

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Honorable G.D. Morgan, Jr., Circuit Court Judge

ERICK ETON HEWINS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-000998

APPENDIX

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INDEX

INDEX	i
TRIAL TRANSCRIPT DATED JANUARY 14, 2013	1
FINAL BRIEF OF APPELLANT	430
<u>STATE V. HEWINS</u> , UNPUBLISHED OP. NO. 2014-UP-478 (S.C. Ct. App. Dec. 23, 2014)	463
PETITION FOR REHEARING DATED JANUARY 6, 2015	471
ORDER DENYING PETITION FOR REHEARING	476
PETITION FOR WRIT OF CERTIORARI DISMISSED DATED MARCH 23, 2016	478
APPLICATION FOR POST-CONVICTION RELIEF (2016-CP-23-2656)	480
RETURN (2016-CP-23-2656)	513
ORDER GRANTING POST-CONVICTION RELIEF (2016-CP-23-2656)	521
ORDER DENYING PETITION FOR WRIT OF CERTIORARI	527
GUILTY PLEA TRANSCRIPT DATED AUGUST 21, 2018	528
APPLICATION FOR POST-CONVICTION RELIEF (2019-CP-23-3629)	541
AMENDED APPLICATION FOR POST-CONVICITON RELIEF (2019-CP-23-3629)	548
RETURN (2019-CP-23-3629)	555
PCR COUNSEL’S AMENDED APPLICATION FOR PCR (2019-CP-23-3629)	571
POST-CONVICTION RELIEF HEARING TRANSCRIPT DATED MAY 25, 2022 (2019-CP-23-3629)	573
APPLICANT’S EXHIBIT NO. 1 (CAD REPORT)	611
STATE’S EXHIBIT NO. 1 (LETTER AND CAD REPORT)	613
ORDER OF DISMISSAL (2019-CP-23-3629)	618
INDICTMENTS	638

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF GENERAL SESSIONS

STATE OF SOUTH CAROLINA,

PLAINTIFF,

-VS-

ERICK E. HEWINS,

DEFENDANT.

2010-GS-23-8295 AND 8296

JANUARY 14, 2013

TRANSCRIPT OF RECORD

BEFORE:

THE HONORABLE G. EDWARD WELMAKER, JUDGE

APPEARANCES:

JOYCE MONTS, ESQUIRE
ATTORNEY FOR THE STATE

CHASE HARBIN, ESQUIRE
ATTORNEY FOR THE DEFENDANT

DANETTE P. HANKS
CIRCUIT COURT REPORTER

INDEX**WITNESSES****DIRECT CROSS REDIRECT RECROSS**

Scott Gardner Monts Harbin	187	208	229	230
Rachel Hall Monts Harbin	231	245		
B.H. Cothran Monts Harbin	252	258		
Kara Bennick Monts Harbin	277	284		
Tabitha Fricks Monts Harbin	287	289		
Scott Gardner Monts Harbin	290	291		
Melanie Watson Monts Harbin	292	295		
David Kern Monts	296			
James W. Armstrong Monts Harbin	298	304		
Megan Newman Harbin Monts	317	329		
Erick Hewins Harbin Monts	341	357	364	
<<-->>				
				PAGE
Jury Voir Dire				12
Opening Statements				
Monts				166
Harbin				168

State of South Carolina -vs- Erick E. Hewins (2010-GS-23-8295 and 8296)
Index

3

Closing Statements				
Harbin				373
Monts				384
Charge				393
Certificate of Reporter				429

STATE'S/ EXHIBITS

NO	DESCRIPTION	ID	EY
S-1	Photo of parking lot at Clarion Inn	190	191
S-2	Photo of parking lot at Clarion Inn	190	191
S-3	Four green tablets	200	304
S-4	Crack found in back floorboard of Defendant's vehicle	202	304
S-5	Crack contained in small bottle	202	304
S-6	Scale	203	304
S-7	Money order	203	304
S-8	Cell phone	203	304
S-9	Drug Analysis Report	276	303

DEFENDANT'S EXHIBITS

D-1	CAD report	228	249
D-2	Photo of parking lot of Clarion Inn	314	328

COURT'S EXHIBITS

C-1	Note from jury - Re: Definition of reasonable doubt	410	
C-2	Note from jury - Re: No consensus on trafficking charge	414	
C-3	Note from jury - Re: No consensus on trafficking charge	417	

JURY VOIR DIRE

#	Juror Name			Ct	St	De	ACC
47	Craig, Patrick K	W	F		x		
172	Praktish, Thomas C	W	M			x	
201	Sprinkler, Victoria R	W	F				x
216	Weatherly, Walter B	W	M			x	
244	Williams, Jimmy D	W	M		x		
94	Higgins, Jennifer E	W	F				x
240	Lowcavage, Donald J	W	M				x
39	Carroll, Fay R	W	F		x		
140	McLaren, Jeffrey S	W	M				x
13	Baldwin, Walker D	W	M				x
200	Smith, Richard S	W	M				x
42	Chittum, Walter E	W	M				x
48	Cress, Carol C	W	F			x	
235	Bender, Brian J	W	M		x		
114	Jones, Lauren M	W	F				x
208	Strong, Marc R	W	M		x		
67	Ferguson, James D	W	M			x	
175	Quast, David C	W	M			x	
243	Sales, Takesha L	B	F				x
160	Owens, John S	W	M				x
109	Jenkins, Russell K	W	M				x
103	Hughes, James M	W	M				x
9	Atkinson, Jeffrey P	W	M				x
131	Little, Lacey M	W	F				x

1 **January 14, 2013**

2 (WHEREUPON, Court convened with all parties present
3 and the following proceedings were had.)

4 MR. HARBIN: Judge, could we address the Court
5 before the jury comes in here?

6 THE COURT: Yes, sir.

7 MR. HARBIN: Judge, we've gotten -- in the last
8 case there was an issue regarding the text messages on the
9 phone.

10 THE DEFENDANT: They wasn't even brought up.

11 THE COURT: Let your lawyer talk, sir.

12 MR. HARBIN: This search warrant was actually --
13 it wasn't even executed or signed until January 7th. So
14 we've recently got -- the Solicitor turned it over to us.
15 Mr. Hewins is concerned about two issues. Number one,
16 about his ability to review -- having enough time to review
17 this information. Number two, he's specifically concerned
18 about the fact that this evidence, and I've tried to
19 discuss this with him, but I want this on the record Your
20 Honor. He's concerned that this evidence was not in the
21 prior trial. This is brand new evidence that they're
22 trying to get in now in this trial that was not presented
23 in the last trial. It was my explanation, whether correct
24 or not, that the Solicitor is allowed to bring whatever
25 evidence she would like to bring within the bounds of the

1 law in this retrial. But Mr. Hewins has a concern that he
2 wanted the Court to be aware of. He seems to be
3 dissatisfied with the particular part of my services, so I
4 don't want to totally speak on his behalf because that
5 would kind of be a conflict, I guess, of his interest if
6 he's saying I didn't do something and me trying to explain
7 to you what I did or did not do. But at this point he has
8 concerns about the timing of this evidence and the fact
9 that there is evidence that was not presented in the last
10 trial that apparently it's intended to be used in this
11 trial, Judge.

12 THE COURT: When did you get the piece of
13 evidence, Mr. Harbin?

14 MR. HARBIN: Just, actually, I believe it was
15 faxed over on Friday afternoon. I think this was the one
16 you had trouble faxing over, I believe, about four or five,
17 three or four or five on Friday afternoon, Judge.

18 MS. MONTIS: Your Honor, if I may ---

19 MR. HARBIN: You can correct me if I'm wrong, but
20 that's my recollection.

21 THE COURT: Yes, Ms. Months.

22 MS. MONTIS: Your Honor, this is the contents of
23 the Defendant's cell phone, which was in his possession
24 when he was arrested. We just didn't use it in the prior
25 trial. As soon as I got a CD of what was on the cell phone

1 last week, I made a copy and provided that to Mr. Harbin so
2 he could see everything that I had that was on the cell
3 phone. So he was provided that. Was it Wednesday or
4 Thursday?

5 MR. HARBIN: Yeah, that was Thursday. And then
6 the following day, I believe -- so the CD I received on
7 Thursday. The actual copy of the warrant, I believe, was
8 what you faxed over for me, I believe.

9 THE COURT: So what you got on Friday was a
10 synopsis of the CD?

11 MR. HARBIN: No, sir. I believe that the actual
12 search warrant is what was faxed the following day, which
13 would be three days ago.

14 THE COURT: But -- okay. For the cell phone
15 records?

16 MR. HARBIN: Yes, for the records which were
17 actually provided to me a day before the search warrant was
18 provided to me.

19 THE COURT: So is this additional evidence? Have
20 you have a chance to review all of that now?

21 MR. HARBIN: Judge, I have. But in all honesty,
22 the preparation for this case, obviously, has kind of been
23 compacted because of the nature of retrial. And, again,
24 the delay in getting the transcript. So once I got the
25 transcript, Mr. Hewins met with me and then met with me

1 again, I believe, on Friday. Friday, and I've gone over,
2 actually, just about thirty minutes ago with him, the CD
3 that has the text messages on it. And I entirely neglected
4 to remember to show him the CD because we were talking
5 about suppression issues in all kinds of case law on
6 Friday. It just totally slipped my mind. I don't know
7 honestly that that -- well, I didn't even anticipate it
8 being used because I didn't know that it was really
9 necessary because once you get -- that only comes when he's
10 arrested. You only get the cell phone if he is, indeed,
11 arrested. Be that as it may, Mr. Hewins, saw that only
12 today and this search warrant, we got the information on
13 Thursday and the search warrant on Friday.

14 MS. MONTS: Your Honor, I'd be happy to hand up a
15 copy of the search warrant.

16 MR. HARBIN: And, Joyce, please correct me if I'm
17 wrong about those days. That's my recollection.

18 THE COURT: All right. Well, the -- if we select
19 our jury now and take care of those issues afterwards, is
20 that going to be satisfactory? We can get our jury
21 selected now. They're waiting out in the hallway. We can
22 address those things. I can find out then whether you've
23 had time to review all of that. If we need to postpone the
24 case and start it tomorrow, we could certainly do that or
25 later in the week if we have to. We just need to get the

1 case proceeding, I would think. This is a apparently a
2 fairly old case. It looks like it was 2010. Don't you
3 want to get this resolved, Mr. Hewins?

4 THE DEFENDANT: Yes, sir. But I haven't had time
5 -- I just received a motion like a week ago.

6 THE COURT: Okay. How much time do you think you
7 need to discuss with your attorney?

8 THE DEFENDANT: I mean, I would like to be able
9 to properly prepare myself for this new trial.

10 THE COURT: Well, I mean, that's what I just
11 asked you. How long will it take you to prepare that?

12 THE DEFENDANT: Like you say, another week or
13 later on this week or something like that. I just want
14 some more, you know, ---

15 THE COURT: But the only thing that's new to you
16 is this ---

17 THE DEFENDANT: The transcript and the search
18 warrant.

19 THE COURT: --- the search warrant and the
20 transcript.

21 THE DEFENDANT: Yes, sir.

22 THE COURT: If we started the case tomorrow
23 afternoon, would that give you enough time? I mean, ---

24 THE DEFENDANT: That would make me certainly stay
25 up all night reading.

1 THE COURT: Well, we could -- it's on the docket.
2 I mean, next week, I don't know what -- when I say, let's
3 try it next week, and what I say and what the Solicitor
4 says, you know, as far as getting witnesses here and their
5 schedule, they have other cases to try. I don't know that
6 we could just say we're going to have a term of court next
7 week. We could hopefully do it tomorrow if we've got time
8 to get started then. We could get our jury selected now.
9 Get our jury selected now, then we can send them home, and
10 then we can take care of some matters that we need to this
11 afternoon. And if we need to delay starting in the morning
12 and then I'll just tell the jury to call back after six
13 o'clock and we would know what time they're to be here
14 tomorrow. So maybe we can start it late tomorrow morning
15 or early tomorrow afternoon and see what we can do about
16 that. All right. Will that take care of that matter do,
17 you think?

18 MR. HARBIN: Can I have one moment to confer with
19 my client?

20 THE COURT: Yes, sir.

21 MR. HARBIN: Judge, may we approach?

22 THE COURT: Yes, sir.

23 (WHEREUPON, Ms. Monts and Mr. Harbin approached the
24 bar.)

25 THE COURT: We were doing a little scheduling to

1 make sure we have all the hearings done.

2 You can have our jury come in.

3 (WHEREUPON, the jury panel entered the open court at
4 approximately 12:13 P.M.)

5 THE COURT: Thank you very much, ladies and
6 gentlemen, for your patience with us. We've tried to get
7 all of our cases scheduled. We're now ready to select a
8 jury for the trial of the first case that we're going to
9 have this week.

10 I have indictments before me for the first case. This
11 is an indictment that says here in Greenville County on or
12 about August the 9th, 2010, that Mr. Erick Hewins willfully
13 and unlawfully had in his possession a quantity of a
14 controlled substance, clonazepam, that being in violation
15 of the law.

16 I also have an indictment that says on or about that
17 same date of August the 9th, 2010, that Mr. Hewins
18 knowingly sold or manufactured, delivered or brought into
19 this state or aided or conspired with others to have in
20 this state a quantity of crack cocaine, that being more
21 than ten grams.

22 Now, Mr. Hewins, he's entered a plea of not guilty to
23 both of these charges. By pleading not guilty the State of
24 South Carolina has the burden of proof beyond a reasonable
25 doubt to convince a jury of his guilt in this matter. He,

1 as all other individuals charged with any offense, are
2 presumed innocent. Now, in this case, I'm going to be
3 judging the law. We need to find twelve fair and impartial
4 jurors to be the judge of the facts in the case to
5 determine what the facts are. You've been qualified to
6 serve as a juror. I now need to ask you some additional
7 questions to determine your eligibility to serve on this
8 particular case.

9 First of all, ladies and gentlemen, is there any
10 member of the jury panel who has any prior knowledge about
11 this particular incident that allegedly happened back in
12 August of 2010, either that you happened upon the scene or
13 read something in the newspaper, heard something on the
14 radio or television, or heard about it at the coffee shop?
15 If you have any prior knowledge from any source whatsoever,
16 would you please stand?

17 (No response.)

18 THE COURT: Thank you, there is no response.

19 Is there any member of the jury panel related by blood
20 or marriage to Mr. Erick Hewins? If so, would you please
21 stand?

22 (No response.)

23 THE COURT: Is there a member of the jury panel
24 who has a close business or a social, a personal
25 relationship, with Mr. Hewins? If so, would you please

1 stand?

2 (No response.)

3 THE COURT: Thank you, there is no response.

4 Several witnesses may be called upon to testify in
5 this case, ladies and gentlemen. Not all of them may be
6 called, but I needed to go over the list of the potential
7 witnesses with you. Among those witnesses would be Megan
8 Elizabeth Newman, James Armstrong, David Kern, Tabitha
9 Fricks, Kara Bennick. From the Greenville Police
10 Department would be Scott Gardner, Rachel Hall, J.D. Bragg,
11 Officer Digirolamo, and Officer Cothran, B.H. Cothran. Is
12 there any member of the jury panel related by blood or
13 marriage to any of these potential witnesses? If so, would
14 you please stand?

15 (No response.)

16 THE COURT: Is there any member of the jury panel
17 has a close business or a social, a personal relationship,
18 with any of these potential witnesses? If so, would you
19 please stand?

20 (No response.)

21 THE COURT: Is there any member of the jury panel
22 a contributing member of any organization whose primary
23 concern is that of the promotion of law enforcement or
24 victims' rights, such as the Sheriff's Association, MADD or
25 SADD, CAVE or PARR. If you are a contributing member of

1 any of those organizations, would you please stand.

2 (No response.)

3 THE COURT: Is there any member of the jury panel
4 expressed or formed an opinion in any way about the facts
5 in this case. If so, would you please stand?

6 (No response.)

7 THE COURT: Is there any member of the jury panel
8 aware of any bias or prejudice that would interfere with
9 your ability to be a fair juror if you were selected to
10 serve in this particular case. If so, would you please
11 stand?

12 (No response.)

13 THE COURT: Thank you. Again, there's no
14 response.

15 Is there any member of the jury panel or a member of
16 your immediate family involved in law enforcement in any
17 way? If you or a member of your immediate family are a law
18 enforcement officer or serve in law enforcement in any way,
19 would you please stand?

20 All right. Let me start here. If you would state
21 your name and number, please?

22 THE JUROR: Sherry Radford, number 176.

23 THE COURT: And what relative do you have in law
24 enforcement?

25 THE JUROR: My daughter.

1 THE COURT: And what agency does she -- where
2 does she work?

3 THE JUROR: She works for the Transylvania County
4 Sheriff's Department. She's a jailer.

5 THE COURT: In North Carolina?

6 THE JUROR: Yes.

7 THE COURT: All right. If you'd remain standing
8 just a moment. Your name and number, please, sir?

9 THE JUROR: David Quast, 175. It's not a direct
10 relative, but my daughter is -- her fiancé is a police
11 officer with Greenville Police.

12 THE COURT: Okay. Is it Greenville City?

13 THE JUROR: Correct.

14 THE COURT: His name was not listed in any of
15 those names I gave you?

16 THE JUROR: Correct.

17 THE COURT: They're due to be married?

18 THE JUROR: Correct.

19 THE COURT: Okay. Your name and number, please,
20 sir?

21 THE JUROR: 234, Barry Zachary. My brother's a
22 law enforcement officer with the Fort Mill Police
23 Department.

24 THE COURT: Okay. Those of you who are standing,
25 you have a relative or a potential future relative in law

1 enforcement, would that affect your ability to be a fair
2 juror? In other words, law enforcement officers presumably
3 are going to be testifying. You're going to hear all the
4 evidence in the case. I'm going to instruct you on what
5 the law is. If you believe that because of this
6 relationship with a law enforcement officer that you could
7 not be fair to both sides, to the State and to the
8 Defendant, then we need to select other jurors to serve.
9 Those three of you who are standing with relatives or
10 future relatives, if you believe you could be a fair juror
11 in this case and weigh all the evidence under the law that
12 I give you, I'm going to ask if you would be seated. If
13 you feel like you would hesitate about being a juror and
14 you couldn't, I'd ask if you would remain standing.

15 THE JUROR: It might have an effect.

16 THE COURT: All right. Thank you, ma'am, for
17 your candor. We'll excuse you from the trial of this case.
18 If you would just be seated. You don't need to respond to
19 any other questions I have. Thank you. Again, your number
20 please?

21 THE JUROR: 176.

22 THE COURT: Thank you. At this time I'm going to
23 ask the attorneys if you would please stand and introduce
24 yourself to the jury. Solicitor?

25 MS. MONTS: Ladies and gentlemen, my name is

1 Joyce Monts. I'm with the Thirteenth Circuit Solicitor's
2 Office.

3 THE COURT: Mr. Harbin.

4 MR. HARBIN: Good morning or I guess good
5 afternoon. My name is Chase Harbin and I'm an attorney in
6 Greenville.

7 THE COURT: Thank you. Is there any member of
8 the jury panel related by blood or marriage to either of
9 these attorneys or members of their staff. If so, would
10 you please stand?

11 (No response.)

12 THE COURT: Is there a member of the jury panel
13 who has a close business or social, a personal relationship
14 with either of these attorneys? If so, would you please
15 stand?

16 (No response.)

17 THE COURT: Is there a member of the jury panel
18 who has ever been involved in any litigation in which
19 either of these attorneys represented you or represented
20 the opposing side? If so, would you please stand?

21 (No response.)

22 THE COURT: Thank you, there is no response.

23 Ladies and gentlemen, the State of South Carolina, the
24 Defendant in this case, Mr. Hewins, they come into this
25 courtroom both desiring to have fair and impartial jurors

1 to hear this case. They deserve to have fair and impartial
2 jurors to hear this case, to make a decision on what's
3 presented in this courtroom, the evidence that's presented
4 in light of the law that I give you and that alone. Is
5 there any member of the jury panel aware of any reason
6 whatsoever that in this particular case you could not be
7 fair to both the State and to the Defendant and render a
8 verdict under the law and the evidence and that alone? If
9 for any reason you believe you could not be a fair juror,
10 would you please stand?

11 (No response.)

12 THE COURT: Thank you, there is no response.

13 Any other questions from the State?

14 MS. MONTS: No, Your Honor.

15 THE COURT: From the Defense?

16 MR. HARBIN: Nothing from the Defense, Judge.

17 THE COURT: All right. Let's select a jury. You
18 can just have them stand in place.

19 THE CLERK: When I call your name, if you would
20 just stand in place and await further instruction.

21 Juror number 47, Patricia Craig. What says the State?

22 MS. MONTS: Please excuse the juror from this
23 case.

24 THE CLERK: Thank you. You may be seated.
25 You're excused from the trial of this case.

1 Juror number 172, Tom Praktish. What says the State?

2 MS. MONTES: Please present the juror.

3 THE CLERK: Thank you. What says the Defendant?

4 MR. HARBIN: Please excuse the juror.

5 THE CLERK: Thank you. You may be seated.

6 You're excused from the trial of this case.

7 Juror number 201, Victoria Sprinkler. What says the

8 State?

9 MS. MONTES: Please present the juror.

10 THE CLERK: Thank you. What says the Defendant?

11 MR. HARBIN: Please seat the juror.

12 THE CLERK: Thank you. You may be seated in the
13 jury box.

14 Juror number 216, Walter Weatherly. What says the

15 state?

16 MS. MONTES: Please present the juror.

17 THE CLERK: Thank you. What says the Defendant?

18 MR. HARBIN: Please excuse the juror.

19 THE CLERK: Thank you. You may be seated.

20 You're excused from the trial of this case.

21 Juror number 244, Jimmy Williams. What says the

22 State?

23 MS. MONTES: Please excuse the juror.

24 THE CLERK: Thank you. You may be seated.

25 You're excused from the trial of this case.

1 Juror number 94, Jennifer Higgins. What says the
2 State?

3 THE COURT: Could I see the attorneys here just
4 for a moment, please?

5 (WHEREUPON, Ms. Monts and Mr. Harbin approached the
6 bar.)

7 THE CLERK: What says the State?

8 MS. MONTS: Please present the juror.

9 THE CLERK: Thank you.

10 MR. HARBIN: Please seat the juror.

11 THE CLERK: Thank you. You may be seated in the
12 jury box.

13 Juror number 240, Donald Lowcavage.

14 MR. HARBIN: What number was that?

15 THE CLERK: 240.

16 MR. HARBIN: Thank you.

17 THE CLERK: Uh-huh (affirmative).

18 MR. HARBIN: Would you say his last name, please?

19 THE CLERK: Lowcavage. I'm sorry. What is it?

20 THE JUROR: Lowcavage.

21 THE CLERK: What says the State?

22 MS. MONTS: Please present the juror.

23 THE CLERK: Thank you. What says the Defendant?

24 MR. HARBIN: Please seat the juror.

25 THE CLERK: Thank you. You may be seated in the

1 jury box. Sorry for mispronouncing your name.

2 Juror number 39, Fay Carroll. What says the State?

3 MS. MONTS: Please excuse the juror.

4 THE CLERK: Thank you. You may be seated.

5 You're excused from the trial of this case.

6 Juror number 140, Jeffrey McLaren. What says the
7 State?

8 MS. MONTS: Please present the juror.

9 THE CLERK: Thank you. What says the Defendant?

10 MR. HARBIN: Please seat the juror.

11 THE CLERK: Thank you. You may be seated in the
12 jury box.

13 Juror number 13, Walker Baldwin. What says the State?

14 MS. MONTS: Please present the juror.

15 THE CLERK: Thank you. What says the Defendant?

16 MR. HARBIN: Please seat the juror.

17 THE CLERK: Thank you. You may be seated in the
18 jury box.

19 Juror number 200, Richard Smith. What says the State?

20 MS. MONTS: Please present the juror.

21 THE CLERK: Thank you. What says the Defendant?

22 MR. HARBIN: Please seat the juror.

23 THE CLERK: Thank you. You may be seated in the
24 jury box.

25 Juror number 42, Walter Chittum. What says the State?

1 MS. MONTS: Please present the juror.

2 THE CLERK: Thank you. What says the Defendant?

3 MR. HARBIN: Please seat the juror.

4 THE CLERK: Thank you. You may be seated in the
5 jury box.

6 Juror number 48, Carol Cress. What says the State?

7 MS. MONTS: Please present the juror.

8 THE CLERK: Thank you. What says the Defendant?

9 MR. HARBIN: Please excuse the juror.

10 THE CLERK: Thank you. You may be seated.

11 You're excused from the trial of this case.

12 Juror number 235, Brian Bender.

13 MR. HARBIN: Give me his name, please.

14 THE CLERK: Brian Bender, 235.

15 MR. HARBIN: Thank you.

16 THE CLERK: Uh-huh (affirmative). What says the
17 State?

18 MS. MONTS: Please excuse the juror.

19 THE CLERK: Thank you. You may be seated.

20 You're excused from the trial of this case.

21 Juror number 114, Lauren Jones. What says the State?

22 MS. MONTS: Please present the juror.

23 THE CLERK: Thank you. What says the Defendant?

24 MR. HARBIN: Please seat the juror.

25 THE CLERK: Thank you. You maybe seated in the

1 jury box.

2 Juror number 208, Marc Strong.

3 MR. HARBIN: I'm sorry?

4 THE CLERK: 208, Marc Strong. 208.

5 MR. HARBIN: Thank you.

6 THE CLERK: What says the State?

7 MS. MONTS: Please excuse the juror from this
8 case.

9 THE COURT: Thank you. You may be seated.
10 You're excused from the trial of this case.

11 Juror number 67, James Ferguson. What says the State?

12 MS. MONTS: Please present the juror.

13 THE CLERK: Thank you. What says the Defendant?

14 MR. HARBIN: Please excuse the juror.

15 THE CLERK: Thank you. You may be seated.

16 You're excused from the trial of this case.

17 Juror number 175, David Quast.

18 THE JUROR: Quast.

19 THE CLERK: Quast, I'm sorry. What says the
20 State?

21 MS. MONTS: Please present the juror.

22 THE CLERK: Thank you. What says the Defendant?

23 MR. HARBIN: Please excuse the juror.

24 THE CLERK: Thank you. You may be seated.

25 You're excused from the trial of this case.

1 Juror number 243, Takesha Sales. What says the State?

2 MS. MONTES: Please present the juror.

3 THE CLERK: Thank you. What says the Defendant?

4 MR. HARBIN: Please seat the juror.

5 THE CLERK: Thank you. You may be seated in the
6 jury box.

7 Juror number 160, John Owens.

8 MR. HARBIN: What ---

9 THE CLERK: 160. That's okay. What says the
10 State?

11 MS. MONTES: Please present the juror.

12 THE CLERK: Thank you. What says the Defendant?

13 MR. HARBIN: Please seat the juror.

14 THE CLERK: Thank you. You may be seated in the
15 jury box.

16 Juror Number 109, Russell Jenkins. What says the
17 State?

18 MS. MONTES: Please present the juror.

19 THE CLERK: Thank you. What says the Defendant?

20 MR. HARBIN: Please seat the juror.

21 THE CLERK: Thank you. You may be seated in the
22 jury box.

23 Juror number 103, James Hughes. What says the State?

24 MS. MONTES: Please present the juror.

25 THE CLERK: Thank you. What says the Defendant?

1 MR. HARBIN: Please seat the juror.

2 THE CLERK: Thank you. You may be seated in the
3 jury box. That was twelve.

4 Juror number 9, Jeffrey Atkinson.

5 MR. HARBIN: Judge, how many ---

6 THE COURT: One and two.

7 THE CLERK: Thank you.

8 Jeffrey Atkinson, number 9. What says the State?

9 MS. MONTS: Please present the juror.

10 THE CLERK: Thank you. What says the Defendant?

11 MR. HARBIN: Please seat the juror.

12 THE CLERK: Thank you. You may be seated in the
13 jury box.

14 Juror Number 131, Lacey Little. What says the State?

15 MS. MONTS: Please present the Juror.

16 THE CLERK: Thank you. What says the Defendant?

17 MR. HARBIN: Please seat the juror.

18 THE CLERK: Thank you. You may be seated in the
19 jury box.

20 THE COURT: Are there any matters we need to take
21 care of as far as the selection of the jury in this case?
22 From the State?

23 MS. MONTS: No, Your Honor.

24 THE COURT: From the Defense?

25 MR. HARBIN: Nothing from the Defense, Judge.

1 THE COURT: Ladies and gentlemen who were not
2 selected, I can excuse you at this time. If you'll just go
3 back to the assembly room. Please call back tonight after
4 six o'clock and Ms. Olsen will further instruct you about
5 that. Everyone please remain seated while the jury
6 departs.

7 (WHEREUPON, the jury panel exited the open court at
8 approximately 12:47 P.M.)

9 THE COURT: Ladies and gentlemen, you've seen the
10 process by which you were selected. I need to make just
11 some brief preliminary remarks to you about the schedule
12 we'll have during the conduct of the trial. This is not an
13 instruction on the law. I'll give you the law at the end
14 of the case. These parties, the attorneys feel like you're
15 the best twelve people to decide this case. We've taken a
16 couple of alternates. We don't have any other trials going
17 on today. That way -- alternates are every bit as much a
18 part of the trial as anyone else. They're sitting in those
19 two seats. That'll be their seats throughout the trial.
20 Sometimes an emergency may come up with one of the first
21 twelve of you that were selected. There may be an illness
22 befall you. I hope it doesn't. But we're in the flu
23 season and in case someone becomes ill, then these
24 alternates, they'll just step into the shoes of the person
25 who had to leave because of that emergency or that

1 conflict. And we'll be able to continue with the case and
2 won't have to start it all over again with a brand new
3 jury. So the alternates are important, as well.

4 I'm well aware that you're here at a sacrifice, that
5 you have other things you need to be doing. We're going to
6 do everything within our power to minimize your
7 inconvenience. We're going to try to keep the trial
8 running smoothly when we're in the courtroom here.

9 You're going to be the judge of the facts, ladies and
10 gentlemen. You may have some apprehension about that title
11 I've bestowed upon you, being a judge. You may never have
12 been at the courthouse before. Certainly not in a
13 courtroom. You went through the process. You answered
14 your summons this morning. You came to court and you've
15 watched a film and now you're seeing yourself sitting in a
16 jury box thinking to yourself, how did this happen? I
17 can't be a judge of the facts. I don't have any law
18 background. I don't have any training. Never been in the
19 courtroom in my whole life. I assure you, ladies and
20 gentlemen, you bring into this courtroom every skill you're
21 going to need to be the judge of the facts in the case.
22 Because what you bring into this courtroom is the good
23 common sense with which you've been blessed, the everyday
24 experiences that you enjoy in the workforce, in the home,
25 in social activities. That's what you're going to need to

1 utilize to be the fact-finder in this case. And I'm
2 confident that you have every skill you're going to need to
3 accomplish that.

4 My job is to be the Judge of the law, to conduct the
5 trial. As the case develops after the lawyers have their
6 opening statements and evidence is presented, sometimes in
7 the course of the trial, an objection may be made. One
8 lawyer or the other, they may object to a document or a
9 question. My job is to rule on those objections. Often
10 when an objection is made, most of the time, I can say
11 sustained or overruled and we move on to the next question
12 or the next Exhibit. Sometimes, as you already have, you
13 see me summons the attorneys up here. At the bench we can
14 whisper and get a matter resolved, perhaps scheduling,
15 perhaps a legal issue. Sometimes in the course of a trial,
16 there are stages in that trial where legal matters arise.
17 Sometimes, unforeseen, a legal matter may arise. If I need
18 to study some law, to read a case or check a statute or
19 hear arguments from the attorney concerning a legal
20 premise, I may need to hear testimony that wouldn't even be
21 properly offered before a trial jury for me to make that
22 decision. I want to make the very best decision I can as a
23 Judge of the law. Sometimes I have to have those
24 extraneous matters come before me that have no concern to
25 you as the fact finder. So even as we've done today and as

1 the case progresses you may find that you may have to go
2 back to your jury room while I resolve a matter of law.
3 We're both judges. You're judging the facts and I'm
4 judging the law. But we have different roles, of course.
5 And just as I need to make those decisions sometimes
6 outside your present, when all the evidence is in and I'm
7 giving you your legal instructions, you'll be back in your
8 jury room deliberating. And even though I'm a Judge like
9 you are, I'm not going to be back there with you telling
10 you what I think the facts are. The law of South Carolina,
11 our Constitution in our state prohibits a Trial Judge such
12 as I from having an opinion about the facts. That's
13 totally up to you, the jurors, to determine what those
14 facts are. So if you have to come back and forth, I hope
15 you understand that that's a necessary matter that I have
16 to take care of.

17 Part of my job also is to conduct the trial and decide
18 when we take breaks and when we start in the morning and so
19 forth. I've told you as a judge of the facts, you're going
20 to need to listen carefully to what takes place. You're
21 going to have to listen to what the evidence -- what the
22 witnesses testify to. They may be called to examine the
23 evidence that may be presented. Your job is to watch what
24 takes place in the trial, watch the demeanor of the
25 witnesses, the transactions that are taking place in this

1 courtroom.

2 Obviously, you need to be focused on listening and
3 watching. If we haven't taken a break and you need a
4 break, please get my attention. Normally, we'll take a
5 break every hour, hour and a half, let you refresh
6 yourself, have a snack or whatever. Sometimes, it may vary
7 a little bit depending on the witness and the availability
8 of that witness. There's a lot of scheduling about when
9 people are available and not available. But if you need a
10 break and I haven't called for a break, please get my
11 attention. If you can't, if you're uncomfortable in any
12 way and you can't listen well, then that's defeating the
13 purpose of you being jurors. If you can't get my
14 attention, these bailiffs are here to help you. You've
15 perhaps already met them. At the back door Mr. Fuller.
16 To your left is Ms. Sims. Each of those will assist you in
17 any way that they can. The young lady from the clerk's
18 office who called your names earlier, Joelle Lanfear, she's
19 available here to help you. She'll be with us this week,
20 someone from the clerk's office to help swear in the
21 witnesses and so forth. Seated directed in front of me is
22 Ms. Danette Hanks. She's the court reporter. She's taking
23 down everything that's said during the course of this
24 trial. She'll be marking any exhibits that may be offered
25 into evidence. Certainly, she'll be of assistance to you

1 any way that she can. Seated beside me is David Brown, a
2 recent law school graduate, admitted to the South Carolina
3 Bar, my law clerk. A valuable asset to me. He'll be up
4 here assisting me. You may see him come and go as the
5 trial is in progress, taking care of matters that I have in
6 the office. But any of these folks will certainly assist
7 you in any way that they can.

8 As we come and go in the courthouse, you may be coming
9 in tomorrow and you see one of the lawyers in the hallway
10 or one of the witnesses, they high-hat you and turn away
11 and don't talk to you or you might be on the elevator with
12 someone. These lawyers are trained to avoid any appearance
13 of any impropriety. Even though they see you in the hall,
14 you're waiting on the elevator or you're talking about a
15 sports score or the weather or the rain or anything else,
16 it could be perceived as jury tampering and they want to
17 avoid any appearance of that. That's the way they're
18 trained in law school and as practitioners. So you
19 shouldn't hold that against these lawyers if they seem to
20 be avoiding you. They're fine young people. They're
21 friendly by nature. But you just accept the fact that in
22 the course of the trial, they won't be communicating with
23 any juror, except here in the courtroom.

24 Cases take place in stages, as I've said. There will
25 be the opening statements by the attorneys. There'll be

1 witnesses called who will be examined and cross-examined.
2 Then the attorneys after all of the evidence is in can make
3 a closing statement to you. And then I'll instruct you on
4 the law. Only then is it proper for you to be discussing
5 the case. Sometimes we want to start analyzing and you can
6 certainly do that in your mind, but you should not be doing
7 that among each other. You need to just listen, keep an
8 open mind to all the evidence and don't discuss it with
9 your fellow jurors. At lunch, you may be with business
10 associates or family or tonight you're going to have loved
11 ones, friends that you may see, going to be awfully curious
12 about what happened. They know you had a subpoena to be at
13 court today for jury service. Did you get picked? What's
14 the case about? Then they want to say, well, let me tell
15 you what I know about that. That would be improper, ladies
16 and gentlemen. You certainly can tell your loved ones that
17 you're serving on a jury that involves drugs. But short of
18 that, you shouldn't be discussing the case that's going on
19 about what some witness said, even though they're not
20 jurors. You shouldn't be talking with anyone about it,
21 family, friends or others. You're going to have a chance
22 when this case is concluded to share your experiences with
23 your family and your friends. But while the case is in
24 progress, that's not the time to do that. You made a high
25 commitment in this selection process to both the State of

1 South Carolina and to the Defendant in this case to well
2 and truly try this case and be fair and objective. I've
3 asked you those questions concerning that. You've made
4 that commitment. So refrain from discussing it with
5 anyone. When you're out and about if someone were to
6 approach you and to say that they want to give you
7 information about this case or ask you questions, you just
8 explain to them, I'm a juror and I've been instructed I
9 can't be talking about it. If anybody were to persist and
10 want to give you information or ask you questions, please
11 excuse yourself as soon as you can. And if possible get
12 the name of that person, report it back to me. And I'll
13 assure you I'll take care of that. I don't expect anything
14 like that happening, but I want to alert you to the
15 importance of the process that we're now in. We need to
16 maintain the purity of that process. You've been selected
17 to hear this case with an open slate and I want to make
18 sure that all the factors that you make a determination on
19 this case are those factors that come about in this
20 courtroom and not anywhere else.

21 We're in a information -- high information age now,
22 lot of technology around. We have lots of means to find
23 out things. I give you this instruction not by way of
24 temptation but by way of order from our Chief Justice of
25 the South Carolina Supreme Court. She's issued an order

1 that all Judges such as I sitting on the bench, a Trial
2 Judge, all of us are to instruct the jurors who have been
3 selected and empaneled to sit on a case that there's not to
4 be any kind of independent research to check on the
5 internet or look up a word that you may hear during the
6 course of a trial or go to the library or do any archives
7 searching. That would be improper, ladies and gentlemen.
8 That would be against the commitment that you're making to
9 these parties. The same goes for any social media, for you
10 to get on any of your social media accounts and share your
11 experiences and talk about what you've heard or what's
12 transpiring. Again, ladies and gentlemen, you'll have the
13 opportunity to do all of that and share your experience.
14 But while the trial is going on that's not the time to do
15 that. That's unfair to all the parties. And it's
16 certainly against the commitment, the oath that you've
17 taken to -- before this Court already today. So I want to
18 make sure you understand that and how important that is.

19 I look forward to working with you. I'm confident, as
20 these attorney's are, that you're the twelve people who can
21 best hear this case. And I know that you're going to be
22 able to fulfill your duties well. Your commitment to do
23 justice to both sides is a strong commitment and it makes
24 me proud that you've accepted that responsibility and made
25 that commitment to them.

1 As I told you, my job is to rule on the law. We have
2 several legal matters that we need to take care of this
3 afternoon. I've consulted with the attorney. I'm not sure
4 that we're going to really be able to start the case with
5 any fluid at all this afternoon. It would not be fair to
6 the lawyers to make their opening statements and then not
7 have a witness or divide a witness up. So we may work
8 through some of these things today and be ready to,
9 hopefully, start as soon as we can get through with those
10 legal matters and make our opening statements to you.
11 Rather than have you come in in the morning, in case we
12 didn't get through, I'm just going to have you call. I
13 told the other jurors they would be calling tonight after
14 six o'clock. I'm going to ask you to call in, as well.
15 There'll be a message for the -- I don't know whether Ms.
16 Olson will call it the empaneled jury or the serving jury
17 or the jury that's been selected, but you'll be able to
18 understand from the message which is for you and which is
19 for the full panel because they may be coming back later
20 today for us to select a jury in another case that may be
21 starting. But if you'll call back tonight after six,
22 ladies and gentlemen, there'll be an instruction just for
23 you, the fourteen of you, as to when you need to report
24 back tomorrow. Again, I'll try not to have you sitting
25 when you don't need to be here. But if you'll call back

1 there'll be further instructions about when to come in
2 tomorrow or you may even have to call back later in the
3 morning. But we'll do all we can to not have a lot of down
4 time for you here and only have you here when we need you
5 here.

6 Look forward to serving with you, ladies and
7 gentlemen. You're free for the day. Again, I remind you
8 not to be discussing the case. I'm going to let you go
9 with Ms. Sims now. She's going to show you where your jury
10 room is, where you need to report back tomorrow whenever
11 you're coming back. Just call back tonight after six
12 o'clock and there'll be instructions for you. You're
13 dismissed at this time. Everyone else, please remain
14 seated.

15 (WHEREUPON, the jury exited the open court at
16 approximately 1:03 P.M.)

17 THE COURT: All right. From a bench conference,
18 I understand that because of the recent conveyance of some
19 of the information and getting the transcript of record,
20 that you may need a little more time to go through all of
21 that. I'd certainly be available if you need to start
22 later this afternoon. But it may, based upon what both
23 attorneys told me, it might just behoove us to wait and
24 start first thing in the morning. If you feel like the --
25 I don't want us to waste time, but I certainly want the

1 Defense to have full opportunity to review the information
2 that they need. If you see any reason that you might be
3 prepared to start this afternoon, Mr. Harbin ---

4 MR. HARBIN: Judge, I would anticipate that as
5 thorough as Mr. Hewins has been, I would anticipate that he
6 and I are probably going to spend the rest of today and
7 into tonight reviewing.

8 THE COURT: All right. So we can be ready to
9 start at nine o'clock in the morning then and have our --
10 whatever pre-trial motions or hearings that we need at that
11 time?

12 MR. HARBIN: I would feel comfortable saying
13 that, yes, sir.

14 THE COURT: All right. Your witnesses are
15 available then?

16 MS. MONTS: Yes, Your Honor.

17 THE COURT: All right. All right. Let's just be
18 back at nine o'clock in the morning then and be ready to
19 proceed. And we'll have our jury -- I'll give an
20 instruction tonight for that panel to call back after
21 eleven o'clock. And do you foresee that it would take more
22 than -- I know it's hard to estimate -- a couple of hours,
23 you think?

24 MS. MONTS: I would hope two hours would be
25 sufficient.

1 MR. HARBIN: Yes, sir. I agree.

2 THE COURT: So if we have them call back maybe
3 after ten thirty? Call back after ten thirty then we will
4 see where we are in the progress of the motion. And then
5 we can give word for when they need to come back in.
6 Hopefully, at eleven-thirty or so.

7 THE CLERK: We have to allow -- I believe we
8 allow them two hours. Is that right?

9 THE COURT: Yeah. But maybe they -- these were
10 all -- maybe they won't need two hours.

11 THE CLERK: Okay.

12 THE COURT: Surely, in an hour's time in
13 Greenville County they can get here.

14 THE CLERK: Okay.

15 THE COURT: I know we need to -- we'll see.
16 We'll have them call back after ten-thirty. So we'll be
17 ready to start promptly at nine o'clock in the morning.
18 All right.

19 MR. HARBIN: Thank you, Judge.

20 THE COURT: See you back then.

21 MS. MONTS: Thank you, Your Honor.

22 **January 15, 2013**

23 (WHEREUPON, Court convened with all parties present
24 and the following proceedings were had.)

25 THE COURT: All right. Are you ready to proceed?

1 MR. HARBIN: I am, Judge.

2 MS. MONTS: Yes, Your Honor. And one question
3 for clarification, Your Honor. If I put in exhibits as
4 Court Exhibits during pre-trial motions and I want to use
5 them as evidence in the trial, can I just have them
6 remarked or how does that work?

7 THE COURT: What would help you the best,
8 Danette? Put a sticker on top or how do you want to do
9 that?

10 **(Off Record Discussions)**

11 THE COURT: All right. What are our issues? If
12 you would give me an overview, Solicitor, as to what we're
13 here on. I understand it's a suppression hearing. Is that
14 what we're here for?

15 MR. HARBIN: Judge, there's three issues we'll
16 bring to the Court's attention. And at your discretion we
17 can have them all heard now or perhaps you might say it's
18 not appropriate to bring all of them up. But certainly a
19 suppression issue. You've been told kind of an overview of
20 the facts. The officers pull up next to a couple of parked
21 cars and as a result of that encounter, they end up
22 searching my client. That's one of the issues.

23 The other issue is a search issue of a cell phone
24 recovered from my client post-arrest and whether or not the
25 search of that phone was proper.

1 And the third issue we would have is a -- and this
2 will depend on what the State's response to what they
3 intend to present during trial -- is that we believe we
4 have a chain of custody matter in the previous trial. And
5 this is only going by what they did in the previous trial,
6 Judge, that they did not present -- all of the folks that
7 were in the chain of custody, they did not present them in
8 person. We're going to have an objection to that.

9 THE COURT: Solicitor, is there any other issues
10 that you know of? Is there any statements or *Jackson Denno*
11 or *Biggers* hearings, lineups, anything else? I just want
12 to make sure we get everything out of the way before our
13 jury comes in.

14 MS. MONTS: Yes, sir. Your Honor, just that the
15 -- and I'm not -- the property and evidence sheet was
16 redacted in the first trial. That's a minor issue.
17 Because the marijuana that was found in the car next door
18 was on that same P&E sheet, so I did redact out the
19 marijuana from that. And just -- and I believe you and Mr.
20 Harbin and I did discuss what wording to use as far as the
21 prior testimony so that we don't let out that there had
22 been a prior trial. And that we would just say, refer to
23 prior testimony or prior hearing.

24 THE COURT: Prior hearing, prior testimony, prior
25 proceeding. Just don't say prior trial. Okay. You can

1 call your first witness.

2 MS. MONTS: And, Your Honor, I did want to add
3 that since this was tried in September of last year in
4 front of Judge Hyman, that we did go through all of these
5 motions. So there is a transcript from the previous trial.
6 And I understand we are going to go forward and redo that
7 suppression motion.

8 THE COURT: Correct.

9 MS. MONTS: Your Honor, the State would call
10 Officer Scott Gardner.

11 THE CLERK: Officer Gardner, if you would come
12 forward to be sworn in, please. Please place your left
13 hand on the bible and raise your right.

14 Do you solemnly swear or affirm that the testimony
15 you're about to give is the truth, the whole truth and
16 nothing but the truth, so help you God?

17 THE WITNESS: Yes, ma'am.

18 THE CLERK: Thank you. You may be seated.

19 SCOTT GARDNER,

20 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

21 MS. MONTS: Your Honor, if we may, we're just --
22 Mr. Harbin is asking whether we should do the search
23 warrant on the cell phone at the same time. It would be an
24 issue at the end.

25 THE COURT: Are there other witnesses that are

1 going to talk about the reasonable suspicion?

2 MS. MONTS: Yes, Your Honor.

3 THE COURT: Let's do the issues one at a time.
4 We'll just call them back.

5 THE CLERK: Would you please state your name for
6 the record.

7 THE WITNESS: Detective Scott Gardner.

8 THE CLERK: Thank you.

9 **DIRECT EXAMINATION**

10 **BY MS. MONTS:**

11 Q. Detective, where are you employed?

12 A. Greenville City Police Department.

13 Q. And how long have you worked there?

14 A. I've worked there roughly over four and a half years.

15 Q. And the date of this incident on August 9th of 2010,
16 where were you employed?

17 A. Greenville City Police Department.

18 Q. And what were -- did you have any training for that?

19 A. Yes, ma'am, I received numerous drug interdiction
20 training, crime interdiction training, and also officer
21 safety training.

22 Q. And on the morning of August 9th, 2010, what shift
23 were you working? We're talking midnight. What shift is
24 that?

25 A. We were on third shift, which is seven P.M. to seven

1 A.M. in the morning.

2 Q. And who were you working with?

3 A. I was working with Officer Rachel Hall.

4 Q. And what was your assignment?

5 A. We were on patrol. We were assigned to ADU, also the
6 aggressive patrol unit. It's where patrol officers wear
7 plain clothes and we drive an unmarked vehicle. This
8 allows us to get to crimes such as narcotics or
9 prostitution or auto break-ins easier than a marked unit
10 would not allow us to do.

11 Q. Describe specifically what you were wearing?

12 A. I specifically was just dressed in plain clothes with
13 a badge around my neck.

14 Q. And what were you driving?

15 A. We were driving a tan unmarked Impala.

16 Q. And where were you going on that morning? What areas
17 were you -- were you being told to go somewhere or were you
18 going somewhere, picking where to go? How does that work?

19 A. When you are with aggressive patrol you go to the most
20 targeted areas that are plagued with crimes, such as auto
21 break-in, prostitution and drugs. That morning, we did go
22 to the Clarion Inn. It is a very high crime area with
23 drugs and prostitution and break-ins. I, myself, have made
24 multiple drug trafficking cases and numerous prostitution
25 cases in that area.

1 Q. And how about, is car break-ins, is that a concern?

2 A. Yes, ma'am.

3 Q. And do those occur there?

4 A. Yes, ma'am.

5 Q. And does the location -- what is the significance of
6 the location of this hotel to other items in that area?

7 A. The hotel is directly off the highway, which is a very
8 high indicator. Most hotels that are on the highway have
9 issues with individuals that do -- especially drug meets
10 and prostitution meets there just because it's easy to get
11 on and off the highway.

12 Q. And what is the significance of other hotels or
13 apartment complexes being nearby?

14 A. It's a common practice in auto break-ins that an
15 individual will park in one parking lot and walk on foot to
16 another one.

17 Q. And what do they do when they go to these other
18 apartments and ---

19 A. Again, they conduct auto break-ins, they conduct
20 robberies, they can conduct anything that they need to.

21 Q. And what -- were you and Officer Hall in the same
22 vehicle?

23 A. Yes, ma'am.

24 Q. And when you went to the Clarion, what did you
25 observe?

1 A. We began driving. We observed, I believe it was a
2 black Lexus backed in with Mr. Hewins in it. And we
3 observed a Camry pulled in right beside him with two young
4 females inside it. It was also late at night. It was a
5 very low-lit area inside the parking lot. And that's just
6 what we observed. It didn't appear that either one of them
7 were attempting to exit the vehicle. It didn't appear that
8 either one of them had really any business being at the
9 hotel. They were just sitting there having -- they
10 appeared to have a meeting for some reason.

11 Q. And why did you think they were meeting?

12 A. Again, just because one was backed in and one was
13 pulled in so they could be driver's side to driver's side
14 window.

15 Q. And is there any other indicator of a car being backed
16 in, does that flag anything to you?

17 A. Yes, ma'am. Especially at that location. A lot of
18 individuals will back their car up so officers that drive
19 by are unable to look at their tag. They do this to
20 conceal a stolen tag or a stolen vehicle.

21 Q. What did you do -- excuse me. Were there any other
22 vehicles in the parking lot?

23 A. Not that I remember, ma'am.

24 MS. MONTS: I'd like to have these marked,
25 please.

1 (WHEREUPON, Court Exhibit Numbers 1 and 2 were marked
2 for identification.)

3 Q. Detective, I'm going to hand you Court's Exhibits 1
4 and 2. Can you please identify these?

5 A. That is the Clarion Inn on the left side where Mr.
6 Hewins and the other individual were parked.

7 Q. And did you take these photos?

8 A. Yes, ma'am.

9 Q. And is that the layout of the parking lot and the
10 building substantially the same as it was on August 9th of
11 2010?

12 A. Yes, ma'am.

13 MS. MONTS: Your Honor, we'd move these as
14 Court's Exhibit?

15 THE COURT: Any objection for the purpose of this
16 hearing?

17 MR. HARBIN: No objection.

18 THE COURT: All right. Without objection.

19 (WHEREUPON, Court Exhibit Numbers 1 and 2 were
20 admitted into evidence.)

21 Q. Detective, please describe per those pictures what
22 those pictures show about the parking lot?

23 A. It is a -- it show it's a single two-lane parking lot
24 that travels the length of the building, all the way around
25 that cars can either just park on either side of it.

1 Q. And where was the Defendant and the other car parked
2 per those pictures?

3 A. Per the pictures, they were parked next to the
4 building. Again, the Defendant was backed up and the two
5 young females, they were pulled in beside him.

6 Q. And that would be on the right side of the picture?

7 A. Yes, ma'am.

8 Q. And where did you and Officer Hall pull when you came
9 up to their location?

10 A. We did pull -- we were towards the middle of the lane.
11 That's for officer safety purposes. We would never pull in
12 too close to a vehicle just due to the fact that if I,
13 myself, or Officer Hall were to exit and they wished to
14 leave at a high rate of speed or anything of that nature,
15 we could be injured.

16 Q. And describe what happened when you got there. Did
17 you get out of the vehicle?

18 A. Yes, ma'am. Myself and Officer Hall both exited the
19 vehicle. We identified ourselves as police officers. And,
20 again, it was due to the fact that we had to drive right by
21 them and we observed, again, it appeared that they were
22 meeting for a purpose in this high crime area at this
23 hotel.

24 Q. And what was Officer Hall wearing? Was she in
25 uniform?

1 A. No. She was also in plain clothes. I believe she
2 might have had a T-shirt on that said police. And then
3 also she, I believe, had her badge on her belt.

4 Q. What did you observe once you got out of your car and
5 got closer to these two vehicles?

6 A. I immediately identified myself as a police officer.
7 They both appeared to be or all three individuals appeared
8 to be very nervous almost instantaneously. All
9 conversation between them ceased. They began to look
10 straight ahead. I began to speak with Mr. Hewins and the
11 ladies, just inquiring about what they were doing there.
12 We asked for their identification. Both the young ladies
13 had their ID, Mr. Hewins did not. He provided his name and
14 date of birth for Officer Hall. He appeared to be very
15 nervous. He was stuttering when he was speaking. And,
16 again, as -- the more I talked to him, Mr. Hewins just
17 began to get increasingly nervous. He began sweating
18 profusely. I found that odd due to the fact that I'm also
19 a large gentleman and I was not sweating at all. I even
20 had body armor on underneath my T-shirt.

21 Q. What was the age difference between the two girls and
22 Mr. Hewins?

23 A. I believe at the time Mr. Hewins was around thirty-
24 seven. And I believe both the young females were around
25 sixteen or seventeen.

1 Q. Was this an alert to you for anything?

2 A. Yes, ma'am. Again, this is a very high area for
3 prostitution. It could have been anything like that.

4 Q. And once you and Officer Hall got their information,
5 what did Officer Hall do?

6 A. She stepped back to the vehicle to run their
7 information through our DMV NS400 database.

8 Q. Did you have a video camera in your vehicle?

9 A. We did not. Vehicles that get used for APU are
10 usually cars that are about to be put out. And so they
11 don't invest a lot into them.

12 Q. And did Officer Hall get a response for the IDs of the
13 two females and Mr. Hewins?

14 A. For the two females she did. Mr. Hewins, we were
15 having trouble getting his information back.

16 Q. And what information would have come back if it had
17 immediately come back?

18 A. Whether he had a valid driver's license and if he had
19 any arrest warrants.

20 Q. And what did the fact that no information came back
21 alert you to?

22 A. It definitely can be an indicator that the individual
23 lied to us about his name, either due to the fact that he
24 is suspended or that he does have arrest warrants.

25 Q. And what about the information on the two females?

1 A. They did come back.

2 Q. And did Officer Hall come back out of her vehicle?

3 A. That's affirmative. Again, she tried to confirm his
4 Social Security Number. I believe at one point in the
5 investigation he even provided her with two. It might have
6 just been due to his nervousness. But, yes, ma'am, she did
7 get out and have him spell his name and stuff like that.

8 Q. And continue, what did -- did you call for backup?

9 A. We did. We called for other officers to arrive on the
10 scene just due to the fact that it was three of them and
11 one of me and Officer Hall was in the vehicle, checking on
12 the database. I again noticed that Mr. Hewins continually
13 touched his left pocket. And he continued to touch the
14 pocket. And even at one point he tried to place his hand
15 in his left pocket. And I asked him for my safety if he
16 could just leave his left pocket alone and leave his hands
17 just where I could see them, just leave them alone. That
18 can be a big indicator that an individual either has
19 weapons or that they have contraband or drugs inside their
20 pocket. It's something that a lot of individuals, that we
21 learn through our training, do unconsciously or
22 consciously. They have to check either they have it or
23 that maybe I can see it. It's something they do. They
24 just have to touch it.

25 Q. And did he continue to touch his pocket after you told

1 him not to do that?

2 A. Yes, ma'am. Multiple times.

3 Q. Was Officer Hall close enough at some point to observe
4 this?

5 A. I believe so, ma'am.

6 Q. What did you do once the other officers arrived?

7 A. Once the other officers arrived and the numbers were a
8 little bit more even, I had Mr. Hewins step out of the
9 vehicle. I advised him that I was going to conduct a Terry
10 frisk on his person for weapons on the outside of his
11 clothing. When I began to pat him down, especially on his
12 left-side pocket where he'd been touching, I felt a hard
13 lump inside of his pocket. I asked him what it was. He
14 didn't advise me of anything. I asked him if I could have
15 consent to place my hand inside his pocket? He did give me
16 consent, at which time I pulled out this large lump, and it
17 was a large wad of cash rolled up in rubber bands. I asked
18 him what did he have this much money for? And he advised
19 me he didn't know. I asked him how much it was and he
20 stated around fourteen hundred. I asked him what he did
21 for a living and he just advised me, this and that. Due to
22 the fact that I couldn't full clear his pocket due to this
23 large lump, and then also still having his consent, being
24 that it was within fifteen to thirty seconds, I reached
25 back into his pocket to clear the rest of the items out

1 because there could possibly have still been a weapon
2 underneath the large lump. And it was four green round
3 pills, which were confirmed to be clonazepam, which is a
4 Schedule IV drug.

5 Q. And as far as the size of weapons, in your training
6 have you been trained that weapons can be of a small size?

7 A. Yes, ma'am. They can be of a small size and be hidden
8 anywhere, ma'am.

9 Q. Did Officer Hall come back at some point?

10 A. Yes, ma'am.

11 Q. From the vehicle that she was running, from the DMV?

12 A. Yes, ma'am.

13 Q. Was this after you had gotten the pills out?

14 A. I believe so, ma'am.

15 Q. And do you know if she eventually got a match for the
16 Defendant with the DMV?

17 A. Eventually did come back, yes, ma'am.

18 Q. And was that that he did not have a driver's license?

19 A. Yes, ma'am.

20 Q. Is there a city parking charge for backing into a
21 parking spot?

22 A. Yes, ma'am, I believe so.

23 Q. Was anyone other than the Defendant in his vehicle?

24 A. No, ma'am.

25 Q. Was he the owner of this vehicle?

1 A. Yes, ma'am. He advised me that he had bought it three
2 or four days prior for thirty-five hundred dollars cash.

3 Q. I'm sorry. Say it again. For how much?

4 A. Thirty-five hundred.

5 Q. Was the Defendant arrested once you found those pills?

6 A. Yes, ma'am, he was.

7 Q. And what is your policy when someone is being
8 arrested? What do you do after that?

9 A. When we arrest somebody out of a vehicle, it's our
10 policy that we have to tow the vehicle now that we're
11 responsible for it. So at that time, we conduct an
12 inventory search of the vehicle for valuables or weapons or
13 other contraband, just due to the fact that we can't allow
14 the tow truck drivers to be trafficking crack themselves.

15 Q. And did you search the vehicle?

16 A. Yes, ma'am.

17 Q. And what did you observe?

18 A. First, I found a large piece of crack in the -- on the
19 back floorboard, approximately eighteen to twenty grams, I
20 believe.

21 Q. Was it hidden at all?

22 A. No, ma'am. It appeared that somebody had just dropped
23 it back there. We also found an Advil bottle in the center
24 console with multiple small crack rocks inside that were
25 the size for distribution level. That's how they commonly

1 sell is in twenty dollar amounts or forty dollar amounts
2 off of a bigger rock like the one that was in the back.
3 Also in the back -- Officer Digirolamo helped me search the
4 trunk. And in my presence, in a blue duffle bag, he found
5 a silver scale at which time he just turned it over to me.

6 Q. And did you take custody of the items seized on that
7 date?

8 A. Yes, ma'am.

9 Q. At that location are there off-duty officers assigned
10 because of the crime that's committed in that area?

11 A. Yes, ma'am, just until recently.

12 Q. Did the Defendant's demeanor ever calm down or not?

13 A. No. The more questions I asked he began to get
14 increasingly nervous. Again, and another indicator to me,
15 I never really asked him threatening questions. I asked
16 what he was doing there. He did advise me that he was
17 there, as he put it, to see his baby mama in room two
18 thirty-seven. I asked him what her name was and he advised
19 me that he didn't know her name.

20 Q. Was any other officer close enough when they arrived
21 to hear your exact discussion with Mr. Hewins?

22 MR. HARBIN: Objection, Judge. I don't know how
23 he would know what the other officers were able to hear or
24 not.

25 THE COURT: Well, I'll allow him to answer it

1 whether it was in normal range of voice.

2 Rephrase your question if you would, Solicitor.

3 Q. Detective how close were any other officers to you?

4 And why were they there? What was their purpose?

5 A. I couldn't advise how close any of them truly were, if

6 they could hear anything. They were there simply as just

7 backup, due to the fact that there was three subjects with

8 just myself.

9 Q. Would that be for safety purposes?

10 A. Yes, ma'am.

11 Q. Is the parking lot well lit?

12 A. Not at all. I believe now that they've placed larger

13 lights in, it is. But at the time, the only lights in the

14 parking lot came from the building.

15 Q. Is there a city charge for giving a false name?

16 A. Yes, ma'am. It's called false information to police.

17 Q. Thank you.

18 MS. MONTS: No further questions.

19 THE WITNESS: Thank you, ma'am.

20 CROSS-EXAMINATION

21 BY MR. HARBIN:

22 Q. Good morning, officer.

23 A. Good morning.

24 Q. You said you've been with the Greenville City for

25 about four or a little bit more than four years?

1 A. Four and a half, yes, sir.

2 Q. And is that as of today or back then? Because I guess
3 this case is a little over two years old.

4 A. Oh, that have been as of today, sir.

5 Q. Okay. So at that time, you had been with the force
6 for two and a half years or so, give or take?

7 A. Yes, sir.

8 Q. Okay. And had you been with -- well, it was APU,
9 which I guess is a subset of uniform patrol?

10 A. Yes, sir.

11 Q. You're out riding around. I guess uniform patrol just
12 kind of casually patrols around, whereas you are, I guess,
13 seeking out particular instances of crime like you
14 described with auto break-ins and drug activity,
15 prostitution, that kind of thing?

16 A. No, sir. We do the exact same thing. We didn't
17 answer calls but patrol officers do the exact thing, we
18 just do it in a plain vehicle so that way we can get closer
19 to the crimes.

20 Q. So really APU is just uniform patrol in a plain
21 vehicle?

22 A. That's it. Yes, sir.

23 Q. Okay. And that night you described what you were
24 wearing. You also described what Officer Hall was wearing.

25 Is it correct to say you were wearing a badge that is

1 visible to someone that looks at you when you get out of
2 the car; right?

3 A. Yes, sir.

4 Q. Okay. And you're also, at all times you're carrying
5 your service weapon?

6 A. Yes, sir.

7 Q. Okay. And that's visible to someone when you get out
8 of the car?

9 A. I don't believe it was that night. I had my T-shirt
10 over it. I have an in-the-pants holster that I wear.

11 Q. Okay. So you had a T-shirt covering your gun at the
12 time?

13 A. Yes, sir.

14 Q. Do you recall how Officer Hall was dressed, whether or
15 not her gun was visible?

16 A. I do not recall that, sir.

17 Q. Thank you. All right. I know that basically the city
18 is your entire jurisdiction as a city officer. You said
19 you were familiar with that particular area, Clarion Inn.
20 I guess it used to be Econo Lodge, that area of Haywood
21 Road. Is that fair to say?

22 A. I believe so, sir.

23 Q. And you were familiar with the numbers of arrests and
24 or incidents in that area that led you to believe it is a
25 high-crime area?

1 A. To a certain extent, yes, sir.

2 Q. Okay.

3 MR. HARBIN: Judge, may I approach the witness?

4 THE COURT: You may.

5 Q. I'm going to hand you a few sheets of paper and if you
6 can just take a look at it. If you can tell me what you

7 ---

8 MS. MONTIS: Your Honor, if I may see what ---

9 MR. HARBIN: Oh, I apologize, Judge.

10 THE COURT: Yes, sir.

11 Q. If you can take a second to look through that and see
12 if you can kind of figure out what that, what that

13 information tells you? Officer, you just let me know when
14 you've had sufficient time to review that document?

15 A. Yes, sir. It appears just to be incidents that
16 occurred at 50 Orchard Park Drive.

17 Q. And if you could look here -- and this may be a bit
18 tedious, but I promise you there is a point. If you could
19 look and tell me how many incidents there appeared to be

20 ---

21 MS. MONTIS: Your Honor, the State would object.
22 This is a document that the witness is not familiar with
23 and the attorney's asking him to interpret it.

24 MR. HARBIN: Judge, I'll be happy to tell the
25 Court what I intend to try to elicit or I can continue on

1 with my line of questioning.

2 THE COURT: For the purpose of this hearing, I'll
3 allow him to ask the questions.

4 Q. If you could, the amount, the number of instances in
5 2008. If you could tell me how many instances at this
6 particular location, which is 50 Orchard Park Drive.

7 A. I believe it's a hundred and fifty-eight, sir.

8 Q. Thank you. Now, I actually counted a little bit less
9 than that. But if you could tell me, and this number is
10 going to be significantly less so it's not going to take
11 you quite as much time, the number of instances in 2009?

12 A. I believe it's thirty-seven, sir. I apologize, the
13 first time I counted all the pages. I apologize, sir.

14 Q. Okay. So let's subtract that thirty-seven number from
15 one fifty-eight, if you counted ever one of them, that
16 would leave, at least by my math, a hundred and twenty-one
17 instances. And then I believe there's a short list of
18 incidents, if you could count for me, that occurred in
19 2010, October, up to the last date of that report. If you
20 could give the last date of the last incident on the report
21 for us, please?

22 A. Yes, sir. Fifteen, sir.

23 Q. Fifteen, thank you. You said ---

24 MR. HARBIN: Can I mark this, please, as Defense
25 Exhibit 1? And for the record, I've asked this to be

1 marked Defense Exhibit 1.

2 (WHEREUPON, Defendant Exhibit Number 1 was marked for
3 identification.)

4 Q. Officer, with your familiarity with that area of town,
5 I assume you recall that that Clarion Inn in late 2008 was
6 actually Econo Lodge. It was bought and then recently
7 redone. So it's a good bit nicer than it used to be. Is
8 that your recollection? Do you have that familiarity with
9 that part of town?

10 A. I think when I first got, on the Econo Lodge wasn't
11 open anymore, sir. But, yes, I know what you're saying.
12 Yes, sir.

13 Q. So would it be fair to say that there's an
14 extraordinarily higher number of incidents recorded at that
15 location in 2008 than there was in 2009?

16 A. Yes, sir.

17 Q. Okay. And in 2009 you reported that there -- you gave
18 testimony that you counted thirty-seven incidents at that
19 location. And in 2010, there were less than half, fifteen
20 -- excuse me. Fifteen through -- I believe I forgot to ask
21 you if you could give me the last date of the incident in
22 2010?

23 A. The last date was August 9, 2010, sir.

24 Q. And that's actually the same night as the arrest. Is
25 that correct?

1 A. That's correct, sir.

2 Q. So if we have fifteen through August or so, maybe
3 you're on pace for about twenty or so that year. My
4 question to you, Officer Gardner, is that if this was a
5 high crime area how long does someplace stay a high crime
6 area? Clearly, in 2008 there was a lot of stuff going on
7 there?

8 A. Yes, sir.

9 Q. 2009 there was significantly less crime. And I'm
10 asking you whether or not you believe that was because it
11 actually changed from Econo Lodge to Clarion Inn. It's a
12 nice hotel as opposed to a weekly Econo Lodge Inn. Did you
13 notice the difference yourself, the fast drop-off in
14 incidents at that location?

15 A. No, sir.

16 Q. Okay. And would it be fair to say that that was not
17 nearly the high crime activity area that it was back when
18 it was Econo Lodge?

19 A. Are you asking my opinion of it, sir?

20 Q. Yes, sir, I am asking your opinion.

21 A. In my opinion, it still is high crime, sir.

22 Q. And could you define specifically, you've given
23 generalities about the fact that there are auto break-ins,
24 there are prostitution or whatever else. How do you square
25 your opinion with what the data on this particular document

1 is?

2 A. Well, within the last two years, sir, I know that I've
3 personally made around or have assisted with over twenty-
4 three prostitution arrests at that location. I've also, I
5 believe, made two other trafficking charges with two other
6 drugs. Also, arrested an individual that had over fifty-
7 six thousand dollars, which was a courier for one of the
8 larger criminal organizations.

9 Q. And the date of this arrest was August 9, 2010?

10 A. That's affirmative.

11 Q. And today's date is January -- I apologize.

12 A. It's the 15th, sir.

13 Q. 15th, sir, 2013?

14 A. Yes, sir.

15 Q. So two years ago would make it January 15th, 2011?

16 A. Yes, sir.

17 Q. Okay. So the knowledge that you just gave, the
18 examples you just gave actually happened after Mr. Hewins
19 was arrested; correct?

20 A. Yes, sir.

21 Q. So that was knowledge that would not have been your
22 knowledge at the time of arrest?

23 A. No, sir. I was just establishing that it's still not
24 the best area, sir. It's still a high crime area.

25 Q. So your opinion that it was a high crime area came

1 from the arrests that you made after 2009?

2 A. No, sir, you were asking is it my opinion that it's
3 still a bad hotel. And I was advising, yes, sir.

4 Q. Okay. Now, you did say when you got out of the car
5 you were wearing a badge, you were wearing a gun, but you
6 believe the gun was underneath your T-shirt?

7 A. It's possible, yes, sir.

8 Q. It's possible?

9 A. Yes, sir.

10 Q. You're not quite certain but it could have been?

11 A. Yes, sir.

12 Q. Okay. Now, when you drove through the parking lot, is
13 it your practice just to drive through parking lots just to
14 kind of check things out?

15 A. Yes, sir.

16 Q. And you noticed these two vehicles. And I believe
17 your testimony was they were the only two vehicles in the
18 parking lot?

