through 55.

A. State's Exhibits 51 through 55 are five fired 9-millimeter Luger caliber cartridge cases which I have previously examined.

Q. Okay. And, once again, just like the .45 caliber casings and bullets, you did not have a 9-millimeter that's ever been submitted, is that correct?

A. Correct.

Q. So you were able then to compare those five 9-millimeter casings with each other?

A. Yes, sir. They were all fired by the same firearm.

Q. Okay. And, yet again, as I have kind of asked you with some of the others, is there any way that those casings were

fired by any of those three guns that you have up there?
A. No, sir.
I also compared them versus test fires from the three firearms, even though knowing that a 9 won't fit into a .32 Smith & Wesson long, I did microscopically compare them, and I compared them versus the .45 auto caliber cartridge cases and these are a separate gun.
Q. They couldn't have been fired. I know you had made reference earlier to a 9-millimeter and a .380 being similar in size, but they were definitely not fired by the .380?
A. No, sir, the class characteristics on State's Exhibits 51 through 55 make me think they were fired either by a Glock or an early Smith & Wesson Sigma brand pistol.
Q. Okay. And those envelopes all reference then I believe being found I think either near Lawton, an oak tree, or something of that, is that correct?
A. Leafs near oak tree and Lawton. Near Lawton and oak tree, yes, sir.
MR. SORENSON: Beg the court's indulgence.
THE COURT: Okay.
(Off the record)
(Back on the record)
BY MR. SORENSON:
Q. Thank you, Agent Green. Please answer any questions Mr. Thomas has.

THE COURT: Cross examination?

MR. THOMAS: Thank you, judge.

THE COURT: All right.

CROSS EXAMINATION BY MR. THOMAS:

Q. Agent, I had a little difficulty yesterday managing my numbers from your report and from State's, so please bear with me.

A. Yes, sir.

Q. Thank you.

State's item 47, 48 and 49?

A. Yes.

Q. Could you tell if those items came from the XD .40 pistol?

A. I'm sorry, you have to refresh my memory as to which ones those were.

Q. Good, good, good, because they throw me off too, so let me tell you.

There are three fired .40 S&W caliber cartridge cases?

A. Yes, sir, they were all fired by the same firearm, but they were inconclusive with this State's Exhibit 34.

Q. So they could have been fired from State's 34, or another pistol?

A. Yes, sir.

Q. State's 51 through 55, the 9-millimeter Luger cartridges, were they fired from the same firearm?

A. They were all fired by the same firearm, yes, sir.
Q. Okay. State's 50, one fired bullet. Was that fired from a .40 caliber Smith & Wesson, or a 10-millimeter?
A. Which -- can I see the packaging again real quick --
Q. Sure.
A. -- because I didn't write down which one it is.
Q. Sure.
A. It could have been fired out of a 10-millimeter, yes, sir.

A .40 Smith & Wesson and 10-millimeter are the same nominal caliber. You find some of the same bullets loaded in cartridge cases or -- there is cartridge cases of a different caliber, so it could be a .40 or a 10.

Q. It could be. Okay. Thank you.

State's Exhibit 41, an unfired .380 cartridge. Is that the typical cartridge that you would find in the item 32 pistol, a .380 automatic?
A. Yes, sir.
Q. I'm sorry?
A. State's Exhibit 30 -- is that 32 or 36? It looks like a 6.
Q. That's a 6?
A. Yes, sir, SLED item 32.
Q. Okay.
A. But to answer your question, yes, sir, that's the

typical caliber cartridge for that pistol.

Q. Okay. State's items -- these are the .45 caliber fired, so I guess they are 42 through 46, is that correct?

Can you tell us with scientific certainty that these -- when these particular shells were fired?

A. No, sir.

Q. Can you pinpoint the age of any fired shell casing?

A. No, sir.

Q. You can't?

A. No, sir.

Q. But you do believe that those came from the same .45 automatic?

A. They were fired by the same firearm, yes, sir.

Q. Okay. State's item 37 is a .32 Smith & Wesson revolver, is that correct?

A. State's Exhibit 37, yes, sir.

Q. Thank you.

State 57, 58 and 59, your items 33 through 35?

A. Yes, sir.

Q. Do you believe they were .45 auto cartridges?

A. Yes, sir.

Q. Were they suitable for one specific firearm, or could it have been more than one?

A. It could have been two. 34 and 35 -- I'm sorry, SLED

items 34 and 35, I don't recall the State's Exhibit No..

Q. That could have been another?

A. There is --

Q. Okay.

A. There is one, if not two, firearms in those .45 bullets.

Q. Okay. And then State's 33, your item 38.

A. Yes, sir.

Q. Was that fired from a .40 caliber or a 10-millimeter?

A. It could have been a 10 or a .40.

Q. It could have been a 10 or a .40?

A. Yes, sir.

Since -- if -- I did not have a gun to compare it -- if I did not have a firearm submitted to compare it against, I would run a GRC list, which would give a list of -- let's say, in this instance I would run .40 or 10-millimeter. And if .40 and 10 showed up, I would say it was most consistent with .40 and/or 10 and give a list of both firearms that could have fired it.

However, since I had a firearm submitted in this case, I compared it against that with an inconclusive result, so I didn't feel the need to give them a list of guns based on that.

Q. But it does open the possibility of additional firearms, is that correct?

A. Yes, sir.
Q. So if I'm correct, we can look over -- we have a .380 automatic?
A. Yes, sir.
Q. We have a .32 revolver?
A. Yes, sir.
Q. We have a .40 caliber --
A. Yes, sir.
Q. -- automatic.
We have a possible 10-millimeter?
A. Based on the bullets, yes, sir.
Q. We have a possible .45 caliber?
A. Well, yes, sir, we do have actually one based on the cartridge case.
Q. Okay. Thank you.
Of those .45 caliber cartridges, how many different firearm manufacturers could they have come from?
A. A lot.
Q. A lot?
A. I don't know the exact number, but a lot.
Q. Okay, but it could have come from a lot.
A. You asked about the cartridges cases, correct, not the bullets?
Q. That's correct. That's correct.
The three fired .45 caliber bullets, though, I believe

we touched on this, 57, 59 and 59?

A. Yes, sir.

Q. You don't -- you can't tell if they were from that same .45 or from a different firearm?

A. Correct.

Q. I'm having trouble counting. I'm not a math guy. I'm a talking guy.

Is that eight possible firearms, or is it nine?

A. I think it's nine.

Q. You think it's nine.

Thank you.

My last couple, they are real brief, though. They just pertaining to your expertise. What's the bullet diameter of a .40 caliber?

A. .4 0.

Q. .4. Is that four-tenths of an inch?

A. Yes, sir.

Q. Okay. Of a .45.

A. .4 5. .4 5 1.

Q. And I know we get funny when we get metric, right?

What's a 9-millimeter?

A. It's 9 X 19, but it's actually .3 5 5 .

Q. And a .380?

A. .3 5 5 .

Q. .3 5 5?

A. Yes, sir.
Q. Thank you.
MR. THOMAS: No more questions.
THE COURT: Redirect?
MR. SORENSON: Yes, Your Honor, just a couple of things.
THE COURT: All right.
REDIRECT EXAMINATION BY MR. SORENSON:
Q. I guess really the main thing I wanted to ask you about, Mr. Thomas had asked you about the two bullets that you said were either .40 caliber bullets or they could have been a 10-millimeter bullets?
A. Yes, sir.
Q. They are basically the same size bullet --
A. Right.
Q. -- for the most part.
A 10-millimeter, would that be a semiautomatic or a revolver?
A. I have never seen a 10-millimeter revolver. There may be some out there that I'm not aware of, but mostly it's a semiautomatic pistol.
Q. So, therefore, if somebody had fired a 10-millimeter pistol, to have fired a 10-millimeter bullet, would you expect to find a 10-millimeter shell casing?
A. You would.

Q. Okay. And there were no 10-millimeter shell casings presented to you, is that correct?

A. No, sir.

Q. Thank you.

MR. SORENSON: That's all.

MR. THOMAS: Nothing further, Your Honor.

THE COURT: And he is free to leave?

MR. THOMAS: No objection.

THE COURT: All right. Very well. You are free to go.

You may call your next witness, please.

MR. SORENSON: May we approach?

THE COURT: You may.

(Whereupon, the lawyers approached the bench for an off-the-record discussion)

THE COURT: I know y'all are ready for a break, but I'm going to give you a larger break.

Ladies and gentlemen, the reason we were conferring is that -- really and truly a trial is a little bit like putting on a Broadway play, or something like that, that this orchestration of having the witnesses come. Some come from far off, and so I'm going to give you a break now for your lunch. It's going to be a little bit longer, but I'm going to ask y'all to be back here at a quarter to one, so it's going to be a little bit longer. We have got some

things that we can do that will speed the trial up, because there is some more that we can do to do that and we are going to do that with you all away. There is no need to have you chill here when you can go about your business to go get lunch. You can cook lunch, if you will have enough time. So quarter to one. At 12:45 I'm going to ask you to be back in your jury room ready to continue.

Now, you know it. Do not discuss this matter or -- y'all can say it with me. Do not discuss this matter or allow anyone to discuss it with you. Don't read anything, listen to anything about this matter; radio television, newspaper, Internet. You must receive all of the information from which you will make up your mind here in court while court is in session.

Ladies and gentlemen, have a good lunch. I'll see you at 12:45, or a quarter to one, however.

Leave the notebooks in your seat. We will take care good of them while you are gone.

(The following takes place outside the presence of the jury panel)

THE COURT: All right. Now, I know that we are awaiting our witness at one o'clock.

MR. SORENSON: Yes.

THE COURT: And with your permission, even though I know that we have that -- as I understand it -- thank you

so much. As I understand it, that is the concluding witness for the State?

MR. SORENSON: Yes, ma'am.

THE COURT: Very well.

And Mr. Thomas, do you mind if I go ahead and just talk with your client with regards to his right to testify? That way he could be thinking about it. Do you mind?

MR. THOMAS: Yes, ma'am, please do.

THE COURT: I'm not going to ask him to make a decision now. We are just going to talk about it right now, okay? And that way you are going to have some time that you can be speaking with him. I should say continuing to speak with him, because I know that you have been talking to him about that, but at least you will be able to do that with my instruction at this point, and I'll do that now with your permission. And as I understand it, that's okay with you?

MR. THOMAS: Yes, ma'am, that's fine.

THE COURT: Very well.

And I'm just going to ask you to stand for me, please, and raise your right hand.

And you are David Benjamin?

THE DEFENDANT: Yes, ma'am.

THE COURT: You are still David Benjamin?

THE DEFENDANT: Yes, ma'am.

THE COURT: All right.

DAVID BENJAMIN, having been first duly sworn, testified as follows:

THE COURT: And that's only because -- thank you so much. Put your hand down and you can be seated.

Mr. Benjamin, and that's just -- I put you under oath because I'm going to ask you very, very few questions basically do you understand what I'm saying, because I want you to understand what I'm going to be talking to you about, okay? And that's the only reason I placed you under oath.

Now, Mr. Benjamin, you know, just so you and I are clear with one another, there is an additional witness that is going to be called by the State and then the State is going to rest and then we will have the motions, okay? And so we are a little bit away from your time that for you to have an opportunity to present a defense. So it is a little bit way away, but your lawyer has agreed to let me talk to you about your right to testify and your right not to testify. And I'm really appreciative of him doing that.

And the reason for that, Mr. Benjamin, is that I like to do that, to have this exchange with folks, and then they have some time to be sure that their decision is made with all the information and possibly people that they want to talk to. So that if I do this and have this exchange with folks and then they immediately have to make a decision, I'm always a little less comfortable, although

sometimes it happens that way. I always like it when I can actually have this exchange with folks and then they have got some time to be absolutely certain about their decision. So I'm sort of -- I'm really delighted that it's worked out this way, to be honest with you, because you will have several hours to be able to continue talking to Mr. Thomas, which I know that you will. If you need to talk to family members, it would be some time that we can certainly afford for you to do that. And I'm -- it's a good thing that it's happened this way, because it gives you some additional time to be considering whether you want to testify or not to testify, with the benefit of you and I having had an exchange about that, so I think that's a good thing.

And so I would tell you that you are about to in the next little bit to reach the point in this trial when you will be able to present a defense. And then it will be up to you and it will be your decision, and only your decision, whether you wish to testify or whether you do not wish to testify. And so in a minute I'm going to talk to you about that.

One of the things that I want you to be aware of is that I want you to understand everything that we are talking about. And if you happen not to understand what I'm saying to you, what I want you to do is I want you to let me know that, because there are many ways to explain any one

thing and it is very important that you understand what I'm going to be talking to you about.

In fact, just to assist me and that I don't leave anything out, I have an outline which is I'm doing now. I'm looking for that outline, because I want to be sure that I go over everything that I want to go over with you, and I've got this outline, so bear with me just a moment.

Now, the first thing I want you to be sure that you understand, Mr. Benjamin, is that I want you to be sure that you understand that it is very important that you understand everything that we are going to be talking about. Do you understand that?

THE DEFENDANT: Yes, ma'am.

THE COURT: And do you understand that I want you to ask me questions about what we are going to be talking about with Mr. Thomas, because I want to be -- I want you to be absolutely certain that you understand everything that we are going to be taking about, all right?

THE DEFENDANT: Yes, ma'am.

THE COURT: All right. Now, I would begin by telling you that in your defense, when we reach that point in your trial, assuming we reach that point in this trial, because Mr. Thomas is going to make some motions, so I'm going assume that for at this moment. Otherwise, I wouldn't be -- we wouldn't be having this discussion, but I'm going

to make that assumption. Having made that assumption, I want you to know I don't know what I'm going to rule at this point, okay? So I want you to know that, but what I want you to know is two things. You have the right to testify. You have the right not to testify.

You have the right to claim the protections given to you by the Fifth Amendment to the Constitution of the United States and the Fifth Amendment of the South Carolina Constitution. It's in both Constitutions, the Fifth Amendment. And this Amendment states, in part, no person shall be compelled in any criminal case, no matter how serious it is, to give testimony, to be a witness against himself, and that's what the applicable part of the Fifth Amendment says. And this means that you cannot be required to testify in this case. You have the right to testify on your own behalf. However, no one can make you testify. This is a personal right and no one can waive this right except you.

And what I'm telling you, Mr. Benjamin, is the right to testify or the right not to testify belongs to you. It is your right and this is the decision that you must make. It belongs to you completely.

And I want to talk about really both sides of that. Obviously the Fifth Amendment gives you the right not to testify, if that is your choice.

If you choose to testify, you have that right as well. And I'm going to be talking about your right to testify and what happens when you testify, but I want to premise my remarks by just telling that you this is just so you are informed. It isn't in any way to have any impact on your decision or certainly too chill you, keep you from doing something that you want to do. It's just to give you information. Do you understand what I'm saying?

THE DEFENDANT: Yes, ma'am.

THE COURT: All right. And this is a big important part of if you have any questions I want you to ask me okay, okay?

If you decide to testify, you are subject to the same rules that govern other witnesses and you may be examined and cross-examined on any relevant issue in this case.

In addition, if you have any convictions -- now, not charges, but convictions. If you have any convictions involving dishonesty, and those are convictions. Perjury is the best one, because if you got a conviction for perjury, that means that you are under oath and you told a lie, and that clearly would be a conviction for dishonesty.

Under South Carolina law, larceny, stealing is considered to be a crime of dishonesty, just for your information. Those are just examples.

But to go back, if you have any convictions involving dishonesty, or false statement, or for crimes punishable by imprisonment for more than one year and this court determines that the probative value of admitting this evidence outweighs its prejudicial effect to you, then the solicitor will be able to introduce your record to attack your credibility.

I want to talk to you just a minute about this. When -- under our rules of evidence, when we consider whether or not someone's prior record can be used for cross-examination with a regular witness, the question gets asked is whether or not the prejudicial effect outweighs the probative value. What that means is whether or not the fact that the jury knows about a conviction, whether or not that prejudicial effect overcomes the probative value. That's any other garden variety witness.

When you are talking about a defendant, it's reversed under our Rules of Evidence, because it is presumed to be prejudicial, any kind of conviction. I don't know if you have any convictions or not. I really don't. Nobody has told me, but when they are talking about a defendant in a case, the law presumes it's going to be prejudicial, because you are a defendant, and that makes perfect sense. So the law says the analysis is reversed. The judge is supposed to presume it's prejudicial to the defendant. And

so the probative value of whatever that conviction might be has got to -- has got to substantiate -- overcome that prejudicial effect before it's admissible against a defendant. It's switched, if you will. Just any old witness, it's the other way, does the prejudicial effect overcome the probative value? When we are talking about a defendant, it's the other way. We presume it's prejudicial. So does the probative value overcome the prejudicial effect. Okay. Does that make sense?

THE DEFENDANT: Yes, ma'am.

THE COURT: Now, there is another piece of it and we're going to talk about that.

Even if the court makes -- and stay with me. Even if the determination is made that the probative value overcomes the prejudicial effect, it, it being the cross-examination with regard to a prior conviction, is only to be considered by the jury, is only to be considered by the jury on the issue of credibility only.

And what happens when a defendant chooses to testify and that balancing test is done by the judge and the judge allows that cross-examination on that conviction, then the judge turns to the jury and tells the jury ladies and gentlemen, you can only consider this prior conviction on the issue of credibility and that's it, on whether or not the defendant's testimony is credible, and that's the only

way you can consider this particular conviction. Do you understand that?

THE DEFENDANT: Yes, ma'am.

THE COURT: And the reason is is that the only relevance it is has is we don't believe, we don't believe in the kind of evidence that if somebody has been convicted of a crime, that unless there are very special rules that don't have anything to do with what we are talking about, we don't believe that you can admit evidence of prior crimes to say to a jury well, he did it. He did this crime on this occasion, they must have done it on this occasion. We don't believe in that in American under our system of justice. We don't.

Now, there are some limited exceptions to that that don't apply here, okay? For example, burglary. We are not talking about burglary. And what I'm specifically talking about there is some burglaries that will enhance a burglary to be a burglary in the first degree. Well, we are not talking about that here at all, so that's not going to have any role. Do you understand what I'm saying?

THE DEFENDANT: Yes, ma'am.

THE COURT: I don't want to confuse you. I do want you to have the information.

So, now, that's so when I tell you if you have any convictions involving dishonesty or false statement or for

crimes punishable by imprisonment for more than a year and this court determines that the probative value, that the probative value outweighs the prejudicial effect, that's what I'm talking about, to you, the solicitor will be able to introduce your record to attack your credibility. That's why I went into all that explanation. This is a little bit shorter and I think needs to be a little bit more, so that's why I have gone into that with a little bit more explanation.

Do you have any -- this is kind of complicated. I can't tell you how long I spent in law school trying to learn it, but does this make sense to you?

THE DEFENDANT: Yes, ma'am.

THE COURT: Okay. I will pause right here if you have any questions of me or Mr. Thomas about this particular issue, because it's important and complicated.

THE WITNESS: I understand.

THE COURT: You got it?

THE WITNESS: Yes, ma'am.

THE COURT: All right. Now, if you decide to testify, this decision on your part must be freely, voluntarily and intelligently made with the knowledge of the protections given to you by the Fifth Amendment and the consequences of your decision to testify.

In other words, what that means is you just got to

be knowledgeable. You got to know the pros and the cons of testifying and the pro and cons of not testifying so that you, Mr. Benjamin, are very informed and you can make an intelligent decision.

Now, here is what I want to tell you. Again, I'm just telling you this for your information, not to influence your decision one way or the other.

Now, if you decided not to testify, of course, you have that right under the Fifth Amendment, this is what happens, and I'm just telling you because this is what I do. I tell the jurors -- I'm pretty strong with that. I instruct the jurors because I'm real serious about them following this instruction. I instruct the jurors that they cannot give the fact that you did not testify any consideration whatsoever, and I pause and I make it real strong, and I tell them you cannot, you cannot give any consideration whatsoever, and I do it like that. I do it strongly. And there is to be absolutely no prejudice whatsoever, and I do it strong like that, to the defendant when I'm talking to them. I'm just telling you that's what I do with the jury, and I tell the jury that there can be absolutely no prejudice to you because you chose not to testify, because that's a matter that is left entirely up to you. And I tell the jury that you are entitled to your Fifth Amendment protections. And I tell this jury that they

cannot even discuss the fact that you didn't testify. They can't even talk about it in the jury room, and I actually tell them that during the final instruction. That's not a matter to be considered by them on the decision of whether you are guilty or not guilty, because -- and I go into it that that is your right, and that the burden is and remains on the State of South Carolina to prove guilt beyond a reasonable doubt and you don't have to prove anything. You don't have the burden of proof. And posing that, they are not to consider the fact that you chose not to testify or you did not testify. Sometimes it comes one way and sometimes it comes out the other, but that is not a matter for them to consider, the fact that they can't even talk about it in the jury room, and that's my I instruction on that as well.

Now, the reason that I'm telling you all of this, again, is because obviously I want you to have both sides.

Now, I wanted you to know that this decision, whether you choose to testify or whether you choose not to testify, that that is your decision. It is only your decision. It is your decision in its entirety.

It is important that you talk with Mr. Thomas about that. I know that you have been talking to him about that. It's important that you continue to keep a dialogue about that.

You know, you should talk to your family, or friends, or anyone whose judgment you have a lot of faith in, whose judgment you trust, if you will, but you have to know, you have to know, Mr. Benjamin, that you consider what your lawyer has to say, what people that you trust have to say on this issue, but you have to know that at the end of the day it's your decision, and it is only your decision, and it is your decision in its entirety. And the reason for that, Mr. Benjamin, the reason that is must be that way is because this is at the end of the day your case. It is your freedom. It is your case. And, therefore, it is you that must ultimately make the decision.

Now, do you understand what I had to explain to you?

THE DEFENDANT: Yes, ma'am.

THE COURT: Okay. Do you have any questions about what I just explained to you?

THE DEFENDANT: No, ma'am.

THE COURT: All right. And Mr. Benjamin, not now, but at some point I will ask whether you wish to testify or not to testify. Now is not the time for you to tell me what your decision is. You have got plenty more time. You got much more time, many more hours before you must make that determination, but I will just ask you at some point.

And I urge you as you continue the next hours to

continue that conversation with Mr. Thomas.

If you need to talk to family or dear friends whose judgment that you trust, you let Mr. Thomas know and we will see if we can't arrange for you to have that continued conversation with them, okay?

THE DEFENDANT: Yes, ma'am.

THE COURT: All right. Any exceptions or objections to my colloquy with Mr. Benjamin, from the State?

MR. SORENSON: No, Your Honor.

THE COURT: All right. Mr. Thomas, anything further you need me to discuss with him about this issue at this time?

MR. THOMAS: No, ma'am, not at this time.

THE COURT: Very well. All right.

Now, counsel, here is what I'm going to do. Ann is in the back and I know she's been working on the charge. If you have any special matters that you want to give me, pass those forward now and I'll be looking at them.

What I'm going to do is I'm going to tell y'all go on and get you something to eat, or whatever, and then the jury is going to be back at a quarter -- what did I tell them, a quarter to one? I would like to see y'all about 12:30. About 12:30. That gives you some time to get a little something to eat. 12:30 and we are going to have an informal conference, okay.

MR. SORENSON: I've got somebody bringing mine. I have got a couple things in there that should be here momentarily.

THE COURT: Okay.

(Whereupon, proceedings were recessed)

(Whereupon, proceedings were reconvened)

THE COURT: Anything before we bring the jury out?

MR. SORENSON: No.

THE COURT: From the defense?

MR. THOMAS: No.

THE COURT: Wonderful. Let's have a jury, please.

(The following takes place in the presence of the jury panel)

THE COURT: All right. Ladies and gentlemen, at this time we will continue with the State's case.

Would you please call your next witness.

MR. LUPTON: Your Honor, the State calls Dr. Janice Ross.

THE CLERK: Dr. Ross, raise your right hand.

DR. JANICE ROSS, having been first duly sworn, testified as follows:

THE CLERK: Please have a seat.

If you will, please state your full name for the record.

THE WITNESS: Janice Edwards Ross.

THE CLERK: Thank you.

THE COURT: Your witness.

DIRECT EXAMINATION BY MR. LUPTON:

Q. Can you explain to the jury what it is that you do?

A. I'm a forensic pathologist in Newberry, South Carolina.

Q. What does that profession mean?

A. Well, to back up to, I have been through -- I went to the University of South Carolina and got my Bachelors of Science Degree, and then went and got my MD, Doctor of Medicine, from Upstate Medical Center in Syracuse, New York, where I also did training in pathology.

Pathology is the study of disease, where we are trained to look at tissue and use the laboratory work to diagnose diseases. We are also trained to do an autopsy.

A forensic pathologist, furthermore, does the forensic autopsy. The word forensic means legal, so we use our pathology training to work with legal matters, such as homicides, suicides, accidents, rapes, and that kind of thing.

So as a forensic pathologist in South Carolina, we do autopsies for the coroners when they authorize and desire and need an autopsy on a deceased person.

Q. So you are a medical doctor?

A. Yes.

Q. And with a specialty that involves essentially doing

autopsies to determine cause of death?
A. Yes.
Q. And have you had any specialized training for that beyond medical school?
A. Yes, the training in forensic pathology through medical examiners offices.
Q. And have you ever been qualified as an expert in the field of forensic pathology before?
A. Yes.
Q. Approximately how many times?
A. In South Carolina, over eighty times.
Q. And, roughly speaking, how many autopsies have you done?
A. Over six hundred --
MR. LUPTON: Your Honor --
A. Six thousand, I'm sorry.
MR. LUPTON: Your Honor, at this time we would move to qualify this witness as an expert in the field of forensic pathology.
MR. THOMAS: No objection.
THE COURT: Very well, she's so qualified.
BY MR. LUPTON:
Q. All right. Were you employed as a forensic pathologist back in September of 2011?
A. Yes.

Q. And in the course of that employment did you perform an autopsy on the victim in this case, Mr. Dominique Lawton?
A. Yes, I did.
Q. And I believe you had a report that you generated from that, is that correct?
A. Yes.
Q. And do you have that with you?
A. Yes, I do.
Q. Now, based on the autopsy, what were you able to determine as the cause of death?
A. We identified a gunshot wound that went through the head and lacerated the brain.
Q. And about where was that gunshot wound on the victim?
A. The entrance wound was in the left forehead, just above the eyebrow, and it went pretty much straight back and exited maybe a little bit to the left. It went backwards and to the left and exited the left side of the head.
Q. So it went essentially straight back, but slightly left?
A. Yes.
Q. So I guess from that it would have been obviously an entrance wound in the front of the head?
A. Correct.
Q. So the head, at least, would have had to have been facing the gun that fired the bullet?

A. Exactly, yes.
Q. And then it exited almost behind, but slightly to the left of that?
A. Yes.
Q. Was it a fairly straight angle, as far as the horizontal angle?
A. Yes.
Q. And you said this was the cause of death?
A. Yes, the brain was lacerated and then swells, and the swelling and the enlargement of the brain from the swelling then impinges on areas of the brain that have to do with breathing and heartbeat.
Q. And so how would this death have occurred, as far as would it have been from bleeding to death, from other causes?
A. From the brain damage.
Q. From the brain damage?
A. Yes, which eventually results in failure to breath, respiratory failure.
Q. And without assistance from a ventilator or some sort of artificial respiration, how long would it take for this injury to be fatal, in your opinion?
A. Minutes. I'm not sure. Up to an hour, maybe.
Q. Okay. And could be prolonged with artificial restoration?

A. With medical intervention, yes.
Q. But was there a chance -- based on this, was there any reasonable likelihood that it would not have been fatal?
A. I'm sorry, state that again.
Q. I apologize.
Was this the type of wound that even with medical intervention was likely to be fatal?
A. Yes.
Q. Now, let's talk about some specifics. You -- as part of your autopsy, you take measurements, correct?
A. Yes.
Q. And did you measure the entry wound for the bullet?
A. Yes.
Q. And do you recall what that is?
A. I believe --
Q. What the size was?
A. It was kind of oval shaped. I believe it was .3 X .4 inches.
Q. All right. Now, based on that, are you able to form any conclusion as to what caliber of bullet would have been able to cause this wound?
MR. THOMAS: I'm going to object, Your Honor. She's not qualified as an expert in firearms or forensics.
MR. LUPTON: Your Honor, I believe that it's within her field of qualification to say whether or not

it's -- the body is able to -- whether her view of the body is able to determine that.

THE COURT: Well, why don't you lay a little bit more foundation and connect it, see if you can connect it.

BY MR. LUPTON:

Q. With regards to the autopsy, your reason for performing is what?

A. To find the cause of death and to document the injury.

Q. All right. And as part of that do you have familiarity with the human body?

A. Yes.

Q. And how it works, mechanisms of injury, and what injuries would result from certain actions?

A. Correct.

Q. You said forensic pathology is the legal -- the application of pathology to the legal field, trying to figure out what happened, basically?

A. Yes.

Q. And as part of that do you attempt to figure out what mechanism would have caused injuries?

A. Yes.

Q. And, yes or no, are you able to tell what caliber of a bullet causes an injury based on the size of the entry wound?

A. Not in the skin, no.

Q. And why is that?
A. Because the skin has elastic fibers in it and it pulls and it can pull and then tear, but come back together, so that the measurement of the hole is imprecise, as far as a wound goes, a bullet going through.

Now, if the bullet had gone straight into a bone, like the skull, if it was straight into it, you could get a round hole that you might be able to pretty much precisely measure, but still it's not exact, as far as comparing it to a specific caliber of a bullet.

Q. All right. So essentially from looking at the wound, measuring the wound, it's not possible to determine the caliber of bullet, is that correct?
A. Correct.
Q. And that's because the skin is elastic?
A. Yes.

MR. LUPTON: Beg the court's indulgence.

(Off the record)

(Back on the record)

BY MR. LUPTON:

Q. And with regards to this, you talked about an exit wound, correct?
A. Yes.
Q. So the bullet went straight through the skull?
A. Correct.

Q. There was nothing recovered inside that you could look at --

A. That's correct.

Q. -- as far as a projectile?

A. No, there was nothing.

Q. All right. And were you able to look at the hole in the skull to be able to determine caliber of firearm that would have shot the fatal bullet?

A. Again, it went in at a little bit of an angle, so it was not exact, no.

Q. All right. So there was no way to tell from the autopsy what caliber of bullet inflicted this wound?

A. Correct.

MR. LUPTON: Beg the court's indulgence.

THE COURT: All right.

(Off the record)

(Back on the record)

MR. LUPTON: Nothing further, Your Honor.

THE COURT: All right, cross-examination?

MR. THOMAS: Thank you, Your Honor.

THE COURT: Yes.

CROSS EXAMINATION BY MR. THOMAS:

Q. Good afternoon, Dr. Ross.

A. Good afternoon.

Q. I'll be very brief.

Was the victim measured and weighed?
A. We measured his height to be 5'7", I believe. 67 inches. And we don't have a scale in the morgue, but we guestimate the weight. His weight as being about 165 pounds.
Q. Did you discover any tattoos on the victim?
A. Yes.
Q. Could you --
MR. LUPTON: Objection, Your Honor, relevance.
MR. THOMAS: They are describing the victim.
THE COURT: Just a second. Is it the same matter we discussed the other day?
(No response).
THE COURT: You don't remember what we discussed the other day.
MR. THOMAS: I do remember what we discussed the other day.
THE COURT: Come up.
(Whereupon, the lawyers approached the bench for an off-the-record discussion)
MR. LUPTON: Thank you, Your Honor.
THE COURT: Yes.
BY MR. THOMAS:
Q. Dr. Ross, was there any snowstorm effect from this bullet wound?

A. No.
Q. What is the snowstorm effect? Could you tell me, please? Tell the jury.
A. That's what you see on x-ray. Whenever we see a gunshot wound, we automatically x-ray the body to see if there is any remaining lead in the body.

And in certain weapons, high power rifle weapons, for instance, the bullet is going through so fast that it actually leaves a track or trail of little pieces of metal which you can identify on the x-ray and we call it a snowstorm effect.

Q. And there wasn't any?
A. No, there was not.
Q. Okay. Thank you, Dr. Ross.

MR. THOMAS: No more questions.

THE COURT: All right. Redirect?

MR. LUPTON: No, Your Honor.

THE COURT: Very well. Is this witness free to leave?

MR. LUPTON: We would ask the witness be excused.

THE COURT: You are free to go then.

THE WITNESS: Thank you very much.

THE COURT: Thank you.

All right. Call your next witness, please.

MR. SORENSON: At this time the State would the

rest, Your Honor.

THE COURT: Very well.

Ladies and gentlemen, you have now heard the witnesses and received the evidence that you will from the State in the State's case in chief.

That signifies to me that there are matters that I must take up outside your presence. Therefore, I'm going to ask you to please step to your jury room.

Do not discuss this matter or allow anyone to discuss it with you and we will be with you shortly.

(The following takes place outside the presence of the jury panel)

THE COURT: All right. Are there any motions?

MR. SORENSON: Nothing from the State.

THE COURT: Yes, sir.

MR. THOMAS: Your Honor, at this time I would like to make a motion for a directed verdict on Indictment Number 2013-GS-09-051, the charge of murder; Indictment Number 2013-GS-09-052, on the charge of attempted murder of James Hampton; and on Indictment Number 2013-GS-09-053, attempted murder of Shawn Defreitas.

THE COURT: Very well. Thank you.

All right. Yes, let me hear from you.

MR. SORENSON: From us?

THE COURT: Yes.

Here is what I want you to do. I want you to -- just for the record I want you to lay out as to each one of those, the witnesses that have laid down the grounds, the evidence of putting, if you will, putting the gun in the hand of the defendant --

MR. SORENSON: Yes, ma'am.

THE COURT: -- and then pointing the gun in the area where the victims were, for me.

MR. SORENSON: Yes, ma'am.

If it please the court, I guess in the light most favorable to the State --

THE COURT: Well, as you know -- as you know, what I am charged with is ascertaining if there is evidence on each and every element. It is not up to me to weigh the evidence. That is for the jury, but I must determine whether or not there is evidence on each and every element from which the jury could determine guilt.

MR. SORENSON: Yes, ma'am.

And, I believe, Your Honor, there would be multiple witnesses.

I guess I'd first start by putting a gun in Mr. Benjamin's hand.

THE COURT: Yes.

MR. SORENSON: That there are multiple witnesses that do that. I believe Mr. Hampton had indicated that he

saw basically all three defendants with guns.

Obviously the co-defendant, Mr. Haggood, testified and his more specifically, because he has knowledge of exactly what type of gun it was also. He testified that he saw this defendant firing a .45 caliber gun that he had seen this defendant with on multiple occasions prior to this night, essentially out in the direction that I would submit the victim was ultimately hit, the victim being Mr. Lawton was struck.

The two of them definitely, and there may be one other without me going through all my notes, but at least the two of them that put this defendant with a gun; one of them describing the actual caliber of the gun, indicating that he was with this defendant when they went out and armed themselves earlier that evening and brought the guns back into the club.

Additionally, Your Honor, if you look at the victims that were actually hit, you look at Mr. Defreitas' testimony that he had basically walked -- was involved in the group that had walked the defendants basically over to their vehicle.

And, as you recall, when I had him kind of describe how he was walking away from his vehicle would have put his right side facing the defendants vehicle when he was struck in the right hip, which I submit at that point in

time, you know, other testimony would have Mr. Frazier shooting in the air and this defendant then being the only person shooting in that direction at that time, which would then kind of fall into -- it's my position that he was shot basically around the same time that Mr. Lawton was shot.

And, furthermore, you have, when they go back and with the metal detectors they find over in the vicinity of where Mr. Saxon's vehicle was pulled in and the victim Mr. Lawton was found with the gunshot wound to the head, they find three .45 caliber rounds; two of them that are matched to each other, and the third one was too damaged, which I submit is from striking Mr. Saxon's vehicle. There are five .45 caliber casings; three bullets there. I submit to you one of those other two went through Mr. Lawton's head.

As to the third victim, Mr. Hampton, I mean, it's our position, and has been since I basically delved into this case and gotten it ready for trial, that the shot that struck Mr. Hampton in the left elbow was fired by the co-defendant Joshua Haggood. So I think our argument with regards to him is more --

THE COURT: Hand of one?

MR. SORENSON: -- of an accomplice liability standpoint, that these three individuals, you know, made a decision to go arm themselves after an altercation inside this club and returned to inside that club, continued

drinking alcohol that spilled out when things shut down.

You have -- I mean -- and I agree, it's chaos out there, but I submit to you the three of them were part of that chaos.

So it would be our theory as to Mr. Hampton would be an accomplice liability theory, not that we are arguing that this defendant actually shot him.

THE COURT: That was what I was interested in is what -- I know that one of the charges that's requested and that is the hand of one is the hand of all, and I did not know if it went to Mr. Defreitas and Mr. Hampton, both, or primarily Mr. Hampton.

MR. SORENSON: I think primarily Mr. Hampton. I mean, obviously I can't be positive who shot -- I mean, really it could be either one of the other two, even though it's our theory as to the person firing the .45 is who, you know, we have at least one witness that puts him in possession of that .45.

THE COURT: Okay. Very well. That's --

I wanted to hear that laid out for me at this point. As I was following that and I wasn't -- my lack of clarity had to do really with Mr. Defreitas in terms of was that hand of one, hand of all, or what was the decision of the State, so that's very helpful.

All right. Yes, sir.

Now, with that in mind, let me hear from you, Mr. Thomas.

MR. THOMAS: Thank you, judge.

As to the defendant Dominique Lawton -- I mean as to the decedent Dominique Lawton, there is no definitive proof as to what firearm killed him. There was some witnesses testifying that there was a barrage of shots, possible other guns involved in this case, possible other people. And without some testimony of a defendant -- of a co-defendant who has already made a deal with the State, without his testimony, there is nothing that puts that .45 caliber handgun in his hand, let alone there is no evidence that said a .45 caliber handgun killed the decedent Dominique Lawton.

As to defendant -- as to victim Shawn Defreitas, Mr. Defreitas, his time line of events as to when he was shot and when he crawled behind his vehicle and looked back at that car is when he saw Kevin Frazier shoot the gun. And other State's testimony indicated that my client, if he returned fire, it occurred after Mr. Frazier fired his gun. I made a point to ask that defendant almost twice -- or that witness twice to make sure that he knew what I was talking about. And his time line was he was wounded and then he looked back over and he saw Mr. Frazier fire. We have got corroborative evidence that Mr. Frazier fired twice.

Numerous witnesses. And according to that time line, if my client did shoot, it was after Mr. Defreitas had already been wounded.

We have just discussed victim James Hampton. On the record, the State's witness said he was responsible for the wounding of Mr. Hampton. It would cause undue prejudice to my client to be charged under hand of one, especially for Mr. James Hampton.

THE COURT: All right. Got it. Thank you so much.

That was helpful to me, and I think the testimony you have pointed out is why I asked that of Mr. Sorenson to walk that through. And I think that he's been quite candid with the court that, particularly with regard to -- I'm going to call him Defreitas because of the -- but it's --

MR. SORENSON: Defreitas.

THE COURT: Mr. Defreitas. I apologize.

That Mr. Defreitas, that it's one of two theories, if you will, because of the circumstantial nature of -- particularly with regards to the injuries to Mr. Defreitas. And largely if the jury believes the testimony that you have elicited, if any, whether it's the responsibility for Defreitas has got to be hand of one, the hand of all, and I don't think it's overly prejudice.

I think it's -- under these facts, I think it's -- unless something changes, at this point I believe that taking the evidence in its entirety and the inferences which could be drawn, I do believe that there is evidence on each and every element of each of these offenses, even understanding that there is a portion of it which is circumstantial, I do believe that there is evidence on each and every element from which this jury could make a determination of guilt, and I would respectfully deny your motion at this point, noting your exceptions thereto for many of the reasons that you have pointed out to me, Mr. Thomas.

Now, do you -- I'm fixing to come to you. Are you prepared and ready to go?

MR. THOMAS: Yes, Your Honor.

THE COURT: Thank you, Mr. Thomas. Very well.

All right. Let us have the jury.

(The following takes place in the presence of the jury panel)

THE COURT: Thank you. Ladies and gentlemen, now you have heard from -- as I stated before you left, you have heard from the State or the State's case in chief. We will now turn to the defense.

Mr. Thomas.

MR. THOMAS: Judge, the defense would like to call

Mr. Kelly Fite.

THE COURT: Very well. Mr. Fite.

THE CLERK: Mr. Fite, if you will raise your right hand for me, please, sir.

KELLY FITE, having been first duly sworn, testified as follows:

THE CLERK: Please have a seat, sir.

If you will just pull that mike close to you as you can and state your full name for the record. Thank you.

THE WITNESS: Kelly Fite.

THE COURT: And spell your last name for us, please.

THE WITNESS: F-I-T-E.

THE COURT: Your witness, Mr. Thomas.

MR. THOMAS: Thank you, judge.

THE COURT: Yes, sir.

DIRECT EXAMINATION BY MR. THOMAS:

Q. Mr. Fite, what's your current occupation?

A. I'm an independent firearms examiner.

Q. What were you prior to this?

A. I worked thirty-one years for the Georgia Bureau of Investigation in the forensic lab as a firearms examiner and a crime scene specialist and a shooting reconstruction person.

Q. How many homicide scenes investigations did you work on

in your time with GBI?
A. More than two hundred.
Q. More than two hundred.
Can you briefly describe the subject matter of your specialties in more detail?
A. Forensic firearms examiner, I examine forensic firearms and the firearms -- the bullets, cartridge cases and weapons, trajectories, and report my findings to the court.
I do shooting reconstructions, where I locate shooters and terminal points of bullets.
I do crime scenes and any kind of trace evidence or DNA evidence that needs to be collected, preserve it and turn it over to the proper person.
Q. And you have specialized training in this?
A. Yes.
MR. THOMAS: Your Honor, at this time I would like to --
BY MR. THOMAS:
Q. Oh, have you provided this expert testimony witness before?
A. Yes.
Q. How many times?
A. About twenty-seven hundred times in the southeastern United States.
Q. Thank you.

MR. THOMAS: Judge, at this time, if there are no objections, I would like to admit Mr. Kelly Fite as an expert in firearms examination and homicide crime scene investigations and crime scene reconstruction.

THE COURT: Voir dire?

MR. SORENSON: No objection.

THE COURT: Very well. So qualified.

MR. THOMAS: Thank you.

BY MR. THOMAS:

Q. Is DNA evidence typically collected at a crime scene?

A. Yes.

Q. Is it collected off -- can it be collected off firearms cartridges, casings, either live rounds or casings?

A. Yes, it can.

Q. Are fingerprints typically collected at a crime scene?

A. Yes.

Q. In regard to DNA, how is it collected and where is it generally sent?

A. Well, it's collected in a manner that you don't contaminate it. That it's preserved, so that when it's examined by the forensic toxicologist -- or I mean the forensic DNA person, that it's not contaminated.

Q. In regard to a crime scene, what area would you typically rope off and set up a crime scene line, the police line of protection?

A. The area that you thought contained the firearms evidence, or the evidence of any kind.
Q. What period of time would you say -- well, when would you -- when would you like that area cordoned off?
A. As soon as possible.
Q. What could happen to a crime scene that's not taped off for thirty minutes?
A. It's a possibility that evidence could be lost or contaminated.
Q. When would the crime scene tape typically come down?
A. After the investigators have finished their work and gone back over it again to make sure that they have collected everything and then it can be taken down.
Q. If you were working a crime scene like that, would you use a metal detector?
A. Yes.
Q. Would you use that while the crime scene is still secured, or would you return at a later date?
A. Say that again.
Q. Would you use that metal detector while the crime scene is still preserved, or would you come back to the site later?
A. When it's still preserved.
Q. What is the circumference of a .45 caliber round?
A. .4 5 inches.

Q. .4 5 inches?
A. Yes, sir.
Q. That's almost a half inch? Is that -- that .4 5 is almost a half inch?
A. Yes.
Q. Mr. Fite, no more questions. Thank you.
THE COURT: Very well. Cross-examination?
MR. SORENSON: Briefly, Your Honor.
CROSS EXAMINATION BY MR. SORENSON:
Q. You worked at the Georgia Bureau of Investigations for thirty-one years?
A. Yes, sir.
Q. Is that correct, Mr. Fite?
And during that time I guess is when you testified over twenty-seven hundred times?
A. Yes.
Q. That was while you worked for the State of Georgia?
A. Yes.
Q. And obviously now you are not working for the State of Georgia, is that right?
A. Correct.
Q. Okay. So during your thirty-one years you were testifying about, you know, probably ninety times a year? Is that about right?
A. Yes, when I first started at the GBI, we did cases from

all over the state. We didn't have any branch labs and we were -- everything was worked out of Atlanta, so I had to testify two, sometimes three times a week the whole total year round.

Q. And you had -- I just want to ask you about a couple things Mr. Thomas had asked you. Obviously you didn't respond out to this scene, is that correct?

A. That's correct.

Q. All right. What items have you reviewed in relation to this case?

A. I had -- I had some discovery that listed the evidence collected, listed some of the statements, and listed the -- showed the crime scene diagrams.

Q. All right. Now, obviously to make an opinion on a crime scene, I mean, you would like to have everything, right?

A. You need everything that you can get.

Q. Okay. But you -- in this case you just got some of the items?

A. Yes.

Q. Okay. And you had testified about that DNA evidence that is typically collected from a crime scene?

A. Yes.

Q. Of course, that -- I mean, a lot of that typically, you know, kind of depends on the type of crime scene, is that

correct?
A. Correct.
Q. I mean, a shooting in a club parking lot, are you going to expect to find a lot of DNA evidence in a club, you know, gravel, dirt, club parking lot?
A. Well, you know, now DNA people are using touch DNA; that is, if you load your semiautomatic pistol and you fire it, it's a good possibility that that cartridge case lying at the scene could contain your DNA. And this touch DNA is really helping forensics right now.
Q. And, of course, I guess you weren't prepared or provided with the DNA report, were you, in this case?
A. I saw the portion of the evidence that was submitted to DNA, but I didn't see the results of the DNA.
Q. Okay. Would it help to review the DNA report?
A. Yes.
(Witness reviewing document).
Q. Have you seen that item before today?
A. What?
Q. Have you seen that item before today?
A. No.
Q. Okay. And, of course, you see where they -- in this case we did -- they did attempt to swab the shell casings found at the scene, is that correct?
A. They did.

Q. Okay. And in looking at that report, they ultimately did not get any DNA off of any of those shell casings, is that correct?
A. That's correct.
Q. And, in your experience, that is while it's possible, it's fairly typical, is that correct, not to get DNA off of a shell casing that's been fired?
A. That's correct, but there is a possibility and it has been done.
Q. Okay. And in this case they attempted to do it and couldn't get them, is that correct?
A. That's correct.
Q. Okay. Part of that reason is because DNA, when you are leaving skin cells and things behind on a shell casing, it's a fairly violent chain of events that go on when a gun is fired, is that correct?
A. Yes, and the main thing is the heat generated by the weapon on a cartridge case.
Q. And that often is going to destroy fingerprints or DNA that potentially would have been there if it hadn't been fired, is that correct?
A. That's correct.
Q. Okay. And as far as -- and I think you touched on this briefly. You said that, you know, they could check for DNA, but they could also check for fingerprints also, right --

A. Yes.
Q. -- on shell casings?
A. Yes.
Q. The problem is you can only do one or the other, is that right?
A. That's correct.
Q. Because once you swab it for DNA, you can't -- obviously the fingerprint is gone.

And the same way, if you try to lift a fingerprint, you destroy any DNA that's there. So it's kind of an either/or situation, right?
A. Correct.
Q. All right. And as far as the crime scene you testified about, obviously -- I mean, you would like to be able to make sure that you rope off as much of an area as possible, is that correct?
A. Yes, you rope it off to what you think you have contained the evidence.
Q. Okay. And then you testified -- Mr. Thomas asked you about using a metal detector. Obviously you have to have a metal detector at your disposal when you are initially out there, is that correct?
A. Yes.
Q. Okay. If you had a metal detector at your disposal down the road, I mean, is it your testimony that you

shouldn't go back out and try to look, to go back to the crime scene?

A. No.

Q. Okay. That's better to do that than to not try at all, right?

A. True.

Q. Part of your field of expertise deals with, you know, reconstructing crime scenes and angles people were shooting and things of that nature?

A. Yes.

Q. Mr. Thomas, did he ask you to do any of that with regards to the pictures and stuff in this case?

A. No, sir.

Q. And you testified, and this is the last thing I think I got, Mr. Fite, is that he had asked you about the size of a .45 caliber bullet, is that correct? The .45 comes from .4 5 inches, is that correct?

A. Yes.

Q. Okay. And, lastly, is your field of expertise dealing with measuring holes and determining what caliber of bullet may have been fired into a person's body?

A. No.

Q. That would be more appropriate, I guess, for a forensic pathologist to -- if that could be done, for her to do that or him to do that?

A. If it could be done, yes.
Q. Let me ask you, you say if it could be done. Is it your kind of experience in dealing with over the last thirty some odd years that that is actually not something that you could rely on? Is that your understanding from your --
A. That's correct.
MR. SORENSON: Beg the court's indulgence.
THE COURT: Very well.
(Off the record)
(Back on the record)
MR. SORENSON: If we could maybe just mark that just for ID purposes, Your Honor, I guess since I have referred to this report, just as a State's ID?
THE COURT: Thank you.
(SLED Report marked as State's Exhibit No. 65 for identification)
MR. SORENSON: Thank you, Mr. Fite.
THE COURT: Yes, redirect?
MR. THOMAS: Just one thing.
REDIRECT EXAMINATION BY MR. THOMAS:
Q. To make it a little more clear, on a .45 ACP round --
A. Yes.
Q. -- what size of impact does it generally make when you shoot it?
A. An impact larger than its caliber.

Q. And its caliber is .4 5 inches, is that correct?
A. Yes.
Q. So it would generally be larger than that?
A. Yes.
Q. If you were to shoot a hollow point bullet, what effect would that have on a human body?
A. Well --
Q. Or a soft point bullet?
A. You would -- you would expect that its exit -- if it stays together, that its exit is larger than its entry.
Q. Would it leave any fragmentation inside the body?
A. It should leave a trail of fragments through the wound track.
Q. Thank you.

MR. THOMAS: No more questions.

THE COURT: Very well. Recross?

MR. SORENSON: I beg the court for one minute.

THE COURT: Certainly.

(Off the record)

(Back on the record)

RECROSS EXAMINATION BY MR. SORENSON:

Q. And, I assume, Mr. Fite, the type of ammo, the type of .45 caliber ammo, would have some bearing on whether it's going to leave some trail through that, through the wound, is that correct, if it's jacketed ammo, or not jacketed,

or --

A. Yes, it would -- it would have some effect on that, plus usually you don't expect a large caliber hollow point bullet to penetrate a person's head, but it does happen.

Q. Okay.

MR. SORENSON: Beg the court's indulgence.

THE COURT: All right.

(Off the record)

(Back on the record)

BY MR. SORENSON:

Q. Not too much longer, but as far as the actual ballistic evidence collected in this case, the bullets, the shell casings and the things of that nature, you didn't actually review any of those, did you?

A. No.

Q. All right.

MR. SORENSON: That's all I have. Thank you.

THE COURT: All right. Is this witness free to leave?

MR. THOMAS: He is, Your Honor.

THE COURT: Very well. Any objection?

MR. SORENSON: No, ma'am.

THE COURT: Very well. You are free to go. Thank you.

Call your next witness, please.

MR. THOMAS: Defense would like to call Antonio Gidron.

THE CLERK: If you will raise your right hand for me, please, sir.

ANTONIO GIDRON, having been first duly sworn, testified as follows:

THE CLERK: Please have a seat.

Pull that mike close to you.

Please state your full name for the record, please, sir.

THE WITNESS: Antonio Jermaine Gidron.

THE CLERK: Thank you.

THE COURT: Your witness.

MR. THOMAS: Thank you, judge.

THE COURT: Would you spell your last name, just so we know we have it correctly?

THE WITNESS: G-I-D, as in David, R-O-N.

THE COURT: R-O-N?

THE WITNESS: R-O-N.

THE COURT: See this young lady on the back row? The acoustics in our courtroom are not wonderful and I just need you to be sure that you are projecting your voice. This microphone is not going to help you out that much. If you would help us in that regard, I would really appreciate it.

THE WITNESS: Okay.

THE COURT: Thank you.

Mr. Thomas, your witness.

MR. THOMAS: Thank you, judge.

THE COURT: Uh-huh.

DIRECT EXAMINATION BY MR. THOMAS:

Q. Mr. Gidron, how old are you?

A. I'm twenty-seven.

Q. You are twenty-seven.

And what do you do for a living?

A. I break down hydraulic pumps for Boesch.

Q. For Boesch?

A. Yes.

Q. And where is that?

A. Boesch is -- it's Platt Springs. It's somewhere up by Clemson. Fountain Inn, that's the name of it. Fountain Inn.

Q. Okay. And where do you live?

A. I live right here in Saint Matthews.

Q. You do? Have you always lived in Saint Matthews?

A. No, sir.

Q. Where did you live prior to that?

A. Cameron.

Q. Cameron?

A. Yes.

Q. Did you ever live in Elloree?
A. Yeah, I stayed with my grandmother at age sixteen for about -- about a year.
Q. All right. Did you know Dominique Lawton?
A. Yes, sir.
Q. Did you know him by any nicknames?
A. Just -- just Killa. Everybody called him Killa.
Q. Do you know Delvin Lawton?
A. Yeah, me and Delvin are real close. I talk to him all the time.
Q. You do.
Is he aware you are here testifying?
A. Yeah, he told me to go ahead and y'all say what I needed to say.
MR. SORENSON: Objection, Your Honor.
THE COURT: Sustained.
BY MR. THOMAS:
Q. Do you know David Benjamin?
A. Yes, sir.
Q. How long have you known David Benjamin?
A. Since about 6th grade.
Q. Do you know him by any nicknames?
A. Just Maud, you know, and I don't even know how to say that right.
Q. Mard?

A. Mard or Mawd, because he was friends with one of my relatives also.

Q. Could you tell me what you did on the evening of September 17th and into the early morning hours of September 18th, 2011?

A. Was that the night of the incindent, or --

Q. It is.

A. That early morning I just sat around home all day, you know, waiting to go to this party, because the party was one of my cousin's party that we attended, and we waited around. I went there that night. You know, shot pool. Normal routine.

Q. Did you see David in the club?

A. Yeah, they came later. They came a little while after I got there. It was kind of late when they came.

Q. Had you seen Dominique in the club?

A. Yeah, he was, you know, there before I got there.

Q. Did you witness any kind of interaction or altercations between David and Dominique?

A. Not really an altercation. When I -- you know, as, you know, I spoke to David and those and let them know that I was in there, or whatnot. I was shooting pool and I notice, you know, they were like kind of like moving back, but they never came close. It was like looking, maybe five feet away, and I went to talk to David and I was like "what's

going on?"

He said "do you know the guy right there?"

I said "yeah, he's a Paulling." You know, I said "I'm related to some Paullings, but me and him we are cool," I said, "so I will talk to him."

And I went over and I talked to Dominique and I was like -- I said "what's going on?"

And he said "it ain't nothing." You know, he was a little tipsy, or whatnot.

And I said "well, those are some of my friends." I say "everybody cool." I said "they don't want no problem," and he actually calmed down and thought nothing of it. He let it be.

Q. What happened later when the club was winding down?

A. All right. When the club was winding down, or whatnot, put my pool stick down. I went over, because we was going to stood by DJ's, and I saw them Delvin and them -- everybody was going to the door. And me, I went back to them before I walked out the door, because I know, you know, the way they are down there something is going to happen. So I went outside, or whatnot, and they were still behind me, so I looked back to make sure I had them in eyesight, because I was going to, you know, help them get to the car. That's -- sometimes that's what I just normally do, you know, just to give somebody a warning.

Q. Does that often happen when folks are from out of town?
A. Newcomers that look like they got some sort of toughness to them, they get tried often. When I first moved down there I had a few problems.
Q. You said the way they get down there. Could you elaborate on that? What does that mean?
A. They -- rowdy. You know, if you -- if you are not a person to make smart decisions, even under pressure, you will give and -- you know, you could get hurt or you could hurt somebody else. It's just at the end of the night they just never had anybody, you know, to get killed like that at that club.
Q. All right. Had you seen guns at that club before?
A. Yeah, all the time.
Q. All the time.
Now, as everybody went outside, was there some kind of commotion?
A. Yeah, it was like -- it was like a pep rally or something. Everybody just swarmed in. I see -- it was a bunch of young fellows. You know, even Dominique, you know, he -- he had a gun tucked in his waist, or whatnot. I seen a few fellows I'm familiar from Santee, because I hang down there a lot. I know a few of them from Santee. They had guns.
And, you know, it was -- I don't know what females,

but, you know, the voice wasn't familiar, but I heard her say "he got a gun." I looked back and then, you know, we just started proceeding to the car and then that's when, you know, Frazier pulled out his gun and said "man, please, we just -- we just want to go home. We don't want no problem. We just want to go home."

Q. And did you hear Mr. Frazier fire first or did someone else fire first?

A. I believe it was Frazier, he fired first, or whatnot, because they wasn't after that. They got flustered. They would not let us move at all.

I mean, he did that, I would say it kind of put everybody on edge. Everybody scattered. They let them get to the car. They were in the car. They sat down and everything. Everybody just -- they let them get to -- actually got into the car, and they was -- then the car was cranked and everything.

Q. What else did you see that evening?

A. As far as from that door to the car, after they shot, like I said, people scattered, or whatnot.

And when we got to the car, it happened so fast. It was -- I call him Shawn Cooper. I don't know his real name, but he was one of the guys that got shot.

Q. Uh-huh.

A. He came.

I read in the paper today. It was saying that he got in between --

MR. SORENSON: Objection.

THE COURT: Sustained.

A. Okay. But, you know, he approached me and I told him to just step off, you know, and just move his car so they could get out.

BY MR. THOMAS:

Q. Okay. What happened next?

A. After that I, you know, backpedalled. I'm like "yo, y'all come this way," because the grass was kind of tall. They couldn't get out either way but the direction that I was in, so it was a little part of a driveway just a little farther over from where, you know, the other driveway was. So in the motion of doing that, by the time I got maybe about to two or three times, that's when a gunfire went off from -- you know, from my left and I saw Dominique, you know, falling back. But as I flinched that fast a rain of fire come from here.

Q. When you saw -- did you see any muzzle flashes?

A. After that -- after the rain of fire back and forth, muzzle -- I saw plenty of muzzle fire, you know, from the top of the road after the rain of fire to my right.

Q. From the top of the road?

A. Yes, sir.

Q. Did you see when Dominique Lawton got him?
A. I saw -- I can -- I'm ninety-nine percent sure I saw when he got hit, because after that shot, before they started, he was like -- it was like something had him on a hook and he was just -- he wanted to fall, but he couldn't fall, and I knew then that he was hit.
Q. Did you see David Benjamin shoot him?
A. No, David -- when they got in the car, I saw David -- when they first got to the car, as I was -- you know, I was basically yelling at him, but Kevin wasn't in the car yet. So I was doing like this. David never even got in full stance. You know, he got in the car. I guess he bent over to crank it and he turned around and then that's when everybody, you know, got down on the seat, but I never even saw him stood back up, but I saw, you know, Haggood, which is Josh, standing in the door, because somebody was on the back of the van and he was basically -- he basically protected them, because somebody was on that van -- on the back of the van firing shots. It was a van right there.
Q. Who -- the person behind the van, who were they firing at?
A. Them, because I -- I'm assuming them, because Josh said "don't come around the van," but they constantly tried to, you know, shoot, and that's when I realized where I was at. That's when I got down to one knee and I was just looking,

you know, for a way out, you know, but I heard Josh kept saying "don't come around the van. Don't come around the van." He shot once or twice, "don't come around the van." And by then Kevin had already -- you know, he was down ready to go too.

Q. From your vantage point were you able to see when Dominique Lawton fell and see David Benjamin?

A. Yeah, I was able -- I was like -- everything looked like a big TV screen. You know, it was like right there.

Q. And when he fell, did you see David Benjamin pointing a gun at him?

A. No, I never even see David got out of the car, no -- no gun. I -- in plain view I saw Josh and I saw Kevin. And then, you know, as he fell, I seen a few people running away from him, you know. And it happened in I would say two minutes. It was just like that after -- when the shooting actually started. Two minutes and everything was over, maybe less.

Q. And you saw flashes from the road as well?

A. Yeah. And as, you know, cars were leaving, I still -- you know, somebody was still shooting.

Q. Could you see -- could you make out those cars at all?

A. I saw -- it was like -- I noticed it's two dark colored cars. The first car that I saw I know because it's one of my other friends. It belongs to Charles Goodwin. He had a

Honda. But, you know, Charles being the size he is, you know, he was cranked up ready to go.

But maybe two car lengths back it was another dark colored car, dark tint windows. I know it had dark tint windows, because the back window was halfway down. You could see all the light in the car, you know, and it's similar to an Impala or a Malibu, but it looked exactly the same.

Q. Was that Nayrone Shivers car?

A. Nayrone, that's my cousin, he don't -- he don't even have a car.

Q. Okay.

A. So --

Q. You don't know whose car that was?

A. No, not that one, you know, but it looked familiar to a car that his brother-in-law or -- I would say brother in-law, because he was talking to the female. It looked similar to a car that he was driving, but I can place him there that night. I call him Bulla. I don't know his actually his real name.

Q. And when the police arrived, where were you?

A. When the police arrived I was standing, you know, looking to see if I could get a ride home, because I have an aunt not far. I couldn't find one, so I was about to walk. And then that's when the young lady, Teisha Cooper, she was

all shook up because she said her brother called and he had got shot and she had to get her mother, so I drove her to her house to pick her mother up first and I brought them back to the club and I got out at the club.

Q. Okay. Did you stay there until the police arrived?

A. Yes, sir, I was there long enough to see them start putting up the tape.

You know, you had a few people, they were drunk, acting silly, you know. It was handled poorly, because one guy was screaming "my flip flap" and the cop was just turning around and around in a circle. All that, you got be kidding me and I just want to go home. I lost my cell phone, $200 cell phone, and never even got it back. I gave it to Denise Miller and just told her to call -- I said "call and get them some help." And I said "I'll get the phone later," and I never even got my phone.

Q. Did you ever meet with Calhoun County investigators?

A. I spoke with someone. I don't know if it was from Calhoun County or where.

Q. But they never took a formal statement from you?

A. No, I -- I never got a statement. I just say what I saw, because I -- I didn't even want to come to court, I'm going to be honest with you, because I got my kids and I really don't want to be here now, because, you know, I got a lot of bills coming that I got to handle like immediately

and it's messing with my overtime. I'm missing about $160 a day sitting here. I don't want to be here, to be honest with you.

Q. And why are you here?

A. I'm -- because -- you know, I'm -- I'm a human being. I got -- you know, I got a conscious. To see somebody go down and I'm ninety-nine percent sure that didn't commit a crime, I can't do it. It's not for either side. You know, it is just me and my conscience and my kids, because it's -- it's been bothering me since it happened. I hadn't even gone out to a major club since then.

Q. And it's your sworn testimony that both David Benjamin and Dominique Lawton were in your field of view?

A. In my -- in my field of view.

Q. And you did not see David Benjamin shoot Dominique Lawton?

A. No, sir.

Q. Did you see him shoot Shawn Defreitas?

A. No, he -- and when it comes to that situation, I don't know even though how Shawn even so close, because I asked him to move his car. The car was right there. How did he get hit in the leg and they are like right here? He should have got hit somewhere up top, because he was walking towards Dominique to talk with him instead of moving his car, so he should have got hit somewhere up top, not down

below, you know, in no leg, but I saw him, he ducked down behind his car, maybe close to the trunk area. I saw him too. He ducked down to the back end of the car, so you should have bullets somewhere in that -- in the door, because the door was open, somewhere in the front of his car. Even in the windshield or anything, if he got hit that low, because I heard he got hit in the leg.

Q. Thank you, Mr. Gidron. Please answer any questions that the solicitor has for you.

THE COURT: Cross-examination?

MR. SORENSON: Thank you.

CROSS EXAMINATION BY MR. SORENSON:

Q. Mr. Gidron, where do you live?

A. Right now I have been at [redacted], Saint Matthews, South Carolina, for about two or three weeks now.

Q. Okay. You don't live at [redacted], do you?

A. I just -- that's where I just recently moved from.

Q. Okay. You know that an investigator with my office attempted to go find you there over the last several weeks?

A. Yeah, I called someone, but he never -- you know, every time I called the number, it would go to a voicemail or something, so I just gave up.

Q. Okay. You never left a message?

A. No, that's something that I just don't do. I'm not, you know, to be honest with you.

Q. And you had testified -- Mr. Thomas asked you about the Calhoun County Sheriff's Office. The fact of the matter is you never talked to anybody with the Calhoun County Sheriff's Office about this?
A. No, sir.
Q. Okay. You talked to somebody that was an investigator for Mr. Thomas?
A. Okay. I wasn't aware of that --
Q. Is that correct?
A. -- you know.
Q. But you never went down to the sheriff's office and gave them a statement?
A. No. Like I said, I didn't want to. I was going to try to stay out of it, if I could.
Q. I mean, this happened back in September of 2011, is that correct?
A. I guess. You know, wherever that night was.
Q. Okay.
A. I don't know any dates. I try to forget it.
Q. Okay. But you seem to remember an awful lot about it for something that you trying to forget.
A. Yeah, because it had -- it was right there, like a camera flash right in my eyesight.
Q. Okay. I'm going to talk to you about that in a second here.

A. All right.
Q. Mr. Thomas asked you about if you knew Mr. Lawton and you knew him by the nickname Killa, right?
A. That's right.
Q. In fact, that's the same nickname he had, right?
A. Yeah.
Q. That wasn't what you said when he asked you.
A. You said Benjamin?
Q. Mr. Benjamin, yeah.
A. No, I only know him by Maud. You know, just basically David.
Q. Okay. You didn't know him by the nickname Killa too?
A. No, uh-uh.
Q. But you have known him since 6th grade?
A. Since about the 6th grade.
Q. And this party this night that you were at, what time did you get there?
A. I would say I was outside maybe about 8:00, 8:30. That's my, you know, my relative's club, so I be there on a regular.
Q. Okay. So you were there from 8:00 or 8:30 in the evening and this happened at -- what time did this all happen?
A. Closing, they normally shut that down about 3:30, 4:00. It don't roll over, because of, you know.

Q. So you were there from 8:00 to 8:30 in the evening until 3:30 or so in the morning, is that about right?
A. Probably longer than that. You know, if you got a good DJ, sometimes it rolls over longer.
Q. Okay. You knew the two DJ's that were working, right?
A. I only knew one of them. That DJ -- I never even went as far as the dance floor, because I don't try to, you know -- but I never even knew they had two DJ's, but I know Andrew Haynes, which is a relative of mine.
Q. Okay. So you knew -- I guess he goes by DJ Stroke?
A. Yeah, pretty good DJ.
Q. You knew him. And he was there that night, right?
A. Uh-huh.
Q. And you didn't -- you didn't know the other DJ whose van it was that was backed up in the -- do you remember the van being there?
A. It's coming back. What's his name, DJ -- they call him DJ Mike?
Q. Michael Bullock?
A. Yeah, that -- that was his name, you are right.
Q. Okay. And, it's your testimony that you became aware, I guess, that night that something had happened between Mr. Benjamin and Mr. Lawton inside the club, because they were basically looking at each other?
A. Yeah.

Q. Obviously not looking at each other in a nice way, right?
A. Yeah, they was -- you know, it was -- I saw the look on Lawton's face and, you know, those are my friends. I just -- I just went to find -- just being nosey, finding out what's going on.
Q. All right. And you spoke to both Mr. Benjamin --
A. Yes.
Q. -- and Mr. Lawton?
A. Yes.
Q. And I believe your description was that upon talking to Mr. Lawton, that he had calmed down and basically just had let it be, right?
A. Yeah, and David -- David wasn't even aggressive. He said -- he said "you are down here, you know, to have fun. We don't want no problems."

So then I said "I'll handle it." I said -- it's kind of like a relative to me, you know. I talked to him. Everything was fine.

I don't know, you know, what -- I don't know what happened from me going back to the pool table until then.
Q. So at that point in time you thought everything was fine, and as far as you knew, inside the rest of that until things shut down everything was fine, right?
A. Yes, sir.

Q. Let me ask you this. Do you know that they had gone out to their car and gotten guns out of their car, him, Mr. Frazier and Mr. Haggood?
A. No, sir.
Q. So they never showed you their guns or said anything about the three of them getting armed?
A. No, sir.
Q. And it's your testimony that at that point in time, kind of when things shut down, I guess the lights come on and music stopped, is that kind of how things shut down at the end of the night to let everybody know to close the club?
A. Yeah, it's supposed to come on -- from where I was, the lights are constantly on over the pool table.
Q. Okay. But you knew that basically the club was shutting down?
A. Yeah, it's time to go, because they had a certain song that they played. I don't remember the name of the certain song, some party ain't over, or something. It's an old song, but that means it's time to hit the door.
Q. Okay. It's your testimony at that point in time you started heading out towards the door and were looking for -- and I don't know who you were talking about there. You just kept saying they. Would that be Mr. Benjamin and Mr. Haggood and Mr. Frazier?

A. I was -- I knew where they were. I was sitting at the door waiting for them to catch up to me, because I was -- and I actually did guide them -- you know, guide them to the car, but after the crowd, you know, I was in between a few people, but I'm still waving them on.

Q. Okay. And it's your testimony that you heard some girl say something about "he's got a gun"?

A. Yeah.

Q. Do you remember that?

A. Yes.

Q. Do you know a girl by the name of Natasha Sumpter?

A. Natasha Sumpter? No.

Q. Okay. So she could have been the girl that said "he's got a gun," could have been, if you don't know who she is?

A. Could have been, but I don't know who it is.

Q. Okay. And you testified that ultimately the first person that fired a shot out there was Kevin Frazier, is that correct?

A. Yes, sir.

Q. And that people scattered at that point in time and that put -- him firing that shot put everybody on edge? I think that was your term, right?

A. Yes, sir.

Q. All right. And that ultimately, though, you got them to their car and got them in their car. You said --

A. I got -- I walked with them to the car. They, you know, did everything themselves.

I nudged Shawn Cooper asking him to move his car, but he didn't do it right then. So he didn't move the car basically until after he supposedly got hit. I just knew he left in a rush, and that's when they pulled out right behind him.

Q. Okay. So he was over there by you and walked away from you?

A. Yes.

Q. That's what I said, you don't know when he got hit?

A. Yeah.

Q. You just know that you heard he got hit, right?

A. Yeah, he -- when I seen him, he was walking towards, you know, Dominique, or whatnot. And in my head I'm like goodness, he ain't moving the car, so that's when I proceeded to show them the other driveway?

Q. Okay. So you were directing them kind of like --

A. I wanted them --

Q. -- air traffic control?

A. I wanted them to go ahead and go before, you know, something happened.

Q. So they are in their vehicle, started up, cranked up, ready to rock and roll at that point in time, all --

A. Yeah.

Q. -- three of them in the car, Kevin, David and Josh?
A. No, David was out in the car, the car cranked and ready. His door wasn't closed yet, but, like I said, when that shot came -- you know, that shot came from the top of the road, by the time I looked back here, Josh was in the doorway and Kevin was back up, but he never even put his gun down, you know. He fired a couple shots. I can't count how many, but he was just letting them off in the air, you know.
Q. But he is firing at the car.

Josh has gotten out of the car. He had gotten in and then got back out?
A. He didn't -- he didn't even touch the car. He was standing in the door, because somebody -- you know, a few -- a few pops. There was another big gun, a few pops. Somebody was behind that van.
Q. Okay. So somebody was behind the van. All right. And you said you saw shooting coming off from your left, right?
A. Off to my left.
Q. Right.

And then you saw Dominique getting shot and falling on your right?
A. No, he was -- before -- before their rain of fire -- the rain of fire came from Josh's gun. Before his rain of fire, that pop from the road, Dominique was like trying to fall. He -- you know, at that point.

Q. Somebody shooting from behind you and you know that somebody is -- I'm just trying to -- it seems like you are describing something in literally every direction.

A. Yeah, it's coming from every direction, but nobody was behind me. I was like just like I'm looking at you, you had a car this close here. Dominique was right here. I'm just back and forth and came to a squat, you know.

Q. Okay. All right.

And it's your testimony that Mr. Benjamin was in the car the whole time?

A. Yeah, he never -- he never even got back out.

Q. His door was closed?

A. No, it wasn't closed yet, you know, but he never stood back up past the door, because if he would have and Kevin -- if Kevin was to shoot, he probably would have got hit in the back of the head.

Q. Okay. So your testimony is that Kevin Frazier that shot Dominique Lawton, is that right?

A. No, Kevin never put his gun down.

Q. Okay. How is he going to shoot him if he's shooting up in the air?

A. That's what I'm saying, Kevin didn't shoot Dominique.

Q. You said he would have hit -- he would have hit him if he --

A. I said if he was. If he was the drop his gun down and

David was out of the car, like everybody put it out to be, he would have got hit in the back of his head.

Q. So your testimony is Kevin didn't shoot down, he was shooting up?

A. Yeah, he was constantly shooting like this, never even dropped his arm.

Q. Okay. And so it's your testimony that nobody else over there at their vehicle was shooting, other than Kevin up in the air and then Josh --

A. And Josh. Josh was just --

Q. Nobody else fired over there?

A. No, just those two, and then it was -- like I say, the other person behind that van, they could only get a few off, you know.

Q. Who was that?

A. I -- I don't know. I couldn't tell, because all I know is Josh was saying "don't come -- don't come from around the van. Don't come around the van," but I could see that shadow on the wall from the light that that person was going from back and forth from the front of that van to the back side.

And, you know, if it wasn't for Josh, they could have got around the van, Kevin probably would have got shot, because he was like stunned, you know. When he stopped, he was just standing there, you know, in a daze.

Q. Okay. And you said that you stayed out there. So you never saw who that was that was on the other side of the van shooting? I mean, you said that you were out there the whole time.

A. Yeah, after they -- after pulled off, as I proceed to go over. When I got there, I did look behind the van, but it wasn't -- it was nobody there any more, but I later saw that my cousin, James Hampton, he got hit in the arm. He was leaning on a white Honda that just pulled up. That was, you know, I guess -- I think that was Andrew Haynes was driving that car. You know, he moved his car. When he pulled up, James was laying on the hood, or whatnot, and I saw that he was hit in the arm. And his baby momma was crying and screaming, and that's when I saw Laticia Cooper, you know, panic.

Q. Okay. Did you see Mr. Hampton -- I'm glad you brought up Mr. Hampton. So that's your cousin?

A. Yes, sir.

Q. Okay. You saw him out there?

A. Yes, sir.

Q. Okay. What did you see him do?

A. I didn't see him do anything. I didn't see him until, you know, when I was trying to find -- you know, find a ride home. He didn't -- you know, he was in the club. He didn't try to start anything, you know, and --

Q. So he was in the club and the first time that you saw him after --
A. After everything --
Q. -- was after he had been shot --
A. Yeah.
Q. -- and was leaning up on the --
A. Yeah.
Q. So as far as you knew, he was just hanging out on the other side somewhere and got shot?
A. Yes.
Q. You don't even know who shot him, right?
A. Yes, sir.
Q. How about -- you talked about Mr. Haynes, knowing Mr. Haynes, the DJ, right? Was he outside or was he inside?
A. That -- I didn't see him until, you know -- as a matter of fact, I didn't see him since I left until -- well, until the car pulled up. That's how I know, you know -- I didn't even know he was actually DJ'g until then.
Q. So you didn't see him out there until after -- the first time that you noticed that he was out there, just to make sure I understand this, is when his car pulls up --
A. Yes.
Q. -- Mr. Hampton goes over and is sitting on it -- or sitting in it or on it after he has been shot?
A. Yes, sir.

Q. And I don't guess you ever saw anybody hit the defendant's vehicle with anything, right?
A. No, but I -- I didn't see that part.
If it did, it must have been Cooper, because I didn't see anybody else get as close, you know -- unless they did it when they pulled out, I don't know.
Q. Okay. Got you.
A. Because I was trying to curve off behind, you know, to get me a ride home. I looked behind the van and that's when Haynes pulled up. So if they got hit, it was after they pulled off.
Q. Okay. All right.
So nothing happened -- your testimony is while you were standing there directing everything, that nothing happened to their vehicle at that point in time, right?
A. Not -- not that I'm aware of, you know, in between from the door to the shooting.
Q. Okay. And obviously you didn't get hit by any bullets out there, standing basically in the middle of all this, right?
A. No, sir, but I -- I'm very lucky and that's why I don't -- I don't -- I rarely go anywhere now because of that, because I could have gotten hit.
MR. SORENSON: Beg the court's indulgence.
THE COURT: Yes.

(Off the record)

(Back on the record)

MR. SORENSON: That would be all I would have, Your Honor.

THE COURT: All right.

Yes, redirect?

MR. THOMAS: Nothing further of this witness.

THE COURT: And is this witness free to leave?

MR. SORENSON: Yes, Your Honor.

THE COURT: Any objection?

MR. SORENSON: No.

THE COURT: You are free to go.

THE WITNESS: Thank you.

THE COURT: All right.

Yes, sir, please call your next witness.

MR. THOMAS: At this time point the defense rests, Your Honor.

THE COURT: Very well.

All right, counsel, before that, let me just see you for just a second.

(Whereupon, the lawyers approached the bench for an off-the-record discussion).

THE COURT: Not yet, yes? Not quite yet?

MR. THOMAS: I would ask that the jury be excused, Your Honor.

THE COURT: Very well.

Ladies and gentlemen, I'm going to ask you to please step to your jury room. Do not discuss this matter. Do not allow anyone to discuss it with you. There is a matter that I must take up outside your presence. We'll be with you shortly.

(The following takes place outside the presence of the jury panel)

THE COURT: Yes, sir, Mr. Thomas.

MR. THOMAS: Thank you, judge.

At this point I would like to renew my motion for a directed verdict.

THE COURT: Hold on one second before you do all that. Hold on.

I need to ask your client. I haven't asked your client on the record whether or not he wishes to testify or not to testify.

THE DEFENDANT: No, ma'am.

THE COURT: You wish not to testify?

THE DEFENDANT: No, ma'am.

THE COURT: Very well. Thank you.

THE DEFENDANT: No, ma'am.

THE COURT: Thank you, sir. You may be seated. Okay.

I presumed that's what he has decided, Mr. Thomas,

but I --

MR. THOMAS: He has. We have discussed that.

THE COURT: And now you are going to rest off the record and now you are going to make the motion?

MR. THOMAS: Yes, Your Honor, I do.

THE COURT: Okay. You rest off the record and then you would rest on the record when the jury returns.

MR. THOMAS: Correct.

THE COURT: Okay. I'll listen to you.

MR. THOMAS: I would like to renew those motions for a directed verdict. Would you like me to read the warrant numbers again, Your Honor?

THE COURT: Yes, please.

Thank you.

THE COURT: I have them. It's 2013-GS-09-52, 51 and 53.

MR. THOMAS: That's correct, Your Honor.

In light of the testimony presented by the defense, I'd certainly move for a directed verdict on the murder of Dominique Lawton, due to eyewitness testimony who stated on the record that my client couldn't have shot Dominique Lawton and move that that charge be dismissed.

THE COURT: Now, who says it couldn't be?

MR. THOMAS: Pardon?

THE COURT: Are you talking about the testimony of

this --

MR. THOMAS: Of this eyewitness.

THE COURT: I understand. All right.

MR. THOMAS: That my client was not the party that shot Mr. Dominique.

And, additionally, I would move again to dismiss the warrant for attempted murder of James Hampton and the attempted murder of Shawn Defreitas.

And also -- especially on the warrant of Mr. Shawn Defreitas. Again, from the eyewitnesses testimony and his proximity to Mr. Defreitas at the time this occurred. If it's presented to a jury it would do my client a great injustice, especially in regard to the murder charge and the attempted murder charge of Shawn Defreitas. Collectively all three charges, Your Honor.

THE COURT: I understand. I understand.

Mr. Thomas, I am going to respectfully deny your motion. That's for the jury to determine.

There is evidence both ways, without question, and what I am charged, of course, to do, again, is to determine whether or not there is evidence on each and every element from which the jury could determine guilt.

Now, with regard to Mr. Defreitas, we talked about that. I think that that is -- that evidence is certainly more in the nature of the hand of one and the hand of all

and I'm going to charge that. And so that would be the basis, particularly with regard to Mr. Defreitas, but I would respectfully deny your motion and your exceptions thereto.

All right, gentlemen, now I'm ready for my formal charge conference, if you would be so kind. We may be able to argue and charge this afternoon. At least argue, if not argue and charge. It's just a quarter to three, so I'm going to --

Would you just inform the jury that this -- we are going to take our afternoon break. Let them smoke, if they want to smoke, and we will be with them shortly.

And if y'all would be so kind as to retire to chamber, we will go over the charge.

(Whereupon, proceedings were recessed)

(Whereupon, proceeding were reconvened).

(Jury Note was marked as Court's Exhibit No. 2 for identification)

(Jury Note was marked as Court's Exhibit No. 3 for identification)

(Jury Note was marked as Court's Exhibit No. 4 for identification)

THE COURT: All right, in regards to the closings, who will open on behalf of the State?

MR. SORENSON: Mr. Lupton is going to do the

opening on the law and then I'm going to do the closing after Mr. Thomas.

THE COURT: All right. Anything before we bring the jury out, from the State?

MR. SORENSON: No, ma'am.

THE COURT: From the defense?

MR. THOMAS: No, ma'am.

THE COURT: Very well then, let's have our jury.

(The following takes place in the presence of the jury panel)

THE COURT: Thank you.

Now, Mr. Thomas, yes, sir.

MR. THOMAS: Your Honor, at this point the State rests -- I mean the defense rests.

THE COURT: Thank you so much, Mr. Thomas.

Very well.

All right, ladies and gentlemen, I will now turn to the State.

Will there be any rebuttal reply?

MR. SORENSON: No, ma'am.

THE COURT: Very well.

You have now heard all of the witnesses and received the evidence which you will in this case. What remains for us are the arguments of counsel and then my charge or instruction on the law.

Ladies and gentlemen, let me tell you how we will be proceeding. You will first hear from Mr. Lupton on behalf of the State in his opening.

You will then hear from Mr. Thomas in his closing arguments on behalf of Mr. Benjamin.

Then you are going to hear the rebuttal or the reply closing arguments from Mr. Sorenson.

We call it, even though it's closing arguments, it's like sort of a term we have gotten used to it's the first closing argument and then the rebuttal reply, closing argument. We call it the opening closing argument, which then doesn't make a whole lot of sense, and then the final closing on behalf of the state.

So we'll first hear with Mr. Lupton. Then you will hear from Mr. Thomas, and then you will hear from Mr. Sorenson in the closing arguments.

Once the closing arguments are finished, I will then explain to you the law that is applicable to this matter. You will then retire to your jury room and you will then begin your deliberations.

Ladies and gentlemen, at this time I ask that you please draw close as we listen to the closing arguments of the attorneys.

Mr. Lupton?

MR. LUPTON: Thank you, Your Honor.

May it please the court?

THE COURT: Yes, sir.

MR. LUPTON: Ladies and gentlemen of the jury, at the opening of this trial I came before you and told you that the evidence that would be presented would prove to you beyond any reasonable doubt that the defendant was guilty of murder and two counts of attempted murder. I believe that the evidence has done that.

My job is almost over in this trial. Your job is about to get ramped up. You are going to go back to the jury room and you are going to have to deliberate. You are going to have to take all this evidence and you are going to have to sift through it and come up with the truth.

Now, the purpose of these closings -- I'm opening on the law. What I'm going to do is talk about not the facts of this case, but the law that you will be using, some of the issues of law that we believe are important that you will want to take back with you. The judge is going to charge you on the applicable law at the end, but I want to talk to you about some of the things that we think are going to be important.

Now, obviously in this case the defendant is charged with murder. Murder, as we explained, as the judge will charge you, is the -- murder is the unlawful killing of another person with malice aforethought, either expressed or

implied. I want to talk about that a little bit.

Malice. Now, we have sort of a common understanding of the term malice, but legally malice talks about the kind of hostility, hatred, or ill will. It's the intentional doing of a wrongful act without just cause. It's the intent to create an injury. The law says that it springs from a depraved heart devoid of social duty and fatally bent on mischief.

Basically malice is acting with such reckless disregard for the life of another that it is foreseeable that someone will die. It can be the laying in wait, murder for hire kind of thing, but that's not required. The acting with complete disregard for the life of another is malice.

Now, the other part of it is aforethought. Aforethought simply refers to the amount of time that malice must exists. It must exists at the time of the killing. There is no requirement that it be formed and held within the person's heart for any great length of time, that it be a grudge harbored for hours or days. The law recognizes that malice may be formed at the very moment that the fatal blow is struck. That is malice aforethought.

Now, malice can be shown in two ways. It can be shown by expressed malice, or it can be inferred or implied.

Expressed malice is a statement of an intent to kill. If you hear testimony "I will kill somebody," that's

expressed malice.

Implied malice is simply looking at the conduct of a person and seeing what that conduct tells you about what they intend. You know, arming -- somebody arming themselves to prepare for a fight. Someone acting with complete disregard for the safety of those around them, shooting into a crowd, those are actions from which you may infer malice.

Now, if you believe that the evidence has shown that, if you believe that the evidence has shown both malice and it was formed at the time of the killing, then your verdict would be guilty of murder.

There is a lesser included offense, however. If you go back into the jury room, you have the option -- if you don't feel that there is malice, you have the option of a voluntary manslaughter.

Voluntary manslaughter is the unlawful killing of another, without malice, during the sudden heat of passion and upon adequate legal provocation.

Talking about each of those terms.

Sudden heat of passion. Sudden heat of passion does not have to be an event so great that it totally dethrones all reason. It doesn't have to be such that he is completely incapable of any thought.

Sudden heat of passion refers to that situation where a person would reasonably act without the ability to

control themselves. Uncontrollable act to do violence. A person who is temporarily unable to control their actions.

The law requires that it be such that a reasonable person would act that way and that the person did have sudden heat of passion.

If you think it's a situation where that person was calmed down, that would not be a voluntary manslaughter. That would be a murder.

Similarly, sufficient legal provocation. That's a situation where some act is done towards the defendant. The victim commits some act that would be sufficient and reasonable under the law to dethrone his reason to create that sudden heat of passion.

Now, for a fight or physical confrontation to rise to the level of sufficient legal provocation, the law requires that it be more than just words. Words, no matter how offensive, are not sufficient legal provocation, nor is a willingness to fight. Displaying a willingness to fight does not amount to sufficient legal provocation. There must be an accompanying physical overt threat in order to -- in order to excuse a murder to the level of voluntary manslaughter.

Now, what is attempted murder? The defendant is charged with two counts of attempted murder.

Attempted murder is the exact same thing as a

murder with the only difference being the victim doesn't die. You have to have an intent to kill; malice aforethought, either expressed or implied. Some act going towards that. Firing a gun could be that act.

Now, obviously this has a lesser included offense as well. If you do not find malice aforethought accompanying the shooting, and I want to talk about that for just a moment. Malice aforethought does not have to be directed at a particular person. Malice follows the bullet. Where you fire a bullet, your malice follows the bullet. Even if an unintended target is hit, that malice transfers to that victim.

So if you feel that there is a shooting and that there was no malice, there is a lesser included offense of ABHAN, or assault and battery of a high and aggravated nature.

Assault and battery of a high and aggravated nature is the unlawful injury to another where great bodily injury results, or great bodily injury was likely to result, that the act was such that it was likely to produce great bodily injury.

Great bodily injury would be an injury which causes substantial risk of death, or serious permanent disfigurement, or protracted loss or impairment of the function of some bodily member or organ.

Now, as you heard the doctor testify, a gunshot wound is the type thing that can reasonably be likely to produce death or great bodily injury.

However, in this case if you look at the injuries that actually did occur and you determine that that gunshot wound wasn't likely to cause death, you can look at assault second.

Assault second is the unlawful injury of another with moderate bodily injury.

Moderate bodily injury requires injury requiring treatment of a complex nature to some part of the body, other than skin or muscle or connective tissue, unless there is penetration of the skin or muscle or connective tissue, and that the repair is either complex or requires a regional or general anesthesia.

In this situation you heard that there was penetration of the skin and general anesthesia.

However, obviously the question is whether or not moderate bodily injury or great bodily injury occurred in this particular two cases, the two victims who lived, what was likely?

If you believe that great bodily injury or death was a likely outcome, not from the particular injury that was sustained, not from the ones that they were fortunate enough to get and survive, but being shot, generally, what

was likely, based on the mechanism of injury?

I think looking at that it is reasonable that it's either attempted murder; or if you feel there is no malice, then ABHAN.

Now, when you go back to the jury room and you look at the evidence, you are going to have all the testimony, and that testimony came to you as two types. There was direct evidence and there was circumstantial evidence.

Direct evidence is obviously some evidence where a person tells you specifically what they saw, what they heard, felt, tasted, something that they perceived directly from their senses. In this case there was testimony about people seeing the defendant shooting. That would be direct testimony.

Circumstantial evidence is evidence where you prove a chain of facts and those facts point to an ultimate conclusion.

Now, the law makes no distinction between direct evidence and circumstantial evidence. No greater amount of proof is required with circumstantial evidence than of direct evidence. It's the same. The evidence that you get is all available to be used and there is no special requirements for any of it.

With circumstantial evidence, what you want to

look at is do the things make sense? Does that chain of evidence point to that fact?

A common example, a friend of mine has a poster drawn from the Peanuts cartoon, Snoopy. It shows Snoopy sitting on top of his doghouse, laying there, covered in a blanket of snow and he says "let me guess, it snowed last night." That's circumstantial evidence. Observing facts and drawing conclusions from them.

Now, in doing that you are necessarily going to have to judge the credibility of the witnesses. Credibility of the witnesses is critical and the law gives you every tool in assessing credibility that you use in your ordinary lives. Everyone in dealing with people in their life has to judge the credibility of others. You listen to people telling you things, you have to decide whether or not it's truth or fiction. Whether it's buying a car, watching the evening news, you look at the -- look at the factors surrounding the testimony to decide credibility. Did the person appear truthful, or did they appear to be hiding something? Did they have some motive to lie? Were they protecting a close friend? Were they protecting their best friend?

But, of course, just because some piece of evidence you have a question about does not mean that everything from that witness is something that you should

disregard. Often the parts that you feel are being shaded by a witness that are not a hundred percent accurate can tell you as much as what they say that you do believe. It shows you what they are trying to conceal. It shows you what they are trying to protect. A person could have a motive to lie about some things, but have no motive to lie about anything else and have every reason to tell you the truth about those things.

Another issue is was those observations, was the testimony corroborated or contradicted? If several people independently saw one particular thing and told you they did certain acts and you have one witness that comes in and says something entirely different, that's a factor for you to consider.

Now, having said that, let us remember that this was a confused situation once those guns started going off. I can promise you, you take any ten people and show them a video of a chaotic shooting like this and then ask them to describe it, people sitting in the safety of an office watching it on video, there will be slight variations on what they saw. All the more so when you are out there and you are afraid and you are ducking for cover. So there are going to be some inconsistencies.

What you should look at is how they overlap, what inconsistencies are there. Are these things that that

person would have less opportunity to had have observed or greater opportunity, and you fit those things together to form a picture.

And at the end of all of this when you go back to the jury room, you are going to have to decide this case beyond a reasonable doubt.

Now, beyond a reasonable doubt is a legal term that the law struggles to define. It's been defined by the courts over the years many different ways. It's been defined as proof that causes you to hesitate to act. It's been defined as proof that leaves you firmly convinced of a person's guilt. The most recent definition from our Supreme Court is the firmly convinced of a person's guilt charge.

Ultimately when you go back to the jury room, what you are going to be asked to decide is what do you believe really happened. You take a look at the evidence, listen to the arguments of counsel on both sides and decide what do you believe really happened.

There is no self-defense case in this situation, as I told you when we came up before you on Monday. What this is not is a self-defense case. If the defendant fired those shots, if you believe that that's what really happened, the defendant fired those shots, it was not self-defense. It was either voluntary manslaughter or it was murder.

So when you go back to the jury room, decide what do you believe really happened. Do you believe that the defendant fired a gun that night? And if you believe he did, then you must return a verdict of guilty. Thank you.

THE COURT: Thank you.

Mr. Thomas.

MR. THOMAS: Thank you, judge.

Hey y'all. I came in and spoke to y'all the other day about this case in the opening statement and I said some things to y'all about what I thought you were going to hear, without having heard them myself, but just from the case, and you have all had time now to absorb those things that you heard and listen to your gut and judge for yourselves.

I want to start and I'm going to cut through these as fast as I can for y'all.

First, Deputy Terry Snead. He said it took him thirty minutes to get to the scene. It's a big county. It's a long distance to go. You know, it's certainly not a knock on Deputy Snead. It's a long way to go. It's, you know, almost four o'clock in the morning. When he got there, he did what he needed to do and establish a crime scene. And as far as he knew, that scene had never been disturbed or tampered. He was the first person, though, that we heard describe the scene as chaos.

The second was Andrew Haynes, and he was inside

DJ'g and he said he saw a disagreement between David and Dominique Lawton. He also was the first to introduce us to Mr. Lawton's nickname of Killa. And he did say that he overheard my client say "I'm Killa too." Did he say "I'm a killer too," or did he say "I'm Killa too," as if that was his nickname as well, because there was some testimony that's also his nickname. So was it Killa? Was it Killa? It's tough to say.

But it was interesting what Andrew said was that contrary to what y'all have heard is that the club owner didn't shut down the club on account of that incident. It wasn't that big a beef. He didn't shut down the club. He kept that club open considerably longer than this supposed altercation, which sounds like a disagreement and some jawing took place.

It's described as a big gang of people outside too when he went out there, twenty-five to thirty, but he described the car as my client was in as a Silver Impala, when it was a black Toyota, and the only person he saw with the gun was Kevin Frazier.

Next we heard from James Hampton. He never saw the altercation. He did see Kevin Frazier with a revolver. He didn't remember seeing the car. He doesn't recall William Pinckney's car even being there, but he did say he never saw David Benjamin shoot.

Natasha Sumpter came and talked to us briefly. She parked out by the ditch; heard gunshots, at least six or more; never saw David with a gun. She did see a short low cut guy with a gun.

We heard from Joshua Haggood. I'm going to get to him last, though.

In the meantime, though, we heard from Shawn Defreitas, also Shawn Cooper, and he talked more about Kevin Frazier and Dominique Lawton going at it outside. He said Dominique Lawton was heated because Kevin Frazier had pulled out a gun. He didn't see who shot when he crawled to the car. He did say he saw David Benjamin shooting at the other side of the club, but he ducked down and went behind his car and he was wounded. And we have heard some other testimony about when that occurs. There may be some time line issues with that. Again, chaos.

According to his testimony he had said he was shot prior to seeing Kevin Frazier hold a gun and shoot it in the air. We have heard lots of testimony, but if you try and recall a timeline involving Kevin Frazier shooting in the air, you have to view that testimony as you received it.

We then heard from Danny Saxon. He heard a bunch of shots. He looked and saw a tall guy with a gun in the air. He didn't see anybody except the shooter shooting in the air. He doesn't remember a car leaving. He didn't look

at the vehicle.

We heard from Mike Bullock after that, DJ. He said that Dominique Lawton kept watching David. He did say they looked at each other, but he said that Dominique Lawton kept watching David. Outside he heard Kevin Frazier say he wanted to go home, but most importantly he didn't see anybody with a weapon. Then he heard a lot of gunshots and they pulled a bullet out of his van.

We then heard from Delvin Lawton, the brother of Dominique Lawton, and he wasn't there that night. And he came in here really to testify about passing over the pistol that had been passed to him and he said he put it in the bag, it's the responsible thing to do, and turned it over to the police, but he did say he had seen his brother with guns before.

Investigator Henry Dukes. He wasn't at the scene when it happened. His job is to go there as a public servant, as an investigator for Calhoun County, and to do the best he can and reconstruct that scene and to preserve what evidence is there, to start his investigation and then make arrests. He has been in law enforcement for twenty-five years.

He said he found five 9-millimeter shells. They were about fifteen feet apart and he gave a distance here. It looked to me to be greater than fifteen, but that was the

distance that he gave during his testimony. He found all kinds of other stuff that went into evidence all stacked here around us.

When I asked him why his investigation ended without finding the apparent shooter of five 9-millimeter rounds, he said it was still continuing. He ruled out Nayrone Shivers after getting a warrant, an arrest warrant for him for attempted murder, the same Nayrone Shivers whose shirt later had gunshot residue on it. Whether that was conclusive or not, we heard his testimony. I'm not a scientist and I don't claim to be, but there was some evidence of some residue on there. He said it was about prioritizing and going after the leads that he believed he had. Five rounds from a 9-millimeter to me sounds like they are also on a priority list.

Why wasn't the crime scene taped or protected for a longer period of time than after he taped it? I don't know. Perhaps he thought his investigation had ceased. There is no statute that says he has to keep it open a certain length of time, so he didn't.

He went back later, though, with the metal detector. He couldn't remember when. He couldn't remember when he went back with the metal detector and picked up some slugs in the ground, slugs that later they couldn't determine when those were fired. It's impossible to

determine when a shot round had been fired. We heard that testimony from the experts.

He said he got a search warrant for David Benjamin's house, and I asked him about that search warrant, and he said they didn't collect any evidence. I said "what else did you get?"

He said I think a driver's license, or a tag, and a box.

I said "what kind of box?"

He said "ammo box."

"What cartridge was in that ammo box?"

He said "I think it was .38." Well, luckily that ammo box was here in the room. I went over and pulled it out of the box and came over here and entered it as a Defense Exhibit 1. It's a 9-millimeter box, though. They had been beating on and on and saying that my client had a .45, but then he had a 9-millimeter, and he had a 9-millimeter, but was it his? It could have been. He was at a different location. Was it important to mention, to remember what caliber it was, of a box that you found?

Was it his first time as a lead investigator? Perhaps. He's got lots of law enforcement experience, though. You know, he's here to protect us. There is no doubt about that. I mean, he's been at this game a long time, but it was his first lead as a homicide investigator

at a scene described as chaos. I mean, does that factor into it? And that's certainly not a knock on Investigator Dukes. He's doing the best he can.

We heard from Investigator Matt Trentham, but Matt just told us about collecting the GSR and stuff like that.

We then heard from Agent John Roberts at SLED and that's where all that GSR evidence got collected and got sent to him. And, you know, luckily that's fresh in y'all's mind. We just had that. I don't need to get into that too deeply I think with you, but we did ask him. I asked him some questions about that, especially about the residue that was found in Josh Haggood's car and he described how that happened and how it can stay in the fabric. I mean, this is September. It's hot. The window is even open a crack. A lot of times -- I mean, people know better than to leave the windows down all the way. I'm not going to say you go to a club and leave your windows down all the way, not at this Piggy Park. But window is open a crack, a potential for that flour-like powder to get in there. Like I said, if you went -- I said to him if you want to a clay shoot, you are shooting shotguns, got truck windows down to both sides, it's going to stick in there on that liner until you scrub it, until you wash it clean. And, again, he did find some evidence of lead particles on the shirt of Nayrone Shivers.

James Green came in, the fellow from Mr. Pleasant

before and now with SLED. He's certainly qualified as an expert. I don't think there is any debate about that. I certainly didn't object to his qualifications.

He talked about the bullet that was surgically removed from James Hampton's arm and it matched either a .40 caliber or 10-millimeter. It could have been either one. He still couldn't tell if it came from Josh Haggood's XD-40, or from another firearm, but he could say it come from one of those two.

I could go more in depth about what he said, but he was here before and it wasn't that long ago. I said to him "it looks like eight handguns to me, a possibility of eight handguns," and he corrected me, which was kind of him and said nine.

We heard from Dr. Janice Ross. She came in. What do I say about what a medical autopsy is? I mean, it is what it is. She did say, though, that the victim was 5'7" and weighed approximately 165 pounds. She talked about the oval hole, but y'all heard that. That was just a little while ago.

My client's expert, Kelly Fite, came in to talk about firearms. Extensive experience. Y'all heard it from him. I mean, he had an entire career of doing nothing but this kind of stuff. He talked about DNA and the State talked about DNA with him too. He talked about why there

weren't fingerprints, but when asked about DNA, is it possible to get DNA from these shell casings? He said it was, but you don't see any. It's not here. It's not here.

Then we heard from Tony Gidron. Antonio Gidron came in here. His testimony was it wasn't easy for him to come in here. You heard him reel off family members, family on the other side. He knows my client, but it's very close. His words very close with the brother of Dominique Lawton. Very close. His words. Judge him for yourself. It's up to y'all to judge the credibility of a witness.

You know, he said in here in his testimony, he said exactly -- I don't want to get it wrong, but he said "you know how they get." And I asked him about that and what he meant by that, and he talked about the atmosphere that's going on down at the Piggy Park, and especially if you are not from there. He was talking about that. He knows. It's his friends, his family, people that he spends his time with until this. Now he says he doesn't any more. It sounds like he had had enough. And he came in here and he said he saw when Dominique Lawton got shot and he could see him in the same field of view and said that David Benjamin didn't do it, and he said the image has stuck in his head from it. He remembers it.

Y'all are going to have to judge that for yourselves, but he sat right there and he fielded all the

questions from the State after that. But it was interesting, he said heroin gets up in here, because I believe also we heard that same testimony from a different witness. I'm not going to dig back in this stack to tell y'all, but we heard that same type of line from one of the earlier witnesses. It was either the first or second witness, but it was very similar language that he used in describing that. Very similar.

He even said the length of time he's known David he knew him as Maud or Maudy, but he didn't know him as Killa, and he had known him a long time. Everybody gets a nickname at some point in time. It depends on your environment.

I said something to y'all when I finished my opening statement. The thing that I said to y'all was to trust your gut, but you are going to hear from people; some that have a reason to lie and some that have the courage to tell the truth. That brings me to Joshua Haggood. He did describe the scene as hostile fire when he came out of there. He would know. He's had Army combat service. And when I asked him, he said he even qualified as a sharpshooter and an expert.

He acknowledged on the record that he was likely responsible for the elbow wound to James Hampton. And he described this so called altercation inside, much like Tony

Gidron did too. What situation? I mean, from their testimony it had chilled out. I mean, things had settled down. Dominique Lawton was still worked up, but it didn't sound like David was. It didn't sound like David was worked up at all. It sounded from the testimony that he was at a party, but he's a big fellow and Dominique wasn't. Dominique was a little fellow. And big fellas can tell you that a little fella wants to be a big fella and there is a great equalizer, though, for a little fella to become a big fella, because it could be an equalizer with anybody in the room. That's a pistol. That's what a pistol does. At least in the mind of the little man. He could believe that it makes him a big man.

Let's go further into Mr. Haggood. He was here in a suit, but those aren't the clothes that he was wearing, not right now, because he's currently incarcerated in the South Carolina Department of Corrections for a conviction of assault and battery of a high and aggravated nature in Lexington County.

He said David was a cool head, said "settle down. Be all right." And he described himself, though, as being fired up. And we have heard everybody talk about Kevin Frazier was fired up, it sounded to me more like that beef started outside.

Everyone has described Kevin Frazier with a gun,

Kevin Frazier with a gun, saw Kevin Frazier with a gun, and he was saying "we just want to get home." He could feel that out-of-towner vibe, "we just want to get home." The sight of the pistol is not good, though.

And that reminds me, I'm not going to pretend there is not an elephant in the room from what Josh Haggood said, because Josh Haggood said "we went out to the car and we got guns and then we went back in the club." Nobody else said that, though. Nobody else said that but Josh Haggood. He went back in there. He said they did that, and they partied on and they came out and then they were strapped and ready to roll. Josh Haggood said that.

Josh Haggood, who stated here before you, that he is testifying for the State in exchange for a sentence of assault and battery of a high and aggravated nature and dismissal of murder and two attempted murder charges. Proof is in the pudding.

And if you wanted to talk about circumstantial evidence, as the State discussed, circumstantial, let's talk about known facts of Josh Haggood. Trained as an expert in the U.S. Army; possessed a .40 caliber XD-40 pistol, this one right here. That's the one. That's the one that he had. .40 caliber slug or 10-millimeter taken from the arm of James Hampton, even though he essentially did say that he felt responsible for it.

His story seemed to change repeatedly from what the investigators had said. It changed a little bit, changed a little bit more. What's interesting is that SLED report, the last one that came out in February, last month February, not February of 2012, you know, four months after this incident, five months after. It came out recently and it pointed towards him. There is a change of heart all of the sudden; "I'm coming clean. I'm coming clean." Coming clean after being dishonorably discharged from the U.S. Army. Another little guy. Another little guy.

Well, for circumstantial evidence you could take those known facts and from those facts you could make a logical and a reasonable deduction, and from that you can point to Josh Haggood. You certainly could. He had a reason to lie. And once he had made his deal, he's out. Look out bus.

Court's indulgence?

THE COURT: Yes.

(Off the record)

(Back on the record)

MR. THOMAS: What it is, though, is it's a statute on the hand of one is the hand of all. You have been hearing about that.

Let's see if this works.

Y'all try and read it. I want y'all to be able to

see it, but it says if a crime is committed by two or more people who are acting together in committing a crime, the act of one is the act of all.

A person who joins with another to accomplish an illegal purpose is criminally responsible for everything done by the other person which occurs as a natural consequence of the acts done in carrying out the common plan and purpose.

For example, two people can be guilty of killing another person when only one of the two had a gun. There was only one bullet and only one of the two fired the shots that caused the death. If two or more people are together, acting together, assisting each other committing the offense, the act of one is the act of all; or sometimes that says is the hand of one is the hand of all.

Prior knowledge that a crime is going to be committed, without more, is not sufficient to make a person guilty of that crime.

Mere knowledge that another person is going to commit a crime, even if the defendant is present when the crime is committed, is not sufficient to convict a defendant as a principal.

Guilt as a principal is shown by actual or constructive presence at the scene as a result of prior arrangement. Therefore, a finding of a prior arranged plan

or common scheme is necessary for a finding of guilt as principal.

The State must also -- the State must prove beyond a reasonable doubt by competent evidence the theory of the hand of one is the hand of all.

A principal in a crime is one who either actually commits the crime or who is present and aiding, abetting, or assisting committing of the crime.

When a person does an act in the presence of and with the assistance of another, the act is done by both.

Where two or more are acting with a common plan or intent, are present at the commission of the crime, it does not matter who actually commits the crime.

Again, let's look at these. You heard testimony after testimony that Kevin Frazier walked out of there first. Kevin Frazier got hot. He had his gun out. We didn't hear testimony from anyone that there was a huddle about it ahead of time, even from Josh Haggood.

The hand of one is the hand of all.

Present at the commission of a crime means to be sufficiently near to aid and abet and assist in the commission of the crime.

However, mere presence at the scene of a crime is not sufficient to convict one as a principal on the theory of aiding and abetting.

Intent is also a necessary element, for there must have been a common design or intent to commit the crime and the crime must have been committed pursuant thereto for the person aiding and abetting by some overt act.

Intent means intending the result which actually occurs, not accidentally or involuntary.

It may be shown by acts and conduct of the defendant and other circumstances from which you may naturally and reasonably infer intent. The State must prove these beyond a reasonable doubt.

Common plan and purpose. Aiding, abet, and assist. These are questions you are going to have to ask yourselves.

As I said, I'm a salesman in the room. Let's talk about it. That last word on the end, though, is the important word. That last word on the end, those last two words on the end are words I talked to y'all before too, reasonable doubt.

I talked to y'all about scales. They start here and they add evidence and everything said that don't look favorably upon David, but did you hear enough? Did you take in these witnesses and these experts and your mental picture of the crime scene and did it go not a little bit, did it tip it? Did it tell you that, or is there a reasonable doubt?

I will tell you all the king's horses and all the king's men can reconstruct that scene the way it was that night.

There is my client. There is David. You have heard these charges against him.

The State is getting ready to present their closing. Remember the testimony. Remember what you heard. Remember what you saw. All those human experiences, remember, and then go back into that room and render verdicts of not guilty on all three of these counts against my client David Benjamin. Reasonable doubt.

Thank you.

THE COURT: Thank you, Mr. Thomas.

Mr. Sorenson?

MR. SORENSON: If it please the court, Your Honor.

THE COURT: Yes, sir.

MR. SORENSON: If I could have just one moment, Your Honor.

THE COURT: Yes.

(Off the record)

(Back on the record)

MR. SORENSON: Thank you.

THE COURT: Uh-huh.

MR. SORENSON: Good afternoon, Madam Forelady, ladies and gentlemen of the jury.

Imagine back on Monday when you first got here if I had asked you to close your eyes and imagine a birthday party at Piggy Park. The images that would come to your mind are going to probably have been a far cry from what you have heard from this courtroom over the last couple of days.

I submit, ladies and gentlemen, there is no shortage of blame, no shortage or fault that can be assigned to a lot of people in this case. A lot of people. A lot of young men out there that were doing things that, quite frankly, they shouldn't have been doing.

What this case boils downs to, ladies and gentlemen, is that it shows what happens you take alcohol, you take egos, you take these, and you mix them together. Alcohol, egos and guns often lead to fatal and tragic results, as we have seen in this courtroom this week. As a result, ladies and gentlemen, I submit to you a lot of peoples actions, most specifically that man's actions, a young man lost his life and two other bystanders were shot that night.

One thing that I just kind of want to make sure I don't forget to talk about is, you know, Mr. Thomas kind of hinted on this a little bit about these 9-millimeters that were found out kind of over near where -- in the general vicinity of where Mr. Lawton's body was found by some trees. If we could figure out who was shooting that 9-millimeter,

if they were shooting it that night, they would be charged also. All right.

And if you want to jump to the conclusion just because they initially got a warrant for Nayrone Shivers, Mr. Shivers had some gunshot residue on his shirt, that he wants to obviously rush to judgment and basically convict him for shooting that gun, but yet at the same time wants to turn around and see all the -- to not look at all the evidence that ultimately convicts his client.

You heard the Investigator Dukes, Lieutenant Dukes, talk about Mr. Shivers. I'm just going to take a second or two to talk about this. Initially his name came up as somebody, but unfortunately they weren't able -- or fortunately, I guess, for Mr. Shivers, they weren't able to corroborate that and had some contradicting evidence that came forward. They never recovered a 9-millimeter. As I said, I submit to you if they had, they can tie it to Nayrone Shivers, or any other person out there that night firing a gun, they would have been charged also. So that's why his answer to that question is that the investigation is still ongoing, but unfortunately eighteen months now the odds of somebody coming forward and admitting to firing a gun out there that night or having credible evidence that somebody else fired a gun out there that night is probably pretty unlikely, so let's look at what we do have. Let's

look at what we do have.

An issue in this case, ladies and gentlemen, it actually ends up being very simple. It boils down to basically one initial question. Do you find that we have proved to you beyond a reasonable doubt that David Benjamin had a gun and fired a gun, I submit to you a .45 caliber gun, the early morning hours of September 18th of 2011? It boils down to that question, because if the answer is yes, he's guilty. If the answer is yes, he's guilty.

If the answer is no, that we hadn't proven to you that, I submit to you under your oath you have to find him not guilty, and I apologize for wasting your time this week.

If you find, however, that we have proven to you that he had that .45 caliber gun that fired, and I'm going to go through some of this stuff, and you will have it all back in your jury room, that fired that .45 caliber gun leaving those five shell casings at the corner of that club where the car he arrived in driving and drove away from the scene was parked, if you find that we have proven to you that he fired that .45 caliber gun, I submit to you he's guilty. There is no -- it's not beyond a reasonable doubt. It is no doubt. The only question then would become is looking at what he's guilty of.

As Mr. Lupton told you on each of the charges, and I'm going to kind of talk about those at the very end just

very briefly. On each of the charges there are different levels of what he could be convicted of.

And then the only other -- and there would be one other issue that would come after that, because I submit to you, ladies and gentlemen, as you have heard not only Mr. Lupton, but then also Mr. Thomas talk to you about the hand of one is the hand of all, or accomplice liability.

In this case I submit to you, and I'm going to show you when I walk you through the evidence in this case, that David Benjamin fired that .45 caliber gun striking Dominique Lawton in the left side of his head killing him, striking Shawn Defreitas in his right hip exiting the inside of his right thigh; that Joshua Haggood fired his .40 caliber gun striking Mr. Hampton.

So the other issue you are going to have is then determining under that hand of one hand of all if Mr. Benjamin is guilty from Mr. Haggood's actions. And I submit to you that's where you look at their actions kind of throughout the entire evening, the fact that they were acting together, aiding each other, assisting each other. In fact, he's actually the one that ends up driving them away from the scene.

Let's talk a little bit about the facts, all right. In a lot of cases, and this one ends up being probably more so than a lot of other ones, kind of

presenting a case as a prosecutor, a lot of times it's kind of like putting a jigsaw puzzle together. You know, the witnesses that you have heard from that didn't say anything to do with Mr. Benjamin. You know, some of them that didn't even see him out there. Okay, you may wonder well, why is that witness testifying? As I said, they are pieces of the puzzle. It's my job now at the end here to put all those pieces together. I submit to you when those pieces are together it's going to be clear, a clear picture of what happened.

And Mr. Thomas asked -- you know, made the comment about how difficult it is to piece together what happened that night. I submit to you it isn't when you look at the evidence; the physical evidence, the vehicles that were out there and where they were struck, where the casings were found and where the bullets were found, and the witnesses that testified. I submit to you when you put all those together, it's pretty clear.

You know, he had the expert witness brought all the way from Georgia up here. You know, his qualifications dealt with firearms, crime scene reconstruction, shooting reconstruction. I thought for sure when I heard all those qualifications and the fact he's testified twenty-seven hundred times, oh my goodness, he's going to get up there and put out this theory that he doesn't -- you know, based

on the evidence, that obviously I'm sure coming all the way from Georgia he's reviewed all these photographs, he's reviewed all this evidence, he's going to put together some theory that it doesn't match any of what we are saying happened. He didn't ask him a single question about that. That's the guy with all the experience in the world to address that. I submit to you there is a reason for that, because if he was asked those questions, if he was given all this, he could come to the same conclusion that I submit to you that you are going to come to in a little while here.

All right. What else while we are looking at witnesses? You know, Mr. Thomas pointed out a few of them. I'm sure probably when you are just going back and looking at your notes maybe come up with some other ones. Some of these little inconsistencies that pop up. Mr. Lupton kind of addressed that a little bit when he came up here before you. People observe things differently. No doubt about that this was a chaotic scene out there. You heard witnesses testify that when the first gunshot popped off, people were running and screaming and hiding and ducking. Everybody but them, that is.

People perceive things differently. You have heard of studies before on sociology and psychology studies, you know, classrooms where they'll have a classroom of students watching teachers teach and have somebody come

running in and swipe something off of the teacher's desk and they go running out. Then afterwards sit down and ask them, you know, describe what they just saw, and you get descriptions that run the gamut from people getting clothing wrong, size wrong, gender wrong, race wrong. People perceive things differently.

In this case, ladies and gentlemen, keep in mind these witnesses. I mean, nobody, nobody has the ability when they are out observing something to see everything going on around them. Obviously their focus has to be somewhere. I submit to you the only witness that got on that stand that seemed to have the ability to remember everything that happened all around him eighteen months ago, even though he's never talked to anybody about it in the interim, was Mr. Gidron, and I'll talk about him in a little while.

So you would expect to see these little inconsistencies, you know, about somebody possibly, you know, putting somebody in a different place, or something of that actually, the order of events that have happened. I submit to you if every one of these witnesses paraded in here and told you word for word the exact same thing, that's when you should have a concern, because obviously that's a script, when somebody has sat down with them and told them what to say. Okay.

Now, let's look at the witnesses, all right?

Mr. Haynes, Andrew Haynes, the DJ. I believe he was our first witness Monday afternoon.

Mr. Haynes says that he saw the initial kind of bump inside where Mr. Lawton, I believe he said, bumped into Mr. Benjamin and they had some words at that point in time. And as a result of that, basically multiple people end up having conversations with both Mr. Lawton and Mr. Benjamin basically trying to diffuse the situation, okay?

In his conversation with Mr. Benjamin, keep in mind where he said that happened, okay? Mr. Thomas, one of the last things he just said before he sat down was talking about Joshua Haggood.

Now, Mr. Haggood is the only witness, the only person from that witness stand that talked about them going out to get guns. Okay. Do you remember him saying that? The only person. Well, who else was going to -- who else is going to be able to testify about that? Kevin Frazier? He's charged also. His charges are still pending, but we do have somebody else that testifies about that. Andrew Haynes. Do you remember Mr. Haynes said he saw the three of them leave the club and went out, hopefully at that point in time that they were leaving, and they were returning from the direction where their car was parked. Returning from the direction where their car was parked. I submit to you

they have already armed themselves, a .45 caliber and a .40 caliber and a .32 revolver. So that's not accurate when he says there is nobody that corroborates that.

What's the dialogue that goes on between them at that point in time? You know, Mr. Haynes says something to the effect to Mr. Benjamin "you know, calm down. Killa is young. He's drinking. He's drunk and you need to chill out."

And his response is -- I mean, it's not "oh, I'm a Killa. My nickname is Killa too." It's "no, I'm a killa." At the time maybe you didn't quite know what that meant, but it ends up being kind of prophetic when you look down the road of what happens a couple hours later. But, you know, you look at that and it may just have been him saying "that's my nickname." That goes into that ego that I was talking about. "He's not Killa. I'm Killa."

They go back inside. Everything for the most part seems to calm down inside, but I submit to you there is still tension in there. You heard that from Mr. Bullock who testified about them glaring back and forth, about looks and stares back and forth. And the tension -- when I talk about Mr. Haggood in a second, we will kind of show some of that also, the tension I would submit to you was there.

But then going back to Mr. Haynes. All right. He ends up learning about this commotion going on outside. He

goes outside and Mr. Frazier has this .32 revolver waving it around in the air, waving it around in the air. All right. And do you remember, he said that his focus was basically on Mr. Frazier. He got him to the car, the driver passenger door and he ends up shooting in the air. He said Mr. Benjamin was around the driver's door at that point in time, but that wasn't where his focus was. When Mr. Frazier shot in the air, he knew that was not a good thing. He said he took off running at that point in time.

If he was coming in here, you know, and we were trying to frame Mr. Benjamin, don't you think that he would have said, you know, I at the very least saw him with the gun? At the very least, you know, if not actually saw him shooting? He doesn't see that, because as he said, his focus wasn't on David Benjamin. It wasn't on the other guy Joshua Haggood. It was on Kevin Frazier. When Mr. Frazier fired up in the air he got out of there. He took off running. He came back into the club.

All right. Then Natasha Sumpter testified. And, you know, we basically all -- we put her up for one reason -- well, a couple reasons. You know, she ends up seeing -- and, you know, she doesn't know these people, but the description she gives, it's going to be Joshua Haggood she sees. You know, a short guy a little bit taller than her. She's 5'4", with low cut hair. That doesn't fit Mr.

Benjamin. It doesn't fit Mr. Frazier, with the gun in his waistband. Okay.

And she ultimately at that point in time, you know, ends up going off towards her vehicle and there are shots flying ultimately all over the place. All right, she kind of goes and shows. There are people out there in this parking lot that are not involved in this altercation. I mean, this isn't just two little groups of, you know, guys that are squaring off like the wild west. You know, there are people that are not involved that are in the middle of this. It goes towards the other recklessness, and I submit to you maliciousness; David Benjamin acting with Kevin Frazier and Joshua Haggood's actions that morning. All right.

Let's look at James Hampton. All right, Mr. Hampton, and, again, sees Mr. Frazier with a gun in the air. He sees Mr. Haggood's gun in his waistband. Takes Mr. Frazier, involved yet again trying to get him -- get them in their vehicle and get them out of there, and he ultimately says at that point in time that Mr. Frazier starts shooting in the air and he basically takes off initially behind towards the van. All right. But what does he say? He saw David Benjamin, the guy with the braids, seen him by the driver's door with the gun in his hand and shots coming ultimately from the area of the defendant's vehicle. Okay.

But his time frame now, and that becomes real important, because it kind of matches up then with a whole lot of other witnesses.

What does he hear happening then? He hears after the initial volley of shots somebody yell "Killa is hit, Killa is down," something to that effect. What does he testify that he did? It was kind of a pause in the lull in the action, so to speak, and he goes over now to the area where Dominique Lawton is down on the ground. He goes over to this area here and sees his friend with a hole in his head on the ground.

What else does he tell you he sees as he's walking back? I can't imagine the anger. You saw some of that come out of him up there, kind of emotion when he was talking about it. As he's walking back now he sees another person. He knows Shawn Cooper. I think he may have referred to him as Shawn Defreitas at the back of his vehicle. He could tell he had been shot, because he was shot in that initial volley, just like he testified he was. But what does Mr. Hampton do? He yanks this thing out of the ground and throws it at Joshua Haggood and David Benjamin and Kevin Frazier's vehicle. Why on earth would he do that unless he knew in his mind at that point in time that's where those shots came from that shot and ultimately killed his friend? Imagine, I mean the anger that must have been going through

him. And we know he didn't have a gun. So if he had a gun, he would have fired and he would have shot at the car. To come and yank this out of the ground and throw, and we know that happened, not only from Mr. Haggood's testimony, but you know they go and recover his vehicle and, I mean, it's got green paint on the broken rear-view mirror or side-view mirror.

But more importantly what does he say happened after that? He goes walking around the far side of the van, I assume at that point in time to go inside or to go find help or something, and shots rang out again and he ducks down and gets hit on the inside of his left elbow. Well, I submit to you there is no doubt where those shots came from. If you look at all the evidence, there is no doubt.

So fast forward for a second to Joshua Haggood's testimony. He testified after that post was flung at his vehicle that he saw somebody at the back of the van and heard gunshots. And I submit to you that may have been true, because ultimately we find -- ultimately they find a shell casing at the back of the van.

If you remember his testimony, and multiple people's testimony, that in between the van and his car was his brother's car backed in, which would put the passenger's side facing the van. And low and behold they pulled a .32 -- I'm sorry, a .380 round out of the vehicle that

matches this .380 pistol, which also matches that. I submit to you what happened, that's the gun that I submit to you that Mr. Lawton had initially.

And you heard testimony from Mr. Haggood that when he first saw him he had charged him and it kicked out -- I submit to you kicked out this live round near the door. I submit to you that gun doesn't get shot again that night until after Mr. Lawton has been shot in the head and is dying on the ground over near that oak tree. One of his buddies picks that gun up. I don't know who, but I submit to you if we knew who, they would be charged, and ends up firing that shot into Mr. Pinckney's vehicle, which draws that return fire from Mr. Haggood, hitting Mr. Hampton. And I submit to you the evidence shows he didn't fire anywhere else, right? If you look at the map, three .40 caliber shell casings found at the corner of the building, and he testified that he fired three or four times. Three casings, three bullet holes in the van. Two exit holes on the other side of the van and a .40 caliber bullet in the van. I submit to you those two exit holes, one of them hits James Hampton in the left elbow. The other one ricochets off that building on the other side of the van.

It's no surprise that Mr. Haggood, when all that is laid out for him, ultimately realizes that, you know, I shot somebody.

What's important about him, you know, Mr. Thomas talks about courage. I submit to you back on September 18th of 2011, there wasn't a whole lot of that being shown out there that night. There wasn't any being shown by Kevin Frazier. There wasn't any being shown by Joshua Haggood. There wasn't any being shown by David Benjamin. Probably several other people out there that were out there also.

Courage, ladies and gentlemen, though, is him coming in here Tuesday morning and getting up on that witness stand and pointing his finger at his childhood friend, somebody he's known since the first grade. You heard him testify he's one of his best friends. Courage is him coming in here and knowing how difficult that was going to make, quite frankly, the rest of his life having done that.

What else did he tell us? All drinking that night. They have all got guns with them that night, when they get to the club that they initially lock up in the car. And then ultimately inside David Benjamin gets his attention and he comes over and he points out Dominique Lawton. "I think he's got at gun. He's over there messing around in a book bag." I submit to you the book bag that probably belonged to the DJ Andrew Haynes. "I think he's got a gun."

Mr. Haggood's response to that is "what do you want to do? What do you want to do?"

I never heard this term before and this is a first for anything, "don't want to get caught slipping." So what does that mean? They didn't want to get caught without their guns.

Mr. Thomas talks about, you know, to show that hand of one, hand of all, and accomplice liability you have got to have the huddle. Well, I submit to you that was your huddle right there. When they broke that huddle, like they do in a football game, they went outside and got their guns. Mr. Haggood got his .40 caliber that he had borrowed every time he came to Orangeburg for the seven months before this. Mr. Frazier got his revolver he was toting around the night before. I submit to you Mr. Benjamin got his .45 caliber gun that we hadn't found. There is a reason for that that I'm going to talk to you about in a second. And they go back inside.

Ladies and gentlemen, you know, things were so bad that I can't imagine being in a situation where I'm at a party at a club and I feel the need to go arm myself to be able to go back in, you know. And I'm sure it's a decision that Mr. Haggood regrets, you know, is going to be regretting for probably the rest of his life in what not only it has done to him, as far as being incarcerated, but also his career. If they had only just left, but the didn't. They made a conscious decision to arm themselves

and go back into that club. All right.

Let's fast forward a little bit to when they go back outside, because, as I said, he had talked about seeing the person that Mr. Benjamin had pointed out charging that gun, which I submit to you discharged that live round near the door that was found. And then Mr. Frazier pulls his gun out. Mr. Haggood said he was going for his gun when Mr. Benjamin told him to fall back. It seems like it's a military operation going on, to fall back. All right. Then he says he hears gunshots. And I asked him "what was David doing?" He was walking up ahead of him, that he pulled out his .45 caliber gun.

Keep in mind now, you know, Mr. Thomas wants to make this out like it's a combat situation out there, all right, that apparently there is shots buzzing around all around. Well, the person with the military training doesn't even have his gun out at this point in time, okay? Keep that in mind. All right. But what does he testify? What does he tell you that David Benjamin did at that point in time? Pulled out that .45 caliber gun and started shooting out in the direction of the parking lot, out away from where there -- from the direction they were walking. All right. I submit to you those shots, and he continued walking. He said he saw him shoot two times, but after that his attention was drawn elsewhere. Well, I submit to you he

kept shooting. He ended up shooting five times. There were five casings that we found out there, okay.

Where did those bullets go? We know the casings were found right at the corner of the building, right in the same general vicinity as the three .40 caliber casings were found, all right, but I submit to you where those shots went, he kind of jumped forward to a couple other witnesses; Shawn Defreitas initially.

Do you remember Shawn testified that, you know, he was involved in initially trying to -- he was a little bit older. He's thirty-one, I think he testified, but a couple of years older than some of these guys; trying to get them and get Kevin and them in their car, get Dominique and their friends to go, and kind of separate things. And at that point in time somebody said "well, you know, your car is in the way." So what does he tell you happened at that point in time? As he turned away from the driver's side of that vehicle and went to walk towards his vehicle he heard gunshots. He gets hit in the right hip. Where is his right hip facing? The defendant's vehicle. All right. He fell to his knee, looked back and saw Kevin Frazier shooting in the air and David Benjamin with a gun shooting also.

Mr. Thomas made a big deal about, you know, well that doesn't -- that doesn't jive with the description because, you know, the testimony from other witnesses was

that Kevin Frazier fired first in the air. Well, nobody ever said he fired and then stopped firing, okay? You know, when we find his gun, it's got two spent shell casings in it, so you assume he's fired twice.

But what else do we know? What else does Joshua Haggood tell us? That Kevin Frazier told him to roll down the window in the back and told him he threw some shell casings out the window. So we know he fired more than two times, but I submit to you those initial shots that Mr. Cooper or Mr. Defreitas is hearing is Kevin Frazier shooting in the air, David Benjamin opening fire. By the time he has fallen down and looking back, he is seeing the tail end of the two of them both shooting still.

What else is in that direction? All right. That explains -- I mean, he's the only peson that could have shot Shawn Defreitas. All right. But what else is in that direction beyond this out into the parking lot away from the direction that Mr. Benjamin was walking? You know, he's walking this way in front of these vehicles, what's out over here? Dominique Lawton.