19 A. To my memory, yes, sir.

20 MR. HARBIN: Your Honor, may I approach again?

21 THE COURT: Yes, sir.

22 Q. I'm going to show you a picture. And if you could
23 tell me, perhaps compare them with with these and see if
24 you recognize this to be an accurate depiction of the
25 parking lot area where you stopped?

1 THE COURT: Hang on just a minute. Let Ms. Monts
2 see it first, okay?

3 MR. HARBIN: I've shown it to her. This is what
4 I showed you.

5 MS. MONTIS: And Your Honor, you know, we would
6 object on the grounds that we don't know -- I don't know if
7 the witness can identify this ---

8 THE COURT: Well, that's something we'll do now.
9 I just wanted you to see it first.

10 MS. MONTIS: Thank you.

11 MR. HARBIN: Yes, sir, I've shown it to her
12 before.

13 Q. Whether or not that's an accurate depiction of your
14 recollection of how this parking lot is set up and if
15 that's -- it might be a current picture. If that's the way
16 it was back in 2010?

17 A. I mean, it appears to be, sir. Like I said, I can't
18 see the rest of the building, so I wouldn't be able to tell
19 you accurately.

20 Q. Okay. Officer, I'm going to hand you three more
21 pictures and just ask you to review them to see if that
22 helps you determine whether or not that is a picture that
23 you can recognize?

24 A. Yes, sir. Thank you. Yes, sir.

25 Q. And so based on those pictures getting a little of

1 perspective, does this -- do you believe this to be an
2 accurate depiction of the setup as the parking lot spaces
3 were when you arrested Mr. Hewins?

4 A. I would say so, yes, sir.

5 Q. Okay. And could you point to, and perhaps with the
6 Court's permission, could you make a mark where -- on this
7 particular spot where each car was sitting. You can just
8 put an "X" on the spot where Mr. Hewins' car was and where
9 his ---

10 A. Would you mind if I marked on this one?

11 Q. Absolutely. And where the other car was.

12 MS. MONTS: Your Honor, the State would ask that
13 the witness be allowed to describe whether or not he would
14 remember exactly which spots these cars were parked in.

15 A. Okay. Again, this is just speculation. It's an
16 aerial view of the area.

17 Q. To the best of your knowledge is all I'm asking.

18 A. Yes, sir. I would guess it would be right there, sir.

19 Q. Okay. Now, in your prior testimony you described that
20 you drove up and your car was basically directly in front
21 of the -- I guess the way that they're pulled in, it would
22 have to be the front of Mr. Hewins' vehicle and the back of
23 the other car since they were reversed?

24 A. Yes, sir.

25 Q. Okay. And could you put an "X" where you believe your

1 car was when you drove up?

2 A. (Indicating.)

3 Q. Okay. Thank you, very much.

4 MR. HARBIN: Can I mark this as Defense Exhibit
5 2, please?

6 (WHEREUPON, Defendant Exhibit Number 2 was marked for
7 identification.)

8 Q. And Officer, I don't know whether you would refer to
9 the picture or just your memory, but would it be fair to
10 say that there's about as much space between the end of one
11 parking space and the beginning of another as the parking
12 spaces are long? In other words, how much distance is
13 there -- when you pull into a parking spot, your car
14 extends so many feet out, however long that is. And then
15 there is an egress and ingress between that parking space
16 and the one on the other side of the parking lot. Can you
17 guesstimate from your recollection and/or photographs as to
18 exactly how much space that is? And if you can't ---

19 A. I probably shouldn't speculate about how many feet it
20 was, sir. I know that the parking lot is large enough for,
21 as in this picture, there's a semi-truck in the parking
22 spot that doesn't stick out. I would say that the parking
23 spots themselves are long enough for their entire car to
24 fit into. And then also for two cars to travel past each
25 other comfortably, and then also for another car on the

1 other side to be parked, sir.

2 Q. Okay. Now, you said that you pulled the car, y'all's
3 car -- excuse me. Officer Hall and you were riding in the
4 same car; correct?

5 A. Yes, sir.

6 Q. And you were driving?

7 A. I believe so, sir.

8 Q. Now, when you pulled in, I didn't ask you this, but
9 from what direction did you pull in? In other words, was
10 your driver door facing the cars or was Officer Hall's
11 window facing the car?

12 A. We came in from that way and Officer Hall's door ---

13 Q. Okay. So she would have been closer to the car and
14 you would have walked around the car?

15 A. That's affirmative, sir.

16 Q. And when you initially approached the vehicle, did
17 Officer Hall remain in the car and you first made contact,
18 or did both of y'all make contact?

19 A. We both exited, sir.

20 Q. So you both exited. Now, when you got out, did both
21 of y'all walk to the same spot or did she cover one side of
22 one car and you cover the other side? How did that work
23 logistically? Where was she standing, where were you
24 standing?

25 A. I can't remember where she was actually standing, sir.

1 I know, myself, I went between the vehicles, sir.

2 Q. You went between the vehicles. And the vehicles
3 again, Mr. Hewins was backed in so his headlights are
4 facing the middle of your car?

5 A. Yes, sir.

6 Q. And the other car, which I believe was a Toyota, was
7 that your recollection?

8 A. I believe so, yes, sir.

9 Q. A sedan type car?

10 A. Yes, sir.

11 Q. It was pulled straight in, so their bumper is facing
12 your car, facing your parked car?

13 A. Yes, sir.

14 Q. So the way he said he's looking at your car and the
15 passengers of the other vehicle would be actually facing
16 the hotel?

17 A. Yes, sir.

18 Q. So you got out and you stood between the two cars.
19 And did you stand facing Mr. Hewins' car or did you stand
20 facing the other vehicle or how were you facing and to whom
21 were you directing comments or questions when you first
22 approached the car?

23 A. As we're trained, sir, I stood behind Mr. Hewins', I
24 believe it's -- I would refer to it as an A-Frame. And
25 he's here, just so I can look down at him. And then I was

1 just facing our vehicle just so I could watch both people
2 at the same time. And I spoke to both individuals. I
3 can't really remember what I said to the females as much.
4 But, again, I was just concentrating on Mr. Hewins,
5 especially because he kept touching his pockets and stuff
6 like that.

7 Q. And what is Officer Hall doing at this time that you
8 were able to observe. And if I can just let you answer
9 this all at once. What is her duty? Do y'all have
10 particular roles that you play when you are directly
11 speaking to somebody. Are you expecting her to be doing
12 something else?

13 A. When there's two officers, usually one is a contact
14 officer and one is the cover officer. Initially, I just
15 made contact and we were speaking. Officer Hall, her job
16 at that point would be to confirm everybody's information
17 while I stood by with everybody.

18 Q. All right. So you were physically talking to them.
19 Now, since she was not standing where you were, I believe
20 your testimony was that you got some information from my
21 client. You said he did not have an identification card so
22 you -- did you get his information and then relay it to
23 Officer Hall so that she could check it in your system?

24 A. No, sir. She got out and I believe she got it
25 herself. I apologize. Initially, we walked up. I didn't

1 know where she, where she was standing. I thought that's
2 what you were asking. I don't remember where initially she
3 was standing, just when we made contact. But then she
4 walked up and she spoke to the individuals and got the
5 information herself.

6 Q. So did you move from the spot that you just said you
7 were at? In other words, did you move from the spot in
8 between the two vehicles?

9 A. No, sir. I was behind his A-Frame and in between
10 because that was my job at that point.

11 Q. Okay. And so to retrieve this information from my
12 client, did Officer Hall walk over to you?

13 A. No. She asked him.

14 Q. No, well, what I'm saying is did she holler across the
15 car or ---

16 A. No, she walked in between where we were and got the
17 information.

18 Q. She walked basically to where you were and asked him
19 the information and then went back to the car?

20 A. That's affirmative, sir.

21 Q. Do you recall seeing her write down that information
22 or did she simply remember it?

23 A. I believe so. She would have had to write it down.
24 That's common practice with us, sir.

25 Q. Do you recall -- let's see. Let me back up. I'm

1 sorry. You said that you noticed that my client was
2 nervous. You said that he was sweating. And you can
3 correct me if I'm wrong. And that he had touched his pants
4 several times and that you had even noticed that and asked
5 him, please don't do that?

6 A. Yes, sir.

7 Q. Okay. And after that he touched his pants again?

8 A. Yes, sir. He -- at one point he even attempted to
9 place his hand in pockets.

10 Q. Okay. And is it your testimony that at some point you
11 became aware of whatever circumstance that you felt that it
12 was in your best interest to pat him down for your safety
13 and that of Officer Hall?

14 A. Yes, sir.

15 Q. Okay. So the combination of the factors that you had
16 described previously, if I missed any, led you to believe
17 that at this point for your safety you needed to get him
18 out and perform what is commonly called a Terry frisk?

19 A. Yes, sir.

20 Q. Okay. And when you got him out, did you perform that
21 frisk first and then feel the lump and then ask him about
22 it and that's how this started?

23 A. Yes, sir. I had him exit the vehicle. I conducted a
24 Terry frisk on his person. When I felt the large lump I
25 asked him what it was and he couldn't advise me. I asked

1 for consent to put my hand in his pocket to retrieve the
2 item, and he gave me consent, sir.

3 Q. Okay. So it's your testimony that you got him out,
4 you frisked him. And then basically the immediate result
5 of that frisk is that you found this lump, this large --
6 basically, a big wad of cash in his pocket?

7 A. Yes, sir.

8 Q. And after you felt that cash you said, hey, can I
9 reach down in there and get that?

10 A. Yes, sir.

11 Q. Okay. And after you retrieved that and you found that
12 it was cash, it's your testimony that after putting your
13 hand down his pocket and pulling out this big lump of cash,
14 that you still think there could have been a weapon in his
15 pocket?

16 A. There could, sir. The wad of cash was very large. I
17 couldn't get underneath the wad of cash.

18 Q. Couldn't get underneath the wad of cash. Well, what
19 kind of pants was he wearing?

20 A. Blue jeans.

21 Q. Blue jeans? Is it blue jeans? I mean, I don't know
22 if there's any other kind of jeans.

23 A. Jeans, yes, sir.

24 Q. What we commonly call blue jeans?

25 A. Yes, sir.

1 Q. So he's got money in his pocket and you frisked him;
2 correct?

3 A. Yes.

4 Q. And you felt that lump. You pull that lump out and
5 yet you thought there was something still large enough to
6 be, I believe in your previous testimony, you said it could
7 have been a small Derringer?

8 A. Yeah, I mean, in that line of questioning when she was
9 asking me how -- I was giving examples of, it could be a
10 Derringer, it could be a razor blade, it could be anything
11 that small. It could be anything that could hurt you, sir.

12 Q. So he could have had a razor blade, anything that
13 basically could be used to interfere with your safety and
14 that of others?

15 A. Yes, sir.

16 Q. The Solicitor asked you if you were aware of a city
17 charge that would make it, I guess, against city code to
18 park the wrong way, to back in as opposed to pulling in?

19 A. Yes, sir.

20 Q. And you responded affirmatively, I believe. Do you
21 have any knowledge as to whether or not that particular
22 ticket is what we would call a custodial ticket?

23 A. No, sir. It would be a parking citation.

24 MR. HARBIN: If I could have one moment, Your
25 Honor.

1 THE COURT: Yes, sir.

2 Q. You had testified that Officer Hall was having trouble
3 getting his information to come back from, I guess,
4 entering it into -- y'all had a mobile computer in that
5 car. Is that right?

6 A. Yes, sir.

7 Q. So you are able to kind of do your own searches. You
8 don't have to go through dispatch to look stuff up?

9 A. Yes, sir.

10 Q. Okay. But ultimately, the name did come back. I
11 believe that was your testimony in the prior trial.
12 Ultimately it did -- for whatever reason, it didn't come
13 back quite as quickly as you would prefer?

14 A. Yes, sir. After he was already in custody, it came
15 back.

16 Q. After in custody. And as a result of your second
17 search of his pocket, you found the four pills. Is that
18 right?

19 A. Yes, sir.

20 Q. Now that ultimately is the basis for your arrest?

21 A. Yes, sir.

22 Q. And subsequent to that arrest, then other drugs in his
23 car were found. Is that fair to say?

24 A. Yes, sir.

25 MR. HARBIN: No further questions, Judge.

1 THE COURT: Any redirect?

2 MS. MONTES: Yes, Your Honor.

3 REDIRECT EXAMINATION

4 BY MS. MONTES:

5 Q. Officer, would you have let the Defendant stick his
6 own hands into his pocket?

7 A. No, sir.

8 Q. And why not?

9 A. If it's a weapon, I would not allow him to retrieve
10 that.

11 Q. Okay.

12 MS. MONTES: Nothing further, Your Honor.

13 THE COURT: All right. Thank you. You may step
14 down, Officer Gardner.

15 You may call your next witness, Solicitor.

16 MS. MONTES: Judge, the State calls Officer Rachel
17 Hall.

18 THE CLERK: Officer Hall, if you would come
19 forward to be sworn in, please. Please place your left
20 hand on the bible and raise your right.

21 Do you solemnly swear or affirm that the testimony
22 you're about to give is the truth, the whole truth and
23 nothing but the truth, so help you God?

24 THE WITNESS: Yes, ma'am.

25 THE CLERK: Thank you. You may be seated. Would

1 you please state your name for the record?

2 THE WITNESS: Rachel Hall.

3 RACHEL HALL,

4 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

5 DIRECT EXAMINATION

6 BY MS. MONTIS:

7 Q. Officer Hall, where are you employed?

8 A. The City of Greenville Police Department.

9 Q. And how long have you worked there?

10 A. Just over four years now.

11 Q. And on August 9th of 2010, how long had you been
12 employed there?

13 A. It would be just over two years.

14 Q. And what were -- did you receive any special training
15 in law enforcement?

16 A. I went to the basic Criminal Justice Academy and
17 special training would include officer safety classes and
18 interdiction classes.

19 Q. And on August 9th of 2010, what was your assignment?

20 A. Myself and Officer Gardner were working a plain
21 clothes unit, the aggressive patrol unit, in an unmarked
22 vehicle.

23 Q. Describe what you were wearing?

24 A. I would have been wearing a black T-shirt that was
25 marked with white writing that said, police, both on the

1 front and on the back. Probably blue jeans. Typically,
2 that's what I would wear. And my badge displayed on the
3 front of my belt and my gun displayed on the right side of
4 my hip.

5 Q. I'm sorry, what was on your hip?

6 A. My firearm.

7 Q. And did you have a jacket or anything covering any of
8 this?

9 A. I don't recall. But if I had a jacket on, it wouldn't
10 be covering my badge or my firearm. It would be tucked
11 inside my pants.

12 Q. And what type of vehicle were you in?

13 A. We were in an unmarked Impala.

14 Q. And what was your assignment and why were you working
15 with Detective Gardner?

16 A. The Aggressive Patrol Unit was the assignment. And
17 essentially it's two officers riding together, unmarked
18 vehicle, specifically targeting problem areas in the city
19 for anything anywhere from auto break-ins, to robberies,
20 drug activity, prostitution, anything of that sort.

21 Q. And why would you go to a hotel parking lot?

22 A. Just a hotel in general or ---

23 Q. Yes. Yes.

24 A. Well, there can be vehicles that are left unattended
25 overnight, people that are in town visiting or potential

1 activity could be going on in the parking lot. And
2 unattended vehicles could very easily become victims of
3 auto break-ins.

4 Q. And Officer, on this day who selects where you go?
5 Would that be you or would that have been Detective
6 Gardner? Or are you just traveling wherever ---

7 A. Like I said, we're really targeting problems areas.
8 So if we're in the area of Haywood Road, you know, the
9 normal problem areas would be the places that we would
10 visit. They're discussed in roll call. And we also have
11 directed patrol cars that we can look at and see where
12 there have been issues. So that would be what we would
13 refer to and then just make your way through the city and
14 check off -- check those areas.

15 Q. And what's the significance, if any, of this hotel and
16 any associated apartments or hotels nearby?

17 A. I remember there's an apartment complex that's direct
18 across the street from that hotel that we had had problems
19 with auto break-ins. There are several other hotels close
20 by. There's one directly next door. There are two or
21 three across Haywood Road on Orchard Park, two or three
22 different hotels. Several apartment complexes along
23 Haywood Road and the mall itself, all of which have issues
24 with auto break-ins.

25 Q. If you would please look at State's Exhibits 1 and 2.

1 Does this accurately depict the route you entered the
2 parking lot?

3 A. Yes, ma'am.

4 Q. Okay. Describe the size of the parking lot as far as
5 the lanes for parking and the driving space?

6 A. As Officer Gardner explained, you know, there is
7 plenty of room for two vehicles to travel side-by-side at a
8 reasonable distance from each other and from the other
9 parked vehicles, and parking on either side of those two
10 lanes.

11 Q. And the night, approximately twelve-thirty in the
12 morning of August 9th of 2010, were there any other cars
13 close -- if you recall, close by Mr. Hewins, the other car
14 and your vehicle?

15 A. No, ma'am. From what I recall there weren't any that
16 were very close to us at all. There may have been one
17 further down the lot.

18 Q. And describe what happened when you approached the
19 parking lot. What did you see in the parking lot? What
20 cars were parked that you observed?

21 A. Yes, ma'am. Upon pulling into the parking lot, I
22 observed Mr. Hewins' vehicle, it was a dark in color Lexus,
23 I think it was black, backed into a parking space with
24 another four-door type vehicle pulled in. Both windows
25 appeared to be down. They did appear to be talking across

1 the vehicles.

2 Q. Could you tell anything about the individuals as you
3 drove up? Could you tell how many people were in each
4 vehicle?

5 A. Yes, ma'am. It was one vehicle and Mr. Hewins -- I'm
6 sorry. Mr. Hewins was in his vehicle and no one else
7 appeared to be in his vehicle. The other vehicle had two
8 females.

9 Q. And why did you -- did you stop -- who was driving?

10 A. Officer Gardner was driving.

11 Q. And when you stopped, what did you do?

12 A. When we stopped we both exited the vehicle. I believe
13 I was calling out with the vehicles on the radio. Officer
14 Gardner approached the cars and then I approached shortly
15 after him.

16 Q. And where did you go when you got out of your vehicle?

17 A. I stood -- as Officer Gardner explained the A-frame of
18 Mr. Hewins' vehicle, I stood in that same area on the other
19 vehicle. But we were both standing in between the cars.

20 We could both see all three parties.

21 Q. And did you do any talking to either Mr. Hewins or the
22 two females in the other vehicle?

23 A. Yes, ma'am. Initially, I asked Mr. Hewins for his
24 identification and I asked the females for their
25 identification, as well. The females provided me with

1 identification. Mr. Hewins advised that he didn't have any
2 identification on him. So I asked for his name, date of
3 birth and the last four numbers of his Social Security
4 Number, just to confirm that the information was correct.

5 Q. Did you notice anything about the ages of the people
6 in either of the cars?

7 A. Yes, ma'am. Mr. Hewins appeared to be approximately
8 thirty-five years of age. And the females appeared to be
9 significantly younger; I would say, sixteen, seventeen
10 years of age.

11 Q. Please continue. Did you go back to your car and what
12 did you do?

13 A. Once I gathered the females' identification and Mr.
14 Hewins' name and date of birth, I did walk back to our
15 vehicle where I began to check the information. The
16 females' information came back off their drivers' license
17 fairly quickly. I entered Mr. Hewins' name and date of
18 birth, which showed result in the same information -- or it
19 would come back in the same format as the females'
20 information came back in. I was receiving no match file
21 message. I did that at least twice before I walked back up
22 to Mr. Hewins' vehicle.

23 Q. And describe when you went back to the vehicle, did
24 you get in and close the door or how did you, how did you
25 do it?

1 A. No, ma'am. I sat in my vehicle I remember sitting at
2 an angle so I could still look up and see Officer Gardner,
3 make sure that he was still safe and that he was standing
4 with the three subjects.

5 Q. Was your vehicle door open or closed then?

6 A. It was open. Completely open so that I could exit
7 quickly if I needed to.

8 Q. And describe where you were parked or your police
9 vehicle parked. Was it blocking Mr. Hewins' vehicle?

10 A. No, ma'am.

11 Q. Describe why it was not?

12 A. Well, when we pulled in -- we're trained to make sure
13 that we have a safe amount of distance between us and
14 anybody that we may be encountering. When we pulled in --
15 I remember as I was sitting in the vehicle, I had the door
16 open and there was still plenty of room for movement in
17 between the two vehicles. I mean between our vehicle and
18 their vehicles.

19 Q. So the vehicle could have pulled out?

20 A. Yes, ma'am.

21 Q. And was there any cars parked on either side of Mr.
22 Hewins or the females?

23 A. No, ma'am.

24 Q. Please continue. What did you do once you got the no
25 match?

1 A. I believe, I ran it once, I got the no match. I ran
2 it again just to make sure I hadn't typed something in
3 wrong. I got a no match again. At which time I walked --
4 I approached Mr. Hewins' vehicle again and I believe I had
5 him actually spell his name out for me to confirm that I
6 had the date of birth written down correctly and I got his
7 full Social Security Number from him.

8 Q. What did you do at that time and had a backup arrived
9 yet?

10 A. I can't recall if at that time a backup had arrived.
11 I believe at that time we did have other units on the way.
12 But once I got that additional information, I went back to
13 my vehicle again to attempt to get a match.

14 Q. And was Detective Gardner still speaking with Mr.
15 Hewins?

16 A. Yes, ma'am. He was still standing in the same
17 position speaking with Mr. Hewins and the females in the
18 other vehicle.

19 Q. And once backup came did Mr. Hewins get out of the
20 vehicle?

21 A. Yes, ma'am.

22 Q. And did you observe anything or what were you doing?

23 A. Once the backup arrived, I was able to focus more
24 fully on attempting to gather the information to get a
25 match and confirm that there were no warrants.

1 Q. And did you eventually get a match?

2 A. Yes, ma'am.

3 Q. And what did you do once you did get a match? What
4 did you find out about Mr. Hewins?

5 A. It just revealed that he had given me the proper
6 information and Social Security Number. It also revealed
7 that he really did not have a valid driver's license at the
8 time. It was suspended.

9 Q. And originally when he was giving you his Social
10 Security Number, did he give you more than one?

11 A. The first time I initially asked him, I just asked for
12 the last four. He stuttered. I remember he stuttered
13 several times, provided me with a couple of different
14 numbers. But the ones that he did give me ended up being
15 the correct numbers.

16 Q. And what did you do once you got a match on who Mr.
17 Hewins was? Did you get out of your vehicle and approach
18 Officer Gardner or where did you go?

19 A. Yes, ma'am. I got back -- once I, you know, received
20 that match and confirmed he did not have any warrants, I
21 then approached Officer Gardner and advised him that that
22 had come back.

23 Q. Did you observe Detective Gardner doing any kind of
24 frisk of the Defendant?

25 A. I can remember looking up as he was patting him down.

1 Then I went back, you know, I was -- as I was about to step
2 out of the vehicle to assist him with that, I believe, is
3 when another officer arrived. So I remained seated in our
4 vehicle.

5 Q. And then you finished what you were doing?

6 A. Yes, ma'am.

7 Q. When you did get a match and got out of your vehicle,
8 had the pat-down already taken place?

9 A. I believe so, yes, ma'am.

10 Q. And did you observe any search of the Defendant's
11 vehicle?

12 A. I was present. I believe I was working on -- we
13 actually have tow paperwork that we have to fill out
14 whenever a vehicle is going to be towed. I believe I was
15 working on that paperwork.

16 Q. And were there officers who were investigating the two
17 females' car?

18 A. Yes, ma'am.

19 Q. And did they search their car?

20 A. The females?

21 Q. Yes. Yes, ma'am.

22 A. Yes, ma'am. I believe so.

23 Q. And did you fill out the tow paperwork for Mr. Hewins
24 car or you just prepared it?

25 A. If I recall correctly, I know I at least pulled the

1 paperwork and pulled the information up.

2 Q. And did someone call a tow truck?

3 A. Yes, ma'am, at some point.

4 Q. Did you ever see what was found on Mr. Hewins or in
5 his vehicle?

6 A. Yes, ma'am.

7 Q. When was that? Shortly after you got out of your
8 vehicle?

9 A. I observed what was found after it had all been
10 collected by Officer Gardner and was placed on the trunk.

11 Q. You did not see it in its original location in the
12 car?

13 A. I don't recall, ma'am.

14 Q. Back to when Officer Gardner first went up to the car
15 and you were asking for Mr. Hewins' information, what did
16 you observe about his mannerisms?

17 A. As soon as Officer Gardner and myself started speaking
18 to Mr. Hewins, the first thing that I noticed was the
19 stuttering as he was trying to give me his information.
20 The biggest flag that I saw was that he continuously, it
21 was like almost grabbing or pinching at his left pocket.
22 He continuously touched his pocket. And that stood out to
23 me and raised my concern that he could have a weapon in his
24 possession.

25 Q. Did you or Officer -- Detective Gardner, did you hear

1 Detective Gardner ask him not touch his pocket?

2 A. I don't recall. I believe that I asked him at some
3 point if there was anything there. But I don't recall
4 actually -- I didn't ask him to keep his hands out of his
5 pocket.

6 Q. Why did this flag -- how many times did he continue to
7 do this?

8 A. It was very consistent, very consistent.

9 Q. How about his nervousness or sweating, what did you
10 observe about that?

11 A. He, initially as I approached the vehicle, I could
12 tell that he was nervous and that he was stuttering. He
13 was looking around instead of looking at us while we were
14 speaking to him. I did notice a little bit of sweating but
15 nothing profuse the first time that I approached the
16 vehicle. It was more in his voice, in his mannerisms.

17 Q. What did you notice, if anything, the second time you
18 went up there?

19 A. The second time I approached the vehicle, I was still
20 able to observe that consistent touching of his pocket. I
21 also observed that he had begun to sweat pretty profusely
22 and he was still almost avoiding eye contact. He continued
23 to touch his pocket. That's what really -- a flag for me
24 that there could be something there.

25 Q. In your training, did you ever get any training

1 regarding relationship between guns and drugs?

2 A. Yes, ma'am. In any type of training really, whether
3 it's interdiction training or officer safety training, it's
4 understood that guns and drugs typically go together.
5 Where there's one, there may very well be the other.

6 Q. Thank you. I have no further questions.

7 A. Thank you.

8 **CROSS-EXAMINATION**

9 **BY MR. HARBIN:**

10 Q. Officer Hall, good morning.

11 A. Good morning.

12 Q. You were not driving, that was Office Gardner. Is
13 that correct?

14 A. Yes, sir.

15 Q. You have reported when asked or you answered a
16 question when asked by Assistant Solicitor Monts that the
17 reason for parking a particular distance away from most
18 cars is for the officer safety reasons?

19 A. Yes.

20 Q. And I believe that was also Officer Gardner's comment.
21 Is that correct?

22 A. Yes, sir.

23 Q. And you also observed that there were no other
24 vehicles at least within direct site of the incident
25 location that night?

1 A. Yes.

2 Q. So the parking lot was empty other than your car and
3 the other two cars?

4 A. On that side, yes, sir.

5 Q. Can you answer me this then. If the point of parking
6 far away from the vehicles that are stopped is for your
7 safety, why not just park where they can't hit you at all?

8 A. What do you mean?

9 Q. You're trying to say that you weren't blocking them
10 in?

11 A. Correct.

12 Q. I believe that's both of your testimony. You were not
13 blocking them in?

14 A. Yes, sir.

15 Q. And both of your testimonies is that parking a
16 particular distance from their cars is an operation of your
17 training to be safe, put yourselves in a safe position?

18 A. Yes, sir.

19 Q. Would it not be imminently more safe to simply park
20 and not in front of the cars?

21 A. Do you mean like try and park in a parking space or
22 ...

23 Q. Any -- I guess the question would be anywhere else
24 except for in front of the cars. Would that not be more
25 safe than parking in front of the cars?

1 A. Well, the reason that we -- to answer your question,
2 it could be, yes.

3 Q. And that's an appropriate answer. Thank you.

4 (WHEREUPON, Defendant Exhibit Number 3 marked for
5 identification.)

6 MR. HARBIN: Judge, may I approach?

7 THE COURT: Yes, sir.

8 MS. MONTS: Your Honor, we'd ask that the officer
9 be able to explain what she was going to explain.

10 THE COURT: I'll allow you to redirect.

11 Q. Do you recognize this document?

12 A. It appears to be a CAD report ---

13 Q. And ---

14 A. --- a printout.

15 Q. Excuse me. I didn't mean to talk over you. And from
16 that document, can you tell when it reports that you
17 arrived on scene?

18 A. It would be double zero thirty-six.

19 Q. That would be --

20 A. Just after midnight.

21 Q. Thirty-six minutes after midnight?

22 A. Yes, sir.

23 Q. Thank you. The Solicitor asked you a few questions
24 about your observations of my client. And I believe your
25 response was somewhat similar to that of Officer Gardner,

1 that you saw him behaving somewhat nervously, touching his
2 pocket and at some point, began to sweat. Did, at any
3 time, you verbally communicate your observations to Officer
4 Gardner?

5 A. I don't recall if I directly looked at him and said,
6 hey, he's touching his pocket.

7 MR. HARBIN: One minute, Your Honor.

8 Q. That's all I have at this time. Thank you, Officer
9 Hall.

10 A. Thank you.

11 THE COURT: Any redirect?

12 MS. MONTS: Yes, Your Honor.

13 **REDIRECT EXAMINATION**

14 **BY MS. MONTS:**

15 Q. Officer, why in your training would you park where you
16 did park? What's the necessity of that?

17 A. There are a lot of factors that can contribute to how
18 we stop our cars, especially in traffic stops and when
19 we're getting out with potential suspects or just anybody
20 to speak to. Upon parking, you know that you are going to
21 need access to your vehicle at some point. But you also
22 know that you still want to be able to have a good line of
23 sight. And being that at some point one of us, whether it
24 was Officer Gardner or myself, was going to be back in that
25 vehicle trying to identify these subjects potentially, then

1 it's safer to just stop the car where it was stopped so
2 that from a seated position in the vehicle either one of us
3 could still look out of the vehicle and have a good line of
4 sign on both of those cars. If we had stopped at an angle,
5 we may be able to see that females, not Mr. Hewins or vice
6 versa.

7 Q. Thank you. I have nothing further.

8 A. Yes, ma'am.

9 THE COURT: All right. Thank you. You may step
10 down, Officer Hall.

11 THE WITNESS: Thank you.

12 THE COURT: Any other witnesses from the State?

13 MS. MONTS: Not on this issue, Your Honor.

14 THE COURT: Anything from the Defense?

15 MR. HARBIN: Yes, sir, Judge. The Defense would
16 call Officer Cothran to the stand.

17 THE CLERK: Officer Cothran, if you would come
18 forward to be sworn in, please.

19 Do you solemnly swear or affirm that the testimony
20 you're about to give is the truth, the whole truth and
21 nothing but the truth, so help you God?

22 THE WITNESS: I do.

23 THE CLERK: Thank you. You may be seated. Would
24 you please state your name for the record?

25 B.H. COTHAN,

1 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

2 DIRECT EXAMINATION

3 BY MR. HARBIN:

4 Q. Good morning, Officer Cothran.

5 A. Good morning.

6 MR. HARBIN: Judge, may I approach the witness?

7 THE COURT: You may.

8 Q. Do you recognize this document?

9 A. Yes, sir.

10 Q. Can you tell the Court what that is?

11 A. It appears to be a copy from the CAD report, Computer
12 Assisted Dispatch, that our agency uses.

13 Q. And from that document, can you read it and tell me
14 when Office Gardner and Officer Hall arrived on scene?

15 A. It appears to be double-oh thirty-six.

16 Q. Okay. And that same document, does it have your name
17 on it? Does it say when you arrived on the scene?

18 A. Yes, sir.

19 Q. And what time was that?

20 A. Double zero forty-eight.

21 Q. So that would be twelve thirty-six and twelve forty-
22 eight for us civilians?

23 A. Yes, sir.

24 Q. Okay. Officer, did you bring with you today a copy of
25 your police report?

1 A. Yes, sir.

2 Q. And have you had -- well, let me ask you this. Do you
3 recollect the night of, I believe, August 9, 2010, this
4 incident date?

5 A. Yes, sir.

6 Q. Okay. And can you tell for the Court what you
7 observed when you first arrived on scene?

8 A. When I arrived on ---

9 Q. If you recall?

10 A. Yes, sir. When I arrived on scene I observed the
11 Impala that was being utilized for the APU car that night
12 parked out in the middle of the parking lot. There were
13 two cars to its right. One was of a black Lexus that had
14 been backed in and at the driver's side was a dark Toyota
15 Camry that had been pulled in. I observed Detective
16 Gardner making contact with the occupant, appeared to be
17 the occupant of the Lexus. I observed Officer Hall sitting
18 in the vehicle with the door open. It appeared that she
19 was trying to retrieve information from the NDB.

20 Q. Okay. And you're welcome to refer to your report if
21 your memory is lacking. But as I read your report, it
22 appears and you can tell me if this is correct, that when
23 you arrived you spoke with Officer Gardner, he kind of gave
24 you the skinny, he kind of told you in short detail what
25 was going on. And part of that information that he gave

1 you was that my client had told them that he was there to
2 visit someone in room two thirty-seven?

3 A. Yes, sir.

4 Q. And as a result of that conversation, I believe your
5 report indicates that you actually went to management,
6 hotel management, to see whether or not there indeed was
7 somebody in room two thirty-seven?

8 A. Yes, sir.

9 Q. And after receiving that information, it's my
10 understanding from your report that you went and actually
11 verified that there was somebody in two thirty-seven, and
12 made contact with them?

13 A. Yes, sir.

14 Q. Okay. And after you were able to confirm that someone
15 was in two thirty-seven, I believe that it said that you
16 reported back to -- well, I won't say report back, but you
17 arrived back in, I guess, the direct area, the direct
18 vicinity of Officer Gardner. Is that your recollection? I
19 mean, in other words, you came back downstairs?

20 A. Well, I don't recall if I went -- after I left -- when
21 I returned from the front desk to find out the information
22 from room two thirty-seven, of whether I went there
23 immediately or if it was -- there was a few minutes
24 between. I don't recall.

25 Q. Okay. I would ask you to refer to your police report

1 because I'm going to ask you some direct questions about
2 your recitation of what happened that night. And if you
3 don't have a copy, I do, that you can refer to.

4 A. Okay.

5 Q. But it says, I responded to 50 Orchard Park Drive, the
6 Clarion Inn ---

7 MS. MONTIS: Objection, Your Honor. We ask for a
8 question, not reading the officer's reports.

9 MR. HARBIN: I'm asking him to compare this to
10 his recollection. He said he didn't recall. So I'm asking
11 ---

12 THE COURT: Just ask him a question about whether
13 the statement is accurate.

14 MR. HARBIN: Well, that's -- I'm sorry, Judge. I
15 thought that's what I was doing.

16 THE COURT: Put it in question form, if you
17 would, Mr. Harbin.

18 MR. HARBIN: Yes, sir.

19 Q. Your report seems to indicate, and I'm asking if it's
20 true, that after you visited with management, confirmed
21 that there was someone in two thirty-seven, actually made
22 contact with two thirty-seven, and then came downstairs.
23 At that point, you observed Officer Gardner conduct a Terry
24 frisk for weapons and the subject placed into handcuffs.
25 Is that correct?

1 A. My report states that I went to the front desk to
2 inquire about the resident of two thirty-seven. I obtained
3 the resident's name and date of birth and returned to the
4 area. Quote unquote, returned to area and checked
5 Henderson for NCIC and warrants. I would have done that in
6 my vehicle. I did not make contact with the resident of
7 the room before that.

8 Q. Okay. I understand. So you didn't necessarily go
9 upstairs. You went to the management and then you went and
10 check based on the information that you had?

11 A. Yes, sir.

12 Q. Okay. I've got you. Your report indicates that at
13 that time, you then witnessed Officer Gardner conduct the
14 Terry frisk for weapons?

15 A. Yes, sir.

16 Q. Do you recall that?

17 A. Yes, sir.

18 Q. Okay. So you arrived and talk to Officer Gardner and
19 he gets you enough information for you to be of assistance,
20 which that assistance being to go check on this room two
21 thirty-seven information. After checking on that
22 information, then you go -- well, I'm sorry. After
23 receiving the information from management, you then run
24 that information on your computer as best you can, I guess
25 back in your unit. Is that what you were intending to ...

1 A. In my patrol unit, yes, sir.

2 Q. Okay. And then after you do that, then you witness
3 Officer Gardner Terry frisk the suspect?

4 A. Yes, sir.

5 Q. Okay. Now, your report also indicates that when you
6 arrived you observed the suspect, Mr. Hewins, standing next
7 to a black Lexus. Is that correct?

8 A. Yes, sir.

9 Q. Okay. So by the time that you arrive on scene, twelve
10 minutes after the initial contact, Mr. Hewins was already
11 standing outside his vehicle; correct?

12 A. When I arrived I observed Mr. Hewins standing beside
13 his vehicle.

14 Q. Okay. And ---

15 A. I ---

16 Q. I apologize.

17 A. The CAD does show the time. Whether that's the time
18 that I actually arrived or if that's just the time that it
19 documented that I called out on scene, I am unsure.

20 Q. Okay. Let's leave the time be for now, the exact
21 time. According to your report you arrived, you saw Mr.
22 Hewins standing outside his vehicle. Then you spoke with
23 Office Gardner, getting enough information for him to
24 basically say, hey, can you go check on two thirty-seven?

25 Is that a fair description?

1 A. Yes, sir.

2 Q. And then you went to check on two thirty-seven and
3 then you used that information to go check that through
4 y'all's ability to check in your system, I guess; right?

5 A. Yes, sir.

6 Q. Okay. Then after you do that, then you witness
7 Officer Gardner performing the Terry frisk of my client,
8 Mr. Hewins?

9 A. Yes, sir.

10 MR. HARBIN: One moment, Judge. That's all I
11 have.

12 Thank you, Office Cothran. I appreciate it.

13 THE COURT: Cross-examination.

14 **CROSS-EXAMINATION**

15 **BY MS. MONTS:**

16 Q. Officer, do you know if you talked with Detective
17 Gardner prior to your arriving at the hotel, if you recall?

18 A. I don't believe so.

19 Q. And do you know if you spoke to Officer Gardner before
20 going to management?

21 A. Yes, ma'am.

22 Q. Do you know if the Terry frisk could have occurred
23 prior to you going to management?

24 A. I don't recall.

25 Q. And based on where the cars were parked, could the

1 Defendant and the other vehicle have left their location?

2 Was this Officer's car -- was Officer Gardner's car
3 blocking them in or was there room?

4 A. There was plenty of room for either vehicle to leave
5 the area.

6 Q. And where did you place your vehicle?

7 A. If I remember correctly, I pulled in at an angle to
8 where the front of my car was approximately one or two
9 places from the end of the Toyota Camry.

10 Q. Thank you.

11 MS. MONTS: Nothing further.

12 THE COURT: Any redirect?

13 MR. HARBIN: Yes, sir. One question.

14 **REDIRECT EXAMINATION**

15 **BY MR. HARBIN:**

16 Q. I believe that we had previously marked this right
17 here. I had asked Officer Gardner to mark where he
18 believed my client's car and the other car was on location
19 and where his patrol car was. Do you mind putting a mark
20 where you believe your car was in relation to the patrol
21 car?

22 A. Yes, sir.

23 Q. Okay. Now, I didn't ask you specifically, but is this
24 a representation to your -- an accurate representation to
25 your recollection of the setup of the parking lot and the

1 Clarion Hotel? And you can also reference these two
2 pictures that the State provided, as well, if that helps?

3 A. Yes, sir.

4 Q. And is that where you recall the -- all the cars being
5 parked to the best of your recollection and approximately
6 which spaces they were in?

7 A. Yes, sir.

8 Q. All right. Thank you.

9 MR. HARBIN: Judge, at this time I would like to
10 move the CAD report and the map into evidence for purposes
11 of this hearing only.

12 THE COURT: I think you've seen both of those?

13 MS. MONTS: Yes, Your Honor.

14 THE COURT: All right. They will be marked as
15 exhibits.

16 (WHEREUPON, Defendant Exhibit Numbers 2 and 3 were
17 admitted for purposes of the hearing only.)

18 MR. HARBIN: Nothing further from this witness,
19 Judge.

20 THE COURT: All right. Thank you. You may step
21 down, Officer Cothran.

22 THE WITNESS: Thank you.

23 MR. HARBIN: Judge, I've got a witness in the
24 hall if I could go get them?

25 THE COURT: All right.

State of South Carolina -vs- Erick E. Hewins (2010-GS-23-8295 and 8296)
Jury Voir Dire

103

1 MR. HARBIN: Judge, I think she may have stepped
2 in the bathroom, but I can go ahead and call Mr. Hewins.

3 THE COURT: All right.

4 THE CLERK: Mr. Hewins, if you would come forward
5 to be sworn in, please. Please place your left hand on the
6 bible and raise your right.

7 Do you solemnly swear or affirm that the testimony
8 you're about to give is the truth, the whole truth and
9 nothing but the truth, so help you God?

10 THE WITNESS: Yes, ma'am.

11 THE CLERK: Thank you. You may be seated. Would
12 you please state your name for the record?

13 THE WITNESS: Erick Eton Hewins.

14 ERICK HEWINS,

15 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

16 DIRECT EXAMINATION

17 BY MR. HARBIN:

18 Q. Mr. Hewins, do you recall August 9th, 2010?

19 A. Yes, sir.

20 Q. And that night do you recall the incident -- your
21 arrest incident at the hotel Clarion Inn?

22 A. Yes, sir.

23 Q. Okay. What were you doing prior to the arrival of
24 Officer Gardner and Officer Hall?

25 A. Sitting in my car talking to Taylor and Megan.

1 Q. Okay. And what had you been doing prior? Why were
2 you at the Clarion specifically?

3 A. I was seeing Michelle.

4 Q. Who is Michelle?

5 A. The girl that was staying in two thirty-seven.

6 Q. Okay. So you were there to see someone staying in
7 room two thirty-seven?

8 A. Yeah.

9 Q. Okay. And why had Megan and Taylor come to meet you
10 at the Clarion?

11 A. To follow me to -- Taylor was going to take the car I
12 was in and I was going to pick up a truck.

13 Q. Okay. So basically you had one car and you needed to
14 move two cars and you needed somebody to basically do you a
15 favor?

16 A. Yes, sir.

17 Q. And how long had you been sitting there before Officer
18 Gardner and Officer Hall arrived, talking to Megan and
19 Taylor?

20 A. A couple of minutes.

21 Q. Do you recall -- it's August 9th. What was the
22 weather like?

23 A. Hot.

24 Q. And what do you remember was your attire? What were
25 you wearing?

1 A. A shirt and a pair of shorts.

2 Q. What kind of shirt and what kind of shorts? If you
3 recall. If you don't ...

4 A. I know it blue jean shorts and probably a red T-shirt.

5 Q. Okay. So you're sitting there in the car. Now,
6 describe how your car was positioned in relation to how
7 Megan and Taylor's car was positioned?

8 A. The girl in two thirty-seven, she had went to the
9 store. She backed the car in. I was just leaving. So I
10 went out to get in the car and it was backed in. But
11 Taylor and Megan was already down there waiting on me. And
12 Taylor had texted the word, busted, because she seen a girl
13 come out of two thirty-seven, which I had told her that she
14 wasn't in the room. But when they pulled up, they saw the
15 girl walk out the room. So she texted the word, busted, to
16 the phone. And then by the time I get downstairs and get
17 in the car, me and her and Megan was talking about where I
18 was going to take them to and pick up the truck. And
19 Taylor was going to take the Lexus. About that time ---

20 Q. So basically you were kind of telling them where you
21 were going, where you were headed, and what you needed them
22 to do?

23 A. Right. Right.

24 Q. Now, do you recall the moment at which Officer Gardner
25 and Officer Hall arrived?

1 A. Yes, sir.

2 Q. Okay. And can you describe for the court exactly how
3 they arrived. Were they walking, driving?

4 A. No, they pulled up in an unmarked vehicle.

5 Q. Where did they pull up?

6 A. Directly in front of us.

7 Q. Okay. When you say -- well, why do you say directly
8 in front of us?

9 A. Behind Megan and them car and directly in the front of
10 my car.

11 Q. So the length of his car was effectively in front of
12 your car and Megan's car at the same time?

13 A. Yes, sir.

14 Q. How close was his car to your car?

15 A. I mean, like they said, they did have enough room to
16 open up the car door, but if one of us actually wanted to
17 leave, we would have hit their patrol car. I mean,
18 unmarked car.

19 Q. And so did you, in fact, have the ability to start
20 your car, turn the wheel and go out, leave out?

21 A. No, sir.

22 Q. Now, after the car parks in front of you, what do you
23 observe Officer Gardner do?

24 A. A male officer coming around, coming around the
25 unmarked car towards my car. I thought it was someone I

1 knew until I actually -- until he actually got directly in
2 view where I could see the police vest and the badge.

3 Q. Okay. So you saw his vest and his badge. Was he
4 wearing a gun at the time?

5 A. I can't -- I mean, I'm pretty sure he was, but I
6 wasn't really just paying that no attention.

7 Q. All right. Did you notice whether or not Officer Hall
8 got out at the same time Officer Gardner did?

9 A. She did not.

10 Q. And so she remained in the vehicle?

11 A. Yes, sir.

12 Q. Okay. When Officer Gardner approached you, can you
13 tell the Court where -- how he approached you, where he was
14 standing?

15 A. He was standing like directly at my window. But his
16 exact words was that this is a heavy hitters area and what
17 are y'all doing out here? And I was like, heavy hitters?
18 I don't know nothing about no heavy hitters. And then he
19 went on to explain car break-ins and drugs. And then I was
20 like, well, I don't know nothing about no car break-ins or
21 no drugs.

22 Q. Can you describe how close your vehicle was parked to
23 Megan and Taylor's vehicle?

24 A. We was close because we was in parking spaces right
25 beside each other.

1 Q. So would it be fair to say that your car was properly
2 parked in the middle of your parking space and so were they
3 were in the middle of theirs?

4 A. Right.

5 Q. So whatever the ordinary distance between two cars
6 are?

7 A. Right.

8 Q. Okay. So it wasn't unusually close or unusually far
9 away?

10 A. No. No, sir.

11 Q. Okay. Did you have enough room to open your door to
12 get out of the car?

13 A. Yes, sir.

14 Q. Okay. Now, and Megan the same, I suppose?

15 A. Right. Right.

16 Q. You were parked -- were you windows side-by-side?

17 A. Right.

18 Q. Okay. And I guess when -- who was driving the other
19 vehicle?

20 A. Megan.

21 Q. Megan. So when Megan pulled in, she was able to roll
22 her window down and y'all were essentially side-by-side at
23 that point?

24 A. Yes, sir.

25 Q. Now, when Officer Gardner walked to you, you said he

1 was between your vehicle and Megan's vehicle. Is that
2 correct?

3 A. Yes, sir.

4 Q. Okay. How close does that make him to -- if you can
5 guesstimate for the Court, try to give him the best idea
6 you can, how close was he standing to you and how far away
7 or close was he from Megan's car and your car?

8 A. I mean, he was close to both. I mean, you know.
9 Like, I guess, at a normal position as, you know, someone
10 would walk up to your car and be talking to you.

11 Q. Okay. Well, let me ask you this. Was he standing
12 close enough -- well, could you open your door?

13 A. No, not if I -- no. Not while he was standing there
14 talking to me, no, I couldn't open the door.

15 Q. And why couldn't you open your door while he was
16 standing there talking to you?

17 A. Because I would have hit him with my car door.

18 Q. Okay. Now, after he approached you, he made a comment
19 about a heavy hitters area.

20 A. Yeah.

21 Q. And you said you didn't know what that means, and he
22 went on to explain what he meant by that. Is that what you
23 just described to the Court? In other words, when he said

24 ---

25 A. Yeah. He said something about drugs and break-ins.

1 Q. And what was his follow-up question after you said you
2 didn't know what that was?

3 A. Do I have my driver's license or ID.

4 Q. ID. So he asked for ID?

5 A. He said, do you have a ID. Yeah, do you have our ID.

6 Q. And what was your response?

7 A. I think I said something along the line, I'm not
8 driving so why did you ask me for my ID and my driver's
9 license?

10 Q. And what did he say?

11 A. And then he said something about to identify me or
12 something. And that's when he took everybody information
13 and relayed it back to the female officer.

14 Q. Okay. How long did all of that take? A minute and a
15 minute and a half?

16 A. I mean, they kept telling me that my name wasn't
17 coming back, so I guess, thirty minutes.

18 Q. Okay. Thirty minutes?

19 A. Something like that. I know it seemed long because, I
20 mean, they just kept saying my name ain't coming back.
21 They thought I was giving them the wrong name, you know.

22 Q. Okay. Officer Gardner, and you heard Officer
23 Gardner's testimony. He said that you were touching your
24 pocket and that he asked you to stop touching your pocket.
25 Do you recollect that?

1 A. I don't recall him asking me nothing about no stop
2 touching my pocket. All that's fabricated. I never was
3 touching my pocket. I was sitting in my car complying with
4 his questions.

5 Q. What kind of car were you driving?

6 A. A black Lexus.

7 Q. What kind of Lexus?

8 A. It's a little 300.

9 Q. A sedan?

10 A. Yeah. I guess, yes.

11 Q. Okay. You're sitting in your driver's seat. Was the
12 car on?

13 A. Sir?

14 Q. Was the car turned on?

15 A. I don't recall it being turned on. I think I was
16 actually parked, but we was about to leave. But I don't
17 think that it was on.

18 Q. Were the interior lights in your car on?

19 A. No, sir.

20 Q. Okay. Was Officer Gardner shining a flashlight into
21 the car?

22 A. No, sir.

23 Q. So was it ---

24 A. He, after, -- I think sometime after he done got me
25 out of the car -- no, while I was sitting in the car as a

1 matter of fact. Yeah. Yeah, him and some more officers
2 kept walking around the car with flashlights, yeah, sure
3 did.

4 Q. Now, let's be clear about this because initially it's
5 just Officer Gardner and Officer Hall, okay?

6 A. Right. Some other officer, some other officer was
7 there too. I can't remember. I can't recall who -- his
8 name. But I know another officer was at the back of my
9 car.

10 Q. Okay. Well, I'm asking you what you specifically
11 remember. So you do or don't remember Officer Gardner
12 himself flashing -- using a flashlight to look into the
13 vehicle?

14 A. Yeah. He was.

15 Q. Okay. Was that before or after he got you out of the
16 car?

17 A. Before.

18 Q. Okay. He was using a flashlight to shine into your
19 vehicle?

20 A. (Affirmative nod.)

21 Q. Now, once -- now, do you recall being sweaty?

22 A. No, sir.

23 Q. Do you recall being nervous?

24 A. I mean, they kept telling me that my name wasn't

25 coming back. I kind of knew what they was trying to get

1 at, you know. I probably was a little bit nervous about my
2 name not coming back. Or at least they was saying my name
3 not coming back, you know.

4 Q. I understand. Okay. Now, at some point Officer
5 Gardner decided to take you out of the car; right?

6 A. Right.

7 Q. Now, it's his testimony that he immediately frisked
8 you?

9 A. No.

10 Q. No?

11 A. Uh-uh (negative). He didn't frisk me at all.

12 Q. Tell me what he did?

13 A. He got me out the car, another officer was standing at
14 the back of my car. I'm asking that officer why y'all out
15 here harassing me? The Officer there, Gardner, he had done
16 went upstairs. He told me to stand at the back of my car
17 and at the front of Taylor's car. So he'd done went
18 upstairs and told the other officer that was standing at
19 the back of the car with me, to watch me. So when he come
20 back from upstairs, then he asked me, I mean -- yeah. He
21 ask me, he said, what is that in your pocket? And I told
22 him I had some money in my pocket. He said, dude, do you
23 mind if I see it? At that time, I pulled out the money. I
24 handed it to him. He laid it on top of my car. And then
25 he asked me what was the other items in my pocket. And I

1 told him, cigarettes, lighter. And he said, take that out
2 and lay it on the hood of Taylor's car. So that's what I
3 did. And then after that, he shied up to me and put his
4 hand down in my pocket.

5 Q. What did you do when he put his hands in your pockets?

6 A. I asked him why was he putting his hands in my pocket.
7 And then he said that I was under arrest and they put me in
8 handcuffs.

9 Q. So his response to why he was putting his hands in
10 your pockets was that you were under arrest?

11 A. Yes, sir.

12 Q. Okay. Did you see him come out of your pocket with
13 those pills that he said were there?

14 A. No, sir.

15 Q. So he didn't pull them out and show them to you?

16 A. No, sir.

17 Q. Okay. So to be clear, you did or did not give him
18 permission to go into your pocket?

19 A. I did not give him consent to go in my pocket.

20 Q. Okay. And how long did it take him to go upstairs and
21 come back down while you were standing outside your car, to
22 come back and reach into your pocket?

23 A. I guess about five, ten minutes.

24 Q. So describe what you're doing when he's gone. You're
25 standing there by yourself?

1 A. Standing by myself, me and Taylor -- I mean, Taylor --
2 me and Taylor pretty much talking. I'm trying to read her
3 lips. She's trying to read my lips. But ---

4 Q. Okay. So Taylor and Megan are actually looking at
5 you, sitting facing you?

6 A. Right.

7 Q. You could see them?

8 A. Right.

9 Q. They hadn't been pulled out of the car yet?

10 A. No.

11 Q. Okay.

12 MR. HARBIN: May I approach the witness, Judge?

13 THE COURT: Yes, sir.

14 Q. See what's been previously marked as Defendant's
15 Exhibit Number 2. Is this an accurate depiction of that
16 parking lot to the best of your knowledge?

17 A. Yeah, I guess. I mean ---

18 Q. Well, you see the "Xs" right here?

19 A. Yeah. Yeah.

20 Q. Does that appear to be approximately where you
21 remember your car parked and Taylor's car parked?

22 A. Right.

23 Q. Okay. Now, there's two other "Xs" there. One appears
24 to be right in front of those two "Xs". Is that where you
25 recollect his patrol vehicle was parked?

1 A. Right in there, I guess.

2 Q. Well, and in reference to where he put the "X", is
3 that an accurate depiction of where the car was parked,
4 where that "X" marks the spot?

5 A. Yeah.

6 Q. Okay. So that's basically positioned in front of your
7 two cars?

8 A. Right.

9 Q. All right. And your testimony is that you did not
10 feel that you could remove -- excuse me -- you couldn't
11 leave?

12 A. No, because the car was too close.

13 Q. Okay.

14 A. No, I mean, I couldn't leave, I mean, if I wanted to.
15 I mean, I would have tore up that car, tore up mine, one.

16 MR. HARBIN: Judge, if I can have one second.

17 Q. Erick, at any time did you give permission for Officer
18 Gardner, Officer Hall, or any of the other responding
19 officers to search your person or your car?

20 A. No, sir.

21 MR. HARBIN: No further questions.

22 THE COURT: You may cross-examine.

23 CROSS-EXAMINATION

24 BY MS. MONTES:

25 Q. Mr. Hewins, did you have a driver's license on you?

1 A. No.

2 Q. Were you driving under suspension when you drove
3 there?

4 A. Probably was.

5 Q. And didn't you previously testify that the pills that
6 you had on you, you were giving to someone?

7 A. Yes, ma'am.

8 MS. MONTS: Thank you. Nothing further.

9 MR. HARBIN: No further questions, Judge.

10 THE COURT: Thank you. You may step down.

11 MR. HARBIN: Judge, our last witness is Megan
12 Newman.

13 THE CLERK: Ms. Newman, if you would come forward
14 to be sworn in, please. Please place your left hand on the
15 bible and raise your right.

16 Do you solemnly swear or affirm that the testimony
17 you're about to give is the truth, the whole truth and
18 nothing but the truth, so help you God?

19 THE WITNESS: Yes, ma'am.

20 THE CLERK: Thank you. You may be seated. Would
21 you please state your name for the record?

22 THE WITNESS: Megan Elizabeth Newman.

23 MEGAN NEWMAN,

24 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

25 DIRECT EXAMINATION

1 BY MR. HARBIN:

2 Q. Ms. Newman, do you recall the night in question,
3 August 9, 2010?

4 A. Yes, sir.

5 Q. And were you, in fact, in the car sitting beside Mr.
6 Hewins ---

7 A. Yes, sir.

8 Q. --- at the time the officers arrived?

9 A. I was driving the other car.

10 Q. You were driving the other car. So that means that
11 your door was right beside his door. Is that right?

12 A. Yes, sir.

13 Q. Your window was rolled down?

14 A. Yes, sir.

15 Q. His window was rolled down?

16 A. Yes, sir. We were talking.

17 Q. Okay. Just sitting in the parking lot talking. Do
18 you recall when the officers pulled up?

19 A. Yes, sir.

20 Q. Okay. Can you tell the Court where the officers
21 pulled up and how?

22 A. Erick was backed in. There was like a stairwell to
23 Erick's passenger side door where he was backed in at. He
24 was backed in and we had pulled in right beside him.
25 Because when we pulled in, he wasn't outside. So we pulled

1 in. We seen his car. We pulled in beside his car. And
2 then she called him to come down or whatever and then she
3 all --

4 Q. She being?

5 A. Taylor.

6 Q. Taylor. What relationship does Taylor have to my
7 client? Were they seeing each other?

8 A. Yeah.

9 Q. Okay. And why were y'all at the Clarion that night?

10 A. To meet him to go get the truck so she could get the
11 Lexus that he just bought her.

12 Q. Okay. So back to my original question. What did you
13 witness when -- or what did you observe when you saw
14 Officer Gardner and Officer Hall pull up?

15 A. Well, when they first pulled in, I didn't know who
16 they were. I was like, you know, who is this pulling in
17 behind us because we couldn't leave. And then when he
18 walked up to the car and I seen the back of his vest, it
19 said, like, I guess sheriff or something on the back. I
20 don't know what it said. But you could see that he was a
21 police officer once he walked up to the car.

22 Q. Okay. And when you say he walked up to the car, where
23 did he walk up?

24 A. He walked up to Erick.

25 Q. Okay. And how close was your door to Erick's door,

1 your window to Erick's window?

2 A. A foot and a half, if that. I mean ...

3 Q. So how close was Officer Gardner to you and what you
4 eventually saw, how close was he to Erick basically?

5 A. Mostly, all I could see was his backside. But he was
6 closer to Erick's car than he was to my car.

7 Q. Okay. And how much -- can you either, by using, you
8 know, foot, inches or a yard or by showing us with your
9 hands how far he was away from your car and how close he
10 was to Erick's car?

11 A. He was probably this far from my car. And probably
12 like this far from Erick's car.

13 Q. And what you're indicating is a little more than
14 shoulder width away from your car and no less than shoulder
15 width from Erick's car?

16 A. Yes, sir.

17 Q. Could you open door to leave your car if you wanted to
18 while Officer Gardner was standing there?

19 A. No, I would have hit him.

20 Q. Okay. And based on what you were able to observed,
21 could the car door -- the driver's door of Erick's vehicle
22 been opened without ---

23 A. No. He really would have hit him. I may could have
24 like shimmied my way out of there because I'm little, but
25 ...

1 Q. Okay. And you were driving. Did you feel as if you
2 could maneuver the car around or through or outside or
3 anything, could you move your car because of the patrol car
4 position?

5 A. No.

6 Q. Okay. How close was that patrol car to your car?

7 A. Well, if we were back like, say, this was us backed
8 into the parking space and this was their car, probably
9 like this.

10 Q. All right. Now, obviously, cars are much bigger than
11 those pieces of paper?

12 A. Well, yes.

13 Q. Was there enough room for Officer -- I believe Officer
14 Hall ---

15 A. If I would have backed out, I would have took out
16 their back bumper and the back panel of their car.

17 Q. Okay. Just to be as specific as we can. Officer Hall
18 had enough room to open her door, or no?

19 A. Yeah.

20 Q. Okay. So she had enough room to open her door. Did
21 she have any more room than to open her door?

22 A. No. I mean, if they would have parked any closer,
23 when she opened her door she would have at least hit
24 Erick's car.

25 Q. All right. Now, were you able to hear the actual

1 words being spoken by Erick and/or by Officer Gardner when
2 he was interviewing Erick outside ---

3 A. Not everything but most of it, just because I did have
4 somebody else in the car with me who was distracting some
5 of my attention, but most of it -- I mean, we were
6 watching.

7 Q. Okay. And before I ask about that, do you recall
8 whether or not Erick's car was on and whether or not there
9 were lights inside his car?

10 A. No, his car was not on. We had maybe been there for
11 -- we waited in the parking lot longer than we got to talk
12 to him before they pulled up.

13 Q. And that would have been how many minutes?

14 A. How long I was there or how long all of us sat there?

15 Q. How long you were there prior to the police pulling
16 up?

17 A. I was there probably about four to five minutes before
18 they pulled up. But sitting there talking maybe a minute
19 or two before they pulled up.

20 Q. And what, if anything, were you able to actually hear?
21 Not just mumbling but what words or what conversation did
22 you actually hear -- actually able to hear between Officer
23 Gardner and Mr. Hewins?

24 A. I know he did ask all of us what we were doing there
25 and we all told him the same thing.

1 Q. Which was?

2 A. That we were there to get -- well, we needed three
3 people because there was going to be three vehicles. So in
4 order for that somebody had to move every car. What was
5 the question again?

6 Q. What you were able to hear specifically Officer
7 Gardner say?

8 A. He asked us what we were doing there and we told him
9 what we were doing there. And I know they got all of our
10 information and we came back. And then he kept telling
11 Erick, you know, your name's not coming back. Your name's
12 not coming back, or whatnot. And then I believe it was
13 probably about four or five minutes afterwards he asked
14 Erick to step out of the car.

15 Q. Okay. And what did you see Erick and/or Officer
16 Gardner do once he was asked to step out of the car?

17 A. He moved Erick to the front of my car, like in the
18 back of Erick's car. They were like ...

19 Q. So was he on the -- was he in the parking lot or by
20 that time is there a sidewalk that he's standing ---

21 A. He was on the sidewalk underneath the awning of the
22 hotel.

23 Q. Okay. And what did you observe, if anything, after
24 Officer Gardner moved Mr. Hewins to the front of your car?

25 A. I know he was asking him some questions, but the only

1 thing that I really heard out loud because they were in
2 front of my car by then, was why the H-E-L-L are you going
3 in my pocket.

4 Q. Okay. And was there some passage of time between the
5 why are you going in pocket statement and him actually
6 moving him around ---

7 A. Oh, yeah. Erick was in the front of the car for a
8 good five or six minutes.

9 Q. Okay. And what was he physically doing? Was he
10 standing, sitting?

11 A. Standing there looking mad at Taylor.

12 Q. Okay. Where were his hands, if you recall? If you
13 don't, it's okay.

14 A. I don't recall.

15 Q. And was there someone standing beside him? Was
16 Officer Gardner standing beside him the whole time or was
17 anyone standing beside him at any point in time?

18 A. I believe somebody was. I'm not positive if it was
19 him because he's looks a little different than I remember.
20 But I can't remember exactly who was there with him, but I
21 know there was somebody standing with him.

22 Q. So your recollection is that Mr. Hewins was asked out
23 of the car and then for a period of five or six minutes or
24 whatever is standing in front of your vehicle prior to what
25 you heard, why in the heck are you going in my pocket?

1 A. Yes, sir.

2 Q. And were you able to hear anything else? Were you
3 able to understand -- there's obviously a windshield
4 between you and Mr. Hewins.

5 A. Uh-huh (affirmative).

6 Q. So were you able to hear anything else?

7 A. I mean, I could see hand gestures and movements, but
8 mostly I couldn't hear anything. The only reason I heard
9 that was because he got very loud with it.

10 MR. HARBIN: One second, Your Honor. No further
11 questions. Thank you, Judge.

12 And thank you, Ms. Newman.

13 THE COURT: You may cross-examine the witness,
14 Solicitor.

15 **CROSS-EXAMINATION**

16 **BY MS. MONTS:**

17 Q. Ms. Newman, what's your age?

18 A. I am nineteen.

19 Q. So at this time you were seventeen?

20 A. Yes, ma'am.

21 Q. And how old was Taylor?

22 A. Eighteen.

23 Q. So how old was she at that time?

24 A. She was eighteen then, she's like twenty-something
25 now.

- 1 Q. Okay. So you were seventeen and she was eighteen?
- 2 A. Yes, ma'am.
- 3 Q. And whose car were you driving?
- 4 A. I was driving her car.
- 5 Q. Why were you driving her car?
- 6 A. Because I don't have a car.
- 7 Q. Why wasn't she driving her car?
- 8 A. She asked me to drive her car.
- 9 Q. Did she have a driver's license?
- 10 A. Uh-huh (affirmative).
- 11 Q. And what is your relationship with Erick Hewins?
- 12 A. He knows my dad.
- 13 Q. Isn't it true you would communicate with him?
- 14 A. Yeah. He knew my dad. He's a family friend.
- 15 Q. Well, wasn't it true you would communicate with him
- 16 late at night?
- 17 A. What do you mean by that?
- 18 Q. Texting, phone calls, meeting?
- 19 A. Yeah. I mean, he was a family friend.
- 20 Q. Okay. And he was dating Taylor?
- 21 A. Uh-huh (affirmative).
- 22 Q. And Taylor's a good friend of yours?
- 23 A. Oh, yeah.
- 24 Q. And how old is Erick Hewins?
- 25 A. I don't know his age exact.

1 Q. A good bit older than you and Taylor?

2 A. Yeah, a little bit.

3 Q. And ---

4 A. Probably around my dad's age, so thirty-something,
5 forty.

6 Q. And Erick had just bought a car for Taylor?

7 A. Uh-huh (affirmative).

8 Q. And she and/or you had communicated with him that
9 night about meeting at the hotel?

10 A. Yeah. She did. I didn't have anything to do with
11 talking to him that night. I just drove her car.

12 Q. But you did communicate with him that night?

13 A. Yeah. Once we got there.

14 Q. And when you arrived there was the Lexus parked there?

15 A. Yes.

16 Q. And did she call him to come down or he just came down
17 on his own?

18 A. No, I mean, when she called him and let him know we
19 was here. And then she seen a female walk out and that
20 kind of upset her a little bit.

21 Q. So you were driving Taylor's car?

22 A. Uh-huh (affirmative).

23 Q. But you're also going that night to get another car
24 for Taylor?

25 A. Yeah. I was driving her car home. Like, once she got

1 the Lexus, I was taking her car back to the house.

2 Q. So she'd have two cars then?

3 A. Yeah.

4 Q. And did you eventually get out of your vehicle?

5 A. Eventually, the officers asked me out, but I didn't
6 just get out. But that was after Erick was already in the
7 handcuffs they asked us out of the car.

8 Q. Okay. Thank you.

9 MS. MONTS: Nothing further.

10 MR. HARBIN: That's all the witnesses we have,
11 Judge.

12 THE COURT: All right. Thank you. You may step
13 down. Okay. Any other witnesses from the Defense?

14 MR. HARBIN: Not on this issue, Judge.

15 THE COURT: All right. Nothing in reply on this
16 issue?

17 MS. MONTS: No, Your Honor.

18 THE COURT: All right. Let's take about a five-
19 minute break and then we'll get into the other -- is the
20 chain of custody going to be an issue now or is that going
21 to be ---

22 MR. HARBIN: Well, it's going to be an issue,
23 Judge.

24 THE COURT: --- when it comes up? Is there
25 anything we can take care of that now or not? Are you

1 going to have your full ---

2 MS. MONTES: Your Honor, the only witnesses that
3 were not here last time were employees at the property and
4 evidence room that are no longer employed there. And I'm
5 going to have one or two of them here to explain the
6 procedure at the property and evidence room.

7 THE COURT: We'll cover that at the time. So all
8 we need now is the telephone records; right?

9 MR. HARBIN: I'm sorry. My client was talking to
10 me.

11 THE COURT: The telephone matters is the only
12 other issue we have.

13 MR. HARBIN: Yes, sir, that'll be the other
14 issue. And, Judge, would you like to have all testimony
15 heard and then have individual arguments or go ahead and
16 have arguments.

17 THE COURT: Yeah, let me hear all the testimony
18 and then I'll hear your arguments on these. Let's take
19 about a five-minute break.

20 (WHEREUPON, the court stood at recess for a short
21 break.)

22 THE COURT: Are you ready to proceed?

23 MS. MONTES: Yes, Your Honor.

24 MR. HARBIN: Yes, sir.

25 THE COURT: Again, I'll hear your arguments on

1 this issue with the others. You may call your next
2 witness.

3 MS. MONT'S: And, Your Honor, the State's position
4 on this suppression motion of the search warrant of the
5 cell phone that Defense is calling is that the State -- is
6 that the Defense must be specific in articulating legal
7 grounds to support their claim that the evidence was
8 obtained violative of Constitutional rights and we believe
9 they need to put that on the record.

10 THE COURT: All right. What we have is a search
11 warrant for a cell phone?

12 MS. MONT'S: Yes, Your Honor.

13 THE COURT: Okay.

14 MS. MONT'S: And, Your Honor, the cell phone was
15 seized on the night of this incident.

16 THE COURT: So the search warrant was obtained
17 afterwards?

18 MS. MONT'S: Yes, Your Honor. Yes, Your Honor,
19 after.

20 THE COURT: Okay.

21 MS. MONT'S: Your Honor, I apologize. I meant to
22 quote the case, *State v. Banda*, 639 S.E.2d 36.

23 THE COURT: B-A-N-D-A?

24 MS. MONT'S: Yes, Your Honor.

25 THE COURT: Do you have the search warrant and

1 the affidavit?

2 MS. MONTS: Yes, Your Honor.

3 THE COURT: If I could look at it.

4 Mr. Harbin, are you challenging the affidavit or the
5 probable cause by the -- the finding by the Magistrate?

6 MR. HARBIN: Judge, I've got three issues.

7 THE COURT: All right, sir. I'll be glad to hear
8 from you.

9 MR. HARBIN: Thank you, Judge. May it please the
10 court. The first issue is the basis for the warrant. And
11 do you have the warrant in front of you?