Fast forward and look at Danny Saxon's testimony. Now, Mr. Saxon testified, you know, he -- really bad timing pulling a parking lot, you know. He pulls in.

You heard Deputy Snead testify that, you know, by the time he got there the vehicle was up a little bit from

Mr. Lawton. I think he said four feet, or so, up in front. You heard Mr. Saxon testify that, you know, the initial first person officer there asked him to move up a little bit and he moved up and to the left a little bit, okay? Otherwise the vehicle oriented the same way. So that's how they were able to get to Mr. Lawton, who was on the ground. All right.

But what does Mr. Saxon tell us? He pulls in the parking lot and he's in the front driver's -- front passenger's seat of his vehicle. His buddy gets out and goes towards the door. He doesn't know where he went over that. All right. But what does he see as he's getting out of his vehicle? He sees Dominique Lawton walking in front of his vehicle coming down the passenger's side and he's upset. He knows him. He gets out. He said he put his hands, and he actually got right up on him and he put his hands on him, basically telling him to calm down, to calm down. He didn't have the gun in his hand. And then he went on by him. And right after he goes on by him he hears gunshots. As he's ducking down he's looking back and all he remembers seeing is a tall guy shooting up in the air. And as he pivots he sees Dominique Lawton down with blood coming out of his forehead at the back of his vehicle. It isn't the guy shooting up in the air shooting him. It was the other guy shooting the .45 caliber gun, just like his buddy

Josh Haggood said.

Yet, again, you know, if we were looking to try to frame David Benjamin, Danny Saxon would be the perfect witness to do that. He knows David Benjamin. He knows him. When he's asked about David Benjamin, "I didn't see him that night." Yet again he had just pulled in when this happened. The defendant ended up pulling out right after it. The only person he sees shooting is the guy, the tall guy shooting up in the air before he's ducking for cover. He's literally pulling into a parking lot, stepped out of his car into the beginning of a gun battle. All right.

But what else do we know about him that's important? All right. Do you remember, if you think back to Mr. Haggood's testimony that when he saw David Benjamin pull out the gun, arm extended, slightly downward angle, he said he sees him fire the first couple of shots and then doesn't know if he fired after that or not. He wasn't looking at him. What do we find out there? Do you remember, they get -- they get Mr. Saxon's vehicle. He brings it up to the sheriff's office and it's got a hole in it on the driver's side of the vehicle, I submit to you on the side that would be facing the defendant's vehicle. You know, they take a look at it and see where it appears, you know, penetrated the door, but where it hit the post inside, you know, there's nowhere else for it to have gone. I mean,

it didn't get into the vehicle, into the seat, or something like that. And obviously it's not in the vehicle at that point in time. All right. They look at this also. You know, you got the vehicle, you know, it was slightly, slightly downward angle shot into the vehicle.

So they go back out there with the metal detector. Yeah, man, I guess it would have been great if they had done it that night, but, you know, you work with what you got sometimes when you are in a small county, but they get ahold of a metal detector and get back out there awhile later for the sole purpose of going back and looking around where this vehicle would have been parked, okay, because they know that bullet had to have gone somewhere. And the most logical thing is that it's hit with the door closed, if it's gone through, hit, fallen, and when the door opened, it opens, it falls out. So they go out there with a metal detector and get looking around and lo and behold they find not one bullet in that vicinity, but three bullets, okay, State's Exhibits 57, 58 and 59, which we know from Agent Green they are all fired by a .45 caliber gun, which happens to be the same caliber of gun, I submit to you, he was firing. There's five shell casings that are found at the corner of the club.

I submit to you he's downward angle, got two bullets that go into the ground. One into the ground

initially and maybe one of them through Shawn Defreitas' leg and then into the ground. Got a third one that hits Danny Saxon's vehicle, which is why it's so damaged that he couldn't even compare it to the other two. He got two more, ladies and gentlemen, as I submit to you, as Mr. Lupton said in his opening, as he's tracking up. One of them that catches Dominique Lawton square in the left side of his forehead and another one that probably misses as he's dropping.

If you put it together, it's really not very complicated, when you put it together. You know, these 9-millimeter casings, you know there is multiple explanations for these. You know, either one, they had nothing to do with this case, which I guess is possible. Two, there is somebody else shooting out there, which I guess is probably more likely, given the actions of a lot of people out there, but I submit to you what you hadn't heard and what we know, nobody is shooting at the defendants, other than that last shot we know that I talked about that Mr. Haggood returned fire to. Okay. You know, there is people all around. Mr. Haggood has testified, Mr. Hampton, Mr. Haynes, Mr. Defreitas. There is no shots coming from out into them.

You know, you can tell that even more so when you look at Mr. Haggood's vehicle isn't hit by any bullets. The

van that's the driver's side of the van that's facing the defendant's vehicle is only hit by the three that I submit to you we can account for the three .40 caliber rounds that Joshua Haggood fired. William Pinckney's vehicle that's in between the two of them is hit by one round from the back of the van, which I submit to you yet again from Joshua Haggood's statement is fired long after Dominique Lawton has already been shot, long after Shawn Defreitas has already been shot. The building doesn't have any bullet holes behind them. That's why Mr. Lupton said this isn't a case of self-defense. I mean, this issue really just boils down to was David Benjamin firing a .45 caliber gun.

You have heard from Mr. Bullock and he testified, you know, he's not out there for any appreciable length of time. He goes out to unlock his van and hears Mr. Frazier, but by that point in time he's over at his vehicle. And from his vantage point, I mean, he's got a big old van in front of him, doesn't see really anything else. So it's important from him, you know, is just the fact that, you know, these bullet holes were not there prior, they would have come from this shooting.

Let's talk a little more about the forensics in this case. You know, we recover three guns. One of them is actually turned into law enforcement by the victim's brother. Okay. He doesn't try to hide the gun. He doesn't

try to get rid of the gun. I guess that speaks a little bit to his credibility and character. I would submit if they contact him, he gives it to them and says "look, I mean, this was given to me. I think it's my brother's." All right.

What other guns do we recover? All right. Kevin Frazier, you know, they arrest him, you know, early afternoon the next day, all right, and he's managed to find, you know, time to hide his gun in his couch.

All right. Mr. Haggood we know had borrowed a .40 caliber gun from a friend, a fellow soldier, had borrowed it on multiple occasions. And lo and behold, you know, within a day after this incident that gun is in a pawn shop up in North Carolina. You know, we're fortunate to have recovered that gun.

So where is the .45? Where is the .45? Do you remember Mr. Haggood's testimony? You remember law enforcement, you know, they arrested Kevin Frazier and they spoke to Joshua Haggood on the telephone that afternoon. They don't get up to Fort Bragg to talk to him for a couple of days after that. What did he tell you he did in the interim? He talked to David Benjamin on the telephone. David Benjamin knew the police probably had heard that Kevin Frazier had been turned in by then, knew they were talking to Joshua Haggood. Ain't no way that .45 caliber was still

going to be around.

Mr. Thomas, I guess, his argument is trying to say that, you know, he's, I guess, a 9-millimeter guy and not a .45 guy, since they found an empty box. He tried to make a big deal with Lieutenant Dukes, you know, that he -- you know, that he somehow, you know, couldn't believe that he had forgotten what caliber that box was. Well, I submit to you that box had no relevancy in this case. It's an empty box, bullet box, that was found at his house. At the time he has got to collect it just in case something comes up where suddenly a 9-millimeter, you know, becomes relevant to Mr. Benjamin. All right, but there is no reason for him to have remembered what caliber that box of bullets is.

But, you know, if his argument is, though, just kind of going back to what I said a minute ago, that, you know, "we have got evidence of a 9-millimeter. You know, he's got a 9-millimeter, not a .45." Guess what, we didn't find a 9-millimeter gun either.

Dr. Ross, I wanted to mention, just say one thing about her. It's not really an issue as to, you know, cause or manner of death, but we tried to -- Mr. Thomas tried to bring this up a little bit with his expert from Georgia. He ultimately ended up saying that he basically no expertise in that area and would defer to a forensic pathologist, but, you know, there is no way you can tell, and this is just

kind of common sense, you know, when you have -- your skin is elastic, okay, so you can measure a hole two days later and your skin has then started to heal, so there is no way to measure that hole and be able to tell what size bullet went through it, okay?

A couple more witnesses I want to talk about, the two witnesses Mr. Thomas called today.

First of all, there is Mr. Fite. As I said, I talked about him a little bit earlier, but, you know, obviously a very qualified person. I mean, no doubt about it, but I really hadn't quite figured out why he drove all the way from Georgia to come up here when he hadn't reviewed all the evidence in this case, hadn't seen all the photographs, hadn't seen all the reports, basically just to tell us that it would have been good that they could have gotten out there with a metal detector that night. I could have told you that. Obviously that would have been more beneficial. That you can sometimes get DNA off of shell casings, which he hadn't even seen the report where they had tried to do that and there is nothing they could kind, so that's why that hadn't been before you before that, because there was nothing there, but it had been done, and that's really about it. We know he didn't address anything that Agent Green, the State's firearm expert testified to, so obviously I guess he didn't have a quarrel with any of that.

So he came all the way from Georgia basically to tell those couple of things.

Then lastly Mr. Gidron. Okay. And, you know, here is an individual that never talked to law enforcement; never came forward. Looking at coming up on eighteen months here, I guess, in a week or so. Never come forward. Somehow he remembers, I mean, every detail about that night, but look at what he's remembering. I mean, as I said, when -- this is -- why don't use just common sense that when you are observing things, and there is no way for you to know what is going on all around you, but yet he somehow manages to describe things going on literally in every direction. He knew there was people shooting behind him. He knew there was somebody shooting over here. He knew that the defendant was in front of him, you know, what he was doing, but somehow knew the exact time that Mr. Lawton got shot over here. I mean, does that appeal to your common sense at all?

But what else does he not tell us that shows to you, ladies and gentlemen, I submit to you -- and he said he had been out there since eight o'clock? Free liquor, beer. You know how much he had been drinking? That's one thing I neglected to ask him. That's my fault, but he had been out to this party for, you know, seven, eight, nine hours, but what doesn't he remember that shows you, ladies and

gentlemen, that his credibility has got issues and you can't believe everything that he said? You know, he doesn't say he never saw James Hampton. Well, James Hampton was right in the middle of all of this. He was at the car. He went over to where Dominique Lawton was shot. He hadn't missed -- I mean, so he puts himself standing directing traffic, basically, in front of the vehicle. How do you miss a guy? You saw him, James Hampton is not only huge. He's got that nickname for a reason. He's not little. How do you miss that guy coming up, yanking this out of the ground and throwing it at the vehicle that you are supposedly standing right in front of watching? How do you miss that? He says the first time he saw James Hampton that night was after he was already been shot and was leaning on Andrew Haynes' vehicle.

And Andrew Haynes then becomes the other one. How do you miss him? Yet again right in the middle of it.

It's interesting, but one thing he does tell us, though, is that Kevin Frazier was the first person to start shooting.

Now, ladies and gentlemen, as I said, the issues that it boils down to is the initial question of whether David Benjamin had a gun and was shooting. I submit to you if you find he wasn't, he's not guilty. You don't need to go any further than that.

If you do, you move onto the next issue, and that is to determine what he's guilty of.

All right. As you have been told, and Your Honor is going to charge you, there is three separate indictments dealing with three separate victims; charging one count of murder dealing with Dominique Lawton, one count of attempted murder dealing with James Hampton, and one count of attempted murder dealing with Shawn Defreitas. Different issues involved in them, so I'm going to talk about the murder and the attempted murder of Shawn Defreitas, because I submit to you those will both be basically the same, and those are the two, ladies and gentlemen, that I submit to you he fired the shot that ultimately killed Mr. Lawton. He fired the shot that hit Shawn Defreitas in the hip. All right.

So on the murder you have got two possible verdicts. Murder -- actually three possible verdicts. Murder, guilty of murder; guilty of voluntary manslaughter; or not guilty, obviously, as I said, if we haven't proven to you his actions that night.

All right. Murder. It's the malicious intentional killing of another person.

Voluntary manslaughter is a killing done in the heat of passion. I submit to you his questioning of Joshua Haggood answers that question. What was David Benjamin's

demeanor? It was calm and cool headed. I submit to you he wasn't somebody under the heat of passion. I think he knew exactly what he was doing when he went out to this car and got that gun, put it in his waistband and came back into that club, confronted by Andrew Haynes at the front door. He knew exactly what he was doing. He was not defending himself. I submit to you he wasn't -- I mean, this isn't a heat of passion killing. He calmly and cooly pulled out that gun and fired five shots at I submit to you a person that was unarmed at that point in time, putting every other person in that parking lot at risk, including a person that ultimately ends up getting hit while going to try to move his car so the defendants could leave. That's murder, ladies and gentlemen.

Then on the charge of the attempted murder, you are going to have options of attempted murder, assault and battery of a high and aggravated nature, or assault and battery second degree.

I submit to you, ladies and gentlemen, if you thought that he was firing that gun with the intent to kill, it doesn't matter that he didn't hit his intended target with one of those bullets, he's guilty of attempted murder.

If he didn't have the intent to kill, I submit to you he's guilty of assault and battery of a high and aggravated nature. That's at Shawn Defreitas.

Lastly as to James Hampton, as I said, it's a little bit different issue there, because, as I said, I feel like the evidence has proven beyond any doubt that he did not fire that shot, that Joshua Haggood had fired that shot, but he falls under the accomplice liability in that. Whether they were aiding each other or assisting each other when they got together in that huddle inside the club and decided to go arm themselves and come back into that situation armed, carrying guns illegally into a club, I submit to you ultimately that's the reason why Kevin Frazier was charged with murder and two counts of attempted murder, while there was no allegation that he shot anybody, but he is charged under that same theory. It's a little different with him, because he fired some shots that I submit to you he kind of set things off also.

What it all boils down to, ladies and gentlemen, I submit to you this, and you have heard this beyond a reasonable doubt, and you are going to hear it a little more from Your Honor's charge, I submit to you there is no doubt. There is no doubt that David Benjamin, back on September 18th of 2011, intentionally armed himself. He intentionally and maliciously fired that gun five times, mortally wounding Dominique Lawton and ultimately leading to the injuries to Shawn Defreitas and James Hampton.

I want to close with one thing, that Mr. Thomas

has made on multiple occasions reference to this, about the little guy, the little guy, and that obviously his guy is not the little guy, the big guy, and he asked some questions of Mr. Hampton. You know, the initial kind of how it all came about initially was I believe he asked Mr. Haggood whether David Benjamin was hot headed and his initial response was no. And I got up and I hadn't really intended to ask him this, and I didn't ask him this initially until he brought that up, but I asked him at that point in time on might redirect what his nickname was. You heard that, it's Killer. Killer. All right. And Mr. Thomas got back up there and tried to get -- tried to get Mr. Haggood basically to say that was from, you know, his prowess on the athletic field. Do you remember his comment is "no, basically in high school it was because he beat everybody up." And kind of the way he finished that was, you know, well, he wasn't the -- well, he wasn't the initial aggressor, right? He wasn't the one that started things. He was the finisher.

What happened on September 18th of 2011, the little man bumped into him, words were exchanged. He went and got his .45 caliber. I submit to you he finished. He finished things that night, just like his friend said he always does.

I want to thank you for your time. Respectfully on behalf of the citizens of Calhoun County I want to thank

you for not only you time, because obviously you didn't really have a choice, but more importantly the attention that you have given to this matter over the last couple of days, your attention I'm sure you are going to give it when you get back in your jury room. Thank you.

THE COURT: Thank you, Mr. Sorenson.

Ladies and gentlemen, it's almost 5:30 and it's going to take me probably -- well, I don't know, it's going to me in excess of thirty minutes, probably close to forty minutes to deliver the charge to you. I am not going to give this case to begin your deliberations after six o'clock this evening. It's not fair to you and I'm not going to do that. I had hoped to do that this afternoon, but it just -- the time is such that I think it's going to be better if I do that in the morning when you are fresh.

So, ladies and gentlemen, I do need to give you some instruction.

First, and foremost, I need to remind you that you have not been instructed on the law. You are not prepared to deliberate. You must not discuss this matter with anyone or allow anyone to discuss it with you.

Now, you know, or I should tell you that I believe when you go home that the curiosity is going to go up a notch, but you must tell whoever is curious that you must not discuss this matter or allow them to discuss it with

you, but remember put it on the judge. Don't let anybody get upset with you. You just tell them that I have instructed you not to discuss this matter or allow them to discuss it with you.

Please do not read anything, do not listen to anything about this matter. Do not do any investigation. Do not even go look up a word. You must receive all the information from which you will make up your mind here in court while court is in session.

Do not read anything. Do not listen to anything about this matter. That's as to the radio, the television, the newspaper, or the Internet. You must receive all of your information here in court while court is in session.

I want to share with you, though, how we will be proceeding in the morning. What we will do in the morning is that I will deliver the charge or the instruction of law to you. There will be a very, very short break, which I will explain to you when we reach that point, and then you will receive this case for your deliberations. That is what you have tomorrow.

Now, my people who used to go to work at night, whose whole system now is all switched. One more night, two more nights, ladies and gentlemen. Please tell your employer be patient. I must have you rested for tomorrow. You must not go in tonight. You must rest. If there is any

concern, of course, get their name and the number and I'm more than happy to intercede on your behalf.

Ladies and gentlemen, I would propose that we begin at 9:30, unless somebody -- unless y'all want to begin at nine in the morning. Nine o'clockers? Got any nine o'clockers in the crowd? Nine-thirtiers? All right. It's a 9:30. It's a 9:30. Very well.

Ladies and gentlemen, I will see you in the morning. Please leave your notebooks in your seats. We will secure those over the evening. Have a good evening. I'll see you in the morning at 9:30.

(The following takes place outside the presence of the jury panel)

(Whereupon, proceedings were adjourned to March 7, 2013)

STATE OF SOUTH CAROLINA)
) IN THE COURT OF GENERAL SESSIONS
COUNTY OF CALHOUN)

THE STATE)
) TRANSCRIPT OF RECORD
-vs-) 2013-GS-09-00051
) 2013-GS-09-00052
DAVID JAMAR BENJAMIN,) 2013-GS-09-00053
) MARCH 7, 2013
DEFENDANT. SAINT MATTHEWS, SOUTH CAROLINA

(VOLUME IV)

B E F O R E:

THE HONORABLE DIANE GOODSTEIN, JUDGE. ; And a Jury.

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

DONALD SORENSON, ASSISTANT SOLICITOR
THEODORE LUPTON, ASSISTANT SOLICITOR
ATTORNEYS FOR THE STATE

NICHOLAS THOMAS, ESQUIRE
ATTORNEY FOR THE DEFENDANT

MICHAEL R. WATTS
CIRCUIT COURT REPORTER

INDEX

(MARCH 4, 2013)

WITNESSES	PAGE
JURY VOIR DIRE -- PAGE 22	
JURY SWORN -- PAGE 83	
OPENING STATEMENT BY MR. LUPTON -- PAGE 96	
OPENING STATEMENT BY MR. THOMAS -- PAGE 103	
DEPUTY TERRY SNEAD (SW)	
DIRECT EXAMINATION BY MR. LUPTON	108
CROSS EXAMINATION BY MR. THOMAS	122
REDIRECT EXAMINATION BY MR. LUPTON	124
ANDREW HAYNES (SW)	
DIRECT EXAMINATION BY MR. SORENSON	126
CROSS EXAMINATION BY MR. THOMAS	148
REDIRECT EXAMINATION BY MR. SORENSON	154

INDEX

(MARCH 5, 2013)

WITNESSES	PAGE
JAMES HAMPTON (SW)	
DIRECT EXAMINATION BY MR. SORENSON	202
CROSS EXAMINATION BY MR. THOMAS	221
NATASHA SUMPTER (SW)	
DIRECT EXAMINATION BY MR. SORENSON	226
CROSS EXAMINATION BY MR. THOMAS	236
TAMMY HUNTER, R.N. (SW)	
DIRECT EXAMINATION BY MR. LUPTON	238
(NO CROSS EXAMINATION)	
DR. JERROLD BUCKALOO (SW)	
DIRECT EXAMINATION BY MR. LUPTON	246
CROSS EXAMINATION BY MR. THOMAS	250
CAPTAIN KIRK CORLEY (SW)	
DIRECT EXAMINATION BY MR. LUPTON	252
CROSS EXAMINATION BY MR. THOMAS	258
REDIRECT EXAMINATION BY MR. LUPTON	258
JOSHUA HAGGOOD (SW)	
DIRECT EXAMINATION BY MR. SORENSON	259
CROSS EXAMINATION BY MR. THOMAS	302
REDIRECT EXAMINATION BY MR. SORENSON	308
RECROSS EXAMINATION BY MR. THOMAS	313

INDEX

(MARCH 5, 2013)

WITNESSES	PAGE
SHAWN DEFREITAS (SW)	
DIRECT EXAMINATION BY MR. SORENSON	315
CROSS EXAMINATION BY MR. THOMAS	329
REDIRECT EXAMINATION BY MR. SORENSON	333
DANNY SAXON (SW)	
DIRECT EXAMINATION BY MR. SORENSON	339
CROSS EXAMINATION BY MR. THOMAS	350
MICHAEL BULLOCK (SW)	
DIRECT EXAMINATION BY MR. SORENSON	352
CROSS EXAMINATION BY MR. THOMAS	361
REDIRECT EXAMINATION BY MR. SORENSON	362
RECROSS EXAMINATION BY MR. THOMAS	363
DELVIN LAWTON (SW)	
DIRECT EXAMINATION BY MR. LUPTON	364
CROSS EXAMINATION BY MR. THOMAS	367
INVESTIGATOR HENRY DUKES, JR. (SW)	
DIRECT EXAMINATION BY MR. SORENSON	369
CROSS EXAMINATION BY MR. THOMAS	409
REDIRECT EXAMINATION BY MR. SORENSON	421

INDEX

(MARCH 5, 2013)

WITNESSES	PAGE
DETECTIVE MATTHEW TRENTHAM (SW)	
DIRECT EXAMINATION BY MR. LUPTON	422
CROSS EXAMINATION BY MR. THOMAS	431
REDIRECT EXAMINATION BY MR. LUPTON	432

INDEX

(MARCH 6, 2013)

WITNESSES	PAGE
SLED AGENT JOHN ROBERTS (SW)	
DIRECT EXAMINATION BY MR. SORENSON	448
CROSS EXAMINATION BY MR. THOMAS	467
REDIRECT EXAMINATION BY MR. SORENSON	470
RECROSS EXAMINATION BY MR. THOMAS	471
SLED AGENT JAMES GREEN (SW)	
DIRECT EXAMINATION BY MR. SORENSON	474
CROSS EXAMINATION BY MR. THOMAS	500
REDIRECT EXAMINATION BY MR. SORENSON	506
DR. JANICE ROSS (SW)	
DIRECT EXAMINATION BY MR. LUPTON	524
CROSS EXAMINATION BY MR. THOMAS	531
STATE RESTS -- PAGE 533	
KELLY FITE (DW)	
DIRECT EXAMINATION BY MR. THOMAS	542
CROSS EXAMINATION BY MR. SORENSON	546
REDIRECT EXAMINATION BY MR. THOMAS	552
RECROSS EXAMINATION BY MR. SORENSON	553
ANTONIO GIDRON (DW)	
DIRECT EXAMINATION BY MR. THOMAS	556
CROSS EXAMINATION BY MR. SORENSON	568
DEFENSE RESTS -- PAGE 587	

INDEX

(MARCH 6, 2013)

WITNESSES PAGE

CLOSING ARGUMENT BY MR. LUPTON -- PAGE 589

CLOSING ARGUMENT BY MR. THOMAS -- PAGE 599

FINAL ARGUMENT BY MR. SORENSON -- PAGE 615

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(MARCH 7, 2013)

WITNESSES PAGE

COURT'S JURY INSTRUCTION -- PAGE 663

JURY VERDICT -- PAGE 707

SENTENCING -- PAGE 718

REPORTER'S CERTIFICATE -- PAGE 720

EXHIBITS

NO.	DESCRIPTION	ID.	EV.
S-1	POSTER BOARD		113
S-2	PHOTOGRAPH		115
S-3	PHOTOGRAPH		115
S-4	PHOTOGRAPH		115
S-5	PHOTOGRAPH		115
S-6	PHOTOGRAPH		295
S-7	PHOTOGRAPH		295
S-8	PHOTOGRAPH		295
S-9	PHOTOGRAPH		295
S-10	PHOTOGRAPH		295
S-11-A	PHOTOGRAPH		328
S-11-B	PHOTOGRAPH		328
S-11-C	PHOTOGRAPH		328
S-11-D	PHOTOGRAPH		328
S-12	PHOTOGRAPH		302
S-13	PHOTOGRAPH		390
S-14	PHOTOGRAPH		390
S-15	PHOTOGRAPH		398
S-16	PHOTOGRAPH		398
S-17	PHOTOGRAPH		360
S-18	PHOTOGRAPH		380
S-19	PHOTOGRAPH		380
S-20	PHOTOGRAPH		380

EXHIBITS

NO.	DESCRIPTION	ID.	EV.
S-21	PHOTOGRAPH		360
S-22	PHOTOGRAPH		381
S-23	PHOTOGRAPH		381
S-24	PHOTOGRAPH		381
S-25	PHOTOGRAPH		384
S-26	PHOTOGRAPH		384
S-27	PHOTOGRAPH		349
S-28	PHOTOGRAPH		349
S-29	PHOTOGRAPH		349
S-30	PHOTOGRAPH		349
S-31	PHOTOGRAPH		407
S-32	WOODEN POST		217
S-33	BULLET		241
S-34	GUN		254
S-35	BULLETS		256
S-36	GUN		367
S-37	GUN		399
S-38	SHELL CASING		399
S-39	SHELL CASING		399
S-40	BULLET		372
S-41	BULLET		374
S-42	SHELL CASING		374
S-43	SHELL CASING		375

EXHIBITS

NO.	DESCRIPTION	ID.	EV.
S-44	SHELL CASING		375
S-45	SHELL CASING		376
S-46	SHELL CASING		376
S-47	SHELL CASING		376
S-48	SHELL CASING		376
S-49	SHELL CASING		376
S-50	SHELL CASING		383
S-51	SHELL CASING		378
S-52	SHELL CASING		378
S-53	SHELL CASING		378
S-54	SHELL CASING		378
S-55	SHELL ASING		378
S-56	BULLET		392
S-57	BULLET		396
S-58	BULLET		396
S-59	BULLET		396
S-60	GSR KIT		405
S-61	GSR KIT		389
S-62	GSR KIT		400
S-63	GSR KIT		429
S-64	GSR KIT		429
S-65	SLED REPORT	552	

EXHIBITS

NO.	DESCRIPTION	ID.	EV.
D-1	BOX OF BULLETS		415
CT-1	JURY NOTE	107	
CT-2	JURY NOTE	586	
CT-3	JURY NOTE	586	
CT-4	JURY NOTE	586	
CT-5	JURY NOTE	718	
CT-6	LETTERS	718	

(PROCEEDINGS, MARCH 7, 2013)

THE COURT: Ladies and gentlemen, just so you know, the jury, they are ordering their lunch and we are waiting on them. And as soon as they finish, then we are going to begin. I thought I would just come on out so we would all be ready when they had finish ordering lunch and then come on out and join us.

Counsel, do y'all want to look at the final verdict form? I know we talked about it. I thought maybe y'all would want to take a look at it.

(Off the record)

(Back on the record)

THE COURT: You can bring them in.

(The following takes place in the presence of the jury panel)

THE COURT: Thank you so much, Ms. Paulling.

Ladies and gentlemen, I hope you had an opportunity to get your lunch ordered. In any event, thank you for doing that, and that's just looking forward to getting your lunch for you, ladies and gentlemen. We wanted to prepare ahead.

(Whereupon, at 9:58 a.m., the Court instructed the jury panel)

THE COURT: Now, here is what is about to occur. I am about to deliver to you the charge or the instruction

on the law applicable to this case. And once I have done that, there is going to be a very short break that I'll explain to you when we reach that point, and then, ladies and gentlemen, you are going to receive this case for your deliberations.

Now, ladies and gentlemen, you have heard the evidence and the arguments of both sides. What remains is the instruction on the law.

Now, ladies and gentlemen, the indictments in this case, and you now know that there are three indictments in this case, charge the defendant, Mr. Benjamin, with one count of murder and two counts of attempted murder. That makes up the three indictments. Each of the indictments charges a different crime, a separate crime. Not necessarily different, but a separate crime.

I remind you that the fact that the defendant, Mr. Benjamin, was arrested, charged and indicted in this case is not evidence in this case and cannot be considered by you as evidence of guilt in this case, nor do these indictments create any presumption, or even any inference of guilt.

These indictments are simply, first of all, just pieces of paper.

Secondly, they are just formal written instruments that have the purpose of giving a citizen notice that the State maintains that the citizen has violated one, or more,

of the laws of the State of South Carolina, one, or more, of the criminal laws of the State of South Carolina. Each one of these indictments exists to give notice of a separate alleged offense, and that's what they are. They are notice documents. They are certainly not evidence of any of the allegations that these indictments contain.

Ladies and gentlemen, to each of the indictments Mr. Benjamin has pled not guilty.

Now, ladies and gentlemen, each of these indictments charges a separate and distinct offense and you must decide each of the indictments separately on the evidence and the law applicable, uninfluenced by your decision as to any other indictment. They exists independently and separately and you must decide them independently and separately.

Ladies and gentlemen, the defendant, Mr. Benjamin, may be convicted, meaning he could be found guilty, or not guilty, on any or all of the offenses charged, meaning on any or all of these indictments.

You are going to be asked to write a separate verdict of guilty or not guilty with regards to each of the indictments. In other words, there is going to be a separate verdict form for each of these three indictments and I'm going to specifically go over with you those verdict forms.

Now, ladies and gentlemen, Mr. Benjamin has pled not guilty to these indictments and that plea places the burden on the State to prove the defendant guilty.

A person charged with committing a criminal offense in South Carolina is never required to prove himself or herself not guilty or innocent.

I charge you that it is an important rule of the law that the defendant, this defendant, in a criminal trial, no matter what the seriousness of the charge or charges may be, that defendant, this defendant, will always be presumed to be innocent of the crime or crimes for which the indictment or the indictments were issued, unless guilt has been proven by evidence satisfying you of that guilt beyond a reasonable doubt.

Ladies and gentlemen, this presumption of innocence does not end when you begin your deliberations, but it accompanies the defendant, it accompanies Mr. Benjamin, throughout this trial until you reach a verdict of guilt based on the evidence satisfying you of that guilt beyond a reasonable doubt.

This presumption of innocence is like a robe of righteousness placed about the shoulders of the defendant, placed about the shoulders of Mr. Benjamin, which remains with him until it has been stripped from him by evidence satisfying you of his guilt beyond a reasonable doubt.

The presumption of innocence is not a mere legal theory and it's certainly not just a legal phrase, but it is a substantial right to which every defendant is entitled, unless you, the jury, are satisfied from the evidence of the defendant's guilt beyond a reasonable doubt.

This presumption of innocence applies to each of these three indictments independently and separately, one from the other, and the analysis that you will do you will do separately and independently for each of these three indictments.

Now, ladies and gentlemen, what do we mean when we use the term reasonable doubt? What is reasonable doubt in the law? A reasonable doubt is the kind of doubt that would cause a reasonable person to hesitate to act.

The State has the burden of proving the defendant guilty beyond a reasonable doubt.

Some of you may have served as jurors in civil cases where you were told that it was only necessary to prove that a fact is more likely true than not true, such as by the greater weight or the preponderance of the evidence. Ladies and gentlemen, in criminal cases the State's proof must be more powerful than that. It must be beyond a reasonable doubt.

Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt.

There are very few things in this world that we know with absolute certainty and in criminal cases the law 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 crimes charged, you must find the defendant guilty.

If, on the other hand, you think there is a real possibility that the defendant is not guilty, you must give the defendant the benefit of the doubt and find him not guilty.

Again, you do this analysis separately and independently with regards to each of these indictments.

I remind you that during this trial you and I have had certain duties to perform.

As the trial judge it is my responsibility to preside over the trial of this case and I also had the duty to rule on the admissibility of evidence offered during this trial.

You have the duty and are to consider only the testimony which has been presented from the witness stand and any exhibits which have been made a part of the record in this case. That makes up the evidence in this case.

I have the additional duty to charge you with regards to the law applicable in this case.

As the presiding judge, I am the sole judge of the

law in this case and it is your duty as jurors to accept and to apply the law as I now state it to you.

If you already have an idea as to what the law is, or what it ought to be, and it does not agree with what I now tell you the law is, that might be a fantastic discussion for you and your legislator at some later time, but for our system to work correctly you must accept and apply the law exactly as I state it to you.

Now, ladies and gentlemen, in every case tried in this court before a jury, the jury, you, become the sole, the only, the exclusive judges of the facts in a case. A trial judge cannot intimate, state, comment on, or make any statement to a trial jury about the facts in a case.

Since you, the jury, are the sole judges of the facts in this case, you must not infer from what I may have said during the progress of this trial in ruling on the admissibility of evidence, or otherwise, or anything that I say now during the course of this instruction to you that I have any opinion about the facts of this case. The law doesn't allow me to have an opinion regarding the facts in this case. I have no opinion regarding the facts in this case. That is a matter solely for you to determine.

As jurors it is your duty to determine the effect, the value, the weight, and the truth of the evidence presented during this trial.

Now, there are typically two types of evidence which are presented during a trial. One is called direct evidence and the other --

I know y'all are a little bit distracted, so we are going to wait a second. No rush. That's okay. You two are busy.

(Off the record)

(Back on the record)

THE COURT: Very well.

There are typically two types of evidence which are presented during a trial. One is called direct evidence and the other circumstantial evidence.

I'm going to define them for you, but then I'm going to give you an example, because I think the example is helpful.

Direct evidence is the testimony of a person who claims to have actual knowledge of a fact, such as an eyewitness. It is evidence which immediately establishes the main fact to be proved.

Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact. It is evidence which immediately establishes collateral facts from which the main fact may be inferred.

Circumstantial evidence is based on inference and not on personal knowledge or observation.

Now I want to give you an example. It was easier when it was February, because we are now into March, but we are going to play like it's February. But you know what today could just about qualify, because it's cold outside, but let's say it's February, it's cold outside and snow is forecasts. Those are facts that you know; that it's February, that it's cold outside, that snow is forecasts. And you walk outside and you look up and all of the sudden this white stuff starts hitting you in the face. Let's say it hits you in the eye. Boy, doesn't that make you an eyewitness to the fact that it is snowing? You are watching it snow. That is direct evidence. You are an eyewitness that it's snowing, literally. You are an eyewitness to the fact that it is snowing. That is direct evidence, because you are testifying based on your direct evidence of it snowing. Direct evidence.

Now, let's talk about circumstantial evidence so you can see the difference, and I'm going to use as close to the same example. It's February. It's cold outside. Snow is forecasts. You go to bed at night and you look out and see if it's snowing and you don't see any snow. All you see is your little pitiful February brown country grass and you look and that's what you see. You go to bed, and here is what you know at the time that you go to bed. You know that it's cold, you know that it's February, you know that it is

forecasts for snow, but you know when you looked out you didn't see anything but little old pitiful brown country grass. When you wake up the next morning and you look out, it's not snowing, but the whole -- everyplace as far as you can see there is snow covering the ground everywhere.

Now, here is what you know. Here is what you know directly; that it's February, snow is forecasts, it's cold, it was brown country grass when you went to bed, but when you woke up snow covered everything. You know inferentially by inference that it snowed overnight. You know that. And that, although, you are not an eyewitness to it snowing overnight, because of the collateral facts that you do know, by inference you know that it snowed overnight.

Now, the law makes absolutely no distinction between the weight or the value to be given to either direct or circumstantial evidence, nor is a greater degree of certainty required of circumstantial evidence than of direct evidence.

Ladies and gentlemen, you should weigh all of the evidence in the case. And after weighing all of the evidence if you are not convinced of the guilt of the defendant beyond a reasonable doubt, you must find the defendant not guilty.

Let me say again, you will do this analysis for each of these three indictments separately and

independently, one from the other.

Now, necessarily then you must determine the credibility of the witnesses who have testified in this case.

Ladies and gentlemen, credibility simply means believability.

It becomes your duty as jurors to analyze and evaluate the evidence and to determine which evidence convinces you of its truth.

In determining the believabilities of the witnesses who have testified in this case, and I'm going to go over some examples for you, but this is not an exhaustive list. These are simply examples of things that you may consider.

Ladies and gentlemen, you did not check your good common sense at the courthouse door, but these are simply examples. This is not an exhaustive list that I'm about to go over with you.

In determining the believability of witnesses who have testified in this case you may believe one witness over several witnesses, or several witnesses over one witness.

You may believe a part of the testimony of a witness and reject the remaining part of the testimony of the same witness.

You may believe the testimony of a witness in its

entirety, or you may reject the testimony of a witness in its entirety.

You may consider whether any witness has exhibited to you any interests, any bias, any prejudice, or other motive in this case.

And you may also consider the appearance and the manner of the witness while on the witness stand.

You certainly may consider the opportunity for the witness to have observed the things about which the witness may testify.

Again, this is not an exhaustive list. This is just examples of the way that you may consider evidence or you may consider testimony.

Ladies and gentlemen, again, you did not check your common sense at the courthouse door.

Now, I want to talk about expert witnesses, because, ladies and gentlemen, as you know, you have heard witnesses who have testified in this case who have been deemed to have been found to be expert witnesses. And as I have already told you, the rules of evidence ordinarily do not permit witnesses to testify regarding their opinions or conclusions, but there is an exception to this rule for witnesses who are found to be expert witnesses and there have been those witnesses in this case. And those are witnesses who, by reason of their education, their

knowledge, their experience, perhaps their profession, they have become an expert in some art, science, profession or calling. And those witnesses may state an opinion as to relevant and material matter in which the witness claims to be an expert, and they are also allowed to state the reasons for their opinions.

Ladies and gentlemen, you should consider expert witness testimony received in evidence in this case, and like any other evidence, you give it the weight that you think it deserves.

If you decide that the opinion of an expert witness is not based on sufficient education and experience, or if you conclude that the reasons given in support of the opinion are not sound, or that the opinion is outweighed by other evidence, you may disregard the opinion in its entirety.

An expert witness' testimony is to be given no greater weight than that of other witnesses simply because the witness is an expert.

Further, you are not required to accept an expert's opinion, even though it is not contradicted.

Ladies and gentlemen, expert witness testimony is given for the purpose of helping you understand the evidence and is not given for the purpose of controlling your judgment.

Now, ladies and gentlemen, I instruct you, and I want to emphasize, that the fact that the defendant did not testify in this case is not a factor to be considered by you in any way in your deliberations and it is not to be considered by you in any respect, in any regard, in your consideration on the question of whether he is guilty or not guilty as to each of these indictments.

Ladies and gentlemen, the fact that this defendant did not testify must not be considered by you in any regard or in any manner whatsoever.

You see, ladies and gentlemen, a defendant has the Constitutional Right, both by our state and by our country. They have the Constitutional Right to remain silent and the assertion of this right must not be considered by you at all in your deliberation.

I repeat, under your oath you are to draw no conclusion whatsoever from the fact that the defendant in this case did not testify.

In fact, the fact that this defendant did not testify should not even be discussed in your jury room. It shouldn't even come up. It's not a topic for conversation at all. The reason for that, you see, is that this defendant, all defendants, they don't have the burden of proof. They don't have to prove anything. The burden is and the burden remains on the State to prove guilt beyond a

reasonable doubt.

It is this defendant's Constitutional Right to remain silent. He has nothing which he must prove. The burden is and remains on the State to prove guilt beyond a reasonable doubt. And for that reason, this defendant's decision not to testify is not a topic for you to either consider and it is not even to be discussed. It's not a topic for you at all.

Now, ladies and gentlemen, in order to establish criminal liability in every criminal case, in every criminal case, and with regards to each crime charged, criminal intent is always required and must always be proven by the State beyond a reasonable doubt.

For example, the mental state required to be proven by the State for a particular crime might be purpose or intent, knowledge, recklessness, and the like.

Criminal intent must be proven by the State beyond a reasonable doubt and criminal intent is always a matter that must be determined by the jury from the circumstances surrounding the situation. There is no way to prove intent to a mathematical certainty.

There is certainly no way that medical science can dissect a person's brain and determine what the person had in mind, so the law says that criminal intent may be inferred. Remember we talked about inference when we talked

about circumstantial evidence. Criminal intent may be inferred from the circumstances shown to have existed. This is how you make a determination of whether or not the element requiring intent was present.

It is not necessary to establish intent by direct evidence. Do you remember, we talked about direct evidence. It's also called positive evidence is another way of referring to direct evidence, but intent may be established by inference, in the same way as any other fact, taking into consideration the acts of the parties and all the facts and circumstances of the case.

Criminal intent is a mental state. Criminal intent is a conscious wrongdoing. It's a conscious wrongdoing.

It is up to you to determine what the defendant intended to do based on the circumstances which are shown to have existed.

Criminal intent can arise from an action or failure to act.

It may arise from negligence or recklessness, or an indifference to duty, or to circumstances that are considered by the law to be the equivalent of criminal intent.

We will talk about criminal -- we will talk about criminal intent as we talk about the different charges.

Now, ladies and gentlemen, there has been evidence presented that witnesses may have made prior statements which are not consistent with the witness' present testimony on the stand. You may use this evidence to decide whether to believe the witness.

You may also use evidence of the earlier contradictory statements, if you find them to be contradictory, to determine the truth of those statements. It is up to you to decide whether to believe the earlier statements or the testimony given here at trial.

If a witness is shown to have knowingly testified untruthfully concerning any material matter, you may consider this in determining whether to trust the witness' testimony as to other matters. You may reject all of the testimony of that witness or give all or a part of the testimony the weight that you think it deserves.

Now, ladies and gentlemen, at this time we are going to be talking about the charges. I'm now going to charge you the law applicable to the charges and some other matters relevant to giving you the law regarding the charges, the three charges.

Now, here is what I want you -- I'm going to give you an overview and then I'm going to go back and be specific.

Ladies and gentlemen, as I give you the charges

that are alleged in the indictments, there are two charges. One is murder. The other charge is attempted murder.

The reason that there are three different indictments is that there are two charges of attempted murder, because there are two alleged victims of attempted murder, but I'm going to talk to you about murder and the elements of murder, and then I'm going to talk to you about attempted murder and the elements of attempted murder.

Now, those are going to be my two, if you will, broad categories; murder and attempted murder. They are not categories, but they are crimes: Murder and attempted murder. However, I'm also going to charge you regarding lesser included offenses of these two crimes.

And you know what? And I use this example. I hope it's a good example, because every time I talk about lesser included offenses, I think about -- you see them around the holiday time. I think they are called Russian Eggs, and it's like where you pick up an egg and underneath it there is another little egg, and you will pick that egg up and there is another little egg. I'm looking for nods that I'm making sense. Okay. Oh, thank goodness. All right.

I can't help but think of the little eggs, those little eggs, when I think about lesser included offenses. You have got the greater offense that I'm going to charge

you first, and it's like I'm going to take that egg and tell you that inside of that egg is another egg. And the way that it's going to work is I'm going to give you the charge on murder, and then I'll talk about attempted murder in a minute, but I'm going to charge you regarding the elements of murder. And then I'm going to tell you, well, if you find that the State has failed to meet its burden of proof as to murder, then you will consider the lesser included offense of what's called voluntary manslaughter. And it's like murder is the bigger Russian Egg, but under that one is a lesser included offense and that is called voluntary manslaughter. I need to bring you some of those eggs in. But murder and then the lesser included offense of voluntary manslaughter.

Now -- and I'm also going to do this again when we go through the verdict form.

First murder. Then the lesser included offense of voluntary manslaughter.

Now, you now know that the defendant is charged with murder, and I'm going to read to you now the indictment regarding murder. And for the record it's Indictment 2013-GS-09-51.

The indictment for murder alleges, in part, that in Calhoun County, on or about September the 18th, 2011, with malice aforethought, the defendant, David Jamar

Benjamin, did kill one Dominique Lawton by means of a gunshot wound to the head. The victim did die as a proximate result thereof, this offense being in violation of Common Law and Section 16-3-10 of the South Carolina Code of Laws, 1976, as amended.

Those are the allegations. As you know, Mr. Benjamin has pled not guilty to this offense, but this is the indictment for murder and the allegations.

Now, ladies and gentlemen, the defendant is charged with murder.

The State must prove beyond a reasonable doubt that the defendant killed another person with malice aforethought.

And then in the indictment it says that as a result of the acts of the defendant that the victim died as a proximate result thereof.

Proximate result, I just want to share with you, is another -- is a legal term and it means direct. Proximate cause means direct cause. It's a but for. But for the acts of the defendant the victim would not have died. So proximate cause in the law simply means direct cause.

Now, ladies and gentlemen, I have used the term malice aforethought. Malice aforethought. What does that mean?

Well, I'm going to first tell you what malice means and then we are going to talk about what it will mean by aforethought.

Malice is hatred, ill will, or hostility towards another person. It is the intentional doing of a wrongful act without just cause or excuse and with an intent to inflict an injury or under circumstances that the law would infer an evil intent. That's what malice is.

Malice aforethought. Aforethought does not require that malice exists for any particular time before the act is committed, but malice must exists in the mind of the defendant just before and at the time that the act is committed. Therefore, there must be a combination of the previous evil intent and the act.

Malice aforethought may be expressed or inferred. These terms expressed and inferred do not mean different kinds of malice, but merely the manner in which malice may be shown to exists. That means either by direct evidence or by inference from the facts and the circumstances which are proved.

Expressed malice is shown when a person speaks words which express hatred or ill will for another, or when the person prepared beforehand to do the act which was later accomplished.

For example, lying in wait for a person, or other

acts of preparation going to show that the deed was within the defendant's mind would be expressed malice.

Malice may be inferred from conduct showing a total disregard for human life.

Now, we have talked about murder, the unlawful killing of another person with malice aforethought. We have talked about murder.

Now, we are going to talk about voluntary manslaughter.

If you find that the State has failed to prove beyond a reasonable doubt that the defendant committed murder, then you may consider whether the State has proved beyond a reasonable doubt that the defendant committed voluntary manslaughter.

Included within the offense of murder is the lesser included offense of voluntary manslaughter.

To prove voluntary manslaughter, the State must prove beyond a reasonable doubt that the defendant took the life of another in the sudden heat of passion, based on sufficient legal provocation.

Both heat of passion and sufficient legal provocation must be present at the time of the killing to constitute voluntary manslaughter.

Sudden heat of passion may for a time affect a person's self-control and temporarily disturb a person's

reason. The sudden heat of passion must be the type that would make an ordinary person unable to coolly reflect on his actions and would produce an uncontrollable impulse to do violence.

Sufficient legal provocation must be the type that would make a person of ordinary reason and caution to become enraged and to lose control temporarily.

The provocation needed for voluntary manslaughter must come from some act of or related to the victim.

Words alone, however vulgar or insulting, are not enough to be legal provocation.

Where death is caused by the use of a deadly weapon, the words must be accompanied by some overt act, threatening act which could have produced the heat of passion.

Now, the exercise of a legal right, no matter how offensive it is to another, is never sufficient legal provocation for voluntary manslaughter.

If the heat of passion had cooled or there was enough time between the provocation, if any, and the killing for the passion of a reasonable person to cool, the killing would not be voluntary manslaughter.

In deciding whether a reasonable person would have enough time to cool off, you should consider all the circumstances surrounding the killing.

You may consider the nature of the provocation, if any, the defendant's mental and physical state, and the circumstances and relationships between the parties.

Now, ladies and gentlemen --

Counsel, let me see you for just a second. Let me pause here for just a moment before I move on.

(Whereupon, the lawyers approached the bench for an off-the-record discussion)

THE COURT: Now, just to catch you up to where we are, we finished talking about murder and the lesser included offense of voluntary manslaughter.

We are now going to talk about attempted murder, which is 16-3-29 of the South Carolina Code of Laws.

Now, ladies and gentlemen, the same thing that we did before. I'm going to first instruct you on what we mean by attempted murder, and there are two lesser included offenses of attempted murder. One is called assault and battery of a high and aggravated nature. There is another one which is called assault and battery second degree.

What I'm first going to talk to you about is attempted murder and then I'm going to talk to you about assault and battery of a high and aggravated nature. And then I'm going to talk to you about assault and battery second degree.

So, again, attempted murdered has two lesser

included offenses, so we are now going to talk about that.

Now, the defendant is charged with attempted murder. And, ladies and gentlemen, there are two counts of attempted murder.

Indictment 2013-GS-09-51 alleges, in part, that in Calhoun County, on or about September the 18th, 2011, with malice aforethought -- oh, let me get myself to correct. Let me do that again.

2013-GS-09-52 states that in Calhoun County, on or about September the 18th, 2011, with malice aforethought the defendant, David Jamar Benjamin, did with the intent to kill, either expressed or implied, commit the offense of attempted murder by shooting and wounding the victim, James Hampton, this offense being in violation of the Common Law in Section 16-3-29 of the South Carolina Code of Laws, as amended.

Now, again, to this indictment Mr. Benjamin has pled not guilty.

The second indictment for attempted murder, which is 2013-GS-09-53, alleges, in part, that in Calhoun County, on or about September the 18th, 2011, with malice aforethought the defendant, David Jamar Benjamin, did with the intent to kill, either expressed or implied, commit the offense of attempted murder by shooting and wounding the victim, Shawn Defreitas, this offense being in violation of

the Common Law and Section 16-3-29 of the South Carolina Code of Laws, as amended.

Again, I tell you that to this offense Mr. Benjamin has pled not guilty.

Now, ladies and gentlemen, in order to prove attempted murder the State must prove beyond a reasonable doubt that the defendant attempted to kill another person with malice aforethought, either expressed or implied.

Now, what do we mean by attempt? I'm going to define attempt.

Attempt is an effort to accomplish a crime which does not succeed.

An attempt includes a specific intent to do a particular criminal act, along with an act falling short of the act intended.

The State must show more than mere preparation and an intent. There must be some overt act committed in the effort to commit the crime.

Now, that is attempt.

Malice, as we have already talked about, is hatred, ill will, or hostility towards another person.

Malice aforethought we have talked about. That means that it doesn't have -- it does not require that malice exists for any particular time before the act is committed, but malice must exists in the mind of the

defendant just before and at the time that the act is attempted.

Now, malice, as we have talked about, may be expressed or inferred. Again, the same definitions apply as before.

Now, ladies and gentlemen, if facts are proved beyond a reasonable doubt sufficient to raise an inference of malice to your satisfaction, the inference of malice is simply an evidentiary fact to be considered by you, along with other evidence in the case, and you give it the weight that you decide it should receive.

A specific intent to kill is not an element of attempted murder, but there must be a general intent to commit serious bodily injury.

Intent means the intending the result which actually occurs, not accidentally or involuntarily.

Intent may be shown by acts and conduct of the defendant and other circumstances from which you may naturally and reasonably infer intent.

Evidence of the character of the act and the purpose which was to be accomplished, the resulting wounds or injuries may be considered in determining the intent with which the act was committed.

Intent may also be inferred when it is demonstrated that the defendant voluntarily and willfully

commits an act, the natural tendency of which is to destroy another's life.

Now, that was the definition of attempted murder.

The lesser included offense of attempted murder that we are first going to talk about is assault and battery of a high and aggravated nature, which is found at 16-3-600(b).

If you find that the State has failed to prove attempted murder beyond a reasonable doubt --

And, of course, this analysis will occur as to each of the two charges of attempted murder.

If you find that the State has failed to prove attempted murder beyond a reasonable doubt, then you would consider the offense of assault and battery of a high and aggravated nature.

A person commits the offense of assault and battery of a high and aggravated nature if the person unlawfully injures another person and great bodily injury to another person results;

Or, the act is accomplished by means likely to produce death or great bodily injury.

Now, great bodily injury means bodily injury which causes a substantial risk of death or which causes serious permanent disfigurement, or protracted loss, or impairment of the function of a bodily member or organ. Ladies and

gentlemen, that is assault and battery of a high and aggravated nature.

Now, ladies and gentlemen, if you find that the State has failed to prove assault and battery of a high and aggravated nature beyond a reasonable doubt, then you would consider the lesser included offense of assault and battery second degree.

Again, this would apply to both of these charges of attempted murder.

A person commits the offense of assault and battery in the second degree if the person unlawfully injures another person, or offers or attempts to injure another person with the present ability to do so and moderate bodily injury to another person results, or moderate bodily injury to another person could have resulted.

What do we mean by moderate bodily injury? Moderate bodily injury means physical injury requiring treatment to an organ system of the body, other than the skin, muscles and connective tissues of the body, except when there is penetration of the skin, muscles, and connective tissues that requires surgical repair of a complex nature, or when treatment of the injuries requires the use of regional or general anesthesia.

Now, I have concluded my instruction to you on

assault and battery second degree.

I am now going to talk to you about a part of the law that is known as the hand of one is the hand of all.

Ladies and gentlemen, if a crime is committed by two or more people who are acting together in committing a crime, the act of one is the act of all.

A person who joins with another to commit an unlawful act is criminally responsible for everything done by the other person which happens as a probable or natural consequence of the acts done in carrying out the common plan or purpose.

For example, two people can be guilty of what's called burglary in the first degree if only one person went into the house at night and stole stuff.

If two people got together and decided that they were going to burglarize a house and only one of them went inside, yet the other person never went inside, never took anything, but they got together and decided that they were going to burglarize the house and the other person stood outside and was the lookout, both parties are equally responsible for the whole crime of burglary in the first degree. That's an example.

If two or more people are together, acting together, assisting each other in committing the offense, the act of one is the act of all, as is sometimes said the

hand of one is the hand of all.

In my example, although just one person went into the house and took stuff at night, both are responsible.

Prior knowledge. Prior knowledge that a crime is going to be committed, without more, is not sufficient to make a person guilty of that crime.

Mere knowledge that another person is going to commit a crime, even if the defendant is present when the crime is committed, is not sufficient to convict the defendant as a principal.

Guilt as a principal is shown by actual or constructive presence at the scene as a result of prior arrangement. Therefore, a finding of a prior arranged plan or common scheme is necessary for the finding of guilt as a principal.

The State must prove beyond a reasonable doubt by competent evidence the theory of the hand of one is the hand of all.

A principal in a crime is one who either actually commits the crime - going into the house and taking stuff - or who is present aiding, abetting, or assisting in committing the crime - the lookout.

When a person does an act in the presence of and with the assistance of another, the act is done by both.

Where two or more acting with a common plan or

intent are present at the commission of a crime, it doesn't matter, it does not matter, who actually commits the crime. All are guilty. The hand of one is the hand of all.

Now, present at the commission of a crime means to be sufficiently near to aid and abet and assist in the commission of the crime.

However, mere presence at the scene of a crime is not sufficient to convict one as the principal on the theory of aiding and abetting.

Intent is also a necessary element, for there must have been a common design or intent to commit the crime and the crime must have been committed pursuant thereto with the person aiding and abetting by some overt act.

Intent means intending the result which actually occurs, not accidentally or involuntarily.

Intent may be shown by acts and conduct of the defendant and other circumstances from which you may naturally and reasonably infer intent.

The State must prove these elements beyond a reasonable doubt.

Now, ladies and gentlemen, there is also a general part of the law that says that if there is doubt with regards to whether a defendant committed the greater offense or the lesser offense, you must always give the defendant the benefit of the doubt and find the lesser.

Obviously, if there is doubt, reasonable doubt, with regard to the lesser, the defendant is always entitled to the benefit of the doubt.

The burden is and remains on the State to prove guilt beyond a reasonable doubt.

Now, I further charge you that voluntary intoxication does not relieve an individual from criminal responsibility and is generally not a valid defense in the State of South Carolina.

Ladies and gentlemen, we are now going to go over the verdict forms.

There is a separate verdict form for each of these three indictments. I tell you that, first of all.

Secondly, as to each of the offenses and with regards to the lesser included offenses, should you reach the lesser included offenses, there are two possible verdicts. I have put those two possible verdicts on the piece of paper. One of them is first and one of them is second.

Ladies and gentlemen, I want you to know that I could have just as easily, just as legitimately, put the second possible verdict first and the first possible verdict second. The reason I'm saying this is that I don't want you to take any hidden meaning by the order in which these possible verdicts are placed on paper, because there is no

hidden meaning intended. It's just reality. If you are going to put something first and something second, something has got to be first and something has got to be second. So please don't take any hidden meaning in which the order of the two possible verdicts have been put on the pieces of paper.

The second thing that I want to tell you before we go over these possible verdict forms is this. Your verdict must be unanimous. It must be the verdict of each and every one of you.

Ladies and gentlemen, this is not the verdict of the majority of you, and this is not the verdict of any one of you, but your verdicts must be the verdict of each and every one of you, the twelve of you.

Oh, Ms. McPeek, you got to stay with me on this next occasion because you are our remaining alternate.

Now, Ms. Wieber, as our presiding juror you will take possession of the verdict forms and it will be your responsibility, once the jury has concluded its deliberations, just to fill out the verdict form. It's one of your duties as our presiding juror. And there is a place here where it says presiding juror on each of these three verdict forms, and you know who you are, so you will write your name there.

For your informational purposes only, today is

March the 7th, 2013.

Now, the first verdict form that we are going to go over is the verdict form regarding the charge of murder.

Now, ladies and gentlemen, this says "please circle the appropriate verdict below and follow the accompanying instruction carefully."

In other words, irrespective of what your verdict is, you must circle it big time so there is no question of which is the verdict of the jury.

Now, number one says "as to the charge of murder of Dominique Lawton, we, the jury, unanimously" -- my children think I'm a nag. Y'all are going to believe it, too, by the time the trial is over with, "unanimously find the defendant," and there are two possible verdicts.

If this is found to be the -- if this jury finds the defendant guilty, you circle it.

If they find him not guilty, you circle it.

Irrespective of what is the unanimous verdict of this jury and you will circle it.

If the verdict of the jury is guilty, then you stop your deliberations with regards to murder and then you would sign your name and date the verdict form.

If the verdict of the jury, with regards to murder, is not guilty, then you consider the lesser included offense of voluntary manslaughter. And you consider that

lesser included offense and then you will determine what is your unanimous verdict with regards to voluntary manslaughter, and you will circle whichever is the unanimous verdict. Be it not guilty or guilty, you just circle the one.

Now, understand, and it's written here. It says "if you find the defendant guilty of murder, then you stop your deliberations on this charge." And then you would, of course, sign and date it.

But it goes on to say "if you find the defendant not guilty of the charge of murder, then you consider the lesser included charge," and the lesser included charge is contained in number two, which says "as to the charge of voluntary manslaughter of Dominique Lawton, we, the jury, unanimously find the defendant," and then you would indicate your unanimous verdict of the jury. Sign and date.

Now, that would conclude then the charge of murder and, if appropriate for you to reach, based on what you would make your determination to be voluntary manslaughter, the lesser included offense.

Now, we are going to consider next Indictment 2013-GS-09-52, and it has the same beginning, which it says circle whatever your unanimous verdict is.

Number one says this: "As to the charge of attempted murder of James Hampton, we, the jury, unanimously

find the defendant," and there are two possible verdicts; not guilty and guilty.

Irrespective of what is the unanimous verdict of the jury, circle it.

Then your instructions go on. "If you find the defendant guilty, stop and end your deliberations on this charge." And then you would sign your name, and again you know who you are, and you would date this verdict form.

If you find that the defendant is not guilty of attempted murder of James Hampton, then you move on to number two, which is a lesser included offense, and it says this: "As to the charge of assault and battery of a high and aggravated nature upon James Hampton, we, the jury, unanimously find the defendant," and again you will make your determination unanimously, it would be one of the two possible verdicts, guilty or not guilty. Whichever it is, you circle it.

If you reach number two and you find the defendant guilty, then it says here "if you find the defendant guilty, stop and end your deliberation on this charge."

"If you find the defendant not guilty, then you consider the lesser included charge below."

Number three set. "As to the charge of assault and battery second degree upon James Hampton, we, the jury, unanimously find the defendant," and again the possible

verdicts, not guilty and guilty. Whichever the unanimous verdict of the jury, if you reach number three, then you circle it. And then, of course, when you reach your verdict, sign and date it. And that will then conclude the deliberations on attempted murder and the lesser included offenses of James Hampton.

Now, ladies and gentlemen, with regards to Indictment Number 2013-GS-09-53, and the same beginning instructions, but number one says "as to the charge of attempted murder of Shawn Defreitas, we, the jury, unanimously find the defendant," and there are two possible verdicts. Circle the one that is the unanimous verdict of this jury.

If you found the defendant guilty, stop your deliberations on this charge. You would then sign and date it.

If you found the defendant not guilty, consider the lesser included charge below, which is assault and battery of a high and aggravated nature, which states "as to the charge of assault and battery of a high and aggravated nature upon Shawn Defreitas, we, the jury, unanimously find the defendant," and, again, two options; guilty, not guilty. Irrespective of what is your unanimous verdict, if you reach number two, you would circle it.

If it is guilty, stop your deliberations, sign and

date the form.

If it is not guilty, then you move on to number three, which is the charge of assault and battery second degree, which reads as follows: "As to the charge of assault and battery second degree upon Shawn Defreitas, we, the jury, unanimously find the defendant." And, again, if you reach number three, you would determine what is the unanimous verdict of this jury; guilty or not guilty. Circle that. Then sign your name and date the form, which for your informational purposes again, today is March the 7th, 2013.

Now, ladies and gentlemen, this concludes my review of the verdict forms, and these instructions are on the form for your continuing assistance.

Now, ladies and gentlemen, in a minute I'm going to ask you to step to your jury room with this instruction. Do not discuss this matter or allow anyone to discuss it with you and leave your note pads in your seat. And you would be absolutely within your rights to say now, wait a minute, you have been telling us for days that this is going to be the time for us to begin our deliberations. So what are you doing? I'm going to tell you what I'm going to do. I am going to turn to these lawyers, because, you see, they help me. They help me know if I have given you all of the law that you may need for your deliberations and they are

listening to me. Hopefully they are listening to me. I think they are. They look like they are, don't they? And they will help me know if I have stated something incorrectly to you, because, you see, this is my one chance to get this right, to give you all of the law that you may need for your deliberations and to state it for you correctly.

Now, ladies and gentlemen, sometimes I need to bring juries back out because I have failed to give you all of the law that you may need for your deliberations, and these lawyers help me know that. In the event that I need to bring you back out for that reason, I ask you in advance please don't consider that instruction with any emphasis. Just know I want to get this right. I want to give you all the law that you may need for your deliberations.

Now, sometimes, and goodness knows it's unintended, something will just pop out wrong. These lawyers are kind enough to help me know that, and sometimes I need to bring juries back out because I have stated something flat out wrong. And so I ask you in advance in the event that I need to bring you back out for that reason, please do not consider -- or please allow me to correct my error in your mind, knowing that this is my chance to get this right, to give you all the law that you may need and to give it to you correctly.

Now, ladies and gentlemen, in the event that I do not need to bring you back out, you will be brought your note pad, the exhibits and the verdict forms and an instruction to begin your deliberations.

Now, I have been doing this with these people for a very long time and they will deliver to you a specific instruction to begin your deliberations. However, comma, y'all might be the first jury in fifteen years that this hasn't happened, so let me share with you, you will not have the verdict forms, the exhibits and your notes pads, unless it's time to begin your deliberations. So if you have that, begin your deliberations.

Now, let me say this to you as well. It may be that you need to take a comfort break. If you do need to take a comfort break, stop your deliberations, take your comfort break, and when all twelve of you are together again just begin them anew. Just remember that all twelve of you have to be together for you to deliberate. Just keep that in your mind. If you need to take a comfort break, just stop, take your comfort break and begin your deliberations anew.

Now, your lunch is going to be delivered to you and certainly it's up to you if you want to continue your deliberations while you eat or not. It's completely up to you. It's completely up to you, but certainly nothing that

prohibits that, should you choose to eat and talk at the same time.

Now, ladies and gentlemen, I am going to leave you with this final thought, final words, and it's that our word verdict comes from the Latin phrase veradicto, which means to speak the truth. To speak the truth. Ladies and gentlemen, that is now your task, to speak the truth.

Please step to your jury room. Do not discuss this matter. Do not allow anyone to discuss it with you and leave your note pads, please, in your seats.

(Whereupon, at 11:13 a.m., the jury panel went to the jury room awaiting instructions to begin deliberations)

THE COURT: Yes, ma'am, hold on right there. I'm going to get them to take you somewhere else, because I'm going to ask you to stay with me for fifteen more minutes, because if something should happen to one of our jurors, I think I can stop deliberations, seat you and start to deliberate to save our trial. If you will go with Mr. Hasty, he will take you in another space.

ALTERNATE JUROR: All right. Thank you.

THE COURT: But you watch your watch now, or we will watch it too, but you watch it too.

(Whereupon, the alternate juror was taken out of the courtroom)

THE COURT: All right. Any exceptions or

additions, from the State?

MR. SORENSON: No, Your Honor.

THE COURT: From the defense?

MR. THOMAS: No, Your Honor.

THE COURT: All right. Very well.

And y'all have already looked at this evidence?

MR. SORENSON: Yes, ma'am.

MR. THOMAS: Yes.

THE COURT: And the verdict forms?

MR. SORENSON: Yes.

THE COURT: Very well. Now, here is what I want you to do. Do not -- don't take the alternate's note pad, but pick up everybody else's note pads, right. Ms. Paulling, do you want to help, and take the exhibits and the verdict forms and their note pads and tell them to begin their deliberations, but if they want to smoke a smoke break, just tell them to take their smoke break and when they are finished, then they may begin their deliberations. Okay Ms. P? You got that?

THE CLERK: Yes.

THE COURT: Okay. We will then be in recess until we hear from our jury.

MR. SORENSON: Thank you.

(Whereupon, at 11:15 a.m., the jury panel was instructed to begin deliberations)

(Whereupon, at 11:16 a.m., proceedings were recessed, pending the verdict of the jury panel)

(Whereupon, at 2:15 p.m., proceedings were reconvened)

THE COURT: Ladies and gentlemen, I know that we have family members present in the courtroom and other interested folks and I just wanted to remind everyone that it is imperative that the decorum of the court be maintained. That obviously the jury has reached its verdict. I have no way of knowing what that verdict is at this point, but what I do know is that irrespective of what the verdict is, the jury is entitled to have the decorum of the court maintained. And to that end, irrespective of what this verdict is, if you have any concerns about your ability to maintain your decorum and your ability to maintain your emotions, I'm going to ask you to please take your leave now. And then once you can gather your emotions, once the verdict is in, then you certainly can come back into the courtroom, but if you believe that you are going to be unable to maintain decorum once the verdict comes in and is published, I want you to leave now. So --

(No response).

THE COURT: Very well. In that folks have remained, I am going to rely on your ability to maintain your decorum when the verdict is rendered. All right. Or

published, I should say.

(Whereupon, at 2:18 p.m., the jury panel returned to open court to render its verdict)

THE COURT: All right. Madam presiding juror, it is my understanding that the jury has reached its verdict?

JURY FORELADY: Yes, ma'am.

THE COURT: Pass it up, please.

Thank you.

All right. I find that the verdict is in appropriate and due form.

If you would publish it for me, please, sir.

THE CLERK: Yes, ma'am.

State of South Carolina versus David Jamar Benjamin, Indictment Number 2013-GS-09-053, as to the charge of attempted murder of Shawn Defreitas, we, the jury, unanimously find the defendant guilty.

The State of South Carolina versus David Jamar Benjamin, Indictment Number 2013-GS-09-051, as to the charge of murder of Dominique Lawton, we, the jury, unanimously find the defendant guilty.

The State of South Carolina versus David Jamar Benjamin, Indictment Number 2013-GS-09-052, as to the charge of attempted murder of James Hampton, we, the jury, unanimously find the defendant guilty.

Madam presiding juror and ladies and gentlemen of

the jury, if that be your verdict, so say you all by raising your right hand.

THE COURT: Let the record show all of our jurors have their right hands raised.

Very well. Anything from the State at this time?

MR. SORENSON: No, Your Honor.

THE COURT: From the defense?

MR. THOMAS: Judge, would you please poll the jury?

THE CLERK: Okay.

THE COURT: Yes.

THE CLERK: We will begin with Madam Presiding Juror. Ms. Amy Wieber as the presiding juror, is this your verdict and is this still your verdict?

JUROR NUMBER 117: Yes, sir.

THE CLERK: Juror Scottie B. Coleman, is this your verdict and is this still your verdict?

JUROR NUMBER 17: Yes, it is.

THE CLERK: Juror Heather M. Hoffman, is this your verdict and is this still your verdict?

JUROR NUMBER 153: Yes, sir.

THE CLERK: Juror Carol F. Barton, is this your verdict and is this still your verdict?

JUROR NUMBER 3: Yes, it is.

THE CLERK: Juror Robert Steve Wilson, is this

your verdict and is this still your verdict?

JUROR NUMBER 118: Yes, sir.

THE COURT: Juror Brandy Myers, is this your verdict and is this still your verdict?

JUROR NUMBER 176: Yes, sir.

THE CLERK: Juror Stephanie L. Gates, is this your verdict and is this still your verdict?

JUROR NUMBER 30: Yes, sir.

THE COURT: Juror Ineatha Riley, is this your verdict and is this still your verdict?

JUROR NUMBER 85: Yes, sir.

THE CLERK: Juror Rosa B. Carson, is this your verdict and is this still your verdict?

JUROR NUMBER 15: Yes, sir.

THE CLERK: Juror Amanda K. Taylor, is this your verdict and is this still your verdict?

JUROR NUMBER 190: Yes, sir.

THE CLERK: Juror Michelle S. Lawson, is this your verdict and is this still your verdict?

JUROR NUMBER 59: Yes, sir.

THE COURT: And juror Megan C. Stanton, is this your verdict and is this still your verdict?

JUROR NUMBER 187: Yes, sir.

THE CLERK: Let the record reflect that all jurors are in concurrence with their verdict.

THE COURT: Very well. Thank you.

Anything further from the defense at this time?

MR. THOMAS: Judge, just ask for ten days in which to prepare motions.

THE COURT: Post-trial motions?

Any objection?

MR. SORENSON: No, Your Honor.

THE COURT: All right. Very well.

All right. Ladies and gentlemen, I want to thank you for your service on this jury and on this jury panel. That should be a hint to you that this is going to conclude the work that you are going to be doing this week.

A couple of things I do want to remind you. I certainly want to tell you that, and remind you, that you have an exemption for your jury service in a court of record for 2014 and 2015, should you choose to exercise that exemption. I will tell you that you are not eligible now to serve on a jury in a court of record for the balance of 2013. So be mindful of that as well, should you happen to receive a juror summons. I suspect that you will not, but if you do, just call Mr. Hasty or Ms. Paulling to let them know that you have been yet summonsed again this year and they will remember you and they will excuse you from that service, because you are not eligible to serve.

Now, with regards to your jury service, oftentimes

jurors would like to know and they are embarrassed to ask about their jury check. It will be coming to you in the mail very shortly. However, our trip to Tahiti, it will get you to Cameron. It is obviously a very small token of all of your dear and precious time that you have given to our system this week.

Let me tell you that you are now at liberty to talk about this case, if you choose. If you choose. If someone should call and want to talk about this case and you are comfortable talking about it, that is perfectly fine. That's a little bit different than what you have heard the last several days.

However, if someone should call and want to talk about this case and you don't want to talk about it, just tell them I don't want to talk about it. And should that person persist in wanting to discuss it and you have told them that you don't, all you need to do is contact Mr. Hasty. He will contact me and I will intercede on your behalf. Having said that, in fifteen years, arguably maybe sort of arguably have had that happen once, so I don't want you to be concerned about it. Quite frankly, I'm afraid if I don't mention it to a jury trial, sure in the world that's when it will happen, so I mention that to each and every jury panel that I have the opportunity to work with.

Ladies and gentlemen, let me just share with you

that those of you who are dashing off to work this afternoon or tomorrow and you need something for your employer so they will know where you have been and what you have been up to, they are happy to get that for you down in the clerk's office on the first floor.

And let me lastly share with you two things.

Number one, sometimes jurors wish to remain. I'm going to be now shifting into the sentencing phase. If you wish to remain, you are welcome to remain, because I'm about to return you to your status as a member of the public and this is a public place. If you wish to remain, you are fine where you are, but if you are ready to go, you are likewise certainly free to do that.

Ladies and gentlemen, let me just share with you that you have given us so much of your dear and precious time, and for every single solitary tick of the clock I want you to know on behalf, certainly of myself, and on behalf of everyone involved in our system of justice we are truly, truly grateful for every moment that you have given to our system and I thank you for it.

And at this time you are certainly free to remain, or you are free to go. It is your choice. Thank you so much.

(Whereupon, at 2:26 p.m., the jury panel was discharged from jury service)

MR. SORENSON: If we can have, Your Honor, we probably need about five minutes to get the paperwork ready.

THE COURT: Sure.

(Off the record)

(Back on the record)

THE COURT: All right, Mr. Sorenson, I have the plea sheets -- or the sentencing sheets, I should say, and I'm certainly happy to hear from either of the victims or certainly the victim's family, the Lawton family.

MR. SORENSON: Yes, Your Honor, and I do believe there are a couple of family members of Mr. Lawton that would hike to address the court.

THE COURT: I'll be happy to hear from them.

MR. SORENSON: Tell the judge your name first and your relation to Dominique.

KAREN STOKES: My name is Karen Stokes and I'm his sister.

THE COURT: And you are -- Stokes?

KAREN STOKES: Yes, ma'am.

THE COURT: Okay. I will be happy to hear from you.

KAREN STOKES: On behalf of the Lawton family and my little brother Dominique, I just want to take this time to say that we are all sorry for the situation that had happened and I wish this could have been another way before

the family could all get involved, but we just wanted to take the time to say that through all of this, all of us has been affected, not only our family, but also Mr. Benjamin and Mr. Haggood's family as well.

And we also just want to let them know that we are not -- we don't have any hatred towards them, and we just want them to also know that situations will happen in life, but we just have to make more mature decisions on what we have to do. And just for that, we just want you to know, Mr. Benjamin, that we do not hate you for the situation that this happened today, for you and your family. We just want you to know that everything is going to be all right and you are going to be taken care of.

THE COURT: Thank you.

KAY STOKES: I am Kay Stokes. I am a cousin/aunt and we would just like to say from the Lawton family we came here for justice. Justice we got, but nobody won today. None of the families won today, really. I mean, none of us. None of us won. And we just -- we are bonded for life. Every holiday that comes when we don't have Dominique, we are going to think about y'all. And I'm quite sure every holiday that comes when you will have to go to the prison, you might have to call each other on the phone.

One decision in all of us here, some of us -- probably was bad at the time, but to get that call. But

when y'all got the call today that Mr. Benjamin was guilty each time, we felt y'all's pain.

So from the Lawton family, all us of in this together, and we're sorry it happened. Take care of that young man. Pray with him. Don't give up on him.

From the Lawton family we thank y'all.

THE COURT: Thank you. Thank you.

I need his record, please, if any.

MR. SORENSON: He has a little record, not a lot, but from 2008 -- it looks like he was put on probation in 2008, so I'm assuming that's when the conviction was from. It's an unlawful carrying of a weapon, the one year statute; and a possession with intent to distribute. I think it's marijuana. I can't tell sometimes from these rap sheets what the drug is, but I think it's a possession with intent to distribute marijuana. That was back in December of 2008, when he at least came into contact with the probation at that time.

THE COURT: Very well.

All right. Anything further from the State?

MR. SORENSON: No, Your Honor.

THE COURT: Very well. Mr. Thomas?

MR. THOMAS: Thank you, judge.

I have in my possession, judge, some letters in support for Mr. Benjamin. If I could approach?

THE COURT: Sure.

Thank you.

MR. THOMAS: Your Honor, they are all very personal letters. I put the one first there from a family friend, an old friend of David's who put that together, and I think that it gives a very accurate representation of what type of human being that David Jamar Benjamin is.

In the eighteen months that I have got to know him and his family, I think very highly of them, despite some decisions that have been made. I find him to be a good person at heart.

His long time girlfriend, Shanique, who is present with us today and has been very supportive. They have three children, two of which are his blood children. The other one he's taken on as if it were his own and provided it with care and support and love.

He has a young son that was born during his period of incarceration for this offense, which he's only had very limited exposure to.

His mother Beverly is also in the room today, but I don't think either of them can address the court. She's a very, very hard working person. I consider her a friend. She's aware of the conduct of her son. She loves him regardless, but not with a blind love.

The words Dominique Lawton's family said were very

kind, and I think everyone in this room feels the same way. If some different decisions had been made, this entire situation could have been avoided.

I have maintained from the day I met him that he did not shoot Dominique Lawton. He has never wavered from that and I do have faith in his sincerity.

He and I both understand the jury has spoken, but we ask the court to have mercy.

THE COURT: Thank you so much, Mr. Thomas.

I'm going to take -- you have done this work. These people have sent these. I'm going to take a moment and read them.

MR. THOMAS: Thank you. We appreciate that. I'm sure they do as well.

There are a few on the end that were from a bond hearing.

THE COURT: Absolutely.

MR. THOMAS: The same general descriptions of his character.

THE COURT: Absolutely.

(Off the record)

(Back on the record)

THE COURT: I'm going to make this a court's exhibit.

MR. THOMAS: Certainly.

THE COURT: Very well.

(Jury Note marked as Court's Exhibit No. 5 for identification)

(Letters marked as Court's Exhibit No. 6 for identification)

THE COURT: Anything further?

MR. THOMAS: Just that he has an extensive family support group who have been here to support him through this entire process and from start to finish.

I would just like to demonstrate, that's the same type of a person that I have been involved with.

Late evenings out and alcohol and guns don't mix and this was where it's left Mr. Benjamin.

But, again, I ask the court to please have mercy on him. That's all.

THE COURT: Thank you so much, Mr. Thomas.

All right, does anyone know of any reason why at this point I should not impose sentence on Mr. Benjamin?

On behalf of the State?

MR. SORENSON: No, Your Honor.

THE COURT: And from the defense?

MR. THOMAS: No, Your Honor.

THE COURT: Very well.

Mr. Benjamin, with regard to 2013-GS-09-51, which is the indictment for murder, I am going to commit you to

the State Department of Corrections for a period of forty years.

With regard to 2013-GS-09-52, which is an indictment for attempted murder, I'm going to commit you to the State Department of Corrections for a period of thirty years.

And with regard to 2013-GS-09-53, which is an indictment for attempted murder, I am going to commit you to the State Department of Corrections for a period of thirty years.

These sentences will run concurrent and you will be given credit for the time that you have served.

Good luck to you, sir.

(END OF REQUESTED TRANSCRIPT OF RECORD)

CERTIFICATE

I, the undersigned, Michael R. Watts, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and the evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for CALHOUN County, South Carolina, on the dates of March 4, 2013 through March 7, 2013.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

DECEMBER 14, 2013

Michael R. Watts

Michael R. Watts
Circuit Court Reporter

WITNESSES

H. Dukes

Calhoun County Sheriff

ARREST WARRANT NUMBER
M355116

Arrested: September 19, 2011

ACTION OF GRAND JURY

TRUE BILL

Date

Foreperson of Grand Jury
Date: February 25, 2013

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 2013GS09-0052

The State of South Carolina

County of CALHOUN

COURT OF GENERAL SESSIONS

February 25, 2013 TERM

THE STATE
vs.

David Jamar Benjamin

Indictment for

ATTEMPTED MURDER

SC Code: 16-3-29

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I _____ hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

ATTEST TRUE COPY
KENNETH HASTY
CLERK OF COURT
CALHOUN COUNTY

FILED
2013 FEB 25 P 4:15
KENNETH HASTY
CLERK OF COURT
CALHOUN COUNTY
ST. MATTHEWS, SC

721

STATE OF SOUTH CAROLINA)
)
COUNTY OF CALHOUN)

INDICTMENT
2013GS09-0052

At a Court of General Sessions, convened on February 25, 2013 the Grand Jurors of Calhoun County present upon their oath:

ATTEMPTED MURDER

That in Calhoun County on or about September 18, 2011, with malice aforethought, the defendant, David Jamar Benjamin did with the intent to kill, either expressed or implied, commits the offense of attempted murder by shooting and wounding the victim, James Hampton. This offense being in violation of the Common Law and Section 16-3-29, of the South Carolina Code of Laws, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

Donald N. Sorenson, Solicitor

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF CALHOUN

FILED

2013 MAR -7 P 3:00

KENNETH HAST
CLERK OF COURT
CALHOUN COUNTY
S. SC

STATE VS. David Jamar Benjamin

INDICTMENT/CASE#: 2013-GS-09-0052

AKA:

A/W#: M355116

Race: B Sex: M Age:

Date of Offense: 9-18-11

DOB: [redacted] SS#: [redacted]

S.C. Code §: 16-3-29

Address:

CDR Code #: 3410

City, State, Zip:

DL# SID#

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☑ CONVICTED OF or ☐ PLEADS TO: Attempted Murder

In violation of § 16-3-29 of the S.C. Code of Laws, bearing CDR Code # 341D

☐ NON-VIOLENT ☑ VIOLENT ☐ SERIOUS ☑ MOST SERIOUS ☐ Mandatory GPS (CSC w/minor 1st or Lewd Act) ☐ §17-25-45

The charge is: ☐ As indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (def.'s initials)

The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Solicitor SC Bar # 9512 Defendant Attorney for Defendant SC Bar #

WHEREFORE, the Defendant is committed to the ☑ State Department of Corrections ☐ County Detention Center, for a determinate term of 30 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of $ _____ ; provided that upon the service of _____ days/months/years and or payment of $ _____ ; plus costs and assessments as applicable*; the balance is suspended with probation for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☑ CONCURRENT or ☐ CONSECUTIVE to sentence on: 3-7-2013

☑ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.

☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C. Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

ATTEST TRUE COPY
KENNETH HAST
CLERK OF COURT
CALHOUN COUNTY

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

Total: $ _____ plus 20% fee: _____ $ _____

Payment Terms: _____

☐ Set by SCDPPPS

Recipient: _____

*Fine:		$
§14-1-208 (Assessments 107.5%)		$
§14-1-211 (A)(1)(Conv. Surcharge)	$100	$
§14-1-211 (A)(2)(DUI Surcharge)	$100	$
§56-5-2995 (DUI Assessment)	$12	$
§56-1-286 (DUI Breath Test)	$25	$
Proviso 47.9 (Public Def/Prob)	$500	$
§14-1-212 (Law Enforce. Funding)	$25	$
§14-1-213 (Drug Court Surcharge)	$150	$
§50-21-114 (BUI Breath Test Fee)	$50	$
§56-5-2942(J) (Vehicle Assessment)	$40/ea	$
Proviso 90.5 (SCCJA Surcharge)	$5	$
3% to County (if paid in installments)		$
TOTAL		$

PTUP _____ days/months/years Parole/Employment

Obtain GED ☐

Attend Voc. Rehab. Or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling ☐

Random Drug/Alcohol Testing ☐

Fine may be pd. in equal consecutive weekly/monthly pmts. of $ _____ Beginning _____

$ _____ Paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel, §47.12 requires $500 be paid to Clerk during probation.

Clerk of Court/Deputy Clerk Claudia W. Fowlkes

Court Reporter: Richard Watts

Presiding Judge

Judge Code: 178

Sentence Date 3-7-2013

SCCA/217 (03/2011)

ARREST WARRANT

M-355116

STATE OF SOUTH CAROLINA

[X] County/ [ ] Municipality of

Calhoun

THE STATE

against

David Jamar Benjamin

Address: [redacted]

Saint Matthews, SC 29135-8140

Phone: SSN: [redacted]

Sex: M Race: B Height: 5 11 Weight: 245

DL State: SC DL #: [redacted]

DOB: [redacted] Agency ORI #: SC0090000

Prosecuting Agency: Calhoun County Sheriff

Prosecuting Officer: M Trentham - 1057

Offense: Murder / Attempted Murder

Offense Code: 3410

Code/Ordinance Sec: 16-03-0029

This warrant is CERTIFIED FOR SERVICE in the [ ] County/ [ ] Municipality of _____. The accused is to be arrested and brought before me to be dealt with according to the law.

(L.S.)

Signature of Judge

Date:

RETURN

A copy of this arrest warrant was delivered to defendant BENJAMIN on 9/19/11 1945

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

Bond Court
1623 Bridge Street
Post Office Box 191
St. Matthews, SC 29135

ORIGINAL ORIGINAL ORIGINAL ORIGINAL

724

STATE OF SOUTH CAROLINA)
[X] County/ [ ] Municipality of)
Calhoun)

AFFIDAVIT

ORIGINAL

Form Approved by S.C. Attorney General April 21, 2003 SCCA 518

Personally appeared before me the affiant M Trentham 11-0942 who being duly sworn deposes and says that defendant David Jamar Benjamin did within this county and state on or about 9/18/2011 violate the criminal laws of the State of South Carolina (or ordinance of [X] County/ [ ] Municipality of Calhoun) in the following particulars:

DESCRIPTION OF OFFENSE: Murder / Attempted Murder

I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that probable cause is based on the following facts:

That on the above date, while at the Pine Terrace Club in the Elloree area of Calhoun County, the defendant and co-defendants, while armed with firearms did engage in a verbal altercation and fire said firearms toward a group of people striking and wounding the victim James Hampton. The above is evidenced by verbal and written statements from the victim and eyewitnesses made to law enforcement.

ATTEST TRUE COPY
KENNETH HASTY
CLERK OF COURT
CALHOUN COUNTY

Signature of Affiant

STATE OF SOUTH CAROLINA)
[X] County/ [ ] Municipality of)
Calhoun)

Affiant's Address 2811 Old Belleville Road
St. Matthews, SC 29135-

Affiant's Telephone

2011 SEP 22 A 9:21

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that on or about 9/18/2011 defendant David Jamar Benjamin did violate the criminal laws of the State of South Carolina (or ordinance of [X] County/ [ ] Municipality of Calhoun) as set forth below:

DESCRIPTION OF OFFENSE: Murder / Attempted Murder

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as soon thereafter as is practicable

Sworn to and subscribed before me on 9/18/2011

(L.S.)

Signature of Issuing Judge

Don A. Rickenbaker Sr

Judge Code: 7059

Judge's Address 1724 Old State Road
Gaston, SC 29053-

Judge's Telephone (803)794-4706

Issuing Court: [X] Magistrate [ ] Municipal [ ] Circuit

ORIGINAL ORIGINAL ORIGINAL ORIGINAL

WITNESSES

H. Dukes

Calhoun County Sheriff

ARREST WARRANT NUMBER
M361077

Arrested: September 19, 2011

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury

Date: February 25, 2013

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2013GS09-0053

The State of South Carolina

County of CALHOUN

COURT OF GENERAL SESSIONS

February 25, 2013 TERM

THE STATE
vs.

David Jamar Benjamin

Indictment for

ATTEMPTED MURDER

SC Code: 16-3-29

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I _____ hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

ATTEST TRUE COPY
KENNETH HASTY
CLERK OF COURT
CALHOUN COUNTY

FILED
2013 FEB 25 P 4:15
KENNETH HASTY
CLERK OF COURT
CALHOUN COUNTY, S.C.

725

STATE OF SOUTH CAROLINA)
)
COUNTY OF CALHOUN)

INDICTMENT
2013GS09-0053

At a Court of General Sessions, convened on February 25, 2013 the Grand Jurors of Calhoun County present upon their oath:

ATTEMPTED MURDER

That in Calhoun County on or about September 18, 2011, with malice aforethought, the defendant, David Jamar Benjamin, did with the intent to kill, either expressed or implied, commits the offense of attempted murder by shooting and wounding the victim, Shawn Defreitas. This offense being in violation of the Common Law and Section 16-3-29, of the South Carolina Code of Laws, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

Donald N. Sorenson, Solicitor

STATE OF SOUTH CAROLINA)
COUNTY OF Calhoun)
STATE)
VS. David Jamar Benjamin)
AKA:)
Race: B Sex: M Age:)
DOB: [redacted] SS#:)
Address: [redacted])
City, State, Zip: St. Matthews, SC)
DL# SID#)
*CDL Yes ☐ No ☒ CMV Yes ☐ No ☒ Hazmat Yes ☐ No ☒

FILED
2013 MAR -7 P 3:00
KENNETH HASTY
CLERK OF COURT
CALHOUN COUNTY
ST. MATTHEWS, SC

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2013 GS 09 53
ARW#: M361077
Date of Offense: 9-15-11
S.C. Code §: 16-3-29
CDR Code #: 3410

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS TO: Attempted Murder
In violation of § 16-3-29 of the S.C. Code of Laws, bearing CDR Code # 3410
☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS (CSC w/minor 1st or Lewd Act) ☐ §17-25-45
The charge is: ☒ As indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (def.'s initials)
The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.
ATTEST: 5/13

Solicitor SC Bar # Defendant Attorney for Defendant SC Bar #

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections ☐ County Detention Center, for a determinate term of 30 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of $ _____ ; provided that upon the service of _____ days/months/years and or payment of $ _____ ; plus costs and assessments as applicable*; the balance is suspended with probation for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: 3-7-2013

☐ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.

☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C. Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

Total: $ _____ plus 20% fee: _____ $ _____

Payment Terms: _____

☐ Set by SCDPPPS

Recipient: _____

*Fine:		$
§14-1-208 (Assessments 107.5%)		$
§14-1-211 (A)(1)(Conv. Surcharge)	$100	$
§14-1-211 (A)(2)(DUI Surcharge)	$100	$
§56-5-2995 (DUI Assessment)	$12	$
§56-1-286 (DUI Breath Test)	$25	$
Proviso 47.9 (Public Def/Prob)	$500	$
§14-1-212 (Law Enforce. Funding)	$25	$
§14-1-213 (Drug Court Surcharge)	$150	$
§50-21-114 (BUI Breath Test Fee)	$50	$
§56-5-2942(J) (Vehicle Assessment)	$40/ea	$
Proviso 90.5 (SCCJA Surcharge)	$5	$
3% to County (if paid in installments)		$
TOTAL		$

Clerk of Court/Deputy Clerk: Claudia H. Fullerton
Court Reporter: Richard Watts

ATTEST TRUE COPY
KENNETH HASTY
CLERK OF COURT
CALHOUN COUNTY

PTUP _____ days/hours Public Service Employment
Obtain GED ☐
Attend Voc. Rehab. Or Job Corp. _____
May serve W/E beginning _____
Substance Abuse Counseling ☐
Random Drug/Alcohol Testing ☐
Fine may be pd. in equal consecutive weekly/monthly pmts. of $ _____ Beginning _____
$ _____ Paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel, §47.12 requires $500 be paid to Clerk during probation.

Presiding Judge: [signature]
Judge Code: 570
Sentence Date: 3-7-2013

SCCA/217 (03/2011)

ARREST WARRANT

M-361077

STATE OF SOUTH CAROLINA

[X] County/ [ ] Municipality of

Calhoun

THE STATE

against

David Jamar Benjamin

Address: [redacted]

Saint Matthews, SC 29135-8140

Phone: SSN: [redacted]

Sex: M Race: B Height: 5 11 Weight: 245

DL State: SC DL #: [redacted]

DOB: [redacted] Agency ORI #: SC0090000

Prosecuting Agency: Calhoun County Sheriff

Prosecuting Officer: H. Dukes - 1068

Offense: Murder / Attempted Murder

Offense Code: 3410

Code/Ordinance Sec: 16-03-0029

This warrant is CERTIFIED FOR SERVICE in the [ ] County/ [ ] Municipality of _____. The accused is to be arrested and brought before me to be dealt with according to the law.

(L.S.)

Signature of Judge

Date:

RETURN

A copy of this arrest warrant was delivered to defendant BENJAMIN on 9/19/11 1945

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

St. Matthews Magistrate
1623 Bridge Street / P O Box 191
St. Matthews, SC 29135

ORIGINAL ORIGINAL ORIGINAL ORIGINAL ORIGINAL ORIGINAL

728

STATE OF SOUTH CAROLINA
[X] County/ [ ] Municipality of
Calhoun

AFFIDAVIT

ORIGINAL

Form Approved by S.C. Attorney General April 21, 2003 SCCA 518

Personally appeared before me the affiant H. Dukes 11-0942 who being duly sworn deposes and says that defendant David Jamar Benjamin did within this county and state on or about 9/18/2011 violate the criminal laws of the State of South Carolina (or ordinance of [X] County/ [ ] Municipality of Calhoun) in the following particulars:

DESCRIPTION OF OFFENSE: Murder / Attempted Murder

I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that probable cause is based on the following facts:

That on the above date, while at the Pine Terrace Club in the Elloree area of Calhoun County, the defendant and co-defendant while armed with firearms did engage in a verbal altercation and fire said firearms toward a group of people striking and wounding the victim Shawn Defreitas. The above is evidenced by verbal and written statements from the victim and eyewitnesses made to law enforcement.

ATTEST TRUE COPY
KENNETH HASTY
CLERK OF COURT
CALHOUN COUNTY

Signature of Affiant

STATE OF SOUTH CAROLINA
[X] County/ [ ] Municipality of
Calhoun

Affiant's Address 2811 Old Belleville Road
St. Matthews 29135-

Affiant's Telephone

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that on or about 9/18/2011 defendant David Jamar Benjamin did violate the criminal laws of the State of South Carolina (or ordinance of [X] County/ [ ] Municipality of Calhoun) as set forth below:

DESCRIPTION OF OFFENSE: Murder / Attempted Murder

FILED
2011 SEP 22 P 4:15
KENNETH HASTY
CLERK OF COURT
CALHOUN COUNTY

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as soon thereafter as is practicable

Sworn to and subscribed before me on 9/18/2011

(L.S.)

Signature of Issuing Judge

Don A. Rickenbaker Sr

Judge Code: 7059

Judge's Address 1724 Old State Road
Gaston, SC 29053-

Judge's Telephone (803)794-4706

Issuing Court: [X] Magistrate [ ] Municipal [ ] Circuit

ORIGINAL ORIGINAL ORIGINAL ORIGINAL ORIGINAL ORIGINAL

WITNESSES

H. Dukes

Calhoun County Sheriff

ARREST WARRANT NUMBER
M361091

Arrested: October 4, 2011

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury
Date: February 25, 2013

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 2013GS09-0051

The State of South Carolina

County of CALHOUN

COURT OF GENERAL SESSIONS

February 25, 2013 TERM

THE STATE
vs.

David Jamar Benjamin

Indictment for

MURDER

SC Code: 16-3-10

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I _____
hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.:

ATTEST TRUE COPY
KENNETH HASTY
CLERK OF COURT
CALHOUN COUNTY

FILED
2013 FEB 25 P 4:15
KENNETH HASTY
CLERK OF COURT
CALHOUN COUNTY
ST. MATTHEWS, SC

729

STATE OF SOUTH CAROLINA)
)
COUNTY OF CALHOUN)

INDICTMENT
2013GS09-0051

At a Court of General Sessions, convened on February 25, 2013 the Grand Jurors of Calhoun County present upon their oath:

MURDER

That in Calhoun County on or about September 18, 2011, with malice aforethought, the defendant, David Jamar Benjamin did kill one Dominique Lawton by means of a gunshot wound to the head. The victim did die as a proximate result thereof. This offense being in violation of the Common Law and Section 16-3-10, of the South Carolina Code of Laws, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

Donald N. Sorenson, Solicitor

STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS

COUNTY OF CALHOUN)

FILED

2013 MAR -7 P 3:00

KENNETH HASTY
CLERK OF COURT
CALHOUN COUNTY
ST. MATTHEWS, SC

STATE) INDICTMENT/CASE#: 2013-GS-09-0051

VS.) A/W#: M361091

David Jamar Benjamin) Date of Offense: 9-18-11

AKA:) Statute §: 16-3-10

Race: B Sex: M Age: [redacted] CDR Code #: 0116

DOB: [redacted] SS#: [redacted]

Address:

City, State, Zip:

DL# SID#

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☑ CONVICTED OF or ☐ PLEADS

TO: Murder

In violation of § 16-3-10 of the S.C. Code of Laws, bearing CDR Code # 0116.

☐ NON-VIOLENT ☑ VIOLENT ☐ SERIOUS ☑ MOST SERIOUS ☐ Mandatory GPS (CSC w/minor 1st or Lewd Act) ☐ §17-25-45

The charge is: ☑ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (def.'s initials)

The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Solicitor SC Bar # 9512 Defendant Attorney for Defendant SC Bar #

WHEREFORE, the Defendant is committed to the ☑ State Department of Corrections ☐ County Detention Center, for a determinate term of 40 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of $ _____; provided that upon the service of _____ days/months/years and or payment of $ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☑ CONCURRENT or ☐ CONSECUTIVE to sentence on: 3-7-2013

☑ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.

☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

ATTEST TRUE COPY

KENNETH HASTY
CLERK OF COURT
CALHOUN COUNTY

Pursuant to 18 U.S.C. Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ **RESTITUTION:** ☐ **Deferred** ☐ **Def. Waives Hearing** ☐ **Ordered** PTUP _____

Total: $ _____ plus 20% fee: _____ $ _____ _____ days/hours Public Service/payment

Payment Terms: _____ Obtain GED ☐

☐ Set by SCDPPPS Attend Voc. Rehab. Or Job Corp. _____

Recipient: _____ May serve W/E beginning _____

Substance Abuse Counseling ☐

*Fine:		$
§14-1-206 (Assessments 107.5%)		$
§14-1-211 (A)(1)(Conv. Surcharge)	$100	$
§14-1-211 (A)(2)(DUI Surcharge)	$100	$
§56-5-2995 (DUI Assessment)	$12	$
§56-1-286 (DUI Breath Test)	$25	$
Proviso 47.9 (Public Def/Prob)	$500	$
§14-1-212 (Law Enforce. Funding)	$25	$
§14-1-213 (Drug Court Surcharge)	$150	$
§50-21-114 (BUI Breath Test Fee)	$50	$
§56-5-2942(J) (Vehicle Assessment)	$40/ea	$
Proviso 90.5 (SCCJA Surcharge)	$5	$
3% to County (if paid in installments)		$
TOTAL		$

Random Drug/Alcohol Testing ☐

Fine may be pd. in equal consecutive weekly/monthly pmts. of $ _____ Beginning _____

$ _____ Paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel, §47.12 requires $500 be paid to Clerk during probation.

Clerk of Court/Deputy Clerk Claudia K. Spitting

Court Reporter: Michael Watts

Presiding Judge

Judge Code: RIM

Sentence Date 3-7-2013

SCCA/217 (03/2011)

ARREST WARRANT 11-0942

M-361091

STATE OF SOUTH CAROLINA

[X] County/ [ ] Municipality of

Calhoun

THE STATE

against

David Jamar Benjamin

Address: [redacted]

Saint Matthews, SC 29135-8140

Phone: SSN: [redacted]

Sex: M Race: B Height: 5 11 Weight: 245

DL State: SC DL #: [redacted]

DOB: [redacted] Agency ORI #: SC0090000

Prosecuting Agency: Calhoun County Sheriff

Prosecuting Officer: M Trentham - 1057

Offense: Murder / Murder

Offense Code: 0116

Code/Ordinance Sec: 16-03-0010, 0020

This warrant is CERTIFIED FOR SERVICE in the [ ] County/ [ ] Municipality of _____. The accused is to be arrested and brought before me to be dealt with according to the law.

(L.S.)

Signature of Judge

Date:

RETURN

A copy of this arrest warrant was delivered to defendant David J Benjamin on 10/04/11

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

St. Matthews Magistrate
1623 Bridge Street / P O Box 191
St. Matthews, SC 29135

ORIGINAL

732

STATE OF SOUTH CAROLINA)
[X] County/ [ ] Municipality of)
Calhoun)

AFFIDAVIT

ORIGINAL

Form Approved by S.C Attorney General April 21, 2003 SCCA 518

Personally appeared before me the affiant M Trentham who being duly sworn deposes and says that defendant David Jamar Benjamin did within this county and state on or about 9/18/2011 violate the criminal laws of the State of South Carolina (or ordinance of [X] County/ [ ] Municipality of Calhoun) in the following particulars:

DESCRIPTION OF OFFENSE: Murder / Murder

I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that probable cause is based on the following facts:

On above date defendant and two codefendants willfully engaged in an altercation with victim Dominique Lawton, all armed with pistols, and, with malice aforethought fired said pistols striking victim in the head, directly causing his death. Malice is evidenced by statements of eyewitnesses on scene and by evidence such as locations of shell casings observed by law enforcement.

ATTESTED TRUE COPY
KEITH HASTY
CLERK OF COURT
CALHOUN COUNTY

Signature of Affiant

STATE OF SOUTH CAROLINA)
[X] County/ [ ] Municipality of)
Calhoun)

Affiant's Address 2811 Old Bellville Road
St. Matthews, SC 29135
Affiant's Telephone

FILED
2011 OCT 11 P 4:15
KEITH HASTY
CLERK OF COURT
CALHOUN COUNTY, S.C.

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that on or about 9/18/2011 defendant David Jamar Benjamin did violate the criminal laws of the State of South Carolina (or ordinance of [X] County/ [ ] Municipality of Calhoun) as set forth below:

DESCRIPTION OF OFFENSE: Murder / Murder

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as soon thereafter as is practicable

Sworn to and subscribed before me on 9/27/2011

(L.S.)

Signature of Issuing Judge

Robert Hill Lake

Judge Code: 5530

Judge's Address Post Office Box 191
St. Matthews, SC 29135
Judge's Telephone (803)874-1112

Issuing Court: [X] Magistrate [ ] Municipal [ ] Circuit

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THE STATE OF SOUTH CAROLINA)
COUNTY OF CALHOUN)

IN THE COURT OF GENERAL SESSIONS
FIRST JUDICIAL CIRCUIT

FILED
2013 MAR 15 P 1:47
KENNETH HASTY
CLERK OF COURT
CALHOUN COUNTY
ST. MATTHEWS, SC

THE STATE)

v.)

DAVID JAMAR BENJAMIN,)

DEFENDANT.)

MOTION TO RECONSIDER SENTENCE

NOW COMES, the Defendant, David Jamar Benjamin, who was found guilty by a Calhoun County jury on March 7, 2013, for the following offenses and sentenced by the Honorable Diane Schafer Goodstein to the following terms of imprisonment:

Indictment 2013GS-09-00051, Murder, Forty (40) Years
Indictment 2013GS-09-00052, Attempted Murder, Thirty (30) Years
Indictment 2013GS-09-00053, Attempted Murder, Thirty (30) Years

WHEREBY, the Defendant moves the Honorable Court for a Reconsideration of the Sentences imposed.

FACTS

The direct testimony of Antonio Gidron indicated that he witnessed firsthand the shooting of the victim, Dominique Lawton, and that the single, fatal wound to the victim did not originate from the Defendant, David Jamar Benjamin, but from a different direction altogether. Mr. Gidron testified that both Mr. Lawton and Mr. Benjamin were within his field of vision and that Mr. Benjamin did not shoot Mr. Lawton. There was also testimony by multiple witnesses that Mr. Lawton was the first person to visibly introduce a firearm to the situation.

The testimony of SLED Agent James Green indicated that one of the victims, James Hampton, was wounded in the elbow by either a .40 caliber or 10mm pistol cartridge. Co-Defendant Joshua Haggood's testimony indicated that he possessed and later fired a .40 caliber XD-40 pistol in the direction of James Hampton and was most likely the shooter who injured Mr. Hampton.

The injury sustained by the third victim, Shawn Defreitas, was a gunshot wound that passed through his thigh and groin area. No bullet fragments were identifiable. His testimony indicated that he did not see the person who shot him or the person who shot first. However, he stated under oath that after seeing Co-Defendant Kevin Frazier shoot his pistol in the air, he saw the Defendant fire a pistol from the passenger side of Co-Defendant Haggood's vehicle. This testimony, when viewed on a timeline of events as described by multiple

witnesses at trial, indicates that Shawn Defreitas was likely wounded prior to the Defendant firing a pistol in the direction of Dominique Lawton. Even if this timeline was incorrect, there was no one who testified that they witnessed the Defendant firing a pistol at Mr. Defreitas nor was there any forensic evidence that would implicate the Defendant as the shooter of Mr. Defreitas. Additionally, all of the other testimony regarding the physical location of the Defendant at the time of the shooting placed him on the opposite side of Mr. Haggood's vehicle.

Attached to this Motion is a copy of *State v. Adams Gibson*, 701 S.E.2d 766 (S.C. App. 2010), which is included strictly for its similarity in the confusing facts of the case, the use of accomplice liability theory, and the resulting sentence of thirty (30) years imprisonment.

While no two cases are entirely similar, the case presently before the Court was one in which the jury verdict was likely achieved due to accomplice liability theory or "the hand of one." Direct and circumstantial evidence indicates that the Defendant, David Jamar Benjamin, more likely than not, was not the individual whose bullets caused the death of Dominique Lawton or the injuries to James Hampton and Shawn Defreitas.

THEREFORE, by and through his attorney, Nicholas Gray Thomas, the Defendant David Jamar Benjamin moves the Honorable Court for a Reconsideration of the Sentences imposed and respectfully prays that his sentences be reduced to thirty (30) years for Murder, and twenty (20) years for each count of Attempted Murder, to be served concurrently.

I so move,

Date: 3/15/2013
St. Matthews, South Carolina



Nicholas Gray Thomas
Coastal Law, LLC
SC BAR 76439

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CALHOUN COUNTY
Court of General Sessions

Diane Schafer Goodstein, Circuit Court Judge

CASE NO.: 2013-001496

State of South Carolina, ...Respondent,

v.

David Jamar Benjamin, ...Appellant.

Final Brief of Appellant

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE 2

STATEMENT OF THE FACTS 4

ARGUMENT 31

I. ISSUE ONE - THE TRIAL COURT ERRED IN NOT GRANTING DEFENDANT'S MOTION FOR DIRECTED VERDICT WHERE THE STATE FAILED TO PRODUCE ANY DIRECT OR SUBSTANTIAL CIRCUMSTANTIAL EVIDENCE REASONABLY TENDING TO PROVE DEFENDANT BENJAMIN'S GUILT.....31

II. ISSUE TWO - THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING DEFENDANT'S MOTION FOR NEW TRIAL WHERE THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE JURY'S FINDING AND WHERE, AS A MATTER OF LAW, THE STATE FAILED TO PRODUCE SUBSTANTIAL CIRCUMSTANTIAL EVIDENCE TO SUPPORT ITS ACCOMPLICE LIABILITY THEORY TO CONVICT DEFENDANT 42

CONCLUSION 44

TABLE OF AUTHORTITIES

Cases

State v. Arnold, 361 S.C. 386, 390, 605 S.E.2d 529, 531 (2004).....41

State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006).....31

State v. Cherry, 361 S.C. 588, 596, 606 S.E.2d 475, 479 (2004).....32, 41

State v. Hughes, 346 S.C. 339, 342, 552 S.E.2d 35, 36 (Ct.App.2001).....42

State v. Kelly, 331 S.C. 132, 502 S.E.2d 99 (1998)..... 42

State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 272 (1987).....38

State v. Lewis, 403 S.C. 435, 743 S.E.2d 124 (2013).....41

State v. Lollis, 343 S.C. 580, 583, 541 S.E.2d 254, 256 (2001).....31, 41

State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010)..... 38

State v. McHoney, 344 S.C. 85, 97, 544 S.E. 2d 30, 36 (2001).....31

State v. Mercer, 381 S.C. 149, 166, 672 S.E.2d 556, 565 (2009).....42

State v. Odems, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011).....31, 32, 37

State v. Salisbury, 343 S.C. 520, 524 n. 1, 541 S.E.2d 247, 249 n. 1 (2001).....32

State v. Schrock, 283 S.C. 129, 132, 322 S.E.2d 450, 452 (1984).....41

State v. Smith, 316 S.C. 53, 447 S.E.2d 175 (1993)..... 42

State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006)..... 31, 32

State v. Zeigler, 364 S.C. 94, 102, 610 S.E.2d 859, 863 (Ct.App.2005).....41

Statutes

S.C. Code 16-3-10.....2, 32

S.C. Code 16-3-29.....2, 32

Miscellaneous

Black's Law Dictionary 636 (9th ed.2009).....32

STATEMENT OF ISSUES ON APPEAL

ISSUE ONE - The Trial Court erred in not granting the Defendant's motion for directed verdict where the State failed to produce any direct or substantial circumstantial evidence reasonably tending to prove Defendant Benjamin's guilt where the State:

A. Failed to prove that but for the actions of Defendant Benjamin, the victim would not have died;

B. Failed to prove Defendant Benjamin intended to kill the victim;

C. Failed to prove Defendant Benjamin fired the fatal shot;

D. Failed to prove Defendant Benjamin fired any of the shots that injured the surviving victims;

E. Failed to prove Defendant Benjamin joined with another in carrying out a common plan or purpose, to wit, murder and attempted murder, sufficient to find Defendant Benjamin guilty under an accomplice liability theory;

F. Failed to prove Defendant Benjamin was present at the scene as a result of a prior arrangement to carry out a prior arranged plan or common scheme sufficient to find Defendant Benjamin guilty under an accomplice liability theory in the wounding of Hampton and DeFreitas or the killing of Lawton.

ISSUE TWO - The Trial Court abused its discretion in denying Defendant's Motion for New Trial where there was insufficient evidence to support the jury's finding and where, as a matter of law, the State failed to produce substantial circumstantial evidence to support its accomplice liability theory to convict Defendant.

STATEMENT OF THE CASE

Defendant David Benjamin was arrested on October 4, 2011, and subsequently indicted by a Grand Jury charged with one count of murder in violation of S.C. Code 16-3-10 and two counts of attempted murder in violation of S.C. Code 16-3-29. Mr. Benjamin pleaded NOT GUILTY and proceeded to a trial before a jury on March 4.

Following a four-day trial during which Mr. Benjamin did not testify, a jury found Mr. Benjamin guilty on all counts. Trial Counsel Nicholas Thomas, Esq. moved for a judgment of acquittal following the verdict arguing the evidence was insufficient to prove Mr. Benjamin's guilt. This motion was denied after a hearing. The motion followed two unsuccessful motions during trial for a directed verdict, the first following the close of the State's case and the second at the close of all the evidence.

The Hon. Diane Schafer Goodstein sentenced Mr. Benjamin to 40 years' imprisonment on Count One – Murder, and 30 years' imprisonment

on each of Counts Two and Three – Attempted Murder, to be served concurrently. Mr. Benjamin was represented in his post-trial motions by Wendy Keifer, Esq., who filed and argued a timely motion for new trial and a timely motion to reconsider the sentence imposed upon Mr. Benjamin. Both motions were denied. Mr. Benjamin, through counsel, filed a Notice of Appeal on July 10, 2013.

Undersigned counsel was substituted as attorney of record. An application on behalf of Mr. Robert L. Sirianni, Jr., has been filed to permit his appearance *Pro Hac Vice*. The transcript of the trial proceedings was received by counsel on January 6, 2014, and this Initial Brief of Appellant follows.

STATEMENT OF FACTS

Introduction

Defendant-Appellant David Jamar Benjamin ("Mr. Benjamin") was at the Pine Terrace Club, nicknamed "Piggy Park" in the late evening and early morning hours of September 18-19, 2009, with two others enjoying music and dancing provided by two disc jockeys. At one point, Mr. Benjamin is bumped on the dance floor by Dominique Lawton, who was present with a group of his friends at the same club. The two stared at each other but there was no physical confrontation.

Several hours passed until the club raised the lights and indicated it was closing down. It was pushing 4 a.m. and there was a large crowd of people exiting the club and leaving from the area. Mr. Lawton was intoxicated and confronted one of the people who had come to the club with Mr. Benjamin. All of the parties had weapons but there was no escalation until shots were fired in the air and then multiple shots were fired from all directions.

Several parties were involved in an exchange of gunfire and during the melee, Mr. Lawton was shot in the head and died. Two others, Mr. James Hampton and Mr. Shawn DeFreitas, were struck with bullets but survived. About two weeks after the event, Mr. Benjamin was arrested

along with the two people he was with that evening and charged with the murder of Mr. Lawton and the attempted murder of two others.

There were dozens of people in the area at the time of the shootings but no one could say for sure who shot first or where the fatal shot came from. Further, no witnesses could say if the shots fired by Mr. Benjamin, described as on a low angle toward the ground similar to military-style "cover fire" ever hit any of the victims. One witness who saw the fatal shot said Mr. Benjamin was not the person responsible. Another witness all but admitted that it was his shot, and not Mr. Benjamin, that ultimately wounded one of the victims. No one saw how, when, or from where the third victim was shot and wounded.

According to the State, represented at trial by Assistant State Solicitors Donald Sorenson and Theodore Lupton, Mr. Benjamin was responsible under a theory known as "the hand of one is the hand of all." This is an accomplice liability theory where Mr. Benjamin would be held responsible for all of the shootings even though he never fired any of the shots that injured or killed the victims. He was just as responsible as the persons who actually did fire the shots, each of which received stunningly light sentences after pleading guilty to significantly lesser charges.

One person was allowed to plead guilty to assault and battery and given a concurrent sentence of seven years in exchange for testifying against Mr. Benjamin at trial. The trial covered four days in early March, 2013, before a jury of ten (10) women and two (2) men.

The Parties Arrive at the Club

Joshua Haggood, an Army veteran of two combat tours in Afghanistan, was stationed at Fort Bragg, North Carolina, in September of 2011. (R. p. 121, lines 14-16). He was a long-time friend with Kevin Frazier and David Benjamin. He knew Mr. Benjamin "most of my life" and knew Mr. Frazier "since about middle school." (R. p. 122, lines 16-17; 21-22). The men were two of Mr. Haggood's "best friends." (R. p. 123, lines 5-6).

Mr. Haggood would typically travel once or twice a month from Fort Bragg back to Orangeburg, South Carolina, to visit. (R. p. 125, lines 4-8). His mother lives there as does one of his sons. (R. p. 126, lines 15-16). On his trips back, he carried with him an XD 40 .40 caliber silver and black semi-automatic pistol he borrowed regularly from a friend in North Carolina, a fellow soldier, Georgio McGarrah. (R. p. 125, lines 13-21; p. 125, line 25 - p. 126, line 3).

Over the weekend of September 16 through September 18, 2011, Mr. Haggood was visiting and had the gun with him. He said normally he

"hangs out" with Mrrs. Benjamin and Frazier when he visits when he is not visiting his mother or with his son. (R. p. 125, lines 9-12). On Saturday night September 18, 2011, Mr. Haggood met with his friends. He drove over to pick up Mr. Benjamin at his mother's home and then the two drove to Mr. Frazier's house to get him. (R. p. 127, lines 15-17).

The trio was planning to go to a birthday party for Nevadria Miller, someone all had known from high school, at a club in the Elloree area called Pine Terrace but more commonly referred to as "Piggy Park." (R. pp. 129, line 20 – 130, line 7). For about 20 minutes, the trio stayed at Mr. Frazier's house and had a few beers. (R. p. 129, lines 3-10). Mr. Haggood had not been to the club before and so Mr. Benjamin drove Mr. Haggood's car to the club "because he knew how to get there." (R. pp. 130, Line 22 – 131, line 1).

The three arrived between 12 a.m. and 1 a.m. (R. p. 131, lines 2-4). Mr. Haggood's brother William was in another car with his cousin and arrived around the same time. (*Id.*, lines 7-10). They backed in and parked about at the corner of the club. (R. p. 132, lines 1-5; 9-10). There was a van already parked there and so his brother backed in first and then Mr. Benjamin went in after that. (*Id.*, at lines 19-23).

All three friends – Mr. Haggood, Mr. Frazier and Mr. Benjamin – had weapons with them. Mr. Haggood had placed his .40 caliber in the glove

box, Mr. Frazier had a .32 caliber revolver and he believed Mr. Benjamin had a .45 caliber pistol. (R. pp. 132, line 25 – 133, line 12). Mr. Haggood locked his gun in the glove box and Mr. Benjamin and Mr. Frazier placed their weapons in the trunk. (R. p. 133, lines 6-12). None took weapons into the club.

When they arrived, there were not that many cars there and not many people inside. (R. p. 133, lines 23-25; R. p. 134, line 11). Inside, there were people on the dance floor but "nothing major." (R. p. 134, lines 11-12). There was an open liquor bar (free to patrons) but people had to pay for beers. (*Id.*, lines 14-16). Mr. Haggood said he believed Mr. Frazier was drinking the free liquor but was unsure if Mr. Benjamin was drinking. (*Id.*, lines 20-23). Mr. Haggood was drinking beer. (R. p. 135, lines 3-6).

The Incident Inside the Club

The club eventually started to fill up as more people arrived and the three were basically "hanging out" together. (R. p. 135, lines 18-19). Andrew Haynes (called "Bubba") was one of the DJs working at the club that evening along with "DJ Mike (Michael Bullock). (R. pp. 34, line 24 – p. 35, line 10). Mr. Haynes said he arrived between 11 p.m. and 11:30 p.m. and "brought a crowd with me" when he arrived. (R. p. 35, lines 13-15; R. p. 38, lines 10-12).

Already at the club was Dominique Lawton. At some point, Mr. Haynes observed that Mr. Lawton "bumped" Mr. Benjamin on the dance floor and there were words exchanged and "a little shoving" but no punches were thrown and no weapons were displayed. (R. p. 39, lines 4-11). Mr. Haynes said he intervened and stopped the episode from escalating. (R. p. 38, lines 16-17). He said Mr. Lawton appeared intoxicated. (R. p. 39, lines 20-22).

Mr. Haynes talked to both parties and calmed everyone down. (R. p. 40, lines 10-13). Antonio Gidron was also in the club at the time of the incident. He did not describe it as an altercation. (R. p. 369, lines 18-20). He spoke with Mr. Benjamin after the incident and said Mr. Benjamin told him "you are down here, you know, to have fun. We don't want no problems." (R. p. 383, lines 14-16). Mr. Gidron said he knew Mr. Lawton and told Mr. Benjamin, "I'll handle it." (*Id.*, line 17). Mr. Gidron then went over to talk with Mr. Lawton, asked what was going on, and Mr. Lawton told him "it ain't nothing." (R. p. 370, lines 6-8). Mr. Gidron told Mr. Lawton that Mr. Benjamin was one of his friends and that "they don't want no problem" and that Mr. Lawton calmed down and "thought nothing of it. He let it be." (*Id.*, lines 10-13).

Inside the club, Mr. Haggood said Mr. Benjamin pointed at presumably Mr. Lawton and another that had been involved and said that he thought one of them had a gun. (R. p. 136, lines 11-14). Mr. Haggood asked Mr. Benjamin what he wanted to do and Mr. Benjamin replied that he did not want to get caught "slipping." (R. p. 137, line 8). Mr. Haggood testified he believed that to mean that Mr. Benjamin wanted to get his gun. (*Id.*, lines 10-13). Mr. Frazier was on the dance floor and so the three went out to Mr. Haggood's car and retrieved their weapons. (R. p. 138, lines 1-4).

Mr. Gidron said he had seen people with guns at the club "all the time" prior to this incident. (R. p. 371, lines 13-15). Mr. Haynes had noticed the three leave the club and so followed them to continue to talk to them and keep everyone calm. (R. p. 41, lines 10-12). He knew Mr. Frazier from high school because he had played basketball against him. (R. p. 40, lines 23-24). He said he met them as they were coming back into the club. (R. p. 41, lines 15-17). He speculated that it appeared the three were coming from the area where cars are normally parked but could not say for sure. (R. pp. 41, line 20 – 42, line 2).

Mr. Haynes had a brief conversation with Mr. Benjamin and suggested that he should not bother getting involved with Mr. Lawton (whose nickname is "Killa") because "he's young, drunk, you know how

they get." (R. p. 42, lines 18-20). He said Mr. Benjamin replied "I'm killer" and they walked back into the club. (*Id.*, lines 21-22). Mr. Haynes also spoke to Mr. Lawton and told him to calm down as well "because it's not called for." (*Id.*, lines 24-25). Mr. Haynes said he did not see any of the three with weapons as they went back inside and he went in behind them. (R. p. 43, lines 20-23).

Mr. James Hampton, one of the injured victims, arrived at the club between 12:30 a.m. and 1 a.m. and learned after arriving that there had been a confrontation involving Mr. Lawton. (R. p. 66, lines 18-20; R. p. 67, lines 5-8). He went to speak with Mr. Lawton and told him to "chill out." (R. p. 67, line 13). He said Mr. Lawton was calm at that point. (*Id.*, lines 16-17). Mr. Hampton did not know Mr. Benjamin or Mr. Haggood but knew Mr. Frazier. (R. p. 65, line 13-23). He said someone pointed out Mr. Benjamin as the person involved in the confrontation with Mr. Lawton. (R. p. 67, lines 21-23).

After that, there were no problems during the more than two hours from the time of the incident until the club closed down. (R. p. 44, lines 7-9). It was, as Mr. Haggood described it, "a normal club environment. Nothing going on really other than music, dancing and just people talking and everything. Nothing negative was going on." (R. p. 139, lines 13-16).

People continued to drink. (*Id.*, lines 17-19). Mr. Haynes said it was about 2 a.m. or 2:30 a.m. when "the crowd was getting kind of iffy" and so he suggested to the club manager to begin shutting the party down. (R. p. 44, lines 17-21).

It was sometime later that the DJs stopped playing music and the lights came up indicating the party was shutting down. (R. p. 140, lines 4-5). Shawn DeFreitas, also known as Shawn Cooper, testified he arrived at the club around 3 a.m. and paid and went inside, spending some time talking to some people. (R. pp. 178, line 3; R. p. 179, lines 3-4). He said about an hour later, the club was closing down so he left. (R. p. 179, lines 8-10).

When the lights came up and the music stopped playing, Mr. Haggood, who was near the pool table by the front door, simply left and went outside. (R. p. 140, lines 7-8). He said Mr. Frazier and Mr. Benjamin were both near the dance floor area. (*Id.*, lines 13-14). He was outside talking with a female friend he knew from high school and saw Mr. Benjamin and Mr. Frazier exit the club. (R. p. 141, lines 7-12).

Shots Are Fired

"As soon as they got outside the door, somebody (later learned it was the victim Mr. Lawton) pulled out a gun and discharged a round," Mr. Haggood said. (R. p. 141, lines 12-14). Mr. Lawton was the aggressor

outside, according to Mr. Haggood. (R. p. 165, lines 12-14). "I guess you could say [it was] like an ambush type thing. He (Mr. Lawton) came out of nowhere. It wasn't provoked or anything. Once he walked up, he pulled out his gun, it wasn't anything said before he pulled out his gun." (*Id.*, lines 17-20).

There was chatter going back and forth between Mr. Frazier and some people with him and Mr. Lawton and his friends. (R. p. 74, line 24-25). Mr. Gidron said he saw something "like a pep rally or something" and "everybody just swarmed in." (R. p. 371, lines 18-19). He said he saw Mr. Lawton with a gun in his waistband. (*Id.*, lines 20-21).

Mr. Gidron said at one point someone said, "he got a gun" but did not recognize the voice and did not know who the voice was referring to but right after said he looked and saw Mr. Frazier with his gun out. (R. p. 372, lines 1-2). Mr. Frazier's gun at that point was not in the air but rather pointed downward near his waist. (R. p. 74, lines 8-12). After that, Mr. Haggood said, "it was just like everything became chaotic, like people arguing and everything and people trying to separate everything." (R. p. 143, lines 4-7). Mr. Haynes said somebody ran back into the club and told him there was a commotion outside the club and he went to investigate and saw 25 to 30

people outside by the door and saw Mr. Frazier holding a silver revolver in the air. (R. p. 45, line 13-14; *Id.*, lines 20-21; R. p. 46, line 23).

Mr. Hampton was also outside and saw Mr. Frazier holding his gun in the air and heard him saying, "All we want to do is go home!" (R. p. 69, line 13). He said there was "a lot of chatter." (R. p. 71, line 1). Mr. Haggood heard the same thing: "I'm just trying to get home. I'm just trying to get home. I don't want any trouble." (R. p. 143, lines 9-10). Mr. Gidron said he heard Mr. Frazier say, "man, please, we just want to go home ... we don't want no problem." (R. p. 372, lines 4-6). Mr. DeFreitas said he saw an altercation breakout "with some of the people I knew" and so he went back from his car to try to break it up. (R. p. 179, lines 14-15). He saw Mr. Frazier and Mr. Lawton right at the door with perhaps a dozen people around. (*Id.*, lines 16-23).

Mr. Haynes had stepped in to try to break up the confrontation as well and he and Mr. Benjamin and Mr. Haggood were trying to "usher" Mr. Frazier toward Mr. Haggood's car. (R. p. 46, line 6; R. p. 144, line 6). Mr. Haggood had tried to step in but Mr. Benjamin interceded and touched him on the shoulder and said "just fall back. Chill out." (R. p. 143, line 15-16). Mr. Haynes said he was focused on Mr. Frazier and was not paying much attention to anything else. (R. p. 46, lines 11-12). Mr. DeFreitas was also

with this group trying to get Mr. Frazier back to Mr. Haggood's car. (R. p. 180, lines 19-20).

The group finally gets back to Mr. Haggood's car and Mr. Haynes said this was the point where Mr. Frazier fired his revolver into the air. (R. p. 46, lines 15-16; R. pp. 74, line 25 – p. 75, line 3). Mr. DeFreitas said "shots just started firing" after that and he got hit in the leg and "went down." (R. p. 183, lines 15-17). He had no idea who fired the first shots. (R. p. 190, lines 1-3). Mr. Haynes ran after the shots started and took cover by the door to the club near the van and ultimately retreated inside. (R. p. 51, lines 20-22). Mr. Haggood said he heard the first shots before Mr. Frazier fired and in fact it was even before they reached his car. (R. p. 145, lines 1-2).

"They started shooting," he said, "and then it was like everybody was scattering." (R. p. 145, lines 2-3). He said he could not tell where the initial shots came from but believed they came from an area near the road. (*Id.*, lines 15-18). It was after that point when Mr. Benjamin pulled out his gun "and let off about two shots." (R. p. 146, lines 4-5). He said Mr. Benjamin's shots were fired "like [in] the direction of the car that was in front of mine." (*Id.*, lines 18-19). Mr. Benjamin was still moving when that was happening. (R. p. 148, lines 17-20).

Mr. Haggood said somebody was firing from behind the van (which was parked near the club) and that it seemed people were "shooting like from different directions" so he took cover towards the rear of his car. (R. p. 148, lines 1-3). He pulled out his .40 caliber and shot back. (Id., lines 4-5). He said he shot "three or four shots" back in the direction of the van. (R. p. 149, lines 5-7).

The gunfire Mr. Haggood described as "enemy fire" based on his experience as a combat soldier. (R. p. 164, lines 11-12). He said the first shot was not fired by Mr. Frazier or Mr. Benjamin. (R. p. 167, lines 1-7). "Once the first shot came out it was like shots from everywhere." (*Id.*, lines 9-11). "Like I guess you could say people already had their guns on them in the parking lot" before Mr. Frazier fired his weapon into the air. (*Id.*, lines 11-12).

When Mr. Benjamin was initially moving from one location seeking cover near Mr. Haggood's car, his shots were fired with his arm extended at a downward angle equivalent to "cover fire" used to provide a chance to rally a group of people into a safe place. (R. p. 168, lines 5-9). Mr. Haggood never saw Mr. Benjamin shoot anyone and was "on the move" when the rounds were discharged. (*Id.*, lines 13-14).

When Mr. Hampton saw Mr. Frazier fire into the air, he turned and walked away back towards the road. He said then more shots were fired and he could "feel the bullet coming past my own head" so he ducked for cover behind the van and went the other way. (R. p. 75, lines 17-19). He said the shots he believed came from behind him. He never saw Mr. Benjamin shooting. (R. p. 76, lines 6-7).

He said once he ducked behind the van and heading in the opposite direction he started hearing yelling and someone saying, "Killa get up!" (R. p. 76, line 24). He ran over to where it was coming from and saw Mr. Lawton on the ground and that he had been shot in the head. (R. p. 77, lines 9-12; R. p. 78, line 2). He said he then ran back to the club, picked up a pole out of the ground and threw it at a car. (R. p. 78, lines 12-13). Mr. DeFreitas said he had no idea who fired the shots that killed Mr. Lawton. (R. p. 193, lines 22-24).