12 THE COURT: I do.

13 MR. HARBIN: The basis for the warrant is that
14 the officer had observed a text message. Excuse me. And
15 I'll read this so I don't get it wrong. It says, also upon
16 the arrest of Erick Hewins I did locate his cell phone.
17 The last text message that he sent to another phone was the
18 word, or with the words busted. Two issues related to that
19 statement, Judge. Number one, we don't believe that it's
20 proper for the officer to go into the phone to begin with.
21 In other words, to have a search, to find something in a
22 search and then justify the search warrant for that very
23 object. The kind of 1(a) 1(b) argument is also that upon
24 reading the actual text in the phone that we have received,
25 the word busted was texted to him, not sent from him. And

1 it was an hour before the police arrived. And that's two
2 of my three issues if Ms. Monts would like to address those
3 before ...

4 THE COURT: All right. One is that he looked at
5 the message before he got the warrant?

6 MR. HARBIN: Yes, sir.

7 THE COURT: Invaded -- and then you're saying
8 even if it was visible there on the phone, that it was an
9 hour before and it didn't -- it came from someone else. It
10 was not sent by the Defendant?

11 MR. HARBIN: That is correct. In other words, it
12 would be impossible for someone to have -- or for that text
13 to have referred to anything about the police activity that
14 night.

15 THE COURT: All right. And then you had another
16 one?

17 MR. HARBIN: Yes, sir. The final point that I
18 would have is the CD that I -- the solicitor's office
19 turned over a CD with the -- they're essentially pictures
20 of the text. So it's not like a printout of the text.
21 It's just a screen shot of the actual phone. And if you're
22 looking at the search warrant, it was signed -- it was
23 submitted on the 7th of January of this year. And it was
24 signed by Judge Heaton on January 10th at three twenty-
25 three P.M. The digital stamp on these pictures -- so, in

1 other words they actually retrieved the pictures and
2 retrieved the evidence is dated January 7th. So in other
3 words they had a violative search and actually gave me the
4 evidence that they had already searched when they weren't
5 supposed to on January 7th. We believe that in this
6 particular circumstance, and with others in this case, the
7 exclusionary rule should apply because the reason it exists
8 is to deter actions exactly like this. In other words,
9 going into somebody's business when they didn't have a
10 warrant to do so.

11 THE COURT: Okay. Let me make sure that I'm
12 following you on that argument, Mr. Harbin. The Judge
13 signed the search warrant on the 7th?

14 MR. HARBIN: On the 10th.

15 THE COURT: Well, I think the return is on the
16 10th; isn't it?

17 MR. HARBIN: Is that what it is? If so, Judge,
18 then I'd simply made an error in that ---

19 THE COURT: Maybe I'm misreading that. It looks
20 like the last page that I have with the three twenty-three
21 P.M.

22 MR. HARBIN: Yes, sir.

23 THE COURT: That's the return; isn't it?

24 MR. HARBIN: You're correct, Judge. I apologize.
25 So I would be limited to my first two arguments, Judge.

1 THE COURT: Okay. And then the other is the 7th

2 ---

3 MR. HARBIN: Yes, sir.

4 THE COURT: --- when the affidavit was signed and
5 when the order was issued or the warrant was issued?

6 MR. HARBIN: Yes, sir.

7 THE COURT: All right. Solicitor, I'll be glad
8 to hear from you in response to those issues that --
9 basically, I think he's saying there was a search before
10 the warrant was issued.

11 MS. MONTES: Your Honor, we'd have to have the
12 person who did the return to talk about the time, but the
13 warrant was signed on the 7th. And if Mr. Harbin is
14 correct, the information was retrieved on the 7th. That
15 would have been the same day.

16 THE COURT: He's withdrawing that.

17 MS. MONTES: Oh, okay. I'm sorry.

18 THE COURT: That one's out. We're now down to
19 the basis of getting the warrant. His argument is that the
20 officer examined the phone before he got the warrant.

21 MS. MONTES: Yes, Your Honor. And there's case
22 law. I don't know if I could put my hands on it at this
23 moment, but there's case law that says, number one, that
24 officers can look at the contents of a cell phone when they
25 seize it in order to keep information on there from being

1 destroyed. If I have a little bit more time I can find the
2 case law on that.

3 THE COURT: All right.

4 MS. MONTIS: But also, Your Honor, that's not the
5 only reason in the affidavit. In addition to that, which I
6 believe is fine for case law, the officer also talks about
7 the Defendant being in possession of trafficking weight
8 crack cocaine and that the information on the phone could
9 be -- the word busted is one that leads them to be
10 concerned about what other information would be on there.
11 But in addition to that, the fact that the Defendant was
12 arrested with twenty-two grams of crack cocaine, and based
13 on law enforcement experience, drug dealings are done on a
14 cell phone, and there may be further information that would
15 be able to be gleaned from this cell phone regarding this
16 case.

17 THE COURT: What evidence from the cell phone
18 records are pertinent to this case?

19 MS. MONTIS: Your Honor, there are text messages
20 shortly before the arrest between the Defendant and the
21 baby's mama that was in the hotel room, talking about
22 delivering crack cocaine. There's also cell text messages
23 between the Defendant and Taylor and Megan talking about
24 coming -- to come and the quote is, quote, are you ho'ing
25 for pills or weed. And the response is, both. I have

1 both. So -- and there's two other text messages from
2 people that are not involved in this case, talking about
3 having the Defendant deliver crack cocaine to them. So all
4 of this will go to show the fact that the crack cocaine
5 found in the car was, in fact, the Defendant's.

6 THE COURT: Yes, sir, Mr. Harbin?

7 MR. HARBIN: Judge, we'd argue that the evidence
8 that they have presented to you, or at least the summary of
9 evidence, would be hearsay because they are messages sent
10 from someone else. He received them. And I think she
11 would have one argument for messages that he sent, they
12 would be statements against interest. For messages that he
13 received, I mean, you can't stop me from texting to you.
14 And so I don't know that you should be held -- now, if she
15 wants to argue a particular response, I think I lose ground
16 there. But something arrives on your phone, you have no
17 control over it. And I would say that even if she wanted
18 to use that, she still has to bring the person that made
19 the statement. It's essentially hearsay. It's an
20 electronically written document. I think the same rules
21 would apply as if she found -- it's simply a hearsay
22 argument. So Judge, I would say that the inbox on his
23 phone is hearsay.

24 MS. MONTIS: And, Your Honor, I believe that that
25 would be a jury question. This is on the Defendant's cell

1 phone and it would be a jury question whether or not -- the
2 defense could certainly argue that, that anybody could have
3 sent that to him. But I think that there is enough reason
4 for a jury to be able to consider that not everybody gets
5 cell phone messages saying, bring me some crack cocaine.
6 Only somebody who would have some knowledge that that
7 person could have some would be doing that, Your Honor.
8 And I think it would be up to a jury. And, again, the
9 Defense could argue that that wouldn't be the case.

10 THE COURT: There are no messages from the
11 Defendant to others?

12 MS. MONTS: Yes, Your Honor. Your Honor, the
13 Defendant sent out one saying, to Taylor, are y'all
14 tricking for weed or pills? They respond back, both, what
15 have you got? He responds back, both. Taylor responds
16 back, okay, give me ten minutes. You know how it goes.

17 THE COURT: How about that, Mr. Harbin? He
18 texted that I've got both.

19 MR. HARBIN: Well, Judge, I still have a little
20 bit of problem with them bringing an out-of-court statement
21 in without the actual statement. Her logic, I certainly
22 understand and I get it. But I don't know that that
23 alleviates her from her responsibility to bring in the best
24 evidence, which would be the person. And certain ---

25 THE COURT: Well, how about just his messages

1 back that -- she just said that the line shows that he said
2 I've got both, in relation to the one about drugs.

3 MR. HARBIN: Judge, I think if we assume that the
4 search warrant is good, which I guess is what we're doing
5 at this point. If we assume that the search warrant is
6 good ---

7 THE COURT: Well, now, let me cross that bridge
8 now. I think the search warrant is good, you know, not
9 just because of the busted, but because of the -- I mean,
10 when they were seeking the search warrant, they already had
11 all the other evidence. They had the drugs. I mean, this
12 is sometime later. They had the drugs in place, the crack.

13 MR. HARBIN: I can follow. I have a little bit.
14 It gets a little murky in my head about why a cell phone or
15 anything on a cell phone tends to prove the existence of
16 that drug in his car, which is essentially what they're
17 doing. If they -- I guess for what limited purpose are
18 they seeking to introduce that information? Or should it
19 be a limited purpose for which that information is allowed?

20 In other words, if the Defendant doesn't present a
21 defense that it wasn't my car or it was -- they weren't my
22 or I didn't know it was in my car. If you follow then for
23 the limited purpose of, you did have knowledge about drugs
24 or you did have knowledge about crack, then it would seem
25 to be a more appropriate admission. Simply -- it seems to

1 me that the matter at hand is whether or not he possessed
2 crack cocaine in excess of ten grams on the arrest, for the
3 arrest. And I'm not sure where the direct ---

4 THE COURT: But isn't knowledge one of the
5 elements?

6 MR. HARBIN: Well, it certainly is. You're
7 certainly right.

8 THE COURT: Knowingly and willingly, doesn't that
9 go toward the knowledge?

10 MR. HARBIN: Judge, I'm trying my best to ---

11 THE COURT: Okay. I'm just -- I'm going to do
12 some more study about that. I don't know who your witness
13 -- I don't know if you've got any other case law, other
14 than the -- I guess the *Banda* case was just procedurally.
15 *Franks versus Delaware* seems to be the criterion that I
16 would have as to that, but maybe -- I'll do a little more
17 research on that. If we get the trial started you can
18 forego anything on that. I guess the witness that you
19 would address that with, I don't know if that'll be your
20 first witness or not, but we'll certainly take a break
21 before you elicit any testimony on that, Ms. Monts. I'll
22 study that a little more.

23 I'll be glad to hear from you about the suppression
24 hearing, Mr. Harbin.

25 MR. HARBIN: And, Judge, just so I'm clear.

1 We're going to preserve any argument about chain of custody
2 until, I guess, it's ---

3 THE COURT: Right. I'm going to study that and
4 maybe y'all can, too, over lunch. I'll make a -- oh, yeah.
5 The chain of custody is going to be reserved until the
6 evidence comes in. As far as the cell phone, I'm reserving
7 judgment on that over lunch. If we proceed with the trial
8 based on the suppression hearing, opening statements and
9 any testimony should not talk about the cell phones yet.

10 MR. HARBIN: Judge, if I may, I've just provided
11 the State with a copy of a case I'm -- two cases I'm going
12 to be referring to. If I could approach the bench and
13 deliver them to you.

14 THE COURT: Okay. Now, we're focusing on the
15 suppression; right?

16 MR. HARBIN: Yes, sir.

17 THE COURT: All right.

18 MR. HARBIN: Judge, as I see it, this case -- and
19 I'll refer back to these cases, but to give you an overview
20 of the argument, if my client is sitting in a car and he's
21 sitting in a car, presumably about to leave, and officers
22 pull up and their vehicle, to a plain and ordinary person
23 and understanding, is blocking him in, I don't think at
24 that moment -- I think as soon as they pull in front of him
25 that my client is not free to leave.

1 I've heard arguments -- I mean, I've heard statements
2 from the officers about how close they were and how close
3 they weren't. But I don't think that it is a reasonable
4 explanation that the positioning of that car is intended to
5 do anything other than intimidate and literally physically
6 trap someone in, in a vehicle. You heard testimony from
7 both officers that the car was positioned directly in front
8 of, not just one car, but both cars. You also heard
9 testimony that they were definitely not blocking them in
10 because that was an officer safety matter. And it just
11 seems absurd to me that their safety protocol requires them
12 to park in front of the very moving -- potentially moving
13 vehicles that they say they're in fear of. And they've
14 also testified that the parking lot is entirely empty. So
15 they chose this exact location on purpose. They could have
16 parked anywhere else. And, in fact, if the exhibits are to
17 be looked at, they could have parked just a little bit
18 before. There's actually a median where you couldn't get
19 to them. You know, they couldn't have been run over,
20 anything like that.

21 As far as whether or not you could see from the car,
22 the officers reported themselves that he didn't pull --
23 excuse me -- Officer Gardner. His testimony was he did not
24 pull Hewins out of the car until his backup arrived. So
25 it's a contradictory statement to say that we need to

1 position the car so that I can see everything from the car,
2 when they, in fact, didn't even act until they had other
3 backup there.

4 So my first point being that he is detained at the
5 instant that they blocked him in. As argument B to
6 argument A, the involuntary -- or the not being free to
7 leave, and this is based on everyone's -- this is
8 uncontradicted testimony that Officer Gardner walks between
9 both vehicles. Now, I think the common ordinary knowledge
10 of everybody in here of how close vehicles are apart,
11 they're, you know, whatever that measurement is, we all
12 know that they're basically designed to make sure you have
13 just enough room to open your door so you don't ding the
14 next person over. And if somebody, especially the size of
15 Officer Gardner, stands in between you, you can't open your
16 door. And the reason I'm addressing this specifically is
17 only because in the previous trial, officer -- excuse me
18 -- Judge Hyman actually brought it up himself saying, he
19 could have just opened the door and walked away. And I
20 thought that was a good point to bring up, because I don't
21 believe he could. I believe as soon as two officers roll
22 up, they block you in, they're wearing guns and badges.
23 And Officer Hall testified that her gun definitely would
24 have been showing because she wouldn't have had her shirt
25 draped over her gun. And her badge is showing, vests are

State of South Carolina -vs- Erick E. Hewins (2010-GS-23-8295 and 8296)
Jury Voir Dire

143

1 showing. It's a show of force. At some point, they're
2 shining flashlights into the car. This is not a consensual
3 type thing. At no point is he ever told, you know, you're
4 free to leave. We're just asking some questions. He's
5 physically blocked in, in his person. And he's physically
6 blocked in, in his vehicle.

7 Judge, I'd also say, and I'm familiar with the case
8 law establishing articulable -- or establishing the
9 requirement, rather, that there be articulable facts to
10 amount to what an officer would call reasonable suspicion,
11 giving him an opportunity to frisk someone under the Terry
12 doctrine. I think that in this particular case, number
13 one, the factors are just weak. They're just plain out
14 weak. Says he's nervous. Well, I think the courts have
15 recognized that every ordinary citizen is nervous, and
16 appropriately so, when officers are present. He's backed
17 into a spot. We've heard testimony, number one, he didn't
18 back the car in himself. I don't follow that rationale
19 whatsoever, that backing into a spot -- I back into a spot
20 every day at my office and I'm not trying to hide anything.
21 Let's see, the other factors. I believe he said he was
22 touching his pocket. I've got two issues with that.
23 Number one, I have no idea what that means in relation to
24 drug dealing. Number two, I don't know how he sees all
25 this because one of the first things he says is this is a

1 poorly lit parking lot. And I've elicited testimony that
2 the interior of the car was not lit. So how all of this
3 was being witnessed, I'm not sure. Now, to address Officer
4 Hall's testimony, I believe that nothing that she observed
5 is pertinent to the Terry frisk and the reasonable
6 suspicion argument because she never communicated that to
7 Officer Gardner. And I believe this argument should be
8 limited to what his -- you know, obviously an officer has
9 to make a decision for his own safety and that of his
10 fellow officers. So if he observed something, that's
11 something we talked about, if another officer observes
12 something but does not communicate that to Officer Gardner,
13 then he has no way of knowing that that exists. So the
14 fact that she may or may not have seen him sweat or touch
15 his pocket or anything, I don't think that -- I'm not
16 saying it's true or untrue. I'm just saying for purposes
17 of this argument, I don't think it applies because she
18 admitted that she does not remember actually speaking to
19 Officer Gardner and telling him about those particular
20 movements.

21 Judge, the cases that I handed up, one of them has to
22 do with -- and I'll address the Foster cases, what I
23 believe they labeled furtive movements. And this is the
24 closest case, Judge, that I could find that would analogize
25 kind of the touching of the pocket or this involuntary

State of South Carolina -vs- Erick E. Hewins (2010-GS-23-8295 and 8296)
Jury Voir Dire

145

1 movement or just basing a suspicious -- or suspicion,
2 rather, on movements. In the *Foster* case, I believe the
3 officer leaves the restaurant. He's eaten dinner with his
4 wife. He looks into a car and recognizes somebody and then
5 sees the passenger, who he believes to have recognized him,
6 kind of raise his arms and do something out of the
7 ordinary, which raises suspicion. That case stands for the
8 proposition that that alone is just simply not -- it's
9 simply not enough. So a furtive movement -- and I believe
10 I'm using that vocabulary correctly -- is not enough. So I
11 think that in this case if you have what is essentially a
12 meaningless statement that he's nervous because law
13 enforcement is there. And I know that case law will tell
14 you that you have to consider the education of the client,
15 the time of night, how many officers were there, whether or
16 not they've had any show of force. And I would argue that
17 having a gun and wearing a badge is certainly a show of
18 force, that that doesn't amount -- or excuse me.
19 Nervousness is appropriate. Sweating, it's August 9th,
20 Judge. And I don't know if you've noticed, but my client
21 is a large man. And there was testimony from Officer
22 Gardner that he was comparing his size to my client. And
23 Officer Gardner is a large man, as well. Now, that being
24 said, one person can sweat and another person can't. But
25 if you are sweating on August 9th, I think you're just

1 humid. So they have nervousness and sweating, along with
2 some movement that the court has said is not, alone in
3 itself, enough. Back then, and which I still don't
4 understand -- and then they try to piggyback this idea that
5 he's given the wrong information, that his name is not
6 coming back. But they will readily admit that the
7 information he gave them came back. So I mean, whether
8 it's operator error or a scriveners's error, whatever that
9 is, that is not attributable to my client. Stuttering is,
10 you know, part of being nervous and I think that's
11 appropriately so.

12 Judge, I believe that the *Massenburg* case, along with
13 the *Foster* case, when I read them, I read them to find that
14 the courts have become a little dismayed at the collection
15 of what I believe is termed as otherwise innocent facts,
16 cobbled together to form suspicious activity or to form the
17 illusion of suspicious activity. I don't believe that
18 anything taken by itself, and I don't believe the
19 collection of these things rises to the level of reasonable
20 suspicion whatsoever.

21 Finally, I will say that if you assume that those
22 factors put together would give a reasonable officer, in
23 this case, Officer Gardner, reasonable suspicion to remove
24 my client and to pat him down for drugs -- or excuse me --
25 for weapons, for safety, then I think Officer Cothran's

1 testimony directly contradicts whether or not that is
2 possibly true. We have a CAD report that reports Officer
3 Cothran and -- excuse me -- Officer Gardner and Officer
4 Hall arrive at twelve thirty-six A.M. That same CAD report
5 -- well, excuse me. And I don't need the CAD report to be
6 accurate. But the CAD report indicates that Officer
7 Cothran arrives twelve minutes later. But his own
8 testimony, whether or not that CAD report is down to the
9 millisecond of when he came, his own testimony says when he
10 arrived Mr. Hewins was standing outside of his car. And I
11 think this is the most important part of this argument if
12 we don't get to the first part of the argument. Mr. Hewins
13 is standing outside of his car. He then speaks to Officer
14 Gardner, and he has to have spoken to Officer Gardner,
15 because Officer Gardner gave him the information about my
16 client's statement, he was visiting room two thirty-seven.
17 Upon receiving that information, and however long it takes
18 to have that conversation, Officer Cothran then goes all
19 the way to the management office, however long it takes to
20 walk to the management office, speak to that management
21 officer to find out what information is available about the
22 occupant of two thirty-seven. Go back to his vehicle --
23 this is all his testimony exactly -- run that information
24 presumably on his computer or through dispatch, then come
25 back to the scene where then he sees my client being

1 frisked.

2 So my point is this, if you remove someone out of the
3 car, if they're sitting there and they're free to leave and
4 then you decide at some point, okay, maybe I need to frisk
5 them down because this is an officer safety matter. If it
6 is truly an officer safety matter and that is why you are
7 frisking him, which is the only legitimate reason to frisk
8 him, I would argue, then you do not leave him standing
9 there for however many minutes it takes for all of that
10 activity from Officer Cothran to occur. There's no
11 explanation for justifying a Terry frisk based on your
12 safety, to remove him from a car and then he make him stand
13 there for minutes at a time. Of course, that testimony was
14 also reiterated by both my client and Ms. Newman.

15 Judge, I will cede the floor to Ms. Monts unless we
16 need further argument.

17 THE COURT: Ms. Monts, be glad to hear from you.

18 MS. MONTs: Your Honor, it's the State's position
19 that the officers on routine patrol pulled into this area
20 due to the fact that there were lots of auto break-ins and
21 other crime in this area. That's specifically what they
22 were looking for. When they pull into this complex they
23 see the only cars close by, these two cars, and they were
24 immediately alerted based on several factors. And these
25 factors led to the reasonable suspicion.

1 Case law talking about reasonable suspicion,
2 specifically last week came out from the South Carolina
3 Supreme Court, *State versus Sylvester Taylor* talks about
4 reasonable suspicion. And it talks about the investigative
5 detention, that it's Constitutional if it's supported by
6 reasonable and articulable suspicion that the person is
7 engaged in criminal activity, and that's what the officers
8 are going up there to look at. Courts must look at the
9 cumulative information available to the officer and not
10 find a stop unjustified based merely on a piecemeal
11 reputation of each individual fact and inference. Just as
12 one point or picture might not reveal the picture's subject
13 or nature, each component that contributes to reasonable
14 suspicion might not alone give rise to reasonable
15 suspicion.

16 Your Honor, also, it's a totality of the
17 circumstances. Courts may not find a stop unjustified
18 based merely on a piecemeal reputation of each individual
19 fact and reference.

20 Your Honor, also Fourth Circuit Court of Appeals in
21 the *Branch* case, that's 537 F3rd 238, talks about officers
22 must offer specific and articulable facts that demonstrate
23 at least a minimal level of objective justification.
24 Judicial review of the evidence offered to demonstrate
25 reasonable suspicion must be commonsensical, focused on the

1 evidence as a whole and cognizant of both context and a
2 particular experience of the officers who are charged with
3 the ongoing tasks of law enforcement.

4 Again, in *Linkous*, which is the Eighth Circuit, Your
5 Honor, 285 F.3rd 716, the Supreme Court has described
6 reasonable suspicion as a particularized and objective
7 basis for suspecting criminal activity. It is determined
8 by looking at the totality of the circumstances in light of
9 the officer's experience. Though each factor giving rise
10 to suspicion might appear to be innocent when viewed alone,
11 a combination of factors may warrant further investigation
12 when viewed together.

13 Your Honor, again, there's several other cases that
14 basically say the same thing. South Carolina Court of
15 Appeals in 2011, *State V. Provet*, that cite is 706 S.E.2d
16 513. Courts must consider totality of circumstances and
17 give due weight to commonsense judgments reached by
18 officers in light of their experience and training. Your
19 Honor, there are many other cases in that same regard. And
20 the different cases talk about different types of fact
21 indicators or factors that lead to the reasonable
22 suspicion. We believe in this case officers had
23 overwhelming amount of factors that would lead them, based
24 upon their experience at that time. In fact, beginning
25 with the officers pulling in and seeing the one car backed

State of South Carolina -vs- Erick E. Hewins (2010-GS-23-8295 and 8296)
Jury Voir Dire

151

1 in and the other car forward, and this indicated to them a
2 meeting. A meeting in a parking lot in a high crime area
3 at a hotel at twelve-thirty in the morning. The two cars
4 are side-by-side, talking to each other. Once they
5 approach, they can tell that it's an older male and two
6 young females. One of the things officers said, they're
7 there looking for prostitution cases, as well as drug case,
8 as well as car break-ins. They're concerned about cars
9 being parked in this area. They're not going into a hotel
10 room. They're not getting out of their cars. They are
11 sitting in the parking lot which led them to believe that
12 they may be planning to do something. They're concerned
13 about apartments and hotels in the area where they could be
14 planning to get out of their car and perhaps break in over
15 there. They talked about it being a high drug area. They
16 talked about the fact that when there are drugs, that guns
17 can be associated. The fact that it was dark. The fact
18 that it was late at night. The fact that it was not a
19 well-lit area. Once they did approach, the Defendant's
20 name -- did not have any ID on him, which led them to
21 believe he may not have a driver's license. They did try
22 to run his name two or three times. This, again, increased
23 their suspicion that something's going on, possibly that he
24 has outstanding warrants or possibly that he didn't have --
25 did not have a valid driver's license.

1 Your Honor, they also thought that he could have been
2 giving a false name, at which time he could have been
3 charged with that. Also, the fact that he was backed in
4 could have been that they were hiding a stolen car because
5 they're possibly trying to hide the tag. And in this case,
6 it did have a paper tag on his car.

7 Your Honor, the officers also testified about how they
8 pulled in, but let me rephrase that. All of these things
9 -- there's approximately fifteen items here that are
10 factors to be considered as the totality, not individually.
11 Each one can be taken apart individually. But when they're
12 looked at through the eyes of an officer with experience in
13 this area at this time of day, and the crimes that take
14 place there, and the indications that these people have
15 given them, they have the ability at that point to continue
16 a detention and investigate what's going on. What happens
17 at that time is that the Defendant gets more and more
18 nervous, he continues to pat his pocket. Officers, both
19 Hall and Gardner, stated that that's an indication of them
20 possibly of a weapon. They're very concerned about this.
21 The Defendant is seated down in his vehicle so they don't
22 know what he's going to do with his hands. He gets more
23 and more nervous. He is stuttering when he first gives his
24 Social Security Number so that was an indication he's
25 possibly making that up. The hit comes back immediately on

State of South Carolina -vs- Erick E. Hewins (2010-GS-23-8295 and 8296)
Jury Voir Dire

153

1 the two females, a match for their identity. His match
2 does not come back, at least two or three times. So they
3 are still concerned at that point.

4 We believe that there was plenty of reasonable
5 suspicion for them to detain him. And at that point, the
6 officer is concerned for his safety. He is, at that point,
7 allowed to get the Defendant out to frisk him based on the
8 fact that he continues to pat his pocket. Even after he
9 was asked not to, he continued to do so. The one officer
10 is there by himself. Officer Hall is seated in the patrol
11 car -- excuse me -- the unmarked patrol car. They have
12 backup coming. Once backup comes, Officer Gardner then
13 gets the Defendant out and immediately pats him down.

14 Now, the testimony from Officer Cothran, I asked him
15 on recross whether or not he could have been mistaken about
16 the order of whether he went to the management first or
17 went to the officer first. And he said, yes. But the
18 point is, Officer Gardner and Officer Hall said that as
19 soon as Gardner got Hewins out of the vehicle, he patted
20 him down for weapons, which was the reason he patted him
21 down. He also said that he would not have let the
22 Defendant put his own hands in his own pockets, because
23 that -- it's a safety issue. He would not have done that.
24 Once the Defendant was asked for consent, that he also did
25 give consent. So not only are we doing a Terry frisk,

1 we're also going on consent. Officer Gardner said that he
2 pulled the large wad of money, which was approximately
3 fifteen hundred dollars wrapped together tightly with a
4 rubber band, which made it feel hard. Once he pulled that
5 out and still had consent, plus that there was still other
6 objects in the pocket, he didn't know if there might still
7 be a weapon in there, that he put his hand in there and
8 brought out other items, which included four controlled
9 substance pills. At that point, he was placed under
10 arrest.

11 Your Honor, as far as -- the officers both testified
12 they were wearing T-shirts that said police on them. They
13 were not wearing high profile tactical vests or anything
14 like that. And, Your Honor, as far as whether or not the
15 Defendant's name eventually came back, it was what the
16 officers knew at the time that they got him out of the car.
17 At that time, no match, as far as who the Defendant was,
18 whether he had any outstanding warrants had come back.

19 Your Honor, so the officers originally had authority
20 to walk up to anybody. They did walk up to the Defendant
21 and the two females. At that point their suspicion was
22 gradually, gradually increased to the point where they had
23 reasonable articulable suspicion that something -- that
24 criminal activity was taking place. They also were in fear
25 for their safety when the Defendant's motions continued to

State of South Carolina -vs- Erick E. Hewins (2010-GS-23-8295 and 8296)
Jury Voir Dire

155

1 be that he was continuously patting his pocket. He did get
2 the Defendant out of the vehicle and we do believe that
3 that is a totality of circumstances argument; in addition
4 to the fact that the Defendant did give the officer
5 consent. Your Honor, once the officer had found the pills,
6 he was under arrest and the search of the vehicle was
7 incident to that arrest, at which time the large amount of
8 crack cocaine and the crack rocks in the smaller bottle
9 were found.

10 We believe that the search is valid, Your Honor.

11 THE COURT: Mr. Harbin?

12 MR. HARBIN: Well, Judge, I don't know how to
13 address the consent argument. On one hand, the State wants
14 you to believe that the officer using commonsense, like
15 everybody would, would certainly not allow a Defendant to
16 ever go in his own pocket, because that's just commonsense.
17 But they don't want you to think that my client has any
18 commonsense because if, in fact, there are drugs in his car
19 and if there are, in fact, pills in his pocket, what
20 reasonable person would assume -- he's like, yeah, go
21 ahead, go ahead in my pocket. Especially the second time.
22 That's -- it borders on insulting that anybody would think
23 that you would really give consent to that. But let's go
24 back to the beginning. The fact that the car blocked those
25 two cars in, and there's no legitimate other explanation,

1 other than the fact that they intended to keep them there
2 at least long enough to talk to them. That is a detention,
3 period. And once that detention occurs, that is the
4 unreasonable detention. They should be free to leave.

5 Now, the second detention becomes when he goes -- he
6 chooses not to go to the passenger side window, which is
7 what -- well, every speeding ticket I've gotten, they go --
8 they walk around the passenger's side, then they might come
9 up to mine. But he's physically blocking my client in.
10 He's physically not free to leave. Whether perceived to be
11 so or not, he literally cannot leave. Now, the statement
12 that the Solicitor made, and I think that we can argue
13 about whether or not the collective nature of these little
14 innocent details actually amounts to reasonable suspicion.
15 And I am doing that. I'm contending that all of that
16 doesn't amount to a hill of beans. However, my stronger
17 argument, and I think the one that is document, whether or
18 not the Solicitor likes it, is that this officer said he
19 pulled my client out of his car for safety. And that is
20 exactly what he said. He said that collection of facts
21 said that he felt unsafe. This other officer, contrary to
22 what Ms. Monts told you was asked, are you sure that's what
23 you did in that order? And he confirmed that. He didn't
24 say he wasn't sure. He knew exactly what he did. He came
25 to Officer Gardner. He was reported what he needed to do.

State of South Carolina -vs- Erick E. Hewins (2010-GS-23-8295 and 8296)
Jury Voir Dire

157

1 He went and did what he needed to do, and then his report
2 exactly, at that time I saw Mr. -- Officer Gardner pat Mr.
3 Hewins down. My argument, Judge, is that what they were
4 doing is fishing. They had him stand around while they
5 tried to collect evidence and that is exactly what Officer
6 Cothran's testimony proves, that he was standing around
7 waiting on something to happen. So he was not frisked for
8 safety. And if he wasn't frisked for safety, then he was
9 unconstitutionally frisked.

10 MS. MONTES: Your Honor, I'd just like to add two
11 points?

12 THE COURT: Yes.

13 MS. MONTES: Your Honor, the officers both drew on
14 the picture that Mr. Harbin put up about where their cars
15 were parked, that there was room for the Defendant to leave
16 there. Also, the officer testified that he was standing in
17 the A-frame of the door for his safety, not blocking the
18 door. But I just wanted to clarify that.

19 MR. HARBIN: And one minor point, Judge. As to
20 whether or not the -- because I think otherwise it would be
21 a significant point. As to whether or not my client was
22 giving false information. Ms. Montes points out that it
23 would be their subjective impression of what was going on
24 as to whether or not his name was coming back. And I think
25 that's a legitimate argument. However, the problem with

1 that is that because they admitted that the information he
2 gave them came back, it was the correct information, they
3 can't benefit from their own typo or their own computer
4 failure. They can't create their own suspicion. And
5 that's what that would amount to. So I don't believe it
6 would be appropriate -- with their admission that the
7 information he gave them was correct, I don't believe it
8 would be appropriate to consider that fact, Judge.

9 THE COURT: Well, I've tried to listen carefully
10 as the testimony was given. Obviously, as always, there
11 will be contradictions in the testimony. Different people
12 observing things in a different way. As far as the timing
13 and so forth, I briefly had a chance to read the *Foster*
14 case that you submitted, Mr. Harbin. Particularly, that
15 case cites the *Sprinkle* case. Our Supreme Court last week
16 talked about that and the *Linder* case in its analysis in
17 *State v. Taylor*. I believe the facts that I derive from
18 the *Foster* case are just distinguishable from the facts in
19 this case. As far as I know, there was nothing in this
20 case about prior criminal record that there was in the
21 *Foster* case, nothing about a crouched position or frenzied
22 arm movement, the furtive movement, I didn't hear anything
23 relating to that. The cases cited by our Supreme Court in
24 the *Taylor* case, I think is well articulated, certainly,
25 you know, a divided decision, but they articulated the

1 totality of the circumstances in reversing our Court of
2 Appeals and looking at each item separately to -- pointing
3 out each one. And I'm going to do my best to go by what
4 our Supreme Court has indicated just last week to do in
5 these, obviously, difficult cases on reasonable suspicion.

6 Also, I'm placing some reliance on *State v. Burgess*, a
7 case of 2011 from our Court of Appeals. That was one that
8 maybe y'all are familiar with in Hardee's parking lot.
9 And, again, with drug activity going on there. I have to
10 certainly consider the high crime area. I know, Mr.
11 Harbin, you presented some evidence that the crime rate was
12 going down. Perhaps that was because of the patrols that
13 were going through there over the years. Also, the
14 officers indicated it wasn't just this location, they had
15 the report on this particular location that they -- I heard
16 testimony about a hotel or motel being next door,
17 apartments across the street and parking at one place and
18 doing criminal activity at the others. I think that it is
19 substantiated that it's a high crime area for the different
20 kind of offenses that they were trying to protect the
21 society from. The Court in the *Taylor* case said that we
22 must give weight to the commonsense judgement reached by
23 officers in light of their experience and training. And I
24 think that the factors set forth have articulately been
25 stated by Officer Gardner to constitute a valid reasonable

1 suspicion. It certainly was a high crime area. The
2 lateness of the hour. Again, that -- our court looked at
3 that on the *Sprinkle* case and the *Linder* case, last week,
4 those Federal Court cases. Nervous behavior is certainly a
5 factor that our Courts have said can be considered.
6 Experience and the training of the officers. They've been
7 on this unit for a while. They knew the areas that they
8 needed to cover. The officers indicated it wasn't just
9 this location they were going to. Roll call told them each
10 shift change where they needed to be focusing and where the
11 crimes had been committed. So I find that all the factors
12 together, the touching of the pocket, even after being
13 warned not to, the activity of the Defendant would warrant
14 a *Terry* frisk in this case. And so I will allow the
15 evidence in. Certainly, your argument is well stated and
16 noted for the record, Mr. Harbin. Again, I'm primarily
17 relying on the -- certainly reviewed the Federal cases that
18 you've submitted and the other Federal cases, the *Taylor*
19 and the *Burgess* case, I think, are closer on point than the
20 *Foster* case.

21 All right. Anything else we need to take care of
22 before our jury comes in for your opening statements? Do
23 you have a short witness or do you want to -- I hate to
24 send a jury home now, but we might -- I mean, for lunch.
25 But if you can at least make your opening statements. Is

1 there a short witness you could call or not?

2 MS. MONTIS: Probably not, Your Honor.

3 THE COURT: I think we'll give them your opening
4 statements anyhow and then we'll -- we can just divide the
5 witness if we need to, over lunch. The jury's been waiting
6 for forty-five minutes. We need to get started with the
7 case. Do y'all need a short break before we being?

8 MR. HARBIN: That would be good, Judge.

9 THE COURT: Okay. Let's take about five minutes.
10 (WHEREUPON, the court stood at recess for a short
11 break.)

12 THE COURT: All right. Are we ready to have the
13 jury come in?

14 MR. HARBIN: Judge, he was asking about ruling on
15 the chain of custody, Rule 6 issue. I informed him that
16 the Court did not choose to take that up pre-trial.

17 I've got one clarification on your ruling on the
18 suppression issue, Judge. I just want to -- you may have
19 actually said it and I just missed it. But my argument as
20 it pertained to Officer Gardner, and my understanding of
21 what reasonable suspicion is, is it's -- in effect, it's a
22 subjective standard in that it is what he is able to
23 observe and what he thinks at the time. And the argument
24 that -- one of the arguments that I put forth that I don't
25 know if you ruled on or not was that even if the facts as

1 looked back upon on a report or argued by the Solicitor,
2 existed at the time, our argument is that Officer Gardner
3 did not observe those factors presently or else he would
4 have frisked my client when he got him out of the car,
5 rather than have him stand around. And I'll be glad to
6 clarify that.

7 THE COURT: Again -- no, I understand it -- I
8 think that, you know, weighing all of the testimony of
9 Officer Gardner and Officer Cothran, as well, that Officer
10 Gardner testified that he did not frisk until he had backup
11 there. Now, whether he had him out first or not, but the
12 frisk took place when the backup was there. Whether they
13 were still talking when Officer Gardner was making his
14 movements, I think the frisk was done in a timely manner
15 once he got him up. And, again, he said it was for safety
16 issues. Sometimes I -- I understand that officers can feel
17 safer when a person is standing in front of them than they
18 can when they're in a car with visibility maybe lessened,
19 and things can be in the car that they -- weapons or
20 otherwise. So I don't think he was detained an unlawfully
21 long amount of time and that the frisk took place within
22 the time period of the backup coming. Does that clarify it
23 for you?

24 MR. HARBIN: Yes, sir.

25 THE COURT: All right, sir.

1 All right. Let's have our jury coming. Having talked
2 with the attorneys, we're going to make opening statements
3 and have a -- start a witness now. The jury's been waiting
4 an hour. And then we'll see how far we get with the first
5 witness.

6 MS. MONTIS: And, Your Honor, I would -- and this
7 first witness is the one who got the search warrant for the
8 cell phone. Do you want to go up until that point?

9 THE COURT: Yeah, let's -- there's not going to
10 be anything about a chain of custody. Do I need to address
11 that anytime sooner now? Is that going to -- I don't know
12 how you plan on introducing things through the chain of
13 custody. Maybe we should do that afterwards. Let's do our
14 opening statements -- swear the jury, do our opening
15 statements and then break for lunch. And if we need to do
16 a chain of custody now, we will. Unfortunately, I sit up
17 here and I'm not as familiar with the cases as both of you
18 are. And I don't know how you, whether the chain of
19 custody matter may come up early-on. If we need to address
20 that, then certainly I don't want evidence presented that's
21 not going to be admissible until the chain is established.
22 I don't know whether you intend to show anything to the
23 jury until it's actually into evidence. Obviously, we'll
24 wait until the evidence is in. So let's just take a break
25 after the opening statements and then we will be ready to

1 start back at -- we'll work part of our lunch and the jury
2 -- they're going to be back by two. So we're going to take
3 care of whatever chain of custody and other matters we need
4 to be ready to use them at two o'clock.

5 All right. Let's have our jury come in if they're
6 ready.

7 (WHEREUPON, the jury entered the open court at
8 approximately 12:33 P.M.)

9 THE COURT: Ladies and gentlemen, thank you very
10 much for your patience with us. I told you yesterday,
11 sometimes I have legal matters that I need to resolve
12 first. And sometimes there's law that is developing as we
13 talk and I need to make sure that I get those things ruled
14 upon correct. So I hope that you will be patient with us
15 in this aspect.

16 But we're ready now for the opening statements of the
17 attorneys. They're going to address you in their opening.
18 This is not evidence. You're going to hear evidence from
19 the witness stand, from the witnesses, perhaps documents
20 are tangible evidence. I urge you to listen carefully as
21 each of the attorneys address you in their opening. While
22 it's not evidence, I'm confident that each of them can
23 perhaps give you some insights to help you as you listen to
24 the case unfold, to be alert to the matters that you need
25 to be listening to, in particular.

1 Before the attorneys address you in their opening
2 statements, the clerk is going to administer an oath to
3 you. I hope you'll listen carefully as this oath is given.
4 It's a time honored oath. It's been in existence since
5 well before the foundation of our country. Jurors such as
6 yourself have taken this oath. And as you listen to those
7 words of the oath, I'm confident that you'll be able and
8 you will be willing to fulfill the duties that you're
9 taking the oath for.

10 All right. Ms. Lanfear, if you would, swear the jury
11 at this time.

12 THE CLERK: Yes, sir, Your Honor. Would you
13 please stand and raise your right hand. The response to
14 the oath is, I will.

15 You shall well and truly try Case 2010-GS-23-8295, the
16 State versus Erick Eaton Hewins, indicted for trafficking
17 cocaine base, and 8296, for possession of a schedule IV
18 controlled substance, and a true verdict render, according
19 to the law and the evidence, so help you God?

20 THE JURORS: I will.

21 THE CLERK: Thank you. You may be seated.

22 (WHEREUPON, the jury was duly sworn.)

23 THE COURT: Thank you, ladies and gentlemen.

24 All right, Solicitor, you may address the jury in your
25 opening statement.

1 MS. MONTIS: May it please the Court, Your Honor.

2 OPENING STATEMENT

3 BY MS. MONTIS:

4 Ladies and gentlemen of the jury, again, my name is
5 Joyce Monts. I'm an Assistant Solicitor with the
6 Thirteenth Circuit, which includes Greenville County. It
7 is my duty to prove to you beyond a reasonable doubt, that
8 the Defendant, Erick Hewins, is guilty of the two charges
9 that are currently pending against him. Those two charges
10 are possession of a Schedule IV controlled substance, which
11 is clonazepam. There were four pills on the Defendant.
12 And the second charge is trafficking crack cocaine, also
13 known as cocaine base. Those names may be used
14 interchangeably throughout the trial.

15 The incident occurred on August 9th of 2010 at the
16 Clarion Inn on Orchard Park here in Greenville County.
17 Officers on routine patrol approached the parking lot, as
18 they normally do. Did find the Defendant there, did
19 investigate what was going on at twelve-thirty that
20 morning. There was another car parked beside them.
21 Officers, in their general duties as Greenville Police
22 Department officers, were looking for auto break-ins,
23 prostitution, drug charges, anything that might normally
24 occur and that they get complaints about that occur in
25 hotel parking lots and in hotels.

1 The State will prove to you through the use of
2 witnesses, the officers that were present, through the
3 chemist and through the chain person, that the Defendant
4 was in possession of the pills; that the Defendant was in
5 possession of the crack cocaine that was found in his car
6 after he was arrested for being in possession of the pills.

7 Ladies and gentlemen, the twelve of you will be back
8 here deliberating at the end, were chosen because you're
9 going to use your backgrounds, your experiences and put all
10 of your knowledge together once the Judge tells you to
11 begin deliberation, and decide what the truth was on that
12 day. The Judge is the law of the facts and you -- excuse
13 me. The Judge is the finder of the law and you are the
14 finder of the facts. You are to decide what factually
15 occurred on that day, meaning was the Defendant in
16 possession of the pills and was he in possession of and
17 trafficking crack cocaine. Trafficking is a big word, but
18 what that means, it can mean possession, it can mean
19 distribution, it can mean he provided financial assistance,
20 it can mean bringing into the State, but the simplest thing
21 is possession of over a certain amount of weight. And in
22 this case it's trafficking over ten grams. The State must
23 prove to you beyond a reasonable doubt that the Defendant
24 was in possession of more than ten grams of crack cocaine
25 or cocaine base. And that term is then trafficking, based

1 on the fact that it was over ten grams. So he was in
2 possession of pills and he was in possession of more than
3 ten grams of crack cocaine.

4 And the State believes we will meet our burden. And
5 once you have heard all of the evidence from the State,
6 once you have seen the physical evidence that you will have
7 to go back in your jury room with you, we believe that when
8 you uphold the swearing that you just took, uphold that,
9 you will find the Defendant guilty of being in possession
10 of the pills and in possession of more than ten grams of
11 crack cocaine on August 9th of 2010. Thank you.

12 MR. HARBIN: May it please the Court?

13 THE COURT: Mr. Harbin, you may address the
14 jury.

15 **OPENING STATEMENT**

16 **BY MR. HARBIN:**

17 This is good afternoon now, not good morning. I
18 always feel the urge to like apologize to you guys for
19 picking you. I appreciate your patience.

20 The Solicitor laid out a very bare kind of set of
21 facts. I want to encourage you to listen to every detail
22 because she's going to want you to focus on the facts that
23 she alleges and that are bright and shinny. Drugs, arrest,
24 handcuffs, all this other stuff. But you are the judge of
25 the not just the big facts, but the small facts. The facts

State of South Carolina -vs- Erick E. Hewins (2010-GS-23-8295 and 8296)
Opening Statement of Mr. Harbin

169

1 as presented as I believe even trying to color them
2 whatever way you want to. So my client is sitting in a
3 hotel parking lot and does nothing other than sit there.
4 And as a result of sitting there is pulled out of his car
5 and searched and handcuffed. I want you to pay very close
6 attention to all of the facts in this case, the very small
7 facts, and then allow me to do my best to explain why I do
8 not believe that Mr. Hewins should be found guilty.

9 Thank you for your attention.

10 THE COURT: Ladies and gentlemen, in consulting
11 with the attorneys as far as scheduling purposes, I think
12 y'all are perhaps getting hungry. I want y'all to do a job
13 for me before we break for lunch. And then we're going to
14 start with the first testimony. I need for you to select a
15 foreperson. Among the first twelve of you who were
16 selected, we need to have a foreperson. And once you do
17 that, just write that name down and give it to the bailiff.
18 And then we'll break for lunch.

19 What the foreperson does is sometimes, as you may have
20 already seen that now, because of the delay, you may have a
21 need back there. The temperature may need adjusting. You
22 may need a cup of coffee, a snack, someone needs to make a
23 phone call to check on a child, whatever it may be, the
24 foreperson would be the communicator, the liaison with the
25 court on behalf of whatever juror it is, alternates or

1 otherwise. That foreperson would just write out the
2 question that you have or the need that you have, give it
3 to the bailiff. The bailiff would get it to the clerk's
4 office or someone -- a representative of the clerk will get
5 it to me if it's a legal matter and we'd do our best to get
6 that resolved for you. It's sort of the spokesperson, if
7 you will, for the jury. What the foreperson also does is
8 sometimes evidence may be introduced; it may be a
9 photograph or a document of some kind, and one of the
10 lawyers might want to show it to the jury. They'd hand it
11 to the foreperson. The foreperson would sit on the front
12 row in the seat closest to the witness stand here. Let the
13 foreperson look at it, pass it around to other jurors.
14 Sometimes it might be an overhead or other means, but
15 that's what the foreperson would do also, would sort of be
16 the one to whom the lawyers would give an exhibit to as
17 it's needed.

18 Ultimately, what the foreperson is going to do is when
19 all of the evidence is in and I've instructed you on the
20 law, your foreperson will be the one who will help
21 facilitate that discussion, to make sure that everyone has
22 their input into the facts as each individual juror sees
23 them. And to make sure, on behalf of all of the jurors,
24 that everyone has their say. And on behalf of the jurors
25 then would write out the verdict form, that I'll provide

1 you at the time, for the finding that the jury makes as to
2 the facts. So if you would select from among the first
3 twelve of you. Obviously, the alternates wouldn't be
4 serving as foreperson. We're not anticipating needing
5 either of those, but if we do then they can assume that
6 position as need be.

7 Once you have that name selected just write it out.
8 And after that, then you're free to go to lunch. We've got
9 some more matters we need to work on over lunch. So,
10 hopefully, when you come back we're going to be ready for
11 the first witness so that the facts will be presented to
12 you for your determination. If you'll be back at two
13 o'clock, we'll be ready to start then. That will give us
14 time, I think, in the next thirty to forty-five minutes
15 we'll be able to get the legal matters that we need to
16 resolve worked out, as well.

17 Let me remind you, again, ladies and gentlemen, that
18 while you're out and about you shouldn't be discussing the
19 case. Don't let anyone discuss the case with you. I know
20 that you'll fulfill this oath that you've taken, this
21 commitment that you've made to both the State and to the
22 Defendant. And that you'll make your decision on what
23 takes place in this courtroom and only in this courtroom.
24 Have a good lunch. We'll be ready to start with our first
25 witness at two o'clock if you'll be back then.

1 Everyone else, please remain seated while the jury
2 departs for lunch.

3 (WHEREUPON, the jury exited the open court at
4 approximately 12:43 P.M.)

5 THE COURT: All right. Is the argument on the
6 chain of custody all the way through, Mr. Harbin, or is it
7 an analysis or is it on the drugs? Is that the chain of
8 custody or is it other documents?

9 MR. HARBIN: It's the drugs. And quite simply,
10 Judge, and I don't know this to be true, the Solicitor will
11 have to confirm this, in the previous trial there are, I
12 believe, at least four people on the chain of custody and
13 all four of those people did not appear. And we would
14 assert that through Rule 6 they're required to submit a
15 sworn affidavit as to the condition of the drugs, which is
16 not in this case. And Rule 6 also provides that the
17 Defendant is allowed to object to those affidavits in lieu
18 of live testimony. And we did so in our discovery
19 requests. So absent having all the members of the chain
20 live and in person here in the court, we believe that the
21 drugs would be inadmissible.

22 THE COURT: All right. Solicitor, are all the
23 witnesses going to be testifying?

24 MS. MONTS: Your Honor, the procedure that law
25 enforcement takes is that they go to a drop box at the law

State of South Carolina -vs- Erick E. Hewins (2010-GS-23-8295 and 8296)
Opening Statement of Mr. Harbin

173

1 enforcement center after hours and drops it in a drop box.
2 And that an employee who comes on duty the next morning
3 with the property and evidence room comes and gets the
4 items out of the drop box and takes them to the property
5 and evidence room and logs them in. That employee no
6 longer works there. We do have the supervisor over the
7 property and evidence room to testify that that person
8 worked for them and what the chain of custody was. The
9 *Hatcher* case, we believe, substantially says that as long
10 as the chain of custody can be proven to a practicable
11 level, that that is all that is required of the State. And
12 we believe that the -- the State's position is that the
13 people employed with the property and evidence room and the
14 chemist in the chain will be here to testify, and that that
15 is sufficient based on the case law, Your Honor.

16 THE COURT: All right. So there's one missing
17 witness?

18 MS. MONTS: And, in addition, Your Honor, the
19 State's position will be that the chain only has to be
20 completed up until the time of analysis. That anyone who
21 handled it afterwards, the case law is firm on that, that
22 the chain only needs to be established up until analysis.

23 MR. HARBIN: Be that as it may, Judge, how many
24 people are not here, I don't think that the State is
25 relieved of its obligation to tell the jury and prove that

1 the drugs were in the same condition as when they handed
2 them -- or when they got them and then handed them off. I
3 would say that, you know, there's two possibilities,
4 obviously. One where the Defendant doesn't object, which
5 we do and did properly under Rule 6. And two, if you
6 didn't object and you didn't have the person, you'd still
7 have to at least get an affidavit. And the fact that they
8 don't work at the police department anymore, number one, is
9 not my client's problem. And number two, that's what an
10 affidavit is for; right? I mean, that presumably is why
11 the statutory construction is so, is that you could
12 alleviate logistical problems in getting here, especially
13 in this case, if you don't work there anymore. But the
14 fact is you have drugs getting from point A to point B and
15 you have somebody in the middle that's not going to tell us
16 what happened to it. And I think specifically the chain of
17 custody rules in general, regardless of whether it's drugs
18 or not, exists for the integrity of the evidence itself.
19 And Rule 6 specifically demands all parties to be here.
20 And we object to the introduction without those parties
21 being here, both, you know, with the Rule 6 rule prior to
22 eleven days out and, obviously, today.

23 MS. MONTS: Your Honor, it is possible that we
24 can track Mr. Israel Flounders down. But he is someone
25 merely who took a -- the evidence from the drop box and

1 took it to the property and evidence room. We would state
2 that under *Hatcher* that he is -- that the fact that we've
3 identified who he is and what he did with the evidence is
4 substantiated.

5 THE COURT: Well, I'll let you decide how you
6 want to try your case, Solicitor. But I'll just rule on it
7 as it comes up. Obviously, Rule 6 must be interpreted
8 along with the *Hatcher* case. I think certainly we talked
9 about that. A couple of years ago I guess that case came
10 out. So I'll make my ruling based on what you have and
11 what efforts the State has made to get the evidence.

12 All right. Let's take a lunch break and be back at
13 two o'clock ready to proceed with the trial. Since the
14 jury's been sworn, of course, Mr. Hewins will be in
15 custody.

16 (WHEREUPON, the court stood at recess for a lunch
17 break.)

18 THE COURT: All right. Are there any things
19 dangling that we need to, other than the telephone records,
20 that we need to talk about before our jury comes back?

21 MR. HARBIN: Well, Judge, I didn't know whether
22 or not you had basically said you don't want to hear any
23 further arguments or are not going to rule at this time
24 about the chain of custody issue. And if that's the case
25 ---

1 THE COURT: Well, I don't know what they're going
2 to put in. They may have all the witnesses. They may have
3 affidavits. They may not have any. I re-read *Hatcher*
4 again. I don't know if you have. And obviously the
5 literal language of Rule 6 and the decision by the Supreme
6 Court in *Hatcher* are not necessarily consistent. But I
7 think that the *Hatcher* case they certainly alluded to the
8 *Chisolm* case and others in analyzing that they're
9 interpreting that decision in light of Rule 6. I think
10 that's clear from the decision.

11 MR. HARBIN: Well, Judge, do you want to hear
12 arguments now? I mean, because ---

13 THE COURT: I'll be glad to as to why -- yeah.
14 Why don't we do that. In other words we're arguing that if
15 the State does not put all of its witnesses in?

16 MR. HARBIN: Right. Then we would ---

17 THE COURT: All right.

18 MR. HARBIN: Well, Judge, I have read *Hatcher* and
19 I agree with you that it does -- at first glance, it tends
20 to eviscerate Rule 6 to a certain extent. However, and I
21 apologize, I did not have time to make copies for the
22 Court. But I've got two cases that I'll cite. *State v.*
23 *Orr*, which is 389 SC 286.

24 MS. MONTS: How do you spell *Orr*?

25 MR. HARBIN: O-R-R. And ---

State of South Carolina -vs- Erick E. Hewins (2010-GS-23-8295 and 8296)
Opening Statement of Mr. Harbin

177

1 THE COURT: What year is that?

2 MR. HARBIN: That is 2010, Judge. And then *State*
3 *v. Sweet* which is 374 S.C. 1, and that's 2007.

4 THE COURT: Wasn't that cited in *Hatcher*?

5 MR. HARBIN: Judge, I would be lying to you if I

6 ---

7 THE COURT: Well, I thought it was but maybe not.

8 MR. HARBIN: And finally, *State v. Frey* or Fry,
9 I'm not sure how you pronounce it, but it's 362 S.C. 511
10 and that's in 2004. And, of course, I understand that some
11 of those pre-date *Hatcher*, but I believe I can make an
12 argument as to why. And, Judge, if you want to hear
13 arguments or would rather pull the cases first, I can do it
14 in whatever order you wish.

15 THE COURT: What is your cite on *Orr* again?

16 MR. HARBIN: *State v. Orr* is 389 S.C. 286.

17 THE COURT: And on *Sweet*?

18 MR. HARBIN: *Sweet*, 374 S.C. 1.

19 THE COURT: Okay. I've got the one on -- B-R-E-Y
20 OR A-Y, Bray?

21 MR. HARBIN: Oh, F. F-R-E-Y. I'm sorry. F, as
22 in Frank.

23 THE COURT: F-R-E-Y?

24 MR. HARBIN: Yes, sir. 362 S.C. 511.

25 THE COURT: All right. Now, I'll be glad to hear

1 from you.

2 MR. HARBIN: Okay. *State v. Frey*, that'll be
3 quick because it's actually where the Court notes in a
4 footnote at the very end of the case. In footnote number
5 1, it says, we reject the State's argument to the extent it
6 relies on the signature of Dara -- I'm mispronouncing that
7 I'm sure -- as substantive evidence of his qualification to
8 collect the blood sample. We find guidance on this point
9 in the manner our rules of criminal procedure address the
10 admission of a report of chemical analysis to establish the
11 physical evidence of a controlled substance. Under
12 narrowly limited circumstances, such as a report signed by
13 the chemist or analyst who performed the test, may be
14 admitted for chain of custody and substantive purposes. It
15 says Rule 6(a) South Carolina Criminal Procedure. However,
16 if the Defendant timely objects to the admission of the
17 report, the signed report alone is insufficient. So this
18 case highlights to me ---

19 THE COURT: All right. Let me interrupt you just
20 a moment. Is the chemical analysis, is the chemist going
21 to be testifying?

22 MS. MONTS: Yes, Your Honor.

23 THE COURT: All right. That related to the
24 chemist testifying, I think.

25 MR. HARBIN: Yes, sir. But it does and that -- I

1 note that. However, it does mention specifically, contrary
2 to *Hatcher*, it mentions specific the Defendant's right to
3 object via Rule 6, and not just the concept of chain of
4 custody in general.

5 THE COURT: All right, sir.

6 MR. HARBIN: If I could move on to *State v Sweet*,
7 it's a 2007 case. I'm trying to give you an idea of where
8 the law and analysis, the first -- it says chain of
9 custody. And this would be the, actually third to the last
10 paragraph, halfway down, the third to the last paragraph
11 beings, we find that the State's argument ... And then
12 halfway through it begins, furthermore, although the
13 unavailability of the confidential informant, which in that
14 case was a chain witness, although the unavailability of
15 the confidential informant made it impracticable to produce
16 him as a witness at trial, the state could have taken a
17 sworn statement. And it goes on further to say, toward the
18 end of that paragraph, in other words, the State simply did
19 not present proof of the chain of custody as far as
20 practicable. Essentially, they're implying that the State
21 wants to simply be a little lazy, not do everything they
22 could. Because I think the implication there is the rule
23 and what we subsequently read in *Hatcher* is what can you
24 reasonably do? And I think the contra-positive to that
25 argument is, what is unreasonable to expect? And in this

1 case I believe that Mr. Flounders, in particular, his
2 whereabouts are known to the extent that he could have been
3 contacted. They just simply chose not to have him
4 subpoenaed for trial. In other words, he's not
5 unavailable, you know, and serving our country in
6 Afghanistan or something. He's just not here.

7 Finally, Judge, *State v. Orr*, it's a 2010 case. The
8 last paragraph before the conclusion. This is in relation
9 to chain of custody. It says, Orr maintains Officer
10 Paulson was required to appear and testify pursuant to Rule
11 6 after Orr objected to Taylor's testimony. At trial, Orr
12 did not object to Taylor's testimony regarding Paulson's
13 signature based on an insufficient chain -- excuse me --
14 chain of custody. Instead, Orr's objection was based on
15 hearsay. At no time did Orr raise Rule 6 or assert that
16 Officer Paulson was required to testify. Judge, I
17 understand that this is the contra-positive of our
18 argument. But lacking any clear, you know, exactly the
19 same thing in case law, I have to assume that because
20 *Hatcher*, not one single time mentions the Defendant's
21 ability to object specifically provided for in the Rule.
22 It doesn't mention that whatsoever because that wasn't
23 present in that case. In this case, in my discovery
24 motion, I put that I demanded the chemist's appearance and
25 all chain witnesses. I believe that *Hatcher* provides for a

1 framework for what is the concept of law of chain of
2 custody, and just the integrity of evidence in general.
3 But it did not eviscerate the Defendant's right
4 specifically to demand, upon proper notice, which was given
5 in the case, the appearance of all chain witnesses.

6 THE COURT: All right. I think I've discussed
7 the *Frey* case with you. Orr, obviously, that's the issue
8 preservation that the court found that Rule 6 was not
9 raised. But the *Hatcher* case, again, talks about Rule 6.
10 So obviously the court was analyzing that in its decision
11 in *Hatcher*, relying on *Chisolm* that -- you know, *Chisolm*
12 was decided on a Rule 8 -- excuse me. I say Rule 8. A
13 Rule 6 analysis. And then the Court of Appeals, even
14 before *Hatcher* reversed itself on the three judge panel on
15 the Court of Appeals saying that *Chisolm* was overruled if
16 that was the understanding that it was required. In *Sweet*,
17 *Sweet* was talked about in the *Hatcher* case. It was cited
18 in the *Hatcher* case. Absent a -- some proof of tampering
19 or bad faith or ill motive -- and perhaps if you have any
20 of that, I'll be glad to hear any testimony you've got
21 about that it was tampered with, or there's bad faith on
22 behalf of the State or ill motive. But it seems to me and,
23 again, I may be wrong, that *Hatcher* has really addressed
24 all those issues that you've raise, Mr. Harbin.

25 MR. HARBIN: Well, Judge, I would respectfully

1 disagree that *Hatcher* does not touch, not for one
2 millisecond, the idea that you can use your specific right
3 in Rule 6 to demand the presence of witnesses. And, in
4 fact, it seems that if that would have been present in
5 those cases, it would have been brought up either by the
6 defense or by the bench. I believe that it was intended to
7 address the idea of a chain of custody. Which obviously,
8 chain of a custody as an issue exists outside of Rule 6.
9 It was already a concept of law and an important facet of
10 prosecution and of something to attack your defense. But
11 Rule 6 specifically provides for a mechanism by which for
12 you to demand the presence of all your chain witnesses and
13 the presence of the chemist. It would seem that there is a
14 logical reason for that provision. And absent case law
15 basically addressing that specific right, and I believe
16 *Hatcher* intentionally doesn't because that wasn't the case
17 in *Hatcher*.

18 THE COURT: Well, *Hatcher* says that the objection
19 was made by the Defendant that the chain of custody had not
20 been sufficiently established. Wasn't that the objection
21 made by the Defendant?

22 MR. HARBIN: I don't think that's ---

23 THE COURT: That's what I'm reading in the
24 decision. The Judge overruled the objection and admitted
25 the drugs. And then, of course, the Court of Appeals

1 reversed that and then we went to the Supreme Court.

2 MR. HARBIN: Well, my argument is what their
3 basis for objection was for. If the basis of objection is
4 simply whether or not there has been proof beyond a
5 reasonable doubt or proof that could be presented to the
6 jury in a reasonable manner, that's one thing. If there is
7 an objection based upon the State's failure to honor your
8 request in Rule 6, that not only -- because Rule 6 has two
9 provisions. One -- well, I mean, I guess you could assume
10 all witnesses are present anyway. Or you could assume that
11 the witnesses that are not present have provided
12 affidavits. If that's not the case then -- or excuse me --
13 the other provision is that whether affidavits are given or
14 not, the Defendant has the ability under Rule 6 to demand
15 the presence of the chemist and/or the chain. And I
16 believe that's where *Hatcher* fails to meet our facts in
17 this case.

18 THE COURT: Well, and they didn't -- and, again,
19 I assume you're talking about the individual, one-sentence
20 paragraph in section (b) of that Rule where it say, they
21 have the right -- the Defendant has a right to do that.
22 And, again, *Hatcher* didn't directly say that's not the law.
23 But I think their analysis of *Chisolm* referring to Rule 6,
24 I think they have certainly, by inference, said that the
25 process that the Judge used in analyzing it is trumping

1 that right. And perhaps the court will find that I'm
2 misreading *Hatcher*. I certainly hope not. As I read
3 *Hatcher* it's, you know, it's got to be some showing of
4 tampering, bad faith or ill motive. You're saying that
5 just the Rule itself gives you the right. And I certainly
6 respect that, but I don't see under the law that that is
7 the case.

8 MR. HARBIN: Thank you, Judge.

9 THE COURT: Thank you for articulating that,
10 though. All right. As far as the telephone ---

11 MS. MONTIS: Your Honor, I would add that we did
12 contact Mr. Flounders. He is in the Naval Reserves and he
13 is either in Charleston or in Texas and in the Naval
14 Reserves, so he is not -- he would not be accessible
15 regardless of ---

16 MR. HARBIN: And, Judge, as far as that goes,
17 just for the record anyway, that the Solicitor is in
18 control of the docket and when she calls this case. So his
19 unavailability, I don't believe -- and we touched on this
20 before. You can't create your own problem. So if the
21 unavailability of the witness is to be considered on appeal
22 or for any other matter, I believe that it would be
23 inappropriate to do so because the Solicitor simply chose
24 to scheduled this trial now.

25 THE COURT: All right. As far as the messages

State of South Carolina -vs- Erick E. Hewins (2010-GS-23-8295 and 8296)
Opening Statement of Mr. Harbin

185

1 from the telephone, based upon Mr. Harbin's argument
2 earlier, I'm denying the State's use of that without proper
3 authentication. Certainly, I'll be glad to look at if
4 there's authentication as to those messages. And certainly
5 some of them would not be admissible anyhow as far as
6 relevance. But if there's proper authentication as to who
7 is sending the messages and who is receiving the messages,
8 then I'll certainly be glad to revisit that. But as of now
9 with an open slate, I'll not allow that evidence in.

10 MS. MONTS: Your Honor, regarding that ruling, I
11 just want to make sure that what we have at this point is
12 just the officers seizing it from the Defendant and then
13 another officer who was trained to take messages off. But
14 we don't have the two or from party, unless one of them
15 takes the stand. Unless that happens, we will not mention
16 it.

17 THE COURT: Right. We're not bringing it up.

18 Okay. All right. We're ready for the jury now;
19 correct?

20 MR. HARBIN: I apologize, I didn't want to stop
21 us from starting, but is it your intention -- your
22 intention, I believe, was to disallow all of the texts;
23 correct?

24 THE COURT: Without authentication.

25 MR. HARBIN: Thank you.

1 THE COURT: If there is authentication, then
2 perhaps they can -- we'll certainly be glad to revisit it
3 then if they can authenticate the ones who are
4 communicating over the telephone.

5 MS. MONTES: And, Your Honor, just to help Mr.
6 Harbin and myself understand. If the witness is on the
7 stand and I ask them about that, I can authenticate through
8 that individual?

9 THE COURT: If that witness authenticates.
10 Let's have our jury come in.

11 For your information, Mr. Jenkins has been selected as
12 the foreperson of the jury.

13 (WHEREUPON, the jury entered the open court at
14 approximately 2:22 P.M.)

15 THE COURT: Solicitor, you may call your first
16 witness.

17 MS. MONTES: The State calls Detective Scott
18 Gardner.

19 THE CLERK: Detective Gardner, would you come
20 forward to be sworn in, please. Please place your left
21 hand on the bible and raise your right.

22 Do you swear or affirm that the testimony you're about
23 to give is the truth, the whole truth and nothing but the
24 truth, so help you God?

25 THE WITNESS: Yes, ma'am.

State of South Carolina -vs- Erick E. Hewins (2010-GS-23-8295 and 8296)
Scott Gardner - Direct Examination by Ms. Monts

187

1 THE CLERK: Thank you. You may be seated.

2 Please state your name for the record.

3 THE WITNESS: Detective Scott Gardner.

4 SCOTT GARDNER,

5 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

6 DIRECT EXAMINATION

7 BY MS. MONTS:

8 Q. Thank you. Detective, please tell the jury where
9 you're employed?

10 A. With the Greenville City Police Department.

11 Q. And how long have you worked with them?

12 A. Roughly for about four and a half years.

13 Q. And did you work for the police department back on
14 August 9th of 2010?

15 A. Yes, I did.

16 Q. And describe what law enforcement training you had
17 before you started with the GPD?

18 A. I've been trained in numerous drug interdictions and
19 also just criminal interdiction itself. And then also
20 officer safety.

21 Q. And did you go to the criminal justice academy?

22 A. Yes, ma'am.

23 Q. And in August of 2010, what unit were you assigned to?

24 A. I was on patrol, APU patrol. We have something called
25 APU or it's also known as the Aggressive Patrol Unit. It,

1 more loosely termed, is when patrol officers, we dress in
2 plain clothes and we ride around in a normal vehicle. And
3 what that does, that allows us to get closer to crimes that
4 we couldn't actually get to in a patrol car, such auto
5 break-ins or prostitution or narcotics, things like that.

6 Q. And on August 9th of 2010, what shift were you
7 working?

8 A. We were working, it's considered our third shift,
9 which is seven P.M. to seven A.M.

10 Q. And who were you working with?

11 A. I was working with Officer Hall.

12 Q. And describe what vehicle were you driving?

13 A. It's a unmarked tan Impala. It's unequipped with any
14 lights or anything like that. Because usually the vehicles
15 we use for APU are vehicles that about to be put out. So
16 there's not a lot invested into them.

17 Q. And did it have a video camera installed?

18 A. No, it did not.

19 Q. And describe what you were wearing?

20 A. I, myself, was just in plain clothes. I had a t-shirt
21 on and I had my badge around my neck.

22 Q. And what was Officer Hall wearing?

23 A. I believe she was wearing the same. I believe her t-
24 shirt actually said police on it. And I think she had her
25 badge on her belt.

State of South Carolina -vs- Erick E. Hewins (2010-GS-23-8295 and 8296)
Scott Gardner - Direct Examination by Ms. Monts

189

1 Q. And what areas of town were you working that evening?

2 A. We worked all areas. But more specifically we work
3 areas that are saturated with certain types of crime, you
4 know, any type of areas that are high in auto break-in,
5 high in prostitution, high in narcotics, those are the
6 areas that we concentrated most when we're on APU.

7 Q. And do you concentrate on apartments and/or hotels?

8 A. Yes, ma'am. And specifically ones near the highway.
9 It's just real easy for drug couriers or anybody that's
10 meeting to do anything illegal, it's easier for them just
11 to meet at a hotel right by the highway or apartment
12 complex right by the highway because then they can just get
13 on and off very easily.

14 Q. And approximately twelve-thirty on that morning, what
15 area did you and Officer Hall go to?

16 A. We went to 50 Orchard Park Drive, which is the Clarion
17 Inn.

18 Q. And is that in Greenville County?

19 A. Yes, ma'am.

20 Q. And why did you go to that particular hotel?

21 A. The Clarion Inn is very much a very high crime area.
22 I, myself, have made numerous cases of prostitution and
23 numerous drug trafficking cases in that parking lot of that
24 hotel.

25 Q. And if you recall, who was driving the vehicle?

1 A. I believe I was.

2 Q. And when you pulled into the parking lot, how
3 populated was it? Approximately how many cars or did you
4 see anybody out?