Daniel Saxon arrived at the club about 3:15 a.m. and said he could not hear any gunfire when he got there but also said he had his music on in the car with the windows up. (R. p. 199, lines 10-12; R. p. 201, lines 4-5). He was in his car and saw Mr. Lawton at one point come around to the front of his vehicle on the driver's side. He said Mr. Lawton was "kind of agitated."

(R. p. 201, lines 19-20). Mr. Saxon got out of his vehicle and tried to calm him down. (*Id.*, lines 21-23).

After this, Mr. Saxon said he heard gunshots and so he ducked down. The only person he saw shooting was "a guy shooting in the air – not aiming." (R. p. 203, lines 1-3). After kneeling down, he turned and looked at the rear of his car and saw Mr. Lawton lying there with a wound to his head. (*Id.*, lines 21-24). He walked around to the front of his car and got one of Mr. Lawton's cousins and told him he thought Mr. Lawton was dead. (R. pp. 203, line 25 – 204, line 5).

Mr. Gidron said he was "99 percent sure" that he saw the point at which Mr. Lawton was shot and that Mr. Benjamin did not fire that shot or even aim a gun at him. (R. p. 374, lines 2-8; R. p. 375, lines 10-12). He said Mr. Haggood was shooting toward the van because "somebody was on the back of the van firing shots." (R. p. 387, lines 12-15). "Josh was saying, 'Don't come --- don't come from around the van. Don't come around the van.'" (R. p. 389, lines 17-18).

Mr. Hampton said that after he had thrown the post he started moving back towards an area behind the DJ's van that was backed up to a door at the club and heard some more shots go off and it was at that point he realized he had been hit in his arm. (R. p. 80, lines 1-13). He said he yelled out, "I'm

hit" and "then some girl came over and wrapped my arm up and they sat me down in Andrew Haynes' car." (R. p. 81, lines 21-23).

Mr. Haggood said Mr. Frazier was in the backseat of his car and he and Mr. Benjamin got into the front seat about the same time. He said Mr. Benjamin was driving and had put the car into gear and "hit the horn a couple of times" because there was a car in front of them and that car, he said, eventually started moving backwards. (R. p. 150, lines 8-11). He said Mr. Frazier was yelling and that it was difficult at first to hear. (R. p. 151, lines 18-21).

Mr. Frazier asked Mr. Benjamin and Mr. Haggood if either of them "had to shoot." (R. p. 152, lines 10-12). Mr. Benjamin, according to Mr. Haggood, said there was no reason to do so because Mr. Frazier had "let off a few shots in the air to let them know what time it was." (*Id.*, lines 19-22). Mr. Haggood did not initially respond, he said, because he was on his cell phone trying to call his brother to find out what happened.

Mr. Frazier, later on, opened the rear window and tossed out some shell casings from his weapon, according to Mr. Haggood. (R. p. 152, lines 6-9). Mr. Benjamin drove and they dropped off Mr. Frazier at another club, Mr. Haggood took Mr. Benjamin back to his mother's house, and Mr. Haggood then went home to his mother's house for a few hours before

getting into his car and heading back to Fort Bragg, North Carolina. (R. p. 153, lines 5-10; R. p. 154, lines 4-13).

The Investigation

Calhoun County Sheriff's Deputy Terry Snead was on duty on the night and early morning of September 17-18, 2011. (R. p. 16, lines 23-25). He was dispatched to the incident and headed there with others with lights and sirens on. (R. p. 17, lines 10-17). He said the first call from the scene came in around 4 a.m. (R. p. 30, lines 15-18).

It took Deputy Snead approximately 26-27 minutes to arrive on scene. (R. p. 30, lines 6-8). While en route, one of his fellow deputies, Sgt. Phil Rice, was told to respond to a convenience store in Cameron because it was reported that a victim was there. (R. pp. 18, line 22 – p. 19, line 2). Deputy Snead and fellow Deputy Sgt. Earl Kinley arrived on the scene of the incident about the same time.

Deputy Snead described it as "chaotic" and that they spent their time trying to find out what had happened. (R. p. 19, lines 13-14; R. p. 31, lines 15-16). One person was found on the ground and another was sitting in a small gray car. (R. p. 19, lines 17-21). The person on the ground was the victim Dominique Lawton and Deputy Snead could not remember the identity of the other victim he saw. (R. p. 27, lines 1-7). As to Mr. Lawton,

Dr. Janice Ross, M.D., a forensic pathologist, could not determine what caliber bullet was the actual bullet that killed Mr. Lawton. (R. p. 354, lines 11-14; R. p. 355, 11-13).

The scene of the shooting had not been secured prior to his arrival and he said there was no way to know if, in the 25 to 30 minutes prior to his arrival, anything was moved or the scene was otherwise compromised. (R. p. 31, lines 7-10). He said when he first arrived on scene, his first concern was securing the scene, meaning making sure that there were no active shooters and then to render what emergency aid he could. (R. p. 27, lines 17-18).

The first 911 call came in "right around 4 a.m.," according to Deputy Snead. (R. p. 30, lines 17-18). He said once it was determined there were no other "active shooters" and the victims had been tended to, he and other deputies secured the scene "and try not to let anything move or be disturbed until we could call other investigators in." (R. p. 28, lines 4-7). This meant roping off the scene "to keep it as sterile as possible." (*Id.*, lines 18-19). To his knowledge, "other than people scattering" the scene was not disturbed or tampered with. (*Id.*, lines 11-15).

Calhoun County Sheriff's Lieutenant Henry Dukes, Jr., was the lead investigator in the case. This was his first homicide investigation in that capacity. (R. p. 267, lines 18-23). Assisting him was Deputy Matthew

Trentham, a criminal investigator. Investigator Trentham received the first call from dispatch at 4:08 a.m. (R. p. 280, lines 14-15). He was the "on-call" investigator that evening. (R. p. 279, lines 13-14).

Investigator Trentham arrived on the scene "right before 5 o'clock" and said the scene was secure at that point. (R. p. 280, lines 18-22). Lt. Dukes arrived on the scene within a few minutes of Investigator Trentham and the two then began coordinating "who was going to do what and who was going to respond back to the hospital." (R. p. 281, lines 8-11). All of the victims had been transported at that point. (*Id.*, lines 2-3). Investigator Trentham went to the hospital and Lt. Dukes remained on scene.

Lt. Dukes said upon his arrival he saw that statements were being obtained from some witnesses (the DJs were still there, according to Trentham (R. p. 281, lines 11-12)) and law enforcement had "started doing [an] initial report." (R. p. 228, line 12). Ultimately, Lt. Dukes began processing the scene that had been roped off previously by Deputy Snead. (*Id.*, lines 19-22). He said he recovered an unspent shell cartridge near the front door; one spent shell casing in the area behind the van; five .45 caliber shell casings and three .40 caliber shell casings in the area near the corner of the club; and five 9-millimeter shell casings in a general area scattered about

fifteen feet from where the body of Mr. Lawton had been. (R. pp. 229, lines 10 – p. 235, line 16).

As far as suspects, Lt. Dukes said initially Mr. Frazier was identified as a result of his name being provided when the 911 call came into dispatch and he was arrested about two o'clock in the afternoon of September 18, 2009. (R. p. 244, lines 20-23; R. p. 245, lines 16-18). A gunshot residue kit was collected at the time of his arrest, Lt. Dukes said. (*Id.*, lines 20-22). He said he also received information about Mrrs. Benjamin and Haggood as possibly involved. (R. p. 247, lines 20-23).

Investigator Trentham arrived at the hospital in the hopes of speaking with the victims and, based on rumors that this was a "family-type function" and that family members might be present, that potentially other witnesses might be present as well from whom he could take statements. (R. pp. 281, line 20 – 282, line 4). Two of the victims, Mr. Hampton and Mr. DeFreitas, were stable and had been treated while Mr. Lawton had been airlifted to Palmetto-Richland. (R. 282, lines 22-25).

Gunshot residue kits were collected from Mrrs. Hampton and DeFreitas. (R. p. 284, lines 8-9). He said as a result of his conversations with the witnesses, the focus of the investigation was on Mr. Benjamin, Mr. Frazier and Nayrone Shivers "as possible suspects." (R. p. 285, lines 18-20).

He reported back to Lt. Dukes with these names. (R. p. 285, line 24 – p. 286, line 1). There were no other leads or any other suspects. (R. p. 288, lines 2-5).

Mr. Shivers was dismissed as a suspect shortly after this when it was learned that although he had a weapon that evening "it was after the fact, after Mr. Lawton was already struck." (R. p. 288, lines 20-22; R. p. 287, lines 21-22). Lt. Dukes said an arrest warrant was issued for Mr. Shivers but never executed and investigators never met with Mr. Shivers to speak with him about the incident. (R. p. 268, lines 4-15). No one was ever identified as being responsible for the 9-millimeter shell casings and there is "no proof at this time" that Mr. Shivers was the shooter. (R. p. 268, line 16 – p. 269, line 1).

Several days after the incident, and after the crime scene tape had been removed, Lt. Dukes said he returned to the scene with a metal detector to continue to look for any evidence. A full week following the shooting, Lt. Dukes executed a search warrant at the home of Mr. Benjamin but recovered no evidence. (R. p. 272, lines 16-18). No firearms were recovered and specifically there was no .45 caliber located. (R. p. 263, lines 14-20). Additionally, there was a search conducted at Mr. Frazier's home where a

revolver was recovered. (R. p. 255, lines 9-12). Lt. Dukes said that to date, there has been no .45 caliber or 9-millimeter recovered.

John Roberts is a forensic investigator with the South Carolina Law Enforcement Division, commonly called SLED. (R. p. 290, lines 7-8). Specifically, his testimony related to his gunshot residue analysis. (*Id.*, lines 22-23). He was provided several gunshot residue kits that had been collected by Investigator Trentham as part of his investigation at the regional medical center. Agent Roberts said the kits taken from Mr. DeFreitas and Mr. Hampton were both negative for evidence of gunshot residue. (R. p. 299, lines 7-9; *Id.*, lines 15-19).

He also testified that he received a gunshot residue kit taken from Mr. Frazier but no test was conducted because its collection took place more than six hours after the shooting, something he said was the cut-off when effective analysis could not be done. (R. p. 299, lines 20-23; R. p. 297, lines 5-7). There was no analysis performed, for the same reason, on a kit taken from Mr. Shivers and on a kit taken from Mr. Lawton.[1] Analysis was also

[1] Investigators did not travel to Palmetto-Richland prior to Mr. Lawton's death to collect any evidence and Agent Roberts testified that because Mr. Lawton remained alive, albeit on life support, for a period of time exceeding six hours from the time of the shooting, no test would be conducted because it was too late. (R. p. 301, lines 17-24). As to Mr. Shivers, there was no testimony from any investigator identifying the circumstances of when or how this kit was collected or whether or not Mr. Shivers was ever interviewed. This reference from Agent Roberts is the first reference to any evidence collection involving Mr. Shivers.

conducted on the vehicle belonging to Mr. Haggood and it was determined that a "single round gunshot residue particle" was detected on a test strip taken from the driver's side rear of the vehicle, indicating a weapon was fired near the vehicle. (R. p. 306, lines 14-17).

To put the size in perspective, Agent Roberts testified that the particles are actually "submicroscopic" detected utilizing a beam of electrons fired through a vacuum. (R. p. 310, line 3). "They are not quite nanometers, but micrometers." (*Id.*, lines 11-12). He said two of these particles were found. (*Id.*, lines 20-23). Additional testing was conducted on the t-shirt belonging to Mr. Shivers and it revealed evidence of gunshot residue. (*See* Note 1 below) (R. p. 307, lines 17-18). "It was near a gun when it went off." (R. p. 308, line 1). There was no gunshot residue kit collected from Mr. Benjamin. (R. p. 309, lines 17-18).

SLED Agent James Green is a firearms and ballistics examiner. (R. p. 313, line 16). He examined three firearms: a Highpoint Model CF-380 .380 caliber semi-automatic pistol; an Armenius Model HW3-32 Smith and Wesson long caliber revolver; and a Springfield Armory Model XD-40 .40 caliber Smith and Wesson semi-automatic pistol. (R. p. 318, lines 5-8; *Id.*, lines 17-20; R. p. 323, lines 22-23). No other weapons were received from law enforcement for testing. (R. p. 324, lines 9-10). He also compared

several shell casings recovered from the scene and attempted to match them to the various weapons presented for review.

Agent Green testified he could not determine if the three .40 caliber casings were fired by the .40 caliber Springfield that was recovered. (R. p. 329, lines 7-8). As to the bullet recovered from Mr. Hampton, Agent Green said it was "consistent" with having been fired by *some* .40 caliber Smith and Wesson but could not say it came from *the* .40 caliber introduced into evidence. (R. p. 331, lines 10-12)(emphasis added). He said the .45 caliber cartridge casings were all fired from the same weapon but the weapon was never recovered and could not be tested. (R. p. 331, lines 5-10; *Id.*, lines 18-19). Finally, the five 9-millimeter casings were consistent with a Luger 9-millimeter and were all fired from the same weapon but no 9-millimeter was ever recovered. (R. p. 337, lines 14-23).

Agent Green conceded that the three fired .40 caliber cartridge cases all were fired by the same pistol but that it could have been a pistol other than the .40 caliber entered into evidence. (R. p. 339, lines 18-20). One of the fired bullets examined was fired either from a Smith and Wesson .40 caliber or possibly a 10-millimeter. (R. p. 340, lines 8-13). Additionally, the .45 caliber casings could have been fired by more than one weapon and the

testing was inconclusive. (R. p. 341, lines 23-25; R. p. 342, line 20 – p. 343, line 1).

Investigator Trentham said, "We worked diligently to identify all – anybody that had a firearm that night and anybody involved" but came up with no one. (R. p. 287, line 23 – p. 288, line 5). Agent Green concluded there could have been at least eight and as many as nine different firearms involved in the shooting that evening. (R. p. 344, lines 8-10).

The Defense Motion for Directed Verdict

Following the testimony from Dr. Ross, the forensic pathologist who conducted the autopsy on Mr. Lawton (and who could not determine what caliber bullet killed him (R. p. 355, lines 11-13)), the State rested its case. Mr. Benjamin, through trial counsel, moved for a directed verdict of not guilty on all counts. (R. p. 358, lines 16-21). The Court asked the Assistant Solicitor to lay out the evidence supporting the elements of the crimes including which witnesses "[put] the gun in the hand of the defendant and then pointing the gun in the area where the victims were." (R. p. 359, lines 1-8).

In response the Assistant Solicitor responded that Mr. Haggood testified that Mr. Benjamin possessed a .45 caliber semi-automatic and saw Mr. Benjamin firing it "essentially out in the direction that I would submit

the victim was ultimately hit, the victim being Mr. Lawton was struck." (R. p. 360, lines 2-9). He also noted Mr. Hampton "basically saw all three defendants with guns." (R. p. 359, line 25 – p. 360, line 1). "Other testimony would have Mr. Frazier shooting in the air and this defendant then being the only person shooting in that direction at that time, which would then kind of fall into – it's my position that he was shot basically around the same time that Mr. Lawton was shot." (R. p. 361, line 1-5).

The Assistant Solicitor also relied upon the discovery, several days later with a metal detector, of three .45 caliber rounds, two of which are matched to each other and a third was "too damaged" as a result, he suggested, of striking Mr. Saxon's vehicle. "I submit to you one of those other two went through Mr. Lawton's head." (recalling Dr. Ross could not say what caliber bullet inflicted the fatal wound to Mr. Lawton)(R. p. 361, lines 13-14). He conceded the injury to Mr. Hampton was inflicted from Mr. Haggood's weapon "so I think our argument with regards to him is more of an accomplice liability theory." (*Id.*, lines 15-23).

"These three individuals made a decision to go arm themselves after an altercation inside this club and returned to inside that club, continued drinking alcohol that spilled out when things shut down," the Assistant

Solicitor opined. "I agree it's chaos out there but I submit to you the three of them were part of that chaos." (R. p. 361, line 23 – p. 362, line 4).

No further evidence was presented by the Assistant Solicitor in support of his theory of the case. It rests exclusively on an accomplice liability theory based upon speculation as to who and what killed Mr. Lawton and the fact that Mr. Benjamin was seen with a .45 caliber semi-automatic. There was no explanation as to the common plan or scheme to commit a crime that involved Mrrs. Benjamin, Haggood and Frazier, no intent to commit a crime at all against any of those injured, and not explanation or evidence supporting that the three defendants met up with the purpose of committing a crime as a result of a prior agreement to do so.

The Court conceded at least a portion of the State's prosecution rested on circumstantial evidence. (R. p. 365, lines 5-7). Additionally, the Court concluded that "taking the evidence in its entirety and the inferences which could be drawn" there was sufficient evidence on "every element of each of these offenses" that a jury could find guilt beyond a reasonable doubt. The motion was denied. (*Id.*, lines 7-10).

Mr. Benjamin did not testify. (R. p. 394, lines 19-20). His defense included the testimony of Mr. Gidron, who specifically said he did not see Mr. Benjamin aim at or shoot Mr. Lawton, and Kelly Fite, a firearms expert.

Following this testimony, the Defense rested its case again moved for a directed verdict of not guilty. (R. p. 395, lines 10 – p. 396, line 15). The motion was, again, denied. "There is evidence both ways, without question." (R. p. 396, lines 17-19).

ARGUMENT

ISSUE ONE - THE TRIAL COURT ERRED IN NOT GRANTING DEFENDANT'S MOTION FOR DIRECTED VERDICT WHERE THE STATE FAILED TO PRODUCE ANY DIRECT OR SUBSTANTIAL CIRCUMSTANTIAL EVIDENCE REASONABLY TENDING TO PROVE DEFENDANT BENJAMIN'S GUILT.

"In criminal cases an appellate court sits to review errors of law only." *State v. Baccus,* 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). An appellate court reviews the denial of a directed verdict by viewing the evidence and all reasonable inferences in the light most favorable to the State. *State v. Weston,* 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006); *State v. Lollis,* 343 S.C. 580, 583, 541 S.E.2d 254, 256 (2001). A defendant is entitled to a directed verdict where the State fails to produce evidence of the offense charged. *State v. Odems*, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011) *citing State v. McHoney*, 344 S.C. 85, 97, 544 S.E. 2d 30, 36 (2001).

"If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, [an appellate court]

must find the case was properly submitted to the jury." *See Weston,* 367 S.C. at 293–93, 625 S.E.2d at 648; *State v. Odems,* 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011).

Direct evidence "is based on personal knowledge or observation and ... *if true,* proves a fact without inference or presumption." *Black's Law Dictionary* 636 (9th ed.2009) (emphasis added). The presentation of direct evidence "immediately establishes the main fact to be proved." *State v. Salisbury,* 343 S.C. 520, 524 n. 1, 541 S.E.2d 247, 249 n. 1 (2001). Circumstantial evidence is "based on inference and not on personal knowledge or observation," *Black's Law Dictionary* 636 (9th ed.2009), and establishes "collateral facts from which the main fact may be inferred." *Id.* Circumstantial evidence is "proof of a chain of facts and circumstances from which the existence of a separate fact may be inferred." *State v. Cherry,* 361 S.C. 588, 596, 606 S.E.2d 475, 479 (2004).

Mr. Benjamin was charged by indictment with murder, in violation of S.C. Code 16-3-10, and two counts of attempted murder in violation of S.C. Code 16-3-29. The Court instructed the jury that to prove murder, the State was required to prove beyond a reasonable doubt that Mr. Benjamin killed Mr. Lawton with malice aforethought, defined as an intentional doing of a wrongful act without just cause or excuse and with the intent to inflict an

injury, and as a result, the intended victim actually died. "But for the acts of this defendant, the victim would not have died." (R. p. 452, lines 19-21). There must have been "previous evil intent and malice must have existed in the mind of the defendant just before and at the time the act is committed." (R. p. 453, lines 11-14).

Attempted murder, the Court instructed, required the State to prove beyond a reasonable doubt that Mr. Benjamin, with malice aforethought and with the intent to kill, shoot and wound the two surviving victims, Mr. Hampton and Mr. DeFreitas. (R. p. 458, lines 6-8). The State "must show more than mere preparation and an intent." (*Id.*, lines 16-17).

Here, the State conceded it could not prove Mr. Benjamin, and in fact the State was not arguing, that Mr. Benjamin was responsible for the injury to Mr. Hampton or Mr. DeFreitas and was relying on a theory of accomplice liability. (R. p. 362, lines 5-7). There was also no direct evidence that Mr. Benjamin actually killed Mr. Lawton and no evidence that he intended to kill Mr. Lawton with malice aforethought.

The State in the instant matter all but conceded that there was no direct evidence linking Mr. Benjamin to any of the crimes charged. "Obviously I can't be positive who shot – I mean really it could be either one of the other two ..." (R. p. 362, lines 14-15). There was no eyewitness

who saw Mr. Benjamin fire the fatal shot that killed Mr. Lawton and in fact, there was uncontroverted direct evidence to the contrary where Mr. Gidron, an eyewitness to the exact moment when Mr. Lawton was struck, testified he did not see Mr. Benjamin shoot at or even aim at Mr. Lawton.

The only connection is an unsupported speculative conclusion from the Assistant Solicitor that is contrary to the state's own forensic expert, Dr. Ross, that one of two .45 caliber bullets recovered several days after the shooting must have hit Mr. Lawton in the head.

The State also conceded that it was NOT Mr. Benjamin who fired any of the shots that wounded Mr. Hampton or Mr. DeFreitas. There was direct testimony from the State's own witness, Mr. Haggood, who took a very favorable plea deal in exchange for his testimony, that it was likely his weapon that injured Mr. Hampton. There was no evidence supporting who shot Mr. DeFreitas other than he was shot sometime during the hail of gunfire that every witness testified was coming from all directions.

Mr. Benjamin's guilt is based upon mere speculation and only marginal circumstantial evidence. Here, the only testimony offered that connected Mr. Benjamin to any gunfire was that of Mr. Haggood, testifying under a very favorable plea deal. Mr. Benjamin fired his weapon perhaps two or three times while moving toward cover from the other gunfire. It was

described as "cover fire" used to permit a group of people to rally in a safe place. He was not aiming his weapon and was not shooting at anyone but rather was holding his weapon at a downward angle.

The evidence presented by the State was that Mr. Benjamin had possession of a .45 caliber semi-automatic several hours prior to the incident outside "Piggy Park" that ultimately led to Mr. Lawton's death. There was an incident inside the club shortly after Mr. Benjamin, Mr. Haggood, and Mr. Frazier arrived between 12:30 a.m. and 1 a.m. where Mr. Benjamin and Mr. Lawton "bumped" on the dance floor and it appeared some words were exchanged. There were no punches thrown and no weapons displayed. After a few minutes, both parties were calmed by friends and each side had made it clear neither wanted any problems with the other.

Several hours later, without any incidents in between, there party at the club was breaking up and the club shutting down and so Mr. Benjamin, Mr. Frazier and Mr. Haggood made their way, separately, outside. Once outside, according to Mr. Haggood (the State's chief witness testifying as a result of a very favorable plea deal) "someone pulled a gun and discharged a round." He stated Mr. Lawton was the aggressor and was likely the one who pulled his weapon. He had possession of a .380 semi-automatic and a .380

caliber round was found near the front door consistent with the testimony from witnesses.

"I guess you could say it was an ambush type thing. He (Mr. Lawton) came out of nowhere. It wasn't provoked or anything. Once he walked up, he pulled out his gun, it wasn't anything said before he pulled out his gun," Mr. Haggood testified.

Everything became chaotic and this is when Mr. Frazier pulled his gun and held it in the air or at his side but had not fired. His concern was echoed by nearly every witness who was present: he and his friends did not want any problems, they just wanted to get home. Mr. Benjamin and others tried to usher Mr. Frazier out of the area toward Mr. Haggood's car, away from the situation. There were perhaps as many as a dozen people right by the door when Mr. Lawton and his friends confronted Mr. Frazier.

Mr. Haggood tried to step in to protect Mr. Frazier but Mr. Benjamin told him to "fall back." The goal was to exit from the area and not escalate the situation. "They started shooting," Mr. Haggood said, referring to unknown others and NOT as to Mr. Benjamin, "and then it was like everyone was scattering." Faced with gunfire in all directions, Mr. Benjamin began moving toward a place of safety and "pulled out his gun

and let off about two shots," according to Mr. Haggood, "in the direction of the car that was in front of mine."

There is no other testimony that Mr. Benjamin fired any additional rounds from his weapon. There is no evidence he aimed at anyone and no evidence that any shot he fired actually hit anyone. There was no .45 caliber weapon recovered by police despite searching Mr. Benjamin's home. The Assistant Solicitor simply speculated in his closing argument that Mr. Benjamin must have disposed of the weapon at some point after the shooting.

"This Court has repeatedly affirmed the principle that when the State fails to produce substantial circumstantial evidence that the Defendant committed a particular crime, the defendant is entitled to a directed verdict." *Odems*, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011).

Having conceded there was no evidence that Mr. Benjamin actually committed the crimes charged, the State rested its prosecution on the theory that Mr. Benjamin is responsible for the actions of his co-defendants, namely Mr. Haggood and Mr. Frazier, as an accomplice. The theory is referred to as "the hand of one is the hand of all." Under this theory, the State can hold Mr. Benjamin responsible for his co-defendants' actions if it proves Mr. Benjamin joined with them "to accomplish an illegal purpose incidental to

the execution of the common design and purpose." *State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010).

Under this accomplice liability theory, the State utterly failed to prove an essential element: there was no prior agreement to commit a crime and Mr. Benjamin did nothing to aid, abet or assist any of his co-defendants in carrying out this mystery scheme. "In order to be guilty as an aider and abettor, the participant (Mr. Benjamin) must be chargeable with knowledge of the principal's criminal conduct." *Mattison*, 388 S.C. 469, 480, 697 S.E.2d 578, 584, *citing State v. Leonard*, 292 S.C. 133, 137, 355 S.E.2d 270, 272 (1987).

First, the State could not prove who the principal was that murdered Mr. Lawton. The State presumed, speculated, and suspected Mr. Benjamin but never proved it. The State never proved Mr. Haggood or Mr. Frazier fired the fatal shot. The State's own expert witness could not say what caliber bullet killed Mr. Lawton and the firearms and ballistics expert testified that his tests were inconclusive. Absent proof of the "principal" there can be no aiding and abetting sufficient to tie Mr. Benjamin to any crime.

Second, there was no evidence, direct or otherwise, of any common scheme or plan to commit a criminal act. The State suggested in its closing

argument that the plan was hatched the minute the three co-defendants exited the club to retrieve their weapons from Mr. Haggood's car. However, there was no evidence it was done for any criminal purpose. Mr. Benjamin, who had just been bumped on the dance floor, stated he thought Mr. Lawton had a weapon and did not want to get caught unprepared. The State argues this proves a criminal intent to commit a criminal act.

But the testimony from all of the State's witnesses who were at the club that evening said whatever bad feelings there may have been between Mr. Benjamin and Mr. Lawton had long since evaporated by the time the club closed down, Mr. Frazier and his friends exited the club, and Mr. Lawton "ambushed" them at the front door. All the State suggested in arguing against a direct verdict was that "it's chaos out there and the three of them are part of that chaos." (R. p. 362, lines 3-4). And so were at least a dozen others including the victim who pulled his .380 semi-automatic and ambushed Mr. Frazier as he left the club.

Interestingly, the State failed to articulate ANY argument about the necessary elements to meet its burden about accomplice liability. All the State articulated was mere presence at the scene, prior possession of a weapon that was never linked to the murder of Mr. Lawton or the wounding of Mr. DeFreitas or Mr. Hampton, and the fact that Mr. Benjamin fired two

shots as he was running for cover to escape the hail of gunfire. There was no evidence of some pre-planned agreement to meet at the front door to kill Mr. Lawton. There was no evidence that Mr. Benjamin aided and abetted anyone because the killer was never identified.

At best, there was only the State's suspicion and speculation that Mr. Benjamin was responsible. The Court instructed the jury that it must find that there was a prior arranged plan or common scheme in order to find guilt. (R. p. 463, lines 13-15). Accomplice liability is shown where "a person joins with another to commit an unlawful act in carrying out a common plan or purpose." (R. p. 462, lines 7-11). Even if the State could prove who the principal was, and even if Mr. Benjamin had prior knowledge that the principal was going to commit a crime, that prior knowledge is insufficient to prove guilt. (R. p. 463, lines 4-10).

Neither is mere presence at the scene enough to find guilt. (R. p. 464, lines 7-10). At best the State's case was one of speculation and conjecture. The murder weapon was never introduced because it could not be determined, according to the State's own expert witness. At most, the State's case, and its artful stringing together of inference upon inference to the jury, raised only a suspicion.

"Suspicion implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof." *State v. Cherry,* 361 S.C. 588, 594, 606 S.E.2d 475, 478 (2004); *State v. Lollis,* 343 S.C. 580, 584, 541 S.E.2d 254, 256 (2001)). Under these circumstances, "and settled principles, the trial judge should grant a directed verdict when the evidence merely raises a suspicion that the accused is guilty." *State v. Lewis*, 403 S.C. 435, 743 S.E.2d 124 (2013) *citing State v. Zeigler,* 364 S.C. 94, 102, 610 S.E.2d 859, 863 (Ct.App.2005) *citing State v. Arnold,* 361 S.C. 386, 390, 605 S.E.2d 529, 531 (2004); *State v. Schrock,* 283 S.C. 129, 132, 322 S.E.2d 450, 452 (1984)).

Here, there was nothing more than speculation and suspicion without any proof of some criminal scheme to commit a criminal act upon the victims in this case. No one can say for sure who fired the fatal shot that killed Mr. Lawton. No one can say who fired the shot that injured Mr. DeFreitas. Mr. Hampton's injury was likely the result of a shot from Mr. Haggood's weapon but even so, there was no evidence Mr. Benjamin did anything to aid, abet or assist Mr. Haggood carry out a criminal act as a result of a pre-planned common plan or scheme. Absent this evidence, the Court should have granted a directed verdict in favor of Mr. Benjamin on all

counts and erred in denying the motion and submitting it to the jury. The conviction should be overturned and the indictment dismissed.

ISSUE TWO - THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING DEFENDANT'S MOTION FOR NEW TRIAL WHERE THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE JURY'S FINDING AND WHERE, AS A MATTER OF LAW, THE STATE FAILED TO PRODUCE SUBSTANTIAL CIRCUMSTANTIAL EVIDENCE TO SUPPORT ITS ACCOMPLICE LIABILITY THEORY TO CONVICT DEFENDANT.

"The decision whether to grant a new trial rests within the sound discretion of the trial court, and [the appellate court] will not disturb the trial court's decision absent an abuse of discretion." *State v. Mercer,* 381 S.C. 149, 166, 672 S.E.2d 556, 565 (2009); *State v. Kelly,* 331 S.C. 132, 502 S.E.2d 99 (1998); *State v. Smith,* 316 S.C. 53, 447 S.E.2d 175 (1993). "An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law." *State v. Hughes,* 346 S.C. 339, 342, 552 S.E.2d 35, 36 (Ct.App.2001).

Similar to the standard utilized in examining a motion for directed verdict, if there is any evidence, direct or circumstantial, which reasonably tends to prove the guilt of the accused or from which guilt may be fairly and logically deduced, the appellate court must find the case was properly submitted to the jury. Here, there is no fair and logical reading of the

evidence sufficient to sustain the jury's verdict and the Court abused its discretion in not ordering a new trial.

Here, there was no direct evidence supporting Mr. Benjamin's guilt as to the murder of Mr. Lawton and the attempted murders of Mr. Hampton and Mr. DeFreitas. The State conceded that its theory of liability rested upon the "Hand of One is the Hand of All" accomplice liability where Mr. Benjamin was held responsible for the actions of his co-defendants in furtherance of a pre-arranged common plan or scheme to commit a criminal act. The State could not establish, and admitted as much during its argument against a directed verdict, who fired the fatal shot that killed Mr. Lawton or injured Mr. DeFreitas. Mr. Haggood essentially admitted during his testimony, given in exchange for a favorable plea deal, that it was likely his gun that fired the bullet that his Mr. Hampton in the arm.

Without identifying the principal in the shooting death of Mr. Lawton or Mr. DeFreitas, the Court erred as a matter of law in not granting Defendant's motion for new trial on this basis. The Court abused its discretion when it determined, contrary to established case law, the jury's verdict was supported by sufficient evidence when it was clear no such sufficient circumstantial evidence existed. The State's evidence, articulated in Point One, supra., was insufficient to support the jury's verdict and the

Court abused its discretion in denying the motion for new trial. The verdict should be vacated and the indictment dismissed.

CONCLUSION

For all of the foregoing reasons, and in light of the legal authority herein cited, it is respectfully submitted that this Court should vacate Defendant Benjamin's conviction and dismiss the indictment; and to provide such other and further relief as the Court deems just, fair and equitable.

Respectfully Submitted.

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Dated: 8/30/11

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Calhoun County
Honorable Diane Schafer Goodstein, Circuit Court Judge
Appellate Case No. 2013-001496

THE STATE,

Respondent,

vs.

DAVID JAMAR BENJAMIN,

Appellant.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUE ON APPEAL v

COUNTERSTATEMENT OF ISSUES ON APPEAL v

STATEMENT OF THE CASE 1

ARGUMENTS 2

I. The trial judge properly denied Benjamin's motion for a directed verdict on one count of murder and two counts of attempted murder because the direct and circumstantial evidence, viewed in the light most favorable to the State, reasonably tended to prove his guilt of these offenses, either individually or under a theory of accomplice liability 2

A. The prosecution's evidence 2

B. Benjamin's motions and the trial judge's ruling 25

1. The initial directed verdict motion and the trial judge's denial of it 25

2. Denial of Benjamin's renewed directed verdict motion 29

C. Discussion 29

II. The trial judge properly denied Benjamin's renewed motion for a new trial based upon the alleged insufficiency of the evidence to support convictions for one count of murder and two counts of attempted murder because the direct and circumstantial evidence, viewed in the light most favorable to the State, reasonably tended to prove his guilt of these offenses, either individually or under a theory of accomplice liability 44

CONCLUSION 45

TABLE OF AUTHORITIES

Arnold v. State,
309 S.C. 157, 420 S.E.2d 834 (1992) 30
Batson v. Kentucky,
476 U.S. 79 (1986) 36
Guevara v. State,
152 S.W.3d 45 (Tex.Crim.App. 2004) 36
Jackson v State,
355 S.C. 568, 586 S.E.2d 562 (2003) 43
Ordway v. Com.,
391 S.W.3d 762 (Ky. 2013) 36
Rosemond v. United States, —— U.S.,
——, 134 S.Ct. 1240, 188 L.Ed.2d 248 (2014) 38
State v. Bailey,
298 S.C. 1, 377 S.E.2d 581 (1989) 39
State v. Bennett,
408 S.C. 302, 758 S.E.2d 743 (Ct.App. 2014) 31, 32
State v. Bostick,
392 S.C. 134, 708 S.E.2d 774 (2011) 31, 32, 36
State v. Byram,
326 S.C. 107, 485 S.E.2d 360 (1997) 39
State v. Chapman,
317 S.C. 302, 454 S.E.2d 317 (1995) 36
State v. Crawford,
362 S.C. 627, 608 S.E.2d 886 (Ct. App. 2005) 35
State v. Dickman,
341 S.C. 293, 534 S.E.2d 268 (2000) 38
State v. Fennell,
340 S.C. 266, 531 S.E.2d 512 (2000) 31
State v. Fley,
2 Brev. 338, 1809 WL 338 (S.C.Const. App. 1809) 38
State v. Follin,
352 S.C. 235, 573 S.E.2d 812 (Ct.App.2002) 44
State v. Gibson,
390 S.C. 347, 701 S.E.2d 766 (Ct.App. 2010) 38
State v. Graham,
260 S.C. 449, 196 S.E.2d 495 (1973) 44
State v. Grant,
275 S.C. 404, 272 S.E.2d 169 (1980) 35
State v. Griffin,
[129 S.C. 200, 124 S.E. 81 (1924) 39

State v. Hepburn,
406 S.C. 416, 753 S.E.2d 402 (2013) 37
State v. Hill,
268 S.C. 390–96, 234 S.E.2d 219, (1977) 38
State v. Irvin,
270 S.C. 539, 243 S.E.2d 195 (1978) 30
State v. Johnson,
376 S.C. 8, 654 S.E.2d 835 (2007) 44
State v. Kelsey,
331 S.C. 50, 502 S.E.2d 63 (1998) 30
State v. Langley,
334 S.C. 643–49, 515 S.E.2d 98, (1999) 37
State v. Leonard,
292 S.C. 133, 355 S.E.2d 270 (1987) 37
State v. Massey,
267 S.C. 432, 229 S.E.2d 332 (1976) 30
State v. Mattison,
388 S.C. 469, 697 S.E.2d 578 (2010) 37
State v. McHoney,
344 S.C. 85, 544 S.E.2d 30 (2001) 30
State v. Miller,
287 S.C. 280, 337 S.E.2d 883 (1985) 44
State v. Odems,
395 S.C. 582, 720 S.E.2d 48 (2011) 31, 32, 36
State v. Pagan,
357 S.C. 132, 591 S.E.2d 646 (2003) 35
State v. Pauling,
264S.C. 275, 214 S.E.2d 326 (1975) 44
State v. Prioleau,
345 S.C. 404, 548 S.E.2d 213 (2001) 39
State v. Reid,
408 S.C. 461, 472-73, 758 S.E.2d 904 (2014) 37
State v. Schrock,
283 S.C. 129, 322 S.E.2d 450 (1984) 32
State v. Smith,
363 S.C. 111, 609 S.E.2d 528 (Ct.App. 2005) 44
State v. Southerland,
316 S.C. 377, 447 S.E.2d 862 (1994) 36
State v. Sullivan,
277 S.C. 35, 282 S.E.2d 838 (1981) 39
State v. Vanderbilt,
287 S.C. 597, 340 S.E.2d 543 (1986) 39
State v. Watts,
321 S.C. 158, 467 S.E.2d 272 (Ct.App. 1996) 39

State v. Weston,
367 S.C. 279, 625 S.E.2d 641 (2006) 29
Tate v. State,
351 S.C. 418, 570 S.E.2d 522 (2002) 30

Statutes

S.C. Code Ann. § 16-3-29 (Supp. 2014) 30

S.C. Code Ann. § 16-3-10 (2003) 30

STATEMENT OF ISSUE ON APPEAL

ISSUE ONE - The Trial Court erred in not granting the Defendant's motion for directed verdict where the State failed to produce any direct or substantial circumstantial evidence reasonably tending to prove Defendant Benjamin's guilt where the State:

A. Failed to prove that but for the actions of Defendant Benjamin, the victim would not have died;

B. Failed to prove Defendant Benjamin intended to kill the victim;

C. Failed to prove Defendant Benjamin fired the fatal shot;

D. Failed to prove Defendant Benjamin fired any of the shots that injured the surviving victims;

E. Failed to prove Defendant Benjamin joined with another in carrying out a common plan or purpose, to wit, murder and attempted murder, sufficient to find Defendant Benjamin guilty under an accomplice liability theory;

F. Failed to prove Defendant Benjamin was present at the scene as a result of a prior arrangement to carry out a prior arranged plan or common scheme sufficient to find Defendant Benjamin guilty under an accomplice liability theory in the wounding of Hampton and DeFreitas or the killing of Lawton.

ISSUE TWO - The Trial Court abused its discretion in denying Defendant's Motion for New Trial where there was insufficient evidence to support the jury's finding and where, as a matter of law, the State failed to produce substantial circumstantial evidence to support its accomplice liability theory to convict Defendant.

COUNTER STATEMENT OF ISSUES ON APPEAL

I. Whether the trial judge properly denied Benjamin's motion for a directed verdict on one count of murder and two counts of attempted murder because the direct and circumstantial evidence, viewed in the light most favorable to the State, reasonably tended to prove his guilt of these offenses, either individually or under a theory of accomplice liability?

II. Whether the trial judge properly denied Benjamin's renewed motion for a new trial based upon the alleged insufficiency of the evidence to support convictions for one count of murder and two counts of attempted murder because the direct and circumstantial

evidence, viewed in the light most favorable to the State, reasonably tended to prove his guilt of these offenses, either individually or under a theory of accomplice liability?

STATEMENT OF THE CASE

David Jamar Benjamin (Benjamin) is currently in the Perry Correctional Institution, of the South Carolina Department of Corrections, where he is serving a sentence of forty years imprisonment for murder and two concurrent thirty year sentences for attempted murder, as the result of events occurring in Calhoun County, on the morning of September 18, 2011. The Calhoun County Grand Jury indicted him on February 25, 2013, for one count of murder (2013-GS-09-0051) and two counts of attempted murder (2013-GS-09-0052 & -0053). **Supp. R. pp. 2-5.** Nicholas Gray Thomas, Esquire, represented him on these charges, while Assistant First Circuit Solicitors Donald N. Sorenson and Theodore N. Lupton prosecuted the case.

Benjamin received a jury trial before the Honorable Diane Schafer Goodstein, on March 4-7, 2013. The jury convicted him of the charged offenses, and each juror confirmed the verdict when polled. **R. p. 472, line 6 – p. 474, line 25.** Judge Goodstein imposed concurrent sentences on him of forty years imprisonment for murder and thirty years imprisonment for each of the attempted murder convictions. **R. p. 475, line 24 – p. 476, line 12.**

On March 15, 2013, Benjamin filed a motion for a new trial based on the insufficiency of the evidence (**R. p. 11**) and a motion to reconsider the sentence. **R. pp. 12-13.** Judge Goodstein heard his motions on June 20, 2013. Both Benjamin and counsel were present at the hearing. Mr. Sorenson again represented the State.[1] Judge Goodstein denied his motions in separate Orders filed on July 9, 2013. **R. pp. 4-7.**

He timely served and filed a Notice of Appeal. This appeal follows.

[1] A copy of that transcript has not been included in the record.

ARGUMENT

I. The trial judge properly denied Benjamin's motion for a directed verdict on one count of murder and two counts of attempted murder because the direct and circumstantial evidence, viewed in the light most favorable to the State, reasonably tended to prove his guilt of these offenses, either individually or under a theory of accomplice liability.

Notwithstanding Benjamin's arguments to the contrary, Respondent submits that the trial judge properly denied Benjamin's motion for a directed verdict on one count of murder and two counts of attempted murder because the direct and circumstantial evidence, viewed in the light most favorable to the State, reasonably tended to prove his guilt of these offenses, either individually or under a theory of accomplice liability.

A. The prosecution's evidence.

The direct and circumstantial evidence presented at trial, viewed in the light most favorable to the State, was that early in the morning of September 18, 2011, Benjamin and co-defendants Joshua Haggood and Kevin Frazier were involved in an exchange of gunfire with the murder victim, Dominique Lawton, at a Calhoun County nightclub. The men were mutual combatants and the shooting stemmed from Dominique bumping into Benjamin on the dance floor earlier that morning. Dominique was killed by a gunshot wound to the head and two innocent bystanders, James Hampton and Shawn DeFreitas, were shot in the elbow and in the leg, respectively.

Calhoun County Sheriff's Deputy Terry Snead testified that he received a dispatch regarding a shooting shortly before 4:00 a.m. on September 18, 2011. He then responded to an Elloree, South Carolina, nightclub known as the Pine Terrace Club or Piggy Park. Sgts. Phil Rice and Earl Kinley also responded, but Sgt. Rice was delayed in going to the scene because he

responded to a tip that one of the shooting victims had unsuccessfully tried to drive to the hospital and was at a convenience store in Cameron, South Carolina. **R. pp. 15-19; 30.**

When Deputy Snead arrived at Piggy Park roughly thirty minutes later, the scene was "kind of chaotic," and some people were leaving as he arrived. Deputy Snead saw one person, Dominique Lawton, lying on the ground between some trees and a parked Cadillac, with a group of people huddled around him. Another wounded person was seated in a small gray car. This person had an arm or shoulder wound. EMS was already on standby and was called in for the victims. **R. pp 19-28; 30; 32; State's Exhibit 3.**

Twenty-five year old Andrew Haynes, who goes by the nickname "Bubba," testified that he is a DJ working under the name "DJ Stroke." He had previously worked at the Piggy Park approximately thirty times without a homicide, and he was working there on September 17-18, 2011. Mr. Haynes arrived between 11:00 and 1:30 p.m. Mike Bullock, "DJ Mike," also worked Piggy Park that night and was there before Mr. Haynes. Bullock had backed his white van up to a door on the right hand side of the nightclub, when viewed from the road (*see* State's Exhibits 4-5),[2] and it remained there the entire night. **R. pp. 33-36; 55-56.**

Dominique and Benjamin, as well as Benjamin's co-defendants, were on the dance floor. "[A]bout thirty minutes" after Mr. Haynes arrived, he witnessed an altercation between Benjamin and Dominique when the victim bumped into Benjamin on the dance floor.[3] There were "some words and a little shoving" but no punches were thrown. As soon as that occurred, Mr. Haynes stepped in between them and stopped it. The club was serving free liquor, everyone

[2] This made it easier to load and unload equipment. **R. p. 36.** Photographs of the van (State's Exhibits 17-21) show that it was not truly "white."

[3] He knew the murder victim well because he and the murder victim had grown up in the same area. He did not know Benjamin before that night.

appeared to be drinking and the victim was intoxicated before this incident occurred. **R. pp. 36-40.**

After Mr. Haynes talked to the men, they both seemed to calm down. However, Benjamin, Haggood and Frazier went outside sometime later.[4] Because Mr. Haynes is respected at the club, he followed them outside shortly afterwards, in an effort to further calm them down. By the time he got outside, it looked like the three men were returning to the club from their car. Mr. Haynes spoke with Benjamin. "Well, Dominique's nickname is Killa, so [I told him] 'don't follow around with Killa because he's young, drunk, you know how they get.' "[5] Benjamin's response was, " 'I'm a killer,' and then they walked in and that was all." **R. pp. 40-42; 56; 58-59.**

Because Mr. Haynes knew Dominique and because violence is bad for a DJ's business, he also spoke with Dominique and told him "go ahead and calm down because it's not called for." (He explained that Dominique was given the nickname of Killa in childhood). Mr. Haynes did not notice any other altercations inside the club that morning, but the decision was made to close the club, since the crowd was "iffy." After the crowd had started leaving, someone ran back inside and told Mr. Haynes that there was another confrontation outside of the club. By the time he got outside, he did not see the murder victim, and he thought that Dominique and Dominique's friends had walked towards the road. However, he saw Kevin Frazier holding a silver revolver and aiming it in the air. **R. pp. 42-45; 47; 59; 62.**

Mr. Haynes knew Frazier. So, in another effort to avoid trouble, he went up to Frazier and talked to Frazier. Frazier said, " 'I just want to get out the country. I want to get home.' " Haynes told Frazier that he was respected and he promised to escort him to the car. He also got

[4] Mr. Haynes knew Frazier because they played basketball against each other in high school.

[5] By this he meant that where there is a crowd of people who are drinking and they bump into one another, shoving can occur. **R. p. 56.**

between the two sides. However, both parties continued their "chatter" and Frazier continued to hold his gun in the air. **R. pp. 45-48.**

According to Mr. Haynes, the black car that the defendants had arrived in was parked on the side of the building and backed in, one car away from the white van. A car owned by Shawn DeFreitas was parked in front of and facing it. By the time that Mr. Haynes and Frazier reached the trunk of the defendants' car, Frazier began firing his revolver into the air. At this point, Benjamin was by the driver's door, Haggood was standing on the passenger side of the car, and roughly twenty-five or thirty men and women were in the area. Mr. Haynes ran back into the club and heard a lot of gunshots. **R. pp. 45-52; 60.**

After the shooting ended, Mr. Haynes went back out and saw that his friend, James "Pee Wee" Hampton, had been shot. Mr. Haynes started to drive Hampton to the hospital but the deputies arrived and would not let him leave because his car was part of the crime scene. **R. pp. 52-53.** Mr. Haynes had not seen anyone with a gun when Frazier fired the shots into the air and he did not see Benjamin with a gun. **R. p. 54; 60.**

Natasha "Tasha" Sumpter testified that she is twenty-four years old. She and her friend, Tanesha, were at Nevadria "Momma" Miller's birthday party at Piggy Park, on September 17-18, 2011. She had witnessed a "little small argument inside the club." When she and her friend were leaving "there was a lot of argument and then I saw one of the guys with the gun." This man was in front of the women. The description that she gave was of a brown-skinned man, who was slightly taller than her and had a "little haircut." She is 5'4" tall and, as will soon be clear, this description was consistent with Haggood. **R. p. 88-93.**

Dominique Lawton was one of the people arguing and the argument was close to the club's front door. Natasha immediately grabbed Tanesha and tried to convince her friend to

leave, but Tanesha wanted to talk. Tanesha had parked next to a ditch that ran alongside the roadway with the passenger side away from the road. The shooting began by the time they reached their vehicle. Natasha did not see the shooting, and their vehicle did not get hit by gunfire. **R. pp. 92-96.**

After the shooting stopped, Natasha got out of the car and heard a girl screaming that "'they shot him. They killed him.'" She subsequently saw Dominique lying on the ground close to the road and called his sister. Other than the man whom she described, she had not seen anyone else with a gun. **R. pp. 96-99.**

James "Pee Wee" Hampton testified that he is from Elloree, South Carolina. He and Dominique Lawton were good friends. Mr. Hampton did not know either Benjamin or Haggood, prior to the night of the shooting, but he played basketball against Frazier in high school. Mr. Hampton and his friend, Charles Goodwin, arrived at Piggy Park between 12:30 and 1:00 on September 18th. They parked along the side of the road. **R. pp. 64-67; 83.**[6]

At some point while Mr. Hampton was in the club, he became aware that Dominique Lawton had been involved in an altercation in the club and the other person involved in the incident was pointed out to him. He then spoke to the victim, telling Dominique "to chill out and calm down." Dominique was calm after this conversation. However, "[a]bout an hour or two" later, there was a commotion outside the club and Mr. Hampton went outside and "tried to keep it calm." **R. pp. 67-68.**

As soon as Mr. Hampton got outside, he saw Frazier standing on his right. Frazier had a revolver in his hand and was waiving it in the air. Frazier said "[A]ll we want to do is go home."

[6] Frazier went to Calhoun County High School. **R. p. 66.**

Benjamin and Haggood[7] had guns as well and were also standing by the door. Dominique and some of his friends were in this same area and "[t]here was a lot of chatter." Hampton walked over to where the defendants were parked, backed in at the corner of the building and next to the DJ's van. **R. pp. 68-73; State's Exhibit 3.**

Shawn Cooper's vehicle was parked in front of the defendants' car. Although Dominique was walking to his car, he and his friends were still exchanging words with Benjamin and his co-defendants. Benjamin, Haggood and Frazier all had their guns out, and by the time that Mr. Hampton reached their vehicle, Frazier fired one or two shots into the air. As Hampton started to walk away from their vehicle and toward the road, several more shots were fired from behind him and in the area of the defendants' vehicle. When Hampton felt a bullet go past his head, he immediately ducked behind the white van. Hampton later told police that he saw Haggood shooting but he did not see Benjamin shooting and, at trial, he testified that he had inferred that Haggood was shooting. **R. pp. 73-76; 85-86.**

After these shots, he heard someone say, " 'Killa, get up.'"[8] Hampton ran over to where his friend was lying on the ground, by a tree, with a gunshot wound to the head. (*See* State's Exhibit 2). In a reaction to seeing his friend in this condition, Mr. Hampton ran up toward the club, pulled a green pole "out of the ground and threw it at the [defendants'] car." Mr. Hampton also saw Shawn Cooper on the ground behind his car, which was still facing the defendants' car. **R. pp. 76-79.**[9]

Next, Mr. Hampton walked started to walk back up behind the DJ's van, on the far side

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[7] Mr. Hampton described Haggood as being of "[a]bout medium height." **R. p. 70.**

[8] He corroborated that "Killa" was a nickname that Dominique had since childhood.

[9] The pole was introduced as State's Exhibit 32.

of the defendants' vehicle. However, several more shots were fired and a bullet struck him in the left elbow. He alerted others present that he had been hit and he was placed in Mr. Haynes' car. (See State's Exhibit 3). Eventually, an ambulance transported him to the hospital. **R. pp. 80-82.**

Dr. Jerrold Buckaloo, an orthopedic surgeon at Orangeburg Regional Medical Center, and personnel at that hospital treated Hampton's gunshot wound to his left elbow, on the morning of September 18th. However, the bullet (State's Exhibit 33) was not removed until a later surgery on February 8, 2012. The bullet was turned over to the Calhoun County Sheriff's Office. **R. pp. 82-83; 100-05; 106-10; 286.** Dr. Buckaloo testified that a gunshot wound, generally, is the type of injury that would be likely to cause a substantial risk of death, serious permanent disfigurement, or protracted loss or impairment in the function of a bodily part or organ. **R. p. 110.**

Capt. Kirk Corley, of the Calhoun County Sheriff's Office, went to Fayetteville, North Carolina to interview Joshua Haggood sometime after the murder. On a second trip to Fayetteville, he picked up a Springfield .40 caliber handgun (State's Exhibit 34) that had been loaned to Joshua Haggood on the night of the shooting by a Mr. McGarrah and which the Fayetteville authorities had collected. Haggood had apparently returned the weapon to McGarrah and McGarrah had pawned it. Capt. Corley also interviewed McGarrah, who provided him with the rest of the ammunition that was in the weapon when it was returned by Haggood (State's Exhibit 35). **R. pp. 113-18.**

Joshua Haggood testified that he was twenty-six years old. At the time of the murder, he was a Sergeant in the United States Army and was stationed at Fort Bragg, in Fayetteville. After his return from deployment to Afghanistan in December 2010, he would come to Orangeburg

and visit once or twice a month. He had known Benjamin, a/k/a "Killa Season,"[10] and Frazier for a long time and they were two of his closest friends. He was testifying as the result of a plea bargain.[11] **R. pp. 120-25; 169-70.**

At some point, he began bringing a .40 caliber semi-automatic pistol with him that he borrowed from fellow soldier Georgio McGarrah. (State's Exhibit 34). On Friday, September 16, 2011, he came to Orangeburg with the .40 caliber pistol "to visit." On Saturday night, the 17th, Haggood went and picked up Benjamin at Benjamin's Orangeburg County residence. Benjamin placed his silver, .45 caliber semi-automatic pistol in the trunk of the car.[12] They picked up Frazier at a trailer in Calhoun County and then went to the Piggy Park, for Nevadria Miller's birthday party. Benjamin drove Haggood's 2009, black, Toyota Camry to Piggy Park because he knew how to get there. **R. pp. 125-31.**

Haggood's brother, William Pinckney, followed them to Piggy Park in a tan car. (State's Exhibit 12). When they arrived at Piggy Park, Benjamin backed the car up "to the edge of the club." Pinckney likewise backed in and he parked his tan car between them and the white van. When they initially entered the club, Haggood's pistol was in the console of his car and both Benjamin's and Frazier's silver, .32 caliber revolver were in the trunk. **R. pp. 131-33; 162-63; 248.**

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[10] Benjamin got this nickname because he did not lose fights in high school and finished a victor when confronted. **R. pp. 169-70; 175.**

[11] Originally, he was indicted on the same charges as Benjamin for his role in the shootings, but he was allowed to plead guilty to one count of assault and battery of a high and aggravated nature for shooting Hampton and the State recommended a ten year cap on that sentence, whereas he could have received twenty years. Also, this sentence was concurrent to an unrelated Lexington County sentence for aggravated assault. **R. pp. 123-24.** He later received a seven year sentence on the Calhoun County conviction. *See* http://public.doc.state.sc.us/scdc-public/.

[12] Haggood had previously seen Benjamin with the .45 "a few times. **R. p. 128.**

Inside the club, "plenty of people were dancing." Haggood only drank beer[13] while in the club, but both Benjamin and Frazier drank beer and free liquor. The entire time Haggood was at the club, he only drank four or five beers. Sometime later, Benjamin told Haggood that there had been an incident and he pointed out two individuals that he thought Haggood needed to look out for because one person had a book bag and the other one was reaching inside the bag. Benjamin thought that one of these men had a gun. **R. pp. 134-36; 139.**

Benjamin "was kind of agitated," and Haggood asked him what he wanted to do. Benjamin's said that "he wasn't trying to get caught slipping," meaning that he wanted to get his gun. So, the three defendants went to the car and each man armed himself. Benjamin and Haggood stuck their weapons in their waistbands, but Frazer put his .32 in his pocket. This was an hour and a half to two hours after they first got to the club, and they went back inside after they had armed themselves. **R. pp. 136-39.**

There was "a normal club environment" when they re-entered the club and they continued to drink. Eventually, the music stopped and the lights came on, signaling that the club was closing. Haggood went outside and talked to a woman while waiting on his friends. As soon as Benjamin and Frazier came outside, Dominique "charged" his weapon, or pulled the slide back, and the gun ejected a live bullet. This happened near the front door."[E]verything became chaotic" after that occurred.[14] **R. pp. 139-43; 165-66.**

Frazier pulled out his gun and waived it in the air, saying, "I'm just trying to get home. I don't want any trouble." As Haggood and Benjamin headed for the car, he also reached for his gun. However, Benjamin pressed his shoulder, as if to tell him to "fall back. Chill out." A lot of

[13] The liquor was free, but patrons had to pay for beer. **R. p. 134.**

[14] Dominique seemed to be the aggressor and Haggood said that this was like an "ambush." **R. p. 165.**

people attempted to intervene and Frazer was ushered to the car. Dominique and his crowd went towards the road. **R. pp. 143-44.**

"By the time I got in front of my brother's William's car, ... the first shots came out. They started shooting. And then it was like everybody was scattering." Haggood did not know who fired these shots but testified that they came from "towards the road." He did not hear these shots hit anything; neither he nor his friends were shot; and his car, his brother's car, and the area of the club near him were not hit. However, Benjamin pulled out his .45, "outstretched [his] arm like downward ... from the waist" and began shooting in the direction of the car in front of Haggood's car (which was Shawn DeFreitas' car). Benjamin was at the passenger side corner when he began but continued moving as he shot. **R. pp. 145-47; 164; 171-73.**[15]

Someone then threw a post, which hit the passenger side mirror of Haggood's car and knocked out the mirror, itself. Haggood heard shots coming from "behind the van." So, he moved to the back of his car and he fired "three or four" shots from his .40 caliber pistol in that direction. Then, Benjamin got behind the wheel and Haggood got into the front passenger seat. Frazier fired "two or three" shots in the air before getting into the back seat. **R. pp. 147-49; 173.**

Initially, Shawn DeFreitas' car was blocking them in, but that car backed up and they left the parking lot. As Benjamin was driving them away, Frazier said that he had fired in the air and he asked his friends if either of them had to shoot. Haggood was on his cell phone with his brother and did not respond. However, Benjamin's response was to the effect that he had not shot into the air because he was not going to waste bullets. Also, Frazier rolled down his window as they rode. Haggood later learned that he had thrown out shell casings from his .32. **R. pp. 150-53.**

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[15] Frazier was near the rear driver's side.

Benjamin drove Frazier to another club and Haggood dropped off Benjamin at his residence. Haggood was thereafter told that DeFreitas and two other people had been shot, and he told Benjamin the news. Yet, Haggood drove back to Fayetteville, leaving around 6:00 a.m. He returned the .40 caliber pistol to McGarrah and was subsequently informed that McGarrah had pawned it. Haggood confirmed that there was no damage to his car (*see* State's Exhibits 6-10) from the shooting, and that the only damage was caused by the pole hitting the mirror of his car. **R. pp. 153-58.**

Haggood was contacted by the Calhoun County Sheriff's office that day, but he lied to them about what had occurred at Piggy Park. He also gave a number of statements before and after his arrest in this case but continued to lie about his involvement, as well as that of Benjamin and Frazier, until he gave his fourth statement. He only gave that statement because, based upon what he heard from others, "I wasn't under the impression that I shot anybody." He later discovered that he had shot someone. **R. pp. 158-62.**

At thirty one, Shawn DeFreitas is a little older than many of the other witnesses. He had attended both Calhoun County and Elloree High Schools. He has a younger sister named Latisha Cooper and he is sometimes called Shawn Cooper. He arrived at Piggy Park, alone, around 3:00 a.m. on September 18th and he parked his Chevy Impala facing two vehicles, with another car on his side. **R. pp. 176-78.**

Mr. DeFreitas went into the club and talked to people. He did not witness any trouble while there. When he left an hour or so later, he saw "an altercation" between Dominique and Frazier in front of the door to the club. Because Mr. DeFreitas knew both of them, he "went to go

break it up." (Sic). Eleven or twelve other people were also standing around in the area.[16] **R. pp. 179-80; 191.**

> Well, I got in the middle of both sides, kind of, and I was telling Dominique, you know, just leave it alone.
>
> And ... I turned to Kevin and told Kevin ... to go to his car.
>
> The altercation was still going. They were yelling at each other and then Kevin pulled out a gun. When he pulled out the gun, that's when I grabbed him and I walked him over to the car.