5 A. To my knowledge the only two -- there was only two
6 vehicles in the parking lot.

7 Q. Describe what you saw when you first pulled into the
8 parking lot?

9 A. As we entered the parking lot, it was a very dark
10 parking lot. It's not a lot of lights. It was at
11 nighttime. We observed a black Lexus backed into a spot.
12 And I believe it was a Toyota Camry pulled next to him. We
13 saw the Defendant, Mr. Hewins, in the Lexus by himself.
14 And we saw two younger females in the Camry speaking to
15 him.

16 Q. And did you have occasion later to go back and take a
17 photo of that area?

18 A. I did.

19 (WHEREUPON, State Exhibit Numbers 1 and 2 were marked
20 for identification.)

21 Q. Detective, I'm handing you State's Exhibits 1 and 2.
22 Can you identify these?

23 A. That is the Clarion parking lot on the side where Mr.
24 Hewins was parked.

25 Q. And did you take those photos?

State of South Carolina -vs- Erick E. Hewins (2010-GS-23-8295 and 8296)
Scott Gardner - Direct Examination by Ms. Monts

191

1 A. Yes, ma'am, I did.

2 Q. And were those taken recently?

3 A. Yes, ma'am.

4 Q. And is that the building lay-out substantially the
5 same or is it exactly the same as it was back on August
6 9th, 2010?

7 A. I would say it's exactly the same.

8 MS. MONTS: Your Honor, we move State's Exhibits
9 1 and 2 into evidence.

10 THE COURT: Any objection?

11 MR. HARBIN: No objection.

12 THE COURT: Without objection Exhibit 1 and 2 are
13 in evidence and may be published to the jury.

14 (WHEREUPON, State Exhibit Numbers 1 and 2 were
15 admitted into evidence.)

16 Q. Please describe where on those photos did you go?

17 A. As you can see on the photos, it's just a two-lane
18 parking lot. It just wraps all the way around and there's
19 parking on either side of the lanes. We just drove
20 directly down on -- again, they were the only two cars in
21 the parking lot when we observed them.

22 Q. And were they parked on the right side?

23 A. On the photo, yes. They were parked against the right
24 side, against the building.

25 Q. Detective, what did you first notice about the two

1 vehicles that were parked there?

2 A. Okay. They were pulled in window-to-window where it
3 was obvious that they were meeting. Neither one of them
4 were making attempts to exit the vehicle or appeared to
5 have any luggage or anything like that. So it was very
6 apparent to us that they were meeting at this hotel parking
7 lot.

8 Q. And could you tell how many -- you may have said --
9 how many people were in each vehicle?

10 A. Yes. Mr. Hewins was in the Lexus by himself. And
11 there was two younger females in the other car.

12 Q. And what alerted you about one vehicle being backed in
13 and the other one being forward in?

14 A. Again, that there could possibly a meeting. Also, and
15 specifically at this hotel, a lot of times individuals back
16 their vehicles in to conceal their license plates from
17 officers that are driving by. And, again, that's just an
18 indicator of something that could be going on.

19 Q. And what does that mean if they're hiding their
20 license plate?

21 A. It just could possibly be a stolen tag or stolen
22 vehicle.

23 Q. And how well lit was this area?

24 A. It was not well lit. The only lights that actually,
25 at the time, were coming from the building. They didn't

1 have a lighted parking lot at the time.

2 Q. What did you and Officer Hall do when you got closer?

3 A. At that time, we stopped our vehicle. We did place
4 our vehicle in front of their vehicles for officer safety,
5 but we placed it far enough away that we could get out of
6 the way in case they started the vehicles and attempted to
7 go forward. And also at the scene, we parked our vehicle
8 where we could see all the individuals in the cars when we
9 got out of the vehicle. That's the reason officers do that
10 is for our own safety. At that time, we exited our
11 vehicle. We identified ourselves as police officers. And
12 basically all we did was just inquire of them what they
13 were doing.

14 Q. And why did you do that?

15 A. Again, just, if you look at all the indicators that we
16 had as far as, it was an older male talking to younger
17 females, it was a high crime area, it was at night, it was
18 in a low-lit parking lot. It was very apparent that they
19 weren't staying there, that they were just sitting there
20 having a meeting. It just drew a little suspicion that we
21 wanted to talk to them.

22 Q. And has your experience been that there are
23 prostitution cases made there?

24 A. Yes, ma'am.

25 Q. And once you approached them, did you observe them

1 speaking to each other?

2 A. I did.

3 Q. And where did you go and where did Officer Hall go?

4 A. I immediately just went between the vehicles. I stood
5 back in the A-frame of Mr. Hewins' vehicle so I could see
6 him. I could see down into his hands. And then also I
7 stood beside of him so I could see the two females also.

8 As officers, we don't turn our back to anyone, pretty much.

9 Because that's a time we can get hurt.

10 Q. And did Officer Hall ask them anything?

11 A. I believe Officer Hall, she made contact. She was
12 just gathering information, name and date of birth, just so
13 we could check who they were. We spoke with them. They
14 said they were not staying at the hotel. And so that was
15 the reason why we were checking them.

16 Q. And what were the approximate ages from your view of
17 them at that point?

18 A. I believe -- I mean, you could see Mr. Hewins was an
19 older male. And both females I believe were around
20 sixteen, seventeen years of age.

21 Q. Did officer Hall get the information that she asked
22 from the girls and from Mr. Hewins?

23 A. Both females had their identification with them. Mr.
24 Hewins did not. He could not provide us with an ID. He
25 did give us his name and date of birth. He was very

1 nervous when he was talking with us. He was stuttering a
2 lot. And he gave his information to Officer Hall.

3 Q. And what did Officer Hall do with this information?

4 A. She went back to the vehicle while I stood by with
5 everybody. And she tried to run their information through
6 the South Carolina DMV database, the NS400, and what that
7 does is that confirms whether you're even allowed to drive,
8 if you have a valid driver's license and, also, if you have
9 any warrants.

10 Q. And, at that point, did Officer Hall receive any
11 response that you're aware of?

12 A. Not that I'm aware of about Mr. Hewins. We couldn't
13 get it to come up.

14 Q. And did you talk to Mr. Hewins?

15 A. I did. Just as I spoke with Mr. Hewins, immediately
16 when I made contact with everybody, everybody's
17 conversation totally ceased. They began to look just
18 straight ahead. Everybody was acting very nervous. One
19 thing I noticed about Mr. Hewins, again, I'm a large
20 individual and I sweat. And I noticed just as I began to
21 talk to him and ask him questions, he started beginning
22 sweating profusely, which he was not doing when I first got
23 there. Also, I'd asked him what he was doing there. And
24 he advised that he was there to see his baby mother, as he
25 put it. And I asked him what her name was and he couldn't

1 provide me his baby mother's name. And, also, his left
2 hand, he continually touched his left pocket. Through
3 officer's training and experience we learn that
4 individuals, consciously or unconsciously, when they have
5 contraband, a weapon or narcotics, they will actually touch
6 it. And it's either to see if we can see it, to see if
7 it's still there, they may not be sure that they have it.
8 And what I noticed is he continued to touch his left pocket
9 over and over again. And even one time he tried to place
10 his hand in his pocket. And I asked him, for my safety,
11 please, do not put your hands in your pockets. And I
12 continued to ask him and he continued to rub his pocket.

13 Q. Did Officer Hall come back up to where you were after
14 being -- running the names on the computer?

15 A. Yes. She came back up and tried to confirm his
16 identification because it still wasn't coming back.

17 Q. And what did you hear her say?

18 A. Ma'am?

19 Q. What did she ask Mr. Hewins when she came back up?

20 A. She was just trying to confirm -- she made him spell
21 out his entire name. She tried to confirm his Social
22 Security Number because I believe the first time she was up
23 there, he was stuttering so much, I believe he actually
24 gave her two different Social Security Numbers. So she
25 just came up and got his entire Social Security Number that

1 time.

2 Q. And did she go back to the patrol car to run the
3 information again?

4 A. Yes, she did.

5 Q. And how far was she and could she see you from where
6 she was seated in the patrol car?

7 MR. HARBIN: Objection, Judge. What she could
8 see is for her to say, not for ---

9 THE COURT: Sustain the objection. If you'll
10 rephrase your question.

11 Q. Could you see Officer Hall where she was seated in the
12 patrol car?

13 A. I could. Again, that's another reason why we parked
14 the vehicle sideways like that. Is so that way, even
15 though Officer Hall's in the vehicle, if I needed
16 assistance, because there was three individuals and just
17 myself, that she would be able to come and give me
18 assistance.

19 Q. Did she leave the patrol vehicle door -- the unmarked
20 patrol vehicle door open?

21 A. She did.

22 Q. And what did you do when you continued with your
23 investigation?

24 A. Once I had some backup arrive, just due to the fact
25 that we couldn't confirm his identification, that he was

1 very nervous, and also continued to touch his left pocket,
2 even after I asked him not to, I had Mr. Hewins step out of
3 the vehicle. At that time, I was going to conduct a Terry
4 frisk on him to look for weapons, which is something that
5 we're allowed to do for our safety. I began to conduct the
6 Terry frisk on Mr. Hewins. I patted down on his left
7 pocket where he'd been touching and I felt a large hard
8 object. I asked Mr. Hewins what it was and he couldn't
9 advise me. So at that time, I asked Mr. Hewins, do I have
10 permission or can I have consent to put my hand in your
11 pocket? At which time he gave me consent. I reached down
12 into his pocket and I retrieved a very large hard object.
13 And due to the size of it, I couldn't actually get my hand
14 all the way in his pocket. So when I retrieved it, it was
15 actually a large wad of cash. I asked him what he was
16 doing with that cash and he couldn't advise me. I asked
17 him how much it was. He said, roughly fourteen hundred.
18 And then I asked him what he did for a living. He told me
19 this and that. Still having his consent to put my hand in
20 his pocket, also due to the fact that I couldn't totally
21 clear his pocket due to the size of the large lump that it
22 was, I placed my hand back in his pocket, within fifteen to
23 thirty seconds of gaining consent from him, and I removed
24 four, I believe, they were green round pills.

25 Q. Was there still a possibility of a weapon being in the

1 pocket?

2 A. Yes.

3 Q. What have you in your experience and training, what
4 type of weapons?

5 A. It could have been anything. A Derringer pistol is
6 only two inches in diameter, I believe. I know there's
7 razor blades. And it could have been any kind of small
8 thing that you're trying to make sure that myself or
9 Officer Hall doesn't get hurt.

10 Q. And regarding the Defendant's car, did it have a paper
11 tag or a solid plate?

12 A. It had a paper tag.

13 Q. And this was parked against the -- up against the curb
14 against the building?

15 A. Yes, ma'am.

16 Q. The back of the vehicle. And is there a city charge
17 for giving a false name?

18 A. There is. It's false information to police. And that
19 was one thing that we were concerned about once we couldn't
20 get his information back because that does happen a lot
21 when individuals are either suspended or they have a
22 warrant for whatever reason. They'll give us a false name
23 and date of birth.

24 Q. And is there a city charge for parking backed in?

25 A. I believe there is. It's just a parking violation.

1 Q. Is that a ticket?

2 A. Yes, ma'am.

3 Q. Once you had backup there and frisked the Defendant,
4 continue. What did you find in his pocket?

5 A. I found four round green pills. We were able to
6 confirm through poison control that they were clonazepam,
7 which is a Schedule IV drug. And at that time, we did
8 place him under arrest.

9 MS. MONTS: Your Honor, may we approach?

10 THE COURT: Yes, ma'am.

11 (WHEREUPON, Ms. Monts and Mr. Harbin approached the
12 bar.)

13 (WHEREUPON, State Exhibit Number 3 was marked for
14 identification.)

15 Q. Detective, I'm handing you State's Exhibit 3. Can you
16 identify this?

17 A. Yes. Those are the four clonazepam I found in his
18 pocket.

19 Q. Did you keep custody of that item?

20 A. I did.

21 Q. And at this point do you know if Officer Hall, did she
22 come back up to you or what was she doing at this point?
23 Had she finished looking on the computer?

24 A. I believe so. I believe she had come back up.

25 Q. And did she substantiate the Defendant's name?

1 A. After he was in custody, yes, we did. We were able
2 to confirm that he did give us the correct name and date of
3 birth.

4 Q. Did you know if he had a valid driver's license?

5 A. He did not have a valid driver's license, which we
6 were able to confirm, of course.

7 Q. Is law enforcement able to allow someone to drive off
8 if you know they do not have a valid driver's license?

9 A. No, we're not.

10 Q. Do you know who owned the car?

11 A. Mr. Hewins advised me that, I believe it was three or
12 four days prior to that, that he'd paid thirty-five hundred
13 dollars cash for it. It was not yet registered in his
14 name.

15 Q. And was Mr. Hewins the only one in his vehicle?

16 A. Yes, he was.

17 Q. Once you found the pills in the Defendant's pocket,
18 and handcuffed him, do you know where he was put?

19 A. He was put in one of the backup officer's patrol cars
20 that arrived.

21 Q. And what did you do?

22 A. At that time, due to our policy, when we arrest
23 somebody that's in a vehicle, we have to at that time do an
24 inventory search of the vehicle in total because at that
25 point we become responsible for that vehicle. At that

1 time, we conducted an inventory search of the vehicle. And
2 at that time we located a large piece of beige-in-color
3 rock-like substance, which field tested positive for
4 cocaine. I believe that in itself weighed about eighteen
5 to twenty grams. Further search of the car we found
6 multiple smaller crack rocks that is usually how it's broke
7 up for sale off of a larger piece, like the one that was in
8 the back floorboard. We found that in the center console
9 in an Advil bottle.

10 Q. And what -- was it in anything?

11 A. The large crack rock was not. It was in clear
12 cellophane, and that was just on the back floorboard behind
13 the passenger's seat. And the Advil bottle was in the
14 center console.

15 (WHEREUPON, State Exhibit Numbers 4 and 5 were marked
16 for identification.)

17 Q. Detective, I'm handing you State's Exhibits 4 and 5.
18 Can you identify these?

19 A. Yes. That is the large amount of crack that we found
20 in the individual's -- in Mr. Hewins' vehicle. And also
21 the Advil bottle, that was located, also, with the crack
22 inside.

23 Q. And describe the difference between the larger piece
24 of crack that you found on the rear floorboard versus the
25 smaller pieces that were inside the Advil container?

State of South Carolina -vs- Erick E. Hewins (2010-GS-23-8295 and 8296)
Scott Gardner - Direct Examination by Ms. Monts

203

1 A. Again, the larger piece of crack that was found in the
2 back, in the Advil container, again, they're broke up in
3 small rocks. And at which time they're usually sold in to
4 twenty, to forty, to fifty amounts, dollars' worth of
5 crack.

6 Q. And did you keep these two items in your custody?

7 A. I did.

8 Q. Was a tow truck called?

9 A. Yes, ma'am.

10 Q. Was anything else found either on the Defendant or in
11 the vehicle?

12 A. We found the Defendant's cell phone. And then also a
13 silver scale was located in a blue duffle bag by Officer
14 Digirolo. He found that while he was in my presence and
15 it was something, he just turned it over to me.

16 Q. Additionally, was there any other type of money in the
17 vehicle?

18 A. No, I believe it was -- he had a little bit over
19 fourteen hundred dollars, I think it what it came out to be
20 in his pocket. And he had a hundred dollar money order
21 inside of that, I believe.

22 (WHEREUPON, State Exhibit Numbers 6, 7 and 8 were
23 marked for identification.)

24 Q. Detective, I'm handing you Exhibits 6, 7 and 8. Can
25 you identify these, please?

1 A. Yes, this is the silver scale that was found, Mr.

2 Hewins' cell phone, and the money order.

3 Q. And did you keep these items in your custody?

4 A. I did.

5 Q. Now, back when you were frisking the Defendant and you
6 got the items out of his pocket, would you have allowed him
7 to go into his own pocket?

8 A. No, I would not. Just, merely, for officer's safety
9 if I believed there could possibly be a weapon in there, I
10 would never allow an individual to place his hand in his
11 pocket.

12 Q. What is the -- based on your experience and training
13 in law enforcement, what is the dollar value of this crack
14 cocaine?

15 A. About a half ounce of crack goes for around five
16 hundred to five-fifty right now. So it could range
17 anywhere from seven hundred fifty to eight hundred dollars.

18 Q. What is the case number in this report, in this case?
19 Do you have that?

20 A. I don't have it with me.

21 Q. What markings -- when you take these into your
22 custody, what do you put on them to identify them?

23 A. You put your initials, case number and the date that
24 you put it in, and then also you heat seal it.

25 Q. And describe, did Officer Hall -- excuse me. When you

1 were at the scene and you finish searching the vehicle,
2 what do you do?

3 A. Could you repeat the question for me?

4 Q. Once you finished searching the vehicle, what did you
5 do?

6 A. Mr. Hewins was transported to detention and the
7 vehicle was towed. Myself and Officer Hall, we counted the
8 money on scene, I believe, at least twice. And then
9 together, we went and counted it again at P&E underneath
10 the cameras.

11 Q. And why would you count the money in front of cameras?

12 A. Just accountability.

13 Q. And describe the procedure at the law enforcement
14 center for anyone who's never been there. What do you do
15 on a step-by-step basis to put this into evidence?

16 A. When it's after hours, officers ---

17 Q. What's after hours?

18 A. After hours I believe now is after four-thirty
19 approximately, in the afternoon, they won't accept anything
20 else. What they have you do is they put it -- you fill out
21 a P&E sheet, you put it in the evidence bag, you put your
22 initials, date and the case number. You heat seal it, the
23 bag. And you take all your evidence and you take you P&E
24 sheet, you put it in an envelope. And they have like a
25 slot or a drop-box that you slide it down into. And even

1 now that they have lockers, you put them in the locker that
2 nobody has a key to it, to my knowledge, except for P&E.

3 Q. Can a person stick their hand in there and pull it
4 back out?

5 A. No, they cannot.

6 Q. Is it like a mailbox?

7 A. Yes. It's almost like the new drink machines type
8 thing that once you open it this way, you can put something
9 in, but there's no way to reach through.

10 Q. And was Officer Hall with you when you turned these
11 items in?

12 A. I believe she was.

13 Q. And describe what you mean by heat sealing,
14 specifically regarding the crack cocaine?

15 A. It's plastic -- the bags are plastic bags and we have
16 this long metal machine that once you put down there, it
17 just heat seals it closed and there's absolutely no way to
18 open it without obvious signs of tampering.

19 Q. And do you request an analysis when you turn something
20 like crack cocaine in?

21 A. Yes, we do.

22 Q. And did you receive an analysis?

23 A. Yes, we did.

24 Q. And did you bring these items to court today?

25 A. I did.

1 Q. And where did you have to go to check them out to
2 bring them to court?

3 A. You have to go back down to property and evidence
4 during the hours that they're open, again, before four-
5 thirty. And I requested them and they gave them to me. I
6 have to sign them out into my custody and then I brought
7 them in.

8 Q. And when this trial started yesterday, did you check
9 them out yesterday?

10 A. I did check them out yesterday.

11 Q. And did you keep it in your custody until today?

12 A. I did.

13 Q. And describe how secure the property and evidence area
14 is? Who has access?

15 A. Only property and evidence employees themselves. No
16 officers, no deputies, nobody's allowed back there except
17 the few people that have access to it.

18 Q. So Detective, you brought State's Exhibits 3, 4, 5, 6,
19 7, and 8 to court with you?

20 A. Yes, ma'am.

21 Q. Have you worked with Officer Hall since this incident?

22 A. Yes, I have.

23 Q. And on the date of the incident, was the other vehicle
24 that was next to Mr. Hewins, was that car investigated?

25 A. It was also investigated, just due to the fact that

1 they were there and we found narcotics in one, we received
2 consent to search her vehicle also. Inside we found some
3 more marijuana.

4 Q. And is the person that you arrested on August 9th of
5 2010 for possessing the pills in his pocket and for
6 possessing the crack cocaine or cocaine base inside his
7 vehicle, in the courtroom?

8 A. Yes, ma'am.

9 Q. Where is he?

10 A. That's Mr. Erick Hewins.

11 MS. MONTS: No further questions.

12 THE COURT: You may cross-examine the witness,
13 Mr. Harbin.

14 MR. HARBIN: May it please the Court.

15 **CROSS-EXAMINATION**

16 **BY MR. HARBIN:**

17 Q. Good afternoon, Officer?

18 A. Yes, sir.

19 Q. I believe your exact quote when Ms. Monts asked you,
20 was you weren't sure exactly who had keys to the P&E room.
21 Is that accurate?

22 A. That's not something that I would know.

23 Q. You're not exactly sure who all has access. You just
24 know you don't?

25 A. That's -- yes, sir.

1 Q. And your responsibility is to get it to the drop box.

2 Realistically, after it goes into the drop box you can't
3 testify as to what happens to it?

4 A. That's also correct.

5 Q. Going back to the beginning of this, you're on routine
6 -- what I assume to be routine patrol with Officer Hall?

7 A. Yes, sir.

8 Q. Okay. And you decide to go check out the Haywood area
9 and drive into the Clarion Hotel parking lot?

10 A. Yes, we did.

11 Q. And upon driving into the hotel parking lot, you see
12 Mr. Hewins' car and another car parked side-by-side?

13 A. Yes, sir.

14 Q. Okay. And you notice immediately that Mr. Hewins is
15 an older black man and there are two younger white females
16 in the adjacent car. Is that correct?

17 A. I noticed that he was older and that there were two
18 young females, yes, I did.

19 Q. You didn't notice that he was black?

20 A. I did. But that's not an indicator to me, sir.

21 Q. And you did or did not notice the ethnicity of the two
22 women in the car?

23 A. I did notice they were white.

24 Q. Okay. Now, when you pulled up to -- you decided it
25 was something you wanted to check out; correct?

1 A. Yes, sir. There was enough indicators that needed my
2 attention, sir.

3 Q. And to go over those indicators again, it was because
4 the Clarion Inn is a high crime neighborhood or area and
5 that he was backed into a space -- I'm sorry, Mr. Hewins'
6 car was backed into a space, and it was nighttime. At that
7 point when you drove up, are those the three indicators
8 that you had?

9 A. Yes. That it was night, and the time of night that it
10 was, in a high crime area and the fact that he was backed
11 in, yes.

12 Q. Okay. Do you recall the layout of the parking lot,
13 what it appeared to be and exactly how much space there was
14 between parking spacings and adjacent -- or excuse me. I
15 guess it would be across the driveway. You have one row of
16 parking spaces and then another row of parking spaces that
17 you can drive through; correct?

18 A. Yes, sir.

19 Q. I'm going to show you a picture and you let me know if
20 you can identify this picture?

21 A. Yes, sir.

22 Q. And can you describe what that picture is a picture
23 of?

24 A. It's a picture of the Clarion Inn, with appears to be
25 four Xs on it where vehicles were parked at.

1 Q. And specifically, the Xs, could you describe what you
2 believe those Xs to be representative of?

3 MS. MONTS: Objection, Your Honor. This is ---

4 MR. HARBIN: Judge, I'm just asking about ---

5 MS. MONTS: He can only testify about what he
6 knows and not what others have done.

7 THE COURT: Okay.

8 MR. HARBIN: Well, I'll be happy to ask him
9 again.

10 THE COURT: Do you have another ...

11 MR. HARBIN: I do not.

12 THE COURT: Okay.

13 MR. HARBIN: But he volunteered the Xs.

14 MS. MONTS: Your Honor, we can get him another
15 copy of that.

16 THE COURT: Well, ---

17 MR. HARBIN: Actually, Judge, if you'll give me
18 one second I may have something else.

19 Q. Do you recognize this picture?

20 A. It appears to be the Clarion.

21 Q. Okay. And this is substantially in the same condition
22 as far as the parking lot layout as it was on the evening
23 that you encountered my client?

24 A. It appears so. It's only partial of the building, so
25 I can't tell you.

1 Q. Well, as far as the immediate area surrounding where
2 you were parked and where they were parked at the time, it
3 appears to be accurate?

4 A. It does appear to be, yes, sir.

5 Q. And can you identify in this picture where you recall
6 Mr. Hewins' car being parked and the two girls that were
7 parked beside him, where they were parked?

8 A. The only reason I can't sir, is the fact I can't see
9 the entire building. That's kind of how I judged on the
10 other picture.

11 Q. Okay. So based on this picture, you are unable to
12 tell me where approximately you were parked and where
13 approximately they were parked?

14 A. Yes, sir. Just because I can't see the whole
15 building, sir.

16 Q. Okay. All right. Fair enough. I'll ask you to take
17 a look at this. Can you tell what that is a picture of?

18 A. Again, it appears to be the Clarion Inn.

19 Q. And is there anything identifying that that helps you
20 identify -- that would tell you that that looks like --
21 that that's the Clarion Inn?

22 A. It's very -- but yes, just the mere fact that that's
23 McPrice Court right there. I know that road right there,
24 sir.

25 Q. Okay. So you're fairly comfortable saying that is an

1 aerial view of the hotel?

2 A. Yes, sir.

3 Q. Now, from your recollection of where you pulled in and
4 where they were parked, can you point to the section on
5 that picture as to what area the cars were parked in
6 relation to which side, front, back, left or right side of
7 the hotel?

8 A. Yes, sir. You want me just to point it out to you,
9 sir?

10 Q. If you wouldn't mind making a mark where you believe
11 Mr. Hewins' car was parked and the other vehicle was parked
12 and then if possible where your car was parked in relation
13 to those two vehicles.

14 A. (Indicating.)

15 Q. Thank you. All right. So your testimony earlier was
16 that you saw the two cars and then you pulled up and you
17 pulled up directly in front of each car, effectively being
18 -- I guess your bumper is front of one car and your
19 headlights are essentially in front of both cars, not just
20 one car at a time. Is that correct?

21 A. Yes.

22 Q. Okay. And your testimony was that you pulled in but
23 you did not block them in?

24 A. No, we did not.

25 Q. And that you pulled in front of them, directly in

1 front of both of them, but that there was enough room for
2 officer safety. Is that right?

3 A. Yes, sir.

4 Q. And your testimony was that the parking lot was
5 completely empty?

6 A. Yes.

7 Q. Okay.

8 A. That I can remember, yes, sir.

9 Q. Okay. Well, you don't recall seeing any ---

10 A. No, I do not.

11 Q. --- obstructions to parking anywhere else in that
12 parking lot?

13 A. No.

14 Q. So you could have parked anywhere in the parking lot
15 because there were no other cars, or to your recollection?

16 A. I would say not safely, sir.

17 Q. Not safely?

18 A. No, sir.

19 Q. Okay. And please tell me why it's not safe?

20 A. In our line of work there are just susceptible
21 dangers. And the way that we articulate that and the
22 reason why we stopped there is I put my vehicle in front of
23 their vehicle, but far enough away where when Officer Hall
24 exited, if they decided to drive off, she's not going to be
25 hit. The reason we would not pull into a parking space or

State of South Carolina -vs- Erick E. Hewins (2010-GS-23-8295 and 8296)
Scott Gardner - Cross Examination by Mr. Harbin

215

1 anything like that is because we would lose sight of one
2 whole car. And the fact -- and to that point is we can
3 dodge a car that's driving at us a lot easier than us
4 losing site of a vehicle and then we wouldn't be able to
5 see it. And we wouldn't be able to dodge the bullet.
6 That's the articulation on it.

7 Q. So your testimony is that it's easier to dodge a car
8 that's coming directly at you rather than being beside a
9 car ---

10 A. And involved in ---

11 Q. Before it came at you? Okay. So, you weren't
12 blocking them in, but you were parked directly in front of
13 both vehicles?

14 A. Yes, sir.

15 Q. And then I believe the testimony is you got out and
16 approached the occupants of the vehicles?

17 A. Yes, we did.

18 Q. Could you tell the jury where you were standing in
19 relation to the cars, the car doors and the occupants
20 themselves?

21 A. If Mr. Hewins was facing this way and the other
22 vehicle was facing this way, I stood between the vehicles
23 so I could keep an eye on both suspects or both
24 individuals. And I stood behind the A-frame of Mr. Hewins'
25 door. That's common practice in law enforcement. And so

1 that way I can see down into his vehicle and see his hands.
2 Because that's what's going to hurt us as law enforcement
3 officers. And I stood more to the side so that way I could
4 also keep eye on these individuals over here if I needed
5 to. But, yeah, that's why we stand by the A-frame.

6 Q. So at this point are you already suspicious of them
7 being dangerous?

8 A. It's just good officer safety, sir. It's something
9 you practice all the time.

10 Q. Well, you've already said that you parked a certain
11 because they might charge at you with the car. And now you
12 stood a certain way because -- I'm not exactly sure why.

13 Perhaps there is some kind of danger. What would they be
14 in danger of doing as you're standing outside of the car?

15 A. Any number of things. Anyone could have a weapon or
16 anything like that. It's prior planning is what keeps us
17 safe. And that's why we just ahead and stand in the A-
18 frame and make ourselves as readily -- have an advantage
19 the best we can.

20 Q. So at this point you are worried about the potential
21 for danger from the people that you approached; right?

22 A. Yes, sir.

23 Q. Because they didn't approach you, you approached them?

24 A. That is correct.

25 Q. And as you approached them, had they committed any

1 criminal violations?

2 A. Not that I could see.

3 Q. Did you have any specific information that night about
4 any criminal activity or drug activity in the parking lot
5 of Clarion Hotel?

6 A. No, we did not.

7 Q. Had you received any complaints or calls for service
8 at that location?

9 A. Not that I remember.

10 Q. To be fair you would have remembered ---

11 A. Exactly.

12 Q. Surely, you would have remembered if ---

13 A. I thought you meant -- I apologize. I thought he
14 meant as a whole department. I didn't know if there was.
15 But, no, specifically I had not heard anything or I did not
16 receive a call.

17 Q. And you had mentioned that one of the things you're
18 looking for is that they're at a hotel at night. It is not
19 illegal, of course, to be in, to be in a parking lot of a
20 hotel; correct?

21 A. No, it's not.

22 Q. And you had mentioned that the nature of the parking,
23 the backing in of Mr. Hewins' car, was somehow suspicious
24 because it may be hiding a stolen license plate or hiding a
25 license plate, indicating a stolen car. There wasn't, in

1 fact, any information gathered that led you to believe the
2 car was actually stolen?

3 A. No. Again, that's just one small indicator.

4 Q. And he got out of the car and you ID'ed yourself as a
5 police officer. You approached them and you're in between
6 both cars; right?

7 A. Yes, sir.

8 Q. And were the cars, other than being back in, which
9 apparently that's against some ordinance; other than being
10 backed in, were they essentially appropriately parked
11 within the lined spaces of the parking lot?

12 A. I would say so, yes, sir.

13 Q. So they are what would be described as just a plain
14 and ordinary distance from one another?

15 A. Yes, sir.

16 Q. So they weren't extremely close and they weren't
17 extremely far away?

18 A. That's correct.

19 Q. And I believe your testimony was that their windows
20 were down and they were actually communicating with each
21 other back and forth?

22 A. That is correct.

23 Q. So you walk up to them, you're standing, I guess, at
24 some point you stop ---

25 A. Yes, sir.

1 Q. --- you're standing in between the two cars and you
2 ask all of them for their identification?

3 A. Yes, sir.

4 Q. Now, it is your testimony, I believe, that they could
5 have both driven off?

6 A. Yes, they can.

7 Q. And they were capable of both having been able to
8 drive off?

9 A. Yes.

10 Q. Because your car was not blocking the egress of their
11 vehicles?

12 A. That's true.

13 Q. So what happens -- what would you do if they had just
14 simply driven off?

15 A. I would go back to my car and went after them.

16 Q. So you get -- do you gather their information or does
17 Officer Hall gather their information?

18 A. Officer Hall gathered it.

19 Q. Okay. But you asked the questions?

20 A. I believe initially. But Officer Hall, being the
21 officer that was going to run the information in the
22 computer, then she took over.

23 Q. So did she get out immediately with you?

24 A. Yes, she did.

25 Q. And where was she standing?

1 A. I don't specifically remember. I believe that she
2 might have been -- I can't remember exactly where she was
3 standing.

4 Q. She wasn't standing beside you, though? She wasn't in
5 between the two vehicles?

6 A. I could not answer that, sir.

7 Q. So you don't recall whether she was in between the two
8 vehicles with you getting the information?

9 A. I cannot recall that. I know at one point she did
10 walk in between there and get the information, but
11 initially, I don't know what she did.

12 Q. So you're talking with Mr. Hewins and he had already
13 given his information to Officer Hall. So had the other
14 two occupants of the other vehicle. And I believe your
15 testimony was that he touched his pocket?

16 A. Continuously, yes, sir.

17 Q. Continuously touched his pocket. And that indicated
18 to you that that was -- that was an indicator that he may
19 have a weapon?

20 A. Again, that's one indicator. But, yes, it is an
21 indicator.

22 Q. And I believe that you indicated that it took some
23 time for the information to come back through your
24 computer, through Officer Hall's computer. So I assume
25 that the reason you know that is because Officer Hall, it

1 took some time for Officer Hall to come -- for you to be
2 informed by Officer Hall that she, in fact, had found his
3 information in the computer?

4 A. Yes, that is correct. Sometimes the computer just
5 runs slow.

6 Q. Okay. But, in fact, the information he gave you did,
7 in fact, turn up. It took a little while but it was the
8 correct information. Is that your understanding?

9 A. It was the correct information.

10 Q. So at some point you became aware of circumstances
11 that led you to believe that my client may be -- may pose
12 some kind of risk to you, so you asked him out of the
13 vehicle in order to conduct what is commonly known as a
14 Terry frisk?

15 A. Yes, I did.

16 Q. And when you pulled him out of the vehicle -- now,
17 you're a large man, he's a large man, I assume that you
18 didn't -- y'all both aren't standing in this small area
19 between the cars when you did that? Or did you?

20 A. I believe we stepped more to the back of his vehicle.
21 I think that we were I would say still almost on the
22 sidewalk, right by the sidewalk, yes, sir.

23 Q. So you patted him down and when you patted him down,
24 you felt this large hard object that turned out to be
25 basically a wad of cash?

1 A. Yes.

2 Q. Now, so you patted him down but you didn't retrieve
3 the object. You said, hey, what is that, essentially? Not
4 verbatim, but that's ---

5 A. Yes, that's correct. Yes.

6 Q. And when you asked him what it was, did he respond?

7 A. He did not.

8 Q. So he did not tell you what it was?

9 A. No.

10 MR. HARBIN: One second.

11 Q. You reached down in his pocket. I'm sorry. I'm
12 skipping ahead. You felt a lump in his pocket?

13 A. Yes, sir.

14 Q. And then at that point -- a Terry frisk presumably
15 would allow you to retrieve that object, yes?

16 A. Yes, sir.

17 Q. Okay. But you didn't retrieve the object right then?

18 A. No, I did not.

19 Q. You said, hey, can I reach in your pocket and grab
20 whatever's in your pocket?

21 A. That is correct.

22 Q. And he said, yes, sir?

23 A. That's correct.

24 Q. Do you recall exactly how you asked him and exactly
25 how he answered?

State of South Carolina -vs- Erick E. Hewins (2010-GS-23-8295 and 8296)
Scott Gardner - Cross Examination by Mr. Harbin

223

1 A. The reason I would say the reason I said, do I have
2 consent to place my hand in your pocket, is because I
3 always ask the same question the same way. And so I
4 believe that's how I said it.

5 Q. So after you got the wad of cash out, then you thought
6 it was still appropriate to put your hand back down into
7 his pocket?

8 A. Yes.

9 Q. Describe what he was wearing, please?

10 A. Again, I believe it was blue jeans and a t-shirt, as
11 well as I remember.

12 Q. So you reach down in his blue jean pocket and pulled
13 out what you had felt before?

14 A. Yes, sir.

15 Q. Now, there are, I assume, instances of Terry frisks
16 where you pat the subject down and do not feel it necessary
17 to go any further than the pat-down because you didn't feel
18 anything; correct?

19 A. That would be correct.

20 Q. Now, if you don't feel anything you don't have a right
21 just stick your hand in his pocket; right?

22 A. I would agree, yes, sir.

23 Q. And if you don't feel anything, presumably you were
24 trained to know by touch what is there and what is not. I
25 mean, that's the whole point of the Terry frisk; right, to

1 be able to touch and figure out whether or not there's
2 something you believe could offer some kind of danger to
3 you and/or your fellow police officers?

4 A. That is correct.

5 MR. HARBIN: Excuse me, Judge.

6 Q. Now, when he -- actually, when you asked Mr. Hewins if
7 you could go into his pocket, you had stopped and basically
8 -- I would call it belts and suspenders -- you thought you
9 had at the time a right to conduct a Terry frisk based on
10 your observations, that's one way for you legally to reach
11 in his pocket per your opinion. And you also decided to
12 get his consent; correct? So basically, you're covering
13 yourself twice?

14 A. I would agree with that, yes, sir.

15 Q. Now, when you decided to get his consent, did you stop
16 and tell Mr. Hewins, now, Mr. Hewins, you don't have to
17 give me consent to do this?

18 A. No, I did not, sir.

19 Q. So you advise him of his Constitutional rights?

20 MS. MONTS: Objection, Your Honor.

21 THE COURT: What's your objection?

22 MS. MONTS: That Mr. Harbin is incorrectly
23 stating the law on search and seizure, Your Honor. There's
24 no requirement.

25 MR. HARBIN: I can -- I'll be happy to rephrase

1 the ---

2 THE COURT: If you'll rephrase your question.

3 Q. You did not advise him of any rights that he has as it
4 relates to his ability to refuse to consent to a search?

5 You did or did not?

6 A. No, I did not.

7 Q. Okay. Thank you. I apologize for that confusion.

8 Okay. So you've gotten Mr. Hewins out of the car. You
9 have patted him down. You found the money in his pocket.

10 And then you go back in his pocket and you find four loose
11 pills. And these appear to be the same pills?

12 A. Yes.

13 Q. Okay. And they haven't gotten any smaller over time,
14 these are the pills that you reached in and got them out,
15 the same size?

16 A. As far as I can tell, yes, sir.

17 Q. Now, I believe your testimony was that you had waited
18 before you got Mr. Hewins out of the car or -- I don't know
19 if you waited, but anyway you didn't pull him out of the
20 car until backup had arrived?

21 A. That is correct.

22 Q. And is that an officer safety issue?

23 A. That is. Just the fact that there was three of them
24 and pretty much one of myself while Officer Hall was in the
25 vehicle being able to observe us.

1 Q. Now, there's three of them, but let me be clear, at
2 this point you have no reason to believe that the two girls
3 are offering any danger. You're just noting the number of
4 people simply, three civilians and two officers; right?

5 A. I wouldn't -- I mean, I just wouldn't -- I wouldn't
6 say that, sir. I mean, until I'm proven otherwise, I've
7 always got to be careful, sir.

8 Q. Now, the Solicitor had asked you whether or not it
9 was, in fact, that there was a law against backing into a
10 parking spot?

11 A. That's correct, sir.

12 Q. And you said -- you answered affirmatively, that there
13 is some prohibition to backing into a parking spot?

14 A. Yes. There is a city ordinance.

15 Q. And I believe y'all may have covered this, but that is
16 a citation; correct?

17 A. Yes. It's a parking ticket.

18 Q. And that means that that is not a custodial arrest.
19 You're not going to handcuff somebody and arrest them for
20 parking backwards?

21 A. No, I would not.

22 Q. And at the time, I believe, you said that at the time
23 that you reached in his pocket, you found those pills and
24 that you had gotten some information, that you believed
25 those pills were prescription. I can't remember what you

1 said they were, but you can repeat that if you'd like.

2 Then you handcuffed him; correct?

3 A. That is correct. We did confirm through poison
4 control that it was a Schedule IV drug.

5 Q. All right. And then after you handcuffed him then I
6 believe you said Officer Hall was able to come and say we
7 finally found him in the system. I think -- because I
8 believe that you said she wasn't present for the frisking,
9 that she was able to, I guess, immediately after she
10 confirmed -- not immediately after -- but afterwards
11 confirmed that the information that y'all had been
12 attempting to look up, she actually did, in fact, find. Is
13 that your recollection?

14 A. Yes.

15 Q. Now, when you were -- and I apologize for skipping
16 around a little bit. I don't want to forget anything.
17 When you approached Mr. Hewins and asked him what he was
18 doing, what was his response as to why he was at the hotel
19 that night?

20 A. Again, he advised me that he was there to visit, in
21 his words, his baby mama in room two thirty-seven, two
22 thirty-seven, but that he couldn't remember her name.

23 Q. Okay. And in the course of your investigation and/or
24 the investigation of your fellow officers, did you, in
25 fact, confirm that he was visiting someone in room two

1 thirty-seven?

2 A. That is correct.

3 Q. I'm going to hand you a piece of paper. Let me know
4 if you know what this is.

5 MS. MONTS: Your Honor, may I see it?

6 MR. HARBIN: I apologize.

7 Q. Let me show this to Ms. Monts.

8 A. It appears to be a CAD report, which is what they call
9 the reports printed from our dispatch.

10 Q. Okay. And are you able to look at that piece of paper
11 and tell what time you arrived on the scene? Or does that
12 indicate what time you arrived on scene?

13 A. I'm specifically not trained to read these, sir. But
14 it appears -- it says that it opened on -- it'd be twelve
15 thirty in the morning, twelve thirty-six in the morning.

16 Q. Twelve thirty-six in the morning?

17 A. Yes, sir.

18 Q. I appreciate you giving me civilian time.

19 A. Yes, sir.

20 MR. HARBIN: Judge, I'm marking this as Defense
21 Exhibit 1.

22 (WHEREUPON, Defendant Exhibit Number 1 was marked for
23 identification.)

24 MR. HARBIN: One second, Your Honor. No further
25 questions.

1 Thank you, Officer.

2 THE COURT: Any redirect.

3 MS. MONTTS: Your Honor, was that last report
4 entered into evidence?

5 MR. HARBIN: No, ma'am.

6 THE COURT: Only marked.

7 MR. HARBIN: Just marked.

8 MS. MONTTS: Yes, Your Honor.

9 REDIRECT EXAMINATION

10 BY MS. MONTTS:

11 Q. Officer, in your experience with CAD reports, are
12 those times sometimes off?

13 A. Yes, very much so. I don't have a lot of experience
14 in CAD reports, but it's really just what time the officer
15 was able to call out.

16 Q. And sometimes are officers called out who don't
17 actually arrive?

18 A. I believe so.

19 Q. And is it just the employee at 9-1-1 who enters times
20 based on their information?

21 A. Again, I'm not trained in that, nor have I ever worked
22 in dispatch, but I believe that's how it works.

23 Q. And regarding when you and Officer Hall counted the
24 money that was on the Defendant at the law enforcement
25 center, did you delineate or distinguish what denominations

1 of each dollar form?

2 A. Yes, we did.

3 Q. And did you make a record of that?

4 A. Yes, we did.

5 Q. Do you have that with you?

6 A. I don't have it up here, no.

7 Q. Is this a record that you wrote? Would that help you
8 refresh your memory?

9 A. Yes, ma'am.

10 Q. And can you please tell us what denominations the
11 money was in?

12 A. There was four one hundred dollar bills; there was
13 twenty twenty dollars; thirty-four ten dollar bills; fifty-
14 two five dollar bills; thirty-seven one dollar bills; and
15 then the one one hundred dollar money order.

16 Q. Thank you.

17 MS. MONTS: No further questions.

18 MR. HARBIN: Judge, just briefly.

19 THE COURT: Briefly.

20 **RECROSS-EXAMINATION**

21 **BY MR. HARBIN:**

22 Q. Although you can't verify the accuracy of the CAD
23 report, do you have any reason to believe that a dispatcher
24 would report you're on the scene to a particular address
25 before that incident actually occurred?

State of South Carolina -vs- Erick E. Hewins (2010-GS-23-8295 and 8296)
Rachel Hall - Direct Examination by Ms. Monts

231

1 A. No.

2 Q. Thank you.

3 MR. HARBIN: No further questions.

4 THE COURT: All right. Thank you, Officer
5 Gardner, you may step down.

6 THE WITNESS: Thank you, Your Honor.

7 THE COURT: You may call your next witness,
8 Solicitor.

9 MS. MONTs: Your Honor, the State calls Officer
10 Rachel Hall.

11 THE CLERK: Ms. Hall, if you would come forward
12 to be sworn in.

13 Do you solemnly swear or affirm that the testimony
14 you're about to give is the truth, the whole truth and
15 nothing but the truth, so help you God?

16 THE WITNESS: I do.

17 THE CLERK: Thank you. You may be seated. Would
18 you please state your name for the record.

19 THE WITNESS: Yes. My name is Officer Rachel
20 Hall.

21 RACHEL HALL,

22 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

23 DIRECT EXAMINATION

24 BY MS. MONTs:

25 Q. Officer Hall, can you please tell the jury where

1 you're employed and how long you've worked there?

2 A. Yes, ma'am. I work for the City of Greenville Police
3 Department. And it's just been over four years now.

4 Q. And on August 9th of 2010 were you employed at the
5 Greenville Police Department?

6 A. Yes, ma'am.

7 Q. And so at that point you had been with the police
8 department how long?

9 A. Approximately two and a half years.

10 Q. And what was your duty at that time? What were you
11 assigned to do?

12 A. Yes, ma'am. Myself and Officer Gardner were assigned
13 to a plain clothes patrol, which we call Aggressive Patrol
14 Unit. Basically, we ride in an unmarked vehicle in plain
15 clothing, which as Officer Gardner did explain, allows us
16 to get a little bit closer without being observed quite as
17 quickly. It allows us to get closer to crimes that could
18 be in progress.

19 Q. And prior to your starting at the Greenville Police
20 Department, did you go to the Criminal Justice Academy or
21 receive other training in law enforcement and safety and
22 different types of crimes?

23 A. Yes, ma'am, I did. I studied Criminal Justice at
24 Greenville Technical College. I also went to the Criminal
25 Justice Academy.

1 Q. And what were your duties on the early morning,
2 approximately twelve-thirty, on August 9th of 2010?

3 A. As I explained, we specifically target -- I'm sorry,
4 as Officer Gardner explained, we specifically target
5 problem areas throughout the city. When we go to roll call
6 each day before shift, we actually learn of issues that
7 have been going on, maybe while we've been off, or other
8 issues in different areas that we may not normally come in
9 contact with. Specifically, we had been having a lot of
10 issues with auto break-ins especially. A lot of drug
11 related activity along the Haywood Road area being that
12 there's so many apartment complexes and hotels.

13 Q. Did you have any prostitution issues?

14 A. Yes, ma'am.

15 Q. And so where did you go when you were going to
16 investigate these possible issues?

17 A. Around this time we had been in the Haywood Road area
18 at several different apartment complexes in that area,
19 several different hotels, along with the mall, that are all
20 in that area. At this time we're focusing on that area and
21 that end of Haywood Road.

22 Q. And did you go to the Clarion Hotel?

23 A. Yes, ma'am.

24 Q. And what road is that on?

25 A. It's on Orchard Park, just off Haywood.

1 Q. And is that in Greenville County?

2 A. Yes, ma'am.

3 Q. And please describe what did you observe when you
4 pulled into that area?

5 A. When we pulled into the parking lot we observed a
6 black vehicle, a black Lexus backed into a parking space,
7 along with another four-door sedan pulled in forward next
8 to it. The windows were down and they did appear to be
9 talking to each other. Being that it was a late night hour
10 and they were in a hotel parking lot, it was not a very
11 well lit area, and that one vehicle was backed in, just
12 some small indicators that caught our attention.

13 Q. And why would a car being backed in catch your
14 attention?

15 A. It could be any number of different things. They
16 could be attempting to conceal a tag that's possibly
17 stolen. It could be a tag that's placed on a wrong
18 vehicle, which could be an attempt to conceal a stolen
19 vehicle. Also, in running tags through the DMV we can see
20 names. They could be attempting to conceal their location
21 if the car is registered in their name. Anything along
22 those lines.

23 Q. And when you're in hotels or apartment complexes, is
24 there anything -- do people sometimes park in one and go to
25 another?

1 A. Definitely, yes. That is a fairly common practice.

2 Q. Why is that?

3 A. And this hotel would be a good example. There's
4 another hotel directly next door. There's a gas station
5 within walking distance. There's an apartment complex
6 within walking distance. It is fairly common practice for
7 someone to park in one parking lot if they have business
8 they would like to conduct, whether it be drug deals, auto
9 break-ins, robberies, anything of that nature. That way
10 they could conceal their vehicle description, walk to the
11 parking lot and come back to their vehicle and leave.

12 Q. And on this morning describe what you and Investigator
13 Gardner were wearing?

14 A. We were both wearing plain clothes. I believe Officer
15 Gardner was wearing blue jeans, a t-shirt. I was wearing a
16 black t-shirt with white writing on the front and on the
17 back that said police, blue jeans. I did have my badge on
18 my belt. I believe Officer Gardner was wearing his around
19 his neck. And then we each had our firearms.

20 Q. Did you have any tactical gear on?

21 A. No, ma'am.

22 Q. Did you have any tactical gear at that time?

23 A. No, ma'am.

24 Q. And describe the vehicle that you were in?

25 A. We were in an older model four-door Impala, unmarked.

1 Q. And did it have video equipment?

2 A. No, it does not.

3 Q. Describe, based on your training, what it was that you
4 and Investigator Gardner did when you saw those two cars in
5 the parking lot?

6 A. We positioned our vehicle that would be a safe
7 distance from their vehicles. It would also be a safe
8 location for us to have access to if we needed to get out
9 or get back in quickly. It was also positioned under the
10 assumption that at some point one of us would be back at
11 the vehicle. Where it was positioned we would still be
12 able to see, at least mostly see, the subjects that were
13 seated in the vehicles. For example, if we had pulled up
14 too far forward, we wouldn't have a clear range of view.
15 Like when I was sitting in the vehicle, I wouldn't be able
16 to see Officer Gardner fully.

17 Q. And how far away from the rear of their vehicles was
18 your car?

19 A. As in like out in front of them?

20 Q. Yes, ma'am.

21 A. Okay. I would say I had enough room to open my door
22 and still have room to walk completely in between. It was
23 a safe -- like I said, our biggest thing is officer safety.
24 And, you know, we ensured that there would be enough room
25 for us to maneuver around the vehicle if we had to, to get

State of South Carolina -vs- Erick E. Hewins (2010-GS-23-8295 and 8296)
Rachel Hall - Direct Examination by Ms. Monts

237

1 out of the way if they decided to move their vehicles.

2 Q. And was there enough room for either of their vehicles
3 to pull out by either -- by maybe even going over in the
4 lane next to them?

5 A. Yes. Yes, there was.

6 Q. And did you and Investigator Gardner get out of the
7 vehicle about the same time and where did you go?

8 A. Yes, we did. Officer Gardner immediately approached
9 the other vehicles. I believe I was calling the
10 information out on the radio so I was just a short distance
11 behind him.

12 Q. What does that mean calling out the information?

13 A. Whenever we get out with a vehicle or we get out in an
14 area, even if we're just walking and not specifically
15 talking to somebody, we let our dispatchers know. They're
16 basically our lifeline. They keep track of where we are.
17 They check on us periodically to make sure that we are
18 still okay. So I was just providing them information over
19 the radio as to our location and what we were looking at.

20 Q. If you recall, were there any other cars in the
21 parking lot that morning?

22 A. In the area that we were in, I don't recall there
23 being any other, any other vehicles.

24 Q. Where did Officer Gardner go and where did you go once
25 you got out of your vehicle?

1 A. Officer Gardner had positioned himself, like he
2 explained, slightly behind the driver's side door of Mr.
3 Hewins' vehicle in between both cars. I did the same with
4 the other vehicle. I positioned myself back so I could
5 slightly see down into their car to watch their hands the
6 best that I could. And I could also still see Mr. Hewins,
7 inside his vehicle, as well.

8 Q. And why is it important for you as an officer to be
9 able to see someone's hands?

10 A. Anybody can do anything with their hands if they have
11 a weapon available in a car. Especially that's going to be
12 our main focus is just to make sure that we can see their
13 hands and make sure that they aren't trying to obtain a
14 weapon or anything that could harm us or anybody close by.

15 Q. And did you or Investigator Gardner speak to either of
16 the two young females or the Defendant?

17 A. Yes. We requested their identification.

18 Q. And did you receive it?

19 A. I received identification from both females. Mr.
20 Hewins stated that he did not have any identification on
21 him, at which time I asked him for his name, his date of
22 birth, and the last four numbers of his Social Security
23 Number to confirm his identification.

24 Q. And what did you do with that information?

25 A. Once I got it written down, I walked back to our

1 vehicle where we have a computer. We can actually check
2 that information to confirm. We also check for warrants,
3 check for valid driver's license. So I walked back to my
4 vehicle and began pulling up that information.

5 Q. And prior -- while you were up there asking Mr.
6 Hewins, did you speak to him directly?

7 A. I did, yes.

8 Q. And what did you notice, if anything, about him?

9 A. When he first started speaking he was -- he did appear
10 to be nervous. He was stuttering when I asked for the last
11 four numbers of his Social Security Number. He even at one
12 point in time kind of stuttered, gave me two separate
13 numbers. And I also observed that he was constantly just,
14 I mean, almost pinching at his pocket, rubbing his pocket
15 and kind of grabbing at something in his pocket, is what it
16 seemed to me. But he did it continuously.

17 Q. What does this mean to you?

18 A. It's a big indicator for us. We're taught that if
19 somebody has something in their pocket they may not
20 necessarily want you to know about, they may just be
21 worried about it. It definitely for us is a big flag to
22 where there could be a weapon. As Officer Gardner
23 explained, they make weapons of all shapes and sizes now,
24 even firearms can be very, very small. So with him
25 constantly grabbing at his pocket, it just was a big flag,

1 for me, that there was something there that he may not want
2 us to know about.

3 Q. And what did you do when you started running the
4 information on the computer? What information did you
5 receive?

6 A. Upon running the females' information I got their
7 matches back fairly quickly. When I attempted to run Mr.
8 Hewins' name and date of birth, it actually came across the
9 screen with no match found. After the first instance of
10 coming back with no match, I attempted to type it in again
11 to make sure that I hadn't made a typing error, and it
12 still came back with no match found. That's when I re-
13 approached the vehicle and actually asked Mr. Hewins to
14 spell out his name, give me his date of birth again, give
15 me his full Social to ensure that I had written everything
16 down correctly, that I hadn't made a mistake.

17 Q. What did you observe about Mr. Hewins the second time
18 you went up?

19 A. I noticed that as he had stood by -- or as Officer
20 Gardner had stood by with him, when I re-approached the
21 vehicle, he was sweating profusely. I could very clearly
22 see it. And he was still messing with his pocket. He
23 still kept grabbing at his pocket. And he was still very,
24 very focused forward instead of looking at -- you know,
25 making eye contact with myself or Officer Gardner.

1 Q. He did not make eye contact with you?

2 A. Not that I ever noticed, no. Not with me personally.
3 He just continued to look forward. But the biggest thing
4 was that he was still just rubbing at his pocket, grabbing
5 at his pocket.

6 Q. And when you got information the second time did you
7 go back and run this information again?

8 A. I did.

9 Q. And when you're back again, when you're in your
10 vehicle, is the door open or shut?

11 A. When I sat down in the vehicle I did have the door
12 completely open, just in the event that Officer Gardner
13 needed my assistance or I needed his assistance.

14 Q. And please continue. What information did you receive
15 when you went back the second time?

16 A. I still came up with a no match found. I did,
17 however, finally get the information back and discovered
18 that the information he'd given me was correct.

19 Q. Had other backup officers arrived at this time?

20 A. Yes, ma'am, I believe so by that point, yeah.

21 Q. Did the Defendant have a valid driver's license?

22 A. He did not. It was actually suspended, I believe.

23 Q. Do you know, had Officer Gardner got the Defendant out
24 of the car at that time?

25 A. Yes, ma'am.

1 Q. And did you observe anything or were you busy with
2 your computer work?

3 A. Well, as Officer Gardner was getting Mr. Hewins out of
4 the vehicle I noticed that another officer had arrived on
5 scene. I remained in the vehicle knowing that he now had a
6 backup officer. I remained in the vehicle and continued to
7 try to get the proper identification for Mr. Hewins.

8 Q. When you finally got a match, what did you do? Did
9 you go talk to Officer Gardner?

10 A. I did. I just let him know that I did get the
11 information back and that he was clear of any active
12 warrants. He did not have any active warrants.

13 Q. Did you see Office Gardner find the -- pull out the
14 money or the pills from his pocket?

15 A. I did not actually see him pull it out, no, ma'am.

16 Q. Were you part of searching the vehicle or was that not
17 one of your duties at that time?

18 A. I did not take part in searching the vehicle, no.

19 Q. Did you see what was found in the vehicle?

20 A. I did after the fact, yes.

21 Q. You saw the crack cookie, the larger -- which is the
22 larger piece and the smaller rocks?

23 A. I did. I had observed after -- I believe Officer
24 Gardner had set it on the trunk of Mr. Hewins' car. And at
25 that point I did observe it.

State of South Carolina -vs- Erick E. Hewins (2010-GS-23-8295 and 8296)
Rachel Hall - Direct Examination by Ms. Monts

243

1 Q. And was it part of one of your duties to go with
2 Officer Gardner to the property and evidence room?

3 A. Yes.

4 Q. And did you do that?

5 A. I did.

6 Q. And were you still in the same vehicle?

7 A. Yes.

8 Q. Was Defendant transported by someone else?

9 A. Yes. He was transported to detention by one of our
10 marked patrol units.

11 Q. When you were running the Defendant's car, did he have
12 a paper tag or a hard plate on it?

13 A. It was a paper tag.

14 Q. Would you have allowed someone to drive off if they
15 did not have a valid driver's license?

16 A. Absolutely not.

17 Q. When you went to the property and evidence room,
18 describe what that is and what you do when you are taking
19 evidence to be put in there?

20 A. Yes, ma'am. The law enforcement center itself, you
21 have to have a scan code to make entry into the building.
22 So once you make entry into the building ---

23 Q. And who has the scan code?

24 A. That would be City or Greenville County employees that
25 -- they give special authorization. You have to work

1 directly in that building.

2 Q. Okay. Please continue.

3 A. But once you get down to the property and evidence,
4 like Officer Gardner explained, you fill out all of the
5 appropriate paperwork, you heat seal the plastic bags.
6 That's to ensure that it's obvious if it has been tampered
7 with. And then you actually place all of your paperwork,
8 along with the evidence, into an envelope and into a drop
9 box that is secured behind a locked door.

10 Q. Do you know the case number that was assigned to this
11 case?

12 A. I do not know it by heart, but I do have it right
13 here. I was 2010-067312.

14 Q. And is that number associated with the items that you
15 and Officer Gardner put into property and evidence?

16 A. Yes. That case number, that same case number would be
17 listed on the property and evidence sheet.

18 Q. And is the person that you ran their driver's license
19 and -- excuse me, their name, date of birth, and was
20 arrested that evening for the trafficking of crack,
21 possession of the pills, is he in the courtroom?

22 A. Yes, ma'am.

23 Q. Where is he?

24 A. That's Mr. Hewins seated right there.

25 Q. Thank you.

State of South Carolina -vs- Erick E. Hewins (2010-GS-23-8295 and 8296)
Rachel Hall - Cross Examination by Mr. Harbin

245

1 MS. MONTS: No further questions.

2 THE WITNESS: Thank you.

3 THE COURT: You may cross-examine the witness.

4 MR. HARBIN: May it please the Court.

5 CROSS-EXAMINATION

6 BY MR. HARBIN:

7 Q. Good afternoon.

8 A. Good afternoon.

9 Q. The information that you got from my client did, in
10 fact, eventually turn up in your computer as correct? Is
11 that right?

12 A. Yes, sir.

13 Q. And, in fact, you went back and asked him to spell his
14 last name so you could get that correct information?

15 A. Yes, sir.

16 Q. And is it possible that the spelling that you
17 originally assumed was just simply incorrect or that he
18 didn't enunciated it well enough for you to know?

19 A. You can assume that, yes.

20 Q. And he was not charged with false information?

21 A. He was not.

22 Q. And by the time you ran his information and you did
23 discovery, I believe per your testimony, that he was
24 suspended, he was already out of the car and I believe that
25 Officer Gardner had testified that by the time you reported

1 back his license status, he was already actually in
2 custody?

3 A. That is correct.

4 Q. So that was not the reason for his custodial status or
5 even to pull him out of the car, not his license status?

6 A. I'm sorry?

7 Q. The fact that he was -- his license was suspended was
8 not the reason to take him out of the car, nor the reason
9 to ---

10 A. Correct. That's correct.

11 Q. Now, you did say that when you approached the car you
12 saw my client sweating, and you saw -- you said that you
13 saw his hand touching his pocket repeatedly?

14 A. Yes.

15 Q. Okay. Do you remember if it's his right hand or his
16 left hand?

17 A. It would be his left hand.

18 Q. His left hand, okay. And I believe your testimony was
19 that that was some -- that was an indicator that you were
20 keeping in your head as to this is important to note?

21 A. Yes.

22 Q. This is one of the indicators that Officer Gardner
23 indicated -- I'm sorry. I don't mean to use the word
24 indicate too much. One of the indicators that he notice
25 that gave him rise to believe there might be something that

1 he needed to be worried about?

2 A. Correct.

3 Q. Okay. Now, once you noticed this indicator, and I
4 believe you said he repeatedly, repeatedly, I'm not sure
5 what your verbiage was, but basically constantly was
6 rubbing his leg. Did you communicate that to Officer
7 Gardner?

8 A. I don't recall. I don't think I specifically said,
9 hey, Gardner, he keeps touching his pocket.

10 Q. Okay. So by -- in and of itself, it wasn't something
11 that you needed to stop and alert Officer Gardner to?

12 A. That's correct.

13 Q. You also said that Officer Gardner got out just a
14 little bit before you did and while he was getting out you
15 were calling in, I believe was the phrase that you used, to
16 dispatch?

17 A. Yes.

18 Q. And you do that routinely so that they know when
19 you're on the move and they know when you're stopped?

20 A. Correct.

21 Q. So they know what you're up to in case somebody needs
22 to come help you?

23 A. Yes.

24 Q. Okay. And you would concede that dispatch is going to
25 -- when you call in, do you believe that they note it? I

1 mean, do you believe that somebody's actually paying you
2 attention?

3 A. Yes.

4 Q. Okay. I hand you a piece of paper. And tell me if
5 you recognize those, please?

6 A. This does appear to be a printout of a CAD report that
7 we could get from dispatch.

8 Q. And from that printout can you tell whether or not
9 they noted your arrival on scene that night?

10 A. Yes, sir.

11 Q. And what time would that be?

12 A. It was be twelve thirty-six, just after midnight.

13 Q. Thank you.

14 MR. HARBIN: At this time, we would move for this
15 to be admitted into evidence as Defense Exhibit 1.

16 MS. MONTIS: And, Your Honor, the State would
17 object because there's no one here to authenticate what all
18 these times and dates mean. And these officers have both
19 said they were not familiar with this document.

20 MR. HARBIN: I would submit that this is a
21 business record. She's recognized what it is.

22 THE COURT: I'll allow it in over objection. It
23 may be marked and admitted and may be published to the jury
24 as Defense Exhibit 1.

25 MR. HARBIN: Thank you, Judge.

1 (WHEREUPON, Defendant Exhibit Number 1 was admitted
2 into evidence.)

3 Q. While you were up near my client and asking -- I guess
4 at the time you were asking him for his information and/or
5 clarifying that information you got previously, at anytime
6 did you direct him yourself to put his hands on the
7 steering wheel or put them where I can see them or anything
8 like that?

9 A. I don't recall.

10 Q. Thank you.

11 MR. HARBIN: No further questions, Judge. Thank
12 you.

13 THE COURT: Any redirect?

14 MS. MONTS: No, Your Honor.

15 THE COURT: All right. Thank you, Officer Hall.
16 You may step down.

17 Mr. Foreman, ladies and gentlemen, this might be a
18 good time for us to take a break. If you'll go back to
19 your jury room, I'll remind you again not to discuss the
20 case one with another in any way. We'll take about a
21 fifteen minute break and be ready to start with the next
22 witness.

23 Everyone else, please remain seated while the jury
24 retires.

25 (WHEREUPON, the jury exited the open court at

1 approximately 3:41 P.M.)

2 THE COURT: All right. Let's take about a
3 fifteen minute break.

4 MR. HARBIN: Thank you, Judge.

5 (WHEREUPON, the court stood at recess for a short
6 break.)

7 THE COURT: All right. Solicitor, are you ready
8 for your next witness?

9 MS. MONTS: Yes, Your Honor.

10 THE COURT: All right. If the jury's ready, you
11 can have them come in, Ms. Simms.

12 Before they come in, I mentioned to both of you in the
13 jury selection process that one of the jurors had been
14 protected tomorrow for a doctor's appointment, I think
15 around twelve o'clock. I'm going to mention that as they
16 leave today. I don't know if she could get other
17 arrangements made. Otherwise, we'll need to -- I don't
18 know where we'll be in the trial then tomorrow. I guess
19 we'll still be taking testimony maybe. But either we'll
20 have to take an extended lunch break or either she can
21 perhaps reschedule her doctor's appointment or we'll have
22 to go with one of the alternates. I was going to just
23 mention that today as they leave and just tell her that
24 we'll do our best to accommodate her tomorrow and maybe
25 even say I don't know if those appointments could be

1 altered any. Since the commitment was made on Monday
2 morning that she had to be -- she'd had surgery and had a
3 follow-up. So I would hope that it wouldn't take very
4 long, but we may have to break at eleven-thirty for early
5 lunch tomorrow unless she can get that rearranged. Any
6 objection to me doing that? I'm not going to identify who
7 it was. I'm just going to say that one of you had a
8 doctor's appointment. Any objection to that?

9 MR. HARBIN: No, sir.

10 MS. MONTS: No, Your Honor.

11 THE COURT: I'll try to remember to do that as
12 they leave. Okay.

13 (WHEREUPON, the jury entered the open court at
14 approximately 4:21 P.M.)

15 THE COURT: All right. Solicitor, you may call
16 your next witness.

17 MS. MONTS: Your Honor, the State calls Sergeant
18 Ben Cothran.

19 THE CLERK: Ms. Cothran, would you please place
20 your left hand on the bible and raise your right hand.

21 Do you solemnly swear or affirm that the testimony
22 you're about to give is the truth, the whole truth and
23 nothing but the truth, so help you God?

24 THE WITNESS: I do.

25 THE CLERK: Thank you. You may be seated.

1 Please state your name for the record.

2 THE WITNESS: Ben Cothran.

3 BEN COTHRAN,

4 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

5 DIRECT EXAMINATION

6 BY MS. MONTS:

7 Q. Sergeant Cothran, if you would, please tell the jury
8 where you're employed and how long you've worked there?

9 A. I'm currently employed by the Greenville City Police
10 Department. I've been employed here for a little over nine
11 years now.

12 Q. And were you employed with the police department on
13 August 9th of 2010?

14 A. With Greenville Department, yes, ma'am.

15 Q. And at that time what was your title and your duties?

16 A. I was a patrol sergeant in uniform patrol working with
17 -- working on my shift that night.

18 Q. And were you supervisor for Investigator Gardner and
19 Officer Hall?

20 A. Yes, ma'am.

21 Q. And approximately at twelve thirty that morning were
22 you were aware that they went to the Clarion on Orchard
23 Park Road?

24 A. Yes, ma'am.

25 Q. And did you go to that location?

1 A. Yes, ma'am.

2 Q. And what did you observe when you arrived? Where was
3 everyone located?

4 A. They were parked on the west side of the hotel, the
5 farthest side from Haywood Road. I observed the APU car,
6 the gold Impala, sitting approximately in the middle of the
7 parking area. I observed a black Lexus backed in on the
8 far side of the group of vehicles and then a darker colored
9 four-door pull in to where it would make it convenient for
10 the two drivers to communicate verbally. I observed
11 Detective Gardner making contact with Mr. Hewins and
12 Officer Hall was sitting in the front seat of the car, what
13 I would have guessed to be, running names on NCIC and
14 checking for warrants.

15 Q. And where did you park your car in relation to theirs
16 when you arrived?

17 A. I parked approaching the space between the APU car and
18 the Camry, nose-in to where it was their car, my car, and
19 then the Camry and the Lexus.

20 Q. And did the two cars that were parked have access to
21 leave at that point?

22 A. Before my arrival, yes, ma'am.

23 Q. And what did you observe of Officer Gardner when you
24 got out of your car? Where exactly was he as far as you
25 remember?

1 A. As far as I remember he had Mr. Hewins at the rear of
2 Mr. Hewins' vehicle conducting what is commonly referred to
3 as a Terry frisk for weapons.

4 Q. And where did you go when you got out of your vehicle?

5 A. If I remember correctly, I believe I posted up on the
6 side of the Camry as an effort to provide as a support or
7 cover officer.

8 Q. And was that your common procedure?

9 A. Yes, ma'am.

10 Q. And was there anybody in the Camry?

11 A. Yes, ma'am. Two females were.

12 Q. And how close were you to Officer Gardner when he was
13 doing the Terry Frisk on Mr. Hewins, if you recall?

14 A. I would have been standing approximately at the back
15 right-hand tire to where I could see the occupants of the
16 Camry. And as I said, Detective Gardner was with Mr.
17 Hewins at the rear of the Lexus. So the width plus of the
18 vehicle.

19 Q. And you were there, as you said, as he did the frisk
20 of the Defendant?

21 A. Yes, ma'am.

22 Q. Did you see him pull anything out of his pockets or
23 did you hear anything?

24 A. I observed him pulling a large roll of cash and lay it
25 on the rear of the vehicle.

1 Q. Could you hear any talk at that time?

2 A. No, ma'am. I don't recall any.

3 Q. What else, if anything, did you see?

4 A. Other officers were there. Detective Gardner
5 began talking to me about what was going on. He
6 stated that Mr. Hewins said that he was visiting
7 someone in one of the rooms. And I went up to the
8 hotel desk, main desk, to consultant to see if there
9 was someone, in fact, in that room and to get their
10 information.

11 Q. And did you then, in fact, do any investigation on
12 that room?

13 A. Yes, ma'am.

14 Q. Did you go to the room?

15 A. I did.

16 Q. Did you speak with someone?

17 A. Yes, ma'am. I made contact with a Shirmia Henderson,
18 a white female born in '76.

19 Q. What did you do once you finished talking to her? Did
20 you come back down to where Officer Gardner was?

21 A. Yes, ma'am.

22 Q. And did you participate in the search of the vehicle?

23 A. No, ma'am.

24 Q. Was that -- or do you recall, was that over by the
25 time you got back down or not, if you recall?

1 A. I remember observing officers conduct the searches of
2 both vehicles, but I don't remember the time frames.

3 Q. And did you write a report after this incident?

4 A. Yes, ma'am.

5 Q. And is your testimony that you're giving today based
6 on your recollection after having reviewed your report?

7 A. Yes, ma'am.

8 Q. And is there anything in the report that is correct or
9 incorrect?

10 A. In reviewing the report I had stated that I responded
11 there and saw -- observed Detective Gardner make contact
12 with Mr. Hewins. And then I made -- had placed in the
13 report his comments about who he was going to visit. At
14 that point I placed in the report that I had gone around to
15 the front desk and then I observed the Terry Frisk. The
16 chronological order may not be correctly written. It may
17 or may not be correct time. I am unsure.

18 Q. And would it be, based on the training of the officers
19 at the Greenville Police Department, that if there's
20 somebody out that they are concerned may have a weapon,
21 that they would go ahead and do a Terry Frisk right away?

22 A. With support, yes, ma'am.

23 Q. And, again, you said you were not close enough or did
24 not hear any conversation between Mr. Hewins and Officer
25 Gardner?

1 A. No, sir. No, ma'am. Sorry.

2 Q. But have you dealt with him on other occasions?

3 A. Yes, ma'am.

4 Q. And have you been his super -- at that time had you
5 been his supervisor?

6 A. Yes, ma'am.

7 Q. And what was your procedure with him when this sort of
8 incident would occur? Perhaps if there was a Terry Frisk
9 or a consent search, is there any procedure or protocol
10 that he is to do under your tutelage?

11 A. Yes, ma'am. All officers are trained per certain
12 procedures to obtain reasonable suspicion to determine
13 whether a search, Terry Frisk, is necessary. Prior to this
14 point, I had been supervisor over Detective Gardner for
15 approximately four plus months. I had, during my ridings
16 around, had heard him initiate several traffic stops and
17 several field interviews, had arrived on scenes to assist
18 him as a contact or as a cover officer while he was a
19 contact officer. Every time he felt he had reasonable
20 suspicion to conduct a Terry Frisk or search of a vehicle
21 or a moped, he normally -- always asked ---

22 MR. HARBIN: Judge, I would object. It sounds
23 like he's attempting to bolster Officer Gardner's judgment
24 somehow.

25 THE COURT: I sustain the objection.

1 MR. HARBIN: Thank you.

2 Q. After this incident were you -- did you continue as
3 his supervisor for some time?

4 A. I did.

5 Q. Thank you.

6 MS. MONTS: Nothing further.

7 CROSS-EXAMINATION

8 BY MR. HARBIN:

9 Q. Good afternoon, Sergeant.

10 A. Good afternoon, sir.

11 Q. It is your testimony right now that you arrived on
12 scene and immediately saw Officer Gardner conduct a Terry
13 Frisk. Is that my understanding of what testimony you just
14 gave?

15 A. Yes, sir. I observed him standing outside with
16 Detective Gardner.

17 Q. I hand you what has been previously marked as
18 Defendant's Exhibit Number 1. If you could take a look at
19 that and tell me if you know what that is?

20 A. Yes, sir. This is a copy of the CAD report from the
21 department computer system dispatch.

22 Q. From that report can you tell when Officer Gardner and
23 Officer Hall arrived on the scene?

24 A. Approximately twelve thirty-six a.m.

25 Q. From that report, can you tell when dispatch had you

1 arriving on the scene?

2 A. Dispatch has me called out at twelve forty-eight.

3 Q. Twelve, forty-eight. So twelve minutes after Officer
4 Hall and Officer Gardner arrived?

5 A. Yes, sir.

6 Q. Do you recall giving testimony in a separate
7 proceeding whereupon you were asked the order of events,
8 specifically relating to when you went to see management
9 and when you went to room two thirty-seven as it relates to
10 the timing of the Terry Frisk that you say you witnessed?

11 A. Yes, sir.

12 Q. And in that earlier proceeding, did you not give the
13 exact opposite recitation of the time line of events?

14 A. During the earlier testimony, I recited what was on my
15 report.

16 Q. And is your report -- when did you write that report?

17 A. It would have been that morning.

18 Q. So I guess technically it was the 9th after midnight,
19 so on the 9th as well; correct?

20 A. Yes, sir.

21 Q. Okay. And obviously you are not going to write
22 something that's false on your report. Is that correct?

23 A. Correct.

24 Q. Okay. And is your recollection better today or would
25 it have been better several hours after the incident?

1 A. It would have been better after the incident, yes,
2 sir.

3 Q. And do you dispute that your report basically has it
4 written that you arrived on scene, you saw Mr. Hewins
5 standing, not being frisked, but standing, then you made
6 contact with Officer Gardner?

7 A. Yes, sir.

8 Q. And subsequent to that contact with Officer Gardner,
9 Officer Gardner gave you information about room two thirty-
10 seven that you then investigated by going to the
11 management's office?

12 A. The report says that I made contact with Detective
13 Gardner and the next paragraph was that I went to the
14 office, yes, sir.

15 Q. And after going to the office, I believe you used that
16 information to do your own bit of investigation on your
17 computer in your car?

18 A. Yes, sir.

19 Q. Okay. Now, the only thing I'm confused about is why
20 the discrepancy on the report and what your testimony is
21 today?

22 A. As I recollected after the earlier testimony provided
23 and in reviewing my notes, the time frame seems to be out
24 of kilter. The report is not necessarily chronologically
25 -- may not be chronologically correct.

1 Q. And do you have those notes that you referred to with
2 you today?

3 A. No, sir.

4 Q. You do not?

5 A. No, sir. I don't recollect keeping any field notes
6 from that date.

7 Q. Okay. So what notes did you refer to to help you
8 recollect something that -- other than what was put on your
9 report?

10 A. The other officers' reports.

11 Q. The other officers' reports?

12 A. Yes, sir.

13 Q. So you used the other officers' reports to help you
14 recollect what was correct and not your own report? In
15 other words, not your notes, their notes?

16 A. Well, their reports, not their notes; correct.

17 Q. I'm sorry. Their reports, not your report. So
18 essentially you've convinced yourself that their report and
19 chronology is better than your chronology or more accurate,
20 yes or no?

21 A. No.

22 Q. So your chronology in your report is the truth?

23 A. Yes.

24 Q. And your report has you approaching Officer Gardner
25 while Mr. Hewins is standing, not handcuffed, not being

1 frisked, speaking to Officer Gardner, getting information,
2 going to the management, then going back to your car, then
3 coming back to report what you did or did not find out
4 about room two thirty-seven occupant, then witnessing the
5 Terry Frisk by Officer Gardner?

6 A. Yes, sir. That's what my report says.

7 Q. And that is what is true?

8 A. That's certainly the reflection of the report, yes,
9 sir.

10 Q. I'm asking you what's true, Officer?

11 A. It's been two and a half years, sir. I don't remember
12 the chronological events of the night specifically. Just
13 based on one other report from that evening.

14 Q. But you acknowledge that your report is very specific
15 in the chronology?

16 A. Yes, sir.

17 Q. And your report indicates specifically that you pulled
18 up, saw Mr. Hewins out of his car standing. And you made
19 contact with Officer Gardner while Mr. Hewins is standing.
20 Then you went to management to get information about the
21 occupant of room two thirty-seven based on the information
22 you'd gotten from Officer Gardner. Then went to you car.
23 then went all the way -- not all the way back. Then you
24 went back to Officer Gardner. Then your report says you
25 witnessed the Terry Frisk?

1 A. Yes, sir, that's what the report says.

2 MR. HARBIN: One moment, Judge. No further
3 questions.

4 Thank you, Officer.

5 THE COURT: Any reply or ---

6 MS. MONTS: No, Your Honor.

7 THE COURT: You may step down.

8 If I could see the attorneys for a moment as far as
9 scheduling for the next witness.

10 (WHEREUPON, Ms. Monts and Mr. Harbin approached the
11 bar.)

12 THE COURT: Mr. Foreman, ladies and gentlemen, I
13 think this might be the best time for us to break. We have
14 another matter that we need to take care of today. And
15 rather than keeping you waiting and have testimony later
16 this afternoon, I think we'll just break now. As far as
17 scheduling purposes, I think it would be better for you to
18 be here at nine-thirty in the morning instead of nine
19 o'clock. That's when we usually start. Based on the
20 schedule that we have now, I think nine-thirty will be
21 better. I certainly anticipate we'll be ready to start
22 with you then and not keep you waiting at nine-thirty.

23 Yesterday, during qualification, one of you I think
24 had an appointment that needed to be met and I promised
25 that juror that I would do all I could to accommodate. I

1 don't know if the appointment could be rearranged or not.
2 But if that juror does need to make that appointment,
3 perhaps a statement to that effect or sort of a chronology,
4 again, using that word as to when the break would be need
5 to be, perhaps we can -- we'll do all we can to accommodate
6 that, to break a little earlier for lunch or whatever we
7 need to do. If it can't be worked out then please let the
8 bailiffs know and just write out a little statement to that
9 effect as to what time frame it is. And we'll do all we
10 can to accommodate that if we can.

11 If you'll be back at nine-thirty in the morning, we'll
12 be ready to start. Have a good evening. I remind you
13 again not to talk about the case, not to do any kind of
14 independent research or any social media. That's against
15 your oath. You've made a high commitment. We're in the
16 middle of the trial. Everything you're going to need to
17 know to make a decision in this case is going to come in
18 this courtroom. These attorneys, I'm sure, are going to
19 give you the information you need and not some other
20 source. That's your commitment to them. I know you'll
21 fulfill that.

22 Have a good evening ladies and gentlemen. I'll see
23 you back in the morning at nine-thirty.

24 (WHEREUPON, the jury exited the open court at
25 approximately 4:41 P.M.)

1 THE COURT: I'm going to sort of take a break.
2 Y'all can just stay where you are. I need to find out from
3 the solicitor's office about tomorrow's docket and what we
4 need so that we can tell the jury when they call back
5 tonight. So if y'all will just be at ease for a moment,
6 we'll talk about anything we need. Don't leave.

7 But see if Mr. Marchant can come over and see what
8 tomorrow's docket looks like.

9 (WHEREUPON, the court stood at recess for a short
10 break.)

11 MR. HARBIN: Judge, may I address the Court?

12 THE COURT: Yes, sir. Just a moment. Let me
13 write down something about our schedule for tomorrow that
14 Lucas just shared with me.

15 MR. HARBIN: Yes, sir.

16 THE COURT: All right. Since we were late in the
17 afternoon I thought it'd be a good time to break to see if
18 we have any chain of custody issues as far as which
19 witnesses were coming and so forth. Mr. Harbin, I'll be
20 glad to hear from you?

21 MR. HARBIN: Judge, may it please the Court.
22 I've been handed by the Solicitor's office what appears to
23 be what I might describe as a complete or a more complete
24 property and evidence report. In my discovery requests and
25 basically my discovery came from Mr. Chambers. I believe

1 they complied with discovery requests from Mr. Chambers and
2 I received his file. But I didn't receive anything past
3 that, nothing updated, in relation to this property and
4 evidence sheet. And this property and evidence sheet that
5 I was just handed has, well, everything that happened to
6 the drugs after August 9th, 2010. It would be my position,
7 Judge, that this would be a Rule 5 violation and at this
8 point I would move for a dismissal or mistrial.

9 THE COURT: All right. Now, tell me again what
10 is -- what have you received now that you didn't have
11 before?

12 MR. HARBIN: Yes, sir. The property and evidence
13 report that I had received during the course of discovery
14 describes, and I can say this while showing the Solicitor
15 so we can be on the same page, describes Officer Gardner's
16 deposit of the drugs into the drop box. And then it
17 appears to have Mr. Israel Flounders' signature, that he
18 would have taken the drugs from the drop box to the
19 property and evidence room. Now, in the sheet that I just
20 received, it has one, two, three, four, five, six, seven --
21 well, actually -- six more actions either taking or putting
22 back to a person or a drop box or property and evidence.

23 THE COURT: All before the analysis by the
24 chemist?

25 MR. HARBIN: No, sir. This is post analysis.

State of South Carolina -vs- Erick E. Hewins (2010-GS-23-8295 and 8296)
Ben Cothran - Cross Examination by Mr. Harbin

267

1 But I will say that the actual signing out of the drugs
2 that is on the sheet that I received just now, was not on
3 the sheet that I was given during discovery.

4 THE COURT: The signing out of the drugs. On
5 what date was that? When was the analysis done? Was it
6 done in 2010?

7 MR. HARBIN: 2010, Judge. It appears to be
8 approximately a month later. James Armstrong signs it out
9 of the lab -- or, I'm sorry -- signs it out of P&E and it
10 appears to be September 8th at 8:30 in the morning.

11 THE COURT: When is the next activity after the
12 chemist Armstrong?

13 MR. HARBIN: After the chemist would be two days
14 later, September 10th at four-thirty in the afternoon.

15 THE COURT: All right. And then who got it then?

16 MR. HARBIN: He gave it back to Ms. Bennick.

17 THE COURT: Okay. So that's still part of that
18 analysis. I would consider that for my purposes of trying
19 to figure out. So Armstrong analyzed it and then gave it
20 back to Bennick?

21 MR. HARBIN: To P&E, yes, sir.

22 THE COURT: All right. And then what happened
23 next? That was like -- still in September?

24 MR. HARBIN: That's correct. It actually sits
25 there, it looks like for a solid two years, until September

1 10th, 2012, if I'm reading this correct, whereupon, Officer
2 Gardner checked it out for State Court.

3 THE COURT: All right. For State Court. All
4 right. So that would have been for the earlier trial, I
5 assume?

6 MR. HARBIN: I assume the same, Judge.

7 THE COURT: And, again, I know we had talked
8 about this, I think all on the record. There has been a
9 previous trial, Judge Hyman tried last fall. And so you're
10 saying that you did not have that chain relating -- are all
11 the other entries relating to that trial or are there other
12 entries or do you know that?

13 MR. HARBIN: Well, I'm not -- if you wouldn't
14 mind rephrasing the question, I'm sorry.

15 THE COURT: Did you know -- maybe the Solicitor
16 could better clarify as to what the other entries that you
17 didn't have relate to from Armstrong's analysis back to
18 P&E. You say there's five or six more since then starting
19 last September?

20 MR. HARBIN: That's correct.

21 THE COURT: Two years later?

22 MR. HARBIN: Well, I mean, I can honestly tell
23 you that I don't know that I had, at least in this format,
24 I didn't have any of it. I didn't have that information
25 because it wasn't there. Now, if you're asking what that

1 information entailed, it obviously entailed who had
2 possession and custody and control of the drugs at the
3 time. Obviously, at some point Officer Gardner had to
4 check them out for Court and put them back. Those are two
5 of the events. And so ---

6 THE COURT: So are those issues that you feel,
7 because you didn't have that information, you're prejudiced
8 because of not having that?

9 MR. HARBIN: Judge, two things. Number one, I do
10 want to reiterate my earlier objection to the -- or I'm not
11 sure if objection is the appropriate ruling. But, of
12 course, we would take the position that everybody in the
13 chain has to be here. And this, of course, would actually
14 tell us who all those people in the chain were should we
15 wish to actually interview them or whoever it might be, if
16 you want to go that far. The other issue that I will tell
17 you that -- and I share with my client, is that one of his
18 main concerns in this is that the -- at the last trial,
19 there were two absent witnesses, I believe. And in this
20 trial there maybe two, there maybe less. I don't know who
21 she has available to testify. But simply the lack of a
22 physical chain of evidence with present witnesses, Judge,
23 is our concern. That we feel that it's not only violative
24 of Rule 6 and his demand for witnesses to be present, but
25 because coupled with -- I guess if you want to put that on

1 top of that issue -- that we didn't receive this. It's,
2 you know, kind of one thing after the other, Judge.

3 THE COURT: All right. Solicitor, let me hear
4 from you as far as the number one, why was it not given to
5 the Defense counsel and who are the added names that relate
6 to the chain of custody?

7 MS. MONTIS: Yes, Your Honor. And at this point
8 in the property and evidence, they were turning their
9 system over from the handwritten sheets to the bar code
10 computer printout sheets. Mr. Harbin was given through the
11 last trial on September 10th and 11th, the property and
12 evidence chain sheet, which was a bar code typed sheet.
13 That was through the drug analysis of James Armstrong and
14 it being returned to the lab on September 10th of 2010. So
15 that was not the handwritten sheet, but it was the bar code
16 sheet. And we can make copies of these for the record if
17 necessary, Your Honor.

18 THE COURT: So the bar code is consistent with
19 the handwritten sheet?

20 MS. MONTIS: Yes, Your Honor. Yes, Your Honor.

21 THE COURT: All right.

22 MS. MONTIS: What he had not been given, and I did
23 not give until today, was the handwritten sheet, which is
24 kept with evidence at the property and evidence room, from
25 the time of the trial on September 10th of -- excuse me --

1 September 11th, 2012. That trial was September 11th and
2 September 12th of 2012. So what Mr. Harbin just got today,
3 as well as I got today, but I did have access because it
4 was in the property and evidence room, was when the drugs
5 were checked out for the trial on September 10th of 2012 by
6 Scott Gardner. It was returned on September 11th of 2012
7 by Scott Gardner into the property and evidence room. And
8 an employee at the property and evidence room, Melanie
9 Watson, took it from the drop box and put it into the
10 property and evidence storage area on September 12th of
11 2012.

12 Officer Kern with the Greenville Police Department
13 checked it out on January 7th of this year. Excuse me. He
14 only checked out the cell phone on January 7th of this year
15 so he could look at the cell phone. And then Melanie
16 Watson checking that back in on January 10th. So what
17 Officer Kern checked out on January 7th and was returned on
18 January 10th was just the cell phone.

19 But all of these inputs are the officer checking it
20 out for the trial September 11th of 2012 and then it being
21 returned back after that time. And the State would also
22 put on the record, Your Honor, as far as the chain, that it
23 has been -- that the law is that it must be complete
24 through the time of analysis. And we would base that on
25 the Cochran case, which says -- it's a DUI case talking

1 about blood, which it says that the chain must be complete
2 through the time of analysis. And the defense attorney did
3 have that. The only things that he got today were the
4 times that the drugs were -- and all the other items were
5 taken out for the prior trial and then returned. And we
6 will have all of those -- expect to have all of those
7 witnesses here tomorrow, Your Honor. The only one we will
8 not have is Israel Flounders.

9 THE COURT: All right. I believe from the
10 beginning the motion made by the Defendant, which the
11 Solicitor acknowledged that there would be no mention of
12 the prior trial. And everybody, the officers that have
13 testified, everybody's been good about not bringing that
14 up, just prior proceedings as Mr. Harbin asked his
15 questions. I gather that these additional names, except
16 for the phone, we can address that later, and movements of
17 the exhibits are all relating to it coming to court and
18 going back from court last September. Is that -- would you
19 disagree with that, Mr. Harbin?

20 MR. HARBIN: I believe that it would be a correct
21 statement to say that the additional information on the
22 newly handed over sheet would be the comings and goings of
23 the drugs and where they were from the moment from which
24 the chemist -- post analysis, if that's what you're asking,
25 yes, sir.

1 THE COURT: And, Solicitor, I understand all
2 those witnesses will be testifying tomorrow?

3 MS. MONTIS: Yes, sir. Yes, Your Honor.

4 THE COURT: From the chain of last September?

5 MS. MONTIS: Yes, Your Honor. And now I can
6 recall Officer Gardner about checking them out for the
7 prior trial. I did not ask him about those.

8 THE COURT: For that chain. And, again, all of
9 those witnesses will be notified to just talk about that
10 they were moved for a proceeding, needed to be at court. I
11 don't know whether the word -- to say court or not or just
12 hearing or proceeding. Are there any words now that would
13 jeopardize that? Is the chain going to be offered into
14 evidence, the document?

15 MR. HARBIN: Well, I can tell you if it is, I
16 don't see anything objectionable that a juror could read.

17 THE COURT: Okay. As far as saying court or
18 anything like that, okay.

19 MS. MONTIS: And, Your Honor, I would not plan to
20 enter it. I believe it just says state. It's very hard to
21 read, but I believe it says state case, I believe. But we
22 would not try to enter it.

23 THE COURT: State case. All right. So is the
24 officer who took the phone separate from the others in the
25 chain of custody? Or would he be testifying as to --

1 whatever officer took the phone, is he different from those
2 in the chain for the drugs?

3 MS. MONTIS: Yes, Your Honor. And I can have him
4 here if necessary.

5 THE COURT: If the document is not going in,
6 would you want that person here since it's not dealing with
7 the drugs.

8 MR. HARBIN: Specifically the person that signed
9 out the cell phone?

10 THE COURT: Right.

11 MR. HARBIN: If in the event Ms. Monts would like
12 to introduce those screen shots or whatever ---

13 THE COURT: Okay.

14 MR. HARBIN: --- then I believe that it would
15 only be appropriate if she had the proper foundation.

16 THE COURT: All right. Somebody who can just put
17 that in for the phone anyhow then. All right. I still
18 understand, Mr. Harbin, you're objecting to the chain and
19 the Rule 6 and otherwise. And I gather that only one
20 witness is not going to be called in the chain?

21 MS. MONTIS: That's correct, Your Honor.

22 MR. HARBIN: Judge, for my client's benefit, I
23 want to reiterate our objection to allowing them to go
24 forward without calling Mr. Flounders. Just so that
25 everybody's clear.

1 THE COURT: Right. Yeah. You're certainly
2 protected on that. So the only newness in the chain is
3 relating to the prior trial?

4 MS. MONTS: Yes, Your Honor.

5 THE COURT: All right.

6 MS. MONTS: As far as the handwritten sheet, I
7 believe the drugs being checked out by James Armstrong,
8 who's the chemist, and returning them, were on the tab --
9 excuse me -- bar coded typed computer form that Mr. Harbin
10 did have.

11 THE COURT: Okay.

12 MS. MONTS: So I do believe that all the changes
13 that he's now ---

14 THE COURT: Well, obviously, Mr. Chambers --
15 perhaps it would have been good to have had Mr. Harbin get
16 that information. Obviously, if Mr. Chambers was aware of
17 that chain since he was participating in the other trial.
18 Make sure that Mr. Harbin and Mr. Hewins has all the
19 documents that you now have that you got today, Ms. Monts.
20 And we'll be ready to proceed with that testimony tomorrow.
21 Again, warning your officers to not talk about a prior
22 trial, just to talk about the prior hearing or proceeding
23 or whatever.

24 All right. Anything else we need to take care of?

25 All right. If y'all can be here at nine o'clock in the

1 morning just in case we have some other things we need to
2 take care of before, so that we won't delay the jury in
3 other matters. We can address those then. So we'll be at
4 ease until nine o'clock in the morning. I'm denying your
5 motion for a mistrial, obviously, Mr. Harbin.

6 MR. HARBIN: Yes, sir, thank you.

7 (WHEREUPON, court stood at recess for the day.)

8 **January 16, 2013**

9 (WHEREUPON, Court convened with all parties present
10 and the following proceedings were had.)

11 (WHEREUPON, State Exhibit Number 9 was marked for
12 identification.)

13 THE COURT: Are they ready for the jury? Ms.
14 Monts, are we ready for the jury?

15 MS. MONTS: Yes, sir.

16 THE COURT: All right. You can have them come in
17 if they're ready.

18 (WHEREUPON, the jury entered the open court at
19 approximately 9:39 A.M.)

20 THE COURT: Good morning, ladies and gentlemen.
21 We're now ready to proceed.

22 Solicitor, you may call your next witness.

23 MS. MONTS: Your Honor, the State calls Kara
24 Bennick.

25 THE CLERK: Ms. Bennick, would you please place

1 your left hand on the bible and raise your right hand.

2 Do you solemnly swear or affirm that the testimony
3 you're about to give is the truth, the whole truth and
4 nothing but the truth, so help you God?

5 THE WITNESS: Yes, ma'am.

6 THE CLERK: Thank you. You may be seated.
7 Please state your name for the record.

8 THE WITNESS: Kara Bennick.

9 KARA BENNICK,

10 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

11 DIRECT EXAMINATION

12 BY MS. MONTS:

13 Q. Ms. Bennick, please tell the jury where you're
14 employed?

15 A. The Greenville County Department of Public Safety, the
16 property and evidence room.

17 Q. And what is your title and what was your training for
18 that position?

19 A. I'm the supervisor of the evidence room. I've been
20 with Greenville County for fifteen years and I've been in
21 that department for nine. We go to various training
22 courses and stuff like that in that area.

23 Q. And what are your duties in that position?

24 A. In addition to being a supervisor, I also maintain the
25 care, custody and control of incoming evidence.

1 Q. And describe what the property and evidence room is?

2 A. The property and evidence room is the location where
3 the officers that are submitting any kind of property or
4 evidence that relates to a case that has to be secured, and
5 that is where they bring it. And we are the ones that
6 secure that evidence.

7 Q. And describe exactly where it's located and the
8 procedure when officers come and bring evidence?

9 A. It's located in the basement of the law enforcement
10 center. It is a secured location that only four people
11 have unlimited access to, and that would be the four full-
12 time property and evidence clerks. We have, in addition to
13 key control, we also have cameras that monitor everything.
14 We have swipe cards that allow us access to different
15 areas, as well as key control. And everything is monitored
16 24/7 by cameras.

17 Q. And when an officer gets evidence both while the
18 office is open and afterwards, can you describe the
19 procedures that they would bring evidence?

20 A. If an officer brings evidence down during business
21 hours, he would turn it into one of the property clerks
22 that's on duty. If he brings it in after business hours,
23 then it would go to a controlled and secured drop box or
24 evidence locker, depending on the size of the item.

25 Q. And if it's during work hours what is the procedure

1 for the officer and the clerk at the property and evidence
2 room?

3 A. They would fill out a property and evidence report. A
4 property and evidence report accompanies everything that
5 comes into the facility. The officer would fill that out.
6 We would verify the inventory of it. We would then sign
7 for the property and go ahead and put it where it needs to
8 go, as far routing, whether it's going to be tested or put
9 into a location or whatever may happen with it.

10 Q. And can an officer get evidence back out?

11 A. The only way for him to get it back out is one of the
12 clerks will pull it for him, he will come to the counter,
13 and he will sign for it.

14 Q. And can people just walk in or how secure is that
15 location?

16 A. No, ma'am. It's all secured. Nobody can get inside
17 without swipe cards and everything's controlled.

18 Q. So when an officer's speaking to a clerk, is it
19 through a window or how is that?

20 A. It's through a window, a counter window.

21 Q. And if it's after hours -- and what are the hours?

22 A. We're there Monday through Friday from seven A.M. to
23 six P.M.

24 Q. And if it's after the office is closed, describe what
25 they do at the drop box and where that's located?

1 A. It's actually located inside the property and evidence
2 secured area, but they put it through a slot that goes into
3 a drop box or into a secured locker if the item is too big
4 for the drop box. And that's located right outside the
5 evidence office.

6 Q. And what is the procedure for your office to get items
7 out of there?

8 A. When we come in the following morning, everybody's
9 assigned to a duty and you would remove the evidence from
10 the locker or the drop boxes, wherever it is, and we would
11 then inventory off that property and evidence sheet and
12 sign for it.

13 Q. And when you have drugs or other fungible or malleable
14 evidence, what condition must it be in for you to accept
15 it?

16 A. There are protocols for all incoming evidence. In the
17 particular case of drugs, they must be sealed upon entry
18 into property and evidence. If they're not, then we will
19 not accept them. They will be staged and the officer will
20 be called back immediately to re-inventory and re-do
21 everything.

22 Q. And what type of seal are you referring to?

23 A. In most cases, a heat seal.

24 Q. And would you be able to tell if that had been
25 tampered with?

1 A. Yes, ma'am.

2 Q. And does the officer have to put any markings on the
3 items?

4 A. Yes, ma'am. He has to put the case number and the
5 date and his initials.

6 Q. And specifically in this case, 02-2010-67312, did
7 evidence come into the property and evidence room?

8 A. Yes, ma'am.

9 Q. And in this case Scott Gardner was the originating
10 officer?

11 A. He was.

12 Q. And brought evidence to the drop box on August 9th of
13 2010 as was previously testified to. Who got the evidence
14 out of the drop box?

15 A. The items were removed from the drop box by Israel
16 Flounders.

17 Q. And who is Israel Flounders?

18 A. He is a former property and evidence clerk.

19 Q. And was he -- were you his supervisor?

20 A. I was.

21 Q. And did he sign a form?

22 A. He did.

23 Q. And you can observe that that is his signature?

24 A. Yes, ma'am.

25 Q. And where is he now, today?

1 A. My understanding is he's away on military duty.

2 Q. And do chemists come and check items out of the
3 property and evidence room to analyze?

4 A. Yes, ma'am.

5 Q. And is James Armstrong one of those?

6 A. He is.

7 Q. And in this case did he come and check the two items
8 out to be analyzed?

9 A. He did.

10 Q. And what would be a chemist's procedure in order to
11 get items out and take custody of them?

12 A. The chemist would come down to the counter and he
13 would request cases. He doesn't specific what cases. We
14 have a staging area where those cases are kept. We will
15 bring them out to him, basically in date order, and he will
16 check them out at the counter. He has to sign for them.

17 Q. And when Israel Flounders picked them items out of the
18 drop box and secured them, all the while they are within a
19 secured area. Is that correct?

20 A. Yes, ma'am.

21 Q. Ms. Bennick, I'm going to hand you State's Exhibits 4,
22 5, 6, 7, 8, and 3. Can you identify these as having been
23 items that came into the property and evidence room?

24 A. Yes, ma'am.

25 Q. And how can you do that?

1 A. These are the bags that our section uses to secure
2 drugs and items and those are our envelopes.

3 Q. And in this case after the item was checked out from
4 Mr. Armstrong, was it checked back in?

5 A. It was.

6 Q. And who was the custodian in your office who checked
7 that back in?

8 A. I was the one that checked it back in.

9 Q. And what date was that?

10 A. That was on September 10th of 2010.

11 Q. At what time?

12 A. Sixteen-thirty.

13 Q. And on this sheet, are there other employees that were
14 or are supervisor on this form?

15 A. Yes, ma'am.

16 Q. Who would those other people be?

17 A. Melanie Watson.

18 Q. Was Tabitha Fricks also an employee of you?

19 A. Tabitha Fricks is my employee, yes.

20 Q. And what does an officer need to do to check them out
21 to bring them for hearings or court proceedings?

22 A. They come to the counter, request the case number and
23 the items that they want. We will pull them for them, and
24 they sign for them to take them into their custody.

25 Q. Thank you.

1 MS. MONTS: I have no further questions.

2 MR. HARBIN: May it please the Court, Judge?

3 THE COURT: Yes, sir. You may cross-examine the
4 witness.

5 CROSS-EXAMINATION

6 BY MR. HARBIN:

7 Q. Ms. Bennick, you said that you were the P&E
8 supervisor?

9 A. Yes, sir.

10 Q. So basically you run the show?

11 A. Yes, sir.

12 Q. Can you tell the jury why -- what's the purpose of
13 signing for each individual taking in and taking -- putting
14 in and taking out?

15 A. It's the maintenance of a chain of custody. The
16 movement of the item is logged so everywhere it goes, it's
17 kept track of.

18 Q. Sure. And why is it important to keep track of
19 exactly where this is going and who has it?

20 A. To maintain the integrity of the evidence.

21 Q. Okay. And so that's why you develop particular
22 protocols?

23 A. Yes.

24 Q. Okay. And one of the protocols, as you've already
25 said, is to sign in and out when you do and when you bring

1 it back?

2 A. That's correct.

3 Q. Okay. And is it the normal course of business or a
4 protocol to sign an affidavit or anything like that that
5 verifies that, in fact, not only did you take the drugs out
6 and put them back in, but they are the same now when you
7 put them back in as when you took them out?

8 A. There have been instances that we've had to do that,
9 but we don't do it for every case.

10 Q. And in this case that was not done. Is that correct?

11 A. No, sir.

12 Q. And the Assistant Solicitor asked you about an
13 employee named Israel Flounders that is no longer employed
14 there. That I believe it was your testimony that he
15 actually removed the deposit from the drop box and actually
16 he's the one that logged them in. Is that your testimony?

17 A. That's correct.

18 Q. Okay. And your testimony is not that you witnessed
19 him remove them from the drop box nor did you witness him
20 log in anything in the P&E room; correct?

21 A. I couldn't tell you if I was actually present in the
22 room that day, that moment.

23 Q. And even if you were, you wouldn't have had the
24 opportunity to actually memorize which case number it was?

25 A. No.

1 Q. Okay. So you can't -- essentially, you can't verify
2 the actions of Mr. Flounders?

3 A. No, sir.

4 MR. HARBIN: No further questions.

5 Thank you, Ms. Bennick.

6 THE COURT: Any redirect?

7 MS. MONTS: No, Your Honor.

8 THE COURT: All right. Thank you. You may step
9 down.

10 Ladies and gentlemen of the jury, when I called the
11 names of witnesses that might potentially testify on
12 Monday, I failed to mention one name and that would be
13 Melanie Watson. Is there any member of the jury panel
14 related by blood or marriage to a Melanie Watson or have a
15 close business or social, knows Melanie Watson. If so,
16 would you raise your hand? Thank you. There is no
17 response. All right. You may call your next witness.

18 MS. MONTS: Your Honor, the State calls Tabitha
19 Fricks.

20 THE CLERK: Ms. Fricks, please come forward to be
21 sworn in. Would you please place your left hand on the
22 bible and raise your right .

23 Do you solemnly swear or affirm that the testimony
24 you're about to give is the truth, the whole truth and
25 nothing but the truth, so help you God?

1 THE WITNESS: I do.

2 THE CLERK: Thank you. You may be seated.

3 Please state your name for the record.

4 THE WITNESS: Tabitha Fricks.

5 TABITHA FRICKS,

6 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

7 DIRECT EXAMINATION

8 BY MS. MONTS:

9 Q. Ms. Fricks, please tell the jury where you're employed
10 and what your duties are?

11 A. I'm employed at the Greenville County Department of
12 Public Safety, forensic division, property and evidence
13 section.

14 Q. And what are your duties there?

15 A. I maintain the care, custody and control of evidence
16 that comes in through our department.

17 Q. And is Ms. Bennick your supervisor?

18 A. She is.

19 Q. And do you do some of the duties that she mentioned as
20 far as checking evidence out to officers and chemists?

21 A. I do.

22 Q. And in this case of 02-2010-67312 did you check out
23 items to be analyzed by the drug lab?

24 A. I did.

25 Q. And what is your procedure in doing that?

1 A. When the chemist comes down to the counter to request
2 cases for testing, we will go into a secured area, pull
3 however many cases, according to oldest date first, bring
4 them out to the counter and they will then sign for
5 physical custody of those items.

6 Q. And in this case did you check these items out --
7 excuse me -- did you check out two of these items or the
8 items to James Armstrong?

9 A. I did.

10 Q. And in addition to the crack cocaine and the pills,
11 would other items have gone along with these items?

12 A. Yes.

13 Q. And why is that?

14 A. If they're on the same P&E sheet, it all travels
15 together just to keep all of the items together.

16 Q. And in this case would that include some marijuana
17 that was unrelated, that was in the other vehicle, the
18 Advil bottle, a metal scale and a cell phone?

19 A. Yes.

20 Q. And all of those items would have stayed with the
21 crack and the pills?

22 A. Yes.

23 Q. And what date did you check them out to Mr. Armstrong?

24 A. On September 8th, 2010, at nine-oh-seven in the
25 morning.

1 Q. And how would he have done that -- would he have been
2 allowed inside the property and evidence room?

3 A. No, he has to stand outside.

4 Q. Thank you.

5 MS. MONTS: No further questions.

6 MR. HARBIN: Just briefly, Your Honor.

7 THE COURT: Yes, sir. You may cross-examine.

8 **CROSS-EXAMINATION**

9 **BY MR. HARBIN:**

10 Q. Ms. Fricks, just one single question. Did you witness
11 Mr. Flounders retrieve this case number of evidence from
12 the drop box and/or did you witness him log that case
13 number into property evidence?

14 A. I would not be able to specify whether I did or not.

15 Q. Thank you.

16 MR. HARBIN: No further questions.

17 THE COURT: All right. Thank you, ma'am. You
18 may step down.

19 You may call your next witness, Solicitor.

20 MS. MONTS: Your Honor, the State calls Scott
21 Gardner.

22 THE COURT: Mr. Gardner, let me remind you,
23 you're still under oath. If you would, please, take the
24 witness stand.

25 THE WITNESS: Yes, sir.

1 SCOTT GARDNER,

2 HAVING BEEN PREVIOUSLY SWORN, TESTIFIED AS FOLLOWS:

3 DIRECT EXAMINATION

4 BY MS. MONTS:

5 Q. Investigator, in addition to having, as you previously
6 testified, dropping the drugs and these other State's items
7 3, 4, 5, 6, 7, and 8 into the drop box on August 9th, did
8 you previously have an occasion to check them out from the
9 property and evidence room?

10 A. Yes, ma'am.

11 Q. And what date was that?

12 A. September 10, 2012, at ten fifty-six.

13 Q. And was that for a previous court hearing that
14 required these items?

15 A. Yes, it was.

16 Q. And did you keep them in your custody and return them?

17 A. Yes, I did.

18 Q. And what date did you return them to the property and
19 evidence room?

20 A. I returned them on September 11th at eighteen twenty-
21 four, which would be six twenty-four P.M.

22 Q. And then, as you previously testified for court
23 earlier this week, did you check the items out of the
24 property and evidence room?

25 A. Yes, I did.

1 Q. And what date was that?

2 A. That was on January the 14th at nine-ten A.M. in the
3 morning.

4 Q. And you brought them here to court with you?

5 A. Yes, I did.

6 Q. Thank you.

7 MS. MONTS: No further questions.

8 THE COURT: You may cross-examine the witness.

9 MR. HARBIN: I apologize Judge. I was consulting
10 with my client.

11 **CROSS-EXAMINATION**

12 **BY MR. HARBIN:**

13 Q. Officer Gardner, just real quick. I believe your
14 previous testimony was that as soon as basically you were
15 finished with that incident on the night of August 9th you
16 went and dropped the evidence into the drop box. Is that
17 right?

18 A. That is correct.

19 Q. Now, when you did that, you didn't hand that directly
20 to Mr. Israel Flounders; did you?

21 A. No, I didn't.

22 Q. And so you can't really verify what happened -- your
23 responsibility is to get it to the drop box?

24 A. That's correct.

25 Q. And so you don't have any specific knowledge of what

1 happens after it goes into the drop box?

2 A. No, I don't.

3 Q. Thank you.

4 MR. HARBIN: No further questions.

5 THE COURT: Thank you, sir. You may step down.

6 THE WITNESS: Thank you, sir.

7 THE COURT: You may call your next witness.

8 MS. MONTS: Your Honor, the State calls Melanie
9 Watson.

10 THE CLERK: Ms. Watson, please come forward to be
11 sworn in.

12 Do you solemnly swear or affirm that the testimony
13 you're about to give is the truth, the whole truth and
14 nothing but the truth, so help you God?

15 THE WITNESS: Yes, I do.

16 THE CLERK: Thank you. Would you please state
17 your name for the record.

18 THE WITNESS: Melanie Watson.

19 MELANIE WATSON,

20 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

21 DIRECT EXAMINATION

22 BY MS. MONTS:

23 Q. Ms. Watson, please tell the jury where you're employed
24 and what your duties are?

25 A. Greenville County. I'm in the public safety

1 department in property and evidence.

2 Q. And is Ms. Bennick your supervisor?

3 A. Yes, she is.

4 Q. And is Ms. Fricks a co-worker?

5 A. Yes, she is.

6 Q. And is part of your duties checking in evidence and
7 checking evidence out to chemists and to law enforcement?

8 A. Yes, ma'am.

9 Q. And in this case, 02-2010-67312, did you have occasion
10 to check evidence either in or out?

11 A. Yes, ma'am.

12 Q. And what date was that on?

13 A. 9/12/2012, at seven-thirty in the morning.

14 Q. And where did you get that evidence from?

15 A. I got it out of the drop box.

16 Q. And what did you do with it once you got the evidence
17 from the drop box?

18 A. After it's removed from the drop box, I verify its
19 contents. I sign that I have received it. And if any
20 items are sealed, I also make note of that. And then I
21 place it in its proper location for storage.

22 Q. And in this case, did you, in fact, make a note that
23 some of the items were sealed?

24 A. Yes, ma'am. We always make note if the drugs are
25 sealed.

1 Q. And in this case you did make a note that the drugs
2 were sealed?

3 A. Yes, ma'am.

4 Q. And was there another occasion that you checked out
5 only one item?

6 A. (No verbal response).

7 Q. I'm sorry, checked in? I'm sorry.

8 A. Yes, ma'am.

9 Q. Did you check an item back in?

10 A. Yes, ma'am. I checked in item 1-10-13.

11 Q. Okay. What item was that?

12 A. That would have been item SC12.

13 Q. And is SC12 the cell phone?

14 A. The cell phone.

15 Q. Which is State's Exhibit 8?

16 A. Yes, ma'am.

17 Q. And where would you have gotten the cell phone from?

18 A. This one came from Officer Kerns.

19 Q. So he directly handed you the item?

20 A. Yes, ma'am.

21 Q. It did not go through the drop box?

22 A. Over the counter, uh-huh (affirmative.)

23 Q. And I'm sorry, where did you place it once that cell
24 phone was checked back in?

25 A. I put it back into its storage area, which is in the

1 secured vault.

2 Q. Thank you.

3 MS. MONTIS: No further questions.

4 **CROSS-EXAMINATION**

5 **BY MR. HARBIN:**

6 Q. Ms. Watson, I apologize for the redundant question,
7 but can you give us any testimony as to what Mr. Flounders
8 did with the evidence from the drop box the night of this
9 incident?

10 A. No, sir.

11 Q. Thank you.

12 MR. HARBIN: No further questions.

13 THE COURT: Thank you. You may step down.

14 You may call your next witness.

15 MS. MONTIS: Your Honor, the State calls David
16 Kern.

17 THE CLERK: Mr. Kern, please come forward to be
18 sworn in. Please place your left hand on the bible and
19 raise your right.

20 Do you solemnly swear or affirm that the testimony
21 you're about to give is the truth, the whole truth and
22 nothing but the truth, so help you God?

23 THE WITNESS: Yes, I do.

24 THE CLERK: Thank you. You may be seated.

25 Please state your name for the record.

1 THE WITNESS: My name is David Kern.

2 DAVID KERN,

3 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

4 DIRECT EXAMINATION

5 BY MS MONTS:

6 Q. Investigator, please tell the jury where you're
7 employed?

8 A. I'm employed with the Greenville Police Department in
9 the detective division.

10 Q. And how long have you been there?

11 A. Fourteen years.

12 Q. And describe what units you've been assigned to with
13 the Greenville Police Department.

14 A. I was on uniform patrol for approximately nine years.
15 I worked in vice and narcotics for approximately three.
16 And for the past two years I've been at the law enforcement
17 center under the white collar section. My main duties are
18 computer crimes and internet crimes.

19 Q. And were you asked to assist in the investigation on
20 this case?

21 A. Yes, ma'am.

22 Q. And did you have occasion to check out one item in
23 this case from the law enforcement center property and
24 evidence room?

25 A. Yes, ma'am. On January the 7th I received a search

State of South Carolina -vs- Erick E. Hewins (2010-GS-23-8295 and 8296)
David Kern - Direct Examination by Ms. Monts

297

1 warrant and I did take the cell phone out from Ms. Watson.
2 I'm sorry. I returned it to Ms. Watson. I don't know who
3 I actually got it from, but I did check it out of the
4 evidence room on the 7th.

5 Q. And describe the procedure when you check something
6 out?

7 A. I go down to the property and evidence room with a
8 case number. I request that specific item. They retrieve
9 it, hand it to me, and I do have to sign for it.

10 Q. And the cell phone is what Officer Gardner labeled
11 SC12, and the court's exhibit number would be State's
12 Exhibit 8? It should be in front of you there.

13 A. Yes, ma'am.

14 Q. I'm sorry did you -- what date did you return it?

15 A. On the 10th, January the 10th.

16 Q. And that was, again, to the property and evidence
17 room.

18 A. Yes, ma'am.

19 Q. Thank you.

20 MS. MONTS: No further questions.

21 MR. HARBIN: No questions for this witness,
22 Judge.

23 THE COURT: Thank you. You may step down Officer
24 Kern.

25 You may call your next witness.

1 MS. MONTS: And, Your Honor, that would be all
2 the witnesses on this issue.

3 THE COURT: All right.

4 MS. MONTS: The next witness would be James
5 Armstrong.

6 THE COURT: Come around and be sworn, please,
7 sir.

8 THE CLERK: Mr. Armstrong, would you come
9 forward, please.

10 Do you solemnly swear or affirm to tell the truth, the
11 whole truth and nothing but the truth, so help you God?

12 THE WITNESS: Yes, ma'am, I do.

13 THE CLERK: Thank you. You may be seated.
14 Please state your name for the record.

15 THE WITNESS: James William Armstrong.

16 JAMES ARMSTRONG,

17 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

18 DIRECT EXAMINATION

19 BY MS. MONTS:

20 Q. Mr. Armstrong, please tell the jury where you're
21 employed?

22 A. I'm employed with the Greenville County Department of
23 Public Safety, forensics division, crime laboratory.

24 Q. Please describe your education?

25 A. I have a Bachelor of Science Degree in Chemistry from

1 Erskine College. I've trained in the area of drug
2 identification for approximately one year under the
3 direction of the lab supervisor. I've attended numerous
4 instrumental and analysis schools concerning the
5 instruments I use in my analysis. And I've testified in
6 federal, state and local courts as an expert in the field
7 of drug identification at least a hundred and fifty-eight
8 times.

9 MS. MONTS: Your Honor, the State would offer
10 James Armstrong as an expert in the area of drug analysis?

11 THE COURT: Any voir dire of the witness or any
12 objection?

13 MR. HARBIN: No objection, Judge.

14 THE COURT: All right. Ladies and gentlemen, let
15 me just explain to you. Normally, a person who testifies
16 in a court can't give an opinion. They can testify as to
17 what they've seen or heard or sensed in some way. But we
18 do have an exception and that's when someone is qualified
19 because of education or experience. They're permitted to
20 give an opinion as to that area of their expertise. In
21 drug analysis, in this particular case. This witness will
22 be allowed to give an opinion and the basis of that
23 opinion. That doesn't mean you must accept the opinion.
24 It's evidence, as all other evidence for you to use in any
25 way you see fit.

1 All right. Solicitor, you may continue your
2 examination of the witness.

3 Q. Mr. Armstrong, what procedure do you take when you are
4 getting items to examine?

5 A. In order for me to get items to test, I go to the
6 property and evidence room counter. I ask them to bring me
7 cases to examine. They then bring me a few cases. I then
8 sign them out by way of property and evidence sheet and
9 then take them back to my office, inventory the contents,
10 and then do my analysis and take them back to property when
11 I'm completed.

12 Q. And do you have to check out things in the same manner
13 as a law enforcement officer would have to check things
14 out?

15 A. Yes, ma'am, I do.

16 Q. All right. Do you have access to the property and
17 evidence room?

18 A. No, ma'am.

19 Q. And in this case 02-2010-67312, did you analyze any
20 items?

21 A. Yes, ma'am, I did.

22 Q. And what date did you check those out from the
23 property and evidence room?

24 A. I received them on September the 8th, 2010.

25 Q. And did you perform an analysis on those?

1 A. Yes, ma'am, I did.

2 Q. And can you identify State's Exhibits 3 and 4 for me?

3 A. Yes, ma'am, I can.

4 Q. And what are these items and how can you identify
5 them?

6 A. State's Exhibit Number 3 is labeled on the property
7 sheet as Item SC8. And then I recognize it by initials and
8 date and my item number written here. I also placed a heat
9 seal across the bag to make sure it stayed intact. Those
10 are actually four green tablets. Then, this bag here, the
11 outer bag has my initials, the date where I'd sealed it.
12 The inner bag has my initials and date where I'd opened up
13 a sealed bag. And there's a bag containing a rock
14 substance which is identified as Item SC7, has my initials
15 and the weight of it, as well.

16 Q. And did you check these items on August -- excuse me --
17 - on September 8th of 2010?

18 A. Yes, ma'am, I did.

19 Q. And were the other items that are in front of you,
20 which would be State's Exhibits 5, Advil Bottle; 6, the
21 scale; 7, the money order; 8, the cell phone. Would they
22 have been with the crack and the pills? When you check the
23 items out do they stay together?

24 A. All the items that were in the same -- on the same
25 property sheet, which were the items SC7, 8, 9, 10, 11, and

1 12, they were all in one package together.

2 Q. And do you do anything with the other items other than
3 the two substances that you were asked to analyze?

4 A. No, ma'am.

5 Q. What's the purpose of you keeping all the items or the
6 office's purpose of keeping all the items together?

7 A. They were all on the same property sheet. They all
8 traveled to the same places at the same time.

9 Q. And after you conducted your analysis, did you return
10 these items to the property and evidence room?

11 A. Yes, ma'am, I did.

12 Q. And what date did you do that?

13 A. It was on September the 10th, 2010.

14 Q. And did you produce an analysis report based on your
15 analysis?

16 A. Yes, ma'am, I did.

17 Q. I'm handing you State's Exhibit 9. Can you please
18 identify this?

19 A. Yes, ma'am, I can.

20 Q. What is this?

21 A. This is a copy of my lab report for case number City-
22 2010-67312.

23 Q. And is that just a copy of your report. And is that
24 your signature on the line?

25 A. Yes, ma'am, it is.

1 MS. MONTS: Your Honor, the State would move
2 Exhibit 9 into evidence.

3 MR. HARBIN: Without objection, Judge.

4 THE COURT: Exhibit 9 is admitted without
5 objection and may be published.

6 (WHEREUPON, State Exhibit Number 9 was admitted into
7 evidence.)

8 Q. Please publish your results.

9 A. Item SC7, that would be a bag of rock substance found
10 to contain cocaine base with a weight of twenty point two-
11 nine grams. Item SC8, found to be four green tablets
12 indicated to be clonazepam.

13 Q. And would SC7 be State's Exhibit 4?

14 A. Yes, ma'am, it would.

15 Q. And would SC8 be State's Exhibit 3?

16 A. Yes, ma'am, it would.

17 Q. What is the difference between the terminology cocaine
18 base and crack cocaine?

19 A. Cocaine base and crack cocaine are used together, the
20 actual chemical name is cocaine base. Crack is a slang
21 term for it.

22 Q. So it's the same thing?

23 A. It's the same thing.

24 Q. And if you had received any evidence that had been
25 tamper; the heat seal had been tampered in any way, would

1 you have analyzed them?

2 A. If I -- it depends on the case. If I had analyzed it,
3 there would have been a notation placed on the property and
4 evidence sheet that the evidence was not properly sealed,
5 as well as on the bag and which I had opened, I would have
6 made a notation. Instead of just having my initials and
7 the date where I cut the seal open, I would have made a
8 notation there in ink, as well, that not properly sealed at
9 the time of analysis.

10 Q. And did you make any such notations?

11 A. No, ma'am, I did not.

12 MS. MONTS: Your Honor, the State would move in
13 State's Exhibits 3, 4, 5, 6, 7, and 8 into evidence.

14 MR. HARBIN: Judge, I'm ---

15 THE COURT: Subject to the objection those will
16 be admitted into evidence over objection.

17 MR. HARBIN: Thank you, Judge.

18 (WHEREUPON, State Exhibit Numbers 3, 4, 5, 6, 7, and 8
19 were admitted into evidence.)

20 Q. Thank you.

21 MS. MONTS: I have not further questions.

22 MR. HARBIN: May it please the Court?

23 THE COURT: You may cross-examine.

24 **CROSS-EXAMINATION**

25 **BY MR. HARBIN:**

1 Q. Mr. Armstrong, now you testified in what I would call
2 pretty great detail about exactly what your procedure and
3 protocol is when you go to get the drugs ---

4 A. Yes, sir.

5 Q. --- and then how you handle them and how much
6 attention you pay to those items when you're testing. And
7 can you tell the jury why that is important for you to be
8 detailed in your custody of the drugs?

9 A. Well, trying to maintain the integrity of the
10 evidence.

11 Q. And would it be fair to say that your only -- your
12 results are only as good as the integrity of the
13 information that is coupled with those items that you're
14 asked to test?

15 A. I would say that, yes, sir.

16 Q. So in other words, you don't know specifically where
17 anything that you are testing comes from. You are only
18 able to take them from point A to point B and then back to
19 point A.

20 A. That's correct.

21 MR. HARBIN: Thank you, Judge. No further
22 questions.

23 THE COURT: Any redirect?

24 MS. MONTIS: No, Your Honor.

25 THE COURT: All right. Thank you, sir. You may

1 step down Mr. Armstrong.

2 All right. You may call your next witness.

3 MS. MONTS: Your Honor, the State would ask that
4 James Armstrong, Tabitha Fricks, Melanie Watson and Kara
5 Bennick be released?

6 THE COURT: Okay. Any objection?

7 MR. HARBIN: No objection, Judge.

8 THE COURT: Without objection all these witnesses
9 may be released from their subpoena.

10 MS. MONTS: Your Honor, the State rests at this
11 time.

12 THE COURT: Mr. Foreman, ladies and gentlemen,
13 we're at a stage in the case that I need to take up a
14 matter of law. If you would go back to your jury room,
15 take a short break. Don't discuss the case. I'll call you
16 back in just a few moments and we'll be ready to proceed.
17 You may retire to your jury room. Everyone else, please
18 remain seated.

19 (WHEREUPON, the jury exited the open court at
20 approximately 10:12 A.M.)

21 THE COURT: All right. Before I have an
22 opportunity to talk to Mr. Hewins, tell him his rights
23 under our Constitution, make sure he understands that, are
24 there any other matters we need to take care of at this
25 time.

1 MR. HARBIN: Judge, I've got a couple of motions
2 if I could.

3 THE COURT: All right, sir. I'll be glad to hear
4 from you, Mr. Harbin.

5 MR. HARBIN: May it please the Court, Judge. At
6 this time I'd make a motion to dismiss based on our
7 previous motion, Rule 6 specifically, chain of custody. I
8 would take the position, Judge, that although *State v.*
9 *Hatcher* does allow -- it seems to allow and, of course,
10 this Court has ruled, that the State can move forward even
11 if they're missing a witness in the chain. I do think,
12 though, that that case intimates if not says explicitly
13 that although the person doesn't have to be there, there
14 has to be evidence presented that what happened to those
15 drugs, I guess, the materials or evidence, during the time
16 that Mr. Flounders in this case had them, that they were in
17 the same condition as when -- essentially they didn't
18 provide information that Officer Gardner put them in the
19 drop box there in condition A or in the particular
20 condition. And then when Mr. Flounders got them, that they
21 were still in that condition. And then when the next
22 person in the chain, which I believe is Ms. Fricks, I don't
23 believe there was any testimony from her that the items
24 retrieved from P&E -- that Mr. Flounders had retrieved from
25 the drop box and put in P&E, I don't believe that she

1 covered exactly what he did with them, how long he had them
2 and what condition they were in when he got them, and/or
3 what condition they were in when she retrieved them from
4 where he put them into P&E. So in other words, I don't
5 believe that *State v. Hatcher* just says you get to entirely
6 omit a person. I think that it asks the state to provide
7 information in lieu of that person. In other words,
8 covering what they could have testified to. I don't
9 believe in this case there was any evidence whatsoever as
10 to what the condition and what was going on with those
11 items during the pendency of what I call Mr. Flounders'
12 custody or control of those items. And, Judge, I don't
13 know if you want me to make this now or not. But I'd also
14 reiterate my motion based on reasonable suspicion that this
15 case be dismissed because Officer Gardner did not have
16 reasonable suspicion to Terry frisk him and thus the fruits
17 of that search would not be admissible. Thank you, Judge.

18 THE COURT: All right. Solicitor, be glad to
19 hear from you on the motions?

20 MS. MONTS: Your Honor, we believe that the chain
21 has been completed as much as the courts have required that
22 the chain has been proven to as much of an ability as is
23 practicable. And we believe that the condition of all the
24 items is intact and that all the officers and witnesses
25 have testified sufficiently on those items. And that based

1 on *Hatcher* all the items should be admitted. And we would
2 renew all of our other arguments regarding the reasonable
3 suspicion.

4 THE COURT: Okay. Mr. Harbin, as we discussed in
5 more detail yesterday, the analysis that our Court made in
6 *Hatcher* with the cases that it cited, *Chisolm* and others,
7 it noted that all the people in the chain were identified.
8 And obviously that's present here as far as identification
9 of who touched the items. I've heard no proof of any kind
10 as to bad faith or ill motive or tampering. Not just
11 *Hatcher* but other cases have said that the chain can be
12 established as far as practical. And each case, of course,
13 must stand on its own. You need circumstances for each
14 case. *Hatcher* specifically said that every person handling
15 the evidence need not be identified in all cases. The
16 ultimate goal, of course, is to simply ensure that the
17 items testified to are what they purport to be. I've
18 considered the nature of these particular items and
19 articles, the circumstances surrounding the preservation
20 and custody of it, the likelihood of any meddling or
21 tampering with it, and I think the chain has probably been
22 established under the law as I understand the law.

23 As far as the reasonable suspicion, I think I covered
24 that adequately yesterday. I stand on the previous
25 position.

1 All right. Mr. Hewins, if you would, please, come
2 forward with your attorney. I need to go over some matters
3 with you and then we'll take a short break.

4 (WHEREUPON, Mr. Harbin and the Defendant approached
5 the bar.)

6 THE CLERK: Sir, would you raise your right hand
7 to be sworn in.

8 THE COURT: If you would, please. Do you swear
9 or affirm the testimony you're about to give me will be the
10 truth, the whole truth and nothing but the truth so help
11 you God?

12 THE DEFENDANT: Yeah.

13 THE COURT: Mr. Hewins, I need to go over with
14 you certain rights you enjoy under our Constitution.

15 THE DEFENDANT: I ain't got no rights.

16 THE COURT: Well, if you would just listen to me,
17 please, sir.

18 THE DEFENDANT: You've stepped on my rights since
19 Monday.

20 THE COURT: All right, sir. The Constitution of
21 South Carolina, the Constitution of the United States of
22 America, they both say that any person accused of any
23 criminal offense does not have to testify in a case, can't
24 be required to testify. That means that you have a right
25 to testify, but you don't have to testify in this case.

1 That right that you enjoy to testify or not is yours and
2 yours alone. Nobody can waive the right except you. If
3 you choose to testify, which is certainly your right, you'd
4 be subject to the same rules that govern any other witness
5 who testifies. You can be examined, you can be cross-
6 examined on any relevant issue in the case. If you have
7 any prior convictions that involve dishonesty or false
8 statements or crimes that are punishable by imprisonment
9 for more than one year and the Court determines that the
10 probative value of admitting this evidence outweighs any
11 prejudicial effect to you, then the Solicitor would be able
12 to introduce prior offenses to attack your credibility.

13 Now, if you decide to testify, that decision on your
14 part, Mr. Hewins, must be made voluntarily. It must be
15 made intelligently with the knowledge of the protections
16 that you enjoy under the Constitution and the consequences
17 of your decision to testify. You may choose not to
18 testify. And if you choose not to testify, I'm going to
19 instruct the jury that they can't give that fact any
20 consideration whatsoever. There can't be any prejudice to
21 you because you chose not to testify. Whether you testify
22 or don't testify is left entirely up to you. You can
23 certainly talk with family, with friends, with your
24 attorney, but that decision is yours and yours alone to
25 make.

1 Do you understand what I've explained to you about
2 your right to testify?

3 THE DEFENDANT: I got to testify in my last
4 trial. So why are y'all trying to make it now where I
5 can't testify in this trial?

6 THE COURT: Well, I'm not making it where you
7 can't. You have a right to testify.

8 THE DEFENDANT: I mean, y'all keep -- you saying
9 that if I testify you're going to let her bring in some --
10 something about some text messages and all this. But all
11 this wasn't at the last trial and she had a chance to
12 present that and everything else that's new in the last
13 trial. And then y'all trying to hide it from the jury that
14 it's a retrial. I mean, I just feel y'all just pretty much
15 -- I mean, the whole case is behind my Fourth Amendment
16 rights being violated. And then I get up here with you and
17 then, you know what I'm saying, you trying to hide -- y'all
18 trying to hide stuff from the jury.

19 THE COURT: Well, that was a motion made at the
20 beginning of the trial, that everybody was in agreement
21 with that, that there would not be ---

22 THE DEFENDANT: No, I wasn't in no agreement with
23 that.

24 THE COURT: Well, that was the reason that that's
25 been done, that there was no ---

State of South Carolina -vs- Erick E. Hewins (2010-GS-23-8295 and 8296)
James W. Armstrong - Cross Examination by Mr. Harbin

313

1 THE DEFENDANT: Well, I wasn't informed ---

2 THE COURT: --- would be no mention of a prior
3 trial so that it would not in anyway jeopardize you.

4 THE DEFENDANT: So now y'all just going to treat
5 me from the night of August 8th, all the way to now. And
6 I'm supposed to just accept these people finding me guilty
7 and y'all going to do the trickery all the way from August
8 of 2010, all the way up to now.

9 MR. HARBIN: Judge, may I say something?

10 THE COURT: Yes, sir.

11 MR. HARBIN: I just wanted to -- and I don't know
12 if this helps at all, Erick has told me that he would like
13 to address to the jury the fact that he has been tried
14 before. And that would not be my advice to him, but I told
15 him that that opens up potential for Ms. Monts to bring in
16 whatever she may bring in, however she thinks that may be
17 appropriate. And I don't know really know what that is,
18 Erick. I've just -- I've advised against it because I
19 don't know what she could possibly do with that, and I
20 think it would only hurt you. But at any rate, I do not
21 know whether the Court wishes -- has ruled such that if he
22 did that would -- I don't want to subject him to a
23 contempt. So I don't know if that's something that he does
24 at his own peril, Judge, or if I need to advise him that if
25 he mentions it, it would be in violation of an order of the

1 court. So I don't want him to get himself into any
2 trouble.

3 THE COURT: I've not made that as an order. That
4 was just a ---

5 THE DEFENDANT: How is everything a violation
6 here?

7 THE COURT: Let me -- do you understand about
8 your right to testify? That's what I need to talk to you
9 about. Do you understand you have a right to testify and
10 you have a right not to testify?

11 THE DEFENDANT: I mean, I testified in my last
12 trial a couple of months ago, so why can't I -- I mean, why
13 all of the trickery? Why all of the trickery now?

14 THE COURT: You have a right to testify if you
15 want to. Let's take a short break. You can talk over with
16 your attorney. Let's take about a five-minute break and
17 then we'll be ready to start back.

18 (WHEREUPON, the court stood at recess for a short
19 break.)

20 (WHEREUPON, Defendant Exhibit Number 2 was marked for
21 identification.)

22 THE COURT: All right. On the record, when I
23 talked with Mr. Hewins earlier he was talking about the
24 text messages. And I've had a chance to review the copies
25 of all of those. And I believe any relevance those may

1 have would be outweighed by prejudicial effect, even for
2 impeachment purposes. So I'm not going to allow the State
3 to cross-examine Mr. Hewins on those text messages. Of
4 course, if a door is opened with him deciding that he wants
5 to talk about text messages, then, of course, I'll allow
6 them that leeway. But just to bring those up on cross-
7 examination, I will not allow unless something happens in
8 direct testimony to alter that. I believe the prejudicial
9 effect of those far outweighs the probative value, even for
10 impeachment. And I've reviewed every single one of them
11 that was presented to me. And obviously, the only ones
12 that would have any relevance would be those sent by Mr.
13 Hewins. And I think those could cause confusion of the
14 jury in and of themselves. So I want him to be aware of
15 that before he testifies, that that will not be brought out
16 by the State unless the door is opened.

17 MR. HARBIN: Judge, could I ask ---

18 THE COURT: Yes, sir.

19 MR. HARBIN: And I apologize because I think you
20 did this once just now with Mr. Hewins. Could the Court
21 clarify it's ruling as with respect to any mention of his
22 prior trial. Not the pre-trial, Judge, but the actual
23 trial with Mr. Chambers. I want to be able to advise my
24 client.

25 THE COURT: Well, the -- everyone has been --

1 we've been operating, everyone, both lawyers, everybody
2 that's testified has said that it was a prior proceeding.
3 And that's where we are now and that's where we need to
4 continue going. If there's any discussion about -- I mean,
5 the only reason that the other trial has any relevance at
6 all is if there's some testimony that comes out from the
7 prior proceeding where someone says one thing and they
8 might have said something different this time to impeach
9 the person on their prior sworn testimony. But, obviously,
10 that was a different trial with a different Judge with a
11 different jury, different procedures, different attorneys,
12 I understand. So we're going to be trying this case this
13 time.

14 MR. HARBIN: Thank you, Judge.

15 THE COURT: All right. Let's bring our jury in
16 if they're ready.

17 (WHEREUPON, the jury entered the open court at
18 approximately 11:05 A.M.)

19 THE COURT: All right. Mr. Harbin, you may call
20 your first witness.

21 MR. HARBIN: Thank you, Judge. The Defense calls
22 Megan Newman to the stand.

23 THE CLERK: Ms. Newman, please come forward to be
24 sworn in. Would you please place your left hand on the
25 bible and raise your right.

1 Do you solemnly swear or affirm that the testimony
2 you're about to give is the truth, the whole truth and
3 nothing but the truth, so help you God?

4 THE WITNESS: Yes, ma'am, I do.

5 THE CLERK: Thank you. You may be seated.
6 Please state your name for the record.

7 THE WITNESS: Megan Elizabeth Newman.

8 MEGAN NEWMAN,

9 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

10 DIRECT EXAMINATION

11 BY MR. HARBIN:

12 Q. Megan, good afternoon.

13 A. Good afternoon.

14 Q. It's not quite afternoon. Sorry about that. Do you
15 recall August 9th, 2010?

16 A. Yes, sir, I do.

17 Q. And were you at the Clarion Inn?

18 A. Yes, sir.

19 Q. Could you tell the jury -- I'm going to try to make
20 these as direct questions as possible. Can you tell the
21 jury approximately what time you recall, what time of night
22 were you -- did you arrive at the Clarion Inn?

23 A. It was after like twelve, twelve-thirtyish maybe
24 twelve-forty. I'm not sure of the exact time but it was
25 after twelve o'clock.

1 Q. So sometime late in the evening?

2 A. Uh-huh (affirmative).

3 Q. And why did you go to the Clarion Inn?

4 A. To meet Mr. Hewins to -- we needed -- it was going to
5 be three vehicles, therefore you three drivers. So I was
6 going to drive my friend Taylor's car, she was going to
7 drive the Lexus and he was going to get the truck. And he
8 was going to take the truck and we would take the other two
9 cars home.

10 Q. Let me back you up. What car did you drive to the
11 Clarion?

12 A. I drove the Toyota Camry.

13 Q. Okay. And whose Toyota is that?

14 A. My friend Taylor.

15 Q. Okay. And is Taylor your friend?

16 A. Uh-huh (affirmative).

17 Q. Well, you just said your friend. How does Taylor know
18 Mr. Hewins?

19 A. They were seeing each other at the time.

20 Q. Okay. And do you know Mr. Hewins? Now, do you call
21 Mr. Hewins Erick or do you call him Mr. Hewins?

22 A. Erick.

23 Q. Okay. So do you know Erick just through Taylor or do
24 you know him independently?

25 A. No, I met him through my father.

1 Q. Okay. So you know Erick and you know Taylor and you
2 know Erick ---

3 A. Yeah.

4 Q. Okay. So you mentioned three cars. Can you back up
5 and tell us -- you drove one car, Mr. Hewins, did he drive?

6 A. Yeah. He was in the black Lexus.

7 Q. Okay. So he was -- so he had a vehicle at the
8 Clarion?

9 A. Yeah. That was -- he was already there.

10 Q. Okay.

11 A. We went there just to meet him.

12 Q. Okay. And where does the third vehicle come into
13 play. Could you try to make sure the jury understands why
14 there's -- where the three vehicles come from?

15 A. The third vehicle was at the shop. And we were taking
16 -- we were going to follow him to go get his truck. And he
17 just bought that car for my friend. So she was getting her
18 car and then I was taking her car back to the house so she
19 could get her new car.

20 Q. So, as you said, you had three cars, you needed three
21 drivers?

22 A. Yes.

23 Q. Okay. So do you recall how you were positioned --
24 well, excuse me. When you pulled up was Mr. Hewins already
25 there?

1 A. Yeah. His car was already backed in.

2 Q. Okay. And how did you pull in, where did you park?

3 A. We pulled right beside him. And then we called him
4 when we got there.

5 Q. And did you pull in front-ways or back in like him?

6 A. No, we pulled in.

7 Q. Okay. So that means that -- well, does that mean that
8 your driver's door faced his driver's door?

9 A. Uh-huh (affirmative).

10 Q. Okay. And so he wasn't in his car when you got there?

11 A. No.

12 Q. Okay. So you said you called him, where was he?

13 A. Well, I didn't call him. She called him. But he was
14 upstairs.

15 Q. And she is?

16 A. Taylor.

17 Q. Taylor.

18 A. Yes, sir.

19 Q. And Taylor called him and he was upstairs and then
20 what happened?

21 A. He came downstairs and got in the car. And then a few
22 minutes later Officer Gardner and Ms. Hall drove up and ...

23 Q. Okay. You said a few minutes later. What are y'all
24 doing sitting in the car for a few minutes before they pull

25 up?