R. p. 180, lines 13-20. Mr. DeFreitas did not see anyone else with a gun at that time. **R. pp. 180-81.**

Although DeFreitas's car was parked in front of Haggood's car, there was almost a car length between the two cars. Even after Mr. DeFreitas and Frazier reached the driver's side of Haggood's car, Frazier and Dominique were "still going at it. And basically Dominique was heated because Kevin pulled out the gun." DeFreitas told Dominique to " 'just leave it alone' " and " 'y'all, just go to your car.' " **R. pp. 181-82.**

Someone came up and pulled Dominique away. Frazier was screaming that he wanted to go home, and Mr. DeFreitas told him that he was going to get home. " 'Just get in the car.' " Benjamin then walked up to the passenger side of the car and someone told DeFreitas to move his car because it was blocking in Haggood's car. As he turned to go move his car, there were several gunshots and he was struck by one. The bullet entered his right side and exited his inner leg. He immediately dropped to the ground and crawled behind his car. **R. pp. 182-85.**

Mr. DeFreitas did not see who shot him. When looked up again, he saw Frazier shooting

[16] He had seen Benjamin "a couple of times, but I didn't know him personally." He also did not know Haggood. **R. pp. 180-81.**

into the air[17] and "Benjamin shooting towards the opposite side of the club." Mr. DeFreitas told another man who had also ducked behind his car that he had been hit, and someone else screamed, " 'Dominique hit.' " Shawn looked over and saw Dominique lying on the ground. **R. pp. 185-86; 192-94.** Although most people had been ducking, screaming and running when the shooting began, Benjamin, Haggood and Frazier did not do any of those things. **R. p. 195.**

Mr. DeFreitas gave the keys to his car to a woman who was present, and she tried to drive him to the hospital. However, the car had a blowout along the way, and the woman flagged down a passing officer. Later an ambulance took him to the hospital where his gunshot wound was treated. His vehicle had not been shot at Piggy Park. **R. pp. 186-90.**

Danny Saxon testified that he was thirty-four years old. He had known Dominique Lawton for roughly fifteen years. He also knew Benjamin from school but he did not know Haggood or Frazier. **R. pp. 197-98.**

Mr. Saxon and a friend, Sammy Brigman, arrived at Piggy Park around 3:15 a.m., on the morning of September 18, 2011. They were in Mr. Saxon's Cadillac Seville and Brigman was driving. They "pulled in in the driveway on the far side of the club," and they parked between ten and fifteen feet off of the side of the road. Brigman headed for the club as soon as they arrived, but Saxon stayed at the car. **R. pp. 198-201.**

Mr. Saxon did not know what happened before he got out of his car because he had the music on, but he saw people "running around" outside of the club. Dominique walked around the front of the Cadillac and to the passenger side. Dominique "was obviously agitated," and Mr. Saxon told him to "calm down" or "take it easy." Dominique did not have anything in his hands. **R. pp. 201-02.**

[17] Frazier may have been shooting in the air before then, but that was the first time that Shawn saw him shoot. Also, Shawn did not know who initially shot. **R. p. 194.**

Mr. Saxon then heard gunshots and took cover behind his car. Before he ducked, he saw a tall man, whom he did not recognize, shooting into the air. By the time Mr. Saxon turned back around, he saw Dominique lying on the ground, on the rear passenger side of the Cadillac. Dominique had a wound to the head. Once the shooting stopped, Mr. Saxon immediately found one of Dominique's cousins and told her what had occurred. When police arrived, Saxon was asked to move his up a short distance and he moved it about a car length, to the position that it is marked on the crime scene diagram, State's Exhibit 1. **R. pp. 202-05.**

Later, an officer from the Calhoun County Sheriff's Office photographed a bullet hole in his car that had not been there before the shooting. Neither Mr. Saxon nor law enforcement found that bullet in his vehicle. **R. p. 206-08; State's Exhibit 27.**

Michael Bullock testified that he was working as a DJ at Piggy Park on September 17-18, 2011. He arrived around 9:00 p.m. He knows Benjamin, Frazier, and Haggood from school, and he met Dominique after he began DJ'ing at Piggy Park. **R. pp. 210-12.**[18]

For the most part, Haggood, Benjamin, and Frazier hung out together while at the club. When asked whether he became aware of an altercation inside the club while he was there, Mr. Bullock testified, "A little. They had bumped into each other in the club and Dominique kept watching him the whole time in the club." As a result, Mr. Bullock had DJ Stroke (Andrew Haynes) go talk to Dominique. Despite this intervention by Mr. Haynes, Benjamin and Dominique "were just looking back and forth at each other" for the rest of the evening. **R. pp. 212-13; 219-20.**

Mr. Bullock went outside to unlock his van (*see* State's Exhibit 5) after Piggy Park closed. All of the people who had been in club were outside and "[i]t was just a big commotion

[18] He knows Benjamin "a lot better than [he] knew Mr. Lawton." **R. p. 221, lines 1-3.**

outside. ... I turned around to go back in, [and] all I heard was Kevin Frazier said all he wanted to do was go home." Frazier and his friends were standing near their car, which was to the left – or driver's side – of Mr. Bullock's van. Bullock did not see anyone with a weapon. **R. pp. 213-16.**

Mr. Bullock went back into the club to unplug his equipment and soon heard a lot of gunshots. Haynes ran back in the club as soon as the shooting started. After the shooting stopped, Mr. Bullock went out to load his equipment in his van but law enforcement would not let him leave. He did not notice any damage to the van, until a deputy alerted him to the presence of three "bullet holes through the window of the van in the back side" and corresponding holes on the other side. The bullet holes are depicted in State's Exhibits 17-21, and they were not present before the shooting on September 18th. **R. pp. 216-19.**

Delvin Lawton testified that he is Dominique Lawton's older brother. He was not at Piggy Park on September 17-18, 2011. However, Jacob "Boomer" Warren brought him a .380 caliber pistol that had belonged to Dominique on the day after the shooting. Warren told Delvin that he had found it on the ground where Dominique had fallen. Delvin then turned over the .380 (State's Exhibit 36) to law enforcement. **R. pp. 222-24.**[19]

Det. Matthew Trentham collected gunshot residue kits from the surviving victims, James Hampton and Shawn DeFreitas (State's Exhibits 63-64) at the hospital before 7:00 a.m. on September 18th. Based upon information provided by eyewitnesses whom Det. Trentham interviewed at the hospital, Benjamin, Haggood and Frazier were developed as possible suspects. **R. pp. 283-86.**

Lt. Henry Dukes, Jr., is employed by the Calhoun County Sheriff's Office as the

[19] Delvin had seen his brother with a gun before. R. p. 225.

lieutenant over the investigation division. **R. p. 227.** When he arrived at Piggy Park on the morning of September 18th, he was informed that there were three gunshot victims. By that time, the scene was secure; the victims had been transported to the hospital by EMS; and other officers were taking statements from witnesses. One of Lt. Dukes' responsibilities that morning was to process the crime scene. **R. p. 228.**

Lt. Dukes found a live round or bullet (State's Exhibit 40) close to the front door of the club.[20] In the area behind the van, he found a spent shell casing (State's Exhibit 41).[21] In the grass and gravel on the corner area of the club, which is on the right side as one faces the club,[22] Lt. Dukes found five .45 caliber shell casings (State's Exhibits 42-46) and three .40 caliber shell casings (State's Exhibits 47-49). All of those casings were found in the same general area. **R. pp. 229-34.**

Dominique's body was found where there is blood stain on the ground near a large oak tree shown in State's Exhibit 2. Lt. Dukes found five 9 mm. shell casings (State's Exhibits 51-55), scattered in the grass, roughly fifteen feet behind where Dominique's body was located. **R. pp. 234-36; 267-68.** He found State's Exhibit 32, the green wooden post that Mr. Hampton threw at Haggood's car, in front of the club. **R. pp. 236-37.**

He also photographed the damage to Mr. Bullock's van, which consisted of three bullet holes that entered on the driver's side of the van, which was the side closest to where Haggood had parked (*see* State's Exhibits 17-20),[23] and three corresponding holes on the opposite side of

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[20] This area is depicted in State's Exhibit 4.

[21] A marker depicted in State's Exhibit 17 designates the location of this casing, as well.

[22] *See* State's Exhibit 3.

[23] One went through the glass on the rear side of the van. The second is into the metal on the rear side and the third bullet hole is closer to the tail light. *See* State's Exhibit 17.

the van. (*See* State's Exhibits 22-24). He managed to retrieve the projectile (State's Exhibit 50) from one of the shots that did not go all the way through the van. **R. pp. 237-41.** He then examined the building to see if he could find areas that appeared to have been struck by bullets. He did not see any defects on the right front of the building or behind the building in the area where Haggood and Haggood's brother were parked. **R. p. 241.**

On the left side of the front of the building, however, he located and photographed (*see* State's Exhibits 25-26) an area where a bullet had chipped a piece of concrete off of the building, and the concrete was on the ground. Although he saw a similar defect a short distance away from this that also may have been caused by a bullet, it did not have a piece of concrete on the ground near it and he was unable to determine whether a bullet had cased that damage. Lt. Dukes did not finish processing the scene until after daylight. **R. pp. 242-44.**

Kevin Frazier's name had been mentioned in the original 911 call. So, Lt. Dukes went to the residence of Frazier's mother, in an effort to locate him. Lt. Dukes thereafter spoke to Frazier, who made arrangements to come speak with Lt. Dukes. Frazier did not show when promised and did not arrive until the afternoon of the 18th, and he was then arrested. A gunshot residue kit was performed at that time as well. **R. pp. 244-47.**

Initially, Frazier denied firing or having the gun with him at the Piggy Park, but he changed his story the following day and admitted he did have a gun. Lt. Dukes got the consent of Frazier and Frazier's girlfriend to search their residence and he recovered a .32 caliber revolver (State's Exhibit 37) that had been hidden in a couch, as the result of the search executed on September 19th. It had two spent cartridge casings (State's Exhibits 38-39) in it. **R. pp. 254-57.**

Lt. Dukes testified that Benjamin and Haggood were also developed as possible suspects and he contacted Haggood in North Carolina on the 18th. Based on that conversation, he was able

to locate the vehicle belonging to Haggood's brother, William Pinckney. When Lt. Dukes examined that car (*see* State's Exhibits 12-14), he discovered that there was a bullet hole in the "right back by the tail light." When the tail light was disassembled, he found and seized the bullet (State's Exhibit 56). **R. pp. 247-50.**

Lt. Dukes likewise examined Mr. Saxon's Cadillac (*see* State's Exhibits 27-30) and saw where a projectile had entered the door of the car and struck the door post, without penetrating the door post. Because Lt. Dukes did not find any bullet, he came to the conclusion that the bullet may have ended up between the door and the post. (*See* State's Exhibits 29-30). If this was correct, it could have simply fallen to the ground when the door was opened. In light of this and information that Mr. Saxon's car had been moved, Lt. Dukes went back to the crime scene several days later and looked for more evidence in the area near where the victim had fallen. This time, he used a metal detector. **R. pp. 250-53; 274; 276.**

This decision proved beneficial because he found three bullets (State's Exhibits 57-59) approximately 7' - 8,' or roughly a car length, in front of where the victim had been.[24] **R. pp. 253-54.** After Dominque died on September 19th, Lt. Dukes went to the hospital and obtained a gunshot residue kit of his hands. **R. pp. 257-58.** Also, Benjamin turned himself in on the 19th and all three defendants were charged. **R. pp. 258-59; 267.**

On September 2nd, Lt. Dukes and Lt. Corley went to Fort Bragg and interviewed Haggood. Although he was still lying about his involvement in the shootings, the officers were able to photograph his car. (State's Exhibits 7-10). The only damage present was that the reflective portion of the passenger side side-view mirror was broken (see State's Exhibit 9), and

[24] Again, the victim was found lying over to the right as one faces the club and near a large oak tree depicted in State's Exhibit 2. **R. p. 253.** Also, Mr. Saxon moved his car forward roughly a car length at the request of law enforcement. **R. pp. 204-05.**

there was some green paint on the mirror. This paint mark was consistent with the green post recovered at the crime scene. **R. pp. 259-61.**

Lt. Dukes also performed gunshot residue testing (State's Exhibit 60) on the car. He swabbed interior areas around the windows on the driver's door; the driver's side rear door; the passenger's door; and the passenger's side rear door. **R. pp. 261-63.** Benjamin's residence was searched several days later but officers were unable to locate his .45 caliber pistol or any other gun. Officers have likewise not been able to locate a 9 mm. consistent with the shell casings that were recovered near the victim's body at the crime scene and they have been unable to identify who fired this weapon. **R. pp. 263-64; 268-69; 272; 275-78; 287-89.**

Agent John Roberts was employed in SLED's trace evidence department until 2012 and analyzed the gunshot residue kits that were submitted in this case. Agent Roberts explained that the palms and the back of the hand of both hands are tested for the presence of the three metals present in gunshot primer: lead, barium and antimony. These three metals must be "in quantities that we associate with firing a gun, handling a gun, or being near a gun when it goes off," since those are the three main ways that people get gunshot residue on their hands. **R. pp. 290-94.**

"Gunshot residue is fairly easy to remove off your hands." Any number of activities will remove it, and within six hours a living person's body will absorb enough of the metals "to a point that we can't find it in quantities that we associate with firearm." So, no analysis is performed on tests administered over six hours after the alleged discharge of the weapon. However, the body of a deceased individual does not absorb the metals and testing may be performed even if the sample was taken beyond the six hour window. Further, clothing is often tested for gunshot residue. **R. pp. 295-97.**

Agent Roberts tested several of the samples received in this case. The samples taken from

Shawn Defreitas and James Hampton (State's Exhibits 63 and 64, respectively) were negative for gunshot residue.[25] **R. pp. 297-99.** Agent Roberts did not perform any analysis of the kits taken from Frazier or Nayrone Shivers[26] because the samples were taken outside of the six hour time frame. **R. pp. 299-300.** Agent Roberts opined that the kit taken from victim came back negative. However, he would not have run the test if he had known that the victim had been on life support for hours after the shooting and that the kit was not collected until after the victim's death on the 19th, since all of the markers had dissipated. **R. pp. 300-02.**

The next kit that Agent Roberts tested was the one performed on Haggood's vehicle. He testified that "[v]ehicles work a lot like clothing. If a gun is fired in the vehicle, or near the vehicle, sometimes you can take samples and you can find gunshot residue kit on those samples from that vehicle." **R. pp. 460-61.** Agent Roberts opined that his testing of the sample from the front driver's side of the car showed the presence of metals that were "associated with or consistent with gunshot residue."[27] **R. pp. 302-06.**

Of the remaining particle lifts, the only one that was positive "was the driver's side back. And on that particle lift I did find a round gunshot residue particle, the particle that's unique to gunshot residue and doesn't come from anywhere else. And I found a non-round particle that has lead, barium and antimony." Based upon these findings, Agent Roberts opined that "a gun fired near" the front and back of the driver's side of the car. He further opined that the shooter was located between six and ten feet from the tested areas, and that either the doors were open or the

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[25] Both samples were taken roughly four hours after the shooting. **R. p. 298-99.**

[26] He did find gunshot residue on a black shirt belonging to Shivers. **R. p. 307-08.**

[27] Agent Roberts explained that he found a round lead particle on this lift and that "[r]ound lead particles are associated with gunshot residue. There [are] a couple other places that they come from, but not very many. They are not unique, but they are close." **R. pp. 305-06.**

windows were down at the time. **R. pp. 306-09.**

SLED Agent James Green is an expert firearms examiner, who examined a number of items that were submitted in this case. **R. pp. 313-15; 317-38.** Agent Green examined three firearms connected to this case, State's Exhibits 36-37. State's Exhibit 36 is a "Highpoint firearms Model CF-380 and a ... .380 auto caliber, serial number of P844000." State's Exhibit 37 is an "Armenius, Model HW3-32, Smith & Wesson long caliber revolver with a serial number of 232359." State's Exhibit 36 was a semi-automatic pistol with a detachable magazine of bullets,[28] while State's Exhibit 37 is a .32 caliber revolver that holds seven cartridges. Both weapons were in working order. **R. pp. 317-21; 323.**

Agent Green explained that it is possible to eject a live round from State's Exhibit 36, either "if it were a misfire" or a person "charges" the weapon, *i.e.*, pulls back the slide to load a live bullet into the chamber, when there is a live round already in the chamber. **R. pp. 321-23.** Another weapon submitted for testing was State's Exhibit 34, Joshua Haggood's "Springfield Armory, 23 Model XD-40 S&W caliber, with a serial number of US298932." This .40 semi-automatic pistol was also in working order. **R. pp. 323-24**

State's Exhibit 40, the unfired .380 caliber round found close to the front door of the club, was the "correct caliber for use in ... State's Exhibit 36," the victim's pistol. Also, it could have been ejected by someone charging the weapon, as explained. State's Exhibit 41, a spent shell casing found behind the van, was "a fired .380 auto caliber cartridge case and it was fired by State's Exhibit 36." Likewise, State's Exhibit 56, the .380 caliber bullet recovered from the tail light assembly of William Pinckney's Ford Taurus, was fired by State's Exhibit 36. **R. pp.**

[28] Because State's Exhibit 36 is a semi-automatic pistol, a bullet should be fired every time the trigger is pulled, the casing of that bullet is ejected, and a new bullet is loaded into the chamber. SLED protocol is not to speculate on ejection patterns of semi-automatic weapons because too many variables can impact where a casing ultimately stops after it is ejected from the gun. **R. pp. 320-21.**

324-28.

Haggood's semi-automatic .40 caliber pistol, State's Exhibit 34, was the only weapon submitted to Agent Green that could have fired State's Exhibits 47-49, the three .40 caliber cartridge casings found in the grass and gravel on the right corner area of the club. State's Exhibit 34 was consistent with firing those casings, but his testing was inconclusive as to whether that was the only .40 caliber gun that could have fired them.[29] **R. pp. 328-29.**

The bag of seventeen bullets provided by Mr. McGarrah (State's Exhibit 35) was the same brand of ammunition as the casings in State's Exhibits 47-49. Agent Green was able to match the cartridge cases in State's Exhibit 35 to each other. While he could also match State's Exhibits 47-49 to each other, he could not match the casings in State's Exhibit 35 to State's Exhibits 47-49. " **R. pp. 329-30.**

Similarly, he opined that the fired bullet recovered from the van (State's Exhibit 50) "was most consistent with being ... a bullet loaded in some .40 Smith & Wesson caliber cartridges. This bullet "bore the same general rifling characteristics as test specimens from the State's Exhibit 34 pistol," but his testing was inconclusive. He explained that "[s]ome firearms just mark inconsistently." Comparison of the fired .40 caliber bullet removed from James Hampton's arm (State's Exhibit 33) to State's Exhibit 34 was also inconclusive, even though this bullet had "similar general rifling characteristics." An additional obstacle to accurately comparing State's Exhibit 33 to Haggood's weapon was that this bullet had dried blood on it. **R. pp. 330-33.**

Although neither a .45 caliber pistol nor a 9 mm. weapon were submitted for Agent Green's testing (**R. p. 324**), he opined that the five .45 cartridge casings (State's Exhibits 42-46) found at the right corner of the club and near the .40 caliber casings were all fired by the same

[29] He opined that "the markings were not of the quality or quantity" to either include or exclude State's Exhibit as firing the casings. **R. p. 329.**

weapon. He explained that a .45 caliber bullet is too large to have been fired by any of the other weapons he had examined. He further explained that a .40 caliber bullet was too small to have been fired by a .45 caliber pistol and too large to have been fired by either the .380 pistol (State's Exhibit 36) or the .32 caliber revolver (State's Exhibit 34). **R. pp. 333-35.**

Agent Green further opined that the three bullets found about 7' - 8' in front of where the victim had been lying (State's Exhibits 57-59) were "consistent with being a .45 auto or a .45 gap caliber cartridges" and that they were consistent with the type of bullets that would have come out of the five shell casings introduced as State's Exhibits 42-46. Although comparison of State's Exhibit 59 with the other bullets was inconclusive because the jacket covering it "was abraded and gouged," Agent Green opined that State's Exhibits 57-58 were both fired by the same weapon. A possible explanation for the damage to State's Exhibit 59 was that it had been caused by penetrating a vehicle door and striking the vehicle's door post. Because the two .32 cartridge casings (State's Exhibits 38-39) had been removed from the cylinder of the weapon, Agent Green did not test them, which is a SLED protocol. **R. pp. 335-37.**

Finally, Agent Green opined that State's Exhibits 51-55 were five fired 9 mm. Luger cartridge casings, which had all been fired by the same firearm. By Agent Green's microscopic comparison of the class characteristics of the casings with State's Exhibit 34, he was able to determine that the victim's semi-automatic .380 caliber pistol did not fire these casings. Also, the other firearms that he examined were too large to have fired them. **R. pp. 333-35; 337-38.**

Dr. Janice Ross is the forensic pathologist who performed the autopsy on Dominique Lawton's body. **R. pp. 349-50.** The victim was 5'7" tall and his estimated weight was roughly one hundred sixty-five pounds. **R. p. 356.** Dr. Ross only found one injury: "a gunshot wound that went through the head and lacerated the brain." **R. p. 350.** She explained that:

> The entrance wound was in the left forehead, just above the eyebrow, and it went pretty much straight back and exited maybe a little bit to the left. It went backwards and to the left and exited the left side of the head.

R. p. 350, lines 14-17.

She opined that the wound's track meant that the victim's head was facing the shooter when he was shot. This wound ultimately caused the victim's death because "the brain was lacerated and then [it began swelling], and the swelling and the enlargement of the brain from the swelling then impinge[d] on areas of the brain that have to do with breathing and heartbeat." As a result, the victim died "[f]rom the brain damage ... which eventually results in failure to breath, [or] respiratory failure." Without a ventilator, the victim would have quit breathing within minutes up to an hour. **R. pp. 350-51.**[30]

Dr. Ross opined that this was the type of injury that likely would have been fatal even with medical intervention. She measured the entrance wound as .3" x .4." However, she explained that it was impossible for her to determine, on autopsy, what caliber weapon caused the injury, and she did not recover the bullet that had caused the wound. **R. pp. 352-55.**

B. Benjamin's motions and the trial judge's rulings.

1. The initial directed verdict motion and the trial judge's denial of it.

Benjamin moved for a directed verdict, on each indictment, after the State had rested. **R. p. 358, lines 16-21.** The trial judge immediately called upon the State "to lay out as to each one of those [indictments,] ... the witnesses that have laid down ... the evidence ...putting the gun in the hand of the defendant ... and then pointing the gun in the area where the victims were, for me." **R. p. 358, line 23 – p. 359, line 8.**

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[30] The victim remained on life support for some time after the injury and was pronounced dead on the 19th. **R. pp. 258; 301.**

Assistant Solicitor Sorenson stated that there were "multiple witnesses" and the trial judge agreed that he should start by providing witnesses who could place the gun in Benjamin's hands **R. p. 359, lines 10-23.** He then argued as follows:

> MR. SORENSON: ... [T]here are multiple witnesses that do that. I believe Mr. Hampton had indicated that he saw basically all three defendants with guns.
>
> Obviously the co-defendant, Mr. Haggood, testified and his more specifically, because he has knowledge of exactly what type of gun it was also. He testified that he saw this defendant firing a .45 caliber gun that he had seen this defendant with on multiple occasions prior to this night, essentially out in the direction that I would submit the victim was ultimately hit, the victim being Mr. Lawton was struck.
>
> The two of them definitely, and there may be one other without me going through all my notes, but at least the two of them that put this defendant with a gun; one of them describing the actual caliber of the gun, indicating that he was with this defendant when they went out and armed themselves earlier that evening and brought the guns back into the club.
>
> Additionally, Your Honor, if you look at the victims that were actually hit, you look at Mr. DeFreitas' testimony that he had basically walked -- was involved in the group that had walked the defendants basically over to their vehicle.
>
> And, as you recall, when I had him kind of describe how he was walking away from his vehicle would have put his right side facing the defendants['] vehicle when he was struck in the right hip, which I submit at that point in time, you know, other testimony would have Mr. Frazier shooting in the air and this defendant then being the only person shooting in that direction at that time, which would then kind of fall into -- it's my position that he was shot basically around the same time that Mr. Lawton was shot.
>
> And, furthermore, ... when they go back ... with the metal detectors they find over in the vicinity of where Mr. Saxon's vehicle was pulled in and the victim Mr. Lawton

> was found with the gunshot wound to the head, they find three .45 caliber rounds; two of them that are matched to each other, and the third one was too damaged, which I submit is from striking Mr. Saxon's vehicle. There are five .45 caliber casings; three bullets there. I submit to you one of those other two went through Mr. Lawton's head.
>
> As to the third victim, Mr. Hampton, ... it's our position, and has been since I basically delved into this case and gotten it ready for trial, that the shot that struck Mr. Hampton in the left elbow was fired by the co-defendant Joshua Haggood. So I think our argument with regards to him is more ... of an accomplice liability standpoint, that these three individuals ... made a decision to go arm themselves after an altercation inside this club and returned to inside that club, continued drinking alcohol that spilled out when things shut down.
>
> You have -- I mean -- and I agree, it's chaos out there, but I submit to you the three of them were part of that chaos.
>
> So it would be our theory as to Mr. Hampton would be an accomplice liability theory, not that we are arguing that this defendant actually shot him.

R. p. 359, line 24 – p. 362, line 7.

The trial judge stated that this had answered her question, which was based on the State's request for an accomplice liability instruction. She wanted to know the charge(s) on which the State was contending that Benjamin was guilty under a theory of accomplice liability. She was mainly confused with respect to the shooting of Mr. DeFreitas. **R. p. 362, lines 8-12; p. 362, lines 19-24.** The State confirmed it was asserting guilt by accomplice liability "primarily" for the shooting of Mr. Hampton, but noted that "really it could be either one of the other two." **R. p. 362, lines 13-18.**

The trial judge then heard from Benjamin. He argued that "there is no definitive proof as to what firearm killed" Dominique Lawton. He further argued that some witnesses had testified

that there was "a barrage of shots" and that other weapons were possibly involved. He added that "without some testimony of a defendant ... who has already made a deal with the State, without his testimony, there is nothing that puts that .45 caliber handgun in his hand, let alone there is no evidence that said a .45 caliber handgun killed the decedent Dominique Lawton." **R. p. 363, lines 3-14.**

Benjamin claimed that he was entitled to a directed verdict for the attempted murder of Shawn Defreitas because Mr. DeFreitas' timeline was that he did not see Frazier shoot into the air until after he was shot and had crawled to safety. On the other hand, other evidence presented by the State indicated that Benjamin only returned fire after Frazier had fired his gun. "We have ... corroborative evidence that Mr. Frazier fired twice." Thus, he could not have shot Defreitas. Finally, Benjamin argued that he would be prejudiced on the submission of accomplice liability charge with respect to the attempted murder of Mr. Hampton because "the State's witness[,] [Haggood,] admitted that he was responsible for the wounding of Mr. Hampton." **R. p. 363, line 15 – p. 364, line 8.**

The trial judge then denied Benjamin's motion:

> THE COURT: All right. Got it. Thank you so much.
>
> That was helpful to me, and I think the testimony you have pointed out is why I asked that of Mr. Sorenson to walk that through. And I think that he's been quite candid with the court that, particularly with regard to -- I'm going to call him Defreitas because of the – but it ' s ... Mr. Defreitas. I apologize.
>
> That Mr. Defreitas, that it's one of two theories, if you will, because of the circumstantial nature of -- particularly with regards to the injuries to Mr. Defreitas. And largely if the jury believes the testimony that you have elicited, if any, whether it's the responsibility for Defreitas has got to be hand of one, the hand of all, and I don't think it's overly prejudic[ial].
>
> ... [U]nder these facts, I think it's -- unless something changes, at this point I believe that taking the evidence in its entirety and the inferences which

> could be drawn, I do believe that there is evidence on each and every element of each of these offenses, even understanding that there is a portion of it which is circumstantial, I do believe that there is evidence on each and every element from which this jury could make a determination of guilt, and I would respectfully deny your motion at this point, noting your exceptions thereto for many of the reasons that you have pointed out to me, Mr. Thomas.

R. p. 364, line 11 – p. 365, line 12.

2. Denial of Benjamin's renewed directed verdict motion.

At the conclusion of the defense's case, Benjamin renewed his motion for a directed verdict on the charge of murder. He argued that the testimony of a defense eyewitness demonstrated that he could not have killed the murder victim. He likewise renewed the arguments for a directed verdict for the attempted murder of Mr. DeFreitas. **R. p. 394, lines 10-12; p. 395, line 10 – p. 396, line 15.**

The trial judge, however, denied his motion. She noted that there was conflicting evidence, but stated that her responsibility in ruling on his motion was "to determine whether or not there is evidence on each and every element from which the jury could determine guilt." She found that there was such evidence with respect to the attempted murder of Mr. DeFreitas under the theory of "the hand of one [is] the hand of all," which she was going to charge." She further denied the remaining portion of his motion and noted his exceptions. **R. p. 396, line 16 – p. 397, line 4.**

The trial judge later instructed the jury on accomplice liability. **R. pp. 462-64.**

C. Discussion.

"When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight. A defendant is entitled to a directed verdict [only] when the state fails to produce evidence of the offense charged." *State v. Weston*, 367 S.C.

279, 292, 625 S.E.2d 641, 648 (2006); *State v. McHoney*, 344 S.C. 85, 97, 544 S.E.2d 30, 36 (2001). "In reviewing the denial of a motion for a directed verdict, the evidence must be viewed in the light most favorable to the State, and if there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find that the case was properly submitted to the jury." *State v. Kelsey*, 331 S.C. 50, 62, 502 S.E.2d 63, 69 (1998). "Unless there is a total failure of competent evidence as to the charges alleged, refusal by the trial judge to direct a verdict of acquittal is not error." *State v. Irvin*, 270 S.C. 539, 543, 243 S.E.2d 195, 197 (1978) (citing *State v. Massey*, 267 S.C. 432, 229 S.E.2d 332 (1976)).

Applying the above principles to the facts of this case, Respondent submits that Benjamin's directed verdict motion on the charge of murder and the two counts of attempted murder was properly denied. South Carolina defines "murder" as the "killing of any person with malice aforethought, either express or implied." S.C. Code Ann. § 16-3-10 (2003). Further, "[a] person who, with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied, commits the offense of attempted murder." S.C. Code Ann. § 16-3-29 (Supp. 2014).[31] Both of these offenses require that the defendant act with "malice aforethought." "Malice is the wrongful intent to injure another and indicates a wicked or depraved spirit intent on doing wrong." *Kelsey*, 331 S.C. at 62, 502 S.E.2d at 69. It is the doing of a wrongful act intentionally and without just cause or excuse. *Tate v. State*, 351 S.C. 418, 570 S.E.2d 522 (2002).[32] *See* **R. pp. 452-54.**

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[31] "A person who violates this section is guilty of a felony, and, upon conviction, must be imprisoned for not more than thirty years." *Id.*

[32] Alternatively, malice has been defined as "something which springs from wickedness, from depravity, from a heart devoid of social duty and fatally bent on mischief." *Arnold v. State*, 309 S.C. 157, 163, 420 S.E.2d 834, 837

The State's evidence reasonably tended to prove that Benjamin, personally, fatally shot the murder victim, Dominique Lawton, with his .45 caliber semi-automatic pistol. Indeed and contrary to Benjamin's understanding, the Assistant Solicitor did not rely upon accomplice liability to convict him of murder. Rather, the Assistant Solicitor urged jurors to acquit him on this charge if they found that the State had failed to prove that he had killed the victim. **R. p. 401, lines 2-23.**

The State's evidence in this case is a far cry from the circumstantial evidence cases where this Court or the Supreme Court has found that a directed verdict should have been granted. *See, e.g., State v. Bostick*, 392 S.C. 134, 708 S.E.2d 774 (2011); *State v. Odems*, 395 S.C. 582, 720 S.E.2d 48 (2011); *State v. Bennett*, 408 S.C. 302, 758 S.E.2d 743 (Ct.App. 2014).[33]

(1992). *See also State v. Fennell*, 340 S.C. 266, 275 n. 2, 531 S.E.2d 512, 517 n. 2 (2000) ("[m]alice is a legal term implying wickedness and excluding a just cause or excuse. The term malice indicates a formed purpose and design to do a wrongful act under the circumstances that exclude any legal right to do it").

[33] In *Bostick*, the Court found that the prosecution's evidence only established a mere suspicion of Bostick's guilt. It found that the State had only presented the following pieces of circumstantial evidence of his guilt: the victim's car keys, calculator, and other items from her home were found in the Bostick family's burn pile; the fire in the burn pile was accelerated with either kerosene or diesel fuel, and Bostick's mother did not use those accelerants when she burned things in the pile; Bostick had a pattern that matched gasoline on his shoes and gasoline was the accelerant used for the house fire; and the DNA from the blood found on Bostick's jeans excluded about ninety-nine percent of the population, but the blood could not be matched to the victim's DNA. The Court held that this was insufficient to withstand a directed verdict motion because (1) the State did not present any direct evidence linking Bostick to the crime scene or to the items found in the burn pile; (2) the State failed to establish that he had control over his family's burn pile; (3) the State did not introduce any weapon that it contended had been used to beat the victim in the head; (4) there was no evidence that Bostick knew that the victim may have had money in her briefcase; and (5) there was no evidence any money was in the briefcase on the Sunday of her murder. *Bostick*, 392 S.C. at 141-42, 708 S.E.2d at 778.

In *Odems*, the state presented circumstantial evidence that: (1) police found Odems in the getaway car with the burglars and the stolen goods less than 90 minutes after the burglary; (2) Odems fled from law enforcement when the car was stopped; and (3) Odems asked an individual not involved in the offenses to lie for him. 395 S.C. at 588, 720 S.E.2d at 51. However, other evidence presented did not tend to prove Odems' guilt. For instance, the lone eyewitness saw only two people at the crime scene; a forensic investigator collected twelve sets of fingerprints from the crime scene, but none matched Odems' fingerprints; and a co-defendant testified during the State's case-in-chief that Odems did not participate in the crime but was present in the car after he offered him a ride. *Id.* The Supreme Court reversed, finding that there was not substantial circumstantial evidence on which to base a conviction, and therefore, the trial court erred in refusing to direct a verdict in favor of the petitioner. *Id.* at 592, 720 S.E.2d at 53.

Likewise, *Bennett* was purely a circumstantial evidence case. This Court held that, at most, the evidence presented

Unlike *Bostick, Odems, Bennett* and *State v. Schrock*, 283 S.C. 129, 322 S.E.2d 450 (1984), this was not a purely circumstantial evidence case. Rather, there was direct evidence of Benjamin's presence at the crime scene. Also unlike *Bostick*, there was a great deal of express malice and evidence of motive in this case, all of which pointed directly at Benjamin.

First, it is undisputed that the incident which ultimately gave rise to the shooting was the words, pushing and shoving that occurred when Dominique bumped into *Benjamin* on the dance floor. This incident did not involve either of Benjamin's co-defendants. Although there was no further violence inside the club that night, tensions still ran high between *Benjamin* and Dominique for the rest of the morning, despite the efforts of numerous people to calm down the two men. The two men continued to exchange glances and watch each other for the remainder of the morning.

Respondent submits that its evidence reasonably tended to prove that Benjamin shot Dominique. At least *two witnesses placed a gun in Benjamin's hands* and *had him firing in the direction of* where *Dominique* dropped after being fatally shot in the head. Mr. Hampton testified that he saw all three defendants with guns. Frazier was waiving his in the air. Benjamin and Haggood were also armed and had their guns out, as they stood by the car. Hampton did not see Benjamin shoot as he walked away from them after Frazier started shooting in the air, but he testified that the shots came from behind him and from the area of the defendants' vehicle. **R. pp. 69; 74-76.**

Haggood testified that he, Benjamin and Frazier all had weapons with them when they

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merely raised a suspicion that defendant committed the crimes. Therefore, this evidence – including evidence (1) that the defendant's fingerprint was found on a community room television set that may have been manipulated by the burglar in an attempt to remove the television, and (2) that two small droplets of blood matching his DNA were found below the space where a stolen television once sat in the computer room, where he had frequently been - was insufficient to support the defendant's convictions for burglary in the second degree, petty larceny, and malicious injury to real property. 408 S.C. at 307-08, 758 S.E.2d at 745-46.

first arrived at Piggy Park. Benjamin and Frazier left a .45 and a .32, respectively, in the trunk of the car and Haggood left his .40 in his car when they initially went into Piggy Park. Following the incident between Benjamin and Dominique on the dance floor, however, *Benjamin* told Haggood that there had been an incident. Also, he pointed out two individuals that he thought Haggood needed to look out for because one person had a book bag and the other one was reaching inside the bag. Benjamin thought that one of them had a gun. **R. pp. 134-36; 139.**

Benjamin "was kind of agitated," and Haggood asked him what he wanted to do. *Benjamin* said that "he wasn't trying to get caught slipping," meaning that he wanted to get his gun. So, the three defendants went to the car and each man armed himself. Benjamin and Haggood stuck their weapons in their waistband, but Frazer put his .32 in his pocket. This was an hour and a half to two hours after the first got to the club and they went back inside once they were armed with their guns. **R. pp. 136-39.**

Mr. Haynes corroborated this, in part. He testified that when he went outside to speak to Benjamin, Haggood, Benjamin, and Frazier were coming in and appeared to have gone to their car. Moreover, Mr. Haynes spoke with the Benjamin and tried to persuade Benjamin to ignore the young, intoxicated "Killa," a/k/a Dominique. However, Benjamin's only response was, " 'I'm a killer.' " Consciously armed and prepared to kill, he and his co-defendants then returned to the club. **R. pp. 40-42; 56; 58-59.**

Haggood testified that he later saw Benjamin shooting the .45 caliber semi-automatic pistol that he had seen this defendant with "a few times" prior to this night. **R. p. 128.** Benjamin pulled out his .45, "outstretched [his] arm like downward ... from the waist" and began shooting in the direction of the car in front of Haggood's car (which was Shawn DeFreitas' car). Benjamin was at the passenger side corner when he began but continued moving as he shot. **R. pp. 145-47;**

164; 171-73. Shawn DeFreitas also testified that he saw "Benjamin shooting towards the opposite side of the club," after he had been wounded. **R. pp. 185-86.** Respondent submits that this testimony has him firing in the direction of where the victim was ultimately hit.

Further, the forensic evidence corroborated the testimony of Hampton, Haggood and DeFreitas as to Benjamin's location when the victim was murdered because there were five .45 caliber shell casings (State's Exhibits 42-46) and three .40 caliber shell casings (State's Exhibits 47-49) found in the grass and gravel in the right corner area of the club, which is consistent with witnesses' testimony of the location of the defendants' vehicle. Also, three, fired .45 caliber bullets (State's Exhibits 57-59) were found approximately 7'-8' – or approximately a car length, in front of where the victim had been. The .45 shell casings were all fired by the same weapon. Three fired bullets (State's Exhibits 57-59) were "consistent with being a .45 auto or a .45 gap caliber cartridges" and they were consistent with the type of bullets that would have come out of the five shell casings introduced as State's Exhibits 42-46. Two of those bullets were fired by the same weapon. **R. pp. 229-34; 253-54; 333-37.**[34]

Additionally, there was expert testimony that the gunshot residue testing from Haggood's car reflected that a gun was fired between six and ten feet from the front and back of the driver's side of the car, with either the doors open or the windows rolled down at the time. **R. pp. 306-10.** Again, this is consistent with Benjamin's location at the time that the victim was shot.

Several other pieces of circumstantial evidence likewise support the trial judge's denial of Benjamin's motion for a directed verdict on the murder charge. Dominique was only a few feet

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[34] What is colloquially called a bullet is actually a cartridge, consisting of four parts: a lead bullet, smokeless powder, a brass casing and a primer. *Pistol Cartridge Basics*, Ultimate Reloader http://ultimatereloader.com/reloading-101/pistol-cartridge-basics/. (Last visited July 18, 2014). When a semi-automatic pistol is fired, the pistol's hammer strikes the primer, which ignites the smokeless powder, which then propels the bullet out of the firearm's muzzle. The momentum causes the now-empty brass casing to be ejected from the side of the gun and a fresh cartridge moves into the chamber. *Id. See also* **R. pp. 319-21.**

from Mr. Saxon when he was shot in the head. While Mr. Saxon did not see who shot his friend, it was obviously not the person who shot into the air, Frazier. Also, the three, fired .45 caliber bullets were found near where Saxon's Cadillac was parked and near the victim. A reasonable inference from this evidence is that the person with the .45, Benjamin, killed Dominique.

Moreover, as the group fled the scene in Haggood's car, Frazier said that he had fired in the air and he asked his friends if either of them had to shoot. Benjamin's response was to the effect that he had not shot into the air because he was not going to waste bullets. **R. pp. 151-53.**

Further, the witnesses present when the shooting began testified that the scene was "chaotic," with people screaming, scattering, ducking and running for cover. **R. pp. 58; 96; 143; 164; 182; 193; 195; 201.** It remained that way for some time because Deputy Snead, the first responding officer, testified that the scene was still "kind of chaotic" when he arrived roughly thirty minutes later. **R. p. 19, lines 8-16.** However, no witness testified that he or she saw ducking, panicking, or running by Benjamin, Haggood or Frazier. This is hardly surprising, since their vehicle did not have any bullet holes in it; there were no bullet marks on the building in the area where there car was parked; and the bullet which came closest to them struck the rear of Pinckney's car.[35] **R. pp. 153-58; 241; 259-61; State's Exhibits 7-10.**

Likewise, there is the obvious evidence of Benjamin's flight from the scene, in an effort to elude capture. *See State v. Pagan*, 357 S.C. 132, 591 S.E.2d 646 (2003) (evidence of flight constitutes evidence of defendant's guilty knowledge and intent); *State v. Grant*, 275 S.C. 404, 407, 272 S.E.2d 169, 171 (1980) ("[A]ttempts to run away have always been regarded as some evidence of guilty knowledge and intent") (citation omitted); *State v. Crawford*, 362 S.C. 627,

[35] Respondent submits that a reasonable inference is that this bullet was fired after the victim had been mortally wounded in the head.

634-36, 608 S.E.2d 886, 890-91 (Ct. App. 2005).[36]

Respondent would note that the State's failure to introduce the weapon with which Bostick allegedly had beat the victim in the head was one of the reasons that the Court in *Bostick* relied upon for finding that the trial judge should have granted a directed verdict. *Bostick*, 392 S.C. at 141-42, 708 S.E.2d at 778. Here, however, the State's inability to locate the weapon that Benjamin had and fired on September 18, 2011, constituted additional circumstantial evidence of his guilt. The State was able to obtain the victim's .380 and the State obtained the weapons of both co-defendants. The only weapon that was secreted, destroyed, sold, or otherwise disposed of was Benjamin's .45, which the State theorized was the murder weapon. His act of disposing of the weapon after Haggood told him that law enforcement was looking for him, even though he had been previously seen carrying it "a few times," was circumstantial evidence of his guilt. *See State v. Southerland*, 316 S.C. 377, 383, 447 S.E.2d 862, 866 (1994) (evidence showing that defendant possessed a shotgun at the time of the murder, that the shotgun was the type used to kill victim, and that defendant disposed of the shotgun after the murder in exchange for cocaine was properly admitted because it established identity and a common scheme), *overruled on other grds.*, *State v. Chapman*, 317 S.C. 302, 454 S.E.2d 317 (1995) (requesting a *Batson v. Kentucky*, 476 U.S. 79 (1986), hearing in effect sets out *prima facie* case of discrimination, warranting *Batson* hearing); *Guevara v. State*, 152 S.W.3d 45, 50 (Tex.Crim.App. 2004) (defendant's attempt to conceal evidence is a circumstance of guilt).

[36] "This common law rule is based on ordinary human experience that echoes its often-quoted Biblical antecedent: 'The wicked flee where no man pursueth; but the righteous are bold as a lion.' Proverbs 28:1.' " *Ordway v. Com.*, 391 S.W.3d 762, 790 (Ky. 2013). *See also* 2 Wigmore, *Evidence* § 276 (Supp. 2007). Contrary to the evidence in *Odems*, where a witness offered a plausible alternative reason for Odems fleeing the scene of his arrest in the State's case-in-chief – *i.e.*, that he wished to avoid trouble because the driver told him that the driver did not have a license, see *Odems*, 395 S.C. at 585, 589-90, 720 S.E.2d at 49, 52 - there was no such plausible explanation here. Instead, viewing the evidence in the light most favorable to the State, the only *reasonable* inference is that Benjamin fled because he knew that he would otherwise be arrested for the crimes he and his co-defendant Haggood committed that morning.

Benjamin references the testimony of defense witness Antonio Gidron in support of the present argument. However, Gidron did not testify for the prosecution and his testimony did not supplement or augment the State's case. As such, it would be inappropriate to consider Gidron's testimony in connection with the trial judge's denial of Benjamin's directed verdict motion. *Accord State v. Hepburn*, 406 S.C. 416, 433-36, 753 S.E.2d 402, 411-13 (2013) (explaining that when the defendant's evidence "does not provide any gap-filling evidence for the government's case, then a reviewing court need not consider that testimony" on review of the denial of a directed verdict motion).[37] In light of the prosecution's evidence, Benjamin was not entitled to a directed verdict for murdering Dominique.

Benjamin likewise was not entitled to a directed verdict for the attempted murders of Shawn DeFreitas or James Hampton. While the State's theory at trial was that Benjamin, personally, shot DeFreitas, he could be convicted under principles of accomplice liability for either of these crimes (and unquestionably for the attempted murder of Hampton), a principle on which the trial judge charged Benjamin's jury. In *State v. Reid*, 408 S.C. 461, 472-73, 758 S.E.2d 904, 910 (2014), the Supreme Court recently explained that:

> The doctrine of accomplice liability arises from the theory that "the hand of one is the hand of all." 23 S.C. Jur. *Homicide* § 22.1 (2014). Under this theory, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose. *State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010). A person must personally commit the crime or be present at the scene of the crime and intentionally, or through a common design, aid, abet, or assist in the commission of that crime through some overt act to be guilty under a theory of accomplice liability. *State v. Langley*, 334 S.C. 643, 648–49, 515 S.E.2d 98, 101 (1999). Accordingly, proof of mere presence is insufficient, and the State must present evidence the participant knew of the principal's criminal conduct. *State v.*

[37] Additionally, Gidron's testimony was highly suspect and readily impeached by the State because he never went to law enforcement with his version about what occurred and he had admittedly been drinking since approximately 8:00 p.m. Yet, Gidron was able to "remember" every detail of the shooting when the shooting did not occur until after 3:00 a.m. R. pp. 379-93; 405; 425-27.

> *Leonard*, 292 S.C. 133, 137, 355 S.E.2d 270, 272 (1987). If "a person was 'present abetting while any act necessary to constitute the offense [was] being performed through another,' he could be charged as a principal—even 'though [that act was] not the whole thing necessary.' " *Rosemond v. United States*, —— U.S. ——, 134 S.Ct. 1240, 1246, 188 L.Ed.2d 248 (2014) (alteration in original) (quoting 1 J. Bishop, Commentaries on the Criminal Law § 649, p. 392 (7th ed. 1882)).

See also State v. Hill, 268 S.C. 390, 395-96, 234 S.E.2d 219, 221 (1977) ("presence at the scene of a crime by pre-arrangement to aid, encourage, or abet in the perpetration of the crime constitutes guilt as a principal"). "In order to establish the parties agreed to achieve an illegal purpose, thereby establishing presence by pre-arrangement, the State need not prove a formal expressed agreement, but rather can prove the same by circumstantial evidence and the conduct of the parties." *State v. Gibson*, 390 S.C. 347, 354, 701 S.E.2d 766, 770 (Ct.App. 2010).[38]

Initially, Respondent submits that Benjamin did not argue in the trial court that the prosecution "[f]ailed to prove Defendant Benjamin joined with another in carrying out a common plan or purpose" to commit murder and/or attempted murder. He likewise did not argue that the State "[f]ailed to prove Defendant Benjamin was present at the scene as a result of a prior arrangement to carry out a prior arranged plan or common scheme sufficient to find Defendant Benjamin guilty under an accomplice liability theory in the wounding of Hampton and Defreitas or the killing of Lawton." Rather, he argued that the timeline established by DeFreitas established that DeFreitas was shot before Frazier fired shots into the air and the

[38] "It is well-settled that a defendant may be convicted on a theory of accomplice liability pursuant to an indictment charging him only with the principal offense." *State v. Dickman*, 341 S.C. 293, 295, 534 S.E.2d 268, 269 (2000). *See also State v. Fley*, 2 Brev. 338, 345, 1809 WL 338, 6 (S.C.Const. App. 1809) ("It is very clear that *a person aiding and assisting another in committing a murder, is to be regarded as a principal*, and that he may be indicted and punished, although the principal who really gave the mortal blow, or was otherwise the immediate instrument by which the murder was effected, had not been taken. The immediate injury, from which death ensues, is considered as proceeding from all who are present and abetting the injury done, and the actual perpetrator is considered as the agent of his associates. His act is their act, as well as his own; and all are equally criminal. Fost. 351. *The distinction between principals in the first and second degree* has been exploded. It *is now a distinction without a difference*") (emphasis added).

State's other evidence was that Benjamin did not shoot until after Frazier fired into the air. He also argued that he would be unduly prejudiced by submission of an accomplice liability instruction for the attempted murder of Hampton because Haggood had admitted shooting Hampton. **R. p. 363, line 4 – p. 364, line 8.** Because Benjamin did not present these arguments to the trial judge and obtain a ruling on them from her, these arguments are not properly before this Court on direct appeal. *See State v. Bailey*, 298 S.C. 1, 5-6, 377 S.E.2d 581, 584 (1989) ("A party cannot argue one ground for a directed verdict in trial and then an alternative ground on appeal"). *See also State v. Byram*, 326 S.C. 107, 485 S.E.2d 360 (1997) (same); *State v. Watts*, 321 S.C. 158, 167, 467 S.E.2d 272, 278 (Ct.App. 1996) ("To be preserved for appellate review, an issue must be both presented to and passed upon by the trial court"); *State v. Vanderbilt*, 287 S.C. 597, 340 S.E.2d 543 (1986) ("Issues not properly preserved at trial may not be raised for the first time on appeal. To the extent that *State v. Griffin*, [129 S.C. 200, 124 S.E. 81 (1924)], may be inconsistent with this result it is overruled"). *See also State v. Sullivan*, 277 S.C. 35, 45, 282 S.E.2d 838, 844 (1981) ("Appellants did not make a contemporaneous objection to this testimony and have waived their right to assert any error on appeal"); *State v. Prioleau*, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001) (an objection should be addressed to the trial court in a sufficiently specific manner that brings attention to the exact error).

Alternatively, he cannot prevail for several reasons. First, as the Assistant Solicitor correctly argued both to the trial judge (**R. p. 360, line 17 – p. 361, line 5**) and before the jury in closing argument (**R. p. 402; 410-11; 416-17**), the State's evidence reasonably tended to prove that Benjamin shot Shawn DeFreitas. Mr. DeFreitas did not see who shot him. However, when he described how he walked away from the defendants' vehicle before being shot, he had his right side facing the defendants' vehicle.

DeFreitas testified that he had walked Frazier over to the driver's side of Haggood's car, in his efforts to avoid trouble erupting. His car was parked in front of that car. Benjamin initially walked up to the passenger side of Haggood's car. The bullet that hit DeFreitas entered the right hip and exited on the inner leg. **R. pp. 182-83.** The record contains the following exchange, in which the State established that DeFreitas' right side was facing Haggood's vehicle when he was shot:

> Q. Okay. Now, let me back you up now. So you were walking -- you are at the driver's side kind of that vehicle?
>
> A. That's right.
>
> Q. So to get back to your car you got to turn and walk this way?
>
> Let's kind of orient these here.
>
> Pretend the car is kind of going back this way, okay?
>
> A. Yes.
>
> Q. So the front of their car is where I am.
>
> A. All right.
>
> Q. Okay. You said that you were around on the driver's side of the vehicle with Kevin?
>
> A. Yes.
>
> Q. Okay. Then Mr. Benjamin had come up more near the front passenger and the passenger's side?
>
> A. Yes, that's correct.
>
> Q. Okay. And at that point in time you turned to go walk to your car to move it, is that correct?
>
> A. Yes, sir.
>
> Q. And that's when the gunshots go off?

A. Yes, sir.

Q. As you were walking to your car?

A. Yes, sir.

Q. Okay. Now, where do you get hit with that shot? In your body, where did you get shot?

A. In my side.

R. p. 183, line 21 – p. 184, line 22. He then demonstrated where he was shot in his right side. **R. p. 184, line 25 – p. 185, line 7.**

The State's other evidence was that the only other person firing a weapon from that area was Frazier, who was shooting into the air.[39] Dominique and his friends were at the wrong angle to have hit DeFreitas' right side because the testimony was that they were in the direction that Benjamin was shooting when the bullet struck DeFreitas, which rules them out, as well. Thus, because none of the bullets fired by Frazier could have struck DeFreitas, the only person who could have fired that bullet was Benjamin.

Further, DeFreitas' testimony that he saw Frazier firing in the air does not change this because it is quite possible that Frazier did not stop firing into the air after two or three shots. In fact, the evidence showed that only two fired shell casings were in the .32 when seized by the Sheriff's Office. However, as the defendants were fleeing the scene, Frazier told Haggood that he had thrown some casings out of the window. Thus, Defreitas' timeline of the events was not inconsistent with the State's other evidence.

Yet, even if the jury did not accept that Benjamin fired the shot that struck Defreitas in the right side, he was nevertheless culpable as an accomplice. Contrary to the position of

[39] Haggood did not fire until the momentary lull in the shooting and after Mr. Hampton had thrown the green post at the defendants' car.

Benjamin before this Court, "[i]n order to establish the parties agreed to achieve an illegal purpose, thereby establishing presence by pre-arrangement, the State need not prove a formal expressed agreement, but rather can prove the same by circumstantial evidence and the conduct of the parties." *Gibson*, 390 S.C. at 354, 701 S.E.2d at 770.

Here, the record is replete with circumstantial evidence and conduct by Benjamin and his co-defendants "the parties agreed to achieve an illegal purpose," *id.*:

- Haggood, Benjamin and Frazier all had weapons with them when they first arrived at Piggy Park, although they left them in Haggood's vehicle when they initially entered the nightclub;

- After *Benjamin*'s confrontation with Dominique, he was "agitated" and, while there was no further violence inside the club that night, tensions still ran high between those men for the rest of the morning;

- Benjamin eventually told Haggood that there had been an incident, and he pointed out two individuals that he thought Haggood needed to look out for because Benjamin thought that one of them had a gun;

- When Haggood asked Benjamin what he wanted to do, Benjamin said that "he wasn't trying to get caught slipping," meaning that he wanted to get his gun;

- Even though Benjamin was the only person with a beef with the victim, all three men then went to Haggood's car together and each man armed himself: Benjamin with his .45, Haggood with his .40, and Frazier with his .32;

- Once they were all three armed, all three men consciously returned to the club, as a group;

- A reasonable inference from Andrew Haynes' testimony is that both Haggood and Frazier were present and could have heard his conversation with Benjamin, before the three defendants re-entered the nightclub, in which Haynes implored Benjamin to ignore "Killa" (Dominique), and that they could have heard Benjamin reply, " 'No, I'm a killer;' "

- In spite of Haggood's testimony that he felt that the victim was the aggressor when the group went outside after the nightclub closed, the

shooting did not start when the victim "charged" his .380, causing a live bullet to eject from it;

- Rather, the shooting only began after Frazier began shooting into the air;
- Despite testimony that Frazier said before the shooting that all the defendants wanted to do was go home, his actions were inconsistent with his statement because he was waiving his weapon in the air and, when he was able to get into the defendants' vehicle, he did not do so; instead, he started firing his weapon into the air (*e.g.*, **R. pp. 180-82**);
- Unlike other patrons in the Piggy Park parking lot on the morning of September 18th, neither Benjamin nor his co-defendants were ducking, screaming or panicking once the shooting began; rather, all three were firing weapons;
- The group all fled the scene in Haggood's car, with Benjamin driving;
- Frazier discarded possibly incriminating shell casings, while Benjamin disposed of the .45, which he had previously carried "a few times;"
- Haggood admitted shooting towards the van and the forensic evidence supports the conclusion that he shot Hampton; and
- When Frazier said, in the car as they were fleeing the scene, that he had fired into the air and asked his co-defendants if they had shot, Benjamin admitted that he had not shot into the air because he did not want to waste bullets.

Notwithstanding Benjamin's contrary argument, a reasonable inference from this evidence is that neither Haggood nor Frazier would have armed himself that evening and neither man would have fired a weapon, but for the desire and intent of each co-defendant to assist Benjamin in an armed confrontation with Dominique Lawton. A fundamental problem with Benjamin's argument is that there was no evidence of self-defense and he has never asserted that he was entitled to a self-defense charge. Rather, this shooting was "mutual combat" between the defendants and Dominique. *See Jackson v State*, 355 S.C. 568, 571, 586 S.E.2d 562, 563 (2003) ("Mutual combat exists when there is 'mutual intent and willingness to fight.' *State v. Graham*,

260 S.C. 449, 450, 196 S.E.2d 495 (1973). Mutual intent is 'manifested by the acts and conduct of the parties and the circumstances attending and leading up to the combat.' *Id.* Mutual combat bars a claim of self-defense because it negates the element of 'not being at fault' *Id.*").

II. The trial judge properly denied Benjamin's renewed motion for a new trial based upon the alleged insufficiency of the evidence to support convictions for one count of murder and two counts of attempted murder because the direct and circumstantial evidence, viewed in the light most favorable to the State, reasonably tended to prove his guilt of these offenses, either individually or under a theory of accomplice liability.

On March 15, 2013, Benjamin filed a motion for a new trial based on the insufficiency of the evidence (**R. p. 11**) and a motion to reconsider his sentence. **R. pp. 12-13.** The trial judge heard his motions on June 20, 2013. Both Benjamin and counsel were present at the hearing. Mr. Sorenson again represented the State.[40] The trial judge denied his motions in separate Orders filed on July 9, 2013. **R. pp. 4-7.** Respondent submits that her ruling must be affirmed because she did not abuse her discretion by denying his motion for a new trial.

"In a criminal case, the only way to contest the sufficiency of the evidence post-trial is to move for a new trial." *State v. Follin*, 352 S.C. 235, 258, 573 S.E.2d 812, 824 (Ct.App.2002), cert. denied (May 30, 2003); *State v. Miller*, 287 S.C. 280, 282, 337 S.E.2d 883, 884 (1985). In considering a motion for a new trial, the trial judge is only concerned with the existence of evidence, she is not concerned with the weight of that evidence. *State v. Smith*, 363 S.C. 111, 609 S.E.2d 528 (Ct.App. 2005); *State v. Pauling*, 264S.C. 275, 214 S.E.2d 326 (1975). "A trial judge has the discretion to grant or deny a motion for a new trial, and [her] decision will not be reversed absent a clear abuse of discretion." *State v. Johnson*, 376 S.C. 8, 11, 654 S.E.2d 835, 836 (2007). For the reasons argued in **Argument I**, Respondent submits that the trial judge did

[40] A copy of that transcript has not been included in the record.

not abuse her discretion in denying Benjamin's motion for a new trial.

CONCLUSION

For the above-stated reasons, Respondent respectfully submits that the judgment of conviction must be affirmed.

Respectfully submitted,

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October 13, 2014.

By: 
WILLIAM EDGAR SALTER, III

ATTORNEY FOR RESPONDENT

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Calhoun County
Honorable Diane Schafer Goodstein, Circuit Court Judge
Appellate Case No. 2013-001496

THE STATE,

Respondent,

vs.

DAVID J. BENJAMIN,

Appellant.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and does not include, or partially redacts, personal data identifiers, Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings, 375 S.C. 56, 650 S.E.2d 462 (2007)(requiring redaction of social security numbers, names of minor children, financial account numbers, and home addresses).

This 13th day of October, 2014.

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

ATTORNEY FOR RESPONDENT

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Calhoun County
Honorable Diane Schafer Goodstein, Circuit Court Judge
Appellate Case No. 2013-001496

THE STATE,

Respondent,

vs.

DAVID J. BENJAMIN,

Appellant.

CERTIFICATE OF SERVICE

I, William Edgar Salter, III, counsel for the Respondent, certify that I have served the within Final Brief of Respondent and Certificate of Compliance on Appellant by depositing three (3) copies of the same via U.S. mail, first class, postage prepaid to his attorneys of record,

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I further certify that all parties required by Rule to be served have been served.

This 13th day of October, 2014.

WILLIAM EDGAR SALTER, III
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ATTORNEY FOR RESPONDENT

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

David Jamar Benjamin, Appellant.

Appellate Case No. 2013-001496

Appeal From Calhoun County
Diane Schafer Goodstein, Circuit Court Judge

Unpublished Opinion No. 2015-UP-554
Heard November 3, 2015 – Filed December 16, 2015

AFFIRMED

Wendy Raina Johnson Keefer, of Keefer & Keefer, LLC, and Joshua Preston Stokes, of McCoy & Stokes, LLC, both of Charleston, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Donald J. Zelenka, and Senior Assistant Attorney General W. Edgar Salter, III, of Columbia; and Solicitor David Michael Pascoe, Jr., of Orangeburg, all for Respondent.

PER CURIAM: David Jamar Benjamin appeals his convictions for one count of murder[1] and two counts of attempted murder,[2] arguing the circuit court (1) erred in denying his motion for a directed verdict and (2) abused its discretion in denying his motion for a new trial. We affirm.

1. As to whether the circuit court erred in denying Benjamin's motion for a directed verdict, we find the court properly submitted the case to the jury because the State met its burden of producing any direct or substantial circumstantial evidence that reasonably tended to prove Benjamin was guilty of the murder of Dominique Lawton and the attempted murders of James Hampton and Shawn DeFreitas. *See State v. Larmand*, Op. No. 27562 (S.C. Sup. Ct. filed Aug. 12, 2015) (Shearouse Adv. Sh. No. 31 at 35) ("A defendant is only entitled to a directed verdict if the State fails to produce any evidence of the offense charged." (citing *State v. Walker*, 349 S.C. 49, 53, 562 S.E.2d 313, 315 (2002))); *State v. Butler*, 407 S.C. 376, 381, 755 S.E.2d 457, 460 (2014) ("When ruling on a motion for a directed verdict, the [circuit court] is concerned with the existence of evidence, not its weight." (quoting *State v. Wiggins*, 330 S.C. 538, 544–45, 500 S.E.2d 489, 492–93 (1998))); *id.* ("On appeal from the denial of a directed verdict, [an appellate court] views the evidence and all reasonable inferences in the light most favorable to the State."); *State v. Bailey*, 368 S.C. 39, 45, 626 S.E.2d 898, 901 (Ct. App. 2006) (providing if "any direct evidence or any substantial circumstantial evidence reasonably tend[s] to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury" (quoting *State v. Lollis*, 343 S.C. 580, 584, 541 S.E.2d 254, 256 (2001))); *see also State v. Reid*, 408 S.C. 461, 472, 758 S.E.2d 904, 910 (2014) ("The doctrine of accomplice liability arises from the theory that 'the hand of one is the hand of all.'"), *cert. denied*, 135 S. Ct. 975 (2015); *State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010) ("Under the 'hand of one is the hand of all' theory, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose."

---

[1] *See* S.C. Code Ann. § 16-3-10 (2003) ("'Murder' is the killing of any person with malice aforethought, either express or implied.").

[2] *See* S.C. Code Ann. § 16-3-29 (Supp. 2014) ("A person who, with intent to kill, attempts to kill another person with malice aforethought, either express or implied, commits the offense of attempted murder.").

(quoting *State v. Condrey*, 394 S.C. 184, 194, 562 S.E.2d 320, 324 (Ct. App. 2002))); *State v. Gibson*, 390 S.C. 347, 354, 701 S.E.2d 766, 770 (Ct. App. 2010) ("[T]o establish the parties agreed to achieve an illegal purpose, thereby establishing presence by pre-arrangement, the State need not prove a formal expressed arrangement, but rather can prove the same by circumstantial evidence and the conduct of the parties."); *Reid*, 408 S.C. at 473, 758 S.E.2d at 910 (asserting if one is present and abetting while any act necessary to constitute the offense is performed through another, then that person may be charged as the principal even when the act is "not the whole thing necessary" (emphasis omitted)).

2. As to whether the circuit court erred in denying Benjamin's motion for a new trial, we find the court did not abuse its discretion because competent evidence supported the jury's verdict on the murder and attempted murder charges in this case. *See State v. Smith*, 316 S.C. 53, 55, 447 S.E.2d 175, 176 (1993) ("It is well settled that the grant or refusal of a new trial is within the discretion of the [circuit court] and will not be disturbed on appeal absent a clear abuse of that discretion."); *State v. Garrett*, 350 S.C. 613, 619, 567 S.E.2d 523, 526 (Ct. App. 2002) ("An abuse of discretion occurs when [the circuit] court's decision is unsupported by the evidence or controlled by an error of law." (quoting *State v. Hughes*, 346 S.C. 339, 342, 552 S.E.2d 35, 36 (Ct. App. 2001))); *id.* ("[I]f competent evidence supports the jury's verdict, the [circuit court] may not substitute [its] judgment for that of the jury and overturn that verdict." (citing *State v. Miller*, 287 S.C. 280, 283, 337 S.E.2d 883, 885 (1985))).

AFFIRMED.

HUFF, WILLIAMS, and THOMAS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CALHOUN COUNTY
Diane Schafer Goodstein, Circuit Court Judge

RECEIVED
DEC 29 2015
SC Court of Appeals

Case No. 2013-001496

The State of South Carolina, ... Respondent,

v.

David Jamar Benjamin, ... Appellant/Petitioner.

APPELLANT/PETITIONER'S PETITION FOR REHEARING

Appellant/Petitioner, David Jamar Benjamin (hereinafter "Benjamin") respectfully requests this Honorable Court rehear and reconsider its decision, filed December 16, 2015, in the above-captioned appeal.

On appeal, Benjamin raised two primary issues: (1) whether the circuit court erred in denying Benjamin's motion for directed verdict, particularly where Benjamin's liability for the charges was based on accomplice liability rather than his own actions; and (2) whether the circuit court erred in granting Benjamin a new trial following the jury's verdict. The Court's December 16 *per curiam* opinion correctly the states the law on these two issues but failed to identify what evidence was presented by the State at trial to support the

jury verdict in this case. Without some description of the evidence the Court deemed sufficient it is difficult to understand the basis for the Court's decision here.

Indeed, the State's own witnesses admitted they did not know who shot the victim. (See. R. p. 362, lines 14-15.) And, indeed, the testimony was relatively consistent that no one present at the time of the crime saw Benjamin aim at or shoot at the deceased victim. Similarly, the State's witnesses also conceded that Benjamin did not fire at the two wounded victims. This case boils down to a shootout at a nightclub with no evidence Benjamin intended to or did fire shots at any of the victims for whose injuries and one death he now stands convicted.

Though the evidence pointed to the use of a .45 caliber weapon, no such weapon was found that was connected to Benjamin. The only thing the State demonstrated was that individuals with whom Benjamin socialized at the nightclub may have shot the victims. The Court of Appeals decision correctly recognizes that accomplice liability may exist under the theory that "the hand of one is the hand of all" but the opinion fails to explain a key element to this type of criminal liability.

In order for this accomplice theory to be a proper basis for criminal liability, there must be evidence that there was some agreement among the players to undertake the criminal activity. See State v. Mattison, 388 S.C. 469, 480, 697 S.E.2d 578, 584 (2010). Benjamin must have known of the other co-defendants' intended crimes. The State's case simply did not

present sufficient, if any, evidence – direct or circumstantial - on this key element.

Though the opinion cites to cases and summarizes this piece of accomplice liability, it does not identify how – in this case – such liability was properly imposed. As a matter of law, there simply was not sufficient evidence to convict Benjamin as an accomplice in these crimes.

Similarly, the Court of Appeals conclusion on the issue of whether Benjamin should have been granted a new trial (i.e., whether the trial court abused its discretion in denying the request for one), fails to explain on what evidence the jury could have based its guilty verdict where the only theory of liability available was that of accomplice liability and the State failed to provide evidence as to plan or agreement, however informal, by Benjamin.

For the foregoing reasons, Benjamin respectfully requests a rehearing in this matter to fully consider the lack of evidence presented by the State in this matter.

December 21, 2015

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CALHOUN COUNTY
Diane Schafer Goodstein, Circuit Court Judge

Case No. 2013-001496

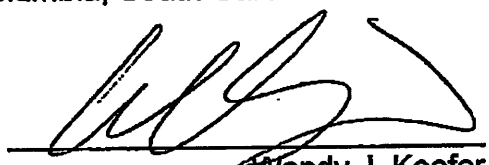
David Jamar Benjamin, ... Appellant,

v.

State of South Carolina,..... Respondent.

PROOF OF SERVICE

I certify that I have served that Appellant/Petitioner's Petition for Rehearing on Respondent, by depositing a copy of it in the United States Mail, postage prepaid, on December 21, 2015, addressed to attorneys of record, William E. Salter, III and Alan McCrory Wilson at the S.C. Attorney General's Office, Post Office Box 11549, Columbia, South Carolina 29211:



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SC Court of Appeals

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The South Carolina Court of Appeals

The State, Respondent,

v.

David Jamar Benjamin, Appellant.

Appellate Case No. 2013-001496

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Thomas E. Huff J.

J.

J.

Columbia, South Carolina

cc:
Alan McCrory Wilson, Esquire
Donald J. Zelenka, Esquire
W. Edgar Salter, III, Esquire
Wendy Raina Johnson Keefer, Esquire

FILED
January 20, 2016

John W. McIntosh, Esquire
David Michael Pascoe, Jr., Esquire
Joshua Preston Stokes, Esquire
The Honorable Diane Schafer Goodstein

The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
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May 27, 2016

The Honorable Kenneth Hasty
PO Box 709
St Matthews SC 29135-0709

REMITTITUR

Re: The State v. David J. Benjamin
Lower Court Case No. 2013GS0900051, 2013GS0900052, 2013GS0900053
Appellate Case No. 2013-001496

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

V. Claire Allen, Deputy
CLERK

Enclosure

cc: Alan McCrory Wilson, Esquire
Donald J. Zelenka, Esquire
W. Edgar Salter, III, Esquire
Wendy Raina Johnson Keefer, Esquire
John W. McIntosh, Esquire
David Michael Pascoe, Jr., Esquire
Joshua Preston Stokes, Esquire

FORM 5

STATE OF SOUTH CAROLINA)
)
COUNTY OF CALHOUN)

IN THE COURT OF COMMON PLEAS

2016-CP-09-00085

DAVID LAMAR BENJAMIN, #354583,
Full name and prison number (if any) of Applicant.

v.

State of South Carolina

APPLICATION FOR

POST-CONVICTION RELIEF

FILED
2016 MAR 20 P 2:02
CLERK OF COURT

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210

2. Name and location of Court which imposed sentence Calhoun County Court of General Sessions, 102 Courthouse Drive, St. Matthews, SC 29135

3. Name(s) of co-defendant(s) (if any) Joshua Haggood, Kevin Frazier

4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:

   (a) 2013-GS-09-051: Murder

   (b) 2013-GS-09-052: Attempted Murder

   (c) 2013-GS-09-053: Attempted Murder

ATTEST TRUE COPY
KENNETH HAGTY
CLERK OF COURT
CALHOUN COUNTY

5. The date upon which sentence was imposed and the terms of the sentence:

(a) March 7, 2013: 40 years

(b) March 7, 2013: 30 years (concurrent)

(c) March 7, 2013: 30 years (concurrent)

6. Check whether a finding of guilty was made:

(a) after a plea of guilty _____

(b) after a plea of not guilty X

(c) after a plea of nolo contendere _____

7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes, Appellate Case No.: 2013-001496

8. If you answered "yes" to (7), list:

(a) the name of each Court to which you appealed:

i. South Carolina Court of Appeals.

ii. _____

iii. _____

(b) the result in each such Court to which you appealed:

i. Convictions affirmed.

ii. Order denying petition for rehearing

iii. _____

(c) the date of each such result:

i. December 16, 2015

ii. January 20, 2016

iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. Unpub. Op. No.: 2015-UP-554

ii. _____

iii. _____

9. If you answered "no" to (7), state your reasons for not so appealing:

(a) _____

(b) _____

(c) _____

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) Ineffective assistance of trial counsel.

(b) Ineffective assistance of appellate counsel.

(c) _____

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) Failure to properly investigate.

(b) Failure to utilize evidence.

(c) Failure to raise all meritorious issues on appeal.

12. Prior to this application have you filed with respect to this conviction:

(a) any petition in a State Court under South Carolina Law? No.

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No.

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No.

(d) any other petitions, motions or applications in this or any other Court? No.

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. _____

ii. _____

iii. _____

iv. _____

(b) the name and location of the Court in which each was filed:

i. _____

ii. _____

iii. _____

iv. _____

(c) the disposition thereof:

i. _____

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No.

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. _____

ii. _____

iii. _____

(b) the proceedings in which each ground was raised:

i. _____

ii. _____

iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) PCR is the proper forum.

(b) _____

(c) _____

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? _____

(b) your trial, if any? Yes.

(c) your sentencing? Yes.

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes.

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? _____

18. If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:

i. Nicholas Gray Thomas, 201 King Street, 2nd Floor, Charleston, SC 29401

ii. Wendy Keefer, 1643 B Savannah Highway, Suite 226, Charleston, SC 29407

iii. James Lee Goldsmith, Jr., P.O. Box 92, Zirconia, NC 28790

iv. Robert L. Sirianni, Jr., 201 N. New York Ave, Suite 200, Winter Park, FL

(b) the proceedings at which each such attorney represented you:

i. Trial, sentencing, and posttrial motions

ii. Direct appeal

iii. Direct appeal

iv. Direct appeal

19. State clearly the relief you seek in filing this application:

A new trial.

20. Are you now under sentence from any other court that you have not challenged?

No.

STATE OF SOUTH CAROLINA)
)
County of Calhoun)

VERIFICATION

I, David Lamar Benjamin, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

X David Benjamin

SWORN to and subscribed before me this 7 day of April, 2016.

Jennifer McElhaney (L.S.)
Notary Public

My Commission Expires: 6/10/2018

APPLICATION TO PROCEED WITHOUT PAYMENT OF COSTS AND AFFIDAVIT IN SUPPORT THEREOF

I, David Lamar Benjamin, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

(1) I am the applicant in this action and I believe I am entitled to redress.

(2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

X David Benjamin
Applicant

SWORN or affirmed to and subscribed before me this 7 day of April, 2016.

Jennifer McKinney
Notary Public

My Commission Expires: 6/10/2018

ATTEST TRUE COPY
KENNETH HASTY
CLERK OF COURT
CALHOUN COUNTY

Revised 3/2003

STATE OF SOUTH CAROLINA COUNTY OF CALHOUN David Benjamin, #354583, Applicant, v. State of South Carolina, Respondent.	IN THE COURT OF COMMON PLEAS FIRST JUDICIAL CIRCUIT 2016-CP-09-0085 **RETURN AND MOTION FOR MORE DEFINITE STATEMENT**

Respondent, making its Return to the Application for Post-Conviction Relief (PCR) filed on April 20, 2016, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Calhoun County. Applicant was indicted by the February 2013 term of the Grand Jury for Calhoun County for one of Murder (2013-GS-09-0051) and two of Attempted Murder (2013-GS-09-0052, -0053). Applicant was represented by Nicholas Gray Thomas, Esq. at trial. Applicant was found guilty of all charges and was sentenced on March 7, 2013, by the Honorable Diane S. Goodstein to forty years imprisonment for Murder, thirty years imprisonment for Attempted Murder, and thirty years imprisonment for the other count of Attempted Murder, all to be served concurrently.

Applicant filed a timely notice of appeal. An appeal was perfected by Wendy Keefer, Esquire. Throughout the appeal process, Applicant was also represented by James Lee Goldsmith, Jr., Esq. and Robert L. Sirianni, Jr., Esq. The South Carolina Court of Appeals affirmed Applicant's conviction in an opinion filed December 16, 2015. State v. Benjamin, Op. No. 2015-UP-554 (S.C. Ct. App. 2015). On December 21, 2015, Applicant petitioned for a

rehearing. The Court denied the petition in an order filed January 20, 2016. The Remittitur was returned on May 27, 2016.

II.

In his Application, Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Trial Counsel
   a. "Failure to properly investigate
   b. "Failure to utilize evidence."

2. Ineffective Assistance of Appellate Counsel
   a. "Failure to raise all meritorious issues on appeal."

Attached herewith and incorporated herein by reference are the records of the Calhoun County Clerk of Court regarding the subject convictions, Applicant's appellate records, the trial transcript, and Applicant's records for the Department of Corrections. Respondent reserves the right to amend its return upon the receipt of other relevant records.

III.

Applicant claims ineffective assistance of trial counsel in his application. Respondent contends Applicant's counsel rendered adequate assistance and provided representation within the range of competence required by attorneys in criminal cases. See Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

In a post-conviction relief proceeding, Applicant bears the burden of proving the allegations in their application. Id. Where ineffective assistance of counsel is alleged as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result."

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 80 L.Ed.2d 674. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, (citing Strickland, 80 L.E.2d 674). Second, counsel's deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

Respondent submits that Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). "However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523 (1990). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

The Applicant must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency. Thrift, at 537; Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005); Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003). When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged, ignored issues are clearly stronger than those actually raised on appeal. Id.

The Respondent contends that the Applicant's appellate attorney rendered effective assistance of counsel. However, this ground for relief may raise factual issues that are not conclusively refuted by the record. The Respondent requests an evidentiary hearing on this allegation.

V.

Respondent moves pursuant to Rule 12(e), SCRCP, to require Applicant to provide a more definite statement of the allegation of "Ineffective Assistance of Trial Counsel" and "Ineffective Assistance of Appellate Counsel" enumerated in his original application for post-conviction relief. The Uniform Post-Conviction Procedure Act requires applicants to "specifically set forth the grounds upon which the application is based." S.C. Code Ann. § 17-27-50 (1985). Furthermore, Rule 8(a), SCRCP, requires all civil pleadings include "a short and plain statement of the facts showing that the pleader is entitled to relief."

Respondent submits Applicant's allegations are so vague and ambiguous that Respondent cannot be reasonably required to frame a responsive return. Therefore, Respondent moves to require Applicant to file an amended application well in advance of the hearing scheduled in this matter.

VI.

Applicant must specify any claims he intends to raise at the PCR trial. Any claims not *specifically* laid out in this PCR application or in amendments will be opposed by the State at an evidentiary hearing. S.C. Code § 17-27-10 et seq; SCRCP 71.1. All claims should be made well in advance of the PCR hearing. If Applicant has an attorney appointed, the attorney, and not the inmate, is the only one authorized to file amendments. SCRCP Rule 11. Filings by inmates will not be considered at the PCR hearing.

VII.

Each and every allegation contained within the application not either expressly admitted, qualified, or explained is hereby denied.

VIII.

WHEREFORE, having made its Return, Respondent requests that a hearing be held on the claims of ineffective assistance of counsel.

Respectfully submitted,

ALAN WILSON
Attorney General

ROBERT BOLCHOZ
Chief Deputy Attorney General

JOHANNA C. VALENZUELA
Senior Assistant Deputy Attorney General

RUSTON W. NEELY
Assistant Attorney General
SC Bar #100192

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

By: _____
ATTORNEYS FOR RESPONDENT

Jan 18, 2017

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CALHOUN	)	
	)	
	)	2016-CP-09-0085
DAVID BENJAMIN, #354583,	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	
	)	

1. I am an employee of the Respondent in the above-captioned action.

2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.

3. I have this day served a copy of the **Return and Motion for More Definite Statement** on the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Tricia Blanchette, Esquire
PO Box 12725
Columbia, SC 29211

DATED this 18th day of January, 2017.

Brianna Arnone, Legal Assistant
For Respondent

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF CALHOUN)
FILED)
David Lamar Benjamin, #354583,) CASE NO.
☒ Plaintiff) 2016-CP-09-00085
2017 APR 12 P 12:21)
v.) MOTION AND ORDER INFORMATION
) FORM AND COVER SHEET
State Of South Carolina)
☐ Defendant.)

Plaintiff's Attorney:	Defendant's Attorney:
Tricia A. Blanchette, Bar No. 74904 Address: PO Box 2147 Leesville, SC 29070 phone: 803-908-3266 fax: e-mail: blanchettelaw@gmail.com other:	Ruston Neely, Bar No. Address: PO Box 11549 Columbia, SC 29211 phone: 803-734-3737 fax: 803-734-4113 e-mail: other:

☐ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☒ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion:
Estimated Time Needed: Court Reporter Needed: ☐ YES / ☐ NO

SECTION II: Motion/Order Type

☐ Written motion attached
☒ Form Motion/Order
I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☒Plaintiff / ☐Defendant — April 10, 2017 Date submitted

SECTION III: Motion Fee

☐ PAID – AMOUNT:
☒ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☒ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

_____
JUDGE

CODE: _____ Date: _____

CLERK'S VERIFICATION

Date Filed:

Collected by: _____

☐ MOTION FEE COLLECTED: _____
☐ CONTESTED – AMOUNT DUE: _____

SCCA/233 (11-03)

STATE OF SOUTH CAROLINA COUNTY OF CALHOUN	)	IN THE COURT OF COMMON PLEAS DOCKET NO.: 2016-CP-09-00085
DAVID LAMAR BENJAMIN, Applicant, v.	)	ORDER AUTHORIZING DISCOVERY
STATE OF SOUTH CAROLINA, Respondent,	)	

FILED
2017 APR 12 P 12:21
JEANNETTE HASTY
CLERK OF COURT
CALHOUN COUNTY
ST. MATTHEWS, SC

This matter comes before the Court by way of an Application for Post Conviction Relief filed on April 20, 2016. The State filed a Return on or about January 18, 2017. On February 13, 2017, Applicant, through counsel, filed a Motion for Discovery, requesting the opportunity to issue subpoenas to the appropriate people, offices or agencies for the production of case files/materials pursuant to S.C. Code Ann. §17-27-150(a) (2008), limited to those files/materials that were subject to discovery during the underlying criminal proceeding.

On February 27, 2017, a motion hearing was conducted in front of the Honorable Robert E. Hood at the Dorchester County Courthouse. Applicant was present and represented by Tricia A. Blanchette, Esquire. Respondent was represented by Ruston W. Neely, Assistant Attorney General.

By way of the written motion and at the hearing, counsel explained that she had consulted with R. Robert Tressel of Forensic Investigative Services to provide expert services in Applicant's case. Counsel further explained that the discovery requests were being made to ensure that she, along with a private investigator and potential expert(s), had the case materials necessary to properly prepare Applicant's case for an evidentiary hearing. Counsel informed the Court that discovery was not being requested as a fishing expedition, but it was only being submitted to the Court due to the importance of the

requested materials in Applicant obtaining "one full bite of the apple." In response, the State did not object to Applicant's request.

To ensure that Applicant has the case materials needed to properly prepare his case for an evidentiary hearing, this Court finds that that Applicant, through counsel, shall be allowed to issue subpoenas to the following people, offices or agencies for the production of the following case files/materials pursuant to S.C. Code Ann. § 17-27-150(a) (2008) limited to those files/materials that were subject to discovery during the underlying criminal proceeding:

1. A complete copy of the State Law Enforcement Agency (SLED) file.

2. A copy of Applicant's file maintained by the Calhoun County Solicitor's Office, and if not contained therein a copy of the Calhoun County Sheriff's Department file.

3. A complete copy of the trial and/or sentencing hearing exhibits maintained by the Calhoun County Clerk of Court.

4. The opportunity for Applicant's counsel, private investigator and potential experts to review the evidence maintained at the Calhoun County Clerk of Court's Office, Calhoun County Sheriff's Department and SLED (if needed).

If copies cannot be made of items in the file, this Court grants the opportunity for counsel for both parties, a private investigator and/or expert(s) to review such items in person. This Court finds that if a person, office or agency does not have a file to provide, Applicant's counsel must be provided with a written response and explanation for the absence of such file. Applicant's counsel is to provide the Office of Attorney General with copies of all discovery received pursuant to this Order.

IT IS THEREFORE ORDERED:

1. That Applicant's counsel is permitted to serve a subpoena and/or submit a request, along with a copy of this Order, upon the above listed people, offices or agencies for the above listed items.

2. That any party in receipt of a subpoena pursuant to this Order may file a timely objection with the Chief Administrative Judge for the First Judicial Circuit.

AND, IT IS SO ORDERED.

RE Hood

Honorable Robert E. Hood
Presiding Judge
First Judicial Circuit

Columbia, SC

3/31, 2017

STATE OF SOUTH CAROLINA COUNTY OF CALHOUN	IN THE COURT OF COMMON PLEAS FIRST JUDICIAL CIRCUIT
David Lamar Benjamin, Applicant, v. State of South Carolina, Respondent.	2016-CP-09-00085 **CERTIFICATE OF SERVICE**

I, Tricia A. Blanchette, Attorney for Applicant, hereby certify that I placed in the United States Mail this 10th day of April 2017, a copy of an Order Authorizing Discovery to Ruston Neely of the Attorney General's Office, at:

Office of the Attorney General
Att: Ruston Neely, Ast. AG
P.O. Box 11549
Columbia, SC 29211-1549

Tricia A. Blanchette
PO Box 2147
Leesville, SC 29070
(803) 908-3266

April 10, 2017

FILED
2017 APR 12 P 12:21
KENNETH HASTY
CLERK OF COURT
CALHOUN COUNTY
ST. MATTHEWS, SC

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF CALHOUN)

FILED
2018 JUN 18 A 10:25
KENNETH HASTY
CLERK OF COURT
CALHOUN COUNTY
ST. MATTHEWS, SC

David Lamar Benjamin, #354583,) CASE NO.
☒ Plaintiff) 2016-CP-09-00085

v.) MOTION AND ORDER INFORMATION FORM AND COVER SHEET

State Of South Carolina)
☐ Defendant.

Plaintiff's Attorney:	Defendant's Attorney:
Tricia A. Blanchette, Bar No. 74904	Christian Saville, Bar No.
Address:	Address:
PO Box 2147	PO Box 11549
Leesville, SC 29070	Columbia, SC 29211
phone: 803-908-3266 fax:	phone: 803-734-3737 fax: 803-734-4113
e-mail: blanchettelaw@gmail.com other:	e-mail: other:

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Amendment to Application for Post Conviction Relief
Estimated Time Needed:Full Day Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

☐ Written motion attached
☒ Form Motion/Order
I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☒Plaintiff / ☐Defendant — June 15, 2018 Date submitted

SECTION III: Motion Fee

☐ PAID – AMOUNT:
☒ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☒ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

_____
JUDGE

CODE: _____ Date: _____

CLERK'S VERIFICATION

Date Filed:

Collected by: _____

☐ MOTION FEE COLLECTED: _____
☐ CONTESTED – AMOUNT DUE: _____

SCCA/233 (11-03)

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF CALHOUN) DOCKET NO.: 2016-CP-09-00085

FILED
2017 JUN 19 A 10:25
KENNETH HASTY
CLERK OF COURT
CALHOUN COUNTY
ST. MATTHEWS, SC

DAVID LAMAR BENJAMIN,
Applicant,
v.
STATE OF SOUTH CAROLINA,
Respondent,

AMENDMENT TO APPLICATION FOR POST CONVICTION RELIEF

This matter comes before the Court by way of an Application for Post Conviction Relief filed on April 20, 2016. The State filed a Return on or about January 18, 2017. In general, Applicant would allege that his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, as well as pursuant to Article I, Section 14 of the South Carolina Constitution, were violated prior to and during his trial. Applicant would further amend his Application for Post-Conviction Relief to contain the following specific allegations of ineffective assistance of trial counsel:

1. Ineffective assistance of trial counsel for failure to fully and properly advise and advocate for Applicant prior to the rejection of the fifteen year plea offer. Transcript pp. 12-18.

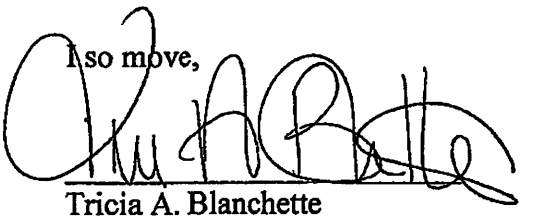
2. Ineffective assistance of trial counsel for failure to effectively and fully utilize the services of Kelly Fite or an expert in his or a similar capacity prior to and at trial.

3. Ineffective assistance of counsel for failure to utilize witnesses and effectively utilize witness (Gidron) called for the defense.

4. Ineffective assistance of counsel for failure to enter an objection or exception to the jury instruction on malice for lacking the general permissive inference instruction. Gibson v. State, 416 S.C. 260, 786 S.E.2d 121 (2016).

5. Pursuant to Rule 15(b), SCRCP, Applicant would move to amend to conform to the evidence and testimony presented at the evidentiary hearing.

I so move,



Tricia A. Blanchette
PO Box 2147
Leesville, SC 29070
Attorney for Applicant

June 15, 2018

STATE OF SOUTH CAROLINA)
COUNTY OF CALHOUN)

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

David Lamar Benjamin,)
Applicant,)

v.)

State of South Carolina,)
Respondent.)

2016-CP-09-00085

FILED
2018 JUN 18 A 10:25
KENNEDY HASTY
CLERK OF COURT
CALHOUN COUNTY
ST. MATTHEWS, SC

CERTIFICATE OF SERVICE

I, Tricia A. Blanchette, Attorney for Applicant, hereby certify that I placed in the United States Mail this 15th day of June 2018, a copy of an Amendment to Application for Post Conviction Relief to Christian Saville of the Attorney General's Office, at:

Office of the Attorney General
Att: Christian Saville, Ast. AG
P.O. Box 11549
Columbia, SC 29211-1549

Tricia A. Blanchette
PO Box 2147
Leesville, SC 29070
(803) 908-3266

June 15, 2018

State of South Carolina)	In the Court of Common Pleas
)	First Judicial Circuit
County of Calhoun)	2016-CP-09-0085
David Jamar Benjamin,)	
)	
Applicant,)	
)	
vs.)	Transcript of Record
)	
State of South Carolina,)	
)	
Respondent.)	
)	
)	

July 12, 2018
St. George, South Carolina

B E F O R E:

The Honorable Robin B. Stilwell, Judge

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

Tricia A. Blanchette, Esquire
Attorney for Applicant

Christian Saville, Esquire
Attorney for Respondent

Maryann S. Nevers, CVR-M-CM
Circuit Court Reporter

I N D E X

Proceedings 4

TESTIMONY - WITNESS

Antonio Gidron,

Direct Examination by Ms. Blanchette 9

Cross-Examination by Mr. Saville 32

Redirect Examination by Ms. Blanchette 43

Recross-Examination by Mr. Saville 47

Robert Tressel,

Direct Examination by Ms. Blanchette 50

Cross-Examination by Mr. Saville 86

Redirect Examination by Ms. Blanchette 99

Recross-Examination by Mr. Saville 101

Pete Skidmore,

Direct Examination by Ms. Blanchette 103

Cross-Examination by Mr. Saville 111

Redirect Examination by Ms. Blanchette 115

Recross-Examination by Mr. Saville 119

Nicholas Thomas, Esq.

Direct Examination by Ms. Blanchette 124

Cross-Examination by Mr. Saville 154

Redirect Examination by Ms. Blanchette 179

Recross-Examination by Mr. Saville 181

I N D E X

TESTIMONY - WITNESS

David Benjamin,

Direct Examination by Ms. Blanchette 185

Cross-Examination by Mr. Saville 196

Nicholas Thomas, Esq.,

Direct Examination by Mr. Saville. 198

Certificate Page. 210

E X H I B I T S

NO.	DESCRIPTION	I.D.	EVID.

No exhibits marked during proceeding.

TRANSCRIPT OF RECORD

(Whereupon, the proceeding was commenced at 10:10 a.m.)

THE COURT: All right. Mr. Saville?

MR. SAVILLE: Your Honor, the state would call the case of *David Lamar [sic] Benjamin v. the State of South Carolina*, Docket No. 2016-CP-09-00085.

Applicant was indicted by the February 2013 term of the grand jury for Calhoun County for one count of murder and two counts of attempted murder. He was represented by Mr. Nicholas Gray Thomas, Esq., at trial. Applicant was found guilty of all charges and was sentenced on March 7th, 2013, by the Honorable Diane S. Goodstein to 40 years' imprisonment for murder, 30 years for attempted murder, and 30 years on the other count for attempted murder, all to be served concurrently.

Applicant filed a notice of appeal. An appeal was perfected by Wendy Keefer, Esq. The South Carolina Court of Appeals affirmed the conviction on December 16th, 2015. Applicant petitioned for rehearing. The petition was denied by order filed January 20th, 2016, and the remittitur was returned on May 27th, 2016.

Applicant filed an application for postconviction relief on April 20th, 2016, and subsequently filed an amendment to his PCR application on June 15th, 2018. He is present here today and represented by Ms. Tricia

Blanchette, Esq. And I will turn it over to Ms. Blanchette. Thank you.

THE COURT: All right. Ms. Blanchette?

MS. BLANCHETTE: Thank you, Your Honor. May it please the Court?

THE COURT: Yes, ma'am.

MS. BLANCHETTE: Tricia Blanchette on behalf of David Benjamin.

THE COURT: Yes, ma'am.

MS. BLANCHETTE: As the state referenced, we did file an amended application in June of this year.

THE COURT: Uh-huh.

MS. BLANCHETTE: At this time, if Your Honor would like, I can briefly address those allegations before calling my first witness or I'm prepared to call my first witness.

THE COURT: You can go ahead and -- and give me the skinny, as it were.

MS. BLANCHETTE: I'll be happy to, Your Honor.

The first issue that we're raising is ineffective assistance of trial counsel for failure to fully and properly advise and advocate for the applicant prior to the rejection of the 15-year plea offer in nonlawyer terms or simpler terms. Essentially, we're alleging that his attorney was ineffective for making -- for failing to

ensure that he understood the "hand of one/hand of all" and the concept of an *Alford* plea before he decided to reject that 15-year plea offer.

The second issue that we'll be addressing is ineffective assistance of counsel for failure to effectively and fully utilize the services of Kelly Fite or an expert in his capacity at trial. Kelly Fite was called as a defense expert. Mr. Fite is now retired. So today we intend to call Bob Tressel to testify as a -- as an expert in the same capacity as Mr. Fite.

The third issue is ineffective assistance of counsel for failure to utilize witnesses and effectively utilize witnesses at trial. In the amendment I reference Gidron. Today we intend to call Antonio Gidron. He testified at the original trial. I hope, through his testimony, we'll show ways that he should've been further utilized and could've assisted in the defense at trial with his testimony. There's no other witnesses we intend to call under that allegation.

And then, finally, we allege ineffective assistance of counsel for failure to enter an objection or exception to the jury instruction on malice for lacking the general permissive-inference instruction, as is cited as deficient conduct in *Gibson v. State*. And I'll have a copy of that case for Your Honor today.

THE COURT: Okay. All right. Good enough.

Now, do you have a copy of your amended application?

MS. BLANCHETTE: Yes, Your Honor.

THE COURT: If you'll pass that up. And also, pass me the -- the case law that you just referenced as well ---

MS. BLANCHETTE: Yes, Your Honor.

THE COURT: --- please.

MS. BLANCHETTE: And I also -- in support, since I'm handing up the *Gibson* case ---

THE COURT: Yes, ma'am.

MS. BLANCHETTE: --- in support of the allegation regarding the expert, I have a copy of the recent case *Reeves v. State* for ---

THE COURT: Okay.

MS. BLANCHETTE: --- Your Honor as well. Would you like that at this time ---

THE COURT: Yes, ma'am.

MS. BLANCHETTE: --- as well?

THE COURT: Yes, ma'am, please. Thank you.

(Off the record briefly.)

THE COURT: All right. You can call your first witness.

MS. BLANCHETTE: Your Honor, I'd call Antonio Gidron to the stand.

THE COURT: Okay.

(Whereupon, the witness came forward.)

DEPUTY CLERK OF COURT: Please stand right there for me.

THE WITNESS: Oh, okay.

DEPUTY CLERK OF COURT: Please raise your right hand.

THE WITNESS: (Complied.)

DEPUTY CLERK OF COURT: State your full name for the record.

THE WITNESS: Antonio Jarmaine Gidron.

ANTONIO GIDRON, having been first duly sworn, testified as follows:

DEPUTY CLERK OF COURT: Thank you. Have a seat, please.

THE WITNESS: (Complied.)

DEPUTY CLERK OF COURT: Make sure you speak into the microphone. If you need ---

THE WITNESS: Okay.

DEPUTY CLERK OF COURT: --- to move it, you can move it.

THE WITNESS: Okay.

DIRECT EXAMINATION

BY MS. BLANCHETTE:

Q Could you please state your name clearly for the record.

A Antonio Jarmaine Gidron.

Q And, Mr. Gidron, what city and state do you currently reside in?

A St. Matthews, South Carolina.

Q Okay. And are you here today under subpoena?

A Yes, ma'am.

Q Okay. And do you recall being at a party that resulted in the incident we're here about today, on September 17th and 18th of 2011?

A Yes.

Q Okay. And do you recall testifying in the trial of Mr. David Benjamin as a defense witness in front of Judge Goodstein?

A Yes.

Q And have you had the opportunity to review your testimony from that trial?

A Yes.

Q I just want to briefly take you through that testimony. And please let me know if you affirm the testimony that you previously provided and if you have anything further to add on the points on which you testified.

A Okay.

Q Okay? And I apologize, Mr. Gidron. I kind of jumped ahead. Just talking about when you testified, how was it that you came to testify in the prior trial? Were you

under subpoena?

A Yeah. Yes, I was.

Q Okay. And who subpoenaed you for that trial? Was that the defense or the state? Do you remember?

A I don't even know. The guy just popped up on my doorstep. I -- so I don't know. I can't remember exactly who ---

Q Okay.

A --- it was.

Q And do you remember any interaction you had with either Mr. Benjamin's defense attorney, Mr. Nicholas Thomas, who's in the courtroom, or anybody acting on his behalf prior to trial?

A Yes.

Q Okay. What do you remember from that?

A I'm assuming that was the guy that came into the house. But I don't recall much of it.

Q Okay. Did they try to talk with you and go through your testimony before you took the stand, or did you just take the stand?

A I basically just took the stand.

Q Okay. So did you have time to prepare, before you took the stand, with defense counsel?

A No.

Q Okay. Did you ever go out to the scene with defense

counsel?

A I did. But like I said, I don't know who that guy was from.

Q Okay.

A I did go to the scene.

Q Okay. Now, I want to go through your testimony from the trial. And you have a copy of that there in front of you?

A Yes.

Q Okay. Let's go through that. To start, if you could look at page 557, is essentially where I have that your testimony started in the transcript.

A I got it.

Q And there, you explained that you knew both the victim in this case -- and you're actually very good friends with the victim's brother -- as well as the defendant since the sixth grade; is that correct?

A Yes.

Q You go on, on page 558 to explain about you being at that location that night and that it was your understanding the victim had arrived first; then you arrived; and Mr. Benjamin arrived sometime after that?

A Yes.

Q On pages 558 through 559, as reflected in the transcript, you recount how Mr. Benjamin approached you,

pointed out the victim, and explained that there had been an issue with the victim; and then you went and spoke to the victim; is that correct?

A Yes.

Q Okay. And you recall the victim being tipsy at that time. Is that still correct?

A Yeah. He was drinking.

Q Now, on 559 you also explain -- specifically, looking at line 20 -- that as things were winding down, you had a feeling something was going to happen. What did you mean by that?

A Well, the feeling is, from being down there prior to incident, that's -- I knew something was going to happen because, you know, everybody was antsy, still jumping around. But I seen them. They never even moved. They just stayed in one corner, stayed to theirself.

Q And later on in your testimony, you do testify that you never saw Mr. Benjamin with a gun. But I wanted to ask you today: Did you ever see Mr. Benjamin or the individuals they -- that he was with go to the vehicle to get a gun?

A No, ma'am.

MR. SAVILLE: Objection, Your Honor: Leading.

THE COURT: Okay. I overrule. I'll allow some leading.

MS. BLANCHETTE: Thank you, Your Honor.

Q And I'm sorry. What was your answer?

A No, I didn't.

Q Okay. Did Mr. Benjamin, when you were communicating with him about the victim, did he ever express to you any ill will or hatred about the victim?

A No. He just wanted to come down there, you know, because of our -- it was our classmate's party -- actually, my cousin, actually. And he just, like, be wanting to come -- come down and enjoy hisself. He didn't want no trouble or nothing. So that's when I said I will talk to him and find out what's going on.

Q Did he ever express to you that he intended to shoot the victim or harm the victim in any capacity that evening?

A No.

Q Now, going back to your testimony on 559 through 560, you recount how things were winding down and you had a concern that something was going to happen. And you used the language that, typically, people from out of town get tried when they're there -- on page 560. What does that mean, Mr. Gidron?

A Newcomers, they -- it's -- it's -- it's was, like, it was a threat towards the women or, you know, just, like, they got to show off, you know, to show how tough they are or what they got. It was -- it was a normal thing for down

there.

Q And you explain on 560 through 561 that you see guns at that club all the time; is that correct?

A Yes, ma'am.

Q All right. And then, you describe the scene outside, such as if there was a pep rally and these young guys were swarming. Can you explain that further for us?

A What I meant by pep rally, soon as we got outside, you know, everything just swarm in. And you couldn't tell who was doing what. But during -- during that, I seen one guy with a gun tucked in his -- in his underwear. And everybody was just yelling. And they was just trying to get to their car.

Q Now, Mr. Gidron, further reviewing your testimony, you testify on 561 that Mr. Frazier that was with Mr. Benjamin shot first. And did you see that shot?

A I seen it. And I heard it. But I saw that.

Q Okay. And then, after that you explain that nobody was letting them move; they were able to get to the vehicle and get it cranked, but weren't able to get out of the parking space. Is that correct?

A Yes, ma'am.

Q Okay. 562, specifically, if you could turn there?

A (Complied.)

Q You're describing the fact that there was tall grass,

beginning on line 10, and it was hard for them to find the second driveway that you were trying to direct them to. Could you explain that for us?

A Yes. The grass is -- it was grew up pretty high, maybe, you know, about knee level. And if you're not familiar with over there, you're probably going to run in -- it's a ditch right beside it.

So that's the only way I knew that they possibly could get out. Because they was, like, bumper to bumper to the wall. It was no way for them to even move. And then ---

Q Okay.

A --- you had a directly in front of them.

Q And you say you may have gone to the scene with somebody before the trial; you don't remember who it was. Did you actually take myself and Pete Skidmore and Bob Tressel to the scene recently?

A Yes ---

Q Okay.

A --- I did.

Q And I'm going to show you what was marked at trial as State's Exhibit 1. Do you recall seeing this at trial?

A Nope.

Q Okay. Were you given any visual aids or diagrams to assist you in explaining what you saw at the scene when you were testifying at trial?

A No, ma'am.

Q Okay. We're going to use this, because this is what was used at trial. But can you explain to the judge, when you're saying -- I mean, this isn't the greatest diagram, but this is what was used at trial -- where the vehicle would have been stuck at and where the driveway is that you were trying to get them to. If this diagram is not usable by you, please answer that.

A It's -- it's off by a lot. I can kind of like put really where it ---

Q Okay. Well, let's first explain to us what is wrong with this diagram, based upon your knowledge of the scene.

A What is this?

Q I don't know. But it -- based upon this scene, is there anything that looks familiar to -- based upon this diagram, is there anything that looks familiar to you?

A Well, you said the club. That's about it.

Q Okay.

A And it's, like, I guess, coming off of the road, it's not at that angle.

Q Okay.

A It's -- basically, everything is just basically parallel.

Q Okay. And this is the club here in this ---

A Uh-huh.

Q --- diagram?

Where would the car that Mr. Benjamin had cranked in trying to get out, where would that have been located in relation to the club?

A All right. This is the door.

Q Uh-huh.

A It was a brown van here back to the door. And their car was, like -- like, literally close to the building. You basically can get through there. But it was -- that was backed against the wall right here.

Q Okay.

A And it was a car here.

Q Okay. And let's kind of disregard whatever these drawings are here on the left. And just for the record, it appears that there's two lines and some type of rectangle with a triangle attached to it. But disregard that.

Where, if you're using this as the club and this is the road, which are clearly marked in marker here, where would be the main exit that they couldn't get to?

A The main exit, it'd be turning like this. And the road is straight. That main exit is, like -- this -- this where they were. It's -- it's, like, literally -- it's close enough, but it was right there. But they couldn't get out of there at all.

Q And where was the tall grass, then, in relation to the

club and the vehicle?

A This right here, I was -- I probably been right there be whatever this was setting.

Q Okay.

A But I'm -- I'm, like, right here. And the other driveway is just above this one.

Q So you're placing yourself at the location of the rectangle with a triangle attached ---

A Yeah. About

Q --- in pencil.

A About that far.

Q And the driveway, then, would've been to the other side of you, the far side of ---

A Yeah.

Q --- the club? Okay.

A Yeah.

Q But there was tall grass in between that driveway and where Mr. Benjamin's vehicle was?

A Yeah. And it was an old tree that had fell or something, like right here, so they couldn't go through that way. So they had to come directly straight out.

Q Okay. So being out there that night, was it something they could see or was it something you had to direct them that second exit?

A I had to basically direct them, because if they

would've tried on their own, they -- they didn't even know it was there. So I had to.

Q Okay.

A That's the only thing I could do ---

Q Mr. Gidron ---

A --- to get out.

Q --- if you had been presented with this state's exhibit at trial and asked to explain the scene, would you have testified that it was -- it did not appear accurate to you?

A Yeah. Because I ---

MR. SAVILLE: Objection: Calls for speculation.

THE COURT: All right. Overruled.

Q Go ahead, Mr. Gidron.

A I was -- I couldn't even use that. Because it was, like, it -- I'm still lost looking at it now. Only thing I recognize -- I'm assuming that's the club and the little green barn that's right there. It is another driveway. Yeah. Like I said, if you would've had it straight, it is another driveway here. But you had a light pole, tree, gas thing. They definitely couldn't use that one.

Q Okay. And since this was admitted as the diagram of the scene at trial, I'm going to continue to reference it. So I'll -- I'll keep it up here for you.

A Okay.

MS. BLANCHETTE: Your Honor, since we don't have a jury, is it okay if I just set it over here for ---

THE COURT: Sure.

MS. BLANCHETTE: --- the time ---

THE COURT: Yeah.

MS. BLANCHETTE: --- being?

THE COURT: Yeah. That's ---

MS. BLANCHETTE: Okay.

THE COURT: --- absolutely fine.

MS. BLANCHETTE: Thank you, Your Honor.

Q Now, turning to page 563, lines 4 through 6, you testify about seeing the victim get shot. And you describe it as "like he was on a hook." How far away from the victim were you, approximately, when he got shot?

A Like I said, anywhere in -- in between maybe -- I was -- it was probably under 10 to 12 feet. It was, like, right there.

Q Okay. And you were standing off to the side, trying to direct Mr. Benjamin's vehicle out when the victim got shot; is that correct?

A Yes, ma'am.

Q Okay. And you said it appeared like he was on a hook. What I want to ask you today is: Did you actually see him get shot and immediately fall back, or did he struggle a bit before he fell back?

A Can I, like, emphasize on that a little bit?

Q Yes. Please explain.

A Okay. When I first testified, you know, I was nervous or whatnot. What I meant by the hook -- because he was on the ground. But he ran -- I saw him get shot. When he got shot, it kicked him back and it -- he immediately fell. He wasn't up but so long.

But I -- I -- I knew he was hit, because I was looking directly at him. And it kicked him back. And he was on the ground, just like that, once everything had happened.

So after the shot, then I'm looking at everything else. And he was still fighting for his life. So that where -- that's where I got the -- got that from about the fish on a hook. That's where that came from.

Q And I hate to have you relive this over and over again. So my question is this, so I'm sorry that I'm having to get into these details.

A Yes.

Q He wasn't standing and struggling. When you were referring to him being on a hook, he had already hit the ground?

A Yes, ma'am.

Q Okay. And what did you see immediately after the impact of the shot?

A It -- it -- it threw him hard. It was, like -- like

that. And he -- he had a gun in his hand. He had a gun in his hand when he went back.

And, like, the -- after the first shot, I'm assuming the second one, it possibly could've came from him. But I know both shots came from that side. Because after the first one, that's when I -- you know, it shocked me. And then I -- now I'm here, where they were.

Q And let me just go back to the diagram, because we have to remember you and I have both been to the scene, but the judge hasn't had the opportunity to do that. So let's ---

A Okay.

Q --- try and help this make a little bit of sense, as far as what we're describing here. If this is the club, you're standing approximately here, you've already testified?

A Yes.

Q And where would you place the victim?

A I'm here. Let's see. If the club was there -- leave it just like ---

Q Okay.

A --- this. If I'm -- I'm here and that driveway is a little -- just a little farther over, I would say I -- I'm about right here. But he was, like, about that far, like, from me. And I was actually -- it scared me, because where

I saw he got hit, I was, like, right in the line of that.

Q When you were saying you were right in the line of that, did you have a perception as to where the shots were coming from when he got hit?

A Yeah. Because when the first one hit, I saw, like, up here. It was, like, the -- it was on the far -- I walked over him and look at him. And I was, like, "Man, I told you to chill."

And it was, like, on the far-left side of his head. So I was, like, man, like -- I'm assuming if I wouldn't have got down, I probably could've got hit. Because it was a lot of gunfire out there.

Q Based upon your present-sense impression that night, did it appear to you that the shots were coming from the club area were Mr. Benjamin's car were -- was at or from the road?

A Talking about when he got hit?

Q Yes, when he got hit.

A It was coming from the road. Because the way he -- he kicked back, he never even had a chance to even turn toward -- that car was, like, to his far -- to our far right. I ---

Q Okay.

A --- could see him. But he -- he never had a chance to even look at them, because he was too busy focusing, I

guess, trying to get the gun right.

Q And what vehicle did you see on the road where you saw gunfire coming from?

A Right behind that tree. It was a person behind that tree. And it was a blue -- a blue Malibu at the top of the road. And a little farther up on the side, it was a blue Honda. But I knew it was a -- a blue -- even though it was dark, I knew that was a blue Malibu. It wasn't -- it was only, like, one or two of those cars down there.

Q Okay. And based upon your perception that night, it appeared to you that that's where the gunfire was coming when the victim was struck?

A Yes, ma'am. The way it was, like, leaning -- after it came out of that car, but it was a person standing right there in, like, the car here -- the person was here in the -- right behind that tree. But that spark came from right there.

Q Okay. And at trial -- and I'm just kind of trying to go chronologically through your testimony so it makes the most sense. Let me give you the page number here. You testified a good bit about what you saw Mr. Benjamin doing. On page 563 you said you saw him start the -- start the car and never saw him stand back up?

A Yeah.

Q You then recount how you saw Mr. Haggood get out of

the vehicle and he was shooting towards someone that was around the van?

A Yes.

Q Can you show us where the van would've been in proximity to Mr. Benjamin's vehicle?

MS. BLANCHETTE: And I apologize we're not marking this. But I didn't want to mess up the original exhibit here.

A All right.

Q Oh. Sorry.

A Like I said, their car were here -- was here. That van was parked at a angle here. That person came from behind this tree. I -- I -- I glimpse him when he ran cross -- he went cross so quick. But I knew he went behind the van. And that's when Haggood was, like, dead on him, asking him to come out.

Q Okay. So Haggood then exited the vehicle Mr. Benjamin was in. And he kept his gun on the individual that had run from the tree behind the van.

A Yeah.

Q Is that correct?

A Yeah.

Q Okay. And so you saw Mr. Haggood shooting that night?

A Yes, ma'am.

Q And you testified to that; is that correct?

A Yes.

Q You also explain on page 564 -- specifically, looking at line 6 through 18 -- where you saw Mr. Benjamin and where you saw the victim when the victim was shot. And you said it was like on a big-screen TV that you'll never forget it. Is your memory still as clear today?

A Yeah. I can't forget that.

Q And you were adamant that you -- you testified at trial that you did not see Mr. Benjamin shooting when you saw the victim get shot. Do you stand by that testimony today?

A Yes, ma'am.

Q Now, turning -- also looking at page 564 ---

MS. BLANCHETTE: I apologize. If I could beg the Court indulgence one moment.

THE COURT: That's all right.

Q You testify on page 564 -- you're asked. And you saw flashes from the road as well, beginning on line 19. And you begin testifying about " . . . as cars were leaving, somebody was still shooting." But just to be clear today: You saw shots from the road before the people were leaving?

A Yes.

Q Okay. Then, turning over to page 566, beginning on line 5, you were asked about being there when law enforcement arrived?

A Yes, ma'am.

Q And do you recall -- you said: "You know, you had a few people, they were drunk, acting silly, you know. It was handled poorly, because one guy was screaming, 'My flip flop,' and the cop was just turning around and around in a circle."

Is there anything further you'd like to add today about how -- what you saw at the scene, as far as once law enforcement arrived?

A Well, that's pretty much it. Like I said, it was handled poorly. And it was, like, little kids running around.

They couldn't control it. You know, they be trying to, you know, I guess, lock down the scene. Whatever is there, it got to stay there.

But it was -- they had one little guy who was just, "Oh, my flip flap, my flip flap," laughing and giggling.

Q Did you see them detaining people or detaining vehicles?

A No.

Q Okay. And what essentially happened to the scene? Did everybody scatter?

A Everybody scatted. And could I say one more thing about this diagram?

Q Let me ask you this: Mr. Gidron, is there something

further you'd like to say about this diagram?

A Yes.

Q And what is that?

A All right.

Q I just can't get it right. Yeah.

A Yeah. Well, when Lawton fell, this car, like I said, it wasn't there at the -- this is B. But it was -- I want to -- it possibly could've been a gray Cadillac. But he was on me. He fell. He was on the side of that Cadillac. The Cadillac was right by these trees that's on the side of the road ---

Q Uh-huh.

A --- driveway. But it was a Cadillac there. He fell beside that car. That's the -- that -- I call -- when they pulled up and I was there, that car was still there. So unless they -- unless it took off, but it wasn't a car here. The only car that was there was -- it was this one.

Q Okay.

A So ---

Q And you were asked about speaking to law enforcement. If they would've wanted to speak with you that night, would you have been willing to speak with them?

A I would have.

Q Okay. And you never gave a statement in the case; is that correct?

A No.
Q But you did testify at trial?
A Yes.
Q Okay. Approximately how many cars do you remember seeing out there that night?
A It was a lot.
Q You can't remember a number?
A No.
Q Okay. How many people do you think were out there that night?
A It had to been -- it was well over a hundred, because it was, like -- you can barely walk, far as the inside.
Q And did you actually end up giving your phone to somebody that night?
A Yes, ma'am.
Q Okay. And why did you give your phone to somebody that night?
A My hands were shaking so bad, I couldn't even dial the number. So I just, like -- "Please, call 911 and direct them here." And I never got my phone back.
Q And, Mr. Gidron, I already mentioned this. You were willing and met with my myself and Bob Tressel and Pete Skidmore at the scene; is that correct?
A Yes.
Q Okay. And you were also willing to review any

evidence or go over anything that we asked you to review; is that correct?

A Yes.

Q And as of today, have you seen a diagram that would've properly reflected the -- the scene that night?

A Closer than that one, no.

Q Okay. So you haven't seen one that properly reflects what you remember being there that night?

A No.

Q Okay. And when you were at the scene with Mr. Tressel, did you actually point out everything to him that you recalled?

A Yes.

Q Okay. And you showed him those places. And do you recall seeing him take measurements?

A I'm confused. That's Mr. Tressel back there, right?

Q Mr. Tressel is the expert that was working with Mr. Benjamin and Mr. Skidmore. Do you remember pointing everything out to him where you were that night?

A Yeah. I pointed everything out ---

Q Okay.

A --- you know, very briefly. But far as measurements, no.

Q Okay. And how much time has passed since that night? Quite a bit of time, correct?

A Yeah.
Q Okay.
A I ---
Q But you remember vividly everything you saw as -- as the victim was being shot?
A Yes.
Q Okay.

MS. BLANCHETTE: Your Honor, if I could beg the Court's indulgence one moment?

THE COURT: Yes, ma'am.

(Whereupon, Ms. Blanchette and Mr. Skidmore conferred.)

MS. BLANCHETTE: Your Honor, I have no further questions of this witness.

THE COURT: Okay. Cross-examination, sir?

MR. SAVILLE: Yes, Your Honor.

CROSS-EXAMINATION

BY MR. SAVILLE:

Q Mr. Gidron, thank you for being here. I know it's not the most pleasant way to spend your afternoon.
A Uh-huh.
Q Now, Mr. Gidron, is it safe to say you're a changed man from where you were five years ago?
A Yeah.
Q Okay. Now, how old were you in March 2013 at the time

of this trial?

A About 27. I can't put an exact year on it.

Q Okay. Now, as you testified at trial, you got to the -- the Piggy Park around 8 p.m. that night?

A I didn't put an exact time on it. But I'm -- it was kind of late.

Q Okay. About how long did you stay there? Do you recall?

A I stayed till the -- still the -- until it closed.

Q Okay. Stayed until it closed?

A (No audible response.)

Q And was there a -- was there a celebration going on at the Piggy Park that night?

A Yeah. A birthday party.

Q Okay. And was -- was there free alcohol being served at the birthday party?

A Yeah.

Q Okay. Now, you do seem to have -- I -- I appreciate you walking through everything on the -- on the diagram there. Now, do you remember at trial saying that you were trying to forget that night?

A Yeah.

Q Okay. And you -- you testified to Ms. Blanchette just a few minutes ago that everybody was acting kind of antsy in the Piggy Park.

A Well, I was explaining as far as the outside after we went out -- you know, left the inside of the club.

Q Okay.

A And what I meant by antsy, you know, riley, macho-acting -- you know, not them but the others -- the locals. Put it that way.

Q I hear you. I hear you.

Now, you testified a few minutes ago that the victim in this case, Mr. Lawton, he had a gun when he was shot?

A Yes.

Q Okay. It begs the question: Why didn't you testify to that in the trial?

A I may have thought I did. But I -- I'm pretty -- I mentioned it before. So why it wasn't at trial or if I wasn't asked the question, I don't know.

Q Okay. You saw fit to mention that he had a gun in his waistband, but you didn't see fit to mention that he had one in his hand when he got shot?

A Say again?

Q So you saw fit to mention at trial that he had a gun in his waistband, but you didn't see fit to mention that he had one in his hand when he got shot?

A I mentioned it at this trial, but I wasn't asked those questions before.

Q Okay. Well, I believe at trial -- weren't you asked a

few questions that allowed for your opportunity to kind of walk everybody through what happened?

A I understand. Yes.

Q They -- would -- would you say that would be a pretty important fact to include?

A Can I emphasize on that?

Q Sure. Go ahead. Yes, sir.

A It would be. But this is my second time going through something like this. I -- I'm still nervous.

Q Understand ---

A And ---

Q --- understandable. I'm still nervous. Don't -- don't ---

A And if ---

Q --- feel bad.

A --- I left something out, I'm sorry. But, you know, what I saw is the truth.

Q Yes, sir. And now, you say that you and Mr. -- you and Mr. Benjamin go way back; is that right?

A Yes, sir.

Q How -- how far back do y'all know each other?

A Far as about the sixth grade, playing sports, going to school together. You know, he was more closer than one of my other relatives at the end of the dirt road where I lived.

Q Okay. Do you remember testifying that y'all were all kind of like family?

A Talk -- far as us? Yeah. Because we played together, you know. It was kind of like that.

Q Okay. So you'd want to say what you can to help him out, correct?

A If it was somebody else, I would still do the same you know.

Q But you didn't want to say at trial that the person he shot had a gun in their hand?

A Like I said, I told it to someone, who the guy was. But I wasn't never asked, you know, that question.

Q Okay. Now, you testified a few minutes ago that you were looking directly at Mr. Lawton when he got shot?

A Yes.

Q Okay. Do you remember testifying at trial that you saw it all like a -- I think it was like a big-screen movie? You could see Mr. Benjamin and you could see Mr. Lawton get shot at the same time?

A No. I didn't say that. I seen everything. But . . .

MR. SAVILLE: Beg the Court's indulgence. I'm sorry.

THE COURT: Yes, sir.

Q Mr. Gidron, I'll just direct your attention, if -- if you'd be so kind, to page 564 ---

A 564?

Q --- on the transcript.

Now, could you read your bit of testimony for me, starting at line 6 where you're being questioned by Mr. Thomas?

A Okay. (As read): "From your -- from your vantage point where -- were you able to see when Dominique Lawton fell and see David Benjamin?"

"Yeah. I was able" ---

Q And ---

A Go ahead.

Q And you testified: "I was, like -- everything looked like a big TV screen. You know, it was, like, right there."

A Yes ---

Q Now ---

A --- I did.

Q --- didn't you just testify to Ms. Blanchette that you were looking directly at Mr. Lawton?

A Yes.

Q Then, how were you able to see both of them at the same time?

A The way this is worded right there, you know, like I said, I was nervous. I could -- yeah. Everything was there. I -- I could see him.

When I was looking at him, I can definitely see

Lawton. When I saw Lawton when the first shot hit, I saw him. Even when I looked back that way, he was still sitting in the car. And Haggood was up in the doorway.

Q Okay. And understandably, Mr. Gidron, you were nervous. So there's going to be some mistakes and ---

A Yes, sir.

Q --- whatnot?

Okay. Are you nervous today?

A Yeah. I'm very nervous.

Q Now, was the solicitor able to reach you before the trial happened?

A This trial?

Q The -- the ---

A Or ---

Q --- first trial where -- where Mr. Benjamin was convicted. Yes, sir.

A I don't really know who -- who could possibly be the solicitor. Like ---

Q It ---

A --- I said, the only guy that came to my house that's -- I remember talking with him ---

Q Okay.

A --- or whatnot. And I guess -- so I don't know if he directed me to -- to someone else. But I don't know his -- still don't know exactly who I -- I was talking to.

Q Okay. Now, do you remember at trial, the solicitor, Mr. Sorenson, told you on cross-examination that his investigator had been trying to contact you?

A Who is -- who is that?

Q That was ---

A That asked ---

Q --- the -- that was the opposing attorney, so that was not Mr. Benjamin's attorney, but the -- the prosecutor.

A Oh. I can't -- I don't recall it. I can't recall if the ---

Q Okay. Do you remember testifying that you actually called him, but you've never left a message?

A Him, as in -- I guess it's the guy that came to the house.

Q No -- no, sir. I'm sorry. The guy that's prosecuting the case. So -- it's my understanding -- sorry for the confusion. It's my understanding, the gentleman that came to your house was actually employed by Mr. Thomas, Mr. Benjamin's lawyer.

A Oh.

Q But no one from the state was ever able to contact you; is that correct? From the other ---

A I don't -- I can't -- like I said, I can't recall it. I don't -- because I don't know what side who was on, even in -- even if, like, the guy that's -- you're talking about

now, I didn't even know -- Thomas or -- I can't put them with anybody.

Q Sure. Now, you've never talked to anybody at the sheriff's office about this case, did you?

A No.

Q And I do believe Mr. Thomas, what -- while he was examining to you, he did elicit testimony from you that you were 99 percent sure applicant didn't do anything -- I'm -- I'm sorry to say applicant -- Mr. Benjamin didn't do anything.

A Yes. I'm ---

Q Okay.

A --- sure of that.

Q Why weren't you 100 percent sure?

A You can never be exact. You know, I just left that 1 percent out there. But if you want 100, I'm 100 percent sure that he didn't do it.

Q If you could see him at the same time that you could see Mr. Lawton getting shot, wouldn't you be 100 percent sure?

A That's -- that's a confusing question.

Q I'm sorry.

A Can you rephrase that?

Q Sure. If you saw Mr. Lawton get shot while you could also see Mr. Benjamin, why was there any doubt in your mind

that Mr. Benjamin didn't shoot him?

A You said doubt that he didn't?

Q (No audible response.)

A I know he didn't. Like I said, I was looking at Lawton. When he got hit, like I said, me just looking at him where I saw that wound, and he never even faced that direction. So that's how -- and not only Benjamin, nobody in that car could've shot him.

Q Okay. Was Josh Haggood in that car?

A In as during the -- the incident or ---

Q Was he -- was he at the car that you just testified no one from ---

A He was ---

Q --- that car ---

A --- at the car, but he hadn't got in yet. Well, they got in, but, you know, with the car not moving ---

Q Okay.

A --- Josh was still up and Frazier was still up.

Q Okay.

A But Benjamin was, like, sitting in the car, cranking it up.

Q Sure. And do you remember testifying that the rain of gunfire came from Josh Haggood?

A Yeah. A lot after those first two shots.

Q Okay.

MR. SAVILLE: Beg the Court's indulgence.

Q I might -- I might be done bothering you, Mr. Gidron.

A Thank you.

(Off the record briefly.)

Q Now, Mr. Gidron, if you were looking directly at the victim when he got shot, wouldn't that place Mr. Benjamin and his codefendants behind you?

A If I'm looking -- as far as I know, both of -- it's like -- it was an angle like this -- well, basically, like this. As far as behind, no. But they were parked here and me and him, like, on a straight V-line, like right -- like here.

Q Yes, sir. And I think I got one last question for you. If you knew that your friend was being charged with these serious charges of murder and two counts of attempted murder, why didn't you come forward and talk to law enforcement?

A The way I was brought up, I don't meddle in people business. That's, you know -- how it acts. Because like, down there, you can't be doing that.

Q Okay. Mr. Gidron, that's all I have for you. Thank you very much.

A Okay.

THE COURT: Yes, ma'am.

MS. BLANCHETTE: Briefly, Your Honor.

THE COURT: Yes, ma'am.

REDIRECT EXAMINATION

BY MS. BLANCHETTE:

Q Mr. Gidron, during cross-examination the state referenced Mr. Benjamin as your friend and ask you about your relationship with him. Do you also have a relationship or did you have a relationship with the victim and the victim's family in this case?

A Pauling side, from me moving down here, I'm related to the Paulings. And I actually grew up and used to be babysitted by some of the same people. And like right now, today, me and his brothers still -- you know, because I work on cars, we -- we -- we work -- we do a lot of business together.

Q Okay. And you testified at trial that you had essentially, like, spoken to his brother about the fact that you were going to testify for the defense before the trial. Did you do that again today?

A I didn't let him know today. But I told him Sunday, because I thought I had to come to trial Monday. And I don't like talking to him about it, because he -- he hasn't broken down about it yet.

And he said, "Man" -- he was, like, "Brother, just to -- just tell the truth." And that's what I'm here to do.

Q And would you say that you're closer to the victim's

brother than you are to Mr. Benjamin, as far as friendship?

A Yes.

Q Okay. And the state also asked you about some of the questions you were asked and the answers that you gave. Prior to taking the stand, did you meet with anybody for the defense that went over your possible testimony with you and had any idea of the questions you'd be asked?

A No. I was lost on the whole thing.

Q Okay.

A You talking about this today, right, or before?

Q At the time of the trial.

A Oh.

Q The state ---

A I don't ---

Q --- was asking you about the questions that were asked and the answers that you gave. At the time of trial, did anybody meet with you to prepare you to testify at trial?

A No.

Q Okay. And just one final question: You were asked a lot of questions about how you were capable of seeing both Mr. Benjamin and the victim when the victim when the victim was fatally shot. Just to be clear: They were both in your view or your vantage point ---

A Uh-huh.

Q --- when that occurred?

A Yes.

Q Okay. And you were standing in such a way that you could see both of them at the same time?

A Yeah.

Q And was part of that because you were trying to direct Mr. Benjamin to get him out of there at that time?

A Yeah. Because I was trying to get him out, but I'm trying to keep my eye on this man too. So that's why I'm, like -- I'm, like, waving. But he couldn't get out because one car was in front of him.

And I'm yelling at the top of my lungs. But you can't really hear, because people had music playing. And, you know, everybody was just loud. So I'm yelling at the top of my lungs.

But I'm, like -- that's what I meant by I was going back and forth.

Q Okay.

A When that shot hit, I'm -- I was stuck here.

Q So your attention was on the victim and Mr. Benjamin, because they were the two parties you were trying to get ---

A Yeah.

Q --- apart and ---

A I wasn't ---

Q --- get Mr. Benjamin ---

A --- I wasn't ---

Q --- out of ---

A --- worried ---

Q --- there?

A --- about -- yeah. I wasn't worried about anybody else.

Q Okay. And once you were able to get them -- the car in front of them moved that an individual named Shawn was driving; is that correct?

A I told him to move. But when them shots went off, that's what made him move.

Q Okay. But then, once you were able to free up some space, you were able to get Mr. Benjamin's car out of there; is that correct?

A He done everything on his own. When the gap got cleared, they took off ---

Q Okay.

A --- you know.

Q Okay. But you were keeping your eye on their car and on the victim?

A Yes.

MS. BLANCHETTE: Your Honor, I have no further questions.

THE COURT: Any recross, limited to that -- the scope of that redirect?

MR. SAVILLE: Briefly.

RECROSS-EXAMINATION

BY MR. SAVILLE:

Q Was it difficult to keep your eye on all these things at once after a long night at the Piggy Park?

A To me, like, no. Far as that part of it, the first portion here, no. But everything else, yeah.

Q Okay. And you just testified that you were -- you're pretty close to the -- to the brother of the victim of this case ---

A Yeah.

Q --- but you were also close to Mr. Benjamin.

Now, does Mr. Benjamin have anything to lose here today?

A Yeah. He got a lot to lose.

Q Okay. What does -- what does Mr. Lawton, the victim, have to lose here today?

MS. BLANCHETTE: Your Honor, I ---

A He ---

MS. BLANCHETTE: --- object. That's speculation.

THE COURT: Okay.

MR. SAVILLE: He ---

THE COURT: I'll sustain that objection.

Q Is there any -- is there any legal detriment to Mr. Lawton, from your testimony today?

MS. BLANCHETTE: Your Honor, I, again, object. That's asking for a legal opinion that this witness cannot offer.

THE COURT: All right. I'll sustain that. But, Mr. Saville, if it's any consolation, I understand what you mean, okay?

MR. SAVILLE: Much appreciated, Your Honor.

THE COURT: Yes, sir.

Q Thank you, Mr. Gidron. You have a good day.

A Thank you.

THE COURT: Okay. Thank you. I appreciate you being here, sir.

THE WITNESS: All right.

THE COURT: You may step down.

(Whereupon, the witness exited the witness stand.)

MS. BLANCHETTE: Your Honor, as I referenced, he's here under my subpoena. I ask that he be released at this time.

THE COURT: Okay. Any objection to that, Mr. Saville?

MR. SAVILLE: No objection, Your Honor.

THE COURT: Okay. You're released from your subpoena, sir. I appreciate you being here today, and I hope you have a good weekend.

THE WITNESS: All right. You do the same.

THE COURT: Okay.

All right. Let's take just a short, short, five-

minute break and then we'll come back in and call the next witness. Okay?

(Off the record from 10:56 a.m. until 11:07 a.m.)