1 A. Talking about where we were going to get the truck.

2 Q. Okay. And I presume your windows are down?

3 A. Yes, sir.

4 Q. Now, you said that Officer Gardner and Officer Hall
5 pulled up. Can you describe where they pulled up?

6 A. Yes, sir. Directly behind our cars.

7 Q. Okay. Now, your bumper is facing which direction?

8 A. My bumper is facing their car.

9 Q. Facing the officer's car?

10 A. Yes, sir.

11 Q. Okay. And Mr. Hewins, you said, was backed in?

12 A. Yes, sir.

13 Q. Okay. So does that mean his bumper was facing the car
14 or his headlights are facing the car?

15 A. His headlights are facing the car.

16 Q. And you said that they pulled in front of both of
17 y'all. Can you describe specifically what you mean by,
18 they pulled in front of both of y'all?

19 A. Yes, sir. We were parked on the right side of the
20 parking lot. So when they drove down, they would have been
21 driving on the right side. I hope they weren't driving on
22 the wrong side of the road. But they should have been
23 driving on the right side. And they stopped directly
24 behind our cars.

25 Q. Okay. I'm going to hand you a piece of paper and let

1 me know if you know what this is?

2 A. That is the Clarion Hotel.

3 Q. Okay. And that's been marked, for the record, as
4 Defendant's Exhibit 2. How do you recognize that picture
5 particularly?

6 A. The stairwell that he came down is right here.

7 Q. Okay. And do you recognize and can you tell from that
8 picture exactly where your vehicle was parked that night?

9 A. Yes, sir. It's not the one next to the handicapped,
10 but the next one.

11 Q. Okay. And this picture, is this the same as --
12 because this is now, you know, 2013, this was a couple or
13 couple and a half years ago, is this picture the same as
14 you remember -- recall it being at the time?

15 A. Yes, sir.

16 Q. Okay. Now, I'm going to hand you a pen. Can you make
17 a mark, and I recognize that there's cars in that picture
18 that surely weren't there that night, but could you make a
19 mark where your car was?

20 A. (Witness complies).

21 Q. Do you mind denoting that with a C. We'll do that for
22 Camry.

23 A. (Witness complies).

24 Q. Can you also make a mark where you recall Mr. Hewins'
25 car was parked? If you will mark that with an L, please,

1 for Lexus.

2 A. (Witness complies).

3 Q. Okay. Now, do you recall exactly where -- okay. And
4 for the record, you've marked with an X the spots?

5 A. Yes, sir.

6 Q. Can you mark please where you remember the patrol car
7 was parked?

8 A. (Witness complies).

9 Q. Okay. If you want to put a P for patrol car, that's
10 fine. Okay. Now, specifically, do you recall exactly how
11 far away the patrol car pulled from your car?

12 A. She had enough room, Ms. Hall had enough room to get
13 out. But, I mean, if I tried to back out, I would have
14 took out the back of their car.

15 Q. Okay. Was it possible for you to back out and then
16 leave?

17 A. No.

18 Q. Could you see whether -- could you observe whether or
19 not it appeared that Mr. Hewins had any room to leave?

20 A. No, sir.

21 Q. You could not observe it?

22 A. No, I could observe it. There was no room for him to
23 leave. If you pull in front of two cars neither of them
24 can get out, you know.

25 Q. When they pulled up, what did you observe the officers

1 do, if anything, once they pulled up?

2 A. I believe Officer Gardner got out first and he came to
3 Erick's window.

4 Q. Okay. And at this time was your window still rolled
5 down?

6 A. Yes, sir.

7 Q. And was Erick's window still rolled down?

8 A. Yes, sir.

9 Q. What did you hear, if anything?

10 A. I know he asked what were we doing there. And he
11 asked for everybody's name. And -- well, he asked for our
12 license, but I guess he asked for Erick's name because he
13 didn't have Erick's license. But he got our license and
14 ran our names.

15 Q. Okay. Well, he asked you what you were doing. Did
16 you tell him what you were doing there?

17 A. Yes, sir.

18 Q. Did you hear anyone else answer his question?

19 A. Everybody answered him.

20 Q. Okay. Did anyone give a different answer that you
21 heard?

22 A. No, sir.

23 Q. So everybody told him exactly what you were doing?

24 A. Yes, sir.

25 Q. Now, the windows are down, so did he talk to y'all and

1 Erick at the same time or did he talk to you and ---

2 A. He approached Erick first.

3 Q. Okay. What can you describe, if anything. I don't
4 know if you were able to hear the entire conversations.

5 But what did you hear specifically as it regards to Mr.

6 Hewins and Officer Gardner's conversation?

7 A. I'm not too sure of what their conversation was

8 because he wasn't talking to me. So I can't say what he

9 said or what Erick said because I'm not really sure what

10 they were talking about through the car.

11 Q. Okay. At some point, Officer Gardner testified that
12 he asked Mr. Hewins to exit the vehicle?

13 A. Yes, sir.

14 Q. Do you recall him exiting the vehicle?

15 A. Yes, sir.

16 Q. Okay. And I apologize. Let me back up. Where was
17 Officer Gardner standing?

18 A. He was standing in front of Erick -- in between our
19 doors because both of our -- we were right beside each
20 other, so he was at Erick's front door and probably about,
21 I guess, where my door opens at, the crack right there
22 where it opens.

23 Q. How -- you can either, you know, use your hands or try
24 to guesstimate, but inches, feet, or yards or however long,
25 how far away was your car door from Erick's car door?

1 A. I mean, normal parking spot space. Probably about
2 like this.

3 Q. That seems awfully close. Could you have opened your
4 door to get out?

5 A. Yeah.

6 Q. Once Officer Gardner came and stood in between your
7 car and Erick's car, did you have room to open your door?

8 A. No. I mean, I may could have shimmied my way out of
9 there because I'm smaller, but no.

10 Q. And could you observe where Officer Gardner was
11 standing in relation to Erick's door and whether or not it
12 appeared that that door could have been opened? Could have
13 been opened?

14 A. He may have opened his door, but he couldn't have
15 gotten out of the car with him standing right there.

16 Q. Because he was standing right there?

17 A. Yeah.

18 Q. Okay. And do you recall when Officer Gardner got Mr.
19 Hewins out of the vehicle? Not what time but do you recall
20 that he got him out of the vehicle?

21 A. Yes, sir.

22 Q. And what did he do with Mr. Hewins or what did Mr.
23 Hewins do when he got out of the vehicle?

24 A. He brought Erick to the back of his car and to the
25 front of my -- well, Taylor's car, but the car I was

1 driving.

2 Q. Okay. And the front of your car would have been
3 facing the motel; right?

4 A. Yeah. He was on the sidewalk by then, probably about
5 right here.

6 Q. Okay. Can you put a small circle where you believed
7 him to have been standing?

8 A. (Witness complies).

9 Q. Okay. So he took Erick out of the car and then put
10 him within sight. And so you're facing Erick at this
11 point; correct?

12 A. Uh-huh (affirmative).

13 Q. Now, Officer Gardner said he took him out and frisked
14 him. Is that what you recall?

15 A. No, sir.

16 Q. What did you recall? What do you recall seeing?

17 A. I know that other officers arrived. I can't tell you
18 exactly when they arrived. But I know that Officer Gardner
19 and Erick stood here for a good while.

20 Q. But do you have any guesstimate as to what a good
21 while is?

22 A. Probably fifteen minutes or maybe a little bit more.

23 Q. What were you able to observe, if anything, other than
24 simply, you know, at some point something happened?

25 A. Yeah. The only thing that I really heard verbally was

1 Erick say why the H-E-L-L are you going into my pocket.

2 Q. Now. You say that's the only thing you heard. Why
3 did you hear that and not hear anything else?

4 A. That was pretty loud.

5 Q. So was there conversation prior to that, that -- were
6 you privy to any conversation ---

7 A. I mean, I seen hand gestures and their mouths moving,
8 but I couldn't make out what they were saying.

9 Q. And so at some point Erick said something loud enough
10 for you to hear him?

11 A. Yes, sir.

12 Q. And at that point, what do you recall seeing?

13 A. Erick being placed into handcuffs and being put in the
14 back of the patrol car.

15 Q. Okay.

16 MR. HARBIN: One second, Judge. Judge, at this
17 time, we would ask that Defendant's Exhibit 2 be moved into
18 evidence.

19 THE COURT: All right. If it's not already it's
20 -- any objection?

21 MS. MONTS: No objection, Your Honor.

22 THE COURT: All right. Exhibit 2 is admitted
23 into evidence without objection.

24 (WHEREUPON, Defendant Exhibit Number 2 was admitted
25 into evidence.)

1 MR. HARBIN: Thank you, Judge. No further
2 questions.

3 THE COURT: All right. Solicitor, you may cross-
4 examine.

5 CROSS-EXAMINATION

6 BY MS. MONTS:

7 Q. Ms. Newman, how old are you?

8 A. I'm nineteen.

9 Q. And how old were you on August 9th of 2010?

10 A. Seventeen.

11 Q. And how old was Taylor?

12 A. She was eighteen at the time.

13 Q. And how long had you known Taylor?

14 A. I've known her since elementary school.

15 Q. And you knew Taylor to be dating Erick Hewins?

16 A. Yes, ma'am.

17 Q. Had you seen them together?

18 A. Yes, ma'am.

19 Q. And who was Erick Hewins giving the Lexus to? You
20 said he was giving it to a friend?

21 A. To Taylor.

22 Q. He was giving her the Lexus?

23 A. Yes, ma'am.

24 Q. On that night what was the relationship between Taylor
25 and Mr. Hewins? Were they getting along or were they

1 fighting?

2 A. They were actually arguing because she did see him
3 walk out of another female's room, so she was a little bit
4 upset. But, I mean, they were still together.

5 Q. And isn't it true that Erick wanted her to get into
6 his car there in the parking lot?

7 A. I ---

8 Q. Weren't they arguing about that?

9 A. I think so, but I know we were -- I can't really say
10 what they were arguing about, ma'am.

11 Q. But they were arguing?

12 A. Yes, ma'am.

13 Q. And did you know that there was marijuana in the
14 vehicle you were in?

15 A. No, ma'am.

16 Q. And why did you not just leave Taylor with Erick if
17 they were going to get another car?

18 A. Because after the fact of him walking out of the
19 female's room, she didn't want to be in a car with him.
20 She just wanted to get her car and go home.

21 Q. She wanted to get a car from him, let him get another
22 car and then ---

23 A. Go home.

24 Q. So how far away did you live from Taylor?

25 A. We lived together.

1 Q. And would Erick ever come over to your house?

2 A. I think so. But I really wasn't there that much.

3 Q. And how long had you known Erick Hewins?

4 A. Probably -- let's see. Stating now or back to that
5 date?

6 Q. At that date?

7 A. Probably about two and a half, three years.

8 Q. And how long at that time had Taylor dated him?

9 A. I have no idea how long they were dating, ma'am.

10 Q. And how long, at that time, had you been living with
11 Taylor?

12 A. That was in August?

13 Q. August 9, 2010?

14 A. Probably two and a half months, maybe a little bit
15 more.

16 Q. Thank you.

17 MS. MONTS: No further questions.

18 MR. HARBIN: Nothing further, Judge.

19 THE COURT: All right. Thank you. You may step
20 down.

21 Mr. Foreman, ladies and gentlemen, before we call the
22 next witness, I think scheduling-wise we're going to take
23 an earlier lunch today. If you'll be back at one o'clock
24 we'll be ready to proceed with the next witness that will
25 be testifying. Let me remind you again while you're out

1 and about and maybe having time with fellow jurors or
2 family or friends not to discuss the case. We're well into
3 the case now and it would certainly be improper for you to
4 discuss it with anyone. Don't let anyone discuss it with
5 you. I'm confident you'll fulfill the commitment you've
6 made to these parties. They've got the confidence in you
7 that you'll fulfill your oath and make a decision after all
8 the evidence is on what takes place here in the courtroom.
9 Have a good lunch. If you'll be back at one o'clock, we'll
10 be ready to proceed.

11 (WHEREUPON, the jury exited the open court at
12 approximately 11:23 A.M.)

13 THE COURT: All right. We'll be at ease until
14 one o'clock. Be ready to start back then.

15 MR. HARBIN: Judge, could I inquire, when does
16 the Court prefer to have a conversation about jury charges?
17 After my client's testimony.

18 THE COURT: Well, it would be ---

19 MR. HARBIN: I mean, I don't expect it to be like
20 an hour-long debate or anything?

21 THE COURT: Yeah. We can do that -- y'all ready
22 now? We can do it now if you want to?

23 MS. MONTS: Yes, Your Honor.

24 THE COURT: All right. Let's -- again, I
25 understand things can change and you may have some

1 different requests and the State may ---

2 MR. HARBIN: Yes, sir.

3 THE COURT: --- but this will be a good time,
4 it'll certainly help us to have everything together.

5 MR. HARBIN: Okay. Well, Judge -- and Ms. Monts
6 if you don't mind, I'll start. Judge, I'd like -- and I'll
7 admit that I've never heard this directly. I know that
8 I've heard jury charges on probable cause before and their
9 determination of facts, they can determine whether the
10 facts led to probable cause. I would ask for and I would
11 argue that it is similarly a factual determination whether
12 the facts exists in relation to reasonable suspicion and
13 what arises -- I'm sorry -- what rises to the level of
14 reasonable suspicion to justify a Terry frisk. I don't
15 have language to suggest to you, other than language that
16 would basically be similar to probable cause, although
17 obviously *Terry v. Ohio* kind of gives you a go-by and I
18 would suggest -- and I've got something printed out. I
19 apologize I've only got one printout. But it says,
20 reasonable suspicion must be based on specific and
21 articulable facts and not merely upon an officer's hunch.
22 Instead reasonable -- and that is *Terry v. Ohio*. Instead
23 reasonable suspicion is founded upon the specific
24 reasonable inferences the law enforcement officer is
25 entitled to draw from the facts in light of his experience.

1 I believe that's a little more helpful to the State.
2 That's *State v. Blassingame*. And, Judge, if you need the
3 cites I'll be -- that's 338 S.C. 240. Okay. I can just
4 read this and hand it up, Judge. The term 'reasonable
5 suspicion requires a particularized and objective basis
6 that would lead one to suspect another of criminal activity
7 in determining whether reasonable suspicion exists. In the
8 totality of the circumstances the whole picture must be
9 considered. And Judge, I can hand this up if you'd like.

10 THE COURT: All right. I'll be glad to -- any
11 other requests to charge?

12 MR. HARBIN: Yes, sir.

13 THE COURT: If you're done, I'll be glad to hear
14 from the Solicitor or I can hear from the Solicitor later.

15 MR. HARBIN: Do you want to go ahead and address
16 that?

17 MS. MONTS: Yes. And, Your Honor, the State
18 absolutely objects to that. We certainly believe that that
19 is a legal issue for the Judge to determine, which we did
20 in the suppression motion and that that is not appropriate
21 for the jury to consider at all. That the jury is not
22 trained in the law, they're not trained in what these terms
23 mean. They're not trained in what is required and that His
24 Honor is. That's been ruled upon. And the State's
25 position is that that should not be anything for the jury

1 to consider.

2 MR. HARBIN: Judge, we believe that the facts
3 that support the legal argument are in dispute. And we
4 would argue that the jury, of course, is the ultimate
5 finder of the facts. And I anticipated the State's
6 objection to it, but I do believe that there is a
7 possibility to fashion instruction whereby they are not
8 being asked to make a legal determination, rather they are
9 being asked to determine whether or not the facts exists or
10 the facts are true from which the Court made its legal
11 determination.

12 MS. MONTs: And, Your Honor, during the
13 suppression motion we elicited a lot more testimony from
14 both Officer Gardner and Officer Hall regarding what took
15 place, lots of information that the jury did not hear,
16 information which His Honor heard and based his decision
17 upon. It would not be fair for the jury to be told to make
18 a decision when they didn't have all of the information
19 that His Honor had. But, again, we believe that is a legal
20 argument that the Judge is to rule upon.

21 MR. HARBIN: And, Judge, I don't recall what
22 pertinent facts were not brought out in direct during trial
23 that were not brought out -- I'm sorry -- that were brought
24 out in the pre-trial motions.

25 THE COURT: All right. Any other requests to

1 charge?

2 MR. HARBIN: Yes, sir, I would have a request for
3 voluntariness of consent. In assessing voluntariness of
4 the consent we examine the totality of the circumstances,
5 including factors such as the characteristics of the
6 accused, his education, and intelligence. The number of
7 officers present, along with the location and duration of
8 the stop. Whether the person giving consent knew that he
9 possessed the right to refuse consent is also relevant in
10 determining voluntariness of consent, although the
11 government need not demonstrate that the person giving
12 consent knew of his right to refuse consent to prove that
13 consent was voluntary. That's *United States v. Boone*, 245
14 F.3rd 353 -- I'm sorry -- 352. I'll hand that up, Judge.
15 And I apologize.

16 Judge, I've got one other matter after the Solicitor
17 addresses that.

18 THE COURT: Again, I'll be glad to hear from the
19 State later if you think of other things. I'd be glad to
20 hear from you now about this charge, Ms. Monts.

21 MS. MONTs: Yes, Your Honor, I believe that
22 that's -- I expect that you would have some sort of a
23 charge on that already. I think that this one is much too
24 specific, especially regarding whether the Defendant had a
25 right to refuse or not. As Mr. Harbin stated, that is not

1 a requirement that the officer explain to them, that they
2 have a right to refuse. But I do believe that that charge
3 is much too specific.

4 MR. HARBIN: Judge, I would say that charge is
5 fair to the State because right after it says it's one of
6 the factors you can consider, it also immediately says that
7 you don't necessarily have to do that to prove
8 voluntariness. And so we would submit that as a reasonable
9 jury charge request.

10 And, Judge, finally, if you want to hear my last one
11 and final?

12 THE COURT: Yes, sir.

13 MR. HARBIN: I believe it's *California versus*
14 *Hodari* that I neglected to bring a copy of that addresses
15 whether or not a person is free to leave or whether or not
16 they felt that they were free to leave and whether or not
17 that would be a detention or not. Judge, I would ask that
18 the Court instruct the jury on the law as to how they would
19 determine what they're allowed to consider when determining
20 whether or not my client was free to leave as it relates to
21 a warrantless detention and/or as it relates to his
22 consent.

23 THE COURT: Do you have a proposed charge?

24 MR. HARBIN: Judge, I have and it's not with me.
25 I can give it to the Court.

1 THE COURT: Okay. Well, you can first share it
2 with the Solicitor.

3 MR. HARBIN: Yes, sir.

4 THE COURT: Yes, ma'am.

5 MS. MONTs: Your Honor, again, the State
6 absolutely objects to that. That's a legal issue for His
7 Honor to rule upon and that that is not something that the
8 jury should be asked to consider.

9 MR. HARBIN: And, Judge, our position again would
10 be that the Court determines whether or not the evidence is
11 admissible and whether or not the trial can proceed after
12 the presentation of those facts. I don't think that the
13 Court intends to usurp the authority of the jury and decide
14 which facts are true and untrue, which facts exist and
15 don't exist.

16 MS. MONTs: And, Your Honor, I believe you have a
17 charge somewhat similar to this regarding the premises upon
18 which the legal substance is found.

19 THE COURT: Okay. I do have a charge and our
20 Supreme Court today has adjusted that charge. So I want to
21 make sure I comply with the law. It came out today, this
22 morning, concerning mere presence. I guess that's probably
23 what you're talking about. I presume you'd want to --
24 would you want a charge on mere presence?

25 MR. HARBIN: Yes, sir.

1 THE COURT: Okay. So I'll have that covered.

2 MS. MONTS: And, Your Honor, when you decide,
3 will you have a charge regarding when contraband are found
4 on premises under the control of the accused that the jury
5 can consider that?

6 THE COURT: Well, that's part of what I was
7 talking about. It'll be basically to the effect that
8 present at the scene where drugs are found is not enough to
9 prove possession. The defendant's knowledge and possession
10 may be inferred when the substance is found on the property
11 under defendant's control, simply an evidentiary fact to be
12 taken into consideration, along with other evidence in the
13 case. That's what I'll be charging.

14 MS. MONTS: Yes, sir.

15 THE COURT: All right. Any other matters now?

16 MR. HARBIN: No, sir.

17 MS. MONTS: No, Your Honor.

18 THE COURT: All right. We'll be at ease until
19 one o'clock.

20 MR. HARBIN: Thank you, Judge.

21 MS. MONTS: Your Honor, when you decide on Mr.
22 Harbin's requests ---

23 THE COURT: I'll certainly let you know. I'll do
24 a little research on that over lunch.

25 MS. MONTS: Yes, sir.

1 (WHEREUPON, the court stood at recess for a lunch
2 break.)

3 THE COURT: All right. Ready to proceed, ladies
4 and gentlemen?

5 MS. MONTS: Yes, Your Honor.

6 MR. HARBIN: Yes, sir.

7 THE COURT: All right. If the jury's ready --

8 MS. MONTS: And, Your Honor, have you made a
9 decision or can we discuss it ---

10 THE COURT: Well, we're not yet -- we'll talk
11 about charges later. We don't need to be that ---

12 MS. MONTS: Okay.

13 THE COURT: There might be more testimony.

14 (WHEREUPON, the jury entered the open court at
15 approximately 1:09 P.M.)

16 THE COURT: All right. Mr. Harbin, you may call
17 your next witness.

18 MR. HARBIN: May it please the Court, Judge.
19 We'd call my client, Mr. Erick Hewins.

20 THE COURT: Come around and be sworn, please,
21 sir.

22 THE CLERK: Mr. Hewins, if you would place your
23 left hand on the bible and raise your right.

24 Do you solemnly swear or affirm that the testimony
25 you're about to give is the truth, the whole truth and

1 nothing but the truth, so help you God?

2 THE WITNESS: Yes, ma'am.

3 THE CLERK: Thank you. You may be seated.

4 Please state your name for the record.

5 THE WITNESS: Erick Eton Hewins.

6 ERICK HEWINS,

7 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

8 DIRECT EXAMINATION

9 BY MR. HARBIN:

10 Q. Mr. Hewins, let's start by telling the jury a little
11 bit about yourself. Where are you from?

12 A. Greenville.

13 Q. Did you grow up in Greenville?

14 A. Yes, sir.

15 Q. Okay. How far did you go in school, Mr. Hewins?

16 A. Ninth grade.

17 Q. And so you didn't graduate?

18 A. No, sir.

19 Q. Did you have trouble graduating or did you just drop
20 out?

21 A. Just dropped out.

22 Q. Did you take any kind of special classes or did you go
23 to regular high school?

24 A. Special classes.

25 Q. What do you mean by special classes?

- 1 A. Speech classes and stuff like that. Slow classes.
- 2 Q. Well, since ninth grade, what have you done for a
- 3 living?
- 4 A. Just basically different temporary jobs, temp jobs.
- 5 Q. And how do you support yourself these days?
- 6 A. Disability.
- 7 Q. Okay. And what are you on disability for, Mr. Hewins?
- 8 A. Different -- it's a SSI check. So, you know, pretty
- 9 much different diagnosis, really.
- 10 Q. Okay. Let's skip ahead to August 9th, 2010. Do you
- 11 remember August 9th, 2010?
- 12 A. Yes, sir.
- 13 Q. Well, I guess we could fast forward all the way up to
- 14 the point which you were at the Clarion Hotel. What
- 15 brought you to the Clarion Hotel that night?
- 16 A. They know her by Ms. Henderson. I know her by Tina,
- 17 you know, she uses different names and different aliases.
- 18 Q. And who is she?
- 19 A. She's the girl that was staying up in two thirty-seven
- 20 that's supposed to be pregnant with my child.
- 21 Q. And can you repeat those names for me, please?
- 22 A. She go by different alias. I mean, that night there,
- 23 she went by Shamora or Shamika Henderson or something. And
- 24 I think she was wanted child support, wanted something that
- 25 particular night, so she was going by that name.

- 1 Q. And what did you know her by?
- 2 A. I know her by Tina and Michelle.
- 3 Q. Tina or Michelle?
- 4 A. Yeah.
- 5 Q. So you were there to visit her?
- 6 A. Right.
- 7 Q. And at some point -- I guess it's fair to call Taylor
- 8 your girlfriend at the time or a girl you were seeing?
- 9 A. A girl I was seeing.
- 10 Q. At some point, a girl you were seeing named Taylor and
- 11 Megan arrived at the hotel. Why did they come see you at
- 12 the hotel?
- 13 A. Because I asked Taylor to come and take me to get the
- 14 truck and she was going to take the Lexus home with her.
- 15 Q. Okay. And what is the truck?
- 16 A. A Avalanche.
- 17 Q. And whose Avalanche was it?
- 18 A. It was my Avalanche.
- 19 Q. And what was -- was that going to be your Avalanche?
- 20 A. Yeah.
- 21 Q. And whose Lexus was it then?
- 22 A. Me and Taylor.
- 23 Q. Okay. So your intention was for you to drive the
- 24 Avalanche and her to drive the Lexus?
- 25 A. Right.

1 Q. Okay. Now, do you recall arriving at the hotel?

2 A. Yes, sir.

3 Q. And explain -- let me back it up a little bit. What
4 did you do when you arrived at the hotel? What's the first
5 thing you did when you actually got there?

6 A. When I first got there, I went up to two thirty-seven.
7 And I was in two thirty-seven for a while. And then she
8 took off and went to the store.

9 Q. Who is she?

10 A. Ms. Henderson.

11 Q. Okay. And how did she get to the store?

12 A. She took my car to the store.

13 Q. She took your car to the store?

14 A. Right.

15 Q. And she came back?

16 A. Yeah. She came back and backed the car in and then
17 she came up to the room. We talked for a little while and
18 then Taylor called or something like that, and then -- I
19 knew they was on the way so I went on downstairs and got in
20 the car.

21 Q. Okay. And you knew they were on their way because
22 you'd asked them to come?

23 A. Right.

24 Q. Okay. So you walk downstairs when they get there?

25 A. Yes.

State of South Carolina -vs- Erick E. Hewins (2010-GS-23-8295 and 8296)
Erick Hewins - Direct Examination by Mr. Harbin

345

1 Q. You hop in your car?

2 A. Right.

3 Q. Now, Officer Gardner's testimony said that when he
4 pulled up, you were just sitting in the car. You weren't
5 moving. You were sitting in the car talking to them. What
6 were y'all talking about?

7 A. Well, we were talking about the location of where we
8 was going to go and get the truck from. And I think I was
9 asking Taylor would she get in the car with me.

10 Q. Okay. And do you recall some kind of disagreement as
11 to what we were discussing about, which car she was going
12 to actually travel in?

13 A. She was going to stay in the car that she was in and
14 travel that way.

15 Q. Okay. So what is your first recollection of seeing
16 Officer Gardner and his car and maybe Officer Hall, too?

17 A. My first what?

18 Q. Your first recollection? What is the first thing you
19 saw when they pulled up?

20 A. Oh, I thought it was someone, I thought it was
21 somebody I knew until he actually walked all the way around
22 the car and I saw his badge and I guess his police shirt or
23 vest or something that he had on that, you know, let me
24 know they was the police.

25 Q. Can you describe for the jury how you remember the car

1 that you were sitting in being situated and how the car

2 that Megan and Taylor were in, how that was situated?

3 Where was it in relation to your car?

4 A. It was right beside my car. Parked in front-wards and

5 I was backed in.

6 Q. Okay. Does that put your driver's door at Megan's

7 driver's door?

8 A. Right.

9 Q. Okay. And do you recall if Megan or Taylor was

10 driving?

11 A. Megan was driving.

12 Q. And was your window up or down?

13 A. Mine was down.

14 Q. How about Megan's?

15 A. It was down.

16 Q. When the patrol car stopped -- well, excuse me. Was

17 it a marked or unmarked vehicle?

18 A. Unmarked.

19 Q. Okay. And when it pulled to a stop, where did it pull

20 to a stop at?

21 A. Directly in front of us.

22 Q. Okay. And when you say directly in front of us,

23 describe specifically what you mean by that?

24 A. Meaning the back of their car was at the back bumper

25 of Taylor's car. And the front of the car was at the front

1 of my car.

2 Q. Okay. How close was that car parked to your car and
3 if you were able to observe how close to Megan?

4 A. It was pretty close. But like I say, she had enough
5 room to get out of the car. But, you know, if I wanted to
6 drive off, I couldn't have just drove off, nothing like
7 that.

8 Q. So I believe your testimony just now was that Officer
9 Gardner got out and walked around the car?

10 A. Right.

11 Q. Was that your car?

12 A. Walked around his car. And then I didn't know exactly
13 where he was until he started coming at my car.

14 Q. Okay.

15 A. Like coming around the driver's side of my car.

16 Q. Okay. And does that put him in between your vehicle
17 and the vehicle that the girls were in?

18 A. Right.

19 Q. Where did he stand while -- did he make contact with
20 you?

21 A. Yes, sir.

22 Q. And once he made contact with you, where was he
23 physically standing?

24 A. Directly at my window.

25 Q. Okay.

1 A. Yeah.

2 Q. Okay. So your window was open so could you reach out
3 and touch him if you wanted to? Was he that close?

4 A. He wasn't just that close, but he was close. But he
5 wasn't close, you know, I couldn't reach out and touch him.

6 Q. Okay. Once he made contact with you what do you
7 recall him saying or asking?

8 A. He said something about this is a heavy-hitter's area.
9 And I was like, I just, you know, like what is he talking
10 about, you know what I'm saying? A heavy-hitter's area.
11 And then he went on and he was like, you know, it's a heavy
12 drug area and car break-ins and stuff like that.

13 Q. Okay. And did he ask you for anything?

14 A. He asked me for my identification.

15 Q. Okay. And what did you do when he asked you for that?

16 A. I told him I didn't have no ID with me.

17 Q. Did you provide him with any information?

18 A. Yes. My name and date of birth.

19 Q. And did you provide that information to Officer
20 Gardner or did you provide it to Officer Hall?

21 A. Mr. Gardner.

22 Q. At some point, I believe there was prior testimony
23 that Officer Hall got out of her vehicle later and came and
24 asked you to clarify your information. At that time, did
25 you give your information to Officer Hall?

1 A. I don't even recall talking to Ms. Hall at all that
2 night. Everything went through Mr. Gardner.

3 Q. Officer Gardner, okay. The information that you gave
4 Officer Gardner, was that your correct information?

5 A. Yes, sir.

6 Q. Did you give him any information that was incorrect?

7 A. Uh-uh (negative).

8 Q. And did they -- did Officer Gardner or Officer Hall or
9 any other officer come back and ask you your information
10 again?

11 A. Mr. Gardner did about two or three times.

12 Q. Okay. And each time did you give him the same
13 information?

14 A. Same information.

15 Q. Okay. Do you recall Officer Gardner instructing you
16 to stop moving your hands?

17 A. No, sir.

18 Q. Do you recall him instructing you to stop touching
19 your pocket?

20 A. No, sir.

21 Q. The date was August 9th, what were you wearing?

22 A. I think I had on some blue jean shorts. Blue jean
23 shorts and a red shirt, a red t-shirt.

24 Q. What was the temperature like?

25 A. It had to be about -- it was at night so I guess it

1 was about eighty something degrees or something.

2 Q. Was it hot earlier that day?

3 A. Yeah.

4 Q. Officer Gardner has testified previously that you were
5 sweating profusely. Do you recall any of that?

6 A. I don't remember sweating like that. But being that I
7 was weighing three hundred pounds at the time and the only
8 window that was let down was the driver's side and I was
9 sitting in a car that wasn't moving, I probably was
10 sweating a little bit.

11 Q. He also said that you stuttered when you spoke?

12 A. I mean, that's how I talk. I been stuttering all my
13 life. I mean, that's something I can't help, you know.
14 Some kind of -- I mean, you got to ask God why I stutter.
15 You know what I'm saying, that's just part of, you know.

16 Q. Yes, sir. And at some point Officer Gardner asked you
17 to get out of the vehicle. Is that right?

18 A. Yes, sir.

19 Q. Now, how did that -- do you recall what he said to you
20 exactly?

21 A. He just asked me could I step out the car and step at
22 the back of my car but at the hood of Taylor's car.

23 Q. Okay. When he asked you to get out of the car did he
24 say anything to the effect of, now, you don't have to get
25 out of the car; just get out of the car if you want to?

1 A. No.

2 Q. Did he tell you, you can head on or you can hang out
3 here and answer my questions?

4 A. No, sir.

5 Q. Once he moved you around to the front of Taylor's car,
6 the Toyota, what happened then?

7 A. It was another officer that was standing on the
8 opposite side of my car.

9 Q. Now, was that other officer -- I'm sorry. Good point.
10 Was that other officer, Officer Hall?

11 A. No, she was in the vehicle. It was a male officer.

12 Q. So that's another officer had come by then?

13 A. Right.

14 Q. When you got out of the car, do you recall how many
15 officers there were on scene at that point?

16 A. I think it was four.

17 Q. Okay. So ---

18 A. Three or four officers.

19 Q. So it was Officer Gardner, Officer Hall and definitely
20 another officer and maybe one after that?

21 A. Right. Right.

22 Q. So he moved you around to the front of Taylor's car
23 and you said you observed another officer around on the
24 other side of your car, I believe?

25 A. Right.

1 Q. And then what happened?

2 A. Officer Gardner told him to watch me while he go and
3 speak with the girl in two thirty-seven.

4 Q. Now, at what point had you shared that information
5 with Officer Gardner that you were visiting a girl in two
6 thirty-seven?

7 A. I think either when I was sitting in the car or when I
8 had got out the car, as soon as he got me out the car. I
9 think as soon as I got out the car he asked me what I was I
10 doing here. And I told him. So he wanted to verify it so
11 he went up to two thirty-seven and spoke with her.

12 Q. When you were sitting in the car, did he ever ask you
13 whether or not you had any weapons or anything like that on
14 you?

15 A. No, sir.

16 Q. When he got you out of the car did he ask you did you
17 have any weapons or anything on you?

18 A. Uh-uh (negative).

19 Q. So your testimony is that he pulled you out of the
20 car, stands you in front of Taylor's car and then he
21 actually leaves the scene? I'm sorry. Not leaves the
22 scene but leaves you?

23 A. Under the supervision of another officer.

24 Q. Okay. And to your information he's going up to check
25 out room two thirty-seven?

1 A. Yes, sir.

2 Q. Okay. What did you observe after that? What happened
3 after he went up to two thirty-seven?

4 A. Well, I was standing asking the officer who was
5 supervising over me, why are y'all harassing me? He was
6 going, you know, like, well, we're not harassing you. You
7 know, and me and him talked. That's when Officer Gardner
8 walked back up and asked me what was that in my pocket?
9 And I told him I had some money in my pocket. And he said,
10 do you mind if I see it? So I took the money out and
11 showed it to him. He took possession of it, laid it on the
12 hood and asked me how much it was? I told him it was
13 fourteen hundred dollars, somewhere in that area. Then he
14 asked me what else do I have in my pocket. And I told him
15 I had a cigarette and a room key and a lighter. He said do
16 I mind taking that out and laying it on the hood of Taylor
17 car. So I did that. And then as soon as I laid those
18 items on top of Taylor's car, that's when he walked up to
19 me and just shoved his hand down in my pocket, and turned
20 me around and said I'm under arrest, put the handcuffs on
21 me.

22 Q. At any point did you invite or give consent or
23 indicate in any way that you wished for or wanted to allow
24 Officer Gardner to search you or go into your pocket?

25 A. No, sir. And for the record, even in 2010, I knew I

1 had a right to consent to a search or not to consent to a
2 search. So no, I did not.

3 Q. So he didn't have to tell you that you had a right,
4 you already knew that you didn't have to consent?

5 A. I already knew it, right.

6 Q. So your testimony is he didn't ask you for consent?

7 A. Right.

8 Q. And had he asked you, you would have said no.

9 A. Right.

10 Q. All right. So he sticks his hand in your pocket,
11 clears out your pocket?

12 A. Right.

13 Q. And then handcuffs you?

14 A. Right.

15 Q. Did you say anything else to him?

16 A. I was like, I mean, the way he was putting his hands
17 in my pocket, I was like, man, why you putting your hand in
18 my pocket?

19 Q. What was his response?

20 A. And then -- well, really, I didn't like that. He was
21 just throwing his weight around, you know. After he put
22 his hand in my pocket and I said that, you know, he put the
23 cuffs on me and basically that was it. But the whole
24 encounter he was pretty much basically just throwing his
25 weight around. You know, because he really wasn't that big

1 back then. He was, you know, kind of built. And he was
2 just, you know, letting it be known that, you know, he was
3 just buff like that. But after he put the cuffs on me,
4 they took me and put in the -- some other officer's car
5 that was like down the street somewhere.

6 Q. Okay. So they put you in the other officer's car.
7 And then I assume you sat there and then they eventually
8 took you to jail?

9 A. Yeah. That officer came and drove past them, then he
10 got back out of the car and then that's when I guess they
11 started searching the car and started messing with other --
12 with Taylor and Megan and them.

13 Q. Well, let me take you back maybe a few minutes in this
14 story. When you got out of the car, from the time he asked
15 you to get out of the car ---

16 A. Uh-huh (affirmative).

17 Q. --- until the time that he stuck his hand in your
18 pocket ---

19 A. Right.

20 Q. --- can you offer for the jury a guess as to how long
21 that -- or it might not be a guess. You might not know.
22 You might know exactly how long. How long did it take for
23 that time to pass where he stuck his hand in your pocket
24 after he took you out of the car?

25 A. It had to be about five, ten minutes, something like

1 that.

2 Q. So you were standing and how close was that other
3 officer standing to you?

4 A. I was at the hood. No, I was at the trunk of my Lexus
5 and he was on the other side of the trunk standing there.

6 Q. Can you be a little bit more specific as to, you know,
7 how close he was to you? Because obviously if he's
8 standing there ---

9 A. Well, the car ain't that big, so I guess -- it's a
10 Lexus 300. I mean, from I guess ---

11 Q. Let me ask you, were you standing at one corner of the
12 hood and he was standing at the opposite corner?

13 A. Yeah. The trunk.

14 Q. I'm sorry, the trunk?

15 A. Yeah, right.

16 Q. So one corner of the trunk and he's standing at the
17 opposite corner of the trunk?

18 A. Right. Right.

19 Q. And he is further away from the Toyota than you are or
20 he was closer to the Toyota?

21 A. He was further away.

22 Q. Okay.

23 A. I close to the Toyota.

24 Q. You're standing nearest the Toyota?

25 A. Right.

1 Q. Could you see Taylor and Megan?

2 A. Yeah.

3 Q. And so you -- presumably they could see you?

4 A. Right.

5 MR. HARBIN: Give me one second.

6 Q. Mr. Hewins, I have no further questions. Please
7 answer all the questions that Ms. Monts poses to you.

8 **CROSS-EXAMINATION**

9 **BY MS. MONTS:**

10 Q. What are you on disability for?

11 A. Different diagnosis. I mean, they say personality
12 disorder, schizophrenic, just different little -- they
13 never really gave me a direct, I mean, diagnosis. Let's
14 just put it that way.

15 Q. All right. And in 2010 on the date of this incident
16 you -- well, describe your relationship with Taylor
17 Padgett?

18 A. We was off and on dating, off and on.

19 Q. And how old was she at the time?

20 A. She was eighteen.

21 Q. And you were how old?

22 A. Thirty-six or thirty-seven.

23 Q. And how long did you know her?

24 A. I had met her just that July.

25 Q. And where did she work?

1 A. Platinum.

2 Q. Say again?

3 A. Platinum Plus.

4 Q. Is that a club?

5 A. Yes, ma'am.

6 Q. And did you know Megan?

7 A. Yes, ma'am.

8 Q. How long had you known her?

9 A. About two or three years.

10 Q. And do you know if she worked or where she worked?

11 A. She was unemployed, I think, at the time. I think she
12 was. I think she was still going to school.

13 Q. And was Taylor and Megan living together, were they
14 roommates?

15 A. Yeah. Yes, ma'am.

16 Q. And where did the woman in the hotel room work?

17 A. She didn't work.

18 Q. Isn't it true you previously said she worked at
19 Platinum Plus?

20 A. Back when I first met her she did. But at that point
21 in time she wasn't.

22 Q. And what's your relationship -- I'm sorry. Say again?

23 A. At that time she wasn't.

24 Q. But she was pregnant with your child at that time?

25 A. That's what she said. But, you know, she was kind of

1 loose so, you know, I don't know if it was mine or not.

2 Q. What was your relationship to her?

3 A. Ma'am?

4 Q. What was your relationship to her?

5 A. I suppose she's supposed to be my baby mama. I mean,

6 you know, if it -- I wasn't going to know until actually

7 the blood test. But like I say, she was kind of loose.

8 So, you know, I don't know if it was mine or not.

9 Q. So you said on August 9th of 2010 you went to a hotel
10 to visit her?

11 A. Right.

12 Q. What was your relationship?

13 A. She was my baby mama. I was assuming or thinking that

14 she was going to be my baby mama. I mean, you know. You

15 know that goes. Everybody knows how that goes. I mean,

16 you're not that sure because she was a loose female, you

17 know, she had plenty of guys. So I don't know if I was the

18 father or not.

19 Q. But why are you going to see her? Are you dating her?

20 A. Yeah.

21 Q. Oh, you were dating her?

22 A. Yeah. We was dating off and on.

23 Q. And did you have a phone on you when you were

24 arrested?

25 A. Yes, ma'am.

1 Q. And did law enforcement take that?

2 A. I guess they did.

3 Q. And did you drive to the hotel?

4 A. Yes, ma'am.

5 Q. Did you have a valid driver's license?

6 A. No, ma'am.

7 Q. Was it your car you were driving?

8 A. Yes, ma'am.

9 Q. Was there a paper tag on the car?

10 A. Yes, ma'am.

11 Q. On that night was Taylor upset with you about
12 something? And excuse me, early morning. It was about
13 twelve-thirty in the morning. Was she upset with you?

14 A. I think so.

15 Q. What was she upset with you about?

16 A. I think we was upset with each other about -- yeah,
17 about me going to the hotel room.

18 Q. And were she and you texting each other back and forth
19 about meeting?

20 A. About her coming to meet me?

21 Q. Yes?

22 A. Yeah.

23 Q. And did she ask you for anything?

24 A. Not that I recall.

25 Q. When you were arrested there were some pills found in

1 your pocket. Is that correct?

2 A. Yes, ma'am.

3 Q. And did you have those pills in your pocket?

4 A. Yes, ma'am.

5 Q. Did you know they were in your pocket?

6 A. Yes, ma'am.

7 Q. Who did you have them for?

8 A. To give them away.

9 Q. To give away to who?

10 A. Probably her.

11 Q. And why is it that Taylor did not want to get into
12 your car with you?

13 A. I guess she was mad about the female in two thirty-
14 seven.

15 Q. And you were buying her a car or you were giving her a
16 car?

17 A. Yeah. I bought that Lexus for me and her, yeah.

18 Q. I'm sorry?

19 A. I had purchased that Lexus from my cousin for me and
20 her, yeah.

21 Q. And were you texting back and forth with baby mama?

22 A. I don't recall.

23 Q. Did you have the name baby mama in your cell phone?

24 A. I probably did.

25 Q. Was she asking you to bring her anything?

1 A. I can't recall.

2 Q. And how much did you pay for the Lexus?

3 A. I think I gave my cousin like fifteen hundred dollars
4 down on it, but total around about five thousand dollars
5 probably.

6 Q. So you were going to make payments on the rest?

7 A. Yes, ma'am.

8 Q. And how much were you paying for the Avalanche?

9 A. About -- total, about twelve thousand, I think. Once
10 I make all the payments it would have been about twelve
11 thousand, I think.

12 Q. Now, the officers took the money out of your pocket;
13 is that correct?

14 A. No, they didn't take it out of my pocket. I took it
15 out of my pocket.

16 Q. And they seized the money after this incident?

17 A. Yes, ma'am.

18 Q. And it was a total of how much money?

19 A. About fourteen hundred.

20 Q. And where did that money come from?

21 A. Savings and my disability over the years.

22 Q. And where were you living?

23 A. I was homeless.

24 Q. And weren't you convicted in 2003 and 2012 of offenses
25 that carried more than a year?

1 A. 2003 and 2012? I think so.

2 Q. What were the officers wearing when they approached
3 you that morning, Officer Gardner and Officer Hall?

4 A. I think that was ---

5 Q. Could you tell that they were law enforcement?

6 A. Yeah. Once he came in view, yeah. He had on a police
7 vest or a shirt with police on it or something.

8 Q. And how did you know Megan's -- or did you know
9 Megan's father?

10 A. Uh-huh (affirmative).

11 Q. How did you know him?

12 A. He had a business one time, pressure washing, and he
13 used to give me work sometimes.

14 Q. And is that how you met Megan?

15 A. Uh-huh (affirmative).

16 Q. And then you also met her when she was at Platinum
17 Plus?

18 A. I met Taylor at Platinum Plus.

19 Q. And Taylor and Megan were roommates?

20 A. Yeah. But when I first met Taylor, I didn't know that
21 she even knew Megan. They got back in touch through me.

22 Q. Do you still keep in touch with Megan?

23 A. Up until my lawyer want her to come to trial, yeah.

24 But it's not like we constantly always calling and talking
25 to each other or hanging out or nothing like that.

1 Q. Thank you.

2 MS. MONTS: Nothing further.

3 THE COURT: Any redirect?

4 MR. HARBIN: Briefly, Judge.

5 **REDIRECT EXAMINATION**

6 **BY MR. HARBIN:**

7 Q. You get your Social Security or SSI, you get that in a
8 check form?

9 A. Yeah.

10 Q. They mail you a check?

11 A. Yeah.

12 Q. Where do you cash it at?

13 A. Well, it goes direct deposit.

14 Q. So you have a bank account?

15 A. Yes, sir.

16 Q. And how often do you pull money out of that bank
17 account? Whenever you want to?

18 A. Yeah. Pretty much.

19 Q. Do you normally carry a debit card or do you carry
20 cash?

21 A. Both.

22 Q. Okay. The last question I have, were you ever -- did
23 Officer Gardner ever ask you anything that you did not
24 comply with to do, absent or not including sticking his
25 hand in your pocket? Did he ever ask you to do something

1 that you did not do? Were you fully compliant?

2 A. Yeah. Say what now? Say that question again?

3 Q. Did you agree to do everything Officer Gardner asked
4 you to do, when he asked you to do and answer the questions
5 he asked you when he asked you the questions?

6 A. Yes, sir.

7 MR. HARBIN: No further questions.

8 Thank you.

9 THE COURT: All right. Thank you, sir. You may
10 step down.

11 MR. HARBIN: Judge, the Defense rests.

12 THE COURT: All right. Anything in reply from
13 the State?

14 MS. MONTS: No, Your Honor.

15 THE COURT: Mr. Foreman, ladies and gentlemen,
16 I'm going to ask you to go back to your jury room briefly.
17 We need to go over the law a little bit, one with another.
18 And in a few moments the attorneys will have a chance to
19 address you in their closing and I'll instruct you on what
20 the law is. Let me remind you again while you've heard the
21 evidence, you haven't heard my instructions on the law nor
22 the closing statements of the attorneys. So you should
23 not, of course, be discussing the case. We'll call you
24 back in just a few moments and be ready for the attorneys
25 to address you in their closing. If you'll retire back to

1 your jury room.

2 (WHEREUPON, the jury exited the open court at
3 approximately 1:40 P.M.)

4 THE COURT: All right. Any other matters before
5 we talk about the charges and verdict form and so forth?

6 MR. HARBIN: Nothing from the Defense, Judge.

7 MS. MONTS: Nothing from the State, Your Honor.

8 THE COURT: All right. I've reviewed the
9 proposed charges and looked over the case from the Fourth
10 Circuit that you relied on, the *Boone* case. I believe that
11 the language there is certainly the law. But I think even
12 in the context of that case that all of these charges
13 proposed would relate to matters of law. And I
14 respectfully deny your request to charge those, Mr. Harbin.
15 Certainly, you're protected on the record on that in your
16 articulate argument as to why they should be charged as to
17 the detention and the consent and the reasonable suspicion.
18 But I believe those are legal matters. And certainly based
19 on the argument that the Solicitor made, I would agree with
20 that. So I won't be charging those matters. I do have a
21 verdict form prepared on each of those charges. I'll let
22 y'all look that over and make sure it's in proper form.

23 MR. HARBIN: Judge, I have one other ---

24 THE COURT: Yes, sir.

25 MR. HARBIN: --- charging issue. And you may

1 already have this prepared. But in anticipation of your
2 ruling, I've got a probable cause charge and I don't know
3 if you've already got that?

4 THE COURT: Probable cause?

5 MR. HARBIN: Your Honor, can I read it?

6 THE COURT: Yes, sir.

7 MR. HARBIN: Get this on the record. Probable
8 cause is a good faith belief that a person has committed a
9 crime when that belief rests on grounds that would make it
10 ordinarily prudent and causes a person under the
11 circumstances to have the same belief. Probable cause for
12 arrest without a warrant is something more than a mere
13 suspicion that the person committed a crime. An arrest
14 made on a hunch, a mere belief or a guess unsupported by
15 facts, circumstances, or credible information showing that
16 the person has committed a crime, is not made on probable
17 cause. Probable cause is somewhere between suspicion and
18 sufficient evidence to convict. In deciding whether there
19 is probable cause to arrest the probability cannot be
20 technical but must be based on factual and practical
21 considerations of everyday life on which reasonable,
22 prudent, and cautious people act.

23 And Judge that is from *State v. Blassingame* and I have
24 redacted four words because it was -- it had referred
25 previously to a misdemeanor specifically and I know that we

1 are not dealing with a misdemeanor and did not want any
2 confusion to the jury. If I could hand this up, Judge.

3 And Judge this is kind of in lieu of -- I wouldn't
4 call it a compromise, but certainly it's -- I'm arguing the
5 existence of certain -- a certain standard of evidence,
6 Judge.

7 THE COURT: Does the State have an objection to
8 that?

9 MS. MONTS: Yes, Your Honor. I believe that it
10 would lead the jury to believe that the officers made it
11 probable cause before they patted the person down. In this
12 case, Your Honor, they needed reasonable suspicion that he
13 may be armed. And that's why they patted him down and when
14 they came across the drugs for which he was arrested. And
15 we believe that that would interfere with what they truly
16 should be deciding upon.

17 MR. HARBIN: Judge, I believe that what she just
18 articulated is a jury argument, not necessarily a charge.
19 And certainly, everything that's in that document for --
20 number one, I believe it to be true and accurate as a
21 matter of law. But that being said, of course, I intend
22 argue the veracity of statements, the credibility of
23 witnesses, and that will touch on facts related to what has
24 been told to the Court as a reasonable suspicion and that
25 kind of thing. Because that relates to whether or not

1 Officer Gardner may be telling the complete truth or
2 Officer Cothran or Officer Hall. So as it goes to their
3 procedural effects, their competence as police officers,
4 all of that combined as the totality of the circumstance,
5 to borrow from our previous discussion, that's going to go
6 to whether or not the jury is going to want to believe that
7 there is, in fact, enough evidence to convict my client
8 beyond a reasonable doubt. And I think it's a reasonable
9 proposal.

10 THE COURT: The arrest was perfected after the
11 pills were discovered; correct?

12 MR. HARBIN: That is my understanding, Judge.
13 But I've not asked to mention that specifically or from the
14 bench.

15 THE COURT: This is a probable cause to arrest.
16 So this would all be geared toward the arrest being made at
17 that stage.

18 MS. MONTS: And, Your Honor, if you are inclined
19 to charge it, we would ask that the charge say that, that
20 the probable cause starts at when they found what they were
21 going to arrest for. We still think that probable cause,
22 just in general, will make the jury not understand that
23 they don't need probable cause to go up to them and to
24 gather their reasonable suspicion. That's not for them to
25 consider.

1 THE COURT: Well, you're basically saying a
2 probable cause to arrest. That's what you're saying is
3 that probable cause to arrest is a good faith belief a
4 person has committed a crime, when that belief rests on
5 grounds. I'll charge, I'll charge that with the redaction
6 that you have ---

7 MR. HARBIN: Thank you, Judge.

8 THE COURT: --- as far as the misdemeanor.

9 MR. HARBIN: Yes, sir.

10 THE COURT: And specify that probable cause, not
11 that just probable cause is good faith belief, but probable
12 cause to arrest is a good faith belief that a person has
13 committed a crime ---

14 MR. HARBIN: Yes, sir.

15 THE COURT: --- at the time the ... that belief
16 rests on the grounds. I'll charge that. Any other
17 requests to charge. Obviously, I'll charge the credibility
18 of witnesses and standard burden of proof, presumption of
19 innocence, expert witness, how that's to be weighed.

20 MR. HARBIN: Judge, the Court is not going to
21 charge an instruction as to whether or not his statement is
22 made voluntarily or that they can't consider it?

23 THE COURT: His statement ---

24 MR. HARBIN: I'm sorry, his consent?

25 THE COURT: No, sir. I still believe that's part

State of South Carolina -vs- Erick E. Hewins (2010-GS-23-8295 and 8296)
Erick Hewins - Redirect Examination by Mr. Harbin

371

1 of the law that I've ruled on. So all three of those I ---

2 MR. HARBIN: Judge, just for the record and for
3 my client's benefit, I intend to argue that the description
4 of facts doesn't fit my client's description of facts. And
5 I believe that simply goes to credibility in general. I
6 don't think we can avoid talking about discrepancies in the
7 factual scenario. So my intention is to raise doubt
8 through that, through credibility, and not attempt to
9 circumvent the direct ---

10 THE COURT: Well, you certainly can argue the
11 credibility of witnesses.

12 MR. HARBIN: Yes, sir.

13 MS. MONTS: Your Honor, actual and constructive
14 possession.

15 THE COURT: Right. Mere presence. I'll charge
16 mere presence.

17 MS. MONTS: And how about the last one I handed
18 up right before we started about whether the -- that the
19 Constitution doesn't require officers to give a warning.

20 THE COURT: Well, does the State want me to
21 charge consent, as well? And then I can include that --
22 the right to refuse consent. The consent that he proposed
23 before? Is the State wanting that? Obviously, if the
24 State -- if I'm charging consent, I will include the
25 Forrester language.

1 MS. MONTS: Your Honor, what was the consent
2 charge, I'm sorry?

3 THE COURT: That was the one handed up
4 voluntariness -- examine the totality of the circumstances,
5 factors such as characteristics of the accused, education
6 and intelligence, number of officers present.

7 MS. MONTS: No, Your Honor. No, Your Honor, the
8 State does not. So we would withdraw our consent.

9 THE COURT: All right. All right. Did you have
10 a chance to look over the verdict form?

11 MR. HARBIN: Oh, sorry, Judge.

12 THE COURT: Any objection to the verdict form?

13 MR. HARBIN: None from the Defense, Judge.

14 MS. MONTS: None from the State, Your Honor.

15 THE COURT: All right. Let's take about ten
16 minutes to get your thoughts together and then we'll be
17 ready to address the jury.

18 (WHEREUPON, the Court stood at ease for a brief
19 recess.)

20 THE COURT: Are y'all ready to proceed?

21 MR. HARBIN: Yes, sir.

22 MS. MONTS: Yes, Your Honor.

23 THE COURT: All right. If our jury's ready you
24 can have them come in, Mr. Fuller.

25 (WHEREUPON, the jury entered the open court at

1 approximately 2:21 P.M.)

2 THE COURT: All right. Mr. Foreman, ladies and
3 gentlemen, the attorneys now will address you in their
4 closing. I told you at the beginning this is not evidence.
5 While it's not evidence I urge you to listen carefully as
6 each attorney addresses you. I'm sure that each of them
7 can give you some valuable insights to perhaps help you in
8 your deliberations to take place soon after I instruct you
9 on the law.

10 Mr. Harbin, you may address the jury in your closing.

11 MR. HARBIN: Thank you, Judge. May it please the
12 Court.

13 CLOSING STATEMENT

14 BY MR. HARBIN:

15 At the beginning of this trial I asked you to pay
16 attention to not only the big things but the little ones,
17 the details. Because I'm going to argue to you that you
18 cannot believe the big guys if you can't believe the little
19 ones. And if you can't trust the officer, and you can't
20 trust the evidence.

21 Just by way of overview, this case is about an officer
22 -- two officers that drive into a hotel parking lot, see a
23 black man talking to two white women and decide that
24 they're going to talk to them. And without any further
25 action he's pulled out of his car, searched and arrested.

1 That's fairly uncontested. You do, of course, have varying
2 views of exactly how that occurs, how the officer, for
3 instance, pulls up his car, how he gets out of his car,
4 where he stands, how he stands, what he says, what he asks,
5 and what the responses are. So let's start with, the first
6 thing they do is just pull up. And this is all about
7 credibility. What do the officers say, in what I would
8 describe as kind of a canned and rehearsed type speech. He
9 said, we pulled up in the middle of the parking lot. We
10 weren't blocking them. Pulled directly in front of each
11 car, strategically positioned in front of each car. We
12 weren't blocking them. Officer Gardner said they had
13 plenty of room to turn. Officer Hall said the same thing.
14 But then Officer Hall, in an honest moment, said, I could
15 open my car door and I had enough room to get around the
16 car door. Y'all think about it. All of y'all have driven,
17 all of y'all have stood in a parking lot and watched
18 somebody trying to pull into a space or back out of a space
19 or back into a space. And inevitably you end up being the
20 person to say, come on, you've got plenty of room, plenty
21 of room, plenty of room. And they've got like this much
22 room and they still are going, I don't know, because they
23 don't know because their perception of how big a car is, is
24 not really always that accurate. In other words, your
25 perception of how much room you have is way smaller than

1 how much room you have. So to effectively block someone
2 in, and I think to fairly block someone in, you don't have
3 to be this close. She said, what, a car door this long,
4 she said she opened her door and then she walked around it
5 so that's another two feet. So she's this far away.
6 That's not very far when you're talking about two
7 automobiles. I don't think they were being entirely honest
8 with you. This is just setting the stage for their amount
9 of truthfulness. I'm not saying that that in and of itself
10 says anything about this case, but it sets the tone for the
11 amount of truthfulness that's going to come from this
12 officer.

13 Now, the officer, of course, says he comes around and
14 makes contact and he sees this sweating and nervousness and
15 stuttering. And I find it interesting that my client says
16 that Officer Gardner got the information, his name, his
17 date of birth. And he gives it to Officer Hall and Officer
18 Hall tries to run it. Now, remember Officer Hall herself
19 said, I had trouble running it. It makes a little bit more
20 sense to me that the reason she has trouble running it is
21 the same reason a telephone exists, that once you relay
22 some information you're bound to get something wrong. And
23 all of us have tried to look up a name or an address or
24 something like that on Google or whatever you want to do
25 and if you miss one little thing, you're not going to get

1 the right result. So what happens, they have to get back
2 and verify his information. And when they verify it, what
3 do they find out? That my client has told the truth. So
4 that my client is telling the truth, we're not so sure
5 about the veracity of the statement of how close their cars
6 were.

7 Now, the Solicitor tried to kind of slip in a couple
8 of times that after his name was run that his license came
9 back suspended. I would argue that's a red herring.
10 Because if y'all recall he's already in handcuffs. Well
11 after -- well before, rather, anybody comes back with a
12 report that he's DUS. Nobody knew that. That has nothing
13 to do with the this, I mean nothing. She just wants you to
14 think, well, he's committing a crime. He's not committing
15 a crime because he's sitting in the car. He's not
16 operating it. You don't have to have a license to sit in
17 the car. You have to have one to operate it.

18 Now, one of the important details I believe, maybe one
19 of -- the most important detail, is that Officer Gardner
20 tells you in his testimony that upon talking to my client,
21 he gets some information from him, observing this
22 particular behavior, that he feels that he is in danger,
23 there is some kind of safety concern he has for him and his
24 fellow officer. So his testimony is that he pulls my
25 client out and he frisked him; right? We've all seen it on

State of South Carolina -vs- Erick E. Hewins (2010-GS-23-8295 and 8296)
Closing Statement by Mr. Harbin

377

1 TV, pat him down to see if there's a weapon. Now, besides
2 the point of whether or not you need to go into a pocket
3 after you've already pulled a big lump out, it's the
4 timeliness that I worry about. He says he pulls him out
5 and he frisks him; right? But what he also said, he also
6 said he didn't do it until backup arrived; right? So he's
7 there for a few minutes figuring this out, getting some
8 information from my client, giving information to Officer
9 Hall so she could run the information through. And by
10 then, I don't know how many minutes that is, a backup
11 officer arrives or more than one backup officer, however
12 many did. Because he said that now it's kind of safe, and
13 even Officer Hall, I believe, said, you know, she could get
14 back to her computer work. Doesn't have to keep one eye on
15 him because somebody else is there. Now, why is that a
16 very important detail? Because I think that that is the
17 seminal moment in this case whether or not you can trust
18 anything Officer Gardner says. If indeed he did pull my
19 client out and frisk him as he says, then I think you ought
20 to believe him. He's trustworthy, he's credible. But he
21 told you he did it as soon as other officers arrived;
22 right? We've had testimony and we've had evidence exactly
23 what time Officer Gardner and Hall arrived, twelve thirty-
24 six in the morning. We also have had testimony and
25 evidence as to what time Officer Cothran arrived, at twelve

1 forty-eight in the morning. So he arrives after these
2 first backup officers arrive. But what is his testimony?
3 Now, initially, initially he says, no, no, my report's
4 wrong. The chronology is all off. Officer Gardner and
5 Officer Hall is right. After I read their report, I
6 realized how wrong I was. And then, if you remember, I
7 wasn't terribly satisfied with that answer, so I asked him
8 again, and I asked him again, and I asked him, I said, is
9 your memory better today than it was two and a half years
10 ago? He said it was better then. I said, do you
11 misrepresent the thing in your report, how it happened?
12 You don't lie in your report or anything like that? He
13 said no. So I said, your report is the truth? And I
14 believe at the very end he finally did say, yes. Flat yes.
15 And by the way, you can look at transcript if you want to.
16 When you get back in there and you don't recall, ask to see
17 the transcript. He said, yes. At the very end of his
18 thing, he said, yes, my report is correct. And I went over
19 it with him almost verbatim what his report said. He said,
20 I arrived on scene. When I arrived on scene Officer
21 Gardner was standing with my client outside of the vehicle.
22 I approached Officer Gardner. He essentially gave him the
23 skinny, that my client said he was there to see somebody in
24 two thirty-seven. So Officer Cothran says, okay. I don't
25 know whether they told him to do it or he just does it, he

State of South Carolina -vs- Erick E. Hewins (2010-GS-23-8295 and 8296)
Closing Statement by Mr. Harbin

379

1 goes and checks out with management, who is in two thirty-
2 seven, what's going on in in two thirty-seven? Gets some
3 information from management, from the hotel management,
4 goes all the way back to his car, checks out that in his
5 computer, then returns back to where Officer Gardner and my
6 client are standing. Then he sees the frisk.

7 Now, why is that important? You say, Mr. Harbin, this
8 is about drugs. This isn't about the frisk. This is about
9 whether or not you can trust the evidence. And you can't
10 trust the evidence if you can't trust the officer, you just
11 can't. So when he gets back and he sees that frisk, that
12 means that Officer Gardner was untruthful about why he
13 pulled my client out of the car. Because he said, I pulled
14 him out because I was -- I don't know if he said scared.
15 He said, this was a safety concern. I pulled him out
16 because I needed to frisk him for my safety and that of my
17 fellow officers. Officer Cothran flat out says that is not
18 true. Not true at all. And you know what, Officer
19 Cothran, I think is the one actually telling the truth
20 because he didn't sit down and write his report with
21 Officer Gardner. He didn't know that he was basically
22 telling something that Officer Gardner was going to tell
23 you. He had no idea probably until this trial. And I
24 believe that his initial answer, he was trying his best to
25 help out his buddy, that he was tutor. This guy was his

1 apprentice. He probably likes him. He's a nice guy. He
2 was doing good work. And then he discovers that his
3 recitation of the facts is entirely different, entirely
4 different from Officer Gardner's. So from that moment on,
5 I would suggest to you, you cannot trust what Officer
6 Gardner says. You can't trust him because he has lost your
7 trust, because he has misrepresented what happened. You
8 can't tell me that there is a reason that Officer Cothran
9 made up some other time line. It doesn't make any sense.
10 It also, by the way, is perfectly in line with what my
11 client says and what Megan says.

12 If you can't trust the officer, you can't trust the
13 evidence. And you look at the evidence we are told -- by
14 the way, the burden is on the State; right? They actually
15 have to make sure all their T's are crossed and all their
16 I's are dotted. And they get here and they say that
17 they've got all these people that can account for where the
18 drugs are. Oh, by the way, except one guy. His name is
19 Israel Flounders. He's an employee that no longer works
20 there and nobody tells you why. The State calls these
21 cases, they schedule all these. They could call him and
22 tell him, hey, come back in town, we need you. Because for
23 however long Mr. Flounders had that packet or packets or
24 things in his custody, we have absolutely no testimony as
25 to what happened to them. We don't have an affidavit. We

State of South Carolina -vs- Erick E. Hewins (2010-GS-23-8295 and 8296)
Closing Statement by Mr. Harbin

381

1 don't have a person saying, well, I saw them the whole
2 time. I know what he did. I know where he put it.
3 Nothing. In and of itself maybe that's not the whole case,
4 but that's indicative of exactly what kind of confidence we
5 have in this particular case. Ms. Bennick told you that
6 there's procedures and checklists and they sign things and
7 the procedural safeguards are there to protect the
8 integrity of the evidence. And I believe that she did.
9 That's her purpose. That's the whole thing. The State
10 didn't. And under every state agency, they're all under
11 one umbrella. The State didn't protect the integrity of
12 this evidence, because they couldn't tell you what happened
13 to this evidence for how many hours or days or whatever it
14 was. I don't remember. But for some period of time, this
15 dude had this evidence and nobody knows what happened to
16 it. And it's not impossible for that information to have
17 been given to you. The burden is on the State to provide
18 that information and it was provideable. Mr. Flounders is
19 not deceased. He just wasn't here. The chemist, Mr.
20 Armstrong, he admitted that his analysis means squat if you
21 can't trust the integrity of the evidence. If you can't
22 trust Officer Gardner, you can't trust what he put into
23 evidence, you can't trust -- or if you don't know who had
24 the evidence, there's no way to trust what Mr. Armstrong
25 actually tested. He admitted it. He said, look, my

1 testing procedure is only as good as the integrity of the
2 evidence. It's just an additional failure of due diligence
3 and procedure. I'd also ask -- there's at least one other
4 officer, if not a couple of other officers, on scene. Why
5 weren't they here because there was clearly a discrepancy
6 between the report of Officer Cothran and Officer Gardner.
7 So why weren't these other officers subpoenaed. Is it
8 because they agreed with Officer Cothran or is it because
9 they agreed with Officer Gardner? I don't know but it's my
10 job to tell you. It's the State's job to tell you. But I
11 am -- it bothers me that officers that saw things that you
12 want to know the answer to didn't testify for you.

13 Speaking to due diligence, where is the lady from two
14 thirty-seven, from room two thirty-seven? What happened in
15 room two thirty-seven? Were there drugs in two thirty-
16 seven? Did she come out, did anybody interview her? All
17 they got was a name that my client said wasn't even right.
18 And, again, by itself, maybe that's not that big a deal.
19 But it's just one more thing in this case that they don't
20 seem to be that concerned about making as good as it should
21 be when you're asking a jury of your peers to convict you
22 or to acquit you. It's just not enough.

23 Now, I don't take lightly what I'm asking you to do,
24 and I'm asking you to acquit my client, find him not
25 guilty. I don't take it lightly. Because I'm asking when

State of South Carolina -vs- Erick E. Hewins (2010-GS-23-8295 and 8296)
Closing Statement by Mr. Harbin

383

1 you go home after all of this is said and done and your
2 neighbors, your family, your loved ones, your kids say,
3 hey, dad, hey, mom, what did you do today? Well, I served
4 on a jury. What was the case about? Well, there was a
5 fellow in a car and they took some stuff and they said it
6 was drugs. And so what did you do? You say, we found him
7 not guilty. How in the world did you do that? It's much
8 easier for you to tell the opposite story; isn't it? It's
9 much easier for you to go, I had a case where a dude was in
10 a car and they found some drugs in the car and we convicted
11 that dude. No problem. It's much complicated, it's much
12 more difficult for you to do the principled thing and hold
13 the State's feet to the fire. Make them meet their burden,
14 which they can't. They can't because the officer has not
15 been truthful in this case. Maybe he could be truthful in
16 the next case. But I don't take it lightly what I'm asking
17 you to do because I don't think it's going to be easy for
18 you to. And I understand that. And I appreciate the time
19 that you've given to listen to me. I just ask you to keep
20 in mind that the right thing to do, like I said, is not
21 always the easiest thing to do. But if you can't trust the
22 officer, you cannot trust the evidence. And I ask you to
23 find my client not guilty.

24 THE COURT: Ms. Monts, you may address the jury
25 in your closing.

1 CLOSING STATEMENT

2 BY MS. MONTIS:

3 Mr. Foreman, ladies and gentlemen of the jury, you're
4 probably wondering what am I supposed to do now? What you
5 are supposed to do is fulfill the oath that you took at the
6 beginning of this trial to render a truthful verdict in
7 this case. And you do that once His Honor allows you to go
8 back and deliberate, and the twelve people that are back
9 there to deliberate, use their commonsense, backgrounds,
10 experiences to decide what the truth is. Because you are
11 the judges of the truth. The finders of the truth. There
12 are two judges in this courtroom, His Honor and you. You
13 are the judges of the truth and the facts, he is the finder
14 and the judge of the law. The law is the legal issues that
15 took place and were brought up during this trial. Some
16 issues take place while you're in a courtroom, some take
17 place while you're outside the courtroom. His Honor is the
18 finder of the law and he rules on those issues. Some of
19 those rulings take place while you're in here. For
20 instance, when you hear Mr. Harbin or I object. The Judge
21 decides what's the legal reason for that, do I sustain or
22 overrule? He makes legal rulings on other things, such as
23 whether the procedures of the police were proper, whether
24 the search and seizure in this case was proper, whether any
25 of the objections were proper, whether evidence can be

State of South Carolina -vs- Erick E. Hewins (2010-GS-23-8295 and 8296)
Closing Statement by Ms. Monts

385

1 admitted. He makes those legal rulings. And thankfully,
2 there are two judges, His Honor and you. Because you split
3 up the duties. You do not have to decide on these legal
4 issues.