THE COURT: All right. You may call your next witness.

MS. BLANCHETTE: Your Honor, I call Robert Tressel to the stand.

(Whereupon, the witness came forward.)

MR. SAVILLE: Your Honor?

THE COURT: Yes, sir.

MR. SAVILLE: Respectfully, Your Honor, I apologize. Mr. Thomas has just briefly stepped away on a phone call. Would it be possible just to continue a brief recess until he can be here to hear the testimony of Mr. Tressel?

THE COURT: Yeah. Yeah. Let's do that. Well, let's do this. Where is he?

MR. SAVILLE: He -- he just stepped into the hallway to answer a phone call just ---

THE COURT: Okay.

MR. SAVILLE: --- a second ---

THE COURT: All right. Go get him.

MR. SAVILLE: Well, sure. Thank you.

THE COURT: And while you're -- while you're doing that, Mr. Saville, I'm going to go ahead and have the witnesses sworn in, okay?

MR. SAVILLE: Yes, Your Honor.

THE COURT: All right. Go ahead.

DEPUTY CLERK OF COURT: Please raise your right hand.

THE WITNESS: (Complied.)

DEPUTY CLERK OF COURT: State your full name for the record.

THE WITNESS: Ralph Robert Tressel.

ROBERT TRESSEL, having been first duly sworn, testified as follows:

DEPUTY CLERK OF COURT: Thank you. Have a seat, please.

THE WITNESS: (Complied.)

THE COURT: All right. We'll just hold tight for a few seconds, okay?

(Off the record briefly.)

THE COURT: Okay.

MR. SAVILLE: Thank you, Your Honor.

THE COURT: Yes, sir. No worries.

All right, Ms. Blanchette, your ---

MS. BLANCHETTE: Thank you ---

THE COURT: --- witness, ma'am.

MS. BLANCHETTE: --- Your Honor.

DIRECT EXAMINATION

BY MS. BLANCHETTE:

Q Would you please state your name for the record again,

please.

A Yes. My full name is Ralph Robert Tressel. I go by "Bob."

Q Okay. And, Mr. Tressel, I'm just going to first go through your credentials and qualifications.

MS. BLANCHETTE: Your Honor, I intend to offer Mr. Tressel as an expert in the area of homicide investigation and crime-scene reconstruction. I don't know the state's position at this time. I'm happy to go through his lengthy qualifications and credentials.

MR. SAVILLE: No objection, Your Honor.

THE COURT: Okay. If you would like, you can -- as opposed to going through all the credentials, you can submit as -- as an exhibit the curriculum vitae if you happen to have it.

MS. BLANCHETTE: Your Honor, he actually did a report for me, where he goes through them. I'll just ---

THE COURT: Okay.

MS. BLANCHETTE: --- briefly go over ---

THE COURT: Sure.

MS. BLANCHETTE: --- them, since ---

THE COURT: That's fine.

MS. BLANCHETTE: --- the state does not object ---

THE COURT: Sure. That's fine.

MS. BLANCHETTE: --- just so you have an understanding

of Mr. ---

THE COURT: All right.

MS. BLANCHETTE: --- Tressel's experience.

THE COURT: And -- and inasmuch as there's -- well, go ahead and go through the experience and then I'll determine whether he should be qualified. But I anticipate the -- the ruling will be favorable to do you.

MS. BLANCHETTE: Thank you ---

THE COURT: Go ahead.

MS. BLANCHETTE: --- Your Honor.

Q Mr. Tressel, if you could just begin for us with how your training started in this area.

A Okay. It -- as I saw in the report when I looked at it again this morning, there's a typo in the very beginning, of course. I started my career in 1973, instead of 1972, with Cobb County Police Department as a uniformed police officer. I was with the police department in that capacity until February 1975, when I was promoted to the rank of detective and transferred to the robbery-homicide unit of the Cobb County Police Department. We called it "crimes against persons."

In 1979 I was promoted to the rank of sergeant in the police department. In 1985 I resigned my position as a sworn police officer and took a position as an investigator with the Cobb County Medical Examiner's Office. And I

became the chief investigator a couple years later.

During my career, up to 1998/beginning of 1999, was in the field of medical-legal death investigation and homicide investigation. I received training at the Georgia Police Academy in 1973, getting my POST certification. I received homicide-investigations training through POST. I received advanced crime-scene training through POST.

I've been trained at the University of St. Louis School of Medicine in medical-legal death investigation; University of Miami School of Medicine in medical-legal death investigation. I've received training in blood-spatter interpretation, two different trainings on that. I've testified as an expert in blood-pattern analysis.

I've trained with the FBI at Quantico, Virginia, in criminology. I've trained through ATF in firearms and explosives. I've spent now -- yeah -- 45 years in this line of work.

Q And have you been qualified as an expert in the area of homicide investigation and crime-scene reconstruction before?

A Yes, I have. I've been qualified in 12 states in the federal courts.

Q And have you been qualified in the state of South Carolina?

A Yes, ma'am. At last count, I think it's been five

times.

Q And were several of those times actually on cases that I handled and those were PCR cases?

A Yes.

Q Okay.

MS. BLANCHETTE: Your Honor, at this time I would offer Mr. Tressel as an expert in the area of homicide investigation and crime-scene reconstruction.

THE COURT: All right. So qualified and accepted.

Q Now, Mr. Tressel, let's turn to the case of Mr. Benjamin. How did you become involved in this matter?

A You contacted me some time ago; asked me if I was available to review materials on an appeal issue that you were working with on -- to determine the quality of the police investigation, analysis of the homicide investigation, and whether or not the crime scene could be reconstructed.

Q Okay. And were you also made aware of the fact that Kelly Fite had been offered as a defense expert in the original trial of this case?

A Yes, ma'am, I was.

Q And what's you familiarity with Kelly Fite?

A I've known Mr. Fite for over 40 years. He was the director of firearms analysis at the Georgia State Crime Lab in Atlanta, Georgia. I met him early in my career in

1975 after I transferred to the robbery-homicide division.

Q And are you aware of the fact that you were actually contacted in this case because Mr. Fite is retired and referred yourself for this case?

A That's correct. Mr. Fite and I -- since both of us left our original assignments, he retired from the GBI. We worked together on multiple cases throughout the United States. We often referred each other, sometimes with crime scene or sometimes with ballistic issues about looking at actual firearms and looking at projectiles. I deferred those cases to him. And we -- we worked together sometimes as a team on some cases.

Q And you've reviewed Mr. Fite's testimony in this -- in this case?

A I have.

Q Okay. And later on, I'm going to get into more detail with that. But ---

A Yes.

Q --- I just wanted to verify that you had reviewed that.

Let's talk about what else you've reviewed.

A Okay.

Q Are you aware that a discovery order was obtained and we were able to get the law enforcement files, the solicitor's files in this case?

A Yes.

Q Okay. And did you also have the -- did you review those paper files and the CDs that were provided?

A I did.

Q And did you also have the opportunity to go in person to review some evidence?

A I did.

Q Okay. Can you explain to the Court what you did?

A Yes. In March of this year, the 19th, I traveled here to South Carolina, where we went to -- we reviewed the evidence in Columbia that was in -- available there. And then we traveled to Calhoun County; looked at the evidence that was in the clerk's office; and then went over to the Calhoun County Sheriff's Office and reviewed the evidence that they still retained.

Q And do you recall one of the items that you wanted to see that was at the Court of Appeals in South Carolina, was that this diagram right here?

A Yeah. Yes, ma'am.

Q That's been marked as State's No. 1?

A Yes.

MS. BLANCHETTE: Your Honor, if I could beg the Court's indulgence, because I do have a way to put this up now. Maybe I do.

Q And this is the diagram that you reviewed at the Court

of Appeals that was still being held in evidence there?

A Yes.

Q Okay. And then, you also traveled to Calhoun County to see the exhibits that weren't being held at the Court of Appeals?

A That's correct.

Q What was your reasoning in wanting to see these diagrams and see these exhibits?

A Well, one, I wanted to see what diagram they had used. There were diagrams produced in the case file. But there was not a -- we didn't know which diagram they had used at trial. It was just marked as an exhibit. And I wanted to see what they used. This is not the same diagram that's in the case file.

Q And was this diagram helpful to you, upon locating it and reviewing it?

A Somewhat. Not very helpful.

Q Okay.

A The other -- the other diagram that we had received was somewhat better. This one just doesn't depict where any -- virtually anything was.

Q And the diagram that you're referencing in the case file, you say that was somewhat better. How was that somewhat better?

A It -- well, it had a little bit more detail on where a

few vehicles were -- were parked, whose vehicles they were. There was a diagram that showed where the shell casings were recovered.

It was color-coded. The reason I know it was color-coded: Because up in the corner, you could see a line that was drawn and represented 9-millimeter, .380, .45, .40-caliber.

It was produced to trial team, I imagine, and the -- and to your office in black and white. So I was trying to locate the color-code diagram so that I could follow along with what they had marked. And we've never found it.

Q On the day that you were in Calhoun County, did you have the opportunity to specifically request of Matt Trentham, who was one of the investigators in this case, that he obtain a color copy?

A Yes, I did. And he said he would look for it; he thought it was in the original case file.

Q And while we are there that day, was he able to produce that?

A He was -- he was not.

Q And as a result of subsequent requests, has a color-coded diagram been provided?

A No, it has not.

Q Okay. Now, the day that you went and reviewed the evidence, did you also have the opportunity to go to the

scene?

A Yes, ma'am. We traveled out to the location of this incident. I get -- I think you call it Ellorlee -- Elloree, South Carolina. Excuse me.

Q Your guess is as good as mine, Mr. Tressel.

And who was at the location when we were there?

A Yourself was there; your investigator, Pete; and Mr. Gidron.

Q Okay.

A Yeah.

Q And just kind of take us through your interaction with Mr. Gidron at the scene that day.

A Well, I was trying to -- not interview him in detail, but ask him where he was and where certain people were and if he could remember where any cars were. One of the problems in reviewing the case we had is all -- all of our photographs are done after virtually all the cars had left. So we don't know what cars were parked where. And there's no documentation in the investigative file of where they determined certain vehicles were parked or people were actually out in the -- in the area of the crime scene at the time the shooting took place.

And he was helpful in showing us where he was standing, where he felt where the victim was standing, and where certain vehicles were parked. His -- he remembers

the van vividly. He remembers -- I believe it's the black Camry. And he remembers the Cadillac; and then, a bunch of other cars.

And he was trying to explain how he was trying to tell the defendant and the -- the folks with him how they could get out of the -- the club area by going through the tall grass.

Q And you heard him testify today. Did he explain to you how he had a vantage point where he could see both the victim and Mr. Benjamin at the time of the shooting?

A Yes. He was off-center to the victim. In other words, he wasn't looking directly at him -- standing directly in front of him, I should say. He was off to the side, where he could see both Mr. Benjamin in the car and the victim in this case.

Q And did he convey to you his position that the gunfire that he saw or heard prior to the victim being struck was coming from the road area?

A Yes. He was adamant ---

MR. SAVILLE: Objection, Your Honor: Hearsay.

THE COURT: Okay. Overruled.

A Yes. He was adamant that the -- the gunshots that was fired when Mr. Lawton fell came from the roadway -- out -- out near the roadway.

Q Let me ask you this: If you would have been contacted

at the time of the original trial, would you have been willing to assist in the capacity you've assisted for this PCR case?

A Yes. I was -- would've been available at the -- this time. Yes.

Q And ---

MR. SAVILLE: Your Honor, I will object. This calls for speculation.

THE COURT: Okay. Overruled.

Q How helpful would it have been to meet with Mr. Gidron at the scene, as you did prior to this PCR case, if you were preparing this case for trial testimony?

A Oh, it -- it would've been -- it would've been vital to have a witness that was outside that could put certain things in place for you so that you could identify where cars were, where people might've been, and what they actually saw happen.

MR. SAVILLE: Your Honor, I would object, as that calls for a legal conclusions as to prejudice -- *Strickland*.

THE COURT: Okay. All right. Inasmuch as he's an expert, I'll give him latitude to -- to opine as to his expert opinion. I find that that is within his scope. Therefore, I'll respectfully overrule. You may proceed.

MR. SAVILLE: Thank you, Your Honor.

MS. BLANCHETTE: Thank you, Your Honor.

Q Mr. Tressel, before we kind of go through the findings in your report ---

A Uh-huh.

Q --- and your additional opinions, being at the scene, were you capable of producing a diagram?

A No.

Q And if you want to explain now, or would you rather go through the ---

A I can ---

Q --- portions ---

A --- explain ---

Q --- of your ---

A --- now.

Q --- report?

A I can -- I can make a diagram of what it looks like now. I can't make a diagram of what it would've looked like at the time of the incident. I can't place any pieces of evidence in a diagram, because there were absolutely no measurements taken of any items of evidence.

There's no measurement of where Mr. Lawton fell. Outside crime scenes are difficult to work. But there are ways of documenting them with measurements.

Q Okay. Now, let's go through some of the specifics, as far as the investigation ---

A Uh-huh.

Q --- in this case. Can you first just provide us, so we have some working knowledge about what you're speaking about, kind of your summary of the incident as you saw it and everything that you reviewed?

A Well, basically, Mr. Lawton succumbed to a gunshot injury to his left side of his forehead. The entry wound is to the left parietal bone above the left eyebrow. It comes out the -- the frontal bones. It comes out the parietal bone at the back, slightly traveling in a back-to-front, very little deviation left-to-right, and slightly upward. The bullet completely passes through and exits the body.

There's no documentation of stippling or soot, indicating that it's what we call a distant gunshot wound. From reading the file, there were at least five firearms that were fired -- or evidence of five firearms found at the crime scene.

Q And were you able to determine which of those five firearms may have been fired first, from the file that you reviewed and going to the scene?

A No. There's no way to determine which weapon was fired first.

Q And why is that?

A You -- you would have to have a witness that would --

that could testify as to which weapon fired first. Forensically, in documenting a crime scene, you can't tell which weapon was fired first, unless it's very unique and, let's say, one weapon is only used and you find a, quote, shell casing or bullet in a bedroom. Well, that's the one that was fired first, if the victim travels out of the bedroom and makes it to the living room before they collapse. You can identify that.

But when you have multiple guns going off, it's virtually impossible to determine which one forensically was fired first.

Q Now, I'm going to ask you about your expert opinion regarding the investigation performed by the county sheriff's department, and then I'll go through it and ask that you explain it. But ---

A Okay.

Q --- what was the expert opinion you reached regarding the investigation?

A It was well below the standards for a homicide investigation.

Q And how did you reach that conclusion?

A Well, we look at the whole totality of the incident. The crime scene, of course, is chaotic. It's outside with a multitude of people running, screaming, vehicles trying to leave. First officers who were on the scene failed to

secure the crime scene. They failed to keep people from leaving. They failed to keep witnesses on the scene after they had arrived.

Then after the detectives arrived on the scene, they took photographs. But we don't have overall photographs. We have very specific photographs, but nothing of a generalized photograph. There was -- there were some photographs -- excuse me -- taken a couple of days later of the overall crime scene. But there's nothing in it.

There are no measurements taken whatsoever of where any pieces of evidence were found. Duh, duh, duh -- there's limited descriptive written reports about shell casings being found in certain locations, primarily at the left corner of the -- at the corner of the building. I -- they use the word "corner of the club."

Now, we've got eight shell casings located at one corner of the club. But I don't know how -- or were they on the front side of the corner, on the side -- what I would consider the south side of the building? Exactly what do they mean by the corner? That's why I wanted the color-coded diagram that we never got.

They did not interview all the witnesses. They had witnesses at the hospital that gave them information, gave the first officer that got to the hospital information. But there were never any additional interviews done of

those witnesses that were at the hospital.

I think I listed one, two, three, four, five, six -- seven people that -- whose names appear in the investigative file that there's no interviews of.

Q And in your experience and expertise, is it fundamental that you attempt to interview all the witnesses that may have been at a scene?

A You try to locate and interview as many witnesses as possible. One of the things that you're trying to do with a crime scene like this is to determine who was where, based on what everybody's -- what the witness saw. Because every witness is going to perceive it from a different angle, from a different perspective.

So you want to try to see what matches up within your witnesses. They've got this person at -- at the entrance to the club. Well, okay. We probably got five or six people that put this person here. It's probably logical.

And then, you try to piece together by interviews who saw what and what is verifiable, based on your crime-scene work.

Q Now, was there also an issue that you came across regarding the numbering of the evidentiary items in this case?

A Yeah. One of the things that Calhoun County Sheriff's Office did was they took items of evidence from the night

of the shooting on one evidence sheet. And then, when they went back to do a subsequent search, they continued with the same evidence sheet, ended up duplicating the numbers. So if it's Item No. 4 in the first one, there's a -- a No. 4 for the second time they were there. And it -- there should've been two separate crime-scene evidence logs.

And you can duplicate your numbers that way. But you don't want to put them all on the same report. Because they become very confusing as to which one are we referring to.

Q And, Mr. Tressel, were you able to reconstruct this scene?

A No.

Q Do you have some pictures that you did identifying and used for reference?

A I -- I did. I pulled a few that are exemplary of what we were talking about.

Q And my next question to you is going to be: What were you able to ascertain regarding this crime scene?

A Well, the -- the biggest thing about this crime scene is we know that there potentially are five or more weapons fired. Which one was fired first, we have no way of knowing that. We know, based on the location of shell casings recovered, that there was shooting coming from the roadway, as well as shooting coming from the area of the

club. And we also know that there were shots being fired by the deceased in this case.

So we now know that we -- I -- I -- I had -- I don't mean to be disrespectful. But it's a shootout at the O.K. Corral. We got bullets and shell cases going in all sorts of different directions.

And we now know where evidence was found. And a perfect example is the three .40-caliber shell casings that are, quote, at the corner of the building. Well, all three of those passed through the van. And we're able to verify that, that those three shots were fired from basically the corner of the building. Beyond that, we don't have anything.

Q And just to be clear for the record, did Mr. Haggood testify at trial that he was shooting a .40-caliber?

A Yes, he did.

Q Okay. And what were the caliber of the guns recovered in this case?

A Well, let me get -- there was a .32-caliber recovered. It was a revolver. Reports indicate it was fired twice. According to witnesses, it was fired in the air. When Calhoun County recovered the weapon from a residence, it was found in the couch of the residence. There were two spent cartridges in the cylinder of that weapon.

There's a 30 -- a .380, which Mr. Lawton apparently

was carrying. There's a .40-caliber, which Mr. Haggood admitted to firing that night.

There's .45-caliber shell casings, the .45-caliber never being recovered. There's also .45-caliber projectiles found in the dirt out in the -- what would be the parking area of the club, not identified to a particular weapon.

And there's 9-millimeter shell casings up on the left-hand side by where the trees are drawn. The weapon has never been identified and never recovered.

Q Let me ask you first about the .45. You've reviewed the trial testimony. Who at trial is that weapon attributed to?

A It -- at trial and in the reports, it's attributed to Mr. Benjamin.

Q Okay. And let me ask you about the 9-millimeter. You mentioned that those were never connected to anyone or a weapon; is that correct?

A That's correct.

Q In your experience and expertise, is that a fundamental component of this crime scene?

A Yes. One of the things we have to look at is what type of weapon can cause this through-and-through injury to the -- to the head of Mr. Lawton. Because of the witnesses that were interviewed and where Mr. Lawton was and where

specifically shooters were, one of the things that I did is I took some linear measurements at the crime scene and from the area generally picked out near the edge of the driveway off to the left where Mr. Lawton fell to the corner of the club -- now, when I say linear, that's using the roadway as a linear measurements. It's in excess of 60 feet.

If you make an angle of it, that distance is going to be more than 60 feet. But I used a linear measurement just to get an idea.

So we have to decide, of these weapons, which ones -- which one of the five weapons that we know were -- were at this scene at some point in time, which one could've caused the injury to Mr. Lawton. I discounted the .32. It's a very low-speed, nonimpactful weapon. I discounted the 9-millimeter, again because it's also low-speed with limited penetration, small projectile.

The .380 was fired by Mr. Lawton, and I don't think he -- he -- he shot himself on this crime scene. So that left us with the .40-caliber and the .45-caliber. A .45-caliber is a slow-moving, large projectile. 900 feet per second is the average speed, carrying anywhere from 180 to 210 or higher-grain bullet. It's designed to enter and stop.

The .40-caliber, however, has a 1300-feet-per-second velocity and carries a bullet anywhere from -- target rounds are 140 grains, up to 180 grains is what we carry in

our .40-calibers that we have. So if I had to pick a weapon fired at a distance of in excess of 60 feet that could go through the hardest bone in the body and then exit the second-hardest bone at the back of the head, it would be the .40-caliber. I don't believe the .45 would penetrate all the way through.

Q And that is based upon your experience and expertise? That is your opinion that a .40-caliber would not have caused the injury in this case; is that ---

A .45 ---

Q --- correct?

A --- caliber.

Q I am glad that you're the expert. The .45-caliber would not have caused the injury in this case, that it was more likely the .40-caliber?

A Correct.

Q Okay. Now, let me ask you a little bit more about the .45-caliber. You reviewed the testimony of James Hampton from the trial?

A I did, yes.

Q And he is one of the witnesses that testifies about seeing Mr. Benjamin shooting; is that correct?

A That's correct.

Q Okay. And so you're taking this opinion from the testimony offered by the state's witness; is ---

A That ---

Q --- that correct?

A That's correct.

Q Okay. And what was your findings regarding the testimony that Mr. Hampton offered in connection with what you saw in the crime-scene evidence?

A Well, Mr. Hampton testified that the -- Mr. Benjamin was laying down cover fire as he ran to the vehicle. Yet there's no .45 shell casings in front of the club. All the shell casings are at the corner of the club.

There are three projectiles that are found just loosely sitting in the dirt that did not even penetrate to the point -- they found them with a metal detector. But they didn't have to dig them out. They were just laying on the ground. And they're clustered together in the same location.

Q Okay.

A So whether those .45 projectiles are associated with this case or not, we don't know. But they didn't even penetrate the ground.

Q So does the crime-scene evidence that you were able to review support the testimony of Mr. Hampton?

A Not fully. No.

Q Let me go back to one of the items that you mentioned. I wanted to ask you about -- further about some of the

testimony that was offered at trial.

A Uh-huh.

Q You're aware of the fact that Investigator Dukes testified that this was, in fact, his first homicide investigation?

A Yes, ma'am. He did testify to that.

Q And does -- did that calculate into any of your opinions in this case?

A Well, I can tell you, if you've never worked a homicide before, you learn from the mistakes you make on that first one. If this was his first homicide, it would probably be one of the worst nightmares a young -- I should say an inexperienced investigator can deal with because you have such a chaotic scene with multiple weapons fired, vehicles not retained at the crime scene by first responding officers. It makes it very difficult.

And not knowing how to handle that creates a situation where not all the necessary interviews were done and not all the necessary documentation to recreate the crime scene were done.

Q Now, I want to ask you a little bit about the 9-millimeter projectiles.

MS. BLANCHETTE: And just for your reference, Your Honor, an order -- or a report has been provided to the state.

Q But for Mr. Tressel, I'm referring to page 7 of your report. What were your opinions and findings regarding the 9-millimeter projectiles?

A Let me take a quick look at that. There were no 9-millimeter projectiles recovered.

Q And what -- were you able to ascertain any information about where the 9-millimeters may have been shot from?

A Well, we know the recovery of the shell casings was -- and it's hard to see on the diagram. But there's two little green trees over here ---

Q Uh-huh.

A --- to the left. There's actually four trees there. But it's behind those trees is where the -- the 9-millimeter shell casings were found. Now, what direction they were fired at, we have no idea. There's no -- no descriptive or photographic evidence of any 9-millimeter rounds being found.

The only thing that we have that is interesting, based on that location, is there's two documented bullet strikes on the -- would be the left side of the club in the photographs. And they appear to be very fresh. But they didn't -- never recovered any projectiles in that area that I found.

Q And, Mr. Tressel, before I get to your final opinions ---

A Uh-huh.

Q --- in this case or overall opinions in this case, I want to ask you a little bit about the testimony of Kelly Fite.

A Yes, ma'am.

Q You indicated before that you're familiar with him and you reviewed his testimony in this case; is ---

A I did.

Q --- that correct?

A Yes, ma'am.

Q And specifically, on page 543 he is -- he -- his expert qualifications are given and then he's qualified in an area of expertise very similar to how you were qualified today; is that correct?

A Yes.

Q And then, he testifies on page 544 through 545 about how it's possible to collect DNA off of ballistics evidence. And he goes through how that would be done. Are you familiar with that testimony?

A I -- I am familiar with it, yes.

Q Okay. Then, on cross-examination he's actually provided the DNA report by the solicitor and ultimately concedes that SLED or the investigative agency had tried to get the DNA that he was saying should have been obtained in this case?

A Yes. He was trying to -- he was talking about touch DNA.

Q And he then admits or concedes on cross-examination -- what he's saying the state should've done was actually done in the case?

A Yes, ma'am.

Q Okay. And he does give some limited testimony about a metal detector being used and some techniques that should be used in crime scene. But did you see in his testimony where he offered any type of opinion regarding the level of investigation in this case, such as you have today?

A I don't remember reading anything of that nature.

Q Now, on both cross and redirect, he speaks briefly -- and I would reference pages 552 and 554. And specifically, if you'd look at 554, lines 2 through 4, he's asked about the caliber that would penetrate someone's skull in the way that it was done in this case, which is something you've testified about today, correct?

A Yes.

Q And he's asked by the solicitor about if he's ever seen -- and, you know, let me turn there and quote it correctly.

MS. BLANCHETTE: Beg the Court's indulgence one moment.

Q He's asked beginning on line 2 -- sorry. It's on 553.

He's asked about the type of ammo, would have been a -- had a bearing on whether it's going to leave some trail through that, through the wound; is that correct? If it's jacketed ammo or not jacketed ammo?

And then, he responds on 554, lines 2 through 4 (As read): Yes, it would. It would have some effect on that. Plus, usually, you don't expect a large-caliber hollow-point bullet to penetrate a person's head. But it does happen."

Does it appear he's touching on there what you're speaking about today regarding the wound that was sustained by the victim?

A That -- that appears what he's talking about. Hollow points are designed to mushroom-spread. And a lot of times, you'll see what we call the -- the copper jacket separating away from the lead core of the bullet. It's designed not to make a complete through-and-through penetration.

.45-caliber can go through the skull, both -- both -- or multiple bones of the skull. But it's only seen when you have close-range shot -- shots, usually within the 3-foot range, possibly a little bit larger than that. Because that bullet is moving so slowly, it loses a lot of energy quickly.

If it was a jacketed hollow-point, it -- it might have

left and probably should have left some fragment. This did not leave an -- any fragments inside Mr. Lawton. There were none recovered at autopsy.

Q And when he says it does happen, was he asked about the distance between Mr. Benjamin, when he was allegedly firing a .45, and the victim?

A No, he was not.

Q And why does that matter?

A Well, because it's, again, the distance. The further away I get from -- whenever I talk about feet per second, we're talking about muzzle velocity, the velocity of the bullet's leaving as it comes out the muzzle of the weapon. As it goes down the range towards the target, it's losing velocity. How much velocity depends on how much distance it travels before it reaches the target that it strikes.

With a .45, you start getting distances of 20/30 yards, that bullet's going to have lost a lot of energy by the time it impacts something. And to go through an adult skull, through the two hardest bones in the skull is virtually unlikely. I'm not saying it can happen. But it's very unlikely that that would happen.

Q And, Mr. Tressel, I -- just to make sure that we have addressed this, is this diagram after you've been to the scene -- is this diagram helpful to you in reconstructing this crime scene?

A No. Unh-unh.
Q And why is that?
A It has no measurements in it. It doesn't even depict the club the way the club building is actually laid out. There's a cutout, like two buildings have been put together. It doesn't depict the actual parking lot. Somebody drew in, with a red marker, the light pole. There's actually two light poles. There's another light pole in there.

As Mr. Gidron testified, there's a propane gas tank that's not drawn in there. It -- there's an awful lot of things that are not there. It would've been better to have an aerial photograph instead of the diagram.
Q So in your opinion, a Google Earth photo would've been better than this diagram?
A I tried. There's too many trees.
Q Okay.
A You can't see the building.
Q And if you were working on this case -- because you said you'd been willing to work on the case prior to the time of trial ---
A Uh-huh.
Q --- would you have shared your -- that information with defense counsel about the accuracy of this diagram?
A Absolutely. And I would've been more adamant that the

defense put in the other diagram that had some cars drawn into it and is a little bit better in determining where things are at.

Q Okay. And would you have recommended that the defense ask that the jury go to the scene in this case?

A That would probably be very helpful. We -- we've done that on a number of occasions so they could get an idea of what we call the lay of the land, so to speak. Is -- (1) Where is this place located and why'd it take so long for everybody to get there? And (2) How is it actually laid out and where certain things may have been, based on the testimony they heard prior to going to the scene.

Q And you have identified some photographs that were introduced as exhibits. Is there anything that you'd like to testify to regarding those photographs?

A Well, we just talked about some general photographs that kind of show us the -- what we call the -- I call the lay of the land, so to speak.

Q If you could just refer to the exhibit numbers ---

A Yeah.

Q --- from trial when you're ---

A I will ---

Q --- referencing ---

A --- do that.

Q --- those, please.

A State 5 is just a photograph of the front of the building. And you can see the -- it's actually the DJ's van over to the left side of the photograph.

It just generally shows the -- the cutout that I was talking about, where this fireplace is. Fireplace is on the inside, but it's a chimney to it. And there's no other vehicles in sight in that photograph.

State's Exhibit 3 is a photograph taken a little bit further to the right of State's 5. It shows the van parked virtually in front of the -- or what would be the backdoor to the club. There's a white Honda in the photograph and no other vehicles. Again, it just shows the rope-off that the first responders did.

Let me put these in order. Okay. Got them.

State's 25 is a photograph. It's actually part of the cutout, the little jutted-in area where the fireplace would be to the right of this photograph. This is taken during the daylight hours. There's two red markers; they've been identified by law enforcement.

State's 26 is a close-up of the one that's down low. And it's definitely a bullet strike. They -- they did not find a bullet associated with that anywhere in the area. It just showed that there's shooting coming from the left of the diagram towards that cutout that should be on the diagram.

State's 17 is a photograph of the driver's side of the van. It's backed in against that door. It has in the photograph Marker No. 2. And according to the documents that I have, Marker No. 2 is a .380 shell casing.

Mr. Lawton is supposedly way out in the -- near the area of the Cadillac where there's a .380 shell casing there. And it does show the three bullet holes that are in the driver's side of the van. Again, remember, we found three .40-caliber shell casings at the corner of the building.

State's 21 is now the passenger's side of the van. It has the three markers where those three projectiles entered and exited. Two are at the back. One is through -- they got it marked at the window.

And State's 24 is a photograph of that window that's broken out. And the projectile is wedged at the base of the window. And from looking at this, this is a -- it's been identified as a .40-caliber and identified as coming from a .40-caliber Mr. Haggood had.

And that is a -- what -- I describe as a fully-jacketed bullet. It may not -- and it's probably not even a hollow-point. It's probably a fully-jacketed -- what I call range round.

Q And for someone with my understanding, why does that matter?

A Because this .40-caliber, what I call a range round, that's fully jacketed in copper would probably not leave any artifacts when passing through a body. It punches a hole.

Q And is that all the pictures that you identified ---

A That's all ---

Q --- Mr. Tressel ---

A --- the pictures that I ---

Q Okay. And that nicely leads to my next question. In your expert opinion, is it more likely a .40-caliber weapon versus a .45-caliber weapon that had the greater potential for passing through the head and skull of Mr. Lawton?

A It's my opinion that of the weapons we know that were there, the .40-caliber is the most potent of it to cause the injury that we see to Mr. Lawton. I can't exclude other weapons that have never been identified or never found that could've created this wound from a weapon that we still have no knowledge of.

Q And I want to ask you about Mr. Haggood's testimony regarding Mr. Benjamin. This is recounted on page 7 of your report.

A Uh-huh.

Q Mr. Haggood testified that Mr. Benjamin was running and fired two shots as he was running. As far as the evidence and everything you reviewed, what could you

determine regarding that testimony?

A There's no forensic evidence that there's two shots fired as Mr. Benjamin is running to the car. The -- the shell casings, remember -- and I'm sure I don't have to -- the judge will know this. Shell casings go up, right, rear.

So if I'm pointing towards coming out the front door of this club pointing at Mr. Lawton, those shell casings should be out in the -- in the driveway/parking lot, in that area somewhere. There was no shell casings found out there, only the five found at the corner of the building.

Q So you didn't find any forensic evidence to substantiate or support the testimony of Mr. Haggood regarding Mr. Benjamin shooting in that capacity?

A No, I did not.

Q Mr. Tressel, unless there's anything further you'd like to add, I'd just like to ask you if you could, you know, summarize your ultimate conclusions in this case. I think we've already addressed the .40 ---

A Uh-huh.

Q --- versus the .45 issue. But just regarding the crime scene itself, what is your ultimate or final conclusion regarding how that was handled?

A Well, the lack of properly documenting, measuring, and photographing this crime scene in -- makes it impossible to

recreate it. One of the things that you have to do, when you're working a homicide case, is you have to be able at some point in time to either put your findings on a diagram that makes sense or be able to go back out to that crime scene and put items back where they were found. By being able to put them back where they were found, which we do, not all the time but on occasion, is to try to determine, "Well, so-and-so said the person was standing here." Well, do I have shell casings or any forensic evidence that we found at that crime scene to match up to it?

So the documentation is -- is vital. Interviewing everybody and anybody they could get ahold of is vital. Never that I could find ever interviewed the owner of the club to determine had there been other incidents that might explain some of these marks that we see on this building. That was never done.

Q Okay.

A The -- the -- the entire investigation did not -- does not allow me to make a complete picture of what actually happened out there that night. We know certain aspects of it. But in totality, we can't recreate anything.

MS. BLANCHETTE: Your Honor, I have no further questions of this witness.

THE COURT: Okay. Cross, sir?

MR. SAVILLE: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. SAVILLE:

Q Good morning, Mr. Tressel. Welcome back to South Carolina.

A I love South Carolina. Thank you.

(Off the record briefly.)

Q Now, just -- just for some -- some housekeeping matters, Mr. Tressel, have you testified in PCR matters in South Carolina before?

A Yes.

Q Okay. How many times, would you say?

A Two or three.

Q Okay.

A I'm -- I'm trying to -- the -- there's a hearing in the back of my mind that I can't remember if it was actually trial or hearing. I think I've done two PCRs with Ms. Blanchette.

Q Okay.

A Uh-huh.

Q And she is an exemplary PCR attorney, so she -- she retained you over other options.

A I -- I get a couple of cases. I mean, it's not like she sends me a case every week.

Q Sure. Now, Mr. Tressel, talking about eyewitnesses here -- and you testified that you went to the scene from

five -- the -- the scene now with Mr. Gidron and Mr. Skidmore. Did you talk to any other eyewitnesses in this case?

A No, I haven't.

Q Okay. Did you attempt to?

A I didn't see in the police reports anybody that actually saw the shooting, other than Mr. Haggood and Mr. Gidron.

Q Okay.

A So out of all the people that were at that club, I wouldn't have any clue who I needed to talk to.

Q Sure. Now, you testified that the owner of the Piggy Park was never interviewed?

A Not that I recall.

Q Oh, okay. So you just don't -- you just don't know if he was interviewed?

A I don't remember seeing any -- anything in the file about interviewing him.

Q Okay. Yes, sir. Now, Mr. Tressel, you testified that the -- the shell casing -- the .45 shell casings -- let me backtrack. I'm sorry. That was going to get a little bit confusing.

You said there was no ballistics evidence to support Mr. Haggood's testimony that Mr. Benjamin fired two shots while he was on the move; is that correct?

A That's correct.
Q And you testified it was because the casings, they eject back and right?
A Up, right, rear.
Q Yes, sir. Now, that would -- I guess the vantage point from which that's being ejected would be dependent upon what angle you're holding the gun; is that correct?
A Absolutely, yes.
Q Okay. And are you able to say with certainty how Mr. Benjamin was holding his gun?
A No -- I have no -- no way of determining that.
Q Okay. Now, would you agree you sounded -- sort of the problem with shell casings, that they're very movable objects?
A Yeah. Shell casings are very movable. They get kicked. They get moved around. They get stuck on people's feet. They get stuck in car -- car-tire treads. All of the shell casings they recovered are pristine.
Q Okay.
A So they're not damaged in any way.
Q So it's very possible that there are other shell casings that were just ---
A Like I said, I -- that -- that's why I hedged my testimony that we know of five weapons.
Q And do you recall there was testimony at trial -- I

think there's actually been testimony here today that there was a large group of people present at the scene, scattering about, and there were also cars -- cars leaving the parking lot?

A Yes, sir.

Q Would you expect that to disturb some of the ballistics that may have been there?

A It -- it -- that all depends on where those cars were and how they left.

Q Okay.

A And that's why you need to attempt to identify as many people as you can that were there and what cars were they driving when they were there and then try to place those cars back, based on witnesses' testimony, to determine could any of those cars have altered anything on our crime scene.

Q Okay. Did you -- did you endeavor to talk to some eyewitnesses to try to figure out where all the cars were?

A Like I said before, I got no idea which ones to start with, because the interviews were very limited and never were they asked where were they when the shooting started.

Q Okay. Now, we talked about the diagram. I -- I have fond memories of reviewing this diagram at the Court of Appeals. Now -- and there's ---

A I don't remember ---

Q --- been ---
A My apologies. Go ahead.
Q Oh, no. I'm sorry. Well, there's been talk about the diagram with actual color-coded ballistics ---
A Yes.
Q --- evidence on -- on the diagram. But now -- now, did -- forgive me for forgetting his -- his last name. Officer Matt from the Calhoun Sheriff's Department, did -- did he guarantee that he was going to get a ---
A He said he was going to look for it.
Q Okay. He was -- he was going to look for it?
A Yeah.
Q So a -- a color-coded diagram with the ballistics evidence was not presented by the defense as an exhibit at trial; is that correct?
A Wasn't presented by anybody.
Q Fair enough. Now, have you -- you testified you go back with Mr. Fite. Did you consult with Mr. Fite about his experience in this case?
A No, sir. I have not talked to him.
Q Okay. Mr. Tressel, are you aware that some of the shells weren't recovered until days later after the incident?
A Shells? Oh, yes. Yes.
Q Okay. Are you aware that there were no bullet impacts

found on the building behind where applicant's car was placed at the scene?

A Law enforcement did not document any.

Q Okay. Did -- did you?

A There was a mark on the building. Now, again, I'm, what, five years post incident. There's a mark on the side of the building.

Q Sure.

A But ---

Q And you testified it went ---

A But I ---

Q I'm sorry.

A --- can't -- you know, I can't speculate it was -- is that now indicative of a bullet strike.

Q Yes, sir. And you testified it looked fresh?

A The -- the -- the ones they took pictures of were fresh.

Q Okay. Now, do you recall Mr. -- you said you read the trial transcript. Do you recall Mr. Gidron testifying that there's guns at Piggy Park all the time?

A I -- I remember reading that somewhere. I couldn't tell you exactly who said it, but ---

Q Sure.

A And I wouldn't doubt it. And I will add that we have the same problem in -- outside Atlanta so . . .

Q Yes, sir. Yes, sir. Now, you've done a lot of -- I'm sure you've -- I -- I -- certainly, you are an expert in homicide investigations. Are people often moving around a lot during shootings?

A You have to give me a better description of moving around.

Q Are people often trying to change their position as related, you know, prone, crouched, behind cover?

A Not normally.

Q Not normally?

A No.

Q So ---

A Occasionally ---

Q --- do you ---

A --- you run into the great case where somebody has actually gone into a prone position and opened fire on somebody. But that's very rare.

Q Okay.

A Crouching position, sometimes. A lot of times, there's movement of either the shooter -- and you can tell that by if shell casings are being ejected.

Q Sure.

A And sometimes there's movement of the shootee, the person that's being shot at. And ---

Q Sure.

A --- they'll be moving, usually running. And sometimes you can tell that based on where you find bullets and different things. But the -- a lot of crime scenes, there's -- sometimes there be very little movement. And some of them, you -- are like, what do you call, Piggy Park, that you got so many people involved, there's people going in all different directions.

Q Yes, sir. And you testified you were not able to a crime-scene reconstruction on this case?

A No.

Q And why is that?

A I don't have any measurements. I don't have documentation of where vehicles were. There's -- there's a -- just a vast amount of material that would be needed to reconstruct the crime scene.

Q Okay. Do you think Kelly Fite had all those materials?

A I don't believe -- if he saw what I saw, he didn't.

Q Okay. Now, Mr. Tressel, on page 3 of the report that's been provided to the state, do you state -- do you stand by the statement that failure to document the crime scene properly and precisely can hinder any prosecution and sometimes invalidate conclusions reached from the overall assessment of the crime scene?

A Oh, absolutely.

Q Do you think this would tend to invalidate your conclusions about the crime scene?

A It's not my failure to document. That's why I'm saying the failure to document can make conclusions invaluable. My conclusions on this scene about where items of evidence were found and what they represent, I think, is what I would call spot-on. Now, who fired what gun, where, and how, I can't do any of that.

Q Okay. And you describe the trajectory of the bullet that killed Mr. Lawton as from front to back, slightly up -- upward, and no deviation from right to left?

A That's according to the autopsy report.

Q Okay.

A Yes.

Q Would you say that contradicts Mr. Gidron's earlier testimony that the bullet hit Mr. Lawton in the head from the side?

A He said it was on the left forehead.

Q Okay. The angle?

A (No audible response.)

Q Okay.

A And -- and you have to remember -- and that's why -- just because it enters, it is going slightly upward, doesn't mean the shooter has to be directly, you know, in line below. Because the head can move around and be in

different positions.

Q Right.

A So if he just tucks his head just slightly, you can get an upward angle.

Q Sure.

A So a -- the angle is not so much an issue here for -- for me, because I know it's going slightly upward. It could've been shot from a slightly lower angle or he had his head tilted when the bullet hit him.

Q Okay.

A Uh-huh.

Q So the bullet -- the bullet angle is not a big issue?

A No. Because you can't -- there's no way to determine its true trajectory, because we don't have the shooting point and we don't have the end point of the projectile.

Q Okay. Now, did you -- I'm sorry. Did you discuss Mr. Lawton's autopsy with the doctor who performed the autopsy?

A No. I just read his autopsy report.

Q Okay. Is it impossible for .45 hollow-point bullets to pass through a human skull?

A They can if they're close range.

Q Okay.

MR. SAVILLE: Beg the Court's indulgence.

THE COURT: Uh-huh.

(Off the record briefly.)

Q Now, you testified on direct that you think it would've been helpful for the jury to have visited the Piggy Park crime scene?

A (No audible response.)

Q Now, you went to the Piggy Park. Were you able to reconstruct the crime scene?

A No. As I already said, no, I don't have any -- enough information to reconstruct the crime scene.

Q Okay.

A It was more -- more or less, to get a lay of the land and to have a conversation with Mr. Gidron about what he could remember.

Q Okay. Would the jury have been able to converse with Mr. Gidron while they were at the crime scene?

A Oh, definitely not.

Q Now, do you recall, in reading the transcript, that there was gunshot residue found in the apex of the driver door of the car in which applicant was allegedly standing during the shooting?

A Yes. There -- there was a positive GSR result.

Q Okay. And do you dispute the fact that there were .45 shell casings found in the general vicinity of the car where Mr. Benjamin was allegedly shooting from?

A No. They were all -- there -- there's a group of five of them at the rear.

Q Okay.

A Would -- what I would call the rear, based on where the car probably was parked and the corner of the building.

Q Yes, sir. Now, do you recall any testimony about Mr. Haggood shooting a .45?

A No. His only admission was he was shooting a .40-caliber.

Q Yes, sir. Do you remember any testimony of Mr. Frazier shooting a .45?

A He -- his testimony was he fired the two shots from the .32.

Q Okay. Was there any testimony of anybody else shooting a .45 in this case?

A Not that I'm aware of.

Q Okay. From your experience do eyewitnesses at crime scenes often have differing accounts?

A Yeah. It's like I -- when -- under direct, when I said they -- they view things from a different perspective. So their accounts can be different.

You have to kind of piece together which one is -- this one may have saw something more accurate than this one, but this -- something more accurate over here subsequent than this one saw. So you have to -- that's why you have to interview everybody, because it -- their perception is different.

Q Do stressful situations seem to exacerbate that problem?

A Yes.

Q Okay. Do you recall Josh Haggood testifying in this case that he saw Mr. Benjamin firing his gun?

A I do remember reading that, yes.

Q Okay. Do you recall that Mr. Haggood has combat experience in the military?

A I do, yes.

Q Okay. Were you able to determine what caliber bullet caused the entry wound to the head?

A No, sir.

Q Okay. And do you recall, in the trial transcript, that the doctor who performed the autopsy testified that the skin is elastic so the entry wound will close off, to a certain degree, after the bullet has entered?

A Usually, the entry wound is a little bit smaller than the bullet that strikes it, unless it's a very close-range gunshot wound.

Q Yes, sir.

A So you can't go based just solely on the measurement of the entry wound.

Q Yes, sir.

MR. SAVILLE: Beg the Court's indulgence.

Q That's all I have, Mr. Tressel. I hope you enjoy your

weekend.

A Thank you.

THE COURT: Redirect, ma'am.

MS. BLANCHETTE: Very briefly, Your Honor.

THE COURT: Yes, ma'am.

REDIRECT EXAMINATION

BY MS. BLANCHETTE:

Q Mr. Tressel, you were asked about when you reviewed the evidence at Calhoun County Sheriff's Department. Do you recall actually showing Investigator Trentham the diagram that said it was color-coded?

A Yes. The black and white one that I had? Yes.

Q Do you remember him acknowledging that that was most likely, in fact, his significant on that diagram?

A Yes, ma'am, I do.

Q And did he indicate to you that he'd try to locate that color diagram?

A Yes. He said he would try to locate it. It should've been part of the original case file.

Q And I was going to say, based upon your expertise and experience, should the color-coded diagram be in the investigative file?

A Yes, it should've been.

Q Okay. I also wanted to ask you briefly about the state's questions about the statement in your report that

failure to document the crime scene properly and precisely can hinder any prosecution and sometimes invalidate conclusions reached from the overall assessment of the scene. In your report that is made in your general portion of your report; is that correct?

A That's correct.

Q Okay.

A And it's -- it is primarily addressed at law enforcement and -- and in -- and in state prosecution. Because I can't fix what's not been done. So any evaluation that the state/law enforcement/prosecutor would make can become invalid because they didn't document their crime scene appropriately.

Q And here, I believe your testimony has established that you don't think that -- it's your opinion that this was not appropriately documented. Does that have any impact on your opinion that it was more likely a .45-caliber that struck the victim?

A No. That doesn't change that one bit.

Q Okay. And is that opinion based upon your review of the autopsy, the information regarding how the bullet traveled and went through the front and the back of the skull, as well as the linear measurements that you took at the scene?

A Yes. And my experience dealing with hundreds of

homicides and probably well over 2,000 suicides in my 45 -- year career.

Q And finally, the state asked you about Mr. Gidron at the scene and whether the jury could have been there with him. Having gone to the scene with Mr. Gidron and having reviewed his testimony, did going to the scene make his testimony make more sense to you?

A Yes.

MS. BLANCHETTE: Your Honor, I have no further questions.

THE COURT: Okay. Any recross, sir?

MR. SAVILLE: Very brief.

THE WITNESS: Uh-huh.

RECROSS EXAMINATION

BY MR. SAVILLE:

Q Now, Mr. Tressel, did you rule out with certainty that a .45 did not cause this wound?

A No. I've not ruled it out. I'm just saying, in my experience, I expect a .40-caliber would be the more logical weapon that we have ---

Q Yes, sir.

A --- that would've gone completely through from that distance.

Q And is it possible to load hollow-point and a full-metal-jacket .45 bullet into the same magazine?

A Yes. If ---

Q Okay.

A --- if they're both -- if they're both chambered for .45. Yes.

Q No further questions. Thank you.

A Uh-huh.

THE COURT: You're good. You can step down.

THE WITNESS: Thank you.

THE COURT: Thank you very much.

MS. BLANCHETTE: And I was just going to ask if he could be ---

THE COURT: Okay.

MS. BLANCHETTE: --- released, Your Honor.

(Whereupon, the witness exited the witness stand.)

(Off the record briefly.)

THE WITNESS: I promised to give these back to the clerk.

THE COURT: Okay. All right. Thank you. I appreciate it. Thank you for being here.

MS. BLANCHETTE: Your Honor, I would call Peter Skidmore to the stand.

THE COURT: All right.

(Whereupon, the witness came forward.)

DEPUTY CLERK OF COURT: Please raise your right hand.

THE WITNESS: (Complied.)

DEPUTY CLERK OF COURT: State your full name for the record.

THE WITNESS: Peter Gordon Skidmore.

PETE SKIDMORE, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MS. BLANCHETTE:

Q Can you please state your name for the record?

A Peter Gordon Skidmore.

Q And, Mr. Skidmore, what is your current profession?

A I'm a licensed private investigator in North and South Carolina.

Q And how long have you been a licensed private investigator?

A Right about 25 years.

Q And during those 25 years, approximately how many homicide cases do you think you've worked on?

A In excess of 100 murder investigations and probably 30 to 40 death penalty cases.

Q And, Mr. Skidmore, do you work on those cases both before they go to trial and in postconviction matters such as this?

A I do.

Q Okay. Mr. Skidmore, how did you become involved in this case?

A You reached out to me and asked me if I would be able to work on the case with you.

Q Okay. And in full disclosure, we do regularly work on cases together; is that correct?

A That's correct.

Q And once you had been retained separately in this case, did you begin reviewing the evidence in this case?

A Yes.

Q And as a result of the discovery order that I received, did you have the opportunity to review the files from SLED, the county sheriff's department, and the -- the solicitor's office?

A I did.

Q And you've heard Mr. Tressel's testimony today. Were you also able to communicate with him about this case?

A Yes.

Q And were you present when the exhibits were reviewed at both the South Carolina Court of Appeals and the Calhoun County Sheriff's Department?

A I was.

Q And the Calhoun County Clerk of Court's office or the courthouse there?

A Yes.

Q Okay. And did you have the opportunity to go to the scene with Mr. Tressel, myself, and Mr. Gidron?

A I did.

Q Okay. Mr. Skidmore, I'm going to ask as -- in your capacity as an investigator that was working this case in preparation for the PCR, what were your impressions of the evidence in this case?

A That it wasn't a thorough investigation because of the witnesses or the people there at the club. There weren't very many witness statements.

Q And Mr. Tressel referenced, I believe, up to seven individuals that were listed as being at the scene but never interviewed. Did you try to locate some of those individuals?

A Yes. The -- some of them are deceased, and some of them are out of state. So it made it more difficult at this late date.

Q Beyond Mr. Gidron, were you able to locate any additional eyewitnesses?

A Yes.

Q Who ---

A I ---

Q --- were you able ---

A I ---

Q --- to locate?

A Mr. Haggood, I believe.

Q Okay. And did -- but you did make attempts to locate

the individuals listed in the discovery ---

A I did.

Q --- we've received?

Okay. Now, you also went to the scene, as mentioned, with Mr. Gidron, Mr. Tressel, and myself. And you've reviewed the diagram that's marked as State's Exhibit 1. Are you in agreement that this diagram does not properly depict the scene?

A It absolutely does not.

Q And would you like to explain, please?

A It just -- I -- I agree with Mr. Gidron that the -- the building or the club would be about the only thing that's really relevant there.

Q How did it factor into your investigation -- or how did speaking to Mr. Gidron assist you, Mr. Skidmore?

A Well, it -- when I first went to speak with him, he was, you know, very reluctant to talk to me because it -- he just said that it really continued to upset him ---

MR. SAVILLE: Objection, Your Honor: Hearsay.

THE COURT: All right. Overruled.

Q You can continue, Mr. Skidmore.

A --- upset him. He continues to have visions of what happened that night. And so I felt that it would be very important to go back out to the crime scene where it happened and get him to explain where everything happened

and who was there and who was doing what.

Q And if you would have been retained or been involved in any way to handle the investigation leading up to the trial, would speaking to Mr. Gidron have been essentially what would have helped you launch your investigation?

A It would've been a huge help. It would've allowed me to maybe possibly track down some other folks that were there that night. He is entrenched in the community. He's well-respected in the community. And it would've been very helpful. And I probably would have focused on a third-party-guilt aspect because of the person that he set up

MR. SAVILLE: Objection ---

A --- by the ---

MR. SAVILLE: --- Your Honor.

A --- road.

MR. SAVILLE: Offering legal opinion.

THE COURT: Okay. Overruled.

Q You can finish your answer.

A He -- he was very clear that there was a shot from up at the top of the road, even to the point where ---

MR. SAVILLE: Objection ---

A --- he saw ---

MR. SAVILLE: --- Your Honor ---

A --- muzzle ---

MR. SAVILLE: --- hearsay.

A --- fire.

THE COURT: Okay. Overruled.

Q Would you repeat your answer, just so we have it for the record?

A Yes. He was very clear that someone up at the top of the road was up by a tree and fired. He saw the muzzle fire. And that person, had I been able to interview other witnesses at the scene, it could've possibly potentially been developed into a third-party-guilt ---

Q And you ---

A --- case.

Q --- attempted to do that investigation prior to this hearing today?

A Yes.

Q And was that investigation successful now seven years later?

A No. Because as I mentioned earlier, the folks that possibly could've helped are either out of state or deceased.

Q Okay. And going to the scene with Mr. Gidron, how would that have aided in your investigation in this case?

A Like I said, he -- he knew people at the club. He knew how people interacted with one another. That's why he was trying to help diffuse the situation, based on what he told me, and felt that something was going to happen. And

he probably, seven years ago, had he been talked to and interviewed several times, would've been able to give us more names and locations of where these people were.

Q After going to the scene with Mr. Gidron and if you had done it before trial, would you have advised, if you were working with trial counsel, that you would recommend that the jury go to the scene?

A Absolutely. I've -- in South Carolina I've done several of those cases where the jury has gone out to the scene.

Q And if the jury had gone out to the scene, do you think it would have been clear that the diagram was not properly depicting the scene in this case?

A Absolutely.

Q And you mentioned that you spoke to Mr. Haggood; is that correct?

A That is.

Q And has he currently completed his sentence, so he's no longer incarcerated?

A He -- that's correct. Yes.

Q Okay.

MS. BLANCHETTE: Your Honor, if I could beg the Court's indulgence one moment.

(Off the record briefly.)

Q Mr. Skidmore, you've been working on this case for a

long time. You've reviewed a lot of evidence in this case. Is there anything else you'd like to offer as testimony here today?

A Yes.

Q Please go ahead.

A When we were at the sheriff's office talking to, as he's been referred to, Investigator Matt, he -- he indicated, as Mr. Tressel said, that there was a color copy ---

MR. SAVILLE: Objection, Your Honor: Hearsay.

THE COURT: All right. Overruled.

Q Go ahead, Mr. Skidmore.

A --- color-copy diagram. What struck me really hard was what he said next. And he went on to say that the lead investigator, not himself, had retired from the sheriff's department and had files at his house and in his garage, which I found way out of bounds.

MR. SAVILLE: Objection: Hearsay.

THE COURT: Overruled.

Q Mr. Skidmore, is there anything else you'd like to offer?

A Yes. I -- I also -- if I had been involved, I probably would've used Mr. Gidron to put cones and other things and do a video of the scene so that it would -- if the jury wouldn't have been able to go out to the scene, we

could've used the video to depict the crime scene.

Q And would you have assisted in obtaining photographs or any type of visual aid that was needed for the jury regarding the scene?

A Yes.

MS. BLANCHETTE: Your Honor, I have no further questions of this witness.

THE COURT: All right. Cross?

CROSS-EXAMINATION

BY MR. SAVILLE:

Q Good morning, Mr. Skidmore. How you doing?

A Good. How are you?

Q Good.

A Good.

Q Now, Mr. Skidmore, you -- you testified that there were a lot of witnesses you would've liked to -- you would've liked to talk to. Do you have any evidence here today as to what they were going to testify to if you had ---

A No, I ---

Q --- found them?

A --- do not.

Q Okay. Did you hear Mr. Gidron's testimony earlier that -- I would say -- I would describe it as sort of a theme of outsiders versus locals ---

A Yes.
Q --- at the Piggy Park?
A Yes.
Q Okay. Would you imagine that most of the people there were probably locals?
A Yes.
Q And do you recall that testimony was put forth at trial that Mr. Gidron knew people at the club and was trying to calm things down?
A Yes.
Q Did you know Mr. Gidron five years ago?
A No, I did not.
MR. SAVILLE: Beg the Court's indulgence.
THE COURT: Yes, sir.
(Off the record briefly.)
Q Mr. Skidmore, you indicated that Mr. Gidron indicated to you -- to you that the person behind the tree was the shooter?
A Yes.
Q But the fact of the matter is there were multiple shooters in this case, correct?
A There was one shot that killed the victim. And he said the shot that came from the road was what he heard and then he heard one other shot and then rounds of other shots. But the other shots came after the victim hit the

ground from the first shot, is what he told me.

Q Okay. He said the shot that came from the road is the shot he heard?

A And saw the muzzle fire. That's correct. And then the victim went down immediately after that.

Q So is it your opinion he could be seeing the muzzle fire at the road while also seeing the victim and seeing Mr. Benjamin simultaneously?

A I would imagine, based on my experience in those type of situations, he was probably looking, as he said, to his left, to his right, and trying to see who was going to be doing what. I think he was -- had probably been in those situations prior to this situation and knew to keep his eyes open so that he wouldn't get harmed.

Q Now, did the evidence at the scene indicate that these people were taking turns shooting, or were different people shooting at the same, you would think?

A He -- what he told me was he heard one shot, saw the muzzle fire, and, to his left, saw the victim go down. Then after that, he heard one more shot. And then he heard multiple shots. But the victim was already down at that time.

He also said there was no way that the defendant could've shot because he saw him in the car.

Q Okay. And you understand, there was testimony from

multiple people that they saw applicant at the car with the door open?

A Okay. I did not read the trial testimony.

Q Oh, okay. So -- so you're not familiar with the record in this case?

A I am not.

Q Okay.

A Other than Mr. Gidron's testimony.

Q So you just had Mr. Gidron's story?

A No. His testimony.

Q Okay. So you just had Mr. Gidron's testimony?

A I've seen that. Yes.

Q Okay. And one last question: What -- what does that say at the bottom-left of the diagram right there?

A "Not to scale."

Q Okay. You know, I -- I misrepresented -- Mr. Skidmore, I do -- I do have one more question. Would it surprise you to learn that throughout the trial, verbal testimony also established where the different parties were located during the shooting, not just witnesses pointing it out on a diagram?

A Repeat that. I'm sorry.

Q You know, I'll just rephrase. Are you -- are you familiar with to what extent that diagram was used at the trial?

A No, I'm not.

Q Okay. No further questions. Thank you. Have a good weekend.

A Thank you.

THE COURT: Yes, ma'am.

REDIRECT EXAMINATION

BY MS. BLANCHETTE:

Q Mr. Skidmore, I'll start where it ended. You were asked about reviewing the trial transcript and the testimony in this case. Did you discuss the trial testimony with myself and Mr. Tressel and ==-

A Absolutely.

Q --- review pertinent ---

A Yes.

Q --- portions thereof?

A Yes.

Q Okay. But you haven't read it from start to finish?

A No, I have not.

Q Okay. And was one of the goals in wanting to review the evidence the hope that there would be a diagram that would help explain this case or help Mr. Tressel and yourself recreate the scene?

A Absolutely.

Q And was that -- was a diagram that was helpful in that regard ever located?

A No. And -- and I'd like to say it -- it's very disturbing because if the investigator -- the lead investigator had this evidence at his house, you know, we don't even know for sure if everything was turned over because we weren't able to see the whole file.

MR. SAVILLE: Your Honor, I'm going to object on the basis that there's no foundation laid that Mr. Skidmore has law enforcement experience.

THE COURT: Okay. All right. And I'll respectfully overrule so . . .

Q And we -- you've been asked about this diagram and the extent it was used at trial. But from what we reviewed and what was provided in discovery, this was the diagram utilized at trial; is that correct?

A Yes.

Q And when you were at the scene with Mr. Gidron, was he able to actually place himself in the specific location where he was?

A Yes.

Q And is that reflected in any way on this diagram?

A No, it is not.

Q Okay. And when he placed himself in the position, were you able to understand what he testified about previously and what he was explaining to you about his vantage point, whereby he could see all the things he was

recounting?

A Oh, it was very clear. And that's why I felt that it was so important that the jury be able to go out to the scene and hear his testimony as well.

Q And this scene actually is -- has a number of trees, doesn't it?

A Yes, it does.

Q And those aren't reflected on that diagram?

A No, they're not.

Q Okay. You were also asked about if you knew Mr. Gidron five years ago. The trial in this case was approximately five years ago. The incident was back in 2011. You did not know Mr. Gidron at that time; is that correct?

A No, I did not.

Q Did he convey to you, though, any concerns he had about the interaction he had with those ---

A Yes, he did.

Q --- individuals that approached him at the time of the trial?

A Yes.

Q And what was your understanding of that?

A There was actually, from my understanding, a confrontation between he and the investigator that came out to serve him a subpoena.

Q And did he indicate to you that he wanted -- he had information he wanted to provide, but it was not a situation in which he felt he was being properly utilized?

A Yes.

MR. SAVILLE: Objection, Your Honor: Hearsay.

THE COURT: Okay. Objection. Go -- I mean, excuse me. Overruled. Go ahead.

Q You can answer, Mr. Skidmore.

A Yes. You know, from my perspective, Mr. Gidron's a pretty big individual. And you -- sometimes that can be intimidating to an investigator like myself. So sometimes I like to take time and warm the person up.

And I don't believe this was done, based on what Mr. Gidron told me. He didn't know who this individual was. And he was serving a subpoena without explanation. And it just did not go over very well with Mr. Gidron.

Q And to have a complete record, you -- you said your perception. How tall are you, Mr. Skidmore?

A I'm six-one.

Q Okay. And did you provide myself any advice about how to deal with Mr. Gidron, based upon your understanding of his prior interaction with the defense in this case?

A Yes. As I said before, you needed to warm up to Mr. Gidron and not just come right at him with questions specifically, because this was a traumatic incident in his

life. This was actually a relative of his. He -- you know, it's very upsetting. And it was upsetting the first time that he and I sat down and talked about it.

Q And did you provide a caution to me that I should not grill or question Mr. Gidron while we were at the scene?

A Absolutely. Because it was very emotional for him.

Q And if you had been handling the case leading up to the trial, would you have provided similar advice to the defense attorney?

A Absolutely.

MS. BLANCHETTE: Your Honor, if I could beg the Court's indulgence one moment.

THE COURT: Yes, ma'am.

(Off the record briefly.)

MS. BLANCHETTE: Your Honor, I have no further questions.

THE COURT: Okay. Recross?

MR. SAVILLE: Very briefly.

RECROSS-EXAMINATION

BY MR. SAVILLE:

Q Mr. Skidmore, were you present when Mr. Gidron testified that he's not the same man he was five years ago?

A Yes, I was.

Q Okay.

A I think this has weighed very heavily on his mind. I

mean, he told me that he has nightmares about it.

Q Yes, sir. And you testified that it's probably not a good idea to -- to, quote, grill him in court?

A Right. As he told you in court today, he was still very nervous about even coming here. Because those are his relatives. And he doesn't want to be put in a situation of choosing sides.

And I don't believe that that's what he's done, to the fact that he even said during his testimony today that he had called the brother of the victim, just to let him know that he was coming. And the brother's -- obviously said tell the truth. And I believe Mr. Gidron has told the truth today.

Q So he's kind of being -- he's kind of being pulled at both ends?

A Yes. It's a very traumatic thing to have one of your relatives that you're probably three to four feet from get shot in the head and see him flopping around like he's got a hook in his mouth and, then, know the person that you've grown up with since sixth grade being accused and tried for something that Mr. Gidron says that didn't happen. So I'm sure it has played very heavily on his heart and mind over the past five years.

Q Sure.

A And that's ---