5 You have to decide whether the Defendant was in
6 possession of these four pills and whether he was in
7 possession of this twenty point two-nine grams of cocaine
8 base, also known as crack cocaine. How do you do that?
9 You remember the testimony from the witness stand and you
10 will have these items in the jury room with you to look at
11 and discuss.

12 Now, His Honor, will give you some instructions on the
13 law and if anything I say is different from what he says,
14 he's the judge of the law, take him at his words. There
15 are two types of possession. There's constructive
16 possession and actual possession. Constructive possession
17 is when you have the knowledge that it exists and the right
18 to execute control over it. Actual possession is something
19 that you have possession of, like right now I have a pen in
20 my hand, I have actual possession of this. I have a TV set
21 at home. I am in constructive possession of that because I
22 know it exists and I have the right to control it. So
23 there are two types of possession, both of them carry the
24 same weight. Possession is possession, whether it's actual
25 or constructive.

1 So how does the State believe, which I do, that we
2 have proven to you beyond a reasonable doubt that the
3 Defendant was in possession of both the clonazepam pills
4 and the cocaine base. Look at what you heard from the
5 witness stand. The facts that you heard include -- and if
6 anything you remember when you're back there deliberating
7 is beyond what I point out right now, everything what you
8 remember is what your decision will be based on. What do
9 you know about the location? The location of the drugs was
10 in a car. Whose car was it? It was in -- and I'm sorry.
11 That's an abbreviation for Defendant. I'll go ahead and
12 write it out. Defendant's car. It was inside his car. He
13 has control over his car. What other ways does he have
14 control over that car? He drove it there. And we know
15 he's going to drive it away, from the testimony. What else
16 do we know? He's got the keys to it. No one else has the
17 keys to the car. He does. What else do you know that
18 shows that he was in possession of these items. You know
19 that no one else at that point had access to that car.
20 What else do you know about these particular substances?
21 Number one, about the items, the pills, the Defendant
22 admitted on the stand that he had these in his pocket and
23 that he had them to give him to someone. I asked him
24 further, who were you going to give them to? And he said,
25 Taylor, his girlfriend. He admitted he had these in his

1 pocket. He was in actual possession of these pills and he
2 admitted it. So the Defendant, I believe you should find
3 him guilty of being in possession of these pills.

4 What else do you know about the crack cocaine? Not
5 only is there a slab, also known as a cookie, the large
6 piece of crack cocaine, there's also some smaller cut up
7 pieces that were in the Advil bottle. Those were ready for
8 sale, ready for distribution. They were, as you can tell,
9 probably broken off of the cookie to sell and were put in a
10 smaller container. Where was the large slab that the
11 officer testified he found first? It was on the rear
12 floorboard behind the passenger seat, so that the person in
13 the driver's seat could reach over and could easily have
14 reached them. I'll just call it the large piece of crack
15 was on the floor in plain view that the officer could see
16 once he was searching. What else do you know? That the
17 Advil container that had the smaller rocks of crack cocaine
18 was inside the center console, on the armrest. What else
19 do you know? We had several witnesses testify, one of them
20 being James Armstrong. You will have back there with you
21 the lab report that he produced. The lab report gives you
22 the results of his analysis, that the crack cocaine or
23 cocaine base was twenty point two-nine grams and the
24 clonazepam was a Schedule IV, four green tablets.

25 His Honor is going to explain to you what elements

1 must be met in order for you to find the Defendant guilty.
2 Those elements of possession -- I'll call the clonazepam
3 just pills. He must be in possession of them. What does
4 that mean? He has actual possession or constructive
5 possession. Because he has the right to control them, they
6 are on his person. What do you know about the crack? He
7 doesn't have it physically on him. That would be the
8 constructive possession because he has the knowledge and
9 the right to control. And the right to control is
10 something that we wouldn't know unless we look at other
11 factors. What other factors do we have? The fact that he
12 owns the car, that he's driving the car, that he has the
13 keys to the car. There's nobody else there in the car with
14 him.

15 Ladies and gentlemen what else is super important?
16 The value. The value of this little piece right here, what
17 did the officer tell you? Between seven hundred and fifty
18 and eight hundred dollars. Ladies and gentlemen, no one
19 just leaves seven hundred and fifty or eight hundred
20 dollars lying around. What else can you consider?
21 Consider the witnesses' testimony. What do you judge a
22 witnesses' testimony, by their credibility and their
23 believability. Look at what the officers said and look at
24 what the defense witnesses said. What interest did they
25 have in the outcome of this trial? Their interests vary

1 differently, vary greatly.

2 What do you know about the Defendant? The Defendant
3 said he is not employed. He said he's homeless. He said
4 he had just bought the Lexus a few days earlier for his
5 girlfriend, the eighteen-year-old, who, when asked what's
6 their relationship, he said that -- he wouldn't use the
7 word girlfriend. He said dating or something. It was a
8 little bit less than girlfriend. But still he's bought her
9 a Lexus that he said cost five thousand and he put a
10 fifteen hundred dollar down payment on it.

11 What else do you know? That evening they're supposed
12 to be going to get a truck, an Avalanche. How much did he
13 say he had paid for that? Twelve thousand. What else do
14 you know? That night they're supposed to be going to pick
15 up the Avalanche from a repair shop. It's twelve thirty-
16 six when officers first arrive. The Defendant and the two
17 white females sitting in the car next to him are still
18 sitting there. They haven't left yet to get this -- the
19 Avalanche. What's the believability that that's the
20 purpose of their meeting that evening, that they're really
21 going at twelve thirty A.M. to go pick up a vehicle?

22 What else do we know about the Defendant? He's got at
23 least two girlfriends, the eighteen-year-old there outside
24 the car, who's mad at him because he's dating a woman who's
25 up in the hotel. So we know he's got at least two

1 girlfriends. We know that the girlfriend in the car was
2 going to be getting the clonazepam from him. We also know
3 that she had marijuana in her car.

4 The elements that the State must prove to you are that
5 the Defendant's identity is true. The officers testified
6 that Mr. Erick Hewins is the person that they arrested on
7 that evening and that was in possession of the pills in his
8 pocket and in possession of the crack cocaine, both the
9 slab or cookie that was on the floorboard and the smaller
10 rocks that were cut up and placed in the Advil container.
11 So his identity is Erick Hewins. We know that the date was
12 August 9th of 2010. We know that it was clonazepam, a
13 Schedule IV drug. How do you know that? The lab report
14 tells you clonazepam is a Schedule IV drug, on those four
15 green pills. We know that the crack cocaine or cocaine
16 base was cocaine base, as the chemist who was authorized
17 and -- as the chemist testified and is on the lab, cocaine
18 base. What else do we know about the cocaine base? The
19 weight of it, the total weight, is on the lab. Total weigh
20 twenty point two nine grams. His Honor will tell you in
21 order to be guilty of trafficking -- I remember from the
22 very beginning, I said trafficking is the same as
23 possession, the only difference is the weight. The weight
24 of the item must be more than ten grams. Twenty point two
25 nine is almost -- excuse me -- over two times the ten grams

1 that equals trafficking.

2 What else do you know about Mr. Hewins from that
3 night? He had a large sum of cash. He had one thousand
4 four hundred and thirty-seven dollars. What do you know
5 about that? The officer testified to the denominations.
6 They counted it several times. He had four one hundred
7 dollar bills; he had twenty twenty dollar bills; he had
8 thirty-four ten dollar bills; he had fifty-two five dollar
9 bills; and he had thirty-seven one dollar bills. All small
10 denominations.

11 Ladies and gentlemen, if you noticed you did not hear
12 from the defense many of the things that I have just talked
13 about. Why? Because the defense does not want you
14 concerned with whether or not the Defendant committed the
15 crime, whether the elements of the crime have been proven,
16 because he wants you off on a rabbit trail considering
17 other things. The other things that His Honor decides as
18 the finder of the law. Those are not for your
19 consideration. Those are for the Judge. What you are to
20 consider is once the Defendant was patted down and was
21 found to be in possession of the pills, he is then
22 arrested. The question is, is there probable cause to
23 arrest him once he has pills in his pocket? Yes. He is
24 being arrested. There is probable cause for the arrest of
25 the pills. He's arrested for the pills and then what is

1 done? The car is going to be towed. The policy of the
2 Greenville Police Department if a car is going to be towed,
3 it will be inventoried. So they do a search of the car
4 because they cannot leave valuables or other contraband in
5 the car for the tow truck driver to be responsible for.
6 And that's when they find the crack on the rear floorboard
7 and the crack cocaine in the center console. The Defendant
8 is guilty based on the search of the car of being in
9 possession of the crack or cocaine base. And the weight of
10 that is more than ten grams.

11 Ladies and gentlemen, His Honor will describe beyond a
12 reasonable doubt. And what burden the state, what burden I
13 must prove to you, beyond a reasonable doubt, is beyond a
14 doubt of a reasonable person. But he will not tell you it
15 is beyond all doubt. Because very few things in this world
16 can be proven to a one hundred percent certainty. You
17 must use your common sense, your backgrounds, your
18 experiences. The two things that you must decide is
19 whether the Defendant was in possession of the green pills
20 and whether he was in possession of the cocaine base.

21 Ladies and gentlemen, the police told you at the
22 beginning, they went to roll call when they came on duty.
23 They were told what areas to go to. They did their job.
24 While doing their job they ended up making these charges
25 against Mr. Hewins. His Honor has ruled on the legal

1 issues here and it's your turn once His Honor tells you to
2 go back and start deliberating to make your ruling on the
3 facts of the case. The facts, number one, whether
4 Defendant's in possession of the pills; and, two, whether
5 the Defendant was in possession of more than ten grams of
6 the cocaine base, which is the crack cocaine, which is the
7 trafficking. We appreciate your being here. We appreciate
8 your time. I know this is a tough, tough situation to be
9 in. I appreciate it very much. The State believes that we
10 have met all the elements that the Defendant is guilty of
11 the pills and is guilty of the possession of the crack
12 cocaine. And your decision as the finders on the facts on
13 those two issues, we believe once you've rendered your
14 truthful verdict, it is guilty on both charges. Thank you.

15 **CHARGE**

16 **BY THE COURT:**

17 Mr. Foreman, ladies and gentlemen, it's now my
18 responsibility to instruct you on the law of the case. Let
19 me remind you that the fact that we have indictments in
20 this case, two charges, one, of course, is trafficking in
21 crack cocaine. The other is possession of a controlled
22 substance, clonazepam. The fact that the Defendant, Mr.
23 Hewins, in this case has been arrested and charged,
24 indicted is not evidence. It cannot be considered by you
25 as evidence of guilt in the case. It doesn't create any

1 presumption or inference of guilt. The indictments are
2 merely the formal written instruments by which the charges
3 are brought against the Defendant and ultimately brought
4 before this Court for disposition. Each indictment states
5 a separate and distinct offense. You must decide each of
6 the indictments separately on the evidence and the law
7 applicable to it, uninfluenced by your decision on the
8 other indictment. In other words, the Defendant can be
9 convicted or acquitted on either or both of the offenses
10 charged. And you'll be asked to write a separate verdict
11 of guilty or not guilty on each of the charges.

12 The Defendant here has pled not guilty to each
13 indictment. That places the burden on the State to prove
14 his guilt. A person charged with committing a criminal
15 offense in South Carolina is never required to prove
16 himself innocent. That's an important rule of law that in
17 a criminal trial, no matter how serious the charge may be,
18 the one charged will always be presumed innocent of the
19 crime for which that indictment was issued unless guilt has
20 been proven by evidence satisfying you of that guilt beyond
21 a reasonable doubt. The presumption of innocence doesn't
22 end when you begin your deliberations. It accompanies the
23 Defendant throughout the trial until you've reached a
24 verdict of guilt based on evidence satisfying you of that
25 guilt beyond a reasonable doubt. Presumption of innocence

State of South Carolina -vs- Erick E. Hewins (2010-GS-23-8295 and 8296)
Charge

395

1 has often been described as a robe of righteousness that's
2 placed about the shoulders of the Defendant and remains
3 with that individual until it's been stripped from him by
4 evidence satisfying you of that guilt beyond a reasonable
5 doubt. Presumption of innocence isn't a mere legal theory,
6 it's not a legal phrase that's tossed about. It is a
7 substantial right to which every defendant is entitled
8 unless you, the jury, are satisfied from the evidence of
9 the Defendant's guilt beyond a reasonable doubt.

10 Now, ladies and gentleman, you may ask yourself, what
11 is a reasonable doubt in the law? A reasonable doubt is
12 the kind of doubt that would cause a reasonable person to
13 hesitate to act. Some of you in the past may have had an
14 opportunity to serve as a juror on a civil case and a Judge
15 told you that a fact was only necessary to prove that there
16 was a fact by what was called the greater weight of the
17 evidence or the preponderance of the evidence, that it was
18 more likely true than not true. Criminal cases, the
19 State's proof is more powerful than that. It must be proof
20 beyond a reasonable doubt. That would be proof that leaves
21 you firmly convinced of the Defendant's guilt.

22 Now, there's very few things in this life that we know
23 with absolutely certainty, and in criminal cases the law
24 doesn't require proof that overcomes every possible doubt.
25 If, based upon your consideration of the evidence, you are

1 firmly convinced that the Defendant is guilty of the crime
2 charged, then you must find the Defendant guilty. If, on
3 the other hand, you think there's a real possibility the
4 Defendant is not guilty, you must give the Defendant the
5 benefit of that doubt and find him not guilty.

6 Now, I remind you, ladies and gentlemen, that during
7 the course of the trial you and I have had certain duties
8 to perform. As the Trial Judge, it's been my
9 responsibility to preside over the trial of the case, to
10 rule on the admissibility of evidence offered during the
11 trial. You're to consider only the competent evidence
12 before you, consider the testimony that's been offered from
13 the witness stand, the exhibits that have been made a part
14 of the record and that alone. I have the additional duty
15 to charge you the law that's applicable to the case. As
16 the Presiding Judge, I'm the sole Judge of the law. It's
17 your duty as jurors to accept the law and apply the law
18 just as I state it to you now. Some of you may already
19 have an idea of what the law is or a notion of what the law
20 ought to be in a case like this. And if you have such an
21 idea and it's not in agreement with what I now tell you the
22 law is, then you must abandon such an idea because under
23 your oath you've sworn to accept the law and apply the law
24 just as I state it to you. Every case that's tried in this
25 courtroom before a jury, that jury becomes the sole,

State of South Carolina -vs- Erick E. Hewins (2010-GS-23-8295 and 8296)
Charge

397

1 exclusive judge of the facts in a case. A Trial Judge
2 can't intimate or state or comment on or make any statement
3 whatsoever to a trial jury about the facts in a case.
4 Since you, the jury, are the sole judges of the facts,
5 you're not to infer from anything I've said in the progress
6 of the trial, any rulings I've made on the admissibility of
7 evidence or otherwise, anything I say to you now in the
8 course of this instruction to you that I have an opinion
9 about the facts in the case. I don't have an opinion about
10 the facts. The law of South Carolina, our Constitution in
11 South Carolina, prohibits a Trial Judge from having an
12 opinion about the facts. That's a matter solely for you,
13 the jury, to determine. And it's your duty to decide the
14 effect, the value, the weight, and the truth of the
15 evidence that's been presented.

16 Now, in a trial, there's normally two types of
17 evidence. There's what's called direct evidence and
18 circumstantial evidence. Direct evidence is the testimony
19 of a person who claims to have actual knowledge of a fact
20 such as an eyewitness. It's evidence which immediately
21 establishes the main fact to be proved. Circumstantial
22 evidence is proof of a chain of facts and circumstances
23 that indicate the existence of a fact. It's evidence which
24 immediately establishes collateral facts from which the
25 main fact may be inferred. Circumstantial evidence, that's

1 based on inference and not on personal knowledge or
2 observation. The law makes absolutely no distinction
3 between the weight or the value to be given either direct
4 evidence or circumstantial evidence. Nor is a greater
5 degree of certainty required of circumstantial evidence
6 than of direct evidence. You should weigh all the
7 evidence, ladies and gentlemen, in the case. And after
8 weighing that evidence, if you're not convinced of the
9 guilt of the Defendant beyond a reasonable doubt, then you
10 must, of course, find the Defendant not guilty.
11 Necessarily, you must determine the credibility of
12 witnesses who've testified in the case. Credibility simply
13 means believability. It becomes your duty as jurors to
14 analyze and evaluate the evidence, to determine which
15 evidence convinces you of its truth. In determining the
16 believability of witnesses who've testified in the case,
17 you can believe one witness over several witnesses or you
18 can believe several witnesses over one witness. In your
19 discretion, you can believe part of the testimony of a
20 witness, reject the remaining part of the testimony of that
21 very same witness. You can believe the testimony of a
22 witness in its entirety or you can reject the testimony of
23 a witness in its entirety. You can consider whether any
24 witness exhibited to you any interest or bias or prejudice
25 or other motive in the case. You can consider the

1 appearance, the manner in which that witness testified
2 while on the stand. Was the witness straightforward or
3 hesitant in answering? Was the testimony of that witness
4 consistent or inconsistent? Was the testimony of that
5 witness strengthened or weakened by other testimony or
6 evidence? How did the witness come to know the information
7 that the witness was testifying to? All those decisions
8 and factors can be weighed by you in determining the
9 credibility of the witnesses. It's totally your
10 prerogative to make that determination.

11 Now, I mentioned briefly and I'll reiterate that the
12 rules of evidence ordinarily do not permit witnesses to
13 testify to opinions or conclusions, but there is an
14 exception for what we call expert witnesses. A witness
15 who, by education and experience, has become an expert in
16 some art or science or profession or calling may state an
17 opinion as to any relevant and material matter that witness
18 claims to be an expert in, and may also state the reasons
19 for that opinion. Now, you should consider an expert's
20 opinion received into evidence, and like other evidence,
21 give it the weight that you think it deserves. If you
22 decide the opinion of an expert is not based on sufficient
23 education or experience or you conclude that the reasons
24 given in support of that opinion are not sound or that the
25 opinion is outweighed by other evidence, you can disregard

1 that opinion entirely. An expert witness testimony is to
2 be given no greater weight than that of any other witness
3 simply because the witness is an expert. Furthermore,
4 you're not required to accept an expert's opinion even
5 though it may be uncontradicted.

6 Now, in order to establish criminal liability,
7 criminal intent is required and must be proven by the state
8 beyond a reasonable doubt. Criminal intent is always a
9 matter that must be determined by the jury from the
10 circumstances surrounding the situation. There's no way,
11 of course, to prove intent to a mathematical certainty.
12 Medical science hasn't devised a way to dissect a person's
13 brain and determine what that person had in mind. So the
14 law says that criminal intent may be inferred from the
15 circumstances shown to have existed. It's not necessary to
16 establish intent by direct and positive evidence, but it
17 may be established by inference and the same way as any
18 other fact, taken into consideration the acts of the
19 parties, all the facts and circumstances of the case.
20 Criminal intent is a mental state. It's a conscious
21 wrongdoing. It's up to you to determine what the Defendant
22 intended to do based upon the circumstances shown to have
23 existed.

24 You have heard evidence that the Defendant was
25 convicted of crimes, other than the one for which the

State of South Carolina -vs- Erick E. Hewins (2010-GS-23-8295 and 8296)
Charge

401

1 Defendant is now on trial. This evidence may be considered
2 by you, if you conclude that it's true, only in deciding
3 whether the defendant's testimony is believable and for no
4 other purpose. You must not consider the Defendant's prior
5 record as any evidence of the Defendant's guilt of the
6 charges that we're here on today.

7 Now, probable cause to make an arrest is a good faith
8 belief that a person has committed a crime, when that
9 belief rests on grounds that would make an ordinary prudent
10 and cautious person under those circumstances to have the
11 same belief. Probable cause for arrest without a warrant
12 is something more than mere suspicion that a person
13 committed a crime. In other words, at the time an arrest
14 is made, it's merely a belief or a hunch or a guess,
15 unsupported by facts or circumstances or credible
16 information showing the person has committed the crime,
17 then it would not be made on probable cause. Probable
18 cause is somewhere between suspicion and sufficient
19 evidence to convict. In deciding whether there was
20 probable cause to arrest, the probability cannot be
21 technical but must be based on factual and practical
22 considerations of everyday life in which a reasonable,
23 prudent and a cautious person would act.

24 Now, ladies and gentlemen, in this case the Defendant
25 is charged with two offenses, as I've stated. First is

1 trafficking in crack cocaine. To prove this charge the
2 State must prove beyond a reasonable doubt the Defendant
3 knowingly sold or manufactured, cultivated or delivered or
4 purchased or brought into the state or that the Defendant
5 provided financial assistance or otherwise aided and
6 abetted or attempted or conspired to sell, manufacture or
7 cultivate or bring into the state. Or that the Defendant
8 was knowingly in actual or constructive possession or
9 knowingly attempted to become in actual or constructive
10 possession of the drug. The State must also prove beyond a
11 reasonable doubt that the amount of the crack cocaine or
12 any mixture contained in the cocaine was ten grams or more,
13 less than twenty-eight grams. Now, to prove possession the
14 State must prove beyond a reasonable doubt the Defendant
15 had both the power and the intent to control the
16 disposition of the drug. Possession may be either actual
17 or constructive. Actual possession means that the drug is
18 in the actual physical custody of the Defendant.
19 Constructive possession means the Defendant had dominion
20 and control or the right to use or exercise dominion and
21 control over either the drug itself or the property on
22 which that drug was found. Mere presence at the scene
23 where the drugs are found is not enough to prove
24 possession. The Defendant's knowledge and possession may
25 be inferred when a substance is found on the property under

1 the Defendant's control. However, this inference is simply
2 an evidentiary fact to be taken into consideration by you,
3 along with other evidence in the case to be given the
4 weight that you decide it should have. Two or more persons
5 may have joint possession of a drug. Mere presence at the
6 scene is not sufficient to prove someone guilty of a crime.
7 A Defendant's presence where a crime has been committed or
8 mere association with a person who commits a crime doesn't
9 make that Defendant an accomplice or aider or abetter of
10 the person committing the crime. The burden is on the
11 State to prove every element of the crime charged. If you
12 find after reviewing all of the evidence that the State has
13 proved that the Defendant was only present at the scene of
14 a crime, and they have not proven beyond a reasonable doubt
15 any other participation in the crime, then you must find
16 the Defendant not guilty. The law is that proof at the
17 scene of a crime is not sufficient to find someone guilty.

18 Now, the Defendant, secondly, is charged with unlawful
19 possession of clonazepam, an illegal drug. The State must
20 prove beyond a reasonable doubt that the Defendant
21 knowingly or intentionally possessed that drug. Knowingly
22 means with knowledge, consciously, not accidentally.
23 Intentionally means willfully intending the result which
24 actually occurs, not accidentally or involuntary. Intent
25 may be shown by acts of conducts of the Defendant and other

1 circumstances from which you may naturally and reasonably
2 infer intent.

3 And, of course, to prove possession the State must,
4 again, prove beyond a reasonable doubt the Defendant had
5 both the power and the intent to control the disposition or
6 use of the clonazepam. Possession can be either actual or
7 constructive as I've told you before. And I've explained
8 to you what actual possession is and what constructive
9 possession is.

10 Now, possession of this drug is a crime unless the
11 drug was obtained directly from or through a valid
12 prescription or order of a practitioner acting in the
13 course of a professional practice. And a practitioner
14 would be a physician, a dentist, a veterinarian, a
15 podiatrist, a pharmacy, a hospital or other person or
16 institution licensed and registered, permitted to
17 distribute and dispense the controlled substance in the
18 course of professional practice of this state.

19 Now, Mr. Foreman, ladies and gentlemen, there's two
20 possible verdicts that you could render. Again, there's
21 two separate charges. On each of these charges you can
22 either find that the State met its burden of proof beyond a
23 reasonable doubt and then, of course, the verdict would be
24 guilty. If you find the State has failed in any way to
25 meet its burden of proof, then your verdict would be not

1 guilty. I've prepared a verdict form. I believe it'll be
2 self-explanatory, Mr. Foreman, one on each of the charges
3 with the appropriate box for you to check, either guilty or
4 not guilty. There's no significance, of course, in the
5 order in which they're listed. One needs to be listed
6 before the other. After you've discussed the case and
7 reached your verdict, then you'd simply check the
8 appropriate block on each of those two charges, sign your
9 name as Foreperson, date it and let the bailiffs know that
10 you have reached a verdict.

11 Your verdict must be a unanimous one. All twelve of
12 you must agree upon the verdict. Your verdict can't be
13 based upon sympathy or passion or prejudice or emotion or
14 any other consideration not in evidence in the case. And I
15 remind you, Mr. Foreman, and ladies and gentlemen, you're
16 certainly free to ask me questions concerning the law that
17 I've given you in this case. But remember, it's
18 impermissible for me to answer any questions you may have
19 regarding the facts of the case. That's your decision and
20 yours alone as the sole fact finders.

21 I'm going to ask if you would now please go back to
22 your jury room. Don't start your deliberations just yet.
23 There's a final matter of law I need to take care of with
24 the attorneys after which, hopefully, we'll have
25 instructions for you with the exhibits for you to begin

1 your deliberations. Don't start deliberating just yet.

2 You may retire to your jury room.

3 (WHEREUPON, the jury exited the open court at
4 approximately 3:16 P.M.)

5 THE COURT: Any exceptions to the charge from the
6 State?

7 MS. MONTS: No, Your Honor.

8 THE COURT: From the Defense?

9 MR. HARBIN: I just renew my previous objection.

10 THE COURT: All right. Those that you had asked
11 for earlier that I didn't ... If y'all will make sure all
12 the exhibits are in proper order. Here's the verdict form,
13 Mr. Fuller.

14 (WHEREUPON, the Court stood at ease for a brief
15 recess.)

16 THE COURT: All right. Let the record reflect
17 that the Solicitor and the Defense attorney both realized a
18 problem with the phone going back in case the jurors were
19 to look on it and it was operational and that could be
20 prejudicial to the Defendant. So we have disabled the
21 telephone by removing the battery, which the court reporter
22 will keep, and it will be reinserted after the verdict in
23 the case. So the jury will have the phone but it will be
24 inoperable. Okay. We'll be at ease until we hear from our
25 jury. I'm going to be dismissing the two alternates right

State of South Carolina -vs- Erick E. Hewins (2010-GS-23-8295 and 8296)
Charge

407

1 now.

2 (WHEREUPON, the verdict forms and exhibits were
3 delivered to the jury at approximately 3:20 P.M.,
4 after which court stood at recess awaiting the verdict
5 of the jury.)

6 THE COURT: Thank you so for much for your
7 service. Your fellow jurors survived. We won't need you.
8 You're welcome to stay. We're going to be selecting a jury
9 tomorrow. We have a panel already coming in. If y'all
10 would like to come back, I'll make sure Ms. Olsen puts you
11 down on that, but otherwise you'll need to call back
12 tomorrow after one o'clock, I think. You might check with
13 her downstairs. We're going to start -- select a jury in
14 the morning. You won't be on that panel unless you just
15 want to be. If you want to be, I'll make sure she puts you
16 on it. You're welcome to stay with us if you'd like.
17 You're free to go too. If you want to stay a while and
18 then leave. Just make sure you leave your badges with
19 them. Thank you for your service. We appreciate it so
20 much.

21 (WHEREUPON, court stood at recess awaiting the verdict
22 of the jury.)

23 THE COURT: All right. We've received a question
24 from the jury signed by the Foreperson. Please provide to
25 us again the legal definition of reasonable doubt and its

1 bearing on our deliberations and verdict.

2 So I will reiterate to them the reasonable doubt
3 standard that I did the first time and probably let them go
4 back and continue their deliberations. I guess my
5 inclination would then be to tell them that they can
6 continue their deliberation. If they need any snacks or
7 otherwise, if they wish to take a -- we'll go as long as
8 they want to go tonight if they do feel like they could
9 come back tomorrow, if that would suit them better, that
10 we'll be at their pleasure basically. If they want to come
11 back tomorrow we'll accommodate them. Any objection from
12 either side if I tell them that since it's nearly five
13 thirty now. I don't know how long -- sometimes juries
14 don't know if they've just got to stay forever. I want
15 them to deliberate fully and consciously without any
16 concerns that they may have, obligations or fatigue or
17 anything else. Is there any input from either side as to
18 whether or not I give them that option and let them decide
19 whether they want to continue or not?

20 MS. MONTIS: That's fine, Your Honor.

21 MR. HARBIN: Judge, I don't have any objection.
22 Whatever your prerogative is.

23 THE COURT: All right. Let's bring them in if
24 they're ready.

25 (WHEREUPON, the jury entered the open court at

State of South Carolina -vs- Erick E. Hewins (2010-GS-23-8295 and 8296)
Charge

409

1 approximately 5:23 P.M.)

2 THE COURT: Mr. Foreman, you've made an inquiry
3 about the legal definition of reasonable doubt. I'll again
4 instruct you on that. A reasonable doubt is the kind of
5 doubt that would cause a reasonable person to hesitate to
6 act. I explained to you earlier today that when you serve
7 as a juror in a civil case where there's a suit between two
8 parties, some Judge may have told you correctly that it was
9 only necessary to prove a fact as more likely true than not
10 true, such as by what is referred to as the greater weight
11 of the evidence or the preponderance of the evidence. In
12 criminal cases, the State's proof is a higher standard,
13 more powerful than that. It must be beyond a reasonable
14 doubt. That would be proof that leaves you firmly
15 convinced of the Defendant's guilt. I explained that
16 there's few things in this world that we know with
17 absolutely certainty and in criminal cases the law doesn't
18 require proof that overcomes every possible doubt.

19 Now, if, based upon your consideration of the
20 evidence, you are firmly convinced that the Defendant is
21 guilty of the crime charged then you must find the
22 Defendant guilty. If, on the other hand, you think there
23 is a real possibility that the Defendant is not guilty,
24 then you must give the Defendant the benefit of that doubt
25 and find him not guilty. That's the law as to reasonable

1 doubt in the State of South Carolina.

2 What I'm going to ask you to do, Mr. Foreman, is go
3 back and continue your deliberations. It's nearly five
4 thirty. I don't know, some of you may have obligations
5 tonight or may need snacks or food or whatever. We're
6 going to leave it up to you. If you want to continue
7 deliberating, you just let the bailiffs know what you need.
8 If anybody needs to make a phone call, if you prefer to
9 deliberate a while and then come back tomorrow and continue
10 your deliberations, we can do it whichever way is more
11 convenient for the twelve of you. We'll leave that up to
12 you. If you'll go back and continue your deliberations and
13 let us know if we can help you in any way.

14 All right. Everyone else please remain seated.

15 (WHEREUPON, the jury exited the open court at
16 approximately 5:30 P.M.)

17 THE COURT: Any exceptions to the instruction
18 from the State?

19 MS. MONTS: No, Your Honor.

20 MR. HARBIN: No, sir.

21 THE COURT: I'll have this marked as Court
22 Exhibit Number 1, I believe, or whatever number. And we'll
23 just be at ease until we hear from our jury.

24 (WHEREUPON, Court Exhibit Number 1 was marked for
25 identification.)

1 (WHEREUPON, Court stood at recess awaiting the verdict
2 of the jury.)

3 THE COURT: They're not able to reach a verdict
4 on the trafficking, but they do have one on the possession
5 charge. Rather than giving them an Allen charge, I think
6 what I would propose to do is just send them home for
7 tonight, to see if tomorrow they can deliberate some more
8 rather than giving them an Allen charge at this time of
9 night. That's what I'm proposing to do is just have them
10 come back and state that they'll come back at nine in the
11 morning and continue their deliberations. We'll be
12 starting another trial and we can still monitor them then.
13 Any objection to that?

14 MS. MONTS: Not from the State, Your Honor.

15 MR. HARBIN: Judge, can I tell my client?

16 THE COURT: Yes, sir.

17 MR. HARBIN: Judge, I don't have any objection to
18 that.

19 THE COURT: Okay. And maybe I'll let you read
20 the note later that says they have an impasse on the other
21 one right now. But I certainly wouldn't be wanting to give
22 an Allen charge at this hour so I'm just going to have them
23 come back. If y'all want to come up and read this and make
24 sure that we can make it a Court Exhibit later. Do that?
25 Y'all all right with that?

1 MR. HARBIN: Yes, sir.

2 MS. MONTS: Yes, sir.

3 THE COURT: This will be Court Exhibit 2 when the
4 jury comes back. All right. Let's have our jury come in
5 if you would, please.

6 (WHEREUPON, the jury entered the open court at
7 approximately 5:55 P.M.)

8 THE COURT: Mr. Foreman, I received your note and
9 we've had a long day today and it's at the end of the day.
10 I'm going to dismiss us for the evening and let you come
11 back in the morning and see if your deliberations will get
12 any further than they have tonight. And I'll give you an
13 opportunity, with a fresh mind and fresh body, to continue
14 your deliberation. We'll be starting another trial. We'll
15 be here. So if you'll be back at nine o'clock. And once
16 everyone is there -- please don't start any deliberations
17 until everyone is there. But once all are there then
18 continue your deliberations. Certainly, you can contact me
19 if you have any other questions about the law or any other
20 difficulties. We'll just give it a try in the morning and
21 if you find you need any further instructions, we'll be
22 glad to help you with that.

23 Let me remind you again that the case is now in your
24 hands and how important it is for you tonight to still not
25 discuss it with anyone, to not let anyone discuss the case

State of South Carolina -vs- Erick E. Hewins (2010-GS-23-8295 and 8296)
Charge

413

1 with you. The evidence is in, the law has been given. The
2 case is in your hands so maintain that purity of the
3 process we're in, that I've encouraged you throughout and
4 I'm confident you will. Don't let anyone have any contact
5 with you. Again, you can share your experience after
6 tomorrow but not while the case is still in progress as it
7 is right now.

8 Have a good evening, ladies and gentlemen. If any of
9 you need to be escorted to your cars, I don't know where
10 you are, it might be dark out there now, just let the
11 bailiffs know and we'll certainly do that for you. Have a
12 good evening and I'll see you back in the morning at nine
13 o'clock. Begin your deliberations when everyone is there
14 in the room. You're dismissed at this time.

15 (WHEREUPON, the jury exited the open court at
16 approximately 5:58 P.M.)

17 THE COURT: I certainly didn't want to take the
18 one verdict now. We'll just let them continue their
19 deliberations if they can. I'll entertain an Allen charge
20 later in the morning if they still are at an impasse in
21 their deliberations. They've deliberated a couple of hours
22 now. We'll let them try again in the morning.

23 All right. Anything else for the evening?

24 MS. MONTS: No, Your Honor.

25 MR. HARBIN: No, sir.

1 THE COURT: All right. If y'all will just be
2 available tomorrow. We're going to be selecting a jury for
3 another trial and we'll go from there.

4 (WHEREUPON, Court Exhibit Number 2 was marked for
5 identification.)

6 (WHEREUPON, Court stood at recess for the day.)

7 **January 17, 2013**

8 (WHEREUPON, Court convened with all parties present
9 and the following proceedings were had.)

10 (WHEREUPON, the jury continued deliberations at
11 approximately 9:06 a.m.)

12 THE COURT: All right. We've received a note
13 from the jury. I'll mark this as Court Exhibit Number 3.
14 It basically says that they -- no consensus on the
15 trafficking cocaine charge. I think they told us yesterday
16 they had reached a verdict, I don't know what that verdict
17 is, on the possession charge. What I propose to do, ladies
18 and gentlemen, is to call the jury back and give them an
19 Allen charge and let them deliberate a little while longer
20 and see if they can reach a verdict on this case. Any
21 input from either of you before I call the jury back?

22 MS. MONTS: And, Your Honor, I've checked a
23 couple of the cases, *State v. Williams*, *Donaldson v. State*
24 and *Tucker*, and we believe that that is an appropriate
25 decision.

1 MR. HARBIN: Judge, the Defense doesn't have any
2 objection to an Allen charge.

3 THE COURT: All right. If our jury's ready on
4 the Hewins' case, you can have them come in.

5 (WHEREUPON, the jury entered the open court at
6 approximately 11:01 A.M.)

7 THE COURT: Ladies and gentlemen, you've stated
8 to me that you've been unable to agree upon a verdict on
9 one of the charges in this case and I've instructed you, of
10 course, that your verdict must be a unanimous one. When
11 matters are in dispute it isn't always easy for even two
12 people to come to an agreement. So when twelve people must
13 agree, it becomes even more difficult. Most cases,
14 absolutely certainty cannot be reached or expected.
15 However, you have a duty to make every reasonable effort to
16 reach a unanimous verdict. In doing this you should
17 obviously consult with one another and express your own
18 views. Listen to the opinions of your fellow jurors, tell
19 each other how you feel and why you feel that way and
20 discuss the differences with open minds.

21 Now, although the verdict must be a unanimous one,
22 everyone of you has a right to your own opinion. The
23 verdict you agree to must be your own verdict, the result
24 of your own convictions. And you should not give up your
25 firmly held beliefs merely to be in agreement with your

1 fellow jurors. The majority should consider the
2 minorities' position and the minorities should consider the
3 majorities' position. You should carefully consider and
4 respect the opinions of each other and reevaluate your own
5 position for reasonableness and correctness and
6 impartiality. You must lay aside all outside matters and
7 reexamine the questions before you based upon the law and
8 the evidence in this case.

9 Now, if you do not agree on a verdict, I must declare
10 a mistrial. In that case it doesn't mean anybody wins. It
11 just means that at some future time, I'll try or another
12 Judge will try this case with some other jury sitting where
13 you now sit. The same participants will come and the same
14 lawyers will ask basically the same questions, get
15 basically the same answers and we'll go through the whole
16 process again. You were selected in the same manner and
17 from the same source as any other future jury will be. And
18 there's no reason for me to believe that the case will ever
19 be submitted to twelve more intelligent or impartial or
20 conscientious or competent jurors than you or that clearer
21 evidence will be produced from one side or the other.

22 I'm going to ask if you would, please, to return to
23 your jury room, continue your deliberations and if you need
24 any assistance, please feel free to contact us. But I'll
25 ask that if you will continue your deliberations for now.

1 If you need any snacks or other matters, lunch, we'll be
2 glad to accommodate you any way we can. I'll ask you if
3 you will go back and continue your deliberations at this
4 time, ladies and gentlemen.

5 (WHEREUPON, the jury exited the open court at
6 approximately 11:06 A.M.)

7 THE COURT: Any exceptions to the charge from the
8 State?

9 MS. MONTS: No, Your Honor.

10 THE COURT: From the Defense?

11 MR. HARBIN: No, sir.

12 THE COURT: All right. This will be Court
13 Exhibit Number 3. It will be marked. And we will give the
14 jury more time.

15 (WHEREUPON, Court Exhibit Number 3 was marked for
16 identification.)

17 (WHEREUPON, court stood at recess awaiting the verdict
18 of the jury.)

19 THE COURT: All right. I understand the jury's
20 reached a verdict in the cases. Are there any things we
21 need to take care of before we receive the verdict?

22 MS. MONTS: Not from the State, Your Honor.

23 MR. HARBIN: Nothing from the Defense, Judge.

24 THE COURT: All right. Let me just remind our
25 folks in the audience, we're going to respect the jury's

1 verdict. There will be no outcries from anyone. You'll
2 have time to -- I don't know what the verdict is, of
3 course, but if anyone feels they can't restrain themselves
4 from joy or from sadness once we hear the verdict, then
5 they need to excuse themselves from the courtroom now. And
6 we'll certainly have you right back in afterwards. I just
7 want to make sure that everyone, lawyers, and parties and
8 participants and witnesses all understand that whatever the
9 jury -- they deliberated long and hard on this and whatever
10 it may be, we'll accept that verdict. And if you feel like
11 you can't contain yourself, this will be the time to leave
12 the courtroom. All right. Everybody's aware of that.

13 All right. If the jury's ready you can have them come
14 in Ms. Simms.

15 (WHEREUPON, the jury entered the open court at
16 approximately 12:32 P.M.)

17 THE COURT: Mr. Foreman, I understand the jury
18 has reached a verdict. Is that correct?

19 MR. FOREMAN: Yes, sir.

20 THE COURT: Is it a unanimous verdict on each of
21 the charges?

22 MR. FOREMAN: Yes, it is, sir.

23 THE COURT: If you would, please, hand the
24 verdict forms to the bailiff.

25 Just for clarification, Mr. Foreman, I notice one is

1 dated yesterday and one is dated today. I believe through
2 your inquires that one verdict was reached yesterday. Is
3 that the reason for the two separate dates on there?

4 MR. FOREMAN: That's correct.

5 THE COURT: All right. Thank you. I just wanted
6 to clarify that for the record.

7 All right, Madam Clerk, you may publish the verdicts.

8 THE CLERK: Your Honor, this is case number 2010-
9 GS-23-1895. We, the jury, unanimously find the Defendant,
10 Erick Eton Hewins, as to the charge of possession of a
11 Schedule IV controlled substance, clonazepam, guilty.
12 Signed the Foreperson, Russell Jenkins.

13 As to the charge of trafficking cocaine base, we, the
14 jury, unanimously find the Defendant, guilty. Signed the
15 Foreperson, Russell Jenkins. If this was your verdict in
16 the jury room and if this is your verdict now, please raise
17 your right hand.

18 (WHEREUPON, all jurors' right hands were raised.)

19 THE CLERK: Thank you.

20 THE COURT: All right. Any matters before -- for
21 the jury before we discharge them in this case?

22 MS. MONTS: Not from the State, Your Honor.

23 MR. HARBIN: Nothing from the Defense, Judge.

24 THE COURT: All right. Thank you very much,
25 ladies and gentlemen, for your service in this case.

1 You've been a conscientious group. You've been good to
2 work with. I appreciate your attention and the time you
3 spent on this case. It's not everyday you're going to have
4 an opportunity to serve as a juror. I hope you realize the
5 valuable service you've rendered to your community to be a
6 juror in this case. One day you may find yourself not
7 sitting in the jury box but sitting at one of the tables
8 and you certainly would want good conscientious jurors such
9 as yourself to make a decision on your behalf.

10 I'm going to ask if you would, if you need a statement
11 for your employer, you can stop by the assembly room
12 downstairs. We have a trial in progress now that we're
13 working on today, maybe even into tomorrow. So we won't
14 need any jurors for any other trials this week. So you're
15 dismissed for the week. If you need a statement for your
16 employer you certainly can stop by and Ms. Olsen will
17 provide that for you in the assembly room. Thank you
18 again, ladies and gentlemen. You're dismissed for the
19 week. You can go with the bailiffs now. I will ask the
20 Foreman, if you would, please, to just wait in the hallway.
21 There's additional documents I need for you to sign. The
22 rest of you are excused. Thank you very much, ladies and
23 gentlemen, for your service this week.

24 (WHEREUPON, the jury exited the open court at
25 approximately 12:37 P.M.)

State of South Carolina -vs- Erick E. Hewins (2010-GS-23-8295 and 8296)
Charge

421

1 THE COURT: We'll have to wait just a moment
2 until the clerk gets back.

3 All right. Are there any matters before we impose
4 sentence? From the State or Mr. Harbin?

5 MS. MONTS: No, Your Honor.

6 MR. HARBIN: Nothing from the Defense, Judge.

7 THE COURT: All right. If you would come forward
8 with Mr. Hewins, I'd be glad to hear from you and him and
9 anyone else.

10 (WHEREUPON, Ms. Monts, Mr. Harbin and Mr. Hewins
11 approached the bar.)

12 THE DEFENDANT: I'm gonna listen, but on that
13 appeal that you won't win. You ain't by no means fucking
14 with me, man, at all. You know the Judge gonna go with the
15 crooked cops.

16 THE COURT: All right. Mr. Harbin, be glad to --
17 well, let me hear from the State first as far as prior
18 record?

19 MS. MONTS: Your Honor, prior record includes
20 1992, trespass after notice; 1993, possession of crack
21 cocaine, assault and battery with intent to kill; 1995, a
22 probation revocation. Also in 1995 distribution of crack
23 cocaine, threatening law enforcement officer, possession of
24 crack cocaine; 2000, disorderly conduct; 2001, operating
25 uninsured vehicle and assault; 2002, criminal domestic

1 violence; 2003, indecent exposure. And in the State of
2 Tennessee two counts of aggravated assault ---

3 THE DEFENDANT: Wasn't no fucking two counts,
4 bitch.

5 MS. MONTIS: 2004, no proof of insurance,
6 operating a non-registered vehicle, driving without a
7 license.

8 THE DEFENDANT: That's all we got ... get to get
9 up there telling mother-fucking lies and these fucking
10 local Judges ---

11 THE COURT: I'll give you a chance. I'll give
12 you a chance to talk. Let me hear from her and I'll
13 certainly give you a chance to talk, Mr. Hewins.

14 MS. MONTIS: 2005, two counts of criminal domestic
15 violence; 2006, arrest on a failure to appear for court;
16 2009 ---

17 THE DEFENDANT: Failure to appear 2006, when? On
18 what charge?

19 THE COURT: I'll let you respond to it in a
20 minute. Let me get what she has to say. All right, sir?

21 MS. MONTIS: 2009, open container, driving under
22 the influence, possession of marijuana; 2010, disorder
23 conduct, DUI; 2012, DUS, possession of crack cocaine.

24 THE COURT: All right. Mr. Harbin, be glad to
25 hear from you and certainly from your client if he'd like

State of South Carolina -vs- Erick E. Hewins (2010-GS-23-8295 and 8296)
Charge

423

1 to address the Court.

2 MS. BROWN: Y'all going to take my baby?

3 THE COURT: Yes, ma'am.

4 MS. BROWN: You gonna take my son away?

5 THE COURT: Yes, ma'am. If you'll hang on just a
6 minute, we can only have one person talk at the time, all
7 right?

8 THE DEFENDANT: Local Judges always side with
9 y'all little punks, you see what I'm saying. But according
10 to the law you didn't have no reason to be stopping a black
11 man and fucking with me, boy.

12 THE COURT: Anything you want to tell me, Mr.
13 Hewins?

14 MS. BROWN: I don't understand this?

15 THE DEFENDANT: Not really.

16 THE COURT: All right, sir.

17 THE DEFENDANT: I know you wrong according to the
18 law. I mean, this man didn't have no reasonable suspicions
19 to be stopping that car in front of my car and coming and
20 harassing me. See, what I'm saying.

21 THE COURT: Yes, sir.

22 THE DEFENDANT: But y'all local Judges all going
23 to go with your little police.

24 THE COURT: Well, fortunately you have a ---

25 THE DEFENDANT: I'm most definitely going to put

1 in for an appeal.

2 THE COURT: Well, we have Appellate Judges who
3 will review the record and that's great for you and great
4 for me both, that we have folks who look over and decide
5 and I'm -- I try to do what I think the law is and we have
6 Judges in the Appellate Courts that can decide whether or
7 not I committed an error.

8 THE DEFENDANT: You committed not one but about
9 three or four of them.

10 THE COURT: Well, that's why we fortunately have
11 an Appellate Court to take care of those matters.

12 Mr. Harbin, anything you'd like to tell me?

13 MR. HARBIN: Judge, may it please the Court. I
14 would, in offering perhaps an explanation for my client's
15 outburst, I would ask the Court to try to consider the
16 sentence just in light of the conviction and not his
17 outburst. Because I understand, if not excused, I
18 understand that he's angry because he has the perception
19 that he was done wrong. And I believe that's what has kind
20 of driven him in this. And I at least understand what his
21 mental frame from that point is. And, Judge, I would ask
22 you to not penalize him for his emotional state because
23 obviously, he knows what a serious thing has just happened.

24 But, Judge, obviously, it was pretty close. I mean,
25 this jury was out for quite, quite some time. And if that

1 speaks to anything perhaps that is justification for --
2 obviously, you don't have much of a range in this case.
3 It's twenty-five, twenty-six, twenty-seven, twenty-eight,
4 twenty-nine or thirty. And, Judge, I would ask you in this
5 case to consider twenty-five because that is, well, that's
6 about as long as -- well, not as long as he's lived, but
7 that's a long, long, long time. So Judge, I would ask you
8 to consider giving him the minimum in this case, which is
9 twenty-five years.

10 THE COURT: How old is your client, Mr. Harbin?

11 MR. HARBIN: I believe -- I'm going to get this
12 wrong, Erick, thirty-nine? Thirty-nine, Judge.

13 RACHEL WILLIAMS: Judge, may I speak?

14 THE COURT: Mr. Harbin, any other folks you want
15 to have speak?

16 MR. HARBIN: Just announce your name for the
17 clerk.

18 RACHEL WILLIAMS: My name's Rachel Williams.

19 THE COURT: Excuse me. I ---

20 RACHEL WILLIAMS: My name's Rachel Williams.

21 THE COURT: Yes, ma'am.

22 RACHEL WILLIAMS: I'm Erick's ex. We have a
23 daughter together that's in college. And we have three
24 grandchildren. I would just ask you, please, give him some
25 type of leniency so he can be around for his daughter.

1 He's a good dad.

2 THE COURT: Thank you, Ms. Williams.

3 Yes, ma'am, if you'd state your name for the record,
4 please?

5 MEGAN ELIZABETH NEWMAN: My name is Megan
6 Elizabeth Newman. My dad walked out on me when I was
7 sixteen and he's the only man that's been there for me as a
8 father. He doesn't deserve this. He's a good -- that is a
9 good man up there.

10 THE COURT: All right. Thank you, ma'am.

11 MS. BROWN: I'm his mother, Ms. Brown. Please
12 don't ---

13 THE COURT: Ma'am, Ms. Brown is talking now,
14 please. Yes, ma'am, if you'd ---

15 MS. BROWN: Judge, please, please don't send him
16 for a long time. I'm begging you, please. Please, Judge.
17 Please God. Please, Judge. Your Honor, please.

18 THE COURT: Thank you, Ms. Brown.

19 Solicitor, can you tell me again when the drug charges
20 were? '93 was the first drug charge?

21 MS. MONTS: Yes, sir. One in '93, two in '95.
22 He received a fifteen year sentence. The next one was in
23 2012.

24 THE COURT: So what was the '95 charge? Was it
25 PWID.

1 MS. MONTES: It was a distribution of crack
2 cocaine and a possession of crack cocaine, unrelated. And
3 I've got the certified convictions, Your Honor, if you want
4 them.

5 THE COURT: Fifteen years, that was suspended?

6 MS. MONTES: Let me double-check on that. Your
7 Honor, on the assault and batter with intent to kill, that
8 was fifteen suspended to five. On the prior distribution
9 of crack cocaine -- Your Honor, the distribution of crack
10 cocaine in '95 was five years. The possession of crack
11 cocaine in '95 was five years. The possession of crack
12 cocaine in '93 was a YOA. And the possession of crack in
13 2012 was one year.

14 THE WITNESS: I'm still waiting on an appeal
15 there too.

16 RACHEL WILLIAMS: Your Honor, can I say one more
17 thing?

18 THE COURT: Yes, ma'am. You're Ms. Williams?

19 RACHEL WILLIAMS: Yes.

20 THE COURT: Yes, ma'am.

21 RACHEL WILLIAMS: I mean, I know you sit here and
22 you look at Erick's charges and you look at some of the
23 things he might have been convicted of, but there's a
24 different side to Erick that people don't see. And I mean,
25 he's always there for his family. He's very involved with

1 his children, with his grandchildren. He's always there
2 when they need something. Anything they need, he's there
3 for them. He helps people that, you know, are down and
4 out, who may not have anyone else, you know, to turn to.
5 And Erick will lend them a hand, you know, just so they can
6 get their feet back on the ground. I've seen this man do
7 this over and over and over.

8 THE COURT: You say your daughter is in college?

9 RACHEL WILLIAMS: Yes, sir. She's in her second
10 year at Greenville Tech.

11 THE COURT: Is that the only child you have?

12 RACHEL WILLIAMS: Yes.

13 THE COURT: This is case 2010-GS-23-8296. The
14 sentence of the Court is Defendant be committed to the
15 State Department of Corrections for a period of one year.

16 Case 2010-GS-23-8295, the sentence is a consecutive
17 sentence, a twenty-five year sentence, consecutive to that
18 previously imposed.

19 I wish you the best, Mr. Hewins.

20 All right. We'll be at ease until two o'clock.

21 THE DEFENDANT: I'll probably stand a better
22 chance at the appeal. It'll probably take a couple of
23 years, but I'll do it.

24

25 [END OF REQUESTED TRANSCRIPT OF RECORD]

1 CERTIFICATE OF REPORTER

2

3 I, the undersigned Danette P. Hanks, Official Court
4 Reporter for the Thirteenth Judicial Circuit of the State
5 of South Carolina, do hereby certify that the foregoing is
6 a true, accurate, and complete transcript of record of all
7 the proceedings had and evidence introduced in the
8 trial/hearing of the captioned case, relative to appeal, in
9 the Circuit Court for Greenville County, South Carolina, on
10 the 14th day of January, 2013.

11 This transcript may contain quoted material. Such
12 material is reproduced as read by the speaker.

13 I do further certify that I am neither of kin,
14 counsel, nor interest to any party hereto.

15 May 10, 2013

16

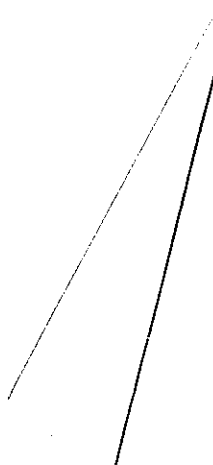
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Circuit Court Reporter



STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions

The Honorable G. Edward Welmaker, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ERICK E. HEWINS,

APPELLANT

Appellate Case No. 2013-000224

FINAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

Table of Authorities.....	ii
Statement of Issues on Appeal.....	1
Statement of the Case.....	2
Standard of Review.....	8
Arguments	
1. THE TRIAL COURT ERRED BY FAILING TO SUPPRESS EVIDENCE SEIZED BY OFFICER GARDNER FOLLOWING HIS UNLAWFUL FOURTH AMENDMENT SEIZURE OF DEFENDANT BECAUSE OFFICER GARDNER FAILED TO ARTICULATE ANY REASON THAT HE REASONABLY SUSPECTED DEFENDANT WAS ENGAGED IN CRIMINAL ACTIVITY AT THE TIME THE OFFICERS SAW DEFENDANT SITTING IN HIS VEHICLE.....	9
2. THE TRIAL COURT ERRED WHEN IT FOUND OFFICER GARDNER HAD REASONABLE SUSPICION SUFFICIENT TO CONDUCT A <i>TERRY</i> FRISK WHERE OFFICER GARDNER FAILED TO OFFER SUPPORT FOR HIS BELIEF THAT DEFENDANT WAS ARMED AND DANGEROUS AND WHERE OFFICER GARDNER ALLOWED TOO MUCH TIME TO ELAPSE BETWEEN ASKING DEFENDANT TO EXIT HIS VEHICLE AND ACTUALLY CONDUCTING THE FRISK.....	18
3. THE TRIAL COURT ERRED IN FAILING TO SUPPRESS EVIDENCE SEIZED BY OFFICER GARDNER DURING A SECOND UNLAWFUL SEARCH OF DEFENDANT.....	22
4. THE TRIAL COURT ERRED IN ADMITTING EVIDENCE WHERE THE STATE FAILED TO PROPERLY IDENTIFY BY TESTIMONY OR SWORN STATEMENT THE EVIDENCE CUSTODIAN INITIALLY RESPONSIBLE FOR RETREIVING OR THE CONDITION OF THE EVIDENCE WHEN IT WAS LOGGED INTO PROPERTY AND EVIDENCE.....	24
Conclusion.....	27

TABLE OF AUTHORITIES

CASES

<u>Maryland v. Bule</u> , 494 U.S. 325, 110 S.Ct. 1093 (1990).....	19
<u>Terry v. Ohio</u> , 392 U.S. 1, 88 S.Ct. 1868 (1968).....	19
<u>Sibron v. New York</u> , 392 U.S. 40, 88 S.Ct. 1889 (1968).....	18
<u>State v. Blassingame</u> , 338 S.C. 240, 525 S.E.2d 535 (Ct.App. 1997).....	8,13
<u>State v. Burton</u> , 349 S.C. 430, 562 S.E.2d 668 (2002).....	20
<u>State v. Butler</u> , 353 S.C. 387, 577 S.E.2d 498 (Ct.App. 2003).....	12, 13, 18, 19, 20
<u>State v. Chisolm</u> , 355 S.C. 175, 584 S.E.2d 401 (Ct.App. 2003).....	24,25
<u>State v. Culbreath</u> , 300 S.C. 232, 387 S.E.2d 255 (1990).....	9
<u>State v. Foster</u> , 269 S.C. 373, 237 S.E.2d 589 (1977).....	12,23
<u>State v. Rodriguez</u> , 323 S.C. 484, 476 S.E.2d 161 (Ct.App. 1997).....	9,10,11,12
<u>State v. Taylor</u> , 360 S.C. 18, 598 S.E.2d 735 (Ct.App. 2004).....	24,25
<u>State v. Taylor</u> , 401 S.C. 104, 736 S.E.2d 663 (2013).....	6,8,16,17
<u>State v. Tindall</u> , 388 S.C. 518, 698 S.E.2d 203 (2010).....	8,13
<u>State v. Williams</u> , 297 S.C. 290, 376 S.E.2d 773 (1989).....	24,25
<u>U.S. v. Digiovanni</u> , 650 F.3d 498 (C.A.4 2011).....	23
<u>U.S. v. Lender</u> , 985 F.2d 151 (C.A.4 1993).....	14,15,16,17
<u>U.S. v. Sokolow</u> , 490 U.S. 1, 109 S.Ct. 1581 (1989).....	13
<u>U.S. v. Sprinkle</u> , 106 F.3d 613 (C.A.4 1997).....	14,15,16,17
<u>U.S. v. Sullivan</u> , 138 F.3d 126 (C.A.4 1998).....	13

OTHER AUTHORITY

U.S. Constitution, Amendment IV.....	9

South Carolina Rules of Criminal Procedure, Rule 6(b).....7,23,24

STATEMENT OF ISSUES ON APPEAL

1. WHETHER THE TRIAL COURT ERRED BY FAILING TO SUPPRESS EVIDENCE SEIZED BY OFFICER GARDNER FOLLOWING HIS UNLAWFUL FOURTH AMENDMENT SEIZURE OF DEFENDANT WHERE OFFICER GARDNER FAILED TO ARTICULATE ANY REASON THAT HE REASONABLY SUSPECTED DEFENDANT WAS ENGAGED IN CRIMINAL ACTIVITY AT THE TIME THE OFFICERS SAW DEFENDANT SITTING IN HIS VEHICLE.

2. WHETHER THE TRIAL COURT ERRED WHEN IT FOUND OFFICER GARDNER HAD REASONABLE SUSPICION SUFFICIENT TO CONDUCT A *TERRY* FRISK WHERE OFFICER GARDNER FAILED TO ARTICULATE FACTS TO SUPPORT HIS BELIEF THAT DEFENDANT WAS ARMED AND DANGEROUS AND WHERE OFFICER GARDNER ALLOWED TOO MUCH TIME TO ELAPSE BETWEEN ASKING DEFENDANT TO EXIT HIS VEHICLE AND ACTUALLY CONDUCTING THE FRISK.

3. WHETHER THE TRIAL COURT ERRED IN FAILING TO SUPPRESS EVIDENCE SEIZED BY OFFICER GARDNER DURING A SECOND UNLAWFUL SEARCH OF DEFENDANT.

4. WHETHER THE TRIAL COURT ERRED IN ADMITTING EVIDENCE WHERE THE STATE FAILED TO PROPERLY IDENTIFY BY TESTIMONY OR SWORN STATEMENT THE EVIDENCE CUSTODIAN INITIALLY RESPONSIBLE FOR RETREIVING THE EVIDENCE OR THE CONDITION OF THE EVIDENCE WHEN IT WAS IN.

STATEMENT OF THE CASE

This case arises out of an arrest that occurred in Greenville, South Carolina on August 9, 2010. At that time, Officers Gardner and Hall of the Greenville City Police Department were assigned to the Aggressive Patrol Unit. The Officers, dressed in plain clothes, and driving an unmarked vehicle, would patrol the city, targeting areas identified during the briefing prior to patrol (R. p. 6, lines 4-25).

On this particular evening, Officers Gardner and Hall drove to the parking lot of the Clarion Inn off of Haywood Road. The Officers had received no communication regarding any alleged crime ongoing at this site, but were instead engaged in routine patrol. Both Officers testified that the surrounding area is considered "high crime", (R. p.25, lines 23-24, R. pp. 40-41), known for prostitution, drugs, and automobile break-ins. However, during his cross examination of the Officers, Defendant's trial counsel, Mr. Chase Harbin, introduced evidence that crime at this particular location had rapidly declined over the year and a half immediately preceding Defendant's arrest. (R. p. 22, lines 7-23).

At approximately 12:36 A.M., the Officers pulled their patrol car into the parking lot of the Clarion Inn, which was empty of vehicles except for Defendant's car, a black Lexus, parked next to a Toyota Camry. The Officers noted that Defendant's car was backed into a space and the Camry was pulled in, and it appeared that the occupants of the two vehicles were speaking to one another. (R. p. 8, lines 1-20). Officer Gardner testified that from the location of the vehicles, he determined that "they [the defendant, and occupants of the Camry] were just sitting there having - they appeared to have a meeting for some reason." (R. p. 8, lines 9-10). As the Officers vehicle approached they

noted that the Defendant was an African American male, and that two White females were in the Toyota Camry.

At that time, Officer Hall parked the patrol car directly behind, and horizontal to, the two parked vehicles. (R. p. 259). While testimony is inconsistent as to the amount of room between the detained vehicles and the Officers' patrol car, Appellant and witness Megan Newman both testified that neither vehicle would be able to leave without hitting the patrol vehicle. (R. p. 71, lines 3-17, R. pp. 81-82).

Once Officer Hall parked, Officer Gardner exited the patrol car and came to stand between the Defendant's vehicle and the Toyota Camry, in the vehicles' A-Frames just at the driver and passenger doors, respectively. Officer Gardner testified that he did this to enable him to see all three individuals. (R. pp. 31-32, line 6). While between the two vehicles, Officer Gardner did not observe any drugs in plain view in either vehicle, nor did he observe any odors of either drugs or alcohol, any guns, money or drug paraphernalia, or other indicia of criminal activity. Yet Officer Gardner proceeded to ask Defendant questions about drugs, stating that the area was known for "heavy hitters." (R. p. 69, lines 15-21). Defendant testified that he told Officer Gardner, "I don't know nothing about no car break-ins or no drugs." (R. p. 69, lines 20-21).

After Officer Gardner had already begun questioning Defendant about drugs, he asked Defendant and the two women sitting in the Toyota Camry for identifying information. Defendant stated that he did not have his license, but provided his name and social security number. Officer Hall ran the check on this information. Both Officers testified that while the women's information came back right away, Defendant's information was not coming back. (R. p. 46, lines 1-7, lines 19-25, R. p. 47, lines 1-2).

Meanwhile, Officer Gardner continued to question Defendant about what he was doing at that particular hotel. According to Officer Gardner, Defendant continued to touch his pants pocket throughout Officer Gardner's investigatory stop, and this alerted Officer Gardner that Defendant could have had either drugs, or a weapon on him. (R. p. 13, lines 9-20). Officer Gardner then stated that he called for backup and asked Defendant to step out of the vehicle.¹

Before backup arrived, Defendant relayed to Officer Gardner that he was at the Clarion Inn to visit his "baby mama", who was staying in room 237. (R. p. 57, lines 10-25, R. p. 58, lines 1-3). Approximately twelve (12) minutes after Officers Gardner and Hall arrived and began their investigation of Defendant, Officer Cothran arrived. Officer Gardner relayed to Officer Cothran what Defendant had told Officer Gardner about why he was at the Clarion Inn, and Officer Cothran went to check on these statements with the front desk. After Officer Cothran had verified Defendant's story, and was coming back toward the vehicle, he saw Officer Gardner perform a pat-down of Defendant. (R. p. 59, lines 19-25, R. p. 60, lines 1-25, R. P. 61, lines 1-11).

Officer Gardner testified that, during the pat-down, he felt a hard lump on the outside of Defendant's pocket, and reached into Defendant's pocket to reveal a wad of cash. Officer Gardner asked Defendant several questions about the cash, and then, went back into Defendant's pocket. At this time, Officer Gardner found four (4) small pills, revealed later to be a Schedule IV substance. After finding these pills, Officer Gardner

¹ The exact order and timeframe of what happened is subject to debate. The Officers and Defendant presented slight variations on what happened, but there was no recording, or any other affirmation as to what actually happened or how long it took, except for CAD reports demonstrating that Officers Gardner and Hall arrived on the scene at 12:36 A.M., and Officer Cothran arrived at 12:48 A.M., at which time Defendant was outside of his vehicle but Officer Gardner had not yet performed the pat-down.

placed Defendant under arrest. Following his arrest, Defendant's information came back from Officer Hall's search. Officer Gardner called a tow truck, and in the process of inventorying the vehicle prior to tow, found a large rock of what appeared to be crack cocaine as well as several smaller cookies.

This case came before the Greenville County Circuit Court, G. Edward Welmaker on January 13, 2013, on Defendant's indictments for trafficking in excess of 10 grams of cocaine base, and possession of a schedule IV controlled substance. After swearing in the jury, Judge Welmaker heard Defendant's motion to suppress. Defendant's counsel argued that there were two distinct 4th Amendment Issues presented in this case, both of which precluded admission of the drugs. (R. pp. 91-99 line 16). First, Defendant's counsel argued that from the moment Officers Gardner and Hall pulled in behind Defendant's vehicle in an otherwise empty parking lot, the officers had initiated an investigatory detention, and that this detention was not based upon reasonable, articulable suspicion that Defendant was actually engaged in criminal activity. (R. pp. 93 - 94).

Second, Defendant's counsel argued that Officer Gardner failed to support his pat-down of Defendant with reasonable, articulable facts that Defendant was armed or otherwise a threat to Officer Gardner or the public. (R. p. 97, lines 1-18). Counsel relied on several factors in his argument including the length of time that passed between when Officer Gardner asked Defendant to step out of his vehicle and when Officer Gardner actually initiated the pat-down. (R. pp. 98 -99). Defendant's counsel also cast doubt on Officer Gardner's decision to go back into Defendant's pocket a second time after removing the lump that Officer Gardner testified he felt upon his pat-down of Defendant.

In opposition to Defendant's Motion to Suppress, the State argued that Officers Gardner and Hall did have reasonable, articulable suspicion of criminal activity sufficient to support an investigatory detention. The State argued the location of Defendant's vehicle parked beside the Toyota Camry indicated to the Officers that the occupants were meeting in a high crime area, at night. (R. p. 102, lines 1-19). Specifically the State argued "[the vehicles' occupants] are not going into a hotel room. They're not getting out of their cars. They are sitting in the parking lot which led [the officers] to believe that they may be planning to do something." (R. p. 102, lines 10-12).

Despite these arguments, Judge Welmaker denied Defendant's motion to suppress. Judge Welmaker relied upon the South Carolina Supreme Court decision in *State v. Taylor*, 401 S.C. 104, 736 S.E.2d 663 (2013), the State's classification of the Clarion parking lot as a "high crime area," the experience and training of Officers Gardner and Hall, and the lateness of the hour. (R. p. 111, lines 1-15). The Court also held that the frisk did not take an unlawful amount of time, and held, as a matter of law, that the "frisk took place within the time period when backup was coming." (R. p. 113, lines 20-22). The Court made this ruling despite testimony from the Officer Cothran that he arrived at the scene after Officer Gardner had removed Defendant from his vehicle, but before the pat down occurred.

The court specifically heard arguments from the Defendant and the State regarding the two separate 4th Amendment violations committed by Officers Gardner and Hall. Yet, in his ruling, Judge Welmaker confused the two separate search issues presented, instead finding only that the Officers had reasonable articulable suspicion to support the *Terry* frisk. (R. p. 111, lines 1-15). The court stated that Defendant's counsel

was noted for the record, indicating that the court did not intend to change its position, and that further argument would not help Defendant's case. (R. p. 111, lines 15-25).

Following the court's ruling, the jury heard opening statements and was then released for Defendant's motion to exclude evidence based upon the State's failure to properly present a chain of custody. Prior to trial, Defendant made a Rule 6, South Carolina Rules of Criminal Procedure (S.C.R.Crim.P.) demand for the appearance of all witnesses in the chain of custody. The state however, failed to present the initial evidence custodian who retrieved the evidence dropped off by Officer Gardner following Defendant's arrest. The State further failed to submit a sworn statement from this individual. In the absence of either the person or his sworn statement, Defendant argued that the state had failed to identify this person, or the condition of the evidence at the time this person retrieved it. (R. p. 121, lines 6-20). The court denied Defendant's motion to exclude, finding that the evidence was admissible absent proof of ill-motive, bad faith, or tampering. (R. p. 123, lines 6-24).

The trial continued, and ultimately the jury found Defendant guilty of possession of a controlled substance, as well as trafficking in greater than 10 grams of cocaine base. The court sentenced Defendant to one year on the possession charge, and twenty five years on the trafficking charge, to run consecutive.

This appeal follows.

STANDARD OF REVIEW

This case presents three separate issues governed by three separate standards of review. In cases where the Court of Appeals is asked to determine reasonable suspicion, the Court conducts its review *de novo*. *State v. Blassingame*, 338 S.C. 240, 525 S.E.2d 535 (Ct.App. 1999). In overturning a trial court's Fourth Amendment suppression ruling, the reviewing court may reverse only when there is clear error, given the facts. *State v. Taylor*, 401 S.C. 104, 736 S.E.2d 663 (2013). However, this deferential review does not preclude an appellate court from conducting its own review of the record to determine whether the trial judge's decision is supported by evidence. *State v. Tindall*, 388 S.C. 518, 520, 698 S.E.2d 203, 205 (2010). Finally, on appeal from a trial court's decision on admission of evidence, the question becomes whether the trial court's decision is controlled by an error of law or lacks evidentiary supports. *State v. Taylor*, 360 S.C. 18, 598 S.E.2d 735 (Ct.App. 2004).

ARGUMENTS

I. THE TRIAL COURT ERRED BY FAILING TO SUPPRESS EVIDENCE SEIZED BY OFFICER GARDNER FOLLOWING HIS UNLAWFUL FOURTH AMENDMENT SEIZURE OF DEFENDANT BECAUSE OFFICER GARDNER FAILED TO ARTICULATE ANY REASON THAT HE REASONABLY SUSPECTED DEFENDANT WAS ENGAGED IN CRIMINAL ACTIVITY AT THE TIME THE OFFICERS SAW DEFENDANT SITTING IN HIS VEHICLE.

a. Seizure pursuant to the Fourth Amendment.

The Fourth Amendment provides that “the right of people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated[.]” U.S.Const.Amend.IV, *State v. Rodriquez*, 323 S.C. 484, 476 S.E.2d 161 (Ct.App.1997). “Not all personal encounters between policeman and citizens involve ‘seizures’ of persons thereby bringing the Fourth Amendment into play.” *Rodriquez* at 592, 476 S.E.2d at 161, quoting *State v. Culbreath*, 300 S.C. 232, 237, 387 S.E.2d 255, 257 (1990). Instead, a person has been seized within the meaning of the Fourth Amendment when the officer “by means of physical force or show of authority has in some way restrained the liberty of the citizen[.]” *Rodriquez* at 491, 476 S.E.2d at 165, citing *Terry v. Ohio*, 329 U.S. 1 at 19, 88 S.Ct. 1868 at 1879. In determining whether an encounter between a law enforcement official and a citizen constitutes a seizure, and thereby implicates Fourth Amendment protection, the correct inquiry is whether, considering all the circumstances surrounding the encounter, a reasonable person would have believed he was not free to leave. *Rodriquez* at 491, 476 S.E.2d at 165, citing *U.S. v. Mendenhall*, 446 U.S. at 545, 100 S.Ct. at 1872-73.

The first question presented in the instant case is whether the Officers’ initial stop, parking their car behind Defendant’s vehicle, and standing in Defendant’s doorframe, constituted a seizure within the meaning of the Fourth Amendment.

In *State v. Rodriquez*, 323 S.C. 484, 476 S.E.2d 161 (Ct.App. 1997), the Officers involved were alerted to Defendant's presence on a Charleston commuter train after reviewing the train's manifest and identifying Defendant's surname. According to one officer, the name Rodriquez was significant because police had arrested a drug courier with the same last name some months earlier. The officer further noted that Rodriquez was on a return trip to Charleston from New York, and that his stay in New York was short. Officers arrived at the station approximately 45 minutes before the train's expected arrival, and the train was one hour behind schedule.

Based upon a vague description of Rodriquez provided by a confidential informant, the Officers approached Rodriquez when he exited the train, identified themselves as officers and asked if they could pat him down for weapons. Rodriquez refused. For the next thirty minutes, Officers continually asked Rodriquez if he would consent to a search. Rodriquez continually refused and also asked why the Officers were detaining him. During examination at the motion to suppress, one Officer admitted that while they allegedly told Rodriquez he was not being detained, they also told him that they wanted to do a short search of his belongings and if nothing was found, he'd be free to go.

The Officers eventually contacted a K-9 unit and notified Rodriquez that they intended to perform a pat down. Rodriquez reportedly lifted his arms to ask "why," at which time the Officers saw a pistol on his waistband and arrested him. Subsequent to the arrest, the Officers found various contraband.

Following a totality of the circumstances evaluation, the trial court denied Defendant's motion to suppress finding that Rodriquez was never seized. Rodriquez

appealed. On appeal, the Court considered two issues: (1) whether the police seized Rodriguez within the meaning of the 4th Amendment; and (2) if a seizure did occur, whether the seizure was reasonable in scope and duration, pursuant to *Terry*.

As to the first issue, whether Rodriguez was “seized” pursuant to the 4th Amendment, the Court of Appeals found that the proper inquiry was whether, considering all the circumstances surrounding the encounter, the reasonable person would have believed he was not free to leave. *Rodriguez* at 491, 476 S.E.2d at 165, citing *Mendenhall* at 554, 100 S.Ct. at 1877 (1979) (so long as the person approached and questioned remains free to disregard the Officer’s questions and walk away, no intrusion upon the person’s liberty or privacy has taken place and, therefore, no constitutional justification for the encounter is necessary.)

Based upon this test, the Court of Appeals concluded that a reasonable person in Rodriguez’s position would not feel free to leave, and that therefore, a seizure had occurred. *Rodriguez* at 491-92, 476 S.E.2d at 165, *see Mendenhall* (“Examples of circumstances that might indicate a seizure where the person did not attempt to leave, would be the threatening presence of several officers... or the use of language or tone of voice indicating that compliance with the officer’s request must be compelled.”)

In the instant case, Officers Gardner and Hall pulled into the parking lot at the Clarion Inn and saw two vehicles parked side by side whose occupants appeared to be talking. The Officers, without more information, parked their patrol car behind those vehicles so that, according to testimony from the Defendant and witness Megan Newman, the Defendant would be unable to leave from his spot without hitting the patrol car. Once parked, Officer Gardner exited his vehicle in a shirt marked police and came to stand

between the Defendant's vehicle and the Toyota Camry in the vehicles' A-Frames. According to Ms. Newman, Officer Gardner's position prohibited Defendant from exiting the vehicle, without hitting Officer Gardner. Furthermore, Officer Gardner testified that, had Defendant attempted to leave, Officer Gardner would have pursued him. (R. pp. 150-159, lines 1-15). From the moment the Officers parked their vehicle behind Defendant, they were showing force that would lead a reasonable man to believe he was not free to go. Thus, from that time forward, Defendant had been seized within the meaning of the Fourth Amendment.

b. Whether Officers Gardner and Hall violated Defendant's Fourth Amendment rights by subjecting him to an investigatory detention without reasonable, articulable suspicion of criminal activity.

Because Defendant was seized pursuant to the 4th Amendment, the Court must consider whether Officers Hall and Gardner violated Defendant's 4th Amendment rights in detaining him. This analysis differs depending on whether the Court considers the stop a routine traffic stop, or an investigatory detention similar to a street stop.

"It is well established that the police may stop and briefly detain and question a person, without treading upon his 4th Amendment rights, upon a reasonable suspicion supported by articulable facts, short of probable cause for arrest, that the person is involved in criminal activity." *Rodriguez* at 492, 476 S.E.2d at 166, citing *State v. Foster*, 269 S.C. 373, 379, 237 S.E.2d 589, 591 (1977). The stopping of a vehicle and the detention of its occupants constitutes a seizure and implicates the 4th Amendment's prohibition against unreasonable searches and seizures. *State v. Butler*, 353 S.C. 387, 577 S.E.2d 498 (Ct.App. 2003).

The underlying purpose for a traffic stop must be lawful, however, *Butler* at 391, 577 S.E.2d at 502, and a law enforcement officer must limit their investigation in scope and duration to the underlying justification for the stop. *State v. Tindall*, 388 S.C. 518, 698 S.E.2d 203 (2010). Any further detention for questioning is beyond the scope of the stop and therefore illegal unless the officer has reasonable suspicion of a serious crime. *Tindall* at 521, 698 S.E.2d at 203, citing *U.S. v. Sullivan*, 138 F.3d 126, 131 (C.A.4 1998).

The term “reasonable suspicion” requires a particularized and objective basis that would lead one to suspect another of criminal activity. *State v. Blassingame*, 338 S.C. 240, 248, 525 S.E.2d 535, 539 (Ct.App. 1999). In determining whether reasonable suspicion exists, the whole picture must be considered. *Id.* citing *U.S. v. Sokolow*, 490 U.S. 1, 109 S.Ct. 1581 (1989).

In the instant case, Officers Gardner and Hall pointed to the parked position of Defendant’s vehicle as one reason that they approached. Specifically, Officer Gardner testified that backing into a spot violated a city ordinance, and was a ticketable offense. Once Officer Gardner approached Defendant’s vehicle, however, it was immediately clear that Officer Gardner was not concerned about how Defendant’s vehicle was parked. Officer Gardner did not testify that he asked Defendant a single question about the position of the vehicle, nor did Officer Gardner attempt to ticket Defendant for this violation. Because Officer Gardner’s underlying traffic stop was improper, every question thereafter exceeded the limited scope and duration of questions allowed under *Terry* and its progeny.

If the Court treats Defendant's detention instead as a simple investigatory stop where the Defendant was nonetheless seized pursuant to the 4th Amendment, the state still bears the burden of demonstrating a reasonable, articulable suspicion that Officer Gardner believed Defendant was engaged in criminal activity. Recently, our State Supreme Court has considered this inquiry through the lense of two cases decided by the Fourth Circuit Court of Appeals: *U.S. v. Lender*, 985 F.2d 151 (C.A.4 1993), and *U.S. v. Sprinkle*, 106 F.3d 613 (C.A.4 1997).

In *Lender*, Officers observed a group of four or five men including the Defendant huddled together at approximately 12:50 A.M. in an area known for its heavy drug traffic. The Defendant was holding his hand out palm up, and the remaining men were looking into his outstretched hand. The Officers approached, and the group dispersed. The Defendant walked away from the Officers, and continued walking despite police requests for him to stop. Following multiple requests, the Defendant finally stopped, and a semi-automatic weapon fell to the ground. The Officers then placed Defendant under arrest.

On Defendant's motion to suppress the gun, Defendant argued that the Officers did not have reasonable suspicion to justify stopping him, and that he was seized from the moment he came to a stop after the Officer's second call for him to do so. The District Court denied the Defendant's motion finding that while the Officers had no reasonable suspicion to stop him, the Defendant was not seized when the gun fell into plain view.

The Fourth Circuit Court of Appeals disagreed. They found that, given the totality of the circumstances, reasonable suspicion existed for the Officers to briefly stop the Defendant. In its finding, the Court noted: "Here the officers personally knew that the

area they were patrolling had a large amount of drug traffic. While the Defendant's mere presence in a high crime area is not by itself enough to raise reasonable suspicion, an area's propensity toward criminal activity is something an officer may consider. Additionally, the Officers observed the Defendant engage in behavior that they suspected to be a drug transaction... "we cannot say that a reasonable Officer was required to regard such conduct as innocuous..." *Lender* at 154. The Court also addressed the Defendant's attempt to flee the scene saying, "[e]vasive conduct, although stopping short of headlong flight, may inform an officer's appraisal of a street corner encounter." *Id.*

On the other hand, in *Sprinkle*, the Fourth Circuit held that the Officers did not have reasonable suspicion sufficient to justify an investigative stop. *Sprinkle*, 106 F.3d at 619. The Officers in *Sprinkle* observed Poindexter, a man with a known narcotics record, sitting in a car around 5:30 in the evening in a neighborhood where police reported a high incidence of narcotics traffic. Defendant Sprinkle entered the passenger side of the vehicle.

The Officers watched the two men huddle together over or near the console with their hands close together. The Officers believed Defendant was passing or about to pass something to Poindexter, though the Officers admitted they could see inside the car and could see everyone's hands but saw no drugs, money, guns, or drug paraphernalia.

Poindexter pulled the car into the street and began driving obeying all traffic signals and laws. Poindexter then came up to an unrelated road block, and the observing Officers activated their blue lights. Defendant stepped out of the vehicle and attempted to run as police immediately initiated a pat down. In the ensuing chase, Defendant pulled

out a hand game, later recovered by the police. The District Court granted the Defendant's motion to suppress the gun and the government appealed.

The government argued that five factors taken together provided police the basis for reasonable suspicion of criminal activity: (1) knowledge of Poindexter's past criminal record for narcotics violations; (2) the subjects spotted in a "high crime" neighborhood; (3) the two men huddled toward the vehicle's center console with their hands close together; (4) Poindexter's efforts to hide his face from view; and (5) Poindexter leaving the scene when Officers drive by the car. *Sprinkle* at 616-17. The government also relied heavily on the Court's opinion in *Lender*. *Id.* at 619, N.3.

The Fourth Circuit distinguished *Lender* however. First, the Court determined that although police could not see into Lender's open hand, the fact that several men were looking into his hand indicated that something was actually in it. In *Sprinkle*, the Officers admitted that they saw Defendant's hands and saw nothing in it passed between the two men. Second, in *Lender*, the Defendant engaged in evasive conduct when he tried to walk away from the Officers despite multiple attempts by the Officers to get Defendant to stop. In *Sprinkle*, the Court specifically determined that Defendant had not engaged in evasive conduct. Finally, the Court noted that the lateness of the hour properly contributed to reasonable suspicion in *Lender* whereas the Defendant in *Sprinkle* was apprehended at 5:30 P.M. The Court held that "[i]n sum, *Lender* is distinguishable to the point that it is not controlling." *Id.*

In *State v. Taylor*, the South Carolina Supreme Court analyzed both *Lender* and *Sprinkle*, but found that Taylor's case more closely mirrored *Lender*. *Taylor* at 112, 736 S.E.2d at 667. The police were alerted in *Taylor* via an anonymous tip that a black male

on a bicycle was selling narcotics at an unpaved portion of a local street in a high crime area around 11 P.M. Officers at the scene observed the Defendant, an African American male, on a bicycle, “huddled up” with another male. *Taylor* at 111-112, 736 S.E.2d at 667. As the Officers approached, the Defendant attempted to pedal away from the scene in an “undisputed attempt to avoid them.” *Id.* The Court in *Taylor* determined that, given the totality of the circumstances, the Officers had reasonable suspicion of criminal activity. *Id.*

The instant case aligns more closely with *Sprinkle* than *Lender*. Defendant was merely sitting in his vehicle speaking to the occupants of another vehicle when Officers Gardner and Hall arrived. The Officers were on routine patrol and had not been alerted to any potential criminal activity in the area. The Officers arrived in the parking lot, saw Defendant speaking to the women in the Toyota Camry, and failed to articulate any suspected criminal activity that was presently ongoing. Both Officers testified that it appeared the vehicles’ occupants were meeting “for a purpose,” that neither the Defendant nor the women in the Camry appeared to be moving from their vehicles, and that they were talking across the cars.

Once the Officers parked their vehicle and approached Defendant to stand in the A-Frame of Defendant’s car, Defendant was completely cooperative. Furthermore, given Officer Gardner’s position in the A-Frame, he was able to see into Defendant’s vehicle and did not observe any drugs, drug paraphernalia, money, guns, or other indicia of illegal activity. In their testimony, Officers Gardner and Hall pointed to three things to support their argument regarding reasonable suspicion: (1) the time of day; (2) the purported “high crime” area; and (3) their experience in the field. (R. p. 150, lines 3-11).

This list alone does not support a finding of reasonable suspicion, and thus the Officers' investigatory detention of Defendant violated his 4th Amendment rights. Based upon the totality of the circumstances, the Court should have found that the Officers did not have reasonable suspicion to detain Defendant, and should have granted Defendant's motion to suppress evidence seized as a result of this unlawful detention.

II. THE TRIAL COURT ERRED WHEN IT FOUND OFFICER GARDNER HAD REASONABLE SUSPICION SUFFICIENT TO CONDUCT A *TERRY* FRISK WHERE OFFICER GARDNER FAILED TO OFFER SUPPORT FOR HIS BELIEF THAT DEFENDANT WAS ARMED AND DANGEROUS AND WHERE OFFICER GARDNER ALLOWED TOO MUCH TIME TO ELAPSE BETWEEN ASKING DEFENDANT TO EXIT HIS VEHICLE AND ACTUALLY CONDUCTING THE FRISK.

Even if the lower court could have found that Officers Gardner and Hall had reasonable suspicion to detain Defendant, the trial court erred by finding that Officer Gardner had reasonable suspicion to conduct a *Terry* frisk.

South Carolina law recognizes that, for an Officer to properly conduct a pat-down, or *Terry* frisk, "[a]n officer must be able to specify the particular facts on which he or she based his or her belief the suspect was armed and dangerous." *State v. Butler*, 353 S.C. 383, 577 S.E.2d 498, quoting *Sibron v. New York*, 392 U.S. 40, 88 S.Ct. 1889 (1968) (mere knowledge of the suspect being a known narcotics dealer who put his or her hand into a pocket as the police approached does not provide justification [for a *Terry* frisk].) In accessing whether a suspect is armed and dangerous, the officer need not be absolutely certain the individual is armed; rather, the question is whether a reasonably prudent person in those circumstances would be warranted in the belief that his safety or that of others is in danger. *Butler* at 393, 577 S.E.2d at 503.

In *Butler*, the Court was asked to determine whether reasonable suspicion existed for Officer Todd Cook to pat-down Defendant Butler following a lawful traffic stop. Butler was a passenger in a van pulled over by Officer Cook for driving without taillights. Officer Cook testified that, as he wrote the driver a warning ticket, he smelled alcohol, and had reason to suspect that there was alcohol inside the vehicle. *Id.* at 386, 577 S.E.2d at 499. Officer Cook then proceeded to the passenger side of the vehicle and asked Defendant Butler to step from the van. After Officer Cook removed Defendant Butler from the vehicle, he performed a pat down of Defendant, which revealed a pistol, and a large quantity of cocaine.

During the Defendant's motion to suppress, Counsel for the Defendant repeatedly asked Officer Cook to articulate anything that the Defendant was doing that would cause a reasonable person to fear for their safety. Officer Cook was unable to respond. The trial court, however, found that Officer Cook had reasonable suspicion to ask the passengers to vacate the vehicle and pat them down. *Butler* at 388, 577 S.E.2d at 500. At trial, the Defendant was convicted of trafficking cocaine, and unlawful carrying of a pistol. Defendant appealed.

The Court of Appeals reversed the trial court. First, the Court noted that "[u]nder the mandates of *Terry*... a police officer must have a reasonable suspicion that an individual is armed and dangerous before conducting a pat down or frisk of the [Defendant]." *Butler* at 389, 577 S.E.2d at 501, quoting *Terry v. Ohio*, 392 U.S. at 27, 88 S.Ct. at 1883. The Court also emphasized that the purpose of the limited *Terry* frisk is not to discover evidence of a crime, but to allow the officer to pursue his investigation without fear of violence. *Butler* at *supra.*, quoting *Maryland v. Bule*, 494 U.S. 325, 332,

110 S.Ct. 1093, 1097 (1990) (limited pat-down for weapons is authorized where a reasonably prudent Officer would be warranted in the belief, based on specific and articulable facts, and not on a mere inchoate and unparticularized suspicion or hunch, that he is dealing with an armed and dangerous individual.)

The Court of Appeals thus determined that Defendant Butler's trial court "failed to make any determination that the Officer had the necessary apprehension of danger to justify a pat-down search." *Butler* at 392-93, 577 S.E.2d at 503. In fact, the Court determined that the Officer had no fear of Butler, but "was merely continuing his investigation of a possible open container violation." *Id.* The Court opined that, "[c]learly, the trial court improperly assumed if the Officer was entitled to remove Butler from the vehicle in furtherance of his investigation, he was automatically entitled to frisk the passenger." *Id.* The Court determined that the "only basis for suspicion [Officer Cook] had was that he smelled alcohol and the driver had provided him with an incorrect name for the passenger." *Butler* at 393-394, 577 S.E.2d at 503. The Court concluded that without more, Officer Cook's search was unlawful. *Id.* see *State v. Burton*, 349 S.C. at 440, 562 S.E.2d at 673. (Where only activity detective pointed to as "suspicious" was individual's refusal to answer questions, and fact that individual kept his right hand in his pocket, detective failed to articulate, valid, reasonable suspicion for stop and search of individual, in spite of detective's testimony he feared for safety of those around him.)

In the instant case, Officer Gardner failed to support his pat down of Defendant by reasonable articulable facts that he feared Defendant was armed and dangerous. According to Officer Gardner, Defendant repeatedly touched his pocket while Officer Gardner questioned him, and Defendant also appeared nervous. These facts, without

more, fail to validate reasonable suspicion. Furthermore, even if Officer Gardner's decision to ask Defendant to vacate his vehicle was supported by reasonable suspicion that Defendant was armed, such suspicion was created by Officer Gardner through his unlawful investigative detention of Defendant.

Finally, in the instant case, Officer Gardner's testimony is made less credible by the amount of time that passed between asking Defendant to exit his vehicle and when Officer Gardner actually performed the pat down for weapons. Though inexact, the testimony at trial creates a period of between five to ten minutes from the time Defendant exited his vehicle until Officer Gardner actually performed the frisk. Furthermore, Officer Gardner testified that Defendant touching his pocket did not alert Officer Gardner to weapons alone, but, instead, "can be a big indicator that an individual either has weapons or that they have contraband or drugs inside their pocket." (R. p. 13, lines 18-20). During this time, as additional Officers arrived on the scene, Defendant remained at the back of his vehicle, and was completely cooperative. Importantly, all the information Defendant provided the Officers was true.

Given the totality of the circumstances, a reasonable man in Officer Gardner's position would not have believed that Defendant was armed and dangerous, and therefore Officer Gardner's pat-down of Defendant violated Defendant's 4th Amendment rights. The trial court therefore erred by not suppressing evidence seized as a result of this unlawful pat-down.

III. THE TRIAL COURT ERRED IN FAILING TO SUPPRESS EVIDENCE SEIZED BY OFFICER GARDNER DURING A SECOND UNLAWFUL SEARCH OF DEFENDANT.

When Officer Gardner conducted a pat down on the outside of Defendant's clothing, he felt a hard lump in Defendant's pants' pocket. Officer Gardner placed his hand into Defendant's pocket to reveal that the hard lump was a wad of cash. Officer Gardner asked Defendant questions about the cash, which Defendant answered.

Officer Gardner then placed his hand back into Defendant's pocket because, he testified, Defendant could have had anything in his pocket. (R. p. 36, lines 4-11). The Officer continued by testifying about additional weapons he thought the Defendant might have had, though the testimony is uncontroverted that, during Officer Gardner's pat down of Defendant, he felt only the hard lump that turned out to be a wad of cash. Officer Gardner never testified that he felt anything other than this lump outside Defendant's clothes.

The second search revealed four small pills, which, taken together, were approximately the size of a penny or nickel. Upon discovery of these pills, Defendant was placed under arrest, roughly twenty minutes after Officers Gardner and Hall first detained Defendant. The Court should have applied the same reasonable, articulable suspicion standard to this second search. However, the Court combined all three of these issues in its analysis.

During Defendant's motion to suppress, the trial court determined that Officer Gardner had reasonable suspicion to conduct a *Terry* frisk based upon the following: (1) the high crime area; (2) the lateness of the hour; (3) "nervous behavior" by the Defendant; (4) that the Defendant allegedly touched his pocket; and (5) the experience of

the Officers. (R. p. 111, lines 1-15). None of these factors articulates what criminal activity the Officers believed Defendant to be engaged in at the time of their initial detention. These factors also fail to articulate the reason Officer Gardner believed Defendant was armed and dangerous. Finally, all Officer Gardner felt upon an over the clothes pat of Defendant's pocket was what turned out to be a wad of cash. Officer Gardner failed to identify a single reason he believed Defendant was still armed after the cash was removed. In short, Officer Gardner engaged in a fishing expedition based upon a hunch and persisted until he discovered contraband. *Sikes v. State*, 323 S.C. 28, 448 S.E.2d 560 (1994), see *United States v. Foster*, 634 F.3d 243 (C.A.4 2011).

Given the totality of the circumstances, Officer Gardner's second frisk of Defendant was not supported by reasonable suspicion that Defendant was armed and dangerous. Officer Gardner testified that Defendant provided consent to perform the second search. However, "consent" must be (1) knowing and voluntary and (2) given by one with authority to consent. *U.S. v. Digiovanni*, 650 F.3d 498 (C.A.4 2011). Whether consent was voluntarily given is a question of fact, but ultimately rests on whether the person providing consent reasonably believed the Officer's request was voluntary. *Digiovanni* at 514. The facts in this case do not support an argument that Officer Gardner's request was voluntary, nor does Defendant concede that he voluntarily consented to search.

For the reasons stated above, Officer Gardner's second search of Defendant violated Defendant's 4th Amendment rights, and the Court erred by failing to suppress evidence seized pursuant to this unlawful search.

IV. THE TRIAL COURT ERRED IN ADMITTING EVIDENCE WHERE THE STATE FAILED TO PROPERLY IDENTIFY BY TESTIMONY OR SWORN STATEMENT THE EVIDENCE CUSTODIAN INITIALLY RESPONSIBLE FOR RETREIVING THE EVIDENCE OR THE CONDITION OF THE EVIDENCE WHEN IT WAS LOGGED IN.

Rule 6(b), South Carolina Rules of Criminal Procedure, provides that:

“[f]or the purpose of establishing a chain of physical custody or control of evidence entered under Part A of this Rule, a certified or sworn statement signed by each successive person having custody of the evidence that he or she delivered it to the person stated is evidence that the person had custody and made delivery as stated without the necessity of the person who signed the statement being present in court provided: (1) the statement contains a sufficient description of the substance or its container to distinguish it; and (2) the statement says the substance was delivered in substantially the same condition as when received.”

In *State v. Chisolm*, 355 S.C. 175, 584 S.E.2d 401 (Ct.App. 2003), the Court of Appeals held that “[c]ustodial signatures on an evidence bag fail to establish an adequate chain of custody where the custodians do not provide testimony under oath or produce a sworn statement pursuant to Rule 6(b), S.C.R.Crim.P.” In *State v. Taylor*, 360 S.C. 18, 598 S.E.2d 735 (Ct.App. 2004), the Court of Appeals clarified that the cornerstone of *Chisolm* was adequately establishing the identify of evidence custodians.

In *Taylor*, the Defendant challenged the admissibility of evidence where the evidence custodian who retrieved the evidence from the arresting Officer was not available to testify. The state attempted to establish a chain of custody via affidavit, as proscribed by Rule 6(b), S.C.R.Crim.P., but Defendant objected.

The trial court found the evidence (36.16 grams of crack cocaine, and a firearm) admissible, ruling that the state had provided sufficient evidence of the chain of custody without the testimony of the absent evidence custodian. The jury found Defendant guilty

of trafficking cocaine and possession of a firearm during the commission of a violent crime.

On appeal, Taylor argued that *Chisolm* required the testimony of every person in the chain of custody to establish admissibility of the evidence. The Court of Appeals rejected this argument. Instead, the Court found that the issue in *Chisolm* and its progeny was identity. See *State v. Williams*, 297 S.C. 290, 293, 376 S.E.2d 773, 774 (1989) (Where the analyzed substance has passed through several hands, the evidence must not leave it to conjecture as to who had it and what was done with it between the taking and the analysis). The Court noted that the question presented in *Taylor* was one of credibility rather than admissibility stating, “where there is evidence to establish the identity of those who have handled the evidence and the manner in which it was handled, a weakness in the chain raises a question of credibility, not admissibility.” *Taylor* at 24, 590 S.E.2d at 737.

In *Chisolm*, the Court excluded evidence where the record failed to establish how long the first technician possessed the evidence, in what condition it was received, where or how it was stored, or how the second technician came into possession of it. Furthermore, neither the first nor second technician testified at trial. *Id.* at 26, 598 S.E.2d at 739. The Court determined that these lapses in the chain left to conjecture the identity of those who handled the evidence, as well as how the evidence was handled.

The Court in *Taylor*, however, found that the state established the identity of every person in the chain through sworn statements, under the mechanism provided in Rule 6(b), S.C.R.Crim.P. Therefore, the question went to credibility rather than admissibility. 360 S.C. at 738, 598 S.E.2d at 737-738.

In the instant case, the state provided custodial signatures of Isreal Flounders, the initial evidence custodian, but did not offer Mr. Flounders' testimony or a sworn statement to identify Mr. Flounders, or the condition of the evidence at the time it was logged in. The state offered three property and evidence witnesses to attempt to establish the chain of custody. On cross examination of the first witness, Ms. Bennick, Defendant's counsel first established that in the normal course of business, the Greenville County Department of Property and Evidence will use an affidavit to verify the identity of technicians and the condition of evidence. (R. p. 225, lines 1-22).

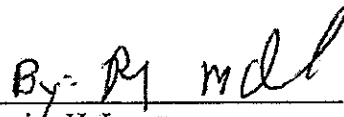
Defendant's counsel then verified that the department created no such affidavit in this case to verify the items dropped off by Officer Gardner. The state's next two witnesses, all employed as evidence custodians at Greenville County Property and Evidence, could not verify that Mr. Flounders was the person responsible for retrieving the evidence in this matter, nor what the condition of the evidence was at the time of retrieval. Thus none of the state's witnesses could identify Mr. Flounders, nor could these witnesses verify the condition of the evidence when it arrived at the Department. (R. pp. 217-229, R. pp. 232-236).

Because the state failed to identify the single most important evidence custodian in this matter, and further failed to identify the condition of the evidence at the time it was logged in, the trial court erred by admitting this evidence.

CONCLUSION

For the reasons provided more fully above, the trial court erred by failing to suppress evidence seized in violation of 4th Amendment rights against unlawful searches and seizures, and further failed by admitting evidence despite the state's failure to properly identify each evidence custodian in the chain of custody, or the condition of the evidence at the time it was logged in with Greenville County's property and evidence division. Thus the trial court must be reversed, and this case remanded, to be decided in accord with the law.

This 1st day of July, 2014



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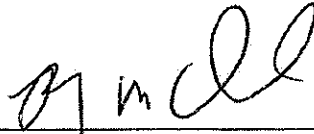
Robert M. Dudek
Chief Appellant Defender

Attorneys for Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

July 1, 2014

A handwritten signature in black ink, appearing to read "R. M. Dudek", is written over a horizontal line.

Robert M. Dudek
Chief Appellate Defender

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions

The Honorable G. Edward Welmaker, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ERICK E. HEWINS,

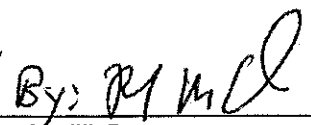
APPELLANT

Appellate Case No. 2013-000224

CERTIFICATE OF SERVICE

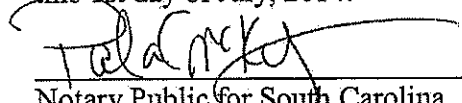
I certify that I have served Appellant's Final Brief upon counsel for the Respondent, the State, to the State's attorney of record Mary S. Williams at South Carolina Office of Attorney General, Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia SC, 29201.

This 1st day of July, 2014.

By: 

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SUBSCRIBED AND SWORN TO before me
this 1st day of July, 2014.



(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022

**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.

Erick E. Hewins, Appellant.

Appellate Case No. 2013-000224

Appeal From Greenville County
G. Edward Welmaker, Circuit Court Judge

Unpublished Opinion No. 2014-UP-478
Heard November 6, 2014 – Filed December 23, 2014

AFFIRMED

Jessica Hanna Lerer, Strom Law Firm, LLC, of
Lexington, and Chief Appellate Defender Robert Michael
Dudek, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant
Attorney General Mary Shannon Williams, both of
Columbia; and Solicitor William Walter Wilkins, III, of
Greenville, for Respondent.

PER CURIAM: The State indicted Erick E. Hewins for trafficking ten grams or more of crack cocaine and possession of a schedule IV controlled substance.

Before trial, Hewins moved to suppress the drug evidence, arguing the detention and subsequent pat-down was unlawful under the Fourth Amendment. The trial court denied his motion after a hearing. During trial, Hewins objected to the admission of the drug evidence pursuant to Rule 6 of the South Carolina Rules of Criminal Procedure, arguing the chain of custody was incomplete. The trial court denied the motion, and the jury found Hewins guilty as indicted. On appeal, Hewins raises four issues to this court: (1) the police lacked reasonable suspicion to detain him; (2) the police did not have a reasonable belief he was armed and dangerous to justify the pat-down or (3) a second reach into his pocket; and (4) the State did not properly identify, by testimony or sworn statement, either the initial evidence custodian responsible for retrieving the drug evidence or the condition of the evidence. We affirm.

On the night of Hewins' arrest, Officers Scott Gardner and Rachel Hall of the Greenville City Police Department's aggressive patrol unit drove into the parking lot of the Clarion Inn. At the suppression hearing, Gardner testified the location was "a very high crime area with drugs and prostitution and break-ins" where Gardner had personally dealt with "multiple drug trafficking cases and numerous prostitution cases." The officers observed Hewins in a black Lexus backed into a parking spot next to a Camry "with two young females inside it." Hewins and the women were parked "driver's side to driver's side window" and "appeared to have a meeting for some reason." No other cars were near the Lexus and Camry. Gardner pulled the unmarked patrol vehicle to the middle of the lane in the parking lot, near the Lexus and Camry, "for officer safety purposes"—the parking lot was not well lit and "[a]t the time, the only lights in the parking lot came from the [Clarion Inn] building."

Gardner and Hall exited their vehicle and identified themselves as police officers as they approached Hewins and the two women. Gardner positioned himself between the Lexus and Camry so he could see Hewins—from behind—on one side and the two women on the other. All three individuals "appeared to be very nervous almost instantaneously" and stopped talking to each other. Gardner asked what they were doing in the parking lot and for their identification—"the young ladies had their ID, Mr. Hewins did not." When Gardner asked Hewins what he was doing at the Clarion Inn, Hewins responded he was there "to see his baby mama in room [237]." When Gardner asked for that person's name, Hewins told Gardner "he didn't know her name." Hewins "was stuttering when he was speaking," "began to get increasingly nervous," and "began sweating profusely."

Hall ran a database check on the three of them.¹ Hall received responses for the women but had "trouble getting [Hewins'] information back." Gardner then called for backup.

Gardner testified Hewins "continually touched his left pocket. And he continued to touch the pocket. And . . . he tried to place his hand in his left pocket." Gardner stated, for his own safety, he asked Hewins to stop moving his hands and to leave his left pocket alone. Gardner testified Hewins' hand motions could be "a big indicator that an individual either has weapons or that they have contraband or drugs inside their pocket. It's something that a lot of individuals, that we learn through our training, do unconsciously or consciously." Hewins continued to touch his pocket after being asked not to do so.

When backup arrived, Gardner asked Hewins to get out of the Lexus. Gardner informed Hewins that he "was going to conduct a *Terry*² frisk on his person for weapons on the outside of his clothing." Gardner conducted a pat-down, "felt a hard lump inside of his [left] pocket," and asked Hewins what the lump was. Hewins did not respond, and Gardner then "asked [Hewins] if [he] could have consent to place [his] hand inside [Hewins'] pocket." Gardner stated he received Hewins' consent and Gardner found "a large wad of cash rolled up in rubber bands."³ Hewins "didn't know" why he had such a large amount of money on his person and told Gardner he did "this and that" to make a living. Apparently without any further inquiry or notice, Gardner then reached into Hewins' pocket a second time. Gardner stated:

Due to the fact that I couldn't full clear his pocket due to this large lump, and then also still having his consent, I reached back into his pocket to clear the rest of the items out because there could possibly still have been a weapon underneath the large lump. And it was four green round

¹ Hall testified that prior to running the check she noticed Hewins was stuttering and that "he continuously, it was like almost grabbing or pinching at his left pocket. He continuously touched his pocket."

² *Terry v. Ohio*, 392 U.S. 1 (1968).

³ Gardner did not testify if Hewins' consent was verbal or non-verbal.

pills, which were confirmed to be clonazepam, which is a Schedule IV drug.^[4]

After finding the pills, Gardner arrested Hewins and called a tow truck for Hewins' car. Pursuant to policy, officers "conduct[ed] an inventory search of the vehicle for valuables or weapons or other contraband." During the search of Hewins' car, Gardner found "a large piece of crack in the -- on the back floorboard, approximately eighteen to twenty grams" and "an Advil bottle in the center console with multiple small crack rocks inside." Another officer assisting with the search found a silver scale in a duffle bag in the trunk of the car.

We find there is evidence to support the trial court's finding that Gardner had reasonable suspicion to justify the stop. *See State v. Taylor*, 401 S.C. 104, 108, 736 S.E.2d 663, 665 (2013) (stating "[a] trial court's Fourth Amendment suppression ruling must be affirmed if supported by any evidence"). As this court has stated, "[I]t is entirely appropriate for courts to credit the practical experience of officers who observe on a daily basis what transpires on the street." *State v. Wallace*, 392 S.C. 47, 52, 707 S.E.2d 451, 453 (Ct. App. 2011) (quoting *United States v. Branch*, 537 F.3d 328, 336-37 (4th Cir. 2008) (internal quotation marks omitted)). Gardner, who had two and a half years of law enforcement experience with the aggressive patrol unit, possessed personal knowledge of the area in which Hewins was detained and its association with "drugs and prostitution and break-ins." *See United States v. Lender*, 985 F.2d 151, 154 (4th Cir. 1993) (stating "an area's propensity toward criminal activity is something an officer may consider" in determining the existence of reasonable suspicion, which includes personal knowledge that an area "ha[s] a large amount of drug traffic"). Specifically, Gardner had personally "made multiple drug trafficking cases and numerous prostitution cases in that area." *See State v. Corley*, 383 S.C. 232, 242, 679 S.E.2d 187, 192 (Ct. App. 2009), *aff'd as modified*, 392 S.C. 125, 708 S.E.2d 217 (2011) (relying on defendant being at a "known drug house where several cases had been made and search warrants executed" to find reasonable suspicion existed). In addition, Gardner testified his suspicion of drug activity and prostitution was raised based upon the orientation of the Lexus and Camry in the Clarion Inn's empty and dimly-lit parking lot at a late hour with no evidence the occupants were

⁴ Gardner testified, based upon his training, that weapons "can be of a small size and be hidden anywhere." Specifically, Gardner testified the weapon "could be a small Derringer, it could be a razor blade, it could be anything that small. It could be anything that could hurt you"

"attempting to exit [their] vehicles." Finally, Gardner testified that when he identified himself as a police officer Hewins "was stuttering when he was speaking," "began to get increasingly nervous," and "began sweating profusely." Hall corroborated this, stating, "[Hewins] was nervous and . . . he was stuttering. He was looking around instead of looking at us while we were speaking to him." Considering this evidence in combination, we believe it supports the trial court's finding that reasonable suspicion existed to detain Hewins. *See State v. Khingratsaiphon*, 352 S.C. 62, 69, 572 S.E.2d 456, 459 (2002) ("In determining whether reasonable suspicion exists, 'the totality of the circumstances—the whole picture—'must be considered." (quoting *United States v. Cortez*, 449 U.S. 411, 417 (1981))).

We also find there is evidence to support the trial court's finding that Gardner had a reasonable belief Hewins was armed and dangerous to justify the pat-down. Subsequent to a valid *Terry* stop, a police officer may conduct a pat-down of an individual for weapons when "the officer has reason to believe the person is armed and dangerous." *Khingratsaiphon*, 352 S.C. at 69, 572 S.E.2d at 459. "In assessing whether a suspect is armed and dangerous, '[t]he officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.'" 352 S.C. at 70, 572 S.E.2d at 459 (alteration in original) (quoting *Terry*, 392 U.S. at 27). Our supreme court has recognized that because of the "indisputable nexus between drugs and guns," when an officer has reasonable suspicion that drugs are present, "there is an appropriate level of suspicion of criminal activity and apprehension of danger" to justify a pat-down of an individual. *State v. Banda*, 371 S.C. 245, 253, 639 S.E.2d 36, 40 (2006).

When Gardner asked Hewins what he was doing at the Clarion Inn, Hewins responded he was there to see his child's mother in Room 237. When Gardner asked for the name of his child's mother, Hewins told Gardner he did not know her name. Gardner and Hall testified they observed Hewins touching his left pocket while he was inside of his car, and Gardner stated Hewins continued to touch the pocket after being asked not to do so. Gardner asked Hewins to exit his vehicle, and Gardner performed the pat-down in search of weapons, "I advised [Hewins] I was going to conduct a *Terry* frisk on his person for weapons on the outside of his clothing."⁵ Given (1) "the frequent association between drugs and guns," 371 S.C.

⁵ The trial court made no definitive ruling as to the time the detention began, but it likely occurred when Gardner asked Hewins to exit his vehicle.

at 254, 639 S.E.2d at 41, (2) the fact that Gardner and Hall testified Hewins continually touched his left pocket before the pat-down occurred, and (3) Gardner's belief Hewins may have possessed weapons, we find it was reasonable for Gardner to conduct the pat-down based on concerns for his own safety, as well as the safety of the other officers on-site.

We also find there is evidence to support Gardner's first reach into Hewins' pocket. When Gardner "began to pat [Hewins] down . . . on his left-side pocket where he'd been touching, [Gardner] felt a hard lump inside of his pocket." Gardner asked Hewins what the lump was and Hewins did not respond. If Gardner had reasonable suspicion the lump was contraband, he was justified in reaching into the pocket to retrieve it. *See Minnesota v. Dickerson*, 508 U.S. 366, 373 (1993) (holding "police officers may seize nonthreatening contraband detected during a protective patdown search . . . permitted by [and within the bounds of] *Terry*"). However, we need not determine whether Gardner had reasonable suspicion to believe the lump was contraband because Gardner testified he received Hewins' consent to reach into the pocket. *See State v. Bailey*, 276 S.C. 32, 35-36, 274 S.E.2d 913, 915 (1981) (recognizing consent as an exception to the Fourth Amendment's warrant requirement). Gardner discovered a "large wad of cash rolled up in rubber bands" inside the pocket.

Finally, we address the issue of Gardner having Hewins' continuing consent to reach into the pocket a second time. After Gardner retrieved the wad of cash from Hewins' pocket he asked Hewins why he had such a large amount of money and Hewins said "he didn't know." Gardner asked Hewins what he did for a living and Hewins answered "this and that." Gardner then reached into the pocket a second time—"still having [Hewins'] consent"—because there could have been a weapon under the wad of cash. Gardner discovered the four pills of clonazepam, which led to Hewins' arrest. "When relying on the consent of a suspect, a police officer's search must not exceed the scope of the consent granted or the search becomes unreasonable." *State v. Forrester*, 343 S.C. 637, 648, 541 S.E.2d 837, 843 (2001). If Gardner had Hewins' consent to conduct the first reach into the pocket, the scope of the consent granted could have been limited to determining what the lump in Hewins' pocket was. Thus, the second reach into Hewins' pocket might have exceeded the scope of consent. The trial court did not make any finding as to whether the scope of consent included the second reach into Hewins' pocket. In addition, we are troubled by Gardner's bare assertion that he received consent for the second reach to justify his actions. *See Johnson v. United States*, 333 U.S. 10, 13-14 (1948) ("The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual

inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.").

While we believe the facts raise the question of whether Gardner's second reach was justified by consent, we find the issue is not preserved. When Gardner was cross-examined during the suppression hearing, he reiterated his assertion that he had Hewins' consent to reach into the pocket the first time to retrieve the "hard lump." Hewins made no inquiry as to Gardner's testimony that he had Hewins' continuing consent to conduct the second reach. Hewins did not object to the State's argument that Gardner's first reach was justified under *Terry* and by Hewins' consent and that the second reach was justified by continuing consent. Finally, while Hewins supported his suppression argument by asserting a reasonable person with drugs in their pocket and car would not give consent, he did not object to the trial court's general ruling on admissibility or seek a specific ruling on the issue of consent for the second reach. Therefore, we find the issue is not preserved for review on appeal. *See State v. Brockmeyer*, 406 S.C. 324, 336 n.8, 751 S.E.2d 645, 651 n.8 (2013) ("Because the trial court did not rule on this argument, it is not preserved for appellate review and we do not reach it."); *State v. McLaughlin*, 307 S.C. 19, 23, 413 S.E.2d 819, 821 (1992) (holding the appellant's failure to request a more explicit ruling constituted a waiver to any objection to the trial court's general ruling); *State v. Passmore*, 363 S.C. 568, 584, 611 S.E.2d 273, 282 (Ct. App. 2005) ("Without an initial ruling by the trial court, a reviewing court simply would not be able to evaluate whether the trial court committed error." (citation and internal quotation marks omitted)).

As to whether the trial court erred in admitting the drug evidence over Hewins' Rule 6, SCRCrimP, objection, we affirm pursuant to Rule 220(b), SCACR, and the following authority: *State v. Hatcher*, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) ("The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." (citation and internal quotation marks omitted)); *id.* ("An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." (citation and internal quotation marks omitted)); 392 S.C. at 95, 708 S.E.2d at 755 ("The State need not establish the identity of every person handling fungible items in all circumstances; rather, the standard is whether, in the discretion of the trial judge, the State has established the chain of custody as far as practicable.").

AFFIRMED.

FEW, C.J., and KONDUROS and LOCKEMY, JJ., concur.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS



COPY

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JAN 06 2015

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions

SC Court of Appeals

The Honorable G. Edward Welmaker, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ERICK E. HEWINS,

APPELLANT

JAN -6 2015

Appellate Case No. 2013-000224

SC OFFICE OF
APPELLATE DEFENSE

PETITION FOR REHEARING

Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, Petitioner, Erick Hewins respectfully requests rehearing of the above referenced matter, as this Court erred when making a factual determination regarding consent, which was not decided by the trial court, nor supported by sufficient argument by the state during the trial of this matter. *State v. Provet*, 405 S.C. 101, 113, 747 S.E.2d 453, 460 (S.C. 2013) (the state has the burden to demonstrate the voluntariness of consent when disputed by the Defendant.)

In this case, there is no ruling by the trial court that Petitioner voluntarily consented to a search. In addition, the state did not raise this as an argument for determination, nor did the state offer any additional evidence in support of this argument. Rather, during the trial of this matter, the arresting officer took the stand and alleged that, upon informing Petitioner that the officer intended to perform a *Terry* frisk for weapons, the officer then asked Petitioner for permission to reach into

his pocket. (Record on Appeal, p. 14, ll. 7-25). Petitioner took the stand and denied having provided consent. (Record on Appeal p. 75-76, line 23).

Despite the contradictory testimony from the Petitioner, the state made no effort to ask the Court to rule on voluntary consent at this time, and provided no corroborating evidence of the encounter to support the Officer's contention that he received voluntary consent to search. The trial court did not rule on this matter, nor did any part of the court's decision on suppression involve a consensual search.

This Court indicates on page 5 of its opinion that a determination as to the arresting officer's reasonable suspicion that Petitioner had contraband in his pocket was unnecessary because "[Officer] Gardner testified he received Hewins' consent to reach into the pocket." (citing *State v. Bailey*, 276 S.C. 32, 35-36, 274 S.E.2d 913, 915 (1981), recognizing consent as an exception to the warrantless search requirement.) This Court's reliance on *State v. Bailey* is misguided however, as the trial court in this case never made a determination on voluntary consent, nor did the state present any case in support of voluntary consent. *Provet, supra* ("[t]he existence of voluntary consent is determined from the totality of the circumstances. When the defendant disputes the voluntariness of his consent, the burden is on the State to prove the consent was voluntary.") Rather the entire basis for this Court's opinion on consent rests exclusively with Officer Gardner's testimony, which the Petitioner refuted when he took the stand at trial.

As this Court is aware, "[a] warrantless search is reasonable within the meaning of the Fourth Amendment when voluntary consent is given for the search." *Palacio v. State*, 333 S.C. 506, 514, 511 S.E.2d 62, 66 (1999). To determine voluntary consent, a trial court must engage in a totality of the circumstances evaluation, with the burden on the state to demonstrate voluntary consent. *Id.* Here the Petitioner disputed the existence of consent in general, not just the existence of

voluntary consent. If the state intended for consent to be a dispositive issue, it was thus the state's burden to raise the issue and provide sufficient evidence for the trial court to make a ruling. The state failed to raise the issue, however, and thus there is no ruling on this issue by the trial court, nor any record that the trial court weighed the totality of the circumstances regarding this issue.

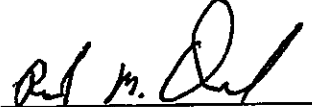
Moreover, this Court even recognizes that there is no opinion from the lower court as to the scope of any consent. In its opinion, this Court states plainly, "[t]he trial court did not make any finding as to whether the scope of consent included the second reach in Hewins' pocket." This Court went on to point out that it was "troubled by Gardner's bare assertion that he received consent for the second reach to justify his actions."¹ Citing *Johnson v. United States*, 333 U.S. 10, 13-14 (1948). Yet, this Court relied on Officer Gardner's bare assertion in finding that there was consent for an initial search into Petitioner's pocket, and ignores that the trial court did not opine in any way as to consent of the Petitioner for an initial search.

While Rule 220(c) of the South Carolina Appellate Court Rules allows this Court to affirm the lower court on any ruling, order, decision or judgment upon any ground appearing in the Record on Appeal, there is no ruling, decision or judgment regarding consent in this case. In fact, this Court's opinion indicates as much, because the basis for this Court's opinion is limited to the Officer's testimony, rather than a totality of the circumstances evaluation by the trial court.

Thus this Court has made a factual determination, not ruled upon by the trial court, and unsupported by the Record on Appeal, with regard to consent. Moreover, this Court's decision

¹ Petitioner thinks it is instructive that this Court states on page 6 of its opinion that "[i]f Gardner had Hewins' consent to conduct the first reach into the pocket, the scope of the consent granted could have been limited to determining what the lump in Hewins' pocket was." This statement illustrates that the question as to consent was never answered by the trial court, and is an inappropriate basis for this Court's decision. *State v. Brockmeyer*, 406 S.C. 324, 336 n.8, 751 S.E.2d 645, 651 n.8 (2013) ("Because the trial court did not rule on this argument, it is not preserved for appellate review and we do not reach it.")

places the burden on the Petitioner to challenge consent, despite the clear mandate in *Provet* that the burden rests with the State to prove voluntary consent when challenged. Finally, this Court declined to determine whether the arresting Officer reasonably believed that the Petitioner had contraband upon him based upon this Court's finding of consent. Petitioner submits that it was error for this Court to make this dispositive factual determination, which was unsupported by the Record on Appeal, and which the state failed to raise at the trial level. For this reason, Petitioner requests rehearing.

By: 
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Columbia SC, 29204
Telephone: (803) 252-4800
jlerer@stromlaw.com

Robert M. Dudek
Chief Appellate Defender

Attorneys for Appellant

January 6, 2015

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County
G. Edward Welmaker, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

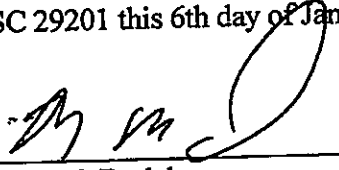
ERICK HEWINS,

APPELLANT

APPELLATE CASE NO. 2013-000224

CERTIFICATE OF SERVICE

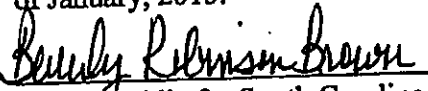
The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Mary S. Williams, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 this 6th day of January, 2015.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 6th day
of January, 2015.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: December 9, 2024.

Pan-
Long
prob
case

The South Carolina Court of Appeals

The State, Respondent,

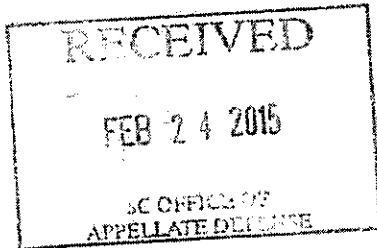
v.

Erick E. Hewins, Appellant.

Appellate Case No. 2013-000224

ORDER

After careful consideration of the Appellant's 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.



John C. Cannon, Jr. C.J.
A. K. E. J.
James E. Hall J.

Columbia, South Carolina

cc:

Robert Michael Dudek, Esquire
 Alan McCrory Wilson, Esquire
 Jessica Hanna Lerer, Esquire
 Mary Shannon Williams, Esquire

KAN (prob) case

FILED

Feb 24, 2015 *cyk*

William Walter Wilkins, III, Esquire
The Honorable G. Edward Welmaker

**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 Supreme Court**

The State, Respondent,

v.

Erick E. Hewins, Petitioner.

Appellate Case No. 2015-000595

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Greenville County
G. Edward Welmaker, Circuit Court Judge

Memorandum Opinion No. 2016-MO-007
Submitted March 15, 2016 – Filed March 23, 2016

DISMISSED AS IMPROVIDENTLY GRANTED

Erick E. Hewins, of McCormick, *pro se*, Petitioner..

Attorney General Alan McCrory Wilson, Assistant
Attorney General Mary Leddon, and Assistant Attorney
General Susannah Rawl Cole, all of Columbia; and
Solicitor William Walter Wilkins, III, of Greenville, all
for Respondent.

PER CURIAM: We granted a writ of certiorari to review the court of appeals' decision in *State v. Hewins*, Op. No. 2014-UP-478 (S.C. Ct. App. filed Dec. 23, 2014) (per curiam). We now dismiss the writ as improvidently granted.

DISMISSED AS IMPROVIDENTLY GRANTED.

PLEICONES, C.J., BEATTY, KITTREDGE and HEARN, JJ., concur. FEW, J., not participating.

STATE OF SOUTH CAROLINA
COUNTY OF

Full name and prison number (if any) of Applicant.

State of South Carolina

IN THE COURT OF COMMON PLEAS

2016-CP-23-02656

APPLICATION FOR
POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (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 McLennick Corr Inst.
2. Name and location of Court which imposed sentence Greenville County Court House of General Sessions.
3. Name(s) of co-defendant(s) (if any) _____
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) No. 2010-GC-23-8295, 2010-GC-23-8296
 - (b) _____
 - (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) January 17, 2013
 - (b) 26 years

6. Check whether a finding of guilty was made:
- after a plea of guilty _____
 - after a plea of not guilty ✓
 - after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes
8. If you answered "yes" to (7), list:
- the name of each Court to which you appealed:
 - Court of Appeal
 - Supreme Court
 - _____
 - the result in each such Court to which you appealed:
 - Affirm
 - Dismissed as improvidently Granted
 - _____
 - the date of each such result:
 - December 23, 2014
 - March 23, 2016
 - _____
 - if known, citations of any written opinion or orders entered pursuant to such results:
 - Opinion No. 2014-UP-478
 - Opinion No. 2016-MO-007
 - _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- N/A
 - _____
 - _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully: INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL
INEFFECTIVE ASSISTANCE OF APPELLANT COUNSEL FOURTH AMENDMENT
SIXTH AMENDMENT FOURTEENTH AMENDMENT, § 23-1-15 Public Revised 3/2003
Parking lots within Police Jurisdiction Jury Charge chain of custody
Trafficking Charge Allen Charge Confrontation clause
Prosecutorial Misconduct SEE ATTACHMENT #10 TO PCR.
Failure to Communicate State's Plea offer
UNLAWFUL detention Consent should not be a issue
an solicitor withdrew consent
UNLAWFUL Terry stop and search.

- (b) FRANKS hearing Delaware
 (c) JACKSON hearing DENNO

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) SEE PCR Attachment

(b) _____

(c) _____

12. Prior to this application have you filed with respect to this conviction:

(a) any petition in a State Court under South Carolina Law? J

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? N/A

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? N/A

(d) any other petitions, motions or applications in this or any other Court? N/A

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. _____

(a) the date of each such disposition:

- i. _____
- ii. _____
- iii. _____
- iv. _____

N/A

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

- i. _____
- ii. _____
- iii. _____
- iv. _____

N/A

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?

N/A

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

- i. _____
- ii. _____
- iii. _____

N/A

(b) the proceedings in which each ground was raised:

- i. _____
- ii. _____
- iii. _____

N/A

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) CANNOT RAISE INEFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL

(b) _____

(c) _____

17. Were you represented by an attorney at any time during the course of:

- (b) your trial, if any? ✓ yes
- (c) your sentencing? 26 yrs 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? ✓ yes
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. Chace Harbin Trial Counsel
- ii. Jessica Leach Direct Appeal Stream Law Firm
- iii. _____
- (b) the proceedings at which each such attorney represented you:
- i. Trial
- ii. Direct Appeal
- iii. _____
19. State clearly the relief you seek in filing this application:
New Trial
20. Are you now under sentence from any other court that you have not challenged?
N/A

County of McLennan

VERIFICATION

Hewins 297728

I, Erick, 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.

Erick Hewins

SWORN to and subscribed before me this 4th
day of April, 2016.

Michael Grune
Notary Public (L.S.)

My Commission Expires: July 09, 2026

APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF

Hewins 297728

I, Erick, 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.

ERICK HEWINS

Applicant

SWORN or affirmed to and subscribed before me this

4th day of April 2016
Michael Canane

Notary Public

My Commission Expires: July 09, 2021

ATTACHMENT # 10

JIAN JAGG.
MOON JIAN

Applicant's right to effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and South Carolina LAW Was Violated as

Trial Counsel Failed to have Court apply correct law to my case regarding Consent And to put state to its burden. When consent to search is contested by contradicting testimony. Consent should not be a issue because it was a unlawful detention.

Trial Counsel failed to produce evidence in regards to motel parking ordinance within police jurisdiction § 23-1-15 which require sign to be posted in parking area.

Applicant's right to effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and South Carolina LAW Was Violated as a result of Trial Counsel's Failure to request FRANKS V. DELAWARE in the event of Perjury or Reckless disregard is established by the defendant by the Preponderance of the evidence, TRIAL Counsel Failed to communicate states plea offer to Applicant. Counsel has duty to communicate plea offers "critical stage." 6th Amendment Violation.

Applicant's right to effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and South Carolina law was violated as a result of Trial Counsel's Failure to request Jackson V. DENNO hearing. According him a reliable determination of the issue of the Voluntariness of his Consent.

Applicant right to effective assistance of counsel as guaranteed by the Sixth Amendment to the United State Constitution and South Carolina law was violated as a result of Appellate Counsel's Failure to argue on Direct Appeal Merit issues v. issue not Preserved. Thus denied Applicant Appellate Review of Direct Appeal.

Applicant right to effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and South Carolina law was violated as a result of Trial Counsel's Failure to request lesser included offense Charge to Jury as Juror's had trouble finding Applicant guilty on Charge instructed. Trafficking elements to the offense were not Proven.

ATTACHMENT # 10

JIAN JADE
MOON JIAN

Applicant's right effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and South Carolina law was violated as a result of Trial Counsel's Failure to OBJECT TO CONSENT 1ST Reach, and 2nd Reach into Applicant's Pocket, UNDER FOURTH AMENDMENT, FOURTEENTH AMENDMENT, Solicitor withholds CONSENT UNLAWFUL Terry stop and search

Applicant's right to effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and South Carolina Law was violated as a result of Trial Counsel's Failure to Confront Accuser on defendant's behalf, The Sixth Amendment Right to Confrontation Clause: Counsel has a duty to Confront, and Thoroughly examine Witnesses on Client's behalf. Trial Counsel Failed to investigate, and Sub poana SEGEE, WESLEY Dispatch operator to ~~show~~ discredit officer's testimony regarding ID information was incorrect which prompted detention of Applicant. Failing to investigate, and Sub poana Hotel management to testify or discredit the officer's testimony regarding activities of the Hotel and the Set-up of the Hotel.

Applicant's right to effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and South Carolina law was violated as a result of Trial Counsel's failure to object to 1st Allen charge and 2nd Allen charge thus prejudiced the Applicant Substantially.

Applicant's right to effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and South Carolina law was violated as a result of Trial Counsel's failure to object to improper comment from Prosecutor regarding false information, Prostitution when no evidence of such were placed in at trial, clearly warranted an objection.

Applicant's right to effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and South Carolina law was violated as a result of trial counsel's failure to object to presence of alternate juror in jury room while jury considered its verdict

State of South Carolina
County of Greenville

In the Court of Common Pleas
Case no 2016-CP-23-02656

Ernest E. Hewins # 297728

Amendments

VS.

The State of South Carolina

FILED
CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENS
MAY 20 AM 11:04

Applicants allegation of his attorney being ineffective is with merit under the two-prong test set out in Strickland v Washington 466 U.S 668, 104, S.Ct 2052 (1984). First applicant must prove his attorney's performance was deficient, And second applicant must show how that performance 'prejudiced' him in violation of his Sixth and Fourteenth amendment right of the United States Constitution.

- 1) my defense attorney failed to conscientiously discharge his professional responsibilities while he was handling my case.
- 2) My defense attorney failed to act as my diligent conscientious advocate
- 3) My defense attorney failed to effectively challenge the Search and Seizure
- 4) my defense attorney deprived me of due process
- 5) Trial Court deprived me of a substantive or procedural right to equal protection
- 6) The state failed to present any evidence to support applicant had knowledge that drugs were being transported, to support trafficking
- 7) The state failed to correctly identify the chain of custody evidence clerk according to my drug analysts report it does not read who they said at trial
- 8) My trial attorney was ineffective for not objecting and not enter

the drug analysis report in evidence to prove it's not identifying who the state said was the initials of evidence clerk just another fraud on the Court

- 9) My trial attorney was ineffective for not objecting to this perjury case
- 10) My trial attorney failed to object to the jury being sent out two times without it's consent
- 11) My trial attorney is ineffective in not objecting to jury being sent home when the Court knew it was deadlocked
- 12) My appellate lawyer was ineffective for not arguing the reasonable suspicion motion.
- 13) Trial Court prejudiced Applicant by allowing the state to commit perjury without any warnings allowing them to do whatever to get a conviction
- 14) Solicitor Ms. Mont initiated this case without probable cause committing misconduct

15 counsel fail to prep applicant to testify

Statement of the Case.

Applicant Erick Hewins was indicted for trafficking in Cocaine base (greater than 10 grams) and possession of a Schedule II Controlled substance (clonazepam). He was tried by a jury January 14-17, 2013. Upon conviction he was sentenced by the honorable Lt. Edward Welmyer to an aggregate term of twenty-six years. A notice of appeal was served January 25, 2013 and the direct appeal perfected. The Court of appeals affirmed the conviction and the sentence (State v. Hewins op no. 2014-up-478 S.Ct app) filed December 23, 2014. A petition for rehearing was filed January 6, 2015 and was denied February 24, 2015. The petition for writ Ceterari followed. Supreme Court granted the petition for writ Ceterari on applicants issue 1-4 on November 5, 2015. On March 23, 2016 Supreme Court dismissed as improvidently granted applicant's filed post conviction relief on April 15, 2016.

Statement of facts

This case arises out of an unlawful fourth amendment seizure and subsequent non-consensual search of the defendants pocket twice without a warrant more than (12) twelve minutes after the officers contact with applicant and the search. The officers were engaged in no more than a routine patrol of location (Clarion Inn) where crime had rapidly and significantly declined over the previous year and a half (Trial Trans pg 60 lines 7-23)

Applicant car was backed into a parking space in the lot of the (Clarion Inn) at 12:36 am. Beside me was another car with two females inside. One of the females applicant was dating. It appeared to the officer that the occupants of the two (2) were doing nothing more than speaking to one another (Trial Trans pg 46 lines 1-20) officer Hardner testified that the occupants "were just sitting there having... They appeared to be having a meeting for some reason" (Trial Trans pg 46 lines 9-10) Conspicuously absent from officer testimony is description of any behavior of any occupant of any car, which appeared criminal or suspicious before seizing them. Officer Hardner and Hall parked their patrol car directly behind and horizontal to the two (2) parked vehicles (Defense Exhibit 2) Applicant and witness Megan Newman both testified that neither one of the vehicles would be able to leave without hitting the patrol vehicle (Trial Trans pg 109 lines 13-17, pg 119-120, lines 15-25, lines 1-24) In fact officer Hardner testified he was blocking applicant (Trial Trans pg 66 lines 19-24) Robinson v State 407 S.C 169, 754 S.E 2d 862 2014 where officers vehicle blocked applicant preventing it from driving away. A reasonable person in petitioner position would not have felt free to leave. Hardner testified that had defendant attempted to leave, he would have pursued him (Trial Trans pg 210 lines 1-15) officer Hardner exited the patrol car and came to stand between the defendant and the other car to enable him to see all individuals (Trial Trans pg 69 lines 23-25, pg 70 lines 16, pg 107 lines 15-21)

Officer Hardner testimony indicated he did not see any occupants hands close together observe any drugs in plain view, nor did he observe any doors of either drugs or alcohol, any guns, money, or drug paraphernalia. Or any other indications of Criminal activity before back up arrived, Applicant relayed to officer Hardner that he was at the (Clarion Inn) to visit his "baby mama" who was in room 237 (Trial Trans pg 93 lines 10-25, pg 94 lines 1-3) more than twelve (12) minutes after officers Hardner and Hall seized applicant, officer Cathran arrived. Officer Hardner and applicant were standing outside their vehicles when officer Cathran got out of his vehicle and walked up to officer Hardner and applicant. Officer Hardner explained the basic situation to officer Cathran including applicant reason for being in the (Clarion Inn) parking lot (Trial Trans pg 97 lines 19-23, pg 98 lines 1-23, pg 99 lines 1-3) officer Cathran went to check on these statements with the front desk, After officer Cathran had verified applicants story and was coming back to applicants vehicle He saw officer Hardner perform a pat down of applicant (Ibid) more more clearly applicant had been seized for more than twelve (12) minutes and was out of his car before officer Cathran arrived, officer Cathran parked his patrol car and secured it before getting out and walking over to where officer Hardner and applicant were standing. Officer Hardner took time to explain things to officer Cathran, and asked him to go to the hotels front desk to verify the applicants story of why he was there. officer Cathran walked to the front desk. upon explanation officer Cathran waited for the desk clerk whom was looking up the room information for 237. As the clerk recited it officer Cathran wrote it down. He then went to the room 237 to meet with the occupant. Officer Cathran then walked to his patrol car and performed a Computer search on room 237 occupant. After Verifying there was no warrants officer Cathran got out his vehicle and began walking to where officer Hardner and applicant were still standing (Trial Trans pg 146-147) Then is when he saw officer Hardner perform a body search pat down on applicant

... (Trial Trans pg 95 lines 10-25, pg 96 lines 1-25, pg 97 lines 1-25, pg 98 lines 1-25, pg 99 lines 1-25, pg 100 lines 1-12) See also Cab report exhibit officer Hardner testified he was allegedly concerned for his personal safety due to what may have been in applicant left pocket even while applicant was still sitting in his own vehicle (Trial Trans pg 51 lines 12-17) This is obviously before officer Cathran arrived on the scene while applicant casually stood outside his car (Trial Trans pg 146-147) officer Hardner testified that during pat down he felt a hard lump on the side of defendant's left pocket, He reached into the left pocket and removed that hard lump. The lump turned out to be a wad of cash. With there no longer being a lump in applicants left pocket. Officer Hardner reached back inside and retrieved four (4) small pills about the size of a nickel combined. The pills were later discovered to be a Schedule IV substance after finding the pills and placing applicant under arrest officer Hardner called a tow truck, and in the process of inventorying the vehicle prior to tow, found a large rock of what appeared to be crack cocaine as well as several smaller cookies.

The applicant will show that Counsel's errors were prejudicial and deprived the applicant of a fair trial. A trial whose result is reliable however due to concerns about fundamental fairness, The Court also may examine whether Counsel's ineffective assistance deprived the applicant of a substantive or procedural right to which the law entitles him to equal protection (Jackson v Denno) Counsel denied me a reliable determination of the issue of voluntariness (Trans pg 370 line 20) "Mr Hartin The Court is not going to charge an instruction as to whether or not his statement is made voluntarily or that they can consider it" line 23 The judge "No sir I still believe that's part of the law 'I've rule on" Counsel should have objected and argued to cure the instruction. The trial error clearly prejudicial applicant to a unfair trial deprived applicant of a substantive or procedural right to which the law entitles him to. Solicitor Ms. Monts withdrew Consent (Trial Trans pg 372 line 19) Trial judge allowed the state to play a unfair procedural Ms. Monts Solicitor used Consent for a shield and sword. Additional etc by Cathran testimony proves officer Hurdner and ofc Hall was fabricating their oath, And did not have a reason to be in, or to search applicant case if he did fear for there safety what reasonable police officer will wait until (3) third back up officer to arrive, check out applicant and then witness a Terry search roughly 20 minutes from the initial stop. These officers committed perjury to get a conviction with Ms. Monts help. The state convicted applicant with perjury testimony

... Finally trial Counsel failed to object to Consent and appellate Counsel failed to address the voluntariness of Consent jury charge denied applicant direct appeal review (Trial Trans pg 333-339) To Court of appeals Mr. Chase Harbin supported the suppression motion with "well judge I don't know how to address the Consent argument" clearly prejudiced to applicant (Trial Trans pg 155 lines 12-13) Counsel knew of evidence that's not consistent with Consent, Applicant testimony at suppression hearing was, He asked officers why were they harassing him (Trans page 113 lines 14-15) Also applicant ask why are you putting your hands in applicant pocket. (Trans pg 114 lines 1-8) which was corroborated by witness Megan Newman (Trans pg 124 lines 1-3) Also (Trans pg 125 lines 8-9) Applicant later testified at his trial he knew his in 2010 so had officers ask for Consent, He would not have Consent to such request (Trans pg 353-354)

Applicant submit next he will show Court how officer Hardner and Hall were Untruthful law enforcement officers. These two Corroborated the same fabricated account of what happened on (Aug 9, 2010) officer Sgt Cathran said that he was telling the truth (Trans pg 261 lines 17-23) but Counsel never requested a (Franklin Delaware) hearing. Despite the fact that Sgt Cathran refuted these two officers, the state witnesses were allowed to commit perjury all through trial not only did Sgt Cathran prove perjury the Cab report incident recall from dispatcher department at Greenville police department Also it show that these officers were not having trouble with my information coming back. It does not represent these officers testimony at all.

The Cab report exhibits will show that my information came back as soon as it was called in, to the dispatcher department. The Cab report does not show them having trouble with my information coming back, It does not show them having to come back to my vehicle two or three times like they testify to.

It does not show my information coming back after I was in custody like officer Hardner testified to. It came back before I was in custody that means all that testimony about me touching my pants was fabricated, because there was never a reason to be at my vehicle window two or three times to see me touching my pants.

On the initial interrogation by the first officer Scott Gardner I was asked to produce identification. I gave name, Soc Sec#, D.O.B. He immediately called into 10/08/09 00:37 reply text: KVL PD203 D. Mr 1A2700612C Cad reports example The Cad reports will show that a match for my information came back in the form of drivers license # E563162010080901398520100809. See Cad report at that point I was being detained. See Cad reports 00:38:14. not under arrest but still being questioned by the officers unable to leave this detention took over 20 minutes. See Cad report also it shows law enforcement officers false statement in affidavit in police misconduct, An outrageous government conduct. A conviction obtained by knowing use of perjured testimony is fundamentally unfair and must be set aside under the facts of this case. Officer Gardner or Hall has a serious credibility problem from the out set and Sgt Cathran testimony (Trans pg 93-100) proves just that see (Trans pg 261 lines 17-23) The more point is Gardner lied about the testimony of the search on applicant touching his pocket, Applicant submit he lied about consent see (Trans pg 353-354) It was six officers on the scene not one of them corroborated officer Gardner having consent